



**THE ATTORNEY GENERAL  
OF TEXAS**

**AUSTIN 11, TEXAS**

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December 23, 1952

Hon. Odis Tomachefsky  
County Attorney  
Washington County  
Brenham, Texas

Opinion No. V-1564.

Re: Legality of a drive-in  
theater's conducting a  
progressive drawing  
with coupons obtained  
free from sponsoring  
merchants.

Dear Sir:

You have requested of this office an opinion concerning the legality of a certain sales promotion enterprise conducted by a local drive-in theater, in view of the statutory prohibition against lotteries. A representative of the theater has described the scheme thus:

"We, the Starlite Drive-In Theatre, Brenham, Texas, propose to give away a free 12-day vacation trip for two people to California, through an advertising program to be accomplished as follows:

"We are to select 12 local business firms to participate in the giving away of this vacation trip, whereby the merchants are to give away chances on a no-purchase-required basis to obtain these coupons. They are free.

"People receiving chances on this trip may deposit the coupons in a hopper located in the concession stand of the Starlite Theatre or a hopper at the box office of the theatre, or they may be mailed direct to said theatre. No theatre admission ticket is necessary nor does the coupon holder have to be present to win.

"We plan to select 30 names on a certain night of each week. These 30 names to qualify for the final giving away of the trip some 12-weeks after the beginning of the program. After the selection of these 30 names, the coupons not qualifying for the grand hopper will

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be destroyed after each weekly progressive selection.

"At the end of 12 weeks, we will have 360 coupons from which we will make our final selection. We will select the winner by drawing one of these 360 coupons in the grand hopper. This person does not have to be present to win the trip."

Your request further states:

"It is my further understanding, with respect to the above proposition as presented to my office by the manager of the local Drive-In Theatre, that the manager of said theatre is to select 12 local business firms to participate in this program by giving away tickets or chances at their local establishment. These tickets or coupons are given away on a non-purchase basis to anyone who might enter their store. It is, however, my further understanding that these merchants that are to participate in this program are to pay to the manager of the theatre a certain fee to help in defraying the cost of advertising this program. Also, that the theatre will pay a fee to the promoter of this scheme or program, who will set up the program for the theatre and the merchants participating therein.

"It might be further pointed out that it is my understanding that, according to the program outlined, the parties obtaining the tickets from the various merchants involved in this program can deposit the tickets either by personally dropping the same in one of the boxes located at the theatre or by mailing the same direct to the theatre."

Section 47 of Article III of the Constitution of Texas directs the Legislature to enact laws prohibiting the establishment of lotteries and gift enterprises in this State. Pursuant to this mandate the Legislature enacted Article 654, Vernon's Penal Code, which provides:

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"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."

A lottery has been judicially defined as 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 the award. City of Wink v. Griffith Amusement Company, 129 Tex. 40, 100 S.W.2d 695 (1936); 54 C.J.S. 843, Lotteries, Section 1; 28 Tex. Jr. 409, 410, Lotteries, Section 2. Thus it is apparent that every lottery consists of three essential elements, as follows: (1) prize, (2) chance, (3) consideration.

The elements "prize" and "chance" are clearly present in the plan described in your request. Therefore our inquiry necessarily will deal with the presence or absence of the element of consideration.

The Texas courts have dealt with this question numerous times in the consideration of the various "Bank Night" contests held by motion picture theaters. Almost without exception these games were held to be lotteries despite the fact that chances for the prize were distributed to large numbers of persons who did not hold theater tickets, as well as to patrons of the theaters. The distribution of "free" chances was considered but a subterfuge which would not have the effect of removing the element of consideration from an otherwise illegal scheme. City of Wink v. Griffith Amusement Company, 129 Tex. 40, 100 S.W.2d 695 (1936); Cole v. State, 133 Tex. Crim. 548, 112 S.W.2d 725 (1938); Robb & Rowley, United v. State, 127 S.W.2d 221 (Tex.Civ.App. 1939); State v. Robb & Rowley, United, 118 S.W.2d 917 (Tex.Civ.App. 1938). See also Att'y Gen. Op. V-1483 (1952).

A number of other sales promotion enterprises in which the participating merchants distributed chances

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for prizes among their customers have been declared lotteries, even though many of the chances were also distributed in various ways to non-customers. Featherstone v. Independent Service Station Association, 10 S.W.2d 124 (Tex. Civ. App. 1928). See also Att'y Gen. Ops. 0-2843 (1940) and V-1420 (1952).

In Smith v. State, 136 Tex. Crim. 611, 127 S.W.2d 297 (1939), the Court of Criminal Appeals considered a promotion scheme known as "Noah's Ark," which is quite similar in many respects to the one described in your request. There a number of merchants paid license fees to a promoter who distributed cards to the merchants. The merchants distributed these cards to persons entering their stores, some in exchange for box tops and other evidences of purchases, many others to persons who did not make purchases at the participating establishments. These cards of course were chances for a prize. The court held that this plan constituted a lottery. The license fees paid by the merchants constituted consideration moving indirectly from the contestants to the promoter, and the merchants received their consideration in the form of advertising and increased patronage.

The most recent decision by the Court of Criminal Appeals is Brice v. State, 242 S.W.2d 433 (Tex. Crim. 1951). There the general public was invited to register for a contest held at the opening of a new retail store. None of the chances for the awards were distributed on the basis of purchases from the donor, and apparently no favoritism was shown the customers. However, the merchant did not pay license fees or any other form of consideration to a promoter. It was held that such a scheme does not violate Article 654, V.P.C., and that the element of consideration was not added by the mere prospect of increased patronage. Previous opinions of this office are in accord with this result. Att'y Gen. Ops. 0-2309 (1940), V-167 (1947).

We agree with your conclusion that Smith v. State, supra, presents the closest analogy to the plan under consideration here. Although the participants may receive chances on a no-purchase-required basis, you have stated that the merchants paid certain fees to the theater which conducts the drawing. The theater

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in turn pays a fee to a promoter to set the plan in operation at the theater and at the stores. This constitutes consideration moving indirectly from the participants to the promoter, and it is sufficient to bring the scheme within the statutory prohibition. In this respect, the following language in Smith v. State, supra, at page 298, is particularly significant:

"We think it clearly appears herein that appellant received a fee from the 145 merchants and dealers who paid him a license fee and joined his 'Noah's Ark' organization, and that the payment of such fee operated as a consideration for the entering into the drawing contest of all persons who came to such dealer's place of business and requested a card or a stamp for the purpose of entering this contest. That this license fee was the payment of a consideration moving indirectly from the contestant and directly to the supervisor or owner of this scheme.  
. . ."

It is difficult to ascertain from descriptive literature alone the exact nature of any given scheme conducted on the lottery principle. The written description might differ materially from the manner in which the plan is actually carried out. However, it appears from the description of the plan in question that the element of consideration is present, and therefore we agree with you that the scheme is a lottery within the contemplation of Article 654, Vernon's Penal Code.

#### SUMMARY

A retail sales promotion plan in which prizes are distributed at a motion picture theater to persons who have obtained chances either at the theater or at one of

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twelve participating retail stores is a lottery and prohibited by Article 654, V.P.C., where the merchants pay a fee to the theater, which in turn pays another fee to the promoter of the plan.

APPROVED:

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Yours very truly,

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