

AT THE CORNERS

WELCOME

In 2018, the sports marketplace encountered at least three disruptions that would fundamentally change the economics of their business. The first major shift occurred when the United States Supreme Court struck down the Professional and Amateur Sports Protection Act (PASPA) as an unconstitutional burden on states. As a result of that decision, close to two dozen states enacted legislation and regulatory rule-making to allow for legalized sports wagering. The American Gaming Association estimates several more states, including Kansas, Missouri and Minnesota, will legalize sports wagering in the coming years. The second major shift occurred when viewership for esports ratcheted to unprecedented levels. Some publishers saw viewership numbers escalate, non-endemic sponsorships expand, and the value of team franchises grow. Indeed, one of the largest esports prize pools in 2018 exceeded \$25 million. These metrics reformed many who were skeptical about esports. Finally, the sports technology marketplace has revolutionized how fans consume the game. The data that can be obtained on fans, the game, and their interaction with one another provides immense opportunities for further engagement and revenue opportunities.

At Stinson, we are always evolving with our clients and their needs. The sports marketplace has transformed, and we are attorneys who are adept at navigating the risks. We appreciate the distinctions between a MOBA and an RTS. We understand the nuances between games of skill and chance, and how to comply with complex legislation and rules regarding sports wagering. We know that data is valuable because it can be turned into content, and content can be monetized.

Because of these changes, we have unveiled a new group at Stinson solely focused on esports, sports technology, and wagering. We are also debuting our new quarterly publication, *At the Corners*, which will be devoted to these issues. We understand that your businesses are confronted with disruption, and we are prepared to provide the type of counseling that you have come to expect from Stinson. We look forward to working with you in these ventures.

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A VICTORY FOR DFS AND THE “PREDOMINATE FACTOR TEST”

BY [HAILEY PERKINS](#) & [SCOTT BECKMEN](#)

On April 16, 2020, the Illinois Supreme Court officially adopted the “predominate factor test” and ruled in *Dew-Becker v. Wu* (2020 IL 124472) that daily fantasy sports (DFS) are, in fact, games of skill, and therefore permissible under Illinois law. This decision provided clarity to the DFS market in Illinois and reversed a controversial 2015 opinion issued by the Illinois Attorney General that had concluded DFS violated state gambling laws.

CASE BACKGROUND

Given the importance of this case, one would assume the actual money in dispute in the *Dew-Becker* case would have been significant as well – but that assumption would be incorrect. On April 1, 2016, Colin Dew-Becker invited Andrew Wu to participate in a \$100 head-to-head DFS contest on the FanDuel Platform. Dew-Becker lost the head-to-head DFS Contest and filed suit against Wu on April 4, 2016. Yes, you read that correctly, \$100.

Dew-Becker argued that DFS, under Illinois law, was considered unlawful gambling and thus, he was entitled to recover the \$100 he lost. This argument was based on the Illinois Loss Recovery Act (LRA) permitting a person who loses a wager in excess of \$50 to potentially recover the lost wager plus court costs. Wu ended up prevailing in the circuit court, but the court did not reach a conclusion on whether DFS should be classified as gambling. Rather, the circuit court ruled the LRA was not intended to “allow recovery when the gambling is not connected” between one person and another – since the bet occurred on the FanDuel Platform and not directly between the parties.

The appellate court affirmed the circuit court’s decision, effectively reasoning that a recovery under the LRA could only occur when there was a “direct connection between the two persons involved in the wager”. Since the bet occurred on the FanDuel Platform, a direct connection between the parties

could not be established, since the parties operated under virtual screen names and not their actual names. The appellate court went on to reason that, in the event Dew-Becker were to prevail under the LRA, then every contest on an internet gaming platform such as FanDuel would be subject to similar claims by any person who loses. Such a decision would cause a flood of litigation that would severely hamper the court and would be inconsistent with how current gambling and DFS platforms operate.²

Somewhat buried in the appellate decision was the bomb that DFS followers dreaded. The appellate court stated that in order to determine if the LRA applies, they must first answer “whether the DFS contest in which [Dew-Becker] and [Wu] participated amounted to ‘gambling.’” In Illinois, “[a] person commits gambling when he or she *** knowingly plays a game of chance or skill for money or other thing of value, unless excepted in subsection (b) of this Section.” Thus, the appellate

court concluded that “the DFS contest at issue was a game of chance, a game of skill, or some combination thereof and that none of the exceptions enumerated in section 28-1(b) apply. See *id.* § 28-1(b). Therefore, we assume *arguendo* that [Dew-Becker’s] and [Wu’s] participation in the head-to-head DFS contest at issue qualified as gambling.”³

ILLINOIS SUPREME COURT RULING

Still unwilling to let go of the \$100 loss, Mr. Dew-Becker appealed again to the Illinois Supreme Court, which granted the petition review under the issue of “[w]hether the [LRA] applies

in an instance where the gambling in question is facilitated by DFS intermediaries such as FanDuel.”⁴

In its opinion, the Illinois Supreme Court reached the same conclusion as the appellate court, but it immediately rejected its reasoning and instead went directly to whether or not the DFS contest should be considered gambling. In doing so, the Supreme Court examined three general tests (1) “predominant purpose test” or “predominate factor test”⁵; (2) “material elements test”⁶; and (3) “any chance test”⁷. The court reasoned that since every contest inevitably has some element of chance, the “predominate factor test” provided a “workable rule

that allows for greater consistency and reliability in determining what constitutes a game of skill.”⁸

This ruling runs parallel to the trend toward legalizing sports gambling and the acceptance of DFS contests as games of skill. More than 20 states have now legalized sports gambling since the *Murphy* decision in 2018, and 43 jurisdictions currently permit DFS contests. However, the regulatory landscape surrounding DFS (and sports betting) remains convoluted and murky. The Dew-Becker decision provides an additional navigation point for the application of the “predominant factor test” to DFS that could provide clarity to the DFS landscape.

¹ 2018 IL App (1st) 171675 (December 14, 2018) at 5.

² *Id.* at 19-20, 22, 25.

³ 2018 IL App (1st) 171675 at 4.

⁴ 2020 IL 124472.

⁵ “Under this test, contests in which the outcome is mathematically more likely to be determined by skill than chance are not considered gambling.” *Joker Club, LLC v. Hardin*, 643 S.E.2d 626 (N.C. Ct. App. 2007).

⁶ “Under this test, a contest is considered a game of chance if the outcome depends in a material degree upon an element of chance, even if skill is otherwise dominant.” See, e.g., *Thole v. Westfall*, 682 S.W.2d 33, 37 n.8 (Mo. Ct. App. 1984).

⁷ “[T]his test finds a contest to be gambling if it involves any chance whatsoever.” *Id.* at 664.

⁸ 2020 IL 124472 at 8.

THERE IS A PRICE FOR ATHLETE DATA

BY ETHAN SANDERS & AALOK SHARMA

On August 4, 2011, the NFLPA and the NFL entered into a collective bargaining agreement (CBA) that would control the NFL's fate for a decade. At the time, many outsiders focused on the agreement's novel rules for rookie compensation (Article VII), or on the leagues revenue model split (Article XII). Indeed, many hailed the 10-year agreement as an opportunity to provide much needed stability for owners and athletes. However, that agreement failed to capture revenue opportunities that the digital world would soon provide. A review of the 316-page agreement shows that the word "data" appears only four times, and little of it directly deals with the monetization of data. By stark contrast, the new NFL CBA passed on March 15, 2020 contains over 140 references to "data," reflecting the league's focus on the importance and monetization of data.

Since the 2011 CBA, the value for athlete data, including data related to biometrics, has grown. However, that growth became exponential after the Supreme Court's decision in *Murphy*¹. As an example, NBA and MGM

Resorts announced a unique agreement that involved data and legalized sports wagering. Over the three-year term of the agreement, the NBA would supply a verified, accurate and official data feed for \$25 million. After the NBA's agreement with MGM, other leagues, including the NHL, MLB and NFL, entered into partnerships for the sale of official data. While the leagues have entered into numerous data deals, some players have demanded they be entitled to some revenue from data.

The fight over data rights has been a constant battle in the sports arena. In 1997, the NBA and Motorola engaged in substantial litigation about the distribution of real-time live scoring data.² Several years later, the PGA Tour sought to enforce its data rights from live scoring publication by news organizations that did not pay for those rights. While these fights have not directly impacted players, they have certainly demonstrated the value of data rights.

If one fast forwards to the current iteration of the NFL's collective bargaining agreement, the value of

data rights will be shared between the parties. A revised Article XII, which deals with the accounting and calculation of the salary cap, states that all revenue includes any revenues generated from gambling, gambling-related sponsorships, and any "player data." Under this CBA, player data, which includes sensitive information such as biometric information, may be shared with broadcast partners. As such, it is likely that player biometric information will be displayed on the next broadcast, or that such biometric information will be utilized in sports wagers.

Until this iteration of the CBA, data monetization opportunities were missed by players, teams, and leagues. Now, it is widely understood that data can be manipulated into content, and that same content can be monetized. As such, data has a value, and that value will be shared between teams and players.

¹ *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018).

² *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997).

REVISITING THE FEDERAL WIRE ACT ON APPEAL

BY SCOTT BECKMEN & AALOK SHARMA

On June 18, 2020, the First Circuit Court of Appeals heard arguments in *New Hampshire Lottery Commission et al. v. Barr et al.*, a case which challenged the DOJ's 2018 reinterpretation of the Wire Act to apply to all or most online gambling, rather than just sports betting. As we await the decision from the appeals court, we take a closer look at the Wire Act and its applicability. Although we don't anticipate the appellate decision will provide much-needed clarity on the Wire Act, we do hope, no matter the outcome, that Congress can be compelled to act and update the Wire Act.

THE WIRE ACT

The Wire Act applies to the transfer of money and information in interstate (or foreign) commerce for use in wagering. It was enacted in order "to assist the various states in enforcing their gambling laws and to aid in the suppression of organized gambling activities."¹ The Wire Act was enacted to assist states in the enforcement of their own laws, and was designed to root out organized crime.² Generally, the Wire Act relates to anyone "engaged in the business of betting or wagering" that uses a wire communication "to transmit bets, wagers, or information" relating to bets or wagers on sporting events or contests.

Thus, in interpreting the Wire Act, any analysis generally poses two

questions³: (1) Is the entity/person "engaged in the business of betting or wagering" and (2) Does the underlying business transmit bets, wagers or related information across a wire communication facility?⁴

A. "Engaged in the business of betting or wagering"

The critical element for the Wire Act to apply is whether or not an entity or person is "engaged in the business of betting or wagering". Statutory interpretation of federal law begins with the statute itself.⁵ Looking at the plain language, an initial consideration is whether the language is broad enough to encompass not only businesses that bet and wager, but also businesses that knowingly accept, place, receive or facilitate the bets or wagers of others. Such a broad interpretation would certainly encompass bookmakers (or "bookies"), whose business is to enter into bets or wagers with others and thereby risk loss or stand to win something of value, depending on the outcome of the events bet or wagered upon. But it would also encompass businesses that receive, place or facilitate the bets or wagers of others, such as those businesses which operate pari-mutuel wagering pools or daily fantasy sports platforms. These businesses have no direct stake in the ultimate outcome of a sporting event.

Such a broad interpretation lacks support in the plain meaning of the

statute, as well as in other gambling-related statutes⁶. If Congress had meant for such a broad interpretation, it would have utilized a much broader term, such as *involved* rather than *engaged*. By using the term *engaged*, Congress essentially narrowed the scope of the Wire Act to those businesses whose actual direct business is to enter into bets or wagers with others and thereby risk loss or stand to win something of value depending on the outcome of the events bet or wagered upon.⁷

The appellate court in *United States v. Scavo*⁸ further examined this issue, but they did so by looking at the issue from the perspective of an individual not directly involved in the business in question and whether or not said person may be culpable under the Wire Act. In *Scavo*, the appellant, an individual not under the direct control of a bookmaking business, was convicted of engaging in the business of betting or wagering in violation of the Wire Act. The evidence demonstrated the appellant worked on behalf of a bookie by providing the bookie with betting line information over the telephone. The appellant argued that "a person who merely provides line information is not 'engaged in the business of betting or wagering.'"⁹ However, the *Scavo* court disagreed. Ultimately, the *Scavo* court found that the appellant and their actions were essential to the operation of the bookmakers' business. Therefore,

they had violated the Wire Act by providing the bookie with the required line information in order to operate their business.

B. Transmission of bets, wagers, or related information

Although not defined under the Wire Act, “betting or wagering” has been clearly defined under other related statutes as “[t]he staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome.”¹⁰ Federal courts have also routinely recognized that a bet or wager must include: (1) the distribution

of prizes; (2) determined on the basis of chance or a future contingent event not under the actor’s control or influence; and (3) for a consideration.¹¹ If, on the other hand, any of these three elements is missing, then the activity would not be prohibited.¹²

C. Carve-outs, Exceptions, and the Safe Harbor

While the Wire Act is broad, there are a handful of exceptions. For example, there is a “newsworthiness” exception which allows the transmission of prohibited information if used for news reporting or sporting events or contests. Another is the safe harbor exception, which allows for the transmission of information across state lines if the “betting on that sporting event or contest” is legal in

both jurisdictions.¹³ However, the safe harbor exception only applies to the “transmission of information assisting in the placing of bets, not to the other acts prohibited in §1084(a) . . .”.

As described above, the Wire Act is an extraordinarily complex statute. Perhaps adding to the complexity, the statute was drafted in the 1960s when President Kennedy sought to disrupt organized criminal activities. Now, with the widespread use of the internet, the Wire Act shows itself to be antiquated and in need of significant revamping from Congress. Regardless of the *New Hampshire* Court’s decision, Congress should affirmatively take steps to reduce confusion with respect to the Wire Act.

¹ *United States v. McDonough*, 835 F.2d 1103, 1105 (5th Cir. 1988).

² *United States v. Southard*, 700 F.2d 1, 20 (1st Cir. 1983).

³ *The New Hampshire Lottery* case outlines two clauses with four potential offenses.

⁴ 18 U.S.C. § 1084(a).

⁵ *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002).

⁶ The Interstate Horseracing Act of 1978 was passed subsequent to the Wire Act and permits interstate pari-mutuel wagering over the phone, over the internet, or through any other electronic communication so long as pari-mutuels are legal in both states. This contradicts the broad interpretation of the Wire Act.

⁷ *United States v. Barborian*, 528 F. Supp. 324, 331 (D. R.I. 1981), *rev’d by Southard*, 700 F.2d at 1.

⁸ *United States v. Scavo*, 593 F.2d 837 (8th Cir. 1979).

⁹ *Id.* at 838.

¹⁰ 31 U.S.C. § 5362(1)(A).

¹¹ *Eastman v. Armstrong-Byrd Music Co.*, 212 F. 662, 665-66 (8th Cir. 1914).

¹² *United States Postal Service v. Amada*, 200 F.3d 647, 652 (9th Cir. 2000).

¹³ *United States v. Lyons*, 740 F.3d 702, 713 (2d Cir. 2014); *United States v. Cohen*, 260 F.3d 68, 73 (2d Cir. 2001); *United States v. Ross*, No. 98 CR. 1174-1(KMV), 1999 WL 782749, at *3 (S.D.N.Y. Sept. 16, 1999).

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