



March 13, 2023

Via Electronic Mail

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Re: *Reasoned Legal Opinion for Card-Based Skill Games*

To Whom It May Concern:

This Reasoned Legal Opinion is respectfully submitted in support of “Card-Based” Skill Games, as described herein, on the Avatarlife platform.

I. GAME SUMMARY

There are a myriad of card games that borrow elements from poker. This opinion does not address poker¹ specifically, but rather games that borrow some or more elements from its core gameplay and mechanics. These games are herein categorized into three (3) groups, “Stud”, “Single Player Draw”, and “Multi Player Draw”.

The games designed in this opinion as “Stud” game operate in the same fashion as so-called “Stud Poker” games. A single player is presented with a Game Field consisting of a set number of rows and columns (5 rows and 3 columns for the

¹ Although not specifically addressed, poker has been held by a reviewing federal court not to constitute gambling, but instead, to be a game of skill. *See United States v. DiCristina*, 886 F.Supp.2d 164 (E.D.N.Y. 2012)

sake of example), the exact number of which does not have an impact on the analysis of the game. Whatever number of columns are present, the player must make the best possible poker hand of that number by selecting one card from each column. As a “stud” style game, there is no opportunity to draw more cards or to discard any cards. The player is presented with all possible options and evaluated based on the strength of the hand they can create.

Singe Player Draw games present the player with a variable Game Field. In the most basic version, the player is dealt a “hand”, 1 row of cards in the same number as the hand that must be compiled (e.g. 5 cards for a 5 card hand and 7 cards for a 7 card hand). The player then has an option to “hold” some or all of the cards – if all of the cards are held, the hand is evaluated, if only some cards are held, the remainder are replaced with new cards. The degree of difficulty can be increased by increasing the number of columns, increasing the number of rows, or both.

Multiplayer Draw Games present each player with their own “hand” of cards and then either provide the option for a player to hold some cards and draw more from a communal set of unrevealed cards or present all players with a partial hand and allow them to make a compete hand using a set of communal cards.

Although I did not come across any examples of this style of play, in theory a Multiplayer Stud Game is possible in which each player is presented with an immutable Game Field and each player must make the best possible hand.

II. INTRODUCTION

The determination of online gambling is dependent on a number of Federal Statutes that regulate gambling and related activities. State law regulations and decisions may be implicated either through the state attorney generals’ right to bring an action for enforcement under 31 U.S.C. § 5365(2)(A), or by specific State statutes governing gambling. Most states choose to regulate games and sites that incorporate: (1) compensation paid (2) for a chance to win (3) a prize. Of particular importance to the providers of games that may fall under these statutes, is the Unlawful Internet Gambling Enforcement Act of 2006 (“UIGEA”). The UIGEA bans and criminalizes the acceptance of funds from bettors by operators of most online gambling websites. The affected operators are those who:

- (1) are engaged in the business of betting or wagering;
- (2) knowingly accept;

- (3) proceeds from credit cards, electronic fund transfers and checks;
- (4) in connection with the participation of a bettor;
- (5) in unlawful Internet gambling, which is the sponsorship of online gambling that violates any other federal or state anti-gambling laws.

31 U.S.C. §§5363 and 5365(2)(A). The UIGEA prohibits gambling businesses from knowingly accepting payments in connection with the participation of another person in a bet or wager that involves the use of the Internet **and** that is unlawful under any federal or state law. 31 U.S.C. § 5363. It states that “unlawful Internet gambling” is “plac[ing], receiv[ing], or otherwise knowingly transmit[ing] a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made.” 31 U.S.C. § 5362(10)(A). (Emphasis added).

The overwhelming majority of cases have assumed, without analysis, that the government need only prove that the business involved gambling as defined by state law, not that the game operated constituted “gambling” as defined by the federal law such as Illegal Gambling Business Act (“IGBA”). An ‘illegal gambling business,’ in turn, is defined as one which ‘(i) is a violation of the law of a State ... in which it is conducted; (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of \$2,000 in any single day.’ ”); *United States v. Truesdale*, 152 F.3d 443, 446 (5th Cir.1998)

A minority of opinions have implied that the government must prove that the business ran games that also constituted “gambling” as defined by the IGBA. *See United States v. Hunter*, 478 F.2d 1019, 1021 n. 2 (7th Cir.1973)(“As defined in the statute, “ ‘gambling’ ” includes but is not limited to pool-selling, book-making, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.’ In this case appellants concede that their activities constituted ‘gambling’ as so defined, *and* that they were conducted in violation of the law of Indiana.”); *United States v. Kaczowski*, 114 F.Supp.2d 143, 152 (W.D.N.Y.2000) (“Section 1955 defines an ‘illegal gambling business as a gambling business which ... is a violation of the law of State of political subdivision in which it is conducted....’ 18 U.S.C. § 1955(b)(1). Further, ‘gambling’ is defined thereunder to include bookmaking. 18 U.S.C. § 1955(b)(2).”).

Because the application of the UIGEA requires the making, and processing, of bets or wager **and** the violation of a state or federal law such that “illegal

gambling” activities are at issue, it becomes necessary to determine whether a game is considered “illegal gambling.” The provision in the UIGEA that focuses on the legality of gaming activities in the jurisdiction where the bettor resides highlights the importance of geographic restrictions on potential users of the site.

Promotional games can be categorized as follows: (1) lotteries; (2) sweepstakes; or (3) skill-based contests. Every state in the United States prohibits lotteries without governmental approval. A lottery is defined as a game whereby players make a wager in exchange for a chance to win a prize. By contrast, a sweepstakes, which is legal but regulated in most states, removes the requirement of a wager in lieu of a no purchase, no compensation, chance to win a prize. Finally, unlike a sweepstakes, the winners of a skill contest are selected for their ability to perform the task required by the contest rather than by random selection. As chance is generally absent, or at least significantly diminished, in a legal skill contest, in most states, a sponsor may require consideration from the contest participants, whether it is in the form of an entry fee or the expenditure of substantial time and effort².

Distinguishing a skill contest from a sweepstakes, however, is not always clear because many skill contests also involve some element of chance. If chance predominates over skill, such that chance, not skill, determines the outcome of the promotion, the skill contest becomes indistinguishable from a sweepstakes, and the consideration element will likely transform it into an illegal lottery. Determining whether a game is a game of skill or of chance is a process performed by individual states and made on a case-by-case basis for each game of concern. For example:

Far from being clear and certain, the provision of outlawing games of chance is one that South Carolina state courts must apply, on a machine-by-machine basis, to a complex and ever-changing cadre of gambling technology. Indeed, the development of video gaming machine technology and of the state courts’ application of § 12-21-2710 demonstrates that the meaning and treatment of games of chance present different questions of state law from which the district court legitimately abstained.

Martin v. Stewart, 499 F.3d 360 at 376.

² See, e.g., *Progress Vending, Inc. v. Department of Liquor Control*, 59 Ohio App.2d. 266, 394 N.E.2d 324 (1978) (coin operated pinball machines are a skill-based game, and therefore required purchase to play is lawful).

Pure Chance

In determining whether chance is present, courts generally employ one of two tests: (1) the pure chance analysis, or (2) the dominant factor test. Under the pure chance test, a promotion is considered to be a lottery only when a person's judgment plays no part whatsoever in the selection and award of the prize.

Dominant Factor Test

According to the dominant factor analysis, a promotion constitutes a lottery where chance dominates the distribution of prizes, even though such distribution is affected to some degree by the exercise of skill or judgment³. Most states follow the dominant factor analysis.⁴ In *Morrow v. State*, the Alaska Supreme Court set forth four elements that determine whether skill predominates over chance:

³ *Morrow v. State*, 511 P.2d 127, 129 (Alaska 1973).

⁴ See, e.g.:

First Circuit: *United States v. Marder*, 48 F.3d 564, 569 (1st Cir. 1995), cert. denied 514 U.S. 1056, 115 S.Ct. 1441, 131 L.Ed.2d 320 (1995) (under Massachusetts law, in order for a game to be considered a lottery, "chance must predominate over skill in the results of the game, or the element of chance must be present in such a manner as to thwart the exercise of skill or judgment in a game").

Alaska: *Morrow v. State*, *supra*.

California: *Bell Gardens Bicycle Club v. Department of Justice*, 36 Cal.App.4th 717, Cal. Rptr.2d 730, 748 (Cal. App. 1995) ("The 'domination' standard is a well-settled test in California.").

Wisconsin: *State v. Hahn*, 586 N.W.2d 5, 10-11 (Wis. App. 1998) (construing the statutory definition of a "gambling machine," which states that the award of something of value is "determined by chance, even though accompanied by some skill," as equivalent to the requirement for lotteries that chance rather than skill must be the dominant factor controlling the award.

1. Participants must have a distinct possibility of exercising skill and have sufficient data upon which to calculate an informed judgment;
2. Participants must have the opportunity to exercise the skill, and the general class of participants must possess the skill;
3. The skill must sufficiently govern the result; and
4. The standard of skill must be known to participants, and this standard must govern the result.

The test for the first element is that, without skill, it would be absolutely impossible to win the game. In other words, there must be some true skill that is being exercised, whether it is athletic or intellectual. Certain games are considered inherently skill-based, such as sporting contests, essay contests, spelling bees, poetry contests, or photography contests. Marble and slot machines, and guessing and most puzzle games, on the other hand, generally are viewed as games of chance. Where the contest is aimed at the general public, the general class must possess the capacity to exercise the skill but not everyone need to have the same level of skill.

Consider, however, that Florida and South Carolina differ on whether a hole-in-one contest is one of skill or chance, with Florida finding in favor of skill and South Carolina in favor of chance. The ultimate determination can be unfortunately subjective. Consider also *Commonwealth v. Plissner*, 4 N.E.2d 241, 244 (Mass. 1936) where a crane-like machine used to grab certain prizes was determined to be an illegal lottery in Massachusetts because “after a certain point in the operation of the machine, the player could no longer exercise any skill or even control over the mechanism” because the actual grasping of the object depended on chance. A somewhat unresolved question is whether the same can be said for the use of random number generator-type elements in arcade and video games.

While the Dominant Factor Test is the most common test employed by jurisdictions in differentiating between permissible games of skill and illegal games of chance, multiple states use the more stringent and fact-intensive Material Element Test. To attest to the legality of the Game in this Opinion, the analysis will separate those jurisdictions that apply the Dominant Factor Test from those that apply the Material Element Test for ease of discussion. Essentially there are only

two aspects to this analysis: (1) whether the Game is considered a game of skill under the Dominant Factor Test; and (2) whether the Game is considered a game of skill under the Material Element Test.

III. State Level Analysis

A. The Dominant Factor Test

The Dominant Factor Test can be thought of as a simple math ratio. If skill accounts for at least fifty one percent (51%) of the outcome of a game, then skill is the predominant factor, and the Game would be considered a “game of skill” in the jurisdictions that follow the Dominant Factor Test, as described below.

Alabama	“Certainly chance must be the <i>dominant</i> factor.” <i>Opinion of the Justices No. 83</i> , 249 Ala. at 522, 31 So.2d at 759
Alaska	Alaska’s <i>Morrow v. State</i> , 511 P.2d 127, 129 (Alaska 1973) provides the seminal case outlining the Dominant Factor Test.
California	“Whether a game is a game of skill or a game of chance depends upon which factor predominates.” <i>Knowles v. O’Connor</i> , 266 Cal.App.2d 31, 33 (Cal. Ct. App. 1958)
Connecticut	“Gambling exists where the element of chance predominates over skill; it is not necessary for the element of chance to be exclusively responsible for a win. See Gen.Stat §53-278a(2).” <i>Mendelsohn v. BidCactus, LLC</i> 2012 WL 1059702; see also Conn. Op. Atty. Gen. 2005 WL 40734, at *3 (Jan. 4, 2005).
District of Columbia	The District of Columbia has no apparent restrictions or prohibitions on the operation of a skill-based contest that would apply to this analysis. D.C. courts have generally followed Federal and

	<p>Supreme Court rulings interpreting federal laws on gambling based on the Dominant Factor Test. <i>See generally National Conference on Legalizing Lotteries v. Farley</i>, 68 App.D.C. 319, 321 “. . . the test is whether success in any given contest depends upon skill or upon chance. If the award of the prize depends upon the exercise by the participants of judgment, the plan is not a lottery, for in that case the element of chance is lacking and winning depends upon the exercise of superior knowledge or skill.”</p>
Georgia	<p>“[C]ontests for the determination of skill” are excluded from the definition of gambling. <i>See generally</i> Ga. Code §§ 16-12-20. In addition, the threshold of “some skill” is extremely low and refers to any act by the player to affect in some way the outcome of the game. <i>See Ultra Telecom, Inc. v. State</i>, 701 S.E.2d 144 (Supreme Court of Georgia, October 4, 2010).</p>
Idaho	<p>“Bona Fide contests of skill” are excluded from the definition of gambling in I.C. §18-3801. <i>See generally Oneida County Fair Bd. V. Smylie</i>, 86 Idaho 341 (1963)</p>
Illinois	<p>Only some degree of skill is required for a determination that a game is a game of skill rather than chance. <i>People v. One Mechanical Device</i>, 11 Ill.2d 151 (1957).</p>
Indiana	<p>“[B]ona fide contests of skill” are excluded from the definition of gambling under I.C. §35-45-5-1. “Chance rather than skill must therefore be the dominant factor controlling the award in a lottery.” <i>Lashbrook v. State</i>, 550 N.E.2d 772</p>

	(Ind.Ct.App.1990)
Iowa	I.C.A. §99B.61 a game is lawful where “skill is the predominant factor in determining the result of play”
Kansas	Bona fide contests of skill are excluded from the definition of gambling under Kan. Stat. Ann. §§21-6403-04 and the appropriate determination is whether skill or chance is the “dominant factor”. See <i>Three Kings Holdings, LLC v. Six</i> , 45 Kan.App.2d 1043 (2011)
Maine	A game is a contest of chance where chance as an element that influences an outcome cannot be eliminated through the application of skill. M.R.S. 17-A §952-3(c); §952-4
Massachusetts	“[B]y the weight of authority a game is not considered a lotter if the element of chance predominates.” <i>Commonwealth v. Lake</i> , 317 Mass. 264, 267, 57 N.E.2d 923, 925 (1944)
Minnesota	A game will not be considered gambling unless its award is “determined principally by chance.” <i>Wexler v. Brothers Entertainment Group, Inc.</i> , 457 N.W.2d 218 (1990)
Mississippi	Where skill predominates over chance a game will not be considered gambling. <i>Rouse v. Sisson</i> , 190 Miss. 276 (1941).
Missouri	“[A] lottery is a form of gambling in which consideration is paid for an opportunity at a prize, where skill is absent or only nominally present.” <i>Harris v. Missouri Gaming Comm’n</i> , 869 S.W.2d 58, 62 (Mo.

	1994).
Montana	“[W]hether the element of skill predominated over the element of chance determined whether game was a lottery.” <i>State ex rel. Dussault v. Kilburn</i> , 111 Mont. 400, 404, 109 P.2d 1113, 1115 (1941).
Nebraska	A game of chance is one in which the result as to success or failure depends less on the skill and experience of the player than on purely fortuitous or accidental circumstances incidental to the game. Nebraska courts apply the Dominant Factor Test – see <i>American Amusements Co. v. Nebraska Dept. of Revenue</i> , 807 N.W.2d 492 (2011)
New Hampshire	“Gambling” is defined as the act of risking something of value upon a future contingent event not under one’s control or influence (i.e. absent the influence of skill). N.H.R.S. §647:2(d).
New Mexico	“Gambling” does not include offers of purses, prizes or premiums to the actual contestants in any bona fide contest for the determination of skill. See N.M. STAT 30-19-1(B)(2). “[L]ottery is defined as ‘an enterprise’ . . . wherein, for a consideration, the participants are given an opportunity to win a prize, the award of which is determined by chance, even though accompanied by some skill.” Citation <i>Bingo, Ltd. v. Otten</i> , 121 N.M. 205, 2017 n.2, 910 P.2d 281, 283 n.2 (1995)
North Carolina	“[M]ost courts have reasoned that there

	are few games, if any, which consist purely of chance or skill, and that therefore a game of chance is one in which the element of chance predominates over the element of skill.” <i>State v. Sroupe</i> , 238 N.C. 34, 37, 76 S.E. 2d 313, 316 (1953).
North Dakota	Impermissible games of chance and lotteries turn on a question of whether chance predominates. <i>Middlemas v. Strutz</i> , 71 N.D. 186 (1941)
Ohio	<i>Pickaway City Skilled gaming, LLC v. Cordray</i> (2010) 127 Ohio St.3d 104, 105 – R.C. 291501(C) “scheme of chance” does not include a skill-based amusement machine. These machines range from games (e.g. Skee-ball and Whac-a-Mole) commonly found at fair and amusement park midways and in family fun centers to more sophisticated skill-based games found in Second Life.
Oklahoma	Gambling is staking on chance where chance is the controlling factor. <i>Delano v. State</i> , 82 Okla.Crim. 258 (1946)
Oregon	Gambling is defined as risking something of value on the outcome of a contingent event not under the control or influence of the person taking the risk. O.R.S. §167.117(7).
Pennsylvania	A game is a game of chance if chance predominates over skill. <i>Commonwealth v. Dent</i> , 992 A.2d 190 (2010).
Rhode Island	“[A] scheme constitutes a lottery when an element of chance dominates the distribution of prizes, even though such a distribution is affected to some degree by

	the exercise of skill or judgment.” <i>Roberts v. Communications Inv. Club of Woonsocket</i> , 431 A.2d 1206, 1211 (R.I. 1981).
Texas	Games of chance are those that are determined entirely or in part by lot or mere luck, and in which judgment, practice, skill or adroitness have honestly no office at all, or are thwarted by chance, a game in which hazard entirely predominates. <i>Boatwright v. State</i> , 118 Tex. Crim. 381 (1931).
Utah	A game of chance is one in which chance predominates over skill. <i>D’Orio v. Startup Candy Co.</i> , 71 Utah 410 (1928).
Virginia	Illegal gambling turns on whether the outcome of an event is uncertain or a matter of chance. Code of Virginia §18.2-325-340.
Washington	“Chance within the lottery statute is one which dominates over skill or judgment.” <i>Seattle Times Co. v. Tieslch</i> , 80 Wash.2d 502, 507, 495 P.2d. 1366, 1369 (1972).
West Virginia	“[W]here . . . chance predominates, even though skill or judgement may enter to some extent in the operation of a particular scheme or device, the scheme or device is a lotter.” <i>State v. Hudson</i> , 128 W.Va. 655, 665. 37 S.E.2d. 553, 558 (1946)
Wisconsin	“Chance rather than skill must therefore be the dominant factor controlling the award in a lottery.” <i>State v. Dahik</i> , 111 Wis. 2d 287, 296, 330 N.W. 2d. 611, 617 (1983)

Wyoming	Contests of skill are excluded from the definition of gambling. WYO Stat. Ann. §6-7-101-(iii)(a)(2014).
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Although somewhat subjective, the Dominant Factor Test presents a low burden for these types of games to meet. Regardless, Single Player Draw games present only a modicum of skill for players since there is no ability to change any of the options presented the player. The skill involved then is only to memorize the best “poker hands” and to be able to pick them out among the other options. It is recommended that this type of game be set aside for the other variants described below.

The draw variants require players to know the best possible “poker hands” but also to evaluate the statistical probability of drawing the required cards to finish a hand (or to have a communal set draw the same). The degree of skill required increases where there is a set number of decks that the cards are drawn from with a set number of each card and suit rather than using randomly generated cards each time a player plays. The addition of wild cards does not present a material variable to alter the degree of skill required to play the game it merely changes the numbers for the statistical evaluation. The addition of other players, however, significantly increases the degree of skill involved in play and it is strongly recommended that development favor skill games. The addition of raising, checking, betting, bluffing, and keeping track of the “hands” of other players add significant and material elements that greatly increase the skill involved.

For the aforementioned “Multiplayer Stud Game” that is possible, skill would only be present in a meaningful way if the players are using communal cards.

B. The Material Elements Test

Colorado	Where the element of chance is a material element in the outcome of a contest it is a game of chance. <i>Charnes v. Central City Opera House Ass’n.</i> , 773 P.2d 546.
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Hawaii	A contest of chance is any game where the outcome depends in a material degree upon an element of chance. H.R.S. §712-1220(3).
New Jersey	See N.J. Stat. Ann. § 2C:37-1 (defining a “contest of chance” as one in which “the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants or some other person may also be a factor therein”).
New York	“Gambling differs from other kinds of contests in that in gambling “the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein.” People v. Turner, 165 Misc.2d 222 (1995).
Vermont	Games will not constitute a lottery where no element of chance is present. <i>State v. Lindsay</i> , 110 Vt. 120 (1938).

The Material Element Test requires an operator to minimize the impact of chance such that it does not play a “material” role in the outcome of a game. Although still subjective, it is clear that any variant other than Single Player Stud, can clearly meet this burden. I have concerns that this version of the game may be too random.

C. Michigan

Michigan is unique in that it is the only applicable jurisdiction to follow neither the Dominant Factor nor the Material Element test for determining what constitutes gambling. Instead, Michigan defines gambling as accepting money or a valuable thing contingent upon result of a game, race, contest or happening of uncertain event. MICH. COMP. LAWS. §750.310 (2010). Thus, under Michigan law, any exchange of a thing of value, based on the results of a game or other type of

contest, would constitute gambling, regardless of the level of skill and/or change involved.

D. Connecticut, Wisconsin, Arkansas, and Florida

Each of these states has expressly outlawed Poker as gambling. As a result, it is likely that any of these variants would be similarly considered.

E. Alabama, Nebraska, North Carolina, Pennsylvania, Colorado, Illinois

Each of these states have court cases where poker was determined to be a game of chance rather than skill. There is no guarantee that the same determination would be made for these games but these states do present risks.

IV. Conclusion

The draw variants of these games are bona fide games of skill under both the Dominant Factor Test and the Material Element Test and appears to be permissible in nearly all jurisdictions. That being said, players from Michigan should be excluded and care should be taken to make as many distinctions and differentiations from poker as possible in order to operate in Connecticut, Wisconsin, Arkansas, Florida, Alabama, Nebraska, North Carolina, Pennsylvania, Colorado, and Illinois. Any additional skill element possible will help this differentiation.

Very truly yours,

Wolk & Levine, LLP



Zachary Levine, Esq.