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## Is Texas Hold'em Poker Unlawful Gambling in Pennsylvania? Two Trial Courts Are Split

Poker players are following two criminal cases in Pennsylvania – one prosecuted by the District Attorney of Columbia County and the other by the District Attorney of Westmoreland County. The two trial courts reached opposite conclusions on the issue of whether a play-for-cash poker event constitutes “unlawful gambling” for purposes of the state gambling statute at 18 Pa.C.S. §5513(a).

This Alert reviews the two decisions and the arguments that were addressed in each. One of the decisions has been appealed to the Superior Court, a Pennsylvania mid-level appellate court. While a published decision on the merits by the Superior Court would establish a statewide rule, the issue will not be finally resolved until the Pennsylvania Supreme Court rules on it.<sup>1</sup> The question has implications not only for those who organize and promote Texas Hold'em poker events, but also for operators of Internet websites offering players the opportunity to compete in play-for-cash games online.<sup>2</sup>

The gambling statute in question provides, in pertinent part, that a person commits a first degree misdemeanor if the person:

- (2) allows persons to collect and assemble for the purpose of *unlawful gambling* at any place under his control;
- (3) solicits or invites any person to visit any *unlawful gambling* place for the purpose of gambling; or

<sup>1</sup> The Pennsylvania General Assembly could also resolve the issue through legislation. In conjunction with Pennsylvania's need to balance its budget for the upcoming fiscal year, the Governor has recommended that video poker be legalized and taxed. See, e.g., Sharon Smith and Roger Quigley, *Gov. Rendell Gambles on Video Poker*, PennLive.com, available at [http://www.pennlive.com/midstate/index.ssf/2009/02/gov\\_rendells\\_gambles\\_on\\_video.html](http://www.pennlive.com/midstate/index.ssf/2009/02/gov_rendells_gambles_on_video.html). While Pennsylvania courts have determined that video poker is a game of chance, it is a very different “game” from Texas Hold'em poker or, for that matter, five card stud or draw poker.

<sup>2</sup> The U.S. Department of Justice takes the position that play-for-cash poker games on the Internet implicate the Wire Act, 18 U.S.C. §1084(a), because they involve interstate or international wire transmissions of wagers. But, the issue has never been addressed by a federal court, and the U.S. Congress, in the Unlawful Internet Gambling Enforcement Act of 2006 (“UIGEA”), 31 U.S.C. §§5361-5367, created an exception to UIGEA's prohibition for state-authorized intrastate Internet wagering, if certain conditions are met. Internet poker is a lucrative business and some states, e.g., California, have looked at authorizing it as a revenue source. See, e.g., Anthony York, *Could Internet Poker Return to California?*, Capitol Weekly, available at [http://www.capitolweekly.net/article.php?issueId=wx1t7vfmfi8i7f&xid=wx2lirtpom8f1y&\\_adctid=v%7Cjq2q43wvsl855o%7Cwx391hj8mv4dt2](http://www.capitolweekly.net/article.php?issueId=wx1t7vfmfi8i7f&xid=wx2lirtpom8f1y&_adctid=v%7Cjq2q43wvsl855o%7Cwx391hj8mv4dt2). Whether skill games are covered by the Wire Act is an unresolved question that has been the subject of recent commentary. See, e.g., Linda J. Shorey, *Can a Wire Act Violation Be Avoided with Enough Skill?*, IGaming News (April 21, 2009).

- (4) being the owner, tenant, lessee or occupant of any premises, knowingly permits or suffers the same, or any part thereof, to be used for the purpose of *unlawful gambling*.

18 Pa.C.S. §§5513(a)(2), (3), and (4) (emphasis added). Accordingly, a violation of the statute involves the facilitation or promotion of “unlawful gambling.”

The first court to address whether “unlawful gambling” includes a play-for-cash poker event was the Columbia County Court of Common Pleas. It concluded that Texas Hold’em poker is a game of skill and, therefore, not “unlawful gambling.” See Jan. 14, 2009 Slip Op. in *Commonwealth v. Dent et al.*, Dkt. Nos. 733 and 746 of 2008 (Columbia Co. C.C.P.). In *Dent*, two defendants hosted Texas Hold’em poker games in a garage they controlled. In each game, the players, for every round of dealing, wagered money against one another on the hands they were dealt in exchange for the chance to win a pot comprised of all the wagers. Because the defendants hosted the games, they were each charged with violating 18 Pa.C.S. §5513(a). They asked the court to dismiss the charges. The court described “the controlling issue [as] whether Texas Hold’em poker is ‘unlawful gambling’ under” the statute. Slip Op. at 3.

In resolving this issue, the court began by noting that, under Pennsylvania case law, there are three elements of gambling: consideration, chance, and reward. The court explained that a cash poker game involves consideration (the money wagered by the players) and a reward (the pots). Thus, “the controlling sub-issue” was “whether Texas Hold’em is a game of skill or a game of chance or, if both, does skill trump chance or vice versa.” *Id.* at 4. In other words, according to the court, “if chance predominates, Texas Hold’em is gambling. If skill predominates, it is not gambling.” *Id.*

The court explained that, although the Pennsylvania Supreme Court determined in *Commonwealth v. One Electro-Sport Draw Poker Machine*, 502 Pa. 186, 465 A.2d 973 (1983), that electronic poker games are predominated by chance, it also acknowledged that “the skill involved in [the electronic games] is not the same skill which can indeed determine the outcome in a game of poker between human players.” Slip Op. at 5 (quoting *One Electro-Sport*

*Draw Poker Machine*, 502 Pa. at 196, 465 A.2d at 978). The court then reviewed and discussed a variety of books, law review articles, and studies providing that skill trumps chance in a traditional cash poker game. Many of these resources posit that, although the game involves a certain degree of randomness (in the sense that cards are dealt to the players randomly as hands are being played), a skilled poker player almost invariably prevails over an unskilled player over the course of many hands. The court agreed with this reasoning and said that the skills necessary for success are “intellectual and psychological skills” and knowledge of “the rules and the mathematical odds,” “how to read...opponents ‘tells’ and styles,” “when to hold and fold and raise,” and “how to manage...money.” Slip Op. at 13-14. The court concluded that “Texas Hold’em poker is a game where skill predominates over chance” and, therefore, does not amount to “unlawful gambling” for purposes of 18 Pa.C.S. §5513(a). *Id.* at 14.

The second trial court to address whether a play-for-cash poker event falls within the ambit of the statute was the Westmoreland County Court of Common Pleas. It reached the opposite conclusion, determining that such an event *is* “unlawful gambling.” See Jan. 30, 2009 Slip Op. in *Commonwealth v. Burns et al.*, Dkt. Nos. 4929 – 4932 C 2007, 1743 – 1745 C 2008, and 463 C 2008 (Westmoreland Co. C.C.P.). In *Burns*, the defendants organized, advertised, and conducted several Texas Hold’em poker tournaments in which participants paid entry fees in exchange for the chance to win cash prizes. As a result, the defendants were charged with violating 18 Pa.C.S. §5513(a). The defendants challenged the statute as being unconstitutionally vague.

The court framed the issue as “whether the word ‘gambling’ and the phrase ‘unlawful gambling’ are sufficiently defined either by statute or as construed in court opinions so as to inform the Defendants that their conduct in organizing, advertising and conducting Texas Hold’em poker tournaments constitutes a crime in this Commonwealth.” Slip Op. at 2. In answering yes, the court began by noting that, in *Commonwealth v. Betres*, 352 A.2d 495 (Pa. Super. Ct. 1975), the Superior Court concluded that, for purposes of 18 Pa.C.S. §5513(a), “unlawful gambling” is any form of gambling that is

not specifically authorized by Pennsylvania law. The court then explained that cash poker tournaments are not authorized by Pennsylvania law and, therefore, the defendants' void-for-vagueness challenge was not viable unless "a man of common intelligence could not have known that engaging in this activity" was a form of gambling. Slip Op. at 5 (internal quotation omitted).

After articulating the three elements of gambling – consideration, chance, and reward – the court gave several examples of Pennsylvania cases in which "poker playing is the subject of a discussion about gambling," including *Commonwealth v. Kehler*, 538 A.2d 979 (Pa. Cmwlth. 1988), in which the Commonwealth Court determined that poker playing constitutes gambling under the Pennsylvania Liquor Code, and *Commonwealth v. Indelicato*, 243 A.2d 137 (Pa. Super. Ct. 1968), in which the Superior Court sustained a conviction for setting up and maintaining a gambling establishment when the establishment at issue was used for poker playing. Slip Op. at 6. The court concluded that "the statute and case precedent, in combination with a common

sense understanding of the game of poker, does give an ordinary man of common intelligence 'fair warning'" that the defendants' organization, advertising, and conducting of the Texas Hold'em tournaments was "a violation of section 5513 of the Crimes Code." *Id.* Interestingly, the court did not analyze whether a cash poker tournament is predominated by skill as opposed to chance.

On January 27, 2009, the Commonwealth appealed the decision in *Dent* to the Superior Court, where briefing is underway. The decision in *Burns* has not yet been appealed, as it did not end the case. It may still be appealed once a final judgment is entered. If the Superior Court issues a published decision in *Dent* that addresses whether a play-for-cash poker event constitutes "unlawful gambling" under 18 Pa.C.S. §5513(a), it would establish a statewide standard on the issue and resolve the split between the Columbia and Westmoreland County Courts of Common Pleas, at least until the Pennsylvania Supreme Court addresses the issue.

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