S T A T E O F T E N N E S S E E
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Opinion No. 08-59

Legality of Future Rebate Contingent Upon The Winner of The NCAA Basketball Tournament

QUESTION

Is it legal in Tennessee to conduct a promotion wherein one receives a partial or full rebate for goods purchased and/or financed if a particular team wins the NCAA basketball tournament?

OPINION

It is not legal in Tennessee to conduct a promotion that requires the purchase and/or financing of goods, when that purchase and/or financing is induced by the speculation that one may receive a partial or full rebate contingent upon a particular team winning the NCAA basketball tournament.

ANALYSIS

The opinion of this Office has been requested as to the legality of promoting the speculation of a partial or full rebate being given to one who purchases and/or finances goods if a particular team wins the NCAA basketball tournament. This speculative partial or full rebate is a thing of value offered to the customer. Only customers who purchase and/or finance goods appear eligible for a partial or full rebate. Based upon the speculation of a particular team winning the NCAA basketball tournament, one may be induced to purchase or finance goods from that particular retailer at a particular time, price, and financial arrangement, than would normally occur.

Tenn. Code Ann. § 39-17-501(1), in part, provides:

> Gambling is contrary to the public policy of this state and means risking anything of value for a profit[1] whose return is to any degree contingent on chance, or any games of chance associated with casinos, including, but not limited to, slot machines, roulette

[1]Tenn. Code Ann. § 39-17-501(6) defines "profit" as "anything of value in addition to the gambling bet."

wheels and the like.[2]

Tenn. Code Ann. § 39-17-501 (5) defines "lottery" as "the selling of anything of value for chances on a prize or stake." Tenn. Code Ann. §§ 39-17-502 and 503 prohibit "gambling" and "gambling promotion." Tenn. Code Ann. § 39-17-506(a) prohibits knowingly making or aiding in the making of a "lottery."

Tennessee's gaming statutes historically have been found to prohibit prize give-a-ways 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 possibly delivered in addition to mints an unknown number of chips with value constituted a "gaming device"); *Eubank v. State,* 50 Tenn. 488 (1871) (sale of 10 cent candy for 50 cents in a box with a prize of unknown value constituted "gaming"); *Bell v. State,* 37 Tenn. 507 (1857) (prize give-a-way only for purchasers of books constituted "gaming"). Similarly, the described promotion is limited to purchasers and there is no opportunity to participate without making a purchase.[3]

"A 'thing of value' to be the subject of gaming may be 'any "thing" affording the necessary lure to indulge the gambling instinct.'" *Painter,* 45 S.W.2d at 47; *see also Heartley v. State*, 157 S.W.2d 1, 3-4 (Tenn. 1941)(reaffirming this rule announced in *Painter*). "Combining the element of chance with the inducement of receiving something for nothing results in gambling." *Painter,* 45 S.W.2d at 47, *quoting Green v. Hart,* 41 F.2d 855, 856 (D.C. Conn. 1930); *see also State v. Vance,* 2004 WL 746296, *11-12 (Tenn. Crim. App. 2004), *perm. app. denied* (quoted approvingly from *Painter* and *Heartley*).

Certainly there is a degree of chance involved in speculating whether a particular team will win the NCAA tournament. Therefore, making a partial or full rebate of a required purchase price or financing arrangements contingent upon the chance that a particular team will win a sporting event would violate the prohibition against "gambling" and conducting "a lottery."

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[2]Tenn. Code Ann. § 39-17-501 also includes an inapplicable exemption from the gambling definition for a "lawful business transaction," which in (4) is defined to include "any futures or commodities trading."

[3]In Op. Tenn. Atty. Gen. No. 89-72 (May 3, 1989), this Office opined that:

Tennessee case law indicates that an organization, charitable or otherwise, may lawfully conduct a cash or prize giveaway if all persons wishing to participate are given an opportunity to do so without being required to pay any money, make any donation, or purchase any product or service.

We explained, however, in footnote 4 of that opinion that:

If, in reality, all participants in a type of prize giveaway are not paying or giving anything of value to participate, then there is no consideration. "Consideration" is negated when no participants pay to play.

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