

7/31/02 Library



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

August 28, 2002

The Honorable James H. Harrison
Chairman, Judiciary Committee
South Carolina House of Representatives
P.O. Box 11867
Columbia, South Carolina 29211

**Re: Your Letter of July 30, 2002
Criteria for Games of Chance Pursuant to S.C. Code Ann. §12-21-2710**

Dear Representative Harrison:

In your above-referenced letter, you ask this Office to "... issue an opinion that would provide the criteria for determining if a machine was an illegal game of chance as prohibited under S.C. Code Ann. §12-21-2710. You also request that this Office "... address the issue of the legality of awarding merchandise to a contestant or player if a machine is determined to be a game of skill versus a game of chance."

LAW/ANALYSIS

Criteria for Determining Games of Chance

Section 12-21-2710 provides in pertinent part as follows:

It is unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State any vending or slot machine, or any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value, or other device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo, or craps, or any machine or device licensed pursuant to Section 12-21-2720 and used for gambling or any punch board, pull board, or other device pertaining to games of chance of whatever name or kind, including those machines, boards, or other devices that display different pictures, words, or symbols, at different plays or different numbers, whether in words or figures or, which deposit tokens or coins at regular intervals or in varying numbers to the player or in the machine, but the provisions of this section do not extend to coin-operated nonpayout pin tables, in-line pin games,

Request Letter

The Honorable James H. Harrison
Page 2
August 28, 2002

or to automatic weighing, measuring, musical, and vending machines which are constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance (Emphasis added).

The statute makes illegal the mere possession of certain machines and devices regardless of their use or intended use. See State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000); Squires v. South Carolina Law Enforcement Division, 249 S.C. 609, 155 S.E.2d 859 (1967); State v. Appley, 207 S.C. 284, 35 S.E.2d 835 (1945). Machines and devices that fall within the proscriptions of §12-21-2710 are therefore considered contraband per se. State v. 192 Coin-Operated Video Game Machines, supra. While the statute specifically mentions such machines and devices as "slot machines" and "punch boards," it also outlaws any "other device pertaining to games of chance of whatever name or kind ..." A game of chance is simply a "game in which chance rather than skill determines the outcome." See *Black's Law Dictionary*. It is the opinion of this Office as well as a majority of jurisdictions in the United States that the "Dominant Factor" test is the appropriate test to determine whether a game is a game of chance. (Numerous state and federal citations included in endnote 1). That is, a game is a game of chance when chance predominates over skill in determining the results of the game. See OPS. ATTY. GEN. DATED AUGUST 2, 2001, SEPTEMBER 5, 1995, DECEMBER 5, 1978.

While our Supreme Court has not expressly adopted the Dominant Factor test, the dissent in Johnson v. Collins Entertainment Co. Inc., 333 S.C. 96, 508 S.E.2d 575 (1998), gives an indication that such would likely be the case if the question was ever specifically presented. In his dissenting opinion, Justice Burnett, joined by now Chief Justice Toal, opined that "... where the dominant factor in a participant's success or failure in a particular scheme is beyond his control, the scheme is a [game of chance], even though the participant exercises some degree of skill or judgment. If a participant's skill does not govern the result of the game, the scheme contains the requisite chance necessary to constitute a [game of chance]. On the other hand, if through the exercise of skill or judgment a participant can determine the outcome, the scheme is not a [game of chance]." 508 S.E.2d at 584, 585. Justice Burnett noted that his "... opinion is supported by the majority of jurisdictions which have considered this question." *Id.*¹

Courts considering whether elements of skill are involved in the playing of a game have looked to the game's requirement that the player exercise such things as manual dexterity, eye-hand coordination, reflexes, muscular control, and concentration. See U.S. v. 294 Various Gambling Devices, 718 F.Supp. 1236 (W.D.Pa., 1989); and Wnek Vending & Amusements Co., Inc. v. City of Buffalo, 434 N.Y.S.2d 608 (N.Y. 1980) (overruled on other grounds). Stated another way, judgment, practice, or adroitness are elements to consider in such an evaluation. State v. Stroupe, 76 S.E.2d 313 (1953). Intellectual abilities have also been viewed by courts as important elements in determining whether the outcome of a game is dominated by skill. For example, in In Re Allen, 377 P.2d 280 (Cal. 1962.), the California court held bridge to be a game of skill given the fact that prevailing requires deductive analysis, psychology, alertness and mental superiority.

The mere presence of one or more of the above mentioned skills, however, does not mandate that a particular game will be designated a game of skill rather than a game of chance. As the Supreme Court of North Carolina stated in State v. Stroupe, 76 S.E.2d 313 (1953), whether a game "... is a game of chance or a game of skill is not whether it contains an element of chance or an element of skill, but which of these is the dominating element that determines the result of the game..." The Stroupe Court stated their test alternatively as "... whether or not the element of chance is present in such a manner as to thwart the exercise of skill or judgment." Id. at 317. Games have been determined to be games of chance where "... the skill of the player may increase the player's odds of winning but ultimately the player's skill cannot determine the outcome, regardless of the degree of skill involved." Opinion Of The Justices, 795 So.2d 630 (Ala.2001). Similarly, it has been held that the mere fact that a knowledge of the law of probabilities may aid a player in maximizing his short term winnings does not make a game one of skill where this knowledge has no effect on the ultimate outcome. Collins Music Co. of North Carolina, Inc. v. North Carolina Alcoholic Beverage Control Commission, 451 S.E.2d 306 (1994). And, as Justice Burnett stated in his dissent in Johnson v. Collins, 508 S.E.2d at 587, "... skill should be defined in terms of the ability to obtain the desired outcome--a certain [icon, image, etc.]--rather than the ability of one player to play more judiciously than another."

Moreover, machines which incorporate into the manner of play the random selection of icons and images through their programming or software must be viewed skeptically when performing a skill/chance analysis. It has been held that such machines, producing images by virtue of a computer program unknown to the player, present only the "illusion of skill." Score Family Fun Center, Inc. v. County of San Diego, 275 Cal.Rptr. 358 (Cal.App. 1990). Also, machines which have as part of their programming the ability to control the percentage of times players win (sometimes referred to as retention ratio or payout ratio) have been viewed as games of chance, despite the existence of some aspects of skill. See Collins Music Co. of North Carolina, Inc. v. North Carolina Alcoholic Beverage Control Commission, 451 S.E.2d 306 (1994); and U.S. v. 294 Various Gambling Devices, 718 F.Supp. 1236 (W.D.Pa. 1989).

Awarding Merchandise for Games of Skill

The elements of gambling in South Carolina are consideration, chance and prize. See OPS. ATTY. GEN. DATED APRIL 23, 2002 & JANUARY 8, 2001. If the first two elements, consideration and chance are present, the awarding of any prize whether it be money or merchandise is illegal. On the otherhand, this Office has previously opined that the payment of an entry fee and the awarding of prizes for a game of skill (golf) does not violate this State's lottery laws (lottery defined as consideration, chance and prize). See OP. ATTY. GEN. DATED MARCH 24, 1986. I am aware of no changes in our laws which would alter the conclusion of the 1986 opinion. It should be noted, however, that this Office has also opined that, even though the nature of a particular game may be skill-based, South Carolina's gambling laws are implicated if the application of the game is such that the outcome and awarding of prizes is dominated by chance. See OP. ATTY. GEN. DATED SEPTEMBER 5, 1995 (even though golf is a game of skill, hole-in-one contest is chance). Of course,

The Honorable James H. Harrison
Page 4
August 28, 2002

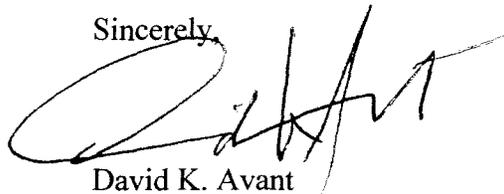
placing a wager on the outcome of any skill-based activity is illegal (i.e. betting on the outcome of a sporting event).

CONCLUSION

It is the opinion of this Office that the appropriate test to apply when determining whether a game is a game of chance or a game of skill is the Dominant Factor test. The question of whether any particular machine or device is an illegal game of chance must be determined initially by law enforcement and ultimately by the fact finder in a court of law. Further, a violation of this State's gambling laws occurs when the elements of consideration, chance and prize are present. If one of the elements is completely removed from the equation, the gambling laws do not appear to be implicated.

This letter is an informal opinion only. It has been written by a designated Assistant Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General and not officially published in the manner of a formal opinion.

Sincerely,



David K. Avant
Assistant Attorney General

DKA/an

1. United States v. Marder, 48 F.3d 564, 569 (1st Cir.), cert. denied, 514 U.S. 1056, 115 S.Ct. 1441, 131 L.Ed.2d 320 (1995) (Under Massachusetts law, "[C]hance must predominate over skill in the results of the game, or the element of chance must be present in such a manner as to thwart the exercise of skill or judgment in a game."); Johnson v. Phinney, 218 F.2d 303, 306 (5th Cir.1955) ("With respect to the element of chance, the authorities are in general agreement that if such element is present and predominates in the determination of a winner, the fact that players may exercise varying degrees of skill is immaterial; and the game or device is a lottery."); National Football League v. Governor, supra at 1385 ("I conclude that the legislative interpretation of the term lottery together with the weight of authority in other jurisdictions would persuade the Delaware Supreme Court that 'lottery' should be interpreted to encompass not only games of pure chance but also games in which chance is the dominant determining factor."); Morrow v. State, supra at 129 ("We agree that the sounder approach is to determine the character of the scheme under the dominant factor rule."); State ex Inf. McKittrick v. Globe-Democrat Pub. Co., supra, at 713 ("[A] contest may be a lottery even though skill, judgment, or research enter thereinto in some degree, if chance in a larger degree determine[s] the result."); People v. Settles, 29 Cal.App.2d Supp. 781, 78 P.2d 274, 277

(Cal.App.Dep't Super. Co.1938) ("The test of the character of a game or scheme as one of chance or skill is which of these factors is dominant in determining the result."); Finster v. Keller, 18 Cal.App.3d 836, 96 Cal.Rptr. 241 (Cal.Ct.App.1971); In re Interrogatories, supra at 598 ("Article XVIII, Section 2 [of the Colorado Constitution] is violated if chance is the controlling factor in the award."); Tinder v. Music Operating, Inc., 237 Ind. 33, 142 N.E.2d 610, 614 (Ind.1957) ("In a lottery the winning of a prize is dependent primarily, if not solely, upon chance. In none of said cases was the prize dependent upon the skill or manipulation of the player. This is a significant factor not contemplated in a lottery."); Commonwealth v. Lake, 317 Mass. 264, 57 N.E.2d 923, 925 (Mass.1944.) ("[A] game is now considered a lottery if the element of chance predominates and not a lottery if the element of skill predominates."); State v. Hahn, 105 Mont. 270, 72 P.2d 459, 461 (Mont.1937), overruled on other grds. State v. Bosch, 125 Mont. 566, 242 P.2d 477 (Mont.1952) ("The test of the character of the game is not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the result of the game."); State v. Steever, 103 N.J.Super. 149, 246 A.2d 743 (N.J.Super.Ct.App.Div.1968) (football pool was lottery because it involved substantial element of chance); Hoff v. Daily Graphic, Inc., 132 Misc. 597, 230 N.Y.S. 360, 363 (N.Y.Sup.Ct.1928) ("The test of the character of the game is not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the result of the game."); State v. Stroupe, 238 N.C. 34, 76 S.E.2d 313, 317 (N.C.1953) ("[T]he test of the character of [the game] ... is not whether it contains an element of chance or an element of skill, but which of these is the dominating element that determines the result of the game...."); Stevens v. Cincinnati Times-Star Co., 72 Ohio St. 112, 73 N.E. 1058, 1061 (Ohio 1905) ("[I]f the dominating, determining element is one of chance, that element gives character to the whole scheme."); Commonwealth v. Laniewski, 173 Pa.Super. 245, 98 A.2d 215, 217 (Pa.Super.Ct.1953) ("It is sufficient that chance be the dominant factor."); Roberts v. Communications Investment Club of Woonsocket, supra at 1211 ("In deciding whether the element of chance is present, we adopt, as have most jurisdictions which have faced this issue, the 'dominant factor' doctrine, under which a scheme constitutes a lottery when an element of chance dominates the distribution of prizes, even though such a distribution is affected to some degree by the exercise of skill or judgment."); D'Orio v. Startup Candy Co., 71 Utah 410, 266 P. 1037, 1038 (Utah 1928) (chance must be dominating element); Seattle Times Co. v. Tielsch, 80 Wash.2d 502, 495 P.2d 1366 (Wash.1972) (en banc) (dominant factor test); State v. Hudson, supra at 558 ("[A] lottery exists, even though skill, judgment or research enters to some extent, if chance predominates in the determination of the result."); see also State v. Wassick, 156 W.Va. 128, 191 S.E.2d 283 (W.Va.1972); State v. Dahlk, 111 Wis.2d 287, 330 N.W.2d 611, 617 (Wis.Ct.App.1983) ("Chance rather than skill must therefore be the dominant factor controlling the award in a lottery. Most jurisdictions apply the 'dominant factor' test, by which a scheme is a lottery if chance dominates even though some degree of skill or judgment is present.").