

AN EDUCATIONAL UPDATE FROM
THE SOUTHEAST LAW INSTITUTE™, INC.

To: Interested Persons
Date: April 2021
From: A. Eric Johnston
Re: Lottery Bills

Six gambling bills were introduced on March 9, 2021. Three of those bills, SB309, SB310 and SB311, were meant to implement the thus far failed SB214 bill that would have authorized all types of gambling in Alabama. These bills would implement that constitutional amendment if it was approved by the people.

Three bills would legalize lottery. SB318 is a constitutional amendment to provide for a vote of the people on a lottery. It would require implementation by the legislature.

SB319 is a constitutional amendment for a more expansive lottery which would include video lottery. Within 12 months it would prohibit current electronic bingo games being played at various gambling venues around the state, all of which have been subject to Attorney General prosecutions. SB320 would implement SB319 should it be approved by the people.

A lottery is a game of chance currently prohibited by Article IV, Section 65 of the Alabama Constitution of 1901. There is no doubt that the outcomes of lotteries proposed by this bill are determined completely by chance. The rule in Alabama is that if a dominant factor in the outcome of the game is chance, then it is a prohibited lottery. See *Ex Parte Ted's Game Enterprises*, 293 So 2d 376 (Ala.2004).

The above reference constitutional amendments require a vote of the people. But will they know what they are voting for? If the Alabama Legislature passes and the voters approve any form of gambling, including one of these lottery bills, it can result in expanded Indian gaming from now what is operated as "bingo" by the Poarch Indians. Consequently, Alabama could have not only the lottery gambling the bill authorizes, but expanded casino-type gambling in Alabama.

The Indian Gaming Regulatory Act ("IGRA") provides three forms of gaming, viz., Class I (traditional Indian games), Class II (traditional paper card bingo) and Class III (other forms of gambling, including electronic slot machine bingo, traditional lottery, sports betting, fantasy sports, as well as, card games, roulette, *et cetera*). It is the Class III gaming that would give us more concern about expanded gambling enterprises in Alabama.

IGRA specifically provides that if a state has Class III gaming (for our purposes here lottery), the Governor must enter into a "compact" with the Indians allowing them to operate Class III gaming, i.e., any type of gambling they wish. See 25 U.S.C. §2710(d)(3)(A).

There has been some discussion that the Code of Federal Regulations recognizes pari-mutuel wagering as Class III gaming, so Alabama already has it. See 25 CFR §502.4(c). However, in Alabama, pari-mutuel wagering is not recognized as a game of chance and would not fit into the category suggested by this CFR. *Opinion of the Justices*, 251 So 2d 751 (Ala. 1971) finds that pari-mutuel wagering is not a game of chance under Section 65 of the Alabama Constitution. Therefore, the CFR is at odds with the finding of the Alabama Supreme Court. The conflict of these provisions has never been resolved. It is likely the CFR would prevail.

Keep in mind that the Poarch Indians attempted to obtain a compact with the State of Alabama to allow casino gambling but failed. See, *Poarch Creek Indians, et al. v. State of Alabama, et al.*, 11 Fed. 3d 1016 (11th Cir. 1994). SB214 requires an Indian compact. If that bill does not ultimately pass, the Poarch Indians may still be interested in that compact. While they may not have pursued it since 1994, there interest may now be renewed in following through with these efforts.

The approval of voters for a lottery will clearly be Class III gaming under IGRA. It will remove any doubt that Alabama has Class III gaming. It may be the catalyst for the compact suggested by the Poarch Indians. Therefore, a vote for any of these lottery constitutional amendments may not be just a vote for a lottery, but for full fledged casino gambling at Indian venues in Alabama.

This memo was provided to some Alabama senators. It is our opinion that legislators in general do not understand the implications of the gambling bills they are considering. There is a rush to pass some kind of gambling, with the perceived idea that it will generate needed revenue for the state of Alabama. It amounts to a regressive tax primarily on lower income people. That is not a fair tax at all.

It is patently unfair for voters to be told they are making the choice about whether gambling will occur in Alabama. The explanation in the above memo demonstrates the pitfalls unknown to voters. By the time this memo is published, some of these will likely have been voted on. None of them have yet been considered by the Alabama House. The explanations in this memo are important to be understood by all Alabama legislators.