

April 24, 2013

The Honorable Mary Taylor  
Lieutenant Governor  
Superintendent of Insurance  
Department of Insurance  
50 West Town Street  
Third Floor, Suite 300  
Columbus, Ohio 43215-4186

SYLLABUS:

2013-012

1. An Ohio insurance company does not operate a scheme of chance or game of chance for purposes of R.C. Chapter 2915 when its private passenger automobile policies grant policyholders the opportunity to be selected randomly for cash prizes unless there is evidence that the predominant purpose for the sale of the policies is to circumvent R.C. 2915.02(A)(2).
2. An Ohio insurance company does not conduct a raffle for purposes of R.C. Chapter 2915 when its private passenger automobile policies grant policyholders the opportunity to be selected randomly for cash prizes unless there is evidence that the predominant purpose for the sale of the policies is to promote drawings for cash prizes.



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OPINION NO. 2013-012

The Honorable Mary Taylor  
Lieutenant Governor  
Superintendent of Insurance  
Department of Insurance  
50 West Town Street  
Third Floor, Suite 300  
Columbus, Ohio 43215-4186

Dear Lieutenant Governor Taylor:

You have requested an opinion about what has been described to you as a rewards program used by an Ohio insurance company to promote the sale and renewal of insurance policies in Ohio. Your letter states that an Ohio insurance company has filed with the Department of Insurance a private passenger automobile policy endorsement that would apply to “all new and renewal policies in Ohio to provide a policy-level mechanism for rewarding retention.”<sup>1</sup> As described in your letter:

The Endorsement establishes conditions to receipt of a lump-sum payment of \$5,000.00 (“Gold Reward”) or \$1,000.00 (“Silver Reward”) by a named insured on certain Ohio personal automobile policies. To be eligible for the Gold Reward, the policy to which the Endorsement applies must be active and in force as of the applicable Eligibility Date, and must have been in effect continuously, with no lapse in coverage, for at least one hundred and eighty (180) days preceding the Eligibility Date. To be eligible for the Silver Reward, the policy to which the Endorsement applies must be active and in force as of the applicable Eligibility Date, and must have been in effect continuously, with no lapse in coverage, for at least ninety (90) days

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<sup>1</sup> R.C. 3937.03(A) requires an Ohio insurance company to file with the Department of Insurance every “endorsement ... which it proposes to use” and “[e]very such filing shall state any proposed effective date and indicate the character and extent of the coverage contemplated.” For purposes of R.C. 3937.03, an “endorsement” is “a provision added to an insurance contract altering its scope or application.” *Merriam-Webster’s Collegiate Dictionary* 412 (11th ed. 2005); accord *Black’s Law Dictionary* 607 (9th ed. 2009). See generally R.C. 1.42 (words in a statute that have not “acquired a technical or particular meaning, whether by legislative definition or otherwise,” shall be accorded their common, ordinary meaning).

preceding the Eligibility Date.<sup>2</sup> The Endorsement defines “Eligibility Date” as meaning March 31, June 30, September 30 and December 31.

The insurer states in the Endorsement that all have an equal chance of receiving such reward without regard to factors other than those expressly stated in the Endorsement; there is no premium charge for the Endorsement; and all payments made are provided for separately and are not considered in the rates. (Footnote added.)

The endorsement sets out the specific process for selecting the policyholders who are to receive Gold and Silver Rewards.<sup>3</sup> In this regard, the endorsement states that, as of the eligibility date, the insurance company will identify the insurance policies that satisfy the eligibility requirements for the Gold Reward and Silver Reward. The insurance company will then determine the date on which it will select the recipients of the Gold Reward and Silver Reward. On that date, the insurance company will randomly select a policy number from the policies that are eligible for the Gold Reward and award the policyholder a lump-sum payment of five thousand dollars. The insurance company will also randomly select a policy number from the policies that are eligible for the Silver Reward and award the policyholder a lump-sum payment of one thousand dollars.<sup>4</sup>

From the aforementioned information, it appears that the insurance company will use the Gold and Silver Rewards program as a sweepstakes promotion to induce persons to purchase or retain automobile insurance coverage from the company. See *Black's Law Dictionary* 1586 (9th ed. 2009) (a “sweepstakes” is “[a] contest, often for promotional purposes, that awards prizes based on the random selection of entries”). See generally Marc W. Dunbar and Daniel R. Russell, *The History of Internet Cafes and the Current Approach to Their Regulation*, 3 UNLV Gaming L.J. 243, 244 (2012) (“sweepstakes serve as a marketing aid to drive sales of the underlying commercial product. These sweepstakes promotions range from the well-known ‘look under the cap’ games of soft drink manufacturers to code numbers on restaurant and store receipts, which when entered following an online consumer satisfaction survey enroll the customer into a prize drawing”). Because the program affords automobile insurance policyholders the opportunity to be selected randomly for cash prizes, you wish to know whether the program violates Ohio’s gambling laws, as set forth in R.C. Chapter

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<sup>2</sup> According to the endorsement, a policyholder who is eligible for the Gold Reward as of an eligibility date is also eligible for the Silver Reward for that eligibility date.

<sup>3</sup> The endorsement directs that each calendar year four policyholders will be selected to receive the Gold Reward and four policyholders will be selected to receive the Silver Reward.

<sup>4</sup> Under the terms of the endorsement, no person who is not a policyholder is eligible to receive the Gold Reward or Silver Reward.

2915.<sup>5</sup> See generally Caleb E. Jay, *10 Things to Know about Arizona Promotions Law*, 49 *Az. Attorney* 17, 17 (2013) (a sweepstakes promoter “must ensure that the operation of the promotion is not an illegal lottery”); Donald V. Pearson, Comment, *Laws, Lotteries and Business Promotion*, 8 *U. Kan. L. Rev.* 110, 110 (1959-1960) (“the good-faith promoter utilizing a scheme as a vehicle to increase advertising and patronage of his community-approved enterprise ... is as liable for criminal prosecution ... since criminal intent is not required to violate lottery prohibitions”).

**Ohio’s Gambling Laws—Article XV, § 6 of the Ohio Constitution and R.C. Chapter 2915**

Article XV, § 6 of the Ohio Constitution declares that, “[e]xcept as otherwise provided in this section, lotteries, and the sale of lottery tickets, for any purpose whatever, shall forever be prohibited in this State.”<sup>6</sup> A person who violates this prohibition by conducting a lottery may not, however, be prosecuted criminally for such conduct unless the person also violates a provision of R.C. Chapter 2915.<sup>7</sup> See generally *City of Columbus v. Barr*, 160 *Ohio St.* 209, 212, 115 *N.E.2d* 391 (1953) (“[i]t

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<sup>5</sup> Your question concerns the application of R.C. Chapter 2915 (gambling) to the rewards program described in your letter. This opinion thus will not consider whether such a program violates a statute that is not included in R.C. Chapter 2915 or a provision of federal law.

The authority of the Attorney General to issue formal opinions does not include determining the guilt or innocence of persons who may have violated a provision of R.C. Chapter 2915. As summarized in 1994 *Op. Att’y Gen.* No. 94-061 at 2-298 n.1:

Prior opinions of the Attorney General have noted that the Attorney General, as an executive officer, cannot determine the guilt or innocence of a particular individual since only the judiciary is vested with the authority to make such a decision. The Attorney General may only express an “opinion as to whether a given set of facts, if proven in court, could constitute a violation of a criminal statute.” [1984 *Op. Att’y Gen.* No. 84-040 at 2-129.] (Citations omitted.)

For this reason, this opinion will not attempt to determine whether the operation of the rewards program described in your letter constitutes a violation of the criminal statutes set forth in R.C. Chapter 2915, “but will, instead, address the elements of those anti-gambling statutes and the characteristics of schemes that have been found to constitute prohibited forms of gambling under those statutes.” 2004 *Op. Att’y Gen.* No. 2004-021 at 2-174 n.2.

<sup>6</sup> None of the exceptions set forth in Article XV, § 6 of the Ohio Constitution applies to the situation you have presented to us.

<sup>7</sup> A person conducts a “lottery” for purposes of Article XV, § 6 of the Ohio Constitution when the person operates “a scheme whereby a monetary consideration is paid and the winner of the prize is determined by lot or chance.” *State ex rel. Gabalac v. New Universal Congregation of Living Souls*,

may be conceded that Section 6, Article XV of the Ohio Constitution ... is not self-executing to the extent that it prescribes no penalty for violation thereof. However, to the extent that it is a declarative limitation upon the plenary legislative power of the Ohio General Assembly with respect to lotteries and the sale of lottery tickets, it is self-executing"); 1975 Op. Att'y Gen. No. 75-005 (syllabus, paragraph 2) ("[b]ingo, and other lotteries except for the state lottery, are declared unlawful by Article XV, Section 6, Ohio Constitution; however, no criminal penalty is provided by R.C. Chapter 2915 for bingo operated solely for charitable purposes rather than for profit"); 1967 Op. Att'y Gen. No. 67-064 at 2-110 (Article XV, § 6 of the Ohio Constitution "is a statement of policy for the State of Ohio, but does not provide any penalty for a violation thereof. In order for the Constitutional provision to be an effective prohibition it was necessary for the General Assembly to enact certain definite criminal legislation").

R.C. Chapter 2915 establishes the criminal offenses of gambling, R.C. 2915.02, operating a gambling house, R.C. 2915.03, public gaming, R.C. 2915.04, cheating, R.C. 2915.05, corrupting sports, R.C. 2915.05, skill-based amusement machine prohibited conduct, R.C. 2915.06, conducting illegal bingo, R.C. 2915.07, illegally operating as a distributor of bingo supplies, R.C. 2915.081, illegally operating as a manufacturer of bingo supplies, R.C. 2915.082, illegally conducting a bingo game, R.C. 2915.09, failure to keep records related to bingo or games of chance, R.C. 2915.10, illegal instant bingo conduct, R.C. 2915.091; R.C. 2915.094; R.C. 2915.13, and illegal conduct of a raffle, R.C. 2915.092. To answer your specific question, we must determine whether the operation of the rewards program described in your letter constitutes the criminal offense of gambling or the illegal conduct of a raffle.<sup>8</sup>

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55 Ohio App. 2d 96, 97, 379 N.E.2d 242 (Summit County 1977); *accord Troy Amusement Co. v. Attenweiler*, 64 Ohio App. 105, 28 N.E.2d 207 (Miami County 1940), *aff'd*, 137 Ohio St. 460, 30 N.E.2d 799 (1940); 1967 Op. Att'y Gen. No. 67-064 at 2-111. *See generally* Tywanda H. Lord and Laura C. Miller, *Playing the Game by the Rules: A Practical Guide to Sweepstakes and Contest Promotions*, 29 Franchise L.J. 3, 3 (2009) ("[b]y eliminating any one element, i.e., prize or chance or consideration, a franchise system can legally sponsor a promotional game without violating state lottery laws"); Robert V. Bullock, *Merchandising Through Use of Lotteries*, 19 Clev. St. L. Rev. 620, 620 (1970) ("[i]t has been almost universally held that there must be three elements present for a promotion to constitute a lottery. These elements are consideration, chance, and prize").

<sup>8</sup> Given the elements that must be proven to establish the occurrence of the criminal offenses of operating a gambling house, public gaming, cheating, corrupting sports, skill-based amusement machine prohibited conduct, conducting illegal bingo, illegally operating as a distributor of bingo supplies, illegally operating as a manufacturer of bingo supplies, illegally conducting a bingo game, failure to keep records related to bingo or games of chance, and illegal instant bingo conduct, it may be concluded generally that an Ohio insurance company does not commit any of these offenses by operating the rewards program described in your letter. Nevertheless, it remains that the facts in a particular case may indicate the commission of one or more of these criminal offenses. *See generally* 1991 Op. Att'y Gen. No. 91-016 at 2-82 n.2 ("[t]he opinion-rendering function of the Attorney

### **The Criminal Offense of Gambling**

Gambling is made a criminal offense in R.C. 2915.02. This statute provides, in relevant part:

(A) No person shall do any of the following:

...[.]

(2) Establish, promote, or operate or knowingly engage in conduct that facilitates any game of chance conducted for profit or any scheme of chance[.]

....

(C) This section does not prohibit conduct in connection with gambling expressly permitted by law.

....

(F) Whoever violates this section is guilty of gambling, a misdemeanor of the first degree. If the offender previously has been convicted of any gambling offense, gambling is a felony of the fifth degree.

The term “person,” as used in R.C. 2915.02, includes, among other things, a for-profit corporation. R.C. 2915.01(HH); *see* R.C. 1.59(C). As a for-profit corporation, an Ohio insurance company is prohibited by R.C. 2915.02(A)(2) from establishing, promoting, operating, or knowingly facilitating any game of chance conducted for profit or any scheme of chance unless Ohio law provides otherwise.<sup>9</sup> *See generally* 2004 Op. Att’y Gen. No. 2004-021 (syllabus) (“[a] lottery pooling venture in which participants pay a company a valuable consideration in exchange for chances to participate in Ohio’s state lottery on terms other than those offered by the State Lottery Commission and for a prize in an amount different from the amount set by the State Lottery Commission is, itself, a scheme of chance, separate from Ohio’s state lottery, the company’s operation of which is prohibited by R.C. 2915.02(A)(2)”).

Pursuant to R.C. 2915.02(D), the following activities are not prohibited under R.C. 2915.02(A)(2): (1) games of chance conducted by a charitable organization in accordance with the requirements and limitations set forth in R.C. 2915.02(D)(1); (2) tag fishing tournaments, as defined in R.C. 1531.01, operated under a permit issued under R.C. 1533.92; or (3) bingo conducted by a charitable organization under a license issued pursuant to R.C. 2915.08. The rewards program you describe does not involve a charitable organization<sup>10</sup> or a tag fishing tournament, as defined in R.C.

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General is not an appropriate forum for making findings of fact”); 1983 Op. Att’y Gen. No. 83-057 at 2-232 (the Attorney General’s “office is not equipped to serve as a fact-finding body; that function may be served by [the office of the county prosecuting attorney] or, ultimately, by the judiciary”).

<sup>9</sup> Information on file with the Secretary of State indicates that the Ohio insurance company proposing the rewards program is a for-profit corporation, rather than a non-profit corporation.

<sup>10</sup> An Ohio insurance company that is a for-profit corporation is not exempt from federal income taxation and thus does not qualify as a charitable organization for purposes of R.C. 2915.02(D). *See*

1531.01.<sup>11</sup> For this reason, R.C. 2915.02(D) does not exempt an Ohio insurance company that operates the rewards program you have described from the gambling prohibitions listed in R.C. 2915.02(A)(2).

A violation of R.C. 2915.02(A)(2) is predicated upon the existence of either a scheme of chance or game of chance. *See generally* R.C. 2915.01(E) (as used in R.C. Chapter 2915, a “game of chance conducted for profit” is “any game of chance designed to produce income for the person who conducts or operates the game of chance, but does not include bingo”). For purposes of R.C. 2915.02, the terms “scheme of chance” and “game of chance” are defined as follows:

(C) “Scheme of chance” means a slot machine, lottery, numbers game, pool conducted for profit, or other scheme in which a participant gives a valuable consideration for a chance to win a prize, but does not include bingo, a skill-based amusement machine, or a pool not conducted for profit.

(D) “Game of chance” means poker, craps, roulette, or other game in which a player gives anything of value in the hope of gain, the outcome of which is determined largely by chance, but does not include bingo.

R.C. 2915.01. Thus, except as provided in R.C. 2915.02, any scheme or game in which a participant gives consideration for a chance to win a prize is a scheme of chance or game of chance for purposes of the gambling prohibitions established by R.C. 2915.02(A)(2).<sup>12</sup>

### **The Proposed Rewards Program Is Not a Scheme of Chance or Game of Chance**

Let us now examine the characteristics of the rewards program proposed in your letter to determine whether the program requires a participant to give consideration for a chance to win a prize.

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R.C. 2915.01(H) (to qualify as a “charitable organization” for purposes of R.C. Chapter 2915, an entity must be exempt from federal income taxation).

<sup>11</sup> R.C. 1531.01(TT) defines a “tag fishing tournament” as “a contest in which a participant pays a fee, or gives other valuable consideration, for a chance to win a prize by virtue of catching a tagged or otherwise specifically marked fish within a limited period of time.”

<sup>12</sup> 2006 Op. Att’y Gen. No. 2006-045 at 2-437 stated that “the essential characteristic that distinguishes a ‘scheme of chance,’ as defined in R.C. 2915.01(C), from a ‘game of chance,’ as defined in R.C. 2915.01(D), is the opportunity that a game of chance offers a person to exercise skill and knowledge in a way that will improve his chances of making a successful wager.” *Accord State v. Beane*, 52 Ohio Misc. 115, 118, 370 N.E.2d 793 (Franklin County Mun. Ct. 1977); 1990 Op. Att’y Gen. No. 90-032 at 2-125 and 2-126. As we explain later in this opinion, it is unnecessary for us to distinguish a “scheme of chance,” as defined in R.C. 2915.01(C), from a “game of chance,” as defined in R.C. 2915.01(D), when determining whether the operation of the rewards program described in your letter constitutes the criminal offense of gambling.

The information you have provided to us indicates that a policyholder who meets the eligibility requirements under the rewards program is given an opportunity to randomly win monetary prizes in drawings. In other words, the policyholder is afforded a chance to be selected at random to win a prize. This means that the elements of chance and prize exist in the proposed rewards program. See generally Ronald J. Rychlak, *Video Gambling Devices*, 37 UCLA L. Rev. 555, 556 n.3 (1990) (since privately conducted “sweepstakes are based on random drawings and offer valuable prizes, the elements of chance and reward are present”); Donald V. Pearson, Comment, *Laws, Lotteries and Business Promotion*, 8 U. Kan. L. Rev. 110, 113 (1959-1960) (consideration “is the key element of lottery litigation involving business promotion activities. The great majority of business promotion cases begin with both parties agreeing that the elements of prize and chance are present, and that the sole issue is the presence of consideration”).

However, for the reasons that follow, under the proposed rewards program, a policyholder does not pay consideration *for a chance to win a prize*. See generally Tywanda H. Lord and Laura C. Miller, *Playing the Game by the Rules: A Practical Guide to Sweepstakes and Contest Promotions*, 29 Franchise L.J. 3, 3 (2009) (“[c]onsideration is present when the sweepstakes participant gives the sweepstakes sponsor money or something of value and receives an opportunity to play the game”); Ronald J. Rychlak, *Video Gambling Devices*, 37 UCLA L. Rev. 555, 556 (1990) (“[c]onsideration is the stake, wager, or bet that gamblers risk losing if they are unsuccessful”). Initially, we acknowledge that under the rewards program consideration exists because a policyholder must pay money, e.g. a premium, to the insurance company to obtain or retain the necessary automobile insurance coverage to become eligible for the monetary prizes. However, the consideration paid by the policyholder is for automobile insurance, rather than for a chance to win a prize, as required by R.C. 2915.02(A)(2). See generally Tywanda H. Lord and Laura C. Miller, *Playing the Game by the Rules: A Practical Guide to Sweepstakes and Contest Promotions*, 29 Franchise L.J. 3, 4 (2009) (“[i]n a traditional sweepstakes or other game of chance, any consideration provided by the participant is for the purchase of a legitimate product or service or something else of value. Sweepstakes sponsors should be wary of structuring a sweepstakes in which the consideration is provided only for the opportunity to play the game”).

In a similar situation, 1985 Op. Att’y Gen. No. 85-013 considered whether R.C. 2915.02 prohibited a military credit union from conducting a sweepstakes promotion under which persons who obtained loans from the credit union received chances to win prizes.<sup>13</sup> The opinion concluded that the promotion did not violate R.C. 2915.02 because it did not constitute a scheme of chance as there was no consideration paid for a chance to win a prize. As explained in the opinion at 2-52:

R.C. 2915.01(C) defines “scheme of chance” to mean “a lottery, numbers game, pool, or other scheme in which a participant gives a valuable consideration for a chance to win a prize.” (Emphasis added.) This statutory provision must be strictly construed against the state. R.C. 2901.04(A). Those persons who participate in the credit union

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<sup>13</sup> The size of the loan obtained determined the number of chances the military credit union gave to the borrower. 1985 Op. Att’y Gen. No. 85-013 at 2-51.

sweepstakes do not, in all probability, give valuable consideration for a chance to win a prize. The participants furnish consideration in order to obtain a loan, and only incidentally receive a chance to win a prize. In strictly construing R.C. 2915.01(C), and without having additional facts before me, I cannot presume that the participants in the subject sweepstakes incur indebtedness with the intent of receiving chances to win prizes. Therefore, I conclude that the sweepstakes is not a scheme of chance within the meaning of R.C. 2915.01(C). Thus, the credit union is not operating a scheme of chance conducted for profit in violation of R.C. 2915.02(A). (Footnotes and citation omitted.)

*Accord* 1985 Op. Att’y Gen. No. 85-001 at 2-3; *see State v. Devroux*, 14 Ohio Op. 283, 28 Ohio Law Abs. 631 (Cleveland Mun. Ct. 1939); 1962 Op. Att’y Gen. No. 3502, p. 1011. *See generally* Mark Fridman, *Prime Time Lotteries*, 10 Tex. Rev. Ent. & Sports L. 123, 126 (2009) (“[a] sweepstakes is simply a lottery with the element of consideration missing: chance and prize are present, but no consideration is necessary to receive the chance to win a prize. Since the element of consideration is missing, a sweepstakes is legal” (footnote omitted)).

The reasoning espoused in 1985 Op. Att’y Gen. No. 85-013 is sound, persuasive, and in accord with that used by courts to determine whether a sweepstakes promotion is a legitimate activity to promote the sale of a product or service or whether the promotion is utilized to legitimize illegal gambling.<sup>14</sup> *See generally* Anthony N. Cabot and Louis V. Csoka, Symposium, *Cross-Border Issues in Gaming: The Games People Play: Is It Time for a New Legal Approach to Prize Games?*, 4 Nev.

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<sup>14</sup> Under Ohio law as it existed prior to 1974, a scheme of chance or game of chance existed when the purchasers of a product or service were given a chance to win a prize, as it was presumed that a portion of the purchase price was to pay for a chance to win the prize. *See Kroger Co. v. Cook*, 24 Ohio St. 2d 170, 265 N.E.2d 780 (1970); *Stevens v. Cincinnati Times-Star Co.*, 72 Ohio St. 112, 73 N.E. 1058 (1905); *State v. Bader*, 24 Ohio N.P. (n.s.) 186 (Cincinnati Mun. Ct. 1922), *aff’d*, 1 Ohio Law Abs. 835 (Hamilton County 1923); 1967 Op. Att’y Gen. No. 67-064; 1964 Op. Att’y Gen. No. 64-1045; 1959 Op. Att’y Gen. No. 313, p. 171; 1931 Op. Att’y Gen. No. 3109, vol. I, p. 489; 1913 Op. Att’y Gen. No. 299, vol. II, p. 1247. In 1974 the concepts of scheme of chance and game of chance were, however, changed by the General Assembly “which, through its own initiative, significantly contributed to the weakening of the clear and long-standing anti-gambling public policy in Ohio” by amending R.C. Chapter 2915. *Mills-Jennings of Ohio, Inc. v. Dep’t of Liquor Control*, 70 Ohio St. 2d 95, 100-01, 435 N.E.2d 407 (1982). *See generally* 1971-1972 Ohio Laws, Part II, 1866, 1935-38 (Am. Sub. H.B. 511, eff. Mar. 23, 1973, with certain sections effective on January 1, 1974) (revising the criminal laws relating to gambling). Currently, in order for an activity to constitute a scheme of chance or game of chance for purposes of R.C. Chapter 2915, it must be shown that a person is actually paying for a chance to win a prize when the chance is associated with the purchase of a product or service. *See City of Cleveland v. Thorne*, 2013-Ohio-1029, 2013 Ohio App. LEXIS 919, ¶¶41-47 (Cuyahoga County Mar. 21, 2013); *State v. Dabish*, Case No. CRB-08-25138 (Toledo Mun. Ct. Nov. 18, 2009); 1985 Op. Att’y Gen. No. 85-013; 1985 Op. Att’y Gen. No. 85-001.

L.J. 197, 237-38 (2003) (“the issue surrounding the source of consideration for sweepstakes is not as simple as it may first appear. Sweepstakes have a broad range. A sweepstake can be a simple and free drawing for products for the grand opening of a new store. However, pushed to its absolute limit, promoters have gone as far as installing vending machines that resemble slot machines that dispense virtually worthless prepaid telephone cards. The special feature of these machines is that each purchase allows the person the chance to win a greater prize through a game of pure chance. The activity is ostensibly a ‘sweepstake’ because the promoters allow non-paying persons an opportunity to participate by a mail-in entry. This is simply casino gaming disguised as a sweepstake”).

For example, an Ohio court of appeals, which recently considered whether participants who purchased Internet access time at an Internet café or cyber café provided consideration for a chance to play simulated casino-style games to win money, stated:

At trial, it was essentially conceded that these [Internet café or cyber café] businesses operated chance-based sweepstakes that offered the chance for monetary gain. It was also conceded that patrons participated in hopes of gain. The primary contested issue was whether those patrons provided anything of value for a chance to participate. This is because under all the above definitions, an exchange of valuable consideration is necessary to find a criminal violation. Appellants argue that patrons purchased internet access time and that this time was not diminished as a result of the sweepstakes offered. The network access time remained and was a valuable product that patrons paid for and received. The sweepstakes points were given free as a promotion and had no actual value.

Stripping away the contrivance that couches the transaction as legitimate leads to a test that examines what is at the heart of the exchange: Whether the sweepstakes points are there to drive the sale of network access time, or whether the sale of network access time is there simply to legitimize gambling. Evidence and inferences reasonably drawn from that evidence, which show that the latter is true, is sufficient for a finding of consideration in the transaction.

*City of Cleveland v. Thorne*, 2013-Ohio-1029, 2013 Ohio App. LEXIS 919, ¶¶41-42 (Cuyahoga County Mar. 21, 2013); *accord United States v. Davis*, 690 F.3d 330, 339-40 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 1283 (2013) *and* 133 S. Ct. 1296 (2013); *State v. Verto*, 286 P.3d 627, 2012 N.M. App. LEXIS 78 (N.M. Ct. App. 2012), *cert. granted*, 296 P.3d 1208, 2012 N.M. LEXIS 395 (N.M. Sup. Ct. 2012); *Jester v. State*, 64 S.W.3d 553, 2001 Tex. App. LEXIS 8047 (Tex. Ct. App. 2001).

Analyzing the rewards program in question discloses that the predominant purpose of the program is to promote the sale or renewal of automobile insurance coverage, rather than sell chances to win prizes. It is reasonable to infer that an automobile insurance policyholder values his automobile insurance, as Ohio law requires him to maintain automobile insurance coverage. *See* R.C. Chapter 4509. Also, the policyholder may use the insurance coverage provided under the policy if he is involved in an automobile accident or his automobile is stolen or vandalized. This happens even if the policyholder does not win a drawing for a cash prize. An automobile insurance policy has additional value to the policyholder in that the policyholder may cancel the policy at any time and receive a

prorated refund on the premiums he has paid to the insurance company. Thus, that the automobile insurance policy retains value despite the outcome of the drawings suggests that the money paid for the policy is not risked to pay for an opportunity to participate in the drawings. *See generally State v. Dabish*, Case No. CRB-08-25138, slip op. at 14 (Toledo Mun. Ct. Nov. 18, 2009) (R.C. 2915.02(A)(2) is not violated when a court “finds that the consideration is for the purchase of [a] phone card only and that consideration is never in jeopardy”); 1958 Op. Att’y Gen. No. 2291, p. 384, at 386-87 (“[b]ut notwithstanding the fact that these [gambling] statutes do not expressly introduce the element of *money contributed by the player* as essential, we find in practically every case touching on the subject matter either the expression or the assumption that gambling in any of its phases involves the risking by the player of a certain sum of money in the hope of obtaining, by the lucky turn of a wheel, or some other chance event, a large return for a small investment”); Anthony N. Cabot and Louis V. Csoka, Symposium, *Cross-Border Issues in Gaming: The Games People Play: Is It Time for a New Legal Approach to Prize Games?*, 4 Nev. L.J. 197, 239-40 (2003) (“where something is sold for its real value, such transaction is not a wager because the central item to the transaction has already exchanged hands.... In short, because the participant received a service or product at fair value, the incidental award of a contest grand prize, under such rationale, did not create an illegal gambling transaction”). *See generally also Moore v. Mississippi Gaming Comm’n*, 64 So. 3d 537, 2011 Miss. App. LEXIS 169, ¶16 (Miss. Ct. App. 2011) (insofar as the patrons of an “internet café were purchasing prepaid telephone cards to play the computer terminals rather than to make telephone calls[,] ... the element of consideration is satisfied”), *reh’g, en banc, denied*, 2011 Miss. App. LEXIS 372 (Miss. Ct. App. June 28, 2011).

Further, given the average monthly cost of automobile insurance is more than a trivial amount, it is unlikely that a person purchases or renews an automobile insurance policy to have the opportunity to be selected randomly for cash prizes. *See generally* Anthony N. Cabot and Louis V. Csoka, Symposium, *Cross-Border Issues in Gaming: The Games People Play: Is It Time for a New Legal Approach to Prize Games?*, 4 Nev. L.J. 197, 239 (2003) (in a sweepstakes promotion that allows a person to participate in a drawing for a prize by purchasing a product, if the product “has little or no value, a state attorney general may be persuaded to prosecute the promoter”). Finally, it is reasonable to assume that the yearly amount of the prizes awarded—24,000 dollars—is dwarfed by the amount of money the insurance company receives for automobile insurance. In other words, the amount of money the insurance company pays out in cash prizes is miniscule in comparison with the amount of premiums the insurance company collects and retains for automobile insurance purposes. *Midwestern Enter., Inc. v. Stenehjem*, 2001-ND-67, 625 N.W.2d 234, ¶28 (N.D. Sup. Ct. 2001) (“[t]he high payout rate of the Lucky Strike game is a distinguishing feature because it goes to the true purpose of the game”); *State v. Vento*, 286 P.3d at 635 (“[t]he lopsided percentages related to internet usage, prizes awarded to patrons, and the significant repurchase of internet time despite patrons already possessing unused internet time constitute substantive evidence that Defendant’s café operation was structured as a guise for commercial gambling”).

Based on the foregoing facts, it appears that the automobile insurance policyholders are not procuring or renewing their insurance policies in hopes of winning cash prizes. Instead, they purchase or renew them because of a real need for automobile insurance coverage. Thus, absent evidence that the predominant purpose of the rewards program is to circumvent R.C. 2915.02(A)(2), we conclude

that such a program does not serve as a subterfuge to legitimize a scheme of chance or game of chance, but rather serves as a legitimate sweepstakes promotion for automobile insurance.<sup>15</sup> See *State v. Devroux*; 1985 Op. Att’y Gen. No. 85-013; 1985 Op. Att’y Gen. No. 85-001; 1962 Op. Att’y Gen. No. 3502, p. 1011. See generally Julie S. James, Comment, *Regulating the Sweepstakes Industry: Are Consumers Close to Winning?*, 41 Santa Clara L. Rev. 581, 595 (2001) (“[m]ost sweepstakes promotions fall short of violating state lottery laws because they lack consideration”). Accordingly, an Ohio insurance company does not operate a scheme of chance or game of chance for purposes of R.C. Chapter 2915 when its private passenger automobile policies grant policyholders the opportunity to be selected randomly for cash prizes unless there is evidence that the predominant purpose for the sale of the policies is to circumvent R.C. 2915.02(A)(2).<sup>16</sup>

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<sup>15</sup> In the proposed rewards program, a person must purchase or renew an automobile insurance policy to participate in the drawings for the cash prizes. See note 4, *supra*. In other words, there is no free alternative method of entry (AMOE) to the drawings. The lack of an AMOE to the drawings may constitute evidence that the rewards promotion is not a legitimate sweepstakes promotion for automobile insurance. See generally Caleb E. Jay, *10 Things to Know about Arizona Promotions Law*, 49 Az. Attorney 17, 18 (2013); Anthony N. Cabot and Louis V. Csoka, Symposium, *Cross-Border Issues in Gaming: The Games People Play: Is It Time for a New Legal Approach to Prize Games?*, 4 Nev. L.J. 197, 204-05 (2003); Ronald J. Rychlak, *Video Gambling Devices*, 37 UCLA L. Rev. 555, 556 n.3 (1990); Donald V. Pearson, Comment, *Laws, Lotteries and Business Promotion*, 8 U. Kan. L. Rev. 110, 114-15 (1959-1960).

The lack of a free AMOE to the drawings does not, however, necessarily mean that a rewards program is a scheme of chance or game of chance for purposes of R.C. Chapter 2915. See *Grimes v. State*, 235 Ala. 192, 193-94, 178 So. 73 (1938) (the purchase of a matinee ticket is not dispositive on the issue whether a theatre bank night drawing is supported by sufficient consideration to authorize conviction for conducting a lottery; instead, it is an illustrative feature of the promotion that is not controlling); Anthony N. Cabot and Louis V. Csoka, Symposium, *Cross-Border Issues in Gaming: The Games People Play: Is It Time for a New Legal Approach to Prize Games?*, 4 Nev. L.J. 197, 238 (2003) (“[w]here no one can enter the sweepstake except by purchasing a product, then the promotional aspect of the sweepstake is almost assured”). See generally Mark Fridman, *Prime Time Lotteries*, 10 Tex. Rev. Ent. & Sports L. 123, 129 (2009) (the existence of an AMOE in a sweepstakes promotion may support the proposition that a person “gives consideration only for the product, not for the chance to win a prize”). Instead, under Ohio law, the determination whether a particular rewards program is a scheme of chance or game of chance is made upon an examination of the totality of the characteristics of the program. See *City of Cleveland v. Thorne*, at ¶¶41-47; *State v. Dabish*.

<sup>16</sup> We emphasize that we are not determining whether any particular rewards program offered by an Ohio insurance company is a scheme of chance or game of chance for purposes of R.C. Chapter 2915, as we are unable to predict what action a court might take in a particular case. See note 5, *supra*.

### **The Criminal Offense of Illegal Conduct of a Raffle**

Let us now turn to whether the operation of the rewards program by an insurance company constitutes the criminal offense of illegal conduct of a raffle. R.C. 2915.092 provides, in part:

(B) Except as provided in division (A) or (B) of this section, no person shall conduct a raffle drawing that is for profit or a raffle drawing that is not for profit.

(C) Whoever violates division (B) of this section is guilty of illegal conduct of a raffle. Except as otherwise provided in this division, illegal conduct of a raffle is a misdemeanor of the first degree. If the offender previously has been convicted of a violation of division (B) of this section, illegal conduct of a raffle is a felony of the fifth degree.

A for-profit insurance company is not one of the entities listed in R.C. 2915.092(A)-(B) that may conduct a raffle drawing. Consequently, because a for-profit insurance company is a person for purposes of R.C. 2915.092, *see* R.C. 2915.01(HH); *see also* R.C. 1.59(C), such an insurance company may not conduct a raffle drawing that is for profit or a raffle drawing that is not for profit.

A “raffle,” as used in R.C. 2915.092, is defined as follows:

“Raffle” means a form of bingo in which the one or more prizes are won by one or more persons who have purchased a raffle ticket. The one or more winners of the raffle are determined by drawing a ticket stub or other detachable section from a receptacle containing ticket stubs or detachable sections corresponding to all tickets sold for the raffle. “Raffle” does not include the drawing of a ticket stub or other detachable section of a ticket purchased to attend a professional sporting event if both of the following apply:

- (1) The ticket stub or other detachable section is used to select the winner of a free prize given away at the professional sporting event; and
- (2) The cost of the ticket is the same as the cost of a ticket to the professional sporting event on days when no free prize is given away.

R.C. 2915.01(CC).

The language of R.C. 2915.01(CC) and R.C. 2915.092 indicates that the criminal offense of illegal conduct of a raffle occurs when a person sells tickets to promote a drawing for one or more prizes. The ticket serves as a certificate or token indicating that the person to whom it is sold is entitled to a prize if his ticket is drawn during the raffle. *See generally Black's Law Dictionary* 1619 (11th ed. 2009) (a “ticket” is “[a] certificate indicating that the person to whom it is issued, or the holder, is entitled to some right or privilege”).

In the proposed rewards program the insurance company does not sell tickets to promote the drawings for cash prizes. Specifically, the automobile policies do not serve as tickets to promote drawings for cash prizes. As previously explained, the predominant purpose of the rewards program is to promote the sale or renewal of automobile insurance coverage, rather than provide the

automobile insurance policyholders with opportunities to win cash prizes. Thus, for the reasons articulated in the earlier discussion concerning the criminal offense of gambling, it appears that the insurance company is not using the automobile insurance policies as tickets to promote drawings for cash prizes.<sup>17</sup>

In the absence of evidence that the predominant purpose of a rewards program is to serve as a smokescreen for a raffle, as defined in R.C. 2915.01(CC), it reasonably follows that the program is a legitimate sweepstakes promotion for automobile insurance. Therefore, an Ohio insurance company does not conduct a raffle for purposes of R.C. Chapter 2915 when its private passenger automobile policies grant policyholders the opportunity to be selected randomly for cash prizes unless there is evidence that the predominant purpose for the sale of the policies is to promote drawings for cash prizes.

### Conclusions

On the basis of the foregoing, it is my opinion, and you are hereby advised as follows:

1. An Ohio insurance company does not operate a scheme of chance or game of chance for purposes of R.C. Chapter 2915 when its private passenger automobile policies grant policyholders the opportunity to be selected randomly for cash prizes unless there is evidence that the predominant purpose for the sale of the policies is to circumvent R.C. 2915.02(A)(2).
2. An Ohio insurance company does not conduct a raffle for purposes of R.C. Chapter 2915 when its private passenger automobile policies grant policyholders the opportunity to be selected randomly for cash prizes unless there is evidence that the predominant purpose for the sale of the policies is to promote drawings for cash prizes.

Very respectfully yours,



MICHAEL DEWINE  
Ohio Attorney General

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<sup>17</sup> We are not determining in this opinion that a particular rewards program offered by an Ohio insurance company is not a "raffle," as defined in R.C. 2915.01(CC). As stated earlier, such a determination must be made by a court. *See* note 5, *supra*.