

Gambling Law Update™
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Introduction

Gambling Law Update returns this month after a several month hiatus. Much has been happening in the world of Internet Gambling, and the Author has been in the trenches fighting various battles at different levels. Advertisers remain nervous about taking online gambling advertising, although significant progress is being made to educate them on the difference between reality and rumor. The Casino City case continues to wind it way through the court system, with the first round of briefs completed, and very little surprises. The Department of Justice claims that the case should be dismissed because they have not prosecuted anybody in the almost 2 years since the initial threats. Now there's an argument. Does that mean that the threats were empty, and they didn't really mean it? Does that mean they finally realized online gambling advertising is protected by the First Amendment? Time will tell, but speaking of time, there's no time to waste, so on with the *Update*:

LEGISLATIVE UPDATE

With revenues from Internet gambling bets placed from the United States toping more than \$1 billion annually, according to Christiansen Capital Advisors, LLC, and with the market is expected to grow to \$18.4 billion internationally by 2010,¹ all eyes were on Congress to determine whether or not they would finally pass some form of Internet gambling legislation.

¹ Tony Batt, *Congress Unlikely to Act on Internet Gambling*, ReviewJournal.com located at www.reviewjournal.com/lvrj_home/2004/Oct-27-Wed-2004/business/25103578.html (10/27/04).

But as was evident in previous terms, Bill language and state's rights to regulate gambling held several different Internet gambling Bills in committee. On July 31, 2004, the Senate Banking Committee voted 19-0 to approve restrictions that Sen. Jon Kyl (R-AZ), the leading anti-gambling voice in Washington proposed. However, the Senate Banking Committee also added additional provisions to prevent states from regulating gambling within their borders, effectively killing the Bill.² In the House of Representatives, Rep. Michael Oxley, Chairman of the Financial Services Committee, added HR 2143, an Internet gambling prohibition bill, to the September 11 Bill before sending it out of Committee. However, this move was against the wishes of House Republican leadership, and the HR 2143 provision was stripped from the September 11 Bill before its final passage.³ Now that the 108th session of Congress has come to a close, any pending legislation will have to be reintroduced. It is likely that Senator Kyl, who has introduced several versions of this Bill before, will attempt to pass another version during the 109th session; "I wouldn't bet the mortgage that (Internet gambling restrictions) will pass this year, but his interest in this issue will not go away," Kyl spokesman Scot Montrey said.⁴ With the loss of Senate Minority Leader Tom Daschle, the major voice of opposition to this Bill, it remains to be seen whether the Senate will be influenced by Kyl. Although Kyl's vendetta for the gaming industry is unlikely to go away, it is more likely that Congress will eventually pass some form of legislation to regulate Internet gambling, similar to HR 1233 proposed by Rep. John Conyers (D-MI), to create a federal commission to study the licensing and regulation of companies taking bets online. Nevertheless, this lack of clarity as to what is legal with respect to

² See *Id.*

³ Kevin Smith, *Rules Committee Pulls Anti-Gambling Language from September 11 Bill*, IGamingNews.com located at <http://igamingnews.com> (last accessed 10/8/04).

⁴ See *Id.*

Internet gambling in the United States is going to continue to cause headaches for online wagering companies.

Taking a different approach to regulating Internet gambling, the Bush administration is urging United States money transfer businesses to take steps to make sure that their overseas agents are not vulnerable to money launderers and terrorist financiers. The Treasury Department's Financial Crimes Enforcement Network ("FinCen") issued guidance aimed at addressing this issue, making it clear that money transfer businesses must put procedures in place to detect abuses by foreign agents, guarding against money launderers and terrorist financiers.⁵ "To the extent a money services business uses relationships with foreign agents and counterparts to facilitate the movement of funds into or out of the United States, the money services business' anti-money laundering program must reasonably address the risks of money laundering and the financing of terrorism," the agency said in a statement.⁶ The Treasury said that companies will have six months to come into compliance, marking the latest step by the administration to bolster oversight of money transfer companies.

WTO RULES AGAINST UNITED STATES' GAMBLING PROHIBITIONS – U.S. APPEALS

Finding that United States' cross-border gambling prohibitions on its citizens were in violation of international trade agreements, the World Trade Organization ("WTO") issued its final ruling in favor of the Caribbean island nation of Antigua and Barbuda. The United States' efforts to ban online gambling within its borders greatly affected Antigua and Barbuda, resulting in a loss of employment and revenue for the island nation. The WTO ruling, recently made public, found that the United States was violating its commitments under the General Agreement on Trade in Services ("GATS") by not providing free trade in commercial services, mainly

⁵ CNN.com, *U.S. Tightens Reins on Money Transfers*, CNN.com located at www.cnn.com/2004/ALLPOLITICS/12/08/money.transfers.ap/index.html (12/8/04).

⁶ See *Id.*

through its prohibition of online gambling transactions, declaring 3 federal laws and 4 state laws “inconsistent” with U.S. obligation under the 1995 GATS. The dispute boiled down to two basic issues, which were: “Whether gambling and betting services are covered by the U.S. commitment to end trade barriers under a sub-sector treaty titled “Other Recreational Services (except sporting);” and, whether the U.S. is entitled to use the “public morals” clause to avoid such a commitment.”⁷ After lengthy discussions over the definition of “sporting,” the panel concluded that “sporting” does not include gambling, and noted that the U.S. had the opportunity to provide its own definitions under this sub-sector, and failed to do so.⁸ Because the U.S. did not specifically exclude gambling and betting services, the panel ruled, these services are included in its GATS commitments. The panel also concluded that the U.S. invocation of Article 14 of the GATS, which permits countries to have laws that protect public morals, could fall within the scope of Article 14 because the laws were aimed at protecting problem gamblers, preventing gambling by minors, and fighting organized crime.⁹ However, since the U.S. spurned Antigua’s offer to discuss these issues, the panel ruled, the U.S. “failed to pursue in good faith a course of action” that could have led to a “WTO-consistent alternative.”¹⁰

The ruling was a first for the WTO since the ruling involves the Internet, and may have a direct impact on a participating country’s ability to regulate what it considers “moral vices.”¹¹ However, the case is far from over, as Antigua must also be successful in obtaining the same ruling from the WTO’s Appellate Body upholding the dispute panel’s report. On Jan. 7, 2005, a trade representative for the United States filed a Notice of Appeal to Valerie Hughes, the

⁷ Interactive Gaming Council, *In the U.S.: WTO Ruling Raises Key Issues; Outlook for the New Congress; and Progress in Casino City Test Case*, IGCouncil.org located at www.igcouncil.org/read_news.php?id=1 (12/03/04).

⁸ See *Id.*

⁹ See *Id.*

¹⁰ See *Id.*

¹¹ Scott Miller, *WTO Ruling Said to Open U.S. to Internet Gaming*, *The Wall Street Journal Europe*; 32-2-741-1328 at http://www.quicken.com/investments/news_center/article (3/24/04).

Appellate Body Secretariat of the World Trade Organization, acknowledging the United States' intent to defend its case against Antigua before the WTO's Appellate Body.¹² If the Appellate Body upholds the ruling, the WTO can request that the United States change its policies for Internet gambling or face trade sanctions. While federal officials will not be losing much sleep over possible WTO sanctions, ignoring the ruling would further increase perceptions that the United States picks and chooses what international agreements it will honor, and may open up the possibility for future proceedings from additional countries that offer online gambling services.

LEGAL PROCEEDINGS

In August 2004, Casino City, Inc. filed a Complaint against the U.S. Department of Justice ("DOJ") in the U.S. District Court for the Middle District of Louisiana, seeking a declaratory judgment that advertising online casinos and sports books is constitutionally protected commercial free speech under the First Amendment of the United States. Casino City, an Internet portal that provides a database of information for traditional and online gambling, is filing the suit in response to the Department of Justice's approach to silencing the Internet gaming advertising industry. Casino City is also seeking a declaration as to whether the DOJ's threat of charging advertisers with aiding and abetting is consistent with the First Amendment. The DOJ recently filed a Reply Brief in support of its Motion to Dismiss Internet portal site Casino City's attempt to obtain a declaratory judgment on its constitutional right to carry advertisements for online gambling companies. Responding to Casino City's latest memorandum filed in November, the Reply Brief attempts to defend the DOJ's actions while arguing why the

¹² Bradley Vallerius, *US appeals WTO Ruling*, IGamingNews.com located at www.igamingnews.com/index.cfm?page=artlisting&tid=5590 (1/11/05).

Department believes the case should be dropped due to lack of ripeness and standing.¹³ The DOJ also stated that the case should avoid a ruling on the merits because Casino City has not proved that it faces a *credible threat* of prosecution, a laughable position to anyone that has been following these developments. The DOJ argues that Casino City “is only one of countless advertisers of Internet gambling,” and that over a year has passed since the DOJ issued its public service letters, but still no prosecutions have been filed.¹⁴ The DOJ contends that there is no constitutional right to advertise any illegal activity (which the DOJ argues that online gambling to be). Interestingly, even though Casino City demonstrates that online gambling providers are licensed and regulated by governments around the world, the DOJ holds that these companies are illegal *everywhere* in the United States¹⁵ – contradicting its position that Casino City has not proved that it faces a *credible threat* of prosecution.

THE ADVERTISING ONSLAUGHT

The gray area surrounding advertising practices in the interactive gaming industry has convinced many network executives to reevaluate their advertising policies and discontinue online gambling advertisements, at least for now. Among the broadcasting giants that have already pulled Internet gambling advertisements are Clear Channel Communications, Infinity Broadcasting, Discovery Networks, and search engines Google and Yahoo! This summer video game giant Electronic Arts announced that is had decided to stop running advertisements for online casinos on its website. Electronic Arts informed Forward Slash, a South Africa-based company, that it would not longer run advertisements for its online casinos on an Electronic Arts

¹³ Bradley Vallerius, *DOJ Holds Its Ground in Casino City Case*, IGamingNews.com located at www.igamingnews.com/index.cfm?page=artlisting&tid=5532 (12/8/04).

¹⁴ See *Id.*

¹⁵ See *Id.*

website Pogo.com, which lets visitors play interactive games without charge.¹⁶ Now, the latest company to halt gaming advertising to U.S. citizens is FindWhat.com, who also recently announced that they would stop showing online gambling ads to people whose IP addresses indicated that they were in the United States or whose location cannot be determined.

According to the *New York Times*, the nation's largest phone operators, Cingular, Verizon and Sprint, are cutting service to adult companies and content for American cell phone users, despite the overwhelming success of such formats throughout Europe and Asia.¹⁷ It is believed that these operators are ignoring revenue forecasts for fear of direct economic repercussions and religious organization boycotts if this material is offered.¹⁸ The refusal of phone operators to carry specific types of content is chilling and may put the operators in the role of censors by keeping people from accessing material that they want, setting the stage for a free speech battle. If operators can prohibit content from the adult industry, the mobile gaming industry could very well be next. However, as no company is compelled to sell material they do not wish to sell, the operators seem confident they can avoid legal repercussions.¹⁹

PayPal, the third party Internet payment processor whose exit from the online gaming industry prompted many companies to follow suit, announced this fall that it would begin penalizing users who violate its acceptable use policy by using PayPal to collect payment for any of the "illegal" services, with fines up to \$500. The policy, which specifically refers to online gambling, adult content and prescription drug sales, is to be enforced by the company's compliance team.

¹⁶ Matt Richtel, *Electronic Arts to Stop Advertising for Online Casinos on Its Web Site*, The New York Times located at www.nytimes.com (06/12/04).

¹⁷ Marshall Pryor, *Phone Networks Drawing the Line on Mobile Content*, AVN Online located at http://www.avn.com/index.php?Primary_Navigation=Articles&Action=Print_Article&Content_ID=210015 (12/22/04).

¹⁸ See *Id.*

¹⁹ See *Id.*

A civil settlement was recently reached by 3 related companies which operated 3 St. Louis sports-oriented radio stations, KFFNS-AM, KFNS-FM and KFRT-AM. The stations entered into an over \$158,000 settlement agreement to settle forfeiture allegations that these stations promoted, aided and abetted illegal offshore and online gambling activities, through airing advertisements for online gambling sites. The settlement agreement, filed in the Eastern District of Missouri, states that these radio stations knowingly received thousands of dollars in funds derived from criminal offenses, mainly the promotions of illegal gambling transactions. The government's use of federal forfeiture laws to suppress commercial speech is dangerous, and sets a bad precedent for the industry, given the uncertainty surrounding the online gaming industry.

NATIONAL GAMBLING OUTLOOK

Options for legalized gambling are exploding around the United States – from the Internet and multi-state lottery games to casinos at racetracks dubbed “racinos.” While the legality of Internet gambling remains in constant limbo, more and more states are attempting to take matters into their own hands and form some kind of regulatory scheme. Although states are attempting to regulate gambling as an additional form of revenue, bills are having a hard time getting through committees or are becoming the victim of slander campaigns by opponents. Even though California voters rejected two gaming initiatives this past election, the political battles there are far from over, as both sides are still pushing for changes in the law with regards to tribal gaming rights.

Nevertheless, states are cracking down on citizens who venture into the murky areas of this industry. State officials in Missouri shut down a “Pimp My Ride” Internet-based lottery site, which offered users an opportunity to purchase a \$2 ticket for a chance to win a \$20,000 grand

prize of having their car “pimped out.”²⁰ Officials shut down the site as a result of a tip, but Missouri state law prohibits individuals from running lotteries, allowing only for raffles and lotteries to be run by charities and non-profit organizations.

Since its airing in April 2003, the Travel Channel's World Poker Tour has become a hit with viewers and now averages 5 million viewers each week, according to the casino-management company Lakes Entertainment, making it the Travel Channel's most-watched series ever. The popularity of card games like Texas Hold 'Em has helped fuel a card-playing craze around the nation and on many college campuses. Card games such as Texas Hold 'em and other poker games have become “the thing” to do on campus with buy-in games organized by some colleges and student groups drawing hundreds, offering prizes ranging from money to televisions. In Florida, Texas Hold 'Em has become so mainstream with college students that Florida State University has sanctioned campus tournaments as part of the school's recreational offerings, with the prize being an intramural T-shirt.²¹ “We're the last ones doing this,” said FSU's recreation director, Alicia Crew. “The have offered everywhere. We're not doing anything that anyone else isn't doing.”²² However, the newfound popularity of poker among teens worries some adults, prompting Orange County to become the first school district in Florida to include anti-gambling lessons in its curriculum. The Florida Council on Compulsive Gambling thinks all school systems in the state should warn students of the perils of wagering. The director of Orange's Safe and Drug-Free Schools program stated that “Instead of doing

²⁰ Kevin Smith, *Missouri Officials Bust “Pimp My Ride” Online Lottery*, Interactive Gaming News located at www.igamingnews.com/index.cfm?page=artlisting&tid=5261 (08/05/04).

²¹ Mary Shanklin, *Poker Craze Spreads to Teens*, Orlando Sentinel located at www.orlandosentinel.com/features/lifestyle/orl-asecpoker18091804sep18,0,639430.story?coll=orl-home-headlines (09/18/04).

²² See *Id.*

drugs or alcohol or other destructive behavior, they're now *gambling* for the excitement, for something to do.”

INTERNATIONAL GAMBLING OUTLOOK

Gaming markets continue to proliferate as the popularity of Internet gambling is becoming widespread, moving into new sectors, and providing much needed revenue to its hosting country. On the Isle of Man, a policy change that allows online gaming operators to accept bets from U.S. customers has been approved. The policy change, approved by the Council of Ministers and jointly issued by the Treasury and Department of Trade and Industry for the Isle of Man, overturns a policy dating back over 18 months when casino operators on the Isle sought to avoid conflict with U.S. authorities.²³

In Canada, where U.S. interference with online gaming ventures has caused constant headaches, the government of British Columbia has passed a bill that attempts to protect its citizens from the U.S.A. PATRIOT Act. The U.S.A. PATRIOT Act, passed as a result of the September 11, 2001 terrorist attacks, allows the FBI to view private data on citizens that is held by subsidiaries of American firms. The bill passed by British Columbia amends the province's Protection of Privacy Act by restricting the access of information from organizations outside of Canada.²⁴

The Atlantic Lottery Corporation (“ALC”) launched a website offering existing lottery products to Atlantic Canadians through a secure and controlled environment on the corporation's website, called PlaySphere at www.alc.ca. The website will allow Atlantic Canadians of legal age to purchase tickets for already existing lottery games via the Internet. In addition to funding

²³ Bradley Vallerius, *Isle of Man Welcomes US Play*, IGamingNews.com located at www.igamingnews.com/index.cfm?page=artlisting&tid=5578 (1/11/05).

²⁴ Interactive Gaming News, *Global Policy Review – November 2004, Protection from Patriots*, Igamingnews.com located at www.igamingnews.com/index.cfm?page=artlisting&tid=5458 (11/02/04).

their account using a voucher purchased at lottery outlets, consumers will be able to pay for their lottery product through an electronic funds transfer from their bank account.²⁵ There will be no option to use a credit card. Currently, more than 30 regulated lotteries worldwide offer products for sale over the web.²⁶

GAMBLING IN THE U.K.

Internet gambling in the United Kingdom (“U.K.”) has been moving steadily towards regulation for almost as long as United States’ effort to prohibit it. The full form of the UK Gambling Bill was introduced this fall and debated in committee. However, the Bill, which aims to modernize 40-year-old legislation, and allows for Las Vegas-style super-casinos, has angered campaigners, health experts and casino operators alike. Waning support from the industry turned to hostility in December when the government announced stringent new caps on their expansion plans – wiping over 300 million pounds off their combined market value in the span of a few hours.²⁷ With a general election expected in early May and only a few weeks to get the Bill approved in the House of Lords, Culture Secretary, Malcolm Moss, said it would be a “miracle” if the Bill is passed in time.²⁸ Some industry representatives believe ministers are considering dropping the contentious parts of the Bill relating to new casinos as a last resort to get the rest of the laws approved.²⁹

In an effort to better represent the needs of the betting industry in the U.K., and as the result of one of the biggest race fixing scandals in the betting exchange industry, the three leading P2P sites joined together this past fall to form the Betting Exchange Trade Association

²⁵ Press Release, *Atlantic Lottery to offer lottery products on website*, located at <http://www.alc.ca/English/AboutALC/MediaRoom/Article.aspx?id=1170> (07/23/04).

²⁶ See *Id.*

²⁷ Casino City Times, *Experts: UK Gambling Bill Will be Buried or Delayed*, CasinoCityTimes.com located at <http://www.casinocitytimes.com/news/article.cfm?contentID=147761> (1/14/05).

²⁸ Rachel Stevenson, *Casinos Face Axe From Gambling Bill*, The Independent Online located at <http://news.independent.co.uk/business/news/story.jsp?story=600703> (1/14/05).

²⁹ See *Id.*

(“BETA”), a self-regulating trade association.³⁰ Betfair, an industry leader, was joined by Betdaq and Sporting Options in the group’s formation, whose main focus will be to act as a representative of the betting exchanges in their discussions with government and regulatory authorities and to curb criticism that exchanges are safe havens for race fixers. However, BETA has already revoked the membership of Sporting Options Ltd, after they were found to be in “material breach” of the new code of practices for betting exchanges. The BETA executive committee ruled that Sporting Options did not meet its requirements in light of the current Gambling Bill.³¹ This author has been a consistent proponent of trade associations, and industry organizing in general. Those forces opposing gambling are well-organized to be sure, and any effort this industry can put forth to achieve even a proportional level of organization compared to those opposition groups, would be time well spent.

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³⁰ *Betting Exchange Trade Association Rules Out Options*, Gambling.co.uk located at <http://www.gambling.co.uk/news/gambling-news.html?story=1516> (11/16/04).

³¹ See *Id.*