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Dalton v. Pataki Meets Justice Teresi

On July 17, 2003, Justice Teresi of Supreme Court in Albany County issued his long awaited decision in Dalton v. Pataki (also known as Saratoga II) This was the overall challenge by gambling opponents to the provisions of Chapter 383 of the laws of 2001 which created a video lottery program for certain racetracks, authorized six Indian casinos, and permitted New York State to enter into a multi-state lottery game. Justice Teresi had earlier in October of 2002 found that all the plaintiffs' claims stated causes of actions.

Justice Teresi's decision came approximately a month after the Court of Appeals made its decision in Saratoga I. In Saratoga Chamber of Commerce v. Pataki the Court by a 4-3 vote found that legislative approval was necessary for a gaming compact between the State and the St. Regis Mohawk tribe. Since the legislature had failed to approve the compact, the compact was invalid. The plurality three judge decision of the Court of Appeals, written by Judge Rosenblatt, refused to decide the ultimate constitutional issue of whether Indian gaming was permissible under the New York State Constitution. While joining the majority analysis, Judge Smith, writing for himself, also found Indian casinos to be unconstitutional. In a vigorous dissent, Judge Read, writing for two other judges, found the Indian casinos to be legal under the Constitution. Thus, there appeared to be a 3-1 vote (with three judges abstaining) on the question of whether the State Constitution authorized Indian gaming.

The failure of the Court of Appeals to render a decision on the decisive constitutional issue of whether gambling could be expanded in New York State squarely put the ball in Justice Teresi's court. Justice Teresi had at the outset of Saratoga I in 2000 ruled against the plaintiffs and in favor of Indian casino gambling. Justice Teresi had found that the tribe was an indispensable party in the case. The Third Department, Appellate Division then overruled Justice Teresi, finding that the tribe was not an indispensable party. See Saratoga County Chamber of Commerce Inc. v. Pataki, 275 A.D.2d 145 (3rd. Dept. 2000). Having been burned previously on a related case, Justice Teresi may have been looking for some guidance from the Court of Appeals before he made his decision in Saratoga II.

He apparently viewed the Court of Appeals decision as a green light for authorizing further gaming, for in a terse conclusory decision, he ruled against the plaintiffs (the opponents of gambling expansion) on all their claims. It may be that Justice Teresi's decision was a realistic one. (In fact some of the attorneys associated with the defendants had voiced the legal realism rationale that the gambling expansion legislation would be found constitutional because a court would find the legislation to be necessary to preserve the fiscal health of the State.) It was not however, a model of judicial writing. Justice Cardozo has nothing to worry about. The legal reasoning was at best perfunctory, but as far as the defendants were concerned, the results trumped the logic.

First, Justice Teresi found that the Governor's message of necessity satisfied Article III, Section 14 of the New York Constitution. The Governor in his message of necessity had simply said the 'bills are necessary to enact certain provisions of law.' Justice Teresi after quoting a long passage from Finger Lakes Racing Association v. New York State Off-Track Pari-Mutuel Betting Commission 30, NY 2d 207 (1972) found that the Governor's action "literally and reasonably conforms with the constitutional requirements ... of the State Constitution."

On the Indian casino issue, Justice Teresi viewed his options as choosing between either Judge Smith's concurring decision or Judge Read's dissent. "After careful consideration," Justice Teresi chose Judge Read. He then stated "this Court will rely on that decision in ... authorizing the Governor to enter into compacts with Indian tribes to operate gaming facilities..."

On the constitutionality of video lottery terminals, Justice Teresi first noted the strong presumption of constitutionality enjoyed by State legislation. Then based on the definition of a video lottery terminal in the request for proposal issued by the Division of the Lottery, the justice found that VLT's are randomly and immediately drawn from the video lottery central system and that video lottery terminals would be "linked electronically to allow players to compete against other players." These distinctions allowed Justice Teresi to distinguish VLT's from illegal slot machines.

The VLT issue also involved the requirement that the net proceeds of a lottery must support education. Justice Teresi again ruled for the State finding that it was up to the legislature to determine net proceeds, and it was not irrational to authorize a vendor fee.

Finally, on the multi-state lottery, Justice Teresi concluded that the State "indeed operates the multi-state lottery within the state and retains sufficient control of all aspects under the Mega Millions Agreement to make this agreement consistent" with the State Constitution.

To the State and the many private defendants who wish to conduct expanded gaming, this decision will be akin to a hit in baseball. The decision may in actuality have been a poorly hit Baltimore chop, but it's a sizzling base hit when you look at the box score.

There are, however, numerous reasons why the decision is still a Baltimore chop. Overlooking the fact that the July decision represents a total 180 degree reversal of Justice Teresi's October opinion, each aspect of the decision contains elements that invite criticism.

1. The Message of Necessity – This part of Justice Teresi's decision is probably his strongest element. He actually makes a finding that the message of Governor Pataki literally conformed with the requirements of the Constitution. The problem here is that literally the Governor's message may not have

“certified ... the facts which in his opinion necessitate an immediate vote.” In the instant case, the Governor simply said that the “the bills are necessary to enact certain provisions of the law.” (In his opinion, Justice Teresi does not mention what was actually contained in the message of necessity.) No facts were certified in the Governor’s message. Instead of relying on the literal compliance by the Governor with the message of necessity language in Article III, Section 14, Justice Teresi may have been better off referencing the cases which make the Governor’s message of necessity unassailable. See generally, Karin A. McArthur, “ Messages of Necessity as Proscribed by the New York State Constitution,” <http://www2.als.edu/glc/wagering/messageofnecessity.pdf>

2. The Indian Casinos – On this topic, other than referring to his “careful consideration,” Justice Teresi simply opts for Judge Read’s dissenting opinion in *Saratoga I* rather than Judge Smith’s concurring opinion. No other reasons for his opinion are offered by Justice Teresi. As peculiar as it might be to base an opinion on a dissent from an appellate court, the absence of any rationale for the choice of opinions is most striking. It almost reads as if the decision was reached on a eenie-menie-minie-mo basis.

By simply citing and quoting Judge Read’s opinion, Justice Teresi dodges one of the detail questions raised by Judge Read. Judge Read in her dissent stated, “We note, however, that the question is not whether these games may be characterized as Las Vegas-style or commercialized gambling, but whether a particular game is a ‘game of chance’ or ‘lottery’ within the meanings of those terms in our Constitution and laws, and requires a detailed analysis of how each game is played.” Note 10.

Justice Teresi simply avoided this issue and made no findings as to the nature of the gambling games that can legally be conducted by the Indian tribes. On appeal, a court will likely be forced to deal with these game-by-game issues. This is hardly a minor issue. A court might find that a tribe in New York can conduct table games such as blackjack– which are generally authorized by the State’s games of chance law – but might not be able to utilize slot machines. This is particularly troublesome because in his analysis of VLT’s, Justice Teresi implies that slot machines, as he understands them, are illegal. If slot machines are illegal, then the tribes can’t have them. The moneys to be received by the State from the tribes are predicated on the tribes having exclusivity on slot machines. If the tribes have no slot machines, there is no State revenue flow.

3. VLT’s – Justice Teresi relies on the RFP issued by the Lottery Division to find that the VLT’s are distinguishable from slot machines and are therefore legal. His basic points of distinction are that under the RFP (How an RFP defines the reach of the statute is not addressed by Justice Teresi.) the players compete against other players and the results are randomly and immediately drawn from the VLT central system. Since Justice Teresi never defines either

a slot machine or a lottery, it is difficult to determine how these elements fit in with the notions of lotteries or slot machines. However, as articulated by Justice Teresi, these distinctions have some logical problems.

If a lottery, in contrast to a slot machine, involves players competing against each other, how do you define a progressive slot machine? In a progressive slot machine game, a number of machines are linked together, and the players on these machines compete for a large pooled prize as well as for a series of minor prizes. It is not unlike the Mega Millions game which has fixed prizes for smaller winning tickets but increases the main jackpot prize based on the overall pool size. These players in a progressive game are playing against each other for the jackpot, and under Justice Teresi's distinctions, this would amount to a lottery rather than a slot machine.

Moreover, if a lottery requires that players play against each other rather than against the house, what becomes of the current New York lottery games involving numbers or Win 4? Here, the players pick either three or four numbers and receive a fixed odd return from the State. The players are playing against the house and not each other. The Numbers and Win 4 games contribute more than \$450 million to State revenues each year, and if a lottery requires players playing against each other, these games are invalid. The bettors are playing against the State.

If immediacy and randomness of results are essential for a lottery, then most slot machines would qualify as lotteries since they provide both immediacy and randomness. However, some of the existing lottery games –such as Lotto - which provides for a drawing which can take place days after the ticket is purchased do not have any immediacy. There is no immediacy even after the Lotto drawing is completed since it normally takes several hours to determine the payouts to the holders of winning tickets. Justice Teresi's analysis of the distinction between a lottery and a slot machine raises more questions than it answers.

Justice Teresi also in his analysis of the net proceeds issue of the lottery avoids a decision on how vendor receipts are to be divvied up. Under the State Constitution, net proceeds of a lottery are required to go to education. By simply allowing the legislature to determine net proceeds and authorize a vendor fee, the decision avoids part of the central focus of the plaintiff's attack. The plaintiffs claimed that it was improper for the vendors' fee paid to the racetracks to be shared with the State's horse breeders and the horsemen at the track via higher purses. The breeders and the horsemen did none of the vending. The decision simply avoids the issue of whether the State can evade the net proceeds issue by having the vendors share part of their fees with non-education related entities. If in fact, it is this simple to evade the net proceeds requirement, the State may wish to reexamine the vendors' fee and expand it to give a share of revenue to an assortment of other entities that might

reasonably be impacted by gambling expansion. Thus, the racetracks might share the vendor fee with organizations that provide treatment – rather than merely educational services – to problem gamblers, and to localities that might be affected by increased traffic to their racetracks.

4. Multi-State Lotteries – The State Constitution requires that a lottery must be “operated by the state.” Article I, Section 9, State Constitution. Here, without any analysis of the facts, the decision finds that the Lottery Division operates the Mega Millions game in New York and that it has sufficient control over all aspects of the Mega Millions game that there is no violation of the Constitution.

Justice Teresi’s decision may well be correct, but normally, you need to find the facts to make this type of determination. Here, there has been no trial and no recitation of the facts that might have been the basis of Justice Teresi’s opinion. In those states, where a multi-state lottery has been found constitutional, there normally has been a trial or a stipulation of facts followed by a detailed analysis of the facts which allowed the court to find that the lottery was operated by the state. Courts have struggled with the issue of whether a state could pay expenses to multi-state organization, whether it could pay out awards to individuals who purchased tickets in other states, whether the state lottery could agree to be bound by rules of a multi-state organization, and whether the state lottery could withdraw from a multi-state agreement. See Tichenor v. Missouri State Lottery Com., 742 S.W.2d 170, (Mo. 1988); State ex rel. Ohio Roundtable v. Taft, 2003 Ohio 3340 (Ohio App. 2003); “Colorado Officials Plan to Hold Trial of Powerball Case in Pueblo, Not Denver, The Pueblo Chieftain July 17, 2001, Powerball Challenge Headed To Pueblo,” Rocky Mountain News, July 26, 2001. Justice Teresi avoided any of the fact-finding and any of the analysis. He simply found that Mega Millions was legal in New York State

Justice Teresi has composed what has to be viewed as a practical, non-analytical decision which appears to be based on his view of how the higher courts in New York State will eventually deal with issues of expanded gambling presented by Chapter 283 of the Laws of 2001. While there are no major misstatements of fact, and the decision is far less objectionable than Judge Smith’s concurring opinion in Saratoga I (See “Judge Smith, Legal History and Saratoga Chamber v. Pataki,” <http://www2.als.edu/glc/wagering/judgesmith.pdf>.) the decision falls short of any reasoned analysis of the issues. In the long run, some of Justice Teresi’s statements on video lotteries are bound to raise more questions than answers. Let’s hope that the appellate courts in New York provide a more authoritative evaluation of the issues than Justice Teresi and turn a Baltimore chop into filet mignon.

N.B. I worked for the State Assembly at the time of the passage of this bill, and I worked on much of the legislation that has been questioned in the law suit. Bennett Liebman