

State of Texas
House of Representatives



OPINION COMMITTEE
JUN 05 2000
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Kip Averitt

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June 1, 2000

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The Honorable John Cornyn
Attorney General
State of Texas
P.O. Box 12548
Austin, Texas 78711-2548

OPINION COMMITTEE

FILE # ML-41449-00

ATTN: Opinions Committee

I.D. # 41449

RQ-0238-8

Dear General Cornyn:

This is a request for an Attorney General's Opinion regarding the application and meaning of Section 2001.556 of the Bingo Enabling Act (Chapter 2001, Occupations Code).

Background: Under the Bingo Enabling Act, the Legislature has provided for a three-tiered system of regulation of the manufacture, distribution and retail sale of bingo supplies and equipment that licensed charities use to conduct bingo. Strict separation of control is required between each entity in the distributive chain (manufacturer, distributor and charity). Each manufacturer, distributor and charity that conducts bingo must be separately licensed to operate in this state.

A manufacturer is prohibited from selling or leasing bingo equipment or supplies directly to a charity that conducts bingo. A manufacturer must sell or lease bingo supplies or equipment to a distributor, who in turn may sell or lease the supplies or equipment to a licensed charity for use in conducting bingo. (See Section 2001.407, Occupation Code)

Section 2001.556, Bingo Enabling Act, provides:

"Sec. 2001.556. PRICE FIXING PROHIBITED. (a) A manufacturer, distributor, or supplier may not by express or implied agreement with another manufacturer or distributor fix the price at which bingo equipment or supplies used or intended to be used in connection with bingo conducted under this chapter may be sold.

(b) The price of bingo supplies and equipment in the competitive marketplace shall be established by the manufacturer, distributor, or supplier and may not be established in concert with another manufacturer, distributor, or supplier."

Immediately below is a provision of a contract in use or being proposed for use to govern the business relationship between a manufacturer of bingo equipment and one or more licensed

distributors. (The names of the parties or potential parties to the agreement have been deleted.)

"[Manufacturer] will establish customer pricing arrangements. No credits, discounts, or any other promotional allowances shall be allowed without [manufacturer's] explicit approval. Distributor will handle all customer collections. Distributor will remit to [manufacturer] for all revenue due less commission due Distributor on a weekly basis along with a cash receipt report. [Manufacturer] shall be entitled to audit the books of Distributor on a reasonable basis and upon reasonable notice to Distributor. Any such audit shall be limited to only such information as shall be specifically required to verify the gross receipts received by Distributor from customers governed by this Agreement."

Other provisions of the contract in use or proposed for use include the requirement that in presenting the product to its potential customers the distributor may use only the pricing information provided by the manufacturer and must limit all representations about the product to those made by the manufacturer in its own literature.

It is important to understand that the use of the word "customer" in the cited contract provision refers to the charities to which the equipment will be sold or leased by the distributor.

Under Section 2001.407, the charity cannot be a manufacturer's customer; the charity must deal only with a distributor.

Thus, under the terms of this manufacturer/distributor agreement the distributor agrees to charge its customer-- *the charity* --a price set by *the manufacturer*, unless the manufacturer *explicitly agrees with the distributor* to charge a different price. Under the terms of the contract, the distributor is not allowed to unilaterally alter the price paid by the charity by, for example, voluntarily cutting its margin.

A distributor's failure to charge and collect from the charity the price set by the manufacturer, or to consult with and obtain the manufacturer's explicit approval of a different price, would breach the contract. Under the terms of the contract, a material breach can result in termination for cause on 30 days notice, coupled with contract damages and any other remedies allowed by law.

(Contrast the contract provision above with a system formerly used in the industry in which the manufacturer set a price to be paid to it *by the distributor*. The distributor then unilaterally set the price it charged to the charity. The distributor had no contractual obligation to the manufacturer to charge the charity any specific amount, maximum or minimum. Distributors alone established their price to the charity based on competition with other distributors, the volume of business done with the charity and the distributor's willingness to cut its markup in light of the competition and volume.)

Questions: Under Section 2001.556(a) and (b), Occupation Code:

(1) May a manufacturer of bingo equipment and a distributor of bingo equipment agree, expressly or by implication, as to the price at which the distributor will sell or lease the bingo equipment to a charity?

(2) May a manufacturer of bingo equipment and a distributor of bingo equipment agree, expressly or by implication, that the distributor may not unilaterally allow any discounts, credits or other promotional allowances to a charity in connection with the purchase or lease of bingo equipment?

(3) Given the facts stated in this letter and Texas law, is the contract provision cited above unenforceable?

(4) Would your answers to questions 1 through 3 vary if the bingo equipment is leased, rather than sold.

If you have any questions regarding this request please contact my office at 463-0712

I look forward to your response.

Sincerely,

A handwritten signature in black ink that reads "Kip Averitt". The signature is written in a cursive style with a large, sweeping flourish that extends to the right and slightly upwards.

Kip Averitt
State Representative