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The Honorable Keith Burdette
The Senate of West Virginia
Office of the President
Charleston, West Virginia 25305

Dear President Burdette:

This is in response to your request for an opinion regarding the legality of sports betting. Specifically, you ask whether sports betting, permitting betting on all sports events, can be legalized by statute or whether it would require an amendment to the West Virginia Constitution.

West Virginia Constitution Article VI, § 36 provides in pertinent part as follows:

> The legislature shall have no power to authorize lotteries or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprise tickets in this State . . . .

The first issue to be resolved is whether sports betting may be deemed a lottery and therefore fall within the above-referenced constitutional prohibition. Our supreme court has determined that in order for a lottery to exist, three essential elements must be present. They are consideration, prize and chance. Any scheme or device which allows a person who provides consideration, in the form of money or other things of value, to receive a prize or nothing, as may be determined predominately by chance, is a lottery. State v. Wassick, 156 W. Va. 128, 191 S.E.2d 283 (1972); State v. Greater Huntington Theatre Corp., 133 W. Va. 252, 55 S.E.2d 681 (1949); State v. Hudson, 128 W. Va. 655, 37 S.E.2d 553 (1946). If the dominating element of a game is that of knowledge or skill, instead of pure chance, a lottery does not exist. 45 Op. Att'y Gen. 605 (1954).

When analyzing sports betting in reference to the three-pronged definition adopted by the West Virginia courts, it is evident that the elements of prize and consideration are present inasmuch as the bettor must submit some amount of money to place a bet, and then if his bet is accurate he may receive a monetary

prize. Therefore, the issue arises as to whether the element of chance, as a predominant factor in the determination of who or who does not receive a prize, exists in this instance.

While lotteries are generally recognized as a species of gambling, a distinction is usually made between certain types of gaming or gambling, and lotteries. The term "gambling" is broader and encompasses more than the term "lottery." All lotteries are a form of gambling, but all gambling need not be considered a lottery. Although some gambling games have elements of a lottery, they have not been traditionally considered as coming within the purview of laws prohibiting lotteries. See, e.g., Bender v. Arundel Atenal, Inc., 248 Md. 181, 236 A.2d 7 (1967). Of course, an example of the power of a legislative body to permit non-lottery type gambling is found in W. Va. Code, Chapter 19, Article 23 providing for horse and dog racing.

Because of the obvious similarity between betting on horse and dog racing and betting on sports, and the absence of any case law dealing with sports betting in the present context, it is helpful to look at various cases involving horse and dog racing. No West Virginia cases exist, but in Oneida County Fair Board v. Smylie, 386 P.2d 374 (Idaho 1963), three county fair boards and a quarter horse breeder petitioned the Supreme Court of Idaho to force the governor of Idaho to appoint members of the Idaho Horse Racing Committee as required by a new law which created the Committee. The members were to be appointed by the governor, and the Committee was authorized to establish a pari-mutuel system of betting on horse racing. The governor refused to make the required appointments, alleging that the law was an attempt to authorize a lottery in violation of an Idaho constitutional provision, similar to West Virginia's, which prohibited the state legislature from authorizing lotteries.

In analyzing the issue of whether betting on horse racing constitutes a lottery, the Idaho Supreme Court surveyed a number of other states with substantially the same constitutional or statutory prohibition and whose courts have ruled upon the issue. The Idaho court found that courts in Arizona, Arkansas, California, Colorado, Illinois, Kentucky, Louisiana, Michigan, New York, Oregon, Texas and Utah have all ruled that betting and/or pari-mutuel betting on horse racing does not constitute a lottery in violation of constitutional or statutory prohibitions against lotteries. See Engle v. State, 53 Ariz. 458, 90 P.2d 988 (1939) (Arizona Supreme Court held that pari-mutuel betting does not constitute a lottery); Longstreth v. Cook, 215 Ark. 72, 220 S.W.2d

433 (1949) (Arkansas Supreme Court upheld statute legalizing pari-mutuel betting on horse racing); People v. Postma, 69 Cal. App. 2d Supp. 814, 160 P.2d 221 (1945) (appellate department of Superior Court of County of Los Angeles held that book making on horse races is not a lottery); Ginsberg v. Centennial Turf Club, 126 Colo. 471, 251 P.2d 926 (1952) (Colorado Supreme Court upheld statute legalizing pari-mutuel betting); People v. Monroe, 349 Ill. 270, 182 N.E. 439 (1932) (Illinois Supreme Court upheld statute legalizing pari-mutuel method of wagering at race tracks); Commonwealth v. Kentucky Jockey Club, 238 Ky. 739, 38 S.W.2d 987 (1931) (Kentucky Court of Appeals upheld statute permitting pari-mutuel system of betting on horses); Gandolfo v. Louisiana State Racing Commission, 227 La. 45, 78 So.2d 504 (1955) (Louisiana Supreme Court upheld statute creating Louisiana State Racing Commission and authorizing pari-mutuel wagering on horse racing); People v. Reilly, 50 Mich. 384, 15 N.W. 520 (1883) (Michigan Supreme Court in 1883 upheld betting on horses as not in violation of constitutional prohibition against lotteries); Rohan v. Detroit Racing Ass'n., 314 Mich. 326, 22 N.W.2d 433 (1946) (Michigan Supreme Court ruled wagering on horse races, this time under the pari-mutuel system, did not violate Michigan's constitutional prohibition against lotteries); Reilly v. Gray, 77 Hun. 402, 28 N.Y.S. 811 (1894) (a New York case wherein it was held that selling pools on races did not constitute a lottery); People ex rel. Lawrence v. Fallon, 4 App. Div. 82, 39 N.Y.S. 865 (1896) (a New York case wherein it was held that wagering on horse racing did not constitute a lottery); Multnomah County Fair Ass'n v. Langley, 140 Or. 172, 13 P.2d 354 (1932) (Oregon Supreme Court ruled that a pari-mutuel system of betting on horse races was not a lottery); Utah State Fair Ass'n v. Green, 68 Utah 251, 249 P. 1016 (1926) (Utah Supreme Court upheld law authorizing pari-mutuel system of betting on horse racing); Panas v. Texas Breeder's & Racing Ass'n, Inc., 80 S.W.2d 1020 (1935) (Texas Court of Civil Appeals held that system similar to pari-mutuel system of betting on horse racing was not a lottery). This appears to be the majority rule in states with prohibitions similar to the prohibition found in Article VI, § 36 of the West Virginia Constitution.

In Longstreth, the Arkansas Supreme Court stated:

> Horses are selected for entrance in a particular race by the Association, and the horses names are listed or lined up on a daily racing card, and there is sold a racing form which shows the weight carried by each horse and its handicap depending on the past performances of the horse in previous races at that or other tracks.

This weight handicap is intended in some measure to equalize the speed of the horses, and the amount thereof depends upon the horse's record in prior races run within the preceding twelve months.

The owners have trainers who are skilled in handling horses with the purpose of increasing their speed and making them more responsive to the control of the jockeys.

Many persons attend the races for the thrill of witnessing the horses as they cross the finish line, and add to the thrill and interest by betting on some horse without knowledge of the information disclosed by the form sheets. . . . But sources of information now are provided . . . by which bettors may bet with more discrimination and with improved chances of selecting or picking a winner.

. . . .

Followers of racing who for long periods of time have studied the records of the horses choose as their selections the horse which in their opinion will be most likely to win and these are for sale and may be purchased at the track. Neither the Jockey Club nor any one connected with it fixes the odds which will prevail on any horse. The bettors themselves do this and it is done through the number of bets made and the amount thereof on particular horses.

215 Ark. at ___, 220 S.W.2d at 436.

The Colorado Supreme Court in Ginsberg held:

While an element of chance no doubt enters into horse and dog races, it does not control them. The bettor makes his own choice of the animal he believes will finish the race in first, second or third place. In making that selection he has available the previous records of the animal and the jockey, and various other facts which he may take into consideration in choosing the animal upon which he places a wager.

126 Colo. at ___, 251 P.2d at 929.

Likewise, in Rohan the Michigan Supreme Court noted:

> The fact that a better cannot determine the exact amount he may win at the time he places his bet, because the odds may change during the course of betting on a race, does not make the betting a mere game of chance, since the better can exercise his reason, judgment, and discretion in selecting the horse he thinks will win. Horse racing, like foot racing, boat racing, football, and baseball, is a game of skill and judgment and not a game of chance.

314 Mich. at ___, 22 N.W.2d at 440 (emphasis added).

It is apparent that the infinite variety of existing games range from those requiring pure skill to those determined solely by the luck of the draw. There are very few in which chance plays no part at all and there are many in which skill plays at least some part. The distinction between games dependent on chance and those dependent on skill is, of course, necessarily one of degree. The test is not the relative amount of both skill and chance in viewing the scheme as a whole; rather, it is whether the existing chance in the system is an integral part which influences the result. See Sherwood and Roberts-Yakima, Inc. v. Leach, 67 Wash. 2d 630, 409 P.2d 160 (1965).

Analyzing the activity of sports betting by the three-part standard of consideration, prize, and chance, and further in light of the above-cited authority, it appears that the amount of skill involved in sports betting places this form of gambling outside the parameters of a lottery. As in horse and dog racing, betting on sports activities is usually performed by those who either have or think they have a degree of knowledge about the game in question. 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, just as those who bet on horse and dog racing, 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. Just as horses and dogs have trainers who are employed to enhance the animals' performance, a sports team or a sports participant has a coach who is given the task of increasing the team's or participant's chances of winning. Furthermore, statistics 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.

It should also be noted that the process by which the result is determined in a lottery is purely random. The result of a sporting event, however, is in part determined by the skill of the participants and a variety of other factors that are controlled to some degree by the players.

In conclusion, it is our opinion that sports betting does not fall within the state's constitutional prohibition against lotteries, and that it may be legalized by appropriate legislation.

Very truly yours,

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