



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

August 31, 1988

MAIN PHONE: 913/296-2215
CONSUMER PROTECTION: 296-3751

ATTORNEY GENERAL OPINION NO. 88- 125

Larry Montgomery
Executive Director
Kansas Lottery
128 North Kansas Avenue
Topeka, Kansas 66603

Re: State Boards, Commissions and Authorities--State
Lottery; Kansas Lottery Act--Co-Promotional
Agreements

Crimes and Punishments--Kansas Criminal Code;
Crimes Affecting Public Morals--Illegal Lotteries

Synopsis: The described co-promotional agreement between the Kansas Lottery and a private business: 1) is excepted from the trading stamp act; 2) is permissible as a promotion which furthers the purpose of the lottery act; 3) is not an illegal lottery if one of the three elements of a lottery (prize, consideration, chance) is eliminated from the operation; and 4) may advertise that every ticket purchased will be accompanied by a bonus which is redeemable through the private business. Cited herein: K.S.A. 21-2801; 21-2803; K.S.A. 1987 Supp. 21-4302; 21-4303; K.S.A. 1987 Supp. 74-8704; Kan. Const., Bill of Rights, §2, Kan. Const., Art. 15, §3c.

*

*

*

Dear Director Montgomery:

You request our opinion regarding a co-promotional agreement into which the Kansas Lottery is considering entering with a private business. The name and logo of the private business would appear on a coupon stub attached to instant Lottery tickets. You explain that each coupon will entitle the ticket purchaser to either a free food product normally sold by the business, or to a discount on such food products upon redemption at the business. Specifically, your questions are:

"1. Since it appears that coupons such as those described are governed by the Trading Stamp Act, would they fall within the exemptions presented in K.S.A. 21-2803?

"2. Is there any legal impediment or prohibition which would preclude a co-promotional agreement with a private business in which the name and logo of the business would appear on a Lottery ticket sold and advertised by a State agency?

"3. Is it legally permissible, in the co-promotion described in which every ticket contains a tear-off coupon providing either a free food product or a discount on another product, to state that there is a 'prize' -- or words of similar import -- with each ticket purchase?"

We will address your questions in the order in which they were asked.

The trading stamp act, K.S.A. 21-2801 et seq., prohibits the distribution of stamps or coupons, in connection with the sale of goods, which are redeemable for anything of value. Clearly, assuming the Kansas Lottery is a "person, firm, association or corporation" covered by the Act, a coupon obtained through purchase of a lottery ticket which is redeemable for a free food product or a discount on a food product falls within the act's proscription. Your question, however, whether the distribution and redemption of these coupons are excepted from the act pursuant to K.S.A. 21-2803 which provides:

"This act shall not apply to any coupon, ticket, certificate, card or other similar device which is issued, distributed, furnished or redeemed:

"(a) By a manufacturer or packer, when such coupon, ticket, certificate, card or other similar device is redeemable:

"(1) Without or with accompanying cash, for any product of the manufacturer or packer or for one specified and particular product not manufactured or packed by the manufacturer or packer; or

"(2) by the manufacturer or packer in cash.

"(b) By a retailer, when such coupon, ticket, certificate, card or other similar device is redeemable by the retailer, with or without accompanying cash, for any product which the retailer normally sells in its usual course of business."

We believe the Kansas Lottery would fall within the exception for manufacturers or packers, subsection (a), and the private business in question would be excepted as a retailer under subsection (b).

The Kansas Supreme Court has interpreted K.S.A. 21-2803(a) as allowing "a manufacturer or packer in connection with his manufactured or packed product [to] include in the package certain stamps or other items which are redeemable."

Cushenberry v. Shanahan, 190 Kan. 720, 721 (1963). The term "packer" is not defined in the trading stamp act. Under the rules of statutory construction, words used in statutes must be attributed with their common, ordinary meanings unless the context clearly requires otherwise. J.A. Tobin Const. Co., Inc. v. Kemp, 239 Kan. 430 (1986). This is particularly true of penal statutes, such as K.S.A. 21-2801, which must be strictly construed against the State. State ex rel. Stephan v. Pepsi-Cola General Bottlers, Inc., 232 Kan. 843, 846, 847 (1983). "Packer" is defined generally as "[o]ne who packs goods . . . for transportation and sale." The American Heritage Dictionary 493 (2d College Edition 1983). The Kansas Lottery meets this definition as it receives bulk shipments of lottery tickets manufactured

outside the State and, upon receiving orders from retailers, packs the orders and distributes the tickets to the retailers. Thus, coupons which are distributed by the Lottery and redeemable with or without accompanying cash for one specified and particular product not manufactured or packed by the Lottery are excepted from the trading stamp act. However, each coupon must be redeemable for only one product, i.e. the same coupon cannot be redeemed for one of several options. Pepsi-Cola General Bottlers, Inc., 232 Kan. at 847.

Similarly, the private business involved would meet the exception stated in K.S.A. 21-2803(b). The coupons will be redeemed by a retailer, with or without accompanying cash, for products which the retailer normally sells in its usual course of business.

You next ask whether there might be any other legal impediment to this type of co-promotional agreement. We have narrowed this broad question to two issues: 1) Whether a state agency may promote a private industry in the course of advancing its own interests; and 2) whether the proposed coupon "giveaway" constitutes an illegal lottery.

K.S.A. 1987 Supp 74-8704 authorizes the Kansas Lottery to "[e]nter into contracts for such promotional services . . . as needed to operate the Kansas Lottery." You indicate that the co-promotional agreement in question will greatly benefit the Lottery. Every instant Lottery ticket sold will be accompanied by a coupon redeemable for something of value, either a free food item or a discount on a food item. The Lottery is responsible for no costs associated with the offering of these coupons beyond what it would expend to operate the game without the coupons. In our opinion, if this agreement will serve to promote the Lottery and thus further the purpose of the Lottery Act, it is within the scope of the Kansas Lottery's authority. This is true regardless of whether the activity also promotes a private business. The Kansas Lottery should take care, however, to not unfairly advantage one private business over another. To avoid conflict with the Kansas Constitution, Bill of Rights, §2 (Equal Protection and no special privileges) other businesses should be given similar opportunities based on their ability to help promote the Lottery.

Participating in a lottery is a class B misdemeanor. K.S.A. 21-4303. Participation in the state owned and operated lottery is not included in this prohibition. K.S.A. 1987

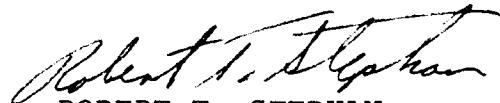
Supp. 21-4302(2). The three essential elements which, when combined, constitute a lottery are consideration, prize and chance. State ex rel. v. Highwood Services, Inc., 205 Kan. 821, 823 (1970). Article 15, section 3c of the Kansas Constitution authorizes a state owned and operated lottery. While the Kansas Lottery will control the sale of tickets which are to be accompanied by the private business' coupons, we do not believe the entire operation is run by the State. The private business will determine the types and quantities of food items for which coupons may be redeemed and these food items and their values will not be considered in the Lottery's prize structure. Thus, in order to avoid being an illegal lottery, one of the three elements listed above must be eliminated. For instance, in addition to being able to obtain a coupon by purchasing a Lottery ticket, the private business may provide a toll-free number for persons to call to receive free coupons for similar food items and discounts. The number must be toll-free so that people do not have to pay to get a coupon. This is so because consideration is defined as "anything which is a commercial or financial advantage to the promoter or a disadvantage to any participant." K.S.A. 1987 Supp. 21-4302(3). Alternatively, the element of chance could be eliminated by making the "prize" offered known to the participant before the ticket is purchased. In this way the participant is no longer taking a chance on what the coupon may be redeemable for; its exact value (amount and type of item) is a known factor.

Finally, you question whether advertising "a prize with every ticket purchased" would be considered deceptive. This language imports that a Lottery prize will accompany every ticket purchased, whereas in reality the "prize" will consist of a coupon redeemable by a private business, with or without accompanying cash, for one of its regularly sold food items. Because the implication is misleading we believe that such advertising would be deceptive and suggest that the Lottery instead advertise that every ticket purchased will be accompanied by a "bonus" offered by or through the private business.

In conclusion, The described co-promotional agreement between the Kansas Lottery and a private business 1) is excepted from the trading stamp act; 2) is permissible as a promotion which furthers the purpose of the lottery act; 3) is not an illegal lottery if one of the three elements of a lottery (prize, consideration, chance) is eliminated from the operation; and 4) may advertise that every ticket purchased

will be accompanied by a bonus which is redeemable through the private business.

Very truly yours,


ROBERT T. STEPHAN
Attorney General of Kansas


Julene L. Miller
Deputy Attorney General

RTS:JLM:jm