**Internet Poker: Is it Class II Gaming?**

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In an article I recently wrote for another magazine, I posed the question of why tribes shouldn’t be able to engage in Internet poker now as a Class II card game using technological aids. At first, even I thought that this idea would readily be dismissed as too radical. But since that time, I have floated the idea by some of the most respected gaming law attorneys in the business. While the concept has not been instantly embraced and supported, it has also not been instantly dismissed. As I continued to deliberate on the issue, I became convinced that the subject is at least worthy of further discussion and exploration.

In preparation for this article, I carefully scoured the Indian Gaming Regulatory Act (IGRA), searching for language that might either support the notion that Internet poker could be a Class II card game using technological aids or that would definitely preclude that possibility. I could find nothing precluding the concept and several provisions that I believe might actually support it.

At §2701 (findings) of IGRA, there are several references to “gaming activity on Indian lands” or the “conduct of gaming on Indian lands.” The term “gaming activity” is undefined.

The definitions section of the act (§2703) states in part “… the term Class II Games means … card games that … are explicitly authorized by the laws of the state” (or not specifically prohibited). Using California as an example, poker is certainly authorized. Also, as we now know, the U.S. Department of Justice does not view the use of the Internet in the conduct of poker as being federally prohibited.

So if poker is legal, why can’t a tribe use the Internet as a technological aid in the conduct of Class II poker “gaming activities” on “Indian lands”? The use of “electronic, computers or other technological aids” are expressly allowed by IGRA for Class II gaming. While the act specifically cites their allowable use for Class II bingo games, it does not prohibit their use in the conduct of other Class II games. In fact, there is precedence for using technological aids for Class II pull tabs games. The U.S. Court of Appeals for the District of Columbia in Diamond Game Enterprises v. Reno, 230 F. 3d 365, found the gaming device known as “Lucky Tab II” (which resembled a slot machine) to be a Class II game. Additionally, and even more definitively, a legal opinion from the National Indian Gaming Commission’s Office of General Counsel, dated Dec. 17, 2009, finds that the use of electronic poker tables (in this case, “DigiDeal” brand) are indeed an allowable use (under IGRA) of technological aids in Class II poker games, as even though “virtual cards” and “virtual chips” are used, the fundamental characteristics of poker are maintained. In other words, it is still player against player (not the house), and the players actually make all of the decisions during the play of the game; therefore, it is not a “facsimile” or Class III device.

Similarly, Internet poker players would be using virtual cards and virtual chips, but would still be engaging in player-against-player activity and would still be making all of the game play decisions. So, again, if the servers where the “gaming activity” is conducted are on “Indian lands,” then it would seem reasonable to conclude that Internet poker is simply a legal Class II poker game using allowable technological aids under IGRA.

Now some would argue that the “player” must be on Indian lands while engaging in a tribe’s “gaming activity.” First, absolutely nowhere in IGRA is there a provision that requires the player to be physically located where the gaming activity is taking place. In fact, I believe there is precedence to support the position that a player does not have to be physically present where the gaming activity is taking place.

Back in the ‘90s, there was a Class II bingo game that consisted of electronic terminals (boxes that resembled slot machines) located in gaming facilities all around the United States. These terminals were all connected (linked) to a single live bingo game being conducted on a single Indian reservation. The “linked” players from all around the country were participating in the same game, but they were certainly not physically present where the actual “gaming activity” or game was being conducted. Additionally, many states have legalized “account wagering,” whereby a participant can make wagers without having to be physically present where the betting event is taking place or being conducted.

There are a couple of other provisions of IGRA that are likely worthy of citing as well. §2710(a)(2) states that “any Class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of the act”. Also, §2710(b)(1) states that “an Indian tribe may engage in, or license and regulate Class II gaming on Indian lands, if … such Indian gaming is located within a state that permits such gaming for any purpose by any person, organization or entity” (and any such gaming is not otherwise specifically prohibited on Indian lands by federal law).

It would seem that all of the above supports a reasonable summation of the following facts. Poker is legal, at least in California. Poker is a Class II card game, as defined in IGRA. The use of electronic, computer or other technological aids is allowed for Class II games under IGRA, and is supported by other precedence. The Internet, computers, servers, etc., are certainly considered technological aids. There is no requirement in IGRA that a participant in a “gaming activity” must be physically present where the gaming activity is being conducted in order to participate.

So let us envision the following scenario. A tribe has an approved ordinance—under IGRA—that legalizes the conduct of Class II poker. The tribe has a well-established tribal governmental gaming regulatory agency. The regulatory agency has appropriately licensed a tribal entity/facility to conduct poker. The agency has promulgated technical specifications for any computerization or other technological aids used in the conduct of a poker game (including the use of the Internet). The agency requires independent lab testing of those technological aids for compliance with specifications and verification of security features. The agency has promulgated stringent accounting standards. The agency has also promulgated industry standard Internet regulations, including internal controls.

The rest of the scenario includes a player establishing a wagering account on Indian lands. The player directs (from elsewhere) wagers from that account to be placed in a poker game being conducted by computers and servers on Indian land. All winnings are deposited in player accounts kept on Indian lands.

There has been considerable whispering going on about whether this scenario could fall within “legal” Class II gaming allowable under IGRA. However, I have not really heard anyone taking a loud public stand on the question. I am hoping that this article may stimulate some of our leading gaming law experts (I am not a lawyer) to do so, one way or the other.

So, in closing, I’ll pose the question once again. Why can’t tribes engage in Internet poker here and now, as a Class II gaming activity under IGRA?

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