FIRST CIRCUIT OPINION AFFIRMS WIRE ACT'S SPORTS BETTING LIMITATION

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On January 20, the United States Court of Appeals for the First Circuit may have finally put to rest a two-year dispute between the federal government and the online gaming industry regarding the proper interpretation of the federal Wire Act, 18 U.S.C. § 1084. In its January decision in *New Hampshire Lottery Commission (NHLC) v. Rosen*,¹ the First Circuit affirmed a 2019 ruling by the United States District Court for the District of New Hampshire, which held that the Wire Act—which criminalizes certain transmissions in interstate commerce related to gambling—applies only to transmissions related to sports wagering, and not to other forms of betting or wagering, such as casino gambling, online poker, or lotteries. The First Circuit's decision disagreed with the opinion issued by the Department of Justice's (DOJ) Office of Legislative Counsel (OLC) in 2018 (and released by DOJ in 2019) which stated that the Wire Act applied not just to sports, but to all forms of wagering.² The 2018 OLC Opinion was a reversal from a 2011 opinion that it issued—in

response to a request from state lotteries seeking to make lottery products available over the internet—stating that the Wire Act's application was, in fact, limited solely to sports wagering.³ Prior to the *NHLC* decision, the only court of appeals to have addressed the decision was the Fifth Circuit in *In re MasterCard International Inc.*, which (prior to both OLC opinions), in the context of a private civil suit, likewise held that the Wire Act was confined to sports wagering.⁴

Although the *NHLC* case dealt directly with the New Hampshire Lottery Commission and its vendor Neo-Pollard's wishes to continue selling lottery tickets such as Powerball and Mega Millions over the internet, as it had been doing in the time following the 2011 OLC Opinion, the case drew the interest and amicus participation of many other state lottery commissions with online offerings, in addition to representatives of the online gambling industry advocating on behalf of gaming operators and their service providers. The case focused on the first provision of the Wire Act, which sets forth the following:

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, shall be fined under this title or imprisoned not more than two years, or both.⁵

As the First Circuit succinctly summarized, the case's key question was “whether the phrase ‘on any sporting event or contest’ (the ‘sports-gambling

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¹986 F.3d 38, 2021 WL 191771 (1st Cir. Jan. 20, 2021).

²See Reconsidering Whether the Wire Act Applies to Non-Sports Gambling (Nov. 2, 2018), available at <https://www.justice.gov/olc/file/1121531/download> (last visited Jan. 13, 2020) (“2018 OLC Opinion”).

³See 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, available at <https://www.justice.gov/sites/default/files/olc/opinions/2011/09/31/state-lotteries-opinion.pdf> (“2011 OLC Opinion”).

⁴313 F.3d 257, 262 n.20 (5th Cir. 2002). The First Circuit in *United States v. Lyons* had previously stated that the Wire Act only applied to wagers on sporting events or contest, 740 F.3d 702, 718 (1st Cir. 2014), but the trial court in the New Hampshire case found that the statement in *Lyons* was non-binding dicta and, therefore, did not rely on *Lyons* in its decision in *NHLC*, and instead reached its conclusion regarding the Wire Act's scope based on its own independent analysis. See *NHLC v. Barr*, 386 F. Supp. 3d 132, 147–48 (D.N.H. 2019) (“The court's additional statement that the Wire Act applied only to sports gambling played no role in its decision. Therefore, that statement is mere dictum, not a holding that binds lower courts. . . . Under these circumstances, I cannot defer to the circuit court's unconsidered dictum in *Lyons* without first undertaking my own independent analysis of the issue.”).

⁵18 U.S.C. § 1084(a) (emphasis added).

qualifier’) qualifies the term ‘bets or wagers’ as used throughout section 1084(a).”⁶ If the so-called “sports-gambling qualifier” applied throughout the Wire Act as found by the 2011 OLC Opinion—which the district court held and the First Circuit ultimately affirmed—then the Wire Act’s applicability would be limited to sports gambling. However, if the qualifier was limited in applicability to the first half of the statute’s language, then the Wire Act could be applied to all gambling activity, a position advocated by many advocates for the land-based casino industry and ultimately adopted by the DOJ in the 2018 OLC Opinion.

The results of the *NHLC* case have far-reaching consequences for the online gaming industry at large. As the First Circuit recognized, even though the *NHLC*’s activities may have appeared to be confined to New Hampshire, it relied on the interstate wires in a number of ways, including using out-of-state backup servers even for brick-and-mortar lottery sales. Additionally, although online lottery players need to be physically located in New Hampshire when purchasing tickets, the court recognized that “intermediate routing of data or information ancillary to the transaction may cross state lines.”⁷ These same concerns are what generated great interest in the case by the broader online gaming industry. This is because while operators—in compliance with state law and pursuant to state licenses—adhere to strict geolocation protocols to ensure players are located within state borders when playing, it remains more challenging to prevent online transmissions from incidentally passing through out-of-state servers. And in the example of online poker, where in-state poker operators require all bets to start and end within the confines of a single state, the reading of the Wire Act advocated by the 2018 OLC Opinion put at risk shared liquidity agreements between certain states that allowed players in multiple states—in which online poker was legal—to compete in games with one another.

In a 2–0 decision,⁸ the First Circuit found that although the text of the Wire Act was “not entirely clear,” it reasoned that the interpretation of the law advanced by the DOJ in 2018 OLC Opinion “would lead to odd and seemingly inexplicable results,” by applying one clause only to sports gambling but applying the other clause to all aspects of gambling.⁹ In other words, the court rejected the DOJ’s proposed reading of the statute that, if upheld, would have to mean that “either Congress outlawed lottery betting over the wires while simultaneously allowing lotteries to provide assistance over the wires in placing lottery bets, or Congress allowed lottery betting over the wires while outlawing use of the wires to tell the winner the results of his bet.”¹⁰ The court said such an interpretation would be an “oddly designed statute” and would lead to a “dubious result.”¹¹ In addition to questioning the DOJ’s reading of the Wire Act’s text, the First Circuit additionally found that the legislative history from when the Wire Act was first adopted in the 1960s “contains strong indications that Congress did indeed train its efforts solely on sports gambling.”¹²

In the end, based on what it described as the government’s “odd and unharmonious” attempted interpretation of the Wire Act in the 2018 OLC Opinion, the First Circuit agreed with the only other court of appeals to consider the question—the Fifth Circuit in *In re MasterCard*¹³—and affirmed the district court’s ruling that the Wire Act applies only to interstate transmissions of wire communications relating to sporting events or contests.¹⁴ The only component of the First Circuit’s decision that did not agree with the trial court is that it vacated the component of the trial court’s decision to “set aside” the 2018 OLC Opinion under the Administrative Procedures Act.¹⁵ However, the First Circuit agreed with the court in New Hampshire that the court’s declaratory judgment that the Wire Act applies only to sports gambling “binds the United States vis-à-vis NeoPollard and the [NHLC] everywhere the

⁶*NHLC*, 2021 WL 191771 at *1.

⁷*Id.* at *3.

⁸The third judge to hear argument in the appeal, Judge Juan Torruella, passed away following oral argument and, therefore, did not participate in the decision.

⁹*NHLC*, 2021 WL 191771 at *14.

¹⁰*Id.*

¹¹*Id.*

¹²*Id.*

¹³See *supra* note 4.

¹⁴*NHLC*, 2021 WL 191771 at *15.

¹⁵*Id.*

plaintiffs operate or would be otherwise subject to prosecution.”¹⁶ Because NeoPollard operates in several states, the clear implication is that the decision applies beyond New Hampshire.

Although the government is still within its window to ask the Supreme Court to grant certiorari regarding the *NHLC* decision—its 150-day window to do so¹⁷ will expire on approximately June 21—there are reasons to believe that the First Circuit’s decision will be the last word on the matter for the foreseeable future. Somewhat coincidentally, the First Circuit’s opinion was issued on January 20, which was Inauguration Day. This is important because the 2018 OLC Opinion represented an about-face by the Trump administration from the 2011 OLC Opinion, which was issued by the DOJ under then-President Obama. With President Biden now inaugurated, there is reason to believe that the DOJ’s new leadership will favor the same reading of the Wire Act that prevailed in the 2011 OLC Opinion, which has been effectively restored by the First

Circuit’s decision in *NHLC*. Therefore, although nothing is assured, the online gaming industry has significant cause to be optimistic that the government will not challenge the First Circuit’s ruling that the Wire Act is confined to sports wagering. And in any case, even in the unexpected event that the government were to seek certiorari, it is also likely that the Supreme Court would not agree to hear the case given that there is no circuit split, as the only two appeals courts to have decided the issue (the First Circuit, in *NHLC*, and the Fifth Circuit, in *In re MasterCard*) are in agreement that the Wire Act is limited to sports wagering.

Either way, the legal landscape is as clear as it ever has been that the Wire Act is limited in applicability to sports wagering, which should be a development welcomed by online gaming operators who, in light of the almost certainly now-failed attempt to broaden the law’s scope— and despite operating legally and under state-approved licenses—have been looking over their shoulders at the DOJ.

¹⁶*Id.* (quoting *NHLC v. Barr*, 386 F. Supp. 3d 132, 158 (D.N.H. 2019)) (alteration in original).

¹⁷The Supreme Court issued a blanket order in 2020 extending the normal 90-day time period to 150 days, in light of the COVID-19 pandemic.