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Federal Wire Act

- 18 USC §1084
  - (a) 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.

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Federal Wire Act

- Business of Betting or Wagering
  - *"...requires the sale of a product or service for a fee involving third parties, i.e., customers and clients, or the performance of "a function which is an integral part of such business --" Baborian*

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Federal Wire Act

- Information Assisting
  - Point Spreads
  - Account Information
  - Odds
  - ... *Information a bookmaker uses to operate their business*

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Federal Wire Act

- "sporting event or contest"
  - *In re: MasterCard*
    - The Federal Wire Act applies to sports wagering only

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Federal Wire Act

- *In re: Mastercard – District Court*
  - Facts

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### Federal Wire Act

• In re: Mastercard – District Court

• Facts

- Bettors lose money playing on off-shore online casinos
- Bettors use credit cards to fund gaming transactions
- Credit card companies make money from each credit card transaction
- Therefore, Bettors argue that credit card companies are part of a racketeering organization in interstate and foreign commerce
  - To prove their claim, they must assert that other federal laws were being broken in such a racketeering activity
  - They claim online gambling is a criminal activity under the Federal Wire Act

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### Federal Wire Act

• How does the credit card industry work?

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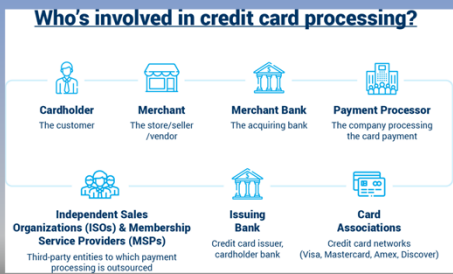
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### Federal Wire Act




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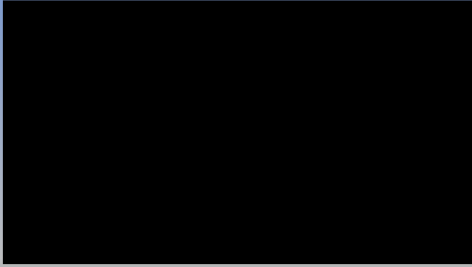
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Federal Wire Act



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Federal Wire Act



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Federal Wire Act

- In re: Mastercard – District Court
  - If you were MC/Visa/Discover/Amex what would you do?

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Federal Wire Act

- In re: Mastercard – District Court
  - Civil Procedure – 12(b)(6) motion?

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Federal Wire Act

- In re: Mastercard – District Court
  - What do the credit card companies argue?

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Federal Wire Act

- In re: Mastercard – District Court
  - What do the credit card companies argue?
    - The Federal Wire Act only applies to SPORTS wagering and Plaintiffs have not alleged any losses for sports wagers; therefore, the court cannot grant relief on their claims
    - “The defendants argue that plaintiffs’ failure to allege sports gambling is a fatal defect with respect to their Wire Act claims...”

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Federal Wire Act

- In re: Mastercard – District Court
  - What do the Plaintiff's argue?

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Federal Wire Act

- In re: Mastercard – District Court
  - What do the Plaintiff's argue?
    - "...plaintiffs strenuously argue that the Wire Act does not require sporting events or contests to be the object of gambling"

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Federal Wire Act

- In re: Mastercard – District Court
  - What is the court's initial impression?

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### Federal Wire Act

- In re: Mastercard – District Court
  - What is the court's initial impression?
    - ... "a plain reading of the statutory language clearly requires that the object of the gambling be a sporting event or contest. Both the rule and the exception to the rule expressly qualify the nature of the gambling activity as that related to a "sporting event or contest." See 18 U.S.C. §§ 1084(a) & (b)."

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### Federal Wire Act

- In re: Mastercard – District Court
  - How does the court handle plaintiff's argument that the legislative history does not require sports wagering to be the object of gambling?

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### Federal Wire Act

- In re: Mastercard – District Court
  - As the plain language of the statute and case law interpreting the statute are clear, there is no need for this court to engage in the inquiry of the Act or its legislative history. See In re Abbott Laboratories, 51 F.3d 524, 528 (5th Cir.1995). However, even a summary glance at the recent legislative history of internet gambling legislation reinforces the Court's determination that internet gambling on a game of chance is not prohibited conduct under 18 U.S.C. § 1084. Recent legislative attempts have sought to amend the Wire Act to encompass "contests" of chance or a future contingent event not under the control or influence of [the bettor]" while exempting from the reach of the statute data transmitted "for use in the new reporting of any activity, event or contest upon which bets or wagers are based." See S.474, 105th Congress (1997). Similar legislation was introduced the 106th Congress in the form of the "Internet Gambling Prohibition Act of 1999." See S. 692, 106th Congress (1999). That act sought to amend Title 18 to prohibit the use of the internet to place a bet or wager upon "a contest of others, a sporting event, or a game of chance..." Id. As to the legislative intent at the time the Wire Act was enacted, the House Judiciary Committee Chairman explained that "this particular bill involves the transmission of wagers or bets and layoffs on horse racing and other sporting events." See 107 Cong. Rec. 16533 (Aug. 21, 1961). *Continuing the law of the land and the clear wording of the statute and case law interpreting the statute are clear, there is no need for this court to engage in the inquiry of the Act or its legislative history. See In re Abbott Laboratories, 51 F.3d 524, 528 (5th Cir.1995). However, even a summary glance at the recent legislative history of internet gambling legislation reinforces the Court's determination that internet gambling on a game of chance is not prohibited conduct under 18 U.S.C. § 1084. Recent legislative attempts have sought to amend the Wire Act to encompass "contests" of chance or a future contingent event not under the control or influence of [the bettor]" while exempting from the reach of the statute data transmitted "for use in the new reporting of any activity, event or contest upon which bets or wagers are based." See S.474, 105th Congress (1997). Similar legislation was introduced the 106th Congress in the form of the "Internet Gambling Prohibition Act of 1999." See S. 692, 106th Congress (1999). That act sought to amend Title 18 to prohibit the use of the internet to place a bet or wager upon "a contest of others, a sporting event, or a game of chance..." Id. As to the legislative intent at the time the Wire Act was enacted, the House Judiciary Committee Chairman explained that "this particular bill involves the transmission of wagers or bets and layoffs on horse racing and other sporting events." See 107 Cong. Rec. 16533 (Aug. 21, 1961). Plaintiffs' argument flies in the face of the clear wording of the Wire Act and is more appropriately directed to the legislative branch than this Court.*

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### Federal Wire Act

- So the matter is dismissed.
- What would you do if you were representing the plaintiffs?

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### Federal Wire Act

- In re: Mastercard – 5<sup>th</sup> Circuit Court of Appeals
  - What is the standard of review?

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### Federal Wire Act

- In re: Mastercard – 5<sup>th</sup> Circuit Court of Appeals
  - What is the standard of review?
    - We review a district court's grant of a Rule 12(b)(6) motion de novo, applying the same standard used below. "In so doing, we accept the facts alleged in the complaint as true and construe the allegations in the light most favorable to the plaintiffs." But "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss."

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### Federal Wire Act

- In re: Mastercard – 5<sup>th</sup> Circuit Court of Appeals
  - What did the appeals court think of the district court’s conclusion that the Wire Act only concerns gambling on sporting events?

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### Federal Wire Act

- In re: Mastercard – 5<sup>th</sup> Circuit Court of Appeals
  - The district court concluded that the Wire Act concerns gambling on sporting events or contests and that the Plaintiffs had failed to allege that they had engaged in internet sports gambling. We agree with the district court’s statutory interpretation, its reading of the relevant case law, its summary of the relevant legislative history, and its conclusion. The Plaintiffs may not rely on the Wire Act as a predicate offense here.

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### Federal Wire Act

- DOJ View Post In Re: MasterCard
  - The...Wire Act, which is codified at Section 1084 of Title 18 of the United States Code. This statute makes it a crime, punishable up to two years in prison, to knowingly transmit in interstate or foreign commerce bets on any sporting event or contest. It is the Department of Justice’s position that this prohibition applies to both sporting events and other forms of gambling, and that it also applies to those who send or receive bets in interstate or foreign commerce even if it is legal to place or receive such a bet in both the sending jurisdiction and the receiving jurisdiction.

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### Federal Wire Act

18 USC §1084

• (a) 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.

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### Federal Wire Act

DOJ View – Sporting Event | Contest

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5th Cir View– Sporting modifies both Event or Contests

18 USC §1084

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### Federal Wire Act

- US v. Lombardo
- Facts

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### Federal Wire Act

- US v. Lombardo
  - Facts
    - Lombardo, with others, operate a payment “Gateway”(website) through various businesses to fund bettor accounts on various online sites
    - Bettors could add funds to betting accounts through “Gateway” and Gateway would mis-code the transactions to avoid detection by banks
    - Lombardo and others are charged with several violations including Wire Act violations and RICO statutes
    - Lombardo fights the Wire Act charge claiming services were provided for online poker sites & casinos not sports betting sites

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### Federal Wire Act

- US v. Lombardo
  - Issue
    - Whether the Federal Wire Act applies to sports wagering activities only

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### Federal Wire Act

- US v. Lombardo
  - Analysis
    - Assumes the 5<sup>th</sup> Circuit is correct in its analysis of the first prohibition in 1084(a)
    - Notes that the 5<sup>th</sup> Circuit did not analyze the second two prohibitions under 1084(a)

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### Federal Wire Act

• US v. Lombardo

• Analysis

• "The absence of the "sporting event or contest" qualifier in the second and third prohibitions is conspicuous, especially as the first prohibition, which includes the qualifier, is directly before the second and third prohibitions in the statute. This is particularly striking in light of the legislative history of the Wire Act, which indicates the intent of Congress to prohibit enforcement of state gambling laws related to "bookmaking, bookmaking, and the officers." Moreover, the exact phrase "information assisting in the placing of bets or wagers" is used twice in 18 USC first, as part of the first prohibited act, and second, as the entirety of the third prohibited act. It is simply ineptitude in the Court to attribute its meaning to Congress's use of the same phrase in two different parts of the statute where the first use is qualified by the phrase "sporting event or contest" and the second use is [unqualified]. Accordingly, the Court concludes that the second and third prohibited uses of a wire communication facility under 18 USC do not require that the bets or wagers in which these uses relate be limited to bets or wagers placed on sporting events or contests alone."

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### Federal Wire Act

WHAT DO YOU THINK?

18 USC §1084

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### Federal Wire Act

• 1084 (b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest 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.

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### Federal Wire Act

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### 18 U.S.C. § 1084

(a) 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

*no (b) exemption for the transmission of bets* → bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest,

*no (b) exemption for the transmission communications re: credit or money from a wager* → or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers,

*questionable whether there is a (b) exemption for info assisting w/o reference to sporting event or contest* → 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.

(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests,

or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest 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.

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### Federal Wire Act

- Timing...
- 2001 Nevada enacts "Interactive Gaming" statute to regulate and license online gaming
- 2002 DOJ warns Nevada that all such wagering violates the Federal Wire Act
- 2005 Online poker is popular in the USA with some providers going public on foreign exchanges and having multi-billion dollar valuations
- 2006 Congress enacts the UIGEA
- 2009 Online poker lobbying in full force
- 2009 Illinois and New York send letter to DOJ
- 2009 Illinois and New York offer online lottery subscriptions
- 2009 New Jersey enacts online gaming legislation
- 2010 Federal compromise reached
- 2011 Nevada enacts interactive gaming revision to compel the Commission to draft regulations to license online poker
- 2011 Reid and Kyl issue letter to DOJ

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### Federal Wire Act

- 2011 DOJ Opinion

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### Federal Wire Act

- 2011 DOJ Opinion
  - What does it address?

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### Federal Wire Act

- 2011 DOJ Opinion
  - You have asked for our opinion regarding the lawfulness of proposals by Illinois and New York to use the Internet and out-of-state transaction processors to sell lottery tickets to in-state adults.

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### Federal Wire Act

- 2011 DOJ Opinion
  - Does it find tension between the UIGEA and the Federal Wire Act

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### Federal Wire Act

- 2011 DOJ Opinion
  - Does it find tension between the UIGEA and the Federal Wire Act
    - Taken together, these interpretations of the Wire Act "lead[] to the conclusion that the [Act] prohibits" states from "utiliz[ing] the Internet to transact bets or wagers," even if those bets or wagers originate and terminate within the state.
    - The Criminal Division further notes, however, that reading the Wire Act in this manner creates tension with UIGEA, which appears to permit out-of-state routing of data associated with in-state lottery transactions.
    - The Criminal Division is thus concerned that the Wire Act may criminalize conduct that UIGEA suggests is lawful.

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Federal Wire Act

- 2011 DOJ Opinion
  - How does it address the sporting events or contest phrase and its impact?

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Federal Wire Act

- 2011 DOJ Opinion
  - How does it address the sporting events or contest phrase and its impact?
  - The more reasonable inference is that Congress intended the Wire Act's prohibitions to be parallel in scope, prohibiting the use of wire communication facilities to transmit both bets or wagers and betting or wagering information on sporting events or contests.
  - We likewise conclude that the phrase "on any sporting event or contest" modifies subsection 1084(a)'s second clause, which prohibits "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." 18 U.S.C. § 1084(a). The qualifying phrase "on any sporting event or contest" does not appear in this clause. But in our view, the references to "bets or wagers" in the second clause are best read as shorthand references to the "bets or wagers on any sporting event or contest" described in the first clause.
  - **Because of the parallel nature of the Act's prohibitions, we conclude that the Act's prohibitions relate solely to sports-related gambling activities in interstate and foreign commerce.**

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Federal Wire Act

- 2011 DOJ Opinion
  - **In sum, the text of the Wire Act and the relevant legislative materials support our conclusion that the Act's prohibitions relate solely to sports-related gambling activities in interstate and foreign commerce:**
  - SPORTS WAGERING ONLY
  - INTERSTATE AND FOREIGN COMMERCE ONLY - not where bets are transmitted from and received by persons in the same state

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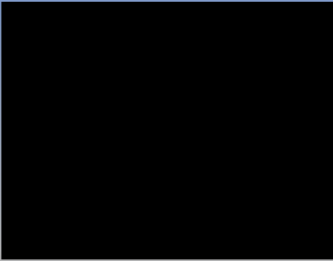
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Federal Wire Act



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Federal Wire Act



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Federal Wire Act

- Restoration of America's Wire Act
  - RAWA seeks to "restore" the federal wire act to pre-2011 interpretation and enhance illegal online gaming enforcement by doing the following:
  - Removing references to "sporting event or contest" in the prohibitions section.
  - Defining an interstate transmission to include any use of the internet where packets could incidentally cross state lines.
  - Excluding unlicensed fantasy sports wagering from the Federal Wire Act's prohibitions.

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# RAWA - Illegal Conduct

## POWERBALL

Are you in the business or wagering?  
YES (MUSL and Lottery Outlets)

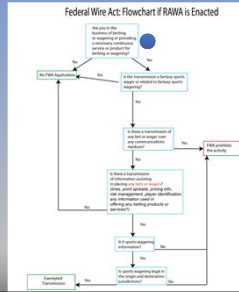
Is it a fantasy sports transmission?  
No (lottery gaming)

Is there a transmission of a bet?  
No (just information)

Is the transmission of information used to place bets?  
Yes (informs players of jackpot)

Is it sports wagering information?  
No (casino gaming)

**RAWA FWA prohibited**




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# RAWA - Illegal Conduct

## Negotiating Significant Player Agreements via Phone or E-Mail

Are you in the business or wagering?  
YES

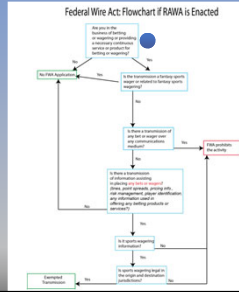
Is it a fantasy sports transmission?  
No (casino gaming)

Is there a transmission of a bet?  
No (just information)

Is the transmission of information used to place bets?  
Yes (terms of wagering)

Is it sports wagering information?  
No (casino gaming)

**RAWA FWA prohibited**




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# Federal Wire Act

- Restoration of America's Wire Act

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## Federal Wire Act

- Restoration of America's Wire Act
  - Hearings are a disaster and the bill dies

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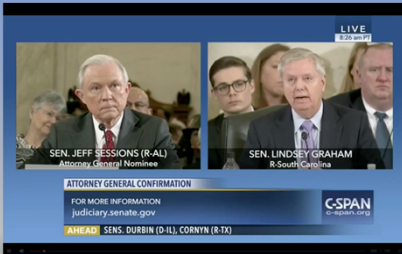
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## Federal Wire Act



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## Federal Wire Act

- January 2019 DOJ Opinion
  - Reinterprets the Federal Wire Act prohibitions again

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### Federal Wire Act

- Evolutionary Interpretation - 2019 Opinion
- States there is no tension between the UIGEA and Federal Wire Act
  - Removes basis for interpreting the Federal Wire Act to not be applicable to intrastate wagering
- Implies NY and IL lotteries must not rely on the 2011 opinion to continue intrastate online lottery product sales

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### Federal Wire Act

• 18 USC §1084

(a) 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 credits 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.

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interstate and foreign commerce only impact the first clause

no sporting event after bets or wagers

sporting event or contest only modifies information assisting

a second transmission without reference to interstate or foreign commerce is present in the second clause and no references to sporting event or contest

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### Federal Wire Act

- More fallout...

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Federal Wire Act

- New Hampshire District Court Opinion
  - What are the issues?

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Federal Wire Act

- New Hampshire District Court Opinion
  - What are the issues?
    - Whether the Federal Wire Act applies to state actors?
    - Whether the Federal Wire Act prohibitions are limited to sports wagering?

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Federal Wire Act

- New Hampshire District Court Opinion
  - Will the court rely on the Lyon's opinion that issued a jury instruction stating the Federal Wire Act applies to sports wagering only?

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### Federal Wire Act

- New Hampshire District Court Opinion
  - Will the court rely on the Lyon’s opinion that issued a jury instruction stating the Federal Wire Act applies to sports wagering only?
    - “I cannot defer to the circuit court’s unconsidered dictum in Lyons”

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### Federal Wire Act

- New Hampshire District Court Opinion
  - In the 2019 Opinion, the DOJ argues the sporting events and contests language only limits the first “information assisting” prohibition to sports wagering and thus the Wire Act’s other prohibitions apply to all sports wagering, does the court agree?

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### Federal Wire Act

- New Hampshire District Court Opinion
  - In the 2019 Opinion, the DOJ argues the sporting events and contests language only limits the first “information assisting” prohibition to sports wagering and thus the Wire Act’s other prohibitions apply to all sports wagering, does the court agree?
    - As the OLC concluded in 2011, the omission of the interstate-commerce modifier from the second clause “suggests that Congress used shortened phrases in the second clause to refer back to terms spelled out more completely in the first clause.” 2011 OLC Opinion at 7. I agree with the 2011 OLC Opinion that this instance of borrowing by the drafters of § 1084(a) gives textual support for similarly importing the sports-gambling modifier into the second clause.

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### Federal Wire Act

- New Hampshire District Court Opinion
  - New Hampshire District Court Opinion
    - Many states filed Amicus briefs. Did the court extend its holding beyond New Hampshire and its vendors?

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### Federal Wire Act

- New Hampshire District Court Opinion
  - New Hampshire District Court Opinion
    - Many states filed Amicus briefs. Did the court extend its holding beyond New Hampshire and its vendors?
      - The parties nevertheless disagree as to whether a declaratory judgment should be limited to the parties or have universal effect.<sup>15</sup> The plaintiffs maintain that declaratory relief “necessarily extends beyond the [Commission] itself.” Doc. No. 58 at 21. The Government contends that any declaratory relief must apply only to the parties to the case. I agree with the Government.

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### Federal Wire Act

- New Hampshire District Court Opinion
  - New Hampshire District Court Opinion
 

The judgment provides the Lottery Commission and NeoPollard complete relief. No more is needed.

III. CONCLUSION

In summary, I deny the Government’s motion to dismiss for lack of jurisdiction (Doc. No. 45) because the plaintiffs have established standing, and the Government has not met its burden to show that the case is moot. I grant the plaintiffs’ motions for summary judgment (Doc. Nos. 2 & 10) and deny the Government’s cross-motion for summary judgment (Doc. No. 45). I hereby declare that § 1084(a) of the Wire Act, 18 U.S.C. § 1084(a), applies only to transmissions related to bets or wagers on a sporting event or contest. The 2018 OLC Opinion is set aside. SO ORDERED

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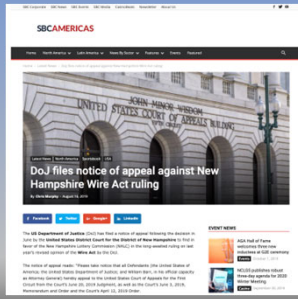
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### Federal Wire Act

- New Hampshire District Court Opinion
- In August 2019 the DOJ Appeals




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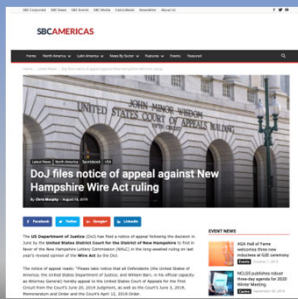
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### Federal Wire Act

- New Hampshire District Court Opinion
- In August 2019 the DOJ Appeals




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### Federal Wire Act

- Appeal, oral arguments heard in June, 2020.
- No opinion yet from the first circuit




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