IO 5775 / Reg. 5109

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

January 11, 1996

Harold B. Johnson, Chief of Police
City of Sumter
P. O. Box 1449
Sumter, South Carolina 29151

Re: Informal Opinion

Dear Chief Johnson:

You have sought our advice regarding the so-called "scratch and win" cards currently being offered throughout South Carolina, typically at local convenience stores. You state the following with respect thereto:

> [t]he City of Sumter Police Department (Department) recently received complaints concerning the local sale of trading cards with a "scratch and win" contest attached. Although, "no purchase required" is printed on the cards, local merchants sell the cards for $1.05 each, using a magic marker to write a price on the cards. I have enclosed copies of three (3) cards purchased from Sumter merchants.
>
> It appears that the only possible justification for the price on these cards is the chance to win money and that, when the cards are sold rather than given away, the contest is an illegal game of chance. Our attorney, Martha McElveen Horne, spoke with Elizabeth Hubbard Atwater of your office

> who confirmed Mrs. Horne's belief that State law is not clear as to whether the "no purchase" language is sufficient [to] legitimize[ ] an otherwise illegal game of chance. Ms. Atwater advised that as a result of similar inquiries from other South Carolina communities, your office is currently researching this question.
>
> I would appreciate a copy of any opinion issued by you as a result of this research. Also, because these cards are being sold throughout South Carolina, would you consider issuing uniform guidelines to assist local law enforcement in the determination of when a contest violates State gambling laws.

I am further advised that the company engaged in this promotion notes that its "promotional game pieces prominently state that consideration is not required to participate in the promotion. Further, the company indicates that

> [p]romotional game rules, posted at each point of sale and available for customer take-home, state . . . that no purchase is required in order to play. Game pieces are available free by writing . . . and the Company supplies free entry request forms at all points of sale. Free promotional games pieces may also be obtained in other manners prescribed by local and state requirements.

LAW / ANALYSIS

Art. XVII, Sec. 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 exempt 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. Sec. 16-9-10 et seq. enforces this constitutional proscription by statute.

The leading case in South Carolina which interprets Art. XVII, Sec. 7 is Darlington Theatres v. Coker et al., 190 S.C. 282, 2 S.E.2d 782 (1939). In Darlington, the Court reviewed the constitutional validity of a plan of "advertising or promotion" established by a local theater. Such scheme consisted of the following:

> [t]he plan of advertising or promotion adopted by the respondents was to obtain a list of names by having persons voluntarily place their signatures on cards, they receiving no consideration directly or indirectly therefor. These cards were placed in a receptacle, and became a part of the permanent set up. Those not desiring the cards bearing their names to be a part of the permanent set up, 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 set up, 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.

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 consideration given to take a chance at winning a prize.

In the Darlington case, there was simply no consideration given, concluded the Court. Pursuant to the theater's plan,

> [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 publisher's 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. On the other hand, the Court was careful to contrast the situation before it with others where a lottery could 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 scheme 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 derives any benefit through advertising it is too remote to be called a consideration.

2 S.E.2d 785 (emphasis added).

In addition, 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 and 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 Virginia Court had concluded that there was consideration passing from the ticket holder to the promoter by virtue of the detriment of attending the sale. While our Supreme Court sharply criticized the case, the Court left open the question of whether "voluntary attendance without obligation, is a legal consideration for participation in a drawing", because actual attendance was not required in the case before it. Moreover, the

Court specifically noted that in the facts before it, there was no suggestion of any "subterfuge or fraud in an attempt to evade ... ."

Recently, in an Informal Opinion, dated September 28, 1995, and dealing with the same basic issue which you have raised herein, I referenced an earlier opinion of this Office of December 12, 1989 which is relevant to your inquiry. There, 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 my review of the referenced proposal, the three elements of a lottery would be present. The elements of prize and chance are present in that there 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 Informal Opinion also referenced the South Carolina decision of Roundtree v. Ingle, 94 S.C. 231, 77 S.E. 931 (1912). Persons 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 stoves and ranges the Crescent Stove Works of Evansville, Ind. are furnishing 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, S.C.

Based upon these facts, the Court stated that "[t]here can be no doubt that the scheme under which the winning card was drawn was a lottery." 94 S.C. at 233.

The Informal Opinion of September 28 also referenced the Illinois decision of G. A. Carney, Ltd. v. Brzeczek, 117 Ill.App.3d 478, 453 N.E.2d 756 (1983). There, a magazine offered as part of the purchase price of $1 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 publisher. No charge or obligation."

The specific facts showed that seldom did the entrant seek a free entry form independent of the one contained in the magazine although such form was available. The trial court, based upon these facts, 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, holding that plaintiff was not likely to succeed on the merits because the plan was indeed an illegal lottery. Referencing the case of People v. Jones, 98 Ill.App.3d 489, 53 Ill.Dec. 892, 424 N.E.2d 683 (1981), the Court noted that in Jones, it was determined that the payment of a $5 "fee" to join defendants' social club with the corresponding "privilege" to place wagers on horse races was a lottery. Despite evidence that the club offered some legitimate services in and of itself and thus had a "value" on its own, the Jones Court found that "even if the payment of the $5 fee was shown to have entitled the payor to participation 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 683.

Similarly, reasoned the Court in Carney,

> . . . the $1 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.

453 N.E.2d at 760.

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

Since the Informal Opinion of September 28 was written, I have researched this question further and found a number of other decisions which conclude that various contests of the type described in your letter are lotteries.

The issue of consideration for purposes of establishing a lottery is thoroughly discussed in an Annotation, "Promotion Schemes of Retail Stores as Criminal Offense Under Anti-Gambling Laws", 29 A.L.R.3d 888. While, concededly, there are cases to the contrary contained therein, this Annotation also provides a number of cases with similar facts to those outlined in your letter, many of which conclude that such schemes are a lottery. The following statement is provided in the 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 participation, 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.App. 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. Independent Serv. Stat. Assoc., 10 S.W.2d 124 (Tex. Civ. App. 1928); and Smith v. State, 136 Tex. Crim. 611, 127 S.W.2d 297 (1939).

In Boyd, the Georgia Appeals Court stated that "[u]nder the rules and regulations governing defendant's sales promotion program, it was not a condition precedent for 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, services 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 was instead 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 hoped to accomplish in the "closed participation" scheme - that is, promotion of their businesses by awarding prizes by chance - 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 decisions 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 shifted, the scheme is still unlawful.'"

Notwithstanding the "no purchase necessary" device, the scheme in Boyd was 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 observe, 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.

And in Idea Research, supra, the Court noted:

> [t]he consideration [for a lottery] does not need to be a money consideration. It 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 or buy merchandise, and other do not.

Thus, said the Court, citing numerous cases from all over the country, "[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.2d at 501.

Other cases have discussed and described these various schemes in considerable detail. For example, the Oklahoma Court in State ex rel. Draper v. Lynch, 192 Okl. 497, 137 P.2d 949 (1943) provided an excellent categorization of these promotional devices:

> . . . In the book, Flexible Participation Lotteries, Williams (1938), Sections 192 - 195, lotteries are shown to be divided generally into three district classes or types. These are: (1) Closed Participation - this type being any lottery in which the attendant restrictions of purchase of goods, tickets, etc. are a condition precedent to participation. These are uniformly declared to be lotteries. (2) Open Participation - in this class none of the participants are required to do anything in order

> to participate, and no offer of any kind is extended as an inducement for participation. (3) Flexible Participation - this type professes to be free, but is closely related to the closed participation type. The essential difference lies in the fact that this scheme is relaxed sufficiently to include some who are, theoretically, non-paying participants. Although represented as being free, there are, ordinarily restrictive conditions which serve to make this scheme much more favorable to paying participants than to non-paying, although in theory their chances are co-equal. There is a closed participation within the flexible scheme, and a better or deluxe chance at the prize can be had only by payment of money for admission, or the price of participation.
>
> This type of lottery first appeared in the country about 1889, and at that early date provided the basis for extensive litigation in the famous case of Yellow-Stove Kit. v. State, 88 Ala. 196, 7 So. 338, 7 L. R. A. 599, 16 Am.St.Rep. 38. Since that time there have been a multitude of schemes put into operation under different names, all of which have been based upon virtually the same plan of operation with variations only in the name and details of operation.

137 P.2d at 951, quoted with approval in Blackburn v. Ippolito, 156 So.2d 550, 551-552 (Fla. 1963). The Blackburn case also quoted Lynch which provided the following summary with respect to consideration as an element where the individual was not paid money:

> (4) Schemes of this kind are said to involve consideration in the following ways, and this means consideration flowing from the participant to the operator of the scheme in that: (1) The registrant is out his time and trouble in going to register in order to be eligible for participation; (2) registrants are subjected to theater's sale appeal, of definite value to the theater; (3) the register makes up a convenient mailing list without cost to the theater, which is of definite value; (4) time and trouble is expended in attending the drawings to participate; (5) participants render services by advertising the scheme at large, and this is valuable because the radio and mail are closed to such advertising; (6) registrants more often than not

> pay admission in order to participate more comfortably and have a superior chance to win; (7) presence of participants at the drawing, even outside, in response to defendant's scheme, and solely for purpose of participating therein. Maughs v. Porter 1930, 157 Va. 415, 161 S.E. 242 . . . There is also a further consideration sometimes said to be present in the mass by reason of the collective contribution of the purchasers in spite of the fact that some of them participate without paying for the privilege of purchase of admission tickets. See 34 Am.Jur. 648, and cases cited under footnote 2.

156 So.2d at 554.

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 nor 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 defendants' place of business. By such appearances they are, of course, subjected to the sales appeal of defendants 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 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.

The case of Midwest Television, Inc. v. Waaler, 44 Ill.App.2d 401, 194 N.E.2d 653 (1963) is especially illuminating. The Courts' 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 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.

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 player actually parts 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 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 this 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 us superficial and of slight legal consequence. The rationale of Society Theatre, supra, implies that, where the two elements of a 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 participants 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:

> [o]ur views . . . find 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 his nearest Acme Market . . . . Finding a consideration essential to a lottery, the court there said . . .
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> > . . . consideration is in fact clearly present here, both in the form of a detrimental 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. The Washington Supreme Court concluded as follows:

> Since 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 inapt definition, 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 advertising and in make 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.

The courts of South Carolina have adopted the standard contract definition of "consideration". As recognized in Howard v. South Carolina National Bank, 288 S.C. 421, 425, 343 S.E.2d 41 (Ct. App. 1986),

> [i]n order to constitute consideration, there must be a benefit to the creditors - that is, something must be secured to him which he could not otherwise demand - or there must be a detriment to the debtor - he must actually do something which in the absence of his agreement he would not be bound to do.

CONCLUSION

Obviously, whether or not a particular scheme is a lottery depends in large part upon the specific facts and circumstances involved. 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, such as the payment for a particular item like trading cards, and included with such purchase is also a free chance or opportunity to win a prize, such would generally constitute a lottery. In your situation, where payment is made for the "purchase of a card or cards (collector or otherwise), and together with such card, there is the opportunity to participate in a contest (involving chance and prize), such would, in my judgment, likely be deemed 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 with respect to such schemes.

Moreover, the fact that the promoters of a particular contest specifically state that "no purchase is required " in order to play is not necessarily determinative of whether a lottery is involved. We agree with those courts which have analyzed such schemes as not necessarily requiring monetary payment for there to be sufficient consideration to constitute a lottery. These courts reason that such promotional schemes must be examined in their entirety, and not with a focus only upon the "no purchase required" aspect. Such courts take the view that sufficient consideration passes from the player 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 Carney discussed at length herein, recognize that, generally speaking, such contests make "free" participation more difficult, and as a result, the ratio of "free" participants to those who pay something is quite small. The Carney court characterized the suggestion that participation was "free" as "chimerical". These decisions, many of which are referenced herein, are, in my view, soundly reasoned.

Because there is contrary authority, however, this is a relatively close question. Moreover, our Supreme Court has yet to review the legality of such promotional devices.[1]

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[1]Only recently, in Treasured Arts, Inc. v. Watson, Op. No. 24331 (October 16, 1995), (continued...)

Following Darlington, the Court has had few occasions to revisit the lottery issue. Nevertheless, there is language in Darlington which at least suggests that the Court does not necessarily deem such promotions to be lawful. Ante. Until our courts actually rule as to the validity of such scheme, we can only attempt to predict what we believe the decision will be.

Pending a decision by our courts in this area, however, it is my opinion that promotional schemes, such as you describe in your letter, are a lottery.[2], Based upon the cases referenced above, the scheme you outline, as well as many of those of the "no purchase required" variety - particularly where benefit flows to the promoter and detriment to the player, regardless of whether actual monetary payment occurs in every instance - are most probably a lottery. Where for a price, a person purchases a card or cards, and along with it the opportunity to compete for a prize by chance, the fact that the promoter also offers other potential players the "opportunity" to pick up a free entry or mail in requesting such entry does not prevent the scheme from being a lottery. Even those who participate "free" must expend the time, effort and postage to submit an entry. The consideration is found in the detriment to the player in entering the contest and the benefit flowing to the promoter in the sale of additional products.

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

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[1](...continued)
the Court had such a case before it, but the merits of the issue were not reached because of mootness. This is a matter which clearly must be settled by our Supreme Court.

[2]Admittedly, this Office has previously opined that a "bottle cap" contest was not a lottery for lack of consideration. In that instance, when a participant was able to spell out the words "Pepsi Cola" with letters placed under the crowns of the caps of individual bottles of the soft drink, that individual won a prize. The individual did not absolutely have to purchase "Pepsi" to compete, but could go to one of the four "Pepsi" plants and secure a crown, free. While recognizing that there was a split of authority regarding whether such a scheme was a lottery, the Opinion chose to follow those cases that found consideration wanting. See e.g., State v. Socony Mobil Oil Co., 386 S.W.2d 169 (Tex. 1964); Brice v. State, 242 S.W.2d 433 (Tex. 1951); State v. Eames, 183 A. 590 (N.H. 1936); State v. Danz, 250 P. 37 (Wash. 1926); Yellowstone Kit v. State, 7 So. 338 (Ala. 1890); People v. Eagle Food Centers, 202 N.E.2d 473 (Ill. 1964). Our Court may agree with this approach, but I believe the other cases, cited above, which find consideration, to be the better reasoned authorities.

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 regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/ph