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1996). This Act restructures how electricity is supplied within Pennsylvania and will introduce competitive retail access within PP & L's service area. The Act's provisions will be implemented over time, preventing full direct access to competition until the year 2001. SER responded by stating that PP & L's current curtailment of electric energy purchases injures SER's ability to compete with PP & L in the future. The court refused to predict the future for the sake of finding an antitrust violation. Specifically, the court stated that "[w]e cannot permit SER to pursue such a speculative path to recovery under the Sherman Act."

This case demonstrates that the antitrust laws are meticulously technical in their application. Unless a plaintiff can demonstrate that it is a competitor and has suffered an injury in which the antitrust laws are designed to protect, it does not have standing to bring an antitrust action. The Third Circuit was admittedly not clairvoyant nor willing to design case law based upon the speculation of "unsubstantiated conclusions and bald assertions."

Concurring Judge Said SER Had No Duty to Sell Exclusively to PP & L

While agreeing with the majority opinion that SER's antitrust claim should be dismissed, the concurring judge reached his decision with one clarification. Judge Stapleton did not accept the panel's conclusion that SER had a duty to sell exclusively to PP & L. Although the majority opinion stated in a footnote that SER, under the terms of the contract only, may sell to third parties, the majority declared that SER can sell to third parties only after it "provides 79.5 megawatts to PP & L." Judge Stapleton, on the other hand, interpreted the contract to simply require SER to have the capacity to satisfy PP & L's requirements — up to 79.5 megawatts if necessary — in excess of SER's potential sales to third parties.

Moreover, Judge Stapleton addressed SER's claim that it is a competitor in the retail market. He stated that while the Pennsylvania Electricity Generation Customer Choice and Competition Act will

gradually initiate competition in the retail market, there was no competition prior to its passage. He concluded that since the market was not competitive, SER could not establish that it was PP & L's competitor, a condition SER needed to satisfy to prove an antitrust injury.

Finally, Judge Stapleton focused on SER's assertion that it was a competitor in the wholesale market. He stated that while the terms of the contract could be construed to mean that SER's obligation to sell exclusively to PP & L is limited to its capacity to satisfy its contractual obligations, SER did not allege that it sold, attempted to sell, or intended to sell any excess capacity. He further noted that, even if SER were allowed to amend its complaint, it would be able to allege only that it has the capacity to sell more than 79.5 megawatts, not that it has competed with PP & L in the wholesale market. Therefore, Judge Stapleton agreed with the majority's decision to affirm the district court's dismissal of SER's antitrust claim.

National Magazine Sweepstakes Are Not Illegal Lotteries Under California Law

by Rana Abbasi

In *Haskell v. Time, Inc.*, 965 F. Supp. 1398 (E.D. Cal. 1997), a federal district court granted partial summary judgment in favor of mail-order retailers who used sweepstakes offers in their magazine and

book marketing campaigns, holding that Defendants' national magazine sweepstakes were legal lotteries, that Defendants' promotional mailings were not false advertising, and that Defendants' did not run their sweepstakes in a misleading manner.

However, the court refused to grant summary judgment on the issue of whether Plaintiff had proved that a "prompt-pay" sweepstakes was an illegal lottery because there was insufficient evidence to decide the issue.

Plaintiff Brought Action for Violations of California's Unfair Business Practices Act

The court previously dismissed Defendant Time Warner from the suit in *Haskell v. Time, Inc.*, 857 F. Supp. 1392, 1405 (E.D. Cal. 1994). The remaining Defendants, Publishers Clearing House ("PCH"), Reader's Digest Association ("RDA"), and American Family Publishers ("AFP"), send thousands of sweepstakes mailings annually to persons identified as previous customers, prior non-purchasing sweepstakes participants, and potential customers. The sweepstakes typically promise that if the recipient returns the winning entry, he or she will win millions of dollars. Although the contests do not condition winning upon the purchase of magazine subscriptions or books, purchasers of Defendants' products receive multiple mailings notifying them of the sweepstakes and providing them with additional sweepstakes numbers.

Plaintiff, Eben Haskell, a recipient of mail-order magazine advertising, brought suit on behalf of himself and the general public of California against Time Warner, PCH, RDA, and AFP claiming that the companies' solicitations violated California law. Haskell argued that the sweepstakes violated California law in three ways: (1) the contests were illegal lotteries; (2) statements in the contests' promotional mailings constituted false and misleading advertising; and (3) Defendants conducted the sweepstakes in a false and misleading manner.

Plaintiff Had Standing to Bring Unlawful Business Practice Claim

Plaintiff brought suit against Defendants claiming that they violated California's criminal statutes against illegal lotteries. Defendants challenged Plaintiff's standing to bring an action under California's penal code because, generally, private citizens do not have the authority to bring suit under the criminal law. In this case, however, Plaintiff claimed that he had standing to sue Defendants under a criminal statute because of a special provision under California's Business and Professions Code ("B & P Code"). This statute permits private plaintiffs to bring a criminal action on behalf of the State's citizens to redress certain unlawful business practices, including "unfair competition." The Code defined "unfair competition" as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." *Haskell*, 1997 WL 258893, at *2 (quoting CAL. BUS. & PROF. CODE § 17200 (West 1997)).

Defendants replied that the court should not rely on the B & P Code to find that Plaintiff had standing because the California Supreme Court had granted *certiorari* in another case where a private plaintiff had used the B & P Code to obtain standing, thus questioning the B & P Code's ability to provide standing to private plaintiffs in criminal actions. The court determined, however, that even though the California Supreme Court was reviewing a single case involving the B & P Code's ability to provide

private plaintiffs with standing, there were several other cases that had relied on the B & P Code to do this, and these cases were still good law. The court reasoned that until the California Supreme Court ruled that the B & P Code's provision does not grant standing in this type of situation, the court could rely on the code and case law precedent using it. Therefore, it concluded that Plaintiff had standing to bring an action for injunctive relief against Defendants under the criminal code.

Finding of Illegal Lottery Required Proof of Consideration

After determining that Plaintiff had standing to bring an action, the court considered the merit of his individual claims. The court first considered whether magazine sweepstakes were illegal lotteries. Plaintiff claimed that three particular types of sweepstakes were illegal lotteries: general sweepstakes, customer-only sweepstakes, and prompt-pay sweepstakes. To find Defendants' various contests illegal, the court required that Plaintiff show the three necessary elements of an illegal lottery, namely: prize, chance, and consideration. Since prizes and chance were present in the sweepstakes, the remaining issue was "whether [D]efendants' repeat mailings amount[ed] to a requirement that consumers pay valuable consideration to obtain entries for the contests."

To prove the element of consideration for the general sweepstakes, Plaintiff argued that Defendants led previous subscribers to believe that they could buy additional sweep-

stakes entries. Since purchasers of Defendants' products received sweepstakes entries with solicitations to subscribe, Plaintiff argued that consumers believed that ordering books and magazines from Defendants was consideration for receiving additional entry opportunities. The court labeled this theory "de facto consideration." Plaintiff further argued that Defendants did not distribute chances to win the sweepstakes "in a random and indiscriminate manner" since Defendants sent more sweepstakes entries to customers than to non-customers.

After declaring that the theory of de facto consideration is not recognized under California law, the court ruled that Plaintiff had not proved the element of consideration because Defendants did not promise purchasers of their books and magazines additional chances to win. The court explained that no purchase was required to win because participants could receive more entries by simply requesting them from Defendants. The court further reasoned that the nationwide scope and random targeting of the sweepstakes mailings undermined Plaintiff's illegal lottery argument. The court explained that the sweepstakes operators' mass mailings were distributed to purchasers and non-purchasers alike in a sufficiently indiscriminate fashion, negating the implication that consideration was required to receive contest entries. The court concluded that since Plaintiff had not proved the essential element of consideration, the general magazine sweepstakes were not illegal lotteries under California criminal

law and granted summary judgment to Defendants on this issue.

The court next considered whether Defendants' customer-only sweepstakes were illegal lotteries since qualifying for these contests was conditioned upon having ordered from Defendants in the past. Plaintiff argued that customers purchased products from Defendants because they believed that a purchase would lead to an offer of entry into the customer-only sweepstakes, thus constituting consideration for the chance to play. The court again dismissed this theory of de facto consideration.

In reviewing Plaintiff's argument, the court explained that "[c]ontests with restricted eligibility requirements are legal, so long as the [contests'] requirements are unrelated to the payment of consideration." The court reasoned that the money customers paid to subscribe to Defendants' magazines was for their products only, not for a chance to enter a customer-only contest which was not advertised at the time of purchase. Thus, the court found that the customer-only sweepstakes was not illegal under California criminal law.

Plaintiff also argued that AFP's prompt-pay sweepstakes, another customer-only sweepstakes, was an illegal lottery. Plaintiff did not rely on the de facto consideration theory. Rather, he argued that the prompt-pay sweepstakes required customers to pay their bills for magazine subscriptions early, and that this early payment was itself consideration. Citing the scarcity of facts in the record, the court denied summary judgment on the single issue of whether AFP's prompt-pay sweep-

stakes was an illegal lottery. The court noted, however, that if the eligibility requirement for the prompt-pay sweepstakes — payment by a certain due date — was a *pre-existing* obligation of customers, summary judgment would be granted in favor of AFP. Summary judgment would be proper in that case since Plaintiff would have failed to prove that consideration was required for entry into a prompt-pay sweepstakes.

The court found that Plaintiff failed to prove that Defendants' general, customer-only, and AFP's prompt-pay sweepstakes were illegal lotteries under California criminal law. Except for Plaintiff's claim against AFP's prompt-pay sweepstakes, the court ruled against each of his illegal lottery claims.

Plaintiff Failed to Prove Violation of California Unfair Business Practices Act

After granting summary judgment on all but one of Plaintiff's four illegal lottery claims, the court examined Plaintiff's claims arising under California's Unfair Business Practices Act and determined that Plaintiff failed to meet his evidentiary burden for each of these claims. To prove that Defendants had engaged in unfair business practices by sending allegedly misleading sweepstakes bulletins, Plaintiff was required to show, without merely relying on anecdotal evidence, that a reasonable customer was likely to be misled by Defendants' sweepstakes offers.

Plaintiff alleged that customers were misled to believe that: (1) if

they failed to return a sweepstakes entry, they would forfeit their prior entries; (2) if they failed to purchase products, they would be dropped from a publisher's mailing lists; and (3) if they purchased additional products, they would receive preferential treatment and would, therefore, have a better chance of winning the contest.

In an attempt to prove Defendants' statements were misleading, Plaintiff pointed to "threats of forfeiture" language in Defendants' sweepstakes bulletins. An example from a Publishers Clearing House sweepstakes bulletin stated:

NOTICE OF FORFEITURE: Our computer has assigned you 10 extra SuperPrize numbers in the Publishers Clearing House Sweepstakes. And all ten of them are qualified to win \$1,000,000.00 and \$10,000,000.00, but you must get your entry in on time. We don't want to void your numbers and award any prize money you might have coming to you to someone else — but if you don't mail your entry, we'll have no choice. A Final Round entry document bearing your ten numbers is enclosed. Mail it at once to get 10 extra chances to win millions!

Plaintiff claimed such language warned customers that their previous entries would be forfeited unless they returned the current entry on time. In reviewing Plaintiff's argument, the court reasoned that the plain language of this excerpt, and similar examples, did not support Plaintiff's argument that Defendants threatened retroactive forfeiture. The court explained that the statement on its face did not mention any forfeiture of past entries. In addition, the court noted

that Plaintiff provided no statistical evidence to show that Defendants' statements confused or misled "a significant portion of the population."

Second, Plaintiff argued that AFP's drop notices led potential sweepstakes participants to believe that they must purchase products in order to stay on AFP's mailing lists. A "drop notice" is a mailing warning a customer that if they do not respond to AFP's sweepstakes bulletins, they may be taken off AFP's mailing lists. The court found that AFP's drop notices were not false or misleading. The court cited the plain language of the drop notices which stated that a consumer could either buy a product or write to AFP to request to stay on its mailing lists. The court concluded that the drop notices would not mislead a reasonable consumer.

Third, Plaintiff claimed that Defendants favored repeat subscribers in their contests. To prove that Defendants gave preferential treatment to customers who had purchased their products in the past, Plaintiff pointed to Defendants' statements in certain sweepstakes notices. An example that Plaintiff cited from Reader's Digest bulletin stated,

"[b]ecause you've been loyal to the company and displayed a faith and trust in our products through the years, we want to show our loyalty to you. As a way of expressing our thanks, we gave preference to [your] name to pass through the initial stages of the Sweepstakes."

In reviewing Plaintiff's preferential treatment claim, the court held that such statements promised nothing and, hence, were a legal

form of advertising. Additionally, the court concluded that since the odds of winning were so slight, a reasonable consumer would not think that buying products would give them substantially enhanced odds of winning the sweepstakes contests. Therefore, the court also granted summary judgment to Defendants on Plaintiff's claim that Defendants gave preferential treatment to repeat customers.

Plaintiff's related argument that consumers received extra chances to win if they bought Defendants' products also did not convince the court. The language Plaintiff cited in support of this claim clearly stated that consumers received extra chances because they previously entered a sweepstakes contest, not because they had previously purchased Defendants' products. In addition to the plain language of Plaintiff's examples, the court again cited the lack of statistical evidence showing that a reasonable consumer would be misled by Defendants' statements regarding extra prize chances. The court granted Defendants summary judgment on Plaintiff's threats of forfeiture, drop notices, preferential treatment, and extra chances arguments because Plaintiff failed to prove that the statements in Defendants' sweepstakes bulletins were false or misleading.

Defendants' Distribution Plans Held Lawful

After addressing the issues of threats of forfeiture, drop notices, preferential treatment, and extra chances arguments, the court considered Plaintiff's challenge to

Defendants' method of distributing mailings and statements in their mailings describing their distribution methods.

To be an unlawful business practice, the challenged action must be: (1) illegal; and (2) a business practice. Because Plaintiff failed to show that the distribution method was illegal under the lottery statute, the court granted summary judgment to Defendants.

The court also granted summary judgment to Defendants on the second element of the distribution count, the allegedly illegal statements. The court found that the sweepstakes' representations that "No Purchase Is Necessary" to win" were not misleading or false, since Plaintiff provided no evidence that these statements were not true.

Pre-Selected Winning Numbers Did Not Mislead Customers

Plaintiff claimed that certain publishers' statements regarding the use of pre-selected winning numbers also constituted misleading and false advertising. These statements referred to the dates of AFP's and

PCH's prize drawings and the chances of winning the contests. Plaintiff argued that since these Defendants use pre-selected winning numbers, they misrepresented how often they held the drawings for prizes. The court found, however, that Defendants truthfully stated the frequency of their prize drawings in their mailings.

Additionally, Plaintiff claimed that entries received earlier by the publishers had a greater chance of being the winning entry based on the pre-selected entry scheme. Plaintiff, however, failed to clearly explain this theory to the court. Consequently, the court granted summary judgment to Defendants.

Defendants' Change in Rules Did Not Mislead Consumers

Finally, Plaintiff challenged an alleged change in the prizes and rules of a sweepstakes run by AFP. AFP's Sweepstakes #27 changed six \$1 million prizes to one \$10 million prize. Plaintiff also claimed that an AFP rule change appeared in some mailings, but was omitted in others, constituting false and misleading

statements. The court granted AFP summary judgment on both of these counts, finding that AFP's rules authorized AFP to change prizes, therefore no evidence supported Plaintiff's argument that this rule change misled consumers. The court granted summary judgment due to the insufficiency of Plaintiff's evidence, the unlikelihood of Defendants' statements misleading a reasonable customer, and a plain-reading of Defendants' sweepstakes bulletins.

Thus, except for Plaintiff's claims against AFP's prompt-pay sweepstakes, the court granted summary judgment to Defendants on all of Plaintiff's claims since they were not supported by law or evidence. Although it denied summary judgment to AFP on the issue of whether AFP's prompt-pay sweepstakes required illegal consideration, the court found that all of the other challenged sweepstakes were not illegal under California criminal law. Additionally, the court did not find any of Defendants' sweepstakes advertising or statements regarding their methods of running the sweepstakes false or misleading.

Virginia Consumer Protection Statutes Fail to Protect Business in its Capacity as a Competitor

By Philip Tortorich

Deceit, fraud and misrepresentation – these are the problems that states seek to combat with consumer protection laws. While the state laws do not use the same wording, the

main focus of all of these laws is to protect consumers from dishonest suppliers. Courts have had to answer an ancillary issue concerning whether a supplier of goods has standing to sue its competitor under

these consumer protection laws. In *H.D. Oliver Funeral Apartments, Inc. v. Dignity Funeral Services, Inc.*, 964 F. Supp. 1033 (E.D. Va. 1997), a district court addressed this issue and held that a supplier did not