ECONOMIC VALUE, EQUAL DIGNITY AND THE FUTURE OF SWEEPSTAKES

Anthony N. Cabot*
Glenn J. Light**
Karl F. Rutledge***

I. INTRODUCTION

On July 29, 2009, the American Bar Association sent the following email to its attorney mailing list:

> Dear Colleague,
>
> Thanks to everyone who has already responded to an important ABA survey regarding potential membership packages (see below). If you have responded, please disregard this email.
>
> If you haven't yet responded, your input is *very important* and we hope you will take the time to share your opinions. Remember, there's a drawing for one of **ten $150 American Express™ gift card prizes as well as a Grand Prize of one $1000 American Express™ gift card** as a "thank you" for your participation. The study will remain open through FRIDAY, JULY 31. You can access the survey by clicking on the link below.
>
> Thank you very much for your time.
>
> . . .
>
> No purchase necessary to enter. Purchase of any ABA product, sevice [sic] or membership will not improve an entrant's chances of winning. To be eligible, you must be a licensed U.S. attorney.

If this were a letter sent out in the ABA's founding year of 1878, the association would certainly have violated the lottery laws of virtually every state then in the Nation.[1] But so would the fast food or retail promotions, such

* Anthony N. Cabot is the chair of the Gaming Law Practice Group at Lewis and Roca, which has offices in Las Vegas, Phoenix, Tucson, Albuquerque and Silicon Valley. He has practiced in the field of gaming law for 25 years. He is a past president of the International Masters of Gaming Law, past president of the Nevada Gaming Attorneys Association, and past general counsel to the International Association of Gaming Attorneys.

** Glenn J. Light is an associate in the Gaming Law Practice Group at the Las Vegas office of Lewis and Roca.

*** Karl F. Rutledge is an associate in the Gaming Law Practice Group at the Las Vegas office of Lewis and Roca. Prior to joining the firm, he was a judicial law clerk to the Honorable James A. Rice of the Montana Supreme Court.

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[1] *See, e.g.*, Cross v. People, 32 P. 821, 822 (Colo. 1893) ("The gratuitous distribution of property by lot or chance, if not resorted to as a device to evade the law, and no consideration is derived, directly or indirectly, from the party receiving the chance, does not constitute the offense. In such case the party receiving the chance is not induced to hazard money with

as the McDonald's Monopoly Game, which have become staples of American life.[2] Common among these retail promotions, a person may receive randomly distributed game pieces with hidden printed symbols by purchasing hamburgers or soft drinks. These game pieces, either by themselves or in combination with other game pieces, could entitle the purchaser to win a valuable prize. Such promotions are a type of "prize gaming."[3]

The three basic forms of prize gaming are gambling, sweepstakes, and contests.[4] Most states have a common approach to determining the legality of prize gaming. In general, states analyze if an activity includes three factors associated with gambling: (1) opportunity to win a prize, (2) winning based on chance, and (3) consideration paid to take that chance.[5] If you take away any one of the three elements of gambling—consideration, prize, or chance—you have an activity that is lawful in most states.[6] A contest, for example, differs from gambling because the winner is determined by skill.[7] Determination of whether a (pay-for-play) skill game (with prizes) is a permitted game as opposed to a prohibited game (of chance) is based on the relative degrees of skill and chance present in the game.[8] In most states, if skill is the predominant factor in determining a winner, the game is lawful.[9]

"[S]weepstakes always contain the elements of chance and prize, so the element of consideration must be eliminated to avoid violating" gambling or lottery prohibitions.[10] Ascertaining what is consideration can prove, however, to be difficult.

This Article addresses how the element of consideration is analyzed in the context of whether a particular activity is illegal gambling or a legal sweep-

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the hope of obtaining a larger value, or to part with his money at all; and the spirit of gambling is in no way cultivated or stimulated, which is the essential evil of lotteries, and which our statute is enacted to prevent.").

[2] *See* Anthony N. Cabot & Louis V. Csoka, *The Games People Play: Is It Time For A New Legal Approach To Prize Games?*, 4 NEV. L.J. 197, 204 (2003-2004).

[3] *See id.* at 199.

[4] *Id.*

[5] Morrow v. State, 511 P.2d 127, 128 (Alaska 1973) ("Where the term 'lottery' is not defined by statute, courts generally adopt a definition including three essential elements: consideration, chance, and prize").

[6] *See, e.g.,* City of Wink v. Griffith Amusement Co., 100 S.W.2d 695, 701 (Tex. 1936).

[7] *See, e.g.*, COLO. REV. STAT. § 18-10-102(2) (2009) (defining gambling as "risking any money, credit, deposit, or other thing of value for gain contingent in whole or in part upon lot, chance, the operation of a gambling device, or the happening or outcome of an event, including a sporting event, over which the person taking a risk has no control, *but does not include . . . bona fide contests of skill . . .* in which awards are made only to entrants or the owners of entries . . . .") (emphasis added).

[8] *See* Anthony N. Cabot, Glenn J. Light & Karl F. Rutledge, *Alex Rodriguez, A Monkey, and the Game of Scrabble: The Hazard of Using Illogic to Define the Legality of Games of Mixed Skill and Chance*, 57 DRAKE L. REV. 383, 390-94 (2008).

[9] *See generally* ANTHONY N. CABOT, INTERNET GAMBLNG REPORT IV: AN EVOLVING CONFLICT BETWEEN TECHNOLOGY, POLICY & LAW 15–16 (Trace Publications 2001); *see also* Chuck Humphrey, *State Gambling Law Summary* (2007), http://www.gambling-law-us.com/State-Law-Summary (setting forth and describing in depth the various tests utilized in different jurisdictions) (last visited Feb. 3, 2009).

[10] Anthony N. Cabot & Jennifer Van Kirk, *Internet Sweepstakes, Contests and Games*, BLOOMBERG L.R. INTELL. PROP., July 23, 2007, at 1, 1-2.

stakes. For example, the ABA survey activity certainly has both prizes and a chance drawing that determines winners, but does the requirement that you must complete a survey for entry constitute consideration? What about the retail promotions through which you receive a game piece for buying products? What about an unlicensed slot machine that you can play by either inserting a coin or sending a self-addressed, stamped envelope to receive a code that permits you to play one game for free? These and other scenarios are addressed in this Article.

II. Public Policy and Policy Goals Related to Gambling

Legal gambling has always been a controversial topic.[11] Most states consider gambling to be an activity that should generally be prohibited unless it is heavily regulated, operated by the government, or conducted for educational or philanthropic purposes.[12] This was not always the case. Historically, "lotteries were used to . . . finance county and municipal buildings, repair streets, ensure the water supplies of cities, and build roads, canals and bridges."[13] Some of the nation's earliest and most prestigious universities—including Harvard, Yale, Columbia, Dartmouth, Princeton, and William and Mary—were built from lottery proceeds.[14] In response to a rise in fraud and loss of public support, states began to abolish lotteries and prohibit private parties from selling tickets.[15] Although there had always been "a group opposing gambling on moral grounds . . . [t]he flames of opposition were fanned . . . by the prevalence of scandals and the belief that the poor were being targeted, especially by lotteries."[16]

Therefore, a starting point to an understanding of consideration in gambling is to examine the policy reasons behind state gambling prohibitions. Arguments against legalized gambling fall into two major camps: either deontological religious/moral or teleological/pragmatic amoral pluralist grounds.[17] "Deontology refers to a theory of moral obligation . . . [t]hat is universal and absolute."[18] Similar to *malum in se*, wrong is always wrong, under all circum-

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[11] *See, e.g.*, Stevens v. Cincinnati Times-Star Co., 73 N.E. 1058, 1062 (Ohio 1905) ("All highly civilized peoples recognize the evils to society arising from the encouragement of the gambling spirit, and it is for the purpose of discouraging this vice and preventing the spread of it that laws are passed in other states like the Ohio statutes to punish and prohibit. Such laws are and should be interpreted and enforced by our courts in a way calculated to secure the object sought.").

[12] *See* Anthony N. Cabot, Casino Gaming: Policy, Economics and Regulation 5 (Trace Publications 1996).

[13] Reuven Brenner with Gabrielle A. Brenner, Gambling and Speculation: A Theory, a History, and a Future of Some Human Decisions 14 (Cambridge Univ. Press 1990).

[14] Roger Dunstan, California Research Bureau, Gambling in California II-2 (1997), *available at* http://www.library.ca.gov/crb/97/03/Chapt2.html.

[15] *See, e.g.*, William N. Thompson, Legalized Gambling 6 (ABC-CLIO, 1994).

[16] *Id.* at II-4.

[17] Cabot, *supra* note 12, at 20.

[18] *Id.*

stances, by all people, despite the results.[19] "Teleological doctrine is 'ends' oriented. It explains phenomena 'by final causes'" and offers a "worldly" approach to problems.[20] Pragmatic amoral pluralists also will focus on the quantifiable impact of gambling, particularly the economic consequences to players.[21]

A further explanation of these positions is helpful. The deontological religious/moral view is that gambling is a sin and inconsistent with a moral society.[22] The harm is not limited to the impact on the individual but extends to any activity that even promotes harmful instincts inconsistent with a moral or religious society.[23] For example, some religions view biblical teachings as commanding Christians to use their talents and direct their efforts to productive vocations.[24] Those religions view gambling as the antithesis of the work ethic; gamblers seek gain for no effort or productive service.[25] Likewise, Christians' devotion should be with God, not money.[26] Greed, or devotion to money, is considered contrary to the devotion to God.[27] Teleological arguments include that gambling vitiates love for God by exalting the worship of money and submits outcome to chance, therefore, subverting a trust in God's dependable provisions for human needs.[28]

Moralists also see a broader purpose in some lottery statutes, noting that "the statutes are designed to prevent other evils incident to the operation of

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[19] *See generally* BLACK'S LAW DICTIONARY 501, 1045 (9th ed. 2009) (defining *malum in se* and providing historical background on the distinction between *malum in se* and *malum prohibitum*).

[20] CABOT, *supra* note 12, at 20.

[21] Social and economic externalities proffered for a ban on gambling include dysfunctional gambling, crime, adverse economic consequences, corruption, and environmental impact. Many moralists adopt a pluralist position because it may assist in reaching a broader audience. In these cases, the moralist's argument often contains untrue or inaccurate statements on the dangers or evils of the activity in an effort to instill fear or unfairly taint the activity. A good discussion of this, as it relates to "victimless" crimes, is found in PETER MCWILLIAMS, AIN'T NOBODY'S BUSINESS IF YOU DO: THE ABSURIDITY OF CONSENSUAL CRIMES IN A FREE SOCIETY 41-49 (Jean Sedillos ed., Prelude Press 1993).

[22] *See, e.g.*, Watchtower 588 (Oct. 1, 1974). The official journal of the Jehovah's Witnesses regularly reports on gambling, calling it an activity of "greed" and "covetness" stimulating "selfishness and lack of concern for others."

[23] *See, e.g.*, THE UNITED METHODIST CHURCH, THE BOOK OF DISCIPLINE: SOCIAL PRINCIPLES 6-1 (1984) ("Gambling is a menace to society, deadly to the best interests of morals, social, economic, and spiritual life, and destructive of good government.").

[24] J. Terry Price, *What Does the Bible Say about Gambling?*, http://www.crosswalk.com / 1201620 (citing J. Kerby Anderson, *Gambling*, http://www.probe.org/site/c.fdKEIMNsEoG/b.4217809/k.C93D/Gambling.html) ("The Bible emphasizes the sovereignty of God (Matt. 10:29-30), while gambling is based upon chance. The Bible admonishes us to work creatively and for the benefit of others (Eph. 4:28), while gambling fosters a 'something for nothing' attitude. The Bible condemns materialism (Matt. 6:24-25), while gambling promotes it.") (last visited Aug. 20, 2009).

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *See, e.g.*, The Salvation Army, *What is the big deal about gambling?,* http://www.salvationarmy.org/alove/engage_culture_gambling.shtml (citing Matt 6:24 "No one can serve two masters. . . . You cannot serve both God and money.") (last visited Aug. 20, 2009).

schemes of chance, such as the general excitement of the gambling instinct, and the purchase of luxuries that might not otherwise be bought."[29]

This deontological religious/moral view was evident in the debate over federal laws prohibiting the mailing of lottery material in 1893, when Senator George Frisbie Hoar from Massachusetts noted:

> I know Harvard College in my own state had repeated lotteries, as had hospitals and humane enterprises also. But our people have determined substantially in all the States in the Union that that ought not to be done, that it fosters a spirit of gambling, the idea of getting something that you do not pay for or do not work for, which is the bane of all human society wherever it prevails. . . .[30]

The concept of "lottery consideration" is broader than mere passage of money from participants to operator.[31] Moralists look to extend the laws beyond the act of gambling to prohibit activities that arouse the "gambling spirit" in the community and, in turn, raise the level of "gambling fever."[32]

In contrast, pluralist opposition derives from the view that gambling is undesirable as a matter of social or economic policy.[33] Here, the focus is on the harm created by losing one's money or other property.[34] As one commentator noted, "[t]he essential purpose of the anti-gambling act is to prevent people from squandering their money against odds which are not fully appreciated; and it follows that unless something of value is surrendered by lottery participants, no harm is done."[35] The concerns of pluralist gaming opponents can extend to further societal problems caused by such dysfunctional gamblers who can be devastated by incurring enormous debt and engaging in criminal activity to support the gambling.[36] Some religions also adopt a results-oriented approach.[37] For example, according to a Catholic encyclopedia:

> [a] person is entitled to dispose of his own property as he wills . . . so long as in doing so he does not render himself incapable of fulfilling duties incumbent upon him by reason of justice or charity. Gambling, therefore, though a luxury, is not considered sinful except when the indulgence in it is inconsistent with duty.[38]

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[29] Note, *Bank Night and Similar Devices as Illegal Lotteries*, 50 YALE L.J. 941, 946 (1940-1941).

[30] 26 Cong. Rec. 4314 (1894) (statement of Sen. Hoar).

[31] *See, e.g*., *Bank Night*, *supra* note 29, at 946.

[32] *See, e.g.*, Baedaro v. Caldwell, 56 N.W.2d 706, 710 (1953) ("Anything affording necessary lure to indulge the gambling instinct and appeal to the gambling propensities of man is a gambling device."); People v. Cerniglia, 11 N.Y.S.2d 5, 7 (City Magis. Ct. 1939) (free replays are "an incentive that fosters the gambling spirit").

[33] CABOT, *supra* note 12, at 36.

[34] *Id.*

[35] Ian D. Volner, *The Games Consumers Play: "Giveaway" and The Law - A Conflict of Policies*, 25 FED. COMM. B.J. 121, 129 (1972-1973).

[36] *See generally* Robert Ladouceur, et al., *Social Costs of Pathological Gambling*, 10 J. GAMBLING STUDIES 399 (Winter 1994).

[37] *See generally* CABOT, *supra* note 12, at 20-21.

[38] WILLIAM N. THOMPSON, GAMBLING IN AMERICA: AN ENCYCLOPEDIA OF HISTORY, ISSUES, AND SOCIETY 322-23 (ABC-CLIO, Inc. 2001) (quoting THE NEW CATHOLIC ENCYCLOPEDIA 1967, 276).

III. Major Theories of Gambling Consideration

These conflicting views of the policies against gambling represented by the deontological religious/moral and the teleological/pragmatic amoral pluralist views have influenced the legal concept of consideration in the context of gambling prohibitions. Over the years, the American courts have developed three major theories of consideration in addressing gambling cases.

A. Simple Contract Consideration

Consideration is a well-known concept in contract law. For the early part of this country's existence, the Simple Contract Consideration Test served as the definition of consideration for gambling.[39] As the name suggests, under the Simple Contract Consideration Test, courts find gambling consideration if the consideration could support a simple contract.[40] According to Professor Melvin Eisenberg, a game forms a structural agreement in which there are *mutual* bargains for a chance: "[t]he contestant enters the contest for the chance of winning, while the promoter stages the game to increase the probability of transacting."[41] Under the Simple Contract Consideration Test, either a detriment to the patron or a benefit to the promoter suffices to constitute consideration. Thus, even a heavily lopsided exchange can constitute sufficient consideration,[42] such as a game in which participants neither pay nor perform any task other than entering the contest.[43] Under the Simple Contract Consideration Test, consideration "need not consist of money or something of actual pecuniary value, but could consist of an act done at the request of the holder of the lottery if that act is one bargained for by the holder of the lottery."[44]

An example of a benefit constituting consideration can be found in *Beck v. Fox Kansas Theater,* which involved a promotion where a theater gave raffle tickets to both paying customers and anyone else who asked.[45] The court held that even though free raffle tickets were provided to anyone who asked, the mere design of the promotion to stimulate demand for a product was sufficient to be consideration.[46] Consequently, the court determined the promotion constituted an illegal lottery.[47]

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[39] State v. Eckerd's Suburban, Inc., 164 A.2d 873, 875 (Del. 1960); State ex rel. Beck v. Fox Kansas Theatre Co., 62 P.2d 929, 934 (Kan. 1936); Lucky Calendar Co. v. Cohen, 117 A.2d 487, 495 (N.J. 1955) (citing Maine v. Bussiere, 154 A.2d 702, 705 (Me. 1959) and Dorman v. Publix-Saenger-Sparks Theatres, 184 So. 886 (Fla. 1938)).

[40] Mark B. Wessman, *Is "Contract" The Name of the Game? Promotional Games as Test Cases For Contract Theory*, 34 Ariz. L. Rev. 635, 652 (1992); *see also, e.g.*, Blackburn v. Ippolito, 156 So. 2d 550, 552-53 (Fla. Dist. Ct. App. 1963).

[41] Melvin Aron Eisenberg, *Probability and Chance in Contract Law*, 45 UCLA L. Rev. 1005, 1044 (1998).

[42] Wessman, *supra* note 40, at 653 ("Lop-sided exchanges count as instances of 'consideration,' and some cases involving promotional games contain language suggestive of the 'pep-percorn' theory of consideration.").

[43] Eisenberg, *supra* note 41, at 1043.

[44] *Eckerd's*, 164 A.2d at 875.

[45] State ex rel. Beck v. Fox Kansas Theatre Co., 62 P.2d 929, 932 (Kan. 1936).

[46] *Id.* at 937.

[47] *Id.*

Therefore, courts following the Simple Contract Consideration Test consider virtually any inconvenience to the patron to enter a promotion sufficient to constitute a recognized detriment.[48] This could include having to be present to win or merely complying with any of the rules for participation.[49] In some instances, courts had devised almost a per se illegality test, where even having to register was a sufficient detriment. One extreme example involved a grocery store marketing scheme in New Jersey.[50] Participants could fill out a free entry form and return it to the nearest grocery store to enter a monthly drawing for various home appliances.[51] In an action for declaratory judgment that the scheme was not an illegal lottery, the Supreme Court of New Jersey found a "clear legislative intent against lotteries"[52] and actually held that "consideration is not a necessary element of a lottery."[53] Even so, the court went on to apply the Simple Contract Consideration Test and found that consideration existed because the scheme inconvenienced the participant by requiring her to complete and drop off the entry form, and the scheme benefitted the grocery store and its advertising company by increasing business volume at the stores.[54]

The Simple Contract Consideration Test, when applied to criminal gambling statutes, often is consistent with deontological, moral, or religious objections to gambling.[55] Anti-gambling laws in jurisdictions using the test often "are designed to prevent other evils incident to the operation of schemes of chance, such as the general excitement of the gambling instinct and the purchase of luxuries that might not otherwise be bought."[56]

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[48] *See, e.g.*, *id.* at 935 (citing Maughs v. Porter, 161 S.E. 242 (Va. 1931)); State ex rel. Hunter v. Fox Beatrice Theatres Corp., 275 N.W. 605, 606 (Neb. 1937); *cf.* Knox Indus. Corp. v. State ex rel. Scanland, 258 P.2d 910, 914 (Okla. 1953) ("[T]he rules do require any prospective participant to go to some Knox Service Station, or Store, and ask for a ticket. That this requires expenditure of time and inconvenience cannot be denied.").

[49] *See, e.g.*, *Beck*, 62 P.2d at 935; *Hunter*, 275 N.W. at 606; *cf. Knox*, 258 P.2d at 914 ("[T]he rules do require any prospective participant to go to some Knox Service Station, or Store, and ask for a ticket. That this requires expenditure of time and inconvenience cannot be denied.").

[50] Lucky Calendar Co. v. Cohen, 117 A.2d 487, 489-90 (N.J. 1955).

[51] *Id.*

[52] *Id.* at 497.

[53] *Id.* at 494.

[54] *Id.* at 495 ("But we do not have to rest our decision on this construction of our statute alone as negativing the need for consideration to find a lottery, for the consideration is in fact clearly present here, both in the form of detriment or inconvenience to the promisee at the request of the promisor and of a benefit to the promisor.").

[55] *See, e.g.*, State ex rel. Beck v. Fox Kansas Theatre Co., 62 P.2d 929, 939 (Kan. 1936) (citing Cross et al. v. People, 32 P. 821, 822 (Colo. 1893)).

[56] *Bank Night*, *supra* note 29, at 946; *see also* State ex Inf. McKittrick v. Globe-Democrat Pub. Co., 110 S.W.2d 705, 713 (Mo. 1937); State ex rel. Home Planners Depository v. Hughes, 253 S.W. 229, 231 (Mo. 1923); State v. Becker et al., 154 S.W. 769, 771 (Mo. 1913); State ex rel. Hunter v. Fox Beatrice Theatre Corp. et al., 275 N.W. 605, 606 (Neb. 1937); State v. Schwemler, 60 P.2d 938, 939 (Or. 1936); Charles Pickett, *Contests and the Lottery Laws*, 45 HARV. L. REV. 1196, 1205 (1932) ("The theory behind lottery laws is that people should be protected from dissipating their money by gambling against odds which usually are not fully appreciated.").

B. Promoter Benefit Test

Another test with questionable continued viability is the Promoter Benefit Test, which had found some favor in the 1960s and early 1970s.[57] This test focuses solely on the economic benefit received by the promoter.[58] Consideration exists where there is "a class of persons who, in addition to receiving or being entitled to chances on prizes, supply consideration for all the chances in bulk by purchasing whatever the promoter is selling, whether the purchasers were required to do so or not under the wording of the promoter's rules."[59] Because the focal point is on the benefit received by the promoter, whether the valuable consideration comes from one or all participants is irrelevant.[60] Accordingly, courts that apply this test look to see if the promoter has derived a direct economic benefit from *any* of the participants.[61]

This test looks only to whether the promoter has received tangible economic benefits because participants have paid for entry into the promotion or have paid for some product or service that also gave entry into the promotion.[62] In *State v. Bader*, an owner of a cafeteria had given away a new automobile to the holder of a lucky ticket.[63] Tickets were distributed free of charge to both customers and non-customers.[64] All tickets, however, had to be returned to a barrel located inside the cafeteria.[65] The Municipal Court of Cincinnati held that the distribution of the *vast majority of tickets* upon payment for meals and the increased patronage received from the operation of the game sufficiently fulfilled the consideration requirement.[66] The fact that an insubstantial number of tickets had been distributed to noncustomers was deemed irrelevant and

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[57] *See, e.g.*, Boyd v. Piggly Wiggly S., Inc., 155 S.E.2d 630, 637 (Ga. Ct. App. 1967) (quoting Whitley v. McConnell, 66 S.E. 933 (Ga. 1910); Winn-Dixie Stores, Inc. v. Boatright, 155 S.E.2d 642 (Ga. Ct. App. 1967); Idea Research & Dev. Corp. v. Hultman & Cent. Broad. Co., 131 N.W.2d 496, 510 (Iowa 1964); Smith v. State, 127 S.W.2d 297, 299 (Tex. Crim. App. 1939); Featherstone v. Indep. Serv. Station Ass'n of Texas et al., 10 S.W.2d 124, 127 (Tex. App. 1928); State ex rel. Schillberg v. Safeway Stores, Inc., 450 P.2d 949, 955-56 (Wash. 1969); 61 Wis. Op. Att'y Gen. 405 (1972).

[58] *See, e.g.*, *Boyd*, 155 S.E.2d at 637 (quoting Whitley v. McConnell, 66 S.E. 933 (Ga. 1910); *Winn-Dixie*, 155 S.E.2d at 642; *Idea*, 131 N.W.2d at 501; *Smith*, 127 S.W.2d at 299; *Featherstone*, 10 S.W.2d at 127; *Schillberg*, 450 P.2d at 955-56; 61 Wis. Op. Att'y Gen. 405 (1972).

[59] *Boyd*, 155 S.E.2d at 632.

[60] *Id.* at 639 ("'[A]ll chances are paid for in mass by the general body of purchasers of tickets, although an individual registrant may not pay for his chance. Therefore, the theater which distributes the chances is paid if the sale of some tickets be looked at as a whole, although some chances are given away.'" (quoting Barker v. State, 193 S.E. 605, 609 (Ga. Ct. App. 1937)).

[61] *See generally Boyd*, 155 S.E.2d at 639; *Winn-Dixie*, 155 S.E.2d 642; *Idea*, 131 N.W.2d at 499; *Smith*, 127 S.W.2d at 298; *Featherstone*, 10 S.W.2d at 127; *Schillberg*, 450 P.2d at 956; 61 Wis. Op. Att'y Gen. 405 (1972).

[62] *See generally Boyd*, 155 S.E.2d at 639; *Winn-Dixie*, 155 S.E.2d 642; *Idea*, 131 N.W.2d at 501; *Smith*, 127 S.W.2d at 299; *Featherstone*, 10 S.W.2d at 127; *Schillberg*, 450 P.2d at 956; 61 Op. Att'y Gen. Wis. 405 (1972).

[63] State v. Bader, 24 Ohio N.P.(n.s.) 186, 192 (1922).

[64] *Id.*

[65] *Id.*

[66] *Id.*

merely designed to evade the lottery laws.[67] The court instead focused its attention on whether any benefit had flowed to the proprietor through the operation of the promotional game and, consequently, in doing so, the court recognized that because the proprietor was a sound businessman, he would not have given away a $1,300 car without the expectation of a return.[68]

Unlike the *Bader* court, however, not all courts required a vast majority of participants to actually purchase admission tickets to find consideration. In *State v. Schubert Theatre Players Co.*, the court held that a "free" ticket to a chance at a prize given with the purchase of each theater show ticket was not in fact "free" because the purchase price was for both the admission and the chance.[69] While the court noted "a person may distribute or give away his property or money by lot or chance provided he does so without a consideration," it concluded that evidence that anyone could get the tickets for free was immaterial because "the moment some pay for the chance of participating in the drawing of the prize it is a lottery under the law, no matter how many receive a chance to also participate free and without any consideration."[70] The court focused on whether any economic benefit had flowed to the promoter through the operation of the drawing to determine if the promotion was a lottery.[71] In this respect, *Schubert Theatre* further lessens the consideration requirement as the court found that the operation of a promotion game may cause an increase in the patronage of a business even though a vast majority of the participants in the game did not make purchases.

Some vestige of this rule still applies. In the unpublished 1992 opinion *State v. Razorback Room, Inc.,*[72] an Arkansas appellate court held that voluntary "donation"-based bingo was an illegal lottery. The court explained that even though free play was allowed:

> All three elements of a lottery are present. The elements of prize and chance are not disputed. While the issue of consideration was disputed at trial, the evidence shows that the vast majority of bingo patrons in fact pay money to participate in the various games. The fact that these payments may be called donations is not, on this issue, significant. The defendants admit that if a significant portion of the bingo patrons chose to play for free, the bingo game would collapse. The game did not cease to be a lottery because some of the players were admitted to play for free, so long as others continued to pay for their chances. The presence of non-paying participants did not change the status of those who paid. If it is a lottery as to those who pay, it is necessarily a lottery as to those who do not pay for their chances.[73]

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[67] *Id.*

[68] *Id.*

[69] State v. Schubert Theatre Players Co., 281 N.W. 369, 370-71 (Minn. 1938).

[70] *Id.* at 370.

[71] *Id.*

[72] State v. Razorback Room, Inc., No. 91-7596 (Pulaski Co. Ch., 6th Div., Sept. 29, 1992).

[73] *Id.*(internal citations omitted); *see also* F.A.C.E. Trading, Inc. v. Dep't of Consumer & Indus. Svcs, 717 N.W.2d 377, 386 (Mich. Ct. App. 2006).

C. Economic Value Test

The past eighty years have seen an abandonment of the Simple Contract Consideration Test and the Promoter Benefit Test.[74] As a result, consideration to support a legal contract is no longer the same as consideration necessary to support an illegal gambling transaction.[75] Perhaps the first case to create this distinction was *Yellow-Stone Kit v. State.*[76] This action centered on lotteries, which during the late 1800s, were the most widely available form of gambling in the United States and most closely identified in the public mind with the evils of gambling.[77] In that case, the Alabama Supreme Court held that a retail promoter did not conduct an illegal lottery because the promoter did not demand that participants in the drawing purchase tickets.[78] Because the payment of money was not required to obtain a chance to win, the court held that there was no consideration.[79]

While the *Yellow-Stone Kit* case marked the creation of a new promotional marketing industry, the idea of any form of legal prize gaming based on chance remained controversial. Conservative legal commentators such as Francis Williams hailed any decision rejecting *Yellow-Stone Kit.*[80] In *Grimes v. State*, the Alabama Supreme Court analyzed a movie theater's "bank night" promotion in which everyone, both movie theater patrons and non-paying members of the public, was given the opportunity to sign a card for the chance of getting his or her name drawn from a "hopper," at which point the lucky winner would be

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[74] *See, e.g.*, Cal. Gasoline Retailers v. Regal Petroleum Corp. of Fresno, Inc., 330 P.2d 778, 788-89 (Cal. 1958); People v. Eagle Food Ctrs., Inc., 202 N.E.2d 473, 475 (Ill. 1964); State v. Bussiere, 154 A.2d 702, 706 (Me. 1959); Mobil Oil Corp. v. Att'y Gen., 280 N.E.2d 406, 412 (Mass. 1972); State ex rel. Stafford v. Fox-Great Falls Theatre Corp., 132 P.2d 689, 696 (Mont. 1942); People v. Mail & Express Co., 179 N.Y.S. 640, 644-45 (N.Y. Sp. Sess. 1921); Cudd v. Aschenbrenner, 377 P.2d 150, 155 (Or. 1962); Albertson's, Inc. v. Hansen, 600 P.2d 982, 985 (Utah 1979).

[75] *See, e.g.*, *Cal. Gasoline*, 330 P.2d at 788-89; *Eagle*, 202 N.E.2d at 475; *Bussiere*, 154 A.2d at 706; *Mobil*, 280 N.E.2d at 412; *Stafford*, 132 P.2d at 696; *Mail*, 179 N.Y.S. at 644-45; *Cudd*, 377 P.2d at 155; *Albertson's*, 600 P.2d at 985.

[76] Yellow-Stone Kit v. State, 7 So. 338 (Ala.1890).

[77] *Id.* at 339. ("The history of lotteries for the past three centuries in England, and for nearly a hundred years in America, shows that they have been schemes for the distribution of money or property by lot in which chances were sold for money, either directly, or through some cunning device. The evil flowing from them has been the cultivation of the gambling spirit,—the hazarding of money with the hope by chance of obtaining a larger sum,—often stimulating an inordinate love of gain, arousing the most violent passions of one's baser nature, sometimes tempting the gambler to risk all he possesses on the turn of a single card or cast of a single die, and 'tending, as centuries of human experience now fully attest, to mendicancy and idleness on the one hand, and moral profligacy and debauchery on the other.' *Johnson v. State,* 83 Ala. 65, 3 South. Rep. 790. It is in the light of these facts, and the mischief thus intended to be remedied, that we must construe our statutory and constitutional prohibitions against lotteries and devices in the nature of lotteries. *Ehrgott v. Mayor,* 48 Am. Rep. 622.").

[78] *Yellow-Stone Kit*, 7 So. at 339.

[79] *Id.* ("[W]e can see nothing in the evidence from which it can be inferred that any one, present or absent, paid any valuable consideration, directly or indirectly, for these tickets, or for the chance of getting a prize.").

[80] FRANCIS EMMETT WILLIAMS, FLEXIBLE-PARTICIPATION LOTTERIES 192-95 (Thomas L. Book Co. 1938).

entitled to a prize if he could claim it within two minutes.[81] The court concluded: "[b]ecause some have not been drawn into the gambling phase does not render it any the less a lottery, with whatever of evil it engenders, as to the large public who have paid."[82] Williams noted this case was "of inestimable value to the citizens of the great state of Alabama" because it swept "away the last vestige of support that the promoters of such lotteries have found in *Yellow-Stone Kit v. State.*"[83] He was wrong.

A major turning point in the debate occurred in 1954 when the U.S. Supreme Court recognized the difference between consideration for contract and gambling purposes. *FCC v. American Broadcasting Co.* (hereinafter "*ABC*") considered whether a promotional activity requiring only that listeners accept a phone call from the radio station had sufficient consideration to be an illegal lottery.[84] While merely having to listen to the radio would have been sufficient consideration to support a contract, Chief Justice Earl Warren inferred that as a criminal prohibition, the consideration element of lottery laws should be more rigorously interpreted in the defendant's favor.[85] Warren recognized "that it would be stretching the statute to the breaking point to give it an interpretation that would make such programs a crime."[86] This was the basis for a departure in definition of consideration for contract law and gaming law purposes.

The influence of the *ABC* case predicated considerable change at the state court level. In a piece on consideration written in 1972, Ian Volner discussed the relaxing of the lottery laws as they applied to promotional activities.[87] In discussing the attempts of state legislatures to redefine the element of consideration to permit the operation of good lotteries while continuing the ban on the bad, Volner detailed several states, including Oklahoma and Illinois, which changed their statutory and judicial views to make clear that the consideration required for an illegal lottery was a pecuniary detriment to the patron.[88] Volner appreciated "that unless something of value is surrendered by lottery participants, no harm is done."[89]

Both the *Yellow-Stone Kit* and the *ABC* cases adopted an economic value theory of consideration that focuses on what the participant must give up to be eligible to win a prize.[90] Under the test, referred to in this article as the Economic Value Test, consideration "means 'something of value and not merely the formal or technical consideration, such as registering one's name or attending a certain place, which might be sufficient consideration to support a con-

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[81] Grimes v. State, 178 So. 73, 73-74 (Ala. 1937).

[82] *Id.* at 74.

[83] WILLIAMS, *supra* note 80, at 194-95.

[84] FCC v. Am. Broad. Co., 347 U.S. 284, 286 n.2, 290-91 (1954).

[85] *Id.* at 296.

[86] *Id.* at 294.

[87] Volner, *supra* note 35, at 123.

[88] *Id.* at 134-36.

[89] *Id.* at 129.

[90] *See* Yellow-Stone Kit v. State, 7 So. 338 (Ala. 1890); FCC v. Am. Broad. Co., 347 U.S. 284 (1954).

tract.'"[91] Similarly, that an operator simply may benefit from a promotional scheme fails to satisfy the consideration requirement.[92] In sum, consideration is met only when the participant must pay something of economic value either through the purchase of a chance to win or indirectly through the purchase of a product or service.[93]

Unlike the Simple Contract Consideration Test, which focuses on mutual bargains for chance, the Economic Value Test focuses on what a participant gives up in exchange for a chance to win a prize.[94] For example, in *Cudd v. Aschenbrenner*, the plaintiffs appealed a declaratory judgment that held their promotion scheme was an illegal lottery.[95] The scheme, which intended to attract customers to grocery stores, involved a weekly drawing.[96] To register for the drawing, participants must have submitted personal information on a registration card and have validated a coupon at the grocery store each week before the drawing.[97] At the time of the drawing, the participant was required to be present in the grocery store parking lot to claim the prize.[98]

The Court found that the plaintiffs' promotional program did not require consideration from participants in that there was no obligation for a participant to make a purchase in order to participate.[99] In reaching this decision, the court rejected the argument that "consideration paid by one person taints the whole scheme."[100] The court ascertained that the legislature intended the anti-lottery statutes to prohibit schemes that required participants to provide something of *economic value* to participate.[101] The court explained that this view did not undermine generally accepted principles of contractual consideration but merely recognized "that a lottery is a special kind of contract which requires a

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[91] Mobil Oil Corp. v. Att'y Gen., 280 N.E.2d 406, 411 (Mass. 1972) (quoting Commonwealth v. Heffner, 24 N.E.2d 508, 508-09 (Mass. 1939)).

[92] *Mobil*, 280 N.E.2d at 412. ("[T]he incidental increase in business attendant upon the use of promotional games like those involved in the present case is not the type of consideration necessary to make these games lotteries.").

[93] *See,* State v. Cox, 349 P.2d 104, 106 (Mont. 1960). (The court held the scheme unlawful on the ground that participants necessarily suffered a pecuniary detriment—the purchase of goods—as a precondition of eligibility.).

[94] *See* People v. Eagle Food Ctrs., 202 N.E.2d 473, 475 (Ill. 1974) ("Our statutory definition of a lottery, in clear and unambiguous terms, refers to persons who 'have paid or promised consideration' for a chance to win a prize. Given their plain and accepted meanings, these words do not admit to a construction or comprehension that the necessary consideration may be found in benefits flowing to the promisor. Their natural purport is, rather, that the consideration must flow from the one who is given the opportunity to win a prize by chance.").

[95] Cudd v. Aschenbrenner, 377 P.2d 150, 151-52 (Or. 1962).

[96] *Id.*

[97] *Id.* at 152.

[98] *Id.*

[99] *Id.* at 156-57.

[100] *Id.* (The court also reasoned that this argument failed to consider that neither the grocery store nor the participants believed purchasing an item at the store was a requirement to participate in the weekly drawing, and parties must intend for their actions to constitute such consideration.).

[101] *Id.* at 155.

special kind of consideration—*consideration which can impoverish the individual who parts with it.*"[102]

Cudd reflects the distinction between the deontological religious/moral view of gambling and the teleological/pragmatic amoral pluralist view. Unlike other cases that focused on "other evils incident to the operation of schemes of chance,"[103] the *Cudd* court focused on "the impoverishment of the individual and its attendant evils."[104] Accordingly, because this policy concentrates on harm to the participants, benefits to the promoter are irrelevant in Economic Value Test jurisdictions. Simply, without having to pay to enter, no economic harm can come to the participant and, therefore, no consideration is recognized.[105]

Under the Economic Value Test, the passing of the consideration does not, however, have to be a direct payment for entry into the sweepstakes.[106] For example, a requirement to buy a good or service as a condition to entry in a sweepstakes is a form of combined cash consideration because the only way to enter the promotion is to buy a product or service. *State v. Cox* is an example of such promotion in which the court held that the requirement to purchase an item to gain entry into the contest resulted in the patron necessarily suffering a pecuniary loss.[107] *Cox* involved a "Chinese Lottery," in which persons making purchases at a grocery store were given numbered cards that served as the basis for the drawing.[108] The Montana Supreme Court held the scheme unlawful on the ground that participants necessarily suffered a pecuniary detriment—the purchase of the goods—as a pre-condition to being eligible for the drawing.[109] In reaching this conclusion, the court disregarded the fact that participants received value for the payment—the groceries purchased—and that there was no additional charge for the right to participate.[110] While a few states have adopted an "equivalent value" exemption—i.e., if the person receives "fair value" for a purchase, with which they also receive entry into a sweepstakes, it is not unlawful[111]—virtually all cases in which promotional sweepstakes entries require purchase of a good or service have been found to be unlawful

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[102] *Id.* (emphasis added) ("We do no violence to the law of contracts when we hold that a lottery contemplates a greater consideration than is generally required to support a contract.").

[103] *Bank Night*, *supra* note 29, at 946.

[104] *Cudd*, 377 P.2d at 155.

[105] Volner, *supra* note 35, at 129.

[106] *See, e.g.*, State v. Cox, 349 P.2d 104, 106 (Mont. 1960).

[107] *Id.* at 106-07.

[108] *Id.* at 105.

[109] *Id.* at 106. ("[W]here one is required to make an outlay of money in order to participate in a scheme whereby an award is made by chance, the participant pays valuable consideration for the chance to participate, notwithstanding the fact he may also receive merchandise at the same time in return.").

[110] *Id.*

[111] *See, e.g.*, Treasured Arts, Inc. v. Ark. Alcoholic Beverage Control Bd., No. CV 97-716, (1997 Pulaski Co., Ch., 6th Div. 1997); Ark. Op. Att'y Gen. No. 2006-052 (June 28, 2006) *available at* 2006 WL 1794426, at *3 (Ark. A.G. June 28, 2006). ("One Pulaski County Circuit Court has found that phone cards with game pieces attached, but not dispensed by machines, were 'legitimate commercial products' and that consideration was paid for those products so that the products and game pieces were neither gambling nor a lottery.").

even where the purchaser has received equivalent value for the product received.[112]

The Economic Value Test has a second consideration. The economic value given by the participant must be more than an incidental amount paid to a third party to facilitate the entry into the promotion. The participant parting with something of economic value is not enough. For example, incidental sums paid to third parties such as postage stamps do not constitute consideration.[113] Likewise, payments to providers of internet services are unlikely to invalidate a sweepstakes by an unrelated promoter where entry is available only online. Potential issues, however, face those who use text messages as a method of entry.[114] Two types of text messaging rates might apply to a sweepstakes entry. The first is a standard rate that the participant pays to the telephone carrier for text messaging. This is typically significantly less than the cost of a postage stamp and is retained by the carrier alone. The second is a premium or special rate arrangement in which the carrier shares the fees received from the customer with the sweepstakes promoter. Regardless of whether the actual fee charged to the customer is less than the cost of postage, this arrangement creates potential legal risk because both aspects of the Economic Value Test are met: the customer is paying something of value, money that, in turn, is partially accruing to the benefit of the promoter.[115]

While some of the migration to the Economic Value Test resulted from court decisions, many states altered their public policy by statutory abrogation of the older tests.[116] For example, Utah, a state with a strong anti-gambling public policy that prohibits any form of gambling and has not historically relied on the Simple Contract Consideration test, statutorily adopted the more lenient Economic Value Test. *Albertson's, Inc. v. Hansen* involved a Utah statute that defined "lottery" as "any scheme for the disposal or distribution of property by chance among any persons *who have paid or promised to pay any valuable*

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[112] *See, e.g.*, *Cox*, 349 P.2d at 106.

[113] *See, e.g.*, Haskell v. Time, Inc., 857 F. Supp. 1392, 1404 (E.D. Cal. 1994). ("Plaintiff concedes that no purchase is required to enter defendants' sweepstakes, but instead asserts that the payment of twenty-nine cents postage is 'valuable consideration.' This assertion is untenable. The California Supreme Court has held that a requirement that a sweepstakes entrant deposit the entry form at the sponsor's place of business is not 'valuable consideration' sufficient to state a cause of action under California law. *California Gas Retailers v. Regal Petroleum Corp.*, 50 Cal.2d 844, 861-62, 330 P.2d 778 (1958). The time, energy, and expense required under those rules exceeds the twenty-nine cents required here. Thus, plaintiff's claim that the sweepstakes themselves amount to illegal lotteries or contests is dismissed since the definitions of both "contest" and "lottery" require the payment of consideration.").

[114] *See generally* Kan. Op. Att'y Gen., 88-125 (Aug. 31, 1988) ("In addition to being able to obtain a coupon by purchasing a Lottery ticket, the private business may provide a toll-free number for persons to call to receive free coupons for similar food items and discounts. The number must be toll-free so that the people do not have to pay to get a coupon. This is so because consideration is defined as 'anything which is a commercial or financial advantage to the promoter or a disadvantage to any participant.'").

[115] *Id.*

[116] *See, e.g.*, People v. Eagle Food Ctrs. Inc., 202 N.E.2d 473, 474-76 (Ill. 1964); State v. Highwood Service, Inc., 473 P.2d 97 (Kan. 1970); Albertson's, Inc. v. Hansen, 600 P.2d 982, 984-86 (Utah 1979).

consideration for the chance of obtaining property."[117] As a result, the court rejected the contention that the participant's intangible expenses, such as inconvenience, effort, and transportation costs, together with the scheme-promoter's increased profits and patronage, constituted consideration.[118] In construing the statutory language, the court focused on the participants: the issue was "not what the promoter receives but *what the player parts with* . . . The profits to Albertson's are not 'paid . . . for the chance of obtaining property' and thus cannot be part of the 'valuable consideration' required by our statute to find a lottery."[119] Relying on the reasoning set forth in *Cudd*, the court also refused to interpret "time, effort, inconvenience, and exercise of choice" as valuable consideration.[120]

Several other states have statutory definitions that recognize that the participants must pay or risk something tangible.[121] North Dakota, for example, defines "gambling" as "risking any money, credit, deposit, or other thing of value for gain, contingent, wholly or partially, upon lot, chance, the operation of gambling apparatus, or the happening or outcome of an event."[122] Minnesota defines "bet" as "a bargain whereby the parties mutually agree to a gain or loss by one to the other of specified money, property or benefit dependent upon chance although the chance is accompanied by some element of skill."[123]

The Federal Government also adopted the Economic Value Test in the federal Deceptive Mail Prevention and Enforcement Act.[124] This is the only federal law to directly regulate sweepstakes promotions. In particular, the Act states that

> [E]ntry materials for a sweepstakes or a promotion that purports to be a sweepstakes; and . . . does not contain a statement that discloses in the mailing, in the rules, and on the order or entry form, that no purchase is necessary to enter such sweepstakes ["is nonmailable matter, shall not be carried or delivered by mail, and shall be disposed of as the Postal Service directs."][125]

IV. Flexible Entry Sweepstakes

While a fundamental condition of a sweepstakes under the Economic Value Test is that a participant does not have to pay consideration to directly or indirectly have the chance to win a prize, two possible entrance structures are common.[126] In the first structure, none of the participants pay to enter the

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[117] *Albertson's*, 600 P.2d at 985 (quoting Utah Code Ann. § 76-10-1101(2) (1973)) (emphasis added).
[118] *Id.* at 985-86.
[119] *Id.* at 985 (emphasis added).
[120] *Id.* at 985-86; *see also Eagle Food*, 202 N.E.2d at 475.
[121] *See, e.g.*, Idaho Code Ann. § 18-3801 (2009) ("money, credit, deposit or other thing of value"); Mass. Gen. Laws ch. 271, §7 (2009) ("property of value"); Miss. Code Ann. §97-33-1 (2009) ("valuable thing"); Mont. Code Ann § 23-5-112 (2007) ("thing of value").
[122] N.D. Cent. Code § 12.1-28-01 (2008).
[123] Minn. Stat. Ann. § 609.75, subdivision 2, (2009).
[124] 39 U.S.C. § 3001(k) (2009).
[125] 39 U.S.C. § 3001(k)(2), (k)(3)(A)(i)-(ii) (2009).
[126] *See supra* notes 74-125 and accompanying text and *infra* note 132 and accompanying text.

sweepstakes. The promoters have a myriad of reasons to hold such a sweepstakes. In many instances, the promoter hopes that the sweepstakes will assist in branding itself, creating customer traffic, or bringing revenue from third-party sponsors or advertisers. In other circumstances, the promoter may use the sweepstakes to benefit the branding of third parties and be paid for the effort. A contemporary example is a permanent sweepstakes internet site where the prizes for the chance-based games are provided by sponsors whose advertising is prominently displayed on the site. These advertiser-supported sweepstakes do not need to be a traditional raffle or instant-win promotion. They could extend to any game of chance including most casino-style games. Interactive forms of sweepstakes that integrate advertising into the games are often referred to as "advergaming." Regardless of whether the promoter is using the sweepstakes for its own products or services or to promote third-party products or services, in situations where no participants pay to enter, no consideration exists under the Economic Value Test.

A second model, a revenue model, is referred to as a Flexible Entry Sweepstakes. This method involves some participants paying direct or indirect economic value, but the promoter provides an opportunity for anyone to enter the sweepstakes for free. On-product schemes are common and involve promotions in which the entry form is within the packaging or label.[127] In more traditional retail settings, a common example occurs where the purchase of fast food or beverages comes with the chance to win a prize.[128] Persons not wanting to buy the food or beverage can request a free game piece at the retail establishment, through the mail, over the internet, or by calling a toll-free number.

Flexible methods of entry must be distinguished from closed participation. As explained by a Kentucky Attorney General opinion discussing a "no purchase necessary" beverage promotion:

> [T]he mere fact that some of the participants in a promotional scheme in fact make purchases of the sponsor's products does not, in and of itself, constitute consideration supporting a lottery, where chances to participate in the scheme are also freely given away on a reasonably equal basis without respect to the purchase of merchandise. These schemes, known as "flexible participation" schemes, are not to be confused with "closed participation" gift enterprise schemes, which are open only to patrons purchasing goods, services or whatever the promoter is trying to push by the scheme.[129]

Thus, in *State v. Cox*, the Montana Supreme Court found consideration existed when a scheme required participants to purchase a sponsor's goods to receive a "free" entry into a promotional drawing.[130] Applying the Economic Value Test, the court reasoned that the purchase requirement posed the threat of inducing people "to hazard anything of value to win."[131]

Since a participant in a flexible entry sweepstakes does not have to give up valuable consideration to play, games that offer a free method of entry do not

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[127] Volner, *supra* note 35, at 130.
[128] Cabot & Csoka, *supra* note 2, at 204.
[129] Ky. Op. Att'y Gen., 81-259, 2-799, 2-801 (1981).
[130] State v. Cox, 349 P.2d 104, 106-07 (Mont. 1960).
[131] *Id.*

implicate the Economic Value Test's underlying "prevent the impoverishment" policy rationale.[132] Thus, jurisdictions that apply the Economic Value Test find that a free method of entry negates consideration. For example, in *California Gasoline Retailers v. Regal Petroleum Corp.*, the California Supreme Court held that a promotional scheme lacked consideration because it included a free method of entry that allowed participants to play without purchasing the sponsor's products.[133] The court commented that because anyone could have had the ability to participate for free, "it would seem that the relative numbers of tickets distributed with purchases or without purchases should not be determinative of the issue involved which is whether the holder, or holders, of the tickets paid, or promised to pay a valuable consideration for the chance of winning a prize."[134] The court then reasoned that the participants who made a purchase "'could not be said to have paid a consideration for the prize tickets since they could have received them free.'"[135]

In contrast, jurisdictions that followed the Simple Contract Consideration Test generally refused to find a lack of consideration because a scheme's operator provided a free method of entry.[136] Indeed, a court may find consideration in nearly any act that a participant performs to signify a desire to enter the contest because the participant is under no legal obligation to perform such an act. Under the Promoter Benefit Test, a free method of entry is inherently irrelevant; a court will find consideration so long as the scheme's operator benefits from any participant.[137]

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[132] *See* Cudd v. Aschenbrenner, 377 P.2d 150, 155 (Or. 1962).

[133] Cal. Gasoline Retailers v. Regal Petroleum Corp. of Fresno, 330 P.2d 778, 782, 789 (Cal. 1958).

[134] *Id.* at 786.

[135] *Id.* (quoting People v. Carpenter, 297 P.2d 498, 500-01 (Cal. Ct. App. 1956)).

[136] In *Barber v. Jefferson County Racing Ass'n, Inc.*, 960 So.2d 599, 611-13 (Ala. 2006), the Alabama Supreme Court "look[ed] through the form of the operation to its substance" and decided that consumers were, in fact, paying for their entries even though the entries were provided for free with purchase of a phone card. *Id.* at 608, 611. Even though the scheme provided free entries that did not require the purchase of a phone card, the court stated that "the opportunity for free plays does not negate the element of consideration, or obviate an inquiry into the purpose and effect of the operation as 'the final proof of . . . consideration.'" *Id.* at 613.

[137] *See* Boyd v. Piggly-Wiggly S., Inc., 155 S.E.2d 630 (Ga. Ct. App. 1967). There, the plaintiff filed suit to recover a prize she allegedly won through a grocery store giveaway promotion; the case turned on whether consideration existed. *Id.* at 632, 635. Although the promotion did not require participants to purchase anything to play, participants had to visit the grocery store to receive a free game piece. *Id.* at 633. Interestingly, the plaintiff in the case knew that she could receive a game piece for free, yet she "had 'rather purchase something than go for free'" and would always make a purchase before requesting a game piece. *Id.* at 633; *see also* Grimes v. State, 178 So. 73, 74 (Ala. 1937) ("[T]he sense of good sportsmanship may exert an influence on the number who put themselves in the position to draw a prize when they have contributed nothing to the common stake which has brought the prize into being.").

The Georgia Appellate Court disdainfully noted the failed attempts of "flexible participation schemes," which allow both purchasers and non-purchasers to participate in a sponsor's scheme to circumvent the anti-lottery laws. *Boyd*, 155 S.E.2d at 638. The court discussed prior case law holding flexible participation schemes to be lotteries even though consideration for the chance to win a prize merged into the purchase price of the sponsor's goods. *Id.* at 640. It went on to highlight a specific case that "applied this rule without

V. EQUAL DIGNITY

Occasionally, commentators refer to a concept of equal dignity in sweepstakes law.[138] In fact, no court has specifically recognized such rule by name, but instead, through a collection of cases, courts have recognized requirements of lawful sweepstakes under the Economic Value Test that require equal treatment of paying and non-paying participants. As the Kentucky Attorney General noted above, a flexible entry sweepstakes must provide entries on an "equal" basis to non-paying participants to negate consideration.[139] The concept of "equal dignity" to validate a free method of entry in a flexible participation sweepstakes has been shaped by case law in regard to (i) method of entry, (ii) opportunity to win, (iii) claiming prizes, and (iv) prizes awarded.[140]

A. Method of Entry

Equal opportunity to enter requires that the entry mechanism for non-paying participants be substantially similar to those of paying participants. As an example, in *Commonwealth v. Frate*, the court addressed the conviction of an individual who set up a device whereby a person could insert a coin and win a prize, but also could receive a chance to win a prize without making a purchase by mailing in a stamped, self-addressed envelope, and a 3x5 card with his name and address printed on it.[141] *Frate* involved a "cumbersome requirement to request free play by mail, rather than immediately on the site of the game machine itself . . . [it] pose[d] a significant practical disadvantage to a player wishing to play for free as compared to a paying player."[142] What is an unreasonably burdensome method of free entry is a question of fact.[143]

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being confused by the 'no purchase necessary' aspect." *Id.* In the end, the court found the grocery store's scheme constituted an illegal lottery because some people made purchases in addition to receiving their free game pieces. *Id.* In this way, they supplied "pecuniary consideration for all the chances in bulk." *Id.*

Although the Simple Contract Consideration Test and Promoter Benefit Test both tend to reject flexible entry sweepstakes, this case presents a clear example of the differences between the two. Under a simple contract theory approach, a court most likely would have rejected the entry as not really "free." By requiring participants to visit the store to receive a game piece, the scheme's operator is bargaining for the chance to sell more goods. Accordingly, consideration still is present. *Id.* As *Boyd v. Piggly Wiggle Southern, Inc.*, demonstrates, however, the Promoter Benefit Test rejects any flexible entry sweepstakes, whether truly free or not, as long as any participant provides a benefit to the scheme operator. *Id.*

[138] Cabot & Csoka, *supra* note 2, at 239.

[139] Ky. Op. Att'y Gen., 81-259, 2-799, 2-801 (1981).

[140] *See generally* Cabot & Csoka, *supra* note 2, at 238-39.

[141] Commonwealth v. Frate, 537 N.E.2d 1235, 1235-36 & n.1 (Mass. 1989).

[142] Commonwealth v. Webb, 860 N.E.2d 967, 971 n.11 (Mass. App. Ct. 2007) (citing *Frate*, 537 N.E.2d at 1235-36).

[143] In *G.A. Carney, Ltd. v. Brzeczek*, 453 N.E.2d 756 (Ill. App. Ct. 1983), the court suggested that consideration is absent where the chance to win is free, even if some participants win by making a purchase, if Illinois' interpretation of the Equal-Dignity Rule is honored. *Id.* at 761. This case, however, concluded that the existence of a free entry form is not dispositive and that a free entry should not be illusory. The court concluded "the obstacles to obtaining a free entry blank are so formidable, the publisher's offer of a free entry blank must be regarded as chimerical." *Id.* The *G.A. Carney, Ltd.* court went on to indicate that

Central to the notion of equal opportunity to enter is that the public knows and understands that no purchase is necessary and knows how to enter the sweepstakes. This typically is reflected in disclosure requirements. For example, disclosure of the free method of entry must be "clear and conspicuous," so that consumers are adequately informed of the existence of a non-purchase method of entry. This began as a matter of common law.[144] For example, in *Mid-Atlantic Coca-Cola Bottling Co. v. Chen, Walsh, & Tecler,* even a game with a free entry option may be deemed a lottery if the promoter fails to widely publicize the availability of free entries, or if non-paying participants do not compete on terms equal to purchasing participants.[145] In another instance, the Kentucky Attorney General evaluated a promotional game offered by McDonald's.[146] The Kentucky Attorney General noted that the game likely was legal as it offered a free entry, but recognized that the alternative must be readily available as well.[147] Moreover, the opinion cautioned that:

> any advertisement of "no purchase necessary", without more, would in this situation be unfair and misleading by failure to disclose the other alternatives for obtaining sweepstakes tickets and participating in this scheme. Therefore, any advertisement of such a scheme must include all of the alternatives for participation in the scheme.[148]

More typically today, the requirement of adequate disclosure is required by statutes governing sweepstakes. For instance, the California Business and Professions Code requires that for all solicitation materials containing or describing a sweepstakes, a no-purchase-or-payment-necessary statement must be provided in the official rules included in the solicitation materials or on the entry-order device.[149] Illinois necessitates that written prize promotions must include the following disclosures:

> (1) A purchase will not improve a person's chances of winning;
> (2) Any requirement that person pay the actual shipping or handling fees or any other charge to obtain prize including amount and nature of charge.
> (3) Any restrictions on receipt of prize; and
> (4) Any limitations on eligibility.[150]

"we do not inquire into the theoretical possibilities of the scheme, but . . . examine it in actual practical operation." *Id.* (internal quotation omitted).

[144] *See generally* F.A.C.E. Trading, Inc. v. Todd, 903 A.2d 348, 353-54 (Md. 2006) (citing Mid-Atl. Coca-Cola Bottling Co. v. Chen, Walsh, & Tecler, 460 A.2d 44, 46 (Md. 1983).

[145] *Mid-Atl. Coca-Cola Bottling Co.*, 460 A.2d at 46.

[146] 2 Ky. Op. Att'y Gen. No. 81-259 (July 14, 1981).

[147] *Id.* at 2-801, 2-802.

[148] *Id.* at 2-802. The Kentucky Attorney General has stated that a contest is not gambling when the promoter offers an alternative for participants to obtain chances free and on a reasonably equal basis. *See, e.g.*, *id.*at 2-801; 2 Ky. Op. Att'y Gen. No. 81-146, 2-700 (Apr. 14, 1981); Ky. Op. Att'y Gen. 76-6, 1976 (no consideration exists where participants can choose to enter for free).

[149] CAL. BUS. & PROF. CODE § 17539.15(b) (West 2009).

[150] 815 ILL. COMP. STAT. ANN. 525/25-4, 6-8 (West 2009); s*ee also* IOWA CODE ANN. § 714B.2(2) (West 2009). "A written prize notice must contain each of the following:

> *a.* The true name or names of the sponsor and the street address of the sponsor's actual principal place of business.
> *b.* The retail value of each prize the person receiving the notice has been selected to receive or may be eligible to receive.

These statutes represent a legal shift towards stricter regulations in "no purchase necessary" disclaimers, as evinced by a recent settlement between the New York Attorney General and Tylenol regarding inadequate disclosures.[151]

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c. A statement of the odds the person has of receiving each prize identified in the notice.

d. Any requirement that the person pay shipping or handling fees, or any other charges to obtain or use a prize, including the nature and amount of the charge.

e. A statement that a restriction applies and a description of the restriction, if receipt of the prize is subject to a restriction.

f. Any limitations on eligibility to receive a prize.

g. If a sponsor represents that a person is a winner or finalist, has been specially selected, is in first place, or is otherwise among a limited group of persons with an enhanced likelihood of receiving a prize; or that a person is entering a contest, sweepstakes, drawing, or other competitive enterprise from which a single winner or select group of winners will receive a prize, and if the notice is not prohibited under section 714B.3, subsection 1, paragraph "c", a statement of the maximum number of persons in the group or purported group with this enhanced likelihood of receiving a prize.

h. Any requirement or invitation for the person to view, hear, or attend a sales presentation in order to claim a prize, a good faith estimate of the length of the sales presentation, a description of the merchandise that is the subject of the sales presentation, and the total cost of such merchandise."

As evinced by a recent New York Attorney general settlement with Tylenol regarding inadequate disclosures, these statutes also are being strictly enforced. *See, e.g.,* Press Release, N.Y. State Att'y Gen., Tylenol Manufacturer To Amend Sweepstakes Ads (Sept. 10, 2004), *available at* http://www.oag.state.ny.us/media_center/2004/sep/sep10a_04.html. In 2004, New York State Attorney General Eliot Spitzer announced a settlement with the maker of Tylenol, McNeil Consumer & Specialty Pharmaceuticals, in regards to its "Survivor All-Stars-Tylenol Push Through the Pain Game" sweepstakes promotion. *Id.* According to the Attorney General's Office, the advertisements for the sweepstakes made it appear that a purchase of Tylenol was required to enter. *Id.* The printed advertisements contained: large bold print, indicating that to enter consumers should "Buy Tylenol"; and, while there was a non-purchase entry, the statement "No purchase necessary" was only disclosed in the disclaimer at the bottom of the print advertisements. In addition to this, the voice-overs for the television advertisements for the promotion stated: "For your chance to win just buy any Tylenol product," and the visual on the screen instructed consumers to buy a Tylenol product to enter the sweepstakes. *Id.* Similarly, the words "No purchase necessary" were only placed in the legal disclaimer at the bottom of the screen at the end of the advertisement. *Id.*

This settlement resulted in Tylenol paying $52,000 in civil penalties and costs. *Id.* Furthermore, McNeil Consumer & Specialty Pharmaceuticals agreed to: (1) "not make any express or implied representation in its advertisements that a consumer must purchase a product in order to enter a sweepstakes[ ] [or that] a consumer will have a greater chance of winning a sweepstakes if they purchase a product;" (2) "clearly and conspicuously disclose in its advertisements that no purchase is necessary to enter a sweepstakes;" and (3) "clearly and conspicuously and with equal prominence to the language that refers to the product purchase, disclose the availability of" non-purchase entries "in any [ads] which refer[ ] to the purchase of a product as a means of entering a sweepstakes." *Id.* The Tylenol action required that non-purchase entries be displayed with "equal prominence" to any purchase method of entry. *Id.* However, it would appear that that the "equal prominence" requirement was only remedial in nature. The current standard that non-purchase entries be disclosed in a "clear and conspicuous" manner has not changed.

[151] Press Release, N.Y. State Att'y Gen., Tylenol Manufacturer To Amend Sweepstakes Ads (Sept. 10, 2004), *available at* http://www.oag.state.ny.us/media_center/2004/ sep/ sep10a_04.html.

B. Opportunity to Win

A second concept of Equal Dignity is that non-paying participants should not face greater odds or obstacles to winning the prizes than paying participants face. For example, a person who enters by paying cannot get a disproportionate number of entries compared to non-paying entries. To illustrate this, in *Black North Assocs., Inc. v. Kelly*, the appellate division of the Supreme Court of New York held that a Lucky Shamrock Vending Machine that cost $1 and dispensed a game piece for prizes between $1 and $500 was a gambling device even though free promotional game pieces were available upon request at the bar where the machine was located or by mail, and a sign indicated "no purchase necessary."[152] Critical to the decision was that the free game piece was limited to one per person per day, whereas "players . . . could increase their chances by making multiple purchases."[153] Likewise, in *Animal Protection Soc. v. State,* a charity offered a "free bingo" game by which persons buying items such as combs and candy received bingo cards.[154] Others not wanting to buy such items also were given cards, but those buying items could receive more "free" cards than those who did not.[155] In finding that the scheme violated state lottery laws, the court noted that the provision for not having to buy the items to obtain some bingo cards:

> alone did not transform the bingo games offered by plaintiffs into "free bingo" since patrons who obtained the cards without making a purchase received fewer cards than patrons who did buy the items; thus, it follows that the other patrons had to pay to obtain a greater number of bingo cards.[156]

In addition, non-paying participants cannot be forced to qualify for the rounds in which paying participants can buy entries. For example, in *People v. Shira,* the promoter offered a game called Ringo in a 100-seat theater.[157] The main game was a variation of bingo, a game of chance.[158] Two methods existed to get entry into the main game.[159] The first was free and involved attempting to toss and encircle a single red ring over a peg.[160] The second way was to buy your way into the bingo game by either buying additional rings to attempt to encircle a peg or simply buy a direct entry into the bingo game.[161] This violated lottery laws because "[t]he chance to win the prize [was] not open to *any* person without the payment of consideration. The vast majority of the players (88 percent) who [could not] successfully toss the small rings over the peg [had to] pay a valuable consideration (25 cents) for a chance to win the prize."[162] The court contrasted this from legal promotions in which "there was a general and indiscriminate system of distribution of the drawing tickets and

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[152] Black N. Assocs., Inc. v. Kelly, 722 N.Y.S.2d 666, 667-68 (N.Y. App. Div. 2001).
[153] *Id.* at 667.
[154] Animal Prot. Soc'y of Durham, Inc. v. State, 382 S.E.2d 801, 802-3 (N.C. Ct. App. 1989).
[155] *Id.* at 807.
[156] *Id.* at 807-08.
[157] People v. Shira, 133 Cal.Rptr. 94, 95 (Cal. Ct. App. 1976).
[158] *Id.* at 97.
[159] *Id.* at 95-96.
[160] *Id.*
[161] *Id.*
[162] *Id.* at 103, 106 (emphasis in original).

the money paid by the patrons for the admission ticket to the theater or for gasoline was no more than consideration for viewing the movie or for the gasoline itself."[163]

Differing deadline dates for paying and non-paying participants also may be inconsistent with equal treatment of paying and non-paying participants.[164]

C. Claiming Prizes

While paying and non-paying participants must have equal opportunity to enter, a third concept of the Equal Dignity Rule is that non-paying customers cannot be disadvantaged in claiming their prizes. This is particularly acute where the opportunity to win the prize pools for free entries is more difficult. For example, in *Supreme Judicial Court of Mass. v. Wall,* the court found a sweepstakes at a movie theater to be an unlawful lottery, despite the fact that free entries were given away to non-paying participants because of the difficulty non-paying participants had in redeeming winning tickets.[165] Specifically, a participant who had paid the admission to the performance had the advantage of immediate presence in the theater where the drawing was taking place.[166] "He could hear the number and the name read [and] [h]e could identify himself at once."[167] In contrast, non-paying participants had to wait outside the theater in relative discomfort for the drawing to occur and hope that they could navigate the crowd to claim the prize in the time allotted.[168]

D. Prizes Awarded

The final concept of the Equal Dignity Rule is that non-paying participants should have equal chances to win all prizes offered. For example, separate prize pools may invalidate the flexible entry sweepstakes because the non-paying participants do not have the opportunity to win the same prizes as paying participants.

In *Classic Oldsmobile-Cadillac-GMC Truck, Inc. v. State,* the court examined a promotion whereby "any person who enter[ed] into a lease arrangement for a new vehicle . . . during a specified four-week period would automatically have twelve monthly lease payments paid by plaintiffs, if the temperature equaled or exceeded ninety-six degrees [F]ahrenheit at the Portland International Jetport on a subsequent date."[169] Alternatively, "any person, without purchasing or leasing any vehicle, could submit [his/her] name for a drawing during the same four-week period and the winner of the drawing would be eligible to receive the sum of $5,000 if the temperature reached ninety-six degrees."[170] Specifically, the court "found that the plan involved two promo-

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[163] *Id.* at 103 (citing Cal. Gasoline Retailers v. Regal Petrol. Corp. of Fresno, 330 P.2d 778 (Cal. 1958); People v. Carpenter, 297 P.2d 498 (Cal. Ct. App. 1956); People v. Cardas, 28 P.2d 99 (Cal. App. Dep't Super. Ct. 1933)).

[164] *See generally* Alaska Op. Att'y Gen. No. 663-93-0004 (Sept. 2, 1992).

[165] Commonwealth v. Wall, 3 N.E.2d 28, 30 (Mass. 1936).

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] Classic Oldsmobile-Cadillac-GMC Truck, Inc. v. State, 704 A.2d 333, 333 (Me. 1997).

[170] *Id.* at 334.

tions—one for those who enter[ed] into a lease agreement and one for those who d[id] not."[171] As a consequence, while "[e]very lessee [would] win the lease payments if the temperature [was] reached, . . . the other entrants [would have to] participate in a drawing in which only one [would] win.[172] The court held, therefore, that the promotion constituted an unlawful game of chance.[173]

VI. Current Ambiguities

A. *Flexible Entry Sweepstakes*

1. *Current Issues*

Over the years, various promoters have attempted to use the free entry exception to devise schemes that prosecutors often describe as "a thinly veiled lottery."[174] The concept of these promotions is relatively simple: to offer a lottery-like product but offer a free method of entry to evade the lottery prohibition.[175] The most litigated scheme was the "Lucky Shamrock." In the late 1990s and through the first decade of the 2000s, several court and attorney general opinions addressed the "Lucky Shamrock" phone card sweepstakes and mechanical dispensers.[176] The Lucky Shamrock emergency phone card was a one- or two-minute long-distance phone card, which also had a sweepstakes entry attached to the card.[177] The Lucky Shamrock emergency phone card machines dispensed cards with a pull-tab sweepstakes entry and electronically displayed the sweepstakes results from that card.[178] Although the purchase of a

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[171] *Id.*

[172] *Id.*

[173] *Id.* at 335.

[174] *See* Bohrer v. City of Milwaukee, 635 N.W.2d 816, 819 (Wis. Ct. App.2001).

[175] *See id.* at 818.

[176] *See* Miss. Gaming Comm'n v. Six Elec. Video Gambling Devices, 792 So.2d 321 (Miss. Ct. App. 2001); Black N. Assocs., Inc. v. Kelly, 722 N.Y.S.2d 666 (N.Y. App. Div. 2001); Midwestern Enters., Inc. v. Stenehjem, 625 N.W.2d 234 (N.D. 2001) (discussing Lucky Strike phone card dispensing device); Freedom Concepts, Inc. v. Ohio Liquor Control Comm'n, No. 02AP-913, 2003 WL 22054059 (Ohio Ct. App. Sept. 4, 2003); Ohio State Div. of Pub. Safety v. Draco Ltd., PLL, No. 02AP-1290, 2003 WL 21652178 (Ohio Ct. App. July 15, 2003); Katmandu, Inc. v. Liquor Control Comm'n, No. 02AP-546, 2002 WL 31750261 (Ohio Ct. App. Dec. 10, 2002); Diamond Game Enters. v. Howland, No. CV-98-1242-ST, 1999 WL 397743 (D. Or. Mar. 23, 1999); Sun Light Prepaid Phonecard Co. v. State, 600 S.E.2d 61 (S.C. 2004); F & H Invs. v. State, 55 S.W.3d 663 (Tex. App. 2001); Alaska Op. Att'y Gen. No. 663-00-0212 (Oct. 17, 2000); Ill. Op. Att'y Gen. No. 98-010 (July 13, 1998); Kan. Op. Att'y Gen. No. 97-26 (Mar. 17, 1997); La. Op. Att'y Gen. No. 98-476 (1998); La. Op. Att'y Gen. No. 98-142 (June 25, 1998); S.C. Op. Att'y Gen., 2000 WL 356794 (Feb. 29, 2000); Tex. Op. Att'y Gen. No. 97-008 (Feb. 20, 1997). Only the Kansas Attorney General provided an opinion that the sweepstakes was likely to be legal because the contest would lack consideration if the entry was free, not overly burdensome and offered an equal chance of winning to non-paying contestants. *See* Kan. Op. Att'y Gen. No. 97-26 (Mar. 17, 1997).

[177] Black N. Assocs., Inc. v. Kelly, 722 N.Y.S.2d 666, 667 (N.Y. App. Div. 1985).

[178] *Compare id.* (The unique feature of the machine is that it scans a bar code on each pull-tab that it dispenses), *with Miss. Gaming Comm'n*, 792 So.2d at 323 ("For one dollar, the Lucky Shamrock dispenses a two minute emergency long distance calling card, good only for one call no matter the time actually used. With each card, the purchaser also receives a game piece. This has a bar code on the back which is read by the machine as the card is being dispensed. The display on the machine then simulates a slot machine by spinning nine

phone card from a dispenser was the primary method for participating in the Lucky Shamrock sweepstakes, it was not the sole method.[179] The Lucky Shamrock sweepstakes also offered an alternative free method of entry.[180] A person could enter the sweepstakes by obtaining a free game piece from a participating retail store or through the mail from a Lucky Shamrock distributor.[181]

Courts and attorneys general in several states looked at the Lucky Shamrock promotion and dispenser with regard to whether such sweepstakes and dispensers violated criminal gambling laws in their states.[182] Only the Kansas Attorney General provided an opinion that the sweepstakes was likely to be legal because the contest would lack consideration if: the alternative method of entry was free, not overly burdensome, and offered an equal chance of winning to non-paying contestants.[183]

In the other instances, the free entry was held to be ineffective or likely to be ineffective.[184] The Illinois Attorney General provides a good example: "although the scheme has been carefully designed to appear to meet the criteria generally prescribed by the courts in approving giveaway schemes, a review of the underlying purpose of the scheme leads inexorably to the conclusion that the Lucky Shamrock sweepstakes is but a thinly veiled lottery."[185] In other words, even though the Lucky Shamrock sweepstakes was designed to avoid the consideration element by using a free entry in a manner consistent with court opinions in Illinois, the Illinois Attorney General still felt it was an illegal gambling game.[186]

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squares. After a few moments the display shows the same combination of squares as on the game piece. Again simulating a slot machine, the machine lights up and plays music if the patron is a winner. A cashier at the store verifies the winning card. This clerk then pays the prize money that can be in the amount of one dollar up to five hundred dollars.").

[179] *See generally Black*, 722 N.Y.S.2d 666; *Midwestern*, 625 N.W.2d 234 (referring to "Lucky Strike" phone card dispensers, a set-up similar to "Lucky Shamrock" phone card dispensers); *Diamond*, 1999 WL 397743; *Sun Light*, 600 S.E.2d 61; Alaska Op. Att'y Gen. No. 663-00-0212 (Oct. 17, 2000); Ill. Op. Att'y Gen. No. 98-010 (July 13, 1998); Kan. Op. Att'y Gen. No. 97-26 (Mar. 17, 1997); Tex. Op. Att'y Gen. No. 97-008 (Feb. 20, 1997). Only the Kansas Attorney General provided an opinion that the sweepstakes was likely to be legal because the contest would lack consideration if the entry was free, not overly burdensome and offered an equal chance of winning to non-paying contestants. *See* Kan. Op. Att'y Gen. No. 97-26 (Mar. 17, 1997).

[180] *See supra* note 179.

[181] *Id.*

[182] *See generally Miss. Gaming,* 792 So.2d 321; *Black*, 722 N.Y.S2d 666; *Midwestern*, 625 N.W.2d 234 (referring to "Lucky Strike" phone card dispensers, a set-up similar to "Lucky Shamrock" phone card dispensers); *Freedom*, 2003 WL 22054059; *Katmandu*, 2002 WL 31750261; *Diamond*, 1999 WL 397743; *Sun Light*, 600 S.E.2d 61; Alaska Op. Att'y Gen. No. 663-00-0212 (Oct. 17, 2000); Ill. Op. Att'y Gen. No. 98-010 (July 13, 1998); Kan. Op. Att'y Gen. No. 97-26 (Mar. 17, 1997); La. Op. Att'y Gen. No. 98-142 (June 25, 1998); S.C. Op. Att'y Gen., 2000 WL 356794 (Feb. 29, 2000); Tex. Op. Att'y Gen. No. 97-008 (Feb. 20, 1997).

[183] *See* Kan. Op. Att'y. Gen. No. 97-26 (Mar. 17, 1997).

[184] *See, e.g.,* Ill. Op. Att'y Gen. No. 98-010 (July 13, 1998); *Miss. Gaming*, 792 So.2d 321; *Black*, 722 N.Y.S.2d 666.

[185] Ill. Op. Att'y Gen. No. 98-010, *supra* note 185, at 6-7.

[186] *Id.*

2. Deviation From Economic Value Test

This deviation from the prevailing Economic Value Test has been justified on three different grounds.

a. Primary Versus Incidental

A consideration by a small number of courts is whether the sweepstakes was the promoter's primary business or incidental to promoting another business. In *F.A.C.E. Trading, Inc. v. Carter,* the Indiana Court of Appeals concluded that an "Ad-Tab" game was an illegal gambling machine.[187] The court went on to distinguish legal promotional contests:

> A distinction exists between promotion of a primary business of selling a meal or a drink for valuable consideration together with a chance to win a business related prize, in kind or, albeit, as a sweepstakes prize which attracts sales, and promotion of a non-primary business related and incidental activity for valuable consideration together with a chance to win a prize unrelated to either the primary business activity or attraction of sales. The difference in the distinction is in the essence of the product: [t]he former promotes sales of the primary business product, e.g., food, while the latter promotes the prize and the product (coupon) is unrelated to either the primary business purpose of the promoter, of the distributor, or of [F.A.C.E.]. The court fails to discern any claim that [ ] [F.A.C.E.] is engaged in the primary business of marketing for the businesses which advertise in the Ad-Tabs, or that [F.A.C.E.]'s primary source of revenue is from those businesses as opposed to the sale of Ad-Tabs.[188]

In *F.A.C.E. Trading, Inc. v. Todd,* the court held that gambling occurs where the purchase of a game card was primary and not incidental to the purchase of the product.[189] In *F.A.C.E. Trading,* a customer at a pizza restaurant could purchase an Ad-Tab, which is a paper ticket, from a machine for $1.[190] The coupon on the Ad-Tabs provided customer discounts from between $5 to $30.[191] The Ad-Tabs also offered the customers a chance to win a cash prize.[192] A customer also could receive a paper ticket for a chance to win a cash prize with no purchase necessary, either by calling a toll-free number or by filling out a mail-in card from the side of the machine.[193] F.A.C.E. argued that because the value of the coupons exceeded the $1 purchase price by at least five times and because there was a free alternative, there was no consideration.[194] The court disagreed and concluded that, unlike the *Mid-Atlantic Coca-Cola* case (where the court explained that there was no consideration for the chance to win the cash prize, but rather, the consideration there was spent to buy the drink), the Ad-Tab machine was a "mere guise under which a gambling transaction may be conducted."[195]

The court explained that a free entry may not always be effective:

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[187] F.A.C.E. Trading, Inc. v. Carter, 821 N.E. 2d 38, 44 (Ind. Ct. App. 2005).
[188] *Id.* at 43.
[189] F.A.C.E. Trading, Inc. v. Todd, 903 A.2d 348, 354 (Md. 2006).
[190] *Id.* at 349.
[191] *Id.*
[192] *Id.*
[193] *Id.* at 350.
[194] *Id.* at 352.
[195] *Id.* at 359 (quoting Stewart v. Schall, 4 A. 399, 401 (Md. 1886)).

> Except for the minor "free entry" aspect of both cases, the case at bar is significantly different from *Mid-Atlantic Coca-Cola*. In *Mid-Atlantic Coca-Cola*, every purchaser, upon paying for a bottle of the soft drink at a retail establishment, received the consumer product at its normal price. The purchaser could not, at the retail establishment, pay to obtain just bottle caps for the purpose of trying to win cash prizes. Instead, the purchaser could obtain a bottle cap from the retailer only if he or she bought the bottle of soft drink at its usual price. The cash prize, represented by a winning bottle cap, was a bonus accompanying a small percentage of the bottles of soft drink sold. There was no consideration given for the chance to win a cash prize. Furthermore, there was no indication in the *Mid-Atlantic Coca-Cola* case that persons were purchasing bottles of soft drink from establishments, and throwing away the soft drink, because their principal interest was to gamble and try to win cash prizes shown on a few bottle caps. The essence of the transaction in *Mid-Atlantic Coca-Cola* was the purchase of a bottle of soft drink at its regular price. The chance to win a cash prize was clearly incidental.
>
> In contrast, the essence of the Ad-Tab™ coupon card game was the purchase of pull-tab cards giving the purchaser the chance to win a cash prize. F.A.C.E. Trading's own evidence showed that only 1% of the Sports Bar Clothing coupon cards, 1.8% of the Zippo coupon cards, and 15% of the Dart World coupon cards, were redeemed for products. Between 85% and 99% of the persons buying these coupon cards were apparently interested only in gambling for cash.[196]

In short "[u]nlike the situation in *Mid-Atlantic Coca-Cola* . . . , the Ad-Tab™ game of chance is not incidental to the purchase of products. Instead, as the Circuit Court held, the product discount aspect of the operation is merely incidental to the game of chance."[197]

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[196] *Id.* at 358.

[197] *Id.* at 354. In *Sniezek and F.A.C.E. Trading, Inc., v. Colo. Dep't of Rev.*, the court suggested that for true promotional activities where the scheme is directed to the primary business of its promoter, a free entry can eliminate the element of consideration. 113 P.3d 1280, 1283 (Colo. App. 2005). In this case, the Colorado Court of Appeals analyzed whether a machine manufactured by F.A.C.E Trading, Inc. that dispensed "Ad-Tabs" was an illegal gambling machine. *Id.* at 1281. The owner of a bar purchased and installed the Ad-Tab machine in her bar. *Id.* The machines were later seized as illegal gambling devices. *Id.* A customer could purchase an Ad-Tab, which is a paper ticket, from the machine for one dollar or by requesting a tab by mail for free from F.A.C.E. *Id.* The paper tickets contained tabs that, when removed, revealed various combinations of symbols which resulted in differing levels of prizes ranging from $1 to $500. *Id.* Beside the tabs and prizes, the tickets contained ads for discounts on certain merchandise. *Id.* This merchandise, however, was not displayed anywhere on or near the machine and it was impossible for the customer to know in advance, what merchandise would be on the coupon. *Id.* at 1282. Also, the signs on the machine more prominently advertised the chance to win money than the chance to get discounts on merchandise. *Id.*

The court explained that gambling requires three elements: (1) the risking of money or a thing of value, (2) for gain, and (3) is contingent in whole or in part on chance. *Id.* The first element, while not labeled as such, corresponds to the "consideration" element and is what this case turned on. The court concluded that the availability of a free game piece by mail did *not* eliminate the element of risk. *Id*. at 1282. This conclusion was based on a very old case, *Cross v. People*, 32 P. 821, 822 (Colo. 1893), where defendants "were in the . . . business of selling shoes and distributed business cards advertising the[ir] shoe store and providing a chance to win a prize." *Sniezek*, 113 P.3d at 1283. In the *Cross* case, "the court acknowledged that a chance to win could be obtained independent of a purchase and that such a procedure negated the element of risk." *Id*.

b. Inflated Value of Products Sold[198]

Sweepstakes promoters often try to emulate retail promotions by offering the purchase of goods or services as the primary method of obtaining entry into a flexible entry sweepstakes and allowing an alternative free method of entry. In this way, the flexible entry sweepstakes more closely emulates the typical retail promotion. In several cases, the courts have focused on the value or cost of the item being sold.[199] This has bred new standards in some states where law enforcement and the courts focus on comparing the price charged to the market value of the goods or services sold.[200] As the Arkansas Attorney General noted: "[i]n making a determination of whether a particular activity is an illegal lottery, a court will likely look at the actual cost of the product being offered on the market compared to the price charged for this product or service with an attendant game piece or chance to win a prize."[201]

As an example, in *Lindey v. Pennsylvania State Police, Bureau of Liquor Control Enforcement,* a trial court addressed whether the seizure of various Ad-Tab machines manufactured by F.A.C.E. was unlawful.[202] The trial court noted that a similar scheme had been upheld in a North Carolina decision.[203] However, the trial court distinguished that case, concluding that "the record supports a finding that the coupons are a subterfuge for the gambling device."[204] The court found particularly relevant the fact that the coupons were thrown away and could not be returned for repayment of the purchase price.[205]

The court in *Sniezek*, however, concluded that F.A.C.E was not engaged in the business of selling a product or even advertising and that such a distinction was significant. *Id.* In fact, this court flatly rejected the argument that the tab cards machines were like the well-known McDonald's promotion where McDonald's promoted its primary commercial activity by offering a meal coupled with a chance to win a prize. *Id*. Instead, the court noted that the tab cards at issue in this case did not promote the business of either Sniezek, the bar owner, or F.A.C.E. *Id*. As such, the availability of a free tab card did not negate the element of risk. *Id.* at 1282.

198 *See* Ark. Op. Att'y Gen. 2004-357 (Mar. 9, 2005). The Opinion found that that amateur poker leagues did not violate anti-gambling or anti-lottery statutes where no entry fee was required, registration was for free, poker chips were distributed equally among players, and no wager of any item of value during the games was permitted. *Id.* However, it also recognized that indirect methods of payment such as annual fees or inflated prices for food or beverages could meet the consideration requirement. *Id.*

199 Mid-Atl. Coca-Cola Bottling Co. v. Chen, Walsh & Tecler, 460 A.2d 44, 48 (Md. 1983) ("[W]here, as here, the price for the purchase of the appellant's product is constant before, during and at the termination of the promotion, the fact that some of its purchasers (or non-purchasers) may receive a prize awarded on the basis of chance does not violate the provisions of the Constitution . . .); *see also* Ark. Op. Att'y Gen. No. 93-364 (Dec. 3, 1993) (stating that despite receiving a product or item, the participants were actually paying a premium for the opportunity to receive a prize and the items received were incidental to that purpose).

200 *Mid-Atlantic Bottling Co.*, 460 A.2d at 48-49.

201 Ark. Op. Att'y Gen. 2006-052 (June 28, 2006).

202 Lindey v. Pa. State Police, Bureau of Liquor Control Enforcement, 916 A.2d 703, 704-05 (Pa. Commw. Ct. 2006).

203 *Id.* at 705-06 (citing Am. Treasures, Inc. v. State, 617 S.E.2d 346 (N.C. Ct. App. 2005)).

204 *Id.* at 706.

205 *Id.*

Also focusing on the question of whether the product has real and independent value, in *American Treasures, Inc. v. State of North Carolina,* the Court of Appeals concluded that the seller of pre-paid phone cards that included free promotional game pieces with prizes of up to $50,000 was not an illegal lottery for two reasons.[206] First, the "per minute" price offered by the card was competitive such that the game piece was not simply a marketing system but also a valuable commodity.[207] Second, a person could receive the free game piece without purchasing the pre-paid phone card by sending a request to the seller.[208] Indeed, the court found that the price for the phone cards in that case was "one of the best in the industry."[209]

c. Continual Versus Occasional

Finally, some states and courts have looked at whether the flexible entry sweepstakes is being conducted occasionally or continually. In *Barber v. Jefferson County Racing Ass'n,* the Supreme Court of Alabama distinguished the MegaSweeps promotion at issue from a legally permissible Pepsi-Cola promotion because, unlike the temporary sweepstakes by Pepsi-Cola, "MegaSweeps is a permanent, high-stakes game."[210] In reaching its decision, the court noted that "the duration of 'promotional sweepstakes occasionally offered by fast food chains, or in connection with candy, sodas, miscellaneous food or other established retail products,' is typically 'limited,' . . . as opposed to the duration of the MegaSweeps, which is *indefinite.*"[211] Consequently, the court concluded "it does not follow that simply because low-stakes, temporary promotional sweepstakes with pay-out rates of one-half of one percent that offer free play are not pursued as lotteries, we must conclude high-stakes, permanent games with pay-out rates of [ninety-two] percent are immune from the definition of [gambling] . . . ."[212]

Accordingly, one state's solution has been to adopt a promotional sweepstakes law. Under a Minnesota statute, an in-package chance promotion is not a lottery if (1) one can participate for "free and without purchase of the package," (2) the permissible methods of participation are free and a "scheduled termination date of the promotion" is listed, (3) upon request, retailers are given entry forms so that customers can participate for free, (4) odds of winning are not misrepresented, (5) game pieces are randomly distributed and distribution records are maintained "for at least one year after the termination date of the promotion," (6) "prizes are randomly awarded if game pieces are not used" and (7) the sponsor provides the state with a record of those who were awarded

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[206] *Am. Treasures, Inc.*, 617 S.E.2d 346, 348-49, 351 (N.C. Ct. App. 2005).
[207] *Id.* at 351 (noting that the "pre-paid phone card is sufficiently compatible with the price being charged and has sufficient value and utility to support the conclusion that it, and not the associated game of chance, is the object being purchased").
[208] *Id*. at 348, 351 (noting that the free entries indicated that "sale of the product is not a mere subterfuge to engage in an illegal lottery scheme").
[209] *Id.* at 351.
[210] Barber v. Jefferson County Racing Ass'n, Inc., 960 So.2d 599, 614 (Ala. 2006).
[211] *Id.* at 612 (citing Tenn. Op. Att'y Gen. No. 02-089 n.5 (August 21, 2002)) (emphasis in original).
[212] *Id.* at 614 (quoting Midwestern Enters., Inc. v. Stenehjem, 625 N.W.2d 234, 240 (N.D. 2001)).

prizes of $100 or more upon request, if such a request is made within one year of the promotion's termination date.[213] The listing of the scheduled termination date of the promotion ensures a limited duration promotional giveaway, thereby preventing a permanent game from attempting to become immune to the state's gambling prohibition.

Michigan has codified these various concepts, including, an analysis of primary versus incidental games, continual versus occasional games, and the value of the prize. M.C.L.A. § 750.372(2) provides that the prohibition does not apply to "a lottery or gift enterprise conducted by a person as a promotional activity that is clearly occasional and ancillary to the primary business of that person."[214] A

> "promotional activity" means an activity that is calculated to promote a business enterprise or the sale of its products or services, but does not include a lottery or gift enterprise involving the payment of money solely for the chance or opportunity to win a prize[,] a lottery[,] or gift enterprise that may be entered by purchasing a product or service for substantially more than its fair market value.[215]

3. Toward a Comprehensive Policy Regarding Flexible Entry Sweepstakes

Sweepstakes law in the United States has progressed from a deontological position, whereby even inciting the gambling instinct was contrary to proper morals and the law, to a teleological view that focuses on harm to the participant. Such progression is reasonable, particularly in light of the prevalence of legal gambling opportunities in the United States. Justifying the prohibition against free or flexible entry sweepstakes because either might incite someone to actually gamble is a difficult proposition where some form of legal gambling is available in 48 of the 50 states[216] and where the U.S. Supreme Court has ruled that a legal gambling establishment in one state has a protected Constitutional right to advertise in other states, even where legal gambling may not be permitted in that state.[217]

Under the prevailing view, as the very notion of sweepstakes is the removal of mandatory consideration, financial harm that may befall individuals participating in such activities must be eliminated to maintain legality.[218] This is easy to understand in the context of entirely free sweepstakes where no one can or does pay directly or indirectly for the opportunity to win a prize.

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[213] MINN. STAT. ANN. § 609.75(1)(b) (2008).
[214] MICH. COMP. LAWS ANN. § 750.372(2) (2009).
[215] *Id.*
[216] ROGER DUNSTAN, CALIFORNIA RESEARCH BUREAU, GAMBLING IN CALIFORNIA I (1997), *available at* http://www.library.ca.gov/crb/97/03/Chapt1.html (last visited Aug. 20, 2009).
[217] Greater New Orleans Broad. Ass'n, Inc., v. United States, 527 U.S. 173, 195-96 (1999).
[218] *See, e.g.*, Kimberlianne Podlas, *Primetime Crimes: Are Reality Television Programs "Illegal Contests" in Violation of Federal Law,* 25 CARDOZO ARTS & ENT L.J. 141, 157-158 (2007) ("The law divides prize gaming – activities where a participant attempts to win a prize – into 'gambling, sweepstakes, and contests.' Gambling is a game of chance (where winning is based on chance and) where an individual pays consideration to participate. On the one hand, a sweepstakes, like gambling, is a game of chance. The participant, however, does *not* pay consideration to enter. Hence, a sweepstakes is often called a 'give-away.'") (emphasis in original).

Flexible entry sweepstakes at least pose the issue of whether those who pay for the opportunity to win the prize can be financially harmed in the process. In theory, a person encountering the prospect of entering a flexible entry sweepstakes is faced with three primary options: (1) do not enter the sweepstakes, (2) enter the sweepstakes indirectly by buying the product or service or directly by paying the entry fee, or (3) enter the sweepstakes by using the free method of entry. The decision is often made for the participant. The participant may have simply stopped in a retail establishment to buy food or goods and found that the purchase included a sweepstakes entry. In other circumstances, however, the person must make a conscious decision to enter the sweepstakes by either paying directly or indirectly, or entering for free. Assuming that a participant acts rationally, the decision between entering for free versus entry by purchasing the product with the accompanying entry is effectively convenience versus cost, or, in some cases, whether the person is going to purchase the product regardless. When the person is going to purchase the product regardless, the ensuing benefit of an entry into a sweepstakes creates no harm. When the person is not otherwise going to make a purchase or other direct payment for entry, the decision is whether the inconvenience and potentially nominal cost (i.e., postage) of the free alternative method of entry exceeds the direct or indirect payment for entry. Where the cost to enter is high and the free method of entry is inconvenient, the person is more likely to become a paid participant. Where the cost is high and the person would not otherwise buy the product, the person is more likely to become a free participant. Therefore, a standard rule that flexible entry sweepstakes are lawful provided that paying and non-paying participants are accorded equal treatment is a powerful tool against abuse.

Undoubtedly, a rational person given the option between paying for an entry or a product versus entering for free, all other things being equal, will choose the free entry unless he is going to buy the product or service anyway.[219] Some jurists and commentators have asserted contrary theories. One court asserted that the problem is that those who do pay may do so because of the embarrassment of asking for a free entry.[220] The problem with this hypothesis is that it lacks factual basis upon which to serve as a public policy consideration. No reports exist to show that persons face financial devastation because they purchased truckloads of Dr. Pepper or other retail products simply to gain entry into promotional sweepstakes.

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[219] *See* Gerald F. Kaminski, *Promotional Games and the Ohio Lottery Laws*, 39 U. CIN. L. REV. 163 (1970).

[220] *See* Pickett, *supra* note 56, at 1208-209 ("In the dissenting opinion in *State v. Danz*, the argument was made that 'it is not a question of who acquired tickets, but did appellants cause any one to pay a consideration for any chance such tickets evidenced.' In other words, if a person is foolish enough to pay money for a ticket which he could have obtained free, his folly should not impose responsibility on the defendant. The weakness of the argument lies in its assumption that conduct is dictated solely by rational considerations. Many people, perhaps laboring under a false sense of delicacy, would prefer to pay for something which they could have for the asking. Undoubtedly, the chance of winning a prize induced many people to purchase tickets of admission to the moving picture theater who would not have come if the prizes had not been offered" (quoting State v. Danz, 250 P. 37, 41 (1926).).

Another conservative commentator claimed that promotional sweepstakes should be banned because of their impact on commercial markets. "These effects include . . . raising . . . prices of goods . . . to pay for the prizes being offered by the game[;] . . . loss of business suffered by competitors solely because they do not offer promotional games[;] . . . and enticement of the public to purchase a product on the basis of the game played rather than on the merits of the product itself."[221] The fallacy in this argument is that it is an indictment of advertising in general, of which promotional sweepstakes are a small part. For example, celebrity endorsements of products have the same issues. Companies pay star athletes considerable sums to endorse their products, and that expense is reflected in the price of the product. The purpose of the endorsement is to entice the public to purchase what the celebrity promotes. This may result in loss of business to companies without celebrity endorsements. Therefore, it makes no more sense to ban promotional sweepstakes than to ban many other types of advertisements, both of which are a reality of the marketplace.

Real concern, however, arises when promoters attempt to create flexible entry to effectively conduct lotteries where the notion of a free entry is illusionary. For this reason, courts have rightfully interpreted the lottery prohibitions as applying to activities where consideration was always present because the promoters effectively eviscerated the effectiveness of the free entry. While the court decisions in the area of equal treatment between paying and non-paying participants have been largely case specific, certain basic principles have surfaced.

The Attorney General of Texas stated the proper analysis regarding the legality of the Lucky Shamrock pre-paid phone card sweepstakes.[222] He noted that the free method of entry could eliminate the element of consideration but that the free method of entry must be a true free alternative and that several factors should be examined, including, among other factors: whether "any character of favoritism" is shown to participants who paid for the phone-sweepstakes card in comparison to those who obtained it for free, and whether the free cards are in fact readily and conveniently available.[223] The overriding issue, according to the Texas Attorney General, was "whether 'customers' and 'non-customers' [were] treated equally in every respect. If any 'character of favoritism' is shown to paying entrants, the scheme is a 'lottery.'"[224]

More succinctly, if the concept of equal dignity ever evolved into a rule, it might be stated as follows: *The Equal Dignity Concept requires that paying and non-paying participants have substantially equal opportunities to enter the sweepstakes, to win the sweepstakes, to claim prizes, and to win the same prizes. These standards must be conspicuously displayed in any advertisement or other announcement.*

The rule cannot require exactly equal opportunities simply because circumstances always occur in which practical differences exist between paying and non-paying participants. For example, paying participants in beverage or

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[221] *See* Kaminski, *supra* note 219, at 174.
[222] Tex. Att'y Gen. Op. No. 97-008 (Feb. 1997).
[223] *Id.* at 5-6, 9.
[224] *Id.* at 6.

other package promotions receive the sweepstakes entries by buying the item at a retail establishment. Requiring free entries at each retail establishment may be difficult to implement and control against fraud. Therefore, the use of mail-in or internet entries may be justified. The burden, however, might be shifted to the promoter to provide legitimate reasons why the method of entry for paying participants is different than the method for non-paying participants. A similar burden should rest on the promoter to justify limitations on the number of free entries. If a fast food chain allowed non-paying participants to obtain an unlimited number of entries into a promotion, then persons might enter thousands and perhaps millions of times and skew the results of the sweepstakes. Limiting the number of free entries to the same number as the typical paying customer might receive on a visit would appear reasonable, but the burden should be on the promoter to prove the reasonableness of the restriction.

Once the participation levels are equal for paying and non-paying participants, the government should have no further interest in the promotion. Market forces alone will prevent harm to the individual because if the cost of participation is any greater than mere nuisance or inconvenience, participants who are clearly informed of the free option and who can access it on an equal basis will certainly chose the free method of entry.

Several recent cases have attempted to distinguish between promotional activities that are incidental to the promoter's main business and those in which the promoter is attempting to make money from the promotion itself. Other cases have looked at the relative value of the products being sold to determine the legality of the promotion. These cases present a form of judicial activism where the courts have set a new public policy that strays from the existing policy to protect the public from the economic impact of gambling to punishing those who would profit from sweepstakes activities through *de minimis* convenience fees usually included in product pricing.

This approach has three problems. The first problem is that it attempts to punish intent as opposed to action. If a large beverage company decides to have a promotion where it has hidden codes in its beverage packaging, it would be legally sufficient. On the other hand, a promoter that decides to entice persons to buy an overpriced new beverage with a hidden code in its beverage packaging may be violating the law if the intent was to make money from the promotion as opposed to promoting a beverage business. The second problem is that the analysis strays from the basic underlying public policy to prevent financial harm to persons from gambling activities. If a legitimate free alternative method of entry exists, the public harm is minimized or eliminated and the intent of the promoter is irrelevant. The third problem is whether it is readily provable or significant to the underlying policy whether the promoter intends to make money through increased sales of an unrelated third product or through the conduct of the sweepstakes. In either case, the promoter is intending that the sweepstakes ultimately result in higher profits.

Another issue is the lack of standards. When, for example, is a product worth substantially more than market value? How do you define market value? For example, designer clothing is considerably more expensive than clothing that can be purchased at chain retail stores. What if the product being sold has no market value? This test can turn an ordinary inquiry into whether a promo-

tion is a legal sweepstakes as opposed to an illegal lottery into a question of proof more typically reserved to antitrust litigation.[225]

More importantly, the creation of new exceptions to the Economic Value Test is unnecessary. The most recent cases that have reviewed promotions and determined them to be "thinly veiled lotteries" have or could have been decided on "equal dignity" grounds. In many instances, the courts found definitive examples of violations of equal dignity but otherwise felt compelled to differentiate the activity from permitted retail promotions. In *F.A.C.E. Trading, Inc. v. Carter,* the Indiana Court of Appeals concluded that an Ad-Tab game was an illegal gambling machine.[226] In the case, a customer could purchase an Ad-Tab, which is a paper ticket, from a machine for $1,[227] or, the customer could, with no purchase necessary, either call a toll-free number or write to F.A.C.E. and ask for a chance to win a cash prize.[228] This "no purchase necessary" method, F.A.C.E. argued, eliminated the element of consideration.[229] The court disagreed and was influenced by the fact that nowhere was the free alternative displayed–not on the Ad-Tab machine nor on posters in the store.[230] By not conspicuously displaying the "no purchase required" option, it violated equal dignity.

Moreover, in several cases where the promoter had a physical machine that dispensed chances to win prizes, no explanation was given why the method of free entry was significantly different than where the person bought coupons or phone cards. In these cases, persons buying the coupons could get unlimited entries at the point of sale, while non-paying customers could not. This resulted in a disadvantage to those who did not want to purchase the coupons and may have been reflected in the fact that virtually no free entries existed in some cases. For example, in *F.A.C.E. Trading, Inc. v. Dept. of Consumer and Indus. Svcs.*, the court noted that more than 2 million Ad-Tabs were being sold each year in Michigan, but that in three years, only five tabs had been provided through the free alternate means.[231]

B. Non-Monetary Consideration

1. Current Issues

In traditional sweepstakes, efforts by participants can include mailing in an entry form, calling a toll-free number, visiting a store, watching a television

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[225] Anticompetitive below-cost pricing is illegal under Federal Law. Predatory pricing claims are brought under Section 2 of the Sherman Act, 15 U.S.C. § 2 and anticompetitive predation under the Robinson-Patman Act, 15 U.S.C. §13(a) (as amended). Such cases require proof of sales below market cost. *See* Patrick Bolton, Joseph F. Brodley and Michael H. Riordan, PREDATORY PRICING: STRATEGIC THEORY AND LEGAL POLICY, http://www.usdoj.gov/atr/public/hearings/single_firm/docs/218778.htm#11.

[226] F.A.C.E. Trading, Inc. v. Carter, 821 N.E.2d 38, 43 (Ind. Ct. App. 2005).

[227] *Id.* at 40.

[228] *Id.*

[229] *Id.*

[230] *Id.* at 42.

[231] F.A.C.E. Trading, Inc. v. Dep't of Consumer & Indus. Servs., 717 N.W.2d 377, 381 (Mich. Ct. App. 2006).

program, or completing a simple survey.[232] Greater expenditures of effort may include disclosure of proprietary information, filling out credit card applications, registering for subscription sites, or the like. A distinguishing feature of these new sweepstakes is that prospective participants are not asked to complete trivial tasks of no useful benefit to the promoter.

The advent of the internet has brought new twists to older concepts of promotions. The interactivity of the internet allows promoters to run sweepstakes that can be supported by third-party advertisers and allows promoters to derive revenues from the sale of information received from participants in the sweepstakes through questionnaires and data mining. In these instances, participants provide information to the promoter that can be sold to others who hope to market their products to a certain demographic identified during the information gathering stage of the sweepstakes.

In addition, sweepstakes and contests requiring user-generated content are becoming more common. This is where a participant in the contest needs to provide some content as a condition of entry such as a drawing or song. While some portion of the contest may be judged on skill, winners can be picked randomly among finalists. To date, no cases have addressed the legality of these contests.

Finally, sweepstakes participants can be used to help viral marketing of internet websites. For example, a promoter can offer a sweepstakes among those who refer at least ten paying subscribers/customers to a site.

2. Toward a Comprehensive Policy Regarding Non-Monetary Consideration

The ABA example that began this article is a good example of a fact pattern that tests whether substantial non-monetary efforts should be sufficient to constitute consideration to support an unlawful lottery. A sense of logic surrounds the argument that it should be sufficient. Unlike a *de minimis* activity that in itself does not directly benefit the promoter, such as mailing the entry, the activity requested by the ABA is specifically for the purpose of creating a valuable set of information that the organization may use for a variety of commercial purposes. Other promoters may use sweepstakes for similar purposes, including the creation of powerful and valuable database marketing. For sweepstakes requiring the submission of user-generated content, the promoter may actually be bargaining for content, such as a jingle or slogan, to be exploited by the promoter for commercial purposes.

The Simple Contract Consideration Test does not distinguish between a detriment to the participant that is trivial and of no direct use to the promoter and an act that is specifically bargained for and valuable to the promoter. A strong argument exists, however, that the Simple Contract Consideration Test should recognize such a distinction. Professor Mark Wessman undertook an exhaustive review and analysis of when and under what legal basis a player may enforce the contractual obligations of promoters to honor sweepstakes

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[232] Ohio deems store visits consideration, while Michigan deems multiple store visits consideration. California requires additional disclosures when a store visit is required. Cabot & Kirk, *supra* note 10, at 2.

contracts to pay winnings.[233] He asserts that the classical theory of contractual consideration never maintained that "if a promise was conditional upon any action of the promisee, no matter how trivial or useless to the promisor, the consideration requirement was satisfied."[234] Whether the offeror is seeking or receiving any benefit is irrelevant. As Wessman notes, "[c]lassical consideration theory clearly recognized the possibility of a conditional gift promise."[235] A gift promise occurs when an offeror sets out a practical requirement as a condition for receiving a gift; in such a case, the offeror is motivated by generosity, not by fulfillment of a condition.[236] For Professor Wessman, a conditional gift promise "seems almost tailor-made for promotional games or contests in which no purchase or fee is required."[237] Minimal steps to participate in a game of chance, such as being present or registering, "is of little or no value" to the offeror.[238] Such a requirement "is merely a condition of a gratuitous promise."[239] If the Simple Contract Consideration Test had adopted a view supporting a conditional gift promise, then a court could legitimately distinguish between trivial and useless acts and substantial or beneficial acts. In that case, activities such as the ABA sweepstakes that feature acts beneficial to the promoter may result in unlawful lotteries, but trivial acts such as mailing in the entry or being present to win are not.

Under the Economic Value Test, however, the harm that is sought to be avoided is the impoverishment of the individual. [240] Therefore, unless the individual parts with something that makes him or her financially poorer, the underlying public policy is not compromised. The notion that the participant needs to complete a survey (like the ABA promotion required), play a game while watching advertisements, or undertake a myriad of other activities that may take some effort or time, does not indicate the impoverishment of the individual decried by the Economic Value Test. The government would have a difficult time prohibiting activities that it conceives as an unproductive use of its citizen's time.

Sweepstakes involving user-generated content are more problematic. The consideration required under the Economic Value Test must necessarily extend to non-cash items that have recognized cash value. Thus, for example, the requirement that a person "donate" an ounce of gold to be entered into a sweep-

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233 *See generally* Wessman, *supra* note 40.

234 *Id.* at 670.

235 *Id.*

236 Wessman explains this theory using Williston's famous "tramp hypothetical":

> Suppose, Williston suggested, that a person encounters a tramp on the street and, moved by an impulse of benevolence, makes the following promise: "If you go around the corner to the clothing shop there, you may purchase an overcoat on my credit." It would be silly to regard the promise as a bargain, induced by the promisor's desire that the tramp take a stroll. The promise is a gift promise, and the condition recited merely makes it clear to the promisee what he must do in order to receive delivery of the gift. Thus, conditional sentence form is not a completely reliable sign of the presence of a bargain.

Id.

237 *Id.*

238 *Id.* at 671.

239 *Id.*

240 *See* Cudd v. Aschenbrenner, 377 P.2d 150, 155 (Or. 1962).

stakes to win a house would be consideration. This would include more common types of noncash items such as virtual-world items that can be bought and sold with real cash in exchanges. Consumer-generated content can have economic value; for example, a song has value, sometimes substantial value as in the Beatles' songbook or even a commercial jingle. If the promoter is in fact bargaining for the user-generated content by requesting the transfer of property rights by virtue of the entry, then a strong argument exists that this is valuable consideration under the Economic Value Test. If, on the other hand, the promoter is not receiving any rights in the user-generated content, then it is probably not consideration under the test.

C. Value as Deriving From Prizes or the Right to Redeem Prizes Given as the Result of Free Play

1. Current Issues

A more abstract reasoning as to what constitutes consideration is presented within a Nevada Attorney General opinion that concluded that participants who pay no initial consideration to play a game may nevertheless pay consideration if they earn something of value while playing the game and risk such consideration in hopes of greater gain.[241] The Nevada Attorney General specifically opined that, where completely free-play credits are risked "upon the chance or uncertain occurrence of a winning outcome . . . a wager would exist."[242] Stated differently, a sweepstake or unlicensed game of chance may be illegal if its participants may lose play credits for the opportunity to win a prize.

A recent case from Idaho applied similar reasoning. *MDS Invs., LLC v. State* illustrates this incongruity between the Economic Value Test and flexible entry sweepstakes treatment.[243] Although Idaho adopted the Economic Value Test,[244] the Idaho Supreme Court recently found a promotional scheme with a free entry to be illegal.[245] Participants in the scheme paid $1 for a sports card and twenty "free" credits to play a video machine.[246] Alternatively, they also could receive twenty free credits by requesting a voucher through mail, phone, or an attendant where the game was located.[247] As a prize, participants could request and receive five cents for each credit won beyond their initial twenty credits.[248] However, participants also could risk these credits and continue to play.[249] The court held these additional credits constituted consideration even though a participant could accumulate them for free by requesting a voucher.[250]

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[241] *See* Nev. Att'y Gen. Op. No. 2000-38 (Dec. 29, 2000).
[242] *Id.* at 216.
[243] *See* MDS Invs., LLC v. State, 65 P.3d 197 (Idaho 2003); s*ee also* Pre-Paid Solutions v. City of Little Rock, 34 S.W.3d 360 (Ark. 2001) (considering promotional scheme similar to the scheme described in *MDS Invs., Inc.*).
[244] *MDS Invs.*, 65 P.3d at 203.
[245] *Id.* at 198.
[246] *Id.* at 203.
[247] *Id.*
[248] *Id.* at 203-04.
[249] *Id.* at 203.
[250] *Id.* at 205.

2. Toward a Comprehensive Policy Regarding Value as Deriving From Prizes or the Right to Redeem Prizes Given as the Result of Free Play

On the one hand, the *MDS Investments* decision appears to contradict the policy rationale behind the Economic Value Test. If a participant can play without any out-of-pocket expense, then no need exists to protect against the risk of impoverishment. On the other hand, a participant essentially wins a cash prize once the participant wins even a single additional credit. If the participant continues to play with this prize, that person is then playing with money that could be in his pocket instead of in the video machine. In this way, the court's logic does not conflict with policy.

This reasoning is significant and surprising. First, it is surprising because it is unsupported by the usual policy rationale for gambling prohibitions. Specifically, if the individual does not part with his or her hard-earned resources, it is more difficult to justify such an approach. Second, it is significant because it further stretches certain features of the minority approach to its unparalleled extremes. As between the Idaho case and the Nevada opinion, however, the Idaho case can be justified, to a great extent, because the players initially parted with consideration.

VII. CONCLUSION

States are generally free to adopt their own gambling policies. Among those who have decided to prohibit some or all forms of gambling, a common theme is to protect vulnerable persons from being financially harmed or exploited by gambling. A critical element to the success of that policy is to define what is prohibited. As a consequence, a common definition of gambling has arisen in the United States that prohibits activities in which a person pays consideration for the opportunity to win a prize in a game of chance. This definition reached a crossroads with promotional marketing involving sweepstakes in the mid-twentieth century. From this, a general consensus arose, that if a person was not required to pay to enter a prize game, then the activity would not be considered gambling. This conclusion is consistent with the policy only to prohibit those activities that could have financial consequences to the participants. For example, public policy should not be concerned with the prospect that persons will become financially destitute buying hamburgers and soda simply to enter a game when they otherwise can receive free entries.

A simple rule can guard against potential exploitation of players: States can require game organizers to provide free, alternative methods of entry. Accordingly, courts have long developed reasonable rules to ensure that entrepreneurs do not distort this notion. For example, to take advantage of a free alternative method of entry, disclosure should be "clear and conspicuous" so that consumers are adequately informed of the existence of a non-purchase method of entry. Any material disparity (actual or perceived) between paying and non-paying entrants can invalidate the free alternate method of entry. Indeed, non-paying participants must have substantially equal opportunity to enter, win, and compete for the same prizes.

Of course, entrepreneurs continue to explore ways to capitalize on the alternative methods of entry. Courts should strongly consider not engaging in judicial activism as a means to justify prohibiting a scheme that they believe is a veiled attempt to make money from a game of chance. Instead, these schemes should be reviewed from the established criteria designed to protect the public from financial harm by making a simple inquiry into whether a person who does not want to pay has an equal opportunity to enter and win. Instead, some courts have strayed from this simple and effective analysis by adopting tests that attempt to distinguish activities based on the intent of the promoters rather than the action of the class of individuals that the law is attempting to protect. As a result, consistency in law and logic in public policy between states that took 50 years to achieve has been undermined with no appreciable gain to the public good.