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Office of the Attorney General
Attention Opinion Committee
Via Email: opinion.committee@oag.texas.gov

Re: Whether an Amusement Machine is Considered a Gambling Device, within the Meaning of Texas Penal Code Section 47.01(4), where the Amount Awarded from Play is Determined Partially by Chance.

Dear Attorney General Paxton:

Scott Brumley, Potter County Attorney, Randall Sims, 47th District Attorney, and I write seeking an opinion whether an amusement machine is considered a gambling device, within the meaning of Texas Penal Code Section 47.01(4), where the amount awarded from play is determined partially by chance. Republic Amusements, LLC, POM of Texas, LLC, (hereinafter "Republic") and a local business owner contacted our offices regarding installation of "Lone Star Skill Game" machines (hereinafter "Game") in local convenience stores. Republic claims that the Game is not a gambling device under Penal Code Section 47.01(4) because players may win 105% of their bet on every play by employing skill, thus removing chance from the equation. Republic informed us that the Game is currently available for play in several Texas counties, including Cook, Ector, El Paso, Grayson, Harris, Midland and Nueces.

Facts

The description of gameplay below is provided by Republic. After viewing a demonstration of gameplay, it appears to be accurate.

The Game is a currency or token-operated video game. It offers three primary phases: a preview screen, a "Tic-Tac-Toe"-style 3x3 grid puzzle ("Wild Card") and "Follow Me," a Simon-style memory game. The insertion of currency purchases credits used to play the Game.

The player must exercise skill at every stage of the Game in order to succeed. Prior to gameplay, a potential player may view the next 3x3 puzzle

to be displayed/played in Wild Card by pressing a "Preview" button. The preview feature enables the player to preview the next outcome before committing any credits to the Game. The initial decision to play the Game at all is the first of several skillful decisions that a player must make. The next puzzle featured applies to every game theme and play level (i.e., the number of credits committed to the game). Thus, before committing credits, the player may preview dozens of "next puzzles" and analyze which will yield an award or a higher award.

Wild Card has different audio-visual themes (e.g., pirates, beach, fruit, military) which can be changed but do not substantively alter the game processes. Wild Card features a 3x3 grid of the nine spaces, each containing a symbol related to the player's chosen theme. After credits are inserted and the screen reflects the nine-symbol grid, the player has a limited amount of time in which to change one of the symbols to a "Wild" symbol in order to create a chain (or chains) of three identical symbols, either horizontally, vertically, or diagonally, similar to connecting three x's or o's in a game of tic-tac-toe. The amount of time allotted gets shorter as the value of the prize increases. For example, if the placement of the Wild symbol in the correct position will cause the player to win an award 10x the value of the consideration paid by the player, then the time to select the Wild will be less than the time allotted if perfect placement of the Wild will result in an award of 5x the consideration paid, or if there is no position in which to place the Wild for an award of any kind. Failure to place the "Wild" symbol in a position that completes a line results in a loss; similarly, failure to place a "Wild" symbol at all during the allotted time frame results in a loss, because the Game cannot generate automatic wins.

Not all of the nine-symbol grids that may be previewed and played include lines capable of successful completion with a "Wild" symbol; additionally, certain puzzles may result in an outcome that, even if executed with perfect skill by the player, awards the player less than 105% of the consideration paid to play the Game. In those situations, players are directed to the Follow Me phase. Follow Me begins with a three-by-three grid of colored dots. Like Simon, the dots flash and make a sound in a random sequence that the player must repeat. The player then matches the sequences for 20 rounds of play, with each round adding another dot to the sequence. If the player successfully completes 20 rounds, the player will win a cumulative total of 105% of the original amount spent to play. The combination of the preview phase, Wild Card, and Follow Me 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%.

Although players may win 105% of their bet every time, either through the Wild Card or Follow Me games, they can win significantly more depending on the symbols generated during the Wild Card game. Regardless of skill, players have no control over the symbols displayed; it is entirely up to chance. Players are not required to proceed to the Follow Me game. After playing Wild Card, they may press the "Preview" button to skip Follow Me and display a new set of Wild Card puzzles. However, they must pay consideration to display this new set of symbols.¹

Relevant Law

According to Texas Penal Code Section 47.01, a:

(4) "Gambling device" means any 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. The term:

(A) includes, but is not limited to, gambling device versions of bingo, keno, blackjack, lottery, roulette, video poker, or similar electronic, electromechanical, or mechanical games, or facsimiles thereof, that operate by chance or partially so, that as a result of the play or operation of the game award credits or free games, and that record the number of free games or credits so awarded and the cancellation or removal of the free games or credits; and

(B) does not include any electronic, electromechanical, or mechanical contrivance designed, made, and adapted solely for bona fide amusement purposes if the contrivance rewards the player exclusively with noncash merchandise prizes, toys, or novelties, or a representation of value redeemable for those items, that have a wholesale value available from a

¹ A finite number of Wild Card puzzles can be previewed without paying consideration. If players do not see a winning combination in any of these puzzles, they can pay consideration and play through both Wild Card and Follow Me or skip Follow Me after playing Wild Card. While they may lose money in Wild Card, players can win 105% back playing Follow Me. According to Republic's representative, it takes slightly over four minutes to complete a game of Follow Me. After Follow Me is completed, a new set of Wild Card puzzles is displayed and the process is repeated. Consideration is not required to view the first set of puzzles, but it is required to view subsequent sets. The only way to cause a new set of puzzles to display is by paying consideration or waiting for another player to do so.

single play of the game or device of not more than 10 times the amount charged to play the game or device once or \$5, whichever is less.

A person commits the offense of Gambling if the person plays and bets for money or other thing of value at any game played with a gambling device. Tex. Pen. Code Ann. § 47.02(3). A person commits the offense of Possession of a Gambling Device 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. *Id.* at § 47.06(a).

Question Presented

The question is narrow: is an amusement machine considered a gambling device within the meaning of Texas Penal Code Section 47.01(4), where the amount awarded from play is determined partially by chance? Every element defining a gambling device, with the possible exception of chance, is met. The Game is: 1) an electronic contrivance that; 2) for consideration; 3) affords the player an opportunity to obtain a thing of value, namely cash; and 4) the award of which is determined partially by chance, even though accompanied by some skill. *Id.* at § 47.01(4). The Game is not excluded under Paragraph (B) because, among other reasons, it awards cash prizes. *Id.* at § 47.01(4)(B).

The controversy centers on the fourth element, whether the award is determined by chance. Republic contends that the Game is not a gambling device because the exercise of skill is required at every level to obtain a prize. This is accurate, so far as it goes, but ignores the fact that the prize amount is determined by both chance and skill. If the element of chance applies only to whether a prize is awarded, and not to its value, Republic's contention is correct. However, if chance applies to all facets of the outcome, including the amount awarded, then the Game is a gambling device. Stated more succinctly, the issue is whether chance applies only to winning or to both winning and the amount won.

A diligent search has revealed little authority on this narrow issue, with the opinion in *State v. Gambling Device*, 859 S.W.2d 519 (Tex. App.—Houston [1st Dist.] 1993, writ refused), most apposite.² The court there construed a previous definition of gambling device: “any contrivance that for a consideration affords the player an opportunity to obtain anything of value, *the award of which is determined by chance, even though accompanied by some skill*, whether or not the prize is automatically paid by the contrivance.” *Id.* at 522, citing Act of June 11, 1987, 70th Leg., R.S., ch. 313, § 2, 1987 Tex. Gen. Laws (emphasis in

² Republic apparently agrees. In a legal opinion rendered on Republic's behalf, attorney David Glickler wrote, “the leading Texas case on interpreting ‘skill’ and ‘chance’ under the ‘gambling device’ definition is *State v. Gambling Device*, 859 S.W.2d 519 (Tex. App.—Hous. [1st Dist.], 1993).” While there is consensus on the case's salience, there is less on how it resolves the question presented.

original). The defendant in that case alleged that the definition of “gambling device” was unconstitutionally vague because it did not specify the degree of chance required. In response, the court stated:

A player's level of skill may influence the degree of chance involved, but *it does not eliminate the element of chance altogether*. The outcome is always determined by chance because no player, through the exercise of skill alone, can control the outcome of any given trial. It is chance that finally determines the outcome of each and every trial. Thus, *it is the incorporation of chance that is the essential element of a gambling device*, not the incorporation of a particular proportion of chance and skill.

State v. Gambling Device, 859 S.W.2d at 523 (emphasis added).

The court made clear that the definition hinges on the presence of any amount of chance. The legislature confirmed this when, in the session following the opinion’s release, it added the terms “partially or solely” that are found in the current version of Penal Code Section 47.01. Act of June 17, 1993, 73rd Leg., R.S., ch. 774, § 1, 1993 Tex. Gen. Laws. This strongly suggests that any element of chance relating to gameplay, even if it affects only the value of a prize, is sufficient to categorize a game as a gambling device. This is supported by the *Gambling Device* court’s discussion of the purpose of Texas’s gambling laws.

Addressing the Penal Code’s gambling provisions generally, the court stated:

At a minimum, the purpose of this statute is to reach a broad range of gambling activities and prohibit them. Gambling activities are, traditionally, those activities that involve the elements of consideration, chance, and profit. By analogy, gambling devices are devices used in a fashion so as to incorporate these elements, even if the devices also incorporate the element of skill.

State v. Gambling Device, 859 S.W.2d at 524. The court continued:

We cannot see where the purpose of the legislature would be served by prohibiting games in which chance is marginally dominant over skill, but at the same time permitting games in which skill is marginally dominant over chance. Such a result would not further any public policy the legislature contemplated under this chapter. In construing a statute, it is the duty of the court, when possible, to ascertain the intent of the legislative body and, when so ascertained, to give effect to that intent.”

Id., citing *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App.1991).

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If, indeed, the legislature's goal is to prohibit a broad range of gambling activity, it defies logic to conclude that the element of chance should apply only to whether a thing of value is awarded while ignoring what that thing is worth. If the Penal Code definition of gambling device includes the application of chance to determining the value of a prize, the Lone Star Skill Game clearly falls into that category. Even when a skilled player makes the best decision possible in every instance, chance alone determines whether the player can be awarded 105 percent of the bet, 1,000 percent, or anything in between.

On the other hand, the following passage from *State v. Gambling Device* appears contradictory: "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." *State v. Gambling Device*, 859 S.W.2d at 523. This language expressly limits chance to "whether an award is provided," thus leaving open the possibility that chance has no bearing on the amount awarded when defining a gambling device. While possible, it is unlikely the court intended this result. It is more likely that the passage was meant to answer the question presented without straying into needless dicta. This possibility is supported by the language quoted above that the gambling statute's purpose "is to reach a broad range of gambling activities and prohibit them." *Id.* at 524. Nonetheless, the resolution of this conflict is less than certain. Because of this ambiguity, we ask that you render an opinion on the question presented.

Thank you for your assistance. We look forward to receiving your response.

Yours truly,



Scott Brumley
Potter County Attorney



Randall Sims
47th District Attorney



Robert Love
Randall County
Criminal District Attorney

cc: Mr. Greg Mitchell
Mr. Matt Pascal
Mr. David Glickler