Opinion No. 38-2048

September 14, 1938

BY: FRANK H. PATTON, Attorney General

TO: Mr. David W. Carmody District Attorney Santa Fe, New Mexico

*{*276}* We have your letter dated September 10 requesting our views as to whether a so-called "Suit-A-Week Club" as outlined in your letter violates our anti-lottery laws, Sections 35-3803, 1929 Compilation, et seq.

The rules governing the club provide as follows:

"One suit will be given each week, on Saturdays at 9 p. m. Member need not be present to get suit; will be notified if he gets it. At the termination of 30 weeks, member whose number has not been called will receive a $ 30.00 tailor-made suit, stock suit, or he may have $ 30.00 worth of furnishing goods -- shoes, hats, etc.

"Member who defaults in payments cannot participate in drawings but may be reinstated on following week. If payments are not made regularly he may have credit on merchandise for the sum he has paid in.

"Each member must pay $ 1.00 a week regularly, not later than Saturday noon of each week."

There are many decisions holding that a scheme having the three elements, to-wit, prize, chance and consideration, is a lottery. In this case I believe we clearly find the elements of consideration and prize. There might be some doubt as to the element of chance in that it might be said that the participant never loses for the reason that in any event he obtains the equivalent of his investment in merchandise either at the end of thirty payments or at any time that he might discontinue before his thirtieth payment. However, the gaming element is nevertheless present in that the primary object of investing the dollar per week is for the purpose of obtaining something of more value than the investment made. In other words, our Courts might construe the investment of the dollar as a "venture" in a game of "hazard" for the "chance" of obtaining a larger value in some article, and that the fact that the participant will in any event receive some merchandise for his investment is a mere incident to the lottery scheme.

However, under the present status of the law in this jurisdiction, the mere finding of the three elements of prize, chance and consideration may not be sufficient to condemn the scheme as a lottery. City of Roswell vs. Jones, 41 N.M. 258, 67 P. (2d) 286.

Prior to the decision of our Supreme Court in the Jones case, supra, this office had consistently condemned "Suit-A-Week Clubs" and like enterprises as lotteries, and as a matter of fact had condemned so-called theater "bank nights" as lotteries. However, in

the Jones case the Supreme Court, by a divided Court, held that theater "bank night" under a free registration setup was not a lottery, and in the majority opinion language is used which if applied to the facts in the matter at inquiry might except clubs such as this from the operation of our lottery statutes.

In the first place, the majority opinion of the Court in the Jones *{*277}* case distinguished lotteries from gift devices which use prize and chance to push the sale of goods. The majority opinion states as follows:

"The Attorney General in his brief defines a lottery as: '* * * a game of hazard in which small sums of money are ventured for the chance of obtaining a larger value in money or other articles.'

"We agree with the Attorney General when he says this definition is sensible and true.

* * *

"The definition quoted by the Attorney General distinguishes the true lottery, lotteries which are gambling propositions, such as the Louisiana lottery, Mexican lottery and Irish sweep-stakes, from lottery, **schemes,** or gift devices **which use prize and chance to push the sale of goods** or services or to increase patronage in profit enterprises."

Then the Court in the majority opinion apparently states that the mere finding of the three elements of prize, chance and consideration is not sufficient but that in addition thereto there must be found the evils aimed at by the lottery statutes, namely, the scheme must affect the community at large so as to impart an excited spirit of gambling to the public generally and must bring about the sacrifice of the savings by the ignorant and credulous, etc. In this respect the Court said in its majority opinion:

"We prefer to reason the matter in our own way, going to the fundamental reason for banning lottery schemes. The mere finding of the three elements necessary to constitute a lottery, to wit, prize, chance, and consideration is not sufficient. These elements are often found in innocent games of amusement or in the **distribution of gifts by legitimate and responsible merchandising firms with no intent to encourage or participate in a gambling scheme.** '"When, however, the **community at large** is invited to come in, a new and very serious objection springs up. Independently of the opportunity for fraud by the managers of such enterprises, **their publication imparts an excited spirit of gambling to the public generally.** On the one side, often ensue gross cases of deception as to the scheme itself; on the other, the **sacrifice of the savings by the ignorant and credulous,** and excitement, destructive of regular industry, often inducing insanity. It is to suppress this species of lottery, we should remember, that the lottery statutes are aimed.' Wharton's Criminal Law, vol. 2, p. 2075, part section 1778."

Taking the language of the Court in the Jones case at its face value it might be difficult to say whether this "Suit-A-Week Club" invites the community at large or merely its

customary patrons. Furthermore, unless the scheme is promoted on an exceptionally large basis it might be doubtful whether it could be classified as affecting the community at large so as to impart an excited spirit of gambling to the public generally and bring about the sacrifice of the savings of the ignorant and credulous, etc.

Of course, the Court was divided in the Jones case and the majority opinion has been severely criticized by legal writers. See Williams, Flexible Participation Lotteries, pages 252-255. Furthermore, our Supreme Court in State vs. Butler (No. 4346), 76 P. (2d) 1149, held the sale of so-called baseball tickets to be a lottery within our statutes without apparently expressly requiring a showing that the scheme affected the community at large and *{*278}* imparted an excited spirit of gambling to the public generally.

What our Supreme Court might hold in a case such as the one you present is difficult to say. The fact remains that the Jones case still expounds the law of this jurisdiction at this time and the language therein found is such as to cause us to hesitate to classify the "Suit-A-Week Club" as a lottery.

The question is, however, close enough to warrant a test case in the matter and if you should determine to institute such case this office will be very glad to present, or assist in the presentation of, the matter to the appellate court for any review that might be sought of the decision of any trial court.

By: FRED J. FEDERICI,

Asst. Atty. Gen.