ALAN WILSON
ATTORNEY GENERAL

June 28, 2022

The Honorable W. Brian White
Post Office Box 970
Anderson, SC 29621

Dear Representative White:

You have requested an opinion from this Office regarding gambling laws and RESPA [Real Estate Settlement Procedures Act, 12 U.S.C. 2601 et seq.]. You explain that a real estate company in your district would like to have a Giveaway Win for potential customers. The Giveaway Win will be run as a sweepstakes. It will be a random drawing with people who have not sent a referral. There is no required purchase or consideration to enter.

LAW/ANALYSIS

As we have stated in many prior opinions, this Office is not empowered to make factual findings.[1] However, we can provide you with the applicable law as guidance. The South Carolina Constitution expressly prohibits the operation of lotteries in South Carolina, although there are certain exceptions:

> Only the State may conduct lotteries, and these lotteries must be conducted in the manner that the General Assembly provides by law . . .
>
> The game of bingo, when conducted by charitable, religious, or fraternal organizations exempt from federal income taxation or when conducted at recognized annual state and county fairs, is not considered a lottery prohibited by this section.
>
> A raffle, if provided for by general law and conducted by a nonprofit organization for charitable, religious, fraternal, educational, or other eleemosynary purposes, is not a lottery prohibited by this section . . .

[1] See Op. S.C. Atty. Gen., 1989 WL 406130 (April 3, 1989) ("[b] ecause this Office does not have the authority of a court or other fact-finding body, we are not able, in a legal opinion, to adjudicate or investigate factual questions.")

S.C. Const. art. XVII, § 7. In response to the State Constitution, the Legislature enacted statutes criminalizing setting up lotteries, selling lottery tickets, and even participating in a lottery. See S.C. Code Ann. §§ 16-19-10; 16-19-30; 16-19-20 (1976 Code, as amended).

We have previously explained that "[t]ypically, a raffle whereby an individual buys a ticket for the opportunity to win a prize based upon a random drawing is considered a lottery." Op. S.C. Atty. Gen., 2006 WL 3877513 (Dec. 11, 2006) (citations omitted). "However, other games or events may also be considered a lottery." Id.

In Darlington Theatres v. Coker, et al. 190 S.C. 282, 2 S.E.2d 782 (1939), our South Carolina Supreme Court concluded that a lottery consists of three elements: (1) the giving of a prize, (2) by a method involving chance, (3) for a consideration paid by the participant. The Court explained "[t]o make a lottery, these three elements or ingredients must be present; chance alone, or chance coupled with consideration alone, will not do so." Id. In a prior opinion, this Office added:

> If one of these essential elements is absent, the scheme is not a lottery, regardless of the motive for the omission, and, conversely, if all of the elements are present, the scheme is a lottery, regardless of the fact that the dominant purpose of its sponsor is to increase its business.

Op. S.C. Atty. Gen., 1966 WL 8502 (May 2, 1966).

The movie theater in Darlington Theatres held a drawing for advertising and promotional purposes. The Court found that the first two elements of a lottery, prize and chance, were clearly present. The issue was whether consideration was given. The Court described the consideration in a lottery:

> In regard to the element of consideration, it has been said that the species of lottery which is intended to be prohibited as criminal by the various laws of this country embraces only schemes in which a valuable consideration of some kind is paid, directly or indirectly, for the chance to draw a prize; and that the gratuitous distribution of property by lot or chance, if not resorted to as a device to evade the law, and if no consideration is derived directly or indirectly from the party receiving the chance, does not constitute a lottery."

Darlington Theatres v. Coker, 190 S.C. 282, 2 S.E.2d at 787 (citations omitted).

Although the Court concluded that no consideration was given for either participating in the drawing or claiming and receiving the prize money in this particular factual situation,[2] it pointed out that "[w]here no price is paid for tickets, but in order to win a person must purchase something else, this would be included in the definition of a nature of a lottery." Id, 190 S.C. 282, 2 S.E.2d at 785.

This language in Darlington Theatres is strongly supported by other court decisions and by opinions of this Office. See Op. S.C. Atty. Gen., 1997 WL 255957 (April 16, 1997) at 3. As we stated in a prior opinion,

> The cases are fairly consistent in holding that where prize tickets are furnished to customers, that is, those who purchase something, the payment by the customer is for both the article purchased and the prize, part of the consideration being for the ticket. State v. Powell, 212 N.W. 169; Matta v. Katsoulas, 212 N.W. 261. On the other hand, the cases where the participant has an opportunity to participate free, hold such schemes legal. Yellowstone Kit v. State, 7 So. 338; People v. Mail and Express Co., 179 N.Y.S. 640.

Op. S.C. Atty. Gen., 1966 WL 8502.

A court has explained:

> [w]hen a person pays no additional cost for a ticket, but much [sic] purchase or rent merchandise in order to receive a ticket, then this gift is no longer a gratuitous distribution of property . . . . The element of consideration is established by showing that the operator or merchant received something of value in return for the

[2] This Office summarized the facts in Darlington Theatres in Op. S.C. Atty. Gen., 2013 WL 5651553 at 3 (Oct. 4, 2013):

> In Darlington, a movie theater developed an advertising plan to direct "public attention to the type and quality of pictures displayed in the theater from day to day." Id., 2 S.E.2d at 783. The theater compiled a list of names from which winners would be drawn. It was not required that a person pay anything or purchase a ticket to be on the list; any person could simply ask to have their name included. A winner did not have to be present at the time of the drawing or enter the theater to claim the prize, and were given ample time to reach the theater from his or her home to claim it. Even if the winner was out of town at the time of the drawing, he or she could still claim the prize if they gave written notice to the theater ahead of time that he or she would be absent.

> distribution of the prizes. See People v. Cardas, 137 Ca. App. Supp. 788, 28 P. 2d 99.

S.C. Dep't of Revenue v. Fraternal Order of Police Foothills Lodge, #9, No. Docket No.: 15-ALJ-17-0047-CC, 2016 WL 1168408 at 4 (Mar. 17, 2016) (emphasis added).

This Office has previously concluded that this type of payment is an indirect consideration:

> It is nothing but a ruse where an individual pays money for one thing, but in reality, is paying for the chance to compete for a prize even if such chance is labelled "free." The "indirect" payment is generally sufficient consideration to constitute a lottery.

Op. S.C. Atty. Gen., 1997 WL 255957 at 14.

Although consideration must be something of value, it does not have to be money.[3] The Court in Darlington Theatres did not decide whether requiring attendance to participate in a drawing constituted consideration. Within its opinion, it cited Maughs v. Porter, 157 Va. 415, 161 S. E. 242. In Maughs, every person attending a public sale of residence lots was given the opportunity to get his name into a receptacle for a drawing where the prize was a car. The Virginia court concluded that the scheme constituted a lottery. Consideration passed from the ticket holder to the promoter because the ticket holder suffered the detriment of attending the sale to enter the drawing.

Regarding Maughs, our State Supreme Court said that "[t]his holding, however, is not in accord with the general current of authority in America, and has met with pointed criticism." Darlington Theatres v. Coker, 190 S.C. 282, 2 S.E.2d at 788 (citations omitted). The Court also distinguished Maughs from the case at hand, stating that "[i]f voluntary attendance, without obligation, is a legal consideration for participation in a drawing, that element is not present here, for actual attendance at the drawing in the present case is not a requirement of the winner."[4] Id. Thus, the Court left open the question of whether "voluntary attendance, without obligation, is a legal consideration for participation in a drawing."

[3] See Op. S.C. Atty. Gen., 1997 WL 255957 at 16:

> [t]he Court [in Darlington Theatres] clearly suggests that the element of 'consideration' does not necessarily have to involve the actual payment of money. 190 S.C. at 296 ['Having found as a fact from the undisputed testimony in the case that the distribution of money by the plaintiff involves no payment of money or the parting with any other consideration on the part of the participants ... .'] (emphasis added).

[4] The Court also found that the Maughs case was distinguishable because the winner of the drawing was required to pay the auctioneer $5.00 for his services in drawing the lucky number.

Courts in other jurisdictions have found consideration was present when a participant was required to go in person to enter a contest, even where "no purchase is required." In an April 6, 1997 opinion, we discussed an article in the Arizona Law Review[5] regarding consideration in "no purchase required" contests:

> [t]his article noted that a large number of courts have determined consideration to be present in "no purchase required" contests pursuant to a number of legal theories. Included among these theories is the so-called "peppercorn" theory of consideration -- that any benefit or detriment -- no matter how trivial -- is sufficient. Also, the author notes:
>
> > [s]ome courts conclude that the prize promises in games requiring no purchase are nevertheless promises supported by consideration because they are designed to increase sales and, in some instances actually do . . . .
> >
> > Other courts find consideration for the promises contained in promotional games by a slightly different, though related path. For example some of the courts point out that, even though a game or other promotional device requires no purchase or fee, a number of the individuals who participate actually do buy goods from the sponsoring grocery store or magazines from the sponsoring magazine distributors or admission tickets to the sponsoring movie theater. Those who do buy, it is said, supply consideration for the contingent promise of a prize, and the consideration they supply supports the same promise to others . . . .
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> The article, however, expresses the opinion that another theory finding consideration where no purchase is required is legally sounder and more logical. The author states that:
>
> > [s]ome courts, however come much closer to the truth by identifying the desire to increase "traffic flow" as the motive behind promotional games or, more formally, by finding the consideration for the

[5] Wessman, "Is 'Contract the Name of the Game? Promotional Games as Test Cases For Contract Theory," 34 Arizona Law Review 635 (Winter 1992).

> promises contained in a promotional game, not in increased sales, but in increased "traffic."
>
> . . . The act for which the disadvantaged party is bargaining is the grant of a chance to impress the opposite party, at no risk to the latter. By making the agreement and perhaps commencing business dealings, the party with the unlimited termination right effectively grants a chance to draw him or her further into a mutually beneficial course of business.
>
> The promotional game for which no purchase is required seems to fit this model of "bargaining for a chance admirably . . . . But the contestant who responds by going to the store is placed in a position in which he or she is subject to the influence of unrelated in-store advertising, attractive packaging, price specials, and all the other devices supermarkets use to peddle groceries. It is thus quite realistic to regard the sponsor as bargaining for a chance, in the sense that he or she is seeking to induce the contestant into a position in which other inducements (or sheer inertia) result in sales. And if enough people respond to the game by going to the store, that is, if "traffic" builds, there is a statistical likelihood sales will increase.

Op. S.C. Atty. Gen., 1997 WL 255957 at 11.

Both the April 6, 1997 opinion and a January 11, 1996 opinion[6] discuss participating in a "free" contest in some detail. They provide excellent summaries of decisions in other jurisdictions. We will provide you with the decisions that are relevant to your question:

In Great Atlantic & Pacific Tea Co. v. Cook, 240 N.E.2d 114 (Ohio 1968), the court stated:

> [t]he question of whether or not one has to be a purchaser of merchandise from the retailer is not germane to this issue. The claim that one does not have to buy merchandise from the retailer, but is permitted to enter the store or write in for a ticket to participate in the game or contest is the very intent that the retailer

[6] Op. S.C. Atty. Gen., 1996 WL 82893 (Jan. 11, 1996).

> seeks to procure and that is either a customer who buys and participates in the game or a prospective customer, who, without purchasing, enters the store to procure a game card and then participates in the game does the very thing that the retailer sets out to accomplish, and that is using a lottery-type scheme to promote business. The increased business which the operator receives through employment of the plan supplies adequate consideration. (citations omitted).

This Office stated that the Court's analysis in Midwest Television, Inc. v. Waaler, 44 Ill.App.2d 401, 194 N.E.2d 653 (1963), "went to the heart of the question of consideration for purposes of a lottery." Ops. S.C. Atty. Gen., 1997 WL 255957 at 9; 1996 WL 82893 at 8 (Jan. 11. 1996). The court analyzed the issue as follows:

> [w]hether [consideration] is present in any given scheme depends upon the method of operation. Thus the definition of consideration must remain flexible... A commonly accepted definition of valuable consideration...[is that such] "consists of some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." According to such definition, it appears to be immaterial whether one party sustains an actual pecuniary loss, or the other reaps an actual pecuniary benefit. In the case at bar, a participant in the sweepstakes event could obtain tickets without paying any money or making a purchase. However, these free tickets could be picked up only at the store conducting the event. Those making purchases at such store could also secure such tickets. As to the non-purchasers it must be concluded that they were induced to visit the store only by the lure of the chance to win a prize. What other reason could be given for them to visit? Obviously free ticket seekers entering the store became potential customers. The benefit accruing to the sponsor is the increase in the number of persons entering the store, regardless of whether or not they all come to buy his goods. The cost of the gift certificates awarded to winners comes out of the store profits. The source of the prize won by both non-purchasing

> ticketholders and those making purchases is the profit realized by the store from the event. The fact that winners paid no money for their chances is without significance. The profits realized from participants making purchases from the sponsor paid for their free chances. There can be no serious doubt concerning the fact that as a result of the event a benefit accrued to the sponsor. This leaves only the question as to the consideration, if any moving from the participants. To comply with the rules governing the event, every participant was required to go to the sponsor's store. Such requirement entailed the effort involved in leaving home and making a trip to the store to obtain a ticket. The further away from the store the ticket seeker lived the more effort was involved.

In Knox Industries Corp. v. State ex rel. Scanland. 258 P.2d 910 (Okl. 1953), all that was necessary to qualify to win a prize was to go into any Knox service station or store and obtain a ticket, and leave the stub in a container. The Court found that the following specific acts constituted consideration:

> 1. the expenditure of participant's time and inconvenience in going to some Knox store and asking for a ticket.
>
> 2. prospective participants are subjected to the sales appeal of the merchandise offered for sale at defendants' stores stations.
>
> 3. in case participant won he must expend further time and effort in appearing at the main office of the Knox Industries Corp to claim the prize.

In the April 6, 1997 opinion, we concluded that requiring appearance at a business to participate in a contest can be sufficient consideration to constitute a lottery:

> [i]n my view, the fact that the promoters of a particular contest specify that "no purchase is required" in order to play and there is no payment or purchase whatever (even indirect) does not necessarily preclude that particular scheme or contest from

> constituting a lottery. I agree with the courts in other jurisdictions which have analyzed such schemes as not necessarily requiring direct or indirect monetary payment for there to be sufficient consideration to constitute a lottery. These courts have reasoned that such promotional schemes must be examined in their entirety, and not with a focus only upon the "no purchase required" element of the contest. Such courts take the view that sufficient consideration passes from the group of players to the promoter, regardless of whether a particular player pays to participate because, inevitably, such promotions produce increased sales, greater purchases of the promoter's products and a large proportion of participating players who do in fact make purchases . . . .
>
> In other words, courts elsewhere have concluded that the contest participant's expenditure of time, thought, attention and energy in exchange for the attraction to the promoter's advertising or the luring of additional customers to the advertiser's place of business is sufficient consideration to constitute a lottery. See, State v. Reader's Digest Assn., 81 Wash.2d 259, 501 P.2d 290 (1972) . . .

Op. S.C. Atty. Gen., 1997 WL 255957 at 14–15.

You have also inquired as to whether the real estate company's sweepstakes would be a violation of the Real Estate Settlement Procedures Act [RESPA], 12 U.S.C. 2601 et seq. As we stated in Op. S.C. Atty. Gen., 2012 WL 3875117 (Aug. 21, 2012):

> The answer to this question requires us to examine and construe applicable federal statutes and regulations. As we have repeatedly advised, it is the general policy of this Office not to opine on issues involving federal law. See Ops. S.C. Atty. Gen., 2010 WL 3048330 (July 9, 2010) (stating "this Office generally does not construe federal law" and "issue[s] involving federal law ... are best addressed before a federal court"); 2009 WL 2406409 (July 24, 2009) (stating that "as a matter of policy, this Office does not opine on questions of federal law" and "defers [such matters] to the federal agency charged with the interpretation of the federal statute or regulation in question").

CONCLUSION

In conclusion, we reiterate that any questions related to a specific sweepstakes are necessarily fact-specific and beyond the proper scope of an official opinion of this Office. As this Office has

opined many times, we do not have the authority of a court to find facts in an opinion. Furthermore, we generally do not have the resources to opine on the legality of individual contests.

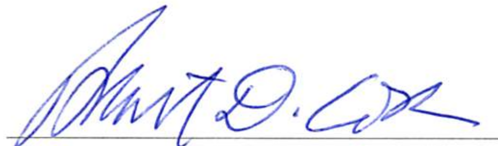
In this particular case, it is not clear how exactly the proposed sweepstakes will be conducted. While we cannot comment on hypothetical questions, it is not difficult to imagine numerous scenarios where a promotional plan crosses the line to become an illegal lottery. See Harvie v. Heise, 150 S.C. 277, 148 S.E. 66 (1929) ("In no field of reprehensible endeavor has the ingenuity of man been more exerted than in the invention of devices to comply with the letter but to do violence to the spirit and thwart the beneficent objects and purposes of the laws designed to suppress the vice of gambling.") Therefore, we strongly urge caution, consistent with prior opinions of this Office. See Op. S.C. Atty. Gen., 1974 WL 27604 (Jan. 21, 1974) ("[a]s in all instances where a criminal statute might be violated, it is urged that utmost caution and deliberation be utilized prior to effectuating such a plan.")

With respect to your question concerning the Real Estate Settlement Procedures Act [RESPA], 12 U.S.C. 2601 et seq., questions of federal law are not within the scope of opinions issued by this Office.

Sincerely,

Elinor V. Lister
Assistant Attorney General

REVIEWED AND APPROVED BY:



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