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Ala. Op. Atty. Gen. No. 2005-173, 2005 WL 1995932 (Ala.A.G.)

Office of the Attorney General
State of Alabama

Opinion No. 2005-173

August 9, 2005

Gambling - Lotteries - Sweepstakes - Gambling Devices - Jefferson County

The Attorney General does not issue opinions as to whether a certain action constitutes a violation of criminal law as this can be determined only by a properly empaneled judge and jury. Each district attorney in the various judicial circuits in the state must review each factual situation on a case-by-case basis and make the decision whether he or she should present the matter to a grand jury.

Credits, free or purchased, provided to play gambling devices are “something of value” as defined by [section 13A-12-20\(11\) of the Code of Alabama](#). When a patron wagers these credits on a gambling device, consideration flows from the patron to the facility. This provides the needed consideration to constitute these schemes as lotteries under section 65 of the Recompiled Constitution of Alabama, as amended.2005

Honorable Arthur Green, Jr.
District Attorney
Tenth Judicial Circuit - Bessemer Division
Courthouse Annex
Bessemer, Alabama 35020-4907

Dear Mr. Green:

This opinion of the Attorney General is issued in response to your request.

QUESTION

Whether it is permissible to market a telephone calling card, or other such card, that is accompanied by credits to operate a “play and win” video game where no purchase is necessary for the credits and full credits can be obtained through a standard mail-in procedure.

FACTS AND ANALYSIS

Your opinion request was accompanied by a set of documents detailing the play of a “sweepstakes” video device. This Office has received other sets of documents detailing similar schemes. The laws relating to gambling offenses

are criminal laws, and this Office does not issue opinions on whether a certain activity constitutes a violation of a criminal law. Only a properly empanelled jury and judge can make such a determination. Each district attorney in the various judicial circuits in the state must review each factual situation on a case-by-case basis and make the decision of whether he or she should present the matter to a grand jury. This opinion will discuss Alabama law as it applies to sweepstakes operations designed to be played on otherwise illegal video gambling devices.

In an opinion to the Honorable Robert B. Leavell, this Office found that a scheme that consisted of a promotional sweepstakes in the form of a scratch-off lottery attached to a commercial phone card, which allowed for the free distribution of game chances through a mail-in option, did not constitute a prohibited lottery. Opinion to Honorable Robert B. Leavell, Administrator, Alabama Alcoholic Beverage Control Board, dated October 29, 1998, A.G. No. 99-00028. This scheme has been developed in various forms, including video machines that serve as readers of the sweepstakes pieces to inform the holder of a winning or losing piece. These schemes do not provide for the utilization of a separate video device that is a gambling device or game of chance.

*2 The scheme described in your request calls for a sweepstakes scheme in which the patron purchases a phone card, internet time, or some other item, to which promotional points have been attached. These points, or credits, are then transferred to a video gaming device either directly, by placing money into the machine, or by some action of the owner/operator of the facility after a purchase of the promoted items. These devices are of the type normally used in gambling activities. The patron then uses these credits to play the video gaming device. These credits are purported to be sweepstakes points. The patron plays the credits until all the sweepstakes credits are extinguished. The patron can then cash-in any accumulated credits for cash or more promotional items and more sweepstakes credits.

Each sweepstakes promotion contains a “no purchase necessary” clause that allows the patron to receive a certain number of free credits, either on site or through a mail-in option, to play on a video gaming device. This clause is promoted as the necessary element in distinguishing between a legal sweepstakes promotion and an illegal lottery.

The video gaming devices described in the information provided are the types of machines normally used for gambling activities. Credits are staked or risked on a game of chance to win additional credits. A gambling device is defined as “[a]ny device, machine, paraphernalia or equipment that is normally used or useable in the playing phases of any gambling activity, whether that activity consists of gambling between persons or gambling by a person involving the playing of a machine.” [ALA. CODE § 13A-12-20\(5\) \(1994\)](#). Possession of a gambling device, by itself, is a violation of Alabama law:

- (a) A person commits the crime of possession of a gambling device if with knowledge of the character thereof he manufactures, sells, transports, places or possesses, or conducts or negotiates any transaction affecting or designed to affect ownership, custody, or use of:
 - (1) A slot machine; or
 - (2) Any other gambling device, with the intention that it be used in the advancement of unlawful gambling activity.

[ALA. CODE § 13A-12-27 \(1994\)](#). Because the devices are used or usable in the playing phase of gambling activity, the devices used in these schemes would be illegal gambling devices. An owner or operator of such machines would be subject to prosecution for possession of a gambling device if the scheme in which they are intended to be used constitutes unlawful gambling activity.

Section 65 of the Recompiled Constitution of Alabama, as amended, prohibits the authorization of lotteries or gift enterprises in this state. This section states as follows:

The legislature shall have no power to authorize lotteries or gift enterprises for any purposes, and shall pass laws to prohibit the sale in this state of lottery or gift enterprise tickets, or tickets in *any scheme in the nature of a lottery*; and all acts, or parts of acts heretofore passed by the legislature of this state, authorizing a lottery or

lotteries, and all acts amendatory thereof, or supplemental thereto, are hereby avoided.

*3 [ALA. CONST. art. IV, § 65](#) (emphasis added). This section has been interpreted broadly by the Alabama Supreme Court. In *Ex parte Ted's Game Enterprises*, the court explained that “the Constitution’s broad prohibition on all lotteries is evident because the Constitution explicitly condemns ‘any scheme’ containing elements that would make the scheme resemble a lottery.” [893 So. 2d 376 \(Ala. 2004\)](#). The court also stated in *Try-Me Bottling Co. v. State* that, in Alabama, “the public policy is emphatically declared against lotteries or any scheme in the nature of a lottery, both by Constitution and by statutes.” [235 Ala. 207, 212, 178 So. 231, 234 \(1938\)](#). This language was emphasized in *Opinion of the Justices* No. 83:

[In *Try-Me Bottling Co.*], this court expressly called attention to the broad conception set forth in [§ 65](#) showing that the prohibition is not only against lotteries but also against any scheme in the nature of a lottery. ***The very purpose of this broad declaration was to put a ban on any effort at evasion or subterfuge.***

[249 Ala. 516, 518, 31 So. 2d 753, 755 \(1947\)](#) (emphasis added). Section 65 and the language of the court establish that Alabama has a strong public policy against lotteries and will not allow a scheme to be established to evade this law.

A lottery has been defined as having “three elements: (1) A prize, (2) awarded by chance, (3) for a consideration.” [Grimes v. State, 235 Ala. 192, 193, 178 So. 73, 74 \(1937\)](#). All three elements must be present. The schemes described above possess the first two elements - a prize (the cash payouts), awarded by chance (the gambling devices). Therefore, the element that is determinative in classifying the nature of these schemes will be whether consideration is present.

The element of consideration has been determined to be absent in a promotional sweepstakes where free entries in the sweepstakes are made available. The Alabama Supreme Court stated as follows:

[T]he ... game is not a lottery, because participants were not required to purchase cards in order to play. Any incidental profit or benefit to Pepsi in the sale of the soft drinks containing the “under the crown” chance neither provides the consideration to make the game a lottery nor negates the free participation aspect of the game.

[Pepsi Cola Bottling Company of Luverne, Inc. v. Coca-Cola Bottling Company, Andalusia, 534 So. 2d 295, 297 \(Ala. 1988\)](#); see also, *Opinion of the Justices* No. 277, [397 So. 2d 546 \(Ala. 1981\)](#). With valid promotional sweepstakes schemes, the prize is readily identifiable from the information provided. The patron is not required to wager anything on a chance to win a prize. By introducing a gambling device into the process, however, it changes the basis of the scheme.

As explained above, the sweepstakes schemes at issue provide credits to a patron to stake or risk on a gambling device to win redeemable credits. “Gambling” is defined as follows:

*4 A person engages in gambling if he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he or someone else will receive something of value in the event of a certain outcome.

[ALA. CODE § 13A-12-20\(4\) \(1994\)](#). “Something of value” is defined as follows:

Any money or property, any token, object or article exchangeable for money or property or any form of credit or promise directly or indirectly contemplating transfer of money or property or of any interest therein, or involving extension of a service entertainment or a privilege of playing at a game or scheme without charge.

[ALA. CODE § 13A-12-20\(11\) \(1994\)](#). Credits provided to play the gambling devices are property or a form of credit or promise that has extended to a patron the “privilege of playing a game or scheme without charge.” *Id.* It is the opinion of this Office that the credits available to play these devices are “something of value” as defined above. See [State v. Vance, 2004 WL 746296 \(Tenn. Crim. App.\)](#) (stating that free credits used to play a video gambling device were “things of value” under the gambling statute because credits were cashed in at five cents a piece); and [Jack Eiser Sales Co., Inc. v. Wilson, 752 N.E.2d 225 \(Ind. Ct. App. 2001\)](#) (finding that a player who uses free points

to play a gambling device stakes his or her points on a chance to win more, therefore, the player gives something of value or consideration). While the sweepstakes credits may not be redeemable for cash, they are wagered for cash. This provides the needed consideration to constitute these schemes as unlawful gambling activities.

There are no cases in Alabama concerning the play of an illegal gambling device as a part of a sweepstakes scheme; however, other jurisdictions that prohibit lotteries have rendered decisions in this area. The Idaho Supreme Court found that a game where players received credits by buying sports cards constituted gambling, and the machines were found to be illegal gambling devices. [MDS Investments, LLC v. State, 65 P.3d 197, 204-205 \(Idaho 2003\)](#). The Idaho court stated that “the player would be gambling (risking something of value for the chance of winning a prize) regardless of whether he initiated play by paying a dollar or presenting a voucher.” [MDS Investments, LLC, 65 P.3d at 205](#); see also [State v. Vance, 2004 WL 746296 \(Tenn. Crim. App.\)](#) (stating that free credits used to play a video gambling device were “things of value” under the gambling statute because credits were cashed in at five cents a piece); [Jack Eiser Sales Company, Inc. v. Wilson, 752 N.E.2d 225 \(Ind. Ct. App., 2001\)](#); and [F.A.C.E. Trading, Inc. v. Carter, 821 N.E.2d 38 \(Ind. Ct. App., 2005\)](#) (explaining that the element of consideration was not eliminated by the “no purchase necessary” print on discount tickets sold with chances to win up to several hundred dollars).

CONCLUSION

*5 Credits, free or purchased, provided to play gambling devices are “something of value” as defined by [section 13A-12-20\(11\) of the Code of Alabama](#). When a patron wagers these credits on a gambling device, consideration flows from the patron to the facility. This provides the needed consideration to constitute these schemes as lotteries under section 65 of the Recompiled Constitution of Alabama, as amended.

I hope this opinion answers your question. If this Office can be of further assistance, please do not hesitate to contact Kenneth S. Steely of my staff.

Sincerely,
Troy King
Attorney General

Brenda F. Smith
Chief
Opinions Division

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