

Clients & Friends Memo

First Circuit Case Doesn't Move the Line on the Future of State Authorized Sports Betting

February 1, 2021

The First Circuit's recent decision in *New Hampshire Lottery Commission v. Rosen*¹ holds that the Wire Act's prohibitions on interstate activity apply only to sports betting, and not to all types of bets and wagers, such as online lotteries, poker, and other gaming for dollars. State lotteries and non-sports betting vendors cheered the decision, but for the sports betting industry, the decision is disappointing because their business still potentially runs afoul of federal law.

The case first made headlines in early 2019 when a group of plaintiffs, led by the New Hampshire Lottery, sued the Department of Justice ("DOJ") over its recent reinterpretation of the Wire Act, a decades-old federal law that prohibits the use of interstate wires to place certain bets. On its face, the language of the Wire Act is ambiguous about the specific types of interstate betting activity it prohibits. A 2011 DOJ opinion narrowly interpreted the Wire Act as only prohibiting the use of interstate wire transmissions in connection with sports betting. However, a subsequent [DOJ opinion released in 2018](#) reinterpreted the Wire Act as broadly prohibiting nearly all betting—sports and non-sports wagers alike—that uses interstate wires. The First Circuit's opinion centered on the structure and legislative history of the Wire Act, finding that the 2018 DOJ opinion would create an "odd and unharmonious piece of criminal legislation," and the Wire Act's limit on using interstate wires applies only to sports betting.

As the non-sports online betting industry applauds the First Circuit's opinion, online sports betting operators must now contend with the reality that the Wire Act prohibits online sports betting – at least until the Supreme Court rules otherwise or Congress changes the law. While the U.S. Supreme Court's May 2018 decision in *Murphy v. NCAA* gave individual states the power to authorize sports betting, the Wire Act remains an obstacle for state-legal betting operators seeking to offer online or app-based sports wagers. This is because, while a bettor and sportsbook may be located in the same state and thus permitted under *Murphy*, the structure of the internet virtually

¹ *New Hampshire Lottery Commission et al. v. Jeffrey Rosen, Acting U.S. Attorney General*, Case No. 19-1835 (1st Cir. Jan. 20, 2021).

ensures that any online or app-based bet will involve the movement of data across state lines and thus violate the Wire Act.

In the near term, it remains to be seen how the Biden administration will interpret the Wire Act. As a presidential candidate, Biden stated that he “doesn’t support adding unnecessary restrictions to the gaming industry like the Trump administration has done.” Although Congress could pass a law that clarifies or wholly changes the scope of the Wire Act, the likelihood of new legislation is unknown.

States, meanwhile, are moving quickly to embrace sports betting, even if it contravenes the Wire Act. In the years since *Murphy*, 25 states and the District of Columbia have authorized some form of sports betting. Given that sports fans prefer betting online over in-person, betting operators in many of those states are [grappling with the tension](#) between state-legal sports betting and the federal Wire Act’s prohibitions of interstate sports wagers. Many businesses with state-legal cannabis operations—which remain illegal under federal law—have operated under the federal government’s unofficial protection since it instructed U.S. Attorney’s offices to think hard before bringing charges for marijuana-related offenses. State-legal sports books that operate in apparent violation of the federal Wire Act may find themselves on similar ground, absent the Supreme Court’s intervention, new guidance from the DOJ, or legislative action by Congress.

* * *

If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

Todd Blanche	+1 212 504 6226	todd.blanche@cwt.com
Jodi Avergun	+1 202 862 2456	jodi.avergun@cwt.com
Lex Urban	+1 202 862 2320	lex.urban@cwt.com
Christian Larson	+1 202 862 2402	christian.larson@cwt.com
Stephen Weiss	+1 202 862 2347	stephen.weiss@cwt.com