

## **2 – The Federal Wire Act**

### **Introduction**

As described in Chapter 1, federal government and federal laws have generally not played a central role in regulating gambling activity. In general, gambling laws, enforcement and regulation have been the domain of the states, with few exceptions. Those exceptions include sports wagering, Native American gaming, and interstate horse race wagering.

For the purposes of this class, we will focus on the core federal statutes, and related court opinions, that regulate gambling.

### **The Federal Wire Act**

The Federal Wire Act, along with several other laws, was a part of the 1961 federal legislative package designed to cut off those activities that profited organized crime and to assist the states in enforcing their gambling laws. The Federal Wire Act, codified as 18 U.S.C. §1084, generally prohibits the use of interstate electronic communications facilities for conducting gambling. There is some difference of opinion as to the types of gambling regulated by the Federal Wire Act, as the case materials and other resource materials will illustrate.

## **The Statute**

### ***18 U.S.C. §1084 Transmission of wagering information; penalties***

(a) 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.

(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State.

(d) When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal,

State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored.

(e) As used in this section, the term "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a commonwealth, territory or possession of the United States.

## **Questions for Discussion**

What does the Federal Wire Act prohibit?

Does it prohibit or regulate online casino game wagering such as online slots?

(Why or why not)

Does it prohibit or regulate online sports wagering such as wagers on NFL games? (Why or why not)

Does it prohibit or regulate online poker sites? (Why or why not)

## Elements

In the business of betting or wagering.

528 F.Supp. 324, 9 Fed. R. Evid. Serv. 964

United States District Court, D. Rhode Island.

UNITED STATES of America

v.

Robert BABORIAN and Anthony Lauro.

C.R. No. 80-0018.

Nov. 25, 1981.

A bettor and a bookmaker were charged with the use of a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers. Though a jury was impanelled, it was subsequently excused, and the case was tried to the court by agreement of the parties. The District Court, Pettine, Chief Judge, held that: (1) the statute providing that whoever being engaged in business of betting or wagering knowingly uses wire communication facilities for transmission in interstate commerce of bets shall be fined not more than \$10,000 or imprisoned not more than two years, or both, does not cover an individual bettor, even if the bettor wagered substantial sums and displayed sophistication of an expert in his knowledge of odds making, and (2) the bookmaker could be convicted under the statute after it was established that he had knowledge that certain telephone calls were being placed from Connecticut to Rhode Island. Ordered accordingly.

### OPINION

PETTINE, Chief Judge.

The defendants are accused of violating 18 U.S.C. ss 2 and 1084. [FN1] Though a jury was impanelled, it was subsequently excused, and the case was tried to the Court by agreement of the parties.

*FN1. These defendants were charged in one count of a multicount indictment. This case was severed.*

The major question presented is whether or not the activities of the defendant Baborian constituted the "business of betting or wagering." 18 U.S.C. s 1084(a) reads as follows:

(a) 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 not more than \$10,000 or imprisoned not more than two years, or both.

The evidence in the case consisted of bookmaking records seized from defendant Anthony Lauro's apartment in Rhode Island, and intercepted telephone conversations between these defendants and others. Baborian is a lavish gambler; since at least the first week of March 1977 through December 1977 he wagered, with Lauro alone, an average of \$800 to \$1,000 a day, three to four times per week, on professional baseball, basketball, and football. In addition to betting, the intercepted phone conversations reveal that he received the line [FN2] on games, made up his own line, and gave Lauro his opinion on the best games on which to wager.

*FN2. The "line" is simply the points added to an underdog, or subtracted from the favorite, to balance more evenly the teams for wagering purpose.*

In all, there were eight telephone conversations. Since they are the basis of the indictment, the substance of each conversation is set forth. The government accurately summarizes them in its memorandum as follows:

On December 9, 1977 at 6:58 p. m., Baborian placed six bets for a total of \$800. He received the line on professional basketball, had already made up his own line, and gave Anthony Lauro his opinion on the best games to wager on.

On the following day at 11:13 a. m., he opened and closed a teaser,[FN3] mentioned that he was in a rush, asked for the afternoon games, asked Lauro if he had gotten him "three with Cincinnati," gave his opinion to Lauro on the best games to bet and asked what time Lauro would get the line on the college games.

*FN3. A "teaser" is a single wager on two or more teams, all of which must win in order to collect. The bettor receives a more favorable point-spread than under the actual line, but collects a lesser payoff if he wins.*

On December 11, 1977 at 11:50 a. m., Baborian told Falk that he played the whole card, that is, 23 games.

On the same day at 1:45 p. m., Baborian asked Falk to get him a line on a professional basketball game. (Falk is a defendant in other counts of the indictment.)

On December 12, 1977 at 6:35 p. m., Robert Baborian mentioned his own line, received the college line from Lauro, made four bets for a total of \$600 and asked for the football line.

On December 17, 1977 at 6:20 p. m., Baborian placed 12 bets with Lauro for a total of \$1,700.

On December 14, 1977 at 5:55 p. m., Robert Baborian called his father (in Rhode Island) from New York City. The conversation shows that Baborian came out of a Christmas party to get the line from his father and to place wagers... Baborian asked his father to relay the wagers to Anthony Lauro. The wagers totaled \$800.

On December 16, 1977, there were a series of phone calls from Robert Baborian in Connecticut to (his father) in Providence who in turn relayed wagers to Anthony Lauro. At 6:15 p. m., Robert Baborian called his father, received the line from him and asked his father to place five bets for Baborian with Anthony Lauro. These wagers totaled \$1,550.... (T)his call was placed from Fairfield, Connecticut. Twenty minutes later, (his father) relayed these wagers to Anthony Lauro and told Lauro that (his son) called him from New Haven and that "He's driving in." Fifteen minutes later, Robert Baborian again called his father, stated that he had just talked to "Pooch," made a mistake on one of his wagers and wanted to raise a \$100 bet to \$250. At 6:55 p. m., (the father) called Lauro and after Lauro confirmed that he had just spoken to Robert Baborian, (the father) relayed the wager made from Connecticut by (his son) to Anthony Lauro.... (T)his second call from Robert Baborian to (his father) was made from Milford, Connecticut.

The government concedes that Baborian only placed bets with Lauro and did so only for himself. It further concedes that all these calls, except those of December 14 and 16, were intrastate. The only other evidence presented was the records seized from Lauro's apartment which show that he was servicing a number of customers in addition to Baborian.

#### "Business" of Betting or Wagering-Defendant Baborian

The sine-qua non of conviction under this statute is proof that the defendant was in the "business" of betting or wagering. **When such a business exists is not easy to determine. There are no sharp contours in a general term such as "business," and the present state of the law is indeed amorphous.**

The legislative history does not help solve the problem at hand. I do not believe the legislators were thinking of a situation such as exists in this case when they enacted section 1084. They used words interchangeably, thus obfuscating the meaning of their various statements. Referring to "professional" gamblers, the legislative history of the Act contains the following observation:

Law enforcement is not interested in the casual dissemination of information with respect to football, baseball, or other sporting events between acquaintances. That is not the purpose of this legislation. However, it would not make sense for Congress to pass this bill and permit the professional gambler to frustrate any

prosecution by saying, as one of the largest layoff bettors in the country has said, "I just like to bet. I just make social wagers." This man, incidentally, makes a profit in excess of a half-million dollars a year from layoff betting. Therefore, there is a broad prohibition in the bill against the use of wire communications for gambling purposes.

S.Rep.No.588, 87th Cong., 1st Sess. (1961) (emphasis added).

It is not too difficult to say from this legislative history that the bill does not encompass discussions between friends as to their opinions on the outcome of sporting events. On the other hand, one cannot say with certainty what was intended by the term "professional gambler." However, "professional gambler" was used in connection with layoff betting, which has a clear meaning in the gambling world-it is nothing more than the process whereby a gambler accepts bets from bettors and then in turn places a portion of these bets with another gambler to balance his books. In other words, he bets with another gambler to minimize potential losses.[FN4] Whatever meaning the Congress had in mind, it certainly did not appear to include a mere bettor.

*FN4. More precisely, a "lay off" is a bet placed by one bookmaker with another bookmaker in order to achieve a more favorable ratio of wagers and in order to reduce his financial risk when one bookmaker holds excess wagers on one team.*

The Court notes that an additional term applicable to the business of gambling is "vigorish," the percentage a bettor must pay the bookmaker on a losing wager. The parties agreed to the incorporation and meaning of this word.

Other legislative history likewise is of little help. For example, when section 1084 was proposed, Senator Kefauver asked during the hearings, "What are you going to do about private social betting ... (,) any individual at home calling up to see how a horse race went.(?)" It was then suggested that the proposed bill be amended to have it apply to gambling activities in furtherance of a business enterprise. From this it may be argued that the Senator intended that a mere social bettor not be included within the provisions of the bill. The reader, however, can only wonder at what the Senator would have said if he were asked to define "social" betting.

Representative Celler said, "This bill only gets after the bookmaker, the gambler who makes it his business to take bets or to lay off bets." From this statement one could conclude that Representative Celler intended to cover only the typical bookmaker. However, he qualified his statement by adding, "It does not go after the casual gambler who bets \$2 on a race. That type of transaction is not within the purview of the statute." 107 Cong.Rec. 16,534 (1961) (emphasis added). What would Representative Celler have said of one who gambled approximately \$200,000 a year with one other gambler?

Further review of the legislative history casts no clearer light on the meaning of “engaged in the business of betting or wagering.” The House Report on the bill reads:

Testimony before your Committee on the Judiciary revealed that modern bookmaking depends in large measure on the rapid transmission of gambling information by wire communication facilities. For example, at present the immediate receipt of information as to results of a horse race permits a bettor to place a wager on a successive race. Likewise, bookmakers are dependent upon telephone service for the placing of bets and for layoff betting on all sporting events.

The availability of wire communications facilities affords opportunity for the making of bets or wagers and the exchange of related information almost to the very minute that a sporting event begins.

H.R.Rep.No.967, 87th Cong., 1st Sess. (1961), reprinted in (1961) U.S.Code Cong. & Ad.News 2631, 2631-32, (emphasis added).

This last quote does indicate that the business of gambling is a bookmaking operation entailing the acceptance of bets and laying off of bets. I conclude, after considering all of the foregoing legislative history, that Congress intended the business of gambling to mean bookmaking, i.e., the taking and laying off of bets, and not mere betting. The provocative question is whether this is still the proper definition when the bettor wagers substantial sums and displays the sophistication of an expert in his knowledge of odds making. I conclude the statute simply does not cover such a situation. I find that Congress never intended to include a social bettor within the prohibition of the statute and that Congress did not contemplate prohibiting the activities of mere bettors, even where, as with Mr. Baborian, they bet large sums of money with a great deal of sophistication. Indeed, I do not see how the statute could be read otherwise. The government's interpretation of the statute would make the implication of criminality turn on the expertise of the bettor and the quantum of money wagered. I submit that these factors are not determinative of what constitutes a business.

As I see it, the legislative language indicates that “being engaged in the business of betting or wagering” requires the sale of a product or service for a fee involving third parties, i.e., customers and clients, or the performance of “a function which is an integral part of such business.” The defendant need not be exclusively engaged in such business. If he is an agent or employee of the business he need not share in the profits or losses of the business or receive compensation for his services, but “the function he performs must provide a regular and essential contribution to the (overall operation of) that business. If an individual performs only an occasional or nonessential service or is a mere bettor or customer, (regardless of the amount bet,) he cannot properly be said to engage in the

business.” There must be a “continuing course of conduct,” and if associated with another, their joint conduct must be to achieve a common objective and purpose. *U. S. v. Scavo*, 593 F.2d 837, 842-43 (8th Cir. 1979).

The various decisions in this area are not to the contrary, but I could find no case truly on point. The government cites *Sagansky v. United States*, 358 F.2d 195, 200 (1st Cir.), cert. denied, 385 U.S. 816, 87 S.Ct. 36, 17 L.Ed.2d 55 (1966), for the proposition that section 1084 applies to a “bettor who is a professional gambler.” This statement is circular; neither does it not tell us when a bettor is a professional gambler, nor does it define “professional gambler.” Moreover, the government fails to note that, in *Sagansky*, the defendants were bookmakers, that is, they accepted bets and were clearly “engaged in the business.” As the court said,

*s 1084(a) does not punish the mere transmission of bets or wagers, but rather the “use” of interstate wire communication facilities for their transmission. When a person holds himself out as being willing to make bets or wagers over interstate telephone facilities, and does in fact accept offers of bets or wagers over the telephone as part of his business, we think it is consistent with both the language and the purpose of the statute that he has “used” the facility for the transmission of bets or wagers. Id. at 200. (emphasis added).*

Finally, the remainder of the opinion does not clarify the problem at stake in this case. The Court hypothesized:

Suppose a professional gambler used interstate wires on ten different days, but never to place more than one bet on a single day. Would he have never violated the statute? ... If a defendant is professionally engaged in making bets and wagers, one single use of interstate facilities is an offense. *Id.* at 201. (emphasis added).

In this last passage the meaning of the phrase “professionally engaged” is not discussed. It is not at all clear from this case whether a mere bettor is or is not excluded under section 1084(a).

Another decision in this area, *United States v. Anderson*, 542 F.2d 428 (7th Cir. 1976), describes certain betting activities as follows:

Their conversations involved in depth discussions of the merits of betting one side of a particular game or the other and the comparison of line information. Crews placed substantial bets with Anderson when these discussions ended. Also, Crews had on occasion used Anderson's phone to collect line information. When asked to characterize the Anderson-Crews relationship, the expert witness ... stated it was “in the nature of a partnership, a cooperating relationship where they were valuing one another's opinions and more or less working together.” *Id.* at 435. (footnote omitted).

The government argued that this was enough to establish that they were partners. The court ruled to the contrary; it reversed Crews' conviction under 1084(a). It stated that, "In the instant case there was no evidence that Crews was in the 'business of betting or wagering.'" *Id.* at 436. Crews, the defendant in this case, seems to be on a comparable footing with Baborian.

In *United States v. Marder*, 474 F.2d 1192 (5th Cir. 1973), witnesses testified, *inter alia*, that they had made numerous bets and wagers with the appellant over an extended period of time. The Fifth Circuit affirmed a s 1084 conviction with language that included the following:

*There was sufficient evidence introduced by the government to prove that (appellant) committed the first element of the offense charged which forbids the use of a wire communication facility for the transmission in interstate commerce of wagering information. In addition the burden was on the government to establish that (appellant) was in the business of gambling or in common parlance, was a "bookie." Id. at 1194. (emphasis added).*

Finally, in a similar manner, while addressing the meaning of the term "transmission" under s 1084(a), the Tenth Circuit noted that "the statute deals with bookmakers-'persons engaged in the business of betting or wagering.'" *United States v. Tomeo*, 459 F.2d 445, 447 (10th Cir.), cert. denied, 409 U.S. 914, 93 S.Ct. 232, 34 L.Ed.2d 175 (1972).

It must be acknowledged that these courts spoke in conclusory terms as to the "business" of gambling. However, the language does tend to indicate how they would address the issue in this case.

In *United States v. Scavo*, 593 F.2d 837 (8th Cir. 1979), the appellant was charged with a violation of s 1084(a). As proof that he was not in the gambling "business", he relied on cases interpreting 18 U.S.C. s 1955, which provides in pertinent part:

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than \$20,000 or imprisoned not more than five years, or both.

(b) As used in this section-

(1) "illegal gambling business" means a gambling business which-

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of \$2,000 in any single day.

The court rejected such an analogy stating:

We find appellant's argument unpersuasive. The issue in the cases decided under s 1955 is whether the person providing line information has such a close, ongoing, and substantial relationship to the person receiving the information as to make them both participants in a single gambling business. In enacting s 1955, Congress did not intend to make all gambling businesses subject to federal prosecution; rather the statute was 'intended to reach only those persons who prey systematically upon our citizens and whose syndicated operations are so continuous and substantial as to be of national concern.'

In regard to s 1084(a), however, there is nothing to indicate that Congress intended only to punish large-scale gambling businesses. The basis of federal jurisdiction underlying s 1084(a) is the use of interstate communications facilities, which is wholly distinct from the connection between large-scale gambling businesses and the flow of commerce, which provides the jurisdictional basis for s 1955. See *United States v. Sacco*, 491 F.2d 995, 999 (9th Cir. 1974). Thus, the necessary showing of interdependence between individuals involved in an illegal gambling business under s 1955 is not required under s 1084(a). Moreover, s 1084(a) is not limited to persons who are exclusively engaged in the business of betting or wagering and the statute does not distinguish between persons engaged in such business on their own behalf and those engaged in the business on behalf of others. See *Truchinski v. United States*, 393 F.2d 627, 630 (8th Cir.), cert. denied, 393 U.S. 831, 89 S.Ct. 104, 21 L.Ed.2d 103 (1968).

In *Scavo*, among the factors the court found pertinent to its conclusion that Scavo was engaged in the business of betting were the facts that Scavo furnished the bookmaker with line information on a regular basis; that such information was critical to the bookmaker's operation; and that there was a financial arrangement between the two. *Id.* at 842. Such facts are absent in the Baborian-Lauro relationship. (While Baborian discussed line information with Lauro, there was no evidence presented that showed Lauro ever relied upon Baborian to supply it.) Baborian was not a part of Lauro's business; rather, he was in the posture of a customer. Finally, I also note that the *Scavo* court, in its instructions to the jury defining the "business" of betting or wagering, pointed out that "a mere bettor or customer" cannot be said to be engaged in the business of betting or wagering. *Id.* at 842-843.

The government finds no greater support in the other cases it cites. *Katz v. United States*, 369 F.2d 130, 132 (9th Cir. 1966), rev'd on other grounds, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), involved a defendant who placed bets on behalf of other bettors and who was a handicapper as well. *United States*

v. Swank, 441 F.2d 264, 265 (9th Cir. 1971), involved a defendant who worked closely with the bookmakers in “laying off” bets to avoid an adverse effect on the horse track odds. Nothing in that opinion addresses the issue in this case.

In short, s 1084 does not sweep within its prohibition a mere bettor. Congress never intended that the federal government should thus invade the criminal jurisdiction that properly belongs to the states. I adopt defense counsels' argument that the interpretation of s 1084(a) proffered by the government would upset this balance between state and federal law enforcement functions by drastically expanding federal criminal jurisdiction. Section 1084(a) by reaching the customer of the business would become an anomaly in the federal matrix, intruding into an area that the individual states are perfectly able to fill. As a general rule, criminal statutes must be narrowly construed. *Bell v. United States*, 349 U.S. 81 (75 S.Ct. 620, 99 L.Ed. 905) (1955); *United States v. Box*, (530 F.2d 1258, 1266 (5th Cir. 1976) ); *United States v. Bergland*, 209 F.Supp. 547 (D.Wis.1962), rev'd on other grounds, 318 F.2d 158 (159) (7th Cir.), cert. den., sub nom, *Cantrell v. United States*, 375 U.S. 861 (84 S.Ct. 129, 11 L.Ed.2d 88) (1963). This general rule applies with particular force where a broad construction would serve to push federal criminal jurisdiction into areas previously reserved to the states. Post Trial memorandum, p. 6.

Thus, I find that, on the record of this case, the defendant Robert Baborian was not engaged in the business of betting or wagering and, therefore, is not guilty of violating 18 U.S.C. s 1084.

#### Defendant Lauro and 18 U.S.C. s 1084(a)

There is no question that defendant Lauro accepted wagers from Baborian as a bookmaker during the period in question, and therefore was in the business of betting or wagering. The only issue as to him is whether he knowingly used or caused to be used a telephone for the transmission in interstate commerce of bets or wagers as stated in the statute. The Court need not decide whether knowledge by the defendant of the interstate nature of a betting communication is required for a conviction under s 1084(a). See *United States v. Feola*, 420 U.S. 671, 95 S.Ct. 1255, 43 L.Ed.2d 541 (1975). The Court is persuaded beyond a reasonable doubt that Lauro knew that the bets he accepted from Baborian on December 16 originated from out of state.

A conviction of Lauro must rest on the events of December 16, 1977. An evaluation of the December 16th phone calls begins with a monitored call between Baborian and his father on December 14 at 5:55 p. m. In this conversation, Baborian, who was out of state, called his father in Rhode Island and asked him to place certain wagers with Lauro who was also in Rhode Island. At 6:34 p. m. of the same date, the father phoned Lauro and placed the bets. Unquestionably Lauro knew these wagers were being placed for Baborian; in the

course of the conversation Lauro said "Well, I'm gonna call him back anyway. I might change. Those are the games he likes." The government argues from this last statement that it may be inferred that Lauro knew at that time that Baborian was out of state. I agree.

On December 16 the following four telephone calls were monitored. First, there was a 6:15 p. m. monitored conversation between father (Brian) and son (Baborian). There is no question that this call was placed by Baborian, who was out of state, to his father in Rhode Island. Baborian clearly told his father he was 10 or 15 minutes from New Haven, Connecticut. He asked his father to phone Lauro in Rhode Island and place certain bets.

Second, there was a 6:36 p. m. monitored conversation between father and Lauro. The father placed his son's bets with Lauro and, in the course of the conversation, told Lauro that his son had called him from New Haven. Lauro knew the bets placed were from Baborian.

Third, there was a 6:51 p. m. monitored conversation between father and son Baborian. Baborian told his father that he had just talked to Lauro (about bets) and had made a mistake. He asked his father to call Lauro back to verify his wagers.

Fourth, there was a 6:55 p. m. monitored conversation between father and Lauro. Lauro verified that Baborian had phoned him.

The 6:15 p. m. call clearly was from Baborian in Connecticut to his father in Rhode Island. The 6:36 p. m. call certainly alerted Lauro that the bets came from Baborian while he was out of state, i.e., in New Haven. The 6:51 p. m. call shows that, between 6:36 p. m. and 6:51 p. m., Baborian had called Lauro to place certain wagers. At this time, Lauro knew Baborian had been in New Haven at 6:36 p. m. Thus, he certainly knew that Baborian was out of state between 6:36 and 6:51 p. m. when Baborian phoned him. The 6:51 p. m. call verifies that Baborian had phoned Lauro; in the 6:55 p. m. call Lauro acknowledges as much. The interstate nature of these calls is further established by the telephone records. (Government exhibit 6).

Notes I need not dwell on whether or not the indirect relay of Baborian's out-of-state bets through his father are violative of s 1084(a), because I am convinced beyond a reasonable doubt that Lauro knew his conversation on December 16 with Baborian was interstate. In my opinion, to interpret the evidence in any other way is to strain to a fragile, meaningless filament the factual premise of this case. I take judicial notice that no one could possibly drive from New Haven, Connecticut to the Rhode Island line in the 15-minute interval between the telephone calls of 6:36 p. m. and 6:51 p. m. See Fed.R.Evid. 201.

I find that the government has proved Mr. Lauro's guilt beyond a reasonable doubt. It has shown that Lauro accepted wagers knowing that such wagers originated outside of Rhode Island, and that he was in the business of betting or wagering, as proven by the records seized from his apartment as well as by the intercepted phone conversations. Thus, I find the defendant Anthony Lauro guilty as charged.

So Ordered.

## **Questions for Discussion**

What does it mean to be in the business of betting wagering?

Does the federal wire act prohibit us from placing online wagers?

Does the federal wire act prohibit us from offering online sports book services from Nevada?

## WIRE COMMUNICATIONS FACILITY

593 F.2d 837, 4 Fed. R. Evid. Serv. 62

United States Court of Appeals,  
Eighth Circuit.  
UNITED STATES of America, Appellee,  
v.  
Frank SCAVO, Appellant.

Decided March 13, 1979.

Defendant was convicted in the United States District Court for the District of Minnesota, Harry H. MacLaughlin, J., of being engaged in the business of betting or wagering and knowingly using wire communication facilities for transmission in interstate commerce of information assisting in placing of bets or wagers. Defendant appealed. The Court of Appeals, Henley, Circuit Judge, held that: (1) evidence established that defendant was "engaged in the business of betting or wagering" within the meaning of the statute; (2) no error was shown in instructions to the jury; (3) defendant waived indictment; (4) a special agent was properly allowed, as an expert, to testify about defendant's role in bookmaking operation and knowledge of, and assistance to, the operation, and (5) failure to move to suppress intercepted communications prior to trial amounted to waiver of a claim that, because the court order authorizing the wiretap referred only to possible violations of one statute and not to possible violations of the statute under which defendant was prosecuted, the Government should have sought subsequent judicial approval prior to utilizing such evidence at trial.

Affirmed.

HENLEY, Circuit Judge.

Frank Scavo appeals from his conviction of being engaged in the business of betting or wagering and knowingly using wire communication facilities for the transmission in interstate commerce of information assisting in the placing of bets or wagers, in violation of 18 U.S.C. s 1084(a). We affirm.

On December 20, 1976 Chief Judge Devitt of the District of Minnesota signed an order authorizing interception of communications conducted on telephones which were suspected of being used in connection with an

illegal gambling business being conducted in violation of 18 U.S.C. s 1955. The investigation centered on one Dwight Mezo, who operated a substantial bookmaking business in the Minneapolis area. As a result of this investigation, appellant, along with nine others, was indicted by a grand jury and charged with conducting an illegal gambling business in violation of 18 U.S.C. s 1955. Eight of appellant's co-defendants, including Mezo, pleaded guilty and charges against a ninth codefendant were dropped.

On March 8, 1978 appellant was charged by information with use of a communications facility to transmit wagering information in violation of 18 U.S.C. s 1084(a). As a result of plea negotiations, appellant consented to having his case transferred to the District of Nevada (where he resided) for plea and sentence pursuant to Rule 20 of the Federal Rules of Criminal Procedure. There, appellant waived indictment and tendered a plea of guilty. For reasons not appearing of record, the Nevada district court rejected the plea of guilty and appellant then entered a plea of nolo contendere, which was accepted by the court. Thereafter, appellant successfully moved to withdraw his plea of nolo contendere and the case was transferred back to the District of Minnesota for trial.

At trial the government's evidence consisted principally of playing recordings of telephone conversations obtained from the court-authorized wiretaps on the telephones of Dwight Mezo. In addition, F.B.I. Special Agent William Holmes was qualified as an expert in gambling and testified about the nature of gambling operations, gambling terminology, and his opinion as to appellant's role in Mezo's bookmaking operation. He testified that appellant, then a resident of Las Vegas, provided Mezo with much-needed "line" information i. e., the odds or point spread established to equalize or induce betting on sporting events.

Appellant offered two exhibits for the purpose of showing the ready availability of line information from other sources, but introduced no other evidence. The jury returned a verdict of guilty and the district court [FN1] sentenced appellant to one year on probation. This timely appeal ensued.

*FN1. The Honorable Harry H. MacLaughlin, United States District Judge for the District of Minnesota.*

Appellant challenges his conviction on six grounds: (1) the evidence was insufficient to show a violation of 18 U.S.C. s 1084(a); (2) the court erred in its instructions to the jury; (3) the court erred in finding that appellant had waived his right to trial by indictment; (4) the court erred in admitting certain opinion testimony of Agent Holmes; (5) the court erred

in denying appellant's motion to dismiss the information for noncompliance with 18 U.S.C. s 2517(5); and (6) the court erred in admitting certain hearsay testimony. We examine these claims individually.

#### A. Sufficiency of the Evidence.

Appellant first contends that the evidence was insufficient to support a conviction under 18 U.S.C. s 1084(a). The statute provides:

(a) 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 not more than \$10,000 or imprisoned not more than two years, or both.

Appellant concedes that he used a wire communication facility (the telephone) to transmit information assisting in the placing of bets or wagers. Appellant argues, however, that a person who merely provides line information is not “engaged in the business of betting or wagering.”

Appellant relies on a series of cases interpreting 18 U.S.C. s 1955. This statute provides in relevant part:

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than \$20,000 or imprisoned not more than five years, or both.

(b) As used in this section

(1) “illegal gambling business” means a gambling business which

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of \$2,000 in any single day.

A number of cases decided under this statute have held that the mere occasional exchange of line information between two individuals is insufficient to show that they are so interdependent as to be part of a single “illegal gambling business.” For example, in *United States v. Guzek*, 527 F.2d 552, 557–58 (8th Cir. 1975), we said:

(T)he mere placing of bets by one bookmaker with another or the mere furnishing of line information in and of itself may not be sufficient to establish the interdependence of the bookmakers so as to fuse them into one single business for the purpose of counting each of these participants toward the five persons necessary to establish a violation of s 1955.

See also *United States v. Todaro*, 550 F.2d 1300, 1302 (2d Cir.), Cert. denied, 433 U.S. 909, 97 S.Ct. 2975, 53 L.Ed.2d 1093 (1977); *United States v. McCoy*, 539 F.2d 1050, 1062 (5th Cir. 1976), Cert. denied, 431 U.S. 919, 97 S.Ct. 2185, 53 L.Ed.2d 230 (1977); *United States v. Leon*, 534 F.2d 667, 677 (6th Cir. 1976); *United States v. Thomas*, 508 F.2d 1200, 1206 (8th Cir.), Cert. denied sub nom. *Schullo v. United States*, 421 U.S. 947, 95 S.Ct. 1677, 44 L.Ed.2d 100 (1975). But cf. *United States v. Campagnuolo*, 556 F.2d 1209, 1211 (5th Cir. 1977). Appellant contends that the phrase “conduct(ing) . . . an illegal gambling business” used in s 1955 is synonymous with the phrase “being engaged in the business of a betting or wagering” used in s 1084(a) and thus the cases decided under s 1955 should also apply to alleged violations of s 1084(a).

We find appellant's argument unpersuasive. The issue in the cases decided under s 1955 is whether the person providing line information has such a close, ongoing, and substantial relationship to the person receiving the information as to make them both participants in a single gambling business. In enacting s 1955, Congress did not intend to make all gambling businesses subject to federal prosecution; rather the statute was “intended to reach only those persons who prey systematically upon our citizens and whose syndicated operations are so continuous and so substantial as to be of national concern . . . .” H.R.Rep.No.1549, 91st Cong. 2d Sess. (1970), Reprinted in (1970) U.S.Code Cong. & Admin.News, pp. 4007, 4029. See also *United States v. Box*, 530 F.2d 1258, 1264–65 (5th Cir. 1976). The cases relied upon by appellant merely reflect a judicial sensitivity to the limited purpose of Congress in enacting s 1955.

In regard to s 1084(a), however, there is nothing to indicate that Congress intended only to punish large-scale gambling businesses. The basis of federal jurisdiction underlying s 1084(a) is the use of interstate communications facilities, which is wholly distinct from the connection between large-scale gambling businesses and the flow of commerce, which provides the jurisdictional basis for s 1955. See *United States v. Sacco*, 491 F.2d 995, 999 (9th Cir. 1974). Thus, the necessary showing of interdependence between individuals involved in an illegal gambling business under s 1955 is not required under s 1084(a). Moreover, s 1084(a) is not limited to persons who are exclusively engaged in the business of betting or wagering and the statute does not distinguish between persons engaged in such business on their own behalf and those engaged in the business on behalf of others. See *Truchinski v. United States*, 393 F.2d 627, 630 (8th Cir.), Cert. denied, 393 U.S. 831, 89 S.Ct. 104, 21 L.Ed.2d 103 (1968).

Although we reject appellant's blanket assertion that suppliers of line information are outside the scope of s 1084(a), we must nevertheless determine whether the government introduced evidence sufficient to show that appellant was "engaged in the business of betting and wagering." At trial, the government proceeded on the theory that appellant was part of Mezo's bookmaking business and on this aspect of the case the authorities relied upon by appellant are relevant to a prosecution under s 1084(a). They are not controlling, however, because the evidence adduced showed more than a mere occasional exchange of line information between appellant and Mezo.

Viewed in the light most favorable to the government, the evidence showed that appellant furnished line information to Mezo on a regular basis; that Mezo relied on this information; that some sort of financial arrangement existed between appellant and Mezo; [FN2] that appellant was fully aware of Mezo's bookmaking operation; [FN3] and that accurate and up-to-date line information is of critical importance to any bookmaking operation.

*FN2. In a telephone conversation of December 21, 1976 Mezo told appellant that "Rodney" (apparently co-defendant Rodney Scott Smith) would be going to Las Vegas and would bring appellant "the money." In a telephone conversation of December 24, 1976 Mezo told appellant that he would give appellant "the money" when appellant arrived at Minneapolis.*

*FN3. On one occasion, appellant flew from Las Vegas to Minneapolis. During that time, he was present at the place where Mezo conducted the bookmaking operation. Appellant answered the phone at this place, and*

*he used Mezo's phone to contact an associate in Las Vegas in an attempt to procure line information for Mezo's use.*

Given this evidence, we conclude that the government has shown that appellant was an important part of the Mezo bookmaking operation and that appellant was indeed “engaged in the business of betting or wagering” within the meaning of s 1084(a).

#### B. The Court's Instructions.

Appellant contends that the court made two errors in instructing the jury. First, he claims that the court erred in refusing to give the following instruction in relation to the elements of the offense under s 1084(a):

That defendant must have been aware of the statute in question; that he must have known that he was violating the law in providing the line information before he can be found guilty of the offense charged.

Appellant contends that such a specific intent instruction is mandated by *Cohen v. United States*, 378 F.2d 751 (9th Cir.), Cert. denied, 389 U.S. 897, 88 S.Ct. 217, 19 L.Ed.2d 215 (1967). In *Cohen*, the court held that Congress intended knowledge of the statutory prohibition to be an element of the offense under s 1084(a), but also held that there is a rebuttable presumption that the accused in fact had knowledge of the law. 378 F.2d at 757.

The parties have not cited, nor has our independent research disclosed, any other case which has accepted the *Cohen* rationale. Indeed, in a subsequent case, the Ninth Circuit, in a brief per curiam opinion, upheld a conviction under s 1084 against a challenge that the defendant had no intent to commit a violation of federal law. See *United States v. Swank*, 441 F.2d 264, 265 (9th Cir. 1971).

Given the facts of this case, we have no occasion to decide whether *Cohen* correctly states the law. In *Cohen*, the court approved the following instruction:

Unless and until outweighed by evidence in the case to the contrary, the presumption is that every person knows what the law forbids and what the law requires to be done.

378 F.2d at 756 n.5. In the instant case, the record is devoid of any evidence from which it could be inferred that appellant acted because of ignorance of the law. Thus, there was nothing to rebut the presumption

approved in Cohen, and failure to give a specific intent instruction, if error at all, was harmless.

Appellant's second contention relates to the instruction defining the phrase "engaged in the business of betting or wagering." Appellant offered, and the court rejected, an instruction limiting application of this phrase to "bookmakers" I. e., persons who accept, exchange, or lay off bets. Instead, the court instructed the jury as follows:

The first of these essential elements that the government must prove is that the defendant engaged in the business of betting or wagering if and when he used the wire communications facility. The term "business" is to be applied according to its usual and ordinary meaning.

An individual engages in the business of betting or wagering if he regularly performs a function which is an integral part of such business. The individual need not be exclusively engaged in the business nor must he share in the profits or losses of the business. He may be an agent or employee for another person's business, but the function he performs must provide a regular and essential contribution to that business. If an individual performs only an occasional or nonessential service or is a mere bettor or customer, he cannot properly be said to engage in the business.

A business enterprise usually involves a continuing course of conduct by persons associated together for a common purpose.

We find no error in the court's instruction, which is in accord with the law in this circuit. See *Truchinski v. United States*, supra, 393 F.2d at 630.

### C. Waiver of Indictment.

Appellant claims that the trial court erred in overruling his motion to dismiss the information made just prior to the selection of the jury. The crux of appellant's argument is that his waiver of indictment filed in the Nevada district court was not knowingly made because he was unaware that his waiver of indictment was effective even though the plea agreement between himself and the United States was not accepted by the district court. In other words, appellant appears to contend that his waiver of indictment was part and parcel of the rejected plea agreement and that the failure of the plea agreement voided his waiver of indictment.

We reject appellant's contention. We begin by noting that we have serious doubts whether this claim was properly raised below. Appellant did not

move to withdraw his waiver of indictment prior to trial. He made no objection to proceeding by way of information until just before the jury was selected and, even then, the question now presented on appeal was only obliquely suggested.

Even assuming that appellant adequately preserved his objection, however, we find his claim to be without merit. The record is entirely barren of any suggestion that the waiver of indictment was conditioned upon the acceptance of the plea agreement by the district court. The waiver, signed by appellant and his former counsel in open court, is unequivocal on its face. The memorandum of the plea agreement submitted to the Nevada district court by the Las Vegas Strike Force Office does not indicate that the waiver was a part of the plea agreement. In addition, appellant's motion to withdraw his nolo contendere plea in Nevada contained no mention of his waiver of indictment. Indeed, the motion affirmatively indicated that, if the court allowed the plea to be withdrawn, the case should be transferred back to the District of Minnesota for trial.

Finally, we note that the mere fact that a district court allows a guilty plea (or in this case a plea of nolo contendere) to be withdrawn does not compel the withdrawal of a waiver of indictment entered in conjunction with that plea. *Bartlett v. United States*, 354 F.2d 745, 749 (8th Cir.), Cert. denied, 384 U.S. 945, 86 S.Ct. 1471, 16 L.Ed.2d 542 (1966). Cf. *United States v. Hammerman*, 528 F.2d 326, 332 (4th Cir. 1975). In addition, a waiver of indictment entered in conjunction with a Rule 20 transfer in a district other than the district where the offense occurred is nonetheless effective in the latter district. *Boyes v. United States*, 298 F.2d 828, 830 (8th Cir.), Cert. denied, 370 U.S. 948, 82 S.Ct. 1595, 8 L.Ed.2d 814 (1962).

In view of all these considerations, we hold that the district court properly concluded that appellant effectively waived his right to indictment.

#### D. Expert Testimony.

Appellant next contends that the district court erred in allowing Special Agent Holmes to give certain opinion testimony. Appellant does not contest Agent Holmes' qualifications as an expert in the field of gambling; rather, he contends that Agent Holmes' testimony "invaded the province of the jury." Specifically, he objects to Holmes' testimony about his role in Mezo's bookmaking operation and his knowledge of, and assistance to, Mezo's operation.

We reject appellant's contention of error. Rule 704 of the Federal Rules of Evidence provides:

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

One purpose of the Federal Rules of Evidence was to make opinion evidence admissible if it would be of assistance to the trier of fact. Rule 704 is consistent with this purpose by doing away with the "ultimate issue" rule, a rule which Professor Wigmore aptly characterized as "empty rhetoric." 7 J. Wigmore, *Evidence* s 1920 at 17 (3d ed. 1940).

Rule 704 does not, of course, render all expert testimony admissible. Expert testimony must still meet the criterion of helpfulness expressed in Rule 702 and is also subject to exclusion under Rule 403 if its probative value is substantially outweighed by the risks of unfair prejudice, confusion or waste of time. 3 J. Weinstein & M. Berger, *Weinstein's Evidence* P 704(01) at 704-9 (1978).

Judged under these standards, Agent Holmes' testimony was properly admitted. The structure of a gambling enterprise is not something with which most jurors are familiar. In addition, the business employs a jargon foreign to all those who are not connected with the business. The latter consideration assumes particular importance in a case, such as this one, where the prosecution's evidence consists largely of tape recorded conversations. These conversations, which are at times virtually incomprehensible to the layman, are fraught with meaning to a person familiar with gambling enterprises.

Accordingly, we conclude that Agent Holmes' concededly relevant expert opinion would be helpful to the jury and was thus admissible under Rule 702. Any possibility of undue prejudice was removed by the trial court's careful instructions regarding the juror's role in deciding the facts and weighing the credibility of witnesses, including expert witnesses.

#### E. Noncompliance with 18 U.S.C. s 2517(5).

Appellant next contends that the trial court erred in allowing the jury to hear the tape recordings of telephone conversations obtained through the wiretap of Mezo's telephone. Specifically, appellant contends that the court order authorizing the wiretap referred only to possible violations of 18 U.S.C. s 1955 and not to possible violations of 18 U.S.C. s 1084(a). Thus, because the wiretap authorization referred to a separate and

distinct offense from that on which appellant was tried, he contends that 18 U.S.C. s 2517(5) required the government to seek subsequent judicial approval prior to utilizing this evidence at trial. Because no such authorization was sought, appellant contends that the information charging a s 1084(a) violation should have been dismissed.

Appellant did not raise the issue of noncompliance with s 2517(5) until after the parties had rested at trial. Section 2518(10) of Title 18, which governs motions to suppress intercepted communications, provides that “(s)uch motion(s) shall be made before the trial, hearing or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion.” Appellant does not contend that he lacked the opportunity to move to suppress prior to trial, nor does he allege ignorance of the grounds of the motion. Accordingly, his failure to move to suppress the conversations prior to trial amounts to a waiver of the claim of noncompliance with s 2517(5). See, e. g., *United States v. Johnson*, 176 U.S.App.D.C. 179, 188, 539 F.2d 181, 190 (1976), Cert. denied, 429 U.S. 1061, 97 S.Ct. 784, 50 L.Ed.2d 776 (1977); *United States v. Sisca*, 503 F.2d 1337, 1349 (2d Cir.), Cert. denied, 419 U.S. 1008, 95 S.Ct. 328, 42 L.Ed.2d 283 (1974).

#### F. Co-Conspirator Testimony.

Appellant's final ground for reversal is that the trial court erred in allowing the jury to hear tape recordings of conversations between Mezo and other bookmakers, customers, etc. Appellant contends that this evidence was inadmissible hearsay. The government responds that the statements were admissions of co-conspirators and thus admissible under Rule 801(d)(2)(E) of the Federal Rules of Evidence.

We agree with the government. The district court made the appropriate findings regarding the existence of a conspiracy required by *United States v. Bell*, 573 F.2d 1040 (8th Cir. 1978), and our examination of the record shows that the finding has abundant support. Accordingly, the evidence was properly admitted.[FN4]

*FN4. The co-conspirator admission exception embodied in Rule 801(d)(2)(E) applies to cases, like the one at bar, in which the defendant is not formally charged with conspiracy. United States v. Richardson, 477 F.2d 1280, 1283 (8th Cir.), Cert. denied, 414 U.S. 843, 94 S.Ct. 104, 38 L.Ed.2d 82 (1973). See generally 4 J. Weinstein & M. Berger, Weinstein's Evidence P 801(d)(2)(E)(01) at 801-141 & n.3 (1978).*

The judgment of conviction is affirmed.

## **Wagering Subject Matter**

As set forth above, the Federal Wire Act applies to *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.*

### **The District Court Opinion**

132 F.Supp.2d 468,

United States District Court,E.D. Louisiana.

In re MASTERCARD INTERNATIONAL INC., INTERNET GAMBLING LITIGATION, and Visa International Service Association Internet Gambling Litigation  
This Document Relates to All Actions  
Nos. CIV. A. MDL1321, CIV. A. MDL1322.

Feb. 23, 2001.

Gamblers filed class action complaints on behalf of themselves and others similarly situated against certain credit card companies and issuing banks based on defendants' alleged illegal involvement with the internet gambling industry. Upon defendants' motions to dismiss Racketeer Influenced and Corrupt Organizations Act (RICO) claims, the District Court , Duval, J., held that: (1) gamblers failed to plead violation of state law as predicate act; (2) since Wire Act did not prohibit internet casino gambling or credit card companies' and issuing banks' association therewith, there could be no mail or wire fraud serving as predicate acts under RICO; (3) gamblers failed to allege a RICO enterprise consisting of internet gambling casinos and defendant credit card companies and issuing banks; (4) gamblers failed to allege that defendant credit card companies and issuing banks satisfied the operation or management test for liability under RICO; and (5) gamblers could not pursue civil remedies under RICO due to their inability to plead proximate causation.

Motions granted.

## ORDER AND REASONS

DUVAL, District Judge.

...

Presently before the Court are Rule 12(b)(6) motions to dismiss for failure to state a claim upon which relief can be granted and Rule 19 motions for joinder or dismissal for non-joinder filed by MasterCard International Inc. (record documents 19 & 20), Fleet Bank and Fleet Credit Card Services (record document 21), Visa International Services Association (record documents 17 & 18), and Travelers Bank (record document 16). These motions have been filed in accordance with the Court's multidistrict litigation management order entered June 14, 2000 and are limited to defendants' liability under federal law, namely the Racketeer Influenced and Corrupt Organizations Act ("RICO"), found at 18 U.S.C. § 1961 et seq. The Court heard oral argument on the motions on September 13, 2000 and has considered the pleadings, memoranda and relevant law and finds that the motions to dismiss shall be granted for the reasons that follow.

The Court will analyze the Rule 12(b)(6) motions as follows:

- I. Background
- II. Standard for Motion to Dismiss
- III. The Racketeer Influenced and Corrupt Organizations Act ("RICO"), Generally
- IV. Elements Common to All RICO claims
  - A. The Existence of a RICO Person
  - B. The Alleged Pattern of Racketeering Activity
    1. Alleged Predicate Acts Under State Law
      - a. New Hampshire Law
      - b. Kansas Law
    2. The Wire Act, 18 U.S.C. § 1084
    3. Mail Fraud, 18 U.S.C. § 1341 and Wire Fraud, 18 U.S.C. § 1343
    4. Other Federal Laws
    5. Collection of Unlawful Debt
  - C. Enterprise
    1. Generally
    2. Existence Separate and Apart From the Pattern of Racketeering Activity
    3. An Ongoing Organization with a Hierarchical or Consensual Decision Making Structure
- V. Additional Elements Discrete to 18 U.S.C. § 1962(c)
  - A. Conduct
  - B. Person/Enterprise Distinctness

VI. Aiding and Abetting Liability under 18 U.S.C. § 1962(c)  
VII. Standing to Assert a Civil RICO Claim under 18 U.S.C. § 1964  
for Violations of 18 U.S.C. § 1962(c)

## The Rule 12(b)(6) Motions

### I. Background

The factual and legal allegations by plaintiffs in each of the two actions before the Court are nearly identical; therefore, the Court will set out the factual background in the form of a single narrative and indicate where the factual allegations or legal theories diverge. For purposes of this motion, the following are taken as true.

Larry Thompson (“Thompson”) and Lawrence Bradley (“Bradley”) (together referred to as “plaintiffs”) filed class action complaints on behalf of themselves and others similarly situated against certain credit card companies and issuing banks for those entities alleged illegal involvement with the internet gambling industry. Named as defendants by Thompson are MasterCard International, Inc. (“MasterCard”), Fleet Bank and Fleet Credit Card Services (“Fleet”). Those named as defendants by Bradley are Visa International Service Association (“Visa”) and Travelers Bank USA Corp (“Travelers”).

Plaintiffs' class action complaints allege that defendants have violated several federal and state laws with respect to defendants' involvement with internet casinos. Plaintiffs argue that defendants' actions constitute a pattern of racketeering activity in violation of the Racketeer Influenced and Corrupt Organizations Act, found at 18 U.S.C. §§ 1961 -1968.

As the internet breaks down the geographic and temporal walls that once restricted the flow of information and commerce, plaintiffs argue that several illegitimate businesses have used the medium to further their illegal industries....

...

In support of these accusations, plaintiffs contend that the defendants' services support “the internet casinos... in foreign countries where their presence may be legal” but that they also “actively directed, participated in and aided and abetted [the casinos] bookmaking activities in the United States where they are not legal.” Bradley Complaint at ¶ 39, Thompson Complaint at ¶ 35. Thompson supports this accusation by alleging that

employees of MasterCard attended an on-line gaming seminar and gave an impromptu presentation explaining MasterCard's role in the internet gambling system. Thompson Complaint at ¶ 40. Bradley supports his claim by alleging that Visa had detailed procedures in place to handle internet gambling transactions. Bradley Complaint at ¶¶ 45-49. It is plaintiffs' contention that the credit card companies know the exact nature of each transaction processed through their international payment system and continue to allow internet gamblers to use their credit cards when defendants knew that internet gambling debts were allegedly illegal. Bradley Complaint at ¶¶ 41-42, Thompson Complaint at ¶¶ 36-37. Plaintiffs do not allege that the defendants received or transmitted any bets or that they have an ownership interest in the online casinos.

Plaintiffs bring their suits under 18 U.S.C. § 1964(c) arguing that the defendants have violated 18 U.S.C. § 1962(c) as well as state law. Plaintiffs support these causes of action with several claims that depend upon a finding that internet gambling is illegal under state and/or federal law, as well as causes of action for mail fraud and wire fraud. With these facts in mind the Court turns to the relevant legal standards.

## II. Standard for Motion to Dismiss

...

## III. RICO Generally

...

## IV. Elements Common to All RICO Claims

...

### B. Pattern of Racketeering Activity

As stated above, a prerequisite to the RICO action is that there be a pattern of racketeering activity...

In this case, plaintiffs' allegations arise under sections 1961(1)(A) and 1961(1)(B). Plaintiffs' (1)(A) allegations are that the defendants violated gambling laws that are chargeable under state law and punishable by imprisonment of more than one year. In plaintiff Thompson's case, he alleges violations of Kan. Stat. Ann. §§ 60-1704 , 21-4302 , 21-4304 and 21-3104. In plaintiff Bradley's case, he alleges violations of N.H.Rev.Stat. Ann. §§ 491:22 , 338:1

, 338:2 and 338:4. As to their claims under § 1961(1)(B) , plaintiffs claim violations of 18 U.S.C. § 1084(a) (“The Wire Act”); 18 U.S.C. § 1952 (“The Travel Act”); 18 U.S.C. § 1955 (Prohibition of Illegal Gambling Business); 18 U.S.C. § 1957 (Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity); and 18 U.S.C. § 1960 (Prohibition of Illegal Money Transmitting Business). There are currently no federal statutes addressing Internet gambling.

It is the defendants' argument that both plaintiffs failed to sufficiently allege a violation of any predicate act listed in the complaint. As such they argue that plaintiffs cannot satisfy a RICO prerequisite and that plaintiffs' case should be dismissed accordingly. Plaintiffs' response is that internet gambling violates the several federal and state statutes as alleged in the complaint. Thus, in order to establish that plaintiffs' have established a crucial RICO prerequisite, the Court turns to the alleged underlying offenses.

#### 1. State Law Claims...

#### 2. The Wire Act

When interpreting a statute, a court looks first to the language of the statute. *Richardson v. United States*, 526 U.S. 813, 818, 119 S.Ct. 1707, 1710, 143 L.Ed.2d 985 (1999). “Courts in applying criminal laws generally must follow the plain and unambiguous\*480 meaning of the statutory language.” *Salinas v. United States*, 522 U.S. 52, 57, 118 S.Ct. 469, 474, 139 L.Ed.2d 352 (1997). “[O]nly the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language.” *Id.*

The Wire Act, found at 18 U.S.C. § 1084 provides in pertinent part as follows,

(a) 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 his title or imprisoned....

18 U.S.C. § 1084(a) (emphasis added). Section (b) of the statute carves out an exception to the rule, instructing that the Wire Act shall not “be construed to prevent the transmission in interstate or

foreign commerce of information for use in news reporting of sporting events or contests” from a state or country where betting on the sporting event or contest is legal to another state or country where “such betting is legal.” 18 U.S.C. § 1084(b) (emphasis added).

The defendants argue that plaintiffs' failure to allege sports gambling is a fatal defect with respect to their Wire Act claims, while plaintiffs strenuously argue that the Wire Act does not require sporting events or contests to be the object of gambling. However, a plain reading of the statutory language clearly requires that the object of the gambling be a sporting event or contest. Both the rule and the exception to the rule expressly qualify the nature of the gambling activity as that related to a “sporting event or contest.” See 18 U.S.C. §§ 1084(a) & (b). A reading of the caselaw leads to the same conclusion. See *United States v. Kaczowski*, 114 F.Supp.2d 143, 153 (W.D.N.Y.2000) (Wire Act “prohibits 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”); *United States v. Sellers*, 483 F.2d 37, 45 (5th Cir.1973)(overruled on other grounds in *United States v. McKeever*, 905 F.2d 829 (5th Cir.1990) (“the statute deals with bookmakers”); *U.S. v. Marder*, 474 F.2d 1192, 1194 (5th Cir.1973) (first element of statute satisfied when government proves wagering information “relative to sporting events”).

As the plain language of the statute and case law interpreting the statute are clear, there is no need to look to the legislative history of the Act as argued by plaintiffs. See *In re Abbott Laboratories*, 51 F.3d 524, 528 (5th Cir.1995). However, even a summary glance at the recent legislative history of internet gambling legislation reinforces the Court's determination that internet gambling on a game of chance is not prohibited conduct under 18 U.S.C. § 1084. Recent legislative attempts have sought to amend the Wire Act to encompass “contest[s] of chance or a future contingent event not under the control or influence of [the bettor]” while exempting from the reach of the statute data transmitted “for use in the new reporting of any activity, event or contest upon which bets or wagers are based.” See S.474, 105th Congress (1997). Similar legislation was introduced the 106th Congress in the form of the “Internet Gambling Prohibition Act of 1999.” See, S. 692, 106th Congress (1999). That act sought to amend Title 18 to prohibit the use of the internet to place a bet or wager upon “a contest of

others, a sporting event, or a game of chance...” Id. As to the legislative intent at the time the Wire Act was enacted, the House Judiciary Committed Chairman explained that “this particular bill involves the transmission of wagers or bets and layoffs on horse \*481 racing and other sporting events.” See 107 Cong. Rec. 16533 (Aug. 21, 1961). Comparing the face of the Wire Act and the history surrounding its enactment with the recently proposed legislation, it becomes more certain that the Wire Act's prohibition of gambling activities is restricted to the types of events enumerated in the statute, sporting events or contests. Plaintiffs' argument flies in the face of the clear wording of the Wire Act and is more appropriately directed to the legislative branch than this Court.

In the context of a Rule 12(b)(6) motion, then, the Court must look to the allegations in the complaints to determine if “the complaint lacks an allegation regarding a required element necessary for relief.” *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir.1995) citing 2A Moore's Federal Practice, ¶ 12.07[2.-5] at 12-91; *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). The parties make several allegations that they placed bets at internet casino sites. See e.g., Thompson complaint at ¶¶ 24, 25, 54, Bradley complaint at ¶¶ 24, 26. Plaintiffs fail to allege the identity of the games that they played, i.e. games of chance or sports related games. Pleading such matters is critical when their right to relief hinges upon the determination of whether Internet casino gambling is legal. That being said, the Court cannot simply assume that plaintiffs bet on sporting events or contests when they make no such allegation in their otherwise extremely thorough complaints.

The sole reference to “sports betting” is a conclusory allegation that the alleged enterprise engaged in sports betting. See Bradley petition at ¶ 88, Thompson petition at ¶ 77. However, nowhere does either plaintiff allege personal participation in sports gambling. Such an allegation is not enough to survive a motion to dismiss where there is no claim that plaintiffs themselves, or the defendants they have sued, participated in sports gambling. Since plaintiffs have failed to allege that they engaged in sports gambling, and internet gambling in connection with activities other than sports betting is not illegal under federal law, plaintiffs have no cause of action against the credit card companies or the banks under the Wire Act.

### 3. Mail and Wire Fraud

Plaintiffs also allege violations of the federal mail and wire fraud statutes...

...

Since the Court finds that the Wire Act does not prohibit internet casino gambling or defendants' association therewith, there can be no mail or wire fraud. Plaintiffs' fraud claims depend upon a finding that the gambling activities and debts were in violation of U.S. and state law and that the defendants therefore misrepresented the debts as legal, as explained in the previous sections. However, plaintiffs' attempt to advance this theory fails because the debts themselves are not illegal. Moreover, even if the debts were illegal, defendants' representations with respect to those debts do not provide a basis for a mail or wire fraud claim because "[i]t is the general rule that fraud cannot be predicated upon misrepresentations of law." See *Meacham v. Halley*, 103 F.2d 967, 971 (5th Cir.1939); see also *Allen v. WestPoint-Pepperell, Inc.*, 945 F.2d 40 (2d Cir.1991).

....

#### VI. Aiding and Abetting a § 1962(c) violation FN9

In a subheading of his complaint, plaintiff Bradley cites the applicable statute as § 1964(a). However, in his factual allegations plaintiff clearly refers to defendants' as aiders and abettors to a § 1962(c) violation. The Court will accordingly analyze plaintiffs' claim as one for aiding and abetting a § 1962(c) violation.

Plaintiffs also assert a cause of action premised on aiding and abetting liability. They state that "[b]ecause Defendants have formed an illegal Internet gambling enterprise, conducted and/or facilitated Internet casino betting and collected unlawful debt, they have participated as a principal within the meaning of 18 U.S.C. § 2 and are liable as an aider and abettor to the violation of 18 U.S.C. § 1962(c)." Bradley Complaint at ¶ 113; see also Thompson Complaint at ¶ 35.

This argument fails as plaintiffs' underlying § 1962(c) claim is meritless. Without a violation of the underlying substantive offense, there can be no aiding and abetting liability. That being said, it is doubtful that an aiding and abetting liability cause of action exists under § 1962(c).

...

Accordingly,

IT IS ORDERED that the motions to dismiss of MasterCard, Visa, Travelers and Fleet are GRANTED.

## The Court of Appeals Opinion

313 F.3d 257, (portions redacted)

United States Court of Appeals, Fifth Circuit.

In Re: MASTERCARD INTERNATIONAL INC. Internet Gambling Litigation.

...

Nov. 20, 2002.

Credit card holders filed class action complaints against credit card companies and issuing banks, alleging that they violated the Racketeer Influenced and Corrupt Organizations Act (RICO) by aiding and abetting illegal internet gambling. The United States District Court for the Eastern District of Louisiana, Stanwood R. Duval, Jr., J., 132 F.Supp.2d 468, granted motions to dismiss, and plaintiffs appealed. The Court of Appeals, Dennis, Circuit Judge, held that plaintiffs failed to sufficiently allege that defendants engaged in a pattern of racketeering activity or the collection of unlawful debt, and thus dismissal for failure to state a claim was proper.

Affirmed.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before DeMOSS, STEWART and DENNIS, Circuit Judges.

DENNIS, Circuit Judge:

In this lawsuit, Larry Thompson and Lawrence Bradley ("Thompson," "Bradley," or collectively "Plaintiffs") attempt to use the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 -1968, to avoid debts they incurred when they used their credit cards to purchase "chips" with which they gambled at on-line casinos and to recover for injuries they allegedly

sustained by reason of the RICO violations of MasterCard International, Visa International, and banks that issue MasterCard and Visa credit cards (collectively “Defendants”). FN1 The district court granted the Defendants' motions to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. We AFFIRM.

I.

Thompson and Bradley allege that the Defendants, along with unnamed Internet casinos, created and operate a “worldwide gambling enterprise” that facilitates illegal gambling on the Internet through the use of credit cards. Internet gambling works as follows. A gambler directs his browser to a casino website. There he is informed that he will receive a gambling “credit” for each dollar he deposits and is instructed to enter his billing information. He can use a credit card to purchase the credits.<sup>1</sup> His credit card is subsequently charged for his purchase of the credits. Once he has purchased the credits, he may place wagers. Losses are debited from, and winnings credited to, his account. Any net winnings a gambler might accrue are not credited to his card but are paid by alternate mechanisms, such as wire transfers.

Under this arrangement, Thompson and Bradley contend, “[t]he availability of credit and the ability to gamble are inseparable.”<sup>2</sup> The credit card companies facilitate the enterprise, they say, by authorizing the casinos to accept credit cards, by making credit available to gamblers, by encouraging the use of that credit through the placement of their logos on the websites, and by processing the “gambling debts” resulting from the extension of credit. The banks that issued the gamblers' credit cards participate in the enterprise, they say, by collecting those “gambling debts.”

Thompson holds a MasterCard credit card issued by Fleet Bank (Rhode Island) NA. He used his credit card to purchase \$1510 in gambling credits at two Internet gambling sites. Bradley holds a Visa credit card issued by Travelers Bank USA Corporation. He used his credit card to purchase \$16,445 in gambling credits at seven Internet gambling sites. Thompson and Bradley each used his credits to place wagers. Thompson lost everything, and his subsequent credit card billing statements reflected purchases of

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<sup>1</sup> Gamblers can purchase the credits through online transactions or by authorizing a purchase via a telephone call. Gamblers also can purchase the credits via personal check or money order using the mails.

<sup>2</sup> The Plaintiffs state that 95% of Internet gambling business involves the use of credit cards.

\$1510 at the casinos. Bradley's winning percentage was higher, but he fared worse in the end. He states his monthly credit card billing statements included \$7048 in purchases at the casinos.

Thompson and Bradley filed class action complaints against the Defendants on behalf of themselves and others similarly situated. They state that the Defendants participated in and aided and abetted conduct that violated various federal and state criminal laws applicable to Internet gambling. Through their association with the Internet casinos, the Defendants allegedly "directed, guided, conducted, or participated, directly or indirectly, in the conduct of an enterprise through a pattern of racketeering and/or the unlawful collection of unlawful debt," in violation of 18 U.S.C. § 1962(c). They seek damages under RICO's civil remedies provision, claiming that they were injured by the Defendants' RICO violations. They also seek declaratory judgment that their gambling debts are unenforceable because they are illegal.

Upon motions by the Defendants, the district court dismissed the Plaintiffs' complaints. ...

## II.

We review a district court's grant of a Rule 12(b)(6) motion de novo, applying the same standard used below. "In so doing, we accept the facts alleged in the complaint as true and construe the allegations in the light most favorable to the plaintiffs." But "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss."

## III.

...  
"A pattern of racketeering activity requires two or more predicate acts and a demonstration that the racketeering predicates are related and amount to or pose a threat of continued criminal activity." The predicate acts can be either state or federal crimes. Thompson and Bradley allege both types of predicate acts.

...  
Thompson and Bradley both identify three substantive federal crimes as predicates-violation of the Wire Act, mail fraud, and wire fraud. The district court concluded that the Wire Act concerns gambling on sporting events or contests and that the Plaintiffs had

failed to allege that they had engaged in internet sports gambling.<sup>3</sup> We agree with the district court's statutory interpretation, its reading of the relevant case law, its summary of the relevant legislative history, and its conclusion. The Plaintiffs may not rely on the Wire Act as a predicate offense here.

The district court next articulated several reasons why the Plaintiffs may not rely on federal mail or wire fraud as predicates. Of these reasons, two are particularly compelling. First, Thompson and Bradley cannot show that the Defendants made a false or fraudulent misrepresentation. Because the Wire Act does not prohibit non-sports internet gambling, any debts incurred in connection with such gambling are not illegal. Hence, the Defendants could not have fraudulently represented the Plaintiffs' related debt as legal because it was, in fact, legal. We agree that "the allegations that the issuing banks represented the credit charges as legal debts is not a scheme to defraud." Second, Thompson and Bradley fail to allege that they relied upon the Defendants' representations in deciding to gamble. The district court correctly stated that although reliance is not an element of statutory mail or wire fraud, we have required its showing when mail or wire fraud is alleged as a RICO predicate. Accordingly, we conclude that Thompson and Bradley cannot rely on the federal mail or wire fraud statutes to show RICO predicate acts.

...

We need not analyze the validity or merit of Plaintiffs' claim based on aiding and abetting liability because (assuming it is valid) it necessarily falls along with the underlying RICO claim. Likewise, we need not consider the merits of the Defendants' motions to join the Internet casinos pursuant to Rule 19 of the Federal Rules of Civil Procedure. We agree with the district court that those motions are moot.

...

For the foregoing reasons, we AFFIRM the judgment of the district court.

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<sup>3</sup> In re MasterCard, 132 F.Supp.2d at 480 ("[A] plain reading of the statutory language [of the Wire Act] clearly requires that the object of the gambling be a sporting event or contest.").

## The DOJ Interpretation

Statement of  
John G. Malcolm  
Deputy Assistant Attorney General

Criminal Division  
United States Department of Justice

At  
Special Briefing: Money Laundering and Payment Systems in  
Online Gambling Sponsored  
By World Online Gambling Law Report  
London, England

It is a pleasure to speak to you today about some of the many issues involved with on-line gambling. Let me state at the outset that when I refer to on-line gambling, I am including within that definition gambling and gaming of all types, be it casino-type games or sporting events, and I am also including gambling by other technologies, such as through interactive television. For purposes of United States law, these distinctions are not as significant as they are under the laws of other countries.

As you all know, the number of Internet gambling sites has increased substantially in recent years. While there were approximately 700 Internet gambling sites in 1999, it is estimated that by 2003, there will be approximately 1,800 such sites generating around \$4.2 billion. In addition to on-line casino-style gambling sites, there are also numerous off-shore sports books operating telephone betting services. These developments are of great concern to the United States Department of Justice, particularly because many of these operations are currently accepting bets from United States citizens, when we believe that it is illegal to do so. The United States has other concerns too, some of which I would like to talk about today.

...

In the United States, both federal and state laws apply to on-line gambling. Historically, the individual states were left to determine what forms of gambling could be offered within an individual state's borders and to regulate such gambling. Not surprisingly, different

states have different laws about gambling. For example, the State of Nevada permits and regulates casinos and sports bookmaking operations; while the neighboring State of Utah, on the other hand, does not permit any gambling. This poses a particular problem in the on-line world because, as I previously stated, the person placing a bet may not be located in the same state or even the same country as the person receiving the bet.

The Department of Justice views a gambling transaction as occurring in both the jurisdiction where the bet is placed by the bettor and in the jurisdiction where the gambling business that receives the bet is located. Thus, if Internet gambling were regulated in the United States, it would be subject to, and would need to be in compliance with, fifty differing sets of gambling laws, which would pose certain unique problems.

While the prosecution of individual bettors and intra-state gambling crimes are largely left to the individual states, there are numerous federal gambling statutes that the Department of Justice has employed against large-scale gambling businesses that operate interstate or internationally.

One such statute is the so-called Wire Act, which is codified at Section 1084 of Title 18 of the United States Code. This statute makes it a crime, punishable up to two years in prison, to knowingly transmit in interstate or foreign commerce bets on any sporting event or contest. It is the Department of Justice's position that this prohibition applies to both sporting events and other forms of gambling, and that it also applies to those who send or receive bets in interstate or foreign commerce even if it is legal to place or receive such a bet in both the sending jurisdiction and the receiving jurisdiction. This view was upheld by the Second Circuit Court of Appeals in the recent successful federal prosecution of Jay Cohen, who was the President of World Sports Exchange, a company which was based in Antigua but which accepted bets via the telephone and the Internet from citizens in the United States, who was the President of World Sports Exchange, a company which was based in Antigua but which accepted bets via the telephone and the Internet from citizens in the United States.

## **Questions for Discussion**

Does the Federal Wire Act prohibit offering sports wagering services across state lines?

Does the Federal Wire Act prohibit offering poker wagering services across state lines?

Does the Federal Wire Act prohibit offering slot machine wagering services across state lines?

Does the Federal Wire Act prohibit offering horse race wagering services across state lines?

## RECENT NEWS ITEMS FOR CLASS DISCUSSION

As part of the interactive nature of the class, please spend a little time researching the following topic in recent news stories:

- The information (charge) and disposition of the matter in U.S. v. [Anurag Dikshit](#).
  - Be prepared to identify the charges levied against Mr. Dikshit
  - Be prepared to discuss Mr. Dikshit's resolution of the matter
  - Be prepared to discuss industry reaction to the matter and its resolution