

The U.S. DOJ Appeals the Wire Act Decision



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As previously reported, on June 3, 2019, U.S. District Court Judge Barbadoro of the U.S. District Court for the District of New Hampshire issued a Memorandum and Order regarding the Wire Act and the United States Department of Justice's ("DOJ") interpretation of the Wire Act (the "Barbadoro Decision")¹.

The Barbadoro Decision² addressed the Wire Act and the DOJ's interpretations of it, including the DOJ's opinion dated November 2, 2018 (the "2018 DOJ Opinion").³ In the 2018 Opinion, the DOJ opined that (a) three of the Wire Act's⁴ four prohibitions apply to all types of betting, not only sports betting⁵ and (b) that the Wire Act is unaffected by the Unlawful Internet Gambling Enforcement Act (the "UIGEA").⁶ The Barbadoro Decision (i) declared that the DOJ's interpretation of the Wire Act in the 2018 Opinion was incorrect and that a better reading of the Wire Act is that all four of the Wire Act's prohibitions are limited to sports betting, and (ii) set aside the 2018 DOJ Opinion pursuant to the Administrative Procedure Act ("APA")⁷ as "not in accordance with law."⁸

On August 16, 2019, the United States Department of Justice ("DOJ") filed a notice of appeal¹ of the Barbadoro Decision and the April 12, 2019 Order denying the DOJ's motion to dismiss.² The appeal will



be heard by the U.S. Court of Appeals for the First Circuit ("First Circuit Court"), in Boston, Massachusetts. Many, if not all, of the amici curiae – non-party "friends of the court" – are expected to appear for the appeal, including the Coalition to Stop Internet Gambling ("CSIG") and the National Association of Convenience Stores ("NACS") who supported the United States in the proceedings below, and the State of New Jersey, the Commonwealth of Pennsylvania and the Michigan Lottery (supported by several other state lotteries), who appeared below for the plaintiffs.

In appealing the Barbadoro Decision and the Court's April 12, 2019 Order, the DOJ prolonged the uncertainty regarding the interpretation of the Wire Act. Had the DOJ allowed the Barbadoro Decision to stand, state lotteries and other stakeholders in the gaming industry may have taken comfort in that action – making the assumption that the DOJ had acquiesced in the interpretation of the Wire Act in the Barbadoro Decision. Now, such an assumption cannot be made.

The First Circuit will review the matter de novo, meaning that (a)

the court will review the issues presented anew and (b) the Barbadoro Decision will not be given deference. However, the effect, if any, that the First Circuit's 2014 decision in *U.S. v. Lyons*,³ will have is not yet clear. In the Lyons case, the First Circuit stated: "The Wire Act applies only to 'wagers on any sporting event or contest,' that is, sports betting."⁴ Judge Barbadoro found that the statement in Lyons was "mere dictum, not a holding that binds lower courts"⁵ (even though Judge Barbadoro came to the same conclusion). While the First Circuit "has explained that 'considered dicta' is also ordinarily binding, ..." ⁶ Judge Barbadoro determined that "the First Circuit's dictum in Lyons does not qualify as 'considered.'" This case provides the First Circuit the opportunity to revisit the Wire Act and consider the dicta in Lyons. It will be interesting for state regulators and private industry members alike to see how the First Circuit analyzes and decides the case.

Given the time required for federal appeals, we do not expect a decision until Spring or Summer 2020. The government has not requested expedited treatment, and

indeed, did not file its appeal until the last business day of the appeal period. After a decision by the First Circuit Court, an appeal to the U.S. Supreme Court is possible, and Judge Barbadoro envisioned such an event in his comments from the bench.

¹ *Memorandum and Order* dated June 3, 2019, New Hampshire Lottery Comm., et al. v. William Barr, U.S. Att’y. Gen., U.S. Dist. Ct. D. NH, Consol. Case No. 19-cv-163-PB, Op. No. 2019 DNH 091P.

² *Memorandum and Order* dated June 3, 2019, New Hampshire Lottery Comm., et al. v. William Barr, U.S. Att’y. Gen., U.S. Dist. Ct. D. NH, Consol. Case No. 19-cv-163-PB, Op. No. 2019 DNH 091P.

³ *Memorandum Opinion* (Slip Op.) “Reconsidering Whether the Wire Act Applies to Non-Sports Gambling,” Nov. 2, 2018 (issued January 14, 2019) (the “2018 Opinion”).

⁴ 18 U.S.C. §§ 1081, 1084.)

⁵ The 2018 Opinion opined that Wire Act section 1084(a) prohibits the interstate or foreign wire transmission by or to a person involved in the business of betting or wagering, of (i) bets or wagers relating to any type of game or event; (ii) information assisting in the placing of sports bets; (iii) a communication entitling the recipient to receive money or credit as a result of bets or wagers relating to any type of game or event; and (iv) a communication entitling the recipient to receive money or credit for information assisting in the placing of bets or wagers relating to any type of game or event. An exception exists applicable to the transmission of information assisting in the placing of sports bets or wagers between states where betting on the particular sports event is lawful in each state.

⁶ 31 U.S.C. §§ 5361 – 5367.

⁷ 5 U.S.C. §§ 701-706.

⁸ 5 U.S.C. § 706(2)(A).

⁹ *Notice of Appeal* dated August 16, 2019, New Hampshire Lottery Comm., et al. v. William Barr, U.S. Att’y. Gen., U.S. Dist. Ct. D. NH, Consol. Case No. 19-cv-163-PB.

¹⁰ *Order* dated April 12, 2019, New Hampshire Lottery Comm., et al. v. William Barr, U.S. Att’y. Gen., U.S. Dist. Ct. D. NH, Consol. Case No. 19-cv-163-PB. The April 12, 2019 Order denied the motion to dismiss for lack of jurisdiction to the extent it relied on the United States Deputy Attorney General’s April 8, 2019 memorandum. (In the April 8, 2019 Memorandum, the DOJ declared that it was reviewing whether the Wire Act applies to state lotteries and their vendors and directed DOJ attorneys to refrain from applying the Wire Act to state lotteries and their vendors until the DOJ concluded its review.) See *Notice Regarding Applicability of the Wire Act, 18 U.S.C. § 1084, to State Lotteries and their Vendors*, U.S. Dept. Just. (April 8, 2019).

¹¹ 740 F.3d 702 (1st Cir. 2014).

¹² *Id.*, at 718, citing *In re MasterCard Int’l Inc.*, 313 F.3d 257, 263 (5th Cir. 2002).

¹³ *Barbadoro Decision*, p. 30.

¹⁴ *Id.*, quoting *McCoy v. Mass. Inst. Of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991). ■

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Is there anything that you would recommend to your colleagues who are just starting out in the process of implementing iLottery?

Gretchen Corbin: The most important step is to create an enjoyable user experience for players. We have found that the majority of our iLottery happens on mobile platforms, so I would suggest considering that you design for mobile first. When you’re working with technology, you have to adopt a policy of continuous improvement because the bar continues to move higher in regards to registration processes, additional payment options, prize validation and other processes. For any lotteries considering the digital space, I would recommend spending a lot of time meeting with other jurisdictions and vendors to discuss best practices and lessons learned. **Driving sales is not the same as driving net funds for beneficiaries. Is there a recipe for managing the rate at which prize-payouts should increase to maximize net profit?**

Gretchen Corbin: Every state has their own philosophy on how to manage their portfolio for optimal net funding for their beneficiary. Big leaps make it more difficult to adjust course along the way based on new information and real-world market-place feedback. So we formulate strategy and evolve tactics incrementally. We feel that this provides the flexible decision-making platform that is sustainable and most sensitive to the need to balance a complex portfolio of products and delivery channels. For every action we take, every new product

or promotion we launch, we assess not only the short-term and direct ROI, but all the collateral impacts on the entire portfolio. Slow and steady helps us ensure a process of continuous improvement and that the enterprise-wide combination of countless actions add up to optimizing the overall performance and results of the Georgia Lottery Corporation.

WILL – Women’s Initiative and Lottery Leadership – works to facilitate mentoring, education, and networking opportunities for women in the industry. What are your thoughts on which of these is the most important objective?

Gretchen Corbin: I think all components – mentoring, education and networking – could be life-changing for any individual. I remember the first time I walked into a WILL event and saw all three of these taking place at once. There were very experienced lottery directors sitting with women newer to the industry. In my life there have been many times I learned something through mentoring that has changed the trajectory of my career or allowed me to do something better or different. I also have met people at networking events who have become champions for me and opened my eyes to different opportunities. Probably the most important step is for those in leadership positions to encourage all individuals within our profession to work hard to achieve ambitious goals. We all appreciate the efforts of lottery titans like Rebecca Paul Hargrove and others who have mentored, championed, and created opportunities for women and everyone to fulfill their potential.

What’s next?

Gretchen Corbin: The Georgia Lottery has generated \$21 billion for Georgia over the last 26 years, and our mission is to continue to maximize profits for the HOPE Scholarship and Pre-K programs that we fund. I have the great honor of being the fourth president and CEO of the Georgia Lottery Corporation. Rebecca Paul Hargrove established an incredibly strong foundation when she started the Georgia Lottery back in 1993. Margaret DeFrancisco and Debbie Alford were astute leaders who continued the strong legacy of success. We would all agree that at the heart of our success is the full Georgia Lottery family, our retailers, our players and our vendors. The Georgia Lottery has been blessed with the vision and support of Gov. Zell Miller and the support of every Georgia governor since then up to current Gov. Brian Kemp, as well as our board of directors. This lottery is a very strong operation, but we do not take it for granted that it was built from wisdom, vision, and hard work over the course of 25 years. We aspire to be a credit to this wonderful legacy by continuing their work going forward. As we say in Georgia, we do it for the students. With continuous improvement and dedication to good causes as our calling card, can you imagine where this industry will be five years and 20 years from now? ■