

MATTHEW H. HAVERSTICK
MHAVERSTICK@KLEINBARD.COM
Direct Dial 215.496.7225



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VIA U.S. MAIL and EMAIL

Michael R. Pace
President
POM of Pennsylvania, LLC
3870 Peachtree Industrial Blvd
Ste 340-194
Duluth, Georgia 30096
Michael.Pace@paceomatic.com

RE: Pennsylvania Skill™ Amusement Device – Gaming Law Amendments

Dear Mr. Pace:

This will supplement our letter of December 18, 2017, in which we opined that POM of Pennsylvania's ("POM") coin-operated skill-based video game machine, the *Pennsylvania Skill™* Amusement Device ("Skill Game"), is not an illegal gaming device under Pennsylvania's amended gaming law, 4 Pa.C.S. §1000 *et seq.* (the "Gaming Act"). It remains our opinion, based on the language of the Gaming Act and its legislative history, that the Skill Game is not an illegal gaming device.

The Skill Game is not a regulated gaming device under the Gaming Act for two distinct, but complimentary reasons: (1) the Skill Game is not a regulated "skill slot machine" as defined by the statute; and (2) the amended gaming law was never intended to change existing Pennsylvania law regarding what is an illegal gambling device or to apply to the Skill Game.

The Gaming Act was amended in 2017 via Act 42. There is potential ambiguity in the language of the Act. In order to determine the intent of the Act, it is necessary to read the words of the statute in the context of the overall regulatory scheme it governs. Taken as a whole, the Gaming Act, including the amendments contained in Act 42, is concerned with the regulation of gaming at locations the Gaming Board is expressly authorized by statute to oversee (casinos, slot parlors, truck stops, airports, horse racing tracks, and online). The Gaming Act does not purport to regulate, and the Gaming Board has no jurisdiction over, locations and activities that are outside of the scope of that enactment— e.g., taverns, bars, restaurants and convenience stores, which are the types of places that operate the Skill Game. Indeed, the Skill Game is not located in any such facilities regulated by the Gaming Board. Thus, "slot machines," as defined by the statute, are machines that are in locations already regulated by the Gaming Board in



Pennsylvania. Act 42’s authorization of “skill slot machines” in casinos and slot parlors did not change this definition and did not magically transform the Skill Game into a device that is now regulated by the Gaming Board.¹

Pennsylvania has two distinct statutory regimes, under which the Gaming Act regulates “gaming” and the criminal code applies to alleged “gambling” devices. In turn, “gaming” is activity occurring in licensed facilities regulated by the Gaming Board – i.e., casinos. The law’s statement of intent (Sec. 1102), is focused on regulated gaming, including: (1) “regulation and policing of gaming and all activities that continue to be unlawful;” (2) “authorization of limited gaming by the installation and placement of slot machines as authorized in this part;” (8) “strictly monitored and enforced control over all limited gaming authorized by this part;” (11) the integrity of the regulatory control and legislative oversight over the operation and play of slot machines and table games in this Commonwealth;” (12) “the intent of the General Assembly to authorize the operation of slot machines and table games under a single slot machine license issued to a slot machine licensee;” and (12.2) to ensure the sustainability of commercial gaming industry . . .by authorizing . . .skill and hybrid slot machines.”

With respect to machine-based gaming, the General Assembly achieved its goals in Act 42 in two primary ways: (1) by expanding the range of slot machines permitted in licensed casinos; and (2) by permitting “video game terminals” in extremely limited locations, specifically, truck stops. The Skill Game is only subject to the Gaming Act if it is a “slot machine,” and specifically a “skill slot machine” as defined by the statute (Sec. 1103).

Act 42 did not actually change the definition of “slot machine” from prior law. If the Skill Game was not an illegal “slot machine” under the Gaming Act before the amendments – and the Commonwealth has never contended it was – it necessarily follows that it is not a “slot machine” now. The definition remains as follows:

Any mechanical, electrical or computerized contrivance, terminal, machine or other device **approved by the Pennsylvania Gaming Control Board** which, upon insertion of a coin, bill, ticket, token or similar object therein or upon payment of any consideration whatsoever, . . . the play or operation of which, whether by reason of skill or application of the element of chance or both, may deliver or entitle the person or persons playing or operating the contrivance, terminal, machine or other device to receive cash, billets, tickets, tokens or

¹ The powers of the Board include “sole regulatory authority over the conduct of gaming or related activities as described in this part, and ensur[ing] the integrity of the acquisition and operation of slot machines...sole regulatory authority over every aspect of the authorization, operation and play of slot machines . . .” (Sec. 1202). That the Gaming Board does not consider the Skill Game to be within its jurisdiction was confirmed by recent statements to the Pennsylvania House of Representatives Appropriations Committee made by R. Douglas Sherman, Chief Counsel for the Gaming Board. While presenting testimony to that committee, Mr. Sherman clarified that the Gaming Board does not regulate devices like the Skill Game and declined to opine on the legality of such games in light of the Gaming Board’s circumscribed role in this respect. See H. Appropriations Budget Hr’g, 2019-20 Leg. Reg. Sess. (Pa. Feb. 27, 2019).



electronic credits to be exchanged for cash or to receive merchandise or anything of value whatsoever, whether the payoff is made automatically from the machine or manually.

A “slot machine” (1) may utilize spinning reels or video displays or both; (2) may or may not dispense coins, tickets or tokens to winning patrons; and (3) may use an electronic credit system for receiving wagers and making payouts. The amendments add two types of devices for which the Board may issue licenses: “hybrid slot machine . . . A slot machine in which a combination of the skill of the player and elements of chance affects the outcome of the game;” and “skill slot machine,” a slot machine in which the skill of the player, rather than the elements of chance, is the predominant factor in affecting the outcome of the game.”

The statute licenses manufacturer, suppliers and end-users of slot machines (casinos). Section 1317.1 provides that:

(D) (1) No person may manufacture slot machines, . . . for use within this Commonwealth unless the person has been issued the appropriate manufacturer license under this section.

(2) . . . no person may use slot machines, . . . unless the slot machines, . . . were manufactured by a person that has been issued the appropriate manufacturer license under this section.

Finally, Section 1518 (a) (4), relating to “Prohibited Acts,” provides that it is “unlawful for any licensed entity or other person to manufacture, supply or place slot machines on the premises of a licensed facility without the authority of the board.”

Taken as a whole, the amended statute reflects an intent to continue to control the Gaming Board’s oversight of the regulated gaming industry. The statute does not modify the criminal statute under which it is determined whether or not a machine is an illegal gambling device. Moreover, the specification in the definition of “slot machine” that the machine be approved by the Gaming Control Board leads us to conclude that the statute is intended to apply to, and the Board to have authority over, the regulated gaming industry in Pennsylvania. Finally, if the law were interpreted to cover any device that dispensed something of value after the insertion of currency, every arcade game that dispensed tickets exchangeable for prizes would be an illegal slot machine. It is unlikely that this is what the Legislature intended.

Second, that the General Assembly intended Act 42 to apply only to machines in regulated gaming locations is clear from the express language in the definition of “slot machine” that a “slot machine” is one “approved by the Gaming Control Board.” The Gaming Board only approves slot machines in regulated casinos and nothing in Act 42 expresses an intent to change existing law relating to devices in locations that are not subject to licensure as a “gaming facility” by the Gaming Board. In fact, far from broadening the scope of application, the amendments confirm that the strictures of the Gaming Act were aimed at casinos. For instance, a



significant portion of Act 42 relates to “Casino Simulcasting.” See 4 Pa.C.S. §§ 13F01-13F44. The legislative intent, according to the Gaming Act, was “to authorize new and innovative gaming activities related to horse racing and commercial casino-style gaming,” *id.* § 13F01(2) and “to give licensed gaming entities the authority to conduct casino simulcasting at . . . licensed facilities in order to expand horse racing opportunities through simulcasting . . .” *Id.* §13F01(3).

The Skill Game, therefore, is entirely outside of this regulatory scheme, which, as the foregoing confirms, applies only to licensed games located in licensed casinos. In sum, the Skill Game is not a “gaming” machine under the Gaming Act, which sets forth a comprehensive regulatory structure that controls and provides oversight for every aspect of gaming in the Commonwealth and is completely inapplicable to the Skill Game.

Although slot machines are covered by Part II of the Gaming Act, see 4 Pa.C.S. §§ 1101-1904, the provisions of Part III also establish that the Skill Game is not within the scope of the Act. See *id.* §§ 3101-4506. The new law also authorizes “video gaming terminals” to be placed in licensed truck stops. Video gaming terminals are devices “approved by the Board” that operate “one or more gambling games, the play of which utilizes a random number generator.” Act 42, § 3102. A “gambling game” is “a game that plays or simulates the play of video poker, reel games, blackjack or other similar game authorized by the Board.” *Id.* As evidenced by this definition, the Skill Game is not a “video game terminal” because: (i) it is not a video poker, a reel game, or blackjack or a similar game authorized by the Gaming Board and; (ii) operation of the Skill Game is dependent upon player input and does not utilize a completely random number generator. Decisively, the definition of “video gaming terminal” expressly “does not include a slot machine operated at a licensed facility in accordance with Part II (relating to gaming) or a coin-operated amusement game.” *Id.* A “coin-operated amusement game,” in turn, is “a machine that requires the insertion of a coin, currency or token to play or activate a game the outcome of which is predominantly and primarily determined by the skill of the player.” Thus, giving effect to all of the words of the statute, the Skill Game is not a “video game terminal” or “slot machine” but a “coin-operated amusement game,” one in which the outcome is predominately and primarily determined by the skill of the player. The fact that the Skill Game meets precisely this definition was substantiated by the Court in Beaver County.

If the language of Part II is read as applicable to the Skill Game, then the conflicting definitions in Parts II and III of the Gaming act give rise to an ambiguity, which requires recourse to other tools of statutory construction. Applying these principles, there can be no doubt that the Skill Game does not fall within the scope of the Gaming Act.

Turning to the contemporaneous legislative history of the Gaming Act, the sponsors of the bill that eventually became Act 42 were emphatic in declaring that the inclusion of “skill slot machines” in the Gaming Act did not render illegal coin-operated amusement games based on player skill, such as the Skill Game. In the discussion preceding the passage of Act 42, Representative Sturla sought clarification from Representative Ortitay, who was the prime sponsor of Act 42:



Mr. STURLA. Mr. Speaker, will the prime sponsor of the bill rise for brief interrogation?

The SPEAKER. Representative Ortitay. He will stand for interrogation. He is glad to do so.

Mr. STURLA. Thank you, Mr. Speaker. Mr. Speaker, the previous speaker said that he believes that the language in this bill will make illegal all games of skill in the State of Pennsylvania that currently exist, all the ones that exist currently at truckstops and convenience stores and social clubs and taverns throughout the State of Pennsylvania. Would you agree with that assessment?

Mr. ORTITAY. I do not believe so, Mr. Speaker.

Pa.H.R. Legis. J. at 1774 (Oct. 25, 2017).

The very next day, Representative Masser offered certain observations of his own:

I wanted to clear up some things from comments that were made last evening on the bill. To set the foundation for my record, I want to bring to the chamber's attention that there is a court case from Bucks County, affirmed by the Pennsylvania Superior Court, which found that games of skill were not unlawful gambling devices. The court had determined that, unlike traditional casino slot machines, these machines only operate if the customer manually initiates the stop buttons. The machines do not contain random number generators and the nature of the symbols and operation of the machines made them a game of skill rather than a game of chance.

Last night a concern was raised that this legislation somehow turns the court decision on its head and precludes games of skill at facilities outside the scope of HB 271. In particular, the concern was based on an unspecified definition in the bill. As a result, I think it is worth discussing several of the definitions.

Calling your attention to page 544, lines 27 through 30, of the bill. The addition of "SKILL SLOT MACHINE" and "HYBRID SLOT MACHINE" does not fundamentally change the current definition of "slot machine." . . . While these new definitions add clarity to the definition of "slot machine," they do not change the nature of such machines. The definition of "slot machine" in current law, reproduced in the bill on page 544, line 6 through 8, states that a slot machine includes machines, "...THE PLAY OR OPERATION OF WHICH, WHETHER BY REASON OF SKILL OR APPLICATION OF THE ELEMENT OF CHANCE OR BOTH..." delivers a potential payoff. So under current law, a slot machine includes machines which operate by chance, by skill, or by some combination of the two. Under this bill, a slot machine includes machines which



operate by chance, by skill, or some combination of the two. If it is legal now, it will be legal after passage of HB 271.

On page 801, lines 21 through 24, the bill defines a “COIN-OPERATED AMUSEMENT GAME” as “A MACHINE THAT REQUIRES THE INSERTION OF A COIN, CURRENCY OR TOKEN TO PLAY OR ACTIVATE A GAME THE OUTCOME OF WHICH IS PREDOMINANTLY AND PRIMARILY DETERMINED BY THE SKILL OF THE PLAYER.” These are the kinds of games described in the Superior Court’s opinion. Another way of thinking about this is that it includes the kind of games you would find in an arcade; that is, games of skill rather than games of chance.

Coin-operated amusement games are not considered video gaming terminals, or VGTs, according to the definition of “VIDEO GAMING TERMINALS” in chapter 31, on page 812, of this bill. “THE TERM” VGT “DOES NOT INCLUDE A SLOT MACHINE OPERATED AT A LICENSED FACILITY

IN ACCORDANCE WITH PART II (RELATING TO GAMING) OR A COIN-OPERATED...” game. Additionally, coin-operated amusement games are not considered slot machines under this bill. The same definition of “video gaming terminals” in chapter 31, on page 812, also excludes coin operated amusement games from slot machines. “THE TERM” VGT “DOES NOT INCLUDE A SLOT MACHINE OPERATED AT A LICENSED FACILITY IN ACCORDANCE WITH PART II...OR A COIN-OPERATED AMUSEMENT GAME.”

Words have meaning. The Pennsylvania Statutory Construction Act states that all the words in a statute are to be “effective and certain.” Stating this another way, the Pennsylvania courts have explained that courts should give meaning to every word in a statute and not assume the legislature intended any words to be mere surplusage. VGTs do not include either slot machines or coin-operated amusement games. Since both those terms are used, they will be interpreted correctly to be different things. As a result, a local bar or tavern owner or a restaurant or any other establishment such as clubs that have coin-operated amusement games would not violate this statute, if enacted, by continuing to operate a coin-operated amusement game in their establishment.

Additionally, it is not the legislative intent to eliminate coin-operated amusement games in local bars, taverns, restaurants, clubs, or any other establishments that have these games of skill, nor does the language of the bill have that effect.

Pa. H.R. Legis. J. at 1801-02 (Oct. 26, 2017).



As the foregoing discussion demonstrates, the members of the General Assembly clearly did not intend for the Gaming Act to regulate the Skill Game.

Finally, if the Skill Game was deemed to be illegal under the Gaming Act, this interpretation would produce several absurd results, in direct violation of one of the core presumptions concerning legislative intent. See 1 Pa.C.S. § 1922(1) (providing that, in ascertaining intent, a court should presume “[t]hat the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable”).

If the amended Gaming Act’s provision relating to “skill slot machines” was interpreted to cover any device that dispensed something of value after the insertion of currency, every arcade game which dispenses tickets redeemable for prizes would be a “skill slot machine.” The General Assembly could not have intended such a wide-sweeping change in Pennsylvania law through the enactment of Act 42. For example, if Respondents’ interpretation of the Gaming Law were correct, the typical Chuck E. Cheese (22 locations in Pennsylvania), or Dave & Buster’s (6 locations in Pennsylvania), would be operating illegal “skill slot machines” – to say nothing of countless fairs, festivals and carnivals across the Commonwealth. This surely was not what the Legislature intended.

On May 2, 2019, a letter attacking skill games and signed by the CEOs of Pennsylvania’s casinos (the “Casino Letter”) was distributed to Pennsylvania legislative leaders. Putting aside the casinos’ obvious self-interest, that letter is no more persuasive than the Commonwealth’s filings in Commonwealth Court. The Casino Letter begins by purporting to describe all skill games: “These games, which frequently invoke “Pennsylvania” in their name, claim to be based on such “skills” as guessing when a spinning wheel will stop. Other games may offer players the opportunity to play a high speed memory game, but only after the players first win a pure game of chance.” Neither of these accurately describes the “Skill Game.” The Casino Letter also makes the specious argument that skill games were rendered illegal by Act 42’s inclusion of “skill slot machines,” neglecting to note that the definition of “skill slot machines” in turn depends upon the definition of “slot machine,” which Act 42 did not alter.² The fact that the casinos are seeking an amendment of the Crimes Code to expressly address skill games makes clear that they are aware that such games are not covered by the Gaming Act and are presently legal games of skill under the Crimes Code.

In sum, based on a contextual analysis of the plain text of the statute, its legislative history, and commercial realities, it is our opinion the Skill Game is not “a slot machine operated at a licensed facility” and, thus, not subject to the Gaming Act.

Please note that this letter reflects only our opinion and is likely to have no effect on the enforcement activities of the LCB, Pennsylvania State Police or other authority.

² The Casino Letter also misstates the financial impact of the sale of skill games, at least as to POM, given that the Skill Game is manufactured in Pennsylvania, employing Pennsylvania citizens, and that taxes are paid by Miele Manufacturing on its sales of the Skill Game.

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The analysis and conclusions in this letter are rendered on the date hereof and we have no continuing obligation hereunder to inform you of changes of law or fact subsequent to the date hereof or facts of which we have become aware after the date hereof. This letter is furnished to you only in connection with your current inquiry concerning the *Pennsylvania Skill*TM Amusement Device on behalf of POM. As before, all assumptions, understandings and statements of reliance herein have been made with your permission and without any independent investigation, inquiry or verification on our part, and we express no opinion with respect to the subject matter or accuracy of such understandings or assumptions or items relied upon. This letter may not be used, quoted from or relied upon by any person or entity other than POM without our prior written consent.

Sincerely,



Kleinbard LLC

Matthew H. Haverstick, Esq., Partner