



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

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ATTORNEY GENERAL**

September 25, 1953

Hon. Jack Y. Hardee
County Attorney
Henderson County
Athens, Texas

Opinion No. MS-94

Re: Legality of "Appreciation
Day", a retail trade promo-
tion enterprise under sub-
mitted facts.

Dear Mr. Hardee:

Your opinion request reads in part:

"Here in Henderson County the merchants in some of the smaller towns have been using a retail sales promotion program called 'Appreciation Day'. Other merchants are interested in using such a program and I am submitting to you herewith the facts connected with the operation of this program and request of you an opinion as to the legality of this 'Appreciation Day' program with reference to the Constitution and laws of Texas.

"The facts relating to this retail trade promotion enterprise are as follows:

"The National Trades Day Association of Weatherford, Texas, for the past eighteen years has regularly sold to retail merchant groups such as Chambers of Commerce in communities throughout many states a systematic trade extension and community survey plan known as 'Appreciation Day'. The purpose of the plan is to provide a vehicle by which the merchants working through their local Chamber of Commerce can accurately define their retail trading territory and promote better relations with the customers and residents of this area.

"The plan involves the setting aside of one day in each week as 'Appreciation Day'. On this day, the merchants do numerous things betokening their appreciation to the people who reside in the area, offering special values on various articles of merchandise and in some instances providing free baby sitter services for those visiting the community. In addition, an award is made each week to some individual, and the award is determined in the following manner:

"Coupons are distributed freely to all desiring them. The first public approach is by the distribution of thousands of printed announcements in the trade territory with thousands of these coupons, all free. This distribution is done by employing delivery boys to place one in each house and in parked cars throughout the entire town and in the surrounding agricultural settlements.

"In addition, coupons may be freely had for the asking at the office of the sponsoring organization (in most instances, the Chamber of Commerce) and in the places of business of the participating merchants. It is not necessary to make a purchase in order to secure coupons, nor even to enter the establishment of a participating merchant, as they are freely available at the Chamber of Commerce office and are offered to all present at the weekly program and drawing which is conducted in a public place, independent of any merchant's place of business. This is explained on the initial printed announcement, in these words:

"Attached to this folder, you will find a Treasure Chest coupon. You may secure others upon request at any time or at the office of the sponsor. Coupons will be offered to all present at the weekly Appreciation Day program. They are free.'

"An individual may, in fact, ask for several coupons, or for a particular type of coupon and his request is honored. Said coupon may be of the same value or varying values indicated by a percentage punched on the coupon. The percentage punched on the coupon will be either 5%, 10%, 20%, 30%, 40%, or 50%, entitling the party who has received the coupon and written his or her name and address on the reverse side thereof to that percentage of the fund indicated.

"A thoroughly mixed quantity of the coupons reposes in an open container at the Chamber of Commerce office and in an open container in each store. A visitor may if he desires ask for a 50% coupon and he will receive it. Or he may merely reach into such a container and secure such coupon or coupons as he desires. Visitors are, in fact, invited to do this.

"In all of the above, coupons are actually distributed to thousands of people, and the distribution is unrelated in any way to any purchase or patronage any of these individuals may have given to or withheld from any merchant.

"In addition to the above, a coupon is offered to anyone making a purchase in any of the stores. In these instances the percentage punched on the coupon bears a relation to the total amount of the transaction, in order that community surveys may be made periodically to determine the size of the average unit purchase in a given store, the exact boundaries of the trade territory from which a store individually and the business community collectively draws its trade, and the amount of money spent each month in the town from each of the surrounding areas. When the merchants discover, for instance, that they are enjoying a relatively small amount of business from a given section of the territory, the Chamber of Commerce organizes a good-will tour into the area for the purpose of acquainting the residents thereof with the town and cementing better relations in general.

"In order that these surveys may accurately reflect the location of the trade territory and the amount of purchases made in the town, these coupons given with purchases differ from the thousands given independent of purchases only in that those given to people who have purchased bear in the lower right hand corner a merchant's number identifying them as having come from a particular store; while the great bulk of coupons distributed independent of purchases have no merchant's number printed on them. Otherwise, the coupons are identical.

"For the drawings, there is no distinction made between coupons distributed freely with the announcement folders, coupons distributed freely from the sponsor's office, coupons obtained freely by being drawn out of customers or non-customers from a container in the establishment of a member merchant, coupons given freely to the members of the audience attending the weekly program, and the 'survey' coupons issued after purchases.

"The 'survey' coupons are not held out as an inducement to purchase, and coupons often of identical value are offered where no purchase is involved, but the 'survey' coupons are offered after a sale has been consummated in order to facilitate the accuracy of the records.

"The winner is not required to be in any place of profit or in the building of any particular merchant. The weekly programs at which the awards are made are conducted in the most public spots in the community, such as the city park or square or on a street roped off in the business section. Just before each drawing a public announcement is made offering anyone present for the program an

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opportunity to secure a coupon, sign his name on the back and deposit it in the container for the drawing, free of any charge whatever."

Article III, Section 47, of the Constitution of Texas, states as follows:

"The Legislature shall pass laws prohibiting the establishment of lotteries and gift enterprises in this State, as well as the sale of tickets in lotteries, gift enterprises or other evasions involving the lottery principle, established or existing in other states."

Article 654 and 655 of the Penal Code refer to "lottery" and "raffles" and were apparently passed by the Legislature in obedience to Article III, Section 47, of the Constitution. Article 654 reads as follows:

"If any person shall establish a lottery or dispose of any estate, real or personal, by lottery, he shall be fined not less than one hundred nor more than one thousand dollars; or if any person shall sell, offer for sale or keep for sale any ticket or part ticket in any lottery, he shall be fined not less than ten nor more than fifty dollars."

There is no Texas statute which defines a lottery, but the courts have consistently adopted the following definition:

"A lottery is a scheme for the distribution of prizes by lot or chance among persons who have paid, or who have agreed to pay, a valuable consideration for the opportunity to win these awards. City of Wink v. Griffith Amusement Co., 129 Tex. 40, 110 S.W. 2d 695 (1936); 28 Tex. Jur. 409, 410, Lotteries, Sec. 2."

Thus it is apparent that every lottery consists of three essential elements as follows: (1) prize; (2) chance; and (3) consideration.

The element of prize and chance are obviously present in the fact situation which you present. The proposition, therefore, resolves itself into a question of whether a consideration is paid for the privilege of competing for the prizes.

The determination of this question depends, to a large extent, on the facts presented in the particular situation involved.

There are several Texas cases on the subject, which cases are not always consistent in the reasoning or their results. However, it appears that the late case of Brice v. State, 242 S.W.2d 433 (Tex.Crim. 1951) is the latest case on this subject and is controlling in this situation. In that case a merchant invited the general public to come into his store and register for a prize to be given away. It was not necessary for the participant to make a purchase or to be present at the drawing to win. The Court held:

"Under the authorities mentioned we must conclude that in the absence of any character of favoritism shown to customers, the lottery statute, Art. 654 P.C., is not violated under a plan whereby a merchant awards a prize or prizes by chance to a registrant without requiring any registrant to be a customer or to purchase merchandise or to do other than to register without charge at the store, though the donar may receive a benefit from the drawing in the way of advertising."

It is significant that the language of the above opinion makes use of the word "requiring", for the question is not what the merchant may "permit" a registrant to do, but precisely what does the merchant "require" of an individual as a condition to that individual's becoming eligible for an award.

It is evident from the Texas cases that a mere subterfuge or evasion of the lottery law by way of offering a few "free chances" or making it practically impossible for a "free chance" to win, will not be allowed. We quote from the case of Featherstone v. Independent Service Station Association, 10 S.W.2d 124 (Tex.Civ.App. 1928) as follows:

"While dealers, under the new plan, distributed tickets to non customers as well as to customers, it seems that the scheme was to distribute tickets, in the main to customers, as the evidence discloses that only a few, negligible in number, were given to persons other than customers. . . . /F/ or one undivided price both were purchased, the merchandise, or service, and ticket, the ticket being as much bought as though priced separately."

The plan involved in that case was held to be a lottery.

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There is, however, no prohibition against a merchant giving away a prize nor is he prohibited from determining who shall receive that prize by making available free coupons upon which the participant must register his name and address. Brice v. State, (supra). The fact that the merchant uses certain of the coupons given free after a purchase by a customer, for a business survey to determine where "good will tours" should be conducted and for other business purposes, does not, of itself, render his action a violation of the law. If this action is merely a subterfuge or evasion of the law and there is actually a consideration passing between the merchant and the participant for the privilege of participating, then the plan will, of course, not be tolerated as this office has many times held in opinions on similar fact situations. Att'y. Gen. Op's. No. O-1174 (1939); No. O-2343 (1940); No. V-1420 (1952). However, where it is evident that there is no purpose to circumvent the law and where it is obvious that no consideration passes between the merchant and the participant, the existence of the elements of chance and prize in a particular merchandizing plan will not render such a plan a violation.

Under the Appreciation Day program, as you have submitted it, it is evident that no person is ever either required or expected to be a customer as a condition to being eligible for an award, that the survey coupons are not held out as an inducement to purchase anything, that any person may conveniently register and have an equal chance to win without purchases and that in actual fact many do so. It is also evident that the "free" coupons which are given away under the submitted plan are great in number and widely distributed to all who wish to participate, in that thousands of such "free" coupons are distributed in cars, in homes, at the ceremony and in the various business establishments and the Chamber of Commerce. It is our opinion from the facts which you give us that participation by the general public without any requirement that they be customers or pay any consideration is indeed a reality and not a subterfuge or evasion. Under these facts we must conclude that such a plan is legal.

Yours very truly,

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Attorney General

By

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