Op-Ed/Editorials – Gambling and the Law®: The U.S. Gets An "F" From The WTO

July 25, 2007

The United States has failed again in trying to overturn the ruling that it is discriminating against Antigua's Internet gambling. Worse, by failing to admit defeat, the Department of Justice has now turned a minor legal problem, limited to the issue of interstate horseracing, into a major headache for the U.S. on all aspects of remote wagering, including purely intrastate betting on horseracing, dogracing, sports, jai alai and maybe even poker.

I would have given a law student a grade of "D" if he or she had done what the D.O.J. did. And that's only because I do not like to fail anyone.

Imagine a student turning in a paper containing a very weak argument. The professor gives the paper a poor grade and explains why the argument won't work. The professor then gives the next assignment: Explain what changes your client now has to make in the way it does business to comply with the law.

The student now takes a year to answer. And, instead of stating what changes have to be made, the student says that the client is now in complete compliance, because it deserved to win.

This is what the D.O.J. did.

It is hard to conceive of a lawyer making the same losing arguments – again – in front of the same judges.

The original decision, April 2005, was not that bad for the U.S. The W.T.O. had ruled that the U.S. had indeed (accidentally) agreed to let in all forms of gambling when it signed the General Agreement on Trade in Services (GATS) treaty. But, the U.S. won on the argument that it had to outlaw people betting from their homes and offices because it has reasonable fears that remote gaming will bring in crime and corrupt the morals of America.

The only thing the U.S. lost on was the minor issue of interstate horseracing.

Congress had amended the Interstate Horseracing Act ("IHA") in December 2000 to expressly allow individuals to bet on horseraces from their homes by phone or computer, so long as the bets were legal in the states where they were made and accepted.

The D.O.J. had raised the rather unique legal argument that the IHA did not mean what it said. Besides being factually questionable, given the large, established cross-border betting industries involving horse races, the argument was legal nonsense. And the W.T.O. politely said so.

The W.T.O. held that the express language of the IHA allowed cross-border betting between states of the U.S., but not with foreign nations. The W.T.O. ordered the U.S. to change its laws.

The remedy was simple: Change the Interstate Horseracing Act into an International Horseracing Act.
Instead Congress did nothing.

So, of course the U.S. lost, again. But taking ridiculous positions can lead to more than losing a case. It can tempt a decision-maker to reexamine the entire record, to find more things wrong.

By failing to quickly comply with the W.T.O.'s original decision, the D.O.J. allowed time for Antigua to find ways to bring in all the intrastate gambling that is allowed in the U.S. Even the D.O.J. had to admit that the Wire Act did not prohibit remote wagering that took place entirely within one state. Antigua showed that 18 states allow people to bet from their homes, not only on horseraces, but also on dograces, sports (in Nevada) and jai alai.

Amending the IHA to include foreign licensed OTBs might not now be enough. The only legally safe position would be to outlaw all intrastate as well as interstate betting. But the horseracing industry is not going to let this happen.

So, the U.S. is going to have to pay off Antigua. It will probably be cash. Fortunately, Antigua is small, so if will be only a few tens or hundreds of millions of dollars.

But what happens if the next complaint in the W.T.O. is filed by the European Union?

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