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Attorney General Paxton
January 13, 2023
Page -1-

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

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

Dear Attorney General Paxton:

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 entirely by skill. I am aware you have an opinion request pending (RQ-0457) regarding a machine/game ("Republic") produced by Republic Amusements, LLC, POM of Texas, LLC. The requestors there ask a materially different question—whether machine/game is gambling where the amount awarded is determined, in part, by chance.

Facts

I understand your office has been provided a screening of and the opportunity to play the BankShot game about which I am inquiring. As noted herein the machine/game at issue in this request is in some respects similar to the ("Republic") game described in RQ-0457. As highlighted below, however, it differs in the most critical, material respect the amount awarded is determined by skill:

The Republic 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 may use the "Preview" button to view the next game outcome, however the player does not control what the next game outcome is or its value. The player cannot change or control the outcome.

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" phase. After playing the "Wild Card" phase, 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

BankShot players, in sharp contrast, control the result as well as the value of the outcome through the game's search, select and solving puzzles gameplay.

BankShot does not require the player to pay more to view additional puzzles or view more after the initial puzzle. The Republic game the player must pay to view a new set of symbols.

BankShot gives the player the ability to search for and select, the puzzle they wish to play. The Republic Game the device provides a puzzle that the player cannot change.

In BankShot, the player selects the puzzle. In Republic the device selects the puzzle.

BankShot gives the player the ability to view one hundred puzzles per play level before they select one. The cycle of puzzles viewable to the player is 100 for each of the four price levels of the game. The combinations of symbols within the puzzles have varying or different values. Some combinations award more than others. Without cost, payment, or time constraint, a player can cycle through all puzzles as many times as they want, until the player locates the highest-value puzzle or finds a puzzle they want to play. The player may elect to not participate any further and, if so, will have incurred no cost. Or they may choose the puzzle they wish to be presented by pressing the start button. The player can view all pay combinations and win-line information from the help menu and use this information to decide which puzzle or puzzles they wish to play, if any.

- A skill is recognizing the combination of symbols that are a higher value combination and also distinguishing between other combinations that award more or less than others.
- A skill is identifying these combinations of symbols in position within the eight win lines.
- A skill is ascertaining the value of combinations of which the value of the award is dynamic.
- A skill is placing the wild symbol in order to create three of the same symbols in a row, column, or diagonal.
- A skill is placing the wild symbol in the correct position within the given time limit in order to achieve the highest value outcome.

The BankShot game presents nine (9) pool ball symbols, constructed in a 3x3 grid to the player, similar to a “tic-tac-toe” arrangement. The game theme allows the player to select a play level, which determines the quantity of points that will be expended to play a game

The BankShot skill game contains a “Next Puzzle” selection feature that allows the player to view and select upcoming game puzzles by pressing the designated onscreen icon on the video screen (ex. This button will display the actual symbol combination of the next puzzle). At any given time prior to the initiation of game play, the player may utilize the Next Puzzle selection feature to preview and/or select upcoming game puzzles. No payment or purchase is required for the player to exercise the ability to utilize the Next Puzzle selection feature for the game theme and play level selected. The puzzle selection feature is available to the player prior to, and after, establishing points on the device. When the player has made the decision to play the puzzle selected, the player can then touch the onscreen button icon designated to play a game, or select the “Start/Stop” button on the devices’ exterior, to initiate a game.

The object of the game is to first utilize the Next Puzzle selection feature to view and select a puzzle to play. There is no time constraint placed on the player in which to choose a puzzle. The player may continue to utilize the Next Puzzle selection function in order to find a desirable puzzle for an indefinite amount of time in an effort to maximize the potential prize to be awarded. Mindfully previewing the puzzles presented will afford a player the opportunity to maximize the potential prize to be awarded by successfully choosing a puzzle which may award a higher value prize. When the player has selected the desired puzzle through the Next Puzzle selection process, the player may elect to initiate game play by touching the onscreen icon designated to play a game, or select the “Start/Stop” button on the devices’ exterior, to initiate a game. Game play will not commence until the player chooses to play the game.

Two additional bonuses may be earned as well. A “Fast Break Bonus” and a “Speed Break Bonus” are available. The additional bonuses are described below:

Fast Break Bonus

The “Fast Break Bonus” utilizes a vertical meter to the right of the puzzle display area. The Fast Break Bonus meter will increment during game play. The meter will increment each time the player successfully completes a puzzle containing three (3) “6” ball or three (3) “7” ball symbols. The symbol combinations must not occur in combination with any other winning combinations. For each puzzle that is not solved for the optimal prize, or is incorrectly solved, the meter will decrement.

Once the meter reaches the top, the “Fast Break Bonus” will be awarded. This award is predetermined and selected from a sequential table, which contains three advertised prize values. The three advertised prize values are displayed and can be viewed by the player at any time well as which one of the three prizes will next be awarded. prior to the initiation of a game by selecting the Fast Break Bonus meter that is displayed on the screen. Each of the three advertised prizes will increase as games are played, and will reset to a default prize value after they are awarded.

Speed Break Bonus

The “Speed Break Bonus” utilizes a vertical meter to the left of the puzzle display area. The Speed Break Bonus meter will increment during game play. Each time the player correctly solves a puzzle while the timer is in the yellow area, the meter is incremented. If the puzzle is not solved correctly while the timer is in the yellow area, the meter is decremented. Any puzzle that is solved containing combination winners, which include (3) “6” ball or three (3) “7” ball symbols in combination with an additional winning symbol combination will not increment the meter.

Once the meter reaches the top, and the player correctly solves the current puzzle, the “Speed Break Bonus” will be awarded. This award is predetermined and selected from a sequential table, which contains three advertised prize values. The three advertised prize values are displayed and can be viewed by the player as well as which one of the three prizes will next be awarded. Each of the three advertised prizes will increase as games are played, and will reset to a default prize value after they are awarded.

Jackpot Prize

The puzzle selection process and presentation to the player is in a fixed rotation, with the exception of the puzzle which, when solved correctly like any other prize by achieving a symbol combination (with three (3) “8” ball jackpot symbols), will yield a “Jackpot” prize.

Bonus Game

During the course of normal play, missed wins are added to a “Bonus Pool”. A missed win occurs when a patron does not solve a puzzle for the maximum prize value. The value of the missed win is the difference between the amount awarded to the patron and the amount that would have been awarded had the “Wild” ball been placed correctly. A “Bonus” game is awarded to a patron completing three “Bonus” balls in a row, and engages the player to select a space from a 3x3 grid. The value is made know to the player before and during game play.

BankShot is a contest in which skill determines the result;

- It is skill when the player views available puzzles before they are presented.
- It is skill when the player searches for and selects a puzzle where the value of the puzzle is made known to them prior to making that selection.
- It is skill that determines when or if the player solves the puzzle correctly by choosing the correct one of 9 locations to place the wild ball.
- It is skill when the player places the wild symbol in order to create three of the same symbols in a row, column, or diagonal.

- It is skill that determines when or if the player places the wild symbol in the correct position within the given time limit in order to achieve the highest value outcome.
- It is skill that the player uses to increment the Speed Break Bonus counter, as only a correct solution in the given time limit shall increment the Speed Break Bonus.
- It is skill when the player uses the Fast Break Bonus to their advantage.

In summary the result of the BankShot game is determined by players' skill and not by chance. In fact, Mr. Nick Farley of Nick Farley & Associates ("Farley"), one of the preeminent expert consultants and game/machine evaluator in the United States has concluded the amount awarded from play is determined entirely by the player's skill—no chance is involved. As you see on page 9 (attached Appendix 1).

Statement of Law

Under Texas law, of course, games of skill are not unlawful gaming; conversely, games of chance, unless expressly sanctioned by the State, are unlawful gambling. A person commits the offense of gambling if he or she:

- (1) makes a bet on the partial or final result of a game or contest or on the performance of a participant in a game or contest;
- (3) plays and bets for money or other thing of value at any game played with cards, dice, balls, or any other gambling device. TEX. PENAL CODE ANN. § 47.02(a) (West Supp. 2016).

Whether playing BankShot constitutes gambling under subsection (1) depends on whether the cost to play the game is a “bet” under Texas law.

“Bet” is defined in section 47.01(1):

- (1) “Bet” means an agreement to win or lose something of value solely or partially by chance. A bet does not include:
 - (A) contracts of indemnity or guaranty, or life, health, property, or accident insurance;
 - (B) an offer of a prize, award, or compensation to the actual contestants in a bona fide contest for the determination of skill, speed, strength, or endurance or to the owners of animals, vehicles, watercraft, or aircraft entered in a contest; or
 - (C) an offer of merchandise, with a value not greater than \$25, made by the proprietor of a bona fide carnival contest conducted at a carnival sponsored by a nonprofit religious, fraternal, school, law enforcement, youth, agricultural, or civic group, including any nonprofit agricultural or civic group incorporated by the state before 1955, if the person to receive the merchandise from the proprietor is the person who performs the carnival contest.

The cost to play BankShot in return for the opportunity to win or lose more than the cost to play is undoubtedly an agreement to win or lose something of value. But the question is whether winning or losing more than the cost of play is done solely or partially by chance. The opportunity to win or lose something of value in BankShot is not decided by chance. In BankShot, whether a player wins or loses something of value depends solely on the player's skill in: 1) remembering and recognizing quickly the puzzles with winning combinations of characters, 2) selecting puzzles with high value, 3) choosing the best item from the tic tac toe block to become “wild,” and 4) doing so in the requisite time scale. This non-gambling option is anticipated in section 47.01(1)(B) which says that a “bet” does *not* include “an offer of a prize, award, or compensation to the actual contestants in a bona fide contest for the determination of skill...” No case law defines “a bona fide contest for the determination of skill.” However, because winning or losing something of value in BankShot involves no chance element, a person that plays the game does not commit the offense of gambling under section 47.02(a)(1).

BankShot is not a “gambling device” under section 47.02(a)(3). Section 47.01 of the Texas Penal Code provides:

- (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 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.

As discussed above, a player's success or failure in playing BankShot is determined by the player's skill in selecting the most optimal screen/puzzle to play, and on how quickly the player completes the game. Accordingly, chance is not involved in whether the player wins or loses.

Conclusion

Like the question in RQ-0457, the question here 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 entirely by the player's skill? I ask you to rely on the expert opinion attached hereto for the fact that *no* chance is involved in the amount awarded.

With chance eliminated, I urge that the answer must be that the machine/game I describe, BankShot, is not a gambling device under Texas law.

I appreciate your consideration and look forward to your response. I ask you to rely on the expert opinion attached hereto for the fact that *no* chance is involved in the amount awarded.

Respectfully,



Craig Goldman
Texas State Representative
District 97