Approved: MARCH 2, 1994
Date

MINUTES OF THE SENATE COMMITTEE ON FEDERAL AND STATE AFFAIRS

The meeting was called to order by Chairman Lana Oleen at 11:05 a.m. on February 10, 1994 in Room 254-E of the Capitol.

All members were present

Committee staff present: Lynne Holt, Legislative Research Department
Theresa Kiernan, Revisor of Statutes
Jeanne Eudaley, Committee Secretary

Conferees appearing before the committee:
See attached list

Others attending: See attached list

Sen. Oleen announced the continuation of the hearing on HB 2560 and introduced Rebecca Rice, who appeared as an opponent of the bill. Ms. Rice offered testimony (Attachment 1) opposing the bill as well as the following:

Questions and Answers, (Attachment 2);
Federal legislation, (Attachment 3);
Federal court case, (Attachment 4).

Additional information (Attachment 5) furnished by Kyle Smith of the KBI, clarifying the testimony of Ms. Rice, was distributed to committee members. Sen. Oleen asked Mr. Smith if machines who meet the Federal criteria as illegal machines can be seized, and Mr. Smith responded the machines, which exist only for the purpose of illegal gambling, can be seized under the Federal law now. Sen. Oleen asked how long these machines have been illegal, and Mr. Smith answered since the Johnson Act was passed - in 1951; that any machine that is capable of taking numerous bets at one time is an illegal machine. Sen. Oleen stated she will hold HB 2560 in committee until next week to allow the committee time to review the bill.

Sen. Oleen referred to the confirmation hearing for Col. Tincher as Brigadier General of the National Guard. Sen. Jones made a motion to recommend Col. Tincher favorably, and it was seconded by Sen. Vidricksen; the motion passed.

Sen. Oleen announced continuation of the hearing on SB 631 and introduced Don Bird, who gave testimony (Attachment 6) opposing the bill. He urged the committee to consider stiffer penalties for repeated violations and recommended community/public service as an addition to sentencing.

Sen. Oleen called the committees' attention to SB 627 and Sen. Jones answered several questions regarding the bill. Sen. Jones made a motion the bill be passed favorably, and it was seconded by Sen. Vidricksen; the motion passed.

Sen. Oleen referred to SB 468 and stated the suggestion was made to include all alcoholic liquor - the bill presently applies to domestic wine and beer only. Sen. Vidricksen stated he would prefer to restrict the bill to domestic beer and wine only. A technical amendment (Attachment 7) offered by Alcoholic Beverage Control to relate the bill to a wholesaler only was discussed. Sen. Hensley made a motion the amendment be adopted, and it was seconded by Sen. Tillotson; the motion passed. Sen. Vidricksen made a motion the bill be recommended favorably as amended, and it was seconded by Sen. Gooch; the motion passed.

Pages from Sen. Parkinson's district assisted the committee today and were introduced.

Meeting adjourned at 11:40.

GUEST LIST

COMMITTEE: Senate Federal & State Affairs DATE: Feb. 10, 1994

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Matt Arnell	Topeka	AP
Neal Whitaker	Topeka	KBWA
Robert Engler	Topeka	ABC
JOHN C. Bottenberg	TOPEKA	VIDEO LOTTERY
JIM CLARK	"	KCDAA
Frances Kastner	"	Ks Food Dealers Assn
STEVE KEARNEY	"	CSAK
Kyle Smith	"	KBI / AG
Terry Bauer	"	IGT
John Pollock	"	KC Star
Doug Smith	Topeka	KAMA
Kim Perkins	Topeka	Intern/Ulery
Tom Conant	Top-	ABC
DON BIRD	Topeka	KFLA/B
Sheila Bird	Wichita	
Kathy Return	" "	Video Lottery
Dan Hamer	Topeka	3D Enterprise
Tom Bruno	Topeka	Allen & Assoc.
Joe Bergen	Top	Sunflower Club Ass
Amy Campbell	Topeka	KRLDA
Rebecca Rice	" "	Wyandotte City Clubs
Arnold Schmidt	Basehor Kans	wyCo Clubowners
Ralph Snyder	Topeka	American Legion
[illegible]	Topeka	Kan Ebert & Weir
Maria Aikman	Topeka	KS Lottery

Attach. 1

TESTIMONY PRESENTED TO THE
SENATE FEDERAL AND STATE AFFAIRS COMMITTEE
re: HB 2560

February 10, 1994

by: Rebecca Rice
Legislative Counsel for the Wyandotte County Private Club Association

Thank you Madam Chair and members of the committee. My name is Rebecca Rice and I appear before you today on behalf of the Wyandotte County Private Club Association. Thank you for allowing me to appear as an opponent to HB 2560. The Wyandotte County Private Club Association is opposed to this legislation for many reasons. I have presented this testimony in outline form to address the statements presented by the proponents to members of this committee. In addition, I have provided a copy of the federal legislation used as a model for this legislation provided to me by Mary Torrence and a copy of the federal court decision which is purportedly codified in one sentence in this bill.

1.) **HB 2560 does not make Kansas law consistent with federal law.**

A "gambling device" as defined by federal law {15 U.S.C.A. Sec.1171(a)(2)} is: "(2) any other machine or mechanical device (including, but not limited to, roulette wheels and similar devices) designed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive as the result of the application of an element of chance, any money or property;"

A "gambling device" **as defined by HB 2560** is: "A contrivance designed, manufactured or altered primarily for use in connection with gambling and (i) which for a consideration may deliver, as the result of chance, anything of value or (ii) by which a person for a consideration may become entitled to receive, as the result of chance, anything of value;"... "It shall be prima facie evidence that a device is designed, manufactured or altered primarily for use in connection with gambling if the device has the capacity to accept multiple coins or dollar bills for the wager of more than one credit, is equipped with or is designed to accommodate the addition of a mechanism that enables accumulated credits to be removed from the device or is equipped with or is designed to accommodate a mechanism to record the number of credits removed from the device."

The three necessary elements to fulfill the definition of "gambling device" under HB 2560 are: 1) A contrivance; 2) Capacity to accept multiple coins for the "wager" of more than one credit; 3) Actual or possible attachment of a "knock-off switch"; and/or 4) Actual or possible attachment of an accumulation device.

As you can determine, HB 2560 goes far beyond federal statute. The additional language including prima facie evidence far exceeds the simple language contained in the federal statute.

2.) **HB 2560 gives law enforcement agents broad discretion to arrest any proprietor who has any on-premise video game which accepts multiple coins.**

The additional sentence regarding prima facie evidence is so broad and so vague that any proprietor with any game of chance which accepts multiple coins could be, at least, arrested for violation of the Kansas law. To allow this type of discretion to a law enforcement agent, whether it be local police, KBI or ABC agents

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seems rather excessive. My extreme concern is the discretion will invite abuse by encouraging selective prosecution under the gambling statute when law enforcement is unable to gather sufficient evidence to prosecute under another criminal statute which retains the traditional evidentiary requirement protections.

Although law enforcement may have the best of intentions, overzealous agents do exist. As many of you may recall, the Kansas Supreme Court was asked to rule on whether pin-ball machines were gambling devices. In 1983, the court ruled video machines are not gambling devices **per se.** This legislation seeks to overturn these Kansas decisions.

3.) **This legislation does render many video machines illegal in Kansas which are not presently illegal under Kansas laws interpreted by our Supreme Court and have not yet been declared illegal in our federal district court jurisdiction.**

Apparently, the proponents of this legislation have taken a seventeen (17) page U.S. District Court opinion interpreting the federal law regarding transportation of gambling devices and reduced that seventeen page opinion to a one sentence definition. That definition is the "prima facie" language you find in this legislation. I have attached the court opinion to this testimony and would like to review portions of it with you as I do not agree that this single sentence adequately codifies this one Pennsylvania court opinion. Unlike the federal law, the very broad and very subjective definition of a "gambling device" as proposed in this legislation would impose the criminal penalty of a Class "E" felony upon the holder of the machine. The federal district court in Pennsylvania was interpreting a federal law where violations resulted in confiscation of the machines at issue.

As stated by the KBI and the video lottery proponents, HB 2560 will "provide the necessary tools" to allow prosecutors to charge business proprietors with a Class "E" felony even when their arcade games do not have "knock-off switches" or "accumulation" devices but do accept more than one quarter at a time. For a drinking establishment, such prosecution would result in revocation of the proprietor's retail liquor license and the subsequent loss of his business plus possible incarceration. {K.A.R. 14-13-2(c)(1)}

4.) **This legislation is being supported by the Kansas Lottery to use as a hammer to "encourage" retailers to become Kansas Lottery retailers. This legislation is being supported by Video Lottery Technology, Inc., Bozeman, Montana, in the hopes it will increase public pressure upon the Legislature to adopt a state run video lottery.**

Although it is a clever lobbying technique, it is perhaps poor public policy to adopt legislation which has a secondary purpose of increasing public pressure on the Legislature to adopt a state run video lottery. Additionally, the Lottery may have a valid point that these machines, whether actually used for gambling purposes or not, are limiting the number of Lottery outlets. If the primary concern is increased tax revenue, perhaps lottery officials should support a narrower definition for this bill so <u>all</u> video machines are not affected and consider a lesser sentence. In fact, this very broad prohibition may result in far less local and state revenue. The Lottery's previous testimony attests to the fact that video machines are no longer illegal because gambling is immoral but is simply "illegal" because the machines are not "Kansas Lottery" video machines. A subtle difference for such a serious penalty.

Thank you, Madam Chair, for allowing me to speak as an opponent to this legislation. I appreciate this committee considering the private clubs' concerns regarding this legislation which injects a very vague and, consequently, very broad definition of "gambling device" resulting in prosecution efforts for a Class "E" felony. We respectfully request this committee defeat this legislation.

Attach. 2

Rebecca Rice

Attorney at Law

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This document has been prepared in response to questions raised in the Senate committee. All references to court ruling refer to United States of America v. 294 Various Gambling Devices, Civ. A. No. 85-297 Erie., USDC, W.D. Pennsylvania, 718 F Supp 1236, 1989.

Q. WiIl the machine have to be equipped with a "knock off" switch before it will be found illegal under this proposed legislation?

A. No. This legislation very clearly states the machines only must be designed or manufactured to accommodate any type of device which can remove accumulated credits. The court case upon which the proponents rely as the basis for the "prima facie" language included, specifically states the machine is not required to have a knock off switch installed at the time of confiscation, but must only have been designed or manufactured to accommodate a knock off switch.

Q. Would unplugging the machine to erase accumulated credits qualify the machine as being equipped with a "knock off" switch?

A. Although previous conferees stated that merely unplugging the machine would not constitute a "knock off" switch, the case upon which the proponents rely states otherwise. The court ruled at page 1244:

> "This device may take many forms, from a remote control, or elaborately concealed switches, to simply unplugging the machine, but in any form, it serves the simple function of permitting the operator of the establishment to quickly remove large numbers of free games from the machine in a matter of seconds."

Although the KBI assured the committee there is no intention to interpret the proposed legislation in this manner, they lack the authority to speak to the intended interpretation for other law enforcement agencies, KBI successors and the judiciary. As the testimony in this committee has stated unequivocally that the intention of this statute is to codify this isolated federal court case, it seems imperative to understand the full range of implications.

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Q. Would this legislation apply only to games which rely solely upon chance?

A. I don't know. There is no definition of the term "chance" as it is used in this statute. The court case upon which this legislation is based does look to the issue of whether the machine being examined requires any "skill". The court addresses the point that video poker machines are based solely on the "luck of the draw". However, it is my understanding some knowledge of poker is helpful to play these machines. The court appears to infer a game of "chance" is a game which you will "know it when you see it" (like pornography).

Q. If a machine has a "knock off" switch, can we remove the switch and the multiple coin feature to make the machine legal?

A. No. The court specifically ruled that eliminating these devices will not "sanitize" the machine. The machine remains a "gambling device", and the individual who owns it can be prosecuted for a Class "E" felony. The Court stated at page 1247:

> "The simple deletion of knock off switches and meters or the elimination of multi-coin features may not sanitize a machine when facts make clear that it was designed primarily to facilitate function as a gambling device."

Again, the actual use of the machine is immaterial under the proposed language.

Q. If the machine only gives free games and no cash payoff is made, is the machine still illegal?

A. Although this court case rules that free games in and of themselves do not constitute giving something of value, please note the proposed legislation is not limited to delivering "any money or property" as is federal law but encompasses the deliverance of **"anything of value"**. Therefore, any machine which accepts multiple coins and delivers anything of value including a free game could be determined a gambling device under such a statute.

Q. Does the legislation make any machines illegal which were not previously illegal in Kansas?

A. Yes. This is an isolated court case specific to interpretation in Pennsylvania which apparently has not been adopted in other jurisdictions. This interpretation has not been tested in the Kansas jurisdiction. Therefore, no one knows whether the federal courts for the Kansas jurisdiction would adopt such a broad interpretation.

Rebecca Rice
Attach. 3

In the court's view, it would not be fair to bar plaintiffs by reason of the conduct of other litigants in other actions without any prior notice, thus negating any retroactive application of the court's conclusions in this matter; and the court is powerless to limit other courts from considering identical punitive damages claims against the same defendants, thus making prospective implementation of its ruling impossible.

Therefore, although the court has concluded that there has been or may be a violation of defendants' due process rights through repetitive awards of punitive damages, the court can conceive of no remedy absent a uniform law to implement the conclusions reached herein.[2] Therefore, the defendants' motions to dismiss the punitive damages claims based upon prior punitive damages awards against them is denied.

CONCLUSION

The court abides by its ruling that multiple awards of punitive damages for a single course of conduct violate the fundamental fairness requirement of the Due Process Clause, but concludes that equitable and practical concerns prevent it from fashioning a fair and effective remedy. If this court's view of the law is correct, then the need for uniform legislation is manifest.

The court will thus vacate its order of June 1, 1989, which provides that plaintiffs' punitive damage claim will be dismissed against any defendant who can establish that a prior punitive award has been entered against it for the same course of conduct upon which plaintiffs rely, and the court will enter an order denying defendants' motion to dismiss plaintiffs' punitive damage claims. However, the court's present ruling will be without prejudice to those defendants against whom punitive damages might ultimately be awarded after trial of this matter. At that time, upon the motion of any defendant against whom a punitive damage award has been rendered, the court will consider what, if any, remedy will be appropriate to protect that individual defendant's due process interests.

2. In this regard, the court notes the efforts of the A.B.A. Section of Litigation and the American College of Trial Lawyers' Committee on Special Problems to institute national legislation addressing the problem of multiple awards of punitive damages in mass tort litigation. The court concurs in their view that a national solution is necessary which would place claims for punitive damages in the context of mass tort litigation in one federal forum and which would create specific standards for awarding punitive damages and some method of allocating an ultimate award to present and future plaintiffs. *See*, "Punitive Damages: A Constructive Examination," 1986 ABA Sec. Litigation, Special Committee on Punitive Damages at 78–81; Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice, American College of Trial Lawyers (March 3, 1989) at 20–26.

UNITED STATES of America

v.

294 VARIOUS GAMBLING DEVICES.

Civ. A. No. 85–297 Erie.

United States District Court, W.D. Pennsylvania.

July 20, 1989.

Government instituted civil forfeiture action against various video draw poker devices, alleging they were "gambling devices" prohibited under Gambling Devices Transportation Act. The District Court, Gerald J. Weber, J., held that: (1) summary judgment disposition of case in favor of Government was warranted; (2) video draw poker devices were "gambling devices" within meaning of Act; (3) devices which made provision for installation of "knock off" switches and meters, allowing measurement of credits exchanged for cash, were "gambling devices" even if such features were not present on particular device; (4) determination under Pennsylvania law that devices were not gambling devices did not affect federal law; and (5) devices were

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forfeited for failure to comply with federal registration requirements.

Judgment of forfeiture granted in part.

1. Gaming ⇐61

In action by Government to seize devices under Gambling Devices Transportation Act Government has burden of establishing probable cause to believe that subject articles are gambling devices; claimants then have burden of proving by preponderance of evidence that various items are not subject to forfeiture. Gambling Devices Transportation Act, §§ 1 et seq., 7, as amended, 15 U.S.C.A. §§ 1171 et seq., 1177.

2. Federal Civil Procedure ⇐2470.3, 2542

Mere gainsaying by an expert, contrary to law and unsupported by fact, will not avoid summary judgment where otherwise appropriate; likewise where facts are undisputed arguments over law will not preclude summary judgment.

3. Federal Civil Procedure ⇐2481

Summary judgment that video draw poker devices were gambling devices within meaning of Gambling Devices Transportation Act was warranted, even though owners offered expert testimony that they were not; primary facts such as nature of game and presence or absence of particular features were undisputed and experts' testimony covered questions of law, and expressed opinions contrary to established law. Gambling Devices Transportation Act, §§ 1 et seq., 7, as amended, 15 U.S.C.A. §§ 1171 et seq., 1177.

4. Gaming ⇐58

Evidence of actual payoffs, either directly by video poker game device alleged to be a gambling device or indirectly by bartender who redeemed credits generated by the device for cash, was not necessary to determination that device was a "gambling device" under Gambling Devices Transportation Act; design and manufacture of device for use in gambling, rather than actual use in gambling, conferred "gambling device" status. Gambling Devices Transportation Act, §§ 1 et seq., 7, as amended, 15 U.S.C.A. §§ 1171 et seq., 1177.

5. Gaming ⇐58

Electronic video draw poker device, which randomly displayed five playing cards, allowed one discard, and then awarded players points depending upon final composition of hand, was "gambling device" within meaning of Gambling Devices Transportation Act; short time of play, inability to extend play, absence of skill elements, existence of programming to retain a set percentage of all credits played, potential for inordinate numbers of free games and presence of "knock off switch" allowing credits to be reduced to zero and "knock off meter" which kept track of knocked off credits, conferred "gambling device" status. Gambling Devices Transportation Act, §§ 1 et seq., 7, as amended, 15 U.S.C.A. §§ 1171 et seq., 1177.

See publication Words and Phrases for other judicial constructions and definitions.

6. Gaming ⇐58

Video draw poker device which had provision in wiring circuitry or programming to accommodate addition of "knock off" switches and meters which controlled and measured credits accumulated toward free games and facilitated payment of money to successful players, were "gambling devices" under Gambling Devices Transportation Act even if they did not presently have such capabilities. Gambling Devices Transportation Act, § 1(a)(2), as amended, 15 U.S.C.A. § 1171(a)(2).

7. Gaming ⇐58

Pennsylvania gambling devices law, which exempted video draw poker device which was not equipped with "knock off" switches or meters which controlled or measured credits for free games and facilitated payments of money to successful players, did not preclude interpretation under federal Gambling Devices Transportation Act that devices having provisions to accommodate knock off switches and meters were "gambling devices" whether such switches and meters were present or not; under state statute critical factor was actual condition of device at time it was

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confiscated while under federal statute issue was whether device was designed and manufactured for use in connection with gambling. 18 Pa.C.S.A. § 5513; Gambling Devices Transportation Act, § 1(a)(2), as amended, 15 U.S.C.A. § 1171(a)(2).

8. Gaming ⇐58

Video draw poker devices were not exempt from seizure as "gambling devices" under Gambling Devices Transportation Act by virtue of exemption of such devices from state gambling devices law; federal law required that state law explicitly exempt device, and state law did not so provide. Gambling Devices Transportation Act, § 2, as amended, 15 U.S.C.A. § 1172; 18 Pa.C.S.A. § 5513(b).

9. Gaming ⇐58

Deletion from video draw poker devices of "knock off" switches which permit reduction of credits earned by player to zero, and "knock off" meters which measure number of credits which have been eliminated, which facilitated giving of cash in return for credits, did not remove devices from category of gambling devices. Gambling Devices Transportation Act, § 1(a)(1), as amended, 15 U.S.C.A. § 1171(a)(1).

10. Gaming ⇐59

Alleged good faith belief by businessmen installing video draw poker devices in their establishments that games were not "gambling devices" did not constitute defense to in rem forfeiture under Gambling Devices Transportation Act. Gambling Devices Transportation Act, § 1 et seq., as amended, 15 U.S.C.A. § 1171 et seq.

11. Gaming ⇐58

Free game granted by an amusement device did not constitute reward of property received as result of chance making device gambling device and eliminating any need for direct or circumstantial evidence of payoffs under Gambling Devices Transportation Act. Gambling Devices Transportation Act, § 1 et seq., as amended, 15 U.S.C.A. § 1171 et seq.

12. Gaming ⇐58

Government was not entitled to seize, under Gambling Devices Transportation Act, video draw poker devices which were in dissembled state. Gambling Devices Transportation Act, § 1(a)(2, 3), as amended, 15 U.S.C.A. § 1171(a)(2, 3).

13. Gaming ⇐61

Clerical errors by Government in identifying specific draw poker video devices and in allocating them to various classes of machines subject to Gambling Devices Transportation Act did not affect their status as "gambling devices" within meaning of Act; even after adjusting for such errors devices were still covered by Act. Gambling Devices Transportation Act, § 1 et seq., as amended, 15 U.S.C.A. § 1171 et seq.

14. Gaming ⇐59

Transporter of video poker devices knew they had been transported in interstate commerce, as required under Gambling Devices Transportation Act; as machines were designed and manufactured with features to facilitate gambling, manuals and brochures accompanying machines described these features, and manufacturers, present owners and middlemen were sophisticated in trade, only logical deduction was that transporter, whoever it may have been, knew machines were designed and manufactured to serve as gambling devices. Gambling Devices Transportation Act, §§ 2, 3(a)(3), as amended, 15 U.S.C.A. §§ 1172, 1173(a)(3).

15. Gaming ⇐58

Forfeiture of all video draw poker devices seized by Government was warranted under Gambling Devices Transportation Act where owners and businessmen utilizing video draw poker games acknowledged to state authorities that games, when equipped with "knock off" switches and devices to facilitate payment of money in connection with certain levels of success, were gambling devices and such devices were subsequently used without disabling knock off features and without being registered under Act. Gambling Devices

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Transportation Act, § 3(a)(3), as amended, 15 U.S.C.A. § 1173(a)(3); 18 Pa.C.S.A. § 5513.

16. Gaming ⇐61

Government did not provide sufficient information with regard to video version of blackjack game, and device appearing to be conventional real-type slot machine, to permit determination of whether devices were covered by Gambling Devices Transportation Act. Gambling Devices Transportation Act, § 1 et seq., as amended, 15 U.S.C.A. § 1171 et seq.

17. Gaming ⇐58

Coins seized from video draw poker devices determined to be "gambling devices" under Gambling Devices Transportation Act were not subject to seizure because coins had been commingled with those obtained from devices not held to be covered by Act. Gambling Devices Transportation Act, § 1 et seq., as amended, 15 U.S.C.A. § 1171 et seq.

James J. Ross, Asst. U.S. Atty., Erie, Pa., for U.S.

John L. Doherty, Manifesto & Doherty, P.C., Pittsburgh, Pa., for Mickey Anderson, Inc.

Roger H. Taft, MacDonald Illig Jones & Britton, Erie, Pa., for Warners Coin, Heritage Vending & Erie Vending.

William F. Scarpitti, Jr., Bifulco Waidley Scarpitti & Assoc., Erie, Pa., for Andrew DiVecchio & Gold Crown Billiards.

Robert J. Cindrich, Bruce A. Antkowiak, Mansmann Cindrich & Huber, Pittsburgh, Pa., for Warner's Coin, Heritage Vending, & Erie Vending Machine.

Robert C. Brabender, Erie, Pa., for Erie Coin Vending.

Sumner E. Nichols, II, Dunlavey Nichols Ward & Krill, Erie, Pa., for Blackie's a/k/a Leonard Kaye.

Bradley H. Foulk, Erie, Pa., for Romeo Amusement.

OPINION

GERALD J. WEBER, District Judge.

The U.S. instituted this civil forfeiture action against a variety of video draw poker machines, alleging that they are gambling devices prohibited by 15 U.S.C. § 1171 *et seq.* The machines were seized by agents of the FBI from various bars, restaurants and clubs throughout Erie County, Pennsylvania, and from the warehouses of several local distributors.

Several claimants have come forward, asserting ownership of the various seized machines. These claimants contend that their machines are not gambling devices within the meaning of the federal statute, but are in fact intended "for amusement purposes only."

The government has filed a wide-ranging motion for summary judgment with voluminous briefs, an expert's report and deposition transcript, and various and sundry affidavits and exhibits. Not to be outdone, the claimants have filed separate and often repetitive briefs, several reports and a deposition transcript from claimants' expert, and other evidentiary material. Several claimants joined in a cross motion for summary judgment. Even a video industry association has joined the fray as amicus curiae, adding little of consequence. Both sides engage in hyperbole and self righteous rhetoric. The result is a large, complex, poorly organized and often redundant pile of information and argument which we have had the misfortune of reading and re-reading in an effort to resolve this matter. Despite the sheer volume of material, the evidence of record on some matters is so woefully inadequate as to prevent resolution in favor of either side.

I. DEFAULTED MACHINES

A number of the seized machines went unclaimed and the government subsequently moved for a default judgment which this Court granted. Shortly thereafter, claimant Leonard Kaye d/b/a Blackie's Amusement filed an objection to the motion for default and sought to amend its claim to include four of the defaulted machines.

This claim is clearly out of time. We earlier granted Kaye one opportunity to file a claim nunc pro tunc and Kaye did not include these four machines. Despite having had ample time to investigate his interests in the various unclaimed machines, and despite having been granted leave to file one untimely claim, Kaye did nothing until the government finally moved for default. Kaye now asks our indulgence a second time, but repetitive dilatory conduct will not be rewarded. Claimant offers no reason for his failure to make a timely claim, and so his objection to the entry of default judgment as to machines No. 9, 10, 127 and 128 is denied.

II. VIDEO POKER MACHINES

FACTS

Almost all of the 294 devices may be characterized as video draw poker machines. Although individual machines may vary in name, design or special features, all depict a video game of draw poker, with the exception of several Blackjack machines and one reel-type slot machine which we will discuss later in this Opinion.

The video incarnation of draw poker is a rudimentary game. The machine displays the time honored ranking of poker hands and the number of points the machine will award for the listed hands. The ranking of hands is grounded in laws of statistical probability, and the video draw poker machine awards points based on this scale, although it does not award true odds. The higher the rank of the hand, the higher the amount of points awarded. Of course the machine does not award points for all hands. Ordinarily the machine awards points for a pair of Aces and higher ranking hands, but does not award points for lower ranking hands, e.g., a pair of sevens.[1]

The actual play of a game of video poker is extraordinarily simple, requiring an average of 5 to 15 seconds. Upon insertion of a quarter, the machine displays five cards on a video screen. These five cards are randomly selected by the machine from an ordinary deck of 52 cards in four suits. In an effort to improve the hand dealt to him, the player may then "discard" any of the five original cards by pressing the appropriate buttons on the machine. The machine then displays new cards to replace the ones discarded. The machine automatically evaluates this final array of five cards, ranks it as a poker hand, and awards points as indicated above.

This in all its simplicity is the sum total of the game of video poker. The object of the game is to obtain the best possible poker hand with a ranking of "a pair of Aces" or better. The machine automatically awards points for the various ranks of poker hands, with the greatest reward naturally coming for the rarest hands. Unlike an ordinary poker game, the video version has no raising, no bluffing, no money management skills. Indeed the player has no opponent. He plays only against a set schedule of point awards.

Up to now we have employed the term "points" to describe the units awarded to the player by the machine for winning poker hands. No matter whether an individual machine labels it "score," "credits," or "games," each point entitles the player to one free play of the machine. Each play of the game has one object: the accumulation of additional free games, and these free games may be accumulated from game to game so that, with a run of luck, a player may accumulate a significant number of free games.

When a machine is used as a gambling device, these free games are converted to cash by a bartender or owner of the establishment that houses the machine. A successful player in such an establishment is paid a quarter for each "credit" accumulated on the machine. The bartender or owner, having verified the number of credits and paid the player, then removes or "knocks off" the player's accumulated

1. The minimum winning hand may vary at the owner's option. For example, some machines award points for a pair of Jacks or better.

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credits, returning the machine to zero credits to await the next player's coins.

Several of the seized machines employ images of dwarfs, or dominoes or other figures instead of an ordinary deck of cards. Although these machines assiduously avoid using the term "poker," they function just as the typical video poker machines described above. The mere substitution of video images does not change the functional characteristics of the machine. Thus, such machines as "Dwarf's Den" and "Roman Tallies" are properly classed for our purposes as video poker machines.

In the course of this litigation, the government's expert sorted the subject machines into 5 Categories, as follows:

1. Devices that were fully operational and contained knockoff meters and switches. (71 machines).
2. Devices that were fully operational and contained knockoff switches and provisions for knockoff meters. (57 machines).
3. Devices that were fully operational and contained provisions for knockoff switches and meters. (102 machines).
4. Devices that were not operational but contained knockoff meters and switches or provisions for knockoff meters and switches. (22 machines).
5. Devices which were not operational, different stages of disassembly, but may contain knockoff meters and switches or provisions for knockoff switches and meters. (42 machines).

While the parties have argued over whether particular machines belong in one category or another, both sides have employed these categories in their motions and briefs.

DISCUSSION

The government has alleged that the subject machines violate the Gambling Devices Act of 1962, 15 U.S.C. § 1171 et seq. in several respects and are therefore subject to forfeiture under § 1177 of that Chapter.

A. SUMMARY JUDGMENT

[1] We are of course mindful of the distribution of the burden of proof under this statute. The government has the burden of establishing probable cause to believe that the subject articles are gambling devices as described in the Act. The claimants then have the burden of proving by a preponderance of the evidence that the various items are not subject to forfeiture. *U.S. v. 137 Draw Poker-Type Machines*, 606 F.Supp. 747, 751 (N.D.Ohio 1984), aff'd 765 F.2d 147 (6th Cir.1985).[2] When the material facts are undisputed, resolution by summary judgment may well be appropriate. *Id.*, 606 F.Supp. at 749–750; *U.S. v. Various Slot Machines on Guam*, 658 F.2d 697, 699–700 (9th Cir.1981).

[2, 3] Claimants have argued strenuously that summary judgment is not appropriate in the present case because claimants' expert contradicts the opinions of the government's expert. Claimants argue that this battle of the experts must be waged before a factfinder at trial.

We have carefully reviewed the reports and deposition of claimants' expert and we find nothing which will preclude summary judgment. The primary facts—the nature of the game, the presence or absence of particular features—are virtually undisputed. Moreover, claimants' expert not only contradicts the government's expert but established law as well. For example, claimants' expert states that, in his opinion, no machine is a gambling device absent evidence of actual payoffs. (Snyder depo. at pp. 110–111, 114, 116–117, 120, 168; Warner Coin's brief at p. 25.) This is clearly contrary to established law as we will see below. Mere gainsaying by an expert, contrary to law and unsupported by fact, will not avoid summary judgment where otherwise appropriate. See, *U.S. v. Various Slot Machines on Guam*, 658 F.2d 697, 700–701 (9th Cir.1981), quoting *Merit Motors v. Chrysler Corp.*, 569 F.2d 666, 672–

2. Because the captions of many cases in this area are so similar, we will generally forego short form citation in an effort to prevent confusion.

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673 (D.C.Cir.1977). Likewise, where the facts are undisputed, arguments over the law will not preclude summary judgment. Much of the expert opinion in this case is merely legal argument better left to counsel.

B. DEFINITION

The statute defines "gambling device" at § 1171:

> As used in this chapter—
>
> (a) the term "gambling device" means—
>
> (1) any so-called "slot machine" or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or
>
> (2) any other machine or mechanical device (including, but not limited to, roulette wheels and similar devices) designed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or
>
> (3) any subassembly or essential part intended to be used in connection with any such machine or mechanical device, but which is not attached to any such machine or mechanical device as a constituent part.

The original Act of 1951, represented by § 1171(a)(1), was aimed quite specifically at slot machines, or "one-armed bandits." This caused some difficulty in enforcement, as numerous courts held the statute to be inapplicable to those acknowledged gambling devices which simply lacked the distinguishing element of a drum or reel with insignia. E.g., *U.S. v. Five Gambling Devices*, 252 F.2d 210 (7th Cir.1958); *U.S. v. Three (3) Gambling Devices, Known as Jokers*, 161 F.Supp. 5 (W.D.Pa.1957); *U.S. v. McManus*, 138 F.Supp. 164 (D.C.Wyo. 1952). The 1962 amendment of the Act added § 1171(a)(2) and reflects Congress' intention to expand the scope of the prohibition to anticipate the continuing ingenuity of gambling device designers who had developed machines which did not fit the narrow definition of § 1171(a)(1) but which nevertheless fleeced the public with equal efficiency. See, *Lion Manufacturing Corp. v. Kennedy*, 330 F.2d 833 (D.C.Cir. 1964), quoting H.R.Rep. No. 1828, 87th Cong., 2d Sess. 6, reprinted in 1962 U.S. Code Cong. & Admin.News 3809.

To this end, § 1171(a)(2) does not contain the limiting specifics of the older § 1171(a)(1). There is no single mechanical element, such as the drum or reel described in § 1171(a)(1), which denotes a gambling device. Section 1171(a)(2) does not contain such a talisman whose presence or absence may alone define the status of the device. Rather, § 1171(a)(2) commands us to consider all the attributes of a subject machine to determine whether it was "designed and manufactured primarily for use in connection with gambling."

[4] In this context it is important to note that evidence of actual payoffs, either directly by the machine or indirectly by a bartender who redeems credits for cash, is not necessary to a determination that a machine is a gambling device. *U.S. v. One Bally "Barrel-O-Fun" Coin Operated Gaming Device*, 224 F.Supp. 794, 797 (M.D. Pa.1963), aff'd. sub nom. *Brozzetti v. Rogers*, 337 F.2d 857 (3rd Cir.1964); *U.S. v. Ansani*, 240 F.2d 216 (7th Cir.1957); *U.S. v. Various Gambling Devices*, 368 F.Supp. 661, 663 (N.D.Miss.1973); *U.S. v. One Bally County Fair Pinball Machine*, 238 F.Supp. 362 (W.D.La.1965). Indeed, a machine may, in fact, not be used for gambling at all, but if it was designed and manufactured for use in gambling, it is still a gambling device subject to forfeiture under the statute. *U.S. v. 137 Draw Poker-Type Machines*, 606 F.Supp. at 751; *U.S. v. Three (3) Trade Boosters*, 135 F.Supp. 24, 27 (M.D.Pa.1955). Thus we will examine in some detail the attributes of the subject

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machines as revealed in the evidentiary material of record.

We should note at the outset that we will deal here with machines in Agent Holmes' Categories 1–4. We will consider Category 5 machines in a separate section later in this Opinion.

C. GAME CHARACTERISTICS

[5, 6] Some relevant characteristics are inherent in the game itself. In relation to most amusement games, the time to play a hand of video poker is extraordinarily short, only 5 to 15 seconds. Also, unlike most amusement games, a video poker player cannot extend the time of play regardless of the player's level of skill. For example, on pinball machines or Pacman, a player's manual dexterity, eye-hand coordination and experience may produce a longer game and greater enjoyment for the player. In video poker, each game has a finite time of play and no amount of skill or experience can extend play beyond that very short limit.

Indeed all the skill elements associated with the ordinary game of draw poker are conspicuously absent in the video version. In video poker there is no raising, no bluffing, no money management skills. The player's only skill is to recognize possible combinations and basic statistical probabilities. In this way a player can maximize his winnings in the short term but he cannot determine or influence the result. Even a player with minimal experience can discard the least desirable cards and retain those cards which provide the greatest likelihood for a winning combination, but the cards drawn are produced at random and only chance determines whether a player wins or loses. Furthermore, even this limited skill element is countered in the long run by what is called a retention ratio. Over time the video poker machine is programmed to retain a set percentage of all credits played, so that over the long haul even the astute player cannot defeat the retention ratio.

Unlike most amusement devices, video poker offers the potential to win incredibly large numbers of free games. Unlike video amusement games such as Pacman, which offer extended play, or pinball games which offer limited numbers of potential free games, all earned through skill in the play of the machine, video poker machines offer up to 400 free games for a single winning hand based solely on luck of the draw. Video poker machines also accumulate credits from game to game, permitting a player to accumulate a maximum of between 899 and 9,999 credits, depending on the setting of a particular machine. Such numbers are more than can realistically be played out (e.g., 900 free games at 10 seconds per game would translate to 2½ non-stop hours of play), and are indicative of some value other than the entitlement to a free game.

The facts described above—the short time of play, the inability to extend play, the absence of skill elements, the existence of a retention ratio, the potential for inordinate numbers of free games—are not in dispute, though claimants may argue their import. We recognize however that various courts have found such factors to be strong indicia of a gambling device. E.g., *U.S. v. 137 Draw Poker-Type Machines*, 606 F.Supp. 747 (N.D.Ohio 1984), aff'd 765 F.2d 147 (6th Cir.1985) (free games); *U.S. v. Sixteen Electronic Gambling Devices*, 603 F.Supp. 32 (D.C.Hawaii 1984) (time of play, free games, retention ratio); *U.S. v. Two Coin-Operated Pinball Machines*, 241 F.Supp. 57 (W.D.Ky.1965), aff'd sub nom. *U.S. v. H.M. Branson Distributing Co.*, 398 F.2d 929 (6th Cir.1968) (free games); *U.S. v. One Bally County Fair Pinball Machine*, 238 F.Supp. 362 (W.D. La.1965) (free games); *U.S. v. One Bally "Barrel-O-Fun" Coin-Operated Gaming Device*, 224 F.Supp. 794 (M.D.Pa.1963), aff'd sub nom. *Brozzetti v. Rogers*, 337 F.2d 857 (3rd Cir.1964) (free games, retention ration); *Szybski v. U.S.*, 220 F.Supp. 806 (E.D.Wisc.1963) (free games).

D. PHYSICAL FEATURES

Certain physical features of most video poker machines are also relevant to our consideration. One common element is a multiple coin feature. This device permits

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a player to insert more than one coin, and then wager more than one credit on a hand. For example, instead of inserting one quarter for one play of the machine as with most amusement devices, a player may insert eight quarters and wager all eight credits on one hand. In this way the player can increase his payoff, because the credits awarded for any winning combination will be multiplied by the number of credits wagered. In some machines, inserting a certain number of coins permits the player to invoke special features, such as Jokers, which may or may not improve the player's odds. In any event, multi-coin insertion and wagering allow a machine to make considerably more money in the same period of time. As stated above, such a feature is unusual in amusement devices and many courts have considered the presence of a multi-coin feature to be strong evidence that a machine was designed and intended for gambling. E.g., *U.S. v. 137 Draw Poker-Type Machines*, 606 F.Supp. 747, 753 (N.D.Ohio 1984), aff'd 765 F.2d 147 (6th Cir.1985); *U.S. v. Sixteen Electronic Gambling Devices*, 603 F.Supp. 32 (D.C.Hawaii 1984); *U.S. v. Various Gambling Devices*, 368 F.Supp. 661 (N.D.Miss. 1973); *U.S. v. One Bally "Barrel-O-Fun" Coin-Operated Gaming Device*, 224 F.Supp. 794 (M.D.Pa.1963), aff'd sub nom. *Brozzetti v. Rogers*, 337 F.2d 857 (3rd Cir. 1964). It appears that all of the subject machines were designed and manufactured with multi-coin capability, although on some machines claimants chose single coin insertion, an option permitted by the machines.

The government has suggested that another feature whose presence is indicative of gambling is a Power Interrupt Circuit (PIC). This is simply a battery pack which may prevent a machine from losing programming instructions or accounting data in the event the machine is unplugged, turned off, or otherwise loses power. The government contends that PIC's are necessary in video poker machines to prevent the loss of accounting data which facilitates payoffs. On the other hand, claimants have advanced evidence that many amusement video and pinball machines contain PIC's and that PIC's in both video poker machines and amusement devices serve perfectly legitimate functions, protecting other non-gambling data and obviating the need to reset optional features each time the machine is turned on. In light of the evidence presented, the government's argument on this point is unpersuasive, but we need not rely on that argument to determine the status of these machines.

We turn now to what some consider to be the indispensable elements of a gambling device—the knock off switch and meter. Most video poker machines are equipped with a knock off switch which permits an attendant to quickly eliminate any number of accumulated credits, returning the machine to zero credits to await the next player's coins. This device may take many forms, from a remote control, or elaborately concealed switches, to simply unplugging the machine, but in any form it serves the simple function of permitting the operator of the establishment to quickly remove large numbers of free games from the machine in a matter of seconds.

The knock off switch is often accompanied by a meter or series of meters which tell the owner of the machine how many credits have been knocked off. In some machines the mechanical meters have been supplanted by computerized accounting features programmed into the machine's circuitry.

These features facilitate the use of video poker machines for gambling. Indeed they appear to have no other function. If a successful player exchanges his accumulated credits for cash, ordinarily being paid by the bartender, the bar owner or bartender can then remove the credits from the machine. The knock off meter or other accounting device automatically records the number of credits knocked off. When the machine's owner makes his periodic stop to empty the coin box, he can read the knock off meter or other accounting device to determine how much the bar owner paid out in winnings and to reimburse him for that amount.

These features have no parallel among most amusement devices. Ordinary amusement games do not permit a player to accumulate large numbers of credits, so there is little need for a knock off switch. The knock off meter is even more obviously related to gambling. Unless a bar owner is paying cash to players for accumulated credits and is expecting reimbursement from the machine's owner, there is no purpose in counting knocked off games. Thus the presence of one or both devices is strong evidence that a player may exchange credits for cash, i.e., that the machine is intended for gambling. E.g., *U.S. v. 137 Draw Poker-Type Machines*, 606 F.Supp. 747, 753 (N.D.Ohio 1984), aff'd 765 F.2d 147 (6th Cir.1985); *U.S. v. Sixteen Electronic Gambling Devices*, 603 F.Supp. 32 (D.C. Hawaii 1984); *U.S. v. Various Slot Machines on Guam*, 658 F.2d 697 (9th Cir.1981); *U.S. v. Two Coin-Operated Pinball Machines*, 241 F.Supp. 57 (W.D.Ky. 1965), aff'd sub nom. *U.S. v. Branson Distributing Co.*, 398 F.2d 929 (6th Cir.1968).

Although in some machines the knock off switch is as obvious as a red button on the cabinet, in others it is disguised in a more or less elaborate manner. Some machines are equipped with radio remote control. Some machines are built so that a magnet passed over a particular part of the machine will cause two wires to make contact and activate the knock off function. Other machines are equipped with a "slam switch," and the cabinet must be struck to cause two terminals to make contact. On some machines, several play buttons on the front of the cabinet must be pressed in a predetermined sequence. Other machines are equipped with what appears to be two bolts projecting from the cabinet. These bolts are wired inside the cabinet and when a quarter is used to span the gap between them, the electrical circuit is completed and the knock off function activated. Computerized accounting devices may also be disguised. Some machines require the insertion of an electrical component carried by the owner to activate the display of the accounting function.

Such elaborate disguises are unusual in most amusement games. Indeed, unless credits have some monetary value, there is little reason to disguise these features. Thus the effort to disguise these features, considered in the context of other evidence, is evidence that the subject machines are gambling devices. Cf., *U.S. v. One Bally "Barrel-O-Fun" Coin-Operated Gaming Device*, 224 F.Supp. 794 (M.D.Pa.1963), aff'd sub nom. *Brozzetti v. Rogers*, 337 F.2d 857 (3rd Cir.1964).

Thus, video poker machines with their inherent characteristics (i.e., short time of play, large number of potential free games, etc.) when equipped with knock off switches and meters are indisputably gambling devices in violation of the statute. See, *U.S. v. 137 Draw Poker-Type Machines*, 606 F.Supp. 747 (N.D.Ohio 1984), aff'd 765 F.2d 147 (6th Cir.1985); *U.S. v. Sixteen Electronic Gambling Devices*, 603 F.Supp. 32 (D.C.Hawaii 1984). However, not all the machines seized in this case are equipped with knock off switches and meters. Defendants argue quite strenuously that without knock off switches and meters, the government must present evidence of actual payoffs on each machine to prove it is a gambling device.

We disagree. To accord such determinative weight to knock off switches and meters would be reverting to the talismanic approach specifically disavowed in the passage of the 1962 amendment of the Act. As discussed above, we must consider all relevant characteristics and features of the machines to determine whether they were "designed and manufactured primarily for use in connection with gambling." 18 U.S.C. § 1171(a)(2).

Several courts have held that the absence of such components is not determinative. In *U.S. v. One Bally "Barrel-O-Fun" Coin-Operated Gaming Device*, 224 F.Supp. 794, 798 (M.D.Pa.1963), aff'd sub nom. *Brozzetti v. Rogers*, 337 F.2d 857 (3rd Cir.1964), the District Court stated:

> Although these machines have no meters for recording the free plays released, a meter is not essential for the carrying on of the gambling operation. It is merely a measure employed by the owner for his

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protection, keeping a check on the amount the proprietor had to pay out in cash, premiums or tokens.

See also, *U.S. v. Sixteen Electronic Gambling Devices*, 603 F.Supp. 32 (D.C.Hawaii 1984).

Defendants point out that most machines do not contain knock off switches and meters when manufactured. Addition of such devices is a local option, ordinarily performed by the owner. Accordingly, defendants argue that video poker machines when manufactured are legal. It is only when these machines are altered by local owners to facilitate gambling that they offend the statute.

But it is also clear from the evidence that knock off switches and meters could not be added unless the circuitry and programming of the machine by the manufacturer contained provisions for these features. Indeed claimants' expert admits this. (Snyder depo. at 98–102.) The government has established that all the subject machines, with the exception of several substantially disassembled ones, contain either knock off switches, knock off meters, or the provisions in programming and circuitry to accomodate the swift addition of such features.

Just as knock off switches and meters have little purpose other than to facilitate use of the machine for gambling, there is likewise no legitimate purpose in designing and manufacturing a machine to accomodate such features. Other courts have addressed this question and have agreed. *U.S. v. Sixteen Electronic Gambling Devices*, 603 F.Supp. 32 (D.C.Hawaii 1984); *U.S. v. One Bally "Barrel-O-Fun" Coin-Operated Gaming Devices*, 224 F.Supp. 794 (M.D.Pa.1963), aff'd sub nom. *Brozzetti v. Rogers*, 337 F.2d 857 (3rd Cir.1964); *U.S. v. H.M. Branson Distributing Co.*, 398 F.2d 929, 943 (6th Cir.1968); but see *U.S. v. Various Slot Machines on Guam*, 658 F.2d 697, 703–704 (9th Cir.1981) (Byrne, Jr., D.J. dissenting). See also, *U.S. v. Ansani*, 240 F.2d 216 (7th Cir.1957) (manufacturer cannot permit owner to accomplish by indirection what manufacturer cannot legally accomplish directly). We therefore conclude that all subject video poker machines with knock off switches and meters, *or the provision* in wiring, circuitry or programming to accomodate the addition of knock off switches and meters, are gambling devices within the meaning of the Act.

E. PENNSYLVANIA LAW

[7] "Foul!" cry the claimants as they gesture frenziedly in the direction of *Commonwealth v. Two Electronic Poker Game Machines*, 502 Pa. 186, 465 A.2d 973 (1983). As claimants interpret this decision, video poker machines are legal in Pennsylvania absent knock off switches and meters or evidence of actual payoffs. Furthermore, claimants allege that in response to the Supreme Court's decision, claimants reached an agreement with the District Attorney for Erie County at that time. Claimants promised to disconnect knock off switches and meters and the District Attorney agreed not to prosecute claimants or seize their machines. Claimants argue that our holding today is contrary to the decision of the Pennsylvania Supreme Court and deprives them of their bargain with the District Attorney.

First of all, it appears that claimants were less than forthright with the District Attorney since nearly half of the machines seized still had functioning knock off switches in violation of the alleged agreement, and nearly a fourth had both knock off switches and meters.

But in any event, the decision of the Pennsylvania Supreme Court is not binding on us in this instance. The Court was interpreting a state statute, 18 Pa.C.S.A. § 5513. We are dealing with a federal statute with a legislative and judicial history of its own. Under the Pennsylvania statute, the critical factor "is the actual condition of the machine at the time it is confiscated which controls when no evidence of gambling activity is introduced." *Commonwealth v. Twelve Dodge City Video Poker Machines*, 517 Pa. 363, 537 A.2d 812, 814 (1988). Under the federal statute, the critical issue is whether the machine was "*designed and manufactured* primarily for use in connection with gambling."

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Under the state statute, "the *potential* for a reward does not satisfy the Commonwealth's burden of proof." *Id.* (emphasis in original). Under the federal statute, a gambling device is a machine "by the operation of which a person *may become entitled* to receive ... any money or property." 15 U.S.C. § 1171(a)(2)(B) (emphasis added).

[8] Claimants correctly point out that the federal statute was intended to supplement state enforcement efforts, not supplant them, and it was not intended to prohibit machines which a state held to be legal. However, the federal statute requires states to affirmatively and specifically exempt machines from the federal prohibition. 15 U.S.C. § 1172. The exemption may not be inferred or implied, but must be stated expressly, with reference to the federal statute. *U.S. v. Two Hollycrane Slot Machines*, 136 F.Supp. 550 (D.C.Mass.1955); *U.S. v. 46 Gambling Devices*, 138 F.Supp. 896 (D.C.Md.1956), aff'd sub nom., *North Beach Amusement Co. v. U.S.*, 240 F.2d 729 (4th Cir.1957).

Pennsylvania's statute does not do this. In fact it does not purport to exempt gambling machines but rather to prohibit them. The Pennsylvania Supreme Court has simply decided what minimum quantum of evidence is required to denominate a machine as illegal per se under a state statute without evidence of actual gambling activity. The state statute does not refer to the federal statute, and as seen above, it is couched in very different terms. Indeed it is unlikely that the state statute, which defines a machine by its status at time of seizure, could mesh in any meaningful way with a federal statute which focuses on design and manufacture. For the reasons stated, we conclude that neither the state statute, 18 Pa.C.S.A. 5513(b), nor the decision in *Commonwealth v. Two Electronic Poker Game Machines*, 502 Pa. 186, 465 A.2d 973, creates an exemption within the meaning of the federal statute.

However, even if Pennsylvania law created an exemption, the subject machines might still be forfeited for failure to register. A state exemption of a machine which otherwise satisfies the federal statutory definition of a gambling device does *not* exempt the owner or the machine from the registration requirements of § 1173. *U.S. v. Various Gambling Devices*, 368 F.Supp. 661, 663–664 (N.D.Miss.1973). We address the issue of registration a little later in this Opinion.

[9] As for claimants' partial efforts to sanitize their machines under agreement with the District Attorney, such efforts have no effect under the federal statute. Altering or removing features may not affect the status of the machine. For example, in *U.S. v. Ansani*, 240 F.2d 216 (7th Cir.1957), machines were altered to remove the coin slots and payout trays:

> A slot machine is not a gambling device merely because it has coin slots or an automatic pay off mechanism. It is a gambling device because its function and design are to allow one to stake money or any other thing of value upon the uncertain event of achieving the winning combination of insignia. Essentially the game is played as it was before the alteration or modification; and we cannot believe that a player would classify the machine differently after the conversion.

Id., 240 F.2d at 220. See also, *U.S. v. 137 Draw Poker-Type Machines*, 606 F.Supp. 747 (N.D.Ohio 1984), aff'd 765 F.2d 147 (6th Cir.1985); *U.S. v. 24 Digger Merchandising Machines*, 202 F.2d 647 (8th Cir.1953); *U.S. v. Three (3) Trade Boosters*, 135 F.Supp. 24 (M.D.Pa.1955). The same is true in the present case. The simple deletion of knock off switches and meters or the elimination of multi-coin features may not sanitize a machine when facts make clear that it was designed primarily to facilitate function as a gambling device. Certainly the player approaches the game no differently just because its internal accounting feature is disconnected. As stated above, the key to the inquiry under the federal statute is the design and manufacture of the machine. Each of the operative machines seized by the government was designed and manufactured so that it would easily accomodate multi-coin features or the addition of knock off switches and meters.

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F. GOOD FAITH

[10] Finally, claimants' counsel have beat their collective breasts and shouted from the mountain that their clients are innocent, hard-working businessmen who never intended or envisioned the use of their machines for such illicit purposes as (gasp!) *gambling*. While we sincerely doubt the verity of such remonstrations, they are in any event irrelevant. Good faith is not a defense to in rem forfeiture under the Act. *U.S. v. 137 Draw Poker-Type Machines*, 606 F.Supp. 747, 755 (N.D. Ohio 1984) and cases cited therein. If St. Peter possessed a gambling device, it would be forfeited, though effecting seizure might be difficult.

G. FREE GAMES AS PROPERTY

[11] In reaching our conclusion that the subject machines are gambling devices within the meaning of § 1171(a)(2), we note that we have not relied on the government's contention that a free game is itself a reward of property received as a result of chance, making the machine a gambling device and eliminating any need for direct or circumstantial evidence of payoffs. Although courts have differed as to whether free games are property, we view the government's argument with some skepticism. The evil of such machines does not lie in the lure of free replays, but in the implicit promise of a cash reward in lieu of those replays. Although each free game has the value of a quarter to a player because it excuses him from spending a quarter to play the game, if the player simply plays out all his credits, he has only won amusement. This is not uncommon in amusement games and in this sense, free games are no different than extended play on Pacman or free replays on pinball machines. Indeed the legislative history of the Act indicates that limited free games are not sufficient reward to make a machine a gambling device. See, *Lion Manufacturing Corp. v. Kennedy*, 330 F.2d 833, 836 (D.C.Cir.1964), quoting H.R.Rep. No. 1828, 87th Cong., 2d Sess. 6, reprinted in 1962 U.S.Code Cong. & Admin.News 3809. The mere fact that a machine awards free games is proof of nothing. Whereas here the potential number of free games is large, where play is short and skill plays little part, then a machine begins to exhibit the indicia of a gambling device. Whether such indicia, absent evidence of knock off switches and meters or the provisions for such devices, are sufficient to sustain a finding that a machine is a gambling device is an issue we need not decide today. Accord, *U.S. v. 137 Draw Poker-Type Machines*, 606 F.Supp. 747, 754 n. 9 (N.D.Ohio 1984), aff'd 765 F.2d 147 (6th Cir.1985).[3]

H. DISASSEMBLED MACHINES

[12] We now return to Agent Holmes' 5 Categories of machines recited earlier:

1. Devices that were fully operational and contained knockoff meters and switches. (71 machines).
2. Devices that were fully operational and contained knockoff switches and provisions for knockoff meters. (57 machines).
3. Devices that were fully operational and contained provisions for knockoff switches and meters. (102 machines).
4. Devices that were not operational but contained knockoff meters and switches or provisions for knockoff meters and switches. (22 machines).
5. Devices which were not operational, different stages of disassembly, but may contain knockoff meters and switches or provisions for knockoff switches and meters. (42 machines).

For the reasons stated above, we conclude that there are no disputed issues of material fact and all video poker machines in Categories 1–4, having all the relevant inherent characteristics of the game (short time of play, little skill, retention ratio, large number of potential free games) and

3. We also note that in resolving the motions we have not relied on reports from government agents who claim to have received or observed payouts on particular machines. Much of this evidence is hearsay, without opportunity for cross examination, but it is unnecessary to our decision today.

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either the presence of knock off switches and meters or the provisions for such devices, are gambling devices within the meaning of 15 U.S.C. § 1171(a)(2).

This brings us to Category 5, with 42 machines. This is a troubling matter. Each of these games is inoperative and most are substantially disassembled with [illegible] machines in Category 5 are little more than a box with a couple of wires. Yet it is also clear that each one of the machines in Category 5 is, or was, a video poker machine. The graphics on the cabinet, the type of buttons and their array on the face of the machine, or the internal distribution of components discloses their identity.

However, the evidence presented by both sides fails to provide enough information on each machine for us to judge which may be fairly classed as gambling devices under the Act and which may be an unrecognizable jumble of spare parts. The government has also failed to shed any light on whether any machines or parts of machines satisfy § 1171(a)(3) or whether that provision was directed solely at so-called "trade boosters." The present record and briefs on Category 5 machines are woefully inadequate on both sides and the cross motions for summary judgment must be denied, although we will not preclude additional motions properly supported.

I. CLERICAL ERRORS

[13] In the course of his examination of the subject machines, claimants' expert identified possible discrepancies in the exhibit numbers affixed to several machines. For example, he indicates that the machine bearing exhibit sticker No. 227 may in fact be the machine described by the government as No. 255. While such apparent discrepancies represent regrettable error by the government, they do not prevent the entry of summary judgment because the expert does not raise a material dispute as to the proper *category* assigned to the machine.

To illustrate, although claimants' expert states that No. 227 may in fact be the machine described as No. 255, he does not deny that this machine, whatever its number, contains a functioning knock off switch and meter and is therefore properly characterized as a Category 1 machine. Likewise, claimants' expert notes numerical discrepancies among several Category 5 machines but does not suggest that these machines are anything other than Category 5 machines.

Claimants have also argued that these several discrepancies bring the government's entire numbered list into question and preclude summary judgment. We reject such an attempt at extrapolation. First of all, we have examined the evidence presented on each alleged discrepancy and find no material dispute as to the character of the involved machines. Secondly, we decline to speculate about the accuracy or inaccuracy of the rest of the list. Claimants bear the burden of presenting evidence to establish a material issue of fact. Each claimant had the opportunity to examine the seized machines. Some claimants took advantage of this opportunity. Some did not. Claimants have failed to produce any evidence of a material inaccuracy in the government's list. Absent evidentiary material to the contrary, the government is entitled to summary judgment.

In several instances, claimants' expert has no quarrel with the exhibit numbers but challenges the category assigned to particular machines by Agent Holmes. Typically claimants' expert has found a particular machine to be inoperative when Agent Holmes earlier found the machine to be functioning,[4] but claimants' expert neither denies the presence of knock off switches and meters or provisions for them, nor demonstrates the absence of such features or provisions. Although the findings of claimants' expert may justify changing the classification of a particular machine, for example from Category 1 (operative machine with knock off switch and

4. There are several possible explanations for such disagreement, including damage to a machine in transit, or the extended period in storage. Because of our conclusion above, we need not consider a cause.

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meter) to Category 4 (inoperative machine with such features or provisions for them) it will not preclude summary judgment because, as described above, all machines in Categories 1–4, operative and inoperative, are gambling devices under the federal statute. Thus with regard to several machines claimants' expert raises a factual dispute, but because of our conclusions above, that factual issue is not material.

J. INTERSTATE TRANSPORT

[14] Of course, the video poker machines in Categories 1–4 are not forfeited simply for being gambling devices. To be forfeited under 15 U.S.C. § 1177, the government must establish that the machines were "transported, delivered, shipped, manufactured, reconditioned, repaired, sold, disposed of, received, possessed or used in violation of" some provision of the Act. The government here alleges two violations: a) the machines were transported in interstate commerce in violation of § 1172, and b) the claimants failed to register, in violation of § 1173(a)(3).

Section 1172 makes it unlawful to "knowingly transport any gambling device to any place in a state ... from any place outside of such state ..." unless the state has created an exemption by statute. As discussed above, Pennsylvania has not created such an exemption.

There is no dispute that all the subject machines were manufactured outside of Pennsylvania and were transported to Pennsylvania in interstate commerce. However, several claimants deny being the importers and contend that the government has failed to provide evidence of a "knowing" transportation.

Scienter on the part of the owner in an in rem action is immaterial. Knowledge of the transporter, whether it be the manufacturer, the present owner, or a middleman, is sufficient to satisfy the Act. *U.S. v. 137 Draw Poker-Type Machines*, 606 F.Supp. 747, 755 (N.D.Ohio 1984), aff'd 765 F.2d 147 (6th Cir.1985); *North Beach Amusement Co. v. U.S.*, 240 F.2d 729, 732 (4th Cir.1957). As noted in the Ohio case, the only logical deduction from the facts is that the transporter, whoever it may have been, knew the machines had moved in interstate commerce. Furthermore, because the machines were designed and manufactured to facilitate gambling, and manuals and brochures accompanying the machines described these features, and the manufacturers, present owners and middlemen are sophisticated in the trade, the only logical deduction is that the transporter, whoever it may have been, knew the machines were designed and manufactured to serve as gambling devices. Claimants have not provided any evidence to the contrary other than protestations of their own ignorance. Thus there is no material issue of fact to prevent summary judgment on the issue of interstate transport.

K. FAILURE TO REGISTER

[15] Section 1173(a)(3) provides:

> It shall be unlawful for any person during any calendar year to engage in the business of repairing, reconditioning, buying, selling, leasing, using, or making available for use by other any gambling device, if in such business he buys or receives any such device knowing that it has been transported in interstate or foreign commerce after the effective date of the Gambling Devices Act of 1962, unless, after November 30, of the preceding calendar year and before the date on which he buys or receives such device, such person has registered with the Attorney General under this subsection.

Claimants do not deny knowing that these machines were transported in interstate commerce after 1962. All the subject machines were manufactured in other states by manufacturers who do not have any Pennsylvania plants. There is also no doubt that claimants were in the business of leasing video poker machines or making them available for use.

Of course claimants deny knowing that the subject machines were gambling devices under the Act, and therefore claim ignorance of their obligation to register. However, each of the claimants possessed several machines which contained function-

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ing knock off switches, or knock off switches and meters, and which are now the subject of this action. These machines clearly violated the Pennsylvania statute as interpreted earlier in *Commonwealth v. Two Electronic Poker Game Machines*, 502 Pa. 186, 465 A.2d 973 (1983), and these machines clearly violated the agreement the claimants reached with the Erie County District Attorney. Also, the decision in *U.S. v. 137 Draw Poker-Type Machines*, 606 F.Supp. 747 (N.D.Ohio 1984), aff'd 765 F.2d 147 (6th Cir.1985), predates the seizure of claimants' machines in this case. Thus claimants were required to register under 15 U.S.C. § 1173(a)(3), and knew or should have known of that obligation. Claimants' failure to register makes all gambling devices in their possession forfeitable under § 1177.

III. BLACKJACK MACHINES/REEL-TYPE MACHINE

[16] Not all of the seized machines depict video draw poker. Two machines depict a video version of Blackjack, and one machine appears to be a conventional reel-type slot machine.

Unfortunately, there is virtually no evidence of record concerning these machines. The government and claimants alike have focused so singlemindedly on video poker that they have ignored these other machines. The Blackjack machines may share many of the characteristics of video poker, such as short time of play, lack of skill elements, etc., but the record is silent. We do not know how the video version is played or what features the machines possess and we will not surmise. Summary judgment on the Blackjack machines must be denied.

The same is true of the one apparent reel-type slot machine. Although the government devoted three paragraphs to it in the brief, *no facts* have been provided. Does it have a reel? How is it played? Does it have a payout tray or some sort of credit meter? Clearly summary judgment is inappropriate on this item as well.

Although we must deny summary judgment for these machines on the present record, we will not preclude a renewed motion properly supported.

IV. COINS

[17] The government also seeks the forfeiture of $24,694.00 in coins taken from the subject machines. Unfortunately the government committed a serious blunder and failed to record how much money was removed from each machine. Because some of the subject machines have not been forfeited at this time, we are unable to determine on the present record how much of the cash is to be forfeited. We suspect it is unlikely that many of the Category 5 machines contained any coins, those machines being substantially disassembled and sitting in warehouses, but there is no evidence of record on this point. Of course the Blackjack machines and the one apparent reel-type slot machine have not been forfeited at this time, and because they were in functioning order in establishments where they were likely to be played, we suspect they may have had coins in them. Because the record provides no basis for us to apportion the cash between those machines which are forfeit and those which are not, summary judgment must be denied, although we will consider the issue again on a properly supported motion, either in the event that all the subject machines are forfeited, or some factual basis is provided for apportioning the cash.

CONCLUSION

For the reasons stated, we conclude that there is no disputed issue of any material fact, and the video draw poker machines in Categories 1–4 are gambling devices within the meaning of 15 U.S.C. § 1171(a)(2) and are forfeit under § 1177 of this Chapter for violation of § 1172 and § 1173(a)(3).

We further conclude that summary judgment is inappropriate at this time as to Category 5 machines, all Blackjack machines, the one apparent reel-type slot machine, and $24,694.00 in coins, although we will entertain a renewed motion or motions

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properly supported by evidentiary material and briefs.

An appropriate Order will be entered.

TRAVELERS INDEMNITY CO.

v.

ALLIED-SIGNAL, INC.

Civ. No. JFM-88-99.

United States District Court, D. Maryland.

June 20, 1989.

Supplemental Memorandum Aug. 4, 1989.

Liability insurer sought declaration that it had no duty to provide coverage to insured for pollution-related clean-up costs. The District Court, Motz, J., held that, under Maryland law, neither environmental clean-up costs incurred pursuant to injunction, nor costs incurred to prevent future pollution to environment, constituted "property damages" within meaning of liability policy.

Judgment for insurer.

See also 124 F.R.D. 101.

1. **Action ⇐17**

Under doctrine of "renvoi," Maryland court looks to law of state whose law is applicable under lex loci contractus doctrine to determine if that state would refer back to Maryland law for decision on substantive issues presented; if it would, Maryland court applies Maryland law.

See publication Words and Phrases for other judicial constructions and definitions.

2. **Insurance ⇐147(1)**

Under Maryland choice-of-law rules, Maryland law was applicable to interpretation of environmental polluter's insurance policy, even if doctrine of lex loci contractus called for application of law of other states, in that other states would apply law of Maryland, where environmental pollution site was located and which was thus state having most substantial interest in outcome of litigation.

3. **Insurance ⇐512(1)**

Under Maryland law, neither environmental clean-up costs incurred pursuant to injunction, nor costs incurred to prevent future pollution to environment, constituted "property damages" within meaning of insured's liability policy.

James P. Ulwick, Kramon & Graham, P.A., Baltimore, Md., Barry R. Ostrager, Simpson, Thacher & Bartlett, New York City, and Robert H. Sand, Asst. General Counsel, Allied Corp., Morristown, N.J., for plaintiff.

Rudolph L. Rose, Semmes, Bowen & Semmes, Baltimore, Md., and Lester O. Brown and Arthur S. Olick, Anderson, Kill, Olick & Oshinsky, P.C., New York City, for defendant.

MEMORANDUM

MOTZ, District Judge.

The Travelers Indemnity Company has brought this action against Allied-Signal, Inc. seeking a declaration that it has no duty to provide insurance coverage to Allied for pollution-related clean-up costs under a series of policies issued by Travelers to Allied from 1951 to 1988. Allied has filed counterclaims for declaratory relief, breach of contract, "bad faith" and breach of fiduciary duty.

On April 22, 1988, this Court denied a motion filed by Allied to stay this action pending resolution of a declaratory judgment action filed by Allied in the Superior Court of New Jersey, Morris County, against all one hundred seventy-six of its insurance carriers seeking a determination of the scope of its pollution coverage. The basis for this ruling was a concern that, in

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CHAPTER 24—TRANSPORTATION OF GAMBLING DEVICES

Sec.

§ 1171. Definitions

As used in this chapter—

(a) The term "gambling device" means—

(1) any so-called "slot machine" or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or

(2) any other machine or mechanical device (including, but not limited to, roulette wheels and similar devices) designed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or

(3) any subassembly or essential part intended to be used in connection with any such machine or mechanical device, but which is not attached to any such machine or mechanical device as a constituent part.

(b) The term "State" includes the District of Columbia, Puerto Rico, the Virgin Islands, and Guam.

(c) The term "possession of the United States" means any possession of the United States which is not named in subsection (b) of this section.

(d) The term "interstate or foreign commerce" means commerce (1) between any State or possession of the United States and any place outside of such State or possession, or (2) between points in the same State or possession of the United States but through any place outside thereof.

(e) The term "intrastate commerce" means commerce wholly within one State or possession of the United States.

(Jan. 2, 1951, c. 1194, § 1, 64 Stat. 1134; Oct. 18, 1962, Pub.L. 87–840, §§ 2, 3, 76 Stat. 1075.)

Historical Note

1962 Amendment. Subsec. (a)(2), (3). Pub.L. 87–840, § 2, substituted provisions including machines and mechanical devices designed and manufactured primarily for gambling by the operation of which a person may become entitled to receive, as the result of chance, any money or property, for provisions which included machines or mechanical devices designed and manufactured to operate by inserting a coin, token, or similar object, in par. (2), and inserted ", but which is not attached to any such machine or mechanical device as a constituent part", in par. (3).

Subsec. (b). Pub.L. 87–840, § 3, substituted "the District of Columbia" for "Alaska, Hawaii".

Subsecs. (d), (e). Pub.L. 87–840, § 3, added subsecs. (d) and (e).

Effective Date of 1962 Amendment. Section 7 of Pub.L. 87–840, provided that: "The amendments made by this Act [enacting section 1178 of this title and amending this section and sections 1172 and 1173 of this title] shall take effect on the sixtieth day after the date of its enactment [Oct. 18, 1962]."

Short Title of 1962 Amendment. Section 1 of Pub.L. 87–840 provided that Pub.L. 87–840, which enacted section 1178 of this title, and amended this section and sections 1172 and 1173 of this title, may be cited as the "Gambling Devices Act of 1962."

Separability of Provisions. Section 8 of Act Jan. 2, 1951, provided that: "If any provision of this Act [this chapter] or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Act [this chapter] which can be given effect without the invalid provision or application, and to this end the provisions of this Act [this chapter] are declared to be severable."

Legislative History. For legislative history and purpose of Act Jan. 2, 1951, see 1950 U.S.Code Cong.Service, p. 4240. See, also, Pub.L. 87–840, 1962 U.S.Code Cong. and Adm.News, p. 3809.

Cross References

Numbering of gambling devices, see section 1173 of this title.

Library References

Gaming ⇐62. C.J.S. Gaming §§ 1, 80 et seq.

Notes of Decisions

causing it to fall to near a sweeper arm which will move the coin toward a mass of quarters on a top tray and, if the player is fortunate, a quarter will fall from the top tray to the tray below and, if the player is extremely fortunate, that will cause quarters to fall off of the lower tray to pay off the player. U.S. v. Two (2) Quarter Fall Machines, E.D.Tenn.1991, 767 F.Supp. 153.

Draw poker-type machines, which were electronic video devices providing option of paying for one to eight quarters for single play, potential for winning inordinate number of free games, ability to "knock off" or eliminate accumulated free games from machines, and means for measuring number of free games eliminated from machine, were "gambling devices" within meaning of federal statute defining such devices for purposes of other statutes that prohibit certain activities with respect to such devices and that provide for forfeiture of such devices. U.S. v. One Hundred Thirty-Seven (137) Draw Poker-Type Machines and Six (6) Slot Machines, D.C.Ohio 1984, 606 F.Supp. 747, affirmed 765 F.2d 147.

12. Free games

Free game granted by an amusement device did not constitute reward of property received as result of chance making device gambling device and eliminating any need for direct or circumstantial evidence of payoffs under Gambling Devices Transportation Act. U.S. v. 294 Various Gambling Devices, W.D.Pa.1989, 718 F.Supp. 1236.

§ 1172. Transportation of gambling devices as unlawful

(a) General rule

It shall be unlawful knowingly to transport any gambling device to any place in a State or a possession of the United States from any place outside of such State or possession: *Provided*, That this section shall not apply to transportation of any gambling device to a place in any State which has enacted a law providing for the exemption of such State from the provisions of this section, or to a place in any subdivision of a State if the State in which such subdivision is located has enacted a law providing for the exemption of such subdivision from the provisions of this section, nor shall this section apply to any gambling device used or designed for use at and transported to licensed gambling establishments where betting is legal under applicable State laws: *Provided further*, That it shall not be unlawful to transport in interstate or foreign commerce any gambling device into any State in which the transported gambling device is specifically enumerated as lawful in a statute of that State.

(b) Authority of Federal Trade Commission

Nothing in this chapter shall be construed to interfere with or reduce the authority, or the existing interpretations of the authority, of the Federal Trade Commission under the Federal Trade Commission Act, as amended (15 U.S.C. 41–58).

(c) Exception

This section does not prohibit the transport of a gambling device to a place in a State or a possession of the United States on a vessel on a voyage, if—

(1) use of the gambling device on a portion of that voyage is, by reason of subsection (b) of section 1175 of this title, not a violation of that section; and

(2) the gambling device remains on board that vessel while in that State.

(As amended Mar. 9, 1992, Pub.L. 102–251, Title II, § 202(a), 106 Stat. 61.)

HISTORICAL AND STATUTORY NOTES

References in Text

The Federal Trade Commission Act, as amended (15 U.S.C. 41–58), referred to in subsec. (b), is Act Sept. 26, 1914, c. 311, 38 Stat. 717, which is classified generally to § 41 et seq. of this title. For complete classification of this Act to the Code, see Tables.

Codification

Amendment by section 202(a)(2) of Pub.L. 102–251, directing in subsec. (a) that ", District of Columbia," be struck out, was executed by striking out ", the District of Columbia," in two places, as the probable intent of Congress.

1992 Amendments

Subsec. (a). Pub.L. 102–251, § 202(a)(1), (2), designated provision relating to knowingly transporting gambling devices as subsec. (a) and, in subsec. (a) as so designated, inserted heading "General rule" and struck out ", the District of Columbia," before "or a possession" and "or possession". See Codification note under this section.

Subsec. (b). Pub.L. 102–251, § 202(a)(3), designated provision relating to the authority of the Federal Trade Commission as subsec. (b) and, in subsec. (b) as so designated, inserted heading "Authority of Federal Trade Commission".

Subsec. (c). Pub.L. 102–251, § 202(a)(4), added subsec. (c).

NOTES OF DECISIONS

3. Construction with other laws

Video draw poker devices were not exempt from seizure as "gambling devices" under Gambling Devices Transportation Act by virtue of exemption of such devices from state gambling devices law; federal law required that state law explicitly exempt device, and state law did not so provide. U.S. v. 294 Various Gambling Devices, W.D.Pa.1989, 718 F.Supp. 1236.

9. Interstate commerce

Even if quarter fall machines were manufactured in Tennessee, where various parts of the machines were manufactured elsewhere, the component parts which were transported into the state were gambling devices subject to forfeiture because of the interstate transportation. U.S. v. Two (2) Quarter Fall Machines, E.D.Tenn.1991, 767 F.Supp. 153.

12. Knowledge and intent

Fact that owner purchased quarter fall machines locally and had no knowledge that they had been transported into Tennessee or that they had not been properly registered was immaterial to forfeiture of the machines as, in an in rem action, claimant's knowledge is not material. U.S. v. Two (2) Quarter Fall Machines, E.D.Tenn. 1991, 767 F.Supp. 153.

§ 1175. Specific jurisdictions within which manufacturing, repairing, selling, possessing, etc., prohibited

(a) General rule

It shall be unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device in the District of Columbia, in any possession of the United States, within Indian country as defined in section 1151 of Title 18 or within the special maritime and territorial jurisdiction of the United States as defined in section 7 of Title 18, including on a vessel documented under chapter 121 of Title 46 or documented under the laws of a foreign country.

(b) Exception

(1) In general

Except as provided in paragraph (2), this section does not prohibit—

(A) the repair, transport, possession, or use of a gambling device on a vessel that is not within the boundaries of any State or possession of the United States; or

(B) the transport or possession, on a voyage, of a gambling device on a vessel that is within the boundaries of any State or possession of the United States, if—

(i) use of the gambling device on a portion of that voyage is, by reason of subparagraph (A), not a violation of this section; and

(ii) the gambling device remains on board that vessel while the vessel is within the boundaries of that State or possession.

(2) Application to certain voyages

(A) General rule

Paragraph (1)(A) does not apply to the repair or use of a gambling device on a vessel that is on a voyage or segment of a voyage described in subparagraph (B) of this paragraph if the State or possession of the United States in which the voyage or segment begins and ends has enacted a statute the terms of which prohibit that repair or use on that voyage or segment.

(B) Voyage and segment described

A voyage or segment of a voyage referred to in subparagraph (A) is a voyage or segment, respectively—

(i) that begins and ends in the same State or possession of the United States, and

(ii) during which the vessel does not make an intervening stop within the boundaries of another State or possession of the United States or a foreign country.

(As amended Mar. 9, 1992, Pub.L. 102–251, Title II, § 202(b), 106 Stat. 61.)

10. Answer

Claimants of slot machines, sought to be condemned by government as gambling devices possessed and used by claimants in their places of business without having registered as dealers therein, have locus standi in federal district court and right to defend government's libel suits therein, even if they have no property rights in machines under state law and violated such law in possessing them, so as to require denial of government's motion to strike claimant's answers and dismiss them from suit, especially where government stipulated proof with claimants. U. S. v. One Hundred Thirty-Nine Gambling Devices Alias Slot Machines, More or Less, D.C.Ill.1952, 109 F.Supp. 23.

11. Defenses

Alleged fact that purchaser of slot machines which had been transported in interstate commerce in violation of this section 1172 of this title, acted in good faith was immaterial on issue of their forfeitability since forfeiture becomes absolute at commission of the prohibited acts. North Beach Amusement Co. v. U. S., C.A.Md.1957, 240 F.2d 729.

Fact that slot machines were not in use and did not form part of the business activity of persons possessing them, but were stored in warehouse, was no defense to forfeiture of machines for failure of their owners to register as required by this chapter. U. S. v. Various Gambling Devices, D.C.Miss.1973, 368 F.Supp. 661.

Innocence of owner at time of seizure is no defense to forfeiture of article actually used in violation of this chapter, and such forfeiture does not violate U.S.C.A.Const. Amend. 5. U. S. v. 46 Gambling Devices, D.C.Md.1956, 138 F.Supp. 896.

Fact that slot machines were contraband under law of state of Georgia would be no bar to assertion of claim by owner thereof in federal court action in rem for forfeiture of same. U. S. v. 15 Mills Blue Bell Gambling Machines, D.C.Ga.1953, 119 F.Supp. 74, affirmed 74 S.Ct. 190, 346 U.S. 441, 98 L.Ed. 179.

Where person to whom slot machines had been consigned for sale had consented to seizure of devices, which were at time stored in building under his control, as tenant, illegal seizure was no defense to action for forfeiture of such machines. Id.

12. Dismissal

In consolidated actions by slot machine owners to obtain return of those machines which were seized by agents of the Federal Bureau of Investigation, defendant United States Marshal's motion to dismiss raised both question of constitutionality of this chapter forbidding transportation of any gambling device in interstate commerce and also the nonconstitutional question of whether plaintiffs had exhausted their administrative remedies. Morgan v. U. S., D.C.Ky.1952, 107 F.Supp. 501.

13. Presumptions

It would be presumed that owner or possessor of slot machines involved in proceeding in rem for forfeiture of same had conformed to all requirements of federal laws relating thereto. U. S. v. 15 Mills Blue Bell Gambling Machines, D.C.Ga.1953, 119 F.Supp. 74, affirmed 74 S.Ct. 190, 346 U.S. 441, 98 L. Ed. 179.

14. Burden of proof

In proceeding for forfeiture of nineteen pinball machines which were seized in interstate commerce as alleged gambling devices, showing by government that the pinball machines had been used as gambling devices before pay-off devices which had been attached to the machines were removed made out a prima facie case for the government, and burden was upon claimant to show which, if any machines were not gambling devices. U. S. v. 19 Automatic Pay-Off Pin-Ball Machines, D. C.La.1953, 113 F.Supp. 230.

15. Admissibility of evidence

Under circumstances allowing government to introduce testimony of pinball machine operators who had been subpoenaed as government witnesses did not constitute reversible error on ground that their testimony was obtained by an unauthorized and illegal grant of immunity in forfeiture proceedings against manufacturer and distributor of machines under this section. U. S. v. H. M. Branson Distributing Co., C.A.Ky.1968, 398 F.2d 929.

Evidence that operators and location owners secured Federal Coin Operated Gaming Device tax stamps costing $250 prior to placing on location in and about Louisville machines similar to claimants' devices was relevant and admissible as an element of usage in forfeiture proceedings, under this section. Id.

16. Weight and sufficiency of evidence

In proceeding to forfeit gambling machines, evidence compelled finding that machines had been knowingly transported in interstate commerce. U. S. v. Twelve Miami Digger Slot Machines, C.A.Miss.1954, 213 F.2d 918.

17. Action on performance bond

In action by claimant against surety company on performance bond of United States marshal, who allegedly breached such bond by destroying gambling devices seized by special agents under this section, which devices had never been transported in interstate commerce, evidence was sufficient to show that United States marshal had faithfully performed duties of his office in selling coin operated gambling devices and that he had acted in strict comformity with this section and in obedience to directions of his superior, the Attorney General, who derived his authority from this section. Bedenbaugh v. National Sur. Corp., C.A.Ga.1955, 227 F.2d 102.

§ 1178. Nonapplicability of chapter to certain machines and devices

None of the provisions of this chapter shall be construed to apply—

(1) to any machine or mechanical device designed and manufactured primarily for use at a racetrack in connection with parimutuel betting,

(2) to any machine or mechanical device, such as a coin-operated bowling alley, shuffleboard, marble machine (a so-called pinball machine), or mechanical gun, which is not designed and manufactured primarily for use in connection with gambling, and (A) which when operated does not deliver, as a result of the application of an element of chance, any money or property, or (B) by the operation of which a person may not become entitled to receive, as the result of the application of an element of chance, any money or property, or

(3) to any so-called claw, crane, or digger machine and similar devices which are not operated by coin, are actuated by a crank, and are designed and manufactured primarily for use at carnivals or county or State fairs.

(Jan. 2, 1951, c. 1194, § 9, as added Oct. 18, 1962, Pub.L. 87–840, § 6, 76 Stat. 1077.)

Historical Note

Effective Date. Section effective on the sixtieth day after Oct. 18, 1962, see section 7 of Pub.L. 87–840, set out as an Effective Date of 1962 Amendment note under section 1171 of this title.

Legislative History. For legislative history and purpose of Pub.L. 87–840, see 1962 U.S. Code Cong. and Adm.News, p. 3809.

Library References

Gaming ⇐63(2).

C.J.S. Gaming § 2.

Notes of Decisions

1. Pinball machines

A pinball machine coming within the coverage of the exemption provision of this section is not within the scope of the definition of the term "gambling device" as used in tion 1171 of this title. U. S. v. Various G bling Devices, D.C.Miss.1972, 340 F.Supp. 1200.

Attach. 5

KANSAS BUREAU OF INVESTIGATION

DIVISION OF THE OFFICE OF ATTORNEY GENERAL
STATE OF KANSAS
1620 TYLER
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ROBERT B. DAVENPORT
DIRECTOR

ROBERT T. STEPHAN
ATTORNEY GENERAL

February 9, 1994

MEMBERS OF THE SENATE FEDERAL
AND STATE AFFAIRS COMMITTEE

RE: House Bill 2560
Written Testimony of Rebecca Rice

Madam Chairperson and Members of the Committee:

At the previous hearing I received a copy of the testimony from Rebecca Rice, Legislative Counsel for the Wyandotte County Private Club Association. I understand she is going to present her testimony on February 10, 1994, and thought certain parts of her testimony needed clarification.

1. **"HB 2560 does not make Kansas law consistent with federal law."** We feel this is slightly misleading as her testimony at that point compares the two statutes while ignoring case law interpretations of the federal statute. I believe that HB 2560 does make Kansas law consistent with federal law, that being federal statutory and case law.

It might be noted that HB 2560 does not make Kansas co-extensive with federal law and is, in fact, somewhat more narrowly drawn as federal courts have also considered factors as proof of a device being a gambling device which are not contained in HB 2560, such as the ability to have an extremely large and therefore unpractical payoff in free games. This was not incorporated in the prima facie section of HB 2560, so while consistent with federal law, HB 2560 is more narrow.

2. **"HB 2560 gives law enforcement agents broad discretion to arrest any proprietor who has any on premises video game which accepts multiple coins."** Again, this is somewhat misleading for several reasons. It is the "capacity to accept multiple coins or dollar bills for the wager of more than one credit" that creates a prima facie proof that the machine is, in fact, a gambling device. As the courts have pointed out, if, in fact, a machine is for entertainment purposes only, the same five seconds of entertainment is obtained whether one unit or five units are risked. The presence of multiple unit gambling for a larger payoff does, as determined by the federal court, show that the machine has been designed and manufactured for gambling, not entertainment purposes.

Senate Fed & State
Feb. 10, 1994
Attachment # 5

Contrary to creating broader discretion, the prima facie language in HB 2560 gives direction and limits the discretion of law enforcement officers by giving examples of what is meant by "manufactured or altered primarily for use in connection with gambling." Again, it should be pointed out that this is currently the law that federal agents operate under. HB 2560 grants local officers no more discretion than any federal law enforcement officer has and the discretion to arrest is no different than for any other crime.

3. **"This legislation does render many video machines illegal in Kansas which are not presently illegal under Kansas law and may not be illegal in our federal district court jurisdiction."** Ms. Rice suggests that the language in HB 2560 is taken from one isolated U.S. District Court opinion. That is not correct. The examples that create prima facie evidence of being a gambling device are characteristics that have been universally recognized by federal courts, both district and circuit, as proving the items are a gambling device.

The case as being distributed is a good review of the law and, in fact, cites a large number of cases, both district and circuit, that hold such characteristics as "strong evidence" or "indispensable elements" of being a gambling device. See page 1244 and 1245 of United States v. 294 Various Gambling Devices, 17 F.Sup. 1236 (W.D. Pa. 1989). That case is a good review of the federal law concerning gambling devices.

Testimony provided by Ms. Rice is also incorrect when it states: "Unlike the federal law, the very broad and very subjective definition of "gambling device" as proposed in this legislation would impose a criminal penalty of a class E felony. The federal court was interpreting a federal law which violation resulted in confiscation of the machines at issue." First, possession of a gambling device, K.S.A. 21-4307, is a class B misdemeanor (there are no B felonies anymore since last year when sentencing guidelines went into effect). Second, the Johnson Act, 15 U.S.C. Sec. 1171, et seq., does, in fact, make violation a felony offense under federal law punishable by a fine up to $5,000 or imprisonment up to two years or both. See 15 U.S.C. Sec. 1176. Certainly, confiscation of machines is also authorized under the federal law, but it is not the only remedy.

Thank you for your attention and consideration.

Sincerely,

Kyle G. Smith
Assistant Attorney General

KGS:ld:#6143

Attach. 6

TO: The Honorable Lana Oleen, Chairperson
Senate Committee on Federal and State Affairs

FROM: Don Bird
Kansans For Life At Its Best

DATE: February 9, 1994

RE: Senate Bill No. 631

We are appearing today as opponents to SB 631 not in regards to its intent but its form. Our opposition is specifically in the striking of the words "knowingly or unknowingly" in Section 2, line 8.

A bill has been introduced in the House (#2847) which utilizes the exact same language as in Section 2-(c) of this bill but without the elimination of this phrase in 2-(a). Should the committee make this change in the bill's reading, we would support its passage.

In Section 1, however, we encourage your consideration of providing more serious penalties for repeated violations similar to what House Bill No. 2876 attempts. We also suggest that quality public service is useful and support it as a mandantory addition to other sentencing.

Senate Fed. - State
Feb. 10, 1994
Attachment # 6

Feb. 10

CRS468tl

Attach. 7

REPORTS OF STANDING COMMITTEES

MR. PRESIDENT:

Your Committee on Federal and State Affairs

Recommends that Senate Bill No. 468

"AN ACT concerning alcoholic liquor; relating to certain sales on credit; amending K.S.A. 41-717 and repealing the existing section."

Be amended:

On page 1, in line 21, following "wine" by inserting "to a consumer";

And the bill be passed as amended.

_____Chairperson

Senate Fed + State
Feb. 10, 1994
Attachment # 7