LOTTERIES AS A BUSINESS PROMOTION

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INTRODUCTION

There is no doubt that lotteries are illegal in Ohio.[1] There is much authority to the effect that the use of lotteries to promote business constitutes an unfair trade practice. How widespread the use of lottery-type schemes to promote business has become is difficult to ascertain because there is a virtual void in Ohio of reported decisions dealing with the subject. However, we all have observed in our everyday life the use of lottery-type schemes to promote the sale of groceries, gasoline, automobiles, soft drinks, and many others. The purpose of this article is to discuss the use of lotteries as an unfair trade practice. The writer has been unable to find any Ohio decision dealing with the use of a lottery to promote business in its aspect as an unfair trade practice. In other words, the writer has found no Ohio cases wherein injunctive relief was sought on the theory that the contemplated plan was a violation of law and that the same would be unfair competition. There is, however, considerable authority from other jurisdictions.

USE OF LOTTERIES TO PROMOTE BUSINESS CONSTITUTES UNFAIR TRADE PRACTICE

Most of the cases dealing with the problem of the use of a lottery to promote business arise under the federal statute relating to unfair methods of competition.[2] The Supreme Court of the United States has expressly held that the use of a lottery to promote business constitutes an unfair method of competition, even though the practice may not be criminal and competitors are free to adopt the same scheme for promotion of their business:

> The facts that competing manufacturers are at liberty themselves to adopt the practices complained of, and that such practices are not criminal, do not preclude the right of the Federal Trade Commission to suppress the practices as unfair competition where the practices involve the element of chance in purchasing candy and tend to encourage gambling by children, and are thus contrary to public policy and the moral principles of the competitors, and where the practices involve the kind of unfairness at which the statute was aimed.[3]

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1 Ohio Const. art. XV, § 6.

2 Federal Trade Commission Act, 38 Stat. 719 (1914), 15 U.S.C. § 45. The pertinent provision reads as follows: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."

3 Federal Trade Commission v. R. F. Keppel & Bro., Inc., 291 U.S. 304 (1934).

During the course of the opinion by Mr. Justice Stone, it is stated:

> It is true that the statute does not authorize regulation which has no purpose other than that of relieving merchants from troublesome competition or of censoring the morals of business men. But here the competitive method is shown to exploit consumers, children, who are unable to protect themselves. It employs a device whereby the amount of the return they receive from the expenditure of money is made to depend upon chance. Such devices have met with condemnation throughout the community. Without inquiring whether . . . the criminal statutes imposing penalties on gambling, lotteries and the like, fail to reach this particular practice in most or any of the states, it is clear that the practice is of the sort which the common law and criminal statutes have long deemed contrary to public policy. For these reasons a large share of the industry holds out against the device, despite ensuing loss in trade, or bows reluctantly to what it brands unscrupulous. It would seem a gross perversion of the normal meaning of the word, which is the first criterion of statutory construction, to hold that the method is not "unfair."[4]

The philosophy behind the granting of injunctive relief to prevent the use of a lottery-type scheme to promote business finds its foundation in the public policy or the moral principles of the common law. In essence, the courts granting such relief hold that it is against public policy to permit a businessman to gain an advantage over his competitors through the use of an illegal or immoral device:

> [I]t has been the public teaching and the public policy of the land that gambling is immoral and to be condemned. . . . Lotteries used in the marketing of merchandise have long been condemned by the Supreme Court and by this court. The cases are legion.[5]

It has been suggested that the problem of the use of lotteries to promote business is not one of great moment because such methods are unusual and are clearly unlawful. In this regard, a federal court of appeals has quoted with approval:

> As a method of sales promotion, lotteries are so unusual as to warrant but passing notice. They are unusual because they were well known to be opposed to public policy even prior to the enact-

[4] *Id.* at 313. The schemes involved in this case were of three types: (1) four pieces out of a box of 120 pieces of candy selling for one cent each would have a penny concealed in the candy wrapper; (2) each piece of candy within a box would have concealed within the wrapper a slip of paper indicating the price to be paid for the candy varying from one to three cents; (3) candy with concealed centers, most of which centers were white, were sold under a scheme whereby a purchaser of a piece of candy with a colored center thereby became entitled to a prize.

[5] Modernistic Candies, Inc. v. Federal Trade Commission, 145 F.2d 454, 455 (7th. Cir. 1944).

> ment of the regulatory legislation of 1914 and in some states they have been made penal offenses by statute. The reasons for this general condemnation of lotteries are primarily ethical and not economic. It is regarded as contrary to sound morality that men should be encouraged to seek "something for nothing" or for a trifle. At the same time, it is recognized that there are economic objections to a scheme which extracts small contributions from many, without compensation, for the benefit of the chance recipient of an unearned prize.
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> In other words, an honest lottery as a method of promoting sales was held to constitute an unfair method of competition. This appears to be sound doctrine. If it is unfair competition to tempt buyers by misrepresentation of the quality of goods it may be regarded as likewise unfair to tempt them to buy goods not upon their merits but upon the chance of securing something for nothing.[6]

The personal observations of the writer would, however, contradict the foregoing statement that the use of lotteries to promote business is unusual. It is true that there are few reported decisions dealing with this aspect of lotteries, that there are relatively few cases dealing with criminal prosecutions of lotteries used to promote business, and that there are few arrests made of persons using lotteries to promote business. Therefore, while the statistical indicia may well indicate that it is relatively unusual for lotteries to be used for this purpose, such statistics do not necessarily give a true picture. Seldom does a day go by that the average individual does not come in contact with some lottery-type scheme in business promotion.

It also appears that the use of lotteries to promote business is appealing to the public and consequently can be quite lucrative:

> That the plan involves a game of chance or the sale of a chance to procure petitioner's merchandise is clearly shown, and that the operation of the plan is contrary to established public policy of the United States and the varied states and contrary to the criminal statutes of many states is conceded. Petitioner's sales were increased from $25,000 in 1932, the year it started in business, to $150,000 in 1934, and even more in 1935.[7]

Several state courts have taken the same position as the federal courts even in the absence of a specific statute providing for injunctive relief against lottery-type schemes as an unfair trade practice. The Supreme Court of Michigan has reasoned:

> No one should be permitted to employ criminal means in trade rivalry. The law proscribes a lottery, and those injured thereby are

[6] Public Regulation of Competitive Practices, 138-40, quoted in Minter v. Federal Trade Commission, 102 F.2d 69, 72 (3d Cir. 1939).

[7] Chicago Silk Co. v. Federal Trade Commission, 90 F.2d 689, 690 (7th Cir. 1937).

> not required to suffer successive inflictions of pecuniary injury until a criminal prosecution is launched. Courts do not depart from the rule that equity may not interfere, except to protect property rights of a pecuniary nature, in enjoining criminal acts exercised by one dealer to enhance his sales to the calculated pecuniary injury of a law-abiding competitor. Defendant . . . adopted the lottery scheme for profit, admits its employment increased his sales, and plaintiffs established the fact that such increase was directly traceable to their loss of customers.[8]

The Texas Court of Civil Appeals has reached a similar conclusion:

> That plaintiff's business, in the case at bar, was interfered with and injured, as a direct result of the operation of the lottery scheme conducted by defendants, is shown by the undisputed facts and the unchallenged findings of the trial court . . . .
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> If we are correct in the conclusions announced above, plaintiff was and is entitled to have his business protected from unfair competition produced by the unlawful means employed by his competitors, and it seems that the only adequate remedy, appropriate and suited to the conditions with which we are dealing, is the restraint of the prejudicial acts of which plaintiff complains.
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> Plaintiff cannot successfully combat this competition except on the plane where the contest for business has been pitched, and this he cannot attempt, without himself becoming a violator of the law. The lottery scheme had been in operation eight or nine months at the time this suit was instituted, a number of drawings had taken place and prizes distributed thereunder, and, so far as the record discloses, without any effort having been put forth for its suppression. In these circumstances, to invite plaintiff to seek relief from this unlawful competition by the institution of criminal prosecutions against the large number of individuals who are aiding and abetting the lottery, to assume the burdens and suffer the loss of time that attention to the prosecutions would require, is to invite him to attempt the accomplishment of an Herculean, if not impossible, task. . . .[9]

The use of injunctive relief to enjoin a competitor from using a lottery-type scheme to promote business has also been considered by an Illinois court. That court enjoined a plan under which a gasoline

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[8] Glover v. Malloska, 238 Mich. 216, 219, 213 N.W. 107, 108 (1927). See also Sproat-Temple Theatre Corp. v. Colonial Theatrical Enterprise, Inc., 276 Mich. 127, 267 N.W. 602 (1936): "Theater operators held entitled to injunction on ground that competitors violated lottery law by awarding cash prizes to patrons holding coupons with numbers corresponding to numbers on tickets drawn from barrel containing coupon tickets given with admission tickets without extra cost."

[9] Featherstone v. Independent Service Station Association, 10 S.W.2d 124, 128 (Texas Civ. App. 1928).

service station distributed cards to its customers and others asking for them, which entitled the holder to participate in a monthly drawing for a cash prize. The court held:

> It is argued strenuously by the appellant that the courts have no jurisdiction to grant an injunction to restrain a person from committing a crime, and this is, in effect, what the granting of an injunction is doing in this case. The injunction in this case was not issued on the theory that it was to restrain the appellant from committing a crime, but on the theory that the contemplated plan was a violation of law and that the same would be unfair competition of trade as against the appellee, and if permitted to continue would seriously interfere with the business of the appellee, and for this reason the injunction was issued. Under such conditions, it is our opinion that the injunction was properly issued.[10]

It has been held, however, that in order for a business to enjoin a competitor from the use of a lottery-type scheme in promoting business, the complaining business must show that it has suffered a resultant injury from the use of such promotion, applying the general equitable principle that a person seeking an injunction must show irreparable injury.[11]

Almost without exception, every court considering the question of whether or not the use of a lottery-type scheme to promote business constitutes an unfair trade practice has concluded that it does.

Injunctive Relief in Ohio

There has been no reported decision in Ohio in which injunctive relief has been sought by, or granted to, a business to enjoin the use by a competitor of a lottery-type scheme to promote his business to the detriment of the person seeking such injunction. Likewise, there is no statute in Ohio expressly dealing with this subject. It would appear that the problem either has not been one which, in Ohio, has caused businessmen to suffer loss of business to the extent that they have felt injunctive relief necessary, or Ohio attorneys have not been fully cognizant of the possibility of injunctive relief, or that the criminal

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[10] Jones v. Smith Oil & Refining Co., 295 Ill. App. 519, 522, 15 N.E.2d 42, 44 (1938). *But see* California Gasoline Retailers v. Rezel Petroleum Corporation of Fresno, Inc., 50 Cal. 2d 844, 330 P.2d 778 (1958).

[11] United-Detroit Theaters Corp. v. Colonial Theatrical Enterprise, Inc., 280 Mich. 425, 430-31, 273 N.W. 756, 758 (1937). The court stated:

> The record fails to show that the theaters were in the same vicinity, thereby creating competition nor do we find any proof that the lottery scheme affected the business of plaintiff's theaters. The restraining order of a court may not be exercised to enjoin the commission of a crime in the absence of a showing of damages to persons or property rights.

enforcement of the law has been sufficient to protect the competitors of those using such lottery-type schemes.

The basic problem is the question of whether injunctive relief can be granted to enjoin an act which is criminal in nature. Lotteries are expressly prohibited by statute.[12] It is one of the general principles of law that injunctive relief cannot be resorted to as a means to enforce a criminal statute.[13] As appears above, however, the basis for injunctive relief is not to enjoin violation of a criminal law but rather to enjoin the use of a method of sales promotion which constitutes an unfair method of competition to the detriment of competitors, and which may also constitute a violation of a criminal statute.[14] That this principle of law should be followed in Ohio is evident. In fact, the Supreme Court of Ohio in the case of *Renner Brewing Co. v. Rolland*[15] adopted the principle that an act which is in violation of a criminal statute may be enjoined where the act also will cause irreparable injury to the person or property of an individual complainant. The court held in the second paragraph of the syllabus:

> Where the averments of petition would, if proven, entitle the plaintiff to an injunction, a writ will not be refused merely because the acts sought to be enjoined are punishable under the criminal statutes of this state.

The court stated in the course of its opinion:

> It is further contended that injunction is not the proper remedy to compel obedience to the penal laws of the state. That, of course, is true, but the fact that wrongful interference with another's property may constitute a penal offense is no reason for refusing a writ, if the plaintiff for other reasons is entitled to the same.[16]

The Ohio courts have also enjoined what has been termed unfair competition. However, most of the cases involve an attempt to mislead persons into thinking one's product is that of a competitor.[17] It would appear, therefore, that a person has a property right in his business

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12 Ohio Rev. Code §§ 2915.10, 2915.12, and 2915.19.

13 Troy Amusement Co. v. Attenweiler, 137 Ohio St. 460, 30 N.E.2d 799 (1940).

14 See text adjoining note 10, *supra*.

15 96 Ohio St. 432, 118 N.E. 118 (1917).

16 *Id.* at 441, 118 N.E. at 121.

17 See, *e.g.*, Drake Medicine Co. v. Glessner, 68 Ohio St. 337, 67 N.E. 722 (1903): Where a person has established a business and reputation for the manufacture and sale of an article of traffic, under a particular name and style of label, whether the words and devices adopted by him constitute a trade-mark or not, another person, whether it be his own name or not, cannot lawfully assume the same name and label, or the same with slight alterations, so as to induce the belief that the imitation is the original; and such use of such name and label will be enjoined on the ground of fraud.

which equity should protect to prevent others from adversely affecting such business by illegal means. There is no question but that this principle will be applied to many illegal acts. Here, however, we are concerned with the promotion of a business by a specific illegal method —a lottery. The only differentiation between a lottery and any other illegal means of promoting business would seem to lie in the area of the proof of injury to the business of the one complaining. In other words, it is much easier for one to prove injury to his business where a competitor by use of a trademark or other means represents his product as being that of another, than it is to prove that one's business has suffered an injury from the use by a competitor of a lottery-type scheme to promote his business. But the fact that the elements are difficult to prove does not justify the conclusion that no remedy exists.

Lotteries have been the subject of much legislation in an attempt to eradicate them from our society. They are by their very nature considered to be immoral and against public policy. The use of lotteries to promote business has apparently proved to be most profitable to those using them. Far too often the person enticed by the lottery promotion is one who can least afford it but has the greatest need and, therefore, is more subject to be tempted by the supposed opportunity to get something for nothing. At the same time legitimate businessmen who disdain using illegal means to promote their business suffer a loss of patronage to their competitors who have no compunctions about using such means.

The Ohio constitution provides that:

> All courts shall be open, and every person, for an injury done him in his land, goods, person or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.[18]

That a businessman may suffer injury to his property by a competitor's use of a lottery-type scheme to promote such competitor's business is apparent. The constitution demands that when such an injury does occur, the person injured "shall have remedy by due course of law." The only adequate and practicable remedy is that of injunction. This does not mean that a businessman may obtain an injunction against the use of a lottery-type scheme by a competitor merely by showing that such a scheme is being used. The person seeking the injunction would have to prove that he has suffered irreparable injury as a direct result of the use of the scheme by the competitor.

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[18] Ohio Const. art. I, § 16.

WHAT CONSTITUTES A LOTTERY

There are many decisions in Ohio involving the question of whether various schemes which have been adopted for the purpose of advertising or promoting a business constitute lotteries. In order for a particular scheme to constitute a lottery there must be three elements present: consideration, prize, and chance.[19] The presence or absence of the elements of prize and chance are usually easily ascertained. It is upon the element of consideration that cases of this type most frequently turn:

> Many decisions involve the question as to whether various schemes which have been adopted for the purpose of advertising or stimulating legitimate business constitute lotteries. . . .[W]here the elements are present, the scheme constitutes a lottery regardless of the fact that it is merely a scheme to stimulate a legitimate business. Nevertheless, in any event, all three elements must concur; . . . and where there is no consideration for the chance to draw a prize, the scheme does not constitute a lottery. These general rules have been applied to various schemes which have been used to stimulate attendance at theaters, celebrations, auction sales, dances, and like affairs. . . . Likewise, the general rules have been applied to schemes for increasing sales of retail merchants, to increase sale of real-estate lots, and to increase the circulation of newspapers.[20]

The Supreme Court of Ohio has commented upon the element of chance as follows:

> Although there can probably be no gamble upon something certain, there can be a gamble on the happening of an event, the happening of which may be largely dependent upon skill, even though dependent upon the skill of one or all of those participating in the gamble. The element of chance which is necessary in order to have gambling can be supplied by having the happening of some future event determine who gets a prize or how much he gets, at least where such event is not certain to happen and even though the happening of such event is dependent predominantly upon skill.[21]

The Attorney General of Ohio has ruled that a promotional scheme whereby the operator of a privately-owned, stocked lake would, for a consideration, permit persons to fish in said lake, and if they were to catch a specially-tagged fish, they would win a prize, constituted a lottery:

> Taking the first factor, consideration, we find that each fisherman

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[19] Fisher v. State, 14 Ohio App. 355 (1921); Westerhaus v. Cincinnati, 165 Ohio St. 327, 135 N.E.2d 318 (1956).

[20] 34 Am. Jur. *Lotteries* § 8.

[21] Westerhaus v. Cincinnati, *supra* note 19, at 327-28, 135 N.E.2d at 320.

must pay twenty-five cents to participate in the jackpot. Thus, the element of consideration is present.

The second element of a lottery, chance, also appears to be present. Certainly fishing requires skill, and the expert fisherman will catch more fish than the amateur, but the amateur does catch fish. In a stocked pond with some fish tagged, it is pure chance whether one manages to catch a fish tagged with a number corresponding to that which he is holding. . . .

The cash prize to the winner of the contest is obviously a prize within the definition of a lottery and constitutes the third and final element necessary for a lottery.[22]

In another opinion, the Attorney General of Ohio ruled:

[I]t is my opinion that a contest promoted by a vendor of soft drinks in bottles whereby all bottles are closed with caps within which various letters of the alphabet are concealed, which letters when assembled in particular combination entitle one to a prize supplied by such vendor, is a lottery . . . .[23]

The Attorney General so held despite the fact that there was no requirement that the winner of a prize actually had ever purchased a soft drink so long as he was in possession of the appropriate bottle caps:

In the one case the entry blank, and the advertising, states that "caps are where you find them," evidently suggesting that a purchase is not necessary to compete.

In the other case it is advertised that "find caps everywhere" and "no purchase necessary."

The inefficacy of these claims are evident when it is considered that a cap, i.e. a "device representing an interest in a lottery" is *sold* to the original purchaser; and that a part of the consideration for the beverage, however small, must be deemed a consideration for the sale of the cap. . . . As to such original purchaser there was, therefor, the sale of a lottery device whether he chose to play the game or not. As to all such purchasers who do play the game, this scheme is so plainly a lottery that the matter cannot be seriously debated. Is this violation of the law to be avoided by the possible circumstance that some original purchasers discard their "lottery devices" so that some street urchin may collect them and win a prize? Certainly not, for the latter in such case merely succeeds to the position of eligibility to compete which *was paid for* by the former. This device of avoidance is too clearly ineffective to be given serious consideration.[24]

It has been held that a scheme whereby an automobile is to be given away through a drawing of tickets given to purchasers of meals

22 1961 Ohio Ops. Att'y Gen. No. 2358.

23 1959 Ohio Ops. Att'y Gen. No. 313.

24 *Ibid.*

at a restaurant, as well as anyone else who came into the restaurant and requested the same without purchasing a meal, where the scheme was admitted to be conducted as an inducement for persons to patronize the restaurant, constituted a lottery.[25]

It has also been held that a theater "bank night" constituted a lottery and that consideration was present even though any member of the public was free to register his name in a book in the lobby of the theater free of charge and was thereupon given a number. If one held the winning number drawn from a wheel on a specified night and was present in the theater at the time of the drawing or presented himself at the theater within a specified number of minutes after the drawing, he received the prize. The court stated in regard to the element of consideration:

> The element of advertisement and increased patronage is sufficient consideration flowing to the operator to bring the transaction within the condemnation of promoting and advertising a scheme of chance.[26]

Thus, it appears that while a lottery involves as a necessary element a consideration, the consideration need not be in the form of a transfer of something of value directly from the participant to the operator. In the lottery-type scheme used to promote business, the increased business that the operator receives through utilization of the scheme in and of itself supplies the requisite consideration. Businesses using lottery-type schemes for promotional purposes are not so philanthropic as to give away something for nothing. The very purpose of the utilization of the scheme is to promote, stimulate, and increase the business of the operator and thereby increase his profits. If the operator did not believe that his profits would be augmented to an extent which would more than offset the amount given away in prizes, it is certain that he would not adopt the scheme. Furthermore, if the utilization of the lottery-type scheme does not prove to be profitable, the operator will abandon it at the first opportunity.

CONCLUSION

It may well be argued that no harm is done by utilization of these schemes to promote business because the purchasers pay no more than they would otherwise. However, so long as it is the legislative intent and the will of the people that lotteries remain illegal, the illegality

[25] State v. Bader, 24 Ohio N.P. (n.s.) 186 (1922).

[26] Troy Amusement Co. v. Attenweiler, 64 Ohio App. 105, 121, 28 N.E.2d 207, 215 (1940), *aff'd*, 137 Ohio St. 460, 30 N.E.2d 799 (1940). For another example of a lottery-type scheme used for business promotion, see Stevens v. Cincinnati Times-Star Company, 72 Ohio St. 112, 73 N.E. 1058 (1905).

cannot be eliminated by considering the amount of harm done or who operates the lottery. Furthermore, although no harm may be done to the purchasers, there are undoubtedly persons attracted to the business utilizing the scheme to the detriment of other businesses who do not use such a promotion.

Thus, as stated at the outset, there are three essential elements of a lottery, viz., prize, chance, and consideration. The element of prize is usually so easily recognized that it merits no further discussion. The element of chance is also usually readily discernible. There are instances, however, where some skill is involved and the question then arises as to whether the particular scheme is predominantly chance or predominantly skill. The question of whether a scheme, in order to constitute a lottery, must be one predominantly of chance has been variously decided.[27] Even though skill may be required in a particular game, it is still a game of chance if the winner is determined by chance. Moreover, a game which is predominantly skill is less likely to be utilized, or to be effective, as a business promotion. There are many contests which primarily involve skill, whether physical or mental, and which may be effectively utilized as a means of business promotion. It is when these "contests" eliminate substantially all skill and the winner is determined basically by means of a drawing, random selection, or fortuitous acquisition of a particular token, label, or similar device that they become lotteries.

The element of consideration poses the most difficult problem. In business promotional schemes, there is often nothing required of a participant other than going to a certain place to determine whether or not he is one of the winners. In other cases he may be required to purchase a product or service at the usual and regular price therefore. In other instances he may be required to go to a certain place to register without any purchase or payment required. However, in each instance, in varying degrees there is a benefit received by the operator by means of increased patronage, business, and profit; and it is beyond question that this is the motive of the operator of the scheme. It has been held that this benefit received by the operator, in and of itself, constitutes sufficient consideration to make a particular scheme a lottery if the other elements are present.

Thus, the requisite consideration for a lottery is present whenever the participant is required to make a payment of something of value, to make a purchase, or whenever a benefit is received by the operator though no payment or purchase is required of the participant.

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[27] See Westerhaus v. Cincinnati, *supra* note 19.