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A Fuzzy Issue: Are Eight-Liners Amusement or Gambling?

Debate continues over the legality of tens of thousands of electronic gaming machines found across Texas. The machines, often called "eight-liners," appear in venues ranging from shopping malls to convenience stores, truck stops, and, increasingly, establishments billed as "casinos" set up solely to play the machines.

In a January 1998 opinion, then-Attorney General Dan Morales ruled that the "fuzzy animal" law legalizing certain machines for amusement purposes is unconstitutional. Since then, some law-enforcement authorities and state agencies have stepped up efforts to stop the proliferation of what they call illegal gambling machines. Machine owners and operators have met these efforts with court challenges that in many cases have left the machines operating while the legal battles are fought. Other law-enforcement agencies have adopted a wait-and-see attitude, delaying enforcement efforts to allow the Legislature or the courts to define an illegal machine.

The machines now number some 30,000, according to Texas Department of Public Safety (DPS) estimates. Much of the growth in the number of machines occurred after a bill that would have tightened Penal Code definitions of permissible and illegal gambling devices died in the 1997 Legislature. Critics of the machines say they are illegal gambling devices that proliferated under cover of 1993 and 1995 laws that were intended only to legalize amusement machines with no significant payoff. Machine owners, operators, and players counter that the machines are legitimate amusement games, authorized by law, that provide entertainment for players and revenue for Texans who operate the machines.

In the face of this legal impasse, the 1999 Legislature is likely to consider legislation dealing with gambling and amusement machines. Proposals range from eliminating language that authorizes amusement machines to clarifying the definitions of legal and illegal machines to increasing penalties for gambling crimes.

The Governor's Task Force on Illegal Gambling, a group of legislators, law-enforcement officials, prosecutors, state agency representatives, and the general public, held four meetings last year to take testimony from police investigators, prosecutors, and state agency officials as well as machine owners and operators. In January 1999, the task force issued recommendations that include amending the Penal Code so that it unambiguously prohibits all slot machines, including eight-liners.

The Legal Debate

The current debate most often centers on eight-liners, which have eight lines on which a player can win (three across, three down, and two diagonal) by matching symbols. The legality of eight-liners and similar machines hinges on two questions: (1) Is the statutory exemption constitutional? (2) If so, how does it apply?

Chapter 47 of the Penal Code explicitly prohibits gambling-device versions of bingo, keno, blackjack, lottery, roulette, and video poker. It also defines illegal gambling devices as electronic, electromechanical, or

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mechanical contrivances that, for a price, allow players an opportunity to obtain anything of value, with the prize awarded solely or partially by chance, even though some skill may be necessary. Owning a gambling device is a Class A misdemeanor, punishable by a \$4,000 fine, one year in prison, or both.

AG's opinion on eight-liners and slots

Under 1993 and 1995 amendments, the Penal Code legalizes "amusement" machines: electronic games that offer low-value prizes — such as fuzzy-animal toys, trinkets, or a token redeemable for these types of prizes — so long as the value of prizes offered in a single play is limited to \$5 or 10 times the cost of playing the game once, whichever is less.

However, Attorney General Morales said in his January 1998 opinion (DM-466) that this exemption for "amusement" devices is unconstitutional because it improperly authorizes the operation of a "lottery." Art. 3, sec. 47 of the Constitution requires the Legislature to prohibit all "lotteries and gift enterprises" except those specifically authorized. The Constitution makes no exception for lotteries just because the prizes are small, Morales said. Only the state lottery, charity-sponsored bingo, and charitable raffles have been specifically authorized by constitutional amendments.

Morales' opinion said that eight-liners appear to have the three elements necessary to constitute a prohibited lottery: (1) they operate on the basis of chance, (2) they require the payment of consideration to play, and (3) they offer a prize, either coupons redeemable for gift certificates or, in some cases, cash. Without the "amusement" exemption, eight-liners would be illegal if they met the Penal Code's definition of illegal "gambling devices," and it is likely that a court would find that they do, Morales said. Court decisions have found that such machines function "solely on the basis of 'chance'" rather than by skill, he noted (*State v. Mendel*, 871 S.W.2d 906 (Tex.App. — Houston [14th Dist] 1994, no writ)). Thus, "we believe it is likely that a court would find . . . that an eight-liner is a 'gambling device' within the statutory definition," the opinion stated.

The state agencies that regulate lottery sales and bingo and alcoholic-beverage licenses also have authority to take action against licensees involved with eight-liners, according to the attorney general's opinion. The Texas Lottery Commission may suspend or revoke the licenses of lottery sales agents or bingo operators convicted of owning or possessing illegal gambling devices, and the commission has rulemaking authority to consider the conduct of an

applicant or licensee with respect to gambling, Morales said. The Texas Alcoholic Beverage Commission (TABC), he said, has statutory authority to prohibit eight-liners in facilities it licenses and may revoke alcohol licenses or permits. TABC also may suspend or cancel retailer licenses or permits of people charged with or convicted of a misdemeanor gambling offense.

While amendments to the Penal Code could authorize some casino-style games, legalizing the use of slot machines would require a constitutional amendment, Morales concluded in an August 1994 opinion (DM-302). Specifically, the Legislature could not legalize slot machines merely by amending the Penal Code definition of "bet," the ruling said.

The Governor's Task Force on Illegal Gambling concluded that eight-liners are illegal slot machines, cosmetically modified by gambling-device manufacturers so the machines appear to be for amusement purposes.

Disagreement with the AG's opinion

The Amusement and Music Operators of Texas (AMOT) — a trade association whose approximately 250 members operate such coin-operated machines as jukeboxes and pool tables as well as eight-liners — told the task force that it believes the law allowing eight-liners to operate in Texas is constitutional and that the attorney general's opinion misreads the Constitution. Many objections to the machines stem from how they look, not from what they do, the association stated. AMOT added that if the attorney general's opinion became law, it could abolish other games besides eight-liners.

Many observers agree that many electronic games played in amusement arcades are legal because they offer no tangible prize. Rather, winners are rewarded with "points," as in Pac-Man or some pinball games. Other games are legal because they are based on skill, not chance. Examples include shooting basketballs into a hoop or Skee Ball, which involves rolling balls up a ramp and scoring points by dropping the balls into slots.

Some analysts say eight-liners are like games of skill that operate within the 1995 law. Mike Macke, president of Cadillac Jack, Inc., a machine manufacturer, testified before the governor's task force that the machines have a button that must be pushed to complete a play of the game and that using this button is a matter of skill. Furthermore, he testified, eight-liners are part of the legitimate amusement industry, and operators often are small, independent business people and taxpayers who would be hurt if the machines were outlawed.

Eight-Liners at Work and Play

The controversy over gaming machines has centered on "eight-liners," so called because of the eight possible lines—three across, three down, and two diagonal—on which players can win. Witnesses told the Governor's Task Force on Illegal Gambling that these electronic machines are found in truck stops, shopping malls, convenience stores, fraternal lodges, and bars. They also are found in bingo halls, often in separate rooms with other machines offering video poker and blackjack, and increasingly in casino-like establishments whose only business is electronic gaming.

According to witnesses, the machines work as follows. Players deposit their money into the machine, receiving "credits," usually four per dollar, to bet as the game is played. Some machines accept bills as large as \$50 or \$100. Players activate the machine by pressing a button or pulling an arm. A match across, down, or diagonally on the screen indicates a win. With some machines, a win allows the option of playing another game that involves betting on whether high or low cards will be revealed. Winning players accumulate credits, sometimes worth large dollar amounts, depending on the amount bet.

Players generally push a button or other device on the machine to convert credits to tickets or other tokens. Although players sometimes are awarded directly with cash from the machine operator, generally the credits are

traded for gift certificates to local discount stores, grocery stores, or gas stations. Some machine operators pay off winnings with lottery tickets. Critics of the machines say that while this procedure may circumvent the law prohibiting cash awards, it still may violate limits on the value and form of prizes, since players may accumulate multiple certificates of \$5 each. Players often buy an inexpensive item with their certificate and receive the balance in cash. Machine owners split profits with the owner or proprietor of the business housing the machine.

Eight-liners and other electronic gambling machines, critics say, share certain features not found in true amusement machines:

- accounting and metering systems that keep track of the games played and the credits bet, won, and lost. Amusement machines usually have only mechanical readers that record the number of plays or amount of money deposited.
- a "knock-off" switch inside the machine that removes credits won by a player before the next player begins.
- means of manipulating the workings of the machine, including payoff odds and amounts. Most electronic gambling machines can be adjusted to retain anywhere from 5 percent to 95 percent of the money paid into them.

Law-Enforcement Efforts

Law-enforcement officials told the governor's task force that the electronic gambling industry — especially promoters of eight-liners — has benefited from loopholes and vague language in the law, which was intended only to legalize amusement games offering no significant payoff. They said that before the attorney general's opinion, enforcement of anti-gambling statutes was weak and prosecution rare because of the complexity of the statutes, gray areas in the law, and competing demand for resources to address other crimes. Local district and county attorneys responsible for prosecution against illegal gambling machines may be more inclined to direct limited resources to other problems, according to some witnesses. Because most gambling offenses are misdemeanors, many machine operators have been willing to risk criminal prosecution to

reap the huge profits that are possible, law-enforcement witnesses said.

After the attorney general's January 1998 opinion, law-enforcement authorities cracked down on owners, operators, and players of eight-liners. Initially, some law-enforcement agencies used the attorney general's opinion as the basis for prosecutions. They argued that since the attorney general said the amusement-machine language was unconstitutional, the machines were no longer exempt from laws prohibiting gambling devices and therefore were illegal. Attorney general opinions function as legal advice that can be relied on as having the effect of law. They are considered persuasive to courts and entitled to careful consideration, but under case law, they do not bind the judiciary.

Machine owners and operators and AMOT countered

the enforcement actions with lawsuits seeking to prevent agencies and prosecutors from basing criminal cases on the attorney general's opinion. These legal challenges prompted many law-enforcement authorities to switch gears and pursue cases by proving that the machines would be illegal even if the amusement-machine exemptions were upheld as constitutional.

Civil lawsuits

Because prosecutions and lawsuits are pending in courts throughout the state, it is difficult to estimate the total number or ultimate effect of legal actions involving eight-liners.

The Attorney General's Office has been involved in about 20 civil lawsuits, according to Reed Lockhoof, assistant attorney general. These cases generally involve machine owners or operators suing law-enforcement authorities or state agencies to stop the seizure of machines or proceeds from the machines. Some of the cases resulted in court orders temporarily restraining law-enforcement authorities and agencies from shutting down the eight-liners. However, many of these orders have been lifted.

In November 1998, the Seventh Texas Court of Appeals threw out a Potter County judge's injunction barring DPS and local law-enforcement authorities from seizing eight-liners. With the ruling, law-enforcement officials potentially could resume seizing the machines. The machine operators who initiated the case have asked the Texas Supreme Court to review it.

In February 1998, TABC notified its licensees and permittees that possession of illegal gambling devices is a violation of the Alcoholic Beverage Code for which the agency would take action. Agency inspectors began citing and issuing warnings to violators, some of whom settled their cases by removing or unplugging the eight-liners. Others countered with lawsuits that, in general, asked the courts to stop the agency from taking action against the machine owners.

In response to a lawsuit filed by AMOT, Austin District Court Judge John Dietz in October 1998 issued a temporary injunction stopping TABC from taking steps, outlined in two agency memos, to initiate certain actions against eight-liners. Judge Dietz said the contents of the memos were, in effect, rules that the agency had issued without following Administrative Procedure Act requirements. The temporary injunction prohibits TABC from ignoring the "amusement" exemption to the definition of gambling devices. Judge Dietz set the trial in the case for June 1999.

Phone Sweepstakes Questioned

Texas is seeing a proliferation of machines selling low-cost, prepaid telephone calling cards that include a chance to win a prize from a "sweepstakes," witnesses told the Governor's Task Force on Illegal Gambling. The chance is encoded on a separate tab that is read by a special bar-code scanner. In some cases, winners can collect winnings from the retail clerk in the store housing the machine. In another variation, prepaid telephone cards contain a covering that is scratched off to reveal whether the purchaser is a winner. Card vendors say the games are similar to sweepstakes offers by other companies, such as fast-food restaurants, and that anybody may obtain a sweepstakes entry for free.

A February 1997 attorney general's opinion (DM 97-008) held that telephone cards with attached sweepstakes entries have at least two of the three elements of an illegal lottery: chance and prize. Depending on the facts in an individual case, the third necessary element would be present if the price of the card included "consideration" for the right or privilege of participating in the sweepstakes and whether the people paying for the phone card and sweepstakes were favored over those obtaining tickets for free. If the Texas Lottery Commission determined that a specific sweepstakes was a prohibited lottery, the device dispensing the tickets would be a gambling device under Chapter 47 of the Penal Code, the opinion concluded.

Criminal prosecutions

Criminal prosecutions against machine owners and operators generally involve charges of possessing a gambling device, keeping a gambling place, or some other gambling-related offense. However, criminal convictions have been few.

What was hailed as the first successful prosecution occurred in November 1998, when a Georgetown man pleaded no contest to misdemeanor gambling charges in an eight-liner case. Critics of the machines applauded the conviction, but machine operators downplayed its significance as a test case because other charges were dropped against the defendant, who also pleaded no contest to an unrelated driving-while-intoxicated charge and was sentenced to probation.

Another criminal case resulted in a jury acquitting the owner of Monte Carlo, a Burnet County establishment housing eight-liners, of 32 misdemeanor gambling charges. In January 1999, an Amarillo jury convicted a woman in an eight-liner case on a misdemeanor charge of keeping a gambling place. The judge placed her on 90 days probation. Some analysts downplayed this case's significance, saying that it dealt more with housing a betting parlor than with the legality of eight-liners.

Local prosecutors and state agencies have had help in their attempts to bring criminal charges against owners and operators of allegedly illegal machines. The Attorney General's Office, with support from the Governor's Office, has established a task force to help local prosecutors with eight-liner cases. DPS has been working with other state agencies and local law-enforcement agencies and prosecutors to raid operations and seize what it calls illegal gambling machines. The Texas District and County Attorneys Association has held training sessions to teach prosecutors and law-enforcement officers about the gambling statutes.

Legislative Proposals

During the 1997 session, the House approved HB 3350 by Place, Keel, and Oakley to alter the Penal Code definitions of gambling devices and to amend the 1995 amusement-machine language to define more carefully amusement machines and other terms relating to electronic machines. The bill died in the Senate after the conference committee report was filibustered. (For a detailed analysis of HB 3350, see House Research Organization *Daily Floor Report*, May 9, 1997.)

Current proposals for legislative action range from deleting entirely the current language authorizing "amusement" machines to defining the features of legal and illegal machines more strictly. Other proposals seek to increase penalties for gambling and to allow state agencies to impose new administrative sanctions against machine owners and operators.

The governor's task force recommended amending the Penal Code to prohibit clearly all slot machines, including eight-liners. One way to do this, the task force reported, would be to eliminate the 1993 language that describes certain amusement machines as legal. The task force also recommended increasing criminal penalties for gambling violations. Other proposals would require state agencies, such as TABC and the Lottery Commission, that oversee some businesses that own and operate the machines to engage in rulemaking and enforcement efforts to crack

down on eight-liners. Another proposal would give more enforcement authority to the Comptroller's Office, which already issues state tax permits for coin-operated amusement machines, including eight-liners.

AMOT testified before the task force that it supports reasonable and fair regulation of amusement machines and opposes cash prizes. The association has proposed banning machines with graphic illustrations that are offensive, prohibiting casino-like operations that have eight-liners as their sole or primary income source, eliminating loopholes that could lead to the conversion of gift certificates to cash, and clarifying the statutes to avoid inconsistent enforcement of anti-gambling laws. However, some urge caution in amending state statutes, because failure to enact language clearly prohibiting the machines could be interpreted by courts to mean that the machines are legal.

Eliminating amusement-machine exception

One proposal would remove from statute the amusement-machine exception that Attorney General Morales found unconstitutional. This would leave a general prohibition against certain types of gambling devices without specifically exempting "amusement" machines.

Supporters say removing the exception would outlaw eight-liners and other machines based on chance without affecting purely skill-based amusement machines. Machines with cranes that pick up stuffed animals or games in which contestants toss a basketball into a net could continue to operate as they did before the amusement-machine exception was enacted in 1993 and 1995.

Opponents of the idea say that the exception allowing amusement machines, including eight-liners, should remain in the law because these devices are true amusement machines that Texans should be able to continue playing. It would be unfair to outlaw eight-liners or other specific types of machines based solely on how they look.

Other opponents of removing the exception argue that some language allowing amusement machines should remain in the statute so that the law would distinguish between true amusement machines and other devices, such as eight-liners. Absent any distinction, the eight-liner industry will continue to operate in Texas by claiming to offer amusement machines based on skill. These opponents argue that eight-liners must be explicitly outlawed or they will continue to proliferate, but other true amusement machines should have specific protection in the law.

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Operators of Native American Gambling Centers Turn to Courts to Test Legality of Games

Gambling centers run by two Texas Indian tribes continue operating despite ongoing legal battles. The Tigua tribe has been operating a gaming center since 1993 and the Kickapoos since 1996, but the dispute over the legality of certain games intensified in 1997 and 1998 when the Governor's Office began exploring ways to stop what it called illegal gambling on the reservations.

Both tribes continue to operate the games in question while they appeal court rulings. The Tigua tribe has appealed a federal district judge's August 1998 dismissal of the tribe's request to decide the legality of their gambling operations near El Paso. The Texas Band of the Kickapoos has appealed a June 1998 ruling by another federal district judge that pull-tab bingo machines operated by the tribe on its land near Eagle Pass are illegal gaming apparatuses that can be operated only with the agreement of the state.

The Alabama-Coushatta tribe, the only other recognized Native American tribe in Texas, voted in 1994 against conducting gambling operations on its reservation and currently maintains that position, according to a spokesman. The tribal lands are in Polk County, near Livingston.

Regulation of Native American gambling

In general, gambling on Native American lands is governed by the federal Indian Gaming Regulatory Act (IGRA) of 1988. State law comes into play only when certain types of gambling, including most casino games, are offered.

IGRA divides games used for gambling into three classes. It gives tribes exclusive jurisdiction over Class I games, which include social games either for nominal prizes or as part of tribal ceremonies or celebrations. Tribes and the federal government regulate Class II gaming, which includes bingo, pull tabs, and certain

other games in which players compete against each other rather than against the house.

Casino operations generally fall into Class III and are subject to both state law and tribal jurisdiction. Generally, tribes may sponsor Class III games that are allowed under state law if a state-tribal compact has been negotiated and if other provisions of federal law are met.

Different laws govern gaming by the Kickapoos and Tiguas. In general, the Kickapoos are governed by IGRA, while the Tiguas are governed by the federal law that restored the tribe to federal jurisdiction. Both tribes generally argue that the card games they offer are legal because players compete only with each other, not against the house. The current legal disputes center on electronic bingo pull-tab games offered by the Kickapoos and on slot machines operated by the Tiguas.

Because the Kickapoos are governed by federal law, the U.S. Attorney's Office is responsible for both civil and criminal law enforcement relating to gambling on their tribal lands, according to the Governor's Office. The Tiguas, however, are governed by their restoration act, which authorizes the state to go to federal court to seek relief in civil matters, while the U.S. Attorney's Office has authority over criminal matters.

The Tiguas and the Speaking Rock Bingo and Entertainment Center

The Tigua tribe (also known as the Ysleta del Sur Pueblo) opened Speaking Rock Bingo and Entertainment Center, a high-stakes bingo operation near El Paso, in November 1993. The tribe later added poker and other card games, pull-tab bingo dispensers, and slot machines. The current controversy centers on whether they can legally operate slot machines.

In 1993, the Tiguas tried to force the state to negotiate a compact so the tribe could open a gambling casino. They argued, among other points, that under federal Indian

gaming law, Texas' creation of a state lottery in 1991 opened the door for the tribe to operate similar gambling activities, including slot machines. U.S. District Judge Lucius Bunton of Pecos ruled that the state had to negotiate a compact with the tribe. In 1994, a 5th U.S. Circuit Court of Appeals panel threw out the lower court decision, ruling that the Tiguas had agreed to a prohibition against state-banned gambling in the law that restored the tribe to federal jurisdiction. The U.S. Supreme Court refused to hear the Tiguas' appeal of the case. The 1998 lawsuit brought by the Tiguas differs from the earlier suit because it bases its arguments on the law that restored the tribe to federal jurisdiction, not on federal Indian gaming law.

In the spring of 1998, the Governor's Office asked Attorney General Dan Morales to pursue litigation against the Tiguas for operating illegal slot machines. In May 1998, before the attorney general had taken any action, the Tiguas sued the state and the governor in federal court, seeking to have the tribe's slot machines declared legal. The tribe claimed that the act that restored them to federal jurisdiction allowed them to conduct any type of gambling permitted in the state.

The Tiguas argue that their slot machines are legal because they have the same basis—random number generators—as some of the games operated by the state lottery. The Governor's Office disputes this claim, arguing that because slot machines are specifically illegal in Texas, they are illegal on Native American lands as well.

In dismissing the case, Judge Bunton said the Tiguas were bound by the Constitution's 11th Amendment prohibition against suing a state without its consent. The dismissal is being appealed to the 5th U.S. Circuit Court of Appeals. If the tribe wins its appeal, the case would return to the district court for a trial.

The Texas Band of the Kickapoos and the Lucky Eagle Casino

The Kickapoos opened the Lucky Eagle Casino on their land near Eagle Pass in August 1996 with high-stakes bingo, card games, and bingo pull-tab dispensers. The tribe claims authority to operate electronic bingo pull-tab games as Class II gaming under the federal Indian gaming act. They argue that their Lucky Tab II machines are legal because they are only an aid to playing the legal game of pull-tab bingo.

In pull-tab bingo, a player buys a ticket and then removes a covering from the game piece to see if the symbols printed on the ticket are winners. To play a Lucky Tab II machine, a player puts money into a machine that dispenses a pull-tab ticket and also provides a video display of what is on the ticket.

Amid discussions in early 1997 between the state and the U.S. Attorney's Office about the legality of the

Kickapoo and Tigua gambling operations, the Kickapoos filed a lawsuit in federal district court in Washington, D.C., asking the court to rule that the Lucky Tab II machines were legal Class II gaming devices. In June 1998, Judge Ricardo M. Urbina ruled that the machines were illegal and could be operated only with state approval through a compact between the tribe and the state. The Kickapoos announced that they would continue to operate the pull-tab machines while appealing the ruling to the District of Columbia U.S. Circuit Court of Appeals. The Governor's Office says it will not enter into a state-tribal compact that permits any game that is illegal in Texas.

Disputes over the legality of certain games offered by Native American gambling operators in Texas have intensified over the past two years. While they appeal court rulings, the Tiguas and Kickapoos continue to operate their games.



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The statute should continue to provide some affirmative approval of amusement machines to protect the legitimate amusement industry from arbitrary prosecutions by law-enforcement authorities. This also would assure proprietors of and investors in businesses that offer amusement games, such as children's pizza parlors, that the machines are legal in Texas. The amusement industry is an important part of the Texas economy that offers wholesome family entertainment.

Defining prohibited features

Another legislative proposal would prohibit machines that include certain features. The list of features that could be outlawed includes random number generators, the ability to accumulate and bet winnings, the ability to increase the odds of winning, and the capability to pre-program the outcome of a play.

Supporters say this proposal would close loopholes in the law that have allowed eight-liners to proliferate under the cover of a law intended only to legalize amusement machines. Law-enforcement efforts would be able to focus on the "bright line" between legal and illegal machines.

Opponents say defining an "illegal" machine based on its inner workings or technical aspects would further

complicate the job of law enforcement and lead to machines that skirt whatever criteria are developed. The value of prizes awarded to players on a single play of the game should be the criterion used to determine legality. Carefully crafting language to target eight-liners specifically would be unfair.

Increasing criminal penalties

Other proposals call for increasing penalties for criminal gambling violations.

Supporters say that the criminal penalties for possession of illegal gambling machines, gambling promotion, and other gambling-related offenses should be increased from misdemeanors to felonies because the punishments available for misdemeanor offenses are not harsh enough to deter people from breaking the law.

Opponents say that raising penalties for these crimes to felonies would be inappropriately harsh and that felony punishments should be reserved for more serious offenses. The careful balance of punishments and crimes crafted in the 1993 revisions of the Penal Code should not be upset.

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