



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN, TEXAS 78711

**WILLIAM FORD C. MARTIN
ATTORNEY GENERAL**

December 27, 1972

Honorable Tom Hamilton
District Attorney
64th Judicial District
Courthouse
Plainview, Texas 79072

Opinion No. M-1286

RE: Whether a certain advertising scheme whereby cards are punched and tokens drawn is a lottery?

Dear Sir:

You have requested our opinion concerning the advertising scheme of a local merchant awarding prizes by drawings, and have inquired as to whether the plan would constitute a lottery in violation of Article 654, Vernon's Penal Code, the more relevant provisions of which read as follows:

"Section 1. (a) '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.

(b) 'Consideration' means anything which is a financial advantage to the promoter or a disadvantage to any participant."

Your description of the plan is as follows:

- "(1) Cards substantially similar to the attached example will be printed. These cards will be given to any person that comes into the store, whether such person makes a purchase or not.
- (2) At the time a card is given to a person, the store employee handing out such card will punch out the figure "1" at the left end of the card under the heading "Free Weekly Punches". Thereafter

the person holding such card will be required to bring it back to the store each week to have an additional number punched out.

- (3) If a person receiving a card wishes to make purchases at the store, then, in addition to the weekly punch number the amount of each purchase will be punched at the right side of the card. The card is retained by the person at all times.
- (4) A large wire drum will be placed in the store. Into this drum will be placed tokens upon which will be printed a cash value. The minimum cash value to be printed on a token will be \$1.00. The maximum cash value to be printed on a token will be \$100.00. All tokens placed in the wire drum will be printed with a dollar value. The number of tokens to be placed in the wire drum will be equal to the number of cards printed.
- (5) At such time as the person holding a card has had all of the weekly numbers punched out or has had all of the purchase sections of the card punched out, he is entitled to surrender the card to a store employee and to draw one token from the wire drum. The store will pay such person the dollar amount shown on the token.
- (6) After a person holding a card has completed it in one of the two authorized methods and has drawn a token, he is entitled to receive a new card.
- (7) The advertising program is to run for a period of twelve weeks, and cards will be given out to anyone requesting them during such twelve-week period. At the end of the twelve-week period, no additional cards will be given out; however, any person holding a card at the end of the twelve-week period will still be entitled to have the card completed, either by continuing to secure a weekly number punch or by having the purchase record punched out. At

the time of completion such person will be entitled to draw a token from the wire drum."

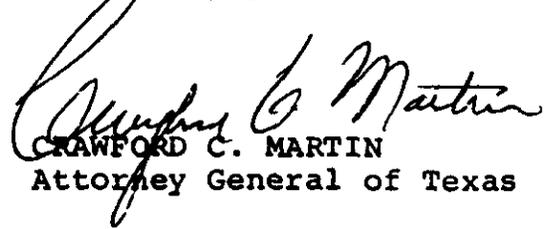
Texas cases have consistently held that a lottery is composed of three elements: "(1) a prize or prizes; (2) the award or distribution of the prize or prizes by chance; (3) the payment either directly or indirectly by the participants of a consideration for the right or privilege of participating." State v. Socony Mobil Oil Co., 386 S.W.2d 169, 172 (Tex.Civ.App. 1964, ref. n.r.e.) In the plan under discussion, there are clearly prizes and they are clearly distributed by chance. The controlling question in determining whether this plan constitutes a lottery is whether the element of consideration is present.

In your description of the prize plan, there are two ways in which a person may draw a prize: by having all of the weekly numbers punched or by having all of the purchase section punched. Thus there are two classes of participants: non-purchasers and purchasers. A participant upon completing one card is entitled to a new card. For the non-purchaser it requires twelve weeks to complete the first card, while the purchaser may complete several during that same period. The rules also provide that no additional cards will be distributed after the end of the initial twelve week period. Thus the non-purchaser at most could receive two chances. In contrast, the purchaser could receive any number, according to how many purchases he made. It is therefore obvious that in the proposed scheme the purchaser receives additional chances in the give-away solely because of the purchases, and in relation to the amount of his purchases. Although it is true that anyone may participate without making a purchase, it is also true that additional chances are available in exchange for purchases made, which but for those purchases are not available. The purchases would, then, constitute consideration for those additional chances, rendering the plan, as proposed, a lottery in violation of Article 654, Vernon's Penal Code.

S U M M A R Y

The proposed advertising scheme, in providing more chances for prizes to purchasers than to non-purchasers, constitutes a lottery in violation of Article 654, Vernon's Penal Code.

Very truly yours,


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