

# **American Indian and Federal Gaming Law**

**2018**

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# 1 – Introduction to Gaming

## *The History of Gaming*

### **Ancient Roots**

Gaming has been a part of the human experience for as long as we have historical records. Some researchers believe that the gambling instinct may have existed even before the rise of man because many animals and insects have been observed in activities that embrace risk for a chance at a reward. For example, in 2005 researchers Michael Platt and Allison McCoy, from Duke University, published findings in the journal *Nature Neuroscience* that monkeys when presented with two targets that rewarded the monkey with juice, overwhelmingly chose the riskier target with a variable return (often less juice) than the target with a consistent reward of juice. According to Platt, *“Basically these monkeys really liked to gamble. There was something intrinsically rewarding about choosing a target that offered a variable juice reward, as if the variability in rewards that they experienced was in itself rewarding.”*

Ancient texts reveal that Sumarian priests would roll the bones to advise petitioners. Archeological digs have uncovered gaming tables and dice from ancient Mesopotamia that were used to play a game thought to be the ancestor of backgammon. Ancient Egyptians claimed the god Toth invented gambling, and the activity was thought to be the domain of the gods.

Jewish religious texts reportedly mention the drawing of lots on a number of occasions. Christian New Testament texts also mention gambling, perhaps most famously, is the mention that Roman soldiers cast lots to determine how the clothes of Jesus would be divided while he was being crucified.

Roman texts show that many forms of gambling were woven into the fabric of Roman life, including wagering on “sporting” events, wagering on card games, wagering on dice games, and wagering on daily events. Though aristocratic Romans were enthusiastic gamblers, at varying times Roman law prohibited gambling and permitted losers to recover losses and refused to allow enforcement of gambling debts. Additionally, if convicted, a punishment of four times the amount wagered could be levied.

In most studied cultures, references to gambling can be found. In European cultures, Roman forms of gambling often displaced more ancient forms of gambling as the empire grew and the influence of its inhabitants became broader.

Gaming continued to be a favorite activity of many Europeans even after the fall of the Roman Empire. However, until the sixteenth century there are no known texts that analyze gaming or gambling in any way that one might consider to be scientific. In the sixteenth century, scholar, physician and inventor Girolamo Cardano authored the first known analysis of the probability theory in mathematics. Driven by a desire to better understand gambling, he developed his general law of wagers and mapped the probabilities of some popular games.

Cardano's work was favorably cited by Galileo in the seventeenth century, and Galileo himself expanded on Cardano's work by creating mathematical analysis of dice games. Analysis of games from this point forward was often a subject for mathematical analysis and papers.

## ***Forms of Gaming***

### **Games of Chance & Lotteries**

The most common forms of gambling are games of chance and lotteries. The characteristics of these endeavors are similar in that they possess the elements of staking some consideration for the chance at winning a prize. While these elements of (1) consideration, (2) chance, and (3) prize are often oversimplified in general gaming discussions, the interpretation of the standards used to determine these elements does vary somewhat between jurisdictions.

#### ***Consideration***

The element of consideration is generally characterized as what the player must pay to participate. There are three prominent lines of authority regarding the consideration element.

##### ***Intrinsic Value***

Most jurisdictions follow the rule that for the consideration element of gambling to be met, the participant must part with or risk something of intrinsic value, such as money. In such jurisdictions promotions are often run that

eliminate or try to eliminate the element of consideration by offering contests without the need for participants to part with or risk anything of intrinsic value. Such promotions are generally called sweepstakes.

The following court opinion illustrates the intrinsic value line of authority:

Supreme Court of Oregon, En Banc.  
Tom CUDD and Nena Cudd, dba Strike it Rich Co., Appellants,  
v.  
Lawrence A. ASCHENBRENNER, as District Attorney for the County of  
Josephine,  
State of Oregon, Respondent.  
Argued and Submitted Oct. 1, 1962.  
Decided Dec. 19, 1962.  
Declaratory judgment case. The Circuit Court, Josephine County, Orval J.

Millard, J., rendered decree, and the plaintiffs appealed. The Supreme Court, Rossman, J., held that promotion scheme conducted by plaintiffs for purpose of attracting customers to two grocery stores was not a lottery.

Reversed.

ROSSMAN, Justice.

This is an appeal by the plaintiffs from a decree entered by the circuit court in a declaratory judgment proceeding which held that a promotion scheme conducted by the plaintiffs for the purpose of attracting customers to two grocery stores was a lottery under the provisions of ORS 167.405 and Article XV, Oregon Constitution. The defendant is Mr. L. A. Aschenbrenner, district Attorney for Josephine County.

The promotion scheme or program which is in essence a weekly 'lucky draw,' is known as 'Strike it Rich.' Anyone desiring to do so may enter one of the

stores using the plaintiffs' scheme and register. He is under no obligation to make a purchase. The registrant writes his name, address and telephone number on a paper provided therefor and is given a number. From this information store employees prepare a 'registration card,' one part of which is used in the actual drawing. Also at the time of registration, the participant is given a coupon upon which he signs his name. It has numbers from 1 to 52 around the edge. In order to be eligible for the cash award a participant must have his coupon 'validated' each week by having one of the numbers punched out. Coupons may be validated at the store at any time and without obligation, except that coupons are not validated on Wednesday, the day on which the drawing is held. The drawing takes place once each week on the parking lot adjoining the store. If the person whose number is drawn is present he receives a cash award of at least \$100. If he is not present at that time, the amount of the award for the following week is increased by \$100. The jackpot is allowed to increase until the prize reaches \$500.

The parties have stipulated that many of those who register are customers of the store and make purchases at the time of registration. Likewise, many persons make purchases at the time they have their coupons validated. But purchases are not a prerequisite to registration or the validation of the coupons.

Article XV, Section 4 of the Oregon Constitution provides: 'Lotteries, and the sale of lottery tickets, for any purpose whatever, are prohibited, and the legislative assembly shall prevent the same by penal laws.'

Pursuant to that constitutional mandate, the legislature enacted ORS 167.405 which says, in part: '(1) Any person who promotes or sets up any lottery for money or other valuable thing, or disposes of any property of value, by way or means of lottery, or aids or is in any way concerned in setting up, managing, or drawing such lottery, or who in any house, shop, boat, shed or building owned or occupied by him or under his control, knowingly permits the setting up, management, or drawing of any lottery, or the sale of any lottery tickets, share of a ticket, or any writing, token, or other device purporting or intended to entitle the holder or bearer thereof, or any other person, to any prize or interest or share thereof, to be drawn in any lottery, shall be punished upon conviction .'

Clearly lotteries are illegal in Oregon. But legislatures generally, ours among them, have been reluctant to define the term 'lottery.' This reluctance may be due 'to the fact that a precise definition will enable ingenious and unscrupulous persons to attempt to devise some plan which may not be within the letter of the definition given but which nevertheless is within the scope of the mischief which the law seeks to remedy.' *State v. Bussiere*, 155 Me. 331, 154 A.2d 702 (1959).

So varied have been the techniques used by promoters to conceal the joint factors of prize, chance, and consideration, and so clever have they been in applying these techniques to feigned as well as legitimate business activities, that it has often been difficult to apply the decision of one case to the facts of another.' *FCC v. American Broadcasting Company*, 347 U.S. 284, 74 S.Ct. 593, 98 L.Ed. 699 (1953).

In our state the courts have been left to decide what schemes are lotteries on a case-by-case basis.

The determination of what constitutes a lottery is no easy matter. *State v. Schwemler*, 154 Or. 533, 60 P.2d 938 (1936), defined a lottery as 'any scheme whereby one, on paying money or other valuable thing to another, becomes entitled to receive from him such a return in value, or nothing, as some formula of chance may determine.' Accordingly, this court has accepted the almost universal formula that the three elements of prize, chance and consideration are essential to a lottery. It follows that the absence of any one of these elements removes the scheme from that category. *Multnomah County Fair Association v. Langley*, 140 Or. 172, 13 P.2d 354 (1932).

Although it has been relatively easy for the courts to decide whether the elements of 'prize' and 'chance' are present in a given instance, a very real problem has arisen as to what constitutes 'consideration' for purposes of the anti-lottery statutes. In some jurisdictions the principles which apply to ordinary contracts have been rigidly adhered to. Such courts have found mere participation in the scheme by patrons of the business as constituting consideration. They have deemed it inconsequential that the participants were required to pay nothing of value for the chance to participate. See, for example, *Lucky Calendar Co. v. Cohen*, 19 N.J. 399, 117 A.2d 487 (1955); *Maughs v. Porter*, 157 Va. 415, 417, 161 S.E. 242 (1931). Other courts hold that the anti-lottery laws contemplate that a consideration of some economic value

passes from the participant before a gift enterprise may be deemed a lottery. Examples of the latter are *State v. Bussiere*, supra; *California Gasoline and Retailers v. Regal Corporation of Fresno, Inc.*, 50 Cal.2d 844, 330 P.2d 778 (1958); *State ex rel. Stafford v. Theatre Corporation*, 114 Mont. 52, 132 P.2d 689 (1942); *People v. Mail and Express Co.*, Sp.Sess., 179 N.Y.S. 640, aff'd 231 N.Y. 586, 132 N.E. 898 (1919).

In determining which contrivances are lotteries it is the duty of the court to ascertain, where possible, what the authors of the constitutional and statutory anti-lottery provisions deemed to be a lottery. ORS 174.020. In arriving at the legislative intention many factors must be considered such as the language used, the object to be accomplished and the history behind the provision--no one of which is completely controlling. *Fox v. Galloway*, 174 Or. 339, 146 P.2d 922 (1944). Thus it was said in *State v. Schwemler*, 154 Or. 533, 60 P.2d 938 (1936), that: 'It is settled that the word 'lottery,' as used in the Constitution of this state, has no technical, legal signification different from the popular one, and the word is to be given the meaning generally accepted and in popular use at the time when the Constitution was adopted. '

Lotteries, which had their beginnings in antiquity, came to America from Europe. American colonists used this method extensively for the raising of funds for the carrying on of governmental functions. In some instances licenses to operate lotteries were granted to private lottery companies, which conducted the lottery as a business for their own profit. Perhaps the most famous of these was

the powerful Louisiana Lottery. Its promoters made enormous profits at the expense of its participants. Their great wealth gave them a powerful influence on the politics of the state. Opponents of the lottery found it increasingly difficult to combat this influence. But gradually the serious financial drain caused by this and other lotteries, the high incidence of fraud in conducting them, and economic depressions led to public agitation against them. State after state passed laws prohibiting them until they were in disrepute. See, generally, *Organized Crime and Law Enforcement*, ABA Commission on Organized Crime (1952); Thomas, *Lotteries, Frauds and Obscenity in the Mails*, Chapter I, page 1; Williams, *Lotteries, Laws and Morals*, Chapter II, page 28.

It is important to our consideration that the goal of these schemes, which were popularly known as 'lotteries,' was the raising of money directly from contributions made by the participants. These contributions were almost invariably cash, and were always a prerequisite to participation in the scheme. The *Encyclopedia Britannica*, Volume 10, in its section on 'Gaming and Wagering,' describes the popular concept of the mechanics of a 'lottery' as follows: Tickets bearing different numbers are placed on sale, and a date is set for a drawing. On that date is set up a device which contains numbered duplicates of all the tickets sold, and one or more numbers are drawn at random. From the money realized by the sale of tickets, the proprietors of the lottery deduct some amount, arbitrarily determined, for expenses and profits; the remainder is paid to the holders of tickets corresponding to those drawn.'

There were many variations of this procedure. But essential to all of them was the contribution by the participants of money or something which was of economic value to them, as a condition of participation.

It is not possible to obtain a true concept of what those who framed our constitution and statute conceived to be a lottery without considering the evil at which they directed the prohibition. The Encyclopedia Britannica, *supra*, describes that evil as follows: 'The principal charge against lotteries is that they penalize the poor, who in ill-advised hope or desperation buy most of the tickets; Count Camillo Benso Cavour called lottery 'a tax on imbeciles .''

In 1808 the British Government appointed a Select Committee to inquire into the evils of lotteries and the effect of the laws which had been instituted to regulate them. We quote the following discussion of its report from Williams, *Flexible Participation Lotteries* (1938), Chap. II, page 5: 'In the report of this committee, many instances were adduced of the most serious evils arising from lotteries. These included cases where people living in comfort and respectability had been reduced by their speculations to 'the most abject state of poverty and distress'; cases of domestic quarrels, assaults, and the ruin of family peace; fathers deserting their families and falling into want and disgrace; mothers neglecting their children, sometimes leaving them destitute; wives robbing their husbands of the earnings of months and years; and the pawning of clothing, beds and wedding rings in order to indulge in speculation. 'In other cases children had robbed their parents, servants, their masters; suicides had been

committed, and almost every crime that can be imagined had been occasioned, either directly or indirectly, through the baneful influence of lotteries."

It is abundantly clear from this description of the evils attending 'lotteries,' as that term was commonly understood, that they were the result of speculation. Their operation depended upon the wagering by the participants of money or something of monetary value on the chance that they would win something of far greater value. Thus, the Supreme Court of Maine, in *State v. Bussiere*, supra, said: 'We cannot go along, under the facts of this case, with those jurisdictions which hold that consideration is not an element of lottery, or with those jurisdictions which hold that consideration is necessary, but may consist of anything which is a detriment to a participant or a benefit to the promoter. We feel that the plan of the defendant lacks one element which is the source of all evil connected with lotteries or gambling; that of a person risking or hazarding something of value, however small, with the hope or opportunity of obtaining a larger sum by chance.'

In *State v. Cox*, 136 Mont. 507, 349 P.2d 104 (1960), the court said: 'To our mind, the framers of the Montana Constitution were seeking to suppress and restrain the spirit of gambling which is cultivated and stimulated by schemes whereby one is induced to hazard his earnings with the hope of large winnings. The statutes which define and prohibit lotteries must therefore be interpreted with this purpose in mind. '

In this statement we concur. To attempt to interpret the anti-lottery laws

without considering the circumstances which spawned them would eviscerate the legislative mandate that the Court is to seek the legislature's intent. The attorney general's brief informs us that the New York Code had a substantial influence on the framers of our constitution and on our legislators. We quote from a discussion of the history of the New York anti-lottery statutes in the case of *In re Dwyer*, 14 Misc. 204, 35 N.Y.S. 884 (1894), as follows: There can be no question as to what a lottery is under the laws of this state. Our statutes concerning lotteries constitute from an early beginning a distinct line of legislation. The subject has a legal literature all its own. The debate over it in the constitutional convention of 1821 is interesting and enlightening, and forms part and parcel of the legal literature of lotteries in this state. No one, after recurring to that discussion, can have any doubt about what was meant by the word 'lotteries' in the prohibition. The entire debate was conducted with precise and scientific reference to lotteries as then conducted by the state, and prohibited by statute to private individuals.

We have discussed those and similar lotteries and their evil effects. We have shown that the anti-lottery statutes were enacted to prevent the impoverishment of the individual and its attendant evils. Unless a scheme requires that (1) a participant part with a consideration, and (2) the consideration be something of economic value to him, participation therein can rob him neither of his purse nor his accumulated worldly goods. We must conclude, therefore, that the anti-lottery provisions of our statute are directed at schemes in which

participants are obligated to contribute something which is of economic value to them as a condition of participation. We do no violence to the law of contracts when we hold that a lottery contemplates a greater consideration than is generally required to support a contract. Professor Corbin, in 1 Corbin on Contracts, Sec. 109, page 346, discusses the problem of defining 'consideration,' and comes to the following conclusion: Who can now read all the reports of cases dealing with the law of consideration laying down the doctrines and constructing the definitions? Certainly not the writer of this volume. He has merely read enough of them to feel well assured that the reasons for enforcing informal promises are many, that the doctrine of consideration is many doctrines, that no definition can rightly be set up as the one and only correct definition, and that the law of contract is an evolutionary product that has changed with time .'

We merely hold that a lottery is a special kind of contract which requires a special kind of consideration--consideration which can impoverish the individual who parts with it.

The holdings of this court since the enactment of the anti-lottery provisions of our statute are consistent with this view. Quatsoe v. Eggleston, 42 Or. 315, 71 P. 66 (1903), defined a lottery as 'a gambling contract in which one or more parties on the one side risk a small sum for the chance of obtaining a greater, the winner or winners to be determined by lot ,' and as 'any scheme whereby one, on paying money or other valuable thing to another, becomes entitled to receive from him such a return in value, or nothing, as some formula of chance may

determine.' This definition was approved in *National Thrift Association v. Crews*, 116 Or. 352, 241 P. 72, 41 A.L.R. 1481 (1925), and in *State v. Schwemler*, supra. In *United States v. Olney*, D.C.Fed.Cas. No. 15,918, 1 Abbott, 275 (1868), Judge Deady, a participant in the convention which framed the constitution of this state, spoke as follows in defining the word 'lottery.' "A distribution of prizes and blanks by chance; a game of hazard, in which small sums are ventured for the chance of obtaining a larger value either in money or other articles.' Worcester's Dic.' "A sort of gaming contract, by which, for a valuable consideration, one may by favor of the lot obtain a prize of a value superior to the amount or value of that which he risks.' Am. Cyclopoedia.'

*McFadden v. Bain*, 162 Or. 250, 91 P.2d 292 (1939), said: 'It is, of course, lawful, if not resorted to as a device to evade the law, for a person to give away his money or property by lot or chance. The vice is in the payment of a consideration for the chance.

It will be noted that the language throughout has reference to 'payment,' a 'small sum,' or 'money,' or 'other valuable thing.' In each scheme which this court has declared to be a lottery, it has been careful to find a monetary consideration. That it has done this warrants our holding in the present case that a consideration of some economic value must be exacted of the participant if the scheme under scrutiny is to be deemed a lottery.

We are aware of the substantial number of cases in various jurisdictions which have held to the contrary. The fallacy in their position lies in the

mechanical application of preconceived notions of 'prize, chance and consideration,' without attempting to look behind those words in order to discover what concepts their users intended to convey. Those words were not written in a vacuum. We prefer not to interpret them in one.

The defendant urges that even if it be conceded that a lottery requires a consideration of economic value to the participant, such consideration is present in the case at bar because some of the participants bought groceries while they were registering for the draw. The contention is based upon the assumption that a part of the price paid for the groceries was paid as consideration for the chance to compete for the prize. He claims that it is immaterial that some of the participants bought no groceries, and that no participant was in any way obligated to buy. He concludes that consideration paid by one person taints the whole scheme and thus casts it into the category of a lottery.

In *Philpot v. Gruninger*, 14 Wall. 570, 20 L.Ed. 743 (U.S.1871), the United States Supreme Court said: Nothing is consideration that is not regarded as such by both parties. It is the price voluntarily paid for a promisor's undertaking.

We quote the following from the opinion of Mr. Justice Holmes in the case of *Wisconsin & Michigan Railway Co. v. Powers*, 191 U.S. 379, 24 S.Ct. 107, 48 L.Ed. 229 (1903): 'In the case at bar, of course the building and operating of the railroad was a sufficient detriment or change of position to constitute a consideration if the other elements were present. But the other elements are that the promise and the detriment are the conventional inducements each for the

other. No matter what the actual motive may have been, by the express or implied terms of the supposed contract, the promise and the consideration must purport to be the motive each for the other, in whole or at least in part.

And Mr. Justice Cardozo, in *McGovern v. City of New York*, 234 N.Y. 377, 138 N.E. 26, 25 A.L.R. 1442 (1923), expressed the same sentiment in the following words: 'Nothing is consideration,' it has been held, 'that is not regarded as such by both parties' The fortuitous presence in a transaction of some possibility of detriment, latent but unthought of, is not enough. Promisor and promisee must have dealt with it as the inducement to the promise. Holmes *Common Law*, p. 292; 1 *Williston, Contracts*, s 139, p. 309.

See also *Corbin on Contracts*, Sec. 118, p. 364; *Williston on Contracts*, Sec. 100, p. 369, 3rd ed. Section 120, p. 369, *Corbin on Contracts*, follows: 'If the term 'consideration' is restricted to a 'bargained-for equivalent given in exchange for the promise,' it is clear that the parties must agree upon what it is. It is one of the elements of the agreement that must be mutually assented to in order that there may be a contract. If one party offers to sell his car for a thousand dollars and the other party says that he accepts at the price of nine hundred dollars, there is no contract. The reason that there is none is that the parties have expressed no agreement as to the consideration for the promise to sell the car. Therefore, in making such a bargain, the consideration must always be expressed in some intelligible way. It need not be called by the name of 'consideration,' or by any other specific name; but it must be agreed upon and the

agreement must be evidenced in some way that will satisfy the court.'

It is clear from the foregoing that consideration must be something which the parties have agreed shall be such. It therefore becomes important to discover exactly what the agreement between the parties to the promotional device before us entailed. Eligibility for the prizes depended upon the fulfillment of three prerequisites relevant to the issues before us. First, the participant had to appear at the store in person for the initial registration. Second, he had to appear at the store to have his coupon validated each week in which he wished to be eligible for a prize. Third, he had to be personally present on the parking lot of the store at the time of the drawing. To each participant who met these three requirements, the owner of the store promised a chance at the prize. Those were the elements of the bargain. It is clear that there is sufficient consideration in the fulfillment of these conditions to support an ordinary contract. But we have shown that a greater consideration is necessary to constitute the scheme a lottery. The defendant's argument that those who purchase commodities at the store are paying a valuable consideration overlooks the fact that neither the storeowners nor the participants considered the making of a purchase a prerequisite to participation. The making of a purchase was neither expressly nor by implication a part of the bargain. And in the words of Justice Cardozo, quoted above, 'The fortuitous presence in the transaction of some possibility of detriment, latent but unthought of, is not enough.' Viewing the facts of this case in light of the analysis which has gone before, we must conclude that there was

no consideration which passed from the participant to the owner of the store sufficient to constitute the scheme before us a lottery.

McFadden v. Bain, *supra*, upon hasty reading, may appear to subscribe to a view contrary to the one taken above. But in that case, as the decision reveals, those who entered the theatre and, as a part of the paying audience participated in the drawing, had actually purchased tickets. The decision held that the price which they paid for the theatre tickets included something for their participation in the drawing. By buying a ticket and getting inside the theatre they could watch the drawing. It is true that those who had been given free tickets that enabled them to participate in the drawing even though they remained outside could possibly win the prize, but the decision held that that fact was immaterial since those who were inside the theatre had paid not only for their theatre tickets but also for participation in the drawing. As to them the scheme was held to be a lottery. They had actually parted with consideration in the form of money. In *McFadden v. Bain, supra*, the situation was as described in the language which we now quote from it: " So here the test is not whether it was possible to win without paying for admission to the theatre. The test is whether that group who did pay for admission were paying in part for the chance of a prize."

That fact must be borne in mind in assaying the decision. Thus, in *McFadden v. Bain* bank night was held a lottery because those who were in the theatre had parted with money that paid not only for their admission but also for participation in the drawing. Those who remained outside had received their

tickets free when distribution was made in the neighborhood. No one of them could enter the theatre unless the number which had been given to him free was declared the lucky number. If it was the lucky number, the holder had to enter the theatre in the presence of those who had purchased tickets, walk upon the stage and receive the prize. Some cases take note of the fact that a person usually feels a strong compulsion to buy a ticket rather than walk through a crowd and face the embarrassment of being thought a freeloader or cheapskate by those who have purchased tickets. Possibly only very small boys, who have paid nothing, feel like heroes when they win a prize in the midst of those who have purchased tickets. We do not embrace the compulsion rule and have no need to do so; but it is pertinent to take note of the fact that this case does not fall even within its scope.

In the case now at bar every participant is like those in *McFadden v. Bain* who remained outside the theatre. None had purchased a ticket or anything else. In fact, the participants in this case were even more favorably situated than those in *McFadden v. Bain*, for since everyone was upon an equal footing none could feel embarrassment if his number was called and he walked to the platform to receive his prize. Whether he purchased anything or not in the store was a matter for his individual choice. There was no compulsion upon him. Unlike the situation in *McFadden v. Bain* where the drawing took place in a theatre, the plaintiffs' drawing took place outside the plaintiffs' store. In fact, it occurred in an open parking lot. The lucky individual who received the prize could put it in his

pocket, go home and spend not a penny in the plaintiffs' stores.

Very likely the money that constitutes the prize comes from the sale of groceries; but for present purposes that is immaterial. The crucial inquiry is: did the participant part with any consideration. The chances are that whatever money the store spends for attracting to itself customers comes from the money that the latter spend in the store. The material fact is that no participant in the drawing under analysis can become impoverished by going to the drawing. It costs him nothing and he parts with nothing.

Defendant implies in his brief that this method of advertising is unfair to plaintiffs' competitors. He also intimates that the congested traffic in the vicinity of the plaintiffs' stores on the night of the drawing causes problems for the police force and is a nuisance. While these contentions may have merit, these questions are not before us to decide. We are to determine whether the plaintiffs may be held criminally liable under our anti-lottery statute for conducting the scheme which we have considered. We hold that they may not for the reason that the scheme is not a lottery under the laws of this state.

We state one more than no one could be rendered poor by participating in the plaintiffs' drawings. The worst that could happen to anyone would be that he would buy some groceries. But, if he purchased any, he would do so not in order to qualify himself as a participant in the drawing--for participation was free--but voluntarily. His purchase would not enhance in the slightest degree his chances upon the drawings. Participation in the drawings could not become for him a

gambling tendency. There was nothing that anyone could do that would improve his prospects of winning. If anyone parted with any money while upon the plaintiffs' premises, he did so solely in the purchase of merchandise. If he purchased anything, he did so at the same price as others who did not participate in the drawings, and their purchase had no effect upon his chances of winning. In order to participate in the drawings it was not necessary for anyone to spend a nickel in the store or in any other place. Tickets for the drawings and tickets to the parking lot (where the drawing occurred) were not for sale. They were free. Anyone who wished to do so could enter the parking lot and watch, free of charge, the drawings take place. This promotional scheme is a mere means of drawing customers to the plaintiffs' stores. The latter possibly devote some of their advertising budget to the creation of the prizes. The scheme is not a lottery although the prize money is distributed by chance. It is not lottery because there is no consideration which is in any way harmful to the participant. The participant parts with nothing of any value to himself.

The decree of the circuit court is reversed.

### **Contract Consideration**

A few courts in a few jurisdictions have held that consideration sufficient to create a contract is sufficient enough to meet the consideration element for regulated or prohibited gambling.

The following court opinion illustrates the contract consideration line of authority:

Supreme Court of Washington, En Banc.  
SEATTLE TIMES COMPANY, a corporation, Appellant,  
v.

George TIELSCH, Chief of Police of Seattle, and the City of Seattle,  
Respondents,  
Slade Gorton, Attorney General of the State of Washington, et al., Appellants.  
No. 42112.  
April 20, 1972.

Newspaper's action for declaratory judgment that football forecasting contest was not in violation of ordinance. The Superior Court, King County, George H. Revelle, J., entered judgment determining that contest was prohibited both as a lottery and as a gambling game, and newspaper appealed. The Supreme Court, Rosellini, J., held that football forecasting contest conducted by newspaper for its readers was prohibited as a lottery but not as a gambling game.

Judgment modified and affirmed.

ROSELLINI, Associate Justice.

This is a declaratory judgment action brought by the Seattle Times Company to obtain an adjudication that its 'Guest-Guesser' football forecasting contest does not violate Seattle City Ordinance No. 16046. The original defendant was the police chief of Seattle, who, in his answer, prayed for a judgment that the contest violated the ordinance and also violated Const. art. 2, s 24, [FN1] and RCW 9.47.010. The parties stipulated to the addition of the City of Seattle as a party defendant and the court granted the city's motion to add the Attorney General, the Prosecuting Attorney for King County, and the King County Executive as additional defendants. By amended answer the police chief prayed

for judgment that the contest also violated RCW 9.59.010 and Laws of 1971, Ex.Ses., ch. 280.

FN1. Senate Joint Resolution No. 5, a constitutional amendment, to be submitted to the voters in the 1972 general election, would authorize the legislature to approve lotteries by a vote of 60 per cent of the members of each house. It also would allow authorization of lotteries by initiative or referendum.

After a trial at which the Times presented evidence by contestants and experts concerning the amount of skill and judgment involved in successful competition in the contest and, in addition, presented evidence that no monetary consideration is paid for the chance to compete, other than the purchase price of the newspaper which carries coupons used in the contest, and that the contests are administered fairly with no deceptive practices, the trial court entered these significant findings:

## II

Since 1939, and including 1970, plaintiff has sponsored a contest called 'Guest-Guesser', the rules, entry forms and results of which are printed in plaintiff's newspaper, . . .

## III

The contest has been conducted in accordance with said rules under which on nine consecutive weeks in the months of September, October and

November plaintiff published a list of twenty football games to be played on the weekend of each of said nine weeks. All persons who have passed their twelfth birthdate, except plaintiff's employees and newspaperboys, may compete in the contest by forecasting the results of the games on coupons printed in plaintiff's newspaper. The rules provide that entries may be made on facsimiles of the same dimensions as the printed coupons with the teams listed in exactly the same sequence. Squares for each team and ties must be drawn so that the square on the facsimiles line up exactly with those on the printed coupon. Reproductions made by duplicating devices, including carbon paper are not eligible. A facsimile made under these requirements takes about twenty minutes to prepare. During 1970 an average of about 35,000 entries was received by plaintiff during each of the nine qualifying weeks. Some contestants spend fifteen to twenty hours each week in preparing their selections for entry and submit as many as twenty-five each week.

#### IV

The contest was designed, in part at least, to stimulate interest in plaintiff's newspaper. Plaintiff considers the contest to be entertaining and of interest to readers. The financial success of plaintiff depends upon the sale of its newspapers and its advertising revenue. Advertising revenue increases in proportion to increased circulation.

#### V

There is no evidence that the 'Guest-Guesser' contest has a discernible

effect on the circulation of the Seattle Times, although one witness has testified to purchasing copies in order to obtain 'Guest-Guesser' coupons. The 'Guest-Guesser' contest creates reader interest and this is financially beneficial to the Seattle Times Company.

## VI

Plaintiff, under its rules, offered to pay \$1,000 to a contestant who submits twenty correct predictions in a single qualifying week, and plaintiff did pay said sum on three occasions during the 1970 contest. One Hundred Dollars (\$100.00) is paid to each week's high scorer or is divided among the week's high scorers. Persons who have the best and second-best scores during the qualifying weeks may submit an entry for the final week's contest, the winner of which is awarded a trip for two persons to the Rose Bowl or Super Bowl.

## VII

The result of a football game may depend upon weather, the physical condition of the players and the psychological attitude of the players. It may also be affected by sociological problems between and among the members of a football team. The element of chance is an integral part of the game of football as well as the skill of the players.

## IX

The lure of the 'Guest-Guesser' contest is partially the participant's love of football, partially the challenge of competition and partially the hope enticingly held out, which is often false or disappointing, that the participant will get

something for nothing or a great deal for a very little outlay.

X

Judgment, skill and knowledge--of which there is a great amount--are not necessary to the 'Guest-Guesser' contest. All they do is define the contestants. They eliminate the participants who are not oriented to football, or who do not have at least a heavy interest in football, and who are not sufficiently interested and oriented to take the time and trouble to do some studying with respect to it. After the contestants are identified by their expertise and knowledge, everything else is chance. No one will ever win the contest without skill but neither will anyone win without chance.

Upon these findings the trial court concluded: Each of the elements of prize, consideration and chance is an integral part of plaintiff's contest when viewed as an entire activity and judgment should be entered in favor of defendants George Tielsch and The City of Seattle declaring that said 'Guest-Guesser' contest is in violation of Section 24, Seattle Ordinance 16046, Section 25, Seattle Ordinance 16046, RCW 9.59.010, RCW 9.47.010.

An appeal was allowed directly to this court. Other leading newspapers of the state, namely the Seattle Post-Intelligencer (joined by a number of smaller newspapers), and The Tacoma News Tribune, were permitted to file amicus curiae briefs, supporting the position taken by the Times and opposing the judgment. In addition, the Attorney General, the Prosecuting Attorney for King County, and the King County Executive have filed a brief in which they too

oppose the judgment.[FN2]

FN2. We are not favored with an explanation of the interest of the state and county in supporting football forecasting contests.

The police chief and the City of Seattle have filed the only brief before us which supports the decision of the trial court. Nevertheless, we are satisfied that under the principles previously laid down by this court concerning the elements which establish the existence of a lottery, the trial court was correct in holding that the contest in question is a lottery within the meaning of the ordinance and RCW 9.59.010.

The state constitution, article 2, section 24, provides that the legislature 'shall never authorized any lottery.' Pursuant to the policy expressed by the people in this constitutional provision, the legislature enacted RCW 9.59.010, and its subordinate, the City of Seattle, enacted its ordinance No. 16046, section 24, of which provides: 12.11.250 Lotteries and prize packages. It is unlawful for any person to open, conduct, maintain or carry on, or be in any manner connected with, any lottery or any establishment or business, by whatever name it may be known, wherein any property is sold or disposed of by chance, or to sell or dispose of any lottery ticket or share, either for religious or secular purposes, or any chance, or any article or thing entitling, or purporting to entitle the purchaser to any chance, or to sell or dispose of any package or article purporting to contain

a prize, or where, as an inducement to purchase, it is held out that such article or package may contain a prize or may entitle the purchaser to some article or thing of value not directly contemplated and known in the purchase.

RCW 9.59.010 contains a less detailed definition of a lottery: A lottery is a scheme for the distribution of money or property by chance, among persons who have paid or agreed to pay a valuable consideration for the chance, whether it shall be called a lottery, raffle, gift enterprise, or by any other name, and is hereby declared unlawful and a public nuisance.

The elements of a lottery are prize, consideration and chance. State ex rel. Schillberg v. Safeway Stores, Inc., 75 Wash.2d 339, 450 P.2d 949 (1969). *We said in that case that where the elements of prize and chance are present, the courts will examine the game to see if consideration in any form actually moves from the participants to the promoter, and we held that **any consideration sufficient to support a contract is sufficient to satisfy the requirement.*** This view is also taken in the only treatise upon the subject of lotteries which we have been able to discover, F. Williams, Flexible Participation Lotteries (1938). The author at page 275, section 278, says that the lottery, although not itself a contract but rather a unilateral creation, is nevertheless contractual in its operation. He says: It is designed to induce many contracts. The entire scheme is presented to the public as a general offer. The scheme prescribes the conditions of acceptance. These conditions require the acceptors to pay something or do something, or both.

For a listing of other jurisdictions which have adopted this theory, See 29 A.L.R.3d 888, Promotion schemes of retail stores as criminal offense under antigambling laws.

In the Times' football forecasting contest, the participants are not required to purchase chances (although they must, or course, purchase at least one newspaper or obtain one purchased by someone else), but they are required to do something, and the thing which they are required to do involves many hours of a participant's time if he is to have any hope of success. He gives his time and his attention to the Times' contest. This is termed by the Times itself as 'reader interest.' It does not deny that 'reader interest' is stimulated. It disclaims any great benefit to itself flowing from this stimulated interest but claims that it is exceedingly beneficial to the contestants, giving them something to do with their time which presumably would otherwise be wasted or consumed in mischievous undertakings.

While the exact extent of the benefit received by a newspaper which conducts one of these contests is not revealed in the record, that there is such a benefit cannot be doubted.

It is perhaps true that the contestants do not feel that they are giving up anything of value to participate in the contest.

As a matter of fact, the participant in any lottery is likely to feel that the small amount which he contributes for a chance to receive much more is well worth the risk. But the people of this state when they framed the constitution, the

statutes, and the ordinances, recognized that the gambling instinct is strong in human nature and enacted these provisions to protect themselves from their own inclination to engage in self-deception when that instinct is stirred. Consequently, the opinion of a participant that he has not given up anything of value is not determinative, and as we said in *State ex rel. Schillberg v. Safeway Stores, Inc.*, *Supra*, if the participant is required to do something which he might not otherwise do, and if there is in fact a benefit flowing to the promoter, which induces him to make the offer, the requirement of consideration is met, provided, of course, that the elements of chance and prize are present.

The appellant acknowledges that under the rule of that case, consideration can be found to exist in this case, but it earnestly urges that the element of chance is lacking. Chance within the lottery statute is one which dominates over skill or judgment. The measure is a qualitative one; that is, the chance must be an integral part which influences the result. The measure is not the quantitative proportion of skill and chance in viewing the scheme as a whole.

*Sherwood & Roberts--Yakima, Inc. v. Leach*, 67 Wash.2d 630, 634--635, 409 P.2d 160, 163 (1965).

The appellant maintains that chance is not a dominant element in football forecasting contests and that its evidence clearly established this to be the fact. The trial court found to the contrary upon that evidence, and we think the finding is justified. The appellant's expert statistician who testified at the trial did not state that chance plays no part in the outcome of such a contest or even that it

does not play a dominant role. He merely testified that such a contest is not one of 'pure chance.' Pure chance he defined as a 50--50 chance. He acknowledged that a contestant who consistently predicted the outcome of 14 out of 20 games correctly would be a 'highly skilled' contestant.

In *State ex inf. McKittrick v. Globe-Democrat Publishing Co.*, 341 Mo. 862, 110 S.W.2d 705 (1937), the court considered a multiple entry contest involving the selecting of the most appropriate titles for cartoons drawn by Peter Arno, the title to be chosen from a list accompanying the publication of each cartoon. The evidence showed that, with respect to almost all of these cartoons, the most appropriate titles could be agreed upon; but for a very few, two equally appropriate titles were proposed, one of which had been chosen as the correct title by a panel of supposedly disinterested judges. The court held that the element of chance entered the contest at this point, if not before, and that it was a substantial element. It said: It is impossible to harmonize all the cases. But we draw the conclusion from them that where a contest is multiple or serial, and requires the solution of a number of problems to win the prize, the fact that skill alone will bring contestants to a correct solution of a greater part of the problems does not make the contest any the less a lottery if chance enters into the solution of another lesser part of the problems and thereby proximately influences the final result. In other words, the rule that chance must be the Dominant factor is to be taken in a qualitative or causative sense rather than in a quantitative sense. This was directly decided in *Coles v. Odhams Press, Ltd.*, *supra*, when it was

held the question was not to be determined on the basis of the mere proportions of skill and chance entering in the contest as a whole.

341 Mo. at 881, 110 S.W.2d at 717.

Our research has revealed only one case involving a football forecasting game and the game there was a 'pool,' that is, a gambling game wherein wagers were placed. The Superior Court of Pennsylvania held that it was a lottery. What is most relevant in the case for our consideration here is the court's discussion of the element of chance in forecasting the result of football games. That court said: It is true that for an avid student of the sport of football the chance taken is not so great as for those who have little interest in the game. However, it is common knowledge that the predictions even among these so-called 'experts' are far from infallible. Any attempt to forecast the result of a single athletic contest, be it football, baseball, or whatever, is fraught with chance. This hazard is multiplied directly by the number of predictions made. The operators of the scheme involved in this case were well cognizant of this fact for the odds against a correct number of selections were increased from 5 to 1 for three teams picked up to 900 to 1 for fifteen teams.

Commonwealth v. Laniewski, 173 Pa.Super. 245, 249, 98 A.2d 215, 217 (1953).

The trial court in the instant case recognized the same basic realities attendant upon the enterprise of football game-result forecasting. We are convinced that it correctly held that chance, rather than skill, is the dominant

factor in the Times' 'Guest-Guesser' contest. The very name of the contest conveys quite accurately the promoter's as well as the participants' true concept of the nature of the contest.

We conclude that the contest, however harmless it may be in the opinion of the participants and the promoters, is a lottery within the definitions contained in RCW 9.59.010 and Seattle City Ordinance No. 16046, s 24.

However, we find no support, either in the findings or in the record, for the proposition that the 'Guest-Guesser' contest violates section 25 of the ordinance, or RCW 9.47.010 (repealed by Laws of 1971, Ex. Ses., ch. 280) or the 1971 law. All of these involve a wager of something of monetary value. We are convinced that the contest is not a gambling game within the meaning of these statutes.

As thus modified, the judgment is affirmed.

Promoter Benefit

A few jurisdictions have statutes and court opinions that follow the promoter benefit line of authority. Under this line of authority any benefit to the promoter is sufficient to meet the consideration element of gambling.

The following abridged court opinion from Ohio is an example of the promoter benefit line of authority:

Court of Appeals of Ohio, Second District, Miami County.

**TROY AMUSEMENT CO.**

**v.**

**ATTENWEILER et al.**

March 13, 1940.

Suit by the Troy Amusement Company against Andrew Attenweiler and others, to restrain the

defendants from interfering with the plaintiff's operation of a 'bank night'. The trial court dissolved a temporary restraining order and sustained a demurrer to the petition, and the plaintiff gives notice of intention to appeal, and a temporary restraining order is allowed in the Court of Appeals, and the defendants file a demurrer.--[Editorial Statement.]

Demurrer sustained, and cause remanded.

Syllabus by the Court.

A plan, commonly known as 'bank night,' whereby every adult member of the public is invited to register his or her name in a book in the lobby of a theater free of charge, and, upon registering, is given a number which he is to hold so as to be eligible to participate in a drawing for a sum of money given each week to the person who holds the number drawn from a wheel if he is present at the time of the drawing or presents himself at the theater within a specified number of minutes after the drawing, is a scheme of chance within the provisions of Section 13063 et seq.

GEIGER, Judge.

This matter had its inception in the Court of Common Pleas of Miami county, Ohio.

Inasmuch as the matter was there decided on a demurrer by the defendants to the petition, it is necessary to set out the allegations of the petition with such minuteness as will enable us to determine whether the petition states a cause of action. Had the defendants answered and had the plaintiff thereupon demurred to the answer, we would have had a broader basis upon which to ground our opinion. Considering the general interest in the question, such a proceeding might have been advisable.

The petition recites that the Troy Amusement Company is a corporation, the business of which is the ownership of a theater and the showing of moving pictures; that in connection with the business, plaintiff for more than three years has held, on one night each week, a program designated as 'bank night' which is alleged to be an advertising plan designated to stimulate public interest and good will in the motion picture industry and particularly in the Mayflower Theater of Troy, Ohio, operated by the plaintiff.

It is alleged that at the start of the 'bank night,' plaintiff placed in the lobby of its theater in Troy, Ohio, a registration book and every adult member of the public was invited to register so as to be eligible to participate in winning the bank account given each week; that no charge of any kind was made for registering and every person registered was given a number, which was held by such person as long as 'bank night' continued.

Each week one ticket containing a number identical with one in the patrons' register book was withdrawn from a wheel which contained the individual numbers of all patrons who had registered. The person having the number drawn was required to be present within three minutes after the announcement of the number and claim the bank account; no charge or fee was ever made in order to participate in the drawing, the only condition being that the person whose number was called must appear within the specified time and claim the same. In the event the person whose number was drawn was not in the theater, the number was announced outside and if the person who held the number was on the outside and came to the theater within three minutes, he was admitted to the theater without charge and allowed to claim the account.

...

State v. Bader, 24 Ohio N.P.,N.S., 186, holds that a scheme whereby an automobile is given away by means of a drawing of tickets, which were given to purchasers of meals at a restaurant, as well as to a few others who came in without purchasing meals, which scheme and drawings are admitted to be inducement for people to patronize the restaurant, is a lottery, and in violation of the provisions of the Code. While this case is by an inferior court, there is much in it of value and the facts are suggestive of those involved in the case at bar. The court states, on page 188 of 24 Ohio N.P.,N.S., that the question to be decided is whether the term 'lottery' as used by the statute and ordinance embraces the distribution by lot of a prize among the holders of tickets, some of whom received their tickets contemporaneously with purchases made by them and without additional charge, and a very small minority of whom received tickets without any charge, and without making purchases. The court gives a definition of 'lottery' as a scheme for the distribution of prizes by lot or chance, or a scheme by which a result is reached by some action or

means taken and in which the result of man's choice has no part. A further definition is a scheme for the distribution of property by chance among persons who have paid or agreed to pay a valuable consideration for the chance. The court states that three essential elements of a lottery are (1) prize, (2) chance and (3) consideration. **The first two elements being conceded, the question before that court was whether there was a consideration, moving from the recipients of the tickets, to the defendants.** The court cites many cases covering the question of consideration, among them *Brooklyn Daily Eagle v. Voorhies*, C.C., 181 F. 579, 581, where the court says, in speaking of the question of consideration, that it does not mean that pay shall be directly given for the right to compete. It is only necessary that the person entering the competition shall do something or give up some right sufficient to comply with that requirement. **Nor does the benefit to the person offering the prize need be directly dependent upon the furnishing of a consideration. Advertising and the sales resulting thereby, based upon a desire to get something for nothing, are amply sufficient as a motive.** The court quotes the case of *Equitable Loan & Security Co. v. Waring*, 117 Ga. 599, 44 S.E. 320, 62 L.R.A. 93, 97 Am.St.Rep. 177, in reference to consideration, to the effect that it need not be great. "It may be money or other things of value. Sometimes the attracting of custom to one's business, or other benefit to the person conducting the scheme [,] is held to be sufficient, [although no] money is paid directly for the ticket, lot or chance." The court concludes that the scheme under question is a well planned lottery, often called a 'gift enterprise.' The claim that the tickets are given away free was a mere 'smoke screen' to conceal the real character of the undertaking. The tickets were not free in the sense of being given without consideration. To obtain them in the ordinary course, a person was compelled to purchase a meal. A very few were compelled to walk a certain distance through the restaurant to get them. The court says the real injury to the people of the state of Ohio, in the operation of such lotteries, is the inducement offered to arouse the gambling spirit. Persons believed they were going to get something for nothing. This is the evil in all schemes of chance, no matter under what novel or devious methods they are conducted. The cupidity of people is aroused and they all rush to obtain a chance, worth perhaps more than a

thousand times that which they venture.

...

Returning now to the facts involved in the case at bar, as disclosed by the petition, we may summarize, that the plaintiff is the operator of a moving picture theater operating in connection therewith, for one night each week, a 'bank night,' **for the alleged purpose of stimulating public interest and good will in the moving picture industry and especially that operated by the plaintiff.** The petition, perhaps inadvertently, recites many indicia of a gambling device. It is alleged that a registration book was placed in the lobby where every adult member of the public was invited to register, so as to be eligible to participate in winning the bank account given each week; that a ticket containing the number assigned to a patron so registering was withdrawn from a wheel, which contained the individual numbers of all persons who had registered, and thereupon the prize was bestowed upon a person present or who might be summoned within a short period. It is well known, but possibly not alleged in the petition, that, if the person whose name is drawn is not present or can not be found within the given time, the prize that would otherwise have been awarded to him is carried forward to the drawing on the succeeding week and that in this way, the prize becomes each week more enticing to those seeking 'something for nothing.'

It is alleged that 'bank night' is not a lottery and is a legitimate part of the business of operating a moving picture theater; and that if the business is interfered with by vexatious suits, the plaintiff's business will be damaged to the extent of thousands of dollars.

It is urged that inasmuch as the patron enters the theater by paying the usual price for a ticket, that he does not thereby pay any consideration for the chance of participating in the prize by having his name drawn from a wheel. The plaintiff has asserted that if it is deprived of the right to operate the scheme it will lose thousands of dollars. **Whose thousands of dollars does it lose that are paid in excess of what would be paid were the scheme not in operation? Manifestly, the money of the patrons who have been lured, by a hope of winning, to go to the picture house in larger numbers than if there were no prize offered. ...**

**The element of advertisement and increased patronage is sufficient consideration flowing to the operator to bring the transaction within the condemnation of promoting and advertising a scheme of chance.**

....

We therefore conclude that when it appears that the scheme involved is prohibited by the statutes, the plaintiff can not appeal to a court of equity to protect it from the consequence of its own illegal act.

While we have not read all the cases cited, we have examined enough to conclude, without reservation, that the scheme presented by the petition is, as a matter of fact, a scheme of chance forbidden by the Ohio statutes.

Demurrer sustained and cause remanded.

HORNBECK, P. J., and BARNES, J., concur

While the court opinion above illustrates a promoter benefit form of consideration, some states have codified this concept regarding consideration.

For example, review the following statutory definition of lottery gambling from

Wisconsin:

**945.01(5) Lottery.**

**(a)** A lottery is an enterprise wherein for a consideration the participants are given an opportunity to win a prize, the award of which is determined by chance, even though accompanied by some skill.

**(am)** "Lottery" does not include bingo or a raffle conducted under ch. 563, pari-mutuel wagering conducted under ch. 562 or the state lottery or any multijurisdictional lottery conducted under ch. 565.

**(b)**

**1.** "Consideration" in this subsection means *anything which is a commercial or financial advantage to the promoter or a disadvantage to any participant*, but does not include any advantage to the promoter or disadvantage to any participant caused when any participant learns from newspapers, magazines and other periodicals, radio or television where to send the participant's name and address to the promoter. (*emphasis added*)

## *Chance*

The element of chance is generally characterizes the method of determining the outcome of a prize event. The element of chance is viewed in opposition to the degree of skill required to determine the outcome of an event. There are three prominent lines of authority regarding the chance element, namely, the “predominance or American view”.

### *The Dominant Factor Test*

This is the prevailing test used by most state courts and the federal courts when assessing the existence of the gambling element of chance, and is sometimes referred to as the “American Test” or the “Predominance Test”.

Under this test, one must envision a continuum with pure skill on one end and pure chance on the other. The element of chance is met if chance predominates over skill in determining the outcome of the contest, even if the activity requires some skill. In theory, an activity crosses from skill to chance exactly in the middle of the continuum. On the continuum, games such as chess would be almost at the pure skill end, while traditional slot machines would be at the pure chance end of the continuum. Between these ends, there are many games that contain both skill and chance. In this area, there is always legal risk because it is a subjective assessment as to where on the continuum a game that is part skill and part chance lies.

### The Gambling Instinct Test

In a minority of states, the relative predominance of skill versus chance is irrelevant. In these states, courts merely look at the nature of an activity to determine whether it appeals to one's "gambling instinct." If an activity appeals to one's "gambling instinct," it is prohibited. Because this test is as subjective, and arguably more so, than the predominance test, court decisions vary widely in its application to particular games.

### The Any Chance or Material Element Test

In a few states, the relative predominance of skill versus chance is irrelevant. These states prohibit any payment for the opportunity to win something based on a game where chance has any role in determining the outcome. At times, older court opinions assessed games based on appealing to one's "*gambling instinct*," when any element of chance determined the outcome of an event.

### Specific Prohibitions

In some states that use the dominant factor test, there are companion statutes identifying particular games, usually games that use cards, balls or dice, as being games of chance regardless of the skill involved. For example, in Nevada, a gambling game is defined by statute as follows:

NRS 463.0152 "Game" and "gambling game" defined. "Game" or "gambling game" means any game played with cards, dice, equipment or any mechanical, electromechanical or electronic device or machine for money, property, checks, credit or any representative of value, including, without limiting the generality of the foregoing, faro, monte, roulette, keno, bingo, fan-tan, twenty-

one, blackjack, seven-and-a-half, big injun, klondike, craps, poker, chuck-a-luck, Chinese chuck-a-luck (dai shu), wheel of fortune, chemin de fer, baccarat, pai gow, beat the banker, panguingui, slot machine, any banking or percentage game or any other game or device approved by the Commission, but does not include games played with cards in private homes or residences in which no person makes money for operating the game, except as a player, or games operated by charitable or educational organizations which are approved by the Board pursuant to the provisions of NRS 463.409.

Therefore, even though Nevada courts have used the dominant factor test to distinguish games of chance from games of skill, if a game is statutorily identified as a gambling game, the relative skill and chance in the game is irrelevant and the game is classified as a gambling game by statute. This was a significant issue with regard to poker when off-shore internet poker companies were arguing that poker was a skill game and thus not subject to gambling prohibitions that applied to games of chance. Whether or not poker is a skill game is irrelevant in many states as state statutes, like the example from Nevada, have classified poker as a gambling game.

## Alabama Supreme Court Analysis

In the following opinion, the Supreme Court of Alabama is a good example of a court analyzing the element of chance.

Supreme Court of Alabama.  
OPINION OF THE JUSTICES.

No. 373.

April 24, 2001.

State House of Representatives requested opinion of Supreme Court Justices on whether Senate bill that would authorize video machine gambling was a revenue-raising measure that should originate in the House of Representatives. The Justices answered that: (1) bill violated constitutional prohibition against lotteries, and (2) bill was not a “bill for raising revenue” and, therefore, did not need to originate in the House of Representatives.

Question answered.

Senate bill which provided for the licensing and regulation of skill dependent wagering games at racing facilities was not a bill for “raising revenue” and, therefore, did not need to originate in the House of Representatives, even though it would levy taxes on the conduct of skill dependent games by racing operators; the bill brought into play the police power over gambling devices, and the levying of taxes was merely incidental to the other purposes. (Opinion of Associate Justices Houston, Harwood, and Woodall.) Const. Art. 4, § 70.

Members of the House of Representatives  
Alabama State House

Montgomery, Alabama

Dear Representatives:

We have received House Resolution No. 251 requesting the opinions of the Justices of the Supreme Court as to whether Senate Bill No. 257 (“S.B. 257”), now pending before the Legislature, is a revenue-raising measure that should originate in the House of Representatives, pursuant to § 70 of the Constitution of Alabama of 1901. Your synopsis of S.B. 257 states:

“This bill would provide that bona fide coin-operated amusement machines shall not be subject to the criminal prohibition against possessing gambling devices; would amend the exemption of racing facilities from existing gambling laws in order to accommodate other licensed wagering activities at such facilities; would authorize each racing commission in the state to license each racing facility under its jurisdiction to conduct skill dependent wagering games and prescribe the terms and conditions of such license; would confer upon each racing commission, in addition to the powers that it has to license and regulate racing and pari-mutuel wagering thereon, the same or similar powers to license and regulate the conduct of skill dependent wagering games; would exempt skill dependent wagering games from the prohibitions of certain criminal and civil statutes and provide that certain acts related to skill dependent wagering games shall constitute crimes; and would levy certain state and local license taxes on the conduct of skill.”

...

The Senate sponsors seem to have relied upon Opinion of the Justices No. 358, 692 So.2d 107 (Ala.1997), in drafting S.B. 257. In that opinion, a majority of the Justices, giving an advisory opinion on House Bill No. 160, opined that as long as “some degree of skill” is required in a gambling activity, that activity differs from a lottery in kind, rather than in degree, and thus, the Justices reasoned, H.B. 160 did not violate Alabama's constitutional prohibitions against authorizing a lottery. Opinion of the Justices No. 358 went further to answer the question whether the use of certain equipment to play video poker instituted gambling by lot “if such equipment is designed and programmed to reflect correctly the rules of poker and the relative values and probabilities of the possible hands in poker.” 692 So.2d at 113. The Justices answered that it did not.

We believe Opinion of the Justices No. 358 has resulted in the very confusion and error it expressly sought to avoid; therefore, this Court should clarify the law regarding the constitutional prohibition against lotteries and schemes in the nature of lotteries contained in § 65, Constitution of Alabama 1901, as it applies to S.B. 257. The failure to address and clarify this underlying constitutional question creates a great danger that local and state officials will similarly rely upon Opinion of the Justices No. 358 to the detriment of the citizens of this State.

We do not believe that under § 70 of the Alabama Constitution of 1901, S.B. 257 may originate in the Senate. To say that it may would mislead the

members of the Alabama Legislature and the citizens of this State to believe that the underlying provisions of S.B. 257 are constitutional,FN1 when they clearly are not. This Court should not avoid the question of the constitutionality of S.B. 257 under § 65 in an attempt to address only the precise and narrow question posed by the House of Representatives. This Court should never imply that a bill that it believes is unconstitutional can originate in either house of the Legislature. This Court should never, by silence, encourage the corruption and immorality FN2 that § 65 was meant to prevent. For the reasons demonstrated in this advisory opinion, we reject the opinion expressed by a majority of the Justices in Opinion of the Justices No. 358. Because we consider S.B. 257 to be unconstitutional, that act cannot properly originate in either house of the Alabama Legislature.

FN1. In fact, we question whether the Legislature would even have proposed S.B. 257 had not a majority of the Justices in 1997 issued an advisory opinion that, in our opinion, incorrectly interpreted the anti-lottery provision of § 65, Ala. Const.1901.

FN2. *State v. Crayton*, 344 So.2d 771 (Ala.Civ.App.1977); *State v. Shugart*, 138 Ala. 86, 35 So. 28 (1903).

#### I. Historical Analysis of Lotteries in America

In its infancy, the United States generally regarded lotteries favorably. Ronald J. Rychlak, *Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C.L.Rev. 11, 12 (1992). This attitude was primarily attributable to the States' weak tax base and decentralized

government. 34 B.C.L.Rev. at 12. Lotteries eventually became so popular and prolific that one writer has noted: “By 1776, a lottery wheel existed ‘in every city and town large enough to boast of a courthouse and a jail.’” 34 B.C.L.Rev. at 27, citing Henry Chafetz, *Play the Devil: A History of Gambling in the United States from 1492 to 1955*, at 25 (1960).

However, America's infatuation with lotteries was relatively short-lived, because of widespread fraud and the related social problems. 34 B.C.L.Rev. at 13, 32. In 1825, Chief Justice Marshall, writing for the United States Supreme Court in *Brent v. Davis*, 23 U.S. 395, 402, 6 L.Ed. 350 (1825), referred to the policy of “tolerating lotteries” as “questionable.” Later, heavy opposition to lotteries began “as part of general social reform that included ... movements for ... peace, women's rights, educational reform, prison reform and abolition of slavery.” 34 B.C.L.Rev. at 32, citing Charles T. Clotfelter & Phillip J. Cook, *Selling Hope: State Lotteries in America* 36-37 (1989). In fact, in 1842, “Democrats [were] swept to power because of their opposition to lotteries.” 34 B.C.L.Rev. at 32, quoting National Institute of Law Enforcement and Criminal Justice, U.S. Department of Justice, *The Development of the Law of Gambling: 1776-1976*, at 269-70 (1977).

Describing the social problems attending lotteries, the librarian of Congress wrote that there existed “a general public conviction that lotteries are to be regarded, in direct proportion to their extension, as among the most dangerous and prolific sources of human misery.” 34 B.C.L.Rev. at 12-13, citing

A.R. Spoffard, *Lotteries in American History*, S. Misc. Doc. No. 57, 52d Cong., 2d Sess. 194-95 (1893) (Annual Report of the American Historical Society). In fact, the problems lotteries created were of such a magnitude and were so pervasive that by the late 1800s the States were nearly unanimous in imposing constitutional prohibitions on lotteries. 34 B.C.L.Rev. at 37. Against this backdrop, Alabama included a constitutional prohibition of lotteries in its Constitution of 1875. The 1901 Constitution adopted verbatim the 1875 Constitutional language. Section 65 of the Constitution of Alabama of 1901 now provides:

“The legislature shall have no power to authorize lotteries or gift enterprises for any purposes, and shall pass laws to prohibit the sale in this state of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery; and all acts, or parts of acts heretofore passed by the legislature of this state, authorizing a lottery or lotteries, and all acts amendatory thereof, or supplemental thereto, are hereby avoided.”

Since 1980, Alabama has adopted various constitutional amendments creating exceptions to § 65, specifically allowing the game of bingo under certain circumstances. See Ala. Const., Amendments 386, 387, 413, 440, 506, 508, 542, 549, 550, 565, 569, 599, and 612.

According to Sir William Blackstone in his *Commentaries on the Laws of England*, the term “lottery” encompassed a broad array of activities:

“[A]ll private lotteries by tickets, cards, or dice ... are prohibited under a penalty ... for him that shall erect such lotteries.... Public lotteries, unless by authority of parliament, and all manner of ingenious devices, under the denomination of sales or otherwise, which in the end are equivalent to lotteries, were ... prohibited....”

William Blackstone, Commentaries on the Laws of England 173.

Nevertheless, Alabama courts did not initially adopt such a broad definition. *Buckalew v. State*, 62 Ala. 334 (1878) (persons who wagered money on a round board and spun a hand fastened in the center in an attempt to register the highest number on the rim and thereby win money did not violate anti-lottery provisions). However, this narrow view was short-lived, and Alabama courts soon defined lotteries as Blackstone did, interpreting the term “lottery” broadly, thus prohibiting a wide variety of activities. See *Reeves v. State*, 105 Ala. 120, 17 So. 104 (1894) (persons paying for a privilege to spin an arrow located on a circular board for a chance to win an article of jewelry or a sum of money had engaged in a prohibited lottery); *Loiseau v. State*, 114 Ala. 34, 36, 22 So. 138, 139 (1897) (Court expressly modified *Buckalew* and held slot machine to be a lottery); *Johnson v. State*, 137 Ala. 101, 104, 34 So. 1018, 1019 (1903) (slot machine is a lottery); *Try-Me Bottling Co. v. State*, 235 Ala. 207, 211, 178 So. 231, 234 (1938) (the prohibition of lotteries applies to any scheme in the nature of a lottery).

Despite this broad interpretation, the courts apparently lacked a consistent judicial standard for determining whether a scheme constituted a lottery. See

Yellow-Stone Kit v. State, 88 Ala. 196, 198, 7 So. 338, 338 (1890) (provides numerous definitions for the term “lottery”), overruled by Grimes v. State, 235 Ala. 192, 178 So. 73 (1938), overruling recognized by Clark v. State, 262 Ala. 462, 80 So.2d 312 (1955). Consequently, in 1938, this Court provided the following definition of the term “lottery”: “(1) A prize, (2) awarded by chance, (3) for a consideration.” Grimes, 235 Ala. at 193, 178 So. at 74. This three-pronged definition of “lottery” was based on definitions of that term used by a vast number of authorities, both judicial and nonjudicial, and it is still accepted by the overwhelming majority of jurisdictions, as well as the United States Supreme Court.FN3

FN3. Black's Law Dictionary (5th ed.1979) succinctly defines “lottery” to mean “a chance for a prize for a price.” Nevertheless, concerning the role of chance, consulting dictionaries often proves unfruitful because most dictionaries ascribe both narrow and broad meanings to the term.

For many years, Alabama courts, when determining whether a gambling activity was an illegal lottery, focused primarily on the element of consideration. See Clark, 262 Ala. at 462, 80 So.2d at 312; Grimes, supra. However, more and more frequently, chance became the pivotal criterion in determining whether a game or scheme was constitutionally defined as a lottery and thus was prohibited. With the emergence of chance as the critical element, a working legal definition of that term became essential. “Chance” came to be defined as a lack of control over events or the absence of “controllable causation”-“the opposite of

intention.” Black's Law Dictionary 231 (6th ed.1990). While this definition of “chance” is generally accepted, FN4 its judicial application remained uncertain because the element of chance in any situation is generally not a question of kind but of degree.

FN4. *Contact Inc. v. State*, 212 Neb. 584, 587, 324 N.W.2d 804, 806 (1982); *State v. Koo*, 647 P.2d 889, 892 (Okla.Crim.App.1982); *People v. Shira*, 62 Cal.App.3d 442, 462, 133 Cal.Rptr. 94, 105(1976); *De Witt Motor Co. v. Bodnark*, 169 N.E.2d 660, 666 (Ct. Com. Pl., Summit Co., Ohio 1960); *Minges v. City of Birmingham*, 251 Ala. 65, 69, 36 So.2d 93, 96 (1948).

## II. The English Rule versus the American Rule

Two dominant paradigms thus evolved concerning the role of chance in defining a lottery: the “English Rule” and the “American Rule.” Under the English Rule, only a scheme that exhibits or involves “pure chance” is a lottery. 34 Am.Jur. Lotteries § 6 (1941). As a result, a scheme involving any skill, no matter how de minimis, will not be classified as a lottery. Several Justices mistakenly expressed this view in *Opinion of the Justices No. 358*; however, the prevailing view in the United States is the “American Rule.” Under the American Rule, a scheme is a lottery if chance is the dominant factor in determining the result of the game, even though the result may be affected to some degree by skill or knowledge. 38 C.J. Lotteries § 5 (1925).

American courts have consistently rejected the English Rule. Most jurisdictions have embraced the American Rule. *Bell Gardens Bicycle Club v.*

Department of Justice, 36 Cal.App.4th 717, 747, 42 Cal.Rptr.2d 730, 749 (1995) (“In determining whether a particular game or scheme is a lottery, the test in California is whether the game is dominated by chance, not whether the winner of the game is determined solely by chance.”); United States v. Marder, 48 F.3d 564, 569 (1st Cir.1995) (“for there to be a lottery, chance must predominate over skill in the results of the game”); Citation Bingo, Ltd. v. Otten, 121 N.M. 205, 207 n. 2, 910 P.2d 281, 283 n. 2 (1995) (“ ‘lottery’ is defined as ‘an enterprise’ ... wherein, for a consideration, the participants are given an opportunity to win a prize, the award of which is determined by chance, even though accompanied by some skill”); Harris v. Missouri Gaming Comm'n, 869 S.W.2d 58, 62 (Mo.1994) (“a lottery is a form of gambling in which consideration is paid for an opportunity at a prize, where skill is absent or only nominally present”); Lashbrook v. State, 550 N.E.2d 772, 775 (Ind.Ct.App.1990) (“[c]hance rather than skill must therefore be the dominant factor controlling the award in a lottery”); State v. Dahlk, 111 Wis.2d 287, 296, 330 N.W.2d 611, 617 (1983) (“[c]hance rather than skill must therefore be the dominant factor controlling the award in a lottery”); Roberts v. Communications Inv. Club of Woonsocket, 431 A.2d 1206, 1211 (R.I.1981) (“a scheme constitutes a lottery when an element of chance dominates the distribution of prizes, even though such a distribution is affected to some degree by the exercise of skill or judgment”); National Football League v. Governor of the State of Delaware, 435 F.Supp. 1372, 1385 (D.Del.1977) (“ ‘lottery’ should be interpreted to encompass not only games of pure chance but also games in

which chance is the dominant determining factor”); *Seattle Times Co. v. Tielsch*, 80 Wash.2d 502, 507, 495 P.2d 1366, 1369 (1972) (“Chance within the lottery statute is one which dominates over skill or judgment.”); *Johnson v. Phinney*, 218 F.2d 303, 306 (5th Cir.1955) (“the authorities are in general agreement that if [chance] is present and predominates in the determination of a winner, the fact that players may exercise varying degrees of skill is immaterial; and the game or device is a lottery”); *State v. Hudson*, 128 W.Va. 655, 665, 37 S.E.2d 553, 558 (1946) (“where ... chance predominates, even though skill or judgment may enter to some extent in the operation of a particular scheme or device, the scheme or device is a lottery”); *Commonwealth v. Lake*, 317 Mass. 264, 267, 57 N.E.2d 923, 925 (1944) (“by the weight of authority a game is now considered a lottery if the element of chance predominates”); *State ex rel. Dussault v. Kilburn*, 111 Mont. 400, 404, 109 P.2d 1113, 1115 (1941) (“whether the element of skill predominated over the element of chance” determined whether game was a lottery); *State ex Inf. McKittrick v. Globe-Democrat Pub. Co.*, 341 Mo. 862, 875, 110 S.W.2d 705, 713 (1937) (“a contest may be a lottery even though skill, judgment, or research enter thereinto in some degree, if chance in a larger degree determine the result”); *Hotel Employees & Rest. Employees Int'l Union v. Davis*, 21 Cal.4th 585, 592, 88 Cal.Rptr.2d 56, 981 P.2d 990, 996 (1999) (“‘Chance’ means that winning and losing depend on luck and fortune rather than, or at least more than, judgment and skill.”); *In re Allen*, 59 Cal.2d 5, 6, 27 Cal.Rptr. 168, 377 P.2d 280, 281 (1962) (“The test is not whether the game

contains an element of chance or an element of skill but which of them is the dominating factor in determining the result of the game.”); *Morrow v. State*, 511 P.2d 127, 129 (Alaska 1973) (“We think that a game should be classified as one of skill or chance depending on the dominating element, not on the presence or absence of a small element of skill, which would validate the game under the pure chance doctrine.”); *State v. Stroupe*, 238 N.C. 34, 37, 76 S.E.2d 313, 316 (1953) (“most courts have reasoned that there are few games, if any, which consist purely of chance or skill, and that therefore a game of chance is one in which the element of chance predominates over the element of skill”).FN5

FN5. While anti-lottery provisions may differ, the rule of law applied to each remains the same, i.e., if chance is dominant, then the game is a lottery and is prohibited.

### III. Opinion of the Justices No. 358

For many years, Alabama courts alluded to the divergent views on the issue of chance. See *Minges v. City of Birmingham*, 251 Ala. 65, 69, 36 So.2d 93, 96 (1948) (contrasting the English Rule and the American Rule); Opinion of the Justices No. 83, 249 Ala. 516, 523, 31 So.2d 753, 760 (1947) (Lawson, J., writing specially and alluding to the “American Rule”). But it was not until 1997 that the Justices of this Court directly confronted the specific role of chance as it applied to the anti-lottery provision in the Alabama Constitution: “Resolution No. 63 requires us to consider the relationship between chance and skill as bearing on the ... element [of chance].” 692 So.2d at 110.

Before responding to the Legislature's request, the Justices emphasized the difficulties in providing well-reasoned advisory opinions based upon conjecture of the sort requested:

“[T]he procedure by which this Court renders advisory opinions is fraught with difficulty. One of the problems is that ‘the opportunity is not generally available for opposing [persons] to present their respective positions.’ Another difficulty results from the fact that the requests come to us without a body of ‘pertinent facts ... as is usual in the adversary nature of our judicial system.’ [E]xpressions of opinions, hastily and abstractly considered, may well pose a greater danger of confusion and uncertainty than the exercise of judicial restraint in declining to respond to the questions submitted.’ ...

“The abstractions with which we are often confronted when we consider requests for advisory opinions are particularly prominent in this request .... [W]e are asked to consider the scope of § 65 in purely hypothetical contexts ....”

692 So.2d at 110. (Citations omitted.) (Emphasis added.)

These warnings were appropriate. But despite the Justices' stated concerns over rendering an opinion “without a body of pertinent facts,” and despite the Justices' steadfast practice of abstaining from issuing opinions based upon hypothetical situations, FN6 a majority of the Justices gave their opinion, stating that a game for consideration is constitutionally permissible, so long as merely “some degree of skill” is involved. 692 So.2d at 112. This conclusion would align Alabama with those few courts that have accepted the English Rule;

it is rather perplexing, in light of Alabama's long history of interpreting § 65 of the Alabama Constitution broadly.

FN6. “The second question is also an improper subject for an advisory opinion because it is a hypothetical question....” Opinion of the Justices No. 308, 449 So.2d 239, 240 (Ala.1984). “We are of the opinion that the statute does not authorize the expression of opinions on hypothetical questions.” Opinion of the Justices No. 162, 267 Ala. 110, 113, 100 So.2d 565, 567 (1958). The question now presented does not, however, request an opinion based on hypotheticals. Rather, our consideration is based on the specific provisions of S.B. 257 currently pending before the Legislature.

In reaching their conclusion, a majority of the Justices prefaced their discussion of applicable law as follows: “Section 65 ‘merely says that the legislature shall not authorize a lottery.’ Therefore, our discussion necessarily focuses on the definition of that term.” Opinion of the Justices No. 358, 692 So.2d at 110 (citations omitted). Consequently, a majority of the Justices focused solely on the meaning of the term “lot,” explaining that when “the result of winning is to be determined by the use of a contrivance of chance, in which neither choice nor skill can exert any effect, it is gambling by lot, or a prohibited lottery.” 692 So.2d at 110-11, citing *Loiseau*, 114 Ala. at 38, 22 So. at 139. They also quoted Justice Lawson's special writing in Opinion of the Justices No. 83, 249 Ala. at 524, 31 So.2d at 761: “In a lottery the winner is determined by lot. Lot or chance is the determining factor....” Justice Lawson also stated that “in order for [a scheme] to

be a lottery the result of winning or losing must be determined by chance, in which neither the will nor skill of man can operate to influence the result.” 249 Ala. at 522, 31 So.2d at 759. Finally, the Justices expressed their reliance upon Justice Livingston's comments: “ ‘If merit or skill play any part in determining the distribution, there is no lottery.’ ” 692 So.2d at 111, quoting 249 Ala. at 525, 31 So.2d at 762 (Livingston, J., writing specially and quoting an American Jurisprudence annotation). These statements appear to imply that a game for consideration is constitutionally permissible if merely “some skill” is involved. However, these statements, taken in context, do not support the conclusion of Opinion of the Justices No. 358.

First, a majority of the Justices misconstrued the expansive nature of § 65 when they stated that “Section 65 ‘merely says that the legislature shall not authorize a lottery.’ ” 692 So.2d at 110. The Justices' analysis was fundamentally flawed, because § 65 includes prohibitions against “gift enterprises” and “any scheme in the nature of a lottery.” This expansive language, which was not included in the Justices' consideration, does not support Opinion No. 358 's narrow interpretation. Because the Justices based Opinion No. 358 on an unduly restrictive interpretation of the term “lottery,” considered in isolation from the other language of § 65, we cannot presume their conclusion is correct.

Second, Loiseau 's statement that “in order for [a scheme] to be a lottery the result of winning or losing must be determined by chance, in which neither the will nor skill of man can operate to influence the result,” 114 Ala. at 38, 22 So.

at 139, was not nearly as broad or sweeping as suggested in Opinion No. 358. We agree that where consideration and a prize are present and winning is determined by chance “in which neither ... choice nor skill can exert any effect,” the scheme is, of course, a lottery. However, Loiseau does not limit the restrictions of § 65 to games or schemes where skill or choice play no role. In fact, the issue in Loiseau “was not whether the prize was awarded by chance, but whether the element of a consideration was present.” 249 Ala. at 522, 31 So.2d at 759 (Lawson, J., writing specially). FN7 Because the issue decided in Loiseau was not the degree of skill or chance necessary to determine whether the game was a lottery, the statements from that opinion relied upon by the Justices in Opinion No. 358 were, at best, dicta.

FN7. In fact, Justice Lawson correctly noted that this Court had never considered the role of chance in a lottery. “In none of [the cases of this Court dealing with gambling] has the court been called upon to pass on the question as to whether or not a lottery was shown to exist where the element of skill entered into the determination of the winner.” 249 Ala. at 522, 31 So.2d at 759 (Lawson, J., writing specially).

Similarly, the Justices' reliance upon Justice Lawson's writing in Opinion of the Justices No. 83, 249 Ala. at 522, 31 So.2d at 761, was misplaced. Although Justice Lawson opined that “to be a lottery the result of winning or losing must be determined by chance, in which neither the will nor skill of man can operate to influence the result,” his very next comment was that “[c]ertainly chance must be

the dominant factor.” 249 Ala. at 522, 31 So.2d at 759 (emphasis added). He then favorably alluded to the American Rule in his comments:

“In a lottery the winner is determined by lot. Lot or chance is the determining factor and a participant has no opportunity to materially exercise his reason, judgment, sagacity, or discretion.... Horse racing, like foot races, boat races, football, and baseball, is a game in which the skill and judgment of man enter into the outcome to a marked degree and is not a game where chance is the dominant factor.”

249 Ala. at 524, 31 So.2d at 761 (Lawson, J., writing specially). (Emphasis added.) This language demonstrates his adherence to the American Rule, i.e., the rule that a scheme is a lottery if chance is the dominant factor in determining the result of the game. 38 C.J. Lotteries § 5 (1925).

In Opinion of the Justices No. 205, 287 Ala. 334, 335, 251 So.2d 751, 753 (1971), the Justices adopted Justice Lawson's opinion, stating that when a “significant degree of skill is involved,” a lottery is not present. (Emphasis added.) Thus, Justice Lawson's opinion does not support the theory that a game for consideration is constitutionally permissible so long as “some skill” is involved. In fact, at no point in his opinion does Justice Lawson espouse that view. On the contrary, he supported “the correct American Rule,” i.e., that a game escapes anti-lottery provisions only where skill is the dominant factor. Therefore, if the Justices joining Opinion No. 358 had relied upon Justice Lawson's view, instead

of on isolated comments, they would have answered the question in a completely different way.

Finally, the Justices relied upon the following comments by Justice Livingston: “If merit or skill play any part in determining the distribution, there is no lottery.” 692 So.2d at 111, quoting 249 Ala. at 525, 31 So.2d at 762. The majority of the Court in 1997 interpreted this language, which was not part of the 1947 majority's opinion, to mean that Justice Livingston considered a game for consideration to be constitutionally permissible as long as “some skill” is involved. Unfortunately, that interpretation was an incomplete representation of Justice Livingston's view of lotteries. Justice Livingston's remarks the very next year in *Minges*, 251 Ala. at 69, 36 So.2d at 96, clarified his position. Justice See, in his special writing in Opinion of the Justices No. 358, placed Justice Livingston's comments in context:

“In fact, in *Minges v. City of Birmingham*, 251 Ala. 65, 69, 36 So.2d 93, 96 (1948), Justice Livingston, writing for this Court in an actual case, provided a more complete quote of the relevant passage from *American Jurisprudence*, as follows:

“ ‘In the United States, however, by what appears to be the weight of authority at the present day, it is not necessary that this element of chance be pure chance, but it may be accompanied by an element of calculation or even of certainty; that is sufficient if chance is the dominant or controlling factor.’ ”

692 So.2d at 114, n. 1 (See, J., writing specially). (Emphasis added by See, J.) Justice See concluded: “Thus, it appears that neither Justice Livingston nor the authors of the American Jurisprudence article would apply the English ‘any part’ test to determine whether a game for consideration is a ‘lottery’ in the United States.” 692 So.2d at 114, n. 1.

Moreover, the Justices joining Opinion No. 358 incorrectly stated: “Although the views of Justices Lawson and Livingston expressed in their special writings in Opinion No. 83 ... were not then shared by a majority of this Court, their views were accepted by a majority in Opinion of the Justices No. 205.” 692 So.2d at 111. (Citation omitted.) However, the Justices joining Opinion No. 205 did nothing more than adopt Justice Lawson and Justice Livingston's view that pari-mutuel betting on horse races and dog races did not constitute a lottery, because such activities involved significant amounts of skill, both on the part of the one betting and on the part of the participants. Opinion No. 205 went no further. As Justice See noted, Justice Livingston's lone opinion, viewed in isolation-outside the context of the remainder of the American Jurisprudence article, upon which he relied-was not adopted by the Justices in Opinion No. 205.

Neither Loiseau, the special writings of Justice Lawson or Justice Livingston, nor the other references quoted in Opinion No. 358 support the conclusion that “any” degree of skill is sufficient to avoid the anti-lottery prohibition of the Alabama Constitution of 1901.

#### IV. The Rule of Law in Alabama

As stated previously, § 65 not only prohibits lotteries, but it also prohibits any “gift enterprise” or “scheme in the nature of a lottery.” “In this State, therefore, the public policy is emphatically declared against lotteries, or any scheme in the nature of a lottery, both by Constitution and by statutes.” (Emphasis added.) *Try-Me Bottling Co.*, 235 Ala. at 212, 178 So. at 234.

“In *Try-Me Bottling Co.* ... this court expressly called attention to the broad conception set forth in § 65 showing that the prohibition is not only against lotteries but also against any scheme in the nature of a lottery. The very purpose of this broad declaration was to put a ban on any effort at evasion or subterfuge. Whatever may be the view of the courts of other states on the subject of lotteries, these cases show that this court has adopted a broad view of the meaning of the constitutional provision which does not admit of quibbling or narrow construction.”

Opinion No. 83, 249 Ala. at 518, 31 So.2d at 755. (Emphasis added.) Moreover, the fact that it was necessary to amend the Constitution to except “bingo” from § 65's blanket prohibition on lotteries also demonstrates the broad construction that section has been given.

In 1981, the Justices of this Court, quoting *Yellow-Stone Kit.*, 88 Ala. 196, 7 So. 338, stated: “ [T]he courts have shown a general disposition to bring within the term “lottery” every species of gaming, involving a disposition of prizes by lot or chance, ... which comes within the mischief to be remedied-regarding always the substance and not the semblance of things, so as to prevent evasions of the law ....” Opinion of the Justices No. 277, 397 So.2d 546, 547 (Ala.1981).

(Emphasis added.) Indeed, the Constitution's broad prohibition on all lotteries is evident because the Constitution explicitly condemns “any scheme” containing elements that would make the scheme resemble a lottery.

Alabama cases follow the American Rule. “ Certainly chance must be the dominant factor.” Opinion of the Justices No. 83, 249 Ala. at 522, 31 So.2d at 759. (Emphasis added.) “In a lottery, ... chance is the determining factor and a participant has no opportunity to materially exercise his reason....” 249 Ala. at 524, 31 So.2d at 761. (Emphasis added.) A lottery is not present where “a significant degree of skill is involved.” Opinion of the Justices No. 205, 287 Ala. at 335, 251 So.2d at 753. (Emphasis added.) See also *Minges*, 251 Ala. at 69, 36 So.2d at 96, quoting 34 Am.Jur. § 6 (“In the United States, however, by what appears to be the weight of authority at the present day, it is not necessary that this element of chance be pure chance, but it may be accompanied by an element of calculation or even of certainty; that is sufficient if chance is the dominant or controlling factor.”).

It is clear that Alabama adheres to the American Rule, which is the rule of widest acceptance in the United States. That adherence is evidenced by prior rulings of this Court, as well as by reason and logic. As the cases cited above demonstrate, the vast majority of jurisdictions adheres to the American Rule: “The rule generally followed in the United States is that the word ‘lottery’ includes those schemes wherein chance is the dominant factor in determining the result,

although it may be affected to some degree by the exercise of skill or judgment.”  
38 C.J. Lotteries § 5 (1925).

“A scheme is not a lottery if winning depends solely on skill or judgment. If elements both of skill and of chance are present in a plan, its character as a lottery generally depends on which is the dominant element. If the result of the distribution is to be determined solely by skill or judgment, the scheme is not a lottery, even though the result is uncertain or may be affected by things unforeseen and accidental. Where elements both of skill and of chance enter into a contest, the determination of its character as a lottery or not is generally held to depend on which is the dominating element.... [I]t is generally held that the mere fact that some skill is involved in the game is insufficient to save it from being a lottery, and that the word ‘lottery’ includes those schemes wherein chance is the dominant factor in determining the result, although it may be affected to some degree by the exercise of skill or judgment.”

54 C.J.S. Lotteries § 4 (1987).

Moreover, logic dictates a similar result. The English Rule is subject to abuse and misuse, because many unquestionably chance-based games, such as guessing contests, roulette wheels, or slot machines might not be classified as lotteries under the English Rule. Mathematicians, engineers, physical scientists, or others familiar with scientific calculations might be considered more “skilled” at using the “laws of probability” to predict a particular outcome. A guess by someone educated in any discipline still, in its essence, remains a guess. Under

the English Rule, any educated guess may be considered sufficient to preclude the contest in which the guess is made from being considered a lottery.FN8

FN8. Justice See, in his special writing in Opinion No. 358, also demonstrated the fallacy of the English Rule. “[A] game simulating a roulette wheel, if labelled a ‘skill dependent game,’ and if it allowed the bettor to start and stop the wheel, might pass the [English Rule], but would probably fail the ‘material exercise’ test [the American Rule].” 692 So.2d at 114.

In 1997, in Opinion No. 358, Justice See, joined by Justice Maddox, stated in his separate writing: “I do not agree with the other Justices’ conclusion ... that a game for consideration is constitutionally permissible as long as merely ‘some skill is involved.’ ” 692 So.2d at 113. Justice See and Justice Maddox thus recognized that the English Rule does not apply in Alabama.

The better definition is that where the dominant factor in a participant's failure or success in any particular game or scheme is chance, the scheme is a lottery-despite the use of some degree of judgment or skill. Therefore, in Alabama the American Rule controls, and even if skill is present, it is the question whether chance dominates that determines whether a lottery exists. It is for the courts to determine, on a case-by-case basis, whether skill or chance dominates in an activity and, therefore, whether the activity is in the nature of a lottery. As this Court has repeatedly made clear, § 65 does not prohibit the Legislature from authorizing gambling. Opinion of the Justices No. 205, 287 Ala. at 335, 251 So.2d at 753. Indeed the Legislature has done so. Ala.Code 1975, § 13A-12-20

et seq. But it is emphatically the role of the courts to determine the constitutionality of an act or activity, and that role requires the courts to determine whether the act or activity constitutes a lottery.

#### V. Video-Amusement Machines

In the typical video-gambling game, a player inserts money into an “amusement machine” in order to begin play. Ronald J. Rychlak, *Video Gambling Devices*, 37 UCLA L.Rev. 555, 567 (1990). The player then wagers his credits or money upon the game. 37 UCLA L.Rev. at 567. A machine may allow the player to make choices, e.g., in the case of video poker, whether to discard a number of selected cards. 37 UCLA L.Rev. at 567. Based on the results of the play, a player will then win or lose credits. 37 UCLA L.Rev. at 567. Frequently, the player redeems remaining credits for prizes, which may include merchandise or certificates of monetary value. 37 UCLA L.Rev. at 567. If a prize is awarded for such consideration and chance predominates in determining the outcome, then the activity would be in the nature of a lottery, whether the activity is a video machine in a small convenience store or is a video machine in an elaborate gambling establishment.

On most video-amusement machines, there is also a preset payout percentage programmed into the machine itself. 37 UCLA L.Rev. at 567. S.B. 257 itself addresses this programming:

“A racing operator holding a supplemental license shall be permitted to program game related equipment to provide such a payback to the players of

such equipment as it shall deem suitable for its business, provided that no such equipment shall be programmed to give players a theoretical cumulative payback of less than 80 percent or more than 99 percent of the money wagered over continuous play, ... assuming that the skill dependent game played on such equipment is being played by a player with the optimum skill level.”

Section 2.7, S.B. 257. Thus, no amount of skill will ever determine the ultimate outcome of a video game allowed by S.B. 257, and the programmed gaming device will, “over continuous play,” always prevail. In other words, even the most skilled player will, over time, be unsuccessful in winning more money than he or she has wagered.FN9 The North Carolina Court of Appeals, confronted with a similar situation, held that such a provision removed even the remotest element of skill, making video games illegal slot machines: “[A]lthough a player's knowledge of statistical probabilities can maximize his winnings in the short term, ... [i]n the long run, the video game's program, which allows only a predetermined number of winning hands, negates even this limited skill element.” *Collins Coin Music Co. v. North Carolina Alcoholic Beverage Control Comm'n*, 117 N.C.App. 405, 409, 451 S.E.2d 306, 308 (1994) (citation omitted).

FN9. Ironically, a purchaser of a single Georgia State Lottery ticket will receive better odds of winning that lottery than he will of winning “over continuous play” against a video machine regulated by S.B. 257. The chance of winning “over continuous play” against a video machine permitted by S.B. 257 is zero percent.

Not surprisingly, courts of other jurisdictions have found such video machines to be games dominated by chance. *Score Family Fun Ctr., Inc. v. County of San Diego*, 225 Cal.App.3d 1217, 275 Cal.Rptr. 358 (1990) (Mini-Boy 7, offering video games of blackjack, poker, hi-lo, double-up, and craps-among others-offered games dominated by chance); *United States v. Marder*, 48 F.3d 564 (1st Cir.1995) (chance dominated over skill in playing video-amusement game); *Games Mgmt., Inc. v. Owens*, 233 Kan. 444, 662 P.2d 260 (1983) (small amount of skill required to play video poker and video blackjack was overshadowed by pure chance); *Garono v. State*, 37 Ohio St.3d 171, 524 N.E.2d 496 (1988) (video-gaming machines are games of chance); *H & Z Vending v. Iowa Dep't of Inspections & Appeals*, 593 N.W.2d 168 (Iowa Ct.App.1999) (“fraternal poker” was a game of chance).

Moreover, the fundamental nature of such games is chance-a player's skill, no matter how good or bad, does not and cannot control the randomness inherent in the “deal” of the cards. Stated another way, the skill of the player may increase the player's odds of winning but ultimately the player's skill cannot determine the outcome, regardless of the degree of skill involved. Chance, being the nature or outcome-determining factor of the game, dominates over skill.

Several Justices have previously found that horse races and dog races were gambling activities subject to regulation by the Legislature, but that they were not lotteries within the purview of § 65. These Justices pointed to the presence of objective criteria, such as the condition, speed, and endurance of a

horse, as well as the skill and management of the rider. Opinion No. 205, 287 Ala. at 335, 251 So.2d at 753. They noted the presence of other objective factors, such as “weight, paternity, trainer, position, past record, wet or dry track, etc.” Opinion No. 205, 287 Ala. at 335, 251 So.2d at 753. These video games apparently provide no objective factors for evaluation. They always lack the human interaction critical in the exercise of an objective analysis. Players face a preprogrammed computer, the nature of which is unknown. In a video game of cards, the player cannot inspect the deck, have the cards reshuffled, request a new deck, or evaluate the “dealer.”

#### Conclusion

Section 65 of the Constitution of Alabama of 1901, in prohibiting a lottery or “any scheme in the nature of a lottery,” was intended to provide a broad proscription of the evils suffered by earlier generations who, after experiencing the effects firsthand, found lotteries to be “among the most dangerous and prolific sources of human misery.” 34 B.C.L.Rev. at 12-13, citing A.R. Spoffard, Lotteries in American History, S. Misc. Doc. No. 57, 52d Cong., 2d Sess. 194-95 (1893) (Annual Report of the American Historical Society). Most American courts, and indeed the courts of Alabama, have long recognized the “American Rule,” which labels as a lottery an activity in which a prize is awarded by chance and for consideration, when chance is the dominant element, even when a degree of skill may affect the outcome. We unequivocally reject the “English Rule,” which would permit any activity where a prize is awarded by chance for a consideration, and in

which some degree of skill is present, to escape the anti-lottery provision of § 65 of the Alabama Constitution.

It is difficult to conceive of any situation where video games of the kind described in S.B. 257 would not be considered a lottery under § 65, because there are no objective and ascertainable criteria a player can use that would demonstrate the exercise of any material skill. But we specifically find that video games of the sort described in S.B. 257 are unconstitutional because chance is the dominant factor in those games, and no amount of skill will ever determine the outcome of a video game where the machine is programmed to win. S.B. 257 would not meet the test for either the American Rule or the English Rule. We reach this conclusion based not on hypotheticals, but upon the certain language and specific requirements of S.B. 257 itself.

The question before this Court concerns a specific bill, which on its face defines and regulates video games in such a way as to violate the anti-lottery provision of § 65 of the Constitution of Alabama of 1901. Because “the legislature cannot enact a statute that conflicts with the Constitution,” *Graffeo*, 551 So.2d at 361, S.B. 257 may not originate in either house of the Legislature. We cannot be so derelict in our duties as to ignore the fact that S.B. 257 is unconstitutional, when the safety and welfare of the public are at stake, but we must support and defend the Constitution we are sworn to uphold.

QUESTION ANSWERED.

## ***DISCUSSION ISSUES***

### *Consideration and Alternative Methods of Entry*

If a state follows the valuable consideration line of authority, do you think that offering a free method of entry will be sufficient to mitigate the risks that the element of consideration will be found in a random give away event?

What factors would you consider in determining whether or not the element of consideration is present in a prize contest?

### *SKILL v. CHANCE*

Though many states use the “dominant factor test” many courts in those states have come to different conclusions regarding the analysis of the same games or events. For example, (i) both Massachusetts and Kansas have used the predominance test to assess the element of chance, yet the states disagree on the classification for the “*crane game*”; (ii) both Alabama and New Jersey have used the predominance test to assess the element of chance, yet the states disagree on the classification for backgammon; and (iii) both Nevada and North Dakota have used the predominance test to assess the element of chance, yet the states disagree whether skill or chance predominates in a hole-in-one golfing contest. How do you explain these differences?