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Where Sports Bet Ruling Meets Federal Gambling Laws

By **Scott Rader and Kelly Frey** (June 12, 2018, 12:49 PM EDT)

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The U.S. Supreme Court's decision in Murphy v. National Collegiate Athletic Association[1] paves the way for sports betting to become lawful in many jurisdictions. The Supreme Court held in Murphy that it violated the anti-commandeering rule for Congress to prohibit states from authorizing sports gambling, and that the Professional and Amateur Sports Protection Act was unconstitutional because it regulated sports gambling in this way.[2]

At the same time, however, the Supreme Court's decision in Murphy reaffirmed that the federal government can regulate sports gambling by imposing gambling restrictions directly on private actors (rather than by imposing prohibitions directed to the states).[3] The Supreme Court also referenced several federal gambling laws that directly criminalize different types of gambling activities and have been used by federal law enforcement agencies as tools for prosecuting individuals and businesses.[4]

This backdrop presents a complex dilemma for modern sports gambling enterprises seeking to enter new markets where sports betting will soon become legal under state law. While each state is now free to enact new laws legalizing sports betting within its borders, the Supreme Court's decision in Murphy does not displace the framework of federal gambling laws that remain binding on private actors.

This analysis explores how these federal gambling laws interact with and are likely to be affected by changes in state gambling laws arising out of the Murphy decision. This analysis also explains why the utility of the federal gambling laws as a federal law enforcement tool is likely to be significantly tested as a result of these new state law developments.

Wire Act

Congress passed the Wire Act in the mid-20th century as an integral part of U.S. Attorney General Robert Kennedy's comprehensive efforts to combat organized crime.[5] At the time, organized crime syndicates often used illegal gambling operations to generate revenue for their criminal operations, and Congress passed the Wire Act to combat that illegal gambling activity.

Despite the Wire Act's intended purpose to combat organized crime, its effect has been far broader. The Wire Act makes it unlawful for anyone in the business of betting or wagering to use an interstate or foreign wire to transfer bets or information assisting in the placing of bets, and no nexus to organized crime is required.[6] The Wire Act therefore has constituted a significant source of exposure for modern gambling enterprises and law enforcement agencies have frequently used it to prosecute gambling crimes.

The Wire Act contains a safe harbor, however, which immunizes from criminal liability any transmission of "information assisting in the placing of bets or wagers on a sporting event or contest" when the transmission is "from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal."[7] The Wire Act's safe harbor acts as an affirmative defense for anyone who transmits information to facilitate sports betting when the transmission is both from and to a state where the betting activity is legal.[8]

The continued viability of the Wire Act as a premier law enforcement tool to combat sports gambling faces significant challenges in light of state legislative developments arising out of the Murphy decision. Now that states are no longer restrained by PASPA's prohibition against authorizing sports betting, the Wire Act's

safe harbor will become more available to those in the business of betting and wagering, with several important questions needing to be answered.

First, questions relating to a particular state's legislative actions need to be examined. For example, which proposed state gambling laws will render sports betting as "legal" for purposes of the Wire Act's safe harbor provision? And does betting on a sporting event need to be legal anywhere in a state for the safe harbor to apply (for example, in at least one casino or authorized sports betting venue), or does it need to be legal everywhere (for example, via a state law permitting sports betting on remote/mobile devices)? These questions are now critical for gambling enterprises seeking to enter new state markets because federal law enforcers have contended that the safe harbor only applies where a state's laws expressly permit the type of betting activity for which a gambling operator has been charged.[9]

These questions are particularly complex because as states open their doors to sports gambling enterprises, each state will adopt its own unique statutory and regulatory framework to authorize and limit specific betting activities within its borders. Consequently, gambling enterprises in each state will present a host of novel arguments for why that state's gambling laws expressly authorize specific betting activities triggering the safe harbor defense. In addition, when sports betting activities involve wire transmissions from and to multiple states, federal courts will need to interpret the laws of each state where the wire transmission was sent or received, potentially without guidance from the state's highest court.[10] This intricate overlay of state gambling law provides fertile ground for gambling enterprises to raise myriad new arguments with respect to the safe harbor provision under the Wire Act.

Second, as more states legalize sports betting, it will become necessary to determine how to draw the boundary between wires transmitting "bets" versus wires "transmitting information assisting in the placements of bets." This distinction is critical because the Wire Act's safe harbor provision "only applies to the transmission of information assisting in the placing of bets [and] ... does not exempt from liability the interstate transmission of the bets themselves."[11] In this regard, federal courts have articulated a general rule that the term "bets" includes "transmissions constituting an individual gambling transaction" but not the "transmission of information that merely assists a potential bettor or bookmaker" such as game odds, game results, or the identities of persons seeking to place bets.[12] To date, federal courts have had limited opportunities to refine their definition of "bets."[13]

However, as more sports gambling operators and participants become eligible to use the safe harbor defense, they undoubtedly will raise novel arguments for why specific forms of wire transmissions constitute mere "information" rather than actual "bets." And this trend will be further amplified as sports wagers and information are exchanged with greater frequency via mobile apps and other means of electronic communication. Sports gambling operators also might seek to modify their business models to fit within the plain language of the Wire Act. For example, instead of a "place bet" button on a mobile app, the button might say "pass this bet information along to our in-state agents" and the in-state agents might then place the bets themselves based on the "information" passed along to them. Because of these types of possibilities, a workable definition of "bets" will need to be developed that accounts for the nuances of state gambling laws and emerging sports betting technologies, including developments relating to in-game betting. The distinction between the transmission of bets versus information is likely to become increasingly nuanced and significant.

Third, the scope of the Wire Act's interstate commerce requirement and what it means for a wire transmission to pass "from" and "to" a state will need to be addressed. Historically, federal courts have interpreted the interstate commerce requirement broadly, citing the Wire Act's intended purpose "to assist the various States … in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and to aid in the suppression of organized gambling activities."[14] For example, courts have found wire transmissions to be "interstate" even when they are sent and received by persons within the same state, but pass through the wires of another state during transit.[15] Under this expansive rule, "the intermediate crossing of a State line provides enough of a peg of interstate commerce to serve as a resting place for the congressional hat" where doing so would further the underlying congressional goal of enforcing state gambling laws.[16] But for purposes of falling within the safe harbor, the legality of the betting activity in the origin and destination of the betting are the relevant locales under the plain language of the safe harbor.

In a future where state-authorized sports betting is commonplace, federal prosecutors will face more challenges in bringing Wire Act charges than they ever did before. Their ability to continue to use the Wire Act in situations far removed from the organized crime context could become significantly more difficult, because the emergent changes in state gambling laws will expand the scope of the Wire Act's safe harbor.[17]

Illegal Gambling Business Act

The Illegal Gambling Business Act is another source of federal criminal exposure for those engaged in gambling activities. Congress passed this act as part of the broader Organized Crime Control Act, and, like the Wire Act, the IGBA's primary goal was to combat illegal gambling syndicates operated by organized crime members.

The IGBA makes it a crime for a person to conduct, finance or manage an illegal gambling business. An "illegal gambling business" is defined as a gambling business that involves five or more people, has either operated for over thirty days or has $2,000 in gross revenue in a single day, and is a violation of the law of a state in which it is conducted.[18] Similar to the Wire Act, the IGBA has been used by federal law enforcement agencies to prosecute gambling operations with no nexus to organized crime because, notwithstanding its original purpose, its language does not require this connection.

To the extent a particular state authorizes sports betting activities, a gambling operation that exists in compliance with that state's laws would not constitute an "illegal gambling business" under the IGBA. As more states now seek to legalize sports gambling, there may be significant room for those involved in sports betting activities to argue that their operations are legal under a particular state's laws and therefore cannot give rise to an IGBA violation. This could reduce the effectiveness of IGBA as a federal law enforcement mechanism, because the ability to prosecute an IGBA violation is dependent on a state's treatment of the activity in question.

In addition, questions may arise as to whether certain individuals can be counted towards the IGBA's "five or more persons" requirement. Federal courts traditionally have interpreted this requirement broadly.[19] For instance, courts have counted individuals toward the five or more persons requirement even where such individuals are unindicted and unnamed,[20] do not know that the alleged gambling business consists of four or more other participants,[21] and do not possess any actual control over the gambling business.[22] However, courts have excluded individuals from the "five or more persons" requirement where they have not contributed to a business's illegal gambling activity, and instead, merely contributed to other legitimate operations carried out by that same business.[23] To the extent a gambling business exists in several states and one member is only involved in the business in a state where the activities are lawful, interesting arguments could emerge as to whether that person could be counted as one of the five members of the illegal gambling business to permit an IGBA prosecution in another state where the business is conducted (especially if that person lacks knowledge that the business is being conducted in another state).

Unlawful Internet Gambling Enforcement Act

Federal prosecutors have also turned to the Unlawful Internet Gambling Enforcement Act to combat illegal sports gambling. Unlike the Wire Act and the IGBA — which were principally developed to curtail organized crime — the UIGEA was developed as a new mechanism for enforcing gambling laws where betting activity is conducted on the internet. To accomplish that goal, the UIGEA's key provisions make it a criminal offense 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."[24]

The UIGEA excludes from its definition of "unlawful internet gambling" instances where "the bet or wager is initiated and received … within a single State," and instances where a bet is properly made in accordance with the laws of the state where the bet is initiated and received.[25] The UIGEA does not apply to situations where bets are initiated and received within states where sports betting is legal, regardless of whether those bets pass through another state during transmission. Therefore, the UIGEA will also be affected by states' decisions to legalize sports gambling, because those legalizations will reduce the scope of the UIGEA.

Future prosecutions under the UIGEA will likely place increased emphasis on the question of where such charges may be brought. Although the UIGEA makes it a crime for gambling operators to accept bets from individuals located in any state where sports betting is illegal, at least one federal court has previously found that prosecutors should pursue UIGEA charges in the state where the gambling operator itself is located.[26] That is important for sports betting operators, as it could ensure that they have a "home field advantage" when defending UIGEA charges. And in future years, this advantage could become even more meaningful, as operators in states with legalized sports betting may pull judges and jurors who are more sympathetic to sports gambling operators.

Conclusion

In the immediate future, gambling enterprises will enjoy newfound opportunities to extend their sports betting operations into states that previously could not authorize sports gambling. But with that opportunity comes a need to carefully navigate a framework of federal gambling laws that were never intended to apply to a world where state-authorized sports betting is commonplace. The viability of these federal laws as a relevant tool will unquestionably be affected — and likely diminished — as states increasingly permit sports betting.

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[1] No. 16-476, 2018 U.S. LEXIS 2805 (U.S. May 14, 2018).

[2] Id. at *29.

[3] Id. at *46.

[4] Id. at *43.

[5] Letter from Attorney General Robert F. Kennedy to Speaker of the House of Representatives, April 6, 1961, 2 U.S. Code & Congr. News, 87th Congr., 1st Sess., pp. 2631, 2633.

[6] 18 U.S.C. §1084(a).

[7] 18 U.S.C. §1084(b).

[8] U.S. v. Eremian, 2012 U.S. Dist. LEXIS 63215, *12 (D. Mass. May 4, 2012) ("Because Congress created an exception to criminal liability under the Wire Act in 18 U.S.C. §1084(b), this safe harbor provision constitutes an affirmative defense").

[9] See U.S. v. Bala, 489 F.3d 334, 341-342 (8th Cir. 2007); see also U.S. v. Cohen, 260 F.3d 68, 74 (2d Cir. 2001) (finding that provision in New York's constitution prohibiting sports betting provided sufficient basis to render sports betting as illegal under New York law).

[10] See Conn. Performing Arts Found., Inc. v. Brown, 801 F.2d 566, 568 (2nd Cir. 1986) (recognizing that where Connecticut Supreme Court denied a certified question presented by the Second Circuit, the federal court was left on its own to interpret a "question of state law portending serious consequences for a significant cultural institution in the State of Connecticut").

[11] See U.S. v. Lyons, 740 F.3d 702, 713 (1st. Cir. 2014).

[12] See U.S. v. Ross, 1999 U.S. Dist. LEXIS 22351, *11-12 (S.D.N.Y. Sept. 20, 1999).

[13] See id, at *11-12 (S.D.N.Y. Sept. 20, 1999) (observing that the "federal courts have not previously addressed this question in the context of a defendant claiming the [safe harbor] exemption").

[14] Letter from Attorney General Robert F. Kennedy to Speaker of the House of Representatives, April 6, 1961, 2 U.S. Code & Congr. News, 87th Congr., 1st Sess., pp. 2631, 2633; see also U.S. v. Yaquinta, 204 F. Supp. 276, 279 (N.D.W.V. 1962).

[15] See Yaquinta, 204 F. Supp. at 278-279 (denying motion to dismiss of defendants that, at all relevant times, were both located within West Virginia because defendants' wire communications were routed through Ohio during transit).

[16] Id. at 278.

[17] See U.S. v. Kelley, 254 F. Supp. 9, 15 (S.D.N.Y. 1966) (stating that the "substantive evil sought to be curtailed" by the Wire Act "is the use of a federally controlled means of communication to violate state penal statutes").

[18] See 185 U.S.C. §1955(b)(1)(i)-(iii).

[19] U.S. v. Reeder, 614 F.2d 1179, 1182 (8th Cir. 1980) ("The scope of section 1955 is broad and excludes only customers of the business").

[20] U.S. v. Bourg, 598 F.2d 445, 448 (5th Cir. 1979).

[21] U.S. v. Schaefer, 510 F.2d 1307, 1311 (8th Cir. 1975).

[22] U.S. v. Bennett, 563 F.2d 879, 882 (8th Cir. 1977).

[23] See U.S. v. Murray, 928 F.2d 1242, 1249 (1st Cir. 1991) ("We do not state that a bartender or waitress may not be a participant in a gambling business. Rather, we conclude that … insufficient evidence was presented to show that [defendant bartender and waitress] were participants in the Willow Bar barstool gambling operation"); but see U.S. v. Tucker, 638 F.2d 1292, 1296 (5th Cir. 1981) (waitresses who "serve drinks to gamblers, make change for them to use in placing bets in a cash game, and delivered phone messages to them" were held to be an integral part of the gambling business so as to be included within the IGBA's "five or more persons" requirement).

[24] See 31 U.S.C. §5362(10)(A).

[25] See 31 U.S.C. §§5362(10)(B)(i)-(ii).

[26] See U.S. v. Ayo, 801 F. Supp. 2d 1323, 1329-1330 (S.D. Ala. 2011) (granting defendant's motion to transfer case from Alabama federal court to Louisiana federal court where defendant sports gambling operator located in Louisiana allegedly received bets from individual located in Alabama).
