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BREAKING NEWS BREAKING NEWS BREAKING NEWS

DOJ ISSUES BLOCKBUSTER INTERNET GAMING OPINION by Robert W. Stocker II

On December 20, the United States Department of Justice released a Memorandum Opinion for the Assistant Attorney General, Criminal Division, dated September 20, 2011, in which the Department of Justice declared that proposals by the states of Illinois and New York to use the internet and out-of-state transaction processors to sell lottery tickets to in-state adults do not violate the federal Wire Act. The DOJ Memorandum acknowledges what gaming lawyers have argued for many years, *i.e.*, the Wire Act relates solely to sport-related gambling activities in interstate and foreign commerce. For the full version of the DOJ Memorandum, visit <http://www.justice.gov/olc/2011/state-lotteries-opinion.pdf>.

The DOJ Memorandum opens the door to the legal operation of intrastate internet gaming beyond the implementation of internet sales of lottery tickets by state lottery agencies. Nevada and the District of Columbia have already enacted intrastate internet gaming legislation, and the state of Nevada has already commenced accepting intrastate internet gaming license applications. The horse is now effectively out of the barn and galloping away.

Can other states be far behind? Several large population states are already grappling with intrastate internet gaming legislation (California, New Jersey, and Florida legislators have conducted hearings over the past couple of years and are the most up to date on internet gaming issues). Iowa, a much smaller population state, is also considering intrastate internet gaming legislation on the heels of a report indicating that intrastate internet gaming could bring additional revenues to the state, albeit in smaller amounts than originally projected.

This activity begs the question – What about federal internet gaming legislation? The failure of Congress to adopt comprehensive internet gaming legislation has in the past placed the focus on state efforts to enact intrastate internet legislation. This is consistent with the tendency of Congress to address gaming issues in a reactive manner rather than a proactive manner. Prime examples are the Unlawful Internet Gambling Enforcement Act (UIGEA) and the Indian Gaming Regulatory Act (IGRA).

UIGEA was enacted to indirectly address rampant internet gaming activities conducted by offshore internet gaming operators. IGRA was enacted by Congress only after federal court decisions opened the door to what Congress perceived as unregulated gaming on federally recognized tribal reservations.

The DOJ Memorandum is such a shocker that it may change the playing field. The big question has now become whether or not the DOJ Memorandum will move Congress to seize the initiative from the states. The answer is unclear.

Ultimately, Congress will adopt some form of federal internet gaming legislation. The question is when and in what form.

For several reasons, it is possible that Congress will do nothing until after the November 2012 general election. First, this is not a party-line issue as members of both parties can be found in both the pro-internet gaming and anti-internet gaming camps. Second, the 2012 elections are a battle for control of both houses of Congress, as well as the presidency. In such an environment, politicians do not take substantive action on controversial issues that will be used against them by their opponents in the election campaign. Leaving the states to their own devices in a heavily politicized environment is the easy way out. Finally, even within the commercial gaming industry itself (as well as the equally important Indian Country gaming industry), there is no clear consensus on internet gaming legislation. Sheldon Aldelson's recent "personal" opposition to internet gaming is a prime example. Internet gaming in Indian Country is an even more divisive issue that is further complicated by tribal/state compact issues and regulatory oversight issues given Indian Country's preference for minimal regulatory oversight by the National Indian Gaming Commission.

That being said, it is entirely possible that the DOJ Memorandum could prompt faster Congressional action with regard to internet gaming. Congressional action could take the form of an attempt to impose a short-term moratorium on intrastate internet gaming (although this raises Tenth Amendment issues) or actually authorizing interstate internet gaming.

Regardless of what happens in Congress in the coming months, intrastate internet gaming legislative efforts will continue to flourish under the guise of state intrastate internet gaming legislation. States may perceive that if they get to the table first, they may reap significant monetary benefits as well as have the fundamental advantage of being ahead of the curve. The intrastate internet gaming train will pick up significant steam in 2012, and the states that adopt intrastate internet gaming will then look at combining their activities with other similarly situated states (think Powerball and Mega Millions lotteries).

At the same time, all elements of the gaming industry must watch developments at the federal level and be actively engaged in all congressional discussions. It is both naive and dangerous to think that

substantive activity at the federal level will not intensify, regardless of whether or not it will result in affirmative Congressional action in the near term.

What does all of this mean for internet gaming operators, internet gaming software manufacturers, player identification software manufacturers, and their progeny, all of whom will be subject to licensure and situs requirements developed by state and federal legislatures? A year ago, this author emphasized the importance of the internet gaming industry's involvement in the drafting and support of intrastate internet gaming legislation at the state level. The DOJ Memorandum places that focus recommendation in boldface. It also emphasizes the importance of similar efforts and attention at the federal level.

In all likelihood, 2012 will be a defining year for the internet gaming industry in the United States. Whether intended or not, the DOJ Memorandum presents dramatic opportunities for the internet gaming industry in the United States and finally (albeit belatedly) presents the opportunity for the world's largest potential internet gaming market to start catching up with an internet gaming industry that is already far down the road in Canada and many parts of Europe.