

1. Definition

Gambling – “A person engages in gambling if he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he or someone else will receive something of value in the event of a certain outcome. Gambling does not include bona fide business transactions valid under the law of contracts, including but not limited to contracts for the purchase or sale at a future date of securities or commodities, and agreements to compensate for loss caused by the happening of chance, including but not limited to contracts of indemnity or guaranty and life, health or accident insurance.” Ala. Code 1975§ 13A-12-20(4)(2009).

The Supreme Court “held ... that statutory definition of gambling was not unconstitutionally vague as applied.” *Barber v. Jefferson County Racing Ass'n, Inc.* 960 So.2d 599 (Ala.,2006)

“The elements of gambling under § 13A-12-20(4) are the same as those at *common law*, namely, the payment of (1) consideration, for the (2) chance to win (3) a prize. See *Grimes v. State*, 235 Ala. at 193, 178 So. at 74; Kyle D. Craddock, *The Cardstock Chase, Trading Cards: A Legal Lottery?* 8 Gaming L.Rev. 310, 314 (2004) (the ‘three basic [common-law] elements of gambling [are] consideration, chance, and prize’).” *Barber v. Jefferson County Racing Ass'n, Inc.* 960 So.2d 599, 616 (Ala.,2006)

“[T]he meanings of the words ‘chance’ and ‘consideration’ are easily apprehended by reference to ‘judicial determinations [and] the common law,’ at which they ‘possess a common and generally accepted meaning.’ *Barber v. Jefferson County Racing Ass'n, Inc.* 960 So.2d 599, 616 (Ala.,2006) *Citing Bowers v. State*, 283 Md. at 125, 389 A.2d at 347. [T]he element of consideration is defined in § 13A-12-20(11). *Barber v. Jefferson County Racing Ass'n, Inc.* 960 So.2d 599, 616 (Ala.,2006).

Consideration – “Something of value. Any money or property, any token, object or article exchangeable for money or property or any form of credit or promise directly or indirectly contemplating transfer of money or property or of any interest therein, or involving extension of a service entertainment or a privilege of playing at a game or scheme without charge.” Ala. Code 1975§ 13A-12-20(11)(2009).

Chance, contest of – “Any contest, game, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein.” Ala. Code 1975§ 13A-12-20(3)(2009). It does not have to dominate, but neither is "any chance" enough.

The Supreme Court, *Barber v. Jefferson County Racing Ass'n, Inc.* 960 So.2d 599, 616 (Ala.,2006), has gone on to define **chance** as “a lack of control over events or the absence of ‘controllable causation’ - ‘the opposite of intention.’” *Opinion of the Justices No. 373*, 795 So.2d 630, 635 (2001) (quoting *Black's Law Dictionary* 231 (6th ed.1990)).

Alabama uses the “**dominant factor**” test to determine what constitutes a prohibited lottery.

Although, case law moves Alabama towards the dominant factor test, recent case has suggested “**any chance**” test. Judge Shaw’s concurring opinion on the game of “Texas Hold’em” poker explains that “the mere fact that the outcome of a game, either in a single play or over multiple plays, can be affected by an understanding of the laws of probability or an understanding of the rules of the game, or can be affected by other recognizable techniques or knowledge, does not change the fundamental nature of that game. Simply put, a player's understanding of the rules or of the laws of probability relating to a game of chance does not change the fact that he is playing a game of chance. A player may be ‘skilled’ at ‘playing the odds,’ but he is still ‘playing the odds.’ ” *Garrett v. State*, 893 So. 2d. 700, 701(Ala.Crim.App.,2007).

Shaw further states in “that “Texas Hold'em” poker is **fundamentally** a game of chance, in that the outcome of the game ultimately depends on a random draw of the cards”(even though a person must possess a **certain amount** of experience and skill in order to be a successful player. “However, a player's skill does not change the **fundamental nature** of the game. As the Court of Civil Appeals noted, “[a] player may be ‘skilled’ at ‘playing the odds,’ but he is still ‘playing the odds.’ ” 893 So.2d at 375. The majority held that “Texas Hold'em” poker is promoting gambling, in violation of § 13A-12-22, Ala.Code 1975. *Garrett v. State*, 963 So.2d 700, 701(Ala.Crim.App.,2007).

An activity where skill dominates is not prohibited by the state constitution. Billiards is such a game, but betting on it is still prohibited. However, billiards could be seen as an exception, since the statutes are separate from the general gambling statutes.

"[I]f a business legally authorized to play bingo should sell a pull tab wagering ticket to a purchaser/player for a consideration where the prizes are awarded to the pull tab ticket purchaser/player as a matter of chance, and not skill, both parties would be in violation of § 13A-12-21(a) which prohibits simple gambling." 230 Ala. Op. Atty. Gen. 36 (1993).

"Credits, free or purchased, provided to play gambling devices are 'something of value' as defined by section 13A-12-20(11) of the Code of Alabama. When a patron wagers these credits on a gambling device, consideration flows from the patron to the facility." 05 Ala. Op. Atty. Gen. 173 (2005).

"Skill or the competitors efforts must sufficiently govern the result. Skill must control the final result, not just one part of the larger scheme." *State ex rel. Tyson v. Ted's Game Enter.*, 893 So.2d 355, 373 (Ala. Civ. App. 2002) quoting *Horner v. U.S.*, 147 U.S. 449, 459 (1893). The test is whether chance is meaningful in determining the outcome of the game--skill should override the effect of the chance.

"[T]he word skillspeaks to the ability, through the application of human physical or mental capacity, to actually cause a desired outcome of a game when the game is played." "A player may be skilled at playing the odd but he is still playing the odds. " *State ex rel. Tyson v. Ted's Game Enter.*, 893 So.2d 355, 375 (Ala. Civ. App. 2002).

If the dominant factor in winning a game is chance, the game is a lottery. This is true despite some degree of judgment or skill being involved. *Opinion Of The Justices*, 795 So.2d 630 (Ala. 2001). It is left to the courts to decide if chance dominates in any particular game.

Lotteries are judged by the "**American**" rule, where it can still be a lottery even if it involves skill. The "**English**" rule (where only a scheme involving pure chance is a lottery) has been rejected. *Ted's Game Enter.*, 893 So.2d at 355.

There is a **proposed** constitutional amendment that has been introduced into the legislature that would (in addition to other changes) add the following:

An activity is a game of chance if:

- (1) played or engaged in for consideration or by staking or risking money or some other thing of value;
- (2) played or engaged in for the purpose of obtaining money or other thing of value or results in the distribution of money or other thing of value;
- (3) the outcome, measured by a single play or over multiple plays, is determined in **material degree by chance**, notwithstanding that the outcome is also determined in equal or greater degree by other factors.

2006 AL H.B. 646 (NS) (Feb 16, 2006); 2006 AL S.B. 441 (NS) (Feb 09, 2006).**This has not be amended as of 2009*)

This amendment would switch the state over to the "chance as a material element" test for all types of gambling; chance would no longer need to dominate for an activity to be unconstitutional. However, as indicated in the concurring opinion in *Garrett v. State*, this has position has already made its move.