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Merchandising Through Use of Lotteries

Robert V. Bullock*

UTILIZATION OF THE DESIRE to get "something for nothing," in merchandising, may range from selling chances on a big panda-bear doll, to attracting the public into a gas station to participate in a "Sunny Dollars" drawing. The first example undoubtedly involves a lottery, while the second causes a split in legal opinion.

One means of bringing in potential customers to do business is to offer a chance of something free as an inducement.¹ As stated in *Affiliated Enterprises Inc. v. Waller*, "(T)here is nascent in the human breast a gambling instinct; that the average human is avid of an opportunity to gain much at a small risk; and that this instinct and passion is likely to blossom upon slight nourishment. (Those who engage in illegal lotteries) know that this spirit is with the old and young, the weak and strong, without regard to sex."²

It has been almost universally held that there must be three elements present for a promotion to constitute a lottery. These elements are consideration, chance, and prize. The absence of any one of these elements is fatal to identifying the transaction as a lottery.³ Promoters are continually modifying and shading each of these three elements, however, so that the courts and government officials must constantly reappraise their positions to protect both the public and legitimate business.

Consideration

The gratuitous distribution of one's property by lot or chance does not constitute a lottery.⁴ Something of value must pass for the chance to be gained, before a lottery can be present. The decisions on this subject are split in the various jurisdictions (e.g., what the consideration must be). Many jurisdictions require "pecuniary" consideration, holding that simple contract consideration is not the kind of consideration contemplated by the lottery acts. Other jurisdictions have held that simple contract consideration is sufficient to make the scheme a lottery.⁵

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¹ Comment, Laws, Lotteries and Business Promotions, 8 Kan. L. Rev. 110 (1959).

² 40 Del. 28, 5 A. 2d 257, 260 (1939).

³ *State v. Jones*, 44 N.M. 623, 107 P. 2d 324, 326 (1940).

⁴ 54 C.J.S. *Lotteries* § 2 (1948).

⁵ Comment, *op. cit. supra* n. 1 at 113-118.

Chance

Chance has been defined as the attempt to gain certain ends not by skill or fixed rule, but by the happening of a subsequent fortuitous event.⁶ Some early decisions defining lotteries required "pure chance," which eliminated all schemes involving any element of skill.⁷ The rule today is that if chance is the prevailing factor, a lottery exists even though skill, judgment or research enters into the scheme. By far the most troublesome element in determining whether a promotion is a lottery is the element of chance.

Prize

In *Fitzsimmons v. U. S.*, the court stated,⁸ "In general it may be said that anything of value offered as an inducement to participate in a scheme of chance is a prize." In researching decisions on lotteries, little disagreement with the statement in the *Fitzsimmons* case was found, in the absence of a statute to the contrary. It should be noted, however, that under some statutes, the prize or award which the player may win shall be property or an interest in property.⁹

There are many promotions and merchandising schemes which involve a question of whether "a lottery" exists.¹⁰

1. *Break and Take; Punchboards—Punch Cards*

One of the landmark cases decided by the Supreme Court, involving merchandising by lotteries, was the 1934 case of *FTC v. Keppel*.¹¹ Keppel & Brothers, Inc. manufactured and distributed candy in packaged assortments known to the trade as "break and take" packages. This was primarily directed toward the "penny candy" trade which was aimed mainly at children.

The scheme consisted of providing different colored wrappers located inside an outer wrapper of the candy. The cost of the candy, or whether it was free, depended on the inside wrapper. Another variation of this scheme, used by Keppel, was to provide different colored centers in the candy, and those purchasers who obtained a certain color were given a special prize. The procurement of a winning piece of candy was thereby determined wholly by lot or chance and was known to the purchaser only after the purchase was made.

⁶ *U. S. v. Rich*, 90 F. Supp. 624 (E.D. Ill. 1950).

⁷ *U.S. v. Rosenblum*, 121 F. 180 (S.D.N.Y. 1903).

⁸ 156 F. 477, 479 (9th Cir. 1907).

⁹ *Middlemas v. Strutz*, 71 N.D. 186, 299 N.W. 589 (1941).

¹⁰ *Supra* n. 4 at 851-859 (For a further discussion of the elements of a lottery see *Gambling Law-Promotion Schemes*, 29 A.L.R. 3d 881, 892 [1968]).

¹¹ 291 U. S. 304, 54 S. Ct. 423 (1934).

The Federal Trade Commission found that the sale of candy in this manner encouraged gambling among children. Upon review, Mr. Justice Stone noted that it was not open to question that this method of competition was successful in diverting trade away from those manufacturers who did not use it. He pointed out that the practice itself did not involve any deception or fraud but was against public policy. A trader may not, by pursuing a dishonest practice, force his competitors to choose between its adoption or loss of trade. It is unfair to cast upon competitors the burden of loss of business unless they will descend to a practice which they are under a powerful moral compulsion not to adopt.

Although no reported cases were found involving "break and take" in recent years, a variation of this scheme appears to be flourishing. For many years "punch cards" have been sent to homes across the United States. These "punch cards" typically contain twenty to forty perforated discs, usually with various childrens' names on them. The recipients of these cards are encouraged to sell chances on a prize to their friends. The winner of the prize is named under a master seal which is opened only after all the chances are sold. For selling the chances the individual is given a duplicate of the prize. The prize is considerably more valuable than the cost of the chance.

In *Bear Sales Co. v. FTC*,¹² the Seventh Circuit Court of Appeals affirmed an earlier decision involving "punch cards," and stated that the promotion of products by this means was an unfair method of competition. The *Bear Sales* case ended its long career in the federal courts in 1966 when the Supreme Court denied certiorari. In 1968, the Federal Trade Commission issued a complaint against a Chicago based firm that merchandised by means of punch cards. This company went by the name of Marco Sales Company.¹³ The Commission issued an order in July 1969 prohibiting them from operating the "punch card" method of conducting lotteries. Several channels of appeals are still open in the *Marco Sales* matter, which could stay a permanent injunction for years. The president of Bear Sales was E. Robert Baer. The president of Marco Sales was Marvin O. Baer. Both companies used the same attorney to represent them in their legal proceedings. It should be noted, however, that no direct connection has been shown to exist between the operation of Bear Sales Co. and Marco Sales Co.

The use of "punch cards" in merchandising is a lottery scheme that often involves children as well as adults. One of the "punch cards" distributed by Marco Sales Co. offered the prize of a big fuzzy panda bear.¹⁴ It is hardly necessary to point out what group this prize was

¹² 362 F.2d 96 (7th Cir. 1966), *cert. den.* 385 U.S. 933 (1966).

¹³ In the matter of Marco Sales Co. and Marvin O. Baer, 7th Cir. Dkt. #8770, complaint issued Nov. 27, 1968; Initial Decision filed July 1, 1969.

¹⁴ Dolls were also offered for sale by the company—see Initial Decision, *Id.* at 4.

directed toward. The Hearing Examiner found that Marco Sales Co. thereby supplied to minors the means of conducting games of chance, gift enterprises, or lottery schemes.

Each of the elements of a lottery is present in the "punch card" scheme—consideration, chance, and prize. However, the only individuals to whom all the elements apply are the sellers of the chances. This means that technically, a child who might be selling chances on the big panda bear is conducting a lottery. Federal officials have therefore approached "punch cards" on the basis that the best means of control is through civil action against the company distributing the "punch cards." Such civil action usually takes the form of a Federal Trade Commission "cease and desist order." An FTC cease and desist order prohibits a company or an individual from committing further specified acts. It does not punish the violator of the law for his past deeds. Therefore, if the scheme is profitable enough, the perpetrator might continue the promotion until the Supreme Court finally affirms the Commission's order. Even after the order has been affirmed, he might decide to take the chance he won't be caught on a compliance check. If a company (or individual) is determined, it can avoid the effects of a Federal Trade Commission cease and desist order.

The reason "punch cards" have continued to exist over the years is public and official apathy. State officials in particular appear to be unable under present law to effectively stop a foreign corporation from sending "punch cards" into their state. It can be reasoned that it is not in the public interest to prosecute children and adults who might have received these cards in the mail and sold chances on the merchandise. In most instances these individuals have assumed that the scheme is legal, and that otherwise postal authorities would not let them be sent through the mails.

What is called for in order to control merchandising by the use of "punch cards" is a strong federal statute prohibiting their distribution and setting a penalty for selling merchandise through their use. It was hoped that a postal statute dealing with lotteries which was amended by Congress in 1968 would be an effective deterrent to "punch card" operations.¹⁵ A Post Office official, however, explained to the writer that his department had no plans to attack the "punch card" method of merchandising through enforcement of this statute. Until effective federal enforcement of a statute outlawing "punch cards" has been adopted and the promoter knows that he will be liable to severe penalties, the "punch card" form of lottery will continue to be foisted on the public.

¹⁵ 39 U.S.C.A. § 4005 (1962).

2. Referral Sales

Another prominently used means of merchandising through the use of lotteries is the promotion generally known as "referral sales." The typical referral selling scheme is operated in the following manner:¹⁶

A salesman makes a sales presentation for what is termed a "fabulous new product" to a prospective purchaser. The price of the product would seem inflated to even the most naive prospect. The prospect is told, however, of a new advertising program which this company has initiated, in which he will be able to participate if he makes the purchase. The salesman explains that the company had previously advertised on the Art Linkletter "Queen for a Day" show, and/or other prestigious program on television. The company observed, however, that after the show, viewers could not recall the name of the sponsor. The company came to the conclusion that "word of mouth" is the best form of advertisement; therefore, they devised a plan under which dollars paid out for promotions would be returned to their customers instead of spending them on costly network advertising.

The plan called for a new purchaser to list the names and addresses of twenty-five friends on a piece of paper. Each of the friends would then receive a card in the mail, introducing the salesman and using the referring party's name by introduction. The card notes that the salesman will call on the new prospect shortly, but does not state the reason for the call. The purchaser that referred the salesman to the new prospects receives a stated sum if the new prospect makes a purchase. The amount of money to be received for each such purchaser is usually graduated, so that, as an example, \$25 is paid for the first three sales, \$50 for the next two sales, and \$25 for each additional sale. It is explained that if only seven of the twenty-five friends purchase this "fabulous new product," he will receive the \$229 (vacuum cleaner) practically free. The prospect may submit as many names as he pleases, and will continue to receive \$25 for each friend who buys. The salesman may assert that it's almost like having a part-time job and that many people have furnished their homes, bought a second car, or gone on European cruises in addition to having received, at no cost, a vacuum cleaner.

If the prospect is hesitant to sign the contract placed before him, he is told that the salesman sells one out of two prospects to whom he demonstrates and that, if his average holds true he will ultimately sell twelve of the prospect's friends. Typically, the salesman continues to emphasize to a reluctant prospect that he will get the product free or

¹⁶ For an example of a Cease and Desist Order issued, prohibiting a company from using referral sales, see, *In the matter of Interstate Engineering Co. et al.*, 62 F.T.C. 1413 (1963).

at no cost through participation in the program. The purchaser signs a binding non-cancellable contract which obligates him to pay for the product, regardless of whether any of his friends purchase. What the salesman failed to disclose to the prospect was that, although his sales ratio was probably one out of every two demonstrations, the ratio of demonstrations that he made was probably one out of every ten names he received. Therefore, out of twenty names supplied, the chances would be that only one sale would be made.

The "sucker" is "taken," and the average attorney will shed no tears because he realizes that the "sucker" has a remedy at law, since fraud was used in the inducement to make the contract. What should be pointed out, however, is that, even if the purchaser realizes that he was taken and wants to do something about it, the price of the product is usually small enough to make a law suit financially unwise. Furthermore, it will be difficult, tedious, and time consuming to ferret out the facts to prove fraud. It therefore appears that the "sucker," who is often ignorant and uneducated, should be protected from this type of trap.

Deception was used in making the prospect think that by providing twenty five names he had a likelihood of obtaining payment for twelve sales. Deception was used in making the prospect believe that he would receive the product free, when it can be statistically shown that the average purchaser does not obtain any money after making his purchase under this scheme. These and many other deceptions were practiced on the purchaser, and could be enjoined through use of a Consumer Protection Act declaring deception unlawful, or through effective enforcement of the Federal Trade Commission Act. But many states do not have a Consumer Protection Act, and enforcement of the Federal Trade Commission Act is often sluggish and ineffective. It therefore becomes necessary in many instances to rely upon the lottery statutes that exist in many states.

An Ohio court, when faced by the issue, refused to find a typical referral selling scheme a lottery. In *Yoder v. So-Soft*,¹⁷ the court, while noting that an excessive and inflated price was paid for the product, stated that the scheme was not what the legislature had in mind when it declared lotteries to be illegal. The court was of the further opinion that the act of purchasing a share of General Motors stock involved more of the elements of gambling than the transaction in question. In the reported decisions on this question, Ohio appears to be in the minority. The elements of consideration and prize are undoubtedly present in referral selling. The element of chance is the only major issue presented to the courts in deciding whether referral selling is a lottery.

¹⁷ 30 Ohio Op. 2d 566, 202 N.E. 2d 329 (1963).

As was noted in the earlier example, typically a demonstration is obtained on the ratio of one per ten names submitted. The ratio of sales that are made is dependent upon the number of demonstrations, because, as every good direct sales manager knows, even the poorest salesman will make a healthy percentage of sales if he is able to demonstrate the product in the home of the prospective purchaser. The ratio of obtainable demonstrations decreases in referral sales the longer the promotion operates in a given area. As more and more people hear of the scheme, fewer and fewer will allow the demonstration to be given in their home. The market therefore becomes saturated with purchasers of the product, individuals who have already seen a demonstration and do not want to see another, and those in the "know" not wanting to waste their time. It therefore becomes obvious that those who make their purchases first, before the market becomes saturated, have the best chance of becoming winners, while those who purchase later have a lesser chance. The prospective purchaser has no way of knowing, at the time of the demonstration, where he stands in the chain of saturation. He is therefore unknowingly taking a chance that he will be one of the early ones.

In contrast to the Ohio case, *Sherwood & Roberts-Yakima, Inc. v. Leach*,¹⁸ decided in the state of Washington in 1965, is often cited as authority for the proposition that referral selling is a lottery.¹⁹ Under the scheme promoted in the *Yakima* case, the consumer purchased a radio intercom and fire alarm system, pursuant to a written conditional sales contract. The consumer would then furnish the seller a list of prospective purchasers. For each sale made to any of the parties thus referred, the seller would pay the consumer \$100. The salesman assured the prospective purchaser that the return of money under this referral system would be at least adequate to cover the price of the purchase, and that the purchaser would probably "make money" besides.

The *Yakima* case involved an action for enforcement of a contract. The State of Washington's Attorney General intervened as *amicus curiae*. It was argued by the defendant that chance was not the dominant factor, since the skill and judgment used in choosing the referred names determined the amount of remuneration. The court answered by saying that, assuming the purchasers in fact used skill or judgment in selecting the referrals, chance still permeated the entire scheme. The court stated that the "purchasers . . . took a chance that the referrals might not be interested; that the salesman might not adequately make his presentation; that the referral might have already been referred by someone else; that the market might be saturated; and that the salesman

¹⁸ 67 Wash. 2d 630, 409 P. 2d 160, 14 A.L.R. 3d 1411 (1965).

¹⁹ See *Commonwealth v. Allen*, 404 S.W. 2d 464 (Ky. 1966).

might not even contact the referral. In addition, . . . (the purchasers) have no control over the general operation after they gave the names of referrals. In fact (the purchasers) were told not to contact the referrals before the Lifetone salesman made his presentation and (the purchasers) were told to emphasize the money-making program in case the referrals contacted them."²⁰

The court went on to say, "It is inherent in referral selling that purchasers . . . be without control. Sooner or later, the market, unknown to the purchasers, will become saturated. This principle is the same as in the chain letter scheme."²¹ Using the *Yakima* example, the court noted that twelve purchasers must be obtained before the product would be paid for in this manner. These purchasers in turn must find twelve more purchasers, and so on, as follows:²²

	<i>Number of Purchasers</i>
	1
1st round	12
2nd round	144
3rd round	1,728
4th round	20,736
5th round	248,832

It becomes obvious that it is virtually impossible for everyone to obtain the product at no cost after about the fourth or fifth round.

The Kentucky Court of Appeals court of last resort followed the *Yakima* case closely in *Commonwealth v. Allen*.²³ The Kentucky legislature had recently passed a law specifically outlawing referral selling. While taking notice of the recently passed statute, the court in effect stated that the statute was not necessary, since referral selling is a lottery prohibited by the Kentucky Constitution²⁴ and existing statutory law.²⁵

It is apparent that many states in their lottery laws have a tool that can be used to control referral selling. Before the problem is to be considered solved, however, it should be noted that there are practical limitations upon even those states following the doctrine that referral selling is a lottery. First, there is no provision in most lottery statutes for investigation. An investigation in a matter involving referral selling is not like a raid on a crap game where a search warrant is obtained and the police blow their whistles and cart everyone off to jail. The proof

²⁰ *Supra* n. 18, at 163.

²¹ *Id.*

²² Illustration used by the Court, *supra* n. 18.

²³ *Commonwealth v. Allen*, *supra* n. 19.

²⁴ Ky. Const. § 226.

²⁵ Ky. Rev. Stat. § 436.360.

in referral selling is mainly dependent upon obtaining victim witnesses. The easiest method of identifying the witnesses is to obtain the suspected company's customer list. If the state has a Consumer Protection Act, which allows civil subpoenas to be issued for this purpose, the customer list can be obtained relatively easily. Without such a Consumer Protection Act, however, a civil suit must be filed, and the evidence must be obtained through discovery procedures or, in the alternative, a grand jury investigation must take place. The only other possibility is to catch the end of the referral chain and develop the customer list by piecing the chain together. Needless to say, piecing together the chain is both costly and time consuming.

A second problem in using lottery laws to control referral selling is that the facts are often confusing to the victim witnesses. A victim must recall the salesman telling him that he would obtain the product free or that he would obtain a large sum of money for participating in the program, for the "chance" element of the lottery to be present. As time passes it is often found that these details are confused in the victim's mind.

Use of lottery laws to attempt to control referral selling is at best a "back door" approach. As noted above, the problem can best be handled through the use of a state Consumer Protection Act; however, many states do not have such an act. Companies using referral selling in interstate commerce may be in violation of the Federal Trade Commission Act. However, the Commission is often slow in its enforcement and is limited by available staff and funds. It would be nearly impossible for the Commission to stop or even effectively impede all the referral selling in all of the states.

3. Multi-Level Sales Operations

A refinement of the typical referral selling plan has emerged in the past two years. The establishment of companies that sell distributorships for products through Multi-Level Sales Operations (hereinafter sometimes referred to as MLS) opens the door to whole new legal concepts in the field of merchandising through the use of lotteries. MLS operations are causing a great deal of concern among consumer protection agencies on both the state and federal level. The Post Office Department has estimated that there are over 200 different MLS promotions in operation in the country today.²⁶ More are emerging, as promoters are becoming aware that this may be their "road to riches." Conferences have occurred among and between state and federal officials, in which MLS has been discussed. However, it should be noted

²⁶ Reported in the *Wall Street Journal* (Dec. 2, 1968).

that there has been no reported contested case in which the question of whether MLS is a lottery has been decided.

Generally Multi-Level Sales Operations operate in the following manner:²⁷

A promoter decides to market a product by MLS in order to avoid going through the laborious task of advertising and placing his product in the stores. In order to accomplish this purpose, distributorships for the product are sold. The distributorships are ranked in levels. The higher the level of distributorship sold, the more the cost, but also the higher the potential profits. In addition to the right to sell the product, a distributor also obtains the right to sell other distributorships and receive compensation for doing so. The amount of compensation depends upon the level of the distributor.

One MLS program operated across the country had four levels of distributorships. The first level was a "Beauty Advisor." The "Beauty Advisor's" job was to sell the product at retail through holding parties in which the product was sold, and through other means. It was suggested in the sales pitch that the "Beauty Advisor" would easily have five customers a week who would purchase \$17 each worth of products from her. (One of the major problems with MLS is the exaggerated earnings claims. Often the exaggeration begins with the lowest level. After subsequent exaggerations are built upon the first one, the earnings of the highest level of distributor often reach astronomical proportions.) The cost of becoming a "Beauty Advisor" was \$30, paid for a kit that was used in demonstrations of the product. The next level was that of a "Coordinator." The "Coordinator" was to obtain several "Beauty Advisors" to sell the product at retail. The cost for becoming a "Coordinator" was \$130.

The preceding two levels were not termed distributors by the company. To become a distributor, the third or fourth level had to be purchased. The term "Supervisor" was chosen for the third level. The cost of becoming a "Supervisor" was \$2,000. The top level was that of "Director." The "Director" paid \$4,500 for his distributorship, but received the highest percentage of profit for selling the product, and the largest compensation for selling other distributorships.

One of the major inducements in this MLS operation was to obtain the position of "Director." Every time a "Director" sponsored a "Supervisor" who later became a "Director" himself, the sponsoring "Director" received \$3,500 plus a 2% override commission on the new Director's sales. By a series of multiplications and by pyramiding the sale of "Supervisorships" and "Directorships," prospects were told that they

²⁷ See, Miriam Ottenberg, *Pyramid Plans—A Vision of Sudden Riches*, Washington *Evening Star*, June 27, 1969.

might receive a total of \$144,000 per year by the sale of distributorships for their \$4,500 investment. This does not include the profit to be made from the sale of the product.

Three methods could be employed to control the sale of Multi-Level Sales Operations. The first two will be discussed for background information.

(A) *Earnings claims*—It is deceptive to represent that an investor may earn \$144,000 for a \$4,500 investment if such earnings are not usual and probable. False earnings claims are deceptive and could be enjoined under a Consumer Protection Act on the state level or the Federal Trade Commission Act on the federal level.²⁸

(B) *Sale of a Security*—When the investment aspect of MLS is emphasized and a prospect is told that he might make money from the effort of others the transaction might be considered the sale of a security. Both the federal Securities and Exchange Commission and state regulatory agencies are examining MLS²⁹ to determine whether securities laws are being violated.³⁰

(C) *Lottery*—As in the case of referral selling, when the market becomes saturated with distributors, the chances of success become almost zero. Those that buy in at the beginning of the promotion in a given area have a better chance of "winning" than those who buy in at a later time.

The payment of an override commission and a "finders fee" for obtaining new distributors for a product are not new to American merchandising. Proponents of MLS point out that the compensation received for finding new distributors have the same characteristics as these two, well established forms of remuneration. To prohibit override commissions or "finders fees" would disrupt the activities of a great many legitimate businesses. Chance is the dominant element under examination, when attempting to prohibit or limit MLS by the use of lottery laws. The lottery laws have not been violated when a company merely decides to pay a compensation to its distributors for obtaining other distributors, so long as the purpose for the establishment of these distributors is to sell the product. If, however, the primary emphasis is not placed on selling the product, but rather on the profit to be made through the sale of other distributorships, the element of chance might be present. It should be noted, however, that chance is only present

²⁸ See, *Tractor Training Service v. F.T.C.* (C.A. 9, 1955), 1955 *Trade Cas.* ¶ 68,196, 227 F. 2d 420 (F.T.C. Dkt. 5943); see also *Goodman v. F.T.C.* (C.A. 9, 1957), 1957 *Trade Cas.* ¶ 68,690, 244 F. 2d 584 (F.T.C. Dkt. 6153).

²⁹ *Op. cit. supra* n. 26.

³⁰ For a recent opinion on this matter, in which a Texas Court held that a Multi-Level Sales Operation was not a security, see *Koscot v. King*, ____ S.W. 2d ____ (Tex., March 11, 1970).

when an apparent "endless chain" is created and there is no realistic limitation on the number of distributorships.

By now it should be obvious that there is a relatively easy means of avoiding the lottery laws, open to those using MLS. If what is claimed to be a realistic limitation is placed on the number of distributorships that will be sold, and at least a token effort is made to market the product, the element of chance becomes hard to prove. This fact is fortified if the prospect is told before he buys of the number of distributorships that will be sold as well as the number that have been sold. An effective argument can then be made that skill and not chance predominates in the success or failure of the purchaser of a distributorship. The only avenue then left open to the advocate attempting to have the operation declared a lottery is to argue that the limitation set for the number of distributors is unrealistic and will cause the market to be saturated if neared.

The Consumer Protection Division of the Office of the Attorney General in Kentucky recently accepted an Assurance of Compliance from a company that employed MLS in their state.³¹ In the Assurance the company agreed to modify its marketing structure so as to place a limit on the number of distributorships to be sold in that state. The company also agreed to disclose to prospective purchasers the number of distributorships that had been sold and those remaining to be sold. The value of this approach was that the limitation was judged reasonable before the Assurance was accepted. To show its good faith and to insure that it would continue to promote the product at retail after there were no longer any distributorships to be sold, the company agreed to place \$100,000 in escrow to act as a bond. It should be noted that Kentucky does not have a Consumer Protection Act that would declare deceptive earnings claims illegal.

It would appear that use of the lottery laws is a weak substitute that can be used in appropriate instances to control MLS. Through the use of false earnings claims, MLS would appear to open the door to deception even with such limitations. The preferable means of control is through a Consumer Protection Act. In the absence of such an act, consideration might be given to the enactment of legislation specifically outlawing MLS.

4. Games

From "Sunny Dollars" at gas stations, to T.V. Bingo at grocery chains, the games may vary but the idea is the same, to get the consumer into the store with the inducement that he has a chance to win a fabulous prize. Some games require many trips to the place of business

³¹ Assurance of Compliance dated April 1, 1969, on file in Attorney General's Office, State Capitol, Frankfort, Ky.

to obtain game pieces, while others provide "instant winners". Whatever the promotion, these games invariably try to skirt the element of *consideration* in order to avoid lottery laws. In discussing the games it is helpful to note that there are two general types of consideration which courts have outlined in discussing these cases, namely, "pecuniary" and "non-pecuniary." State courts are split on the question of whether "non-pecuniary" consideration will bring a promotional plan within lottery statutes.³²

An Ohio case decided in 1968 is typical of those jurisdictions holding that there must be "pecuniary" consideration in order to bring a promotional plan within the limits of being considered a lottery. In *Kroger Co. v. Cook*,³³ the Kroger company had engaged in a promotion termed "Race to Riches." They distributed cards bearing numbers corresponding to the numbers on various automobile racing cars. Each week there was a T.V. sequence in which the cars raced. A prize was awarded to any cardholder with the number of the car winning the race.

Kroger distributed cards to any person passing through a check out line, regardless of whether a purchase was made. Cards were also sent out if requested by mail or telephone. The Court of Appeals for Franklin County, Ohio, stated that Kroger's promotion did not constitute a lottery. Although the elements of prize and chance were present, according to the court there was no "price" charged. The court reasoned that the fact that there was a cost to the promoter was not transformed into consideration *quid pro quo*. The court said, "Cost does not create a sale transaction nor constitute a bargain for consideration. Customers may be intrigued by the opportunity for a prize and either patronize appellants store or purchase more items or otherwise respond to the lure of the promotions. However, the fact that certain consumer behavior patterns are anticipated as a matter of predictable response to a set of circumstances and that the anticipated responses occur does not establish that the behavior of any individual was bargained for by the promoter."³⁴ The court went on to find, however, that the promotion violated a state regulation against premium or gift merchandising in connection with the solicitation or sale of alcoholic beverages.

A 1964 Iowa case is in contrast to the Ohio case. The court, in *Idea Research and Development Corp. v. Hultman*,³⁵ held that consideration was present in a television bingo promotion. To participate in the promotion it was necessary for an individual to make a trip to a sponsor to obtain the bingo cards which were free of charge. No purchase from

³² Comment, *op. cit. supra* n. 1.

³³ 17 Ohio App. 2d 41, 244 N.E. 2d 790 (1968).

³⁴ *Id.* at 791.

³⁵ 131 N.W. 2d 496 (Iowa, 1964).

the store was necessary. New cards were furnished each week. No bingo cards were mailed to participants nor were any located outside of the store.

The court, while noting that the issue centered on whether consideration was present, stated, "The consideration does not need to be a money consideration. It can be in the nature of the participant doing something in the way of going each day or each week to the place of business of the sponsors and picking up a T.V. Bingo card. There is consideration for all participants when some pay or buy merchandise and others do not."³⁶ The court in the *Idea* case emphasized the point that the game was a lottery at least to those who purchased a product of the sponsor. "It did not cease to be a lottery because some were permitted to play the game without purchasing any product so long as others paid for their chances."³⁷

It is suggested that the *Idea* case and those following it are possibly correct in fact, but wrong in theory. As noted earlier in this paper, all three elements must be present in order to constitute a lottery. It is submitted that each of these elements must run to the lottery for the promotion to be illegal. In the situation presented in the *Idea* case, since non-purchasers as well as purchasers were allowed to play and receive a prize, the consideration ran to the product purchased and not the promotion. The contract to which the "pecuniary" consideration attached was for the purchase of soap, food products, etc., and not for the right to participate in the contest. If the element of consideration is present it must be in the form of a disadvantage or inconvenience to the participant directly related to the promotion itself. When a participant is required to go to a place of business to register or obtain a piece of game material it could be reasonably held that there is simple contract consideration.

In 1956 a Nebraska court wrote an opinion which recognized the contract theory but did not fall into the pitfall of basing its decision on the sale of merchandise to some participants while others made no purchase. In *State v. Grant*³⁸ the court held that the element of consideration is present if there is a benefit to the promisor, who is the promoter of the scheme, or if there is a detriment to the promisee, who is the contestant or holder of a chance for the prize. The court cited 54 *Corpus Juris Secundum*,³⁹ which states, ". . . Some authorities hold that the presence or absence of consideration is measured by the usual tests applicable in the law of contracts, that consideration may consist of a

³⁶ *Id.* at 499.

³⁷ *Supra* n. 35, at 500.

³⁸ 162 Neb. 210, 75 N.W. 2d 611 (1956).

³⁹ *Lotteries* § 2, at 848.

benefit to the person conducting the scheme, or an inconvenience or disadvantage to the promisee, and hence that money or something of value need not be directly given for the right to compete." It is suggested that if the element of consideration is present in such games, which abound in the marketplace today, the Nebraska court has used better reasoning than the Iowa court.

The problems inherent in the promotional games go beyond the boundaries of a lottery and into the field of deception. As noted in a report by the Federal Trade Commission,⁴⁰ the games conducted by merchants are often rigged. The games depend upon a controlled ratio of winning pieces being distributed among the non-winners. One method of rigging the game was for the merchant or promoter to distribute or "seed" the winning pieces among favored stores and allow the win to occur at times designed to have the most impact on customers.⁴¹ It was also shown that in some instances those charged with the distribution of game pieces kept the winning pieces for distribution to friends and relatives.⁴² A large percentage of games studied by the Commission were derivatives of some type of gambling game such as bingo, card games, or slot machines.⁴³ Another factor reported is that the chances for winning a large prize are low while the cost for participation through increased prices is relatively high.⁴⁴ When the games were first introduced the public embraced them and participated vigorously. Later, as most merchants began to adopt such games in order to compete, the public began to take them for granted. Now there is evidence to show that some merchants do not wish to continue such contests but must do so in order to compete.⁴⁵

Conclusions

Since the impulse to gamble and the desire to make money are both strong motivations in man, it is logical to assume that the two reinforce each other. However, the motivations present in gambling are not good criteria for making intelligent consumer purchases. It therefore becomes necessary to protect the public interest by limiting or outlawing lotteries before the marketplace becomes one giant bingo game.

More evil than the lotteries themselves are the attendant deceptions that are usually found with them. In referral selling it is the representa-

⁴⁰ Federal Trade Commission, *Economic Report on the Use of Games of Chance in Food and Gasoline Retailing* (Dec. 1968).

⁴¹ *Id.* at 460.

⁴² *Op. cit. supra* n. 40, at 481.

⁴³ *Op. cit. supra* n. 40, at 403-404.

⁴⁴ Investigation of Sohio by the F.T.C., reported by UPI in the *Lexington (Kentucky) Herald* (August 27, 1969).

⁴⁵ *Op. cit. supra* n. 40, at 471.

tion that the customer will receive the product free; in Multi-Level Sales it is the exaggerated earnings claims; and in games it is the false claims about the chances of winning, coupled with rigging and an increased cost of goods.

Break and Take, and "punch cards," should be stopped by strong federal statutes prohibiting their use. After providing the statute, Congress should also provide for quick and efficient enforcement. Referral selling and Multi-Level Sales would be best controlled by state Consumer Protection Acts declaring deceptive practices to be unlawful. Under a Consumer Protection Act, a state agency would be able to institute an action to prohibit a company or promoter from using false and exaggerated earnings claims. The games found in grocery stores and gas stations should be prohibited by statute if legislatures believe the public is being damaged by them. The Federal Trade Commission Act and State Consumer Protection Acts can be used to control rigging, seeding, and related problems.

While lottery laws are used by law enforcement officials in an attempt to control what essentially amounts to deceptive practices, it is suggested that deceptive practices are best controlled by federal statutes and the enactment of state Consumer Protection Acts. At present some thirty states have some type of Consumer Protection Act. Those states in the minority, that do not have such a law, should consider adopting one at the next session of their respective legislatures.⁴⁶

⁴⁶ It should be noted that the states of Kentucky, Ohio and West Virginia had a Consumer Protection Act recently considered by their legislatures, which failed to adopt such a statute.