

## CHAPTER 2

# ***Basics: Common Law Definitions and Formats of Gambling and Quasi- gambling Games***

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### **WHAT IS GAMBLING?**

The definition of “gambling,” unless changed by statute, consists of any activity with three elements: consideration, chance, and prize. If any one or more of these elements is missing, the activity is not gambling.

Consideration can have many different meanings, as we will discuss shortly. But, in general, there is no “gambling” unless a participant is required to risk something of value.<sup>12</sup> The legal term for an activity where there is no consideration should be “gift,” when a person gives another a chance of winning a valuable prize at no cost. Much more common is “sweepstakes,” often called a no-purchase-necessary sweepstakes. For gambling, each interested party must have a chance of gain and stand a risk of loss.<sup>13</sup>

It is impossible to eliminate chance from any human activity, so the usual test is stated as whether skill or luck predominate. This really means, is chance involved in any stage of the activity to the point where we can say that it was chance and not skill which determined the winner or how much he or she won? If skill predominates through all stages, then the game is considered to be a game of skill. Operators can charge players to enter skill contests in the hopes of winning valuable prizes, although the money will be called an entrance fee rather than a wager. Games of skill are by definition not gambling, but more

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<sup>12</sup> 38 Am. Jur. Gambling §2i; see also WILLISTON ON CONTRACTS §17.6 (4th Ed. 1997): “The offer of a prize to the winner of an athletic competition does not make a wagering contract” unless the offeror also competes for the prize.

<sup>13</sup> WILLISTON ON CONTRACTS §17.6 (4th Ed. 1997).

and more states are passing laws to regulate them, to prevent both fraud and operators running gambling games disguised as contests of skill.

Today, games and contests employing some element of chance are a given in everyday life. Such promotions and events are visible everywhere, in print, at point of purchase, over broadcast media, or on the Web, thrown at potential customers for any product or service. It is most confusing to the average person to observe that some of these are subject to civil and criminal prosecution, and held up to opprobrium as “gambling,” while others are deemed respectable, in fact workaday mainstays of publicity and marketing efforts worldwide.

No discussion of gambling, on the Internet or anywhere else, can proceed without a working definition of what gambling is and is not. The definition essentially comes in two parts: first, we discuss in general the elements that comprise a gambling transaction. Next we will examine the types of games, contests, or events that are classified as “gambling.”

### Elements of a Gambling Transaction

The traditional formula—“payment of a price for a chance to win a prize”<sup>14</sup>—neatly sums up the three necessary elements: consideration, chance, and prize.<sup>15</sup> If any one of the three basic elements is missing, the activity in question, though it may be regulated, is not gambling.

### Consideration and its Development

There is no “gambling” unless a participant is required to risk something of value.<sup>16</sup> Each interested party must have a chance of gain and stand a risk of loss.<sup>17</sup> In the United States there were two completely different definitions of what constitutes “consideration” for gambling purposes.<sup>18</sup> The older, rigid interpretation is now giving way to a more realistic view.

**Majority View.** The majority view, now the U.S. national standard for practical purposes, dates back to 1890 and the case of *Yellow-Stone Kit v. State*.<sup>19</sup> This

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<sup>14</sup> See, e.g., *Boys v. Bartell* 82 Ariz 217, 310 P.2d. 834, 837 (1954). See also Ling & Gates, *The Law Of Online Gambling: Canada in the Global Context*. 7(10) CYBERSPACE LAWYER 7 (January 2003).

<sup>15</sup> In addition, where state laws prohibit gambling “for profit,” profiting by the deed is a necessary component of the offense, see, e.g., *State v. Geddar*, 19 Wash. App. 826, 579 P.2d 949 (1978); WASH. REV. CODE §§9.46.020(14),9.46.020(15) (1978), repealed by Laws 1987, c. 4, §47, effective March 16, 1987.

<sup>16</sup> See 38 AM. JUR. *Gambling* §2; see also WILLISTON ON CONTRACTS §17.6 (4<sup>th</sup> ed. 1997). (“The offer of a prize to the winner of an athletic competition does not make a wagering contract” unless the offeror also competes for the prize).

<sup>17</sup> See WILLISTON ON CONTRACTS §17.6 (4<sup>th</sup> ed. 1997).

<sup>18</sup> See Volner, *The Game Consumers Play: “Giveaway” and The Law—A Conflict of Policies*, 25 FED. COMMUNICATIONS L.J. 121, 129 (1972).

<sup>19</sup> 88 Ala. 196, 7 So. 338 (1890).

action centered on lotteries, which were at that time the most widely available form of gambling in the United States, and most closely identified in the public mind with the evils of gambling. In *Yellow-Stone*, the Alabama Supreme Court held that a retail promoter did not conduct an illegal lottery where he did not demand that participants in the drawing purchase tickets. Because the payment of money was not required to obtain a chance to win, the Court held that there was no consideration. It is interesting to note however, that in a non-gambling contract this might have counted as adequate consideration. This view—that for there to be consideration in the gambling frame of reference, the player must pay money to participate—is followed today by a majority of states and the federal government. While several of these jurisdictions, and the Federal Communications Commission, further specify that the money must be paid directly to the promoter for the activity to be a form of gambling,<sup>20</sup> most governments look only at whether the participants are required to give money, not who receives it. Courts usually reject the idea that consideration is a function of the total funds received by the distributor. “Consideration” is not present in a gambling frame of reference where the player need only give trifling sums or minimal efforts to play, and the operator receives only minimal benefits, even though these would create sufficient consideration for a non-gambling contract.<sup>21</sup> In the same vein, incidental expenses to third parties, such as the cost of postage stamps, have so far been ignored by courts in deciding whether consideration is present.<sup>22</sup>

**Minority View and the *Williams* Analysis.** Asserting that what is adequate consideration for a standard contract is adequate consideration for gambling, a shrinking minority of states use the broad definition of contract law, namely that consideration is any “right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.”<sup>23</sup> Under this line of reasoning, such commonplace marketing devices as registering customers in a sweepstakes as an “extra” for purchasing goods at regular prices, or even for provision of previously contracted services (e.g., incentive program for boosting sales quotas) may constitute the necessary element of consideration.<sup>24</sup>

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<sup>20</sup> Cf. *Greater Indianapolis Broadcasting Co., Inc.*, 44 F.C.C.2d 37, 39 (1973); *Smith Broadcast Company, Inc.*, 87 F.C.C.2d 1132 (1981).

<sup>21</sup> See *California Gasoline Retailer v. Regal Petroleum Corporation of Fresno*, 50 Cal.2d 844, 330 P.2d 778 (1958).

<sup>22</sup> See, e.g., *Federal Communications Com’n. v. American Broadcasting Co.*, 347 U.S. 284, 74S.Ct. 593, 98 L.Ed. 699 (1954); *Haskell v. Time, Inc.* 857 F.Supp. 1392 (E.D. Calif. 1994) (sweepstakes did not amount to illegal lotteries or contests, where only payment required was 29 cents postage). See also *ACT Wrigley Stores, Inc. v. Olsen*, 359 Mich. 215, 102 N.W.2d 545 (1960).

<sup>23</sup> Opinion of the Attorney General of New York regarding the “Good as Gold” real estate sales incentive (Opn. No. 96-F1, Jan 29, 1996 ([http://www.oag.state.ny.us/lawyers/opinions/96\\_f1.htm](http://www.oag.state.ny.us/lawyers/opinions/96_f1.htm))).

<sup>24</sup> See *id.* See also e.g., *Kroger Co. v. Cook*, 24 Ohio St.2d 170, 265 N.E.2d 780 (1970). In *Idea Research and Development Corp. v. Hultman*, 131 N.W.2d 496 (Iowa 1964), the court found “[t]here is consideration for all participants [in a television bingo game] when some pay or buy merchandise and others do not.” *Id.* at 499.

The most notable advocate of this view was Judge Francis E. Williams of Georgia, a fierce and articulate opponent of lotteries, sweepstakes, and gambling in general. In his writings, he addressed the gambling question via the then-current topic of lotteries.<sup>25</sup> Williams asserted that any kind of chance drawing was a lottery, and presupposed therein the existence of the consideration needed for gambling. He argued that while theoretically there are three distinct classes of lotteries, in practice there is only one. Judge Williams classified lotteries by the method of participation: “closed participation,” “open participation,” and “flexible participation.”<sup>26</sup> “Closed participation” is the traditional lottery format, which requires the purchase of goods or a ticket to enter. In an “open participation” lottery, none of the participants are required to do anything to participate and no offer of any kind is extended as an inducement to enter. Williams, however, stated that as a practical matter there can hardly be any such thing as an “open participation” lottery, since a genuine specimen would return no profit to the sponsors or operators. In real life, said Williams, there is always a catch, something that must be paid over to participate. Therefore, in his view, the “flexible participation” lottery (familiar today as “no purchase necessary”) is not a viable hybrid of open and closed, but merely gambling in sheep’s clothing. While it is advertised “free” because some may enter at no charge, in reality, Williams said, this is no more than a thinly disguised “closed participation” type, since restrictive conditions make the scheme much more favorable to paying participants than to non-paying.<sup>27</sup>

**The Dawn of the Common Sense Approach.** The Williams analysis held sway in many states until the Depression, when the definition of “consideration” for gambling purposes began to be re-defined in the “Bank Night cases.” These centered on theater promotions used to boost attendance in a near-desperate economy. Moviegoers were offered raffle tickets for assorted prizes (usually dishware or other minor valuables) free with the price of admission. To avoid being declared an illegal lottery, the theaters also gave these raffle tickets at no charge to anyone who asked at the box office before show time, and often participants did not have to be present to win.<sup>28</sup> Most of the states that decided the issue found that there was no consideration, since no purchase

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<sup>25</sup> This was due to a peculiarity of many state laws of the period, which specifically outlawed lotteries but not other kinds of gambling. It became accepted prosecutorial practice to stretch the term “lottery” to cover any kind of gambling, even roulette wheels and poker games, and in many jurisdictions the word “lottery” was synonymous with gambling activity in general.

<sup>26</sup> WILLIAMS, FLEXIBLE PARTICIPATION LOTTERIES 192–195 (1938); *cf.*, WILLIAMS, LOTTERIES, LAWS AND MORALS (1958).

<sup>27</sup> *Id.*

<sup>28</sup> This was the ostensible policy, at any rate. It was, however, always an open question whether the actual distribution of “free” tickets was in any way substantial. *See, e.g.*, *People v. Gonzales*, 62 Cal.App.2d 274, 144 P.2d 605 (1944).

was necessary.<sup>29</sup> A few states held that there was consideration, since, strictly speaking, the participants suffered a detriment in loss of time and the theater obtained a benefit in its increased patronage even though no purchase was required.<sup>30</sup> This view, however, was increasingly seen as overreaching, since some of these cases were criminal prosecutions. Although there might have been consideration under traditional contract law, the necessary consideration to form a gambling contract to put a person in jail must be provided from the player's side. It became generally accepted for both civil and criminal cases that consideration must be measured by the value to the participant of what he gives, not the benefit conferred on the person offering the prize.<sup>31</sup>

Nonetheless, the Williams school of consideration lasted well into the twentieth century. Typical was *State ex rel. Schillberg v. Safeway Stores, Inc.*,<sup>32</sup> where the Washington Supreme Court held that a "bonus bingo" promotion sponsored by Safeway supermarkets was actually illegal gambling, because participants had to visit the store to obtain a booklet of game cards, pick up prize slip numbers, and present the winning card. Although no purchase was required, the Court found consideration in the benefit to Safeway from increased traffic at its stores, and in the time and effort participants expended in filling out entries. Because players are not paying for the opportunity to participate in the drawing, this form of consideration, particularly a benefit such as increased patronage, is called indirect consideration. A number of other states clung to this view until fairly recently.<sup>33</sup>

### **Rise of the Common-Sense Approach: The Radio and TV Cases**

In spite of official opposition, free promotional sweepstakes of various descriptions continued in use. The impact of broadcast media further loosened the grip of the Williams interpretation. In 1954, the U.S. Supreme Court ruled that supposed benefits to promoters from on-the-air prize contests did not provide the consideration necessary to violate the federal prohibition of lottery promotions. In *FCC v. American Broadcasting Co.*,<sup>34</sup> the Court put it plainly: "We believe that it would be stretching the statute to the breaking point to give it an interpretation that would make such programs a crime. The states began to fol-

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<sup>29</sup> See, e.g., *Griffith Amusement Co. v. Morgan*, 98 S.W.2d 844 (Tex.Civ.App.—Austin 1936).

<sup>30</sup> See, e.g., *United-Detroit Theaters Corporation v. Colonial Theatrical Enterprise, Inc.*, 280 Mich. 425, 273 N.W. 756 (1937), *State ex rel. Beck v. Fox Kansas Theatre Co.*, 144 Kan. 687, 62 P.2d 929 (1936).

<sup>31</sup> See *People v. Cardas*, 137 Cal.App.Supp 788, 28 P.2d 99 (1933).

<sup>32</sup> 75 Wash.2d 339, 450 P.2d 949 (1969).

<sup>33</sup> Cf. *Blackburn v. Ippolito*, 156 So.2d 550 (App.Fla. 1963) *Boyd v. Piggly Wiggly Southern, Inc.*, 115 Ga.App. 628, 155 S.E.2d 630 (1967).

<sup>34</sup> *Federal Communications Com'n v. American Broadcasting Co.*, 347 U.S. 284, 294, 74 S.Ct. 593, 600 (1954).

low suit, realizing passive participation did not equal the needed consideration from the player's side.<sup>35</sup>

As these promotions have grown in popularity and become a mainstay of print, broadcast, and Web marketing campaigns nationwide, the common-sense approach has generally taken hold. The Washington legislature, for example, reacted to the Safeway Bonus Bingo verdict by passing a statute specifically allowing grocery stores, and others, to conduct "promotional contests of chance," as long as certain requirements are met.<sup>36</sup> Michigan's response was more typical. Its legislature did not change the definition of consideration for a lottery; rather, it enacted a new statute, the Game Promotion Law,<sup>37</sup> to protect all parties when consideration is not present in a commercial sweepstakes. Even the minority of states that clung to the Williams theory have gradually abandoned all-out opposition and instead adopted a policy of supervision. Though this does not amount, by any means, to an all-clear for any sort of lottery-related promotion scheme. Taking a common sense approach does not mean abandoning the prior standard which has held up over decades or refusing to find consideration when players expend significant amounts of money or effort or the operator receives cash directly, not just increase patronage. The majority's emphatic language in *People v. Brundage*,<sup>38</sup> made it clear that it did not intend its common sense approach in *ACF Wrigley Stores* to mean that a retail outlet could run any game it wanted without having to worry about the element of consideration.<sup>39</sup> While the minority view has been for the most part eclipsed by events, one element, the theory of "flexible participation" still lingers as a litmus test to tell disguised lotteries and other sub rosa gambling schemes apart from honest commercial promotions. "Common sense" would probably be a better term than flexible participation for seeing through the facade of an obvious gambling scheme, even though some participants can enter for "free." The 1980s, for example, saw the introduction of 900-number telephone lotteries in the USA. These supposedly complied with the letter of the law by allowing "free" entries (self-addressed stamped envelopes; total postage at that time, 40¢). The Attorney General of Georgia exposed the absurdity of the scheme, asking who would

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<sup>35</sup> Michigan's Supreme Court adopting the language of a trial judge: "It is the opinion of the Court that these radio and television programs do not encourage gambling because the person is passive as far as the giveaway plan is concerned" *ACF Wrigley Stores, Inc. v. Olsen*, 359 Mich. 215, 223, 102 N.W.2d 545, 549 (1960). *But see* U.S. v. II Starpack Cigarette Machines, 248 F.Supp 933 (E.D.PA.1966) (mechanism that randomly dispensed extra pack of cigarettes along with pack purchased was "gambling device": consideration was provided by (supposedly) increased patronage alone.

<sup>36</sup> *See* WASH. REV. CODE §9.46.0356 (2002).

<sup>37</sup> MICH. COMP. LAWS §750.372.(2) (2002). Even Williams' native state has surrendered to the satanic lure, authorizing promotional sweepstakes (albeit under protest), GA. CODE ANN. §§16-12-36 and 10-1-393 (2002).

<sup>38</sup> 381 Mich. 399, 162 N.W.2d 659 (1968).

<sup>39</sup> *See also* Schwartz v. Upper Deck Co., 967 F.Supp. 405, RICO Bus.Disp.Guide 9294, (S.D.Cal. 1997), *overruled by* Schwartz v. Upper Deck Co., 104 F.Supp.2d 1228, RICO Bus.Disp.Guide 9933 (S.D. Cal. 2000) and *Diamond Game Enterprises v. Howland* 1999 WL 397743 (D.Or. 1999).

spend 40¢ and wait to hear if they'd won, when they could find out at once for a 35¢ phone call?<sup>40</sup> Where phone cards were sold in tandem with a sweepstakes promotion, patrons purchased cards solely to participate in the sweepstakes, throwing away cards that were not "winners." The North Dakota Supreme Court, quoting Professor I. Nelson Rose, held that the phone card vending machines were in fact a species of slot machine. The availability of sweepstakes cards with self-addressed stamped envelopes did not change the fact that most players were almost exclusively playing the sweepstakes game, and throwing away the "product" they were supposedly buying.<sup>41</sup> The rise of the common sense approach, especially in regard to promotions linked to broadcast media, was an important step toward liberalizing the public mood toward gaming in general and gambling on-line in particular.

**Consideration and Internet Gambling.** On-line casinos and sports books, which are unquestionably gambling, operate on an account basis and therefore require an initial "post-up" (transfer of funds to a customer's secure on-line account) by credit card, debit card, or wire transfer. Since these funds must be in place before any bets can be taken, this constitutes consideration by any standard.

Many overseas sports books require patrons to deposit money in overseas banks. When the patron places a bet on-line, he technically orders the bank to transfer the amount of the wager from his account to the sports book's account. Foreign operators argue that this means no bets are being placed from the state where the bettor is located. Whether or not this scheme will work, and it probably will not, it only goes to the issue of where the bet takes place. It is irrelevant to the question of whether there is consideration. There clearly is consideration under any definition, because the money being wagered is the patron's, even if it is in an overseas bank.

On the other end of the scale are Web sites which offer games which are truly free, used as a form of marketing. Internet bingo has become particularly popular, where the winner receives a small prize, usually under \$10, but there is no cost to play. The prize money comes out of the Web site's advertising budget. If a game has no consideration, it is legally a gift, although almost everyone today would call it by the better known designation, "sweepstakes."

The free alternative means of entry thus may make the games non-gambling "sweepstakes" under some state laws and under federal law as well. Participation in these "free" games often involves transfer to one or more additional Web sites, with attendant barrages of pop-up ads, banners and assorted other come-ons. The (informal) consensus of law enforcement is that this does

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<sup>40</sup> Ga.A.G. Op. No. 84-83, 1984 WL 59954 (Nov. 26, 1984).

<sup>41</sup> Cf. *Midwestern Enterprises, Inc. v. Wayne K. Stenehiem*, North Dakota Attorney General, 2001 ND 67, 625 N.W.2d 234 (2001).

not constitute participation in gambling, either because it technically lacks consideration, or because the gauntlet of on-line flackery amounts to an appropriate penance. Internet access by itself is generally not held to amount to consideration. The last remaining hard-line state in this respect, Florida, changed its stance in late 1999.<sup>42</sup>

The more difficult question about consideration arises with Web operators who combine free games with gambling requiring money bets. Many on-line casinos allow players to obtain a small, or even large, number of chips for free. But most play is with chips purchased by credit cards. This is usually the only way players can participate for any significant length of time in games which pay out in money. Operators have found that free casino games are popular; as many as one-third of their visitors play for free, even if these games do not offer large cash prizes. But that means that two-thirds of the site's patrons are playing for money.

Free games lack consideration, while a game that requires all players to bet cash clearly has consideration. What about games which can be played for free for a short period of time? An argument can be made that this is the same as no-purchase-necessary sweepstakes used to sell soft drinks; a few customers may enter for free, but the vast majority of customers enter by buying the soft drink.

The answer sometimes is written in statutes controlling sweepstakes: The law often requires that the free game be only used as a promotion to sell another product or service. Since many of these casino Web sites do not offer anything other than games, they do not meet the requirements of the law and would be considered gambling.

Many jurisdictions do not put in the extra requirement that the no-purchase-necessary sweepstakes be used only as a commercial promotion of another product or service. In that case, the court has to decide whether this game is legitimate. Do players entering for free have the same chances of winning as players playing for money? The answer almost always is no, players using credit cards can buy more chips and greatly increase their chances of winning.

It should also be noted that most states have passed statutes specifically covering casino-style gambling games, even with free alternative means of entry. In those states, if any player pays money to play, the game becomes an illegal form of gambling.

## Chance

Even if a game costs money to enter and therefore has "consideration," and the winner will receive a thing of value, a "prize," the contest is technically not

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<sup>42</sup> See Jennifer L Collins Internet Sweepstakes: Marketing Tool or Minefield? (<http://www.commlaw.com/FSL5CS/news%20bites/news%20bites%201346.asp>) (July 2001).

gambling if skill predominates over luck in determining the winner. This test is stated in different ways by different courts.<sup>43</sup>

Bets are made on every conceivable contest and event, by the actual participants and bystanders alike. Where does skill stop, and chance begin? The deciding factor lies in the individual bettor's participation in the event and control over the results. The less input and control a bettor has over the outcome of the contest, the higher the likelihood it is a game of chance. In a true game of skill, moreover, there is no "house" participating as a player, and no third party can place a wager on a contest between actual participants.

Most jurisdictions hold that the element of chance is supplied if luck enters in at any point as a substantial factor in determining the outcome. As the official commentator to the New York anti-gambling laws put it: "Gambling is not defined purely in terms of betting or risking something of value upon a contest of chance. The point may be illustrated by considering a chess game between A and B, with A and B betting against each other and X and Y making a side bet. Despite the character of the game itself as one of pure skill, X and Y are 'gambling' because, from their standpoints, the outcome depends upon 'chance' in the sense that neither has any control or influence over it. The same is not true of A and B, who are pitting their skills against each other; they, therefore, are not 'gambling.' It is this feature that requires the definition of 'gambling' to embrace not only a person who wagers or stakes something upon a game of chance but also one who wagers on a future contingent event [whether involving chance or skill] not under his control or influence."<sup>44</sup> It is interesting to note, however, that at least one federal court has ruled that cheating eliminates the element of chance. Therefore the operators of a crooked gambling scheme, while clearly fraudulent, could not be prosecuted for gambling, as the element of chance had been removed.<sup>45</sup>

In the real world, skill and chance are simply two ends of a spectrum. Every activity imaginable fits somewhere between the two points. For games played on-line, roulette would seem to be a game entirely on the chance end, with chess, especially tournament chess, on the skill end.

Of course every game requires some skill. There are millions of Americans who cannot play roulette at an Internet casino because they cannot figure out

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<sup>43</sup> A "game" has been defined as a "contest for success or superiority in a trial of chance, skill, or endurance." When used in connection with gambling, a game is anything that is used as a means of playing for money or other stakes, with the result depending more on chance than on skill. 19 AM.JUR.POF 647.

<sup>44</sup> See William C. Donnino, *Practice Commentary*, MCKINNEY'S PENAL LAW Ch. 40, Pt. 3, T.M.Art. 225, Refs. & Annos. (1999).

<sup>45</sup> The particular case involved a variation on "past posting," an old scheme to bilk horse bettors. Wisconsin players were enticed to bet on horse races in Arkansas, not knowing the races had already run, but the operators had private phone and radio links for inside information. The fact that the race results had already been determined, if not announced, by the time the bets were made, persuaded the Court that the element of "chance" was not involved. See *U.S. v. Bergland*, 209 F.Supp. 547 (E.D.Wis. 1962), reversed on other grounds, 318 F.2d 159, (7<sup>th</sup> Cir. 1963), *certiorari denied*, 84 S.Ct. 129, 375, U.S. 861, 11 L.Ed.2d 88.

how to use a computer, or connect with the Internet, or make a bet. And roulette allows some choices, including one wager<sup>46</sup> which offers different odds from other wagers. The noted mathematician, Dr. Edward O. Thorp, showed that a skillful player can increase his chances of winning at a real-world roulette wheel, even if the wheel is not off-balance, because the croupiers, being human, tend to spin the wheel with an identical amount of force, spin after spin. There are undoubtedly players who have figured out ways to beat the simulated roulette of an Internet casino, perhaps by deconstructing the algorithms. Of course, these players are not publicizing their successes.

Chess would appear to be entirely skill, since there are no hidden pieces, no chance factor such as a roll of dice. But if chess were just a matter of skill, the most skilled player should always win. Chess contains so much skill that it can have rankings. But even ignoring random factors like whether a player has a head cold, chess is an activity involving human beings and human interactions and is thus unpredictable.

It should be noted that all human activities, even those not involving psychology, involve some luck. Farming, subject to the vagaries of the weather and commodities prices, involves individuals risking time and money in an effort to obtain more money. But farming will never be outlawed as a form of gambling.

No court requires that every player be able to beat the game. But simply because a very few players can win does not turn a game into a game of skill, otherwise blackjack would qualify. The toughest standard requires that the average player be able to win under average circumstances. Most courts, especially trial courts, are more lenient, and will declare games to be predominantly skill if chance really plays a minor role.

Courts have developed various tests to determine whether a game is one of skill or luck. Some of the major characteristics of a game of skill are as follows:

1. A skillful player will win more than an unskillful one. The Oregon Supreme Court gave an example:

Take, for instance, the great American game of poker; we have no doubt, if a couple of gamblers sat down to play this game against a couple of ministers, who presumably do not indulge in it, that the ministers would soon be destitute of "chips" and the gamblers' pile augment accordingly.<sup>47</sup>

2. Skill can be learned from experience, from real or mock play. Play improves with experience. All the experience in the world cannot help a slot machine or lottery player.

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<sup>46</sup> A bet on the unusual five number combination of 0-00-1-2-3.

<sup>47</sup> *State v. Randall*, 256 P. 393, 394 (Or. 1927).

3. Skill games require a knowledge of mathematics. This is particularly true of games played with cards and dice, but applies to almost all other games. Backgammon has been a consistently difficult game to categorize since a skillful player will win over time, but a lucky player may win in the short run.
4. Skill games require psychological skill. This is obviously limited to games involving play against other human beings. A player must know how to read people and how to predict or influence the actions of others.
5. Player participation changes the result. The Ohio legislature created separate statutory prohibitions on “games of chance” and “scheme of chance,” explicitly including a lottery. The Ohio Supreme Court analyzed the difference in terms of the control, however nebulous, the participant has.
6. Skill can be learned from reading. In determining that the card game of bridge was a game of skill and not a game of chance the Supreme Court of California pointed to the large body of books and periodicals discussing strategy for playing the game. “The existence of such a large amount of literature designed to increase the player’s skill is a persuasive indication that bridge is not predominantly a game of chance.”<sup>48</sup>
7. The opinion of the community. Common sense tells us that some games require skill. Someone who knows virtually nothing about the game might be willing to buy lottery tickets every day for a year, and no one would criticize him for his poor plays. But we would all think that same person was crazy if he took an identical amount of money and without knowing the game played against a professional poker player. An amateur can buy a lottery ticket, and might even win. But the amateur will lose, even in the short run, against an experienced and knowledgeable poker player.

It is possible that even sports betting could be run as a skill game, if the chance element can be factored out. This usually requires that the game be conducted as a tournament. A lucky bettor might win a single bet. But by keeping records, it is possible to show that chance drops out over time and skillful players win tournaments.

For the Internet, the easiest way to run a skill game is to have a tournament, where chance equalizes out over time. Players play only against other players, never the house, with a guaranteed prize to the winner. Interesting and fun skill games are difficult to design, especially when players cannot be penalized simply because they have slow modems.

The amount of luck or skill involved in any game has always been important in determining whether or not the game is a form of gambling. Some courts have gone further and looked at the amount of skill and luck to determine

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<sup>48</sup> In re Allen, 27 Cal.Rptr. 168, 53 Cal.2d 5, 377 P.2d 280 (1962).

whether the game was a lottery. Federal law has adopted the “pure chance” rule, meaning a game with virtually no skill is a lottery. This does not mean that a game with some skill is legal, just that it is not a lottery. The federal anti-lottery laws are not the only prohibitions on gambling enacted by the United States Congress. No federal court should find an on-line bookie, accepting regular bets on sports events, is running a lottery. “Gambling schemes where winning depends on skill or judgment are not like a lottery in which success is determined by pure chance and is thus specially attractive to the inexperienced and the ignorant.”<sup>49</sup> However, the on-line bookie may be violating other anti-gambling laws, such as the federal Wire Act.<sup>50</sup>

The federal court’s “pure chance” doctrine is the minority rule in the United States, and has been adopted in some states, most notably Missouri. The Missouri Supreme Court ruled that slot machines and bingo were lotteries and could not be played on the state’s riverboat casinos, due to a state constitutional prohibition on lotteries. Blackjack was allowed, because, although it was still predominantly chance and therefore gambling, it did not fall under the prohibitions on lotteries. Backers of the riverboats reacted by getting the voters to amend the state constitution.

Most states do not draw the line between lotteries and other forms of gambling by looking at the amount of skill involved. Instead, they look at factors such as whether players have to go to a particular place and participate in the play of a game, or merely buy a ticket and wait for a drawing.<sup>51</sup> But all jurisdictions draw a distinction between gambling, which has to be predominantly chance, and games of skill.

A few states have begun regulating contests of skill, to ensure the games give fair notice, are not rigged, and the winner is paid. California is typical. Its statutory requirements were enacted by the state legislature and can be found in its Business & Profession code at §§17539-17539.3. The law opens with legislative findings:

The Legislature finds that there is a compelling need for more complete disclosure of rules and operation of contests in which money or other valuable consideration may be solicited; that current methods of disclosure are inadequate and create misunderstandings as to the true requirements for participation and winning of prizes offered; that certain problems which have arisen are peculiar to contests.<sup>52</sup>

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<sup>49</sup> *Boasberg v. U.S.*, 60 F.2d 185, 186 (5<sup>th</sup> Cir. 1932); Annotation, Offenses Against the Mails: What is a Lottery or Similar Scheme, 96 L.Ed. 312, 314 (1952).

<sup>50</sup> 18 U.S.C. §1084 (2004).

<sup>51</sup> See *National Football League v. Governor of State of Delaware*, 435 Supp. 1372 (Del. 1977); *State v. Coats*, 158 Or. 122, 74 P.2d 1102, 1107 (1938) (Kelly, Concurring); *Finster v. Keller*, 18 Cal.App.3d 836, 96 Cal.Rptr. 241 (1971).

<sup>52</sup> CAL. BUS. & PROF. CODE §17539 (2004).

What are those “certain problems”? Many laws regulating contests of skill, including California’s, are stated in the negative: that is illegal not to do certain acts, like give adequate notice. Because these laws are written as reactions to specific problems that occurred, they often contain language that talks about mailings or puzzles.

(a) The following unfair acts or practices undertaken by, or omissions of, any person in the operation of any contest are prohibited:

- (1) Failing to clearly and conspicuously disclose . . . the total number of contestants anticipated based on prior experience and the percentages of contestants correctly solving each puzzle used in the three most recently completed contests conducted by the person. . .
- (2) Failing to promptly send to each member of the public upon his request, the actual number and percentage of contestants correctly solving each puzzle or game . . .
- (3) Misrepresenting in any manner the odds of winning any prize.
- (4) Misrepresenting in any manner, the rules . . .
- (5) Failing to clearly and conspicuously disclose . . .
  - (A) The maximum number of puzzles or games which may be necessary . . .
  - (B) The maximum amount of money, including the maximum cost of any postage and handling fees, which a participant may be asked to pay . . .
  - (C) That future puzzles or games, if any, or tie breakers, if any, will be significantly more difficult than the initial puzzle.
  - (D) The date or dates on or before which the contest will terminate . . .
  - (E) The method of determining prize winners if a tie remains . . .
  - (F) All rules, regulations, terms, and conditions of the contest.
- (6) Failing to clearly and conspicuously disclose the exact nature and approximate value of the prizes . . .
- (7) Failing to award and distribute all prizes . . .
- (8) Representing . . . that the number of participants has been significantly limited . . .
- (9) Representing . . . that any particular person has won any money, prize . . . in a contest unless there has been a real contest . . .
- (10) Representing . . . that any particular person has won any money, prize, thing, or other value without disclosing the exact nature and approximate value thereof.
- (11) Using the word “lucky”. . . or representing in any other manner . . . that any number, ticket, coupon, symbol, or other entry confers . . . an advantage . . .

- (12) Failing to obtain the express . . . consent of individuals before their names are used for a promotional purpose . . .
- (13) Using or distributing simulated checks . . .
- (14) Representing . . . that any tie breaker puzzle may be entered upon the payment of money qualifying the contestant for an extra cash . . . prize . . . unless:
  - (A) It is clearly and conspicuously disclosed that the payments are optional . . .
  - (B) Contestants are clearly and conspicuously given the opportunity to indicate they wish to enter such phase of the contest for free . . .<sup>53</sup>

There are also detailed rules requiring record keeping, refunding entry fees under some circumstances, and making available names of all winners.<sup>54</sup>

The *Los Angeles Times* broke the story at the end of May 2001: The Walt Disney Co. was backing a pay-to-play on-line gaming venture. Disney's partner, Skillgames, was supposed to officially launch its Web site, Skillgames.com, in 2001 "amid a multimillion-dollar promotional blitz." This particular project may have evaporated into the vaporweb because [www.skillgames.com](http://www.skillgames.com) no longer exists.

But the question remains, is Disney gambling on gambling? Disney executives say, "No." A visit to the Web site in May 2001 showed they are probably right. By paying \$25 with a credit card players could sign up to be skillgames users. (Play was suspended when the site went into its "Beta Launch" and never returned.)

Each game cost \$1 to play. The prizes ranged from \$1 to \$500, although it was promised that once in full operation, players might be able to win as much as \$1 million. The details are bound to change. Disney does not have experience with gambling and will learn that players who pay \$1 to enter a game do not consider a prize of \$1 as "winning."

But the interesting question is how can Disney be thinking about operating games for money at all? The answer is they plan to offer only games of skill, not of chance. The trick is to create a game that is both playable, with an outcome that depends more on skill than luck. The law requires that it must be possible for a skillful player to win under normal playing conditions.

Of course, with a true game of skill, the first skillful player could break the bank. So, Skillgames.com had a maximum win limit. A player who had won an amount equal to a game's top prize could never play that game again.

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<sup>53</sup> CAL. BUS. & PROF. CODE §17539.1 (2004).

<sup>54</sup> See CAL. BUS. & PROF. CODE §17539.2 (2004).

To prevent compulsive gamblers, or gamers, players were limited to charging no more than \$300 per month to their credit card accounts.

Disney did tip a toe into the legal gambling waters a few years ago, when it announced it would start a lottery TV show. Viewers in states with state lotteries could play over the air; a no-purchase-necessary sweepstakes would be available for non-gamblers.

The reaction of the press and public was so immediate, negative, and intense that Disney canceled its plans the next day. Having learned its lesson, that people do not want to see their children gambling, Skillgames.com made it very clear that minors could not play and if they played they could not collect.

Disney is still taking a risk, but you don't make billions of dollars by playing it safe. Its major problem is designing an interesting game site that meets the standards of the law, when the law is decades or even centuries out of date.

What happens when you mix a law passed in 1850 with Internet technology developed in the twenty-first century? Disney has to worry not only about being accused of gambling, but meeting the standards some states have imposed on games of skill. The company's lawyers put in a lot of time, and came up with the following limitations:

- Players must reside in one of the 50 states or the District of Columbia and be at least 18 years old, except in Nebraska and Alabama, where they must be at least 19, and Mississippi, where the minimum age is 21.
- Players may not be residents of Arizona, Connecticut, or Vermont.

Why these states? Arizona has a very low limit on prizes. Connecticut has a higher limit, but until recently made it difficult to advertise games of skill.

As for Vermont, in 1850 the state legislature passed a law, which is still on the books: "A person who pays money or other valuable thing lost at a game or sport or horse race may recover the value thereof of the person to whom it was paid in a civil action, if commenced within one month from the time of payment." In the only two reported cases involving this ancient law, in 1854 and 1856, the Supreme Court of Vermont said the law does not apply to gambling wagers, but anyone who loses money at a game of skill can sue and get his or her money back.

A rival site, WorldWinner.com, has a different list of states: Arizona, Arkansas, Connecticut, Delaware, Florida, Iowa, Louisiana, Maryland, Tennessee, and Vermont.

Why the difference? In part, it is because the lawyers for the two companies came to different conclusions about the laws of the various states. But also WorldWinner runs tournaments only; with Skillgames, you had to beat the site's computer, not other players.

They may both be wrong. In Nevada, for example, the state Supreme Court

ruled in 1961 that a golf course had to pay the \$5,000 it offered to anyone paying 50 cents and getting a hole-in-one. The Court indicated tournaments cannot offer prizes created out of the entry fees of players. And the Nevada Attorney General is one law enforcement official who would love to go after anything that smacks of illegal gambling on the Internet.

### **Prize**

If no prize can be won, the activity in question is classified as an amusement game, not gambling. When machines give free replays for high scores, are these replays of value and therefore “prizes”? The overwhelming majority of jurisdictions differentiate between a free replay and a credit which can be redeemed for cash or merchandise. There is virtually no danger of violating any federal or state law for on-line games, even gambling style games, in which the prizes are merely free replays. There are no cases on record of an Internet operator being accused of violating an anti-gambling law, when players can only win more game time or another round of the game. This is true even if players are paying to participate and the outcome of the game is determined by chance. However, if players can turn in free replays for cash or merchandise, then the replays are generally held to be credits, and a prize of value.<sup>55</sup> Games that offer prizes of value, either cash, merchandise, or services, or points redeemable for cash, merchandise, or services, fall under different sets of laws.

### **For Nevada Casinos a Non-wager Is a Wager**

Just about every jurisdiction in the world agrees with the above analysis, that gambling requires the three elements of consideration, chance and prize. This applies both on and off the Internet. The one significant exception is Nevada—the only state in the United States, and probably the only government in the world, to conclude that players are making wagers when they are not making wagers. The Attorney General of Nevada has declared that betting nothing for something can be an illegal wager.

The issue arose when the State Gaming Control Board asked for advice on Internet promotional games proposed by MGM Mirage (“MGM”) for its Web sites. Attorneys from the Board and Attorney General’s office had meetings and conference calls with representatives of MGM and the game designers, Silicon Gaming and its subsidiary, WagerWorks. Frankie Sue Del Papa, as Attorney

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<sup>55</sup> The arrangements for tracking and recording free plays are, by extension, often dispositive of whether they are actually part of gambling transactions. *See, e.g.*, U.S. v. Sixteen Electronic Gambling Machines, 603 F.Supp.32 (D. Haw. 1984) (meters to record credits won on game machines plus “knockoff switches” to reset count for next player indicated use in gambling).

General, issued the formal Opinion, although it was actually written by Jeffrey R. Rodefer, Senior Deputy Attorney General, Gaming Division.

The A.G. Opinion explicitly held that “instant incentives,” which entitle Web site patrons to receive randomly awarded prizes or sweepstakes tickets, are not gambling. MGM can also offer redeemable “casino points,” based on time spent at the site. But the Opinion declares that it is “a wagering activity” if prizes are given to winners of free, “for-fun” casino games on-line, like “virtual blackjack, roulette or some other traditional casino game.”

The Attorney General justified the rather startling idea that a player can be making a wager without the possibility of losing anything by pointing to a 1997 act of the state legislature. Nevada lawmakers, in response to some tax and bankruptcy cases, amended the statutory definition of “wager.” A “wager” now includes risking not only money, but also a “representative of value.” A “representative of value” was defined to mean “any instrumentality used by a patron in a game whether or not the instrumentality may be redeemed for cash”; which would include gaming chips.

The legislature and casino lobbyists were probably thinking of chips that were redeemable for merchandise, but not for cash. Also, the change enabled casinos to deduct jackpots awarded on free-play slot promotions as losses when they calculated gross gaming revenue for taxes. And it helped to ensure that casinos would not have to pay back money they had received from a person who then declares bankruptcy.

But the Attorney General has now extended the statute to the Internet. Which means that Nevada licensees, meaning casinos, are the only entities in the civilized world which can run no-purchase-necessary lotteries but not no-purchase-necessary casino games.

### **Free Dollars on Internet Casinos**

Gambling operators want to demonstrate their games to potential players. They often offer new players the opportunity to try out the games for free. First time visitors are given “demo” money or chips. Since these players are spending nothing, other than their time, there is no consideration and thus no gambling, even if valuable prizes can be won.

But other operators are offering incentives which look like free “demo” money, knowing that many will want to then play for real money. To attract customers in an increasingly competitive market many on-line casinos offer “bonus dollars” for signing up. A 10% bonus, for example, causes a customer’s post-up of \$100 to be registered on the casino’s books as \$110. Since these “ghost” dollars can be used to make actual winning bets requiring actual money payoffs and thus are capable of turning in a win, they clearly do not fit in the “demo” category.

## FORMATS OF GAMBLING

Gambling comes in three basic formats: lotteries, gaming, and wagering. All lotteries are gambling, but not all forms of gambling are lotteries. The same holds true for gaming and wagering. The distinctions are based on historic accidents: precedent, tradition, the moral sentiments of the time, and political currents. What follows is a description of each format and its development in both U.S. and applicable foreign law.

### Lotteries

The concept of pooling wagers, betting on a winning number or token, to be drawn by chance, dates from remote antiquity and retains its appeal today. We deal here with lotteries separately because of their unique legal position as state approved and sponsored entities. In their current form, lotteries are classified by the method used to determine a winner. Essentially there are two types: instant (scratcher-type) and so-called on-line. This does not refer to the Internet, but to the statewide circuit of ticket machines which feed the ticket purchase data to the central database. A particular lottery program or business can, and usually does, offer both types. Usually no other types of games are offered, although this can vary.

### American Lottery Development

Lotteries were outlawed in the U.S. until the 1960s as a result of cheating and corruption scandals at the end of the nineteenth century.<sup>56</sup> New Hampshire began the change back when it authorized a state lottery in 1963. Today lotteries have regained their popularity nationwide, and 41 of the 50 states and the District of Columbia now sponsor them. Many states still have laws dating from the Louisiana Lottery Scandal in the 1890s on their books that outlaw not only lottery operations in state (suitably modified, of course, to permit the indigenous action) but possession of out-of-state lottery tickets (mainly unenforced).<sup>57</sup>

### Government Sponsored

Today, government-sponsored lotteries are by far the most numerous, as the approval of the government is generally held to indicate an honest, reliable game.

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<sup>56</sup> Several jurisdictions followed Mississippi's lead and forbade them in the state constitutions. *Cf.* Mississippi Constitution of 1890 ([http://mshistory.k12.ms.us/features/feature10/1890\\_state\\_constitution.html](http://mshistory.k12.ms.us/features/feature10/1890_state_constitution.html)). A number of states do not specifically ban any form of gambling other than lotteries, as a result of lottery scandals in the 1820s and 1830s.

<sup>57</sup> *See, e.g.*, R. I. GEN. LAWS §11-19-4 (2003); N.J. STAT. ANN. §2C:37-6 (2003). It is worth noting that while sale, and even possession, of out-of-state lottery tickets is banned in a number of jurisdictions in this fashion, it is unheard of for a liquor store or gas station to refuse an out-of-state traveler the right to buy tickets to the local lottery!

However, although a state lottery must be owned and operated by the government very few governments actually run the day-to-day operation of their own lotteries. Most grant licenses to private operators.<sup>58</sup> Government permits range from merely selling licenses—the approach in many offshore locations—to requiring complete background checks and continuing oversight of operators, as in Europe, Australia and the U.S.

### **Lotteries and the Internet: Expansion vs. Jurisdictional Holds**

At present no state lottery in the U.S. actually allows the purchase of lottery tickets directly over the Internet. The line between Internet marketing and Internet playing, however, is becoming increasingly blurred. The Georgia House of Representatives voted overwhelmingly in favor of a bill which would allow anyone in the state to set up a “Georgia Peach Account” to allow on-line purchases of state lottery tickets by debit and credit cards. The bill still needs, as of this writing, to pass the State Senate, before Georgia becomes the first state in the U.S. to authorize Internet lottery sales.<sup>59</sup>

### **Direct vs. Indirect Participation**

Each state lottery has a Web page, and uses it to post results of daily and weekly drawings, press releases, and so on. There are, additionally, the “for fun” games (actually tutorials on how to play the real ones). And the Web pages can be used to help lottery play more directly. In 2001, Indiana’s state lottery sponsored “second chance drawings” for its three- and four-number draws, and these could be entered—by previous ticket purchasers only—via the Internet. This was merely a continuation of the telephone entry programs offered by such states as California and Massachusetts in the 1980s. Any player in the state with a losing paper lottery ticket could enter by calling an 800- or 900-number. A number of other lotteries use their Web pages in a “semi-interactive” mode, to post second and even third chance drawings for tickets which contained one or more, but not all of the latest lucky numbers. The 800-number games are legally not gambling—at least that part of the game which requires only a toll-free telephone call—but the 900-number games were true lotteries, because players could bet more, by dialing the 900-number, for the chance of winning more.<sup>60</sup> There are also the televised “semi-interactive” variation, as in the California lot-

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<sup>58</sup> The largest licensee in the U.S. is G-Tech corporation, whose Web page, (<http://www.gtech.com>), contains useful background information on the working of lotteries generally.

<sup>59</sup> See Rennie Sloan, *Georgia Bill Would Allow On-line Lottery Ticket Sales*, LOS ANGELES TIMES, March 5, 2004, at A12.

<sup>60</sup> See E-Lottery Web page (<http://www.elottery.com/pressreleases.asp/>). As of 2003, Indiana’s Internet participation program has been discontinued, and the second-chance tickets must now be mailed in, though the Web page is used to display winning numbers as before.

FIG. 2-1 The Home Page of the New Jersey Lottery, is a typical example of a government sponsored lottery (<http://www.njlottery.net>).

NJ Home Responsible Play VIP Club Retailers Winners' Circle Site Map Privacy Policy Contact Us

New Jersey Lottery  
Benefits Education & Institutions

Games & Drawings Instant Games Where the Money Goes News & Media Center General Information

## Win Big in the Lottery Bonus Zone!

New Jersey Lottery presents the Bonus Zone where non-winning scratch-off tickets can win big! To win big in the Bonus Zone, play New Jersey Lottery scratch-off games like Pac-Man, Hollywood Stars, The Young and the Restless or Breeders' Cup Gold. Collect three non-winning tickets from the same game and you're eligible for second-chance drawings with thousands of great prizes!

[Log into the VIP Club](#) to enter your non-winning Bonus Zone scratch-off tickets online, or visit any New Jersey Lottery retailer for details. Play Bonus Zone scratch-off games from the New Jersey Lottery.

**Your non-winning tickets can win big!**

# TETRIS

**Play TETRIS® Today!**

Tetris® has been voted "Best Video Game of All Time" by Electronic Game magazine. And now, the famous and wildly popular action puzzle game is another exciting e-game from New Jersey Lottery! Sold at New Jersey Lottery retailer locations, Tetris® offers a multimedia playing experience for those who enjoy playing lottery and playing interactive games on the internet. There are two (2) chances to win up to \$10,000 on each Tetris® ticket purchased, so get ready to be mesmerized by this amazing new online game! [Try the TETRIS game demo](#)

### Current Winning Numbers

**MEGA MILLIONS**  
Tuesday 01/25/05

02 10 21 25 45 + 22

[Click Here](#) to print the winning numbers.

Click on a game below to view the current winning numbers

Pick 6 Mega Millions

Jersey Cash 5 Pick 6 Lotto

**MEGA MILLIONS**

**CYBER SLING**  
**TETRIS**  
Click here to play on-line!

**VIP CLUB**  
Enroll Now It's Free

**Get in on:**

- Exclusive prize drawings
- Winning number emails
- Info in advance

[Register Today](#)

**MEMBERS LOG-IN** [LOG-IN](#)

### WINNERS CIRCLE

Eleanor & Nicholas Matson  
of Woodbridge  
Won \$135,252

[View Remaining Instant Prizes!](#)

[View the New Jersey Lottery's daily drawing](#)

[Click Here for Recent Winning Numbers!](#)

**Illegal Foreign Lotteries: The Games You Can't Win!**  
[CLICK HERE](#)

Games & Drawings Instant Games Where the Money Goes News & Media Center General Information  
Lottery Home Responsible Play VIP Club Retailers Winners' Circle Site Map Privacy Policy Contact Us New Jersey Home

Benefits Education and Institutions  
In the event of a discrepancy, the official and certified files maintained by the New Jersey Lottery's Drawing Unit shall prevail.  
Pick-6 Lotto — Estimated annuity jackpot based on sales and one winner.  
Play responsibly. If you or someone you know has a gambling problem, call 1-800-GAMBLER®.  
New Jersey Lottery tickets are available only at authorized retailer locations.  
Copyright © State of New Jersey, 2004

FIG. 2-2 The Home Page of GroupLotto, is an example of a modern privately run lottery  
 (<[http://register9.GroupLotto.com/Reg\\_Step\\_1\\_2/gl\\_reg.html](http://register9.GroupLotto.com/Reg_Step_1_2/gl_reg.html)>).

GROUPLOTTO  
STATUS: **CONFIRMED**
GROUPLOTTO®  
**OFFICIAL CLAIM AUTHORIZATION**  
FOR ELIGIBLE REGISTRANTS ONLY

## IMPORTANT :

### Complete this prize winner notification form to CLAIM YOUR GUARANTEED† CASH PRIZE

1 Enter your name and address for your prize winning check

Title:	First Name:	Last Name:
<input type="text" value="Choose"/>	<input type="text"/>	<input type="text"/>
Address:	City:	State: Zip:
<input type="text"/>	<input type="text"/>	<input type="text" value="State"/> <input type="text"/>
Email Address:	Alternate Email: (Optional)	
<input type="text"/>	<input type="text"/>	
Home Phone:	Cell Phone: (Optional)	Birth Date:
<input type="text"/> - <input type="text"/> - <input type="text"/>	<input type="text"/> - <input type="text"/> - <input type="text"/>	<input type="text"/> <input type="text"/> <input type="text"/>

**click button below to continue (Step 2)**

➤ YES!

**and claim my guaranteed† cash prize!**

GroupLotto Players Login Here  GO

By clicking the "Yes" button, you are registering to become a member of GroupLotto and are indicating that you have read and agreed to the official contest GroupLotto [Rules & Terms Of Service](#) and GroupLotto [Privacy Policy](#) under which the personal information provided above will be used by GroupLotto for its promotions. You also agree to receive email promotions and other solicitations from GroupLotto and its advertising partners.

† By registering for GroupLotto® and playing the PrizeDistributors, Inc. free sweepstakes available for entry at our website 10 times on the date of registration, you will receive at least \$1.00. In addition, you will be automatically entered into the PrizeDistributors \$2500.00 monthly cash prize drawing. You will be notified via email of your cash prize which will be awarded through PayPal®. Guaranteed Cash Prize is a one time offer to new GroupLotto® and PrizeDistributors registrants only. GroupLotto® Grand Prize drawings are independently overseen and conducted by SCA Promotions®. PrizeDistributors games are open only to legal residents of the United States and the District of Columbia, living in the United States and the District of Columbia, who are at least 18 years of age. These Promotions are void in Puerto Rico. Offer void where otherwise prohibited by law. Winners are responsible for taxes on all prizes. No purchase necessary to play or win. Purchase will not enhance the odds of the entry winning. By clicking the "Yes" button above and entering the drawing, you agree to receive email marketing from GroupLotto®, our partners and affiliates.

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 PrizeDistributors [Privacy Policy](#) and PrizeDistributors [Terms & Conditions](#)

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tery, where a closed circuit TV service displays the winning numbers of a “scratcher” game. New games are posted every few minutes.

### **Interactive Lottery Play**

In October 2000, the Iowa Lottery introduced a game called “Treasure Tower.” Translated from the successful “Trésors de la Tour” game rolled out that same February by Canada’s Loto-Québec,<sup>61</sup> it was the first U.S. state lottery game played on a CD-ROM. The game consisted of two parts: players purchased a package consisting of instant-win scratch tickets and a CD. This disc contained software for a role-playing game on a home PC, similar to an interactive video adventure game. Players assumed the role of a character who must solve assorted puzzles and challenges as the story line unfolds. Because the game is a lottery, with no skill required, players can click on an animated guide to tell them exactly how to play every step of the game. Prizes ranging from \$4 to \$10,000<sup>62</sup> were pre-determined by code numbers revealed on a lucky scratcher ticket which places the game in the category of instant lottery rather than on-line. The play of the game itself was irrelevant. Controversy soon shut down the Iowa project, but Loto-Quebec will be releasing new CD-game programs in the near future. Proponents of this variation maintain that there is no conceptual difference between old fashioned ticket scratching or pulltabs, and purchasing a CD-ROM from the same Lottery agent. The new technology is only a better grade of entertainment on the way to deciding the outcome. On the other hand, the step from CD-ROM to a game downloaded or played straight on-line is a very short one. In the end, concern over possible violations of the Johnson Act,<sup>63</sup> which forbids the transport and distribution of unregistered gambling devices, seems to have smothered the project in the U.S.

There has been at least one U.S. experiment which came close to genuine on-line interactive lottery play. In 1991, the Minnesota State Lottery announced that it would conduct a market test of at-home lottery games played on Nintendo-style home TV game consoles. The scheme appeared legal, if confined to state residents only; but legislative concerns about underage gambling killed the project.<sup>64</sup> In March 2004 the State Assembly of Georgia passed a bill which would allow account betting, including via the Internet, on the Georgia state lottery. As of this writing it is doubtful that the State Senate will allow it to become law. Considering Georgia’s powerfully conservative social history, however, the fact that such a bill has emerged there at all seems to be a favorable omen for on-line gaming’s future in the U.S.<sup>65</sup>

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<sup>61</sup> See Loto-Québec (<http://www.loto-quebec.com/>).

<sup>62</sup> See (<http://gamingmagazine.com/managearticle.asp?c=510&a=90>).

<sup>63</sup> 15 U.S.C. §1177 et seq. (2004). See *infra* for fuller discussion.

<sup>64</sup> See (<http://www.megspace.com/entertainment/neskingdom/special/lottery/>).

<sup>65</sup> See *U.S. Law Roundup, March 2004*, INTERACTIVE GAMING NEWS (<http://www.igamingnews.com>).

## The Pressure of Competition and Cross-border Bets

Lotteries must cope with a constant demand to update and improve their offerings, and the pressure has only become more severe as other forms of gambling are made available to the public. The marketing power of the Internet has therefore become indispensable. It is merely a matter of time before state lotteries gain permanent access to the home audience via the Web, cable, phone betting, or some other combination. In fact, this is central to their long range planning. The principal obstacle to full-bore on-line ticket sales is the political division of the U.S. national market into state-by-state monopolies. The state lotteries have an unwritten “gentleman’s agreement” that they will sell their tickets only within their individual state borders. But once one state lottery takes out-of-state orders on the Internet, other states are sure to resent the outsider’s access to the previously captive market of its citizens. A likely solution is already evident in the move toward multi-state, multi-jurisdictional lotteries. A number of states have merged their respective lotteries to operate across state lines. The first was the Tri-State, which began linking the small state lotteries of Maine, New Hampshire, and Vermont in 1985. Created to compete with the larger Massachusetts Lottery, it actually sends wagers across state lines. The later and bigger Powerball games, by comparison, share multi-state accounting data and a pool of games,<sup>66</sup> but take particular care not to accept the actual bets interstate. Tri-State has not been legally challenged to date, despite the fact that it is possibly operating in violation of the Federal Wire Wager Act.<sup>67</sup> The lottery sponsors take the position that this law does not apply to lotteries, and that the federal anti-lottery statutes exempt legal state lotteries from the prohibitions on interstate commerce if the lottery is being conducted pursuant to express agreements among the states.<sup>68</sup> Under many U.S. federal laws, there is no gambling violation unless the states say there is: the racketeering provisions against illegal gambling businesses<sup>69</sup> requires violations of state law to become operative. Therefore it seems probable that this lottery arrangement will continue undisturbed as long as the sponsoring states desire.

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<sup>66</sup> See (<http://www.powerball.com/muslabout.shtm>).

<sup>67</sup> 18 U.S.C. §1084 (2004). Authorities are divided on whether this law forbids interstate transmission of betting on sporting events only, or all gambling.

<sup>68</sup> 18 U.S.C. §1301 (2004). The position that the Wire Act, 18 U.S.C. §1084, does not cover lotteries received significant support in early 2001 when Judge Duval of the U.S. District Court for the Eastern District of Louisiana specifically held that the Wire Act does not apply to Internet gambling, other than bets on sports events. Consolidated class actions by players against Visa and MasterCard were dismissed, *inter alia*, for failing to allege that sports betting was involved. See *In re Mastercard International Inc., Internet Gambling Litigation*, and *Visa International Service Association Internet Gambling Litigation*, 132 F.Supp.2d 468 (E.D.La. 2001), *affirmed*, *Thompson v. Mastercard Int’l, Inc.*, 313 F.3d 257 (5<sup>th</sup> Cir. 2002). Both the decision and the Judge’s interpretation of 18 U.S.C. §1084 were specifically upheld on appeal.

<sup>69</sup> The Organized Crime Control Act, 18 U.S.C. §1955 (2004).

## International

Government lotteries outside of the U.S. are likewise under continual challenge to keep the payout interesting and the game fresh. The pressure to expand into neighboring markets has only grown with the adoption of the Euro as the common currency. Austria's lottery decided its traditional payout of about 55% was too low for the fast-paced Internet games, so on the Net its payout is 90%. Legislative restrictions prevent Germany's lotteries from doing the same: Games, both traditional and on-line, must be at the same low rate, 50%. The UK national lottery, at this writing, is re-launching itself to counter falling revenues, including account betting for games on-line.<sup>70</sup> While some jurisdictions have barred non-nationals from participation in their draws, even on-line, the rule against accepting cross border bets is not as pervasive as in the U.S. The French national lottery (La Francaise des Jeux) is an interesting case in point: in June 2001, it launched live cash Internet gaming. Developed by Access Gaming Systems of Australia, it features three instant games with software offering rich animation that mimics real world instant lottery tickets. In keeping with standard European practice at this time, it restricts purchase to residents of France—but this also includes its overseas territories. Thus, residents of Tahiti or Guyana can buy a French lottery ticket on-line, but not those of Trieste or Germany. Where the demand is not directly met on-line, as in the case of Liechtenstein<sup>71</sup> and South Africa<sup>72</sup> selling subscriptions on-line, various ticket agencies fill the gap, purchasing in-country for foreign clients.<sup>73</sup> Here again, the difference between merely marketing on-line and true on-line ticket sales is not only increasingly blurred, but increasingly insignificant. Even Mainland China is now experimenting with direct on-line sales of virtual lottery tickets: the principal barrier to worldwide participation seems to be Web pages solely in the Chinese language.<sup>74</sup> In the late 1990s, international organizations, such as AELLE, the European Association of State Lotteries and Lottos, began holding conferences in which the issue of State Lotteries marketing internationally on the Internet was of primary concern.<sup>75</sup> The World Lottery Association, comprised of more than 140 lotteries, was created in 1999 by the merger of Intertoto and AILE (the

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<sup>70</sup> See <http://www.national-lottery.co.uk/>.

<sup>71</sup> This Web site can be visited at <http://www.pluslotto.com>.

<sup>72</sup> See <http://www.nationallottery.co.za/>.

<sup>73</sup> A typical example is the International Lottery Ticket Service (Interlotto) at <http://www.winalot.com>. Often it is difficult to tell the actual national lottery apart from a ticket agent. Compare, for example <http://www.lotto.ie> with <http://www.irishlotto.net>.

<sup>74</sup> The PRC's Welfare Lottery Bureau of Heilongjiang in April 2001, began selling virtual lottery tickets to mobile subscribers (data-enabled cell phones and handheld computers, like Palm Pilots) in this northeastern province. See Mark Anderson, *Killer app for cell phones: Lottery tickets*, SNS TECH TRENDS, MSN MONEY CENTRAL INVESTOR, Apr. 24, 2001. <http://moneycentral.msn.com/articles/invest/trends/6790.asp>.

<sup>75</sup> Professor Rose was the keynote speaker at the 1997 AELLE Congress, held in Portugal, and his presentation and paper on Internet gambling was translated into French, Spanish, Portuguese, and German.

International Association of State Lotteries) to “try and get some control on the Internet,” among other goals.<sup>76</sup>

## Gaming

### Casino-style Games

By casino-style gambling we mean every game which is found in a Nevada-style licensed gambling establishment. These include the table games, such as blackjack, craps and roulette, slot machines, video poker, and poker. All these games depend on the generation of random numbers within set parameters: possible results available from 52 cards, two dice, three reels, etc. Sports betting (a sportsbook) depends on odds and payoff calculations, measured against results transmitted real-time. Both, therefore, are particularly adaptable to the use of computer software and on-line communication—in other words, the Internet.<sup>77</sup>

### Banked vs. Non-banked

Games can be classified as “banked” or “non-banked.” In a “banked” or “banking,” game the players compete against the gaming establishment rather than against one another. That is, they play against the house, usually in the person of the dealer.<sup>78</sup> Casino games are also “percentage games,” where the house participates as a player but with a percentage advantage built in. Non-banked or “round” games are played among individual players with no house participation and no single participant has a continuous advantage. Blackjack, baccarat, and Caribbean Stud are examples of banked card games. Texas Hold ‘em and other forms of poker can never be a banked game, because players bet against each other, not against the house.

Casino gambling is one of the few businesses in the world where the operator makes its money by beating its own customers at games of chance. With lotteries and parimutuel betting, the operator acts as a disinterested stakeholder, taking a portion of the wagers and returning the remainder to the winners. With banking and percentage games, the house is a player and cares very much who wins and who loses. It is therefore understandable why game security, and paranoia, tends to be tighter for casino games. Certainly, on-line poker operators are concerned about cheating. Patrons will abandon and bad-mouth a site, if it looks like a few players have an unfair advantage, such as forming illegal partner-

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<sup>76</sup> Guy Simonis, “Head of the British Columbia Lottery Corporation, who has been spearheading the effort to merge the two associations,” in Patricia A. McQueen, *AILE, Intertoto form one group*, INT’L. GAMING & WAGERING BUSINESS 17, 19 (Aug. 1999).

<sup>77</sup> See Casino Gambling Glossary.

<sup>78</sup> (<http://www.casino-gambling-reports.com/GamblingStudy/ReportGlossary/>); See also NEV. REV. STAT. §463.01365 (2002).

ships through secret, telephone communications while the game is in play. But, if it looks like a player has figured out a way to beat a game like blackjack, or even gain a slight advantage, it is the house, the operator itself, which can be wiped out. Players who win consistently are sometimes forbidden to play, based on the realistic possibility that the player has broken the casino site's security system.

### **Poker**

It is now possible to play poker, live and on-line, against other players from anywhere in the world. Paradise Poker<sup>79</sup> currently advertises itself as the biggest of these, but there are a number of others. The play can be for amusement only, or for money via account betting.

In non-banked games, like poker, the operator is not a player. Losses go to other players; there is no house. On-line poker operators derive their revenue from renting "seats," charging per hand, or by taking a percentage of winnings, known as "raking the pot."

The biggest event in the world of Internet poker took place not on-line, but in a casino in downtown Las Vegas. As most poker players already know, on May 23, 2003, Chris MoneyMaker won the World Series of Poker (WSOP), and its \$2.5 million top prize, at Binion's Horseshoe Hotel & Casino. You could not write a script like this. Well, you could, but no one would believe it.

Start with the winner's name. It really is Chris MoneyMaker. To get the money to travel from his home in Tennessee, he sold a 20% stake to his father for \$2,000 and his friend, with the equally unbelievable name of David Gamble.

It costs \$10,000 to enter the WSOP. Some players pay cash. But MoneyMaker put up only \$40. Like dozens of others at the WSOP, he won his entry fee through poker games played entirely on-line. In fact, MoneyMaker never before played in a live poker tournament, where you can see the other players' faces.

This naturally raises the question of whether Chris was breaking the law. Professor Rose gets more e-mail asking whether it is legal to bet on-line than on any other subject.

Federal law is clear. The federal government's interest in gambling is pretty much limited to organized crime. Federal statutes are written with phrases like, "Whoever being engaged in the business of betting or wagering . . ." or "Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business . . ."

A regular player cannot get into trouble with the federal government even if the gambling operation is blatantly illegal, unless he does something to help

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<sup>79</sup> <<http://www.paradisepoker.com>>.

the business. Prosecutors have charged players with being part of the gambling business when they helped operators collect debts from other players. But the very few times the federal Department of Justice (DOJ) has gone after regular players, judges have thrown the cases out.

What about state laws? Here the question is more difficult, because many states long ago passed anti-gambling laws, which are still on the books. There was a time when state governments wanted to protect not only the health, safety, and welfare of their citizens, but their souls as well.

All states make it a crime to conduct some forms of unauthorized gambling. But about half the states also make it a crime to make a bet under some circumstances, even though nobody is ever charged any more.

There are obvious exceptions to the anti-gambling laws. It would not make sense for a state to run a state lottery and make it a misdemeanor to buy a ticket. Many states also make exceptions for social gambling. For example, the Oregon Legislature passed a statute expressly exempting players in social games, like poker, from the prohibition on gambling, as long as the players do not help set up the game and the only money they make is from winning. But a player at a commercial poker Web site is not so clearly protected.

The only way for a player to know for sure is to check the laws of his or her state. No state has passed a law expressly stating that players can or cannot play poker on-line. So, legal interpretation is required.

California, for example, makes it a crime to play 11 named games, including "21," and any "banking or percentage game."<sup>80</sup> Unfortunately, a California court ignored the universal definition of a percentage game as a game where the operator participates and has a percentage advantage. Instead, this court ruled, incorrectly, that an operator is running a percentage game if it takes a portion of bets or winnings, amounts bet or won, even if the operator does not play a hand. So, participating in a poker game where the house rakes the pot is a crime in California. The situation gets even more complicated, because the California Legislature, by statute, allows licensed card clubs to take up to three levels from a pot, four if the house takes nothing if the pot is too small.<sup>81</sup> For example, an operator can take nothing for a pot less than \$10, \$1 from a pot with more than \$10 and less than \$20, \$2 from a pot between \$20 and \$30, and \$3 from a pot over \$30. This is defined as not being a percentage game.

The California Penal Code also makes it a misdemeanor to make sports bets.<sup>82</sup> But other wagers are not forbidden. It is not a crime to buy a lottery ticket, even in an illegal numbers game.

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<sup>80</sup> CAL. PENAL CODE §330 (2004).

<sup>81</sup> See CAL. PENAL CODE §337j (2004).

<sup>82</sup> See CAL. PENAL CODE §337a (2004).

So, at least in California, it seems it is not a crime to play poker on-line for money, if the game is not a percentage game. But, if the operator is raking the pot more than four times, the game is a percentage game, and state law makes it a crime to even make a bet at a percentage game.

Of course, in the real world, prosecutors almost never go after bettors, only operators.

It is important to note that this does not mean it is necessarily legal to run such a game and take bets from California. Penal Code section 337j states that it is illegal “[t]o deal, operate, carry on, conduct, maintain, or expose for play in this state any controlled game,” which specifically includes poker. Of course, this opens the question of whether an Internet operator is dealing a game in California if the operator and maybe other players are not in that state. It is also possible that running a tournament using poker hands is not even a form of gambling, but rather a contest of skill, specifically permitted by California state law. Every situation has to be analyzed independently.

### **Software Versions**

Most on-line gambling sites offer patrons a computerized version of casino gambling, where a software program takes the place of the dealer or the machine. A random number generator and an animation sequence are combined to furnish a simulation of the dice roll, card draw, or slot pull, and the process appears as an animated simulation on the player’s PC monitor. A great deal of effort is put into reproducing the “look and feel” of a crap table, roulette wheel, or video poker machine. Interested parties, take heed: This is definitely the land of *caveat emptor*. There is considerable variation in the software offered by the various sites, in clarity, playability, and honesty.

### **CD and Download**

Depending on the type of software, a player may be required to first download a simulator program into his PC’s hard drive. Some companies mail a CD-Rom directly to players on the establishment of a betting account, but the delay is a definite drawback for marketing purposes, and opens the possibility that the company may be held liable for dealing in gambling devices. Others send the CD-Rom to players who show the slightest interest, or even unsolicited, including as insertions in magazines. Downloading used to take hours and often failed to work, but for complex graphics, downloading has become the delivery method of choice, as long as the patron has a cable, DSL, or faster modem.

### **Direct Play On-line**

The more modern and powerful sites, designed for the increased availability of global broadband, do not require either download or CD, but allow the player to participate directly on-line once the account is established.

**Live Streaming Video.** An interesting variation of the above is the use of a live dealer at the other end of the video link for such games as blackjack.<sup>83</sup> The result is monitored by computer as well as camera, so that the result can be applied to the player's account when the gambling event is resolved. This technology holds particular promise when considered in conjunction with the "private game exception" which is on the books of several American states. Live streaming video of horse races is also offered at a number of sites, licensed and unlicensed.

## Wagering

Technically a wager is staking money on the outcome of a given event.

## Sports

**Horse Racing in the U.S.: The Beginning of Account Betting.** The legalization of lotteries and other forms of gambling in the U.S. meant the end of the near-monopoly that horse racing had enjoyed over the gambling public since the Depression. Off Track Betting (OTB) allows bettors to place parimutuel wagers<sup>84</sup> without being physically present at the track. The odds, races, and race results are simulcast via a closed circuit TV link from the race track itself to other sites, where they are displayed on monitors. Bets are taken on machines which are usually connected to the same pari-mutuel data base as the host track. This system was initiated under state auspices, and was the first interactive on-line gambling mechanism in the U.S., albeit on a private line. New York City was the first to activate it in 1970 "to raise needed revenue for the city and state, to combat organized crime's hold on gambling by providing a legal alternative and to help New York State's racing industry."<sup>85</sup> Soon the signal was not only sent to off-the-grounds betting parlors, but shared between tracks intrastate and then interstate,<sup>86</sup> effectively doubling or even tripling the races available to bet on, and the pool of bettors betting. OTB betting is now a standard feature of race betting throughout the United States,<sup>87</sup> and the system has been expanded to include even greyhound racing.

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<sup>83</sup> A good example of this type of software is on view at (<http://www.casinoreality.com>).

<sup>84</sup> See Glossary (<http://www.casino-gambling-reports.com/GamblingStudy/ReportGlossary>). The horse racing industry draws a distinction between OTBs and what it calls inter-track wagering, where the patron goes to one track to bet on a race taking place at another track. In both cases, bettors are not physically present where the race is conducted, and follow the progress of the race on a video screen.

<sup>85</sup> New York City OTB Web page, (<http://www.nycotb.com>).

<sup>86</sup> Cf., e.g., Nebraska Laws 2-1247, "Interstate Compact on Licensure of Participants in Horse Racing with Pari-Mutuel Wagering" (2002).

<sup>87</sup> "No matter how modest a racetrack's racing, it can claim national distribution in handle. Every track simulcasts." Jim Mango, senior vice president of the Maryland Jockey Club, quoted in *Harness Tracks of America*, TRACK TOPICS, Week of April 30–May 6, 2001. (<http://www.harnesstracks.com/tracktopics.htm>).

There was soon a demand to allow telephone account wagering, whereby patrons set up accounts and ID procedures with a track or off-track betting parlor and then make bets by phone. In 1990, the New York state legislature amended the state's Racing, Pari-Mutuel Wagering and Breeding Laws to allow telephone betting by both residents and non-residents. The law not only authorized account betting, but even spelled out the minimum advance deposits required: \$450 for residents of New York or contiguous states and \$100 for residents of other states.<sup>88</sup> States such as Nebraska<sup>89</sup> and Kentucky<sup>90</sup> then passed laws explicitly allowing phone wagers to the states' licensed OTB operators. Except for New York's, none of these statutes specifically allowed taking bets from outside the jurisdiction, but none forbade it, either.<sup>91</sup> Nevada followed New York's lead, expressly allowing pari-mutuel wagers made by wire communications from patrons within the state of Nevada, from other states in which such wagering is legal or from places outside the U.S. in which such wagering is legal.<sup>92</sup>

While the various OTB corporations can be said to have "taken the bit in their teeth," their reasoning was not completely unsound. While it is true that the Wire Wager Act (18 U.S.C. §1084) specifically forbids taking bets by telecommunication facilities unless it is legal to take the bet both at the place the bet originates and at the place it is taken, it is also clear that the targets of that law are illegal bookies. It is simply not known what precautions, if any, the assorted states take to prevent the acceptance of a cross-border bet. The unofficial American consensus seems to be that, just as with multi-jurisdictional lotteries, there is only a gambling problem when the states say there is. So the law will likely not be enforced against licensed state authorities. The protests and even threats of non-OTB states have so far had little impact.<sup>93</sup>

The federal government agreed. Since it was still unclear whether the Wire Wager Act prohibited a licensed OTB from accepting wagers from out-of-state, Congress amended the Interstate Horseracing Act<sup>94</sup> in December 2000. The definition of "interstate off-track wager" was expanded to include wagers placed by "electronic media," meaning by computer on the Internet or by a closed

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<sup>88</sup> See N.Y. RAC. PARI-MUT. WAG. & BREED. LAW §1012 (2002).

<sup>89</sup> See NEB. STAT. §2-1239 (2002).

<sup>90</sup> See KY. Rev. Stat. Ch 230 Section 378 (2002).

<sup>91</sup> Connecticut's story was typical. In 1993, the state's OTB system was sold to Autotote®, a private operator. The Legislature never approved phone bets per se, but in sections 12-574-F59 and F60 of the Regulations of Connecticut State Agencies the Division of Special Revenue explicitly allowed them, at least from within the state, and out of state residents were not on the list of prohibited betters per Section 12-574-F59 (k).

<sup>92</sup> See NEV. REV. STAT. §§464.020 (2003).

<sup>93</sup> Michigan, for instance, has a Horse Racing Act which prohibits off-track wagering in any form. (MICH. COMP. LAWS §431.317 (2004). Michigan's Attorney General and Racing Commissioner made their displeasure known to online OTB operators licensed by other states, such as Ladbrokes, YouBet!, and XpressBet. *Michigan Attorney General Issues Warning to Online Horse Racing Companies*, 7(15) THE MICHIGAN GAMING LAW NEWSLETTER. The effect was not great. Youbet!, for instance, still lists Michigan tracks as "partner tracks" as of this writing. (<http://www.youbet.com>).

<sup>94</sup> 15 U.S.C. §§3001 *et seq.* (2004).

loop.<sup>95</sup> While technically there are limits to this definition—the wager must be lawful in each state involved<sup>96</sup>—in practice the restriction is easy to get around. In 2001, California joined more than two dozen states taking interstate bets on horse races by phone and computer. AB 471 constructively transfers any bet on California races made by phone or Internet from anywhere, and places it within the “licensed enclosure” required by law.<sup>97</sup> Once the location requirement is met, the Horseracing Act allows almost any form of wager. Bets need not be pari-mutuel (though this is usual), and any combination of pari-mutuel wagering pools is permitted.<sup>98</sup>

### International

By its own terms the Wire Wager Act is limited to states and territories of the U.S.<sup>99</sup> For some other nations, the cross-border problem scarcely exists. Canada expressly allows licensed betting on races in other countries.<sup>100</sup> Australia and New Zealand also have pari-mutuel systems, and on-line wagering sites with worldwide connections, but limited participation on-line.<sup>101</sup> British sites (including Gibraltar) and sites from the Caribbean will take bets from anywhere.<sup>102</sup> Caribbean, British, and European horse betting is not pari-mutuel, only straight-bet, spread, and exotic betting.<sup>103</sup> Depending on the site, it is possible to bet either against bookmakers or other players.

### Team Sports

The question of which states allow sports betting is of more than passing importance. Federal law, “The Professional and Amateur Sports Protection Act,”<sup>104</sup> prohibits any state or Indian tribe from offering sports betting. However, the

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<sup>95</sup> The operative section now reads:

“interstate off-track wager” means a legal wager placed or accepted in one State with respect to the outcome of a horserace taking place in another State and includes pari-mutuel wagers, where lawful in each State involved, placed or transmitted by an individual in one State via telephone or other electronic media and accepted by an off-track betting system in the same or another State, as well as the combination of any pari-mutuel wagering pools 15 U.S.C. §§3002(3).

<sup>96</sup> See 15 U.S.C. §§3002 (2004).

<sup>97</sup> See CAL. BUS. & PROF. CODE §19590 (2004).

<sup>98</sup> See CAL. BUS. & PROF. CODE §19590 (2004).

<sup>99</sup> In a conversation he had years ago with one of the architects of the Wire Wager Act, Professor Rose recalls asking why races and OTBs in foreign countries were excluded from coverage. The legislator replied that it was an accident, “they simply never thought about it.”

<sup>100</sup> See Criminal Code C.R.C. Part VII, §204.8.1. (2001).

<sup>101</sup> See (<https://www.ebetonline.co.nz>). Since these services are government licensed, no accounts can be set up at this time for U.S. residents.

<sup>102</sup> See, e.g., (<http://www.betfair.com>); (<http://www.bodog.net>).

<sup>103</sup> See Glossary (<http://www.casino-gambling-reports.com/GamblingStudy/ReportGlossary/>).

<sup>104</sup> Enacted October 28, 1992, codified at 28 U.S.C. §§3701-3704 (2004).

Act grandfathered in all existing forms of sports wagering, defined as any type of gambling on sports events authorized by a state “at any time during the period beginning January 1, 1976, and ending August 31, 1990.” (It also gave New Jersey one year to legalize sports betting, but that state’s legislature did not pass enabling legislation). So, the question becomes which states had legal sports betting between 1976 and August 31, 1990.

Betting on college and professional sports was legal in at least the following states:

Delaware. The State Lottery can run games based on sporting events.<sup>105</sup> The lottery did take bets on professional sports events. In 1974 professional sports leagues sued to stop these games, and lost.<sup>106</sup> The lottery’s game was so poorly designed that it failed, but the state still has the right under federal law to open again whenever it wishes.

Montana. Allows “Calcutta Pools,” a form of auction pool in which bettors bid against each other to “buy” the team they think will win. Calcutta pools are allowed on all sports, other than elementary school and high school sports events and horse races.<sup>107</sup> The Montana State Lottery can run sports pools.<sup>108</sup> Licensed operators may conduct sports tab games, “on premises appropriately licensed to sell alcoholic beverages for consumption on the premises. . . .”<sup>109</sup> Licensed operators may also conduct sports pools.<sup>110</sup>

New Mexico. The state allows pari-mutuel betting on bicycle racing. This became a point of contention during the Congressional debate on the Act.<sup>111</sup>

North Dakota. Calcuttas allowed “for professional or amateur sporting events held in this state, but not for elementary, secondary, or postsecondary education sports events.”<sup>112</sup> And nonprofit organizations may run sports pools on professional sports events.<sup>113</sup>

Oregon. The State Lottery can run games based on sporting events.<sup>114</sup> It is currently taking bets in a form similar to parlays on National Football League games. It took bets for a short while on National Basketball Association games, but the lottery could not attract enough players and had to fold, since the size of the prize was determined by the amount of money bet.

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<sup>105</sup> See DEL. CODE, tit. 29, §4805(b)(4).

<sup>106</sup> National Football League v. Governor of State of Delaware, 435 Supp. 1372 (Del. 1977).

<sup>107</sup> See MONT. CODE ANN. §§23-5-221, 23-5-222, 23-5-501.

<sup>108</sup> See MONT. CODE ANN. §§23-5-221, 23-5-501.

<sup>109</sup> MONT. CODE ANN. §§23-5-502, 23-5-512, 23-5-513.

<sup>110</sup> See *id.* See also §23-5-503.

<sup>111</sup> See CONG. REC. S18,332-01 (Oct. 29, 1992).

<sup>112</sup> N.D. CENT. CODE §53-06.1-07.3.

<sup>113</sup> See *id.* at §§53-06.1-03(1)(a), 53-06.1-09.

<sup>114</sup> See OR. REV. STAT. §461.213.

Washington. The state allows anyone to conduct low-limit sports pools without a license.<sup>115</sup>

Wyoming. Qualified organizations may conduct calcuttas on amateur sports events, professional golf tournaments, and other limited events.<sup>116</sup>

Betting on horse races may enjoy wide latitude in the U.S., but this is hardly the case with other spectator sports. Federal law specifically prohibits any United States jurisdiction from legalizing betting on team sports, professional or amateur (28 U.S.C. §§3701 ff). Nevada, however, escaped this provision via a grandfather clause. This kind of wagering is also against state law in most of the U.S.,<sup>117</sup> but the sheer popularity of team sports and side bets means these statutes are observed mainly in the breach. Where licensed establishments are not allowed to tread, informal mechanisms serve the demand: there is hardly an office in this country, business, or government, without its weekly bets for football, basketball, and other events. Just how much money this market handles is anyone's guess: even low estimates are in the tens of billions. It is plain, however, that busting every office pool would require a police force of millions with a budget to match. Inasmuch as the act of gambling, where it is prohibited at all, is usually a mere misdemeanor, most law enforcement professionals see enforcement at this level as simply not worth the effort.

Predictably, then, betting on American team sports, pro and college, is the mainstay of offshore on-line gambling, which offers bigger payouts than the office pool.<sup>118</sup> The peak time is midwinter, when both football and basketball are in season. The Super Bowl is the single busiest day of the year for on-line bets.<sup>119</sup> Betting stays relatively strong until the end of basketball season. After the running of the Preakness, however, business rapidly declines to a drought as only day-to-day baseball and horse racing are open. Summer betting has seen some encouragement and new blood from betting on professional auto racing such as NASCAR, and there is growing interest in World Cup Soccer, but at present it remains the slow season.<sup>120</sup>

### Non-sports Event Wagers

There is an old saying to express that people are deep-dyed gamblers: they "would bet on the thermometer." This is non-sports event wagering, sometimes

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<sup>115</sup> See WASH. REV. CODE §9.46.0335.

<sup>116</sup> See WY. STAT. ANN. §§6-7-101(a)(i), 6-7-101(a)(iii)(F). See also CONG. REC. S17,434-01 (Oct. 7, 1992).

<sup>117</sup> See e.g., CAL. PENAL CODE §337a (2002).

<sup>118</sup> Special thanks to Mr. Rob Gillespie and BoDog Sports Book of Costa Rica for a lively and informative look at the process of setting sports odds.

<sup>119</sup> Informed professional estimate courtesy of Mr. Frank Rosenthal, 4 Seasons Sports, Boca Raton, FL.

<sup>120</sup> For this overview of the gambling year we are indebted to Bettorsworld (<http://www.bettorsworld.com>).

called “propositions.” Well known betting firms such as Chandler, William Hill, and Ladbroke’s in the U.K. receive a steady stream of bets on such things as elections, show-business awards, due dates of pregnant celebrities, and anything else that takes a bettor’s fancy.<sup>121</sup> There were even, before April 2003, on-line betting pools on the chances of Saddam Hussein’s regime surviving the imminent war between the USA and Iraq.<sup>122</sup> Some U.S. states still allow such colorful bets for charitable purposes, notably Alaska.<sup>123</sup> The Nevada regulators now prohibit that state’s sports and racebooks from booking proposition wagers like the Oscars, where insiders could have advance knowledge or even manipulate the outcome. Similar fears, plus the worry that betting on who will lead the nation was somehow unseemly, led many more states to specifically outlaw wagers on elections.<sup>124</sup>

### New Developments

**Fantasy Leagues.** The Fantasy League is just that: an on-line virtual version of the actual pro sports world. Fantasy League players are the owners of virtual teams, assembled via a virtual draft and trades of players (statistical simulations of actual pro athletes). The owners then compete against one another on-line by managing their respective clubs on-line. The performance statistics that a real world player generates in real games, however, reflect immediately on the fantasy simulations of him (or her) that are part of a given fantasy team. Real life performance—home runs, touchdowns, and goals—mean extra fantasy points for the respective virtual teams. In fantasy football, for example, these points determine a winner in a weekly (virtual) head-to-head match-up of two of the fantasy teams. The team that accumulates the most victories over the course of the season and prevails in the postseason is declared the League Winner.<sup>125</sup> There are fantasy leagues for every popular team sport, and spectator events such as pro golf and auto racing. A number of sites allow betting on the outcomes, or offer substantial prizes to competing managers.<sup>126</sup> There are even virtual reality horse racing sites: The track, jockeys, horses and the race itself are all computer simulations, but the betting is real.<sup>127</sup> Despite pronouncements by

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<sup>121</sup> See, e.g., First Official Oscar Odds Announced by BetWWTs.com (February 11, 2003, 10:59 am ET) at [http://biz.yahoo.com/prnews/030211/mxto003\\_d1.html](http://biz.yahoo.com/prnews/030211/mxto003_d1.html)).

<sup>122</sup> See *Gambling Online over Saddam’s Fate*, THE STRAITS TIMES [Malaysia], Jan. 26, 2003 (<http://www.thestar.com.my/news/story.asp?file=/2003/1/26/asia/sinline&sec=asia>).

<sup>123</sup> Alaska gambling law allows charitable pools on such bets as lowest winter temperature and first iceberg to break in the spring thaw, in addition to dogsled and snowmobile races. ALASKA STAT. §05.15.100 ff (2002).

<sup>124</sup> In Illinois, for example it is specifically forbidden to bet on the “result of any . . . political nomination, appointment or election.” 720 ILL. COMP. STAT. §5/28-1(a)(2) (2002).

<sup>125</sup> See, e.g., *ESPN Fantasy Football* (<http://games.espn.go.com/content/ffl/2002/rules?page=intro>).

<sup>126</sup> Fox TV’s Fantasy Baseball challenge, for instance, offers a \$10,000 grand prize and \$25,000 total of other prizes weekly throughout the baseball season. ([http://www.optilc.com/linkc/sat\\_b/go.php3?169/](http://www.optilc.com/linkc/sat_b/go.php3?169/)).

<sup>127</sup> See e.g., (<http://www.raceclubs.com>).

several State Attorneys-General that fantasy leagues are illegal, such media giants as ESPN and CBS feature them, and it seems unlikely at this time that there will be more than a handful of scattered prosecutions by state law enforcement officials.

There is little if any chance of genuine corruption in these virtual scenarios, and that is probably the reason that fantasy leagues have received sympathetic treatment in several quarters. In Montana, for example fantasy sports leagues are specifically authorized.<sup>128</sup> Entry fees may be collected, and cash and prizes may be awarded to the owners of the winning teams,<sup>129</sup> but any operation serving as the clearinghouse for such a fantasy league is limited to 15% deduction for expenses.<sup>130</sup>

Notwithstanding some state hostility, fantasy leagues are also candidates for federal protection. When Arizona's Senator Kyl sought to outlaw Internet gambling with S. 692 in the 106<sup>th</sup> Congress, a specific exemption was made for fantasy leagues.<sup>131</sup> Of course, betting on actual games through this mechanism is forbidden.<sup>132</sup> But since fantasy leagues are making ever-increasing use of the Internet, and because 15% hold on the take is comparable to those in the gaming industry, this sector may open up new opportunities as the idea expands.

**The Home TV Console and Cable.** The possibilities of home TV as a gambling center have long been discussed, and are especially apparent now that cable companies offer Internet access service. Familiar arcade-style TV console gaming systems such as Sega and Nintendo are now going interactive via cable. Players log in either via cable connection to television or via PC, and performance-only (nonmonetary) records are kept for them.<sup>133</sup> Nevertheless, interest has grown in the possibility of gambling using this same console system. As of this writing, a cable TV subscription company serving the Netherlands and Austria is planning to spice up its offerings with Zone4Play, a custom real-time casino featuring blackjack, slots, and video poker. Play will be for fun and high scores only, and subscribers join via a toll-free line.<sup>134</sup>

**Trivia and "Skill Games."** Other Web sites have opened, offering so-called skill games and tournaments. These games, software simulations via the Web site, are a mix of traditional gambling fare such as blackjack, and nontraditional

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<sup>128</sup> See MONT. CODE ANN. §23-5-802.

<sup>129</sup> See, e.g., Passrush Fantasy Football League (<http://www.passrush.com>).

<sup>130</sup> See MONT. CODE ANN. §23-5-805.

<sup>131</sup> S. 692 (106th Cong., 1999), referred to House subcommittee Mar. 23, 1999, not passed.

<sup>132</sup> See MONT. CODE ANN. §23-5-806.

<sup>133</sup> See, e.g., (<http://www.sega.com/games/online/home>).

<sup>134</sup> See *Interactive Casino Ready for Digital TV*, ONLINECASINONEWS, February 1, 2003 (<http://www.covers.com/includes/articles.asp?theArt=4336>).

games based on such favorites as Tetris, Scrabble, and crossword puzzles. Play is in tournament form against other on-line players. Like on-line poker, nevertheless, accounts can be set up and money won and lost.<sup>135</sup>

As discussed earlier, in *What Is Gambling?: Elements of a Gambling Transaction—Chance*, what constitutes a game of skill as opposed to a game of chance (gambling) varies from state to state. Large operators are getting legal opinions before they accept paying participants from any jurisdiction.

### Gambling in All but Name

**Commercial Transactions Involving Elements of Chance.** The legal line between activity designated as gambling and actions considered non-gambling activity is not only often an arbitrary one, but subject to change at short notice. It has often been noted that many kinds of investment closely resemble gambling, particularly for the impulsive and unwary.<sup>136</sup> A number of states, as well as the federal government, have found it expedient to specifically protect and distinguish by law, transactions which otherwise fit the description of gambling, such as certified stock and real estate transactions, or insurance sales.<sup>137</sup> The three things which are legally held to be essential elements describing gambling—*price* paid for a *chance* at a worthwhile gain—also comprise the business model for much of the financial industry worldwide. Objectively speaking, “price” can be the stock purchase or investment, “chance” the business outcome

<sup>135</sup> See, e.g., <http://www.worldwinner.com> and <http://www.mygamblingdirectory.com>.

<sup>136</sup> See, e.g., Edward Looney, *Stock Market Gambling* (<http://www.800gambler.org/stmgamb.htm>) (Council on Compulsive Gambling of New Jersey, Inc. (2001)). For a lighter but still valid commentary see Mark Cooper, *A More Honest Gamble*, LA WEEKLY, Aug. 6, 2002 (<http://www.alternet.org/story.html?StoryID=13773>).

<sup>137</sup> Even today, lawmakers feel constrained to specifically spell out these exemptions. HR 21, introduced to the 108<sup>th</sup> Congress at this writing contains the following:

Section 3 (b)(1) BETS OR WAGERS—The term “bets or wagers”— . . . (E) does not include—

- (i) any activity governed by the securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934) for the purchase or sale of securities (as that term is defined in section 3(a)(10) of such Act);
- (ii) any transaction conducted on or subject to the rules of a registered entity or exempt board of trade pursuant to the Commodity Exchange Act;
- (iii) any over-the-counter derivative instrument;
- (iv) any other transaction that—
  - (I) is excluded or exempt from regulation under the Commodity Exchange Act; or
  - (II) is exempt from State gaming or bucket shop laws under section 12(e) of the Commodity Exchange Act or section 28(a) of the Securities Exchange Act of 1934;
- (v) any contract of indemnity or guarantee;
- (vi) any contract for insurance;
- (vii) any deposit or other transaction with a depository institution (as defined in section 3(c) of the Federal Deposit Insurance Act)” . . .

See also 720 ILL. COMP. STAT. 2/28(1)(a)(4); COLO. REV. STAT. §18-10-102 (2002).

and market prices which the investor does not control, and “gain,” the dividend or profit which the investor hopes to receive. In fact, an investor who seeks too much of a reduction in the element of chance affecting his investments may well run afoul of the antitrust<sup>138</sup> and insider trading laws<sup>139</sup> in so doing!

**Speculative Investments.** Individual investors with internet access can become day traders, buying and selling securities such as stocks, bonds, and futures in the big markets, directly on-line for their own account. Before the advent of the Internet this was not possible. The risks, behaviors, and fates of many on-line day traders are eerily similar to, if not indistinguishable from, those of on-line gamblers.<sup>140</sup> The comparison can in fact be made point for point.<sup>141</sup> The very terminology is often interchangeable, in such phrases as “high risk–high reward games.”<sup>142</sup> Traders who “ride the losses” and reinvest are the counterparts of gamblers who “double down”,<sup>143</sup> using the news to evaluate underlying market conditions is called “handicapping” when a gambler does it.<sup>144</sup> Likewise, both gamblers on-line and investors on-line are notorious for relying on software, programmed systems and even “black boxes” of doubtful value to make winning picks for them.<sup>145</sup> The two groups even ignore the same wise warnings: Never play with money you cannot afford to lose, never borrow your stake, and always set a limit for losses and stick to it.<sup>146</sup>

**Financial Wagering.** Apart from actually buying and selling stocks, gamblers can also bet on the movement of securities on the market: individual stocks, Dow Jones or NASDAQ indexes, commodities and futures.<sup>147</sup> Unlike the highly speculative world of traditional commodities trading, where, for example, farmers and bakeries shift the risk of changes in the future price of wheat to gam-

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<sup>138</sup> Cf. AREEDA & HOVENKAMP, ANTITRUST LAW, §1807(d)(7): “Analyzing a close exclusive dealing is an expensive and rather speculative enterprise.” The observation is well borne out in considering the analysis behind such cases as *Jefferson Parish Hosp. Dist. No. 2 v. Hyde* 466 U.S. 2, 104 S.Ct. 1551 (1984).

<sup>139</sup> Even experts versed in case and statute have trouble determining when receiving information on one’s own stocks makes one part of an “inside tip”, or who might then be in the zone of liability for “misappropriation” under Rule 10 (b)5. See WANG & STEINBERG, INSIDER TRADING §§5.3.5, 5.4.6, 15.6.3 (1996).

<sup>140</sup> To take a near example, even noted authorities disagree on whether on-line stock trading should be considered gambling, government classification notwithstanding. See NIGEL TURNER, *Internet Gambling: First Person Account in EGAMBLING-ELECTRONIC JOURNAL OF GAMBLING ISSUES* (Feb. 2002) ([http://www.camh.net/egambling/issues6/first\\_person/index.html](http://www.camh.net/egambling/issues6/first_person/index.html)).

<sup>141</sup> See J. BERNSTEIN, STRATEGIES FOR THE ELECTRONIC FUTURES TRADER (2001).

<sup>142</sup> See *id.* at 23.

<sup>143</sup> See *id.* at 17.

<sup>144</sup> See *id.* at 82.

<sup>145</sup> See *id.* at 51, 53.

<sup>146</sup> See *id.* at 27.

<sup>147</sup> This being a somewhat esoteric market, <http://www.betatwallstreet> has been acquired by <http://globalsports-network.com>. See (<http://www.gobet.net/corp-services.html>).

blers, stock index futures do not even have actual bushels of stocks which have to be delivered at a future date.

**Events Futures.** Even more of a hybrid is the “events–futures market.” These are supposedly set apart from mere event wagering by their social usefulness (i.e., proposition betting wearing a coat and tie). Notwithstanding assorted state laws against betting on elections and similar events, the University of Iowa’s Henry B. Tippie College of Business faculty created the Iowa Electronic Market (IEM) in 1988.<sup>148</sup> Although designed to be an educational and research project the IEM allows players to bet real money on unpredictable, future events, in the hopes of winning bigger money—the classic definition of gambling. Instead of betting on the future prices of commodities, like pork bellies, or bundles of stock, traders buy and sell events, like the U.S. Presidential election.<sup>149</sup> The final prices in the IEM have proven to be amazingly accurate predictors. The federal Commodity Futures Trading Commission (CFTC) issued a “no-action” letter to the IEM, stating that as long as the IEM conforms to certain guidelines, the CFTC will take no action against it.

Perhaps this was the inspiration for the highly controversial Policy Analysis Market, recently proposed and even more recently abandoned by the Pentagon’s Defense Advanced Research Projects Agency (DARPA, the same outfit that pioneered the Internet itself). Using IEM’s theory that investment is a reliable indicator of trends and future actions, this experimental market went much farther out on the limb, seeking to open, in effect, a futures market in predicting terrorist activity and other future events in the Middle East and elsewhere. An opponent, Senator Ron Wyden (D.-Or.), put it this way:

You may think early on that Prime Minister X is going to be assassinated. So you buy the futures contracts for 5 cents each. As more people begin to think the person’s going to be assassinated, the cost of the contract could go up, to 50 cents.

<sup>148</sup> Iowa Electronic Markets: (<http://www.biz.uiowa.edu/iem/>) (2003).

<sup>149</sup> One player (researcher?) legally won \$1,300 by “betting” on Al Gore to win the Presidential election. Here’s his story:

“So I’m a Yellow Dog Democrat and I’m pretty sure Gore is going to capture the popular vote. On November 1, 2000 I bought about 1900 futures on Gore at 34 cents which cost a little over \$600. On the 10<sup>th</sup> of November when the popular count was certified, these contracts were worth a buck apiece. I had earlier found the Market in 1996 when the Republican Convention came here to San Diego. I made some phenomenal money “betting” Buchanan on an uptick after the Arizona Primary, and a good bunch more selling “derivatives” of this market (i.e., campaign buttons with a little stamp on them indicating they could be redeemed for a multiple of their purchase price if the candidate won the nomination) backed by an equal number of contracts on the Market.

“I’m a little surprised the Nevada books haven’t offered action like this. It seems that when people put their money where their mouth is politically, and actually win something tangible when their candidate comes through, it’s a good thing. Here’s the actual results from the trade I mentioned:

Date	Contract	Units	\$Volume	LowPrice	HighPrice	AvgPrice”
11/01/00	Dem	1,901	646.093	0.311	0.378	0.340

The payoff if he's assassinated is \$1 per future. So if it comes to pass, and those who bought at 5 cents make 95 cents. Those who bought at 50 cents make 50 cents.<sup>150</sup>

The concept may or may not have potential value as a predictor of events or intelligence tool. Markets do respond to imminent threats and the growing or shrinking probability of a given event; on the other hand, it is quite possible to deceive markets by planting false tales or withholding true ones: Disinformation is a weapon of war in use since ancient times. Regardless, the public reaction was decidedly negative. The interesting aspect, for our purposes, is that characterizing the project as "gambling" seemed to seal its damnation. "Spending taxpayer dollars to create terrorism *betting parlors* is as wasteful as it is repugnant. Can you imagine [our reaction] if another country set up a *betting parlor* so that people could . . . *bet* on the assassination of an American political figure?"<sup>151</sup> Almost instantly upon its being known, the plan was disavowed.<sup>152</sup>

But hope of thus preventing such wagers was vain. In addition to the proposition betting mentioned above, Tradesports.com already has a futures markets on terrorist-related events ("Will Osama bin Laden be dead by Christmas?," etc.). The difference between the proposed DARPA market and Tradesports.com, is that the U.S. would have been willing to take on any wager, losing money in the process. Without that guarantee, a market can become completely illiquid. There are bets that no one will make, and odds that no one will give.

**Multi-Level, Chain, and Pyramid Marketing: Opportunity or Gamble?** So-called network or multi-level marketing (MLM) has been a feature of the commercial landscape since about 1950. Allegedly an arrangement of independent sales representatives, it differs from the standard independent sales organization in that "override" or "downline" commissions are awarded the initial organizers on the sales of products or services by the representatives which he recruits, and on the sales made by the sub-representatives which the first group of representatives have recruited in turn.<sup>153</sup> Where this right to receive rewards based on recruitment is completely unrelated to sales of products or services, a company is in danger of violating Federal Trade Commission guidelines for the prevention of pyramid schemes.<sup>154</sup> These representatives and their successive generations of recruits advertise and/or sell both products and services and the MLM scheme itself on-line. Goods and services offered range from

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<sup>150</sup> Carl Hulse, *Pentagon Prepares A Futures Market On Terror Attacks*. NEW YORK TIMES, July 29, 2003, at A1, A15.

<sup>151</sup> Josh Mener, *Trading on the Future of Terror*, LOS ANGELES TIMES, July 29, 2003, at A1, A19.

<sup>152</sup> See Peter G. Gosselin, *Plan for Terrorism Futures Market Killed*, LOS ANGELES TIMES, July 30, 2003, at A11.

<sup>153</sup> A more detailed and extremely positive picture of network marketing is offered by noted sales trainer Zig Ziglar in *Network Marketing for Dummies* (IDG Books 2001).

<sup>154</sup> See, e.g., *Webster v. Omnitrition Int'l. Inc.*, 79 F.3d 776 (9<sup>th</sup> Cir. 1996).

gold, general legal services, and offshore trusts in Belize to prepaid phone cards, cigarettes and online pornography.<sup>155</sup> MLM is the subject of recurring controversies and legal actions regarding its fairness and ethics. Not all MLM plans are gambling or illegal, but for many, the underlying assumptions are uncomfortably similar to the classic Ponzi or pyramid scheme. The Ponzi scheme is a swindle wherein initial investors in a highly-hyped but poorly understood “investment opportunity” are paid very attractive returns, but there is no underlying business to generate profits or dividends. Instead, older investors are paid with contributions made by later “investors.” Since such an arrangement requires successive geometric increases in investments to continue, every scheme of this type eventually exhausts the available supply of suckers and implodes, ruining the latecomers. In the same way, the MLM’s promises of successive layers of prosperity are founded on the assumption of an infinite market for selling the goods or services which are allegedly the primary business. The chain or pyramid structure often means new entrepreneurs, faced with a market already saturated by previous entrants, are in many cases unable to recover their initial outlay, let alone thrive.<sup>156</sup> Therefore, MLM participation may be said to have a gambling element built in. The initial investment (consideration) is in effect a bet that there is still room to expand. Because the late entrant generally does not know whether or not this is so, it can be said that chance determines the outcome, or at least factors beyond the entrants’ control (chance). And of course participants are attracted to the programs by the promise of quick, easy, and substantial profits (prize). In the eyes of a number of states, where this lure of quick reward outweighs the commercial aspects of the program, this is a species of lottery and is explicitly forbidden.<sup>157</sup> Because it fits the technical description of gambling, MLM marketing as a general proposition has been officially declared as such in several states.<sup>158</sup> Nevertheless, it continues to use the Internet as a recruiting ground, as a look at almost anyone’s email will show.

**Lawsuits as a Form of Gambling.** The offenses of champerty and maintenance arise when a third party with no legitimate interest in a lawsuit, in return for a percentage of the judgment amount, supports one party to it (usually with money) or in other ways steps in to advance the lawsuit.<sup>159</sup> This too has been condemned as a form of gambling, though the condemnation seems more strongly rooted in a public policy against encouraging litigation rather than any

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<sup>155</sup> See, e.g., (<http://www.prepaidlegal.com>), (<http://www.pornpreneur.com>), (<http://www.mlmlegal.com>). This last site contains excellent summaries of state and federal laws and decisions regarding MLM activity.

<sup>156</sup> See (<http://www.falseprofits.com>) for an informed critique of the MLM business model and the industry generally.

<sup>157</sup> See, e.g., CAL. PENAL CODE §327 (2002). See also Stipulated Final Judgement, FTC Futurenet (C.D.CA 1998) at (<http://www.ftc.gov/os/1998/9804/futurenet.pdf>).

<sup>158</sup> See, e.g., FLA. STAT. ANN. §849.091 (2002).

<sup>159</sup> See BLACK’S LAW DICTIONARY (6<sup>th</sup> ed. 1991).

actual gamble as to the verdicts in the cases involved.<sup>160</sup> The aim of outlawing this practice is to prevent mere speculators from maintaining stables of promising actions, or trading in lawsuits as a commodity.

**Future Development.** As gambling has expanded and become more acceptable, its forms have evolved from the old standard games. It is clear that new variations on the themes of consideration, chance and prize will continue to be deployed in the global market, as marketing aids for goods and services, or as services in and of themselves. And as before, their legal status will not be determined by automatic formulae, but by an every shifting combination of law, public sentiment, morality, and profit.

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<sup>160</sup> See *Wilson v. Harris*, 688 So. 2d 265 (Ala.Civ.App 1996) citing *Sampliner v. Motion Picture Patents Co.*, 255 F. 242 (2d Cir. 1918) rev'd. on other grounds, 254 U.S. 255, 412 S.Ct 74 (1920).

