

Pa. 'Skill Games' Ruling Could Chill Gambling Crackdowns

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Law360 (December 1, 2023, 6:07 PM EST) — A state appellate court's ruling that "Pennsylvania Skill Games" aren't illegal gambling could have repercussions for the state's legal gambling industry, enforcers hunting illegal gambling machines, and "skill games" operators around the country, attorneys told Law360 Friday.

Thursday's precedential Commonwealth Court opinion said the machines made by Georgia-based Pace-O-Matic were neither slot machines under the conventional definition of the word, nor were they illegal gambling machines that state gambling regulators and the Pennsylvania State Police Bureau of Liquor Control Enforcement could seize from the bars, clubs and storefronts where they have been installed.

The court pointed to the inclusion of a memory-based secondary game mode, which losers of the chance-based main game could use to still win, as evidence that the machines relied more on skill than chance.

The Pennsylvania Attorney General's Office has vowed to appeal the ruling to the state Supreme Court, but for now the lower court's decision could have the effect of not only allowing Pace-O-Matic's machines to operate and spread, but also slowing any crackdown on other companies' "skill-based" game machines, said Ketan Bhirud of Cozen O'Connor, former chief litigation counsel for the Nevada Attorney General's Office.

"One of the things you may see is enforcers not rushing to court quite as much, because they see they're at risk," Bhirud told Law360. "They're not going to want to have bad precedent."

Bhirud said that until the Supreme Court weighs in, other gaming companies might either feel slightly more comfortable that they could also be considered legal — or would have to examine if their games are close enough to Pace-O-Matic's to pass the same test.

Other states' gambling regulators, though perhaps dealing with different local laws, might be able to look to the court's ruling for guidance on how to approach so-called skills games, and may likewise be more circumspect about when they challenge if a particular machine is based on skill or chance, he said.

In an opinion written by Judge Lori Dumas, the Commonwealth Court said that under the "predominate factor" test the court had laid out in July's Pinnacle Amusement LLC v. Bureau of Liquor Control Enforcement decision, the Pace-O-Matic machines' "follow me" game mode, which allows a skilled user to memorize and reproduce patterns to recoup more than they lose in the more chance-based game mode, made the machines predominantly skill-based.

The Crimes Code, which bars unlicensed slot machines, had not defined what a "slot machine" was, so Judge Dumas took the dictionary definition offered by the state's lawyers and said the Pennsylvania Skill Games didn't fall under it. The court didn't have to follow the broader definition of slots in the Gaming Act because the latter law was separate from the Crimes Code and dealt only with the licensed slot machines the state had legalized, she wrote.

"It seemed to me that she engaged in a careful analysis of the facts to understand the nature of the skill games before her and how they differed from other games the law might treat differently," said **Alexander Denton** of **Robbins Alloy Belinfante Littlefield LLC**, who represents clients in Georgia's skill-games industry.

"When courts evaluate the legality of skill-gaming activities, whether under a predominant factor test, as the Pennsylvania court applied here, or some other rubric, it is important to focus on the precise statutory language at issue," **Denton** said. "That is what Judge Dumas did in yesterday's opinion, using traditional tools of statutory construction in determining that the skill games in question were not prohibited slot machines."

Both the Dauphin County trial court and the Commonwealth Court had looked at the state's investigation of the Pennsylvania Skill Game machines and found it less convincing than the experts that the gaming company offered, noting that the undercover police playing the games at Champions Sports Bar, where the three machines at issue in the suit were seized, had skipped the "follow me" mode to focus on the mode that was more like gambling.

Cozen's Bhirud said playing the consoles solely as if they were slot machines was a "results-based" way of investigating them, and an "odd way to go about it," which meant the game companies in the case were able to bring in their own experts to convince the lower court that the skill-based mode could matter more in ultimately winning the games.

Attorneys representing clients in the state-licensed gambling business took a dimmer view of the opinion.

"Anyone who plays these machines knows they are gambling devices and operate just like slot machines," said Joel L. Frank of Lamb McErlane PC, which represented numerous casino operators who filed amicus briefs opposing the machines at issue. "This ruling opens up the floodgates for tens of thousands of these machines to enter the state, and it jeopardizes more than \$2 billion in tax revenue provided by the state's licensed casinos. We look forward to hearing what the Pennsylvania Supreme Court has to say about such games."

William Gantz, team lead for the gaming industry group at Duane Morris LLP, said future enforcement against allegedly illegal games would have to rely on more careful investigation and analysis, or the state Legislature supplying new definitions of legal slots.

"Between this decision and the preceding Pinnacle decision, getting a different result in a Pennsylvania court in the next seizure case will likely depend on legislation to define the term 'slot machine' as used in the gambling code. Or at least a very different approach to the expert analysis of these games," he told Law360. "This decision is really unfortunate for our regulated gambling industry, and does not bode well for a petition to appeal further, but the commonwealth's incomplete approach in the case resulted in the loss of the proverbial 'battle of the experts' on the critical issue of whether the results of the games were predominantly

due to skill or chance."