

## **Opinion No. 82-16**

October 13, 1982

**OPINION OF:** Jeff Bingaman, Attorney General

**BY:** Frank D. Katz, Assistant Attorney General

**TO:** The Honorable Alex G. Martinez, New Mexico State Senator, 1949 Hopi Road, Santa Fe, New Mexico 87501

### **GAMBLING**

There being no consideration given to afford the player the opportunity to use the slot machine, such machines would not be gambling devices under New Mexico law.

### **FACTS**

Many retail establishments currently give to customers purchasing merchandise different sorts of bingo or keno cards affording the customer the opportunity of winning money or merchandise through chance. The customer does not pay the store for the cards which come free of any additional charge with regular purchases.

It has been proposed that instead of receiving a card which determines whether a prize has been won, the store will give a token to be placed in a slot machine to determine if a prize is won.

### **QUESTIONS**

Is it legal for retail outlets or other marketing organizations to give out tokens at no additional charge to customers purchasing merchandise if such tokens are used in slot machines on the premises which offer the customer an opportunity to win prizes?

### **CONCLUSIONS**

Yes.

### **ANALYSIS**

Section 30-19-1 NMSA 1978 defines "lottery" and "gambling device" under current law as follows:

"B. "lottery" means an enterprise wherein, for a consideration, the participants are given an opportunity to win a prize, the award of which is determined by chance, even though accompanied by some skill. As used in this subsection, "consideration" means anything

of pecuniary value required to be paid to the promoter in order to participate in such enterprise;

C. "gambling device" means a contrivance which, for a consideration, affords the player an opportunity to obtain anything of value, the award of which is determined by chance, even though accompanied by some skill and whether or not the prize is automatically paid by the device;"

The definition of lottery had been changed by a 1965 Amendment. Prior to the amendment "consideration" meant anything "which is a financial advantage to the promoter or a disadvantage to any participant."

### **OPINION**

Under the pre-1965 language, Opinion of the Attorney General No. 60-5 had determined to be a lottery a scheme whereby customers purchasing merchandise were given cards at no additional charge which provided them the opportunity to win money. The Opinion found "consideration" in the financial advantage to the promoter of the increased patronage.

{\*308} Opinion of the Attorney General No. 63-141, also pre-1965, concerned a slightly different scheme: a business gave out bingo cards to anyone on request, no purchase being necessary. Subsequently, the person could use the card to play radio or television bingo for possible prizes. The issue again was whether there was consideration in this "flexible participation lottery." Relying on the pre-1965 definition of consideration as being anything of "financial advantage to the promoter," the Opinion concluded that the promoter received consideration by the increased traffic to the participating stores.

After the 1965 Amendment, Opinion of the Attorney General No. 65-196 noted the change in definition from advantage to the promoter to the payment of pecuniary value in order to participate in the lottery. The Opinion concluded that the drawing of numbered admission tickets for prizes was not a lottery because no pecuniary consideration was given "for the sole purpose of engaging in the gambling enterprise".

Opinion of the Attorney General No. 69-60 distinguished the situation where a promoter charges more than the usual price for an innocent activity (there \$50 for dinner) and advertises that prizes would be awarded to ticket holders. The extra price is the consideration, making it a lottery.

Finally, Opinion of the Attorney General No. 71-109 found unobjectionable a savings and loan association's giving depositors of a certain amount of money the chance of winning a trip. No additional payment being required, no pecuniary value was being paid the promoter for the chance of winning the trip.

Under current law, therefore, the giving of tokens at no extra charge to customers purchasing merchandise would not constitute a lottery. That winners are determined by

use of tokens in a slot machine rather than by bingo cards is legally irrelevant to a determination of whether the procedure is a lottery under New Mexico law.

Use of this method of determining winners does raise the question, however, of whether a slot machine which accepts only tokens given at no additional charge to customers purchasing merchandise is a gambling device. Under New Mexico law the setting up of a gambling device is illegal under Section 30-19-3 and dealing in gambling devices is proscribed by Section 30-19-5.

A gambling device is a contrivance which, for a consideration, affords the player an opportunity to obtain something of value, the award of which is determined by chance. There is no question but that a slot machine is typically a contrivance which affords the player an opportunity to obtain something of value, the award of which is determined by chance. The only issue is whether the tokens which operate the machine and which are given at no additional charge to purchasers of merchandise constitutes "consideration" which would render the slot machines gambling devices. Although consideration is not defined in the subsection defining "gambling devices," it is in the immediately preceding subsection defining "lottery". There is no reason to give it a different definition. Statutes are to be read as a whole so that each provision is considered in its relation to other parts. **State ex rel. Newsome v. Alarid**, 90 N.M. 790, 568 P.2d 1236 (1977).

There being no consideration given to afford the player the opportunity to use the slot machine, such machines would not be gambling devices under New Mexico law and may be imported into New Mexico.

#### **ATTORNEY GENERAL**

Jeff Bingaman, Attorney General