

The New Hampshire Lottery Sues to Restore the DoJ's 2011 Opinion that the Wire Act Applies Only to Sports Betting



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The Department of Justice “Reversal” of its 2011 Opinion

On January 14, 2019, the Department of Justice, Office of Legal Counsel (“DoJ”) issued a memorandum dated November 2, 2018 (the “2018 Opinion”)¹ declaring that the Wire Act applies to wagering on all types of gambling games, not only wagering on sports events. The 2018 Opinion thus “reversed” the DoJ’s 2011 opinion (the “2011 Opinion”)² which had determined that the Wire Act’s³ prohibitions apply only to sports betting. The 2011 Opinion had provided a “green light” to state lotteries desiring to offer lottery products to consumers online via personal computers and mobile devices and to state regulatory agencies desiring to license commercial operators to similarly provide non-sports wagering gaming products to consumers.

In the 2018 Opinion, the DoJ also determined that the Unlawful Internet Gambling Enforcement Act of 2006 (the “UIGEA”)⁴ does not modify the Wire Act. In other words, the Wire Act is not modified or amended by the UIGEA’s intrastate exception to “unlawful internet gambling” or the UIGEA’s language providing that “[t]he intermediate routing of electronic data shall not determine the location or locations where a bet or wager is initiated, received, or otherwise made.”⁵ As a result, transmissions may be deemed to travel in “interstate commerce” for purposes of the Wire Act if they begin and end in the



same state where the non-sports betting is lawful, but travel intermediately outside the state. This concept is commonly referred to as “intermediate routing.”

In its 2018 Opinion, the DoJ interpreted the Wire Act’s prohibitions⁶ to prohibit a gambling business from knowingly use “a wire communication facility” (which includes the Internet⁷ and mobile networks⁸) for the transmission (sending or receiving⁹) “in interstate or foreign commerce” of:

1. “bets or wagers” relating to **any** type of gambling game or contest, or
2. information assisting in placing bets or wagers on any sporting event or contest, or
3. transmissions which entitle the recipients to receive money or credit:
 - a. as a result of bets or wagers, or
 - b. for information assisting in the placing of bets or wagers relating to **any** type of gambling game or contest.

Under the new DoJ interpretation, only the second Wire Act prohibition is limited to sports betting. The other prohibitions apply with respect to any type of gambling game or contest.

The Wire Act contains certain exceptions

from the above prohibitions,¹⁰ but they clearly apply only to sports betting. The exceptions were unaffected by the 2018 Opinion. There is an exception related to news reporting as well as an exception related to information assisting in placing sports bets. This second exception provides that “the transmission in interstate or foreign commerce of . . . information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.”¹¹ Because this exception relates only to sports betting, the 2018 Opinion’s expansion of the Wire Act’s prohibitions to all forms of gambling results in an exception for the transmission of information assisting in placing sports bets between two states in which the activity is legal, but no parallel exception for such transmissions related to non-sports bets. Thus, based on the 2018 Opinion, the transmission of information assisting in placing of non-sports bets (e.g., instructions on how to place a non-sports bet) are illegal under the Wire Act, **even if the betting is lawful in the state from which the information is sent and in the state in which the information is received.**¹²

Continued on page 64

such sales transactions traveled “in interstate or foreign commerce” – e.g., across state lines – even if only on an intermediate basis. The Wire Act may also cover instant ticket validations if they were considered to entitle the recipient to receive money or credit as a result of a bet or wager and crossed state lines. Regarding state-licensed commercial gaming, wide area progressive (“WAP”) slot machines – slot machines linked from multiple casinos in the same state (and sometimes different states) – could violate the Wire Act under the 2018 Opinion if (a) a bet or (b) information entitling the recipient to money or credit as a result of (i) a bet or (ii) information assisting in placing a bet, was transmitted among them and/or to a central system across state lines. If the 2018 Opinion is read strictly and literally, it could have broader implications such as prohibiting game play instructions and advertising on a website, if such were transmitted across state lines and considered to “assist” in purchasing a non-sports gaming product. It is unclear whether the DoJ actually intends to apply and enforce its 2018 Opinion in such a broad manner.

The New Hampshire Response

In response to the 2018 Opinion, on February 15, 2019, the New Hampshire Lottery (the “Lottery”), as well as its online games vendor, NeoPollard Interactive (together with Pollard Banknote) commenced lawsuits in the United States District Court for the District of New Hampshire, seeking a declaratory judgment that the 2018 Decision was wrongly decided.¹⁸ The Lottery seeks (a) a declaration that the Wire Act “does not apply to state-conducted lotteries” and (b) an order enjoining the DoJ from “acting under or pursuant [to] the interpretation of [the Wire Act] advanced by the 2018 Opinion ...”¹⁹ NeoPollard Interactive and Pollard Banknote seek an order that the Wire Act “does not prohibit the use of a wire communication facility to transmit in interstate commerce bets, wagers, receipts, money, credits, or any other information related to any type of gaming other than gambling on sporting events and contests.”²⁰ Each party has moved for summary judgment,²¹ the cases have been consolidated, and argument on the motions has been scheduled for April 11, 2019.

Additionally, the Commonwealth of Pennsylvania and iDEA Growth (a trade association for the online interactive gaming

industry) moved to intervene in the case. Their motions were denied as the Court determined that their interests were adequately addressed through the existing plaintiffs. However, each was granted *amicus* status with the right to file a supporting brief and present oral argument. Finally, *amici curiae*²² briefs supporting the plaintiffs were filed by the State of New Jersey and the Michigan Bureau of State Lottery, the latter on behalf of itself and the District of Columbia, the states of Alaska, Delaware, Idaho, Mississippi and Vermont, and the state lotteries in Colorado, Kentucky, North Carolina, Rhode Island, Tennessee and Virginia. They seek a favorable ruling to be applicable on a nationwide basis.

Conclusion

As newly interpreted, the scope of the Wire Act is broad, applying to all types of gambling. It may cover, for example, sales of traditional lottery draw games initiated at bricks-and-mortar retailers as well as online sales, if such sales transactions traveled “in interstate or foreign commerce” – e.g., across state lines.

The New Hampshire Litigation has moved relatively quickly and we are optimistic that the court will issue a decision prior to the expiration on June 14, 2019 of the period of prosecutorial discretion during which the DoJ will refrain from applying the Wire Act to persons who engaged in conduct violating the Wire Act in reliance on the DoJ’s 2011 Opinion. ■

¹ *Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, dated November 2, 2018, by Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, Department of Justice (“2018 Opinion”). The opinion is dated just days before Attorney General Jeff Sessions stepped down on November 7, 2018. However, it was not issued until January 14, 2019.

² *Whether Proposals by Illinois and New York to use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act*, dated September 20, 2011 (issued December 23, 2011), by Virginia A. Seitz, Assistant Attorney General, Office of Legal Counsel, Department of Justice.

³ 18 U.S.C. § 1081 et seq.

⁴ 31 U.S.C. §§ 5361 - 5367.

⁵ 31 U.S.C. § 5362(10)(E).

⁶ 18 U.S.C. § 1084(a) provides: “Whoever being engaged in the business of betting or wagering knowingly uses 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, shall be fined under this title or imprisoned not more than two years, or both.”

⁷ See *United States v. Lyons*, 740 F.3d 702 (1st Cir. 2014), holding that the Internet falls within the definition of “wire communication facility”. “Internet” is not defined in the Wire Act. However, it is defined in the UIGEA as “the international computer network of interoperable packet switched data networks.” 31 U.S.C. § 5362(5).

⁸ Data sent via mobile networks in the United States travels over packet switched networks, and thus, the “Internet”. See <https://thepump.jsi.com/cellular-networks-101/> (last accessed March 11, 2019).

⁹ *United States v. Torneo*, 459 F.2d 445 (10th Cir. 1972), holding that that a gambling business uses a wire communication facility for the “transmission” of information when it receives information as well as when it sends it.

¹⁰ The Wire Act’s exceptions are in 18 U.S.C. § 1084(b). That subsection provides: “Nothing in this section [1084] shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.”

¹¹ Id. § 1084(b).

¹² This assumes that the information is transmitted by a gambling business in interstate or foreign commerce

¹³ *Applicability of the Wire Act, 18 U.S.C. § 1084, to Non-Sports Gambling*, Rod J. Rosenstein (Jan. 15, 2019).

¹⁴ Id.

¹⁵ *Additional Directive Regarding the Applicability of the Wire Act, 18 U.S.C. § 1084, to Non-Sports Gambling*, Rod J. Rosenstein (February 28, 2019).

¹⁶ See 31 U.S.C. § 5361(b): “No provision of this subchapter shall be construed as altering, limiting, or extending any Federal or State law, or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States.”

¹⁷ See 31 U.S.C. § 5362(10)(E):

The term “unlawful Internet gambling” does not include placing, receiving, or otherwise transmitting a bet or wager where--

(i) the bet or wager is initiated and received or otherwise made exclusively within a single State;

(ii) the bet or wager and the method by which the bet or wager is initiated and received or otherwise made is expressly authorized by and placed in accordance with the laws of such State, and the State law or regulations include--

(I) age and location verification requirements reasonably designed to block access to minors and persons located out of such State; and

(II) appropriate data security standards to prevent unauthorized access by any person whose age and current location has not been verified in accordance with such State’s law or regulations; and

(iii) the bet or wager does not violate any provision of ... [certain other federal law].”

¹⁸ Complaint of the New Hampshire Lottery filed February 15, 2019, D.NH, Civil Action No. 1:19-cv-00163 (the “Lottery Complaint”); and Complaint of NeoPollard Interactive LLC and Pollard Banknote Limited, filed February 15, 2019, D.NH, Civil Action No. 1:19-cv-00170 (the “NeoPollard Complaint”).

¹⁹ Lottery Complaint, prayers for relief A and C.

²⁰ NeoPollard Complaint, prayer for relief 1.

²¹ Meaning they agree that there is no issue as to any material fact.

²² Meaning “friends of the court.”