

KLETT ROONEY LIEBER & SCHORLING

A PROFESSIONAL CORPORATION

THE BRANDYWINE BUILDING
1000 WEST STREET, SUITE 1410
P.O. BOX 1397
WILMINGTON, DELAWARE 19801-1397
TELEPHONE (302) 552-4200
FACSIMILE (302) 552-4295

MEMORANDUM

DATE: May 5, 2003

RE: Review of NFL's opinion regarding constitutionality of sports

On November 19, 2002, we furnished a memoranda discussing certain legal issues arising under federal and State law and associated with the renewal of sports betting games conducted by the State. Recently, we have reviewed an April 29, 2003 memorandum prepared by counsel for the National Football League ("NFL Memorandum"). While the NFL Memorandum does not consider the federal law issues discussed in our November 19 memorandum, it concludes that sports betting is not permissible under Delaware's Constitution. We disagree and summarize below our difference of opinion with the NFL Memorandum. From the General Assembly's perspective, though, it should hardly be surprising that lawyers may differ regarding unwritten legislation yet to be considered by our courts. Instead, Members of the House and Senate should exercise their legislative discretion with the assumption that the NFL and others will challenge any new game just as they did in 1977. We believe that any future case, like the NFL's earlier lawsuit, will be unsuccessful.

In reviewing the NFL Memorandum, we note the following:

- **If the NFL's lawyers are correct, then "Powerball" and, perhaps, other games violate Delaware's Constitution.** The NFL Memorandum concludes, in part, that sports betting cannot be a "lottery" if the winning prize is determined by pari-mutuel principles. However, the prizes in many lotteries, including "Powerball," are, in fact, determined by pari-mutuel principles. In the the Powerball lottery, the jackpot grows and until there is a winning ticket or tickets and "the pot" (after the State's share and other expenses are withdrawn) is divided among the winning tickets. This is precisely how a pari-mutuel horserace betting system works. Bettors place bets on horses (instead of numbers), and the winning bettors' payoffs are determined by the total amount bet and the number of successful bettors, after the racetrack subtracts its share of the proceeds. Thus, the mere presence of pari-mutuel or pool-selling principles does not render what would otherwise constitute a lottery impermissible.

- **The NFL Memorandum ignores the fact that none of the Justices in the *Jai-alai* Advisory Opinion disagreed with the *NFL Case*.** In their opinion, the Justices avoided the conclusion apparently reached by the NFL's lawyers:

“In short, in *NFL* the Court was analyzing a “lottery” conducted under terms and conditions substantially different from those presented here.”

Opinion of the Justices, 385 A.2d 695, 704 (Del. 1978) (the “*Jai-alai Advisory Opinion*”).

- **The NFL’s memorandum, like many of the analyses upon which it relies, ignores the presence of point spreads – an important aspect of sports betting distinguishing it from other betting games and, we believe, qualifying it as a lottery under the Delaware Constitution.** In horse racing (and under the facts of the *Jai-alai Advisory Opinion*), bettors attempt to pick the winner. Total proceeds are divided among all of those who did so. Picking the winner may not be easy, but with proper study of the relevant factors (prior results of the entrants, condition of the track, etc.), one can make an “educated guess” about the outcome. In other words, the bettor’s skill will improve his chances of successfully picking the winner (or “place” or “show” horse). But the bet is simple – one need only pick the winner. The margin of victory is irrelevant.

With sports betting, though, one must not only pick the winner, but one must predict the margin of victory. If established with the care taken in, say, Las Vegas, the *point spread* dramatically reduces the predominance of skill as an outcome determinant. In other words, chance predominates over skill. The Court for the District of Delaware, in *National Football League v. Governor of Delaware*, 435 F.Supp. 1372 (D.De1. 1977)(the “*NFL Case*”), illustrated this point by examining the record of a famous (or infamous) sports “tout.” Jimmy “the Greek” Snyder was found to have successfully predicted the winner of 101 out of 126 professional football games. However, his selections “beat the spread” only 38 out of 126 times. Thus, the Court concluded that the addition of a point-spread essentially made the game one of chance. That conclusion was not disturbed by the members of the Delaware Supreme Court in the *Jai-alai Advisory Opinion*.

- **The authors of the NFL Memorandum ignore the advisory nature of the opinion in the *Jai-alai Advisory Opinion*.** Under Delaware law, the opinion in the *Jai-alai Advisory Opinion* has no binding precedential effect. See *Satterthwaite v. Highfield*, Del.Supr., 152 A. 45 (1930); Holland, *The Delaware State Constitution, A Reference Guide* (2002) at 143 (“Since the nature of this advisory function is nonjudicial, it does not constitute an adjudication by the Supreme Court. Accordingly, advisory opinions by the justices do not have a binding precedential effect.”). Moreover, the Justices who offered their advisory opinions in the *Jai-alai Advisory Opinion* could not agree on a single set of advice and offered two separate opinions – one of which disagrees with the NFL’s lawyers.

- **The NFL Memorandum incorrectly suggests that Delaware courts have considered the distinction between the “English” rule regarding lotteries (in which the outcome must be based on “pure chance”) and the “American” rule (in which chance must merely be the “predominant factor” – some skill may be involved). Moreover, the NFL claims, our courts have adopted the English rule. Not so.** The NFL Memorandum cites to *Affiliated Enterprises v. Waller*, 5 A.2d 257 (DelSuper. 1939) for the foregoing proposition, but the *Affiliated Enterprises* Court did not consider the “pure chance”/“dominant factor” distinction. In fact, in its advisory opinion regarding betting on jai-alai, the Delaware Supreme Court expressly stated that “[t]he Courts of this State have not ruled on whether the ‘pure chance’ or ‘dominant factor’ rule applies in Delaware.” *Jai-alai Advisory Opinion*, 385 A.2d at 700 n.8.
- **The NFL Memorandum ignores changes to Delaware’s lottery statute enacted since the 1977 District Court case.** In the *NFL Case*, the District Court held that a sports betting game which gave fixed payouts to winners violated Delaware’s lottery statute which required that 45% of the amount received be returned in prizes. The Lottery Director argued that the 45% requirement *would* be met over time, but the *NFL* Court expressed doubt whether the statute could be read that way. Since the *NFL Case*, though, the lottery statute has been amended to allow the 45% requirement to apply over time. Were the *NFL Case* to be decided today, presumably all three 1977 games, rather than two, would be found consistent with Delaware law.
- **The memorandum relies heavily on “opinions” from attorney generals in other states applying other states’ laws.** The NFL Memorandum quotes at length from the opinions of attorneys general from other states, opining that sports betting is not permissible under those state’s statutes or constitutions. In some cases, those attorneys general discuss the *Jai-alai Advisory Opinion* and the *NFL Case*. Interestingly, although perhaps not surprisingly, the NFL Memorandum ignores the Oregon Attorney General’s opinion in which he concluded that a sports betting game run by the Oregon State Lottery Commission was permissible under an Oregon constitutional provision permitting for a state lottery. We see little point examining the views of attorneys general from other states – each of whom had different circumstances, legal and political, to consider.

In sum, then, we believe the NFL Memorandum places too much reliance on an advisory opinion that is not binding precedent, places too much reliance on the opinions of attorneys general from other states, and gives too little regard to the District Court’s opinion in the *NFL Case* – a case in which the NFL attempted to stop a sports betting game run by the Delaware Lottery and lost.