

# Survey of Significant Developments in Internet Gambling

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## INTRODUCTION

During the past year, activities related to the regulation of internet gambling in the United States have progressed. The Unlawful Internet Gambling Enforcement Act (“UIGEA”) continued to generate uncertainty; Kentucky’s attempt to seize domain names used by certain internet gambling companies continued to generate news; Minnesota and the Interactive Media Entertainment & Gaming Association, Inc. (“iMEGA”) resolved their differences concerning access to alleged gambling websites; and iMEGA’s challenge to UIGEA failed in the U.S. Court of Appeals for the Third Circuit. Below we survey recent developments on these fronts.

## UIGEA REGULATIONS

The key development in connection with the UIGEA regulations (as discussed in their final form in the 2009 survey<sup>1</sup>) was the delay of the compliance date from December 1, 2009, until June 1, 2010. On September 18, 2009, the Poker Players Alliance (“PPA”), the National Thoroughbred Racing Association (“NTRA”), and the American Greyhound Track Operators Association (“AGTOA”) submitted a petition for rulemaking (“Petition”) to the U.S. Department of the Treasury and the Federal Reserve System (“the Agencies”), requesting that the regulation compliance date be postponed for twelve months—until December 1, 2010.<sup>2</sup> According to the Agencies, the petitioners sought postponement “because a significant number of regulated entities will not have in place the necessary policies and procedures by the current December 1, 2009 compliance date” due to “the possibility of confusion regarding the term ‘un-

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1. Edward A. Morse, *Survey of Significant Developments in Internet Gambling*, 65 *BUS. LAW.* 309, 309–14 (2009) [hereinafter *2009 Survey*].

2. See *Prohibition on Funding of Unlawful Internet Gambling*, 74 *Fed. Reg.* 62687, 62687 & n.3 (Dec. 1, 2009); see also Letter from Robert P. Charrow, Greenberg Traurig, LLP, to Hon. Timothy Geitner, U.S. Sec’y of the Treasury & Hon. Ben Bernanke, Chairman, Bd. of Governors of the Fed. Reserve Sys. (Sept. 18, 2009), available at <http://www.federalreserve.gov/generalinfo/foia/Petition-RegGG-UIGEA-extensionpdf.pdf> [hereinafter *Petition*].

lawful Internet gambling.’”<sup>3</sup> In the Petition, NTRA specifically noted that this confusion could lead to “a devastating impact on electronic wagering as authorized by the IHA [Interstate Horseracing Act of 1978] which produces some \$100 million in prize money for horsemen and millions of dollars of state and local tax revenue.”<sup>4</sup>

Representatives of the financial industry and more than fifty members of Congress submitted letters in support of postponement.<sup>5</sup> Only one letter in opposition to postponement was submitted, and it was from long-term opponents of internet gambling—Representative Bachus and Senator Kyl.<sup>6</sup> The basis for their opposition, among other reasons, was that “[t]he ‘problems’ raised by certain interest groups are speculative,” and that “simply delaying the compliance date serves no interest except that of the Internet gambling enterprises that have long evaded American gambling laws and will continue to do so until effective enforcement is in place.”<sup>7</sup>

The Agencies granted the Petition in part, extending the compliance date for six months—from December 1, 2009, to June 1, 2010.<sup>8</sup> As June 1, 2010 approached, news reports indicated that at least one card association (an entity that provides credit and debit cards) would allow “online horserace wagers and state lottery transactions to be processed” after the compliance date, if the entities submitting the transactions demonstrated that their activities were excluded from UIGEA’s definition of “unlawful Internet gambling”—but financial institutions would still retain the discretion not to process the transactions.<sup>9</sup>

## KENTUCKY DOMAIN NAME CASE

In September 2008, the Commonwealth of Kentucky sought to seize 141 domain names for alleged internet gambling websites on grounds that the names were used to facilitate gambling activities that violated Kentucky law.<sup>10</sup> The Commonwealth argued the domain names were “gambling devices” for purposes of KRS § 528.010(4) and, therefore, were subject to forfeiture under

3. Prohibition on Funding of Internet Gambling, 74 Fed. Reg. at 62687.

4. Petition, *supra* note 2, at 3.

5. See Prohibition on Funding of Unlawful Internet Gambling, 74 Fed. Reg. at 62687–88 & nn.4–6.

6. See Letter from Sen. Jon Kyl & Rep. Spencer Bachus to Hon. Timothy Geitner, U.S. Sec’y of the Treasury & Hon. Ben Bernanke, Chairman, Bd. of Governors of the Fed. Reserve Sys. (Nov. 3, 2010), available at <http://www.federalreserve.gov/generalinfo/foia/Reg%20GG-UIGEA-Comments.pdf>.

7. *Id.* at 14.

8. Prohibition on Funding of Unlawful Internet Gambling, 74 Fed. Reg. at 62687.

9. James Kilsby, *Racing Lobby, Lotteries Score UIGEA Coding Win*, GAMBLING COMPLIANCE (Apr. 12, 2010), <http://www.gamblingcompliance.com/node/42212&fastlogin=notifications/dbdJyG&statmid=346782>; see also Mark Balestra & Cindy O’Hara, *Policy Pulse: 9754—Operators, Banks on the Fence*, BO-LAVERDE MEDIA GROUP (May 19, 2010, 1:44 PM), <http://www.bvmediagroup.com/BVconnection/Blog/tabid/748/EntryId/75/Policy-Pulse-9754-Operators-Banks-On-The-Fence.aspx>.

10. See 2009 Survey, *supra* note 1, at 314 (discussing Interactive Media Entm’t & Gaming Ass’n, Inc. v. Wingate, No. 2008-CA-02000-OA, 2009 WL 142995 (Ky. Ct. App. Jan. 20, 2009), available at [http://pub.bna.com/eclr/ky081409\\_12009.pdf](http://pub.bna.com/eclr/ky081409_12009.pdf)).

KRS § 528.100,<sup>11</sup> which provides that “[a]ny gambling device or gambling record possessed or used in violation of this chapter is forfeited to the state.”<sup>12</sup> The trial court agreed with the Commonwealth and concluded that the domain names were used to violate Kentucky’s anti-gambling statutes, ordered the domain names be seized, and instructed the registrars of the domain names to transfer them to the Commonwealth.<sup>13</sup>

Counsel for the domain names and counsel for trade associations, including iMEGA and the Interactive Gaming Council (“IGC”), whose members allegedly included registrants of the names, responded by asking that the forfeitures be enjoined on grounds, among others, that domain names are not “devices” within the meaning of KRS § 528.010(4).<sup>14</sup> The Kentucky Court of Appeals granted their request.<sup>15</sup> The Commonwealth appealed to the Supreme Court of Kentucky, and on March 18, 2010, that court reversed the appellate court, concluding that neither the domain names nor trade associations had established standing to challenge the forfeiture.<sup>16</sup> While the Supreme Court of Kentucky found the litany of arguments in favor of affirmance to be “compelling,” it stressed, “Although all such arguments may have merit, none can even be considered unless presented by a party with standing.”<sup>17</sup> It then explained why neither the domain names<sup>18</sup> nor trade associations<sup>19</sup> had demonstrated their standing. The court, however, expressly left open the possibility that they could do so (and obtain relief on the merits) in the future:

If a party that can properly establish standing comes forward, the writ petition giving rise to these proceedings could be re-filed with the Court of Appeals. The Court of Appeals could then properly proceed to the merits of the issues raised, or upon a proper motion, this Court could accept transfer of the case, as the merits of the argument have already been briefed and argued before this Court. Until then, however, consideration of the merits of this matter is improper for lack of standing.<sup>20</sup>

Adhering to this roadmap, iMEGA filed a petition on March 23, 2010, with the Court of Appeals of Kentucky, in which it disclosed the identity of one of the domain name registrants it represents—Yatahay Limited—whose domain name (<truepoker.com>) was allegedly among the 141 seized by the Commonwealth.<sup>21</sup>

11. See Commonwealth *ex rel.* Brown v. Interactive Media Entm’t & Gaming Ass’n, Inc., 306 S.W.3d 32, 35 (Ky. 2010).

12. KY. REV. STAT. ANN. § 528.100 (LexisNexis 2008).

13. Brown, 306 S.W.3d at 35.

14. See *id.*

15. *Id.*

16. *Id.* at 35–36.

17. *Id.* at 35.

18. *Id.* at 37 (“The domain names are not their own owners or registrants, nor do they claim to be. Thus, they lacked standing to pursue the writ.”).

19. *Id.* at 40 (“Through their unwillingness to identify any of their members, iMEGA and IGC failed to meet this burden [to prove standing]. As such, iMEGA and IGC lack standing and, therefore, their writ petition should have been denied.”).

20. *Id.*

21. Petition for Original Proceeding Pursuant to CR 76.36 at 3, Interactive Media Entm’t & Gaming Ass’n, Inc. v. Wingate, No. 2010-CA-000553-OA (Ky. Ct. App. Mar. 23, 2010).

In the petition, iMEGA averred, "Because iMEGA has established associational standing in accordance with the [Supreme] Court's Opinion by naming a member of its association that has alleged a concrete injury in fact, this court should now resolve the substantive and important issues this case presents."<sup>22</sup> It then set forth arguments as to why the seizure was unlawful and asked for an order requiring the trial court to dismiss the case in its entirety.<sup>23</sup> At the same time, it moved for the Supreme Court of Kentucky to accept a transfer of the case.<sup>24</sup> On March 26, 2010, the Court of Appeals of Kentucky entered an order recommending the transfer.<sup>25</sup>

On September 23, 2010, the Kentucky Supreme Court accepted the transfer. The court concluded there were unresolved factual issues related to iMEGA's standing that, in the first instance, needed to be resolved by the trial court and refused to address iMEGA's substantive arguments.<sup>26</sup>

## MINNESOTA

The 2009 survey noted that the Minnesota Department of Public Safety sought to have eleven internet service providers ("ISPs") block access by Minnesota-based computers to approximately 200 allegedly illegal gambling websites,<sup>27</sup> and that this action had been challenged by iMEGA in federal court.<sup>28</sup> The federal case was amicably resolved, with iMEGA filing a notice of dismissal without prejudice after the notices sent to the ISPs were withdrawn.<sup>29</sup>

## iMEGA CHALLENGE TO UIGEA

The 2009 survey mentioned iMEGA's challenge to the constitutionality of UIGEA, noting that the challenge was unsuccessful in the U.S. District Court for the District of New Jersey.<sup>30</sup> The district court decision was appealed to the U.S. Court of Appeals for the Third Circuit,<sup>31</sup> which affirmed the district court's decision.<sup>32</sup>

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22. *Id.* at 4.

23. *See id.* at 48.

24. Motion to Transfer from Court of Appeals to Supreme Court, Interactive Media Entm't & Gaming Ass'n, Inc. v. Wingate, No. 2010-CA-000553-OA (Ky. Ct. App. Mar. 23, 2010).

25. Interactive Media Entm't & Gaming Ass'n, Inc. v. Wingate, No. 2010-CA-000553-OA (Ky. Ct. App. Mar. 26, 2010) (order recommending transfer).

26. Interactive Media Entm't & Gaming Ass'n, Inc. v. Wingate, No. 2010-SC-000212-TG (Ky. Sept. 23, 2010).

27. *See 2009 Survey, supra* note 1, at 315.

28. *See* Interactive Media Entm't & Gaming Ass'n, Inc. v. Willems, No. 0:09-cv-01065-JNE-JJG (D. Minn. filed May 6, 2009).

29. Notice of Dismissal Without Prejudice, Interactive Media Entm't & Gaming Ass'n, Inc. v. Willems, No. 0:09-cv-01065-JNE-JJG (D. Minn. June 8, 2009).

30. *See 2009 Survey, supra* note 1, at 315.

31. *Id.* at 315 n.64.

32. Interactive Media Entm't & Gaming Ass'n, Inc. v. Attorney Gen., 580 F3d 113, 119 (3d Cir. 2009) [hereinafter *3d Cir. iMEGA*].

iMEGA originally asserted that UIGEA violates four provisions of the U.S. Constitution and was also enacted in violation of an order of the World Trade Organization.<sup>33</sup> On March 4, 2008, the district court dismissed each of iMEGA's claims, concluding that iMEGA lacked standing to assert some of the claims and, in any event, all of them were without merit.<sup>34</sup> iMEGA appealed the dismissal to the U.S. Court of Appeals for the Third Circuit and focused its argument exclusively on its claims that UIGEA is unconstitutionally vague on its face because the statutory definition of "unlawful Internet gambling" is not "ascertainable and workable," in violation of the First and Fourteenth Amendments, and that UIGEA infringes on the right of individuals to engage in gambling-related activity in the privacy of their homes in violation of the Fourteenth Amendment.<sup>35</sup> Oral argument was held on July 7, 2009, and the Third Circuit, on September 1, 2009, issued a decision that rejected both arguments.<sup>36</sup>

The court gave five main reasons for concluding that UIGEA is not void for vagueness. First, the court explained that the definition of "unlawful Internet gambling"—which makes a violation of UIGEA contingent upon the legality of online wagering "at the location in which" an online wager is received or "from which the individual initiates the bet"—is sufficiently precise to "clearly provide[] a person of ordinary intelligence with adequate notice of the conduct that [UIGEA] prohibits."<sup>37</sup> Second, after noting that, in the context of a facial challenge, a statute is void for vagueness only if it is impermissibly vague in all of its applications, the court concluded that UIGEA passed that test.<sup>38</sup> It reasoned that "several states prohibit all gambling activity . . . by persons within the state and/or specifically ban Internet gambling" and, therefore, a wagering operator's knowing acceptance of an online wager placed or received in one of those states is plainly contrary to the statute.<sup>39</sup>

Third, the court explained that UIGEA is not unconstitutionally vague merely because it can only be violated if a predicate statute (federal or state) is violated, noting that "the fact that gambling may be prohibited in some states but permitted in others does not render [UIGEA] unconstitutionally vague."<sup>40</sup> Fourth, the court said that UIGEA is not too vague even though it might, on occasion, be "difficult to determine the jurisdiction from which an individual gambler initiates a bet over the Internet and, consequently, whether the bet is unlawful," because determining the relevant jurisdiction is a factual issue for the prosecution, not a legal matter.<sup>41</sup> Finally, the court explained that UIGEA is not unconstitutionally

33. Complaint at 13–33, *Interactive Media Entm't & Gaming Ass'n, Inc. v. Gonzalez*, 580 F.3d 113 (3d Cir. 2009) (No. 07-2635).

34. See *Interactive Media Entm't & Gaming Ass'n, Inc. v. Gonzalez*, No. 07-2625 (MLC), 2008 WL 5586713, at \*11 (D.N.J. Mar. 4, 2008).

35. 3d Cir. *iMEGA*, 580 F.3d at 115.

36. *Id.* at 116–18.

37. *Id.* at 116.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 116–17.

vague simply because a law that could serve as a predicate for a UIGEA violation might be vague.<sup>42</sup>

With respect to iMEGA's privacy argument, the court first explained that it shared "the District Court's doubts regarding [iMEGA's] standing" to assert the argument.<sup>43</sup> The court then concluded that, unlike the consensual sexual conduct in the home that was deemed a protected privacy interest in the cases cited by iMEGA, "[g]ambling, even in the home, simply does not involve any individual interests of the same constitutional magnitude."<sup>44</sup>

## CONCLUSION

While the emphasis in 2009 was on federal and state efforts to preclude internet gambling and attempts to counter those efforts, 2010 offers a more favorable outlook for the industry. As of June 2010, three bills are pending in the U.S. Congress that would authorize and regulate certain types of internet gambling.<sup>45</sup> The bill introduced by Rep. Barney Frank—H.R. 2267—has, as of June, received the most attention. Rep. McDermott has introduced a companion bill—H.R. 2268—that would provide a taxing scheme for licensees under the Frank Bill.<sup>46</sup> Both Senate bills include similar taxing schemes. Some states, relying on a potential safe harbor provision in UIGEA, have considered or are considering legislation that would authorize some form of internet gambling. In California and Florida, it was internet poker.<sup>47</sup> In New Jersey, it was internet casino games.<sup>48</sup> The few months between the drafting of this survey and its publication may see either Congress or a state enacting a bill that authorizes and provides for the licensure and taxation of internet gambling in one or more forms.

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42. *Id.* at 117.

43. *Id.* at 118.

44. *Id.*

45. See H.R. 2267, 111th Cong. (2010); S. 1597, 111th Cong. (2010); S. 3018, 111th Cong. (2010).

46. Subsequently, Rep. McDermott introduced H.R. 4979, 111th Cong. (2010), which supersedes H.R. 2268, 111th Cong. (2010), as the companion tax bill for H.R. 2267.

47. See S. 1485, 2009–2010 Leg. Sess. (Cal. 2010); H.R. 1441, 2010 Reg. Sess. (Fla. 2010).

48. See S. 490, 2010–2011 Leg. Sess. (N.J. 2010).