

LOTTERIES:
NEWSPAPER PROMOTION:

A newspaper subscription contest in which contestant is awarded points for subscriptions sold does not constitute a lottery in violation of Section 563.430 because the element of chance is absent.

December 31, 1964



Honorable Brunson Hollingsworth
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri

OPINION NO. 265

Dear Mr. Hollingsworth:

This is in answer to your request for an official opinion of this office, which reads in part as follows:

"The Jefferson County Press-Times newspaper of June 25, 1964, contains a contest. Reference is made to your Opinion of June 29, 1951, to the portions of the Jefferson Republic of June 14, 1951, which I trust remain in your files.

"In both schemes there seems to be a use of discounts, commissions, incentives and bonuses. Periodical publication of commission agents status is made in terms of 'votes' which are given collateral to a commission of 20%. The allocation of 'votes' is according to published rules and the 'votes' can be gained by

- (1) Merely reporting periodically.
- (2) Acting promptly.
- (3) Selling longer subscriptions.
- (4) Emphasizing new subscriptions.
- (5) Selling subscriptions at all.
- (6) Sending in a coupon.

"This subscription campaign is promoted in the excitatory language of gaining.

"It seems clear that consideration and prize are proveable in this promotion. Your Opinion is requested as to whether the element of chance is present."

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It is well settled in this state that the elements of a lottery are prize, chance and consideration. State ex Inf. McKittrick v. Globe-Democrat Pub. Co., 110 S.W. 2d 705, 1.c. 713. If any of these elements are lacking in the proposed contest, it is not illegal.

As noted in your opinion request, it cannot be questioned that the element "prize" is present in the plan, here presented for consideration. Indeed, the sole inducement for entering the proposed contest is the opportunity of winning a substantial award if successful.

Nor can it be questioned that the element of "consideration" is present, as defined in the 1963 amendment to our lottery statute as follows:

" . . . provided, however, that this section shall apply only where there is consideration in the form of money, or its equivalent, paid to or received by the person awarding the prize."

Certainly, the money received by the publisher for subscription and for the copy of newspapers containing coupons falls well within the above quoted statutory definition of consideration of an element of lottery.

However, the question remains whether the element of "chance" exists in this proposed plan.

This contest may be readily distinguished from the 1951 opinion mentioned in your opinion request. In that plan the purchaser of the subscription could cast his vote for any person who had entered the contest. Under that plan the "chance" element might be a dominant factor in that the outcome would not be determined by the efforts of the individual contestant but might well be determined by factors outside his control. This is not true in the contest here under consideration. Other distinguishing factors will be noted in the course of this opinion.

The leading case on the element of "chance" in the State of Missouri is the case of State v. Globe-Democrat, supra, decided in 1937. In that case the Missouri Supreme Court noted a contest may be a lottery even though skill, judgment, or research enters therein to some degree if chance in a larger degree determines the result. The Court also observed that it is a question whether the chance factor is dominant or subordinate in State ex Inf. McKittrick v. Globe-Democrat Pub. Co., 1.c. 717:

". . . in other words the rule that 'chance' must be the dominant factor is to be taken in a qualitative or causative sense rather than in a quantitative sense. This was directly decided in Coles v. Odhams Press, Ltd., supra, when it was

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held the question was not to be determined on the basis of the mere proportions of skill and chance entering in the contest as a whole."

Other jurisdictions have defined "chance" as an element of lotteries as follows:

"The 'chance' which is an essential element of lottery, is the antithesis of that which happens by plan or design or by the exercise of volition or judgment." Com. v. Laniewski, 98 A.2d 215, 217.

"As an essential element of lottery, the word 'chance' refers to attempt to attain certain ends, not by skill or known or fixed rules, but by happening of a subsequent event, incapable of ascertainment or accomplishment by means of human foresight or ingenuity." U.S. v. Rich, D.C. Ill, 90 F. Supp. 624, 627.

"'Chance' as element of lottery, is something that befalls as result of unknown or unconsidered forces, a happening in a particular way, issue of uncertain conditions, a fortuity, an unforeseen or inexplicable cause or its operation, or an accident." Minges v. City of Birmingham, 36 So. 2d 93, 96, 97, 251 Ala. 65."

Keeping the above definitions in mind, can it be said that the "chance" element is the dominant factor in the proposed plan? We think not. The language contained in the case of DeWitt Motor Co. vs. Bodnark (Ohio) 169 N.E. 2d 660, 667 [6] is appropriate to the facts of this contest.

The court stated:

"In all lines of legitimate business, the members thereof are working to bring about a certain result for gain or profit and while these contingencies may never develop, nevertheless the dominating factor of judgment, design and volition has entered into their work. This contingency is not, as used in the definition of a lottery, termed 'chance'."

Basically, the plan here under consideration awards a prize to the contestant who sells the most subscriptions. All contestants are paid a commission on each sale.

We find a problem however that presents difficulty. On page 2 of the promoter's letter of explanation concerning the contest, we find the following language:

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"The person making the sale is automatically credited with the number of points appropriate to that sale; the buyer of the subscription has no choice whatever concerning the distribution of these points."

However, in the advertisement in the newspaper on page 1 thereof, we find the following language:

"Subscriptions may also be left at the campaign office * * * or at the press times office * * * credit and votes will be given to the candidate of your choice."

These two statements appear to be inconsistent. If the former statement is correct then there would be no element of chance. If, however, the latter statement is the rule then the element of chance is definitely injected into the contest.

Another problem is presented in connection with the advertisement in the newspaper whereby a contestant received points or votes for mailing in a coupon clipped from the advertisement. This is an introductory proposal to the contest and is published one time. The points or votes earned by sending in this coupon are credited only to the contestant. This does not seem to inject the element of chance.

However, another and different coupon is provided in the advertisement which permits anyone to clip the coupon and credit 500 votes to any contestant the sender desires. This appears to inject the element of chance. Another rule of the contest is that the points to be awarded to the contestant for obtaining new subscriptions decreases as the contest progresses. This would have the effect of discouraging a contestant from himself purchasing subscriptions in order to win. This factor appeared to be decisive in the 1951 opinion of this office mentioned above. The promoter's letter also stated that contestants are prohibited from purchasing blocks of subscriptions for themselves.

It is our view that this plan (with the exceptions above noted) is essentially a subscription contest in which the person who sells the greatest number of subscriptions according to the rules of the contest wins the prize, but all persons selling subscriptions are entitled to a commission on each one sold. In this sense this contest cannot be distinguished from any number of sales contests conducted by various companies to stimulate the sale of their products. The ability to persuade a purchaser to buy any product is based on human ingenuity and foresight and is not inexplicable and incapable of ascertainment.

Having reached the conclusion that the element of "chance" is absent from this proposed contest we are of the opinion that it is therefore not a lottery as contemplated by Section 563.430, RSMo. Cum. Supp. 1963.

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CONCLUSION

A newspaper subscription contest in which a contestant is awarded points for each subscription sold within the contest period does not constitute a lottery in violation of Section 563.430 because the element of chance is absent.

The foregoing opinion, which I hereby approve, was prepared by my Assistant Robert D. Kingsland.

Very truly yours,


THOMAS F. EAGLETON
Attorney General

JGS/cs