SPORTS AND ONLY SPORTS: 1ST CIRCUIT ADDRESSES SCOPE OF THE WIRE ACT

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Betting and Gaming Alert

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The U.S. Court of Appeals for the 1st Circuit recently issued an important decision regarding the scope of the Wire Act.[1] Aligning itself with the 5th Circuit, the 1st Circuit concluded that, in *all* of its applications, the Wire Act covers *only* bets and wagers that are placed on sporting events and not bets and wagers that are placed on things like lottery, poker, and casino games. This decision helps to fortify the framework for states to authorize online, non-sports wagering activities.

The Wire Act makes it a crime for an entity that is in the business of betting or wagering to knowingly use:

a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers[.][2]

In November 2018, the Office of Legal Counsel (OLC) of the U.S. Department of Justice (DOJ), which is the agency that enforces the Wire Act, issued an opinion regarding the scope of the statute.[3] Reversing its December 2011 opinion on the topic, the OLC concluded that, in most of its applications, the Wire Act covers not only bets and wagers that are placed on sporting events, but also *all other types* of bets and wagers. In particular, relying on a variety of rules of statutory construction, the OLC made the following determinations:

- The Wire Act criminalizes a gaming operator's use of a wire communication facility (including the Internet) to make interstate or international transmissions of "information assisting in the placing of bets or wagers" and, in this respect, the statute is triggered *only* if the bets or wagers are placed on sporting events.[4]
- The Wire Act also criminalizes a gaming operator's use of a wire communication facility to make interstate or international transmissions of (i) "bets or wagers," (ii) any "wire communication which entitles the recipient to receive money or credit as a result of bets or wagers," or (iii) any "wire communication which entitles the recipient to receive money or credit . . . for information assisting in the placing of bets or wagers"—and, in each of these respects, it *does not matter* whether the bets or wagers at issue are placed on sporting events or, instead, something else (like lottery, poker, or casino games).[5]

Having authorized an online lottery regime in reliance on the OLC's 2011 opinion, New Hampshire decided to challenge this "re-interpretation" of the statute. It joined with the entities that designed and operate its online lottery system to sue the United States, DOJ, and U.S. Attorney General, arguing that the Wire Act deals *only* with bets and wagers that are placed on sporting events. The U.S. District Court for the District of New Hampshire issued a declaratory judgment in which it agreed with this argument and, on 20 January 2021, the 1st Circuit affirmed that decision.[6]

Focusing first on the text and syntax of the statute, the 1st Circuit explained that it is unclear whether the phrase "on any sporting event or contest" qualifies *only* the reference to "bets or wagers" that appears immediately before it or, instead, *every* reference to "bets or wagers." As the court explained, the first alternative would mean that, in all but one of its applications, the Wire Act covers bets or wagers that are placed on anything (sporting events or otherwise), while the second option would mean that, in all of its applications, the statute covers *only* bets or wagers that are placed on sporting events. The court concluded that, when considering the statute as a whole, the second option reflects "the most natural reading" and is therefore the correct one.[7]

In reaching this conclusion, the court explained that the contrary reading, which the OLC adopted in its November 2018 opinion, "poses unharmonious oddities[.]"[8] "Under the [contrary] reading," for example, there is tension within the first clause of the Wire Act because a person is permitted to "transmit over the wires information assisting someone in placing a bet or wager over the wires on a non-sporting event, but the person receiving the assistance commits a crime if he then places the bet or wager."[9] "Conversely," the court explained, "if we read 'on any sporting event or contest' as qualifying both antecedents, harmony is restored: You cannot use the wires to place a bet or wager on a sporting event, and you cannot use the wires to send information assisting in placing that bet or wager."[10]

The court reasoned, in addition, that the contrary interpretation creates a lack of parallelism between the first clause of the Wire Act and the statute's other clauses:

If Clause One is limited to sports betting (i.e., if it does not prohibit placing a bet on a lottery outcome), why in the world would Congress in the very next clause outlaw telling the winning lottery participant that he is entitled to payment? Or to pay someone to assist lottery bettors?[11]

The court opted to avoid this type of incongruous result. It also bolstered its conclusion by highlighting the Wire Act's legislative history, which, it explained, "contains strong indications that Congress did indeed train its efforts solely on sports gambling."[12]

The court observed, moreover, that its decision was consistent with the 5th Circuit's pronouncement in 2002 that "[a] plain reading of the statutory language [of the Wire Act] clearly requires that the object of the gambling be a sporting event or contest."[13]

Having concluded that, in *all* of its applications, the Wire Act covers *only* bets and wagers that are placed on sporting events, the 1st Circuit handed a win to the states that, within their respective territorial jurisdictions, authorize online lottery, poker, and casino activities (and the gaming operators who undertake those activities). Given that the operators' online gaming transmissions are often routed across state lines, even when they begin and end in the same state, the operators were concerned that, in light of the OLC's November 2018 opinion, they could trigger implications under the Wire Act and face criminal prosecution. While the 1st Circuit's decision is not binding in other circuits where state-authorized online gaming activities take place, it is a well-reasoned decision that will serve as persuasive authority to courts in those circuits if they are called upon to address the scope of the Wire Act.

FOOTNOTES

[1]18 U.S.C. § 1084.

[2]Id. § 1084(a).

[3]See Steven A. Engel, Assistant Att'y Gen., OLC, Reconsidering Whether the Wire Act Applies to Non-Sports Gambling (Nov. 2, 2018), https://www.justice.gov/sites/default/files/opinions/attachments/2018/12/20/2018-11-02-wire-act.pdf.

[4]Id. at 7–8.

[5]Id. at 11.

[6]See N.H. Lottery Comm'n v. Rosen, No. 19-1835, 2021 WL 191771 (1st Cir. Jan. 20, 2021).

[7]Id. at *12.

[8]Id.

[9]Id.

[10]Id.

[11]Id.

[12]Id. at *14.

[13]In re Mastercard Int'l, Inc., 313 F.3d 257, 262 n.20 (5th Cir. 2002) (internal quotation omitted).

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