NEW HAMPSHIRE LOTTERY STRIKES BACK: THE U.S. DISTRICT COURT HOLDS THAT THE WIRE ACT APPLIES ONLY TO SPORTS BETTING

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On June 3, 2019, U.S. District Court Judge Barbadoro of the United States District Court for the District of New Hampshire issued an opinion (the "Barbadoro Decision")[1] declaring that the Wire Act[2] applies only to sports betting. In doing so, Judge Barbadoro stated that the interpretation of the Wire Act by the Department of Justice Office of Legal Counsel (OLC), in its September 20, 2011 memorandum (the "2011 Opinion"),[3] presented a better reading of the Wire Act than the OLC's November 2, 2018 memorandum ("2018 Opinion").[4] The 2011 Opinion had determined that the Wire Act applied only to sports betting, while the 2018 Opinion stated that only one of the four Wire Act prohibitions in 18 U.S.C. § 1084(a) was limited to sports betting—the other three applied to all types of gambling. Judge Barbadoro ruled that his decision under the Declaratory Judgment Act (declaring that the Wire Act applied only to sports betting)[5] applied only to the parties in the case, and in regard to the Administrative Procedure Act (APA),[6] Judge Barbadoro "set aside" the 2018 Opinion as "mistaken"—i.e., not in accordance with law.[7] The Barbadoro Decision and its likely effects are discussed below.

1. A BRIEF HISTORY

Section 1084(a) of the Wire Act makes it a crime for—

> Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles 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, . . . [8]

In 2005, the Illinois legislature was considering a bill that would have allowed the Illinois Lottery to offer its games online—i.e., via laptops and mobile devices. In connection with that legislation, the Department of Justice (DOJ) wrote to the Illinois Lottery that:

> Section 1084 of Title 18, United States Code, prohibits one in the business of betting or wagering from knowingly using a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers.

Keywords: Wire Act, 18 U.S.C. 1084, New Hampshire Lottery Commission v. Barr, intermediate routing

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[1]Memorandum and Order, New Hampshire Lottery Comm., et al. v. William Barr, U.S. Att'y. Gen., 386 F. Supp. 3d 132 (D.N.H. June 3, 2019).

[2]18 U.S.C. §§ 1081, 1084.

[3]*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*, dated September 20, 2011 (issued Dec. 23, 2011), 35 Op. O.L.C. (2011) (the "2011 Opinion").

[4]*Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, dated November 2, 2019 (issued Jan. 14, 2019), 42 Op. O.L.C. (2018) (the "2018 Opinion").

[5]28 U.S.C. §§ 2201–2202.

[6]5 U.S.C. §§ 701 et seq.

[7]5 U.S.C. §§ 701.

[8]18 U.S.C. § 1084(a).

> . . .
> Although [accepting wagers that cross state lines] might be considered to be lawful in the State of Illinois, we believe that the acceptance of wagers through the use of a wire communication facility by a gambling business, including that operated by a component of the government of a state, from individuals located either outside a state or within the borders of the state (but where the transmissions is routed outside of the state) would violate federal law.
> In addition to the actual gambling business' being subject to prosecution under federal law, those persons or entities which knowingly assist the gambling business to operate would likewise be subject to prosecution. Section 2 of Title 18, United States Code, imposes criminal liability on those individuals or entities that aid, abet, and counsel, command, induce, or procure the commission of an offense against the United States.
> At this time, we have no knowledge that the Illinois lottery is actually selling tickets, and thereby accepting wagers, over the Internet or otherwise by wire communication across state lines; nor do we have any information that such activity is currently authorized by Illinois law. However, we wanted to alert you to the potential violations of federal law if the acceptance of Internet wagers by the Illinois Lottery is actually implemented. If such activity actually takes place, we will be under a duty to investigate it as warranted.[9]

The Illinois legislation was not enacted.

A. New Federal Law—Unlawful Internet Gambling Enforcement Act

In 2006, the federal Unlawful Internet Gambling Enforcement Act (UIGEA)[10] was enacted. The UIGEA prohibits a gambling business from knowingly accepting credit, electronic funds transfers, checks, or similar payment instruments in connection with another person's participation in "unlawful Internet gambling."[11] "Unlawful Internet gambling" is defined as "to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wagers is initiated, received, or otherwise made."[12] However, intrastate online gambling is expressly excepted from "unlawful Internet gambling" when (1) the bets or wagers are initiated and received within a single state, (2) the bets or wagers are expressly authorized by applicable state law, (3) the state's laws or regulations include data security and age and location verification requirements, and (4) the bets or wagers do not violate certain other federal gaming laws.[13] In this regard the UIGEA also states: "The intermediate routing of electronic data shall not determine the location or locations in which a bet or wager is initiated, received, or otherwise made."[14]

Thus, the UIGEA provides an exception for online bets or wagers initiated and received in the same state, regardless whether the bets or wagers travel outside the state on an intermediate routing basis ("intermediate routing"). By contrast, however, according to the DOJ's 2005 letter to the Illinois Lottery, such bets or wagers violate the Wire Act.

While Congress took a different position on intermediate routing in the UIGEA than in the Wire Act, some dispute whether the UIGEA modified the Wire Act. On the one hand, the UIGEA provides expressly: "No provision of [the UIGEA] shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States." This seemingly made clear that the UIGEA does not amend or modify the Wire Act. On the other hand, some who followed the legislative process that resulted in the UIGEA argue that Congress did not intend for the intrastate gambling that was "carved out" from "unlawful Internet gambling" in the

[9]Letter from Laura H. Parsky, Deputy Assistant Attorney General, to Carolyn Adams, Illinois Lottery Superintendent (May 13, 2005).

[10]31 U.S.C. §§ 5361–5367.

[11]*Id.* § 5363.

[12]*Id.* § 5362(10)(A).

[13]*Id.* § 5362(10)(B).

[14]*Id.* § 5362(10)(E).

UIGEA to still be unlawful under other federal laws. Under this rationale, online wagers made in a state and accepted in the same state would not violate the Wire Act.

B. 2011 DOJ Wire Act Opinion

In 2009, Illinois enacted a law to help rebuild the state's deteriorating infrastructure. To fund that work, the law directed the implementation of an Internet lottery pilot program allowing persons located in the state to purchase certain Illinois lottery products via their laptops and mobile devices.[15] That same year, New York was finalizing construction of a lottery system that would allow "virtual tickets" to be "electronically delivered over the Internet to computers or mobile phones located inside the State of New York."[16] Given the uncertainty as to the reach of the Wire Act and the interplay between the Wire Act and the UIGEA in regard to intermediate routing, the Illinois and New York lotteries asked the DOJ whether the Wire Act and UIGEA prohibit state-run lotteries from (1) using the Internet to sell tickets to in-state adults or (2) "transmitting lottery data associated with in-state ticket sales to out-of-state transaction processors either during or after the purchasing process."[17]

Responding to these requests, on December 23, 2011 the OLC issued an opinion examining the text of the Wire Act and its legislative history.[18] In the 2011 Opinion, the OLC concluded as follows:

> Having considered the [DOJ] Criminal Division's views, as well as letters from New York and Illinois to the Criminal Division that were attached to your opinion request, we conclude that interstate transmissions of wire communications that do not relate to a "sporting event or contest," 18 U.S.C. § 1084(a), fall outside of the reach of the Wire Act. Because the proposed New York and Illinois lottery proposals do not involve wagering on sporting events or contests, the Wire Act does not, in our view, prohibit them. Given this conclusion, we have not found it necessary to address the Wire Act's interaction with UIGEA, or to analyze UIGEA in any other respect.[19]

Thus, the OLC concluded that the Wire Act applies only to sports betting and declined to answer what effect, if any, the UIGEA had on the Wire Act. The OLC did not consider how to reconcile the Wire Act with UIGEA, because it found that the Wire Act did not apply to the situations presented by the Illinois and New York lotteries.[20]

C. Reactions post-2011 Opinion

Following the 2011 Opinion, several states began selling lottery and/or other gaming products via the Internet.[21] Many state lotteries began transmitting data to out-of-state servers (or "back-up" servers).[22] For example, traditional lottery draw game sales transactions may travel via Internet, cellular network, or satellite.[23] In a typical draw game sales transaction, the retail terminal requests a wager from the server, which generates and records the wager in the lottery system. Then, the server sends the wager information to the retail terminal, which prints a record of the wager (a "lottery ticket") for the player. Regarding multi-jurisdictional draw games such as PowerBall and Mega Millions, such games "involve up to 48 states and territories [and] have operated on the interstate transfer of data and prize money through the telephone, internet, and wire transactions for well over thirty (30) years."[24] In short, state lotteries relied on their position that the Wire Act did not prohibit their traditional or mobile lottery games, even when their data centers were out of state, and even where the lottery wager was processed via an out-of-state game server.

[15] ILL. P.A. 96-34 (eff. July 13, 2009). *See also* Department of Revenue and Illinois Lottery, *State of Illinois Internet Lottery Pilot Program* (Mar. 10, 2010) ("Ill. White Paper").

[16] Letter for Portia Roberson, Director, Office of Intergovernmental Affairs, from William J. Murray, Deputy Director and General Counsel, New York Lottery (Dec. 4, 2009) ("N.Y. Letter").

[17] 2011 Opinion, *supra* note 3, at 1.

[18] *Id*

[19] *Id.* at 1–2.

[20] *Id.* at 13.

[21] Complaint, NeoPollard Interactive LLC and Pollard Banknote Limited v. William Barr, U.S. Dep't of Justice, No. 1:19-cv-00170, ¶¶ 4–5 (D.N.H. Feb. 15, 2019).

[22] Complaint, N.H. Lottery v. William Barr, U.S. Dep't of Justice, No. 19-cv-163-PB, ¶ 33 (D.N.H. Feb. 15, 2019).

[23] *See e.g.*, *id.* at ¶ 42.

[24] *Id.* at ¶ 55.

This position was supported by case law developed even before the 2011 Opinion. Prior to 2011, the only federal court of appeals to consider the scope of gambling covered by the Wire Act—the Fifth Circuit Court of Appeals—held that the Wire Act applied only to sports betting.[25]

2. THE 2018 DOJ WIRE ACT OPINION

After the 2011 Opinion, several states began making lottery and gaming products available online.[26] Three states—Nevada, Delaware, and New Jersey—entered into an interstate compact to authorize regulated online poker among their residents in an effort to increase market liquidity. Meanwhile, state lotteries continued to consolidate data centers, using out-of-state "super" data centers to process traditional lottery ticket sales and to validate instant winners. Again, many states took comfort in the 2011 Opinion's determination that the Wire Act did not apply to the interstate transmission of non-sports wagers. Indeed, state lotteries, state-licensed commercial gambling operators, Internet gambling system vendors, and payment processors all operated in reliance on the DOJ's determination (and directive to the DOJ's Criminal Division) that non-sports wagering was not covered and therefore not prosecutable under the Wire Act.

These arrangements were called into question on January 14, 2019, when the OLC publicly issued a new opinion—dated November 2, 2018—reversing the interpretation of the Wire Act set forth in the 2011 Opinion.[27] In the 2018 Opinion, the OLC concluded that § 1084(a) of the Wire Act is unambiguous. According to the 2018 Opinion, "the text [of § 1084(a)] is clear, and thus, even if so inclined, we would not have justification for delving into the Congressional Record to ascertain what individual Members of Congress may have thought at the time [of the Wire Act's enactment]."[28]

The OLC further stated, "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms."[29] After an extensive grammatical analysis of section 1084 (a), the OLC concluded that the phrase "on any sporting event or contest" applies to only one prohibition in § 1084(a)—the prohibition on transmitting "information assisting in the placing of bets or wagers." The OLC stated: "In sum, the linguistic maneuvers that are necessary to conclude that the sports-gambling modifier sweeps both backwards and forwards to reach all four of section 1084(a)'s prohibitions are too much for the statutory text [of the Wire Act] to bear."[30] The OLC "view[ed] the statutory language as plain,"[31] and determined that "applying the Wire Act as written does not produce an obviously absurd result."[32]

Thus, the OLC opined that § 1084(a) prohibits the interstate or foreign wire transmission by or to a person involved in the business of betting or wagering, of:

1. bets or wagers relating to any type of game or event;
2. information assisting in the placing of sports bets;
3. a communication entitling the recipient to receive money or credit as a result of bets or wagers relating to any type of game or event; and
4. a communication entitling the recipient to receive money or credit for information assisting in the placing of bets or wagers relating to any type of game or event.

(An exception exists applicable to the transmission of information assisting in the placing of sports bets or wagers between states where betting on the particular sports event is lawful—in each state.)

[25]In re MasterCard Int'l Internet Gambling Litig., 313 F.3d 257 (5th Cir. 2002). In 2014, the First Circuit Court of Appeals, citing the Fifth Circuit case, stated in dicta that the Wire Act applied only to sports betting. U.S. v. Lyons, 740 F.3d 702 (1st Cir. 2014).

[26]Complaint, NeoPollard Interactive LLC, et al., v. Barr, et al., at ¶ 4.

[27]2018 Opinion, *supra* note 4.

[28]*Id.* at 16–17.

[29]*Id.* at 7, quoting Lamie v. U.S. Trustee, 540 U.S. 526, 534 (2004).

[30]*Id.* at 13–14.

[31]*Id.* at 14.

[32]*Id.* at 15.

In addition, the OLC opined as to the relationship of the UIGEA to the Wire Act. It stated:

> [T]he Criminal Division . . . asked whether, in excluding certain activities from UIGEA's definition of "unlawful Internet gambling," UIGEA excludes those same activities from the prohibitions under other federal gambling laws." . . . We conclude that it does not.
>
> . . .
>
> UIGEA's definition of "unlawful Internet gambling" simply does not affect what activities are lawful under the Wire Act. This definition applies only to the "subchapter" in which UIGEA is contained, 31 U.S.C. § 5362, and the Wire Act does not use the term "unlawful Internet gambling" in any event. Our conclusion follows from the plain meaning of the statutory definition, and Congress has confirmed it with a reservation clause stating that "[n]o provision of this subchapter shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States." *Id.* § 5361(b). UIGEA therefore in no way "alter[s], limit[s], or extend[s]" the existing prohibitions under the Wire Act.[33]

The 2018 Opinion thus reverted to the DOJ view prior to the issuance of the 2011 Opinion in two respects. First, it opined that three of § 1084(a)'s four prohibitions apply to all types of gambling and not only betting on sports events. Second, it suggested that a transmission is in "interstate or foreign commerce" for purposes of the Wire Act if the transmission is routed across state or national boundaries, even if only based on intermediate routing.

By memorandum dated January 15, 2019, the deputy attorney general instructed federal prosecutors to adhere to the 2018 Opinion.[34] However, the memorandum called for a period of prosecutorial forbearance, directing DOJ attorneys to refrain from applying the 2018 Opinion's interpretation of the Wire Act to persons who relied on the 2011 Opinion for 90 days (the "January 2019 Enforcement Directive").[35]

3. THE JUNE 2019 DECISION OF THE U.S. DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

In February 2019, the New Hampshire Lottery and its vendors NeoPollard Interactive LLC and Pollard Banknote Limited (collectively, the "plaintiffs") sued the DOJ in the U.S. District Court for the District of New Hampshire challenging the 2018 Opinion. In the lawsuit, the plaintiffs sought, among other relief, an order (1) vacating and setting aside the 2018 Opinion as issued in violation of the APA,[36] (2) declaring the 2018 Opinion wrong as a matter of law, and (3) declaring that the Wire Act does not apply to non-sports wagering.[37] The plaintiffs moved for summary judgment on their claims, and the DOJ moved to dismiss.

Separately, by memorandum dated February 28, 2019, the DOJ extended through June 14, 2019, the forbearance period set forth in its January 2019 Enforcement Directive (the "February 2019 Enforcement Directive").

On April 8, 2019, three days prior to the parties' oral arguments, the DOJ issued another memorandum (the "April 2019 Enforcement Directive"). Unlike the other directives, this one did not amend the forbearance period. Rather, in the April 2019 Enforcement Directive, the DOJ announced that it was reviewing whether the Wire Act applies to state lotteries and their vendors. The Enforcement Directive then instructed: "[DOJ] attorneys should refrain from applying Section 1084(a) to State lotteries and their vendors, if they are operating as authorized by State law, until the [DOJ] concludes its review."[38] Finally, the April 2019 Enforcement

[33] *Id.* at 17–18.

[34] *See Applicability of the Wire Act, 18 U.S.C. § 1084, to Non-Sports Gambling,* U.S. Dept. Just. (Jan. 15, 2019) (the "January 2019 Enforcement Directive").

[35] *Id.*

[36] 5 U.S.C. §§ 701–706.

[37] Complaint, NeoPollard Interactive LLC, et al., v. Barr, et al.

[38] *See Notice Regarding Applicability of the Wire Act, 18 U.S.C. § 1084, to State Lotteries and their Vendors,* U.S. Dept. Just. (Apr. 8, 2019) (the "April 2019 Enforcement Directive").

Directive further instructed that, if the DOJ determined that the Wire Act does apply to state lotteries or their vendors, then DOJ attorneys should extend the forbearance period for 90 days after the DOJ publicly announced the position so as to allow state lotteries and their vendors a reasonable time to conform their operations to federal law.[39]

At the oral argument on April 11, 2019, the DOJ argued that because it had not yet determined whether the Wire Act applied to state lotteries and their vendors (as stated in the April 2019 Enforcement Directive), the plaintiffs were not at risk of any "imminent injury"—i.e., there was no credible risk that the plaintiffs would be prosecuted under the Wire Act for carrying on their existing operations. Accordingly, the DOJ argued that the plaintiffs lacked standing to bring their suit. The court invited the DOJ to take a position as to whether the Wire Act applied to state lotteries and their vendors, but the DOJ was not prepared to do so. The court then asked the parties to brief the issue. In doing so later, the DOJ still did not reach a decision on the issue, but argued against the position of the Lottery.

On June 3, 2019, Judge Paul Barbadoro of the U.S. District Court for the District of New Hampshire issued his opinion.[40] In his opinion, Judge Barbadoro stated: "The key question this case presents is whether the limiting phrase 'on any sporting event or contest' in [the Wire Act] § 1084(a)'s first clause modifies all references to 'bets or wagers' in both clauses."[41]

A. Standing

Judge Barbadoro first addressed the issue of standing. Standing can be established if a plaintiff has "(1) suffered an injury in fact,[42] (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."[43] 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."[44] 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."[45] 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.[46]

For several years, and based on the 2011 Opinion, the Lottery engaged in lawful activities involving online transmissions related to lottery product sales. As in the examples mentioned above, the Lottery demonstrated its intent to continue engaging in those activities, which the 2018 Opinion "now brands as criminal."[47] However, in light of the 2018 Opinion and the deputy attorney general's internal enforcement directive, "the risk of prosecution is substantial."[48] Judge Barbadoro held that, given the risk of prosecution, the Lottery faced an imminent injury based on the 2018 Opinion. Because the Lottery faced an imminent injury or an "injury in fact," Judge Barbadoro held that the Lottery had standing to sue.[49]

B. The APA claim

An agency action is reviewable by a court if it is considered "final." Although the parties agreed that the 2018 Opinion was a definitive statement of the DOJ's position, the DOJ contested whether the 2018 Opinion and the January 2019 Enforcement Directive would "directly affect the parties."[50] The DOJ argued

[39] *Id.*

[40] Memorandum and Order, New Hampshire Lottery Comm., et al. v. William Barr, U.S. Att'y. Gen., 386 F. Supp. 3d 132 (D.N.H. June 3, 2019). (the "Barbadoro Decision").

[41] *Id.* at 3.

[42] Because the second and third elements of standing were not challenged, the court focused on the first element.

[43] Barbadoro Decision, *supra* note 40, at 13 (quoting Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016)).

[44] *Id.* (quoting Lujan v. Defs. Of Wildlife, 504 U.S. 555, 560 (1992)).

[45] Barbadoro Decision, *supra* note 40, at 13.

[46] *Id.* at 15.

[47] *Id.*

[48] *Id.*

[49] Although the DOJ argued that it was unlikely the Lottery would face prosecution under the Wire Act, the court rejected such argument, particularly given that the 2011 Opinion was a response to Illinois and New York regarding the applicability of the Wire Act to online lottery sales. *Id.* at 16–18.

[50] *Id.* at 24.

that the 2018 Opinion and the January 2019 Enforcement Directive would not have a direct effect on the Lottery unless and until the Lottery was indicted. The court disagreed, stating: "Here, because the threat of prosecution the plaintiffs face is substantial, that threat alone satisfies the direct effect component of the final agency action test."[51] The court further stated:

> The 2018 OLC Opinion will also have an immediate adverse effect on the [Lottery] Commission even if no indictment issues. The 2011 OLC Opinion explicitly gave businesses engaged in non-sports gambling a "reasonable reliance" defense to prosecution under the Wire Act. . . . That defense will no longer be available to the Commission once the Department of Justice begins to enforce the 2018 Opinion against entities engaged in non-sports gambling. Thus, even if the Commission is not immediately indicted, its position will become far more precarious if the 2018 OLC Opinion is allowed to stand.[52]

In addition, the court noted that § 1084(d) of the Wire Act authorizes law enforcement agencies to notify a common carrier (such as a telephone or Internet service provider) that it was providing services "used for the purpose of transmitting or receiving gambling information" in violation of the Wire Act, and that upon receipt of such notice, the provider would be compelled to "discontinue or refuse" that service to the offending subscriber. The government had not represented that it would forebear from enforcing § 1084(d). Because § 1084(d) could be invoked to disconnect the Lottery from the Internet, the Lottery was subject to direct legal consequence. The court concluded: "The 2018 OLC Opinion is a definitive statement concerning the Justice Department's interpretation of the Wire Act, and the opinion has a direct and immediate impact on the [Lottery] Commission's operations. . . . Accordingly, the opinion constitutes final agency action without an adequate alternative to APA review.[53]

C. The Wire Act analysis

The court then examined the text of the Wire Act. The court determined the text was ambiguous, and therefore examined contextual evidence pertaining to the Wire Act, including the Wire Act's legislative history. The court stated that limiting the Wire Act to sports betting "avoids the significant coherence problems that result from the OLC's [2018] interpretation and it construes the Wire Act in harmony with another gambling statute that Congress enacted the same day as the Wire Act"[54]—i.e., the Interstate Transportation of Wagering Paraphernalia Act (the "Paraphernalia Act").[55]

The court examined whether the Wire Act could apply to all bets or wagers, but bar transmissions of information that assisted in the placing of only sports bets or wagers, as the 2018 Opinion states. The court found this "incongruous" and agreed with the 2011 Opinion that "it is difficult to discern why Congress, having forbidden the transmission of *all* kinds of bets or wagers, would have wanted to prohibit only the transmission of information assisting in bets or wagers concerning sports."[56]

In addition, the court found an "even more serious coherence problem" with the 2018 Opinion's interpretation of the Wire Act as it related to transmissions "entitl[ing] "the recipient to receive money or credit." If, as the 2018 Opinion concludes, the phrase "on sporting events or contests" in the Wire Act's second prohibition modified only the prohibition on information transmissions, a person would be prohibited from sending information assisting in placing sports wagers, but not from sending information assisting in placing wagers of other types. However, such person would be barred from receiving payment for either type of information—prohibited information or permitted information. As the court stated, "[i]t is bizarre to authorize an activity but prohibit getting paid for doing it. . . . Limiting the entire section [1084(a)] to sports gambling renders the statute coherent and makes the 2011 Opinion the better reading of the text."[57]

[51] *Id.* at 25.

[52] *Id.* at 25–26

[53] *Id.* at 27.

[54] *Id.* at 41.

[55] The Wagering Paraphernalia Act is codified at 18 U.S.C. § 1953.

[56] Barbadoro Decision, *supra* note 40, at 41 (quoting the 2011 Opinion) (emphasis in original)).

[57] *Id.* at 43.

Still further, the court noted that the Wagering Paraphernalia Act, passed on the same day as the Wire Act, prohibits carrying paraphernalia in interstate commerce that is to be used in "(a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game."[58] As the court explained:

> That these two gambling statutes were passed the same day sends a strong contextual signal concerning the Wire Act's scope. The Paraphernalia Act demonstrates that when Congress intended to target non-sports gambling it used clear and specific language to accomplish this goal. . . . The absence of similar language in the accompanying Wire Act supports the plaintiffs' position that the Wire Act is limited to sports gambling."[59]

Finally, the court reviewed the legislative history of the Wire Act and concluded:

> [W]hile the syntax employed by the Wire Act's drafters does not suffice to answer whether § 1084(a) is limited to sports gambling, a careful contextual reading of the Wire Act as a whole reveals that the narrower construction proposed by the 2011 OLC Opinion represents the better reading. The [Wire] Act's legislative history, if anything, confirms this conclusion. Accordingly, I construe all four prohibitions in § 1084(a) to apply only to bets or wagers on a sporting event or contest.[60]

D. Remedies awarded by the court

Judge Barbadoro made clear in his opinion that declaratory relief applied only to the parties in the case.[61] He stated further: "My declaration [that § 1084(a) of the Wire Act applies only to transmissions related to sports betting] thus binds the United States vis-à-vis NeoPollard and the Lottery . . . everywhere the plaintiffs operate or would be otherwise subject to prosecution."[62]

However, in regard to the APA relief, Judge Barbadoro stated: "[The OLC] has produced a capable, but mistaken, legal opinion that no additional process can cure."[63] "The 2018 Opinion is 'set aside.'"[64]

By "setting aside" the 2018 Opinion (which Judge Barbadoro ruled constituted "final agency action" under the APA), Judge Barbadoro negated it—i.e., made it void and of no effect. [65] Thus, subject to any appeal, the 2018 Opinion has no legal force on any entity nationwide.

In response to the Barbadoro Decision, on June 12, 2019, the DOJ further extended its forbearance period until the later of December 31, 2019 or 60 days after the final resolution of the New Hampshire litigation.[66]

Finally, in accordance with the Barbadoro Decision, judgment in the case entered on June 20, 2019. Accordingly, the government had 60 days from that date in which to appeal.[67] Indeed, the U.S. Department of Justice filed a notice of appeal on August 16, 2019.

4. CONCLUSION

Pursuant to the Barbadoro Decision, the 2018 Opinion is vacated and of no effect (subject to appeal). However, notwithstanding the Barbadoro Decision, the United States is not precluded from prosecuting persons (other than the Lottery, NeoPollard, and

[58]18 U.S.C. § 1953(a).

[59]Barbadoro Decision, *supra* note 40, at 44–45 (citations omitted).

[60]Barbadoro Decision, *supra* note 40, at 53.

[61]*Id*. at 54.

[62]*Id*. at 56.

[63]*Id*. at 59.

[64]*Id.* at 60.

[65]"Virtually everyone understands 'set aside' to connote total nullification of the unlawful agency action." Ronald M. Levin, *The National Injunction and the Administrative Procedure Act*, The Regulatory Review (Sept. 18, 2018), https://www.theregreview.org/2018/09/18/levin-national-injunction-administrative-procedure-act/ (last accessed June 4, 2019); *see also* Nat'l Min. Ass'n v. U.S. Army Corps of Engineers, 145 F.3d 1399, 1409 (D.C. Cir. 1998) ("[I]f the [APA] plaintiff prevails, the result is that the rule is invalidated, not simply that the court forbids its application to a particular individual."); Harmon v. Thornburgh, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989) ("When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.").

[66]*See Updated Directive Regarding Applicability of the Wire Act, 18 U.S.C. § 1084, to Non-Sports Gambling,* U.S. Dept. Just. (June 12, 2019) (the "June 2019 Enforcement Directive").

[67]28 U.S.C. § 2107.

Pollard Banknote) under its current "new" theory of the Wire Act. Indeed, Judge Barbadoro specifically declined to enter an injunction restraining the government from taking adverse action against existing state lotteries. (In this regard, Judge Barbadoro stated that he had "no reason to believe that the Government will fail to respect my ruling that the Wire Act is limited to sports gambling."[68]) Although the Barbadoro Decision does not bind the DOJ as to any non-parties, if it were to challenge a gaming operator under the Wire Act, one would expect the operator (assuming compliance with the 2011 Opinion) to cite the Barbadoro Decision in support of its defense and legal position.

Upon filing the appeal, the June 2019 Enforcement Directive will remain in effect for 60 days after the litigation (including all appeals) is finally resolved.

In any event, there is no doubt that the Wire Act applies to businesses engaged in sports betting conducted or licensed by state governments. While the 2018 Opinion called into question whether intermediate routing could be the basis for a Wire Act violation, the Barbadoro Decision did not address it.

[68]Barbadoro Decision, *supra* note 40, at 21.