

5064/5735



The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON  
ATTORNEY GENERAL

October 10, 1995

The Honorable William C. Mescher  
Senator, District #37  
Post Office Box 1  
Pinopolis, SC 29469

RE: Informal Opinion

Dear Senator Mescher:

As you are aware, your letter of September 4, 1995, to Attorney General Charles Molony Condon was referred to me for a response.

I have read your letter and the attachment that you enclosed. As I understand your letter, you have asked whether the promotional material which is being used by a company to promote its long-distance telephone service is legal under South Carolina law.

The promotion in question includes the use of an official entry form by which participants may enter a sweepstakes drawing for a number of valuable prizes, including a 1995 Mustang automobile. The sweepstakes form is labeled as "Official Entry Form & Long Distance Application." Not surprisingly, the words "Official Entry Form" are in substantially larger and bolder print from the words which follow, i.e., "& Long Distance Application Form."

The entry form contains additional information about the sweepstakes promotion. Apparently, when a person enters the sweepstakes promotion, the person is thereby authorizing the company conducting the promotion to switch the person's long-distance carrier. It is not, however, clearly disclosed that mere entry of the sweepstakes promotion constitutes a knowing and intelligent authorization by the person to switch his or her long-distance telephone service. While it is true that a person may

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enter the drawing without switching long-distance carriers, the person entering the promotion would have to read the entire contents of the rules, and the opportunity to enter without switching carriers is buried at the very end of the promotional rules and is entirely inconspicuous in the overall promotional literature.

The South Carolina Unfair Trade Practices Act, § 39-5-10, et. seq., S. C. Code Ann., 1976, expressly prohibits unfair or deceptive practices in trade or commerce. Section 39-5-20, Code specifically provides as follows:

§ 39-5-20 Unfair methods of competition and unfair or deceptive acts or practices unlawful;

(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

\* \* \*

It is obvious that the conduct here involves trade or commerce, so the sole question becomes whether the use of the promotion is unfair or deceptive under South Carolina's Unfair Trade Practices Act.

The South Carolina Supreme Court has held that the standard for determining whether an act is deceptive is whether the conduct has the capacity to deceive. State ex rel. McLeod v. C & L Corporation, Inc., 280 S.C. 519, 313 S.E.2d 334 (Ct.App. 1984). There is no need to show that a claim or representation was intended to deceive, only that it has the capacity, effect or tendency to deceive. State ex rel. McLeod v. C & L Corp., Inc., supra; Young v. Century Lincoln Mercury, Inc., 302 S.C. 320, 396 S.E.2d 105 (1990); Clarkson v. Orkin Exterminating Company, 761 F.2d 189 (4th Cir. 1995). The courts have held that even a truthful statement may be deceptive if it has the capacity to deceive. State ex rel. McLeod v. C & L Corp., Inc., supra.

Viewing the promotional material in its entirety and applying the standard set by our Supreme Court, we are of the opinion that the sweepstakes promotion used by the company has the capacity, effect or tendency to deceive and is an unfair or deceptive act or practice as prohibited by § 39-5-20, S. C. Code. Therefore, the practice appears to be unlawful under South Carolina law.

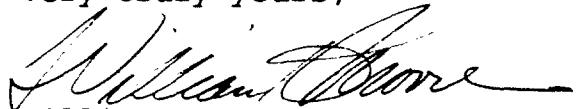
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Since the offering of long-distance service is under the jurisdiction of the Public Service Commission, it may be that the Public Service Commission has primary jurisdiction over this type of conduct by companies offering long-distance service within this State. We recommend that you contact the Public Service Commission and request action by that agency. You may feel free to use the contents of this letter as part of your complaint to the Public Service Commission. I trust this answers your question. If, however, you have any additional questions, please feel free to contact me at your convenience.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind personal regards, I am,

Very truly yours,



William K. Moore  
Assistant Deputy Attorney General

WKM/fc