



DOJ's Wire Act interpretation adds hurdle for stakeholders

IN THEORY, MAY 14, 2018, should have marked a major shift in America's sports betting landscape. That day, the Supreme Court, in *Murphy v. NCAA*, rejected the federal law that prohibited most states from legalizing sports betting. Individual states, said the justices, have the power to authorize and regulate sports betting within their borders. To no one's surprise, happy sports fans interpreted the decision to mean that the nation's highest court had opened the floodgates to legal internet and app-based sports betting.

That celebration was short-lived. At the outset, fan enthusiasm was misplaced because the Supreme Court's decision did not legalize anything. It simply cleared the way for states to choose whether and how to authorize sports betting. Although some states moved quickly to authorize sports betting, including online and app-based betting, those plans faced an unexpected challenge in January 2019 when the Department of Justice released a new interpretation of a federal law called the Wire Act. The DOJ reinterpreted the Wire Act to prohibit betting operators from using interstate wire transmissions — such as phone calls or internet transactions — for the placement of all types of bets, not only those related to sports. That guidance has disrupted states' efforts toward legalized sports betting and has thrown online bettors' expectations into disarray. Because virtually every online or app-based bet crosses state lines, the DOJ's recent guidance may be a dealbreaker.

When the *Murphy* decision came down, states

spotted an opportunity to capture revenue lost to offshore sportsbooks already popular with fans in the U.S. Eight states now have active legal sports betting operations. Several states and the District of Columbia have passed bills or ballot questions authorizing sports betting operations that are soon

expected to open for business. Many other states are actively considering bills to authorize sports betting.

States that have green-lighted sports wagers are experimenting with a variety of betting platforms.

New York's draft legislation would permit only in-person sports betting at authorized "sports wagering lounges." By contrast, a number of states authorize or propose authorizing hybrid platforms: in-person wagers, plus online or app-based betting. Mississippi, for example, permits in-person wagers plus online betting when players are on-site at a state-authorized casino. Other states go further, calculating that maximizing revenue requires allowing fans to bet from anywhere using a mobile app. New Jersey and D.C. have been early leaders in this model.

New Jersey is one of the eight states with active legal sports betting. Fans, bettors and betting operators can place and facilitate cash bets and payouts both in person at New Jersey's sportsbooks and via app when physically within the state's borders. D.C. has passed similar legislation. In January, the District authorized betting at local stadiums, private businesses and through geofenced mobile apps. D.C. will have exclusive rights to a citywide betting app, other than within two

blocks of the city's four main professional sports arenas, where licensed betting operators may offer both in-person and in-app betting.

In choosing whether to offer in-person or app-based sports betting, several factors are at play. States want to maximize tax revenue and meet demand for more accessible sports betting. The stakes are high — in January players in the Garden State wagered four times as much online as in person. But the risks of money laundering, underage betting, gambling addiction and the integrity of sports wagers present challenges. And states, leagues and franchises are questioning whether wins and losses will take on a new meaning: whether once-dedicated fans will grow more attached to their bets than their team.

Despite these concerns, states acted reasonably to permit online sports betting. From 2011 until 2019, the DOJ considered state-legal online betting permissible so long as it did not involve sports. When the Supreme Court undid the prohibition on sports betting, states understood that online sports betting was equally permissible under federal law. Now, however, state-authorized online betting is at risk. The DOJ's 2019 reinterpretation says the Wire Act prohibits the use of interstate wires for the placement of all types of bets, including those related to sports.

Muddying the waters further, the DOJ's reinterpretation does not carry the force of law. Instead, it marks the DOJ's litigation position: As of June 14, 2019, federal prosecutors may bring criminal charges against businesses using interstate wires for online betting. Unsurprisingly, states looking to capitalize on sports betting have cried foul.

Stakeholders will battle over the DOJ's reinterpretation in two arenas. Publicly, states, betting operators and the DOJ will fight in court to test their conflicting understandings of the law on online and app-based sports betting. Privately, companies that offer or consider offering online sports wagers will debate the risks and rewards of offering the convenient betting environment so many fans expect. There will be winners and losers. Far from being the game point for sports betting, May 14, 2018, merely marked the beginning of a new period in an evolving contest.

Stephen Weiss and Christian Larson are members of the Sports Law Group at Cadwalader, Wickersham & Taft LLP. Cadwalader partners Jodi L. Avergun and Todd Blanche contributed to this column.