

2012

Major League Baseball and the National Collegiate Athletic Association: Private Lotteries and Enforceable Contracts

Charles S. Michels

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/jetlaw>



Part of the [Gaming Law Commons](#)

Recommended Citation

Charles S. Michels, Major League Baseball and the National Collegiate Athletic Association: Private Lotteries and Enforceable Contracts, 14 *Vanderbilt Journal of Entertainment and Technology Law* 395 (2020)

Available at: <https://scholarship.law.vanderbilt.edu/jetlaw/vol14/iss2/4>

This Note is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Journal of Entertainment & Technology Law by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

Major League Baseball and the National Collegiate Athletic Association: Private Lotteries and Enforceable Contracts

ABSTRACT

This Note argues that both the National Collegiate Athletic Association (NCAA) and Major League Baseball (MLB) have run or continue to run contests for playoff tickets that constitute lotteries under state law. For a contest to be considered a lottery in New York and Indiana, there must be a prize, consideration, and chance. Both of these schemes meet these three requirements, because entrants pay a non-refundable fee for a chance to purchase a playoff ticket to games at a time when the face value of the ticket will likely be much lower than the market value of the ticket.

*However, in *George v. NCAA*, the Indiana Supreme Court ruled that the NCAA ticket contest did not constitute a lottery because there was no prize involved. The court found that where the creator of the event determines the face value of the ticket, the market value of the ticket would be the stated face value at the time of the contest. The court cited no economic theory or precedent for this holding, and it goes against what courts have held in other contexts where the face value of the item in question does not equal the market value of the item in question. This ruling vacated the Seventh Circuit opinion, which had held that since the market value of the ticket was higher than the face value of the ticket that there was a prize involved.*

*In the future, courts should follow the analysis proposed in the Seventh Circuit's vacated *NCAA v. George* opinion rather than the analysis used by the Indiana Supreme Court. Courts should view both the NCAA and MLB ticket contests, and other similar schemes sure to arise in the future, as illegal lotteries run in violation of the organizations' respective state laws. By doing so, courts will protect uninformed contestants and slow the proliferation of these types of contests. An organization may continue to hold similar contests in the future, but if an organization chooses to do so, it must return the consideration the contestants paid to enter the contest to those contestants who do not win the prize. When the organization returns*

the consideration, the organization will not be conducting an illegal lottery because there cannot be a lottery without prize, chance, and consideration. Returning the consideration allows the winner to purchase tickets at a price that he believes is fair at the time he enters the contest and returns the loser to the same position that he was in when he entered into the contest.

TABLE OF CONTENTS

I.	NCAA AND MLB PROCEDURES AND US GAMBLING	
	POLICY	398
	A. <i>The NCAA Ticket Contest and the MLB Scheme</i>	399
	B. <i>Gambling in General</i>	400
	1. Relevant Indiana and New York Lottery Laws	401
	2. Relevant Precedent.....	403
	C. <i>Legitimate Business Transactions, Enforceable</i>	
	<i>Contracts, Wagers, Lotteries, and the Internet</i>	405
	1. Legitimate Business Transactions: Securities,	
	Futures, Forwards, and Options.....	405
	2. Enforceable Contracts, Wagers, and Lotteries	408
	3. Internet Wagers.....	410
	D. <i>In Pari Delicto: Can Any Past Participants in the</i>	
	<i>Scheme Recover if the Schemes are Illegal?</i>	410
II.	ANALYSIS: THE NCAA AND MLB SCHEMES MEET THE	
	REQUIREMENTS UNDER STATE LAW TO BE CONSIDERED	
	LOTTERIES AND CANNOT BE CONSIDERED LEGITIMATE	
	BUSINESS TRANSACTIONS.	411
	A. <i>The NCAA Scheme Functions as and Meets the</i>	
	<i>Requirements to be a Lottery under Indiana State</i>	
	<i>Law.</i>	411
	B. <i>The MLB Scheme Functions as and Meets the</i>	
	<i>Requirements to be a Lottery under New York State</i>	
	<i>Law.</i>	413
	C. <i>Neither the MLB nor the NCAA Scheme are Legitimate</i>	
	<i>Business Transactions.</i>	414
	D. <i>If Neither the NCAA nor the MLB Scheme is</i>	
	<i>Considered a Lottery, they Both Will Likely Stand as</i>	
	<i>Enforceable Contracts</i>	416
	E. <i>The In Pari Delicto Exception Should Not Bar</i>	
	<i>Entrants to the MLB and NCAA Schemes from</i>	
	<i>Seeking Restitution.</i>	418
	F. <i>The MLB Scheme may be Invalid under the Unlawful</i>	
	<i>Internet Gambling Enforcement Act of 2006</i>	418

	<i>G. Public Policy Weighs against Finding these Schemes to be Legal</i>	419
III.	SOLUTION: BY RETURNING THE CONSIDERATION PAID TO ENTER THE CONTEST TO THOSE PERSONS WHO DO NOT WIN THE CONTEST, ORGANIZATIONS CAN AVOID ILLEGAL LOTTERY STATUS IN THE FUTURE	420
IV.	CONCLUSION	422

Imagine a situation where a person is able to pay five dollars to participate in a raffle in which the winner receives \$500. That is exactly what happens in an everyday state-run lottery.¹ Now imagine a situation where a person pays a five-dollar non-refundable handling fee and a forty-dollar refundable payment for a chance to win the right to use the forty-dollar refundable payment to purchase a forty-dollar face value ticket to a sporting event, when the ticket has a market value of \$540 at the time of purchase. This type of contest functions just like any state-run lottery; in both cases, the winner receives the opportunity to take away a prize worth \$500 while the losers are out five dollars.

The National Collegiate Athletic Association (NCAA) and Major League Baseball (MLB) have both run ticket contests where the above scenario occurs.² The NCAA put an end to its ticket lottery program in 2010 after angry fans filed lawsuits challenging the practice in state and federal court.³ The US Court of Appeals for the Seventh Circuit, applying Indiana law under diversity jurisdiction, ultimately held that the NCAA ticket lottery was an illegal lottery in *NCAA v. George*.⁴ However, the Seventh Circuit vacated the opinion and certified questions to the Indiana Supreme Court.⁵ The Indiana Supreme Court came to the opposite conclusion, finding that the contest was not a lottery because there was no prize involved.⁶

1. See, e.g., *How to Play*, TENNESSEE LOTTERY, <http://www.tnlottery.com/howtoplay/default.aspx#power> (last visited Oct. 11, 2011).

2. Judith L. Grubner, *NCAA Ticket Lottery Subject To Potential Nationwide Class Action*, ARNSTEIN & LEHR LLP (July 23, 2010), <http://legalnews.arnstein.com/2010/07/23/ncaa-ticket-lottery-subject-to-potential-nationwide-class-action>; Mark Newman, *Postseason Ticket Reservations Introduced: System Guarantees Fans Opportunity to Buy Tickets at Face Value*, MLB.COM (June 30, 2010, 7:00 PM), http://mlb.mlb.com/news/article.jsp?ymd=20100629&content_id=11714326.

3. Andrew M. Harris, *NCAA Must Face Ticket Lottery Suit, U.S. Appeals Court in Chicago Rules*, BLOOMBERG (July 16, 2010, 2:28 PM), <http://www.bloomberg.com/news/2010-07-16/u-s-appeals-court-revives-fans-ncaa-championship-ticket-lottery-case.html>.

4. See *George v. NCAA (George I)*, 613 F.3d 658 (7th Cir.), *vacated*, 623 F.3d 1135 (7th Cir. 2010).

5. *George v. NCAA (George II)*, 623 F.3d 1135 (7th Cir. 2010).

6. *George v. NCAA (George III)*, 945 N.E.2d 150 (Ind. 2011).

As the legality of the NCAA program played out in court, MLB instituted a similar ticket program in June 2010.⁷ MLB frames its contest as “investing in futures. Sure, there is some degree of chance involved. Competitive balance is great in 2010, and there will no doubt be frantic finishes throughout the standings.”⁸ Just as the NCAA’s contest satisfies the three elements of an illegal lottery under Indiana law,⁹ the MLB scheme satisfies the three elements of an illegal lottery under New York law: (1) prize, (2) chance, and (3) consideration given for the chance to win.¹⁰ Although the MLB ticket lottery has yet to face a legal challenge, its program is certainly vulnerable to attack in the same way that the NCAA scheme and other similar schemes remain subject to attack, as New York common law and Indiana common law address lottery issues in almost exactly the same way.¹¹

This Note argues that the Indiana Supreme Court ignored reality and failed to adequately address whether there is a prize involved in the NCAA contest. Thus, the MLB and NCAA contests and similar schemes are illegal lotteries. The vacated Seventh Circuit opinion in *NCAA v. George* should be reinstated and followed in other jurisdictions, while the Indiana Supreme Court decision should be ignored and overturned. Part I examines the legal background against which courts will consider these contests. Part II shows that neither the MLB contest nor the NCAA contest constitutes an enforceable contract. Part III proposes that to avoid illegal lottery status in the future, MLB and other groups who use similar schemes should return the consideration paid to enter the contest—the five dollars in the above example—to those participants who do not receive tickets under the program.

I. NCAA AND MLB PROCEDURES AND US GAMBLING POLICY

This Part begins by explaining the ticket contest that the NCAA ran in the past and the contest that MLB currently runs. It then explains the legal history of gambling in the United States, as

7. Newman, *supra* note 2.

8. *Id.*

9. See *George I*, 613 F.3d at 661.

10. *Harris v. Economic Opportunity Comm’n, Inc.*, 542 N.Y.S.2d 913, 914 (N.Y. App. Term 1989) (identifying the three factors that New York courts use to determine whether a lottery exists). The NCAA is headquartered in Indiana. *Contact Us*, NCAA, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/home/contact+the+ncaa> (last visited Nov. 9, 2011). The MLB is headquartered in New York. *Major League Baseball Headquarters in New York, United States*, TOP BOX DESIGN (June 19, 2010), <http://www.topboxdesign.com/major-league-baseball-headquarters-in-new-york-united-states>.

11. Compare *Harris*, 542 N.Y.S.2d at 914, with *George I*, 613 F.3d at 661.

well as current law in the states of Indiana (NCAA headquarters) and New York (MLB headquarters). This part then focuses on whether courts can classify these contests as something other than a lottery, including: unenforceable wagers, securities, futures contracts, option contracts, and forward contracts. It also analyzes whether the MLB scheme, if otherwise a legal transaction, is subject to challenge under the Unlawful Internet Gambling Enforcement Act of 2006. This part concludes by discussing the *in pari delicto* exception, which focuses on whether MLB or the NCAA can enforce these contracts against potential plaintiffs even if courts find that this type of contest constitutes a lottery.

A. The NCAA Ticket Contest and the MLB Scheme

The NCAA ticket contest, which no longer exists today, allowed applicants to enter for a chance to win Final Four tickets for basketball or hockey by paying full face value for the desired number of tickets, plus a six-dollar service charge per entry.¹² Applicants could submit up to ten entries but could only win two tickets.¹³ If the applicant won the drawing, the applicant received the tickets and the NCAA retained the ticket price plus the service charge.¹⁴ If the applicant did not win, the NCAA refunded the face value of the tickets to the applicant but retained the service fee.¹⁵

Similarly, the MLB ticket procedure allows a fan to purchase the right to buy seats at face value if the fan's chosen team hosts the selected playoff game.¹⁶ To reserve a seat, the fan must pay both a non-refundable service fee and a transaction fee to MLB.¹⁷ For National League Divisional Series games, the service fee is ten dollars per ticket, plus a one-dollar transaction fee.¹⁸ For National League Championship Series games, the fee is fifteen dollars per ticket, plus a one-dollar transaction fee.¹⁹ For World Series games, the fee is twenty dollars per ticket, plus a one-dollar transaction fee.²⁰ For example, if a fan wants to buy tickets to the second home game that the Philadelphia Phillies host in the National League Championship Series, the fan can purchase up to two seat reservations for that game

12. Grubner, *supra* note 2.

13. *Id.*

14. *Id.*

15. *Id.*

16. Newman, *supra* note 2.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

for thirty dollars plus the one-dollar transaction fee.²¹ If the Phillies make it to the National League Championship Series, then the fan will be able to purchase two tickets for Philadelphia's second home game at face value.²² As with the NCAA ticket lottery, the service fee and transaction fee are not refunded, regardless of the outcome.²³

B. Gambling in General

Laws proscribing gambling in the United States date back to 1833.²⁴ Every state in the United States banned lotteries from 1894 until 1964.²⁵ Due to shifts in public policy over time, forty-four states currently hold state-run lotteries.²⁶ States have the authority to regulate gambling and lotteries as part of their police powers, designed to allow states—rather than the federal government—to protect the public health, public morals, public safety, or public welfare.²⁷ For example, the common law rule of New York bars the enforcement of gambling contracts, acknowledging that they are illegal and void in much of the United States.²⁸ Likewise, public policy is against private, as opposed to state-run, gambling because it “affords no protection to customers and no assurance of fairness or honesty in the operation of the gambling devices.”²⁹

Enforcing gambling-related legislation proves to be difficult,³⁰ and there is a growing movement to relax laws aimed at gambling.³¹

21. Newman, *supra* note 2.

22. *Id.*

23. *Id.*

24. ROGER DUNSTAN, CALIFORNIA RESEARCH BUREAU, GAMBLING IN CALIFORNIA (1997), available at <http://www.library.ca.gov/crb/97/03/Chapt2.html> (“The attack against gambling was focused particularly on lotteries because it represented a form of wagering that was offensive to both the moral sensibilities of reformers, and the Jacksonian resentment toward privilege. . . . In 1833 Pennsylvania, New York, and Massachusetts put an end to state authorized lotteries. By 1840, most states had banned lotteries. By 1860, only Delaware, Missouri, and Kentucky still allowed state-authorized lotteries.” (footnote omitted)).

25. *Id.*

26. See, e.g., Elise Hu, *Lottery Deal Bid Process Is Attacked*, N.Y. TIMES, Nov. 20, 2010, <http://www.nytimes.com/2010/11/21/us/21tlottery.html>.

27. F.A.C.E. Trading, Inc. v. Carter, 821 N.E.2d 38, 41 (Ind. Ct. App. 2005) (quoting Jack Eiser Sales Co., Inc. v. Wilson, 752 N.E.2d 225, 227 (Ind. Ct. App. 2001) (internal quotation marks omitted)).

28. *Id.* at 15.

29. Intercont'l Hotels Corp. v. Golden, 15 N.Y.2d 9, 15 (1964).

30. FCC v. Am. Broad. Co., Inc., 347 U.S. 284, 292-93 (1954) (“[States] have been plagued with as many types of lotteries as the seemingly inexhaustible ingenuity of their promoters could devise in their efforts to circumvent the law. . . . So varied have been the techniques used by promoters to conceal the joint factors of prize, chance, and consideration, and so clever have they been in applying these techniques to feigned as well as legitimate business activities, that it has often been difficult to apply the decision of one case to the facts of another.”).

One of the driving forces behind this movement is a counter argument to the public policy against gambling: the public policy supporting an individual's freedom to contract.³² Courts today are more likely to interpret a transaction between two willing parties as a valid, enforceable contract rather than as an unenforceable wager.³³ While some courts accept that it is the legislature's role to determine whether public policy has shifted over time,³⁴ other courts find that in the absence of a stated legislative policy, a court may weigh the interests involved to determine whether public policy deems certain agreements unenforceable.³⁵

1. Relevant Indiana and New York Lottery Laws

The NCAA is headquartered in Indianapolis, so it must abide by Indiana law.³⁶ In Indiana, a person or entity may not knowingly or intentionally conduct a lottery.³⁷ Indiana defines a lottery as "a scheme for the distribution of prizes by lot or chance."³⁸ Indiana requires a plaintiff to show three elements to establish a lottery: (1) consideration given to enter the contest, (2) an element of chance, and (3) a prize.³⁹

MLB is headquartered in New York City, so it must abide by New York law.⁴⁰ The New York Constitution declares that lotteries not run by the state and authorized by the legislature are illegal.⁴¹ New York common law, however, prohibits any scheme that functions as a lottery—no matter the name that the promoters give to the

31. See DUNSTAN, *supra* note 24.

32. *Baltimore & Ohio Sw. Ry. Co. v. Voigt*, 176 U.S. 498, 505-06 (1900) (quoting *Printing & Numerical Registering Co. v. Sampson*, L.R. 19 Eq. 462, 465 (1875)).

33. *Cobaugh v. Klick-Lewis, Inc.*, 561 A.2d 1248, 1252-53 (Pa. Super. Ct. 1989) (Popovich, J., dissenting) (arguing that courts should not turn a blind eye to wagering contracts barred by the legislature; noting that the fact that gambling transactions in violation of statutory law occur every day without punishment is no reason for the court to allow a gambling contract to be enforceable when the contract reaches the court).

34. See, e.g., *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1210 (Ill. 1979).

35. *Trotter v. Nelson*, 684 N.E.2d 1150, 1153 (Ind. 1997); see also *In re Sprinzen* (Nomberg), 46 N.Y.2d 623, 628 (1979) ("Public policy, like society, is continually evolving and those entrusted with its implementation must respond to its everchanging demands.").

36. *Contact Us*, NCAA, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Home/Contact+the+NCAA> (last visited Oct. 23, 2011).

37. IND. CODE § 35-45-5-3 (2010).

38. *Leshner v. Baltimore Football Club*, 496 N.E.2d 785, 789 (Ind. Ct. App. 1986) (quoting *Kaszuba v. Zientara*, 495 N.E.2d 761, 763 (Ind. Ct. App.); *Tinder v. Music Operating, Inc.*, 142 N.E.2d 610, 614 (Ind. 1957)), *vacated in part*, 512 N.E.2d 156 (Ind. 1987).

39. *George I*, 613 F.3d 658, 661 (7th Cir.), *vacated*, 623 F.3d 1135 (7th Cir. 2010).

40. *Official Info: Terms of Use Agreement*, MLB.COM, http://mlb.mlb.com/mlb/official_info/about_mlb_com/terms_of_use.jsp (last visited Oct. 23, 2011).

41. N.Y. CONST. art. I, § 9, cl. 1.

scheme—to prevent circumvention of the law through technicalities.⁴² As in Indiana, there are three elements under New York common law to an unlawful lottery: (1) consideration, (2) chance, and (3) a prize.⁴³ The only difference between New York and Indiana law is the possibility in New York, as explained below, that the lottery must involve a physical ticket for the contest to qualify as a lottery.⁴⁴ Because courts in Indiana and New York identify the three main elements of lottery in the same fashion—prize, consideration, and chance—this Note analyzes both New York and Indiana case law interchangeably when discussing those three elements. Below, this Note briefly addresses the possibility that New York may, in addition to the three main elements, require a ticket for the contest to constitute a lottery.

The first element of an illegal lottery is valuable consideration, which “may consist of some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.”⁴⁵ If persons can participate in a contest without permanently giving up valuable consideration, the contest will not be a lottery.⁴⁶ Many lottery cases turn on whether participants pay consideration to enter a game of chance.⁴⁷ In a situation where participants can—without giving consideration—sign a ledger in a theater in order to be eligible for a prize (even though some of the people who enter the contest also purchase tickets to see a show in the theater), there is no lottery.⁴⁸ This type of scheme does not meet the consideration element because people may enter the contest for free.⁴⁹ Where only people who pay admission to the theater are eligible to win the prize, that contest will constitute an illegal lottery.⁵⁰

42. *People v. Cadle*, 114 N.Y.S.2d 451, 455 (Crim. Ct. 1952). This flexibility also keeps the New York legislature from having to update its lottery laws each time a “new and novel scheme” is developed. *Id.*

43. *Harris v. Econ. Opportunity Comm’n, Inc.*, 575 N.Y.S.2d 672, 675 (App. Div. 1991).

44. *Dalton v. Pataki (Pataki I)*, 780 N.Y.S.2d 47, 71 (App. Div. 2004), *aff’d in part*, 835 N.E.2d 1180 (N.Y. 2005).

45. *Holt v. Feigenbaum*, 52 N.Y.2d 291, 299 (1981) (quoting *Rector of St. Mark’s Church v. Teed*, 24 N.E. 1014 (N.Y. 1890)) (internal quotation marks omitted); see *Harris*, 575 N.Y.S.2d at 675.

46. *People v. Cadle*, 180 N.Y.S.2d 576, 579-80 (App. Div. 1958).

47. See, e.g., *People v. Shafer*, 289 N.Y.S. 649, 652-53 (Crim. Ct. 1936) (holding that requiring participants in a drawing to be present in order to win does not alone constitute valuable consideration, where participants were aware that they undertook no other obligations).

48. *Id.* at 651-52.

49. *Id.*

50. *People v. Miller*, 2 N.E.2d 38, 47-48 (N.Y. 1936).

The second element of a lottery is chance, which includes any contest where the outcome is determined by uncertainty and/or randomness.⁵¹ In addition, a contest does not become a lottery merely because the contestant's judgment may insignificantly affect the results.⁵² Courts presume chance for schemes that involve a random drawing or bingo.⁵³ Even where it is certain that each contestant will receive a prize, chance exists where the value of the good in question depends on the order in which the recipient wins.⁵⁴

The third element of a lottery is a prize, which is something of more value than the amount invested.⁵⁵ This includes a reward of a tangible good or of money.⁵⁶ A reward is a prize where the market value of the item is greater than the total price paid to enter the contest, including any service and transaction fees.⁵⁷ If participants give consideration in exchange for the right to attend an event at which prizes are given away, but the consideration is not commensurate with the value of the event itself, the game may still be a lottery.⁵⁸ For example, a sale of tickets to see a movie in a theater can constitute a lottery if attendees may win a prize during the show and the cost to attend that show is higher than the cost to attend the show where no prizes are given away.⁵⁹

2. Relevant Precedent

In *George v. NCAA*, the Seventh Circuit found that the NCAA ticket lottery contained all three elements of an illegal lottery under Indiana law: consideration, prize, and chance.⁶⁰ The consideration was a six-dollar, non-refundable service fee paid on every transaction.⁶¹ The prize was the ticket, because the petitioner proved that the market value of the ticket was much greater than the face value paid by those who won the game.⁶² Finally, chance was found

51. N.Y. PENAL LAW § 225.00 (McKinney 2011).

52. *Lefkowitz v. ITM, Inc.*, 275 N.Y.S.2d 303, 326-27 (Sup. Ct. 1966) (quoting *People ex rel. Ellison v. Lavin*, 71 N.E. 753, 755 (N.Y. 1904)) (internal quotation marks omitted); see *Tinder v. Music Operating, Inc.*, 142 N.E.2d 610, 615 (Ind. 1957).

53. See, e.g., *People v. Williams*, 113 N.Y.S.2d 167, 170 (Crim. Ct. 1952).

54. *Carl Co. v. Lennon*, 148 N.Y.S. 375, 377 (Sup. Ct. 1914).

55. *Leshner v. Baltimore Football Club*, 496 N.E.2d 785, 789 (Ind. Ct. App. 1986), *vacated in part*, 512 N.E.2d 156 (Ind. 1987).

56. *People v. Psallis*, 12 N.Y.S.2d 796, 798 (Crim. Ct. 1939).

57. *George I*, 613 F.3d 658, 661-62 (7th Cir.), *vacated*, 623 F.3d 1135 (7th Cir. 2010).

58. See *id.*

59. *Id.* at 662.

60. *Id.* at 662-65.

61. *Id.* at 662.

62. *Id.*

because the number of entries into the contest was greater than the total supply of tickets.⁶³

However, the Seventh Circuit later vacated its opinion and certified three questions for review by the Indiana Supreme Court.⁶⁴ The Seventh Circuit believed that the contest was a lottery, but ultimately decided to certify questions to the Indiana Supreme Court because the Seventh Circuit was interpreting a matter of Indiana state law.⁶⁵ The Seventh Circuit was also concerned about the possible “far-reaching effects [of its decision] on sports-ticket-distribution systems utilized by the NCAA and others.”⁶⁶

The Indiana Supreme Court’s opinion only reached the first certified question, which dealt with whether the NCAA scheme, as alleged by the plaintiffs, constituted a lottery under Indiana law.⁶⁷ The court found that “where an event coordinator creates the primary market for event tickets, the fair-market value of the tickets is equal to their face value.”⁶⁸ In other words, the value of the tickets equaled the amount the winners paid, removing the prize element necessary to find an illegal lottery under Indiana common law. The court did not cite to any precedent or economic theory in making this determination.⁶⁹ The Indiana Supreme Court’s holding does not prevent a prosecutor or petitioner from attacking a similar scheme when someone uses it as a ruse to conduct a traditional lottery.⁷⁰

There is no precedent in any jurisdiction, other than the vacated Seventh Circuit *George* decision, that declares that a prize exists where the market value of a good is greater than the face value of the item in question.⁷¹ Other jurisdictions have addressed the differences in market value and face value, but only as it relates to the value of stolen property in a criminal proceeding.⁷² For example, New Mexico follows a rule similar to the one advanced in the vacated

63. *Id.*

64. *George II*, 623 F.3d 1135, 1137 (7th Cir. 2010).

65. *Id.* at 1137-38.

66. *Id.* at 1137.

67. *George III*, 945 N.E.2d 150, 153 (Ind. 2011) (listing the other two certified questions accepted by the Court: (1) “If the plaintiffs’ allegations describe an unlawful lottery, would the NCAA’s method for allocating tickets fall within the Ind. Code § 35-45-5-1(d) exception for ‘bona fide business transactions that are valid under the law of contracts?’”; (2) “If the plaintiffs’ allegations describe an unlawful lottery, do plaintiffs’ allegations show that their claims are subject to an *in pari delicto* defense as described in *Leshar v. Baltimore Football Club*, 496 N.E.2d 785, 790 n.1 (Ind. Ct. App. 1986), and *Swain v. Bussell*, 10 Ind. 438, 442 (1858)?”).

68. *Id.* at 160.

69. *See id.*

70. *Id.*

71. *George I*, 613 F.3d 658, 662 (7th Cir.), *vacated*, 623 F.3d 1135 (7th Cir. 2010).

72. *State v. Contreras*, 915 P.2d 306, 308 (N.M. Ct. App. 1996).

George case.⁷³ In *State v. Contreras*, the defendant allegedly stole a necklace with a face value of \$600.⁷⁴ Store employees testified that jewelry often sold for 50 to 60 percent below face value.⁷⁵ The court ruled that the value of stolen property should be defined as “the price at which the property could ordinarily be bought or sold at the time of the alleged offense.”⁷⁶ Washington and New York also follow this approach in determining the value of a stolen good for the purposes of a criminal trial.⁷⁷ In the future, when a jurisdiction determines whether a prize exists in a lottery context, that jurisdiction should follow these precedents that focus on the market value of the item, rather than the stated face value of the item.

C. Legitimate Business Transactions, Enforceable Contracts, Wagers, Lotteries, and the Internet

This Section addresses whether the MLB or NCAA may enforce the contests if they do not constitute lotteries. If the contests are not lotteries, the question becomes whether they are legitimate business transactions, some other type of enforceable contract, or unenforceable wagers. Legitimate business transactions, for the purposes of this Note, include: securities, futures, forwards, and options. Below, this Note provides the framework for determining into which category, if any, these schemes fall.

1. Legitimate Business Transactions: Securities, Futures, Forwards, and Options

If courts determine that the MLB, NCAA, and other similar schemes do not constitute lotteries, then they will have to determine whether the contests are unenforceable wagers, legitimate business transactions, or some other type of enforceable contract. The four most likely legitimate business transactions for these schemes are securities, futures, forwards, and options.

Congress adopted the Securities Act of 1933 to protect investors, while also considering capital formation, competition, and

73. *Id.*

74. *Id.* at 307.

75. *Id.*

76. *Id.* at 308.

77. *People v. Irrizari*, 156 N.E.2d 69, 71 (N.Y. 1959) (finding that market value is determined by “the price at which [the goods] would probably have been sold in the regular course of business at the time when and the place where they were stolen.”); *State v. Kleist*, 895 P.2d 398, 400-01 (Wash. 1995) (finding that the ultimate issue is what a consumer would be willing to pay; noting, however, that in criminal cases the value of a ticket for something such as a sporting event is limited by Washington statutory law to the retail value of the ticket).

promotion of efficiency.⁷⁸ The Securities and Exchange Commission enforces the Securities Act.⁷⁹ Investments subject to the Act are securities, including “any note, stock, treasury stock, security future, bond, debenture, . . . investment contract, . . . option, . . . or [any] instrument commonly known as a ‘security.’”⁸⁰ In *Howey*, the Supreme Court states that investment contracts are schemes that involve “an investment of money in a common enterprise with profits to come solely from the efforts of others.”⁸¹ Profits are money that the investor seeks for himself as the return on his investment.⁸² These profits must come as a result of work by other parties to increase the investment’s value.⁸³ The US Court of Appeals for the Fifth Circuit adds that “[t]he critical factor is not the similitude or coincidence of investor input, but rather the uniformity of impact of the promoter’s efforts.”⁸⁴

A futures contract is “[a] contractual agreement . . . to buy or sell a particular commodity or financial instrument at a pre-determined price in the future.”⁸⁵ The Commodity Futures Trading Commission (CFTC) has exclusive jurisdiction over futures contracts.⁸⁶ The primary purpose of the CFTC is to ensure “fair practice and honest dealing and to provide some control over excessive speculative activity which causes injury to producers, consumers and the exchanges.”⁸⁷ When dealing with futures contracts, there does not have to be physical delivery of the commodity in question.⁸⁸ Offsetting contracts between brokers has the legal effect of delivery, and courts consider a contract for this purpose to be a valid business purpose.⁸⁹ Courts more readily view futures contracts as a type of common stock rather than as a vehicle through which people agree to trade goods at a future date.⁹⁰ Courts will only find that an instrument constitutes a

78. 15 U.S.C. § 77b(b) (2006).

79. *Id.* § 78d.

80. *Id.* § 77b(a)(1).

81. SEC v. W. J. Howey Co., 328 U.S. 293, 301 (1946).

82. *See id.*

83. *Id.*

84. SEC v. Koscot Interplanetary, Inc., 497 F.2d 473, 478 (5th Cir. 1974).

85. *Futures Contract*, INVESTOPEDIA, <http://www.investopedia.com/terms/f/futurescontract.asp> (last visited Oct. 23, 2011).

86. *Mullis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 492 F. Supp. 1345, 1349 (D. Nev. 1980).

87. *Paine, Webber, Jackson & Curtis, Inc. v. Conaway*, 515 F. Supp. 202, 206 (N.D. Ala. 1981).

88. *Id.* at 205.

89. *Id.*

90. *Farmers Elevator Co. of Oakville, Inc. v. Hamilton*, 926 N.E.2d 68, 81 (Ind. Ct. App. 2010).

futures contract if the contract trades on an exchange designated or registered by the CFTC.⁹¹

A forward contract contemplates actual delivery of the good in question—that the contract will ultimately lead to an exchange of goods for money.⁹² Neither the CFTC nor the SEC regulates forward contracts,⁹³ because the Act intends that the SEC and CFTC only govern speculative markets.⁹⁴ A forward contract is typically one in which: “(1) [t]he contract specifies idiosyncratic terms regarding place of delivery, quantity, or other terms . . . (2) [t]he contract is between industry participants . . . rather than arbitrageurs and other speculators . . . [and] (3) [d]elivery cannot be deferred forever [due to penalties].”⁹⁵ While none of these factors by themselves determine whether the contract is future or forward, if the contract does not require actual, physical delivery then the contract will not be a forward contract.⁹⁶

An option contract gives the holder of the option the right to buy or sell the underlying security on or before the date that the option expires.⁹⁷ At the time they contract, the parties negotiate a “strike price”: the amount for which the security can be bought (for “call options”) or sold (for “put options”).⁹⁸ Changes in the market price of the underlying stock influence whether the holder of an option contract buys for a call option or sells for a put option.⁹⁹ The option-holder pays some amount less than the value of the property in question for the ability to convert an offeror’s immediate offer to sell (or buy) into an irrevocable offer to sell (or buy) for some amount of time.¹⁰⁰ Once the holder exercises the option, the option contract becomes an executed contract.¹⁰¹

Courts view the variations in value during an option contract in terms of risk and the chance that the good in question ultimately changes hands.¹⁰² The offeror transfers risk (such as risk of devaluation of the underlying stock) to the offeree for

91. *Id.* at 82.

92. *Id.* at 81-82.

93. *Id.* at 82.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Deutschman v. Beneficial Corp.*, 841 F.2d 502, 504 (3d Cir. 1988).

98. *See id.*

99. *Id.*

100. *Wolvos v. Meyer*, 668 N.E.2d 671, 674 (Ind. 1996).

101. *Id.*

102. ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 86.17, at 15-86 (Joseph M. Perillo, rev. ed. 2011).

consideration—as opposed to a wagering transaction, where the formation of the contract itself creates new risk.¹⁰³

2. Enforceable Contracts, Wagers, and Lotteries

Due to variations in state law, it is possible that a contest constitutes an illegal lottery even where the contest is not a wager.¹⁰⁴ This is because separate sections of state gambling laws can regulate wagers and lotteries.¹⁰⁵ All lotteries constitute a type of gambling, but not all forms of gambling constitute lotteries.¹⁰⁶

Both Indiana and New York recognize that a lottery is a subset of gambling.¹⁰⁷ Indiana declares all gambling, including lottery, illegal.¹⁰⁸ New York's Constitution states that "no lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling, except lotteries operated by the state" shall be legal.¹⁰⁹ Thus, in New York a lottery is a separate type of gambling offense, because the term lottery is set out in a list of specific terms that, as a whole, make up the general term of gambling.¹¹⁰ Therefore, when a court reviews these contests, Indiana and New York law requires the court to determine whether the NCAA and MLB schemes are wagering contracts, lotteries, both, or neither.

An aleatory contract is one that, by its terms, is enforceable only after the occurrence of a future event.¹¹¹ If the conditional event never occurs, the parties do not have to perform their obligations under the contract.¹¹² Some aleatory contracts are wagering contracts, and others are not.¹¹³ The key characteristics of wagering contracts, which are unenforceable, are: conditional performance, no subsequent consideration required for the performance if the conditional event

103. *Id.*

104. *See* *Humphrey v. Viacom, Inc.*, No. 06-2768 (DCM), 2007 WL 1797648, at *8-9 (D.N.J. June 20, 2007) (finding that even though the plaintiff asserted that each element of a lottery was present in the defendant's scheme, since the plaintiff challenged the scheme under the gambling laws, rather than the lottery laws, the lottery law was irrelevant).

105. *Id.*

106. *See* Michael William Eisenrauch, Note, *Video Poker and the Lottery Clause: Where Common Law and Common Sense Collide*, 49 S.C. L. REV. 549, 567 (1998).

107. *Pataki I*, 780 N.Y.S.2d 47, 69 (App. Div. 2004), *aff'd in part*, 835 N.E.2d 1180 (N.Y. 2005); IND. CODE § 35-45-5-2 (2011).

108. *Id.*

109. N.Y. CONST. art. I, § 9, cl. 1.

110. *Dalton v. Pataki (Pataki II)*, 835 N.E. 1180, 1192-93 (N.Y. 2005).

111. CORBIN, *supra* note 102, § 86.17.

112. *Id.*

113. *Id.*

occurs, and assumption of a risk that the bargain creates by the promisor.¹¹⁴

In recent years, states have begun to clarify the differences between unenforceable wagers and enforceable contracts.¹¹⁵ Where “(1) the entry fees are paid unconditionally; (2) the prizes offered to . . . contestants are for amounts certain and are guaranteed to be awarded; and (3) [contest operators] do not compete for the prizes,” the transaction is not a wager.¹¹⁶ The mere act of receiving and keeping the consideration paid to enter a contest does not make the offeror the winner of a “prize” of the contest.¹¹⁷

The New Jersey case, *Humphrey v. Viacom*, sets out the framework to review possible wagers.¹¹⁸ According to the court’s reasoning, pay-to-play “fantasy football” leagues are enforceable contracts rather than unenforceable wagers.¹¹⁹ Although contestants pay entrance fees and compete for prizes, the offeror (here, Viacom) does not compete for the prizes in question and provides substantial services in the way of league administration to the competitors.¹²⁰ The Court states that “[t]o suggest that one can be a winner without risking the possibility of being a loser defies logic and finds no support in the law.”¹²¹ A winner can only be one who “actually ‘wagers, bets or stakes’ upon a race, game, or other unknown or contingent event.”¹²²

Therefore, under *Viacom*, the offeror is not considered a winner because he will not profit from the outcome of the contingent event.¹²³ Regardless of the result of the event, the offeror has already secured his profit by running the fantasy football league.¹²⁴ The participant never risks losing his entry fee—he has already surrendered it to the offeror per the contract—and the offeror’s entitlement to the fee is not contingent in any way on the outcome of the league.¹²⁵

114. *Id.*

115. *State v. Am. Holiday Ass’n, Inc.*, 727 P.2d 807, 810 (Ariz. 1986).

116. *Humphrey v. Viacom, Inc.*, No. 06-2768 (DCM), 2007 WL 1797648, at *9 (D.N.J. June 20, 2007)

117. *Id.* at *9-10; *see also Am. Holiday Ass’n*, 727 P.2d at 810 (“Prize money, on the other hand, is found where the money or other prize belongs to the person offering it, who has no chance to win it and who is unconditionally obligated to pay it to the successful contestant.”).

118. *Humphrey*, 2007 WL 1797648, at *8.

119. *Id.* at *8-9.

120. *Id.* at *9.

121. *Id.*

122. *Id.* at *10 (quoting N.J. STAT. ANN. § 2A:40-1 (West 2011)).

123. *See id.*

124. *See id.*

125. *Id.*

3. Internet Wagers

While this Note focuses on state law and diversity jurisdiction, this Note briefly addresses the possibility that a plaintiff may be able to bring a claim against the MLB in federal court under the federal question doctrine. Under the Unlawful Internet Gambling Enforcement Act of 2006, the MLB procedure may be illegal because the MLB playoff ticket procedure is run through an online website.¹²⁶

The Unlawful Internet Gambling Enforcement Act allows regulators to prevent completion of qualifying Internet-based gambling transactions.¹²⁷ The Act defines unlawful Internet gambling as where a party transmits a bet or wager through the Internet, and the bet or wager is illegal under Federal or State law in the state in which the bet is initiated or received.¹²⁸ Under an exemption from the law for online-based fantasy sports, the statute states that the exemption fails if any winning outcome is based on the actual performance of any one single team or group of teams, as compared to individual players.¹²⁹

D. In Pari Delicto: Can Any Past Participants in the Scheme Recover if the Schemes are Illegal?

In pari delicto means—for contract purposes—that where both parties are equally at fault in entering into an unenforceable contract, the plaintiff may not recover what he advances in furtherance of the unenforceable contract.¹³⁰ It is an equitable defense that bars recovery when the plaintiff's conduct is as bad as the defendant's conduct in the eyes of the law.¹³¹ The rule is based on the belief that "(I) courts should not mediate disputes between wrongdoers and (II) denying judicial relief to wrongdoers deters illegal conduct."¹³²

In the vacated Seventh Circuit *George* opinion, the court stated, "the NCAA's act of knowingly conducting an unlawful lottery demonstrates a greater degree of fault than Plaintiffs' act of unwittingly entering that lottery."¹³³ The pleadings did not suggest a mutual agreement to violate Indiana lottery law between the NCAA

126. Newman, *supra* note 2.

127. 31 U.S.C §§ 5361, 5364 (2006).

128. *Id.* § 5362(10)(A).

129. *Id.* § 5362(1)(E)(ix)(III)(aa).

130. *Knauer v. Jonathon Roberts Fin. Group, Inc.*, 348 F.3d 230, 236 (7th Cir. 2003).

131. *Symbol Techs., Inc. v Deloitte & Touche, LLP*, No. 0033150/2006, 2008 WL 4103244 (N.Y. Sup. Ct. June 16, 2008)

132. *Id.*

133. *George I*, 613 F.3d 658, 664 (7th Cir.), *vacated*, 623 F.3d 1135 (7th Cir. 2010).

and the fans who entered the contest, and there was no indication that the fans knew they were violating the lottery laws at the time they entered into the contract.¹³⁴ After the Seventh Circuit vacated its holding, the Indiana Supreme Court agreed to review whether the *in pari delicto* defense would be colorable.¹³⁵ However, that question was moot because the court found that there was no prize involved.¹³⁶

II. ANALYSIS: THE NCAA AND MLB SCHEMES MEET THE REQUIREMENTS UNDER STATE LAW TO BE CONSIDERED LOTTERIES AND CANNOT BE CONSIDERED LEGITIMATE BUSINESS TRANSACTIONS.

Courts should deem both the NCAA and MLB schemes lotteries operating in violation of Indiana and New York law respectively, because both schemes meet the requirements of chance, prize, and consideration under those state's laws. However, assuming courts find the schemes to not be lotteries, then the contracts will likely be enforceable contracts rather than unenforceable wagers. In addition, the *in pari delicto* doctrine will not prevent plaintiffs from being able to recover against the NCAA and MLB if the contract constitutes a lottery or an unenforceable wager.

A. The NCAA Scheme Functions as and Meets the Requirements to be a Lottery under Indiana State Law.

This Note proposes that the Indiana Supreme Court's decision in *George* incorrectly interprets Indiana law and that courts should follow the interpretation set out by the Seventh Circuit in the vacated *George* opinion. The Indiana Supreme Court held, "the critical fact . . . that no market for tickets exists until the event coordinator issues the tickets in the first place, so, as a matter of law, the face value of the tickets equals the fair-market value of the tickets on the primary market."¹³⁷ Thus, the court found that there was no prize involved in the contest.¹³⁸ The court cited no precedent or economic theory for this reasoning.¹³⁹

This conclusion is fundamentally flawed. If other jurisdictions choose to apply this theory, a contest organizer will be able to charge any amount whatsoever for the right to enter a contest, so long as he

134. *George II*, 623 F.3d 1135, 1137 (7th Cir. 2010).

135. *George III*, 945 N.E.2d 150, 160 (Ind. 2011).

136. *George v. NCAA*, No. 94S00-1010-CQ-544, 2010 WL 4361443, at *1-2 (Ind. Oct. 29, 2010); *George II*, 623 F.3d at 1138; *George III*, 945 N.E.2d at 160.

137. *George III*, 945 N.E.2d 150, 159 (Ind. 2011).

138. *Id.*

139. *Id.*

sets the face value for the contest prize in question and requires the winner of the contest to purchase the item at that price. Thus, a hypothetical car company named Zinga can set the face value of a limited edition car, where the manufacturer produced 500 cars, at \$1,000. The only way to obtain the car is through the lottery. Zinga can then set the cost to enter the contest at \$1,020, and put no limit on the number of entrants. One thousand dollars will reflect the purchase price, and twenty dollars will reflect the non-refundable handling fee. By setting up the scheme in this fashion, Zinga can potentially entice many more people to put in bids due to the low face value price of the car. If a court follows the *George* precedent set by the Indiana Supreme Court, the court will rule that the \$1,000 rate is the market value of the car since that is the face value Zinga set the for the car—despite the fact that the average sale price of a new car in the United States is \$28,400.¹⁴⁰ Moreover, as discussed above, states have refused to assume that the face value of an item is equal to the market value when the face value is not the price at which one can buy the item on the open market.¹⁴¹

Assuming that there is in fact a prize involved, the NCAA scheme and similar contests clearly meet the two other requirements to be a lottery under Indiana law.¹⁴² There is consideration because of the six-dollar non-refundable service fee paid on each entry.¹⁴³ There is chance because the number of entrants into the lottery is greater than the total supply of lottery tickets.¹⁴⁴ The original lawsuit against the NCAA claims that the NCAA received more than 100,000 submissions for 2008 Final Four tickets, but awarded just 4,600 tickets.¹⁴⁵ Based on that figure, the NCAA earned between \$600,000 and \$1,000,000 on the service charges alone in 2008.¹⁴⁶ Therefore, so long as the Indiana Supreme Court's holding in *George* is overturned on the prize issue, the NCAA scheme is an illegal lottery under Indiana law because it will meet the factors of chance and consideration.

140. *Facts for Consumers: Buying a New Car*, FEDERAL TRADE COMMISSION, <http://www.ftc.gov/bcp/edu/pubs/consumer/autos/aut11.shtm> (last visited Oct. 23, 2011).

141. *George III*, 945 N.E.2d at 160.

142. *George I*, 613 F.3d 658, 662-63 (7th Cir.), *vacated*, 623 F.3d 1135 (7th Cir. 2010).

143. *Id.* at 662.

144. *Id.*

145. *Id.*

146. *Id.*; Grubner, *supra* note 2.

B. The MLB Scheme Functions as and Meets the Requirements to Be a Lottery under New York State Law.

The MLB procedure does not involve a random drawing, and MLB refers to its procedure as “investing in futures.”¹⁴⁷ Functionally, however, the MLB procedure operates in the same way as the NCAA scheme. In the MLB scheme, the consideration is the non-refundable service fee.¹⁴⁸ Chance lies in the fact that the team the fan picks may not play in the selected game, in that the team may not make the playoffs, or, in games five through seven of a seven game series, the teams will not have to play if one team has already won four games.¹⁴⁹ The scheme meets the prize element because the fan who wins can purchase a ticket at a face value that is likely to be much less than its current market value.¹⁵⁰ For example, tickets to the first playoff game hosted by the Cincinnati Reds in 2010 were being resold for as much as five times the face value, even for bleacher seats.¹⁵¹ This situation is very similar to what occurs in a Pick-Six lottery; in a Pick-Six lottery, a person picks six numbers out of a set of numbers, usually one through fifty, and if his six numbers are drawn, he wins the lottery.¹⁵² In *Kaszuba v. Zientara*—a case involving a Pick-Six lottery ticket—the Indiana Supreme Court states, “[t]his case would not be before this Court had not the numbers 6-15-16-23-24-37 been selected.”¹⁵³ Here, the only way a person can win in the MLB scheme is to pick the correct team—the team that actually makes it to the playoffs and plays in that specific game—and thus the MLB contest functions much like a Pick-Six lottery ticket because it exchanges individual teams for a set of six numbers.¹⁵⁴

However, under a narrow reading of lottery—and if New York determines the holding of a ticket is an essential element to a

147. Newman, *supra* note 2.

148. *Id.*; see *Harris v. Econ. Opportunity Comm’n of Nassau County, Inc.*, 575 N.Y.S.2d 672, 675-76 (App. Div. 1991).

149. Newman, *supra* note 2; see *People v. Li Ai Hua*, 885 N.Y.S.2d 380, 383 (Crim. Ct. 2009).

150. Newman, *supra* note 2.

151. *Cincinnati Reds 2010 Playoff Tickets—The Breakdown*, BALLPARKSAVVY (Sept. 1, 2010), <http://www.ballparksavvy.com/1/post/2010/9/cincinnati-reds-2010-playoff-tickets-the-breakdown.html>; P.J. O’Keefe & John Matarese, *Wow! High Prices for Sunday’s Reds Game*, WCPO.COM (Sept. 29, 2010), <http://www.wcpo.com/dpp/sports/baseball/reds/where-to-find-reds-postseason-tickets>.

152. *Lottery Odds and Payouts*, WINNING WITH NUMBERS, <http://www.winningwithnumbers.com/lottery/odds> (last visited Nov. 17, 2011).

153. *Kaszuba v. Zientara*, 506 N.E.2d 1, 1 (Ind. 1987).

154. See Newman, *supra* note 2.

lottery—then the MLB scheme might stand.¹⁵⁵ In Mississippi, a bingo is not a form of lottery under *Knight v. State*.¹⁵⁶ The court based this conclusion on statutory construction, as the Mississippi statute barring private lotteries specifically notes that a lottery involves tickets.¹⁵⁷ Thus, Mississippi takes a narrow reading of lottery, and finds that a lottery involves tickets.¹⁵⁸ Although New York's statutory scheme never mentions that there must be a ticket in order for there to be a lottery, as the Mississippi statute does, there is precedent that suggests New York could read this requirement into the statute.¹⁵⁹ If New York follows the *Dalton v. Pataki* decision, rather than New York's statutory law, the law will define a lottery as consisting of "consideration, chance, prize, tickets and multiple participation."¹⁶⁰ The question will be whether the requirement continues to be an element of a lottery offense in New York in the future and how New York defines the term ticket.

C. Neither the MLB nor the NCAA Scheme Are Legitimate Business Transactions.

The contracts in question are not securities, futures, forwards, or option contracts. These schemes have one element that is common in most gambling transactions: A set amount of money is exchanged between the parties with no effect on the total wealth of the group.¹⁶¹ A speculative investment, on the other hand, is one in which wealth of all the investors will increase or decrease in proportion to their investments.¹⁶²

Neither the NCAA nor the MLB scheme fits the definition of a security; the closest either comes to being a security is as an investment contract.¹⁶³ For an investment contract, "[t]he critical factor is not the similitude or coincidence of investor input, but rather the uniformity of impact of the promoter's efforts."¹⁶⁴ Neither scheme

155. *Knight v. State*, 574 So. 2d 662, 669 (Miss. 1990).

156. *Id.*

157. *Id.*

158. *Id.*

159. *Pataki I*, 780 N.Y.S.2d 47, 71 (App. Div. 2004), *aff'd in part*, 835 N.E.2d 1180 (N.Y. 2005).

160. *Id.* at 74.

161. *Lashbrook v. State*, 550 N.E.2d 772, 776 (Ind. Ct. App. 1990).

162. *Id.*

163. See *SEC v. Koscot Interplanetary, Inc.*, 497 F.2d 473, 477-78 (5th Cir. 1974) (noting that an investment contract exists where a person invests money in a common enterprise with the expectation that profits will be achieved solely from the efforts of a third party).

164. *Id.* at 478.

relies on the uniformity of the impact of the promoter's efforts.¹⁶⁵ In the NCAA scheme, the promoter selects winning tickets in a lottery style fashion, which unquestionably leads to each investment being affected differently.¹⁶⁶ In the MLB scheme, the promoter takes the proceeds and waits for a contingent event to occur before doling out the prizes.¹⁶⁷ The outcomes of many events make up this contingent event, and each event affects each investment differently.¹⁶⁸

In addition, neither scheme fits the requirements of a futures contract, because in futures contracts the contract shuffles risk between the parties rather than creating new risk.¹⁶⁹ The NCAA scheme creates risk in that it grants fewer tickets than there are entries into the lottery.¹⁷⁰ The MLB scheme creates risk as well: When a fan purchases the right to buy a ticket, the fan buys a right that has a value that depends on the outcome of a contingent event.¹⁷¹

The MLB scheme and the NCAA scheme are neither forward contracts nor option contracts. Under a forward contract, both parties contemplate actual delivery of the goods at some point in the future.¹⁷² The key to an option contract is that the holder of the option has the right to exercise the option any time before the contract expires.¹⁷³ And like a futures contract, an option contract is used to shuffle risk between parties rather than to create new risk.¹⁷⁴ In both schemes, delivery ultimately depends on a contingent event; the fan cannot choose to exercise any kind of option before that contingent event occurs, and the contracts create new risk.¹⁷⁵ Ultimately, the MLB scheme depends on the team the fan chooses making the playoffs, and the NCAA scheme the luck of the draw.¹⁷⁶ Therefore, neither scheme constitutes a forward or an option contract.

165. See Grubner, *supra* note 2; Newman, *supra* note 2.

166. See sources cited *supra* note 165.

167. See sources cited *supra* note 165.

168. See sources cited *supra* note 165.

169. See *Paine, Webber, Jackson & Curtis, Inc. v. Conaway*, 515 F. Supp. 202, 205 (N.D. Ala. 1981).

170. Grubner, *supra* note 2.

171. Newman, *supra* note 2.

172. *Farmers Elevator Co. of Oakville, Inc. v. Hamilton*, 926 N.E.2d 68, 82 (Ind. Ct. App. 2010).

173. *Wolvos v. Meyer*, 668 N.E.2d 671, 674 (Ind. 1996).

174. CORBIN, *supra* note 102, § 86.17.

175. Grubner, *supra* note 2; Newman, *supra* note 2.

176. See sources cited *supra* note 175.

D. If Neither the NCAA nor the MLB Scheme Is Considered a Lottery, they Both Will Likely Stand as Enforceable Contracts

Since the NCAA and MLB schemes cannot be investment contracts, futures contracts, forward contracts, or option contracts, the key issue is whether courts view the NCAA and MLB schemes as unenforceable wagers, enforceable contracts, or lotteries.¹⁷⁷ As stated above, courts should find that the schemes in questions are lotteries; however, if they do not, the schemes will be enforceable contracts, rather than unenforceable wagers.

There are three main differences between unenforceable wagers and enforceable contracts.¹⁷⁸ As mentioned above, the US District Court for the District of New Jersey in *Viacom* declared that the transaction is not a wager when “(1) the entry fees are paid unconditionally; (2) the prizes offered to . . . contestants are for amounts certain and are guaranteed to be awarded; and (3) [contest operators] do not compete for the prizes.”¹⁷⁹

Based solely on the three factors listed above, both contests will constitute enforceable contracts, as they both likely meet the three factors set out in *Viacom*. The NCAA scheme requires a six-dollar fee to be paid unconditionally.¹⁸⁰ The NCAA knows what prizes it will award before the contest starts and the number of entrants does not affect the number of prizes awarded.¹⁸¹ Finally, all of the prizes (the tickets) will be awarded to the contestants, so the NCAA does not compete for the prize involved.¹⁸² Therefore, the NCAA scheme is not a wager.

The MLB scheme works in a similar fashion. It is not a wager under the first element because the fees on each ticket reservation are unconditional; no one receives a refund, no matter the result.¹⁸³ There is, however, a question as to the second element: whether the MLB knows the prizes it will award before the contest begins.¹⁸⁴ While MLB keeps this information confidential, it is safe to assume that there are a varying number of ticket reservations available for each team.¹⁸⁵ Since the results of future events, and not the number of

177. *Humphrey v. Viacom, Inc.*, No. 06-2768 (DCM), 2007 WL 1797648, at *9 (D.N.J. June 20, 2007).

178. *Id.*

179. *Id.*

180. Grubner, *supra* note 2.

181. *Id.*

182. *Id.*

183. Newman, *supra* note 2.

184. *Id.*

185. *Id.* (noting that the Yankees, for example, were not a part of the ticket program).

entrants, determine prizes awarded, the MLB scheme will likely satisfy the second element.¹⁸⁶ As for the third element, the prize is the right to buy a ticket at face value.¹⁸⁷ When a selected team does not make the playoffs, the prize never comes into existence.¹⁸⁸ Since the prize fails to come into existence rather than MLB winning the prize, it is likely that this will satisfy the third element. Thus, the MLB scheme would probably meet the three-part test set out in *Viacom*, classifying the scheme as not a wager.¹⁸⁹

A final requirement remains under *Viacom* and similar cases.¹⁹⁰ If the MLB and NCAA contests are not wagers under *Viacom*, courts must then examine whether the consideration paid to enter the contest is reasonable before concluding that the schemes are enforceable contracts.¹⁹¹ If it is reasonable, courts will find the contests to create enforceable contracts.¹⁹² If the consideration paid to enter the contest is unreasonable, the schemes will be unenforceable contracts.¹⁹³

While the NCAA has a better claim as to reasonableness (it charges a flat six-dollar fee per entry), the MLB claim may be problematic on this front.¹⁹⁴ MLB charges a higher service fee (ten dollars for divisional games, fifteen dollars for league championship games, and twenty dollars for World Series games) depending on the reservation purchased.¹⁹⁵ Since the cost of administering the contest likely does not depend on differences in the underlying events, courts can call the reasonableness of the MLB scheme fees into question. It is hard to predict how a court will deal with the MLB scheme's claim to reasonableness. While a twenty-dollar fee may be reasonable, and a ten-dollar fee may be reasonable, the fees are clearly not correlated to the costs of running the contest because the costs for processing the ticket reservation should not change whether it is a divisional game or a World Series game.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Humphrey v. Viacom, Inc.*, No. 06-2768 (DCM), 2007 WL 1797648, at *9 (D.N.J. June 20, 2007).

190. *Id.* at *8; *see also* *State v. Am. Holiday Ass'n, Inc.*, 727 P.2d 807, 810-11 (Ariz. 1986) (holding that "reasonable entrance fees charged by the sponsor of a contest to participants competing for prizes are not bets or wagers").

191. *Humphrey*, 2007 WL 1797648, at *8.

192. *Id.*

193. *Id.*

194. Grubner, *supra* note 2.

195. Newman, *supra* note 2.

E. The In Pari Delicto Exception Should Not Bar Entrants to the MLB and NCAA Schemes from Seeking Restitution

Under the *in pari delicto* doctrine, a court will not aid a party by enforcing an illegal contract when that person knew of the illegality when he entered the contract.¹⁹⁶ The court will simply leave the losses where they lie.¹⁹⁷ The comments to the *Restatement (Second) of Contracts* list two situations where a party to an unenforceable contract has a claim to restitution: (1) the law intends to protect the offeree and thus views the offeree as less culpable than the offeror, and (2) the law protects the offeree because the offeror acted in a misrepresentative or oppressive fashion.¹⁹⁸ Where the offeror engages in the transactions in question as a business or in another special position of trust or confidence, it is more likely that the offeree will be allowed to seek restitution.¹⁹⁹

A court will probably find that purchasers under either the NCAA or the MLB scheme are less culpable than the sellers. When the offeror engages in the transaction as a business, it is more likely that the court will allow the offeree to seek restitution.²⁰⁰ The NCAA and MLB both conduct the contests in question in their capacities as businesses.²⁰¹ Thus, courts will probably allow past contestants to seek restitution.²⁰²

F. The MLB Scheme May Be Invalid under the Unlawful Internet Gambling Enforcement Act of 2006

Even if a court finds that the MLB and NCAA schemes are enforceable contracts under state common law, the MLB procedure may be illegal under the Unlawful Internet Gambling Enforcement Act of 2006.²⁰³ This is because the MLB playoff ticket procedure is run through an online website.²⁰⁴ Section 1563 of the Act prevents the transfer of money in connection with unlawful Internet gambling where the bet or wager is unlawful under any applicable federal law

196. RESTATEMENT (SECOND) OF CONTRACTS § 197 (1981).

197. *Id.* cmt. a.

198. *Id.* cmt. b.

199. *Id.* § 198 cmt. b.

200. *Id.*

201. Grubner, *supra* note 2; Newman, *supra* note 2.

202. RESTATEMENT (SECOND) OF CONTRACTS § 198 (1981).

203. Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. §§ 5361-67 (2006).

204. Newman, *supra* note 2.

or the law of the state in which the bet is “initiated, received, or otherwise made.”²⁰⁵

It remains to be seen how courts will apply the Act, as only a few jurisdictions have interpreted the Act so far. The Act states that a court can sustain an unlawful Internet gambling charge where the action is illegal in the jurisdiction in which the individual initiates the bet.²⁰⁶ Chapter thirty-one of U.S.C. § 5365(b)(2) gives state attorney generals the power to institute proceedings to prevent violations of the Act.²⁰⁷

However, Washington, one of the only states to have interpreted the Act, found that it does not give a state the right to regulate gambling that originates outside of its jurisdiction.²⁰⁸ Thus, while a potential plaintiff may argue that courts are more likely to deem the MLB scheme an illegal lottery in a state with harsh lottery laws, this may not matter if other jurisdictions follow the Supreme Court of Washington’s interpretation that bars states from instituting actions against out-of-state companies under 31 U.S.C. §5365.²⁰⁹

G. Public Policy Weighs against Finding These Schemes to be Legal

There is a significant difference between privatized gambling and state-regulated gambling.²¹⁰ Citizens reap the benefits of state-regulated gambling,²¹¹ and the state is able to protect its citizens from poorly run, deceptive, and private schemes.²¹² In both the NCAA and MLB schemes, the ultimate winner is the corporation.²¹³ Moreover, neither scheme discloses relevant information such as the number of tickets available, the odds of winning, or the seat location to the participants at the time they enter the contest.²¹⁴

205. 31 U.S.C. § 5362(10)(A).

206. *Id.*

207. *Id.* § 5365(b)(2).

208. *Rousso v. State*, 239 P.3d 1084, 1087-88 (Wash. 2010) (“The acts cited recognize and expressly preserve a state’s authority to criminalize some or all gambling activities *within the state’s borders*, but nothing more.”).

209. *Id.*

210. *Am. Legion Post # 113 v. State*, 656 N.E.2d 1190, 1194 (Ind. Ct. App. 1995).

211. *Uncertain Benefits, Hidden Costs: The Perils of State-Sponsored Gambling*, INSTITUTE ON TAXATION AND ECONOMIC POLICY (Oct. 2011), <http://www.itepnet.org/pdf/pb19gamb.pdf> (noting that states promote gambling as a means of public revenues and to keep potential gamblers from gambling in other states or participating in illegal activities).

212. *Id.*

213. Eamonn Brennan, *NCAA Ticket Scalping: Now Totally Legit*, ESPN (Jun. 30, 2010, 12:08 PM), http://espn.go.com/blog/collegebasketballnation/post/_id/12904/ncaa-ticket-scalping-now-totally-legit.

(noting that the NCAA and MLB have attempted to eat into the profits of scalpers).

214. Grubner, *supra* note 2; Newman, *supra* note 2.

According to the US Supreme Court, states have always had to be wary of attempts to circumvent state lottery law through the lottery promoter's ingenuity.²¹⁵ Because of the way these schemes are able to change quickly so as to not violate a prior finding of illegal lottery, courts often have difficulty applying the facts of one case to another.²¹⁶ However, decisions such as the *George* case give potential lottery promoters an easy argument as to legality.²¹⁷ Thus, if courts continue to uphold contests such as the ones run by MLB and the NCAA, it is likely that others will follow until there is a shift in the law. In both schemes, demand for a valuable product exceeds supply.²¹⁸ Likewise, both products have a set face value.²¹⁹ The winners of both scenarios pay face value for the product, and all participants pay for the right to compete to buy the product at face value.²²⁰

Therefore, if courts uphold these schemes, all that will be needed to run a legal, private lottery is the availability of a product with a face value lower than its expected secondary market value.²²¹ This kind of ingenuity is exactly what the Supreme Court warned of in 1954.²²² While this example seems much more malignant and like gambling than the NCAA and MLB schemes, it functions in the exact same way. Courts should not sanction a scheme just because it is run by a reputable corporation and performs a service that some consumers deem valuable.

III. SOLUTION: BY RETURNING THE CONSIDERATION PAID TO ENTER THE CONTEST TO THOSE PERSONS WHO DO NOT WIN THE CONTEST, ORGANIZATIONS CAN AVOID ILLEGAL LOTTERY STATUS IN THE FUTURE

To avoid illegal status, the NCAA and MLB should refund the consideration contest entrants paid to enter the contest—the service charge—to those persons who are unable to purchase tickets to the events. While this will reduce the NCAA's and MLB's profits from the contests, there are multiple ways to recoup these losses. For example,

215. FCC v. Am. Broad. Co., Inc., 347 U.S. 284, 292-293 (1954).

216. *Id.*

217. See discussion *supra* Part II.A (describing the Zinga hypothetical).

218. Grubner, *supra* note 2; Newman, *supra* note 2.

219. Grubner, *supra* note 2; Newman, *supra* note 2.

220. Grubner, *supra* note 2; Newman, *supra* note 2.

221. For example, a private company will be able set up a website in which it conducts a contest. At the website the participants can pay a minimal entry fee and the winners will each receive the option to purchase a good at face value, such as a rare hundred-dollar bill. The face value of the bill will be equal to its value as currency, but its market value will reflect its rarity.

222. FCC v. Am. Broad. Co., Inc., 347 U.S. 284, 292-293 (1954).

both the NCAA and MLB can increase the initial service charge that an entrant pays to enter the contest. Although this solution will increase ticket prices for those who win the contest (since the losers get their initial contest entrance fee refunded, but the winners do not get to put this service fee towards the price of the ticket), it is exactly these people—the winners—who do not need the law's protection.²²³ Both the NCAA and MLB could also increase the face value of the tickets in order to recover the lost profits.

In *Lesh v. Baltimore*, the Indiana Court of Appeals stated that the offeree cannot seek the protection of the lottery laws for a scheme where the winner receives the right to purchase NFL season tickets and the loser receives his money back, since there is no risk involved.²²⁴ Both the “winners” and the “losers” of the raffle come out equal, because the “winners” have to pay a price equal to face value to get the tickets, ending up with no net gain, and the “losers” do not end up paying anything, thus ending with no net loss.²²⁵

The NCAA scheme is the equivalent of the scheme in *Lesh*, except that the NCAA does not return the consideration the losers paid.²²⁶ In both schemes the contestants pay full face value to enter the raffle, but the NCAA scheme includes a six-dollar, non-refundable transaction fee.²²⁷ Since the *Lesh* case is still good law, the safest way for the NCAA and MLB—assuming New York finds the argument in *Lesh* be persuasive—to run ticket schemes is to amend their policies such that they return the consideration paid to those contestants that ultimately are unable to purchase tickets to the event.²²⁸

The MLB scheme requires participants to pay only the non-refundable portion of the consideration upfront.²²⁹ Thus, so long as MLB returns the initial consideration to the losers of the contest, then New York courts will not consider it a lottery.²³⁰ Participants might even be willing to put more money down initially to reserve tickets so long as they are guaranteed return of that consideration if they do not win the contest.

223. See *Lesh v. Baltimore Football Club*, 496 N.E.2d 785, 789-90 (Ind. Ct. App. 1986). This is fair because going into the deal, the winners know the price they must ultimately pay for the ticket, so it is not so much a service charge for them as it is just the price of acquiring the ticket. See *id.*

224. *Id.*

225. *Id.*

226. Grubner, *supra* note 2.

227. *Id.*

228. *Lesh*, 496 N.E.2d at 790.

229. Newman, *supra* note 2.

230. *Id.*

Moreover, *Leshner* stands for the proposition that where one party knows that he is entering a contract where another party will hold his entry fee for some time and earn interest on it, the contract will not be illegal on this fact alone.²³¹ It is the offeree's duty to negotiate for interest in such a contract, or to not enter into such a contract in the first place.²³² Thus, the fact that the NCAA scheme and similar schemes asks for money upfront is not an issue. Therefore, the NCAA and MLB should choose to institute a refundable service charge rather than allow free entry, because under *Leshner* the NCAA and MLB are allowed to earn interest on the participant's money while they hold it.²³³ This earned interest will help to offset the loss incurred by ultimately having to return the service charge to the contest entrants who do not win.

Ultimately, although this solution will increase ticket prices for those who win the contest (since the service fee will not be put toward the face value of the tickets for those who win), it is exactly these people—the winners—who do not need the law's protection. These persons will ultimately decide that for a certain price they wish to create a contract with the NCAA or MLB for tickets, and thus will enter the contest. They will enter into the contract knowing that they will either receive a ticket in exchange for the service charge they provided plus the face value of the ticket, or they will receive back their service charge.

IV. CONCLUSION

In the future, courts should follow the analysis proposed in the vacated *NCAA v. George* opinion rather than the analysis used by the Indiana Supreme Court.²³⁴ Courts should view both the NCAA and MLB ticket contests, and other similar schemes sure to arise in the future, as illegal lotteries run in violation of the organizations' respective state laws. Both schemes meet the three main elements, consideration, prize, and chance, that constitute a lottery. These types of schemes are not legitimate business transactions, future contracts, forward contracts, or option contracts, and therefore cannot be saved by attempting to classify the transactions as such. By viewing these schemes and similar schemes as illegal lotteries, courts will put an end to the potential proliferation of copycat contests before they begin.

231. *Leshner*, 496 N.E.2d at 793.

232. *Id.*

233. *Id.* at 790.

234. See *George II*, 623 F.3d 1135 (7th Cir. 2010); *George I*, 613 F.3d 658 (7th Cir.), vacated, 623 F.3d 1135 (7th Cir. 2010).

Organizations that choose to hold such contests should return the consideration the contestants paid to enter the contest if the contestants do not win the prize. By returning the consideration—the entry fee—to those persons who do not win, the organization cannot be found to be conducting an illegal lottery because there cannot be a lottery without prize, chance, and consideration.²³⁵

*Charles S. Michels**

235. *See id.*

* J.D. Candidate, Vanderbilt University Law School, 2012; B.S., Illinois College, 2009. The author would like to thank Mr. William Whalen, Ms. Mary Kennedy, and Ms. Donna Sipe for their contributions to his legal career.

