

STATE OF TENNESSEE

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Opinion No. 05-159

Legality of Texas Hold'Em Poker Tournaments with Jackpot Prize

QUESTION

Whether poker tournaments charging an admission fee to play “Texas Hold’Em” for a chance to win a prize are legal in Tennessee.

OPINION

No. The facts presented in this opinion request would be sufficient to support a finding by a trier of fact that a poker tournament charging an entry fee to play poker and to have the chance to win a prize constitutes “gambling” under Tennessee law. Additionally, a “Texas Hold’Em ” poker tournament, with the opportunity to win a jackpot prize, could be considered a lottery prohibited by TENN. CONST. art. XI, § 5 and Tenn. Code Ann. § 39-17-506. The described pay to play poker tournaments for a chance to win a prize remain prohibited under the Tennessee Charitable Gaming Implementation Law, Tenn. Code Ann. §3-17-102(8)(B). This Opinion is not based on an investigation of how a particular game of chance has or will in practice be conducted, but is solely based on the facts provided in the opinion request.

ANALYSIS

1. The pay to play poker tournament with a chance to win a jackpot prize violates Tennessee’s gambling statutes.

Section 37-17-501(1) of Tennessee Code Annotated defines “gambling” as “risking anything of value for profit whose return *is to any degree contingent on chance, or any games of chance associated with casinos, including but not limited to, slot machines, roulette wheels and the like . . .*” (emphasis added). This broad definition includes the poker tournament scenario presented. The Sentencing Commission Comments leave no doubt that the poker tournament at issue is a prohibited form of gambling. “The Commission intends to include *any scheme* by which value is risked upon a chance for greater value as a ‘gambling’ offense. The definition of ‘gambling’ includes lotteries, chain or pyramid clubs, numbers, pinball, *poker* or any as yet unnamed scheme where value is risked for profit.” (emphasis added). The legislature approved the publication of the Sentencing Commission Comments to the 1989 revisions to the criminal code. *See* 1989 Tenn. Pub.

Acts, ch. 591, § 114. Therefore, the comments can be used as evidence of the legislature's intent as to the inclusion of poker as a gambling offense. *See* NORMAN J. SINGER, SUTHERLAND STAT. CONST. § 48.09 (5th ed. 1992).

The current criminal code applies the definition of "gambling" to Tenn. Code Ann. §§ 39-17-502 and 39-17-503, which respectively prohibit "gambling" and "gambling promotion." Section 39-17-502 provides: "(a) A person commits an offense who knowingly engages in gambling. (b) The offense of gambling is a Class C misdemeanor." It is important to note that enforcement of the state's prohibition of gaming is within the responsibility of the district attorneys general who must decide whether the facts in a particular situation warrant prosecution under these statutes. *See* Tenn. Code Ann. § 8-7-103(1); *State v. Superior Oil, Inc.*, 875 S.W. 2d 658 (Tenn. 1994). Those conducting and promoting such an event wherein entrants must pay for the chance to win valuable prizes could be found by an objective trier of fact to violate the state's prohibition against gambling or gambling promotion. Tenn. Code Ann. § 39-17-503 sets forth the following elements of a gambling promotion:

- Gambling promotion--(a) A person commits an offense who knowingly induces or aids another to engage in gambling, and:
- (1) Intends to derive or derives an economic benefit other than personal winnings from the gambling; or
 - (2) Participates in the gambling and has, other than by virtue of skill or luck, a lesser risk of losing or greater chance of winning than one (1) or more of the other participants.
- (b) The offense of gambling promotion is a Class B misdemeanor.

Furthermore, those regularly conducting such contests could be in violation of Tenn. Code Ann. § 39-17-504, which prohibits aggravated gambling promotion:

- Aggravated Gambling Promotion--(a) A person commits an offense who knowingly invests in finances, owns, controls, supervises, manages or participates in a gambling enterprise.
- (b) For purposes of this section, "gambling enterprise" means two (2) or more persons regularly engaged in gambling promotion as defined in Section 39-17-503.
- (c) The offense of aggravated gambling promotion is a Class E felony.

To pay to play poker for a chance to win a jackpot prize provides a basis sufficient to permit a trier of fact to find that game participants have engaged in "gambling." It follows that the promoters of the games could also be found to have committed the offense of "gambling promotion" in violation of Tenn. Code Ann. § 39-17-503. Plainly, the promoters know that the prizes to be awarded are an inducement to the participants to make a payment upon entry to the tournament in order to have a chance to win the prize. The promoters appear to derive an economic benefit from the tournament in the form of "entry fees" and possibly a portion of each hand's winnings. In these

circumstances, a trier of fact could reasonably find all of the elements of the offense of “gambling promotion.”

2. A trier of fact could conclude that the proposed pay to play poker tournament with a chance to win a jackpot prize constitutes an illegal lottery, in violation of Tenn. Code Ann. § 39-17-506 and Article XI, § 5 of the Tennessee Constitution.

Tenn. Code Ann. § 39-17-501(5) defines “lottery” as “the selling of anything of value for chances on a prize or stake” In the pay to play poker tournament scenario at issue, the sponsors or promoters are, in effect, selling (through the entry fee charged) the chance to win money playing poker hands and selling a chance to win a prize or stake. Therefore, the additional element of a jackpot prize may cause the poker tournament to be both illegal gambling and an illegal lottery.

Early Tennessee decisions defined a lottery as “a game of hazard in which small sums are ventured for the chance of obtaining a larger value either in money or articles.” *France v. State*, 65 Tenn. 478, 484 (1873). Under the traditional test, three elements must be present in order for a transaction to be considered a lottery: (1) chance, (2) prize, and (3) consideration. *State ex rel. District Attorney General v. Crescent Amusement Co.*, 170 Tenn. 351, 357, 95 S.W.2d 310, 312 (1936). All three elements are present in the proposed pay to play poker tournament that includes an opportunity to win a jackpot prize, making the pay to play poker tournament players and sponsors subject to criminal penalties.

To determine whether the required element of “chance” is present, courts look at the extent to which distribution of prizes is based upon chance as opposed to skill. Most courts apply a “dominant factor” test, under which a type of gambling is a lottery when chance dominates the distribution of prizes even though the exercise of some degree of skill, judgment or research is present. *State v. Dahlk*, 330 N.W. 2d 611, 617 (Wis. Ct. App. 1983); *Morrow v. State*, 511 P.2d 127, 128-9 (Alaska 1973). But it is the character of the contest itself, the particular facts of the game itself, not the skill or lack of skill of an individual participant that determines whether the game is one of chance or skill. *Engle v. State*, 90 P.2d 988, 992 (Ariz. 1939). *See also* Op. Tenn. Att’y Gen. No. 99-084 (April 5, 1999) (fishing tournament in which entrants pay fees with an opportunity to receive cash and other prizes constituted gambling under Tenn. Code Ann. § 39-17-502(a)). It is not the name of the game that determines its legality, but the nature of the game itself, however skillfully disguised, must be analyzed to ascertain if it is a prohibited lottery. *Bell Gardens Bicycle Club v. Dept. of Justice*, 42 Cal. Rptr.2d 730, 746-7 (Cal. Ct. App. 1995). Games which have been deemed games of skill, rather than games of chance, are chess, checkers, bowling, baseball, archery, golf and spelling contests. 38 Am. Jur. 2d *Gambling* § 55 (2005) (citations omitted).

The Tennessee Supreme Court has examined the legality of commercial bingo operations in which cash prizes are awarded. *Secretary of State v. St. Augustine Church/St. Augustine School*, 766 S.W.2d 499 (Tenn. 1989). The court found that Article XI, Section 5 of the Tennessee Constitution prohibited the General Assembly from authorizing the game of bingo, “under the auspices of various charitable, religious, fraternal and other nonprofit organizations” as an exemption from the State’s general gambling laws and a way of fundraising. *Id.* The Court deemed

it an ineffective means to circumvent the constitutional prohibition against lotteries for the General Assembly to attempt to define the consideration paid by a bingo participant as a “charitable contribution rather than a wager.” *Id.* at 501. The “game of bingo for any commercial purpose, charitable or otherwise,” as described in that case, was found to contain the three elements of a lottery: prize, chance and consideration. *Id.* at 501-02.

While Tennessee courts have not yet addressed the question of skill versus chance in the particular factual context of a pay to play poker tournament for a chance to win a jackpot prize, other state courts have. In *State v. Schlein*, 854 P.2d 296 (1993), a poker tournament in which entrants were charged a fee and prizes awarded was considered a game of chance. The facts in *Schlein* were: (1) there was an entry fee of \$150 per participant to the poker tournament; (2) the poker tournament involved the playing of cards, betting, and the exchange of money which took place at a house; and (3) the winners of the tournament were to receive cash prizes. The defendants were convicted for gambling. In some instances, the rules of the poker tournament concerning how someone who paid the entry fee might win the “jackpot” prize are announced at the tournament and may have absolutely nothing to do with the poker game itself. Who, if anyone, wins the prize may depend solely on chance. *Bell Gardens Bicycle Club v. Dept. of Justice*, 42 Cal. Rptr.2d 730 (scheme of jackpot prize appended to pay to play poker constituted an illegal lottery).

The Rhode Island Supreme Court has advised:

The fundamental nature of such games (poker and blackjack) is chance - - A player’s skill, no matter how good or bad, does not and cannot control the randomness inherent in the ‘deal’ of the cards. Stated another way, the skill of the player may increase the player’s odds of winning but ultimately the player’s skill cannot determine the outcome, regardless of the degree of skill involved. Chance, being the nature of the determining factor of the game, dominates over skill.

In re Advisory Opinion to the Governor, 856 A.2d 320 (R.I. 2004) (quoting *Opinion of the Justices*, 795 So. 2d 630, 643 (Ala. 2001)). A backgammon tournament in which the players posted a fee, and prizes were paid out of the pool created by both the fees and an additional amount from the sponsor was considered a game of chance in *Boardwalk Regency Corp. v. Attorney General of State of N. J.*, 457 A.2d 847, 850 (N. J. Super. L.1982).

Article XI, Section 5 of the Tennessee Constitution authorizes a state lottery of the type “such as in operation in Georgia, Kentucky and Virginia in 2000.” TENN. CONST. art. XI, § 5. The Tennessee Constitution’s ban of lotteries such as the pay to play poker tournaments with an opportunity to win a jackpot prize remains. *Id.* Significantly, the 2002 amendments to Article XI, Section 5 did not modify the meaning of “lottery” as interpreted by Tennessee courts. Op. Tenn. Att’y Gen. No. 05-068 (May 3, 2005). Section 5 specifically states that it does not authorize “games of chance associated with casinos, including, but not limited to, slot machines, roulette wheels, and the like.” Notably, this same language is included in the definition of gambling at Tenn. Code Ann. § 39-17-501, to wit: “[o]r games of chance associated with casinos, including, but not limited to, slot

machines, roulette wheels, and the like.”

3. The pay to play poker for a chance to win a jackpot prize event remains prohibited by The Tennessee Charitable Gaming Implementation Law, Tenn. Code Ann. § 3-17-101 *et seq.*

The Tennessee Charitable Gaming Implementation Law, enacted in 2004, allows certain games of chance under strict time and registration requirements. The games of chance which are allowed if the sponsor meets all requirements of that law are raffles, reverse raffles, cakewalks and cakewheels. Tenn. Code Ann. § 3-17-102(8)(A). However, “pulltabs, punchboards, bingo, instant bingo, video lottery, instant and on-line lottery games of a type operated by the Tennessee education lottery corporation, keno and games of chance associated with casinos including, but not limited to, slot machines, roulette wheels, and the like” are expressly prohibited. *Id.* The Tennessee Charitable Gaming Implementation Law further provides at Tenn. Code Ann. § 3-17-102(8)(B) that “any type of lottery game not expressly authorized in this subdivision (8) is prohibited.” Therefore, the proposed Texas Hold’Em poker tournament is prohibited under this statute as well.

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