

# Federal & Indian Gaming Law



## WAGERING PARAPHERNALIA ACT TRAVEL ACT

with Greg Gemignani

# RECAP

Elements to look for in a gambling scheme

Variations on what constitutes the elements



# RECAP

## Federal Wire Act

Essence of the act

What is the business of wagering

Pre-2011 DOJ Interpretation vs. 5th Circuit

Lombardo Interpretation post *In re Mastercard*

December 2011 DOJ Opinion Interpretation

January 2019 DOJ Opinion Interpretation

Limited Exemptions

# RECAP

Illegal Gambling Business Act

# RECAP

Illegal Gambling Business Act

What does it prohibit?

# RECAP

## Illegal Gambling Business Act

What is an illegal gambling business?

# RECAP

Illegal Gambling Business Act

Is a bettor part of an illegal gambling business?

# RECAP

## Illegal Gambling Business Act

What does it mean to conduct an illegal gambling business?



# RECAP

## Illegal Gambling Business Act

What does it mean to conduct an illegal gambling business?

Being a janitor?

# RECAP

## Illegal Gambling Business Act

What does it mean to conduct an illegal gambling business?

Providing a line subscription?

# RECAP

## Illegal Gambling Business Act

What does it mean to conduct an illegal gambling business?

Do you have to be paid?

# WAGERING PARAPHERNALIA ACT

18 U.S.C. §1953 the Statute

Interstate transportation of wagering paraphernalia

(a) Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be fined under this title or imprisoned for not more than five years or both.

# WAGERING PARAPHERNALIA ACT

18 U.S.C. §1953 the Statute

Interstate transportation of wagering paraphernalia

(b) This section shall not apply to

(1) parimutuel betting equipment, parimutuel tickets where legally acquired, or parimutuel materials used or designed for use at racetracks or other sporting events in connection with which betting is legal under applicable State law, or

(2) the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a State in which such betting is legal under the statutes of that State, or

(3) the carriage or transportation in interstate or foreign commerce of any newspaper or similar publication, or

(4) equipment, tickets, or materials used or designed for use within a State in a lottery conducted by that State acting under authority of State law, or

(5) the transportation in foreign commerce to a destination in a foreign country of equipment, tickets, or materials designed to be used within that foreign country in a lottery which is authorized by the laws of that foreign country.



# WAGERING PARAPHERNALIA ACT

## Mendelsohn Opinion

### Basic Facts

- Mendelsohn and Bentsen developed an accounting program called SOAP
- SOAP is tailored with features useful for bookmakers
  - Computerized methods for analyzing sports bets
  - Game schedules
  - Point spreads
  - Odds calculator
  - Quick erase feature
  - Recovery program available

# WAGERING PARAPHERNALIA ACT

## Mendelsohn Opinion

- Basic Facts
  - They sell the program to Felix, an undercover policeman posing as a bookmaker
- They send Felix the SOAP installation disk by mail from Nevada to California
- They are convicted under the WPA

# WAGERING PARAPHERNALIA ACT

## Mendelsohn Opinion

What are Defendants' arguments?

The disk is protected speech

The statute is overbroad

The disk qualifies as news paper or similar publication for an exemption

The software is not a device nor is the disk

No intent to violate the law

Reliance on a legal opinion

# WAGERING PARAPHERNALIA ACT

## Mendelsohn Opinion

What does the court think of the arguments ?

- The disk is protected speech.
  - SOAP is too instrumental in and intertwined with the performance of criminal activity to retain first amendment protection.
- The Statute is too broad.
  - We will not invalidate this statute simply because "there are marginal applications in which ... [it] would infringe on First Amendment values."
- The disk qualifies as news paper or similar publication for an exemption
  - SOAP did not bring the bookmaker any news of the betting world. It contained no information about races, games, bets, or even betting strategy. Rather, SOAP helped computerize the bookmaker's system of keeping records and making bets. Classifying SOAP as a publication similar to a newspaper requires a stretch of the statutory language beyond the possible intention of Congress.

# WAGERING PARAPHERNALIA ACT

## Mendelsohn Opinion

What does the court think of the defenses?

The software is not a device nor is the disk

- Although Congress heard testimony regarding items used to record bets, such as blank lottery tickets, bookmaker's records, and flash paper, it did not limit § 1953 to those or similar items. On the contrary, Congress employed broad language to "permit law enforcement to keep pace with the latest developments ..." because organized crime has shown "great ingenuity in avoiding the law."
- Whatever merit the defendants' argument may have with regard to such generic items as pencils, it does not encompass their computer program that was far more narrowly targeted for use in bookmaking. The few, if any, legal uses of SOAP by large bettors do not immunize SOAP's major, illegal use from the reach of § 1953.



# WAGERING PARAPHERNALIA ACT

## Mendelsohn Opinion

What does the court think of the defenses?

No intent to violate the law

- “Knowing” usually connotes a general intent crime, especially when the words “willfully” or “with intent to” are absent. Consequently, the only court to face this issue held that a violation of §1953 does not require specific intent to violate the law.
- The defendants knew quite well what SOAP contained, because they designed it, marketed it, and instructed others on its use. They may or may not have known that selling SOAP outside of Nevada was illegal, but the statute does not require that knowledge.

# WAGERING PARAPHERNALIA ACT

## Mendelsohn Opinion

What does the court think of the defenses?

### Reliance on a Legal Opinion

- Mendelsohn told Detective Felix that his attorney said that selling SOAP was legal. He later told Felix that his attorney said he did not know what would happen if Mendelsohn sold SOAP interstate. Over defendants' objections, the district court found a limited waiver of the attorney/client privilege and permitted Mendolsohn's former attorney, Raby, to testify. Raby testified that he told Mendelsohn that sending SOAP outside Nevada violated federal law.

# WAGERING PARAPHERNALIA ACT

Mendelsohn Opinion  
Thoughts?

# WAGERING PARAPHERNALIA ACT

U.S. v. Norberto

# WAGERING PARAPHERNALIA ACT

U.S. v. Norberto

Basic Facts



# WAGERING PARAPHERNALIA ACT

## U.S. v. Norberto

### Basic Facts

- Defendants are accused of operating an illegal gambling business in the U.S. that sold Spanish lottery tickets for an annual lottery called El Navidad with a top prize drawing called El Gordo.
- The Spanish lottery prohibits individuals from taking any El Navidad tickets outside the country, though it is well known that this rule is disregarded by many and it is played by players throughout Europe and around the world.
- Defendants set up operations in the U.S. and Canada to promote, import, transport, and sell El Navidad lottery tickets
- Defendants used a complex web of companies to conceal the nature of the operation and launder the proceeds.
- Lottery solicitations were made through mail and internet solicitations all over the world.

# WAGERING PARAPHERNALIA ACT

U.S. v. Norberto

Norberto's WPA Defense

# WAGERING PARAPHERNALIA ACT



# WAGERING PARAPHERNALIA ACT

## 18 USC 1301 - Importing or transporting lottery tickets

Whoever brings into the United States for the purpose of disposing of the same, or knowingly deposits with any express company or other common carrier for carriage, or carries in interstate or foreign commerce any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any advertisement of, or list of the prizes drawn or awarded by means of, any such lottery, gift enterprise, or similar scheme; or, being engaged in the business of procuring for a person in 1 State such a ticket, chance, share, or interest in a lottery, gift, enterprise or similar scheme conducted by another State (unless that business is permitted under an agreement between the States in question or appropriate authorities of those States), knowingly transmits in interstate or foreign commerce information to be used for the purpose of procuring such a ticket, chance, share, or interest; or knowingly takes or receives any such paper, certificate, instrument, advertisement, or list so brought, deposited, or transported, shall be fined under this title or imprisoned not more than two years, or both.

# WAGERING PARAPHERNALIA ACT

18 USC 1302 - Mailing lottery tickets or related matter

Whoever knowingly deposits in the mail, or sends or delivers by mail:

Any letter, package, postal card, or circular concerning any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;

Any lottery ticket or part thereof, or paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;

Any check, draft, bill, money, postal note, or money order, for the purchase of any ticket or part thereof, or of any share or chance in any such lottery, gift enterprise, or scheme;

Any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance, or containing any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes;

Any article described in section 1953 of this title—

Shall be fined under this title or imprisoned not more than two years, or both; and for any subsequent offense shall be imprisoned not more than five years.



# WAGERING PARAPHERNALIA ACT

18 USC 1307 - Exceptions relating to certain advertisements and other information and to State-conducted lotteries

(a)The provisions of sections 1301, 1302, 1303, and 1304 shall not apply to—(1)an advertisement, list of prizes, or other information concerning a lottery conducted by a State acting under the authority of State law which is—(A)contained in a publication published in that State or in a State which conducts such a lottery; or

(B)broadcast by a radio or television station licensed to a location in that State or a State which conducts such a lottery; or

(2)an advertisement, list of prizes, or other information concerning a lottery, gift enterprise, or similar scheme, other than one described in paragraph (1), that is authorized or not otherwise prohibited by the State in which it is conducted and which is—(A)conducted by a not-for-profit organization or a governmental organization; or

(B)conducted as a promotional activity by a commercial organization and is clearly occasional and ancillary to the primary business of that organization.

(b)The provisions of sections 1301, 1302, and 1303 shall not apply to the transportation or mailing—(1)to addresses within a State of equipment, tickets, or material concerning a lottery which is conducted by that State acting under the authority of State law; or

(2)to an addressee within a foreign country of equipment, tickets, or material designed to be used within that foreign country in a lottery which is authorized by the law of that foreign country.

(c)For the purposes of this section (1) “State” means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States; and

(2) “foreign country” means any empire, country, dominion, colony, or protectorate, or any subdivision thereof (other than the United States, its territories or possessions).

(d)For the purposes of subsection (b) of this section “lottery” means the pooling of proceeds derived from the sale of tickets or chances and allotting those proceeds or parts thereof by chance to one or more chance takers or ticket purchasers. “Lottery” does not include the placing or accepting of bets or wagers on sporting events or contests. For purposes of this section, the term a “not-for-profit organization” means any organization that would qualify as tax exempt under section 501 of the Internal Revenue Code of 1986.

# WAGERING PARAPHERNALIA ACT



# WAGERING PARAPHERNALIA ACT

U.S. v. Norberto

The Defense

The Defendants contend that because the Lottery Solicitations "were `designed to be used within the foreign countr[ies]' to which they are sent," Norberto Mem. in Sup. at 10, the statutory exceptions found in Sections 1307(b)(2) and 1953(b)(5) preclude liability. The validity of this argument hinges on the definition and interpretation of the word "**authorized**." The Defendants argue that in the context of these exceptions, the word "authorized," makes it lawful to send lottery materials to a foreign country that permits lotteries in general, and/or permits its citizens to play the lotteries of another country. On the other hand, the Government takes a much narrower view of "authorize" and interprets it to only apply to situations where the foreign country itself runs, conducts, or administers the lottery for which the solicitations are sold.

# WAGERING PARAPHERNALIA ACT

U.S. v. Norberto

The Defense

b) This section shall not apply to ... (5) the transportation in foreign commerce to a destination in a foreign country of equipment, tickets, or materials designed to be used within that foreign country in a lottery which is **authorized** by the laws of that foreign country.

# WAGERING PARAPHERNALIA ACT

On the other hand, the Government takes a much narrower view of "authorize" and interprets it to only apply to situations where the foreign country itself runs, conducts, or administers the lottery for which the solicitations are sold.

# WAGERING PARAPHERNALIA ACT

U.S. v. Norberto

The Court

"Thus, the word "authorize" does not merely mean "to permit" or "to allow," as the Defendants contend. Rather, according to the plain meaning of the word "authorize" there must be an affirmative granting of formal approval or permission to allow the conduct in question."

...

Accordingly, for the reasons stated above, the Court finds that the statutory exceptions found in sections 1307(b)(2) and 1953(b)(5) do not preclude criminal liability under sections 1301, 1302 and 1953(a) and the motion to dismiss the allegations relating to Sections 1301, 1302 and 1953(a) based on these exceptions is denied.



# WAGERING PARAPHERNALIA ACT

U.S. v. Norberto

The Court

The language "that foreign country" indicates that in order for the mailing and/or transportation of the Lottery Solicitations to be lawful, they must be designed to be used for the lottery that is "formally approved" by the country to which the shipment of lottery material, equipment, or tickets was sent. At this juncture, in this case, there is nothing in the record to indicate that any of the countries to which the Defendants sent the Lottery Solicitations has statutes authorizing or "giv[ing] legal authority" to participate in lotteries administered by Spain



# WAGERING PARAPHERNALIA ACT

U.S. v. Norberto

The Counter Argument

If Congress really wanted to limit the destination of lottery product shipping, then Congress could have used the same language in 1953(b) that was used in the lottery transportation of materials for State run lotteries.

# WAGERING PARAPHERNALIA ACT

U.S. v. Norberto

The Court's Answer to the Counter Argument

However, the Court finds that there is a logical explanation for the different language in the subsections that apply to the States compared with the subsections that apply to foreign countries. Unlike the States which almost always conduct and/or administer their own State Lotteries, see, e.g., N.Y. Const, art. 1 § 9 ("[n]o lottery or the sale of lottery tickets ... or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature ... shall hereafter be authorized or allowed within this state...."), such is not the case for foreign countries.

# WAGERING PARAPHERNALIA ACT

U.S. v. Norberto

The Court's Answer to the Counter Argument

...it is irrelevant whether the Defendants were actually "conducting" the lottery or "in the business of wagering and betting." Rather the relevant inquiry is whether the Lottery Solicitations were "used, or to be used, or adapted, devised, or designed for use in ... a numbers policy, bolita, or similar game." 18 U.S.C. § 1953.

Accordingly, the motion to dismiss the charges based on section 1953 is denied.

# WAGERING PARAPHERNALIA ACT

THOUGHTS?

# TRAVEL ACT

18 U.S.C. §1952 the Statute

Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to--

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform—

(A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both; or

(B) an act described in paragraph (2) shall be fined under this title, imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for any term of years or for life.

(b) As used in this section (i) "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States...

# TRAVEL ACT

## General Comments

Most often used in narcotics cases

Very broad interpretation by the courts

# TRAVEL ACT

## Polizzi Opinion

- The Basic Facts
  - In 1966 and 1967 Polizzi and Zerilli and others (Polizzi) acquired an interest in Vegas Frontier, Inc.
  - Vegas Frontier, Inc. owned the Frontier Hotel in Las Vegas
  - The Frontier operated under a Nevada gaming license.
  - The ownership by Polizzi was not disclosed to Nevada authorities
  - The trial court held that the business was involved in gambling and that Polizzi's interest was in violation of Nevada law, thus satisfying the two elements of the Travel Act.



# TRAVEL ACT

## Polizzi Opinion

- The Polizzi's Travel Act Arguments
  - Since VFI had a gaming license, the gambling activity could not be illegal within the meaning of the Travel Act
  - Even if the VFI license was acquired fraudulently, there was no criminal violation of Nevada law.
  - The travel act only reaches wholly unlawful businesses and since VFI was licensed, the Travel Act does not apply.
  - The Travel Act is unconstitutionally vague

# TRAVEL ACT

## Polizzi Opinion – The Court's Opinion

- Since VFI had a gaming license, the gambling activity could not be illegal within the meaning of the Travel Act
- Nevada statutes clearly prohibit the conduct of Polizzi
- While VFI was licensed, Polizzi's interest was not, and thus an underlying violation of a state law gambling prohibition was present.

# TRAVEL ACT

## Polizzi Opinion – The Court's Opinion

- The Polizzi's Travel Act Arguments
- Since VFI had a gaming license, the gambling activity could not be illegal within the meaning of the Travel Act
- Even if the VFI license was acquired fraudulently, there was no criminal violation of Nevada law.
- The travel act only reaches wholly unlawful businesses and since VFI was licensed, the Travel Act does not apply.
- The Travel Act is unconstitutionally vague

# TRAVEL ACT

## Polizzi Opinion – The Court's Opinion

- Even if the VFI license was acquired fraudulently, there was no criminal violation of Nevada law.
- The violations at issue were not those of VFI, but of those in control of VFI.
- By violating the licensing requirement statute, Polizzi falls within the catch all of criminal penalties for unlicensed involvement in gaming.
- Therefore the predicate criminal state law offense is met.

# TRAVEL ACT

## Polizzi Opinion – The Court's Opinion

- The travel act only reaches wholly unlawful businesses and since VFI was licensed, the Travel Act does not apply.
- If the Travel Act applied only when a business activity was absolutely prohibited, the reach of the section would be materially diminished.
- Additionally, there is nothing in the evidence that Congress intended this result.

# TRAVEL ACT

## Polizzi Opinion – The Court's Opinion

- The Travel Act is unconstitutionally vague
- Having reached the conclusion that appellant's knowingly violated Nevada statutes.
- Defendants did not make any argument that interstate travel or facilities were not used.

# TRAVEL ACT

## Polizzi Opinion – The Court's Opinion

- Convictions under the Travel Act are confirmed.



# QUESTIONS/DISCUSSION

Questions/Discussion