AND THEY’RE OFF! WOULD INSTANT HORSE WAGERING IN NEW JERSEY REQUIRE VOTER APPROVAL?

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I. INTRODUCTION

The “Sport of Kings” has a long and storied history in New Jersey, but in recent years the horse racing industry has struggled in the state and across the nation. Presently, there are three licensed operating horse racetracks in the Garden State: Freehold Raceway, which features standardbred harness racing for trotters and pacers in Freehold;1 The Meadowlands Racetrack, which features thoroughbred2 and standardbred harness racing in East Rutherford; and Monmouth Park in Oceanport, which features thoroughbred racing.3

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1 “Standardbred” horses are “so called because the American harness studbook . . . used the ability to cover a mile in a ‘standard’ time (initially 2 min[utes] and 30 sec[onds]) as the criteria for entry.” Harness Racing Terms, HARNESS RACING: STANDARDBRED HORSES, http://www.harnessracing.ws/Harness-Racing-Glossary.htm (last visited Mar. 12, 2016). “Pacers” and “trotters” refer to two distinct types of gaits, or “the manner in which [the] horse moves its legs [while] running,” used by harness race horses. Id. A pacer is a horse that has a lateral gait while a trotter has a diagonal gait. Id.

2 A “thoroughbred” horse refers to a specific breed of horse developed in England for racing. Thoroughbred, ENCYCLOPÆDIA BRITANNICA, http://www.britannica.com/animal/Thoroughbred (last visited Mar. 12, 2016). The term may also be used to refer to “purebred” horses, meaning that a horse is born to two horses of the same breed. See id. (noting that “[t]he term thoroughbred is sometimes incorrectly used to mean purebred”); see purebred, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/purebred (last visited Apr. 9, 2016).

Raceway is the oldest continuously operating racetrack in the United States, dating back to 1853. The New Jersey Racing Commission, a division of the New Jersey Department of Law & Public Safety, Office of the Attorney General, regulates and oversees the horse racing industry in New Jersey.

Even though pari-mutuel wagering on live horse racing has been around for centuries, the horse racing industry is seeking to gain a new audience of supporters through technological innovations such as instant horse-wagering terminals. At first glance, one might think that an instant horse-wagering terminal looks an awful lot like a slot machine, and they would be right. However, current operators argue that they are different from the iconic gambling devices. Instead of the normal random number generator that produces results on a slot machine, instant horse wagering terminals use the results of past races, selected at random, without identifying the track, date, or horse names, to determine the outcome. Many states have considered or have implemented instant horse wagering, largely in an effort to help ailing tracks,


6 See ROBERT M. JARVIS ET AL., GAMING LAW CASES AND MATERIALS 153 (2003) (“Pari-mutuel wagering has existed for centuries; today, its principal forms [include]. . . horse racing . . .”).


though their use remains controversial.\textsuperscript{10} Instant horse-wagering is currently permitted in Arkansas,\textsuperscript{11} Oregon,\textsuperscript{12} Kentucky,\textsuperscript{13} and Wyoming.\textsuperscript{14} Wagering on historical horse racing was permitted briefly in Idaho, but has since been banned.\textsuperscript{15} Texas legislators passed a bill to permit the Texas Racing Commission to regulate the devices, but a state judge struck down the law.\textsuperscript{16}

\textsuperscript{10} See infra notes 11–16 and accompanying text.


\textsuperscript{13} The Kentucky Supreme Court ruled that the Kentucky Horse Racing Commission has the authority to regulate instant horse wagering, but remanded the issue to determine the legality of the games and whether they meet the definition of pari-mutuel wagering. Janet Patton, \textit{Kentucky Supreme Court Says Instant Racing Can be Regulated, Doesn’t Rule on Legality}, LEXINGTON HERALD LEADER (Feb. 20, 2014, 10:43 AM), http://www.kentucky.com/news/state/Kentucky/article44472534.html; see also Appalachian Racing, LLC v. Family Tr. Found. of Ky., Inc., 423 S.W.3d 726, 730 (Ky. 2014).

\textsuperscript{14} Wyoming briefly permitted instant horse wagering in 2015, but the Wyoming Pari-Mutuel Commission banned the devices because it determined the games contained an element of chance and therefore violated state law. Frank Angst, \textit{Wyoming to Shut Down Historical Racing Games}, BLOOD HORSE (Oct. 6, 2015, 8:19 PM), http://www.bloodhorse.com/horse-racing/articles/94954/wyoming-to-shut-down-historical-racing-games. The Commission reversed its earlier position that instant horse wagering did not contain a component of luck or randomness, which would violate state law following a legal determination by the state’s attorney general. \textit{Id.; Laura Hancock, Historic Horse Race Gaming Resumes in Wyoming}, BILLINGS GAZETTE (Nov. 20, 2015), http://billingsgazette.com/news/state-and-regional/wyoming/historic-horse-race-gaming-resumes-in-wyoming/article_0b1883eb-36d4-5e9a-913d-e96274275586.html. Shortly after banning the games, the Commission met and approved two new historical horse racing games that complied with state law, with the games resuming operation in the state in late November of 2015. Hancock, supra.


The Idaho Supreme Court ruled that Idaho Governor Butch Otter’s veto of legislation prohibiting instant horse racing was invalid and banned the devices. \textit{Id. However, Governor Otter believes that he properly vetoed the bill and supports the legalization of the devices in the state}. \textit{Id.}

\textsuperscript{16} See Aman Batheja, \textit{Judge Strikes Down State Plans for “Historical Racing”},
In an effort to increase revenues for horse tracks in New Jersey, several state legislators have considered permitting wagering on historical horse racing, also known as instant racing, at in-state racetracks, off-track wagering facilities, and in casinos in Atlantic City.\textsuperscript{17} Senate Bill 2935 advanced out of the State Government, Wagering, Tourism & Historic Preservation Committee of the State Senate by a vote of 5-0 in 2013, but no further action was taken on the bill.\textsuperscript{18} The legislation was reintroduced in the 2014-2015 legislative session and was referred to committee as Assembly Bill 1290\textsuperscript{19} and Senate Bill 956.\textsuperscript{20}

\section*{II. State Constitutional Law Barriers}

The idea of permitting this type of wagering in New Jersey raises an important issue of state constitutional law. As a constitutional rule, gambling in New Jersey is illegal unless it has been approved by a statewide referendum and the State Constitution is amended.\textsuperscript{21} This constitutional prohibition against gambling has been broadly construed and is “reflective of New Jersey’s ‘comprehensive,’ ‘clear,’ and ‘long standing’ policy against gambling ‘except where specifically authorized by the people.’”\textsuperscript{22} This has occurred several times over the course of New Jersey history. Pari-mutuel wagering on horse racing was approved in 1939\textsuperscript{23} and New Jersey voters legalized bingo, with nearly 70 percent of voters voting in favor in 1953.\textsuperscript{24} In 1969, New Jersey

\begin{thebibliography}{9}
\bibitem{lehne}Lehne, \textit{supra note 21}, at 62; \textit{see also JARVIS ET AL., supra} note 6, “Pari-mutuel wagering has existed for centuries; today, its principal forms are greyhound racing, horse racing, and jai-alai. Although similar to other types of gaming in many respects, pari-mutuels are notable because payouts are tied to the number of players and the amount of their bets.”
\bibitem{lehne}Lehne, \textit{supra note 21}, at 66.
\end{thebibliography}
voters overwhelmingly voted to legalize a state lottery, which garnered more than 80 percent of the vote. In 1976, voters in the state were asked whether or not to allow casino gambling in Atlantic City, which, like the other proposals, passed with a majority of the vote and 16 of the 21 counties voting in support. Most recently, in 2011, voters in New Jersey approved a referendum legalizing sports gambling at New Jersey casinos, racetracks, and former racetracks, with nearly two-thirds of voters supporting the constitutional amendment.

III. ANALYSIS AND DISCUSSION

The issue then becomes whether or not instant horse wagering falls within the forms of horse racing approved by the New Jersey State Constitution. Under the current New Jersey State Constitution, all forms of gambling are prohibited unless they have been approved in a statewide referendum. In order for instant horse racing to be effective without prior voter approval, it “must be deemed a ‘specific kind’ of gambling [for] which the ‘restrictions and control’ have already been approved by the people.” It is important to note that it is not contested that instant horse wagering is gambling. If this type of wagering is found to be no different than what has already been approved, the devices could be offered without first receiving statewide voter approval. However, if instant horse wagering terminals fall outside the scope of the constitutionally permissible forms of wagering, then they would likely be illegal unless and until approved by voters. Recognizing this as a potential

25 Id. at 80. The State sought to legalize the lottery in order to curb the illegal numbers games, where people placed bets on numbers that would be determined the next day. Id. at 81. The numbers game was heavily influenced by organized crime. Id.

26 Id. at 86.


28 N.J. CONST. art. IV, § VII, cl. 2 (“No gambling of any kind shall be authorized by the Legislature unless the specific kind, restrictions and control thereof have been... authorized by a majority of the votes cast by, the people at a special election or shall hereafter be submitted to, and authorized by a majority of the votes cast thereon by, the legally qualified voters of the State voting at a general election. . . .”).

29 See Atlantic City Racing Ass’n v. Att’y Gen., 489 A.2d 165, 174 (N.J. 1985) (holding that intertrack wagering on horse racing must be approved by voters).

30 See N.J. CONST. art. IV, § VII, cl. 2.

31 See id.
issue, New Jersey legislators discussed placing instant horse wagering terminals under the control of Atlantic City casinos and Internet wagering regulations that are already in place. In addition, the proposed bill seeks to redefine the definition of “live or simulcast running and harness horse races” in the constitution to include “previously-recorded live horse races on which wagers are placed during an instant racing event.” However, based on case law interpreting the expansion of gambling in New Jersey, it is not clear that these end-runs would not be constitutionally sufficient.

The current State Constitution of New Jersey, adopted in 1947, incorporated the New Jersey Constitution of 1844’s article IV, section 7, clause 2 which permitted pari-mutuel betting “in duly legalized race tracks” (i.e. live-racing at licensed race tracks in New Jersey). After the Legislature authorized simulcasting of horse racing between tracks for the purpose of pari-mutuel wagering, the New Jersey Supreme Court had to determine whether or not this expansion of pari-mutuel wagering was permitted under the 1939 referendum in order to permit live pari-mutuel racing at racetracks without further voter approval. The Court held that the 1947 Constitution maintained “the status quo as to gambling, which then consisted solely of pari-mutuel betting at the race track where a horse race was actually being run.”

Thus, the Court held that the Intertrack Wagering Act, permitting simulcasting of races for pari-mutuel wagering, was ineffective until approved by a majority of voters at a general election. Voters in the 1985 general election then approved simulcasting for pari-mutuel wagering.

Likewise in a case that addressed a similar question of gaming expansion and state constitutional law in 1993, the New Jersey Appellate Division and Supreme Court held that the 1976 referendum permitting “gambling games” in Atlantic City was not so broad as to encompass sports wagering, which would require its own voter approval. Following the failure of the New Jersey Legislature to implement a sports wagering scheme pursuant to a limited

32 See Soriano, supra note 9.
34 Atlantic City Racing Ass’n, 489 A.2d at 168.
35 “Simulcast” horse racing refers to the broadcast of generally live horse racing from a horse track to other locations, such as other racetracks, casinos, and off-track betting parlors. Simulcast Racing, HORSERACING.COM, http://www.horse racing.com/simulcast-racing/ (last visited Apr. 8, 2016).
36 Atlantic City Racing Ass’n, 489 A.2d at 167–69.
37 Id. at 170.
38 Id. at 167, 174.
39 See Lehne, supra note 21, at 58.
exception in the Professional and Amateur Sports Protection Act, the operators of the licensed casinos in the state sought a determination from the New Jersey Casino Control Commission that the original wording of the constitutional amendment that first legalized “gambling games” in Atlantic City also permitted the New Jersey Casino Control Commission to authorize the casinos to offer sports wagering. The New Jersey Casino Control Commission determined that it did not have the authority to authorize sports wagering, and the casino operators appealed. The Appellate Division affirmed the determination of the New Jersey Casino Control Commission and recognized that New Jersey has hewed to a “step-at-a-time approach to the introduction of legalized gambling.” The court went on to note that “[t]he introduction of various forms of legalized gambling into this state has always been by specific constitutional amendment,” which had not been done for sports wagering in the state.

It is likely that the logic of the New Jersey Supreme Court in these cases would apply with syllogistic force to instant horse wagering. The random races that determine the outcome of games played on these devices are based on previously run races, not live races, nor are they based on actual-time simulcasting of those races. Voters simply did not contemplate instant horse wagering when they approved live and simulcast pari-mutuel wagering on horse races in the state and New Jersey courts have narrowly construed the scope of prior expansions of gambling. The Legislative Committee’s proposed plan to place these devices under the auspices of Internet wagering regulations already in place in New Jersey and to redefine, in a constitutional sense, the definition of horse racing after the fact, only reinforces the idea that instant horse wagering is not a “specific kind” of gaming for which “restrictions and control” have already received voter approval. While instant horse wagering devices may be based on historical horse races, they are simply

41 The Professional and Amateur Sports Protection Act, commonly referred to as PASPA, 28 U.S.C. Ch. 178, is a federal law that prohibits state-sponsored sports wagering in the United States, with certain exceptions. 28 U.S.C. §§ 3702, 3704(a) (2014). One such exception is contained in 28 U.S.C. § 3704(a)(3), which by its terms could only apply to casinos located in Atlantic City, New Jersey. See § 3704(a)(3). The exemption essentially gave New Jersey a one-year grace period to opt-in, but the state failed to do so, which lead to the litigation discussed above. See id.; In re Petition of Licensees, 633 A.2d at 1050.
42 In re Petition of Licensees, 633 A.2d at 1050–51.
43 Id. at 1050.
44 Id. at 1053.
45 Id. at 1054.
46 See Soriano, supra note 9.
47 See Atlantic City Racing Ass’n v. Att’y Gen., 489 A.2d 165, 167–69, 174 (N.J. 1985); In re Petition of Licensees, 633 A.2d at 1052, 1054.
48 See supra Part III.
not the same as live and simulcast pari-mutuel wagering.\textsuperscript{49} They are slot machines with a different kind of random number generator that would need specific voter approval to be permissible in New Jersey.\textsuperscript{50} The implementation of instant horse racing without voter approval would likely be found unconstitutional because it would violate the constitutional requirement of a gradual, step-by-step expansion of gaming by voter approval.\textsuperscript{51} Absent a specific constitutional amendment approving instant horse racing, New Jersey courts are likely to leave the status quo in place.

IV. CONCLUSION

While it is likely that a New Jersey court would rule that instant horse wagering terminals would need voter approval in a statewide referendum, it is not to say that New Jersey should not move forward with legalization. The New Jersey horse racing industry is a vital part of the state’s economy, with an estimated $1.1 billion annually in positive impact on the economy in 2007, including agriculture and open-space preservation.\textsuperscript{52} However, the industry has suffered in recent years, with two racetrack closures in the state.\textsuperscript{53} It is important for state legislators to consider new and innovative ideas, such as instant horse racing, that keep New Jersey’s gaming industry competitive and on the forefront of technological innovation, all while supporting key aspects of the state’s economy.

What can New Jersey do now to move forward with permitting instant horse racing? The most obvious way would be for the New Jersey Legislature to place the question of permitting instant horse racing terminals on the ballot.\textsuperscript{54}

\textsuperscript{49} The fact that these machines are based on previously run races poses an additional issue that would require regulatory reform. Current regulations for horse racing in New Jersey require that all wagering on a race “shall cease not later than off-time.” N.J. ADMIN. CODE § 13:70-29.20 (2016). “Off-time” is defined as “the moment at which, on signal of the starter, the horses break and start to run.” N.J. ADMIN. CODE § 13:70-2.1 (2016). Under these current regulations, a wager cannot be placed on a race after off-time. \textit{Id.}; N.J. ADMIN. CODE § 13:70-29.20. Thus, these regulations would need to be amended to permit the placing of wagers after off-time on previously-run races used in instant horse racing devices. \textit{See} N.J. ADMIN. CODE § 13:70-2.1; N.J. ADMIN. CODE § 13:70-29.20.

\textsuperscript{50} \textit{See supra} Part III.

\textsuperscript{51} \textit{See In re Petition of Licensees,} 633 A.2d at 1053.


\textsuperscript{53} Brubaker, \textit{supra} note 3.

\textsuperscript{54} Another option would be to include the question of permitting instant horse
New Jersey voters have consistently approved expansions of legalized gambling in the State, and there is no reason to believe that the electorate would choose differently with instant horse wagering. Another possibility that has been discussed, as mentioned earlier, would have the instant horse wagering placed on terminals at the racetracks and off-track betting facilities and flow through the casinos in Atlantic City, similar to the way internet gambling works in the state.\footnote{Jennifer Bogdan, ‘Instant Racing’ Could Renew Demand for Horse Wagering, PRESSOFATLANTICITY.COM (Dec. 11, 2013, 2:30 AM), http://www.pressofatlanticcity.com/news/press/atlantic_city/instant-racing-could-renew-demand-for-horse-wagering/article_7c032daf-d964-566c-a9ce-48b985123c8a.html. Under this plan, racetracks and off-track betting facilities in the state could partner with a casino in Atlantic City, similar again to how Internet casinos are operated in the state. See id.} Under this plan, a racetrack or off-track betting facility could have a designated area for the instant horse wagering terminals, but the bets would actually be made through servers physically located in Atlantic City.\footnote{See id.} One concern with this plan is that the operators would need to ensure that the designated instant horse wagering terminal areas do not resemble so-called “cyber-gaming cafes,” which was a concern when internet gambling was first legalized and could potentially catch the eye of gaming regulators in the state.\footnote{See Juliet Fletcher & Donald Wittkowski, Gov. Chris Christie Vetoes Online Gambling Bill, Citing Constitutional Concerns, PRESSOFATLANTICITY.COM (Mar. 3, 2011, 7:45 PM), http://www.pressofatlanticcity.com/news/breaking/gov-chris-christie-vetoes-online-gambling-bill-citing-constitutionalconcerns/article_03b33450-45b6-11e0-9099-001cc4c03286.html.}

While there are clear constitutional barriers to instant horse wagering terminals operating outside of Atlantic City as stand-alone devices, New Jersey has a number of options to choose from. No matter how New Jersey decides to move forward, it is critically important that it is done in a way that comports with the State Constitution and in a transparent manner in order to preserve the integrity and public confidence of the entire gaming industry in the state.