



## Ohio State Racing Commission

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**Ted Strickland**  
Governor

**William Koester**  
Chairman

### MEMORANDUM

To: Chairman William Koester, Commissioner Ted Brown, Commissioner Jerry Chabler and Commissioner Gerald Holland  
From: Commissioner Tom Zaino – Finance Committee Chair  
Date: February 19, 2009  
RE: History and Current Law Related to Gambling in Ohio

As you know, there have been recent public discussions suggesting the use of slot machines and other forms of gambling at Ohio horse racing tracks, as well as other Ohio venues. In light of those discussions, the current plight of the Ohio horse racing industry, and the financial condition of the State Racing Commission, it seems prudent for the Racing Commission to monitor these developments closely and to understand their potential impact. To aid each of us in this process, the purpose of this memorandum is to discuss the evolution and current status of Ohio law related to gambling. Future memorandums may discuss the evolution and regulatory environment of gambling at horse racing tracks in other states.

#### Executive Summary

Limits on gambling in Ohio preceded statehood. Today, Article XV, Section 6, of Ohio's Constitution prohibits lotteries unless such lotteries are conducted by an agency of the state and the net proceeds of the lotteries are allocated to primary, secondary, vocational or special education. The Constitution does not, however, prohibit other types of gambling; rather, it is Ohio Revised Code Chapters 2915 (criminal statute) and 3769 (horse racing statute) that regulate and limit other types of gambling.

The term "lottery" or "lotteries" is not defined by the Constitution or by the Ohio Revised Code. Ohio courts have defined a lottery to be a "scheme whereby a monetary consideration is paid and the winner of the prize is determined by lot or chance." No court in Ohio has defined lotteries to include slot machines. However, courts in some states have defined lotteries to include slot machines, while courts in other states have held that lotteries are not slot machines.

Ohio Revised Code Chapter 2915, a part of the Ohio criminal code, prohibits schemes of chance, which include by definition, lotteries and slot machines. However, lotteries are not defined by statute to include slot machines, nor vice versa. The statute also prohibits games of chance, which include by definition poker, craps and roulette.

The General Assembly seems to have authority to statutorily permit the operation of slot machines and table games in Ohio without amending the Ohio Constitution. However, some risk exists that Ohio courts could determine that the use of slot machines constitutes the operation of a constitutionally prohibited lottery and, therefore, the revenue could be lost. Therefore, short of amending Ohio's Constitution, the safest way for the General Assembly to insure the revenue

stream from such slot machines is realized, would be for the General Assembly to empower an agency of the state to operate the gambling. Such agency could, for instance, grant licenses to operators of Ohio's horse racing tracks—where legal gambling has taken place since the 1930s. In this way, constitutional problems are avoided, there would be no need to amend Ohio's Constitution in order to have legal use of slot machines and/or other gaming, and the state could maximize tax revenue and regulation of gambling.

In the alternative, a Constitutional Amendment could be sought to authorize private parties to operate slot machines without the intervention of a government agency. Of course, this has been attempted three times with no success.

### **History of Gambling in Ohio**

In 1982, the Ohio Supreme Court provided a historical review of Ohio's gambling laws, which is restated, in part, as follows:<sup>1</sup>

The effort to control gambling in this state is a never-ending fight. Historically in Ohio the gambling instinct was considered as an evil in and of itself. As early as the year 1790, by a law passed by the Governor and Judges of the Northwest Territory at Vincennes, it was provided that "any species of gaming, play or pastime whatsoever" whereby money may be won or lost was prohibited. Likewise the use of billiard tables "or any other machine for gambling was prohibited. See 1 Chase, Statutes of Ohio 105. Effective October 1, 1795, it was provided that tavern keepers or inn holders were prohibited from permitting "cards, dice, billiards, or any instrument of gaming to be made use of, on the premises operated by them as such tavern or inn. Id., at page 199.

The first Constitution of Ohio, adopted in 1802, made no direct reference to lottery or gambling. In 1805, the General Assembly passed an Act making various forms of gambling illegal. Id., at page 503. In 1807, it was made an offense to conduct a lottery "without a special act of the legislature." 5 Ohio Laws 91. From 1807 to 1828 the General Assembly passed a number of Acts providing for the raising of money, by way of lottery, to make public improvements. In 1830, the General Assembly prohibited the further use of lotteries or schemes of chance for any purpose, 28 Ohio Laws 37, and this prohibition was carried over into the Constitution adopted in 1851. Section 6, Article XV of the Constitution of 1851 provided that "lotteries, and the sale of lottery tickets, for any purpose whatever shall forever be prohibited in this State." It is interesting to note that when the people of the state adopted the Constitution of 1851, nothing therein was said of gaming or gambling as such, or in the Amendments to that Constitution later adopted. The prohibition of the Constitution was against lotteries and the sale of lottery tickets only. As we have seen, the adverse attitude of the General Assembly toward the use of gambling machines or devices was so pronounced, and their use so adverse to the policy of the state, that it apparently was thought unnecessary to write any prohibition thereof into the Constitution. It was only

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<sup>1</sup> *Mills-Jennings, Inc. v. Dept. of Liquor Control* (1982), 70 Ohio St.2d 95

because the legislatures had seen fit to employ the scheme of a lottery for public and private purposes that the people considered it necessary to prohibit lotteries in the Constitution. This is clearly demonstrated by the enactment of Ohio's first anti-gambling provisions, on February 14, 1807, under the title, "an act, for the prevention of certain immoral practices." Every " \* \* \* species, kind or way of gambling at hazard or chance, under any pretense whatever, for money or any other article of value, and betting thereon," were prohibited. 3 Ohio Laws 218. Thus, at the time of the Constitutional Convention of 1851, all gambling, whether games or schemes of chance, was illegal in Ohio.

Relying on the foregoing constitutional provisions, courts in Ohio treated the Constitution as broadly prohibiting lotteries in the generic sense, thus extending the threat of unconstitutionality to other games and schemes of chance. Any device or scheme which served to arouse the gambling instinct was equatable with a lottery for the purposes of applying the public policy expressed in the Constitution. Although the courts seldom relied solely on the Constitution in anti-gambling litigation, it was repeatedly invoked as evidencing a strong public policy against gambling while at the same time the conduct was held to be statutorily proscribed.<sup>2</sup> Thus the general proposition was that just because the Constitution referred only to lotteries, this did not mean that other forms of gambling were allowed.

This entire concept was dramatically changed by the state which, through its own initiative, significantly contributed to the weakening of the clear and long-standing anti-gambling public policy in Ohio. The promulgation of the new Ohio Criminal Code in 1974 (and the 1975, 1976, and 1977 amendments thereto) with regard to R.C. Chapter 2915, the constitutional authorization, effective November 5, 1975, for bingo conducted by a charitable organization for charitable purposes and a lottery operated by the state, added to the already existing pari-mutuel wagering on horse racing, substantially changed the public policy with regard to gambling as it existed when Ohio Adm. Code 4301:1-1-53(B) (hereinafter "Reg. 53[B]") was adopted. In addition there is the well-reasoned opinion of Judge Mahoney of the Court of Appeals for Summit County to now consider.<sup>3</sup>

In 1933, pari-mutuel wagering at horse race tracks was authorized after passage of the "Horse Racing Act" by the Ninetieth General Assembly in an effort to raise revenues and create jobs during the depression.<sup>4</sup> Authority to conduct pari-mutuel wagering at horse race tracks is currently contained in Chapter 3769 of the Ohio Revised Code. The Ohio State Racing Commission is the state agency that regulates such wagering.<sup>5</sup>

<sup>2</sup> See *Kroger Co. v. Cook* (1970), 24 Ohio St.2d 170 ; *Stillmaker v. Dept. of Liquor Control* (1969), 18 Ohio St.2d 200 ; and *Westerhaus Co. v. Cincinnati* (1956), 165 Ohio St. 327 .

<sup>3</sup> *State ex rel. Gabalac v. Congregation* (1977), 55 Ohio App.2d 96.

<sup>4</sup> Am. Sub. S.B. 103, 90<sup>th</sup> Gen. Assem., Reg. Sess. (Ohio 1933). See also *The Michigan Horse Racing Industry, An Economic Comparison*, p. 6 (2002).

<sup>5</sup> The Commission's primary goals are to regulate and promote pari-mutuel horse racing in the state of Ohio. To promote the racing industry, the Commission has several programs which promote breeding horses in-state and supplement purses at the commercial racetracks and county fairs for Ohio bred horses. The Commission also has significant enforcement responsibilities to protect the betting public, including the licensing of all horses and

Pari-mutual wagering on horse races is permitted with regard to live racing conducted at such tracks, as well as races conducted at race tracks around the world.<sup>6</sup> Revenues generated from taxing such wagering not only funds the Commission, but also supports the horse race industry and related agricultural industry, as well as contributes to fund PassPort.<sup>7</sup>

### **Current Law – Prohibition of “Lotteries”**

Section 6, Article XV of Ohio’s Constitution provides:<sup>8</sup>

Except as otherwise provided in this section, lotteries, and the sale of lottery tickets, for any purpose whatever, shall forever be prohibited in this State.

The General Assembly may authorize an agency of the state to conduct lotteries, to sell rights to participate therein, and to award prizes by chance to participants, provided that the entire net proceeds of any such lottery are paid into a fund of the state treasury that shall consist solely of such proceeds and shall be used solely for the support of elementary, secondary, vocational, and special education programs as determined in appropriations made by the General Assembly.

The General Assembly may authorize and regulate the operation of bingo to be conducted by charitable organizations for charitable purposes.<sup>9</sup>

The only type of gambling that is prohibited by the Ohio Constitution is lotteries. As a result, the General Assembly may pass laws legalizing other forms of gambling. One example of this is the Ohio Horse Racing Law contained in Revised Code Chapter 3769. See *State, ex rel. Gabalic v. Congregation* (1977), 55 Ohio App.2d 96, 97-98.

The term “lottery” or “lotteries” is not defined by the Constitution or by the Ohio Revised Code. Courts have defined a lottery to be a “scheme whereby a monetary consideration is paid and the winner of the prize is determined by lot or chance. *Stevens v. Cincinnati Times-Star Co.* (1905), 72 Ohio St. 112, 147, cited by *Gabalic*, at 97.

The term “gambling” is broader and encompasses more than the term “lottery.” *Westerhaus Co. v. Cincinnati* (1956), 165 Ohio St. 327, 339, cited by *State, ex rel. Gabalic*, at 97-98. In *Gabalic*, the court stated that “each type of gambling must be separately analyzed to see if it is a lottery.” 55 Ohio App. 2d at 98. The Revised Code, and no case, has defined a slot machine to constitute a “lottery.”

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participants, on site regulation of each race and facility, the study of betting patterns, and the drug testing of horses and participants.

<sup>6</sup> See current Revised Code Chapter 3769, including R.C. 3769.01, 3769.089, and 3769.26.

<sup>7</sup> Ohio Rev. Code Ann. §173.40. R.C. Passport is a government program designed to help Medicaid-eligible older Ohioans get the long-term services and supports they need to stay in their homes. See “Ohio Department of Aging PASSPORT Program.” *Ohio Department of Aging*. 2 Feb 2009

<<http://aging.ohio.gov/services/passport/default.aspx>>. In calendar year 2007, horse racing contributed \$3,078,936 to PassPort. 2007 Annual Report, Ohio State Racing Commission, p. 22.

<sup>8</sup> Amended, effective November 5, 1975; HJR No.16.

<sup>9</sup> SJR 9; Adopted November 3, 1987, effective January 1, 1988.

## **Current Law – Prohibition of Other Gambling**

In 1974, the Ohio General Assembly enacted a new Chapter 2915, intended to prohibit the business of gambling without forbidding gambling carried on for pleasure, rather than profit. Under Chapter 2915, all forms of gambling and activities in aid of it are illegal if carried on as a business, or for personal profit, or as a significant source of income or livelihood. Otherwise, no form of gambling is illegal. Gambling in public is prohibited to avoid enforcement problems, and this represents a partial exception to the general rule in the chapter.<sup>10</sup>

Unless permitted by other laws (such as the Ohio's Horse Racing Law),<sup>11</sup> Ohio's law prohibits the following:

- (1) Engaging in or facilitating *bookmaking*;
- (2) Establishing, promoting or operating any *game of chance* conducted for profit;
- (3) Establishing, promoting or operating any *scheme of chance* (without regard to profit motive);
- (4) Engaging in betting or playing any scheme or game of chance as a substantial source of income or livelihood;
- (5) Acquire, possess, control or operate any gambling device for purposes of facilitating the previous four activities.<sup>12</sup>

"Bookmaking" means the business of receiving or paying off bets.<sup>13</sup>

"Game of chance conducted for profit" is defined to include poker, craps, roulette, or other game in which a player gives anything of value in the hope of gain, the outcome of which is determined largely by chance, but does not include bingo.<sup>14</sup> As a result, it is legal to have a friendly poker game at home, only so long as the house/operator does not take a piece of the action (including an entry fee, a portion of the pot, etc.).

"Scheme of Chance" is defined to include a **slot machine, lottery**, numbers game, pool conducted for profit, or other scheme in which a participant gives a valuable consideration for a chance to win a prize, but does not include bingo, a skill-based amusement, or a pool not conducted for profit.<sup>15</sup> As a result, a office football pool is permissible so long as the sponsor does not keep any proceeds (and so long as it is not defined to also be a "lottery"). In contrast, no lottery or slot machine may be operated in Ohio whether or not it is operated for profit.

## **Analysis and Discussion**

Only "lotteries" are prohibited by Ohio's Constitution (unless operated by a state agency). The Constitution does not define what constitutes a lottery. Therefore, existing case law and statutes must be reviewed for guidance.

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<sup>10</sup> 1974 Committee Comment to H.B. 511

<sup>11</sup> R.C. 2915.02(C); R.C. Chapter 3769.

<sup>12</sup> R.C. 2915.02(A) and (C).

<sup>13</sup> R.C. 2915.01(A).

<sup>14</sup> R.C. 2915.01(D).

<sup>15</sup> R.C. 2915.01(C); slot machines were previously listed under the definition of "game of chance."

Case Law Definition of Lottery: In 1977, a Court of Appeals defined the term “lottery” to be a “scheme whereby monetary consideration is paid and the winner of a prize is determined by lot or chance.”<sup>16</sup> The court went on to observe that “[t]he term ‘gambling’ is broader than the term ‘lottery’” and that other statutorily permitted gambling does not violate Ohio’s constitutional ban on lotteries.

Several cases have considered whether a particular type of gambling constituted a prohibited lottery, but no Ohio case has specifically addressed whether a slot machine constitutes a constitutionally prohibited lottery. For example, the following games have been interpreted to constitute a lottery:

- Instant bingo;<sup>17</sup>
- Contest or game involving a chance to win a prize if the participant must make a purchase of an item to participate;<sup>18</sup>
- A promotional game requiring the participant obtain a token before qualifying for participation and such token is obtained by making a purchase on the premises of a commercial enterprise;<sup>19</sup>

I found no Ohio case law that has addressed the issue of whether slot machines (or table card games) are constitutionally prohibited lotteries. Rather, all cases dealing with the prohibition of slot machines for instance, are related to the statutory prohibitions under Revised Code Chapter 2915.

Statutory Treatment of Lotteries and Other Gambling: “Lottery” is included in the statutory definition of a *scheme of chance*, but the statute does not define the term “lottery.”<sup>20</sup> “Slot machine” is included in the definition of a *scheme of chance*.<sup>21</sup> On the other hand, poker, craps, and roulette are defined to be *games of chance*.<sup>22</sup>

As outlined above, schemes of chance are outlawed in Ohio by statute.<sup>23</sup> Games of chance conducted for profit are also generally outlawed by statute, unless permitted by other laws.<sup>24</sup> For instance, games of chance may be legally conducted by some charitable organizations.<sup>25</sup>

As a result, it is the Ohio Revised Code, not the Ohio Constitution, which prohibits the use of slot machines or table games in Ohio. Therefore, arguably, the General Assembly could

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<sup>16</sup> *State ex rel. Gabalac v. Congregation* (1977), 55 Ohio App.2d 96, 97, citing *Stevens v. Cincinnati-Times Star Co.* (1905), 72 Ohio St. 112, 147.

<sup>17</sup> *State v. Beane*, 52 Ohio Misc. 115 (1977).

<sup>18</sup> *Great Atlantic & Pacific Tea Co. v. Cook*, 15 Ohio Misc. 181 (1968).

<sup>19</sup> OAG No. 67-064 (1967).

<sup>20</sup> R.C. 2915.01(C).

<sup>21</sup> R.C. 2915.01(C).

<sup>22</sup> R.C. 2915.01(D).

<sup>23</sup> R.C. 2915.02(A).

<sup>24</sup> R.C. 2915.02(C) and (D).

<sup>25</sup> R.C. 2915.02(D).

authorize the use of slot machines or table games simply by changing Ohio's statute.<sup>26</sup> One important and potential problem is that no Ohio case has held that a slot machine, or scheme of chance in general, are not lotteries—if slot machines are held to be lotteries by Ohio's courts, then they would be prohibited by the Constitution unless operated by a state agency.

If Slot Machines are Deemed Lotteries: Although Ohio law does not specifically define a slot machine as a lottery, future Ohio courts could arguably make such a ruling. In fact, some courts in other states have taken the position that a slot machine is a "lottery."<sup>27</sup> However, at least two other states have held that a slot machine is not a lottery.<sup>28</sup>

If slot machines are also considered to be lotteries by Ohio courts, then Ohio's constitutional prohibition of lotteries would apply to slot machines. In such case, and assuming no change to Ohio's constitution, slot machines could only be permitted by statute if conducted by an agency of the state of Ohio and if the net proceeds of the slot machines are appropriated for use in primary, secondary, vocation or special education.<sup>29</sup>

## **Conclusion**

The General Assembly seems to have authority to statutorily permit the operation of slot machines and table games in Ohio without amending the Ohio Constitution. However, some risk exists that Ohio courts could determine that the use of slot machines constitutes the operation of a constitutionally prohibited lottery and, therefore, the revenue could be lost. Therefore, short of amending Ohio's Constitution, the safest way for the General Assembly to insure the revenue stream from such slot machines is realized, would be for the General Assembly to empower an agency of the state to operate the gambling. Such agency could, for instance, grant licenses to operators of Ohio's horse racing tracks—where legal gambling has taken place since the 1930s. In this way, constitutional problems are avoided, there would be no need to amend Ohio's Constitution in order to have legal use of slot machines and/or other gaming, and the state could maximize tax revenue and regulation of gambling.

In the alternative, a Constitutional Amendment could be sought to authorize private parties to operate slot machines without the intervention of a government agency. Of course, this has been attempted three times with no success.

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<sup>26</sup> See *State ex rel. Gabalac v. Congregation* (1977), 55 Ohio App.2d 96, 97, which concluded that Ohio's constitution only prohibits lotteries, not other types of gambling, and that the General Assembly can, therefore, pass laws legalizing other forms of gambling.

<sup>27</sup> See *State of Washington v. The Brotherhood of Friends* (1952), 41 Wn.2d 133, 149 (a Washington supreme court decision holding that slot machines are mechanical lotteries); *State v. Marck*, 124 Mont. 178, 181 (a Montana supreme court decision holding that the use of slot machines is clearly a lottery); *State v. Coats*, 148 Ore. 122, 133 (an Oregon supreme court decision holding that the operation of slot machines and similar gambling devices constitute lotteries);

<sup>28</sup> *Johnson v. Collins Entertainment Co., Inc.*, (1998) 333 S.C. 96 (holding that video gaming devices do not come within the plain and ordinary meaning of "lottery" because they do not involve a drawing and "tickets" or other indicium of entitlement to a prize); *Lee v. City of Miami*, 163 So.386 (Fla. 1935) and *In re Advisory Opinion to the Attorney General re: Authorizes Miami-Dade and Broward County Voters to Approve Slot Machines in Parimutuel Facilities*, 880 So.3d 522 (Fla. 05/13/2004) (holding that slot machines do not constitute lotteries).

<sup>29</sup> Ohio Constitution, Article XV, Section 6.