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Gambling is unlawful in Oregon with limited exceptions.¹ The Oregon State Lottery asked whether several activities being conducted by private entities, through websites or online software, constitute “gambling” under Oregon law.² We have set out those questions and our answers below, followed by a discussion.

BACKGROUND

As background for the following questions, assume that a business operates a website or application accessible to Oregonians that offers “sports betting.” Customers register for an online account by providing personal information and a payment source, such as a credit card. The customer selects one or more sporting events and chooses an amount of money to wager on the outcome. The subject of the wager can vary from whether a particular team will win at all, or win by a certain number of points, to more complex wagers that depend on the outcome of several different events. The business determines the outcome of the events by consulting official sports statistics and pays prizes on that basis.

¹ See ORS 167.127 (promoting or profiting from unlawful gambling is a Class C felony).

² The Oregon State Lottery is not subject to Oregon’s gambling laws. ORS 461.030(2); ORS 461.040.

This opinion does not address other elements of Oregon’s gambling offenses, such as whether a particular activity that constitutes gambling is specifically authorized by law and therefore does not constitute “unlawful” gambling. ORS 167.117(24); *see, e.g.*, ORS ch 462 (authorizing the Oregon Racing Commission to license and regulate race meets where the pari-mutuel system is used, as well as off-track wagering and advance deposit wagering); ORS ch 464 (directing the Department of Justice to authorize and regulate the operation of bingo, lotto and raffle games and Monte Carlo events permitted under ORS 167.117); *City of Portland v. Duntley*, 185 Or 365, 391, 203 P2d 640 (1949) (holding that the Oregon State Racing Act authorized “pari mutuel betting at the race track or at race meets conducted under the supervision of the Oregon Racing Commission” and therefore exempted that sort of betting from the scope of Oregon’s nuisance statute, but did not exempt other forms of bookmaking or betting on animal races). This opinion also does not address issues of federal law, such as whether a particular activity falls within the scope of the Commodity Exchange Act, 7 USC § 1 *et seq.* Furthermore, gaming activities conducted by a Tribe pursuant to a State-Tribal Gaming Compact authorized under the Indian Gaming Regulatory Act (IGRA), 25 USC §§ 2701-2721, are outside the scope of this opinion.

QUESTIONS AND SHORT ANSWERS

QUESTION 1

Does the website or application offer “gambling” as defined in ORS 167.117(7)?

SHORT ANSWER 1

Yes. A business that offers sports betting to Oregonians through a website or application is offering “gambling” and is at risk of committing the offenses articulated in ORS 167.108 through ORS 167.167 if the other elements of those offenses are met. That prohibition would not apply to the Oregon State Lottery, which is exempt from Oregon’s gambling laws pursuant to ORS 461.040.

QUESTION 2

Does the answer to Question 1 change if instead of traditional sports betting, the website or application offers betting on “fantasy sports,” in which customers select or “draft” a roster of players from various real-life sports teams, and the performance of those players determines whether the customer wins and what the payout amount should be?

SHORT ANSWER 2

No.

QUESTION 3

Does the answer to Question 1 change if, instead of traditional sports betting, the website or application offers betting on “e-sports,” in which customers bet on the outcome of video games being played by professional, competitive video game players?

SHORT ANSWER 3

No.

QUESTION 4

Are traditional forms of gambling, such as poker, blackjack, and slot machines, exempt from the definition of “gambling” when they are offered through a website or application?

SHORT ANSWER 4

No.

DISCUSSION

ORS 167.117(7) defines “gambling,” for the purpose of Oregon’s gambling laws, as follows:

“Gambling” means that a person stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under the control or influence of the person, upon an agreement or understanding that the person or someone else will receive something of value in the event of a certain outcome.

In interpreting the definition of “gambling,” we follow the statutory interpretation method set out by the Oregon Supreme Court in *PGE v. Bureau of Labor and Industries*, and subsequently refined in *State v. Gaines*.³ The first step is to examine the statute’s text and context.⁴ In doing so, we apply statutory and judicial rules for reading the text and context, including giving terms of common usage their plain meanings.⁵ The second step is to consider legislative history where it appears useful to the analysis of the statute.⁶ The third and final step is to resort to “general maxims of statutory construction to aid in resolving [any] uncertainty” as to the legislature’s intent that remains “after examining text, context, and legislative history.”⁷

The first clause of the definition of gambling, prior to the stated exceptions, sets forth three elements for that definition. The first is that a person “stakes or risks something of value.” The second is that the “something of value” is staked or risked “upon the outcome of a contest of chance or a future contingent event not under the control or influence of the person.” The third is that the staking or risking occurs “upon an agreement or understanding that the person or someone else will receive something of value in the event of a certain outcome.” That definition was enacted in 1971, and remains largely unchanged.⁸

I. “Stakes or risks something of value”

When interpreting a statute under the interpretational method described in *PGE* and *Gaines*, if a statutory term is not defined, we are directed to consult dictionaries in existence around the time of the enactment of the statute.⁹ Accordingly, if a word in the first clause of the definition of “gambling” is not defined elsewhere by statute, we consult the 1971 edition of Webster’s Third New International Dictionary to determine its plain meaning.

The first element of gambling requires a person to “stake” or “risk” something of value. ORS 167.117(22) defines “something of value” as “any money or property, any token, object or article exchangeable for money or property, or any form of credit or promise directly or

³ *PGE*, 317 Or 606, 610, 859 P2d 1143 (1993); *Gaines*, 346 Or 160, 171-172, 206 P3d 1042 (2009).

⁴ *PGE*, 317 Or at 610-11.

⁵ *Id.*

⁶ *Gaines*, 346 Or at 171-172.

⁷ *Id.* at 172.

⁸ Oregon Laws 1971, ch 743, § 263.

⁹ *State v. Perry*, 336 Or 49, 53, 77 P3d 313 (2003).

indirectly contemplating transfer of money or property or of any interest therein.” The statutes do not define “stake” or “risk,” so we consult a dictionary to determine their meaning. To “stake” is “to risk (as one's money or life) upon the issue of competition or upon a future contingency : WAGER, VENTURE, BET.”¹⁰ To “risk” is “to expose to hazard or danger.”¹¹ “Hazard” refers to “an adverse chance (as of being lost, injured, or defeated) : DANGER, PERIL.”¹² Accordingly, the first element of gambling is met when a person exposes something of value to a chance of being lost.

Taken out of context, the term “stake” or “risk” could be read to mean that, if a person pays something of value to win a prize and has no expectation of receiving that payment back, nothing has been “staked” or “risked” because there is a certainty, rather an adverse chance, that the something of value is lost. The statutory context of ORS 167.117, however, indicates that the legislature considered payment for a chance to win a prize to be a “stake” or “risk” of something of value. Statutory context includes other terms enacted at the same time as the definition of “gambling.”¹³ At the time that the legislature defined “gambling,” it also defined a “lottery” as follows:

“Lottery” or “policy” means an unlawful gambling scheme in which: (a) The players pay or agree to pay something of value for chances, represented and differentiated by numbers or by combinations of numbers or by some other medium, one or more of which chances are to be designated the winning ones; (b) The winning chances are to be determined by a drawing or by some other method; and (c) The holders of the winning chances are to receive something of value.¹⁴

The legislature defined a lottery as an “unlawful gambling scheme” in which players “pay or agree to pay” something of value for chance, represented by numbers, to receive something of value. The legislature also provided that a person promotes gambling in the first degree if he receives, in connection with a lottery, “money or written records” or more than \$500 in one day of money played.¹⁵ By characterizing a lottery in which players “pay or agree to pay” for a chance to win as an “unlawful gambling” scheme, the legislature indicated that a player satisfies the element of “gambling” that requires one to “stake or risk something of value” when the player pays or agrees to pay for a chance to win a prize of some kind.

Statutory context also includes court decisions that existed at the time that the statute was enacted.¹⁶ In *State v. Coats*, the Supreme Court observed that “all forms of gambling,” not just

¹⁰ *Webster's Third New Int'l Dictionary* 2220 (unabridged ed 1971).

¹¹ *Id.* at 1961.

¹² *Id.* at 1041.

¹³ See *Northwest Natural Gas Co. v. City of Gresham*, 359 Or 309, 322, 374 P3d 829 (2016) (citing “statutes enacted simultaneously as well as prior versions of the same statute” as context for the interpretation of a statute imposing a privilege tax).

¹⁴ ORS 167.117(12).

¹⁵ Or Laws 1971, ch 743, § 265 (Reg Sess).

¹⁶ *Oregon Occupational Safety & Health Div. v. CBI Services, Inc.*, 356 Or 577, 593, 341 P3d 701 (2014).

lotteries, “involve prize, chance, and consideration,”¹⁷ meaning that all forms of gambling have the elements of a scheme “whereby one, on paying money or other valuable thing to another, becomes entitled to receive from him such a return in value, or nothing, as some formula of chance may determine.”¹⁸ Again, this confirms that the legislature would have understood that paying someone for a chance to win a prize is gambling, whether or not one expected to get the initial payment back.

The legislative history of the definition of “gambling” indicates that the phrase “stakes or risks something of value” should be read broadly. ORS 167.117 was adopted as part of the 1971 Criminal Code, and Oregon courts have held that the Commentary to the Oregon Criminal Law Revision Commission Proposed Oregon Criminal Code, Final Draft and Report, is part of the code’s legislative history.¹⁹ That commentary observes that the Commission defined the terms “contest of chance” and “gambling” using “broad, comprehensive terms that are intended to include any sort of activity that includes gain based on chance.”²⁰ The legislature adopted the phrase “stakes or risks something of value” in the definition of “gambling” without changes from the draft, suggesting that it shared this goal. If the legislature intended to define gambling broadly to include any sort of activity that includes gain based on chance, it follows that it would have understood paying for a chance to win a prize to fall within the term “stakes or risks something of value.”

II. “Contest of chance or future contingent event”

The second element of gambling requires a person to expose something of value to a chance of being lost “upon the outcome of a contest of chance or a future contingent event not under the control or influence of the person.”²¹ The disjunctive “or” can be inclusive or exclusive,²² meaning that it can mean “a contest of chance or a future contingent event” or both, or “a contest of chance or a future contingent event” but not both. However, “or” is distinct from the conjunctive “and,” which would require the state to establish that something of value was risked on both a contest of chance and a future contingent event. “There is no justification for using ‘or’ as meaning ‘and’, unless the failure to do so would leave a statute meaningless or absurd.”²³ Accordingly, the second element of gambling can be satisfied by establishing that something of value was risked upon the outcome of either a contest of chance or a future contingent event. It also can be satisfied by proving both, but that is not required.

¹⁷ 158 Or 122, 132, 74 P2d 1102 (1938).

¹⁸ *Id.* at 129.

¹⁹ *State v. Chakerian*, 325 Or 370, 379, 938 P2d 756 (1997) (acknowledging the commentary as part of the code’s legislative history under the *PGE* framework of statutory analysis, but declining to consider it based on a lack of ambiguity in the text).

²⁰ Commentary to Criminal Law Revision Commission Proposed Oregon Criminal Code, Final Draft and Report §§ 264, 265 at 257 (July 1970).

²¹ ORS 167.117(7).

²² *Burke v. State ex rel Dept of Land Conservation and Development*, 352 Or 428, 437, 290 P3d 790 (2012) (analyzing the use of “or” in ORS 195.300’s definition of an “owner”).

²³ *McCabe v. State*, 314 Or 605, 611, 841 P2d 635 (1992) (quoting *Lommasson v. School Dist. No. 1*, 201 Or 71, 79 (1954)).

A. “Contest of chance”

ORS 167.117(6) defines a “contest of chance” as follows:

“Contest of chance” means 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.

Before the adoption of the 1971 Criminal Code, Oregon criminal statutes prohibited playing “any game of faro, monte, roulette, rouge et noir, lansquenet, rondo, vingt-et-un or twenty-one, poker, draw poker, brag, bluff, thaw or any banking or any other game played with cards, dice or any other device * * *.”²⁴ In its commentary to the definition of “contest of chance,” the Oregon Criminal Law Revision Commission stated that that term, like “gambling,” was “intended to include any sort of activity that brings in gain based on chance,” although “none of the specific games are listed by name.”²⁵ In other words, by replacing the specific games listed in the prior statute with the definition of “contest of chance,” the legislature did not intend to permit those games; instead, it intended to broaden the definition of gambling to include games other than those specifically named by statute.

B. “Future contingent event”

ORS chapter 167 does not define the term “future contingent event.” “Future,” when used as an adjective, ordinarily means “that is to be : still to come.”²⁶ When used with reference to an event, the term “contingent” can have several meanings, including “happening by chance : affected by unforeseen causes or conditions : not patently necessary : unpredictable in occurrence or outcome <a ~ event>.”²⁷ The statute refers to risking something of value upon the “outcome” of a future contingent event, indicating that the legislature did not use “contingent” in the sense of whether the event would occur, but what its outcome would be. This is consistent with the definition of “bookmaking” as “unlawfully accepting bets from members of the public, as a business * * * upon the outcomes of future contingent events.”²⁸ Thus, of the various possible meanings for “contingent” suggested by the dictionary, “unpredictable in outcome” is the most consistent with how the term is used in the statute.

Other statutes enacted as part of the 1971 Criminal Code provide examples of what might be a future contingent event. ORS 167.153, for example, indicates that sports were a type of future contingent event:

In any prosecution under ORS 167. 117 and 167.122 to 167.147 in which it is necessary to prove the occurrence of a sporting event, the following shall be

²⁴ *Former* ORS 167.505 (1969).

²⁵ Commentary §§ 264, 265 at 257.

²⁶ *Webster’s* at 926.

²⁷ *Id.* at 493.

²⁸ ORS 167.117(3).

admissible in evidence and shall be prima facie evidence of the occurrence of the event:

(1) A published report of its occurrence in a daily newspaper, magazine or other periodically printed publication of general circulation; or

(2) Evidence that a description of some aspect of the event was written, printed or otherwise noted at the place in which a violation of ORS 167.117 and 167.122 to 167.147 is alleged to have been committed.

The fact that the legislature considered proving the occurrence of a sporting event potentially necessary to a prosecution for gambling indicates that the legislature considered a sporting event to be either a contest of chance or a future contingent event on which something of value could be staked or risked. The February 1970 minutes of the Oregon Criminal Law Revision Commission, confirm that Donald Paillette, project director for the commission, informed the legislators serving on the commission that the term “contingent events” “means football games, boxing matches, horseraces, etc.”²⁹

At the same time, the statutes and legislative history indicate that “future contingent events” included events other than sporting events. When the legislature defined “gambling,” it also defined a “numbers scheme or enterprise,” to be a form of gambling, as follows:

“Numbers scheme or enterprise” means a form of lottery in which the winning chances or plays are not determined upon the basis of a drawing or other act on the part of persons conducting or connected with the scheme, but upon the basis of the outcome of a future contingent event otherwise unrelated to the particular scheme.³⁰

The February 1970 minutes indicate that for the definition of “mutual” or “numbers game,” which later was used to define the statutory terms “numbers scheme or enterprise,” Mr. Paillette stated that the term “future contingent event” was “used to get at the scheme where the winning number depends on the total number of stocks traded on the market that day or on how the horses run in three races that afternoon, etc.”³¹ Mr. Paillette also stated that while he did not believe the particular practices that he had identified were “presently a great problem in Oregon,” he “thought the code should be equipped to deal with this kind of situation.”³²

The specific examples of “future contingent events” described in the legislative history under the definition of “gambling” reveal three points about the term “future contingent event.” First, although the definition uses “event” in the singular, the reference to “how the horses run in three races that afternoon” indicates that “gambling” can encompass staking something of value on the outcome of one or more events. Second, the fact that a contingent event can include both football games and “the total number of stocks traded on the market that day” indicates that contingent events can include events whose outcome a person could not predict at all, as well as

²⁹ Minutes, Criminal Law Revision Commission, Feb 9, 1970, 3.

³⁰ Or Laws 1971, ch 743, § 263 (Reg Sess).

³¹ *Id.* at 4.

³² *Id.*

events with outcomes that can be predicted subject to a margin of error. For example, a customer of a gambling website may not be able to predict or even estimate the number of stocks traded on the market during a particular day but may feel confident in predicting the outcome of a football game based on public information about the teams and the players, and yet both of those events are contingent events. Finally, the breadth of examples of future contingent events identified by the commission is consistent with its comment that the definition of gambling, as a whole, is intentionally broad so as to capture any type of gain by chance, including gains where the customer may be able to mitigate the element of chance (or believe that they are able to do so) based on personal knowledge, as long as the customer cannot influence or control the outcome of the event.

III. “Upon an agreement or understanding that the person or someone else will receive something of value”

The third element requires that a person risks something of value “upon an agreement or understanding that the person or someone else will receive something of value in the event of a certain outcome.” The “agreement” or “understanding,” in other words, is an agreement or understanding on terms of payout. “Agreement,” when dealing with such terms, can refer formally to “a contract duly executed and legally binding on the parties entering into it,” or “an arrangement (as between two or more parties) as to a course of action.”³³ “Understanding” may refer to “a mutual agreement not formally entered into but in some degree binding on each side” or “an understood or acknowledged condition, limitation, or provision.”³⁴ Courts typically presume that when the legislature uses different terms in the same statute, those terms have different meanings.³⁵ Based on that presumption, a court reviewing the terms “agreement or understanding” is likely to presume that “agreement” refers to a more formal arrangement such as a contract, and “understanding” refers to an arrangement that is not formally entered but binding to some degree. Accordingly, the third element is satisfied by establishing that the person who staked or risked something of value did so based on an understanding, formal or otherwise, that they would receive something of value if a certain outcome occurred.

CONCLUSION

Having reviewed the text, context, and legislative history of the definition of “gambling,” we reach the following conclusions. First, a customer who places bets on sports through a website engages in gambling. If a customer pays money to the operator of a website for a chance to win money or other prizes, then the person has staked or risked something of value. If the customer’s chance to win depends on the outcome of a sports event, then the person has staked something of value on the outcome of a future contingent event. If the website pays prizes based on the outcome of such events, it follows that there was an understanding that it would do so.

Second, the activity described above would still constitute gambling if something of value was staked on the performance of individual players, as opposed to the overall outcome of

³³ *Webster’s* at 43.

³⁴ *Id.* at 2490.

³⁵ *Marshall v. Pricewaterhouse Coopers, LLP*, 371 Or 536, 555, 539 P3d 766 (2023).

a game. The plain meaning of “future contingent event not under the control of the person” is broad enough to include the performance of an individual player in a game. And while the legislative history of ORS 167.117 refers to sporting events broadly, that legislative history also indicates that both “gambling” and “future contingent event” were intentionally and broadly defined to include any sort of activity involving gain based on chance, including practices that were not necessarily prevalent in Oregon at the time that the code was drafted. Accordingly, “gambling” would include payments made or bets placed with a website that paid prizes based on the performance of individual players.

Third, the activity described above would still constitute gambling if something of value was staked on the outcome of a video game or the performance of a person playing a video game. Again, the outcome of a video game or the performance of a player would fall within the plain meaning of a future contingent event, unless the person staking something of value had control over the outcome of the event. Again, the definitions of “gambling” and “future contingent event” were intended to capture practices that were not necessarily prevalent in Oregon at the time that those provisions were drafted.

Finally, traditional activities considered to be “gambling” such as poker, blackjack, and slot machines do not cease to be gambling when they are conducted using modern technology. No part of the definition of “gambling” suggests that its application depends on the technology being used, and the legislative history of the definition of “contest of chance” indicates that it encompasses games such as poker.



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