



DEPARTMENT OF LAW  
OFFICE OF THE  
Attorney General  
STATE CAPITOL  
Phoenix, Arizona 85007

(R76-24)

BRUCE E. BABBITT  
ATTORNEY GENERAL

76-134

April 22, 1976

Honorable Tony Gabaldon  
Arizona State Senate  
State Capitol  
Phoenix, Arizona 85007

LAW LIBRARY  
ARIZONA ATTORNEY GENERAL

Dear Senator Gabaldon:

Pursuant to your request dated January 8, 1976,  
I am enclosing two copies of a research memorandum treating  
the application of lottery laws to bingo games on television.  
While the matter is by no means free of doubt, it is our  
conclusion that such games would constitute a lottery.

Sincerely,

Bruce E. Babbitt  
Attorney General

BEB:cl  
Enclosures



Office Of Attorney General

INTER-OFFICE MEMO

*Th...*  
*...*

~~MICHAEL SOPHY~~

Date March 1, 1976

FROM: IAN A. MACPHERSON

SUBJECT: DRAFT OF R 76-24

ORIGINATOR OF REQUEST: SENATOR TONY GABALDON

QUESTION PRESENTED:

"Does the Arizona Bingo Law and/or the Arizona lottery statute apply to bingo games on cable television systems where:

- (1) the bingo cards are made available to all parties free of charge;
- (2) participating merchants do not condition the availability of the bingo cards upon the purchase of goods in their stores;
- (3) a participant need not go through a "checkout lane" to obtain the bingo cards;
- (4) the merchant is notified of the foregoing rules and said rules are enforced by the game promoter;
- (5) the bingo cards are made available at the cable television company's studio or office and would also be mailed upon request;
- (6) A person need not be a subscriber to participate in the bingo games but can participate by watching a subscriber's television set; and
- (7) the foregoing facts and rules are publicized?

\*NOTE: An informal (i.e., non-written) opinion was requested.

ANSWER: See body of opinion

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The question which you have posed is complex in nature and will therefore require a somewhat lengthy response.

To begin with, it should be noted that the "earlier Tax Commission ruling" to which you refer in the second paragraph of your letter of January 8, 1976, concerned the operation of A.R.S. § 5-406(S). That statute specifically provides that no person who is not physically present on the premises where a game of bingo is actually conducted shall be allowed to participate as a player in the game.

The basis for the ruling was that the broadcasting or transmission of audio and video signals (i.e., a bingo game) from a television studio to a cable TV subscriber's television set would violate the statute if the person sitting before the set (as distinguished from a person sitting in the studio audience) were permitted to participate as a player. A collateral issue also concerned the question of whether or not the cable television company could qualify to hold a "small game" bingo license under A.R.S. §§ 5-421 et seq., since gross receipts from advertising were anticipated to be in excess of the \$300 per month limit imposed by A.R.S. § 5-421(B).

The further question, however, concerns whether the activity under consideration and under the factual circumstances you have stated, constitutes either "bingo" as contemplated under A.R.S. §§ 5-401 et seq. or a "lottery" under A.R.S. § 13-436, or both. The resolution of this problem therefore requires an analysis of the terms "bingo" and "lottery".

Although there is no specific definition of the term "bingo" contained in A.R.S. §§ 5-401 et seq., the word was defined in Bender v. Arundel Arena, Inc., 248 Md. 181, 236 A.2d 7, 12 (1967). There, the court quoted from Webster's Third New International Dictionary, defining the English equivalent of "bingo" (i.e., "lotto") as:

"... a game usually played for a pool with cards bearing rows of numbers in which a caller draws numbered counters from a stack and each player covers the corresponding numbers if they appear on his card, the winner being the one who first covers one complete row".

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It is rather common knowledge that bingo games conducted today frequently involve elaborate machinery (e.g., ping-pong ball blowers, illuminated master and satellite number boards, etc.) and varied winning bingo "patterns" (e.g., "crazy 'L'", "T", "small picture frame", "X", etc.). Notwithstanding this variety, it is the substance of the game rather than variations upon its form to which courts will look. See, e.g., State v. Lipkin, 169 N.C. 265, 84 S.E.2d 340, 343 (1915), a case dealing with the definition of a "lottery" and holding that the absence of a precise and detailed definition of the term was not fatal since

"... no sooner is a lottery defined, and the definition applied to a given state of facts, than ingenuity is at work to evolve some scheme of evasion which is within the mischief, but not quite the letter of the definition."

It is immediately clear that the foregoing definition of bingo does not contain a requirement of consideration. That is, something of value flowing to the operator of the bingo game in exchange for the opportunity to participate therein does not specifically appear in the definition. It might therefore be argued that, even in the absence of consideration, a particular game might yet be still classified as bingo.

This result, however, does not appear to be justified when the provisions of A.R.S. §§ 5-401 et seq. are read as a whole and construed in pari materia. It is evident that the type of "bingo" with which the Legislature was concerned when it enacted the statutes in question was "bingo" involving the same requisite elements that, in other contexts, would constitute a type of illegal lottery or gaming scheme proscribed under A.R.S. § 13-436. It would be difficult to examine A.R.S. §§ 5-401 et seq. and conclude that the Legislature was intending to license and regulate bingo games where absolutely no consideration whatsoever changed hands, directly or indirectly.

This is not to say, however, that minimal consideration can exist and still no lottery will be found. On the contrary, minimal consideration has frequently been found to exist in various forms with a resultant declaration that a lottery also existed.

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In general, the Supreme Court of Arizona has defined "Lottery" as the payment of a price for the opportunity to win a prize that is awarded by chance. Engle v. State, 53 Ariz. 458, 90 P.2d 988 (1939); In re Gray, 23 Ariz. 461, 204 P.1029 (1922). In In Re Gray, supra, the court outlined several cases generally defining the term, and finally stated, 23 Ariz. at 466:

"Perhaps as satisfactory a definition as any is that given by Cyc. [i.e., Cyclopedia of Law and Procedure, 1907 ed.] vol. 25, p. 1633:

'A lottery is a species of gaming which may be defined as a scheme for the distribution of prizes by chance, among persons who have paid, or agreed to pay, a valuable consideration for the chance to obtain a prize.'

It is at once apparent that the foregoing definition uses the term "chance" twice and in two different ways. The first use of the term (i.e., "... distribution of prizes by chance...") is in the sense of a distribution according to random selection and luck. The second use of the term (i.e., "... the chance to obtain a prize.") is in the sense of an opportunity to participate in the scheme as one of the players.

In In Re Gray, supra, the Defendant was convicted of operating a lottery wherein a punchboard holding 600 gold plated collar buttons, which buttons covered numbers, was exhibited to prospective players. Upon the investment of one dime, a player could purchase one of the collar buttons and, if it covered a certain number, he would win a box of candy.

The Court held that the scheme constituted a lottery in that prizes were being awarded by chance after the giving of consideration. On the "consideration" issue, the Court stated, 23 Ariz. at 468:

"In the briefs, some emphasis is placed upon the fact that the collar buttons exhibited were worth the prices paid, and that the purchaser could sustain no loss. But the mere fact that there are

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no blanks, and that every subscriber is sure to get something as the actual or ostensible equivalent in value for the consideration paid, does not relieve the scheme of its character as a lottery, where the prizes given are of unequal value."  
(Numerous citations omitted;  
Emphasis added)

"As remarked in State v. Lipkin [169 N.C. 265, 84 S.E. 340 (1915)], that the purchaser is to secure something only makes the scheme more enticing." (Emphasis added).

In the Engle case, supra, it was held that although the maintenance of a gambling room and house where persons bet on horse races was "gambling" and was a public nuisance, the proprietors were not guilty of maintaining a lottery. The Court held, 53 Ariz. at 469, that the three necessary elements of a lottery were:

"(a) the offering of the prize,  
(b) giving of a consideration for an opportunity to win the prize, and  
(c) the awarding of the prize by chance."

The case was decided, however, not upon the issue of whether or not consideration existed but rather upon the issue of whether or not the horse races were games of chance or games of skill. In concluding that they were games of skill rather than games of chance, the Court removed the activities of the Defendants from the definition of lotteries and, thus, found them innocent on that issue.

Yet the definition of lottery remains: the offering of a prize, the giving of a consideration for the opportunity to win the prize and the awarding of the prize by chance.

The decision in State v. Lipkin, supra, upon which the Arizona Supreme Court relied in deciding In Re Gray, supra, contains a scathing denunciation of lotteries, asserting, 84 S.E. at 343-344, that

"...[the law] will look to the substance and not to the form of [the transaction], in order to disclose its real elements and the pernicious tendencies which the law is seeking to prevent. The court will inquire, not into the name, but into the game, however skillfully

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disguised, in order to ascertain if it is prohibited, or if it has the element of chance.

. . . . .

"The sale of the ticket gave the purchaser the chance to obtain something more than he paid for it, and the other fact [i.e., that other merchandise was purchased] became an extra inducement for the purchase, making the general scheme more attractive and alluring. The difference between it and a single wager on the cast of a die is only one of degree. They are both intended to attract the player to the game and have practically the effect of inducing others, by this easy and cheap method of acquiring property of value, to speculate on chances in the hope that their winnings may far exceed their investment in value. This is what the law aims to prevent in the interest of fair play and correct dealing, and in order to protect the unwary against the insidious wiles of the fakir or the deceitful practices of the nimble trickster. Call the business what you may, a 'gift sale', 'advertising scheme', or what not, but it is nonetheless a lottery, and we cannot permit the promoter to evade the penalties of the law by so transparent a device as a mere change in style from those which have been judicially condemned, if the gambling element is there, however deep it may be covered with fair words or deceitful promises."

In view of the more recent proliferation of state-sponsored lotteries, the foregoing language may seem to be unduly harsh or constitute the remnants of a "... dogma that has long since evaporated", as contended in New York State Broadcasters Ass'n v. United States, 414 F.2d 990, 996 (2nd. Cir. 1969), cert. denied 396 U.S. 1061 (1970).

Nonetheless, the fact remains that, whether or not a lottery is

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sponsored by a state government or is being illegally operated by private parties, does not alter the definition of the enterprise: the payment of a price for the opportunity to win a prize to be awarded on the basis of chance.

Numerous opinions of the Arizona Attorney General's Office have dealt with the question of what will and what will not, under a given set of circumstances, constitute a lottery. Although none of the opinions has been specifically overruled, there seem to be some inconsistencies among several of them.

Arizona Attorney General Opinion 53-16 dealt with the question of whether or not bingo constituted a lottery where, although no direct charge was levied upon the players for their bingo cards, an admission charge is made at the door for an evening's entertainment. After citing several precedents establishing that bingo and similar schemes were lotteries, the Opinion cited both In Re Gray, supra, and State v. Lipkin, supra, in coming to the conclusion that the fact that the consideration for participation in the bingo games was indirect did not alter the fact that the bingo games were lotteries. This scheme constitutes a "gift enterprise" or "gift concert", which are merely variations of lotteries. See, e.g., Matter of Gregory, 219 U.S. 210 (1911); American Broadcasting Co. v. United States, 110 F. Supp. 374, 382 N.4 (D.N.Y. 1953), aff'd sub nom. Federal Communications Comm. v. American Broadcasting Co., 347 U.S. 284 (1954). Cf. 45 Harv. L. Rev. 1196, 1206 (1932), infra.

The Opinion reasoned from the Lipkin case, supra, that the mere fact that a bingo player may also receive a variety of other benefits, such as entertainment, only made the scheme more enticing. The Opinion continued to analogize the stated fact situation to theatre "bank nights" and "screeno nights", stating, A.G. Op. 53-16 at 4:

"The great majority of cases have held that indirect consideration is sufficient to constitute a lottery and have held that these bank nights or screeno nights were lotteries."  
(Citations omitted).

The Opinion cited and relied upon, among others, State ex rel. Draper v. Lynch, 192 Okla. 497, 137 P.2d 949 (1943) and Troy Amusement Co. v. Attenweiler, 64 Ohio App. 105, 28 N.E.2d 207 (1940). In the Draper case, supra, a theatre conducted "Box

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Office Insurance Policy" nights wherein drawing participants were registered free of charge and were not required to purchase a ticket or be present to win. The court held the scheme to be a lottery and observed that since more people attended the theatre and paid their admission to more readily claim their prize, should they win, they supplied the consideration for not only themselves, but for those who participated without buying an admission ticket.

In Troy Amusement, supra, a similar scheme was attempted wherein the winner, although having been registered free and not being required to be present at the actual drawing, was required to claim the prize within 3 minutes of the drawing. If the winner were not inside the theatre, the winning number was announced outside the theatre. If the winner were there, he would be admitted free to claim his prize. Again, the court declared this to be a lottery, stating that the majority who paid their way supported the minority who did not, thereby supplying the requisite consideration. See also United Detroit Theatres Corp. v. Colonial Theatrical Enterprise, 280 Mich. 425, 273 N.W. 756 (1937); Society Theatre v. City of Seattle, 118 Wash. 258, 203 P.21 (1922).

In short, the thrust of Arizona Attorney General Opinion 53-16 is that the consideration underlying a lottery need not be direct consideration, but may be indirect as well. The Opinion concludes, A. G. Op. 53-16 at 5:

"... [A]ny interpretation of the cases which would, by a slight change of form or a disguise of the consideration paid, open the door to lottery operation by others with less worthy aims and perhaps less honorable methods, would in our opinion be a grave error on the part of the law enforcement agencies of the state."

Although Attorney General Opinion 53-16 still stands, it is clear that subsequent Attorney General Opinions have been issued in this area. Arizona Attorney General Opinion 53-43-L deals with bingo games where prizes are awarded but the players are "not required to pay any consideration . . ." but, in the case of bond fide church or charitable organizations, the players may be given an opportunity, after the games have been played, to make a voluntary contribution. The Opinion includes that a lottery would not be present, but states, A.G.Op. 53-43-L at 2:

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"You will realize, of course, that the contribution must be truly voluntary and no obligation may be imposed or compulsion exercised on the contributor. Stated in another way, there may not be a relationship between the donation and the prize so that a court or jury could hold that the contribution was not voluntary or that it was a mere subterfuge to hide the payment of a consideration."

Arizona Attorney General Opinion 54-91, relying upon the decision in Federal Communications Commission v. American Broadcasting Co., Inc., supra, opines that where a merchant announces that each person who comes into his store will be given a numbered chance, free for the asking, and a drawing is later held and a prize awarded, no lottery would exist. The Opinion reasons that the person obtaining the chance does not expend substantial effort or time in obtaining the chance and thus, no consideration that would support a lottery exists.

The Opinion does hold, however, that a chance to win a prize given to a purchaser along with a purchase made would constitute a lottery, since part of the purchase price paid for the goods would be the consideration for the chance. The Opinion quotes from State v. Lipkin, supra, that the fact that a buyer receives his chance to win a prize along with merchandise purchased at the regular price ". . . only makes the scheme more enticing." A. G. Op. 54-91 at 3. This part of the opinion also recognizes the lottery characteristics of "gift enterprises" discussed supra, and relies upon In Re Gray, supra.

Arizona Attorney General Opinion 55-89 ruled that "digger" or "claw" machines, wherein a player maneuvers a mechanical grasping device over a glass encased pile of candy and other merchandise prizes, then deposits a coin to drop the "claw" onto the pile in the hope of obtaining, in addition, one of the prizes, were illegal gambling devices within the purview of A.C.A. § 43-2701 (1939), now A.R.S. §§ 13-431 and 13-432. This conclusion was given judicial recognition by the Supreme Court of Arizona in Boies v. Bartel, 82 Ariz. 217, 310 P.2d 834 (1957). It was specifically there held that, since the skill of the average player did not outweigh the element of chance, the machines constituted illegal gambling devices.

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Strangely enough, the next Arizona Attorney General Opinion to be rendered in this area following the Boies v. Bartel decision, supra, comes to somewhat of a different conclusion, although the opinion cites and relies upon the Boies decision. Arizona Attorney General Opinion 61-11-L holds that the giving of a free game in a "digger machine" operation would not constitute a "prize" and that if the free games alone constituted the prize, the machine would not be a gambling device under A.R.S. § 13-432 (the same statute as construed in Boies v. Bartel, supra).

There is some question as to the reasoning of this opinion in view of the following facts. First, the opinion cites and relies upon Davies v. Mills Novelty Co., 70 F.2d 424 (8th Cir. 1934) and State v. Betti, 23 N.J.Misc. 169, 42 A.2d 640 (1945), both of which held that "free replays" on pinball machines did not constitute a "valuable thing" and thus, the replays could not be considered a "prize" within the definition of a lottery and the pinball machines were therefore not illegal gambling devices.

This conclusion is at odds with the decision in Westerhaus Co. v. City of Cincinnati, 165 Ohio St. 327, 135 N.E.2d 318 (1956), a case cited and relied upon by the Arizona Supreme Court in its Boies v. Bartel decision, supra, 82 Ariz. at 221, regarding the constituent elements of a lottery. The Westerhaus decision, supra, specifically ruled (135 N.E.2d at 325-326) that free replays on a pinball machine (achieved by aggregating a sufficiently high score on a "regular", 5¢ game) constituted a thing of value (i.e., heightened amusement) sufficient to supply the "prize" element of a lottery. The confiscation and destruction of the pinball machines by the Cincinnati authorities was upheld.

Moreover, in one of the most recent rulings in this area, Division 2 of the State Court of Appeals upheld the confiscation and destruction of numerous slot machines which were used by a fraternal organization for purposes of gambling, citing, inter alia, A.R.S. § 13-432. State v. Clifton Lodge No. 1174, Benevolent and Protective Order of Elks, 20 Ariz. App. 512, 514 P.2d 265 (1973).

Second, insofar as A.G.Op. 61-11-L holds that "digger machines" giving as prizes replays only are not gambling devices, it is somewhat difficult to understand how the operation of the machine could be altered so that replays only, and not the trinkets described in the Boies v. Bartel case, supra, were awarded.

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Again, it is not the actual awarding of the prize that constitutes one of the elements of a lottery: it is the opportunity to win the prize that is crucial, for a lottery may exist even without the awarding of any prize. See, e.g., Maughs v. Porter, 157 Va. 415, 161 S.E. 242 (1931), discussed infra.

Although, as stated, Attorney General Opinion 61-11-L seems to be inconsistent with the Boies v. Bartel decision, supra, as well as A.G.Op. 55-89, supra, the opinion still stands and no further judicial interpretations of the issues involved have been reported. Moreover, since it is rather common knowledge that law enforcement authorities in this state have not seized "free replay" pinball machines as illegal gambling devices, it is unlikely that a complete answer can be given short of a ruling from the Supreme Court of Arizona.

Arizona Attorney General Opinion 61-132-L relies on former Opinions 54-91, supra, and 53-43-L, supra, in determining that when items of merchandise are sold for a consideration and in addition to the items, the purchaser is given the opportunity to win a prize, a lottery exists.

Arizona Attorney General Opinion 63-32-L held that the State Fair Commission was not violating A.R.S. § 13-436 where it awarded all-expense paid trips by drawings held at the 1963 state fair. The Opinion reasoned that since the tickets for the drawing would be distributed at the fairgrounds and at various stores throughout the City of Phoenix without charge, coupled with the fact that the winners did not have to be inside the fairgrounds for the drawing but could gather outside the fairgrounds where loudspeakers had been set up to hear the results, the consideration required for a lottery did not exist. Although the Opinion relied upon A.G.Ops. 53-43-L, 54-91 and 61-132-L, supra, it cited neither A.G.Op. 53-16, nor In Re Gray, supra.

Arizona Attorney General Opinion 64-39-L opined that the radio or television broadcasting of bingo games where absolutely no consideration is required to obtain the bingo cards from participating merchants and no purchase is required would not constitute a lottery under A.R.S. § 13-436. This opinion was rendered, however, some eight years prior to the enactment of A.R.S. §§ 5-401, et seq., governing bingo games and, in particular, A.R.S. § 5-406(S), which limits the playing of bingo games to participants actually present.

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This statute aside for the moment, the crucial issue remains: is the element of consideration present to the degree required for a finding that a lottery exists?

Finally, the most recent ruling in this area is found in Arizona Attorney General Opinion R 75-253. That Opinion holds that a scheme whereby automobile owners participating in a free auto inspection program, but who were required to make and pay for any necessary mechanical repairs and who could thereby participate in a drawing for valuable prizes, would constitute a lottery in violation of A.R.S. § 13-436. The Opinion lists and summarizes many of the same Arizona Attorney General Opinions cited supra.

It is therefore evident that certain inconsistencies exist among the various opinions thus far discussed. Many of the differences are explainable by virtue of slight but significant factual variations. The "consideration" issue, however, remains somewhat blurred.

In addition to the foregoing opinions of the several Attorneys General of Arizona, and of particular interest in the present context, are numerous rulings and decisions of the Federal Communications Commission regarding the federal anti-lottery broadcast provisions of 18 U.S.C. § 1304. A brief chronology of the rulings may be helpful in ascertaining what the state of the law under the federal statutes is.

To begin with, the Federal Communications Commission (hereinafter "FCC"), pursuant to its obligation to regulate broadcasters and insure that 18 U.S.C. § 1304 is not violated, has issued many rulings in this area. 18 U.S.C. § 1304 provides:

"Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than

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\$1,000 or imprisoned not more than  
one year, or both."

In its rulings prior to the decision in American Broadcasting Co. v. United States, 110 F.Supp. 374 (D.N.Y. 1953), aff'd sub. nom., Federal Communications Commission v. American Broadcasting Co., Inc., 347 U.S. 284 (1954), the FCC had taken an extremely rigid stance with regard to the "consideration" component of broadcast schemes which were assertedly "lotteries".

For example, in In re Northern Virginia Broadcasters, Inc., 43 F.C.C. 257 (1947), a program entitled "Dollars for Answers" constituted a lottery. Both prize and chance were found to exist along with consideration in the form of a legal detriment incurred by listeners who merely tuned in the program and a legal benefit bestowed upon the radio station by augmenting its audience and thereby enhancing the value of the station's assets. The ruling cited and relied upon many "strict" anti-lottery authorities and cases, including, inter alia, Maughs v. Porter, 157 Va. 415, 161 S.E. 242 (1931).

It was held in Maughs v. Porter, supra, that the attendance by persons at an auction which had been previously advertised as including a free chance to win a new Ford, whether those in attendance bought or bid or not, was sufficient consideration to render the scheme a lottery, thereby voiding the agreement to award the prize to the winner. The auctioneer required the drawing participants to write their names on a piece of paper and deposit the same in a box. He thereafter drew out the name of Mrs. N. S. Maughs, who was declared the winner, and then demanded of her a \$5.00 payment for his services rendered in drawing out her name, which sum she paid. The auctioneer, however, reneged and was sued.

The decision has been the subject of much discussion, some good, some bad. With regard to critical commentary on the case, much of it seems to be founded upon the somewhat unfortunate fact that Mrs. Maughs had been deprived of what would have otherwise been rightfully hers. Several law review articles seem to take this position upon the grounds that the type of consideration required to be present for a lottery to exist is that which has a monetary or pecuniary value or other "economic value". See, e.g., 18 Va.L.Rev. 465; 80 U of Pa.L.Rev. 744.

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The critical comments contained in the article "Contests and the Lottery Laws", Pickett, 45 Harv.L.Rev. 1196, 1206 N. 37, however, have been called "tendentiously critical" and "bromidic". American Broadcasting Co. v. United States, 110 F.Supp. at 393. In addition to those foregoing observations, it would also appear that the article's analysis of the Maughs decision, supra, is also unclear in some respects and inconsistent in others.

To begin with, the analysis states (45 Harv.L.Rev. at 1206, N.37) that "... [t]he decision can not be sustained on the ground that plaintiff [(i.e., Maughs)] paid five dollars to the auctioneer." In point of fact the court in the Maughs case, supra, made no attempt whatsoever to indicate that it was Mrs. Maugh's \$5.00 payment to the auctioneer that constituted the consideration. On the contrary, the court specifically stated, 161 S.E. at 244:

"... we conclude that the attendance of the plaintiff at the sale was a sufficient consideration for the promise to give an automobile, which could be enforced if otherwise legal."

The analysis then continues by acknowledging that "[p]ayment of consideration to a third party is sufficient to satisfy the requirement of the lottery laws. Blair v. Lowham, 73 Utah 599, 276 Pac. 292 (1929). Cf. People ex rel. Ellison v. Lavin [179 N.Y. 164, 71 N.E. 753 (1904)]". This observation seems to be correct, but it also seems to be inconsistent with the prior statement that the \$5 payment could not have formed the requisite consideration.

The inconsistency might be explained by virtue of the fact that, at the time Mrs. Maughs paid the \$5, the drawing was over: the payment was not a condition precedent to her participation in the lottery but was, instead, reimbursement to the auctioneer for his physical services rendered, minimal as they may have been, in drawing her number.

In other contexts, this situation takes on the appearance of a "kickback". But the court did not consider this "kickback" issue as dispositive of the question of the illegality of the transaction: It considered instead the "lottery" aspect of the situation as rendering the drawing illegal, which was the

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precise issue advanced by the defendant-auctioneer, Porter.

Finally, the law review article states, 45 Harv.L.Rev. at 1206, N. 37:

"But there was no allegation that the defendant was bargaining for the payment to the auctioneer. The court thought that attendance at the auction was not a condition to a gift, but the acceptance of an offer for a unilateral contract. It is rather doubtful whether this interpretation is correct; if the defendant was bargaining for any act, it was the act of bidding at the auction."  
(Emphasis added)

To begin with, and with regard to the foregoing quote, the defendant and the auctioneer were one and the same: H. P. Porter. Any "bargaining" that went on would necessarily have had to have occurred between the plaintiff (Maughs) and the defendant (Porter) rather than the defendant and the auctioneer as indicated by the quote.

Second, if it be assumed that it was the plaintiff (Maughs) that was purportedly "bargaining" with the defendant-auctioneer (Porter) for the "... act of bidding at the auction...", the sentence is illogical. There is nothing in the Maughs decision, supra, to indicate that Mrs. Maughs actually did bid or buy anything as a result of the auction. And the \$5 payment had nothing to do with the auction or, for that matter, the "consideration" component of the lottery drawing.

In short, the basis for the criticism of the Maughs decision, supra, contained in 45 Harv.L.Rev. 1196, 1206 seems to be somewhat cloudy. Moreover, it should be noted that the U.S. Supreme Court, in affirming the decision in the American Broadcasting Co. case, supra, saw fit to comment critically upon the Maughs decision, supra, citing, 347 U.S. at 293, 294, N.12: 18 Va.L.Rev. 465, 80 U. of Pa.L.Rev. 744 and 45 Harv.L.Rev. 1196, 1206.

In In re Promulgation of Rules Governing Broadcast of Lottery Information, 43 F.C.C. 396 (1949), the FCC further articulated its "consideration" position, citing Horner v. United States, 147 U.S. 449 (1893) and Brooklyn Daily Eagle v. Voorhies, 181 F. 579 (1910). Again the "benefit/detriment" test, in terms of fundamental contract

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law, was employed. The decision in the Horner case, supra, held that consideration exists where a chance or a prize drawing is given with the purchase of legitimate goods, even though the goods are in fact priced no higher because of the issuance of the prize or chances.

In 1953, however, the U.S. District Court for the Southern District of New York struck down the attempt by the FCC to apply certain "anti-lottery broadcast" regulations it had promulgated against various radio and television "give-away" game shows (e.g., "Stop The Music", "What's My Name?" and "Sing It Again"). American Broadcasting Co. v. United States, supra. With regard to the "consideration" issue as it bore upon whether or not the programs constituted lotteries prohibited from broadcast under 18 U.S.C. § 1304, the three-judge panel held, with one judge dissenting, 110 F.Supp. at 386:

"The [FCC] argues that it is a 'legal detriment' to the listener or viewer to set at home listening to the program and awaiting a telephone call from those in charge of the contest. Technically, and applying the law of contracts, that may be true. But that is not sufficient where a lottery statute, a criminal statute, is involved. The alleged legal detriment to the radio listener is not the kind of a 'price' or 'thing of value' paid by a participant in a lottery, which the law contemplates as an essential element of a lottery".

(Citations omitted)

The court also declined to follow the principles advanced by Maughs v. Porter, supra, and cited many cases and law review articles critical of that decision. Although Second Circuit Judge Clark filed a vigorous dissent, the decision was affirmed by a unanimous U.S. Supreme Court (Justice Douglas taking no part in the decision) under the caption Federal Communications Commission v. American Broadcasting Co., Inc., supra. The Court held that the increased advertising value of the "give-away" programs resulting from the requirement, direct or indirect, that home contestants listen to the programs does not constitute the type of valuable consideration which would turn the schemes into lotteries prohibited under 18 U.S.C. § 1304.

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In 1957, another important case was decided in this area: Caples Co. v. United States, 243 F.2d 232 (D.C.Cir. 1957). It was there held that a television "give-away" program entitled "Play Marko" broadcast over KTLA-TV in Los Angeles and based on the game of "bingo" and in which participating viewers used cards which could be obtained free of charge and in any quantity without the necessity of registering or making a purchase, but only from stores handling the sponsor's products, did not constitute a lottery under 18 U.S.C. § 1304. The FCC unsuccessfully argued that the American Broadcasting case, supra, was inapplicable because, as opposed to merely listening to the program, the participant was required to visit a particular store to obtain the cards. Cf. Maughs v. Porter, supra.

As in the District Court decision in the American Broadcasting decision, supra, D.C. Circuit Judge Danaher in the Caples Co. decision, supra, filed a lengthy and detailed dissent outlining the specific facts of the "Play Marko" scheme, a summary not contained in the majority opinion. Judge Danaher also lamented the fact that the majority opinion would permit, in the name of the federal government, that which many states have declared to be prohibited lotteries simply because a broadcast medium was being employed.

The same type of "Play Marko" game involved in the Caples Co. case, supra, was upheld as not constituting a lottery in ACF Wrigley Stores, Inc. v. Olsen, 359 Mich. 215, 102 N.W.2d 545 (1960) and upon the same grounds. To the same effect is State v. Socony Mobil Oil Co., 386 S.W.2d 169 (Tex.Civ.App. 1964). But see Idea Research and Development Corp. v. Hultman, 256 Iowa 1381, 131 N.W.2d 496 (1964), involving the same company that promoted the TV-bingo game in the Socony case, supra. Cf. Midwest Television Inc. v. Waaler, 44 Ill. App. 2d 401, 194 N.E.2d 653 (1963), holding that a state statute prohibiting the advertising of a lottery had not been preempted by federal law, citing Head v. New Mexico Board of Examiners in Optometry, 374 U.S. 424 (1963). That case held that the FCC's jurisdiction to regulate radio advertising did not preempt New Mexico's authority to prohibit eyeglass price advertising by radio, a decision relevant to the present question as well: simply because an activity may not violate a federal law (as opposed to being specifically authorized by a federal law) does not preclude a state from making an inquiry into whether or not the same activity violates a specific state law.

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Turning back, therefore, to the rulings of the FCC, the decisions began to slowly reflect the mandates of the courts laid down in the American Broadcasting and Caples Co. decisions, supra. In In re Liability of KTOK Radio, Inc., 3 F.C.C. 2d 653 (1966), the FCC ruled that an advertising scheme whereby purchasers of a gallon of milk from stores in a particular grocery chain would also be given a chance to win a color TV was a lottery. Thus, the station that broadcast advertisements of the scheme was held liable under 18 U.S.C. § 1304 and was fined \$500. The fine was upheld notwithstanding the fact that a substantial number of persons had been permitted to participate in the drawing without making the advertised "required purchase".

In In re Liability of Bob Jones University, 18 F.C.C.2d 8 (1969), the broadcast of "Pepsi-Cola Bottle Cap" prize contest ads was declared to be a prohibited lottery broadcast, but the \$1,000 fine imposed was suspended. In this ruling, the FCC first articulated what would come to be known as the "reasonably equal availability" test.

The gist of this criterion, as it bears upon whether or not a particular scheme will constitute a lottery for purposes of 18 U.S.C. § 1304, may best be described through an examination of a quote from the ruling itself, 18 F.C.C.2d at 10-11:

"The element of consideration is present in a promotional scheme when a person pays money or something else of value, directly or indirectly, for the chance to win a prize. Thus, consideration is present when a participant is required to make a purchase or to pay or risk money or any other thing of value. On the other hand, the mere acts of appearing, registering, and securing free paraphernalia, standing alone, does not constitute consideration. See FCC v. ABC, Inc., supra; Caples Co. v. U.S., 243 F.2d 232 (1957). If persons may participate in the scheme free of charge -- if free chances are made available to them -- then the element of consideration is not present and the scheme does not constitute a lottery within the meaning of section 1304. However, thereby to eliminate the element of consideration necessary to support a lottery finding, the free chances must be reasonably equally available to all participants in the contest.

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Nonpurchasing contestants must be able to obtain chances in the same places at the same times as purchasing contestants, in [a] setting which does not otherwise encourage a purchase. Thus, in any on-produce merchandise sales promotion, where chances are affixed to a product which is sold and other chances are given free, "reasonably equally available" means that such free chances can be readily obtained from all or at least most of the customary retail outlets for such products, such as grocery stores and supermarkets.

. . . .

[A]ny announcement of a promotional scheme which depends upon the reasonably equal availability of free chances for its legality, should adequately describe the availability of such free chances and the locations, times, and manner in which they may be obtained. Clearly such cryptic phrases as "No purchase necessary" or "Nothing to buy" etc., fail to meet this requirement. Further, in any determination as to whether a particular scheme contains the element of consideration, the reasonably equal availability test must be applied to the operation of the scheme as it is actually carried out by those conducting the activity, as well as to the character of the scheme as set forth in its rules. Accordingly, it is incumbent upon a licensee who has determined that a promotional scheme, as set forth in its rules, is not a lottery, to exercise due diligence to assure that the scheme which it advertises is being carried out in accordance with the rules, and that it is not a lottery because of the manner in which it is actually conducted."

The FCC decided, however, to relieve the broadcaster of liability in the case upon the grounds that there had been no prior FCC or judicial decisions which would have enabled the broadcaster to anticipate the "reasonably equal availability" test for the element of consideration.

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The rationale of the FCC ruling in the Bob Jones University decision, supra, is somewhat unclear on one point: the ruling seems to indicate that, insofar as the "reasonably equal availability" test is concerned, a prohibited lottery scheme which clearly involves all the requisite elements (i.e., payment of a consideration for an opportunity to win a prize awarded by chance) could be "legalized" by simply sprinkling in a few players who pay no consideration whatsoever but who are guaranteed a reasonably equal opportunity vis a vis paying players to obtain free chances to participate. Such an interpretation does not seem to be legally supportable and would, in fact, tend to invite the precise type of abuse sought to be proscribed by 18 U.S.C. § 1304.

As a follow-up to the Bob Jones University decision, supra, the FCC thereafter issued a formal notice of the test. In re Public Notice Concerning Applicability of Lottery Statute to Contests and Sales Promotions, 18 F.C.C.2d 52 (1969) sets forth not only the "reasonably equal availability" test, but also establishes that limitations such as "one free chance" per person requesting such dilutes the nonpurchasers' access to equal availability of chances vis a vis purchasing contestants. Further, the ruling requires that any broadcasted announcement of a promotional scheme which depends upon the reasonably equal availability of free chances to avert a finding that a lottery exists should adequately describe the availability of such free chances and the locations, times and manner in which they may be obtained, such cryptic statements as "no purchase necessary" or "nothing to buy" being insufficient. However, the same comments made herein as to the "legalizing" of a lottery by sprinkling in truly "free" chances applies here too.

In two companion cases, the FCC ruled that a "win cash" promotion scheme whereby purchasers of a loaf of a particular brand of bread would also receive a coupon entitling him to a prize depending upon the coupon's number and where non-purchasers were told to "see your grocer for free coupons" but such free coupons were not actually available as advertised, was a lottery. In re Liability of WBRE-TV, Inc., 18 F.C.C.2d 96 (1969); In re Liability of Taft Broadcasting Co., 18 F.C.C.2d 186 (1969). Moreover, the operation of the scheme involved a "one free chance" per person requesting one limitation.

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In In Re Broadcasting of Information Concerning Lotteries, 21 F.C.C.2d 846 (1970), the FCC further delineated what information could and could not be broadcast in view of the decision in New York State Broadcasters Association v. United States, 414 F.2d 990 (2nd Cir. 1969), cert. denied 396 U.S. 1061 (1970). The cited court decision held that 18 U.S.C. § 1304 prohibited only the broadcasting of advertisements and information directly promoting a lottery and that the FCC's regulations, as well as the statute, applied to state-operated lotteries. The statute did not forbid, however, bona fide news accounts or interviews of general public interest provided that the broadcast had only an incidental effect of promoting a lottery. (In this regard, see New Jersey State Lottery Comm. v. United States, 491 F.2d 219 (3rd Cir. 1974), vacated and remanded 420 U.S. 371 (1975), upholding the right of Jersey Cape Broadcasting Co. to broadcast the weekly winning number in the New Jersey State Lottery, but vacating and remanding for purposes of determining whether or not the controversy was mooted by Public Law 93-583 (18 U.S.C. § 1307) exempting from 18 U.S.C. § 1304 the broadcasting of lottery information from state-sponsored lotteries).

The FCC ruling holds, 21 F.C.C.2d at 847, that it would consider as information directly promoting a lottery, and therefore prohibited,

"... specific information as to where, how and when winning tickets will be drawn as well as live broadcasts of the actual drawing. . . ." (Emphasis added).

One of the most recent FCC rulings on lotteries is In Re Liability of Greater Indianapolis Broadcasting Co., Inc., 44 F.C.C.2d 37 (1973). This ruling takes a somewhat different approach from the prior rulings and, in fact, specifically states (44 F.C.C.2d at 40), that "To the extent that our decision here is contrary to previous rulings, they are reversed".

The case involved the promotion by radio station WXLW, Indianapolis, of the "XL-95 Golf Classic", a contest whereby listeners could enter by visiting a participating sponsor's store, obtain an "XL-95" scorecard and play 18 holes of golf on a local golf course. Thereafter, the player was required to have the particular course's golf pro sign his card and would then mail the card to the radio station.

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After mailing the card in, the player was eligible to play in the "XL-95" tournament "Golf Classic Finals" which was held at a local golf course that had been rented for the finals by the radio station. If, on the tournament round, the player bettered his score from his former round, he won a prize. Prizes were also awarded for holes-in-one, closest to hole, etc., and a drawing was held for radios and theatre tickets.

While the initial Notice of Apparent Liability indicated that consideration existed in the form of the payment by the players of greens fees or country club membership fees in order to play the golf games, upon reconsideration the FCC concluded that "... the lottery element of consideration is not present". The FCC states, 44 F.C.C.2d at 39-40:

"We base this conclusion upon the absence of any indication that consideration substantial enough to support a finding that there was a lottery flowed, directly or indirectly, from the participants to the promoter. While it is clear that where the purchase of a product or service entitles the buyer to a chance at a prize there is adequate consideration, *Horner v. United States*, 147 U.S. 449 [(1893)], we know of no case interpreting the federal lottery statutes where a lottery was found to exist without a receipt of the consideration by the promoter. . . . [I]t is, we believe, difficult to sustain the proposition that there is a lottery without any additional benefit to the promoter (here WXLW), even though the participants in the contest may make some payment to someone else in order to participate, at least so long as there is no indirect flow through of the payment to the promoter."

There is nothing in the decision to indicate whether or not the radio station received advertising revenues for the broadcast promotions, although it was asserted by the station that none of the participating sponsors were in any way connected with the golf courses in the area.

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The principle to be gleaned from the foregoing cases and FCC rulings, as it bears upon the cable television bingo game proposed herein, is this: If the chances to participate in the bingo game are either not truly "free" or if they are not reasonably equally available to all who wish to participate, the consideration component of a lottery will spring into existence and the scheme will become illegal under A.R.S. § 13-436. Furthermore, the question remains as to whether or not the establishment of the reasonably equal availability of chances to non-paying participants will cancel out the "consideration" component otherwise supplied by the paying participants.

Here, it is clear that the bingo game will be conducted through the use of a closed circuit, cable television system. While it may well be true that persons desirous of participating in the game need not make a purchase from any of the merchants who distribute the bingo cards, it is equally true that, unless the players are subscribers to the cable television system or have free access to the studio or a television set connected to the system, their opportunity to participate in the game is thwarted.

- The proposal clearly contemplates the use of the cable television system as an integral part of the procedures whereby the bingo game proceeds from start to finish. Cable television subscribers pay for their subscriptions: without payment, no cable television programs at all, let alone the bingo game proposed, would flow into their home television sets. The result is, of course, that the subscribers pay the cable television operator and the programs flow.

Without a subscriber whose television set is connected to the cable system, not only will that person be unable to participate in the game, but non-subscribers won't be able to participate either. This fact demonstrates that the subscribers who pay for the cable television system are supplying not only consideration for themselves, but the consideration for non-subscribing game participants as well. This circumstance causes the proposal to resemble the "gift enterprise" and "gift concert" lottery variants discussed supra.

Again, the consideration required to support a finding of a lottery need not be direct: indirect consideration will suffice.

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Cf. Blair v. Lowham, 73 Utah 599, 276 P.292 (1929), holding that consideration paid by the player to a third party will do. The amount of the consideration is not controlling: the fact that some valuable consideration exists is the crucial point. In Re Gray, supra, and cases cited therein. Cf. Glover v. Malloska, 238 Mich. 216, 213 N.W. 107 (1927), holding that one cent was enough.

Three recent cases require examination. The first is United States v. Southwestern Cable Co., 392 U.S. 157 (1968). After setting forth a clear description of the general operational principles whereby community antenna television (CATV) systems perform, the Court upheld an order by the FCC restricting the expansion by a Los Angeles CATV operator of its service into areas in and near San Diego where it had not operated as of a certain date. The basis for the opinion was that such expansion infringed upon the rights of San Diego broadcasters.

The second decision is Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968). This decision held that a CATV operator that originated no programs of its own but simply collected and amplified remote television broadcast signals for cable distribution to its subscribers did not violate federal copyright law by supplying to its subscribers such collected and amplified signals in the form of certain motion pictures. The Court also observed that, while CATV equipment is powerful and sophisticated, its basic function was little different from that served by the equipment generally furnished by a television viewer (e.g., a TV set, an antenna, etc.).

The decision in the Fortnightly case, supra, was recently reaffirmed in a third case, Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 U.S. 394 (1974). This case too involved an asserted copyright infringement with regard to both locally collected and remotely collected television signals by the CATV operator, both of which, it was asserted, constituted a "performance" within the purview of the copyright law. The U.S. Supreme Court disagreed with regard to collected signals, whether local or remote, but noted with regard to certain new technological advances taking place since the Fortnightly decision, supra, that, 415 U.S. at 404:

"It is undisputed that such CATV systems 'perform' those programs which they produce and program on their own. . . ."

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The three foregoing decisions are cited herein for the purpose of showing that they contain no language which would suggest that a CATV system that originates its own shows (e.g., bingo games) may "cablecast" that which, if sufficient consideration is found to exist, would otherwise constitute a lottery.

Based upon the foregoing authorities, Arizona Attorney General Opinions and cases, particularly the Arizona decisions and cases cited, there is a strong argument to be made that under the facts as presented, a lottery would exist. On the other hand, numerous case law decisions from other jurisdictions, and including cases decided by the U. S. Supreme Court, suggest that the "consideration" component of a lottery would not be present.

With this amount of authority on both sides of the issue, questions of policy come to the fore. It is clear that the moral attitudes of society in general have changed dramatically in recent years. Lotteries which were once condemned as the "deceitful practices of the nimble trickster" are now legalized and promoted by numerous state governments as being effective new revenue generators. Indeed, the Arizona Legislature presently has before it two bills which would authorize the creation of a legal state lottery. See, S.B. 1386, H.B. 2423, Thirty-second Legislature, Second Regular Session.

With regard to the position taken by the FCC on the facts presented by this opinion request (see attachment to opinion request), in a letter dated December 23, 1975, David D. Kinley, Chief of the Cable Television Bureau of the Federal Communications Commission expressed the opinion that, under the facts presented, "... the element of consideration is not present and that, accordingly, the proposed cable bingo game would be compliant with our rules". Mr. Kinley also stated:

"Further, we have previously determined that where non-subscribers [i.e., persons who do not pay for CATV subscriptions] are permitted to participate, cable subscriber-ship in and of itself does not constitute consideration for the purpose of our rules."

Apart from the previously discussed question of whether or not the offering of "free" chances to some will negate the payment of consideration by the majority, it is submitted that the FCC determination should not be interpreted as a prohibition upon the State of

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Arizona to itself examine the facts and determine whether, under Arizona law, a violation of either A.R.S. § 13-436 or the bingo statutes would exist if the proposed plan were put into effect. See Head v. New Mexico Board of Examiners in Optometry, supra.

As a matter of fact, in response to a request for additional information by this office, Mr. Stuart F. Feldstein, Vice-President (Legal/Government Relations) of the National Cable Television Association, Washington, D.C., supplied a copy of a letter opinion rendered on October 10, 1975 by the FCC (signed by Mr. David D. Kinley) to the Wisconsin Attorney General's Office. The letter (copy attached) states that where a state's lottery laws are more restrictive than federal law, as far as the FCC was concerned, there would be no prohibition upon the state continuing to enforce its lottery laws even though the scheme in question was not in violation of federal law. Mr. Kinley specifically stated that he could see no reason why the State of Wisconsin should not "... continue to enforce its lottery laws with respect to cable television".

We are thus, in effect, brought back full circle to the original question: upon the facts presented, is there sufficient consideration to support a finding that a lottery exists under A.R.S. § 13-436 and, if so, does the scheme constitute that type of a lottery (i.e., bingo) which would be subject to the additional prohibitions set forth in A.R.S. § 5-406(S)?

On the basis of the Arizona law as it presently stands, the weight of authority seems to indicate that the scheme would be a lottery. However, it may well be time to conduct a thorough inquiry into the question in an attempt to achieve consistency in the Opinions of the Attorney General with due regard to the case decisions. Should such further inquiry and research be indicated, two A.L.R. annotations would be of particular assistance: 29 A.L.R.3d 888; 42 A.L.R.3d 663.

Please advise if you require additional information.

IAN A. MACPHERSON

IAM:lh

Enc. Attachments