



HENRY McMASTER
ATTORNEY GENERAL

November 1, 2006

Charles E. Brown, Director of Investigations
South Carolina Secretary of State's Office
Post Office Box 11350
Columbia, South Carolina 29211

Dear Mr. Brown:

We have been requested to review our opinion of July 31, 2006, relating to a proposed promotion entitled "Chuck-A-Puck." This promotion is being contemplated by the South Carolina Stingrays Hockey Team. Since our opinion was rendered, we have been provided additional information concerning the promotion; this information appears to demonstrate, based upon testing, that the promotion is predominantly a game of skill rather than one of chance. Considering this additional information, together with our opinion of February 2, 2006, involving what appears to be an analogous contest, we are of the opinion that a court would conclude that the "Chuck-A-Puck" promotion is predominantly a game of skill, and thus not illegal under South Carolina law.

Law / Analysis

As we noted in our July 31, 2006, the Stringrays promotion is structured as follows:

1. Attendees at each Stringrays home game will be offered the opportunity to purchase a Stringrays puck or similar item for a small fee, one to two dollars.
2. On the night of purchase, each participant will be able to aim and then toss his puck from his seat onto the ice attempting to land it closest to a bulls-eye or other target.
3. The individual landing his puck closest to the target point will be able to participate in the final round.
4. That individual from a selected distance will attempt to shoot a regulation puck from a specified distance through a hole in a board covering the hockey goal.
5. If the individual is able to shoot the puck entirely through the slot into the goal from the designated shooting point, the participant will win \$1,000,000.00 payable in installments.

Since our July 31, 2006 Opinion, we have been provided with test results regarding the promotion. Five individuals participated in the test. Each threw ten sets of ten pucks from various seats in the North Charleston Coliseum. The characteristics of the five individuals were as follows: Individual A was a 24 year old male ticket sales representative; Individual B was a 30 year old retail salesman; Individual C was a 37 year old male executive; Individual D was a 31 year old male former athlete; Individual E was a 23 year old female college student. The system was scored by pucks hitting within five feet of the target. The results of this test which, for purposes of this Opinion we must take as true and accurate, as we cannot make factual determinations in an opinion (*Op. S.C. Atty. Gen.*, December 12, 1983), have been summarized to us as follows:

[e]nclosed are three charts confirming (i) that individuals vary by *skill levels* and (ii) that *results improve through practice*, which increased an individual's skill level.

Chart A highlights the variability per round based on an individual's skill and experience. For example, the 31 year old former athlete (results shown in light blue) scores consistently higher than the 24 year old male (results shown in dark blue). In addition, the chart shows an upward sloping bias highlighting the improvement that all players exhibited by gaining experience in throwing the pucks – that is, in the later rounds, fifty percent or more of the pucks thrown scored within five feet of the target.

Chart B shows marked average improvement of all participants based on experience. As players gained experience in throwing the pucks, their skill levels improved dramatically. You will note that in round 1, only twenty-eight percent (28%) of the pucks thrown landed within five feet of the target, whereas in round 10, seventy-two percent (72%) of throws landed within five feet of the target.

Chart C highlights the varying levels of skill by each participant. For example, the 31 year old former pro athlete succeeded in being within five feet of the target 61% of the time, while the 23 year female was only successful 42% of the time.

These charts, made from the statistical data produced from the case study, indicate that landing within five feet of a target is based both on an individual skill level and that an individual's skill level improved through practice.

Article XVII, § 7 of the South Carolina Constitution (1895 as amended) prohibits all lotteries except in certain narrow circumstances specified therein. *Darlington Theatres v. Coker*, 190 S.C. 282, 2 S.E.2d 782 (1939) enunciates the criteria for determining a lottery as follows:

1. the offering of a prize;
2. the payment of money or other consideration for the opportunity to win a prize;
3. the awarding of the prize by chance.

In addition, S.C. Code Ann. Section 16-9-10 also forbids lotteries. A lottery is a form of gambling. *Johnson v. Collins Entertainment Co., Inc.*, 333 S.C. 96, 508 S.E.2d 575 (1998). Other statutory enactments prohibit various forms of gambling and gaming devices. *See, e.g.*, § 16-19-40 (unlawful games and betting); § 16-19-50 (keeping unlawful gaming tables); § 16-19-80 (forfeiture); § 16-19-90 (betting on elections); § 16-19-130 (betting or wagers prohibited); §§ 12-21-2710 and -2712 (gambling devices constitute contraband *per se* and are subject to forfeiture).

In *Op. S.C. Atty. Gen.*, March 24, 1986, we set forth the general definition of “chance” as it relates to lotteries and gaming:

[c]hance, as one of the elements of a lottery, has reference to the attempt to attain certain ends, not by skill or any other known or fixed rules, cut by the happening of a subsequent event, incapable of ascertainment or accomplishment by means of human foresight or ingenuity (I)t is not necessary that this element of chance, be pure chance but it may be accompanied by an element of calculation or even of certainty; it is sufficient if chance is dominant or [the] controlling factor

By comparison, “[a] game of skill ... is one in which nothing is left to chance, but superior knowledge and attention, or superior strength, agility, and practice gain the victory.” *State v. Eisen*, 192 S.E.2d 613, 615-16 (1972). While the South Carolina Supreme Court has never squarely adopted the so-called “Dominant Factor” test, the dissent in *Johnson v. Collins Entertainment Co., Inc.*, *supra* indicated that the Court would likely accept this rule. In *Johnson*, Justice Burnett, joined by now Chief Justice Toal opined:

... where the dominant factor in a participant’s success or failure in a particular scheme is beyond his control, the scheme is [a game of chance], even though the participant exercises some degree of skill or judgment. If a participant’s skill does not govern the results of the game, the scheme contains the requisite chance necessary to constitute a [game of chance].

In a recent opinion, *Op. S.C. Atty. Gen.*, February 2, 2006, we applied these general principles to determine the legality of a plan by a local high school to raise funds for charity. The plan in question involved a golf contest, one which involved the following:

[t]here will be 22 flights consisting of 200 contestants each who have entered the contest by paying an entry fee of \$100 or by selling 10 entry fees of \$100 each. Each contestant will be given the opportunity to chip two golf balls from the goal line to a pin located in the 50-yard line of one of the football fields at the ... High School. The contestant with the golf shot closest to the pin in each flight will qualify to move to the finals of the tournament.

The finals of the tournament will be held at the halftime of the Dutch Fork v. Chapin football game in the fall of 2006. Each contestant will again be given the

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opportunity to chip two golf balls as before. The top three or four contestants with the shots closest to the pin will win a new car. First choice of the [cars] will be given to the best shot and so on.

In our February, 2006 opinion, we concluded that the contest was primarily a game of skill and thus not illegal. We referenced therein a previous opinion of August 29, 2003 wherein we considered the “legality of tournaments based upon contests of skill, in whatever form, in which a prize, purse, or premium, usually in the form of cash, is offered to contestants who win or place highly in the tournament.” In that 2003 Opinion, we had advised as follows:

[t]he assumption of your question is that a particular contest is purely one of skill; the entity operating the tournament or contest does not participate in the contest or through representatives; the participants pay an entry fee, but the entry fee does not determine or make up the prize, purse or premium; and the total prize, purse or premium is not based upon the number of persons entering the contest or the amount of the entry fees. Based upon these assumptions, and the authorities referenced above, it is our opinion that a game which meets all of these criteria would likely be held by a court not to violate South Carolina’s gambling laws

Furthermore, we noted that the August 29, 2003 Opinion distinguished a previous Opinion regarding the legality of a “hole in one” contest from those games relating to the game of golf generally. Unlike a golf tournament, which predominantly involves skill, a hole in one in golf is, in our view, as expressed in an Opinion of September 5, 1995, “such a fortuitous event that skill is almost an irrelevant factor.” Thus, our Opinion of February 2, 2006 concluded that the proposed golf contest was legal, stating as follows:

[b]ased upon all the foregoing authorities, we conclude that the plan set forth in your letter would likely be held by a court not to violate South Carolina’s gambling laws. In terms of the element of skill, we deem the Dutch Fork plan more akin to the traditional golf tournament than to the hole-in-one contest addressed in our September 5, 1995 opinion. A contest which offers a prize to a golfer or golfers who can place one or more golf shots closest to the hole is, in reality, a condensed version of the game of golf which has as its hitting the ball in the hole in the least number of shots possible. Such is primarily a game of skill, in marked contrast to a “hole in one contest,” the results of which are largely fortuitous. Thus, assuming the Dutch Fork plan operates as described in the letter which you have enclosed, we are of the opinion such does not violate the gambling laws of South Carolina.

Conclusion

In our opinion, the “Chuck-A-Puck” contest appears to be analogous to the golf contest, outlined above. The object of the “Chuck-A-Puck” promotion, like that of the golf contest, is to come as near as possible to a target. As a general proposition, such a contest – whether it be golf or

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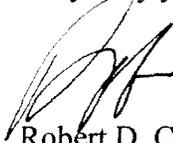
horseshoes – involves skill, based upon strength, agility or practice. As is stated in *Brown v. Bd. of Police Com'rs of City of L.A.*, 136 P.2d 617, 619 (1943), [i]t may be admitted that competitive shooting at a target is a game of skill.”

Of course, this Office has consistently emphasized that we do not make factual determinations in an Attorney General's Opinion. *Op. S.C. Atty. Gen.*, December 12, 1983. Only a court may make such determinations. However, we have been presented with raw data, which indicates that skill plays a significant role in this contest. As noted above, “[a] game of skill ... is one in which nothing is left to chance, but superior knowledge and attention, or superior strength, agility and practice gain the victory.” *State v. Eisen, supra*. Here, the data submitted to us supports “Chuck-A-Puck” as a game of skill, indicating not only wide variances in performance among the participants, but improvement based upon practice.

Moreover, like the golf contest addressed in our February 2, 2006 Opinion, the person who does best in the initial round, may then compete for the ultimate prize, which clearly involves a game of skill – the ability to toss the puck through the goal. While our earlier opinion regarding the “Chuck-A-Puck” contest pointed out initial misgivings we had with whether the competition in the initial round is a game of chance or one of skill-analogizing therein the Chuck-A-Puck to a hole-in-one contest and thus more likely a game of chance – further examination alleviates those misgivings. The additional data appears to show that skill is primarily involved in coming nearest to the target and that practice improves performance. This makes the “Chuck-A-Puck” promotion more akin to the golf contest discussed in our February 2, 2006 Opinion than the “hole in one” contest addressed in our September 5, 1995 opinion..

Accordingly, it is our opinion, based upon the additional information provided and the analogy of our February 2, 2006 Opinion, that a court would likely determine that the “Chuck-A-Puck” contest, as outlined above, is primarily a game of skill and thus not violative of the South Carolina gambling laws.

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General