

The Federal Wire Act of 1961 – The Department of Justice’s 2011 Interpretation and 2018 Reversal

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The Wire Act of 1961 – 18 U.S.C. § 1081

- **18 U.S.C. § 1081. Definitions**
- The term “**wire communication facility**” means any and all instrumentalities, personnel, and services ... used or useful in the transmission of writings, signs, pictures, and sounds of all kinds **by aid of wire, cable, or other like connection** between the points of origin and reception of such transmission.
- “Wire communication facility” has been held to include the “internet.”



Uncertainty prior to DoJ's 2011 Opinion

- Before 2011, there was uncertainty as to whether the Wire Act applied to non-sports betting. The Wire Act prohibited:
 - Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce:
 - 1) of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or
 - 2) 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.
- Does “sporting event or contest” refer to “bets or wagers” as well as “information assisting in the placing of bets or wagering”?
- Does “sporting event or contest” from (1) relate to wire communications in (2)?

Wire Act Court Decisions prior to 2011

- [A] plain reading of the statutory language clearly requires that the object of the gambling be a sporting event or contest. Both the rule and the exception to the rule expressly qualify the nature of the gambling activity as that related to a “sporting event or contest.” *Mastercard International Inc., Internet Gambling Litigation, and Visa International Service Association Internet Gambling Litigation*, 132 F.Supp.2d 468 (E.D.La. 2001).
- “We agree with the district court's statutory interpretation, its reading of the relevant case law, its summary of the relevant legislative history, and its conclusion.” In re: *Mastercard International Inc., Internet Gambling Litigation*, 313 F.3d 257 (5th Cir. 2002).
- “[T]he Court concludes that the second and third prohibited uses of a wire communication facility under § 1084(a) do not require that the bets or wagers to which those uses relate be limited to bets or wagers placed on sporting events or contests alone.” *U.S. v. Lombardo*, 639 F.Supp.2d. 1271 (D. Utah 2007). See also *U.S. v. Carruthers*, Magistrate Report (E.D. Mo. 2007)

DoJ's 2011 Opinion – a “Green Light” for online non-sports betting

- In response to petitions from the Illinois Lottery and New York Lottery, the Department of Justice (“DoJ”) issued an opinion on December 23, 2011 (dated September 20, 2011) that **the Wire Act applies only to sports betting.**
- Several state lotteries subsequently offered their games online (via PCs and mobile devices), including the lotteries in GA, IL, KY, MI, NH and PA.
- NJ and DE offer casino games online via licensed operators, and NV offers poker online. (NJ, DE and NV have entered into a tri-state agreement for poker to increase liquidity.)



DoJ's 2018 Opinion – “Red Light” for online gaming of all types? Traditional draw games?

- DoJ Opinion issued January 14, 2019 (dated November 2, 2018).
- The DoJ reverses its 2011 Opinion and opines that the Wire Act applies to **all types of betting**. Opinion states that the Act covers interstate transmissions of:
 - Bets or wagers of any type;
 - Information assisting in the placing **of sports bets**; and
 - Information entitling the recipient to receive money or credit:
 - As a result of bets or wagers of any type;
 - For information assisting in the placing bets or wagers of any type.
 - Exception for information assisting in the placing of sports bets between states where betting on the sports event is lawful.

DoJ: UIGEA Does Not Alter Scope of Wire Act

- DoJ Opinion also decides that the Unlawful Internet Gambling Enforcement Act (the “UIGEA”) does not alter the scope of the Wire Act.
- Thus, the UIGEA “carve out” from “unlawful Internet gambling” of state-authorized intrastate gambling, does not apply to modify the Wire Act.
- The UIGEA’s “intermediate routing” language does not apply to the Wire Act. (“The intermediate routing of electronic data shall not determine the location or locations in which a bet or wager is initiated, received, or otherwise made.”)

DoJ Forbearance Period

January 15, 2019 – Dep. Atty. Gen. Rod Rosenstein issues memo directing DoJ attorneys to refrain from bringing prosecutions under the Wire Act against those who acted in reliance on the DoJ’s 2011 Opinion.

Forbearance period originally set to expire on April 15.

The New Hampshire Litigation

- February 15, 2019 – The New Hampshire Lottery, NeoPollard Interactive and Pollard Banknote sue the Justice Department seeking:
 - (NHLot) Declaratory Judgment that the Wire Act does not apply to state-conducted lotteries
 - (NHLot) Ruling that DoJ’s 2018 Opinion violated the Administrative Procedure Act in that it is arbitrary, capricious and an abuse of discretion as extending to state-conducted lottery activity, and therefore vacating the 2018 Opinion.
 - (NeoPollard) 2018 Opinion is wrong, illogical and inconsistent with the Wire Act’s legislative history. Seeking a declaratory judgment that Wire Act does not prohibit any type of gaming other than gambling on sports events.

The Amici Curiae – “Friends of the Court”

- Michigan Lottery filed an Amicus brief supporting plaintiffs, joined by the state lotteries in CO, KY, NC, RI, TN and VA, and the States of AK, DE, ID, MI and VT.
- New Jersey filed an Amicus Brief supporting plaintiffs.
- Pennsylvania sought to intervene in support of plaintiffs.
- iDEA Growth (association of payment processors) sought to intervene supporting plaintiffs.
- Coalition to Stop Internet Gambling and National Association of Convenience Stores (“NACS”) filed an Amicus Brief supporting the DoJ.
- March 23 letter to Atty. Gen. Barr. by Attorneys General from WV, AK, AZ, AR, CO, CT, DE, DC, ID, IL, IN, IA, KY, LA, MI, MS, NM, NC, ND, OK, PA, SD, TN, TX and VA – seeking an “opportunity to meet” to discuss “sweeping implications” of 2018 Opinion.

The New Hampshire Litigation (*cont'd*)

- Parties agreed there was no issue of material fact. Therefore, plaintiffs moved for summary judgment.
- DoJ moved to dismiss, claiming plaintiffs lacked “standing” to sue because there was “no credible threat of prosecution.”
- DoJ extended “forbearance period” through June 24.
- The “April 8 Memo” – The DoJ memo states it is reviewing whether the Wire Act applies to state lotteries, their employees and vendors. DoJ argues (again) that case should be dismissed because plaintiffs not subject to threat of prosecution. DoJ extends forbearance period as to state lotteries and their vendors indefinitely during the review and for 90 days after resolution.

The New Hampshire Litigation (*cont'd*)

- Hearing on April 11 – Court refused to dismiss the lawsuit and hears argument on all points from parties and amici.
- Court directs parties to brief issue whether Wire Act applies to state lotteries, their employees and vendors.
- Decision expected in June.
- Whatever the decision, there is a good chance it will be appealed.



Finally, Some Important Wire Act Issues

- What is a “bet or wager” vs. “information assisting in placing” a bet or wager?
- What is a transmission “in interstate or foreign commerce”? Is use of the Internet, without more, automatically a transmission in “interstate commerce”?
- What about bets or wagers - or “assisting information” that is “intermediately routed” out of the state before returning to the state?
 - The UIGEA provides that “[t]he intermediate routing of electronic data shall not determine the location or locations in which a bet or wager is ... made.”
 - But the 2018 Opinion says the UIGEA does not modify the Wire Act.
- Will the Government prosecute if the underlying gambling is lawful under state law?
- Aiding and Abetting Liability – helping to make illegal venture successful.

Thank You!

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