International Masters of Gaming Law Current Issues Discussion...

Tuari
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The Off-Reservation Internet Gaming Debate

There is an interesting debate currently brewing in Indian Country. While IGRA recognizes the right of Tribes to conduct Class II gaming (such as poker) on Indian Lands (i.e., reservation), the NIGC has previously opined that a bet placed off reservation to a game server located on the reservation (e.g., a wager placed over the Internet) violates IGRA. Over 10 years ago, a couple federal circuit court decisions supported that viewpoint. UIGEA also imposes what might be perceived as additional limitations where its excludes from the definition of "unlawful internet gambling" wagers that are "initiated and received" or "otherwise made exclusively" within the Indian Lands of a singly Tribe or multiple Tribes to the extent authorized by IGRA.

While those laws are not at play in Europe, it is my understanding that the European jurisdictions have tended to treat the location of the server as the location where the bet is placed under contract principles and for purposes of establishing jurisdiction/taxation principles.

It also appears that the NJ law is following the European reasoning by treating any wager placed within the state as if it were placed at one of the casinos in Atlantic City.

Any viewpoints on this?

3 days ago

You, Tracey Miller like this

19 comments

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Martin Owens • It is settled law that where a contract is silent as to the place of performance, that performance is deemed to be where ever the contract may be made executory.
In the case of online gambling, there is only one place where all the elements of the bet are brought together- the offering of the wager, the actual bet itself, the resolution event and the calculation of who gets paid, and who gets collected from.

That place is inside the server of the online gaming establishment.

Therefore, logically, the bet legally takes place where that server is physically located.

It should be noted however, that this may be changed by fiat. The most notable example is the change in various state laws made pursuant to modifications of the Interstate Horse Racing Act. California is probably the best example: they simply modified the Business and Professions Code to state that a bet placed with any licensee (meaning somebody like TVG) would automatically be deemed, legally speaking, to have been placed within the betting enclosure of an actual racetrack.

3 days ago • Like • Reply privately • Delete 2

Follow Tracey

Tracey Miller • Interesting topic, the NIGC holds that IGRA neither approves nor prohibits gambling off tribal land, and the courts have held that if any of the regulated gambling 'activity' occurs beyond the borders of the reservation then gambling is occurring beyond the reach of IGRA, so a Tribe would likely need State approval (license) to offer class II i-gaming to customers off tribal land.

Both the courts and Congress through the UIGEA seem to be suggesting that both the gambler and the server must be within the jurisdiction of the regulator for an internet wager to be considered a legal contract, so unless the Tribe is willing to have it's gambling regulated by the State, it's going to be limited to only offering i-gaming on it's own territory or that of another Tribe through compact.

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Ian Imrich and 2 more commented on:
The Off-Reservation Internet Gaming Debate
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Tuari Bigknife commented in the group on Do you think current law (IGRA, UIGEA) would authorize a Tribe to accept bets placed off-reservation for online Class II games such as poker where the gaming server is located on reservation?: Agreed. It should have read "not authorized by IGRA" instead of "prohibited by IGRA".
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Tuari Bigknife

New Jersey was able to use legal fiction to avoid conflicting with their constitution because, unlike IGRA, the amendment to the NJ constitution doesn't limit 'gambling activity' to within the borders of Atlantic City, it only requires that all gambling 'houses' be located within the borders of AC - and the NJ DGE is still regulating the beyond-AC customer gambling 'activity'.

3 days ago • Like

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Barth Aaron • Martin makes a valid argument for civil or regulatory liability. However, a federal gambling violation would be treated as a crime which has differing jurisdictional requirements. We may remember the law school example of a person standing in one state shoots a gun across state lines killing a victim standing in the second state. Where was the crime committed? The classic answer is both states, the act occurred in one and the result in the second. Here prosecutors would make the same argument, even though the form of gambling may be legal and authorized on tribal lands where the server is located, the act of placing the bet occurred "off-reservation" where it was not legal and therefore a crime committed there. An interesting proposition is whether an Indian tribe could operate a gaming server on its lands and take bets from residents of Nevada which just allowed interstate compacts, or vice-versa.

2 days ago • Like 1

Follow Martin

Martin Owens • Unfortunately, the rifle-across-the-border scenario is a red herring that has long ago been exploded.

While criminal liability may in fact lie if sufficient damage is being done from without the state borders, the argument certainly falls apart in today's America, where 48 of the 50 states have gambling programs of their own, ranging through bingo to lotteries, racetracks, Indian gaming (Class III) all the way to gambling riverboats and full-blown casinos. So if the harm that gambling does may be compared to shooting a rifle, it is incontrovertible that the majority of US state governments have long ago opened fire on their own people. Therefore someone from outside the jurisdiction can hardly be accused of doing extraordinary damage- if damage there be, it's the same kind that the home authorities are inflicting. As a justification for cross-border criminal jurisdiction, it simply doesn't pass the straight face test.

Note also that most if not all of the online gaming establishments such as Poker Stars do not hold licenses from "fly-by-night" governments down in the Pirate Island someplace, but reputable and stable places such as the Channel Islands, Gibraltar, Malta, etc. So the argument that "their" licensing is somehow defective while "ours" is scrupulously honest is also a nonstarter.

But most important, to my mind, is the fact that the basic question of online jurisdiction has yet to be seriously discussed, let alone settled. If bettor Bob, from State X, should go online and connect to Poker R US.com, whose server and offices are in the Republic of Islandia, does that, without more, grant State X jurisdiction f any kind over Poker R Us?

It's a particularly difficult call in the context of US state gambling law. Sixteen States and the District of Columbia do not even have a definition of what "gambling" is or is not on their statute books to this day! In fact only nine States mention the Internet in connection with gambling at all.

Now to return to tribal gaming: suppose a particularly adventurous tribe were to offer Internet gaming, with a click-through agreement that the customer agreed that for purposes of jurisdiction he would consider himself to be on the reservation while he was playing? It's nothing the states haven't done, after all, with horse bets.

2 days ago • Like 1

Tuari
Unfollow

Tuari Bigknife • Great dialogue so far! Notwitstanding the position of the NIGC and the 8th & 9th Circuit Courts on the issue of IGRA and the legality of accepting wagers placed off-reservation, I find it difficult to get around the provisions articulated in UIGEA and its exception for Intratribal transactions. The use of the terms "initiated AND received OR otherwise made exclusively" within Indian Lands appears to require the gaming patron "initiating" the wager to be located on the same Indian Lands as the entity (in this case a Tribe via its iGaming server) receiving the wager. This is also consitent with the Intrastate transactions exception which requires the gaming patron and gaming establishment to be located in the same state. Any other construction would render the use of those terms meaningless, and would conceivably also allow Nevada to receive wager from patrons in California as long as the server is located in Nevada. That is inconsistent with the current interest in Interstate compacts.

I have asked folks to distinguish a hypothectical that I believe is critical to the analysis of

Ian Imrich

Martin Owens

Sue Schneider

Tracey Miller

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Class II gaming and the boundaries of IGRA. So far, I have not received a convincing response If a Tribe is allowed to accept wagers for real money poker over the Internet from gaming partrons off the reservation, Tribes should also be authorized to set up Class II gaming terminals off reservation in local stores, restarants, bars, etc., as long as those Class II terminals are connected to a server on Indian Lands that determines the outcome. If the latter hypothectical is not allowed under IGRA (and most agree it is not), it is difficult to reconcile how Internet Poker would be currently allowed.

2 days ago • Like 1

Follow Tracey

Tracey Miller • In NJ and many other States, unlike NV, the (mere player) act of unlicensed (internet or otherwise) gambling isn't a crime, but that doesn't mean that a NY or CT Tribe could accept bets from players in NJ - even if the player drove to tribal land to deposit to avoid UIGEA concerns.

Unlicensed gambling profit is considered unjust enrichment in most States, Under NJ law, all unlicensed gambling transactions are unlawful, the gambler has the right to recover his losses both from the house, and in the case of poker, from the winning player - essentially every unlicensed bet is an illegal contract.

Recall that the reason IGRA came to be was that SCOTUS held non-prohibitive gambling laws to be regulatory/civil rather than criminal, so as long as the player was on Cabazon land, he was within the Tribal government's civil jurisdiction to declare his bets legally enforceable, but that couldn't be the case of an off reservation player.

So regardless of whether a crime was committed on either side of the border, without a compact/agreement with the State where the player is located, the NIGC and the courts will block Tribes from accepting off reservation bets.

It would be analogous to allowing tribal police to use email to issue off reservation traffic citations, just because the Tribe isn't leaving it's territory doesn't give them civil jurisdiction to police (regulate) the activity occurring off the reservation.

2 days ago • Unlike 1

Follow Martin

Martin Owens • I don't understand why a particular tribe would want to set up gaming terminals when every laptop, iPad and smart phone can bring gambling to their constituents and customers better and cheaper- in fact, at no cost to the tribe. All they would need is one reliably functioning website, run out of a server on tribal lands (or better yet, licensed someplace outside the USA in case the Feds feel frisky sometime).

It's important to remember that identifying gambling as Class I, II, or III is for Indian gaming, and Indian gaming only. These classifications do not apply outside Indian land. So if a tribe wanted to set up , say, an online poker operation outside the reservation, they would have to do so subject to the applicable state laws where those operations were located.

However, the tribe would not be able to have its cake and eat it too. If what you're after is to set up online gaming operations outside reservations, but still retain the protections of sovereign immunity which so many tribes claim for their in-reservation enterprises, then yes, it's quite correct to state that that won't fly.

I personally see no reason that the tribes can't make up their own minds to get in the Internet gambling mix. It might involve going toe to toe with Uncle Sam, but they've done that before, and at much more unfavorable odds.

2 days ago • Like 1

Ian Imrich • Interesting commentary.

On the UIGEA aspects, keep in mind that UIGEA drafters assumed that the Wire Act -- per DOJ policy prior to the December 2011 reversal opinion (actually issued October of 2011 and not made public until 12/24/11) re State Lotteries applied to all gaming activity. Viewing UIGEA provisions that are already murky through new prism of current DOJ Wire Act policy, it further complicates analysis for IGRA, IHRA, and Intra versus Inter State activity. Conceptually, I have never had an issue on peer-to-peer, Class 2, or non-house banked games conducted on "remote servers" because I, like the a few federal courts in the US and analogous to EU perspective (and now NJ), have not ever accepted the DOJ viewpoint pre 12/2011 Memo.

That said, I understand that few are ready, willing, or able (i.e, have resources) to litigate such issues like a DiCristina has for poker, or like a Church Hill Downs will for horse-racing; but at some point I expect to see a Tribe or another State or some other brave soul let the courts decide what all of those provisions your guys are batting around in this Class 2 scenario thread mean, and in a post-DOJ Memo world -- a world which I and my legal opinions -- at least legally-speaking -- have already lived in since

even before In re MasterCard and certainly since.

How do you think the courts will view these confusing provisions today....?

1 day ago 1

Follow Tracey

Tracey Miller • Ian,

I believe the court's view of those provisions would vary greatly depending on the subject matter of the case, if it were a case where the question was whether a foreign business that offered online poker the US had violated US criminal law as a matter of proof, the court would likely rule that they did not.

However, if the question is whether a US State would have the right to either enjoin a tribe from offering off-reservation internet poker or grant relief to block traffic to a Tribal poker site under the UIGEA remedy, I believe they would decide in favor of the State.

Some Caribbean sites used to include language in their terms and conditions asking the player to subject himself to the territorial jurisdiction of the site, but when that argument was made orally before the 3rd Circuit (iMega v UIGEA) a justice responded that they might as well of had customers check a box saying that their living rooms were Caribbean Islands - agreeing to it doesn't make it true.

He went on to say that beyond anything he agreed to, his physical gambling activity would still be subject to DE jurisdiction and the question as to whether the UIGEA applied to the site for his financial transaction would depend on the factual question of whether playing poker on the internet is illegal in DE.

There are many good arguments as to why the poker site might not be criminally liable for violating the UIGEA in that transaction; internet nor poker mentioned in DE gambling statutes, poker site not in business of betting or wagering, foreign business not criminally liable to regulatory rather than prohibitive laws, were the UIGEA regulations finalized, whether the site posted the transaction transparently, mens rea, etc.

But none of those arguments would make an internet player subject to territorial jurisdiction of the Tribe if he's not on Tribal land, the only party capable of transferring that jurisdiction to a tribe is the party that currently has territorial jurisdiction over his gambling activity - the State - unless Congress preempts the field.

1 day ago • Like

Ian Imrich • That latter point is why some Tribes actually prefer Federal legislation, provided that Tribes are on equal footing as "qualified licensing bodies" with Nevada and other States -- and other sovereignty issues are not abridged -- i.e., something different than Reid/Kyl were trying to sneak through the past two lame duck sessions of Congress.

I think that iMega case is problematic. Not a good record below and with all due respect to the legal representation in that case, don't think the arguments (particularly those on US Constitutional grounds) were properly briefed and argued by iMega. That said, they thankfully left out my Right To Travel argument, and my DCC argument version, so I'm pleased in the event those issues and some others end up coming to a courtroom down the road.

I do agree from the "player" side of the equation DE or other State law could be implicated depending on the type of activity -- bingo, casino-style gaming, horse-racing, P2P poker, house-banked video poker, lottery, etc. -- but I'm still not convinced that a player of non-house banked peer-to-peer skill gaming is within the ambit of UIGEA or any other Federal law (IGBA, Travel Act) from both "operator" or the "player" perspective except for perhaps in the State of WA. Even there, Con Law issues are implicated for the "player" as well with such P2P activity occurring on remote servers -- not in the State of WA despite what Rousso and Betcha.com cases wrongly decided on poor trial court records to litigate re DCC and WA law -- that sort of issue was not ever presented.

But your assessment is fair and reasonable and until we get to SCOTUS and State Supreme Courts outside of WA State we'll just have to wait and see what Tribes can and cannot do given a complex labyrinth of State and Federal law in this area...

1 day ago

Follow Tracey

Tracey Miller • I don't disagree, it's just that when it comes to gambling the default civil position is that all bets are unlawful contracts unless specifically authorized (licensed), so what might not violate any criminal laws is not the same as 'legal' - having specific authorization.

The idea behind licensed casino gambling (or insurance and other speculation) is that the regulator is insuring that the gambling is fair, in fact when Italy first brought remote gambling online the whole system choked because the regulator required every bet to be recorded with the regulator in real time.

In NV e.g. if a poker player were caught using their Iphone to calculate pot-odds or outs during a hand they could be charged with a cat B felony, the same law could be enforced on remote players if they are within the territorial jurisdiction of Nevada, but unless there is a reciprocity agreement with other States, players from other jurisdictions would face no repercussions.

Without territorial jurisdiction, a tribal government can't truly regulate off-reservation online gaming, beyond what current offshore regulated sites do in banning players or confiscating their balances, so while it might not be illegal (penal violation) internet gambling for them to offer poker off-reservation, it would likely remain unlawful internet gambling unless authorized by the State in the eyes of financial institutions and the UIGEA gives the State AG the authority to have the site's traffic blocked.

21 hours ago • Like

Follow Martin

Martin Owens • You are completely correct, Tracey. The Achilles' heel of state law is that it is not meant to be enforced beyond state boundaries, except in special circumstances. So if different states have different laws, different attitudes, or all too frequently, rely on laws passed when Al Capone or even Jesse James was still running around, you have one hell of a problem enforcing across state lines in regard to Internet gambling.

And let's face it, rightly or wrongly there is not going to be a national regime of Internet gambling licensing any time soon. On the other hand, trying to coordinate 50 state legislatures, and five territorial legislatures, is not merely herding cats. For as controversial as subject is this is, you'll be wrestling Hornets.

I think that the private operators have a tremendous opportunity here. We can compare it to the Age of Exploration, 1492 and onwards, when the seafarers launched their puny barks into locales whose labeling on the map was only "Terra Incognita" and "Here Be Dragons". To rely upon lawmakers to show the way is just plain wrong. The law is always behind technology. Necessarily so! How could there have been regulations for railroads before steam engines were invented? How could the FAA have been convened before air travel became a realistic possibility?

No, the future belongs to those people whom Ian has christened "the brave souls". 'Twas ever thus, and so shall it ever be.

I will never forget a short story written in the "alternative history" mode, whereby the German Wehrmacht actually broke through Africa into India. Of course Gandhi was on their short list of people to disappear. He told a German general, on the way out to the execution ground, that "history shall judge us." The Prussian replied, "history is written by the winners".

Ladies and gentlemen: so are the laws. And so, the question to be resolved here is whether you want to be one of the winners, one of the people who sets the tone for what is to come. The situation is crying out for leadership.

20 hours ago • Like

Follow Tracey

Tracey Miller • As was the situation in Professor Rose's analogy, Martin; he compares online poker to the insurance industry of the early 19th century.

In the early 19th century, NY businesses decided they wanted NY to be the gold standard regulator of insurance, so they lobbied desperately to no avail for Federal legislation - insurance was considered contract wagering (gambling) at that time in more conservative States.

Then after attempting to sell NY's services to regulate the industry on behalf of States with no experience in insurance for half a century, the companies took their case to court challenging State laws that forbid out-state insurance contracts - of course they lost as insurance wasn't considered legitimate business (commerce) at the time.

75 years later they tried once again, this time the business of insurance had lost much of it's bad connotation and the court ruled that indeed it was commerce, therefore subject to dormant Commerce Clause doctrine so States would need to open their markets.

The very next session of Congress passed the MFA (McCarren Ferguson Act), reestablishing the State's right to regulate for consumer protection (and discriminate against out-state competition), much of which is still in effect to this day, despite the cries of a patchwork of regulations from 'gold standard' industry leaders.

The moral of the story being that States like Nevada may be wasting their breath here, their compacting idea seems to have one fewer chance than Federal legislation, which had only slim and none itself; the way online poker liquidity will likely be shared is the same way insurance pools are shared, with peer-to-peer regulating States agreeing to multi-jurisdictional reciprocity agreements by companies/tribes with software licensed in multiple States.

19 hours ago • Unlike 1

Dave
Unfollow

Dave Palermo • In response to attorney Robert Rosette's inquires on behalf of the Lac Vieux Desert Band of Chippewa Indians, which sought to launch an Internet bingo operation, then NIGC Counsel Kevin Washburn, in a letter dated Oct. 26, 2000, said, "we have determined that Internet Bingo is not authorized by IGRA. We reach this conclusion because the play of Internet Bingo does not necessarily occur on Indian lands."

9 hours ago • Unlike 1

Ian Imrich • Dave, I think that may be the opinion, or one of them, Tuari was referring to at the beginning of this discussion. I would be curious to see a fresh evaluation of that assessment in view of new technologies - particularly with respect to P2P skill gaming like poker - as well as bingo. The factual assumptions made over a decade ago may impact legal analysis today post-UIGEA and post-12/11/2011 DOJ wire act memo re lotteries. With sophisticated age verification, fraud and collusion tech, and compulsive gambling tech all reliably occurring on well-regulated servers on Tribal lands by duly licensed operators, we might see some different view and interpretations of the gaming laws at issue here. I'm not convinced the bets will be seen the same way physically or legally today and the consumer protection advances which also would occur in these sovereign locales. Nice find!

6 hours ago

Tuari
Unfollow

Tuari Bigknife • To add to Dave's post, the argument in support of Internet Bingo attempted to frame the question as whether the Internet was a Class II technological aid under IGRA -- an argument that had succeeded before in legal disputes related to the technolgy used in Class II gaming devices. The NIGC decided that it did not need to address the "technological aid" issue because not all of the gaming activity related to Internet Bingo would take place on Indian Lands. To date, I have seen nothing to indicate a change in the NIGC's position -- i.e., every element of Class II gaming activity must take place on Indian Lands to fall within the safe harbor (federal preemption of state law) afforded by IGRA. That line of reasoning ties back to my Class II gaming device hypothetical. For the NIGC to opine that Tribes can offer Internet Poker to off-reservation gaming partons, I believe the NIGC would also have to accept that Class II terminals could be set up off-reservation to display the outcome of a Class II bingo game that takes place on a master server on a Tribe's Indian Lands.

5 hours ago • Like

Tuari
Unfollow

Tuari Bigknife • Martin's email really highlights the mentality behind the interest of some Tribes in potentially offering Internet Poker to gaming patrons off the reservation. They view it as an issue of tribal sovereignty. If current law already authorizes the Internet Poker activity -- a premise certain Tribes have adopted as true -- the is no rational reason to seek state or federal legislation that would interfere with, or complicate, the ability of such Tribes to offer and regulate the Internet Poker activity. Of course, if the premise turns out to be false, those Tribes may get left behind, without a seat at the legislative tables on both the state and federal levels. Most successful gaming Tribes also have a lot more at risk by taking such a gamble on Internet Poker than may have been the case in the earlier days of Indian Gaming. I am very curious how this will all shake out in the coming months and years.

5 hours ago • Like

Dave
Unfollow

Dave Palermo • I'm aware the letter I mentioned was what Tuari was referring to. I'm just providing documentation. I have no opinion, legal or otherwise. The PDF can be obtained on the NIGC.gov website.

5 hours ago • Like

Ian Imrich • On the "technological aid" issue, I would like to see that issue revisited in light of P2P technology where all activity takes place on the Tribal server and the patron uses a proprietary Tribal "software client" (not a web browser, remote terminal, OTB

terminal), in order to play.

First-tier iPoker sites regulated in EU jurisdictions such as the UK, France, and Italy typically do not use web browsers (though the technology is clearly available) because the technological concept and regulation thereof his via P2P servers with customers connecting via that proprietary IP from desktop PC, laptops, and in some instances - via apps on mobile devices. In its infancy, iGaming was clunky and often occured via web browsers to web hosting stations and the play (i.e., bets, wagers, et.al) arguably and likely did occur not on any gaming server but right there locally on the users computing system. That is not the case today -- at least not with modern first tier P2P gaming ops and systems.

I think folks may be incorrectly assuming as a fait acompli that betting, wagering, and play by the user is actually occurring "off Tribal lands" in this context. In some instances that could be a correct fact. In others such as some forms of iPoker is not. It is critical distinction with a legal difference not only for Tribes but States and Nations as well. I fully realize many do not accept that. So for those we would just have to agree to disagree with that mixed question of fact and law.

I am not intimately aware of how certain bingo operates on the internet in this setting. My primary web gaming experience -- from an IT standpoint -- is with P2P iPoker. That being said, if Bingo could utilize a proprietary web client that must and can only be utilized via servers entirely on Tribal lands, then I think an analogous argument to iPoker could be made; and if so, that would not necessarily implicate "off-reservation" displays on the outcome of such Bingo games.

I do realize, as you point out, that there is risk of making the wrong assessment on such a premise by a Tribe be it iPoker or any other Class II game. (For example, if it turns out that Poker Stars violated State or Federal law in offering iPoker virtual online card room hosting services to US customers - or to those withing in certain US States -- that will likely be an impedemint if not a fatal blow to licensing in many jurisdictions in the US. If it turns out Poker Stars was correct in their legal assessments on this score, then many will scratch their heads wondering why certain key legal and factual assumptions were made many years ago -- not unlike those that were made prior to the Wire Act memo by the DOJ in 12/2011.

However, a conservative course would not necessarily warrant no activity or waiting for someone (such as NIGC, DOJ, etc.) to act and sit on the fence in the meantime. For example, Declaratory Relief could be sought by a Tribe if there was serious contemplation and plans of a Tribe actually on the threshold of launching an iPoker site (or bingo or other Class II) and in "legal fear" of regulatory action by the government / authorities. Of course, even that sort of action has costs with lawyers and risks as well. I'm just suggesting it is available for consideration as one alternative to waiting for regulatory clarity or a better consensus as to what is and what is not legal.

The Lotteries in Illinois and New York we now know could have launched systems with out running afoul the Wire Act well before 12/2011. But, out of an abundance of caution, they opted to wait until hearing back from DOJ on that aspect. The law never changed, just DOJ's "point of view" about it -- though, at least a few federal courts has opined as much years before. But had DOJ not so opined, and the Lotteries went forward, there could have been a Wire Act prosecution or parallel civil case, among others, that could have been instituted. Risk-reward.

5 minutes ago

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