

Client Alert

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On June 3, 2019, a federal court in New Hampshire issued a highly anticipated decision in *New Hampshire Lottery Commission et al. v. Barr et al.*, challenging a recent opinion by the U.S. Department of Justice (DOJ) regarding the scope of the Wire Act, a 1961 criminal statute intended to prohibit certain interstate gambling activities. The court's opinion set aside the DOJ's most recent opinion interpreting the Wire Act to apply to all interstate gambling activities, such as lotteries and casino games. Instead, the court held that the Wire Act only applies to gambling activities on sporting events. While the decision will provide short-term clarity to state lotteries and companies in the gaming industry, this is a case that will almost certainly be appealed.

The Wire Act Before the Trump Administration

The Wire Act, 18 U.S.C. § 1084, was enacted in 1961 to assist states in enforcing their gaming laws and to suppress organized gambling activities across state lines. The statute contains two provisions. The first prohibits anyone in the business of betting or wagering from knowingly using interstate communications to transmit "bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contests, or for the transmission" entitling the recipient to receive money or credit from bets or wagers, or for transmitting information assisting in the placing of bets or wagers. The second provision creates a limited safe harbor.

Companies operating in the gaming industry were faced with uncertainty regarding the scope of the Wire Act's provisions because of the way the statute is drafted: in one prohibition in the statute, the law references "information assisting in the placing of bets or wagers on any sporting event or contest," whereas the other prohibitions in the statute simply refer to "bets or wagers." There were a range of conflicting assessments of the statute's language: did the phrase "on a sporting event or contest" apply throughout the entire statute or only to the place in which it was specifically written?

Beginning in 2009, New York and Illinois sought clarity from the DOJ regarding whether the Wire Act prohibited in-state sales of lottery tickets if those sales caused information to be transmitted across state lines, for instance, when processing payment or logging lottery tickets. The DOJ referred the question to its Office of Legal Counsel for a formal opinion. In 2011, the DOJ concluded that the Wire Act only applies to sports gambling. It reached this conclusion based on an analysis of the statute's text, legislative history and underlying policy purposes. In reliance on this opinion, various lotteries and gaming companies began to develop and market online gaming platforms.

The DOJ Reverses Course and Lotteries Sue

In late 2018, in a move that surprised the entire gaming industry, the DOJ revisited and reversed its interpretation of the Wire Act by concluding that the Wire Act makes all or most interstate online gambling illegal. Through multiple canons of statutory interpretation, the DOJ concluded that "sporting event or contest" only modified the clause it preceded, meaning that the other prohibitions applied to all interstate betting or wagering. Acknowledging that its change in position could disrupt businesses, the DOJ instituted a 90-day

grace period, starting Jan. 15, 2019, to allow individuals and entities to bring their business models into compliance. That window was later extended through June 14, 2019.

Shortly after the new opinion was announced, multiple lawsuits were filed challenging the DOJ's new opinion. The New Hampshire Lottery led the charge, though other state lotteries and lottery vendors eventually joined as well.

The DOJ vigorously resisted the lawsuit, arguing not only that the DOJ's most recent opinion should stand on substantive grounds, but also seeking to dismiss the lawsuits against it on various procedural grounds as well. Most notably, on the eve of oral argument in the case, the DOJ issued a new memorandum in which it attempted to disclaim the lotteries' fear of criminal prosecution. In that memorandum, the DOJ stated that its most recent opinion "did not address whether the Wire Act applies to State lotteries and their vendors" and that the DOJ "is now reviewing that question." Notwithstanding this last-minute attempt to avoid adjudication, the court proceeded to hear oral arguments.

The Wire Act Applies Only to Sports Gambling

The court's opinion, issued late in the afternoon of June 3, 2019, set aside the DOJ's most recent Wire Act opinion and held that the Wire Act applies only to interstate sports gambling activities. In so holding, the court rejected the many procedural objections lodged by the DOJ and reached the merits of the dispute. The court ultimately determined that the Wire Act was ambiguous enough to require judicial interpretation and that the DOJ's 2018 Wire Act opinion misinterpreted the law. In so deciding, the court set aside the 2018 opinion as a matter of law.

In addition to the importance of the court's core holding that the Wire Act applies only to sports gambling activities, the opinion contained a number of interesting additional observations.

First, many observers and industry insiders predicted that the court might rule against the DOJ's latest opinion based on a 2014 criminal case from the U.S. First Circuit Court of Appeals. In that case, *United States v. Lyons*, criminal defendants convicted of violating the Wire Act challenged whether their convictions were valid because they had accepted interstate bets or wagers related to both sporting events and traditional casino games. In *Lyons*, the court agreed that the Wire Act applied only to sports gambling, but rejected the defendants' argument, stating that although "[t]he Wire Act applies only to 'wagers on any sporting event or contest,' that is sports betting[.]" the fact that the defendants engaged in other forms of betting was immaterial because "nothing in the statute limits its reach to entities devoted exclusively to sports betting[.]" In this most recent case, the court declared that this language in the *Lyons* opinion merely constituted dicta. In other words, the *Lyons* court did not definitively decide the issue of whether the Wire Act applies to only sports gambling and was not binding in this case.

Second, both sides in this lawsuit presented highly technical canons of interpretation in support of their positions. However, the court rejected both sides' positions and instead engaged in its own analysis of the Wire Act's admittedly ambiguous text. The court guided itself by the principle that "statutes should be interpreted as a symmetrical and coherent regulatory scheme." Based on the way the Wire Act is written—and by reference to a similar anti-gambling statute enacted on the same day as the Wire Act—the court concluded that Congress intended that the Wire Act applies only to enumerated activity in connection with sporting events or contests. In concluding that the DOJ misinterpreted the law when it issued its most recent opinion, the court set aside that opinion as legally invalid.

What Comes Next?

The lottery and gaming industries represent billions of dollars in revenue nationwide. Indeed, state lotteries provide hundreds of millions of dollars to education and other state programs. However, not everyone in the industry agrees with this most recent opinion. Anti-online gambling groups joined this litigation and various industry groups also supported the DOJ's most recent Wire Act opinion. Because of the high stakes for both sides, an appeal of this case to the U.S. Court of Appeals for the First Circuit is almost guaranteed, and it would not be surprising if the U.S. Supreme Court eventually took up the issue of interpreting the Wire Act.

For the time being, state lotteries and intrastate online gambling activities have received a reprieve from the threat of criminal prosecution under the Wire Act. However, this issue is far from settled.

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This document is intended to provide you with general information regarding a federal court opinion on the scope of the Wire Act and its prohibitions on certain interstate gambling activities. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorneys listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.

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