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Lottery Tickets Sold after the Featured Prize Is Claimed: Will the Courts Force the Practice to be Stopped?

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In the past few years, several different people sued state-run lotteries in a variety of jurisdictions for selling tickets after awarding the grand prize of a particular game. The players challenged the practice by many of the 42 state-run lotteries that offer and allow vendors to continue to sell scratch-off or instant win tickets despite someone else already receiving the top prize. Some media sources estimate that over half of the nation’s lotteries follow this practice to some extent or another. States like Colorado, Florida, Michigan, New Jersey, and Tennessee deem this policy acceptable for a variety of reasons including the fact that they notify the players of these practices via the Internet, by disclosures on the back of the ticket, or as allowed through state-approved operational regulations.

According to the executive director of the North American Association of State and Provincial Lotteries, the difficulty in determining when to discontinue the sale of tickets for a particular game stems from the number and size of lower tier prizes available for award. Officials in Colorado close a particular game after awarding the last top prize unless a “significant number” of lower tier prizes remain. In other states, negative publicity generated by lawsuits trying to stop the practice forced a shift in the government’s policy. California, Massachusetts, New York, and Virginia follow a strict guideline where they terminate the game upon someone winning the last grand prize and notify retailers to stop selling the tickets. Similarly in Texas, the lottery officials voluntarily decided to go along with the more stringent approach after a state senator introduced legislation to compel the practice, and Arizona changed its procedures after a gubernatorial candidate made it an issue during the 2000 election campaign.

Players of the popular instant win or scratch games must evaluate whether the operator of the lottery they decide to play chooses to follow the questionable ethical guidelines by selling tickets after someone claims the grand prize or follows a more stringent policy to give all those involved a fair and equal chance. If someone in the states that follow the lesser policy believes the practice by the state's lottery is unethical, they have a legal right to challenge the policy in court.

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1 Sue Lindsey, Suit: Va. Lottery sold tickets with no top prizes, ASSOCIATED PRESS, June 30, 2008.
5 See Correll, supra note 3.
6 Id.
7 See Cauchon, supra note 4.
8 Id.
9 Id.
run operator needs a more ethical approach, then the options to achieve a change become limited. The courts tend to protect these government-sponsored lotteries from lawsuits that might succeed if the same practices occurred in the commercial environment; so the odds of winning a lawsuit against the state entity face an uphill battle. However, states with prohibitions against certain types of gaming activities or those jurisdictions where the lottery barely maintains support for its existence may respond more favorably to such negative publicity.

A BRIEF HISTORY OF LOTTERIES

Lotteries in the United States trace their roots to the Puritans.11 Then, the Jamestown settlement became the beneficiary of a lottery conducted throughout Britain by the Virginia Company of London to provide for the colony’s financial needs.12 However, this approach ended quickly when the British realized that the lottery placed a drain on their economy, so the operation changed its focus toward the colonies.13

Until the Civil War, the colonies chartered more than 158 different lotteries to fund infrastructure and higher education projects,14 including “the fortification of New York City and Philadelphia, the construction of roads, hospitals, lighthouses and jails, the promotion of literature, the improvement of navigation on rivers, the development of industry, and even the construction of churches.”15 All in all, over 47 colleges, 300 schools, and 200 religious groups all benefited from this type of fund raising.16

In addition, private lotteries existed at first but later became outlawed because these merchants regularly complained of unfair competition with the public ones.17 The colonies found that the best way to silence these critics as well as funnel revenue to public needs was to make the for-profit lotteries illegal.18 These governments took the position that the lottery functioned as a voluntary tax for public works-type projects as well as a means to give back a small portion to those lucky enough to choose the right numbers.19

With this approach in mind, the colonial governments were forced to promote their operations because they depended on lottery revenue to fund essential needs.20 At the same time, the policymakers used a strategy to link the negative aspects associated with a lottery toy those conducted for private interests—not the public ones.21 However, the rise of lotteries ended very quickly as economic pressures and tensions with England caused few to participate in the activity.22 These threats caused England to ultimately close several colonial lotteries.23

Eventually, the newly established states established a national lottery, as well as several state lotteries, to provide financial assistance toward the Revolutionary War.24 The Continental Congress even authorized a lottery for $10 million, but later ordered it shut down because of the size and lack of interest.25

After the Revolutionary War, hard times occurred on a local level for lottery promoters.26 However, the business aspect grew rapidly with the country’s expansion toward the west when these ventures grew their base across a state or the nation.27 Many entrepreneurially minded people created ticket brokerage businesses to promote the lotteries.28 They purchased tickets in sizeable lots for reduced prices; and in turn, they sold them to customers using many different approaches like installment plans, fractional interests, and games available in other states.29 Because these brokerages generated so many problems, the colonial governments turned to regulating the industry.30

Later, as the country expanded further westward during the early 1800s, lotteries again helped fi-

12 Roger Dunstan, Gambling in California, CALIFORNIA RESEARCH BUREAU, Jan. 1997, at ch II.
13 Id.
14 See Rychlak, supra note 11.
15 Id. at 26.
16 Id. Among the colleges, Harvard, Yale, Kings College (which became Columbia University), Princeton, Rutgers, Dartmouth, Rhode Island College (which became Brown University), the University of Pennsylvania, the University of North Carolina, and the University of Michigan were beneficiaries. Id.
17 Id.
18 Id.
19 Id.
20 Id. at 27.
21 Id.
22 Id. at 28.
23 Id.
24 Id. at 29.
25 See Dunstan, supra note 12.
26 See Rychlak, supra note 11.
27 Id.
28 Id. at 30.
29 Id.
30 Id.
nance necessities and infrastructure projects because the banking system and the fledgling central government were not well developed at the time.31 While this system worked in the beginning because most would-be foes benefited from the proceeds, lottery opposition gained momentum in the early to mid-1800s due to social issues and the rise in fraudulent activity.32 This resulted in many states enacting legislation to completely prohibit them.33

In spite of these public policy decisions, financial needs following the Civil War and the next expansion of the country into the west lead to the legalization of lotteries for a brief period in the 1860s.34 Tickets for these operations became available across the country but caused problems. For example, the Louisiana lottery became notorious because of the difficulty in “closing it down” due to its use of the postal service to bring revenue from outside the state while influencing the media, financial institutions, and lawmakers.35 In 1890, Congress eventually acted, due to great pressure from other states, to prohibit a lottery from sending any materials in the mail.36 Ultimately, every state with the exception of Louisiana made lotteries illegal by 1878 via their statutes or constitution. Louisiana waited until 1895.37

In 1964, nearly a century later, New Hampshire became the first state to reauthorize a government run lottery.38 Several states, mainly in the northeast, followed New Hampshire’s lead, but they did not achieve very much success at first.39 The popularity began to increase when New Jersey began offering a weekly game with cheaper tickets, more opportunities to win, convenient sales locations, and a big grand prize.40

With this new-found success, many states determined that the lotteries provided a good way to generate revenue without raising taxes.41 Promotional activities and lottery games now encompass various different forms like the creation of alliances among states to create even larger grand prize drawings, weekly or biweekly drawings, subscriptions to allow players the convenience to replay the same numbers up to a year without going to a sales location, instant scratch-and-win tickets for those not willing to wait for the selection event, and television shows.42

Accordingly, lotteries in this country maintain a long and distinguished history of generating vital funds for the government, religious groups, and education despite attempts by various groups to stop the practice for moral, ethical, and public policy reasons.

PROBLEM LOTTERIES OF THE PAST

While the lotteries of our heritage provided the country with numerous positives and laid the foundation for the future, many of these ventures operated with less than the highest ethical standards while justified by dubious public policies. Corruption issues occurred with the lotteries during the country’s early years and later the infamous Louisiana Lottery took the allegations of fraud to a new level.

Early issues with fraud

In the early days of the country, lottery fraud immediately became an issue for those governments allowing lotteries. Many states began investigations to determine whether the money generated actually found its way to the beneficiary.43 In Massachusetts, the legislature took the draconian step of completely banning lotteries after discovering that the Plymouth Beach reparation fund only received $9,876 after nine years despite selling $886,439 worth of tickets.44

Another high-profile example included a private lottery authorized by Congress in 1823 created to beautify the nation’s capital.45 This operation folded because those in charge departed with the money raised while never paying the winner.46 Similarly, the governor of New York publicly told the state...
legislature in 1827 that many winners in their lottery did not receive their prizes because the operators absconded with the proceeds.47

In addition, many newspapers of the time began publishing in-depth investigations to expose the many deceptive practices undertaken by lottery operators.48 These articles mainly explained how operators could manipulate outcomes or misappropriate the funds.49 One operator tried to sue a newspaper for libel based on an exposé that the management swindled and fraudulently conducted its lottery in New York, but lost when the periodical asserted and showed that it published the truth.50

Likewise, several cases that documented the pervasiveness of corruption and indiscretion by lottery operators found their way to the United States Supreme Court during the 1820s and 1830s.51 In the first case regarding the Corporation of Washington’s lottery, the court examined some questionable methods for determining a winner but held that the methods provided a fair result despite some unintentional and minor issues.52 The high court distinguished this case from other decisions of the time that found indiscretions by the lottery operators.53 Furthermore, the Court pointed out its distaste for the public policy allowing lotteries and its need to ensure the removal of “all temptation to fraud.”54

Thus, many early state governments as well as the United States Supreme Court determined that the risks associated with fraudulent behavior by the operators of these lotteries outweighed their benefit to the public.

The Louisiana Lottery

In a different, yet similar twist to the early fraud, the Louisiana Lottery brought forward the difficulties in closing an operation that gained control of elected officials and the numerous private watchdog organizations that assist in ensuring the government sets forth good public policy.

In an attempt to rebuild after the war decimated the South, many states again turned to lotteries in order to generate much-needed funding.55 The most notorious of the era included the Louisiana Lottery because of the difficulty in shutting it down and its use of the postal service to lure players outside of the state.56 At its pinnacle, it became so well known that “a winning ticket was accepted everywhere in the country as the equivalent of a certified check.”57 The lottery began with a 25-year charter in 1868, and the New Orleans Times-Picayune explained it as “conceived in the miscegenation of reconstruction and born in inequity.”58

From the onset, the Louisiana Lottery’s transparency and integrity became an issue. A New York gambling syndicate operated the lottery and hired two former Confederate generals to supervise the drawings in an effort to add a veil of southern legitimacy.59 One commentator explained that the syndicate comprised carpetbaggers who bribed the Louisiana Legislature into enacting the lottery legislation and allowing their organization to solely operate it.60 The lottery did not allow for the disclosure of its financials; so many estimated that in its prime, the operation made annual profits around $13 million while awarding winners somewhere around $3 million per year.61 It received 90 percent of its revenue from sources outside Louisiana and invoked the ire of many outside the state.62

With such large amounts of money flowing into Louisiana, the operators of the lottery wielded incredible amounts of power with the media, financial institutions, and lawmakers.63 To garner public support, the lottery donated heavily to an assortment of state projects.64 Despite the efforts of many within the state to close it down, the lottery survived many close calls because Louisiana lawmakers refused to take such action.65 In fact, the Legislature modified the constitution in 1879 to extend the lottery’s life until 1895.66

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47 See Rychlak, supra note 11.
48 Id. at 35.
49 Id.
50 Id.
52 Brent v. Davis, 23 U.S. 395.
53 Id. at 403.
54 Id. at 402.
55 See Dunstan, supra note 12.
56 Id.
57 See Rychlak, supra note 11.
58 Id. at 41.
59 Id.
60 The generals were P.G.T. Beauregard and Jubal A. Early.
61 See Dunstan, supra note 12.
62 See Rychlak, supra note 11.
63 See Dunstan, supra note 12.
64 See Rychlak, supra note 11.
65 Id. at 41.
66 Id.
As a result, many other states tried to force its end but did not succeed. Opponents, backed by religious leaders, ultimately turned to the federal government for assistance. Congress finally prohibited the movement of lottery tickets over state lines by any means within its powers granted under the commerce clause in 1895. Then, the United States Supreme Court again supported the regulation of gambling. The Court held that:

It is well settled that the police power of the state may be exerted to preserve and protect the public morals. It may regulate or prohibit any practice or business, the tendency of which, as shown by experience, is to weaken or corrupt the habits of those who follow it, or to encourage idleness instead of habits of industry. Whether gambling is demoralizing in its tendencies is no longer an open question. Gambling is injurious to the morals and welfare of the people, and it is not only within the scope of the state’s power to suppress gambling in all its forms, but it is its duty to do so.

Hence, when the Louisiana Lottery finally concluded, later analysis showed that the promoters received enormous amounts of unearned and fraudulent returns while leaving the state’s Legislature mired in allegations of bribery and corruption.

CASELAW

While the legality of selling lottery tickets after awarding the main prize seems like a new issue for the courts to decide, several jurisdictions already decided these types of cases fairly recently. One interesting aspect of these previously decided cases emanates from the fact that only one of the three courts officially published its opinion. The Colorado Supreme Court chose to set a precedent while the appeals courts of California and Washington chose to issue unpublished opinions only. Accordingly, the decisions of all of these courts are included to show their tendencies for enforcement, but some opinions may only provide good arguments and not precedent.

California

In December 2001, the Los Angeles Times reported on a trial in the prior July where California Lottery Chief Deputy Director Dennis Sequeira acknowledged under oath that, since 1996, the organization sold instant win tickets to 11 different games after someone already won the grand prize. This investigation by the newspaper followed a lawsuit brought by a woman against the California State Lottery Commission for, among other legal theories, a breach of contract as well as violating its duty to the public by placing false and misleading advertising.

In the original complaint, the plaintiff explained that the California Lottery closely monitored the availability of all the prizes advertised and did not take any actions to either inform players of the prize availability or stop retailers from continuing to sell the tickets. The Sacramento Superior Court orig-
inally ruled in favor of the California Lottery on both the duty and breach of contract claims. Upon review by the California Court of Appeals, in an unpublished opinion, the issue regarding the lottery’s duty and breach of contract received another examination.

A tortious violation of its duty to the public. In beginning its analysis, the court of appeals started with the premise that a public entity does not incur liability for injuries that evolve from an act or omission via the California Torts Claims Act. However, the plaintiff in the case asserted that a statutory exception exists when the “public entity is under a mandatory duty imposed by an enactment.”

To trigger liability upon a public entity, the statute imposes a three-part test. First, a law must provide compulsory adherence to the duty and not allow discretion. Then, the statute must be designed to protect against the kind and type of injury being pursued from occurring. Finally, the breach of the compulsory duty must provide the basis for the proximate cause of the damages incurred by the plaintiff.

Further interpreting the test, the California Supreme Court discussed that the duty imposed must obligate the government agency as opposed to creating a situation where the action becomes permitted. In situations where the governing legislation did not specifically articulate or create a duty upon a government agency, the legislature often provides guidelines to assist those vested with the power to exercise discretion.

With these applications in mind, the court turned to specifically applying Cal. Gov’t Code § 8880.24, which directs the California State Lottery Commission to “ensure the California State Lottery complies with both the letter and spirit of the laws governing false and misleading advertising.” To begin with, the court noted that the language used in the law does not specifically obligate the state lottery nor does it use the specific word shall. This language simply stops short of compelling the agency to conform to the law which allows private party actions, but it designates the lottery commission as the primary body responsible for enforcement.

Moreover, the court held that the laws applying to false and misleading advertising under the Business and Professions Code do not apply to the state lottery. The problem in using these laws starts with the definitions because they only pertain to persons. The court noted that governmental entities do not conform to the definition of persons; and based on Cal. Gov’t Code § 8880.69, only this particular chapter applies to all affairs involved in the lottery’s operation.

In addition, the court analyzed the directive for the lottery commission to guarantee compliance with “both the letter and spirit” of the false advertising laws in a bifurcated manner. In doing so, the court clarified that “letter of the law” requirement might create a violation in lottery scratcher advertisements that probably will mislead or deceive even though the message in reality is not actually untrue.

However, the court also looked at the task of making sure the lottery adheres to the “spirit” of the law, which includes a discretionary component. Because the California Legislature took the action of creating a discretionary component, the court reiterated the earlier precedent that unless the lottery received the actual duty to perform, this flexible part did not rise to the higher requirement. Consequently, the dual requirements only create a “mandatory duty at one spot in a sea of discretion.”

79 Id.
80 Id.
81 See id. at *29.
82 Id. quoting CAL. GOV’T CODE § 815.6
83 Id. at *30.
84 Id.
85 Id.
86 Id.
87 Id. at *34.
88 Id.
89 Id.
90 Id. at *36.
91 Id. at *37. The court further explained that the lottery commission was established “to oversee the Lottery and the Director.” Id.; CAL. GOV’T CODE § 8880.11. The language of § 8880.24 suggests a relationship of oversight to ensure the observance of false and misleading advertising principles, not one of compliance.
93 Id. The code defines a person as including “any individual, partnership, firm, association, or corporation.” CAL. BUS. & PROF. CODE § 1506.
95 Id.
96 Id. at *40.
97 Id.
98 Id.
99 Id. at *41.
Ultimately, the court assessed the “decisions” responsibility of the lottery commission with respect to ensuring conformity of the state lottery’s advertising and promotions.\textsuperscript{100} Here, the court pointed out that decision making requires selecting a course of action between different alternatives.\textsuperscript{101} In doing so, the determination of a resolution requires the use of discretion.\textsuperscript{102} This allows the lottery commission the ability to determine whether and how the lottery advertises its games.\textsuperscript{103}

Furthermore, § 8880.24 bestows upon the lottery commission powers of a broad capacity with vague directions; since the requirement to make certain that the state lottery’s actions fit within “both the letter and spirit” of the false advertising laws.\textsuperscript{104} For this reason, the lottery commission receives the latitude to utilize its best judgment to achieve these goals.\textsuperscript{105} What’s more, the court pointed out that the lottery commission exercised this authority prior to and after this case when it allowed the state lottery to provide admonitions to the “scratcher” tickets and retail displays.\textsuperscript{106}

Hence, the court concluded that the plaintiff’s disputes with the state lottery’s practices more appropriately belong with the lottery commission than in the courts.\textsuperscript{107}

**Breach of contract as a lottery or a “banking game”**. In evaluating the breach of contract claim as applied to scratchers, the court of appeals began by explaining the California Supreme Court’s classification of the different types of gaming as well as the distinctions between lotteries and “banking games.”\textsuperscript{108} This court noted the definition used by other California opinions,\textsuperscript{109} which quoted a law review article as saying:

> “Gaming may be defined as ‘the playing of any game for stakes required by the players.’ A lottery may be defined as a ‘distribution of prizes by lot or chance.’ Betting may be defined as ‘promises to give money or money’s worth upon the determination of an uncertain or unascertained event in a particular way, and (unlike a lottery) may involve skill or judgment.’”\textsuperscript{110}

Further, the court explained the mutual exclusivity of lotteries and banking systems.\textsuperscript{111} In a lottery situation, no individual bets occur between the operator and participant.\textsuperscript{112} This means that the operator does not directly take concern over the outcome or the value of the prizes because the distribution will depend on the number of entrants.\textsuperscript{113} In contrast, a banking game creates a situation where the operator competes separately against each individual participant.\textsuperscript{114} Thus, the operator will take an interest in the result of the game since the payouts will be subject to the outcome of each wager.\textsuperscript{115}

As a result, the court looked toward the precedent set regarding the status of scratchers as a lottery or banking game.\textsuperscript{116} Despite the lack of direction from the California Supreme Court, this court followed a prior opinion that determined a scratcher is more like a lottery than a banking game.\textsuperscript{117} For consideration as a lottery, the tickets must either have the opportunity to win or lose without anything in the manner of play determining the outcome; the game ends when all of the tickets available tickets are sold.\textsuperscript{118} This allows the operator to calculate the precise financial situation since the ticket revenues and prize payouts become known from the outset.\textsuperscript{119} Since both situations apply to scratchers, the court explained its previous decision that held the tickets as a lottery because the California State Lottery does

\textsuperscript{100} Id.
\textsuperscript{101} Id. at *42
\textsuperscript{102} Id.
\textsuperscript{103} Id. at *43.
\textsuperscript{104} Id. at *48.
\textsuperscript{105} Id. at *50.
\textsuperscript{106} Id. at *51.
\textsuperscript{107} Id.
\textsuperscript{108} Id. at *55.
\textsuperscript{109} See, e.g., id.; Western Telecon, Inc. v. California State Lottery, 917 P.2d 651 (Cal. 1996).
\textsuperscript{111} Id.
\textsuperscript{112} Id. at *56.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} Id. Interestingly, Cal. Penal Code § 330 prohibits banking games. In fact, the California State Lottery lost the right to hold keno games because the court declared it a banking game. See Western Telecon., 917 P.2d at 657–59, 661–62. However, the state lottery may operate lotteries in accordance with the Lottery Act, and the court considered pari-mutuel horseracing a lottery too. Id.; Brown v. California State Lottery Comm’n, 232 Cal. App. 3d 1335 (Cal. Ct. App. 1991).
\textsuperscript{117} Id. at *57.
\textsuperscript{118} Id.
\textsuperscript{119} Id.
not care who buys a particular winning or losing ticket.\textsuperscript{120}

With this determination in mind, the court turned to the plaintiff’s claim that a contract occurred when the lottery commission knowingly sold a ticket with an advertisement promoting a chance to win a grand prize followed by a breach because someone else previously claimed the award before the purchase.\textsuperscript{121} This court quickly disposed of this part of the claim by explaining that numerous California appellate courts follow the notion that “[a] bet does not create a wagering contract between the bettor and the operator of a pari — mutual pool. No contract agreement or bet exists between the bettor and the operator of the pool.”\textsuperscript{122}

Then, the court turned to whether a valid contract formed with the lottery commission because the scratchers could now qualify as an illegal banking game.\textsuperscript{123} Here, the court’s analysis centered around California’s public policy against judicial resolutions of civil claims emanating from unlawful gambling contracts.\textsuperscript{124}

In California, the courts follow a long and un-wavering precedent of public policy against the enforcement of civil claims originating from gambling transactions where no statutory right to enforcement exists.\textsuperscript{125} This approach traces its roots to the state’s earliest days where the courts barred the enforcement or collection of gambling debts based on their illegality.\textsuperscript{126} The courts broadened this doctrine over the years by also refusing to allow recovery for cases where California legalized the specific gaming activity or other jurisdictions like Nevada.\textsuperscript{127}

Even though the application of the precedent case comes from a torts action, the court held that the rationale behind the decisions applies in the same way to these circumstances despite the contracts claim in the particular case at hand.\textsuperscript{128} This court relied on the part of the doctrine that bars recovery from an illegal transaction regardless of whether the inducement occurred fraudulently or with deceit.\textsuperscript{129} Hence, the illegality of banking games supersedes whether the state lottery used dubious means to lure the plaintiff into becoming a victim.\textsuperscript{130}

Therefore, since there is no statutory right to pursue a claim against the state agency for an unlawful gaming activity, the public policy against judicial intervention must further disallow the plaintiff’s breach of contract claim for false and misleading advertising.\textsuperscript{131}

\textbf{Colorado}

On July 24, 1998, a woman at a Texaco station in Colorado purchased the “Luck of the Zodiac” scratch game lottery ticket which included the advertisement “Win up to $10,000” on its face.\textsuperscript{132} At the time, the woman expected an opportunity to win the grand prize, yet she found out that the Colorado Lottery already awarded this prize seventy-two days earlier.\textsuperscript{133} As a result, she filed a lawsuit against the Colorado State Lottery Division and Texaco for numerous claims that the trial court dismissed because she did not exhaust her administrative remedies.\textsuperscript{134}

The court of appeals upheld the trial court’s decision, but the Colorado Supreme Court agreed to decide whether the Colorado Government Immunity Act (CGIA) applied to the contractual claims made in this case.\textsuperscript{135}

In Colorado, the court began with untangling the competing notions that the CGIA did not apply to injuries arising out of contracts and that, except in situations where the state created exclusions, a plaintiff may not pursue a public entity for liabilities arising out of torts.\textsuperscript{136} More specifically in evaluating a misrepresentation situation, a claim of eq-

\textsuperscript{120} Id. at *58. Curiously, the court pointed out that it did not consider the possibility where less than all of the tickets were sold which would create circumstances where the scratchers did not technically meet the California Supreme Court standard. \textit{Id}. However, the court refused to go further in this area and determine whether the scratchers still qualified. \textit{Id}.

\textsuperscript{121} Id. at *59.


\textsuperscript{123} Id. at *60. The court pointed out that the defendant did not assert an appeal that a contract formed under a pari-mutuel system, so this analysis remains an open point. \textit{Id}.

\textsuperscript{124} Id.

\textsuperscript{125} Id. These types of policies in the United States trace their roots to England in 1710 where the Statute of Anne basically makes the enforcement of gambling debts unenforceable without legislation stating otherwise. See \textit{Darren A. Prum, Enforcement of Gaming Debt, 7 Gaming L. Rev. 17} (2003).


\textsuperscript{127} Id. at *64.

\textsuperscript{128} Id. at *66.

\textsuperscript{129} Id.

\textsuperscript{130} Id. at *67.

\textsuperscript{131} Id. at *68.

\textsuperscript{132} \textit{See Robinson}, 179 P.3d at 1002.

\textsuperscript{133} Id.

\textsuperscript{134} Id.

\textsuperscript{135} Id. at 1003.

\textsuperscript{136} Id.
suitable estoppel applies to torts because the falsification presently or previously existed. Promissory estoppel relates to contracts since the prospective occurrence absent the immediate intention not to complete the promise lacks the requisites to fulfill the requirements for tortious misrepresentation of facts. While a plaintiff may frame the pleadings as contracts or torts, the courts will make the final determination as to which basis the claim emanates. In doing so, the nature of the injury and relief sought will help assist the court to decide whether “the claim lies in tort or could lie in tort for purposes of the CGIA.” Accordingly, precedent dictates that when a plaintiff makes allegations for fraud or misrepresentation, the claim will or could probably originate from torts.

**Governmental immunity’s application to contracts.** With the foregoing in mind, the court turned to the facts put forward by the plaintiff. The court noted that the lottery sells to players instant scratch game tickets for a significant period of time after the awarding of the advertised prizes and that these buyers have no chance of winning at the time of purchase. In addition, the lottery encourages gamblers to buy these tickets knowing that they would not sell if potential buyers knew that the represented prizes were not available. This practice allows the lottery to gain significant revenue by taking advantage of players who do not know the agency already awarded the prize they seek.

However, the court explained that the CGIA’s main focus relates to the plaintiff’s possible arguments rather than those set forth in the complaint. While Colorado’s precedent gave examples of prior cases where the plaintiff’s facts sustained a claim for fraud or misrepresentation, this situation regarding the sale of the lottery tickets appears to support pursuing a torts cause of action. In addition, the court held that the nature of the relief sought supported the potential torts claim. This court drilled in on the lack of specifics in her prayer for relief regarding actual and appropriate damages. However, the court specifically mentioned that this aspect would help bolster the proper type of relief but not provide determinative evidence.

Therefore, the CGIA and its protections against claims for these types of liability should apply since the plaintiff’s action could arise out of torts.

**Governmental immunity’s application to unjust enrichment.** Furthermore, the Colorado Supreme Court evaluated whether the plaintiff’s claim for unjust enrichment constituted a contract or torts action. In Colorado, to recover using a theory of unjust enrichment, the defendant must profit at the plaintiff’s detriment without the occurrence of compensation and where the circumstances dictate that leaving the parties alone would create an unjust outcome. This type of claim may originate in either contract or tort law, and also requires the court to make a case-by-case evaluation.

Applying these rules, the court looked at the plaintiff’s claim that by allowing the lottery to keep the money spent on the scratch ticket by the plaintiff who could not win would allow an injustice to occur. The court started by separating the plaintiff’s assertions to determine the essence of the argument. In this action, the court found that in order to show the unfair action by the lottery, the plaintiff would need to rely on the fact that the agency made misrepresentations on the availability of specific prizes. To make this causal connection, the plaintiff would then have to show that the conduct and type of injury came from the lottery’s misrepresentation, which is a tort or could become a tort.

As a result, the CGIA will apply to the plaintiff’s claim and provide immunity for the lottery in these types of cases.

**Washington**

In this case, the plaintiff bought a $5 instant win/scratch ticket specifically because it advertised

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137 Id. at 1004.
138 Id.
139 Id. at 1003.
140 Id.
141 Id. at 1004.
142 Id. at 1005.
143 Id.
144 Id.
145 Id.
146 Id.
147 Id.
148 Id. at 1006.
149 Id.
150 Id.
151 Id. at 1007.
152 Id.
153 Id.
154 Id.
155 Id.
156 Id. at 1008.
in bold letters a “Top Prize of $98,000”—but the plaintiff did not know someone else already had won the money.¹⁵⁹ The reverse side of the ticket mentioned several smaller awards and the odds of winning a single prize.¹⁶⁰ The ticket also explained that, “All Lottery Games Subject to Title 315 WAC and Chapter 67.70 RCW.”¹⁶¹

Accordingly, the plaintiff filed a class action lawsuit asserting that the scratch tickets created a contract that the state breached along with its duty to deal fairly and in good faith when it sold tickets after awarding the grand prize. The plaintiff also claimed that the government was unjustly enriched.¹⁶² The Washington Court of Appeals reviewed the dismissal of this claim by the trial judge and put forward an unpublished opinion upholding the initial decision.¹⁶³

**Breach of contract despite disclaimers.** Based on these facts, the court of appeals began with an inquiry as to whether the trial judge granted summary judgment properly because the state breached its contract when it sold a ticket that could not win the featured prize.¹⁶⁴ Immediately, the court did not find the plaintiff’s argument persuasive as to an actionable breach of contract as a matter of law for a couple of reasons.¹⁶⁵

First, the plaintiff was aware that other people bought tickets from other locations before and after his purchase.¹⁶⁶ With this in mind, he knew or should have known that any of these people could have won the featured prize or another one during the game’s duration.¹⁶⁷

Second, the court pointed out that a contract may assign risk.¹⁶⁸ In the case of the state’s lottery tickets, they clearly and conspicuously stated that the “Overall Odds of Winning Any Prize Are 1 in 3.”¹⁶⁹ Based on this disclosure, the plaintiff new most tickets did not win, so he assumed the risk.¹⁷⁰

Hence, the court concluded that the state discharged its duty to inform the plaintiff of any further risk regarding the winning of the featured prize.¹⁷¹

**Unjust enrichment.** In addition, the court evaluated whether the state incurred an implied duty or received unjust enrichment due to its actions.¹⁷² To start, the court turned to the Washington Administrative Code for guidance.¹⁷³ Under title 315, the lottery commission received authority to continue selling tickets for sixty days after the end of the game.¹⁷⁴ The plaintiff in this case purchased his tickets during the permitted time period.

Furthermore, the court reasoned that the state may not know if and when someone purchased the winning ticket.¹⁷⁵ In title 315, the winner of an award receives 180 days from the official end of the game to claim the prize.¹⁷⁶ Thus, the system developed by the state’s lottery commission considered and warned potential purchasers through specific language on the back of the ticket that individuals may potentially play the game after someone else claimed the top prize.¹⁷⁷

**ANALYSIS OF THE PUBLIC POLICY**

Courts appear to be unwilling to force the management of the state lotteries to change their ways. While most people can quickly see that the sale of tickets after the awarding of a grand prize creates ethical issues, these holdings by the courts place the decision by the state run lottery officials to take such actions in a public policy dilemma. While technically the operational procedure does not violate a statute in at least three different states, most people would deem these practices as unethical or at the very least poor public policy.

By continuing these practices, the lotteries provide additional motivation to the anti-gambling groups to attempt the suppression of these operations similar to the examples shown in the colonial days and in Louisiana where fraud and the lack of transparency created upheaval and eventual action. Many people will assert that the state operators of
these lotteries now hide behind the governmental immunity statutes, which were never designed to protect these types of activities, and would be stopped if done by a private enterprise.  

Moreover, these same forces will assert that the managers of a lottery with these types of practices place the generation of revenue from unknowing participants above conducting a game with true transparency and equal opportunities for all players. By choosing to continue to allow vendors to sell tickets that cannot win the major prize, the operators send the message that the lottery needs the additional revenue gained by these sales to cover the management fee or the money promised the beneficiary and is unwilling to take responsibility for any adverse risk in designing and running such games.

In considering reasons for choosing this type of strategy, one must consider the real motivations for such policies by the decision makers. The executive director of the North American Association of State and Provincial Lotteries explained the need by operators to consider the size and availability of lower tier prizes before ordering a stop to ticket sales. Colorado provides an example of this philosophy. The Colorado Lottery’s policy for scratchers includes the closing of a game as soon as the top prize is awarded top prize; but the lottery may choose to leave it open if a “significant number” of secondary awards still remain available. To further justify this practice, the executive director of the Colorado Lottery explains that many players purchase tickets for the instant awards and desire the lesser prizes, too. If a game closes too soon, then many of their players become unhappy.

Other operators of state-run lotteries look to disclaimers on the back of the tickets and their website with its status updates as a means for creating an assumption of risk type defense. This worked successfully in the Washington state case where the administrative code allowed for the sale of scratchers up to sixty days after the end of the game and the back of each ticket stated the odds of winning provided enough notice to a player of the risks inherent in the activity. In addition, Colorado adds language to the back of its tickets that “availability of prizes is subject to prior sales” while giving up-to-date information on the status of prizes through its Web site as well as through prize update reports that vendors receive instructions to post at their location.

Ultimately, the real question with regard to a scratcher game centers on its classification within a true gaming context. Both a lottery and a banking game create pools of money with the distribution of awards to winning tickets. Following the California court’s use of definitions by commentators that lotteries distribute prizes by lot or chance, this reasoning allows for the understanding that the operator and individual do not make bets with one another. The value of the prizes in a lottery becomes no concern to the operator since the number of entrants will determine how the pool of money gets distributed. The player takes no role in determining the outcome and the operator ceases to sell tickets and the game ends when the allotted number reaches the maximum set for the pool. Hence, the money going into a specific pool equals the prizes awarded plus the fees earned by the operator for managing the game and the amount generated for the beneficiary, if any.

Similarly, a banking game creates pools of money like a lottery but differs with respect to who bears the risk on the wager. In this situation, the operator makes individual wagers with each player and bears the responsibility for paying the winners and collecting from the losers. Accordingly, the op-

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178 In fact, when the author spoke with former Nevada Gaming Control Board Member Shannon Bybee on this issue, he mentioned that, during his enforcement days, he required taverns to remove and terminate punchboard games in their establishment where someone already won the grand prize and additional opportunities remained for unsuspecting customers. Interviews with Shannon L. Bybee, Jr., Associate Professor of Law and Hotel Management and Executive Director, International Gaming Institute, University of Nevada, Las Vegas, in Las Vegas, Nev. (Aug 1997 to Aug 2003).

179 See Correll, supra note 3.

180 See id.

181 See id.

182 See id. See also Cauchon, supra note 4.


184 See Correll, supra note 3.

185 As explained earlier, California law makes banking games illegal, see Stanley, 2003 Cal. App. Unpub. LEXIS 8296, and Louisiana prohibits gambling “as a business”, Darren A. Prum & Shannon Bybee, Commercial Gaming in the United States: A Jurisdictional Analysis of Gaming Taxes, Licenses, and Fees, 4 GAMING RES. & REV. J. 17 (1999), so many times the courts leave these macro policy decisions to courts with more authority and weight.


187 See id.

188 See id.

189 Id. at *57.

190 Id.

191 Id. at *56.

erator will naturally take an interest in the outcome because the payouts will change based on each wager’s result.\textsuperscript{194}

In a perfect world where all of the tickets sales conclude prior to the awarding of the grand prize, a scratcher fits within the lottery definition. In reality, with respect to scratchers, the first ticket sold may award the major prize and place the operator in a position with no further revenue source to cover the award and fees while maintaining an inventory of tickets that no one wishes to purchase. This type of scenario would then make the scratcher game more like a banking game because the operator would naturally take an interest in the outcome. Thus, a scratcher or instant-win game may not fit squarely into one category or the other.

With this in mind, the decision by some state lottery operators to immediately change their policy and stop selling tickets after redemption of the grand prize may bolster their fundamental contention and possible legal requirement that scratchers qualify as lotteries instead of a banking game where it might not be allowed under the law. Conversely, those states that continue the procedure may not have an issue with the qualification of the game and can afford to legally maintain the practice despite the negative perception and public policy implications that surround it.

Since the lotteries became reauthorized in 1964, one of the main tenets of legalized gambling follows the philosophy that gaming maintains a role in society so long as the proper regulatory scheme keeps the activity honest and transparent.\textsuperscript{195} In conjunction, the law reflects the values and beliefs of a society and requires a reevaluation when a policy fails to reflect a minimal standard of conduct.\textsuperscript{196} If state-operated lotteries continue to sell tickets after awarding the grand prize, then the constituents of the jurisdiction need to urge their policymakers to change the guidelines of operation to better reflect their morals and ethics.

Because the courts seem reticent to stop the practice when requested to do so by private individuals, the decision to keep selling tickets after awarding the main prize appears to reflect bad public policy by those government officials who continue to keep it in place for the aforementioned reasons despite the awareness that it will lure in unsuspecting players and reflect a less than ethical appearance.

\begin{footnotesize}
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\item \textsuperscript{194} See Stanley, 2003 Cal. App. Unpub. LEXIS 8296 at *56.
\item \textsuperscript{195} Prum, supra note 125.
\item \textsuperscript{196} Frank Cross & Roger Miller, \textit{West’s Legal Environment of Business} (6th ed., Cengage 2007).
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