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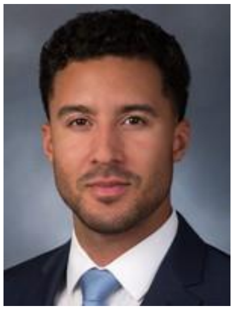
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

DOJ's Wire Act Opinion Means Uncertainty For Tribal Gaming

By **Charles Galbraith and Julian SpearChief-Morris** (March 20, 2019, 1:26 PM EDT)

Charles Galbraith



Julian SpearChief-Morris

On Jan. 14, 2019, the U.S. Department of Justice released a legal opinion, originally issued in November 2018, that reversed an Obama-era opinion issued in 2011 regarding the interpretation of the Wire Act. The Wire Act was originally enacted in 1961, and among other things, prohibits the interstate transmission of certain types of wagering-related wire communications.

The 2011 opinion found that the prohibitions outlined in the Wire Act only applied to sports betting. This finding presented an apparent opportunity for tribes to pursue new business opportunities related to online gaming. Given that most tribes in the United States are located in rural areas, the finding was seen as a way for these tribes to add much needed diversity to their economies through pursuing remote business ventures.

But the DOJ's recent opinion now reverses and replaces the 2011 opinion, finding that the Wire Act's prohibitions "sweep beyond sports gambling."[1] As such, tribes with strong land-based gaming operations may instead receive a boost to their bottom line.

The two opinions differ based on their interpretation of the effect of the words "on any sporting event or contest" in the Wire Act's principal provision, Section 1084(a).[2] The 2011 opinion, while noting that the provision was ambiguous, determined that those words applied to the whole provision, rendering the entire Wire Act applicable only to sports betting.[3] But the Trump-era opinion instead finds that the words "on any sporting event or contest" modify only part of the provision, and therefore expand the breadth of the prohibitions in Section 1084(a) to online communications unrelated to sports betting.

Under this opinion, the DOJ will now apply the Wire Act to any form of gambling that crosses state lines. The future of online gambling, which has already been significantly curtailed by various state and federal laws, is particularly threatened by the DOJ's change of position. The economic opportunities for rural and remote tribes will likewise be further diminished due to the DOJ's new stance.

The new opinion falls hard on the heels of the U.S. Supreme Court's 2018 decision in Murphy v. National Collegiate Athletic Association,[4] which held, in part, that certain parts of the Professional and Amateur Sports Protection Act of 1992 prohibiting states from passing laws authorizing sports betting violated the Constitution's anti-commandeering doctrine.[5] Noting that the legalization of sports gambling requires an important policy choice, the Supreme Court stated that, "Congress can regulate sports gambling directly, but if it elects not to do so, each state is free to act on its own."[6] Given the recent opinion's proximity to Murphy, it can arguably be seen as part of a broader effort by the federal government to regain control over the gambling industry.

Of course, the new opinion does not change the law, and will likely face challenges in court, especially given that many states, tribes and other entities have already taken steps to pursue online gaming in reliance on the Obama-era opinion. While the DOJ's recent opinion does not foreclose the ability of these entities to offer online gaming in an intrastate capacity, it certainly adds significant uncertainty for enterprises looking to incorporate these activities into their gaming businesses.

Whether the DOJ's new opinion will ultimately prevail over the previous interpretation is unclear, but tribes should watch these developments closely because the DOJ's new position and willingness to weigh in on otherwise settled gaming laws could have a significant impact on other aspects of tribal gaming.

In any event, tribes that have engaged in forms of online gaming in reliance on the Obama-era opinion should review their activities to determine if they are in violation of the DOJ's new stance. Fortunately, in a letter dated Jan. 15, 2019, the deputy attorney general has instructed DOJ attorneys to refrain from enforcing the new opinion until April 15, 2019, to give businesses that relied on the 2011 opinion time to bring their operations into compliance with the new holding.[6]

The Obama-era opinion, and the apparent window it provided for online gaming, presented a unique opportunity for tribes located in rural and remote areas to bring revenue to their communities. Having apparently negated that opportunity, the new opinion puts a damper on those hopes and these tribes will have to look elsewhere to add diversity to their economies. But for tribes with strong land-based casinos, the new opinion could be viewed as a limitation to an online threat to market share.

For precisely that reason, chairman, CEO and founder of the Las Vegas Sands Corporation Sheldon Adelson — a significant GOP donor who donated $113 million to Republican candidates during the 2016 election cycle — has long been lobbying for this change in position. The DOJ has stated that the new opinion was not effected by nongovernmental communications.

However, this development also comes soon after Ryan Zinke's resignation as Secretary of Interior, following, among others, allegations that Zinke unlawfully blocked efforts by two tribes to expand their gaming operations due to political pressure and lobbying by nontribal gaming interests.

In any case, while tribes may split on whether or not the new Wire Act opinion is a positive or negative, all should note that the Trump administration has again appeared to be particularly receptive to the lobbying efforts of traditional casinos operators. Beneficial or not, it's a political reality that must be considered and analyzed as tribes work to ensure the long-term viability of tribal gaming in the current environment.

Charles W. Galbraith is a partner and Julian P. SpearChief-Morris is a law clerk at Kilpatrick Townsend & Stockton LLP.

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[1] OLC Memorandum Opinion: Reconsidering Whether the Wire Act Applies to Non-Sports Gambling.

[2] 18 U.S.C. § 1084(a)

[3] OLC Memorandum Opinion: Whether Proposals by Illinois and New York to

Use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act.

[4] 138 S. Ct. 1461 (2018)

[5] See id at 1466–67.

[6] See id at 1484–85.

[7] DOJ Memorandum: Applicability of the Wire Act, 18 U.S.C. §1 84, to Non-Sports Gambling.