

Fla. Slot Machine Ban Headed For Constitutional Challenge

By Nathan Hale

Law360, Miami (April 11, 2013, 11:27 PM ET) -- Florida's new ban on gray-market slot machines appears likely to face a constitutional challenge from gaming operators that feel they were unfairly roped into the measure, but the low bar for the government to show it acted reasonably means they face a steep challenge, a leading expert said Thursday.

The Florida Arcade Association, which represents hundreds of senior arcades affected by the law signed Wednesday by Florida Gov. Rick Scott, has set its sights on restrictions it says are arbitrary and gut the business model arcades have been allowed to use for decades, according to association attorney Michael Wolf.

But Tallahassee attorney Marc W. Dunbar of Jones Walker LLP, who runs the state's largest gambling practice and worked with legislative and executive staffs on the ban, said the case law against such a challenge didn't look good. At the core of the arcades' arguments are claims that the law is vague and has no rational basis — claims that rarely succeed in gambling law cases, according to Dunbar.

"It's just next to impossible to win that," he said.

The group is close to retaining constitutional law expert Bruce Rogow, Wolf said. Its battle plan is to zero in on provisions banning gift cards as prizes and requiring that electronic gaming machines be coin-operated.

"What legitimate state interest is served by that?" Wolf said. "How are we protecting the citizens of the state of Florida by requiring them to use a coin on an amusement machine?"

He questioned the legislature's view of gift cards as equivalent to cash, saying the ones association arcades gave out were for retail outlets or expressly prohibited redemption for cash and alcohol.

The arcades may go after vague language in the law, according to Wolf. And if it finds that the law invalidates machines that had been deemed legal for years, it could consider claims of inverse condemnation, which target instances where the government takes private property without compensation.

"You have the potential for a government taking from the people," Wolf said.

The law had been in the works for three years, according to Dunbar. But the senior arcades may legitimately have been blindsided by their inclusion in them, he said, as the state moved swiftly and cast a wide legislative net in the wake of a \$300 million scandal involving Internet sweepstakes cafes that prompted the resignation of Lt. Gov. Jennifer Carroll last month.

"They were always very close to the line," he said. "I think many years ago they had opportunities to come in to become regulated, and they chose not to. If they had taken regulation then, they wouldn't be in this situation."

The new law aimed to bolster law enforcement's ability to prosecute offenders by updating Florida's definition of a slot machine and clarifying the state gambling ban's few legal exemptions for charity drawings, promotional sweepstakes and amusement arcades.

“Adult arcades were collateral damage,” Dunbar said. “It's their own fault.”

While Wolf acknowledged that regulation would have prevented the current situation, he said the industry's opposition was not to regulation in general. Instead, it stood against proposals that would severely restrict arcades' business models and raise their taxes to higher levels than slot machines at horse tracks and other licensed gambling facilities were charged.

“Overall regulation is a very good idea,” he said, adding that the association's members paid taxes and registered their machines with the state Department of Revenue.

Looking ahead, many questions remain in terms of how the law's impact will play out, between unintended consequences and a patchwork system of enforcement, Dunbar said.

Venues like Disney World, Universal and Chuck E. Cheese, as well as smaller businesses such as local bowling alleys, currently offer electronic gaming machines that would be illegal under the new law, both Dunbar and Wolf said.

“Dave & Buster's has video poker machines,” Wolf said. “And none of their machines take coins. If they somehow think it won't apply to them, the more power to them.”

The restaurant and arcade chain, however, seems unconcerned for now.

“We have been assured, both publicly and privately by members of the state legislature, that the changes to the existing legislation were not intended to adversely impact arcade amusement centers such as Dave & Buster's, Chuck E. Cheese, Disney World and others operating games of skill,” a spokeswoman for Dave & Buster's told Law360 on Thursday.

But Dunbar said he had received calls from theme parks and other companies that wanted to have their machines reviewed. Stronger racketeering penalties in the new law increase potential criminal penalties and open the door to civil cases, he said — and for big companies, the risk is considerably higher.

Some will likely handicap the risk based on how much they have invested in the machines, how much they cash they reap from them and the level of enforcement they expect, he said.

Although a comprehensive study by the Senate Gaming Committee could result in the establishment of a statewide regulator, in the meantime enforcement will happen on a community-by-community basis, Dunbar said. Where there are hawkish sheriffs, arcades will likely close quickly, but for many small-town police, taking on the sophisticated machinery and deep pockets of the gaming operators is not always realistic.

“The people in the gambling industry are very, very good at adapting and coming up with new mousetraps,” Dunbar said. “You have an industry making \$100 million a month. They're not going to leave this state willingly.”

--Editing by Kat Laskowski and Elizabeth Bowen.
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