

The Evolution of Legalized Gambling in Wisconsin

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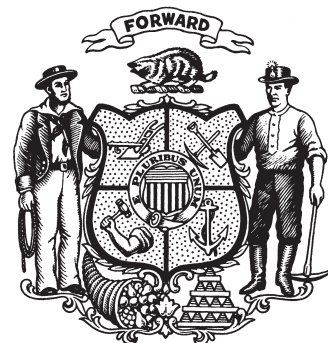


TABLE OF CONTENTS

I.	THE DEVELOPMENT OF GAMBLING LAWS IN WISCONSIN	2
A.	Promotional Contests	2
B.	Bingo	3
C.	Raffles	5
D.	Racing: On-Track Pari-Mutuel Wagering	6
E.	State Lottery	11
F.	Activities Exempted from Antigambling Laws	18
II.	GAMING REGULATION AND LAW ENFORCEMENT IN WISCONSIN	19
III.	INDIAN GAMING IN WISCONSIN	21

THE EVOLUTION OF LEGALIZED GAMBLING IN WISCONSIN

This bulletin summarizes the history of legalized gambling in Wisconsin and highlights topics currently receiving media attention:

- **Casino Gaming Compacts** with the state's Indian tribes due for renewal beginning August 1998.
- **Property Tax Relief** in light of the 1996 circuit court decision that the current lottery property tax credit is unconstitutional.
- **Internet Gambling** as interstate and international wagering on computers becomes a challenge for state law enforcement.

Legal gambling goes through cycles of growth and contraction. Since World War II, there has been sustained growth nationally, with casino gambling accounting for most of the recent increase. Americans legally wager an estimated \$500 billion per year in the 48 states that permit some form of legal gambling.

The evolution of legalized gambling in Wisconsin grew from absolute prohibition to the present situation in which the state and certain organizations and entities, including Indian tribes, conduct a variety of gaming activities. Most of these changes required constitutional amendment.

In 1965, the voters approved participation in promotional contests, followed by charitable bingo (1973), charitable raffles (1977), on-track pari-mutuel wagering (1987), and the state lottery (1987). In 1993, they voted to limit gambling to those existing activities. Currently, the only gaming operated by the state is the Wisconsin Lottery, which grossed \$431.1 million in sales in 1996-97. Greyhound racing is conducted at three privately owned tracks, down from a maximum of five. The 17 casinos in Wisconsin are operated by Indian tribes on tribal lands under compacts, which are based on federal law and negotiated between the governor and the tribes.

Gambling still draws strong support and criticism from voters. Proponents view gambling as harmless recreation if not done to excess. They contend it creates jobs, draws tourists, benefits nearby businesses and, in the case of private raffles and bingo games, supports worthy causes. Opponents note gambling's association with criminal activity and public corruption, and they oppose government exploitation of people's vices. They emphasize the social costs and family problems that can result from gambling.

This report discusses these issues in depth and describes the forms of gambling currently permitted and regulated by the state.

I. THE DEVELOPMENT OF GAMBLING LAWS IN WISCONSIN

Wisconsin's constitution, as adopted in 1848, stated in Article IV, Section 24: "The legislature shall never authorize any lottery . . ." This provision was generally interpreted by the courts, the legislature and attorneys general as prohibiting all forms of gambling, both public and private, whether conducted for profit or to benefit charitable causes. Any game involving the three elements of prize, chance (random odds or luck) and consideration (paying money or giving a thing of value to play) was held to be a lottery, and thus prohibited. Even if skill or knowledge could influence the outcome of a game, as long as luck was the major factor, the activity was considered to be illegal gambling.

Despite the law, illicit gambling was common. Charitable organizations operated bingo games and raffles. Taverns offered slot machines, pinball machines with money betting, dice and card games, punchboards, tip jars and various other gambling schemes for patrons. Bookmakers ran numbers games and accepted wagers on races and athletic events. Private social gambling existed in many forms, such as betting on card games like poker. Wagering on horse and dog racing occurred at various times and places. Because gambling was perceived by many persons as a relatively harmless and victimless crime, it was reluctantly tolerated, though not necessarily condoned, by law enforcement authorities.

Since 1965, changes in federal law regarding Indian gaming and the amendment of the Wisconsin Constitution and state laws, along with federal and state court decisions, have resulted in the legalization of the state lottery, on-track pari-mutuel wagering on dog races, charitable bingo and raffles, promotional contests, and Indian gaming which includes certain casino-type games not conducted elsewhere in the state.

A. Promotional Contests

Prior to 1965, all sales promotions that awarded prizes primarily by chance were prohibited as illegal lotteries, and disclaimers, such as "void in Wisconsin", appeared in advertisements for national contests. Nevertheless, promotions by local retailers were common. Consideration was deemed to be involved if the promoter received some commercial advantage from the activity or participants were disadvantaged in some way, such as being required to visit a retailer or pay postage to mail in an entry form.

The state legislature in Chapter 463, Laws of 1951, had tried to permit certain "giveaway" programs by restricting the definition of "consideration" to the payment of money or expenditure of substantial effort or time, although the state's courts and attorneys general had consistently ruled that it was not the requirement of a monetary payment that made a game illegal. The Wisconsin Supreme Court in *State v. Laven*, 270 Wis. 524 (1955), overturned Chapter 463 and ruled that lottery-type activity could be legalized only by amending the constitution.

In April 1965, the voters approved a constitutional amendment by a vote of 454,390 to 194,327 to permit promotional contests, despite opponents' fears that any liberalization of the antilottery laws would inevitably lead to more pernicious forms of legalized gambling.

Chapter 122, Laws of 1965, and subsequent laws have refined the permissible forms of promotional contests by requiring that: 1) contests or drawings must be open to anyone essentially free of charge, with the exception of minimal postage, copying, telephone or transportation costs and 2) all entrants must enjoy an equal chance of winning all prizes.

The constitutional provisions and laws governing drawings, sweepstakes and other promotional contests are specified in Article IV, Section 24 (2), Wisconsin Constitution and Section 945.01 (5), Wisconsin Statutes, respectively. The promoter cannot require purchase of a product and must accept facsimiles (photocopied or handwritten) of proofs of purchase, such as a universal product code (UPC) or bar code. Facsimiles or handwritten entry blanks for contests conducted through the mail or via newspaper or magazine must also be accepted. Contestants may, however, be required to watch or listen to a television or radio program, send in an entry, or visit a particular store or other place without having to make a purchase or pay an admittance fee.

Some promotional contests, especially national sweepstakes drawings, have been criticized because the odds of winning are very poor and are alleged to be further reduced if one fails to purchase the sponsor's product, such as by declining to buy a magazine subscription. This type of complaint has resulted in warnings from the State of Wisconsin to sponsors that they risk being prosecuted for conducting illegal lotteries.

B. Bingo

Bingo has long been viewed as a relatively harmless social diversion and has been widely used as a fundraising tool by religious, charitable, service and fraternal organizations. Pressure to legalize charitable bingo intensified after the authorization of promotional contests in 1965. It was argued that if merchants could use games of chance, many of which resembled bingo, to increase profits, then churches and charities should have the same opportunity to raise money for worthy causes.

In 1940, the Wisconsin Supreme Court ruled that bingo is an illegal lottery regardless of whether proceeds are used for public benefit (*State ex rel. Trampe v. Multerer*, 234 Wis. 50). However, the widespread popularity of low-stakes charitable bingo led to an extremely sensitive law enforcement situation, with sheriffs and police reluctant to intervene in games conducted by community groups. Numerous bills were introduced to legalize bingo by statute, despite the court's ruling that a constitutional amendment was required.

A constitutional amendment, ratified in April 1973 by a vote of 645,544 to 391,499, permitted the legislature to authorize licensed bingo games conducted by religious, charitable, service, fraternal or veterans organizations or other groups entitled to receive tax-deductible contributions. Chapter 156, Laws of 1973, legalized charitable bingo games in Wisconsin.

The procedures for conducting bingo games are specified in Chapter 563, Wisconsin Statutes. To be eligible for a bingo license, an organization must be a nonprofit entity incorporated in Wisconsin that has at least 15 members in good standing, conducts activities within the state in addition to bingo and has been in existence for at least three years. All bingo profits must be used for "the advancement, improvement or benefit of the organization". Bingo callers, supervisors and those handling receipts must be members of the organization, and they may not be compensated or allowed to play the games at which they work. (Nonmember, unpaid adult volunteers may, however, provide additional assistance.) All supplies and equipment must be purchased from approved vendors. Games may be advertised, and transportation may be provided to players. Minors may play if accompanied by a parent, legal guardian or spouse.

There is no limit on the number of games that may be played at a single bingo occasion, but prize money may not total more than \$1,000 per occasion and no prize in a single game may exceed \$250. Merchandise prizes whose retail value does not exceed these limits may be awarded, but alcohol beverages may not be used as prizes.

A regular bingo license allows an organization to hold an unlimited number of bingo occasions per year, with a fee paid to the state per occasion. Purchase of a regular bingo card, at a maximum price of \$1, serves as admission to a bingo occasion, and the player may purchase additional cards for not more than \$1 each.

A limited-period bingo license allows an organization to conduct bingo on a limited number of days in any one year at a festival, bazaar, picnic, carnival or similar special function. The law does not prohibit concurrent regular bingo games. Cards for limited-period bingo occasions are sold on a game-by-game basis for not more than 50 cents each, with no admission fee allowed.

1989 Wisconsin Act 147 allowed community-based residential facilities, senior citizen residential facilities or community centers, and adult family homes to obtain \$5 annual licenses to sponsor social, recreational games for residents, guests and employees. No admission may be charged and the total per player fee for all cards used at an occasion may not exceed \$2. All fees must be awarded as prizes.

The state collects an occupational tax of 2% of gross bingo receipts to cover regulatory and administrative expenses. In fiscal year 1996, the state received approximately \$226,000 in li-

cense fees and \$542,000 in gross receipts taxes from about 800 licensed organizations that reported over \$27 million in gross receipts in that year. Recent years have seen reduced fundraising success by charitable bingo operations, with the competition from Indian tribal casinos and bingo halls (which have no statutory limits on prize amounts) cited as the principal cause of the downturn.

C. Raffles

Raffles are a form of lottery in which participants purchase tickets for the chance to win a prize in a random drawing. Like bingo, raffles had been widely and illegally used as fundraisers by nonprofit groups, with sponsors sometimes asking for “donations”. Because of their association with charitable causes, drawings were routinely tolerated by law enforcement authorities. The legalization of charitable bingo games in 1973 led to demands for similar treatment of raffles.

A constitutional amendment, ratified on April 5, 1977, by a vote of 483,518 to 300,473, allowed the legislature to authorize state-licensed raffles conducted by local religious, charitable, service, fraternal or veterans organizations or other groups entitled to receive tax-deductible contributions. It also required that all profits go to support the licensed organization.

The laws relating to raffles are contained in Subchapter VIII of Chapter 563, Wisconsin Statutes. All raffle drawings must be held in public, and all prizes must be awarded, but there is no legal limit on the value of prizes offered. The maximum price that may be charged for a ticket in an individual raffle is \$50. Trying to circumvent the maximum by “suggesting” buying a block of tickets is not permitted. After some confusion about limiting raffles to local organizations, 1989 Wisconsin Act 147 specifically provided that statewide organizations could sponsor raffles.

1995 Wisconsin Act 27 provided for Class A and B raffle licenses. Under a Class A license, tickets may be sold on days other than the day of the raffle drawing. Each Class A ticket must be individually and consecutively numbered and contain detailed information about the raffle. The purchaser of a ticket for a raffle conducted under a Class A license need not be present at the drawing to win a prize. Upon request, the sponsor must furnish a list of prize winners to any purchaser of a ticket.

A Class B license provides for the conduct of a raffle in which all tickets are sold on the day of the drawing. Class B tickets may cost up to \$10 and need not be numbered. 1995 Wisconsin Act 301 provided that a ticket purchaser (or a substitute) must be present at the drawing to win, unless the organization opts to allow participants to win even if not in attendance.

The state receives approximately \$165,000 per year in license fees from about 6,500 groups sponsoring raffles. These groups make an estimated profit of approximately \$21 million on

gross ticket sales of about \$38 million. Despite competition from the state lotteries, casinos and other forms of gambling, raffles continue to be a popular fundraising tool, with Wisconsin being the leading state in terms of gross receipts from raffles and total number of raffle sponsors.

D. Racing: On-Track Pari-Mutuel Wagering

Racing without wagering has always been legal in Wisconsin, and county fairs have often held harness, horse or stock car races. However, illegal horse race wagering was common, particularly in the southeastern part of the state. This led to passage of Chapter 187, Laws of 1897, which explicitly outlawed pool selling, bookmaking, betting or wagering “upon the result of any trial or contest of skill, speed or power of endurance of man or beast . . . or upon any other uncertain event or occurrence.” Despite the law, illegal on- and off-track race wagering continued to occur, sometimes under a thinly disguised betting scheme in which track patrons “contributed” money for certain dogs but only received “refunds” on winning animals. This system was specifically prohibited by Chapter 218, Laws of 1929.

A number of bills were introduced over the years to statutorily legalize race wagering, although a 1963 attorney general opinion (52 Op. Atty. Gen. 188) stated that race wagering would require a constitutional amendment, because chance was the dominant element, despite factors such as the speed of the animals and the bettor’s skill. Numerous attempts to change the constitution in the 1970s and 1980s culminated in an amendment ratified on April 7, 1987, by a vote of 580,089 to 529,729.

The amendment did not name the types of racing that would be permitted, but it did specify that only pari-mutuel on-track betting would be allowed. The prospect of thoroughbred racing was the driving force in the referendum, with horse enthusiasts touting the state because of its tourism and abundance of farms for growing feed and raising stock. Some racing experts, however, warned that Wisconsin was not populous enough to profitably support both horse and dog racing. 1987 Wisconsin Act 354 authorized wagering on horse, dog and snowmobile racing, but thus far only dog racing has been conducted.

In the pari-mutuel system of betting, participating gamblers wager against one another, rather than against the track. The track has no direct stake in the outcome of races and receives a fixed amount of every dollar wagered to cover taxes, contestants’ purses, operations and maintenance. Any money remaining after the payouts constitutes the track’s profit.

During the 1996 racing season, a total of approximately 1.3 million people attended 1,275 live races and viewed almost 9,200 simulcast dog and horse races. They bet a total of over \$174 million, down about 4% from 1995. The tracks paid the state about \$2.9 million in pari-mutuel taxes and \$1.3 million in special program taxes. The owners of winning animals received almost \$7 million in purses. Local governments received about \$650,000 in admissions tax revenue.

The laws related to on-track pari-mutuel wagering on racing are contained in Chapter 562, Wisconsin Statutes. Racetracks are operated by private companies, which are licensed, regulated and taxed by the state. Five licenses were issued to greyhound racetracks in May 1989, and three tracks continue to operate. In order of opening dates, they are:

Wisconsin Dells Greyhound Park - Lake Delton, opened April 30, 1990; closed September 8, 1996.

Geneva Lakes Kennel Club - Delavan, opened May 25, 1990.

Dairyland Greyhound Park - Kenosha, opened June 20, 1990.

Fox Valley Greyhound Park - Kaukauna, opened August 2, 1990; closed August 12, 1993.

St. Croix Meadows - Hudson, opened June 20, 1991.

The Wisconsin Gaming Board determines the types and number of greyhound racetracks allowed and annually approves the number of racing performances to be held at each track. It issues operating licenses for the various racing occupations, audits financial reports and inspects facilities. The board must consider the adverse effects on existing operations before allowing new tracks. At least 51% of the ownership interest in a racetrack must be held by Wisconsin residents or a corporation chartered in the state, and at least 85% of a track's employees must have been state residents for at least one year prior to being hired. Under the "Wisconsin Whelped" program, established in 1990, at least two kennels at each track must be wholly owned by Wisconsin residents. Anyone who has been convicted of legal violations relating to racing, gambling or animal mistreatment or who is considered a threat to the integrity of racing is ineligible for an ownership or occupational license.

Racing Operations. A greyhound race usually consists of eight dogs. Races are run on dirt tracks typically 1/4 or 5/16s of a mile in length at speeds up to 40 mph. Tracks offer one or two racing performances per day, each consisting of 13 to 15 races that begin about every 15 minutes.

Track employees and owners are not allowed to bet at their own tracks. Minors may not bet and may attend pari-mutuel racing events only if accompanied by a parent or guardian. Wisconsin's racing regulatory laws are recognized as among the strictest in the nation, with violations of security or animal safety resulting in disciplinary action, such as fines or suspensions.

The minimum wager is generally \$2 a ticket with no limit on the number of tickets purchased. Prizes are paid for picking the first, second or third finisher ("win", "place" or "show") in a particular race. Also offered are a variety of combination (exotic) bets such as: perfecta - picking a race's first and second place winners; trifecta - picking win, place and show in the same race; and daily double - picking the winner of the first and second race.

Winning ticketholders divide 80% to 83% of the “handle” (the total amount wagered) from *straight pool* races (bets on single animals to win, place or show). They divide 75% to 77% of the handle from *multiple pool* races (combination bets). The exact percentages that tracks may deduct from the total wagers depends on Gaming Board approval. Final race odds and payoff amounts, which vary depending on the volume and distribution of bets, are not announced until after completion of a race. As is the case with lotteries, a winning bettor must present a valid ticket in order to collect a payout.

The state collects a pari-mutuel tax, which is deducted from the daily handle and calculated as a percentage of the cumulative handle wagered on all race days during that particular racing season. The rates range from 2% of the first \$25,000,000 wagered to 8-2/3% on bets totalling more than \$250,000,000. All tax revenues are deposited in the state’s general fund.

Since July 1, 1996, tracks have retained 100% of the breakage, which is defined as “the odd cents by which the amount payable on each dollar wagered exceeds a multiple of 10 cents”. (For example the breakage on a \$4.53 payout is 3 cents.) Previously, the state and the tracks split the breakage, with the state’s share used for gaming regulatory operations.

A dog track must devote an amount equal to at least 4.5% of the total amount wagered on each race day to purses paid to the owners of animals which place first, second or third in races.

Each spectator at a greyhound racetrack pays an admissions tax of 50 cents, which is divided equally between the county and the municipality in which the track is located. Governmental units must use at least part of this money to defray the costs of law enforcement, traffic control, road construction and maintenance, snow removal, and other expenditures incidental to racing. Tracks may charge an additional admission fee.

Treatment of Compulsive Gambling. Experts claim approximately 4% to 5% of people who gamble become addicted, and an estimated 50,000 compulsive and problem gamblers in Wisconsin result in over \$300 million in social costs each year. Although 1987 Wisconsin Act 354 provided for grant programs for specific purposes, including research on or treatment of compulsive gambling, which were to be funded through a percentage calculated on the daily handle, breakage and unclaimed prizes, the revenues between 1988 and 1991 were insufficient to award any grants. The special programs fund was repealed by 1991 Wisconsin Act 269. Subsequent legislative sessions have considered allocating lottery and racing revenues for the prevention and treatment of compulsive gambling, but no laws have been enacted.

Humane Treatment and Drug Testing. Racing dogs must be treated humanely. They are not eligible to race if they were trained using live lures or bait or if they were trained in a state that does not prohibit cruel training or racing methods. Individual dogs may not race more than once in a three-day period and cannot compete when ill or injured. Track surfaces must

be safely maintained, and animals must receive adequate food, housing, attentive handling and medical care. Humane euthanasia methods are required. Wisconsin was the first state to initiate an adoption program that annually places hundreds of retired racing greyhounds as household pets.

No medication, performance enhancing drug or other foreign substance may be administered to an animal within 48 hours prior to a race. After each race, a drug test is performed on at least one animal selected by the steward. Positive findings can result in license suspension or revocation or fines. Since 1993, the tracks are required to reimburse the state for drug testing costs not covered by legislative appropriations, but the state is currently paying the entire drug testing cost of about \$275,000 per year.

Simulcasting. Simulcasting occurs when a race takes place at a different site but is viewed simultaneously via closed-circuit television. Wisconsin race tracks are authorized to take wagers on-site for an unlimited number of simulcast races originating at in-state or out-of-state tracks, provided certain conditions are met. Out-of-state simulcasts may involve any form of pari-mutuel racing conducted in other states, including thoroughbred horse races, such as the Kentucky Derby.

1987 Wisconsin Act 354 originally authorized Wisconsin tracks to simulcast up to nine out-of-state races each year. Some feared that Wisconsin tracks might become virtual off-track betting parlors, and they argued that the constitutional language specified on-track pari-mutuel betting, thereby precluding wagering on races that are run at places other than the place the bet is accepted. After Attorney General Donald Hanaway stated in 77 Op. Atty. Gen. 299 (1988) that simulcasting probably was constitutional, 1995 Wisconsin Act 27 removed the limit on out-of-state simulcasts. Tracks that offer simulcasts must conduct a minimum of 200 live racing performances per year and must not rely on simulcasting as the primary source of wagering revenue.

1991 Wisconsin Act 39 permitted the state to authorize Wisconsin tracks to offer pari-mutuel wagering on an unlimited number of simulcasts of races taking place at other tracks within Wisconsin. To be eligible, a track must have a minimum of 250 live racing performances per year and simulcasts may not occur concurrently with the track's live racing.

Financial Performance and Relief Legislation. Poor attendance, reduced betting and heavy debt loads have combined to significantly reduce racing's profitability since 1991 and have resulted in the closure of two racetracks (Kaukauna's Fox Valley Greyhound Park in August 1993 and the Wisconsin Dells Greyhound Park in September 1996). Competition from tribal casinos, both within and outside Wisconsin, and riverboat gambling in Iowa and Illinois have been blamed, and track operators complain of burdensome regulations and fees while pointing out that the state lottery is not required to pay out as high a percentage of wagers to

bettors as the tracks must. In addition, tribal casinos have the advantage of not being subject to state taxation. As a result of operating losses, several tracks have received lower property tax assessments, which has angered local taxpayers.

Of the three remaining racetracks, only Dairyland reported a profit (about \$250,000) in 1996. Geneva Lakes lost about \$2.3 million and St. Croix Meadows lost approximately \$7 million. Similar results are expected in 1997.

After the Fox Valley track closed, owners warned more tracks might fail unless the state relaxed its regulations and adjusted the tax structure. Subsequently, the "Pari-Mutuel Reform Act", approved in 1995 Wisconsin Act 27, allowed the remaining tracks: unlimited out-of-state simulcasting, retention of 100% of breakage, and reduction in the proportion of the handle that must be paid to winning bettors.

Racetrack/Casino Complex Proposed at Hudson. Since 1991, the owners of the St. Croix Meadows Racetrack have warned that, unless additional gambling opportunities were approved at the site, they might be forced to close. In 1992, the St. Croix band of Chippewa Indians proposed purchasing the track, placing it in reservation trust status and operating it as a combined casino/racetrack complex. The change would be subject to approval by the U.S. Department of the Interior and the governor. Two local advisory referendums on the issue in 1992 showed supporters and opponents about equally split.

The St. Croix band abandoned its casino/racetrack effort in March 1993, but a similar arrangement was proposed in September of that year by a consortium of three other Chippewa bands: Lac Courte Oreilles, Red Cliff and Sokaogon (Mole Lake). The Bureau of Indian Affairs (BIA) turned down the request to take the 52-acre track site into trust for the enterprise in July 1995. The BIA considered opposition from nearby tribes in both Wisconsin and Minnesota, who feared competitive harm to their existing casinos. A suit currently in federal court against the decision alleges the exercise of improper political influence with federal officials by the opposing tribes' lobbyists. Although the Hudson track continues to be unprofitable, its owners have stated their intent to remain open as long as there is a chance that a casino could be approved. Other tracks have expressed interest in tribal casino/racetrack collaborations.

Horse Races at Fairs and Snowmobile Racing. A local fair may be licensed by the Gaming Board to offer pari-mutuel wagering on its own horse races if the applicant has the concurrence of the county board and takes into account the competitive effects on existing racetracks. The state Gaming Board may also authorize on-track pari-mutuel wagering on snowmobile racing.

E. State Lottery

Lotteries date back to colonial times in America, but almost all states had abolished lotteries by the end of the 19th century. In 1963, New Hampshire authorized the first modern state lottery. It was intended as a revenue-raiser in a state that lacked a sales or income tax and relied primarily on property tax levies and “sin” taxes on alcohol beverages and cigarettes. Since then, 37 states and the District of Columbia have adopted lotteries. Although the lotteries have not been as profitable as hoped, they do raise significant amounts of money for public purposes.

The framers of the Wisconsin Constitution specifically prohibited legislative authorization of lotteries. The first attempt to constitutionally legalize lottery games was a 1939 proposal to allow the legislature to authorize lotteries for purposes of raising revenue for old age assistance. Later proposals in the 1940s would have permitted authorization of private lotteries. A 1965 measure proposed a Wisconsin Sweepstakes (inspired by 1963 creation of the New Hampshire Sweepstakes) to be operated by the state with the proceeds to be used for public education.

Interest in a Wisconsin lottery grew after the Illinois Lottery began operation in July 1974. Lottery proponents asserted that Wisconsin gambling dollars spent across the border could be recaptured and used for tax relief and that voters should be given the chance to decide on lottery legalization. Public support was manifested in the legislature with an increasing number of bills beginning in the mid-1970s. However, many remained opposed to exploiting people’s vices to raise money for the treasury.

The lottery amendment was ratified in the April 1987 election by a vote of 739,181 to 391,942, and 1987 Wisconsin Act 119 created the state lottery, which began operation on September 14, 1988, with “Match 3”, an instant win scratch-off game. Among the notable features of the Wisconsin Lottery are that: net profits must be used for property tax relief; public funds may not be used for promotional advertising; and all informational advertising must indicate the odds for winning each prize amount.

Defining the Lottery. Disagreement arose as to whether the 1987 state lottery amendment permitted the legislature to legalize any form of state-operated gambling it chose, including casino-type games. The controversy revolved around whether the word “lottery” in the Wisconsin Constitution should be broadly interpreted as including all types of gambling or narrowly defined as only the types of games commonly associated with state lotteries.

In a 1990 opinion, Attorney General Donald Hanaway (79 Op. Atty. Gen. 14) concluded that the constitutional ban on “lottery” narrowly refers to only to lottery-style games as distinct from casino-style games of chance such as roulette, blackjack and slot machines. Therefore, he theorized, because casino-type games were not constitutionally prohibited, the legis-

lature could statutorily authorize state or private casino gambling at any time. In contrast, Attorney General James Doyle stated in 1991 (80 Op. Atty. Gen. 53), that “lottery” was a broad term that included all forms of gambling, so that, while the 1987 amendment permitted the legislature to authorize the operation of casino-style games as an integral part of the state lottery, it did not legalize private commercial gambling. A third view of “lottery” asserted that the original intent of the constitution was to prohibit all types of gambling and that the 1987 amendment permitted the legislature to authorize the state to operate only lotteries, not casino-type games. In January 1993, the Wisconsin Supreme Court declined petitions to rule on the scope of gambling allowed, saying the question was not yet ripe for adjudication.

Governor’s Blue Ribbon Task Force on Gambling. In October, 1991, Governor Tommy Thompson, established a Blue Ribbon Task Force on Gambling to determine public opinion, assess economic benefits and social costs, and make recommendations regarding the scope and regulation of gaming. In its January 1992 final report, the task force found that there appeared to be a general acceptance of and willingness to expand legal gambling in the state.

The task force suggested authorizing four floating casinos and the legalization of video gaming machines, such as video poker, in places such as taverns and racetracks, subject to approval by local voters. All of these games would technically be state-operated and linked to the state lottery computer. Supporters of this controversial proposal asserted the games would generate additional state revenue and help financially struggling taverns. The governor rejected the floating casino recommendation but included a proposal in 1991 Senate Bill 483, which was later deleted by the Joint Committee on Finance, to allow video gaming machines in establishments licensed to serve alcohol beverages.

State Lottery Definition Legislation – 1991 Wisconsin Act 321. In a special session called by the governor, the legislature enacted a law to limit the scope of state-operated gambling. 1991 Wisconsin Act 321 specifically stated what types of games are allowed as part of the state lottery and which are not. According to Section 565.01 (6m), Wisconsin Statutes, the state lottery is “an enterprise, including a multistate lottery in which the state participates, in which the player, by purchasing a ticket, is entitled to participate in a game of chance.” Thus, the lottery is limited to the scratch-off instant win games, pull-tabs and on-line numbers drawing games currently offered. The act also provided that five statewide nonbinding advisory referenda on the future of gambling in Wisconsin would appear on the April 6, 1993, ballot.

1993 Constitutional Amendment Limits Gambling. Governor Thompson called a special session in June 1992 to consider amending the constitution to permanently exclude casino-style gambling from inclusion in the state lottery. After considerable debate and a series of legislative hearings held around the state, the question, as presented to the voters, read:

Gambling expansion prohibited. Shall article IV of the constitution be revised to clarify that all forms of gambling are prohibited except bingo, raffles, pari-mutuel on-track betting and the current state-run lottery and to assure that the state will not conduct prohibited forms of gambling as part of the state-run lottery?

A coalition of eight of the state's 11 tribes and bands offered the state a significant share of future casino revenues (up to \$250 million per year) if the amendment was shelved and the gaming compacts were renegotiated to allow a tribal consortium to build a large casino in southeastern Wisconsin. Those campaigning against the amendment included the Wisconsin Indian Gaming Association (WIGA); and the Tavern League of Wisconsin, racetrack operators and boosters of floating casinos in port cities, such as La Crosse and Superior. Indian tribes were generally against the amendment because they feared that a constitutional provision which specifically outlawed casino-type games might jeopardize renewal of their existing gaming compacts. Taverns and others were opposed because the measure would prohibit video poker and other gambling machines they wanted for enhanced revenue. However, a few of the WIGA's member tribes, notably the Oneida, believed the future of tribal casinos would be unaffected by the amendment and realized it cemented the tribal monopoly on casino-type operations. Opponents funded an expensive advertising campaign against the amendment.

Republican Governor Thompson and Democratic Attorney General Doyle stumped for amendment passage in joint appearances around the state and expressed a shared desire to restrict the expansion of gambling. The Wisconsin Conference of Churches and the Wisconsin Catholic Conference also favored passage, asserting that gambling activity had exceeded the bounds of moderation and was a threat to community values and health.

On April 6, 1993, the amendment was ratified by a vote of 623,987 to 435,180. As things now stand, state-operated or private casino-style gaming in Wisconsin would require subsequent constitutional change. The results of the advisory referenda, which also appeared on the ballot, indicated a preference for maintaining the status quo regarding gambling. The voters registered against allowing casino gambling on excursion boats by a vote of 604,289 to 465,432; against video poker and other forms of off-reservation video gambling by a vote of 702,864 to 358,045; for a continuation of pari-mutuel on-track wagering on racing by a vote of 548,580 to 507,403; and for the continuation of the state lottery by a vote of 773,306 to 287,585. A fifth advisory question asking voters if they favored a constitutional amendment that would restrict gambling casinos in the state, made moot by the ratification of the amendment, passed by a vote of 646,827 to 416,722.

Sports Lottery Plan. In 1996, a constitutional amendment was proposed to allow proceeds from a special state lottery game to be earmarked to help fund construction of a new stadium for the Milwaukee Brewers baseball team. Despite winning solidly in the Milwaukee

metropolitan area, the rest of the state overwhelmingly voted against the plan, which was defeated by a vote of 618,000 to 348,818.

Operation and Administration of the Wisconsin Lottery. The laws relating to the Wisconsin Lottery are contained in Chapter 565, Wisconsin Statutes. Over the years, the state lottery had been administered by different state departments. Since July 1, 1996, the Department of Revenue's Lottery Division has been responsible for day-to-day lottery operations, but the Gaming Board retains significant oversight of lottery policy by approving or promulgating administrative rules relating to the organization, retailing, advertising and structure of the lottery. In order to maintain public confidence in the integrity of the lottery, drawings are conducted under secure conditions subject to scrutiny by outside auditors.

State law requires that at least 50% of lottery revenues be paid out in prizes to winners, and in recent years the average payout has been about 57% of total sales. The law also limits administrative expenses, including retailer commissions, to no more than 15% of gross revenues. The remainder of lottery revenues constitute the net proceeds available for property tax relief.

The most popular lottery activity in Wisconsin, currently accounting for about 61% of sales, are the *instant win scratch-off games*, which use preprinted tickets with a latex covering that is scratched off to reveal numbers and symbols. Matching a predetermined winning combination results in prizes of \$1 to \$100,000, although the typical top prize is \$5,000 or less. Odds of winning some sort of prize are about 1 in 5, and 10 or 12 new games are introduced annually.

Another type of instant win game is *pull-tabs*, in which partially perforated tickets are pulled apart to reveal printed numbers that may offer a winning combination. These games are commonly sold at taverns, restaurants and bowling centers. Nonprofit organizations may also apply to sell pull-tabs at special events for fundraising purposes, receiving commission of approximately 30% of sales. Pull-tabs, which constitute about 2% of total Wisconsin Lottery sales, are inexpensive and offer prizes ranging up to \$100.

The other main category of lottery activity are the *on-line games*, in which a player chooses or has the computer select lottery numbers. These games account for about 37% of all Wisconsin Lottery sales. Tickets bearing entry numbers are issued by a terminal electronically connected to a central lottery computer which records the play and keeps track of all tickets sold. Random drawings are conducted with numbered balls, and prizes are awarded for matching all or some of the numbers selected. Tickets serve as the only evidence of a player's participation and must be redeemed to collect a prize. Some games have set prize amounts. For example, at least one \$250,000 prize will be awarded each day in "Supercash". Other games have a guaranteed minimum jackpot (for example, \$5 million for "Powerball"), but the size of the top prize will increase if ticket sales permit. If there is no jackpot winner in a particular draw-

ing, money is rolled over to increase the amount available in subsequent drawings. Simultaneous winners divide the jackpot. On-line games which are or have been sold exclusively in Wisconsin include "Supercash", "Wisconsin's Very Own Megabucks", "Daily Pick 3" and "Money Game 4".

Wisconsin belongs to a consortium of about 20 states and the District of Columbia which participate in the Multi-State Lottery Association's on-line lottery games, "Powerball" and "Daily Millions". Multistate lottery pools are able to accumulate prize money quickly. In the largest individual payoff to a single lottery ticket in the United States to date, a Fond du Lac couple won \$111 million on July 7, 1993. The newest offering, "Daily Millions", which began September 16, 1996, offers \$1 million every day, which is paid in a lump cash sum. Although the state constitution does not specifically mention multistate lotteries, Wisconsin's participation in them has not been challenged in court.

Sales and Payout Procedures. Wisconsin Lottery tickets are sold by private businesses under contract. Retailers receive a basic commission of 5.5% on total sales. The commission was increased from 5% in 1995 in response to grocers, who claimed they were losing money on ticket sales. Grocers sell about 70% of all tickets. Nonprofit organizations may apply to sell tickets on a temporary basis and can receive a higher rate of return.

Over half of the more than 5,000 "retail partners" throughout the state are grocery or convenience stores and about 12% are tavern owners. Other types of establishments selling lottery tickets include gas stations, restaurants, bowling centers, liquor stores and pharmacies. All retail outlets sell instant win tickets, and about 2,300 also offer on-line games. Temporary mobile retail outlets may be established at special events, such as the Wisconsin State Fair and Summerfest in Milwaukee, provided the unit will not cause any harm to sales at regular retail outlets. The 1997-98 biennial budget bill proposes the establishment of vending machine sales of lottery tickets.

All Wisconsin Lottery tickets must be sold for cash and only at the established price unless discounts are authorized. A person must be 18 years of age or older to purchase a ticket, but minors can receive tickets as gifts. Winning tickets must be redeemed within 180 days of the end of a particular game. Tickets with payout values of less than \$600 may be redeemed at the Wisconsin Lottery offices or any on-line retailer. Prizes of \$600 and over must be redeemed by bringing the tickets or sending claim forms to the Wisconsin Lottery offices. Unclaimed prize money is ultimately used to increase property tax relief.

In the case of lottery prizes exceeding \$2,000, a portion is withheld for the payment of federal and state income taxes. In addition, winners of \$1,000 or more are identified to the Wisconsin Department of Revenue to determine whether some or all of the winnings must be applied toward debts owed to the state, including delinquent taxes or court-ordered child or

spousal support payments. Some of the large jackpots are paid in the form of 20- or 25-year annuities, which may be inherited.

From its inception through June 30, 1997, the Wisconsin Lottery has grossed over \$3.8 billion in sales. Total approximate sales figures by fiscal year were:

1988-89	\$230.4 million
1989-90	\$309.6 million
1990-91	\$400.6 million
1991-92	\$445.8 million
1992-93	\$495.1 million
1993-94	\$495.5 million
1994-95	\$518.9 million
1995-96	\$482.1 million
1996-97	\$431.1 million

Studies indicate that over 60% of Wisconsin residents play the lottery, with about half playing less than once a month. About 10% of the state's population accounts for nearly 75% of ticket sales. According to a 1995 survey, while minorities and the poor spend a higher proportion of their income on tickets, the vast majority of all lottery players, about 95%, said their lottery spending caused them no personal or family problems.

Lottery Advertising. The Wisconsin Constitution prohibits spending state funds on promotional advertising of the state lottery. However, retailers may conduct promotional advertising if their ads clearly indicate private sponsorship. Any state-funded informational advertising for lottery games must indicate the estimated odds that a specific lottery ticket will win a prize. Information about on-line games must explain that the size of prizes and odds of winning depend on the number of entrants.

Informational advertising on the following topics is permitted: the fact that the state has a lottery; ticket prices and sales locations; prize structures; game types and playing procedures; the time, date and place of drawings; and the identity of winners and amounts won. Creative presentation of these topics is not prohibited, but there has been controversy over the line between informational and promotional advertising. A panel, commissioned by Governor Thompson, stated in May 1991 that almost any approach used to attract consumers is bound to be both informational and promotional in nature. In July 1991, Attorney General Doyle stated that lottery advertising sometimes violates the spirit, but not necessarily the letter, of the law. He noted that "the distinction between promotional and informational advertising can become so blurred as to be improperly vague", and he recommended that the legislature clarify what is legal.

Property Tax Relief. The constitutional amendment which authorized the state lottery required that the net proceeds be used for property tax relief, as determined by the legislature.

Proponents of the amendment did not promise that the lottery would substantially reduce property taxes, but they did claim that earmarking the profits would serve to moderate tax increases. In fiscal year 1996, about 32% of total annual sales was available for property tax relief.

Approximately \$419 million of the lottery proceeds earned from the September 1988 start of the lottery through the end of 1992 were variously applied to general school equalization aids, farmland tax relief credits and district attorney salaries. Disagreement arose as to whether these expenditures were proper methods of delivering direct property tax relief. In May 1991, State Senator Russell Feingold, joined by eight state residents, filed a class action suit against the state on behalf of all Wisconsin property taxpayers, alleging lottery profits were improperly used to fund district attorneys' salaries and the general school equalization aids program. Also questioned were partial vetoes by Governor Thompson of 1991 Wisconsin Act 39 that resulted in about \$83 million in lottery profits being transferred to the general fund. On May 4, 1992, Dane County Circuit Court Judge Michael Nowakowski ruled that using lottery profits to supplement school aids was unconstitutional. He declared that the intent of the voters in ratifying the 1987 lottery amendment was to provide for direct property tax relief which is "separate, different and extra" and that adding funds to existing state aid programs may or may not result in an actual dollar-for-dollar reduction of property taxes due. Although the previous expenditures of approximately \$190 million in lottery profits were declared inappropriate, the court did not order replacement of the funds, and the decision was not appealed.

In response to the court decision, the legislature, in 1991 Wisconsin Act 39, created "the lottery credit for school property tax relief" as the vehicle for direct distribution of lottery revenues. Owners of principal residences were eligible for the credit on their local property tax bills, related to the amount of property taxes they owed toward the local school levy. In 1991, the first year of the lottery credit, about \$180 million was distributed to about 1.2 million homeowners, which included a credit supplement from lottery profits held in escrow from previous years. Each owner-occupied residence received an average \$144 credit. (Credits ranged from \$46 in the Niagara School District to \$242 in the Mellen School District.) The size of the lottery credit for a particular residence is based upon the school tax rate for the district in which the home is located and a proportion, determined by a statutory formula, of the residence's assessed valuation. The state can adjust the total annual credit statewide to the level of lottery profits by changing the amount of assessed value applied in the credit formula.

In the second year of the program, the credit totaled \$205 million, distributed to about 1.2 million homeowners. The average 1992 credit was \$168. The legislature had boosted the 1992 credit an extra \$21 million by deferring some lottery spending obligations into the following fiscal year. Disagreement over that shift led to the enactment of 1991 Wisconsin Act 323 which

required that the amount of lottery credits must equal lottery profits in the previous year beginning in 1993.

For 1993 through 1995, the lottery credit was calculated by a statutory formula on a portion of each home's assessed value. During these years, the average credits were about \$106, \$112 and \$126 per homeowner, respectively.

Lottery Credit Procedure Unconstitutional. On October 29, 1996, Dane County Circuit Court Judge Angela Bartell ruled that the law providing lottery property tax credits only to owners of primary residences in Wisconsin violated the uniformity clause of the state constitution. The suit, brought by the Wisconsin Out-of-State Landowners Association, asserted that the constitution requires that all classes of property must be treated equally for the purposes of property taxation, including credits applied toward property taxes. The decision holds that homes owned by out-of-state residents, second homes owned by Wisconsin residents and commercial property cannot be arbitrarily excluded from the lottery property tax relief program. While appealing the ruling, the state decided not to distribute the 1996 lottery proceeds totaling approximately \$124 million. (It was estimated that the statewide average credit for homeowners would have been about \$100 that year.) Without constitutional amendment or legislation designed to pass constitutional muster, it is possible smaller lottery credits will have to be distributed to all classes of property in the future.

F. Activities Exempted from Antigambling Laws

Certain activities involving chance or risk have been specifically exempted from the anti-lottery laws by statute, primarily because of the skill required for successful participation. Legitimate business activities exempt from the antigambling laws include commodities futures and insurance policies. In addition, athletic contests and races are allowed, even if an entry fee is required and prizes are awarded to the winners, provided the outcome is primarily dependent on skill or endurance. However, betting on most sports events or races is illegal.

Some games involving chance have been permitted due to the amount of skill involved in playing them. Pinball machines were permitted, but a 1935 attorney general opinion (24 Op. Atty. Gen. 536) held that they could be considered illegal gambling devices if players were awarded anything of value based on the points accumulated in play. Chapter 91, Laws of 1979, specified that the awarding of immediate free replays would be considered legal.

Crane games are coin-operated amusement devices that allow the player an opportunity to win inexpensive merchandise prizes, such as stuffed animal toys. By operating controls to manipulate a steel-clawed crane within a glass-enclosed cubicle, the player tries to pick up and win the object. Some people characterized crane games as harmless, inexpensive sources of amusement with skill being the primary determinant for success. Opponents countered that the machines could be fixed so that chance, not manual dexterity, was the critical factor

for success. A public relations and lobbying effort by the amusement games industry resulted in the passage of 1987 Wisconsin Act 329, which legalized the devices but required that skill must be the major determining element and only prizes contained within the machine could be won. The wholesale value of the prizes may be not more than seven times the cost charged to play or \$5, whichever is less. Operators installing the games in their establishments must pay a one-time licensing fee to the state. As of April 1, 1997, over 1,600 crane games were licensed in Wisconsin.

II. GAMING REGULATION AND LAW ENFORCEMENT IN WISCONSIN

Wisconsin Gaming Board. The Wisconsin Gaming Board, which replaced the Wisconsin Gaming Commission on July 1, 1996, oversees and regulates legal gambling as provided in Chapters 561 through 569, Wisconsin Statutes. It carries out the state's responsibilities related to racing, charitable games and Indian gaming. The board may levy fines and suspend or revoke licenses for administrative violations, and it reports suspected criminal violations of gaming laws to the Wisconsin Department of Justice. If the department chooses not to pursue a criminal prosecution, the board may work with local law enforcement officials. The board is composed of five part-time members, who are appointed by the governor with the advice and consent of the senate for 4-year terms. Although it retains some significant duties relating to the state lottery, the board is no longer responsible for the day-to-day operations, which are handled by the Department of Revenue.

Penalties for Private Gambling. Section 945.01, Wisconsin Statutes, defines betting: "A bet is a bargain in which the parties agree that, dependent upon chance even though accompanied by some skill, one stands to win or lose something of value specified in the agreement." Section 945.02 provides that making a bet or participating in gambling activity is a Class B misdemeanor punishable by a fine not to exceed \$1,000 or imprisonment not to exceed 90 days, or both. Because private wagers are widespread and generally perceived to cause little harm, law enforcement authorities rarely prosecute activities, such as low-stakes poker games or betting pools.

Penalties for Commercial Gambling. Although the law has always considered commercial gambling to be a more serious offense than private betting, local law enforcement authorities typically raid establishments conducting for-profit gaming only in response to specific citizen complaints. Section 945.03 provides that commercial gambling, as well as manufacturing or dealing in illegal gambling devices, constitutes a Class E felony punishable by a fine not to exceed \$10,000 or imprisonment not to exceed two years, or both.

The Thomson Law – From Slot Machines to Video Games. The 1940s saw a proliferation of gambling machines, with slot machines and other devices openly available in taverns and

resort areas catering to out-of-state tourists. The legislative response was Chapter 374, Laws of 1945, known as the Thomson Antigambling Law for its sponsor, Assemblyman Vernon W. Thomson (later attorney general and governor). The Thomson Law provided for the revocation of a tavern's alcohol beverage license and the seizure of any slot machine, payoff pinball machine or other gambling device found on the premises. Any law enforcement official aware of illegal gambling who failed to take appropriate action was subject to removal from office by the governor. Well-publicized tavern raids resulted in the confiscation of many illegal gambling machines. The constitutionality of the Thomson Law was upheld by the Wisconsin Supreme Court in *State v. Coubal*, 248 Wis. 247 (1946), and the essential elements of the law are embodied today in Sections 945.041, 968.10 and 968.13, Wisconsin Statutes.

The seizure and license revocation sanctions of the Thomson Law are now being applied to a new invention, video gaming machines. Video games, controlled by computer microchips and featuring high-tech graphics and sound effects, may be programmed to simulate the play of poker and other casino-type games. In recent years, thousands of these machines have appeared in Wisconsin taverns after the bar business was hard hit by a combination of competition from Indian tribal casinos, the higher legal drinking age, and stricter enforcement of prohibitions against drinking and driving. Although the machines are not designed to automatically dispense coins, some proprietors commonly award money prizes to patrons who accumulate certain numbers of points.

There is confusion among law enforcement authorities as to whether mere possession of video gaming machines is prohibited, although payouts based on the results of the games are clearly illegal. Proprietors argue that the devices can legitimately be used for amusement because they do not automatically dispense prize money. Enforcement officers encountered a very sensitive issue when they raided taverns to seize games similar to those legally available at nearby Indian tribal casinos.

Attorney General Doyle stated in a March 1992 informal opinion that possession of video gaming machines in taverns is inherently illegal, declaring gambling to be their principal purpose. Nevertheless, he suggested the legislature consider clarifying the law. After the opinion, district attorneys sent warning letters to taverns, prompting the removal of many machines. Periodic raids around the state have netted many video games but have resulted in few prosecutions because authorities did not wish to overload the courts. Some district attorneys have expressed the opinion that confiscation of the expensive machines is an adequate punishment and deterrent.

In December 1992, the District IV Court of Appeals ruled that video gambling machines that do not directly pay winnings to the player are not illegal devices per se. In November 1993, the Wisconsin Supreme Court returned the case to Dane County Circuit Court for retrial,

saying the appellate court had insufficient evidence on the nature and use of video gaming machines to render an adequate decision. It is likely that the question of whether mere possession of video gaming machines is illegal will ultimately be decided by the high court.

Internet Gambling. The same technology that allows computer users to send electronic mail messages and access distant databases over telephone lines through the Internet also makes possible various types of wagering. Operators are able to set up “virtual casinos” that take bets on sporting events, conduct lotteries, and permit on-line customers to play simulated casino-type games. In many cases, state laws appear to prohibit such private gambling operations within the state, but situations where the bet is made in one state and accepted in another state or a foreign country create legal ambiguities. Operating Internet wagering is legal in some foreign countries and the number of sites and monetary volume of activity are rapidly growing, at the same time state law enforcement officials warn there is little guarantee that the sites are being managed honestly. They express concern that having almost every computer available as a mini-casino will lead to increased gambling addiction and fraud, and they are particularly worried that children have access to gambling opportunities. The state attorneys general, let by James Doyle of Wisconsin and Hubert Humphrey of Minnesota, recently urged that federal law ban all on-line gambling because regulation is impractical. On September 15, 1997, Attorney General Doyle filed lawsuits on behalf of Wisconsin against three Internet gambling operators. These suits, which seek injunctions from the Dane County Circuit Court against on-line gambling, assert that accepting bets via computer is illegal in Wisconsin.

Gambling Contracts and Debts Unenforceable. Laws in effect since 1858 (Statute Sections 895.055 and 895.056) make all gambling contracts and debts legally uncollectible. Losers may also sue to recover money lost in gambling. In December 1992, the District II Court of Appeals ruled that the law still barred prosecution for insufficient funds checks at dog tracks. 1993 Wisconsin Act 174 permits enforcement of wagering debts related to legal gambling, such as the state lottery, racing and Indian gaming.

III. INDIAN GAMING IN WISCONSIN

Indian tribes are considered to be self-governing domestic, dependent nations that retain many attributes of sovereignty in the regulation of internal affairs on tribal lands. Tribal members are subject to tribal civil and criminal law while on the reservation, and state and local governments cannot interfere with on-reservation rights granted by federal treaties or laws, including those related to hunting, fishing and gambling. Tribal members hold dual tribal-U.S. citizenship and are exempt from state income taxes and local property taxes if they live and work on the reservation. Tribal enterprises located on reservation land, such as casinos or other for-profit businesses, are also exempt from state and local taxes for business activities

on the reservation. However, some tribes voluntarily enter into agreements providing for payments to reimburse municipalities for government services, such as police and fire protection and road construction and maintenance.

The U.S. Constitution gives Congress the power to regulate commerce with the Indian tribes. Historically, this has precluded states from exercising jurisdiction over Indian matters unless an aspect of tribal sovereignty is specifically affected by federal statute or by federal-tribal treaty. Federal law (Public Law 83-280) currently grants some states, including Wisconsin, broad jurisdiction over criminal offenses committed by or against Indians on tribal lands. Under P.L. 280, if a state generally outlaws an activity and makes violations punishable with criminal penalties, then the state law is criminal-prohibitory and enforceable on the reservation. However, if the state allows an activity in certain circumstances, even if it is subject to extensive regulation, then the law is civil-regulatory and the state may not enforce that law in Indian territory. The shorthand test, as stated in *Barona Group of Capitan Grande Band of Mission Indians, San Diego County, California v. Duffy*, 694 F.2d 1185 (1982), is “whether the conduct at issue violates the State’s public policy.” In *Sycuan Band of Mission Indians v. Roache*, 708 F. Supp. 1498 (1992), the U.S. District Court for the Southern District of California explicitly stated that any doubts concerning characterization of a state’s gambling laws should be resolved in favor of finding the laws to be civil-regulatory, rather than criminal-prohibitory.

Bingo games on tribal land began to proliferate after 1982, when the U.S. Supreme Court let stand a lower court’s decision that Florida had no jurisdiction under its P.L. 280 powers to regulate bingo games on reservations if the game was legal elsewhere in the state [*Seminole Tribe of Florida v. Butterworth*, 491 F. Supp. 1015 (S.D. Fla. 1980); 658 F.2d 310 (5th Cir. 1981); cert. denied, 455 U.S. 1021 (1982)]. The Court ruled that the state could not restrict bingo games conducted by the tribe on reservation lands because Florida law allowed certain community organizations to conduct low-stakes bingo games on a limited basis. In 1981, the Oneida Tribe in Wisconsin was threatened with enforcement action by the Brown County sheriff because it conducted unlicensed games which exceeded the prize limits set by the state’s charitable bingo statutes. After first granting an injunction, Federal Judge Barbara Crabb ruled in *Oneida Tribe of Indians of Wisconsin v. State of Wisconsin*, 518 F. Supp. 712 (W.D. Wis. 1981), that once the state legalized bingo, it lost its regulatory jurisdiction under P.L. 280 on the Oneida Reservation. She observed that “the Wisconsin legislature and the general populace, as evidenced by the constitutional amendment of 1973, have determined that bingo playing is generally beneficial and have ‘chosen to regulate rather than prohibit.’ Thus, it appears that Wisconsin’s bingo laws are civil-regulatory and . . . not enforceable by the state in Indian country.”

In a pivotal 1987 case, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), the U.S. Supreme Court explicitly affirmed the criminal-prohibitory/civil-regulatory test and ex-

tended it to forms of gambling other than bingo. California law allowed gambling at card clubs and allowed charitable organizations to conduct bingo games. The state sought to apply restrictive state laws, including jackpot limits, to card and bingo games conducted by the Cabazon tribe on their Riverside County reservation. The federal district court held that the state and county lacked authority to enforce gambling laws on the reservation, noting that not only did California not prohibit gambling, it permitted betting on horse races and had approved state-operated gambling in the form of the California Lottery: “In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular.” Thus, the Cabazon Band of Indians could conduct its gambling activities free from state regulation on tribal lands. The U.S. Supreme Court did not, however, specifically define what amount of gambling was sufficient to characterize a state’s public policy as regulatory rather than prohibitive.

Indian Gaming Regulatory Act. In *Cabazon*, the U.S. Supreme Court indicated that Congress, if it chose, could pass laws to limit the gambling rights of the tribes. On October 17, 1988, Congress enacted Public Law 100-497, titled the “Indian Gaming Regulatory Act” (IGRA). IGRA was the culmination of years of efforts to forge a workable compromise between the states, federal agencies and the sovereign tribes. The stated purpose of the law is to promote tribal economic development and employment; tribal self-sufficiency; and strong, sovereign tribal governments. Employment and revenue from tribal gaming enterprises was seen as an effective way to raise the standards of living on historically poverty-stricken reservations. The National Indian Gaming Commission (NIGC) was established to regulate and oversee Indian gaming operations, maintain the fairness and honesty of tribal gaming, and keep gaming free from the influence of criminal elements. Congress intended that existing state gaming regulatory systems be used to the extent possible in order to satisfy the law enforcement concerns of all parties. The key component of the law was the requirement that states and tribes enter into compacts to regulate reservation gaming.

IGRA generally provides that tribes may offer the types of gambling that are either specifically permitted or not criminally prohibited by the laws of the state in which the Indian lands are located. It divided gambling into three classes which were subsequently refined by the commission:

Class I games are social games played solely for prizes of minimal value or traditional forms of Indian gaming played in connection with tribal ceremonies or celebrations. Class I gaming is totally under the control of the tribes and is not regulated by outside agencies.

Class II includes bingo or bingo-type games and certain nonbanking card games such as poker. (A nonbanking game is one in which players compete against one another as opposed

to playing against the house.) If bingo or any other Class II game is permitted by a state's law, then tribes within a state may conduct similar games free of state regulation, including setting prize amounts above those specified in state statutes.

Class III covers all other forms of gaming, including, but not limited to: a) any house banking game such as blackjack ("21") or baccarat, or casino games, such as roulette, craps and keno; b) slot machines and electronic or electromechanical facsimiles of any game of chance; c) any sports betting and pari-mutuel wagering including, but not limited to, wagering on horse racing, dog racing or jai alai; or d) lotteries, including raffles.

Casino Games Must Be Considered in Wisconsin Tribal Compacts. In Wisconsin, controversy arose over the question of whether casino-type games should be included in state-tribal gaming compact negotiations. Federal courts have tended to be permissive, generally ruling that tribes in a state that allows one or more forms of Class III gaming may conduct any type of Class III game and are not limited to the exact games played in that state. The issue was further complicated in Wisconsin because some interpreted the 1987 state lottery amendment as permitting statutory authorization of state-operated casino games.

By late 1989, Attorney General Hanaway, designated the state's negotiator by Governor Thompson, had reached tentative agreements with several tribes that would have allowed certain casino games. The compacts were awaiting gubernatorial and tribal approval when Hanaway issued an opinion, 79 Op. Atty. Gen. 14 (1990), putting the process on hold. He said that casino gambling, while not constitutionally prohibited, was illegal under criminal statutes, thus making such games ineligible for consideration in compact talks. He indicated in his opinion that the legislature could amend the statutes to legalize casino games for non-Indians and thus make them appropriate for inclusion in tribal-state gaming compacts.

Some Wisconsin tribes had already opened casinos in anticipation of completing the compacts. The Lac du Flambeau and Sokaogon (Mole Lake) Chippewa bands filed suit in federal court, alleging the state failed to bargain in good faith. Judge Crabb held in a preliminary decision, *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 743 F. Supp. 645 (W.D. Wis. 1990), that tribes could not operate casinos without signed agreements. However, she held, only federal officers have enforcement authority over illegal Indian casinos.

Hanaway's successor took a different view. Attorney General Doyle concluded in a 1991 formal opinion (OAG 10-91) that "lottery", as used in the original constitution, must be broadly interpreted to include all games in which a person pays for a chance to win a prize. Because "lottery" meant "gambling", he reasoned that the 1987 constitutional amendment which authorized the legislature to create a state "lottery" also removed any constitutional prohibition against state-operated games of chance, including casino gambling.

On June 18, 1991, Judge Crabb, citing Attorney General Doyle's broad interpretation of the word "lottery", ruled that since the state constitution did not prohibit the legislature from authorizing state-operated casino games and since Wisconsin permitted a substantial level of Class III gambling, Indian tribes in Wisconsin could conduct casino games under a state-tribal gaming compact. In *Lac du Flambeau Band of Lake Superior Chippewa Indians, et al., v. State of Wisconsin, et al.*, 770 F. Supp. 480 (W.D. Wis. 1991), Judge Crabb held Wisconsin gaming laws to be regulatory rather than prohibitory in nature within the meaning of IGRA. She ordered the state to consider casino games "on the table" in compact negotiations and directed it to reach agreement with the tribes within the 60-day period required under IGRA. She also relied on a long-standing principle governing ambiguities in treaties or federal statutes as set forth by the U.S. Supreme Court in *Bryan v. Itasca County*, 426 U.S. 373 at 392 (1976), which holds that vague laws are to be interpreted in favor of Indian sovereignty. Judge Frank Easterbrook of the Seventh Circuit Federal Court of Appeals in Chicago dismissed the state's appeal of the case in March 1992 on procedural grounds.

Compacts Reached with 11 Tribes. The governor was authorized to enter into gaming compacts on behalf of the state by 1989 Wisconsin Act 196, which contained no provision for legislative review or approval of negotiated agreements. By June 1992, Wisconsin had concluded 7-year gaming compacts with all 11 of the state's Indian tribes and bands, authorizing blackjack, electronic video games, slot machines and pull-tabs in tribal casinos. The following list names the 17 casinos operated by the tribes as of September 1, 1997, and the dates the respective compacts were finalized:

Lac Courte Oreilles Band of Lake Superior Chippewa. (LCO Casino, Hayward, Sawyer Co.) Compact signed August 16, 1991.

Sokaogon (Mole Lake) Chippewa Community. (Regency Resort and Grand Royale Casinos, Crandon, Forest Co.) Compact signed August 22, 1991.

Oneida Tribe. (Oneida Bingo and Casino, Green Bay, Brown Co.) Compact signed November 8, 1991.

Red Cliff Band of Lake Superior Chippewa. (Isle Vista Casino, Red Cliff, Bayfield Co.) Compact signed December 12, 1991.

Bad River Band of Lake Superior Chippewa. (Bad River Bingo and Casino, Odanah, Ashland Co.) Compact signed December 12, 1991.

St. Croix Band of Lake Superior Chippewa. (St. Croix Casino and Hotel, Turtle Lake, Barron Co.; and Hole in the Wall Casino, Danbury, Burnett Co.) Compact signed December 19, 1991.

Stockbridge-Munsee Community. (Mohican North Star Casino, Bowler, Shawano Co.) Compact signed February 13, 1992.

Lac du Flambeau Band of Lake Superior Chippewa. (Lake of the Torches Casino, Lac du Flambeau, Vilas Co.) Compact selected by court-appointed mediator on March 23, 1992.

Forest County Potawatomi Community. (Northern Lights Casino near Carter in Forest Co. and Potawatomi Bingo Casino in the City of Milwaukee.) Compact signed June 3, 1992.

The tribe bought part of a former college in Milwaukee's Menomonee Valley, put it in trust status and, pursuant to a 1990 agreement with the city, established a high-stakes bingo operation. In June 1992, with the encouragement of the U.S. Department of the Interior, the state approved a gaming compact which authorized 200 slot/video gaming machines on the site but excluded blackjack. City officials contended that its agreement with the tribe, which only permitted the opening of the bingo hall, required further city approval prior to instituting casino gaming. In September 1993, Federal District Judge Crabb ruled that the tribe may operate a casino in accordance with the compact reached with the state. Legal appeals by the city have been unsuccessful.

Menominee Tribe. (Menominee Nation and Crystal Palace Casinos, Keshena, Menominee Co.) Compact signed June 3, 1992.

Ho-Chunk (formerly Winnebago) Tribe. (Ho-Chunk Casino, Lake Delton, Sauk Co.; Majestic Pines Casino, Black River Falls, Jackson Co.; Rainbow Casino, Nekoosa, Wood Co.) Compact signed June 11, 1992.

The compact allows the tribe to operate casinos on its lands in Sauk, Jackson and Wood Counties and at a fourth location determined by mutual agreement with the state. The tribe has expressed a long-standing desire to establish the fourth casino on a site along Interstate 90 on Madison's southeast side in Dane County. It has completed, but not yet opened, the De Jope facility there. Federal law permits the tribe to commence bingo games on this land at any time without state regulation, but bingo operations have been delayed pending agreement with the city regarding municipal services. In June 1993, Federal Judge Crabb ruled that the tribe is bound by the compact's gambling location restrictions, meaning that the governor must approve amendment of the state-tribal agreement before casino gambling could occur at the Dane County site. Thus far, the governor has been reluctant to give approval due to opposition from local elected officials who have expressed concern over the potential for increased crime and demand on public services.

Provisions of Gaming Compacts. The first of the compacts, the agreement with the Lac Courte Oreilles Chippewa, set the basic pattern for those that followed. Tribes are authorized to conduct the following Class III games: 1) blackjack (also known as "21"); 2) electronic games of chance with video facsimile displays (video poker, video keno, etc.); 3) electronic games of chance with mechanical displays (i.e., electronic slot machines); and 4) pull-tabs when not played at the same location where bingo is being played. If any tribe is subsequently permitted to operate additional types of games, the others may also request the right to operate those games. Blackjack, the only table game authorized, may not be played at more than two casinos per tribe.

Patrons must be 18 years old to gamble and all play must be on a cash basis. The maximum wager on a blackjack hand is \$200 before any double-downs or splits, and blackjack may not be played for more than 18 hours per day at any location. No more than \$5 may be wagered at a time on any slot/video gaming machine. Slot/video gaming machines that are not affected by player skill must pay out, over a period of time, a minimum of 80% of the amount wagered, and no more than 100%. Electronic games of chance in which outcomes may be affected by player skill, such as video poker, must have average payout rates of at least 83%.

The Indian Gaming Office of the Wisconsin Gaming Board regulates and audits tribal gaming activities; certifies contractors that provide gaming machinery and supplies; conducts background investigations of certain employees; and recommends prosecution of criminal violations of state gambling laws that occur on tribal lands. It also assists the governor in negotiating tribal-state gaming compacts. The state receives \$350,000 annually to defray oversight costs, with each tribe assessed a proportional share based on gross profits. Financial and other proprietary records for individual tribes are kept confidential.

Tribal casinos generally operate in conformance with worker protection laws, but compliance is voluntary in the areas of unemployment insurance, worker's compensation, overtime pay, minimum wages, harassment and discrimination, and collective bargaining. Tribes must retain full ownership of their gaming facilities, but may hire outsiders to finance, construct and manage them. Management fees are limited by federal law. Most Wisconsin tribes now manage their own gaming operations. As sovereign entities, tribes may not be sued against their will.

Expansion of Gaming to Other Tribal Lands. Generally, Class III gaming may not be conducted on trust lands acquired after October 17, 1988, unless the land is adjacent to the boundaries of the reservation as of that date. However, subject to approval or veto by the governor, gaming on newly acquired noncontiguous lands may be authorized by the U.S. Secretary of the Interior, provided it is deemed in the best interest of the tribe and not detrimental to the surrounding community or nearby tribal gaming operations. There is no appeals procedure if the governor withholds consent.

Compact Renewals. According to federal law, the gaming compacts, which start to expire in August 1998, are extended automatically for 5-year periods if the state fails to give formal notice of intention to nonrenew at least six months prior to expiration. A March 1996 decision by the U.S. Supreme Court introduced uncertainty into the process for renewing the Wisconsin compacts by invalidating the provisions of IGRA which allowed a tribe to sue in federal court if a state failed to negotiate in good faith. In *Seminole Tribe v. Florida* (116 S. Ct. 1114), it ruled that the Eleventh Amendment to the U.S. Constitution prevents Congress from authorizing IGRA enforcement suits by Indian tribes against sovereign states. Unless Congress amends

IGRA or enacts a different scheme for regulating tribal gaming, it is possible that disputes over gaming compact negotiations may proceed directly to the mediation phase, with ultimate decisions imposed by the Secretary of the Interior.

Representatives of Governor Thompson and the tribes are currently conducting closed-door negotiations. The state is reportedly seeking increased contributions for regulatory expenses and lost local tax revenue and has raised other issues, such as hunting and fishing quotas and placing additional private land into tax-exempt reservation trust status.

Benefits, Concerns and Prospects. According to the Wisconsin Indian Gaming Association (WIGA), an organization representing the 11 Wisconsin tribes and bands, tribal gaming enterprises in Wisconsin directly provide over 10,000 jobs with an annual payroll of more than \$160 million. Of the over \$7 billion wagered in tribal gaming casinos in 1996, about 91% was returned to winning bettors, with approximately \$280 million in profits remaining after payroll and other operating expenses. In accordance with the IGRA requirement to use gaming profits to promote "community objectives", proceeds are used to fund social welfare programs, tribal government, schools, higher education scholarships, medical facilities, day-care centers, housing, business development, roads and other infrastructure improvements, and direct payments to members. Tribal officials also cite sociological benefits, such as increased optimism and self-esteem and a decline in domestic violence, alcoholism and welfare dependency. A November 1993 study conducted by UW-Green Bay Professor James Murray for the WIGA reported that Indian gaming operations generated millions of dollars in new revenues for state and local government from income and sales taxes paid by employees and suppliers and spurred tourist spending at businesses such as hotels, restaurants and gas stations.

Tribal gaming is not without its critics. Competition from high-stakes Indian casinos and bingo halls is blamed for the diminished profitability of greyhound racetracks and charitable bingo and raffle activities in the surrounding areas. Some question the fairness of the tribes' current monopoly on casino gaming in Wisconsin, with tavern owners and others urging legislators to allow them to offer games such as video poker machines to "level the playing field". They assert that tribal gaming facilities enjoy a number of advantages, including tax breaks, freedom from many employment regulations, around-the-clock operating hours, and the ability to use cheap food and beverages to attract customers. Some intra-tribal disputes over the control of gambling operations have led to charges of mismanagement and occasional violent incidents.

Legal authorities generally agree that 1991 Wisconsin Act 321 and the lottery definition amendment, both designed to exclude state casino games, will have no adverse effect on Indian gaming during the course of the current compacts and probably will not affect this round of compact negotiations. Attorney General Doyle has commented that compact renewal will

likely depend upon how tribal games have been conducted, their contributions to the state's economy, and criminal or social problems associated with casinos, if any. However, he speculated the amendment may strengthen the state's position if it ever wishes to end all casino gambling. Ending the Wisconsin state lottery and pari-mutuel wagering, as several legislators have proposed, could also bolster future attempts to curtail the scope of Indian gaming. On the other hand, federal judges may rule that casino gambling, once established, cannot be taken away. In the meantime, tribal casinos in Wisconsin continue to prosper, giving historically poor tribes the chance to use "the new buffalo" (as gaming has been dubbed) to diversify and provide for the economic security of present and coming generations.

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