

AN EDUCATIONAL UPDATE FROM  
THE SOUTHEAST LAW INSTITUTE™, INC.

**To:** SLI Supporters  
**Date:** October 2015  
**From:** A. Eric Johnston  
**Re:** *State of Alabama v. PCI Gaming Authority, et al. Decision September 3, 2015*

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A three judge panel on the 11<sup>th</sup> Circuit Court of Appeals reviewed the above case and upheld the district court's finding that the State of Alabama had no ability to stop the Class III gaming going on at the Poarch Indian facilities (Atmore and Wetumpka) in the State of Alabama. The state had brought a lawsuit alleging virtually every possible reason to close down the illegal gambling operations being conducted by the Poarch Indians.

The state had been successful in closing down non-Indian gambling operations. The Supreme Court of Alabama determined the electronic "bingo machines" were in fact illegal "slot machines" and the operators could be prosecuted and the machines destroyed. However, the Poarch Indians continued to use the same type slot machines saying it is "bingo." Bingo is Class II gaming permitted under the Indian Gaming Regulatory Act ("IGRA"). However, they and we know what they are doing is not bingo.

In an effort to extend Alabama's authority to close down illegal gambling, Attorney General Luther Strange brought this lawsuit. The findings of the district court, confirmed by the circuit court, are that the state has no ability to bring a lawsuit to enforce Alabama's gambling laws against the Poarch Indians.

The U.S. Supreme Court earlier decided an important case in *Carcieri v. Salazar*, on the basis that Indian tribes not recognized by a federal act in 1934 could not be recognized as having tribal lands. This translated to mean potentially that if the Poarch Indians were not recognized until 1984, then the "tribal lands" on which they operate gambling casinos would not be recognized and therefore subject to state regulation.

The 11<sup>th</sup> Circuit held an attack through *Carcieri* must be through the federal Administrative Procedures Act. It could not be a "collateral" attack through a direct court action like *PCI*. But, the court further ruled that the statute of limitations on bringing a claim under the APA is six years. Since the Poarch Indians were recognized in 1984, the statute of limitations has now expired. The state did not bring a timely lawsuit and therefore has no cause of action under the APA. However, the APA issue was not actually before the court. Its holding is therefore dicta and should not be binding on other cases, such as another noted below.

This holding on the statute of limitation seems rather odd because there were no gambling operations taking place in those years for which the state would need to take action. However, the issue centers on attacking the question of whether the Poarch Indians were properly a tribe and not whether they were engaged in some type of illegal operations. Obviously, the state was not prescient enough to realize the Indians would be engaging in illegal activities at a later date and there would not have been the necessity of challenging the 1984 recognition of the Poarch Indians.

In another facet of the *PCI* lawsuit, the PCI Gaming Authority and other Indian defendants argued they are immune from state action. The federal court upheld this. The court looked at the ability of the state to bring an action under Section 1166 of IGRA. The state argued that it could, but the court held there was no express or implied right of action in a state to prosecute under that section. Section 1166 provides that only if an Indian tribe is engaged in Class III illegal gaming "in violation of a compact," then it can be sued in federal court. However, since Alabama has no compact with the Indians, then it cannot bring the lawsuit. A compact is an agreement entered into by the state and an Indian tribe to permit gaming under IGRA. There is no compact in Alabama, although it is being considered by certain members of the Alabama state legislative delegation.

The problem with entering into a compact in light of this *PCI* decision and present circumstances is that the Poarch Indians would insist on the compact recognizing their current operations as being legal or even expanding to unlimited casino gambling permitted under Class III gaming. Otherwise, they would not enter into a compact and would keep operating the way they are now. After all, if Section 1166 does not permit prosecution of them for their illegal slot machine operations, why should they agree to enter into a compact that would later restrict them? These slot machines are their significant source of income. Obviously, the state would like to tax that income, but it is a deal with the devil if it is done.

The only conclusion that can be drawn from the *PCI* case at this time is that it leaves virtually no room for the State of Alabama to challenge the Poarch Indians. Further review of the case is likely unsuccessful. There is another case pending in the 11<sup>th</sup> Circuit against the Poarch Indians. It will also address their sovereignty and whether they can be taxed. It will have a different panel of judges who very well can reach a different conclusion. The issues are different, but the outcome is still about what the Indians can do. There is still hope. For this reason, the Governor or Legislature should not consider entering into a compact with the Poarch Indians.