

JAN - 9 1998

**MEMORANDUM**

**To:** Director, Division of Enforcement

**From::** Staff Attorney, Office of the General Counsel *DMS*

**Subject:** Reels of Skill Gaming Device

Several tribes in Oklahoma are using the Reels of Skill machine at their gaming facilities. As a result, you have requested our opinion on whether such games constitute Class II or Class III gaming. We conclude that these machines are Class III devices and can only be played pursuant to a tribal-state compact.

**DESCRIPTION OF THE MACHINE:**

The Reels of Skill game is a modified "Cherry Masters" game, which was recently found by the Florida Court of Appeals to be an illegal gambling device under Florida state law. See, State Department of Business and Professional Regulation v. Broward Vending, Inc., 696 So.2d 851 (Ct.App Fla. 1997). The machine is outwardly similar to a slot machine.

The machine consists of a cabinet containing a video screen, dollar bill acceptor, ticket printer (for dispensing credits via a paper ticket) and buttons to play the game. The video screen consists of nine symbols, arranged in a 3-x 3 pattern. During play the symbols appear to spin, as if on reels. The symbols are cherries, bells, bars and other various fruit. On the left side of the screen is a menu indicating how a player may obtain "bonus" play on the machine (i.e., if three bells, bars, cherries, etc. line up a certain number of times, the player will get bonus spins). Lining up winning patterns of symbols results in a line being imposed over the line and the player receiving credits, which the player can use to continue to play (or cash out). If the player plays multiple lines, the player can win multiple lines each play. Credits do accumulate within the device. Another "screen" appears alternately on the video screen, which indicates which symbol combinations are winners and the amount of the corresponding prize.

To play the game the player inserts money into the bill acceptor. Credits are given and appear on the screen numerically. One credit equals five cents. Once the player has credit, he can wager on one to eight lines at a time. Each line wagered costs one credit. The player can wager on 3 horizontal, 3 vertical and 2 diagonal lines. To select the number of lines to wager, the player pushes a button. Each push of the button adds another line to the wager.

Once the player has wagered, he pushes a button to start the video reels spinning. Once the reels begin spinning they do not stop until a button is pushed by the player to stop the reels. The player can push one button to stop all 3 reels or he can push separate buttons to stop each reel one at a time. If the reels stop and a predetermined pattern appears on one of the lines wagered by the player, the player receives credits. As the player plays, and does not line up the winning symbols, credits decrease.

According to the manufacturers' representative, the machines can be set at three (3) skill levels. The skill levels relate to how easy it is for the player to stop the spinning reels on the desired symbol. Mr. Cataldo stated that the game "loosens up or tightens up" depending on how poorly or well the player is doing. (i.e., if the player is winning, the machine becomes more difficult, requiring more skill; if the player is losing, the play becomes easier, thus less skill is required. The game software controls this feature.

An option the player has in playing the game, is to "hold" two similar symbols in one line for replay during the next spin. Pushing a button allows the player to select which two symbols, if any, the player wishes to hold. Another option, is to participate in bonus play which can be earned by obtaining a certain number of specific patterns, the player must then wager on all eight lines of play.

When the player chooses to cash out his credits, he pushes a button and a receipt is printed indicating his credit balance. The ticket can then be redeemed for cash or merchandise.

#### **ANALYSIS:**

- I. The Reels of Skill game is a "facsimile" under NIGC regulations which adopt the definition of "gambling device" under the Johnson Act.**

Pursuant to IGRA, 25 U.S.C. § 2703:

The term "Class II gaming" does not include ... (ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." 25 U.S.C. § 2703(B)(ii).

The current regulatory definition of electronic or electromechanical facsimile of any game of chance is "any gambling device as defined in 15 U.S.C. Sec. 1171(a)(2) or (3)." As discussed in Cabazon Band of Mission Indians v. Nat. Ind. Gaming, 827 F.Supp. 26 (D.D.C. 1993) aff'd 14 F.3d 633 (D.C.Cir. 1994) cert denied \_\_\_ U.S. \_\_\_, 114 S.Ct. 2709 (19 ), the distinction between Class II and Class III, according to IGRA, is that the use of "aids" is permitted for certain Class II games; the use of "facsimiles" is permitted only in Class III games when there is a Tribal-State compact. Therefore, in order to remain within Class II, the

Reels of Skill machine must not be a "gambling device" under the Johnson Act.

The term "gambling device" is defined in the Johnson Act, 15 U.S.C. 1171(a) as:

(1) any so-called "slot machine" or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or

(2) any other machine or mechanical device (including but not limited to, roulette wheels and similar devices) designed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as the result of the application of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or

(3) any subassembly or essential part intended to be used in connection with any such machine or mechanical device, but which is not attached to any such machine or mechanical device as a constituent part.

(emphasis added).

Federal courts have construed the term "gambling device" to include all sorts of electronic video gambling machines. United States v. 137 Draw Poker-Type Machines & Six Slot Machines, 606 F.Supp. 747, 754 (N.D. Ohio 1984), aff'd without op., 765 F.2d 147 (6th Cir. 1985); United States v. Sixteen Electronic Gambling Devices, 603 F.Supp. 32, 34 (D.Haw. 1984)(electronic video games duplicating casino games such as draw poker, blackjack and keno held to be gambling devices; Cabazon II, 827 F.Supp. At 26,(video pull tab devices).

Machines which operate as pure dispensers have been determined to be gambling devices. In United States v. Wilson, 355 F.Supp. 1394 (D.Mont. 1971) aff'd 475 F.2d 108 (9th Cir. 1972), the court held that two dispensers were gaming devices. Similarly, in United States v. Brown, 156 F.Supp. 121 (N.D. Iowa 1957), the court interpreted "gambling devices" under the Johnson Act, to include a coin operated machine that delivers a pellet containing a slip of paper on which certain poker hands were imprinted. The buyer would then compare the slip of paper to the posted board to determine whether they had a winning card combination. The court observed that a person operating the machine has no control over which particular pellet or poker hand he will receive. Everyone who puts money in the machine receives a pellet, but "whether he wins or loses on a particular play is determined entirely by chance." Id.

Other cases have reached similar results. United States v. Three Trade Boosters, 135 F.Supp. 24 (M.D.Pa. 1955)(court found that a trade booster designed to be used for remote control of an altered slot machine was a gambling device despite the fact that trade booster could be used in connection with non-gambling devices); United States v. 11 Star-Pack Cigarette Merchandise Machines, 248 F.Supp. 933 (E.D.Pa. 1966)(court found that device attached to a regular cigarette vending machine, and whose function was to activate, by element of chance, the cigarette vending machine to deliver a free package of cigarettes in addition to one which customer had purchased, was a "gambling device", and fact that gambling element furnished by device was intended as lure with which to attract more business did not alter its character).

More recently, in United States v. 294 Various Gambling Devices, 718 F.Supp. 1236 (W.D.Pa. 1989), the Court found that video draw poker devices were "gambling devices" within the meaning of the Act. In reaching this conclusion, the Court examined the evolution of the Johnson Act.

The original Act of 1951, represented by § 1171(a)(1), was aimed quite specifically at slot machines, or "one armed bandits." This caused some difficulty in enforcement, as numerous courts held the statute to be inapplicable to those acknowledged gambling devices which simply lacked the distinguishing element of a drum or reel with insignia . . . The 1962 amendment of the Act added § 1171(a)(2) and reflects Congress' intention to expand the scope of the prohibition to anticipate the continuing ingenuity of gambling device designers who had developed machines which did not fit the narrow definition of § 1171(a)(1) but which nevertheless fleeced the public with equal efficiency.

Id. at 1242.

There can be little question that the Reels of Skill machines fall within the definition of gambling devices. They are machines specifically designed and manufactured for gambling which requires prize, chance and consideration. When money(consideration) is inserted into the machine, the player has the opportunity (chance) to win money or property (prize).

## **II. The "skill" factor in the Reels of Skill game does not change the fact that the games are "gambling devices."**

Although some degree of skill may improve a person's chances of winning the Reels of Skill game, chance is still the predominant factor. As stated in State of Florida v. Broward Vending, Inc., 696 So.2d 851, 852 (Ct.App. 1997), "[w]hile skill will significantly improve the player's winning percentage, it does not eliminate the element of chance in the machine itself."

Other courts have found certain physical characteristics of a game to be relevant in deciding whether it is designed for amusement or for gambling. For example, the length of time it takes to play a particular game has been found to be a relevant factor in determining whether the game is a game of chance or skill. "On pinball machines or Pacman, a player's manual dexterity, eye-hand coordination and experience may produce a longer game and greater enjoyment for the player. In video poker, each game has a finite time of play and no amount of skill or experience can extend play beyond that very short limit." United States v. 294 Various Gambling Devices, 718 F.Supp. 1236 (W.D.Pa. 1989). The Reels of Skill game is more like video poker than pinball or Pacman in that the game is of very short duration and no amount of skill can extend the length of the game. While a player may accumulate credits to play additional games, skill does not impact the length of an individual game.

In addition, the limited skill element in Reels of Skill is countered by a retention ratio. As described by the manufacturer, the game is programmed to be more difficult when the player starts winning. The court in 294 Various Gambling Devices found this factor to be significant in determining whether a machine was a gambling device. "Over time the video poker machine is programmed to retain a set percentage of all credits played, so that over the long haul even the astute player cannot defeat the retention ratio." Id. at 1243.

Various courts have found that the short time of play, the inability to extend play, the absence of skill elements, the existence of a retention ratio, and the potential for inordinate numbers of free games are strong indications of a gambling device. E.g. United States v. 137 Draw Poker-Type Machines, 606 F.Supp. 747 (N.D.Ohio 1984) aff'd 765 F.2d 147 (6th Cir. 1985)(free games); United States v. Sixteen Electronic Gambling Devices, 603 F.Supp. 32 (D.C. Hawaii 1984)(time of play, free games, retention ratio); United States v. Two Coin-Operated Pinball Machines, 241 F.Supp. 57 (W.D.Ky. 1965) aff'd sub nom United States v. H.M. Branson Distributing Co., 398 F.2d 929 (6th Cir. 1968)(free games); United States v. One Bally County Fair Pinball Machine, 238 F.Supp. 362 (W.D.La. 1965)(free games). The Reels of Skill game has a short time of play, the inability to extend play, the existence of some form of retention ratio and the potential for inordinate number of free games. All of these factors illustrate that the machine is a gambling device.

Finally, the Reels of Skill game contains the equivalent of a multiple coin feature. The device permits a player to insert \$20.00 bills in the bill acceptor, even though each game costs only a nickel or a quarter. This feature allows a player to wager more than one credit on each play. Numerous federal courts have found that "multi-coin insertion and wagering allow a machine to make considerably more money in the same period of time. . . such a feature is unusual in amusement devices and many courts have considered the presence of a multi-coin feature to be strong evidence that a machine was designed and intended for gambling. United States v. 294 Gambling Devices, 718 F.Supp. at 1244 (citing United States v. 137 Draw Poker-Type Machines, 606 F.Supp. 747 (N.D.Ohio 1984) aff'd 765 F.2d 147 (6th Cir. 1985); United States v. Sixteen Electronic Gambling Devices, 603 F.Supp. 32 (D.C. Hawaii 1984); United States v. Various Gambling Devices, 368 F.Supp. 661 (N.D.Miss. 1973).

**III. The Reels of Skill games are class III under the plain meaning of IGRA.**

The IGRA's definition of class III gaming is one of omission. "Class III gaming means all forms of gaming that are not class I gaming or class II gaming. 25 U.S.C. § 2703(8). Class I gaming is traditional forms of Indian gaming engaged in as part of or in connection with, tribal ceremonies or celebration. 25 U.S.C. § 2703(6). Class II gaming means:

(I) The game of chance commonly known as bingo whether or not electronic, computer, or other technological aides are used in connection therewith -

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards,

including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that -

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State,

but only is (sic) such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

25 U.S.C. § 2703(7)(A)(emphasis added). The statute goes on to exclude "any banking card games, including baccarat, chemin de fer, or blackjack (21) or electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." 25 U.S.C. §2703(B).

The Reels of Skill machines do not fit the definition of class I or class II gaming. The machines are not bingo or any subgame of bingo, and therefore by omission from class II are class III. The result is that the games can only be played pursuant to a tribal/state compact.

## CONCLUSION:

Based on the foregoing analysis it is our conclusion that the Reels of Skill game is a "gambling device" under the Johnson Act, and as a result, is a class III game under current NIGC regulations. The existence of an element of skill in the game does not change the result that the game is predominantly a game of chance. It is clear that the machine was designed primarily for use in gambling, and by operation combined with an element of chance results in the delivery of money or property. Consequently, the game can only be played pursuant to a tribal state compact.