

Legalized Gaming in Mississippi: A Young Industry with an Eventful History.

By Jay McDaniel¹

The regulated casino industry was born in Mississippi when gaming was legalized just twenty-five years ago. When compared with other large regulated industries in the state – banking, insurance, healthcare to name a few – the gaming industry is still rather young. However, it is an industry that has changed dramatically and endured much during its tenure here, and it continues to change and adapt today. The role that lawmakers, attorneys, regulators and the operators themselves have played in developing a successful gaming industry cannot be overstated. A quick look at the history of gaming in our state is fascinating and highlights many legal and operational challenges that had to be overcome to get the industry where it is today.

Starting from Scratch

Three simple elements are required to engage in gambling: Consideration, chance and reward. *Miss. Gaming Comm'n v. Henson*, 800 So. 2d 110, 113 (Miss. 2001). There are some exceptions for things like charitable games and raffles, but generally, engaging in the three elements can trigger a gambling charge. This is certainly true when an electronic machine or table game is involved. Illegal gaming has long had some presence in this state. In fact, wagering on games of chance has existed in Mississippi in one form or another for centuries dating back to games conducted by Native Americans. However, regulated wagering first made its appearance statewide in the form of a lottery approved by the Mississippi Legislature in 1867.

In 1867 the state was trying to find ways to recover financially after the Civil War. The legislature created the Mississippi Agricultural and Manufacturing Aid Society, and granted that entity the right to conduct lotteries in Mississippi. However, when a new state constitution was adopted two years later it specifically prohibited the legislature from approving a lottery. This of course led to legal challenges as to whether the lottery that was created prior to the 1869 constitution could continue. The United States Supreme Court decided the issue and held that a lottery contract that resulted in the legislature giving up the right to regulate or prohibit a lottery was invalid. *See Stone v. Mississippi*, 101 U.S. 814 (1879). After this brief attempt, state-regulated gaming was nonexistent in Mississippi for the next one hundred years (although local unregulated gaming was quite an industry on the gulf coast for many years before Hurricane Camille).

The explosion of gaming in Nevada in the 1960s and the successful introduction of gaming in Atlantic City, New Jersey in the 1970s gave states a reason to consider gaming as a regulated activity again. Many states viewed gaming as not only a tax revenue generator, but also an entertainment outlet that could enhance tourism and help showcase other attractions in

the state. The first instance of legal *casino* gaming appeared in Mississippi in 1987, but not by legislative enactment. The Europa Star cruise ship created a gaming business by making excursions from Biloxi to waters where Mississippi arguably had no jurisdiction. Legal battles ensued over whether the excursions were permissible, with the Attorney General's office arguing that the 90 minute trip off shore did not take the cruise ship out of Mississippi's waters. It was eventually determined that Mississippi did have jurisdiction over these waters, but the issue was quickly becoming moot thanks to the state legislature.

In 1989 lawmakers decided to allow gambling aboard cruise ships as long as those ships were passing to or from international waters. One year later in 1990 the state enacted much broader legislation known as the Gaming Control Act. The Gaming Control Act created the framework to establish the Mississippi Gaming Commission and legalizing dockside gaming along the Mississippi River and coastal counties. *See* Miss. Code Ann. § 75-76-1, *et seq.* Prior to the passage of the Act, many found it inconceivable that such legislation could get passed in the Bible Belt, and found it even more implausible that such an industry could thrive. The doubters were wrong.

The “Mississippi Miracle”

When gaming was first legalized in this state, many believed that the casinos that would follow would resemble the old riverboats that once patrolled the Mississippi River and its waterways. After all, the legislation to pass dockside gambling used words like “cruise vessel” and “navigable waters.” Few expected the large resorts and entertainment options that are here today. While the early operators did use large barges that were quickly moved and moored into gaming sites, it quickly became apparent that gaming was going to be hugely popular in the area and plans were made by developers to do anything they could to make their operations more permanent. Fortunately for the operators, the Gaming Control Act was not so restrictive that these large-scale developments could not be achieved.

Other than the qualifications about locations and structures, the rest of the Mississippi Gaming Control Act was modeled after Nevada's gaming statutes and regulations. Nevada has always been regarded as the domestic expert on the subject, and it was a good idea to emulate its regulations which had cleaned up the industry in the state. However, Mississippi did not have near the number of gaming experts, and was ill-prepared for what would follow shortly. In 1992 four legal casinos appeared in Mississippi within a span of three months. The first dockside casino appeared in the state on August 1, 1992 when the Isle of Capri – Biloxi opened. Two other casinos, the President Casino in Biloxi and the Biloxi Belle, opened that same August. In October 1992 the Splash Casino became the first casino in Tunica County. Upon opening the casino charged an entry fee just to get into the casino, and there were still lines to get inside. The Splash Casino had so many visitors that it had to be temporarily closed at one point just so all of

the money in the count room could be counted and moved to the bank to make room for more. This was an early sign that Tunica had serious potential.

In October 1993 the Mississippi Gaming Commission was formed and took over the primary role of regulating the casino industry (prior oversight was by the tax commission). By early 1994, 19 casinos had opened in Mississippi. By the end of that year over 30 had been opened. Also in 1994 the Silver Star casino opened in Neshoba County, thanks to a compact entered into by the State and the Mississippi Band of Choctaw Indians. Many coined the statewide gaming expansion as the “Mississippi Miracle.” Expectations were tempered early, but by 1994 a state budget surplus was recognized and some credit for the surplus was given to the introduction of gaming into the State. Regulators and state officials were not the only ones trying to control what they had on their hands. Likewise, gaming attorneys that were new to the concept of regulated gaming were having to guide their clients through the rigorous process of applying for gaming licenses, getting gaming equipment approved and licensing individuals that were associated with these gaming companies. Many of the members of the gaming section of the Mississippi Bar were guiding the mergers, acquisitions and reorganizations as casinos entered the marketplace and changed hands.

This was also a time that saw some legal maneuvering to clarify just where the casinos could be located. The relevant statutes and regulations mandated that gambling was only legal on a vessel or cruise vessel as defined in Mississippi Code Ann. § 27-109-1. For the river counties, the vessel had to be on the Mississippi River or its navigable waters within any county bordering on the Mississippi River. Thus, the question for many applicants became “where can I put my vessel and still be on the Mississippi River?” The river of course rises and falls, and what appears to be the shoreline one week may no longer be the shoreline the next week. It was eventually determined that a vessel could be placed anywhere within the bank-full stage of the river where there was a suitable, navigable waterway. The bank-full stage is an established stage at a given location along a river that represents the maximum safe water level that will not overflow the river banks. Thus, in Tunica especially, operators were able to use waterways that extended off of the main river channel but that were still within the bank-full stage of the river itself. This was an important step for the industry because it allowed larger vessels to be moored in these waterways without the worry of the constant rising and falling of the main river channel itself. Such a determination is what allowed the larger resorts to be built in Tunica with hotels and other amenities next to the vessels themselves.

Also in the mid-1990s a legal issue was boiling in Warren County over whether another navigable waterway was an appropriate site for a casino. Developers wanted to build a large casino in eastern Warren County along the Big Black River not far from Interstate 20 and in much closer proximity to Jackson than the Vicksburg casinos were. The developers argued that the Big Black was a navigable waterway of the Mississippi River. Because it was still in Warren County, it was in a location where gaming was legal even though it was not immediately

adjacent to the Mississippi River. As you can imagine opposition arose over the legality of the location, much of it from casinos that were already operating in Vicksburg. Ultimately the Mississippi Gaming Commission decided that while the site technically fit the definition of a legal site it was not a suitable site for gaming, citing several concerns over what a major development could do to that portion of the river environmentally and otherwise. While appeals followed, the Mississippi Supreme Court upheld the commission's decision. *See, generally, Mississippi Gaming Comm'n v. Pennebaker*, 824 So.2d 552 (Miss. 2002) (finding that the Mississippi Gaming Commission's determination that the planned casino site was not suitable for gaming was supported by substantial evidence).

Enhancing the Product and Beating the Odds

By the late 1990s the market began to stabilize and the casinos matured into more than just a short-term idea. Larger structures were built and amenities added. Numerous individuals worked to make sure the developing product could flourish and grow. During this time Captain Robert C. Engram, Commissioner helped developed a regulation requiring operators to bring more than floating vessels to their gaming sites. Having the foresight to recognize that any number of factors could suddenly make an operator up and move their operation, Commissioner Engram and his fellow commissioners instituted infrastructure regulations in 1999 that required any new casino development to spend an equal amount of money on additional infrastructure as they did on the gaming areas themselves. This regulation helped give rise to more hotel rooms, golf courses, marinas and other amenities that many of the properties have today. Larger amenity driven properties were built like the Beau Rivage that opened in 1999 and the Hard Rock in Biloxi that was finished in 2005.

More work was done during the 2005 legislative session when lawmakers addressed concerns that gaming vessels might need extra protection from hurricanes on the gulf coast or floods on the river. The legislature passed a law that allowed casinos to elevate their barges on pilings or take other engineering measures to protect against storm surges or floods. These protective measures were implemented so that the barges could withstand weather events, but the law did not allow the casinos to be moved to new locations. This measure was a big step to show the industry that Mississippi was not ignorant to their concerns, and that our state wanted to see the industry thrive and remain competitive. Unfortunately, before any casino could take advantage of the new measure, August 2005 brought a storm event that no casino on the gulf coast was prepared for and that required even more action by lawmakers.

After Hurricane Katrina, not one casino was left operational on the gulf coast. Like most everything within view of the coastal beaches, the casinos were destroyed. Not only were they destroyed, but as the barges were lifted off of their moorings and floated inland, they destroyed much of what was left in their path. For the casinos to come back with an improved product it would take more than just rebuilding. Measures had to be taken to help ensure such a

catastrophe didn't happen again. Not only were some of the largest employers on the gulf coast out of operation, but the state was losing valuable tax revenue every day.

Within weeks Governor Haley Barbour called a special session to address hurricane recovery, with one of the major issues being how to assist the casino industry in recovery. After much debate, lawmakers determined that an adjustment of a few hundred feet would allow the properties to rebuild in a more permanent manner and still be consistent with the original concept of dockside gaming. The phrase "shore-based gaming" was promoted by the operators to point out that this was not a move to expand gaming all over the state, but merely to allow permanent structures within sight of the water to avoid another devastating event. Lawmakers approved the measure to bring casinos onshore 800 feet from the mean high water line of state waters, and Governor Barbour signed the bill into law on October 17, 2005. The new law was carried out swiftly and with much thought, and allowed the coastal casinos to return in better form and without great expansion of gaming across the state that many feared at the time.

In addition to Hurricane Katrina, the last decade saw many events that altered the state of gaming in this jurisdiction. Just as Mississippi saw its highest gaming revenues hit almost \$2.9 billion in 2007, the recession hit and numbers started to decline. Additionally, gaming was growing in nearby states and in the Midwest resulting in more competition. In 2011, the Mississippi River flooded and closed all but 2 of the 19 river casinos temporarily. As a result, revenues have been in a slow decline over the last 8 years, but the industry is still considered strong and weathered the recession quite well. The most significant impact has been seen in Tunica, which is still a resilient gaming market, but not nearly the one that was once ranked as one of the highest revenue markets in the United States.

Maintaining the Product and the Public's Confidence

As our gaming industry continues to grow, one of the most important aspects to maintain is public confidence in that industry. Mississippi has done well to see that the industry is properly regulated and held to the standards that lawmakers put in place. The Mississippi Gaming Commission investigates all gaming operators, and the principals of the companies that own and are affiliated with them. These investigations review the background and character of gaming employees, the sources of financing for acquisitions and development of casinos, and the overall business capability of the operator. The Commission has the authority to limit, condition, suspend or revoke any gaming license. *See* Miss. Code Ann. 75-76-103. In some circumstances an individual's gaming license may be revoked automatically, such as the conviction of a felony. The Commission also has the discretion to fine a licensee for any violation of the Gaming Control Act or the Mississippi Gaming Commission Regulations.

In 2014 the commission developed new infrastructure requirements for casinos with the goal of increasing amenities beyond just the gaming product. For a casino development to

receive approval it must have at a minimum a 300-room or larger hotel with at least a “three-diamond” rating, a restaurant capable of seating at least 200 people, a fine dining facility capable of seating 75 people, a 40,000 square foot or larger casino floor, and the project must have or support an amenity that is unique to the market and shown to encourage economic development and tourism. Currently, a new casino is being developed that falls under these new standards that will be D’Iberville’s first casino. Additionally, the state has 28 state-regulated casinos: 9 in Harrison County, 2 in Hancock County, 2 in Adams County, 4 in Warren County, 2 in Washington County, 1 in Coahoma County and 8 in Tunica County. While it is not state regulated, the original Silver Star casino is now part of the larger Pearl River Resort which also features the Golden Moon casino, the Dancing Rabbit Golf Club, the Geyser Falls water park and other non-gaming amenities.

Hancock County was the first county to approve dockside gambling in December 1990. When gaming was approved by local vote in Harrison County and Biloxi, it took a second vote and only passed by a narrow majority. Today, Hancock and Harrison Counties host some of the best locations for tourism in our state and it can be argued that much of that is owed to gaming. Tunica County had the unfortunate designation as the poorest county in the nation prior to the introduction of gaming to the area. Now, the tax revenue from gaming has lifted that label and provided much needed employment and infrastructure to the area. While not everyone will agree that gaming is a good thing for the state, the fact remains that it is here as an established industry and therefore must be scrutinized and regulated strictly but fairly. Mississippi has done an excellent job of developing the gaming product here, all while keeping the industry virtually scandal free. The lawmakers that helped pass the initial legislation and adapted to changes, the existence of a good regulatory framework, and the attorneys that practice in the gaming area can be thanked for that.

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