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A Reinterpretation With Unintended Consequences: Did the USDOJ Just Declare Your State Lottery Illegal?

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On January 21, 2019, the United States Department of Justice (DOJ) issued an opinion, Reconsidering Whether the Wire Act Applies to Non-Sports Gambling (“2018 Opinion”). This opinion reconsidered a 2011 opinion in which the DOJ evaluated whether the Wire Act applies to internet and interstate lottery ticket sales. The 2011 Opinion interpreted the Wire Act to apply only to sports betting, leaving state lotteries to continue to operate and expand with few concerns as to their legality. But the 2018 Opinion’s interpretation extended the reach of the Wire Act beyond sports betting to include any type of gambling, including lotteries. Recognizing the significant expansion in the scope of the Wire Act created by the 2018 Opinion, the DOJ deferred enforcement under the 2018 Opinion twice, first to April 15, 2019 and then to June 14, 2019. But these deferrals still leave states facing impending federal prohibition of a longstanding form of government-conducted gambling.

In sum, the 2018 Opinion could directly impact one of states’ most meaningful sources of revenue—the state lottery. The 2018 Opinion directly calls into question internet sales of lottery tickets, which were permitted under the 2011 Opinion. Through its reasoning, the opinion also calls into question the legality of interstate sales of lottery tickets and multi-state lottery offerings such as Powerball and Mega Millions. Significantly, a finding that these lottery offerings are illegal would eliminate a measurable revenue source for states (many of which dedicate this funding to their education systems). This article will analyze the Wire Act, the DOJ opinions, and the current uncertainty regarding the 2018 Opinion’s application. It will then provide a straightforward interpretation of the Wire Act that does not diminish the applicability of the Wire Act but appropriately respects state sovereignty within the area of gambling.

The Wire Act

The Wire Act, 18 U.S.C. §§ 1081 to 1084, was adopted in 1961 as one of a series of proposals by Attorney General Robert F. Kennedy to combat organized crime. The Act was intended to add to allegations of unlawful gambling activity and act as a means to enhance punishments to deter unlawful gambling syndicates. The text of the act is fairly straightforward, but also vague in a manner that demonstrates its purpose as an add-on charge:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.

As Attorney General Kennedy stated, this legislation was written to assist law enforcement through existing state laws in targeting “organized crime in this country without invading the privacy of the home or outraging the sensibilities of our people in matters of personal inclinations and morals.” In other words, the Wire Act was intended to assist states that had outlawed gambling but simultaneously respect that some states permitted gambling. This is reflected in paragraph (b) of § 1084:
Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a state or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.

This safe harbor would appear to allow the transmission of information to assist in the placement of a wager from one state where the wager is legal to another state where the wager is legal without incurring criminal liability under the Wire Act. If the safe harbor is interpreted to apply only to sports betting however, the transmission of other gambling information between states where such gambling is legal may be arguably illegal under the Act. This narrow interpretation of the safe harbor is inconsistent with a broad interpretation of § 1084(a) that would cover state lotteries. It makes more sense that Congress intended § 1084(a) and (b) to be read consistently to only prohibit (and only provide safe harbor for) the use of wire communication facilities to transmit both bets or wagers and betting or wagering information only in connection with sporting events or contests.

**State and Multi-State Lotteries Have Legally Existed for Decades**

With a single exception, state sponsored lotteries came into being after enactment of the Wire Act. The first modern government-run lottery was established by Puerto Rico in 1934. In the continental United States, the first government-run lottery was created by New Hampshire in 1964, three years after passage of the Wire Act. Currently, all but six states offer some version of a government-sponsored lottery. Additionally, many states participate in multistate lotteries, which require the interstate transmission of betting information and prize monies in order to allow the linked operation of the lottery. Multistate lotteries have been in existence since 1985.
The 2011 and 2018 Opinions in Brief

In 2011, New York and Illinois sought clarification as to whether the Wire Act applied to the use of the internet and out-of-state transaction processors to sell lottery tickets to in-state adults. In response, DOJ concluded in its 2011 Opinion that the Wire Act applied only to interstate transmission of information regarding sporting events or contests, in other words, sports gambling. In 2018, DOJ sua sponte revisited the 2011 Opinion. After engaging in a lengthy statutory construction analysis, the DOJ reversed itself and reinterpreted the Wire Act to apply to much more than simply sports betting. The 2018 Opinion concluded that the Wire Act applied to interstate transmissions involving all forms of gambling. Analysis of the 2018 Opinion's statutory interpretation of the Wire Act is beyond the scope of this article, but it may be summed up by economist Ronald Coase's general observation that, “if you torture the data long enough, it will yield.” The 2018 Opinion thoroughly dissects the rules of statutory interpretation, but hardly acknowledges the extant legal gambling regime, most of which was enacted after adoption of the Wire Act. This divorce of legal analysis from real world application creates immense legal uncertainty for most states because they are members of multi-state lotteries, have legalized gambling that includes the interstate transfer of data and prize monies through the internet and via wire transactions, and have been engaged in this conduct for decades without any hint that their actions could violate federal law.

In response to the 2018 Opinion, on February 15, 2019, New Hampshire filed suit against the U.S. Attorney General, asking the court to hold that the Wire Act does not apply to state-conducted lotteries and to permanently enjoin the DOJ from acting in accordance with the 2018 Opinion.

The Extended Reach of the Wire Act Under the 2018 Opinion

The 2018 Opinion, through its reinterpretation of the Wire Act, may declare illegal activities whose legality was never previously in question. One must consider that the opinion will not apply only to multi-state lotteries. Another area now called into question is multistate progressive slot machines. South Dakota, Maryland, Nevada, New Jersey, and other states participate in slot machines linked across state lines, which may now be covered by the Wire Act.

The reinterpretation of the statute, which prohibits the use of a wire communication facility to transmit information designed to assist in the placement of bets on sporting events or contests, may also now apply to many sports shows and web page profiles. For example, on March 11, 2019, ESPN began airing a show called, “The Daily Wager.” According to ESPN, the show will focus on content that sports bettors care about, namely point spreads and money lines. Fox Sports has a similar show called “Lock It In,” which provides information and picks regarding sports bet-
ting. These shows and web content are transmitted nationwide, and are not limited only to states where sports gambling is legal. Significantly, these shows were developed after issuance of the 2018 Opinion and no one has yet questioned their legality.

This makes interpretation and application of the DOJ’s 2018 Opinion even more confusing and unpredictable because attorneys will have difficulty advising clients on the fundamental question of what is legal and what is not.

**Does the 2018 Opinion Invade State Sovereignty Impermissibly?**

An additional challenge for the reinterpretation of the Wire Act may be that the DOJ’s reinterpretation runs afoul of the anti-commandeering doctrine. That doctrine holds that, under the Tenth Amendment, federal laws are unconstitutional when the federal government compels the states to enforce federal statutes. The Supreme Court’s recent decision in *Murphy v. Nat’l Collegiate Athletic Ass’n*, __U.S. __, 138 S. Ct. 1461 (2018) expanded the doctrine. In *Murphy*, the Professional and Amateur Sports Protection Act (PASPA) prohibited states that banned sports gambling when the law was enacted from ever legalizing sports gambling. The statute was held to violate the anti-commandeering doctrine because although Congress has the ability to expressly prohibit gambling, the Court held it could not do so by prohibiting state legislatures from taking a certain action in the future. In striking the anti-authorization provision of PASPA, the Supreme Court recognized that states were free to establish their own sports gambling regimes, and held that PASPA was invalid because it directed the activities of state legislatures instead of private individuals.

Applying the teaching of *Murphy*, it appears that if an outcome of DOJ’s reinterpretation prohibits state authorized lotteries, then that interpretation may violate the anti-commandeering doctrine. Although the Wire Act uses the term “whoever” and not “person,” the Act was directed at organized crime and recognized the authority of States to legalize betting and wagering. States are not engaged in the business of betting or wagering and otherwise cannot be held criminally liable. For example, it is hard to imagine a State Lottery Director or Lottery Commission being arrested for a Wire Act violation for performing the duties assigned by valid state statutes. Applying the law as DOJ suggests in the 2018 Opinion would likely violate the 10th Amendment through the anti-commandeering doctrine. This conclusion is reinforced when one considers that Congress has not acted regarding state lotteries for more than 50 years, while state legislatures have repeatedly authorized state and multi-state lotteries with minimal federal oversight and interference.

**A Pragmatic Solution from the Wire Act’s Origin**

Perhaps the simplest approach that would allow the reinterpretation by the DOJ to stand without disrupting the well-settled legal regime of state lotteries, state gambling, and state sovereignty over gambling offerings is to center the reinterpretation in the original purpose of the Wire Act. Specifically, the Wire Act only applies to transmissions regarding illegal wagers. This application would limit the reinterpretation in a manner that is already recognized by the U.S. Supreme Court, most recently in the *Murphy* case. Within that case, the Court acknowledged the Wire Act: “18 U. S. C. §1084, which outlaws the interstate transmission of information that assists in the placing of a bet on a sporting event, appl[ies] only if the underlying gambling is illegal under state law.”

This recognition also hearkens back to Attorney General Kennedy’s testimony that the Wire Act was only intended to apply to activities that were already illegal under state law. Applying DOJ’s reinterpretation in this manner would allow the federal government to retain all the tools within its discretion to combat illegal gambling and organized crime, and to partner with the states in doing so, while also fully recognizing state sovereignty within the area of gambling regulation. This revised application could be issued within the deferred enforcement period that now extends to June 14, 2019.

Recognizing that the 2018 Opinion may have created more problems than it solved with its issuance, it is likely that this issue will remain one that state attorneys general will have to deal with. Letters and lawsuits have been delivered and filed. Most recently, the DOJ issued an additional memorandum on April 8, 2019 indicating that the 2018 opinion “did not address whether the Wire Act applies to State Lotteries
and their vendors.” The memo directs DOJ attorneys not to apply §1084(a) to state lotteries/state lottery vendors at this time, “if they are operating as authorized by State law.” If DOJ determines that the Wire Act does apply in these contexts, the enforcement forbearance period, currently set to expire on June 14, will be extended an additional 90 days after that determination to allow states to conform their operations to whatever conclusions the DOJ reaches. At a minimum, it appears that DOJ recognizes that the 2018 Opinion’s breadth may require some cabining, but the April 8 memorandum may prove only a brief respite for uncertain state lotteries. Hopefully a workable and understandable outcome is not that far off.

Endnotes

1 The opinion was formally released on January 21, 2019, but was dated November 2, 2018. This article will refer to the opinion as of its date on the face of the Opinion: 2018.


8 2011 Opinion at 1.

9 This conclusion is reinforced by In re MasterCard Intern., Inc., 313 F.3d 257, 263 (5th Cir. 2002) (“Because the Wire Act does not prohibit non-sports internet gambling, any debts incurred in connection with such gambling are not illegal.”).

10 Notably absent from the 2018 Opinion is any deference to the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA), which generally prohibits the acceptance of payments in connection with unlawful gambling over the Internet. UIGEA is consistent with the Wire Act’s underlying premise that the underlying gambling activity is illegal and therefore prohibits payments related to illegal internet gambling activity. The 2018 Opinion expressly states “UIGEA therefore in no way alters, limits, or extends the existing prohibitions under the Wire Act.” 2018 Opinion at 18.


12 The reinterpretation also reveals a troubling inconsistency in application of statutes. Or, to put it more bluntly, why is the DOJ adopting a laissez-faire approach to marijuana enforcement by deferring to novel state legalization efforts, but challenging well-settled existing state-authorized lottery regimes?


14 A “Lock” in sports betting is a bet that the bettor is extremely sure of—in other words, Team X is a “lock” to win. https://www.foxsports.com/presspass/shows-properties/show/lock-it-in (last accessed April 1, 2019).

15 138 S.Ct. at 1476-77.

16 If applied this way, the 2018 Opinion may violate the rule of statutory construction that counsels a constitutional interpretation (one that respects state sovereignty through limited application) over one that is unconstitutional (anti-commandeering question with regard to expansive application invading state legislative authority).


18 138 S. Ct. at 1483.

19 Re Notice Regarding Applicability of the Wire Act, 18 U.S.C. § 1084 to State Lotteries and their Vendors, Memorandum from the Deputy Attorney General of the United States to United States Attorneys, Assistant Attorneys General and the Director of the FBI, (April 8, 2019). This statement is perplexing given the express text on pages 22-23. “Some States, for example, began selling lottery tickets via the Internet after the issuance of our 2011 Opinion. But in light of our conclusion about the plain language of the statute, we do not believe that such reliance interests are sufficient to justify continued adherence to the 2011 Opinion.”
Recent Powers and Duties Decisions

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This is another in our series reporting on recent decisions from across the country affecting the powers and duties of state and territory attorneys general.

CALIFORNIA

Attorney General, Not Local Prosecutors, Represents State Citizens

The Orange County District Attorney sued several pharmaceutical companies alleging violations of California’s Unfair Competition law (UCL), Cal. Bus. & Prof. Code § 17200 et seq. The district attorney sought injunctive relief, penalties and restitution. Citing California caselaw, the defendants sought to dismiss portions of the complaint. They argued that “a district attorney’s enforcement authority under the UCL was limited to the geographic boundaries of the county for which the district attorney was elected.” In this case, the district attorney was seeking recovery for overcharges paid by California users of the drug at issue, insurers and government payors. The court denied the defendants’ motion. The district court held that earlier California caselaw had addressed only whether the district attorney could bind the attorney general in a settlement relating to misconduct covering several counties. In this case, the court held that if there was a settlement, the attorney general would be permitted to appear and be heard. The defendants appealed.

The court of appeals held that the district attorney could not enforce the statutes outside the county in which he or she operated. The court first described the respective roles of the attorney general and the district attorneys. The court noted that the California Constitution makes the attorney general “the chief legal officer of the state.” The state constitution also provides that the attorney general has “direct supervision over every district attorney . . . in all matters pertaining to the duties of their respective offices.” The district attorney, on the other hand, represents the state when prosecuting criminal violations of state law, and acts as a state officer in those cases, but is designated by the state constitution as a county officer. The district attorney is elected by the county voters, has a salary set by the county board of supervisors, and the county has the authority to supervise the district attorney’s conduct and use of public funds. The court held, consistent with prior caselaw, that the “district attorney has no authority to prosecute civil actions absent specific legislative authorization.” The court held,

[I]n civil matters, as in criminal matters, a district attorney lacks authority to function outside his or her county jurisdiction absent the consent of the district attorney of the other county. Even when a district attorney acts in a matter within the jurisdiction of the superior court, he or she is subject to oversight and direct supervision by the Attorney General, the state’s chief law enforcement officer obligated to ensure the uniform and adequate enforcement of state law.

The attorney general and the California District Attorneys Association filed amicus briefs arguing that prior caselaw specifically prohibits the right of the district attorney to surrender the powers of the attorney general and his fellow district attorneys to commence, when appropriate, actions in other counties under the UCL. The appellate court agreed, holding that, although the UCL expressly conferred standing on district attorneys to bring civil law enforcement action under UCL in the people’s name, “that grant of standing, as in criminal actions, cannot reasonably or constitutionally be interpreted as conferring statewide authority or jurisdiction to recover such monetary remedies beyond the county the district attorney serves, or restricting the attorney general’s constitutional power to obtain relief on behalf of the entire state.” The court of appeals noted that such a grant of authority “would permit the Legislature to usurp the attorney general’s constitutional authority as the state’s chief law officer, and allow the district attorney of one county to impermissibly compromise and bind the attorney general and the district attorneys of other counties.”
The court of appeals also agreed with the attorney general that the structure of the UCL’s penalty provisions argues against statewide jurisdiction for the district attorneys. The statute provides that the attorney general must deposit half of any collected civil penalties in the state’s general fund and half in the county in which the judgment is entered. District attorneys, on the other hand, must deposit collected civil penalties in the county’s general fund. The court stated,

The Legislature has manifested its understanding that a district attorney’s redress is restricted to local violations, benefitting the electorate to which the district attorney is accountable. There is no indication the Legislature sought to write the UCL so broadly as to permit county district attorneys to collect penalties from violations occurring outside their county boundaries for their own county treasurers.

In response to the district attorney’s argument that this result would allow defendants to escape full liability for illegal conduct, the court also noted that the district attorney could enter into agreements with the attorney general or with other district attorneys to engage in joint prosecution if the district attorney believes the public would benefit from action outside his or her jurisdiction. Finally, the court held that the district attorney’s interpretation would “incen-
tivize public prosecutors, acting in their respective county’s financial self-interest, to withhold pertinent information from their sister agencies” then race to the courthouse “in hopes of obtaining all of the civil penalties that would otherwise be deposited in those other county treasuries.” *Abbott Laboratories v. Superior Court of Orange County*, No. 3072577 (Cal. Ct. App. 4th Dist. May 31, 2018).

**ILLINOIS**

Local Prosecutor Represents State For Purposes of Diversity Jurisdiction

In a decision directly contradicting *Abbott Laboratories* (above), a federal district court remanded an action brought against Facebook by an Illinois state’s attorney, concluding that she represented the state for purposes of diversity jurisdiction.

Facebook sought to remove a consumer protection case filed by the state’s attorney for Cook County on diversity grounds, arguing that the state of Illinois was not the real party in interest in the case because, among other reasons, the district attorney, rather than the attorney general, had brought the action. The district court held that “the overall test is whether the government official or entity’s lawsuit would primarily vindicate state interests and primarily obtain relief for the state, rather than serving primarily parochial interests and obtaining parochial relief.” Facebook then argued that this reasoning only applies when the case is brought by the state’s chief legal officer, not by a subordinate government official.

The court noted that Facebook is confusing two separate issues: 1) is the state the real party in interest, a question of federal law; and 2) who has the authority to represent the state in a lawsuit, a question of state law. The court held that if the subordinate state official is authorized to seek the relief for the state, then the entity bringing the case has no effect on whether the state is the real party in interest. Facebook “contends the Illinois Consumer Fraud Act should be construed as limiting the scope of actions by State’s Attorneys to the jurisdictions they represent, such that a lawsuit by a State’s Attorney may only target conduct that occurred within the county, and may only seek relief for the county or the people within it.” The court held that the plain language of the state’s Consumer Fraud Act does not distinguish between the attorney general and the state’s attorney, providing that either may...
seek injunctive relief, penalties, and restitution in the name of the people of the state. The court described this as consistent with Illinois’ statutory scheme, because state’s attorneys are required by the statute to keep the attorney general apprised of any suit they file under the Consumer Fraud Act. It is the responsibility of the attorney general to oversee the state’s attorneys. “If a State’s Attorney brings a statewide action and the attorney general disagrees with its scope, its timing, the relief it seeks, or the way it’s being pursued, she can simply intervene and take over the case.”

The district court explicitly disagreed with the California appellate court decision in Abbott Labs (discussed above). Describing the Abbott decision as wrong, the federal district court viewed “a system of multiple prosecutors empowered to enforce civil fraud laws” as efficient and able to avoid duplication, as well as better protecting the rights of consumers. If a state’s attorney brings a case and is unsuccessful, other state’s attorneys and the attorney general will likely be barred by claim preclusion from bringing similar claims. On the other hand, the federal district court stated,

[I]magine that a county prosecutor brings an action against the wrongdoer and prevails. If the suit could cover only conduct within the county, or if relief were limited to the jurisdictional boundaries of the county, then only the residents of that county would be protected, and only the fraud that affected the county would be punished, despite the fraud’s effects being felt statewide. For people from the other 101 counties in Illinois, either their rights would not be vindicated or each county prosecutor would need to bring a copycat action. Such a system does not seem sensible from anyone’s standpoint, including the defendant’s.

The court next addressed Facebook’s argument that Illinois is not the real party in interest because civil penalties recovered by the state’s attorney will go to the county treasury rather than to the state. The court described the purpose of civil penalties as “not to compensate a victim but to punish the wrongdoer and deter future wrongdoing by others.” From the standpoint of punishment and deterrence, it does not matter where the penalties end up. The statute is designed to incentivize state’s attorneys to bring such actions.

The court concluded that the state was the real party in interest in the state’s attorney’s suit because it seeks civil penalties that private parties cannot obtain under the statute, and statewide injunctive relief to prevent future violations of the privacy rights of a large group of Illinois residents, a matter of statewide concern. The court held, “Overall, this is the embodiment of a state enforcement action brought in the public interest. Therefore, Illinois is the real party in interest for diversity purposes, which means there is no diversity jurisdiction and the action must be remanded. . . .” In re: Facebook, Inc., Consumer Privacy User Profile Litigation, MDL No. 2843 (N.D.Cal. Jan. 1, 2019).

GUAM

Attorney General Disqualification Standard

In one portion of a long-running dispute between the Attorney General of Guam and the Guam Department of Revenue & Taxation (DRT) over the validity of gaming device regulations, the attorney general appealed a court order requiring her office to pay for DRT’s independent counsel in the litigation. DRT and the Governor of Guam cross-appealed the court’s denial of their motion to disqualify the attorney general’s office from the case.

In 2008, DRT issued licenses to gaming device owners, departing from a prior position developed after consultation with the attorney general. Two court cases were filed, one by the attorney general seeking that the court order DRT to revoke the licenses. A duty attorney general appeared on the record as representing both the attorney general and DRT. Another case was brought by a private party, seeking a writ of mandamus directing issuance of the licenses. DRT was represented by the attorney general after executing a waiver of any conflicts. Appeals from both cases were heard in a consolidated proceeding, during which the attorney general and DRT had a unified position. The parties dismissed those proceedings and the attorney general filed a declaratory judgment action. In that action, DRT sought to disqualify the attorney general and to require the attorney general to appoint and pay for special counsel for DRT. Another case was brought by a private party, seeking a writ of mandamus directing issuance of the licenses. DRT was represented by the attorney general after executing a waiver of any conflicts. Appeals from both cases were heard in a consolidated proceeding, during which the attorney general and DRT had a unified position. The parties dismissed those proceedings and the attorney general filed a declaratory judgment action. In that action, DRT sought to disqualify the attorney general and to require the attorney general to appoint and pay for special counsel for DRT. The trial court did not disqualify the attorney general, but did require the attorney general to pay for DRT’s independent counsel because the attorney general has a duty to represent the executive branch. The parties appealed to the Guam Supreme Court.
DRT argued that the attorney general’s office should be disqualified because an assistant attorney general (now retired) represented DRT in a related action that was dismissed, and that representation creates an “appearance of impropriety” that requires removal of the entire attorney general’s office. The Supreme Court held that the appearance of impropriety standard no longer applies in Guam, since the adoption of new model rules of professional conduct in 2003. The current rules require disqualification only when the attorney’s representation violates or significantly risks violating the rules of professional conduct. This new standard precludes disqualification for potential conflict, rather than for “inevitable and material” conflicts.

Applying that standard, the Supreme Court found that the attorney general is not conflicted in this case. The court first rejected the attorney general’s argument that the Guam Rules of Professional Conduct should be applied flexibly to her office. The court stated, “We recognize that the Attorney General is in a unique position, but also read certain rules as deliberately providing flexibility for government attorneys.” The court then held that no conflict exists in this case as a matter of law, because the attorney general, using her broad common law powers to challenge laws which she believes are unconstitutional, is herself the party in this case. She is not representing a client or person, but suing on her own behalf. Even assuming that the assistant attorney general who represented DRT in the earlier proceeding obtained confidential information, he was permitted to reveal confidential information “to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client.” The court held that is the situation here, so there is no violation, and the attorney general should not be disqualified.

Turning to the question of whether the attorney general must pay for DRT’s independent counsel, the court rejected the attorney general’s argument that such a payment would violate the separation of powers doctrine by invading the executive branch’s internal decision-making. Instead, the court noted that Guam statutes provide that DRT must pay for its attorney of choice when it decides not to, or for whatever reason cannot, use the services of the Principal Guam Territorial Income Tax Attorney or the Attorney General. The attorney general is thus not required to pay for DRT’s independent counsel. *Barrett-Anderson v. Camacho*, 2018 Guam 20 (Guam 2018).

**KENTUCKY**  
Attorney General Public Statements Are Not Attorney-Client Communications

The Kentucky legislature enacted a bill making changes to the state’s pension system for public employees. Several public employee unions and the attorney general of Kentucky challenged the legislation on the grounds that the legislature did not properly enact it in accordance with section 46 of the state constitution. Section 46 requires that the bill be given a reading on three different days in each legislative chamber (the “three-readings” requirement), and requires that bills that appropriate money or create a debt obtain 51 votes in the House of Representatives. The lower court found that the legislature violated the constitution in enacting the bill and struck it down without analyzing other claims. The legislature appealed. The Supreme Court affirmed the lower court ruling on the three-readings rule and declared the legislation void without addressing the substantive claims of the parties.

The legislature also sought to disqualify the attorney general from the case. The legislature argued that the attorney general provided legal advice to the General Assembly specifically related to the legislation and therefore has a conflict of interest precluding him from suing the legislature, to whom he gave professional advice.

The attorney general sent two letters to the legislature during consideration of the legislation, in which he stated that the legislation would violate the “inviolable contract” between the legislature and state employees regarding their pensions. These letters were issued publicly at the same time they were sent to the legislature. The court held “These communications were plainly designated for public consumption and were not communications between a lawyer and a client. The communications in question expressing the attorney general’s “advice” on the constitutionality of the proposed pension legislation did not create an attorney-client relationship between the legislature and the attorney general. We accordingly conclude that the trial court did not err by failing to disqualify the attorney general from participating in the proceedings.” *Bevin v. Beshear*, No. 2018 SC 000419 (Ky. Dec. 13, 2018).
NEW YORK

Attorney General Disqualification

The director of a public interest group challenged as unconstitutional legislation increasing salaries for state judges. The suit also challenged the creation of the Commission on Legislative, Judicial and Executive Compensation. The trial court dismissed all of the plaintiff’s claims and the plaintiff appealed. In the course of its ruling upholding the trial court’s decision, the appellate court addressed the plaintiff’s argument that the attorney general, who is a defendant in the case, should be disqualified from representing the attorney general’s co-defendants because of a conflict of interest.

The appellate court held, “The Attorney General has a statutory duty to represent defendants in this action, who are united in interest. . . .” On the other hand, the plaintiff argued that state statutes required the attorney general to represent the plaintiff or intervene on her behalf. The court held, “Executive Law § 63 (1) empowers the Attorney General to prosecute and defend all actions and proceedings in which the state is interested—it does not authorize the Attorney General to represent private citizens. Similarly, State Finance Law article 7-A contains no provision that requires the Attorney General to prosecute a citizen/taxpayer action commenced by a private citizen or that allows a citizen to compel the Attorney General to provide representation in such actions.” Center for Judicial Accountability, Inc. v. Cuomo, 2018 NY Slip Op 08996 (N.Y. App. Div. Dec. 27, 2018).

ARKANSAS

Attorney General Representation of State Employees

Plaintiffs were unhappy with the actions of an electric utility contractor who trimmed trees that they believed were on their property. They filed complaints against the contractor with the Arkansas State Board of Licensure for Professional Engineers and Professional Surveyors (ASBL). ASBL dismissed their complaints. Plaintiffs then filed suit against several state agencies, as well as employees of those agencies, members of ASBL, and the state attorney who advised the agencies, each in their individual capacity. The plaintiffs alleged a conspiracy to conceal fraud by the contractor. The district court dismissed their claims and plaintiffs appealed.

In the course of affirming the district court’s opinion, the court of appeals addressed the plaintiffs’ argument that the attorney general cannot represent the individual defendants because that representation would be the prohibited conduct of the private practice of law. The plaintiffs cited Ark. Code Ann. §25-16-701, which provides, “the Attorney General shall not engage in the private practice of law, which shall include, but not be limited to, acting as office counsel, participating in litigation, and accepting retainers.” The appellate court pointed out that the following section of the Arkansas Code specifically authorizes the attorney general to represent individual defendants sued for actions taken in the scope of their employment. The statute states, “the Attorney General shall be the attorney for all state officials, departments, institutions, and agencies. Whenever any officer or department, institution, or agency of the state needs the services of an attorney, the matter shall be certified to the Attorney General for attention.” Watkins v. Ark. Dept. of Agriculture, 2018 Ark. App. 460 (Ark. App. Oct. 3, 2019).

Endnotes

2 Cal. Const. art. XI, §1, subd. (b).
Handling Consumer Protection Matters through Joint Approaches by Prosecutors and Investigators and Effective Methodologies

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Since 2011, the National Attorneys General Training and Research Institute (NAGTRI) has hosted an annual International Fellows program, where a group of remarkable international and domestic government attorneys have the opportunity to work collaboratively on critically important global legal issues. They jointly work on these issues while also meeting and interacting with experts in the field.

At the conclusion of the program, the Fellows produce, as a group project, papers on the subject of that year’s program. The focus of the 2018 program, held in June 2018, was “Prosecutorial Strategies to Protect Consumers Against Deceptive and Fraudulent Products.” Two group papers are being published in this issue of the NAGTRI Journal.

Law enforcement exists to protect the public and serve the public interest in lawful, fair, and non-deceptive marketplaces. Globalization of trade in goods and services includes the proliferation of fraudulent and illicit products. Consumer frauds and scams cannot easily be contained within physical borders. Combatting consumer fraud on a global scale requires targeted and cogent strategies that define the problem and devise an appropriate legal response as well as the advanced investigative techniques necessary to implement the chosen strategies.

Enforcement is only beneficial if it achieves meaningful results. Laws that are not enforced or have no teeth will do little to prevent bad acts. Many jurisdictions have the ability to protect consumers and represent the interests of their individual constituents under a traditional police power theory. In some instances, the government is the best or only authority for bringing actions against consumer fraud.

Prosecutors and investigators must work together—and with their international counterparts—to protect their citizens from the harms caused by fraudulent products and services. Prosecutors and investigators each have unique skills and work together using their different techniques and methods to investigate and prosecute consumer protection cases, despite gaps in the law and insufficient resources. Both groups have joint and distinct roles in addressing these cases and achieving the desired outcomes. This paper will address ways for prosecutors and investigators to work together to handle consumer protection matters jointly and develop and adopt effective methodologies in an ever-changing and more sophisticated environment.
Genesis of Consumer Protection Cases

Agencies charged with protecting consumers through law enforcement action, whether criminal or civil, begin all of their cases with information regarding potential violation of laws. These agencies learn about potential cases in a variety of ways:

1. Consumer complaints or inquiries
2. Media reports
3. Outside law enforcement agencies, lawmakers, and other regulators
4. Advocacy agencies
5. Sister jurisdictions, both domestic and international
6. Private sector/industry participants

Agencies should prioritize methods for gaining this initial knowledge of consumer protection issues and violations. Most agencies, criminal or civil, have dedicated portals for consumer victims to contact them directly to report violations. Agencies can maximize their effectiveness by developing and maintain strong relationships with other law enforcement agencies, regulators, and the private sector.

In some agencies, it is common for the investigator and prosecutor to learn about the case at the same time. In these situations, it is not unusual for the prosecutor to work with the investigator to develop the initial case strategy and investigative plan. This is a typical model for state attorneys general consumer protection units. In consumer protection offices, the investigators and prosecutors may have the same chain of command and, if not, they all ultimately report to their Attorney General. This structure allows the prosecutor to be more actively involved in individual investigations.

Criminal prosecutors often work with investigators who are members of different agencies with different chains-of-command. In these situations, the prosecutors often learn of a consumer protection case when the investigative agency delivers a completed investigation report. These reports will contain witness interviews and other evidence, such as documents, photographs, and physical items. In this model, the prosecutor usually is not directly involved in the investigation. Prosecutors commonly have the authority to request that the investigator gather additional evidence necessary for the prosecution. Prosecutors also typically are available to consult with investigators to provide advice about the investigation and what may be needed to prove the case.
The Role of Consumers in Consumer Protection Cases

The consumer victim is an important factor in many jurisdictions. As noted above, consumers often bring issues to the attention of law enforcement in the first instance. In most jurisdictions, consumer victims are very active in the investigation and prosecution of the case. At a minimum, they are witnesses who are interviewed or testify about their experiences. In some jurisdictions, the consumer victim is actually the client of the law enforcement agency and the matter is prosecuted on behalf of the consumer victim.

Investigation Techniques

Although the nature of the investigative tools varies given the different roles of consumer protection enforcers in different countries, i.e. criminal versus civil, the investigative tools to be deployed in any investigation need to be considered at the outset by the prosecution team and embedded in their strategy. In the United Kingdom, prosecutors often deploy prosecution strategy documents which set out the investigative methods to be used and the consequences for disclosure (discovery).

The ever-increasing challenge for investigation into consumer protection, as in all investigations, is the explosion of material generated by digital devices. Enforcers must use a broad range of techniques from the traditional to those assisted by new technologies. A typical smart telephone can produce the equivalent of 26,000 pages of paper, so artificial intelligence and proactive coding are becoming ever more critical to successful investigations. The challenge in this area will become the selection of meaningful search terms and the careful consideration of what devices are interrogated. Equally important will be the careful drafting of subpoenas. The private sector can have an important role to play in this regard. For example, organizations such as Western Union offer assistance to investigators in ensuring subpoenas are drafted appropriately. The common theme is that, at every point in the investigation, collaboration with all involved, whether investigators or private business, is key.

Proactive investigative tools such as interception of communications evidence, test purchase operations, and use of recording devices are important in consumer protection investigations. There are some interesting differences between investigations involving multiple states in the U.S. and investigations involving U.S. states and jurisdictions outside the U.S. Because this may present challenges where investigations cross state and international boundaries, it further emphasizes the need for collaboration with all those involved at all stages of the investigation. The strategy in selecting these methods should be a legal decision for a prosecutor but should also be informed by the experience of investigators. Determination of appropriate targets for investigation may be informed by collaboration with private business. For example, Microsoft has established a Digital Crimes Unit that can offer intelligence about email addresses, domain names, IP addresses, and other information.

Evidentiary and Ethical Considerations

Although there was a broad commonality of investigative techniques used by prosecutors within the group, the evidence produced by those techniques and how it is treated by their respective courts varied. Given the ever-increasing global nature of fraud, the differences in the rules of evidence in different jurisdictions will become more important. Prosecutors involved in investigations that cross boundaries need to appreciate how evidence is collected and how it can be used. In particular, enforcers need both formal and informal networks. Programs such as the NAGTRI International Fellows Program have a clear role to play here. Equally important is the assistance provided by organizations such as Interpol, the FBI, and liaison prosecutors. Further cooperation on a bilateral basis or through the Mutual Legal Assistance process is vital in ensuring a consistent and effective approach to consumer cases.
The ethical considerations involved in differing evidence-gathering techniques need to be understood by all those involved in these cases. Independence of the prosecution authority should be paramount. Most ethical difficulties can be avoided with clear delineation of tasks and roles within any given case, whether the case is domestic or global in reach. This is achieved on a macro level by constitutional principles, codes of prosecution, and statements of mission. On a micro level, individual staff must consider conflicts and must be trained on ethical issues. Prosecutors have a key role in assisting investigators to ensure that the investigative methods used are not susceptible to legal challenge resulting in rulings of inadmissibility. In addition to this duty, prosecutors must show leadership with investigators and private business.

Understanding and being passionate about why prosecutors do what they do will inspire development of clear strategies that lead to strong cases being put before the courts. This will, in turn, ensure better results for the victims of consumer fraud.

**Case Selection and Prosecutorial Considerations**

After a consumer protection investigation has been concluded and the matter is ready for decision or action by the prosecutor, there are several key considerations before the case may proceed to a formal indictment or litigation. Prosecutors typically make the decision as to next steps, but certain high-profile or complex matters may require higher level approval. Generally, the stronger and more thorough an investigation, the greater the likelihood the prosecutor will be able to proceed to litigation.

An important consideration is the enforcement goal. Most authorities have constraints on their jurisdiction and resources, as well as enforcement policies they must follow in deciding what, if any, action to take. Prosecutors often must analyze the goals of prosecution in a particular case, including: (1) deterrence; (2) restitution; (3) punishment; (4) disgorgement; (5) enjoining or preventing future bad conduct; and (6) vindicating the authority of the government.

Prosecutors have various means to accomplish their goals. Some have options other than litigation, such as formal or informal settlements or plea agreements. Where non-litigated results are not possible, prosecutors will proceed to formal enforcement litigation. The nature of the charges and proposed resolution should be closely tied to the prosecutorial goal. Where consumer restitution is a goal, it is important to consider tracing and seizing assets during an investigation. Where deterrence is the primary goal, many prosecutors seek injunctions. The stronger the injunctive relief, the less likely the investigators and prosecutors (and other law enforcement agencies) are to see the defendant again.

**Investigative Strategy for Global Consumer Protection Cases**

The strategy for investigating an international or global consumer protection case should be directed by an expert prosecutor who has some knowledge about the laws and culture in the countries where the crimes or violations occur. The prosecutor may have other prosecutors and investigators reporting to him or her, but the lead prosecutor should establish the strategy and ensure the others are working toward that goal of determining the facts and charging the guilty parties. Importantly, if the prosecutor thinks the bad actors may flee the jurisdiction or abscond with ill-gotten gains, the prosecutor should ask the court for a precautionary order. In international or global cases, this necessarily could involve close collaboration with authorities of a different country or countries.

In global or international consumer protection, cases are prosecuted by authorities in the country where the unlawful conduct took place. Where the unlawful conduct is occurring in more than one country simultaneously, agencies in the two countries should communicate. If one country has already opened a file, it should have priority to complete its process (assuming the other country does not need to act quickly to
address immediate harm). The offense may also be enforced civilly under applicable consumer fraud statutes in one or multiple jurisdictions.

Developing a joint investigation strategy is an effective way to handle case successfully. When developing this strategy, the following should be considered:

1. Assessing the merits of the case or potential case;
2. Identifying the roles of the participants;
3. Exploring all available statutes and provisions;
4. Studying the available resources and data which may help for prosecution, including inter-agency cooperation;
5. Assessing the consequence of investigative actions which may be taken;
6. Whether overseas investigation should be required and, if yes, when and how to organize.

Recently, many crimes against consumers (e.g., identity theft fraud, intellectual property crimes, and illegal trafficking of goods) have crossed borders and have had a greater effect on the environment and public. Investigation of those cases has required more comprehensive global commitment from prosecutors. Developing informal channels between prosecutors and investigators is one of the significant steps for tackling cross-border crimes against consumers. In particular, processes that take a long time and involve diplomatic formalities may undermine the investigative result. Prosecutors and investigators must be aware of these processes and formalities and include them in their strategy.

Seeking mutual legal assistance in criminal matters is a crucial formal process by countries to assist each other in gathering evidence for solving a criminal case. This type of request is most often governed by a Mutual Legal Assistance Treaty (MLAT), which may be bilateral or multilateral. MLATs differ, but generally they can be used to obtain witness testimony (either voluntarily or by compulsion); execute search warrants; obtain bank records; obtain a user’s online records, subscriber details, email content, metadata, and social media; and freeze or forfeit the proceeds of crime.

Prosecutors should develop contact points for requests under an MLAT, should provide a template of an MLAT request for use by their office, and should provide a comprehensive list of the legal requirements under the MLAT. For example, a request usually requires details of the crime under investigation, the name and address of the person under investigation, and the basis for believing the information will be located in the jurisdiction of the receiving state.

Prosecutors also should determine whether the information may be available through other open source and local professional and international organizations and whether they need to use international professional networks, such as Interpol, Europol and Egmont. They must decide if they need to reach out less formally with other law enforcement officers, such as police-to-police or prosecutor-to-prosecutor contacts.

**Challenges for Prosecutors**

In addressing international and global consumer protection, the primary challenge is jurisdiction. Not all countries are willing to allow another country’s law enforcement agencies to obtain evidence. Some countries do not allow extradition. Knowing these limitations in advance will help guide the strategy and avoid setbacks in the investigation. Political awareness regarding the other countries involved is crucial.

Successful prosecution of consumer protection cases on a global basis requires significant resources. Critically, limited resources means limited investigative and enforcement results. If governments are committed to stopping global crime and fraud, they should fully fund prosecutors and investigators. At the end of the day, these amounts will not be an expense but an investment that will protect consumers worldwide. Enforcing authorities may also be able to recoup the costs of the investigation and prosecution, which reinforces the importance of viewing the expenditures as an investment in future consumer protection.

Additional funding should be used to develop investigatory expertise in technology-based fraud, forensic accounting, and other skills. Consumer protection cases are more successful when investigators have experience in a variety of techniques. Lack of expertise can endanger an investigation and allow consumer frauds to continue. Prosecutors also will benefit from the assistance of an international law specialist to advise on how to collect evidence in foreign jurisdictions and ultimately extradite defendants and enforce foreign judgments. This expert should be familiar with applicable bilateral and multilateral treaties.
Identifying Methods Prosecutors Use to Reduce Infiltration of Counterfeit and Dangerous Products & Practices and Effective Methodologies

A coordinated international effort combining increased education, improved legislation, global enforcement, and structured collaboration among all stakeholders will help to reduce the demand and supply of counterfeit products.

Education

A top priority in combatting counterfeit products should be a multi-faceted, coordinated, global campaign to increase awareness. Too frequently, the public believes that counterfeiting is a relatively victimless crime—consumers understand they are purchasing illegal goods, but they believe that the only victim is a business that loses on legitimate sales revenue.

Targeted Youth Campaigns and Curriculum Integration

By engaging consumers at a young age, we can instill knowledge and core values on the importance of protecting innovation and creativity as well as the threats posed by counterfeit products to the health and safety of the end user. This should be combined with increased education about threats against the integrity of personal data posed in the online environment by fraudulent actors, and increased education as to the organized criminal element that is frequently behind these operations. While an educational campaign alone can increase awareness, building this into school curriculums would ensure that all children are knowledgeable about the risks associated with these counterfeit operations. This will also, in the long run, enhance the development of new products and ideas by young people fully informed about the benefits of protecting intellectual property rights.

These ideas can be adopted into a broader global campaign that is directed to the general population to help increase overall awareness.
Educating the Business Community

While rights holders frequently will cooperate with law enforcement to protect their interest and curtail illegal activity, all businesses in the distribution chain of these products would benefit from increased knowledge of the associated risks. Retailers who are knowingly selling counterfeit products likely understand the illegal nature of the conduct; however, they may not fully understand the global implications. Businesses that are unknowing participants in the criminal enterprise also contribute to the problem and would benefit from education on preventive measures and global efforts to identify and combat the flow of illegal products. Moreover, intermediary companies that facilitate distribution, such as providing online marketplaces or serving as money transfer services, should be held to the same standards and should also participate in these educational measures. These efforts are of particular importance and can have significant impact when directed to smaller or mid-sized businesses that may not have as much information and background on the problem as their larger counterparts would.

Governmental Education

Much like the general public, legislators, regulators, judiciary, and law enforcement would all benefit from increased awareness of the scope and risks associated with the counterfeit industry. By ensuring that those responsible for creating and enforcing our laws understand not only the global impact, but also the severe risks to health and safety to the end user, we can help to ensure that appropriate funding and other resources are allocated to addressing the problem.

Legislation

While each jurisdiction has its own legislation, there is need for further legislative tools and harmonization. The legislation must be standardized in order to tackle, in particular, products affecting consumers’ health and safety. This includes specifications and technical standards that apply to different types of products.

One of the challenges identified is that the legislation governing consumer protection is vastly different in each jurisdiction. In the United States of America (USA), the Federal Trade Commission (FTC) enforces laws and enacts rules and standards relating to consumer protection, e.g., consumer fraud and identity theft. However, the prosecution of consumer-related cases is concurrently conducted at the state level. These various entities have differing authority depending on their jurisdiction—some have both civil and criminal enforcement authority, while, in some jurisdictions, enforcers are limited to civil only. In some countries like Thailand, there are specific criminal offenses covering fraud, counterfeit goods, and products likely to cause detriment to the public. Public prosecutors can conduct civil litigation on behalf of consumers providing that complaints are made to the relevant authorities. In Jamaica, such conduct is only a criminal offense. Legislatures may want to consider looking at the approaches of each jurisdiction and working together to develop expanded authority to help increase the available tools for enforcers.

In the European Union, different EU directives have been enacted to create standards for different products and they are enforced uniformly in all jurisdictions in the member states. These product specifications are mandated to be used by actors who manufacture or market such products for the first time.

There are also a wide variety of investigating authorities in each jurisdiction. There are FINCEN and the FTC in the USA, the Consumer Protection Bureau in Thailand, the Consumer Affairs Commission in Jamaica, and the coordinating committees made up of industry and other stakeholders in the EU.
Taking that into consideration, we recommend a number of different technical as well as legislative solutions. Globally, there must be better inspection and review of incoming and marketed products. This could be done by creating uniform standards and practices for reviewing and monitoring products which arrive at borders and via different modes of transport (including shipping, airmail, and ground transportation) as well as products detected in physical marketplaces. Mandatory requirements should include application of robotic technology, advanced scanning, augmented reality, big data analyses, artificial intelligence, and blockchain technology.

In light of the complexity and cross border nature of the problem, we propose that the legislation and procedures be standardized, with legislative tools that can assist prosecutors in making successful criminal and civil prosecutions. These tools may include:

- KYC “Know Your Customer”: Legal requirement for collection of more detailed and comprehensive customer information
- Legal provisions allowing law enforcement officers to obtain evidence more easily
- Testimony via video link in exceptional circumstances
- Wiretapping, data interception, and undercover operations
- Enhanced penalties

**Enforcement**

Law enforcement and regulators responsible for conducting civil investigations and enforcement should collaborate on best practices to ensure that enforcement efforts are coordinated and calculated to lead to results that are responsive to the global nature of the problem. These efforts can be coordinated through existing working groups but with expanded membership and resources.

First, law enforcement should recognize that every seizure of illegal goods creates an opportunity to gain intelligence about the source, and can ultimately be used to help slow down the influx of those goods. Once a retailer is found selling illegal goods, that retailer can serve as a resource to law enforcement to help identify the distribution chain. That information can be shared with global law enforcement partners who can ultimately identify and prosecute those responsible for the manufacturing.

Second, law enforcement should consider all portions of the distribution chain as potential targets of enforcement. While companies operating online marketplaces and money transfer services can be partners in education, as mentioned above, they also may be liable in some jurisdictions for facilitating the sale and distribution of illegal goods. Through targeted enforcement actions, those companies can be obligated to cooperate with future investigations, implement better safeguards for monitoring illegal activity, repay consumers, and help fund future enforcement activities.

Third, coordinated enforcement can take advantage of the strongest tools of each participating jurisdiction. For example, some enforcers may have civil authority to quickly and easily identify and preserve available assets, while other jurisdictions with stronger criminal authority may simultaneously execute arrest warrants for responsible individuals. These combined efforts can help to ensure that forfeited assets will be available to indemnify losses incurred by right holders and consumers or to help fund future enforcement.

In addition to the above mentioned sources of funding, enhanced cooperation and law enforcement efforts can be funded by future growing surpluses generated by fees obtained in connection with the registration of intellectual property rights.

Finally, coordinated enforcement activity can be used as an opportunity for global education. By having various jurisdictions all publicize the enforcement activity, and tying that message to the educational campaigns described above, governments can maximize the impact of these efforts and the deterrent effect they can have.

**Collaboration**

An overriding theme of each of the above proposals, and perhaps the most crucial element to deter infiltration of counterfeit products, is better collaboration among enforcers on a global scale. This collaboration can make use of existing working groups, but should be better formalized and organized. This will ensure that the maximum number of members and resources are made available and that all stakeholders are included.
Nationally and internationally, a number of task forces and working groups have been created to combat counterfeit goods. In Jamaica for example, there is the Counter-Terrorism and Organized Crime Investigation Branch of the Jamaican police force (C-TOC) that shares information with relevant authorities in other jurisdictions to combat counterfeit goods and other illegal activities. In the USA, the Intellectual Property Rights Coordination Center (IPRCC), and in the EU, the Intellectual Property Crime Coordinated Coalition (IPC3), facilitate comparable sharing of intelligence. Across the world, payment processors share information through the International AntiCounterfeiting Coalition (IACC).

However, these groups at times may be country or industry specific, and, as such, efforts become duplicated and are inefficient. By creating a more formalized task force comprising local, state, national, and international enforcers who have civil and criminal authority, as well as media, and private sector participants, all parties can maximize the use of their resources and ensure consistency in enforcement. Moreover, this global network can ensure that the entire scope of any particular scheme is investigated—from the manufacturers, distributors, retailers, and even end users that may be complicit in the illegal conduct. A first task should be a detailed analysis of the strengths and weaknesses of each participating jurisdiction’s authority. Through this review, ideas for new legislation, prioritization of enforcement efforts, and opportunity for further education can arise.

Private sector engagement and resources are particularly important to this effort. Rights holders are often the best situated and funded of all the parties, and have a unique interest both in protecting their own rights and also benefitting the public as a whole. As such, there should be an expectation that those entities will commit significant resources to ensuring the effectiveness of this operation.

Of note, however, is that some jurisdictions may be resistant to participating in these efforts. In the event that any jurisdiction fails to take advantage of the opportunity for better coordination or resists the curtailing of illegal goods, the trade dispute resolution mechanism of the World Trade Organization (WTO) can be activated, or other diplomatic solutions may be sought.

Conclusion

Counterfeiting and the sale of illicit products is a global epidemic impacting the health, safety, privacy, and security of consumers. While prosecutors have tools available to combat this activity, unless the global nature of the problem is fully recognized, they will not be able to effectively or efficiently slow down the operations in the absence of better coordinated efforts. Through collaborative global education, joint enforcement, and harmonized legislation we can unite to combat the epidemic and better protect the consumers of our various jurisdictions.
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