

Blurred Lines: The Ongoing Battle Between iLottery and iGaming

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Online gaming is a booming industry. In fiscal year 2022-23, the Pennsylvania Lottery's iLottery program generated \$872.5 million in instant sales, while online gambling revenues topped \$2 billion in Pennsylvania last year according to published reports. But behind the scenes, a dispute has arisen that pits the Pennsylvania Lottery against privately owned casinos. The fight is over legislation that prohibits the Pennsylvania Department of Revenue (the "Department"), the administrator of the Lottery, from offering products that "simulate casino-style lottery games" as part of the iLottery program. The Pennsylvania Supreme Court recently construed the meaning of that phrase in *Greenwood Gaming & Entertainment, Inc. v. Department of Revenue*, 306 A.3d 319 (Pa. 2023), and remanded the case to the Commonwealth Court with instructions to apply a corresponding standard. The question now is whether, and to what extent, the Commonwealth Court will be able to establish a boundary between iLottery games and the online products offered by casinos.

Act 42

On March 15, 1972, the Pennsylvania Lottery sold its first ticket for a weekly drawing. The Lottery, then only a year into its existence, operated without competition and continued to do so for decades. Over the years, with the rising popularity of Lottery games, including now-ubiquitous "scratch-offs," came a tide of competition and technology that shepherded in a new legislative era for Pennsylvania gambling rules. First came the Race Horse Development and Gaming Act (the "Gaming Act"), which authorized slot machines. Six years later, the Legislature expanded the Gaming Act to include table games. Then, in 2014, the General Assembly amended the State Lottery Law (the "Lottery Law") to prohibit the Department from offering "[i]nternet instant game[s]" and "simulated casino-style lottery game[s]" through the Lottery, absent further legislative authorization.

But before long, the General Assembly charted a new course. In 2017, it amended the Lottery Law and the Gaming Act to permit both the Lottery and privately owned casinos to offer different forms of online gaming. The legislation that effected this change, known as Act 42, authorized the Department to offer "iLottery games," defined as "[i]nternet instant games and other lottery products." 4 Pa.C.S. § 502. At the same time, Act 42 authorized casinos to offer "interactive gaming," which, broadly stated, encompasses paid-for gambling games "offered through the use of communications technology." *Id.* § 1103. To keep iLottery and casinos in their respective lanes, the Legislature drafted Act 42 to give each an exclusive space in which to operate. The Department can offer iLottery games but cannot offer products that "simulate casino-style lottery games." *Id.* § 502. Casinos can offer "interactive gaming" but not a "lottery game or [i]nternet instant game" as defined in the Lottery Law. *Id.* § 1103.

With Act 42 in place, the Department began work on its iLottery program. The Department modeled the program after the Michigan iLottery program. Unlike Pennsylvania, however, Michigan's law does not prohibit its lottery from simulating casino-style games. The Department relied upon Scientific Games, a leading slots game designer, to develop the iLottery platform. The Department subsequently promulgated temporary regulations for the iLottery program. But the temporary regulations did not address the limits on the iLottery authorization and contained no guidance with respect to limiting iLottery games to those that do not represent or simulate casino-style games. On May 22, 2018, the Department launched "iLottery," offering games played online and on mobile devices.

Greenwood Gaming

A group of casinos filed a Petition for Review against the Department four months later, alleging that its iLottery games simulate slot machines and other casino-style lottery games, in violation of Act 42. The casinos moved for a preliminary injunction, seeking to enjoin the Department from offering iLottery games that include features of interactive slot games, such as autoplay, reveal all, adjustable bet, and bonus games. The Department opposed the injunction principally on the contention that iLottery games have different “mechanics” (*i.e.*, programming and features) than slot machines and other casino-style games. Despite finding that “the side-by-side video comparisons of the iLottery games with the online or land-based casino games . . . highlight[ed] striking similarities,” the Commonwealth Court denied the preliminary injunction.

At the ensuing bench trial, the Department largely abandoned its defense from the preliminary injunction hearing. Instead, it contended that the features offered in iLottery games are “rooted in traditional lottery products.” Following post-trial submissions, the Commonwealth Court denied the Petition and dismissed the claims. The Court noted that there are undefined terms in Act 42 and the Lottery Law, namely, “simulate” and “casino-style.” Resorting to their common and approved usage, the Commonwealth Court concluded that, as used in Act 42, “simulate” means “to give or assume the appearance or effect of often with the intent to deceive” or “to make a simulation of.” In applying that definition, however, the Court superimposed an exclusivity requirement not found in any law, regulation, or definition of any statutory term—*i.e.*, whether a game uses features that are “particular” or “exclusive” to casino-style slot machines. The Court also held that, for purposes of Act 42, “casino-style lottery games” means “online games that create a likeness or assume the appearance of a game that is in the style, with reference to form, appearance or character, *particular to a casino slot machine.*” The Court further held that only “signature, iconic, or key features particular to” casino slot machines would meet this definition, and the only such features are spinning reels and pay lines, even though this construction conflicts with the definition of “slot machine” within the same statute.

The Commonwealth Court then turned to the challenged features, limiting its evaluation to reviewing the features in isolation instead of considering the simulation of the games as a whole. This is despite the fact that: (a) the Legislature prohibited the Department from offering casino-style *games*, not casino-style *features*, as part of the iLottery program; and (b) only one game traditionally combines all of the features used in iLottery games, and it is a slot machine. In any event, and notwithstanding its previous acknowledgement of the “striking similarities” between iLottery games and land-based and online casino games, the Court held that the iLottery games do not simulate casino-style slot machines.

The Pennsylvania Supreme Court reversed on appeal in a 5–1 decision. The Supreme Court determined that Act 42 prohibits the Department from offering iLottery games that “give the appearance or effect of casino games,” adding: “[t]he class of casino games that may not be simulated includes, *but is not limited to*, . . . slot machines.” The Supreme Court reasoned that the Commonwealth Court’s more narrow interpretation “threatens to dissolve” the legislatively created barrier between lottery games and casino games because: (a) it “reduces slot machines to spinning reels and pay lines,” when, “by definition, a slot machine in Pennsylvania need not employ spinning reels or pay lines”; and (b) “reads the term ‘simulate’ out of the statutes by limiting the prohibition to games that incorporate only particular features unique to a casino game.”

Applying a plain-language analysis, the Supreme Court held that Act 42 prohibits the Department from offering iLottery games that “mimic slot machines in operation.” According to the Supreme Court, “[t]his requires a subjective assessment of the appearance and play function of an iLottery game that cannot be reduced to an objective inquiry regarding the presence or absence of pay lines and spinning reels.” The Supreme Court ordered that, on remand, the Commonwealth Court must apply Act 42 as the Supreme Court interpreted it, “focus[ing] on the overall appearance and experience of play of an iLottery game, not the presence of any particular feature.”

Impact

In the wake of *Greenwood Gaming*, the Commonwealth Court issued an Order directing the parties to submit supplemental briefing addressing the standards set forth by the Supreme Court and the application of those standards to

the record evidence. Supplemental briefing is set to conclude in June, and oral argument to take place in July. The Commonwealth Court’s forthcoming decision could have far-reaching consequences for the future of the iLottery program because, according to the casinos, every single one of the games approved by the Department as of October 31, 2019, “in some degree, assume[s] the character of slot machines by imitating the appearance, function, and player interface of slot machines.”

It also remains to be seen whether the Commonwealth Court will cabin its forthcoming decision to the 57 games at issue when the discovery phase concluded or will include subsequent games approved by the Department as well. Moreover, regardless of how the Commonwealth Court rules in this case, it seems highly probable that the fact-specific standard articulated by the Supreme Court will lead to future challenges by the casinos over the legality of particular iLottery games, as the Supreme Court eschewed a bright-line rule in favor of a “subjective assessment of the appearance and play function of an iLottery game.”

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