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FIRST CIRCUIT NARROWS SCOPE OF THE WIRE ACT, REVERSING OFFICE OF LEGAL COUNSEL OPINION

To Our Clients and Friends:

In a decision with far-reaching implications for the online gaming industry, on January 20, 2021, the U.S. Court of Appeals for the First Circuit held that the prohibition on the transmission of interstate wagers under the Wire Act, 28 U.S.C. § 1084, applies *only* to bets and wagers placed on sporting events, and not, as the Office of Legal Counsel within the United States Department of Justice had opined, to all types of bets and wagers. *New Hampshire Lottery Comm'n v. Rosen*, No. 19-1835 (1st Cir. Jan. 20, 2021). In this alert, we summarize (1) the background of the Wire Act, (2) the First Circuit's decision, and (3) the potential impact of the ruling.

I. Overview of the Wire Act

The Wire Act, enacted in 1961 as part of Attorney General Robert F. Kennedy's effort to crackdown on organized crime, provides, in relevant part:

> 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.

18 U.S.C. § 1084(a). The legislative history surrounding the enactment of the statute makes clear that the intent was to target sports bookmakers who supplied an important stream of revenue for organized crime. For many years after its enactment, the Department of Justice took the view that the statute's express reference to "bets or wagers on any sporting event or contest" meant that the statute prohibited only interstate bets or wagers on sporting events, and not other types of interstate gambling. Representatives of the Department expressly testified as much in hearings before Congress in the 1990s.

In the early 2000s, however, the Department began to take the position, in various informal letters to gaming commissions and state lottery operators, that interstate transmissions of *non*-sports wagers would also violate the Wire Act. That change in position prompted New York and Illinois—both of whom operated lotteries that relied in some part on interstate wire facilities—to seek clarification in 2009 from the Department as to the scope of the Wire Act.

In 2011, the Office of Legal Counsel ("OLC") within the Department issued an opinion concluding that the Wire Act's prohibitions with respect to the interstate transmission of bets and wagers apply only to

those bets or wagers involving sporting events—meaning that sales of lottery tickets online were not covered by the statute. The OLC concluded as much by examining the text of the statute, and also by considering the absurd consequences that would follow if the statute were read to cover certain types of non-sports betting activities, but not others. In reliance on that opinion, States began moving their lottery systems online, taking full advantage of the freedom and certainty afforded by the OLC opinion.

In late 2018, however, the Trump Administration's OLC issued a new opinion, reversing the interpretation adopted in the 2011 OLC opinion, and arguing that the Wire Act *does* extend beyond sports betting. The 2018 opinion concluded that the statute's limiting language—"on any sporting event or contest"—applied only to the transmission of "information assisting in the placing of bets or wagers," and not to the transmission of bets or wagers themselves, or to the transmission of information regarding payment on a bet or wager. As a result, the 2018 opinion called into question the legality of state lotteries that sold tickets online, or even those that simply used the Internet to facilitate their operations. The 2018 opinion expressly acknowledged that "some may have relied on the" 2011 opinion, including States that "began selling lottery tickets via the Internet after [its] issuance."

Gibson Dunn filed suit in the U.S. District Court for the District of New Hampshire on behalf of NeoPollard Interactive LLC and Pollard Banknote Limited—a parent and subsidiary that provides lottery infrastructure for the New Hampshire Lottery Commission—arguing that the 2011 opinion was contrary to law and seeking declaratory relief. NeoPollard and Pollard joined their lawsuit with one filed the same day by the New Hampshire Lottery Commission, seeking the same relief. The Department opposed the lawsuit on the ground that in the absence of a pending or threatened prosecution, the dispute was not ripe for review, and that the 2018 interpretation was legally correct.

Judge Paul J. Barbadoro expedited the proceedings, and held in June 2019 that the 2011 OLC opinion was correct in holding that the Wire Act is limited in all respects to bets and wagers placed on sporting events, declaring the 2018 OLC opinion wrong as a matter of law and vacating the decision as contrary to law under the Administrative Procedure Act, 5 U.S.C. § 706. The Department appealed to the First Circuit.

II. The First Circuit's Decision

On January 20, 2021, the First Circuit affirmed the district court's decision in all relevant aspects. It agreed with the district court's decision that the dispute was ripe for review and that the Wire Act is limited to sports betting. The Court departed from the district court only in that it did not believe vacatur under the Administrative Procedure Act was a necessary form of relief.

With respect to standing and ripeness, the Court explained that in the pre-enforcement context, it is not necessary that there be an actual threatened prosecution against the specific plaintiff. Rather, it was sufficient that the government had declared that the conduct plaintiffs were engaged in was criminal. The Court pointed out that the Department had expressly warned at least one state lottery (Illinois) that its operations were in violation of the Wire Act as construed prior to 2011, and also that the Department had prosecuted non-sports-betting operations in the past.

The First Circuit rejected the Department's argument that a memorandum released during the pendency of the proceedings—which purported to reserve decision on whether state lotteries, specifically, were subject to the prohibitions of the Wire Act—rendered the case moot or unripe. The new memorandum, the Court observed, did not disclaim that the Wire Act covered state lotteries, but rather offered only a temporary forbearance from prosecution.

On the merits, the First Circuit agreed with the district court that the plain text of the statute is not clear as to the scope of the prohibition. The Court thus focused instead principally on the structure and context of the statute, concluding that the Department's proffered reading made no sense. The First Circuit observed, in particular, that reading the sports limitation to apply to only *some* of the prohibitions in the statute would be incongruent, as it would criminalize the transmission of any type of bet or wager, but would not reach the transmission of *information* with respect to bets or wagers other than those on sporting events. The Court also examined the history of the statute, agreeing with the district court that the history confirmed that the statute was directed at sports betting.

The Court thus affirmed the district court's grant of declaratory relief, although it vacated the relief awarded under the Administrative Procedure Act on the ground that such relief was not necessary.

III. Implications of the Decision

The First Circuit's decision gives some comfort and certainty to those state lotteries and other industry participants who relied on the 2011 opinion in taking their operations online. The decision restores the 2011 interpretation of the Wire Act, which was itself sought by state lotteries seeking to operate online facilities. It also has similar implications for gaming platforms other than state lotteries, who similarly faced a threat of prosecution as a result of the 2018 opinion if they used the Internet to process bets or wagers.

It is important to note, however, that as a formal matter, the First Circuit directly binds the Department only with respect to the named parties in the lawsuit. It also precludes, as a matter of binding precedent, any attempted prosecutions within the First Circuit that are based on the interpretation advanced in the 2018 opinion. The Department could, however, adhere to its 2018 interpretation in other federal circuits, and pursue prosecutions of online lotteries and other non-sports gambling operations in defiance of the First Circuit's interpretation.

There is some indication, however, that the Biden Administration is not inclined to take such an aggressive stance. In July 2019, then former-Vice-President Biden stated his position that if elected, he "would reverse the White House opinion [on the Wire Act] that was then reversed and overruled by the [district] court. The court is correct. That should be the prevailing position." Dustin Gouker, *Should You Vote for Biden or Trump if You Want Legal Online Poker and Gambling?*, Online Poker Report (Oct. 23, 2020), https://perma.cc/595G-2EVH. He later stated at an event in December 2019 that he did not "support adding unnecessary restrictions to the gaming industry like the Trump Administration has done." Howard Stutz, *Biden Says DOJ's Wire Act Changes Add "Unnecessary Restrictions" to the Gaming Industry*, CDC Gaming Reports (Dec. 16, 2019), https://perma.cc/R9XU-U6NX. The decision of the First Circuit may push the Biden Administration to make its stance on the statute clear right away,

perhaps through a formal rescission of the 2018 opinion, or through a memo advising U.S. Attorneys to adhere to the First Circuit's decision.

Even if the Biden Administration does not make a formal announcement, given the First Circuit's decision and President Biden's express opposition to the 2018 re-interpretation, it seems unlikely that the Department of Justice is poised to pursue an aggressive campaign to disobey or overturn the First Circuit's decision. Indeed, the Department's principal argument before the First Circuit was that the dispute was not ripe. Although the Department also defended the 2018 opinion on the merits, there may be little appetite for maintaining that position now that there has been a firm decision by a U.S. court of appeals and a change in administration.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. Please feel free to contact the Gibson Dunn lawyer with whom you usually work, or the following authors:

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