

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42

OPINION NO. 39

GAMBLING - Calcutta pool, distinguishing characteristics of;

MONTANA CODE ANNOTATED - Title 23, chapter 5, part 11; sections 23-5-1101, 23-5-1102;

MONTANA CONSTITUTION - Article III, section 9.

HELD: A legal Calcutta pool exists if all of the following circumstances occur:

1. The bets vary in amount and were "sold" at an auction;
2. The auctioneer/house has no interest in the outcome of the event;
3. The amount a bettor can win varies with the size of the pool rather than with odds set by the auctioneer/house;
4. The Calcutta pool is "fully subscribed," i.e., all competitors in the event--either individually or as part of the "field" (see James and Gamble, supra)--are wagered on, so that the auctioneer or the house does not have an interest in the outcome of the event;
5. The rules of the particular Calcutta pool do not allow more than one wager per

OPINIONS OF THE ATTORNEY GENERAL

competitor (or "field") per Calcutta pool.

16 November 1987

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Gentlemen:

You have requested my opinion concerning the following question:

Are sports books encompassed within the definition of Calcutta pools in section 23-5-1101, MCA?

As you know, it is my policy not to issue opinions on the legality of specific activities. It is my belief that such rulings intrude on the lawful functions of local prosecutors and courts. However, because these statutes (§§ 23-5-1101 to 1106, MCA) are not self-explanatory, and because of the need for uniformity in the application of statutes dealing with gambling, I have determined that a formal opinion is warranted in this situation. In addressing your question, however, I will concentrate on explaining the specific characteristics of Calcutta pools, as legalized by section 23-5-1102, MCA, leaving it for you to determine whether a specific activity should be prosecuted.

The Legislature has defined the term "Calcutta pool" as follows:

As used in this part, "Calcutta pool" means a form of auction pool in which persons bid or wager money, with winnings awarded based on the outcome of an event, except that persons

OPINIONS OF THE ATTORNEY GENERAL

may not bid or wager money on any elementary school or high school sports event.

§ 23-5-1101, MCA. I believe a strict construction of this statute is warranted for several reasons. First, the Montana Constitution, article III, section 9, as well as section 23-5-102, MCA, prohibit all forms of gambling except those specifically authorized by statute. Second, the common usage of the phrase "a form of" denotes a particular example within a larger class. This leads to the conclusion that all Calcutta pools must be auction pools. Finally, the intent of the Legislature, as expressed in the legislative history of sections 23-5-1101 to 1106, MCA, suggests that these statutes are to be strictly construed. (See Hearings on House Bill 648, Montana House of Representatives Business and Labor Committee, February 13, 1987, p. 9; Montana Senate Business and Industry Committee, March 5, 1987, pp. 4-5.) Section 1-2-102, MCA, directs those construing statutes to pursue the intent of the Legislature, if possible. If the Legislature had wanted to legalize forms of sports bookmaking, it would have expressed this intent, either in the language of the bill passed or in legislative history. It did not do so.

Examining the term "auction pool," the following extensive definition is contained in an 1885 Maryland case.

A certain number of horses is entered to run at a certain race, to be held at a certain time and place. Any person desiring to invest money in a pool or race, offers to the auctioneer a certain amount of money for the choice or selection of a horse, which he supposes will be the winner of the race. A number of bids may be offered for the first choice. The person offering the highest amount obtains the first choice or selection of the horse which he supposes will be the winner, which horse he then and there names; the amount then and there offered for the first choice, is then and there deposited in the hands of the parties conducting the pools. It often occurs, that after several different choices are selected by the persons bidding, there remains a number of horses undisposed of--these are called "the field." These are taken together by the person offering and depositing the highest amount for the same. The amount so deposited for each choice, and the field, (if there be a field,) are added

OPINIONS OF THE ATTORNEY GENERAL

together, and the total constitutes what is commonly called "the pool." Each person so depositing his money on his choice or on the field, receives a card or receipt for the same, showing the horse or (if on the field) the horses selected, the amount so deposited, and the total amount in the pool. The money in the pool (less the commission of five per cent. to the person or persons conducting the pool) is paid to the person having selected the winning horse in the race, upon presentation of the card or receipt aforesaid, to the person conducting the pool. [Emphasis added.]

James and Gamble v. State, 63 Md. 242, 248-49 (1885).

Calcutta pools often occur in conjunction with sports events with multiple entrants (golf tournaments, rodeos, track meets, basketball tournaments, etc.). See also Kilpatrick v. State, 58 N.M. 88, 265 P.2d 978, 980 (1953). John Scarne, a recognized authority on gambling, describes a particular golf tournament Calcutta pool as follows:

After the participants [in the golf tournament] are chosen, the Calcutta pool opens with a player auction in which gamblers bid for individual golfers. The bids for the privilege of "owning" a player usually range from \$2,000 to \$25,000. ... [T]he [pool] is usually divided as follows: 50% to the holder of the winning player, 20% to the holder of the second place, 15% to the holder of third place, and 10% and 5% to the holder of fourth and fifth place.

J. Scarne, Scarne's New Complete Guide to Gambling at 138 (2d ed. 1974).

Because Calcutta or auction pools are a long-standing and limited form of gambling, without substantial pertinent legal explication, I have found it useful to consult various authorities who contrast these pools with other types of gambling. For example, bookmaking is a form of gambling which differs from Calcutta pools. The sports bookmaker has been described as follows:

The sports bookmaker is a broker, bringing together money on both sides of a sports contest. He hopes to bring these monies together in such a manner that the losers' money will be more than sufficient to cover

OPINIONS OF THE ATTORNEY GENERAL

payments to winners. In order to achieve an equality between the teams, one which the bookmaker hopes will attract like sums of money on each contestant, a handicapping process takes place.

Organized Crime Training Institute, California State Department of Justice, California Investigation Training Manual 8.

In the early days of betting on horse races, most bets were made either in auction pools or with bookmakers licensed by the track and working within the track enclosure. An important distinction between pools and books is set forth in the following discussion of the development of pari-mutuel betting:

At most of the thoroughbred tracks, before the pari-mutuel betting system came into use, the books were licensed by the track and paid the track a fixed fee for the privilege of accepting bets within the track enclosure. Each bookie was his own handicapper and pricemaker and usually quoted his own payoff odds. These often varied from one bookie to another; ... The pari-mutuel (Paris mutuel) system was invented in Paris, France, in 1865 by Pierre Oller. ... Oller suggested that tickets be sold on each horse and that the payoff price of each winning ticket be determined by the amount of money wagered on the winner in relation to the amount wagered on all the horses in the race. This meant that the bettors would be wagering against each other rather than against the bookmaker, and they could get back only the amount wagered minus a percentage which the bookmaker retained as his commission. This is exactly what happens today.

J. Scarne, op. cit. (pp. 48-49; see also pp. 46-47).

In the usual sports book, the amount of money wagered varies according to the bettor's and agent's agreement, and the amount of money available to be won varies with the odds given when the bet is placed. Thus, the bookmaker is actually betting against the people who place bets with him, because he gives odds at the time bets are placed. This accounts for the fact that a bookmaker will minimize his risks by altering odds in the course of accepting bets on an event in an attempt to balance the amount bet on each competitor (cf. Ignatin, "Sports Betting," 474 The Annals of the

OPINIONS OF THE ATTORNEY GENERAL

American Academy of Political and Social Science 168
(July 1984)).

In the sports book, the bookmaker is the counterpart of the banker in a banking game. This element is crucial, because it gives the bookmaker a vital interest in the outcome of the event. (For a discussion of the interest element in bookmaking see State v. Andreano, 285 A.2d 229, 231 (1971).) By contrast, in a Calcutta pool, the interest of the auctioneer/Calcutta pool operator is only a percentage of the total pool; he has no interest in the outcome of the event. Concluding the comparisons, pari-mutuel betting combines elements of both auction pools and books. Wagers are made for fixed amounts, with winnings varying according to the odds at the close of betting. However, all wagers form a pool, with the odds calculated "internally" and varying continuously as the betting on various competitors changes. A bettor has no vested interest in any particular odds, and potential winnings (as well as the operator's commission) are calculated using a fixed formula.

Thus, the primary distinguishing characteristics of Calcutta pools, legalized under Montana law, are that the bets are made through a competitive bidding process, and the house or auctioneer has no interest in the outcome of the event wagered upon; rather, the only interest of the house/auctioneer is in a fixed percentage of the pool.

Having said this, I believe it is advisable to point out that the term "auction" is a broad one and that the statutes (§§ 23-5-1101 to 1106, MCA) contain no limitations on that term.

It is my conclusion that in legalizing Calcutta pools, the Legislature clearly intended to expand the number of legal types of sports betting beyond the sports pools currently legalized by sections 23-5-501 to 511, MCA. It did not, however, legalize what are commonly known as sports books where the bookmaker sets the odds and has an interest in the outcome of the event.

THEREFORE, IT IS MY OPINION:

A legal Calcutta pool exists if all of the following circumstances occur:

1. The bets vary in amount and were "sold" at an auction;

OPINIONS OF THE ATTORNEY GENERAL

2. The auctioneer/house has no interest in the outcome of the event;
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4. The Calcutta pool is "fully subscribed," i.e., all competitors in the event--either individually or as part of the "field" (see James and Gamble, supra)--are wagered on, so that the auctioneer or the house does not have an interest in the outcome of the event;
5. The rules of the particular Calcutta pool do not allow more than one wager per competitor (or "field") per Calcutta pool.

Very truly yours,

MIKE GREELY
Attorney General