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Federal District Court Sides with Prior Circuit Court Opinion on Wire Act Interpretation

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In a win for the online gaming industry, the U.S. District Court for the District of Rhode Island has entered an order in *International Game Technology PLC et al. v. Merrick B Garland & The United States Department of Justice*[1] siding with the groundbreaking and influential interpretation of the Wire Act[2] by the U.S. Court of Appeals for the First Circuit in *N.H. Lottery Comm'n v. Rosen*[3] ("*NHLC II*").

Importantly, the decision provides further peace of mind for the iGaming industry as it relates to the threat of prosecution under the Wire Act for wagers other than sports wagering activity.

THE DISTRICT COURT DECISION

Plaintiffs, International Game Technology and IGT Global Solutions Corporation (collectively, "IGT"), sought a declaratory judgment that a 2018 Department of Justice ("DOJ") opinion (the "2018 Opinion"), which held that the Wire Act applied to all forms of bets or wagers (implicating online lottery ticket sales in the process) only prohibits sports wagering activity. Primarily, IGT sought to protect its products by seeking declaratory relief that its online lotteries and iGaming products would be free from federal prosecution.

On a motion to dismiss, the DOJ argued that IGT lacked Article III standing to seek the declaratory relief at issue. The DOJ asserted that (1) the DOJ had not brought similar prosecutions after the expiration of a DOJ forbearance period, and (2) the existence of the *NHLC II* decision itself rendered the threat of future prosecutions too speculative an injury to confer Article III standing.

The district court denied the DOJ's motion to dismiss, reasoning that the threat of prosecution faced by IGT for its lottery and iGaming business was credible enough to meet the requirements for an Article III standing.

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Specifically, and like the plaintiffs in *NHLC II*, the court found that IGT "should not have to operate under a dangling sword of indictment while DOJ purports to deliberate without end the purely legal question it had apparently already answered and concerning which it offers no reason to expect an answer favorable to the plaintiffs."[4]

Not only did the district court deny the DOJ's motion to dismiss, but it also granted IGT's separate motion for summary judgment and held that "as to the parties now before it, the Wire Act applies only to 'bets or wagers on any sporting event or contest.'"

In short, the DOJ clearly cannot dangle the threat of prosecution over IGT, or those similarly situated.

THE FLUCTUATING FRAMEWORK OF THE WIRE ACT

This decision solidifies years of uncertainty surrounding the Wire Act.

In 2011, the DOJ issued a memorandum opinion concluding that the Wire Act's prohibitions on the interstate transmission of bets and wagers apply only to sports wagering and not to other types of gambling (the "2011 Opinion"). This opinion clarified the interpretation of the Wire Act to specifically hold that its prohibitions did not apply to lotteries, or other non-sports forms of wagering. Thus, the 2011 Opinion opened the doors to interstate internet wagering on games like slots, table games, and poker.

However, in November 2018, the DOJ issued the 2018 Opinion, reversing the position articulated in its 2011 Opinion and concluding that the Wire Act does in fact apply to forms of wagering other than sports wagering.

Per the 2018 Opinion, the DOJ construed 18 U.S.C. § 1084(a) as establishing four distinct types of prohibited conduct, specifically, barring persons in the gambling business from knowingly using a wire communication facility in interstate or foreign commerce:

1. To transmit bets or wagers;

2. To transmit information assisting in the placing of bets or wagers on any sporting event or contest;

3. That entitles the recipient to receive money or credit as a result of bets or wagers; and,

4. For information assisting in the placing of bets or wagers.

The DOJ asserted that the limitation "on any sporting event or contest" in the second prohibition does not sweep backwards or forwards to limit the other prohibitions.

In other words, according to the 2018 Opinion, only the second prohibition in 18 U.S.C. § 1084(a) (barring the transmission of information assisting in the placing of bets or wagers on any sporting event or contest) is limited to sports betting or wagering.

The first (barring persons in the gambling business from using a wire communication facility to transmit bets or wagers), third (barring any such persons from transmitting wire communications that entitle the recipient to receive money or credit as a result of bets or wagers), and fourth (barring any such persons from transmitting wire communications for information assisting in the placing of bets or wagers) prohibitions extend to non-sports-related wagering.

Notably, the 2018 Opinion does not conclude that intra-state sports wagering activity (or interactive gaming), where authorized by state law, implicates the Wire Act.

NHLC II was the first challenge to the 2018 Opinion. On February 15, 2019, the New Hampshire Lottery Commission, joined by certain lottery systems and iGaming companies, filed suit – *New Hampshire Lottery Commission v. William Barr*[5] ("*NHLC I*") – in the U.S. District Court for the District of New Hampshire (the "New Hampshire District Court") against the DOJ seeking a declaration that the DOJ's 2018 Opinion was legally incorrect and, in fact, that the Wire Act prohibitions do not apply to lotteries or other non-sports forms of wagering.

Representatives of other states and state lotteries, as well as certain anti-gambling proponents, joined as amicus curiae.

On June 3, 2019, the New Hampshire District Court issued an order granting summary judgment to plaintiffs (the "June 3rd Order"). In the June 3rd Order, the New Hampshire District Court found that the language of the Wire Act was ambiguous as to whether the limitation "on any sporting event or contest" applied to all four prohibitions in Section 1084(a).[6]

Looking at the context and structure of Section 1084(a), then, the New Hampshire District Court concluded[7] that the reading of the Wire Act language underlying the 2011 Opinion provided a more coherent interpretation of the entire subsection and "construes the Wire Act in harmony with another gambling statute that Congress enacted the same day as the Wire Act (i.e., the Interstate Transportation of Wagering Paraphernalia Act).[8]

The New Hampshire District Court next turned to the legislative history for the Wire Act and concluded that it, too, supported the interpretation underlying the 2011 Opinion.

The New Hampshire District Court entered judgment based on the June 3rd Order on June 20, 2019, and the DOJ appealed the District Court's ruling.[9]

On January 20, 2021, the First Circuit issued an opinion affirming the New Hampshire District Court's interpretation of the Wire Act.[10] The First Circuit held that, as an issue of apparent first impression, the prohibitions of Wire Act Section 1084(a) apply only to the interstate transmission of wire communications related to any "sporting event or contest." The First Circuit applied the New Hampshire District Court's reasoning and concluded that the language and syntax of the provision supported the interpretation underlying the 2011 Opinion.

Importantly, the First Circuit held that Section 1084(a) does not bar internet transactions of state lotteries and their vendors.

IMPLICATIONS

The NHLC II, and now the *IGT*, decisions will almost certainly have implications that reach well beyond online lottery ticket sales. For example, there is no argument that the Wire Act prevents states from authorizing casino or poker play across state lines. Nonetheless, state authorization of casino or poker play across state lines, even without the threat of legal action from the DOJ, could be complex, as states which permit online poker would need to agree amongst themselves on how to regulate and tax interstate gambling. Some states have already entered into such agreements, but others have not.

Perhaps most importantly, the opportunities for more efficient structures for gaming operators (who might be able to consolidate expensive servers and support equipment to a single location rather than replicating it in each state) and the potential for growth of the business and associated tax revenue could spur states to consider such cooperation via interstate compacts and the like. Any such multi-state agreements, though, would be limited to online poker and casino gaming. Online sport wagering, which is booming as more and more states move to legalize and regulate that business, would still be subject to the Wire Act and, therefore, continue to be operated purely on an intra-state basis only.

It remains to be seen whether an appeal will be taken; however, this ruling may spur Congress to finally take up the Wire Act and the question of online gambling and sports betting generally, perhaps considering a model based on the Interstate Horseracing Act[11] providing guardrails for interstate online wagering, which complies with state regulation in each relevant state. Assuming the ruling stands, this is a boon to the already blossoming online gaming industry, and a positive sign for growth in new jurisdictions.

Notes

1. No. CV 21-463 WES, 2022 WL 4245579 (D.R.I. Sept. 15, 2022).
2. 18 U.S.C. § 1084.
3. 986 F.3d 38, 41 (1st Cir. 2021).
4. *Id.* (quoting *NHLC II*, 986 F.3d at 53).
5. 386 F. Supp. 3d 132 (D.N.H. 2019).
6. *NHLC I*, 386 F. Supp. 3d at 151-52.
7. *Id.* at 152.
8. 18 U.S.C. § 1953.
9. *NHLC II*, 986 F.3d 38.
10. *NHLC II*, 986 F.3d 3.
11. 15 U.S.C. §§ 3001-3007.