



# POWER PLAY

## Illinois Gaming Board Granted Exclusive Jurisdiction to Determine Validity of Video Gaming Contracts

By William Bogot



The Illinois Supreme Court (top) held that the Illinois Gaming Board, not the circuit court, has exclusive jurisdiction to determine the validity and enforceability of agreements for the placement and operation of video gaming machines in gaming route locations.

In *J & J Ventures Gaming, LLC et al v. Wild, Inc. et al.*, 2016 IL 119870, the Illinois Supreme Court held that the Illinois Gaming Board, not the circuit court, has exclusive jurisdiction to determine the validity and enforceability of agreements for the placement and operation of video gaming machines in gaming route locations. However, the *J & J Ventures Gaming* decision may have raised more questions than it answered. There is disagreement as to the breadth and scope of the Court's mandate, and questions as to the constitutionality of the Board's emergency rules to implement that mandate.

### Background of the Illinois Video Gaming Act

In July 2009, Illinois enacted the Video Gaming Act (VGA) (230 ILCS 40/1 *et seq.*), which legalized the use of video gaming machines within certain licensed establishments, including bars, veterans organizations, fraternal organizations, and truck stops. The Illinois Gaming Board is charged with licensing and regulating the

industry under the VGA. The video gaming machines the VGA authorizes are similar to those found in Las Vegas and Illinois casinos, and include video poker, video blackjack, and line-up games. Since video gaming machines first went "live" on October 2012, the industry has grown tremendously. As of January 2017, there were over 25,000 video gaming machines in almost 5,800 locations.

The VGA requires that the video gaming machines be owned and operated by licensed terminal operators, who in turn place and maintain the machines at licensed locations. 230 ILCS 40/25. Up to five video gaming machines may be placed in each licensed establishment only if the establishment has entered into a written "use agreement" with the licensed terminal operator for the placement of the machines. 230 ILCS 40/25(e). A "use agreement" is defined as a contract between a licensed terminal operator and a licensed establishment prescribing the terms and conditions for the placement and operation of video gaming machines at the estab-

ishment. According to the IGB's regulations, a use agreement may be assigned only from one licensed terminal operator to another. 11 Ill. Admin. Code 1800.320(d) (2010).

### Hundreds of Overlapping Use Agreements

After the enactment of the VGA, many locations signed putative use agreements with multiple terminal operator applicants. Some bars and other establishments signed exclusive agreements with three or four different aspiring terminal operators, and when these operators all became licensed by the gaming board, litigation ensued in courts across the state over which operator had the exclusive right to place their video gaming machines in the locations.

In *J & J Ventures Gaming, LLC v. Wild, Inc.*, 2015 IL App (5th) 140092, affirmed by *J & J Ventures Gaming, LLC v. Wild, Inc.*, 2016 IL 119870, ¶ 45, an unlicensed operator entered into agreements with various business locations granting it the exclusive right to place video gaming terminals in those locations, and then assigned its rights in those agreements to Action Gaming LLC, an unlicensed terminal operator applicant. The IGB issued a preliminary notice of denial for Action Gaming's terminal operator application, and Action Gaming then sold its rights to the agreements to J & J Ventures Gaming, LLC (J & J Ventures),

a licensed terminal operator. Around the time of this assignment to J&J Ventures, the business locations signed separate location agreements with Accel Entertainment Gaming, LLC (Accel), a licensed terminal operator. Thereafter, J & J Ventures sued in the circuit court seeking a declaratory judgment that it had the exclusive right to operate video gaming machines in the subject locations. Accel intervened and alleged that the location agreements assigned to J & J Ventures were invalid because they did not comply with the Act and the Board's regulations. The appellate court was tasked with determining the validity and enforceability of the exclusive location agreements and the assignments. According to the appellate court:

The central issue in this case concerns whether the exclusive location agreement, entered into between unlicensed entities, can control the placement of video gaming terminals once the agreement is assigned to a licensed terminal operator. Resolution of this controversy necessarily involves a determination of whether the original contract along with the series of subsequent assignments constitute a valid "use agreement" under the Act and under the regulations enacted by the Gaming Board.

*Continued on next page*

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Continued from previous page

*J & J Ventures Gaming*, 2015 IL App (5th) 140092 at ¶ 30. The appellate court decided, *sua sponte*, that only the IGB could make such a determination, and that the gaming board has exclusive jurisdiction over the matter. *Id.* ¶¶ 30–32, 64.

The case was appealed to the Illinois Supreme Court, and at that time the Illinois Gaming Board intervened in the case. The board argued that “[i]t is impossible to declare the agreement between J & J Ventures and Wild valid without first determining whether it meets the standards of a use agreement under the Video Gaming Act and the Board’s regulations,” and that the Board has exclusive jurisdiction to make that determination. The Illinois Supreme Court agreed and affirmed the appellate court decision. According to the Illinois Supreme Court, the legislature’s intent to vest original jurisdiction in an administrative agency may be “discerned” by considering the statute as a whole and whether the legislature enacts a comprehensive statutory scheme that creates rights and duties that have no counterpart in common law or equity. *J & J Ventures Gaming*, 2016 IL 119870 at ¶ 23–24. In this case, the Illinois Supreme Court held:

By legalizing the use of video gaming terminals for commercial gambling purposes, the legislature enacted a comprehensive statutory scheme, creating rights and duties that have no counterpart in common law and equity. Considered in its entirety, this statutory scheme demonstrates the legislature’s explicit intent that the Gaming Board have exclusive jurisdiction over the video gaming industry and the use agreements that are a necessary prerequisite of engaging in that industry. The Act, therefore, confers authority on the Gaming Board to determine the validity and enforceability of contracts that purport to control the location and operation of video gaming terminals within the licensed establishments.

*Id.* at ¶ 32.

**“ There is disagreement as to whether the Illinois Supreme Court’s decision granted the gaming board jurisdiction to determine these additional matters that are traditional common law contract issues. The emergency rules also provide that the petitioner bears the burden of proof by clear and convincing evidence. ”**

### Where Do We Go From Here?

Following the Illinois Supreme Court’s mandate, in February 2017, the Illinois Gaming Board issued emergency regulations<sup>1</sup> for the agency to accept and rule upon disputes as to the enforceability and validity of video gaming use agreements. 41 Ill. Reg. 2704, effective February 24, 2017. According to those emergency regulations, the board shall decide a petition brought by a terminal operator or video gaming location alleging that a use agreement, or portion thereof, is invalid or unenforceable, including whether a use agreement complies with the requirements of the VGA and the corresponding regulations. *Id.* This much appears to be in accord with Supreme Court’s mandate in *J & J Ventures Gaming*. However, the emergency rules also provide that the gaming board shall decide which use agreement will control if there are two or more use agreements between a video gaming location and one or more terminal operators with overlapping periods, whether a terminal operator has used coercion, deception or improper inducement to persuade a video gaming location to enter into a use agreement, and whether any automatic renewal provision in a use agreement constitutes an undue burden on the video gaming location. *Id.* at 2704–2705. There is disagreement as to whether the Illinois Supreme Court’s decision granted the gaming board jurisdiction to determine these additional matters that are traditional common law contract issues. The emergency rules also provide that the petitioner bears the burden of

proof by clear and convincing evidence. *Id.* at 2705. This burden of proof, being higher than it would otherwise be for such contract claims and defenses in the circuit court, may be constitutionally problematic.

In addition, there is a disagreement as to how these procedures will or should be applied. For example, say a video gaming location refuses to allow a terminal operator to place video gaming machines at the location contrary to the parties’ use agreement. Does a terminal operator have to essentially exhaust its administrative remedies and get a gaming board finding that its use agreement is valid as a precondition to court action even when no party is alleging that the use agreement fails to comply with the VGA and the regulations? Or, can a terminal operator file a direct action for specific performance or damages in court, and then only if the defendant files an answer alleging that the use agreement is invalid or otherwise unenforceable does the action get stayed while the parties are required to petition the gaming board for a determination as to the validity or enforceability of the use agreement?

One thing is certain: with all the litigation over use agreements in Illinois since the enactment of the VGA, these disagreements will likely find their way back into court. ♣



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<sup>1</sup> Emergency regulations are good until permanent regulations are adopted, but no more than 150 days.