

FORMAL OPINION

June 22, 1982

HONORABLE KENNETH R. BIEDERMAN
State Treasurer
Department of Treasury
State House
Trenton, New Jersey 08625

FORMAL OPINION NO. 5—1982

Dear Treasurer Biederman:

You have asked for our advice as to the authority of the Lottery Commission to use three new proposed lottery games to be played on consumer-operated video lottery game terminals as part of the New Jersey State lottery. For the following reasons, it is our opinion that there is no constitutional nor statutory bar to the incorporation of these proposed lottery games as part of the New Jersey State lottery.

This proposal presents an innovative means for stimulating public interest in the state-operated lottery. Therefore, it is necessary to describe the proposal in some detail in order that the legal problems may be placed in the proper perspective. Generally, a consumer-operated video games terminal allows a lottery participant to directly operate a terminal with a television screen which displays a lottery game and the game's instructions. The first proposed game to be offered is a bingo game. In this game, the player deposits \$1 into the lottery terminal; four colored bingo boards, each with 25 squares, appear on the television screen, a bingo mixer appears on the screen and the numbered balls begin to tumble and mix. Inside the terminal an electronic computer conducts an electronic drawing to select a numbered bingo ball. The random number selected by the process would range between 1 and 75 corresponding to the numbers appearing on the displayed bingo boards. As soon as a number is drawn, the bingo boards are checked and each occurrence of the selected number on any of the boards is then circled. If any row, column or diagonal of any of the four bingo boards is filled, the player wins the prize associated with that bingo board. A small computer printer inside the terminal would print out a prize winning ticket. The video lottery terminal would be connected to a large computer at a central site in the state.

In the second proposed game, a TV screen would show a planet in space with 150 areas of land marked off with boundary lines. Of the 150 locations, there will be at least three occurrences of each prize amount offered in a treasure chest. The video lottery terminal computer conducts a random drawing that randomly scatters the prize amounts to the 150 locations. The player would select five of the 150 areas for an astronaut to dig for the buried treasure.

In the third proposed game, a five digit score is developed as a result of the player's participation in a amusement game. The five digit score is the player's five digit number in a drawing conducted by the computer terminal. If the player matches all five digits in order, he or she wins the top prize. If the right-most four digits match, a lesser prize would be won and so forth.

From this description of the proposed video games, certain basic

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the court's decision is that any mechanical device or machine would be subject to the statutory prohibition against the use of a slot machine where the traditional elements of consideration, chance and prize were found in its operation.

The definition of a slot machine is now found in both the Criminal Code and the Casino Control Act. It is generally defined as:

Any mechanical, electrical or other device, contrivance or machine which, upon insertion of a coin token or similar object therein, or upon payment of any consideration whatsoever, is available to play or operate, the play or operation of which, whether by reason of the skill of the operator or application of the element of chance, or both, may deliver or entitle the person playing or operating the machine to receive cash or tokens to be exchanged for cash, whether the payoff is made automatically from the machine or in any other manner whatsoever. [N.J.S.A. 2C:37-1f; 5:12-45.]

From this discussion of both the judicial and statutory interpretation of the meaning of a slot machine, it is clear that the video lottery games terminal falls within those definitions. It is a machine or device which is available to operate upon the insertion of a coin. Depending on chance, the operation of the machine terminal may deliver or entitle the player to receive a monetary prize.

Notwithstanding our characterization of the video terminal as a form of "slot machine," slot machines in certain cases have been found to be a proper component of a "lottery." For example, a slot machine has been held to be a form of lottery where the perpetrators used the machine as a means to carry into execution an illegal scheme or plan. *State v. Coats*, 74 P. 2d 1102, 1106 (Ore. 1938); *State, et al. v. Circuit Court*, 148 So. 522 (Fla. 1933); *Commissioner v. McClintock*, 154 N.E. 264 (Mass. 1926), a slot machine containing mint rolls and providing for the distribution of premium checks held to be a lottery for the machine was deemed a scheme for the distribution of prizes by chance; *In re Rogers*, 118 P. 242 (Cal. 1911), cigar vending machine would dispense at uncertain intervals three cigars for the price of one and held to be a lottery; *Theyer v. State*, 37 S.E. 96 (Ga. 1900), a nickel slot machine which entitled a player to a cigar and in addition thereto a prize in the amount of 100 cigars for a "royal flush" held to be part of a lottery; *Loiseau v. State*, 22 So. 138 (Ala. 1897). See also Annotation, "Coin-Operated or slot machine as lottery, 101 A.L.R. 1126 (1936).

Also, under the case law in this state:

A lottery is defined as being a scheme for the distribution of prizes by chance, a game of hazard in which small sums are ventured for the chance of obtaining a larger value either in money or other valuables. Where a pecuniary consideration is paid and it is determined by lot or chance, according to some scheme held out to the public what the party who pays the money is to have for it, or whether he is to have anything, it is a lottery. [*State v. Lovell* 39 N.J.L. 461.]

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premises are established. All of the games would be games of pure chance without any element of skill. Prizes will be distributed as a result of an electronic randomization among the lottery participants who will have paid monetary consideration to participate in the lottery game.

The public policy of this state has traditionally condemned gambling by lotteries. The Constitution of 1844 expressly forbade lotteries or the sale of lottery tickets within the state. Art. 4, §7, ¶2. In 1897 this provision was extended to deny the right of the legislature to authorize "pool—selling, bookmaking or gambling of any kind." The Constitution of 1947 while generally continuing the ban on legislation authorizing gambling contained specific exceptions to the prohibition. It continued the authorization for pari-mutuel betting on horse races first permitted in 1939 and authorized veterans, charitable, education and other similar organizations to conduct bingo or lotto and to hold raffles. In 1969 a popular referendum was held to authorize the legislature to direct the operation of a state lottery. This amendment appears as Art. 4, §7, ¶2 of the State Constitution and reads as follows:

C. It shall be lawful for the Legislature to authorize the conduct of State lotteries restricted to the selling of rights to participate therein and the awarding of prizes by drawings when the entire net proceeds of any such lottery shall be for State institutions, State aid for education.

This amendment was implemented by the legislature by the enactment of the State Lottery Law, L. 1970, c. 13, which established a State Lottery Commission with power to promulgate rules and regulations governing the establishment and operation of a state lottery as it deems necessary and desirable.

The constitutional amendment does not provide any clue or definition of its important operative terms, for example, the word "lotteries" or the phrases "selling of rights to participate," or "the awarding of prizes by drawings." Since the probable meaning of these phrases are significant to the resolution of your inquiry, it is necessary to review the commonly understood meaning of those phrases at the time of the adoption of the 1969 amendment.

In this regard, a preliminary question arises as to whether a video lottery game terminal is a "slot machine" and whether or not the same is comprehended within a "lottery." The term "slot machine" was unknown at the common law. *State v. Brandt*, 122 N.J.L. 488, 489 (Sup. Ct. 1939). The question of the definition of a slot machine first arose in the context of whether a "pinball" game fell within the purview of a "slot machine." In *Sterling Distributors v. Keenan*, 135 N.J. Eq. 508 (E. & A. 1944) the Court of Errors and Appeals defined the term as any machine started by dropping a coin into the slot which could entitle the operator to a prize if he should win. Also, in *State v. Ricciardi*, 18 N.J. 441 (1955) the Supreme Court rejected arguments that a "slot machine" applied only to the classic "one-armed bandit." The court held that a pinball machine fell within the interdiction of a statute prohibiting the keeping of slot machines where the result was dictated by chance alone. The import of

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Moreover, the classic form of lottery involved the distribution of prizes by the random selection of a number at some chance event. *See State v. Shorts*, 32 N.J.L. 398 (Sup. Ct. 1868). A lottery was also defined by the criminal law, N.J.S.A. 2A:121-6 prior to its repeal in 1979 as "a distribution of prizes by chance in return for a consideration in the form of money or other valuable thing." Also, the Code of Criminal Justice, enacted in 1979, defines a lottery as:

an unlawful gambling scheme in which (a) the players pay or agree to pay something of value for chances, represented and differentiated by numbers or by combinations of numbers or by some other media, one or more of which chances are to be designated the winning ones; and (b) the winning chances are to be determined by a drawing or by some other method based upon the element of chance; and (c) the holders of the winning chances are to receive something of value. [N.J.S.A. 2C:37-2h.]

Certain common features of a lottery are apparent from both the common law and statutory definition. It was contemplated a lottery would be a public scheme involving multiple participants or players. Also, an essential ingredient of the definition is that a lottery is a game of chance. In the present situation, the video lottery game terminal, although a form of slot machine, is the component for carrying into execution an innovative means of public lottery. The winner thereof is determined by a method of randomized electronic selection so that the prize is determined by pure chance.¹ For these reasons, it is our opinion that the use of a video terminal would permissibly fall within the meaning of a "lottery" under Art. 4, §7, ¶2.

Also, although the use of the proposed video games does not include the purchase of tickets in order to play, there is little doubt in characterizing the depositing of money into the video terminal as the "selling of rights to participate." Also, the constitutional language does not provide any definition of the term "drawing." It may reasonably be assumed that the framers had in mind some form of random selection so that the result be determined purely by chance. The courts have defined "drawing" as not only the act of randomly selecting a winning ticket from among many tickets but also "in a generic sense meaning any chance event upon which the . . . activity is based." *State v. Gatling*, 95 N.J. Super. 103, 109 (App. Div. 1967). A random selection of a winner by computer or electronic

1. In an opinion letter dated Sept. 8, 1981 to the Director of the New York State Lottery, New York Attorney General Abrams rendered an opinion concerning the installation of certain electronic games as part of that state's lottery. The Attorney General concluded that those specific games were prohibited by both the Constitution and statutory law of the State of New York. It is clear to us that the games considered by Attorney General Abrams are distinguishable in a meaningful way from the present proposal. There, blackjack and red devil games were expressly characterized as predominantly games of skill where a player was pitted against a single game machine. In the present situation, it is contemplated that the games be premised on pure chance through a randomized electronic selection mechanism and available to multiple players on a statewide basis.

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means would in our opinion fall within the constitutional meaning of a "drawing."

Further, not only does the proposal for the incorporation of a video lottery games terminal as part of the state lottery conform with the literal terms of the State Constitution, but also with its intended scope and purpose. Certain indicia of the framers intent are discernible from public hearings held on the concurrent resolution. Assemblyman Brown expressed the view that the exact nature and structure of the games should be left to the legislature to decide in its discretion at some future date:

There are so many forms of lottery that I truly feel . . . that the mechanics of it should be left to a later date when public opinion has shown itself as to what it desires. I think the purpose now is to determine do the people or do not the people want this particular thing.

* * *

Now the mechanics can always be worked out later and my own thoughts are very flexible on it because . . . the least amount of revenue anticipated would considerably swell the state's treasury . . . [Public Hearings before Assembly Judiciary Committee on *Assembly Concurr. Resolu. 22* Page 7, 9.]

Also, the hearings reveal the intent of the legislature to compete with illegal numbers games so that the state could cut into the profits reaped by organized crime. *Id.* at 5. However, it was consistently agreed by all speakers that the specific format for conducting a lottery should be left to a later date and to those persons responsible for implementing it. Although the legislature could not have comprehended the present proposal in 1969, it is clear to us that it does not fall outside of their broad consensus. Consequently, it is our judgment that there would be no impediment from either the constitutional language or from its basic objective and history to the implementation of a video lottery games similar to the one discussed above.

The statutory framework governing the operation of a state lottery was enacted in 1970. N.J.S.A. 5:9-1 *et seq.* A State Lottery Commission was established with power "to promulgate such rules and regulations governing the establishment and operation of a state lottery as it deems necessary and desirable in order that the mandate of the people, expressed in their approval of the amendment . . . to the Constitution . . . may be fully implemented." It was further provided that rules and regulations may include:

1. The type of lottery to be conducted.

* * *

4. The manner of selecting the winning tickets or shares.
5. The manner of payment of prizes to the holders of winning tickets or shares, including, subject to the approval of the State Treasurer, provision for payment of prizes not to exceed \$599.00 by agents licensed hereunder out of moneys received from sales of tickets or shares.

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6. The frequency of the drawings or selections of winning tickets or shares, without limitation.
 7. Without limit as to number, the type or types of locations at which tickets or shares may be sold.
 8. The method to be used in selling tickets or shares.
- N.J.S.A. 5:9-7.

From this enumeration of the powers of the Commission, the legislature intended to confer broad and pervasive regulatory discretion on the members of the Commission in the actual conduct of the lottery and in structuring its games.

The statutory direction in subsection (5) concerning the payment of prizes to the holders of winning tickets or shares does not pose any obstacle.² Although the proposed video game entails no purchase of a ticket in order to play, there should be little difficulty in perceiving the depositing of money into the terminal as the sale of a "share" in the lottery. There is no statutory definition of a share but the term is generally defined as the "portion belonging to, due to, or contributed by, an individual." *Webster's Third International Dictionary (1976)*. In the present context, the statutory "share" is the opportunity given to the player to participate in the lottery game and to win a prize. Accordingly, there is no impediment to the exercise of the discretion of the Lottery Commission to adopt a proposal of this nature under the State Lottery Law.

In conclusion, therefore, you are advised that there is no constitutional or statutory bar to the incorporation of a consumer-operated video games terminal into and to be made a part of the New Jersey State lottery.

Very truly yours,
IRWIN I. KIMMELMAN
Attorney General

By: THEODORE A. WINARD
Assistant Attorney General

2. A reported case interpreting the state lottery law is *Karafa v. N.J. State Lottery Commission*, 129 N.J. Super. 499 (Ch. Div. 1974). The court held that a lost lottery ticket may not be established by a judicial determination and that it was incumbent on the winner to produce the winning ticket to claim the prize. The court's opinion was predicated to a great extent on the then existing regulatory scheme of the Lottery Commission to require the presentation and validation of a winning ticket. It is therefore apparent that substantial amendments to existing rules and regulations must be made in order to accommodate the video games terminals as part of the Lottery Commission program.