

PBA Gaming Law Committee Examines Issues of Skill Games vs. Chance

Legal gambling has become big business in Pennsylvania — very big.

As Pennsylvania ventures into new sources of gaming income, a number of legal issues have emerged.

According to the American Gaming Association (the gambling industry's national trade group), nationwide commercial gaming revenue totaled \$14.31 billion in the first quarter of 2022, a record for the period. It nearly matches the all-time quarterly record, \$14.35 billion, set in the fourth quarter last year.

The association says that the strong start to the year was punctuated by March's revenue performance of \$5.31 billion, the highest-grossing revenue month in industry history.

In mid-April, the Pennsylvania Gaming Control Board (PGCB) reported that the combined total revenue generated from all forms of regulated

gaming along with fantasy contests during March 2022 was the highest revenue achieved in a single month since the inception of regulated gaming in Pennsylvania, totaling about \$463 million. The previous high revenue month occurred in November 2021 at more than \$432 million. The record was driven by all-time highs in two gaming sectors, including retail table games that exceeded \$90 million for the first time and internet casino-type gaming that exceeded \$110 million for the first time.

Sources of gaming revenue regulated by the PGCB include slot machines, table games, internet gaming, sports wagering, fantasy contests and video gaming terminals, or VGTs.

"In terms of tax revenues from gaming, Pennsylvania is No. 1 in the U.S.," said Stephen S. Cook, chief counsel, PGCB. Gaming will likely generate more than \$2 billion in tax revenues in



Stephen S. Cook



Kevin C. Hayes



Merritt C. Reitzel

2022, he said, with a subsequent property tax reduction of \$1 billion.

According to the Associated Press, Americans have bet more than \$125 billion on sports with legal gambling outfits in the four years since a U.S. Supreme Court ruling cleared the way for all 50 states to offer it.

Skill Games

Along with that exponential growth in regulated gaming comes potential issues, including legal and other ramifications, over the new "skill" games being considered by the PGCB.

What are skill games? And why should attorneys be concerned?

To proponents of the games, instead of solely involving chance, there is an element of skill involved.

According to casino.org, "today's leading manufacturers of skill games produce terminals that closely mimic the look, sound and feel of a licensed casino slot machine. The games come with animated graphics and energizing sounds, and typically offer real cash payouts."

However, according to the organization, the primary difference between a slot machine and a skill gaming device is that a player must identify a winning

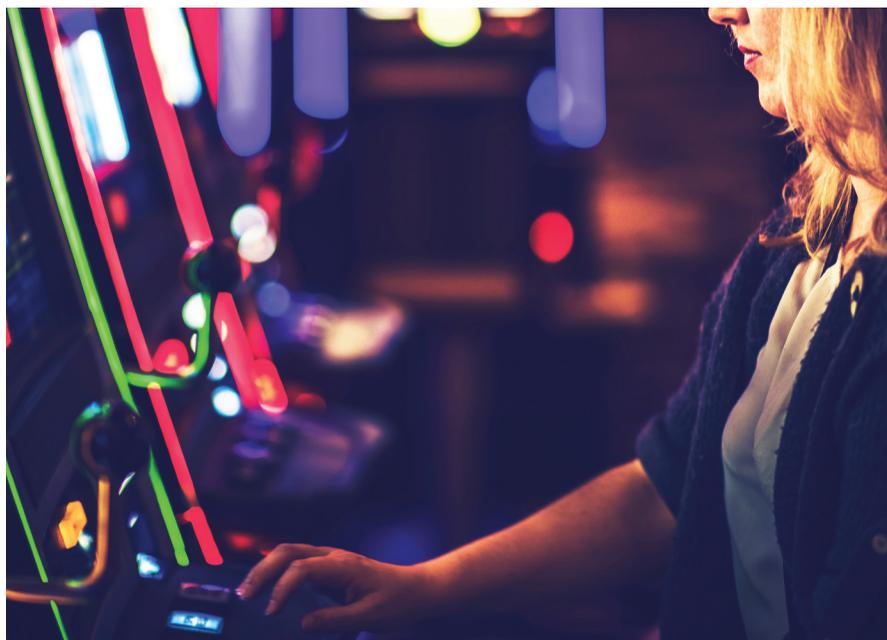
payline (a lineup of specific symbols) on the latter in order to receive a "payout." With a classic slot machine found inside a regulated casino, it is a "spin" that automatically tells the gambler if he or she won.

Casino.org said skill-gaming manufacturers argue that their products are not gambling devices, since they include elements of skill. This loophole has presented issues as to the legality of skill games in many states.

"A skill game is purported to require some degree of skill, either physical or mental, to win," said Kevin C. Hayes, Saiber LLC, Scranton, who spoke at a gaming issues webinar co-sponsored with the PBA Gaming Law Committee and conducted by the Pennsylvania Bar Institute (PBI) in late April. On the other hand, slot machines are controlled by a random number generator "which allows the element of chance to select the winner of the game."

"The courts have been left without a clear statutory definition of gambling, or legislation that squarely addresses skill games," said Hayes, PBA Gaming Law Committee vice chair. "So, they have been forced to create certain criteria for

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evaluating illegal gambling and skill games.”

To the owners of convenience stores, social clubs and taverns, skill game machines represent a source of substantial revenue during challenging economic times. But to the state lottery and established gaming industry, skill games are regarded as unwelcome competition and illegal gambling devices that are costing the state hundreds of millions of dollars in tax revenues each year.

“We have no more certainty in the world of skill games than we did a year ago,” Hayes said. “There are so many moving parts. It would benefit everybody if we had some certainty here, including the small businesses who have come to rely on revenue from these skill game machines.”

In 2017, 1 in 27 lottery retailers reported having at least one skill-game machine in their establishment, according to attorney Merritt Reitzel, who also spoke at the PBI webinar. Reitzel is the executive director of the Pennsylvania Senate Community Economic and Recreational Development (CERD) Committee, and counsel to Sen. John Yudichak (I-14), committee chairman. Reitzel noted that CERD is the committee in the Pennsylvania Senate where most gaming legislation is assigned.

Reitzel said that these unregulated and untaxed skill games have proliferated at such an explosive rate that, in 2021, just four years later, the number of lottery retailers with at least one skill game increased to 1 in every 3.5.

In response to a report during the webinar that stated 20,000 skill game machines were operating in Pennsylvania, Reitzel noted that during a CERD committee hearing last year, Delaware County District Attorney Jack Stollsteimer testified that, in his estimation, there were 25,000 skill machines in Delaware County alone.

Reitzel said she believes that the number of unregulated skill games in Pennsylvania is probably closer to 80,000, at least.

Landscape Changed

The landscape of gaming has changed considerably.

“Before 2004, we had two forms of gambling in Pennsylvania,” Cook said. “We had the Pennsylvania lottery, which was overseen by the Lottery Commission under the Department of Revenue and horse racing, under regulatory supervision by the Horse and Harness Racing Commission, a part of the Department of Agriculture.

“Then in 2004, what happened was the Pennsylvania General Assembly, on July 5, in the midnight hours, passed the Pennsylvania Racehorse Development and Gaming Act, and substantially broadened the breadth of legalized gaming in the commonwealth. It created an entirely new area, specifically at the very beginning. It authorized slot machines in casinos: brick-and-mortar casinos with real live slot machines.”

In the past 18 years, there have been several gaming industry benchmarks.

After the Gaming Act was signed in 2004, the first casino opened in the Poconos two years later. In 2010, an amendment to the Gaming Act included table games, with additional gaming opportunities opening in 2017 and 2018. The first online sports wagering began in May 2019; about two months later, i-gaming was introduced. August 2019 saw the introduction, at truck stops, of VGTs.

“The Legislature, in 2010, amended the gaming act to legalize table game operations in the commonwealth,” said Susan A. Yocum, Eckert Seamans Cherin and Mellott LLC, Harrisburg, who spoke at the PBI webinar. Amendments in 2017 legalized the placement of VGTs at Pennsylvania truck stops.

Critics indicate there was haste in putting regulations into effect.

“The General Assembly actually enacted and legalized sports wagering in the commonwealth before it was legal under federal law,” Cook said.

The reason it was not legal under federal law at the time was because of the Professional Amateur Sports Protection Act, or PASPA, Cook said. The 1992 act made it unlawful to have state-sponsored sports betting anywhere except for states that had it prior to the date of PASPA in 1992.

“PASPA was found by the U.S. Supreme Court to be unconstitutional under the 10th Amendment’s anti-commandeering doctrine,” he said. “Congress couldn’t tell the states what to do relative to sports wagering.”

For gaming, the General Assembly allowed the Gaming Control Board to issue temporary regulations. That temporary authority allowed the board “to act incredibly quickly,” Cook said.

On Nov. 17, 2018, the first Sportsbook opened at Hollywood Casino at Penn National Race Course, and many casinos teamed up with other organizations, including restaurants, to offer sports wagering.

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“Sixty percent of the online wagers in the commonwealth go through Fan-Duel at Valley Forge Casino,” Cook said. “It is interesting to note that 90% of sports wagers in the commonwealth are online.”

Good Intentions

There were good intentions along the way, especially with slots gaming.

“There was a lot of political debate about whether it was a good thing or a bad thing,” Cook said. “Ultimately, the proponents for legalized gaming thought that slot-machine gaming alone was good for the commonwealth for three reasons: No. 1, it could support property-tax relief: 34% of revenue coming out of slot machines, after winners are paid, goes to property tax relief. The second real pitch for making this legal was to support the horse-racing industry. Horse racing was legal in Pennsylvania. It wasn’t performing very well. There was a feeling that it needed a little bit of a boost.

“So, in passing slot-machine casinos, the General Assembly did two things to support horse racing,” Cook said. “One was to give 10% of the gross terminal

revenue over and above the 34% that was going to property tax relief to the horse-racing industry. Additionally, each horse-racing track in Pennsylvania, if they wanted it, got a casino or the ability to get a casino on property for payment of the requisite licensing fee. It was meant to bolster that industry.

“The third thing really was employment and economic benefits for the commonwealth. It was understood that building casinos would create a lot of jobs, even if they were just slot machines at the very beginning, there would (eventually) be restaurants and so on and so forth.”

The general assemblies in other states saw this as a mechanism to garner substantial tax revenues.

However, the pandemic has fueled the concerns regarding loss of state revenue because of the growing prominence of skill games, which are being installed in many places other than casinos, and the rise of online gaming.

Between February 2020 and February 2021, gross table game and retail slot machine revenue in brick-and-mortar establishments fell by 25%, according

to Yocum. In the same period, revenue from i-gaming rose by 425%.

Yocum noted that from July 2021 to March 2022, i-slots generated \$620 million in revenue: \$211 million in taxes and \$43 million to local share. I-tables generated \$282 million in revenue: \$6 million to the local share and \$40 million for overall tax relief.

Looking back to the beginning of the COVID-19 pandemic from March to June 2020, with forced casino closures, she said that, at times and in many instances, i-gaming was the “only vehicle to wager in the commonwealth during COVID-19.”

‘Strong Opinions’

“There are varied and strong opinions on skill games,” Hayes said. “What is less clear is whether skill games are legal.”

Hayes said Pennsylvania licensed casino operators have alleged that the growth of skilled games and the skill-game industry in Pennsylvania “has had a direct and negative impact on revenues generated at their land-based casinos. Specifically, casinos believe that instead of traveling to one of the regional casinos to engage in slot play, patrons are opting to go to local convenience stores and gas stations that are in closer proximity to their homes and playing skill games there.”

Hayes believes a recent Commonwealth Court decision has essentially created two forms of slot machines: the regulated and unregulated.

According to Hayes, “because the Commonwealth Court has determined these skill games are, in fact, slot machines, they must fall under the jurisdiction of the Gaming Act and the state gaming control board. No final resolution on these legal issues has been arrived at from a common-law perspective. But these are important cases to continue to watch.”

The skill machines, Hayes said, are completely unregulated with no restrictions on where they are placed. He said there is no testing or certification of games to ensure integrity, no licensing of the manufacturer, and no monitoring for underage play or compulsive and problem gambling.

Opposed to the greater accessibility of skill games, the casino industry is dependent on regular casino visits and table games.

“Employment is a substantial driver,” Yocum said. “Table games are far more labor-intensive than slot-machine operations.”

Bills Under Consideration

Measures are underway to deal with skill games, including Senate Bill 950, which would allow the manufacturing, distribution, sales, service, operation and taxation of video skill games in Pennsylvania. The proposed tax rate would determine that 16% of all gross profits from machines would be subject to taxation and divided up as follows: 50% to the general fund, 22% to counties, 22% to municipalities and 6% for enforcement.

A different bill, SB 212, proposes to ban skill games and make them illegal in Pennsylvania, with a misdemeanor fine of \$5,000 per machine for the first offense and \$10,000 per machine for the second offense. A third offense would be classified as a felony, with a minimum fine of \$15,000 per machine.

The state Legislature must be able to “balance what to do with skill games and not hurt our clubs, bars and taverns,” Reitzel said.

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Court Summaries

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Commonwealth Court

PETITION TO MODIFY COMPENSATION STATUS — PARTIAL DISABILITY — Section 306(a.3) — 77 P.S. 511.3 — impairment rating evaluation (IRE) — consideration of injuries that arose after initial disability — reasonably related conditions not formally added to notice of compensation payable (NCP) — discretion placed in physician evaluator — physician constrained by currently accepted diagnoses — misapprehension of responsibility — order granting employer petition to modify compensation status reversed

Sicilia v. API Roofers Adv. Prog., No. 747 C.D. 2021 (June 7, 2022) — Order granting petition to modify compensation status reversed when physician who conducted IRE felt rating was constrained by currently accepted diagnoses since she misapprehended her responsibility as physician evaluator in initial calculation of whole-person impairment rating.

MODIFICATION — IRE — CREDIT FOR PAYMENTS FOR TOTAL OR PARTIAL DISABILITY — Act 111 of 2018 — Section 306(a.3) — 77 P.S. 511.3 — due process — due course of law claims — Article I, Section 1, and Article III, Section 18 — Pennsylvania Constitution — NO VESTED RIGHTS — reasonable compensation for workers — order granting modification petition affirmed

DiPaolo v. UPMC Magee Women’s Hosp., No. 878 C.D. 2022 (June 13, 2022) — Act 111 restoration of IRE process does not violate reasonable compensation aspect of Article III, Section 18, of the Pennsylvania Constitution. ⚖️

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The Philadelphia City Council approved an ordinance to ban skilled games in early February this year, said F. Warren Jacoby, Cozen O'Connor, Philadelphia, co-chair of the PBA Gaming Law Committee.

"This is an ordinance that is not sufficiently worded and directed, I think, to escape some of the criticisms that have been made about the regulation of skill games vs. games of chance," Jacoby said.

Which bill is more likely to pass in the General Assembly?

"I'm not sure that either one of them will necessarily pass," Jacoby said. "Nor have I seen enforcement activity relating to the Philadelphia ordinance. What will happen at some point is that some legislation or additional ordinance will be enacted that may or may not limit the conduct based upon the distinction they make, whether it's a game of skill or a game of chance. In a number of cases, the manufacturers already have the VGTs accepted by the state. A lot of people see these games as being competitive with the state lottery."

"I agree with Fred," said PBA Gaming Law Committee Co-Chair Michael J. Lyon, Walsh Pancio LLC, Lansdale. "If I would give an answer about which one is going to pass, I think my answer would be neither. At least not any time soon. Fred alluded to it: I don't think there is a particular political appetite for either of them at this point. It's an important issue in the gaming industry, for sure, especially

in an election year. But I don't think we'll see any legislative activity on either of these bills until 2023, at the earliest. That even may be pushing it."

"I expect there will be a change, because (allowing skill games) does bring in revenue," Jacoby said. "The question is whether the legislators will make a distinction between skill and chance, or whether they'll just decide that this is a great source of revenue, so why don't we tax it all? It's hard to tell. The real reason is economic. These games are not subject to the regulatory process, such as the case with slot machines, and therefore are lost tax revenues."

As for the Philadelphia anti-skill-game ordinance, Jacoby said that one of the reasons stated for the ordinance was apparently a concern about potential crime relating to these activities.

Health of Industry

Crime may not be the greatest concern about the health of the gaming industry. That concern remains the effect of the post-pandemic recovery.

"Probably the greatest concern that we've dealt with the last three years is the pandemic, the shutdowns and the restrictions," Jacoby said. "They've impacted the casinos and their revenue. For a while, they were closed. It has affected their restaurants, activities and attendance."

Over the last several years, Hayes said, casino operators have requested the PGCB grant them permission to remove a number of slot machines from their gaming floors and "have represented that



Susan A. Yocum



F. Warren Jacoby



Michael J. Lyon

one of the main reasons for the request is the cannibalization of their market caused by unregulated, untaxed gambling machines across Pennsylvania."

Hayes points to the total number of machines on casino floors as of the end of March this year. The number of slot machines offered at Category 1 and Category 2 casinos has been reduced by approximately 24% from the maximum complement of slot machines that these facilities once offered on its gaming floors.

"That is significant from an economic standpoint," Hayes said. "Slot machines are taxed at an effective rate of 54%. With less slot machines on casino floors, there are less casino employees."

Hayes said the Pennsylvania Lottery is one of most vocal opponents of skill games, competing directly for customers visiting lottery retailers.

Hayes pointed to a report issued by the Pennsylvania Lottery that showed a loss of \$500 million in lottery sales between October 2017 and July 2021.

The real question is why would the General Assembly have expanded the definition of slot machines in the 2017 amendments to the Gaming Act to include skill and hybrid slot machines if they did not intend for the Pennsylvania Gaming Control Board to regulate skill games?

In June 2018, skill-game manufacturer POM of Pennsylvania LLC (POM) filed a petition for review in the Commonwealth Court seeking a declaratory judgment and injunctive relief. POM maintained that the POM game is not an illegal game of chance under the relevant statute of the Pennsylvania Crimes Code governing illegal gambling devices.

In that proceeding before the Commonwealth Court, the Pennsylvania Department of Revenue alleged the POM game is considered a slot machine under

Section 1103 of the Gaming Act.

"The court ultimately concluded that the gaming act does not apply to the unlicensed or illegal slot machines," Hayes said. "The court noted the gaming act does not grant PGCB jurisdiction or authority over the POM machines. But most importantly, the court determined that the POM machines were, in fact, slot machines."

According to Hayes, the court held that "the PGCB had no jurisdiction over those slot machines because they were not located within racetracks, casinos, hotels or the other locations authorized under the Gaming Act."

The PBA Gaming Committee continues to closely follow the skill-game and other issues.

"We try as much as we can, and we are very successful, to attract new people to our monthly meetings," Jacoby said. "It's to encourage lawyers to become involved in the gaming industry. It's changed remarkably from the inception of the Gaming Act. The best evidence was the response we got both by people attending and their response to the meeting."

Now with online gaming, the public has "just naturally realized that it's much easier," Lyon said. "The uncertainty surrounding the pandemic is a very good answer. From a sports gambling perspective, people in a facility enjoy playing in person."

"But a simple bet-down is ridiculously more easy to do from your cellphone or your laptop than to drive somewhere to a casino," Lyon said. "It's much, much easier. I don't see that stopping. I think that trend continues for at least the next several years. The gaming industry has stayed on top of that." 

Allegheny County Bar Honors Silberblatt



PBA President Jay N. Silberblatt, fourth from left, was honored by the Allegheny County Bar Association during a recent special recognition ceremony at the Hotel Monaco, Pittsburgh. From left are PBA Executive Director Barry M. Simpson, 2019-20 PBA President Anne N. John, 1997-98 PBA President Vincent J. Grogan, Silberblatt, 1991-92 PBA President Thomas L. Cooper and 2006-07 PBA President Kenneth J. Horoho Jr. Simpson previously practiced law in Allegheny County, and Silberblatt and the PBA past presidents in the photo are from Allegheny County.