

Lawsuit challenging Virginia's skill game ban will continue into 2023

Case won't go to trial until April or May due to state senator's involvement

BY: [GRAHAM MOOMAW](#) - DECEMBER 5, 2022 12:38 PM



Emporia's Sadler Travel Plaza, part of the lawsuit challenging Virginia's skill-game ban, has had the machines for roughly two decades, according to court filings. (Graham Moomaw/Virginia Mercury)

EMPORIA — A judge on Monday declined to dismiss [a lawsuit](#) claiming Virginia’s ban on slots-like skill machines violates free speech and indicated a state senator’s involvement in the case means it won’t go to trial until after the 2023 General Assembly session is over.

At a hearing Monday morning in Greensville County Circuit Court, Judge Louis Lerner also rejected a claim the General Assembly violated the Virginia Constitution by quietly adding legislation to the most recent state budget that sought to reinforce the purported illegality of the machines that have proliferated in Virginia convenience stores, truck stops and sports bars.

Lerner said he had serious concerns about the argument but ultimately concluded it wasn’t the court’s role to try to force the General Assembly to legislate in the open.

“Government at any level should not be doing business in the dark,” Lerner said from the bench. “But once again, I’m not going to peek into that closet.”

But after siding with the state on that issue, Lerner said he continues to see merit in the skill-game industry’s arguments that the ban violates free speech by seeking to classify a particular type of video game as illegal gambling.

“Naming it as gambling or wagering does not matter,” Lerner said, echoing the industry’s argument as he extended an injunction preventing the state from enforcing the ban as the lawsuit proceeds. He made clear he had the General Assembly’s schedule in mind, noting that an April or May timeframe for concluding the matter seemed most realistic given the involvement of Sen. Bill Stanley, R-Franklin, in the case.

“We understand that the plaintiff’s attorney has obligations at the General Assembly that are entitled to deference by statute,” Lerner said, referencing a

state law that empowers General Assembly members who are practicing attorneys to delay court matters while the legislature is in session.

The result of Monday's hearing is that thousands of skill machines estimated to be operating in Virginia can continue in a largely unregulated and untaxed state for the near future.

The General Assembly and former Gov. Ralph Northam attempted to ban the machines in the 2021 legislative session. But the legal challenge brought by Stanley and lawyers for a major skill-game company, Queen of Virginia, has successfully delayed enforcement of that ban for nearly a year. The plaintiff in the suit is Hermie Sadler, a former NASCAR driver who owns a truck stop in Emporia that has benefited from skill-game machine revenue.

"We anticipate the final court decision will uphold the legality of skill games in the commonwealth," Michael Barley, a spokesman for Queen of Virginia parent company Pace-O-Matic, said in a news release after the ruling.

"However, without further regulation and additional taxation, taxpayers are missing out on nearly \$100 million in tax revenue that could have gone toward critical projects along with curbing illegal games that are proliferating in Virginia communities."

The difficult-to-define machines have been a perennial sticking point for policymakers as Virginia has expanded legal gambling over the last few years.



Skill games in a Richmond corner store. The games popped up in gas stations, convenience stores and bars around the state before they were outlawed. (Ned Oliver/Virginia Mercury)

Critics say the skill-game industry brazenly exploited legal loopholes to create a major gambling enterprise without seeking clear permission from the legislature as the casino, sports betting and horse racing industries did. Skill-game defenders say the machines give smaller businesspeople an opportunity to benefit from looser rules on gambling. The industry insists the machines shouldn't be classified as gambling at all because they're primarily based on skill, not chance.

“We're pleased with the court's ruling,” said Jason Hicks of the Womble Bond Dickinson law firm, which is representing Sadler in the case and also works for Queen of Virginia.

The state argues the skill involved in the games is minimal and only serves to give some semblance of legal cover to what it contends are gambling machines the state has every right to outlaw. The machines aren't being targeted for any First Amendment messages they convey, according to Virginia's lawyers, but because the wagering activity that comes with them sets them apart from other types of arcade games.

Attorneys for the state did not comment after the hearing but told Lerner they're interested in lodging formal objections to how the case has been handled, an indication they're planning to appeal if Lerner strikes down the ban permanently next year.

The Virginia skill-game industry has enlisted national free speech expert Rodney Smolla, the president of Vermont Law School, to bolster its argument that machines designed to mimic slots have the same First Amendment protections as other video games. Many of the machines feature the same spinning reels and nine-square layout as slot machines but require players to take some action to complete a winning pattern. For some games, that just involves touching the screen as opposed to the more passive experience of playing slots, where winning patterns complete themselves.

In a brief filed with the court, Smolla compared the situation to the televised trivia game "Jeopardy!" The state can ban its residents from wagering money on the outcome of a Jeopardy contest, Smolla wrote, but it can't pass a law prohibiting people from playing the game, which also involves money, skill and, to some extent, wagering.

"At the end of the day, the Commonwealth's case rests on nothing more than an 'Alice in Wonderland' approach to the meaning of words, in which 'illegal gambling' comes to mean whatever the Commonwealth chooses to define it to mean," wrote Smolla, who was in the courtroom for Monday's hearing. "As Humpty Dumpty said to Alice: 'When I use a word it means just what I

want it to mean — neither more nor less.’ But First Amendment law is neither so glib as Humpty Dumpty nor so credulous as Alice.”

Pace-O-Matic has contributed more than \$850,000 to both Republicans and Democrats in Virginia since 2018, [according to the Virginia Public Access Project](#).