

## The First Circuit Rules that the Wire Act Applies to Sports Betting Only

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We have analyzed the Federal Wire Act on several occasions, and have noted that it is one of the greatest impediments to the expansion of legalized interstate sports wagering. The Wire Act, an archaic statute signed into law in the 1960s by President Kennedy, was specifically designed to clamp down on organized crime. The statute specifically states:

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.

Accordingly, the Wire Act has been a hurdle as many bets or wagers are processed or placed via a wire communication facility (i.e., through the internet). Much, however, has changed since the 1960s. Along with the invention of the internet, and the Supreme Court's decision in *Murphy*, legalized sports wagering has exploded with dozens of states enacting legislation. Many sports books in those states have received hundreds of millions of dollars in wagers, and have paid millions more in the form of tax revenue. Of course, state budgets hampered by the pandemic needed this additional tax revenue. Moreover, some states realized that the convenience of mobile wagering contributed towards more wagering volume, and have since expanded rules and regulations surrounding online wagering. However, the Wire Act has remained an obstacle, and will continue to be one until Congress addresses this outmoded law. Recently, the First Circuit Court of Appeals ruled in *New Hampshire Lottery Commission v. Rosen* that the Federal Wire Act is to be narrowly applied to bets or wagers that on any sporting event or contest", and that its provisions do not apply broadly to other forms of wagering. While a boon for other forms of wagering, the

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ruling reinforces the Wire Act's broad impact on the legalized sports wagering marketplace.

The genesis of the First Circuit's ruling was a reversal of guidance issued by the DOJ in 2011. In 2011, the DOJ opined that the Wire Act was designed to prohibit transmissions of wire communications relating to sports. Indeed, the DOJ adopted its reasoning from the Fifth Circuit Court of Appeals, which held in dicta the Wire Act required that the "object of the gambling be a sporting event or contest." But the DOJ revisited its interpretation of the Wire Act in 2018, and published new guidance which stated that the Wire Act prohibited all forms of interstate wagering, and was not solely related to sports wagering. The DOJ supported its reversal by claiming that the 2011 DOJ opinion did not devote enough time to statutory construction. If implemented, the DOJ's position would have had a significant impact on state run lotteries, which had begun selling various forms of lottery tickets online since 2011. Moreover, the DOJ's position would have had a significant impact on iGaming, and other forms of interstate wagering.

In a blow to the DOJ's 2018 interpretation of the Wire Act, the First Circuit held in a 49-page opinion that the statute only applies to sports bets or wagers. Indeed, the First Circuit noted that the DOJ's interpretation and statutory argument was a "curious reach." The First Circuit held that a natural reading of the text, along with the legislative history, leads to the conclusion that the Wire Act applies solely to sports wagers. The First Circuit's opinion, which was released on January 20, 2021, is unlikely to be appealed by the current Biden administration.

The First Circuit's recent ruling confirms that the Wire Act will remain an obstacle to interstate sports legalization, but that other forms of interstate wagering may be acceptable. Ultimately, Congress will need to act in order to modernize an antiquated law that is in need of repair.

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