CONDO CASINO!

Gambling Law and the Florida Community Association

by Marc J. Randazza

"It can be argued that man's instinct to gamble is the only reason he is still not a monkey up in the trees." —Mario Puzo[1]

Speaking before the British House of Commons in 1780, Edmund Burke said, "Gambling is a principle inherent in nature." Americans have proved Mr. Burke correct to such an extent that by 1996, one author claimed: "Judged by the dollars spent, gambling is now more popular in America than baseball, the movies, and Disneyland combined."[2] Most commentators agree that Americans spend more annually on gambling than they spend on movie tickets, theme parks, spectator sports, and video games together.[3]

With such a nationwide love of wheel, card, and table, it is no surprise that condominiums, co-ops, and homeowners associations frequently seek to bring gambling home to their community clubhouses.[4] But when they do, the associations are often breaking the law and exposing themselves to unnecessary risks, which can be managed with a little bit of education on the state of the law.

Florida is considered a "fairly strict state in prohibiting gambling."[5] As such, Florida community associations and their attorneys are well-advised to educate themselves on gambling laws and how they operate in the context of common-ownership communities. Most associations consider their gambling activities to be nothing more than "having a little fun" or a creative way to raise money for a community project. Unfortunately, without the proper planning and controls in place, a "little fun" could land a community in big trouble.[6]

While this article is not intended to be a complete study of gaming law in Florida, its purpose is to educate the reader about the legal issues surrounding gambling activity in Florida condominium, co-op, and homeowners associations. To a lesser extent, this article may also serve to educate the reader regarding issues surrounding gambling in other multi-unit housing environments such as apartment buildings, college dormitories, and fraternity/sorority houses, but it is not intended to evaluate the law with respect to such entities.

Gambling Generally

"A dollar picked up in the road is more satisfaction to you than the ninety-and-nine which you had to work for, and money won at faro or in stocks snuggles into your heart in the same way." — Mark Twain[7]

In Florida, gambling is governed by F. S. §849.01, *et seq.*, (2004). Despite any use of semantic camouflage, a person engaged in illegal gambling will not escape prosecution under the statute by using a creative title for the

activity.[8] Whether it is called a "fifty-fifty raffle," a "casino night," or any other name, the law will call it the same thing — gambling.[9] The Florida Supreme Court has stated that "gambling," as used in the statute, and "gaming" are synonymous, and are "defined as an agreement between two or more to risk money on a contest of chance of any kind, where one must be the loser and the other the gainer."[10] The legal definition of gambling is broad enough that almost any wagering activity falls under this general term. If it looks like "gambling," then it probably is.

Association Liability

It is important for community associations to understand that conducting or allowing prohibited gambling activities could subject the association to significant liability. The Florida gambling statute specifically prohibits maintaining a "gambling house." If an association improperly permits the use of the community's common elements[11] for illegal gambling operations, the association might be in violation of §849.01 (2004), which prohibits the keeping of a "gambling house."[12]

F. S. § 849.01. Keeping gambling houses, etc.

Whoever by herself or himself, her or his servant, clerk or agent, or in any other manner has, keeps, exercises or maintains a gaming table or room, or gaming implements or apparatus, or house, booth, tent, shelter or other place for the purpose of gaming or gambling or in any place of which she or he may directly or indirectly have charge, control or management, either exclusively or with others, procures, suffers or permits any person to play for money or other valuable thing at any game whatever, whether heretofore prohibited or not, shall be guilty of a felony of the third degree, punishable as provided in §775.082, §775.083, or §775.084.

Note that §849.02 (2004) provides for liability for *agents and employees* of a keeper of a gambling house. Permitting such activity thus exposes the association, its employees, and even board members (and the association manager) to potential criminal liability. Accordingly, community associations and association counsel should understand the particular nuances of gaming law as it applies to these entities and what the coastlines of the "safe harbors" in the law look like. To that end, the next section of this study will discuss some of the more common gaming activities held in community associations.

Lotteries and Raffles

"A lottery is a salutary instrument and a tax...laid on the willing only, that is to say, on those who can risk the price of a ticket without sensible injury, for the possibility of a higher prize." — Thomas Jefferson[13]

Many community associations and social groups attempt to raise money by conducting friendly lotteries. Often these lotteries take the form of a "fifty-fifty raffle" whereby half of the money goes to the association and half of the money goes to the winner. Regardless of nobility of the purpose or the seemingly harmless nature of the game, these lotteries are unlawful.

At common law, even in Florida, lotteries were permitted as long as they did not constitute a public nuisance.[14] In 1986, lotteries came into full favor when Florida voters amended the Florida Constitution to allow state-run lotteries. Still, the law does not extend the approval of lotteries to allow community associations to run their own numbers games.

In order for an activity to constitute a "lottery," it only needs to have three elements: 1) a prize; 2) the prize must be bestowed as a matter of chance; and 3) consideration must be paid for that chance.[15] Even if the primary focus of the activity is not the generation of revenue, it is still an illegal lottery if the requisite elements are present.[16]

Pursuant to §849.09 (2004), it is unlawful for any person in Florida to set up, promote, or conduct any lottery for money or anything else of value. Additionally, §849.09(1)(d) (2004) makes it unlawful to aid or assist someone in conducting a lottery. If a community association allows residents to conduct an illegal lottery, even though the community association may not take part or benefit, the association could find itself on the wrong side of §849.09.

Card Games/Casino Night

"I am sorry I have not learned to play cards. It is very useful in life. It generates kindness and consolidates society." — Samuel Johnson[17]

What about card games or casino night? A couple of friends playing cards for a few bucks seems innocent enough, and many a life-long friendship began at a card table. Unfortunately, in Florida, even a "friendly game of cards" (when wagers are involved) creates legal risks.

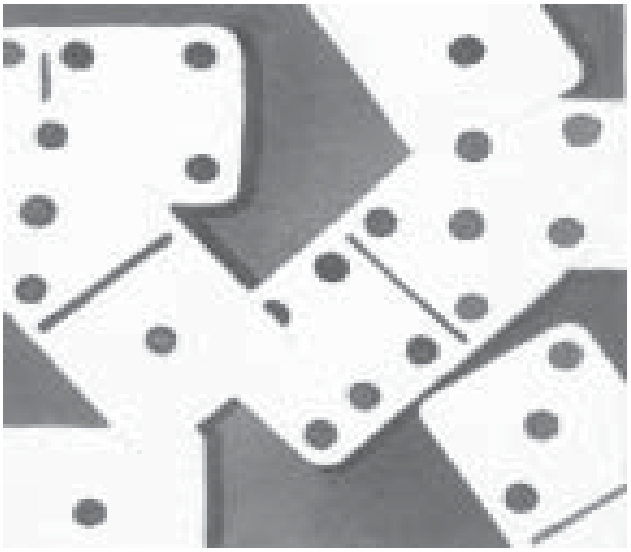
Section §849.08 (2004) prohibits the playing of cards, keno, roulette, faro, or "other games of chance at any place, by any device whatever, for money or other thing of value." The good news is that a "safe harbor" for "penny ante" card games exists in §849.085 (2004). Even better news for community associations is that the law specifically contemplates their needs.

A penny-ante game is defined as a game or series of games of poker, pinochle, bridge, rummy, canasta, hearts, dominoes, or mah-jongg in which the winnings of any player in a single round, hand, or game do not exceed $10 in value.[18] Additional statutory provisions prohibit participation of players under 18 years of age[19] and charging admission or any other fee to play.[20] Participants in such games should be wary of taking markers from other players, as the statute specifically provides that debts incurred in such games are not legally enforceable.[21]

While the definition of "penny- ante" card games is relatively simple, §849.085 (2004) has additional requirements that must be followed if the participants are to fully avail themselves of the law's safe harbor. The game must be conducted in a "dwelling,"[22] which is defined to include the obvious definition of any residence owned or rented by a participant in the game.[23]

Regarding community associations, the law expands the plain-meaning of the word "dwelling" to encompass common areas of a condominium, cooperative, residential subdivision (or homeowners' association), or mobile home park as long as a participant is a unit owner in the community.[24] If the game is held in one of the exempted places, the community association (or other eligible entity) is immune from civil liability, as are all nonparticipating unit owners.[25]

Interestingly enough, the statute also protects otherwise-qualifying games in college dorms, publicly-owned community centers, and facilities of tax-exempt organizations,[26] but it does not include common areas in apartment or rental communities. There



Any county or municipal ordinance that does not conflict with existing state law may lay down stricter guidelines as to the time, place, and manner of conducting permissible gambling activities.

is no exemption for residents or owners in these kinds of communal living environments.

While the above limitations appear to be aimed toward allowing friendly card games without creating liability, the legislature seems to have gone overboard with prohibitions on constitutionally protected expression. For example, §849.085(3)(d) (2004) provides that no person, whether they are a participant in the game or not, may solicit other players by means of "advertisement," nor may anyone "by means of advertising in any form, advertise the time or place of any penny-ante game.[27]

While this article is not intended to be a discussion of the First Amendment implications of the Penny-Ante Card Game Act, the ultimate enforceability of this particular provision is questionable.[28] It seems almost certain that the final clause in this subsection is void under the First Amendment as it forbids any person from "advertis[ing] the fact that he or she will be a participant in any penny-ante card game."[29] As the statute does not define "advertising," the term may encompass any activity attracting public notice or attention to the fact that someone intends to hold or participate in a card game protected by the statute.[30]

Gambling Among Players/ Games of Skill

What about "innocent" wagers between individuals on the outcome of a bocce game or shuffleboard match? What if two players at the community tennis court or golf course want to make a friendly wager for a small amount of money, or even lunch at the clubhouse, on the result of the match? Florida law prohibits even this level of gambling. Section 849.14 (2004) states:

> Whoever stakes, bets or wagers any money or other thing of value upon the result of any trial or contest of skill, speed or power or endurance of human or beast, or whoever receives in any manner whatsoever any money or other thing of value staked, bet or wagered, or offered for the purpose of being staked, bet or wagered, by or for any other person upon any such result, or whoever knowingly becomes the custodian or depositary of any money or other thing of value so staked, bet, or wagered upon any such result, or whoever aids, or assists, or abets in any manner in any of such acts all of which are hereby forbidden, shall be guilty of a misdemeanor of the second degree, punishable as provided in §775.082 or §775.083.

There is no operative distinction between a game in which the participants wager among themselves and a game upon which spectators place bets, and unless conducted in a licensed pari-mutuel wagering facility licensed under F. S. §550, both types of bets are prohibited by law. Although the Florida Supreme Court case that gives us this impression is more than a century old,[31] it has been favorably adopted in more recent opinions of the Florida attorney general.[32] Therefore, even wagering on your own performance is a violation of Florida law.

Although there may be an element of chance inherent in many athletic games, if the game is generally and widely accepted as a game of skill (such as golf), as opposed to a game of chance (such as dice, cards, or roulette), it will fall under the prohibitions contained in §849.14 (2004). Wagering on the result of a game of golf, bocce, or any other sport or contest clearly falls under the prohibitions enumerated in §849.14.

Tournaments

Does this mean that sporting tournaments are per se illegal? Not exactly, as the law looks more favorably upon a sporting event in which contestants pay entry fees and have the opportunity to win prizes. A Florida attorney general opinion on point states: "There is no stake, bet or wager, and therefore no violation of gambling statute where contestants in a golf or bowling tournament pay entry fees and have the opportunity to win valuable prizes by the exercise of skill, provided that the entry fees do not specifically make up the purses, prizes or premiums contested for."[33]

It is important to note the key distinction in this opinion — that the entry fees may not make up the purse or prize intended to be awarded to the winning contestants.[34] Thus, a golf tournament in which the contestants each pay an entry fee, a portion of which creates a "prize

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kitty" would be illegal. However, a golf tournament in which the contestants pay an entry fee for a chance to win a new set of golf clubs that are not purchased with entry fee funds would be permissible.

Bingo!

"Even as I approach the gambling hall, as soon as I hear, two rooms away, the jingle of money poured out on the table, I almost go into convulsions."
-Fyodor Dostoevsky[35]

No discussion of gambling in Florida would be complete without a look at bingo, our stereotypical pastime.[36] Florida recognizes bingo games as a form of gambling.[37] Nevertheless, any Florida official foolish enough to attempt to stand between Florida's sizeable bingo-playing population and their game of choice would likely be tarred and feathered. The legislature has long recognized this, and permits bingo games held by "qualified charitable, nonprofit, or veterans organizations."[38]

Florida law provides that bingo games may be held only on certain prescribed premises. This includes property contained in a condominium association, a cooperative association, a homeowners' association, a mobile homeowners' association, or a recreational vehicle park.[39]

The Florida bingo statute, §849.0391 (2004), is a fairly detailed rulebook governing when, by whom, and how bingo games may be conducted or played. The statute is detailed enough that, for example, §849.0931(12)(i)(2004) prohibits anyone from saving a seat during a bingo game, and subsection (h) requires the caller to ask "are there any other winners?" upon hearing the word "bingo."[40]

Of importance to common-ownership communities, §849.0931(4) (2004) grants condominiums, homeowners' associations, cooperatives, mobile home owners' associations, groups of residents of a mobile home park, and groups of residents of recreational vehicle parks the right to conduct bingo games on-site. Organizers of such games must be residents of the community where the bingo game is being held.[41] Regardless of the type of community, bingo games may be held as long as the net proceeds from the games are returned to the players in the form of prizes.[42] The association or group holding a bingo game may only hold back "actual business expenses for such games."[43] Authorized expenses may include the payment of an independent contractor to prepare supplies used in a bingo game, rent, utilities, and any other "intangibles" that are reasonably necessary for the conduct of a bingo game.[44] Compensation for the organizers of a bingo game is not a proper expense.[45]

The bingo statute, in setting forth the regulations for conducting bingo games, prohibits associations from holding bingo games more than two days per week.[46] Additionally, no jackpots may exceed the value of $250 or its equivalent,[47] and there may be no more than three jackpots in any single session of bingo.[48] Under the statute "a session" is defined as "a designated set of games played in a day or part of a day."[49]

Many common-ownership communities consist of a master association and two or more sub-associations. Such facts necessarily beg the question whether one sub-association may hold a bingo game pursuant to the above restrictions, and then another sub-association may use the central clubhouse to hold a subsequent bingo game.

It should be noted by players that the bingo statute requires that each person involved in any bingo game must be a resident of the community where the organization is located. Accordingly, qualified players and event organizers should take care not to abuse the provision in order to hang on through multiple sessions held by multiple sub-associations. Nevertheless, it appears that, in a twist of the current law, a sub-association and master association can both hold bingo sessions on the same day and premises, separated only by a short intermission,[50] and that residents of the sub-association can legally attend both sessions.

A 1992 Florida attorney general opinion contemplated the question of whether two organizations could piggyback their three jackpots per day limit, in order to essentially have a six jackpot day in the same location.[51] The attorney general opined that, in the absence of legislative or judicial clarification, nothing in §849.0931 prohibits two qualified orga-

nizations from each holding a bingo session with three jackpots under the circumstances described. Accordingly, under this opinion, a central clubhouse could be the site of a three-jackpot bingo session in the morning, organized by the master association, followed by three-jackpot session run by a sub-association. Of course, this is merely an attorney general opinion and is not, therefore, binding authority.

Local Municipal Twists

The reader should understand that the preceding analysis is not necessarily the law of gambling in all municipalities. In Florida, the legislature has evidenced no intent to preempt local laws governing gaming.[52] Any county or municipal ordinance that does not conflict with existing state law may lay down stricter guidelines as to the time, place, and manner of conducting permissible gambling activities.[53] Accordingly, any analysis of a proposed course of conduct that omits a review of the applicable county or municipal ordinance is incomplete.

Conclusion

Community associations are granted some latitude when it comes to holding "home style" or other types of legislatively permitted gambling. However, because the penalties for violating Florida's gaming laws are harsh, no gaming activity should be entered into lightly and without the assistance of competent counsel who, with due diligence, can advise his or her clients on how they can enjoy friendly games of chance without running afoul of the law. ❑

"A dollar won is twice as sweet as a dollar earned."

— Fast Eddie Felson[54]

[1] MARIO PUZO, INSIDE LAS VEGAS (1977).

[2] TIMOTHY L. O'BRIEN, BAD BET: THE INSIDE STORY OF THE GLAMOUR, GLITZ, AND DANGER OF AMERICA'S GAMBLING INDUSTRY 4 (1998). *See also* Michael Granberry, *Bowl Brings Out Worst in Bettors*, DALLAS MORNING NEWS, Jan. 30, 2004, at A1, *available at* 2004 WL 67091157); *see also* Richard C. Morais, *The Stakes Get Higher* (April 29, 2002), *found at* www.forbes.com/global/2002/0429/024_print.html (April 29, 2002).

[3] *See* Morais, *supra* note 2 ($64 billion in 2001).

[4] *See* Kevin L. Edwards, *Ante Up*, 103 COMMUNITY UPDATE (Aug. 2003) ("The practice of gambling in the form of penny-ante poker games and bingo seems to be a common occurrence these days in many condominium associations.").

[5] *See* comments of Michael Siegel, associate dean for the University of Florida Levin College of Law, *quoted in* Chris Tisch, *Here's a Game Tip: Don't Wager on It*, ST. PETERSBURG TIMES, (Jan. 28, 2001), at 1, (*available at* 2001 WL 6959517).

[6] *See, e.g.*, Tisch, *supra* note 5 (discussing activities of Pinellas County vice detectives aimed at shutting down football pools).

[7] Mark Twain, *At the Shrine of St. Wagner* (1891), *at* www.sharebook.co.kr/twain/wman/shr.htm.

[8] *See, e.g.*, Fla. Op. Att'y. Gen. 55-189 (opinion that a "jigsaw puzzle contest" was in fact a subterfuge for an illegal lottery).

[9] *See Creash v. State*, 179 So. 149, 151 (Fla. 1938) ("To constitute gambling it is immaterial by what name it is called if the elements of gambling are present and it is condemned by statute in nothing more than the use of the generic term.").

As the statute does not define "advertising," the term may encompass any activity attracting public notice or attention to the fact that someone intends to hold or participate in a card game protected by the statute

[10] *Bellamy v. State*, 347 So. 2d 419, 420 (Fla. 1977), citing *Creash* 179 So. at 149 (anything which induces risk of money or property without any other hope of return than to get for nothing any given amount from another is "gambling.")

[11] Common elements (or "common areas") are the portions of a condominium, co-op, or homeowners' association that are not part of the individual units or lots. *See* FLA. STAT. §718.103(8) (2004) (condominiums); FLA. STAT. §719.102 (7) (2004), and FLA. STAT. §719.102(8) (2004) (co-ops); and FLA. STAT. §720.301(2) (2004) (homeowners' associations).

[12] The gambling statute provides for an exception to the law in the case of "penny ante" card games. FLA. STAT. §849.085 (2004). This section specifically exempts unit owners who were not participants in the game from liability for violations of the Florida Gambling Act and thus, by extension, the association, generally. However, this exception is for specifically enumerated card games — not for lotteries.

[13] *See* Oregon Lottery Web site at www.parisfranceinc.com/portfolio/oregonlottery.org/general/l_hist.htm.

[14] *See Lee v. City of Miami*, 163 So. 486 (Fla. 1935).

[15] *See Little River Theatre Corp. v. State ex rel. Hodge*, 185 So. 855, 861 (Fla. 1939).

[16] *Gulf Theaters, Inc. v. State*, 185 So. 862 (1939) (Movie theater operating a "bank night" where patrons who bought movie theater tickets on a Friday night could participate in a drawing which ranged anywhere from $100 - $500 per Friday night of attendance held to be an illegal lottery.); Fla. Op. Att'y. Gen. 55-189 (Opinion that a "jigsaw puzzle contest" was in fact a subterfuge for an illegal lottery.).

[17] *See* THE WORLD OF GAMBLING at www.gamble.co.uk/quotes.htm.

[18] FLA. STAT. §§849.085(2)(a) and 849.086(8)(b) (1995); *PPI, Inc. v. Department of Business and Professional Regulation*, 698 So. 2d 306 (Fla. 3d D.C.A. 1997).

[19] FLA. STAT. §849.085(3)(e) (2004).

[20] FLA. STAT. §849.085(3)(c) (2004).

[21] FLA. STAT. §849.085(4) (2004). Generally, no gambling debts incurred in Florida are enforceable unless the specific gambling transaction is authorized by law. *See* FLA. STAT. §849.26 (2004). Gambling debts legally incurred outside of Florida may, however, be domesticated and enforced in this state. *See* Steven M. Davis, *Florida's Gambling Debt Collection Process: Play There, Collect Here*, 8 GAMING LAW REVIEW 35 (2004).

[22] FLA. STAT. §849.085(3)(a) (2004).

[23] FLA. STAT. §849.085(2)(b) (2004).

[24] FLA. STAT. §849.085(2)(b) (2004).

[25] FLA. STAT. §849.085(5) (2004).

[26] FLA. STAT. §849.085(2)(b) (2004).

[27] FLA. STAT. §849.085(3)(d) (2004).

[28] Senate Bill 2474 and House Bill 1155, both introduced in early 2004, attempted to modify FLA. STAT. §840.085(4). The House version sought to insert the following language into the statute: "This paragraph shall not apply to the conduct of any penny-ante game within the common elements or common area of a condominium, cooperative, residential subdivision, or mobile home park, the dwelling of an eligible organization as defined in subsection (2), or a publicly owned community center owned by a municipality or county."

The Senate version was slightly less far-reaching (in this specific context) and provided that such communications would be lawful if they consisted of "posting a notice at the dwelling or distributing notice to residents or members of the entity owning the dwelling." Regardless, the Senate bill died in the Committee on Regulated Industries on Friday, April 30, 2004.

[29] *Id.*

[30] *See generally* 2 FLA. JUR. 2D Advertising §1.

[31] *McBride v. State*, 22 So. 711, 713 (Fla. 1897).

[32] *See* Fla. Op. Att'y. Gen. 90-58; Fla. Op. Att'y. Gen. 91-3; Fla. Op. Att'y. Gen. 94-72.

[33] Fla. Op. Att'y. Gen. 66-41.

[34] *See also* Fla. Op. Att'y. Gen.90-58.

[35] FYODOR DOSTOEVSKY, THE GAMBLER (1867).

[36] *See, e.g.*, Lesley Clark, *Social Security Reform is Tough Sell*, MIAMI HERALD, Feb. 4, 2005 at www.miami.com/mld/miamiherald/news/politics/10812019.htm ("Though South Florida is famous for its sprawling enclaves of retirees — think *The Golden Girls* or Seinfeld's fictional Del Boca Vista Phase II — legions of one-time snowbirds and some South Florida transplants have flocked to the Gulf Coast in the past decade, transforming piney forest into senior towns rich with golf-cart dealerships, bingo halls and all-you-can eat buffets.").

[37] *See, e.g., Perlman v. State*, 269 So. 2d 385,387 (Fla. 4th D.C.A. 1972).

[38] FLA. STAT. §849.0931(1)(c) (2004).

[39] *See* FLA. STAT. §849.0931(11)(e) (2004).

[40] This article is not intended to be a comprehensive study of the game of bingo and, therefore, mercifully omits reporting the other specific rules enshrined in §849.0931.

[41] *See* FLA. STAT. §849.0931(8) (2004).

[42] *See* FLA. STAT. §849.0931(4) (2004).

[43] *Id.*

[44] *See State v. South County Jewish Federation*, 491 So. 2d 1183 at 1187 (Fla. 4th D.C.A. 1986); *see also* Fla. Op. Att'y. Gen 92-91.

[45] *See* FLA. STAT. §849.0931(4) (2004).

[46] *See* FLA. STAT. §849.0931(6) (2004).

[47] *See* FLA. STAT. §849.0931(5) (2004).

[48] *Id.*

[49] *See* FLA. STAT. §849.0931(1)(g) (2004).

[50] *See South County Jewish Federation*, 491 So. 2d at 1183 (holding that one charity could lease the premises, conduct bingo on two days, sublease the premises to another charity and allow that charity to conduct bingo for two additional days).

[51] Fla. Op. Att'y. Gen. 92-91.

[52] *See F.Y.I. Adventures, Inc. v. City of Ocala*, 698 So. 2d 583, 584 (Fla. 5th D.C.A. 1997) (A city may enact regulations restricting bingo games that are more strict than those enacted by the state, provided that they did not conflict with state law.); *Jordan Chapel Freewill Baptist Church v. Dade County*, 334 So. 2d 661,664 (Fla. 3d D.C.A. 1976) (holding that Miami-Dade County was permitted to enact laws governing bingo games that did not conflict with state law).

[53] *See F.Y.I. Adventures*, 698 So. 2d at 584.

[54] WALTER TEVIS, THE COLOR OF MONEY (1984).

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