

August 6, 2004

The Honorable Ken Egbert, Jr.
Seneca County Prosecuting Attorney
71 South Washington Street, Suite 1204
Tiffin, Ohio 44883

SYLLABUS:

2004-029

1. If the outcome of the play of a game is determined more than fifty percent by chance, the outcome of the game is determined “largely or wholly by chance” for purposes of R.C. 2915.01(AAA)(1)(b).
2. Anything of value that is offered for winning a contest, competition, or tournament, based upon the play of a machine referred to in R.C. 2915.01(AAA)(2), constitutes a “prize” for purposes of R.C. 2915.01(AAA)(2)(c).



STATE OF OHIO
OFFICE OF THE ATTORNEY GENERAL
JIM PETRO, ATTORNEY GENERAL

30 E. Broad St.
Columbus, OH 43215-3400
Telephone: (614) 752-6417
Facsimile: (614) 466-0013
www.ag.state.oh.us

August 6, 2004

OPINION NO. 2004-029

The Honorable Ken Egbert, Jr.
Seneca County Prosecuting Attorney
71 South Washington Street, Suite 1204
Tiffin, Ohio 44883

Dear Prosecutor Egbert:

You have submitted an opinion request concerning the meaning of the phrase “scheme of chance,” as used in R.C. 2915.02, which prohibits, among other things, various activities related to “schemes of chance.” As used in R.C. 2915.02, the term “scheme of chance” excludes a “skill-based amusement machine,” as defined in R.C. 2915.01(AAA). You specifically ask:

1. Pursuant to R.C. 2915.01(AAA)(1)(b), the outcome of an individual’s play and participation involving a “skill-based amusement machine” is not to be determined largely or wholly by chance. Therefore, if the outcome is to be determined largely by skill rather than largely by chance, what amount of skill is necessary for the play to not constitute a game or scheme of chance?
2. Pursuant to R.C. 2915.01(AAA)(2)(c), what constitutes a prize for purposes of a “skill-based amusement machine” being used in a contest, competition, or tournament?

Before answering your specific questions, let us briefly examine the prohibitions against “schemes of chance” prescribed by R.C. 2915.02, in part, as follows:

(A) *No person shall* do any of the following:

...

(2) *Establish, promote, or operate* or knowingly engage in conduct that facilitates any game of chance conducted for profit or *any scheme of chance*;

(3) Knowingly procure, transmit, exchange, or engage in conduct that *facilitates* the procurement, transmission, or exchange of *information for use* in establishing odds or determining winners *in connection with* bookmaking or with any game of chance conducted for profit or *any scheme of chance*;

(4) Engage in *betting* or in *playing* any *scheme* or game of *chance* as a *substantial source of income* or livelihood;

....

(B) For purposes of division (A)(2) of this section, a person facilitates a game of chance conducted for profit or a scheme of chance if the person in any way knowingly aids in the conduct or operation of any such game or scheme, including, without limitation, playing any such game or scheme.

(C) This section does not prohibit conduct in connection with gambling expressly permitted by law.

....

(F) Whoever violates this section is guilty of gambling, a misdemeanor of the first degree. If the offender previously has been convicted of any gambling offense, gambling is a felony of the fifth degree. (Emphasis added.)

For purposes of R.C. 2915.02, the term “scheme of chance” includes “a slot machine, lottery, numbers game, pool conducted for profit, or other scheme in which a participant gives a valuable consideration for a chance to win a prize, but *does not include* bingo, a *skill-based amusement machine*, or a pool not conducted for profit.” R.C. 2915.01(C) (emphasis added).¹ Thus, a skill-based amusement machine does not constitute a “scheme of chance” for purposes of R.C. 2915.02.

The term “skill-based amusement machine,” as used in the foregoing definition of “scheme of chance,” means:

a skill-based amusement device, such as a mechanical, electronic, video, or digital device, or machine, whether or not the skill-based amusement machine requires payment for use through a coin or bill validator or other payment of consideration or value to participate in the machine’s offering or to activate the machine, provided that all of the following apply:

(a) The machine involves a *task, game, play, contest, competition, or tournament* in which the *player actively participates* in the task, game, play, contest, competition, or tournament.

(b) The *outcome* of an individual’s play and participation is *not determined largely or wholly by chance*.

(c) The outcome of play during a game is not controlled by a person not actively participating in the game.

¹ R.C. 2915.01(AAA) was added to R.C. 2915.01 by Am. Sub. H.B. 95, 125th Gen. A. (2003) (eff., in pertinent part, July 1, 2003).

R.C. 2915.01(AAA)(1) (emphasis added).²

Your first question concerns the portion of the definition of a “skill-based amusement machine” in R.C. 2915.01(AAA)(1)(b) that requires the outcome of the play of any such machine not to be determined “largely or wholly by chance.” Pursuant to R.C. 2915.01(AAA)(1)(b), if the outcome of the play of a device is determined “wholly by chance,” involving no element of skill, the device does not constitute a “skill-based amusement machine.” Your concern, however, focuses on the meaning of the word “largely,” as used in R.C. 2915.01(AAA)(1)(b), to describe the amount of chance involved in determining the outcome of the play of a device.

It is well established that a word in a statute, unless it has acquired a technical or special meaning, is to be understood according to its common meaning. R.C. 1.42. According to *Webster’s New World Dictionary* 794 (2d college ed. 1978), “largely” means “much; in great amounts ... for the most part; mainly.” Thus, if the outcome of the play of a device is determined for the most part or mainly by chance, the device is not a “skill-based amusement machine,” as defined in R.C. 2915.01(AAA).

The phrase “largely by chance,” as part of the definition of “game of chance” in R.C. 2915.01(D),³ has been similarly interpreted. As explained by the court in *Ohio Vending*

² Pursuant to R.C. 2915.01(AAA)(2), a “skill-based amusement machine” must possess certain additional characteristics, as follows:

All of the following apply to any machine that is operated as described in division (AAA)(1) of this section:

(a) As used in this section, “task,” “game,” and “play” mean *one event* from the initial activation of the machine until the results of play are determined without payment of additional consideration. An individual utilizing a machine that involves a single task, game, play, contest, competition, or tournament may be *awarded prizes based on the results of play*.

(b) Advance play for a single task, game, play, contest, competition, or tournament participation may be purchased. The cost of the contest, competition, or tournament participation may be greater than a single non-contest, competition, or tournament play.

(c) To the extent that the machine is used in a contest, competition, or tournament, that contest, competition, or tournament has a *defined starting and ending date* and is *open to participants in competition* for scoring and ranking results toward the awarding of *prizes that are stated prior to the start* of the contest, competition, or tournament. (Emphasis added.)

Operators Group v. Department of Liquor Control, No. 87AP-64, 1987 Ohio App. LEXIS 8308 (Franklin County Aug. 13, 1987), the phrase “largely by chance,” as used in R.C. 2915.01(D) to describe games of chance, requires that the outcome of a game be determined more than fifty percent by chance or that the element of chance predominates over skill in determining the outcome of a game. *See, e.g., Progress Vending, Inc. v. Department of Liquor Control*, 59 Ohio App. 2d 266, 273, 394 N.E.2d 324 (Franklin County 1978) (“in light of the trial court’s finding that skill predominates over chance in the play of the pinball machines in question, the play of such machines does not constitute a game of chance as defined by R. C. 2915.01(D)”)⁴. In using the same phrase in the definition of “skill-based amusement machine,” the General Assembly indicated its intent that the phrase receive a similar interpretation. *See generally State ex rel. Enos v. Stone*, 92 Ohio St. 63, 110 N.E. 627 (1915) (had the General Assembly intended a particular result, it could have employed language used elsewhere that plainly and clearly compelled that result).

This interpretation of the phrase “largely ... by chance,” as used in R.C. 2915.01(AAA)(1)(b), is consistent with the long-established understanding of that phrase as describing the element of chance that is part of any type of gambling. *See, e.g., Westerhaus Co. v. City of Cincinnati*, 165 Ohio St. 327, 135 N.E.2d 318 (1956) (syllabus, paragraph eight) (“[i]n order to have a lottery, the determination as to who gets a prize or how much of a prize he gets must be dependent at least *predominately* upon the element of chance” (emphasis added)); *Stevens v. Cincinnati Times-Star Co.*, 72 Ohio St. 112, 148, 73 N.E. 1058 (1905) (“if the *dominating, determining* element is one of chance, that element gives character to the whole scheme” (emphasis added)).

In answer to your first question, we find that, if the outcome of the play of a game is determined more than fifty percent by chance, the outcome of the game is determined “largely or wholly by chance” for purposes of R.C. 2915.01(AAA)(1)(b).

Your second question asks what constitutes a “prize,” as that word is used in R.C. 2915.01(AAA)(2)(c), which imposes the following limitation on the use of any “skill-based amusement machine”:

³ R.C. 2915.01(D) defines “game of chance” as meaning “poker, craps, roulette, or other game in which a player gives anything of value in the hope of gain, the outcome of which is determined *largely by chance*, but does not include bingo.” (Emphasis added.)

⁴ *See generally VFW Post 8586 v. Ohio Liquor Control Comm’n*, 83 Ohio St. 3d 79, 82, 697 N.E.2d 655 (1998) (“R.C. 2915.01(D) recognizes that its enumerated games, including poker, are largely determined by chance and involve a player giving something of value in the hope of gain. It draws other games within its purview only if they are demonstrated to similarly involve an element of chance and the giving of something of value in the hope of gain”).

To the extent that the machine is used in a contest, competition, or tournament, that contest, competition, or tournament has a *defined starting and ending date* and is *open to participants in competition* for scoring and ranking results toward the awarding of *prizes that are stated prior to the start* of the contest, competition, or tournament. (Emphasis added.)

The word “prize,” as used in R.C. 2915.01(AAA)(2)(c) is not defined by statute. However, the courts have frequently addressed what constitutes a “prize” as one of the three elements of gambling.⁵ The courts have generally adopted a broad definition of the word “prize,” as meaning *anything of value*. See, e.g., *Kraus v. City of Cleveland*, 135 Ohio St. 43, 46, 19 N.E.2d 159 (1939) (“for a game to constitute gambling, it must be one which is played for gain of money or a thing of value as the prize or reward”). Even the opportunity to replay a machine at no additional cost upon attaining a sufficiently high score in the initial play has been determined to have sufficient value to constitute a prize. See, e.g., *Stillmaker v. Department of Liquor Control*, 18 Ohio St. 2d 200, 249 N.E.2d 61 (1969) (syllabus, paragraph two) (“[a]musement has value and added amusement has additional value, and where added amusement is subject to be procured by chance without the payment of additional consideration therefor, there is involved in the game the elements of gambling, namely, price, chance and a prize”); *Westerhaus Co. v. City of Cincinnati* (syllabus, paragraph seven) (“[t]he right, to replay a nickel pinball machine, if a sufficient score is attained, by merely pushing a button and without using another nickel, may represent the prize which is necessary in order to have the operation of such a machine constitute gambling”). See generally *Great Atlantic & Pacific Tea Co., Inc. v. Cook*, 15 Ohio Misc. 181, 185, 240 N.E.2d 114 (C.P. Franklin County 1968) (“[t]he courts are in general agreement that a prize is some advantage or inequality in amount or value, accruing to some, but not all, of the participants in the game or contest”). Accordingly, we conclude in answer to your second question that anything of value that is offered for winning a contest, competition, or tournament, based upon the play of a machine referred to in R.C. 2915.01(AAA)(2), constitutes a “prize” for purposes of R.C. 2915.01(AAA)(2)(c).

Based upon the foregoing, it is my opinion, and you are hereby advised that:

1. If the outcome of the play of a game is determined more than fifty percent by chance, the outcome of the game is determined “largely or wholly by chance” for purposes of R.C. 2915.01(AAA)(1)(b).
2. Anything of value that is offered for winning a contest, competition, or tournament, based upon the play of a machine referred to in R.C.

⁵ *Stillmaker v. Department of Liquor Control*, 18 Ohio St. 2d 200, 249 N.E.2d 61 (1969) (syllabus, paragraph one) (“[i]n general, the elements of gambling are payment of a *price* for a *chance* to gain a *prize*”); *Westerhaus Co. v. City of Cincinnati*, 165 Ohio St. 327, 135 N.E.2d 318 (1956) (syllabus, paragraph five).

The Honorable Ken Egbert, Jr.

- 6 -

2915.01(AAA)(2), constitutes a “prize” for purposes of R.C.
2915.01(AAA)(2)(c).

Respectfully,

A handwritten signature in black ink, appearing to read "Jim Petro", written in a cursive style.

JIM PETRO
Attorney General