

UNIVERSITIES & SPORTS BETTING

ALERT

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The Impact of the January 2019 DOJ Memorandum In Light of *Murphy v. NCAA*

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The federal rules for sports betting have been radically changed and then left in disarray. First, the Supreme Court's *Murphy* decision in May 2018 ceded regulation of sports gambling to the individual states. Then, the Department of Justice's ("DOJ") memorandum opinion in January 2019 prohibited any form of interstate gambling that uses a wire communication, expanding the reach of the Wire Act beyond sports-related gambling. Pending legal challenges to the DOJ opinion now further muddy the waters. How are universities, businesses, and other organizations to best navigate in this turbulent legal environment?

Background

On January 14, 2019, the DOJ's Office of Legal Counsel ("OLC") released a memorandum opinion regarding the applicability of the Wire Act, 18 U.S.C. § 1084, to non-sports betting. Under that opinion, DOJ interpreted the Wire Act to apply to any form of gambling that (1) uses a wire communication and (2) crosses state lines. The opinion is an about-face from the OLC's previous opinion issued in 2011, which limited application of the Wire Act to sports-related gambling. In contrast, the 2019 opinion significantly expands the reach of the Wire Act beyond the realm of sports wagering, and calls into question the legality of online casinos, internet lotteries, and other internet and wire-based gambling activities that cross state lines. In response to the 2019 OLC memorandum, the New Hampshire Lottery Commission ("NHLC") has filed suit against DOJ in federal court in an effort to prevent DOJ from enforcing the Wire Act against internet and wire-based lotteries.

The OLC memorandum is particularly surprising in light of the previous trend by both DOJ and the courts toward easing restrictions on gambling. By advising prosecutors that the Wire Act was limited to sports-related gambling, the 2011 OLC memorandum essentially left regulation of intrastate online casinos, internet lotteries, and other internet and wire-based gambling activities (that are not related to sports-gambling) to the individual states. In reliance on that opinion, a number of states, including Pennsylvania, Delaware, and New Jersey enacted legislation aimed at legalizing internet and other wire-based gambling. Although some district courts have held to the contrary, the 2011 OLC opinion is in line with decisions by the First and Fifth Circuit Courts of Appeals limiting the proscriptions of the Wire Act to bets and wagers placed on sporting events and contests (*U.S. v. Lyons* and *In Re: MasterCard International Inc. Internet Gambling Litigation*, respectively).

The Supreme Court continued this trend toward less restrictive regulations in its May 14, 2018 decision in *Murphy v. National Collegiate Athletic Association*. *Murphy* opened the door for individual states to legalize sports gambling by holding that the Professional and Amateur Sports Protection Act ("PASPA") violated the 10th Amendment which reserves to the states powers not delegated by the Constitution to the federal government. The Supreme Court held that PASPA, which was enacted in 1992, improperly commandeered power from the states to regulate their own gambling industries, by making it unlawful for a state to "sponsor, operate, advertise, or promote, betting on competitive sports events." As a direct

result of the *Murphy* decision, numerous states introduced legislation to legalize sports gambling.

Impact of 2019 OLC Memorandum

In stark contrast to the 2011 opinion and the decisions by the First and Fifth Circuits, the 2019 OLC memorandum reverts back to the DOJ's pre-2011 position – that the Wire Act's prohibitions include all manner of gambling, and are not limited exclusively to sports betting. Under this revised guidance, a gambling business is prohibited from knowingly using a wire communication facility to: (1) transmit bets or wagers; (2) transmit information assisting in the placing of bets or wagers on any sporting event or contest; (3) receive money or credit as a result of bets or wagers; or (4) receive money or credit for information assisting in the placing of bets or wagers – where such communication is transmitted in interstate or foreign commerce.

Under the recent memorandum, only the second provision – the prohibition against “transmitting information assisting in the placing of bets or wagers on any sporting event or contest” – is limited to sports-related gambling. The remaining activities criminalized by the Wire Act apply equally to all types of gambling.

On January 15, 2019, Deputy Attorney General Rod J. Rosenstein, recognizing that many gambling businesses have likely fashioned their operations to comport with the 2011 OLC opinion, issued a memorandum that provides a 90-day grace period to allow businesses that have operated in reliance on OLC's 2011 opinion to modify their operations before prosecutors began expanded enforcement of the Wire Act. In April, DOJ subsequently issued guidance that directed prosecutors to further refrain from enforcement of the Wire Act against online and internet gambling activities until June 14, 2019, pending consideration of the issues raised in the New Hampshire Lottery Commission's lawsuit. The lawsuit has been joined by several states including Pennsylvania, New Jersey, and Michigan. At the same time, DOJ has moved to dismiss the suit, alleging that the NHLC lacks standing because the Wire Act does not apply to the activities of state lotteries or their vendors. The outcome of this litigation will likely not be clear until later this year.

Considerations for Affected Organizations

The 2019 OLC memorandum raises a host of potential issues for businesses engaged in and universities and other organizations impacted by sports gambling operations. At this point, universities in Pennsylvania should continue to plan for the impact of sports betting, both online and on-site in casinos in the state. Betting is likely to carry on within the Commonwealth for state-regulated operations, at least until the dust settles from the January memorandum. Although the four points below indicate potential complications for the roll out of sports betting in Pennsylvania, it is unlikely that the state-based industry will be completely thwarted.

Here are four areas of possible complications and fallout from the January OLC memorandum:

First, despite the Supreme Court's decision in *Murphy* to strike down PASPA and the resulting expansion of intrastate sports gambling operations, the Wire Act nonetheless continues to prohibit sports gambling operations that operate interstate, or between a state and a foreign country. The crux of the 2019 opinion is that this proscription has now been expanded to include non-sports gambling. This point by itself should not stop state-regulated in-state sports betting in Pennsylvania.

Second, although the *Murphy* decision included a discussion of a “safe harbor” provision under the Wire Act for “information assisting in the placing of bets or wagers” where such information (as opposed to actual bets or wagers) is sent from a state in which sports gambling is legal to another state or foreign country that has also legalized sports gambling, such a “safe harbor” does not protect non-sports related gambling. Furthermore, it is unclear how the safe harbor language squares with the plain-language of the Wire Act, which prohibits interstate transmission of such information, regardless of whether the state from which the information was sent, or the state in which it is received, deems such activity to be legal. Although this point may complicate the operations of sports betting businesses licensed in Pennsylvania, the ultimate impact on bettors may be minimal.

Third, it is also uncertain what, if any, impact the Wire Act will have on the transmission of intrastate sports

bets or wagers, where the electronic information may be temporarily routed outside of that state, in what's known as "intermediate routing." Gambling businesses cannot assume that their operations will not run afoul of the Wire Act simply because the person placing the bet and the business processing the bet are located in the same state. Similar to the prior point, this factor may have more impact on behind-the-scenes business operations than on bettors.

Fourth, the OLC's revised memorandum opinion will undoubtedly cause banks and payment processors that are an essential component of many online sports-betting operations to tread carefully when considering their involvement in such operations. Universities involved with banks in credit card agreements for students may want to pay special attention to this point. In addition, this issue could create more direct problems for bettors, if they are eventually forced to use cash in person for gambling transactions.

Conclusion

The *Murphy* decision opened up a plethora of opportunities and challenges for universities related to sports gambling. In the end, whether, and to what extent the 2019 OLC opinion affects sports betting businesses, and in turn, how that impacts universities, their employees, student-athletes, and student bodies-at-large, remains to be seen. ♦

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