

'Bad actor' provisions thwart California i-gaming consensus

With a population of 38 million, California is poised to become the largest intrastate location for online poker. Yet disagreements have kept legislation enabling online poker from being enacted so far. The 'Internet Poker Consumer Protection Act of 2014' aims to find consensus and is currently in the Californian legislature. Although the draft bills making up the Act have considerable tribal support, a major issue remains over the use of 'bad actor' provisions in the bills. Heidi McNeil Staudenmaier of Snell & Wilmer LLP examines the controversy created by the 'bad actor' clauses and the overall outlook for i-gaming in California.

If California legalises online gaming this year or in the near future, some reports have estimated that i-gaming in the Golden State could produce as much as \$729 million in gross gaming revenue in the first year alone. Those potential numbers are certainly at the core of the intense ongoing debate.

There are numerous challenges facing the i-gaming market in California before these lofty financial projections become a reality. Various i-gaming legislation has been introduced - and subsequently languished - since 2011 in the California legislature. The current Senate Bill 1366 is sponsored by Senator Lou Correa and the Assembly Bill 2291 is sponsored by Assemblyman Reginald Jones-Sawyer. The proposed legislation has been titled 'The Internet Poker Consumer Protection Act of 2014.' The bills will require two-thirds of the vote to achieve passage.

One of the primary roadblocks to

passage of internet gaming legislation has been the lack of support and consensus among some of the state's wealthier and powerful gaming tribes near the populous urban centres. However, in June of this year, a coalition of 13 tribes led by the Pechanga Band of Luiseno Indians announced their agreement to unified language that would authorise intrastate internet poker in California. In a letter to Correa and Jones-Sawyer setting forth the proposed legislative amendments, the coalition states that 'We are proud to announce that we have reached a consensus that builds upon the pillars of previous legislation.' The coalition's letter to the California legislators added that the group supports legislation that 'safeguards consumers and the vulnerable from dishonest and unsuitable operators.'

Another major gaming power in the state - the Morongo Band of Mission Indians along with three Southern California card clubs - has voiced strong opposition to the online poker bill and has been at odds with the Pechanga-led group. The major sticking point appears to be the 'bad actor' provisions in the proposed legislation. These provisions would preclude the involvement of partner companies, or assets, involved in taking California wagers after passage of the Unlawful Internet Gambling Enforcement Act ('UIGEA'). Specifically, the bill's language provides: 'There shall be a rebuttable presumption that an applicant for a service provider license is unsuitable if the service provider or any corporate or marketing affiliate of the service provider, accepted any wager or engaged in transactions related to such wagers from persons in the United States in any form of Internet gaming after December

31, 2006.' This language would effectively shut out PokerStars, a proposed partner of the Morongo Band's internet gaming plans.

PokerStars and its now defunct affiliate Full Tilt Poker reportedly controls more than 50% of the global online gaming market outside of the US. PokerStars, however, was involved in the 'Black Friday' federal crackdown on illegal internet gambling in April 2011. PokerStars' founder and two other company officials were indicted in connection with bank fraud, wire fraud and money laundering charges. Full Tilt went out of business as a result of the indictments. PokerStars ultimately forfeited a hefty chunk of cash (\$731 million) in coming to a settlement with the US Justice Department. The federal indictments still hang over the individuals. As a result of the forfeiture payment, the Justice Department opined that PokerStars would not be prohibited from entering legal US online gaming markets. Notwithstanding this pronouncement from the federal officials, Nevada's online gaming laws effectively preclude PokerStars for five years, and New Jersey has refused to license PokerStars.

A further wrinkle to the PokerStars' scenario appeared in June, when the Montreal-based Amaya Gaming Group entered into an agreement to purchase the ultimate parent company of PokerStars and Full Tilt Poker in a transaction reportedly valued at \$4.9 billion. The pending acquisition and likely executive and other changes at PokerStars could cause New Jersey and other jurisdictions to soften their stance against PokerStars. The acquisition is planned to close this Fall.

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subject of intense debate. The Morongo Band has stated that it will 'strongly oppose the so-called "bad actor" language that is nothing other than a blatant attempt to provide certain interests with unfair competitive advantage by arbitrarily locking out trusted brands. We will vigorously oppose any legislation that includes this language.' The Morongo-led coalition has further declared: 'Efforts by a select few interests to rewrite longstanding and effective policy in order to gain a competitive market advantage or to lock out specific companies is not in the best interests of consumers or the state and will be vigorously opposed by our coalition, online poker players and many others.'

The Legislative proponents of the i-gaming bills plan to consult with the California Attorney General's office and others to review, among other things, the constitutionality of the 'bad actor' provisions. PokerStars has reportedly engaged Laurence Tribe, a Harvard University professor, to consult with and lobby the California legislators. The legislators have made it clear that they will not 'rubber stamp' the existing legislative drafts, nor will they rush the review process.

On 16 July 2014, 25 California card rooms sent a letter to the California legislators expressing their support of online legislation, but confirming that they are in support of retaining the 'bad actor' provisions.

California is already among the top states for Indian gaming revenue. In 2012, the tribal casinos generated nearly \$7 billion in gaming revenue (per Casino City's annual report). This number was nearly one-fourth of the total revenue generated by all tribal casinos across the country. The existing bills as well as the unified

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tribal draft limit internet poker licences to tribes and card rooms. Thoroughbred racing has been pushing to be included in the legislation, but has not been successful to date. It should be kept in mind, though, that the State of Delaware projected that it would bring in \$5 million in revenue from its first year of online gaming. After one year of operation in Delaware, the actual revenue figures have fallen far short of the expectations. The online operations brought in \$1.2 million in revenue; but after start up and vendor fees, the state's take-home was only \$318,000.

Nevertheless, expectations remain high in California. And, based on the likely lucrative nature of the online gaming industry in California, the plot thickened further in mid July. The Iipay Nation of Santa Ysabel Indians, located in a rural area east of San Diego, announced the launch of its online poker site, 'PrivateTable.com,' with the intention of offering real money play in the near future. At launch time, the site offered only free play poker. The tribe has announced publicly that it will offer real money online poker 'soon.' Only residents of California will be allowed to play for real money once those games go live. In addition, real money players must be physically located within the state and be at least 18 years of age.

The tribe contends that it is within its legal rights to offer poker over the internet on the premise that poker constitutes Class II gaming under the federal Indian Gaming Regulatory Act. Class II gaming is solely within the tribe's jurisdiction and authority, and cannot be regulated by the state. The tribe has partnered with the Kahnawake Gaming Commission to host part of its i-gaming servers on the Mohawk Territory of the

Kahnawake located near Montreal.

Announcing the site's launch, the tribe stated: 'The Tribe supports the effort by the Legislature to enact interactive gambling legislation in the State, but has decided to rely on the tribal sovereignty and the provisions of the federal Indian Gaming Regulatory Act (IGRA) to offer I poker from the Tribe's reservation.' The tribe has no plans to offer online slots or other casino style games requiring a Class III gaming compact with the state.

The tribe further stated that it has 'significant concerns' with the pending legislation. Specifically, the tribe commented: 'The current proposed legislation excludes all but the wealthiest gaming tribes from engaging in state-regulated online gaming. Smaller or remotely located tribes, such as Santa Ysabel, would not be able to meet the financial prerequisites for participation in online gaming as currently proposed, in spite of their years of experience conducting and regulating brick-and-mortar Class II and Class III gaming.' The licence fee as currently set forth in the pending legislation is \$10 million - paid up front. As such, this fee is a big deal to many of the tribes in the state.

The Santa Ysabel Tribe previously operated a small casino with 350 slot machines. Primarily due to its remote location, the casino closed its doors in February and the tribe owes approximately \$50 million from the casino operations.

It will be interesting to see how it all plays out. The California 2014 legislative session is slated to end on 30 September. But that likely will not be the end of the internet poker debate, regardless of whether legislation is passed or not.

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