

Costing a Pretty Penny: Online Penny Auctions Revive the Pestilence of Unregulated Lotteries

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I. INTRODUCTION

Penny auctions, an online phenomenon imported from Europe, operate by the hundreds in the United States without meaningful oversight from consumer protection agencies.¹ In a penny auction, consumers compete for items one penny at a time.² Consumer complaints about penny auctions—“a combination of bingo night, the Home Shopping Network and a slot machine addiction”³—may inspire a comprehensive regulatory response. But, potential regulation will respond too slowly and unevenly to address the consumer’s present concerns. A current solution is needed to address the business model that the Better Business Bureau identified as the top “Sales Scam” of 2011.⁴ As of November 2012, just three state Attorneys General⁵ and the Federal Trade Commis-

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1. *With Penny Auctions, You Can Spend a Bundle but Still Leave Empty-Handed*, CONSUMERREPORTS.ORG (Mar. 2012), <http://www.consumerreports.org/cro/2011/12/with-penny-auctions-you-can-spend-a-bundle-but-still-leave-empty-handed/index.htm> (“The penny-auction world feels a bit like the Wild West.”).

2. *Id.*

3. Shelley Dubois, *Penny Auction Bet on Chump Change*, WIRED (Jan. 21, 2010), available at <http://www.wired.com/business/2010/01/penny-auctions-bet-on-chump-change-part-i-of-ii/>.

4. *BBB Names Top Ten Scams of 2011*, BETTER BUS. BUREAU (Jan. 4, 2012), <http://www.bbb.org/us/article/bbb-names-top-ten-scams-of-2011-31711>. “BBB recommends you treat [penny auctions] the same way you would legal gambling in a casino—know exactly how the bidding works, set a limit for yourself, and be prepared to walk away before you go over that limit.” *Id.* In the wake of the 2008 financial crisis and the meltdown of the housing market, consumer scams of all sorts are not in short supply. See, e.g., Zachary E. Davies, Comment, *Rescuing the Rescued: Stemming the Tide of Foreclosure Rescue Scams in Washington*, 31 SEATTLE U. L. REV. 353, 360 (2008) (“The CPA . . . prohibits unfair, deceptive, or fraudulent business practices . . . but it offers an inadequate remedy because of a low damages cap. . . . [I]ts \$10,000 cap on exemplary damages has not been raised since being established in 1971. . . . A plaintiff bringing a claim under the CPA must establish five elements: (1) the defendant committed an unfair or deceptive act or practice; (2) the act or practice occurred in trade or commerce; (3) the act or practice impacts the public interest; (4) the plaintiff suffered injury; and (5) the act or practice caused the injury.”).

5. See *Active Public Consumer-Related Investigation, Case Num. L12-3-1029*, FLA. OFFICE ATT’Y GEN., http://www.myfloridalegal.com/lit_ec.nsf/investigations/4816DFB0311DD21985

sion⁶ investigated the operation of an online penny auction.⁷ This handful of investigations into penny auctions did not challenge the legitimacy of the business model.⁸ Instead, these investigations focused on misleading advertising or discrete instances of deceptive practices.⁹ More recently, the Securities and Exchange Commission filed a complaint against Rex Venture Group, LLC for an alleged Ponzi and pyramid scheme through its website ZeekRewards.com, an “affiliated advertising division” of Zeekler.com, a penny auction.¹⁰ To date, no significant inquiry, either academic or practical, into the legitimacy of the penny auction has occurred.¹¹

2579D5004AE52C (last visited Aug. 17, 2012) (investigating Ecom Interactive, LLC d/b/a zbiddy.com for Potential 501.204, Unfair and Deceptive Trade Practices); Press Release, Wash. State Office of the Attorney Gen., PennyBidr Agrees to Cash Out and Refund Consumers Under Agreement with Washington Attorney General (Sep. 28, 2010), available at <http://atg.wa.gov/pressrelease.aspx?&id=26506> (describing consent decree resolving investigation of Federal Way-based penny auction website); Press Release, Ga. Governor’s Office of Consumer Prot., Wavee.com Settles with the Governor’s Office of Consumer Protection (July 6, 2011), available at <http://consumer.georgia.gov/news/press-releases/view/wavee-com-settles-with-the-governor-soffice-of-consumer-protection> (announcing settlement with Georgia-based penny auction website to cease operations, provide \$202,210.20 in consumer restitution, and pay a \$35,000 civil penalty and \$15,000 in administrative expenses); see also Herb Weisbaum, *Most Online Penny Auctions Just Don’t Make Any Sense*, MSNBC.COM, http://www.msnbc.msn.com/id/44010040/ns/business-consumer_news/t/most-online-penny-auctions-just-dont-make-any-sense/#.UE_Tg7KPxMA (last visited Aug. 17, 2012) (discussing penny auction websites generally and all three investigations by state attorneys general).

6. Press Release, Fed. Trade Comm’n, FTC Charges Online Marketers with Scamming Consumers out of Hundreds of Millions of Dollars with ‘Free’ Trial Offers (May 17, 2011), available at <http://www.ftc.gov/opa/2011/05/jessewillms.shtm>.

7. Private action in the form of complaints and lawsuits is also on the rise. An Oregon consumer filed a class-action suit in federal court against one of the largest auction websites, Quibids.com, alleging that the website is engaging in gambling. John McCarthy, *Penny Auctions Promise Savings, Overlook Downside*, USA TODAY (Feb. 6, 2011), available at http://www.usatoday.com/tech/news/2011-02-06-penny-auctions_N.htm.

8. See *supra* notes 3–5 and accompanying text.

9. See *supra* notes 3–4. To its credit, the Consumer Protection Division of the Washington State Attorney General’s Office conducted an investigation into a Washington-based website using a shill bidding program. Washington State Office of the Attorney General, *supra* note 5.

10. Press Release, Sec. & Exch. Comm’n, SEC Shuts Down \$600 Million Online Pyramid and Ponzi Scheme (Aug. 17, 2012), available at <http://www.sec.gov/news/press/2012/2012-160.htm>; see also James O’Toole, *SEC Shuts Down Alleged \$600 Million Ponzi Scheme*, CNN MONEY (Aug. 17, 2012), <http://money.cnn.com/2012/08/17/technology/zeek-rewards-ponzi-scheme/index.html>; see also Complaint, SEC v. Rex Venture Group, 2012 WL 3550930 (W.D.N.C.).

11. The uncertainty of the legal status of penny auctions under federal and state law is compounded by the lack of consensus on the effectiveness and viability of the Unlawful Internet Gambling Enforcement Act, 31 U.S.C. § 5361-5367, and other law seeking to control or prohibit online gambling. See, e.g., David B. Kuznick, *Betting Blind: Problems with Proposed Federal Regulation of Online Poker*, 12 J. HIGH TECH. L. 450 (2012) (proposing improvements to the current body of regulatory law); Rachel J. Schaefer, Note, *Must the House Always Win?: A Critique of Rousso v. State*, 35 SEATTLE U. L. REV. 1549 (2012) (critiquing Washington state’s current approach to online gambling).

Although marketed as auctions, online penny auctions may actually qualify as lotteries. Unlike the multifarious and confusing definitions of gambling,¹² the long-accepted definition¹³ of a lottery consists of three elements: prize, consideration, and chance.¹⁴ If a penny auction satisfies this definition then, under well-established case law in Washington, it is prohibited under the mandatory and self-executing lottery clause,¹⁵ as well as a probable violation of the Washington Consumer Protection Act.¹⁶

This Comment will explore whether an online penny auction constitutes a lottery under article II, §24 of the Washington constitution. Ultimately, this Comment concludes that penny auctions are lotteries and should be regulated as such to protect consumers while improving Washington's own bottom line. Part II explains the typical operation of an online penny auction with the help of two hypothetical auctions. Part III reviews lottery law in Washington and discusses the constitutional basis of the lottery prohibition, as well as its intersection with consumer protection. Part IV explores the elements of the definition of a lottery, focusing on the most difficult element—chance. Part V discusses Washington's potential judicial, statutory, and regulatory responses to the growing penny auction industry. This Comment contends that instead of banning penny auctions outright, the state could adopt the penny auction model as an expansion of the traditional state-run lottery games into the online environment. Part VI briefly concludes.

II. WHAT IS A PENNY AUCTION?

The typical penny auction website¹⁷ has several pages of auction items, including electronics, computers, jewelry, and other merchandise.¹⁸ The website lists the items with extremely low prices and banners

12. Gambling statutes and regulation are notoriously complex. Particularly troublesome is establishing the “nexus” in order for a bid fee to constitute a bet under gaming law. *See, e.g.*, WASH. REV. CODE § 19.46. The definition of lottery law, distinct from the complex regulation of gambling and other games of chance, is much more straightforward. *See infra* Part IV.

13. *See* cases cited *infra* note 80.

14. *See* cases cited *infra* note 83.

15. WASH. CONST. art. II, § 24.

16. WASH. REV. CODE § 19.86.010.

17. The description here is a generalization and is not intended as a portrayal of any individual website. There are hundreds of penny auction websites with a variety of designs. One unverified estimate places the number at over 1,100 websites, though slightly more than half are currently inactive. *Complete Penny Auction Site Listing*, ALLPENNYAUCTIONS.COM, http://www.allpennyauctions.com/complete_penny_auction_site_list/ (last visited Aug. 17, 2012). A few of the largest penny auction websites include Quibids (www.quibids.com), BidRivals (www.bidrivals.com), Skoreit! (www.skoreit.com), and Beezid (www.beezid.com).

18. *Online Penny Auctions: Nothing for Something?*, Consumer Information, FED. TRADE COMMISSION (Aug. 2011), <http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt041.shtm>.

with flash savings of up to 90% or more.¹⁹ The items on the homepage “appear to be selling extremely fast and mind-bogglingly cheaply: a \$100 gift card for 16¢; a \$150 knife set for \$1.82; a \$1,700 HD TV for \$32.19.”²⁰ Not surprisingly, most bidders, even those that win an auction, do not experience the dramatic advertised savings.²¹ In the current economy, when the need to budget is greater than ever, penny auctions provide an incredible temptation precisely because of their unbelievable selling prices.²²

Each auction starts at a very low price varying from \$0.00 to \$0.50, with no expressly established reserve price.²³ Each bid during a penny auction increases the price by \$0.01.²⁴ In addition to a picture of the merchandise and the current bid amount, every auction has a countdown timer.²⁵ The “winner” is the person who placed the last, and therefore highest, bid when the timer runs out.²⁶ But with every bid the timer increases a set amount, anywhere from ten seconds to two minutes.²⁷

Unlike other auction websites, penny auction websites charge bidders a small fee, usually between \$0.50 and \$1.00, for each bid.²⁸ Bidders buy bids in variously sized “bid packages” up front.²⁹ Packages range from as few as 10 bids to 500 or more.³⁰ For all bidders, the bid fees are paid to the penny auction website whether or not the bid is used in an auction.³¹

To better understand the progression of a penny auction, consider this hypothetical in which you are a new bidder on a penny auction website. You came to the website after clicking on a flashy banner ad that

19. Susan Stellin, *Penny Auction Scam*, REAL SIMPLE, <http://www.realsimple.com/work-life/money/penny-auction-scam-0010000067690/index.html> (last visited Aug. 17, 2012).

20. Jennifer Eagan, *Losing Your Cents*, TIME MAG., Jun. 17, 2010, available at <http://www.time.com/time/magazine/article/0,9171,1997462,00.html#ixzz1fBAmqFaq>.

21. One BidRodeo winner used a total of 451 bids at a cost of \$306 to claim a 16-gigabyte iPad—a savings of roughly 35%, or \$172, off the retail price. Deborah L. Cohen, *Entrepreneur Turns Pennies into Million-Dollar Business*, REUTERS (Jun. 9, 2010), <http://www.reuters.com/article/2010/06/09/us-column-cohen-bidrodeo-idUSTRE65848P20100609>.

22. “For anybody who finds a bargain even mildly stimulating, this is like pure heroin. In recessionary times, it’s like heroin that will also save puppies.” Eagan, *supra* note 20.

23. *Online Penny Auctions: Nothing for Something?*, *supra* note 18.

24. *Id.*

25. *Id.*

26. *See id.*

27. FED. TRADE COMM’N, AVOIDING THE PITFALLS OF ONLINE PENNY AUCTIONS (2011), available at <http://www.ftc.gov/bcp/edu/pubs/articles/naps46.pdf>.

28. *Id.*

29. *Id.*

30. Amanda Lee, *From A to BeeZid: A Beginner’s Guide to Winning Penny Auctions*, PENNY AUCTION WATCH (Apr. 4, 2011), <http://www.pennyauctionwatch.com/2011/04/from-a-to-beezid-penny-auction-tips-beginners/>.

31. *Id.*

accompanied your search results. On the homepage, you find a smartphone “listed” at a start price of \$0.50.³² The low starting price entices you, a new visitor to the world of penny auctions, to give it a shot.³³ “After all it’s 50 cents plus a penny—what a deal!”³⁴ You buy a “special offer” package of 250 bids and enter a promo code for 10 free bids you remembered from the radio this morning.³⁵ You start bidding early because of the excitement of the timer, the hunt for a bargain, and the fact that only a few bidders appear interested. For the sake of simplicity,³⁶ we will limit the auction to you and one other person.³⁷

The price slowly increases from \$0.50 to \$1.00, still a bargain, as you and your opponent trade \$0.01 bids. Transfixed by the excitement of your battle with an anonymous opponent, you keep clicking the “Bid” button. Finally, after what seems like hours of back and forth, your opponent fails to bid and the timer mercifully reaches zero. You win! And the final bid price for your new smartphone—just \$5.00.

But to get from the start price, there were 450 bids.³⁸ And half of those bids were yours at \$0.60 per bid.³⁹ Your one-time steal of a deal dissolved into \$135 in bid fees, plus the \$5.00 final bid price (to say nothing of taxes and shipping and handling).⁴⁰ Meanwhile, your competitor walks away without a smartphone and without his \$135.⁴¹

32. Tony Duke, *Penny Auctions May Leave You Feeling Pound Foolish*, N. ISLAND MIDWEEK (Nov. 15, 2011), <http://www.northislandmidweek.com/news/133917968.html>.

33. *Id.*

34. *Id.*

35. Advertisements for online penny auctions are not terribly common, but the industry has advertised on a variety of platforms, including radio and television. *Penny Auction Commercials – QuiBids and Beezid*, BID PENNY (Mar. 20, 2011), <http://bidpenny.blogspot.com/2011/03/penny-auction-commercials.html> (criticizing the production value of most penny auction commercials). This Comment does not consider whether the mediums themselves, some of which adopt guidelines for endorsements or at least respond to public pressure, owe any duty to consumers regarding penny auction advertising. *E.g.*, Timothy Burke, *ESPN Personalities Shill for Penny-Auction Site, Despite the Worldwide Leader’s “Endorsement Guidelines,”* DEADSPIN (Dec. 16, 2011), <http://deadspin.com/5868734/espn-personalities-shill-for-penny+auction-site-despite-the-worldwide-leaders-endorsement-guidelines> (questioning the wisdom of ESPN personalities’ endorsements of SkoreIt.com when “googling ‘skoreit scam’ returns about 21,000 results, most of them from sites like RipoffReport, ComplaintsBoard, ScamBook, and FindTheScam”).

36. This simplification helps illustrate the amount the losing bidder stands to forfeit. Nearly all penny auctions have more than two bidders. In fact, penny auctions for valuable merchandise can attract hundreds of unique bidders resulting in thousands of bids. *Hall of Fame – Epic Battles*, ALLPENNYAUCTIONS.COM, http://www.allpennyauctions.com/epic_battles/ (last visited Aug. 17, 2012).

37. Duke, *supra* note 32.

38. *Id.*

39. *Id.*

40. *Id.*

41. Some penny auction sites allow expended bid fees to go towards a “Buy Now” feature. Under this feature, the bid fees are applied to the posted retail price of the item. Penny auction sites

Unlike a traditional in-person auction, a penny auction website generates most of its revenues from the bid fees you and your competitor expended, not from the winning bid price.⁴² Another hypothetical illuminates how penny auction websites make a profit. In this hypothetical auction for another smartphone, bidders place a total of 999 bids, for a \$10 winning bid price. At \$0.50 per bid, the penny auction website collected \$499.50 plus the winning bid price, for a total revenue of \$509.50. Losing bidders do not get their bid fees back. As a result, the penny auction website easily covered the retail price of the smartphone, while the winning bidder received a drastic discount. The bids placed by the losing bidders funded the winning bidder's discount and the penny auction website's profits.⁴³ The openly redistributive nature of a penny auction mirrors the effect of a lottery.⁴⁴

Penny auctions also differ substantially from other online auctions. A comparison to eBay, the most well-known online auction website, illustrates these differences. First, actual individuals, not eBay, list the auction items, whereas penny auction sites are responsible for listing items for auction.⁴⁵ As a result, eBay has a significantly reduced incentive to prolong auctions or encourage additional bidders through questionable tactics like "bidbots."⁴⁶ Second, an individual can choose a maximum bid amount, which eBay applies incrementally to the next highest bid; eBay users do not have to enter penny bids over and over again.⁴⁷ Third, eBay's revenue stream is not predicated on bid fees because eBay does not charge an individual for placing a bid in an auction.⁴⁸ Finally

aver that this ability means you do not "lose" the money spent on bid fees. For a discussion on the impact of this feature under the element of consideration see *infra* Part III.

42. See Cohen, *supra* note 21.

43. See Kristin Alexander, *Some Penny Auctions Use Cheap Tricks to Cheat Consumers*, WASH. ST. OFF. ATT'Y GEN. ALL CONSUMING BLOG (Sep. 28, 2010), <http://www.atg.wa.gov/BlogPost.aspx?id=26514>.

44. CHARLES T. CLOTFELTER & PHILLIP J. COOK, *SELLING HOPE: STATE LOTTERIES IN AMERICA* 134 (1989) ("Some of the lottery's effects are baldly redistributive: many lose so that a few might win."). The redistributive effect is even more questionable because of the noted propensity of the economically disadvantaged to frequently purchase lottery tickets. See *infra* notes 147–48 and accompanying text.

45. *How Do I Buy an Item?*, EBAY, <http://pages.ebay.com/help/buy/questions/buy-item.html> (last visited Aug. 17, 2012).

46. "Bidbots" are computer programs that simulate real bidders in order to increase the bid price and prolong the auction. See *infra* Part IV. Penny auction websites use bidbots to increase the perceived traffic and the final bid price; individuals can also purchase bidbots for personal use to automatically place bids on their behalf. See *infra* notes 187–191 and accompanying text.

47. *All About Bidding*, EBAY, <http://pages.ebay.com/help/buy/aboutbidding.html> (last visited Aug. 17, 2012).

48. See *Fees for Selling on eBay*, EBAY, <http://pages.ebay.com/help/sell/fees.html> (last visited Aug. 17, 2012); see also Aron Hsiao, *What Does It Cost to Trade on eBay? Is There a Catch?*,

and most significantly, only the winning bidder in an eBay auction pays any money.⁴⁹ The losing bidders spend nothing.

The secondary effects of the penny auction boom have materialized only recently. The penny auction industry has inspired a cottage industry of strategists claiming to possess knowledge for beating the system. Various sources—mostly online—provide “strategies” for winning penny auctions.⁵⁰ One popular tip recommends developing a reputation as a “power bidder” by immediately outbidding any competition.⁵¹ This power bidder strategy bills itself as a psychological ploy to frustrate and intimidate the competition into capitulation.⁵² Another strategy recommends refraining from bidding until the end of an auction to score a last minute victory when other bidders appear exhausted.⁵³ By using one of these strategies, the bidder theoretically increases the likelihood of winning in the short-term as other bidders may become discouraged by being quickly outbid, have used a large number of bids early, or failed to obtain a sufficient number of bids. In the long-term, according to most strategy guides, a history of victories can establish one’s reputation, which is available to other bidders on some websites, to dampen competition.⁵⁴ But really, only the creativity of the author limits the number of strategies and the justifications of these strategies.⁵⁵ A few sources even claim

ABOUT.COM, http://ebay.about.com/od/frequentlyaskedquestion1/f/faq_whatcost.htm (last visited Aug. 17, 2012).

49. *See All About Bidding*, *supra* note 47.

50. *How to Win a Penny Auction*, EHOW.COM, http://www.ehow.com/how_5736070_win-penny-auction-tips.html (last visited Aug. 17, 2012); *Are Penny Auction Sites the Wave of the Future?*, PENNY AUCTIONS REV. (Oct. 25, 2010), <http://www.pennyauctionsreview.org>; *5 Commandments to Winning*, QUIBIDS, <http://www.quibids.com/quibids101/blog/20-5-Commandments-to-Winning> (last visited Aug. 17, 2012); *Penny Auction Strategy*, PENNY AUCTION INTELLIGENCE, <http://www.pennyauctionintelligence.com/penny-auction-strategy>, (last visited Aug. 17, 2012). These tips are similar to other “get rich quick” schemes seen in any number of books on various topics. As the Better Business Bureau notes, “Sales scams are as old as humanity.” *BBB Names Top Ten Scams of 2011*, *supra* note 4. Significantly, some sites provide “tips” on winning on the penny auction’s own website. *E.g.*, *Tips and Strategies*, BEEZID.COM, <http://www.beezid.com/help/bidding/tips-strategies> (last visited Aug. 17, 2012). Naturally, this begs the question whether this is sound advice at all. *See infra* Part IV.C.

51. *Winning Penny Auction Bidding Styles*, BESTPENNYAUCTIONS.NET, <http://www.bestpennyauctions.net/strategy/bidding-styles/> (last visited Aug. 17, 2012).

52. *Id.*

53. This type of strategy is often called “Sniper Bidding.” *Id.*

54. These tips and strategies are more critically examined in Part IV *infra*.

55. Other styles include “Blitzkrieg,” “War of Attrition,” and “First In Bidder.” *Id.* Other strategies emphasize studying the “trends and patterns” to discover the weaknesses of opponents. *Penny Auction Strategy*, PENNY AUCTION STRATEGY GUIDE, <http://www.pennyauctionstrategyguide.com> (last visited Nov. 30, 2011).

to rely on game theory and economics.⁵⁶ And not surprisingly, some of these “secrets” are not free.⁵⁷

With this background into the operation of a penny auction, Part III briefly surveys the current Washington lottery law and its intersection with the Washington Consumer Protection Act. While this Comment applies Washington law for the sake of clarity, Washington’s prohibition against lotteries is nothing unusual.⁵⁸

III. LOTTERY LAW IN WASHINGTON

Washington’s constitutional prohibition on lotteries is as old as the state itself. By the time Washington became a state, the tide had turned against lotteries in most of the United States.⁵⁹ According to Washington law, lotteries “shall be prohibited except as specifically authorized upon the affirmative vote of sixty percent of the members of each house of the legislature or . . . by referendum or initiative approved by a sixty percent affirmative vote of the electors thereon.”⁶⁰ This clause is mandatory and self-executing.⁶¹

56. Amanda Lee, *Is There an Effective Strategy to Winning Penny Auctions?*, PENNY AUCTION WATCH (Sep. 1, 2009), <http://www.pennyauctionwatch.com/2009/09/penny-auction-strategy/> (quoting blog post discussing the implications of game theory and the work of Dr. John Nash to explain Hawk-Dove or Snowdrift game theory applied to penny auctions).

57. “The Penny Auction Secret – Ultimate Bidder Manuscript” costs \$17. *Attention! Before You Purchase Any Bids From a Penny Auction, You Need to Know There’s an Easier Way to Win*, PENNY AUCTION SECRET, <http://www.pennyauctionsecret.com> (last visited Nov. 30, 2011).

58. Although the prohibitions of lotteries and sales of lottery tickets are more often by statute, many states have constitutional provisions. 54 C.J.S. *Lotteries* § 10 (2012). Some state constitutions even have stronger prohibitory language than Washington. *E.g.*, KAN. CONST. art. XV, § 3 (“Lotteries and the sale of lottery tickets are forever prohibited.”). Other state constitutions merely direct the state legislature to pass laws to prohibit lotteries. *E.g.*, W. VA. CONST. art. VI, § 36 (“The legislature shall have no power to authorize lotteries or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprise tickets in this State.”). Lottery law, like gambling law generally, underwent a series of ups and downs in the United States, but every state regulates lotteries to some extent. *See generally* GEORGE SULLIVAN, *BY CHANCE A WINNER: THE HISTORY OF LOTTERIES* 40–51 (Dodd, Mead, 1972). Current laws are actually markedly more lenient than the early 20th century. *See* I. Nelson Rose, *Gambling and the Law-Update 1993*, 15 HASTINGS COMM. & ENT. L.J. 93, 96 (1992) (“[T]he great Louisiana Lottery scandal of the 1890s led to the passage of strong federal anti-lottery laws and a complete prohibition of state lotteries for seventy years, until they were reintroduced by New Hampshire in 1963.”). State and federal authorities demonstrate no inclination to reverse this liberalization; in fact, further relaxation may be the order of the day. *See* Rose, *infra* note 221 and accompanying text.

59. “In fact, the problems lotteries created were of such a magnitude and were so pervasive that by the late 1800s the States were nearly unanimous in imposing constitutional prohibitions on lotteries.” Opinion of the Justices, 795 So. 2d 630, 634 (Ala. 2001).

60. WASH. CONST. art. II, § 24.

61. *City of Seattle v. Chin Let*, 52 P. 324, 325 (Wash. 1898) (“The language of the constitution is mandatory, and the provision is self-executing.”).

As a self-executing provision, “the legislature cannot, by loose, vague or inapt definition of lottery, constitutionally authorize indirectly in law what the courts reasonably find to be a lottery in fact.”⁶² The judicial inquiry “must look into, through and around any schemes and devices which appear even superficially to constitute a lottery.”⁶³ Thus, the constitutional ban applies to any scheme the court concludes is a lottery, regardless of the common understanding of what constitutes a lottery or the purveyors attempt to relabel a scheme to avoid the ban.⁶⁴

The broad and sweeping terms of the provision are intentional.⁶⁵ This phrasing is “all embracing as far as different types and kinds of lottery schemes and devices are concerned.”⁶⁶ Framers of the Washington constitution intended to ban all lotteries, not a specific methodology or design.⁶⁷ Nor is the wide breadth of the definition of a lottery unique to Washington.⁶⁸ But the broad prohibition does not “forbid games of skill or . . . bar the ordinary chance or contingency which is involved in practically every human endeavor,”⁶⁹ which would have been as impossible as it would be unpopular.

Washington laws preclude the lottery promoter’s gains so the promoter cannot reap “an unearned harvest at the expense of the players.”⁷⁰ The “laws against lotteries are designed to prevent improverishment [sic] of the unwary, to discourage the gambling spirit and prevent the public from wagering their substance upon chance and the fortuitous events so that one cannot be enticed to hazard his earnings on a chance to win a prize.”⁷¹ Moreover, the laws protect the unwary and prevent the exploitation of the “natural yearning in most everyone to get something for nothing.”⁷² “[T]he people of this state . . . recognized that the gambling in-

62. *State ex rel. Schillberg v. Safeway Stores, Inc.*, 450 P.2d 949, 952–53 (Wash. 1969) (holding that a grocery store’s promotion contest was a lottery).

63. *Id.* at 953.

64. *Id.* at 952–53.

65. *State ex rel. Evans v. Bhd. of Friends*, 247 P.2d 787, 794 (Wash. 1952) (“We cannot agree with appellant’s contention that Art. II, § 24 . . . applies only to chartered or ticket lotteries. In the first place, we feel most strongly that the language of this constitutional provision is *not ambiguous*. The provision is phrased in the broadest and most sweeping terms. It prohibits *any* lottery.”) (emphasis in original).

66. *Id.*

67. *Id.* at 796.

68. *E.g., Ex parte Ted’s Game Enters.*, 893 So. 2d 376, 377 (Ala. 2004) (“[A]ll private lotteries by tickets, cards, or dice . . . are prohibited under a penalty . . . for him that shall erect such lotteries.” (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 173)).

69. *D’Orio v. Jacobs*, 275 P. 563, 565 (Wash. 1929) (finding that a contest involving solving a checker problem was a game of skill).

70. *Id.*

71. *State ex rel. Schillberg v. Safeway Stores, Inc.*, 450 P.2d 949, 956 (Wash. 1969).

72. *Id.*

instinct is strong in human nature and enacted these provisions to protect themselves from their own inclination to engage in self-deception when that instinct is stirred.⁷³ The constitutional ban is, to a significant degree, Washington's first foray into the realm of consumer protection.

It is no surprise then that unauthorized lotteries may violate current consumer protection laws. The Washington Consumer Protection Act (CPA) prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce."⁷⁴ For a plaintiff to prevail under the CPA, a private party must prove the following: (1) the defendant's act or practice is unfair or deceptive; (2) the act or practice occurred in trade or commerce; (3) the act or practice affects the public interest; (4) the act or practice caused injury to business or property; and (5) a causal link.⁷⁵ In at least one instance, the Washington Supreme Court has found a lottery in violation of the CPA.⁷⁶ In *Reader's Digest*, the court determined that a magazine sweepstakes was a lottery.⁷⁷ The court further held that a lottery was "[p]er se an unfair trade practice" and a violation of the CPA.⁷⁸

More broadly, unauthorized lotteries also violate federal law. Federal courts applying the Federal Trade Commission Act,⁷⁹ upon which the CPA is based, consistently hold that an unauthorized "lottery" in states prohibiting lotteries is an unfair trade practice.⁸⁰ The lottery is an unfair method of competition precisely because it is contrary to public policy and punishable under criminal statutes in many states.⁸¹ But, as the next Part explores, not all methods of competition and gaming are unfair. Lotteries have their own characteristics that make them so widely despised.

73. *Seattle Times Co. v. Tielsch*, 495 P.2d 1366, 1369 (Wash. 1972).

74. WASH. REV. CODE § 19.86.020.

75. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 719 P.2d 531, 533 (Wash. 1986) (clarifying a "highly confused area of the law").

76. *State v. Reader's Digest Ass'n, Inc.*, 501 P.2d 290, 299 (Wash. 1972), *modified by Hangman Ridge*, 719 P.2d at 535 (holding that the ability to declare a practice a "per se" violation of the CPA rested with the legislature, not the courts).

77. *Id.*

78. *Id.* As noted above, Washington courts no longer have the ability to declare a practice a per se violation of the CPA. *Hangman Ridge*, 719 P.2d at 535.

79. 15 U.S.C. § 45.

80. *Fed. Trade Comm'n v. R. F. Keppell & Bro., Inc.*, 291 U.S. 304 (1934); *Peerless Prod., Inc. v. Fed. Trade Comm'n*, 284 F.2d 825 (7th Cir. 1960), *cert. denied*, 365 U.S. 844 (1961); *Globe Cardboard Novelty Co. v. Fed. Trade Comm'n*, 192 F.2d 444 (3d Cir. 1951); *Wolf v. Fed. Trade Comm'n*, 135 F.2d 564 (7th Cir. 1943); *Helen Ardelle, Inc. v. Fed. Trade Comm'n*, 101 F.2d 718 (9th Cir. 1939); *Ostler Candy Co. v. Fed. Trade Comm'n*, 106 F.2d 962 (10th Cir. 1939), *cert. denied*, 309 U.S. 675 (1940).

81. *Keppell*, 291 U.S. at 313-14.

IV. ELEMENTS OF LOTTERIES: PRIZE, CONSIDERATION, CHANCE

A lottery is a “scheme for the distribution of money or property by chance, among persons who have paid or agreed to pay a valuable consideration for the chance.”⁸² The elements of this definition are well-established: prize, consideration, and chance.⁸³ While the first two elements—prize and consideration—present little controversy in application to penny auctions, the final element of chance is less easily defined and consequently more difficult to apply.

A. Prize

Though no statutory definition of “prize” exists, the language of the statute describes the thing to be distributed as “money or property.”⁸⁴ Moreover, a “[t]hing of value . . . means any money or property, any token, object or article exchangeable for money or property, or any form of credit or promise, . . . or in involving extension of a service, entertainment, or a privilege of playing at a game or scheme without charge.”⁸⁵ While the courts consistently describe this element as a “prize,” this terminology appears to be a judicial gloss on the statutory language of “money or property,” not an independent term in need of explanation.⁸⁶

Under Washington law, the prize element in a penny auction website is quickly demonstrated. Although one could argue there is no prize at the end of the penny auction because the “winner” still has to pay for the item like a traditional auction, the argument fails even cursory examination. Even if the auction item cannot be a “prize” because it is paid for, the discount alone is sufficient to constitute a prize. The merchandise offered in a penny auction at the final bid price, which is typically a discount from the retail price, is sufficient to constitute a prize as the merchandise is property of some value. In some penny auctions, the value of the property is quite high relative to the final bid. Given that items like “a sack of flour or a can of a certain brand of fish” constitute a prize,⁸⁷ it follows that an expensive electronic device for 90% below retail price would qualify as well.

82. WASH. REV. CODE § 9.46.0257.

83. *Seattle Times Co. v. Tielsch*, 495 P.2d 1366, 1368 (Wash. 1972); *State ex rel. Schillberg v. Safeway Stores, Inc.*, 450 P.2d 949, 953 (Wash. 1969); *State ex rel. Evans v. Bhd. of Friends*, 247 P.2d 787, 797 (Wash. 1952); *State v. Danz*, 250 P. 37, 38 (Wash. 1926); *Soc’y Theatre v. Seattle*, 203 P. 21, 22 (Wash. 1922).

84. WASH. REV. CODE § 9.46.0257.

85. WASH. REV. CODE § 9.46.0285.

86. *See Sherwood & Roberts-Yakima, Inc. v. Leach*, 409 P.2d 160, 162 (Wash. 1965); *Danz*, 250 P. at 37–38.

87. *Soc’y Theater*, 203 P. at 21.

B. Consideration

Consideration encompasses “acts of forbearances, promises, or conduct which in law are sufficient to support an agreement.”⁸⁸ So long as a court could find “consideration, in whatever form, actually mov[ing] from the participants to the promoters” the element is satisfied.⁸⁹ Sufficient consideration is present if a person does something the person would otherwise not do—a detriment.⁹⁰ The use of the participant’s time, thought, attention, or energy may also constitute sufficient detriment.⁹¹ The participant’s opinion that he has given nothing of value is not “determinative.”⁹²

Like the prize, the existence of consideration is readily apparent. First, the bidders pay for each individual bid. Second, in almost every auction, a bidder will use multiple bids, sometimes dozens or hundreds of bids, in an effort to prevail. Thus, the bidders can incur substantial costs during the auction regardless of the outcome. Finally, each bidder allocates the bidder’s time, thought, attention, and energy to search for and bid in the auctions. Even independently, any of these reasons are likely sufficient detriment to the bidder and constitute action the bidder might otherwise not do.⁹³

The most serious challenge to this element arises from the so-called “Buy Now” features of some penny auction websites.⁹⁴ Under this feature, a losing bidder may apply the bid fees to buy the item at a posted price. Penny auction websites and their defenders claim that this ability means you do not lose the money spent on bid fees.⁹⁵ Even if this argument is correct, the fact remains that a court may find consideration in

88. *Schillberg*, 450 P.2d at 955.

89. *Id.* at 954. “Consideration for a lottery may be both gain and detriment or one without the other.” *Id.* at 955.

90. *Seattle Times Co. v. Tielsch*, 495 P.2d 1366, 1369 (Wash. 1972).

91. *Schillberg*, 450 P.2d at 956–57.

92. *Seattle Times*, 495 P.2d at 1369.

93. *See id.* at 1371–72.

94. *QuiBids 101—Buy Now Explained*, QUIBIDS, <http://www.quibids.com/quibids101/blog/25-Buy-Now-Explained> (last visited Apr. 2, 2012). But not all online penny auctions offer this feature. *E.g.*, *Frequently Asked Questions (FAQ)*, SKOREIT!, <https://www.skoreit.com/Help/FAQ> (last visited Aug. 16, 2012) (“At SkoreIt!, every bid you place takes you one step closer to winning the item at an incredible discount and is, in effect, an investment into that auction. With that being said, once you place a bid into an auction, it becomes part of the auction and is non-refundable.”).

95. *QuiBids 101—How It’s Not Gambling*, QUIBIDS, <http://www.quibids.com/quibids101/blog/39-How-Its-Not-Gambling> (last visited Aug. 14, 2012); *Are Penny Auctions Gambling?*, PENNYBURNERS, <http://www.pennyburners.com/getting-started/are-penny-auctions-gambling> (last visited Aug. 14, 2012) (arguing non-exclusively that penny auctions are not gambling because bidders “must pay for the item being auctioned,” per-bid fees are merely “entrance fees,” and a “buy it now” feature nullifies any argument because the fees are not worthless upon losing).

“whatever form.”⁹⁶ Consequently, the bidder’s time and energy spent bidding in the auction—doing something the bidder would otherwise not do—is sufficient consideration.⁹⁷

C. Chance

Even if a court can easily establish two of the three elements, the outcome ultimately rests on whether the distribution of the merchandise from a penny auction occurs by chance. Appropriately, chance is the dispositive element because it “is the lure that draws the credulous and unsuspecting into the deceptive scheme, and it is what the law denounces as wrong and demoralizing.”⁹⁸ That is, it is the existence of chance—the unknown outcome—that provides the thrill and fun of “entertainment auctions.”

Chance, it turns out, is the most difficult area of lottery law.⁹⁹ The Washington legislature did not create a statutory definition of chance.¹⁰⁰ Nor have the courts developed a concise definition. Instead, what we are left with is a matter of judicial inquiry on a case-by-case basis: “The court will inquire, not into the name, but into the game, however, skillfully disguised, in order to ascertain if it is prohibited, or if it has the element of chance.”¹⁰¹

Because undefined statutory terms are given their ordinary meaning, including the meaning found in a dictionary,¹⁰² courts have developed a variety of definitions for chance. But it is generally understood to be “used in the sense of being opposed to something which happens by plan or design, or by the exercise of volition or judgment.”¹⁰³ In the words of Justice Holmes, “What a man does not know and cannot find out is chance to him, and is recognized as chance by the law.”¹⁰⁴ Consequently, a lack of information is a form of chance.¹⁰⁵

96. *Schillberg*, 450 P.2d at 954.

97. *Id.* at 956–57; *Seattle Times*, 495 P.2d at 1369.

98. *Sherwood & Roberts-Yakima, Inc. v. Leach*, 409 P.2d 160, 163–64 (Wash. 1965) (quoting *State v. Lipkin*, 84 S.E. 340, 343 (N.C. 1915)).

99. Charles Pickett, *Contests and the Lottery Laws*, 45 HARV. L. REV. 1196, 1210 (1932) (“The requirement of chance presents perhaps the most perplexing aspect of lottery law.”).

100. See WASH. REV. CODE § 9.46.0257.

101. *Sherwood*, 409 P.2d at 163–64 (quoting *Lipkin*, 84 S.E. at 343 (“It is the one playing at the game who is influenced by the hope enticingly held out, which is often false or disappointing, that he will, perhaps and by good luck, get something for nothing, or a great deal for a very little outlay.”)).

102. *Lake v. Woodcreek Homeowners Ass’n*, 243 P.3d 1283, 1289 (Wash. 2010).

103. 54 C.J.S. *Lotteries* § 2b (2012).

104. *Dillingham v. McLaughlin*, 264 U.S. 370, 373 (1924).

105. See *id.*

In penny auctions then, the question is whether a person, in the form of a semi-anonymous online bidder, satisfies the element of chance because the bidder is the unknown in the auction; the bidder decides when to bid and when not to bid. Although public officials should scrutinize penny auctions because of increasing consumer complaints, remarkably little case law on penny auctions exists, and none render a decision applicable to this Comment.¹⁰⁶

This section will first explain the role chance must play under the qualitatively dominant rule, which is the starting point for the case-by-case inquiry required by Washington law. Then it will address four questions about chance and apply these questions to penny auctions to determine if chance exists. The four questions are (1) whether the participants control the outcome; (2) whether skill plays a role in penny auctions; (3) whether humans can be a source of chance; and (4) whether the asymmetric information environment creates chance.

1. The Qualitatively Dominant Rule

In defining a lottery, the chance element can be met by something less than “pure chance.”¹⁰⁷ An element of skill, judgment, or knowledge may accompany chance to some degree so long as chance is the dominant factor in determining the result.¹⁰⁸ “It may be said that an event presents the element of chance so far as after the exercise of research, investigation, skill, and judgment we are unable to foresee its occurrence or non-occurrence or the forms and conditions of its occurrence.”¹⁰⁹

The dominance of the chance is measured by a qualitative test.¹¹⁰ The most helpful statutory language defines a “[c]ontest of chance” as “any contest, game, gaming scheme, or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein.”¹¹¹ Chance must be an integral part of the contest that influenced the result, but it does not have to be a quantitatively greater portion when viewing

106. The lack of case law may soon change. Consumer complaints against penny auctions are on the rise as their popularity grows. At least one once popular penny auction, *BidRack*, shut down and faces a consumer class action lawsuit in California federal court. The court denied a motion to dismiss on six of the seven substantive claims of the class in September 2011. *Parino v. BidRack, Inc.*, 838 F. Supp. 2d 900 (N.D. Cal. 2011).

107. *Seattle Times Co. v. Tielsch*, 495 P.2d 1366, 1369 (Wash. 1972).

108. *Id.*; *Sherwood & Roberts-Yakima, Inc. v. Leach*, 409 P.2d 160, 162–63 (Wash. 1965).

109. *People ex rel. Ellison v. Lavin*, 179 N.Y. 164, 169 (1904).

110. *Seattle Times*, 495 P.2d at 1369–70.

111. WASH. REV. CODE § 9.46.0225.

the scheme as a whole.¹¹² Chance must be the dominant factor in a “causative sense.”¹¹³

The application of the qualitatively dominant rule is simpler when the scheme or plan involves a mechanical device that can be deconstructed and easily understood. In *Evans*, a non-profit fraternal organization operated slot machines for use by members at its facility.¹¹⁴ The court held that a slot machine is a lottery regardless of the regular order of prize distribution or the player’s knowledge of the machine’s operation.¹¹⁵ Because the court found that the slot machine required no skill, it determined that the mechanical device in control of the spinning drums was the dominant factor in the distribution.¹¹⁶ While a player could, with adequate time and money, play the slot machine enough to receive 95% of the player’s money back, “the practical facts of life [are] . . . that seldom, if ever, is it to be expected that the machines would be operated by players in the precise fashion just described.”¹¹⁷ Whether a particular operation constitutes a lottery depends on the scheme or plan involved, rather than the mechanical device employed.¹¹⁸

Unfortunately, for all the beautiful judicial language it inspires, the qualitatively dominant rule provides remarkably little guidance. There is no exclusive list of factors to consider or bright line test to determine the “quality” of dominance. This lack of guidance is the natural consequence of this “most perplexing”¹¹⁹ part of lottery law because the law requires, in every sense of the word, a case-by-case examination.

2. Do the Participants Control the Outcome?

Chance exists when the participants have no control over the factors that determine whether they receive any prize.¹²⁰ In *Sherwood*, a seller utilized a referral-selling scheme, in which a purchaser pays for equipment and, in exchange, the purchaser will receive commissions on future sales to new customers referred by the purchaser.¹²¹ The court held that

112. *Sherwood*, 409 P.2d at 163.

113. *Seattle Times*, 495 P.2d at 1370, (quoting *State ex inf. McKittrick v. Globe-Demorat Pub. Co.*, 110 S.W.2d 705, 717 (Mo. 1937)).

114. *State ex rel. Evans v. Bhd. of Friends*, 247 P.2d 787, 789–90 (Wash. 1952).

115. *Id.* at 797.

116. *Id.* at 796–97.

117. *Id.* at 798.

118. *See id.* at 798.

119. Pickett, *supra* note 99, at 1210.

120. *Sherwood & Roberts-Yakima, Inc. v. Leach*, 409 P.2d 160, 162 (Wash. 1965).

121. *Id.* at 161.

the referral-selling scheme was a lottery.¹²² Even assuming that the purchaser used skill or judgment in selecting referrals, chance pervaded the arrangement when the referrals may not be interested, the sales presentation may be inadequate, the referrals might already have been referred, the market may be saturated with the equipment, and the salesperson may never contact the referral.¹²³ The number of unknowns inherent in the scheme creates the chance.

Just as the referral-scheme was a lottery because the purchasers had “no control,” a penny auction is a lottery because bidders cannot control the arrival of new bidders.¹²⁴ Until the penny auction concludes, the potential entry of bidders eliminates the control any individual player has over the outcome of the auction. The bidder’s control over his or her individual bid, like the purchaser’s control over the selection of referrals, is irrelevant to the outcome of the penny auction.¹²⁵ The determinative factor of the auction is the occurrence of future bids.

Unlike *Sherwood*, where whether the purchasers received a commission depended entirely on if the seller made additional sales,¹²⁶ a penny auction website has no role in determining the result—the bidders determine it. A referral-selling scheme is a lottery because the purchasers ceded control to the seller after making the referral and had no opportunity to influence the results.¹²⁷ Though an individual bidder cannot control the actions of other bidders, a bidder retains the ability to bid again. As a result, the bidder always has the opportunity to reclaim control.

The bidder’s control is illusory, however. Until the auction concludes, the potential entry of bidders eliminates the control any individual player has over the outcome of the auction. Theoretically, a penny auction never has to end. Because each bid adds time onto the auction, the clock will never expire so long as new bids occur. In reality, there is some point (or at least there should be some point) at which no new bids will occur because the bid will no longer yield any conceivable savings. But a bidder has no way to calculate that end point for other bidders short of the retail price of the item.

122. *Id.* at 164 (“Respondents took a chance on whether they could get something for nothing. This chance permeates the entire scheme of referral selling. This court holds that the referral selling scheme is a lottery.”).

123. *Id.* at 162–64.

124. *Id.* at 162.

125. *See id.*

126. *Id.* at 163.

127. *Id.*

3. What Role Does Skill Play in the Outcome?

The relevance of skill in determining the outcome is also critical to the chance inquiry. If a game can “certainly be won by a skillful player it is not a game of chance.”¹²⁸ In *D’Orio*, the court held that a game in which a player secured a checker problem by a punching board and obtained a prize if he solved the problem was a “game of skill” and not a lottery.¹²⁹ As the parties stipulated that any checker game could be won if the person “ha[d] sufficient skill as a checker player,” the court reasoned that chance did not dominate the game if skill could be decisive.¹³⁰ “The fact that one player may be less skillful than another or that one of the games may be more difficult than another does not make it a game of chance.”¹³¹

A contest is a lottery even if a lack of knowledge or skill eliminates many contestants.¹³² For example, this rule is illustrated in the Washington Supreme Court’s examination of a newspaper’s weekly (and popular) football forecasting contest.¹³³ In that case, the *Seattle Times* filed an action for declaratory judgment regarding whether its football-forecasting contest was an illegal lottery.¹³⁴ In the forecasting contest, contestants attempted to pick the winners of football games.¹³⁵ The court held that the football-forecasting contest was prohibited as a lottery.¹³⁶ Although a lack of skill, expertise, knowledge, and judgment regarding football prevented some contestants from winning, the contest did not require these attributes to enter.¹³⁷ The attributes merely defined the truly competitive contestants, who were then separated only by chance.¹³⁸

To the extent that any skill or judgment exists in a penny auction, it does not decide the outcome; it merely eliminates the unskilled contestants.¹³⁹ By adopting the “power bidder” strategy, a bidder may discourage others from competing, assuming other bidders are aware of the power bidder’s reputation.¹⁴⁰ However, the use of this strategy merely culls the bidders with an inferior strategy or insufficient funds. Once

128. *D’Orio v. Jacobs*, 275 P. 563, 566 (Wash. 1929).

129. *Id.*

130. *Id.* at 564.

131. *Id.* at 566.

132. *Seattle Times v. Tielsch*, 495 P.2d 1366, 1367 (Wash. 1972).

133. *Id.*

134. *Id.*

135. *Id.* at 1366.

136. *Id.* at 1370.

137. *Id.* at 1373.

138. *Id.* at 1367.

139. *See id.*

140. For a brief description of penny auction strategies see *supra* notes 51–56 and accompanying text.

weaker bidders drop out, the outcome between two equally strong, equally determined, and equally well-funded bidders is relegated to chance.¹⁴¹ A bidder can never ensure that he or she will ultimately win an auction by continuing to place bids because there may be other determined bidders fighting to ensure that they will win. The skill or strategy may increase the odds in the bidder's favor, but they cannot determine the outcome regardless of the amount of skill or type of strategy employed.¹⁴²

With each bid, the bidder spends the bid fee on the chance that no later bids will be placed. If the bidder is outbid, a new contest begins and the clock is reset. Though one may bid again, it is a new bid on the outcome of a future contingent event. As a bidder cannot know whether another bidder will bid, the chance element is satisfied.

Penny auction proponents critique this per-bid separation of a penny auction. They argue that the per-bid breakdown—creating a series of discrete lotteries occurring tens, hundreds, or even thousands of times per penny auction—is not an accurate depiction of the penny auction. As a result, this separation is an unconvincing attempt to redefine the penny auction to eliminate the role of judgment and strategy, specifically the development of an auction reputation. The purpose of the prohibitions on lotteries, on the other hand, is not to “forbid games of skill or . . . bar the ordinary chance or contingency which is involved in practically every human endeavor.”¹⁴³ Under this disaggregation argument, nearly any game of skill could be sufficiently sliced into component parts to be a matter of chance.

Yet, it is the overall plan or scheme, not the “device,” that introduces chance.¹⁴⁴ A penny auction acts like an online slot machine where the bidders, with each click, feed the bid fee into a virtual slot for the chance to win a jackpot. No one can predict who will win, and no matter how many times a player bids, their likelihood of winning does not increase.¹⁴⁵ Their likelihood cannot increase because the chance remains a function of whether the next bid occurs—an occurrence wholly outside of the bidder's action. The strategies hold out the false hope that *this* time will be different; that *this* time there is no one else; that *this* time the counter will reach zero.

The various bidding strategies, while superficially logical, employ the same reasoning expressly rejected in *Evans*,¹⁴⁶ by simply bidding

141. See *Seattle Times v. Tielsch*, 495 P.2d 1366, 1367 (Wash. 1972).

142. See *id.*

143. *D’Orio v. Jacobs*, 275 P. 563, 565 (Wash. 1929).

144. *State ex rel. Evans v. Bhd. of Friend*, 247 P.2d 787, 798 (Wash. 1952).

145. See *id.*

146. *Id.* at 797.

often enough and long enough, the bidder can eventually win. A bidder is no more likely to prevail on the first bid than on the one hundredth bid because, even with a perfect strategy, a new bidder may always enter before the end of the auction. But the poor odds, which are part of any lottery scheme, are deceptive. The lure of lotteries is the result of a combination of myopic decision-making¹⁴⁷ with the seemingly low stakes of buying a ticket.¹⁴⁸ As one researcher put it, “It almost doesn’t feel real. The lottery and penny slots are kind of the sweet spot of risk taking. They’re really cheap, really inexpensive to play, but there’s a big possible upside.”¹⁴⁹ This allure is present not just in penny auctions, but in the strategies themselves.

Thus, the absence of bidder control and the generally limited role of skill and strategy suggest that chance plays the qualitatively dominant role in the outcome of a penny auction. But this conclusion begs the question: If the other bidders’ decisions control the outcome, are those decisions themselves the result of chance?

4. Can Humans Be an Element of Chance?

One might define chance as not only outside a plan or design, but entirely random and not within the control of any individual or group of

147. Game and business management theories explain myopia as the immediate focus of expedient decisions. STEPHEN J. HOCH & RICHARD C. KUNREUTHER, *WHARTON ON MAKING DECISIONS* 108 (2001); TAMER BASAR & GEERT JAN OLSDER, *DYNAMIC NONCOOPERATIVE GAME THEORY* 185–86 (2d ed. 1999).

148. Game theory research suggests that it is exactly this combination—myopic decision-making and the “peanuts effect”—that drives low-income individuals to purchase lottery tickets. See Emily Haisley, Romel Mostafa & George Loewenstein, *Myopic Risk-seeking: The Impact of Narrow Decision Bracketing on Lottery Play*, 37 *J. RISK & UNCERTAINTY* 57, 73–75 (2008), available at <http://sds.hss.cmu.edu/media/pdfs/loewenstein/myopicriskseeking.pdf> (describing the results of a study researching the effect of the “narrow” or “broad” context on the number of lottery tickets purchased); Emily Haisley, Romel Mostafa & George Loewenstein, *Subjective Relative Income and Lottery Ticket Purchases*, 21 *J. BEHAV. DEC. MAKING* 283, 288, 290 (2008), available at <http://sds.hss.cmu.edu/media/pdfs/loewenstein/SubRelIncomeLottery.pdf> (describing a study that found that people with a perceived lower income have an increased propensity to purchase lottery tickets and those with a lower income “may be particularly drawn to purchasing lottery tickets because lotteries afford them an equal opportunity of winning”). The “peanuts effect” is the idea that some amounts of money are so small that “people almost ignore them.” Jacques Wilson, *Why You Keep Playing the Lottery*, CNN (Aug. 16, 2012), http://www.cnn.com/2012/08/15/health/psychology-playing-lottery-powerball/index.html?hpt=hp_t1 (describing the research by Professors Haisley, Mostafa, and Loewenstein into the prevalence of lottery play among the economically disadvantaged).

149. Wilson, *supra* note 148 (quoting Professor Loewenstein). Although no research into the demographics of penny auction bidders comparable exists, it stands to reason that penny auction websites, with the low per-bid pricing, appeals to lower-income populations for similar reasons as lotteries and other low stakes gambling. See Haisley, Mostafa & Loewenstein, *Subjective Relative Income and Lottery Ticket Purchases*, *supra* note 148.

human decision makers.¹⁵⁰ Under this narrow human-free definition, chance cannot be the dominant factor in the outcome of a penny auction because a human makes each (at least theoretically) bidding decision.¹⁵¹

At least one court ascribed to the theory that an activity is not subject to chance if the outcome is entirely determined by the decisions and actions of the participants.¹⁵² In *Lindsay*, a collection of merchants used a popularity contest as a marketing tool.¹⁵³ In the contest, based on the purchase of qualifying goods, merchants gave consumers tickets on which the consumers could “vote” for any person.¹⁵⁴ The persons receiving the highest number of votes received one out of a number of prizes.¹⁵⁵ The court held that the contest was not a lottery because the outcome was determined by the participants.¹⁵⁶ The act of voting had “no resemblance to the blind fate which is determined by the drawing of a number, the turning of a card, or the spinning of a wheel.”¹⁵⁷

Applying the popularity contest case law to penny auctions, because a person makes each decision to bid and a person is a rational actor, there is insufficient chance for a penny auction to be a lottery. As the bidders control the outcome as a group, a penny auction, like a popularity contest, is not subject to chance and cannot be a lottery.¹⁵⁸ Each bid is a culmination of a series of decisions by the bidder regarding the bidder’s desire for the item, the bidder’s maximum bid price, and the bidder’s willingness to use his or her remaining bids. Thus, the outcome of each penny auction is the result of the decisions of the participants.¹⁵⁹

Moreover, the decision to bid is unlike putting a coin into a slot machine because a pre-set, automated mechanism beyond the control of all participants decides whether a person wins when playing a slot machine.¹⁶⁰ An automated mechanism does not determine the outcome of each penny auction or the final price for the item.¹⁶¹ The bid fee no more

150. See *State v. Lindsay*, 2 A.2d 201, 201 (Vt. 1938).

151. *Id.* at 203.

152. See *id.* at 203. But see *Main v. Mackey*, 39 Pa. C.C. 589, 592 (Pa. Com. Pl. 1912) (holding that coupon collections were lotteries because the “number of contestants and a much larger number of purchasers receiving the cash coupons at the store, no one would be able to control the result”).

153. *Lindsay*, 2 A.2d at 202.

154. *Id.* at 203.

155. *Id.*

156. *Id.* at 204.

157. *Id.*

158. *Id.*

159. *Id.*

160. See *State ex rel. Evans v. Bhd. of Friend*, 247 P.2d 787, 790 (Wash. 1952).

161. The exception would be, of course, penny auctions in which the penny auction website or one or more participants use bidbots. In that case, the outcome would be the result of an automated mechanism, albeit one set in motion by human hands (or, more precisely, fingers). The weakness of this argument is that it suggests that the removal of bidbots from a penny auction removes the exist-

determines the outcome of the penny auction than the quarter determines the slot machine. The rolling drum determines the outcome in a slot machine; the bidders as a group determine the outcome in a penny auction.

This “human factor” argument, while facially plausible and convincing, rests on a shaky foundation. First, the argument relies on an overly broad characterization of the “popularity contest” case law.¹⁶² Namely, that the popularity contest holdings stand for the idea that if participants solely control the outcome of the contest, there is no chance.¹⁶³ The actual holdings are narrower: “voting,” as the conscious and willful act of a human being, cannot be chance.¹⁶⁴ The courts decide these cases not based on *who* decided the outcome, but *how* the participants decided the outcome.¹⁶⁵

There is a significant factual distinction between a vote in an election and a bid in a penny auction; the ability to vote entitled the holder to nothing.¹⁶⁶ Even the use of that vote provided no benefit to the person.¹⁶⁷ Likewise, merely possessing the ability to bid in an online penny auction entitles the bidder to nothing. Once placed, however, the bid entitles the bidder to the auction item, at least until a new bid is placed. It is precisely this point that the “popularity contest” cases turn on.¹⁶⁸ “By the arrangement, each purchaser of goods of certain value obtained a ticket, which simply entitled him to the right to vote in the contest, but by no possibility could he obtain a piano merely as a holder of such ticket, or of any number of tickets, on account of these purchases.”¹⁶⁹ These popularity contests were not considered lotteries because there was “no appeal to the cupidity of any one, nor inducement to make reckless purchases in the hope of securing some prize superior in value to the amount invest-

ence of chance. This Comment argues that chance exists deeper within the very structure of the penny auction business model. As a result, the use of bidbots, while representing a source of asymmetric information, *see infra* Part IV.C.5, is not the source of chance.

162. *See, e.g., Lindsay*, 2 A.2d at 203.

163. *See id.*

164. *Id.* at 203–04 (“[T]he only real issue was whether or not the process of voting constituted the element of chance necessary to be a lottery.”); *Brenard Mfg. v. Jessup & Barrett Co.*, 173 N.W. 101, 102 (Iowa 1919) (“It was a simple matter of mathematical calculation in which no favoritism could be shown contestants. . . . The grand prize . . . to be awarded . . . [was] to be given to the contestant having the largest number of votes. . . . It was a question largely of ‘hustle.’”); *Quatsoe v. Eggleston*, 71 P. 66, 67 (Or. 1903) (“[T]he award depended upon the result of the vote.”).

165. *See Lindsay*, 2 A.2d at 203–04.

166. *Quatsoe*, 71 P. at 67.

167. *Id.*

168. *See id.*

169. *Id.*; *see also* *Dion v. St. John Baptiste Soc.*, 19 A. 825, 826 (Me. 1890) (“No contributor expects to get any personal benefit from his contribution.”).

ed.”¹⁷⁰ The vote was an ancillary benefit, not the purpose of the expenditure.

A penny auction is further distinguished because the participants in the popularity contest received the ability to vote from the purchase of an item.¹⁷¹ The popularity contest cases involved promotional schemes intended to increase sales, rather than business unto itself.¹⁷² Voters purchased an item, which incidentally gave them the right to vote.¹⁷³ The bidder in a penny auction gets no value for the money and time expended to bid, unlike the popularity contest voter, who at least received the valuable merchandise.¹⁷⁴ Every voter got something he or she wanted;¹⁷⁵ the losing bidders in a penny auction get nothing, except the chance to spend more money.

More importantly, other case law presents a more nuanced understanding of the limitations of the human factor argument.¹⁷⁶ In *Hecht*, customers joined a “suit club” for \$2 per week, and the management or solicitor chose one member to receive a suit each week.¹⁷⁷ The court found that the “plan of doing business was to select some person to receive a suit of clothes and waive all further payments.”¹⁷⁸ As such, the court held that the suit club was a lottery because the customer gets “the chance of securing the suit before he pays for it.”¹⁷⁹ The court reasoned that “it may be said that there is no element of chance because there is no drawing; that the management itself selects the beneficiary; but this fact does not purge the transaction of all element of chance. To the purchaser it is uncertain, as to him it is chance.”¹⁸⁰ Here, the court identified a specific person who created the chance, defying the notion that a human cannot, by definition, be a source of chance. Finally, the human factor argument necessarily implies a broader policy consideration regarding the validity of the voting process.¹⁸¹ Broader challenges to voting may have followed judicial decisions that a vote, in any context, was a lottery.¹⁸² Although no court explicitly mentions this concern, a zealous advocate could make a good faith argument for the extension of the law

170. *Quatsoe*, 71 P. at 67.

171. *Commonwealth v. Jenkins*, 166 S.W. 794, 795 (Ky. Ct. App. 1914).

172. *Id.*

173. *Id.*

174. *See id.*

175. *Id.*

176. *People v. Hecht*, 3 P.2d 399, 401–02 (Cal. App. Dep’t Super. Ct. 1931).

177. *Id.* at 779.

178. *Id.* at 784.

179. *Id.* at 786–87.

180. *Id.* at 785 (quoting *People v. Wassmus*, 182 N.W. 66, 67 (Mich. 1921)).

181. *See id.*

182. *See id.*

from a popularity contest to challenge actual government elections. Once chance exists in the vote, there are plausible arguments that the office sought is a prize, and the campaign funds expended are consideration.

Regardless, insufficient information may taint the decision-making process such that the rationality is fundamentally and incurably flawed. Where there is always incomplete information, there is always chance. But it may only matter that the perception of insufficient information comes from the voter; the objective actions of the prize giver are irrelevant.

5. Does the Asymmetric Information Environment Create Chance?

Whatever the merits of the arguments that chance exists because of the absence of control, the minimal effect of skill and strategy, and the influence of human participation, the lack of information is the strongest reason why chance controls the outcome of a penny auction. The other bidders—semi-anonymous online users about whom the bidder may have little or no information—lay a foundation that produces a result outside a “plan or design.”¹⁸³ Since the bidder “does not know and cannot find out” a competing bidder’s actions, the competition’s action “is chance as to [the bidder] and is recognized as chance by the law.”¹⁸⁴ The imperfect information introduces the element of chance.

Imperfect information is an inherent part of the online environment.¹⁸⁵ “A contest involves perfect information if the game is sequential and each player knows every action of the players that moved before him at every point.”¹⁸⁶ Devices linked in disparate locations like in online penny auctions give rise to an uncertainty about the identity, motivation, and reputation of opponents.¹⁸⁷ The bidders’ remoteness creates a significant information gap fatal to the rationality of the decision to start or continue bidding in a particular auction. Subsequent bids without this information are, therefore, random from the individual bidder’s perspective because the bidder does not know, cannot discern, and is unable to predict the decision-making process of others. Thus, chance is the qualitatively dominant factor in determining the result of the penny auctions.

183. 54 C.J.S. *Lotteries* § 2b (2012).

184. *Dillingham v. McLaughlin*, 264 U.S. 370, 373 (1924).

185. Memorandum from Dean J. Guaneli, Alaska Chief Assistant Attorney Gen., to Bruce M. Botelho, Alaska Attorney Gen., Computer Video Games and State Gambling Laws, Num. 663-01-0183 (May 22, 2001), available at http://www.law.state.ak.us/pdf/opinions/opinions_2001/01-007_663010183.pdf.

186. Anthony N. Cabot et. al., *Alex Rodriguez, a Monkey, and the Game of Scrabble: The Hazard of Using Illogic to Define the Legality of Games of Mixed Skill and Chance*, 57 *DRAKE L. REV.* 383, 397 (2009).

187. *Id.*

In fact, the bidder cannot know for certain that the other bidder is a person at all.¹⁸⁸ Some penny auction websites utilize computer programs, commonly referred to as “shill bidders,” “bidbots,” or “bots,” to act as bidders in order to increase the bid price and keep the auction going.¹⁸⁹ This practice also simulates increased traffic to the website that is helpful in search engine results and in building a reputation.¹⁹⁰ Nor is the use of “bots” restricted to the penny auction websites themselves.¹⁹¹ Other bidders may purchase “bots” to run on personal computers set by the bidder to bid in lieu of the person sitting at his or her computer.¹⁹² It is this information void that introduces chance.¹⁹³

In fact, this asymmetric information is part of the draw of penny auctions. The industry’s self-characterization of the online penny auction as “entertainment shopping” turns that asymmetry into a positive.¹⁹⁴ A penny auction, under this description, offers bidders not only the potential fantastic deal but also the added benefit of an enjoyable, even thrilling, shopping experience.¹⁹⁵ It is the thrill that puts the entertainment in entertainment shopping.¹⁹⁶

Penny auctions fulfill all the necessary elements of a lottery’s statutory definition. Penny auctions involve a prize, in the form of the prize and the discount to the winner. They involve consideration as the bidder spends time, money, and energy the bidder otherwise would not expend. And, as this Comment has shown, the always-present information asymmetry creates chance. Whether this means they should be prohibited altogether deserves further scrutiny and is the subject of the next Part of this Comment.

V. SOLUTION—FINDING THE THIRD WAY

A. *The Policy Against Pestilence*

From a public policy perspective, penny auctions rely on the addictiveness of gambling to appeal to the human tendency to risk a small sum

188. See Alexander, *supra* note 43.

189. *Id.*

190. *Id.*

191. Amanda Lee, *Don't Be a Sniper*, PENNY AUCTION WATCH (June 11, 2011), <http://www.pennyauctionwatch.com/2011/06/third-party-bidding-bot-software-snipers/>.

192. *Id.*

193. See *id.*

194. Mark Gimein, *The Big Money: The Pennies Add Up at Swoop.com*, WASH. POST (July 12, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/11/AR2009071100684.html>.

195. *Id.*

196. *Id.*

for the chance to win a prize of greater value.¹⁹⁷ This pervasive tendency to want “something for nothing” motivated the bans on lotteries in the first place:

Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; and it plunders the ignorant and simple.¹⁹⁸

The drafters designed the Washington constitution and Washington Revised Code § 9.46.0257 to curtail this “natural yearning.”¹⁹⁹

But, the narrow definition of chance discussed above is not supported by the policy rationales for lottery prohibitions and conflicts with the critical inquiry consistently required by Washington courts.²⁰⁰ Superficial inquiries seem inadequate when “the vice of the whole scheme lies farther back than that, and is found in the ‘chance’ which the customer takes when he pays his money . . . and the temptation held out to arouse the gambling spirit” that will lead to losing all that one has paid “if he fails once or twice, or more time to win the prize, and discontinues paying.”²⁰¹ Chance exists when the scheme appeals to the “disposition for engaging in hazards and chances with the hope that luck and good fortune may give a great return for a small outlay, and is we think the general meaning of the word lottery, and clearly within the mischief against which the statute is aimed.”²⁰² Chance is an element of a lottery because it is the unknown that provides the thrill. Any scheme that preys on this natural human tendency should receive critical review.

At this point the entertainment shopping industry may be a victim of its own success. Penny auctions may be exciting, but the law frequently regulates activities that may be entertaining for other policy reasons. If courts accept penny auctions’ self-serving industry description as entertainment shopping by consenting adults, then that definition could easily be expanded to other prohibited or regulated industries and activities. Betting on sports could be seen as “entertainment viewing,” speeding as “entertainment driving,” and vandalism as “entertainment artistry.” Permitting an industry to rebrand itself to avoid the consequences of poten-

197. *State ex rel. Schillberg v. Safeway Stores, Inc.*, 450 P.2d 949, 956–57 (Wash. 1969).

198. *Stone v. Mississippi*, 101 U.S. 814, 818 (1879).

199. *Schillberg*, 450 P.2d at 956.

200. *E.g.*, *Sherwood & Roberts-Yakima, Inc. v. Leach*, 409 P.2d 160, 162–63 (Wash. 1965).

201. *State v. Lipkin*, 84 S.E. 340, 345 (N.C. 1915).

202. *State v. Clarke*, 33 N.H. 329, 336 (1856).

tially illegal and unconstitutional activity proves patently absurd on its face.

The penny auction preys on the human desire to get “something for nothing” and “is essentially gambling.”²⁰³ Government authorities consistently seek to control lotteries because lotteries insidiously drain society and prevent the development of the public’s necessary skills.²⁰⁴ While the drafters of the Washington State Constitution were certainly not motivated by the same concerns as the rulers of medieval England,²⁰⁵ the pervasive and corroding nature of lotteries was certainly on their mind.²⁰⁶ It would be a perverse outcome for the penny auction to survive because of the thrill, when the thrill is what the ban on lotteries ultimately fights.²⁰⁷

B. The Options

Because penny auctions likely are lotteries as defined in Washington, the state could adopt a variety of responses: (1) continue the current regulation, address consumer complaints individually, and stress consumer education; (2) undertake enforcement actions based on the Washington constitution and the WCPA in order to eliminate online penny auction operations within the state; or (3) enforce the Washington constitution, but encourage the Washington State Legislature to pass a bill to authorize online penny auctions as part of the state-run lottery.

Given the rising number of consumer complaints and perceived lawlessness in the industry,²⁰⁸ the Washington legislature should not continue along the current path. The once-vaunted doctrine of caveat emptor

203. Dubois, *supra* note 3; see also Tom C. W. Lin, *A Behavioral Framework for Securities Risk*, 34 SEATTLE U. L. REV. 325, 340–41 (2011) (“Cognitive bias is a type of reflexive mental processing used for ‘quick, low-effort analysis.’ Cognitive biases ‘are subconscious mental processes that impair rational thought-processes and ultimately lead to ‘irrational choices.’ . . . Lottery players think that they have a reasonable chance at winning the jackpot in the face of astronomical odds to the contrary.”).

204. R. Randall Bridwell & Dr. Frank L. Quinn, *From Mad Joy to Misfortune: The Merger of Law and Politics in the World of Gambling*, 72 MISS. L.J. 565, 622–23 (2002). The first English statute dealing with “gambling” in 1388 directed all persons covered by the statute to “cease ‘all playing at tennis or football, and other games called coits, dice, casting of the stone, kails, and other such importune games.’ . . . to assure the proficiency of common people in archery, which was essential to military defense, and to prevent the pursuit of gaming from interfering with such proficiency.” *Id.*

205. *Id.*

206. See, e.g., *State ex rel. Schillberg v. Safeway Stores, Inc.*, 450 P.2d 949, 956 (Wash. 1969).

207. *Id.*

208. The Better Business Bureau receives hundreds of complaints regarding penny auctions every year. Kelvin Collins, *Auctions Can Cost a Pretty Penny*, AUGUSTA CHRON. (Oct. 24, 2010), <http://www.chronicle.augusta.com/news/business/your-business/2010-10-24/auctions-can-cost-pretty-penny>.

gave way to government-led consumer protection long ago.²⁰⁹ Some regulation is necessary, even if the political realities and emerging organization of the entertainment auction industry may present hurdles.²¹⁰

Applying the Washington constitutional ban on lotteries to online penny auctions and encouraging other states (all of which have similar bans by statute or constitution) to follow, is appealing for its simplicity. Realistically, a market for this type of business has already been established and cultivated—first in Europe and now in the United States. Pretending that a state ban in Washington will have any meaningful effect on the number of Washington residents using online penny auctions ignores reality. The interstate and international nature of the Internet makes any meaningful enforcement expensive and sporadic. The government's experience with the Unlawful Internet Gambling Enforcement Act²¹¹ over the past six years demonstrates the difficulty of drafting and enforcing a ban.²¹² State prohibitions can ultimately ensure only that all penny auction websites will be hosted overseas and outside of American jurisdiction, increasing the likelihood of exploitative practices by unregulated penny auctioneers.

There is a final path—let the already existing Washington state lottery add a new game: the Penny Auction. With this solution, the state will enforce the Washington constitution while developing a state-run online penny auction overseen by the Washington Lottery Commis-

209. Frickel v. Sunnyside Enterprises, Inc., 725 P.2d 422, 427 (Wash. 1986) (“[T]he doctrine of *caveat emptor* has given way to the protection of purchasers and investors, largely as a result of legal reform pioneered by court decision, which ultimately was codified in the Uniform Commercial Code.”); but see Alan M. Weinberger, *Let the Buyer Be Well Informed?—Doubting the Demise of Caveat Emptor*, 55 MD. L. REV. 387, 390 (1996) (arguing that the enactment of mandatory disclosure statutes for real estate transactions is a return to, not a further departure from, *caveat emptor*).

210. For example, three large penny auction websites formed an industry trade association dubbed the “Entertainment Auction Association” in 2010. *About Us*, ENT. AUCTION ASS’N, <http://www.entertainmentauctionassociation.com/about.html> (last visited Aug. 17, 2012). The Association’s stated mission is “to promote integrity within the entertainment auction industry through a strict code of conduct, audits of members, and fines for non-compliance.” *Mission*, ENT. AUCTION ASS’N, <http://www.entertainmentauctionassociation.com/mission.html> (last visited Aug. 17, 2012).

211. 31 U.S.C. § 5301.

212. See Jason A. Miller, *Don’t Bet on This Legislation: The Unlawful Internet Gambling Enforcement Act Places a Bigger Burden on Financial Institutions Than Internet Gambling*, 12 N.C. BANKING INST. 185, 186 (2008) (criticizing the Act for burdening financial institutions instead of targeting actual internet gambling organizations); Rotem Nicole Moran, Note & Comment, *Winner, Winner, No Chicken Dinner: An Analysis of Interactive Media Ent’tmt & Gaming Ass’n v. Att’y Gen. of the U.S. and the Unjustified Consequences of the UIGEA*, 31 LOY. L.A. ENT. L. REV. 55, 60 (2011) (calling for an overhaul of the Act to allow for internet gaming in the United States); see also Rachel J. Schaefer, Note, *Must the House Always Win?: A Critique of Rousso v. State*, 35 SEATTLE U. L. REV. 1549 (2012) (discussing various sections of Washington state’s 1973 Gambling Act and the constitutional limits on Washington state’s regulation of internet gambling).

sion.²¹³ The Commission already has the power to modify the state lottery.²¹⁴ In fact, new “games” are vital to the continued operation of a lottery because they increase revenue,²¹⁵ and many lotteries now cross state lines.²¹⁶ The movement of a lottery into the online environment is a logical next step. It is the next step leveraging the useful aspects of regulated lotteries to augment state revenues—a once novel idea that is now relatively uncontroversial.²¹⁷ In many ways, the state-run lottery is merely a return to the practices of early America.²¹⁸

Unfortunately, the current Washington statute bans the sale of lottery tickets over the Internet.²¹⁹ But a 2011 opinion from the Department of Justice (DOJ) opened the door to overturn that ban.²²⁰ In this opinion, the DOJ reversed its position that the Wire Act of 1969²²¹ prohibited online sales of lottery tickets.²²² Following this opinion, Illinois became the first state to legalize the sale of lottery tickets online.²²³ The best reg-

213. The state lottery commission consists of five members appointed by the governor with the consent of the senate. WASH. REV. CODE § 67.70.030.

214. WASH. REV. CODE § 67.70.040.

215. Erika Gosker, Note, *The Marketing of Gambling to the Elderly*, 7 ELDER L.J. 185, 194 (1999).

216. The Mega Millions lottery is played in 44 jurisdictions: 42 states, the District of Columbia, and the U.S. Virgin Islands. *History of the Game*, MEGA MILLIONS, <http://www.megamilions.com/about/history.asp> (last visited Aug. 17, 2012).

217. See Sullivan, *supra* note 58; see also Clotfelter, *supra* note 44, at 36–37.

218. In fact, in the late 18th and early 19th centuries, “government-sanctioned lotteries were common throughout America. Lacking a strong central government and burdened with a weak tax base, early Americans viewed lotteries as legitimate vehicles for raising revenue. Lottery proceeds were used to build cities, establish universities, and even to help finance the Revolutionary War.” Ronald J. Rychlack, *Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C. L. REV. 11, 12 (1992) (tracing the history of lottery law and calling for a re-examination of state-run lotteries on the impoverished).

219. WASH. REV. CODE § 67.70.040.

220. Whether Proposals by Illinois & New York to Use the Internet & Out-of-State Transaction Processors to Sell Lottery Tickets to in-State Adults Violate the Wire Act, Op. O.L.C., 2011 WL 6848433 (Sept. 20, 2011).

221. 18 U.S.C. § 1084 (2006).

222. The opinion concluded that the Wire Act pertained only to a “sporting event or contest.” Op. O.L.C., *supra* note 220. At least one prominent commentator believes that the impact of the DOJ opinion will not be limited to state lotteries. I. Nelson Rose, *A Christmas Present from the DOJ: Internet Lotteries (and Poker?) Are Legal*, GAMBLING & LAW (Dec. 24, 2011), available at <http://calvinayre.com/2011/12/25/legal/present-from-doj-internet-lotteries-and-poker-are-legal/>. Noting the desperate financial condition of many state governments, Professor Rose expects states to seize the opportunity to follow in the footsteps of the provincial lotteries in Canada, which run Internet poker and other online gambling websites. *Id.*

223. 20 ILL. COMP. STAT. § 1605/7.12 (2012). The Internet pilot program went live in Illinois the Sunday before the record \$640 million Mega Millions jackpot drawing on March 30, 2012. *Online Illinois Lottery Tickets Net \$15K First Day*, CHI. TRIB. (Mar. 26, 2012), <http://www.chicagotribune.com/news/local/breaking/chi-20120326,0,5165692.story>. The first week of sales was not without problems. Ashley Rueff, *Illinois Lottery Website Down Temporarily During Mega Millions Sales*, CHI. TRIB. (Mar. 30, 2012), <http://www.chicagotribune.com/>

ulatory response to the rise of penny auctions for consumer protection agencies is not to bury their heads in the sand; it is to find a statutory accommodation combining the power to create new lottery games and the recent liberalization of online lottery ticket sales.

A state-run penny auction is in keeping with modern regulation of vices more generally. The outright ban of a “vice,” especially a popular one, is nearly always ineffective, and usually expensively ineffective.²²⁴ Much more effective are the present policies toward gaming²²⁵ and tobacco.²²⁶ These policies curb and regulate the availability and use, without attempting to foist restrictions that few citizens actually desire.

In an era of state budget deficits and funding shortages for virtually every service including education, the use of a new game on a new platform may provide some relief. If we are to allow this highly successful lottery to continue, it should be with proper oversight. The Washington State Lottery Commission already exists to do precisely this—it uses the “pestilence” of lotteries to the advantage of the state.²²⁷

VI. CONCLUSION

Penny auctions are big business and only appear to be growing in revenue and popularity. A court’s determination that the auction participants, as anonymous online auction bidders, create sufficient chance because of the imperfect information in the online environment is a matter of first impression in Washington. This state has frequently led the way in these types of emerging business issues. In fact, the Consumer Protection Division of the Washington State Attorney General’s Office is one of the few government agencies to take any interest in penny auctions.²²⁸ Yet, the state’s action to date is insufficient.

The effort to bring this burgeoning industry to heel will not be easy. It represents a new challenge to the consumer protection regulations in

news/local/breaking/chi-illinois-lottery-website-down-temporarily-during-mega-millions-sales-20120330,0,1042838.story.

224. Perhaps the most iconic example of the outright ban, the colossal failure of Prohibition and the 18th Amendment hardly need to be expounded on. In more recent times, the much maligned “War on Drugs” provides another example of the hubris of policymakers in drafting a legislative response that refuses to account for the realities of society. *E.g.*, Seth Harp, *Globalization of the U.S. Black Market: Prohibition, the War on Drugs, and the Case of Mexico*, Note, 85 N.Y.U. L. REV. 1661 (2010) (comparing the failure of Prohibition and the War on Drugs).

225. Age-restricted and heavily regulated (WASH. REV. CODE §§ 19.46).

226. Age-restricted (WASH. REV. CODE § 70.155.080) and heavily taxed (WASH. REV. CODE § 82.26.260).

227. Moneys from the state lottery can only be used for certain purposes including funding of prizes, education, bonds, veterans’ programs, and actual lottery expenses. WASH. REV. CODE § 67.70.240.

228. *See* Alexander, *supra* note 43.

place, especially those concerning lotteries and gambling. Additionally, there is persuasive authority from other jurisdictions that indicates chance cannot exist when a group of people controls the outcome. But, because the bidder's likelihood of winning does not increase by placing additional bids, the bidder has no control over the bidding strategy of other bidders. Thus, the bidder lacks significant information about the other bidders, and the bidders do not determine the outcome of an auction. The subsequent bid is random from the individual bidder's perspective, which is the perspective that matters. The lack of control over information demonstrates that chance, not skill, is the qualitatively dominant factor in a scheme that distributes a prize—a lottery.

The judicial mandate in Washington lottery law is searching and skeptical; the court must verify that the scheme is not a new formulation of the "wide-spread pestilence of lotteries."²²⁹

229. *Stone v. State of Mississippi*, 101 U.S. 814, 818 (1879).