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The sports betting legal market dramatically shifted when the U.S. Supreme Court struck down the Professional and Amateur Sports Protection Act (PASPA) as unconstitutional commandeering under the 10th amendment.¹ PASPA prohibited state and local legislatures from enacting laws that would favor sports betting. But the U.S. Supreme Court ruled that PASPA was unconstitutional because it “dictates what a state legislature may and may not do.”² As a result, PASPA is no longer the primary impediment to legalized sports gambling.

Freed from the restraints of PASPA, state legislatures have been moving at a breakneck pace to enact their own framework to legalize and regulate sports betting. For example, West Virginia, Pennsylvania, Mississippi, Delaware, New Jersey and Nevada have successfully enacted regulations and legislation favoring lawful sports betting. Moreover, sports betting businesses, such as bookmakers, casinos, sports data analysts, and others now may expand their businesses. Yet one federal law serves as a potential impediment to the expansion of legalized interstate sports betting – the Federal Wire Act (18 U.S.C. § 1804).³

Signed into law by President Kennedy in the 1960s, the Federal Wire Act⁴ was designed as a tool to suppress organized crime, specifically by focusing on the transmission of sports wagers or information connected to sports wagering.⁵ The statute provides:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility⁶ 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

By its express terms, the Federal Wire Act creates criminal liability for those who use a wire to transmit sports information⁸ in connection with a bet or wager, or alternatively, use a wire to transmit a bet or wager. However, the Federal Wire Act does not apply to intrastate commerce.⁹ But what happens¹⁰ if the transmission of a sports wager or information in connection with a sports wager is *incidentally* transmitted across state lines. For example, consider the scenario where the bettor places a bet

¹ See *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018).

² *Id.* at 1478.

³ See generally 18 U.S.C. § 1801, *et seq.*

⁴ The Federal Wire Act is not the only federal law that serves as an impediment. The Unlawful Internet Gambling Enforcement Act (UIGEA) still presents roadblocks to expansion of interstate gambling. This article does not address those implications, but readers should note that UIGEA will not be applicable in intrastate bets.

⁵ Legislation Relating to Organized Crime Hearings on H.R. 468, H.R. 1246, H.R. 3021, H.R. 3022, H.R. 3023, H.R. 3246, H.R. 5230, H.R. 6571, H.R. 6572, H.R. 6909, H.R. 7039 Before Subcommittee No. 5 of the Committee of the Judiciary, 87th Cong. at 22 (1961).

⁶ The statute broadly defines “wire communication facility” and is applicable to modern forms of communication, including those communications made by the internet. See *United States v. Lyons*, 740 F.3d 702, 716 (1st Cir. 2014). As a result, it is almost certain that the Federal Wire Act will apply to communications with mobile sports betting apps.

⁷ 18 U.S.C. § 1804(a).

⁸ The statute maintains a safe harbor provision that protects information that is transmitted for its newsworthiness, or if information is being transmitted from one state where it is legal, to another state where it is legal. But the internet is a decentralized form of communication, with its user unable to dictate how to transmit that information precisely.

⁹ The Federal Wire Act only applies to interstate betting activities, and does not criminalize lawful intrastate gambling. See *United States v. Lyon*, 740 F.3d 702, 713 (1st Cir. 2014).

¹⁰ Certain cases suggest that the bettor must know that the transmissions will cross state lines, but it is unclear whether this approach is widely adopted. See *United States v. Blair*, 54 F.3d 639, 641-42 (10th Cir. 1995) (holding that a crime under § 1804 is a general intent crime).

with the bookmaker in a jurisdiction where sports betting is legal. However, the information crosses state lines, thereby creating federal jurisdiction over an action that is lawful within the state. In scenarios such as these, the Federal Wire Act applies, even though the state has regulated the activity and made it lawful.

This very scenario was encountered by a federal district court in *United States v. Yaquina* soon after the law was enacted.¹¹ In *Yaquina*, several bookmakers in West Virginia used the telephone system to transmit bets and wagers in connection with horse racing.¹² As part of their betting scheme, the bettors made telephone calls from a physical location in West Virginia, but transmission of those telephone calls briefly passed into Pennsylvania, before returning to a location in West Virginia. Those bettors were charged with violations under 18 U.S.C. § 1804. As a defense, the bettors argued that the Federal Wire Act should not trigger federal jurisdiction just because the transmission of betting information incidentally crossed state lines. The federal district court disagreed, noting that “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.”¹³ Accordingly, some courts have found that federal jurisdiction can be triggered by the mere act of crossing state lines.

The States Attempt to Mitigate Risk

Understanding the risk to the sports betting marketplace, some states have attempted to limit the federal jurisdictional trigger. For example, New Jersey specifically addresses the incidental transmission of sports wagers or information pertaining to sports wagers:

All wagers on sports events authorized under this provision shall be initiated, received and otherwise made within this State unless otherwise determined by the division in accordance with applicable federal and state laws. Consistent with the intent of the United States Congress as articulated in the Unlawful Internet Gambling Enforcement Act of 2006 (31 U.S.C. § 5361 *et seq.*), **the intermediate routing of electronic data relating to a lawful intrastate wager authorized under this provision shall not determine the location or locations in which such wager is initiated, received or otherwise made.**¹⁴

In addition, New Jersey requires an additional safeguard – that the physical servers be located within the jurisdiction. Specifically, the proposed New Jersey bill requires that:

The server or other equipment used by a racetrack to accept wagers at a sports pool or online sports pool shall be located in that racetrack or in any location in Atlantic City which conforms to the requirements of section 20 of P.L.2013, c.27 (C.5:12-95.22) and any additional requirements which the division may impose by regulation. The server or other equipment used by a casino to accept wagers at a sports pool or online sports pool shall conform to the requirements of section 20 of P.L.2013, c.27 (C.5:12-95.22) and any additional requirements which the division may impose by regulation.

By requiring the physical presence of servers in New Jersey, the legislature has moved to reduce the risk of running afoul of the Federal Wire Act. Similar to New Jersey, the Pennsylvania legislature has attempted to address the intermediate routing of sports wagers:

[A]ll wagers made through interactive gaming shall be deemed to be initiated, received or otherwise made within the geographic boundaries of this Commonwealth. **The intermediate routing of electronic data associated or in connection with interactive gaming shall not determine the location or locations in which a bet or wager is initiated, received or otherwise made.**¹⁵

Even though the states have attempted to mitigate the risk associated with interstate sports betting, that does not affect the application of federal law. Indeed, the federal government is not limited by the states' proposal to limit the application of the Federal Wire Act, and thus, participants in the sports betting market must be aware of the potential implications.

¹¹ 204 F. Supp. 276 (N.D. W. Va. 1962).

¹² *Id.* at 277.

¹³ *Id.* at 278.

¹⁴ N.J. Stat. § 5.12A-11.

¹⁵ Pa. C.S.A. § 13B21.

Will the Federal Government Approach Sports Betting Similar to Marijuana?

There is some evidence that the federal government will have limited appetite for enforcing sports betting violations of the Federal Wire Act. In particular, many commentators point to the now rescinded¹⁶ Cole-Memorandum (the “*Cole Memo*”) as basis for this opinion. The *Cole Memo*, dated August 29, 2013 and named after the then-Deputy Attorney General, presented the United States Department of Justice’s position on the enforcement of marijuana-related crimes. Specifically the *Cole Memo* noted that Congress declared the sale and use of marijuana as unlawful. Notwithstanding Congress’ broad prohibitions on marijuana, several states enacted legislation legalizing the use of medicinal and recreational marijuana. Consequently, the interests of federal and local governments came into conflict. Under the *Cole Memo*, the federal government would use its discretion in prosecuting businesses engaged in the sale of marijuana. The *Cole Memo* noted that states and local governments were in the best position for the enforcement of laws regulating the sale and distribution of marijuana, and the federal government only would intervene when there were insufficient measures to protect against certain harms as noted by Congress. Accordingly, the federal government took a “hands-off” approach when it came to intervening in the sale and distribution of marijuana.

While the current Attorney General, Jeff Sessions, rescinded the *Cole Memo* on January 4, 2018,¹⁷ freeing local federal prosecutors to enforce marijuana laws on the books, President Trump tamped down on that step in response to pressure from legislators from states where marijuana is legal and a thriving business, such as Colorado, deferring to states’ rights principles.¹⁸

Similarly, the federal government *could* take the same approach towards sports betting – that is, choosing not to infringe on those states that choose to make such gaming an active part of their economies. Indeed, even courts like the one deciding the *Yaquina* case pointed out that the goal of Congress in passing the Federal Wire Act was to assist states in enforcing their own laws against gambling.¹⁹ Therefore, taking a light enforcement hand in states that do want to legalize betting is consistent both with the current administration’s philosophy and the original congressional intent.

This hope has not stopped many state legislatures from considering how best to mitigate risk in connection with legalized sports betting. Similar to daily fantasy sports legislation, state governments could authorize a limited number of sports books, and require robust consumer protections, including background checks, segregation of funds, and other licensing regulations. Indeed, by performing these actions, the state legislatures would be accomplishing many of the aims and objections of rooting out organized crime – a primary goal of the Federal Wire Act. Because of this, it is plausible that the federal government will approach sports betting in a similar manner as marijuana.

How Can Businesses Mitigate Risk of Triggering Federal Jurisdiction?

No business wants to be a “test case” for federal prosecutors. Businesses therefore should consider appropriate risk reducing strategies given the implications of the Federal Wire Act. While it may be impractical in this era for sports betting, businesses could significantly reduce the risk of using “wire communication facilities” by only accepting bets placed in person and in cash. Given that the future of sports betting likely is to involve mobile sports betting, however, businesses should consider two enforcement mechanisms: (1) a rigorous application of geolocation in their sports betting apps; and (2) a requirement that all servers and technology equipment be physically located in the jurisdiction. As part of the geolocation requirements, all sports bettors must be physically present in the jurisdiction. This will reduce users from placing bets across state lines or in jurisdictions where sports gambling is considered illegal. Additionally, by requiring a physical presence of servers in the jurisdiction, sports businesses will reduce the risk of incidental transmission across state lines. Further, businesses should not

¹⁶ Attorney General Jeff Sessions rescinded <https://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement> the Cole Memo on January 4, 2018. See <https://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement>.

¹⁷ *Id.*

¹⁸ https://www.washingtonpost.com/politics/trump-gardner-strike-deal-on-legalized-marijuana-ending-standoff-over-justice-nominees/2018/04/13/2ac3b35a-3f3a-11e8-912d-16c9e9b37800_story.html?noredirect=on&utm_term=.6e63dded493a

¹⁹ *United States v. Yaquina*, 204 F. Supp. 276, 279 (N.D. W. Va. 1962). See also *United States v. Ross*, No. 98 CR 1174-1, 1999 WL 782749, (discussing that “Congress intended to both assist the various States . . . in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses”).

accept bets or wagers via telephone. A telephone is obviously a wire communication, and that form of communication presents inherent problems in determining the bettor's location.

Conclusion

There is significant uncertainty in how the federal government will handle intermediate routing problems in the context of sports betting. Because of this uncertainty, businesses involved in sports betting must equip themselves in a manner that mitigates such risk. Businesses should consider implementing certain minimal standards, including requiring in-person bets, and prohibiting interaction with bettors over the telephone. To the extent that businesses want to take bets through a mobile sports betting app, a geolocation strategy must be implemented to reduce the risk that bettors not physically located in the state will be unable to place bets. In addition, businesses should require the physical presence of all servers be located in the jurisdiction.

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