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OFFICE OF THE ATTORNEY GENERAL
State of California

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OPINION

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THE STATE SOLID WASTE MANAGEMENT BOARD has requested an opinion on a question we have rephrased as follows:

Would a “reverse vending machine” which provides payment upon the deposit in the machine of specific kinds of empty containers on the basis of a stated item of value for a designated number of deposited containers, the payout to be made on a deposit selected at random within the designated number, constitute a lottery prohibited by California law?

CONCLUSION

A “reverse vending machine” which provides payment upon the deposit in the machine of specific kinds of empty containers on the basis of a stated item of value for a designated number of deposited containers, the payout to be made on a deposit selected at random within the designated number, constitutes a lottery prohibited by California law.

ANALYSIS

The State Solid Waste Management Board (“Board”) is considering the introduction of “reverse vending machines” which would receive empty containers for recycling. To provide an incentive for container return, the machine would dispense an item of value such as a coin or coupon redeemable for merchandise which will be referred to as the “payout.” However, a payout would not be made for each container returned. Instead a payout would be dispensed only after a certain number of containers have been returned at a rate determined in a manner the Board describes as “at random within a designated interval.” The interval refers to the number of containers needed to make their salvage value equal the value of the payout. As the containers are returned the machine dispenses one payout for each interval, but not in any regular sequence. Instead the payout is dispensed at random on the return of one of the containers within the interval so that whether a payout will be made for any particular container returned cannot be predicted. We are asked whether such a reverse vending machine would constitute a lottery prohibited by California law.”

Article IV, section 9, of the California Constitution provides:

“(a) The Legislature has no power to authorize lotteries and shall prohibit the sale of lottery tickets in the State.

“(b) The Legislature may provide for the regulation of horse races and horse race meetings and wagering on the results.

“(c) Notwithstanding subdivision (a), the Legislature by statute may authorize cities and counties to provide for bingo games, but only for charitable purposes.”

Penal Code section 319 provides:

“A lottery is any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable

consideration for the chance of obtaining such property or a portion of it, or for any share or any interest in such property, upon any agreement, understanding; or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift enterprise, or whatever name the same may be known.”

Penal Code section 320 provides:

“Every person who contrives, prepares, sets up, proposes, or draws any lottery, is guilty of a misdemeanor.”

A lottery consists of three elements: (a) a prize, (b) distribution by chance, and (c) consideration paid for the chance to win. (*Cal. Gas. Retailers v. Regal Petroleum Corp.* (1958) 50 Cal. 2d 844, 851.)

We assume the payout is money or some item having value which would constitute property under the lottery definition and thus satisfies the prize element of a lottery. The courts have construed the word “property” in section 319 in its most general sense including the right to play a free game in the case of a coin operated machine game in which chance predominates over skill: (*People v. Settles* (1938) 29 Cal. App. 2d Supp. 781; 22 Cal. Jur. 3d, Criminal Law, § 3144, pp. 298–299.)

The reference to consideration in the statutory definition of a lottery is “. . . distribution of property by chance, *among persons who have paid* or promise to pay any valuable consideration for the chance of obtaining such property or any portion of it, (Emphasis added; Pen. Code, § 319.) As we stated in 64 Ops. Cal. Atty. Gen. 114, 116 (1981):

“ . . . The question of consideration is not to be determined from the standpoint of the sponsor of the game, but from that of the . . . [players]. It is not the benefit flowing to the sponsor, but rather something of value paid or promised from the . . . [players] that constitutes the consideration for a lottery. In other words the consideration for a lottery is provided when the [player] hazards something of value on the chance to win the prize. (*People v. Cardas* (1933) 137 Cal. App. Supp. 788, 790–791; *Cal. Gas. Retailers v. Regal Petroleum Corp.* (1958) 50 Cal. 2d 844, 860.)”

It is the payment by the players, not who benefits therefrom, that determines whether the consideration element of a lottery is present. Thus, it is immaterial that the sponsor does not profit from the game or that important public policies are furthered such as the recycling

of resources with its attendant conservation of energy. (Cf. 64 Ops. Cal. Atty. Gen., *supra*, at p. 117.)

It is suggested that the reverse vending machine does not constitute a lottery because the only payment by the “players” is the deposit of the empty containers. Since the empty containers are considered to be waste material, they would have no value which would provide the consideration necessary to make the scheme a lottery. But is this true?

Viewing the question of consideration from the standpoint of those who deposit the containers, we see three possible motivations. (1) *The good deed*. To some the reverse vending machine would simply provide a convenient method of disposing of valueless waste perhaps coupled with such good citizenship motives as the prevention of littering and the recycling of resources. (2) *Free enterprise*. To the enterprising scavenger the machine will provide a ready method of converting a quantity of empty containers collected through his efforts into money or merchandise at a known rate of exchange. (3) *The windfall*. To those with sporting blood the machine will offer a chance of winning a prize by parting with something of little value. With respect to those with the free enterprise or windfall motive it cannot be said that the empty containers would have no value. We are mindful that our Supreme Court has pointed out that Penal Code section 319 requires that the consideration paid for the chance to win the prize must be a “valuable one” and held that the fact that a ticket holder must go to the place of business of the scheme to deposit a ticket stub does not supply the required consideration. (*Cal. Gas. Retailers v. Regal Petroleum Corp.* (1958) 50 Cal. 2d 844, 861–862.) Nevertheless, a specified empty container must be deposited in the reverse vending machine to obtain a payout. While the intrinsic value of such a container may be small it does have a pecuniary salvage value. In fact it is this pecuniary salvage value which determines the value and interval of the payout. The words “valuable consideration” have long been held to refer to something of pecuniary worth as distinguished from “good consideration” which may be supplied by ties of blood or natural affection. (*Clark v. Troy* (1862) 20 Cal. 219, 224.) But the amount of such pecuniary worth does not affect its status as a “valuable consideration.” (*Clark v. Troy, supra*; *Cain v. Richmond* (1932) 126 Cal. App. 254, 260) We conclude that deposit of the empty container provides a valuable consideration within the meaning of Penal Code section 319.

It has been argued that a game is not a lottery under California law unless all of the players who may win the prize have paid a consideration for the change to win. This argument was fully explored and rejected in *People v. Shira* (1976) 62 Cal. App. 3d 442, 460. If the scheme is a lottery as to some of the players it violates California’s lottery laws. (*People v. Shira, supra*; 64 Ops. Cal. Atty. Gen. 114, 117.)

The Legislature has specifically proscribed a particular form of lottery known as the slot machine. The definition of a slot machine in Penal Code section 330a is instructive. The slot machine is there described as a “mechanical device, upon the result of action of which money or other valuable thing is staked or hazarded, and which is operated, or played, by placing or depositing herein any coins, . . . or other articles . . . and by means whereof or as a result of the operation of which any merchandise, money, or representative or articles of value, . . . is won or lost, or taken from or obtained from such machine, when the result of action or operation of such machine, . . . is dependent upon hazard or chance. . . .” (Cf. Pen. Code, § 330.1.)

The consideration in the case of slot machine play is “money or other valuable thing” in the form of “any coins, . . . or other articles.” Since a penny is “any coin” a slot machine played for pennies would be just as unlawful as a nickel, dime or dollar machine. We are advised that an empty aluminum can has a salvage value of a little more than one cent. The empty can is an “article” or “thing” which has more intrinsic value than a penny and thus would appear to provide the consideration to make the reverse vending machine come within the statutory definition of a slot machine.

We conclude that the deposit of the empty containers in the reverse vending machine supplies the consideration necessary to make the scheme a lottery under California law. There remains for discussion the third and final element of a lottery. Is the prize distributed by chance?

For those with free enterprise motivation who collect enough empty containers to equal the payout interval before depositing them into the reverse vending machine there is no lottery because the chance element is missing.¹ In such case the depositor knows he will receive a payout though he does not know which deposit will trigger it. For the sport who deposits fewer containers than the payout interval, whether he receives a payout is purely a matter of chance since the payout is made at random during the interval. (See *State v. Lowe* (1919) 178 N.C. 770 [101 S.E. 385, 387–389].) As in the case of the consideration element, if the chance element is present in the case of some of the players we believe the scheme is a lottery even though, as to other players, the element of chance has been removed.

We conclude that the reverse vending machine, operated as described herein, would constitute an unlawful lottery under California law.

¹This assumes that the depositor knows when the payout interval begins and ends. The payout for any containers (less than a full interval) deposited before or after a full payout interval will be determined by chance.