

ROUNDTABLE DISCUSSION FROM THE EXPERTS: DEBATING SKILL VS. CHANCE

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On January 17, 2018, *Gaming Law Review* hosted a roundtable to delve into the fundamental debate on the concepts of skill and chance.

ANTHONY CABOT: Our discussion today involves the operational and legal ramifications of games of skill. This would be a relatively esoteric topic if it were not for the Internet, which allows operators to offer games of skill to participants in multiple jurisdictions across the world. These skill games can be traditional, like chess or backgammon; casual, like Bejeweled; or more complicated games, like first-person shooters.

Before we tackle what skill games are, we should look at the legal and practical implications of the differences between skill games and chance games.

Before we start, however, can each of the participants give us a sentence or two on why they are conversant on this topic.

JENNIFER ROBERTS: This is Jennifer Roberts. I am the associate director of the International Center for Gaming Regulation at UNLV [University of Nevada, Las Vegas]. As part of that, we do some analysis on skill versus chance. In my 14 years of practice in gaming law, I did a lot of such analysis for clients.

PETER COHEN: This is Peter Cohen. I am director of Regulatory Affairs for the Agenda Group and have been doing that for the last seven years, primarily consulting gaming regulators, the industry, and governments on all things gaming. Prior to that, I worked with the gaming regulator in the state of Victoria, and I was executive commissioner and CEO of that organization for eight years. I have also been chairman and a board member of the International Association of Gaming Regulators. So my background is primarily on the regulatory side.

BLAINE GRABOYES: Blaine Graboyes here. I am the co-founder and CEO of GameCo. We were the first regulated gaming manufacturer to release contemporary skill-based games under the latest rounds of regulation from gaming jurisdictions, and we make the Video Game Gambling Machine, or VGM™, which allows casino patrons to gamble playing video games at land-based casinos.

KARL RUTLEDGE: This is Karl Rutledge. I am a partner with Lewis Roca Rothgerber Christie. Since joining the firm in 2007, I have primarily focused on skill-based offerings in the online space. This ranges from trivia contests to casual games like Bejeweled to the more hardcore gaming offerings such as Dota 2 [Defense of the Ancients 2] and Call of Duty.

ANTHONY CABOT: Let us get started on a very fundamental question. Does the jurisdiction that you are most familiar with distinguish between games of skill and games of chance, and what is the history and underlying public policy for distinguishing between the two?

JENNIFER ROBERTS: I am most familiar with Nevada law as that is where I practiced. It has always been generally understood that the definition of gaming, even though it does not really distinguish between skill and chance, was much easier to distinguish what a gambling game was than an amusement game. I

think the problem is that in Nevada, there is really no definition for an amusement game.

We are seeing a redefinition of gambling games that incorporates both skill and chance, but we do not see any kind of distinction on amusement games. I look to the 2015 Nevada attorney general opinion addressing daily fantasy sports, which provides that the definition of a gambling game does not even require a review of skill or chance, so they have essentially eliminated that as part of the analysis.

But we are also seeing a blurring of what is skill and chance in determining what is gambling, which kind of goes against what has always been understood in Nevada, which is a dominant factor state. So I think there is much more blurring in the definition of gambling and whether it is a game of skill or chance, because it does not seem to be relevant any longer.

ANTHONY CABOT: Jennifer, something confuses me about the state of Nevada. I understand and appreciate the distinction you just made. Can you explain, however, how fighting video game tournaments and Madden Football tournaments not held on the casino floor but on the casino premises, are exempt from having to obtain licenses? This is particularly confusing since the Nevada legislature passed a law that allows, but regulates, skill-based games on the casino floor. Can you help explain that difference?

JENNIFER ROBERTS: Well, I think with the kind of video gaming tournament activity—you know, esports—that you are seeing, it has always been traditionally considered skill gaming. It does involve skill in order to participate, and the players are the ones who are actually participating in the game, versus something like daily fantasy sports, where the participant is the actual football player, as the attorney general distinguished.

So, just like a karaoke contest or something that involves a heavily skilled component to participate in, esports or video gaming tournaments have always fallen more in line with those skill-based activities.

But I think now, with the wagering that is occurring, you are going to see a lot more oversight or scrutiny, if it is taking place on the casino floor.

ANTHONY CABOT: Even for skills-based tournaments?

JENNIFER ROBERTS: I think so. Not the tournament itself, but any kind of wagering activity clearly involved in the tournament.

BLAINE GRABOYES: I think one of the important considerations around esports is that there are really two kinds of money changing hands. One is a prize pool, where competitors are competing for a fixed prize pool. I think that generally falls outside of the purview of “gambling.”

And then, as Jennifer touched on, there is the fact that now sportsbook-style wagers are being accepted in some jurisdictions, particularly Nevada, with certain structures around it that are more gambling-oriented.

And absolutely, in those cases, we are seeing a lot of oversight around that. There is a group that has been established, the Esports Integrity Coalition (ESIC), that has really taken a leadership position in that space of ensuring there is integrity in those betting events.

ANTHONY CABOT: Blaine, you are making a distinction between betting on your own skill—for example, like an entry fee into a tournament where you can win—as opposed to betting on the outcome of a skill event in which you are not a participant. Is that correct?

BLAINE GRABOYES: Yeah, I think that is absolutely correct. When you are a participant in a tournament, it is very structured and controlled. When you are doing a sportsbook-style bet on an esports tournament, I would say it is a little bit more unstructured, if you will, in that you are likely not in the same venue as the tournament; you have no control or oversight over the outcome. You are doing a sportsbook-style bet on what is a digital sport instead of a traditional stick-and-ball sport.

ANTHONY CABOT: Karl, can you explain how the laws differ or are similar in other states to what Jennifer described in Nevada?

KARL RUTLEDGE: In the U.S., there are generally four ways that you look at whether a game is a lawful game of skill or is it a game of chance. In most states—as Jennifer mentioned, that Nevada has previously followed—it is the predominant or the dominant factor test, which simply means if skill predominates over chance in determining the outcome of a game, it is a lawful game of skill.

While most states use that test, it is not the only test used. Other states use what is known as the material element test, which simply means, even if skill predominates, so long as chance plays a material element in the outcome, it is a game of chance in that state. Washington State is an example that follows material element.

Other states will analyze a game and ask, “Does chance play any role whatsoever in determining the outcome?” It does not matter if skill predominates, or if chance does not play a material element; so long as chance plays any role in determining the outcome, it is a game of chance in that state, and unlawful. An example of a state that statutorily follows the *any chance* test is Montana.

And finally, some states disregard whether a game is a game of skill or chance and simply say, “You cannot wager on the outcome of a game regardless of whether it is a skill-based game in which you are participating.” So that is how the U.S. breaks it down. States fall within one of the four tests, but again, with the majority falling in the predominance test.

ANTHONY CABOT: Karl, I assume the distinction that Blaine made, that if you are betting on your own skill, it is treated differently than if you are trying to bet on the outcome of a skill event in which you are not a participant.

KARL RUTLEDGE: Yes, you are absolutely correct. So when we talk about what is an unlawful game of chance, there are really two factors to be mindful of. One, which I just broke down, is the skill-versus-chance-based analysis. But two, states also look at the aspect of whether you are betting on a future contingent event outside of your control.

In a practical sense, this is the difference between myself paying an entry fee to enter a bowling tournament, where I am paying money for the opportunity to win a prize, and my success is based on my ability to bowl, versus me going up to the sportsbook and placing \$10 on Jennifer to win the bowling tournament. In the latter scenario, I am not actually participating, but instead, betting on a future contingent event outside my control.

So, yes, it is a major distinction that states look at, whether you are actually wagering on your own skill

and participation in the contest, or someone else’s participation that is outside of your control.

JENNIFER ROBERTS: By the way, that is a terrible bet. [Laughter]

ANTHONY CABOT: So let me bounce over to Australia and ask Peter, is that consistent or inconsistent with the approach in Australia?

PETER COHEN: Thanks very much, Tony. Australia, like the U.S., is a federation of states and territories. We have eight different states and territories, so regulation is done at the state or territory level. But for this issue, I can say quite confidently that every state and territory is exactly the same, that is, if a game has any component of chance in it, it is going to need to be regulated and approved as a gambling product.

So, calling games “skill-based” is probably unhelpful terminology in Australia. They are much better to be called games of mixed skill and chance, or games of chance with a skill component, or something like that. There is no pure skill-based game approved in Australia at all. In fact, I do not think there is a skill-and-chance-based game approved in Australia.

I cannot see the definition changing. I can see games being approved, but I cannot see that definition changing for some time. If there is an element of chance—and that could be just the turn of a card, throw of dice, an RNG (random number generator) involved in something, then it is going to be regulated and need to be approved like any other gaming product.

Interestingly, that dominant factor test term does not exist here, and it would be open to a lot of discussion about what “dominant factor” actually would mean.

The other thing to keep in mind with Australia is that there is a very strong anti-gambling movement, which is going to try and stop any change to anything, ever. Governments are unlikely to want to fiddle with the legislative language, which at the moment defines “gaming” as something that you can bet on and there is also an element of chance in determining the result.

BLAINE GRABOYES: Just curious, not having been to Australia, does Australia have electronic poker?

PETER COHEN: Now, let me be clear what we are saying. When you say electronic poker, are you talking about online gaming, or are you talking about—

BLAINE GRABOYES: No. Land-based, at the casino.

PETER COHEN: Video poker machines, so to speak?

BLAINE GRABOYES: Correct, yes.

PETER COHEN: Right. So what you call a slot machine in Nevada, we call a poker machine. Do not let that language confuse you. They do not necessarily have to be playing a game of poker. In legislation, what we call electronic gaming machines, you call slot machines. But they are colloquially known as poker machines or *pokies*, and we have lots of them.

We have them in casinos, but we also have thousands of bars and clubs that have slot machines. My state of Victoria has 30,000 of the machines, 2,628 in the casino, and another 27,500 in about 500 bars and clubs. But the state north of us, New South Wales, Australia's most populous state, has 95,000 slot machines distributed over about 2,000 venues. So, they are ubiquitous, but they are all at the moment entirely chance-based.

BLAINE GRABOYES: So I guess, just to dig in a little bit on that, does Australia have, terminology aside, video poker machines—i.e., the game played with 52 playing cards, but in an electronic format?

PETER COHEN: Yes, but you would be hard-pressed to find it anywhere, because it is not as economically and commercially valuable as what we would call the traditional spinning wheel machine. It is approved, it does exist, but they are hard to find.

BLAINE GRABOYES: So, under what regulation is a game like that? Because at GameCo, we always make the analogy between our games and video poker. I think it is fair to say that the 52-card video poker is a combination chance/skill game, and I am just curious, in Australia, how a game like that, regardless of the economics and profitability, just from a legislative standpoint, under what aspect would a game like that be approved?

PETER COHEN: It is approved as a standard electronic gaming machine because it has got that ele-

ment of chance. Whilst we do not use the term “dominant factor,” we would see chance as being the dominant factor in that particular game and still required to meet a return-to-player, which can vary from state to state, but is usually somewhere between about 85% to 87%. So, it would be considered to be a slot machine, what we call an electronic gaming machine or poker machine, and it would have to meet the Australian/New Zealand Gaming Machine National Standard.

New Zealand, of course, is a separate country, but we work together to have a standard agreement for what a gaming machine must have before it can be approved.

BLAINE GRABOYES: Interesting.

ANTHONY CABOT: Peter, let me follow up on your comments. Would anything be considered a game of skill in Australia that would fall outside the regulatory framework of casino or gaming device regulation?

PETER COHEN: We have seen some games of skill, historically, that do not work commercially, so you do not see them for very long. The only one I can think of off the top of my head is an electronic game which was effectively a trivia game. You would put your money in and you're asked to answer a trivia question. If you could answer the question correctly, you could get a prize. That was considered to be a game of skill only, with no element of chance, and because of that, it did not get regulated at all. But you did not see it for long, because it was not commercially successful.

ANTHONY CABOT: How then do the various jurisdictions in Australia define chance, right? Take the trivia game example. There is no random element of chance, or what I call a systemic chance, in that game and therefore, the game is testing the players' skill.

A trivia game, however, has imperfect information. A player does not know what the next question is going to be. He could be lucky and get a question he absolutely knows or be given a complicated question that he does not know. Moreover, the questions could be easy or hard. So, does Australia recognize a difference between systemic chance on the one hand and imperfect information on the other?

PETER COHEN: It is probably not a question Australian regulators have been asked to consider, because there have been so few skill-based games. I can think of that trivia game as the only one considered by the regulator.

It was not an easy decision to say it was a skill-only game because of those questions that you asked. And so, whilst we do not usually term it “dominant factor,, that is the decision we came to, that if there was any element of chance, it was so remote that it was hard to even identify how the chance component was chosen.

It exists in non-electronic gaming form, as well, when it comes to things like sports tipping competitions—not betting, but tipping. Who is going to win a competition? Tipping for Australian football, or for rugby in the northern states of Australia, is a big social activity. Every workplace does it, every hotel bar does it, and people put \$10 or \$20 in at the beginning of the year, and they take home the prize pool at the end if they have tipped the most winners for the season. That is considered to be a skill-based game.

But it was not always. It has been back and forth through regulators about whether it is chance, whether it is skill or whether it is a game of mixed chance and skill, and we have decided it is a skill-based game. It is not an easy decision, for any of these games, to determine how much of it is chance, how much of it is skill, and how much chance does there need to be for it to be regulated.

Footy tipping competitions are very popular. Innocuous in terms of a betting point of view, but they have been determined to be a form of skill-based activity. But it is not easy to define. We have not had enough skill-based games yet to have a firm view on what is systemic chance and what is skill.

ANTHONY CABOT: I want to ask Jennifer and Karl about that from a legal perspective, and ask Blaine from an operational perspective. Before I do that, though, are there operators online offering skill games legally to Australian citizens, or Australian residents?

PETER COHEN: I can answer that quite clearly and say no, because they cannot do it legally, but that is nothing to do with state-based regulation. That is a national law called the Interactive Gambling Act. The Interactive Gambling Act bans the provi-

sion of any form of gaming that involves, let us call it the Internet, but the language does not quite say that in the Act. It is illegal to offer any form of Internet-based gaming to Australian residents, with the exception of betting on horses and sports betting. Everything else is blanket banned. It does not make sense, but it is there.

ANTHONY CABOT: Okay, so if someone decided to hold an Internet backgammon tournament, that would be unlawful under that Act?

PETER COHEN: Yes, it would be. Backgammon would be, because there is an element of chance because of the throw of the dice. If you had a chess tournament, I’m not so sure. Because it is a skill-based game, it may actually miss the dragnet that act puts in place to capture everything. A purely skill-based game may be exempt. But it has to be purely skill-based, and that is going to be pretty hard to find.

ANTHONY CABOT: Even in chess, however, who gets to make the first move is based on chance, right?

PETER COHEN: Let us call it a chess tournament where the starting player alternates. So a single chess game, I agree has that small element of chance. Nevertheless, I think a regulator, if asked to consider whether a chess game has got any element of chance, would accept that the toss of a coin to determine who starts is the only element of chance, and that would not be enough to bring it under the regulatory scheme.

ANTHONY CABOT: Right. So let me flip back over to the United States, and we will ask Jennifer and Karl how the law is distinguished in the United States versus Australia. Then I am going to ask Blaine how a company can operate online with the variety of different rules. So, Jennifer, do you want to start?

JENNIFER ROBERTS: Again, I will just focus mainly on Nevada. It is interesting, listening to Peter, because historically we can look at the kind of traditional games and activities as, yes, chess is a skill game, even though there is a little chance component of who goes first.

But what you are seeing now, as you move into an online or video and technological environment, is playing Monopoly against others in a tournament

is relatively easy to distinguish, versus a head-to-head competition on a video game version in which a wager and a prize are made.

How do you distinguish the two? Do you look at it versus the wagering element, the immediate prize element versus a traditional tournament?

I think that is where you are going to start seeing much more of the blurring, where maybe we cannot necessarily just look at skill versus chance. You have to look at it almost like a gambling instinct, you know, that kind of a third test that people applied in certain jurisdictions. Are we looking at that now as the test on what is a gambling game?

ANTHONY CABOT: You are talking about in Nevada?

JENNIFER ROBERTS: In Nevada, yeah.

ANTHONY CABOT: Nevada seems different than most of the other states. Do you think that is primarily because the gaming industry is so vital to the state's economy that they wanted to be perhaps more conservative in their interpretation so that they retain control over all these activities, somewhat similar to Australia?

JENNIFER ROBERTS: I think that plays an important part. I do not think that they have ever really had to distinguish, and you cannot really find a definition of amusement, whereas you go to New Jersey, and they have their games of chance commission versus their casino commission. There are a lot of states that have a clearer distinction between amusement and casino gambling, and we have never been tested in that way.

KARL RUTLEDGE: Tony, I just wanted to follow up on Jennifer's point. I think you are absolutely right. I think Nevada has allegiance to its casino industry, and they want to preserve their control. If we were talking about a bowling tournament in Nevada with a \$5,000 set entry fee and fixed prize, that is—regardless of how many people entered or joined, the prize is going to be \$100,000—or if it was a head-to-head bet, you and I bowling against each other for \$10, I do not think it would be of interest to the regulators in Nevada. We would not be focusing on it.

What we are focusing on is, how are we going to attract people to casinos? How are we going to attract

millennials? How are we going to keep their attention? As a result, skill gaming has been a focus. Esports are now part of the dialect of the Gaming Control Board and are seen as a way to preserve the industry and keep people coming to the casinos.

ANTHONY CABOT: Thanks for that, Karl. So let me follow up with you, then, Karl, because I want to try to distinguish how Nevada is different from the rest of the United States on some of these issues, particularly about systemic chance versus imperfect information and some of the other issues we just talked about.

KARL RUTLEDGE: Okay, I just wanted to clarify a little bit about imperfect information before we dive into it. What we are talking about here is the phenomenon where skill is not the sole determinant, but the outcome is also influenced by not having complete information of all factors that can impact the game result. For example, when we talk about chess, it is a game of perfect information. The game board is laid out in front of both competitors and if Tony and I were playing, as Tony makes a move, I know what his move is. I can make my move and strategy based on it. There are no hidden factors in the game.

Contrast that to a game with imperfect information; poker is a good example. In poker, cards are dealt to each player. I do not know what cards Tony has in his hand and he does not know what cards are in my hand. We also do not know what cards are in the pile. So we are basing strategic maneuvers off of imperfect information.

Another game of imperfect information would be rock, paper, scissors. There is absolutely no randomness involved in the game. Tony knows what he is going to play, and I know what I am going to do. But it is a game of complete imperfect information, because we are making our determinations at the exact same time with no knowledge of what the other person is actually doing. So that is kind of the background of imperfect information.

How other states look at imperfect information, when you look at the case law, it does not get the attention that systemic chance or randomness, the RNG factor, gets when you are analyzing what is a game of skill versus what is a game of chance. Courts really have not paid as much attention to imperfect information as they have randomness.

In regards to whether imperfect information actually makes a game one of more skill, or does it make a game chance-based, really depends on what sort of game we are talking about. For example, you could argue that the imperfect information in poker actually makes the game more skill-based. If I have a mathematics background or if I am great at reading the tells of another player, that imperfect information actually aids my gameplay, because I can use my skill set to take advantage of what other users do not know or see.

Contrast that to Minesweeper, a game we all played when we were younger, back in the '90s, when computers did not have today's elaborate games. The basis behind Minesweeper is, there are these tiles, and there are mines hidden underneath the tiles, and you go through, and you click tiles.

Unfortunately, you often get to the point in the game where you are left with two tiles, one of which has a mine underneath it, and the other one does not, and regardless of how much time you stare at the game board, you cannot use strategy or reasoning to decipher the correct tile. It is simply a game, at that point, of equal probabilities—50% you are going to click the wrong tile and lose, 50% you click the right tile and win. That is how imperfect information can negatively impact whether a game is skill-based or not. So I just wanted to give that little bit of background for what is imperfect versus perfect information.

JENNIFER ROBERTS: I know, for example, what we saw at G2E [Global Gaming Expo] with a lot of the skill-based components involved in gambling games—and Blaine could obviously talk about this—but even if you have Minesweeper, what if you suddenly have a head-to-head challenge for Minesweeper, and you can win money from it? Are we getting into the gambling arena now because it is a kind of skill-based gambling, if you are betting against someone else involved in the game?

KARL RUTLEDGE: I think it is going to vary based on what state is looking at it. If Nevada is looking at the issue and it is going to be on the casino property, it is definitely going to be deemed to be a game that they are able to regulate as gambling. Another state that also follows the dominant factor test but is not worried about the casino industry, or regulating

those types of operations, is going to take a more mathematical approach and say, “Okay, if Jennifer and I played 100 times head-to-head, or 1,000 times head-to-head, who is going to win the majority?”

Using the dominant factor test, the skilled person should be able to win about 75.5% of the time to show true predominance. And if that can be demonstrated, it would most likely not matter how the bet is being made, or if we are just doing \$5 head-to-head, or what the immediate payoff is.

ANTHONY CABOT: Karl, a quick follow-up on that. If it gets to court, and we are talking about the predominance test or the material element test, how does the company go about proving its case that a game is predominantly skill or the game does not contain a material element of chance?

KARL RUTLEDGE: We can demonstrate both through experts and actually putting together data to show the win/loss rate. The predominant factor test is a little easier to demonstrate. For example, we can put together data showing backgammon tournaments where we bring 1,000 people in, we rank them based on their skill level, their knowledge of the game, and how they competed. Via this process, we can actually demonstrate whether a game is predominantly one of skill through mathematics.

The material element test, however, takes a quantitative approach used by the predominance test and replaces it with a qualitative approach of what is material. That is a subjective test that is going to vary by jurisdiction, as well as by judge or jury, as to what they believe to be material. Specifically, the material degree language has altered the mathematical exactitude of the predominance test and replaced it with a test that recognizes that, although skill may primarily influence the outcome, a state may prohibit wagering on the game if the final outcome materially depends on chance. This is a little harder to prove.

But back to the predominance test, let us go a little more in depth about that. If skill determines 51% of the results and chance determines 49%, then you would expect a skilled player to win over the non-skilled player at a set rate. To figure that out, it would be 51% plus one-half of 49%, because if it is 51% skilled, that leaves 49% by chance, which

you and I would have equal opportunity to win. So you take a half of that, which is 24.5%, add it to the 51% that is skill-based, and that is how you come up with the 75.5% win rate figure. This rate should be demonstrable over the course of a series of games to satisfy the predominance test.

ANTHONY CABOT: Blaine, you have heard the different commentary from Jennifer and Karl and Peter, which show widely different approaches between jurisdictions as to what constitutes a legal game of skill versus an illegal game of chance, whether it be predominance, material element, systemic or nonsystemic chance. How does an Internet operator of skill games navigate this online?

BLAINE GRABOYES: To provide some clarity, GameCo does not operate online. We only operate in land-based casinos. And I would say the way we approach this is, we are a licensed, regulated gaming company. The fact that we have products in casinos means that our products need to be licensed and regulated.

We build our products under the GLI-11 standard, which is a very widely accepted gaming standard that does allow for both games of skill and games of chance, and it particularly allows for games of skill—and that is why I was asking about video poker in Australia—under the concept of optimum play or optimum payback. Our patented platform for bringing video games into the casino very much uses the same approach from a regulatory perspective as electronic poker in terms of how those games are approved and regulated inside of casinos.

ANTHONY CABOT: Okay, thank you. So let me raise the broader question to any of the participants: how does an operator who wants to do things online navigate these myriad different rules? Do you want to start, Jennifer?

JENNIFER ROBERTS: Hire a lawyer. [Laughter] Obviously, they do have to look state to state. I know, for example, Louisiana has very interesting rules and restrictions, and it is going to vary across the states.

I think the challenge is when someone wants to operate a skill gaming system that has chance elements outside of casinos, and that is where the law gets confusing. I do not know that we are creating a test

where, if it is offered at Dave & Buster's and your prize is a plastic elephant or something, then it is not a big deal. But if your game is offered on a casino floor and you can win money or higher amounts of value, will that be the new test? And I think that is something that is not clearly answered right now.

ANTHONY CABOT: Karl, do you have anything to add on that?

KARL RUTLEDGE: I think it is very important, if you are looking to operate in the online sector, to do tremendous due diligence now. You have to look at all the states in which you intend to operate, not just where you are based, but from where you are taking players.

ANTHONY CABOT: And countries, as well.

KARL RUTLEDGE: Yes, and countries, as well. And you have to be mindful of several factors there in addition to whether the game is one of skill in that state, and which test will be used. States also have very nuanced laws regarding prize structure. Some states say, "Even if it is a game of skill, we will not allow you to offer pari-mutuel prizing." So you really need to be prepared to defend your games, both in regards to whether the games satisfy the standards implemented in the various jurisdictions as to what constitutes skill-based, as well as ensuring the prize structure is compliant.

ANTHONY CABOT: Skill games are a very complicated area, given how intricate some of these issues are. Does this myriad of rules and how they interrelate among states put a significant burden on the industry and potentially impact the ability of those industries to offer innovative products on a multijurisdictional basis?

PETER COHEN: I am happy to speak to this point. Whilst it might seem difficult to have differences amongst jurisdictions, it is actually the great ally of the industry. If you had one global standard, you would be stuck with it. It would never change, and you would never get any regulatory reform, because it would be too hard. By having jurisdictions doing it differently, you can, in effect, play one against the other. You can say to one jurisdiction, "Why do you not do it like this other jurisdiction and improve your process?"

I am not saying it is easy. But having differences actually helps the industry, because it can get things done, where it would not be able to if there was a global standard that everybody had to meet. This is partly because getting every jurisdiction to agree would be incredibly hard, to start off with, and you do not know which model you might end up with. You might not get the model you like. You might get the most restrictive model rather than the most flexible model. And secondly, once you have that approved scheme in place, you will never get it changed. It would be too hard to get all the jurisdictions to agree.

So, having competition of policy ideas is actually to the industry's advantage. And we see that in Australia with gaming quite regularly. One jurisdiction will compete by lowering tax or by reducing some regulatory requirement, and others will then follow. If they all had to agree, there would never be any change. So whilst it seems like it is a nightmare for the industry, there are some huge advantages to them having this competitive policy arrangement between jurisdictions.

ANTHONY CABOT: Blaine, do you have anything to add on that?

BLAINE GRABOYES: I would just second that, as saying there are some very widely accepted standards. I touched on the GLI-11 standard earlier, which I think is one of the most widely accepted gaming standards. But I also think that the point of having competition is very relevant.

And I would say now, to some of the points earlier about attracting new audiences, reaching younger players, thinking about innovation in the future, you are seeing a lot of change happening at a much more rapid pace than might have been the case a few years ago.

Not having a global standard, I would say, is actually a benefit to the manufacturers like GameCo, and to the operators as well. We want to be in the jurisdictions that are the most innovative with the largest possible audience. So having that level of competition is definitely beneficial.

ANTHONY CABOT: Let us put aside what the law is and start to talk a little bit about policy. The history

of skill games derives from different areas. So the amusement game side developed their own set of rules as to what is permitted in amusement arcades.

Baking contests or other types of contests developed in a different scope. Even carnival fairway games, like shoot a basket and win a teddy bear, developed a different set of rules. And obviously, we have the casinos, which initially started out as predominantly chance-based games, but now are evolving into skill-based games, as well.

So, given the histories are all very different, if we take all that aside and say, "If you were the policy-makers now," would you distinguish between skill games and chance games for purposes of legality? Peter, do you have an opinion on that?

PETER COHEN: Because just about every game is going to have an element of chance in it, I think the skill component does not change the regulatory obligation that the state expects. As I have said many times, we do not have a dominant factor test, so any element of chance in a game means that whether it has a skill-based element or not, it is still going to have to meet the same regulatory requirements.

What regulators are going to be most concerned about with games that have elements of skill is whether the players understand how to play that skill-based game and whether the return to player can meet the requirements that are necessary. Do players have an unrealistic expectation of the amount of control they will have on a skill-based game? And will it be fair to all the players? In other words, would a player with a higher level of skill have a better chance of winning? Is that fair to the players that are not as good at the game?

Those sorts of elements are always going to impact the regulatory approval process, and unless you have a pure skill game—which, seems unlikely to happen, or at least for most games, I do not think it will happen—I think because there is that element of chance, those other issues of skill are going to get caught in the regulatory scheme, just like the chance components, but have to meet requirements that satisfy regulators, if you like, all over again.

Australian regulators have gone through a process for the last 20 or 30 years of working out how best

to regulate pure chance-based games, and they are now going to have to work out a way of regulating games of mixed skill and chance.

ANTHONY CABOT: Putting aside for a second the existing regulations and existing approach, the question I have is, should they be different? Should gaming regulators who are doing traditional gaming devices be the same regulators that are regulating skill-based games, and should they be under the same criteria as the games of chance, or different criteria?

PETER COHEN: I think some elements, some of that criteria would need to be the same, but some of it will need to be different. And it is a mindset issue rather than requiring a different regulator. The regulator needs to accept that the old system of regulation, which is purely a chance-based game, has to be modified to work out how best to also regulate the skill-based component in such a game. And that is a skill set that the Australian regulators may not have and they are going to have to work out how to do it.

Having said that, we do regulate skill-based games as regulators. They are just not electronic games. They are skill-based games like traditional table games in casinos like blackjack, poker, and sports betting. So we already have the understanding of skill components. We just do not have it yet for skill components in traditional gaming machine-style cabinets.

BLAINE GRABOYES: I will weigh in here from the GameCo perspective. You know, we work with regulators all over the country and all over the world, and I would say we find regulators to be very open-minded and very collaborative. They want to bring innovative new games to their jurisdiction. It is their job to make sure that products conform to the regulation that has been provided to them and to make sure that games are fair to the patrons.

But I would say we do not necessarily find a great difference between how a regulator would treat us making a skill-based game versus how a regulator might treat a slot manufacturer with a pure chance-based game.

ANTHONY CABOT: Let me follow up on something you said, because I think it is an interesting

question. You bring up the question of fairness. Typically, when talking about fairness, it is different from honesty. A game is honest if players have equal opportunity to win.

But fairness is about whether a person who does not have skill has a fair opportunity to win versus a person who does. Is that not the heart of skill games, that it really is not fair? Skilled players are going to beat unskilled players almost every time.

BLAINE GRABOYES: Well, I think it matters what we are calling fair, and I think what you touched on earlier is about transparency. Do you understand the rules?

ANTHONY CABOT: Right.

BLAINE GRABOYES: Is the machine, you know, “cheating?” The reality is, in our games, a more skilled player will win more often, but will not win every time, and that is sort of the heart of our platform and patent.

But the reality is the fact that a more skilled player has a greater opportunity to win in a given scenario does not, in my opinion, make the game more or less fair. The patron has the choice to participate or not. What is really critical is whether the game is “cheating?” Is the game acting in a way that is giving the patron transparency into how it operates?

JENNIFER ROBERTS: It seems like the fundamental core of all of this is that there has to be built-in consumer protections. Whether it is a skill-based contest or the bowling tournament, you have to have rules and spell out how someone wins the game. There is a structure to it: who can participate, and whether it is a game of chance. You have to have rules; you have to abide by standards that the gaming regulators set. So it really comes down to the core, fundamental existence of consumer protections.

ANTHONY CABOT: So, let’s follow up on that, Jennifer, because it is an excellent point. Looking at esports, and suppose for example we are reviewing an online Call of Duty tournament.

As Blaine mentioned, you want to ensure the integrity of the game so that some players do not have unfair advantages against other players.

JENNIFER ROBERTS: Right.

ANTHONY CABOT: But who should be regulating that? Is it really the purview of the casino regulators, or should there be some other private or public body that is looking at these issues that are kind of foreign to the casino regulator?

BLAINE GRABOYES: If there is wagering on it, I think that requires that the state gaming regulator has purview. That is where groups like this private group, ESIC, the Esports Integrity Coalition, come into play.

But, if it is just a buy-in tournament online on MLG.com, Major League Gaming, it is absolutely, in that case, the responsibility of the tournament organizer and the game publisher. You are bringing up a unique case with MLG in that Activision publishes Call of Duty and also owns MLG. So in that case, the tournament organizer and the publisher are the same.

But let us say it is a Counter-Strike: Global Offensive tournament being conducted on FaceIt!, which is a tournament organizer. I think it would be fair to say that both the tournament organizer and the game publisher have a responsibility to ensure that there is no cheating, that the tournament is conducted fairly, that no one is using exploits in the game and that there is some level of auditing available on the tournaments. And I would say that most of the larger online tournament operators, as well as live event tournament operators and game publishers, have a sense of responsibility and process in that.

JENNIFER ROBERTS: Then there is always going to be some government involvement in non-gambling activities. There is always the Federal Trade Commission or Attorney General Consumer Protection Division to oversee deceptive trade practices. Then there is the consumer themselves. The consumers will not play games or participate in tournaments where they feel cheated or it is unfair or there is not information. So even if it is not a gambling oversight activity, there is always some law there to help protect the consumers.

ANTHONY CABOT: In a real sense, though, is that not kind of counter to what we do in the gaming industry? Because in the gaming industry, the regulators go to great lengths to ensure that everything that is placed on the floor is adequately tested and built according to specific technical standards and all these other things. But are you arguing that, re-

garding esports, “We will let it go to the publishers or some private organization or the tournament organizer to ensure the honesty of the game. And if something goes wrong, we will pick it up after the fact.”

BLAINE GRABOYES: Well, just to be clear, again, I think it is really important to differentiate events where there is sports book-style wagering versus just an online or live tournament. For all of the events that have had sportsbook-style wagering, the Nevada Gaming Control Board has sanctioned them. ESIC is monitoring them. They are monitoring them in real time, so definitely not after the fact.

I would say in many ways, the oversight for sportsbook-style wagering on esports is at a much higher standard than traditional sports, and that is really because you get real-time data feeds from this game. The reality is there is no such thing as a real-time data feed from a baseball or football game. So in that case, you are looking at things after the fact.

I think when it comes to these online platforms, there are some that let players wager against players. I think there is a whole scope or range of outlooks on how legal or not legal that is. But I think there is really a strong case of, it is a platform operator’s responsibility, and it is very much buyer beware.

Then when it comes to a professional esports tournament where you are competing for a prize pool, it is absolutely the responsibility of the event organizer and tournament organizer. There is no lack of clarity on that. And, again, organizations like ESIC step in there and provide an enormous amount of real-time oversight, and they have caught people cheating. They have banned them, sanctioned them, taken prize money back. So there has actually been action against this, as well.

ANTHONY CABOT: I understand that. But is that not different than what you do when you provide games to a casino? Because if we look at the casual player, and you say, “Well, it is buyer beware,” that would never be the attitude of a casino regulator, right?

BLAINE GRABOYES: Absolutely. But I think this has nothing to do with skill/chance. This simply comes down to the fact that, if a product is in a casino, an independent test lab has tested it. It is

managed by and approved by a regulator. So I think this has a lot less to do with skill versus chance than being in a regulated land-based casino versus being on the Internet.

ANTHONY CABOT: Jennifer, you had something to add?

JENNIFER ROBERTS: I think a lot of the reason that we have a front-loaded system with gaming is because of our history. We had a lot of adverse elements to remove from the industry, so we created a really strict regulatory system to make sure consumers were protected on the front end, and then once licensing happens, there is a little less control by the regulators and more of a burden on the operators. That was just really based upon history.

ANTHONY CABOT: So from a policy perspective, you do not have that much of a problem with the differences between how esports is regulated currently by either a private organization, the publisher, or the tournament organizer, and the way we do it in the gaming industry?

JENNIFER ROBERTS: I definitely think if it involves betting, that it needs to have more gaming regulatory involvement.

ANTHONY CABOT: Right, if you are betting on an event, you are not a participant, right?

JENNIFER ROBERTS: Right.

ANTHONY CABOT: However, if you are a participant, should we not be worried about the same level of consumer protection that we are in the gaming industry?

JENNIFER ROBERTS: I agree that we should be worried about consumer protection, but I think those are built in through—as Blaine said, the tournament organizations, the rules, and testing of devices by the tournament operators. I think there are consumer protections built in, just not from a government-sanctioned level.

BLAINE GRABOYES: Yeah, there is. My outlook would be, there is no government regulation on football from a competitive standpoint. There is no government organizational body. The NFL [National Football League] is responsible for making sure that NFL games are conducted within the purview of

how they want to operate the league. So, the fact that it is esports and it is digital versus traditional football, I do not think should be a key difference here.

ANTHONY CABOT: Peter, as a former regulator, would you like to weigh in on the public policy issue just raised?

PETER COHEN: The gaming industry has always been regulated by more than just the gaming regulator. The gaming regulator covers a number of important issues through the integrity and probity and distributions of process and so on. But the industry has always had to comply with other consumer protection requirements, electrical safety requirements, occupational health and safety rules.

And I know what was said about football not being regulated in the same way, but it still has to comply with various rules and laws, and whether that is about drugs in sport or whether it is the way it sells its product to the consumer, they still also have to comply with requirements.

So gaming regulators sometimes forget that they are not the only ones out there doing this work and that the industry has to comply in multiple places. But for the specifics of what we are talking about, the skill component, the gaming regulator is going to be the primary server of the community to make sure that these products meet the expectations for the community.

The games of skill, or the componentry of skill, because of its novelty—because we basically just had games of chance until now—is going to draw attention. And it is always important, I think, to remember that the regulators are only able to do what they are empowered to do by their political masters, and the political masters can always change the rules. It does not matter which jurisdiction you are in, the rules might be one thing one day, and the legislators could change them at another time. Regulators can only work within that regulatory framework.

ANTHONY CABOT: I have one last question before we conclude today. The skill games industry, particularly online, has a predominantly young audience, which raises two questions I'd like your opinions on. The first question is, should we be concerned about problem gambling or problem skill gaming among the youth, and how would we address that?

The second question is whether we should be concerned about the use of illicit drugs to increase performance, particularly in highly skilled competitions. Does that require any particular focus from a regulatory perspective that is not there today?

PETER COHEN: The responsible gambling component will always be expected. Regulators will require that any game, whether it is a game of purely of chance or a game of mixed skill and chance, must meet expectations for responsible gambling. If I could just use an American expression, I think that is a no-brainer. That will always be an issue that has to be done.

The other issue, though, about the use of the illicit drugs and it sounds like you mean like performance-enhancing, if I could use that term, I do not think the gaming regulator is going to get into that space. I think that is something outside its capabilities. But it is an interesting point you raise, because someone has to do it.

If we look at the analogy of sport—and sports betting is very big in Australia, so we have the same here—the sports themselves have to take responsibility for ensuring that there is a drug code in place and the

players of those sports are tested for drugs using the international scheme put in by the World Anti-Doping Association.

As a gaming regulator, we require the sports to have those sorts of integrity features themselves before we allow betting on their sport. I think the same will apply for gaming regulators when it comes to something like esports, that the organizer of the sport takes responsibility to ensure that the integrity of that sport is not compromised by performance-enhancing drugs.

JENNIFER ROBERTS: I would agree. I think it goes back to consumer protections, and, from the gambling perspective, we need to make sure that minors are not engaging in gambling activities online. But as far as participating in esports and that, I would consider that a separate issue.

The drug testing should be a concern, and is monitored increasingly among tournament organizers, and there are integrity monitoring organizations, as well.

ANTHONY CABOT: Thank you, everybody, for a fascinating conversation.