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Gambling and the Law®
The U.S. Justice Department Opinion on Internet Gaming:
What's at Stake for Tribes

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As a completely unexpected gift to the states, announced two days before Christmas, the United States Department of Justice (“DoJ”) declared that states are now free to legalize almost every form of Internet gambling, and not be worried about federal laws. This might not have been the intent – the ruling dealt with state lottery subscription sales – but the result will be an explosion of poker, instant lotteries and casino games on the Internet, run or licensed by the states. And, although the DoJ was careful to say the opinion is limited to intra-state gambling, there is now nothing stopping states from entering into compacts for online gambling with other states, and even foreign nations.

Many tribes, especially those with established landbased gaming operations, are worried that they might not be included in this coming proliferation of state-operated and -licensed Internet gambling. And they have every reason to worry.

Although tribes have the right to operate any form of gambling permitted under the laws of the state where the tribe is located, it seems likely that courts would limit that right to patrons who are physically on Indian lands. Tribes are not prohibited from taking bets from throughout a state. But that would be a privilege granted by a state, not a right. And, the state could not be sued for bad faith if it refused to let tribes accept off-reservation wagers. This puts tribes in the position of having to compete for a limited number of Internet gambling licenses, to be issued by not always friendly state governments.

The tests for Indian gaming seem clear, based on the decision of the U.S. Supreme Court in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083 (1987), and the declarations of Congress in the subsequent Indian Gaming Regulatory Act (“IGRA”), 25 U.S.C. §§2701-21 and 18 U.S.C. §§1166-68. First, what is permitted in the state? This is a shorthand for requiring tribes to follow the public policy of the state toward specific forms of gambling. Second, tribes regulate, sometimes with, sometimes without, state or federal governments, but only if the gambling is conducted

on Indian lands. Tribes in Nevada can operate casinos and sports books; tribes in Utah have none.

This limit on tribal gaming to Indian lands is particularly true with Class II gaming. So, if a state legalized Internet bingo or poker, tribes could also conduct those games online, and would not need a tribal-state compact. But players would have to be physically present on Indian lands. There might be ways around this – proxy play for bingo has been tried – but that would not work with poker.

The argument for limiting Class III gambling to Indian lands is weaker. There is an express exemption in IGRA for tribal lotteries from the federal anti-lottery statutes, 18 U.S.C. §§1301-1304 (IGRA §2720). But this only proves Congress intended to allow tribes to send lottery tickets across state lines and through the U.S. Mail. The lottery would have to be conducted pursuant to a tribal-state compact, and the statutes do not necessarily indicate Congress intended to allow sales off-reservation. Tribes also can clearly operate off-track betting (“OTB”), even though the races are taking place on non-Indian lands. But even though states have to agree to compacts allowing their tribes to operate OTBs, it is not clear that states would have to allow tribes to accept wagers from bettors who are not physically on Indian land. A majority of states allow remote betting conducted by state-licensed OTBs through Advanced Deposit Wagering (“ADW”), where players fund their accounts in advance over the phone or through the Internet. Even though a state might agree to tribal ADWs, that does not mean it had to.

I think courts would find tribes could demand compacts if states legalized Internet lotteries, casinos, sports betting and other Class III gaming. But, again, the bettors would have to be on Indian lands.

The Unlawful Internet Gambling Enforcement Act (“UIGEA”), 31 U.S.C. §§ 5361 et seq., does allow tribes to go across state lines for inter-tribal Internet gambling, Class II or III, but players are, again, expressly limited to those on Indian lands. 31 U.S.C. §§5362(10)(C).

The reason for the coming explosion of state-legal Internet gambling was the declaration by the Barack Obama administration that the major federal anti-gambling statute, the Wire Act, 18 U.S.C. §1084, applies only to bets on sports events and races. State legislators and governors are desperate to find ways to raise revenue without raising taxes. Gambling is seen as a painless tax, so every state is looking into expanding legal gaming. They can now do so. The only exception is sports betting, which cannot be introduced into a state that does not already have it, due to a different federal statute, the Professional and Amateur Sports Protection Act (“PASPA”), 28 U.S.C. §§3701-3704. And, New Jersey, which would like to also have true sports betting, has filed a court challenge to the PASPA.

Federal anti-gambling statutes can be seen as being merely enforcement laws, not legalizing or prohibiting any form of gambling. So, with only two exceptions, all federal

anti-gambling statutes apply only to gambling that violates some other federal or state law. Only the federal anti-lottery statutes and the Wire Act can apply to gambling that is legal under state law. But, long before Powerball, states found ways of getting around the federal prohibitions on interstate lotteries, by having no money, only information, cross state lines. And state lotteries are now expressly allowed to have multi-state lotteries, 18 U.S.C. §1301.

So, the only remaining barrier that blocks states from legalizing games like Internet poker – which is not a lottery – has been the DoJ's expansive view of the Wire Act. For example, when the American Virgin Islands and Nevada passed legislation licensing online casinos, the DoJ stopped state regulators from issuing licenses by saying they would arrest operators under the Wire Act. Now that the Department charged with enforcing the law has limited that statute to cross-border sports bets, there is literally no federal law standing in the way of a state authorizing intra-state online games, and even entering into compacts with other states and nations to pool players.

The political fights will be over who gets the licenses. There is so much legal gambling in the U.S. that it is easy for politicians to say, "We've already got casinos, racetracks and a state lottery. What's the big deal about Internet poker?" Of course, there is so much legal gambling in the U.S. that those casino and racetrack owners, and even the state lottery, respond, "Internet poker is fine, as long as we get to run it."

But state lawmakers are not proposing legalization to protect local operators; it is solely to raise money. Even in states as big as California, the existing cardclubs, tribal casinos and racetrack do not have anywhere near enough financial strength to outbid outsiders, such as the largest Nevada casino companies and Internet gambling operators.

Giving the exclusive right to Internet games to the State Lottery might bring in more money in the long run, but the states are desperate for cash, now. Only outside companies, like Caesars Entertainment, can come up with the \$100 million or so the state will want up front. But California's long-established and politically powerful cardclubs and tribal casinos will not quietly accept an outsider setting up a competing operation that brings legal gambling into every home in the state.

Still, there is so much money at stake that political deals will be made. In states like Nevada and New Jersey, where the local operators are the big money, the landbased casino companies will get the Internet gambling licenses. In states like California, local operators will get a license or two, but others will also be sold to the highest bidders.

The great irony is that this coming explosion of legal Internet gambling in the U.S. was created in part by a conservative Republican attempting to outlaw online gaming. When the GOP controlled Congress and George W. Bush was President, Bill Frist (R.-TN), then majority leader of the U.S. Senate, attached the UIGEA to a must-pass anti-terrorist bill, the SAFE Port Act. But, the UIGEA has many loopholes, accidentally opening the door to many forms of online gaming, including fantasy sports, skill games,

and intra-state gambling. The UIGEA has an express exemption for gambling where the bettor and operator are in the same state. It explicitly declares that legal gambling does not violate the UIGEA, even if the wires carrying the gambling information pass into another state.

It was the last that led to the announcement by the DoJ. The DoJ had always taken the position that the Wire Act outlawed all forms of gambling, and that that federal law applied so long as the gambling information crossed, even briefly, into another state.

The DoJ decided the only way out of this conflict with the UIGEA was to reinterpret the Wire Act. If this statute applied only to sports bets, then it wouldn't matter if phone lines happened to carry lottery or poker bets across other states.

The timing was also interesting. Although written months earlier, the DoJ made its announcement on Christmas weekend, when news staffs are at their absolute minimum. This prevented it from getting any immediate great attention. Even anti-gambling activists did not notice it for days. Plus, the tie-in to Christmas may not have been accidental. This was a gift of hundreds of millions of dollars and thousands of jobs to the states from Pres. Obama, at a time when they desperately need help to continue recovering from the Great Recession.

The Memorandum Opinion was written by Virginia A. Seitz, Assistant Attorney General, in the DoJ's Office of Legal Counsel, and represents the official position of the Obama administration. It was written in response to inquiries, some more than two years old, from Illinois and New York. Technically, it answered the question: "Whether proposals by Illinois and New York to use the Internet and out-of-state transaction processors to sell lottery tickets to in-state adults violate the Wire Act." But, it also ended up responding to the letter sent by the Majority Leader of the U.S. Senate, Harry Reid (D.-NV), and Jon Kyl (R.-AZ), the number two Republican in the Senate. They had written to the DoJ, after the District of Columbia Lottery announced it was going to open Internet gaming in Washington, demanding that the Department clarify its position on Internet gambling.

They now have their answer, though it may not have been what they had wanted. Instead of declaring the D.C. Lottery's Internet plans illegal, federal prosecutors will now only use the Wire Act when the gambling involves sports events or races across state lines. Because interstate horse racing already has its own statute, the only federal prohibition remaining on state-legal gambling is on sports betting, and even that might be changing.

The PASPA grandfathers-in Nevada, Delaware and a half-dozen other states, while prohibiting any other state from legalizing sports betting. This is now being challenged in the courts, because New Jersey voters approved sports betting in November 2011. My guess is that the PASPA will be declared unconstitutional. It is as legally irrational as saying that only some states can have movie theaters with sound. And it is

possibly the only federal statute in history that tells the states they cannot change their public policies on gambling.

The immediate beneficiaries will be the eight state lotteries that are already using the Internet. Now, they can use out of state payment processors and will quickly expand into selling individual tickets, not just subscriptions. The big question is whether they will sell instant tickets online. Because, if you put a scratcher on a video screen, it becomes almost indistinguishable from a slot machine. Every state lottery is also looking into whether it can offer other games, including online poker, as the DC Lottery already has authority to do. After all, most of the provincial lotteries in Canada are already operating Internet poker and other online gambling games, or are about to.

State legislatures are looking at how much revenue they can raise by changing their laws to license Internet gambling. Nevada is furthest along, having issued regulations for Internet poker. The Silver State already has online and telephone sports betting. It allows remote wagering on casino games from dedicated computer pads, limited to casino grounds and excluding hotel rooms. But Nevada will probably not license true Internet casino games, as long as the state's brick and mortar casinos fear the competition.

States will then enter into compacts with other states, and even foreign nations. In fact, there is no reason to wait. Nevada and the District of Columbia can immediately agree that players in Las Vegas, Reno and Washington can play online poker on sites operated by the D.C. Lottery or a Nevada-based casino company. The main barriers will be licensing and tax-revenue sharing. But multi-state and multi-national lotteries show these difficulties can be overcome.

They should also be talking with the governments of England, Alderney and the dozens of other foreign jurisdictions that license Internet gaming. So long as they stay away from sports betting and lotteries, there is no federal barrier to having truly international games.

This surprise Christmas present from the DoJ will spur other states to legalize. Iowa will probably be first. The Iowa Legislature mandated a report, which has already been submitted, concluding that intra-state poker can be operated safely and will raise money. This is the third year the Legislature has considered the issue. Since it meets for only 100 days, it will act quickly, one way or another.

California is desperate for any source of revenue, and it has so much legal gambling that the only question is which operators are going to be the big winners.

In New Jersey, the Democratic-controlled Legislature approved intra-state online gaming, but the bill was vetoed by Gov. Chris Christie (R.-NJ). Christie understands his state needs the money, so he will help put the issue on the ballot in November. It should probably be done through a constitutional amendment, to eliminate the present language limiting gaming to Atlantic City. The main author, state senator Ray Lesniak (D.-Union),

will probably not limit online patrons to New Jersey, as his original bill stated, but instead will accept players from any other state and nation where Internet gambling is legal.

Questions remain. The Wire Act still applies to bets on horse races. In December 2000, Congress amended the Interstate Horseracing Act, 15 U.S.C. §§3001-3007, to expressly allow the states to decide for themselves whether their residents can make bets on horse races by phone and computer. More than half the states have opted in under the Interstate Horseracing Act to allow residents to bet by phone or computer, including across state lines. But the DoJ's official position is still that the ADW operator and the bettor have to be in the same state. No one else, including the World Trade Organization, agrees with the DoJ. And payment processors have to figure out who is right.

The control of gambling has always been left up to the states. A federal licensing law would not really change things that much: States have to be able to opt in or out. Congress will not impose the same gambling policy on Nevada and Utah.

The problem for federally recognized tribes is that gambling remains a public policy decision left to the states. We are in what I call the Third Wave of Legal Gambling. This is the third time in American history that legal gambling has spread nearly everywhere. Historically, it has always been up to the states to decide their own public policy toward gambling. That is why Utah and Nevada can share a common border, yet have completely different gaming laws. The role of the federal government has, until recently, always been limited to helping the states enforce their public policies. Congress only acts when it has to, as with interstate horseracing and Indian gaming, or when the states have asked for federal assistance, as with the Wire Act and other statutes designed to fight organized crime. Even IGRA codifies the Supreme Court's decision in *Cabazon* that federally recognized tribes can only operate those forms of gaming permitted by the state where the tribe is located.

There are so many statements in the IGRA referring to “gaming on Indian lands,” that there can be little doubt that Congress intended to set up a system for allowing tribes to have legal gambling on their land, if the games were low-stakes social or traditional, Class I, or permitted by the laws of the state where the tribe is located, Class II and III. A typical statement comes at the beginning of IGRA in the Findings, 25 U.S.C. §2701(5): “Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.” IGRA contains no similar statement referring in any way to allowing tribes to conduct any part of their gaming off Indian lands.

Even the statement in IGRA, quoted above, that tribes have the exclusive right to regulate gambling on their lands might not be true. At least one judge has found that state lotteries may sell their tickets on Indians lands, and that the state regulation of gambling, in this case, was not preempted by IGRA or by any other federal law.

Confederated Tribes and Bands of the Yakama Indian Nation v. Lowry, 968 F.Supp. 531 (E.D.WA. 1996), judgment vacated by *Confederated Tribes & Bands of Yakama Indian Nation v. Locke*, 176 F.3d 467 (9th Cir. 1999). Although the decision is non-binding, it indicates that tribes might find it difficult to convince courts to keep Internet gaming off their land once a state has made it legal.

The attempts to make Indian gaming available to the general population of a state, without patrons having to come onto Indian lands, have not met with much success. The Coeur d'Alene Tribe's attempt to sell its National Indian Lottery tickets by telephone to patrons in most of the states met with such severe legal challenges that the Lottery folded. Many of the cases were resolved on legal technicalities. But it is clear that a number of judges rejected the Tribe's argument that the Lottery was being conducted on the Tribe's land in Idaho, merely because the drawings took place there. Some judges even objected to tribes ever offering any gambling off-reservation, even if the tribe has express permission from the state. See, e.g., the dissent in *A T & T Corporation v. Coeur d'Alene Tribe*, 295 F.3d 899, 910 (9th Cir. 2002) (Gould, Dissenting); see also *State of Missouri v. Coeur d'Alene Tribe*, 164 F.3d 1102 (8th Cir. 1999); *A T & T Corporation v. Coeur d'Alene Tribe*, 45 F.Supp.2d 995 (D.Idaho 1998), reversed, 295 F.3d 899 (9th Cir. 2002).

It is theoretically possible that the DoJ could someday reverse its conclusion that the Wire Act's "prohibitions relate solely to sport-related gambling activities in interstate and foreign commerce." But that is highly unlikely. Not only are such reversals rare, but they tend to be limited to issues a new presidential administration considers important, such as Pres. Obama's reversal of the DoJ's approval of torture under Pres. George W. Bush. Perhaps more importantly, the DoJ's position is the one that is legally correct, and is supported by almost all federal court decisions, including consolidated class actions from throughout the U.S. decided by the Fifth Circuit Court of Appeals. *In Re MasterCard International Inc.*, 313 F.3d 257 (5th Cir. 2002), affirming 132 F.Supp.2d 468 (E.D.LA. 2001). See also, *Jubelirer v. MasterCard International, Inc.*, 68 F.Supp.2d 1049 (W.D.Wis. 1999). The only published opinion declaring that the Wire Act does cover non-sports wagering was *United States v. Lombardo*, 639 F. Supp. 2d 1271 (D. Utah. 2007).

The Wire Act was part of Attorney General Robert F. Kennedy's war on organized crime and was designed to cut the telegraph wires illegal bookies used to get the results of horse races before their bettors. Using a 1961 law designed for telegraph wires against Internet poker has always been like using stone tools to perform brain surgery: It might work, but it would be extremely messy.

It is worth noting that the UIGEA and other federal anti-gambling laws have not been rendered irrelevant by the DoJ's new position on the Wire Act. The Black Friday indictments, where the U.S. Attorney for the Southern District of New York closed down the largest online poker sites then taking money bets from America, never mentioned the Wire Act. In that case, the federal government bootstrapped New York state anti-

gambling misdemeanors into federal organized crime felony charges. This shows that the DoJ has known for quite a while that the Wire Act does not cover poker. It also illustrates the continuing importance of state anti-gambling laws in a federal context.

I want to make it clear that I am not passing judgment on whether it is a good or bad thing that tribes have no inherent rights under *Cabazon* or IGRA to accept off-reservation patrons for Internet gaming. There are some constitutional issues, dealing with federalism and state and tribal sovereignty. But it is mainly statutory: Congress wrote IGRA to make it clear that tribes could run legal gambling, open to the public, but only on Indian lands.

IGRA was also intended to strengthen tribal governments. So there is nothing preventing a tribe from accepting bets off-reservation, if the tribe can reach an agreement with the state.

Some tribes can protect their gaming operations from the coming explosion of online competition, for example, through compacts that are already in place. But it is up to Congress to protect the rest. Of course, any attempt to expand Indian gaming rights will undoubtedly be met with strong opposition from most of the states.

Congress should not put off looking at these issues. States are acting. Now. In 1962, there were no legal state lotteries in the U.S. It took more than 45 years before almost all the states made lotteries legal. Internet years are like "dog years." Developments now happen so fast, that it won't take four decades before Internet gambling is legal in almost every state. And many tribes may be out of luck.

END

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Professor I. Nelson Rose is a Distinguished Senior Professor at Whittier Law School and a Visiting Professor at the University of Macau, an internationally known scholar, author and public speaker, and is recognized as one of the world's leading experts on gaming law.

Prof. Rose is best known for his internationally syndicated column and 1986 landmark book, "GAMBLING AND THE LAW®." He is the co-author of INTERNET GAMING LAW (1st and 2nd editions), BLACKJACK AND THE LAW, and the first casebook on the subject, GAMING LAW: CASES AND MATERIALS (LexisNexis). Prof. Rose is co-editor-in-chief of the *Gaming Law Review & Economics*.

Harvard Law School educated, Prof. Rose is a consultant to governments and industry. He has testified as an expert witness in administrative, civil and criminal cases throughout the United States, in Australia and New Zealand, including the first NAFTA tribunal on gaming issues. Prof. Rose has acted as a consultant to major law firms, international corporations, licensed casinos, tribes and local, state and national governments, including the provinces of Ontario and Québec, the District of Columbia, the states of Arizona, California, Delaware, Florida, Illinois, Michigan, New Jersey, Texas, and the federal governments of Canada, Mexico and the United States.

With the rising interest in gambling throughout the world, Prof. Rose has addressed such diverse groups as the National Conference of State Legislatures, Congress of State Lotteries of Europe and the National Academy of Sciences. He has taught classes on gaming law to the F.B.I.; at universities in Spain, France, Slovenia and China; and as a Visiting Scholar for the University of Nevada-Reno's Institute for the Study of Gambling and Commercial Gaming. Prof. Rose has presented scholarly papers on gambling in Nevada, New Jersey, Puerto Rico, Canada, England, Australia, Antigua, Portugal, Italy, Argentina and the Czech Republic.

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