

Tackling a hidden danger

Marc W Dunbar, a partner with Jones Walker LLP in Florida says that the Unlawful Gambling Business Act is a latent trap for online gaming operators trolling for customers in the US

A RECENT US federal court case out of Texas highlighted a potential significant impediment in the ongoing quest to service the online gaming market in the US.

The case, *US v Castillo*¹, was likely not on the radar of many in the internet gaming world. The opinion rendered by District Judge Mary Lou Robinson overruling the objections filed by the defendant spends no time discussing the gambling crime committed by Mr Castillo, but instead is dedicated to reaffirming the constitutionality of an often overlooked US federal gambling statute known as the Unlawful Gambling Business Act.

This act, codified at 18 USC 1955, was passed during the Kennedy-era assault on organised crime. Quite simply it allows federal investigators and prosecutors to go after gambling perpetrators who were violating state gambling laws.

The substance of the act elegantly states that “whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both.”² The act defines an “illegal gambling business” as a gambling business that has three elements:

(1) an operation of five or more individuals that has been in business for at least 30 days,

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(2) gross revenue in excess of \$2,000 in any single day, and

(3) is a violation of the law of a state or political subdivision in which it is conducted.³

The first two elements are relatively easy to identify by a business owner; however, the last item involving a violation of state law or political subdivision is often overlooked particularly by those conducting internet operations, be it single-day fantasy leagues, penny auctions, internet bingo or game promotions, or even social gaming sites where no money is transferred from the player that nonetheless competes for valuable prizes.

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While seemingly irrelevant today, the historical context of the Act is to allow federal officials to stand in the shoes of local law enforcement who were either co-opted by organised crime and as such could not be trusted to enforce the law of their communities or were overmatched by the criminals and could not handle the complex investigation needed to prosecute the crime.

In short, federal law enforcement are able to use the Act to serve as local law enforcement and imposed even stiffer penalties than those established by state and local officials.

As highlighted by the recent *Castillo* case, even a low-level violation of a state misdemeanour gambling statute can result in federal prosecution under the Act. For those engaging in internet gaming businesses with websites that face every resident of a US state or territory, the potential

applicability of this Act is that your business model can be tested by federal investigators against every state law and every law or ordinance of a political subdivision of the US.

Take a populous state like Florida which has 67 counties and more than 400 incorporated municipal governments, many of which have their own gambling ordinances, the potential for liability is unimaginable when placed in the hands of a creative federal prosecutor targeting the spread of gaming operations which push the boundaries of “legal gambling” on the internet.

Florida, like a number of southern states, still maintains many strict anti-gambling statutes, which have been interpreted very broadly by conservative southern judges. Like a number of US states, Florida has adopted a very broad interpretation of “consideration” in a lottery context so as to not require any financial remuneration to be risked by the player, merely time and effort can suffice to satisfy this element of a lottery crime.⁴

Additionally, Florida has very strict statutes involving bingo, game promotions and sweepstakes.⁵ Most recently, Florida adopted one of the broadest slot machine statutes in the US which criminalises the possession or operation of any device or network of devices that, upon activation through any means, allows a player to play games of skill or chance and has the capability of awarding anything of value or the ability for the player to play the device or network again.⁶

Florida is not alone in its temperate view toward gambling. The real peril is the unknown reach of 18 US 1955 in that any state or local ordinance can be the tool of federal investigators to target the ever growing and very sophisticated online gaming environments.

Reasoned legal opinions are increasingly required as part of any business which involves gaming on the internet, particularly those

¹ Slip Copy cite as 2014 WL 2766540 (N.D.Tex. signed June 18, 2014)

² The Act also grants very broad forfeiture rights to the government providing as follows:

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the US. All provisions of law relating to the seizures, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

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involving the movement of money between players, businesses and financial intermediaries. Most centre around the applicability of the Unlawful Internet Gambling Enforcement Act, which while important cannot insulate the business from the broad reaches of Unlawful Gambling Business Act.

Judge Robinson seemed to have an inkling of the staggering reach of this Act in her conclusion in which she stated:

“Defendant Castillo presents a persuasive argument that the utility of § 1955 in combating organised crime has diminished over time, and that both the passage of time and the legalisation of gambling in different states raises serious concerns about the appropriateness of § 1955 and whether there is any justification for the federal government to be involved.

“The decision as to whether § 1955 has outlived its usefulness, however, is a decision for Congress, not the courts. Courts are not empowered to overturn constitutional legislative enactments just because the law is not a good idea or has outlived its purpose.”

Until definitive safe harbours are created by the US Congress, the US Supreme Court or via Department of Justice memorandum⁷, the risk will continue to be out there surrounding all internet gaming businesses facing residents of the US and its territories. In the meantime, all operators should take precautions in the construct and promotion of the online gaming environments in these jurisdictions.

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³ 18 USC 1955 (b) states:

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.

⁴ See *Little River Theatre Corp. v. State ex rel. Hodge*, 135 Fla. 854, 185 So. 855 (Fla. 1939).

⁵ See Sections 849.0931, 849.0935, and 849.094, Florida Statutes, by way of example.

⁶ See Sections 849.15 and 849.16, Florida Statutes.

⁷ For an overview of the DOJ memorandum involving online state lottery sales, see <http://www.forbes.com/sites/nathanvardi/2011/12/23/departement-of-justice-flip-flops-on-internet-gambling/>.