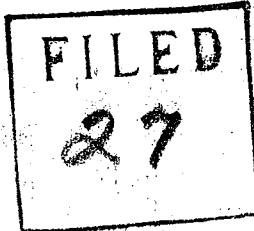


LOTTERY: An operation whereby an automobile dealer gives a prize to the person who supplies the largest number of prospective purchasers who actually purchase an automobile does not contain the element of chance and is therefore not a lottery.

October 22, 1954



Hon. Irvin D. Emerson  
Assistant Prosecuting Attorney  
Jefferson County  
Hillsboro, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office, which request reads as follows:

"This office has been requested to give an opinion as to whether or not a certain promotion plan contemplating being used by auto dealers of this county constitutes lottery.

"The plan is to give each purchaser of a new automobile a prospect book containing cards. The owner of each automobile purchased is privileged to furnish the dealer with names and addresses of prospective purchasers. Such information will be placed upon the cards and mailed to the dealers.

"At the end of the year, the owner of the newly purchased automobile who has furnished the dealer with the largest number of prospects who have actually purchased a new car from the dealer, will be entitled to a new automobile in exchange for his old one, and without additional consideration. The other new car purchasers who have furnished to the dealer prospects who have purchased a new automobile, will be paid the sum of one dollar for each prospect whose name was furnished to the dealer and who, in fact, purchased a new automobile.

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"Your opinion on this question will be appreciated by this office."

The question to be determined from the facts submitted is whether or not the procedure outlined would be in violation of Section 563.430 RSMo 1949, which section reads as follows:

"If any person shall make or establish, or aid or assist in making or establishing, any lottery, gift enterprise, policy or scheme of drawing in the nature of a lottery as a business or avocation in this state, or shall advertise or make public, or cause to be advertised or made public, by means of any newspaper, pamphlet, circular, or other written or printed notice thereof, printed or circulated in this state, any such lottery, gift enterprise, policy or scheme or drawing in the nature of a lottery, whether the same is being or is to be conducted, held or drawn within or without this state, he shall be deemed guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary for not less than two nor more than five years, or by imprisonment in the county jail or workhouse for not less than six nor more than twelve months."

In the case of State ex inf. McKittrick, Attorney General, v. Globe Democrat Publishing Company, 110 SW 2d 705, 1.c. 713, the Supreme Court of Missouri stated:

"The elements of a lottery are: (1) Consideration; (2) Prize; (3) Chance."

The absence of any one of the three elements above mentioned would remove a particular plan, scheme or transaction from the operation of Section 563.430. Therefore, for the sake of brevity, we shall first examine the procedure outlined to determine if the element of chance is present.

The term "chance," as it relates to lottery statutes, has been defined in 6 Words and Phrases, 1954 Cum. Supp. p. 142, as follows:

"The 'chance,' which is an essential element of lottery, is the antithesis of that

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which happens by plan or design or by the exercise of volition or judgment. Com. v. Laniewski, 98 A. 2d 215, 217, 173 Pa. Super. 245.

"As an essential element of a lottery, the word 'chance' refers to attempt to attain certain ends, not by skill or known or fixed rules, but by happening of a subsequent event, incapable of ascertainment or accomplishment by means of human foresight or ingenuity. U.S. v. Rich, D.C. Ill, 90 F. Supp. 624, 627.

\* \* \* \* \*

"'Chance,' as element of lottery, is something that befalls as result of unknown or unconsidered forces, a happening in a particular way, issue of uncertain conditions, a fortuity, an unforeseen or inexplicable cause or its operation, or an accident. Minges v. City of Birmingham, 36 So. 2d 93, 96, 97, 251 Ala. 65."

Applying the above-noted definitions we are compelled to the conclusion that the element of chance is lacking in the procedure described. Certain fixed rules govern the awarding of the prize. The person who supplies the automobile dealer with the largest number of prospects who actually purchase a new car from the dealer within a time certain is allowed to exchange his automobile for a new one. Such a result is not, in our opinion, inexplicable nor incapable of ascertainment, but may be accomplished by means of human foresight or ingenuity. Having reached the conclusion that the element of chance is absent, we are of the opinion that the scheme or procedure outlined does not constitute a lottery as contemplated by Section 563.430.

#### CONCLUSION

Therefore, it is the opinion of this office that an operation whereby a person who purchases a new automobile is given a book containing cards upon which said purchaser lists and submits to the dealer prospective buyers, and whereby the person who submits the greatest number of prospective purchasers who actually purchase a new automobile within a fixed time is

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allowed to exchange, without cost to himself, his automobile for a new one, does not constitute a lottery, since the element of chance is absent.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Donal D. Guffey.

Yours very truly,

John M. Dalton  
Attorney General

DDG/vtl