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The DOJ's Wrath Descends on Internet Poker

Online poker players in the United States are referring to April 15, 2011 as "Black Friday," as it is the day when the U.S. Department of Justice, in tandem with the announcement of the unsealing of a criminal indictment and related civil complaint, shut off their access to the dot com websites of Pokerstars, Full Tilt, and Absolute Poker. In this alert, we describe (i) the DOJ's announcement and its immediate effects, (ii) the charges and forfeiture sought in the indictment, and (iii) the claims and relief sought in the civil complaint. We conclude by identifying two unsettled legal issues likely to come into play.

The Announcement

On April 15, 2011, the United States took action against the three largest online poker sites that permit U.S.-based individuals to play poker – Pokerstars, Full Tilt, and Absolute Poker ("Poker Companies"). In a DOJ press release issued on the same date, the Federal Bureau of Investigation and the U.S. Attorney's Office for the Southern District of New York announced the unsealing of an indictment charging 11 individuals (the founders and certain employees of the Poker Companies, various individuals that provided payment processing services, and a bank official) with (i) conspiracy to commit bank and wire fraud, (ii) money laundering conspiracy, (iii) violating the Unlawful Internet Gambling Enforcement Act ("UIGEA"), and (iv) violating the Illegal Gambling Business Act ("IGBA"). According to the press release, two of the non-founder defendants had been arrested that morning – one in Utah and one in Nevada – and another non-founder defendant would shortly be arraigned in New York. The press release also stated that the other eight defendants, seven of whom are U.S. citizens, were not in the United States, but that the USAO "is working with foreign law enforcement agencies and Interpol to secure the arrest of these defendants and the seizure of criminal proceeds located abroad."

The law enforcement agencies also announced that a civil action for money laundering and in rem forfeiture had been filed and that, in conjunction with the civil complaint, the Poker Companies' domain names had been seized and restraining orders had been obtained against "approximately 76 bank accounts in 14 countries containing the proceeds of the charged offenses." According to the press release, the civil complaint seeks "at least \$3 billion in civil money laundering penalties and forfeiture."

As the effect of the domain name seizures rippled across the United States (and into Canada) on April 15, online poker players found themselves unable to deposit funds into, or withdraw funds from, their accounts with the Poker Companies and unable to participate in games and tournaments, as illustrated in a contemporaneous feature in the Wall Street Journal. See Alexandra Berzon, "Online Poker Players Face Big Life Changes," Wall Street Journal (April 18, 2011). Visitors to the Poker Companies' dot com sites soon began being greeted by the FBI and DOJ logos and the following message:

This domain name has been seized by the FBI pursuant to an Arrest Warrant in Rem obtained by the United States Attorney's Office for the Southern

District of New York and issued by the United States District Court for the Southern District of New York. Conducting, financing, managing, supervising, directing, or owning all or part of an illegal gambling business is a federal crime. (18 U.S.C. §1955) For persons engaged in the business of betting or wagering, it is also a federal crime to knowingly accept, in connection with the participation of another person in unlawful Internet gambling, credit, electronic fund transfers, or checks. (31 U.S.C. §§5363 & 5366) Violations of these laws carry criminal penalties of up to five years' imprisonment and a fine of up to \$250,000. Properties, including domain names, used in violation of the provisions of 18 U.S.C. §1955 or involved in money laundering transactions are subject to forfeiture to the United States. (18 U.S.C. §§981, 1955(d)).

See, e.g., <http://www.pokerstars.com/> (as of April 18, 2011). On April 20, 2011, the USAO issued another press release, in which it announced an agreement with Pokerstars and Full Tilt that would permit U.S.-based players to use the companies' dot com websites to request the return of their funds. According to the press release, the dot com websites of Pokerstars and Full Tilt may also be used by non-U.S.-based players to play online poker, but a monitor must be employed by Pokerstars and Full Tilt to ensure that no U.S.-based players are permitted to play. The press release is available at <http://www.justice.gov/usao/nys/pressreleases/index.html>).

This action against the Poker Companies follows two related actions on September 10, 2010, in which the United States recovered \$13,335,248.91 from Allied Wallet and \$733,804.92 from Goldwater Bank, N.A., which were alleged to be proceeds from transactions involving Pokerstars. These actions make clear the risks that UIGEA presents not only to gaming companies, but also to payment processors and banks.

The Indictment

The indictment charges all 11 defendants with gambling offenses based on UIGEA (31 U.S.C. §§5363, 5366) and IGBA (18 U.S.C. §1955). These

offenses require the violation of a predicate gambling law. While the indictment alleges that "the laws of other states" were violated, the only state law specifically identified is that of New York – specifically, N.Y. Penal Law §§225.00 and 225.05.

The indictment charges 9 defendants with conspiracy to commit wire and bank fraud (based on 18 U.S.C. §§1343, 1344, 1349). These defendants are alleged to have conspired with each other, and "with others known and unknown," to execute a scheme to defraud and obtain funds from financial institutions "by means of false and fraudulent pretenses, representations, and promises," which was, at least in part, done by using wire communications. The overt acts alleged in connection with the wire and bank fraud charges involve the creation of "dozens of phony e-commerce websites purporting to sell everything from clothing to jewelry to golf clubs to bicycles which, in reality, ... would be used to disguise [the Poker Companies'] gambling transactions." It is also alleged that many U.S. banks in which the payment processors kept accounts for the phony companies became aware that transactions related to the accounts were for "Internet gambling."

The indictment charges all 11 defendants with money laundering conspiracy based on 18 U.S.C. §§1956(a)(2)(A), 1956(h), and 1957. The predicate illegal activity cited in support of this charge is the "operation of an illegal gambling business."

The indictment seeks forfeiture in connection with the IGBA charge, the bank and wire fraud charges, and the money laundering charge as follows:

- IGBA – at least \$3 billion (representing "the amount of proceeds obtained" from and the "amount of property used" in the operation of the alleged illegal gambling business) and "all of the defendants' right, title, and interest" in 24 listed entities (including the Poker Companies), 32 listed "domestic accounts," and 45 listed "foreign accounts."
- Bank and wire fraud – "at least \$2 billion" and "all of the defendants' right, title, and interest" in 24 listed entities (including the Poker

- Companies), 32 listed "domestic accounts," and 45 listed "foreign accounts."
- Money laundering – "at least \$2.5 billion" and "all of the defendants' right, title, and interest" in 24 listed entities (including the Poker Companies), 32 listed "domestic accounts," and 45 listed "foreign accounts."

The Civil Complaint

The civil money laundering and in rem forfeiture action seeks "civil monetary penalties for money laundering" against the defendants and "forfeiture of all right, title and interest in the assets of" the defendants. The defendants named in the civil complaint in connection with the money laundering claim are the Poker Companies and various others alleged to be entities through which the Poker Companies did business. The defendants-in-rem in connection with the forfeiture claims are the defendants' property.

In requesting relief, the United States specifically requests (i) that money judgments be entered against the entities associated with Pokerstars, Full Tilt, and Absolute Poker in amounts of "not less than" \$1.5 billion, \$1 billion, and \$500 million, respectively, and (ii) that "process issue" to enforce the forfeiture of the defendants' property. The property sought to be forfeited includes (i) the domain names used by the Poker Companies, (ii) 31 bank accounts (located in financial institutions in the United States, Switzerland, Luxembourg, Germany, Malta, Panama, England, Ireland and Denmark) associated with the Poker Companies, and (iii) 70 bank accounts (located in financial institutions in the United States, Cyprus, UK, Hong Kong, Andorra, Malta, and Canada) associated with the payment processors.

Unsettled Legal Issues

Much speculation, often expressing different viewpoints, is appearing in news reports and other media about the impact of the DOJ's action. We attempt not to speculate here, but rather to identify two legal issues that strike us as unsettled and likely to come into play as the criminal and civil cases progress.

The first concerns the predicate violation of law that is an element of both of the alleged gambling offenses. As noted above, the indictment specifically alleges violations of N.Y. Penal Law §§225.00 and 225.05 as the required predicate violation. Section 225.00 defines gambling, along with some of the terms used in the definition of gambling. Section 225.05 establishes second-degree promotion of gambling as a felony. In defining gambling, Subsection 225.00(2) explains: "A person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome." Section 225.00(1) defines a "contest of chance" as "any contest, game, gaming scheme or gaming devise in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein."

Not all gambling or promotion of gambling is illegal in New York. For example, purchasing a ticket to play the New York State lottery constitutes gambling, but because it is statutorily authorized, it is not illegal gambling. *Compare* N.Y. Tax Law §1601 (Article 34 of New York Tax Law "establish[es] a lottery to be operated by the state") with N.Y. Tax Law §1609 (authorizing lottery tickets). Moreover, it is not certain whether poker is gambling under New York law. A court in at least one state with a definition of gambling similar to New York's has determined that poker is not gambling. *See Chimento v. Town of Mount Pleasant*, Case No. 2009-CP-10-001551 (Charleston Co. C.C.P. Oct. 1, 2009), slip op. at 11 ("For the reasons set forth above, this Court has concluded that Texas Hold'em is not 'gaming' within the meaning of South Carolina law because skill predominates over chance."), *on appeal to S.C. Supreme Court*.

We are not aware of any reported New York decision that could be considered binding precedent that a player-to-player poker game, such as 5-card stud or Texas Hold 'Em, is a game in which "the outcome depends in a material degree upon an element of chance." However, some New York courts have expressed, in dicta, that it is. *See, e.g., People v. Turner*, 629 N.Y.S.2d 661, 662 (N.Y.

Crim. Ct. 1995) ("Games of chance range from those that require no skill, such as a lottery...to those such as poker or blackjack which require considerable skill in calculating the probability of drawing particular cards. Nonetheless, the latter are as much games of chance as the former, since the outcome depends to a material degree upon the random distribution of cards.").

A second unsettled legal issue concerns the question of whether domain names constitute property that can be seized. Courts have reached differing conclusions with respect to whether the right to use a domain name is an intangible property right or, instead, a contractual right that lacks the attributes of personal property. For example, the U.S. Court of Appeals for the Ninth Circuit concluded, in *Kremen v. Cohen*, 337 F.3d 1024 (9th Cir. 2003), that the right to use a domain name is an intangible property right, stressing that the name is an interest that can be precisely defined and is susceptible to exclusive possession and control and that the registrant has a legitimate claim to exclusive use of the name. *Id.* at 1030. By contrast, in *Network Solutions, Inc. v. Umbro International, Inc.*, 529 S.E.2d 80 (Va.

2000), the Virginia Supreme Court concluded that a domain name cannot be garnished because the right to use the name is, in essence, no more than a contractual right to receive services from the domain name's registrar. *Id.* at 86. *See also Wornow v. Register.com, Inc.*, 778 N.Y.S.2d 25, 26 (N.Y. App. Div. 2004) (same).

There are likely a number of other unsettled legal issues that will be identified, and explored, during the course of these cases. Whether any of them will actually be decided by a court, given the propensity for cases such as these to be resolved without a trial, remains to be seen. That said, in this context, the presence of unsettled legal issues regarding the meaning and scope of the relevant criminal statutes could benefit some of the defendants. Indeed, the so-called "rule of lenity" provides that, when a defendant is alleged to have violated a criminal statute, and the statute is ambiguous on its face or as it applies to the defendant, the ambiguity should be resolved in the defendant's favor. *See, e.g., United States v. Bass*, 404 U.S. 336, 347 (1971) ("ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity").

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