

# GAMBLING IN ALABAMA: NO LIFEGUARD ON DUTY, SWIM AT YOUR OWN RISK

By Scott E. Address and J. Eric Getty



**I**n this election year in Alabama, gambling, or more precisely, electronic bingo, is a leader on the list of hot topics. Gov. Bob Riley and his Task Force on Illegal Gambling have commenced almost weekly raids on casinos throughout the state to seize electronic bingo machines that the governor contends are illegal slot machines. The state's Attorney General Troy King disagrees with both the governor's interpretation of recent opinions from the state's Supreme Court and the antics of the task force, but has chosen to stay out of the fray for now.

The majority of the state's commercial electronic bingo facilities have temporarily closed their doors in the face of warrantless raids being conducted by the task force, hoping that a court or the legislature might clarify whether the operations are legal. A number of proposed bills are wending their way through the state's legislature that would let citizens vote on whether to allow electronic bingo. Amid all of this uncertainty, a limited number of facilities have decided to remain open and take their chances—and they are swimming at their own risk.

## Background

Alabama currently has four major commercial bingo facilities, two of which opened multi-million dollar resort-style facilities within the last few months. There are three Native American bingo facilities in the state operated by the Poarch Band of Creek Indians. Several smaller commercial facilities operate throughout the state, though most have been forced to shut down in fear of being raided and having their machines seized by the governor's task force. A Chickasaw, Ala., electronic bingo hall, for instance, had its 25 bingo machines seized in late February just hours after opening, in what was the 21st crackdown in a month.

Alabama's Constitution prohibits lotteries, Ala. Const. art. IV, § 65 (1901). The Alabama Supreme Court has broadly defined a "lottery" as (1) a prize, (2) awarded by chance, (3) for consideration in *Grimes v. State*, 178 So. 73 (1938). The court also has declared that the ordinary game of bingo is a lottery prohibited by the state's constitution in *City of Piedmont v. Evans*, 642 So. 2d 435, 436-37 (Ala. 1994). The constitution has been



amended 17 times, however, to create exceptions to the prohibition and allow charity bingo to be operated in certain counties or municipalities. The state has no regulating body and no regulations for electronic bingo. Rather, regulation of charity bingo is delegated to county or municipal government or law enforcement authorities according to the applicable constitutional amendment. One might think that under this structure a few traditional bingo facilities might spring up with bingo blowers, cardboard cards and ink daubers; rather, Class II electronic bingo machines flooded the state.

In late 2004, Attorney General King released a statement to the press on his findings after investigating gambling throughout the state. He concluded in the press release that just as e-mail is no less a form of communication than a letter written with a quill pen, bingo played on electronic bingo machines was no less the game of bingo as permitted by the applicable constitutional amendments simply because the game was played on video consoles that resembled slot machines.

### The Governor and the Courts

The year 2005 saw the very first enforcement action taken against a "gambling" facility in Alabama, when the sheriff of Jefferson County raided the Birmingham Race Course. Although Jefferson County did not enjoy a constitutional amendment authorizing charity bingo, the Birmingham Race Course, relying on a statute permitting promotional sweepstakes, operated a promotion whereby patrons purchased tickets for cybertime and received entries in a sweepstakes. Patrons inserted these entries into card readers designed to appear as slot machines, which informed the patrons whether they had won. Jefferson County District Attorney David Barber filed an action seeking a declaratory judgment that the sweepstakes involved the use of slot machines that are illegal gambling devices under the Alabama Constitution, and the Alabama Supreme Court determined that, on the basis of their appearance, the sweepstakes machines are "slot machines" as defined by the Alabama Constitution. *Barber v. Jefferson County Racing Ass'n*, 960 So. 2d 599 (Ala. 2007).

Seeking election to a second term in 2006, Gov. Riley campaigned partly on a promise to rid the state of "illegal gambling." In 2008, the governor issued an executive order creating the Governor's Task Force on Illegal Gambling and appointed David Barber, the former district attorney of Jefferson County, as commander of the task force.

Due in part to the activities of the task force and in part to the efforts of certain local officials, the legality of electronic bingo in the state has repeatedly been challenged in the last several months and has been the subject of a number of opinions by Alabama courts.

In November 2007, the Sheriff of Triana, a small town in north Alabama, raided an electronic bingo facility and seized 200 machines. A federal district court in Alabama decided in September 2009 that the facility was not operated by a charity as defined and required by the applicable constitutional amendment and that the operation was thus illegal in *Texas VFW v. Dornig*, No. 07-S-2144-NE, 2009 U.S. Dist. LEXIS 94759

(N.D. Ala. Sept. 28, 2009). In its opinion, the court also commented, *in dicta*, that the games were more akin to slot machines than the game commonly known as bingo. *Id.* at \*72.

The *Texas VFW* opinion served as a catalyst for other courts around the state to address pending issues on the legality of electronic bingo. In late October 2009, two state court judges issued opinions on the same day concerning the legality of electronic bingo. In the first, the Circuit Court of Walker County concluded that in ratifying a constitutional amendment authorizing bingo in Walker County, Ala., the legislature and voters intended to allow only the "traditional" game of bingo, which included paper cards and active participation by players. The electronic bingo machines being played, the court concluded, did not fit within the ambit of the applicable constitutional amendment, and therefore constituted an illegal lottery in *Baker v. Walker County Bingo*, No. 2007-0400 (Circuit Court of Walker County, Ala., Oct. 26, 2009).

In the second opinion that day, another circuit court determined that electronic bingo machines that had been seized at an assembly plant in Alabama were illegal gambling devices and subject to forfeiture to the state. The court found that the machines were slot machines, even if not designed to be slot machines, because they were "readily convertible to such use." Further, the court stated that even if the applicable constitutional amendment had legalized the operation of electronic bingo games, it had not legalized the manufacturing or assembly of such games in *State v. American Gaming Sys., LLC*, No. 08-1837 (Circuit Court of Jefferson County, Ala., Oct. 26, 2009).

On the heels of these opinions, on Nov. 13, 2009, the Alabama Supreme Court issued a decision defining "bingo" for the first time in *Barber v. Cornerstone Community Outreach, Inc.*, Nos. 1080805, 1080806, 2009 Ala. LEXIS 267. The *Barber* decision arose out of a March 2009 raid by the governor's task force at the White Hall Entertainment Center in Lowndes County.

According to the court, which reversed injunctive relief granted by the lower court precluding subsequent raids, the traditional game of bingo as used in the constitutional amendment at issue has six characteristics: (1) a player uses cards with spaces arranged in five columns and five rows, with an alphanumeric designation assigned to each space; (2) alphanumeric designations are drawn randomly and announced one by one; (3) a player must pay attention to the values announced and must physically act by marking his card accordingly; (4) a player can "sleep" a bingo (i.e., miss an opportunity to win by failing to pay proper attention or properly mark the card); (5) a player must recognize a bingo and announce it to other players; and (6) multiple players compete against each other. *Id.* at \*55-56.

Gov. Riley declared the *Barber* opinion a victory for his task force and sent letters to gaming regulators in jurisdictions around the country, urging them to make sure their respective licensees cease all illegal activity in Alabama. Some manufacturers and operators, however, saw the *Barber* opinion as a directive for how to comply with the law, and modified their games accordingly. The regulatory bodies for the major commercial bingo operations enlisted the services of an international gaming laboratory to test and certify compliance of the modified games.



Confident that the modified games complied with the court's definition in *Barber*, Country Crossing, a country music-themed entertainment complex in Houston County, opened its doors on Dec. 1, 2009. One month later, the governor's task force showed up in the early morning hours to raid the facility. Although Country Crossing was initially successful in obtaining a temporary restraining order to stop the seizure of its machines, the Alabama Supreme Court vacated the TRO, holding that the manufacturers and operators could not obtain civil injunctive relief to prevent a criminal investigation.

### The Task Force's Latest Efforts

Due to the greatest of ironies, this would be the last victory for David Barber as task force commander. In a Jan. 13, 2010, resignation letter to Gov. Riley, Barber explained that his continued service as task force commander would be a political distraction since he had recently won several thousand dollars while patronizing a casino in Mississippi. Gov. Riley appointed John Tyson, the Mobile County district attorney, as "Jackpot" Barber's successor.

Picking up where Barber left off, Tyson led the task force to attempt warrantless raids on Victoryland (a commercial bingo facility in Macon County) and Country Crossing on Jan. 29 of this year. Relying on the "plain view" doctrine, which allows law enforcement under certain circumstances to seize illegal contraband that is within plain view, the task force showed up at the two facilities in the middle of the night. Ostensibly fearing that the bingo machines would flee, the task force was equipped with a helicopter, a SWAT team, hundreds of state troopers dressed in riot gear and moving trucks to haul off the electronic bingo machines. Country Crossing got wind of the raid before the task force arrived and shut its doors. Victoryland obtained a TRO and also filed an action seeking a declaratory judgment that its activities were legal. The task force promptly filed a motion with the Alabama Supreme Court seeking to vacate the TRO.

In short order, the Alabama Supreme Court ruled in favor of the task force, holding that neither injunctive nor declaratory relief is available to operators to prevent the seizure of the allegedly illegal gambling devices. Instead, the operators' sole remedy is through a forfeiture proceeding. *Tyson v. Macon County Greyhound Park, Inc.*, No. 1090548, 2010 Ala. LEXIS 19 (Ala. Feb. 4, 2010).

### The Attorney General and the Legislature

Public pressure for Attorney General King to get involved in this constitutional query has been mounting recently as Gov. Riley's task force continues to conduct warrantless raids of the bingo facilities. Many have called for King to step in and take over the task force. In a recent statement, King urged the governor to stop the raids, which may expose the state to significant litigation, and suggested that the issues be left to an orderly judicial process or to a vote of the people. In response, Gov. Riley contends that the Alabama Supreme Court has ruled, the people have spoken, and gambling—including electronic bingo—is illegal.

The state legislature currently is considering a bill that would allow the citizens of Alabama to vote on a constitutional

amendment that would authorize the limited operation of electronic bingo. The proposed constitutional amendment would create regulatory oversight, allow a limited number of bingo licenses and levy taxes on bingo revenue.


### Conclusion

Three of the four major commercial bingo facilities in Alabama remain closed. Gov. Riley has stated that he will soon turn his attention and that of the task force to the operations of the Poarch Band of Creek Indians. Meanwhile, manufacturers and operators wishing to conduct electronic bingo in Alabama can be certain of one thing: There is no lifeguard on duty, and they swim in Alabama waters at their own risk.

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