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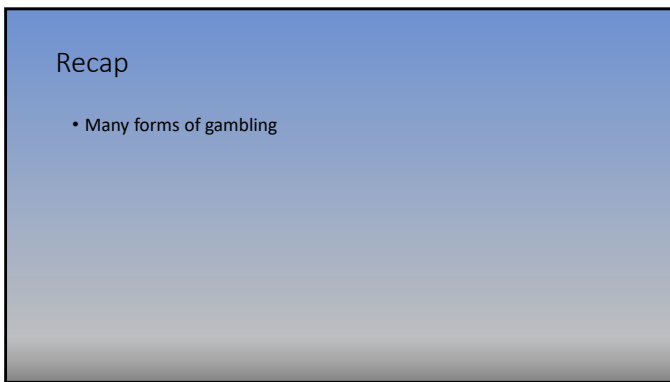
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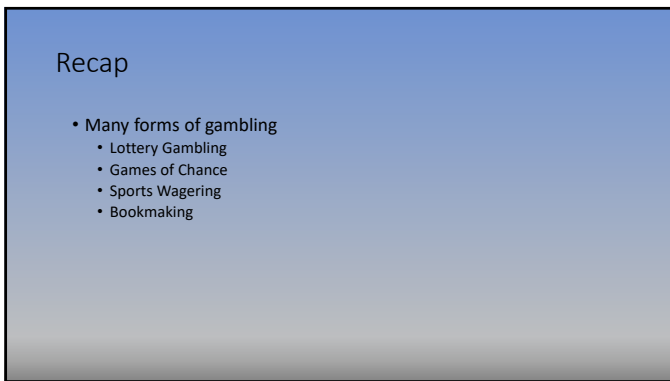
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Recap

- Lottery and Games of Chance
  - Consideration
  - Chance
  - Prize

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Recap

- Valuable Consideration
  - Cudd v. Aschenbrenner
    - Quick Summary...

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Recap

- Contract Consideration
  - Seattle Times v. Tielsch
    - Quick Summary...

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Recap

- **Promoter Benefit**
  - Troy Amusement v. Attenweiler
    - Quick Summary...

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Consideration

- RECAP - Primary Theories
  - **Valuable Consideration** - parting of something of marketable value, usually money.
  - **Contract Consideration** - consideration sufficient to create a binding obligation or agreement.
  - **Promoter Benefit**
    - WIS STATS §945(5)(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.

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Consideration

- CONSIDERATION + CHANCE + PRIZE = Games of Chance or Lottery

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Consideration

- CONSIDERATION + CHANCE + PRIZE = Sweepstakes

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Consideration

- What does free mean?

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Consideration

- What does free mean?

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### Consideration

- In some states, an alternative free method of entry will eliminate the element of consideration for a gambling analysis.

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### Consideration

- In some states, an alternative free method of entry will eliminate the element of consideration for a gambling analysis.
  - The free method must have "Equal Dignity" with methods associated with a purchase

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### Consideration

- In some states, an alternative free method of entry will eliminate the element of consideration for a gambling analysis.
  - The free method must have "Equal Dignity" with methods associated with a purchase
    - Equal dignity" means that there is equality among entrants with regard to four aspects of the sweepstakes:
      - (i) method of entry,
      - (ii) opportunity to win,
      - (iii) claiming prizes, and
      - (iv) prizes awarded

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### Consideration

- <https://www.newegg.com/promotions/nepro/20-1699/index.html>
- [https://promotions.newegg.com/social/Intel\\_Asus\\_10900K\\_Super\\_Build\\_Giveaway\\_-\\_Official%20Rules%20\(FINAL\).pdf](https://promotions.newegg.com/social/Intel_Asus_10900K_Super_Build_Giveaway_-_Official%20Rules%20(FINAL).pdf)

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### Consideration

- <http://pepsigiveaways.com/>

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### Consideration



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CHANCE

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Chance

- For those that have never taken a gaming law course in the past, how would you distinguish chance from skill?

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Chance

- Dominant Factor – Predominance Test – American 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.

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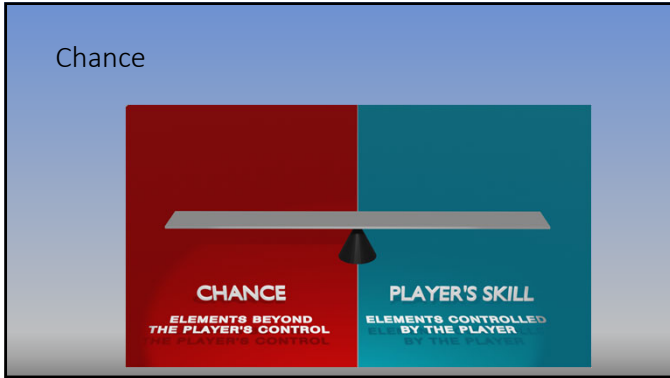
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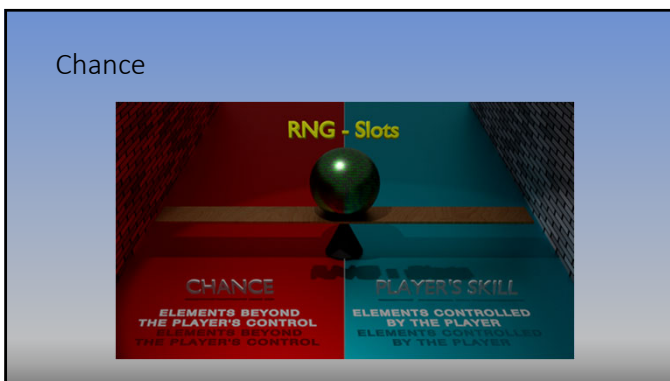
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Chance

- Blackjack

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Chance



**Blackjack**

**CHANCE**  
ELEMENTS BEYOND THE PLAYER'S CONTROL  
ELEMENTS BEYOND THE PLAYER'S CONTROL

**PLAYER'S SKILL**  
ELEMENTS CONTROLLED BY THE PLAYER  
ELEMENTS CONTROLLED BY THE PLAYER

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Chance

- Poker

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Chance



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Chance

- Billiards

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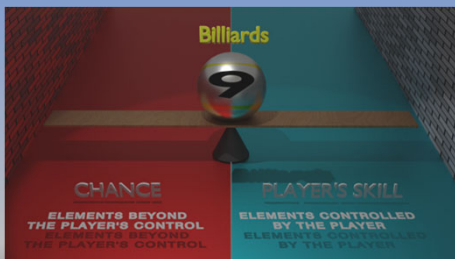
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Chance



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## Chance

- Chess

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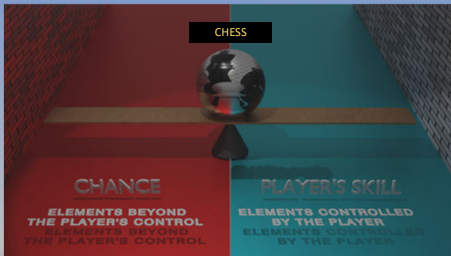
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## Chance



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## Chance

- Gambling Instinct
  - 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.

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Chance

- Gambling Instinct



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Chance

- Gambling Instinct



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Chance

- Gambling Instinct



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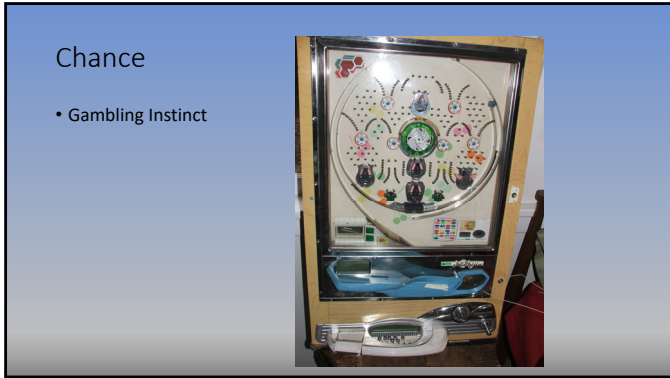
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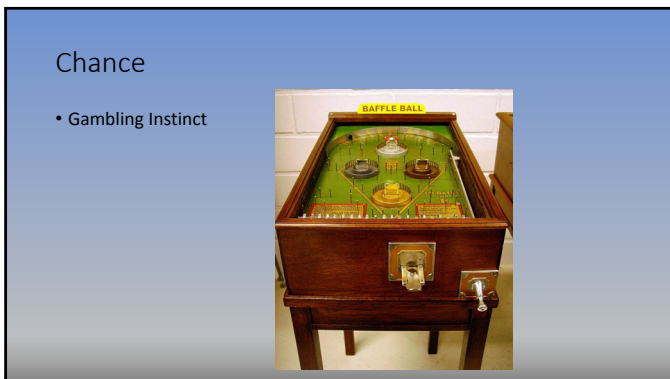
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Chance

- Gambling Instinct



A photograph showing a person from the side, wearing a blue shirt, looking at a slot machine. The machine has a colorful display and a coin slot. The number '5' is visible on the machine's front panel.

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Chance

- G



A photograph of a person's hands playing a slot machine. The machine's screen shows a colorful game with various symbols and lights.

<https://www.youtube.com/watch?v=bM17ReX77hE>

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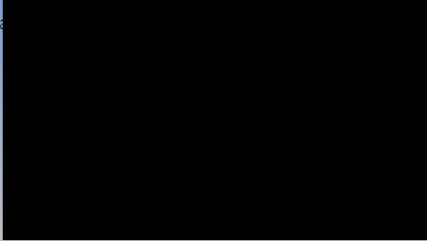
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Chance

- G



A photograph of a slot machine that has been completely blacked out, obscuring all details of the game.

<https://www.youtube.com/watch?v=vdUICar9axc>

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Chance

- Gambling Instinct



Pachinko is very popular in Japan. Even 30mins before opening, there are a lot of people waiting.

[https://www.youtube.com/watch?v=D5hm8cG\\_hfs](https://www.youtube.com/watch?v=D5hm8cG_hfs)

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Chance



<https://www.youtube.com/watch?v=mF-OaCvPeVA>

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Chance

- Material Element or Any Chance

- 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.

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Chance

- Class Example



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Chance

- Tournament electronic golf machine
- Statistically, skill is clearly the dominant factor in winning.
  - Skill increases as players increase their frequency of play
  - Mathematical models show skill is clearly dominant in determining the outcome of a round of e-golf
  - All machines and components are kept in virtually the same condition.
  - If any part wears, becomes stuck or operates outside of tolerances the machine is tilted and player funds are returned.



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Chance

- Tournament electronic golf machine
- Players pay an entry fee (\$100)
- Players play against other players on networked machines
- Tournament winners receive cash and other valuable prizes
- Machines located nation wide



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### Chance

- Play is based on trackball and button use



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### Chance

- What do you think?
  - Is it a game of skill or chance?



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### Chance

- Bruce M. Botelho, Attorney General May 22, 2001 –
  - A.G. file no: 663-01-0183



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### Chance

- Bruce M. Botelho, Attorney General May 22, 2001 –
  - Under Alaska law, crimes involving gambling depend on the statutory definition of “gambling” in AS 11.66.280. That definition excludes certain business transactions and charitable gaming. With some narrow exceptions (such as playing in a social game in a home), gambling means:
    - (1) staking or risking something of value, in other words, paying an entry fee or betting;
    - (2) to obtain something of value, in other words, to win a prize;
    - (3) based on
      - (a) a game or contest in which the outcome is dependent to a material degree on chance, even if skill is also a factor; or
      - (b) a future contingent event not under the player’s control or influence.




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### Chance

- Bruce M. Botelho, Attorney General May 22, 2001 –
  - The final element in determining whether an activity constitutes illegal gambling turns on the concepts of skill and chance. As noted previously, gambling requires a contest of chance<sup>3</sup> or a future contingent event. Old Alaska case law held that illegal gambling occurred “where chance dominates the distribution of prizes even though such a distribution is affected to some degree by the exercise of skill or judgment.” *Morrow v. State*, 511 P.2d 127 (Alaska 1973). In other words, the court held that for an activity to be considered gambling, chance must be the dominant factor, even if skill is material.




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### Chance

- Bruce M. Botelho, Attorney General May 22, 2001 –
  - But in 1978 the Alaska Legislature specifically rejected the court’s formulation in *Morrow* and actually reversed the factors so that gambling occurs even if skill is the dominant factor, as long as chance is a material element. Senate Journal Supp. No. 47, at 112-14 (June 12, 1978). The Alaska Legislature adopted the commentary of the New York legislature, in noting that “despite the importance of skill in any game, [gambling occurs if] the outcome depends in a material degree upon an element of chance.” *id.*




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### Chance

- Bruce M. Botelho, Attorney General May 22, 2001 –
  - The Alaska Legislature made it clear that “Games of pure skill, e.g., chess, will not be considered gambling if the contestants bet against each other.” Senate Journal Supp. No. 47, at 112-14 (June 12, 1978). By contrast, although betting between chess players (i.e., those in control of the outcome) is not gambling, betting by onlookers is gambling. The reason for this, the legislature determined, was that “from the onlooker’s perspective, the outcome depends on ‘chance’ as he has no control over the outcome.” Id. The legislature thus recognized that the player’s control over the outcome of a contest is a critical element.




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### Chance

- Bruce M. Botelho, Attorney General May 22, 2001 –
  - With the golf machine, no player is guaranteed a prize. Indeed, the odds of winning a prize depend on both the player’s experience and the number and experience of other players who are also competing, perhaps in another city or another state. Although skill is important in a player achieving a high score, the scores achieved by all other players is a result that is completely out of the control of any particular player and not in any way dependent on that player’s skill. Thus, although playing the golf machine well is dependent on skill, winning a prize depends on other factors and, indeed, on a material element of chance.




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### Chance

- Bruce M. Botelho, Attorney General May 22, 2001 –
  - Notwithstanding that the skill of the participants may be the predominant factor in achieving a high score on computer video machines, we are of the opinion that the complex, adjustable, or inter-connected nature of these devices, and lack of player control over the outcome, creates a material degree of uncertainty and chance as to whether the player will win a prize, which brings these devices within the ambit of Alaska gambling laws.




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Chance

- Supreme Court of Alabama – Opinion of the Justices

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Chance

- Supreme Court of Alabama – Opinion of the Justices
  - What are the issues?

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Chance

- Supreme Court of Alabama – Opinion of the Justices
  - What was the historical view of skill gaming vs. gambling in Alabama pursuant to the 1997 opinion?
  - What did the 1997 opinion state according to this opinion?

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### Chance

- Supreme Court of Alabama – Opinion of the Justices
  - Describe the historical analysis provided by the justices.

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### Chance



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### Chance



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Chance



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Chance



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Chance

- The Crane Game



- <https://youtu.be/eHzxgucnHiA>

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Chance

- The Crane Game



<https://www.youtube.com/watch?v=JejiJ-RgLVc>

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Chance

- Dominant Factor Revisited
  - 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?

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Chance

- Remember it is the whether the participants risking consideration are controlling the outcome of the event.
  - “Bona-fide contests of skill, speed, strength or endurance.

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### Chance

- Bob and Ray play chess and bet each other \$100 each on who will win...



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### Chance

- Bob and Ray play chess and bet each other \$100 each on who will win.
- They bet against each other with Michael, who will take \$110 from each of them and pay the winner \$210, keeping \$10 for his services



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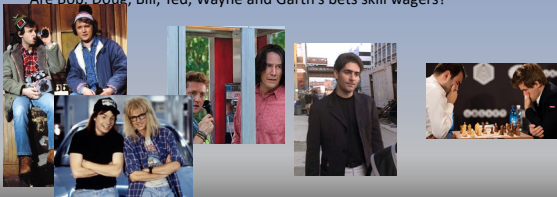
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### Chance

- Bob, Doug, Bill, Ted, Wayne and Garth also want to bet on the chess game between Bob and Ray. Bob, Doug, and Garth bet on Ray through Michael. Wayne, and Bill bet on Bob through Michael.
- Are Bob, Doug, Bill, Ted, Wayne and Garth's bets skill wagers?



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### Hypotheticals – Part 1

- Client Alex T. wants to put coin operated networked trivia machines in bars with a game show theme.
- Players pay \$5 to enter an hourly round of trivia games.
- Each hour, the player with the highest score nationally wins \$100, to be paid out by the sponsoring bar.
- Client Alex T. is asking for a clean opinion, can it be provided?
- What risk reduction measures would you suggest?

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### Hypotheticals – Part 2

- Ezra from rebgame.com calls
  - Rebgame is an online streaming site with Xbox Series X head-to-head gaming content (Forza Racing, NHL 22, FIFA 22, NBA 22, Madden 22...)
  - Rebgame is funded entirely by player subscriptions
  - Rebgame wants to add the following:
    - H2H Bets – Players can play each other for money in amounts determined by the players. Rebgame will collect a service fee of 10% of the total amount of the combined wagers.
    - H2H Staking – Players can be staked by streaming content watchers. At the end of a game, 10% of the total amounts staked will be kept by Rebgame the watchers that staked the winning player will get back their stake, 50% of the remainder goes to the winning player and 50% of the remainder goes to those that staked the winner in proportion of their stakes to the total winning stakes. For example:
      - Bob plays Doug in Madden 22.
      - Bill stakes \$300 on Bob.
      - Ted stakes \$200 on Bob, and Jake stakes \$100 on Bob.
      - Elwood stakes \$400 on Doug and Jim stakes \$100 on Jim.
      - The total pot is \$1100.
      - Rebgame gets \$110 in service fees leaving \$990
      - Bill gets his \$300 back, Ted gets his \$200 back and Jake gets his \$100 back leaving \$390
      - Bob gets half of the remainder \$195, the other half is split 50% to Bill(\$97.50), 33.3% to Ted (\$65), and 16.6% to Jake (\$32.50)

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### QUESTIONS

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