

A Growing Body of Evidence Demonstrates Why State Legislators Should Consider iLottery: a White-Paper Explanation

By Mark Hichar, Shareholder of Greenberg Traurig, LLP, Boston office

hicharm@gtlaw.com | www.gtlaw.com

States have been allowed to enact legislation authorizing iLottery and online games generally (other than sports betting) at least since 2011, when the Department of Justice (“DOJ”) issued its memorandum declaring that the Federal Wire Act¹ applied only to sports betting.² While this opinion was reversed by the DOJ in a 2018 memorandum³, the 2018 memorandum has had little effect on iLottery and other forms of online gaming as a result of litigation in the first federal judicial circuit that declared the 2018 opinion “mistaken” and held the Federal Wire Act applicable only to sports wagering.⁴

In regard to sports betting, however, states have been allowed to enact legislation authorizing in-person and online sports betting only since 2018. In June of that year, the Supreme Court struck down as unconstitutional the Professional and Amateur Sports Protection Act – the federal law that made it unlawful for states to authorize sports wagering.⁵

Although states have been allowed to enact

sports betting legislation for less than five years, in that short time 23 states have enacted legislation authorizing online sports wagering.⁶ On the other hand, in the 21 years since states were allowed to authorize iLottery, only 13 states have authorized their lotteries to sell lottery products online.⁷

This difference in adoption rates cannot be due to the lack of success of iLottery or its ability to generate revenues for states. Considering the 12 states operating iLottery as of November 2022, total gross iLottery sales increased 19% year-over-year, representing approximately 14% of those states’ gross lottery product sales.⁸ Further, it is estimated that net iLottery sales (wagering less prize payout) increased by 26% year-over-year, “driven by a higher mix of Draw game sales as well as moderately higher hold rates among Draw games versus the prior year.”⁹

Considering actual contributions to state revenues, in Michigan, while sports wagering has contributed approximately \$26.4 million in taxes to the state since going live in 2020,¹⁰ iLottery contributed \$241.8 million in “net win” (ticket sales net of discounts



and prize expense) to the Michigan Lottery in fiscal year 2021 alone.¹¹ Similarly, in New Hampshire, sports wagering has contributed approximately \$24 million in taxes to the state in the 12 months ending June 30, 2022,¹² and iLottery contributed \$29.9 million in “net win” (ticket sales net of discounts and prize expenses) to the New Hampshire Lottery in that same period.¹³ In Pennsylvania, sports wagering contributed

¹18 U.S.C. §§ 1081, 1084.

²Whether 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, dated September 20, 2011 (issued December 23, 2011), 35 Op. O.L.C. (2011) (the “2011 Opinion”).

³Reconsidering Whether the Wire Act Applies to Non-Sports Gambling, dated November 2, 2019 (Memorandum Opinion (Slip Opinion) issued January 14, 2019), 42 Op. O.L.C. (2018).

⁴See N.H. Lottery Comm’n v. Barr, 386 F. Supp. 132 (D. N.H. 2019), affirmed in part and vacated in part by N.H. Lottery Comm’n v. Rosen, 986 F.3d 38 (1st Cir. 2021). See also Int’l Game Tech. PLC v. Garland, 2022 U.S. Dist. LEXIS 166590 (D. R.I. 2022).

⁵Murphy v. NCAA, 138 S. Ct. 1461, 200 L. Ed. 854 (2018).

⁶Eilers & Krejciak Gaming U.S. Online Gaming Report (March 2022), which shows 22 states have authorized online sports wagering. Massachusetts has been added as legislation authorizing online sports wagering was enacted in August, 2022. This report is available at https://mvbbanking.com/wp-content/uploads/2022/03/MVB_Online_Gaming_Report__March_2022.pdf (last accessed on February 19, 2023).

⁷Eilers & Krejciak Gaming, U.S. iLottery Tracker – 3Q22 (November 17, 2022), noting that Connecticut was not yet operational. Eilers & Krejciak define iLottery “as a lottery product for which account funding and game play can be managed online.” See id., p. 4.

⁸Id., p. 6.

⁹Id.

¹⁰In Michigan, retail sportsbooks went live in March 2020, and online sports books went live in January 2021 and sports wagering has contributed approximately \$26.44 million in revenue to the state in the aggregate since going live. See Legal Sports Report at <https://www.legalsportsreport.com/michigan/#:~:text=Michigan%20officially%20legalized%20sports%20betting,over%20%24100%20million%20in%20wagers> and <https://www.legalsportsreport.com/sports-betting/revenue/> (last accessed February 19, 2023). (The second document is referred to as the “LSR US Sports Betting Report”).

¹¹Michigan Bureau of State Lottery Annual Comprehensive Financial Report for the Years Ended September 30, 2021 & 2020, p. 43, available at https://assets.ctfassets.net/d6062jwe1jr/1FMFKXch3le2hR9Tz4FqwU/484c038cae9ac62381399b2f474bbcdc/FINAL_PDF_2021.pdf (last accessed February 19, 2023).

¹²See <https://www.sportsbettingdime.com/new-hampshire/sports-betting-revenue/> (last accessed February 19, 2023).

¹³New Hampshire Lottery Commission Annual Comprehensive Financial Report for the Fiscal Year Ended June 30, 2022, p. 47, available at https://www.nhlottery.com/Files/PDFs/Financial-Reports/2022/NHLC_ACFR_2021-2022_Final (last accessed February 19, 2023).

approximately \$114 million in taxes to the state in the fiscal year ending June 30, 2022,¹⁴ while iLottery contributed \$71 million in net gaming revenue (ticket sales net of prize payouts, promotions, bonuses and costs) to the Pennsylvania Lottery during that same time period.¹⁵ (Pennsylvania has a 36% tax rate – 34% to the state and 2% to local jurisdictions – on sports wagering revenues, which is particularly high.¹⁶)

Later adopters of iLottery have been notably successful, perhaps being guided by lessons learned by early adopters, and likely also benefiting from increased consumer acceptance of digital commerce.¹⁷ Spectrum Gaming Group's¹⁸ analysis of the iLottery implementations in Michigan, Pennsylvania, New Hampshire and Virginia, show that later adopters of iLottery have significantly greater first month iLottery revenue on a per capita basis. In Michigan, which implemented iLottery in 2014, first month per capita iLottery sales were only \$0.24, while in Pennsylvania, New Hampshire and Virginia they were \$1.69, \$2.08 and \$4.06, respectively.¹⁹ As stated by Spectrum Gaming Group: "Michigan started with a much more limited product selection compared to the other three states. However, the initial success of the three other states ... indicates a changing consumer acceptance of digital commerce and a growing acceptance and knowledge of iLottery products, specifically digital instant tickets."²⁰ Finally, since its arguably modest start, in the five years since its 2014 launch of iLottery, the Michigan Lottery became North America's first lottery to generate \$1 billion in cumulative sales through online channels,²¹ and indeed, in its fiscal year 2021, sales were estimated to be \$2 billion.²²

Thus, iLottery implementations have been successful and contribute significantly to state lottery revenues and those beneficiaries that benefit from them. In addition, based on a growing body of evidence gathered from U.S. states that have implemented iLottery, it appears that the sale of lottery games online does not cannibalize traditional

retail lottery sales. Among other examples, Spectrum Gaming Group cites the following:

From FY 2017, the year before iLottery launched in Pennsylvania, to FY 2021, retail lottery sales grew by 33%. A similar experience is shared by the Michigan Lottery, which grew by 91% at retail from 2013, prior to iLottery's launch, to FY 2021.²³

Spectrum maintains that iLottery reaches a younger demographic not reached by traditional lottery retail channels, and that this is a reason that iLottery and traditional retail sales have increased simultaneously. They note:

A survey conducted by the US Bureau of Labor Statistics noted that for the 12-month period ending June 2018, the average annual spend on lottery tickets was nearly \$70, but adults under 25 spent less than \$8, and for adults between 25-34, the average spend was slightly more than \$40.

The growth of iLottery has demonstrated an ability to reach younger generations. Data gleaned from the participating iLottery jurisdictions of Michigan, New Hampshire, North Carolina, Virginia, and the Canadian province of Alberta, show that, in Fiscal Year ("FY") 2021:

- 25% of those who played digital draw-based games were 35-44 years old, an increase of 3 percentage points over FY 2016.
- 27% of those who played digital Instant games were 35-44 years old, an increase of 5 percentage points over FY 2016.

The data also showed that the average age of adults who played iLottery on mobile devices was 47. That data point makes clear that the willingness of consumers to purchase lottery tickets via a mobile device cuts across all age groups. This creates an opportunity to capture a younger demographic, while also making inroads into older age groups.

Finally, problem gaming in regard to iLottery can be addressed via methods not available in regard to traditional lottery. Traditional

lottery games (physical draw and instant tickets) are sold anonymously. The consumer is not required to provide any identifying information, and thus historic game play volumes and trends are not ascertainable. Consumers cannot play iLottery games anonymously, however, and play history and trends are detectable. Opportunities therefore exist to identify and address problem gaming behavior, and regulations and/or consumers themselves may establish deposit and play limits, as well as self-exclude entirely. While the convenience afforded by iLottery - i.e., making lottery games more accessible – makes more urgent the need for effective responsible gaming policies and procedures, the available options, and the ability to implement such policies and procedures is greater with iLottery products.

In short, iLottery can be a significant contributor to states fiscal health and to the good causes served by state lotteries. A growing body of evidence demonstrates that iLottery can co-exist with traditional retail sales channels without cannibalizing traditional retail sales, and effective responsible gaming policies and procedures can be implemented with respect to iLottery which cannot be implemented in regard to anonymous traditional lottery play.

Consumers increasingly acquire their information, entertainment, goods and services, and do their banking and investing online. The success of state lotteries requires that they have a robust online presence, and a failure to offer lottery products online could result in lotteries not being relevant to the growing demographic that shops, learns and plays online. This does not mean offering lottery products exclusively online, as traditional sales channels continue to be the primary means of state lottery sales. However, there is an increasing body of evidence demonstrating that iLottery contributes significantly to state revenues. Accordingly, iLottery should be included in the discussion when state legislators consider the appropriate mix of gaming for their states. ■

¹⁴See Gambling Industry News at <https://gamblingindustrynews.com/news/usa/pennsylvania-gambling-revenue-fy-21-22/> (last accessed February 19, 2023).

¹⁵Pennsylvania Lottery Annual Report FY 21-22, p. 2, available at https://www.palottery.state.pa.us/PaLotteryWebSite/media/PA-Lottery-Reports/Annual/PAL_Annual-Report_FY21-22.pdf (last accessed February 19, 2023).

¹⁶See Gambling Industry News, cited in footnote 14 above.

¹⁷Spectrum Gaming Lottery Group, Future of iLottery: Analyzing, Developing Multi-Channel Strategy, Prepared for NeoPollard Interactive, March 15, 2022 (the "Spectrum Paper"), p. viii - x. The Spectrum Paper is available at <https://www.spectrumgamingcapital.com/wp-content/uploads/2022/05/spectrum-report-on-future-of-ilottery-3-15-22.pdf> (last accessed February 19, 2023).

¹⁸Spectrum Gaming Group "is a non-partisan consultancy that specializes in the economics, regulation and policy of legalized gambling worldwide." <https://spectrumgaming.com/> (last accessed February 19, 2023).

¹⁹ Id., citing NeoGames, S.A. Form F-1: Preliminary Prospectus, November 16, 2020.

²⁰ Id., p. ix.

²¹ Testimony Scott Bowen, Senior Vice President of NeoPollard Interactive before the Senate Government Oversight & Reform Committee, of file:///C:/Users/hicharm/Downloads/SB269_Proponent_Bowen.pdf.

²² Spectrum Paper, p. 33.

²³ Understanding iLottery: Growth Through Expansion, not Cannibalization, by Michael Pollock, Managing Director, Spectrum Gaming Group, in NASPL Insights, May/June 2022, available at <https://www.spectrumgaming.com/wp-content/uploads/2022/06/naspl-insights-magazine-may-june-understanding-ilottery-pollock.pdf> (last accessed February 19, 2023).