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THE GAMES PEOPLE PLAY: IS IT TIME FOR A NEW LEGAL APPROACH TO PRIZE GAMES?

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“As some wise man doubtless said when Babylon was merely a country town, it is impossible to suppress the gambling instinct. It is not impossible, however, to put more sense into the laws affecting gambling”¹

***198 I. Introduction**

People love games. We buy hamburgers to acquire game pieces for an opportunity to become millionaires. We watch game shows with the thought that some day we will have the opportunity to win a fortune before a nation-wide audience. We hold our children's birthdays at pizza arcades where kids play coin-operated games all day to win plastic trinkets. We log on to the growing number of game sites on the Internet to compete in both casual games like solitaire and more intense first-person shooter tournaments. And we love to gamble on everything from large jackpot state lotteries to slot machines and sporting events.

Yet there is no consistency between legal and illegal prize gaming. With regard to illegal gambling, the criminal laws are even inconsistently enforced. Complicating matters further, the notion of “gambling” itself is being tested by the merging of sweepstakes, contests, and lotteries. Specifically, as long as the public has an unfulfilled demand for a gambling experience, entrepreneurs continue to test the boundaries of legal sweepstakes and contests to meet these demands. The variations of sweepstakes and contests are bound only by human imagination and unbound by tremendous leaps in technology.²

Anomalies have become the rule, as opposed to the exception. For example, many states have arcade-restaurants that cater primarily to children. These arcades, such as Chuck E. Cheese, Dave & Busters, and Jillian's feature prize-redemption games. Many of the games have some skill elements, but they are also designed to emulate, if not achieve, chance-based gambling.³ In some states, games unabashedly include “casino” in their names and incorporate spinning reels, typical of traditional slot machines, into their games. Despite this, an owner of a tavern that is restricted to adults may commit a crime by offering an actual slot machine for play in those states.⁴

This Article focuses on the various types of prize gaming. These categories include the following: (1) gambling games, including casino-gaming, pari-mutuel gaming, sports wagers, and lotteries; (2) promotional gaming, such as sweepstakes; and (3) the growing field of skill-based gaming.

Part II of this Article provides general background and legal definitions. Part III explores the recent history of the various forms of prize gaming. Part IV describes anomalies and inherent contradictions that exist in prize gaming. Part V focuses on some policy concerns that can provide a theoretical foundation for a more harmonious approach. Lastly, in Part VI, we argue that modern gambling requires a new legal approach to prize gaming and we propose a basic structure for such an approach.

II. What Is Prize Gaming?

“In the beginning, there was only chaos”⁵

*199 A. Confusion Reigns Despite a Persistent Phenomenon

Almost all countries of the world afford their citizens some form of legal prize gaming.⁶ It could be, for example, betting on a hot stock rumor, buying a ticket in a state-run lottery, wagering on a horse, or checking the bottom of a soda can to see if you won a trip to the World Cup.⁷

There is an old saying that “[i]f you bet on a horse, that's gambling. If you bet you can make three spades, that's entertainment. If you bet cotton will go up three points, that's business. See the difference?”⁸ Of course, given the analytical-similarity between the foregoing activities, it is difficult to justify why some activities are spurned, while others are legal.

Prize gaming is any activity where the participant is attempting to win a prize. There are three basic forms of prize gaming: gambling, sweepstakes, and contests.⁹ In general, court decisions typically analyze gambling offenses as financial schemes where (1) individuals pay consideration (usually money) (2) to participate in a game of chance (3) for the opportunity to win a prize (usually even more money).¹⁰ A sweepstake is similar, but involves activities where the participant does not pay consideration.¹¹ Likewise, a contest differs from gambling only because the winner is determined primarily by skill as opposed to chance.¹²

Increasingly, prize gaming scenarios appear to defy classification under such simple analytical models. For example, why is it legal to risk your money (consideration) on the chance that cotton stock will go up three points (a chance event) in hopes of making a profit (prize), while risking your money on the finish of a horse at the track may be prohibited?

In many instances, historic reasons, based on politics rather than analytical reasoning, exist for such distinctions.¹³ One argument is that those forms of prize gaming activities that were popular with the upper class tended to be legal (i.e., stock trading, horse racing, and golf contests for a prize), while those that were popular with the “lower classes” tended to remain illegal (i.e., numbers [lotteries], general sports wagering, and card games for a prize).¹⁴ For now, however, we merely note that legislation and case law dealing with prize gaming often appears to be intellectually incongruous.

*200 Even courts are sometimes confused as to what activity should be prohibited under criminal gambling laws. For example, a Washington court held that a newspaper's free football contest contained the element of consideration because it required effort to pick the teams each week.¹⁵ In another equally perplexing case, the Supreme Court of Nebraska upheld a ruling that chess and checkers are games of chance.¹⁶

B. The Basic Framework

[Historically,] [a]t common law . . . gambling . . . where practiced innocently and as a recreation, was not unlawful. Such games were unlawful, however, where they became an incitement to a breach of the peace, so as to constitute a nuisance, tended to immorality . . . or for any peculiar reason were against public policy, or were conducted by means of cheating or by fraud. . . . Thus, gambling essentially is a crime only when and to the extent that the legislature has so declared it.¹⁷

As we prepare to examine the public policy choices and general historical background, a brief overview of the various categories of prize gaming is helpful. “Gambling” itself does not have a single definition; it is made up of three separate categories.¹⁸ In the first category of gambling games are “lotteries” or chance games involving schemes where a person pays valuable consideration for the chance to win a prize based on a game of chance.

“Casino-style gaming” is generally a subset of lotteries or chance gaming. This subset encompasses such well-known chance games as slot machines, roulette tables, craps, and the like. In these games, participants risk something for the chance to win something of greater value than that which was risked.¹⁹

The second category of gambling games is “bookmaking.” Bookmaking occurs when a person risks something of value on the outcome of an uncertain event, in which the bettor does not exercise any control, but has the opportunity to win something of greater value than that which was risked.²⁰ Whether sports wagering is an activity predominately determined by chance or skill can be the subject of much debate. Most states avoid this debate by enacting separate laws defining bookmaking as a criminal offense. The key difference between bookmaking and lottery laws is that a predominant element of chance, a prerequisite in many states to illegal gambling, is not a specific prerequisite to a bookmaking violation.²¹ Bookmaking is typically associated with wagering on sporting events.²²

Despite this, not all bookmaking is illegal. For instance, “trading commodity options” is a legal form of bookmaking.²³ Prior to federal legislation *201 that specifically authorized such trading, the great majority of courts held that a contract to speculate in the rise and fall of commodities is illegal gambling if there was no intent that the underlying commodities would be delivered.²⁴ Specifically, this occurs if an actual stock or commodity purchase was never intended to take place.

“Pari-mutuel wagering” is a unique form of sports wagering. Unlike other forms of sports wagering, pari-mutuel horse wagering is legal in most states. Pari-mutuel wagering is important to the success of wagering on horse races.²⁵ The popularity of pari-mutuel wagering assures that horse track operators have the gross profits necessary to maintain horse track facilities and compensate the horse owners and others involved in the industry. Gross profit is assured because the track or off-track betting (“OTB”) operator takes a commission from each wager and places the remaining amounts into pools to be divided among winning bettors. The commission retained by the operator is called the “takeout.” Takeouts vary between states and tracks and are often set by law or regulation. Typically the takeout on win, place, and show bets is about fifteen percent and is slightly higher on “exotic” bets, such as exactas and trifectas. Pari-mutuel wagering is most commonly used for events such as horseracing, dog racing, and motor sports.²⁶

The final category of “gambling” involves activities that are predominantly skill-based “contests,” but because state legislatures want to eradicate *202 these types of activities, they have grouped them with illegal gambling. The best example of this type of activity is poker.²⁷

Besides poker and some other more traditional casino games, where any of the three elements of a chance game or lottery are missing, the activity is usually not treated as a prohibited lottery.²⁸ For example, because sweepstakes lack “consideration” (i.e., an entry fee), they are generally deemed to fall outside lottery prohibitions.²⁹ More specifically, a “sweepstake” is a giveaway based on chance.³⁰ Among other things, sweepstakes may include sending in a postcard to enter, receiving a game piece, or obtaining a free game card at a business.³¹ Examples of this type of promotion include “Publisher’s Clearinghouse” sweepstakes or the various McDonald’s promotions.³² While in many states private lotteries are illegal, correctly structured sweepstakes are legal.³³

Moreover, true “skill games” lacking the lottery element of “chance” are legal in most states.³⁴ “Skill games” are games where participants' skill, and not chance, predominantly determine the outcome of the game.³⁵ A traditional slot machine, for example, is a game of chance because winning is determined purely by chance.³⁶ Another game, such as chess, which contains virtually no chance, is a game of skill.³⁷ Between the extremes of chess and slots are many games, however, that contain both chance and skill.³⁸

To assess the legality of such games, most states have adopted the “predominance test.” Under that test, if the winner is determined predominantly by chance, then the activity is gambling.³⁹ If, however, the winner is determined predominantly by skill, then the activity is a contest.⁴⁰ Two more traditional activities within the “grey area” are poker⁴¹ and backgammon,⁴² both of which have elements of skill and chance. To date, these two games have been held to *203 be predominantly skill-based by some courts and predominately chance-based by others.

III. The Recent History of Prize Gaming

“Jacta alea est” (“the die is cast”).⁴³

A. Lotteries and Numbers

Since the founding of our nation, many forms of prize gaming have existed in this country with periods of prohibition following periods of permissiveness.⁴⁴ Lotteries are one of the best and earliest examples of a gambling activity that became sanctioned or legalized to help support socially important causes.

[Specifically,] [l]otteries in the United States date to early colonial times. A lottery was conducted in 1612 to support the Jamestown settlement. In the 1740s, Benjamin Franklin organized a lottery to raise money for the strengthening of Philadelphia's defenses. George Washington's Continental Army was the beneficiary of a lottery authorized by the Continental Congress in 1776. [Furthermore,] [s]tate-authorized lotteries funded much of the westward expansion of the nation throughout the first half of the nineteenth century.⁴⁵

Several institutions of higher learning, including Yale and Harvard, were, in part, financed by lotteries.⁴⁶ The proliferation of state-run lotteries began in the mid-1960s to address state budget deficits. As one commentator noted:

[More recently,] [g]rowing opposition to tax increases was a leading factor in establishing [legalized] state-run lotteries in the 20th century. In 1964 New Hampshire was the first state to sponsor a lottery, followed by New York in 1967. New Jersey launched the first financially successful modern lottery in 1971. . . .

There were also various attempts to legalize a national lottery, but they failed to be passed by Congress.⁴⁷

The illegal “numbers” game was another prominent form of lottery. Often, for as little as a penny, residents of usually the poorest neighborhoods of major United States cities could pick either a three or four digit number with *204 the hopes that it would match the number drawn by the operator. Tens of thousands of low-income individuals have purchased tickets in these underground lotteries.⁴⁸

Numbers was quite popular, even though the game is illegal. One author claimed, “the amount wagered on numbers was \$5 billion in 1960. Another estimate shows that the numbers game was grossing \$20 million annually in Chicago alone during the early 1970s and the total handle was \$1.1 billion.”⁴⁹

B. Sweepstakes

Sweepstakes have been around for a long time. McDonald's and Pepsi, among others, have been operating sweepstakes with great success.⁵⁰ Most states permit sweepstakes, provided that several conditions are present.⁵¹ Specifically, the promoter may not require participants in the promotion to stake anything that may be deemed "consideration." Under the majority rule, incidental expenses or inconveniences undertaken to enter a contest promotion are not consideration.⁵² For example, the cost of a postage stamp or the need to go to a store to obtain a contest entry form is not consideration under the "any effort or expense" test.⁵³

Perhaps the most popular are sweepstakes that are tied to the sale of particular retail products. For example, persons buying a certain brand of soda or hamburger may have the chance to win a prize. These sweepstakes are designed to promote legitimate business objectives: increased sales.⁵⁴ There are costs associated with these benefits. These costs are born by the promoter and competitor. For example, when Pepsi holds a sweepstakes promotion, both Coke (in lost product sales) and Pepsi (in the cost of purchasing the prizes), and not the general public (in entry fees paid), pay the costs.⁵⁵

When tying sweepstakes with products, a company promoting the product will typically incorporate into the product's packaging either a game piece or information about whether the patron won the prize. Thus, by virtue of the purchase itself, the patron may obtain a game piece or determine if he or she won the prize.

The cost of the product itself is consideration in most states.⁵⁶ To avoid classification as an illegal lottery based on this, promoters must provide a free *205 alternative method of entry ("AMOE"). Games like this are generally legal because the participant is not required to purchase the product as a prerequisite for entering the sweepstake.⁵⁷

Recently, sweepstakes have come under increased state scrutiny, not because they too closely resemble lotteries, but due to misleading promotions. Specifically, a few years ago, the attorneys general of twenty-six states made a joint announcement in which they explained that Publishers Clearing House ("PCH") was to pay \$34 million - "including immediate restitution to thousands of consumers" - and "make significant and permanent reforms in the way it conducts its future contests."⁵⁸ In particular, according to that announcement:

The \$34 million settlement and permanent injunction will resolve state lawsuits that alleged consumers often were misled by PCH mailings into believing they had won contests, or that making purchases would enhance their chances of winning. "No longer will Publishers Clearing House be able to use false statements, fictional characters and deceptive personalized letters to prey upon the elderly citizens of our state," said Wisconsin Attorney General Jim Doyle. Texas Attorney General John Cornyn added, "At last, Texas consumers can rest assured that this settlement will hold PCH accountable in the way the company does business. . . ." In addition to the changes in its future business practices, PCH must pay immediate restitution totaling \$19 million for customers who were deceived by its past practices. PCH also will pay civil penalties totaling \$1 million, as well as \$14 million to cover the costs associated with the states' litigation and the costs of administering the restitution payments. "This injunction requires PCH to make the restitution money available for distribution right away, and not wait two or three years," Missouri Attorney General Jay Nixon said. "This is especially important when our investigation shows that most of the consumers who have been injured by PCH's past practices were elderly, and time is a big factor."⁵⁹

C. Skill Games, Contests, and Game Shows

Like sweepstakes, most states exempted skill games from criminal gambling prohibitions.⁶⁰ Many reasons exist for these exemptions. Historically, such contests were used to motivate the citizenry to increase its combat skills. As experts noted: "The

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