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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

April 16, 1997

The Honorable John Drummond
President *Pro Tempore*
The Senate of South Carolina
111 Gressette Building
Columbia, South Carolina 29202

Dear Senator Drummond:

You have asked whether so-called "'scratch and win' cards, which are being distributed at convenience stores throughout South Carolina [are] a lottery and thus illegal under South Carolina law?" Subject to a definitive ruling from the South Carolina Supreme Court to the contrary, it is my opinion that these games would constitute a lottery.

Law / Analysis

Article XVII, Section 7 of the South Carolina Constitution (1895 as amended) forbids the operation of lotteries in South Carolina. That Section of the State Constitution provides:

> [n]o lottery shall ever be allowed or be advertised by newspapers, or otherwise, or its tickets be sold in this State. The game of bingo, when conducted by charitable, religious or fraternal organizations except from Federal income taxation or when conducted at recognized annual state and county fairs, shall not be deemed a lottery prohibited by this Section. S.C. Code Ann. Section 16-9-10, et seq.

The leading case in South Carolina which interprets Article XVII, Section 7 is Darlington Theatres v. Coker, et al., 190 S.C. 282, 2 S.E.2d 789 (1939). In Darlington,

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the Court reviewed the constitutional validity of a plan of "advertising or promotion" established by a local theater. Such release consisted of the following:

> [t]he plan of advertising a promotion adopted by the respondents was to obtain a list of names by having persons voluntarily place their signatures on cards, thus receiving no consideration directly or indirectly thereof. These cards were placed in a receptacle, and became part of the permanent setup. Those not desiring the cards bearing their names to be part of the permanent setup, may apply on the day that the prize was to be awarded for special cards for that occasion. This card was placed in the same receptacle with the cards in the permanent setup, but were designated by a different color as they would be good only for that occasion.
>
> On a given night, a disinterested person would draw a card from the receptacle and the person whose name is drawn would be entitled to the prize money offered for that day. In order that the person whose name is drawn to receive the prize, it is not required that such person be in the theater; the award is announced in the theater and at the same time outside of the theater. While it is not required that in order to make one eligible to obtain the award that such person be in the theater, the winner of the award is given ten minutes within which to reach the theater and obtain the award, but in order to receive the award that person is not required to pay admission into the theater. The evidence shows that the time allowed to reach the theater is ample for anyone living in the city of Darlington and the City of Hartsville.

2 S.E.2d at 789; see also, 2 S.E.2d at 783-4 [facts set forth by trial court; "the list was obtained and maintained through the initiative of the plaintiff."]. The Court held that the foregoing promotion did not constitute a lottery. Concluding that, the traditional definition of a lottery required three elements--prize, chance and consideration--the Court determined that the first two elements--prize and chance--were easily present. The more difficult question was whether there was sufficient "consideration" given to take a chance at winning a prize.

In Darlington, there was, in the view of the Court, simply no such consideration present. Pursuant to the theater's plan, in the eyes of the Court,

> [t]he case is only one step removed from a situation in which a theater might on a given occasion, without previous notice, give away to some person, in or out of the theater, some sum of money, solely for the purpose of getting the theater talked about. It could hardly be material whether that person is selected from a telephone book, a city directory, a publishers mailing list, or a list arbitrarily made up by the theater management. Such a case could hardly be said to come within the statutory prohibition.

2 S.E. 2d at 785. However, the Court was careful to distinguish the factual situation before it from others where a lottery could or might be involved. Reasoned the Court,

> [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. For instance, where the winner must have purchased a ticket to the theater on the day of the drawing or on some other day, that would be a monetary consideration, and such a chance would be in the nature of a lottery. However, under the plan adopted by this theater, there is absolutely no direct or indirect consideration passing from the winner or other person whose name has been enrolled, and if the theater desires any benefit through advertising, it is too remote to be called a consideration. 2 S.E. 2d 785. (emphasis added).

The Court, however, did not specify the circumstances where "any benefit through advertising" might not be "too remote" to be "called a consideration." Moreover, the Darlington Court left open the question of whether requiring attendance to enter the contest would constitute sufficient consideration. Citing the case of Maughs v. Porter, 157 Va. 415, 161 S.E. 242 (1931), the Court noted that, in Maughs, every person attending a sale of residence lots had been given the opportunity to get his or her name into the receptacle from which a drawing for a car to be given away was made. The Maughs Court had found that consideration passed from the ticket holder to the promoter by virtue of the detriment of attending the sale. ["Even though persons attracted by the advertisement of the free automobile might attend only because hoping to draw the automobile, and with the determination not to bid any of the lots, some of these even might nevertheless be induced to bid after reaching the place of sale." 161 S.E. at 244]. Although our own Supreme Court sharply criticized the Maughs ruling, the Darlington Court left open the legal issue of whether "voluntary attendance without obligation, is a

legal consideration for participation in a drawing" because actual attendance was not required in the Darlington facts before the Court.

Other decisions of the courts, as well as opinions of this Office strongly support the Court's language in Darlington 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." For example, in an Opinion dated December 12, 1989, we addressed this issue where an association provided coupon books which sold for a ten dollar "donation" and had a redemption value of between $500 and $1,000. Included in each book would be a free bonus coupon which the patron could fill out and deposit at a local automobile dealership. At a later date, a drawing would be held to determine the winner of an automobile. Concluding that the proposal constituted a lottery, we stated:

> [b]ased upon ... review of the referenced proposal, the three elements of a lottery would be present. The elements of prize and chance are present in that this would be a drawing for an automobile. While the bonus coupon is described as "free," such "free" coupon is included in a coupon book which must be purchased. In other words, it is my understanding that only those individuals who buy a coupon book would have access to the "free" coupon included in such books. Therefore, the third element of a lottery, which is consideration, would be present. In such circumstances, a lottery would exist.

The January, 1996 Informal Opinion also referenced the South Carolina decision of Roundtree v. Ingle, 94 S.C. 231, 77 S.E. 931 (1912). In Roundtree, who traded at a Union furniture store were given a numbered card, giving them the opportunity to win a range. The furniture store offered as an inducement the following printed circular:

> An elegant range free. In order to advertise their high grade stores and ranges, the Crescent Store Works of Evansville, Indiana are forwarding us this $65 range free to give away to our customers. It will not cost the one who gets it a brownie ... trade with us, and in addition to getting more and better goods for the money, we give you a numbered card, a duplicate of which is placed in a box from which a number will be drawn and the one holding the corresponding number will get the range, which will be given away about the first of October. Every dollar you spend with us before that time gets you a chance at the range. Hold your tickets and watch our

> ad the first week in October and see who gets the range. It may be you if you trade with the Bailey Furniture and Lumber Company, the home furnishers and home builders, Union, South Carolina.

An Informal Opinion of this Office, dated September 28, 1995, also referenced the decision of G.A.Carney, Ltd. v. Brzeczek, 117 Ill. App. 3d 478, 453 N.E.2d 756 (1983). In Brzeczek, a magazine offered as part of the purchase price of $1.00 a "free" entry form to participate in a drawing. Players were allowed to pick various combinations of numbers and the winning numbers for each day were the same ones drawn in the Illinois State Lottery. Participants were eligible to win cash prizes. The contest rules specifically stated "No purchase necessary. Free entry blanks can be obtained at the office of the publishers. No charge or obligation." The specific facts showed that seldom did the entrant seek a free entry form independent of the ones contained in the magazine although such form was available. Based on these facts, the trial court concluded that a contestant could obtain a free entry form if he desired, and that the plan thus lacked the necessary consideration and, therefore, was not a lottery.

The Illinois Appeals Court reversed the lower court, however. The Appeals Court concluded that the plaintiff was not likely to succeed on the merits because the plan constituted an illegal lottery. Referencing the case of People v. Jones, 98 Ill. App. 3d 489, 53 Ill, Dec. 892, 424 N.E.2d 63 (1981), the Court noted that Jones had determined that the payment of a $5.00 "fee" to join defendants' social club with the corresponding "privilege" to place wages on horse races was a lottery. Despite evidence that the club offered legitimate services which possessed a "value," the Jones court had found that "even if the payment of the $5.00 fee was shown to have entitled the payor to participate in other activities, it is clear that the payment also constituted an indirect fee for the placement of a wager and thus violated the statute." 424 N.E.2d at 683.

Adopting this same line of reasoning, the Court in Carney found that

> ... the $1.00 paid for the Minority News Review is an indirect payment to participate in a game of chance, even though it entitles the purchaser to a copy of the magazine. That the magazine itself may be worth the purchase price does not alter this conclusion.

453 N.E.2d at 760. The Court determined that,

> [T]he controlling fact in the determination of whether a given scheme or business is a lottery is determined by the nature of

> the appeal which the business makes to secure the patronage of its customers.... We note in this regard that the contest rules provide that although there is "[n]o limit to the number of entries," "[o]nly one selection [is] allowed per entry blank." It would appear that persons buying multiple copies of the same issue are paying consideration to enter the contest and not to read the magazine.

Id.

The Carney Court also dismissed the argument that the availability of free entry forms at the publisher's office meant that no consideration was present. Instead, the Court found that the "obstacles to obtaining a free entry blank must be regarded as chimerical." Furthermore, under contest rules only one "free" entry blank was available per family, per edition, while a contestant purchasing multiple copies of the magazine could submit second entries, thereby establishing "further evidence that the contest is an illegal lottery." Id.

The issue of consideration for purposes of establishing a lottery is thoroughly discussed in an Annotation entitled "Promotion Schemes of Retail Stores as Criminal Offense Under Anti-Gambling Laws," 29 A.L.R. 3d 888. While concededly, there are cases to be contrary therein, this Annotation also provides a number of decisions which have concluded that consideration was present in situations similar to the "scratch and win" cards about which you inquire. The following general summary of the cases is provided in this Annotation:

> [t]he Courts which have considered the question appears to be evenly divided as to whether the consideration necessary to support a lottery must flow from the participant, himself, to the sponsor of a retail promotional scheme, or may be provided indirectly by other persons. Some courts have held or recognized that although no purchase of merchandise is necessary to participate, if any participants in a promotional scheme are also customers of the sponsoring retail store, the consideration present is sufficient to render the scheme a lottery as to all the participants.

Id. at 920. The Annotation referenced cases such as Boyd v. Piggly Wiggly Southern, Inc., 115 Ga. 628, 155 S.E.2d 630 (1967); Winn Dixie Stores, Inc. v. Boatwright, 115 Ga. App. 645, 155 S.E.2d 642 (1967); Idea Research and Devel. Corp. v. Hultman, 256 Iowa

1381, 131 N.W.2d 496 (1964); Featherstone v. Ind. Serv. Stat. Assoc., 10 S.W.2d 297 (1939) in support of the foregoing legal principle.

In Boyd, the Georgia Appeals Court stated that "[u]nder the rules and regulations governing defendants' sales promotion program, it was not a condition precedent of an individual to obtain a Derby ticket that he make a purchase of groceries, but it was necessary that he come into a Piggly Wiggly store and request a ticket." The Court stated that it was "well settled" in Georgia that a "closed participation scheme," i.e., one "given only to patrons purchasing goods, service or whatever the promoter is trying to push by the scheme is illegal and contrary to public policy." 155 S.E.2d at 636. The issue before the Court in Boyd, however, was the validity of the "flexible participation" scheme. Such a device, noted the court, was one in which

> ... the promoters hoped to accomplish exactly what they had agreed to accomplish in the "closed participation" scheme but they hoped to frame the rules of their programs so that the rules themselves, rather than the practical operation of the scheme, would be taken as the determinative criteria by the courts so that the anti-lottery statutes and decision would be evaded. The device employed in this type of scheme is the "no purchase necessary" artifice ... "'As fast as statutes are passed or decisions made, some skillful change is devised in the plan of operation, in the hope of getting just beyond the statutory prohibition but so long as the inherent evil remains, it matters not how the special facts may be whiffed, the scheme is still unlawful.'"

In the eyes of the Boyd Court, the "no purchase necessary" device did not prevent the scheme from constituting a lottery. Reasoned the Court,

> [t]he working of the sales promotion scheme in this case amply demonstrates that it was a prohibited lottery or gift enterprise under the law of Georgia; for not only was there present a class of persons who made purchases in addition to receiving the Derby tickets, thus supplying a pecuniary consideration for all the chances in bulk, but plaintiff was herself a faithful member of that paying class. We might also assume, as have some courts, that schemes such as that involved here have a particularly harmful effect because they inject into a natural free market dealing with basic commodities of everyday living all of the consequences of a lottery.

155 S.E.2d at 640.

Moreover, in the Idea Research case, the Court stressed that the consideration necessary to constitute a lottery "does not need to be a monetary consideration."

The Court further noted that

> [i]t can be in the nature of the participant doing something in the way of going each day or each week to the place of business of the sponsors and picking up a T.V. Bingo card. There is consideration for all participants when some pay and buy merchandise and others do not.

Thus, said the Court, "[i]t is abundantly clear that the element of consideration is present in the case at bar and the flowing of some consideration from the participant to the donor appears ... in similar cases in many states." 131 N.W. at 501.

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 there was consideration, concluding that

> [t]he value of the advertising can neither be doubted or minimized, since the general acceptability of defendants' product is made thereby. But more than this, the rule requiring prospective participants to secure tickets in order to become eligible necessarily demands that such individuals appear at defendant's place of business. By such appearances they are, of course, subjected to the sales appeal of defendant's assorted merchandise. That this works to defendants' benefit must be conceded.

In addition, the Knox Court found that the following specific acts constituted consideration:

> 1. the expenditure of participants' 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 to the sales offered or the merchandise offered for sale at defendants' stores' stations; and

> 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.

The case of Midwest Television, Inc. v. Waaler, 44 Ill. App. 2d 401, 194 N.E.2d 653 (1963) is especially illuminating. The Court's analysis in that case went to the heart of the question of consideration for purposes of a lottery. The Court analyzed the issue thusly:

> [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 more 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-purchase, 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 came 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 ticket holders and those making purchases is the profit realized by the store from the event. The fact that winners paid no money for their chance 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 participant. To couple 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 a ticket seeker lived, the more effort was involved.

194 N.E.2d at 657.

Instructive also is State ex rel. Schillberg v. Safeway Stores, 450 P.2d 949 (Wash. 1969). In that instance, Safeway Stores conducted a "Bonus Bingo" contest and the issue before the Court was whether or not a lottery was involved. The Washington Supreme Court described Safeway's contest as follows"

> [i]t all added up to a scheme designed largely as an advertising or sales promotional device in which the general adult public was invited to participate free of charge without being required to make any purchases or pay any money and in which every participant, depending upon his luck, had a chance to win a cash prize. Bonus Bingo did not, according to the agreed facts, affect the quality or prices of Safeway's merchandise or otherwise alter its merchandising policies.

450 P.2d at 952. Safeway argued that "unless the players actually part with something of value, by wagering it upon the turn of an uncertain or fortuitous event, it is no lottery." In other words, Safeway contended that "since the members of the public neither pay money nor hazard any tangible or intangible property for the chance to win a prize, bonus Bingo would probably not be a lottery." Id. at 953.

However, the Washington Supreme Court refused to accept Safeway's argument. Instead, the Court stated that in order to give effect to the broad constitutional ban on lotteries, "the courts must look into, through and around any schemes and devices which appear even superficially to constitute a lottery, and to apply the constitutional ban to all of them which in fact amount to a lottery." The Court referenced its earlier decision of Society Theatre v. City of Seattle, 118 Wash. 258, 203 P. 21 (1921) and concluded that while the case was somewhat different on the facts, it was, nevertheless, controlling.

Said the Court,

> [a]lthough the theater patron in Society Theatre, Supra, paid nothing for the ticket which went into the drawing, he did pay for his theater admission ticket, whereas in Bonus Bingo, the

> participant need not part with any money or property to have a chance to win. Any real distinction, however, between the two cases on the question of consideration seems to be superficial and of slight legal consequence. The rationale of Society Theatre, supra, implied that, where the two elements of lottery clearly exist, i.e., prize and chance, the courts will examine the details of the game innately to see if a consideration, in whatever form, actually moves from the participant to the promoters, and to ascertain whether there is an actual loss on the one hand, or a genuine gain on the other, or perhaps both a loss and a gain. But if a prize and chance are manifest, any substantial consideration, supplied in whatever form, will make it a lottery.

Referencing case law from other jurisdictions, the Court went on to say that its view found

> ... strong support in what is perhaps a leading case on the question of consideration as an element of a lottery. Lucky Calendar Co. v. Cohen, 19 N.J. 399, 117 A. 2d 487 (1955) [adhered to on rehearing, 20 N.J. 451, 120 A. 2d 107]. In that case, it was shown that, to win a prize offered by the Acme Stores, the participant "need purchase nothing ... need pay nothing" nor do anything except complete a coupon form and deposit the coupon in a box just inside the door of the nearest Acme Market.... Finding a consideration essential to a lottery, the court then said..
>
> > ... consideration is in fact clearly present here, both in the form of a detriment or inconvenience to the promisee at the request of the promisor and of benefit to the promisor. It is hornbook law that if the consideration is sufficient to sustain a simple contract (if otherwise legal), it is sufficient to satisfy this third alleged element of lottery.

450 P. 2d at 955. Thus, the Washington Supreme Court concluded:

> [s]ince the legislature of this State may not, under the constitution, directly authorize any kind of lottery at all, it

> cannot, by means of a loose, uncertain or inept definitive, authorize indirectly that which the constitution forbids it to do directly. Given a scheme involving a prize to be won purely by chance or lot, the courts will look most closely to see if any substantial consideration moves from player to promoter....
>
> Under our constitution and lottery statutes, therefore, one need not part with something of value, tangible or intangible, to supply the essential consideration for a lottery. He may, in order to secure a chance to win a prize awarded purely by lot or chance, supply the consideration by his conduct or forbearance which vouchsafes a gain or benefit to the promoter of the scheme. The benefit or gain moving the one need not be the same as the detriment to the other. Consideration for a lottery may be both gain and detriment or one without the other.
>
> ... If Safeway charged a solitary penny for a Bonus Bingo booklet or for a prize slip, it could not be sensibly argued that Bonus Bingo would not then be a lottery. Where it received not a penny, but something worth far more to players and promoters--the time, attention, and the efforts of countless persons in studying Safeway advertizing and in [making] at least one trip to a Safeway Store--it is apparent that the consideration moving from players to promoters was actually greater than had there been a mere sale and distribution of booklets or prize slips for money.

450 P.2d at 955-956.

In Geis v. Continental Oil Co., 511 P.2d 725 (Utah 1973), an oil company held a contest in which the company's dealers distributed to customers small cards upon which there was situated spots covered with paper concealing thereunder printing which became visible when the paper was scraped with a coin. The designated combination was necessary to win. The contest was open to all licensed drivers and no purchase was necessary; game cards were free.

One of the issues considered by the Court in Geis was whether the scheme constituted a lottery. Relying upon the Safeway Stores case, referenced above, among others, the Court found a lottery to be present regardless of whether the players invested

"a special kind of consideration such as money or its equivalent ... ." 511 P.2d at 727. The fact that "players wagered their time, attention, thought, energy and money spent in transportation to the store for a chance to win a prize", in the Court's view "constituted a valuable consideration moving from the players to the promoter." Id.

In Great Atlantic & Pacific Tea Co. v. Cook, 240 N.E.2d 114 (Ohio 1968), the Court had this to say:

> [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 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. Stevens v. Cincinnati Times Star Company, 72 Ohio St. 112, 152, 73 N.E. 1058; Troy Amusement Co. v. Attenweiler, 64 Ohio App. 105, 28 N.E.2d 207 and Westerhaus v. Cincinnati, [165 Ohio St. 327, 338, 339, 135 N.E.2d 318].

See also, State v. Reader's Digest Assn., Inc., 81 Wash.2d 259, 501 P.2d 290 (1972).

Attorney General's opinions from other jurisdictions are also persuasive with respect to the element of consideration in contests such as the "scratch and win" variety. For example, the Rhode Island Attorney General found that a proposed "Bingo USA" syndicated television program constituted a lottery. Free bingo cards could be obtained by viewers from retail outlets of the television's show's sponsors. No purchase was necessary to obtain the card. The Rhode Island Attorney General wrote:

> [a]lthough the Bingo USA scheme uses cards that are "free", the individuals must go to sponsors of the television show to receive their "free" card. "The requirement of a visit by the participant, or someone on his behalf, is said to be a thing of value since it is of benefit to the sponsor." Caples Company v. United States, 243 F.2d 232, 233 (D.C. Cir. 1957).

> Accordingly, the value of the individual's time and effort to obtain the card can be held to constitute consideration.

And in an opinion of the Mississippi Attorney General, dated December 16, 1996, the Attorney General of that state wrote:

> [t]he fact that a person can get a free game piece by mail does not, in our opinion, remove the element of consideration. ... The only cases that we find that address the issue are from other states. In Pepsi Cola Bottling Co. v. Coca Cola Bottling Co., 534 So.2d 295 (Ala. 1988), the trial court had enjoined a promotional campaign where a purchase was necessary in all instances in order to receive a chance to win a prize, except for the right to obtain free chances at some place other than the point of purchase. The trial court found that very few people had actually requested such free chances and "declared the free participation option a sham". Id. at 296. In contrast, a scheme where free chances to play were available at the participating stores was found not to be a lottery by the Alabama Supreme Court. Id. In Commonwealth v. Frate, 537 N.E.2d 1235 (Mass. 1989) the facts were that a person could receive a chance to win a prize without making a purchase only by mailing in a stamped, self-addressed envelope and a 3 x 5 card with his name and address printed on it. The trial court left it to the jury to determine whether such a scheme constituted an illegal lottery. The Superior Court upheld the jury's conviction. The court held that it was a jury question as to whether or not consideration had been required by the promoter of the scheme. Id. at 1236. It appears from these cases that the ability to receive a free chance is relevant to, but not determinative of, the question of whether the purchaser is paying for the chance to win or for the accompanying product(s). See also, Boyd v. Piggly Wiggly Southern, Inc, 155 S.E.2d 630 (Ga. 1967) (fact that some chances are given away free while others are given with purchase does not render lottery legal).
>
> In summary, consideration must be present in a game in order to constitute an illegal lottery. Whether consideration is being given in return for a chance to win is a question of fact to be determined by a court of competent jurisdiction.

> The ability to mail off for a free chance to play may be relevant to, but not conclusive of that question.

Similarly, it is stated at 38 Am.Jur.2d, Gambling § 7 that

> [i]n 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. While under this view it could be necessary that all participants part with some consideration for the privilege of playing, in order to constitute a particular scheme a lottery, there is substantial authority that is sufficient consideration if only some of the players pay while others participate gratuitously. In other words participate gratuitously. In other words, a game does not cease to be a lottery merely because some, or even many, of the players are admitted to play free, if others continue to pay for their chances. Furthermore, what may appear on its face to be a gratuitous distribution of property or money has frequently been declared to be merely a device to evade the law. Particularly with regard to advertising and promotion schemes, it has been held that sufficient consideration is present if the prospective customer or patron goes to some slight trouble, or inconveniences himself in the slightest degree, or performs some small service at the request of the promoter.

Likewise, in 54 C.J.S., Lotteries, § 2, p. 848 it is written that

> [t]he consideration required as an essential element of a lottery need not be great, and in general may be money or any other thing of value. Some authorities hold that the presence or absence of consideration is assumed by the usual tests applicable in the law of contracts, that consideration may consist of a benefit to the person contracting the scheme, or an inconvenience or disadvantage to the promisee, and hence that

> money or something of actual pecuniary value need not be directly given for the right to compete.

Applying this statement of law was the Florida Court in Blackburn v. Ippolito, 156 So.2d 550 (Fla. 1963), which held that a contest held by a grocery supermarket requiring participants to register their name and address at the store, but it not being necessary to purchase any merchandise to enter, was a lottery. Similarly, in State v. Grant, 162 Neb. 210, 75 N.W.2d 611 (1956), the Supreme Court of Nebraska found a lottery in an automobile dealer's scheme whereby persons who visited showrooms were entitled to register children's names, giving the year, make and model of automobiles registrants were driving, entitling children to chances on toy automobiles, even though registrants were not required to advance any money or make any purchase or be present at the drawing. The Court in that case cited with approval the following language: "where a promoter of a business enterprise, with the evident design of advertising his business and thereby increasing his profits, distributes prizes to some of those who call upon him or his agent, or write to him or his agent, or put themselves to trouble or inconvenience, even of a slight degree or perform some service at the request of and for the promoter, the parties receiving the prize to be determined by lot or chance, a sufficient consideration exists to constitute a lottery though the promoter does not require the payment to him directly by those who hold chances to draw prizes." 75 N.W.2d at 615.

Finally, in a lengthy scholarly article, the question of consideration where schemes using "no purchase is required" is discussed at length. See, Wessman, "Is 'Contract the Name of the Game? Promotional Games as Test Cases For Contract Theory," 34 Arizona Law Review 635 (Winter) 1992). This 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 ... .

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 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.

34 Ariz. L.R. at 665-675. The article offered the following list of cases in support of this latter "building of traffic" theory of consideration to constitute a lottery. Gold Bond

Stamp Co. v. Bradfute Corp., 463 F.2d 1158, 1160 (2d Cir. 1972); Caples Co. v. United States, 243 F.2d 232, 237 (D.C. Cir. 1957) (dissenting opinion); People v. Eagle Food Ctrs. Inc., 202 N.E.2d 473, 474 (Ill. 1964); Midwest Television, Inc. v. Waaler, 194 N.E.2d 653, 657 (Ill. App. Ct. 1963); Idea Research & Dev. Corp. v. Hultman, 131 N.W.2d 496, 498 (Iowa, 1964); Mid-Atlantic Coca-Cola Bottling Co., Inc. v. Chen, Walsh and Tecler, 460 A.2d 44, 46 (Md. 1983); State ex rel. Glendenning Cos. v. Letz, 591 S.W.2d 92, 101 (Mo. Ct. App. 1979); United Stations of N.J. (US) v. Getty Oil Co. 246 A.2d 150, 155 (N.J. Super. Ct. 1968); Knox Indus. Corp. v. State, 258 P.2d 910, 914 (Okl. 1953); Smith v. State, 127 S.W.2d 297, 299 (Tex. Crim. App. 1939); Albertson's Inc. v. Hansen, 600 P.2d 982, 989 (Utah 1979) (dissenting opinion); Geis v. Continental Oil Co., 511 P.2d 725, 727 (Utah 1973); State ex rel. Schillberg v. Safeway Stores, Inc., 450 P.2d 949, 956 (Wash. 1969); State v. Laven, 71 N.W.2d 287, 289 (Wis. 1955). But see Opinion of the Justices, 397 So.2d 546 (Ala. 1981); Clark v. State, 80 So.2d 308 (Ala. Ct. App. 1954), cert. denied, 80 So.2d 312 (1955); Cross v. People, 32 P. 821 (Colo. 1893); Dumas v. Todd, 92 S.E.2d 265 (Ga. Ct. App. 1956); People v. Brundage, 150 N.W.2d 825 (Mich. App. 1967), revd., 162 N.W.2d 659 (Mich. 1968).

An opinion of this Office, Op. Atty. Gen., No. 2031 (May 2, 1966) is often referenced for support that this Office has found that the "no purchase required" schemes do not constitute a lottery. Involved in that opinion was the fact that the Pepsi Cola Company ran a contest in which various letters of the words "Pepsi Cola" were placed under individual bottle caps. Upon accumulating enough letters to spell out these words, the entrant could win a prize or series thereof. In addition to caps sold at retail, an individual could go to one of four Pepsi plants and pick up a free bottle cap. Also, an individual could request a crown from the various cooperating radio stations or from a Pepsi route salesman. The issue was thus "whether or not consideration is paid."

The opinion quoted the following general statement of law from 54 C.J.S., Lotteries, § 2:

> [a]ccording to some authorities, whether a particular scheme is to be regarded as a lottery or otherwise, is not to be determined by ascertaining whether anyone may possibly win a prize through the operation of the scheme without having paid for the chance to win, and a lottery may exist although not every participant directly pays a consideration. Under this view, as long as some of the participants pay for their chances, a lottery does not cease to be such, merely because other, or even many, participants are permitted to play free. There is also authority, however, holding that if there is no bargain or inducement for the chance and the chance is a

> gratuity, a thing done voluntarily, as in purchasing a ticket which need not be purchased in order to obtain the chance, is not a consideration for it, and under this view, the fact that most of those who participate in the drawing may actually buy tickets, does not make the plan a lottery.

In addition to reliance upon Darlington, the opinion cited a number of cases which concluded that the "no purchase required" element removed a scheme from the classification as a lottery. Among the decisions relied upon were Post Publishing Co. v. Murray, 230 Fed. 773; People v. Cardas, 28 P.2d 99; and Cross v. People, 18 Colo. 321, 32 P. 821. Other cases referenced in the opinion were State v. Powell, 212 N.W. 169 and Matta v. Katsoslas, 212 N.W. 261 for the proposition 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." On the other hand, the opinion found that "the cases where the participant has an opportunity to participate free, hold such schemes legal." [Citing, Yellowstone Kit v. State, 7 So. 338; People v. Mail and Express Co. 179 N.Y.S. 640]. In light of these authorities, this Office concluded that

> [t]he better reason[ed] cases hold, generally, that if the participant has an opportunity to participate free without the requirement that he purchase something or pay a consideration, then the lottery statute is not violated. The fact that the participant does not avail himself of the opportunity to participate free is of no consequence in the better reasoned cases.
>
> Based on these authorities, it appears that the Pepsi Cola scheme or plan does not violate our lottery statutes, for the reason that the element of consideration is lacking.

While this opinion is often cited in support of the legality of "scratch and win" games, it does recognize quite clearly that there is a considerable difference of opinion on this question among the courts and, as I stated in the 1996 Informal Opinion, I believe that those cases "which find consideration [are] ... the better reasoned authorities."

Finally, I would note that in Darlington, the admitted purpose of the plan in that case was "the stimulation of interest on the part of the public in the operation of the theater, and the direction of public attention to the type and pictures displayed in the theater from day to day." Moreover, as noted above, the Court was careful to state that it was leaving open the question whether "voluntary attendance, without obligation, is a

legal consideration for participation in a drawing" because "actual attendance at the drawing in the present case is not a requirement of the winner." 2 S.E.2d at 788. In the plan present in Darlington, "[a]ny person, without purchasing a ticket, [could] ask that his name be added to the list." Furthermore, the Court found that the plan in question "involves no payment of money or the parting with any other consideration on the part of the participants. ...", clearly suggesting thereby that the element of consideration was not limited to the payment of money.

Conclusion

As we have often recognized, whether or not a particular scheme is a lottery depends in large part upon the specific facts and circumstances involved. This Office stated in Op. Atty. Gen., February 24, 1975, for example, that "the highest variation from the facts given may change a legal promotion into an illegal scheme, or [vice] versa." And in an opinion of February 23, 1965, we observed that "[t]he facts and circumstances surrounding each promotion or scheme must be considered in order to determine whether such a promotion or scheme violates the lottery law." Of course, this Office does not conduct fact-finding inquiries in the issuance of its legal opinion. Op. Atty. Gen., December 12, 1983. With that caveat in mind, however, I would offer the following as general principles for your guidance.

If indirect payment of money is involved with so-called "scratch and win" cards, such as the payment for a particular item like the trading card itself, and included with such purchase is also a free chance or opportunity to win a prize, such would generally constitute a lottery. Our Supreme Court's statement in Darlington 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," would be dispositive of such schemes. 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.

Moreover, in 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. Moreover, cases such as the Carney decision, discussed at length above, recognize that, generally speaking, such contests make "free" participation more difficult and, as a result, the ratio of "free" participants to those who ultimately pay something is quite small. The Carney Court characterized the suggestion that such participation was "free" as "chimerical." These decisions, many of which are referenced herein are, in my view, soundly reasoned.

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). Likewise, these courts have viewed as sufficient consideration the completing of a coupon and the deposit of such coupon at a participating supermarket. Lucky Calendar Co. v. Cohen, supra. As was stated in Albertsons Inc. v. Hansen, 600 P.2d 982, 993 (Utah 1979), in supposing two stores one mile apart have precisely the same capacity to draw customers, except that one sponsors a contest involving chance and prize,

> [i]t would take some proportionally greater reward to induce customers nearer store B to go to store A; and as the distance between the stores increased, the inducement would have to be proportionally increased. By supposing increasing distances, it should be plain that there must be some real inducement to go to store A, rather than to store B. The logic is inescapable that in offering it [contest], store A must be giving something of sufficient value to persuade customers to go to its store, rather than store B; and that each customer gives some benefit of at least equal value to plaintiff, otherwise we may be sure that plaintiff would not operate the game. Further, each customer who is thus induced to enter store A does something he would not otherwise do. Therefore, he thus suffers a detriment to that extent and so contributes his portion, however small that may be, to the total value received by the plaintiff in this [contest]. It is thus inescapable that there is consideration on both sides of the equation. [Crockett, C. J., dissenting].

It is my opinion that this statement provides an excellent description of the so-called "scratch and win" games. Whether the consideration is deemed the customer's cost, time and effort in making the trip to the store or his cost, time and effort in mailing in the

entry form, either in exchange for the right to participate in the owner's contest, it is the kind of "consideration" required to constitute a lottery. Our Supreme Court has held that "[a]n age-old definition of consideration is, 'a benefit to the party promising, or a loss or detriment to the party to whom the promise is made.'" Evatt v. Campbell, 234 S.C. 1, 106 S.E.2d 447 (1959). Thus, it is my opinion that the so-called "scratch and win" games generally constitute a lottery under South Carolina law.

I would be less than candid if I did not advise you that no case in South Carolina has, as yet, declared these games to be illegal, however. Recently, in Treasured Arts, Inc. v. Watson, _____ S.C. _____, 463 S.E.2d 90 (1995), our Supreme Court had a case involving such a contest before it, but the merits of the issue were not reached because of mootness.

The only case law where the facts could be said to be somewhat similar to the typical "scratch card" situation where the ruse of "no purchase required" is employed is the Darlington Theaters case. That case has been cited repeatedly by others to this Office as support for the legality of the scratch and win" games because the Court in Darlington found no consideration there. To my mind, however, there are several significant distinctions between the facts in Darlington and the typical factual scenario in "scratch and win" games. First, many "scratch and win" games provide for the "purchase" of cards and also the chance to participate in the contest itself being labelled as "free." As noted above, such indirect consideration makes the game a lottery.

Secondly, even where there is no such "indirect" consideration, Darlington is arguably distinguishable in two other ways. First, the Court 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). Secondly, as noted above, the Court in Darlington at least suggests that the detriment of attendance for the purpose of entering a contest might constitute consideration for purposes of a lottery. See Op. Atty. Gen., Op. No. 3698 (January 23, 1974) [Court in Darlington did not decide whether or not South Carolina would follow the Virginia decision of Maughs v. Porter, supra which found consideration in the detriment incurred by a contestant in attending a sale to enter a drawing].

In short, our Court must still decide the question of the legality of "scratch and win" contests. Until such time as a definitive court ruling is forthcoming, however, it is my opinion that such games would constitute a lottery based upon the foregoing authorities.

With kindest regards, I remain

Very truly yours,

Robert R. Cook
Assistant Deputy Attorney General

REVIEWED AND APPROVED BY:

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