

February 26, 2025

OPINION
OF
RAÚL TORREZ
Attorney General

Opinion No. 2025-07

To: Michelle Lujan Grisham, Governor, State of New Mexico; Larry Phillips Jr., Governor, Ohkay Owingeh Pueblo; Randall Vicente, Governor, Pueblo of Acoma; Wilfred Herrera, Jr., Governor, Pueblo of Laguna; Thora Walsh Padilla, President, Mescalero Apache Tribe; Jenelle Roybal, Governor, Pueblo of Pojoaque; J. Michael Chavarria, Governor, Pueblo of Santa Clara; Max Zuni, Governor, Pueblo of Isleta; Felix L. Chaves, Governor, Pueblo of Sandia; Anthony Ortiz, Governor, Pueblo of San Felipe; Milton Herrera, Governor, Pueblo of Tesuque

Re: Attorney General Opinion – The Legality of the Jackpocket App in New Mexico

Questions

1. Does the New Mexico Lottery Authority’s (“NMLA”) Memorandum of Understanding (“MOU”) with Jackpocket, Inc., which allows people to play the New Mexico Lottery online using mobile devices or computers and a “courier service,” trigger the contingency in Paragraph 17 of New Mexico’s Tribal-State Class III Gaming Compact (“Indian Gaming Compact”) requiring the parties to reopen good faith negotiations if any internet gaming is authorized in New Mexico?
2. Does the Jackpocket app violate NMSA 1978, Section 30-19-15 (1979), which prohibits any person from, directly or indirectly, knowingly accepting for a fee, property, salary or reward anything of value from another to be transmitted or delivered for gambling or pari-mutuel wagering?
3. Does the Jackpocket app violate NMSA 1978, Section 6-24-15(A) (1995), which prohibits the sale of lottery tickets for other than the stated price without signed authorization by the CEO of the NMLA?
4. Does Jackpocket require a certificate of authority from the NMLA, pursuant to Section 6-24-15(A), to conduct its operation pursuant to NMSA 1978, Section 6-24-14(A) (1995)?

Answers

1. It is the opinion of this Office that the Jackpocket app constitutes internet gaming. As a consequence, its use within the State of New Mexico triggers the Indian Gaming Compact's requirement that the State reopen good faith negotiations with the Tribes to evaluate the impact, if any, of internet gaming and consider adjustments to the Compact.
2. Assuming that the New Mexico Lottery operates on a pari-mutuel basis, in which the jackpot is divided among all winners, Jackpocket's operations appear to be contrary to Section 30-19-15.
3. Jackpocket is, in effect, reselling lottery tickets for a profit. Accordingly, if it does not have written authority to do so from the chief executive officer of the New Mexico Lottery Authority, its operations appear to be in violation of Section 6-24-15(A).
4. Jackpocket is effectively selling lottery tickets. Therefore, it needs a certificate of authority from the NMLA to act as a lottery retailer in New Mexico.

Background

This Opinion concerns a company called Jackpocket, which created an application (app) that allows individuals to play state lottery games online using mobile devices or computers. Jackpocket entered into an MOU with the NMLA in March of 2022. Under this MOU, Jackpocket provides a "courier service" pursuant to which "a person physically located in New Mexico accesses a mobile device application and places an order for Jackpocket to physically purchase lottery tickets on the person's behalf[.]" Users of the Jackpocket app deposit money in an account for the purpose of playing the lottery. Jackpocket charges a percentage-based fee for users to place money in their accounts.

Jackpocket's operations in New Mexico raise several legal issues.

First, the nature of Jackpocket's operations implicates New Mexico's Indian Gaming Compact, which the Tribes who requested this Opinion are all parties to. The current Indian Gaming Compact was based on an understanding that internet gaming was illegal in New Mexico, and that

[i]n the event that internet gambling is authorized within the State, the State and the Tribe agree that they will reopen good faith negotiations to evaluate the impact, if any, of internet gaming and consider adjustments to the Compact. The parties understand and agree that it is not possible to determine at this time what, if any adjustments to the Compact would be necessary.

2015 Indian Gaming Compact § 17.

Beyond the provisions of the Indian Gaming Compact, state law prohibits any person from

directly or indirectly, knowingly accept[ing] for a fee, property, salary or reward anything of value from another to be transmitted or delivered for gambling or pari[-]mutuel wagering on the results of a race, sporting event, contest or other game of skill or chance or any other unknown or contingent future event or occurrence whatsoever.

Section 30-19-15.

Finally, lottery games in New Mexico are governed by the New Mexico Lottery Act, NMSA 1978, §§ 6-24-1 to -34 (1995, as amended through 2007). The Lottery Act includes requirements such as that “[t]he price of each lottery ticket shall be clearly stated on the ticket” and that “[n]o person shall sell a ticket at a price other than at the price established by the authority unless authorized in writing by the chief executive officer.” Section 6-24-15(A). The Lottery Act also forbids altogether the sale of any lottery ticket at a price other than that fixed by the authority, Section 6-24-32(A)(1), and requires that “[l]ottery tickets shall be sold only by a lottery retailer who, pursuant to a contract with the authority, has been issued a certificate of authority signed by the chief executive officer,” Section 6-24-32(A)(1).

The extent to which these matters impact Jackpocket’s operations in New Mexico are addressed in more detail below.

Analysis

1. The Jackpocket app constitutes internet gaming and, as a consequence, its use within the State of New Mexico triggers the requirement that the State reopen good faith negotiations with the Tribes to evaluate its impact.

As noted above, under Section 17 of the Indian Gaming Compact, the authorization of “internet gaming” in New Mexico triggers a requirement that the State reopen good faith negotiations with the signatory Tribes to consider the impact on Indian Gaming operations. To determine whether Jackpocket’s operations trigger this requirement, it is necessary to determine the meaning of “internet gaming” within the Indian Gaming Compact.

The Compacts are contracts between New Mexico and the Tribes. *See Sipp v. Buffalo Thunder, Inc.*, 2024-NMSC-005, ¶¶ 10, 15. As such “[g]eneral principles of federal contract law govern . . . Compacts, which were entered pursuant to [the Indian Gaming Regulatory Act (IGRA)].” *Citizen Potawatomi Nation v. Oklahoma*, 881 F.3d 1226, 1239 (10th Cir. 2018) (citing *Pauma Band of Luiseno Mission Indiana v. California*, 813 F.3d 1155, 1163 (9th Cir. 2015)). “Under federal contract principles, if the terms of the contract are not ambiguous, this court determines the parties’ intent from the language of the agreement itself.” *Id.*; *see also Sipp*, 2024-NMSC-005, ¶ 16 (analyzing the plain language of the Indian Gaming Compact to interpret its provisions).

In addition, because these contracts were signed under the authority provided by IGRA, that statute is implicitly incorporated into the Compact. *See Richard A. Lord, Williston on Contracts* § 30:20 (4th ed. 1999) (“Where the subject matter of the contract between the parties lies in an area covered by federal law, they necessarily adopt, as a portion of their agreement, the applicable provisions

of the particular Act of Congress.”). IGRA itself is to be read *in pari materia*, and construed together with other statutes covering the same subject matter. *See Russell v. Dept. of the Air Force*, 915 F. Supp. 1108, 1115 (D. Colo. 1996). One such statute is the Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §§ 5361 to 5367 (UIGEA).

Applying these principles, it is the opinion of this Office that Jackpocket’s operations constitute “internet gaming” under the terms of the Indian Gaming Compact.

Neither the Compact itself nor IGRA define “internet gaming,” or either of the two words that make up the phrase. However, the UIGEA, defines “internet” as “the international computer network of interoperable packet switched data networks.” 31 U.S.C. § 5362(5). This is simply tech-speak for connections that allow computers and smartphones to transmit small portions of data at a time to each other, without creating a dedicated connection, as would be required for a traditional telephone call. A wired broadband fits this definition, as do 4G and 5G networks. The types of devices that operate in this manner also correspond with the “Potter Stewart¹” intuitive definition that most people have for the internet.

Similarly, “gaming” has several definitions, but is commonly understood as “the practice or activity of playing games for stakes,” akin to “gambling.” *Gaming*, (noun) MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/gaming>. The terms “gaming” and “gambling” can thus be used interchangeably.

Based on these definitions, Jackpocket’s activities are firmly within the definition of “internet gaming”: the lottery is a game that is played for stakes, and Jackpocket allows an individual to play this game utilizing the internet. The fact that a Jackpocket employee still physically places the bet on a paper lottery ticket is irrelevant. *See* 31 U.S.C. § 5362(10)(A) (defining “unlawful internet gaming as unlawful bets or wagers as unlawful gambling conducted, *at least in part*, using the internet” (emphasis added)). Since the first step in playing the lottery using Jackpocket is done through the app, Jackpocket’s operations amount to internet gaming. Indeed, public lotteries, played online, have been considered to be encompassed by the term. *See* Jennifer W. Chiang, *Don’t Bet On It: How Complying with Federal Internet Gambling Law is not Enough*, 4 SCHIDLER J. L., COM. & TECH., 1, 2 n.2 (2007) (noting, as examples of legal internet gambling, that “the French and German national lotteries are available online to the respective nationals[, and] Lichtenstein allows its national lottery to be played worldwide”).

In short, the MOU allowing for the use of Jackpocket in New Mexico is considered the authorization of internet gaming, triggering the Indian Gaming Compact’s requirement under Section 17 that the State reopen good faith negotiations with the Tribes to evaluate the impact of internet gaming and consider any adjustments to the Compact. Considering that the parties who requested this Opinion may wish to address in negotiations whether Jackpocket’s operations

¹ Justice Stewart famously stated, with regard to obscenity, “I know it when I see it.” *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Similarly, it is likely that that most people have an intuitive definition of the internet, involving the use of computers and smartphones (other than basic phone functionality) to communicate.

constitute an expansion of gaming under Section 11(D) of the Compact, this Opinion does not address such question.

2. To the extent that the New Mexico lottery operates on a pari-mutuel basis, Jackpocket’s operations appear to violate Section 30-19-15.

Jackpocket’s operations potentially run afoul of New Mexico law prohibiting any person from

directly or indirectly, knowingly accept[ing] for a fee, property, salary or reward anything of value from another to be transmitted or delivered for gambling or pari[-]mutuel wagering on the results of a race, sporting event, contest or other game of skill or chance or any other unknown or contingent future event or occurrence whatsoever.

Section 30-19-15(A).

This statute is to be interpreted according to the basic canons of statutory interpretation. The ultimate goal is to “ascertain and give effect to the intent of the legislature.” *State v. Smith*, 2004-NMSC-032, ¶ 8, 136 N.M. 372. Our analysis begins with a review of the plain “language of the statute itself.” *Id.* ¶ 9. However, it is important to look beyond the statutory language “when the results [of an unmodified plain language analysis] would be absurd, unreasonable, or contrary to the spirit of the statute.” *Id.* ¶ 10.

In the context of Article 19 of Chapter 30, “gambling” has a specific definition, found in NMSA 1978, Section 30-19-2 (1963), as

- A. making a bet;
- B. entering or remaining in a gambling place with intent to make a bet, to participate in a lottery or to play a gambling device;
- C. conducting a lottery; or
- D. possessing facilities with intent to conduct a lottery.

These definitions are further clarified by NMSA 1978, Sections 30-19-1(B), (E) (1997), which provide that a “bet” does not include a lottery, or any “betting otherwise permitted by law.” In addition, the term “lottery” does not include the state lottery. Thus, playing the state lottery is not “gambling” for the purposes of Section 30-19-15.

However, as noted above, Section 30-19-15 also bans accepting, for a fee, money for pari-mutuel wagering “on the results of a race, sporting event, contest or other game of skill or chance or any other unknown or contingent future event or occurrence whatsoever.” The term “whatsoever” is defined as “of any kind or amount at all.” *Whatsoever*, THE BRITANNICA DICTIONARY, <https://www.britannica.com/dictionary/whatsoever> (last accessed December 12, 2024).

The use of the word “whatsoever” suggests that the legislature intended to emphasize that there would be no unstated exceptions to this gambling or wagering prohibited by Section 30-19-15. Accordingly, the ban on accepting a fee for pari-mutuel wagering on an unknown or contingent

event could conceivably extend to an “event” in which numbers are drawn. Accepting a fee to facilitate pari-mutuel wagering this type of game could be encompassed by this ban.

This raises the question of whether the state lottery is considered to be pari-mutuel wagering. Pari-mutuel wagering or betting is defined as “[a] system of gambling in which bets placed on a race are pooled and then paid (less a management fee and taxes) to those holding winning tickets.” *Parimutuel Betting*, BLACK’S LAW DICTIONARY (12th ed. 2024). While this general definition appears to be limited to races, such a limitation would be absurd in the context of the statute, which also encompasses any game of skill or chance, “or any other unknown or contingent future event or occurrence whatsoever.” Section 30-19-15(A).

Thus, the term “pari-mutuel wagering” in Section 30-19-15 is best understood in this context as any game in which bets are pooled and the jackpot (which is the pool total minus the house’s take) is distributed among the winners. While this would not apply to “scratchers,” in which a person who buys a winning ticket wins any amount revealed by a scratch off, it would likely apply to the most popular lottery games, in which six numbers are selected and the pooled winnings divided amongst all who choose those six numbers. Accordingly, many of Jackpocket’s operations appear contrary to Section 30-19-15.

3. Due to its markup, Jackpocket appears to be in violation of the Lottery Act.

Jackpocket’s fee may be a violation of the Lottery Act. There are two provisions of the Lottery Act that pertain to the sale of tickets at other than their stated price. The first, Section 6-24-15(A), states that “[t]he price of each lottery ticket shall be clearly stated on the ticket. No person shall sell a ticket at a price other than at the price established by the authority unless authorized in writing by the chief executive officer [of the New Mexico Lottery Authority].” The second, Section 6-24-32(A)(1), states that “[i]t is unlawful for any person to sell a lottery ticket at a price other than that fixed by the authority pursuant to the New Mexico Lottery Act.”

Here, the MOU does not explicitly authorize Jackpocket to sell tickets at a markup, let alone authorize the specific markup required by Jackpocket. Therefore, Jackpocket’s markup likely violates the Lottery Act.

Although an argument could be made that there is no markup, because the fee is attached to the depositing of money into the purchaser’s account, rather than for the purchase of the ticket itself, such conclusion is contrary to the legislature’s intent. Under the Jackpocket “courier service” model, the purchaser’s money is placed in an account for the express purpose of a later purchase of lottery tickets. Charging a fee for this purpose undermines the legislature’s intent to bar markups on lottery tickets without written authorization.

4. Jackpocket must be approved as a lottery retailer to operate in New Mexico.

Finally, New Mexico law requires that “[l]ottery tickets shall be sold only by a lottery retailer who, pursuant to a contract with the authority, has been issued a certificate of authority signed by the chief executive officer” of the NMLA. Section 6-24-14(A). This is silent regarding the resale of a lottery ticket that had already been purchased from a retailer. However, this silence and ambiguity is clarified by another section of the Lottery Act, which states that “[i]t is unlawful for any person

other than the authority or a lottery retailer to sell *or resell* any lottery ticket.” Section 6-24-32(A)(2) (emphasis added). By purchasing a lottery ticket for a customer who has provided a fee, Jackpocket has essentially sold or resold a lottery ticket to an app user. For that, it needs to be a lottery retailer.

The sale of lottery tickets using the internet raises other concerns, as well. For instance, it is unlawful to sell lottery tickets to anyone under the age of eighteen. Section 6-24-32(A)(3). A party selling lottery tickets online would not be able to readily determine if the purchaser is a minor and to request some proof of age if appropriate. The MOU states that Jackpocket will take measures to prevent sales to minors, but it is unclear what measures, if any, could be successful in this regard. In total, any authorization to sell lottery tickets online appears contrary to many provisions of the Lottery Act.

Conclusion

The Memorandum of Understanding between the New Mexico Lottery Authority and Jackpocket constitutes the authorization of internet gaming in New Mexico. As such, it triggers the renegotiation required by Section 17 of the Indian Gaming Compact between New Mexico and the Tribes.

Moreover, the MOU appears to run afoul of New Mexico law as described above. Jackpocket’s continued operation in New Mexico is therefore subject to challenge.

Please note that this opinion is a public document and is not protected by the attorney-client privilege. It will be published on our website and made available to the general public.

RAÚL TORREZ
ATTORNEY GENERAL

/s/ Lawrence M. Marcus
Lawrence M. Marcus
Assistant Solicitor General