

**STATE OF TENNESSEE**  
OFFICE OF THE  
**ATTORNEY GENERAL**  
PO BOX 20207  
NASHVILLE, TENNESSEE 37202

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Opinion No. 05-068

Constitutionality of House Bill No. 8 / Promotional Contests

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**QUESTION**

Does House Bill No. 8 (“H.B. No. 8”), which authorizes promotional contests as part of the Tennessee Consumer Protection Act, comply with the Tennessee Constitution?

**OPINION**

No, the proposed legislation is, at a minimum, constitutionally suspect under the Tennessee Constitution. First, to the extent that H.B. No. 8 attempts to authorize a “promotional contest” that a trier of fact in an objective analysis would conclude contains the traditional elements of prize, chance, and consideration, the bill is constitutionally suspect as violating the ban on lotteries in Article XI, Section 5 of the Tennessee Constitution. The attempt to exclude from the definition of “consideration” “accumulated credits, points, or other things of value” which may be bet or risked during the “promotional contest” on the chance to win any prize, such as cash, merchandise or other thing of value, is particularly problematic. Moreover, the proposed bill violates Article II, Section 17 of the Tennessee Constitution because the body of the bill embraces more than one subject matter and is broader than its title and caption.

**ANALYSIS**

This opinion addresses whether proposed H.B. No. 8 is constitutional under the Tennessee Constitution. H.B. No. 8 amends the Tennessee Consumer Protection Act by creating a new part, Tenn. Code Ann. §§ 47-18-5201 to -5206, to authorize “promotional contests,” which would be designated “lawful business transaction(s)” that are exempt from the prohibitions of gambling, including lotteries, in Title 39, Chapter 17, Part 5 of the Tennessee Code. H.B. No. 8 further provides that a “vending machine or like dispensing system used in the conduct of advertising and promotional undertakings, or any record related thereto, is not a gambling device or record . . . .” H.B. No. 8, Section 1, new code Section 47-18-5203(a). In pertinent part, H.B. No. 8 determines

that “consideration” “does not include coins or currency used to purchase the advertised or promoted good . . . Moreover, accumulated points, credits, or other things of value gained or earned during the playing of a promotional contest shall not be deemed to constitute actual or implied consideration.” H.B. No. 8, Section 1, new code Section 47-18-5204(b)(1). This definition of “promotional contests” is sufficiently broad to include activities that objectively may be found to contain traditional consideration and to meet the definition of a lottery.

## **I. Lottery Ban: Article XI, Section 5**

H.B. No. 8 authorizes businesses to operate a “promotional contest in advertising” as long as payment of monetary consideration is optional and there is “an alternative method of entry requiring no consideration, other than furnishing a stamped, self-addressed envelope.” H.B. 8, Section 1, new code Section 47-18-5204(a). Furthermore, it authorizes so-called “vending machines” even if those machines contain gaming features that allow the player of a video slot machine to bet and win or lose accumulated credits, which could be cashed out for money, merchandise or other things of value. To the extent that a trier of fact in an objective analysis would conclude that any such “contest” contains traditional “consideration” (that most players are paying the “purchase price” to instantly play rather than to obtain the merchandise and/or that players are risking valuable accumulated credits by betting in the contest) in addition to prize and chance, that activity is a lottery that the Legislature cannot authorize for any purpose.

Article XI, Section 5, as amended in 2002, prohibits the General Assembly from authorizing a lottery except in two narrow circumstances: (1) if the lottery is Tennessee’s state-run lottery with the net proceeds allocated for specific purposes; and (2) if the lottery constitutes an annual event operated for the benefit of a 501(c)(3) organization located in Tennessee, as defined by the 2000 United States Tax Code or as may be amended from time to time, and is authorized by a two-thirds vote of all members elected to each house of the General Assembly. TENN. CONST. art. XI, § 5. The Tennessee Constitution authorizes and defines the state lottery as a lottery of the type such as in operation in Georgia, Kentucky and Virginia in 2000. *Id.* Section 5 clearly states that all other forms of lottery not authorized are expressly prohibited. *Id.* Therefore, if games of chance associated with casinos, including but not limited to, slot machines, roulette wheels, and the like are *not* specifically authorized, they are expressly prohibited. *Id.* Notably, the 2002 amendments to Article XI, Section 5 did not modify the meaning of “lottery” as interpreted by Tennessee courts.

In *Secretary of State v. St. Augustine Church*, 766 S.W.2d 499, 501 (Tenn. 1989) (quoting *France v. State*, 65 Tenn. 478, 483 (1873)), the Court defined “lottery” as a game of hazard in which small sums are ventured for the chance of obtaining a larger value either in money or other articles. A transaction, to be deemed a lottery, must have three elements: consideration, prize, and chance. *Id.* (quoting *State ex rel. District Attorney General v. Crescent Amusement Co.*, 170 Tenn. 351, 357, 95 S.W.2d 310, 312 (1936)). The Tennessee Supreme Court opined in *St. Augustine Church* that the attempt by the General Assembly to remove bingo from the constitutional ban on lotteries by redefining “consideration” as a “charitable donation” was an ineffective means to circumvent the constitutional prohibition, so long as the other elements of prize and chance were present. *Id.*

Just as calling the consideration paid by a customer a “charitable contribution” rather than a wager is ineffective to circumvent the Tennessee Constitution, so too is an attempted emasculation of the natural, ordinary and statutory meaning of “consideration” in the instant bill to the extent that it authorizes activities that objectively appear to contain the traditional elements of “consideration.” The proposed bill is constitutionally suspect because it asserts in Section 47-18-5204(b)(1) that “accumulated credits, points or *other things of value*” which may be bet and lost during the contest are not in reality things of value. (emphasis added).

The statutory definition of “lottery” and the common law definition of “lottery” essentially match.<sup>1</sup> Both the common law cases and the statutes require the three elements of consideration, prize and chance. When an objective analysis would find “consideration” is present in an activity (including payments from purchasers/players or the betting of accumulated credits), Article XI, Section 5, forbids the Legislature from legalizing that activity.

There are “promotions” or “contests” in which an objective trier of fact would likely conclude that so-called product purchasers are in reality risking something of value (the purported purchase price of the advertised product) on the chance to instantly play and attempt to win cash or other valuable merchandise. For example, in Tenn. Op. Att’y Gen. No. 99-146, this Office opined that machines vending purported collector cards simultaneously with an opportunity to win cash by playing a video game constitutes illegal gambling and that the machines are “gambling devices.” The machines were deemed to be illegal because an objective analysis showed they have the elements of prize, chance, and consideration. Consideration is present even if the associated “Official Rules” state that “no purchase [is] necessary” in order to participate. That opinion stated:

We believe that any trier of fact objectively analyzing this type of vending/video gaming machine as a method to distribute cash prize payoffs would conclude that its various versions violate the current gaming prohibitions set forth above. It appears that only the purchaser’s available cash restricts the number of times he may instantaneously play the video (poker or slot machine type) game for a chance to win a cash payoff. A reasonable inference from the facts is that most players pay the “purchase price” not to obtain the “collector cards” but rather for the chance to win cash and other prizes in the video game.

*Id.* at 3.

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<sup>1</sup>“Lottery” has previously and traditionally been defined as “the selling of *anything of value* for chances on a prize or stake.” Tenn. Code Ann. § 39-17- 501(5) (emphasis added).

The Tennessee Code also provides that “[g]ambling is contrary to the public policy of this state and *means risking anything of value for a profit* 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 wheels and the like.” Tenn. Code Ann. § 39-17-501(1) (emphasis added).

This Office's opinion as to the illegal nature of the operation of these "Free Spin" machines was confirmed in *State v. Vance*, No. E2003-00110CCA-R-3-CD, 2004 WL 746296 (Tenn. Crim. App. Apr. 8, 2004), *permission to appeal denied & reh'g denied* Oct. 4, 2004. The appellate court upheld a jury decision that the operation of the "Free Spin" machines at issue in that case constituted illegal aggravated gambling promotion. *Id.* at \*14. In the "Free Spin" promotion, a player activated the Free Spin machine by inserting varying amounts of dollar bills; for every dollar inserted, the machine dispensed one baseball card and gave the player twenty credits for every dollar to wager on a video slot-machine game (similar to what is played at casinos). *Id.* at \*13. After a player wagered accumulated credits and hit the "play" button, the Free Spin machine randomly determined if the player won additional credits or lost credits. *Id.* The player could wager from eight credits to sixty-four credits on each video slot-machine game; if a player accumulated at least two hundred credits on the machine, he could go to the cashier of the business and cash in the credits at five cents a credit. *Id.* While a player could send away for a free play voucher and play the Free Spin machine for free, that took several days or weeks, and very few people utilized this procedure. *Id.* The Free Spin machine was deemed an illegal gambling device because it allowed the player to insert money for five cent credits, to wager those credits on a game of chance, and to cash in those credits after two hundred credits had been accumulated by the player. *Id.* The machines could also track or record the amount of money placed into the machine and the amount paid out to players (a feature of gambling devices); additionally, the machines had a component which could modify the winning percentage on the machine. *Id.* Basically, the machines were used to risk credits for a profit whose return was contingent on chance. *Id.* at \*14. The defense argued unsuccessfully that the credits were "promotional" and had "no cash value." *Id.*

Thus the way a machine works, not its name, determines whether or not the machine operates as a lottery or is a "gambling device" as defined at Tenn. Code Ann. § 39-17-501. The proposed changes to the Consumer Protection Act would appear broad enough to authorize these types of machines or contests, and therefore are constitutionally suspect as violative of Tennessee's anti-lottery provision.

## **II. Title and Caption: Article II, Section 17**

The body of the proposed bill embraces more than one subject matter and is broader than its title or caption indicate, in violation of Article II, Section 17 of the Tennessee Constitution, which states: "[n]o bill shall become a law which embraces more than one subject, that subject to be expressed in the title. All acts which repeal, revive or amend former laws, shall recite in their caption, or otherwise, the title or substance of the law repealed, revived, or amended." TENN. CONST. art. II, § 17.

The Tennessee Supreme Court examined Article II, Section 17 in *Tennessee Municipal League v. Thompson*, 958 S.W.2d 333, 336-37 (Tenn. 1997). At issue in that case was the constitutionality under Section 17 of the following caption of proposed 1997 Tenn. Pub. Acts Ch. 98:

An Act to amend Tennessee Code Annotated, Title 6, Chapter 1, Part 2; Title 6, Chapter 18, Part 1; and Title 6, Chapter 30, Part 1, relative to the distribution of situs-based tax collections after new municipal incorporations and the timing of elections to incorporate new municipalities.

*Id.* at 334. The Court determined that the subject of the act was the amending of the statutory schemes listed in the caption but that the phrase “relative to” made the caption restrictive. *Id.* at 337-38. Because the body of the bill included amendments that fell outside the “relative to” clause in the caption, the act violated Article II, Section 17. *Id.* at 338. The purpose of Article II, Section 17 is “to prohibit so-called ‘omnibus bills’ and bills containing hidden provisions which legislators and other interested persons might not have appropriate or fair notice.” *Id.* at 336 (quoting *State ex rel. Blanton v. Durham*, 526 S.W.2d 109, 111 (Tenn. 1975)). The *Tennessee Municipal League* Court restated the well established rule that Article II, Section 17 should be “liberally construed, so that the General Assembly would not be ‘unnecessarily embarrassed in the exercise of its legislative powers and functions.’” *Id.* (quoting *Memphis St. Ry. Co. v. Byrne*, 119 Tenn. 278, 287, 104 S.W. 460, 461 (1907)).

In *Farris v. State*, 535 S.W.2d 608, 609 (Tenn. 1976), the Tennessee Supreme Court considered the constitutionality of Tenn. Code Ann. § 40-2707. The trial court had charged the jury on parole eligibility and related matters pursuant to the challenged code provision, Tenn. Code Ann. § 40-2707. *Id.* That statute provided for sentences of an indefinite period not to exceed the maximum nor minimum term with certain allowances. The original statute, enacted in 1913, did not refer in any way to the substance of any charge to the jury. *Id.* at 610. A 1923 amendment by Chapter 52 of the Public Acts of 1923, codified at Tenn. Code Ann. § 40-2707, provided for the “verdict of the jury to fix the maximum term in cases where maximum and minimum term is provided by law.” *Id.* The Court noted that neither the caption nor body of the 1923 amendment “hints at any charge to be given to the jury.” *Id.* The next amendment to the statute occurred in 1973. The caption of the 1973 amendment read: “An Act to amend Section 40-2707 Tennessee Code Annotated, relative to *verdict and sentence* on felony conviction.” (emphasis added). *Id.* The body of the 1973 amendment, however, contained a requirement that trial courts in felony cases charge the jury on parole eligibility and related matters. *See* 1973 Tenn. Pub. Acts 163, § 2.

Nothing in the 1973 amendment’s caption, nothing in the body or caption of the 1923 Act it amended, and nothing in the original statute reflected the requirement to charge the jury on parole eligibility and related matters. *Farris*, 535 S.W.2d at 612. The Court observed, “There is nothing whatsoever about this caption to alert any legislator or any interested citizen that tucked away into the Act would be a requirement that the judge charge the jury on parole considerations.” *Id.* at 610. Because the caption specified “verdict and sentence,” any portion of the Act beyond that subject and not relating to “verdict” or “sentence” was void. *Id.* at 612. The Court declared Tenn. Code Ann. § 40-2707, Section 2 (the jury charge requirement) unconstitutional, in violation of Article II, Section 7 of the Tennessee Constitution. *Id.* Additionally, the Court determined that the jury charge requirement was unconstitutionally vague and impossible to apply. *Id.* at 612-13. The remaining

provisions of the Act were upheld because they were within the limits of the caption and were germane to it. *Id.* at 610.

As in *Farris* and *Tennessee Municipal League*, the body of the proposed bill includes amendments that fall outside the “relative to” clause in the caption. The caption simply reads “An ACT to amend Tennessee Code Annotated, Title 39; Title 47 and Title 67, *relative to vending machines.*” (emphasis added). The body of the proposed bill generally embraces promotional advertising contests - not just vending machines. The proposed bill exempts promotional contests from the reach of criminal statutes by designating promotional contests as “lawful business transaction[s]” under Tenn. Code Ann. § 39-17-501(1)(A). H.B. No. 8, Section 1, new code Section 47-18-5203(a). In addition to exempting promotional contests in advertising from the definition of gambling, Section 47-18-5203(a) excludes a vending machine “or like dispensing system used in the conducting of advertising and promotional undertakings, or any record related thereto” from the definition of a gambling device under Title 39, Chapter 17, Part 5. Section 47-18-5204(b)(1)-(3) defines what is and is not consideration in promotional advertising contests. The bill’s sole reference to vending machines occurs at Section 47-18-5203 of H.B. No. 8.

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PAUL G. SUMMERS  
Attorney General and Reporter

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MICHAEL E. MOORE  
Solicitor General

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MEREDITH DEVAULT  
Senior Counsel

Requested by:

Honorable Randy McNally  
Senator  
5th Senatorial District  
307 War Memorial Building  
Nashville, TN 37243-0205