

OPINION NO. 67-064**Syllabus:**

1. A promotional game which requires a participant to make a purchase on the premises of a commercial enterprise as a prerequisite to obtaining a token necessary for participation is a lottery.

2. A promotional game which requires a participant to pass through a check-out line on the premises of a commercial enterprise to obtain a token necessary for participation, although no purchase is required, is a lottery.

3. A promotional game which requires a participant to go on to the premises of a commercial enterprise to obtain a token necessary for participation, although no purchase is required to obtain the token, is a scheme of chance. Opinion No. 3502, Opinions of the Attorney General for 1962, affirmed.

To: C. Howard Johnson, Franklin County Pros. Atty., Columbus, Ohio
By: William B. Saxbe, Attorney General, July 15, 1967

In your request for my opinion you set forth questions pertaining to the increased use of "give-away" games as promotional activity in Franklin County and throughout the state, said questions reading as follows:

"1. Is a promotional game which requires a participant to make a purchase on the premises of a commercial enterprise as a prerequisite to obtaining a token necessary for participation a lottery?"

"2. Is a promotional game which requires a participant to pass through a check-out line on the premises of a commercial enterprise to obtain a token necessary for participation, although no purchase is required, a lottery?"

"3. Is a promotional game which requires a participant to go onto the premises of a commercial enterprise to obtain a token necessary for participation a lottery or scheme of chance, although no purchase is required to obtain the token?"

In order to reach a determination of whether each or any of the described situations constitutes a lottery, it will be necessary to examine the laws which hold lotteries illegal and the cases which have defined lotteries and their elements.

Section 6 of Article XV, Ohio Constitution, provides:

"Lotteries and the sale of lottery tickets, for any purpose whatever, shall forever be prohibited in this state."

This constitutional provision is a statement of policy for the State of Ohio, but does not provide any penalty for a violation thereof. In order for the Constitutional provision to be an effective prohibition it was necessary for the General Assembly to enact certain definite criminal legislation. This it has done by the enactment of the following sections.

Section 2915.10, Revised Code, reads, in part, as follows:

"No person, for his own profit, shall vend, sell, barter, or dispose of a ticket, order, or device for or representing a number of shares or an interest in a lottery or scheme of chance, by whatever name, style, or title denominated or known, located in or to be drawn, paid, or carried on within or without this state.

"* * * * *"
(Emphasis added.)

Section 2915.12, Revised Code, reads, in part, as follows:

"No person, for his own profit, shall

establish, open, set on foot, carry on, promote, make, draw, or act as 'backer' or 'vendor' for or on account of a lottery or scheme of chance, by whatever name known, located in or to be drawn, paid, or carried on within or without this state, or by any of such means, sell or expose for sale anything of value.

* * * * * * * * *"
(Emphasis added.)

Under the Constitutional provision, supra, and these statutes it is settled in Ohio, and in virtually all jurisdictions under varying statutes, that three elements are necessary to constitute a lottery. These elements are recognized to be (1) the payment of a price or consideration for (2) a chance to (3) gain a "prize". 35 Ohio Jurisprudence (2d), 63, ff., Lotteries, Section 3, Westerhaus Co., Inc., vs. City of Cincinnati, 165 Ohio St. 327 (335) (1956).

That the element of a "prize" is present in the promotional games referred to in your request is an undisputed fact. Likewise, the element of chance in determining the person or persons to be the recipient of a prize is clearly established by even the most cursory examination of the operation of these games.

Chance was set out in the second branch of the syllabus of Fisher vs. The State of Ohio, 14 Ohio App., 355 (1921), as the predominant feature of a lottery:

"2. The element of chance is present in a scheme by which the prize is awarded by some action or means taken in which result man's choice or will has no part, nor can human reason, foresight, sagacity or design enable him to know or determine such result until the same has been accomplished."

It would appear from a reading of the above quoted passage that if a certain degree of skill were present in the operation of a game, the element of chance would be eliminated. This, however, is not the position that the Ohio Supreme Court has taken as is indicated by the eleventh branch of the syllabus of Westerhaus, supra:

"11. The element of chance which is necessary in order to have gambling can be supplied by having the happening of some future event determine who gets a prize or how much he gets, at least where such an event is not certain to happen and even though the happening of such event is dependent predominately upon skill."

(Emphasis added.)

In addition to the determination that skill may be present in the element of chance, the language above specifies that chance can be supplied by the happening of a future event. This does not mean that chance can only be supplied by a future event. As the body of the opinion in Westerhaus, supra, indicates, and as the

third syllabus of Fisher, supra, clearly states:

"3. It is not essential, in order that the element of chance may exist in a scheme, that the result be determined by the happening of an event subsequent to the giving of the consideration. The determination may be based upon the subsequent ascertainment of facts unknown and unknowable at the time of the giving of the consideration."

The question upon which this opinion turns, as have practically all of the cases and opinions involving similar sales promotion schemes, is that of consideration.

Where a participant in a scheme must pay solely for the chance to win a prize, all of the elements of a lottery are unquestionably present, and the scheme is therefore illegal. The situation described in your first question involves those games which require the participant to make a purchase on the premises at a commercial enterprise as a prerequisite to obtaining a token necessary for participation. It is clear from the facts presented and it is a well established principle of law that when the participant is required to make a purchase, sufficient consideration flows from the participant to the operator to be regarded as fulfilling the requirement of the element of consideration.

* * * * *

"Scheme [s] for the division or distribution of certain articles of property, to be determined by chance among those who have taken shares in the scheme * * * for example, a merchant or tradesman sells his ware for the market value, but by way of inducement gives to each purchaser a ticket which entitles him to a chance to win certain prizes * * * are lotteries.

* * * * *

(Emphasis added.)

State vs. Bader, 24 N.P. (N.S.), 186, (1922),
Municipal Court of Cincinnati, at page 189.

The second question in your request poses a more limited situation in which the participant must pass through a check-out line on the premises of a commercial enterprise in order to obtain a token, even though no purchase is required. State vs. Bader, supra, is direct authority that this particular scheme is a lottery. In Bader, tickets were given out to all patrons of a cafeteria after they had entered the premises and walked through the check-out line to the cash register regardless of whether they had purchased food or not. The defendant owners of the cafeteria testified that the distribution of the tickets with meals and to persons who entered and did not buy meals was an inducement for them to view the premises. In holding that this scheme included the necessary element of consideration, the opinion stated at page 190 that:

* * * * *

"* * * The question of consideration does not mean that pay shall be directly given for the right to compete. It is only necessary that the person entering the competition shall do something or give up some right or acquisition."

The third question in your request is the most complex. Here you have posed a situation where the sole requirement of the game is that the participant go onto the premises to obtain a token necessary for participation.

In order to fully consider this question, I will review the theories of consideration and the authorities commenting thereon. There are few Ohio cases dealing with these problems, therefore it is necessary for me to review decisions in other states. Some of these authorities are seemingly opposed to each other, not however, in two distinct lines but in varying details leading to opposite conclusions on the question of consideration for a lottery. I shall consider these positions and draw therefrom my conclusions for the purpose of answering the questions posed by your request.

State vs. Deveroux, 14 O.O. 283 (1939), Municipal Court of Cleveland, distinguished Bader, supra, in a case involving the simultaneous operation of a restaurant and bingo game. Persons who were eating at the restaurant played bingo in one part of the building, while those who did not wish to eat played in a separate part. It was clear from the factual description of the game that the interior of the building was divided into two distinct parts, the stage where the numbers were called out being the only thing visible to those on both sides. Thus a non-purchasing participant was never exposed to the food being offered for sale and did not suffer the embarrassment of requesting to participate while all others around him had made purchases. He merely had to enter the premises to play and collect whatever he might win. The grounds for ruling that this scheme did not constitute a lottery were that it was not a device designed to evade the law and the party receiving the chance was not induced to hazard any money with the hope of obtaining a larger value.

The Virginia Supreme Court, ruling on a question in which there was obviously no direct consideration, held in Maughs vs. Porter, 157 Va. 415 (1931) that the mere attendance of a participant at a sale was a sufficient consideration for the promise to give an automobile, which could be enforced if otherwise legal. Speaking directly on whether or not the scheme was a lottery, the court held in the third branch of the syllabus that:

"The instant case was an action for the value of an automobile. Defendant advertised that every white person over sixteen years of age attending an auction sale should have an equal chance at a new Ford, regardless of buying or bidding. Plaintiff attended the sale and received from defendant a slip of paper upon which she placed her name and deposited in a box held by auctioneer. Upon the drawing she was judged the winner of the automobile. Defendant refused to pay for the automobile and also refused demand of plaintiff to pay her the value of the car.

Defendant demurred to plaintiff's notice of motion on the ground that the drawing for the automobile constituted a lottery.

Held: That the drawing did constitute a lottery and that plaintiff could not recover as the automobile was a prize drawn in a lottery."

(Emphasis added.)

It is noted that the sole requirement of this promotional scheme was attendance.

Our neighbor State of Michigan has numerous rulings which offer direct support to the conclusions reached in this opinion.

In the case of Glover vs. Malloska, 238 Mich. 216 (1927), it was held that the scheme of a wholesale oil company in selling tickets to its customers to be given away by them to their customers and others, entitling them to a chance at the drawing for an automobile once a month was clearly a lottery scheme.

United-Detroit Theaters Corp. vs. Colonial Theater Enterprises, Inc., 280 Mich., 425 (1937), ruled out "bank night" operations which did not require purchase of a ticket and defined consideration as an element of lotteries at page 428:

"* * * it is argued that the element of consideration does not appear because the patrons of the theaters pay no additional consideration for entrance thereto, and pay nothing whatever for tickets which may entitle them to prizes. But while the patrons may not pay, and the respondents may not receive any direct consideration, there is indirect consideration paid and received. The fact that prizes of more or less value are to be distributed will attract persons to the theaters who would not otherwise attend. In this manner those obtaining prizes pay considerations for them, and the theaters reap a direct financial benefit."

The Connecticut Supreme Court ruled on a grocery store give-away contest which required only that the participants come into the store. No purchase was necessary and the winners did not have to be in or around the store at the time of the drawing. The definition of consideration, based on a statute very similar to our own, was stated as follows:

"* * * as we held in the Dorau case, supra, the payment of consideration to participate in the 'drawing' is not essential in order for the conduct to be forbidden by our statute."

(Emphasis added.)

Herald Publishing Co. vs. Bill, 142 Conn. 53 (1955).

One additional theory of consideration remains to be examined which appears to set forth a sound guideline for the determination of the legality of schemes of chance.

In a recent case in the Georgia Court of Appeals, the court had occasion to examine a sales promotion program conducted through retail grocery supermarkets. The general operation of this program was as follows: Participant was only required to go to the store to request a ticket. Once a ticket was obtained, the participant would watch a series of horse races shown on television to determine whether or not he held a winning ticket. Redemption of winning tickets was accomplished by returning to the store and presenting the winning ticket. The court found that the elements of prize and chance were present in the scheme, and made this statement concerning consideration in branch 3 of the syllabus:

"3. Consideration as an ingredient of a prohibited lottery or gift enterprise is shown when there is present, in the actual working of the sales promotion scheme, a class of persons who, in addition to receiving or being entitled to chances on prizes, supply consideration for all the chances in bulk by purchasing whatever the promoter is selling, whether the purchasers were required to do so or not under the wording of the promoter's rules."

(Emphasis added.)

Boyd vs. Piggly Southern, Inc., 115 Ga App. 628 (1967).

The case which offers direct authority on the problems raised by all three of your questions is Troy Amusement Co. vs. Attenweiler, 64 Ohio App. 105 (1940). In Troy, persons who had registered in a movie theater lobby were given numbers making them eligible to participate in a drawing held each week for a sum of money to be awarded to those persons either present at the drawing, or presenting themselves within three minutes thereafter. No purchase of a theater ticket being necessary to register or claim a prize.

The court chose to follow the reasoning set forth in Bader, supra, in order to hold this "bank night" plan illegal as a scheme of chance under Section 13063, General Code [now Section 2915.10, Revised Code].

On the question of consideration, the court examined applicable Ohio authorities and set out this definition at page 121:

* * * * *

The element of advertising and increased patronage is sufficient consideration flowing to the operator to bring the transaction within the condemnation of promoting and advertising a scheme of chance.

* * * * *

"The fact that such individuals did not pay the price and enter the theater might be a good defense if they were charged with gambling, but it certainly can be no defense to one who is operating a scheme of chance. The participation in

the scheme of chance is not dependent upon those who may or may not have paid admission.

"* * * * * * * *"
(Emphasis added.)

In addition to clarifying the ambiguity surrounding the element of consideration, the court in Troy held that even though a promotional game might not fit precisely into the judicial outline of a lottery, it could still be prohibited as a scheme of chance under the statutes:

"The design of these provisions is to cover every device or operation that may fall within their inhibition, without attempting to definitely define any of the forbidden transactions but to provide restraint for any such offenses, as the same may be developed and promoted * * *

(112)

"* * * * * * * *"

"Whether we are correct in denominating the scheme a 'lottery' and holding that there is a consideration paid by the patron for the chance of winning we cannot avoid the conclusion that the drawing is a 'scheme of chance', prohibited by the statute.

"As we have pointed out, the statutes cover more than the operation of a lottery.

(120)

"* * * * * * * *"
(Emphasis added.)

The above cases are not unique in their attitude concerning lotteries and other schemes of chance. Admittedly, other authority exists which may be construed by some to legalize schemes which offer the general public the opportunity to gain something for nothing. However, it is my belief that operation of the games described in your request letter are prohibited by Section 6 of Article XV of the Ohio Constitution and Sections 2915.10 and 2915.12, Revised Code.

The most recent review of lottery law in Ohio may be found in Opinion No. 3502, Opinions of the Attorney General for 1962, page 1011. That Opinion dealt with a situation somewhat different from the games described in your request letter. The operation of the promotional game involved was organized so that substantial numbers of the tickets or cards were distributed on a house to house basis in an area surrounding each outlet of the sponsoring chain without cost, obligation, or the necessity of the participant going onto the premises of a commercial enterprise. Chances were also available at the store with no requirement of making a purchase or passing through a check-out counter. The contestants then viewed a television program to determine whether or not they had won a prize.

The Opinion finally rested its conclusion on two cases which had held specifically that the primary purpose of the scheme was not to get people to come into the store, but rather to get them to view the television program. Thus, the participants were not being exposed to goods being offered for sale in order to compete, but were merely exposed to visual advertising in common with all television viewers.

The syllabus, quoted below, was restricted to a rather narrow factual situation:

"A plan whereby persons obtain cards by distribution to their homes, or by obtaining them free at a supermarket without passing through the checkout counter, which cards are used to participate in a television contest in which the winners are determined predominately by chance (numbered balls rolling out of a drum), and in which contest monetary prizes are given, does not constitute a lottery within the purview of Section 2915.10 and 2915.12, Revised Code, as the element of consideration necessary to constitute a lottery is not present in such an operation."

Accordingly, I affirm that Opinion insofar as it holds that a game does not constitute a lottery if it is not necessary for a participant to go onto the sponsor's premises in order to obtain a token.

In some situations the final determination of legality must rest on an examination of the actual operation of said games. This does not mean the operation as set out in the game rules; but the operation as it is actually carried out by those conducting and those participating in the activity.

Therefore, in accord with the foregoing authorities and in view of the statutory prohibition, it is my opinion and you are accordingly advised that:

1. A promotional game which requires a participant to make a purchase on the premises of a commercial enterprise as a pre-requisite to obtaining a token necessary for participation is a lottery.

2. A promotional game which requires a participant to pass through a check-out line on the premises of a commercial enterprise to obtain a token necessary for participation, although no purchase is required, is a lottery.

3. A promotional game which requires a participant to go onto the premises of a commercial enterprise to obtain a token necessary for participation, although no purchase is required to obtain the token, is a scheme of chance. Opinion No. 3502, Opinions of the Attorney General for 1962, affirmed.