

January 28, 2021

Wire Act Ruling a Win for iGaming and Lotteries, Status Quo for Sports Betting—for Now

William Moschella, Scott Scherer, Mark Starr

Brownstein Hyatt Farber Schreck

+ Follow

Contact

Brownstein

On Jan. 20, 2021, the U.S. Court of Appeals for the First Circuit issued a potentially historic ruling in *New Hampshire Lottery Commission et al. v. Barr et al.*, by rejecting an appeal brought by the U.S. Department of Justice (DOJ). The DOJ's appeal created uncertainty for the future of the online gambling industry. Essentially, the Court reaffirmed a [June 3, 2019](#) decision, issued by a federal district court judge in New Hampshire, finding that the Wire Act applies only to gambling activities on sporting events and does not prohibit other forms of gambling conducted over the internet—including online casino gaming (iGaming) or online lotteries (although iGaming or online lotteries may be prohibited by other laws in various states).

Previously, pundits predicted that the case would ultimately make its way up to, and be decided by, the U.S. Supreme Court. Judge Paul Barbadoro, the judge that presided over the case in New Hampshire, stated on the record that “however I resolve the case, or however the First Circuit resolves the case, it is likely going to be resolved by the U.S. Supreme Court either way.” While the DOJ may still seek an appeal to the Supreme Court, that will be a decision for a new administration, as President Joe Biden was inaugurated mere hours after the ruling was issued. Post-Trump, and with the recent passing of GOP mega-donor and staunch online gambling opponent Sheldon Adelson, a DOJ appeal seems less likely.

The Wire Act

The Wire Act, 18 U.S.C. Section 1084, was enacted in 1961 to assist states in enforcing their gaming laws and to suppress organized gambling activities across state lines. The statute contains two provisions. The first prohibits anyone in the business of betting or wagering from knowingly using interstate communications to transmit “bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest” and the second prohibits “the

Privacy - Terms

transmission of a wire communication entitling 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.” The Wire Act contains limited safe harbors, which exempt transmissions of information for use in news reporting of sporting events or contests, and information assisting in the placing of bets or wagers (but not bets or wagers) from a jurisdiction where such betting is legal to another jurisdiction where such betting is legal.

DOJ Opinions

In 2011, in response to inquiries from New York and Illinois relating to whether the Wire Act prohibited intrastate sales of lottery tickets via the internet, the DOJ’s Office of Legal Counsel (OLC) concluded that the Wire Act only applied to sports gambling (the 2011 Opinion). Per the 2011 Opinion, the OLC reached this conclusion based on an analysis of the Wire Act’s text, legislative history and underlying policy purposes. Relying on the 2011 Opinion, certain states adopted legislation for legal and regulated iGaming, including iLotteries, and gaming companies continued to develop and market iGaming and iLottery products.

In late 2018, after unsuccessful legislative attempts to expand the scope of the Wire Act, the DOJ revisited and reversed its interpretation of the Wire Act in the 2011 Opinion by concluding that the Wire Act was not limited to sports gambling—concluding that the Wire Act made essentially all interstate gambling illegal (the 2018 Opinion). The 2018 Opinion, notably issued just six months after the Supreme Court overturned the Professional and Amateur Sports Protection Act (PASPA), took many in the gaming industry by surprise. Seemingly overnight, the DOJ took the stance that interstate lotteries, interstate gaming compacts and a plethora of other gambling-related products were illegal. Acknowledging that its change in position could disrupt businesses, the DOJ instituted a 90-day grace period, starting Jan. 15, 2019, to allow individuals and entities to bring their business models into compliance (This window was ultimately extended through June 30, 2020, or “60 days after entry of final judgment in the New Hampshire litigation, whichever was later.”).

New Hampshire Lottery Sues & DOJ Appeals

On Feb. 15, 2019, shortly after the 2018 Opinion was released, multiple lawsuits were filed challenging the DOJ’s new opinion. The New Hampshire Lottery led the charge, though other state lotteries, lottery vendors and trade associations joined *amici curiae*. Their suit sought to nullify the 2018 Opinion. The DOJ opposed the lawsuit, arguing not only that the 2018 Opinion should stand on substantive grounds but also seeking dismissal on various procedural grounds. Notably, on the eve of oral argument, the DOJ issued a memorandum where it attempted to disclaim the lottery’s fear of criminal prosecution. In that memorandum, the DOJ stated that the

2018 Opinion “did not address whether the Wire Act applies to State lotteries and their vendors.” However, the DOJ stopped short of excluding such businesses and organizations, stating only that it was “reviewing that question.”

This last-ditch effort did not sit well with the court, and after proceeding to hear oral arguments, the district court set aside the 2018 Opinion and held that the Wire Act applies only to interstate sports gambling. On June 3, 2019, the district court issued a 63-page decision in which it rejected nearly every argument that the DOJ offered in support of its broadened interpretation of the Wire Act. The DOJ appealed the district court’s decision to the First Circuit Court of Appeals on Dec. 20, 2019.

Court of Appeals Rejects DOJ Appeal

On Jan. 20, 2021, the First Circuit issued its ruling that the Wire Act only applies to sports betting. In reaching its conclusion, the appeals court determined that the phrase “on any sporting event or contest” qualifies the term “bets or wagers” throughout the Wire Act. In its 49-page opinion, the appeals court acknowledged that the text of the Wire Act is “not entirely clear on the matter at hand.” Nonetheless, the First Circuit sided with the district court’s ruling, finding that the DOJ’s reading of the statute was not supported by “common sense” or legislative history, and that the DOJ’s reading “would lead to odd and seemingly inexplicable results.” The First Circuit did not, however, invalidate the 2018 Opinion, ruling that the declaratory judgment was sufficient to grant relief to the plaintiffs in the case and declined to address whether the 2018 Opinion was valid under the Administrative Procedure Act.

Appeal Not Likely

While the DOJ could seek an appeal to the Supreme Court, that will be a decision for the Biden administration. Given the current state of affairs with political, social, and economic issues—including the ongoing response to the COVID-19 pandemic—an appeal is likely not high on the list of priorities for President Biden or his administration. And, even if appealed, the chances of the Supreme Court granting *certiorari* are remote, at best. With the First Circuit’s ruling, we now have two federal appeals courts that have determined that the Wire Act applies only to gambling activities on sporting events.¹ Moreover, President Biden has historically been friendly to the gambling industry. Biden was vice president when the 2011 Opinion was released and was outspoken in denouncing the unnecessary restrictions placed on the gambling industry by the Trump administration.²

What This Could Mean



After two years of uncertainty created by the DOJ's 2018 Opinion, state lotteries and companies involved in the iGaming industry may finally feel a sense of reprieve. While interstate sports wagering may still not be in the cards, multi-state compacts for shared liquidity of online poker and potentially other online casino gambling are no longer at as much of a risk of being deemed illegal. Assuming the ruling stands, this could be a positive sign for growth in the relatively nascent but ever-burgeoning iGaming industry.

¹ In 2002, the U.S. Court of Appeals for the First Circuit ruled that the Wire Act applies to exclusively to gambling on sporting events or contests. *See, In re Mastercard Intern, Inc.*, 313 F.3d 257, 262-63 (5th Cir. 2002).

² *See*, Howard Stutz, *Biden says DOJ's Wire Act changes add 'unnecessary restrictions' to the gaming industry*, CDC Gaming Reports (Dec. 16, 2019), <https://www.cdcgamingreports.com/biden-says-doj-s-wire-act-changes-add-unnecessary-restrictions-to-the-gaming-industry/> (last visited Jan. 26, 2021).

[Send](#)[Print](#)[Report](#)

RELATED POSTS

- [CEQA News You Can Use – Volume 5, Issue 2](#)
- [The FCC Resolves Petitions on Texting Platforms and TCPA Consent](#)
- [SBA Expands Loan Program to Include Small Gaming Companies](#)

LATEST POSTS

- [U.S.-China Policy Update, April 2023](#)
- [IRS Releases Long-Awaited Spending Plan for \\$80 Billion in New Inflation Reduction Act Funding](#)

[See more »](#)

DISCLAIMER: Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.

© Brownstein Hyatt Farber Schreck 2023 | Attorney Advertising

WRITTEN BY:

Brownstein Hyatt Farber Schreck

Brownstein

Contact

+ Follow



William Moschella

+ Follow



Scott Scherer

+ Follow



Mark Starr

+ Follow

PUBLISHED IN:

Department of Justice (DOJ)

+ Follow

Gambling

+ Follow

Interstate Wire Act

+ Follow

Lottery

+ Follow

Online Gaming

+ Follow

Sports Betting

+ Follow

Sports Gambling

+ Follow

Science, Computers & Technology

+ Follow

BROWNSTEIN HYATT FARBER SCHRECK ON:

