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May 22, 2001

Honorable Tim Leslie
4164 State Capitol

GAMING: BANKED GAMES - #9041

Dear Mr. Leslie:

QUESTION

Is Section 330.11 of the Penal Code, as added by Chapter 1023 of the Statutes of 2000, and as proposed to be amended by Assembly Bill No. 54 of the 2001-02 Regular Session, as amended March 13, 2001, constitutional?

OPINION

Section 330.11 of the Penal Code, as added by Chapter 1023 of the Statutes of 2000, and as proposed to be amended by Assembly Bill No. 54 of the 2001-02 Regular Session, as amended March 13, 2001, is constitutional.

ANALYSIS

Section 330 of the Penal Code[1] reads as follows:

"330. Every person who deals, plays, or carries on, opens, or causes to be opened, or who conducts, either as owner or employee, whether for hire or not, any game of faro, monte, roulette, lansquenet, rouge et noire, ronco, tan, fan-tan, seven-and-a-half, twenty-one, hokey-pokey, or any banking or percentage game played with cards, dice, or any device, for money, checks, credit, or other

[1] All section references are to the Penal Code, unless otherwise specifically provided.

representative of value, and every person who plays or bets at or against any of those prohibited games, is guilty of a misdemeanor, and shall be punishable by a fine not less than one hundred dollars ($100) nor more than one thousand dollars ($1,000), or by imprisonment in the county jail not exceeding six months, or by both the fine and imprisonment." (Emphasis added.)

Thus, generally, every person who deals, plays, carries on, opens, or conducts or who plays or bets at or against any banking game played with cards or dice is guilty of a misdemeanor. While the term "banking game" is used in Section 330, it is not defined in that section. In 2000, a statutory definition of "banking game" for the purposes of Section 330 was enacted in Section 330.11 by Assembly Bill No. 1416 (Ch. 1023, Stats. 2000; hereafter Chapter 1023).

That section reads as follows:

"330.11. 'Banking game' or 'banked game,' as those terms are used in Section 330 and in the Gambling Control Act (Chapter 5 (commencing with Section 19800) of Division 8 of the Business and Professions Code), refers to a game in which the house, a player, or other entity is a participant in the game, taking on all comers, paying all winners, and collecting from all losers. The bank is actually involved in the play, and serves as the ultimate source and repository of funds, dwarfing that of all other participants in the game. 'Banking game' or 'banked game' does not include a controlled game if the published rules of the game feature a player-dealer position and provide that this position must be continuously and systematically rotated amongst each of the participants during the play of the game, ensure that the player-dealer is able to win or lose only a fixed and limited wager during the play of the game, and preclude the house, another entity, a player, or an observer from maintaining or operating as a bank during the course of the game. For purposes of this section it is not the intent of the Legislature to mandate acceptance of the deal by every player if the division finds that the rules of the game render the maintenance of or operation of a bank impossible by other means. The house shall not occupy the player-dealer position."

Section 330.11, as added by Chapter 1023, thus provides that a prohibited "banked game" or "banking game" has four elements. The first three elements describe what is included in the definition of a banking game, as follows:

(1) The house, a player, or other entity is a participant in the game, taking on all comers, paying all winners, and collecting from all losers.

(2) The bank is actually involved in the play.

(3) The bank serves as the ultimate source and repository of funds, dwarfing that of all other participants in the game.

In addition to these three elements, Section 330.11, as added by Chapter 1023, contains a fourth element, which excludes certain games of chance[2] from the definition of "banking game." Specifically, the section provides that a game is not a banking game if the published rules of the game feature a player-dealer position and provide that this position must be continuously and systematically rotated amongst each of the participants during the play of the game, ensure that the player-dealer is able to win or lose only a fixed and limited wager during the play of the game, and preclude the house, another entity, a player, or an observer from maintaining or operating as a bank during the course of the game. Section 330.11 also prohibits the house from occupying the player-dealer position.

Assembly Bill No. 54, as amended March 13, 2001 (hereafter A.B. 54), proposes to amend Section 330.11 as added by Chapter 1023, as follows:

> ~~"330.11. "Banking game" or "banked game," as those terms are used in Section 330 and in the Gambling Control Act (Chapter 5 (commencing with Section 19800) of Division 8 of the Business and Professions Code), refers to a game in which the house, a player, or other entity is a participant in the game, taking on all comers, paying all winners, and collecting from all losers. The bank is actually involved in the play, and serves as the ultimate source and repository of funds. "Banking game" or "banked game"~~
>
> "330.11. 'Banking game' or 'banked game' does not include a controlled game if the published rules of the game feature a player-dealer position and provide that this position must be continuously and systematically rotated amongst each of the participants during the play of the game, ensure that the player-dealer is able to win or lose only a fixed and limited wager during the play of the game, and preclude the house, another entity, a player, or an observer from maintaining or operating as a bank during the course of the game. For purposes of this section it is not the intent of the Legislature to mandate acceptance of the deal by every player if the division finds that the rules of the game render the maintenance of or operation of a bank impossible by other means. The house shall not occupy the player-dealer position."[3]

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[2] Section 330.11 excludes certain controlled games from the definition of "banking game." Controlled games include most games of chance (Sec. 337j). Because Section 330.11 applies only if there is a player-dealer position, that section applies to card games and similar games of chance.

[3] Additions are shown in underline and deletions are shown in strikeout.

Section 330.11, as proposed to be amended by A.B. 54, would delete elements (1), (2), and (3), and retain only element (4). Section 330.11, as proposed to be amended by A.B. 54, would, thus, provide that a "rotating deal" game is not a prohibited "banked game" or "banking game."

Neither Chapter 1023 nor A.B. 54 purports to amend the provision of Section 330 that prohibits banking games as a criminal offense. Thus, the issue presented is whether, with respect to defining "banked games" or "banking games," Section 330.11 of the Penal Code, as added by Chapter 1023 and as proposed to be amended by A.B. 54, authorizes gaming activities prohibited under the California Constitution. If so, Section 330.11 would not be valid since a statute inconsistent with the California Constitution is void (*Nougues v. Douglass* (1857) 7 Cal. 65, 70).

By way of background, under the doctrine of separation of powers, the powers of state government are executive, legislative, and judicial, and persons charged with the exercise of one power may not exercise the powers of the other unless expressly permitted by the Constitution (Sec. 3, Art. III, Cal. Const.). Section 1 of Article V of the California Constitution vests "[t]he supreme executive power of this State ... in the Governor." The role of the executive branch is to "see that the law is faithfully executed" (Ibid.). Generally it may be said that "it is for the Legislature to make public policy and for the executive to carry out the policy established by the Legislature" (*California Radioactive Materials Management Forum v. Department of Health Services* (1993) 15 Cal.App.4th 841, 870).

Section 19 of Article IV of the California explicitly recognizes the Legislature's role in defining the gambling policy of the state. That section reads as follows:

> "SEC. 19. (a) The Legislature has no power to authorize lotteries, and shall prohibit the sale of lottery tickets in the State.
>
> "(b) The Legislature may provide for the regulation of horse races and horse race meetings and wagering on the results.
>
> "(c) Notwithstanding subdivision (a), the Legislature by statute may authorize cities and counties to provide for bingo games, but only for charitable purposes.
>
> "(d) Notwithstanding subdivision (a), there is authorized the establishment of a California State Lottery.
>
> "(e) The Legislature has no power to authorize, and shall prohibit, casinos of the type currently operating in Nevada and New Jersey.
>
> "(f) Notwithstanding subdivisions (a) and (e), and any other provision of state law, the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law. Accordingly, slot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands subject to those compacts.

> "(f) Notwithstanding subdivision (a), the Legislature may authorize private, nonprofit, eligible organizations, as defined by the Legislature, to conduct raffles as a funding mechanism to provide support for their own or another private, nonprofit, eligible organization's beneficial and charitable works, provided that (1) at least 90 percent of the gross receipts from the raffle go directly to beneficial or charitable purposes in California, and (2) any person who receives compensation in connection with the operation of a raffle is an employee of the private nonprofit organization that is conducting the raffle. The Legislature, two-thirds of the membership of each house concurring, may amend the percentage of gross receipts required by this subdivision to be dedicated to beneficial or charitable purposes by means of a statute that is signed by the Governor." (Emphasis added.)

Thus, in our opinion, the California Constitution designates the Legislature as the branch of government responsible for establishing the fundamental public policy of the state in regards to gambling.

Subdivision (e) of Section 19 of Article IV of the California Constitution (hereafter Section 19(e)) was added to the Constitution as part of the California State Lottery Act of 1984, an initiative measure approved by the voters as Proposition 37 at the November 6, 1984, statewide general election. Section 19(e) provides that "[t]he Legislature has no power to authorize, and shall prohibit casinos of the type currently operating in Nevada and New Jersey."

Section 19(e) was interpreted by the California Supreme Court in *Hotel Employees & Restaurant Employees International Union* v. *Davis* (1999) 21 Cal.4th 585 (hereafter *Davis*). That case involved an original mandamus action challenging the constitutionality of "The Tribal Government Gaming and Economic Self-Sufficiency Act of 1998," a statutory initiative approved by the voters as Proposition 5 at the November 3, 1998 statewide general election (hereafter Proposition 5; Id., at p. 590). In construing Section 19(e), the court held that, in light of the contemporary understanding of that phrase in 1984, and in light of the ballot pamphlet analysis and arguments of Proposition 37, the electors who approved the California State Lottery Act of 1984 would have understood that this provision endowed the existing statutory prohibitions on gambling, including Section 330 of the Penal Code, with a new, constitutional status (Id., at p. 605, and p. 609, fn. 5). The court determined that the substantive gaming activities authorized by Proposition 5 were, in fact, inconsistent with the anticasino provision of Section 19(e), and because in a conflict between a statutory and constitutional law the latter must prevail, Proposition 5, as a statutory initiative, could not

authorize gaming activities that were prohibited under the California Constitution (Id., at pp. 589 and 605).[4]

As described above, Section 330.11, as added by Chapter 1023 and as proposed to be amended by A.B. 54, defines the term "banking game" or "banked game" for the purposes of Section 330. Whether the term "banking game"or "banked game" as defined in Section 330.11, as added by Chapter 1023 and as proposed to be amended by A.B. 54, is unconstitutional is an issue that must be resolved by the courts as a matter of law, not as a question of fact (*Huntington Park Club Corp. v. County of Los Angeles* (1988) 206 Cal.App.3d 241, 247). To determine whether either of these versions of Section 330.11 is unconstitutional, we look to the cases that have considered what constitutes a "banking game" or "banked game" for the purposes of Section 330. The Legislature is presumed to have had knowledge of these decisions when it enacted Section 330.11, as added by Chapter 1023, and A.B. 54 would be enacted in light of these decisions (see *Estate of McDill* (1975) 14 Cal.3d 831, 839).

In 1998, the Court of Appeal in *Oliver* v. *County of Los Angeles* (1998) 66 Cal.App.4th 1397 (hereafter *Oliver*) analyzed a card game called "Newjack" to determine if the playing of that game was prohibited by Section 330. Since "Newjack" was not one of the games specifically mentioned in Section 330, the *Oliver* court concluded that the question of the legality or illegality of "Newjack" depended upon whether the game qualified as either a banking or a percentage game (*Oliver*, supra, at p. 1401). The court reasoned as follows:

> "(3) 'Section 330 embodies several differing approaches to gambling regulation. Those games specifically mentioned are banned outright. Rather than undertaking numerous piecemeal amendments every time a new game is deemed worthy of prohibition, the Legislature adopted the "banking or percentage game" test as a flexible means of reaching two evils perceived by the Legislature.' (*Sullivan*, supra, 189 Cal.App.3d at p. 679). '[A] card game played for money not specifically listed under section 330 and not played as a banking or percentage game is not prohibited. [Citations.]' (*Tibbets v. Van de Kamp* (1990) 222 Cal.App.3d 389, 393 [271 Cal.Rptr. 792].)
>
> "(4) 'Banking game has come to have a fixed and accepted meaning: the "house" or "bank" is a participant in the game, taking on all comers, paying all winners, and collecting from all losers. [Citations.]' (*Sullivan*, supra, 189 Cal.App.3d at p. 678.) '[T]he house is actually involved in play, its status as

[4] Subsequent to the decision in *Davis*, Proposition 1A was approved by the voters at the March 7, 2000, primary election, which authorized Indian gaming compacts that would permit banking and other games by way of a constitutional amendment. Since Proposition 1A permits banking games only in the context of Indian gaming compacts, and Section 330.11 is not limited to that context, Proposition 1A does not affect this analysis.

the ultimate source and repository of funds dwarfing that of all other participants in the game.' (Id., at p. 679.)

* * *

"Section 330 was enacted in 1872. According to expert testimony in *Tibbetts* v. *Van de Kamp, supra,* 222 Cal.App.3d at page 393, '... the common thread among the games specifically listed in section 330 at the time of its enactment was that they were casino games, i.e., banking or percentage games, which were deemed especially "suspect" because, among other reasons, the house had an advantage and limitless funds.' 'Apparently, the evil sought to be controlled by section 330 is the house having an interest in the game, whether through acting as banker or taking a percentage of the wagers. [Citations.]' (*Walker* v. *Meehan* (1987) 194 Cal.App.3d 1290, 1296 [240 Cal.Rptr. 171].)" (*Oliver* v. *County of Los Angeles*, supra, at pp. 1404-1405; emphasis added.)

Thus, pursuant to *Oliver*, a "banking game" prohibited under Section 330 refers to a game in which (1) the "house" or "bank" is a participant in the game, taking on all comers, paying all winners, and collecting from all losers; (2) the house is actually involved in play, its status as the ultimate source and repository of funds dwarfing that of all other participants in the game; and (3) the house has an interest in the game, by acting as banker

In 1999, the California Supreme Court issued its decision in the *Davis* case discussed above. In that case, the Supreme Court discussed "banked games" or "banking games" as follows:

"[C]ommencing in 1872, section 330 of the Penal Code has prohibited all 'banking' games, that is, those games in which there is a person or entity that participates in the action as 'the one against the many' (*People* v. *Ambose* (1953) 122 Cal.App.2d Supp. 966, 970 [265 P.2d 191]), 'taking on all comers, paying all winners, and collecting from all losers' (*Sullivan* v. *Fox* (1987) 189 Cal.App.3d 673, 678 [235 Cal.Rptr.5]), doing so through a fund generally called the bank (*Western Telcon, supra,* 13 Cal.4th at p. 487).

"... In a banking game, ... , the banker 'pays off all winning wagers and keeps all losing wagers.' (Id., at p. 485.) He is in fact a participant and, hence, 'compete[s] with the other participants: "he is the one against the many."' (Id., at p. 488.) He has an 'interest in the outcome of the game, because the amount of money' he 'will have pay out,' or be able to take in, 'depends upon whether each of the individual bets is won or lost.' (Ibid.) The result is variable: the banker may either win or lose as to either some or all of the other participants. (see Id., at pp. 485, 487, 489, 494.)

* * *

> "[A] banking game, within the meaning of Penal Code section 330's prohibition, may be banked by someone other than the owner of the gambling facility. (*Oliver* v. *County of Los Angeles* (1998) 66 Cal.App.4th 1397, 1407-1409 [78 Cal.Rptr.2d 641].)" (*Davis*, supra, at p. 592; emphasis added.)

Thus, the California Supreme Court in *Davis* stated that a "banked game" or "banking game" is a game in which there is a person or entity (1) that participates in the action as "the one against the many," (2) "taking on all comers, paying all winners and collecting from all losers," (3) who has an interest in the outcome of the game; and (4) the game may be banked by someone other than the owner of the gambling facility (Ibid.). This construction is consistent with the construction of the term given by the Court of Appeal in *Oliver*, supra. Indeed, in *Davis*, the Supreme Court cites the reasoning of *Oliver* on this point with approval (*Davis*, supra, at p. 608). Thus, a "banked game" or "banking game" also includes a game in which the house is involved in play, its status as the ultimate source and repository of funds dwarfing that of all other participants in the game, as the Court of Appeal in *Oliver* concluded (*Oliver*, supra, at pp. 1404-1405).

In summary, under decisional law existing prior to the enactment of Section 330.11 and its proposed amendment, a "banked game" or "banking game" was held by the courts to be a game in which there is a person or entity (the house or bank) that (1) participates in the action as "the one against the many"; (2) by "taking on all comers, paying all winners and collecting from all losers"; (3) has an interest in the outcome of the game; (4) may be someone other than the owner of the gambling facility; and (5) is actually involved in play, its status as the ultimate source and repository of funds dwarfing that of all other participants in the game.

We have considered whether the elements of Section 330.11, as added by Chapter 1023 or as proposed to be amended by A.B. 54, as outlined above, would meet the constitutional standards set forth by the courts in *Oliver* and *Davis*. We conclude that elements (1), (2), and (3) of Section 330.11 as added by Chapter 1023 are constitutional because the language of those elements is for practical purposes identical to the language used by the courts in *Oliver* and *Davis* to define a prohibited "banked game" or "banking game."

Element (4) as added by Chapter 1023 provides that a "rotating deal" game is not a prohibited "banked game" or "banking game." Thus, element (4) excludes from the definition of a "banked game" or "banking game" a game in which the player dealer position is continuously and systematically rotated among the participants, the player-dealer is able to win or lose only a fixed and limited wager during the play of the game, neither the house nor any other entity may maintain or operate as a bank during the course of the game, and the house may not occupy the player-dealer position. Element (4) thus describes a game that is a modification of a "banked game" where the position and advantages of the player-dealer rotate from player to player in fixed order. A game played on this basis was held to not violate Section 330 of the Penal Code in the case of *Huntington Park Club Corp.* v. *County of Los Angeles (1988) 206* Cal.App.3d 241 (hereafter *Huntington Park*).

In *Huntington Park*, city ordinances authorized the playing of a for n of the game of pai gow in certain gaming establishments or clubs (*Huntington Park*, supra, a t p. 244). These clubs were subsequently ordered by the police to cease and desist from playing pai gow because the game was deemed by the county district attorney to amount to a banking or percentage game prohibited under Section 330 (Ibid.).

The court, at page 245, found that the game of pai gow as played n the clubs could be characterized as follows:

"* * *

"(d) . . . In any given round of play, the participant designated to receive the dealer hand is required to place a fixed wager.

"(e) The dealer position continually and systematically rotat s among each of the participants.

"(f) Plaintiffs [the house] do not participate as a player in the game, and have no interest in the outcome of play.

* * *

"(i) No participant ever plays against or makes a wager agains plaintiffs [the house]."

Thus, this form of pai gow is a game in which the dealer positi n continually and systematically rotates among the participants, the dealer is required to p ace a fixed wager, and the house is not a participant.

The clubs sought and obtained from the superior court a dec laratory judgment that pai gow as played in the clubs was neither a banking nor a percentag e game prohibited under Section 330 (Id., at p. 244-245). The county appealed the judgmer t, alleging that pai gow as played in the clubs violated both the proscription of Section 330 against percentage games and the proscription of Section 330 against banking games (Id., at p. 249).

The Court of Appeal reversed the lower court's judgment in pa t because it found that pai gow as played in the clubs was a percentage game which is prohibi ed by Section 330. However, the Court of Appeal did agree with the lower court that pai g w as played in the clubs was not a banking game. The Court of Appeal held that the def nition of "banking game" is a legal question and that the term has come to have a fixed and accepted meaning: the "house" or "bank" is a participant in the game, taking all comers, payi ng all winners, and collecting from all losers (Id., at p. 250). The Court of Appeal applied th is definition to the facts of the case and determined that under those facts pai gow is n t a banking game proscribed under Section 330 because neither the house nor any other ntity maintains or operates a bank (Ibid.; see also *City of Bell Gardens* v. *County of Los Angeles* (1991) 231 Cal.App.3d 1563, 1568-1569).

The court in *Oliver*, supra, also considered the definition of a b anking game in the context of the game of Newjack. Under the rules of Newjack, the pl yer-dealer position rotates from player to player, with a player having the option to be pl yer-dealer for two consecutive hands. However, a player can decline to be a player-dealer, a d the option keeps passing until a player accepts the option to be player-dealer (Id., at p. 104). In that case, the

court found that there is a potential that all players but one would decline to act as player-dealer, and thus the player-dealer position does not have to rotate among the players (Id., at p. 1408). This potential that the game could involve only one player acting as the bank was held by the court to mean that the game is a prohibited banking game (Id., at p. 1409). Thus, in *Oliver*, supra, the court found that a game involving a rotating player-dealer position could constitute a prohibited banking game if the player-dealer position is not required to rotate. However, the court recognized that if the player dealer position is required to rotate, the game is not a prohibited banking game (Id., at p. 1408).

Thus, under *Huntington Park*, supra, and *Oliver*, supra, a game in which the dealer position continually and systematically rotates among the participants, the dealer is required to place a fixed wager, the house is not a participant, and neither the house nor any other entity maintains or operates a bank is not a banking game and is not violative of Section 330.

Both *Oliver*, supra, and *Huntington Park*, supra, construed the term "banking game," as used in Section 330 prior to the decision of the Supreme Court in *Davis*, supra. Furthermore, as mentioned previously, the construction of the term by the Court of Appeal in *Oliver*, supra, was relied upon by the Supreme Court in *Davis*, supra, in construing the meaning of the prohibition on banking games contained in Section 330. Thus, when the Supreme Court in *Davis*, supra, stated that Section 19(e) of Article IV of the California Constitution was intended in part to constitutionalize the prohibitions contained in Section 330 (*Davis*, supra, at p. 609, fn. 5), the prohibitions of Section 330 are as discussed by the Supreme Court in *Davis*, supra, including the construction placed on that section in the previous cases. Therefore, we conclude that neither Section 330 nor Section 19(e) of Section IV of the California Constitution prohibits the use of a player-dealer position in a card game if the position is required by the rules of the game to rotate among players.

Applying this construction to element (4), we conclude that element (4), which excludes from the definition of a proscribed "banked game" or a "banking game" a game in which the player-dealer position is continuously and systematically rotated among the participants, the player-dealer is able to win or lose only a fixed and limited wager during the play of the game, neither the house nor any other entity may maintain or operate as a bank during the course of the game, and the house may not occupy the player-dealer position, is consistent with this construction.

Accordingly, it is our opinion that Section 330.11 as enacted by Chapter 1023 is constitutional.

Section 330.11, as proposed to be amended by A.B. 54, would delete elements (1), (2), and (3), and retain only element (4). Section 330.11, as proposed to be amended by A.B. 54, would thus provide that a "rotating deal" game is not a prohibited "banked game" or "banking game." As indicated above, the courts have found this type of game not to be violative of Section 330. Although the effect of A.B. 54 would thus be to delete the provisions of Section 330.11 that define the characteristics of a game that does qualify as a "banked game" or "banking game," the removal of that definition from the Penal Code would not, in our view, authorize unlawful gambling to occur or otherwise violate any of the constitutional constraints discussed above.

Accordingly, we conclude that Section 330.11 as proposed to be amended by A.B. 54 is also constitutional.

In summary, it is our opinion that Section 330.11 of the Penal Code, as added by Chapter 1023 of the Statutes of 2000 and as proposed to be amended by Assembly Bill No. 54 of the 2001-02 Regular Session, as amended March 13, 2001, is constitutional.

Very truly yours,

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Legislative Counsel

By Sharon R. Fisher
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Deputy Legislative Counsel

SRF:emb

Two copies to Honorable Herb Wesson,
pursuant to Joint Rule 34.