Op-Ed/Editorials – New York "Anti's" Blow It

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The opponents of legal gambling, the "anti's," in New York were given a once-in-a-lifetime opportunity to outlaw all of the forms of betting they hate. They managed to get their case heard by the New York Court of Appeals, the highest court in the state. And they blew it – big-time.

What's worse is that any decent gaming lawyer could have won this case in less than five minutes – if he or she had been working for the anti's.

At stake was almost everything.

The two main legal issues were whether the state could enter into compacts to allow tribes to open casinos and whether tracks could get a decent share of the revenues of Video Lottery Terminals ("VLTs"). Casinos and VLTs are major issues. But the potential economic impact was even greater, since many if not all of the state's racetracks would have to eventually close if they could not install gaming devices.

New York's high court issued its 5-to-2 decision in May 2005. At the time this is written, it is not yet considered final. But it is clear the anti's lost everything.

The anti's big mistake can be found in a footnote, number 4:

> *"... there is a conflict in the interpretation of IGRA – whether a state must negotiate with tribes concerning all forms of Class III gaming when it allows any type of Class III gaming, or whether it must only negotiate for the specific games permitted in the state. We do not address this issue as the plaintiffs have challenged the authority to enter into tribal-state compacts in general, rather*

than the authority to negotiate for particular games."

Anyone who knows anything about Indian gaming knows:

1. Congress passed a statute called the Indian Gaming Regulatory Act ("IGRA");
2. IGRA divides all gaming into three Classes; and
3. Tribes can offer Class III games only if that form of gambling is permitted in the state and there is a tribal-state compact.

As the footnote says, there is a dispute over the word "permitted." At one extreme, one court ruled that if a state allows one form of Class III gaming, such as a state lottery, the state has to negotiate compacts for all forms of Class III gaming that are similar, even VLTs. At the other extreme, some courts have said tribes may only have the same, specific games permitted by state law.

But everyone agrees that if a state has some form of Class III gaming, tribes in that state have the right to something that is Class III, even if we don't agree on exactly what that something is.

Somehow, the lawyers for the anti's missed this most fundamental point. They argued that the state did not have the authority to enter into compacts at all.

The anti's went on and on about the state's public policy against "commercial casinos." But the proper legal response is, "Who cares?"

Almost every state also prohibits commercial bingo. But the U.S. Supreme Court held that the only public policy issue is whether the state permits that form of gambling. So, if a state allows charities to run bingo games it shows that the state does not have a public policy against gambling in general and bingo in particular. And tribes can then open high-stakes commercial bingo halls.

The anti's based their entire case on the theory that the state does not have the power to enter into compacts. So, the only question is whether the state permits any form of Class III gaming.

Now, let's see: Does New York state law permit any form of Class III gambling? IGRA defines Class III as all forms of gambling that are not Class I, traditional games, and Class II, bingo and non-banking card games. Is it possible the anti's

did not know that New York has a State Lottery (Class III), parimutuel betting on horseraces (Class III) and charity casino table games like roulette (Class III)?

The amazing thing is that all the anti's had to do was ask the right question B Does New York state permit slot machines? The answer is clearly, "No."

But this would have required conceding that tribes could have some forms of Class III gaming, including those casino table games.

The tracks were as lucky as the tribes that the anti's did not know anything about the forms of gambling they were trying to ban.

Keno, for example, may be played by state lotteries in some states. But in New York, a lottery has to have a ticket and multiple player participation. With almost no discussion, the Court of Appeals found that a video screen is the same as a ticket. As for "multiple participation," it stated that with the VLTs, "players compete against one another for prizes… by choosing a series of keno numbers, colors or symbols from a finite pool in the hope that they, as opposed to other players, will have matched those colors, numbers or symbols later drawn…"

It's clear that the anti's never played keno.

But maybe it's not all the fault of the anti's. New York judges know how much the state needs the revenue gaming brings in.

Besides allowing casinos and VLTs, the Court upheld a law allowing tracks to share in the State Lottery's VLT profits, despite a State Constitutional provision that says this is not allowed. The Court understood that if tracks don't get a significant share of the take they won't put in the machines. So the judges stretched the definition of net proceeds to mean anything the State Legislature wants it to mean.

With a Court this much on the side of more gambling, the anti's might have lost anyway, even if they had known what they were doing.