

LETTER OPINION
95-L-39

February 10, 1995

Honorable William Kretschmar
State Representative
House Chambers
600 East Boulevard Avenue
Bismarck, ND 58505-0360

Dear Representative Kretschmar:

Thank you for your February 1, 1995, letter requesting my opinion regarding the effect of the federal Professional and Amateur Sports Protection Act, 28 U.S.C. ?? 3701-3704 ("PASPA"), on House Bill No. 1164 and House Bill No. 1212.

House Bill No. 1164 would amend and reenact subsection 1 of N.D.C.C. ? 12.1-28-01 to exclude from the definition of "gambling" "[l]awful contests in which the entrant makes decisions based on the entrant's knowledge of the skill, speed, strength, or endurance of others and in which awards are made only to entrants or to the owners of entries." House Bill No. 1212 would amend and reenact subsection 3 of N.D.C.C. ? 12.1-28-02 to provide that a sports pool on professional and collegiate athletic events does not constitute the business of gambling "when the amount wagered per participant does not exceed five dollars per week and the number of participants does not exceed one hundred twenty and all proceeds are paid to winners."

House Bill Nos. 1164 and 1212 would legalize certain sports pools on professional or collegiate athletic events that are currently unlawful in North Dakota. The question raised by your letter is whether federal law, specifically the PASPA, prohibits states from enacting laws permitting such limited sports pools on professional or collegiate athletic events.

Congress can preempt state law expressly or impliedly by intending to occupy an entire field of regulation. State v. Liberty Nat'l Bank & Trust Co., 427 N.W.2d 307, 309 (N.D. 1988). State law can also be preempted if it conflicts with federal law. Id.

28 U.S.C. ? 3702 provides that it is unlawful for a state "to sponsor, operate, advertise, promote, license, or authorize by law or compact . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly

(through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games." (Emphasis supplied.) Through section 3702 Congress has expressly prohibited states from making it legal to bet, gamble, or wager on competitive games in which amateur or professional athletes participate.¹

That Congress intended the PASPA to preempt state law is evidenced by not only the plain language of the law but also the legislative history. The purpose of the act "is to prohibit sports gambling conducted by, or authorized under the law of, any State or other governmental entity." Senate Report No. 102-248 at 3553. As later explained, the law

serves an important public purpose, to stop the spread of State-sponsored sports gambling and to maintain the integrity of our national pastime. States would be prohibited from sponsoring, operating, advertising, promoting, licensing, or authorizing sports lotteries or any other type of sports betting that is based on professional or amateur games or performances therein.

Id. at 3555. (Emphasis supplied.)

House Bill No. 1212 would make it legal for individuals to participate in sports pools on professional or collegiate athletic events under limited circumstances. To do so would violate the plain language of 28 U.S.C. ? 3702. Section 3702 therefore would preempt House Bill No. 1212 if enacted.

In addition to limiting the state's authority to authorize such laws, 28 U.S.C. ? 3702 makes it unlawful for any person to "sponsor, operate, advertise, or promote . . . a lottery, sweepstakes, or other betting, gambling or wagering scheme based directly or indirectly . . . on one or more competitive games in which amateur or professional athletes participate. . . ." Because House Bill No. 1164 provides that gambling does not include "lllawful contests in which the entrant makes decisions based on the entrant's knowledge of the skill, speed, strength, or endurance of others," it

¹ 28 U.S.C. ? 3704 provides limited exceptions to the applicability of section 3702. For a sports gambling scheme to be exempt from the prohibitions of section 3702 it must fall within one of three "grandfather" clauses. 28 U.S.C. ? 3704. Because House Bill Nos. 1164 and 1212 would legalize sports gambling that was previously prohibited by law, none of the exemptions apply.

automatically incorporates the prohibitions of 28 U.S.C. ? 3702. Therefore, on its face House Bill No. 1164 would not conflict with the PASPA. However, House Bill No. 1164 could not authorize any sports gambling prohibited by 28 U.S.C. ? 3702.

In conclusion, it is my opinion that House Bill No. 1164 does not conflict with the PASPA because "lawful contests" incorporates the prohibitions of 28 U.S.C. ? 3702. It is further my opinion that House Bill No. 1212 does conflict with the PASPA because the bill would authorize by law sports pools on professional or collegiate athletic events in violation of 28 U.S.C. ? 3702 and therefore would be preempted by federal law.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

dab/mh
cc: Representative Clarence Martin