



# THE DOOR IS NOW OPEN FOR MULTISTATE INTERACTIVE LOTTERY GAMES

by Mark N. G. Hichar,  
Partner, Hinckley, Allen and Snyder, LLP and  
Chair of its Gaming Law Practice Group  
MHichar@haslaw.com

As is now well known, in an opinion announced December 23, 2011, the United States Department of Justice (“DoJ”) reexamined the Wire Wager Act of 1961<sup>1</sup> and reversed its long-standing position that the Act applies to all types of wagering. The DoJ declared that the Wire Act – which prohibits gaming businesses from using wire communications facilities to transmit wagers and related information across state lines – applies only to wagering involving sporting events.<sup>2</sup> The DoJ’s historic position, coupled with its claim that the Wire Act applies to transmissions between points in the same state when intermediately routed out of the state, had effectively frustrated states and state lotteries that sought to conduct gaming via interactive systems (e.g., the internet and mobile communications systems) in order to increase revenues for good causes and help address state budget deficits.

As a result of the DoJ opinion, the only remaining federal legal restriction on the conduct of interactive gaming by state lotteries is a limited restriction on the transmission of information to be used for the purpose of procuring for a person in one state a ticket of a lottery conducted by another state<sup>3</sup> – provided such interactive gaming is lawful in the states in question and does not involve sporting events, the interstate transportation or mailing of physical lottery tickets or the interstate mailing of any check, money order or other ticket purchase consideration (the “Conditions”). As discussed below, however, even the law restricting the transmission of lottery information does not apply if such conduct is permitted under an agreement between the states in question. Accordingly, there is no legal impediment to state lotteries agreeing to conduct one or more multistate interactive lottery games, if such are permitted under applicable state law and are otherwise consistent with the Conditions. Moreover, and contrary to claims made by proponents of federal internet gaming legislation,<sup>4</sup> such an interstate agreement would not require congressional approval.

Several federal statutes assist states in enforcing their existing restrictions on unlawful gambling, but none would restrict the operation of a multistate interactive lottery game conducted in accordance with the Conditions. The Illegal Gambling Business Act<sup>5</sup> makes it a federal crime for a business of a certain size to operate a gambling business, but it applies only if the business operates in violation of state or local law. Similarly, the Travel Act<sup>6</sup> prohibits the use of any “facility” in interstate or foreign commerce to distribute the proceeds of, or to promote, manage or carry on, any business involving gambling, but it applies only if the activity violates applicable state law or a different federal law. Further, while violation of the Interstate Transportation of Wagering Paraphernalia Act<sup>7</sup> does not require the violation of a state or other federal law, it expressly exempts from its prohibitions “equipment, tickets, or materials used or designed for use within a state in a lottery conducted by that state acting under authority of state law.”<sup>8</sup> Finally, federal laws known as the “anti-lottery laws”<sup>9</sup> prohibit, among other things, the interstate transportation or mailing of lottery tickets, advertisements and prize lists,<sup>10</sup> and the mailing of lottery information, advertisements and

1) 18 U.S.C. §1084; 2) Memorandum Opinion for the Assistant Attorney General, Criminal Division, “Whether Proposals by Illinois and New York to Use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act,” September 20, 2011 (issued December 23, 2011), p. 12.; 3) 18 U.S.C. §1301; 4) Frank Fahrenkopf, President of the American Gaming Association was recently quoted as saying: “If you have four or five states that join together in an interstate compact perhaps you would have enough liquidity to make [state-regulated internet poker] worthwhile. The difficulty with that is the United States constitution gives the federal government the right to accept or reject interstate compacts.” “US Poker: Fact or Fiction,” in Inside Poker Business online magazine, May, 2012, at <http://www.insidepokerbusiness.co.uk/poker/insight/1261/us-poker-fact-or-fiction.html> (last accessed August 16, 2012); 5) 18 U.S.C. §1955; 6) 18 U.S.C. §1952; 7) 18 U.S.C. §1953; 8) Id.; 9) 18 U.S.C. §§1301-1307. See also the postal law at 39 U.S.C. §3005.; 10) 18 U.S.C. §§1301-1302; 11) 18 U.S.C. §1302; 12) 18 U.S.C. §1307(a)(1); 13) 31 U.S.C. §§5361-5367; 14) [http://www.powerball.com/pb\\_contact.asp](http://www.powerball.com/pb_contact.asp) (last accessed August 16, 2012); 15) Id.; 16) <http://www.illinoislottery.com/en-us/lottery-faqs.html#playing> (last accessed August 16, 2012); 17) See footnote 14.; 18) 18 U.S.C. §§1301-1302; 19) 18 U.S.C. §1301; 20) See footnote 4.; 21) U.S. Const., Art. I, §10, CL. 3 provides: “No state shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another state. . . .”; 22) U.S. Steel v. Multi-State Tax Commission, 434 U.S. 452, 460 (1978); 23) McComb v. Wambaugh, 934 F.2d 474, 479 (3rd Cir. 1991).

ticket purchase consideration.<sup>11</sup> However, expressly exempt from these prohibitions are the following:

(1) an advertisement, list of prizes, or other information concerning a lottery conducted by a State acting under the authority of State law which is –

(A) contained in a publication published in that State or in a State which conducts such a lottery; or

(B) broadcast by a radio or television station licensed to a location in that State or a State which conducts such a lottery.<sup>12</sup>

Finally, the Unlawful Internet Gambling Enforcement Act of 2006 (the “UIGEA”)<sup>13</sup> applies only to wagering that is unlawful under any applicable state law or different federal law. Thus, the UIGEA would not apply to interactive wagering conducted by state lotteries under the authority of state law and otherwise in accordance with the Conditions.

At present, the multistate online lottery games Powerball® and Mega Millions® are run by the participating states on separate systems. Each state has its own separate computer system.<sup>14</sup> Winning tickets need to be presented for payment in the same state as that in which they were purchased.<sup>15</sup> Money is transferred among the states in accordance with the agreements among them to accommodate payment of prizes. At the present time, players in Illinois can play Mega Millions via the internet,<sup>16</sup> but players in other Mega Millions states must purchase their tickets at lottery sales terminals in their lottery jurisdictions selling the game. Powerball tickets can only be purchased at lottery terminals in lottery juris-

dictions that participate in Powerball.<sup>17</sup>

While physical lottery tickets cannot be transported across state lines, and neither they nor ticket purchase consideration may be mailed across state lines,<sup>18</sup> no such restriction exists with respect to electronic (i.e., intangible) lottery tickets or electronic purchase consideration such as would be involved in the play of a properly-designed multistate interactive lottery game. In addition, although federal law prohibits a business that procures for persons in one state tickets of a lottery conducted by another state from knowingly transmitting in interstate or foreign commerce information to be used for the purpose of procuring such tickets,<sup>19</sup> the law does not apply when such activity is permitted pursuant to an agreement between the states in question. Indeed, this restriction might not apply to begin with to an interactive lottery game conducted by several states collaboratively, because the game could be considered to be “conducted by” each participating state (and thus, arguably, tickets for the game would not be considered tickets of a lottery conducted by another state). Regardless, since the participating states would inevitably enter into an agreement regulating the conduct of the multistate interactive game, even if the game were considered to be “conducted by” a state other than the state in which the ticket was purchased, the agreement among the states could simply make clear that such cross-border sales activity was permitted.

Finally, some have claimed that any agreement among state lot-

...continued on page 65



## Game Book Ticket Dispenser

- Allows for Prime Placement on the Retail Counter
- Fits within current stack of Modular Mini® dispensers
- Provides card insert area for Game POS
- Ease in loading and dispensing of ticket

1-800-222-4489 | 1-641-742-3266 | teresa.jimmel@ownrev.com | stef.fagan@ownrev.com | www.ssi-la.com

Schaefer Systems Inc. | 1000 Flag Road | Adair, IA 50002 USA

level of awareness and support. But we know we have to prepare for transition to the next phase, which is where the real work begins: the focus on execution and the countless details that drive the success of the business. This is when we need to apply the methods and the real science of managing a complex consumer product category. It is when the lottery operator and its commercial partner must work together to control the transition into the middle stage of the product life cycle, where properly managed growth will still be strong. If you look at the best performing lotteries across the world, and certainly now in China, every single one of them has come to this point where they have to drill down into the details of execution, engage the retailers and the players, and tie the products, promotions and merchandising together to create a package that makes sense to the consumer.

The importance of effective management processes kicks in after that initial excitement of the launch begins to settle. But we have had decades of experience at doing just that and the strong results of this past year reflect this. In the U.S., for instance, sales in the instant category increased nearly 10%, from \$32 billion to \$35 billion. And there wasn't one new start-up. It was all accomplished with solid execution at established lotteries.

*What are some of the basic things that you do in switching to the mode of nurturing an established market?*

**J. Kennedy:** It's really important to benchmark. The gaps and opportunities are revealed when you correlate the various indices of performance and then compare those to other marketplaces. The numbers tell the story. Best practices should not be applied as an academic exercise or a method to point out who is doing a good job. Applied correctly, the benchmarks do two things. First, they provide a tool for assessing performance in all the different areas of the business. Interpreted correctly, they show you precisely what can be done to improve performance and results. There are the big-picture issues like the relationship between payout, price point and sales. We look at the number of games launched and the whole business of managing a portfolio of products for optimal overall results – including same store sales and the methods of the top-performers. We've had discussions about the limitations of the science of data-driven decision making. You are correct in saying that data never gives us the whole picture. Interpretive analyses must convert the data into insights that truly inform the decision-making process. But still, we need to start with the data. And we need to trust the facts

more than our subjective interpretive skills. Because where the science becomes really interesting is when you compare the huge volume of data across many jurisdictions around the world. I become more convinced of that over time. Benchmarking for us at Scientific Games involves over 30,000 instant games and innumerable variables that impinge upon the outcomes. The number of permutations and combinations of the correlative analyses is mind-boggling. We measure performance across all different dimensions and varieties of attributes. Then the analysis of the data informs the whole benchmarking process to tell us how and where there are performance differentials and performance enhancements, and how we can change things to improve results and produce better outcomes.

Instant products are the most intriguing category of games in the sense that the potential for creative to add value is unlimited. This tends to invite people to mix the process of data-driven analysis with their creative impulses. It requires discipline to ensure that decisions are driven by the facts and not by subjective opinions. Scientific Games has an extensive understanding of the science of the instant game category, informed by over \$500 billion in instant game consumer sales. Today, the information needed to make smart decisions is available and we are using it. ♦

## *The Door is Now Open for Multistate Interactive Lottery Games* ...continued from page 67

teries to collaborate on a multistate interactive game would require congressional consent.<sup>20</sup> Although the United States Constitution suggests that Congress must approve all agreements between or among states,<sup>21</sup> the United States Supreme Court has held that congressional consent is required only when an interstate agreement “enhance[s] state power to the detriment of [the power of the federal government].”<sup>22</sup> In *U.S. Steel v. Multi-State Tax Commission*, the Supreme Court held that an interstate tax agreement among several states was not the type of interstate agreement that required congressional consent. The agreement was held to not enhance state power to the detriment of federal power, because: (1) it did not authorize participating states to exercise any powers other than those they already had prior to the agreement; (2) state sovereign power was not delegated to the newly-created interstate agency; and (3) each participating state retained its ability to adopt or reject rules and regulations developed by the interstate agency and to withdraw from the agreement at any time. In addition, the United States Court of Appeals for the Third Circuit has held that an agreement between states does not encroach on federal power when the subject of the agreement concerns “areas of jurisdiction historically retained by the states.”<sup>23</sup> Gambling, of course, is an activity historically left to the regu-

lation of the states. Accordingly, agreements among states pertaining to interactive gaming could be entered into without congressional consent provided they were consistent with the aforementioned conditions.

In summary, the DoJ's December 23, 2011 opinion has opened the door to the collaboration by state lotteries on multistate interactive lottery games. Provided such games are lawful under the laws of the participating states and do not involve sporting events, the interstate transportation of physical lottery tickets or the interstate mailing of any check, money order or other ticket purchase consideration, the conduct of such games would not violate federal law. Moreover, contrary to claims made by supporters of federal internet gaming legislation, a properly-structured multistate agreement governing the conduct of such multistate interactive lottery games would not require congressional approval or consent. ♦

*Mark Hichar is a Partner with Hinckley, Allen and Snyder, LLP and is the Chair of its Gaming Law Practice Group. He works out of the firm's offices in Providence and Boston. Mark is a frequent writer and speaker on developments in Gaming Law and related regulatory actions. Mark received his B.A. degree from Yale University, and his J.D. from the University of Chicago Law School.*