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Opinion No. 02-089

Legality of Vending Machine Distributing Instant Win Cards

QUESTION

Whether a machine that upon payment of a fee dispenses a short term prepaid telephone or "psychic reading" card connected to a scratch-off type card, which, in turn, provides the opportunity to instantly win cash or other prizes, violates Tennessee's lottery or gambling prohibitions, found in Tenn. Code Ann. §§ 39-17-501 -- 509?

OPINION

Yes. It is the opinion of this Office that the activity described above is an illegal "lottery" and illegal "gambling" and that the machine in question is an illegal "gambling device."

ANALYSIS

The opinion of this Office has been requested as to the legality of a machine that dispenses a short term (two minute) prepaid telephone or "psychic reading" card connected to a portion that can be scratched-off, "pull tabbed," or otherwise read by the machine to disclose whether the person is an instant winner of cash or other valuable prizes. According to information provided to this Office, when payment (usually one dollar) is inserted into the machine, the machine issues a two minute prepaid telephone or "psychic reading" card, with a tear off instant win portion attached. Using the "instant win" portion of the card, the customer scratches-off, pulls tabs, or otherwise learns if he or she is a winner of a particular prize. Winners are determined strictly by chance distribution of winning "promotional game pieces."

Customers can insert five, ten or twenty dollars to receive a corresponding number of cards. No change is given from the machine. The cards may also be distributed from a roll through a manual counter top dispenser. The one dollar, prepaid, so-called "emergency" telephone card allows the possessor, during a limited time period, to call a toll-free number, enter a pin code revealed on the card, and to talk for no more than two minutes. Information included with the opinion request indicates that, with at least one version of these cards, additional prepaid telephone time may be purchased from the telecommunications carrier servicing the card for 14.9 cents per minute by contacting the same toll-free number. The one dollar "psychic reading" card allows the possessor to call a so-called "psychic" line and, according to the promoter, talk "free" for two minutes to a telephone "psychic." After the first two minutes, the caller can continue but will be billed at the psychic line's normal per minute rate (described in the

materials submitted with the request as approximately $3.99 per minute). It is unclear if, when, and how clearly and conspicuously these additional charges connected with the "psychic line" are disclosed to prospective purchasers. Customers may not combine the minutes from the purchase of multiple cards. That is, if someone purchases ten cards he or she cannot talk for a combined twenty minutes on one call. These cards do not appear to be marketed independently of the attached "sweepstakes promotion." Apparently there is always a version of the instant win prize "promotion" attached to the cards.

It appears that the most prominent advertising on the machines is for what the promoter calls the "sweepstakes promotion" and not the product offered. In other words, the advertising does not appear to be designed to generate future retail sales of the particular "product" attached to the "sweepstakes promotion." From materials submitted with this request, supposedly a "No Purchase Necessary" disclaimer and advertisement of "Free Sweepstakes Promotion" appear on the machine. The "Rules" supposedly contain the odds of winning each type of prize offered in the particular version of the "promotion," identified by the "Sweepstakes Number" and "Series No.," which is currently being distributed through that machine. Also the "Rules" explain that "No purchase [is] necessary" and under certain conditions a request can be made for a "free promotional game piece." It is unknown how clearly and conspicuously these "Rules" will be displayed, especially the free play redemption procedure, or whether the "Rules" will in fact be available at or near each machine. Generally, by sending a hand written card (containing among other things the "promotion" number and series) with a self-addressed, self-stamped envelope to the promoter, non- purchasers may obtain a validated free game piece for a "promotion" that allegedly contains the same odds of winning as the "promotion" offered at a specified machine location. The number of requests for free promotional plays are restricted to one per envelope and per day. The out-of state promoter advises that the P.O. Box for the free game piece requests is checked about once a week and that one should allow 14 days for return mail to bring the free game piece. According to the promoter, a limited number of free game pieces also may be available at the retail location of the machines.

While a purchaser may immediately redeem an instant winning card for cash at the retail location, it appears that a winner on a free play must mail the game piece back to the promoter to redeem his prize. The promoter admits that, in its "promotions" of this type in other states, only a very few (about a couple of dozen) requests for free plays have been made compared to the large number (approximately a million) of game pieces sold. There is no limitation on how many cards one can purchase from the machine per visit.

It appears that each version or series of the "promotion" is intended to be self-sufficient. That is, the sale of the rolls of cards connected with that version of the "promotion" will generate the cash to pay the prizes and costs in that promotion and also generate a profit for the retailer.[1] These machines are placed in small locally owned convenience-type stores, which apparently are locations where one would not normally expect a high volume of sales of the associated "products" in the absence of an accompanying prize distribution scheme.

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[1]In one example, the promoter estimated the profit to be approximately 23%, after the cash prize payouts, on a roll of 7,500 cards.

This "promotion" is substantially similar to the machine that vends a so-called "collector card" simultaneously with an opportunity to play a video game for the chance to win cash and other valuable prizes. This Office opined that the game involving cash payoffs is illegal "gambling" and, consequently, that the machine would be an illegal "gambling device." Op. Tenn. Atty. Gen. No. 99-146, July 30, 1999, "Legality of Machines Vending Purported 'Collector Cards' Simultaneously With An Opportunity To Win Cash By Playing a Video Game." It is the opinion of this Office that the above described activity is a "lottery" and "gambling" under Tennessee law. In addition, it is the opinion of this Office that the machine in question is an illegal "gambling device."

As this Office has previously explained, by design, the definitions in the current gambling statutes are broader than those found in earlier law. *See State v. Burkhart*, 58 S.W.2d 694, 698 (Tenn. 2001)(upholding constitutionality of "gambling" statutes against vagueness and overbreadth challenge by possessor of video slot machines). Following amendments in 1989 and 2001, "Gambling" is expressly declared "contrary to the public policy of this state" and is presently defined, in pertinent part, in Tenn. Code Ann. § 39-17-501(1) as "risking anything of value for a profit whose return is to any degree contingent on chance, but does not include a lawful business transaction." The exemptions in Tenn. Code Ann. § 39-17-501(1) for a "lawful business transaction," such as futures and commodities trading, a legislatively authorized annual event benefitting charity, or an approved official state lottery are not applicable here. The 1989 Sentencing Commission Comments state that "the commission intends to include any scheme by which value is risked upon a chance for greater value as a 'gambling' offense." *Id.*

"'Gambling' includes lotteries. . . or any as yet unnamed scheme where value is risked for profit." *Id.* Tenn. Code Ann. §39-17-501(5) defines "lottery" as "the selling of anything of value for chances on a prize or stake." Lotteries for any purpose, charitable or otherwise, are unlawful in Tennessee. *Secretary of State v. St. Augustine Church/St. Augustine School*, 766 S.W.2d 499, 500 (Tenn. 1989).[2] Three elements present in a lottery are: (1) chance, (2) prize, and (3) consideration. *State ex rel. District Attorney General v. Crescent Amusement Co.*, 170 Tenn. 351, 357, 95 S.W.2d 310, 312 (1936).[3]

Tenn. Code Ann. § 39-17-502 makes it an offense for a person knowingly to engage in gambling. Tenn. Code Ann. § 39-17-503 prohibits as a misdemeanor offense "gambling promotion," while Tenn. Code Ann. § 39-17-504 prohibits as a felony offense "aggravated gambling promotion." Tenn. Code Ann. §39-17-506(a) makes it an offense knowingly to make or aid in the making of any lottery.

"Gambling device" is defined in Tenn. Code Ann. § 39-17-501(3) to mean "anything designed for use in gambling, intended for use in gambling, or *used for gambling*." (emphasis added). Tenn. Code Ann. § 39-17-505(a) specifies that it is a criminal offense if a person "knowingly owns, manufactures, possesses, buys, sells, rents, leases, stores, repairs, transports, prints or makes any gambling

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[2] Article XI, Section 5 of the Tennessee Constitution provides: "The Legislature shall have no power to authorize lotteries for any purpose, and shall pass laws to prohibit the sale of lottery tickets in this State."

[3] Early Tennessee decisions defined a lottery as "a game of hazard in which small sums are ventured for the chance of obtaining a larger value either in money or articles." *France v. State*, 65 Tenn. 478, 484 (1873).

device or record."

The "promotion" as described herein allows purchasers the opportunity to win a "profit whose return is . . . contingent upon chance." Under the facts submitted with the request, there can be no credible claim that purchasers are simply buying a product and, accordingly, that there is no "consideration" or thing of value risked, on the theory that the associated "Rules" state "no purchase [is] necessary" in order to participate in a similar sweepstakes with the same odds.[4] Previously this Office has stated, especially in the context of alleged charitable fund raising, that merely labeling the payments exacted from prize giveaway participants as "suggested" or "voluntary" donations (or as otherwise not required) does not in and of itself alter the fact that "consideration" is present, if, in reality, participants are paying or giving anything of value to participate. September 15, 1989 Memorandum, "Legality of Proposed Types of Prize Giveaways", *cited* in Op. Tenn. Atty. Gen. No. 97-025, March 19, 1997, "Legality of Fund-Raising 'Rubber Duck Races' At Which Valuable Prizes Are Given Away " and Op. Tenn. Atty. Gen. No. 99-146, July 30, 1999. "[F]or a prize giveaway to fall outside the proscription provided by the constitutional ban [on lotteries], *participation* in the prize giveaway *must be objectively independent from any charge made or received*, directly or indirectly, by donation or otherwise, for a product, service, membership, or event." *Id*. (emphasis added). With respect to the machine at issue here, we believe that a trier of fact would conclude that, for many of the participants, the payment of the price connected with the cards is not objectively independent from the dominant desire to attempt instantly to win cash or other valuable prizes.

Apparently these telecommunications cards with these usage terms and restrictions are not marketed at retail to any substantial degree in the absence of an accompanying prize "promotion." This factor distinguishes this situation from a limited duration promotional giveaway associated with an established retail product, in which it objectively appears that the retail product being offered for sale remains at its normal or legitimately established retail price.[5] Normally those products would be marketed at that same retail price without any accompanying promotional giveaway.

In contrast to limited duration promotions with an established retail product, many of the participants in the activities described herein would not buy the product at the vended price but for the accompanying prospect of instantly winning a prize. The practical utility of purchasing short term (two

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[4]The gaming statutes historically have been found to prohibit prize giveaways restricted to purchasers of products (commonly known as "gift enterprises"). *See, e.g., Painter v. State*, 163 Tenn. 627, 45 S.W. 2d 46 (1932)(mint vending machine that delivered in addition to mints an unknown number of chips with value constituted a "gaming device"); *Eubanks v. State*, 50 Tenn. 488 (1871)(sale of ten cent candy for fifty cents in a box with a prize of unknown value constituted "gaming"); and *Bell v. State*, 37 Tenn. 507 (1857)(prize giveaway only for purchasers of books constituted "gaming").

[5]Thus, the activity at issue here is fundamentally different from limited duration promotional sweepstakes occasionally offered by fast food chains, or in connection with candy, sodas, miscellaneous food or other established retail products. For example, in upholding the legality of a Coca-Cola bottle cap contest that did not require a purchase, the court specifically noted that the price of the product which could be purchased with the "free" game caps was constant before, during and at the termination of the promotion. *Mid-Atlantic Coca-Cola Bottling Co., Inc. v. Chen, Walsh & Tecler*, 460 A.2d 44, 47 (Md. App. 1983).

minute) cards for telecommunications services is significantly limited since the minutes cannot be combined to purchase a call of any significant length. A reasonable inference from the facts is that most players pay the "purchase price" not to obtain the limited use short term telecommunications cards but rather for the chance instantly to win cash and other prizes.

This machine, as was the vending/video gaming machines at issue in Op. Atty. Gen. No. 99-146, July 30, 1999, is analogous to the bingo schemes discussed in Attorney General Opinion No. 89-105 (August 18, 1989), "Legality of Variations on Bingo." Those bingo games, like the machine at issue here, also stated that it was not necessary to pay to participate. In all of the bingo variations, as with this machine, certain characteristics remained constant: there is a distribution of prizes (*i.e.*, money) to participants, and apparently the money for this distribution, either in the short or long term, is generated by payments from the gaming participants [in that instance for the bingo cards]. Payments, voluntary or compulsory, from some, most or all participants by whatever name, were deemed in Opinion No. 89-105 to constitute consideration and, therefore, each type of bingo variation constituted a lottery.[6] The same conclusion applies to the activity at issue here.

As previously noted, a trier of fact would be well justified in concluding that it is highly unlikely that many participants would pay the requested price for the card itself, without the associated chance to win prize money. The purchase price of each card enables the person to immediately and repeatedly play the instant win game, and, that feature in our view supplies the element of consideration. In our opinion, the fact that a very few people may not pay to play does not negate the element of consideration in the case of the vast majority of players who do pay for the chance to win the game.

In summary, the operation of the machine at issue is, in the opinion of this Office, an illegal "lottery" and illegal "gambling." Furthermore, it is our opinion that this machine is a prohibited "gambling device" under Tenn. Code Ann. §§ 39-17-501(3) and 505.

Enforcement of the gaming statutes and the lottery prohibitions falls within the responsibility of the independent district attorneys general. The ultimate decision whether to prosecute under these statutes, based upon any particular factual situation, would rest with the district attorney general in the appropriate judicial district.

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[6]*See State v. Mabry*, 60 N.W.2d 889 (Iowa 1953)(the court held that the bingo operations did not cease to be a lottery because some players were admitted to play without paying for the privilege, while the majority of the others paid for the opportunity to win cash prizes).

In Attorney General Opinion 89-105, these variations on bingo also failed because there was not an equal opportunity for the free players to participate in the games. Participants did not receive the same number of cards or opportunity to participate, which was a further indication that the participants were paying to play and for the chance to win. The number of cards a donor received depended on his donation, while nondonors generally received only one card per game. Similarly, in this case, there does not appear to be a limit on how many chances to instantly win one can purchase at any given time. In practice, it appears that only the purchaser's available cash restricts the number of times he may instantaneously play the game for a chance to win and immediately receive a cash payoff. Generally there are restrictions, however, on the number of free game entries which one can receive with each request and per day, and the requester must wait an average of two weeks to receive such free game entries.

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