Recent Legal Opinions Impacting Florida's Gaming Landscape

Marc W. Dunbar

In the past six months, three legal opinions have impacted the opportunities for those interested in Florida’s gaming industry. The first two affect the regulated slot machine operations at pari-mutuel facilities in Florida and the slot machine operations of the Seminole Tribe of Florida. These appellate court opinions have the potential to increase the types of gaming devices at the slot machine casinos, as well as increasing the overall number of slot machine facilities in the Sunshine State. The third opinion, from a trial judge in Jacksonville, upholds local governments’ ability to regulate Internet café operations, which have exploded in Florida, with estimates placing this gambling industry at more than $1 billion annually.1

The first case involved a challenge by slot machine manufacturers to an administrative regulation requiring that random number generators (RNGs) be located inside of each individual slot machine cabinet.2 The rule at issue required that “[e]ach slot machine shall use an internal random number generator.”3 The manufacturers challenged the Florida Department of Business, Division of Pari-mutuel Wagering’s authority to promulgate such a rule, which denied them the ability to offer many of their slot machine products in Florida due to their use of a common external RNG. Both Interblock and Shuffle Master sought to market in Florida a roulette-themed slot machine that looks, feels, and plays very similar to a traditional roulette table game, but is tested and certified to meet the slot machine standards by an independent testing laboratory. The Division argued, among other things, that the slot machine statute authorized it to adopt rules concerning “[p]rocedures to scientifically test and technically evaluate slot machines,” which would include the ability to regulate the location of slot machine components, including the RNG.4

In holding that the Division lacked the authority to require slot machine RNGs to be inside each slot machine cabinet, the administrative law judge stated “there is no relationship between the object of agency regulation—internal random number generators—and the statutory assignment of duties listed above; Respondent [the Division] can meaningfully discharge each of these duties without requiring slot machine manufacturers or distributors to include a random number generator in each slot machine.”5 This holding allows new electronic table games into the Florida casino marketplace that, so far, have been very popular. Early reports from Florida’s casino operators indicate that these games are currently operating in excess of $1,000 WPU (win per unit), which is four to five times above house average. Clearly, these are very popular products both for Florida’s casino customers and for slot machine operators, since Florida does not allow true table game play except at the facilities operated by the Seminole Tribe—and the permissible table games for the Seminole Tribe are limited to only card games.6 Industry opinion is that manufacturers of

4Fla. Stat. § 551.103(1)(c).
5Interblock at 10.
6see definition of “covered gaming activity” in the Gaming Compact between the Seminole Tribe of Florida and the State of Florida, at 4–5.

Marc W. Dunbar is a shareholder at Pennington, Moore, Wilkinson, Bell and Dunbar in Tallahassee, Florida, where his practice focuses on gaming and governmental law.
electronic table games have turned their eyes toward Florida as a potential new and robust market for these products.

The second case involved a challenge to the constitutionality of a statute which allowed additional pari-mutuel permitholders to conduct slot machine gaming. In 2005, voters in Broward County approved slot machines pursuant to a county-wide referendum. That same year, the legislature enacted Chapter 551, Florida Statutes. Section 551.101, entitled “Slot machine gaming authorized,” which mirrored the language of Article X, section 23. The legislature defined “eligible facility” as:

any licensed pari-mutuel facility located in Miami-Dade County or Broward County existing at the time of adoption of s. 23, Art. X of the State Constitution that has conducted live racing or games during calendar years 2002 and 2003 and has been approved by a majority of voters in a countywide referendum to have slot machines at such facility in the respective county.

A 2009 amendment to the slot machine statute amended the definition of the facilities eligible to conduct slot machine gaming to read as follows:

any licensed pari-mutuel facility located within a county as defined in s. 125.011, provided such facility has conducted live racing for 2 consecutive calendar years immediately preceding its application for a slot machine license, pays the required license fee, and meets the other requirements of this chapter; or any licensed pari-mutuel facility in any other county in which a majority of voters have approved slot machines at such facilities in a countywide referendum held pursuant to a statutory or constitutional authorization after the effective date of this section in the respective county, provided such facility has conducted a full schedule of live racing for 2 consecutive calendar years immediately preceding its application for a slot machine license, pays the required licensed fee, and meets the other requirements of this chapter.

This amendment, among other things, allowed the quarter horse track at Hialeah Park, which did not meet the original definition of “eligible facility,” to conduct slot machine operations. The incumbent pari-mutuel operators, including Calder Race Course and Flagler Dog Track, sued, challenging the legislature’s authority to expand the outlets for slot machine gambling in South Florida. In the words of the First District Court of Appeal, the lawsuit was intended to protect the appellant’s perceived “constitutionally-protected monopoly” over slot machine gaming in Florida.

In its order affirming the trial court ruling in favor of the statute’s constitutionality, the First District rejected the “contention that the purpose of Article X, section 23 was to limit slot machine gaming in Florida to certain facilities in Miami-Dade and Broward Counties.” The court further clarified that the “legislature has broad discretion in regulating and controlling pari-mutuel wagering and gambling under its police powers.” The First District’s ruling was appealed to the Florida Supreme Court, which in April issued a brief opinion declining to review the ruling by the lower appellate panel. The ruling has the immediate impact of authorizing an additional slot machine “racino” in Miami-Dade County at Hialeah Park. The effects of the opinion, however, are not limited just to that venue. The ruling affirms the Florida Legislature’s control over whether gambling expands or contracts in that state. An additional provision in the 2009 amendment allowed other pari-mutuels throughout Florida to also be eligible for slot machine licenses if their county voters pass a referendum allowing the same. In the first six months of 2012, three Florida counties have passed such referenda—Washington, Gadsden, and Hamilton—and referenda are being contemplated for November 2012 in Palm Beach, Lee, Brevard, St. Lucie, Volusia, and St. John’s Counties. Slot machine operations at these venues await a judicial review.
review of a non-binding opinion issued by the Florida Attorney General from January of 2012, but all industry observers point to this court ruling as the critical decision that will serve as a catalyst for Florida’s next gambling expansion.

The final opinion out of Florida impacting the size and scope of Florida’s gaming industry involves the storefront slot machine parlors known as “Internet cafés.” These operations basically involve electronic pull-tab gambling and have exploded in Florida, with estimates of more than 1,000 venues handling in excess of $1 billion in annual gaming revenues. With significant legal ambiguity at the state level, local governments in Florida are beginning to step in as the frontline regulators of these gambling operations. A recent challenge by an operator to a county ordinance capping the number of outlets and placing a host of regulatory restrictions on the operations was rejected by a trial judge in April of 2012.

The basis of the challenge was that the ordinance conflicted with state gambling laws and the Florida Constitution. In a five-page opinion from the circuit court, the judge rejected the operator’s claims that the state laws related to game promotions and non-profit raffles pre-empted local government action on the same subject, instead finding that the ordinance was constitutional and within the home rule authority of the local government. The impact on Florida and elsewhere is an affirmation that local governments may take control of gambling within their jurisdiction, which translates into potential problems for the fastest growing grey market gambling industry in the country.

Each of these court rulings will be felt beyond the borders of the Sunshine State. Those looking to Florida to be the next big commercial gambling market see these opinions as a step closer to that goal. As the potential gambling venues and product offerings increase, with a corresponding drop in grey market gambling outlets, business models analyzing investments in Florida’s gaming industry slowly project more possibility of profits. However, only time will tell if these opinions serve as the major shifts in the Florida gambling landscape which have been widely anticipated for the past few years.

17Fla. AGO 12-01 (2012).
18Dara Kam, All eyes now on Palm Beach County case for slot machines decision, PALM BEACH POST, Apr. 27, 2012.
20City of Jacksonville v. Smith, Case. No. 16-2011-IN-015903 (Duval County).
21City of Jacksonville, Order Denying Motion to Dismiss and Finding the Jacksonville Ordinance Code Constitutional, Case No. 16-2011-IN-015903 (Duval County).