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February 6, 2023

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Opinion No. KP-0425

Re: Whether an amusement machine is a gambling device under section 47.01 of the Penal Code where the amount awarded from play is determined partially by chance (RQ-0457-KP)

Dear Mr. Love, Mr. Sims, & Mr. Brumley:

Collectively, you ask us to determine whether a particular amusement machine constitutes a gambling device under Penal Code subsection 47.01(4), where the amount awarded from play is partially determined by chance.¹

The Amusement Machine

You tell us Republic Amusements (“Republic”) offers machines for the play of a game called the “Lone Star Skill Game” (the “Game”). Request Letter at 1. You recount Republic’s description of the Game as a “currency or token-operated video game” offering three phases: a preview screen; a tic-tac-toe-style 3x3 grid puzzle (the “Wild Card”); and a Simon-style memory

¹See Letter from Honorable Robert Love, Randall Cnty. Crim. Dist. Att’y, Honorable Randall Sims, 47th Dist. Att’y, & Honorable Scott Brumley, Potter Cnty. Att’y, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (March 31, 2022), <https://texasattorneygeneral.gov/sites/default/files/request-files/request/2022/RQ0457KP.pdf> (“Request Letter”).

game called “Follow Me.”² *Id.* According to Republic, the Game’s first phase is a preview screen that allows the player to preview, prior to paying consideration to play, dozens of “next puzzles” to analyze which one may yield an award or a higher award. *See id.* at 2. The Wild Card second phase features a nine-space grid with each space containing a symbol related to a player-chosen theme. *See id.* The player has a limited time to change one of the symbols to a “wild” symbol in order to create a horizontal, vertical, or diagonal chain of three identical symbols. *See id.*

You explain that not all grids are capable of successful completion, and the second phase may result in less than 105 percent of the consideration paid to play the Game, even if played with perfect skill. *See id.* When that is the case, the Game directs the player to the Follow Me third phase where play “begins with a three-by-three grid of colored dots . . . [that] flash and make a sound in a random sequence that the player must repeat.” *Id.* The player that matches 20 rounds, where each round adds another dot to the sequence, wins a “cumulative total of 105 [percent] of the original amount spent to play.” *Id.* You state that Republic asserts all phases of the Game require player skill, and “always present the skillful player with the opportunity to win more than the cost to play the Game, every time, with a minimum return of 105 [percent].”³ *Id.* You note that Republic also asserts players can win significantly more depending on the symbols generated during the Wild Card phase and that the symbols display entirely by chance. *See id.* at 3. Lastly, you tell us that players are not required to proceed to the Follow Me phase but can instead display a new set of Wild Card puzzles upon new payment. *See id.*

A Gambling Device under the Penal Code

The State of Texas has long prohibited gambling. *See City of Fort Worth v. Rylie*, 602 S.W.3d 459, 460–61 (Tex. 2020) (discussing Texas’s history of prohibiting gambling). Article III, subsection 47(a), Texas Constitution, requires the Legislature to “pass laws prohibiting lotteries and gift enterprises in this State,” subject to certain exceptions. TEX. CONST. art. III, § 47(a). The Legislature prohibits a variety of gambling activities through Penal Code chapter 47. *See* TEX. PENAL CODE §§ 47.01–11; *see also Adley v. State*, 718 S.W.2d 682, 683 (Tex. Crim. App. 1985) (stating that the Legislature criminalizes many of the “various forms of gambling”).

In particular, Penal Code section 47.06 criminalizes the possession of a gambling device. *See* TEX. PENAL CODE § 47.06(a) (“A person commits an offense if, with the intent to further gambling, he knowingly owns, manufactures, transfers, or possesses any gambling device that he knows is designed for gambling purposes or any equipment that he knows is designed as a

²We received briefing from the Game manufacturer disagreeing with your description of the Game. *See* Letter from David Glicker, Glicker Law & Assoc., to Op. Comm., Off. of the Att’y Gen. at 1 (May 9, 2022) (hereinafter “Republic’s Brief”) (on file with the Op. Comm.). As this office relies on the “factual assertions of the one requesting our opinion,” we rely on your description of the Game. Tex. Att’y Gen. Op. No. GA-0760 (2010) at 1, n.2.

³If the assertion is true that the Game affords a “skilled” player a minimum return of 105 percent, it is also true that the entity offering the Game for play loses money on games played by “skilled” players. We are skeptical that an entity would offer play of the Game on a nonprofitable basis. Accordingly, we question the assertion that the Game is one solely based on skill and believe a court would also, but we accept it as true for the limited purpose of our legal analysis about the scope of Penal Code subsection 47.01(4).

subassembly or essential part of a gambling device.”). Chapter 47 defines “gambling device,” in relevant part, to mean:

[A]ny electronic, electromechanical, or mechanical contrivance not excluded under Paragraph (B) that for a consideration affords the player an opportunity to obtain anything of value, *the award of which is determined solely or partially by chance, even though accompanied by some skill*, whether or not the prize is automatically paid by the contrivance.⁴

Id. § 47.01(4) (emphasis and footnote added).

You note Republic’s contention that winning at all depends on skill with no element of chance, but you also note the amount that may be won is determined by a combination of skill and chance. *See* Request Letter at 4. For purposes of this opinion, we rely on your assessment of the facts. *See infra* notes 2 and 3. Whether a game is a gambling device depends on the determination of fact questions. *See* Tex. Att’y Gen. Op. No. JC-0449 (2002) at 6; *cf. Am. Amusement Co. v. Neb. Dep’t of Revenue*, 807 N.W.2d 492, 502–04 (Neb. 2011) (reviewing testimony about computer programming and human reaction times to determine the element of chance in a video game). Accordingly, we do not opine about the legality of this particular Game. *See* Tex. Att’y Gen. Op. No. KP-0057 (2016) at 3 (acknowledging that “[i]n the attorney general opinion process, we cannot resolve factual issues”). Without deciding whether the Game you describe is otherwise illegal under chapter 47, we consider your narrow legal question—“whether chance applies only to winning [anything] or to both winning and the amount won.” Request Letter at 4.

Construction of Penal Code Subsection 47.01(4)

A court’s objective in construing a statute is to effectuate the Legislature’s intent as found in the statute’s text. *Broadway Nat’l Bank, Tr. of Mary Frances Evers Tr. v. Yates Energy Corp.*, 631 S.W.3d 16, 23–24 (Tex. 2021), *reh’g denied* (Sept. 24, 2021). Courts further “presume the Legislature included each word in the statute for a purpose and that words not included were purposefully omitted.” *Id.* at 24 (quoting *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015) (per curiam)). Courts apply the definitions the statute supplies, but if a term is not defined, they typically “interpret the term according to its ordinary meaning[.]” *Tex. Dep’t of Crim. Just. v. Rangel*, 595 S.W.3d 198, 208 (Tex. 2020). Additionally, a court will avoid adopting an interpretation of a statute that “renders any part of the statute meaningless.” *City of Dallas v. TCI W. End, Inc.*, 463 S.W.3d 53, 55 (Tex. 2015) (quoting *Crosstex Energy Servs., L.P. v. Pro Plus, Inc.*, 430 S.W.3d 384, 390 (Tex. 2014)).

We consider subsection 47.01(4)’s language: “anything of value, the award of which is determined solely or partially by chance[.]” TEX. PENAL CODE § 47.01(4). In this context, the word “award” is the noun form of a verb that means to “give or order the giving of (something) as an

⁴Paragraph (B) contains an exclusion not relevant here. *See* Request Letter at 4 (stating that the “[g]ame is not excluded under Paragraph (B) because, among other reasons, it awards cash prizes”).

official payment, compensation, or prize to (someone).” NEW OXFORD AMERICAN DICTIONARY 112 (3d ed. 2010). The word “the” is a definite article indicating that “the award” is limited by the remainder of the phrase, i.e., “of which is determined solely or partially by chance.” MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 1221 (10th ed. 1999) (“‘The’ is ‘used as a function word before a noun to limit its application to that specified by a succeeding element in the sentence.’” (quoted in *Graham v. Prochaska*, 429 S.W.3d 650, 659 (Tex. App.—San Antonio 2013, pet. denied))). “Which” is a relative pronoun that “refer[s] to something previously mentioned when introducing a clause giving further information.” NEW OXFORD AMERICAN DICTIONARY 1968 (3d ed. 2010). Here, “which” takes the place of the phrase “anything of value” that precedes the clause we consider. Thus, the clause “award of which” can be restated as the giving of anything of value.

Chapter 47 incorporates the breadth of “any” thing of value by defining the phrase “thing of value” to mean “any” benefit. *See* TEX. PENAL CODE § 47.01(9). When modified by the language “solely or partially by chance,” the language means that chance applies to the giving of any benefit. *See generally* Tex. Att’y Gen. Op. No. KP-0057 (2016) at 5–6 (discussing chance and stating that “the argument that skill so predominates that chance is minimal is nonetheless an admission that chance is an element and partial chance is involved”). The giving of any benefit certainly includes the giving of an amount as a winning prize. But it also includes the giving of an increased amount as the prize. Further, no language in the definition of “gambling device” evinces any intent by the Legislature to parse the scope of “award” so narrowly that the element of chance applies to only the winning of an amount.

You and Republic both refer us to a 1993 Houston Court of Appeals opinion addressing a device under the definition in subsection 47.01(4). *See* Request Letter at 4–5; Republic’s Brief at 4; *see also State v. Gambling Device*, 859 S.W.2d 519 (Tex. App.—Houston [1st Dist.] 1993, writ denied). The *Gambling Device* opinion contains language that, in isolation, could support either a construction in which chance applies to both the fact of winning and the amount won or a construction in which chance applies to only the fact of winning. It recognizes that the definition of gambling device applies to “contrivances that incorporate *any element of chance*, even if the exercise of skill also influences the outcome.” *Gambling Device*, 859 S.W.2d at 523 (emphasis added). But it also states that “[a] contrivance that is designed to incorporate the element of chance to influence *whether an award is provided* to a player is a contrivance whose outcome is determined by chance.” *Id.* (emphasis added). Yet the opinion does not consider the precise issue in your question and instead considers whether the statute was unconstitutionally vague by not specifying the amount of chance required to make a device a gambling device. *See id.* In concluding that any element of chance, even if accompanied by some skill, rendered a device a gambling device, the opinion does not delve into whether chance applied only to the act of giving of a prize and not to the determination of the amount of the prize.

While the Houston Court of Appeal’s analysis in *Gambling Device* is not dispositive of your question, its reliance on the purpose of the statute is instructive. The Court recognized the purpose of chapter 47 is to “reach a broad range of gambling activities, and prohibit them.” *Id.* at 524. As we previously observed, it has long been the policy of the State of Texas to prohibit gambling. *See supra* at 3. As demonstrated above, subsection 47.01(4) may reasonably be construed to apply the element of chance to all aspects of the award of a prize and that construction

best serves the purpose of chapter 47. *See Citizens Bank of Bryan v. First State Bank, Hearne*, 580 S.W.2d 344, 348 (Tex. 1979) (stating that when “the language is susceptible of two constructions, one of which will carry out and the other defeat [its] manifest object, [the statute] should receive the former construction”); *Hebner v. Reddy*, 498 S.W.3d 37, 41 (Tex. 2016) (cited in ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* 63 (2012)). To construe subsection 47.01(4) otherwise, arguably renders it meaningless, a result courts avoid. *See City of Dallas*, 463 S.W.3d at 55; *see supra* at 5. Moreover, if we take Republic’s argument that a device that renders “an” award based on skill is not a gambling device to its logical conclusion, it follows that no gambling device could exist in Texas because every player with any skill receives a nominal “benefit,” such as the benefit of the joy watching a screen, playing a game, or receiving a prize.⁵

Conclusion

Accordingly, while we do not offer an opinion on the legality of this particular Game, it is unlikely a court would conclude that subsection 47.01(4) excludes an amusement machine where the amount awarded from play is partially determined by chance.

⁵Under Republic’s argument, a rubber duck pull raffle would not be gambling, if an organizer for example places 1,000 rubber ducks floating in a body of water and sells 1,000 opportunities to player’s who pay \$10 per opportunity to pull a rubber duck from the water. Every player who has the “skill” to pull the rubber duck out of the water gets to keep the rubber duck, a “thing of value,” but the one player that happens to pull the one rubber duck with a gold star on its bottom wins \$1,000. In other words, if it looks like a duck, walks like a duck, and sounds like a duck, it is a duck.

S U M M A R Y

Penal Code section 47.06 criminalizes possession of a gambling device. Subsection 47.01(4)'s definition of gambling device includes specified contrivances that afford a player an opportunity to obtain anything of value, the award of which is determined solely or partially by chance. It is unlikely a court would conclude that subsection 47.01(4) excludes an amusement machine where the amount awarded from play is partially determined by chance.

Because it involves the resolution of fact questions, we do not opine on whether a particular amusement machine constitutes a gambling device.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, slightly slanted style.

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