

## Convenience Stores Sue Over 50-50 Gaming Split

A group of convenience store owners are fighting a new state law regulating coin-operated video gambling machines that demands they give 50 percent of the machine's profits to the machines' owners.

The store owners recently have shifted their battleground, dropping a federal suit and re-filing a similar one in Fulton County Superior Court.

According to documents in both suits, the storekeepers have no particular quarrel with most of the requirements of House Bill 487, which transfers regulation of the machines from the Department of Revenue to the Georgia Lottery Corp. The law also steers part of the machines' profits to the lottery, requires annual registration and licensing of the machines and the store operators, and maintains a ban on cash payouts—allowing only lottery tickets and vouchers for merchandise to be awarded, with the exception of tobacco and alcohol.

But the plaintiffs—a consortium of store owners known as "Commoditas Georgia" that formed this year, and 23 individual store owners—object to the law's requirement that written contracts guarantee a 50-50 split of net profits between stores and the machines' owners. The plaintiffs say the rule violates their constitutional "rights to contract and engage in a free market of commerce."

"Prior to the enactment of HB 487," the complaint said, "contracts between owners and operators could be in writing, but frequently the contracts were not in writing."

"Each operator was free to negotiate the percentage rate that would be paid to the owner of the machine," it said. "Percentage rates that would be paid to owners ranged from 10% to 30% of the net revenue of each machine. Prior to the enactment of HB 487, no plaintiff paid an owner 50% of the net profit."

The Commoditas website says it agrees that the law's requirement that 5 percent of any video gambling profits go to the lottery—increasing by 1 percent a year for five years, when it will be capped at 10 percent—"is of vital interest and supports this aspect of the law. We believe that the Legislature should enact the portions of HB487 that comply with American principles of free trade, economic liberty and freedom to contract, while supporting the Georgia Lottery in the process."

The Fulton County suit, filed Oct. 15 by former Houston County District Attorney Kelly Burke of Warner Robins' Burke Lasseter and Macon solo Charles Cox Jr., names Gov. Nathan Deal and Attorney General Sam Olens as defendants. The complaint argues that the law violates the U.S. Constitution's Contract Clause, which bars the state from passing any law "impairing the obligation of contracts," and the Georgia Constitution's due process protections and restriction on any "laws impairing the obligation of contract or

making irrevocable grant of privileges."

The plaintiffs ask the court to declare the law unconstitutional and enjoin its enforcement.

Neither Burke nor Cox replied to requests for comment, and a spokeswoman for Olens said the department had not been served with the new complaint.

On June 25, Burke and Cox filed a similar suit on behalf of Commoditas in U.S. District Court for the Northern District of Georgia seeking an injunction and temporary restraining order halting the law's July 1 enactment.

In that case, the Georgia Amusement and Music Operators Association, or GAMOA, entered an appearance and filed an amicus brief opposing the store owners and supporting the law.

During June 28 arguments before U.S. District Judge Harold Murphy, Cox argued that there is no public interest in regulating how the machines' profits are split.

"This is a regulated industry, but prior to House Bill 487, none of the regulation has operated to take money from one private party and give it to another private party," Cox is quoted as saying in a transcript.

"[T]he coin-operated amusement machine business is not a business that's affected with the public interest, which is required before a statute like this can withstand public scrutiny under the due process clause because it, essentially, is price fixing. It establishes the price or the cost that these operators have to pay to be able to lease or use machines from the owners."

"Obviously GAMOA has an interest in this," Cox added. "They represent the owners, they represent the entities that now are guaranteed to get half of plaintiff's net receipts from the operation of these machines."

Assistant Attorney General Devon Orland and **GAMOA attorney Josh Belinfante** argued that, because the use and operation of the machines has been regulated for many years, the state is entitled to continue such regulation as it sees fit.

The Contract Clause claim, they said, could not stand because Commoditas is a newly formed organization and could not claim to have any pre-existing contract with anyone.

"Plaintiff hangs their hat on the allegation that the 50/50 split is unreasonable, per se, and that the State doesn't have an interest in it," Orland said, according to the transcript.

She said the purpose of the split was to allow the state to keep up with how much money came in to the machines.

"The argument is that there's a lot of cash going in these machines," Orland said.

"With the mandate for written contracts and the 50/50 split, she said, "the state can track the money that's going in, ensure that there's no fraud, there's no money laundering, there's no tax evasion, and ensure there are no cash payouts."

**Belinfante, a partner at Robbins Ross Alloy Belinfante Littlefield**, said that "as to the argument that, well, the State should have done something other than 50/50, it is both State and federal law that the State solution does not have to be perfect ... . So the fact that it's not 70/30 or 60/40 doesn't matter as long as

there's a rational basis as to how it got to 50/50 as was articulated by the Attorney General, then it should survive."

Murphy is quoted as saying he was "surprised, really, to see the distribution of funds required by the statute," but he declined to grant the TRO. His written order observed that it "appears that Defendants have valid, legitimate interests in enacting the law. Moreover, whether any impairment that HB 487 works on Plaintiff's contracts is of an appropriate nature and is based on reasonable conditions is a particularly tough issue that the Court cannot yet resolve."

"In sum," it said, "the Court simply cannot conclude at this point that Plaintiff has a substantial likelihood of succeeding on the merits of its Contract Clause claim."

The plaintiffs voluntarily dismissed their case Aug. 20.

Belinfante reviewed a copy of the Fulton County suit at the Daily Report's request, and said he and his client, GAMOA, were still discussing whether to intervene in that case as well.

"But I can speak to our position in the prior case," Belinfante said. "Our position was that the Legislature was within its rights to pass the law as it was written. There are some things we like, and some others we may not like. The question is not whether it was good idea, but whether it was constitutional."

"It seems to me and to Judge Murphy that it was constitutional, and it's telling that he refused to issue a TRO," said Belinfante.

Jim Tudor, president of the Georgia Association of Convenience Stores, said he was aware of the federal suit and that his organization had taken no position on it. But he noted that the GACS had strongly supported HB 487 from the time it was introduced, and he said his board of directors had voiced no objection to the profit-splitting measure.

Very few of our members had the video games in their stores anyway," Tudor said. "Most of our members are larger—Quik-Trip, RaceTrac—so the revenue split was not really an issue to our members, because we weren't getting any revenue anyway."

Tudor said some of the group's smaller members had expressed concerns when the bill was being crafted, but that he had pointed out that the Legislature had long been urged to take up the issue of cash payoffs linked to the video machines, and that there was some sentiment for banning them from the state entirely.

"Every year their whole industry was basically a few votes from extinction," said Tudor. "I was telling them, '50 percent of an existing industry is better than 70 percent of an industry that won't exist anymore.'"

The sponsor of HB 487, State Rep. Matt Ramsey, R-Peachtree City, could not be reached to discuss the bill and litigation.

The case is *Commoditas Georgia v. Deal*, No. 2013CV237746