



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 2, 1998

The Honorable Kim Brimer
Chair, Committee on Business and Industry
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 98-088

Re: Requirements of matched contests under the
Contest and Gift Giveaway Act, Business and
Commerce Code chapter 40 (RQ-1161)

Dear Representative Brimer:

You ask us to construe portions of the Contest and Gift Giveaway Act, codified in Business and Commerce Code chapter 40. The act regulates advertising and other promotional programs whereby a person is offered a gift or a chance to win a prize as an inducement to attend a sales presentation. A violation of its provisions carries criminal penalties and is actionable as a deceptive trade practice. *See* Bus. & Com. Code §§ 40.121, .122. The act directs us to interpret chapter 40 "to provide the maximum disclosure to, and fair treatment of, a person who enters a contest or gift giveaway through which the person is solicited to attend a sales presentation." *Id.* § 40.002.

You ask in particular about subchapter C, which governs "matched contests." A "matched contest" is a contest in which winning numbers are preselected, printed on an entry form, distributed to the public, and then matched with a list of winning numbers at the sales location to determine who has won a prize. *Id.* § 40.003(a)(7). Section 40.065 sets out the requirements of a matched contest. It provides:

- (a) The identity and number of the major prizes to be awarded in a matched contest shall be determined before the contest begins. That information shall be disclosed on each entry form distributed.
- (b) Each major prize identified on an entry form shall be awarded.
- (c) The contest period may not exceed 12 calendar months.
- (d) If, during the contest period, a winning number is not presented or matched for a major prize, the offeror shall conduct a drawing from the names of those individuals who have attended a sales presentation during the contest period. The offeror shall conduct the drawing not later than the 60th day after the date on which the contest period ends. Each major prize

identified on the entry forms distributed during the contest period that was not previously awarded shall be awarded at the time of the drawing.

You first ask if section 40.065(d) requires a prize to be awarded in a matched contest if: (1) it is verified that the winning number was distributed;¹ (2) the contest notification disclosed that the winning number must be presented before the contest period ends; (3) the contest notification stated that unclaimed prizes will revert to the contest organizer; and (4) the winning number was not presented before the end of the contest period. We assume that you are asking about the award of a “major prize,” defined as “a prize that has an actual unit cost to the offeror of at least \$250.” *Id.* § 40.003(a)(6). Section 40.065 does not speak to the requirements of matched contests for “minor prizes,” which have a cost of less than \$250. *See id.* § 40.003(a)(8).

The crux of your question is whether a prize may revert to the offeror, instead of being awarded by a drawing, if a winning ticket has been distributed but the winner does not claim the prize before the contest ends. We conclude that it may not. Section 40.065 provides unequivocally that unclaimed prizes in matched contests must be awarded by a drawing. Subsection (b) states: “Each major prize identified on an entry form shall be awarded.” Subsection (d) states: “If, during the contest period, a winning number is not presented or matched for a major prize, the offeror shall conduct a drawing from the names of those individuals who have attended a sales presentation during the contest period.” Subsection (d) also states: “Each major prize identified on the entry forms distributed during the contest period that was not previously awarded shall be awarded at the time of the drawing.” Furthermore, section 40.066, listing acts prohibited in a matched contest, provides that a person may not use a matched contest unless the person discloses in writing in the contest offer “the fact that all unclaimed prizes will be awarded by a drawing and the date of the drawing.” *Id.* § 40.066(b)(9). No provision is made in the act for the prize to revert to the offeror if it is not claimed. An offeror may not avoid the requirements of the act merely by notifying contestants of its intention to do so.

You next ask about section 40.066, which lists acts prohibited by a person “engaged in the preparation, promotion, sale, distribution, or use of a matched contest.” *Id.* § 40.066(a). Such a person may not, among other things, “use or distribute simulated checks or currency or other simulated items of value unless the words ‘SPECIMEN–NON-NEGOTIABLE’ are clearly and conspicuously printed on those items in at least 18-point type.” *Id.* § 40.066(a)(11). We understand from the correspondence attached to your request letter that you wish to know whether this requirement applies where a simulated check is distributed “in conjunction with” an advertisement for a matched contest, but where the check does not represent the prize to be awarded in the contest.²

¹A prize offeror in a matched contest must keep records showing, among other things, that the winning numbers have been deposited in the mail or otherwise made available to recipients. Bus. & Comm. Code § 40.092. You ask us to assume that the offeror can verify with these records that the winning number was distributed.

²It is unclear from your letter and the correspondence attached thereto what is meant by the phrase “in conjunction with.” In any event, we cannot, in an attorney general opinion, determine whether any particular matched
(continued...)

The purpose of the Contest and Gift Giveaway Act is “to regulate contests and gift giveaways through which persons are solicited to attend a sales presentation.” Senate Comm. on Economic Development, Bill Analysis, S.B. 1695, 71st Leg., R.S. (1989). The act was intended by the legislature to address “a compelling need for more complete disclosure of the rules and operation of contests and gift giveaways through which persons are solicited to attend a sales presentation,” and to help eliminate “misunderstandings as to the true requirements for participation and winning of prizes offered.” Act of May 22, 1989, 71st Leg., R.S., ch. 665, § 2, 1989 Tex. Gen. Laws 2196, 2196. The matched contest provisions of the act apply to “a person who uses a contest as part of an advertising plan or program.” Bus. & Com. Code § 40.061. The simulated check and other particular matched contest requirements and prohibitions apply to a person “engaged in the preparation, promotion, sale, distribution, or use of a matched contest.” *Id.* § 40.066(a). The act instructs us to construe it “to provide the maximum disclosure to, and fair treatment of, a person who enters a contest or gift giveaway through which the person is solicited to attend a sales presentation.” *Id.* § 40.002. We also may consider the objective sought to be obtained by the act, and its legislative history. *See* Gov’t Code § 311.023 (Code Construction Act).

In accordance with these principles, we conclude that a simulated check need not represent the prize to be awarded in a matched contest in order for the contest requirements to apply. We think the statute can be fairly construed to mean that if a simulated check is distributed in connection with the preparation, promotion, sale, distribution, or use of a matched contest, it must comply with the requirements of chapter 40. Whether a simulated check’s connection with a matched contest is sufficient to invoke chapter 40 depends upon the facts of each case, at all times bearing in mind the goal of the act: to provide maximum disclosure to, and fair treatment of, persons who enter a contest or gift giveaway through which the persons are solicited to attend a sales presentation.

²(...continued)

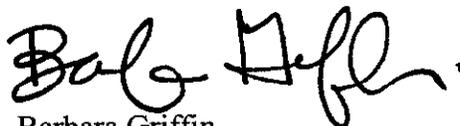
contest materials comply with the requirements of the Contest and Gift Giveaway Act, as such a determination involves questions of fact.

S U M M A R Y

The Contest and Gift Giveaway Act, Business and Commerce Code chapter 40, requires an unclaimed prize in a matched contest to be awarded by a drawing from the names of those individuals who have attended a sales presentation during the contest period. The act does not permit a prize to revert to the offeror if the prize is unclaimed at the end of the contest period.

The act also prohibits a person engaged in the preparation, promotion, sale, distribution, or use of a matched contest from using or distributing simulated checks or currency or other simulated items of value unless the words "SPECIMEN-NON-NEGOTIABLE" are clearly and conspicuously printed on those items in at least 18-point type. This requirement applies to a simulated check distributed in connection with the preparation, promotion, sale, distribution, or use of a matched contest, whether or not the check represents the prize to be awarded in the matched contest.

Yours very truly,

A handwritten signature in black ink, appearing to read "Barbara Griffin". The signature is fluid and cursive, with a period at the end.

Barbara Griffin

Assistant Attorney General
Opinion Committee