

Lottery: : A promotional scheme wherein the promoter in
: his effort to increase the sales of his product
Gambling: : offers to give a cash prize to a portion of the
: purchasers of his product constitutes a lottery.
.....



November 19, 1954

Honorable J. Hal Moore
Prosecuting Attorney
Lawrence County
Mt. Vernon, Missouri

Dear Sir:

By your letter of October 26, 1954, you requested an opinion of this office as follows:

"Enclosed find a copy of an advertisement which is self-explanatory and was run in the Aurora Advertiser. We would like to receive an opinion from your office as to whether or not this promotional scheme is a lottery."

The relevant part of the advertisement to which you refer reads:

"WATCH FOR THE T _____ CALLER

"Win Up to \$6.00 For Having T _____ Milk in your Refrigerator

"You've always known that T _____ Dairy Products give you extra satisfaction. Now get set for another bonus - - - in cash! The T _____ Caller will be in your neighborhood this week. He'll stop by to see if you have T _____ products in your refrigerator, and he'll pay you \$6.00 if he finds T _____ milk. Stock up on T _____ products now and get a bonus in dollars when the T _____ Caller knocks on your door."

The fundamental policy in this State toward lotteries is established by Article III, Section 39, Constitution of

Honorable J. Hal Moore:

Missouri, 1945, which reads:

"* * * The general assembly shall not have power:

* * * * *
* * * * *

"(9) * * * To authorize lotteries or gift enterprises for any purpose, and shall enact laws to prohibit the sale of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery; * * *."

Section 563.430, RSMo 1949, which proscribes lotteries, reads as follows:

"If any person shall make or establish, or aid or assist in making or establishing, any lottery, gift enterprise, policy or scheme of drawing in the nature of a lottery as a business or avocation in this state, or shall advertise or make public, or cause to be advertised or made public, by means of any newspaper, pamphlet, circular, or other written or printed notice thereof, printed or circulated in this state, any such lottery, gift enterprise, policy or scheme or drawing in the nature of a lottery, whether the same is being or is to be conducted, held or drawn within or without this state, he shall be deemed guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary for not less than two nor more than five years, or by imprisonment in the county jail or workhouse for not less than six nor more than twelve months."

The Supreme Court of Missouri in State ex inf. McKittrick vs. Globe Democrat Publishing Company, 341 Mo. 862, 110 S.W. (2d) 705, discussed the above provisions in the following manner, l.c. 713:

Honorable J. Hal Moore:

"It will be noted both the Constitution and statute prohibit any scheme in the nature of a lottery; and it has been several times held that within their meaning and intent a lottery includes every scheme or device whereby anything of value is for a consideration allotted by chance. State v. Emerson, 318 Mo. 633, 639, 1 S.W. 2d 109, 111. The word has no technical meaning in our law. Lotteries are judicially denounced as especially vicious, in comparison with other forms of gambling, because by their very nature they are public and pestilentially infect the whole community. They prey upon the credulity of the unwary and widely arouse and appeal to the gambling instinct. State v. Schwemler, 154 Or. 533, 60 P. 2d 938; State ex rel. Home Planners Depository v. Hughes, 299 Mo. 529, 537, 253 S.W. 229, 231, 28 A.L.R. 1305, 1310; State v. Becker, 248 Mo. 555, 562, 154 S.W. 769, 771.

"The elements of a lottery are: (1) Consideration; (2) prize; (3) chance. * * *."

We will now examine the scheme at hand to see if it contains those three elements.

To be eligible for the cash award it is necessary for a person to acquire and keep on hand a certain brand of milk, the sale of which is being promoted by the scheme. We conclude that the purchase and storage of the milk sold by the promoter constitutes "consideration". From the standpoint of consideration this case does not differ materially from State vs. Mumford, 73 Mo. 647, 39 Am. Rep. 532. In that case the subscriber to a certain newspaper received the newspaper and a ticket which might draw a prize. The subscription price of the paper was not raised and the value of the ticket was included in the subscription price. The Court concluded that the scheme was a lottery saying, i.e. 651:

"* * * The fact that the subscription price of the Times was not increased, does not alter the character of the scheme, inasmuch as the price paid entitled the subscriber to a ticket in the lottery as well as to a copy of the paper. * * *."

Honorable J. Hal Moore:

In the situation at hand the price of the milk presumably remains the same. However, it is obvious that the expense of conducting the scheme must ultimately be borne by the purchasers of the product, and that there is hidden in the price of the milk a sum to defray the expenses of the promotional scheme.

The payment of cash to those persons who are called upon, and who have the particular brand of milk in the refrigerator, is so obviously a "prize" that no discussion is needed upon that aspect of the scheme.

The advertisement does not, in itself, conclusively indicate the element of chance. A literal interpretation of the advertisement would lead the reader to believe that a representative of the promoter would call at every home likely to be reached by the advertisement, and that each person having milk of the desired brand would receive \$6.00 in cash. If that were the essence of the scheme, we would conclude that no "chance" exists, because every person purchasing and storing the particular brand of milk would, with dead certainty, receive \$6.00 in cash. If, as is likely, the representative of the promoter calls at only a selected number of homes, not every person purchasing and storing milk of the brand being promoted, would receive a cash prize. In the latter situation there would be "chance", because not every person participating in the scheme would win, and the purchasers of the milk would presumably not know at whose home the "caller" would appear. It is not essential to a lottery that the selection of the winners be done by the casting of lots or the drawing of names. Thus, in *State vs. Emerson*, 318 Mo. 633, 1 S.W. (2d) 109, the following method of choosing the winner satisfied the requirement of "chance", 1.c. 110:

"Appellant and other agents of the company stated to prospective customers and dissatisfied contract holders that there was a drawing at the office of the company every Saturday afternoon from which the public was excluded, and in some cases these representations were to the effect that the drawings were by lot; that is,

Honorable J. Hal Moore:

drawing names from a box. In some instances where the customer was one 'best known in the neighborhood,' it was hinted that the drawing was done at will or pleasure, and not by lot. A former employee of the company testified that the discounting was always done at will, upon recommendation of the crew managers, and that the 'discounts' went to those whose influence and efforts in the community would best 'help the company.'"

This scheme is nothing more than an attempt to increase the sales of a particular brand of milk by appealing to the human desire to take a chance on receiving an undue return for an expenditure of money or other valuable thing. This appeal is the essence of every scheme in the nature of a lottery, whatever the guise in which it appears, and we conclude that this scheme is a lottery.

Conclusion

In the premises, therefore, it is the opinion of this office that a promotional scheme, wherein the promoter in his effort to increase the sales of his product offers to give a cash prize to some of the purchasers of his product, the identity of the recipients of the prize being unknown to the purchasers, constitutes a lottery.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Very truly yours,

JOHN M. DALTON
Attorney General

PMcG:irk