

New California Online Poker Bills Seek Political Compromise and Consensus

But Could Prove Costly for the Santa Ysabel Tribe's Bet on Internet Bingo

By Heidi McNeil Staudenmaier and Anthony J. Carucci

California is now poised to consider new Internet poker legislation for the eighth consecutive year. Assemblyman Mike Gatto prefiled AB 9 in December 2014 and Assemblyman Reggie Jones-Sawyer introduced AB 167 in January 2015, both to be considered during the 2015 legislative session.

Assemblyman Gatto's bill would allow Indian tribes with gaming compacts and card clubs to operate online poker websites for players located in California. The bill excludes thoroughbred horse racing facilities from participating, as have previously introduced bills. As originally filed, AB 9 included an in-person player registration requirement. However, a

proposed amendment to the bill would remove this requirement. Additionally, in its current form, AB 9 contains a "bad actor" clause prohibiting any entity from obtaining a license to operate online poker if the company has accepted a bet or engaged in a financial transaction related to a bet after December 31, 2006 — the enactment date of the Unlawful Internet

Gambling Enforcement Act ("UIGEA").

Such bad actor language has stifled prior attempts to pass online poker legislation in California by thwarting consensus. A bad actor provision could effectively exclude PokerStars from participating in the California online poker market. PokerStars would likely fall within any bad actor clause due to the company's involvement in the "Black Friday" federal crackdown on illegal Internet gambling in April 2011.

PokerStars, and its affiliate Full Tilt, were acquired last year by Montreal-based Amaya Gaming Group. Certain language in AB 9 may provide a mechanism whereby Amaya could obtain a license. Amaya would need to demonstrate by clear and convincing evidence that the use of "covered assets," as defined by the bill (e.g., PokerStars's trademarks, software, technology, etc.), will not adversely affect the regulation and control of intrastate Internet poker. The bill does not indicate how this standard may be satisfied.

Assemblyman Gatto has publicly acknowledged "this is a very difficult bill" and that "there is a 50-50 shot we fail spectacularly once again."

The competing bill, AB 167, has been lauded by some as a "compromise" to AB 9. This bill arguably removes two of the largest stumbling blocks to consensus: (1) deletion of the bad actor provisions, and (2) inclusion of the race tracks being able to participate in the online poker market. AB 167 includes a one-time licensing fee





of \$10 million, credited against the gross gaming revenue tax, with license terms lasting four years. Licensed operators would be taxed at 8.5% of “gross gaming revenue.” That term is defined expansively to include all income from licensed games before deducting the cost of operating the games except for fees to marketing affiliates and payment processing fees.

Such taxation could have a positive impact on state revenue — some reports estimate that Internet poker in California could yield as much as \$729 million in gross gaming revenue in the first year alone. Indeed, both AB 9 and AB 167 are cognizant of the tremendous economic potential of legalizing some form of Internet poker in California. Both bills contain the following identical statement regarding the economic impact of Internet poker: “California players assume all risks, any negative social or financial aspects are borne by the citizens of California, and the revenues generated from online gambling are being realized by offshore operators and do not provide any benefits to the citizens of California.”

Not surprisingly though, an approach that enables the thoroughbred racing industry to participate alienates those tribes that stand to gain the most from a more exclusive licensing system. Both

the Pechanga Indian Tribe and the Agua Caliente Indian Tribe have been outspoken against AB 167 and have instead advocated limited Internet gaming. By contrast, the California PokerStars coalition — comprised of PokerStars, the Morongo and San Manuel tribes, and several card clubs — supports AB 167 because it lacks the bad actor provision.

Instead of a bad actor provision, AB 167 requires the California Gambling Control Commission and the Department of Justice, in conjunction with other state agencies and tribal gaming regulatory authorities, to issue licenses to conduct Internet poker to “suitable” entities. The bill currently lacks a cutoff date for ineligible entities, although it does contain language excluding certain entities from eligibility. Specifically, entities convicted of either having accepted a bet over the Internet in violation of U.S. or California law, or having aided or abetted another entity in doing so, would be ineligible. This language would not necessarily exclude PokerStars from obtaining a license under Amaya’s ownership,

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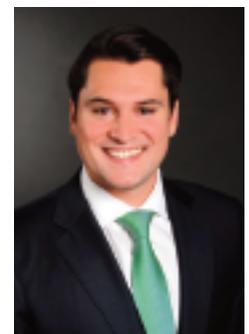
“ This is a very difficult bill. There is a 50-50 shot we fail spectacularly once again. ”

—California State Assemblyman Mike Gatto



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garnering the gaming giant's support for the bill.

These legislative efforts further complicate issues for the Iipay Nation of Santa Ysabel Indian Tribe as it fights to establish its right to operate an online bingo website pursuant to the Federal Indian Gaming Regulatory Act ("IGRA").

In November 2014, the Santa Ysabel Tribe ("Tribe") became the first Indian tribe to offer "real-money" online gaming when it launched an Internet bingo website using "proxy" players (DesertRoseBingo.com). The State of California promptly filed suit to shut down the Tribe's website, alleging (1) breach of the Tribal-State Compact and (2) violation of the UIGEA. The United States filed its own suit for a permanent injunction under the UIGEA.

On December 12, 2014, Judge Anthony Battaglia of the U.S. District Court for the Southern District of California granted the State's Motion for a Temporary Restraining Order ("TRO") against the Tribe. The TRO enjoins the Tribe from offering any gambling over the Internet to persons not physically located on the Tribe's Indian lands and from accepting any funds from persons wagering over the Internet.

The litigation presents a case of first impression with respect to a tribe's right to conduct class II gaming online pursuant to the IGRA and the effect of the Internet on a game's status as class II or class III under the statute. The outcome of the litigation could set a critical precedent for Indian gaming nationwide. Tribes across the country may be willing to follow Santa Ysabel into the online gaming market if the Tribe successfully establishes its right to conduct online class II gaming pursuant to IGRA. By contrast, a defeat may set a precedent sufficient to deter many, if not all, tribes from attempting to offer online gaming in the absence of legislation or a Tribal-State Compact authorizing them to do so.

IGRA's classification system is at the heart of the litigation. How the Tribe's game is characterized determines whether



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it is classified as permissible class II gaming subject only to Tribal regulation or as class III gaming prohibited by the Tribe's Compact. IGRA allows tribes to conduct class II gaming on Indian lands free from state regulation. The key issue is whether “on Indian lands” means the player must be physically located on the Tribe's reservation, or whether “electronic, computer, or other technologic aids” encompass technology enabling people to gamble on Indian lands while physically located elsewhere.

There seems to be tension in the sources construing IGRA's requirements for “electronic, computer, or other technologic aids” between the aid incorporating all

of the characteristics of the game into an electronic format and the aid increasing participation among players. On the one hand, the Internet arguably fits Congress's description of a technologic aid as something aimed at enabling broader participation. On the other hand, the Tribe's online bingo game incorporates all the characteristics of the game into an electronic format — which the National Indian Gaming Commission and some courts have interpreted as the benchmark for identifying a facsimile under IGRA. If the game is deemed a facsimile, and not a technologic aid, then it falls outside the class II definition and is a class III game.

Notwithstanding the TRO, the Tribe does not appear ready to back down. The Tribe filed a Motion to Dismiss the State's Complaint. If the Court denies the Tribe's Motion to Dismiss, the Tribe may file a permissive interlocutory appeal to the Ninth Circuit Court of Appeals. In the event the Ninth Circuit denies the Tribe's appeal, the parties have stipulated to expedite proceedings to be held in connection with a permanent injunction hearing consolidating the trial on the merits.

While it is unclear what effect online poker legislation may have on other tribal efforts to operate online bingo, such legislation could prove costly for the Santa Ysabel Tribe. If a bad actor clause is in a bill signed into law, then the Tribe may be precluded from operating Internet poker if its bid to operate online bingo fails. If, on the other hand, AB 167 is signed into law without any substantive changes to its bad actor approach, then the Tribe may be able to obtain a license to operate Internet poker at the regulatory agencies' discretion, regardless of the merits or outcome of the Tribe's bid to operate an online bingo website.

Without a doubt, the gaming industry will be keeping a careful eye on the State of California in 2015. ♣