



OFFICE OF THE ATTORNEY GENERAL

STATE OF ILLINOIS
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Jim Ryan

ATTORNEY GENERAL

FILE NO. 98-010

SPORTS AND GAMING:
Automated Telephone Calling Card
with a Free Sweepstakes Game
Piece as a "Lottery"

The Honorable Michael J. Madigan
Speaker of the House
State House, Room 300
Springfield, Illinois 62706

Dear Speaker Madigan:

I have your letter wherein you inquire: (1) whether sales of the "Lucky Shamrock Prepaid Emergency Phone Card", an automated telephone calling card which also contains a free sweepstakes game piece, constitutes a "lottery"; and, if so, (2) whether the "Lucky Shamrock Prepaid Emergency Phone Card Dispenser", an automated telephone calling card dispensing machine, constitutes a "gambling device." For the reasons hereinafter stated, it is my opinion that the sale of a Lucky Shamrock Prepaid Emergency Phone Card that also contains a sweepstakes game piece, in the circumstances you have described, constitutes a "lottery" as that term is used in Illinois law. Further, it is my opinion that the Lucky Shamrock Prepaid Emergency Phone Card

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Dispenser is a "gambling device", as that term is defined in Illinois law.

A review of the materials submitted with your request indicates that Diamond Game Enterprises, Inc., is marketing the "Lucky Shamrock Prepaid Emergency Phone Card" (hereinafter referred to as the "Phone Card") through the sale of the "Lucky Shamrock Prepaid Emergency Phone Card Dispenser" (hereinafter referred to as the "Lucky Shamrock Dispenser"), an automated telephone calling card dispensing device which resembles a slot machine. A person who inserts a one dollar bill into the Lucky Shamrock Dispenser receives, in return, a Phone Card good for two minutes of long distance telephone service on a touchtone telephone. Each Phone Card contains a toll-free number by which to access the long distance network and a personal identification number to validate the call.

In addition to receiving long distance telephone service credit, the purchaser of the Phone Card also receives a Lucky Shamrock sweepstakes game piece. The sweepstakes game piece contains a configuration of nine icons, winning combinations of which entitle the bearer to monetary prizes ranging in value from \$1 to \$500. The icons are also bar coded onto the back of each Phone Card and are read by the Lucky Shamrock Dispenser. Thus, subsequent to the purchase of a Phone Card, the Lucky Shamrock Dispenser displays on its video screen the same combination of icons which are contained on the sweepstakes game

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piece portion of the Phone Card. The purchaser can instantly determine whether the Phone Card contains a winning combination of icons by peeling off the covering of the Phone Card or by viewing the screen of the Lucky Shamrock Dispenser.

Although the purchase of a Phone Card from a Dispenser is the primary method for participating in the Lucky Shamrock sweepstakes, it is not the sole method. In addition, a person who wishes to enter the sweepstakes may obtain a free sweepstakes game piece from a participating retail outlet or through the mail from a Lucky Shamrock distributor. Sweepstakes rules, including the fact that free game pieces are available from the retail outlet or the distributor, are posted on all Lucky Shamrock Dispensers. Winners, whether they have purchased a Phone Card or have obtained a free sweepstakes game piece from a retailer or distributor, must go through the same procedures to claim their prize money. The configuration of icons that determine whether a particular game piece is a winner are preprinted on all tickets. The selection of which game pieces will be attached to Phone Cards and which will be given away is completely random so that the odds of winning by purchasing a Phone Card or by obtaining a free game piece are essentially the same. Against this background, you have inquired, firstly, whether the sale of a Phone Card that also contains a sweepstakes game piece constitutes a "lottery".

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Section 28-1 of the Criminal Code of 1961 (720 ILCS 5/28-1 (West 1996)) provides that a person commits the offense of gambling when he or she, inter alia, "* * * [s]ets up or promotes any lottery or sells, offers to sell or transfers any ticket or share for any lottery; * * * [k]nowingly drafts, prints or publishes any lottery ticket[,] * * * except for such activity related to lotteries * * * authorized by and conducted in accordance with the laws of Illinois * * *; or [k]nowingly advertises any lottery[,] * * * except for such activity related to lotteries * * * authorized by and conducted in accordance with the laws of Illinois * * *." As used in the Criminal Code of 1961 (720 ILCS 5/1-1 et seq. (West 1996)), the term "lottery" refers to:

" * * *

* * * any scheme or procedure whereby one or more prizes are distributed by chance among persons who have paid or promised consideration for a chance to win such prizes, whether such scheme or procedure is called a lottery, raffle, gift, sale or some other name. * * *

* * *

(720 ILCS 5/28-2(b) (West 1996).)

"

In People v. Eagle Food Centers, Inc. (1964), 31 Ill. 2d 535, the Illinois Supreme Court determined that the statutory definition of the term "lottery" simply codified the common law elements thereof. The court further stated that at common law "* * * there are three elements essential to the existence of a lottery, viz., chance, consideration and a prize * * * and * * *

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that there is no lottery if any one of these elements or ingredients is missing." (People v. Eagle Food Centers, Inc., 31 Ill. 2d at 538.) Thus, as a general rule, a giveaway promotion or sweepstakes that entails no payment of additional consideration for a chance to win a prize is not a lottery. There are limits, however, to the application of this general rule.

In G.A. Carney, Ltd. v. Brzeczek (1983), 117 Ill. App. 3d 478, the court reviewed the legality of a contest which was based upon the numbers drawn in the Illinois State Lottery, the entry form for which was available in issues of a news magazine sold through vendors. The cover price for the news magazine was \$1. The court concluded that:

" * * *

* * * the \$1 paid for the Minority News Review is an indirect payment to participate in a game of chance, even though it entitles the purchaser to a copy of the magazine. That the magazine itself may be worth the purchase price does not alter this conclusion. Thomas v. People (1871), 59 Ill. 160; Dunn v. People (1866), 40 Ill. 465.

The controlling fact in the determination of whether a given scheme or business is a lottery is determined by the nature of the appeal which the business makes to secure the patronage of its customers. If, as here, the controlling inducement is the lure of an uncertain prize, then the business is a lottery. (Kent v. City of Chicago (1939), 301 Ill. App. 312, 316, 22 N.E.2d 799. Accord, Almy Manufacturing Co. v. City of Chicago (1916), 202 Ill. App. 240, 244-45.) * * *

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In the circumstances you have described, it is clear that two of the three elements of a lottery, chance and a prize, are present in the Lucky Shamrock sweepstakes. The resolution of your inquiry, therefore, turns on whether there is the payment of consideration for an opportunity to win a prize. Based upon the information we have been provided, the purchaser of a Phone Card receives something for his or her money which is arguably worth the amount deposited into the Lucky Shamrock Dispenser (although the utility of a two minute Phone Card is questionable). It is "the lure of an uncertain prize", however, that appears to motivate a purchaser to patronize the Lucky Shamrock Dispenser. The lure of a prize is enhanced by the physical attributes of the Lucky Shamrock Dispenser--the Dispenser contains audio and video effects to announce the vending of a winning Phone Card, not unlike those displayed on slot machines. These physical attributes would do nothing to enhance the machine's value as a Phone Card dispenser, but would certainly advertise the fact that it is possible to win a prize by patronizing one. Consequently, although the Phone Card sweepstakes which is the focus of your inquiry appears, facially, to comply with the general principles set down in People v. Eagle Food Centers, Inc., it is my opinion that the Lucky Shamrock sweepstakes is precisely the type of scheme to which the court referred in G.A. Carney, Ltd. v. Brzeczek. Therefore, although the scheme has been carefully designed to appear to meet the criteria generally prescribed by

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the courts in approving giveaway schemes, a review of the underlying purpose of the scheme leads inexorably to the conclusion that the Lucky Shamrock sweepstakes is but a thinly veiled lottery.

You have also inquired whether the Lucky Shamrock Dispenser constitutes a "gambling device". The Criminal Code of 1961 provides that a person commits the offense of gambling when he or she "* * * [o]perates, keeps, owns, uses, purchases, exhibits, rents, sells, bargains for the sale or lease of, manufactures or distributes any gambling device * * *." (720 ILCS 5/28-1 (West 1996).) Section 28-2 of the Criminal Code (720 ILCS 5/28-2 (West 1996)) defines the phrase "gambling device" to include:

" * * *

* * * any clock, tape machine, slot machine or other machines or device for the reception of money or other thing of value on chance or skill or upon the action of which money or other thing of value is staked, hazarded, bet, won or lost; or any mechanism, furniture, fixture, equipment or other device designed primarily for use in a gambling place. A 'gambling device' does not include:

* * *

(2) Vending machines by which full and adequate return is made for the money invested and in which there is no element of chance or hazard.

* * *

(Emphasis added.)

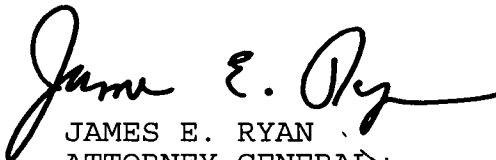
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The primary purpose of statutory construction is to ascertain and give effect to the intent of the General Assembly. (Kunkel v. Walton (1997), 179 Ill. 2d 519, 533.) Legislative intent is best evidenced by the language used in the statute. (Burrell v. Southern Truss (1997), 176 Ill. 2d 171, 174.) Where statutory language is clear and unambiguous, it must be given effect as written. City of Chicago v. Morales (1997), 177 Ill. 2d 440, 448.

As discussed above, the sale of Phone Cards containing sweepstakes game pieces in the circumstances you have described constitutes a lottery. The statutory definition of the term "lottery" expressly indicates that a lottery is "any scheme * * * whereby * * * prizes are distributed by chance * * *." Because the Lucky Shamrock Dispenser distributes lottery tickets upon the deposit of money, and prizes awarded are determined by chance, under the plain and unambiguous language of subsection 28-2(a) of the Criminal Code of 1961, it is my opinion that the Lucky Shamrock Dispenser constitutes a gambling device.

Sincerely,


JAMES E. RYAN
ATTORNEY GENERAL