

BETTER TO BE LUCKY THAN GOOD? THE SUPREME COURT OF PENNSYLVANIA WILL TAKE UP QUESTION OF WHAT CONSTITUTES 'SKILL' GAMING

PUBLICATION, *CASINOREPORTS.COM* - EVAN W. DAVIS, JULY 17, 2024

Across the Commonwealth of Pennsylvania, Pace-O-Matic's (or "POM's") "skill-based" games have been creeping into bars, gas stations, restaurants, and other local establishments. These games resemble slot machines in their appearances, and their game play experience is nearly identical: A player inserts money into the machine and wagers on games involving spinning reels (or their equivalent). The American Gaming Association estimates that nearly 70,000 of these machines are scattered across Pennsylvania, more than in any other state.

In 2019, the Pennsylvania State Police seized several of these machines from Champions Sports Bar near Harrisburg, stating that they were gambling devices that were being operated in violation of state law, and citing the establishment for allowing gambling on its premises. The bar challenged this law enforcement action, claiming that the devices were not slot machines but rather "skill-based" games due to a "Follow Me" feature available to losing players in which the player tries to repeat a pattern in order to win back the initial wager plus a bonus. Based on this feature, the trial court held that the machines were not illegal gambling devices but rather "skill-based" games that did not violate state law.

State prosecutors appealed the ruling to Pennsylvania's Commonwealth Court which, in 2023, upheld the trial court's ruling. The Commonwealth Court held that the machines in question were not "slot machines" as defined under state law. Why? Because the Commonwealth Court decided to use a "standard dictionary" definition of the term, specifically defining a slot machine as a "coin-operated gambling machine that pays off according to the matching of symbols on wheels spun by a handle."

The court included in its definition "electronic version[s] of the machine," but rejected the much broader definition actually used by the state's legislature in the Gaming Act that authorized casinos in the state. The court reasoned that the Gaming Act's definition was inapplicable because it "regulates licensed gambling in the Commonwealth" as opposed to the allegedly illegal machines at issue here.

Follow the rationale

Pennsylvania's highest court will decide whether the cash-paying electronic game terminals that are commonplace in convenience stores, bars and elsewhere are unlicensed gambling machines. <https://t.co/jPqWkJY0sJ>

— CBS Philadelphia (@CBSPhiladelphia) June 23, 2024

Based on this narrow definition, the Commonwealth Court concluded that the machines were not “slot machines” because of the “skill-based” memory component that allows a losing player to turn a loss into a win. As the Court noted, “[w]hile the first stage in gameplay may be analogous to the experience that a slot machine offers, the POM machines also integrate a memory game into the overall gameplay experience that requires a player to focus on a sequence of multicolored shapes and then recall the sequence correctly. This additional feature of the POM machines distinguishes them from the common definition of a slot machine.”

The Commonwealth Court additionally found that the games were not otherwise illegal gambling devices because of the role that skill plays in the “Follow Me” feature, noting that “even though the puzzle portion of the game was predominantly a game of chance, the fact that the Follow Me feature could be won every time and showed up every time a player won less than 105% of the amount played eliminated the chance element.”

The Commonwealth Court’s reasoning, however, will not be the final word on the matter; the Supreme Court of Pennsylvania recently agreed to review the matter and take on the question of whether these games do in fact constitute illegal gambling.

In doing so, the Supreme Court will be tasked with addressing a number of pending uncertainties, but none as pressing as clarifying how likely it must be that skill can allow a player to achieve a winning outcome to classify a game as one of skill rather than chance. Neither the trial court nor the Commonwealth Court addressed this issue despite significant evidence that the “Follow Me” feature was an often-disregarded aspect of the game. The state introduced evidence demonstrating that a “rapid play” feature could be enacted, which bypassed the “Follow Me” feature altogether, as well as the fact that the game’s manufacturer did not even bother to track any data regarding the feature, including how often it was used and its outcomes.

Indeed, even the Commonwealth Court acknowledged that the machines’ primary play feature was “predominately a game of chance” and “analogous to the experience that a slot machine offers,” meaning that the “Follow Me” feature was essential to its finding that the games were sufficiently skill-based. But how likely is it that skill plays a role?

Requiring a player to memorize a pattern of five instances is far different than requiring the same involving 500 instances, yet the distinction seems to have been of little import to the judges who addressed the issue. Would devices that would otherwise constitute slot machines be permitted if they allowed losing players to recoup their losses by, for example, belting out a pitch-perfect rendition of a Taylor Swift song, or doing complex math equations in their head? Presumably some evidence that skill actually plays a meaningful role — as is the case for many of the online head-to-head skill-based gaming platforms that have found increasing success — is necessary in delineating between games of skill and chance.

Look and feel and licenses

Despite a state ban on skill games, a new type of machine featuring "pre-reveal" games is showing up in Virginia convenience stores, based on the legal theory that some skill game variations involve no skill at all. <https://t.co/Upa5BJbmb1> — The Virginia Mercury (@MercuryVirginia) July 11, 2024

While these games may look and feel like slot machines, they fail to offer the same protections to consumers and benefits to the state as those found within licensed casinos. Licensed slot machines are subjected to rigorous testing to ensure that they return a minimum percentage of a player's money. Casinos employ in-person security and cameras to ensure that players are of legal age and not pursued after cashing in their winnings, and they pay significant gaming taxes into state coffers based on their slot revenue.

"Skill games," on the other hand, are allowed to function without any of these protections or obligations in place. The issue is of great significance not only in Pennsylvania, but in other states with similar statutory schemes that are seeing the proliferation of "skill game" machines; in 2022 the American Gaming Association estimated that over 580,000 such machines exist nationwide, resulting in approximately 40% of all gaming machines being unlicensed.

The Supreme Court of Pennsylvania's willingness to review this decision provides hope that there will not only be clarity on the question of what truly constitutes "skill gaming," but also an increased focus on the significant issues posed by these machines and a more robust conversation about whether they truly belong in the locations where they can currently be found.

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Originally published by [CasinoReports.com](https://www.casino-reports.com).

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