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October 26, 2023

Bureau of Gambling Control
Attn: Regulations
P.O. Box 168024
Sacramento, CA 95816-8024

Re: Proposed Regulations Concerning Blackjack

Dear Sir or Madam:

I write on behalf of Artichoke Joe's with comments on the concept language for regulations prohibiting the game of Blackjack circulated on September 11, 2023. The prohibition in Penal Code section 330 against "twenty-one" is void for vagueness, and to the extent, it can be sufficiently construed, the proposed regulations would not be consistent with section 330 and would not be authorized by the Gambling Control Act.

I. Penal Code section 330 is void for vagueness

Penal Code section 330 prohibits the game named "twenty-one." This prohibition on "twenty-one" was added to the statute in 1885, and neither section 330 nor any other statute details the rules of the game or even the characteristics that made the game illegal. Without that clarification, there is no definitive way to know what the Legislature intended to prohibit, and the statute is void for vagueness.

In *Tibbetts v. Van de Kamp* (1990) 222 Cal.App.3d 389, the court struggled with the same problem in a challenge to the game Texas Hold'Em which the Attorney General claimed was the same game as Stud Horse Poker, also prohibited by section 330. The court wrote, "The definition of stud-horse poker, which has never been legislatively or judicially defined since its prohibition in 1885, remains uncertain...." The court relied on old newspaper articles to determine some general rules of stud horse poker despite writing, "Generally, newspaper articles are inadmissible to prove their contents because of the hearsay rule [cite omitted], and should not be authority for the definition of criminal offenses." Then it ruled that

Texas Hold'Em, unlike Stud Horse Poker, involved community cards, and thus was sufficiently different. The court concluded the opinion writing:

We note that the regulation of gambling in general and of poker games in particular in California is a matter for the Legislature, not the judiciary. The continuing uncertainty arising from the stud-horse poker proscription in section 330 may be alleviated by appropriate legislation.

Here an administrative agency, not a court, attempts to determine which types of gambling are allowed and which prohibited, which, as discussed below, is even more problematic.

In *Walker v. Meehan* (1987) 194 Cal.App.3d 1290, the court construed the prohibition in section 330 against "percentage games." In dissent, Judge Newsom (Governor Newsom's father) would have held the statute void for vagueness, writing, "... neither I, nor the Legislature, nor to the best of my knowledge 'men of common intelligence' [cite] can say with the reasonable certainty required by law what is a 'percentage' game as proscribed by Penal Code section 330. ¶ For that reason, I am of the opinion that Penal Code section 330 is void for vagueness, in that it does not adequately or reasonably define the conduct sought to be prohibited, and in a manner that does not encourage arbitrary and discriminatory enforcement."

The same is true here. It is not the use of the name "twenty-one" that is illegal. Rather, it is offering the game played the way "twenty-one was played that is illegal, and there is no way 138 years later for any of us to know with reasonable certainty how twenty-one was played and what were its characteristics that rendered it illegal.

II. To the extent Penal Code section 330 can be construed, the prohibited game of twenty-one was a banking game, completely different from the game of blackjack played in cardrooms

The game of twenty-one, as played today in Nevada and in private in California, is a banking game, one person against the many, and a percentage game. There is no evidence that the game was played otherwise in 1885, when this prohibition was added to the Penal Code.

In this regard, in *Sullivan v Fox* (1987) 189 Cal.App.3d 673, an expert opinion report submitted by Professor I. Nelson Rose concluded that all the games listed in section 330 were banking or percentage games. Regarding twenty-one, Professor Rose wrote, "The game was always dealt as a banking game, and still is in casinos around the world."

The various blackjack style games approved by the Bureau for play in California cardrooms today are not banking games. The house does not play. Rather, a player plays in the position of the dealer, in one-on-one match-ups against all the other players at the table. This is a very different type of game than the game of twenty-one as played in 1885. The house does not participate in the game. Therefore, the prohibition against twenty-one does not apply to them.

III. The Bureau Lacks Authority to Restrict Games By Regulation

The Department has no authority to construe or supplement the Penal Code by regulation. The general rule is that "only the Legislature can define crimes." *People v. Figueroa* (1999) 68 Cal.App.4th 1409. "Only the Legislature, not an administrative body, may determine what conduct is unlawful." *Id.* "The underpinnings of this nondelegation rule include the constitutional provision vesting legislative power in the Legislature, which requires the Legislature to make fundamental policy decisions (Cal. Const., art. IV, §1...)." *Id.*

The purpose of the Gambling Control Act is "to regulate businesses that offer otherwise lawful forms of gambling games." (19801(f).) The Department administers the Gambling Control Act, and its role is limited to that Act. It has authority to adopt regulations to govern its administration of the Act, but the Department has no authority to adopt regulations interpreting Penal Code sections 330 or 330.11.

The Department's authority to adopt regulations under the Gambling Control Act is very limited. In contrast, the Commission is given broad powers to adopt regulations to regulate cardrooms. In particular, section 19841(b) requires the Commission to adopt regulations to "provide for the approval of game rules and equipment by the department to ensure fairness to the public and compliance with state laws." Further, section 19842, imposes limits on the Commission's powers to restrict games by requiring the Commission to conduct a proceeding to determine if a game violates the law. Section 19842(a) reads,

“The commission shall not prohibit, on a statewide basis, the play of any game or restrict the manner in which any game is played, unless the commission, in a proceeding pursuant to this article, finds that the game, or the manner in which the game is played, violates a law of the United States, a law of this state, or a local ordinance.”

This section allows restrictions to be imposed on games only to prevent violation of a law.

Section 19826(g), entitled “Responsibilities of department”, provides that the department shall have the responsibility to “Approve the play of any controlled game, including placing restrictions and limitations on how a controlled game may be played.” This does not authorize the Department to adopt regulations interpreting the Penal Code. Further, this section must be understood in the context of the Commission’s authority.

Penal Code §330.11 provides that acceptance of the deal is not required “if the division finds that the rules of the game” render the maintenance or operation of a bank impossible by other means. This is not a grant of authority to adopt regulations. Further, note that when this section was enacted in 2000, the Commission had not yet been created, and the Bureau’s predecessor (the Division of Gambling Control) was the sole regulator.

Conclusion

As seen, the Penal Code prohibition against “twenty-one” is void for vagueness, and to the extent the term “twenty-one” can be construed, the proposed regulations would not be consistent with Penal Code section 330 and would not be authorized by the Gambling Control Act. For these reasons, the proposed regulations should not be adopted.

Sincerely,
Alan Titus