Gubernatorial Authority to Enter Gaming Compact Before Legislative Authorization is Legally Suspect

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Myriad statutory and constitutional questions surround a Gaming Compact between the State of North Carolina and the Eastern Band of Cherokee Indians which would grant the Cherokee exclusive rights to operate live table gaming west of Interstate 26. Most of the legal debate has surrounded the substance of the Gaming Compact. However, another issue warrants thoughtful consideration. That issue is whether the Governor possesses the authority to enter into a Gaming Compact allowing an activity that is prohibited by state law at the time of signing, that activity becoming legally authorized only after entering into the compact.

Factual Background

On November 28, 2011, Governor Bev Perdue signed the first version of the Table Gaming Compact currently awaiting a vote at the General Assembly. Chris Mackey, "*Gov. Perdue, Cherokee Reach New Compact*," Nov. 28, 2011 http://www.governor.state.nc.us/NewsItems/PressReleaseDetail.aspx?newsItemID=2165. The Gaming Compact was recently modified, accepted by both sides, and signed on May 23, 2012. The Gaming Compact expands the current games allowed on the Eastern Band of Cherokee Indians' tribal lands. The expansion to allow live table games is contrary to current state law, as well as state law in force at the time the compact was signed. Chapter 14, Article 37 of the North Carolina General Statutes prohibits most forms of gaming, including table gaming. N.C. Gen. Stat. § 14-295. Expanding permissible forms of gaming before amending state law is beyond the scope of the governor and invites litigation, which could render the Gaming Compact unenforceable and void.

Legal Discussion

The federal Indian Gaming Regulation Act (IGRA) sets out guidelines with which tribes and states must abide to establish Indian gaming rights. 25 U.S.C. § 2710. The numerous requirements are in place to ensure tribes and states operate in good faith to negotiate gaming compacts that will harm neither group and benefit primarily tribe members. The IGRA requires that the state allow tribes to conduct gaming on tribal lands if an agreement can be reached between the state and the tribe and the state "permits such gaming for any purpose by any person, organization, or entity." 25 U.S.C. § 2710(d)(1)(B). States are not required to enter into negotiations with tribes for games that are banned under state law. Kathryn R.L. Rand, *Caught in the Middle: How State Politics, State Law, and State Courts Constrain Tribal Influence over Indian Gaming*, 90 Marq. L. Rev. 971, 983 (2007). If the state has banned a particular type of gaming and allows no one to participate in the activity, then tribal leaders cannot compel the state to enter into negotiations simply to allow the tribe the sole right to conduct the game.

Conversely, the IGRA requires that the gaming rights granted by a compact must be available prior to the agreement governing the tribal gaming. *See* 25 U.S.C. § 2710, *American Greyhound Racing, Inc. v. Hull,* 146 F.Supp.2d 1012, 1067 (D.Ariz.2001) ("The State must *first* legalize a game, even if only for tribes, before it can become a compact term."), *vacated on procedural grounds,* 305 F.3d 1015 (9th Cir.2002) (emphasis added), and Kathryn R.L. Rand, *Caught in the Middle: How State Politics, State Law, and State Courts Constrain Tribal Influence over Indian Gaming*, 90 Marq. L. Rev. at 984. Allowing a state or governor to enter into compacts without any indication that the illegal activity in question will actually become legal at some future date can undermine the requirement that both parties operate in good faith. Negotiating a compact on the premise that an illegal activity "may become" legal, and agreeing

to permit currently illegal gambling practices allows the governor to make promises to tribes that may never come to fruition.

North Carolina state law permits the governor "to negotiate and enter into Class III Tribal-State gaming compacts, and amendments thereto, on behalf of the State *consistent with State law* and the Indian Gaming Regulatory Act." N.C. Gen. Stat. § 147-12(14) (emphasis added). The plain language of the statute indicates that the agreement negotiated by the Governor must be "consistent with state law," but here, the Governor negotiated a compact that was not consistent with state law at the time the compact was negotiated or entered into. The Governor is not permitted to expand state law or ignore state prohibitions when entering into gaming compacts with federally recognized tribes. Tribes, in turn, under state law, may only "conduct games consistent with the Indian Gaming Regulatory Act [], that are in accordance with a valid Tribal-State compact executed by the Governor pursuant to G.S. 147-12(14)…" N.C. Gen. Stat. § 71A-8. The Gaming Compact executed by Governor Perdue attempts to work around the requirement that gaming be legalized before it becomes a compact term by including a provision that purports to make the compact effective upon several events, including passage of "authorizing legislation by the North Carolina General Assembly."

Governor Perdue appears to have exceeded the scope of her authority when she signed the Gaming Compact that expanded current gaming options for the Eastern Band of Cherokee Indians. Live table games were not permitted at the time the Governor entered into the compact. The proper procedure requires the state law to be expanded to encompass live table games before the Governor negotiates and enters a gaming compact. When the live table Gaming Compact was both signed and amended, it was contrary to state law. Live table gaming should have been legalized first by the North Carolina General Assembly, only then would a gaming compact

containing such provisions be valid in North Carolina. Reversing the proper sequence of events by negotiating and signing the Gaming Compact before table games were legalized undermines the legal integrity of the compact and provides fodder for those wishing to challenge the integrity of the Gaming Compact.

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