

SUBJECT: Prohibiting certain activities related to sweepstakes offers

COMMITTEE: Business and Industry — committee substitute recommended

VOTE: 7 ayes — Brimer, Corte, J. Davis, Elkins, George, Solomons, Woolley
0 nays
2 absent — Dukes, Giddings

WITNESSES: For — None
Against — None
On — John Greytok, Office of the Attorney General

DIGEST: CSHB 2530 would amend the Business and Commerce Code to prohibit a person offering a sweepstakes primarily through the mail, except in mailed newspapers and magazines, from:

- ! requiring someone to order or buy goods or services or promise to do so to enter a sweepstakes;
- ! automatically entering someone in a sweepstakes because the person ordered or bought or promised to order or buy goods or services;
- ! soliciting business by using a purchasing mechanism that had any role in the operation of a sweepstakes;
- ! using a sweepstakes entry mechanism that:
 - ! had any connection to ordering or buying goods or services,
 - ! was not identical for all people entering the sweepstakes, and
 - ! did not have a statement in large type on the front and back of the entry form informing a consumer that buying goods or services would not help the person win and that it is illegal to give any advantage to buyers in a sweepstakes;
- ! soliciting someone to enter and allowing the person to indicate preferred characteristics of a prize unless the choices were made on the sweepstakes entry mechanism and were not connected in any way to a purchasing mechanism;

- ! offering any non-sweepstakes prize or other incentive other than a competitive price on goods or services and an opportunity to enter a sweepstakes in the same calendar year;
- ! asking for information or action consistent with the person's winning a sweepstakes prize unless the person already had won the prize;
- ! providing someone who had not yet won a sweepstakes with any document or item that simulated any event, circumstance, or condition connected with winning the sweepstakes;
- ! sending accompanying material that implied that a person must comply with a restriction or condition to enter, unless all people had to comply with the identical restriction or condition;
- ! using a scratch-off device or game piece that suggested an element of chance or luck to convey information about entering a sweepstakes;
- ! sending material relating to a sweepstakes that implied or stated that:
 - ! a person's chance of winning a prize was raised, lowered, or different because of factors or circumstances irrelevant to the manner of selecting the winner;
 - ! the winner of a prize would be selected at a time or place or in a manner other than the actual time or place or manner through which the winner would be selected;
 - ! the person had received special treatment or personal attention from the offeror of the sweepstakes;
 - ! a person who ordered goods or services would receive an advantage in the sweepstakes or that failure to purchase goods or services would cause the person to suffer a disadvantage;
 - ! the recipient was a winner if the recipient was not, or that the recipient would be a winner under certain conditions, could or would be among a group from which a winner was selected, or had a better chance than someone else of winning the sweepstakes;
- ! publishing different advertisements for the same sweepstakes with inconsistent descriptions of the grand prize;
- ! offering more than one sweepstakes at the same time;
- ! awarding multiple prizes in a sweepstakes unless all prizes were awarded on the same date through the same selection process;
- ! publishing rules that did not uniquely identify the prizes to be awarded and the date they would be awarded; or
- ! using more than one address to accept mailed sweepstakes entries or using the sweepstakes entry address for any other purpose.

CSHB 2530 expressly would *not* prohibit a person from describing the method used to choose a winner in the official rules, nor from notifying a winner after the sweepstakes had ended.

Each prohibited statement, implication, representation, or offer would represent a separate violation, resulting in a separate fine, where multiple statements were made in one sweepstakes offer. For mass-distributed materials, each recipient would count as a separate violation or group of violations. Each violation would be punishable by a civil penalty of not less than \$5,000 or more than \$50,000. Civil penalties would have to be deposited in the state treasury.

The attorney general could file suit in the Travis County district court or in the district court in any county where a violation occurred. If the attorney general substantially prevailed, the court would have to award the attorney general reasonable expenses, including reasonable attorney's fees, investigative costs, witness fees, and deposition expenses. The court also could award injunctive or other equitable or ancillary relief reasonably necessary to prevent future violations.

The bill would create joint and several liability for a person who provided names and addresses or any service connected to the mass distribution of a sweepstakes if that person knew or should have known that the person offering a sweepstakes was violating the bill's provisions.

This bill would take effect September 1, 2001.

SUPPORTERS
SAY:

CSHB 2530 would protect Texans from deceptive and misleading mail solicitations by prohibiting people from using certain specific implications when offering a sweepstakes by mail. The proposed prohibitions are reasonable and narrowly drafted.

Deceptive and misleading sweepstakes statements are a national problem. Businesses often use the mail to invite people to enter sweepstakes contests with high-dollar prizes. The mailed material sometimes is misleading or confusing, and many people have been led to believe they already had won a contest or had to make a purchase to enter, among other misinformation. Research has shown that these misleading representations are designed

specifically to take advantage of the way some elderly people process information.

At least 31 states have sued Publishers Clearing House for deceptive trade practices. In October 1999, the Texas attorney general sued the company for numerous violations of the Deceptive Trade Practices Act (DTPA), alleging that the company had made misleading representations in its mail-order solicitations. The suit further alleged that those representations were designed to extract money from recipients, particularly elderly ones.

Current law is insufficient to protect Texans from misleading sweepstakes statements. Some of the most egregious companies design their sweepstakes around loopholes in the law. Current penalties under the DTPA are not stiff enough to deter companies from making misleading statements in sweepstakes materials. Some companies make millions of dollars per year in Texas alone and regard the current financial penalties as a cost of doing business. This bill's civil penalty would be a significant deterrent.

CSHB 2530's enforcement provisions would be narrow and appropriate. The bill would allow only the attorney general to bring a civil lawsuit on behalf of the public. It would not provide for a private right of action, so individuals could not file separate lawsuits. The bill would not allow recovery of punitive damages nor any other kind of damages. Violators would have to pay civil penalties to the state treasury.

The House Business and Industry Committee's Interim Subcommittee on Consumer Fraud Directed at the Elderly noted that 20 other states have laws addressing sweepstakes fraud. Recognizing the problem at the federal level, Congress enacted the Deceptive Mail Prevention and Enforcement Act of 1999, but it specifically does not preempt state laws addressing sweepstakes fraud.

**OPPONENTS
SAY:**

CSHB 2530 would place an undue burden on any business offering a sweepstakes in Texas. Many sweepstakes are national in scope. If Texas adopted specific restrictions, sweepstakes offerors would be forced either to produce Texas-specific materials or not to offer the sweepstakes in Texas.

NOTES:

The committee substitute expanded the list of prohibited conduct in the bill as filed. The additional items include the prohibitions on automatic entry, use of scratch-off devices and game pieces, implying that a purchase would result in an advantage or that lack of a purchase would result in a disadvantage, and stating a person was a winner, might be a winner, or had a better chance than someone else. The substitute also added the required statement informing recipients that buying a product or service would not help them win.

The bill as filed would have prohibited a person from publishing an advertisement that included an invitation or opportunity to enter a sweepstakes if the advertisement also offered any gift or other economic incentive except for a competitive price on the goods or services. It also would have prohibited a person from sending an advertisement by mass distribution that included an offer for any gift or incentive other than a competitive price on the goods or services originally advertised before 45 days after the date of the original advertisement. The committee substitute would prohibit a person from offering any non-sweepstakes prize or incentive other than a competitive price on goods or services and an opportunity to enter a sweepstakes in the same calendar year.

The substitute specifically would allow a person to state the method used to choose a winner in the official sweepstakes rules and to notify a winner after the sweepstakes had ended. It also included a more specific definition of what would constitute an individual violation, and it added the section that would create third-party liability.

The committee substitute would require a minimum fine of \$5,000 per violation in addition to the maximum fee specified in the bill as filed. The substitute also would authorize the court to award injunctive or other equitable or ancillary relief to prevent future violations.