

California Online Poker: Dead Again in 2014

By Heidi McNeil Staudenmaier



As has happened for the past five years – online poker in California was declared dead for the 2014 legislative session. It was hoped that the 2014 efforts had a greater chance of success than in the past, but the roadblocks were apparently too big to overcome before the session closed in late August.

Two online poker bills were introduced during the 2014 legislative session. Senate Bill 1366 was sponsored by Senator Lou Correa and the Assembly Bill 2291 was sponsored by Assemblyman Reginald Jones-Sawyer. The proposed legislation was titled “The Internet Poker Consumer Protection Act of 2014.” Two-thirds of the California legislature is required to pass bills. These online bills were similar to legislation introduced in past years.

Senator Correa shelved his bill on August 6, 2014, citing grounds that there was just not enough time to make certain changes in the bill and obtain consensus from all the major players. “Internet poker is an important public policy. We need to make sure it’s done right,” Correa advised the media.

At publication deadline for this article, Assemblyman Jones-Sawyer’s bill was still reportedly alive. However, that bill had not moved through the committee process nor had any hearing date been set. As such, it is likely that bill will not see any movement before the 2014 session closes.

One of the major roadblocks to the online poker bills involves the “bad actor” language in both bills. These provisions would prohibit the involvement of partner companies, or assets, involved in taking

California wagers after passage of the Unlawful Internet Gambling Enforcement Act (UIGEA) – the Federal law enacted in 2006. The specific 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...”

Why is this “bad actor” language the subject of great debate – and likely to continue to be troublesome for the 2015 session? These provisions would effectively keep PokerStars out of the California market as an online poker participant. PokerStars and/or its affiliates is reportedly one of the largest online gaming companies in the world – controlling more than fifty percent of the global online gaming market outside of the United States.

PokerStars would likely fall within the “bad actor” clause due to the company’s involvement in the “Black Friday” federal crackdown on illegal Internet gambling in April of 2011. Based on that crackdown, PokerStars’ founder and two other com-

pany officials were indicted on bank fraud, wire fraud and money laundering charges. Full Tilt, an affiliate of PokerStars, went out of business due to the indictments. PokerStars later negotiated a settlement with the U.S. Justice Department and paid \$731 million to resolve the charges.

Although the federal indictments of the company officials are still pending, the Justice Department opined that, because of the settlement, PokerStars should not be prohibited from entering legal U.S. online gaming markets. Nevertheless, Nevada’s online gaming laws effectively keep PokerStars out of that market for five years, and New Jersey has refused, to date, to issue a license to PokerStars which would permit it to participate in that market.

The PokerStars’ situation may have taken a positive turn in June, when the Montreal-based Amaya Gaming Group agreed to purchase the parent company of PokerStars and Full Tilt Poker in a transaction reportedly valued at \$4.9 Billion. The acquisition closed in early August. As a result of the new parent ownership, certain “house cleaning” of existing company executives may take place. The new company leadership may get a second chance from jurisdictions such as New Jersey and others.

The constitutionality of the “bad actor” clause was the focus of considerable legal debate. PokerStars engaged well known constitutional law scholar, Laurence Tribe, Harvard University professor, to

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NEW DEVELOPMENTS IN NATIVE AMERICAN GAMING



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consult with the California legislators about the impropriety of the “bad actor” language. Professor Tribe contended that the language violated several provisions of the U.S. Constitution – Bill of Attainder, Equal Protection and the Takings Clause. A bill of attainder involves a legislative body making an act a crime, but only after the act has already been committed. In essence, the act was legal at the time it occurred but then was later deemed illegal. Professor Tribe argued that the “bad actor” provisions improperly seek to punish PokerStars for its past actions without the benefit of a trial or other due process.

Nelson Rose, a well-known California gaming law professor, took issue with Professor’s Tribe’s constitutional arguments. Professor Rose opined in his July “Gambling and the Law” column: “The problem is that Prof. Tribe knows the U.S.

Constitution. But he doesn’t have enough experience with legal gambling to know that gaming statutes and regulations often appear to be unconstitutional. The limits placed on every person and business associated with licensed wagering would indeed violate the Constitution, if gambling were almost any other business.” Prof. Rose discusses how gambling is viewed as a “vice” and accordingly subject to the “state’s police power” which is to “protect the health, safety, welfare and morality of its citizens.” As such, “a state’s police power often trumps constitutional rights.”

This “bad actor” debate embroiled the state’s wealthiest and most powerful gaming tribes. One of the primary challenges to passage of Internet gaming legislation in the past has been the lack of consensus among these tribes. In an attempt to find a compromise, a coalition of thirteen tribes led by the Pechanga Band of Luiseno

Indians, came to agreement on unified language in June that would authorize intrastate Internet poker in California.

In a letter to the legislators setting forth the group’s proposed amendment language, the coalition stated that “this journey has been long and difficult, but the challenges posed by the Internet demand that we harness rather than cede the technology of the future for California and for our tribal communities.” One of the coalition members noted: “We are proud to announce that we have reached a consensus that builds upon the pillars of previous legislation. It provides strong consumer protections against fraud, ensures that no one under the age of 21 can play and bars those who have violated federal online gaming laws from offering Internet poker.” 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.”

On the other side of the table has been the Morongo Band of Mission Indians along with three Southern California card clubs. Morongo voiced strong opposition to the online poker bill and was at stark odds with the Pechanga coalition – primarily over the “bad actor” provisions. PokerStars is a proposed partner of Morongo in its Internet gaming plans. The Morongo Band asserted that it would “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 further opined: “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.”

To add further fuel to the fire, twenty-five California card rooms sent a letter in mid-July to the California legislators expressing their support of online legislation, but confirming that they were in sup-

port of retaining the “bad actor” provisions. The bills limited Internet poker licenses to tribes and card rooms. Another gaming interest—thoroughbred racing—had been pushing to be included in the legislation.

Without a doubt, a political compromise will have to be reached if iGaming in California is to become a reality in 2015. The stakes are high for reaching a middle ground. Some reports have estimated that iGaming in the Golden State could produce as much as \$729 million in gross gaming revenue in the first year alone. With a population of 38 million, California is poised to become the largest intrastate location for online poker. 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.

Not all of the California tribes supported the legislative path. The Iipay Nation of Santa Ysabel Indians, located in a remote area east of San Diego, announced in July the launching 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 claimed that it intended to offer real money online poker in the very near future. 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 Santa Ysabel Tribe and its attorneys say that it is within the Tribe’s legal rights to offer poker over the Internet—asserting 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 (along with the National Indian Gaming Commission), and cannot be regulated by the state. The tribe has partnered with the Kahnawake Gaming Commission to host part of its iGaming servers on the Mohawk Territory of the Kahnawake located near Montreal, Canada.

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 iGaming from the Tribe’s reservation.” The tribe has no plans to offer online slots or

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other casino style games that would require a Class III gaming compact with the state.

The tribe was critical of the pending online legislation. In noting that it had “significant concerns,” 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 proposed upfront license fee is \$10 million.

The tribe previously operated a small casino with 350 slot machines, but it shut down in February owing around \$50 million. The Tribe attempted to file for bankruptcy protection, but the matter was dismissed because Indian Tribes do not qualify under the federal bankruptcy laws for such protection.

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