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Examining the Legality of Online Gaming

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Special to the Legal

Is internet gambling legal? The answer depends upon who you are, who you ask and, possibly, where it is conducted.

Existing law provides little clarity as it was adopted prior to the advent of the internet and, therefore, fails to directly address the topic. The one federal statute enacted in the internet era does not to define what constitutes lawful internet gambling. The sparse case law that exists provides little guidance.

What is clear is that internet gaming is big business, generating approximately \$6 billion in revenues from the United States and over \$30 billion worldwide. According to the American Gaming Association, there are over 2,000 internet websites offering a myriad of wagering options, including sports betting and casino-style games.

The principal federal law cited in this area is the 1960s era Wire Act (18 U.S.C. §1084). Based on that statute, the Department of Justice has taken the position that internet gambling in any form is illegal in the United States. In an August 23, 2002 letter to the Chairman of the Nevada Gaming Control Board, Assistant Attorney General Michael Chertoff stated the position of the Department of Justice is that federal law



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prohibits gambling over the internet, including casino-style gambling. No analysis or rationale for this position was offered. Notwithstanding this position, three years earlier, Assistant Attorney General Jon Jennings suggested to Sen. Patrick Leahy, Chairman of the Senate Judiciary Committee, that the Wire Act was unclear and should be expanded to include all forms of betting and wagering, not only betting and wagering on sports events.

Recent case law is muddled. In *In re: Master Card International, Inc.*, 313 F.3d 257 (5th Cir. 2002), the Court of Appeals for the Fifth Circuit held that only internet sports betting is illegal under federal law and not other forms of internet gambling. The District

Court of Utah, in *United States v. Lombardo*, 639 F.Supp.2d 1271 (D.Utah 2007), disagreed, holding that federal law prohibits all games of chance, including casino-type gambling.

Congress too has been less than clear. In 2006, Congress enacted legislation placing the onus on payment processors, such as credit card companies and banks, to block restricted transactions involving unlawful internet gambling. In 2010, there was a flurry of activity in Congress where various bills were introduced to legalize internet gambling, but those efforts appear to have stalled.

New Jersey may step into the picture. In January 2011, the New Jersey Legislature became the first state to pass legislation which would permit intrastate casino-style gambling on the internet as long as the operator is an Atlantic City based casino. As of the date of this article, the Governor has yet to sign the bill, reportedly due to concerns over its legality.

This article will examine existing federal law, case law and pending federal and state legislation and the implications for existing casinos and the general public. We will not address legislation some states have enacted which expressly prohibits internet gambling.

Background

The legalization and regulation of gambling has historically been

left to the states under the Tenth Amendment to the U.S. Constitution. Currently, 37 states have enacted legislation to permit land-based (or riverboat) gambling (non-lottery) within their borders. However, when gambling crosses state lines, e.g. over telephone lines (wires) or the internet, federal interstate commerce law is implicated.

In the late 1950s and early 1960s, with the rise of organized crime and its involvement in bookmaking, Congress passed a series of laws, including the Wire Act, to combat this activity. The Wire Act has become the primary tool utilized by the government to fight internet gambling.

Wire Act

The Wire Act provides in relevant part:

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.

Thus, on its face, to establish a

violation of the Wire Act, the government must show that a person is:

- engaged in the business of betting or wagering (as opposed to a casual gambler); and

- uses a wire communication facility to: transmit over interstate lines (x) bets or wagers or (y) information assisting the placing of bets or wagers on any sporting event or contest; or transmit a communication which entitles the recipient to receive money or credit (x) as a result of bets or wagers or (y) for information assisting in the placing of bets or wagers.

Interpretations

First, it appears only those engaged in the business are covered. The casual bettor, i.e., one not engaged in the business of gambling, is not addressed. This interpretation is supported by the absence of any reported, successful prosecutions of casual internet gamblers. Thus, the battleground is over those involved in the gaming business.

Two courts that have been called upon to interpret the Wire Act have closely parsed the words of the statute and reached opposite conclusions.

In 2002, the Fifth Circuit Court upheld a federal District Court decision that the Wire Act does not prohibit internet casino gambling unrelated to sports betting. The Court's decision was based upon three factors: (1) the statute, on its face, only addresses gambling activity relating to a sporting event; (2) the legislative history evidences an intent to target wagers or bets and layoffs on horse racing and other sporting events; and (3) recent legislative efforts to amend the Act to clarify and expand its reach evidence a recognition of the its limited reach.

In 2007, the District Court of

Utah held that the Wire Act prohibited interstate gambling on all games of chance, not just gambling on sporting events. The Utah court reasoned that the qualifying phrase, "sporting event or contest," in the statute only limited the scope of the first portion of the statute since the qualifier does not appear in the last clause of the operative paragraph of the statute. Thus, it concluded that the Wire Act was intended to have wider application than just sporting events.

Some commentators supporting a broader interpretation contend that "sporting" only modifies the word "event" and not "contest." Thus, the Act would prohibit internet gambling on sporting events and other contests, such as casino-style gambling.

UIGEA of 2006

In 2006, Congress passed the Unlawful Internet Gambling Enforcement Act ("UIGEA"), 31 U.S.C. §5361 et seq. In addition to targeting the gaming operator, the law prohibits credit card companies, banks and other payment processors from processing any transaction associated with "unlawful internet gambling." The UIGEA does not resolve the ambiguity in the Wire Act; however, it does exempt purely intrastate gaming transactions, legal in the state where conducted, from its scope.

After much delay, the Department of Treasury and Federal Reserve issued implementing regulations, effective June 1, 2010. The

regulations do not provide further clarity as they also fail to define what types of internet gambling are unlawful. To date, no reported prosecutions have been brought under the UIGEA.

Pending Legislation

In the summer of 2010, the U.S. House Financial Services Committee voted by a 2 to 1 margin to pass a bill sponsored by Rep. Barney Frank that would legalize and regulate internet gambling in the United States. The Frank bill has not been taken up by the full House. Other

bettor's location in the state when made.

The bill provides that internet wagering will be subject to the provisions of, and preempted and superseded by, any applicable federal laws, thus setting the stage for potential states' rights litigation. If the Governor signs the bill, look for other states to follow suit.

Conclusion

Where does this leave the casual bettor and legal casinos? Under current federal law, it is unlikely that casual bettors will be prosecuted for gambling on the internet. However, the legality of such conduct under federal law is not perfectly certain.

It is clear that a business operating an internet gambling or sports betting operation would violate the Wire Act. The federal government's successful prosecution of BetonSports.com demonstrated this.

The operation of a casino-style internet gambling site is less clear. Given the uncertainty, no licensed casino has tried its luck on this gamble given the dramatic risk to their existing licenses. If New Jersey's law is enacted, the intrastate issue will certainly be litigated.

The bottom line: play at your own risk.

Note from the authors: following the date this article went to print, on March 3, 2011, New Jersey Governor Chris Christie, vetoed the intrastate internet gambling bill citing legal concerns and the negative potential impact on Atlantic City.

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legislators have focused on legalizing only internet poker, including a bill proposed by Nevada's Senator Harry Reid late last year. With the new Republican majority in the House, these efforts have stalled.

The real action in internet gambling may take place in the statehouses.

Several states have pursued the issue. In New Jersey, the legislature actually passed an internet gaming bill; however, it has not been signed into law. If signed into law, intrastate internet wagering by New Jersey residents would be permitted. All games legally offered in Atlantic City casinos would be available to be played on the internet. All intrastate wagers would be deemed to have occurred in Atlantic City regardless of the