

ALERT

# First Circuit Says Wire Act Is Limited to Sports Wagering

January 27, 2021

**WHAT:** According to the U.S. Court of Appeals for the First Circuit (First Circuit), the Federal Wire Act's criminal prohibitions are limited to sports wagering activity only.

**WHEN:** On January 20, 2020, in *New Hampshire Lottery Commission v. Rosen*, No. 19-1835, 2021 WL 191771 (1st Cir. Jan. 20, 2021), the First Circuit disagreed with the U.S. Department of Justice (DOJ) Office of Legal Counsel's (OLC) most recent interpretation of the Wire Act and declared that the Wire Act does not apply to non-sports wagering.

**WHAT DOES IT MEAN FOR THE INDUSTRY:** The First Circuit's decision comes on the heels of years of uncertainty surrounding the scope of the Wire Act and means that state lotteries and online gambling companies in Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island can offer non-sports wagering (e.g. casino-style games) on the internet without fear of facing criminal liability under the Wire Act. State lotteries and online gambling companies in other states may also take heart in this decision as it lays the groundwork for similar decisions in other jurisdictions.

Last week, in *New Hampshire Lottery Commission v. Rosen*, No. 19-1835, 2021 WL 191771 (1st Cir. Jan. 20, 2021), the First Circuit announced that, contrary to a 2018 DOJ OLC opinion, the Wire Act is limited to sports wagering only. After nearly twenty years of conflicting opinions on the scope of the Wire Act's application, the First Circuit's decision provides greater clarity for states that rely on lottery profits to fund critical state programs.

## Authors

Holly Wilson  
Associate  
202.719.4628  
hwilson@wiley.law

## Practice Areas

White Collar Defense & Government  
Investigations

### ***The Wire Act & the DOJ's Shifting Application***

The Wire Act, 18 U.S.C § 1084, was enacted in 1961 as part of then-Attorney General Robert F. Kennedy's campaign against organized crime.[1] Section 1084(a) specifies what conduct the Wire Act criminalizes. Its language has been dissected into two prohibition clauses. It reads:

[Clause 1] 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***, [Clause 2] 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.[2]

By the early 2000s, the scope of Section 1084(a) was unclear. Did the Wire Act prohibit all interstate "bets or wagers" or sports wagering only? The DOJ and courts reached conflicting conclusions.

- In 2002, the DOJ signaled that it believed the Wire Act criminalized all interstate "bets or wagers" – not just "bets or wagers on any sporting event or contest." [3] In a letter to the Nevada Gaming Control Board, the DOJ said that "the Department of Justice believes that federal law prohibits gambling over the Internet, including casino-style games." [4]
- Three months later, the U.S. Court of Appeals for the Fifth Circuit reached the opposite conclusion. It opined in a private civil suit that "[a] plain reading of the statutory language [of the Wire Act] clearly requires that the object of the gambling be a sporting event or contest." [5]
- In 2005, the DOJ reiterated its understanding of the Wire Act by warning the Illinois Lottery that the purchase of lottery tickets over the internet was illegal. [6]
- In 2007, the DOJ tripled down. In a hearing before the House Judiciary Committee, then-U.S. Attorney for the Eastern District of Missouri Catherine Hanaway stated: "It is the Department's view, and that of at least one federal court (the E.D. Mo.), that [the Wire Act] applies to both sporting events and other forms of gambling." [7]

In 2011, after being asked by the New York and Illinois lotteries to clarify the scope of Section 1084(a), the DOJ OLC reversed its prior position and issued an opinion (2011 OLC Opinion) concluding that the Wire Act applied to sports wagering only. [8] To reach this conclusion, the DOJ OLC determined that the phrase "on any sporting event or contest" modified the "bets or wagers" in Section 1084(a)'s first and second clauses. [9] The DOJ OLC concluded that this interpretation best comported with the "natural" and "logical" reading of the statute and provided for a cohesive legislative scheme supported by the Wire Act's legislative history. [10]

Seven years passed with no issue, but in 2018, the DOJ changed tack again. The DOJ OLC opined (2018 OLC Opinion) that the Wire Act was not limited to sport's wagering and, instead, broadly criminalized all interstate "bets or wagers." [11]

### **The First Circuit's decision in *New Hampshire Lottery Commission v. Rosen*, No. 19-1835 (1st Cir. 2021)**

Last week, in *New Hampshire Lottery Commission v. Rosen*, No. 19-1835, 2021 WL 191771 (1st Cir. Jan. 20, 2021), the First Circuit provided clarity to state lotteries and other online gambling companies by holding that the Wire Act is limited to sports wagering.

After the DOJ released the 2018 OLC Opinion, in February 2019, the New Hampshire Lottery Commission and one of its vendors, NeoPollard, (together, "Plaintiffs") – "[n]ot eager to scrap or shrink [the New Hampshire] lottery" – sued the U.S. Government in the U.S. District Court for the District of New Hampshire under the Administrative Procedure Act and Declaratory Judgment Act seeking to overturn the DOJ's interpretation of the scope of the Wire Act.[12] Plaintiffs argued that the text of Section 1084(a) plainly limited the Wire Act to sports wagering and that state lotteries were therefore not subject to Wire Act liability. The Government argued the opposite, consistent with the 2018 OLC Opinion. The district court sided with the Plaintiffs, and the Government appealed. The same arguments were advanced on appeal.

The First Circuit affirmed the district court and held that the Wire Act is harmonized when the qualifier "on any sporting event or contest" is read to apply to all references to "bets or wagers." [13] With this in mind, under Section 1084(a), "[y]ou cannot use the wires to place a bet or wager on a sporting event, and you cannot use the wires to send information assisting in placing that bet or wager." [14] The court determined that reading the Wire Act differently, as the Government argued, "would lead to odd and seemingly inexplicable results." [15] The legislative history behind the Wire Act also bolstered the court's reading of Section 1084(a). [16] Accordingly, the First Circuit affirmed the district court's declaration that the Wire Act is limited to sports wagering. [17]

### **Implications for State Lotteries and Other E-Gaming Companies**

State lotteries – especially those in Maine, Massachusetts, New Hampshire, Puerto Rico and Rhode Island – can take comfort in the First Circuit's decision. Under the First Circuit's interpretation, state lotteries not engaged in sports wagering are not subject to criminal liability under the Wire Act. Because many states rely on lottery profits to fund critical state programs, the First Circuit's decision removes uncertainty for states in the process of building the next year's fiscal budget. The First Circuit acknowledged this fact, pointing out that many states "rely on substantial profits earned from lotteries that operate like New Hampshire's" and specifically noting that "[t]he Michigan Bureau of State Lottery along with forty-six other government-operated lotteries collectively generated more than eighty billion dollars in gross revenues in 2017, which went to fund a myriad of state programs." [18]

Similarly, online wagering companies not involved in the business of sports wagering can breathe a sigh of relief. They, like state lotteries, are safe from the Wire Act's reach.

The decision is less impactful for online sports wagering companies, though still significant. Online sports wagering companies have always, and continue to be, subject to the Wire Act's prohibitions under Section 1084(a). Nevertheless, the decision, in providing certainty to state lotteries, may help speed online sports wagering companies' state licensure process.

Whether the First Circuit opinion will prompt the incoming Biden Administration to revisit the 2018 DOJ OLC opinion remains to be seen, particularly as there might be other litigation that may ensue in other federal circuits. Wiley is well-versed in these developments, and can counsel clients regarding Wire Act compliance and other gaming compliance issues.

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[1] See 18 U.S.C. § 1084 (codifying Pub. L. No. 87-216, § 2, 75 Stat. 491, 491 (1961)).

[2] *Id.* § 1084(a).

[3] *Id.*

[4] *Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, slip op. at \*5 n.7, 2018 WL 7080165, at \*3 n.7 (Nov. 2, 2018), <https://www.justice.gov/olc/file/1121531/download> (quoting Letter for Dennis K. Neilander, Chairman, Nevada Gaming Control Board, from Michael Chertoff, Acting Assistant Attorney General, Criminal Division (Aug. 23, 2002)).

[5] *In re MasterCard Int'l Inc.*, 313 F.3d 257, 262 n.20 (5th Cir. 2002) (second alteration in original) (quoting *In re MasterCard Int'l Inc., Internet Gambling Litig.*, 132 F. Supp. 2d 468, 480 (E.D. La. 2001)).

[6] *Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, slip op. at \*5 n.7, 2018 WL 7080165, at \*3 n.7 (Nov. 2, 2018) (citing Letter for Carolyn Adams, Superintendent, Illinois Lottery, from Laura H. Parsky, Deputy Assistant Attorney General, Criminal Division (May 13, 2005)).

[7] *Establishing Consistent Enforcement Policies in the Context of Online Wagers: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 14 (2007) (statement of the Honorable Catherine Hanaway, U.S. Attorney for the E.D. Mo.).

[8] *Whether the Wire Act Applies to Non-Sports Gambling*, 35 Op. O.L.C. 134, 151 (2011), <https://www.justice.gov/olc/file/op-olc-v035/download>.

[9] *Id.* at 140.

[10] *Id.*

[11] *Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, slip op. at \*11-\*14, \*23, 2018 WL 7080165, at \*6-\*9, \*14 (Nov. 2, 2018), <https://www.justice.gov/olc/file/1121531/download>.

[12] *New Hampshire Lottery Comm'n v. Rosen*, No. 19-1835, 2021 WL 191771, at \*1 (1st Cir. Jan. 20, 2021).

[13] *Id.* at \*12.

[14] *Id.*

[15] *Id.* at \*14

[16] *Id.*

[17] *Id.* at \*15.

[18] *Id.* at \*3 n.4.