

Lottery courier services and the law

APP-BASED LOTTERY COURIER SERVICES ARE A POPULAR WAY TO WORK AROUND BLOCKS ON INTERSTATE TICKET TRAFFIC OR A REQUIREMENT TO PLAY IN PERSON IN MANY U.S. STATES. **DANIEL RUSSELL AND DANIEL MCGUINN** ASK HOW THEY WORK AND HOW THEY SHOULD BE REGULATED TO MAXIMISE REVENUES TO THE STATE AND PROTECT CONSUMERS?

As jurisdictions continue to search for both revenue streams and innovative ways to broaden the scope and audience of their lottery products, regulators are faced with an increasing number of questions from stakeholders about the legality and availability of products and services. Savvy regulators recognize that discussions around lottery expansion often draws the attention of the public and the press. Additionally, while many states have been in a surplus budget state for a number of years coming out of the 2019-20 pandemic period, forecasts appear to suggest that revenue will decrease over the next several fiscal years, which will coincide with the end of federal pandemic related funding that is bolstering many state budgets.

Now seems the ideal time to lay the groundwork for revenue streams that will begin to meaningfully impact their states as other streams fade and spending gets leaner. However, many legislators are unwilling to expand controversial revenue raising policies when times are good to avoid potential constituent backlash, instead preferring to push these policies through during lean times. This practice results in revenue gains being too late to save many legislative programs and projects. Therefore, being able to identify meaningful, manageable, and profitable options that require minimal additional legislative action or regulatory rulemaking is a vitally important skill as the revenue landscape will likely shift away from large surpluses before states have time to react.

While U.S. lotteries are run and regulated almost entirely at the state level, some important federal oversight remains. Federal prohibitions on the interstate traffic of lottery tickets dates back to the late 1800s with 18 U.S.C. § 1301, the current prohibition on interstate traffic in lottery tickets, initially becoming law in 1895. At its inception, section 1301 prevented the physical transportation or receipt of any part of a lottery scheme in interstate commerce. In the early 1990s, Pennsylvania struggled to prevent a company from avoiding “the longstanding prohibition on the interstate traffic in lottery tickets by keeping the tickets themselves in the state of origin and transferring only a computer-generated “receipt” to

the customer.”¹ The Federal Government responded by passing the Interstate Wagering Amendment in 1994, which added language to section 1301 prohibiting the transmission in interstate commerce of information to be used for the purpose of procuring a lottery ticket, to account for technological advances such as internet purchasing. The updated language reinforced a state’s right to regulate lottery sales within its borders, closed the loophole for non-physical transmission of lottery tickets, and protected state revenue through the federal government’s control of interstate wagering.

Federal oversight also touches on the advertisement of lotteries. 18 U.S.C. §§ 1302 and 1304 combine to prohibit the use of the mail system, radio, or television to advertise a lottery by any type of publication or broadcast, unless the information concerns a state-run lottery and is contained in a publication published in that state or in a state which conducts such a lottery, or is broadcast by a radio or television station licensed to a location in that state or a state which conducts such a lottery.²

Additionally, while it appears that for now the U.S. Department of Justice will apply the Wire Act only to sports betting³, participants must still contend with the specter of the Unlawful Internet Gambling Enforcement Act of 2006 (31 U.S.C. §§ 5361-5367, “UIGEA”). UIGEA prohibits any person engaged in the business of betting, as defined, from knowingly accepting credit, electronic fund transfers, checks, or any other payment instrument involving a financial institution from a person participating in unlawful internet gambling. State lotteries are neither specifically referenced nor specifically excluded from the provisions of UIGEA. However, the term “unlawful internet gambling” is defined as including bets or wagers involving the use of the internet where the bet or wager is unlawful under any federal or state law. Consequently, it appears accepting any form of payment involving a U.S. financial institution for lottery activities conducted using the internet either in violation of 18 U.S.C. § 1301, another federal law, or any state law prohibition could subject an entity to prosecution under UIGEA.

¹ *Pic-A-State, Pa., Inc. v. Reno*, 76 F.3d 1294, 1297 (3d Cir. 1996)

² 18 U.S.C. § 1307(a)(1). Section 1307(a)(2) permits the advertisement of lawful lottery schemes by non-profit organizations, or by commercial organizations where the lottery activity is clearly occasional and ancillary to the primary business of the organization.

³ See *New Hampshire Lottery Comm’n et. al v. Rosen*, 986 F.3d 38 (1st Cir. 2021)

Courier services a growing trend

One of the growing innovations in the lottery arena is the use of lottery courier services. While lottery courier services as a concept have been around for decades,⁴ the proliferation and adoption of these services is a relatively new phenomenon. The “new” model of lottery courier services relies on technological innovation and current consumer trends to reach both the traditional lottery player-base as well as those demographics that have historically proven to be difficult for brick-and-mortar lottery retailers to capture.

Most popular lottery courier services operate similarly to other commonly recognized online purchasing applications. Lottery customers create an account on the courier’s mobile or desktop application. Customers are required to upload identifying information and provide a method or methods to fund their account. When the customer places an order through the lottery courier service’s app, a courier employee is assigned to complete the transaction by purchasing the desired lottery ticket from a licensed lottery retailer. The courier employee scans and uploads the serial number and other identifying information from the purchased ticket to the app platform, where it is linked to the purchaser’s account for viewing and tracking purposes. The courier then acts as an escrow service located in the state of purchase, which requires compliance with all applicable state laws related to such services, as well as an office and additional staff. Winners are usually notified through the app and via email to begin the prize claim process.

This shift from traditional in-person lottery purchasing to an app-based model is designed to appeal to a younger, more tech savvy audience that favors convenience and speed over the experience of visiting a familiar location or store clerk. To date, providers of such services have been largely successful in reaching this group. The mobile app also provides state lotteries a fringe benefit by subsidizing some marketing costs

– the app must “advertise” the available games as well as retail locations to direct customers through the purchase flow where before this type of marketing was solely a state lottery responsibility.

The formal adoption of the practice by New Jersey in 2017⁵ serves as the beginning of the current era of lottery courier services. Currently, 16 states⁶ and the District of Columbia authorize some form of lottery courier service. New Jersey and New York license the services directly under their own license type⁷. Other states that have officially addressed lottery courier services do so either through administrative rulemaking, or by attempting to fit the services into a previously existing category or license type (e.g. “merchant of record”). Texas chose to address the proliferation of these services with an entirely hands-off approach, stating that “the lottery courier business model is not contemplated by current Texas law and is now being examined closely by the Texas Legislature. Legal and policy issues related to courier services are for the Texas Legislature to determine.”^{8,9} Washington took the opposite approach and claimed that when gaming statutes fail to specifically prohibit a practice such as lottery courier services, this failure to address the practice does not imply authorization. This position led to the Washington State Gambling Commission issuing a cease-and-desist letter to Mido Lotto, whose parent company responded by filing a declaratory action against the Commission¹⁰. Clearly, the U.S. currently lacks a consensus view on where these services fall within the regulated gaming space. It is therefore imperative that regulators plan ahead to design an environment that best aligns with their goals in this area.

Furthermore, despite some predictions by opponents of the courier services, there does not appear to be any evident cannibalization of brick-and-mortar retailer based sales. This lack of overlap appears to support the premise that lottery courier services serve an audience beyond traditional lottery customers.¹¹ Additionally, the businesses appear to be

4 <https://www.mcall.com/1989/03/02/lottery-couriers-say-they-have-a-sure-bet/>

5 N.J. Stat. § 5:9-14.3

6 Arizona, Arkansas, Colorado, Idaho, Indiana, Massachusetts, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Texas, West Virginia.

7 N.J. Stat. § 5:9-14.3; N.Y. Comp. Codes R. & Regs. tit. 9 § 5014.1.

8 *Lottery watchdogs: Is there a way to beat the system?*, quoting the Texas Lottery Commission. Originally posted May 1, 2023, available at <https://www.cbsnews.com/texas/news/lottery-watchdogs-is-there-a-way-to-beat-the-system>. Last accessed September 11, 2023.

9 Note Texas’ 2023 General Appropriations Act included a rider directing the commission to prohibit the activity of couriers after the Texas House did not consider legislation designed to ban courier operations. However, the Texas Governor’s proclamation on the signing of the act included a reference to the likely unconstitutional nature of the rider language.

10 *Lottery Now, Inc. v. Wash. St. Gambling Comm’n.*, Case No. 21-2-01794-34 in the Thurston County Superior Court. Summary judgment motion hearings are set for October 2023.

11 Spectrum Gaming Group. *Future of Lottery Courier Services: Identifying Opportunities, Challenges*. P. 14-16. June 27, 2023.

generally successful in producing retail sales. Although Texas does not license or recognize the “private business activity” of lottery courier services, the Texas Lottery Commission noted that sales associated with these services reached over US\$100 million during the first seven months of 2023.¹²

Regulating courier services

Lottery courier services appear to provide an additional revenue stream from a new audience without harming the ongoing lottery sales environment, making their adoption or integration into the system an attractive option. When attempting to integrate these services into their framework, either independently or as a result of various outside pressures, regulators must address several key elements of the legitimization to create a transparent and intelligible regulatory environment.

Primarily, it will be necessary to determine what the specific goals for a courier service program are, and what action is necessary to create oversight of the services. Bringing stakeholders back to the table to fix loopholes or otherwise adjust the initial output is difficult, therefore it is imperative to begin with as detailed and comprehensive a plan as possible. Next, stakeholders must determine whether executive and/

or legislative action will be necessary to implement the plan. Key to this determination will be whether the courier service model or any of its vital parts are explicitly prohibited, such as whether payment options are restricted, the extent to which a ban on “online sales” expands, or whether purchasing as an agent is permissible. If the services are not explicitly barred, or if there are current licensing schemes in place that can accommodate them, then the lighter task of regulatory rulemaking or the state equivalent can be practical. Otherwise, overcoming legislative inertia will be necessary.

At this stage, the scope and manner of the offerings permissible from the lottery courier services must also be developed. The services, like any industry, cannot be expected to self-regulate as they will operate in their best interests alone. Thus, establishing comprehensive procedures with clear definitions for key terms and roles within the system will be important. Moreover, the specific types of offerings that can be made by the couriers must also be defined. Can the couriers offer subscription services? What about lottery pools or multi-draw options? The courier services will be understandably aggressive in their offerings and activities and attempting to “fix” perceived loopholes later on will be seen as trying to claw back an established privilege.

Next, it will be vital to instill a sense of legitimacy in the

¹² Texas Lottery Commission 2022 Annual Report and 2023-2024 Comprehensive Business Plan. Available at https://www.texaslottery.com/export/sites/lottery/Documents/TxLottery_AnnualReportBusinessPlan2024.pdf. Last accessed Sep. 11, 2023.



new service options. The legitimacy of the drawings and the protection of public welfare are primary concerns for state lottery agencies, who often face questions about controls to ensure confidence in the validity of the drawing process. Engaging with qualified independent testing outlets to evaluate the safety and security practices of the courier services can provide stakeholders with the requisite peace of mind to continue to view lottery drawings as snag free. Safeguards and procedures will need to be in place to prevent sales beyond the lottery's jurisdiction, to prevent sales to minors, and to prevent other unfair or deceptive practices. Furthermore, it will be important to address the permissible use of lottery trademarks and other intellectual property in advertisements since, as mentioned previously, lottery courier services also provide incidental marketing to the lottery agencies. Mandating agency approval of the advertisements that courier services conduct will be key to maintaining a consistent image

for the lottery brand.

Once the scope of the potential services is established, evaluating the consumer protection and customer service aspects of the processes can be tackled. Will the couriers be required to post a bond for any ticket redemption issues, and if so, what will that level be? Will redemption have specific requirements to ensure that it is simple, easy to understand, secure, and instills public confidence, and if so, how will it be implemented, measured, and tested? How will the courier services handle prize redemptions, specifically those that exceed the retailer payout cap and require personal redemption of the ticket? How will the physical tickets be retained and protected against theft or casualty? The answers to these questions must be clear and any accompanying regulations in place before widespread use of the courier services commences so that lottery consumers are informed as to how the products

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work and what their responsibilities will be.

The courier services will have access to a vast amount of personal and financial information from customers. The responsibility for securing this data and ensuring that applicable financial standards are upheld should also be addressed through regulation. Most lottery agencies will not have employees well versed in banking regulations, anti-money laundering, know-your-customer best practices, and associated federal/state requirements. This situation creates a need for independent, certified auditing of internal controls and compliance standards that should be integrated into lottery courier service regulations, particularly given the industry's potential use for illegal activities and the dollar amounts of prizes at stake. Similar protections are necessary for both customers' personal identities and payment information. Recordkeeping requirements must also be addressed. It should be clear from the outset what information must be retained by a courier service, the proper retention period, and the method and timeframes in place for sharing the information with the state lottery agency upon request.

Thereafter, like all strong regulatory bodies, enforcement mechanisms must be in place to permit the lottery agency to coerce compliance or responsiveness when necessary. Regulations should be in place that permit the agency to levy penalties, either administrative or financial, within reasonable timeframes, and the penalties for violations should be clear to any lottery courier service seeking to do business in the jurisdiction. Courier services should be obliged to disclose any disciplinary or other negative action taken against them in other jurisdictions, and to the extent that sharing of such information exists between state agencies, such information should be included in the appropriate database.

Regulators must also decide whether they intend to use the brick-and-mortar vendors, who are already within the agency's regulatory sphere as the pressure point (through suspension or revocation of lottery privileges unless dealings

with a rogue courier service are terminated, for example), or whether they will attempt to license or otherwise have jurisdiction over the courier services themselves. Either way, the penalties must be both sufficient and timely enough to incentivise compliance and empower the regulator with true enforcement power.

Finally, there must be sufficient information, with marketing materials distributed by the agency and the lottery courier services, to allow customers to understand the distinction between the lottery agency and courier service. Lottery customers need to understand who is responsible in the event of errors. For example, if tickets were available at the retailer and the courier botched the purchase or retention of the ticket, it is clear that the lottery agency itself is not at fault and the customer can still play with confidence through either another service or via traditional retail purchasing. All marketing materials must also comply with the provisions of 18 U.S.C. §1301-1307.

Conclusion

The gaming industry will continue to evolve, creating new revenue ideas, new gaming practices, and new questions for regulators to consider as they try to maintain the standards set by their respective legislature. Lottery courier services using app platforms are one of the current trends, and as their spread is limited to around one-third of the U.S. market, their expansion and evolution can be expected to continue over the next several years. By considering and addressing the concerns identified prior to the launch of lottery courier services in a given jurisdiction, regulators can attempt to stay ahead of the curve and get a better understanding of the challenges they will face as alternative retail channels continue to prosper. However, stakeholders on both sides must be aware of the interplay between the express provisions of individual state laws and the overarching federal restrictions in 18 U.S.C. 1301 and UIGEA to ensure that any new retail options comply with all applicable restrictions.

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