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GAMING LEGALNEWS

CALIFORNIA INCHES CLOSER TO APPROVING INTERNET POKER

by Glenn M. Feldman

For the third year in a row, the California Legislature has adjourned without acting on Internet gaming legislation. But there are indications that situation may change in 2014.

With over 38 million residents, California has a population that could provide a robust intrastate Internet gaming market. And Californians know how to gamble. In 1987, the U.S. Supreme Court noted that "California permits a substantial amount of gambling activity …." Today, it is estimated that lawful gaming in California – through tribal casinos, commercial card rooms, racetracks, and the lottery – generates over $10 billion in gross gambling revenue.

So, with a population and the proclivity, what is keeping California from stepping into the Internet gaming arena? In a word – politics.

At the time the Legislature adjourned on September 13, three separate Internet poker proposals were under consideration at the Capitol. The first, SB 51, had been introduced early in the year by Senator Roderick Wright, the Chairman of the Senate Governmental Organization Committee. Senator Wright had introduced I-gaming legislation in previous sessions of the Legislature, but none had ever made it out of his Committee. A second bill, SB 678, authored by Senator Lou Correa, reflects the views of a coalition of about fifteen California Indian tribes headed by the San Manuel Band of Serrano Mission Indians. And in May, draft legislation proposed by a second tribal coalition, including the Pechanga Band of Luiseño Indians, began circulating.

While all three proposals would permit only Internet poker, the substantive differences among the proposals on other issues have prevented the sponsors from reaching agreement on a single bill that all can support. Among the areas of major disagreement are the following:

- License Fee – The amount that an operator would pay the State for an Internet gaming license varies widely: $15 million under SB 51, $10 million under Senator Correa's bill, and $5 million under the Pechanga proposal.

- License Eligibility – Significant debate still swirls around the question of what entities would be eligible for operator licenses. The two tribally-backed proposals would limit eligibility to Indian tribes and licensed card rooms. Senator Wright, on the other hand, has been adamant that racetracks and advance deposit wagering operators must be included on the list.

- "Bad Actor" Prohibitions – All of the proposals prohibit the licensing of entities that accepted unlawful Internet wagers in the past. The scope of those provisions differs, however. The Wright and Correa bills would bar operators who accepted bets from players in the United States, but only for bets placed after December 31, 2006. The Pechanga proposal applies to the acceptance of a wager from a player in California at any time prior to the enactment of California I-gaming legislation. This broader ban would permanently bar several major Internet gaming operators from the California market, which measure has generated substantial controversy.

- Tribal Regulatory Involvement – While all of the proposals establish a California regulatory structure for the online gaming, they differ markedly in the extent to which existing tribal regulatory bodies can play a role in that process. Not surprisingly, the tribal proposals offer more opportunities for tribal participation than does Senator Wright's bill.

These and a host of more minor differences kept the parties from agreeing on a unified approach to Internet poker before the Legislature adjourned for the year. But, while significant differences between the proposals remain, there are at least some indications that these differences could be bridged – and legislation enacted – in 2014.

First, the level of strong opposition to any Internet gaming legislation has been significantly reduced. In years past, a number of influential gaming tribes in California had opposed any legislation that would allow Internet gaming in the state. Their concern was the uncertainty as to what effect I-gaming might have on the successful casino businesses that they had spent years developing. But today, those concerns have apparently been addressed, as virtually all of those tribes are supporting one or the other of the competing tribal Internet poker proposals.

Second, the differences among the three proposals are narrowing. For example, amendments to Senator Wright's bill adopted within the last few weeks reduced the amount of the proposed operator's license fee from $30 million (which had been opposed by all tribes) down to $15 million; lengthened the license term from five to ten years (making it consistent with the two tribal proposals); and recognized, for the first time, that tribal gaming commissions could have a role in the licensing of I-gaming employees. While these amendments do not eliminate all the differences between the proposed bills, they do suggest a willingness on the part of the players to try to find common ground; a willingness shaped in part by the long-held understanding of California tribal leaders that strength comes from unity.

Third, and perhaps most important, is the recognition by all parties to the debate that carefully crafted and properly regulated Internet poker in California could provide significant economic benefits to all of the stakeholders. While estimates of the potential market vary greatly, the suggestion that lawful Internet poker in California could generate hundreds of millions of dollars in annual revenues is widely accepted.

With that kind of incentive, and with a willingness to compromise and work together on the part of the proponents, it is not unrealistic to think that 2014 will be the year that California finally enacts Internet poker legislation.

STATES AND CONSUMERS BATTLE TRIBAL PAYDAY LENDERS

by Patrick Sullivan

The tribal payday lending business finds itself facing a flurry of class action lawsuits and state crackdowns painting the lenders as loan sharks preying upon vulnerable consumers with usurious rates and fees. The tribal payday lenders respond that they are immune from state regulation, service a legitimate market need, and generate much-needed jobs and income for Indian tribes.

Tribal payday lenders purportedly originate loans over the Internet from within Indian Country, claiming that tribal sovereignty and immunity from suit allow them to circumvent state consumer protection laws capping interest rates. The loan agreements generally specify tribal jurisdiction and individual arbitration of disputes and defaults, preventing borrowers from escaping the debts in state courts. Fees and interest rates on these loans can reportedly reach an effective APR of 500%.

A federal class action suit filed against Western Sky Financial, a South Dakota lender owned by a Cheyenne River Sioux member, and other payday lenders demonstrates the profitability of the business and the borrowers' difficulty escaping the cycle of debt. North Carolina resident Thomas Brown, a disabled veteran and named plaintiff in the litigation, initially borrowed $2,600 from Western Sky. Western Sky immediately withheld $75 from the loan as an origination fee. The repayment terms required Brown to make 48 monthly payments at an effective interest rate of 273% resulting in total payments of $14,102.87 – more than five times the $2,525 Brown received. Western Sky accessed Brown's bank account, into which his military disability income is directly deposited, and directly debited the loan payments.

In New York and most other states, these expensive loans violate state law. Loans under $250,000 originated by non-bank lenders with interest rates exceeding 16% are illegal under New York's civil statutes, and rates over 25% are criminal violations. The New York State Department of Financial Services has aggressively moved to stop Internet payday lenders by blocking their access to the Automated Clearing House banking network that processes the loan transactions. In August, Superintendent Benjamin Lawsky sent a letter to Bank of America, Capital One, Wells Fargo, and other major banks asking for help "to stamp out these pernicious, illegal payday loans in New York." The banks have largely complied, leaving the lenders with no access to borrowers' bank accounts. This has driven many Internet lenders like Western Sky to close their operations and lay off employees.

New York has also filed a petition in state court against Western Sky Financial, CashCall, and their respective owners for civil and criminal violations of New York's usury laws. The State asks for an injunction preventing the companies from conducting business in New York or enforcing loans to New York customers and directing the companies to return excessive fees to those customers and report to credit agencies that the loans they originated are invalid. Despite the lenders'

assertions that they are tribally owned and operated, the State alleges that Western Sky Financial, an entity owned by a tribal member, immediately sold each loan to WS Financial and CashCall, both off-reservation non-Indian owned entities, to service the loans.

In August, Oklahoma's Otoe-Missouria Tribe, Michigan's Lac Vieux Desert Band of Lake Superior Chippewa Indians, and several tribal payday loan companies operating under the protection of those tribes sued the New York State Department of Financial Services for an injunction enjoining the Department from pressuring banks to reject their transactions. The Tribes argue that their ability to conduct lending is a matter of "economic and social survival," that lending is an economic development activity over which tribes maintain inherent sovereignty, and that Congress has expressly exempted Indian tribes from state regulation in the Dodd-Frank consumer protection legislation.

In 1998, the Supreme Court held in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies* that Indian tribes are immune from suit absent Congressional authorization or waiver by the tribe. The Court refused to "confine immunity from suit to transactions on reservations and to governmental activities," holding that tribes could not be sued regardless of where the tribal activities occurred. However, the Court also recognized that while states may not sue tribes directly, they may tax or regulate tribal activities occurring within the state but outside Indian Country. Under this precedent, it appears to be within the rights of New York to, in Superintendent Lawsky's words, "choke off" tribal lending activities when those activities violate state consumer protection laws by preventing their access to banking networks. It remains to be seen whether the Supreme Court of the State of New York State will find jurisdiction over the State's civil and criminal allegations against tribally-owned Western Sky Financial.

The lending tribes have formed an advocacy group called the Native American Financial Services Association "to protect and advocate for Native American sovereign rights and enable tribes to offer responsible online lending products," which called New York's actions "a threat to all natives." The advocacy group points out that many tribes are at a geographical disadvantage due to their remoteness from urban markets that could support a gaming facility and that online lending is a "lifeline" for these tribes.

Oregon Senator Jeff Merkley is poised to introduce a bill enabling states to take their complaints about tribal lenders directly to the federal Consumer Financial Protection Bureau. Because Congress has plenary power over Indian affairs, federal legislation could quickly resolve the ambiguity regarding the application of state consumer protection laws to tribal companies operating from within Indian Country conducting business over the Internet. Once Merkley's bill is introduced, it will be considered in parallel with the question of the role of Indian tribes in pending legislation to legalize certain forms of Internet gaming.

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