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THE DICRISTINA CASE LIVES – AND MAY MAKE IT DIFFICULT FOR SOME STATE LOTTERIES TO CONDUCT POKER AS A LOTTERY GAME

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On August 21, 2012, the federal U.S. District Court for the Eastern District of New York – in the “DiCristina” case (U.S. v. DiCristina, 886 F. Supp. 2d 164 (E.D.N.Y. 2012)) – determined that Texas Hold’em poker was a game of skill not chance, for purposes of the federal “Illegal Gambling Business Act” (the “IGBA,” codified at 18 U.S.C. § 1955). As a result, the Court held that the game was not among the activities prohibited by the IGBA, and it therefore

entered a judgment acquitting DiCristina under that Act after a jury had found him guilty.

Lawrence DiCristina had operated regular games of “Texas Hold’em” poker as a business. Acting as the “house,” he received a 5% “rake” from each pot. Dealers were paid 25% of the rake, and the remainder was used for expenses relating to the operation of the business and constituted his profit. As mentioned, a jury convicted DiCristina of operating an illegal gambling business in violation of the IGBA.

In acquitting DiCristina notwithstanding the jury verdict, the Court held that for there to be a violation of the IGBA, the government must show that the defendant conducted a business involving “gambling” as defined under that federal statute, not merely that the defendant’s conduct constituted illegal gambling under state law. Because the term “gambling” under the IGBA was ambiguous, the Court decided that it was compelled to adopt the defendant’s more narrow construction of the statute – that the IGBA applies only to games in which chance predominates over skill. After hearing and analysing extensive expert testimony on the issue, the Court determined that Texas Hold’em poker was not such a game – i.e., in that game, skill predominated over chance. Thus, even though DiCristina’s conduct violated New York State gambling laws, his conduct did not give rise to a violation of the IGBA, because it did not involve “gambling” under that federal law.

Almost one year later – on August 6, 2013 – the U.S. Court of Appeals for the Second Circuit reversed the DiCristina decision and remanded the case back to the District Court with instructions to reinstate the jury verdicts finding DiCristina guilty and to proceed with sentencing. (U.S. v. DiCristina, 2013 U.S. App. LEXIS 16197 (2d Cir. N.Y., Aug. 6, 2013) In its opinion, the Court of Appeals determined that the critical question in the case was not whether Texas Hold’em poker constituted “gambling,” but whether DiCristina operated a “gambling business,” as defined in the IGBA, and whether that business was prohibited under New York State law.

The Court stated that, when enacting the IGBA, Congress did not “intend[] to create a definition of “gambling” unique to the IGBA, or to confine the reach of the IGBA to businesses involving certain types of gambling, ...” Further, Congress did not intend to limit the scope of the IGBA to businesses operating games of chance. Thus, it was not relevant to the case whether poker constituted a game of skill or chance. Only three elements had to be established for there to be a violation of the IGBA: (1) the conduct of a gambling business which violated the law of the state in which the business activities were conducted; (2) the involvement of five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and (3) substantially continuous operation for a period in excess of thirty days or gross revenue of \$2,000 in any single day. Because it was uncontested that DiCristina’s gambling activities violated New York State law, and it was undisputed that DiCristina’s business satisfied the second and third requirements of the IGBA, the Court held that DiCristina operated an “illegal gambling business” as defined by the IGBA.

Notably, the Appeals Court’s decision did not contest the low-

...continued on page 53

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ry, I don't have to do anything, I don't have to make a decision so I can just enjoy.' Yet, a simultaneous intuitive voice whispers in our ear, 'this could be important information, I'd better pay attention, I might have to remember this.' What better frame of mind could you ever wish for in the mind of a person you would like to influence?

When we anticipate a story, our critical left-brain powers down and our right brain opens up. Our right brain is connected to all our senses and imagination (art, music, food, thrills, touch). Our right-brain is also connected to our limbic, emotional brain. It is in our emotional brain where we decide why we are going to do something. It is our emotional brain that decides, 'this feels good,' or 'I like this person,' or 'I trust this person,' or, 'even though I don't have all the facts, I am going to take a leap of faith and try something new.' We still need our left-brain (analysis) to come up with enough logic to convince those that

matter to us that we are sane. Insight is a whole-brain process. We make emotional decisions for logical reasons. Stories allow us to educate, inspire and influence people without telling them 'what they need to do.' Stories enable us to motivate others to do difficult things by enabling insight – the Ah-Ha moment.

Another wonderful thing about stories is we can all learn to be much better at building them, telling them and tending them that we ever would have realized.

In our Story Seekers workshops we use a 'card' system. Every participant gets a story board 'placemat' that has the five elements of a story in our framework. The YELLOW card is the 'why' of the hero of the story, the GREEN card is the setting and introduction of the character(s), the WHITE card is the struggle, the complication, the BLUE card is the turning point; the new insight, and the RED card is the resolution to the story. This framework allows ordinary human beings

who have never been that good at connecting, inspiring and influencing other people to learn to do it in 2.5 days!

Think about a person you would like to influence to do something difficult that will benefit them. Do you think they would like you to tell them what they need to do, or might they rather accept the offer of a story?

The power of story can help you emotionally connect with others. Most of us struggle to be influenced by people we do not trust or like. Connection is an integral component of trust. Trust is necessary in order to be able to influence.

Our mission at Mike Bosworth Leadership is to help 'journeymen,' influencers – parents, friends, teachers, executives, leaders, politicians, preachers, lawyers, family members and yes, salespeople influence others to do difficult things that will benefit them. The power of story facilitates influence, with or without authority. ♦

Theo Gößner Interview ...continued from page 18

that want the EU to impose a pan-European regulatory framework. The EU Commission has already acknowledged that there is no reason to create a pan-European system that would result in a race to the bottom of minimal taxation. The EU Commission has stated that their focus is on consumer pro-

tection and responsible gaming. So, we are hopeful that the EU Commission will recognize that we, and our counterparts in other EU nations, are taking every measure to deliver the highest standards of consumer protection and responsible gaming and to have a fair regulatory system. And we hope the

EU Commission recognizes that bowing to the pressure of the few small Member States which want free and open borders would be devastating to the causes that depend on funding from lotteries, and would most definitely not contribute to the goal of protecting the consumer. ♦

The DiCristina Case Lives ...continued from page 54

er court's finding that skill predominates over chance in determining the outcome of Texas Hold 'Em poker played over time. Rather, the Appeals Court's holding decided merely that such question was not relevant in DiCristina's case, since his gambling business was unlawful under New York State law, and therefore constituted an illegal gambling business under the IGBA. Thus, although undoubtedly of less significance, the lower court's decision still may be used to support the argument that Texas Hold'em poker is a game of skill, and not chance, and thus not "gambling" in jurisdictions where a gambling game is defined as one in which chance predominates over skill. Because of its detailed examination of Texas Hold'em poker and its recitation and analysis of expert testimony, the lower court's opinion should remain useful in such other jurisdictions. Nothing in the Appeals Court's decision discredited or cast doubt upon the expert testimony presented in the lower court or the lower court's analysis thereof. (Indeed, already there is evidence that the lower court's decision in DiCristina is viable to support future legal arguments. In an unpublished opinion dated September 3, 2013, the Court of Appeals of Minnesota cited the lower court's decision in DiCristina as support for its conclusion

that the outcome of the game of blackjack ("21") is determined predominately by chance. (In the Matter of the Request of North Metro Harness Initiative, LLC, to Amend its Plan of Operation, 2013 Minn. App. Unpub. LEXIS 838)

Notwithstanding the subsequent reversal, the lower court's decision in DiCristina is important to state lotteries because it supports the position that peer-to-peer Texas Hold'em poker is a game in which skill predominates over chance in determining the outcome. In many states, the state's lottery is limited to conducting "lottery" games, defined often as games in which chance predominates over skill in determining the outcome (and also involving "consideration" and a "prize"). In those states, therefore, the state lottery would be precluded from offering peer-to-peer Texas Hold'em poker, since that game would not be considered a "lottery" game (since skill predominated over chance in determining the outcome). Thus, the lower court's decision in DiCristina may continue to be important to state lotteries, notwithstanding its reversal, since that reversal did not discredit or cast doubt upon the expert testimony presented in the lower court or the lower court's analysis thereof. ♦