

STATE OF NEW YORK:

LIQUOR AUTHORITY

Application of the gambling prohibitions in the Alcoholic Beverage Control Law on a gaming device known as "Moxie Mania"

DECLARATORY
RULING
2009-00198D

Preliminary Statement

Section 98.1 of the Rules of the State Liquor Authority, (9 NYCRR subtitle B) provides that any person may request the Authority to issue a declaratory ruling on the applicability of the Alcoholic Beverage Control Law, or the Rules of the Authority, on any person, property or state of facts. Sections 105(22) and 106(6) of the Alcoholic Beverage Control Law prohibit gambling in establishments licensed for the retail sale of alcoholic beverages. Section 53.1(m) of the Rules of the Authority extends that prohibition to any licensee and section 53.1(t) prohibits licensees from having certain coin-operated video display game machines in the licensed establishment.

By letter dated June 18, 2008, a request was submitted by New York State Senator Frank Padavan for a declaratory ruling as to whether a particular gaming device, called Moxie Mania Empire Edition v618 ("Moxie Mania"), would constitute gambling as prohibited by the Alcoholic Beverage Control Law and the Rules of the Authority. After considering the record¹ before the Full Board in this matter, as well as the relevant statutory and case law, the Members of the Authority find that playing the Moxie Mania game is gambling under the aforesaid provisions of the Alcoholic Beverage Control Law and the Rules of the Authority.

¹ The record before the Full Board consisted of: (1) an opinion memorandum issued by the Authority's Counsel with respect to gambling in licensed premises; (2) the March 7, 2008 request, with supporting documentation, from the manufacturer of Moxie Mania for an opinion from the Authority's Counsel as to whether the gaming device constituted gambling; (3) an April 21, 2008 letter with additional information from the manufacturer; (4) the April 21, 2008 opinion of the Authority's Counsel that Moxie Mania was not gambling; (5) the June 18, 2008 request from Senator Padavan for a declaratory ruling; and (6) a live presentation of the device at the November 6, 2008 Full Board meeting.

Description of the game

To play Moxie Mania, a player must feed money into the device. Bright iridescent lights randomly flash on the screen as they would in a video slot-machine. When the flashing lights arbitrarily stop, a player is left with a nine-square box resembling a tic-tac-toe board. As the clock ticks, the player must quickly choose which one of the squares turns the board into a wild card in order to produce three in a row of a certain number. For a player to receive a return of more than it cost to play the game, and thus "win," a player must select the correct square within one second. If the player chooses the right square but does so after this allotted time, any return on the initial cost to play decreases as the clock ticks. That is, the player's return -- if any -- diminishes with time. And if the player chooses the wrong square, the initial cost is lost. The inventor of Moxie Mania explained that the device could be adjusted and manipulated. He maintained that he was the only person who knew how to adjust and manipulate the device and that he would not do this.

Applicable Statutory Law

Article 225 of the Penal Law governs gambling offenses. Section 225.00 defines the terms used in that article. A "contest of chance" is any gaming device in which the outcome depends -- in a material degree -- upon an element of chance, notwithstanding that skill of the contestant may also be a factor therein (Penal Law § 225.00 [1]). A person engages in gambling when he stakes something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence (Penal Law § 225.00[2]). Moreover, a gambling device is any device or machine which is used or is usable in the playing phases of any gambling activity, including a person playing a machine (Penal Law §225.00 [7]). And a "coin

operated gambling device” is a gambling device which operates as a result of the insertion of something of value. A device designed, constructed or readily adaptable or convertible for such use is a coin operated *gambling* device notwithstanding the fact that it may require adjustment, manipulation, or repair in order to operate as such (Penal Law § 225.00 [7-a]). A “slot machine” is a gambling device “which, as the result of insertion of a coin or other object, operates... in such a manner that, depending on elements of chance, it may eject something of value... A machine which awards free or extended play is not a slot machine merely because free or extended play may constitute something of value, provided that the outcome depends in a material degree upon the skill of the player and not in a material degree upon the element of chance” (Penal Law § 225.00[8]).

The Authority historically has relied on these Penal Law definitions to determine whether the conduct in question is gambling. The Court of Appeals, in *Plato's Cave Corporation v. State Liquor Authority*, 68 NY2d 791 (1986), upheld the Authority's reliance on those definitions. Therefore, in deciding whether an activity is gambling, the Authority will consider three questions. First, is the activity a contest of chance? Second, is the person giving something of value to participate? Finally, is there something of value being offered as a prize? An answer of “yes” to each of these questions means that the activity will be considered to be gambling by the Authority.

Applying these three questions, the Authority has determined that activities such as football pools, dice games raffles and pull tabs are all considered gambling. Moreover, under the Authority's interpretation of gambling, there is no distinction between professional (or criminal) betting and social (or casual) wagering. The Court of Appeals, in *Katz Delicatessen*

Inc. v. State Liquor Authority, 302 NY 286 (1951) held that the friendly poker game for nominal stakes is considered gambling under the Alcoholic Beverage Control Law.

Discussion

With respect to Moxie Mania, this three-question analysis was applied. In order to find that the gaming device is gambling, all three questions must be answered in the affirmative.

First, the easier question to answer was, “is the person giving something of value to participate?” It is undisputed that there is a cost to participate in the game, therefore the answer is yes. Second, is there something of value being offered as a prize? As described by the manufacturer, it is intended that something of value will be given to players who obtain a winning outcome in the game.

The last question to be answered is whether Moxie Mania is a “contest of chance?” A “contest of chance” is defined in Section 225.00(1) of the Penal Law as “any contest, game, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein. The New York courts have not provided a strict formula to apply when determining elements of chance that are inherent in a game. However, the opinions of many New York courts and attorney generals have stated that the New York standard with respect to tolerance of chance in a game for prizes is as follows. “It is necessary to determine whether skill or chance is the dominating element in the game. The statute only requires that chance be a material factor and expressly discounts the presence of some element of skill. [For example] if the subject video games reproduce various card and dice games by electronically shuffling and dealing cards, or electronically rolling dice, it cannot be denied that chance is playing a material role in the

outcome, notwithstanding the exercise of skills by poker participants and crap shooters.” 1985 Op. Inf. Atty Gen. N.Y. 75 (February 27, 1995). The understanding being that even where the participant can make a substantial difference in the outcome of game play, if by means of chance the machine controls and limits the maximum score performance of the participant, then chance predominates.

Gambling is different from other types of contests because with gambling “the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor”. Penal Law 225.00(1); *Plato's Cave Corp. v. State Liquor Authority*, 115 A.D.2d 426, 428, *aff'd* 68 N.Y.2d 791 (1986); *People v. Turner*, 165 Misc.2d 222 (N.Y. City Crim. Ct. 1995). And games of chance vary. For example, lottery, bingo, poker, and blackjack are all forms of gambling. But while playing lottery and bingo involve no skill whatsoever, playing poker and blackjack require considerable skill. Indeed, a skilled poker or blackjack player may calculate the probability of drawing a particular card. Nonetheless, poker and blackjack are as much games of chance as lottery and bingo because the outcome of the card games depends to a material degree upon the random distribution of the cards. *In re Plato's Cave Corp. v. State Liquor Authority*, 115 A.D.2d at 428, *aff'd* 68 N.Y.2d 791 (1986). Thus, where the outcome of a game depends -- in a material degree -- upon an element of chance, it constitutes gambling even if skill of the contestant is a factor.

Applying these principles to this case, the Moxie Mania device is a game of chance. As explained above, a player pays to play and the lights flash on the screen. When the flashing arbitrarily stops, the winning square randomly appears on the nine-square board. In order to affect the outcome of the game -- that is, “win” the game -- a player must identify the winning

square in less than one second. This split-second time allotment leaves a player simultaneously picking a square at the instant the flashing lights stop. A player must pick a square, any square, in order to have a chance at winning his money back. This design essentially leaves a player arbitrarily picking any square just to compete to win. Thus, based on the chance appearance of the winning square on the board, coupled with the player's split-second selection of a square, the outcome of Moxie Mania is largely dependent on chance.

The existence of chance in Moxie Mania was described in the two written opinions submitted by the manufacturer, one by Nick Farley & Associates and the other by Steven Heubeck, Ph.D. Both clearly state that an element of chance is present in the Moxie Mania game. As recited in the Farley opinion, "the prize is determined by a random selection, from a finite pool of available prizes. The device software selects the prize levels to be aligned on two intersection win lines, which will present the winning outcome." [Farley, pg 3] The game incorporates a random selection with replacement logic to assure that all prizes and all prize tiers are available for random selection at all times. [Farley pg 4] All of this is possible because the software housed on the 128 MB Compact Flash controls the game's processes, including elements that affect the game integrity and game outcome determination. Heubeck opines that, "during the moxie phase the potential awards for correct choices made during the moxie period are hidden and only revealed once the moxie phase is over. The chance element is the randomness of the award when skill fails during the moxie phase, and that randomness can arise in the consolation award given to the player who still solves the puzzle with a less binding time element. If the post moxie phase was isolated, it would be a game that involves skill and chance in my opinion. During the second phase, the player has no control over the quantity of value to

be awarded based on his performance. It is, rather, randomly determined by the game software." This is classic chance and, therefore, it is gambling.

Moxie Mania is different from other video games such as Pac Man and Space Invaders. With those games, skills such as coordination, muscle control, concentration, and reflexes are required to successfully follow the course of the game within the designated paths; to do so with accuracy and speed; to focus and to aim at targets; to eradicate those targets; and to overcome and avoid obstacles along the path. There is no course to follow in Moxie Mania, no targets to eradicate, no aiming with focus or shooting with accuracy, and no obstacles to meet or overcome during the course of the game. Furthermore, unlike Pac Man and Space Invaders, playing and practicing Moxie Mania will not affect the outcome of the game. Learning and familiarizing oneself with the course, targets, and obstacles, as well as practicing hand-eye coordination by aiming and shooting or destroying figures in Pac Man and Space Invaders sharpens a player's skills. But a Moxie Mania player cannot expect to affect the outcome of the game by practicing because the game randomly stops, the wild card randomly appears on the board, and the restrictive time frame makes it nearly impossible to identify the winning square. Even assuming, *arguendo*, that some skill is needed to select the correct square, the outcome of Moxie Mania, as with blackjack and poker, nonetheless depends -- to a material degree -- on chance. Indeed, it requires far more skill to play blackjack and poker than it takes to play Moxie Mania. And although Moxie Mania can be solved in ten to nineteen seconds, the payout in this time span is less than the cost to play. Thus, it cannot be considered winning, just losing less. Therefore, contrary to the arguments made by Moxie Mania representatives, their device is not a puzzle

solved entirely with skill, and its outcome is not dependent exclusively on superior mental and physical dexterity.

The New York Courts have provided guidance in the determination of what games are considered gambling. In *People v. Turner*, 165 Misc.2d 222 (1995), the defendant was charged with the crimes of possessing a gambling device and promoting gambling in the second degree. A police officer saw the defendant manipulating three bottle caps on top of a cardboard box with his hands and encouraging pedestrians to place bets, this is commonly known as the shell game. The defendant relied on *People v. Hunt*, 162 Misc.2d 70 where the court held that “three card monte” is a game of skill and not of chance. The Moxie Mania creators also rely on the *Hunt* decision but do not go as far as discerning the difference between the material element required to be a game of skill based on the type of game. Games of chance range from those that require no skill, such as a lottery (See *Ginsberg v Centennial Turf Club* 251 P.2d 926 [Colo.1952]), to those such as poker or blackjack which require considerable skill in calculating the probability of drawing particular cards. Nonetheless, the latter are as much games of chance as the former, since the outcome depends to a material degree upon the random distribution of cards. Therefore, the skill of the player may increase the odds in the player’s favor, but cannot determine the outcome regardless of the degree of skill employed.

Here, the Moxie Mania experts find that the skill of the player, not chance, is the critical determinant in the outcome of the game. The *Turner* decision rejects such arguments, finding that while the shell game may be a contest of skill from the perspective of the player, the player may be influenced by the dealer’s manipulation of the object. The player may select the apparently correct shell or reject appearances and to select at random from among the three

shells. This unalterable feature of the game convinced the court that it was, essentially, a game in which the outcome is determined by chance.

Similarly, in *People v. Denson*, 192 Misc.2d 48 (2002) the defendant was charged with promoting gambling in the second degree and possession of a gambling device due to playing "three card monte." This court agrees with the analysis of the *Turner* decision, "three card monte is essentially a game of chance, wherein the player has a one in three chance of selecting the right card if he can resist the operator's manipulation and simply choose randomly." "Three card monte masquerades as a game of skill in order to lure players, but in reality, it is at best a game of chance." *Denson* at 53.

In addition, the Moxie Mania device constitutes a coin operated gambling device because it readily can be adjusted and manipulated to be a game of chance. At the meeting of the State Liquor Authority, the inventor of Moxie Mania admitted that the device could be manipulated and adjusted. And the device has been adjusted and manipulated on at least two occasions.

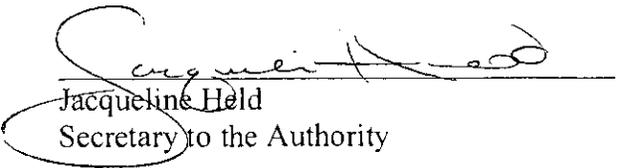
First, Moxie Mania had been adjusted and manipulated from when it appeared in Ohio, to when it appeared in New York and was demonstrated for Counsel to the State Liquor Authority. After that demonstration, Counsel to the Authority found that the device contained certain components which constituted gambling. Thereafter, the Moxie Mania device, again, was manipulated and adjusted. Upon a second demonstration, the specific components to which Counsel objected had been removed. Subsequently, Counsel issued his opinion letter that the device was a game of skill. Thus, the Moxie Mania device already has been adjusted and manipulated more than once, and gambling components recently have been removed. This

establishes that the device has been designed, constructed and/or is readily adaptable or can be converted to be used to operate as a gambling machine.

As described above, the device has all the characteristics of a video slot machine. Similar to a video slot machine, to operate Moxie Mania, money is inserted. Likewise, it has a similar screen, operates with the similar flashing of iridescent lights, and randomly stops. And it already has been adjusted and manipulated twice. Therefore, if Moxie Mania is placed in the market, the device itself is an attractive invitation for hackers and criminals to convert it into video slot machine.

Based on the discussion above, the game known as Moxie Mania answers the question, is it a contest of chance, in the affirmative. This gaming device's outcome depends in a material degree upon an element of chance. Although the proponents for the device allege that the skill of the player is the overriding factor, they have not proven that the device removes the material elements of chance. Moxie Mania masquerades as a game of skill in order to lure players and convince the New York State Liquor Authority it is a game of skill. The reality is the game depends in a material degree upon an element of chance. Therefore it is a gambling device that renders it unlawful to remain on licensed premises.

Dated: January 15, 2009


Jacqueline Held
Secretary to the Authority