

Litigator of the Week: Gibson Dunn's McGill Hits the Jackpot in Online Gambling Challenge

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By Jenna Greene
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The Litigator of the Week award goes to Gibson, Dunn & Crutcher's Matthew McGill. The Washington, D.C.-based partner led a team to victory in a case where the entire online gambling industry as well as multi-state lotteries like Powerball were at risk after an abrupt new Justice Department position.

Representing online lottery system technology provider NeoPollard Interactive and Pollard Banknote, McGill persuaded Judge Paul Barbadoro of the U.S. District Court for the District of New Hampshire on June 3 to strike down the new DOJ policy.

McGill discussed the case with Lit Daily.

Lit Daily: What happened in 2019, when the Justice Department's Office of Legal Counsel reversed its prior position and came out with a new interpretation of the Wire Act? What was the government's new position?

Matthew McGill: In 2011, several state lotteries asked DOJ whether the sale of lottery tickets over the Internet would violate the Wire Act, which is a federal criminal statute that prohibits interstate transmissions of "bets or wagers or information assisting in the placing of bets or wagers on any sporting event."

DOJ responded by issuing an opinion that the Wire Act applies only to transmissions involving betting on sports, and therefore would not apply to the Internet sales contemplated by state lotteries. This cleared the path for state lotteries to set up online platforms and also allowed gaming companies to offer poker and casino games online in states that permit online



Matthew D. McGill, partner with Gibson, Dunn & Crutcher

gaming, as New Jersey and a growing number of other states now do.

With no notice or transparent process, the 2019 Opinion abruptly declared that the 2011 Opinion was wrong and that the Wire Act applied to all forms of betting over the Internet—not just sports wagering. What, on the morning January 14, 2019, were thriving businesses licensed or operated by states, suddenly had been declared to be criminal enterprises. It was, to say the least, a startling exercise of governmental power.

What do you think was behind DOJ's change of heart?

Respected journalists have **documented** that DOJ's reversal of position followed an extended lobbying campaign by an entity called the **Coalition to Stop**

Internet Gambling and its attorneys. DOJ has not yet responded to pending Freedom of Information Act requests about those lobbying efforts, so future historians will have to determine whether there was a cause-and-effect relationship there.

Who are your clients and what was at stake?

Our clients are NeoPollard Interactive and Pollard Banknote. Pollard Banknote is a leading provider of lottery products and is a joint venture partner of NeoPollard Interactive, which is the technology provider for the online lottery platforms in New Hampshire, Michigan, and Virginia.

DOJ's new opinion essentially declared NeoPollard's entire business to be a felony-in-progress. So, for NeoPollard, this case very much is about whether it can continue to operate as it does today.

But the implications of DOJ's new Wire Act opinion reach far beyond NeoPollard, and even beyond gaming on Internet platforms. Because even traditional lottery sales in brick-and-mortar stores typically involve interstate transmissions of data to and from lottery servers, DOJ's re-interpretation of the Wire Act also imperils multi-state lotteries like Powerball and Mega Millions and the billions of dollars of state education funding they generate each year. OLC's opinion was set to blow gaping holes in state budgets across the country.

How did you get involved in the case?

As soon as the new opinion was released, our phones started ringing as our gaming clients sought advice about the opinion's implications for their businesses. But the implications for state lotteries were just as obvious and just as stark.

We got in touch with Charlie McIntyre, the Executive Director of the New Hampshire Lottery Commission, and he then connected us with NeoPollard. From that point on, we worked closely with the office of New Hampshire Attorney General Gordon MacDonald, who represents the Lottery Commission, to develop our challenge to DOJ's new Wire Act opinion.

What was your strategy? How did you attack the case?

Contemporaneously with DOJ's new opinion, the deputy attorney general issued a memo to federal prosecutors directing they should not initiate any prosecutions based on the new opinion for 90 days. That memo put us on a very short fuse.

So, immediately after filing our complaint, we sought summary judgment on our claim for a declaratory judgment that the Wire Act is limited to sports betting. And to emphasize the urgency of the matter, we filed a motion for a "speedy hearing" under Rule 57, which was a first for me.

On the merits, we showed the district court that the text, structure, and history of the Wire Act, the context in which it was enacted, and ample judicial precedent, including the only two courts of appeals to have addressed the issue, all strongly confirmed that DOJ's 2011 Opinion was correct in concluding that the Wire Act is limited to sports betting.

DOJ's new interpretation, on the other hand, placed enormous weight on the disappearance of two commas from the final version of the bill, which supposedly transformed its meaning. We responded by invoking Justice Scalia's pithy maxim that "Congress does not hide elephants in mouseholes," and added to it, "or with misplaced commas."

Recognizing the urgency of the situation, Judge Barbadoro set an expedited schedule. What did that entail and how did you and your team manage the crunch?

From our very first telephonic conference, Judge Barbadoro made clear that he would resolve the litigation before any party was exposed to the threat of prosecution under DOJ's new interpretation of the Wire Act. Even after DOJ extended its forbearance from prosecution by an additional 60 days, we still were litigating at a very fast clip. Judge Barbadoro scheduled oral argument on the parties' dispositive motion less than two months after we filed our complaint. That's fast!

As for how we managed the time crunch, we had frontloaded the lion's share of our work by filing our motion for summary judgment contemporaneously with our complaint. But when we later had quick turnarounds, we just put our heads down and powered through the work that needed to be done in the time we had.

Having requested the "speedy hearing," we were grateful for the court's willingness to treat our case with urgency, and were going to work at least as hard as the court to meet the deadline arbitrarily imposed by DOJ.

Tell us a bit about prior work you and the firm have done in this area. To what extent was that

experience relevant or helpful in litigating this case?

Gibson Dunn and its betting and gaming practice group have deep expertise in the gaming space and we drew on nearly all of it here in crafting our arguments.

For nearly six years, Ted Olson and I had handled the case that went into the books as **Murphy v. NCAA**, New Jersey's successful challenge to the federal ban on state legalization of sports betting. That litigation gave us a great deal of insight into just how carefully states regulate gaming activities, particularly online.

Debra Wong Yang, who has served both as an appellate judge and as U.S. Attorney for the Central District of California, is the preeminent counselor to the gaming industry on compliance matters, and she brought to our team both insight into DOJ's prosecutorial practices and also a nuanced understanding of the gaming industry and how it operates.

And on top of all that, Ted Olson had served as the head of the Office of Legal Counsel during the Reagan Administration, so he was able to contribute invaluable insights into the internal processes at DOJ.

Who were the others members of your team and how did you work together? Did you also work with co-counsel?

In addition to my partners Ted Olson and Deb Yang, we have a team of absolutely superb associates working on this matter: John Ehrett, Jason Kleinwaks, Lochlan Shelfer, and Joshua Wesneski. They have responded to every twist and turn in the litigation with creativity and focused effort.

We are fortunate also to have Mike Delaney of McLane Middleton as our co-counsel in New Hampshire. Mike served as Attorney General of New Hampshire and has encyclopedic knowledge of the judges on the bench there and, of course, also was most helpful in facilitating our work alongside the New Hampshire AG's office.

Anthony Galdieri of that office argued for the New Hampshire Lottery Commission, and his presence was crucial to conveying the enormous stakes of this matter not only to the state of New Hampshire but to states all around the country.

Tell us about the marathon, five-hour hearing in April. What stands out in your memory? And high (or low) points? Unconventional strategic choices?

Mike Delaney had told us that Judge Barbadoro is always very well prepared and on top of the key cases. So my expectations were high headed into the hearing, but Judge Barbadoro really blew me away.

I don't know that I've ever appeared before a judge who had engaged more deeply with the parties' arguments. And Judge Barbadoro managed to achieve this level of preparation even though the parties had finished briefing the dispositive motions less than a week before argument. We all should be grateful that there still are judges in our federal judiciary as conscientious and dedicated as Judge Barbadoro.

Another moment I'll never forget: As our morning hearing continued into the afternoon, during one of our brief recesses, I turned back toward the gallery and found Deb Yang with a purse full of turkey sandwiches and bottled water. "I couldn't just let you starve up there," she exclaimed.

What strikes you as the most significant aspects of Judge Barbadoro's June 3 decision?

We had argued—and still believe—that the scope of the Wire Act had already been resolved by First Circuit precedent. Judge Barbadoro could have rested on that case and gone no further.

But the fact that he chose to grapple with the textual, contextual, structural, and historical arguments about the Wire Act means that the resulting opinion is the most comprehensive, thorough, and persuasive interpretation of the Wire Act that any court has issued. I expect Judge Barbadoro's opinion will stand as the definitive interpretation of the Wire Act for many years to come.

What made this case unique? What do you hope will be its legacy?

This case was shaped by the abrupt and entirely arbitrary manner in which the federal government here declared an entire industry to be criminal: DOJ simply announced one day that it was adopting a much broader interpretation of a very old criminal statute.

The notion that people so suddenly could be subjected to imprisonment based on nothing more than DOJ's shifting interpretations of federal criminal law is jarring and at war with basic notions of due process. I hope that this case's enduring legacy is to confirm the judiciary's role as a bulwark against such arbitrary manipulation of criminal laws.