

**OPINION NO. 71-090****Syllabus:**

A restaurant holder of a liquor license, which honors a coupon by giving the person presenting the coupon a meal of equal value to one already purchased, does not violate Section 4301.21 (D), Revised Code, or Regulation LCc-1-45 of the Liquor Control Commission, which prohibit the giving away of food in connection with the sale or advertising of alcoholic beverages.

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To: Richard E. Guggenheim, Director, Dept. of Liquor Control, Columbus, Ohio  
By: William J. Brown, Attorney General, December 16, 1971

I have before me your request for my opinion, reading as follows:

"Your attention is respectfully invited to the following statute of the Ohio Revised Code and Regulation of the Ohio Liquor Control Commission:

"Regulation LCc-1-45 provides:

"'Premium or gift merchandising in connection with the solicitation, advertising or sale of alcoholic beverages is prohibited.'

"Section 4301.21(D) of the Ohio Revised Code provides:

"'Neither the seller nor the board of liquor control by its regulations shall require the purchase of food with the purchase of beer or intoxicating liquor; nor shall the seller of beer or

intoxicating liquor give away food of any kind in connection with the sale of beer or intoxicating liquor.'

"Specifically, the Department of Liquor Control requests your opinion on the applicability of the above quoted regulation and statute on 'coupon books' now being circulated and used throughout the State. Each coupon in the 'books' in question has the name of a particular restaurant, usually a liquor permit holder, printed on it. The books are sold to the public at a price that is determined by the number of participating restaurants. The purchaser of the coupon book may go to one of the participating restaurants; and upon purchasing a meal of a certain pre-designated value, he may, upon presentation of the coupon of the participating restaurant, receive another meal of equal value to the one purchased.

"The books are printed, put together and distributed by various companies, non permit holders, who use as their chief source of distribution various civic and charitable organizations. These organizations receive a percentage of the selling price of each book they sell. The benefit to the restaurant permit holder is the advertising it gets via the distribution of the coupon books. The remaining profit goes to the companies who promote the coupon books.

"Your opinion is requested as to whether the participating restaurants, being liquor license holders and subject to LCc-1-45, a Regulation of the Liquor Control Commission and Section 4301.21(D) of the Revised Code, violate that regulation and statute when they honor coupons by giving the person presenting the coupon a meal of equal value to one already purchased."

I understand that the coupons specifically exclude the price of any beverage.

The question is the meaning of the phrase "in connection with", which appears in both the statute and the regulation. The regulation was applied in International Breweries, Inc. v. Crouch, 118 Ohio App. 202 (1955), which holds in the third branch of the Syllabus as follows:

"A payment in money by a distributor

of beer and malt beverages to qualified tax-exempt nonprofit organizations for each bottle cap of such distributor's beer and malt beverages turned over to it by such organizations, and the advertising of such plan by such distributor, are within the prohibition of such regulation against 'premium or gift merchandising in connection with the solicitation, advertising or sale of alcoholic beverages.'"

The Court explains its holding at 118 Ohio App. 203-4, as follows:

"Appellant's first contention is that this method of merchandising is not 'premium or gift merchandising' within the regulation. Under that regulation, the mere fact of a premium or gift, and the fact that it is in connection with merchandising beer, is not enough to make the regulation applicable. For example, a gift of \$100,000 to charity, and the advertisement of that fact, might build good will for the company and indirectly contribute to the sale of its product. However, the relationship between the gift, and the purchase or consumption of the products, would be so remote that the application of the regulation is arguable. The relationship of the gift here to the consumption of the product is very indirect. However, in our opinion it is not so remote as to take the plan outside the regulation."

The regulation was applied by the same Court of Appeals in Kroger Co. v. Cook, 17 Ohio App. 2d 41, 46 Ohio Op. 2d 63 (1958), which held as follows:

"1. A grocery business promotional game which involves the gift of a chance to win a prize, in connection with the advertising and sale of the products sold by such grocer, is not a violation of the constitutional prohibition (Section 6 of Article XV) against 'lotteries, and the sale of lottery tickets,' nor is it 'gambling' within the purview of Section 2915.01 et seq., Revised Code (the 'gambling' statutes).

"2. Such promotional game by a grocery permit holder is a violation of Regulation 53 of the Liquor Control Commission which prohibits the exhibiting or employing on permit premises of any forms, tickets or

papers which can be used for the recording of chances on the result of any contest.

"3. Such promotional game is, by virtue of the giving, in connection with the advertising and sale of products sold by such grocer (which products include alcoholic beverages), of a chance to win a prize, a violation of Regulation 45 of the Liquor Control Commission which prohibits 'premium or gift merchandising in connection with the solicitation or sale of alcoholic beverages.'"

Section II of Regulation 53, supra, quoted by the Court at 17 Ohio App. 2d 45, reads as follows:

"'No person authorized to sell alcoholic beverages shall have, harbor, keep, exhibit, possess or employ or allow to be kept, exhibited or used in, upon or about the premises of the permit holder any device, machine, apparatus, book, records, forms, tickets, papers or charts which may or can be used for gaming or wagering or the recording of wagers, pools or chances on the result of any contest, or allow or conduct gaming or wagering on such premises on (of) any game of skill or chance.'

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The Court of Appeals applied Regulation 45, supra, on their own initiative. Counsel for the Liquor Department did not brief or argue it. (17 Ohio App. 2d 46.) On appeal, the Supreme Court did not mention Regulation 45, supra, but affirmed the Court of Appeals' judgment on the basis of Regulation 53, supra, holding as follows:

"1. Regulation 53, Section II, of the Liquor Control Commission, which prohibits gaming or a game of skill or [171] chance on the premises of a liquor permit holder, is within the powers granted the commission by R.C. §4301.03(B), and is a reasonable exercise thereof.

"2. The operation on liquor permit premises of a sales promotional game which involves the payment of a price by a majority of the participants who purchase merchandise, for a chance to win a prize by all participants, including a minority who make no purchases and participate free, constitutes the conducting of gaming or a

scheme of chance on permit premises within the prohibition of Regulation 53, Section II, of the Liquor Control Commission."

Neither International Breweries, Inc. v. Crouch, supra, nor Kroger Co. v. Cook, supra, covers the fact situation here. In International Breweries, Inc. v. Crouch, supra, the charitable gifts were used directly in the advertisement of beer, while in this case the advertisement is of restaurants. The connection between the gift and the sale of liquor or beer is more tenuous here than it was in International Breweries, Inc. v. Crouch, supra, because in that case the gifts depended on the collection of caps from the appellant's beer bottles, while in this case the coupon holder is entitled to a free meal whether or not he drinks alcoholic beverages. The fact situation of Kroger Co. v. Cook, supra, is closer to this case, but with the addition of the element of "gaming or a scheme of chance". Furthermore, the Court of Appeals' holding that the Kroger game violated the regulation under consideration here is weakened by the Supreme Court's failure to affirm on that point.

The case law, then, does not indicate clearly whether the connection between the gift and the advertising or sale of alcoholic beverages in this case is close enough to be proscribed by Regulation LCc-1-45, supra, and Section 4301.21(D), supra. However, a consideration of the language of each in the light of other regulations and statutes is helpful. Former Regulation 53, supra, prohibits the presence or use of materials for gaming or schemes of chance "upon or about the premises of the permit holder", while Regulation LCc-1-45 (formerly Regulation 45), supra, prohibits premium or gift merchandising "in connection with" the advertising or sale of alcoholic beverages. If the Commission had intended to prohibit gift or premium merchandising on any premises where alcohol is sold, it would have used language similar to that of former Regulation 53. The choice of different words indicates an intention to apply a different standard. Consequently, the "connection" required is something more than the presence of gift merchandising and alcoholic beverage sales on the same premises.

Section 4301.21(D), supra, was enacted in its present form, as Section 6064-21 (4), General Code, in 1933. (115 Ohio Laws, Pt. II, 118 (139), §21.) Its forerunner was the "anti-free lunch" law, Section 13224-1, General Code, enacted in 1910 and repealed in 1929 (101 Ohio Laws, 357; 113 Ohio Laws, 685, 690). The most foods in places selling alcoholic beverages. During those times when it was being enforced, the law was often under attack in court. In State v. Feld, 12 O.L.R. 64 (1914), the Municipal Court of Cincinnati (the highest court to rule on this law) held it unconstitutional, as follows:

"1. For the reason that to prohibit

the giving away of food in no way promotes the public health, morals or general welfare, what is known as the 'anti-free lunch' law (Section 13224-1, G.C.), making it unlawful for a person engaged in retailing intoxicating liquors 'to give away or furnish to any person free of charge, in the place where said business is carried on, any food except crackers, cheese and pretzels, is an unwarranted interference with the right to dispose of property in any manner the owner may see fit, and is therefore an invalid enactment.

"2. Moreover this act is also rendered invalid by its discrimination in favor of crackers, pretzels and cheese, whether wholesome or unwholesome, as against other food, whether wholesome or unwholesome.

"3. Nor is it within the province of the Legislature to restrain charity, even though it may be commercial charity induced by competition in business, particularly when it is in the form of dispensing food of which the recipients may stand in need."

When the legislature enacted Section 6064-21, supra (now Section 4301.21, supra), it did not use the language of the old "anti-free lunch" law, which applied by its terms to the giving away of food and the selling of alcoholic beverages on the same premises. This change indicates that the legislature intended to apply a different standard. Furthermore, if Section 4301.21 (D), supra, were to be construed to mean the same as the "anti-free lunch" law, it would be subject to the same constitutional infirmities, and an unconstitutional construction of a statute should be avoided. I conclude that Section 4301.21, supra, as well as Regulation LCC-1-45 requires a closer connection between the giving away of food and the sale of liquor than the mere fact of their presence on the same premises.

In the present case, the connection is no more than the sharing of the same premises. The free meal is given for the purchase of the first meal, not for the purchase of alcoholic beverages. There is no requirement that a customer purchase alcoholic beverages, and no doubt many do not. The gift merchandising is not used in the advertising of alcoholic beverages, and hence is not prohibited by Regulation LCC-1-45, supra, or Section 4301.21(D), supra.

In specific answer to your question it is my opinion, and you are so advised, that a restaurant holder of a liquor license, which honors a coupon by giving the person presenting the coupon a meal of equal value to one already purchased, does

not violate Section 4301.21(D), Revised Code, or Regulation LCC-1-45 of the Liquor Control Commission, which prohibit the giving away of food in connection with the sale or advertising of alcoholic beverages.