The Case For Class II Gaming

by Jamie Hummingbird

For many years now, there has been an ongoing debate as to what constitutes a Class II game and how that game is differentiated from Class III games. The National Indian Gaming Commission (NIGC) has wrestled with the issue. Tribal gaming regulators have addressed the matter on numerous fronts (e.g. state and federal venues). Most notably, the federal courts – including the Supreme Court – have provided direction on how to determine the differences between the two classes of gaming.

In May 2009, I was privileged to take part in a regulatory fact finding hearing hosted by the Sycuan Gaming Commission. The purpose of the hearing was to gather information about the history and development of the Indian Gaming Regulatory Act (IGRA). The hearing was also a method for compiling an administrative record that would assist the Sycuan Gaming Commission in evaluating and making determinations on Class II games. Testimony was given by tribal leadership, gaming laboratories, manufacturers, attorneys, and tribal gaming regulators throughout the three-day event.

The hearing was an opportunity for not only the Sycuan Gaming Commission to learn more about Class II gaming, but also for scores of other tribes that desire to offer such games; even those of us that have been involved in Class II gaming for a while benefited from the presentations made at the hearing. The testimony that was given, as well as the documentation received as a part of the hearing process, will prove invaluable as Class II gaming and the arguments surround it continue.

In order for tribal gaming regulators to make informed decisions on Class II games it is important to remember the basic criteria of a Class II game as set forth in the IGRA (25 U.S.C. § 2703 (7)(A)): a game which is played for prizes, including monetary prizes, with cards bearing numbers or other designations; a game in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined; and a game in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards. These same criteria have been cited by the federal courts as the "sole requirements" constituting a Class II game.

Throughout the development of Class II gaming, particularly as more manufacturers created games that employed technological aids as well as other features commonly associated with Class III games, there have been claims that the line between classes has been blurred. I respectfully disagree. To further illustrate the difference between Class II and Class III games, the courts also pointed to 25 CFR § 502.7, which defines a technological aid as machines or devices that: broaden the participation levels in a common game; facilitate communication between and among gaming sites; or allow a player to play a game with or against other players rather than with or against a machine. The legislative history surrounding the IGRA gives clear indication that tribes are to have "maximum flexibility" in the use of computers and other technological aids (Senate Report 555). The NIGC, in recent times, has promulgated technical standards and internal controls in an effort to draw a "bright line" between Class II and Class III gaming. The impetus for these regulations – the need for the "bright line" – was to provide 'everyone' the means with which to distinguish Class II games from Class III games. The enactment of these regulations, however, serves to limit the flexibility Congress intended tribes to have and strips authority away from the tribal gaming regulator. Tribes have demonstrated their ability to make such distinctions time and again prior to the arrival of these regulations.

Tribal gaming regulators, as the primary regulators of Class II gaming, have the first duty of evaluating each purported Class II game to determine if all – not just some – of the criteria discussed above are met. The evaluation process begins with the collection of all available documentation on a game: a detailed game description, a legal opinion, payout information, etc. If a tribe has other administrative and/or technical requirements, such as testing requirements for any feature of the game (e.g. random number generator), those, too, must be confirmed through documentation and/or observation. A live demonstration and testing of the game is also a vital step in the evaluation process. Once all of the pieces are gathered, they can be compared to the best information available such as court decisions and NIGC game classification opinions to identify potential conflicts. Ultimately, it will be the decision of the local tribal gaming regulatory authority to make the determination as to whether or not the game should be considered Class II. The exclusive right to oversee and regulate Class II gaming resides with tribal gaming regulators; it is our responsibility to develop the regulations that define the Class II environment.

Tribal gaming regulators, therefore, must continually monitor all aspects of Class II gaming so that we may adequately fulfill our obligation of protecting the assets of the tribe. This includes remaining vigilant in the protection of an important facet of tribal economic development against the challenges that are frequently posed by entities looking to impact Class II gaming in such a way as to be advantageous to their interests. We must continue our efforts to educate not only ourselves, but those that need guidance in the realm of Class II gaming so that they can understand that there is still a case to be made for Class II. ♣

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