Even if the PASPA is Struck Down, the Wire Act will still Prohibit Sports Bets from Crossing State Lines.

Will this Prohibit Intrastate Online Sports Betting?

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By the end of June, 2018, the U.S. Supreme Court is expected to rule in the case of *Murphy v. NCAA*, et al[1] At the core of the case is the Professional and Amateur Sports Protection Act ("PASPA"),[2] the federal law that makes it unlawful for states to operate, promote, license or authorize sports betting, and also prohibits non-state operators from conducting sports betting pursuant to state law. The key legal question to be decided is whether PASPA "commandeers" states to maintain state-law prohibitions on sports betting in violation of the 10th Amendment to the U.S. Constitution (which reserves to the states or the people the powers not given to the federal government). If the Court upholds PASPA, it still may rule in favor of New Jersey by holding that PASPA is not violated by New Jersey's 2014 law which repealed the State's sports betting prohibitions, but only to the extent applicable to Atlantic City casinos and New Jersey horse racetracks.[3]

Even if PASPA is struck down completely, however, the Wire Act[4] will remain intact and unaffected. The Wire Act prohibits the transmission of sports bets, and information assisting in the placing of sports bets, across state or international borders, using the internet or other wire communication facility. An exception exists for information assisting in the placing of sports bets if the information is transmitted from, and is received in, a state or foreign country in which betting on the particular sporting event is legal, but no exception exists for the bets or wagers themselves.

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Several states around the country anticipate PASPA being struck down and are preparing for that possibility. As this writing, five states – Connecticut, Mississippi, New Jersey, New York and Pennsylvania – have passed laws that would authorize sports betting if PASPA is struck down or amended. Several other states have sport betting laws pending before their legislatures. Pennsylvania's law[5] expressly authorizes slot machine licensees to conduct sports betting. It provides:

> The [Pennsylvania Gambling Control Board ("PGCB")] may authorize a slot machine licensee to conduct sports wagering and to operate a system of wagering associated with the conduct of sports wagering at the slot machine licensee's licensed facility, . . . or through an Internet-based system.
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> The [PGCB] may authorize a sports wagering certificate holder [i.e., a slot machine licensee which obtains a sports wagering certificate] to conduct sports wagering and to operate a system of wagering associated with the conduct of sports wagering as a form of interactive gaming authorized by the Commonwealth.[6]

As long as the federal Wire Act exists, however, state online and mobile sports betting systems can operate only on an intrastate basis. This means that sports bettors will be required to initiate all online and mobile bets from within a state in which such sports betting is lawful, and their bets must be received, accepted and processed by an operator using servers and other equipment located within that same state.[7] Because internet information packets and mobile transmissions generally travel via the most efficient route existing at the time of transmission, unless a sports betting operator uses a private closed-loop system (which is impractical given its cost and inconvenience) it is possible that sports bets will travel across state lines on an intermediate basis before returning to the state where such bets were initiated and later accepted. As discussed below, such intermediate routing of sports bets may violate the Wire Act.

Whether the intermediate routing of sports bets across state lines violates the Wire Act depends on the interpretation given the Act by applicable law enforcement bodies, and ultimately by the relevant courts. In Nevada, for example, where intrastate mobile sports betting exists today, "wireless phone transmissions . . . including those used for mobile sports wagering — often travel through routers in Arizona, California or Utah because of the network topology and function."[8] There, the relevant enforcement bodies and regulators apparently do not take the position that the intermediate routing of sports bets across state lines constitutes a Wire Act violation. (There are no reported court rulings on the issue pertaining to Nevada's intrastate sports wagering.)

It is not clear that this would be the case in other jurisdictions, however. Indeed, before the U.S. Department of Justice ("DOJ") issued its 2011 Wire Act opinion (opining that the Wire Act applies only to sports betting), the DOJ took the position that betting of all types (not only sports betting) was covered by the Wire Act, and

"that the acceptance of wagers through the use of a wire communication facility by a gambling business, . . . from individuals located either outside a state or within the borders of the state (but where transmission is routed outside of the state) would violate federal law."[9] While the Unlawful Internet Gaming Enforcement Act (the "UIGEA")[10] contains an express exception for intermediate routing, the Wire Act contains no such exception, and the UIGEA states that "[n]o provision of [the UIGEA] shall be construed as altering, limiting, or extending any Federal or State law . . . prohibiting, permitting, or regulating gambling within the United States."[11]

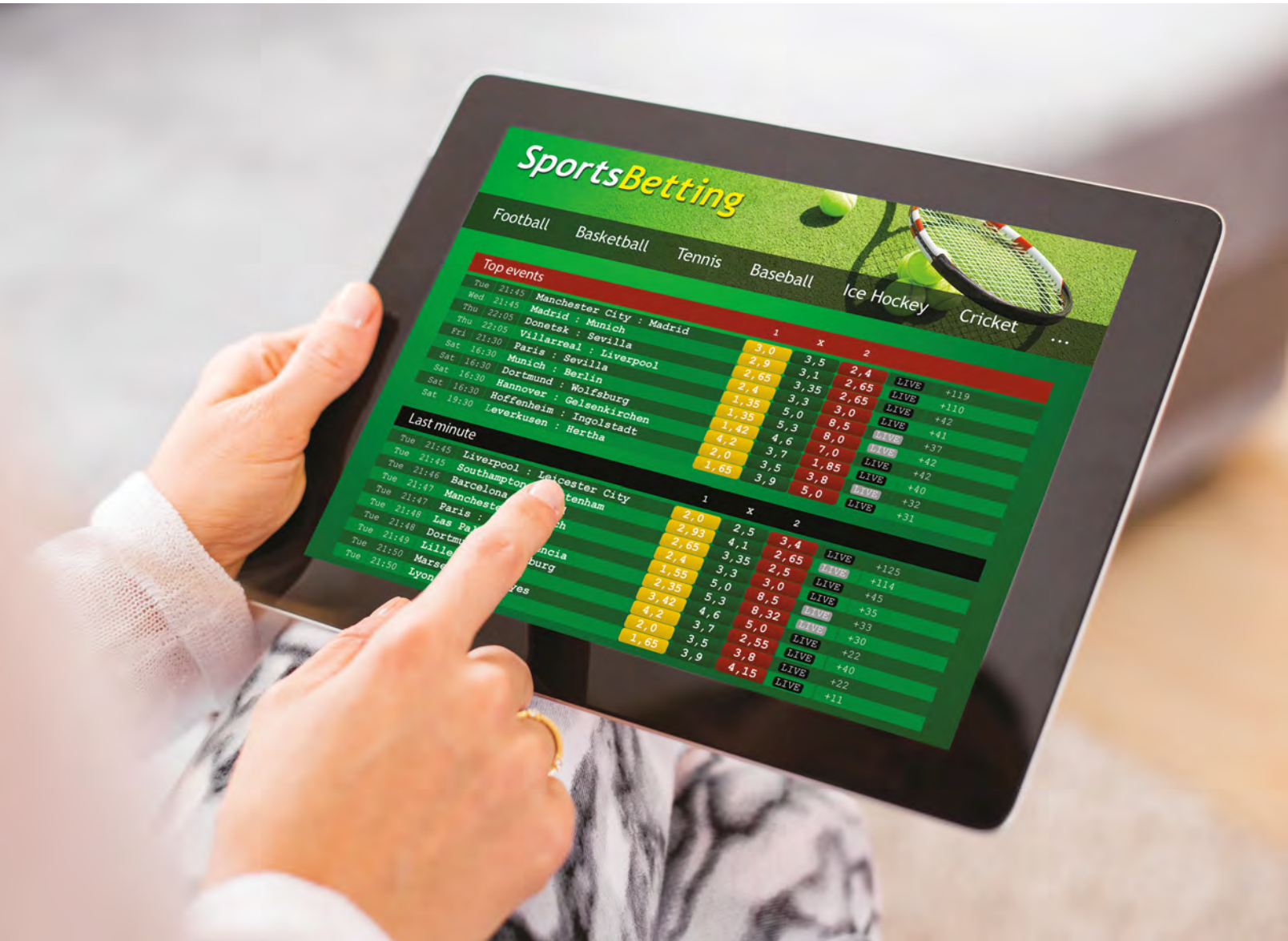
Thus, there is a significant risk that courts outside Nevada would hold the intermediate routing of sports bets across state lines to violate the Wire Act. In 2009, when the DOJ considered the Wire Act to apply to all wagering (not only sports wagering), I wrote on this issue as follows:[12]

> [T]he DOJ may still take the position that transmissions beginning and ending in the same state, but routed out of the state, are "interstate" transmissions for purposes of the Wire Act and thus unlawful if such transmissions make up a bet or wager....

Although no reported case is directly on point, the DOJ's position is supported by case law. In *Yaquinta v. United States*,[13] at issue was whether the Wire Act applied to the use of a wire transmission facility to carry information assisting in wagering on horse races, where the messages were initiated and ended in West Virginia, but were routed through Ohio. All defendants knew that the transmissions traveled through Ohio. In West Virginia at the time, pari-mutuel wagering on horse races at licensed racetracks was lawful, but off-track wagering on such races was not.

The defendants argued that the congressional intent expressed in the Wire Act was not to make criminal the use of an interstate wire transmission facility to carry messages beginning and ending in the same state "no matter how many other States the electrical impulses, carried by the wires, traversed,"[14] but rather was to prohibit certain interstate wire transmissions that began and ended in different states. The court rejected this argument, stating that "the intermediate crossing of a State line provides enough of a peg of interstate commerce to serve as a resting place for the congressional hat, if that will serve the congressional purpose."[15] The court thus held the Wire Act applicable to the wire transmissions at issue.

The 10th U.S. Circuit Court of Appeals reached a similar conclusion in *United States v. Kammersell*.[16] The defendant was charged under 18 U.S.C. § 875(c), which prohibits the transmission "in interstate or foreign commerce [of] any communication containing any threat to kidnap any person or any threat to injure the person of another," and at issue was whether a threatening



> "instant message" between two points in Utah, but routed through other states, constituted a transmission "in interstate or foreign commerce." The 10th Circuit affirmed the lower court's holding that the transmission was in interstate commerce, notwithstanding the fact that the transmission originated and was received in the same state. The defendant's threat "was unquestionably transmitted over interstate telephone lines," and thus fell "within the literal scope of the statute and [gave] rise to federal jurisdiction."[817]

Yaquinta and Kammersell provide support for the view that a gambling operator's wire transmission of sports bets between points in the same state, but where the transmission is intermediately routed out of the state, constitute interstate transmissions for purposes of the Wire Act. Courts today could come to that same conclusion, particularly those in the 10th Circuit, where *Kammersell* was decided. (The 10th Circuit includes Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming.) However, it would be contrary to the purpose of the Wire Act to use it to prohibit online sports bets transmitted between two points in the same state, and incidentally routed outside the state, where the state has expressly legalized online sports betting within its boundaries. It was true before the DOJ's 2011 Wire Act opinion and remains true today, that:

> There has been no reported case of enforcement of the Wire Act against gaming operators transmitting wagers or information assisting in the placing of wagers, between points in the same state, where the underlying wagering was expressly authorized by the laws of the state. This is not surprising, because to do so would be contrary to the intended purpose of the Wire Act.
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> In *Yaquinta*, there was no question as to the culpability of the underlying conduct. The wagering at issue was illegal under West Virginia law. At issue was only whether the wire transmissions constituting the illegal conduct were in interstate commerce so as to make applicable the federal statute. This is different from a situation where the underlying wagering is legal in the state in which the wire transmissions begin and end. In such a situation, the conduct clearly would be legal under applicable state law if it all occurred within the state—i.e., if the wagering-related transmissions never crossed the state's boundaries. To make such conduct illegal merely because the wagering transmissions, although sent and received in the same state, were routed outside it, would not serve the purpose of the Wire Act. As stated by the court in Yaquinta, the purpose of the Wire Act is:
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> > to assist the various States . . . in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and to aid in the oppression of organized gambling activities by prohibiting the use of . . . wire

> communication facilities which are or will be used for the transmission of certain gambling information in interstate...commerce. ... [18]

Moreover, and more to the point, the court stated: "[T]he objective of the [Wire] Act is not to assist in enforcing the laws of the States through which the electrical impulses traversing the telephone wires pass, but the laws of the State where the communication is received. [19] [20]

In addition, if the state through which the transmissions were intermediately routed attempted to prohibit such digital traffic through their state, even though it only traveled through the state and was not initiated, received or processed there, such action could violate the "Dormant Commerce Clause" of the U.S. Constitution, which bars states from discriminating against interstate commerce and favoring in-state economic interests over out-of-state economic interests.

In summary, a business that accepts online sports bets initiated and received in a state in which such betting is legal, but intermediately routed through a state in which such betting is illegal, may be held to violate the Wire Act, depending on the relevant court's interpretation of that law. However, this form of intrastate sports betting appears to be happening in Nevada without challenge from regulators or law enforcement, and if a court were to hold that the Wire Act prohibited such conduct, such would be contrary to the Wire Act's stated purpose. As I wrote before:

> Had the underlying wagering in *Yaquinta* been legal, it seems unlikely that the prosecution would have been brought, and if it had been brought, it seems unlikely that the court would have found the defendants guilty under the Wire Act, even if the wagering-related information constituted actual bets and wagers (as opposed to mere information assisting in the placing of bets and wagers). If the underlying wagering had been legal in West Virginia, there would have been no need to assist the State in the enforcement of its laws, and using the Wire Act to prohibit communications that began and ended in that State, and assisted in wagering authorized by that State, would not have served the purpose for which the Wire Act was enacted.[21] Moreover, use of the Wire Act to prohibit intrastate wagering (except for the routing of transmissions) expressly authorized by a state would actually thwart that state's laws, directly contrary to the stated purpose of the Wire Act. The Wire Act should not be used toward such ends inconsistent with its intended purpose. [22]

[1] Formerly, "Christie v. NCAA," before Phil Murphy succeeded Chris Christie as Governor of New Jersey on January 16, 2018. Christie v. NCAA, et al., 832 F.3d 389, 396-397 (3rd Cir. 2016), cert. granted, 2017 U.S. LEXIS 4279 (2017) and consolidated with New Jersey Thoroughbred Horsemen's Association, Inc. v. NCAA, et al., U.S. Sup. Ct. Nos. 16-476 and 16-477. Respondents are the National Collegiate Athletic Association, the National Basketball Association, the National Football League, the National Hockey League and Major League Baseball.

[2] 28 U.S.C. §§ 3701 – 3704.

[3] N.J. 2014 P.L. c. 62, § 1.

[4] 18 U.S.C. §§ 1081, 1084.

[5] 2017 PA Act No. 72.

[6] Pa.C.S. § 13C11(a).

[7] The Pennsylvania Gaming Law enacted in 2017 provides: "Except as provided in this part [of the Law relating to sports wagering], all individuals wagering on sporting events through authorized sports wagering must be physically located within this Commonwealth or within a state or jurisdiction with which the board has entered a sports wagering agreement." Pa.C.S. § 13C11(a)(3)(i).

[8] See: Howard Stutz, Las Vegas Review-Journal May 20, 2015, at https://www.reviewjournal.com/business/casinos-gaming/analysis-net-gambling-bill-accidentally-criminalizes-some-nevada-sports-bets/ , quoting Las Vegas gaming attorney Greg Gemignani. (Last accessed February 6, 2018.)

[9] Letter dated May 13, 2005 from Laura H. Parsky, Deputy Assistant Attorney General, U.S. Department of Justice, Criminal Division, to Carolyn Adams, Illinois Lottery Superintendent. See also, letter dated January 2, 2004, from David Marshall Nissman, United States Attorney, District of the Virgin Islands, to Judge Eileen R. Petersen, Chair, Virgin Islands Casino Control Commission.

[10] 31 U.S.C. §§ 5361 – 5367.

[11] 31 U.S.C. § 5361(b).

[12] "The Wire Act Should Not be Used to Prohibit Internet Gambling Carried out Under the UIGEA Intrastate Wagering Exception," by Mark Hichar, Gaming Law Review and Economics, Vol. 13, No. 2 (2009), pp. 112-113, https://www.researchgate.net/publication/247565503_The_Wire_Act_Should_Not_Be_Used_to_Prohibit_Internet_Gambling_Carried_Out_under_the_UIGEA_Intrastate_Wagering_Exception (last accessed February 8, 2018).

[13] 204 F. Supp. 276 (N.D. W.Va. 1962).

[14] Yaquinta, 204 F. Supp. at 277.

[15] Id. at 278.

[16] 196 F.3d 1137, 1139 (10th Cir. 1999), cert. denied, 530 U.S. 1231, 120 S. Ct. 2664, 147 L. Ed. 2d 277 (2000).

[17] 196 F.3d at 1139.

[18] Yaquinta, 204 F. Supp. at 279 (quoting from U.S. Attorney General Robert F. Kennedy's letter to the branches of Congress dated Apr. 6, 1961).

[19] Id. at 279. Subsequent cases have established that the Wire Act is violated by the knowing sending of interstate wire transmissions assisting in wagering, where the underlying wagering, although legal in the state where the transmission is received, is illegal in the state from which the transmissions are sent. See, for example, Martin v. United States, 389 F.2d 895 (5th Cir), cert. denied, 391 U.S. 919, 88 S. Ct. 1808 (1968).

[20] Hichar, at p. 113.

[21] As noted above, the Yaquinta court determined that the out-of-state routing of communications beginning and ending in the same state was sufficient to consider the communications "in interstate or foreign commerce" for purposes of the Wire Act, "if that will serve the congressional purpose." Yaquinta, 204 F. Supp. at 278 (emphasis added). If the communications at issue in Yaquinta had related to wagering expressly authorized by the state, then applying the Wire Act to prohibit such communications would not have served the congressional purpose, and the court's statement suggests it would have decided the case differently.

[22] Hichar, at p. 114.