

Opinion No. 47-5064

August 11, 1947

BY: C. C. McCULLOH, Attorney General

TO: M. Ralph Brown District Attorney Second Floor Court House Albuquerque, New Mexico

{*77} This will acknowledge receipt of your letter of August 7, 1947, wherein you request the opinion of this office as to legality of a plan by the Phillips' Petroleum Company to give away a freeze unit at the State Fair.

The facts as stated in your letter and documents attached thereto are as follows:

{*78} It is proposed that the Phillips Petroleum Company will establish an exhibit at the state fair to be held in Bernalillo County in this State. The exhibit will have a large display to the effect that you register here for a freeze box which will be given away free without cost and without any purchase. The drawing will not be advertised elsewhere.

Anyone can come in and register. The Company is hopeful that the people will look around while they are there, ask questions of their representatives; but the company will not have anyone present to take orders. There will not be an order book in the display. The company will not use the register as a mailing list, nor will it be used for any other purpose except its use in the drawing. On the last day of the fair. a drawing will be held, and some lucky person will win a freeze unit. That person need not be present to win.

Section 41-2213 of the 1941 Compilation prohibits the setting up, drawing, managing or promotion of **lotteries**.

The Supreme Court of New Mexico in the case of State v. Jones, 44 N.M. 623, 107 P. 2d 324, held that the "bank night" plan constituted a lottery and stated:

"The test universally employed for detecting a lottery is the presence in the transaction of three elements, prize, chance and **consideration**. **The absence of any one is fatal to identifying the transaction as a lottery.**"

The question first to be determined is whether the element of **consideration** is present in the proposed plan. .

The exhibit will be at the State Fair, where those attending normally visit the exhibits anyway. No money is paid out by the patron, and no ticket of any kind purchased. The only requisite to win the freeze unit is registration. I doubt that mere registration would be sufficient to constitute "consideration."

"Bank night" plans are distinguishable from the present proposed plan since, in the "bank night" plan, consideration for the prize is in the purchase price of a theater ticket, or in the increase in gross receipts produced by the plan.

Since "consideration" is one of the necessary elements of lottery, and since it is absent under the facts herein stated. I am of the opinion that the proposed plan by Phillips Petroleum Company to give away a freeze unit at the State Fair does not constitute a lottery, and is, therefore, legal.

By: WILLIAM R. FEDERICI

Asst. Atty. General