

COVINGTON & BURLING

1201 PENNSYLVANIA AVENUE NW
WASHINGTON, DC 20004-2401
TEL 202.662.6000
FAX 202.662 6291
WWW.COV.COM

WASHINGTON
NEW YORK
SAN FRANCISCO
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BRUSSELS

April 29, 2003

MEMORANDUM OF LAW

THE DELAWARE CONSTITUTION PROHIBITS SPORTS GAMBLING*

On June 26, 2002, the Delaware House of Representatives passed a resolution creating a committee to study “the feasibility of instituting sports gaming activities at existing gaming venues” and to quantify “the potential economic benefit of such gaming” to Delaware and its racing industry (i.e. its three race tracks) H.R. 63, 141st Gen. Assem. (Del. 2002). The games under consideration, which would be offered under the auspices of the Delaware Lottery Office, apparently would be similar to or broader than the sports lottery games offered by Delaware in 1976. The games apparently would resemble Las Vegas-style betting on team sporting events, except that (1) single-game bets apparently would not be allowed, and (2) participants possibly would be subject to longer odds than bettors in Las Vegas. For the reasons discussed below, the Delaware Constitution does not permit the Delaware Lottery Office to offer such sports gambling, and the Delaware Lottery Statute does not authorize it to do so.

SUMMARY

The Delaware Constitution prohibits “[a]ll forms of gambling” but, as amended in 1974, contains an exception for “lotteries under State control for the purpose of raising funds.” Del.

Const. art II, § 17(a) (“Lottery Exception”) The Delaware Lottery Statute provides the framework for lotteries permitted under this exception. Del. Code Ann. tit 29 § 4801, et seq. The sports gambling apparently under consideration, however, would not constitute a “lottery” within the meaning of the Delaware Constitution

First, to the extent that the proposed sports betting would involve pari-mutuel wagering or pool-selling—as two of the three games offered by Delaware in 1976 did, as Oregon’s sports lottery does, and as non-fixed-payout sports gambling in Las Vegas does—the proposed games would not constitute a “lottery” within the meaning of the Delaware Constitution. Under a 1978 Opinion of the Justices, the Lottery Exception does not allow pari-mutuel wagering or pool-selling. Opinion of the Justices, 385 A 2d 695, 701-02, 705 (1978) Moreover, to the extent that the proposed games would involve fixed payouts—as one of the three games offered by Delaware in 1976 did—the proposed games would not be permitted by the Delaware Lottery Statute. Under the decision of the U.S District Court for Delaware in National Football League v. Governor of Delaware, 435 F Supp 1372, 1387-88 (D Del. 1977), the Delaware Lottery Statute does not allow sports lottery games with fixed payouts, because fixed payouts are inconsistent with the statute’s percentage-based requirements for distributing payouts.

Second, whatever the form of payout and whether or not the games involve pool-selling, the Lottery Exception does not authorize sports gambling The Attorneys General of New York and Connecticut, among other states, have reached a similar conclusion in rejecting claims that sports gambling could be offered under the lottery provisions of their state constitutions or laws. Although the Delaware Supreme Court in its 1978 opinion had no need to decide whether the

Covington & Burling is counsel to the National Football League.

Lottery Exception is limited to games of “pure chance” (the English rule) or instead permits games in which chance is the “predominant factor” (the American rule), the court specified that the Lottery Exception “must be narrowly and strictly construed ” Opinion of the Justices, 385 A.2d at 701. The “pure chance” definition is more restrictive, and therefore more consistent with the court’s rule of construction, than the “dominant factor” definition, which generally has been used in prohibitory contexts where an expansive definition of “lottery” is desired. Whichever definition is used, however, sports lottery games of the type apparently under consideration would not constitute a “lottery --

The Delaware Attorney General concluded in a 1976 opinion that the Lottery Exception allowed a sports lottery involving pari-mutuel sports pools in which chance was only a “predominant factor” The Attorney General’s 1976 opinion did not survive the 1978 Opinion of the Justices, in which the Delaware Supreme Court (1) concluded that the Lottery Exception does not allow pari-mutuel wagering or pool-selling (except on horse races), (2) declined to validate the “predominant chance” approach; and (3) directed that the Lottery Exemption be strictly and narrowly, rather than expansively, construed—a directive that mandates the more restrictive “pure chance” test. Under the 1978 Opinion of the Justices, any sports lottery game similar to the 1976 Delaware sports lottery games, the current Oregon sports lottery, and common forms of Las Vegas sports gambling would fall outside the Lottery Exception and thus violate the Delaware Constitution.

I. The 1976 Delaware Sports Lottery.

A. The 1976 “Scoreboard” Games.

In 1976, the Delaware Lottery Office introduced “Scoreboard,” a football betting scheme consisting of three games — *Football Bonus*, *Touchdown*, and *Touchdown II* — each based on regularly scheduled NFL games.¹ In *Football Bonus*, the wagering card contained a list of the week’s fourteen NFL games divided into two pools of seven games. To win, a player had to place a bet and correctly project the winners of all seven games in one or both of the two pools. Prize amounts were “determined on a pari-mutuel basis” NFL, 435 F. Supp. at 1376. In *Touchdown*, the wagering card listed the week’s fourteen games along with three ranges of point spreads. To win, a player had to select both the winning team and the winning margin in each of three, four, or five games. Prize amounts were again determined “on a pari-mutuel basis.” *Id.* As the district court noted, the State of Delaware maintained that both *Football Bonus* and *Touchdown* were “true pari-mutuel games.” *Id.* at 1387 n.29. Indeed, in his deposition, which was admitted into evidence, the Director of the Delaware Lottery Office specifically likened them to pari-mutuel wagering on horse races.² The district court found that the games were

¹ The NFL sued in federal court to block the lottery, see NFL, 435 F. Supp. 1372, eventually obtaining limited injunctive relief after the lottery had been suspended. The following description of the lottery is taken from the district court’s opinion in this case. See id. at 1376, 1387 n.29.

² See Dep. Tr., Direct Exam. of Peter M. Simmons at 107-08 (Aug. 21, 1976) (“[A]ll bets would be placed on a pari-mutuel basis [I]t is similar to the way people do when they go to the race track and all the bets are in a pool”); see also, e.g. id. 7 (“The prizes are awarded on a pari-mutuel basis If he won, [the bettor] would share in the pari-mutuel pool for the given week.”); id. at 8 (“The pari-mutuel formula applies”); id. at 9 (referring to “the pari-mutuel pool here”). The state also characterized the games as pari-mutuel in its post-trial brief. Def.’s Post-Trial Br. 3 (“Payoffs for the Touchdown and Football Bonus Games are determined on a parimutuel system”); id. (The games are “betting pools.”); id. at 23 (“Football Bonus and Touchdown” are “parimutuel pools.”); id. at 101 (“Touchdown and Football Bonus” are “parimutuel.”); id. at 106 n.* (The “first two Scoreboard games” were based on a “parimutuel system.”). See also Stipulation of Facts ¶ 10, addendum 1 to Plaintiffs’ Post-Trial Opening Br. (“Payoffs are made on a pari-mutuel basis on Touchdown and Football Bonus.”).

“pari-mutuel,” 435 F. Supp at 1376, and contemporaneous descriptions of the games in the media also described them as “pari-mutuel.”³

Finally, in *Touchdown II*, which replaced Touchdown mid season, a predicted point spread on each of twelve games was published before the games. The player had to select a team to do better in the game than the stated point spread. To win, the player had to choose correctly with respect to each of four-to-twelve games. There was a fixed payoff depending on the number of games on which a player bet. “Scoreboard” tickets were available only from authorized agents of the Delaware State Lottery. Revenues were to be distributed according to a fixed schedule among the winning “Scoreboard” players, the state, the sales agents, and the Lottery Office (for administrative expenses).

B. The 1976 Attorney General’s Opinion.

The Lottery Office introduced “Scoreboard” after obtaining an opinion from Attorney General Richard R. Wier, Jr. that “sports betting or pooling” is a “lottery” within the meaning of Delaware’s lottery statute, Del. Code Ann. tit. 29, § 4803(b). See Del. Op. Atty. Gen. 76-014 (1976). The opinion did not address the particular games that the Lottery Office proposed to offer or consider whether the Lottery Exception permitted pari-mutuel wagering or pool-selling. It concluded that the Lottery Exception was not limited to games that would meet the English “pure chance” definition but would permit any game -- including sports gambling -- that satisfied the expansive “predominant factor” test. Acknowledging that there was “little case law in Delaware,” the Attorney General stated that Delaware courts had included “sports pools, bank-

³ E.g., Steve Cady, A New Deck of Cards, N.Y. Times, Sept. 12, 1976, at 3 (stating that the 1976 games were “set up like a race track pari-mutuel pool”); Delaware Sales in Lottery High N.Y. Times, Sept. 2, 1976, at 34 (“Prizes are determined on a parimutuel basis.”); Judge Allows Delaware to Start (continued.. .)

nights and policy and numbers games” within the definition of a lottery. Id. at 9, see also id. at 9-10 (citing cases). According to the opinion, as long as consideration, prize, and chance are present, “the exact method for applying chance to the distribution of the prizes should not be material.” Id. at 10

The only case the Attorney General cited for the claim that Delaware courts had included “sports pools” within the definition of a lottery, however, was State v Sedgwick, 81 A. 472, 473 (Del Ct. Gen. Sess. 1911). But the sports pools in Sedgwick were nothing like the games offered in 1976 or those apparently contemplated now. In Sedgwick, the “sports pool” involved a game in which participants, for a fee, were each randomly assigned six baseball teams. A prize was awarded to the participants that had been assigned teams that scored the most combined runs during the week. This game, the equivalent of a modern-day scratch card, was based on pure chance—the outcome depended solely on the luck of the draw. Indeed, the court itself compared the scheme to one in which a person “draw[s] the decisive or determining number from a hat.” Id. Moreover, Sedgwick interpreted the state’s broad criminal prohibition on lotteries, not a narrow exception to a prohibition. Id. at 472. In short, the authority on which the Attorney General relied to support his conclusion that the “Scoreboard” games were a “lottery” within the meaning of the Lottery Exception did not support that conclusion.

The Attorney General’s opinion also was inconsistent with the application of the “English definition” of “lottery” by the Court in Banc, see Affiliated Enterprises, Inc. v Waller, 5 A.2d 257, 259 (Del. Super. Ct. 1939) (per Layton C J), whose decision the Delaware Supreme Court subsequently stated “should be followed,” State v. Eckerd’s Suburban, Inc., 164 A.2d 873,

Lottery Based on N.F.L. Games, N.Y. Times, Aug. 28, 1976, at 9 (“The bets are placed in a pool and distributed to winners on a parimutuel basis.”).

876 (Del. 1960). Neither the 1976 games nor the sports gambling under consideration is a game of “pure chance” as prescribed by the English definition--indeed, their intended allure is that they are not pure chance. Therefore, neither is a lottery under the English definition.

C. The Short, Unhappy Life of the 1976 “Scoreboard” Games.

The “Scoreboard” games began during the first week of September 1976,⁴ but were cancelled after fourteen weeks, before the season ended. The lottery collapsed when the Lottery Office offered a bad line on an upcoming weekend’s Touchdown II games that threatened to cause the state huge losses, and then attempted to avoid such losses by canceling that weekend’s lottery and offering refunds to bettors instead of paying the winning bets. The lottery had already picked the wrong favorite in two games and missed the margin in three others, which had apparently spurred heavy betting, particularly among professional gamblers. Attorney General Wier, however, ruled that the Lottery was required to honor its commitment to pay the winning Touchdown II bets, which the lottery was able to do only by drawing on its emergency fund.⁵ Although the Lottery paid the winning bets, the debacle left the football lottery mortally wounded, and it was permanently cancelled.⁶

⁴ See Delaware Planning Legal N.F.L. Bets, N.Y. Times, Aug. 19, 1976, at 45; N.F.L. Sues Over Lottery, N.Y. Times, Aug. 19, 1976, at 8; Judge Allows Delaware to Start Lottery Based on N.F.L. Games, N.Y. Times, Aug. 28, 1976, at 9; Delaware Sales in Lottery High, N.Y. Times, Sept. 2, 1976, at 34; Cady, A New Deck of Cards, N.Y. Times, Sept. 12, 1976, at 3.

⁵ See Delaware Stops Football Lottery, Cites Reports of Wrong Bet Line, N.Y. Times, Dec. 12, 1976, at 22; Delaware Football Betting Canceled for Weekend, N.Y. Times, Dec. 13, 1976, at 22; Delaware Official Voids Cancellation of Lottery, N.Y. Times, Dec. 14, 1976, at 20; Delaware Will Pay Off on Lottery That was Cancelled and Reinstated, N.Y. Times, Dec. 15, 1976, at A18.

⁶ Director Simmons had estimated that the State would net \$2 million from its 30-percent statutory share of the gross receipts of “Scoreboard” during the 14-week NFL season, thus averaging for the state a net yield of \$400,000 per week. This estimate proved to be highly unrealistic. The State received only one-eighth of this estimate— an average weekly net of \$53,000— through the first nine weeks of the NFL season. See Joint Stipulation of Facts ¶¶ 24-25. This low yield did not include the debacle of *Touchdown II*. The claim by proponents today, that legalizing sports gambling could net the state \$13 million a year, (continued.. .)

D. The NFL's Legal Challenge to the 1976 "Scoreboard" Games.

On August 20, 1976, the NFL filed suit in federal court challenging the Delaware Sports Lottery on a variety of grounds. NFL 435 F Supp 1372. The League argued, among other things, that the "Scoreboard" games did not constitute a "lottery" within the meaning of the Delaware Constitution because the games entailed an element of skill. Id. at 1382. The district court, however, held that the games constituted a "lottery" under art. II, § 17 based on its prediction that Delaware's courts would interpret the term to encompass "not only games of pure chance" "but also games in which chance is the dominant determining factor." Id. at 1385. The League also argued that "Scoreboard" violated the Delaware Lottery Statute's requirements that not less than 30 percent of the total revenues accruing from the sale of lottery tickets be paid into the General Fund, that not less than 45 percent be distributed as prize money, and that not more than 20 percent be devoted to administrative expenses. Id. at 1387. The district court agreed that *Touchdown II* violated the 45 percent prize money rule because of its fixed payment structure. Id. at 1387-88. Accordingly, the court ruled *Touchdown II* unlawful under the Lottery Statute. id. at 1387.⁷

must be regarded in light of the unrealistic estimates offered by the Lottery Office in 1976. Oregon is the only other state with a sports lottery, and its experience is instructive. With more than four times the population of Delaware, and offering its sports lottery in more than 2,500 locations (as compared with three race tracks), Oregon nets only \$2.3 million annually; and apart from administrative expenses, Oregon does not have to split a portion of the proceeds with race tracks or anyone else.

⁷ The NFL also contended that the 1976 games constituted "pool-selling," which the League argued the Delaware Constitution did not allow. Delaware did not dispute that the games constituted pool selling. See, e.g., Simmons Dep. at 13 (explaining that bettors bet in different "pools," and that a bettor could bet in one "pool" without betting in another); Def.'s Post-Trial Br. at 3 (stating that "prizes depend on the amount of the betting pool," and that "[t]he Football Bonus ticket carries two separate betting pools"); id. at 23 (describing *Football Bonus* and *Touchdown* as "parimutuel pools"). But Delaware argued that pool-selling — which had been specifically prohibited by the Delaware Constitution before 1976—became permissible when the specific prohibition was deleted in 1974. Id. at 90-91. The district court stated its view that no "clear inference" could be drawn from the deletion of this language from the (continued..)

II. The 1978 Opinion of the Justices and Later Authorities from Other Jurisdictions.

Subsequent to the Attorney General's 1976 opinion and the district court's 1977 opinion in NFL, the Delaware Supreme Court in 1978 opined on the definition of a "lottery" under the Delaware Constitution. See Opinion of the Justices, 385 A 2d 695. That opinion, as well as the persuasive weight of later authorities from other jurisdictions, demonstrates that sports betting similar to or broader than that offered by Delaware in 1976, by Oregon in its sports lottery, or by Las Vegas casinos would violate Delaware's Constitution and Lottery Statute

A. The Lottery Exception Must Be "Narrowly and Strictly Construed."

"Gambling is, by the State Constitution," "against the public policy" of Delaware Aprile v Delaware, 143 A.2d 739, 745 (Del. Super. Ct 1958) Delaware's constitution prohibits "[a]ll forms of gambling" except for those expressly authorized. Del. Const art. II. § 17. One exception to the constitutional prohibition is for "[l]otteries under State control." Id § 17(a). The Delaware Supreme Court stated in its 1978 opinion, however, that this exception to the "general constitutional prohibition must be narrowly and strictly construed." Opinion of the Justices, 385 A.2d at 701; see also id at 705 (exceptions to the "general constitutional interdiction against gambling" are "specific and narrow") The court stated.

Governed, as a constitutional exception is, by the rule of narrow and strict construction, the Lottery Exception may not be given the broad and expansive interpretation . . . , which would legalize unlimited pari-mutuel betting on all types of sporting events, on and off the premises, under the guise of the Lottery Exception. If the 1973 drafters had intended to eliminate the 75 year old distinction between lotteries and pool selling, and if they had intended to remove

Constitution but indicated a willingness to infer that the Constitution permitted "pool selling" on team sporting events under the aegis of the Delaware Lottery. NFL 435 F Supp. at 1386. As discussed below, the Delaware Supreme Court in 1978 held that the deletion of the specific prohibition against "pool-selling" did not substantively change the law, thus invalidating this defense of the 1976 games.

from the general constitutional prohibition the many types of gambling which would be permissible under the broad construction of the word “lottery” . . . they would have done so in clear and unmistakable terms and not left it to implication and inference which would require such mental and legal gymnastics to accept.

Id. at 705. In light of the Opinion of the Justices, the Delaware Attorney General has recognized that the “amendatory exceptions” to Delaware’s gambling ban are “specific and narrow,” Del. Op. Atty. Gen. 90-1019, at 3 (1990) – position markedly different from the position reflected in the Attorney General’s 1976 opinion, in which he utilized an expansive definition of “lottery.”

The New York Attorney General has similarly opined that New York’s “lottery exception” to its constitutional gambling ban “must be given a narrow interpretation,” and that “only a traditional lottery, essentially based on the drawing of a ticket,” is authorized N.Y. Op. Atty. Gen. 84-F1, at 7 (1984). The Kentucky Attorney General likewise has stated that the “state lottery” exception to Kentucky’s “broad constitutional prohibitions should be narrowly construed” Ky. Op. Atty. Gen. 99-8, at 6 (1999). A “state lottery,” according to Kentucky’s Attorney General, “is a narrowly defined constitutional grant of authority to the state to operate only traditional state lottery games.” Id. at 9 It is “an extremely narrow and limited exception to the long-standing prohibition of lotteries.” Id. at 10

B. To the Extent that Sports Gambling Would Involve Pari-Mutuel Wagering or Pool-Selling, it Would Not Qualify as a “Lottery” Under the Delaware Constitution.

Pari-mutuel wagering involves “a division of the pool among the successful contributors in proportion to the respective contributions, or wagers ” Wise v. Del. Steeplechase & Race Ass’n, 18 A.2d 419, 421 (Del. Super. Ct. 1941), affd. Del. Steeplechase & Race Ass’n v. Wise, 27 A.2d 357, 359 (Del. 1942) (describing the pari-mutuel wagering system as one in which “all money staked by backers is pooled, and, when the result is shown, shared by those who have backed the winners”) (internal quotation marks omitted) Moreover, the Delaware Supreme

Court stated that “pari-mutuel betting is a form of pool selling” Opinion of the Justices, 385 A.2d at 700 n.5. As noted, two of the three “Scoreboard” games offered by Delaware in 1976 were pari-mutuel games and sports pools. See supra notes 2-3 and accompanying text. The sports lottery currently operated by Oregon similarly involves pari-mutuel wagering. See Oregon Lottery, How to Play Sports Action, at http://www.oregonlottery.org/sports/s_howto.shtml (last updated Sept 3, 2002) (describing seven of the nine available Sports Action payouts as “pari-mutuel”), Or. Op. Atty. Gen. OP-6328, at 1 (1989) (describing Oregon’s pari-mutuel scheme) To the extent that the proposed sports lottery games are structured like the 1976 games, the Oregon sports lottery, or common forms of Las Vegas sports gambling, the proposed sports lottery games would therefore involve pari-mutuel wagering and sports pools. If so, however, under the 1978 Opinion of the Justices, the Delaware Constitution would not allow the games.

Delaware’s Constitution prohibits pari-mutuel wagering, except for wagering on horse races at racetracks. Del Const, art. II, § 17. In its 1978 opinion, the Delaware Supreme Court concluded that pool-selling or pari-mutuel wagering schemes are not “lotteries” and, therefore, are constitutionally banned.

It is our conclusion that the pool or pari-mutuel system of wagering has never been considered a “lottery” by the constitutional draftsmen of our State either in 1897 or in 1973 and that it may not be made so now either by legislative act or judicial fiat. Common and ordinary understanding of the word “lottery”, then and now, rejects the concept of pari-mutuel betting on sporting events. Moreover, the historical evolution of Art. II, s 17 and the great weight of authority are in harmony with this result and lead inescapably to the conclusion that a sound basis in reason, logic, and experience exists in support of the result we reach

Opinion of the Justices, 385 A.2d at 705

In Opinion of the Justices, the court addressed whether pari-mutuel wagering on jai-alai, which the General Assembly had authorized, constitutes a “lottery” under Delaware’s Constitution 385 A.2d at 696. Noting that Delaware’s 1897 Constitution, art. II, § 17, distinguished “lotteries” from “pools” (that provision stated that “Lotteries, the sale of lottery tickets, pool selling and all other forms of gambling are prohibited in this State”), and that the present version of art. II, §, 17 prohibits all gambling except that which is explicitly authorized, the Delaware court concluded that “[e]xcept for on-track pari-mutuel betting authorized by” the Constitution, “pool-selling is not excepted from the general anti-gambling prohibition of Art. II, s 17 by any express provision. We are of the opinion, therefore, that all other forms of pari-mutuel betting remain constitutionally banned .. Id. at 701

The court offered three further reasons why “pari-mutuel” wagering does not constitute a “lottery.” First, by “common usage and ordinary definition, the two forms of gambling have been clearly differentiated .. Id. at 702. Second, “following the lead of the 1897 Constitutional drafters, later constitutional drafters have consistently distinguished between lotteries and pool-betting and other types of gambling, expressly maintaining the distinction in both the 1935 Racing Amendment and the 1957 Bingo Amendment .. Id. Finally, “prevailing case law would have guided the 1973 drafters away from the word ‘lottery’ and along other lines if they had intended to legalize unlimited pool-selling and pari-mutuel wagering” in Delaware. Id.

The court concluded that both betting on jai-alai and betting on horse racing “involve sporting events in which the skill, condition, and experience of the participants are important elements; in both, the bettor has information and opportunity enabling him to exercise his judgment and discretion in placing his bet; and in both, the form and method of wagering is substantially the same ” Id. at 702 n. 11. This was so, the court held, even when the jai-alai

betting involved exotic wagers such as trifectas, superfectas, and other multi-event bets Id. at 698. These same factors apply to remove pari-mutuel betting on other sports, including football, basketball, and baseball, from the “lottery” category. The Delaware Supreme Court favorably quoted an opinion of the Alabama Supreme Court that expressly distinguished lotteries from such sports betting.

In a lottery the winner is determined by lot . . . Lot or chance is the determining factor and a participant has no opportunity to materially exercise his reason, judgment, sagacity, or discretion . . . In a horse race the winner is not determined by chance alone The bettor has the opportunity to exercise his judgment and discretion Horse racing, like . . . football, and baseball, is a game in which the skill and judgment of man enter into the outcome to a marked degree and is not a game where chance is the dominant factor

Id. at 702 n 12 (emphasis added) (quoting Opinion of the Justices, 31 So 2d 753, 761 (Ala. 1947)).

The Delaware Supreme Court’s holding that under the Delaware Constitution a “lottery” may not involve pari-mutuel wagering or pool selling, coupled with its directive that the Lottery Exception be “narrowly and strictly construed,” displaced the Attorney General’s 1978 opinion. The Delaware court’s holding also displaced the district court’s opinion in NFL that the two pari-mutuel “Scoreboard” games constituted a “lottery” under Delaware law. See Wainwright v. Goode, 464 U.S. 78, 84 (1983) (per curiam) (a state supreme court’s views “with respect to state law are binding on the federal courts”); Brown v. Ohio, 432 U.S. 161, 167 (1977) (state courts “have the final authority to interpret” state law) (quoting Garner v. Louisiana, 368 U.S. 157, 169 (1961)).⁸

⁸ The Delaware Supreme Court mistakenly thought that the district court’s holding in NFL that “Scoreboard” was a “lottery” was distinguishable, based on the Delaware Supreme Court’s misconception that the 1976 games “did not involve pari-mutuel betting.” Opinion of the Justices, 385 A.2d at 704. As (continued. .)

C. To the Extent that Sports Gambling Would Involve Fixed Payouts, it Would Violate Delaware’s Lottery Statute.

“On its Face,” sports gambling with a “fixed payoff scheme does not comply with the revenue apportionment provisions” of the Delaware lottery statute. *NFL*, 435 F. Supp. at 1387. Delaware’s lottery statute requires that “no less than 30 percent of the total revenues accruing from the sale of tickets or shares shall be dedicated to” the “General Fund of the State.” Del. Code Ann. tit. 29, § 4805(a)(11) It also requires that the Director “pay as prizes not less than 45% on the average of the total amount of tickets which have been sold and are scheduled for sale throughout the games -- *Id.* § 4815(a).

In *NFL*, the court held that the *Touchdown II* football betting game, in which players predict the winners of regularly scheduled NFL games, with a “prize scale ranging from \$10 for four out of four correct selections to \$1,200 for twelve out of twelve correct selections,” violated the statute’s revenue apportionment provisions. 435 F. Supp. at 1387. The court reasoned that “[i]n a given week, if those who play Touchdown II are extraordinarily successful, pay outs may run far over the 45% mark. Similarly, if the players fare very poorly, it is conceivable that there would be no prizes awarded at all.” *Id.* The possibility, under a fixed payout scheme, of successful betting derailing the ability of the games to pay at least 30 percent of the revenue to the General Fund was not mere speculation by the court. “[D]uring the week of December 5, 1976, bets totaling \$95,929 were placed on Touchdown II.” *Id.* Winning tickets, however, totaled \$67,330, which was slightly more than 70 percent of the amount wagered, leaving less than the required 30 percent, even if no money were allocated to administrative expenses or ticket agents. *Id.* Moreover, the court in *NFL* rejected the Lottery Director’s claim that the

discussed above, however, the 1976 games were pari-mutuel and a form of pool-selling. See supra notes (continued. .)

revenue apportionment requirements could be met by averaging payouts over time or across games. The court noted that Del. Code Ann. tit. 29, § 4815 “requires that accumulated funds be turned over to the General Fund monthly” and that this requirement “severely restricts the ability to average prizes over time .. Id. at 1387-88.

D. Regardless of the Form of Payout, Sports Gambling Does Not Constitute a “Lottery.”

1. The Attorneys General of Surrounding States Have Concluded that Sports Gambling Is Not a “Lottery.”

The Attorneys General of surrounding states have concluded that sports wagering does not constitute a “lottery” and therefore is not permissible under the constitutions or laws of their respective states. The New York Attorney General, for example, concluded that the New York Constitution — which, like Delaware’s, allows the state to operate a lottery — prohibits sports betting and that a constitutional amendment would be required to institute sports lottery games of the very sort Delaware is now contemplating N Y. Op. Atty. Gen. 84-F1 The proposed “New York Pro-Sports Lottery Card” permitted players to purchase, at Lottery Division outlets, cards listing the professional football games for the upcoming weekend. Id. at 1-2. Betting was of a parlay nature, the simplest bet requiring the player correctly to determine the outcome of four or five games and the most complex bet requiring the player to ascertain the winner of fourteen games. Id. at 2. Each game was to be assigned a point spread. As with Delaware’s 1976 “Scoreboard” games, the more games wagered upon, the higher the potential payout. Id. The state had not yet decided whether payouts were to be on a pari-mutuel or fixed basis Id.

The Attorney General concluded that the New York Constitution’s prohibition on gambling and pool-selling barred this proposed football wagering scheme and that the

2-3 and accompanying text. The findings and evidence in NFL are unequivocal in this regard

constitution's exception for "lotteries operated by the state" did not permit such sports lottery games. Id. at 1. The Attorney General stated:

[T]he New York Constitution, courts and statutes have historically distinguished between lotteries and wagers on the outcome of sporting events. We find that the Constitution, both through its specific bans on bookmaking and pool-selling and through its general ban on all forms of gambling not expressly authorized, forbids the kind of gambling involved in the proposed sports betting game. We find that, in carving out an exception to the anti-gambling provision of the Constitution so as to empower the Legislature to authorize and prescribe a lottery to be operated by the state, there was no intent on the part of the framers to sanction the kind of gambling involved in the proposed game. We find that both the statutes enacted to forbid gambling and those enacted to authorize and prescribe a certain form of State-run lottery operate to preclude the kind of gambling involved in the proposed game. Finally, we find that the case law of New York permits no other interpretation than that lotteries are forms of gambling essentially based upon random chance and that New York jurisprudence has never deemed betting on the outcome of sporting events to be a lottery

Id. New York's Attorney General concluded that it is "indisputable" that "New York law has viewed lotteries and betting on sports events as two distinct forms of gambling," id. at 4, and that "[t]he two types of gambling have been historically distinct in New York's statutes, case law and, since 1894, constitutional provisions," id. at 11.

New York's Attorney General then addressed Delaware law and, noting that the Delaware Supreme Court had "rejected" portions of the district court's reasoning in NFL, id. at 9 n.12, concluded that "we need not conjecture at length on" the implications of NFL's holding (that Delaware's 1976 games were a permissible "lottery") because, in the subsequent Opinion of the Justices, the Delaware Supreme Court concluded that pari-mutuel sports betting did not constitute a "lottery," id. at 12. The Attorney General stated that the Opinion of the Justices was "of sharp pertinence" to the question before him and then quoted the Delaware court's conclusion that "the pool or pari-mutuel system of wagering has never been considered a lottery by the constitutional draftsmen of our State . . . and that it may not be made so now." Id. at 12. The Attorney General concluded that "the New York courts presented with a sports betting

program under the guise of a state lottery would reason similarly and conclude precisely as the Delaware court did.” Id. at 13.

The Connecticut Attorney General has also concluded that “wagers on the outcome of organized athletic contests (e.g., National Football League Games)” are “not a lottery” and, therefore, are not “authorized legal gambling” under Connecticut law Conn Op. Atty Gen 86-8, at 1 (1986) The Connecticut Attorney General considered sports betting that involved both head-to-head and parlay betting, both fixed-odds and pari-mutuel payoffs, and point spreads, and concluded that such schemes are not a “lottery” and are therefore barred:

[W]hereas random chance is the sole determining factor in present lottery games, a new element of skill would be introduced under the proposed format. While it is virtually impossible to quantify the degree to which a player’s skill in measuring the respective strengths of the opposing teams may enhance his/her opportunity to win, one thing is certain: random chance has lost its exclusive significance.

Id. The Connecticut Attorney General also addressed Delaware law. In particular, the Attorney General noted that the district court in NEL, had “predicted” that sports gambling would be a permissible lottery under Delaware law so long as chance remained the “dominant factor” in any such game, Conn Op Atty. Gen 86-8, at 2, but the Attorney General concluded that the “accuracy of such a prediction has not yet been established,” id. at 3. The reason to question the district court’s prediction, according to the Connecticut Attorney General, was because “[j]ust eight months after the National Football League decision” the Delaware court, in Opinion of the Justices, expressly declined to validate the district court’s “prediction” in this regard. Id. at 3.

Michigan’s Attorney General has also opined on whether gambling “in which players may win prizes by correctly predicting the outcome of sporting events” constitutes a “lottery” under the state’s statute authorizing the Bureau of State Lottery to “operate a state lottery.” Mich. Op. Atty. Gen 6655, at 1 (1990) The Attorney General concluded that “sports wagering

activities” do “not constitute a ‘lottery,’” reasoning that the state supreme court “has consistently held that, because sports wagering activities involve at least some degree of skill on the part of the person placing the wager, such activities do not satisfy the ‘chance’ element and, accordingly, do not constitute a ‘lottery’ under Michigan law .. Id. Accordingly, the Attorney General concluded that the State Lottery did “not have the statutory authority to institute” sports gambling Id. at 3

Finally, the West Virginia Attorney General has opined that the West Virginia constitution’s ban on “lotteries” did not prevent the state from legalizing sports betting because, in the Attorney General’s view, sports betting does not constitute a “lottery”—because of the degree of skill involved. W Va. Op. Atty Gen 8, at 4 (1991). The Attorney General reasoned that “the amount of skill involved in sports betting places this form of gambling outside the parameters of a lottery.” Id. at 4 The Attorney General concluded that, in light of substantial authority, sports betting does not satisfy the “chance” element of a “lottery.” Id. Sports betting involves a significant element of skill, so it is not a lottery:

It would be naive to believe that teams or players are chosen merely on the basis of their names, mascots, jersey colors or numbers.

Those who bet on sports . . . usually take into consideration past records, who has the home field advantage, and a myriad of other factors that may influence the outcome of the event. . . [S]tatistics and other materials pertinent to sporting events are readily available for those who wish to study them and then place an informed bet using reason and judgment. The person making the bet is utilizing his knowledge about the sporting activity in order to enhance his chances of winning. This is the employment of skill.

Id⁹ To similar effect is a 1990 opinion of the Maryland Attorney General interpreting “lottery” as a game of “pure chance” · Md. Op. Atty. Gen. 90-026, at 3 (1990) (“[A] lottery is a scheme for pooling funds from which to distribute prizes by pure chance . . .”).

2. Delaware Courts Would Likely Conclude that Sports Gambling Is Not a “Lottery” for Purposes of the Lottery Exception.

Delaware courts have long defined a “lottery” as “a scheme for the distribution of money or prizes by chance” e.g., Sedgwick, 81 A. at 473, see also State v. Gilbert, 100 A. 410,411 (Del. Ct. Gen. Sess. 1917). There are two competing rules for determining whether a scheme is based on “chance.” Under the “English” or “pure chance” rule, no element of skill may be involved. “[I]f skill plays any part in determining the prize winner, there is no lottery,” because the distribution is not solely by chance. Opinion of the Justices, 385 A.2d at 700 n.8. In contrast, under the “American” or “dominant factor” rule, “if chance is the dominant or controlling factor,” then the “chance” element of a lottery is present. Id. In its 1978 opinion, the Delaware Supreme Court saw no need to recognize either rule definitively and declined to do so Id. (“The Courts of this State have not ruled on whether the ‘pure chance’ or ‘dominant factor’ rule applies in Delaware.”). Although it seems likely that the court would interpret the Lottery Exception to allow only games that meet the English “pure chance” definition, the sports lottery games apparently under consideration would fail under either rule

a. The “pure chance” rule. In Affiliated Enterprises, 5 A 2d 257, the Court in Banc recognized that Delaware had adopted the “English definition” of the term “lottery.” Id. at 259.

⁹ Oregon’s Attorney General has also addressed whether the particular sports pool offered in that state constitutes a “lottery,” and concluded that, under the American rule that Oregon would likely apply, it does. Or. Op. Atty. Gen. OP-6328, at 1. The Attorney General recognized that, if it were to adopt the English rule, the proposed sports pools would not constitute a “lottery.” Id. at 3.

In Eckerd's Suburban, 164 A.2d 873, the Delaware Supreme Court stated that Affiliated Enterprises "should be followed." Id. at 876 Under the English definition, as noted, a game must be one of "pure chance" to qualify as a "lottery." Sports gambling of the type apparently under consideration would not be a game of "pure chance" and therefore would not constitute a "lottery" under the English or "pure chance" rule.

In its 1978 opinion, the Delaware Supreme Court recognized that what definition of "lottery" is appropriate may depend on the purpose for which the term is being defined Opinion of the Justices, 385 A 2d at 700 n.8 ("The decision as to which rule applies often seems to depend upon whether the case is a tax case or a regulation case.'). The English rule is most consistent with the Delaware court's statement that the "lottery" exception is "specific," that it is not a "broad" or "expansive" exception, and that the lottery exception should be "strictly" and "narrowly" construed Id. at 701, 705. Indeed, the common understanding of the term "lottery" is "specific" and "narrow". a "lottery" is a "contest in which tokens are distributed or sold, the winning token or tokens being secretly predetermined or ultimately selected in a chance drawing," Webster's II New College Dictionary 647 (2001); see also Oxford English Dictionary (2d ed. 1989), available at <http://dictionary.oed.com/cgi/entry/00135882> (last visited Apr 24, 2003) (Lottery "An arrangement for the distribution of prizes by chance among persons purchasing tickets. Slips or lots, numbered in correspondence with the tickets, and representing either prizes or blanks, are drawn from a wheel."). The "pure chance" rule is most consistent with this understanding of a lottery, which "in the traditional sense, implies an almost total absence of a participant's 'skill' as having any determining influence upon the ultimate chance of that participant's success." Conn. Op. Atty Gen. 86-8, at 2 The American or "dominant factor" rule strays significantly from this limited understanding.

A broader understanding of the lottery exception would not be consistent with the rule of narrow construction of the Lottery Exception mandated by the Delaware Supreme Court. As the court noted, such a broader understanding would not explain the framers' use of the term "lottery" in the Delaware Constitution. "[P]revailing case law would have guided the 1973 drafters away from the word 'lottery' and along other lines if they had intended to legalize unlimited pool-selling and pari-mutuel wagering" in Delaware. Opinion of the Justices, 385 A.2d at 702. Had the drafters wished to carve out a broad exception to the Constitution's ban on gambling for sports betting, they would have used a more general phrase such as wagering "upon the outcome of future contingent events" See, e.g., Y Op. Atty. Gen 84-F1, at 7 ("If the Legislature had wanted to carve out a general exception to the overall gambling prohibition . . . it knew how to do so"). Had they understood "lottery" to be sufficiently broad to cover sports betting, they likely would not have seen any need expressly to exempt wagering on particular sports, such as horse racing. See generally Opinion of the Justices, 385 A.2d at 697 (stating that "lottery" must be read "in context"). As New York's Attorney General stated, "one may not, in the teeth of canons of construction, expand the scope of the state lottery exception so as to legalize every illegal gambling scheme involving consideration, some element of chance, and a prize." Id.

The cases cited by the Attorney General in his 1976 opinion that applied the broader "dominant factor" rule are therefore inapposite. In those cases, the courts were defining "lottery" in the context of enforcing constitutional provisions or criminal statutes banning lotteries.¹⁰ Their

¹⁰. See, e.g., State v. Ricciardi, 114 A.2d 257, 259 (N.J. 1955) (applying "dominant factor" test); Comtn. v. Laniewski, 98 A.2d 215, 217 (Pa. Super. Ct. 1953) (same); State ex rel. McKittrick v. Globe-Democrat Pub. Co., 110 S.W.2d 705, 713, 717 (Mo. 1937) (en banc) (same) (detailing the vices of lotteries); Comm. v. Plissner, 4 N E 2d 241, 244 (Mass. 1936) (same).

broad constructions served to effectuate the state’s anti-gambling policies. They provide no basis for broadly construing an exception to the Delaware Constitution’s prohibition against gambling that the Delaware Supreme Court has said must be “narrowly and strictly construed.” See Ky Op Atty. Gen. 99-8, at 5 (concluding that “the broad definition of a lottery developed by the courts” to enforce the constitution’s lottery prohibition “does not apply” to the narrow exception to that prohibition for a “state lottery”), *cf.* N.Y. Op Atty. Gen 84-F1, at 7 (relying on such cases to support a broad construction of the exception “would require assent to the novel proposition that the range of the state’s authority to operate a lottery is co-extensive with the reach of the courts to enforce the anti-lottery provisions of the penal law,” and would permit “the ingenuity of criminals to devise new gambling methods” to define “what the state may mount as a legal lottery. Such transformation of forbidden criminal behavior into permissible state action would require an alchemy unknown to the legal arts.”).

b. The “dominantfactor” rule. Even if Delaware were to adopt the “dominant factor” rule—which holds that a game in which skill is present may still qualify as a “lottery” if chance remains the “dominant” or “controlling” factor—sports gambling of the type apparently under consideration still would not qualify as a “lottery,” because of the significant role that skill would play in such sports gambling. Under the “dominant factor” rule, if both chance and skill are present in a gambling scheme, it constitutes a “lottery” only if chance is the “dominating element.” People ex rel. Ellison v Lavin, 71 N.E. 753, 755 (N.Y. 1904), *see also* United States v. Marder, 48 F.3d 564, 569 (1st Cir. 1995) (stating that “chance must predominate over skill”).

Sports betting combines both skill and chance, but the element of chance, though perhaps significant, is not “dominant.” Typical sports bettors gather and analyze information, sometimes in significant quantities, about the nuances of the sports on which they bet. They read about the

teams that are facing-off in particular games-their standings, records, box scores, game summaries, injuries, and recent transactions. They then weigh the probabilities of each team winning and compare their determinations to those of the odds-maker (in this case, the state). See N.Y. Op. Atty. Gen. 84-F1, at 10 (The “exercise of [a] bettor’s judgment in trying to select the winners or losers” of an NFL football game, and to “figure the point spreads,” requires “substantial (not ‘slight’) skill.”) That the outcome of a game turns on a number of factors, some of which are unpredictable, is beside the point. Winning at anything depends on a combination of luck and skill. That luck is not “dominant” is evidenced by the demise of Delaware’s 1976 football betting scheme, which resulted from the state’s lack of expertise in running a sports-betting operation compared to the sophistication of bettors that took advantage of what they saw as “value” bets being offered by the state. See James H. Frey, Gambling on Sport-Policy Issues, 8 J. Gambling Stud. 351, 354, 359 (1992).”

The long line of cases concluding that gambling on other sports, such as horse racing, is not a “lottery,” e.g., Oneida County Fair Bd. v. Smylie, 386 P.2d 374 (Idaho 1963) (surveying a vast body of cases holding that pari-mutuel horse betting is not a “lottery”), support the conclusion that gambling on football, baseball, or basketball is not a lottery. Delaware’s Constitution distinguishes “lotteries” from pari-mutuel wagering on horse races by separately exempting each from the broad gambling prohibition. See Del. Const. art. II § 17(a), (c). This distinction strongly suggests that wagering on sports, such as horse racing, does not fall within the framers’ understanding of a “lottery.” “For decades,” the Delaware Supreme Court stated,

¹¹ The district court in NFL erred in concluding that chance, not skill, was the “dominant determining factor” in Delaware’s 1976 games. 435 F. Supp. at 1385. Its conclusion was inconsistent with its recognition that “educated predictions can be made” about the factors relevant to the games’ outcomes. Id. at 1385.

“by the great weight of authority, pari-mutuel betting has been held not to be a lottery.” Opinion of the Justices, 385 A.2d at 702. Horse-race wagering is not a “lottery” because of the skill involved in betting on the sport:

In a horse race the winner is not determined by chance alone, as the condition, speed and endurance of the horse, and the skill and management of the rider are factors affecting the result of the race. The bettor has the opportunity to exercise his judgment and discretion in determining the horse on which to bet.

Gandolfo v. La. State Racing Comm’n, 78 So. 2d 504, 509 (La. 1954) With respect to the skill element, the New York Attorney General concluded, football betting is no different:

Accepting bets on the outcome of a football game is the legal equivalent of accepting bets on the outcome of a horse race. Accepting bets on a parlay of 4 to 14 football games does not constitute running a lottery any more than accepting bets on the daily double, a 4-horse or 14-horse parlay transforms a bookmaker or pool-seller into a lottery operator

N.Y. Op. Atty. Gen. 84-FI, at 11. Indeed, the Michigan Supreme Court long ago stated that “it would be straining the law to include” betting on baseball, horse racing, and other sports “within the category of lotteries.” People v. Reilly, 15 N.W. 520, 522 (Mich. 1883) And a Delaware court would be unlikely to place much weight on an attempt by the state to distinguish sports betting (like the 1976 games) from horse racing. Such a characterization would represent a 180-degree turn from Delaware’s position in the NFL litigation, in which it stated that “all bets” made in the 1976 games “would be placed on a pari-mutuel basis . . . similar to the way people do when they go to the race track and all the bets are in a pool.” Dep. Tr., Direct Exam. of Peter M. Simmons 107-08 (Aug. 21, 1976)

Sports gambling is meaningfully different from those games of chance that courts have consistently found to be lotteries. For example, courts have found games such as dice, bingo, lotto, slot machines, and keno all to be based purely on chance. Similarly, courts have found guessing games, such as a betting scheme in which participants attempt to guess the number of

marbles in a glass jar, to be based almost totally on chance, or “luck” Even after the exercise of “research, investigation, skill, and judgment,” a player is “unable to foresee” the “the forms and conditions” of the event’s occurrence. Ellison, 71 N.E. at 754 There is no colorable argument that skill plays any role in such games, or even that there is any element of such contents to which skill could be applied. The winner is selected literally at random. These guessing games are a far cry from sports gambling.

CONCLUSION

Sports gambling cannot constitute a “lottery” under the Delaware Constitution if it involves pari-mutuel wagering or pool selling, and it cannot meet the percentage-based requirements of the Delaware Lottery Statute if it involves fixed payouts Regardless of the form of the payout or whether it involves pool-selling, it cannot constitute a “lottery” under the reasoning found persuasive by the Attorneys General of surrounding states. To obey the Delaware Supreme Court’s directive that the Lottery Exception be narrowly and strictly construed, the exception must be deemed to allow only games of “pure chance.” Sports gambling of the type apparently under consideration would not constitute a “lottery” either under that definition or under the more expansive “dominant factor” rule. ¹²

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¹² If the Delaware Constitution were deemed to permit the state to offer sports lottery games, federal law would independently limit the state’s ability to do so. The Professional and Amateur Sports Protection Act (“PASPA”), 28 U.S.C. §§ 3702-3704, generally prohibits states from legalizing sports gambling. Its prohibition is qualified, however, with respect to a state sports lottery “to the extent that the scheme was conducted by that State” between January 1, 1976 and August 31, 1990. *Id.* § 3704(a)(1). This memorandum does not address the extent of PASPA’s limits on Delaware’s ability to offer sports lottery games. If and when any new sports lottery games are recommended, the League will assess those particular games in light of PASPA’s prohibition as qualified by § 3704(a)(1).