Opinion No. 63-141

October 21, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: Mr. Alexander F. Sceresse District Attorney Second Judicial District Albuquerque, New Mexico

QUESTION

FACTS

You inquire whether the following plan constitutes a lottery in violation of New Mexico law. A person goes to a supermarket or other retail business and picks up a bingo card. No purchase is required as a prerequisite to obtaining a card. The person takes the card home and at certain scheduled hours he can play radio and/or television bingo for possible prizes. New cards of a different color must be obtained periodically in order to be eligible for a prize.

QUESTIONS

(1) Is the broadcasting of a lottery an area in which the federal government has pre-empted the field so that state statutes in this regard are superseded?

(2) If the answer to question 1 is "no," does the procedure outlined above constitute a lottery in violation of Section 40A-19-1 and 2, as enacted by the 1963 legislature?

CONCLUSIONS

(1) No.

(2) Yes.

OPINION

*{*313}* **ANALYSIS**

Since radio and/or television is the method by which the plan is implemented, it is necessary in the first instance to determine whether federal legislation has pre-empted the field of lottery broadcasting regulation.

There is a federal statute which makes it a crime to broadcast lottery information. It is interesting, and, as we shall see later, significant that this provision was originally incorporated in the Federal Communications Act as § 316 but was transferred to the Federal Criminal Code in 1948 as 18 U.S.C. § 1304.

While this federal statute has been generally ignored by the Federal Communications Commission, according to the author of **State Control of Broadcasting,** 73 Harv. L. Rev. 386, 390 (1959), it was involved in the 1957 case of **Caples Company v. United States,** 243 F.2d 232. The television give-away program there under consideration was called "Play Marko" but for all intents and purposes was the same plan about which you inquire. The Federal Communications Commission held that under the statute and its regulations "Play Marko" was a prohibited lottery. On appeal, the Circuit Court of Appeals for the District of Columbia held, in a two to one decision with a strong dissent, that the plan did not contain the element of consideration (which is not defined in the statute) and thus did not violate the lottery statute.

The question thus arises whether a plan which has been held not to violate the federal statute can be prohibited by a state law. To phrase the matter another way, has the federal government so preempted the field of broadcasting in general, and lottery broadcasting regulation in particular, that the federal statute supersedes the state lottery statute?

That the Federal Communications Act confers upon the Commission a great measure of control over the content of radio and television programs is undeniable. Nonetheless, as the author states in **State Control of Broadcasting,** 73 Harv. L. Rev. 386 (1959):

"The fact that radio and television regulation touches upon so many aspects of contemporary law renders it difficult to generalize about solutions to the problems of federalism in the area; but it should be apparent that even though there are few industries which are as clearly interstate, **it would be grave error to assume that broadcasting is governed exclusively by federal law."** (Emphasis added)

The United States Supreme Court has often said that state statutes will not be rendered inoperative unless clear congressional intent to pre-empt a field over which it has jurisdiction is shown. **Welch Co. v. New Hampshire,** 306 U.S. 79; **Kelly v. Washington,** 302 U.S. 1; **Carey v. South Dakota,** 250 U.S. 118. In the case of **Pennsylvania v. Nelson,** 350 U.S. 497, the Court did find that the pervasiveness of federal legislation dealing with sedition against the United States and the dominance of the federal interest in this area justified the finding of an intent to pre-empt this particular field. So too in the area of censorship, which is even denied to the Federal Communications Commission. **Allen B. Dumont Labs, Inc. v. Carroll,** 184 F.2d 153, cert. denied, 340 U.S. 929.

The recent case of **Head v. Board** ***{*314}*** **of Examiners,** Docket No. 392, filed June 17, 1963, establishes to our satisfaction that the earlier statement to the effect that "Congress has occupied fully the field of television regulation and that field is no longer open to the states" (Dumont case) has been modified and limited.

For example, the majority opinion states:

"In areas of the law not inherently requiring national uniformity, our decisions are clear in requiring that state statutes, otherwise valid, must be upheld unless there is found 'such actual conflict between the two schemes of regulation that both cannot stand in the same area, or evidence of a congressional design to preempt the field.'" Florida Avocado Growers v. Paul. 373 U.S. 132.

At another point the Court states as follows:

"In the absence of positive evidence of legislative intent to the contrary, we cannot believe Congress has ousted the States from an area of such fundamentally local concern."

Examining the three criteria contained in the above quotations, and which are dealt with one by one in the concurring opinion of Mr. Justice Brennan, we find that our state lottery statute is not superseded in any respect by the federal statute relating to lottery broadcasting.

Lotteries, being a form of gambling, are primarily a matter of state interest and policy under the police power. No national uniformity either exists or needs to exist.

There is no conflict between the state law and the federal regulatory system that "stands as an obstacle to the full effectiveness of the federal statute." **Head v. Board of Examiners,** supra (concurring opinion).

Not only is there no indication of a congressional intent to preempt the field of lottery broadcasting regulation but the apparent intent is quite to the contrary. Section 3231 of Title 18, which codifies the federal criminal law and in which title the federal statute dealing with broadcasting of lotteries is contained, provides "nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof." This phraseology has been interpreted to mean that in the absence of an explicit congressional pre-emption the states are to be allowed to legislate in the area. **Sexton v. California,** 189 U.S. 319; **State v. Duncan,** Ark., 255 S.W. 2d 430.

A good example is in the area of counterfeiting. Article 1, Section 8 of the United States Constitution provides that "The Congress shall have Power to . . . provide for the punishment of counterfeiting the Securities and current coin of the United States." And Congress has so legislated. Nonetheless, the courts have held that the states also have the power to enact statutes punishing counterfeiting in view of the savings clause (Section 3231) in Title 18 which was discussed above. **Ex Parte Dixon,** Cal., 264 P. 2d 513 **Natasi v. Aderhold,** Ga., 39 S.E. 2d 403. We would also point out that what Congress has prohibited in Title 18, Section 1304, is broadcasting lottery information. What the New Mexico legislature has prohibited in Section 19-2, Article 19, Chapter 303, Laws 1963, is gambling -- and "conducting a lottery" is defined as gambling. See **Natasi v. Aderhold,** supra.

Quoting again from **State Control *{*315}* of Broadcasting,** 73 Harv. L. Rev. 386 (1959):

"Although the act of showing motion pictures, which was involved in Dumont (case), was not itself unlawful, **many activities which might be televised would constitute crimes on public nuisances in the judgment of state authorities. It is inconceivable that these should be rendered unassailable simply because they are televised.** If boxing matches were staged and televised in a state in which boxing was unlawful, even the Dumont court, despite its broad formulation of the pre-emption doctrine surely would not suggest that the state court could not enjoin them." (Emphasis added)

It is to be noted that under our state statutes a lottery is a **crime** and any place conducting a lottery is a gambling place which constitutes a **public nuisance** which may be abated. Sections 19-1, 19-2, 19-8, Criminal Code.

In summing up his discussion of lottery statutes, the author of the above-quoted article points out that since Section 3231 of the Federal Criminal Code provides that nothing in that title shall divest states of their criminal jurisdiction, and since there is no indication, either in section 1304, or elsewhere, of a congressional intent to reserve regulation of the broadcasting of lotteries to the federal government, it seems that the states may regulate such broadcasts to the same extent as the broadcasting of other gambling information. Accord: 39 Ops. Wisc. Atty. Gen. 374 (1950). Our opinion is the same and we accordingly answer your first question in the negative.

Turning to your second question, we find that historically, a lottery has been defined as a plan which contains the elements of prize, chance and consideration. That prize and chance are involved in the plan here presented cannot be disputed.. Whether consideration is present is the real issue.

Since no purchase is required in order for the participant to obtain his bingo card, this is what is sometimes denominated as a flexible participation lottery. Williams, **Flexible Participation Lotteries** (1938).

In the case of **State v. Jones,** 44 N.M. 623, 107 P2d 324, our Court aligned itself with the group of courts which hold that consideration is present even though no purchase is required as a condition precedent to eligibility for a prize. As we pointed out in Opinion No. 63-36, the Court in the Jones case quoted with approval the following from Williams, **Flexible Participation Lotteries,** § 215 (1938):

"The burden of the 'bank night' offensive is that its service to prospective patrons in registration, assignment of numbers, and the distribution of prizes by chance, is a free and gratuitous service and that its prizes are gifts and without consideration.

This position is untenable. **The object of this contention is to divorce the registration and offer of prizes by chance from the increase in gross receipts**

produced thereby. In short, it is an attempt to sever cause from effect, to separate advertising from its results, and to violate established principles underlying consideration, offers and acceptances and other features of the law of contracts." (Emphasis added)

Our Court also cited with approval the English case of **Willis *{*316}* v Young,** 1 K.B. 448. That case involved a flexible participation plan by the Weekly Telegraph of London to increase the paper's circulation.

The Weekly Telegraph made a free general distribution of numbered medals to the homes of the people in London. Each medal carried a serial number and the words, "Keep this, it may be worth 100 pounds. See the Weekly Telegraph Today." A drawing was held weekly and the winning medal numbers were published in the Weekly Telegraph. Every precaution was taken to keep the sale of the papers separate from the distribution of medals, and the winners were given several days in which to claim their prizes. Many places were maintained in London where persons could read the paper free to see if they were winners without having to buy a copy.

When the Weekly Telegraph was prosecuted for violating the lottery laws, the defense contended that the scheme was legitimate advertising and not a lottery; that the distribution of the medals and the award of prizes was gratuitous; that the risk of loss was absent from the plan; that the purchase of a copy of the paper was independent from the ownership of a medal.

The Court found that the plan constituted a lottery, the Chief Justice asking this question:

"Looking at the whole of the circumstances of the case, is it not plain that the circulation of the paper increased by reason of people getting these medals?"

At the time our Court handed down the decision in **State v. Jones,** supra, the recent Criminal Code had not been enacted. Various Attorney General Opinions on the question of what constitutes a lottery were also issued prior to July 1, 1963, the effective date of the Criminal Code. Accordingly, it is necessary to now examine the 1963 lottery legislation.

Section 19-2, Article 19, Chapter 303, Laws 1963, compiled as Section 40A-19-2, provides that gambling contained therein includes "conducting a lottery." Section 40A-19-1 defines a lottery as follows:

"'Lottery' means an enterprise wherein for **consideration** the participants are given an opportunity to win a **prize,** the award of which is determined by **chance,** even though accompanied by some skill. As used in this subsection 'consideration' means **anything which is a financial advantage to the promoter or a disadvantage to any participant."** (Emphasis added)

A scheme which was identical in all pertinent respects to the one here involved was dealt with by the court in **State v. Laven,** Wisc., 71 N. W. 2d 287 (1955). After referring to certain earlier cases the court had this to say:

"In these cases we said that a lottery involves three elements, -- prize, chance and a consideration . . . and consideration consists in a disadvantage to the one party or an advantage to the other. . . .

Those elements and that consideration are obviously present in appellant's 'Banke' operation. . ."

Involved in the case of **State v. Grant,** Neb., 75 N. W. 2d 611, was the rather standard type of flexible participation lottery, i.e., a person could register at the promoter's store for a prize to be *{*317}* determined by chance. No purchase was required in order to register.

The syllabus by the court reads as follows:

"Where the promoter of a business enterprise, with the evident design of advertising his business and thereby increasing his profits, distributes prizes to some of those who call upon him or his agent, or write to him or his agent, or put themselves to trouble or inconvenience, even of slight degree, or perform some service at the request of and for the promoter, the parties receiving the prize to be determined by lot or chance, a sufficient consideration exists to constitute the enterprise a lottery though the promoter does not require the payment of anything to him directly by those who hold the chances to draw."

The court recognized the obvious fact of life that "the purpose of conducting the scheme was to advertise defendants' business, induce people to come into their place of business, look at defendants' exhibits, and buy merchandise, and to generally stimulate defendants' business as a new car dealer."

Said the court:

"In order to give force and effect to statutes comparable with our own, the great weight of authority has adopted the basic contract theory of consideration, holding that the element of consideration is present if there is a benefit to the promiser who is the promoter of the scheme, or if there is a detriment to the promisee who is the contestant or holder of a chance for the prize."

The court cited a number of cases which hold the same way and pointed out that "the fact of the registrants' going to the store each day to get the daily coupon and that **the operation of the scheme paid the defendant or he would not operate it, constitutes a consideration.** Consideration consists in a disadvantage to the one party or an advantage to the other. **We have here both."** (Emphasis added) Accord: **Maughs v. Porter,** Va., 161 S.E. 242.

In **Herald Publishing Company v. Bill,** Conn., 111 A. 2d 5, the "standard" plan was involved. The person goes to a supermarket, registers, and has an opportunity to win a prize in the drawing. No purchase was required and winners did not have to be present at the drawing. A newspaper, before it would accept the copy advertising the plan, asked for a declaratory judgment as to whether the plan violated the lottery statute. The court held that the plan did violate the statute, saying:

"However, as we held in the Dorau case, supra, the payment of a consideration to participate in the 'drawing' is not essential in order for the conduct to be forbidden by our state."

A New Jersey case involved a scheme whereby a supermarket chain mailed free calendars to the public. All a recipient had to do was fill out the coupon attached to the calendar and deposit it at the nearest supermarket operated by that company. A drawing was held to determine the award of prizes. There was no requirement of a purchase and a person did not have to be present to win. **Lucky Calendar Co. v. Cohen,** N. J., 117 A. 2d 487. Nonetheless, the court said:

"The obvious design of the entire Lucky Calendar, while it *{*318}* avoids saying so in so many words is to get the calendar holder, by participating in the Lucky Calendar scheme, into the nearest Acme Supermarket for the purpose, of course, of increasing its sales."

The court said that "consideration is in fact clearly present here, both in the form of a detriment or inconvenience to the promise at the request of the promisor and of a benefit to the promisor." In discussing this benefit the court said: ". . . it is transparently clear that the real benefit which the plaintiff and its customer, American Stores Company, were seeking -- and in fact has been obtaining -- is an increase in volume of business. The whole advertising scheme is artfully directed to enticing customers to the Acme supermarkets to the resultant benefit of American Stores Company and incidentally to the plaintiff."

Continuing, the court said:

"The motives of the plaintiff and its customer, American Stores Company, are in nowise altruistic. Somebody must pay for the program and the prizes -- and the ultimate bearer of the burden is of course the 'lucky' calendar holder". (Emphasis added).

This decision was reaffirmed in 120 A. 2d 107. Accord as to a similar scheme where no purchase is required as a prerequisite to eligibility: **Journal Square Merchants Association v. McNamara,** N.J., 117 A. 2d 498 (1955).

The case of **Knox Industries v. State,** Okla. 258 F.2d 910 (1953) involved the standard type plan which requires no purchase. The court said:

"But more than this, the rule requiring prospective participants to secure tickets in order to become eligible necessarily demands that such individuals appear at defendants' place of business. By such appearances they are, of course, subject to the sales appeal of defendants assorted merchandise. **That this works to defendants' benefit must be conceded."**

(Emphasis added)

There are some cases which go the other way, and others which appear to. For example see **Clark v. State,** Ala., 80 So. 2d 312: **Finch v. Rhode Island Grocers Association,** R. I., 175 A. 2d 177; **Cudd v. Aschenbrenner,** Ore., 377 P. 2d 177; **State v. Bussiere,** Me., 194 A 2d 702; **California Gasoline Retail v. Regal Petroleum Corporation,** Cal. 330 P. 2d 778; **ACF Wrigley Stores, Inc., v. Olsen,** Mich., 102 N.W. 2d 545.

But in none of these states is consideration defined as it is in our statute, and in most it is not defined at all. When such is the case there is considerable discretion in the courts as to what the term "consideration" means in this area. See Williams, **Flexible Participation Lotteries** (1938)

Our legislature, however, has specifically defined "consideration" as "anything which is a financial advantage to the promoter or a disadvantage to any participant." We simply cannot close our eyes to the economic fact of life that the plan here involved increases traffic to the participating stores with a necessarily resultant increase in sales. Therein lies the financial advantage to the promoter and thus the consideration as defined in our statute.

Our lottery statute was enacted in the exercise of the police power of the state in pursuance of a *{*319}* public policy which the legislature has determined. And as the court said in **State v. Grant,** supra,

"We are bound in the process of statutory construction to give due weight to every word employed by it (the legislature) in an effort to give effect to the legislative intent."

Summing up, it is our opinion that (1) the federal government has not pre-empted the field of lottery broadcasting regulation and (2) the plan in question does violate the state lottery law, **as do other plans which involve the elements of prize, chance and consideration as defined in the Criminal Code.**

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