

## RAFFLES, DRAWINGS AND LOTTERIES

### I. INTRODUCTION

Michigan, along with other states, prohibits various types of games of chance. While the rules vary from state to state, for the most part, a game is illegal if all three of the following elements are involved: (a) consideration, (b) chance; and (c) a prize. If the game only involves two of the three elements, the game may be permissible under state law.

Recently, the producers of "America's Got Talent," "American Idol," "Deal or No Deal," and "The Apprentice" were defendants in a class action suit brought in California. At issue in each instance was a text-to-win sweepstakes by which a consumer could enter by sending a text message subject to a 99¢ premium charge (or by filling out a free online entry form). The plaintiffs argued that the sweepstakes were unlawful under the California lottery statute because individuals didn't get anything of value for the money they paid to enter other than the opportunity to win prizes. The defendants' position was that the availability of the free entry method meant that there was no required consideration and, thus, the game was permissible. Nonetheless, the defendants agreed to settle the matter. Under the settlement, the class action plaintiffs got their 99¢ back and the attorneys that brought the case got over \$5 million in fees and costs.

Obviously then, rules on raffles and similar games of chance should not to be taken lightly. This article will discuss the Michigan statutes and the cases that have been decided interpreting those statutes.

## II. DISCUSSION

### A. The Michigan Lottery Statute

The Michigan Lottery Statute prohibits the establishment or promotion of “any lottery or gift enterprise for money.” MCL 750.372. The statute does not prohibit “game promotions.” A “game promotion” is defined in the Lottery Statute as, “any game or contest in which the elements of chance and prize are present but in which the element of consideration is not present.” MCL 750.372a(a).<sup>1</sup>

In analyzing the “consideration” element, both the Attorney General and the Michigan Supreme Court have looked at whether there is a financial benefit gained by the business offering the drawing. For example, a promotion whereby a theatre gave all patrons a ticket to a drawing was deemed to be an illegal lottery, even though the patrons paid no additional amount beyond the cost of the theatre ticket. *Sproat Temple Theatre Corp v Colonial Theatre Enterprise, Inc.*, 276 Mich 127 (1936). The Court stated:

The fact that prizes of more or less value are to be distributed will attract persons to the theatre who would not otherwise attend. In this manner those obtaining prizes pay consideration for them and the theatre reaps a direct financial benefit.

Similarly, the Michigan Attorney General was once asked about a credit union’s promotional program which provided that in order for an individual to be eligible for a prize drawing, he or she must deposit funds in the credit union. 1979-1980 Mich OAG

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<sup>1</sup> Even where we have an otherwise permissible “game promotion,” the Occupational Code provides that a REALTOR® cannot use a game promotion to promote a specific piece of real estate. It would not be permissible, for example, to provide that all persons who attended an open house at 123 Main Street would receive a raffle ticket for a drawing to win a flat screen TV. MCL 339.2511.

No. 5692. The Attorney General opined that there was consideration being paid (and thus, there was an unlawful lottery) because the program:

. . . requires a participant to forego other uses of the deposit funds and enhances the assets of the credit union.

The Michigan Supreme Court has even gone so far as to find consideration where participants were not required to purchase any items, but were only required to visit a store twice within a week – once to have a qualification card punched, and once to attend the drawing. *People v Brundage*, 381 Mich 399 (1968). Under this analysis if, for example, an association provides a raffle ticket to any member who spends \$50 at the association's store, this promotion could be declared an impermissible lottery. This is true even though no additional consideration was paid for the raffle ticket itself.

Providing an alternative method to enter a raffle that does not involve payment will not save an otherwise illegal raffle. *F.A.C.E. Trading, Inc. v Dept of Consumer and Industry Services*, 270 Mich App 653 (2006). In that case, the Court of Appeals struck down a raffle whereby a person could enter a drawing by either paying \$1.00 for a ticket or by following these instructions:

To enter without purchase: (a) ask the participating retailer for an official game piece request form and legibly print all the information requested on the form; or (b) call 800-xxx-xxxx to request an official game piece request form; or (c) on a sheet of white paper no smaller than 3" by 5", legibly print your name, address, city, state, zip code, age, the name of the promotion for which you are requesting a game piece, and the name and address of the retail establishment at which you will redeem the game piece if it is a winning game piece.

In declaring this an illegal lottery, the Court did note in passing that six million \$1.00 tickets had been sold, but only five tickets had been provided in response to request under the “no purchase necessary” option.

Local associations may be able to make use of an exception to the Lottery Statute that allows promotional activities that are “clearly occasional and ancillary to the primary business.” MCL 750.372(2). Even “occasional and ancillary” lottery activities, however, must be structured so that a participant does not pay money solely for the chance to win. Instead, any money paid must be paid for an actual product or service and, the amount paid may not be “substantially more than the fair market value” of that product or service. In other words, the participant cannot have paid money for the chance to participate in the drawing.

The Lottery Statute is a criminal statute. A violator of the Lottery Statute is, for each violation, guilty of a misdemeanor, punishable by imprisonment of not more than two (2) years or by a fine of not more than \$1,000. MCL 750.372.

#### **B. The Traxler-McCauley-Law-Bowman Bingo Act**

Where there is a fee or other consideration required to participate in the contest, the contest will be a prohibited lottery unless the Bingo statute applies and the sponsor complies with all of the requirements of that statute. The Bingo statute allows the conduct of raffles for a fee if the sponsor is a “qualified organization,” as that term is defined under the statute, and the sponsor complies with the applicable registration and licensing requirements.

A “qualified organization” is defined as:

. . . a bona fide religious, educational, service, senior citizens, fraternal, or veterans’ organization that operates without profit to its members and that either has been in existence continuously

as an organization for a period of 5 years or is exempt from taxation under 26 USC 501(C).

MCL 432.103(6).

Local REALTOR® associations, even those that are organized as non-profit corporations, are not “qualified organizations.” While these associations operate “without profit to their members,” they do not fall within the statutory definitions of religious, educational, service, senior citizen, fraternal or veterans organization.

Where the sponsor is a “qualified organization,” under the Bingo statute, the raffle will be regulated, rather than prohibited. The level of regulation depends upon certain characteristics of the raffle, such as the total value of the prize(s) to be awarded. For example, if the raffle is held at a single event at which all of the tickets are sold, prize(s) are drawn and the value of the prize(s) is \$100.00 or less, the raffle will be exempt from both the licensing and registration requirements of the Bingo statute. If the value of the prize(s) is \$101.00 to \$500.00, the raffle must be registered, for a fee, with the Bureau of State Lottery. If the value of the prize(s) exceeds \$500.00, the sponsor must obtain a gaming license from the Bureau of State Lottery in order to lawfully conduct the raffle.

Similar to the Lottery Statute, a violation of the Bingo statute constitutes a misdemeanor and is punishable by a fine of not more than \$1,000.00, imprisonment for not more than six months, or both. MCL 432.117. The sponsor of the illegal gaming also may have its gaming license revoked and be prohibited from obtaining a gaming license for a period of one year from the revocation. MCL 432.118(1).

### III. CONCLUSION

Games involving consideration, chance and a prize are prohibited lotteries within the meaning of the Michigan Lottery Statute. Local REALTOR® associations may conduct raffles so long as there is no “consideration” required to participate. Where there is no consideration, but only chance and a prize, the drawing is most likely a permissible game promotion.<sup>2</sup> “Consideration” for purposes of distinguishing between an illegal lottery and a legal game promotion is interpreted quite broadly. “Consideration” has been found where a person is required to buy goods or services in order to enter a drawing, even though the participant is not required to pay any additional amount for the chance to win.

Importantly, where the “consideration” paid is for an actual product or service and does not involve an additional cost for the chance to win, the Michigan Lottery Statute permits a business to use this type of drawing on an “occasional” basis to promote its products or services.

Finally, REALTORS® should remember that a program is not protected activity just because it involves a charity or religious organization. An otherwise prohibited raffle is no less illegal just because the benefactor is a charitable or religious organization. The only legal distinction between these types of organizations and other organizations in this regard is that charitable organizations themselves may be able to get a license under the Bingo statute to conduct a raffle in which participants are charged a fee to participate.

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<sup>2</sup> REALTOR® members should be reminded that even otherwise legal game promotions cannot be used to promote a specific parcel of real estate. MCL 339.2511.