

WHEN ILOTTERY AND ICASINO COLLIDE

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When Pennsylvania's Lottery Law created the state's lottery in 1971, the internet was still a figment of Al Gore's imagination. Fast forward half a century, the internet has become a digital battleground, where state lotteries and online casino operators are jostling for position and consumer dollars. This battle has taken center stage within the state's judicial system in Pennsylvania, the outcome of which will be instructive in other jurisdictions across the U.S.

In 2017, the Pennsylvania legislature authorized online casino gaming, but also allowed for the state lottery – run by the Pennsylvania Department of Revenue – to operate an “iLottery” product as well. In defining what iLottery could entail, the law stated that permitted games included “internet instant games,” which it defined as “lottery game[s] of chance in which, by the use of a computer, tablet computer or other mobile device, a player purchases a lottery play, with the result of play being a reveal on the device of numbers, letters or symbols indicating whether a lottery prize has been won according to an established methodology as provided by the lottery.” The law specifically noted, however, that iLottery could not include “games that represent physical, Internet-based or monitor-based interactive lottery games which simulate casino-style lottery games, specifically including poker, roulette, slot machines or blackjack.”

While not expressly set forth in the legislation, the intent behind the law was clear: as Kipling no doubt implied, iLottery should be iLottery, iCasino should be iCasino, and the two should be set up in such a fashion to minimize cannibalization of their revenues and, by extension, the state's cut of the action.

Judicial intervention

A coalition of Pennsylvania casinos has filed suit in Commonwealth Court, seeking to stop the Pa. Lottery from offering casino-style online games. The casinos had warned in late June that they would take action if the games weren't stopped. — Jon Harris (@ByJonHarris) August 22, 2018

This state of demarcation and peace, however, was short lived. In 2018, before online casino gaming even launched within the state, several Pennsylvania casinos filed suit against the Department of Revenue, claiming that the iLottery product had overstepped its boundaries. The casinos noted that iLottery games employed a number of striking similarities to online slot products, including “reveal all” features, auto play, bonus games, adjustable bets, unlimited plays and non-depleting prize pools, the use of a random number generator, and the use of par sheets, among others. The casinos noted that even the lottery's own marketing affiliates had run advertisements describing iLottery's products as “casino-style” or “slots-style.”

The court, however, was not persuaded. In a 2021 opinion, the Commonwealth Court found that the products and features to which the casinos objected were not objectionable, stating that the only features that it considered to be unique to slot machines were “spinning reels and pay lines,” neither of which were present in the iLottery games.

The casinos appealed, and in December 2023 the Pennsylvania Supreme Court vacated the lower court’s decision. Rather than focusing on the technical aspects of the games, the Supreme Court found that the law prohibited iLottery games that simulate casino-style games (including slot machines) in “appearance or effect.” Noting that slot machines need not incorporate spinning reels or paylines, the Court believed that the law intended to preclude iLottery from operating “games that mimic slot machines in operation,” which necessarily “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 instructed the Commonwealth Court to readdress the issue through this “appearance and experience of play” lens, and “not the presence of any particular feature.”

How the Commonwealth Court will address this question – perhaps mirroring Justice Potter Stewart’s famous “I know it when I see it” test for obscenity – remains to be seen. Ideally, the Court’s ultimate conclusion will give the parties a sense of clarity and ensure that both Pennsylvania’s iLottery platform and the online casino gaming industry can thrive.

But it also may serve as a wake-up call to other states that are looking to allow for similar dueling platforms, such as Michigan – which sought to protect its existing online lottery by mandating a significant tax rate on the online casino product that it subsequently legalized – or Connecticut, which like Pennsylvania has sought to limit the games that its yet-to-launch online lottery could offer.

With online casino bills struggling to pass through state legislatures around the country, those seeking to operate these platforms would be best served by having further clarity on the extent to which they will be protected from competition by the state itself.

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