



The Latest (Re) Interpretations of the Wire Act

By Mark A. Clayton and Erica L. Okerberg

After the United States Supreme Court held that the Professional and Amateur Sports Protection Act (“PASPA”)¹ is unconstitutional in *Murphy v. NCAA*, many states across the U.S. began considering legalizing sports wagering. However, the U.S. gaming and lottery industries were taken aback on January 14, 2019, when the U.S. Department of Justice’s (“DOJ”) Office of Legal Counsel released a memorandum dated November 2, 2018, reinterpreting² the Wire Act (“2018 Opinion”).³ Shortly after the release of the 2018 Opinion, a lawsuit was filed by the New Hampshire Lottery Commission, *et al.*, with the U.S. District Court for the District of New Hampshire, challenging the 2018 Opinion (“NH Case”). A brief review of the Wire Act, the DOJ’s prior memorandum on the Wire Act from 2011 (“2011 Opinion”),⁵ the 2018 Opinion, and the NH Case is helpful to understand the status of the reinterpretation of the Wire Act.

The Wire Act

The Wire Act prohibits a person in the business of betting or wagering from knowingly using a wire communication facility (e.g., phone, internet) to transmit wagers, “information assisting in the placing of bets or wagers,” or communications entitling the recipient to money from wagers across state lines. There are exceptions for (i) transmitting information for news reporting on sporting events and (ii) transmitting “information assisting in the placing

of bets or wagers” on sporting events among states where the underlying wagering activity is legal.

The 2011 Opinion

After analyzing the text and legislative history of the Wire Act, in the 2011 Opinion, the DOJ concluded that the Wire Act’s prohibitions apply only to sports wagering. As a result of the 2011 Opinion, state lotteries authorized the use of internet transmissions for lottery sales in-store and online, and some states

entered into interstate compacts to allow online casino gaming among states where such activity is legal.

Many state agencies and gaming operators saw the 2011 Opinion as a signal that the Federal Government intended to leave gaming regulation largely to the states. This led to, among other things, broad reliance on a provision of the Unlawful Internet Gambling Enforcement Act (“UIGEA”),⁶ which stated that “intermediate routing of electronic data shall not determine the location or locations in which a bet or wager is initiated, received or otherwise made.” Specifically, many interpreted this provision as modifying the Wire Act, such that (i) legal intrastate wagering would not be deemed “unlawful internet gambling” and (ii) if an otherwise legal intrastate wager crossed state lines solely due to the interstate nature of the internet, such wager would not be deemed to have cross state lines for purposes of the Wire Act.⁷ Under this rationale, online wagers made in a state and accepted in the same state would not violate the Wire Act. In reliance on this, state agencies and sports betting operators began permitting and accepting, respectively, online intrastate sports wagers.

Accordingly, after the 2011 Opinion, a wide array of gaming and lottery products were offered online on both an interstate basis (casino and lottery games) and an intrastate basis (sports wagers). These methods of operating were brought into question after the 2018 Opinion.

The 2018 Opinion

After declaring the Wire Act unambiguous, the DOJ analyzed the text of the Wire Act at length using statutory canons of construction. Applying these canons, the DOJ concluded that the Wire Act applies to wagering on all types of gambling games, not only wagering on sports events. The 2018 Opinion thus “reversed” the 2011 Opinion, which had limited the Wire Act’s prohibitions to sports betting. In the 2018 Opinion, the DOJ also determined that the Wire Act is not modified or amended by the UIGEA’s intrastate exception to “unlawful internet gambling” or the exception for intermediate routing. As a result, wagering transmissions may be deemed to travel in “interstate commerce” for purposes of the Wire Act even if they begin and end in the same state where the wagering activity is lawful, but travel intermediately outside the state.

In other words, the 2018 Opinion (a) brought lotteries and casino gaming activities back within the purview of the Wire Act and (b) suggested that intermediate routing could be a basis for a Wire Act violation.

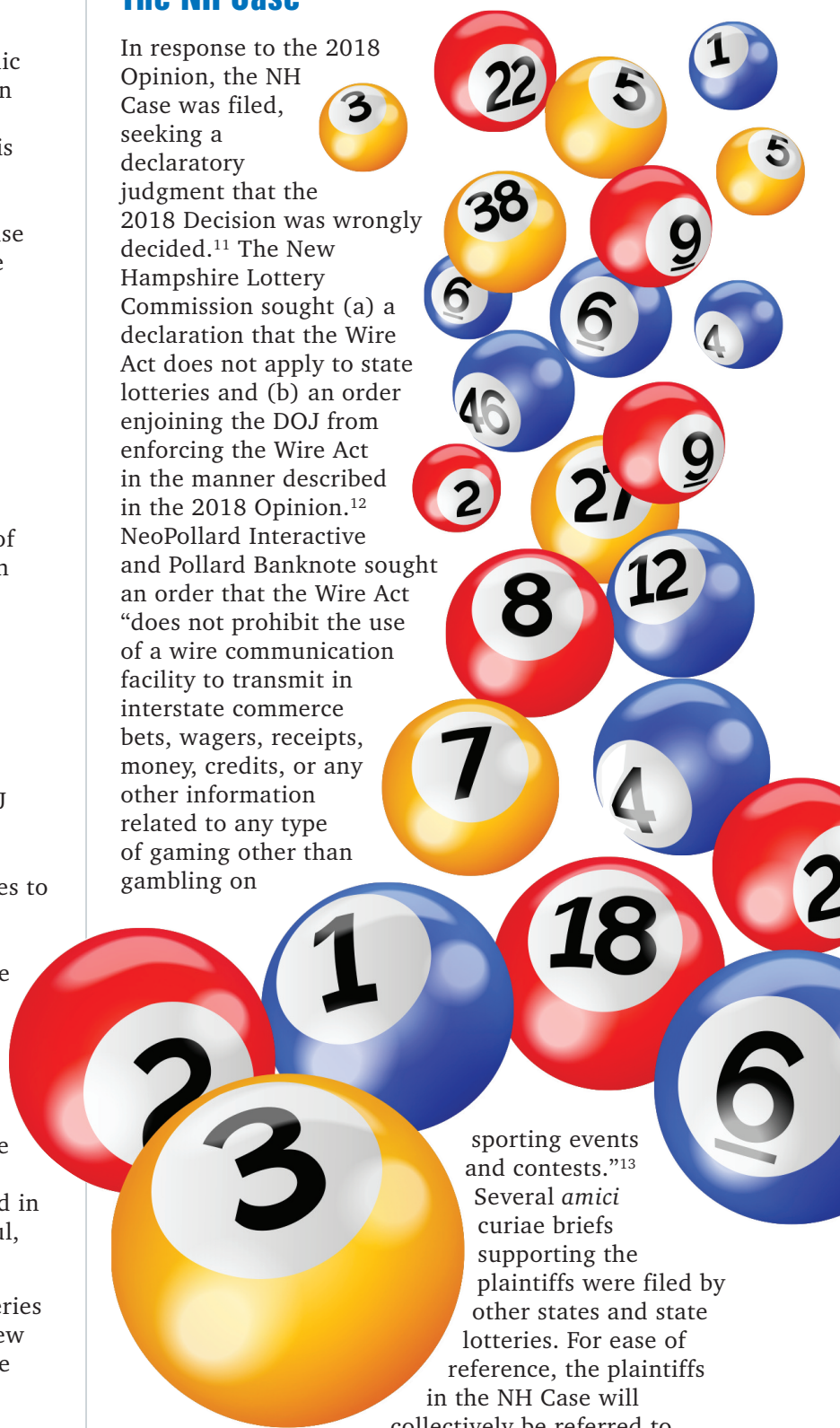
On January 15, 2019, Deputy Attorney General Rosenstein issued a memorandum directing the DOJ’s attorneys and FBI agents to delay applying the Wire

Act consistent with the 2018 Opinion for 90 days.⁸ This period was later extended an additional 60 days, to June 14, 2019.⁹ The period was subsequently extended a third time to December 31, 2019, or 60 days after the final decision of the NH Case, whichever is later.¹⁰

The NH Case

In response to the 2018 Opinion, the NH Case was filed, seeking a declaratory judgment that the 2018 Decision was wrongly decided.¹¹ The New Hampshire Lottery Commission sought (a) a declaration that the Wire Act does not apply to state lotteries and (b) an order enjoining the DOJ from enforcing the Wire Act in the manner described in the 2018 Opinion.¹² NeoPollard Interactive and Pollard Banknote sought an order that the Wire Act “does not prohibit the use of a wire communication facility to transmit in interstate commerce bets, wagers, receipts, money, credits, or any other information related to any type of gaming other than gambling on

sporting events and contests.”¹³ Several *amici curiae* briefs supporting the plaintiffs were filed by other states and state lotteries. For ease of reference, the plaintiffs in the NH Case will collectively be referred to herein as “NH Lottery.”



The U.S. District Court for the District of New Hampshire’s (“NH Court”) decision (“NH Decision”) can be broken down into three main points: (1) whether the plaintiffs have standing, (2) whether the 2018 Opinion is a “final agency action” such that it is appropriate for judicial review, and (3) whether the 2018 Opinion correctly interpreted the Wire Act.

[The Plaintiffs Have Standing](#)

Standing can be established if a plaintiff has “(1) suffered an injury in fact,¹⁴ (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.”¹⁵ An injury is considered one “in fact” if it is “actual or imminent,” meaning that the injury is impending or there is a “substantial risk that [] harm will occur.”¹⁶ In the context of a pre-enforcement challenge to a criminal statute, a plaintiff must show that it faces “a threat of prosecution because of [its] present or intended conduct.”¹⁷ Past cases illustrate a continuum of what is considered “imminent.” Within that continuum are cases wherein the plaintiff had intended to continue to engage in allegedly unlawful behavior, enforcement had not yet begun, but the risk of prosecution was substantial.¹⁸

For several years, and based on the 2011 Opinion, the NH Lottery has engaged in lawful activities involving online transmissions related to lottery products. As in the examples from the continuum mentioned above, the NH Lottery intends to continue to engage in those activities, which the 2018 Opinion “now brands as criminal.”¹⁹ However, in light of the 2018 Opinion and the Deputy Attorney General’s internal enforcement directive, “the risk of prosecution is substantial.”²⁰ Given the risk of prosecution, the NH Lottery faces an imminent injury based on the 2018 Opinion. Because the NH Lottery has suffered an imminent injury or an “injury in fact,” the NH Lottery has standing in the NH Case.²¹

[The 2018 Opinion is a Final Agency Action Subject to Judicial Review](#)

The Administrative Procedure Act (“APA”) entitles a party to seek judicial review of a “final agency action.”²² An agency’s action is considered final if the agency has completed its decision-making process and the result thereof will directly affect the parties.²³ As the NH Court explains, the “final agency action requirement has not been construed to require litigants [] to choose between abandoning an otherwise lawful and productive activity and facing a credible threat of ‘serious criminal civil penalties.’”²⁴

Although the DOJ admitted that the 2018 Opinion was final, it disputed whether the 2018 Opinion directly

affected the NH Lottery. The DOJ argued that the 2018 Opinion would not directly affect the NH Lottery unless and until the NH Lottery were indicted for a Wire Act violation pursuant to the 2018 Opinion. The NH Court disagreed – it found that the NH Lottery faced a substantial threat of prosecution, which was sufficient to demonstrate a direct effect. The NH Court further explained that the interpretation in the 2018 Opinion could cause a common carrier, such as an internet service provider, to discontinue services to the NH Lottery under the Wire Act.²⁵ Accordingly, because the 2018 Opinion is a definitive statement of the DOJ’s position and it would directly affect the NH Lottery, it is a “final agency action” subject to judicial review.

[The 2018 Opinion is “Set Aside” as to the NH Case Parties](#)

After resolving the DOJ’s standing and APA claims, the NH Court turned to the heart of the case – the Wire Act. The NH Court considered the First Circuit case, *United States v. Lyons*,²⁶ but determined that the dictum therein was not inherently binding. Rather, an independent review of the Wire Act was deemed warranted.²⁸

The 2018 Opinion found that the Wire Act was unambiguous. It concluded that the phrase “on any sporting event or contest” does not modify the prohibition on bets, but rather, only modifies the prohibition on information assisting in placing bets.²⁹ On the other hand, the 2011 Opinion concluded that the Wire Act was ambiguous because such phrase could be read to modify both prohibitions or either prohibition.³⁰

The NH Court was inclined to agree with the 2011 Opinion given that the 2018 Opinion “produces an unlikely reading of § 1084(a) that the 2011 [] Opinion avoids.”³¹ The NH Court considers the context and structure of the Wire Act when determining that it is limited to sports wagering.³²



First, interpreting the phrase “on sporting events or contests” to modify both prohibitions noted above, results in a more symmetrical approach. For example, when read this way, sports wagers and information assisting in placing sports wagers are prohibited. If the phrase “on sporting events or contests” only modified the prohibition on information, all wagers would be prohibited, but only information assisting in placing sports wagers would be prohibited. As the NH Court and 2011 Opinion reasoned, it would seem incongruous for Congress to forbid all wagers, while forbidding information relating only to sports wagers.³³

Second, the text and legislative history of the Wagering Paraphernalia Act,³⁴ which was passed the same day as the Wire Act, supports the conclusion that “when Congress intended to target non-sports gaming it used clear and specific language to accomplish its goal.”³⁵ In the Wagering Paraphernalia Act, Congress specifically addressed “bookmaking,” “wagering pools with respect to a sporting event,” and “numbers, policy, bolita, or similar game[s].”³⁶ As the NH Court determines, given that Congress did not use similar language addressing non-sports wagering in the Wire Act, it would be logical to infer that Congress did not intend for the Wire Act to apply to non-sports wagering.³⁷

In light of the foregoing, the NH Court concludes that (1) the Wire Act applies only to sports wagering³⁸ and (2) the 2018 Opinion is “set aside” or void under the APA.³⁹ However, the NH Court clearly states that the declaratory relief does not apply to any non-parties.⁴⁰ Thus, even if the 2018 Opinion has been “set aside” or voided in the broad sense, the NH Decision does not preclude the U.S. Government from enforcing the Wire Act as described in the 2018 Opinion against anyone who is not a party to the case.

The NH Decision is expected to be appealed by the U.S. Government, but no appellate filings have been made as of the date this article was written.



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¹ 28 U.S.C. § 3701 *et seq.*
² 18 U.S.C. § 1081 *et seq.*
³ *Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, Nov. 2, 2018, Steven A. Engel, Asst. Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice (“2018 Opinion”).
⁴ *N.H. Lottery Comm’n, et al. v. Barr*; U.S. Dep’t of Justice, Case 19-cv-163-PB (D.N.H. 2019).
⁵ *Whether Proposals by Illinois and New York to use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act*, Sept. 20, 2011 Virginia A. Seitz, Asst. Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice (“2011 Opinion”).
⁶ 31 U.S.C. §§ 5361-5367.
⁷ Although UIGEA makes clear by its own terms that it does not modify any other federal or state law, it had been considered as instructive regarding Congress’s intent for internet gambling. *See id.* § 5361(b).
⁸ *Applicability of the Wire Act*, 18 U.S.C. § 1084, to Non-Sports Gambling, Rod J. Rosenstein (Jan. 15, 2019).
⁹ *Additional Directive Regarding the Applicability of the Wire Act*, 18 U.S.C. § 1084, to Non-Sports Gambling, Rod J. Rosenstein (Feb. 28, 2019).
¹⁰ *Updated Directive Regarding the Applicability of the Wire Act*, 18 U.S.C. § 1084, to Non-Sports Gambling, Jeff Rosen (June 12, 2019).
¹¹ Complaint, N.H. Lottery, Case No. 1:19-cv-00163 (D.N.H. Feb. 15, 2019) (the “Lottery Complaint”); Complaint, NeoPollard Interactive LLC and Pollard Banknote Ltd, Case No. 1:19-cv-00170 (D.N.H. Feb. 15, 2019) (the “NeoPollard Complaint”).
¹² Lottery Complaint.
¹³ NeoPollard Complaint.
¹⁴ Because the second and third elements of standing were not challenged, the NH Court focused on the first element.
¹⁵ *N.H. Lottery Comm’n, et al. v. Barr*; U.S. Dep’t of Justice, Case 19-cv-163-PB at 13 (D.N.H. 2019) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)).
¹⁶ *Id.* (quoting *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560 (1992)).
¹⁷ *N.H. Lottery Comm’n, et al.* at 13.
¹⁸ *Id.* at 15.
¹⁹ *Id.*
²⁰ *Id.*
²¹ Although the DOJ argued that it was unlikely the NH Lottery would face prosecution under the Wire Act, the NH Court rejected such argument, particularly given that the 2011 Opinion was a response to two states regarding the applicability of the Wire Act to online lottery sales. *Id.* at 16-18.
²² *Id.* at 23.
²³ *Id.* at 23.
²⁴ *Id.* at 24-25.
²⁵ *Id.* at 26.
²⁶ 740 F.3d 702 (1st Cir. 2014).
²⁷ *N.H. Lottery Comm’n, et al.* at 27-31.
²⁸ *Id.* at 31.
²⁹ *Id.* at 33.
³⁰ *Id.* at 36.
³¹ *Id.* at 38, 41.
³² *Id.* at 41.
³³ *Id.* A similar issue arises in the construction of the prohibition on transmissions related to money or credits as a result of a bet or wager. *See id.* at 42-43.
³⁴ Interstate Transportation of Wagering Paraphernalia Act, 18 U.S.C. § 1953.
³⁵ *N.H. Lottery Comm’n, et al.* at 44-45.
³⁶ *Id.* at 44.
³⁷ *Id.* at 45.
³⁸ *Id.* at 53.
³⁹ *Id.* at 58-59.
⁴⁰ *Id.* at 53-55.