The Potentially Catastrophic Impact of Re-interpreting the Federal Wire Act

(Using RAWA as a Guide)

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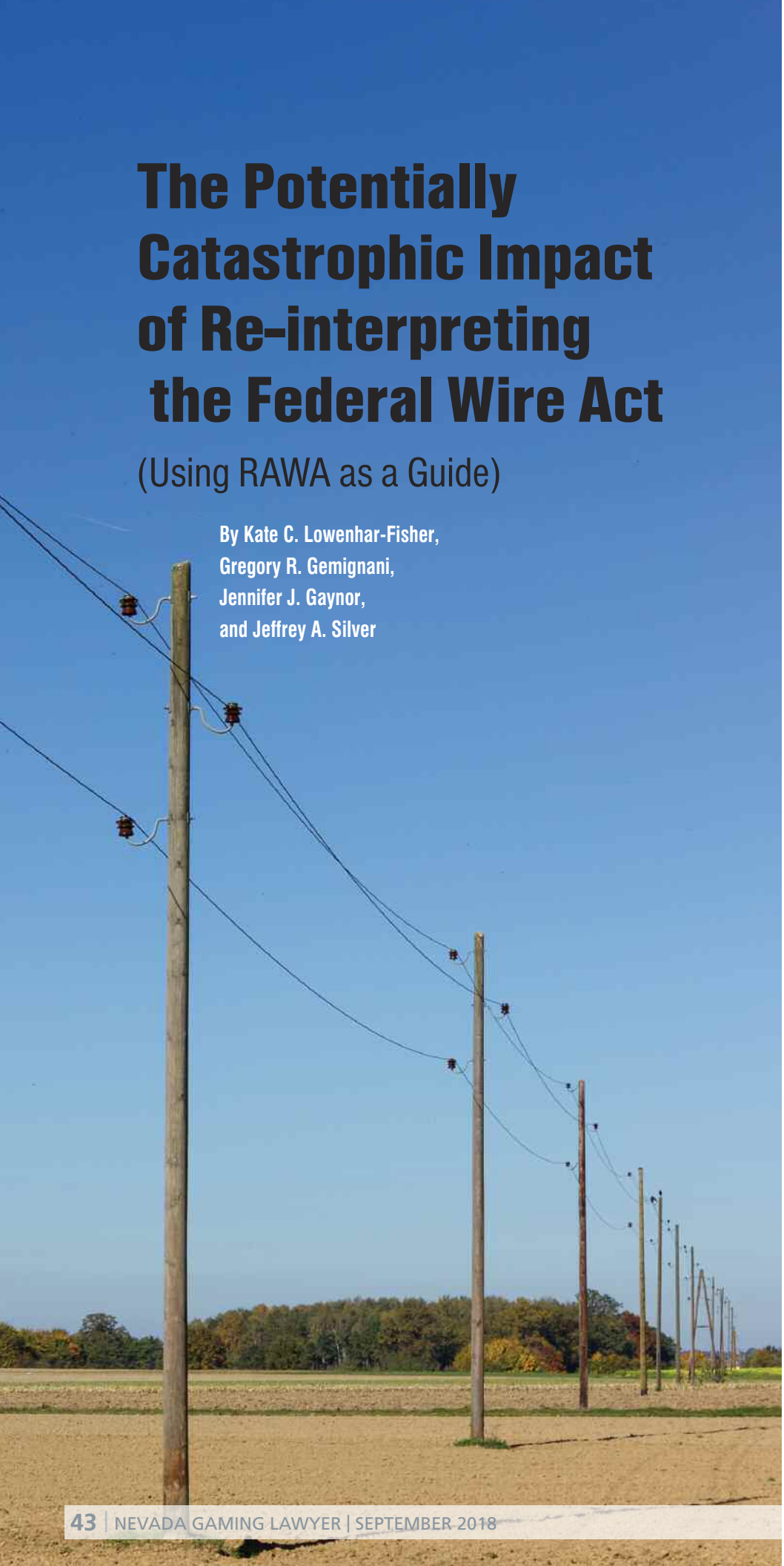


With the Professional and Amateur Sports Protection Act ("PASPA") being struck down as unconstitutional, many pundits are hailing a new golden age of gaming where states are solely in control of their own gaming destiny. Looming like a specter over this new golden age, however, is the Federal Wire Act ("FWA").

In recent years, the FWA has been interpreted in ways that are favorable for the gaming industry-including that the FWA applies only to sports wagering and does not apply to intrastate activity. If the FWA is reinterpreted or amended, however, as Attorney General Jeff Sessions has threatened to do, the impact could be catastrophic for the gaming industry.

History of the FWA and Its Application

A bit of history may help frame the issue. The FWA was enacted in 1961 as part of a package of federal acts aimed at depriving organized crime of its interstate money-making activities. From 1961 through the end of 2011, the United States Department of Justice ("DOJ") took an expansive view of the prohibitions set forth in the FWA. Specifically, 18 USC 1084 contains the following prohibitions:

> *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.*

Based on the language of the FWA, the DOJ issued statements that the FWA applied to all forms of wagering and applied to all electronic communications that could cross state lines. With regard to the application of the FWA to all wagering activity, the DOJ interpreted the phrase "sporting event or contest" in the first prohibition to apply to both "sporting events" and "contests" as separate forms of wagering.[1] Under such an interpretation, contests were games that contained the elements of consideration, chance and prize.

The DOJ's interpretation regarding the types of wagers subject to the FWA was challenged in an action in Louisiana, In *re Mastercard*,[2] in which bettors who lost money in online casino games sought to recover losses from credit card companies under a civil RICO action. To sustain such a racketeering action, the plaintiffs had to show that the defendants were engaged in some kind of underlying federal crime. The plaintiffs cited the FWA as the underlying criminal offense. The Plaintiffs' theory was that the online gaming sites were violating the FWA and the credit card companies were part of the criminal enterprise because they profited from the violations and thus were liable for civil damages under RICO statutes.

Understandably, the credit card companies were concerned about being deemed to be part of a criminal enterprise due to the actions of merchants who had accounts with merchant banks that had agreements with the credit card companies. As such, the credit card companies wanted to extricate themselves from this action as early as possible, and they filed a motion to dismiss on the grounds that the plaintiffs failed to state a claim upon which relief could be granted. The basis for the motion was that the plaintiffs alleged violations of the FWA for wagering that was not sports wagering, and, because the FWA applies only to sports wagering the claims were defective.

Ultimately, the Federal District Court and the Fifth Circuit court of appeals agreed with the credit card companies that the FWA applied only to sports wagering and the RICO claims were dismissed.

The *In re Mastercard* opinion was not cited for its FWA interpretation by another court in a reported opinion until 2007, when it was cited in an opinion from the Federal District Court in Utah, *US v. Lombardo*.[3] The matter in Utah involved a financial service provider that was maintaining accounts and transferring funds for off-shore casino and poker sites. Those involved with the financial service provider were charged with a series of crimes, including FWA violations. As one would expect, one of the defendants challenged the indictment under the FWA by citing that they never provided services to off-shore sports books.

The Federal District Court in Utah analyzed the defendants' motion to dismiss the FWA charges in light of the *In re Mastercard* opinion. In its analysis, the court assumed that the Fifth Circuit was correct that the phrase "sporting" modifies both "event" and "contest", thus limiting the first prohibition of the FWA to sports wagering. However, the court noted that there were two other prohibitions in the FWA: a prohibition on the transmission of a *"communication entitling the recipient to money or credit based on a bet or wager"* and a second prohibition on the transmission of *"information assisting in the placement of a bet or wager"* without any references to sporting event or contest. The court continued to opine that because every word of a statute must be given meaning, that the second prohibition on the transmission of "information assisting" without reference to sporting events or contest can only be given meaning if it applies to wagering information not already captured by the first prohibition against the transmission of "information assisting" with reference to sporting events or contest. Under this interpretation, only the first prohibition clause is limited to sports betting while the other two prohibition clauses apply to all forms of wagering.

The next significant point of evolution in interpreting the FWA was triggered in 2009, when the states of Illinois and New York sought to obtain guidance from the DOJ regarding the issue of whether the online sale of lottery subscriptions to in-state residents while using an out-of-state payment processor would violate the FWA. In the absence of a timely response, Illinois and New York went forward with selling lottery subscriptions online using out-of-state payment processors. Meanwhile, in the summer of 2011, Senators Kyl of Arizona and Reid of Nevada petitioned the DOJ to reassert its prior interpretations that the FWA applies to all forms of wagering and prohibits activities such as the online sale of lottery subscriptions even to in-state

residents. For months, there appeared to be no response to the competing petitions sent to the DOJ.

On December 23, 2011, the DOJ issued an opinion in response to Illinois and New York. In sum, the DOJ opined that the FWA applied only to sports wagering and that the use of the term "bet or wager" throughout the statute was a reference to sports wagering.[4] It also opined that transactions in which the sender and receiver are in the same state do not satisfy the interstate and foreign commerce requirement to implicate the FWA. The opinion was nothing short of a revelation. In effect, the DOJ would now enforce the FWA only against bookmakers and do so only when the bookmaking activity involved bettors and service providers in different states.

The Specter Rises: Opposition to the 2011 DOJ Interpretation

There were many stakeholders who welcomed the opinion, including the State of Nevada, which had recently passed legislation requiring the Nevada Gaming Control Board to draft, and the Nevada Gaming Commission to adopt, regulations for licensing online poker before the end of January 2012. As one might expect, there were also those who were appalled by the opinion.

Those opposed to the opinion began to work on a federal legislative "fix" that became known as the Restoration of America's Wire Act ("RAWA"). RAWA is more than just a restoration of the FWA; it is a significant expansion of the FWA. RAWA seeks to apply the prohibitions to all forms of wagering, not just sports wagering, while simultaneously keeping the limited exemptions for the transmission of sports betting information between jurisdictions where sports wagering is legal. It also seeks to deem all use of the internet to be communications in interstate or foreign commerce, even if all of the parties to the communication are in the same state.

Proponents of RAWA point to prior interpretations of the DOJ and a court opinion from West Virginia to support the notion that the FWA applies to all forms of wagering and that all communications that do or could cross state lines are communications in interstate commerce.[5] Despite a slick advertising campaign and strong support from some members of Congress, RAWA never made it past the hearing stages in Congress. Today RAWA appears to be dead or dormant legislation. However, if past history associated with the Unlawful Internet Gambling Enforcement Act ("UIGEA") taught us anything, it taught us that dormant or dead legislation may be resurrected and attached at the last minute to a must-pass bill without anyone noticing until the bill is passed.

Likewise, the current administration has significant philosophical objections to many of the acts of the prior administration. With regard to the potential for repealing the 2011, Obama-era DOJ opinion, the following exchange occurred during the confirmation hearing of Attorney General Sessions:

January 10, 2017

SENATOR L. GRAHAM:

That's right. That's the point we're trying to make here. About the Wire Act, what's your view of the -- Obama's administration's interpretation of the Wire Act to law, to allow online video poker or poker gambling.

SENATOR J. SESSIONS:

Senator Graham, I was shocked at the memorandum, I guess the enforcement memorandum, that the Department of Justice issued with regard to the Wire Act and criticized it. Apparently there is some justification or argument that can be made to support the Department of Justice's position, but I did oppose it when it happened and it seemed to me to be an unusual...

SENATOR L. GRAHAM:

Would you revisit it?

SENATOR J. SESSIONS:

I -- I would revisit it and I would make a decision about it based on careful study rather than -- and I haven't reached -- gone that far to give you an opinion today.

Given the current Attorney General's views, there is some reasonable likelihood that the Obama-era opinion from the DOJ that limits the

application of the FWA prohibitions to interstate sports wagering may be subject to repeal or re-interpretation.

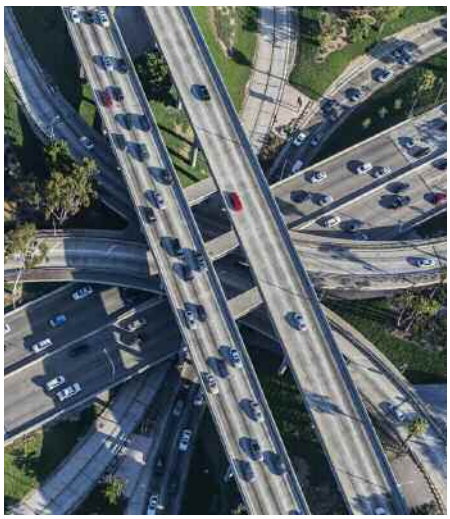
The Potential Impact of a RAWA-Style Re-Interpretation of the FWA on the Gaming Industry

If RAWA passes in some unusual way, or if the Sessions-led DOJ reinterprets the FWA to incorporate the concepts of RAWA, this could have a significant negative impact on the gaming industry in Nevada and elsewhere.

First, an interpretation that interstate commerce includes communications that may cross state lines while in transmission between two points within one state would make nearly all electronic communications subject to FWA prohibitions. This is because the communications systems in the U.S. have changed dramatically since 1961 when the FWA was enacted.

In 1961, the physical communications layer of the phone system dedicated circuits for communications connections. You may recall the old movies where a telephone user talks to an operator, then the operator plugs wires into a switchboard to connect the caller to the recipient. By 1961, many of these manual service exchange switches were still in use, and automated switches were simply an automated version of manual exchanges. Digital and touchtone service was not available anywhere yet. In 1961, the phone system was the electromechanical version of two tin cans on a string because only one conversation per circuit was generally accommodated. Until the use of packet switching network technology, the only way to increase network capacity was to lay new communications lines. If you analogize the old phone system to a road, it would be a road between origin and destination where only two cars can travel at any given time and the only destinations are the sending location and receiving location.

In the late 1990s and early 2000s, the network began to change to use internet technologies. Internet technologies break communications down into packets with a "to" and "from" address. It allows multiple discrete connections over a common physical layer (wire). The road analogy for the new system is like our current road system, where many cars may travel on the same system of roads, and many destinations may be reached over common roadways. Just like a real road system, congestion may occur when too many users try to use the same road to get to a destination. However, unlike the road system, the packet switched network monitors congestion and sends each data and voice packet from origin to destination via the least congested and efficient route possible based on the priority of the packet, without regard to geographic distance. This means communications over a packet switched network can, and often do, cross state lines and even international boundaries.



The problem with reinterpreting the FWA to apply to all communications that do or could cross state lines is that all modern communications equipment - including land phones, cell phones, office phones, computers and tablets - ultimately use packet-switched networks that can, and often do, cross jurisdictional boundaries, even if the users are not aware of the fact.

This becomes more significant if RAWA passes or the DOJ adopts an interpretation that is consistent with the Lombardo court opinion, namely that the phrase "sporting event or contest" in the FWA means the provisions modified by the phrase are limited to sports wagering and those that are not modified by the phrase are not limited to sports wagering. The net result would be that two of the three prohibition clauses are not limited to sports wagering, while the exemption in 1084(b), below is limited to sports wagering.

18 USC 1084(b) - Nothing in this section 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.

If either RAWA is enacted or the DOJ takes a more expansive view of the application of the FWA, it brings risk of federal law violations to activities previously thought to be compliant with federal and state law.

For example, remote-account sports wagering could be found to violate the FWA. This is because there is a transmission of a bet over the internet (which would be deemed to be interstate commerce even if the sender and receiver are in the same state), and there is no exemption for the transmission of bets under 1084(b).

Likewise, even the practice of enticing slot players to move play from one casino to another could present a risk. For example, if Casino X contacts Player A and offers incentives to move his slot play from Casino Z to Casino X, under RAWA or such a new interpretation, there is a risk of violating the FWA because (1) the transmission is with someone in the business of betting or wagering; (2) the information is information assisting in the placement of a bet or wager; (3) a call over the modern phone system uses the internet, and is thus a transmission deemed to be in interstate commerce; and (4) there is no exemption for the transmission of information assisting in the placement of wagers other than sports wagers under 1084(b). Thus, there is a risk this common and seemingly innocuous activity could violate the FWA under RAWA or a RAWA-like re-interpretation of the FWA.

The number of examples of common casino gaming activities that could violate RAWA or a RAWA-like interpretation of the FWA would take more space than can be allotted for this article. Gaming companies, therefore, should take great care in supporting any changes to the interpretation of the FWA, because such changes could thrust many activities that are normal in the course of operating a modern gaming establishment into new, risky territory. Now that PASPA is dead, the FWA is the law to watch.

Kate C. Lowenhar-Fisher is the chair of Dickinson Wright's international gaming law practice. Kate counsels gaming companies on regulatory issues in connection with mergers and acquisitions, corporate restructuring, reorganizations and financings. She has extensive experience advising clients on issues related to Internet gaming, social gaming, fantasy sports, liquor licensing, nightclubs, restaurants, sweepstakes, contests, and promotions.

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[1] *See* John G. Malcolm, Deputy Assistant Att'y Gen., U.S. Dep't of Justice: Criminal Div., *Statement at the World Online Gambling Law Report's Special Briefing on Money Laundering and Payment Systems in Online Gambling* (Nov. 20, 2002), available at http://www.leg.state.nv.us/Session/76th2011/Exhibits/Assembly/JUD/AJUD534I.pdf.

[2] *In re Mastercard Int'l Inc.*, 132 F. Supp. 2d 468 (E.D. La. 2001), *aff'd*, 313 F.3d 257 (5th Cir. 2002).

[3] *United States v. Lombardo*, 639 F. Supp. 2d 1271, 1282 (D. Utah 2007).

[4] *Whether Proposals by Ill. & N.Y. to Use the Internet & Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act*, 35 Op. O.L.C. 1 (2011), *available at http://www.justice.gov/sites/default/files/olc/opinions/2011/09/31/state-lotteries-opinion_0.pdf.*

[5] *See generally United States v. Yaquinta*, 204 F. Supp. 276 (N.D.W. Va. 1962). (Defendants all located in West Virginia were convicted under the FWA based on communications over a long distance telephone line that started in West Virginia, crossed into Ohio, then crossed back into West Virginia. The court opined that the defendants didn't need to know the communication crossed state lines to be deemed interstate communications.)

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