Q: What is an “eight liner” machine?

A: An eight liner machine is an electronic gaming machine that resembles a slot machine. Depending on the type of machine, a player “wins” if a horizontal, vertical, or diagonal row of objects line up. The machines now come in multiple variants and can include video reel, video keno, and video bingo games, among many others. The cost to play a machine, as well as the prize for winning, varies. Over the last ten years, many Texas cities have seen a massive proliferation of gaming parlors that feature the machines.

Q: What has prompted the proliferation of – and controversy relating to – eight liners?

A: A 1993 statutory amendment. Prior to 1993, Section 47.01 of the Texas Penal Code clearly prohibited any game of chance that “for consideration affords the player anything of value.” In 1993, the Legislature amended this statute by adding Section 47.01(4)(B). That amendment relaxed the previous standard by making legal:

any electronic, electromechanical, or mechanical contrivance designed, made, and adapted solely for bona fide amusement purposes if the contrivance rewards the player exclusively with noncash merchandise prizes, toys, or novelties, or a representation of value redeemable for those items, that have a wholesale value available from a single play of the game or device of not more than 10 times the amount charged to play the game or device once or $5, whichever is less.

TEX. PENAL CODE § 47.01(4)(B) (emphasis added). The above provision, sometimes referred to as the “fuzzy animal law,” appears intended to allow the operation of coin-operated amusement machines that award children’s prizes, such as stuffed animals or coupons redeemable for toys. In practice, it has been used to justify machines that go way beyond children’s games.

Q: Is the fuzzy animal law constitutional?

A: Contrary to the attorney general’s initial opinion, Texas courts have concluded that the fuzzy animal law is constitutional. In Opinion Number DM-466 (1998), the attorney general interpreted Section 47.01(4)(B) as unconstitutional under Article III, Section 47(a), of the Texas Constitution. That constitutional provision provides that “[t]he Legislature shall pass laws prohibiting lotteries and gift enterprises in this State other than [charitable bingos, raffles, and the state lottery].” TEX. CONST. art. III, § 47(a). However, several Texas appeals courts have held that the attorney general’s interpretation of the Penal Code is incorrect. In other words, those courts concluded that the fuzzy animal law is constitutional. See Legere v. State, 82 S.W.3d 105, 112 (Tex. App.—San Antonio 2002, pet. ref’d); State v. Wofford, 34 S.W.3d 671, 680-81 (Tex. App.—Austin 2000, no pet.); Owens v. State, 19 S.W.3d 480 (Tex. App.—Amarillo 2000, no pet.); State v. Hancock, 35 S.W.3d 199, 200-01 (Tex. App.—Waco 2000, no pet.). C.f., State v. Gambling Paraphernalia, Devices, Equip. & Proceeds, 356 S.W.3d 594 (Tex. App.—Corpus Christi 2011, no pet.) (holding that a “replay” card is a “thing of value” that would bring the
devices within the definition of an illegal gambling device); *Letson v. Vanaman*, No. 07-98-0263-CV, 1998 WL 767093 (Tex. App.—Amarillo Nov. 4 1998, pet. denied) (not designated for publication) (overturning an injunction by an eight liner operator against the sheriff and state law enforcement officers that seized his machines in order to investigate a violation of the Penal Code).

In addition, at least two courts have concluded that law enforcement officials may not rely solely on Attorney General Opinion Number DM-466 to seize machines as being illegal gambling devices. *Weaver v. Head*, 984 S.W.2d 744 (Tex. App.—Texarkana 1999, no pet.) (concluding that a sheriff needs probable cause to seize eight liners as gambling devices, and may not rely solely on an attorney general opinion to do so); *Texas Alcoholic Beverage Comm’n v. Amusement & Music Operators*, 997 S.W.2d 651 (Tex. App.—Austin 1999, pet. dism’d w.o.j.) (upholding an injunction against the Texas Alcoholic Beverage Commission that prohibited reliance on an enforcement memorandum issued to officers in reliance on Texas Attorney General Opinion Number DM-466).

Q: Are eight liners legal in Texas?

A: It depends. Several Texas appeals courts have held that Penal Code Section 47.01(4)(B) is constitutional. Thus, eight liners that fit within the definition contained in Section 47.01(4)(B) are legal to operate in Texas.

Under current law, if the eight liner is used only for bona fide amusement purposes, awards the player with noncash merchandise or vouchers redeemable for novelty items, and the value of the prize or certificate is not more than 10 times the cost of a single play or five dollars (whichever is less), the machine is legal. On the other hand, if the machine pays out in cash or exceeds the statutory minimum prize amount, it is illegal.

However, it’s not quite that simple. Eight liner operators use various tactics to “skirt” the law. For example, two consolidated Texas Supreme Court cases from 2003 hold that gift certificates redeemable at retail stores are the equivalent of cash and eight liners that dispense the certificates are illegal gambling devices. In addition, if an eight liner rewards a player with cash, even if that cash is only used to play another machine, the eight liner is an illegal gambling device. *See Hardy v. State*, 102 S.W.3d 123 (Tex. 2003); *State v. One Super Cherry Master Video 8-Liner Machine*, 102 S.W.3d 132 (Tex. 2003); *see also* Tex. Att’y Gen. Op. No. GA-0913 (2012) (concluding eight liner machines in a bingo hall that issue tickets redeemable for daubers, bingo play cards, and items from a bingo hall concession stand are illegal gambling devices).

The Texas Supreme Court extended the logic of *Hardy* in a 2013 case, *State v. $1,760.00 in U.S. Currency*, 406 S.W.3d 177 (Tex. 2013). Here, the eight liners accepted cash, which the machine converted into points that were used for play. When a player redeemed points from an eight liner upon completion of play, the eight-liner dispensed a ticket for every five hundred points won. Players could use the tickets to either (1) redeem store merchandise that did not exceed a wholesale value of $5, or (2) receive credits to replay another machine, which were implemented electronically by an attendant without having to convert the tickets back into cash. Players could return at a later date to redeem the tickets for replays on the eight liners. The tickets had no cash
value and were never exchanged for cash for replay. Nevertheless, the court held that an electronic, non-immediate right of replay does not fall into the Section 47.01(4)(B) exception because the distributed tickets were not redeemable exclusively for noncash merchandise prizes, toys, or novelties. State v. $1,760.00 in U.S. Currency, 406 S.W.3d 177, 178 (Tex. 2013).

The attorney general issued an opinion in 2007 concluding that an amusement machine that records a player’s winnings onto a stored-value debit card is not excluded from the definition of gambling device (meaning that such a payout system would be illegal depending on the payout amount). Tex. Att’y Gen. Op. No. GA-0527 (2007). However, a federal court later concluded that the opinion is not persuasive, and in all likelihood would not be followed by a Texas Court:

the sum and substance of the Attorney General’s opinion is that stored-value cards are equivalent to cash (and, therefore, the amusement game is prohibited) because “the stored-value cards ... are used as a medium of exchange ... that can be exchanged for merchandise.” Yet the Act specifically authorizes an award of “a representation of value redeemable for [noncash merchandise].” Consequently, Opinion No. GA-0527 is not helpful.

Aces Wired, Inc. v. Gametronics, Inc., No. A-07-CA-768-LY, 2007 WL 5124986 at *4 (W.D. Tex. Sept. 24, 2007). In the Aces Wired case, prize points were awarded and stored in an account and accessed by use of a card issued to a customer. The points had no cash value but represented one dollar for each point, strictly for purposes of prize redemption. When a customer redeemed points at a participating retailer, the retailer transferred possession of the customer’s selected noncash merchandise to the customer. Aces Wired then paid the retailer. The court held that, “[a]ccordingly, a ‘Prize Point’ is no more than a representation of value as contemplated by the [Penal Code].” Id. The court distinguished the Texas Supreme Court’s opinion in the Hardy case. In Hardy, the eight liners dispensed tickets redeemable for gift certificates, which violated the Penal Code because the certificates could be used exactly the same as cash. Hardy v. State, 102 S.W.3d 123, 131 n.6. (Tex. 2003). In other words, the tiniest distinction muddies a court’s opinion.

Other cases have interpreted the legality of eight liners and various questions of law relating to them, including Jester v. State, 64 S.W.3d 553 (Tex. App.—Texarkana 2001, no pet.) and Allstar Amusement v. State, 50 S.W.3d 705 (Tex. App.—Waco 2001, no pet.). For instance, courts have opined that owners of eight liners are not entitled to a declaratory judgment as to whether their machines are operating legally. See Briar Volunteer Fire Dep’t v. Anderson, No. 2-04-258-CV, 2005 WL 1475409 (Tex. App.—Ft. Worth June 23, 2005, no pet.) (mem. op.); City of Longview v. Head, 33 S.W.3d 47 (Tex. App.—Tyler 2000, no pet.); Warren v. Aldridge, 992 S.W.2d 689 (Tex. App.—Houston [14th Dist.] 1999, no pet.). In Warren, the owner of an eight liner establishment filed a lawsuit seeking a declaration that their machines were not illegal gambling devices (and injunctive relief to prevent criminal prosecution and forfeiture of machines). The appeals court ultimately held that the trial court had no jurisdiction to render a declaratory judgment on the interpretation of a penal statute prohibiting the possession of gambling devices or to enjoin its enforcement in the absence of any challenge to the constitutionality of the statute. See Warren, 992 S.W.2d at 691.

Ultimately, the difficulty in enforcing Section 47.01(4)(B) is twofold: (1) it is not always clear when an eight liner’s payouts are illegal; and (2) the costs and logistics of investigating and prosecuting the cases.

Q: May cities prohibit or ban eight liner machines altogether?

A: The Texas Penal Code makes the operation of eight liners illegal in the circumstances discussed above. City law enforcement may enforce state law if a machine is being operated illegally. However, if a machine is operating legally under state law, a city is arguably prohibited from banning it (based on the preemption doctrine). City attorneys may have different interpretations in this area, so it is of the utmost importance to seek the advice of your city attorney, who is familiar with the specific facts of your situation, before taking any action.

Q: Have Texas legislators attempted to address eight liner issues?

A: Yes, but without success. For example, during the 2011 regular legislative session, at least two bills were introduced but did not pass. H.B. 1154 would have, among other things: (1) authorized the comptroller to assess a penalty between $50 and $2,000 against an owner or operator of a coin-operated machine who is convicted, in relation to owning or operating the machine, of keeping a gambling place or possessing a gambling device, equipment, or paraphernalia; and (2) authorized a city to assess a civil penalty against an owner or operator of a coin-operated machine who is convicted, in relation to owning or operating the machine, of keeping a gambling place or possessing a gambling device, equipment, or paraphernalia.

H.B. 1183 would have: (1) authorized a commissioners court and – in some instances – a city, to order, on proper petition, a local option election to legalize or prohibit the operation of eight liners; and (2) authorized the imposition of a fee on eight liner owners and provide for the allocation of the fee revenue as follows: (a) thirty percent to the state’s general revenue fund; and (b) seventy percent to a city in which the eight liner is located. Essentially the same bill was introduced in 2013 (H.B. 109 and the accompanying constitutional amendment, H.J.R. 27) and 2015 (H.B. 1385 and H.J.R. 92) but, again, did not pass.

At least two other eight liner bills, H.B. 1830 and H.B. 2642, were filed in 2015. As filed, both bills would have provided: (1) that the current law authorizing one county to regulate “amusement redemption machines” is expanded to authorize any county to do so; and (2) for additional county regulatory authority over such machines. It was unclear whether the bills would have applied within a city’s limits and/or would preempt city regulations. Neither bill passed.

Q: Is a city authorized to impose a fee or levy a tax on eight liner machines?
A: Yes. A city is authorized to impose an occupation tax on coin-operated machines that may not exceed one-fourth of the state tax. Tex. Occ. Code § 2153.451(b). The current state tax is sixty dollars per machine. Id. § 2153.401. Thus, a city may impose a tax of fifteen dollars per year on each machine. This fifteen dollar tax is authorized by state law.

Q: May cities impose other taxes or fees on eight liner machines to raise revenue for the city or related entities?

A: No. No other general revenue-raising measure may be imposed upon a machine, regardless of whether it is termed a “tax” or a “permit fee.” Any regulatory fee imposed by a city must be related to the cost of enforcing related regulations not for the purpose of raising revenue. In Hurt v. Cooper, 110 S.W.2d 896, 899-900 (Tex. 1937), the Texas Supreme Court set forth the test to determine whether a fee should be classified as a regulatory measure or a tax measure. One court discussing that test explains as follows:

[T]he rule for determining this question is well settled, that if from a consideration of the ordinance as a whole, the primary purpose of the fees provided for therein is the raising of revenue, then such fees are in fact occupation taxes. On the other hand, if the primary purpose appears to be that of regulation, then the fees imposed are license fees. The word ‘revenue’ as used above means the amount of money which is excessive and more than reasonably necessary to cover the cost of regulation, and not that which is necessary to cover cost of inspection and regulation.

Producers Ass’n of San Antonio v. City of San Antonio, 326 S.W.2d 222, 224 (Tex. Civ. App.—San Antonio 1959, writ ref’d n.r.e.) (citations omitted). In other words, exorbitant regulatory fees may be deemed an unconstitutional tax.

In addition, revenue from eight liners should probably not be used to fund city-related entities, such as a volunteer fire department. The reason for that advice is the confusion detailed above regarding whether the machines are in violation of the Penal Code. See, e.g., Briar Voluntary Fire Dept. v. Anderson, No. 2-04-258-CV, 2005 WL 1475409 (Tex. App.—Fort Worth June 23, 2005, no pet.)(mem. op.).

Q: May a city otherwise regulate eight liner machines?

A: Yes, with certain limitations. Section 2153.452 of the Texas Occupations Code expressly authorizes a city to regulate eight liners through zoning. However, it goes on to provide that a city “shall treat the exhibition of a music or skill or pleasure coin-operated machine in the same manner as the political subdivision treats the principal use of the property where the machine is exhibited.” In other words, a city can’t discriminate against a commercial or retail establishment solely because there are eight liners on the premises.

In addition, Section 2153.452(b) expressly authorizes a city to “restrict the exhibition of a coin-operated amusement machine within 300 feet of a church, school, or hospital.”
Finally, some cities have enacted ordinances requiring, among other things: (1) that an attendant to be present during open hours; (2) that machines be in full, open view; (3) limited hours of operation; and (4) the prohibition of minors near the machines. Many cities also require a license or permit for a game room or individual machine. None of the above requirements have been tested in court. Whether or not to impose them should be decided by each city after consultation with local legal counsel. As stated above, any fees imposed by a city, beyond a $15 tax, should be related to the cost of enforcing the related regulations.