The Wire Act Revisited:

How the DOJ's Recent Reinterpretation May Affect Gaming in Nevada

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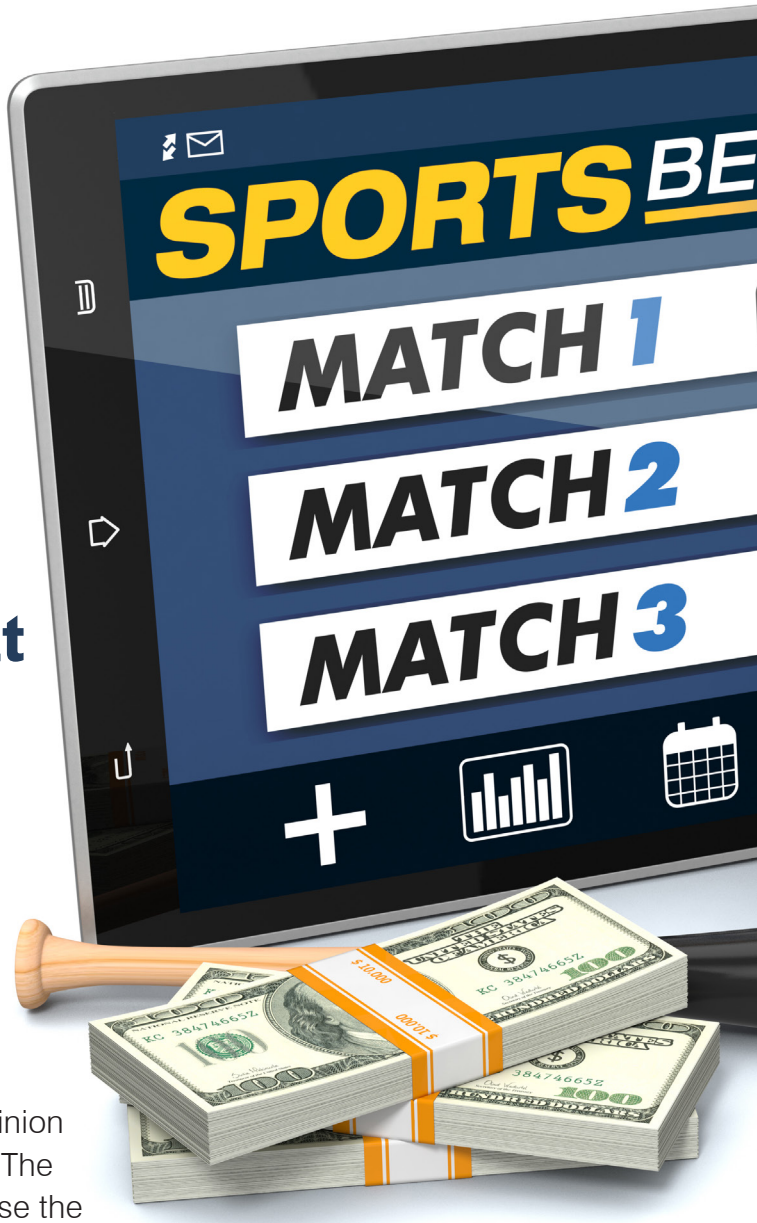

On January 14, 2019, amid the longest-running government shutdown in U.S. history, the U.S. Department of Justice (DOJ) quietly released an opinion that sent shockwaves through the gaming industry. The opinion, dated November 2, 2018, purports to reverse the DOJ's longstanding interpretation, articulated in its 2011 opinion, that the Wire Act's prohibitions exclusively apply to interstate gambling activities associated with "sporting events or contests" or, in other words, sports wagering. In stark contrast to the 2011 opinion, the 2018 opinion states that the Wire Act applies to all forms of wagering activity—gambling—that cross state lines. Following the 2011 opinion, numerous states, including Nevada, authorized online gambling in one form or another—online lotteries, online poker and online casino games are now fixtures in multiple jurisdictions across the country. In light of the 2018 opinion, states and industry participants are left to question what the future holds.

A Brief History of the Wire Act

Congress enacted the Wire Act in 1961 as part of a package of bills—championed by then-U.S. Attorney General Robert F. Kennedy—aimed at combatting organized crime. These bills, which included among others, the Wire Act, the Travel Act and the Wagering Paraphernalia Act, sought to curtail organized crime by cutting off organized crime's primary source of income: illegal gambling.[1] Thus, when assessing whether the Wire Act's drafters intended the law to apply to non-sports-related gaming, it is critical to go back to 1961—not just before online gambling, but before the internet.

As enacted, 18 U.S.C. § 1084(a) states:

> 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.

At the time of drafting, Congress could not have foreseen the advent of the internet—and, by extension, the Wire Act's application to the internet. However, the modern internet fits squarely within 18 U.S.C. § 1081's definition of "wire communication facility."[2]

Between 1961 and 2011, the federal government repeatedly employed the Wire Act as a tool to prosecute individuals engaged in unlawful interstate gambling, including sports wagering and non-sports wagering. But, over time, as the internet evolved and online gaming entered the homes of Americans, the online gambling industry became ever-more prevalent, and prosecutions of this activity grew ever-more complex. As a result, both the federal government and gaming operators turned to the judiciary for clarification. In 2002, the Fifth Circuit Court of Appeals provided some clarity with its decision in *In re Mastercard*.[3] In *Mastercard*, the court held that, based on statutory interpretation, the Wire Act *did not* prohibit non-sports wagering. While not removing all doubt, the *Mastercard* opinion created a sense of comfort and, as a result, the online poker industry dramatically expanded throughout the 2000s. Then, in 2011, the DOJ weighed in with an opinion that provided the online gaming industry with some of the reassurance it needed.

The 2011 OLC Opinion

The DOJ's Office of Legal Counsel (OLC) interpreted the Wire Act and subsequently issued its 2011 opinion after receiving inquiries from the Illinois and New York lotteries regarding the legality of online ticket sales.[4] With the 2011 opinion, the OLC clarified that the Wire Act's prohibitions were specifically limited to sports wagering: "the Wire Act does not reach interstate transmission of wire communications that do not relate to a 'sporting event or contest.'"[5]

With this opinion in hand, state lotteries began offering online ticket sales and drawings. Additionally, in reliance on the 2011 opinion, several states—including Nevada, Delaware, New Jersey and, most recently, Pennsylvania—authorized, licensed and regulated internet gambling. Three states—Nevada, Delaware and New Jersey—compacted to authorize online poker across state lines in an effort to increase market liquidity. Notably, this expansion of legal, regulated online gambling activity was not accompanied by any demonstrable uptick in criminal activity, fraud or other negative consequence.

The 2018 OLC Opinion

After nearly 10 years of growth in the internet gambling space, due in large part to the relative clarity provided by the 2011 opinion, the DOJ surprised the industry by revisiting the issue with the 2018 opinion.[6] The 2018 opinion revises the 2011 opinion by declaring that all but one of the Wire Act's four prohibitions go beyond sports wagering and extend to all internet gambling, including online casino games, poker and lotteries. OLC explained its reversal on this issue as follows:

> Our 2011 Opinion concluded that this clause was ambiguous on whether the sports gambling modifier applies to both prohibitions in the first clause. We reasoned that the text itself can be read either way because section 1984(a) lacks a comma after the first reference to 'bets or wagers'; we thought that such a comma would have made it plausible that the first prohibition in the first clause was not limited to sports-based gambling.

This new interpretation seems to ignore not only the legislative intent clearly expressed on the record at the time

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of the Wire Act's initial passage, but it also appears to disregard the complete absence of any compelling reason to disturb the 2011 opinion. Moreover, the OLC's lengthy statutory analysis fails to provide a cogent explanation for its change in position and, as a result, creates far more questions than it answers. The OLC overtly acknowledges that Congress drafted the Wire Act to specifically target illegal sports wagering, yet it goes on to explain that a statute's language, rather than legislative intent, controls. Ultimately, the OLC rests its analysis on the "last antecedent rule" when declaring that "the Wire Act's reference to gambling 'on any sporting event or contest' modified only the phrase it immediately follows."

The 2018 opinion also includes a discussion and subsequent dismissal of the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA). With UIGEA, Congress made it a federal offense for payment processors to facilitate online gambling transactions where the underlying gambling violates state law. In doing so, Congress also created a carve-out that paved the way for fantasy sports. While the 2011 opinion did not address UIEGA, the OLC took the opportunity in its 2018 opinion to address UIEGA's impact on the Wire Act. In short, the 2018 opinion makes it clear that, even though UIGEA presents a more flexible and realistic approach to gambling, it in "no way" limits the Wire Act's prohibitions.

Implications of the 2018 Opinion in Nevada and Beyond

One can hope that the uncertainty created by the 2018 opinion is its most drastic effect. The day after releasing the 2018 opinion to the public, Deputy Attorney General Rod Rosenstein issued a memorandum instructing prosecutors to refrain from applying the new Wire Act interpretation in criminal and civil actions for a period of 90 days.[7] However, just how the DOJ will enforce its new interpretation after April 15, 2019, remains unclear. Clearer is the potential for the 2018 opinion to have a chilling effect on the internet gambling industry in the near-term. While an OLC opinion is not binding precedent and, as such, it does not carry the force of law outside of the federal executive branch, states, along with gaming operators, will likely approach internet gaming expansion with caution until they see how the DOJ's Criminal Division intends to apply the OLC's most recent interpretation of the law. In the end, the courts will have the final say on the correct interpretation of the Wire Act. Once the DOJ initiates an enforcement action—and quite possibly before it ever gets the chance to do so—the 2018 opinion could be met with legal challenges by states, operators and industry participants seeking judicial clarification. Until such time as the courts can weigh in, internet gaming operators, service providers and other industry participants would be well advised to review their business models in light of the 2018 opinion. NL

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1. 18 USC § 1084; 18 U.S.C. § 1952; 18 U.S.C. 1953; *see also The Attorney General's Program to Curb Organized Crime and Racketeering: Hearings Before the S. Comm. of the Judiciary,* 87th Cong. 6 (1961).
2. 18 U.S.C. § 1081 ("The term 'wire communication facility' means any and all instrumentalities, personnel, and services (among other things, the receipt, forwarding, or delivery of communications) used or useful in the transmission of writings, signs, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission.").
3. *In re Mastercard Intern, Inc.,* 313 F.3d 257, 262-63 (5th Cir. 2002).
4. *See* Whether Proposals by Illinois and New York to Use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act, 35 Op. O.L.C. __ (2011).
5. *Id.*
6. Reconsidering Whether the Wire Act Applies to Non-Sports Gambling, 42 Op. O.L.C __ (2018).
7. Memorandum from Rod Rosenstein, Deputy Att'y Gen., to U.S. Att'ys, Assistant Att'ys Gen., and Dir., Fed. Bureau of Investigation (Jan 15, 2019).