

PIONEERING A NEW IGAMING FRONTIER TO NEW JERSEY AND BEYOND

Two US states with a long history of legal land-based gaming have been competing against each other to become the first state in the nation to legalise iGaming within their borders. Although Nevada seems to have won the short-term race, New Jersey may actually end up as the first state to extend online play — and, as a result, its player pool — well beyond national limits, writes Washington Attorney, **Rachel Hirsch**.

New Jersey's iGaming law not only allows New Jersey residents to play online against each other, but also opens the door for New Jersey residents to play against residents of other states, to the extent that such wagering is permitted in those jurisdictions. Even more significantly, the New Jersey law opens play to individuals outside of the state if such wagering is determined to be 'not inconsistent' with federal law. Given that there are no federal laws prohibiting a state from enacting such permissive legislation, there is nothing preventing New Jersey from offering its games to residents of foreign countries in an effort to increase player liquidity and potential revenue for the state.

Recent developments in New Jersey legislation

The race to become the first state in the nation to pass iGaming legislation has been tight. Not to be outdone by its competition in the east, Nevada – in one of speediest actions on a bill seen in its legislative history – became the first state on February 21, 2013, to authorise interactive gaming. New Jersey appeared poised to be the first state to pass an iGaming bill when, in December 2012, the State Senate voted 33-3 to legalise online gaming in the state. The General Assembly had previously approved the bill by a vote of 48-25-3. Then the waiting game began as the state watched to see what Governor Chris Christie would do in a 45-day deliberation period. On February 7,

2013, Governor Christie issued a conditional veto of the iGaming bill, sending the bill back to the legislature to approve minor changes. The changes included an increase in the tax rate on revenues generated from online gaming, additional funding for problem gamblers, and tighter regulations on relationships between state employees and companies that hold an Internet gaming licence. While these changes are not insignificant, the fact that they are relatively minor is clearly a huge victory for proponents of iGaming in New Jersey. Governor Christie subsequently signed the revised bill into law on February 26.

Looking beyond New Jersey for player liquidity

Despite these amendments, the New Jersey law still leaves the door open for the state to offer online play not only to its residents, but also potentially to residents of other jurisdictions that have permitted wagering in their borders and have allowed for reciprocal agreements with other states that have legalised online gaming. The Nevada law contemplates similar inter-state gaming compacts within the borders of the United States.

The concept of inter-state compacts is not new. It stems from a well-accepted truth in the iGaming world that to be profitable, a game needs a large player pool. In the poker world, player liquidity refers to the fact that games with the most players

and most populated tables tend to attract more players.

By themselves, states like Nevada are too small to provide a sufficient player base to run a profitable online game. With a population of approximately 2.8 million people, as compared to New Jersey's population of around 8.8 million, Nevada will struggle to maintain a purely intra-state iGaming model. Recognising the inherent problems with intra-state gaming, the New Jersey bill contemplates online gaming well beyond the state level. Unlike the Nevada law, which merely contemplates the potential for inter-state play, the New Jersey bill opens up the possibility for its residents to play against international players. As New Jersey sees it, why should interactive game play be limited to the boundaries of the United States when the international market provides the largest, and most profitable, playing pool imaginable? The inclusion of the "foreign nation" provision in the New Jersey law broadens the playing field to reciprocal agreements with any international jurisdiction that permits online gaming, so long as those agreements are not inconsistent with federal law.

The absence of federal impediments

While earlier legal opposition from the US Department of Justice (DoJ) may have once posed an obstacle to international play, there are currently no federal laws that prohibit New Jersey from entering into reciprocal agreements with foreign jurisdictions.

The Wire Act

Once thought to be the biggest obstacle to inter-state or international transmission of money related to online wagering, the



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Federal Wire Act of 1961 no longer poses a threat to the types of inter-state and international compacts contemplated by the New Jersey bill. In December 2011, the DoJ reversed its long-held position that the Wire Act prohibited all forms of Internet gambling, including poker. Instead, in a 13-page opinion, the DoJ stated that the Wire Act applies only to sportsbetting. This opinion eased fears among state lawmakers that money involved in online gaming could not be sent across state lines without incurring a violation of federal law. With that hurdle removed, the possibility of gaming compacts became a reality.

UIGEA

The other most notable impediment to online gaming in recent years has been the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA). Added as a tag-on to a larger bill meant to regulate port security, UIGEA, “prohibits gambling businesses from knowingly accepting payments in connection with the participation of another person in a bet or wager that involves the use of the Internet and that is unlawful under any federal or state law.” The law explicitly excludes from the definition of “unlawful Internet gambling” online gambling that is permitted within the boundaries of a state. In other words, UIGEA piggybacks off state law. If the state permits gambling within its borders, then there is no UIGEA violation. Although the DoJ largely relied on UIGEA to take down the online poker industry in the United States in 2011, UIGEA does not stand as an impediment to

inter-state or international play in a state like New Jersey that explicitly provides for such arrangements in its iGaming legislation.

IGBA

Like UIGEA, the Illegal Gambling Business Act (IGBA) has been used in online gaming prosecutions. IGBA, like UIGEA, requires a violation of state law for the federal statute to apply. Therefore, it would similarly not prohibit New Jersey from entering into agreements with other states or foreign jurisdictions that have permitted online wagering within their borders.

The Travel Act

A lesser known statute, The Travel Act forbids the use of US mail, or inter-state or foreign travel, for the purpose of engaging in certain specified criminal acts, such as online gambling. The Travel Act, however, also explicitly excludes from the definition of “unlawful activity” gambling that is consistent with federal law or the laws of the state in which it was committed. Therefore, it too does not stand in the way of New Jersey residents potentially playing against foreign players in jurisdictions permitting online gambling.

Moving towards a new iGaming frontier

Shared player liquidity will ultimately be the key to success for the new online gaming market in New Jersey. Even if there are not enough players online at any one time in New Jersey, gaming compacts will allow for the possibility of many more players to be online at that time to play against New

Jersey residents. Not all states would need to pass laws similar to New Jersey in order to participate in inter-state gaming compacts. Depending on the state law or the powers granted to the state executive based on the state constitution, a state may be able to participate in gaming compacts without any legislative action. Similarly, regulators in foreign countries can permit play with New Jersey residents simply by allowing their countries to participate in reciprocal agreements with the United States.

Now that New Jersey has introduced the possibility of both inter-state and international play, there may be no need for federal iGaming legislation after all. It will be up to the states to decide for themselves if, and how, to participate in inter-state play. With the passage of its iGaming law, New Jersey has a chance to pioneer a new iGaming frontier for other states.

To maintain its status as a regulatory leader, New Jersey should address the issue of inter-state compacts quickly, as there are still too many unanswered questions about how they would operate.

One thing is certain, however: at this point, the possibilities are limitless.

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