



GAMING, GAMBLING AND LOTTERIES

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FEDERAL AND STATE REGULATION OF ADVERTISEMENTS FOR GAMING, GAMBLING AND LOTTERIES

I. FEDERAL LAW

Generally speaking, federal laws prohibiting the broadcast of any advertisement of gaming, gambling and lotteries are subject to such broad exceptions that the laws are no longer enforceable.

A. Gambling Activity Permitted Under Federal Law

The FCC – which broadly defines a lottery as “any game, contest, or promotion that combines the elements of prize, chance and consideration” – provides a number of exceptions to its one-time ban on lottery advertising. Based on legislative exemptions passed by Congress, the following advertisements are permitted by the FCC:

1. Advertisements for a State’s lottery by Stations licensed to a location in: (i) that State; or (ii) any other State that conducts such a lottery;
2. Advertisements for gambling conducted by an Indian Tribe pursuant to the Indian Gaming Regulatory Act; and
3. Advertisements for lotteries that are authorized or not otherwise prohibited by the State in which they are conducted, are conducted by a not-for-profit or governmental organization, or are conducted as a promotional activity by a commercial organization not in the primary business of conducting such lotteries.

See 47 C.F.R. § 73.211(c); 18 U.S.C. § 1304; 18 U.S.C. § 1307. In other words, the FCC permits advertisements for State-run lotteries, Indian gaming (including casino gambling), lotteries run by non-profits and governmental organizations and lotteries run by commercial organizations that don’t ordinarily conduct lotteries (e.g., a car dealer holding a car giveaway).

Moreover, the Supreme Court has declared unconstitutional the FCC’s prohibition of advertisements for private, for-profit casino gambling and casino-type gambling (e.g., slot machines and card table gaming) as applied to states where gambling is legal. *See Greater New Orleans Broadcasting Ass’n v. United States*, 527 U.S. 173 (1999). Thus, if State X permits gambling, the FCC may not prohibit ads for private casinos in State X from being broadcast on Stations in State X, or in any other State that permits private casino and casino-type gambling, even if the Station’s signal carries over into States

where private gambling is not legal (these were the basic facts presented in *Greater New Orleans*).

The Supreme Court considered the ban on such advertising unconstitutional based on the fact that the very same law in which the ban appeared contained many of the exemptions outlined above. *See* 18 U.S.C. § 1304. According to the Supreme Court, maintaining the ban on lawful private casino gambling while exempting other similar forms of gambling within the same statute rendered the statute incoherent and the ban unjustifiable.

Because the Supreme Court found fault with the entire law, as written, the Department of Justice and the FCC have stated that they will not enforce the federal statute, as written, against broadcasters airing advertisements for lawful casino gambling, regardless of whether the broadcaster is located in a State that permits casino gambling or in a State that does not. DOJ and the FCC have thus construed *Greater New Orleans* as reaching beyond the immediate facts of that case to deem any application of the federal ban on advertising lawful private casino gambling unconstitutional: if private casino gambling is legal in State X, not only may Stations in State X broadcast advertisements for such gambling, but, as far as the federal government is concerned, so may Stations in State Y, even if private casino gambling is illegal there.

On a cautionary note, the Supreme Court did not say that any and all bans on advertising lawful private casino gambling would violate the Constitution, only the ban contained in this particular law as written. This leaves open the possibility, however remote, that Congress could attempt to revise the statutory ban to pass constitutional muster.

B. Federal Law Prohibits Ads for State-Operated Lotteries in States that do not Permit such Lotteries

There is one significant exception to the general unenforceability of federal laws regulating gaming, gambling and lotteries. In the context of State-operated lotteries, the Supreme Court has upheld the constitutionality of a federal law prohibiting broadcast advertisements for State-operated lotteries in States that do not permit State-operated lotteries. *See United States v. Edge Broadcasting*, 509 U.S. 418 (1993); 18 U.S.C. § 1307. Thus, if State Y does not have a State-operated lottery, Stations in State Y may not air advertisements for the State-operated lottery in neighboring State X.

C. Federal Law does not Preempt State Law in the Gambling Context

Finally, it is important to keep in mind that federal laws generally do not preempt state law in this context. While the federal government may no longer regulate lottery advertising to any great extent, pending further word from the Supreme Court, the States remain free to do so. Thus, Stations remain subject to their respective State's laws concerning broadcast advertisements for gaming, gambling and lotteries occurring both in-state and out-of-state.

II. ALABAMA LAW

A. Promoting Unlawful Gambling a Crime

Under Alabama law, “[a] person commits the crime of promoting gambling if he knowingly advances or profits from unlawful gambling activity otherwise than as a player.” AL Code § 13A-12-22. Similarly, “[a] person commits the crime of conspiracy to promote gambling if he conspires to advance or profit from gambling activity otherwise than as a player.” AL Code § 13A-12-23.

For purposes of these provisions, Alabama considers conduct directed toward “the solicitation or inducement of persons to participate” in unlawful gambling as conduct that “advances” gambling. AL Code § 13A-12-20(1). Thus, both of these criminal provisions apply to broadcasters in Alabama airing ads for unlawful gambling.

B. The Definition of Unlawful Gambling

Alabama defines “gambling” as follows:

A person engages in gambling if he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he or someone else will receive something of value in the event of a certain outcome.

AL Code § 13A-12-20(4). Gambling activity is considered unlawful in Alabama unless it is expressly authorized by law. *See* AL Code § 13A-12-20(12). In other words, any gambling that has not been considered and approved by the Alabama legislature is deemed illegal.

C. Out-of-State Gambling

Alabama’s criminal code states that “[i]t is no defense under Section 13A-12-22 [the crime of promoting gambling] relating to a lottery that the lottery itself is drawn or conducted outside Alabama and is not in violation of the laws of the jurisdiction in which it is drawn or conducted.” AL Code § 13A-12-29. At a minimum, Stations in Alabama are prohibited under this provision from broadcasting advertisements for “lotteries” occurring out-of-state.

Alabama’s definition of “lottery” is more narrow than its definition of gambling. Alabama law defines a “lottery” as follows:

An unlawful gambling scheme in which: (a) the players pay or agree to pay something of value for chances, represented and differentiated by numbers or by combinations of numbers or by some other medium, one or more of which chances are to be designated by the winning ones; and (b) the winning chances

are to be determined by a drawing or by some other fortuitous method; and (c) the holders of the winning chances are to receive something of value.

AL Code § 13A-12-29. Because Alabama law defines “lottery” more narrowly than “gambling,” there may be some forms of out-of-state gambling that are not expressly covered by this particular provision.

However, keep in mind that Alabama considers “unlawful” any gambling that has not been expressly approved by the Alabama legislature. *See* AL Code § 13A-12-20(12). Thus, Alabama’s authority to reach in-state ads for out-of-state gambling under § 13A-12-22 is technically as great as its authority to reach in-state ads for out-of-state lotteries, despite the fact that Alabama has expressly codified this authority with respect to lotteries but not as to other forms of gambling. Whether Alabama’s Attorney General’s Office chooses to enforce a prohibition of in-state broadcasts of ads for out-of-state lotteries or, more broadly, gambling, is a separate question from its authority to do so. And the limits on Alabama’s authority to prohibit in-state ads for out-of-state gambling are set by what Alabama permits within its own borders – i.e., if Alabama permits certain forms of bingo or dog-racing within its borders, then it may allow in-state Stations to broadcast ads for similar forms of out-of-state bingo and dog-racing. In any event, Alabama Stations should consult an attorney before broadcasting ads for any out-of-state gambling.

D. Lawful Gambling in Alabama

Various forms of gambling are permissible under Alabama law.

1. Bingo

The Alabama Constitution provides for the enactment of constitutional amendments applicable to particular localities rather than the whole state. These constitutional amendments can be, and have been, used to authorize forms of bingo in particular cities and counties in Alabama. Stations may broadcast ads for bingo only if a valid constitutional amendment authorizes bingo for the jurisdiction in question. And any bingo taking place within a jurisdiction must conform to the form of bingo described in the enabling constitutional amendment.

2. Greyhound Racing

Greyhound racing is expressly exempted from the criminal prohibition on gambling in the Alabama code. *See* AL Code § 13A-12-31.

3. Coin-Operated Games of Skill

Coin-operated games where skill predominates over chance in determining the outcome and the prize is worth no more than five dollars are permissible in Alabama pursuant to the so-called Chuck E. Cheese law. *See* AL Code 13A-12-76.