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U.S. and E.U. Court Decisions Uphold Internet Gambling Restrictions

Last month both the United States Court of Appeals for the Third Circuit and the European Court of Justice announced rulings that support restrictions on Internet gambling in the United States and European Union Member States, respectively. These decisions cast some doubt upon the future viability of cross-border online gambling.

***iMEGA v. Attorney General* – Third Circuit Affirms Rejection of Constitutional Challenges to UIGEA**

On September 1, the Third Circuit handed down its opinion in *iMEGA v. Attorney General*, 3-07-cv-02625 (3d. Cir., order issued Sept. 1, 2009). The case, on appeal from the United States District Court for the District of New Jersey, raised constitutional challenges to the Unlawful Internet Gambling Enforcement Act of 2005 (UIGEA).

The UIGEA prohibits any person or business engaged in the business of betting or wagering from knowingly accepting financial instruments such as credit cards, electronic fund transfers or checks in connection with Internet-based gambling or wagering, when such bet or wager is unlawful under any applicable federal or state law in the state or tribal lands in which the bet or wager is initiated, received or made. Thus, even if Internet gambling is legal in a jurisdiction, a business may still be liable under the UIGEA if it accepts money from a gambler located in a jurisdiction in which Internet gambling is illegal.

In the District Court case, the Interactive Media Entertainment and Gaming Association (iMEGA), a non-profit corporation that collects and disseminates information related to electronic and Internet-based gaming, filed suit, claiming that the UIGEA is facially unconstitutional because it is overly broad, void for vagueness, and violates iMEGA's First Amendment rights, the privacy rights of gamblers, the *ex post facto* clause, and the Tenth Amendment. The District Court rejected all of iMEGA's claims.

iMEGA's appeal to the Third Circuit sought review of only two of the arguments which were rejected by the District Court. First, it claimed that the UIGEA is void for vagueness because it lacks a definition of "unlawful Internet gambling" and will require Internet gambling businesses to consult numerous applicable and constantly changing state and federal laws to determine whether particular activity was

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unlawful gambling. The Third Circuit rejected this void for vagueness argument, noting that a statute is not unconstitutionally vague merely because it incorporates other provisions by reference or because it may be difficult to determine an "incriminating fact."

iMega's second argument claimed that the UIGEA violates the constitutional right of individuals to engage in gambling-related activities in the privacy of their own homes. The Third Circuit declined the opportunity to extend constitutional protection to gambling activity, stating simply that "such conduct is not protected by any right to privacy under the Constitution."

Bwin v. Portugal Lottery – ECJ Upholds National Online Gambling Restrictions

On September 8, the ECJ issued its ruling in Liga Portuguesa de Futebol Profissional and Bwin International Limited v. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa, Case C-42/07 (E.C.J., Sept. 8, 2009), a case brought by Bwin International Limited, an online gaming provider, against Santa Casa da Misericórdia, the non-profit organization that runs the Portuguese lottery.

Portuguese law grants Santa Casa, which operates under the strict control of the Portuguese government, a complete monopoly over the right to organize and operate lotteries, lotto games, and sporting bets via the Internet. Bwin, in 2005, entered into a sponsorship deal with the Portuguese football league, Liga Portuguesa de Futebol Profissional, that allowed Bwin to advertise Bwin's company and games to fans who visited the Liga Portuguesa Web site. The government of Portugal fined Bwin and Liga Portuguesa EUR 74,500 and EUR 75,000, respectively, for advertising and offering games of chance via the Internet in violation of Santa Casa's exclusive rights. Bwin and Liga Portuguesa challenged the fines in the local Portuguese court. The court sought advice from the ECJ as to whether the Portuguese lottery monopoly legislation is compatible with the free movement of services required between Member States of the European Union.

The ECJ found that because the Portuguese law prevented Bwin, a company lawfully providing gaming services in a Member State, from providing

those services in Portugal, the law indeed constituted a restriction on the free movement of services. The ECJ continued, however, to state that, in some cases, restrictions on the freedom to provide services may be justified by overriding public interest concerns. Portugal's stated justifications of preventing fraud and criminal activity were, in the eyes of the court, sufficient to justify the law, especially given the higher risk of fraud involved in Internet gambling. The ECJ therefore upheld the Portuguese lottery law.

What This Means for Your Business

The Third Circuit and ECJ decisions have important ramifications for businesses engaged in or wishing to engage in online gambling activities and for companies such as credit card companies that may facilitate online gambling transactions by providing or distributing wagers and winnings. The Third Circuit's decision in the iMEGA case has brought the UIGEA into the news again. The court's holding that the law is constitutional may encourage law enforcement to more aggressively enforce its provisions. Many observers believe that the primary target of such enforcement efforts will not be companies that provide Internet-gambling services, but will instead be businesses, such as credit card companies, that facilitate the financial transactions necessary to complete a bet or wager. In the short term, this will lead to confusion about how the laws will be enforced as law enforcement and businesses learn how to interpret certain provisions of the UIGEA, such as making the determination of exactly "where" a particular bet or wager has been initiated. Recent rules and regulations promulgated by the Department of the Treasury and the Federal Reserve System (the subject of an upcoming Advisory), will hopefully help to alleviate some of this confusion. In addition, some lawmakers (most notably Massachusetts Congressman Barney Frank) are continuing efforts to overturn the UIGEA entirely. Thus, questions surrounding the enforcement and fate of the UIGEA can best be described as unsettled.

The ECJ's decision against Bwin is more troubling for Internet gambling providers. Under the ECJ's ruling, any Member State of the European Union can enact laws that restrict foreign companies from providing Internet-gambling services within its borders, so long as that Member State has ample

justification for doing so. Because the ECJ has already held that combating fraud and crime are sufficient justifications for such restrictions, it appears that it will only be a matter of time before other Member States enact similar laws.

Businesses considering expanding their online gambling services to Europe must carefully consider the possible ramifications of this ruling before investing time and money in expansion.

If you have any questions or would like to learn more about the issues raised by this Advisory, please contact any of the attorneys listed above.

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