

Senator Bonacic introduces i-poker bill to New York State

Bill S 6913 would legalise and regulate online poker

In late March 2014, New York state Senator John Bonacic introduced a bill (S 6913) to legalise and regulate online poker in New York. Some bill highlights:

- Authorised games include Texas Hold'em and Omaha Hold'em, as well as any other poker game that the New York State ('NYS') Gaming Commission determines is a material equivalent, whether in a cash game or tournament;
- Up to ten online poker licences each lasting ten years;
- \$10 million one-time licence fee;
- 15% tax rate on gaming gross revenue;
- 'Bad actor' clause prohibits licensure for any applicant who knowingly and willfully accepted online wagers from persons located in the US after 31 December 2006, unless the wagers were authorised by federal or state law; there is also a 'covered asset' provision;
- The State may enter into agreements with other states to pool liquidity; and
- Unlicensed operators are also liable for the 15% tax.

Background: New York gambling law

New York's constitution prohibits all forms of gambling except for (i) the state lottery, (ii) pari-mutuel wagering on horse racing, (iii) some forms of charitable gaming, and (iv) the recently authorised seven commercial casinos¹. New York courts have historically considered poker as gambling under state law. New York applies the material degree standard, which asks whether chance plays a substantial, even if non-dominant, role in the game's outcome. Courts have found that poker contains a sufficient element of chance to constitute gambling in New York². Most other states apply the dominant factor test, which asks whether skill or chance dominates the game.

In the recent federal case *United States v. DiCristina*³, a federal judge ruled that poker is a game of skill and not considered gambling under a federal law, the Illegal Gambling Business Act. The decision was reversed on appeal in the Second Circuit. The reversal, however, did not turn on whether poker is a game of skill under federal law. Instead, the Second Circuit held that the issue turned on whether the defendant violated the gambling laws of the state in which it took place. Indeed, the parties did not dispute that poker constituted gambling under New York law⁴. Put another way, there was no separate federal gambling test that need be met in addition to state law. Although not binding precedent, *DiCristina's* lower court ruling indicated a possible jurisprudential shift towards viewing poker differently from other traditional casino games.

Legal implications

In addition to authorising regulated online poker in New York, Sen. Bonacic's bill presents some other broader implications. The bill purports to amend the State's definition of 'contest of chance' from depending 'in a material degree' to

'predominantly' upon an element of chance. Applying the dominant element test, the bill finds that poker is not gambling under New York law. This approach effectively circumvents the constitutional restriction on authorised gambling in the State.

By also separating poker from gambling, the bill possibly authorises all for profit poker games in the state. The bill does make it a crime to knowingly and willfully offer unlicensed online poker to persons in New York. The bill does not appear to make it a crime to offer unlicensed brick-and-mortar poker games. If the bill advances to debate in the legislature, this issue will almost certainly be addressed.

One may consider whether a constitutional amendment to authorise online poker is a viable alternative path to legalisation in New York. Although viable, a proposed constitutional amendment in New York must be adopted by two successive legislatures, followed by a public referendum⁵. The constitutional amendment authorising up to seven commercial casinos in the state took many years of political heavy lifting. A legislative poker carve-out from gambling seems far more sensible.

Prospects

Sen. Bonacic himself has said he "doesn't intend to push this [bill] this year. But we need to start a discussion."⁶

Bonacic's position on the bill isn't a surprise. The State is in the early stages of rolling out commercial casinos, with the first wave of applications for gaming facilities due by 30 June 2014. It may be too much too soon to make a strong push to pile online poker on top of the brand new era of gaming in New York.

The bill has no companion legislation in the State Assembly. John Pappas, the Executive Director of the Poker Players Alliance, said "[g]etting House support will be critical and, without that, it will be a real challenge to have legislation considered this year."⁷

The bill has been referred to the Senate Committee on Racing, Gaming, and Wagering. At the time of writing, it is unclear whether the bill will take any advanced steps. Authorised online poker in New York is likely at least a year or two away.

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1. NY Const. art. I, § 9.

2. See *People v. Turner*, 629 N.Y.S.2d 661, 662 (N.Y. Crim. Ct. 1995).

3. 886 F. Supp. 2d 164 (E.D.N.Y. 2012), rev'd, No. 12-3720 (2d Cir. Aug. 6, 2013).

4. See *DiCristina*, No. 12-3720, at 9.

5. NY Const. art. XIX, § 1.

6. Klepper, David, 'Lawmaker wants NY to license, tax Internet poker,' Associated Press, 1 April 2014.

7. Cypra, Dan, 'New York Online Poker Bill Introduced, PPA Calls It 'A Great First Step,' PocketFives, 31 March 2014, available at <http://www.pocketfives.com/articles/new-york-online-poker-bill-introduced-ppa-calls-great-first-step-589378/>