

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General



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PRIVILEGED AND CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION

Legal Counsel Division

MEMORANDUM

TO: Jonathan Berman
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FROM: Arthur J. Parker
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A handwritten signature in black ink, appearing to read "A. Parker", is written over the printed name of Arthur J. Parker.

DATE: February 14, 2019

SUBJECT: Legal Advice Concerning Whether “Nudge” or “Skill” Video Gaming
Machines are Gambling Devices
(AL-18-604)

This memorandum responds to your request that this Office provide legal advice to the Alcoholic Beverage Regulation Administration (“ABRA”) on whether certain types of video gaming machines, referred to as “nudge” or “skill” games, would be considered gambling devices in the District. Although similar games have not yet appeared in the District, they are spreading rapidly in other neighboring states. Unlike other states, the District has both a local prohibition on gambling devices in D.C. Official Code § 22-1704, and is additionally subject to the federal Johnson Act, which prohibits gambling devices in the District. While the parameters of such video gaming machines are highly variable, there is a significant likelihood that they are games of chance, and therefore gambling devices, under D.C. Official Code § 22-1704, and a strong likelihood that they are gambling devices under the Johnson Act. In order not to be considered gambling devices in the District, a game should be winnable in every iteration of the game, and a perfectly skilled player should at a minimum be able to regularly win money at the game.

Background

The Virginia Alcoholic Beverage Control Authority (“Virginia ABC”) has recently determined that it will not prosecute its license holders for having certain kinds of standalone video gaming machine terminals on its premises, and the devices have begun to proliferate in establishments

throughout Virginia.¹ The devices in question are marketed in Virginia under the name Queen of Virginia Skill & Entertainment. Queen of Virginia's website states that its "game terminals use Pace-o-Matic® skill game software," "[p]layers can WIN every time based on skill & not chance," and "[t]he software which QVS utilizes has been adjudicated in a court of law as a skill predominate game."² The Queen of Virginia devices all appear to have slots for cash or cards built into their cabinets. The price to play the game, odds, and payouts are not discussed on the Queen of Virginia website, but it is not disputed that a player pays money to play and can win money from the game.³ ABRA reached out to the Virginia ABC for an explanation of its determination that the Queen of Virginia devices were not illegal gambling devices. Virginia ABC responded that "[g]ames of skill (includes pattern recognition, hand-eye coordination and memory) do not fit the definition of illegal gambling in Virginia."⁴

The video gaming devices are created by the company Pace-O-Matic, Inc.⁵ They are offered on the company's website under the subheading "Skill." The description of the games reads, "[f]rom simple Nudge Games to the most comprehensive Ultra Skill concepts, we pride ourselves on creating the best-earning, legally compliant systems on the planet."⁶ A brief demonstration video on Pace-O-Matic's website shows and describes the games.⁷ It begins with text overlaid on the video describing a "25 Line Skill" game. A 3 by 5 grid of various pictures appears. The text says, "press the play button to spin the reels," then "after a number of spins a sequence of numbers will pop on screen. Put these numbers in the correct order." The numbers "13245" pop up, the player moves the 2 behind the 3, and the text states, "You win!" Other similar games are displayed in which five slot reels are spun, then numbers from 1 to 5 appear with two numbers out of order, the player selects the two numbers to switch, and wins free spins. It is not clear from the video what the relation is between the spinning slot reels and the five numbers that are ordered; the pictures in the slot reels do not make any row in any of the "winning" depictions.

¹ See generally Rebecca Carballo, *New games let bar patrons cash in, but aren't considered gambling machines*, *The Virginian-Pilot* (July 2, 2018), https://pilotonline.com/business/consumer/article_c0852932-749b-11e8-bdc6-c7c126d4ae95.html ("The gaming machines made their debut in Virginia in January; there are now 317 of them in 187 restaurants and truck stops in Hampton Roads."); Aleah Hordges, *You can now play on Vegas-style slot machines at Humboldt Steel Corporation in Portsmouth*, *WTKR* (Mar. 24, 2018, 12:28 PM), <https://wtkr.com/2018/03/22/you-can-now-play-on-vegas-style-slot-machines-at-humboldt-steel-corporation-in-portsmouth/>.

² Queen of Va. Skill & Entertainment, <https://www.vaskillgames.com/> (last visited Feb. 4, 2019). No citation to the referenced court case is provided; however, the case may be *In re Pace-O-Matic, Inc. Equipment*, No. M.D. 965-2013, 2014 Pa. Dist. & Cnty. Dec. LEXIS 3203 (Beaver Cnty., Pa. Ct. Common Pleas Dec. 13, 2014).

³ An undated newsletter authored by Queen of Virginia and displayed on its website states that two of its terminals net the owner of an establishment between \$750 and \$1000 per month, and that players "add to a running cash total highlighted in the right bottom corner of each screen." *The Queen Speaks*, Queen of Va. Skill & Entertainment, https://docs.wixstatic.com/ugd/a288b7_2d8799bb933f482_bb886506bb2978277.pdf (last visited Feb. 4, 2019). In one establishment with Queen of Virginia games, if a player wins, the player "gets back 104 percent of what he put in; the "play level" starts at 40 cents and goes to \$4." Hordges, *supra* note 1. In another establishment, the machines "pay out a very high percentage - up to \$5,000," and the owner of the establishment claimed "there has been more than \$3,000 in winnings so far." Caballo, *supra* note 1.

⁴ The response is substantively similar to one given by Virginia ABC to a news station inquiry. See Caballo, *supra* note 1.

⁵ Pace-O-Matic, Inc., <http://www.paceomatic.com/> (last visited Feb. 4, 2019). Queen of Virginia's website lists "Pace-O-Matic®" at the bottom of the page. Queen of Va., *supra* note 2.

⁶ *Skill*, Pace-O-Matic, Inc., <http://www.paceomatic.com/Products/Skill> (last visited Feb. 4, 2019).

⁷ *Id.*

Another type of game depicted in the video involves three spinning slot reels with various pictures on the wheels, and once the wheels stop spinning, the player can move one of the slot wheels up or down by one picture to try and create a row of the same pictures. These kinds of games are generally referred to as “nudge” games, as the player wins by “nudging” one slot reel by one spot in a certain direction.⁸ Based on the video, not every spin of the slot reels involves a possible winning combination; there appear to be spins that do not permit a possible winning “nudge.”

In another style of game in the video, a 3 by 3 grid of squares containing various pictures is displayed, the player is instructed to “make it 3 in a row,” and the player selects the square that would create one or more rows of three pictures. Queen of Virginia’s newsletter describes the games as “a sophisticated form of tic-tac-toe.”⁹

Virginia ABC reviewed variants of the tic-tac-toe games, and found them to be skill devices. In a letter from Virginia ABC to Pace-O-Matic dated July 7, 2017,¹⁰ Virginia ABC indicates that a Pace-O-Matic game “is currently being widely used in Pennsylvania . . . and has been found to be a game of skill by the Court of Common Pleas of Beaver County, Pennsylvania.” It then describes a “tic-tac-toe” game, a “shooter game,” and a “follow me” game.¹¹ The letter states that after reviewing the Pennsylvania case and a letter from a Virginia attorney, that “this game appears to be predominantly a game of skill.”

The games reviewed by Virginia ABC are described in *In re: Pace-O-Matic, Inc. Equipment*, No. M.D. 965-2013, 2014 Pa. Dist. & Cnty. Dec. LEXIS 3203 (Beaver Cty., Pa. Ct. Common Pleas Dec. 13, 2014):

Upon initiating gameplay, the game spins each of the nine reels arranged in a three-by-three grid on the screen. After the reels stop spinning, the player has ten seconds to select one of the nine cells to change a symbol in that position to a wild symbol. The player is tasked with choosing the most advantageous spot to place the wild. Whether one spot is more advantageous than another depends on the value of the symbols in the row, column, or diagonal that was completed, and whether completion of one row, column, or diagonal completes another. If the player does not make a selection in the allotted time, no wild symbol will be placed on the screen. Because a random number generator excludes an automatic winning game, failure to place the wild will always result in a loss for the player. Each game will have at least one spot where placing the wild will result in a nonzero score, and no game will be completely unwinnable.

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⁸ See *Banilla Games, Inc. v. Iowa Dep't of Inspections & Appeals*, 919 N.W.2d 6, 10 (Iowa 2018), discussed *infra*.

⁹ Queen of Va., *supra* note 3.

¹⁰ Letter from Thomas W. Kirby, Deputy Chief, Department of Alcoholic Beverage Control, Commonwealth of Va., to Jeffrey L. McGinness, Pace-O-Matic (July 7, 2017).

¹¹ The “shooter game” analysis is not directly relevant here.

If, during the Tic-Tac-Toe game, the player wins an amount that is less than 104% of the purchase price to play the game, the player is afforded the option of selecting the "Follow-Me" mini-game. A player who chooses to proceed with the Follow-Me feature is presented with a three-by-three grid of colored dots. Essentially, the Follow-Me feature is a memory game. The dots flash in a random sequence which the player must repeat. Starting with one circle flashing, the player will need to follow the correct sequence for a total of forty rounds of play, with each sequence adding another circle. If a player successfully follows the pattern each time, the player is awarded with 104% of his or her original wager.

Id. at *3-5.

In analyzing whether the machines were gambling devices, the *Pace-O-Matic* court applied Pennsylvania's standard that "it must be a game where chance predominates rather than skill." *Id.* at *7 (citing *Commonwealth v. Two Elec. Poker Game Machines*, 465 A.2d 973, 977 (Pa. 1983)). The court noted that regarding the tic-tac-toe game, "[a]lthough there often is . . . an 'obvious' position where placement of the wild would generate a nonzero score, several puzzles have a position where placement of the wild will lead to a more advantageous score." *In re: Pace-O-Matic*, 2014 Pa. Dist. & Cnty. Dec. LEXIS 3203, at *10-11. It reasoned that "[e]very puzzle is winnable, and some have higher wins depending on whether the player has the skill to recognize the most advantageous spot to place the wild. *Id.* at *13. The court concluded that "[o]n balance, the outcome of the game is determined predominantly by skill rather than chance." *Id.* at *15.

Virginia ABC only reviewed and authorized the tic-tac-toe games discussed and approved in *In re: Pace-O-Matic*. It has not yet approved other games shown in the video on the Pace-O-Matic website, although other companies have submitted similar games to Virginia ABC for review which is currently pending. At issue is whether the Pace-O-Matic gaming devices or related devices are gambling machines that would violate prohibitions on gambling in the District.

Analysis

I. Gambling Laws in the District

Gambling devices are forbidden in the District by both a local act of Congress¹² and the federal Johnson Act.¹³ D.C. Official Code § 22-1704 provides that "[w]hoever shall in the District set up or keep . . . any kind of gaming table or gambling device adapted, devised, and designed for the purpose of playing any game of chance for money or property, . . . shall be punished by imprisonment . . . and . . . may be fined." "Gambling device" is not defined, although "gaming table" is. D.C. Official Code § 22-1707 provides that "[a]ll games, devices, or contrivances at which money or any other thing shall be bet or wagered shall be deemed a gaming table within

¹² An Act To establish a code of law for the District of Columbia, effective March 3, 1901 (31 Stat. 1331; D.C. Official Code § 22-1704 (2012 Repl.)).

¹³ An Act To Prohibit transportation of gambling devices in interstate and foreign commerce, effective January 2, 1951 (64 Stat. 1134; 15 U.S.C. § 1171 *et seq.*).

the meaning of §§ 22-1704 to 22-1706; and the courts shall construe said sections liberally, so as to prevent the mischief intended to be guarded against.”

In *Washington Coin Mach. Ass'n v. Callahan*, 142 F.2d 97 (D.C. Cir. 1944), the court expounded upon the intent and elements of the prohibition on gambling devices in the District:

[T]he purpose of Congress in the enactment of the local law was to make criminal the use of all contrivances by which money or property is bet or wagered or risked on the chance of some material reward. Hence it is obvious that a crap table, a dice table, a horse race device, keno, a lottery, book making, or a six-wheel or a chuck-a-luck table or a faro table, at which money is bet and won or lost, are all gambling devices as are also many other like schemes or devices. But in all the primary consideration in this jurisdiction is whether the machine or device, whatever its scope or nature, is the inducing cause to gambling for money or property. To gamble, as is well known, is to risk one's money or other property upon an event, chance or contingency in the hope of the realization of gain, and the test as to whether a particular machine combination constitutes a gambling device is . . . whether it is adapted, devised and designed for the purpose of playing any game of chance for money or property. The elements, chance and money or property, are therefore fundamental ingredients.

Id. at 98. Although “gambling device” is not expressly defined, *Washington Coin* makes clear that the test in determining whether something is a gambling device is whether it is designed for the purpose of playing a game of chance for money or property.¹⁴

In *Boosalis v. Crawford*, 99 F.2d 374 (D.C. Cir. 1938), the court established the standard for when a game is considered a game of chance in the context of “claw machines.” Claw machine players could move the claw over the top of prizes, the machine would then lower the claw, and the players would get the prize if the claw picked it up. *Id.* at 375-76. The lower court had found that “in respect of a player . . . , except to the extent that he could, by turning the locator-handle, suspend the claw in the vicinity of a desired article, the operation of the machine was beyond his control.” *Id.* at 376. The court held that even on the assumption that “skill played a part in suspending the claw in the vicinity of a desired article, . . . on the whole of the operation of the machines . . . , chance predominated over skill or was present in such manner as to thwart the exercise of skill. Under such facts, the device operates as a game of chance.” *Id.* The test established in *Boosalis* for whether a game is a game of chance is thus whether chance predominates over skill, or thwarts the exercise of skill.

In addition to laws in the D.C. Official Code, the federal Johnson Act bars the possession or use of gambling devices in the District. The Johnson Act provides that “[i]t shall be unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device in the District of Columbia.” 15 U.S.C. § 1175(a). It defines “gambling device” as “any other machine

¹⁴ See also *Nat'l Conference on Legalizing Lotteries v. Farley*, 96 F.2d 861, 863 (D.C. Cir. 1938) (“[A] lottery is composed of three elements: Prize, consideration, and chance. The first two may exist in a game of skill; the last always converts the contest into a lottery or a gamble. The question then is whether the winning of the prizes under the instant scheme depends upon chance.”).

or mechanical device . . . designed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property.” 15 U.S.C. § 1171(a)(2).¹⁵ “In the District of Columbia, . . . the Johnson Act makes it unlawful to ‘possess’ or ‘use’ any ‘gambling device.’” *Cabazon Band of Mission Indians v. Nat’l Indian Gaming Comm’n*, 14 F.3d 633, 635 n.3 (D.C. Cir. 1994); see also *Brizill v. D.C. Bd. of Elections & Ethics*, 911 A.2d 1212, 1215 (D.C. 2006) (“[S]ection 1175 of the Johnson Act . . . clearly applies to the District of Columbia.”).

In construing whether something is a gambling device under the Johnson Act, the court in *United States v. 24 Digger Merch. Machines*, 202 F.2d 647 (8th Cir. 1953), stated that “comparison of the elements of chance and skill is immaterial. The statute refers to a machine so designated that it will deliver property ‘as the result of the application of an element of chance’. Where a substantial element of chance is involved, . . . the fact that skill in operating the particular machine is helpful in attaining the end sought does not take the machine out of the type defined by the statute.” *Id.* at 650-51. Under the Johnson Act, the standard for whether a game is a game of chance does not require a comparison of the elements of skill and chance, but is whether a substantial element of chance is involved; the fact that some skill may be used does not render a game skill-based if there is a substantial element of chance.

Overall, a device is a gambling device that violates D.C. Official Code § 22-1704 if chance predominates over skill or thwarts the exercise of skill, and is a device that violates the Johnson Act if it relies on a substantial element of chance. These definitions overlap significantly, and have been used in the same contexts.¹⁶ They both apply to the District, and a device must not be a gambling device under either to be legal in the District.

II. Cases Interpreting Similar Games

There are myriad cases involving whether various devices constitute gambling machines, and the cases are heavily fact-dependent, as there are an endless series of contrivances to circumvent gambling laws. We survey several of the other cases involving devices most closely analogous to Pace-O-Matic’s “Nudge” and “Ultra Skill” games.

In *Pace-O-Matic, Inc. v. N.Y. State Liquor Auth.*, 72 A.D.3d 1144 (N.Y. 2010), the court described a game structured somewhat similarly to the current games at issue:

¹⁵ At least since the enactment of the Indian Gaming Regulatory Act, approved October 17, 1988 (102 Stat. 2467; 25 U.S.C. § 2701 *et seq.*) (“IGRA”), the definition of “gambling device” in the Johnson Act includes electronic versions of games of chance. See 25 C.F.R. § 502.8 (“*Electronic or electromechanical facsimile* means a game played in an electronic or electromechanical format that replicates a game of chance by incorporating all of the characteristics of the game”); *United States v. 103 Elec. Gambling Devices*, 223 F.3d 1091, 1102 (9th Cir. 2000) (“[C]omplete, self-contained electronic or mechanical facsimiles of a game of chance . . . may indeed be forbidden by the Johnson Act after the enactment of IGRA” (citing 25 C.F.R. § 502.8)); *Cabazon Band of Mission Indians v. Nat’l Indian Gaming Comm’n*, 827 F. Supp. 26, 31 (D.D.C. 1993) (“[I]t is plainly evident that IGRA’s ‘facsimiles’ are the Johnson Act’s ‘gambling devices.’”).

¹⁶ See, e.g., *United States v. 10, More or Less, Digger Machines*, 109 F. Supp. 825 (E.D. Mo. 1952) (applying the *Boosalis* analysis to the Johnson Act).

After money is deposited into the machine, . . . [d]uring the Moxie phase, if the player selects the proper symbol within one second of the game grid appearing, he or she wins 104% of the amount wagered. If no symbol is selected, the game progresses to the post-Moxie phase, where the player must select the proper symbol within a set time of 10 to 19 seconds and the amount of the prize is randomly selected by the machine in proportion to the difficulty of choosing the correct symbol.

Id. at 1144-45. The court upheld the state liquor association’s finding that “the game was a contest of chance.” *Id.* at 1146. It reasoned that “[w]hile solving the puzzle in any phase may require skill, the outcome in the post-Moxie phase—which includes the amount of the prize—‘depends in a material degree upon an element of chance.’ The prize is selected at random by the machine” *Id.* Even though aspects of the game required skill, when taken as a whole, the court found that the game “is a gambling device that is not permitted on licensed premises.” *Id.*

In *Banilla Games, Inc. v. Iowa Dep’t of Inspections & Appeals*, 919 N.W.2d 6 (Iowa 2018), the court addressed nudge-style video gaming devices similar to the ones at issue here:

Nudge-style games consist of three electronic reels featuring different icons that spin when a player pushes the play button and stop automatically after a short time. The reels may also stop spinning if a player pushes the stop button. However, if a player pushes the stop button, the same icons will appear as if the player let the machine stop automatically. Players then determine whether a potential winning combination of two or more icons is present and choose one of the wheels to move up or down (i.e., nudge) in order to complete the winning pattern.

Id. at 10. Although not expressly clear, the *Banilla* court made multiple references to players determining whether a potential winning combination is present, and also concluded that “outcome” in Iowa’s gambling statute includes both winning a prize and failing to win a prize, *id.* at 15-17, which strongly imply that the games had iterations with no potential winning combination. The devices had a payout structure that could be set between 92% and 98%, but positive prizes were only available in less than 1/3 of the outcomes, and a player with perfect skill would still steadily lose at least 2% of the time. *Id.*

Banilla Games argued that “skill plays more of a role than chance because players must complete a skill task—nudging or swapping—to play the game.” *Id.* at 18. The court rejected this argument on the grounds that “a player will always expend more total credits to play than he or she will redeem in prizes, despite how skillful or knowledgeable a player might be. The reason for this is that the machine can be set on how much it will pay with the highest payout being a 98% payout. Thus, with perfect skill and knowledge, a player cannot win every time.” *Id.*¹⁷ The *Banilla* court concluded that “whether a player wins on the Superior Skill games relies primarily

¹⁷ See also *Gator Coin II*, 254 So. 3d at 1118 (“Version 67 is a slot machine because the element of chance is inherent in it given that it has a preset win/loss ratio, and that the game outcomes are determined by the machine by chance, . . . and there is nothing the user can do to affect the outcomes.” (citation omitted)).

more on chance than on skill or knowledge,” and affirmed that the games were gambling devices. *Id.*¹⁸

In contrast, in *Am. Amusements Co. v. Neb. Dep't of Revenue*, 807 N.W.2d 492 (Neb. 2011), the court upheld a version of a video “tic-tac-toe” game similar to some depicted in the Pace-O-Matic video,¹⁹ on the grounds that it required skill and “a winning combination is possible with respect to each puzzle.” *Id.* at 495. In that case, players had a short amount of time to solve the puzzle, and the court upheld a finding that “the puzzles were not presented so fast that a player could not exercise skill in the selection of the puzzle to be played,” and thus “[t]he selection of the puzzle is thus determined by player skill, not by chance.” *Id.* at 503-04. The state also argued that the game was “determined by chance because of the infrequent presentation of winning puzzles,” where “[w]inning” in this context means a puzzle that pays the player more credits than the player puts at risk.” *Id.* at 504. The court rejected that argument, finding that although “[t]he odds of coming away with more money than a player risks on a puzzle are

¹⁸ See also *Sandhill Amusements, Inc. v. Sheriff of Onslow Cty.*, 762 S.E.2d 666, 679-86 (N.C. Ct. App. 2014 (Ervin, J., dissenting), *rev'd*, 773 S.E.2d 55 (N.C. 2015) (adopting dissenting opinion)). In that case, the dissent, subsequently adopted by the North Carolina Supreme Court, argued that a nudge game was a game of chance:

[T]he machines and equipment at issue here only permitted a predetermined number of winners. For that reason, a player who plays after the predetermined number of winners has been reached will be unable to win a prize no matter how much skill or dexterity he or she exhibits. . . . Finally, the extent to which the opportunity arises for the “nudging” activity upon which the trial court’s order relies in support of its determination that the equipment in question facilitated a game of “skill or dexterity” appears to be purely chance-based. Although Mr. Farley persuaded the trial court that the outcome of the games . . . depended on skill or dexterity, the only basis for this assertion was the player’s ability to affect the outcome by “nudging” a third symbol in one direction or the other after two matching symbols appeared at random on the screen. Assuming for purposes of argument that this “nudging” process does involve skill or dexterity, . . . an individual playing the machines and utilizing the equipment at issue simply does not appear to be able to “determine or influence the result over the long haul.” . . . I am compelled by the undisputed evidence to “conclude that the element of chance dominates the element of skill in the operation” of Plaintiffs’ machines

Id. at 686 (Ervin, J., dissenting) (citation omitted).

¹⁹ The *Am. Amusements* court described the game as follows:

Each Bankshot game consists of a series of puzzles presented to the player as a three-by-three grid of pool balls, and the object of the game is to solve puzzles by creating a winning “tic-tac-toe” combination of three like-colored balls in a row. The puzzles will never by default contain a winning combination of three pool balls in a row of the same color, but a winning combination is possible with respect to each puzzle.

. . . [D]epending upon the mode of play selected, the pool balls will either start to spin or scroll indefinitely until the player chooses to stop on a given puzzle. Once the balls have stopped, the player then decides where to replace one of the nine displayed pool balls with a ball marked “Wild.”

807 N.W. 2d at 495. Notably, while upholding the spin version of the game as a game of skill, the trial court struck down the scrolling versions of the game as gambling, and American Amusements did not appeal those parts of the trial court’s decision, as it had reconfigured the games accordingly. *Id.* at 497-98.

remote”²⁰ and “a player must exert considerable patience while waiting for the ‘winning’ puzzles to appear,” “[n]evertheless . . . Bankshot is more controlled by the player than not, and thus is predominantly a game of skill.” *Id.*

III. Conclusions

From the cases, at least one general conclusion may be safely drawn: if a winning combination is possible in every iteration of the game, as in *Am. Amusements* or *In re: Pace-O-Matic*, then that weighs strongly in favor of the game being considered to be a game of skill; if a winning combination is not always possible, as in *Banilla*, that strongly weighs against finding that the game is a game of skill. We note a general but not determinative trend that the tic-tac-toe style games have fared significantly better in the courts than the nudge games, indicating that they are at least perceived to involve more skill.

The issue of payouts, however, has been different in each of the cases, with differing findings. In *N.Y. State Liquor*, the fact that the prize for each iteration was randomly determined rendered the machines gambling devices, and the court did not consider net payouts. In contrast, in *Banilla* and *Am. Amusements*, the payouts were randomized, but the *Banilla* court found the games to be games of chance, while the *Am. Amusements* court did not. In both cases, there were possibilities of positive outcomes, i.e., outcomes that payed more than the player put in. The *Banilla* court focused on the fact that the payout was necessarily negative over time, while the *Am. Amusements* court did not expressly consider whether the total payout over time was net negative, instead focusing on the possibility of positive outcomes. In both *N.Y. State Liquor* and *In re: Pace-O-Matic*, the games were structured to have the possibility of a 104% payout every time, but to make that payout extremely difficult to obtain. It is thus difficult to draw any strong conclusions regarding games that have the possibility of positive individual outcomes but a guaranteed net negative payment over time, or games where a positive payout is theoretically possible but in actuality subject to chance. However, we can conclude at a minimum that if a perfectly skilled player could regularly win money at a game, that weighs strongly in favor of finding that it is a game of skill.

The varying holdings as to whether the games are games of chance may be at least partially explained by the strength of the particular gambling laws in each state. In New York, the *N.Y. State Liquor* court used the standard of whether “the outcome depends in a material degree upon an element of chance.” 72 A.D.3d. at 1146 (quoting N.Y. Penal Law § 225.00). In Iowa, the *Banilla* court applied the “dominant factor” doctrine, 919 N.W.2d at 14-16, which is that “a player’s ‘skill or knowledge’ must influence the outcome of whether a player wins or loses more so than chance.” *Id.* at 17 (citing Iowa Code § 99B.53(1)). In Nebraska, the *Am. Amusements* court used the test that an activity is gambling “if its outcome is predominantly caused by chance.” 807 N.W.2d at 502. In Pennsylvania, the *In re: Pace-O-Matic* court applied the “chance predominates rather than skill” test. 2014 Pa. Dist. & Cnty. Dec. LEXIS 3203, at *7. Iowa, Nebraska, and Pennsylvania all use a “chance predominates” or “dominant factor” test, and in the Nebraska and Pennsylvania cases, the devices were found to be skill games, although they were still found to be games of chance in the Iowa case. New York used a stronger

²⁰ “Of the 10,325 puzzles in Table A, 1,187 pay more than the credits put at risk on the puzzle. That number is 155 in Table B and 12 in Table C.” *Id.* at 504.

“depends in a material degree” test, which does not require that chance predominates, only that it makes a material contribution, and found the games to be gambling devices.

The tests applicable to games of chance in the District are overall stronger and closer to a “substantial element of chance” test rather than a “chance predominates” test. The test for D.C. Official Code § 22-1704 under *Boosalis* is whether “chance predominated over skill or was present in such manner as to thwart the exercise of skill.” 99 F.2d at 376. Although the first clause incorporates the “chance predominates” standard, it then goes further to include a “thwart the exercise of skill” standard. The interpretation of the Johnson Act in *24 Digger Merch. Machines*, although it is an Eighth Circuit case and not directly binding on the District, clearly rejects the “chance predominates over skill” standard. Instead, it held that “comparison of the elements of chance and skill is immaterial” and that a device is a gambling device whenever “a substantial element of chance is involved.” 202 F.2d at 650-51. The test for whether something is a game of chance under D.C. Official Code § 22-1704 is at least as strong and perhaps stronger than the “chance predominates” standard used in the cases allowing the nudge or skill games, and the test under the Johnson Act is very likely stronger. Accordingly, if the games at issue involve any substantial element of chance, there is a significant likelihood that they are gambling devices under D.C. Official Code § 22-1704, and a strong likelihood that they are gambling devices under the Johnson Act.

Since Pace-O-Matic or other companies have not yet sold any particular gaming devices for use in the District, and the kinds and parameters of the games are highly customizable and variable, we cannot determine in advance what iterations would be considered gambling devices. However, we can generalize that if the games do not have a possible winning combination every time, then chance predominates over skill, and the machines are gambling devices. Assuming the game is winnable every time, the payouts must at a minimum be structured so that a perfectly skilled player could win money, otherwise chance would be either a substantial element or predominate. If a game is both winnable every time and a perfectly skilled player could steadily win money over time, the game may be a game of skill. We may revisit our analysis once particular gaming devices appear in the District, or are presented to ABRA or another appropriate District agency for approval.

If you have any questions about this memorandum, please contact Matt James,^{*} Assistant Attorney General, Legal Counsel Division, at 724-5558, or me at 724-5565.

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^{*} Admitted to practice only in Kentucky. Practicing in the District of Columbia under the direct supervision of Arthur J. Parker, a member of the D.C. Bar, pursuant to D.C. Court of Appeals Rule 49(c).