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BetonSports: effect on First Amendment arguments

Online casinos have historically relied on a perceived exemption to the Wire Act, the text of which appears to only prohibit betting on a sporting contest, argues Lawrence G. Walters, a partner with Weston, Garrou, DeWitt and Walters. Walters points out that the BetonSports ruling could endanger a ruling 'In Re MasterCard', which enshrined that the Wire Act only applies to bets made on a sporting contest.

A ruling has been handed down from the prosecution of the principals of BetonSports.com that is of significant interest to the online gambling industry. The ruling arises out of the racketeering prosecution against various individuals and corporations associated with the BetonSports.com website, including former CEO David Carruthers and founder Gary Kaplan. The Government contends that BetonSports engaged in a pattern of racketeering activity by allowing United States citizens to bet on sporting events and other games of chance via the BetonSports.com website, all in violation of various federal statutes, including the Wire Wager Act[1].

On 7 May 2007, United States Magistrate Judge Mary Anne Medler rendered a Report and Recommendation, suggesting that the Motions to Dismiss filed by David Carruthers, and his Co-Defendants, in the BetonSports.com prosecution be denied. Mr. Carruthers' attorney filed written objections to the Report and Recommendation, which are permitted before a final ruling on the motions is considered by the United States District Court Judge assigned to the case. While Magistrate Judge Medler's ruling is potentially devastating to the defendants involved in the case, it is even more disastrous to the online gambling industry, if ultimately upheld.

'In Re MasterCard' ruling

The BetonSports decision threatens both the continued viability of the 'In Re MasterCard' ruling, which exempts online casinos from the Wire Wager Act, as well as the potential for success of various First Amendment arguments related to commercial speech. First: the 'In Re MasterCard' issue.

For years, online casinos have relied upon the perceived exemption to the Wire Wager Act (the Wire Act) as a basis for asserting that United States federal law does not apply to their betting activity. Initially, this position was based on the text of the Wire Act itself, which appears to prohibit one from engaging in the business of betting or wagering on any sporting event or contest. The legislative history surrounding the Wire Act appears to support this narrow construction of the law as applying only to sporting events. Moreover, the judicial interpretations of the Wire Act all concluded that it applied exclusively to sports betting activity. In addition, various legislative proposals debated in Congress over the years sought to amend the Wire Act to encompass games of chance - but were defeated. This supposedly demonstrates that existing law was not sufficiently broad to prohibit games of chance.

This longstanding interpretation of the scope of the Wire Act in regards to brick and mortar betting was confirmed and made applicable to online gambling in a case litigated in the Eastern District of Louisiana, colloquially referred to as the 'In Re MasterCard case'. There, the court ruled that the plain language of the statute and the interpretive case law clearly indicate that the object of the gambling prohibited by the Wire Act must be a sporting event or contest. Accordingly, the court ruled that 'internet gambling on a game of chance is not prohibited conduct under [the Wire Act]'.

This ruling gave some degree of comfort to those involved with the online casino industry, supporting their position that online casino gambling is not illegal - at least under the Wire Act, which is most often cited by the government as a basis for criminalizing internet gambling operations. Participants in the online gambling industry were hesitant to initiate any litigation that would endanger the 'In Re MasterCard' ruling, or put it at risk of being overruled. However, that era may have ended with the following ruling from Magistrate Judge Medler in the BetonSports case: 'This court respectfully disagrees with the MasterCard cases'. The Magistrate concluded that the Wire Act pertains to all forms of gambling, including sports betting and games of chance, based on the fact that the language of the statute only includes the limiting phrase 'sporting events or contests' in some, but not all, of the prohibitions contained in the statute. In fact, the broadest prohibition on using a wire communication facility for the transmission of bets or wagers in subsection (a) of the statute fails to include the limiting language, and thus (according to the ruling) applies to all 'bets or wagers'. The report goes on to note that it is appropriate to assume that Congress meant something different when it used the phrase 'bets or wagers on any sporting event' in some parts of the statute as compared to 'bets or wagers' in others. The latter allegedly

presumes a broader prohibition on all forms of gambling, while the former is limited to sports betting activity. In his Objections to the ruling, Carruthers argues that any ambiguity in the Statute must be resolved in favor of the defendant. This is a correct statement of the law, under the so-called 'Rule of Lenity'. It remains to be seen whether the District Court Judge will agree with the Magistrate or Carruthers on this point.

The court goes on to discuss the impact of the recently passed UIGEA on this issue. Magistrate Medler incorrectly concludes that the UIGEA's definition of 'bet or wager' demonstrates that Congress considered non-sports wagering to be illegal at the time the legislation was passed. However, the new Act only prohibits bets or wagers associated with 'unlawful Internet gambling' which is defined as any gambling that is already illegal under state, tribal, or federal law. The definition of 'bet or wager' in the UIGEA therefore has no bearing on the issue of whether the Wire Act prohibits non-sports related betting activity. Perhaps this error will be corrected by the US District Court Judge upon review of the report and recommendation, but the substantive ruling is no less dangerous.

Interestingly, the Magistrate Judge concludes that even if the 'In Re MasterCard' decision is correct, the Grand Jury Indictment can be 'corrected' to eliminate the references to non-sports related gambling, despite the general constitutional prohibitions on amendments of indictments. Thus, the US District Judge has the option of ruling against the defendants on this issue without calling into question the viability of the 'In Re MasterCard' decision, if desired. Ordinarily, Grand Jury Indictments cannot be 'corrected' if they contain an error of substance. The concern here is whether the Grand Jury was incorrectly instructed on the law applicable to the alleged criminal activities. If the error 'substantially influenced' the Grand Jury's decision to indict, the case should be dismissed. Since the Grand Jury was apparently instructed that all forms of online gambling, including non-sports related gambling, violate the Wire Act, that instruction should result in a dismissal of the indictment if the Court determines that the Wire Act only applies to sports betting activity.

The concern here is whether the Grand Jury was incorrectly instructed on the law applicable to the alleged criminal activities

First Amendment issues

Mr. Carruthers, and others, also challenged the validity of the government's contentions that BoS' advertising activities were deceptive and illegal, in its Motion to Dismiss. Specifically, they contended that the First Amendment to the United States Constitution protects the company's advertising statements as a form of commercial speech, which can only be banned or regulated if a strict test is met - known as the Central Hudson Test. While the Magistrate Judge notes that the defendants failed to articulate a specific regulation which is alleged to be an unconstitutional ban on advertising, she decided to dispense with their constitutional arguments nonetheless.

Unfortunately, the Magistrate Judge resolved this issue based on a fairly simplistic reading of the holding in Greater New Orleans Broadcasting Association v United States, 527 U.S. 173 (1999). In that case, the United States Supreme Court held that advertising of gambling (lottery) activity that was legal in one jurisdiction could not be banned just because it was received in another jurisdiction where the same gambling activity was prohibited. The BoS defendants argued that, similarly in their case, the gambling activity was legal in Antigua, Barbuda, and Costa Rica where it was conducted, and that BetonSports was fully licensed in those jurisdictions. Therefore, the advertising should be considered legal in the US. The government countered with the argument that internet gambling is illegal in the specific states where the bets are made. Unfortunately, the court accepted the government's argument claiming: 'To hold otherwise would effectively permit any activity licensed in a foreign jurisdiction to be legal in the United States without reference to local law'. This is incorrect. Rendering a decision in the defendant's favor on this argument would only mean that the advertising of the gambling activity would be considered legal, not the underlying gambling activity itself. That is the essence of the Greater Orleans holding. The Magistrate's ruling goes too far when it presents this 'parade of horribles' suggesting that other countries' regulations would be able to 'supersede United States laws'. At worst, only the advertising of a legal and licensed activity in some other country would have to be tolerated in the United States. Regrettably, this ruling represents the first and only substantive analysis of the First Amendment advertising issue raised by the Greater Orleans case, as applicable to internet gambling. The industry can hope that the District Judge, or some future Appellate Judge, will recognize the error of the Magistrate Judge's reasoning - but for that, the industry will have to wait and see.

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1. Title 18 U.S.C. § 1084.

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