

Generally, What is gambling?

- Most forms of gambling contain the elements of prize, chance and consideration.
- Sometimes expressed as risking something of value upon the outcome of an uncertain event.

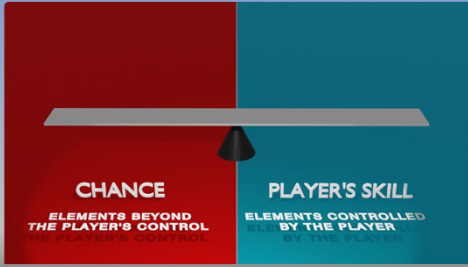
Common Elements of Lottery and Chance Game Gambling

- Consideration
- Chance
- Prize

Note

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

Chance



Chance

• **THE DOMINANT FACTOR TEST**

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

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• **GAMBLING INSTINCT TEST**



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- GAMBLING INSTINCT TEST

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

Chance

- Any Chance / Material Element

- In a few states, the relative predominance of skill versus chance is irrelevant. These states prohibit any payment for the opportunity to win something based on a game where chance has any role in determining the outcome.

Chance

- Supreme Court of Alabama – Opinion of the Justices

Chance

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

Chance

- Supreme Court of Alabama – Opinion of the Justices
 - What are the issues?
 - Whether a bill that would authorize video poker machine would violate the constitutional prohibition against lotteries and gambling.
 - The bill defines video poker machines as skill dependent wagering games.

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- Supreme Court of Alabama – Opinion of the Justices
 - What did the 1997 opinion state according to this opinion?

Chance

- Supreme Court of Alabama – Opinion of the Justices
 - What did the 1997 opinion state according to this opinion?
 - The 1997 opinion stated that so long as some degree of skill is required in a gambling activity, that activity differs from a lottery.
 - In 1997, the court opined that since video poker has some skill it did not violate the state constitution on the prohibition of lotteries

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

Chance

- Supreme Court of Alabama – Opinion of the Justices
 - Describe the historical analysis provided by the justices.
 - Lotteries were popular “Lotteries eventually became so popular and prolific that one writer has noted: “By 1776, a lottery wheel existed ‘in every city and town large enough to boast of a courthouse and a jail.’”
 - **However, America’s infatuation with lotteries was relatively short-lived, because of widespread fraud and the related social problems.** 34 B.C.L.Rev. at 13, 32. In 1825, Chief Justice Marshall, writing for the United States Supreme Court in *Brent v. Davis*, 23 U.S. 395, 402, 6 L.Ed. 350 (1825), referred to the policy of “tolerating lotteries” as “questionable.” Later, heavy opposition to lotteries began “as part of general social reform that included ... movements for ... peace, women’s rights, educational reform, prison reform and abolition of slavery.” 34 B.C.L.Rev. at 32, citing Charles T. Clotfelter & Phillip J. Cook, *Selling Hope: State Lotteries in America* 36-37 (1989). In fact, in 1842, “Democrats [were] swept to power because of their opposition to lotteries.” 34 B.C.L.Rev. at 32,

Chance

- Supreme Court of Alabama – Opinion of the Justices
 - Describe the historical analysis provided by the justices.
 - Against this backdrop, Alabama included a constitutional prohibition of lotteries in its Constitution of 1875. The 1901 Constitution adopted verbatim the 1875 Constitutional language. Section 65 of the Constitution of Alabama of 1901 now provides:
 - “The legislature shall have no power to authorize lotteries or gift enterprises for any purposes, and shall pass laws to prohibit the sale in this state of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery; and all acts, or parts of acts heretofore passed by the legislature of this state, authorizing a lottery or lotteries, and all acts amendatory thereof, or supplemental thereto, are hereby avoided.”

Chance

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Chance

- Supreme Court of Alabama – Opinion of the Justices
 - Describe the historical analysis provided by the justices.
 - By 1878, Alabama courts interpreted the lottery to include more than mere chance-based drawings to include spinning wheels, slot machines, and other games of chance.
 - By 1938, the Alabama Supreme Court defined a lottery to include events with the following characteristics: “(1) A prize, (2) awarded by chance, (3) for a consideration.”
 - “Chance” came to be defined as a lack of control over events or the absence of “controllable causation”-“the opposite of intention.”

Chance

- Supreme Court of Alabama – Opinion of the Justices
 - What is the English Rule?

Chance

- Supreme Court of Alabama – Opinion of the Justices
 - What is the English Rule?
 - Under the English Rule, only a scheme that exhibits or involves “pure chance” is a lottery.

Chance

- Supreme Court of Alabama – Opinion of the Justices
 - What is the American Rule?

Chance

- Supreme Court of Alabama – Opinion of the Justices
 - What is the American Rule?
 - Under the American Rule, a scheme is a lottery if chance is the dominant factor in determining the result of the game, even though the result may be affected to some degree by skill or knowledge.

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- Supreme Court of Alabama – Opinion of the Justices
 - According to the opinion, how have American courts overwhelmingly addressed the English Rule vs. American Rule?

Chance

- Supreme Court of Alabama – Opinion of the Justices
 - According to the opinion, how have American courts overwhelmingly addressed the English Rule vs. American Rule?
 - American courts have consistently rejected the English Rule. Most jurisdictions have embraced the American Rule.
 - Then the Opinion cites other courts from California, the First Circuit, New Mexico, Missouri, Indiana, Wisconsin, Rhode Island, Delaware, Washington State, West Virginia, the Fifth Circuit,...and others.

Chance

- Supreme Court of Alabama – Opinion of the Justices
 - What test applies in Alabama?

Chance

- Supreme Court of Alabama – Opinion of the Justices
 - What test applies in Alabama?
 - The American Rule – Dominant Factor Test

EXAMPLES

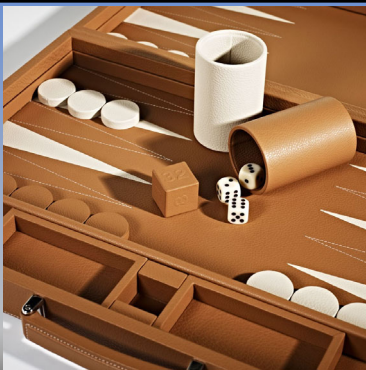
Chance



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

Chance

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

Chance

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



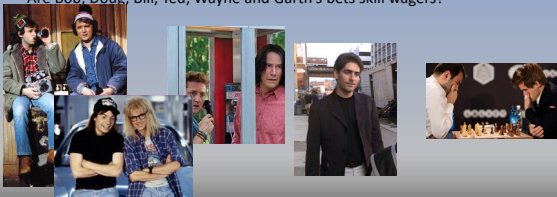
Chance

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



Chance

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



Hypotheticals – Part 1

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

Hypotheticals – Part 2

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

RECAP

•Common Elements

- Consideration
- Chance
- Prize

RECAP

- Consideration

RECAP

- Primary Theories
- **Valuable Consideration** - parting of something of marketable value, usually money.
- **Contract Consideration** - consideration sufficient to create a binding obligation or agreement.
- Promoter Benefit
 - WIS STATS ,945(5)(b) 1. "Consideration" in this subsection means anything which is a commercial or financial advantage to the promoter or a disadvantage to any participant, but does not include any advantage to the promoter or disadvantage to any participant caused when any participant learns from newspapers, magazines and other periodicals, radio or television where to send the participant's name and address to the promoter.

RECAP

- In many jurisdictions that use the valuable consideration theory, consideration may be eliminated if:
- Consideration is not required to win
- Non-paying participants are eligible to win the same prize as participants that have paid.
- Non-paying participants have the same odds of winning as participants that have paid (no advantages for purchases or payment)
- Non-paying entries are no more onerous to provide than entires from participants that have paid.

- In essence, free entrants have equal dignity with entrants that have paid.

SOURCE OF GAMING LAWS

U.S. Gaming Law in General

- In the United States, there are several forms of permitted and prohibited gaming.
- Most forms of gaming are defined as events that require participants to part with consideration for the chance of winning a prize.
- With regard to online gaming, courts have deemed a bet or wager to occur in both the jurisdiction in which the bettor is located and the jurisdiction where the bet is recorded or offered.

U.S. Gaming Law in General

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U.S. Gaming Law in General

- In the United States, federal and state laws share concurrent jurisdiction over gaming activities.
- With the exception of sports wagering, federal laws generally assist states in enforcing state gambling prohibitions regarding interstate and foreign gaming that are offered in a state.
- States are often the primary source of legal authority with regard to most forms of gaming other than sports wagering.

U.S. Gaming Law in General



U.S. Gaming Law in General



Federal Wire Act

- Part of the 1961 legislative package designed to cut off activities that financially sustained organized crime and to help states enforce their gambling laws.

Federal Overview

- Crimes
 - Title 18
 - Federal Wire Act
 - Illegal Gambling Business Act
 - Wagering Paraphernalia Act
 - Travel Act
 - Johnson Act
 - Lottery Ticket Transportation
 - Lottery Ticket Broadcasting

Federal Overview

- Financial Crimes
 - Title 31
 - Bank Secrecy Act
 - Unlawful Internet Gambling Enforcement Act

Federal Overview

- Indian Gaming
 - Title 25
 - Indian Gaming Regulatory Act

Federal Overview

- Judiciary & States
 - Title 28
 - Professional and Amateur Sports Protection Act [DEAD]

Questions
