

RAISING THE STAKES FOR IGAMING REGULATION IN THE US

A year in review, by **Rachel Hirsch**, Attorney at Washington DC-based law firm, Ifrah PLLC.

At the end of 2011, the future of iGaming in the United States appeared uncertain. In the wake of Black Friday in April 2011 and the government's shutdown of the country's three biggest and most reputable poker websites, online poker players suddenly found themselves left without options to play legally in the US. Then, players experienced even further setbacks as federal efforts to regulate online poker failed to gain traction and individual states, buoyed by the lack of momentum on the federal front, tried, but often failed, to pass their own legislation.

As 2012 comes to an end, the future is looking brighter. There has been renewed legislative activity this year on both the federal and state levels, raising many Americans' hopes for the return of iGaming in the US. And as for poker specifically, 2012 brought two pieces of welcome news: the DoJ's historic settlement with PokerStars and Full Tilt Poker and a decision by a well-respected federal district court judge that poker is a game of skill.

Legislative advancements in iGaming regulation

The resurgence of legislative activity in 2012 was due, in large part, to a legal opinion issued by the US Department of Justice in December 2011, reversing a 50-year-old interpretation of the Wire Act. In its memo, the DoJ concluded that "interstate transmissions of wire communications that do not relate to a 'sporting event or contest' fall outside the reach of the Wire Act." Propelled by this decision, individual states, coping with tight budgets, became increasingly open to allowing – and taxing –

full scale online gaming. Leading the pack, not surprisingly, were New Jersey, Nevada and Delaware.

New Jersey

It appeared for some time last year as if New Jersey was about to become the first state to legalise and regulate online gaming in the form of poker. But Republican Governor, Chris Christie, vetoed state legislation to the effect, citing legal and constitutional concerns. Then, oddly, Governor Christie turned his attention to a different, and often more controversial type of gambling – sportsbetting. In January 2012, the Governor signed legislation allowing sportsbetting in New Jersey after it was approved by a two-to-one margin in a non-binding voter referendum in November 2011. And he announced on May 24 of this year that he planned to go ahead and set up a system of wagering at the state's racetracks and casinos this autumn, before the National Football League season ends. The four major American professional sports leagues, as well as the National Collegiate Athletic Association, however, were not as pleased with the law. Together, they have sued the state in federal court, claiming that the Sports Gambling Law, as it is known, violates the Professional and Amateur Sports Protection Act (PASPA), a 1992 federal statute that imposes a broad ban on sportsbetting. Once launched, sportsbetting will quickly go online as New Jersey has also recently passed a mobile gaming bill that allows a casino's customers to access games offered in that casino online.

While the sportsbetting battle wages on in New Jersey federal court – most likely

into next year – there is still continued hope on the state level of passing intra-state iGaming legislation. State legislation in New Jersey will require iGaming operators to team up with the state's bricks-and-mortar casinos in the gambling hub of Atlantic City. The inclusion of a 'tainted assets' provision in the legislation, however, threatens to preclude from action some iGaming providers who accepted wagers using the Internet from persons located in the United States after 2006. This provision would exclude such companies shut down by the US government during the Black Friday seizures. However, many believe that New Jersey will drop this provision from its legislation, thereby opening the door to the most experienced names in the business to team with land-based casinos and operate in the state. A final vote on the bill is expected before the end of 2012.

Nevada

When New Jersey failed to pass iGaming legislation last year, Nevada passed its own Internet poker bill, which called for the Nevada Gaming Commission to develop regulations and a path to licensure for online gambling businesses by January 2012. It also stipulated that online sites would need to have a partnership with an existing non-restricted gambling licence holder or an affiliate that has been in business for at least five years.

In August 2012, South Point Hotel and Casino became the first company to receive an interactive gaming licence from the Nevada Gaming Commission, allowing South Point to operate, manufacture, and serve as a service provider of interactive gaming systems in Nevada. The licence is unique since South Point's operation is run in-house and there will be no need to

partner with a third-party operator. More than 30 companies have submitted licence applications to the Nevada Gaming Control Board, with casino giants like Caesars Interactive Entertainment still waiting approval of their applications. Nevada's intra-state gaming network is expected to be up and running by early next year.

Delaware

Following Nevada's lead, Delaware became the second state this year to pass legislation authorising online poker play in the state. Unlike in Nevada, Internet poker will not be the only gaming offered under the jurisdiction of the Delaware state lottery. Casino games and lottery tickets will also be available, making Delaware the first state to legalise full-scale Internet gambling. The state hopes to launch online gambling next year.

Federal legislation

While the states passed their own intra-state gaming legislation, federal legislation regulating online poker gained traction in Congress. The proposed bill, known as "The Internet Gambling Prohibition, Poker Consumer Protection and Strengthening UIGEA Act of 2012" looks to reinforce existing legislation including the 1961 Wire Act and 1970 Illegal Gambling Business Act to prevent all forms of unlicensed gambling, but with a carve-out specifically for online poker and off-track horse race wagering. The act calls for a state-by-state opt-in procedure through a voluntary election. Inaction will result in the state opting out. Supporters of the bill are looking at the post-election 'lame duck' session of Congress to push the bill and potentially find a piece of legislation that is guaranteed to pass, in order to attach the bill as a 'rider'. Significant movement toward federal legislation is therefore not likely to occur until the end of the year.

Judicial advancements in iGaming

As the legislative debate continued, the judiciary took important strides in advancing online gaming in the US.

The most notable step toward this end was the Southern District of New York's approval of two stipulated orders of settlement that concluded a three-way transaction between Full Tilt Poker, PokerStars, and the Department of Justice. Together, the settlement stipulations provided for, inter alia, the forfeiture of assets from the Full

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Tilt companies and the conveyance of those assets to the PokerStars companies. Both stipulations were signed by the court on July 31, 2012, and ended both companies' civil forfeiture proceedings with the DoJ. Because the settlement did not require PokerStars to admit guilt, PokerStars is now poised to re-enter the US market, whether via state or federal legislation.

The other most notable judicial advancement in iGaming came in the DiCristina case, in which Judge Jack Weinstein of the Eastern District of New York held that poker is a game of skill and that running a poker game or business is, therefore, not a violation of the Illegal Gambling Business Act (IGBA). Having established that IGBA was only intended to prohibit games involving a significant degree of chance, Judge Weinstein relied heavily on a notable amount of statistical evidence to determine that "skill, when sufficiently honed, makes the difference

between winning and losing in poker," and, therefore, poker is a game of skill. The most immediate effect of the district court's ruling was that Lawrence DiCristina, who was indicted for operating a poker club, escaped federal prosecution for his poker business. While the long-term impact of the ruling remains to be seen, it is yet another encouraging step toward legalising online poker.

Looking forward

As 2012 nears its end, the individual states are leading the charge in legalising and regulating online gaming. Although Nevada was the first to legalise intra-state gaming, it would not be surprising if a state like New Jersey ended up as the first to actually launch it. Of course, politics plays a large part in the forward movement of any legislation, especially in New Jersey where the tainted asset provision of the proposed bill presents an unnecessary obstacle to the ultimate success of legislation in the state. The upcoming elections will also play a determining role in the course of federal legislation in the US. A checkerboard of up to 50 intra-state poker or gaming networks, each with its own regulations, is hardly ideal. But with federal online gaming legislation remaining bottled up in Congress, the stakes are even higher for individualised states to take the future of iGaming in the US into their own hands. Looking forward, it will be interesting to see whether once Nevada and New Jersey go live, other states will follow with their own legislation or enter into inter-state compacts.



Rachel Hirsch is an attorney at the Washington, DC-based law firm of Ifrah PLLC. Ms Hirsch focuses her practice on iGaming and Internet Advertising and Marketing. Her clients have included PokerStars, Full Tilt Poker, and Microgaming. Ms Hirsch graduated with honours from the University of Maryland School of Law and practiced at Venable prior to joining Ifrah Law. Web: www.ifrahlaw.com/attorney/rachel-hirsch/ Email: rhirsch@ifrahlaw.com