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CRIMINAL LAW: Lotteries.

The three elements of a lottery are consideration, prize and chance.

The element of consideration in a lottery requires that the participant pay something valuable for the chance to win a prize.

It is questionable whether a prosecution for violation of lottery statute could be successfully maintained against certain business promotional schemes which do not require payment of something of value for the chance to win a prize inasmuch as they are not lotteries as defined by the Michigan Supreme Court since they lack the element of consideration. The Attorney General recommends that appropriate legislation be enacted clarifying the definition of the term "lottery" in a manner which would permit prosecution for institution of business promotional schemes if such is the desire of the legislature.

No. 4562 March 22, 1967.

Honorable George F. Montgomery
State Representative
The Capitol
Lansing, Michigan

You have sought my opinion concerning the application of Michigan statutory and case law to various sales promotion schemes currently being used by certain business enterprises operating in Michigan.

As you have noted, these promotional schemes generally involve distribution at the promoter's place of business of some token, either with or without a purchase. The token is held by the consumer who, in order to win a prize, must successfully match his token with others, or receive a token with the right combination of numbers, letters or symbols.

Article IV, Section 41 of the Michigan Constitution of 1963 provides:

> "The legislature shall not authorize any lottery nor permit the sale of lottery tickets."

In addition, Michigan has, for over a century, had a criminal statute prohibiting lotteries. Section 372 of the Michigan Penal Code, C.L. 1948 §750.372; M.S.A. §28.604, provides:

> "Any person who shall set up or promote within this state any lottery or gift enterprise for money, or shall dispose of any property, real or personal, goods, chattels or merchandise or valuable thing, by the way of lottery or gift enterprise, and any person who shall aid, either by printing or writing, or shall in any way be concerned in the setting up, managing or drawing of any such lottery or gift enterprise, or who shall in any house, shop or building owned or occupied by him or under his control, knowingly permit the setting up, managing or drawing of any such lottery or gift enterprise, or the sale of any lottery ticket or share of a ticket, or any other writing, certificate, bill, goods, chattels or merchandise, token or other device purporting or intended to entitle the holder or bearer or other person to any prize or gift, or to any share of or interest in any prize or gift to be drawn in any such lottery or gift enterprise, or who shall knowingly suffer money or other property

to be raffled for in such house, shop or building, or to be there won by throwing or using dice, or by any other game or course of chance, shall for every such offense be guilty of a misdemeanor, punishable by imprisonment in the state prison not more than two [2] years or by a fine of not more than one thousand [1,000] dollars."

The background of Michigan's lottery prohibition was reviewed at some length by Justice Campbell in *The People v. Edward F. Reilly,* 50 Mich. 384, 386-387 (1883), in the course of which he stated:

"The statutes concerning lotteries, which go back into the territorial period, have from the beginning provided the same penalty of two thousand dollars as the fine which might be imposed. Act of June 30, 1828, (3 Terr. L. 687). This statute, which was 'An act to suppress private lotteries,' goes more into detail than the subsequent statutes, and shows very clearly that the evil aimed at was that class of schemes whereby large numbers of persons are enticed into purchasing tickets for the distribution of prizes in money or property upon some sort of drawing or allotment by chance. It is also to be noticed that one primary object was to punish such acts as the assumption of privileges, which it was then customary to grant to the aid of various public enterprises. Lotteries were frequently allowed to raise money for public improvements, such as schools, bridges, etc. Thus in 1805 four lotteries were authorized for the benefit of the city of Detroit, shortly after the destruction of the town by fire. 1 Terr. L., 67. Four lotteries were allowed for the benefit of the University in 1817. 2 Terr. L., 105. Lotteries were also authorized in 1829 to secure free bridges and improved highway communication between Detroit and Monroe. 2 Terr. L., 731.

"By the Constitution of 1835 (art. 12, §6) it was provided that 'no lottery be authorized by this State, nor shall the sale of lottery tickets be allowed.' There can be no doubt what was meant by this language, and it clearly referred to the class of enterprises which had formerly been lawful if authorized by law, and criminal if unauthorized. * * *."

Several early cases decided by our Supreme Court also established certain basic concepts with regard to the prohibition against lotteries.

In *The People v. William O. Elliott,* 74 Mich. 264 (1889), the Court defined a lottery in the following terms:

"A lottery is a scheme by which a result is reached by some action or means taken, and in which result man's choice or will has no part, nor can human reason, foresight, sagacity, or design enable him to know or determine such result until the same has been accomplished. It was the obtaining of money or property by such means that our statute was intended to prevent and punish, * * *." (pp. 267, 268)

And in *Sproat-Temple Theatre Corp. v. Colonial Theatrical Enterprise, Inc.,* 276 Mich. 127 (1936), the Michigan Court indicated accord with the usually stated elements of a lottery. Namely: (1) consideration, (2) prize and (3) chance.

In *United-Detroit Theaters Corp. v. Colonial Theatrical Enterprise, Inc.*, 280 Mich. 425, 429 (1937), our Court, quoting from Ruling Case Law, with approval stated:

> " '* * *, it appears to have become the established American doctrine that, in order to constitute a lottery within the meaning of the various statutes, it is not necessary for the distribution of prizes to be purely by chance, but only for such distribution to be by chance as the dominating element, even though effected to some extent by the exercise of skill or judgment.' 17 R.C.L. p. 1225, §12."

The Supreme Court first considered the problem of promotional schemes under our lottery prohibitions in a series of cases involving suit clubs.

In *People v. McPhee,* 139 Mich. 687 (1905), the Supreme Court stated:

> "It cannot be denied that the respondent sought to, and presumably did, increase his business by a device or scheme, the feature of which, so far as securing patrons and customers was concerned, was the chance to obtain $20 worth of clothing for some sum of money less than $20. It was calculated to, and did, appeal to the gambling propensity of men, was within the mischief at which the legislation is aimed, was within the terms of the statute, and, in our opinion, a disposition of property by way of lottery. * * *." (pp. 692, 693)

People v. Wassmus, 214 Mich. 42 (1921), involved prosecution of a defendant who sold suits for $48.00, payable $1.00 per week. Each week one customer had his suit discounted and received it without additional payment, regardless of the amount still owed. The Court held:

> "* * * it is contended that there is no element of chance in the transaction, that one buys a suit for $48 and gets it, and beside he may get his suit discounted before he makes 48 payments. Herein lies the element of chance. By purchasing a suit for $48 one gets the chance of acquiring it before he pays for it, or before he pays the $48. This chance is the seductive thing about the scheme and it is this which attracts the investor. But it may be said that there is no element of chance because there is no drawing, that the management itself selects the beneficiary; but this fact does not purge the transaction of all element of chance. * * *" (p. 45)

However, as the quoted language of these cases indicates, the Court at that time appears to have been primarily concerned with the element of chance in business promotion schemes. Here the question of whether the kinds of promotions referred to by you are lotteries centers around the element of consideration.

This issue came before the Court in the theatre "bank night" cases. *Sproat-Temple Theatre Corp. v. Colonial Theatrical Enterprise, Inc.*, supra, involved the defendants' scheme to give cash prizes to some theatre patrons without any charge except the usual admission ticket. The lower court held the scheme to be a lottery and issued an injunction. Upon appeal the Supreme Court affirmed stating:

> "Defendants * * * contend that in view of the fact that the patron pays nothing for a chance to receive the prize, no consideration runs from the public, and, therefore, the statute is not violated." (p. 129)

The Court then quoted with approval from *Society Theatre v. City of Seattle,* 203 Pac. 21 (Wash. 1922), as follows:

> " 'The elements of lottery are: First, a consideration, second, a prize, and third, a chance. It needs no argument to show that the second and third elements appear in the business conducted by respondents. But it is argued that the element of consideration does not appear because the patrons of the theatres pay no additional consideration for entrance thereto, and pay nothing whatever for tickets which may entitle them to prizes. But while the patrons may not pay, and the respondents may not receive, any direct consideration, there is an indirect consideration paid and received. The fact that prizes of more or less value are to be distributed will attract persons to the theatres who would not otherwise attend. In this manner those obtaining prizes pay considerations for them, and the theatres reap a direct financial benefit.' " (pp. 130, 131)

And the Michigan Court went on to summarize the effect of the lottery statute in these terms:

> "Act No. 328, §372, Pub. Acts 1931, definitely prohibits any lottery or gift enterprise within the State; and prohibits the disposition of any property, real or personal, goods, chattels or merchandise or valuable thing by way of lottery or gift enterprise; and provides punishment for a violation thereof. Our statutes do not attempt to define what a lottery is, but our court has said that the essentials of a lottery are consideration, prize and chance." (p. 129)

United-Detroit Theaters Corp. v. Colonial Theatrical Enterprise, Inc., supra, involved a game called "screeno" which the Court described as follows:

> "The 'screeno' cards are given to patrons of the theater with each admission ticket sold. The cards are not confined to purchasers of admission tickets, but are given upon request to any person in the foyer of the theater or to persons on the sidewalk in front of the theater." (p. 427)

The Court held as follows:

> "Section 372 of the above act definitely prohibits any lottery or gift enterpise within the State. The three essential elements of a lottery are: consideration, prize, and chance. (citations omitted)
>
> "In Michigan we have held that an indirect consideration is sufficient. (citations omitted) * * *
>
> "In the instant case the distribution of the tickets unquestionably attracted others to the theater who otherwise would not have attended and in this way the theater owner profited thereby. This is a sufficient consideration." (pp. 428, 429)

In *Glover v. Malloska,* 238 Mich. 216 (1927), suit was brought to enjoin an alleged lottery scheme. The facts were stated as follows:

> "* * * Defendant Malloska, doing business as the Lincoln Petroleum Products Company in the city of Flint, conceived the idea that it would

> aid his business of selling gasoline and oils to retail dealers to have tickets printed giving holders thereof a chance to draw an automobile at monthly drawings. Malloska procured the tickets, sold the same at a cent each to his customers, and let them give away the tickets to purchasers at their retail oil stations, or to anyone asking for tickets without making a purchase. Once a month stubs of the tickets so given out were placed in a barrel, a drawing made, and the winner determined by chance. * * *" (pp. 217, 218)

The Court held:

> "The scheme was clearly a lottery. (citations omitted) The often asserted essentials of a lottery, viz.: consideration, prize, and chance, were all present. Malloska sold the tickets to his customers for distribution by them in the course of trade to further his pecuniary interest, and this established consideration. * * *" (p. 219)

More recently, however, the Michigan Supreme Court had occasion to review and to consider the effect of lottery statutes on commercial promotional schemes in the light of modern practices. The case was *ACF Wrigley Stores, Inc., v. Wayne Prosecuting Attorney,* 359 Mich. 215 (1960), a civil suit brought by a business enterprise to determine that its television program was not a lottery and to enjoin prosecution. In the Court's own language, the facts were as follows:

> "The television program under question consists of drawing and televising numbers by the television station. The participant in his home, or elsewhere, observes a television screen and ascertains whether the numbers drawn match the vertical, horizontal, or diagonal set of numbers on his card. The participant may use a card distributed by plaintiff or he may prepare his own card, which participant forwards to the television station where it is registered and then returned to participant with notice of the broadcasting day on which the card may be used. If participant matches numbers, he notifies the broadcasting station and is awarded a prize." (pp. 217, 218)

Then, after considering applicable cases from this as well as other jurisdictions, the Court adopted the following language of the trial court as its opinion:

> " 'Michigan statutes do not define lotteries. The elements of a lottery are not set forth in the statute and, therefore, this has been left to the courts.
>
> " 'Our lottery statute has been on the books for many years and was passed to prevent the mulcting or cheating of the public by the sale of gambling chances.
>
> " 'In 41 Georgetown L. J., 556, 558, it is said that authority is only as good as the reason for it, and the evil sought to be eradicated by the lottery statutes was the impoverishment of the participant, and the enrichment of the promoter of the scheme, but this evil results only when the participant pays something valuable for the chance to win a prize.
>
> " 'It is the opinion of the court that these radio and television programs do not encourage gambling because the person is passive as far as

the giveaway plan is concerned; also, it seems to follow that the radio and television programs are not included within the prohibition of the statutes.

" 'The courts have been quite realistic in viewing giveaway programs only as a nuisance in our time and not as the evil of the century.

" 'The court therefore holds that television program "Play Marko" is not a lottery within the meaning of the statute.' " (p. 223)

The above review of the statute and the cases interpreting it indicates that a state of genuine doubt exists as to whether the kinds of promotional schemes described by you fall within the definition of a lottery. This being the case, it is questionable that a prosecution for criminal violation of the statute could be successfully maintained. I would therefore recommend that appropriate legislation be enacted clarifying the definition of the term "lottery" in a manner which would permit prosecution for institution of business promotional schemes if such is the desire of the legislature.

Another quote from the *Wrigley* case appears to be appropriate at this point. In arriving at its conclusion, the Court adopted with approval the following language of *Caples Company v. United States,* 243 F. 2d 232 (1957):

" '* * * we conclude that "it would [still] be stretching the statute to the breaking point to give it an interpretation that would make such programs a crime." *Ibid.* The undesirability of this type of programming is not enough to brand those responsible for it as criminals. Protection of the public interest will have to be sought by means not pegged so tightly to the criminal statute or in additional legislative authority.' " (p. 221)

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