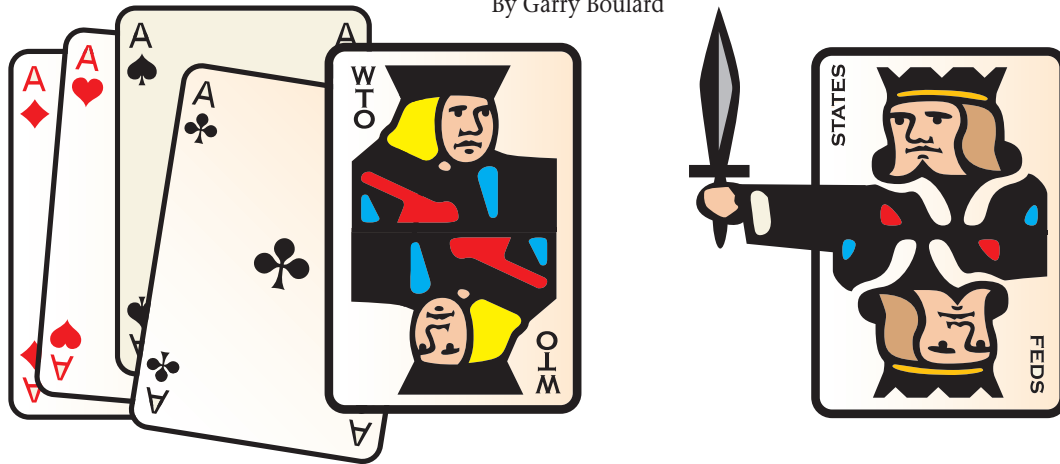


Trade Rules Gamble with State Laws

The WTO ruling on Internet gambling seems to favor the states, but some fear it also left the door open for another challenge in the future.

By Garry Boulard



When North Dakota Representative Jim Kasper introduced two bills earlier this year to legalize online poker, he thought he was identifying an untapped revenue source by acknowledging “what a lot of people are doing every day.”

“There are millions of people who gamble on the Internet and the numbers are getting larger all the time,” says Kasper. “It is a huge business with a huge revenue potential for a state like North Dakota.”

“I thought the time had come to make this particular type of gaming legal through the kind of regulating that other forms of gambling are subject to in other states,” he says.

In March, the North Dakota House passed HB 1509, which set forth the rules for regu-

lating, licensing and taxing online poker, and HCR 3035, which would have presented the question in 2006 to voters as a proposed amendment to the state constitution.

Then the federal government stepped in.

In a letter addressed to North Dakota Attorney General Wayne Stenehjem, U.S. Deputy Assistant Attorney General Laura H. Parsky wrote that “federal law prohibits gambling over the Internet, including casino-style gambling.”

She cited three sections of the U.S. criminal code that prohibit the use of a wire communication for gambling, gambling across state lines, and the establishment of any business that could promote gambling in an illegal way. Parsky said that anyone who “knowingly assists the gambling business to operate would likewise be subject to prosecution.”

Shortly after the letter was made public, the Senate defeated Kasper’s measures. He is convinced that the DOJ letter—“intimidating in tone and intent”—was instrumental.

While it may or may not have been the main reason the bills failed, Kasper says there is “no doubt in my mind that the letter scared away a lot of the support. How could it not have?”

EXPLOSIVE TOPIC

That the U.S. Department of Justice should find itself playing a prominent role in what seemed, until Parsky’s letter was released, a topic of interest only to the lawmakers of North Dakota, shows how explosive Internet gambling has become for the federal government and the states.

“It is an issue that is becoming front and center for the states,” says Martin D. Owens, a Sacramento attorney and Internet gambling law expert. “And, let’s face it, one of the reasons why so many people think the states are going to finally address the whole Internet gambling issue is because they are already willingly and happily involved in so many other forms of gambling.”

Owens says that not only do 48 states currently offer some form of gambling, “but in most cases they have become very active in promoting gambling in the confident expectation that they have had a captive market.”

But the introduction of Internet gambling, says Joseph Kelly, a professor of law at the State University of New York in Buffalo, has added a new and uncertain element to the mix, primarily because it remains illegal throughout the country, but also because it is so stubbornly popular.



REPRESENTATIVE
JIM KASPER
NORTH DAKOTA

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"I don't think anyone has seen anything like this before," Kelly says. "The growth rate is fantastic. And unless you take some sort of drastic measure like chopping off the right hand of every 10th bettor, there is nothing anyone can do to stop it."

A decade old, Internet gambling is a \$5.5 billion industry, according to Christiansen Capital Advisors, a company that follows Internet gambling trends. The activity is expected to almost triple in growth to nearly \$17 billion by 2009. CCA additionally estimates that of the 12 million people who gamble yearly on the Internet, some 7.5 million live in the United States.

"That's the reason why everyone, but particularly those at the state level, are looking for some kind of guidance," Kelly says. "Everyone agrees that it is not permitted by law. But more and more people are doing it in complete disregard of the law, and a lot of the states are wondering just what is expected of them in all of this."

TRADE DISPUTE

Many Internet gambling experts thought that guidance—or at least a rough roadmap—would make itself clear once the results of a trade dispute between the United States and Antigua and Barbuda were known. But so far, that has not been the case.

A three-island Caribbean nation that is the home to legalized Internet gambling, Antigua and Barbuda complained before the World Trade Organization that U.S. laws prohibiting the cross-border supply of gambling services had damaged its domestic gambling industry. It claimed that the U.S. effort to enforce its laws were in violation of international trade rules.

Antigua and Barbuda officials said their country lost more than \$30 million and some 4,000 jobs because of U.S. actions regarding international Internet gambling.

An interim ruling by a WTO panel favored Antigua and Barbuda, but the WTO's appellate body in April overturned that with a decision much more positive for the United States.

The appellate decision said that international trade laws allowed for exceptions to WTO rules in specific instances where a party makes a successful case that special laws are needed to protect what is generally referred to as "public morals."

Then-acting U.S. Trade Representative Peter F. Allgeier immediately hailed the WTO

decision as a victory for the United States, noting that the body "agreed with our position that the U.S. gambling laws at issue here protect public order and public morals."

Allgeier added that the WTO decision also reaffirmed the role of "federal and state law enforcement officers and regulators who protect the public from illegal gambling and its associated risks of money laundering and organized crime."

PARTIAL VICTORY

But the WTO ruling was not, from the U.S. perspective, a complete success.

The United States, through the Interstate Horse Racing Act of 2000, clearly allows Americans to bet on horseracing either by phone or online. Antigua and Barbuda argued that the United States is engaging in a discriminatory practice if it does not also allow operators in Antigua and Barbuda to offer the same services through their own casinos. The appellate WTO ruling says that all "gambling and betting services" in the United States are subject to the rules of the General Agreement on Trade Services (GATS). This means that the United States could eventually be challenged by another country for not providing market access to all parts of its gambling service sector.

"This puts the states in a potentially precarious position," says Peter Riggs, the director of the Forum on Democracy and Trade, who notes that a process in the services agreement under GATS allows for a country to withdraw from an existing trade commitment, but only if it is willing to relinquish an "equivalent level of access to a foreign trading partner in another sector such as energy, water or health facilities management."

For the states, says Riggs, the implications are clear. "Every year the Internet gambling market is getting bigger, which means that if the United States is again challenged on this matter, they will need to offset it by opening up another market in another sector."

"Basically that is a huge hole in the U.S. position," says Kelly, who predicts that "at some point someone else could come along and make a better case than Antigua did."

Utah Representative Sheryl Allen worries about the same thing. She says that even though GATS includes a public morals exception, the Central American Free Trade Agreement's investment chapter does not. "That means you could very easily end up

with a situation where an offshore company brings an investor case against a state under CAFTA," she says.

And if that state should lose such a case, Allen says the state could not only be forced to pay a judgment, but might very well "lose



REPRESENTATIVE

SHERYL ALLEN

UTAH

control over its ability to set its own policies on gambling. This may seem far-fetched, but it could happen," she says.

Jeffrey A. Modisett, a former Indiana attorney general and Internet gambling law specialist, says that if anyone is thinking that the WTO decision has resolved all the Internet gambling issues, they are mistaken. "I think just the opposite is true," he says.

"There is just too much money and too many interests involved for this issue to suddenly no longer be discussed," says Modisett. "And the states are going to be left trying to keep up with the latest turns in both federal law and international trade policy as a result."

ATTORNEYS GENERAL STEP IN

The idea that the United States—and by inference, the individual states—could be forced to comply with GATS' market access rules, prompted the attorneys general of 29 states to send a letter to Rob Portman, the U.S. Trade Representative, several weeks after the WTO ruling. They complained that GATS provisions protect the "right of foreign service providers to establish a commercial presence within the United States to provide a covered service."

The attorneys general additionally noted that "an array of common U.S. gambling regulations, including limitations on the number of casinos, state monopoly lotteries or exclusive Indian gaming rights, are now subject to challenge before future WTO tribunals as violating U.S. GATS obligations."

"There is no doubt that a number of states are really quite furious with how the Antigua matter was handled," says Kelly. "The WTO language seems to be telling the states that they cannot do away with any particular kind of gambling, which in this case could

include online gambling.

"In essence, the attorneys general are telling the federal government, 'Look, you did not at all represent the states' interests in this. Basically, you sold us out,'" says Kelly.

Representative Kasper shares that frustration. "It is the states—and state lawmakers—who are closest to the people. And the way our system of government is supposed to work, the states have the right to establish their own policies on a wide range of issues, including gambling."

"But it has not worked out that way when it comes to online gambling," says Kasper. "We've been left in the position of simply rubber-stamping whatever Washington decides."

Indeed, most state legislative action on Internet gambling has been along the lines of restricting its use. In 2001, Oregon Senator Rick Metsger sponsored a law that attacks



SENATOR
RICK METSGER
OREGON

Internet gambling from the credit card perspective. His bill allows the Oregon attorney general to not pursue consumers who run up debts from Internet gambling.

"The thinking here is that if the enablers recognize that they run the risk of not being able to collect from those who are gambling, they will be less likely to try to encourage Oregonians to participate," explains Metsger.

In New Jersey, Senator Barbara Buono



SENATOR
BARBARA BUONO
NEW JERSEY

held hearings on the importance of *U.S. v. Antigua and Barbuda*, before the case was even decided, with the hopes of exploring the implications for states.

"Basically we are left with trying to do whatever we can to enforce the federal laws in this matter," says Buono.

"There are many people in my state who are gambling over the Internet," she says. "I have to think that they really just don't know that it is illegal." Buono would like to see New Jersey initiate what she calls "an informational program" that would explain the legal status of Internet gambling.

"But it would not be just something where we explain the penalties that could be a result of gambling on the Internet," Buono says. "It should also be a means of letting people know that unlike the bricks and mortar casinos in New Jersey, there really is no state agency that can guarantee the fairness or integrity of these online games."

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REPRESENTATIVE JIM KASPER

In Nevada, lawmakers this summer passed a law that will permit casino patrons to gamble on walk-around PDAs on casino property. The bill was signed into law in June, pending a decision from the Nevada Gaming Commission on how exactly such electronic gambling would be regulated.

"This is the thing that we keep hearing over and again: Internet gambling is illegal because we cannot ensure its safety," says Michael Tew, a finance expert with Political Capital, a Washington, D.C., consulting firm.

"But look at what happened with the land-based gaming industry," he says. "It was underground until it was decided that it could be legalized and taxed. Once that happened, it drove the mob out of business. And the reason for that was that you had to be licensed, and in order to get a license you had to have no criminal record."

BUT IT'S AVAILABLE

You only have to look at the business plan of a company called PartyGaming PLC to see that millions of Americans gamble on the Internet entirely indifferent to federal and state regulations. Going public on the London stock exchange this summer, PartyGaming—whose most well-known site is called PartyPoker.com—saw its stock surge 9 percent within minutes of its debut. Its 2004

revenues topped \$600 million with nearly 90 percent coming from U.S. gamblers.

PartyGaming, in its business plan, is betting that the United States will never be able to actually enforce its anti-Internet gambling laws. "PartyGaming and its directors rely on the apparent unwillingness or inability of regulators generally to bring actions against businesses with no physical presence in the country concerned," the company recently announced.

Critics of the U.S. position also note that the ascendancy of companies like PartyGaming proves that it is impossible to stop other countries from licensing online gambling opera-

tions. And it is just as difficult to stop those operations from accessing the U.S. market.

"Our options are admittedly limited," says Buono. "But we can still do things like targeting software providers that carry the advertising for these Web sites. You could get them for engaging in a deceptive trade practice by falsely conveying to the public that the advertised activity is legal."

Kasper takes a different tact: "What we need to start doing is talking seriously about what we want the policies of the states to be, because I really believe that if push comes to shove, Washington cannot tell the states what to do. And that means that if a state really does want to legalize some form of Internet gambling, it can."

Utah Representative Allen says state lawmakers need to establish permanent committees just to study international trade issues.

"These issues are undeniably complex," she says. "We need to get involved. We need to have regular contact with the United States Trade Representative's office and our congressional delegations."

"The thing that we cannot forget is that trade agreements have the potential to hamstring us at the state level," Allen says. "We need to stay on top of what is going on because whatever happens, it is very much going to impact the states." ■