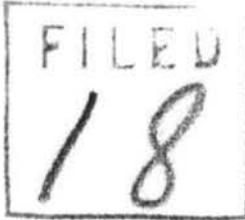


LOTTERIES:

In the determination of the winner of a contest in which the winner is determined by the judgment of the comparative merits of statements within twenty-five words or less, which statements begin, "I like to trade at Crown Drug Stores because," they are determined upon skill, and not upon chance, and although such operation may entail the elements of consideration and prize, yet the operation is not a lottery within the meaning of lottery laws of Missouri inasmuch as the third and necessary element of chance is not present.



October 21, 1957

Honorable William A. Collett
Prosecuting Attorney
Jackson County
415 East 12th Street
Kansas City 6, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"I am requesting herewith pursuant to a telephone conversation this afternoon with Mr. Williamson, an opinion as to the legality of a contest which is commencing in Jackson County, as shown by the enclosed advertisement in the Friday, October 4, Kansas City Star, and the enclosed entry blank, and contest rules.

"I have advised the general counsel of the Crown Drug Company, Mr. Alfred Kuraner, 937 Rialto Building, Kansas City, Missouri, of this request for an opinion. You will note that the contestant is required to answer true to a number of questions, and then finish in twenty-five words or less the following sentence 'I like to trade at Crown Drug Stores because - - -'. In this connection I would refer you to the last sentence of rule one of the contest rules, which states that 'if you are in doubt as to which statement is true or false', you may go to your nearest Crown Drug Store and examine the merchandise.

"You will notice also that one entry blank is given with each 25¢ purchase in a Crown Drug Store.

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"The essay sentence is by rule 7 to be judged on 'originality, sincerity, aptness of thought and expression'. I am advised by Mr. Kuraner, counsel for the Crown Drug Company, that according to the contest plan all entries are turned over to an independent contractor, Potts-Woodbury, Inc., the drug company's advertising agency, which advertising agency is instructed to judge the contest on the basis of the elements previously mentioned. It is the position of the drug company that they do not control in any way the selection of the winners.

"I would appreciate your opinion at your earliest convenience whether this contest violates the lottery laws of the State of Missouri."

To your opinion request you have attached what is labeled "OFFICIAL ENTRY BLANK - CROWN'S FAMOUS BRANDS 'True or False' CONTEST." Following this heading are eight rules which the contestant is advised to follow. Rules 1, 2, 3 and 4 read:

"1. Read all of the statements of each Famous Brand listed below and then mark an X in the square in front of the statement which is 'True.' By a 'True' statement we mean a statement which tells what the product is actually used for or a statement which describes the actual product. You must identify EACH 'True' Statement of EACH product to be eligible. If you are in doubt, as to which statement is 'True or False,' you may go to your nearest Crown Drug Store and examine the merchandise.

"2. After you have marked an X in the box in front of EACH 'True' statement then finish the statement, 'I like to shop at Crown because' in 25 words or less. Space for your statement is provided at the bottom of this entry blank.

"3. Print your name and address plainly in space provided at the bottom of this blank. Then drop your entry in the official entry box which is provided in all

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Crown Drug Stores. Do not attach letters, drawing or photographs of your entry.

"4. There is no limit as to the number of entries you may make; however, all entries must be on an official entry blank (one given with each 25¢ purchase) or on a facsimile thereof. An entry blank will be on display at all Crown Drug Stores at all times during the contest. Contest is subject to all Federal, State and Local Regulations. All entries must be original and in the contestant's own name."

Rule 7 reads:

"7. All entries will FIRST be judged as to the correctness of the marked by X 'True' statements. If every 'True' statement of EVERY product is correct, then the statement 'I like to shop at Crown because' will be judged. This statement will be judged on originality, sincerity, aptness of thought, and expression. All judging will be made by Potts-Woodbury, Inc., Advertising Agency and the decision of the judges will be final. Duplicate prizes will be awarded in case of ties. Fancy entries will not count extra. No entries will be returned and no correspondence will be entered into in regard to this contest. Entries, contents and ideas therein become the property of the Crown Drug Company and can be used as it sees fit."

The first three true or false statements are set forth here in order that their character may be perfectly understood. They are:

- "() SILICARE A Medicated Dandruff Treatment
- () SILICARE A Medicated Hand Lotion
- () PEPSI-COLA 'The Light Refreshment'
- () PEPSI-COLA 'Good for your Car'

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- () SHULTON SPRAYS 'For a Lovelier You'
- () SHULTON SPRAYS 'For all Household Pests'."

There are twenty-seven of these true or false questions, all of them relating to products sold at Crown Drug Stores. Following the last question, set forth in a box, is repeated the invitation set forth in Rule 1, above, which reads:

"If you are in doubt, as to which statement is 'True or False,' you may go to your nearest Crown Drug Store and examine the merchandise."

At the bottom of the page, also set forth in a box, is the statement:

"FINISH THIS SENTENCE IN 25 WORDS OR LESS...

I like to trade at CROWN DRUG STORES
because: . . ."

This statement is followed by four blank underscored lines, a space intended for the statement referred to above.

We now turn to the case of State ex inf. McKittrick v. Globe-Democrat Publishing Co., 341 Mo. 862. At l.c. 875 the Missouri Supreme Court stated:

"The elements of a lottery are: (1) consideration; (2) prize; (3) chance. It is conceded that the first two of these were present in the 'Famous Names' contest, here involved, the sole question being whether the third element - chance - was there. In England and Canada where the 'pure chance doctrine' prevails a game or contest is not a lottery even though the entrants pay a consideration for the chance to win a prize, unless the result depends entirely upon chance. In the United States the rule was the same until about 1904; but it is now generally held that chance need be only the dominant factor. [38 C.J., sec. 5, p. 291; 17 R.C.L., sec. 10, p. 1223; Waite v. Press Publishing Assn., 155 Fed. 58, 85 C.C.A.

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576, 11 R.A. (N.S.) 609, 12 Ann. Cas. 319.] Hence a contest may be a lottery even though skill, judgment or research enter thereinto in some degree, if chance in a larger degree determine the result. Whether the chance factor is dominant or subordinate is often a troublesome question."

It will be noted from the above that the elements of a lottery are prize, consideration and chance. All three must be present if an operation is to be a lottery under Missouri law. We may state that the Globe-Democrat case has been followed by Missouri appellate courts since its rendition in 1937.

In the instant situation, the element of "prize" is obviously present. On the opposite side of the entry blank, from which we quoted above, there is a statement of the prizes which will be awarded the winners. The first prize is a 1958 Edsel car; the second is a \$750 bottle of perfume; the third is a \$645 Sylvania Color TV; and other prizes listed are referred to up to the number of near three thousand.

There can be no question but that the element of "consideration," as that term has been construed by Missouri courts, is also present. It will be noted from the contest rules, quoted above, that in order to enter the contest one must purchase some article at a Crown Drug Store for not less than 25¢. There must then be expended upon the entry form the work of marking the twenty-seven true or false statements. This, as is indicated by the contest rules, may necessitate another trip to a Crown Drug Store. There must then be written the little essay on why the contestant prefers Crown products. After this, the contest form must either be taken to a Crown Drug Store or mailed. As we stated above, all of this expenditure of money, time and effort clearly constitutes "consideration" as Missouri appellate courts have construed the meaning of that term.

There now remains the question of whether or not the third necessary element of "chance" is the dominant element in determining the winners. It will be remembered that in our quotation from the Globe-Democrat case the court stated that "a contest may be a lottery even though skill, judgment or research enter thereinto in some degree, if chance in a larger degree determine the result. Whether the chance factor is dominant or subordinate is often a troublesome question."

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We take the above to mean, conversely, that even though some element of chance may be present in a contest it will not be held to be "chance" if that element is subordinate and if skill is dominant.

We now come to the specific situation which you present. It will be noted that this contest consists of two parts. The first is the marking of the true or false statements. It will be noted that the rules state, both preceding the true or false statements and immediately succeeding them, that if a contestant is in doubt regarding the proper answer to any of the questions he may go to a Crown Drug Store and examine the product about which he is doubtful in order to determine the correct answer. We submit that this phase of the contest presents no element of chance. By the exertion of some effort, the contestant may determine with absolute finality the correctness of the true or false statements. Therefore, as we stated, we see no element of "chance" in the first part of the contest.

We now come to the second part, which is finishing the statement, in twenty-five words or less, "I like to trade at Crown Drug Stores because: . . ." Specifically, we have to determine whether the determination of the best statement is a matter of "chance" or of "skill."

In connection with this matter, we turn again to the Globe-Democrat case. At l.c. 876 the Missouri Supreme Court stated:

"Laying the foregoing cases aside for a minute, let us look at a few of the decisions cited by respondent which may be thought to face the other way. In Brooklyn Daily Eagle v. Voorhies (1910), 181 Fed. 579, it was held a contest for a prize for the 'best' essay upon the name of a certain breakfast food was not a lottery, and that advertisements thereof could be sent through the United States mail. The defendant postmaster contended the conditions of the contest did not specify in what respect the essays should be 'best' and therefore left it open to the whim of the judges - or chance. The opinion said, 'it must be held that to offer a prize for the "best" essay might be a lottery, if the persons are not induced to compete with some definite statement of what the word "best" means;' but

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ruled that sufficient appeared in the record to show definitely the contest was to be judged on the basis of literary merit for advertising purposes."

It will be noted that in Rule 7 of the Crown contest, set forth above, a definite standard is set up by which the statement is to be judged, to wit, "originality, sincerity, aptness of thought, and expression." Turning to the Brooklyn Daily Eagle case, referred to in the Globe-Democrat case, above, we find the following (181 Fed. 579, l.c. 582):

"The government also contends that inasmuch as the advertisement does not specifically say that the essays shall be judged because of literary merit, but, on the other hand, offers a prize solely for the 'best' essay, which might be best written, best expressed, most persuasive, longest, shortest, or best from any other standpoint, the judging would depend upon the whim of the judges, and not upon their application of any recognized standard.

"It must be held that to offer a prize for the 'best' essay might be a lottery, if the persons are not induced to compete with some definite statement of what the word 'best' means. But a distinction as to the methods of the judges is academic, for if the contest be honestly carried on (and this is admitted), and the best essay from any definite known standpoint selected, such competition would not seem to be in any sense a lottery. The wording of the suggested advertisement is disconnected and does not definitely say that the merits of the breakfast food, rather than its title, are to be extolled; but the general sense indicates that literary merit for advertising purposes, as it might appear to the opinions of the three judges, would be the standard of judging."

In United States Supreme Court Reports (Annotated), 94 L. Ed. 73, following a discussion of operations which were held to be lotteries, we find the statement:

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"On the other hand, a bona fide contest for a competition in essays was held not to be a lottery, so as to come within the purview of the mail fraud statutes, in Brooklyn Daily Eagle v. Voorhies (1910, CC NY) 181 F 579."

In the case of Gilbert v. Houck Piano Co., 159 Ill. App. 347, the Illinois Appellate Court, in referring to a promotional scheme which consisted of a "word contest" which called for a statement as to the excellency of the pianos sold by the Houck Company, stated, l.c. 350:

"With the justice of the contract between plaintiffs and defendant we have nothing to do, nor have we with the merits or expediency of this method of advertising pianos. But the method is no more a lottery and depends no more on lot or chance than a distribution of school prizes does."

In the case of Lucky Calendar Co. v. Cohen, 120 A2d 107, l.c. 113, the Supreme Court of New Jersey stated:

"There can be no criticism of prize contests when they are truly contests of ability, and the best or superior entrants have a reasonable opportunity to be the winner. Prize contests, where the selection is based on adequate standards made known to the contestants and sought to be complied with by them and used to select the winner by judges whose qualifications have reasonable relation to the purpose to be achieved, are not illegal, Brooklyn Daily Eagle v. Voorhies, 181 F. 579 (C.C.E.D. N.Y. 1910). The ingredient of chance, so condemned in State v. Shorts, 32 N.J.L. 398 (Sup. Ct. 1868), where Chief Justice Beasley said at page 401: 'This ingredient of chance is, obviously, the evil principle against which all prohibitory laws are aimed,' and by this court in our recent decision in this case, is absent where there is an honest attempt to judge all entrants by reasonable criteria. The subjective involvement of the judge, unavoidable as it is in a great many of the cases where the standards to be applied require personal judgment, does not vitiate the choice as one of chance

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selection, provided he has qualifications which reasonably indicate that the result reached by him generally would be concurred in by persons learned or experienced in the particular field involved. As an appropriate example we refer to a contest in our own profession, the Ross Prize Essay Contest, conducted annually since 1934 by the American Bar Association under the terms of the will of the late Judge Erskine M. Ross. The judges chosen are traditionally a practicing lawyer, a judge and a law teacher, and they do not select the winner by chance, 41 A.B.A.J 823 (September 1955); see also Blyth v. Hulton & Co., Ltd., (Ct. App. 1908), 24 T.L.R. 719, 72 J.P. 401, 52 S.J. 599, Minges v. City of Birmingham, 251 Ala. 65, 36 So. 2d 93 (Sup. Ct. 1948), and the illuminating discussion in Contests and the Lottery Laws, 45 Harv. L. Rev. 1196, 1210-1217.

"In Blyth v. Hulton & Co., Ltd., supra, the English Court of Appeal had before it a very similar jingle contest. The defendants, who were proprietors of a weekly journal, announced that they would give a first prize of lb. 300 for the best last line in a limerick competition, a second prize of lb. 100 and two more prizes of lb. 50 each and in addition they would send a sovereign to each of the next 100 entries by way of consolations prizes. The express indication was that every coupon entry sent would be very carefully examined by a competent staff, and would be judged entirely on its merits and that the editor's decision would be final. The limerick there to be completed was:

'He wished her a happy New Year and
endeavored to make it quite clear that
her happiness lay in naming the day
.'

"The winning line was:

'When the ring and the book should
appear.'

"When the winner was announced, the plaintiff, who had sent in a line identical to the one

chosen as the winner, but who had not been declared the winner, brought action to recover the amount of the prize. The court there held that in all the circumstances of the case the contest was a lottery, it being obvious that the selection of the winner, by reason of the greater than 60,000 entries, and the screening out process used to eliminate all but a select few, had to be made by chance and not merit. It particularly condemned the 100 consolation prizes as clearly contemplating distribution by chance. The elements of chance in the Lucky Calendar 'contest' are far greater than those condemned in the English case.

"In the 'Pepsi-Cola' case, *Minges v. City of Birmingham*, 251 Ala. 65, 36 So. 2d 93 (Sup.Ct. 1948), heavily relied upon by the plaintiff, the court found that there were definite known standards set up for judging the winners; that these standards were known not only to the participants but to the judges as well - factors absent in the case at bar - and that these were sufficient to remove the contest there from the 'odium of lotteries, gift enterprises, or schemes in the nature of lotteries.' Though it reached a different conclusion, the court in that case expressed the same view we adhere to in judging this case when it said:

'The standards set up for judging the monthly contest statements or compositions, as to why Pepsi-Cola hits the spot, are aptness, originality and interest. This can mean but one thing: the most apt, the most original and the most interesting, statement shall be adjudged the winner. The selections are to be made by the application of definitely known standards promulgated and announced for that purpose. That to prepare such a statement or composition requires the exercise of the judgment, skill, discretion and effort of the contestant, cannot be denied. And if the contests are honestly carried on and the best composition selected according to these known standards, the selections made are not the result of chance.' (36 So. 2d 93, at page 97.)"

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In view of the above, it is our belief that while there might be some element of chance, although we believe it to be very small, in determining the winner of the statement referred to above, such element is very subordinate and that the dominant element would be skill.

Therefore, we do not believe that the third necessary element, to wit, "chance," is present in the situation which you present, and that it therefore is not a lottery within the meaning of the Missouri lottery law.

CONCLUSION

It is the opinion of this department that in the determination of the winner of a contest in which the winner is determined by the judgment of the comparative merits of statements within twenty-five words or less, which statements begin, "I like to trade at Crown Drug Stores because," they are determined upon skill, and not upon chance, and that although such operation may entail the elements of consideration and prize, yet the operation is not a lottery within the meaning of the lottery laws of Missouri inasmuch as the third and necessary element of chance is not present.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Yours very truly,

JOHN M. DALTON
Attorney General

HPW:ml