

A DISTURBING “STATE” OF AFFAIRS -- EVALUATING THE NEW WAVE OF STATE-LEVEL ONLINE GAMBLING LAWS

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U.S. Representative Robert Scott (D-VA) recently said: “If we wanted to be effective in prosecuting illegal gambling over the Internet, we would prosecute individual gamblers.”¹ It appears that Congressman Scott’s point of view is gathering steam, and the online gaming industry should be concerned.

Despite prohibitionists’ efforts² at the federal level, most proposed federal legislation has overlooked (or intentionally omitted) criminalization of the mere act of placing a bet by a potential player. As Washington lobbyists jockey for position in this feud, state legislators are training their sights on players in a new wave of state-level restrictions that threaten to do more damage to the online gaming industry than federal prohibitionists could ever hope to wreak.

At least eight states restrict online gambling³ and more are considering similar bills. In addition, existing legislation in many states may be broad enough to cover online gambling activity as falling within prohibitions relating to “computers,” “devices,” or “communications facilities.” But with the recent trend toward attempts to criminalize player behavior, prohibitionists are truly opening a new front and creating an unprecedented threat to the industry.

¹ P. Hardin, “Goodlatte tries to revive Internet gambling bill” *Richmond Times Dispatch* (April 6, 2006).

² Representatives Bob Goodlatte (R - VA) and Jim Leach (R - IA), and Senator John Kyl (R – AZ) are leading congressional prohibitionists.

³ Illinois, Indiana, Louisiana, Michigan, Nevada, Oregon, South Dakota and Washington.

Despite Congressman Scott's position that individual gamblers would be an appropriate target for prosecution, pending federal legislation focuses on the operation of an online gambling business, or -- where it seeks to attack a third party -- on supporting service providers such as banks or hosting companies. State governments may be a step ahead of the feds in this regard as some state laws appear to specifically prohibit player wagering conduct.⁴

For example, Washington State, recently enacted a law amending the state's Gambling Act to prohibit all forms of electronic gambling. The law draws no distinction between players and website operators.⁵ With more than half of the wagers placed on Internet gaming sites coming from United States citizens, any prohibition on player activity, in even a single state, may significantly impact gaming revenues if players respond by giving up their keyboard betting activity.

Illinois law prohibits individuals from making "a wager upon the result of any game, contest, political nomination, appointment, or election by means of the Internet."⁶ While no widespread prosecution of online bettors has occurred in Illinois, its statute appears to be broad enough to ensnare even the casual bettor within its proscription.

Not all state laws include prohibitions on player conduct. Oregon's Internet gambling statute focuses on prohibiting Internet gambling businesses from accepting certain Electronic Funds Transfers (EFTs) from financial institutions and others transferring such funds.⁷ Nevertheless, nothing prevents this state from amending its laws to include criminalization of player activity.

⁴ Nothing contained in this article is intended as legal advice on the interpretation of any state's laws. Only an attorney licensed in the particular state can provide a legal opinion regarding the meaning or scope of a particular state's statutory provisions.

⁵ Washington Senate Bill 6613, signed on March 28, 2006, to be implemented on June 7, 2006.

⁶ Article 28, Gambling and Related Offenses, 720 *ILCS* 5/28/1, § 28-1(a)(12).

⁷ § 167.109, *ORS* (2005).

Some state statutes fall into a more ambiguous category. For example, Florida law punishes individuals who “play” or “engage in” any “game of chance” by “any device whatever.”⁸ The term “device” under the Florida Statute is not defined, and may well include computers, modems and/or gaming software. Many state laws are written in a similarly expansive manner, allowing the state to utilize its law to prohibit a vast array of gambling activities, potentially including those taking place online. Recently, the Colorado Attorney General attempted to rely on preexisting Colorado gambling statutes as a basis for claiming that online gambling was illegal, as was advertising such services at a Denver Nuggets football game.⁹ Important to note is the fact that Colorado has not passed specific online gambling legislation. Nonetheless, Colorado Attorney General John Suthers claims that Internet gambling is illegal in Colorado, and virtually every other state.¹⁰ Similarly, a judge in New Jersey convicted a webmaster for promoting an online sports betting operation, internationalnetcasino.com, despite the fact that online gambling is not specifically prohibited by New Jersey law.¹¹ This demonstrates the disturbing potential for reliance on ambiguous or even non-existent state law as a basis for prohibiting both the operation of Internet gambling sites, and the mere betting thereon. Politicians and law enforcement officials may find themselves invoking vague, expansive gambling prohibitions, as they are confronted with online gambling issues, but find that their state has not addressed this industry with any specific legislation.

Of more concern is the newly-adopted statutes that specifically prohibit player activity. A wave of state laws sweeping the nation could leave carnage in its wake in the form of former

⁸ § 849.07, *Fla.Stat.* (2006).

⁹ Staff, “GoldenPalace.com Has State of Colorado Fuming Over Advertisements,” *Gambling911.com* (February 27, 2006), which can be viewed at: <http://www.gambling911.com/022706news.html>.

¹⁰ *Id.*

¹¹ Staff, “Website Owner Convicted of Promoting Online Gambling,” *CasinoMeister.com* (March 10, 2006) [discussing Judge Salem Vincent Ahto’s decision in *State v. Nicholas Drakos*, heard in Morristown, New Jersey].

online bettors. While federal legislation attempts to chip away at the online gambling industry by intimidating the banking and hosting industries, state level restrictions often cut to the chase by imposing outright prohibitions on player activity. Well-established legal principles, may affirmatively demand this dichotomy since federal government is limited in the types of activities it may criminalize. Generally Congress can only criminally prohibit activity that involves some element of interstate or foreign commerce.

While all Internet transactions can be viewed, at some level, as connected to interstate commerce, federal prosecutors and judges will not be thrilled to handle throngs of cases involving casual bettors engaged in small stakes poker or sports betting activity. The federal courts have historically been reserved for decidedly higher-stakes matters. Any attempt to bog down the federal courts in such penny ante cases would likely be met with swift rebuke from federal judges and magistrates. Moreover, given the practical difficulties encountered when attempting to enforce United States' law against offshore gambling establishments, the states may be in a better position to effectively attack the online gambling industry with these player prohibitions.

The logical question is, then; what to do? The industry, and its trade organizations, are not powerless in the face of this mounting trend. Thus far, no court has considered the constitutionality of any state-level restriction on Internet gambling. There are a variety of legal arguments that address the validity and enforceability of any such law; and, any affected individual or company may be entitled to initiate declaratory test case litigation to challenge this legislation. Significant issues remain to be decided by the courts as to whether any of these state-level restrictions are constitutional, in light of the dormant Commerce Clause,¹² and Due

¹² See this author's article entitled "Will the Commerce Clause Save Online Gambling?" which can be found at: <http://www.gamblinglawupdate.com/archives/Commerce%20Clause.pdf>.

Process concerns. Some state Constitutions contain privacy protections which exceed those provided by the United States Constitution, thus giving rise to additional, potential state-level legal challenges.¹³

While gambling regulation has historically been a subject reserved to the states, the presence of the Internet creates a dimension to gambling regulation that was heretofore unanticipated by the courts when evaluating previous state level gambling legislation. The new era of state online gambling legislation, while intimidating and potentially damaging to the bottom line of the online gambling operator, may create unique opportunities for the development of online gambling law, and provide a vehicle for the preservation of cherished constitutional rights

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¹³ For example, the States of Oregon and Florida have adopted greater state constitutional privacy rights than provided by the United States Constitution.