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LOTTERY, EXISTS WHERE AUTO CUSTOMER MAY GET \$100 IF A PERSON WHOSE NAME HE SUBMITS PURCHASES AN AUTO ALSO—§2915.12 R.C.

SYLLABUS:

A plan whereby a dealer agrees to pay a purchaser of an automobile \$100.00 upon the purchase of an automobile under the same plan by any individual whose name was first submitted by said original purchaser, and also to pay to said original purchaser \$50.00 upon the purchase of any automobile under the same plan by a person whose name is first submitted by such individual above referred to, is a lottery; and the promotion of such a scheme is a violation of Section 2915.12, Revised Code.

Columbus, Ohio, July 6, 1959

Honorable C. W. Ayers, Registrar
Bureau of Motor Vehicles, Columbus, Ohio

Dear Sir:

I have before me your request for my opinion which reads as follows:

“Your opinion is respectfully requested as to whether the following constitutes a lottery.

“The Jenkins Auto Sales, Inc., Dayton, Ohio, is utilizing a sales promotion plan wherein ‘commissions’ are paid to purchasers of automobiles under a so-called referral plan according to the terms of the contract which reads as follows:

“This Agreement made the day and year first above written by and between Jenkins Auto Sales, Inc., Advertising Department, hereinafter referred to as ‘Advertising Department’, and, hereinafter referred to as Independent Salesman (who name was submitted to Jenkins Auto Sales, Inc., by), WITNESSETH THAT Advertising Department and Independent Salesman have agreed as follows:

1. Advertising Department hereby retains the services of Independent Salesman for a period of twelve (12) consecutive months from the date hereof in a capacity of automobile owner Independent Salesman, upon the terms and conditions hereinafter set forth.
2. Independent Salesman shall submit to Advertising Department the name of individuals considered by Independ-

ent Salesman to be qualified prospective purchasers of new Dodge automobiles. Each name so submitted shall be time-stamped of thirty (30) days thereafter. In the event that two Independent Salesmen submit the same name, the Independent Salesman first submitting the name as evidenced by the time stamp shall become solely entitled to all payments herein provided in respect to such individual.

3. Jenkins Auto Sales, Inc., shall pay to Representative, as earned commission the sum of One Hundred Dollars (\$100.00) for each individual, whose name is first submitted by the Representative, and who thereafter becomes a qualified automobile Owner-Representative with Jenkins Auto Sales, Inc.
4. Jenkins Auto Sales, Inc., shall pay Representative, as earned commission the sum of Fifty Dollars (\$50.00) for each name first subsequently submitted by the individual referred to in paragraph three (3) at the time that he too becomes an Automobile Owner-Representative with Jenkins Auto Sales, Inc.
5. The commission payment herein provided shall be the sole and only compensation due Independent Salesman from Jenkins Auto Sales, Inc.
6. This agreement may be terminated by Jenkins Auto Sales, Inc. by reason of fires, floods, strikes, lock-outs, Acts of God, war, rules and regulations by the United States, State or Local Governments, Repossession, Conversion or other circumstances beyond the control of Jenkins Auto Sales, Inc. Advertising Dept.
7. This agreement shall go into effect only after completion of the sale of the automobile to the Independent Salesman, and the signing of this agreement by an authorized agent of the Advertising Department and by the Independent Salesman.
8. The Advertising Department may, at its option, but without any obligation to do so, apply any portion of the monies due the Independent Salesman up to a maximum of seventy-five percent (75%) to the balance due on the purchase price of the Independent Salesman's auto.
9. It is expressly understood by and between the parties hereto that the Independent Salesman will in no way be controlled or regulated by Jenkins Auto Sales, Inc. that they are not required to work regular hours, but may sell at any and all times as the Independent Salesman may see fit.

10. The independent salesman shall obtain and have in his or her possession an Ohio Motor Vehicle Salesman's License before making any referrals to Jenkins Auto Sales, Inc., for possible sales of any motor vehicle.
11. THE INDEPENDENT SALESMAN UNDERSTANDS THAT HE ALONE IS OBLIGATED TO MAKE EACH PAYMENT DUE ON THE AUTOMOBILE AS IT COMES DUE.'

"As the result of this advertising or sales scheme, the Bureau of Motor Vehicles has received a large number of applications for Ohio Motor Vehicle's Salesman's licenses from applicants, residing throughout the State of Ohio and even two residing in the State of Indiana, and who have been designated by the Jenkins Auto Sales, Inc. to act as its salesmen.

"At the same time I have received inquiries as to whether or not this scheme was legal. It is because of these inquiries and also because of my desire to take whatever steps are necessary to protect the automobile buying public that I am requesting your opinion as to whether or not this scheme constitutes an illegal lottery."

In *Westerhous v. Cincinnati*, 165 Ohio St., 327, the Ohio Supreme Court held, in the fifth, eighth and ninth paragraphs of the syllabus:

"* * * 5. In general, the elements of gambling are payment of a price for a chance to gain a prize.

"* * *

"8. In order to have a lottery, the determination as to who gets a prize or how much of a prize he gets must be dependent at least predominately upon the element of chance.

"9. The term 'gambling' includes a lottery but is broader and may encompass more than the term 'lottery'. * * *"

In the contractual arrangement here involved it is plain that the element of prize is present. In fact, this is an important feature of the contract of which paragraph three provides for a "commission" of \$100.00 to the "Independent Salesman" for each automobile purchased by a person whose name was submitted to the Jenkins Auto Sales, Inc., Advertising Department by said "Independent Salesman" and of which paragraph four provides for a "commission" of \$50.00 to said "Independent Salesman" upon the purchase by a person whose name is subsequently submitted by one of the individuals whose name was originally submitted by the said "Independent Salesman" and who had become an "Independent Salesman" himself by virtue of his own purchase.

The element of consideration is also clearly present for the contract itself specifically provides in paragraph seven that "This agreement shall go into effect only after completion of the sale of the automobile to the Independent Salesman, and the signing of this agreement by an authorized agent of the Advertising Department and by the Independent Salesman."

In 35 Ohio Jurisprudence 2d, 64, Section 3, we find this statement:

"* * * the strict consideration that is required in contracts is not the kind required as an element of a lottery, and what may appear on its face to be a gratuitous distribution of property or money has frequently been declared to be merely a device to evade the law. The element of advertisement and increased patronage is consideration sufficient to constitute a lottery, and where lottery tickets are given with meals, the consideration is adequate. * * *"

It is obvious, therefore, that in the instant case there is adequate consideration as is required as an element of a lottery.

It therefore remains only to inquire as to whether the element of chance is present and, if so, whether the determination of who is to get a prize or the amount of the prize is dependent at least predominately upon the element of chance.

In 35 Ohio Jurisprudence 2d, 65, Section 3, we find this statement:

"Chance, as one of the elements of a lottery, has reference to the attempt to attain certain ends, not by skill or any known or fixed rules, but by the happening of a subsequent event, incapable of ascertainment or accomplishment by means of human foresight or ingenuity, or upon the subsequent ascertainment of facts known at the time of giving the consideration. But it should not be concluded from this that, if any element of certainty or skill enters into the scheme, it therefore relieves it of its character as a lottery or scheme of chance. The element of chance is not at all incompatible with the presence of an element of calculation, or even certainty. All that is required is that the element of chance is the controlling or predominate feature, and the Supreme Court has announced the rule that in order to have a lottery, the determination as to who gets a prize or how much of a prize he gets must be dependent at least 'predominately' upon the element of chance."

The subject contract reveals that the earning of a "commission" by an "automobile owner Independent Salesman" or by an "automobile Owner-Representative" is actually subject to uncertainty or chance in several respects:

First. It is clear upon the face of the contract that the only sales effort to be expended by the said "Independent Salesman" or Owner-Representative is the furnishing of names (See Paragraph 2 of Contract), whereas the actual selling is to be accomplished by the regular full-time salesmen of Jenkins, Inc. In this respect, it is obvious that the Independent Salesman or Owner-Representative is entirely dependent upon the sales ability of some third party entirely beyond his control to make a sale under the same plan. It might be a good possibility or likelihood that these full-time salesmen will sell a car to a person whose name has been submitted by an "Independent Salesman", but whatever the odds, the occasion of the persons referred, to buy under this plan, or not to buy under the plan, remains mostly a matter of chance insofar as the original "Independent Salesman" is concerned.

Second. Paragraph Two of subject contract provides in part as follows:

"Each name so submitted shall be time stamped by Advertising Department when received and shall remain active for a period of thirty (30) days thereafter."

This reveals that the "earned commission" or prize is dependent upon still another element of chance; namely, as to whether the "Advertising Department" will be able to act within the thirty days or, if not, will the party come in voluntarily to make a purchase.

Third. The last sentence of paragraph two of subject contract reads:

"In the event that two Independent Salesmen submit the same name, the Independent Salesman first submitting the name as evidenced by the time stamp shall become solely entitled to all payments herein provided in respect to such individual."

Thus, we see that in spite of all the diligent effort, speed and skill that may be expended by a person in the selection and submission of names, the chance of earning a "commission" is dependent first of all upon the uncertain chance that the names he submits will not arrive for time stamping before someone else submits the same name thereby depriving him of any further chance to earn a commission or prize even though the person referred actually does purchase a car.

As is stated in 35 Ohio Jurisprudence 2d, 66, Section 4:

"The schemes by which the circumvention of the lottery law is attempted are many and varied."

Of course, what we have here is not a Bingo game or a Bank Night nor is it a "Cross the T" game or "Dot the I" game which latter two games were held to be lotteries in Opinion No. 313, Opinions of the Attorney General for 1959, but this scheme might well be characterized as the "Referral Game" because it certainly is a game of chance. On the basis of the foregoing alone, it seems clear that the earning of a "commission" is dependent quite predominately upon chance, for the only opportunity to exert any control or skill is at the time an Independent Salesman selects names for submission. Thereafter, everything is dependent upon chance much in the manner of a pinball machine on which the player exerts a certain amount of skill and control by determining how far the spring plunger should be cocked. Once the marble is shot towards the target, however, the player loses all control just as the "Independent Salesman" loses all control over the potential customer referred to the "Advertising Department." An additional element of chance is injected into the instant game, though, in that we have another player who can cause our machine to "tilt" if he gets his marble to the target first.

There is more, however, to this referral game, whereby a so-called second stage is established by the third and fourth paragraphs of subject contract as follows:

"3. Jenkins Auto Sales, Inc., shall pay to Representative, as earned commission the sum of One Hundred Dollars (\$100.00) for each individual, whose name is first submitted by the Representative, and who thereafter becomes a qualified automobile Owner Representative with Jenkins Auto Sales, Inc.

"4. Jenkins Auto Sales, Inc., shall pay Representative, as earned commission, the sum of Fifty Dollars (\$50.00) for each name first subsequently submitted by the individual referred to in paragraph three (3) at the time that he too becomes an automobile Owner-Representative with Jenkins Auto Sales, Inc."

The dependence upon chance is even more predominate in this second stage because control of the original Independent Salesman is completely non-existent at this level of the game. First of all, he has no control whatsoever over the decisions of those whose names he submitted to participate or not to participate in the scheme any further. In other words, they may or may not even submit any names themselves, and whatever they do is pure chance so far as the original "Independent Salesman" is concerned. Second, if names are submitted by one who was originally referred by the original Independent Salesman, the original Independent Salesman will

have no opportunity to exert any control or skill in selecting the names as this will be the sole responsibility of the subsequent purchasers.

Furthermore, another factor in determining whether or not the earning of a "commission" or "prize" is dependent predominately upon chance, is the fact that when a customer buys an automobile and enters the plan he is in no position to know the extent of the saturation of the market for sales of the automobile in question. The longer the plan is in operation, the less likelihood there is of any success on the part of the individual participant, and it would be practically impossible for the participants to obtain this information.

It may, of course, be argued that this plan constitutes merely the payment of a commission for services rendered in the selling of automobiles, and that it differs in no respect from the commonly accepted practices of paying employees a commission on their sales, fee-splitting, etc. That those practices are legitimate will not be denied, however, the mere fact that the "prize" in the instant case is termed, a "commission", does not serve to change a lottery into a legitimate business promotion or sales promotion plan.

It must be recognized that this plan is of itself an endless chain scheme although the "commissions" earned by any one individual are limited to the stated amounts and are contingent upon a purchase in either the first or second state of the plan. In the case of *New, Postmaster General v. Tribond Sales Corporation*, 19 F. 2d, 671, a similar though single stage scheme was involved wherein the defendant corporation sold so-called "contracts" at \$4.00 each, bearing three coupons, the purchaser of the contract being entitled to silk hose worth \$10.00 upon payment of \$6.00 additional within one year; he might sell each of the three coupons for \$1.00, to be retained by him, the buyer of the coupon being entitled to purchase a like contract for the coupon and \$3.00, in which case \$2.00 was credited to the holder of the previous contract. The buyer of a contract might therefore receive 10 for 1, 2 for 1, 5 for 4, or 10 for 10, dependent largely upon contingencies beyond his control. Here, more so than in the instant case, the benefit to be derived by the original contract holder was in the nature of a commission for sales actually made by the individual, yet the court on page 673, after computing the mathematical progression, stated:

"* * * While it is unlikely that the chain would progress to such an extent in any locality, it is apparent that the extent to

which a chain has progressed in a given locality will have a material bearing upon the ability of 'contract' holders to dispose of coupons, through the narrowing of the field of possible purchasers. It is practically impossible for a 'contract' holder to obtain any advance information in this connection, but the appellee is much more advantageously situated in this respect."

On page 674, the Court continues :

"It is apparent, we think, from what we have said, that whether a 'contract' holder will get his hosiery for an investment of \$1.00, \$5.00, \$8.00, or \$10.00, depends largely upon contingencies largely beyond his control. First, there is the requirement that the three 'respective purchasers' to whom he sells the three coupons will in turn remit \$3.00 each to the corporation for three other 'contracts'. These coupon purchasers may, upon inquiry, ascertain that others are trying to sell coupons, and they may, for this or some other reason satisfactory to them, conclude to forfeit the \$1.00 paid for the coupon and abandon the scheme. Obviously, this is a matter beyond the control of the original 'receipt holder' and, as to him, a matter of chance. Another circumstance is that those who embark upon the scheme at its inception have a better chance to earn a prize than those who take it up later. Although this element of chance is not as pronounced as that in the first instance, it may be present."

The U. S. Court of Appeals of the District of Columbia in its decision in the above case upheld the Postmaster General's fraud order which had been based upon his finding that the scheme was a lottery.

Regarding the instant case, it is my conclusion that the possibility of earning a "commission" under the subject plan is dependent predominately upon the element of chance, and it is therefore my opinion that this scheme constitutes a lottery which is made illegal in the State of Ohio by virtue of Sections 2915.10 and 2915.12, Revised Code, which provide respectively, in part, as follows :

Section 2915.10.

"No person, for his own profit, shall vend, sell, barter, or dispose of a ticket, order, or device for or representing a number of shares or an interest in a lottery or scheme of chance, by whatever name, style, or title denominated or known, located in or to be drawn, paid, or carried on within or without this state.
* * *

Section 2915.12.

"No person, for his own profit, shall establish, open, set on foot, carry on, promote, make, draw, or act as 'backer' or 'vendor'

for or on account of a lottery or scheme of chance, by whatever name known, located in or to be drawn, paid, or carried on within or without this state, or by any of such means, sell or expose for sale anything of value. * * *

Accordingly, it is my opinion and you are advised that a plan whereby a dealer agrees to pay a purchaser of an automobile \$100.00 upon the purchase of an automobile under the same plan by any individual whose name was first submitted by said original purchaser, and also to pay to said original purchaser \$50.00 upon the purchase of an automobile under the same plan by a person whose name is first submitted by such individual above referred to, is a lottery; and the promotion of such a scheme is a violation of Section 2915.12, Revised Code.

Respectfully,

MARK McELROY

Attorney General