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Gambling Bill Is Questioned On Constitutional Grounds

Legality of Slot Machines Is a Key Question

By RICHARD PÉREZ-PEÑA

ALBANY, Oct. 25 — The sweeping gambling bill passed Wednesday night by the Legislature is likely to be tied up in court for years, with opponents, some state lawmakers and legal experts saying that it might violate the State Constitution's restrictions on gambling in several ways.

The measure's defenders, including Gov. George E. Pataki's office, insist it will hold up in court. But even some legislators who voted for it say it might fail legal tests.

And if, as opponents hope, the courts rule that the slot machines permitted by the measure are unconstitutional, New York could end up with six new Indian-run casinos, and no revenue at all for the state.

Supporters say the state desperately needs the tax revenue that new gambling will generate — estimated by different camps at $300 million to more than $1 billion a year — particularly after Sept. 11.

Yet many lawmakers said they voted for the bill with great reluctance. These legislators, Democrats and Republicans, said they could not turn down either the spending on various programs that were included in the bill, or the chance to help the economies of depressed areas.

The bill approves six Indian casinos in the Catskills and western New York and declares slot machines legal for Indian casinos. The only state revenue from the proposed Indian casinos would come from slot machines. Without them, the state gets nothing.

The bill also permits horse-racing tracks to install video lottery terminals, and authorizes New York to join the Powerball lottery.

If successful, it would be by far the broadest expansion of legal gambling since the state lottery began in 1966, and would vault New York to the front rank of gambling states.

Donald J. Trump, whose Atlantic City casinos would lose money to New York competitors, said he would probably challenge — or help challenge — the law in court. He said he was also considering an advertising campaign against the gambling initiatives.

Others say they also plan to sue, including the Saratoga Chamber of Commerce, which fears a loss of tourist dollars; a handful of legislators; and anti-gambling groups.

Michael McKeon, a Pataki spokesman, said he would not be surprised by suits. But, he said, "We believe that we are on very solid ground."

State Senator Frank Padavan, a Queens Republican, said, "I'm convinced that the whole thing is unconstitutional," a view echoed by many who opposed the bill.

The Senate also voted to amend the State Constitution to legalize casino gambling — a tacit admission, many members of the Republican majority said, that the gambling bill was legally vulnerable. The proposed amendment would have to clear several hurdles to become law, and previous attempts at such an amendment have failed.

A central question in any court fight will be the legality of slot machines. A passage in the State Constitution since 1938 has been widely interpreted as banning them, and in 1994, G. Oliver Koppell, then state attorney general, issued a formal opinion to that effect. But the provision has never been tested in court.

The relevant part of the Constitution, Article 1, Section 9, never actually mentions slot machines. It forbids gambling, but makes several exceptions, like horse race betting and low-stakes games run by religious and charitable groups.

"None of the constitutional provisions on their face even purport to bar slot machines," said James McGuire, counsel to Mr. Pataki.

More important, he argued, it does not matter what the State Constitution says, because it is superseded by a 1988 federal law. That law says that when a state allows casino-style gambling, even under limited conditions, it cannot prohibit Indian tribes from using such games.

That means, Mr. McGuire contends, that because New York allows charities and churches to hold low-stakes casino nights, it cannot forbid Indian casinos to operate slots.

But the 1990 case that tested the scope of that law dealt with a state, Connecticut, that did not have constitutional provisions like New York's, a distinction that gambling opponents say would carry considerable weight in court.

Another legal question involves video gambling machines, which New York's two existing Indian casinos, both upstate, have instead of slots. Gambling opponents argue that video gambling machines are just electronic slot machines, and are also prohibited.

Even some who voted for the measure say it might fail legal tests.

That, too, is a question that has never been tested in court. If the courts prohibit slots, the casinos can switch to video machines. But if the courts ban both kinds of machines, gambling experts say, no casino can survive. Slot machines — or, in their absence, video gambling machines — are by far the biggest moneymakers for casinos.

The bill approved Wednesday allows Aqueduct, Yonkers and Monticello raceways, as well as some upstate tracks, to install video lottery terminals, similar to video gambling machines in casinos and likely to face the same legal challenges.

The bill says the horse tracks will receive 12 to 25 percent of the take from their lottery terminals, far higher than the 6 percent paid to other lottery vendors. But it requires that the tracks use 45 percent of their cut to increase race purses.

"That's nothing but an attempted end-run around the State Constitution's requirement that lottery revenues go to education," said State Senator Eric T. Schneiderman, a Manhattan Democrat.

Another legal question concerns Powerball. The State Constitution says that only "lotteries operated by the state" are permitted. Powerball is operated by the Multi-State Lottery Association: 21 states and the District of Columbia.

Opponents say that makes joining Powerball unconstitutional. Supporters disagree, noting that New York's own lottery would carry out the games within the state.

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