

State Lotteries Eye Jackpot Through Internet Sales

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While legal doubts have to date restricted U.S. lotteries' activities on the Internet, states led by Illinois and New York are now challenging prior assumptions regarding online lottery sales and intrastate Internet gaming in general, notes Mark Hichar of law firm Edwards Angell Palmer & Dodge.

With little fanfare, U.S. state lotteries are pushing forward with Internet sales initiatives, notwithstanding the long-held position of the United States Department of Justice (DOJ) on Internet gambling that would appear to preclude such activities.

For example, at least thirty-seven state lotteries¹ are currently running or have recently run "second chance" games or similar prize drawings whereby entry can be – and in many cases must be – effected via the Internet, even though these games essentially constitute separate lottery games with the "bet" made online.²

In addition, lotteries in four states – New Hampshire, New York, North Dakota and Virginia – offer residents of their states three-month to one-year lottery [subscriptions which can be purchased over the Internet](#).

Although these "second chance" games and lottery subscription sales have not been declared legal by the DOJ or any court, neither has any action been taken (to this author's knowledge) by the DOJ nor any regulatory authority to restrict such activities.

[A survey of U.S. state lottery websites](#) reveals that there is confusion in the lottery industry as to what federal law does and does not permit in regard to Internet sales of state lottery games:

- Seven state lotteries state or imply that federal law prohibits sales of lottery games over the Internet;³
- One state lottery states that Internet sales of lottery games are "possibly illegal;"⁴
- One state lottery maintains that federal legislation has exempted state lotteries from a new law restricting interstate online wagering sales,⁵ and;
- The Multi-State Lottery Association (MUSL) – which operates the "Powerball" multi-state lottery game – asserts explicitly: "A lottery can also legally sell tickets on the Internet, but only to persons within its own state."⁶

Against this backdrop, two lotteries – the Illinois Lottery and the New York Lottery – are in the vanguard of the push for clarity in the applicable federal law so that they can expand the types of lottery products they offer for purchase on the Internet.

Specifically, they are engaged in discussions with the DOJ seeking – among other things – a revision or clarification of the DOJ's historic position with respect to the Wire Wager Act (also referred to as the "Wire Act") and an acknowledgement that federal laws are not violated when a state lottery offers its lottery products for sale on the Internet in accordance with the intrastate exception for such activity contained in the Unlawful Internet Gaming Enforcement Act (the "UIGEA").

The Source of the Confusion:

The Wire Act generally prohibits gambling businesses (including state lotteries) from knowingly using a wire communication facility – e.g., the Internet – for the transmission across U.S. state or national boundaries of (i) wagers or information assisting in wagering on any sporting event or contest, or (ii) communications entitling the recipient to money or credit as a result of wagers or information assisting in wagering.

The DOJ has long argued that the Wire Act applies to all types of wagering and is not limited in application to wagering on sports events. Judges in Utah and Missouri upheld this view in 2007 and 2008, respectively,⁷ although a 2002 decision by the United States Court of Appeals for the Fifth Circuit held, and many legal writers (including this one) have argued, that the Wire Act applies only when the underlying wagering pertains to sporting events or contests.⁸

Thus, whether the Wire Act applies to Internet purchases of lottery wagering products is not clear.

Further, the DOJ has historically taken the position that wagers placed via the Internet from within a state to another point within the same state constitute interstate transmissions (because the Internet is a means of interstate communication and Internet transmissions can be presumed to cross state boundaries), and thus violate the Wire Act just as would transmissions of wagers sent from one state to another.⁹

Although no court interpreting the Wire Act has upheld this, the DOJ's position is supported by cases in other contexts.

For example, in *United States v. Kammerzell*,¹⁰ the defendant was charged under a statute prohibiting the transmission "in interstate or foreign commerce [of] any communication containing any threat to kidnap any person or any threat to injure the person of another."¹¹

At issue was whether a threatening "instant message" between two points in Utah, but routed through other states, constituted a transmission "in interstate or foreign commerce" for purposes of the statute.

The United States Court of Appeals for the Tenth Circuit affirmed the lower court's holding that the transmission was in interstate commerce, notwithstanding the fact that the transmission originated and was received in the same state.

The Court stated that the defendant's threat "was unquestionably transmitted over interstate telephone lines," and thus fell "within the literal scope of the statute and [gave] rise to federal jurisdiction."¹²

Thus, even intrastate lottery game purchases via the Internet – where the transactions are initiated and received within the same state – arguably violate the Wire Act (assuming that the purchase of lottery games are within the scope of that law).

It is often argued that the UIGEA specifically authorizes state lotteries to put their games online on an intrastate basis, as it excepts from the definition of "unlawful Internet gambling" online games offered on an intrastate and subject to age and location controls.

However, even this exception is ambiguous.

The UIGEA prohibits gambling businesses, including state lotteries, from knowingly accepting credit (including credit extended through credit cards) and most other forms of payment in connection with the participation of another person in "unlawful Internet gambling." However, specially excepted from the

term “unlawful Internet gambling” is the sending or receiving of bets (e.g., a lottery ticket purchase) where each of the following is true:

- (i) The bet is initiated and received within a single state;
- (ii) The bet and the method by which it is initiated and received is expressly authorized by and placed in accordance with the laws of such state, and the state’s law or regulations include--
 - (I) age and location verification requirements reasonably designed to block access to minors and persons located out of such state; and
 - (II) appropriate data security standards to prevent unauthorized access by any person whose age and current location has not been verified in accordance with such state’s law or regulations; and
- (iii) The bet or wager does not violate any provision of certain specified federal laws.¹³

The UIGEA also makes clear that the intermediate routing of wagering transactions – whether across state or national boundaries – will not be considered in determining whether they are intrastate in character.¹⁴

In other words, Internet wagers will be deemed to be “intrastate” as long as they are initiated and received in the same state.

Thus, it seems clear that state lotteries will not violate the UIGEA if they accept payments or credit in connection with their sales of online lottery games, provided: (1) the players and lottery game servers are physically located within the state when the transactions are initiated and received, (2) the state’s laws expressly authorize such Internet lottery transactions, and (3) the laws or regulations of the state require age and location controls and appropriate security standards.

However, the above mentioned exception to “unlawful Internet gambling” is modified by other language in the UIGEA.

The UIGEA also provides:

*"No provision of [the UIGEA] shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting or regulating gambling within the United States."*¹⁵

Accordingly, the UIGEA does not therefore limit the application of the Wire Act – or the DOJ’s historic view of it.

This strange result, given the fairly clear language of the UIGEA exception, is supported by even stranger legislative history to the UIGEA.

The conference report on the UIGEA, written just before Congress passed the bill, discusses the UIGEA’s intrastate wagering exception, stating:

"The Internet gambling provisions [of the UIGEA] do not interfere with intrastate laws. New section 5362(10)(B) creates a safe harbor from the term 'unlawful Internet gambling' for authorized intrastate transactions, if the state law has adequate security measures to prevent participation by minors and persons located out of the state.

*"The safe harbor would leave intact the current interstate gambling prohibitions such as the Wire Act, federal prohibitions on lotteries, and the Gambling Ship Act so that casino and lottery games could not be placed on websites and individuals could not access these games from their homes or businesses."*¹⁶

Thus, the conference report suggests that the UIGEA's intrastate transaction exception was not meant to permit players to purchase lottery tickets from their home computers via the Internet – even though the express language of the UIGEA seems clearly to provide otherwise.

Illinois and New York:

As mentioned, the Illinois Lottery and the New York Lottery are not waiting for federal legislation or additional judicial decisions to resolve the ambiguity surrounding intrastate Internet lottery sales.

Instead, they are actively negotiating with the DOJ, explaining how conventional lotteries work today, where conventional lottery purchases at retailer locations may cross state boundaries (indeed they may leave the earth's atmosphere if satellites are involved in the communication) before returning to a point within the same state, and why these activities should not be considered violations of federal law.¹⁷

The Illinois Lottery is acting pursuant to a [2009 state law that authorizes it to conduct a pilot program](#) in which its games would be sold over the Internet on an intrastate basis if the DOJ "does not object to the implementation of the program within a reasonable period of time after its review."¹⁸

The New York Lottery is acting without any such state-law restriction.

The lotteries held [discussions with the DOJ in December 2009](#) and January 2010, but as of the date of this writing (and to this author's knowledge) neither has yet received a response clarifying the application of the Wire Act and/or the DOJ's enforcement policy with respect to it.

In the absence of an objection from the DOJ, it appears that the both lotteries will move forward to expand their Internet product offerings, taking the DOJ's silence as tacit acquiescence to their actions.¹⁹

The outcome of these discussions, or the actions of the Illinois and New York lotteries if there is no clear outcome, will be critical in determining whether and to what extent U.S. state lotteries will be able to expand their Internet product offerings.

There is no distinction under the Wire Act between using a wire communication facility to buy one year's worth of lottery bets or a single one.

Under the DOJ's historic interpretation of the Wire Act, each involves a prohibited interstate transmission of a wager. Thus, if the DOJ were to officially allow wagering transactions consistent with the UIGEA to occur, it would constitute a change in its historic interpretation of the Wire Act.

A Place for the DOJ to Land:

Assuming the DOJ wishes to accommodate state lotteries – a reasonable assumption, given the fact that many states are currently experiencing revenue shortfalls resulting in looming budget deficits – there are several options available to it.

The DOJ could decide that the Wire Act applies only to sports wagering or that the transmission of wagers between points in the same state, regardless of the intermediate routing, should not be considered interstate.

However, these would constitute complete reversals in the DOJ's historic interpretation of the Wire Act, and the latter change could adversely affect the DOJ's ability to prosecute other crimes which – like the Wire Act – include as an essential element a communication in interstate or foreign commerce.

Much more likely in my view, is that the DOJ will determine that the Wire Act was not intended to thwart

states' decisions as to what gambling can occur within their boundaries, but to the contrary, was intended to assist states in carrying out their gambling policies.

Thus, if a state's law explicitly authorized Internet gambling on an intrastate basis (and otherwise compliant with the UIGEA intrastate wagering exception), it would be found compliant with the Wire Act.

There is some judicial support for this position.

In a 1962 federal case out of West Virginia,²⁰ at issue was whether the Wire Act applied to the use of a wire transmission facility to carry information assisting in wagering on horse races, where the messages were initiated and ended in West Virginia, but were routed through Ohio.

Pari-mutuel wagering at licensed race tracks was lawful at the time in West Virginia, but off-track wagering was not. The defendants argued that the congressional intent expressed in the Wire Act was not to make criminal the use of an interstate wire transmission facility to carry wagering information beginning and ending in the same state, but rather was to prohibit wire transmissions of wagering information that began and ended in different states.²¹

The court rejected this argument, stating that "the intermediate crossing of a State line provides enough of a peg of interstate commerce to serve as a resting place for the congressional hat, if that will serve the congressional purpose."²² The court thus held the Wire Act applicable to the wire transmissions at issue.

However, in that case there was no question as to the culpability of the underlying conduct. The subject wagering was illegal under West Virginia law. Had the wagering at issue been legal in West Virginia, the court likely would have reached a different conclusion, based on the purpose for which the Wire Act was enacted – which, the court stated, was "to assist the various States . . . in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and to aid in the oppression of organized gambling activities . . ."²³

Moreover, and more to the point, the court stated that "the objective of the [Wire] Act is not to assist in enforcing the laws of the States through which the electrical impulses traversing the telephone wires pass, but the laws of the State where the communication is received."²⁴

Thus, in respect of intrastate Internet gambling, the purpose of the Wire Act is to assist the state in which the wagering communication is received (which will also be the state where it originated), and the Wire Act is not concerned with the laws of the other states through which such communication might be routed.

It would be clearly contrary to the purpose of the Wire Act, therefore, if it were used to thwart states' laws pertaining to gambling – as would be the case if the Wire Act were used to prohibit intrastate Internet gambling which had been specifically authorized by the state in which such gambling was to occur.

This interpretation then – that the Wire Act does not prohibit Internet wagering where wagers are initiated and received in the same state and such wagering is authorized by the applicable state's law – is one which the DOJ could adopt without adversely affecting its enforcement of other crimes and leaving intact much of its former position with respect to the Wire Act.²⁵

Conclusion:

At present, the lottery industry focus is on the Illinois and New York lotteries as they negotiate with the DOJ in an attempt to resolve the conflict between the Wire Act and UIGEA intrastate wagering exception.

Even if no new official interpretation or enforcement policy results from such discussions – provided the DOJ does not expressly object – the Illinois and New York lotteries might be expected to expand the wagering products they make available for purchase on the Internet on an intrastate basis.

[Other U.S. lotteries will take note of their actions and likely follow suit](#), expanding their online product offerings as well. Within the next year, we may see multiple state lottery wagering products available on the Internet on an intrastate basis.

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Footnotes:

1- Specifically, the lotteries in Arkansas, California, Colorado, Delaware, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, Washington and West Virginia have run such games.

2- These "second chance" games are prize drawings wherein entry is effected by transmitting to the lottery over the Internet the identifying codes from an instant ticket. These games likely constitute independent lottery games because they have the necessary elements of a lottery – chance, a prize and consideration – the last element because one must purchase an instant-ticket to enter. It can be argued that these "second chance" games are not separate and should be considered together with (and as part of) the first "scratch-off" prize opportunity. Under this argument, consideration is given at the time of purchase of the instant ticket (from an in-state retailer) for two chances to win a prize – one immediate (the "scratch-off") and the second via the "second chance" drawing. However, this argument ignores the fact that one is not automatically entered into the "second chance" drawing, but does so separately at his/her option.

3- Connecticut, Idaho, Louisiana, Massachusetts, New Mexico, Texas and West Virginia.

4- Kansas.

5- Missouri.

6- See statement of MUSL on Powerball website.

7- See U.S. v. Lombardo, 2007 WL 4404641 (D. Utah 2007) (unreported), and U.S. v. Gary Kaplan, et al., (U.S.D.C. E.D.Mo. March 20, 2008), No. 4:06CR0037 CEJ/MLM, "Report and Recommendation of United States Magistrate Judge Regarding Gary Kaplan's Motion to Dismiss Counts 3 – 12," pp. 3 – 7 (citations omitted).

8- In re MasterCard International Inc., 132 F.Supp. 2d 468 (E.D. La. 2001), *aff'd*. 313 F.3d 257 (5th Cir. 2002).

9- See, for example, letter dated January 2, 2004, from David M. Nissman, United States Attorney, District of the Virgin Islands, to Judge Eileen R. Petersen, Chair of the U.S. Virgin Islands Casino Control Commission (the "DOJ Virgin Islands Letter"), and letter dated May 13, 2005, from Laura H. Parsky, United States Deputy Assistant Attorney General, to Carolyn Adams, Illinois Lottery Superintendent.

10- 196 F.3d 1137, 1139 (10th Cir. 1999); cert. denied, 530 U.S. 1231, 120 S.Ct. 2664, 147 L.Ed.2d 277 (2000).

11- 18 U.S.C. § 875(c).

12- *Id.*, at 1139.

13- 31 U.S.C. §5362(10)(B). A similar exclusion is provided for wagers within the land of a single Indian tribe or between the Indian lands of two or more Indian tribes to the extent authorized by the Indian Gaming Regulatory Act. (25 U.S.C. 2701 et seq.).

14- 31 U.S.C. §5362(10)(E).

15- 31 U.S.C. §5361(b).

16- 152 Cong. Rec. H8026-04, p.8; 2006 WL 2796951 (Cong.Rec.).

17- Remarks of William Murray, Deputy Director and General Counsel of the New York State Lottery at SMART-Tech 2010 Conference, March 23, 2010.

18- 20 ILCS 1605/7.12.

19- The Illinois Lottery is authorized by state law (see *id.*) to take the DOJ's silence as tacit approval after a "reasonable period of time." The New York Lottery has indicated it intends to take the same view.

20- *Yaquinta v. United States*, 204 F.Supp 276 (N.D. W.Va. 1962).

21- *Yaquinta*, at 277.

22- *Id.*, at 278, emphasis added.

23- *Yaquinta*, at 279, quoting from US Attorney General Robert F. Kennedy's letter to the branches of Congress dated April 6, 1961.

24- *Id.*, at 279. Subsequent cases have established that the Wire Act is violated by the knowing sending of interstate wire transmissions assisting in wagering, where the underlying wagering, although legal in the state where the transmission is received, is illegal in the state from which the transmissions are sent. See, for example, *Martin v. U.S.*, 389 F.2d 895 (5th Cir. 1968); cert. denied, 391 U.S. 919, 88 S.Ct. 1808.

25- This interpretation would, however, be a reversal of the DOJ's position taken in its letters cited in footnote 9.