

U.S. LAND-BASED AND INTERNET GAMBLING; WOULD YOU BET ON A ROSY FUTURE?

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I. INTRODUCTION

This Article will set forth a proposal which explains how states may raise gambling revenues, for which, there are several viable methods. Specifically, states could establish new casinos, approve licenses for Virtual Lottery Terminals (“VLTs”) also known as slot machines, allow twenty-four hour gambling, develop tribal state compacts with federally-recognized tribes, authorize intrastate internet gambling, attempt to change federal law to legalize sports betting, and exploit tax skill games that are not considered gambling by the state. Additionally, it would be advantageous to attract out-of-state customers to reap indirect benefits. States, however, must be prudent before enacting laws which impose or raise taxes on gambling operators.

In the United States, gross gambling revenues plunged from 2007’s record level highs to \$32.54 billion in 2008. In *State of the States 2009*, the American Gaming Association (“AGA”) concluded that in 2008, casino revenues were 4.7% below that of the 2007 level.¹ Some states experienced substantial economic loss. For example, in Nevada, revenues were down 9.7% and tax revenues were down 10.6%; in New Jersey, revenues were down 8.5%; in Colorado, revenues were down 12.3%; and, in Illinois, revenues were down 20.9%.² Although the economic decline existed nationwide, there were some exceptions worth noting. A few states reported an increase in revenues. In Pennsylvania, revenues increased by 50.3% and tax revenues increased by 63.2%.³ Similarly, in Missouri, revenue increased by 5.7%.⁴ Some states relied, in part, on their re-

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1. *State of the States 2009, The AGA Survey of Casino Entertainment*, AMERICAN GAMING ASSOCIATION, at 2, <http://www.americangaming.org/survey/index.cfm> (last visited Apr. 2, 2010).

2. *Id.* at 6.

3. *Id.*

4. See Lucy Dadayan & Robert B. Ward, *For the First Time, a Smaller Jackpot Trends in State Revenues from Gambling*, ROCKEFELLER INST., (Sept. 21, 2009), available

cently established gaming facilities to account for the increased revenues. For example, one state, after establishing racetrack casinos (“racinos”) increased revenue by 17.2% from 2007 to 2008 (roughly \$6.2 billion), but decreased by 2.6% from the fiscal year of 2008 to the fiscal year of 2009.⁵ Low gambling taxes are a contributing factor, but low gambling taxes alone, are not determinative in these matters. For example, New Jersey has one of the lowest gambling tax rates (9.25%) in the United States, and Pennsylvania has one of the highest (55%).⁶ For various reasons, however, Pennsylvania gaming revenues have risen while New Jersey’s have declined, partly due to Pennsylvania’s competition.

II. STATES DEVELOPING NEW CASINOS

The AGA’s Survey provides a comprehensive report on the commercial casino industry, which consists of various types of gambling, each of which contributes to the overall success of a thriving gaming operation. Specifically, lotteries accounted for forty-six percent of gambling, Casino Gambling made up twenty-five percent, Poker comprised eleven percent, Horseracing contributed six percent and Internet Gambling reached only two percent of gambling.⁷ For states interested in establishing new casinos, the AGA survey, in particular the statistics associated with each type of gambling operation, outline details which states should consider in the process.

In planning to establish a casino, a state should consider: (1) an appropriate license fee (regulatory tax); (2) whether money should be targeted to subsidize the horseracing industry; (3) whether a casino plan should be integrated into local economy development and stimulation of tourism (such as Harrah’s New Orleans Casino); and (4) whether a “de facto” monopoly should be established.⁸ It is also essential to decide whether the casino should be a destination resort, an urban casino or a racino.

at http://www.rockinst.org/pdf/government_finance/2009-09-21-No_More_Jackpot.pdf
http://www.pdfnews.org/article/26202/For_the_First_Time_a_Smaller_Jackpot_Trends_in_State_Revenues_from_Gambling.html (noting that certain States have found economic success due to gambling).

5. *Id.* at 15.

6. *See State of the States 2009, supra* note 1, at 6.

7. *See id.* at 33 (discussing percentages of gambling by type).

8. *See* Paul Girvan, *Key Policy and Tax Considerations in Bringing Gaming to New Jurisdictions*, INNOVATION GROUP, G2E (Nov. 2009), <http://www.theinnovationgroup.net/articles.asp> (stating potential concerns of states when establishing casinos).

Presently, there are about thirteen states that have land-based casinos and twelve states that have racinos.⁹ Kansas, Ohio, and Pennsylvania are the most important states that have recently established or are establishing new casinos. Kansas enacted legislation in 2007 that designated four “state owned,” but privately managed casinos.¹⁰ Legislation established four gaming zones in the Northeast, Southeast, South Central and Southwest of the state, with \$225,000,000 required for infrastructure development, except in the Southwest, which required \$50,000,000. Successful applicants must pay a “privilege fee” of \$25,000,000, except in the Southwest where applicants are required to pay \$5,500,000.¹¹ The “proposed facilities location as a tourist and entertainment destination” concern in the Kansas state legislation would be a major factor in consideration of an application.¹² At least twenty-two percent of gross gaming revenues must go to the state, plus two percent for problem gambling treatment, and at least two percent must go to the host community. Presently, the only operational casino is the “Boot Hill Casino and Resort” in Southwest Kansas. Proposals have been accepted to create casinos in South Central Kansas and Northeast Kansas, but there is no successful applicant for the Southeast license, largely because of fear of Native American casino competition in adjacent Oklahoma.¹³ Hollywood Casino and International Speeding Corp./Penn National Gaming have been successful bidders in two of the other areas.¹⁴

As a result of a November 3, 2009 referendum, Ohio has also approved casinos in Cleveland, Columbus, Cincinnati, and Toledo, with a thirty-three percent taxation rate. Fifty-one percent of gross gaming revenues, about \$306,000,000 per year, would be distributed to Ohio’s counties, thirty-four percent, or roughly \$250,000,000 per year, would go to public school districts, and five percent would go to the host city.¹⁵ Each licensed operator must

9. See *State of the States 2009*, *supra* note 1, at 4 (charting locations of various casino types); see also Dadayan & Ward, *supra* note 4 (providing locations for casinos and racinos around country).

10. See KAN. STAT. ANN. § 74-8734(a),(e),(g)-(h) (West 2008) (setting forth state legislation and requirements for development of casinos).

11. See *id.* at (g)-(h) (stating sources of funding).

12. *Id.* at (e).

13. See Rick Alm, *Tribal Rivals Reshape Kansas Casino Race*, GAMBLING COMPLIANCE, LTD., Dec. 2, 2009, <http://www.gamblingcompliance.com/node/40542> (discussing concerns with casino licensing).

14. See *id.* (noting success of certain casinos and contrasting with failures of others).

15. See OHIO CONST. art. XV, § 6 (addressing funding).

pay an up-front license fee of \$50,000,000 and, “make an initial investment of at least \$250,000.”¹⁶ Casino proponents had stressed that 34,000 jobs in Ohio would also be created. It is anticipated that Ohio casinos will result in Indiana losing \$100,000,000 in tax revenue and will also impact Kentucky, West Virginia, and Michigan gaming revenue.¹⁷ After four previous failures, the referendum was approved largely because of the current economy. In 2008, pursuant to the Governor’s directive, Ohio allowed Keno at taverns and social clubs. On July 17, 2009, legislation allowed the lottery to license VLTs at Ohio’s racetracks.¹⁸

Similarly, Pennsylvania has gradually expanded legal gambling. Pennsylvania first legalized slot parlors in 2004.¹⁹ Presently, the state has three stand alone casinos: Mount Airy Casino Resort (2007), Sands Casino Resort in Bethlehem (2009), and Rivers Casinos (Holdings Acquisition) near Pittsburgh (2009). There are also six operational racinos: The Meadows Racetrack and Casino, Mohegan Sun at Pocono Downs, PARX (Philadelphia Park Casino and Racetrack), Harrah’s Chester Casino & Racetrack, Hollywood Casino (Penn National Race Course) and Presque Isle Downs and Casino.²⁰ Two Philadelphia based casinos have yet to become operational, (Foxwoods Casinos and SugarHouse Casino) largely because of difficulties such as zoning. For example, Donald Trump’s casino company is presently in litigation, claiming it was refused a license because of a perception that Trump will be using his Pennsylvania gaming facility as a feeder for his Atlantic City casinos.²¹

Slot machine taxes make up fifty-five percent of gross gaming revenue, which is distributed at rates of thirty-four percent to tax

16. *Id.*

17. See Dan Townend, *Tax Cut Talk Greets News of Ohio Casino Vote*, GAMBLING COMPLIANCE LTD., Nov. 9, 2009, <http://www.gamblingcompliance.com/node/40296> (analyzing cross state impact of gambling revenues).

18. See Michael Zatezalo, *The Perfect Storm: Ohio’s Entry Into Legalized Gaming*, CASINO ENTERPRISE MGMT., Jan. 2010, at 14-17, available at <http://www.casinoenterprisemanagement.com/articles/january-2010/perfect-storm-ohio’s-entry-legalized-gaming> (tracking growth of lottery system in Ohio).

19. See Pennsylvania Race Horse Development & Gaming Act of 2004, 4 PA. CONST. STAT. ANN. § 1101 (West 2009) (legalizing slot parlors).

20. Pennsylvania Gaming Control Board, Map of PA Casinos, <http://www.pgcb.state.pa.us/?p=180> (last visited Apr. 2, 2010).

21. See *Keystone Redevelopment Partners, Inc. v. Thomas Decker*, 2009 U.S. Dist. Lexis 117210 (M.D. Pa. 2009) (alleging that PA Gaming Control Board’s denial of its application for slot machine license violated Commerce Clause, Equal Protection Clause and Pennsylvania’s Race Horse Development and Gaming Act, violating First Amendment and Equal Protection Clause).

relief, four percent to local governments, twelve percent to horse racing, and five percent to economic development. In 2009, gross gaming revenue rose 19.8 percent from the previous year.²² On January 7, 2010, Pennsylvania enacted a new law that allowed legalization of up to two hundred and fifty table games, such as blackjack and roulette.²³ Table game revenues are subject to extremely complicated tax provisions, most of which would go to property tax relief. Successful Category 3 applicants must pay a \$7,500,000 table game fee. All Category 3 applicants must operate a “resort hotel with no fewer than [two hundred and seventy-five] . . . guest rooms,” have amenities such as bowling lanes, and not be within fifteen miles of any other licensed machine casino.²⁴ Pennsylvania might also consider legalizing video poker machines, which are presently illegal and are estimated to exceed seventeen thousand. It is believed regulated video poker would result in \$550,000,000 per year to Pennsylvania.²⁵

Aside from Pennsylvania, Massachusetts has debated establishing casino gambling, at least since 1997. For the first time the Governor and House and Senate leaders support a resort casino. In an excellent analysis, Professor Clyde Barrow suggested that, “the state should authorize three commercial resort casinos strategically located to maximize the recapture of revenues flowing to Connecticut and Rhode Island and to provide maximum economic development benefits, while minimizing and mitigating the social impacts.”²⁶ Barrow opined that:

[resort casinos] will generate approximately [one and a half] . . . billion [dollars] in gross gaming revenues, while creating about [ten thousand] . . . construction jobs and more than [ten thousand] . . . jobs at the resort casinos. The casinos can also support growth in the state’s tourism,

22. See Pennsylvania Gaming Control Board, *Gaming Benefits for Pennsylvanians*, <http://www.pgcb.state.pa.us?p=52> (last visited Apr. 2, 2010) (noting gaming revenues).

23. See 2010 Pa. Legis. Serv. Act 2010-1 (S.B. 711) (permitting legalization of certain gambling types).

24. Pennsylvania Gaming Control Board, *Application Period for Category Slot Machine Operator’s License Now Open Until April 7, 2010*, <http://www.pgcb.state.pa.us/?pr=304> (last visited Apr. 2, 2010).

25. See Elizabeth Cronan, *Industry Leaders Plead With Alabama’s Lawmakers For Electronic Bingo Reprieve*, GAMBLING COMPLIANCE LTD., Jan. 15, 2010 (discussing video poker).

26. CLYDE W. BARROW, MAXIMUM BET: A PRELIMINARY BLUEPRINT FOR CASINO GAMING & ECONOMIC DEVELOPMENT IN MASSACHUSETTS 2 (Center for Policy Analysis, Univ. of Mass., Dartmouth Aug. 2007).

hospitality and convention and meeting sectors and provide Massachusetts' business the opportunity to compete annually for over four hundred million dollars in casino-related goods and services contracts.²⁷

III. STATE LEGALIZATION OF VIRTUAL LOTTERY TERMINALS AND THE EXPANSION OF GAMBLING

Besides establishing new casinos, there are alternative methods available for states to raise gambling revenue. A state may try to expand upon legal gambling. Illinois, in July 2009, legalized VLTs and permitted a maximum of five machines in businesses that serve liquor. With a taxation rate of thirty percent, operators and establishments were able to split the remaining seventy percent equally. The maximum insertion amount for the machines is two dollars, with a five hundred dollar maximum award. About \$300,000,000 per year in tax receipts are expected from the legalized VLT machines. Under the Illinois law, however, municipalities and counties may opt out of the VLTs. The bill contains a provision that eliminates the three-dollar-per-patron admissions tax to the casinos, if those casinos will make over \$45,000,000 in improvements. Overall, the state expects that it will eventually see a one percent increase in gaming tax revenue.²⁸

To raise gaming revenues, states have other options which have mixed results. Nevada, in 2009, unsuccessfully attempted to pass legislation to amend the State's constitution in order to allow a lottery. Colorado enacted legislation to permit higher bet limits, twenty-four hour gambling and table games in its casinos in historic mining towns.²⁹ This year, revenue has increased only 8.5 percent, instead of the projected increase of twenty to twenty-five percent. Missouri, through its 2008 referendum, has eliminated the five hundred dollar maximum loss limit.

Presently, there are bills in both houses of the Indiana legislature which if passed, would allow two riverboat casinos to move inland and give tax relief to Indiana's two racinos. The rationale for this bill was supported by a state legislative report that concluded

27. *Id.*

28. See Ben Moshinsky, *Illinois VLT Expansion Could Provide Kentucky Catalyst*, GAMBLING COMPLIANCE LTD., July 15, 2009, <http://www.gamblingcompliance.com/node/37662> (discussing revenues).

29. See Andy Vuong, *New Gambling Revenue Falling Far Short of Forecast*, DENVER POST, Dec. 26, 2009, available at http://www.denverpost.com/economy/ci_14031692 (reporting revenues).

Indiana would raise between \$23,000,000 and \$30,000,000 if casinos were established in Fort Wayne and a land based Gary casino.³⁰ The report also warned that Indiana could lose up to \$400,000,000 as a result of increased gambling in Kentucky, Ohio and Michigan. The Casino Association of Indiana does not support the relocation and had hoped the report would reward tax breaks for new casino developments.

New York, faced with a huge budget deficit, has been seriously considering expansion of gambling. Governor Paterson has long suggested allowing “quick draw,” a game similar to Keno, to be played twenty-four hours a day. Also in New York, there is a serious attempt to expand upon permitted VLT gaming to include electronic games, such as blackjack and roulette.³¹ Since 2001, VLTs have been authorized at racetracks with the tax rate of sixty to seventy percent, which was among the highest in the nation. In 2008, a new bill allowed a sliding scale of taxation with the proposed Aqueduct VLTs retaining about forty-six percent, and Monticello obtaining a tax-break if a gaming facility within sixty miles became operational.³²

The tax revenues at Aqueduct would yield \$1,000,000 daily to New York State. Yet, after years of bid submitting and five finalists remaining, nothing had been done until the end of January 2010. This is largely a result of the Byzantine selection process, which allows the Governor, Speaker of the House and Senate Majority Leader to make the final selection.³³ On January 29, 2010, Governor Paterson finally announced Aqueduct Entertainment Group (“AEG”) as the successful bidder. The House Speaker said he would support AEG only if it increased its upfront payment by \$100,000,000, which would come to a total of \$300,000,000.³⁴

30. See Jim Landers, *Estimates of the Fiscal Impacts from Out-of-State Casino Competition and Movement of Casino Licenses in Indiana*, REPORT TO THE GAMING STUDY COMMITTEE, Oct. 19, 2009 (detailing Colorado legislation).

31. See Scott Van Voorhis, *New York Officials Hurry To Okay Electronic Table Games*, GAMBLING COMPLIANCE LTD., June 29, 2009, <http://www.gamblingcompliance.com/node/37560> (reviewing New York gambling).

32. See New York State Revenue Report, Feb. 2009, available at <http://assembly.state.ny.us/comm/WAM/2009RevRep/2009RevRep.pdf> (summarizing gambling revenues).

33. See Charles V. Bagli & Danny Hakim, *Aqueduct Racetrack Still Awaits a Decision*, N.Y. TIMES, Nov. 24, 2009, at A26, available at <http://www.nytimes.com/2009/11/24/nyregion/24aqueduct.html> (reporting developments in New York state gambling).

34. See Paul Post, *State Picks VLT Operator for Aqueduct Racino*, THE SARATOGIAN, Jan. 30, 2010, available at <http://www.saratogian.com/articles/2010/01/30/news/doc4b63602ce0698946448127.txt> (relaying announcement by Governor Paterson which awarded Aqueduct Entertainment thirty year contract to operate VLTs).

West Virginia, in 2007, approved table games at racetracks for several counties.³⁵ Track owners have promised to build one hundred and fifty room hotels and create one thousand jobs. Thirty-five percent of table game profits would go to the state; with an annual license fee of \$2,500,000 that might be lost if a hotel is not built within three years. Delaware is also considering expanding gambling. TMS Consulting, which had been retained by the Delaware Video and Sports Lottery Study Commission, issued a report on January 5, 2010, that concluded Delaware racetrack casino revenue would fall twelve to fifteen percent unless two new casinos were developed. If two casinos were established, gaming revenues would increase twenty-five percent statewide and generate up to five thousand new jobs. Nevertheless, the proposal was rejected five to four.³⁶ Delaware legalized table games such as roulette in late January, 2010. The revenue projected is at least \$40,000,000. The three casinos will have to pay an annual fee that will be reduced if the casinos pay a total of \$2,500,000 in capital improvements.³⁷

Also it is estimated that gaming expansion should result in new full time jobs in the amount of three hundred to four hundred in Maryland, twelve hundred in Kansas, five hundred to six hundred in West Virginia and sixteen thousand (plus nineteen thousand construction jobs) in Ohio.³⁸ In Alabama, the major issue is whether certain counties may permit licensed electronic bingo gambling machines. In *Barber v. Cornerstone Community Outreach, Inc.*, the Alabama Supreme Court decided it was all but impossible to operate electronic bingo machines.³⁹ The court concluded that electronic bingo machines had almost none of the characteristics of

35. See W. VA. CODE § 29-22C-3 (2009) (permitting limited gambling).

36. See Doug Denison, *Consultant Says Two More Gambling Venues Work Best for Delaware*, DOVER POST, Jan. 12, 2010, <http://www.doverpost.com/news/x532574862/Consultant-says-two-more-gambling-venues-work-best-for-Delaware> (discussing Delaware gambling); see also Scott Van Voorhis, *Delaware Panel Rejects Expanded Gambling Arguments*, GAMBLING COMPLIANCE LTD., Jan. 19, 2010, <http://www.gamblingcompliance.com/node/40980> (analyzing rejection of proposal).

37. See Donald Wittkowski, *Delaware Legalizes Table Games at its Casinos*, PRESSOFATLANTICCITY.COM, Jan. 29, 2010, http://www.pressofatlanticcity.com/news/top_three/article_6285507e-0c93-11df-90c7-001cc4c002e0.html (reporting legalization of table games).

38. See Karen Bailey, Presentation at NCLGS: Gaming Expansion (Jan. 8, 2010).

39. See, Nos. 1080805 and 1080806, 2009 WL 3805712, at *18 (Ala. Nov. 13, 2009) (reversing trial court's order issuing preliminary injunction against defendant because there was not enough evidence that plaintiff had reasonable likelihood of success in proving electronic gaming machines constituted "bingo"). Alabama's Constitution prohibits lotteries, but Amendment No. 508 provides an exception for bingo. See *id.* at *9-10.

traditional bingo, and thus did not fall under the exception for bingo carved out from the state's prohibition on lotteries.⁴⁰ In response to gubernatorial raids on electronic bingo establishments such as those in *Barber*, House Bill 154 was introduced to stop further interference and allow an Alabama casino.⁴¹

IV. EXPANSION OF GAMBLING WITH NATIVE AMERICANS

Connecticut considered legalizing Keno games but reconsidered when it realized it might lose huge revenues from its tribal state compacts with Native Americans.⁴² Connecticut became the first state to reach an agreement with a Native American tribe whereby a class III compact would allow the state to receive twenty-five percent slot machine (video facsimile machine) gross gaming revenues in return for granting the tribe exclusive rights to install slot machines.⁴³ While state tax on profit-sharing was prohibited by the 1988 Indian Gaming Regulatory Act ("IGRA"), the agreement between Connecticut and the Mashantucket Pequots set precedent for slot machine profit-sharing in many other states, such as New

40. *See id.* at *18-19 ("[A]n entire 'bingo game' takes approximately six seconds, involves no numbered cards, and requires no player interaction at all").

41. *See* H.B. 154, 2010 Leg. (Ala. 2010) (allowing operation of electronic bingo machine).

42. *See* William Sokolic, *Connecticut Council on Problem Gambling Opposes Rell's Keno Proposal*, NORWICH BULL., May 29, 2009, <http://www.norwichbulletin.com/news/x313665369/Connecticut-Council-on-Problem-Gambling-opposes-Rell-s-keno-proposal> (asserting that it is irresponsible of public officials to propose gambling expansion before results of study are released and reviewed).

43. *See* Joseph M. Kelly, *Indian Gaming Law*, 43 DRAKE L. REV. 501, 511-13 (1995) (distinguishing why "gambling can be a godsend for the Grand Ronde, an economic boon for the Cow Creek and Coquille, but seriously detrimental, if not fatal, for the Siletz Tribes").

York.⁴⁴ Presently, the state receives approximately \$411,000,000 from compacts with the Pequots and the Mohegan tribes.⁴⁵

In 2009, the legislature considered legalization of Keno, which would be politically feasible if Keno were considered a lottery.⁴⁶ Nevertheless, if the classification of Keno as a lottery failed, the twenty-five percent revenue sharing would be placed in jeopardy.⁴⁷ Consequently, a legislature requested a legal opinion from the Attorney General, Richard Blumenthal. Blumenthal suggested that ruling regarding Keno might jeopardize the \$411,000,000 in compact revenue if it were found not to be lottery game.⁴⁸ In his opinion, Blumenthal explained that

These payments continue so long as no change in State law is enacted to permit the operation of video facsimiles or other commercial casino games by any other person and no other person within the State lawfully operates video facsimiles or other commercial casino games. Mashantucket Pequot Second Amendment to MOU dated April 25, 1994, pp 1-2; Mohegan MOU of May 17, 1994, p. 2 (language slightly different but same meaning).⁴⁹

44. See Indian Gaming Regulation, 25 U.S.C. § 2701 et seq. (1988). The Congress finds that:

- (1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;
- (2) Federal courts have held that section 81 of this title requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;
- (3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;
- (4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and
- (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.

Id.

45. See Richard Blumenthal, *Keno Opinion*, CONNECTICUT OFFICE OF THE ATTORNEY GENERAL, June 1, 2009, at 3, available at <http://www.kids.ct.gov/ag/cwp/view.asp?A=3673&Q=440912> (addressing whether Keno is lottery game and analyzing whether legalizing keno would impact Connecticut's compact and memoranda of understanding ("MOUs") with Mohegan and Mashantucket Pequot tribes).

46. See *id.* (considering possibility of keno lottery).

47. See *id.* at 4 (assessing whether type of keno will allow change in state law to permit operation of commercial casino games by another person, eliminating requirement to pay twenty-five percent of slot revenue to state).

48. See *id.* at 3 (illustrating total amount resulting from twenty-five percent of gross operating revenues from video facsimile machines).

49. *Id.* at 3.

Although, the legal issue of whether Keno can be a lottery remains uncertain, Blumenthal opined that it might not be prudent to risk over \$400,000,000 per year to “gain twenty to sixty million dollars in estimated revenues from legalizing Keno.”⁵⁰

Moreover, New York could expand gaming revenues if the Mohawks establish a \$600,000,000 resort casino in the Catskills.⁵¹ In 2001, a New York State statute allowed significant Native American casino expansion and VLTs at certain horserace tracks.⁵² The tribes signed tribal state compacts that permitted New York State to share in slot machine revenue on a sliding scale.⁵³ The most important provision allowed the development of three Catskills casinos that have yet to be built, partially because of complicated land-in-trust procedures.⁵⁴ The Mohawks did have a designated casino area and underwent the complicated environmental procedure for placing land in trust.⁵⁵ On January 3, 2008, the Interior Secretary, Dirk Kempthorne, issued a “Guidance Memorandum” which stated that land acquired after IGRA may be used for casino gambling only if it is within a tribal’s commuting distance.⁵⁶ Consequently, Governor Paterson and Senator Chuck Schumer have been trying to get the Obama administration to revoke this Memorandum.⁵⁷ While IGRA seemed to prohibit state taxation of class III gaming revenue, tribes had little choice but to accommodate states after *Seminole Tribe of Florida v. Florida*, which declared unconstitutional the IGRA provision that allowed tribes to sue the state, should the state fail to ne-

50. *Id.* at 5.

51. See Charles V. Bagli, *Cayuga Tribe Moves Closer To a Casino in the Catskills*, N.Y. TIMES, May 4, 2004, available at <http://www.nytimes.com/2004/05/04/nyregion/cayuga-tribe-moves-closer-to-a-casino-in-the-catskills.html?scp=1&sq=Cayuga%20Tribe%20Moves%20Closer%20to%20a%20Casino&st=cse> (proposing casino development in Catskills).

52. See Nelson Rose, *Status of Gambling Laws*, GAMBLING AND THE LAW, Aug. 3, 2003, available at <http://www.gamblingandthelaw.com/status.html> (examining American jurisdictions having recent activity concerning legal gambling).

53. See *id.* (allowing state to share in revenue as result of statute).

54. See *id.* (highlighting most important provision of 2001 New York gambling law).

55. See *id.* (exemplifying one tribe that placed land in trust to make it difficult for state to expand development of casinos).

56. See Press Release, Gov. David A. Patterson, Current DOI Policy is Detrimental to the Economic Interests of New York State, May 1, 2009, http://www.state.ny.us/governor/press/press_05010910.html (stating Guidance Memorandum “restricted Indian tribes from taking off-reservation land into trust for gaming purposes, which is a necessary step for New York’s Indian Nations to acquire land in Sullivan County”).

57. See *id.* (urging Interior Department to undo Bush administration policy that restricts taking off-reservation land into trust, preventing New York tribes from economic development).

gotiate in good faith.⁵⁸ Accordingly, many states entered into slot machine revenue sharing through tribal-state compacts.⁵⁹ Florida and similar states could raise enormous amounts of revenue if the legislature approves a class III tribal-state compact with the Seminoles.⁶⁰ In June of 2009, the legislature rejected the agreement between Governor Charlie Crist and the Seminoles, requesting that the National Indian Gaming Commission (“NIGC”) terminate class III games, such as blackjack, at Seminole casinos.⁶¹

V. STATES AND INTERNET GAMBLING

Along with the possibility of intrastate interactive poker revenue in states like Florida, California and Massachusetts, state Internet gaming revenues are generally derived from lottery and horseracing revenue.⁶² Presently, three state lotteries (New York, North Dakota and New Hampshire) sell subscription packages online, but none of the 42 U.S. lotteries have sold lottery tickets over the Internet.⁶³ Although there are currently no lottery tickets sold over the Internet, New York and New Hampshire have recently considered the expansion of Internet gambling.⁶⁴ Additionally, there is presently a bill before the Illinois legislature that would amend Illinois Lottery law to allow, pursuant to a “Pilot Program,” privatization of the Illinois Lottery and intrastate interactive lottery sales, and perhaps lottery games besides lotto and MegaMillions.⁶⁵

58. 517 U.S. 44 (1996) (concluding Congress could not abrogate Florida’s Eleventh Amendment right of sovereign immunity through IGRA).

59. See Eric S. Lent, *Are States Beating the House?: The Validity of Tribal-State Revenue Sharing Under the Indian Gaming Regulatory Act*, 91 GEO L.J. 451, 456-62 (2003) (illustrating states that have gaming compacts requiring tribes to share revenue with state, such as Connecticut, California, Wisconsin, Michigan and New Mexico).

60. See *id.* (providing example of what class III compact could accomplish).

61. See Andrew Gellatly, *Pressure Grows on NIGC to Act Over Seminole Gaming*, GAMBLING COMPLIANCE, Jan. 12, 2010, <http://www.gamblingcompliance.com/node/40894>.

62. See Kavan Peterson, *48 States Ranking in Gambling Proceeds*, STATELINE.ORG, May 23, 2006, <http://www.stateline.org/live/details/story?contentId=114503> (explaining how gambling revenue has provided states with tax relief which has led to explosion in state sanctioned casinos, slot machines and race track gambling).

63. See Chris Krafcic, *The Man in the High Castle*, POL’Y PULSE, Dec. 9, 2009, available at, <http://www.bvmediagroup.com/bvConnection/Blog/tabid/748/EntryId/37/Policy-Pulse-The-Man-In-The-High-Castle.aspx> (speaking on Internet gambling as issue that has divided country’s gambling lobby since mid 1990s).

64. See New Hampshire Game Study Commission, Dec. 21, 2009, http://www.nh.gov/gsc/publications/documents/20091221_interim.pdf (summarizing commissions work to date).

65. See *Lottery-Internet Pilot Program*, <http://www.ilga.gov/legislation/BillStatus.asp?DocTypeID=SB&DocNum=198&GAID=8&SessionID=50&LegID=15329> (pro-

Illinois had earlier been informed by the Justice Department that an intrastate Internet lottery would be in violation of federal law.⁶⁶ On December 11, 2009, Governor Pat Quinn, claiming that “the State of Illinois faces an unprecedented fiscal crises,” requested a Justice Department opinion that its Pilot Program, for privatization of and an Internet lottery, would not violate federal law.⁶⁷ It is estimated that a privatized Internet lottery would raise at least an additional \$152,000,000 per year.⁶⁸

As a result of the December 2000 amendments to the Interstate Horseracing Act of 1978, it remains uncertain whether interactive interstate horseracing has been legalized.⁶⁹ The Justice Department has opined that interstate horserace wagering is illegal.⁷⁰ The WTO has concluded the U.S. Prohibition on foreign horseracing operators entering the U.S. market, while allowing domestic interstate interactive horseracing, has violated the General Agreement on Trade in Services (“GATS”).⁷¹ The Unlawful Internet Gaming Enforcement Act (“UIGEA”) has done nothing to

viding Department of Revenue must create pilot program that allows Illinois residents to purchase Illinois lottery tickets over Internet).

66. See Rich Cholodofsky, *Government Perplexed by Internet Gambling*, TRIBLIVE, Jan. 15, 2006, available at http://www.pittsburghlive.com/x/pittsburghtrib/s_413664.html (explaining that Illinois is one of four states that prohibits Internet gambling).

67. James Kilsby, *Illinois Approaches DOJ for Clarity on Internet Lottery Gambling*, GAMBLING COMPLIANCE, Jan. 26, 2010, available at <http://www.gamblingcompliance.com/node/41078> (explaining Illinois Governor Pat Quinn’s letter to Eric Holder, Junior Attorney General of United States, regarding Illinois plans to allow state lottery to expand).

68. See *id.* (showing benefits of allowing Internet gambling).

69. See Interstate Horseracing Act of 1978, 15 U.S.C. §§ 3001-3007 (1994) (amended 2000) (expanding definition of “interstate off-track wager” to include pari-mutuel wagers transmitted between states by way of telephone or other electronic media).

70. See Joe Kelly, *The Unlawful Internet Gambling Enforcement Act*, CATANIA GAMING CONSULTANTS, Aug. 19, 2009, available at <http://www.cataniaconsulting.com/news/news081909.html> (insisting that all interactive wagering including interstate, state-licensed interactive horse racing in about twenty-nine states is illegal).

71. See, REPORT OF THE APPELLATE BODY UNITED STATES – MEASURES AFFECTING THE CROSS-BORDER SUPPLY OF GAMBLING AND BETTING SERVICES, S. 373, Doc. No. 05-1426 (Apr. 2005), available at http://www.wto.org/english/tratop_e/dispu_e/285abr_e.pdf (concluding three United States federal laws (Wire Act, Travel Act and Illegal Gambling Business Act) and provisions of four state laws on their face, prohibit one, several or all means of delivery included in mode 1 of GATS (i.e. cross-border supply), contrary to United States’ specific market access commitments for gambling and betting services for mode 1). Therefore, the United States failed to accord services and service suppliers of Antigua treatment no less favorable than that provided for under the terms, limitations and conditions agreed and specified in the US Schedule, contrary to Article XVI:1 and Article XVI:2 of the GATS. See *id.* (detailing violation of GATS).

clarify the legal uncertainty.⁷² Presently, state licensed-operators, such as Youbet and other entities, accept customers from about twenty-nine states that have licensed interactive wagering in either at-home account betting or online Internet wagering.⁷³

As a result, the Justice Department has warned jurisdictions, such as the U.S. Virgin Islands.⁷⁴ The U.S. Virgin Islands adopted Internet gambling regulations, which stated that all interstate interactive gambling, including but not limited to the acceptance of interstate wagers, constitutes illegal activity in violation of U.S. law.⁷⁵ Although North Dakota hoped to employ interstate poker as a method to raise \$500,000,000 in revenue, the Justice Department also warned this state not to accept interstate interactive poker customers.⁷⁶ Presently, Florida and California are considering legalizing and taxing intrastate interactive poker.⁷⁷ In November 2009, Florida released a report suggesting that legally regulated intrastate interactive poker “[c]ould potentially increase state revenues, but currently there are no objective estimates of fiscal impact.”⁷⁸ Should Florida select the private operator through a bidding process, it is estimated that Florida would receive one hundred million dollars per year.⁷⁹

72. See Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §§ 5361-5367. Sect. § 5362 (10)(D)(ii) (identifying underlying cause as to why lack of uncertainty exists).

73. See, I. NELSON ROSE & MARTIN D. OWENS, INTERNET GAMBLING LAW 142 (Mary Ann Leibert Inc. Pub., 2nd ed. 2009) (examining types of games, contests and events that are classified as gambling).

74. See Kelly, *supra* note 70 (warning jurisdictions not to participate in illegal forms of interstate gambling).

75. See, Virgin Islands Internet Gaming and Gambling Act, 32 V.I. CODE ANN. Tit. 32 §§ 601 et seq. (2002); see also Letter from U.S. J. Dept. to V.I. Casino Control Commission (Jan. 4, 2004).

76. See Interview by IGN with Rep. Jim Kasper (Feb. 5, 2005) (stating proposed House Bill 1509 could lead to legalized Internet poker in North Dakota); Letter from U.S. J. Dept. to A'tty Gen. of North Dakota (Mar. 7, 2005) (on file with author).

77. See Stephen Carter, *New Jersey Introduces First Intrastate Egaming Bill*, Jan. 18, 2010, <http://www.egrmagazine.com/news/427488/new-jersey-introduces-first-intrastate-gambling-bill.html> (explaining that New Jersey is first state to introduce intrastate gambling bill in U.S., but that California and Florida are among states currently considering authorizing intrastate poker).

78. Alex Regalado et al., *The Legislature Could Consider Several Options to Protect Consumers from Unregulated Internet Poker*, No. 09-39, OFFICE OF PROGRAM POLICY ANALYSIS & GOVERNMENT ACCOUNTABILITY, Nov. 2009, available at <http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/0939rpt.pdf>.

79. See Darren Chow, *California Online Poker Games in 2010?*, AM. CHRONICLE, Nov. 20, 2009, available at <http://www.americanchronicle.com/articles/view/129465> (describing possible increase in state revenue by regulation of online gambling).

For years, California has considered legalizing intrastate Internet poker, which could “net four hundred and fifty million dollars a year.”⁸⁰ It is undisputed that the major obstacle to passage would not be the opposition from California’s state-licensed sixty card clubs, but rather California’s tribal interests, who believe it would infringe on the “tribes’ exclusive right to casino gambling.”

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On September 2, 2009, the Massachusetts Attorney General rejected a proposed referendum on the state ballot that would have legalized intrastate Internet poker, as long as the site and payment providers were state approved.⁸² The bill’s major sponsor, the Poker Players Alliance, stressed the revenue that could be raised by legalizing intrastate online poker.⁸³ Nevertheless, the Attorney General opined that the proposal was ambiguous when he asserted, “[w]e simply cannot determine whether, if the proposed law were enacted, any financial service providers would be required to make the five percent payment to the Commonwealth [of Massachusetts].”⁸⁴

In 2001, Nevada passed legislation that would legalize and regulate intrastate interactive gambling, leaving most major policy decisions to state gaming regulators.⁸⁵ Nevertheless, in 2002 a letter from the Justice Department frustrated any attempt to further Internet gambling, as the letter provided notification that intrastate internet gambling would violate federal law.⁸⁶ Perhaps more significant was an April 2007 study by UNLV that concluded only

80. Peter Hecht, *California Online Poker Push Inflames Tribal Divisions*, GAMBLING COMPLIANCE, Aug. 17, 2009, available at <http://www.gamblingcompliance.com/node/38204>.

81. *Id.*

82. See James Kilsby, *Lobby Group Fails In Massachusetts Internet Poker Vote Bid*, GAMBLING COMPLIANCE.COM, Sept. 4, 2009, available at <http://www.gamblingcompliance.com/node/39166> (explaining that Poker Players Alliance wanted voters to weigh in on whether Massachusetts should tax and regulate internet poker games offered by sites approved by state lottery commission, but initiative was rejected by Attorney Gen. Martha Coakley after she said proposed law’s tax requirements were highly ambiguous).

83. See *id.* (emphasizing increased revenue as influence to accept bill).

84. *Id.*

85. See generally NEV. REV. STAT. § 463.750 (2001); Rose & Owens, *supra* note 73.

86. See Letter from Michael Cherthoff, Assistant Attorney General, to Dennis Neilander, Chair of Nevada Gaming Control Board (Aug. 23, 2002) (stating belief that gambling over internet was illegal).

“three and seven tenths percent of the state’s residents indicated that they have gambled (on the internet) in the past five years.”⁸⁷

A New Jersey bill, introduced on January 11, 2010, would allow licensed casinos to offer internet gambling to adult New Jersey residents under stringent conditions.⁸⁸ The bill would impose a tax on licensed operators on “internet wagering gross revenues in the amount of twenty percent” an initial application fee of at least two hundred thousand dollars and an annual fee of at least one hundred thousand dollars. Numerous provisions provide for verification of gaming software, funds for compulsive gambling treatment, and protective measures to minimize the risks of problem gambling. It is estimated that New Jersey would receive about “thirty-seven and a half million dollars in direct annual tax revenues.”⁸⁹ The newly-elected governor is opposed to the bill.

VI. TRIBAL INTERNET GAMBLING

Federal laws (the IGRA, and UIGEA) are unclear whether the Native American federally-recognized tribes may conduct class II internet gambling or class III with a tribal-state compact. The National Indian Gaming Commission (“NIGC”), the regulatory body for Indian gaming, opined that UIGEA prohibitions “did not apply to wide-area progressive systems (“WAPs”) or multi-site bingo games That is because WAPs and multi-site bingo systems use ‘closed, proprietary communications networks’, they make no use of the Internet and do not fall within this [UIGEA Prohibitory] definition.” The NIGC offered “no opinion about the permissibility of playing from home, even if located on tribal land, or of the scope and effect of UIGEA’s safe harbor as that is an open question of law about which the United States has not yet taken a position.”⁹⁰ *AT&T*

87. Bo J. Bernhard et al., *Internet Gambling in Nevada*, INTERNATIONAL GAMING INSTITUTE, Apr. 2007, at 3, available at http://gaming.nv.gov/documents/pdf/igi_ngcb_internet_gaming_nvfinalrpt.pdf. Professor Barrow has estimated that only 2% of New England adults gambled on the Internet within the past year. See Clyde W. Barrow, *Playing the Odds, II: Who Gambles at New England’s Casinos and Racinos?*, CENTER FOR POLICY ANALYSIS, Oct. 2009, at 5, available at http://www.umassd.edu/seppce/policyanalysis/docs/playing_the_odds_2.pdf.

88. See S. 3167, 213th Leg., 2d Sess. (N.J. 2010). This is an act “permitting Internet wagering at Atlantic City casinos under certain circumstances and amending and supplementing the ‘Casino Control Act’, P.L. 1977, c.110 (C.5:1201 et seq.)” (9)(27). *Id.*

89. See Poker Voters of America Home Page, <http://www.pokervoters.com/> (last visited Mar. 30, 2010).

90. See Letter from Penny J. Coleman, Acting National Indian Gaming Commission General Counsel, to Donald L. Bailey, President of Atlantis Internet Group, Inc., (Sept. 24, 2009).

Corp. v. Coeur d'Alene Tribe would seem to permit tribal class III interactive interstate lotteries if the NIGC approved and there was a tribal state compact.⁹¹

Tribal gaming representatives have not fully embraced regulated gambling and some tribal leaders have been hostile. Danny Tucker, Chair of the California Nations Indian Gaming Association, opined on Federal internet gambling regulatory bills:

While the down economy is challenging our industry I believe there is an even greater threat to tribal economics on the horizon The recent drive by members of Congress to bring internet gaming nationwide represents the greatest threat to Indian gaming in the last twenty years. It is my intention to lead the fight against these outrageous and unjust proposals.⁹²

VII. FEDERAL BILLS AND POSSIBLE STATE REVENUE

There are presently three bills before Congress that would legalize and regulate interactive gaming. The Frank bill (HR 2267) and the McDermott bill (HR 2268) would respectively regulate and tax (a two percent tax on all customer deposited internet gambling funds) internet gambling operators. The Menendez bill (Title II, Internet Games of Skill Tax Provisions) would amend the Internal Revenue Code of 1986 to require a ten percent gaming licensing fee on a "licensee's Internet gaming deposited funds for a calendar month". The amount would be split between the federal government and either the state or tribal government of the player. The Menendez bill would mostly legalize skill games such as internet poker. Both bills would require applicants to establish suitability and solvency, as well as carrying out socially responsible policies. Both would allow states and tribes to opt out of inclusion. Neither bill would legalize interactive sports wagering.

It is uncertain how much revenue would be raised for regulation and taxation. PriceWaterhouseCoopers estimates that regulation over ten years (2010-19) would raise from roughly \$49 billion to \$13 billion depending on whether there were no state opt-outs

91. See generally 295 F.3d 899 (9th Cir. 2002) (holding that tribe's interstate gambling plan had been considered by National Indian Gaming Commission).

92. See Andrew Gellatly, *California's Tribes Grapple with Internet Poker Strategy*, GAMBLINGCOMPLIANCE.COM, Jan. 14, 2010, available at <http://www.gamblingcompliance.com/node/40934>.

or high state opt-outs.⁹³ Should sports betting be included, the total would range from roughly \$63 billion to \$14 billion. The revenue sources would be license fees, wagering taxes, and individual and corporate income taxes. The “Joint Committee on Taxation” concluded that wagering taxes from regulated internet gambling would range between \$10 billion to \$42 billion in fiscal years 2010 – 2019. The estimate does not mention whether sports wagering is included.⁹⁴

One major obstacle to any federal regulation would be the apprehension of land based casino operators to federal taxation. A spokesperson for MGM suggested that “while internet gambling could be permitted federally, we think that taxation and regulation should be left to the states.” A spokesperson for Wynn Resorts suggested if

there was a guarantee that the federal government would never, ever, ever look to extend their taxation and regulation from online into offline, then of course you’d go federal, because its one license one time, you let whoever opt out, and you’re in business it’s hassle free. The problem is that you can’t get that guarantee.⁹⁵

A spokesperson for Harrah’s expressed concern that licensing online lotteries state by state would be “a threat” to land based casinos since lotteries “are going to be competing with you and they’ll probably be willing to pay higher taxes.”⁹⁶ Congresswoman Shelly Berkley (D. Nev.), who supports internet gambling regulation, opposes the McDermott tax bill because it would open the door to federal taxation of gambling.⁹⁷

93. See National Economic Consulting, *Estimate of Federal Revenue Effect of Proposal to Regulate and Tax Online Gambling: Executive Summary*, PRICE-WATERHOUSECOOPERS, Dec. 6, 2007, available at <http://www.safeandsecureig.org/media/taxestimate.pdf>.

94. See Letter from Thomas Barthold, Acting Director of Joint Committee on Taxation to Jim McDermott, Democratic Congressman from Washington’s 7th district (Oct. 23, 2009).

95. James Kilsby, *MGM Fears Casino Tax Trap in Barney Frank Bill*, GAMBLINGCOMPLIANCE.COM, Nov. 18, 2009, available at <http://www.gamblingcompliance.com/node/40390>.

96. Scott Longley, *Casinos Wary of US Lotteries Head Start on Internet Gambling*, GAMBLINGCOMPLIANCE.COM, Nov. 19, 2009, available at <http://www.gamblingcompliance.com/node/40406>.

97. See Tony Batt, *US Legislative Perspective: Jim McDermott*, GAMBLINGCOMPLIANCE.COM, Jan. 27, 2010, available at <http://www.gamblingcompliance.com/node/41100/> (explaining reasoning for opposing tax bill in favor of internet gambling).

VIII. SPORTSBETTING

It is doubtful whether sports betting, either online or land-based, will ever be legal except in Nevada as a result of the Bradley bill of 1992.⁹⁸ Almost all experts agree over ninety-nine percent of all sports wagering with the U.S. is done illegally. For example, in 2009, over \$2.5 billion was legally wagered in Nevada's sports books with gross gaming revenues of about \$137 million.⁹⁹ The National Gambling Impact Study Commission estimated all sports betting in the United States to be between "\$80 billion to \$380 billion annually."¹⁰⁰

Delaware in 2009 had passed sports legislation allowing straight sports betting within its borders.¹⁰¹ Delaware enacted the legislation "to generate sixty million dollars in new revenues for the state coffers — three million dollars from the games themselves and fourteen million dollars in increased tax revenues from gamblers attracted to the state's racinos by the availability of wagering."¹⁰² Unfortunately, litigation by professional sports groups resulted in the single game sports wagering found in violation of the Bradley Bill ("PASPA").¹⁰³

New Jersey gaming and horseracing operators believe the exclusion of New Jersey from sports betting has cost over \$100 million per year in tax revenue.¹⁰⁴ By 2011, sports betting in New Jersey could be a \$10 billion a year industry.¹⁰⁵ On March 23, 2009, the

98. See Professional and Amateur Sports Protection Act, 28 U.S.C.S §§ 3701-04 (1992) (allowing only sports gambling that existed at time of its passage in states that had some legal sports wagering). The states included in the statute are Nevada, Delaware, Oregon, and Montana. *Id.*

99. See *Industry Information Fact Sheets: Industry Issues, Sports Wagering*, AMERICAN GAMING ASSOCIATION, available at http://www.americangaming.org/Industry/fact-sheets/issues_detail.cfv?id=16 (last visited Mar. 30, 2010) (estimating gross gaming revenue in 2009 for sports betting in Nevada was about \$136,441,000).

100. National Gambling Impact Study Commission Final Report, Ch. 2 at 2-14 (1999), available at <http://govinfo.library.unt.edu/ngisc/reports/2.pdf>.

101. See Delaware Sports Lottery Act, DEL. CODE ANN. tit. 29, §§ 4801-49 (2010) (stating purpose as creation of state-operated lottery system in Delaware).

102. See James Kilsby, *Delaware on Brink of Defeat in Sports Lottery Dispute*, GAMBLINGCOMPLIANCE.COM, Oct. 6, 2009, available at <http://gamblingcompliance.com/node/39990>.

103. See *Office of the Comm'r of Baseball v. Markell*, 579 F.3d 293 (3d Cir. 2009) (encapsulating appellate court decision, which Delaware has since appealed to Supreme Court).

104. See Jon Hurdle, *New Jersey Files Suit on Sports-Betting Ban*, REUTERS, Mar. 23, 2009, available at <http://www.reuters.com/article/idUSTRE52M6SX20090323> (detailing action against federal government claiming Professional and Amateur Sports Protection of 1992 violates United States Constitution).

105. See Wayne Parry, *Lawsuit Seeks to Allow Sports Betting Nationwide*, VENTURA COUNTY STAR, Mar. 23, 2009, available at <http://www.vcstar.com/news/2009/mar/>

Interactive Media Entertainment and Gaming Association Inc. (iMEGA), the New Jersey Thoroughbred Horseman's Association, and others filed a request for declaratory judgment, alleging PASPA was unconstitutional since it violated, inter alia, the Commerce Clause, Equal Protection Clause, and the First Amendment.¹⁰⁶ New Jersey had one year from the enactment of the Bradley bill to legalize sports bet wagering but failed to do so.

IX. TAXATION OF NON GAMBLING GAMES

There are numerous Internet and land based activities where players play money in exchange for winning a huge sum or expensive prize, but the game might not be considered gambling. Gambling requires prize consideration and chance, which many states require to be the predominate factor over skill. King.com allows internet players to pay money in hope of winning huge prizes and it is not considered gambling because it is a game of skill where chance is not a significant factor. In *Pace-O-Matic, Inc. v. New York State Liquor Authority*, the court concluded that Moxie-Mania, a video touch screen game that required payment and awarded prizes, was a skill game where a chance was not a material factor and thus did not violate New York gambling law.¹⁰⁷

In *Internet Community and Entertainment Corp. v. Washington State Gambling Commission*, the Washington Appellate Court concluded that Betcha.com did not violate state gambling laws because the loser did not have to pay the winner unless he wanted to and therefore there was no consideration.¹⁰⁸ Fantasy Sports is not considered illegal wagering under federal law and in the vast majority of states. Most Fantasy Sports operators exclude Florida, Arizona, Louisiana, Montana, and about six other states because state statutes prohibited skill games. Interestingly Montana, the only state to

23/bc-sports-betting-1st-Id-writethru0716-lawsuit/ (detailing potential financial gain that could be realized should sports betting be allowed in New Jersey casinos).

106. Complaint, Interactive Media Entm't & Gaming Ass'n v. Holder, No. 08-1981, slip op. (3d Cir 2009), available at http://imega.org/wp-content/uploads/2009/09/us-3rd-circuit-imega-v-holder_decision.pdf (3:09-cv-01301-GEB-TJB).

107. See *About Moxie Metro!*, MOXIE METRO, <http://moxiemetro.com/about.php> (last visited Mar. 30, 2010) (discussing New York Supreme Court decision, delivered on March 20, 2009, that Moxie Metro is New York's only legal skill redemption game).

108. 201 P.3d 1045 (Wash. Ct. App. 2009) (finding that internet betting exchange website did not fall under definition of "gambling" as covered by state law).

legalize specifically Fantasy Sports, is avoided because the administrative fee may not exceed fifteen percent of the entry fee.¹⁰⁹

X. SOME POTENTIAL PROBLEMS

If a jurisdiction derives a substantial amount of gaming revenues from out of state players, the jurisdiction will reap other benefits (a “free ride”) from tourists utilizing “restaurant shops, entertainment and other attractions.” It is the Philadelphia area facilities (Harrah’s, Chester Downs, and Philadelphia Park) that provide most competition for Atlantic City since Philadelphia area residents will no longer have to travel the seventy plus miles to play slot machines.¹¹⁰

In New England Casino Gaming, Clyde Barrow estimates that Massachusetts residents in 2008 spent over \$709 million and Rhode Island residents spent approximately \$250 million at Connecticut’s casinos and \$35 million indirectly.¹¹¹ The Center for Policy Analysis estimates that over two-thirds of Foxwoods casino revenues come from out-of-state players.

One cautionary note; it may be economically counter-productive to raise gaming taxes for revenue purposes. Illinois, for example, increased gaming taxes in July 2002. The revenues to the state treasury did increase (over \$136 million) but far less than the amount expected (\$300 million p.a.). However, riverboat employment declined by five and a half percent and “the increased tax payments also . . . postponed or curtailed capital spending programs by Illinois licensees.”¹¹²

A similar conclusion concerning Illinois was reached in “Estimating the Effect of the 2003 Gaming Tax Restructuring on Riverboat Gaming Volume.” The author concludes, after extensive statistical analysis, that

109. MONT. CODE. ANN. § 23-5-805 (2)(a) (2007) (establishing maximum amount participant can be charged by commercial establishment for fantasy sports league).

110. See Richard McGowan, *The Competition for Gambling Revenue: Pennsylvania v. New Jersey*, 13 GAMING L. REV. & ECON. 145 (2009) (explaining negative impact on New Jersey’s gambling market caused by establishments in Pennsylvania).

111. Clyde W. Barrow, *New England Casino Gaming, Update, 2009*, CENTER FOR POLICY ANALYSIS, U.M. DARTMOUTH, Mar. 2009 at vii, available at <http://archives.lib.state.ma.us/bitstream/handle/2452/38860/ocn319062297.pdf?sequence=1> (providing statistics on decreased spending by Massachusetts residents on gambling in Connecticut casinos).

112. Eugene Christiansen, *The Impacts of Gaming Taxation in the United States*, AM. GAMING ASS’N, 2005, available at http://www.americangaming.org/assets/files/studies/The_Impacts_of_Gaming_Taxation.pdf.

By examining the relationship between the 2003 Illinois tax restructuring and coin-in, this research indicates that increases in gaming taxation had a significant negative effect on Illinois gaming demand. The results of the study support the findings of research on occupancy taxes, real estate taxation, and sin taxes that have consistently found a negative correlation between demand and increased taxation and restrictions. Specifically, this study supports the research hypothesis predicting that increased gaming taxes will have a negative impact on gaming demand.¹¹³

Another path to avoid is that taken by Maryland. In November 2008, voters approved up to fifteen thousand slots for five locations. The taxation rate of sixty-seven percent is among the nations highest and there are additional fees such as Baltimore's \$13 million p.a. to \$25 million p.a. in five years. Consequently little has been accomplished. Only three licenses out of five have been awarded. In Baltimore, which was to have been the major slot center, the selection process has bordered on the farcical. One investment banker has opined "every day this thing is postponed, it costs the state seven hundred thousand [dollars] in revenue."¹¹⁴ There are also serious zoning problems concerning the location of VLTs.¹¹⁵

In conclusion, it does not appear that the gaming market is saturated. If a state wants to expand legal gambling, it should have a "master plan" based on objective research, which will describe goals and negative features. No longer is it true that if you build a gaming facility, customers will come.

113. Mikael Ahlgren, Michael C. Dalbor & Ashok Singh, *Estimating the Effect of the 2003 Gaming Tax Restructuring on Riverboat Gaming*, 13 UNLV GAMING RESEARCH & REV. J. (2009).

114. Scott Van Voorhis, *Baltimore's 2010 Slot Schedule Slipping*, GAMBLING COMPLIANCE.COM, Jan. 4, 2010, available at <http://www.gamblingcompliance.com/node/40802>.

115. See David Placher, *Site Fight: Anne Arundel Co., Md.*, CASINO ENTERPRISE MANAGEMENT, Aug. . 31, 2009, available at <http://www.casinoenterprise.com/articles/septmber-2009/site-fight-anne-arundel-county-md> (discussing voter-passed referendum allowing for and establishing locations for five video lottery terminals in Maryland).