

# The DOJ Doubles Down: Wire Act Applies Only to Sports Betting

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On December 23, 2011, the Department of Justice's (DOJ) Office of Legal Counsel (OLC) issued a memorandum opinion making clear that "interstate transmission of wire communications that do not relate to a 'sporting event or content' fall outside the reach of the Wire Act." The decision may have future implications for online poker or i-gaming.

To arrive at its decision, the OLC was required to resolve a long-standing legislative (and grammatical) puzzle. Section 1084(a) of the Wire Act contains two broad clauses, the first of which prohibits the use of a wire communication facility to transmit "bets or wagers or information assisting in the placing of bets or *wagers on any sporting event or contest*."<sup>1</sup> The second clause bars the transmission of communications that "entitle 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." Although nearly parallel to the first, the second clause's references to "bets or wagers" are not modified by the term "on any sporting event or contest." As a result, the DOJ's Criminal Division had interpreted section 1084(a) to forbid the interstate transmission of bets and wagers of all kinds, including non-sports bets and wagers. Examining the text and legislative history of section 1084(a), the OLC disagreed, essentially overruling the Criminal Division and holding that both clauses of section 1084(a) apply only to sports betting.

Although the OLC did not expressly discuss online poker or i-gaming, its opinion may mean that i-gaming companies do not run afoul of section 1084(a) because they are not involved in the interstate transmission of bets or wagers related to sporting events or contests. Spurred by the OLC's opinion, online poker and i-gaming companies

## Authors

Kathryne C. Dickerson  
Partner  
202.719.7279  
kdickerson@wiley.law

may step-up their efforts to obtain advertising space from broadcasters.<sup>2</sup> It is important to note, however, that the OLC expressly declined to opine on “the proper interpretation or scope of UIGEA [the Unlawful Internet Gambling Enforcement Act].” UIGEA prohibits “any person engaged in the business of betting or wagering” from knowingly accepting payments in connection with *unlawful Internet gambling*. UIGEA exempts from that prohibition “bet[s] or wager[s ] initiated and received or otherwise made exclusively within a single State” but otherwise leaves the definition of “unlawful Internet gambling” up to state law. At a minimum, then, online poker and i-gaming websites may still violate state law. Broadcasters would be wise to await further clarification on the scope of UIGEA before accepting online poker and i-gaming advertisements.

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[1] Emphasis added.

[2] Under title 18, sections 1304 and 1307, of the United States Code, radio and television stations are generally prohibited from airing “any advertisement of or information concerning any lottery” unless that lottery is legally authorized by the state in which the station is located or adjacent states with legal lotteries. Broadcasters are, therefore, free to advertise the state-run, entirely intra-state lotteries of the state in which they are located. An additional exception to the prohibition in sections 1304 and 1307 may come from the FCC’s definition of “lottery.” Under the FCC’s rules, a “lottery” involves three components: a prize, consideration, and chance. Arguably, online poker and similar i-games are skill-based, and therefore outside the definition of a “lottery.” Whether poker is skill-based or chance-based is, however, an open question, and therefore broadcasters should exercise caution in accepting online poker and i-gaming advertisements.