

May 7, 2020

DEVELOPMENTS IN THE SPORTS BETTING LANDSCAPE IN THE UNITED STATES DURING THE COVID-19 PANDEMIC

To Our Clients and Friends:

The world of sports betting, like many other industries, has been impacted by the COVID-19 pandemic in significant ways. One major disrupting force has been the widespread cancellation of live sporting events. On March 11, 2020, in light of the spread of COVID-19, the National Basketball Association halted play “until further notice”, and Formula 1 and the PGA Tour followed suit the next day. By the end of March, play in Major League Baseball, the Premier League, the Champions League, the National Hockey League, the 2020 Tokyo Olympics and March Madness had been suspended, postponed or cancelled. Without live sports, participants in the sports betting market have less to wager on. Likewise, the operations of brick-and-mortar casinos and sportsbook operators have been upended by the pandemic. Virtually all casinos in the United States have faced closures for some period of time as a result of the pandemic, whether pursuant to state or municipal “stay at home” orders or other limitations on the operation of businesses deemed “non-essential”, voluntary suspensions of tribal gaming operations, or other voluntary closures.

In spite of these disruptions to the industry, significant developments in the regulation and operation of sports betting have occurred in several states since the pandemic emerged. On May 1, 2020, online sports betting was launched in Colorado, with four online sportsbooks going live on the first day in a state that is anticipated to be a competitive market for sports betting operators. From the end of March 2020 to date, new legislation or regulations authorizing and governing sports betting have been enacted or adopted in each of Virginia, Tennessee and Washington. Likewise, in response to the widespread shutdown of live sports around the world, regulators in the established sports betting markets in New Jersey and Nevada have approved expanded offerings by online sports betting operators.

Overview of the Pre-COVID-19 Sports Betting Landscape in the United States

In 2018, the U.S. Supreme Court overturned the Professional and Amateur Sports Protection Act in *Murphy v. National Collegiate Athletic Association, et al*, 138 S.Ct. 1461 (2018), ending the federal ban on sports betting.^[1] Following the *Murphy* decision, regulation of sports betting was placed in the hands of each state, which has caused a patchwork of state legislation and case law governing sports betting to emerge over the past two years. The federal Interstate Wire Act of 1961 further complicates this state-by-state legal landscape, as it prohibits the transmission of sports bets or wagers through interstate commerce. As a result, online and mobile sports betting operations (where legalized) currently require the bettor to be geographically located in the same state as the sportsbook operator accepting bets.

GIBSON DUNN

By the end of 2019, sports betting had gone live, in one form or another, in 16 states. State regulatory schemes governing sports betting have varied widely, with some states expressly authorizing online or mobile betting, and others limiting wagering to certain brick-and-mortar locations. Of the states where online or mobile sports betting has been legalized, many have limited the number of licenses available to operate online or mobile brands (so-called “skins”), including by linking skins to brick-and-mortar casinos, triggering a wave of joint ventures, strategic partnerships and market access agreements between such casinos and platform developers. Other emerging issues facing gaming operators include the use of official sports league data, integrity fees, player protections, and the costs imposed by evolving, and at times ambiguous, laws and regulations applicable to sports betting.

Colorado: Online Sports Betting Goes Live

In spite of the widespread shutdown of live sports in the United States and around the world, four online sportsbooks launched operations in Colorado on May 1, the first day on which operators were eligible to begin sports betting operations in the state. Two additional online sportsbook operators had received clearance to begin operations in Colorado on May 1, according to a statement from Dan Hartman, director of the Colorado Division of Gaming, although they did not launch on the first day of eligibility. Betting on a wide variety of esports competitions may be offered by operators in Colorado, so long as such competitions are sanctioned by a sports governing (or equivalent) body.

The first step towards legalizing sports betting in Colorado came in May 2019 through adoption of legislation authorizing a voter referendum to permit sports betting at Colorado’s 33 brick-and-mortar casinos, as well as statewide mobile and online betting. A narrow majority of Colorado voters in the November 2019 elections voted in favor of a proposition that authorized and regulated land-based and mobile sports betting (other than NCAA sports, which is being reviewed by state regulators).

The Colorado Limited Gaming Control Commission and the Colorado Division of Gaming worked quickly to meet their mandate to authorize operators to launch mobile betting platforms by May 1, despite the myriad challenges imposed by the COVID-19 pandemic. Aiding in the launch of mobile and online betting operations amid the pandemic were the rules governing participant registration, which permit players to register remotely, without an express requirement to enter a brick-and-mortar location to establish identity, which has been an impediment in other jurisdictions. Although land-based casinos in Colorado remain closed in light of the pandemic, sports betting at these brick-and-mortar locations will be legal and regulated when launched.

Colorado is widely anticipated to be a competitive market for mobile and online sports betting. State regulatory authorities have made 33 skins available, linked with the state’s 33 brick-and-mortar casinos. Of these 33 skins, industry tracking reports indicate that 17 have been accounted for (including the four platforms that launched operations on May 1), with numerous out-of-state sportsbook operators entering into joint ventures, strategic partnerships, and market access agreements with in-state casinos to date.

Virginia: Sports Betting Legalized in Sweeping Gaming Legislation

Virginia’s state legislature initially passed bills legalizing both casino gaming and online sports betting in March 2020. After Governor Ralph Northam proposed amendments to this legislation, which

GIBSON DUNN

amendments were ultimately accepted by both houses of the state legislature, House Bill 896 (legalizing and regulating online sports betting) and Senate Bill 36 (authorizing up to five casino licenses, subject to local voter approval in November) became law on April 22, 2020. House Bill 896 authorizes up to 12 operators to obtain licenses to operate online-only betting on professional and collegiate sports (excluding proposition bets on collegiate sports and bets on Virginia college sports), with preferred consideration for each of the five operators that are ultimately selected to operate brick-and-mortar casinos in the state. Regulation of betting on virtual events and esports in Virginia remains to be decided.

Tennessee: Sports Betting Regulations Adopted

On April 15, 2020, a new set of regulations was adopted by the Tennessee Education Lottery Board, the state agency tasked with regulating sports wagering, which regulations will govern sports betting when it becomes operational in Tennessee, which is projected to occur by the end of 2020. The regulations provide for an open licensing system based on a European-style model, with an unlimited number of online and mobile wagering licenses available for operators. When operational, mobile and online platforms will be able to offer bets on professional, collegiate (other than proposition bets) and most Olympic sports. The regulations do not cover betting on virtual events or esports.

Washington: Sports Betting Legalized at Tribal Casinos

On March 26, 2020, Governor Jay Inslee signed into law House Bill 2638, authorizing and regulating sports betting exclusively on tribal lands in Washington. The law, which contained an “emergency clause” limiting voters’ ability to block it through a referendum, permits betting on all professional and college sports (other than college teams based in Washington), to the extent offered on tribal lands pursuant to gaming compacts with the state that include sports betting. There are currently 29 tribal casinos that are eligible to renegotiate their state gaming compacts in order to host retail sportsbook and on-site mobile sports betting under the new law.

New Jersey: New Bets Approved Amid Widespread Live Sports Shutdown

Amid the COVID-19-driven shutdown of live sporting events in North America, Western Europe, and Asia, New Jersey’s Division of Gaming Enforcement (“DGE”) expanded its official list of approved wagering events at the end of March 2020, allowing online sportsbooks in the state to offer betting, in some cases for a temporary initial period, on sporting events that have not historically drawn interest in the U.S. sports betting marketplace. Table tennis, Swedish handball, Nicaraguan and Algerian Soccer, and Turkish volleyball were among the approved new offerings. Regulations in New Jersey already permit betting on certain limited esports events (for instance, the DGE permitted betting on the 2019 League of Legends championship), and state legislators are considering a bill that would significantly expand esports betting, allowing betting on any esports event not involving high schools or a majority of contestants under the age of 18.

Nevada: Esports Betting Approvals Increased in Light of Live Sports Shutdown

The Nevada Gaming Control Board (the “NGCB”) has significantly increased approvals for operators to offer esports betting since late March 2020, including approving betting on multiple League of

GIBSON DUNN

Legends tournaments, the 2020 Overwatch League, and an eNASCAR series. Unlike for live sports, the NGCB requires event-specific approvals for betting on esports contests, and approval is contingent upon specific integrity criteria. Prior to March 2020, the NGCB had only approved betting on three major esports tournaments (in 2016 and 2017).

Until brick-and-mortar gaming operations in Nevada are reopened, however, the expanded esports offerings for online and mobile sports betting participants will benefit only those players whose accounts have previously been verified in accordance with state regulations. Although online and mobile sports betting participants may register their accounts remotely in Nevada, they must verify their identities in person at the sportsbook operator's physical location before being eligible to place bets. As a result, unverified participants will not be able to participate in the expanded esports betting options in Nevada until such time as land-based casino operations resume.

The Road Ahead

Although the COVID-19 pandemic has resulted in the shutdown of many live sporting events around the world and almost all brick-and-mortar casino operations in the United States, state-level regulations governing sports betting have continued to expand and develop during the pendency of the crisis, and online operations have launched in a state that is expected to grow into a major market. These developments evidence confidence on the part of legislators, regulators and operators that the sports betting market in the United States will continue to grow at a significant pace when the crisis subsides. Although executives of major sportsbook operators have expressed skepticism that betting on more obscure sporting events, as we have seen in New Jersey, will continue in a post-COVID world, the momentum that has developed behind esports betting in certain markets during the pandemic may endure even after betting on the more traditional live sporting events returns.

[1] Gibson, Dunn & Crutcher LLP represented the State of New Jersey in this historic victory.



Gibson Dunn's lawyers are available to assist with any questions you may have regarding these developments. For further information, please contact the Gibson Dunn lawyer with whom you usually work, or the following authors in Gibson Dunn's Betting and Gaming practice group.

Authors: *Kevin Masuda, Sarah Graham and Maya Hoard*

© 2020 Gibson, Dunn & Crutcher LLP

Attorney Advertising: The enclosed materials have been prepared for general informational purposes only and are not intended as legal advice.