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The Applicability of the **UIGEA is Uncertain**, Notwithstanding the **iMEGA Court's Decision** that it is **Not Void for Vagueness**

On September 1, 2009, the U.S. Third Circuit Court of Appeals rejected the Interactive Media Entertainment and Gaming Association's ("iMEGA") claims that the Unlawful Internet Gambling and Enforcement Act ("UIGEA") [1] was void for vagueness and violated individuals' privacy rights. [2] In affirming the lower court, the Court left intact the UIGEA and the regulations promulgated thereunder, with which covered financial transaction processors must comply beginning December 1, 2009. Unfortunately, the decision does nothing to clarify the UIGEA, and in particular, it leaves uncertain the UIGEA's applicability to intrastate Internet wagering on non-sporting events and interstate wagering on horse races carried out pursuant to the Interstate Horseracing Act ("IHA"). [3] This is because the UIGEA intentionally preserves the uncertainty regarding the applicability of the Wire Act [4] to those activities.

The UIGEA prohibits a gambling business from knowingly accepting credit, electronic funds transfers, checks or various other financial instruments in connection with another person's "unlawful Internet gambling." [5] "Unlawful Internet gambling" is defined as "to place, receive, or otherwise knowingly transmit a bet or wager [using] the Internet where such bet or wager is unlawful under any applicable Federal or State law…in which the bet or wager is initiated, received, or otherwise made." [6] However, specifically excepted from the term is the "placing, receiving, or otherwise transmitting a bet or wager" where the bet or wager is initiated and received or otherwise made within a single state, where such activity is expressly authorized by that state's laws, and where state-mandated age and location verification controls are in place. [7] The UIGEA also requires certain financial transaction processors "to develop policies and procedures reasonably designed to identify and block or otherwise prevent or prohibit the acceptance of restricted transactions," [8] where a "restricted transaction" is a transaction or transmission involving credit, funds or financial instruments which the recipient is barred from accepting because it involves another's participation in unlawful Internet gambling. [9] Thus, knowing what constitutes "unlawful Internet gambling" is critical to knowing the applicability of the UIGEA.

The Court dismissed iMEGA's vagueness claim because iMEGA had not made the required showing that the UIGEA "is impermissibly vague in all of its applications," [10] noting that the UIGEA's application is clear in states where all gambling is prohibited. Further, "the fact that gambling may be prohibited in some states but permitted in others does not render the Act unconstitutionally vague," even though this may result in conduct being lawful under the UIGEA in some states while being unlawful in others. [11]

The Court seemed to assume that any vagueness in the UIGEA would arise only as a result of vagueness or ambiguity in applicable state law. The Court stated:

It bears repeating that the [UIGEA] itself does not make any gambling activity illegal. Whether the transaction [involved when a U.S.-based gambler sends a bet to a foreign country where such betting is legal] constitutes unlawful Internet gambling turns on how the law of the state from which the bettor initiates the bet would treat that bet, i.e., if it is illegal under that state's law, it constitutes "unlawful Internet gambling" under the Act. [12]

Omitted from the Court's analysis, however, was the fact that federal laws critical to the application of the UIGEA are ambiguous, and further, that the UIGEA was purposely drafted to avoid resolving those ambiguities.

At the time the UIGEA was being considered, it was well-known to Congress that the applicability of the Wire Act to non-sports wagering and to interstate betting on horse races was in dispute. In debating the so-called "Leach Bill," the predecessor bill to the UIGEA, [13] Representative Jim Leach (R-IA) referred to this dispute – which arose after passage of a 2000 amendment to the IHA which seemed to legalize Internet betting on horse races. He stated:

The Executive Branch has taken the position that the 1961 Wire Act overrides the IHA, even though the IHA is a more recent statute, because neither statute expressly exempts IHA transactions from the Wire Act. The horseracing industry vigorously disagrees. [The Leach Bill] has been very carefully drafted to maintain the status quo regarding horseracing, preserving the ability of the Executive Branch and the horseracing industry to litigate the proper interpretation of these two statutes. The text of the bill is clear: "this Act does not change which activates [sic] related to horseracing may or may not be allowed under Federal law." [14]

In other words, the Leach Bill intentionally preserved the ambiguity as to whether or not the Wire Act overrides the IHA and thus prohibits

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[1] 31 U.S.C. § 5361.

[2] Interactive Media Entertainment and Gaming Association v. United States, et al., 580 F.3d 113 (3rd Cir. 2009).

[3] 15 U.S.C. §§ 3001-3007.

[4] 18 U.S.C. §§ 1081 and 1084.

[5] 31 U.S.C. § 5363.

[6] 31 U.S.C. § 5362(10)(A).

[7] 31 U.S.C. § 5362(10)(B). The UIGEA also provides that "[t]he intermediate routing of electronic data shall not determine the location or locations in which a bet or wager is initiated, received, or otherwise made." 31 U.S.C. § 5362(10)(E).

[8] 31 U.S.C. § 5364.

[9] 31 U.S.C. § 5362(7).

[10] iMEGA, at 116, citations omitted, emphasis in original.

[11] Id.

[12] iMEGA, at 117.

[13] The "Leach Bill," or H.R. 4411, was so called because its sponsor was Representative James Leach (R-IA).

[14] 152 Cong. Rec. H4978-03, p. 24; 2006 WL 1896448 (Cong.Rec.)

interstate Internet wagering on horseracing. The language of the Leach Bill that preserved this ambiguity is now part of the UIGEA. It provides:

It is the sense of Congress that this subchapter [i.e., the UIGEA] shall not change which activities related to horse racing may or may not be allowed under Federal law. This subparagraph is intended to address concerns that this subchapter could have the effect of changing the existing relationship between the Interstate Horseracing Act and other Federal statutes in effect on the date of the enactment of this subchapter. This subchapter is not intended to change that relationship. This subchapter is not intended to resolve any existing disagreements over how to interpret the relationship between the Interstate Horseracing Act and other Federal statutes. [15]

Not only was this dispute as to the legality of interstate Internet betting on horse races well known at the time the UIGEA was drafted, but it was also well-known that there is general uncertainty as to the Wire Act's applicability to non-sports related wagering. The Department of Justice ("DOJ") maintains that the Wire Act applies to all types of gambling, although most legal experts maintain that its scope is limited to sports betting and the Fifth Circuit Court of Appeals so held in 2002. [16] The DOJ also has asserted that the Wire Act prohibits intrastate Internet wagering via the Internet even when all wagering-related communications begin and end in the same state and the wagering is expressly authorized by that state's laws. [17] Acknowledging these disputes while debating language in the Leach Bill that would have amended and clarified the Wire Act (which amending and clarifying language was removed before passage of the UIGEA), Representative Bob Goodlatte (R-VA) stated:

The legislation clarifies the Wire Act, the 1961 statute that made it a Federal felony for gambling businesses to use wire communication facilities to transmit bets or wagers or related money in interstate or foreign commerce. The Wire Act did not contemplate the Internet or wireless communications devices and is ambiguous as to whether it applies to only sports-related gambling or all forms of gambling. The bill updates the Wire Act to clarify that it covers all types of gambling and all types of communication facilities. [18]

Since the language that would have amended and clarified the Wire Act was removed before the final bill was passed, one may reasonably deduce that Congress preserved intentionally the ambiguity as to whether the Wire Act applies to non-sports related wagering or to the above-described intrastate Internet wagering.

Because the Wire Act is critical to the application of the UIGEA, Congress' careful and intentional preservation of these uncertainties as to the Wire Act's application make the application of the UIGEA correspondingly unclear. While these uncertainties will not create problems in states that prohibit all forms of gambling, there are only two such states – "[t]oday, every state except Hawaii and Utah has some form of legalized gambling." [19] Thus, the applicability of the UIGEA is unclear in almost every state. Specifically, because of the uncertainty surrounding the Wire Act's applicability, it is unclear whether "unlawful Internet gambling" under the UIGEA includes interstate wagering on horse races conducted in accordance with the IHA, non-sports related Internet wagering carried out in accordance with state law, and/or wholly intrastate Internet wagering (except for the intermediate routing of the communications) conducted in accordance with state law and with state-mandated location and age verification controls. While many, including this author, maintain that the UIGEA's intrastate wagering exception was intended to allow states to authorize intrastate Internet wagering where in-state bettors wager over the Internet from their home computers, the Conference Report on the UIGEA suggests otherwise, further adding to the confusion. That report, written the day before Congress passed the UIGEA, discusses the UIGEA's intrastate wagering exception, stating:

The Internet gambling provisions [of the UIGEA] do not interfere with intrastate laws. New section 5362(10)(B) creates a safe harbor from the term "unlawful Internet gambling" for authorized intrastate transactions, if the state law has adequate security measures to prevent participation by minors and persons located out of the state. The safe harbor would leave intact the current interstate gambling prohibitions such as the Wire Act, federal prohibitions on lotteries, and the Gambling Ship Act so that casino and lottery games could not be placed on websites and individuals could not access these games from their homes or businesses. The safe harbor is intended to recognize current law which allows states jurisdiction over wholly intrastate activity, where bets or wagers, or information assisting in bets or wagers, do not cross lines. This would, for example, allow retail lottery terminals to interact with a processing center within a state, and linking of terminals between separate casinos within a state if authorized by the state. [20]

Thus, the Conference Report suggests that the UIGEA's intrastate transaction exception is meant only to create a safe harbor for intrastate wagering where the wagering occurs from retailer terminals and not from home computers. That seems inconsistent with the express language of the intrastate wagering exception, and if upheld as a correct interpretation would make the exception almost meaningless.

In summary, because of the intentionally preserved disputes as to the scope of the Wire Act, the applicability of the UIGEA is uncertain. This uncertainty will exist in every state that authorizes interstate Internet wagering on horse races and in every state that seeks to allow intrastate Internet wagering (subject to age and location verification measures) where bettors wager from their home computers. Under such circumstances, it is unfair to require gambling businesses and financial transaction providers to determine what constitutes "unlawful Internet gambling," particularly (as to gambling businesses) under threat of criminal liability. While the Third Circuit Court found the UIGEA clear in at least one application – where the gambling at issue is prohibited by state law – in many if not most other applications it will be unclear, and the likely result of this uncertainty will be that Internet gambling activities that are actually legal (i.e., a court would so rule) will be considered too risky to undertake. ◆

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[15] 31 U.S.C. § 5362(10)(D)(iii).

[16] In re MasterCard International, Inc., 313 F.3d 257 (5th Cir. 2002).

[17] See letter dated Jan. 2, 2004, from David M. Nissman, United States Attorney, District of the Virgin Islands, to Judge Eileen R. Petersen, Chair of the U.S. Virgin Islands Casino Control Commission, and letter dated May 13, 2005, from Laura H. Parsky, United States Deputy Assistant Attorney General, to Carolyn Adams, Illinois Lottery Superintendent.

[18] 152 Cong. Rec. H4969-04, p. 5; 2006 WL 1896445 (Cong.Rec.)

[19] "Sports betting next target for some states," Stateline.org, updated May 8, 2009, at http://www.stateline.org/live/details/story?contentId=398253

[20] 152 Cong. Rec. H8026-04, p.8; 2006 WL 2796951 (Cong.Rec.), emphasis added.