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Lotteries--Promotional Scheme Constituting a Lottery

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court in applying the *expressis unius* rule, has said that an exclusionary clause excepting certain vehicles from coverage necessarily allowed all others to be included.[26]

In conclusion, it should be mentioned that although the West Virginia court in *Laraway* said that the policy was clear and unambiguous, it still noted as pertinent the evidence relating to the pickup truck's use and construction. Will the court, if confronted with a future case involving similar policy language as applied to a pickup truck feel that such evidence is relevant? If the answer is yes then the prospect for recovery is better, because a review of the cases indicates that plaintiffs do stand a better chance of recovering when emphasis is placed on the private nature and use of the vehicle.

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Lotteries—Promotional Scheme Constituting a Lottery

Safeway Stores, Inc., operated ten retail grocery stores in Snohomish County, Washington. Each of the stores sponsored a "Bonus Bingo" contest as part of its advertising activity. Winners received cash awards. No purchase was necessary to obtain the prize slips used in the game, but in order to obtain a sufficient number of prize slips to complete a winning card it was necessary to visit the store. The contest was advertised extensively within the store and in the general advertising of Safeway in the local newspapers. Snohomish County sought a declaratory judgment on the legality of the contest, and an injunction against continuance by Safeway of the contest, alleging it constituted an illegal lottery. The

private passenger automobile of the pleasure car type); Paetz v. London Guarantee & Accident Co., 228 Mo. App. 564, 71 S.W.2d 826 (1934) (vehicle was licensed and registered as a Ford Runabout, but was used as a family car.)

[25]*E.g.*, Mutual Benefit Health & Accident Assoc. v. Hudman, 385 S.W.2d 509, 513 (Tex. 1964). The Texas statute defined a passenger car as any motor vehicle, excluding a motor cycle or a bus, that was "designed or used primarily for the transportation of persons." The court did not consider the statute conclusive, because it was adopted in a different context, but its persuasive value was accepted.

[26]Aetna Life Ins. Co. v. Bidwell, 192 Tenn. 627, 241 S.W.2d 595 (1943).

Superior Court of Snohomish County entered a judgment in favor of Safeway and the county appealed to the Supreme Court of Washington. *Held, reversed,* with instructions that the injunction be issued. The "Bonus Bingo" contest was attended by the requisite element of a lottery—prize, chance, and consideration—and was therefore enjoinable as a public nuisance. *Schillberg v. Safeway Stores, Inc.,* 450 P.2d 949 Wash. (1969).

The relevant law, under which this case was decided, was taken from the Washington constitutional prohibition against state authorization of any lottery,[1] and from a statute declaring such lotteries a nuisance[2] and, as such, enjoinable. The West Virginia Constitution likewise prohibits state authorization of lotteries and, further, directs legislative enactments to prohibit sale of lottery tickets.[3] The response of the West Virginia Legislature to this constitutional direction was to impose a criminal sanction, in the form of a misdemeanor, on those who operate a lottery.[4]

West Virginia is in agreement with the Washington court that the "essential elements of a lottery are consideration, prize, and chance."[5] Phrased in other terms, the West Virginia court defines a lottery as a "scheme for the distribution of prizes by chance."[6]

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[1]WASH. CONST. *art.* II, § 24: "The legislature shall never authorize any lottery . . . ."

[2]WASH. REV. CODE § 9.59.010 (1955):

> A lottery is a scheme for the distribution of money or property by chance, among persons who have paid or agreed to pay a valuable consideration for the chance, whether it shall be called a lottery, raffle, gift enterprise, or by any other name, and is hereby declared unlawful and a public nuisance.

[3]W. VA. CONST. art. VI, § 36: "The legislature shall have no power to authorize lotteries or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprise tickets in this State."

[4]W. VA. CODE ch. 61, art. 10, § 11 (Michie 1966):

> If any person shall set up or promote or be concerned in managing or drawing a lottery or raffle, for money or other thing of value, . . . or knowingly permit the sale . . . of any chance or ticket, . . . or other device purporting or intended to guarantee or assure to any person, or to entitle him to a prize, or a share of, or interest in, a prize to be drawn in a lottery, or shall, for himself, or any other person, buy, sell, or transfer . . . any such writing, certificate, bill, token or device, he shall be guilty of a misdemeanor . . . .

[5]*See* State v. Hudson, 128 W. Va. 655, 664, 37 S.E.2d 553, 558 (1946): "[A]nd, where they are present and chance predominates, even though skill or judgment may enter to some extent in the operation of a particular scheme or device, the scheme or device is a lottery." (The purpose of this paper is to illustrate how the courts have found the elements of lottery present and not to distinguish between sanctions imposed.)

[6]State v. Matthews, 117 W. Va. 97, 99, 184 S.E. 665, 666 (1936).

These definitions seem simple enough on the surface to permit clear application to any situation in question, but this has not been so in practice. An examination of several cases indicates that the problem of applying the lottery approach to business promotional schemes lies in the difficulty of finding "consideration."

One of the earlier applications of the lottery prohibitions to business was against the so-called "bank nights" conducted by theaters. The idea was that by signing a registration card people had a chance to win cash or other valuable prizes in a drawing. In a Washington case, *Society Theatre v. City of Seattle*,[7] the patrons of the theater were given a prize ticket for a random drawing for groceries. There was no charge for the chance ticket other than the cost of an admission ticket. Having no trouble finding the elements of prize and chance, the court went on to rest a finding of consideration on the idea that the theater received a benefit from the patronage which the contest drew. In a similar West Virginia case[8] the scheme called for registration for a drawing by signing a card. The court upheld an instruction that where the elements of prize and chance were present, the defendant was guilty of conducting a lottery provided there was present the added factor of an intent to attract additional persons to the theater, combined with the fact of purchase of tickets by any such persons. The court further held that the scheme had to be judged on the whole and that the defendant could not be relieved from responsibility merely because a few people were allowed a chance without having to purchase an admission ticket.[9] Other jurisdictions seem to be generally in line with this view of "bank night."[10]

The "bank night" schemes represent only one area in which courts have found business promotional schemes to constitute illegal

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[7]118 Wash. 258, 203 P. 21 (1922); *accord*, State v. Danz, 140 Wash. 546, 250 P. 37 (1926).

[8]State v. Greater Huntington Theatre Corp., 133 W. Va. 252, 55 S.E. 2d 681 (1949).

[9]*Id.* at 265, 55 S.E. 2d at 689.

[10]*See* State *ex rel.* Cowie v. LaCrosse Theatres Co., 232 Wis. 153, 286 N.W. 707 (1939), in which the court found that a bank night scheme constituted a lottery where most tickets were given to purchasers of admission tickets, even though some chance tickets were given away free. *But see* Cross v. People, 18 Colo. 321, 32 P. 821 (1893). In considering a shoe store give-away, the court failed to find consideration where a chance could be obtained by request made by mail. It was further concluded that the hope of or actual inducing of patronage by the scheme was too remote to constitute consideration.

lotteries. As early as 1928 a Texas court found that a promotion by an association of service stations which consisted of chance drawings for automobiles was a lottery.[11] The decision rested on the fact that most of the participants purchased products, though not required by the rules, just as was the situation in *Schillberg*. The Texas court determined that the patronage induced by the scheme was the consideration which passed for the chance received.[12]

In commenting on *State v. Greater Huntington Theatre Corp.*[13] in an earlier volume of this publication,[14] the writer discussed three grounds on which courts have found consideration, i.e., (1) "contract consideration," (2) "increased revenues" (from increased patronage), and (3) "valuable consideration by payment in part for the chance to participate." The writer placed West Virginia with the courts using the third category. He went on to express the view that the West Virginia court would no longer tolerate schemes designed to evade the lottery statute under the guise of "free participation."[15]

Perhaps one of the best discussions of the lottery approach to business promotional schemes is in *Lucky Calendar Co. v. Cohen*,[16] a case on which the Washington court relied heavily. The participants in this grocery store promotion were not required to make a purchase to get the calendars containing prize coupons, nor could they get the calendars in the store. The calendars were mailed, winners were notified by mail or phone and prizes from the drawing were delivered free of charge. The one act required of the participant was to deposit the coupon at one of the supermarkets involved. From this the New Jersey court found contract consideration, sufficient to make the scheme a lottery:[17]

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[11]Featherstone v. Independent Serv. Station Ass'n, 10 S.W.2d 124 (Tex. Civ. App. 1928). The plaintiff in this case was the operator of a service station which was not part of the Association. He sought injunctive relief against use of the lottery scheme by his competitors.

[12]*Id.* at 127.

[13]133 W. Va. 252, 55 S.E.2d 681 (1949).

[14]52 W. VA. L. REV. 131 (1950).

[15]*Id.* at 132.

[16]19 N.J. 399, 117 A.2d 487 (1955). For discussion of this decision *see* 5 DEPAUL L. REV. 308 (1956). Enactment of N.J.S.A. 2A:121-6 (1961), six years after this case *may* have had an effect on the New Jersey law as pronounced in the decision.

[17]Lucky Calendar Co. v. Cohen, 19 N.J. 399, 415, 117 A.2d 487, 495 (1955) (emphasis added).

> [T]he consideration in a lottery, as in any form of simple contract, need not be money or the promise of money. Nor need it be of intrinsic value . . . provided it is what is asked for by the promisor and is not illegal. The law will not inquire as to the adequacy of consideration when the *thing to be done is asked to be done,* be it ever so small.

It can be seen that the concept of "consideration" is quite adaptable when its presence is required. The underlying reason for such results in many of the cases discussed seems to be a desire by the courts to thwart efforts of businessmen to appeal to man's "get something for nothing" weakness and to prevent the allegedly unwholesome influence on the community of such schemes.[18] There is still no uniform finding of consideration in such cases,[19] so that the conflict persists between a strict interpretation of the requirements of the lottery statutes and the desire to protect the general public from the appeal of "get rich quick" schemes.

Critics of the promotion schemes used by gasoline stations and grocery stores in recent years recognize the efforts of the business promoter to hide the element of consideration so as to avoid the lottery tag. In answer to this it has been suggested that:[20]

> [I]f the operator receives a benefit in the form of increased patronage, business, and profit, this benefit should be sufficient to constitute the necessary consideration. Businessmen are not so philanthropic as to give away something for nothing. Certainly if they did not expect their additional profits to offset the costs of the scheme, they never would have undertaken it. And the mere fact that "some" people could win without themselves having been detrimented certainly should not be the factor removing such a scheme from a lottery, for the greater proportion of participants do indeed pay actual consideration—usually in the form of increased prices.

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[18]*See Id.* at 417, 117 A.2d at 497; State v. Hudson, 128 W. Va. 655, 665, 37 S.E. 2d 553, 558 (1946); Note, *Lottery Approach to Promotional Schemes,* 42 WASH. L. REV. 668, 669 (1967).

[19]*See* 17 DEPAUL L. REV. 555, 559 (1968), for a discussion of cases on both sides of the consideration question.

[20]*Id.* at 560-61.

The court in the *Schillberg* case seemed to adopt this line of reasoning when considering that "Safeway experienced a material increase in business not attributable to any factor other than the effects of Bonus Bingo . . . . The visit to a Safeway Store [to procure a prize slip] and a perusal of the promoter's advertising . . . amount to a consideration moving from player to promoter."[21]

A somewhat different approach to regulation of business promotional schemes hinges on the idea of unfair or deceptive practices. If the complaining party can establish that the contest is deceptive, he may demonstrate to a court that it is an unlawful practice, which, if it yields a competitive business advantage may be deemed an unfair method of competition. Though this approach may serve to obviate the necessity of showing consideration to be present, it does not appear to have gained widespread acceptance, even where statutory provisions would facilitate its use.[22] The concept has, however, been used successfully in at least one case.[23]

It would appear that the lottery approach based on constitutional and statutory provisions similar to those in West Virginia, for the control of business promotional schemes is the predominant attack used.

> It becomes evident that such statutes are being construed as prohibiting not only lotteries in the narrow sense of the word, but also schemes in the nature of a lottery. By the use of a broad construction, the courts have been able to strike down schemes which apparently require no consideration, but nonetheless are patent evasions of the spirit, if not the letter of the statutes. Where such a view is taken, the conflict over what is meant by consideration as used in the statute is relegated to the position of a moot question—no longer of any importance in deciding the case.[24]

No matter whether the traditional lottery concept, or one of the other proposed approaches is used, there would seem to be a growing concern for protection of consumers from the possible evils of the growing number of such schemes. The *Schillberg*

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[21]Schillberg v. Safeway Stores, Inc., 450 P.2d 949, 956 (Wash. 1969).
[22]*See* 42 WASH. L. REV. 668, 675 (1967), discussing the Washington Consumer Protection Act, which received no mention in the Schillberg case.
[23]F.T.C. v. R.F. Keppel & Bro., 291 U.S. 304 (1933).
[24]5 DEPAUL L. REV. 308, 312 (1956).

case presents a good example of the judiciary taking a hand in the protection. An even more recent attempt at control can be seen in the recently adopted regulations of the Federal Trade Commission, providing for full disclosure in gasoline and supermarket give-away games.[25] Concern has been expressed at both the state and national levels. A consumer's choice of product or outlet could be based, not on the quality he receives, but on what he may be able to win "just for stopping in."

Where is it all going to end? Or is it? The answer may lie with the courts, as indicated by the *Schillberg* decision. West Virginia has already initiated the lottery approach in attacking the "bank night" promotions, and could conceivably use this as a stepping-off point on the road to consumer protection against the more modern schemes. But if the consideration element should become a major obstacle, then perhaps legislative action might be desirable—for regulation of fair and honest trade practices.

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Property—Recovery for Improvements Mistakenly Made on the Land of Another

The plaintiff Somerville and defendant Jacobs owned adjacent lots in the city of Parkersburg. Apparently relying on a surveyor's report and plat, plaintiff had a warehouse built on what he thought was one of his lots. The warehouse, however, was mistakenly constructed upon the defendant's property. Plaintiff then instituted a proceeding for equitable relief in the circuit court. The trial court entered judgment for the plaintiff and decreed that the defendant either buy the warehouse for $17,500, have judgment entered against him for that amount, or convey the lot upon which the building was constructed to the plaintiff. Defendant appealed. *Held,* judgment affirmed. A person, who through a reasonable mistake of fact constructs a building entirely upon the land of another,

[25]34 Fed. Reg. 13302 (1969).