

FORMAL OPINION

June 1, 1983

HONORABLE WALTER N. READ, *Chairman*
Casino Control Commission
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Princeton, New Jersey 08625

FORMAL OPINION NO. 6—1983

Dear Chairman Read:

The Casino Control Commission has requested our opinion whether certain casino-related promotional activities are lawful under those provisions of the Code of Criminal Justice concerning gambling. Among the promotions in question are those related to charter bus tours, in which, under one alternative, all bus patrons receive free gifts upon arrival or, under the second alternative, the bus patrons must participate in a drawing for a chance of winning free prizes. Also of interest are promotions within the casinos themselves, by which tickets are distributed free to all who wish to participate in drawings or other activities. It is our conclusion a promotion should be deemed to be gambling only if a participant risks "something of value" such as money, tangible or intangible property or personal services, on the outcome of a contest of chance based on an understanding or agreement something of value will be won in the event of a specific outcome.

Public policy in New Jersey is strongly against gambling. Except for particular forms of gambling specifically mentioned in the State Constitution the Legislature is prohibited from authorizing any kind of gambling "unless the specific kind, restrictions and control thereof" has been approved at a popular referendum. N.J. Const. (1947), Art. IV, §7, ¶2. The Legislature over the decades has complemented the constitutional prohibition with statutory proscriptions on gambling, the most recent being Chapter 37 of the Code of Criminal Justice. N.J.S.A. 2C:37-1 et seq. N.J.S.A. 2C:37-2 thus defines as criminal the promotion of gambling, while the succeeding sections make criminal the possession of gambling records and the maintenance of a gambling resort. N.J.S.A. 2C:37-3, 4.

Although the Legislature has expressed in this fashion its intent to ban gambling, the more specific characteristics of that prohibition can be ascertained only by considering the statutory definitions of the various elements of the gambling offense. It is these definitions which demarcate the boundary between the lawful and unlawful. "Gambling" is defined as:

staking or risking something of value upon the outcome of a contest of chance or a future contingent event not under the actor's control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome. [N.J.S.A. 2C:37-1(b).]

In pertinent part "something of value" is defined as:

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any money or property, any token, object or article exchangeable for money or property, or any form of credit or promise directly or indirectly contemplating transfer of money or property or of any interest therein, or involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge. [N.J.S.A. 2C:37-1(d).]¹

The "something of value" definition is plainly critical to identifying gambling activity, since gambling does not exist if the participant is not risking something of value or is not entertaining the beliefs that he may receive something of value.

Although the "something of value" definition is not entirely free of ambiguity, its phrasing indicates that legislative intent was to exclude from the statutory elements comprising the gambling offense the sort of personal inconvenience which will constitute consideration sufficient to support a contract. The definition may be parsed to encompass (1) money or property, (2) any token, object or article exchangeable for money or property and (3) any form of credit or promise which either contemplates the transfer of money or property or which involves the extension of a service, entertainment or playing privilege. An analysis of the first two categories produces the conclusion that only money or property or tangible items standing in their stead constitute "something of value." Some analytical difficulty does arise upon consideration of the third category. While its first part continues the pattern of specifying surrogates for money or property, this time by the intangible surrogate of "any form of credit or promise" which contemplates "transfer of money or property or of any interest therein," its second part is more confusing in its reference to "any form of credit or promise" which involves "extension of a service, entertainment or a privilege of playing at a game or scheme without charge." Some of this last phraseology seems not entirely to mesh with the concept of something being risked. However, the precise extent and under what particular circumstances these final words of the "something of value" definition might apply to the risking aspect of a gambling incident need not be decided here, for in all events the activities described require the person involved to bear far more of a burden than that minimal inconvenience which would bind him to a contract.²

Difficulty can sometimes be encountered in ascertaining whether, in the context of particular circumstances, money or property or their tangible or intangible surrogates are in fact being risked. In some situations the risking is self-evident, as when a participant hands over money to the

1. Also of significance is the definition of "lottery," which means:

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:37-1(h).]

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operator of a game only then to be allowed to sit down and play. In other situations, however, the nexus between payment and the opportunity to win is more ambiguous, as when the payment made constitutes consideration for both a gambling and a non-gambling activity. The courts have devised standards according to which this sort of operation might be judged, with differentiation being made between “closed participation” and “flexible participation” operations. As a Pennsylvania court has said:

In the “closed participation” system, as applied to theatre “bank nights,” an admission price must be paid to the theatre owner for a theatre ticket in order that the person so purchasing may be assigned a number which is drawn by chance, or lot, in some manner. There need be no increase in the price of the theatre ticket purchased by the possible winner, the price paid for the ticket including the price paid for the chance. . . . [*Commonwealth v. Lund*, 142 Pa. Super. 208, 15 A. 2d 839, 842 (Super. Ct. 1940)]

The *Lund* court held that:

a drawing conducted upon the basis of a “closed participation” is a lottery, even though the price or cost of the chance is included in the original price of the theatre ticket. In other words, in such a scheme the purchase of the ticket and the fact that one cannot contend for the prize unless he has purchased such a ticket, establishes the fact of consideration. . . . [*Ibid.*]

In the “flexible participation” operation, by contract, “some sort of method is employed by means of which some persons get chances to win

2. Over the decades the courts in New Jersey have struggled to specify the outermost boundary of the “something of value” concept—the least measure of detriment borne which, when combined with the other elements of chance and winnings, will constitute gambling. *State v. Berger*, 126 N.J.L. 39 (Sup. Ct. 1941), and *Furst v. A. & G. Amusement Co.*, 128 N.J.L. 311 (E. & A. 1942), were “Bank Night” cases typical of many from across the nation, in which movie theatres sold drawings for prizes in which those paying an admission price to the motion picture as well as those who did not could participate. The *Furst* court in particular emphasized that “[t]hose that have not paid for admission to the motion picture must at some inconvenience wait outside to be sure of hearing the announcement and of entering the theatre promptly thereafter.” 128 N.J.L. at 313. *State v. Berger*, 126 N.J.L. at 43. It was stated in *Formal Opinion* No. 9—1978, however, these decisions do not represent a definition of gambling for purposes of the New Jersey Constitution. At the time of the early decisions the Legislature had in effect created a statutory type of “gambling” which required no consideration whatever or only the most minimal consideration. That this choice by the Legislature does not limit the legislative prerogative to adopt a less-encompassing definition is clear from the later enactment which exempted from the lottery prohibition the minor personal inconvenience incurred in submitting a boxtop or package label so as to participate in a game. N.J.S.A. 2A:121-6 (repealed). This legislative prerogative to choose a narrow definition is exemplified as well by the current definition in the Code of Criminal Justice, which in terms of its risking aspect concerns only valuable items or kinds of personal effort calling for substantially more than mere personal inconvenience.

without purchasing any theatre ticket." Under those circumstances the trier of fact must determine whether something of value is being risked and whether gambling is therefore occurring by considering "the character and practical operation of the scheme as a whole, and not by rare instances of departure from the general scheme and practice." *Id.* at 845.

A number of the promotions would be or have been held in the casinos themselves. Many of the promotions which have been brought to our attention are variations or composites of the six authorized casino gambling games. It is the Casino Control Commission which possesses the expertise and the responsibility for determining whether they are suitable for casino use. N.J.S.A. 5:12-5. See *IGP-EAST, Inc. v. Div. of Gaming Enforcement*, 182 N.J. Super. 562, 566 (App. Div. 1982). Other types of promotion held in the casinos include the "Winter of Winners" promotion where seven hourly drawings were held each day, with three winning tickets drawn per hour. No purchase or casino play was required to participate, and entry tickets having no cash value were available on request to anyone visiting the casino. Each drawing was for cash and merchandise prizes, with there also being daily, weekly and monthly drawings and a grand prize drawing the last day. Under another promotion, "One on the House," participation was similarly broad, with all persons except casino employees and their immediate families eligible to participate by means of coupons having no cash value. On these facts, the promotions do not constitute gambling in general or lotteries in particular. As discussed, the statutory definition of "gambling" hinges upon the phrase "something of value;" the statutory definition of "lottery," N.J.S.A. 2C:37-1(h), does so as well.¹ Here, apparently no risking of something of value is made, either from the standpoint of the individual participants or from the standpoint of the operation as a whole. It appears quite unlike the old "Bank Night" scheme, which was often held unlawful because, even though payment was not literally required, the majority of participants did pay to secure a more favorable position in claiming potential winnings. *Commonwealth v. Lund*, *supra*. 15 A. 2d at 846. In this instance, by contrast, no such hidden inducement exists for playing, and consequently the operations appear to be genuinely open to all without the necessity of risk.

The same conclusion may be reached with regard to one of the kinds of charter bus tour promotions which have been devised, though not with regard to the other kind. Under the first kind a patron will pay between, \$8.50 and \$16.50 for the tour to and from Atlantic City, but will receive from the casino a bonus in the form of \$10.00 in coins and coupons redeemable for food. It will be recalled that under the Code of Criminal Justice "gambling" means risking something of value "upon the outcome of a contest of chance," N.J.S.A. 2C:37-1(b), with "contest of chance" meaning a game in which "the outcome depends in a material degree upon an element of chance. . . ." N.J.S.A. 2C:37-1(a). Considering that apparently every bus patron receives the bonus without exception, gambling does not exist because of the absence of the chance element. Obviously a casino or a tour bus operator may give away its property if it so desires. That it does so in hopes of attracting a larger patronage and of ultimately higher profits is of no legal consequence.

There is great difficulty with the second kind of charter bus tour

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promotion, however. There the bonus is not given to all of the bus patrons. Instead, the bonus would be given only to those patrons selected by a drawing; moreover, only those patrons buying tickets for that bus tour would be eligible to participate. Not only is the element of chance present,³ but the chance element functions within the kind of closed participation scheme discussed earlier. The inevitable inference must be that those who bought bus tour tickets did so at least partially because of the drawing and that some part of the purchase price was staked upon the game. Under these circumstances, the promotion is unlawful.

In some instances the bus tour operator is not associated with the casino. The monetary payments made by bus patrons do not themselves constitute the "pot" from which winnings are drawn, for those payments are kept by the operator to cover the costs and profits of the bus operation while the winnings are provided by the casino. Nevertheless, this lack of identity between something of value staked and something of value won does not alter the character of the event as gambling, assuming that all other statutory elements are present. Gambling—the risking of something of value upon the outcome of a contest of chance upon an agreement of understanding of possibly receiving something of value, N.J.S.A. 2C:37-1(b)—is a contract, *Lucky Calendar Co. v. Cohen*, 19 N.J. 399, 414-416 (1955), and, as a principle of general contract law, "[i]t matters not from whom the consideration moves or to whom it goes" as long as "it is bargained for as the exchange for the promise. . . ." *Coast Nat'l Bank v. Bloom*, 113 N.J.L. 597, 602 (E. & A. 1934); *Guaclides v. Kruse*, 67 N.J. Super. 348, 354 (App. Div. 1961). This principle is particularly pertinent to current New Jersey statutory law. As mentioned, "gambling" occurs under N.J.S.A. 2C:37-1(b) when something of value is risked upon the agreement that something of value will be won in the event of a specified outcome of a contest of chance or a future contingent event. Nothing in this definition nor in the gambling provisions in their entirety intimates a legislative requirement for identity of wagers and winnings; nor does there appear any such requirement for identity of the person taking the bets and the person distributing the winnings. In view of the social mischief intended to be controlled, *Lucky Calendar Co. v. Cohen*, 19 N.J. at 410, the Legislature is not likely to have imposed such a requirement upon no apparent rationale.

In summary, gambling can occur only when a participant risks "something of value," and that term in its legislative definition means the participant's risking of money or property or tangibles or intangibles as well as personal effort standing in their stead. The definition does not include lesser acts of personal inconvenience. Whether something of value is being risked in any particular situation, moreover, is to be ascertained by considering all of the relevant circumstances. The proposed promotions held in the casinos by which free tickets or coupons are given to all interested persons in anticipation of later drawings for prizes are lawful. The charter bus tour promotions which give a bonus to each bus patron without

3. It is important to note that a game may be a "contest of chance" notwithstanding that the skill of the contestant may also be a factor therein. *Boardwalk Regency v. Attorney General*, 188 N.J. Super. 372 (Law Div. 1982).

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exception, is lawful, because of the absence of the element of chance. Another bus tour promotion is not lawful, however, since the bonus there is available to only bus patrons whose names are selected in a drawing and the inference must be that part of the patron's ticket price was staked upon the outcome of the drawing. The promotion is equally unlawful when the payments to the bus operator do not represent the source of the winnings ultimately paid by the casino because that sort of identity is not statutorily required.

Very truly yours,
IRWIN I. KIMMELMAN
Attorney General

July 5, 1983

PAMELA S. POFF, *Director*
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FORMAL OPINION NO. 7—1983

Dear Director Poff:

You have asked for our opinion as to whether it is unlawful under the Law Against Discrimination for a lending institution to include inquiries in credit applications concerning the marital status of a prospective borrower. The Division on Civil Rights has received numerous inquiries from lending institutions as to whether a designation of marital status may be included on an application for credit when the information is necessary to either enable the institution to obtain an enforceable security interest or to create a valid lien, pass clear title, or waive inchoate rights to property. For the following reasons, it is our opinion that under the Law Against Discrimination a lender may make an inquiry in order to enable it to protect its interest in security provided on account of the loan. A lender, however, may not make an inquiry as to the marital status of a prospective borrower in order to ascertain his or her credit worthiness.

The Law Against Discrimination ("LAD") N.J.S.A. 10:5-12(i), provides that it shall be unlawful:

For any person, bank, banking organization, mortgage company, insurance company or other financial institution, lender or credit institution to whom application is made for any loan or extension of credit. . . .

2. To use any form of application for such loan, extension of credit or financial assistance or to make record or inquiry in connection with applications for any such loan, extension of credit or financial assistance which expresses, directly or indirect-