High Wire Act: the DOJ creates uncertainty in the budding online gambling industry by reversing course on the applicability of the Wire Act

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Earlier this month, the Department of Justice (DOJ) Office of Legal Counsel released a new opinion concerning the application of the Wire Act, 18 U.S.C. § 1084, to online gambling. The opinion reversed a 2011 DOJ opinion that had concluded that the Wire Act applied only to sports betting (and not online lotteries and online casino games, such as blackjack and roulette). The new opinion also concluded that the Unlawful Internet Gambling Enforcement Act, 31 U.S.C § 5362 (UIGEA), which was passed long after the Wire Act and directly addresses online gambling, should not be used to help interpret the ambiguous language in the antiquated Wire Act.

Following the issuance of this opinion, U.S. Deputy Attorney General Rod Rosenstein issued a memo stating that the opinion would not take effect for 90 days as the DOJ creates prosecutorial guidelines. Since then, gaming and sports betting operators, state gaming commissions, state lotteries, state legislators and other interested parties have poured over the DOJ opinion wondering whether existing and proposed online gambling in the states are in jeopardy. This alert looks at the opinion and what interested parties should expect.

What is the Wire Act?

Congress enacted the Wire Act in 1961—long before the advent of internet communications—to help states combat sophisticated gambling operations controlled and managed by organized crime. Put simply, the Wire Act prohibits the knowing use of a wire (such as a telegraph, telephone, or the internet) across state lines by someone in the business of betting or wagering for the purpose of transmitting: (1) bets or wagers, (2) information assisting in placing certain bets or wagers or (3) communications entitling the recipient to money or credit resulting from bets or wagers.

The Wire Act only prohibits interstate activities. The Wire Act does not prohibit states from legalizing gambling within their borders (or, put another way, intrastate gambling). In fact, in Murphy v. NCAA, 138 S. Ct. 1461, 1483 (2018), which recently paved the way for states to legalize sports betting within their borders, the Supreme Court stated that federal gambling statutes, including the Wire Act, “respect the policy choice of the people of each [s]tate on the controversial issue of gambling.”

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Gaming and sports betting operators, state gaming commissions, state lotteries, state legislators and other interested parties have relied on *Murphy* and other decisions in crafting their gambling laws, regulations, procedures, operations and policies. These decisions, as well as the legislative history of the Wire Act, stress that it is each state's prerogative to legalize gambling within their borders, and that the Wire Act was passed to prosecute those who used illegal gambling—specifically, illegal sports betting—to finance their criminal activities.

Up until this past month, these interested parties also relied on the DOJ’s 2011 opinion on the Wire Act.

**What did the 2011 opinion say?**

The DOJ issued the 2011 opinion in response to questions by the states of New York and Illinois. Each state wanted to sell lottery tickets over the internet. Each state’s online lottery would be entirely intrastate: only those within the borders of each state would be able to buy and receive an online ticket. Even if the purchase and sale of the online ticket occurred within the state, however, it was still possible that there were incidental out-of-state internet transmissions in connection with the purchase. Such intermediate routing of data is generally unavoidable given the nature of internet transmissions.

The states wondered whether this intermediate routing of data was enough to invoke the “interstate commerce” requirement of the Wire Act—thereby making the state-sponsored online lotteries illegal under federal law. If so, this would conflict with UIGEA—a law that Congress passed long after the Wire Act and contemplated the use of the internet for placing bets and wagers. UIGEA, like the Wire Act, does not prohibit legal intrastate gambling. UIGEA goes one step further, however, and provides that the incidental out-of-state routing of internet data does not destroy the intrastate character of an otherwise legal intrastate wager (one that is placed and accepted within a state's borders). The Wire Act does not address this issue.

The states pointed out that this issue could be avoided by finding that the Wire Act only applied to sports betting activities (and not other online gaming activities, such as a state’s lottery). There was support for this conclusion in the Wire Act’s legislative history. If the Wire Act did not apply to the states’ online lotteries, there was no need for the DOJ to analyze whether incidental interstate communications of internet data were enough to transform an otherwise intrastate bet into an interstate bet, thereby satisfying the Wire Act’s “interstate commerce” requirement.

The DOJ did just that. It concluded that, because the states’ proposals did not involve wagering on sporting events or contests, the Wire Act did not apply. This allowed the DOJ to side-step the complicated question concerning the impact of UIGEA on the Wire Act—specifically, whether UIGEA’s allowance of intermediate routing of internet data outside of the state should be read into the Wire Act.

From the time of the DOJ’s 2011 opinion until its most recent opinion, many states have either passed or explored legislation that regulates online gaming within their states. These laws go beyond state-run online lotteries, and include privately run online casino games, such as blackjack and roulette. Additionally, as a result of the Supreme Court’s decision in *Murphy*, states have passed (and many are evaluating) legislation that would permit and regulate sports betting within their borders. Many states and operators, relying on these authorities, have already established the regulatory framework and technological infrastructure for these online gaming activities.
What does the new opinion say (and not say)?

The new opinion ignores the Wire Act’s legislative history and reverses course, concluding that the Wire Act is applicable to any form of online gambling that crosses state lines—whether that be online sports betting, a state-sponsored lottery or casino games. This means that any state that has already legalized online gaming—including Delaware, Pennsylvania, New Jersey and Nevada—must now comply with the other requirements of the Wire Act (at least according to the DOJ), even outside of the sports wagering context. In other words, these states (and gaming operators in these states) must ensure that any such online gambling occurs entirely intrastate within the meaning of the Wire Act.

The issue is that the Wire Act is not as clear as UIGEA regarding what constitutes “intrastate gaming.” The UIGEA expressly states that the intermediate routing of internet data out-of-state for bets placed and received in a state does not destroy the intrastate nature of that bet. The Wire Act does not (and, indeed, could not) anticipate this issue.

The new opinion states that UIGEA should not be used to interpret the reach of the Wire Act. The DOJ does not expressly adopt an interpretation of the Wire Act that conflicts with the UIGEA. The DOJ simply states, in effect, that UIGEA should not inform any interpretation of the Wire Act—one way or the other.

Significantly, the DOJ does not expressly state that it is returning to its pre-2011 position on this issue. Prior to its 2011 opinion, the DOJ took the position that, even if the wire communication originates and terminates in the same state, the law’s interstate commerce requirement is nevertheless satisfied if the wire crossed state lines at any point in the process. Historically, the DOJ has taken a broad view that the internet is inherently an interstate communications medium in order to successfully prosecute other federal crimes (outside of the context of the Wire Act) that also have an “interstate commerce” requirement, such as crimes involving child pornography. If the DOJ intends to return to this rigid position for purposes of the Wire Act, it would call into question whether any state could legalize online gambling—a position that is directly at odds with the idea that the federal government should not interfere with a state’s right to permit gambling within its borders. The opinion could even call into question those states that offer multi-state lotteries online, such as Powerball.

What Should We Expect?

The DOJ has given businesses until April 15, 2019, “to bring their operations into compliance with federal law.” The DOJ plans to issue a new review and approval process for prosecutions under the Wire Act. These new enforcement guidelines could provide more clarity.

In the meantime, those businesses operating in states that have already legalized online gaming should be prepared to explain how their gaming operations function (or can be set up to function) entirely within the state’s borders. The Pennsylvania Gaming Control Board, for example, asked operators to provide how they will structure their operations to assure compliance with the new opinion. Other states have continued to push forward with legislation permitting and regulating online gaming and sports betting despite the DOJ’s latest opinion.

At this point, given the lack of guidance in the new memo and until new enforcement guidelines are issued, it is difficult to tell if or how the DOJ will take enforcement action. The fact that the DOJ has gone out of its way to say that UIGEA should not be used to justify a limited reading of the...
Wire Act may signal that the DOJ does not want its prosecutors to forgo Wire Act gambling cases simply because they involve complicated technical questions concerning whether an internet transmission occurs entirely within a state.

That being said, the end result could be similar to the current state of cannabis regulation—states continue to regulate the market despite disapproval at the federal level. Indeed, in a somewhat similar situation, last year the DOJ rescinded a 2013 DOJ opinion that adopted a policy of non-interference with states that regulate the cannabis market. That move, too, created much uncertainty. Nevertheless, states have continued to regulate the cannabis market and the federal government has generally continued a hands-off approach. It remains to be seen whether a state like New Jersey, which has invested heavily in online gaming in the state, will “wait-and-see” or, instead, directly challenge the new opinion by attempting to bring a declaratory judgment action in order to protect its nascent industry.

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