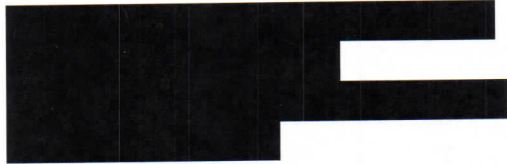


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Jacksonville, FL 32202

LEGAL OPINION

Question Presented

Does a “No Chance Game,” in which players can see all future prizes, in order, and play or withdraw without restriction, violate Florida law proscribing illegal lotteries or slot machines?

Short Answer

It is universally accepted in the United States that gambling must have three elements: chance, prize and consideration. Florida statutory and case law also requires that those three elements be present to condemn a device as illegal. A game in which players know whether or not they are going to win, including the size and order of all future prizes, contains no element of chance. It is thus not gambling under Florida law, even if there is a fee to enter and valuable prizes are awarded.

Analysis

I. Factual Assumptions

The No Chance Game (“NCG”) will be operated on machines and will be limited to states where the activities are legal. The NCG is intentionally designed to ensure that each and every player is able to know the order of every prize in advance for every play level. The NCG has no “Official Rules,” because neither player participation nor a random number generator can change the order or size of the prizes. All players can tell in advance exactly how much they will win or lose, not just for the next round but for all future rounds as well. Players are free to cash out at any time, so they alone can decide whether they want to continue playing until they win a guaranteed prize. Their decisions will be based on how much they will have to pay – an amount they know in advance – to

win that prize. Nothing that they do can influence whether a prize will be awarded, or the amount or order of the prizes.

The machine has buttons, clearly labeled, which allow players to view all upcoming prizes, in order, for any play level. Players deposit money, but are free to withdraw that money and any winnings at any time. When players touch the button labeled "Prize Viewer," on the front screen, they see each and every prize to be awarded on any particular play level, in the order that the prizes will be awarded. The game does not determine the prize outcome. The outcome is always determined by the next prize in the finite prize pool. All prizes at each play level come from a separate, pre-determined, finite list of prizes. What the machine displays as the next win, and all future wins, is awarded on the next play of the game and all subsequent plays.

II. Legal Analysis

A. Introduction

Gambling has been universally defined in the U.S. as having three elements: a prize, consideration and an outcome determined by chance.

The elements of gambling are consideration, a result determined by chance rather than skill, and a reward or prize; or, in other words, payment of a price for a chance to gain a prize. In addition, under a statute that prohibits gambling for profit, "for profit" is a necessary element of the offense.

38 Am.Jur. Gambling §2.

If any one of these three elements is missing the activity is not gambling, though it still might be subject to government regulations.

All human activities contain some element of chance. The game of chess is considered to be the epitome of a game of skill. But even the second best chess player in the world could be eliminated in the early rounds of a tournament, if he happened to have a head cold, or was distracted during the game, or had the bad fortune to be competing against the number one player in the world in an early elimination game. So, the element of chance that turns a game into a form of gambling must be something internal to the game itself that introduces an element of randomness and influences the outcome of the game. This requirement that chance must be inherent in the rules of the games is shown by the language used in the statute: "A component of chance must take place any time during the game." Component means that whatever is creating the chance has to be part of the game itself, for the game to be considered gambling.

With gambling games, the chance factor is introduced through a random number generator. These include dice; spinning wheels or reels, as with roulette or mechanical slot machines; and playing cards.

It is important to note that with games like slot machines, the chance factor arises because the machine itself has a random number generator (“RNG”), either a computer or spinning reels. Although the order of prizes may be also appear to be random with the NCG, they are all knowable in advance, without the player risking any money. There is no element of chance in the machine if the order and size of prizes can easily be known to every player. There is nothing internal to the game, no component of chance, influencing the outcome.

There would be a component of chance only if the rules required that players not know the list of randomly ordered prizes in advance. The only decision the players make is whether to play, knowing in advance the order and size of all prizes.

B. Florida Law Proscribing Slot Machines

Even if a game costs a player money to enter and therefore has “consideration,” and the winner will receive a thing of value, a “prize,” the contest may not technically be gambling. The test is stated in different ways by different courts. At a minimum, the outcome must be determined by chance for a game to be gambling. 19 AM.JUR.POF 647; see also *Hotel Employees and Restaurant Employees International Union v. Davis*, 21 Cal.4th 585, 981 P.2d 990, 88 Cal.Rptr.2d 56 (1999), where the California Supreme Court cited GAMBLING AND THE LAW (1986), written by the author of this Legal Opinion.

The gambling laws of the United States are a confusing, conflicting, and often over-lapping hodgepodge of usually outdated statutes, regulations, Attorney General Opinions and cases. A major reason for this is the tendency of legislatures to react to a particular crisis facing them at the time, such as the Louisiana Lottery scandal of the 1890s, and then to leave the laws on the books. Politicians do not usually win votes by acting to remove restrictions on gambling.

In addition, governments have the inherent right to regulate non-gambling activities, if there is a danger to the health, safety, welfare or morals of their citizens. This is known as a state’s “police power.” Gambling, whether legal or illegal, falls within the police power. Some state governments have even begun using their police power to regulate contests of skill, to ensure that the contests are fair and that prizes are actually awarded to winners.

In general we are dealing with criminal statutes, which, although they carry penal penalties, have the advantage of requiring strict construction. The criminal law of the

federal government and virtually every state require that there be a specific statute outlawing an activity before the activity can be deemed criminal. There are no common law crimes, only the legislature can declare an activity illegal; a judge cannot decide for himself whether an activity is criminal. This means that an activity is legal unless it fits into an existing criminal prohibition. The prohibitions on gambling often date back to the 19th century and simply did not anticipate the changes wrought by modern technology.

Specifically, the law of Florida proscribing slot machines defines them as devices so adapted that

upon activation, which may be achieved by, but is not limited to, the insertion of a piece of money, coin, account number, code, or other object or information, such device...is directly or indirectly caused to operate... and if the user, ...by reason of any element of chance or other outcome unpredictable by the user, [that user] may... receive or become entitled to receive any piece of money, credit, allowance, or thing of value...", or the user may "Secure additional...rights to use such...device, even though the device... in addition to any element of chance or unpredictable outcome,...may also sell, deliver... some...entertainment or other thing of value."

849.16, Florida Statutes.

In *Deeb v. Stoutamire*, 53 So. 2d 873 (Fla. 1951), the Florida Supreme Court considered the meaning of the phrase "any element of chance or other outcome unpredictable by the user." According to the Florida Supreme Court:

The law denouncing slot machines defines them as devices so adapted that "as a result of the insertion" of a coin they are "caused to operate or may be operated, and by reason of *any element of chance or of other outcome of such operation unpredictable by him*, the user may receive or become entitled to receive any * * * thing of value" or anything which may be exchanged for something of value, such as money or merchandise, "or the user may secure additional * * * rights" to play, "even though [the machine] may, in addition to any *element of chance or unpredictable outcome*" deliver merchandise or entertainment. 849.16, Florida Statutes 1941, and F.S.A.

We have italicized the characteristics which we think differentiate an innocent machine, vending amusement or entertainment, from a guilty one affording a means of gambling.

53 So. 2d at 874.

Furthermore, the Court declared that the element of chance must be created by the device: "It seems to us that inasmuch as the machine itself is on trial, so to speak, it should not be condemned unless this element of unpredictability is inherent in it... It is our thought that the element of unpredictability is not supplied because a player may not be sure what score he can accomplish, but that it must be inherent in the machine...". 53 So. 2d at 874-875.

In the case of the NCG not only does the machine not contain any element of unpredictability, but the players may be sure what score they can accomplish. Each prize is pre-determined and the user can view, in order, every single outcome which might entitle the user to anything of value, every outcome is entirely predictable by that user and is not determined by any element of chance.

In the case of a game where the prize outcomes are determined by a random number generator, that game would be considered an illegal slot machine, *even if just the next prize were shown before the play of the game*, since each outcome after that first one is determined by chance and inherently unpredictable to the user. *Gardner v. Daugherty*, 10 F.2d 373 (D.Mich. 1925)

C. Florida Law Proscribing Lotteries

In Florida, lotteries other than the State Lottery are prohibited by the Florida Constitution and by statute. However, neither section 849.09, Florida Statutes, which prohibits lotteries, nor the Constitution defines "lottery." Lotteries are a form of gambling. So, the term has to include the three elements of prize, chance, and consideration. *See Little River Theatre Corporation v. State ex rel. Hodge*, 185 So. 855 (Fla. 1939); *Dorman v. Publix-Saenger-Sparks Theatres*, 184 So. 886 (Fla. 1938).

The Florida Attorney General's office was faced with the question whether a sweepstakes scheme where patrons at a licensed pari-mutuel establishment selected a winning horse, constituted a lottery. In its published Opinion, AGO 76-131, the State Attorney General declared:

A lottery has been judicially defined to include three elements:
A prize awarded by chance for a consideration... Chance is defined as accomplishing a result that is one in which a person's

choice, will, or input has no part and will not enable the individual to know or to determine the result until it has been accomplished. *Great Atlantic and Pacific Tea Co. v. Cook*, 240 N.E.2d 114, 118 (Ohio Misc. 1965); *State ex rel. McKittrick v. Globe-Democrat Publishing Co.*, 110 S.W.2d 705, 713 (Mo. 1937).

The opinion then concludes:

Thus, the program does contain elements of a prize and consideration but not the element of chance. Absent the coexistence of all three elements, a lottery prohibited by s. 849.09, F. S., is not created by the referenced program and is not violative of Ch. 849, F. S.

In the case of the NCG, since each prize is pre-determined and the user can view in advance every prize outcome, in order, every single outcome which might entitle the user to anything of value is entirely predictable by that user and is not determined by any element of chance.

Conclusion

The No Chance Game has only two of the three elements required to be gambling: prize and consideration. The third element, chance, is completely missing. Since, in the NCG, all prizes come from pre-determined prize pools and those prize outcomes may be viewed in advance by the user, in the order in which they will be awarded, every outcome is entirely predictable to the user and chance has absolutely no role in any outcome. Therefore, the NCG does not meet the definition of an illegal slot machine or an illegal lottery under Florida statutory or case law.



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STATEMENT OF LIMITATION AND BIOGRAPHY

This Opinion is a legal analysis based on the state of the law and the information available as of this date. It is limited to the specific question asked and the specific set of assumed facts given in the Opinion and is limited to Florida state laws on slot machines and lotteries. It is not meant to cover any federal law, nor any other specific state law, or apply to any other set of facts. The views expressed herein are entirely those of the author, Professor I. Nelson Rose. This Opinion may only be relied upon by [REDACTED], and their principals, subsidiaries, attorneys and agents, and may not be provided to or relied upon by any other person, or quoted from, or reproduced in whole or in part without the prior written permission of the author. Permission is hereby given to provide copies of this Opinion to potential investors.

Prof. Rose is an internationally known legal scholar, public speaker and writer and is recognized as one of the world's leading authorities on gambling law. The co-editor-in-chief of the *Gaming Law Review and Economics*, Prof. Rose is best known for his internationally syndicated column and 1986 landmark book, *GAMBLING AND THE LAW*®. He is the co-author of the first casebook on the subject, *GAMING LAW: CASES AND MATERIALS*, as well as *INTERNET GAMING LAW, BLACKJACK AND THE LAW*, and the recently published *GAMING LAW IN A NUTSHELL*.

Prof. Rose received his B.A. degree from U.C.L.A. in 1973 and his J.D. in 1979 from Harvard Law School. He is a tenured full Professor of Law at Whittier Law School and teaches one of the first law school classes on gaming law. He has been admitted to practice in California, Hawaii and federal courts, including the United States Supreme Court.

With the rising interest in gambling throughout the world, Professor Rose has been called upon to discuss gambling and the law before such diverse groups as the F.B.I., National Conference of State Legislatures, Congress of State Lotteries of Europe, National Academy of Sciences, United States Conference of Mayors, Law Enforcement Intelligence Unit, North American Association of State and Provincial Lotteries, National Council on Compulsive Gambling, and International Conferences on Gambling and Risk Taking. He has presented scholarly papers on gambling in Nevada, New Jersey, Puerto Rico, the Bahamas, Canada, England, Austria, Portugal, Ireland, Argentina, Australia and the Czech Republic.

A consultant to governments and industry on gambling issues, Professor Rose has testified as an expert witness in administrative, civil and criminal cases and has acted as a consultant to major law firms, licensed casinos, international corporations, players, Indian tribes, and local, state and national governments, including California, the District of Columbia, Florida, Illinois, Michigan, New Jersey, New Mexico, Texas, Washington, Ontario, Québec, and the federal governments of Canada, Mexico and the United States.

Additional background on Professor Rose is available on his website:
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