

## Gaming



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### New Wire Act Ruling by Federal Court of Appeals Expands the Potential of Online Gaming

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On January 20, 2021, the U.S. Court of Appeals for the First Circuit upheld the decision of a lower court to allow the New Hampshire Lottery Commission to continue to sell lottery tickets online, finding that such online sales were not in violation of the Wire Act of 1961.

The New Hampshire Lottery, along with its vendor NeoPollard Interactive, brought the suit as a challenge to a 2018 Department of Justice (“DOJ”) opinion, which held that the Wire Act applied to all forms of bets or wagers, implicating online lottery ticket sales in the process. This 2018 opinion superseded a 2011 opinion from the Office of Legal Counsel interpreting the Wire Act to only apply to “the placing of bets or wagers **on any sporting event or contest.**” New Hampshire, relying on the 2011 interpretation, launched online lottery sales well before the 2018 DOJ opinion was issued. After the 2018 DOJ opinion was made public, the New Hampshire Lottery brought suit to challenge the new opinion and interpretation of the Wire Act.

The New Hampshire Lottery prevailed at the federal district court level and on appeal to the First Circuit, as both courts interpreted the language of the Wire Act to apply only to bets or wagers placed on “sporting event[s] or contests.”

With the inauguration of the Biden administration, it is not clear whether the DOJ will pursue an appeal to the Supreme Court, but many in the gaming industry believe it is more likely the DOJ under Biden will revert back to the 2011 interpretation of the Wire Act and allow the First Circuit’s ruling to stand without appeal. One online gaming expert, Professor Tony Cabot, posits that “The Department of Justice has no motivation, either politically or on a policy basis, to continue to pursue this case [and that] even if the DOJ had a reason to pursue it, the likelihood that the Supreme Court would hear the case is extremely low.”

Presuming the ruling stands, this narrow interpretation of the Wire Act—which limits its application to sports betting—could have implications that reach well beyond online lottery ticket sales. There would be no argument that the Wire Act prevents states from authorizing casino or poker play across state lines. Nonetheless, state authorization of casino or poker play across state lines, even without the threat of legal action from the DOJ, would be complicated, as states would need to work out between themselves agreements on how to regulate and tax interstate gambling. But the opportunities for more efficient structures for gaming operators (who might be able to consolidate expensive servers and support equipment to

a single location rather than replicating it in each state), and the potential for growth of the business and associated tax revenue could spur states to consider such cooperation via inter-state compacts and the like.

Any such multi-state agreements, though, would be limited to online poker and casino gaming. Online sport wagering, which is booming as more and more states move to legalize and regulate that business, would still be subject to the Wire Act and, therefore, continue to be operated on an intra-state basis only. This ruling may be the impetus for Congress to finally take up the Wire Act and the question of online gambling generally, perhaps considering a model based on the Interstate Horseracing Act (15 U.S.C. §§ 3001-3007) providing guardrails for interstate online wagering, which complies with state regulation in each relevant state. Assuming the ruling stands, this is a boon to the already blossoming online gaming industry, and a positive sign for growth.

**For additional information, please contact:**

**Dennis M.P. Ehling**  
424.239.3423 | [ehling@blankrome.com](mailto:ehling@blankrome.com)

**Stephen D. Schrier**  
215.569.5651 | [schrier@blankrome.com](mailto:schrier@blankrome.com)

**Jeremy N. Kolman**  
215.569.5615 | [jkolman@blankrome.com](mailto:jkolman@blankrome.com)

**Lauren E. O'Donnell**  
215.569.5735 | [odonnell@blankrome.com](mailto:odonnell@blankrome.com)