

## New Hampshire Hold ‘Em: Federal Decision Sets Aside Latest DOJ Wire Act Opinion

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### Key Points:

- On June 3, 2019, a federal court in New Hampshire ruled in favor of a New Hampshire state agency in concluding that “the text, context, and structure of the Wire Act” limit the Act’s applicability to sports gambling and no other types of gambling.
- The New Hampshire Lottery Commission commenced the lawsuit in February 2019, shortly after the U.S. Department of Justice (DOJ) released a new opinion interpreting the Wire Act to include nonsports-related gambling.
- Although the government may appeal the decision, for now, it preserves the status quo that the DOJ set under the Obama administration.

### In-Depth:

In 2011, at the request of the U.S. Department of Justice’s (DOJ or the “Department”) Criminal Division, the DOJ’s Office of Legal Counsel issued an opinion that the Wire Act (18 U.S.C. § 1084(a)) (the “Act”) prohibited only conduct related to sports betting. See *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*, 35 Op. O.L.C. \_\_\_ (2011).<sup>1</sup> For reasons that are not entirely clear, the DOJ chose to revisit that opinion in 2018. Upon reconsideration, the DOJ reversed its previous guidance and held that the Wire Act’s reference to “any sporting event or contest” limited just one part of its multipartite prohibitions, meaning that other parts of the Act prohibited the use of interstate wires to facilitate nonsports-related gambling. *Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, 42 Op. O.L.C. 1 (2018).<sup>2</sup> Although the DOJ recognized that various states had relied on the 2011 opinion in setting up operations to sell lottery tickets online, the Department stated that the states’ interests were outweighed by the plain language of the statute.

As we noted in our [Regulatory Alert](#) of January 17, 2019, on this topic, we did not believe that the last page had been written on this matter. Indeed, on February 15, 2019, the New Hampshire Lottery Commission (NHLC) commenced a lawsuit in federal court alleging that the 2018 opinion was contrary to law and seeking a

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declaratory judgment defining the parties' rights under the Wire Act and vacating the 2018 opinion.<sup>3</sup> In *New Hampshire Lottery Commission v. Barr*, NHLC claimed that the 2018 opinion conflicted with binding precedent, as well as the text, structure, purpose and legislative history of the Act. The NHLC argued, among other things, that the 2018 opinion was subject to judicial review under the Administrative Procedures Act and that it was unconstitutionally vague and unconstitutional under the First and Tenth Amendments.

The government moved to dismiss NHLC's complaint for lack of standing and the parties' cross-moved for summary judgment regarding the legality of the 2018 opinion. On June 3, 2019, a federal court in New Hampshire ruled in favor of NHLC on each of the motions. First, the court held that NHLC had standing to challenge the 2018 opinion. Describing the DOJ's 2018 opinion as a "sudden about-face," the court found that NHLC faced an imminent threat of prosecution by continuing to offer multiple types of lottery games that utilize interstate wires—conduct in which NHLC had engaged for many years, but which the DOJ "now brands as criminal." The court emphasized the Deputy Attorney General's directive to the Department to begin enforcing the 2018 opinion following a 90-day grace period. Second, the court held that the opinion constituted final agency action that is subject to review under the Administrative Procedures Act. Third, after determining that the relevant statutory text was ambiguous, the court examined the context of the Act (beyond the plain language) and concluded that "[l]imiting the Wire Act to sports gambling . . . avoids significant coherence problems that result from the OLC's current interpretation and [] construes the Wire Act in harmony with another gambling statute that Congress enacted the same day as the Wire Act [the Paraphernalia Act]."<sup>4</sup> The court further found that the legislative history of the Wire Act supported NHLC's interpretation because "the original text was unequivocally limited to sports gambling" and the purported evidence for Congress's intent to amend the bill to cover all gambling was "too speculative to carry any weight."

The court held that Section 1084(a) of the Wire Act applies only to transmissions related to bets or wagers on a sporting event or contest.

### **Practical Impact:**

Although the government may appeal the district court's decision, for now, that decision preserves the status quo set by the Obama administration and limits the DOJ's ability to prosecute nonsports-related gambling that makes use of interstate wires, such as multistate lotteries. The decision is an important victory for states that have made significant investments in—and profited from—the expansion of various forms of online gambling. The court's decision also permits states to continue to develop new and innovative interstate gambling concepts for consumers.

1 <https://www.justice.gov/file/18341/download>

2 <https://www.justice.gov/olc/file/1121531/download>

3 <https://www.governor.nh.gov/news-media/press-2019/documents/20190215-wire-act-barr-complaint.pdf>

4 In the court's reasoning, the Paraphernalia Act, which outlawed carrying equipment for use in "lottery-style games," demonstrated Congress's ability and propensity to use "clear and specific language" when it intended "to target non-sports gambling."