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A newsletter brought to you by the Sports Law Group at Proskauer.

Welcome to *Three Point Shot*, a newsletter brought to you by the Sports Law Group at Proskauer. *Three Point Shot* brings you the latest in sports law-related news and provides you with links to related materials.

Your feedback, thoughts and comments on the content of any issue are encouraged and welcome. We hope you enjoy this and future issues.

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"Win-Time" for the Online Gaming Industry in Wire Act Ruling

"Luck Yeah!" The New Hampshire Lottery Commission ("NHLC"), along with its service providers, NeoPollard Interactive LLC and Pollard Banknote Limited (collectively, "NeoPollard"), recently prevailed against the U.S. Department of Justice ("DOJ"), when the U.S. Court of Appeals for the First Circuit affirmed a narrow reading of the Wire Act, 18 U.S.C.§ 1084, to apply only to interstate transmissions related to bets or wagers on sporting events and not to the state lottery and online gaming operations of NHLC. (*New Hampshire Lottery Comm. v. Rosen*, No. 19-1835 (1st Cir. Jan. 20, 2021)). This victory represents a huge win, not just for NHLC and NeoPollard or even the 47 other state-run lotteries, but for the online wagering and online gaming industry (and their technology providers), all of which might now look for new opportunities and partnerships given that Wire Act enforcement of their gaming and lottery products is off the table. [Note: Beyond the Wire Act, federal lottery control statutes, see e.g., 18 U.S.C.§1301-1308, 1953, contain provisions concerning state-conducted lotteries and the interstate transfer of lottery tickets and lottery information, but permit states to form interstate lotteries pursuant to an official agreement (e.g., Mega Millions).]

Lotteries were one of the major sources of revenue in colonial America, and a few hundred years later, the New Hampshire Lottery claims to be the oldest legal state lottery in the United States. Since 1964, NHLC has been administering a variety of lottery-style and scratch-off games. NHLC also started an iLottery online gaming system, which allows players located within the state to create online accounts and wager on various types of online games. In all, NHLC operates 1,400 retail locations and an interactive website, which together, account for the lottery providing up to $100 million a year in support of education.

While none of NHLC's business involves sports bets or wagers, NHLC's contests generally involve the transmission of data over the wires and the use of out-of-state vendors, which means online data transmissions may cross state lines even if the actual lottery transaction occurs within the state. For example, as noted by the court, NHLC's retail stores rely on computer gaming and back-office systems that might depend on out-of-state backup servers; on a related front, the NHLC's website transmits lottery results and advertisements online. Thus, although a person must be physically located within the state of New Hampshire to participate in any online lottery transaction, the intermediate routing of information may cross state lines.

Co-plaintiff NeoPollard is a technology and service provider that developed NHLC's online lottery (iLottery) system. Having invested millions in its technology platform, NeoPollard also provides its iLottery system to both Michigan and Virginia. NeoPollard handles the player management, game management, payments, compliance, responsible gaming and all essential iLottery functions for the states it serves. Since running its iLottery system necessarily involves the intermediate routing of data across state lines, NeoPollard claimed that the DOJ's wide interpretation of the Wire Act to encompass non-sports betting would compel the suspension of the iLottery system, prompting its own suit against the DOJ.

The story of the Wire Act begins in 1961. Seeking to dismantle organized crime's grip on sports wagering, in the early 1960s then-U.S. Attorney General Robert F. Kennedy worked with Congress to enact various pieces of legislation aimed at giving the federal government a collection of laws with teeth. Among the bills passed for this purpose, perhaps the most well-known is the Wire Act. Generally speaking, the Wire Act prohibits the "use of 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" unless the transmission of such information occurs between one state or foreign country and another state or foreign country in which such betting is legal. [Note: If a New York resident wonders why he or she currently has to drive or take mass transit across the river into New Jersey to place an online bet on a sportsbook app, look no further than the Wire Act]. Since its passage in 1961, the Wire Act has been used mostly to go after illegal sports betting conducted across state lines. However, with the rise of e-commerce and overseas gambling websites, the statute received renewed attention in the last few decades. In particular, since the 2000s the use of the internet in lottery transactions by states has been met with continued and inconsistent attempts at regulation.

The genesis of the current dispute began in 2009, when New York and Illinois asked the DOJ whether in-state sales of lottery tickets via the internet would violate the Wire Act if those sales caused information to be transmitted across state lines. The DOJ referred the matter to its Office of Legal Counsel (OLC) for a formal opinion. In 2011, the OLC answered the question and concluded that "interstate transmissions of wire communications that do not relate to 'a sporting event or contest,' 18 U.S.C. § 1084(a), fall outside of the reach of the Wire Act." Following this opinion, states began to expand their lotteries and gaming offerings to online platforms, often partnering with providers like NeoPollard to provide the technological backbone of new online operations. However, in 2018, the DOJ changed its betting stance and sent shock waves through the gaming industry, releasing a new OLC opinion concluding that "the prohibitions of 18 U.S.C. § 1084(a) are not uniformly limited to gambling on sporting events or contests."

Refusing to cash out, in February 2019 NHLC filed a complaint and motion for summary judgment in response to the 2018 OLC opinion. NHLC requested a declaratory judgment asserting that the Wire Act does not extend to lotteries run by the states, an order setting aside the previous 2018 DOJ opinion, and injunctive relief permanently barring enforcement of the 2019 DOJ Opinion. NeoPollard also filed a complaint and concurrent motion for summary judgment, seeking a judgment stating that the Wire Act only applied to gambling on sports. The district court consolidated the cases. In June 2019 the district court granted summary judgment in favor of NHLC and NeoPollard, ruling that the Wire Act only applied to transmissions related to bets

or wagers on sporting events, setting aside the 2018 OLC opinion. The government appealed.

The question presented to the First Circuit was one of statutory construction, that is, whether in Section 1084(a) the phrase "on any sporting even or contest" qualifies the term "bets or wagers" used throughout section 1084(a), or just the "bets or wagers" in the clause it appeared in.

Section 1084(a) of the Wire Act provides that:

"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." [emphasis added]

The appeals court was asked to answer whether each reference to "bets or wagers" be interpreted to mean "bets or wagers on any sporting event or contest," or if the phrase "bets or wagers" in the other prohibitions, untethered to the sports-gambling modifier, apply to all forms of gambling. The parties disagreed on how broadly to apply the phrase "on any sporting event or contest" and proffered differing canons of statutory construction to support their arguments. The Government argued the phrase "on any sporting event or contest is" limited and only qualifies the "bets or wagers" in the first clause, in which it is located. In opposition, NHLC claimed it qualifies both uses of "bets or wagers" in the first clause, and that the term "bets or wagers" in the second clause is shorthand for the qualified meaning in the first. The appeals court's decision was no quick pick, requiring 49 pages of analysis.

Ultimately the First Circuit sided with NHLC, concluding that the Government's "impractical interpretation" must give way to NHLC's "more natural reading" that the prohibitions under Section 1084(a) of the Wire Act apply only to the interstate transmission of wire communications related to any "sporting event or contest." After parsing the parties' main syntax-related, statutory interpretation arguments, the court determined that many of those arguments yielded no firm resolution. The circuit court stated that the fact that the provision at issue "accommodates several possible readings" does not mean that the statute as a whole lacks clarity on the issue at hand. The court stressed the principle of statutory construction that prefers "the most natural reading" of a statute that harmonizes the various provisions and avoid odd or unpredictable results. The First Circuit reasoned that read the Government's way, there would be no congruity between the two prohibitions nor parallelism between the two clauses. Following the Government's reasoning, the Act would allow anyone to transmit over the wires information assisting someone in placing a bet over the wires on a non-sporting event without running afoul of the Wire Act, but the person receiving the assistance would commit a crime if he then places the bet or wager. However, by reading "on any sporting event or contest" as qualifying both, the court appeared to find congruity: one cannot use the wires to place a bet on a sporting contest, nor can one use the wires to send information assisting in placing that bet or wager. In scratching out the DOJ's broad interpretation of the Wire Act, the court also questioned why the Wire Act's safe harbor, 18 U.S.C. § 1084(b), which exempts from liability transmissions "for use in news reporting of sports events or contests," only mentions sporting events if the statute was truly meant to apply to all forms of betting.

With a new administration in power and the DOJ's refocused enforcement priorities, it seems unlikely that the Government will seek Supreme Court review of the decision. It is also seems unlikely the Supreme Court would accept the case as there is no apparent split of authority, with the only other appeals court to consider this issue, albeit in dicta, having stated that the Wire Act's prohibitions are restricted to sporting events and contests. Thus, if the First Circuit's decision stands, the decision is a "Win-Time," or a "Cash for Life" opportunity for the online lottery and gaming industry and the technology providers that work with states to offer the related online and mobile platforms, as such entities will not have to operate under regulatory uncertainty as to whether they may be subject to prosecution under the Wire Act.

Athletes Unable to Compete for Refunds for Races Cancelled Due to COVID-19

The race came to a halt early for triathletes and other runners seeking a refund for the money they paid to participate in an Ironman Triathlon and a Rock 'n' Roll Marathon in California in 2020 ("Race Events") when a Florida district court ended a proposed class action against the Race Events' organizers. Lead plaintiffs, Mikaela Ellenwood ("Ellenwood") and Jorge Casanova ("Casanova") (collectively, "Plaintiffs"), alleged that World Triathlon Corp., Competitor Group Holdings, Inc. and Competitor Group, Inc. (collectively, "Defendants") breached contracts with race participants and, among other things, violated Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA") by cancelling the Race Events due to COVID-19 without providing a refund. However, the court quickly put an end to this potential marathon of litigation, holding that a "no refunds" clause in the contracts was clear, not unconscionable and not deceptive. (*Ellenwood v. World Triathlon Corp.*, No. 20-1182, 2021 WL 62482 (M.D. Fla. Jan. 7, 2021)).

Plaintiffs are individuals who each registered for a Race Event. Ellenwood, a resident of Denver, Colorado, paid $89.00 (plus a $14.99 processing fee) to participate in a Rock 'n' Roll Marathon Series event set to take place in San Francisco, California on April 5, 2020. The event combines music and running for a more enjoyable and motivating experience. In particular, the race routes are lined with live bands, cheerleaders and themed water stations so participants can run and hydrate in style. Casanova, a resident of Vallejo, California, paid $399.60 (plus a $29.60 processing fee) to participate in an Ironman Triathlon event set to take place in Santa Rosa, California on May 9, 2020. The event is a three-legged race consisting of a 2.4-mile swim, 112-mile bicycle ride and 26.22-mile marathon run, raced in that order. The race typically starts at 7:00 AM, and in order to be designated an Ironman, competitors must complete it by midnight.

Defendants are in the business of organizing, operating and facilitating these events which are held numerous times throughout the year in various cities around the world. However, this past year Defendants were forced to cancel both Race Events due to mandates from governmental officials in California related to the COVID-19 outbreak. Instead of providing refunds to all of those racers that had already registered and paid the corresponding fees, Defendants offered them the opportunity to transfer their registrations to future comparable races or defer them to the same exact race in 2021 when it was once again safe to host the events. Plaintiffs refused to accept this and, in a bit of cross-training, ran to the courthouse for their money back.

Defendants argued that when Plaintiffs registered for the Race Events they entered into online agreements in which they were required to demonstrate their assent to the event terms – including a "no refunds" clause – by clicking through fillable boxes. Both contracts at issue had virtually identical language. For example, the Ironman contract stated, in part: "I acknowledge and agree that WTC, in its sole discretion (whether it is for safety reasons, legal reasons or any other reason) may… (b) delay or cancel the Event…if it believes the conditions are unsafe or otherwise unsuitable for the Event. If the race course or Event is changed, modified, delayed or cancelled for any reason, including but not limited to acts of God or the elements…or any other cause beyond the control of WTC, **there will be no refund of WTC's entry fee or any other costs incurred in connection with the Event**." [emphasis added].

Plaintiffs countered that Defendants breached these race contracts and, among other things, violated FDUTPA.

The court quickly swam, biked, and jogged its way through Plaintiffs' arguments and sided with Defendants' ironclad defense. Let's break down the court's reasoning one mile at a time.

As to the breach of contract claim, in its complaint, Plaintiffs essentially argued that Defendants promised to provide the Race Events in certain locations at specific dates and times but failed to deliver even though Plaintiffs had already fully paid the entry fees. In other words, by requiring the Plaintiffs to choose between participating in comparable races later in the year or the same Race Event the following year, Defendants had altered the contracts and failed to give the Plaintiffs what they bargained for, thus requiring a full refund.

In reaching its decision, the court hardly broke a sweat in an 11-page decision, where it refused to "rewrite" the contract and found the contractual language clear and unambiguous. The court noted that the Defendants were not free to cancel the Race Events on a whim. Rather, the contract included a series of contingencies beyond Defendants' control that could result in cancellation and that there was nothing ambiguous about the above-referenced "no refunds" clause that the Plaintiffs specifically acknowledged and agreed to. As the court put it: "'No refunds' means exactly what it says – no refunds." Therefore, since the COVID-19 pandemic was a circumstance beyond the Defendants' control, the contract provisions were valid and enforceable and the failure to provide refunds was not a breach of contract.

With their main argument rejected, the Plaintiffs then began running in circles, and tried to contend that there was no contract at all because the "no refunds" clause was unconscionable. To prove an agreement is unconscionable, the court stated that under Florida law, a party must show that the agreement is so egregiously one-sided that no person would ever accept it. However, the court sprinted through this argument, holding that when it comes to outdoor sporting events, there are always factors beyond the parties' control (like inclement weather) that could impact the event, so "a 'no refund' provision is fair and consistent with common sense" (and that without the flexibility to limit refunds, it was unlikely that any organization would ever agree to host such an outdoor event due to the possibility of weather-related and other contingencies impacting the event).

Hitting the wall, Plaintiffs lastly claimed that Defendants violated FDUTPA by failing to provide refunds after cancelling the Race Events. A FDUTPA violation has three elements: 1) a deceptive act or unfair practice, 2) causation and 3) actual damages. Once again, the court did not even approach maximum heart rate in declining this argument. Instead, it ruled that the claim seemed duplicative of the breach of contract claim and that, regardless, Plaintiffs could not even satisfy the first prong of their three-legged race since there was nothing in the record to indicate Defendants did anything that could be perceived as deceptive or unfair.

With none of the Plaintiffs' legal arguments having enough legs to even make it to trial, the court granted Defendants' motion for summary judgment, thus giving them a solid victory. Not only did Defendants win this lap, they won the marathon, as a check of the docket at the time of publishing reveals that Plaintiffs have decided not to try and get back in the water with an appeal.

No Fowl Play in Congress' Prohibition on Cockfighting in Puerto Rico

Recently, a three judge panel for the First Circuit unanimously pecked away at the last remnants of legal cockfighting, the sport of pitting gamecocks against each other, in the United States. The court upheld a ruling by the U.S. District Court for the District of Puerto Rico which had rejected a constitutional challenge to the federal cockfighting ban that, as a practical matter, extended the prohibition on animal fighting ventures to the Commonwealth of Puerto Rico and other territories. (Hernandez-Gotay v. United States, No. 19-2236 (1st Cir. Jan. 14, 2021)).

Cockfighting is a long-standing part of Puerto Rico's economy and culture, with some describing it as a "national sport." In essence, a cockfight involves two equally matched roosters (bred for such activity and often fitted with steel spurs, or gaffs) that engage in combat in a cockfighting arena before a crowd of bettors until there is a winner. The practice, which purportedly dates back to when the Spanish brought it to the island in the 1700s, was banned in Puerto Rico in 1898 but returned in 1933, subject to local regulations. In 1976, Congress amended the Animal Welfare Act (the "AWA"), to ban animal fighting ventures except fights between "live birds" where permitted by local law, and in ensuing years, added additional restrictions. Although Puerto Rico was subject to the AWA, its cockfighting regulations allowed it to take advantage of this exception. In 2018, Congress again amended the AWA (specifically, in Section 12616 of the Agriculture Improvement Act of 2018), removing the exception that allowed individuals to, among other things, "sponsor or exhibit" cockfights if allowed under local law. This 2018 enactment effectively outlawed cockfighting in every United States jurisdiction, including the Commonwealth of Puerto Rico. Proponents

of the ban cited animal cruelty concerns as well as the potential for gamecocks to spread disease in poultry.

Club Gallístico de Puerto Rico, one of the largest cockfighting rings in Puerto Rico ("Club Gallístico"); Asociación Cultural y Deportiva del Gallo Fino de Pelea, a cultural organization dedicated to preserving the tradition of cockfighting; and several individuals who are involved in some way in the business of cockfighting (collectively, the "Plaintiffs") brought suit to challenge the ban in 2019, seeking a declaratory judgment that the ban was unconstitutional. In two separate lawsuits, which were consolidated on August 5, 2019, Plaintiffs alleged, among other things, that the ban exceeded Congress' power under the Commerce Clause and that it violated their First Amendment rights to free speech and freedom of association, as well as their Due Process rights. The Government countered that under the Commerce Clause and the Territorial Clause, Congress has the power to restrict animal fighting in the fifty states and extend this prohibition to all territories, and that pursuant to the Supremacy Clause, the ban preempts any local law or regulation in Puerto Rico that legalizes cockfighting.

The district court rejected the Plaintiffs' claims, finding that the federal government had a rational basis to regulate live bird fighting in Puerto Rico and other territories because it affects interstate commerce and the means of regulation, a comprehensive prohibition of these fighting ventures, was reasonably adapted to that legislative end. (*Club Gallístico de P.R. Inc. v. United States*, 414 F. Supp.3d 191 (D.P.R. 2019)). The lower court also ruled that a cockfighting venture "did not fall within any expressive or non-expressive protected conduct" protected under the First Amendment, and even if it did, the government could regulate such conduct (versus restricting the written or spoken word). Despite the setback, the Plaintiffs showed gameness and an appeal followed (although Club Gallístico dropped out of the suit after a notice of appeal was filed).

Preparing for the fight, the appeals court first considered whether Congress, in enacting the ban, exceeded its authority under the Commerce Clause, which empowers Congress to regulate "activities that substantially affect interstate commerce." The appeals court was tasked with determining whether there was a rational basis for concluding that the cockfighting ban substantially affected interstate commerce. The court considered the following four factors: (1) whether the statute regulates economic or commercial activity, (2) whether the statute contains an "express jurisdictional element" that limits the reach of its provisions, (3) whether Congress made findings regarding the regulated activity's impact on interstate commerce; and (4) whether "the link between [the regulated activity] and a substantial effect on interstate commerce was attenuated."

Plaintiffs argued that prohibiting cockfighting did not truly regulate any economic or commercial activity. Finding this argument unpersuasive, the court reasoned that animal fights are for the purposes of "sport, wagering, or entertainment" (and that some of the Plaintiffs sponsored or exhibited cockfights), thus the ban regulated a quintessential economic activity.

Next, the Plaintiffs alleged that the ban was overly broad, forbidding all cockfighting without a distinction between interstate or intrastate commerce. Here, the court noted that the Government argued that the ban only applied to cockfighting with a commercial element – the fight could go on so long as commerce was not involved.

Plaintiffs also pointed to a lack of congressional findings in the 2018 amendment to the AWA concerning the amendment's impact on interstate commerce as evidence that Congress exceeded its power under the Commerce Clause. Noting that the ban was not a new restriction on cockfighting, but rather an amendment to the existing law, the court allowed Congress' findings from the AWA and its previous amendments to enter the fray. The court referenced several congressional findings including the fact that cockfighting attracts spectators from numerous states and advertising in nationwide print media. The court also highlighted the potential for the spread of disease as an especially salient concern given the ongoing COVID-19 pandemic.

Given these factors, the court found that the Plaintiffs' cockfighting activities did have an adequate link to interstate commerce, making them subject to regulation. The court then turned to the Plaintiffs' other contenders.

On the grounds that cockfighting is an expression of their culture and "deeply rooted sense of self-

determination," the Plaintiffs argued that the ban violated the Free Speech and Freedom of Association Clauses of the First Amendment. To determine whether cockfighting was protected by the Free Speech Clause, the court looked to whether the conduct was "sufficiently imbued with elements of communication." Rejecting this challenge, the court stated that Plaintiffs "failed to identify any expressive element in the cockfighting activities that they engage in" such that the ban could be considered even an incidental burden on speech. The court also explained that even had Plaintiffs shown some expressive element to their activities, under the Supreme Court's *O'Brien* test, which analyzes instances where expressive and non-expressive conduct are combined in the same activity, the ban would be a permissible incidental restraint on such speech. The appeals court also found no violation of Plaintiffs' freedom of association as nothing in the law prevented the Plaintiffs from gathering to discuss or express their views on cockfighting. Thus, the First Circuit affirmed the judgment of the lower court granting summary judgment in favor of the Government and further solidified Congress' power to referee the practice of animal fighting through its regulation of interstate commerce.

Proskauer has more than 50 years of experience counseling the world's premier sports organizations on their most critical and complex matters.

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