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IS "CONTRACT" THE NAME OF THE GAME? PROMOTIONAL GAMES AS TEST CASES FOR CONTRACT THEORY

Mark B. Wessman*

I. INTRODUCTION

It is barely possible, in Twentieth Century America, to avoid exposure to the various promotional devices used to sell goods or other property. Such avoidance would, however, require that you retire to a wilderness beyond the reach of electronic or print media, live in a cave, and draw your sustenance from the good earth. Otherwise, you will undoubtedly be bombarded, as the rest of us are, with a variety of solicitations to participate in events called "contests," "sweepstakes," "games," "giveaways," "promotions" and other more specific (and more laudatory) names.[1] Turn on your television, and Ed McMahon greets you with the news that you may have already won ten million dollars. Open your mail, and you find McMahon's pitch again or some other chance to win a prize. Go to the grocery store, and the maker of the coffee you buy offers you a chance on a Buick. Open a newspaper or magazine, and manufacturers or retail stores are similarly waiting to tempt you.

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* Associate Professor, Tulane Law School; B.A. 1973, St. Olaf College; M.A. 1976, Oxford University; J.D. 1980, Harvard Law School. The author wishes to express his thanks to Paul Barron, Lissa L. Broome, Shael Herman, Adam J. Hirsch, Julie H. Jackson, Glynn S. Lunney, Jr., Mark J. Osiel, and John Stick, all of whom read previous drafts of this article, and to Chris Daniel and Alan Fisch who provided research assistance.

1. Casual observation suggests that "bonus," "bonanza," "spectacular," "extravaganza," "instant cash," and, of course, "big bucks" appear with some regularity.

None of these promotional devices usually attracts much attention from legal academics.[2] There are, nevertheless, at least three good reasons why promotional games and similar devices are worthy of extended discussion.

First, they are significant to the economy because of the sheer frequency of their use and their purported effect on sales volume.[3] In 1967, when the Federal Trade Commission (FTC) surveyed all known game promoters in connection with its study on the use of games of chance in food and gasoline retailing, annual billings for promotional games already amounted to $37.2 million.[4] The FTC study also found that, although games were not invariably successful, they often were followed by significant increases in sales and changes in market share.[5] By 1987, reported expenditures for sweepstakes and games in retail promotions amounted to $185,946,000.[6]

Second, in the past several years, a number of instances of rather spectacular promotional game failures have been reported. The failures in question were not (or at least not necessarily) failures to attract attention, draw customers, or boost sales. Rather, in each case, some defect in design or conduct of the game or contest generated one or more high-stakes lawsuits.

Third, and most importantly, reflection upon the dispositive issues in litigation arising out of promotional games leads quite directly to some of the central questions of contract theory. Four examples[7] illustrate the legal issues often raised in such actions.

During its 1985 thoroughbred racing season, the Hollywood Park racetrack in Inglewood, California conducted a promotion known as the "Hollywood Park Million Dollar Handicapping Contest" or the "Pick Nine

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2. Except, of course, those of my colleagues who annually nourish the hope of a phone call from the good Mr. McMahon and early retirement in greener pastures.

3. Promotional games generally fall within the category of sales promotion devices, as distinguished from advertising. *See* Russ Bowman, *Annual Report 1989: Growing Up & Out*, 25 MARKETING & MEDIA DECISIONS, July 1990, at 20 (list of sales promotion devices recognized by Council of Sales Promotion Agencies). The traditional function of sales promotion devices is to produce a boost in sales in the short term, rather than to build brand image. *See* authorities cited *infra* notes 327–29. In addition, prize promotions and similar devices are often used in order to differentiate products which are otherwise similar in quality and price or in order to create a sense of urgency in the mind of the consumer. *See* Doug McCrum, *Winner Take All: Prize Indemnification Insurance Market Excess and Surplus Lines*, BEST'S REVIEW, Feb. 1992, at 47.

4. *See Economic Report on the Use of Games of Chance in Food and Gasoline Retailing: Hearings Before the Subcommittee on Activities of Regulatory Agencies of the Select Committee on Small Business of the House of Representatives*, 90th Cong., 2nd Sess. (1968) 417, 425 (FTC staff report to the Federal Trade Commission) [hereinafter *FTC Staff Report*].

5. *FTC Staff Report*, *supra* note 4, at 398–99, 441–48.

6. Russ Bowman, *1987: The Year in Promotion*, MARKETING & MEDIA DECISIONS, July 1988, at 150, 154. For even higher estimates of expenditures on prize promotions, as well as a summary of the somewhat sparse social science research on consumer response to promotional games, see James C. Ward & Ronald Paul Hill, *Designing Effective Promotional Games: Opportunities and Problems*, J. ADVERTISING, Sept. 1991, at 69.

7. None of the four sample cases have yet generated a reported decision. In order to obtain details of the sample cases, it has been necessary to rely on media reports and, in some instances, copies of pleadings filed in the cases. Copies of the relevant pleadings are on file with the author.

Handicapping Contest."[8] Each person who paid for admission to the track was given an entry form.[9] Whether or not an individual placed any bets, he or she could use the form to try to predict the winning horse in each of the day's nine races.[10] Upon completion, the form could be deposited (prior to the first race) in one of several designated containers.[11] The prize for a correct prediction of all nine races was $1,000,000, payable in installments over twenty years.[12]

On July 21, 1985, the last day of the contest, a disabled, unemployed farm worker and welfare recipient, Rodolfo Sahagun, became the first and only contestant to predict all nine winners correctly.[13] His name was announced over the loudspeakers at the track, and, at the request of track officials, he and his family subsequently posed for a variety of publicity photographs, some of which appeared in the media.[14]

A dispute arose when it was discovered that Mr. Sahagun had submitted multiple entry forms in his attempt to win the contest.[15] He had found two such forms in a trash barrel at the track and had submitted them in addition to the two he and his wife had been given at the gate.[16] A contest rule, printed on the back of the entry form, prohibited more than a single entry each day of the contest.[17] To make matters worse, the insurance company that had underwritten the prize had insisted that Hollywood Park warrant that only one entry form would be given to each entrant.[18] Consequently, the insurance company refused to pay Hollywood Park's claim for the prize money, and

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8. Complaint for Damages at 2, Ex. 1, Sahagun v. Hollywood Park Operating Co., No. SWC 81924 (Cal. Super. Ct., L.A. County filed Oct. 18, 1985); Tom Gorman, *Carlsbad Race Fan's Fortune Handicapped*, L.A. Times, May 21, 1988, § 2 (Metro), at 1.

9. Memorandum of Points and Authorities of Defendant Hollywood Park Operating Co. in Support of Its Motion for Summary Judgment at 1, Mission National Insurance Co. v. Hollywood Park Operating Co., No. SWC 77936 (Cal. Super. Ct., L.A. County filed Aug. 2, 1990).

10. *Id.*

11. *Id.*

12. First Amended Complaint for Damages, Ex. 1, Sahagun v. Hollywood Park Operating Co., No. SWC 81924 (Cal. Super. Ct., L.A. County filed Jan. 23, 1986).

13. Memorandum of Points and Authorities of Defendant Hollywood Park Operating Co. in Support of Its Motion for Summary Judgment at 2, Mission National Insurance Co. v. Hollywood Park Operating Co., No. SWC 799376 (Cal. Super. Ct., L.A. County filed Aug. 2, 1990); Gorman, *supra* note 8.

14. Complaint for Damages at 3, Sahagun v. Hollywood Park Operating Co., No. SWC 81924 (Cal. Super. Ct., L.A. County filed Oct. 18, 1985); Memorandum of Points and Authorities of Defendant Hollywood Park Operating Co. in Support of Its Motion for Summary Judgment at 3–4, Mission National Insurance Co. v. Hollywood Park Operating Co., No. SWC 799376 (Cal. Super. Ct., L.A. County filed Aug. 2, 1990).

15. Memorandum of Points and Authorities of Defendant Hollywood Park Operating Co. in Support of Its Motion for Summary Judgment at 5–6, Mission National Insurance Co. v. Hollywood Park Operating Co., No. SWC 799376 (Cal. Super. Ct., L.A. County filed Aug. 2, 1990).

16. *Id.* at 2.

17. *Id.* at 3.

18. Complaint for Declaratory Relief at 7, Mission National Insurance Co. v. Hollywood Park Operating Co., No. SWC 79936 (Cal. Super. Ct., L.A. County filed July 29, 1985).

Hollywood Park disqualified Mr. Sahagun.[19] Mr. Sahagun filed a complaint in Los Angeles County Superior Court.[20]

A little later that year, Beatrice Companies, Inc. and its Hunt/Wesson subsidiary joined the ranks of unhappy game sponsors. In the fall of 1985, Beatrice conducted a promotional game called the "Monday Night Winning Line-up," that was designed to track the 1985 professional football season.[21] The promotion took the form of a "scratch off" game, with cards distributed through grocery stores.[22] The object of the game was to scratch a series of silver-coated spaces to reveal numbers matching the number of touchdowns and field goals actually scored by particular teams in each of eight televised Monday night football games.[23]

Frank Maggio, a salesman for Beatrice's competitor, Procter & Gamble, grabbed fifty of the cards from a grocery store display and began scratching.[24] He soon detected what he believed to be patterns in the concealed numbers.[25] Mr. Maggio and his supervisor began collecting thousands of cards, and Maggio determined that there were only about 300 different card patterns.[26] Scratching the coating off all the spaces of the first of the eight games on each card enabled him to determine which pattern of numbers lay beneath the undisturbed scratch-off coating for the remaining seven games.[27] By scratching all the coating off one card of each type, Maggio produced a set of master cards.[28] After each televised football game was played and the correct number of touchdowns and field goals was ascertained, the master cards were used to locate and scratch off the correct numbers on the remaining cards, a process Mr. Maggio compared to "picking off sitting ducks."[29] This theoretically enabled Mr. Maggio to turn each of his several thousand cards into a winner worth $5,500 on the prize schedule.[30] Maggio, his supervisor, and up to twenty friends ultimately formed a "scratch gang" to perform the requisite scraping.[31]

On November 22, 1985, over two weeks before the scheduled completion of the game, Maggio contacted Beatrice, informed the company of his success, offered to show how he had achieved it, and offered to negotiate for

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19. Memorandum of Points and Authorities of Defendant Hollywood Park Operating Co. in Support of Its Motion for Summary Judgment at 5–6, Mission Nat'l Ins. Co. v. Hollywood Park Operating Co., No. SWC 799376 (Cal. Super. Ct., L.A. County filed Aug. 2, 1990).

20. Complaint for Damages at 2, Ex. 1, Sahagun v. Hollywood Park Operating Co., No. SWC 81924 (Cal. Super. Ct., L.A. County filed Oct. 18, 1985).

21. Laurie Baum, *How Beatrice Lost at Its Own Game*, BUS. WK., Mar. 2, 1987, at 66; James Litke, *His Winning Ways May Throw Company for a Loss; When Georgian Deduced the Key to Contest Cards, He Scored $16 Million*, L.A. TIMES, Jan. 19, 1986, § 1, at 2.

22. Baum, *supra* note 21, at 66; Litke, *supra* note 21, § 1, at 2.

23. Baum, *supra* note 21, at 66; Litke, *supra* note 21, § 1, at 2.

24. Litke, *supra* note 21, § 1 at 2.

25. *Id.*

26. Baum, *supra* note 21, at 66; Litke, *supra* note 21, § 1, at 2.

27. Baum, *supra* note 21, at 66; Braham, *Beatrice 'Blunders' ... and United Takes Away a Giveaway*, INDUS. WK., Apr. 14, 1986, at 16; Litke, *supra* note 21, § 1, at 2.

28. Litke, *supra* note 21, § 1, at 2.

29. *Id.*

30. Baum, *supra* note 21, at 66; Braham *supra* note 27, at 16.

31. Baum, *supra* note 21, at 66.

a lesser sum than the apparent value of his cards.[32] Beatrice cancelled the game a few days later, two weeks prior to its originally scheduled completion.[33] Maggio and his crew continued scratching and submitting cards.[34] In December, Maggio and his supervisor filed a suit for breach of contract, claiming winnings of $21 million.[35] In a class action in Chicago, a class of 2,900 other contestants claimed an additional $3.5 million in damages.[36]

The Beatrice game was a "probability" game, i.e., one in which each game piece has a theoretical (if remote) chance to win.[37] While one might think that a game designed with predetermined winners and losers would offer fewer opportunities for disaster, Florida's Publix supermarket chain discovered the contrary in the summer of 1987. Publix conducted a promotion designed to coincide with the popular "Wheel of Fortune" television show.[38] Each time a customer visted a Publix store, he or she could obtain a free game card.[39] Game cards were valid for a single week.[40] Each game card contained four slogans or phrases of the type commonly used as puzzle solutions on the "Wheel of Fortune" television show.[41] The game participant was instructed to watch "Wheel of Fortune"[42] and, if a puzzle solution that appeared on his or her card also appeared on the show during the week, the participant won $5, $10, $100, or $1000, depending upon the position the matching phrase occupied on the card.[43]

Publix had purchased the right to use the game from a corporate game promoter that, in turn, was authorized to market it by the producers of the television show.[44] The television producers (who obviously knew the winning television puzzle solutions in advance) supplied both winning and losing phrases to the promoter for the weeks during which the game was to run. The promoter then printed and supplied numbers of winning and losing cards designed to produce a predetermined maximum number of prizes each week.[45] The game proceeded flawlessly for nine weeks.[46]

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32. Litke, *supra* note 21, § 1, at 2.
33. Braham, *supra* note 27, at 16; Litke, *supra* note 21, § 1, at 2.
34. Litke, *supra* note 21, § 1, at 2.
35. Baum, *supra* note 21, at 66. The contract claim was coupled with a treble damages claim under Georgia's Fair Business Practices Act. *See* Braham, *supra* note 27, at 16.
36. Baum, *supra* note 21, at 66.
37. Braham, *supra* note 27, at 16.
38. Fox, *Troubles Cast Shadows over Games; Supermarkets and Promotional Contests*, 37 SUPERMARKET NEWS, Aug. 31, 1987, at 1; Morse, *TV Blooper Gives Publix a Bad Picture; "Wheel of Fortune" Promotion Bungled*, 37 SUPERMARKET NEWS, Aug. 3, 1987, at 1.
39. Complaint for Statutory Interpleader and Declaratory Relief Against Defendant Classes and Complaint Against Other Named Defendants at 6–7, 35, Publix Super Markets, Inc. v. MW Mktg. Servs. Corp., No. 87–1290–Civ–T–10B (M.D. Fla. filed Aug. 31, 1987).
40. *Id.*
41. *Id.* at 7.
42. *Id.* at 34, 35.
43. *Id.* at 7.
44. *Id.* at 5–6, 8–11.
45. *Id.* at 7–8.
46. *Id.* at 12.

Apparently, however, some of the "losing" phrases for each week had been chosen from past episodes of "Wheel of Fortune."[47] Four such phrases[48] were printed on thousands of ostensibly "losing" cards for the week of July 20, 1987, provided to Publix and distributed to customers.[49] As in the past, none of the four phrases appeared as solutions on the regularly-scheduled, Monday-through-Friday versions of "Wheel of Fortune."[50] Unfortunately for Publix, however, "Wheel of Fortune" had attained levels of popularity in Florida sufficient to support weekend reruns of past shows.[51] On Saturday, July 25, 1987, all four of the supposedly losing phrases appeared as puzzle solutions on a rebroadcast of an old show.[52] The following week, Publix was swamped with prize claims.[53] Publix denied the claims, contending that the rules of the game, properly understood, restricted the eligible "week" to the shows airing on Monday through Friday.[54] Disappointed contestants filed a class action,[55] which Publix ultimately settled for $4.25 million.[56]

Finally, in June of 1989, Kraft, Inc. suffered a similar misfortune with a promotional game that was supposed to have a predetermined number of winners.[57] Kraft conducted a "matching" game called the "Ready to Roll" game.[58] Each game piece consisted of half of the picture of one of the game's four prizes—a 1990 Dodge Caravan minivan, a bicycle, a skateboard, or a package of Kraft Singles American Cheese.[59] Initially, game pieces could be obtained by buying packages of Kraft Singles or by mailing a request for a free game piece to Kraft.[60] Additional game pieces were published on June 11, 1989, in

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47. *Id.* at 9.
48. The phrases in question were "apple pie a la mode," "by the same token," "meteorologist," and "the refrigerator." *Id.* at 12–13, 38.
49. *Id.* at 13.
50. *See id.* at 13–14, 38.
51. *Id.* at 5.
52. *Id.* at 12–13, 38.
53. *Id.* at 13, 38.
54. *Id.*
55. Bryan v. Publix Supermarkets, Inc., No. 87–10969–14 (Cir. Ct. Pinellas County, Fla., filed July 28, 1987). Publix subsequently filed a federal complaint for interpleader and declaratory relief against various prize claimants and the suppliers of the game, and the case was ultimately settled in the context of the consolidated federal litigation. *See* Settlement Agreement, Publix Super Markets, Inc. v. MW Mktg. Servs. Corp., No. 87–1290–Civ–T–10B (M.D. Fla. 1989).
56. Settlement Agreement at 9 and Ex. H, Publix Super Markets, Inc. v. MW Mktg. Servs. Corp., No. 87–1290–Civ–T–10B (M.D. Fla. 1989).
57. Answer and Counterclaim of Defendant Kraft, Inc. to Consolidated Class Action Complaint at 12, *In re* Kraft "Ready to Roll" Litig., No. 89 CH 5016 (Ill. Cir. Ct. Cook County filed Aug. 18, 1989).
58. *Id.* at 10.
59. Consolidated Class Action Complaint at 2, *In re* Kraft "Ready to Roll" Litig., No. 89 CH 5016 (Ill. Cir. Ct. Cook County, filed July 19, 1989).
60. Answer and Counterclaim of Defendant Kraft, Inc. to Consolidated Class Action Complaint at 12, *In re* Kraft "Ready to Roll" Litig., No. 89 CH 5016 (Ill. Cir. Ct. Cook County filed Aug. 18, 1989). The number of game pieces inserted in packages of Kraft Singles cheese was 2.712 million. 20,000 game pieces were reserved for requests by mail. *See* Defendant Kraft General Foods, Inc.'s Memorandum of Law in Support of Its Motion for Summary Judgment at 9, *In re* Kraft "Ready to Roll" Litig., No. 89 CH 5016 (Ill. Cir. Ct. Cook County, filed Aug. 23, 1990).

free-standing Sunday newspaper inserts in Illinois and Texas.[61] The newspaper ads indicated that participants who acquired matching left and right halves of a prize picture won the prize depicted.[62]

One would assume that a "matching-half" game of this type would offer maximum opportunity for the promoter to predetermine the number of prizes to be awarded. Indeed, the game was designed to include a "common" left half and a "rare" right half for each prize category.[63] By controlling the number of rare game pieces, Kraft intended to limit prize awards to a maximum of one van, 100 bicycles, 500 skateboards and 8000 coupons for free cheese.[64] The odds of winning the van were supposed to be one in 15,160,000.[65] The total value of all prizes Kraft intended to award was $63,000.[66]

Due to a massive (and catastrophic) error in the printing of the newspaper insert,[67] the right halves appearing in Sunday newspapers turned out to be common pieces, not the rare pieces originally intended.[68] As a result millions of game pieces in newspaper inserts matched millions of game pieces previously inserted in cheese packages, and the game became almost difficult to lose.[69] The odds of winning the van, for example, dropped from one in 15,160,000 to one in four.[70] The odds of winning some kind of prize ap-

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61. The combined circulation of the newspapers in which game pieces were published exceeded 3.1 million. Since each newspaper insert contained four game pieces, the June 11 distribution put over 12 million game pieces into circulation. *See* Defendant Kraft General Foods, Inc.'s Memorandum of Law in Support of Its Motion for Summary Judgment at 9–10, *In re* Kraft "Ready to Roll" Litig., No. 89 CH 5016 (Ill. Cir. Ct. Cook County, filed Aug. 23, 1990).

62. Consolidated Class Action Complaint at 1–2, *In re* Kraft "Ready to Roll" Litig., No. 89 CH 5016 (Ill. Cir. Ct. Cook County, filed July 19, 1989).

63. Answer and Counterclaim of Defendant Kraft, Inc. to Consolidated Class Action Complaint at 10–11, *In re* Kraft "Ready to Roll" Litig., No. 89 CH 5016 (Ill. Cir. Ct. Cook County, filed Aug. 18, 1989).

64. *Id.* at 10.

65. *Id.* The odds of winning a bicycle were supposed to be one in 151,600. The odds for winning a skateboard or a package of cheese were one in 30,320 and one in 1,895, respectively. *Id.*

66. *Id.*

67. Responsibility for the printing error was disputed. *See* Julie L. Erickson & Ira Teinowitz, *Not Really "Ready to Roll"; Kraft Puzzles over Who Crashed Its Minivan Promo*, ADVERTISING AGE, June 19, 1989 at 1. Kraft is neither the first nor the last company to face unanticipated prize claims as a result of production errors. Over twenty years ago, Colonial Stores, Inc. fell victim to a printer's error in connection with a supermarket "matching" game. The results in the case of Colonial Stores were somewhat less disastrous than Kraft's predicament. *See* Gold Bond Stamp Co. of Ga. v. Bradfute Corp., 463 F.2d 1158 (2d Cir. 1972). More recently, Anheuser–Busch's self-proclaimed "king of beers" became the latest victim of production error. In May of 1992, Anheuser–Busch began a prize promotion for Budweiser beer called the "Bud Summer Games." As a result of a production error, an unanticipated (and undisclosed) number of "winning" second and third prize sweepstakes cards were inserted into several popular magazines. *See* Ira Teinowitz, *A–B Rushes to Polish 'Bud Summer Games' After Ticket Fiasco*, ADVERTISING AGE, May 25, 1992, at 4.

68. Defendant Kraft General Foods, Inc.'s Memorandum of Law in Support of its Motion for Summary Judgment at 10, *In re* Kraft "Ready to Roll" Litig., No. 89 CH 5016 (Ill. Cir. Ct. Cook County, filed Aug. 23, 1990).

69. *Id.* at 10.

70. Answer and Counterclaim of Defendant Kraft, Inc. to Consolidated Class Action Complaint at 12, *In re* Kraft "Ready to Roll" Litig., No. 89 CH 5016 (Ill. Cir. Ct. Cook County filed Aug. 18, 1989).

proached one to one.[71] A flood of prize claims began the very day the newspaper insert appeared,[72] and ultimately 9999 people submitted matching game pieces for the van.[73] Each van was worth approximately $17,000.[74]

The rules on each game piece indicated that the game would continue until October 31, 1989,[75] but Kraft announced its cancellation on June 12, the day following the appearance of the bungled newspaper inserts.[76] In addition, in a June 16 newspaper advertisement entitled "Ouch!," Kraft offered to pay $250.00 to each person holding matching van game pieces, $50.00 to each person holding matching bicycle game pieces, $25.00 to each person holding matching skateboard game pieces, and $5.00 to each person holding matching cheese game pieces.[77] Kraft also announced that anyone who mailed in his or her game pieces by midnight on June 16 would be eligible for a substitute drawing offering four times the number of prizes originally scheduled.[78]

The total expenditures for the "Ouch!" cash and prizes amounted to approximately three million dollars.[79] Apparently, it was not enough. Three class actions had already been filed the day after Kraft's cancellation of the game.[80] In July, a consolidated class action complaint was filed against Kraft in the Chancery Division of the Circuit Court of Cook County, Illinois.[81] By the time Kraft's summary judgment motion was filed a little over a year later, Kraft's exposure was $200 million, assuming liability only to the members of the plaintiff class who had obtained matching game pieces.[82] If, as the plaintiffs

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71. *Id.*

72. Defendant Kraft General Foods, Inc.'s Memorandum of Law in Support of its Motion for Summary Judgment at 10, *In re* Kraft "Ready to Roll" Litig., No. 89 CH 5016 (Ill. Cir. Ct. Cook County, filed Aug. 23, 1990).

73. *Id.* at 12.

74. *Id.* at 8.

75. Consolidated Class Action Complaint at 2, *In re* Kraft "Ready to Roll" Litig., No. 89 CH 5016 (Ill. Cir. Ct. Cook County, filed July 19, 1989).

76. Defendant Kraft General Foods, Inc.'s Memorandum of Law in Support of its Motion for Summary Judgment at 11, *In re* Kraft "Ready to Roll" Litig., No. 89 CH 5016 (Ill. Cir. Ct. Cook County, filed Aug. 23, 1990).

77. *Id.* at 12.

78. *Id.* Anheuser–Busch borrowed Kraft's "substitute drawing" strategy in its attempt to save the "Bud Summer Games" promotion, discussed *supra* note 67. Anheuser Busch announced that it would award twice the number of second and third place prizes (Kawasaki jet skis and Olympic pins, respectively) it had originally intended to award. The additional prizes were to be distributed to holders of "defective" sweepstakes tickets selected by a random drawing. *See* Teinowitz, *supra* note 67, at 4; *Important Notice to Game Ticket Holders in the Bud Summer Games Memorial Day Program*, N.Y. TIMES, May 20, 1992, at A16. Anheuser's Busch's chances for successful employment of the "substitute drawing" device are better than Kraft's were, largely because the "Bud Summer Games" game piece contains language purporting to authorize such a procedure in the event a printing or production error produces an excess of winning numbers. Kraft's game piece included no such language. *See* Teinowitz, *supra* note 67, at 4.

79. Defendant Kraft General Foods, Inc.'s Memorandum of Law in Support of its Motion for Summary Judgment at 12, *In re* Kraft "Ready to Roll" Litig., No. 89 CH 5016 (Ill. Cir. Ct. Cook County, filed Aug. 23, 1990).

80. *Id.* at 12–13.

81. Consolidated Class Action Complaint at 2, *In re* Kraft "Ready to Roll" Litig., No. 89 CH 5016 (Ill. Cir. Ct. Cook County, filed July 19, 1989).

82. Defendant Kraft General Foods, Inc.'s Memorandum of Law in Support of its Motion for Summary Judgment at 3–4, *In re* Kraft "Ready to Roll" Litig., No. 89 CH 5016 (Ill. Cir. Ct. Cook County, filed Aug. 23, 1990).

alleged,[83] Kraft was required to continue the game until its originally scheduled October 31 completion date, the company's exposure to potential van claimants alone rose to $11 billion.[84] In August of 1991, the class action was settled, reportedly for $10 million in cash and free food coupons.[85]

The foregoing cases, like many cases involving promotional games, have colorful facts. But there seems to be an underlying assumption by lawyers, judges, and academics that the only legal issues such cases present are simple, unsophisticated, and a trifle boring. Justice Douglas, in a tax case, believed he could dispose of the critical issues in a few lines:

> In the legal sense payment of a prize to a winner of a contest is the discharge of a contractual obligation. The acceptance by the contestants of the offer tendered by the sponsor of the contest creates an enforceable contract. See 6 Corbin on Contracts § 1489; Restatement, Contracts § 521. The discharge of legal obligations—the payment for services rendered or consideration paid pursuant to a contract—is in no sense a gift. ... Where the payment is in return for services rendered, it is irrelevant that the donor derives no economic benefit from it.[86]

The reference to payment for the performance of services, and to the irrelevance of the economic value of those services, is the language of the classical theory of unilateral contract. Indeed, it is not difficult to find cases classifying games and contests generally, in more clear and express language than that of Justice Douglas, as instances of unilateral contracts.[87] Still other cases presuppose such a classification without articulating it.[88] Cases containing anal-

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83. Consolidated Class Action Complaint at 7, *In re* Kraft "Ready to Roll" Litig., No. 89 CH 5016 (Ill. Cir. Ct. Cook County, filed July 19, 1989).

84. Defendant Kraft General Foods, Inc.'s Memorandum of Law in Support of Its Motion for Summary Judgment at 4 n.5, *In re* Kraft "Ready to Roll" Litig., No. 89 CH 5016 (Ill. Cir. Ct. Cook County, filed Aug. 23, 1990).

85. *Botched Kraft Contest Is Settled*, NAT'L L.J., Sept. 9, 1991, at 29; *Deal in Kraft Contest Gets Judge's Nod*, CHICAGO TRIBUNE, Aug. 23, 1991, (Business) at 1; *Kraft Tentatively Resolves Contest Fiasco*, INVESTOR'S DAILY, Aug. 26 1991, at 14; *Settlement OKd for Kraft Prize-Winners*, CHICAGO TRIBUNE, Oct. 18, 1991, (Business) at 3.

86. Robertson v. United States, 343 U.S. 711, 713–14 (1952).

87. *See* Waible v. McDonald's Corp., 935 F.2d 924 (8th Cir. 1991); Moreno v. Marbil Prods., Inc., 296 F.2d 543 (2d Cir. 1961); National Amateur Bowlers, Inc. v. Tassos, 715 F. Supp. 323 (D. Kan. 1989); Gemeroy v. Leopold, 79 F. Supp. 458 (S.D.N.Y. 1948); Lucas v. United States, 25 Cl. Ct. 298 (1992); Minton v. F.G. Smith Piano Co., 36 App. D.C. 137 (1911); Harlem–Irving Realty, Inc. v. Alesi, 425 N.E.2d 1354 (Ill. App. Ct. 1981); St. Peter v. Pioneer Theatre Corp., 291 N.W. 164 (Iowa 1940); Scott v. People's Monthly Co., 228 N.W. 263 (Iowa 1929); Chenard v. Marcel Motors, 387 A.2d 596 (Me. 1978); Holt v. Rural Weekly Co., 217 N.W. 345 (Minn. 1928); Las Vegas Hacienda, Inc. v. Gibson, 359 P.2d 85 (Nev. 1961); Johnson v. New York Daily News, 450 N.Y.S.2d 980 (N.Y. Sup. Ct. 1982), *rev'd* 467 N.Y.S.2d 665 (N.Y. App. Div. 1983); Grove v. Charbonneau Buick–Pontiac, Inc., 240 N.W.2d 853 (N.D. 1976); Myles v. WAVI Broadcasting Corp., 1981 WL 2892 (Ohio Ct. App. Aug. 19, 1981); Cobaugh v. Klick–Lewis, Inc., 561 A.2d 1248 (Pa. 1989); Geis v. Continental Oil Co., 511 P.2d 725, 728 (Utah 1973) (dissenting opinion); Walters v. National Beverages, Inc., 422 P.2d 524 (Utah 1967); Magruder v. Hagen–Ratcliff & Co., 50 S.E.2d 488 (W. Va. 1948).

88. *See* United States v. Amirikian, 197 F.2d 442 (4th Cir. 1952); Simmons. v. United States, 197 F. Supp. 673 (D. Md. 1961); Hertz. v. Montgomery Journal Pub. Co., 62 So. 564 (Ala. Ct. App. 1913); Groves v. Carolene Products Co., 57 N.E.2d 507 (Ill. App. Ct. 1944); Woods v. Morgan City Lions Club, 588 So. 2d 1196 (La. Ct. App. 1991); Schreiner v. Weil Furniture Co., 68 So. 2d 149 (La. Ct. App. 1953); Carlini v. United States Rubber Co., 154

yses of games and contests in common law terms other than contractual terms are exceptional.[89]

The thesis of this article is that the traditional assumption that games and contests are perfectly straightforward offers of unilateral contracts[90] is, at best, only part of the story and, at worst, a gross oversimplification. At a very minimum, that assumption obscures the astonishing variety of promotional games and contests and the very different doctrinal and theoretical issues raised by the different types.

Some promotional games or contests fit the classical model of the unilateral contract quite neatly. Application of the classical model to others creates mild stresses and strains, although the model can be adapted doctrinally to accommodate them. Progressively, however, application of the unilateral contract model to the rather bewildering variety of promotional games becomes more difficult, and, at the margin, certain games cause the model to break down altogether. As in other areas of legal theory, the marginal cases are of greatest interest, for they function as test cases which pose more fundamental theoretical questions quite directly.

If certain promotional games and contests will not fit the unilateral contract model, is there some other reason to enforce the promises they contain? Or should such promises be relegated (like gift promises) to a residual category of promises that there is no reason to enforce (or, alternatively, a specific reason not to enforce)? Such questions lead very quickly into discussions of the reasons why promises are enforced at all. Even assuming there is good reason to provide a remedy for broken promises made in the context of promotional games and contests, moreover, the choice of the type of remedy is by no means an obvious one, particularly in marginal cases. A civil action for breach of contract is merely one possibility among many. It would, after all, be possible to treat the broken game promise as a species of tort or regulatory wrong and to provide a corresponding remedy. The ultimate goal of this article is to suggest answers to these general questions about the proper legal treatment of promises made in the context of promotional games.

Part II fleshes out in more detail the features of the unilateral contract model that has been applied uncritically to virtually all promotional games and similar devices. Part III analyzes the degree to which various types of games fit the traditional model. The games discussed will be grouped functionally, according to the similarity of the doctrinal and theoretical issues they raise,

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N.W.2d 595 (Mich. Ct. App. 1967); Mooney v. Daily News Co. of Minneapolis, 133 N.W. 573 (Minn. 1911); Seale-Lily Ice Cream Co. v. Buck, 15 So. 2d 213 (Miss. 1943); Brown v. Morrisey & Walker, Inc., 150 A. 330 (N.J. 1939); Ritz v. News Syndicate Co., 183 N.Y.S.2d 850 (N.Y. App. Term. 1959); Endres v. Buffalo Auto. Dealers Ass'n, Inc., 217 N.Y.S.2d 460 (N.Y. Sup. Ct. 1961); Simmons v. Randforce Amusement Corp., 293 N.Y.S. 745 (N.Y. Mun. Ct. 1937); First Tex. Savings Ass'n v. Jergins, 705 S.W.2d 390 (Tex. Ct. App. 1986); Hall v. Bean, 582 S.W.2d 263 (Tex. Civ. App. 1979); Bowlerama of Tex., Inc. v. Miyakawa, 449 S.W.2d 357 (Tex. Civ. App. 1969); Holt v. Wilson, 55 S.W.2d 580 (Tex. Civ. App. 1932); Bryant v. Deseret News Publishing Co., 233 P.2d 355 (Utah 1951); Davidson v. Times Printing Co., 116 P. 18 (Wash. 1911).

89. See cases cited *infra* at notes 339–42.

90. For historical background of the unilateral/bilateral contract distinction and an argument that unilateral contract analysis is expanding, *see* Mark Pettit, Jr., *Modern Unilateral Contracts*, 63 B.U. L. REV. 551 (1983).

rather than on the basis of strict factual similarity. Many of the promotional games analyzed will ultimately fit the unilateral contract model, although, in some instances, some fancy doctrinal and theoretical footwork will be necessary in order to make them fit. At the end of the analysis of Part III, I will isolate a class of promotional games which neither fit the classical unilateral contract model nor satisfy the requirements of traditional alternate grounds of promissory enforcement. Part IV examines more closely the marginal promotional games which do not fit the traditional unilateral contract model and explores the question of whether they present a class of promises that should be enforced. The analysis of Part IV begins with an examination of the distinction between gifts and contracts and the reasons why executory gift promises are normally not enforced. I argue that the reasons for denying enforcement to gift promises do not apply to the prize promises contained in the marginal class of promotional games and that other possible reasons for denying enforcement are similarly inadequate. After establishing that there is no good reason to deny enforcement of such prize promises, I argue that there are good reasons in favor of continuing to enforce them as a matter of contract law, provided that the traditional grounds of contractual liability are reconceptualized in the manner suggested by the contract scholarship of the past decade. Finally, Part V briefly explores the form that legal enforcement of such promises should take, assuming enforcement is desirable.

II. THE UNILATERAL CONTRACT MODEL

Perhaps one reason that promotional games and contests are classified as unilateral contracts is that they are frequently analogized to offers of rewards.[91] If a pet owner offers $50 to the person who returns her lost dog, or Sheriff Pat Garrett offers $5000 for the capture (or carcass) of Billy the Kid, the offer is not accepted by *promising* to find the dog or *promising* to bring in the outlaw. In each case, the offeror is making a promise, but the offeree must accept by performing an act other than a promise. For that reason, they are classified as unilateral contracts.

Intuitively, the conditional offers to award prizes in the sample cases described in Part I resemble the reward offers made by the pet owner and the sheriff. Any contestant who claimed entitlement to Hollywood Park's million dollar prize on the grounds that he or she had *promised* to predict the winners of nine horse races would no doubt have been greeted with richly-deserved derision. The same would be true of anyone who claimed a van from Kraft by virtue of a promise to find the matching halves of its picture. If this apparent similarity between promotional games and reward offers is to be confirmed, however, it is necessary to describe the features of the classical[92] unilateral contract in more detail.

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91. Waite v. Press Publishing Ass'n, 155 F. 58 (1907); *Lucas*, 25 Cl. Ct. 298; *Minton*, 36 App. D.C. 137; Jackson v. Investment Corp. of Palm Beach, 585 So. 2d 949 (Fla. Ct. App. 1991); *Groves*, 57 N.E.2d 507; *St. Peter*, 291 N.W. 164; *Scott*, 228 N.W. 263; *Woods*, 588 So. 2d 1196; *Schreiner*, 68 So. 2d 149; *Rural Weekly Co.*, 217 N.W. 345; *Las Vegas Hacienda, Inc.*, 359 P.2d 85; *Johnson*, 450 N.Y.S.2d 980; *Grove*, Inc. 240 N.W.2d 853; *First Tex. Savings Ass'n*, 705 S.W.2d 390; *Davidson*, 116 P. 18.

92. In speaking of the "classical" theory of contract, I refer to the general theory of contract that developed in the Nineteenth and early Twentieth Centuries and that Gilmore

A. Offeror Control over Contract Formation

A central tenet of the "classical" theory of contract is that the offeror is master of the offer.[93] The offeror decides whether acceptance must take the form of a promise or some other act, and thereby decides whether the contract is bilateral or unilateral.[94] The offeror of a reward or the sponsor of a promotional game thus has the power to determine which acts, or series of acts, constitute acceptance. In order to make a valid acceptance and form a contract, the offeree must satisfy what has been called the "mirror image rule."[95] The offeree must perform precisely the acts specified in the offer (or, at least enough of them to constitute "substantial performance").[96] Material

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attributes to Langdell, Holmes and Williston. *See* GRANT GILMORE, THE DEATH OF CONTRACT (1974). For views similar to Gilmore's, but much more extensively documented and dating the classical period somewhat differently, *see* P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979).

93. *See* E. ALLAN FARNSWORTH, CONTRACTS § 3.12, at 144 (2d ed. 1990). Cases generally illustrating the degree of offeror control in the context of competitions, contests and games include Tilley v. Cook County, 103 U.S. 155, 160–61 (1880); Waible v. McDonald's Corp., 935 F.2d 924 (8th Cir. 1991); Bunting v. Atlantic Ref. & Mktg. Corp., 1991 WL 160927 (E.D. Pa. Aug. 15, 1991); National Amateur Bowlers, Inc. v. Tassos, 715 F. Supp. 323 (D. Kan. 1989); Younker v. Disabled Am. Veterans Serv. Found., 137 F. Supp. 407 (E.D.N.Y. 1954); Furgiele v. Disabled Am. Veterans Serv. Found., 116 F. Supp. 375 (S.D.N.Y. 1952), *aff'd* 207 F.2d 957 (2d Cir. 1953); *Lucas*, 25 Cl. Ct. 298; Millsaps v. Urban, 171 S.W. 1198, 1199 (Ark. 1914) (dictum); Winston v. National Broadcasting Co., Inc., 282 Cal. Rptr. 498 (Cal. Ct. App. 1991); Lamb v. U.S. Sales Corp. 390 S.E.2d 440 (Ga. Ct. App. 1990); *Groves*, 57 N.E.2d at 509 ("The defendant had a right to attach such conditions to the offer of reward as it saw fit, and require the terms to be strictly complied with."); *Scott*, 228 N.W. at 265 ("one desiring to offer a reward may fix *his own terms and conditions.*"); Seale–Lily Ice Cream Co. v. Buck, 15 So. 2d 213 (Miss. 1943); Estlow v. New Hampshire Sweepstakes Comm'n, 449 A.2d 1212.(N.H. 1982); Milich v. Schenley Indus., Inc., 387 N.Y.S.2d 641 (N.Y. App. Div. 1976); Quinones v. Gem Collectors Int'l., Ltd., 459 N.Y.S.2d 684 (N.Y. Sup. Ct. 1983); Endres v. Buffalo Auto. Dealers Ass'n., Inc. 217 N.Y.S.2d 460 (N.Y. Sup. Ct. 1961); Myles v. WAVI Broadcasting Corp., 1981 WL 2892 (Ohio App. Aug. 19, 1981); *Grove*, 240 N.W.2d at 856 ("the offeror has a right to prescribe in his offer any conditions as to time, place, quantity, mode of acceptance, or other matters which it may please him to insert in and make a part thereof ...."); Trego v. Pennsylvania Academy of Fine Arts, 3 A. 819 (Pa. 1886); *First Tex. Savings Ass'n*, 705 S.W.2d 390; Bowlerama of Tex., Inc. v. Miyakawa, 449 S.W.2d·357 (Tex. Civ. App. 1969); Walters v. National Beverages, Inc., 422 P.2d 524 (Utah 1967); *Davidson*, 116 P. 18.

94. FARNSWORTH, *supra* note 93, § 3.12, at 144–45.

95. *Id.* § 3.21 at 170.

96. For cases invoking the mirror image rule (expressly or implicitly) in the context of competions, contests, and games, *see Tilley*, 103 U.S. 155; *Waible*, 935 F.2d 924; *National Amateur Bowlers, Inc.*, 715 F. Supp. 323; Simmons v. United States, 197 F. Supp. 673 (D. Md. 1961); Harlem–Irving Realty, Inc. v. Alesi, 425 N.E.2d 1354 (Ill. App. Ct. 1981); *Groves*, 57 N.E.2d 507; St. Peter v. Pioneer Theatre Corp., 291 N.W. 164 (Iowa 1940); *Scott*, 228 N.W. 263; Holt v. Rural Weekly Co., 217 N.W. 345 (Minn. 1928); *Seale–Lily Ice Cream Co.*, 15 So. 2d 213; Barker v. Lewis Publishing Co., 131 S.W. 924 (Mo. App. 1910); *Estlow*, 449 A.2d 1212; Brown v. Morrisey & Walker, Inc., 150 A. 330 (N.J. 1939); Johnson v. New York Daily News, 467 N.Y.S.2d 665 (N.Y. App. Div. 1983); *Endres*, 217 N.Y.S.2d 460; *Grove*, 240 N.W.2d 853; Southwestern Land Co. v. McCallam, 136 P. 1093 (Okla. 1913); Cope v. Hastings, 38 A. 717 (Pa. 1897); *First Tex. Savings Ass'n*, 705 S.W.2d 390; *Bowlerama of Tex., Inc.*, 449 S.W.2d 357; Holt v. Wilson, 55 S.W.2d 580 (Tex. Civ. App. 1932); Geis v. Continental Oil Co., 511 P.2d 725, 729 (Utah 1973) (dissenting opinion); *Davidson*, 116 P. 18.

deviations from the requested performance will render the purported acceptance ineffective.[97]

Promotional games and contests normally have a set of rules, and the sponsor-offeror has wide latitude in determining their content. Most significantly, the sponsor may effectively control the assessment of the adequacy of performance by providing for a panel of judges or experts and specifying that the decision of the panel as to disputed matters (such as eligibility, compliance with the rules and ranking of entries or participants) is final.[98] Such a provision is enforceable, at least in the absence of fraud, bad faith, or gross mistake.[99] The utility of such a provision is obvious in a situation like the Hollywood Park case, in which the plaintiff/contestant's compliance with the game rules is the major contested issue in his contract claim.

A somewhat more controversial aspect of the classical model of unilateral contract is the extent of the offeror's power to revoke the offer prior to acceptance. Only rarely has anyone seriously contended that the offeror of a unilateral contract is, or should be, free to revoke the offer at any time before completion of the act or acts constituting acceptance, even if those acts have commenced and amount to serious reliance on the part of the offeree.[100] The few commentators and cases supporting such a view have, of course, generated hours of classroom debate over the proper treatment of offers of money in return for a stroll across the Brooklyn Bridge when the offeror revokes while the hapless offeree is halfway to Manhattan.[101] Amusing as such discussions may continue to be, they are largely out of date. By the time of the first *Restatement of Contracts*, the prevailing opinion was that commencement

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97. FARNSWORTH, *supra* note 93, § 3.21 at 170.

98. *See Waible*, 935 F.2d 924; Gillmore v. Procter & Gamble Co., 417 F.2d 615 (6th Cir. 1969); Bunting v. Atlantic Ref. & Mktg. Corp., 1991 WL 160927 (E.D. Pa. Aug. 15, 1991); *National Amateur Bowlers Ass'n, Inc.*, 715 F. Supp. 323; Younker v. Disabled Am. Veterans Serv. Found., 137 F. Supp. 407 (E.D.N.Y. 1954); Furgiele v. Disabled Am. Veterans Serv. Found., 117 F. Supp. 375 (S.D.N.Y. 1954), *aff'd* 207 F.2d 957 (2d Cir. 1955); Baez v. Disabled Am. Veterans Serv. Found., 13 F.R.D. 330 (S.D.N.Y. 1952); Wassyng v. Disabled Am. Veterans Serv. Found., 92 F. Supp. 275 (S.D.N.Y. 1950); Minton v. F.G. Smith Piano Co., 36 App. D.C. 137 (1911); Long v. Chronicle Publishing Co., 228 P. 873 (Cal. Ct. App. 1924); *Groves*, 57 N.E.2d 507; Newmac/Bud Light Team Bass Circuit, Inc. v. Swint, 486 So. 2d 255 (La. Ct. App. 1986); Carlini v. United States Rubber Co., 154 N.W.2d 595 (Mich. Ct. App. 1967); Bridges v. Georgiana, 511 A.2d 1255 (N.J. Super. Ct. 1985); *Johnson*, 467 N.Y.S.2d 665; Milich v. Schenley Indus., Inc., 387 N.Y.S.2d 641 (N.Y. App. Div. 1976); *Endres*, 217 N.Y.S.2d 460; Trego v. Pennsylvania Academy of Fine Arts, 3 A. 819 (Pa. 1886); *Davidson*, 116 P. 18; Schmidt v. Three Lakes Chamber of Commerce, 417 N.W.2d 196 (Wis. App. 1987) (text in WESTLAW).

99. *See* cases cited *supra* note 98. *See also* McInnes v. Publishers Serv. Co., 174 F.2d 647 (2d Cir. 1949) (contest judges' decision upheld without citation to specific contest rule); Groves v. Byrnes, 231 N.W. 926 (Minn. 1930) (same). *But see* Jones v. Fowler, 185 So. 40 (La. Ct. App. 1938) (rule giving one party absolute power over judgment of performance unenforcible potestative condition); Ritz v. News Syndicate Co., 183 N.Y.S.2d 850 (N.Y. App. Div. 1959) (rule making judges' decision final normally enforced, but jury question presented if judge fails to decide); *Long*, 228 P. 873 (contest sponsor may not reserve discretion to decide questions of law); *Holt*, 55 S.W.2d 580.

100. The best-known statement of the strict view is I. Maurice Wormser, *The True Conception of Unilateral Contracts*, 26 YALE L.J. 136 (1916).

101. Professor Farnsworth has called Wormser's Brooklyn Bridge hypothetical "the most durable and influential hypothetical in American legal education." FARNSWORTH, *supra* note 93 § 3.24 at 191.

of performance by the offeree bound the offeror, at least conditionally,[102] and the *Restatement (Second) of Contracts* preserves the result, if not the language, of its predecessor.[103] The generally favorable reception[104] accorded the *Restatement* view of the matter should lead one to expect that, in most cases, the offeror's unilateral power of revocation is quite limited once the offeree commences the acts which constitute acceptance.

Nevertheless, Professor Farnsworth suggests that there may be an extremely narrow range of transactions that still fit the model of the old-fashioned, fully revocable offer of a unilateral contract. If a real property owner enters into an "open" (that is, non-exclusive) brokerage arrangement with more than one broker, he is not bound to pay a commission to anyone except the broker who arranges the sale, and even extensive efforts by the other, unsuccessful brokers go uncompensated.[105] Offers of rewards are arguably governed by the same principle.[106] If it is implicitly understood by the parties to a non-exclusive brokerage that only success is to be compensated and efforts to perform are at the brokers' own risk, perhaps it can be said that those who seek to capture Billy the Kid do so at their own risk and can claim no reward until successful. Nothing short of complete success seems to do either the property owner or the sheriff any good, and so perhaps each should have the full power of revocation asserted in classical theory, even if other offerors of unilateral contracts should not.

As a practical matter, the extent of the power to revoke held by the offeror of a unilateral contract remains uncertain in the reward context and, therefore, in the context of promotional games. There are older cases involving promotional games in which a full power of revocation is asserted or implied.[107] On the other hand, the drafters of the *Restatement (Second) of Contracts* section 45 clearly intended it to apply to offers of reward and to subscription contests[108] and therefore would presumably extend it to promotional games as well.[109] The significance of the ambiguity is obvious. Both

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102. RESTATEMENT OF CONTRACTS § 45 (1932).

103. RESTATEMENT (SECOND) OF CONTRACTS § 45 (1979).

104. *See* FARNSWORTH, *supra* note 93, § 3.24.

105. FARNSWORTH, *supra* note 93, § 3.24, at 196.

106. Professor Farnsworth does not expressly embrace the view that rewards should be treated the same as open real estate listings and effectively removed from the operation of RESTATEMENT (SECOND) § 45. He considers it unlikely that a reward offer will be revoked prior to completion of acceptance because of the difficulty of revoking offers communicated generally to a wide audience, and for that reason, he considers the problem to be of little significance. FARNSWORTH, *supra* note 93 § 3.24 at 195. To the extent promotional games and contests are assimilated to reward cases, however, there are grounds to disagree with his assessment of the practical importance of the issue. To return to the examples discussed in Part I, both Beatrice and Kraft made attempts to cancel their respective promotions after participation by consumers had commenced but before participation was complete.

107. *See, e.g.*, Minton v. F.G. Smith Piano Co., 36 App. D.C. 137, 146 (1911); Cope v. Hastings, 38 A. 717, 719–20 (Pa. 1897).

108. *See* RESTATEMENT (SECOND) OF CONTRACTS § 45 cmt. d, illus. 4 & 5 (1979). *See also* Lucas v. United States, 25 Cl. Ct. 298 (1992) (citing § 45 with approval in context of competition).

109. In a few of the early subscription contest cases, the courts reached results consistent with RESTATEMENT (SECOND) § 45 by limiting the sponsor's capacity to close the contest early or to change its rules. *See, e.g.*, Hertz v Montgomery Journal Publishing Co., 62 So. 564 (Ala. 1913); Youngblood v. Daily and Weekly Signal Tribune, 131 So. 604 (La. App. 1930); Mooney v. Daily News Co. of Minneapolis, 133 N.W. 573 (Minn. 1911).

Beatrice and Kraft, in the examples discussed in Part I, attempted to cancel promotions after they had begun but before contestants had an opportunity to complete performance. But for the fact of settlement in each case, millions could have turned on the extent of the power of revocation.

B. Consideration

Today, no one believes that the so-called "requirement" of bargain consideration is truly a necessary condition of contractual liability.[110] Indeed, it may be that no one ever really accepted all the implications of such a view.[111] It is equally obvious, however, that satisfaction of the "requirement" of bargain consideration is normally a sufficient condition of contractual liability, absent some other defense.[112] Traditionally, promotional games and contests have been regarded as falling within the class of enforceable promises because they involve genuine bargains.

It is important to notice, however, a potentially serious source of confusion in the role played by the doctrine of consideration in cases involving promotional games. The largest single category of reported decisions on promotional games, contests and sweepstakes consists of cases in which the dispositive issue was whether the promotional device in question constituted a lottery prohibited under state law. Many of these cases were actual criminal prosecutions for conducting or abetting a lottery.[113] Others were declaratory

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110. The RESTATEMENT (SECOND) OF CONTRACTS lists nine separate categories of promises which are, or may be, enforceable even in the absence of tradtional bargain consideration. RESTATEMENT (SECOND) OF CONTRACTS § 82–90 (1981).

111. *See* GRANT GILMORE, THE DEATH OF CONTRACT 18 (1974) (suggesting that the classical theory of contract may never have existed outside the classrooms of Harvard Law School).

112. Indeed, John Dawson has argued that the disrepute into which the doctrine of consideration has fallen is a result of its acquisition of three superfluous "functions" (specifically, the preexisting duty rule, the full revocability of offers and the doctrine of mutuality of obligation). It was his view that, if "these useless appendages" were "stripped away," consideration doctrine

> would then express more clearly an idea that has been accepted for centuries in Anglo-American law: that a sufficient reason for enforcing a promise is that it is part of an agreed exchange which would enable each party to secure from the other an act or result that he sought. There are other exceptional reasons for enforcing promisies, but this is overwhelmingly the normal one.

JOHN P. DAWSON, GIFTS AND PROMISES 220–21 (1980).

113. Clark v. State, 80 So. 2d 308 (Ala. Ct. App. 1954); Yellow-Stone Kit v. State, 7 So. 338 (Ala. 1890); *Ex parte* Gray, 23 Ariz. 461, 204 P. 1029 (1922) (habeas corpus); People v. Cardas, 28 P.2d 99 (Cal. App. Dep't Super. Ct. 1933); People v. Hecht, 3 P.2d 399 (Cal. App. Dept. Super. Ct. 1931); Bills v. People 157 P.2d 139 (Col. 1945); Cross v. People, 32 P. 821 (Col. 1893); State v. Eckerd's Suburban, Inc. 164 A.2d 873 (Del. 1960); Blackburn v. Ippolito, 156 So. 2d 550 (Fla. Ct. App. 1963) (habeas corpus); Tierce v. State, 178 S.E.2d 913 (Ga. Ct. App. 1970); People v. Eagle Food Ctrs., Inc., 202 N.E.2d 473 (Ill. 1964); People v. Schaeffer, 194 S.E.2d 804 (Ill. App. Ct. 1963); State v. Bussiere, 154 A.2d 702 (Me. 1959); ACF Wrigley Stores, Inc. v. Olsen, 102 N.W.2d 545 (Mich. 1960); People v. Brundage, 150 N.W.2d 825 (Mich. Ct. App. 1967), *rev'd* 162 N.W.2d 659 (Mich. 1968); State v. Moren, 51 N.W. 618 (Minn. 1892); State v. McEwan, 120 S.W.2d 1098 (Mo. 1938); State v. Eames, 183 A. 590 (N.H. 1936); People v. Shafer, 289 N.Y.S. 649 (Monroe County Ct. 1936); People v. Mail & Express Co., 179 N.Y.S. 640 (N.Y. City Ct. 1919); People v. Psallis, 12 N.Y.S.2d 796 (N.Y. Mag. Ct. 1939); State v. Big Chief Corp. 13 A.2d 236 (R.I. 1940); Brice v. State, 242 S.W.2d 433 (Tex. Crim. App. 1951); Smith v. State, 127 S.W.2d 297 (Tex. Crim. App. 1939); State v. Danz, 250 P. 37 (Wash. 1926); State v. Hudson, 37 S.E.2d 553 (W. Va. 1946); State v. Laven, 71 N.W.2d 287 (Wis. 1955). *See also* Marco Sales Co. v. FTC, 453 F.2d 1 (2d

judgment actions, apparently designed to forestall criminal prosecution.[114] In others, a contestant suing for a prize (or its value) was met by a defense that the contract upon which he or she sued was illegal because it was properly classified as a lottery.[115]

Cir. 1971) (review of FTC cease and desist order); Wren Sales Co. v. FTC, 296 F.2d 456 (7th Cir. 1961) (same); Pepsi Cola Bottling Co. of Luverne, Inc. v. Coca-Cola Bottling Co., Andalusia, 534 So. 2d 295 (Ala. 1988) (review of contempt citation for violation of injunction); California Gasoline Retailers v. Regal Petroleum Corp. of Fresno, 330 P.2d 778 (Cal. 1958) (suit for injunction against violation of Unfair Trade Practices Act, laws against misleading advertising, and lottery laws); Jones v. Smith Oil & Ref. Co., 15 N.E.2d 42 (Ill. App. Ct. 1938) (suit by competitor to enjoin alleged lottery); State *ex rel.* Frizzell v. Highwood Serv., Inc., 473 P.2d 97 (Kan. 1970) (suit by state attorney general to enjoin alleged lottery); Beck v. Fox Kan. Theatre Co. 62 P.2d 929 (Kan. 1936) (suit by state attorney general to enjoin corporation from doing business in Kansas due to abuse of corporate franchise); Glover v. Malloska, 213 N.W. 107 (Mich. 1927) (civil suit to enjoin alleged lottery); State v. Powell, 212 N.W. 169 (Minn. 1927) (suit to enjoin operation of alleged lottery); R.J. Williams Furniture Co. v. McComb Chamber of Commerce, 112 So. 579 (Miss. 1927) (civil suit to enjoin operation of alleged lottery); State v. Cox, 349 P.2d 104 (Mont. 1960) (suit by state attorney general to enjoin alleged lottery); State v. Grant, 75 N.W.2d 611 (Neb. 1956) (suit by county attorney to enjoin alleged lottery); United Stations of N.J. (US) v. Getty Oil Co., 246 A.2d 150 (N.J. Super. Ct. 1968) (action by competitor to enjoin allegedly illegal scheme); Kraus v. City of Cleveland, 94 N.E.2d 814 (Ohio Ct. Comm. Pl. 1950) (taxpayer's suit to enjoin administration of bingo licensing scheme); Knox Indus. Corp. v. State, 258 P.2d 910 (Okla. 1953) (suit to enjoin alleged lottery); State v. Socony Mobil Oil Co., 386 S.W.2d 169 (Tex. Civ. App. 1964) (suit to enjoin alleged lottery); Featherstone v. Independent Serv. Station Ass'n of Tex., 10 S.W.2d 124 (Tex. Civ. App. 1928) (civil suit to enjoin operation of lottery); State v. Reader's Digest Ass'n, Inc., 501 P.2d 290 (Wash. 1972) (suit by attorney general for declaratory judgment and injunction).

114. Finster v. Keller, 96 Cal. Rptr. 241 (Cal. Ct. App. 1971); Idea Research & Dev. Corp. v. Hultman, 131 N.W.2d 496 (Iowa 1964); Midwest Television, Inc. v. Waaler, 194 N.E.2d 653 (Ill. App. Ct. 1963); Mobil Oil Corp. v. Attorney Gen., 280 N.E.2d 406 (Mass. 1972); Mobil Oil Corp. v. Danforth, 455 S.W.2d 505 (Mo. 1970); Lucky Calendar Co. v. Cohen, 117 A.2d 487 (N.J. 1955), *rev'd* 117 A.2d 487 (N.J. 1955), *on reh'g*, 120 A.2d 107 (1956); Journal Square Merchants Ass'n v. McNamara, 117 A.2d 498 (N.J. 1955); Cudd v. Aschenbrenner, 377 P.2d 150 (Ore. 1962); Albertson's Inc. v. Hansen, 600 P.2d 982 (Utah 1979); Seattle Times Co. v. Tielsch, 495 P.2d 1366 (Wash. 1972); State *ex rel.* Schillberg v. Safeway Stores, Inc., 450 P.2d 949 (Wash. 1969); Kayden Indus., Inc. v. Murphy, 150 N.W.2d 447 (Wis. 1967); Coca-Cola Bottling Co. of Wisconsin v. La Follette, 316 N.W.2d 129 (Wis. Ct. App. 1982); *See also* FCC v. American Broadcasting Co., 347 U.S. 284 (1954) (challenge to regulations interpreting criminal statute); Caples Co., v. United States, 243 F.2d 232 (D.C. Cir. 1957) (appeal of ruling on application for declaratory relief before Federal Communications Commission); Opinion of the Justices, 397 So. 2d 546 (Ala. 1981) (question certified by legislature to state supreme court); Minges v. City of Birmingham, 36 So. 2d 93 (Ala. 1948) (suit to enjoin arrest for violation of lottery laws); G.A. Carney, Ltd. v. Brzeczek 453 N.E.2d 756 (Ill. App. Ct. 1983) (suit to enjoin arrest for violation of lottery laws); Mid-Atlantic Coca-Cola Bottling Co., Inc. v. Chen, Walsh & Tecler, 460 A.2d 44 (Md. 1983) (declaratory judgment action against purchasers seeking civil penalties for violation of lottery law); Goodwill Advertising Co. v. State Liquor Authority, 244 N.Y.S.2d 322 (N.Y. Sup. Ct. 1962) (suit for declaratory judgment that scheme did not violate liquor regulations); Carl Co. v. Lennon, 148 N.Y.S. 375 (N.Y. Sup. Ct. 1914) (suit to enjoin arrest for violation of lottery laws); Kroger Co. v. Cook, 244 N.E.2d 790 (Ohio Ct. App. 1968), *aff'd* 265 N.E.2d 780 (Ohio 1970) (action for declaratory judgment construing liquor regulations); Wishing Well Club, Inc. v. City of Akron, 112 N.E.2d 41 (Ohio Ct. Comm. Pl. 1951) (action to enjoin arrest for bingo operation); Society Theater v. City of Seattle, 203 P. 21 (Wash. 1922) (suit to enjoin interference by city officers).

115. Waite v. Press Publishing Ass'n, 155 F. 58 (6th Cir. 1907); Dorman v. Publix-Saenger-Sparks Theatres, Inc., 184 So. 886 (Fla. 1938); Standridge v. Williford-Burns-Rice Co., 96 S.E. 498 (Ga. 1918); Boyd v. Piggly Wiggly S., Inc., 155 S.E.2d 630 (Ga. Ct. App. 1967); Winn-Dixie Stores, Inc. v. Boatright, 155 S.E.2d 642 (Ga. Ct. App. 1967); St. Peter v. Pioneer Theatre Corp., 291 N.W. 164 (Iowa 1940); Hardy v. St. Matthew's Community Ctr.,

While there are some minor local variations in the definition of a "lottery," virtually all of the lottery cases identify three constitutive elements. First, a prize of some sort must be available for disposition. Second, the disposition must depend, at least in part, upon chance. Third, participants must supply some form of consideration for the chance to win the prize. The recitation of this three-part test for a lottery—prize, chance and consideration—is probably the most frequently recurring feature of cases involving promotional games and similar devices.[116] Most frequently, the critical and controversial

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240 S.W.2d 95 (Ky. Ct. App. 1951); Doskey v. United Theatres, Inc., 11 So. 2d 276 (La. Ct. App. 1943); Shanchell v. Lewis Amusement Co., Inc., 171 So. 426 (La. Ct. App. 1936); Leonard v. Pennypacker, 89 A. 26 (N.J. 1913); Harris v. Economic Opportunity Comm'n of Nassau County, Inc., 575 N.Y.S.2d 672 (N.Y. App. Div. 1991); Hoff v. Daily Graphic, Inc., 230 N.Y.S. 360 (N.Y. Sup. Ct. 1928); Shapiro v. Prudential Theaters, 328 N.Y.S.2d 28 (Nassau County Dist. Ct. 1972); Simmons v. Randforce Amusement Corp., 293 N.Y.S. 745 (N.Y. Mun. Ct. 1937); Finch v. Rhode Island Grocers Ass'n, 175 A.2d 177 (R.I. 1961); Geis v. Continental Oil Co., 511 P.2d 725 (Utah 1973); Maughs v. Porter, 161 S.E. 242 (Va. 1931); Williams v. Weber Mesa Ditch Extension Co., Inc., 572 P.2d 412 (Wyo. 1977). *See also* Youngblood v. Bailey, 459 So. 2d 855 (Ala. 1984) (fraud suit by original purchasers of raffle ticket against second purchaser); Holmes v. Saunders, 250 P.2d 269 (Cal. Ct. App. 1952) (conversion action, illegality defense); Bloodworth v. Gay, 96 S.E.2d 602 (Ga. 1957) (suit by one raffle participant against another under agreement to pool tickets and share proceeds); Kelly v. Banda, 157 S.E.2d 782 (Ga. Ct. App. 1967) (suit to recover on contract to share contest proceeds); Dennis v. Weaver, 121 S.E.2d 190 (Ga. Ct. App. 1961) (trover action brought by alleged true owner of winning ticket against boyfriend); Dion v. St. John Baptiste Society, 19 A. 825 (Me. 1890) (suit to recover money expended in allegedly illegal lottery); Amlie Strand Hardware v. Moose, 224 N.W. 158 (Minn. 1929) (action in replevin by contest sponsor to recover prize allegedly delivered to wrong contestant); Valentin v. El Diario La Prensa, 427 N.Y.S.2d 185 (N.Y. Civ. Ct. 1980) (action for rescission); Rountree v. Ingle, 77 S.E. 931 (S.C. 1913) (replevin action, illegality defense); Cuffman v. Blunkall 124 S.W.2d 289 (Tenn. App. 1938) (replevin action by alleged prizewinner against agent holding prize); Blair v. Lowham, 276 P. 292 (Utah 1929) (conversion action by one raffle participant against another under agreement to pool tickets and share proceeds).

116. FCC v. American Broadcasting Co., 347 U.S. 284 (1954); Marco Sales Co. v. FTC, 453 F.2d 1 (2d Cir. 1971); *Caples Co.*, 243 F.2d 232; *Pepsi Cola Bottling Co. of Luverne, Inc.*, 534 So. 2d 295; *Youngblood*, 459 So. 2d 855; *Opinion of the Justices*, 397 So. 2d 546; *Minges*, 36 So. 2d 93; *Clark*, 80 So. 2d 308; *Gray*, 23 Ariz. 461, 204 P. 1029; *California Gasoline Retailers*, 330 P.2d 778; *Finster*, 96 Cal. Rptr. 241; *Holmes*, 250 P.2d 269; *Cardas*, 28 P.2d 99; *Hecht*, 3 P.2d 399; *Bills*, 157 P.2d 139; *Eckerd's Suburban, Inc.*, 164 A.2d 873; *Dorman*, 184 So. 886; *Blackburn*, 156 So. 2d 550; *Tierce*, 178 S.E.2d 913; *Boyd*, 155 S.E.2d 630; *Eagle Food Ctrs., Inc.*, 202 N.E.2d 473; Midwest Television, Inc. v. Waaler, 194 N.E.2d 653 (Ill. App. Ct. 1963); *Idea Research & Dev. Corp.*, 131 N.W.2d 496; *St. Peter*, 291 N.W. 164; *Highwood Serv., Inc.*, 473 P.2d 97; *Beck*, 62 P.2d 929; *Shanchell*, 171 So. 426; *Bussiere*, 154 A.2d 702; *Mid-Atlantic Coca-Cola Bottling Co., Inc.*, 460 A.2d 44; *Mobil Oil Corp. v. Attorney Gen.*, 280 N.E.2d 406; *ACF Wrigley Stores, Inc.*, 102 N.W.2d 545; *Glover*, 213 N.W. 107; *Brundage*, 150 N.W.2d 825; *Amlie Strand Hardware Co.*, 224 N.W. 158; *Powell*, 212 N.W. 169; *Moren*, 51 N.W. 618; *R.J. Williams Furniture Co.*, 112 So. 579; *Mobil Oil Corp. v. Danforth*, 455 S.W.2d 505; *McEwan*, 120 S.W.2d 1098; *Cox*, 349 P.2d 104; *Grant*, 75 N.W.2d 611; *Eames*, 183 A. 590; United Stations of N.J. (US) v. Kingsley, 240 A.2d 702 (N.J. Super. Ct. 1968); *Lucky Calendar Co.*, 115 A.2d 603; *Harris*, 575 N.Y.S.2d 672; *Goodwill Advertising Co.*, 244 N.Y.S.2d 322; *Carl Co.*, 148 N.Y.S. 375; *Shafer*, 289 N.Y.S. 649; *Valentin*, 427 N.Y.S.2d 185; *Mail & Express Co.*, 179 N.Y.S. 640; *Psallis*, 12 N.Y.S.2d 796; Stevens v. Cincinnati Times–Star Co., 73 N.E. 1058 (Ohio 1905); *Kroger Co.*, 244 N.E.2d 790; *Wishing Well Club*, 112 N.E.2d 41; *Kraus*, 94 N.E.2d 814; *Knox Indus. Corp.*, 258 P.2d 910; *Cudd*, 377 P.2d 150; *Big Chief Corp.*, 13 A.2d 236; *Socony Mobil Oil Co.*, 386 S.W.2d 169; *Brice*, 242 S.W.2d 433; *Smith*, 127 S.W.2d 297; *Featherstone*, 10 S.W.2d 124; *Albertson's, Inc.*, 600 P.2d 982; *Geis*, 511 P.2d 725; *Maughs*, 161 S.E. 242; *Reader's Digest Ass'n, Inc.*, 501 P.2d 290; *Seattle Times Co.*, 495 P.2d 1366;

question in such cases is whether the third element—consideration—is present. Courts facing that question have produced a clear division of authority. On the one hand, there is a significant number of cases in which courts state or imply that any promotional scheme in which consideration sufficient to support a "simple contract" is present will qualify as a lottery.[117] Accordingly, such schemes are unenforceable by participants on grounds of illegality, and criminal prosecution is possible. In other cases, courts conclude that the only promotional schemes deserving of condemnation as lotteries are those in which participants supply "valuable" or "pecuniary" consideration,[118] i.e., money or something worth money.[119] Under the latter view, at least some promotional schemes can qualify as contracts without falling under the condemnation of the criminal lottery statutes because "simple contract" consideration need not have a readily ascertainable monetary value.

The choice between the two possible interpretations of the "consideration" element of the lottery offense is irrelevant to the task of this article. The problem with true lotteries is not that they are not contracts, but that they are, in the opinion of some, particularly naughty or pernicious contracts, and should therefore be denied enforcement. I am interested in the entirely separate question of whether contractual treatment is appropriate for promotional games and similar devices, and it is regrettable that such devices are most frequently analyzed in lottery cases. The lottery context creates the potential for distortion because courts in lottery cases frequently devote most of their efforts to deciding whether to adopt the "simple contract" interpretation or the more restrictive "pecuniary" interpretation of the "consideration" element of the lottery offense. In so doing, they typically neglect to make any detailed inquiry into whether the particular promotional devices before them really satisfy the traditional standards of the (purely contractual) bargain the-

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Safeway Stores, Inc., 450 P.2d 949; *Danz*, 250 P. 37; Society Theater v. City of Seattle, 203 P. 21 (Wash. 1922); *Hudson*, 37 S.E.2d 553; *Laven*, 71 N.W.2d 287; *Coca-Cola Bottling Co. of Wisconsin*, 316 N.W.2d 129; *Williams*, 572 P.2d 412.

117. *See Eckerd's Suburban, Inc.*, 164 A.2d 873; *Blackburn*, 156 So. 2d 550; *Boyd*, 155 S.E.2d 630; *Midwest Television, Inc.*, 194 N.E.2d 653; *Idea Research & Dev. Corp.*, 131 N.W.2d 496; State *ex rel.* Glendinning Cos. of Conn., Inc. v. Letz, 591 S.W.2d 92 (Mo. Ct. App. 1979); *Grant*, 75 N.W.2d 611; *Lucky Calendar Co.*, 117 A.2d 487; *Knox Indus. Corp.*, 258 P.2d 910; *Albertson's, Inc.*, 600 P.2d at 988 (dissenting opinion); *Geis*, 511 P.2d 725; *Maughs*, 161 S.E. 242; *Reader's Digest Ass'n, Inc.*, 501 P.2d 290; *Seattle Times Co.*, 495 P.2d 1366; *Safeway Stores, Inc.*, 450 P.2d 949. *See also Dorman*, 184 So. 886 (reviewing early cases).

118. *See Opinion of the Justices*, 397 So. 2d 546; Yellow-Stone Kit v. State, 7 So. 338 (Ala. 1890); *Clark*, 80 So. 2d 308; *California Gasoline Retailers*, 330 P.2d 778; *Cardas*, 28 P.2d 99; Cross v. People, 32 P. 821 (Col. 1893); *Eagle Food Ctrs., Inc.*, 202 N.E.2d 473; *St. Peter*, 291 N.W. 164; *Highwood Serv., Inc.*, 473 P.2d 97; *Bussiere*, 154 A.2d 702; *Mid-Atlantic Coca-Cola Bottling Co., Inc.*, 460 A.2d 44; *Mobil Oil Corp. v. Attorney Gen.*, 280 N.E.2d 406; *ACF Wrigley Stores, Inc.*, 102 N.W.2d 545; *Eames*, 183 A. 590; *Goodwill Advertising Co.*, 244 N.Y.S.2d 322; *Shafer*, 289 N.Y.S. 648; *Mail & Express Co.*, 179 N.Y.S. 640; *Cudd*, 377 P.2d 150; *Big Chief Corp.*, 13 A.2d 236; *Albertson's Inc.*, 600 P.2d 982.

119. The basis for the stiffer "pecuniary consideration" standard may be the peculiar language of a state lottery statute, the view that criminal prosecution should require a strict construction of the relevant statute or a heightened burden of proof, or the view that the policy basis for the prohibition of lotteries is the potential for impoverishment of participants. *See* cases cited *supra* note 117.

ory of consideration. The most interesting issue for purposes of this article is thus poorly treated—or simply assumed away—in such cases.

The bargain theory of consideration, which is part of the unilateral contract model used to conceptualize promotional games, is simpler, at least in standard instances. To say that bargain consideration is present is to imply that the transaction at issue is an exchange, not a pure gift.[120] An important qualification, however, is that the exchange need not be an exchange of equivalents.[121] Lop-sided exchanges count as instances of "consideration," and some cases involving promotional games contain language suggestive of the "peppercorn" theory of consideration.[122] In addition, the classic instances of traditional concept of consideration include an element of mutual inducement. Each side of the exchange is offered or given to induce the other. In a number of cases involving promotional games, courts have articulated or assumed this feature of the bargain theory.[123]

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120. *See* FARNSWORTH, *supra* note 93, § 2.5.

121. *Id.* at § 2.11.

122. Robertson v. United States, 343 U.S. 711 (1952); United States v. Amirikian, 197 F.2d 442 (4th Cir. 1952); State v. Eckerd's Suburban, Inc., 164 A.2d 873 (Del. 1960); Dorman v. Publix–Saenger–Sparks Theatres, Inc., 184 So. 886 (Fla. 1938); Blackburn v. Ippolito, 156 So. 2d 550 (Fla. Ct. App. 1963); Tierce v. State, 178 S.E.2d 913, 916 (Ga. Ct. App. 1970) (concurring opinion); Midwest Television, Inc. v. Waaler, 194 N.E.2d 653 (Ill. App. Ct. 1963); Idea Research & Dev. Corp. v. Hultman, 131 N.W.2d 496 (Iowa 1964); *St. Peter*, 291 N.W. 164; State *ex rel.* Glendinning Cos. of Connecticut, Inc., 591 S.W.2d 92 (Mo. Ct. App. 1979); State v. Grant, 75 N.W.2d 611 (Neb. 1956); Lucky Calendar Co. v. Cohen, 117 A.2d 487 (N.J. 1955); Simmons v. Randforce Amusement Corp., 293 N.Y.S. 745 (N.Y. Mun. Ct. 1937); Great Atl. & Pac. Tea Co., Inc. v Cook, 240 N.E.2d 114 (Ohio Ct. Comm. Pl. 1968), *aff'd sub nom.* Kroger Co. v. Cook, 244 N.E.2d 790 (Ohio Ct. App. 1968), *aff'd* 265 N.E.2d 780 (Ohio 1970); Knox Indus. Corp. v. State, 258 P.2d 910 (Okla. 1953); *Cudd*, 377 P.2d 150 (dictum); Cobaugh v. Klick–Lewis, Inc., 561 A.2d 1248 (Pa. Super. Ct. 1989); *Albertson's Inc.*, 600 P.2d at 993 (dissenting opinion); State v. Reader's Digest Ass'n, Inc., 501 P.2d 290 (Wash. 1972); State *ex rel.* Schillberg v. Safeway Stores, Inc., 450 P.2d 949 (Wash. 1969).

123. *See* Fernandez v. Fahs, 144 F. Supp. 630, 631 (S.D. Fla. 1956) (no consideration given by attending ball game where participant in drawing would have done so even in absence of drawing); Lawton v. United States, 144 F. Supp. 638, 640 (E.D. Va. 1956) (holding prize to be a gift based on analysis of winner's motives); Robertson v. United States, 93 F. Supp. 660, 662 (D. Utah 1950) (holding prize in music composition competition to be a gift based on analysis of motives of winner and sponsor), *rev'd* 190 F.2d 680 (10th Cir. 1951), *aff'd* 343 U.S. 711 (1952); Yellow–Stone Kit v. State, 7 So. 338, 339 (Ala. 1890) (where tickets for prize drawing distributed free, mere expectation of drawing larger crowd or selling more products too "remote" to constitute consideration); Clark v. State, 80 So. 2d 308, 310 (Ala. Ct. App. 1954) (rejecting "indirect" and "remote" benefits as consideration); California Gasoline Retailers v. Regal Petroleum Corp. of Fresno, 330 P.2d 778, 786 (Cal. 1958) (finding no consideration where participants could receive game tickets free, even though many made purchases); People v. Cardas, 28 P.2d 99, 100–01 (Cal. App. Dept. Super. Ct. 1933) (same); Cross v. People, 32 P. 821, 822 (Col. 1893) (rejecting remote benefits as consideration); *Dorman*, 184 So. at 888–89 (quoting Williston's "tramp hypothetical"); *Idea Research & Dev. Corp.*, 131 N.W.2d at 502 (dissenting opinion); *St. Peter*, 291 N.W. at 169 ("Of course, it is fundamental that the act which is asserted as the consideration for acceptance and performance of a unilateral contract must be an act which the party sought to be bound bargained for, and the acts must have been induced by the promise made."); Mobil Oil Corp. v. Attorney Gen., 280 N.E.2d 406, 411 (Mass. 1972) (indirect benefit to one conducting game is not a "price"); *Lucky Calendar Co.*, 117 A.2d at 495 ("That is consideration which is regarded as such by the parties."); People v. Mail & Express Co., 179 N.Y.S. 640, 645 (N.Y. City Ct. 1919) (finding no consideration for prize drawing where neither obtaining ticket nor monitoring winning numbers required purchase of newspaper); *Kroger Co.*, 244 N.E.2d 790 (fact that behavior is predictable response does not establish that it was bargained for); *Cudd*, 377 P.2d at 156 ("the

C. Post-Formation Aspects of the Unilateral Contract

The unilateral contract model usually used to classify and interpret promotional games has the standard post-acceptance features. Most obviously, acceptance puts an end to the offeror's power to revoke.[124] Moreover, any change in the terms of a unilateral contract must meet the normal requirements for contractual modification. Thus, if a sponsor desires to change the rules of a promotional game after participants have "accepted," such rule changes must qualify as contractual modifications and, as such, must normally be consensual.[125] Finally, any refusal to perform by the sponsor must be supportable by one of the traditional contract defenses, such as fraud or mistake.[126]

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promise and the consideration must purport to be the motive each for the other, in whole or at least in part.") (quoting Justice Holmes in Wisconsin & Mich. Ry. v. Powers, 191 U.S. 379 (1903)); State v. Big Chief Corp., 13 A.2d 236 (R.I. 1940) (requiring proof of participants' motives); Brice v. State, 242 S.W.2d 433, 435 (Tex. Crim. App. 1951) (finding no consideration, even when sponsor receives a benefit, if participant is not required to confer it); *Albertson's, Inc.*, 600 P.2d at 985–86 (rejecting "indirect" consideration and noting that nothing can be consideration unless it is treated as such by both parties); Maughs v. Porter, 161 S.E. 242, 243 (Va. 1931) (quoting Williston's "tramp hypothetical"). *But see* Simmons v. United States, 197 F. Supp. 673 (D. Md. 1961) (holding prize in fishing contest not to be a gift where winner had heard of offer, even though winner's deposition testimony indicated he had just gone out for a day's fishing, not to win the prize); Reynolds v. United States, 118 F. Supp. 911 (N.D. Cal. 1954) (holding prize not to be gift in spite of winner's lack of personal knowledge of sweepstakes); Dumas v. Todd, 92 S.E.2d 265 (Ga. Ct. App. 1956) (distinguishing "motive" and "consideration"). Both *Simmons* and *Reynolds* were tax cases in which the respective taxpayers sought to avoid tax on prizes because they were classifiable as gifts, and the court in *Simmons* expressly distinguished the definition of "gift" used at common law and the definition for tax purposes. *Simmons*, 197 F. Supp. at 675.

124. *See* FARNSWORTH, *supra* note 93, § 3.3, 3.17.

125. There are a number of cases in which courts have denied the sponsor of a game, contest, or competition the power to alter its rules unilaterally once a participant has accepted the sponsor's offer. *See* Millsaps v. Urban, 171 S.W. 1198 (Ark. 1914); Harlem–Irving Realty Inc. v. Alesi, 425 N.E.2d 1354 (Ill. App. Ct. 1981); Smead v. Stearns, 155 N.W. 307 (Iowa 1915); Woods v. Morgan City Lions Club, 588 So. 2d 1196 (La. Ct. App. 1991); Schreiner v. Weil Furniture Co., 68 So. 2d 149 (La. Ct. App. 1953); Bays v. U.S. Camera Publishing Corp., 171 N.W.2d 232 (Mich. Ct. App. 1969); Mooney v. Daily News Co. of Minneapolis, 133 N.W. 573 (Minn. 1911); Hoff-v. Daily Graphic, Inc., 230 N.Y.S. 360 (N.Y. Sup. Ct. 1928); First Tex. Sav. Ass'n v. Jergins, 705 S.W.2d 390 (Tex. Ct. App. 1986); Hall v. Bean, 582 S.W.2d 263 (Tex. Civ. App. 1979); Holt V. Wilson, 55 S.W.2d 580 (Tex. Civ. App. 1932); Magruder v. Hagen–Ratcliff & Co., 50 S.E.2d 488 (W. Va. 1948). *See also* Van Gulik v. Resource Dev. Council for Alaska, Inc., 695 P.2d 1071 (Alaska 1985) (attempt to "re-do" bungled lottery invalid); Paley v. Coca Cola Co., 197 N.W.2d 478 (Mich. Ct. App. 1972) (class action arising out of purported rule change in bottle cap promotion). *But see* Hertz v. Montgomery Journal Publishing Co., 62 So. 564 (Ala. Ct. App. 1913) (any executory contract may be modified by consent, which may be implied, or by estoppel or accord and satisfaction); Long v. Chronicle Publishing Co., 228 P. 873 (Cal. Ct. App. 1924) (sponsor reserves power to amend in original rules but must give notice of change); Walters v. National Beverages Inc., 422 P.2d 524 (Utah 1967) (where original rules silent as to order of drawing, sponsor may decide order in which prizes awarded).

126. *See, e.g.*, Gold Bond Stamp Co. of Georgia v. Bradfute Corp., 463 F.2d 1158 (2d Cir. 1972) (printing error suggests mistake defense, sponsor honors prize claims to preserve public image); *Hertz*, 62 So. 564 (dictum); Jackson v. Investment Corp. of Palm Beach, 585 So. 2d 949 (Fla. Ct. App. 1991) (newspaper employee makes mistake in transcribing offer); Boyd v. Piggly Wiggly S., Inc., 155 S.E.2d 630 (Ga. Ct. App. 1967) (illegality; facts suggesting mistake defense); *Woods*, 588 So. 2d 1196 (unsuccessful assertion of defense of unilateral error); Amlie Strand Hardware Co. v. Moose, 224 N.W. 158 (Minn. 1929) (delivery of prize to wrong contestant by mistake); *Cobaugh*, 561 A.2d 1248 (unsuccessful mistake

III. CATEGORIES OF PROMOTIONAL GAMES AND SIMILAR DEVICES

One of the surprising features of an investigation of promotional games and similar schemes is the sheer volume of cases they have generated. Moreover, the length of time such devices have been used is equally surprising, at least initially.[127] Given the volume and variety of the raw materials for analysis, any attempt to classify promotional games must be provisional at best, and some overlap among categories is to be expected. Nevertheless, for purposes of analyzing the contractual aspects of such devices, it is useful to subdivide and group them according to the classification scheme described below. As each category is described, I will examine the extent to which the games in the category fit the traditional unilateral contract model discussed above. Application of the model to each succeeding category will prove progressively more difficult, until, in the final category, the traditional unilateral contract model will break down altogether.

A. Direct Money-Making Games

The easiest games to classify, and the ones that fit most readily into the traditional unilateral contract model, are the games one pays to play. The most obvious examples are games that the operator runs for his or her own profit. Casino gambling, where legal, is the paradigm case, but a variety of other amusements are reflected in the cases as well.[128] The punch

127. Commentators have suggested that the use of games of chance as sales promotion devices can be traced at least as far back as the merchants of Venice, Florence and Genoa in the Sixteenth Century. *See* 4 G. ROSDEN & P. ROSDEN, THE LAW OF ADVERTISING § 55.02 (1989).

128. *See, e.g.*, Chicago Downs Ass'n, Inc. v. Chase, 944 F.2d 366 (7th Cir. 1991) (racetrack "Super Bet"); Erickson v. Desert Palace, Inc., 942 F.2d 694 (9th Cir. 1991) (slot machine); Tavares v. Commissioner, 275 F.2d 369 (1st Cir. 1960) (Irish Sweepstakes); *Van Gulik*, 695 P.2d 1071 (lottery); State v. Takacs, 169 Ariz. 392, 819 P.2d 978 (video games and casino style games); Aguimatang v. California State Lottery, 286 Cal. Rptr. 57 (Ct. App. 1991) (state lottery); Hair v. State, 2 Cal. Rptr. 2d 871 (Ct. App. 1991) (state lottery); Finster v. Keller, 96 Cal. Rptr. 241 (Ct. App. 1971) (horseracing "pick the winners" game requiring $2 entry fee); *Jackson v. Investment Corp. of Palm Beach*, 585 So. 2d 949 (dogracing "pick the winners" game); Garland v. Isbell, 76 S.E. 591 (Ga. 1912) (horse raffle); *In re* Marriage of Mahaffey, 564 N.E.2d 1300 (Ill. App. Ct. 1990) (state lottery); Jackson v. Indiana State Lottery Comm'n, 585 N.E.2d 276 (Ind. Ct. App. 1992) (same); Alston v. Alston, 582 A.2d 574 (Md. Ct. Spec. App. 1990) (same); Ruggiero v. State Lottery Comm'n, 489 N.E.2d 1022 (Mass. Ct. App. 1986) (same); Ramirez v. Bureau of State Lottery, 475 N.W.2d 819 (Mich. 1991) (same); Miller v. Radikopf, 228 N.W.2d 386 (Mich. 1975) (Irish Sweepstakes); Coleman v. State, 258 N.W.2d 84 (Mich. Ct. App. 1977) (state lottery); State v. Two IGT Video Poker Games, 465 N.W.2d 453 (Neb. 1991) (video poker); Estlow v. New Hampshire Sweepstakes Comm'n, 449 A.2d 1212 (N.H. 1982) (state instant lottery game); Sousa v. State Sweepstakes Comm'n, 401 A.2d 1067 (N.H. 1979) (state sponsored numbers game); Kugler v. Market Dev. Corp., 306 A.2d 489 (N.J. Super. Ct. 1973) (direct mail sweepstakes requiring payment of $15 "service charge"); Ullah v. Ullah, 555 N.Y.S.2d 834 (N.Y. App. Div. 1990) (state lottery); Cochran v. Dellfava, 517 N.Y.S.2d 854 (N.Y. Mun. Ct. 1987) ("airplane" chain distribution scheme); Peters v. Ohio State Lottery Comm'n, 587 N.E.2d 290 (Ohio 1992) (state lottery); Stevens v. Cincinnati Times-Star Co., 73 N.E. 1058 (Ohio 1905) (pay-to-play vote guessing contest); *In re* Lotto Jackpot Prize, 602 A.2d 402 (Pa. Commw. Ct. 1992) (state lottery); Valente v. Rhode Island Lottery Comm'n, 544 A.2d 586 (R.I. 1988) (state lottery).

board[129] was once a popular form of petty gambling, and commercial or charitable bingo games requiring payment of admission or entry fees are not uncommon.[130] A less common variant is the promoter who "sells" small items (e.g., combs or candy) at inflated prices and then allows purchasers to play a game of chance "free."[131] One company, the American Holiday Association, operated a fairly complex word puzzle contest in which participants could compete for progressively more valuable prizes by paying progressively higher entry fees.[132] Some fishing contests requiring payment of an entry fee may fall into the same category.[133] In some of these cases, the game is not really "promotional" in any recognizable sense. The game sponsor is not selling something else by using the game; he or she is selling the game itself.

Often, however, games and contests of this kind are used as fund-raising devices by charitable or other non-profit organizations. Again, bingo is often used for this purpose.[134] The Fraternal Order of Elks seems to raise money through the use of pay-to-play golf tournaments in which prizes are offered for hitting a hole in one.[135] Perhaps the most bizarre instance of this type of game is the "gelatin jump" used as a fundraiser by an upstate New York hospital.[136] In return for an initial fee (or "contribution"), a participant was given the opportunity to ascend a ladder and jump (or, for the stout-hearted, dive) into a large tub filled with

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129. *Ex parte* Gray, 23 Ariz. 461, 204 P. 1029 (1922); State v. Hudson, 37 S.E.2d 553 (W. Va. 1946). Push cards have been used more recently as merchandising aids, rather than pure gambling devices. *See* Marco Sales Co. v. FTC, 453 F.2d 1 (2d Cir. 1971); Wren Sales Co. v. FTC, 296 F.2d 456 (7th Cir. 1961).

130. *See* United States v. Thomas, 33 M.J. 224 (C.M.A. 1991); *Woods*, 588 So. 2d 1196; David Shelton Amvets Post 60 v. Sam, 389 So. 2d 785 (La. Ct. App. 1980); Marceaux v. V.F.W. Post 2130, 337 So. 2d 923 (La. Ct. App. 1976); Wishing Well Club, Inc. v. City of Akron, 112 N.E.2d 41 (Ohio Ct. Comm. Pl. 1951); Kraus v. City of Cleveland, 94 N.E.2d 814 (Ohio Ct. Comm. Pl. 1950).

131. Animal Protection Society of Durham, Inc. v. State, 382 S.E.2d 801 (N.C. Ct. App. 1989).

132. State v. American Holiday Ass'n, Inc. 151 Ariz. 312, 727 P.2d 807 (1986); Department of Legal Affairs v. Rogers, 329 So. 2d 257 (Fla. 1976). The Disabled American Veterans Service Foundation also conducted a word puzzle contest requiring participants to pay an entry fee. Furgiele v. Disabled Am. Veterans Serv. Found., 116 F. Supp. 375 (S.D.N.Y. 1952), *aff'd* 207 F.2d 957 (2d Cir. 1953). *See also* Younker v. Disabled Am. Veterans Serv. Found., 137 F. Supp. 407 (E.D.N.Y. 1954), *aff'd* 228 F.2d 958 (2d Cir. 1955); Baez v. Disabled Am. Veterans Serv. Found., 13 F.R.D. 330 (S.D.N.Y. 1952); Wassyng v. Disabled Am. Veterans Serv. Found., 92 F. Supp. 275 (S.D.N.Y. 1950); Presser v. Sutton, 137 N.Y.S.2d 384 (N.Y. Sup. Ct. 1955). Indeed, one company apparently made a business of conducting "pay-to-play" word puzzles on behalf of sponsoring charities. *See* Gemeroy v. Leopold, 79 F. Supp. 458 (S.D.N.Y. 1948).

133. Lee v. Elk Rod & Gun Club, Inc., 473 N.W.2d 581 (Wis. Ct. App. 1991); Schmidt v. Three Lakes Chamber of Commerce, 417 N.W.2d 196 (Wis. Ct. App. 1987) (text in WESTLAW). In some fishing contest cases, it is not clear whether or not an entry fee was required. *See* Newmac/Bud Light Bass Circuit, Inc. v. Swint, 486 So. 2d 255 (La. Ct. App. 1986); Lynd v. State, 784 S.W.2d 480 (Tex. Ct. App. 1990). *See also* Jones v. Fowler, 185 So. 40 (La. Ct. App. 1938) (shooting gallery operated for profit); Bowlerama of Tex. v. Miyakawa, 449 S.W.2d 357 (Tex. Civ. App. 1970) (bowling tournament requiring payment of entry fee).

134. *See* cases cited *supra* note 130.

135. *See* Chenard v. Marcel Motors, 387 A.2d 596 (Me. 1978); Grove v. Charbonneau Buick–Pontiac, Inc., 240 N.W.2d 853 (N.D. 1976). *See also* Las Vegas Hacienda, Inc. v. Gibson, 359 P.2d 85 (Nev. 1961) (similar contest by owner of golf course).

136. *See* Long v. State, 551 N.Y.S.2d 369 (N.Y. App. Div. 1990).

congealed gelatin.[137] Embedded in the gelatin, in theory, were coupons for various prizes.[138] The use of moneymaking games by charities or other non-profit organizations[139] is "promotional," at least in the sense that the game is being used to foster some other interest.

Because such moneymaking games are frequently used for charitable purposes, it would not be outrageous to regard them as gratuitous transactions, rather than contracts. At least some of those who pay an entry fee to participate in such charitable events may be motivated to enter by a desire to contribute to the organization sponsoring it, rather than by the lure of a prize. Not all participants in a charity golf tournament may enjoy the game, and it is difficult to imagine why anyone would pay to jump into gelatin (no matter what the prize) except out of a desire to make a charitable gift of the money. In such cases, it is at least superficially plausible to argue that the promise of a prize has not induced the payment of the entry fee or the performance of the acts necessary to win the prize. If, as suggested above, mutual inducement is characteristic of the classic cases of bargain consideration, it might be argued that consideration for the promise of a prize is absent and liability for the prize, if any, is not contractual in nature. Ultimately, however, the preceding argument must be rejected. Most importantly, it overstates the stringency of the "mutual inducement" element of the doctrine of consideration. It may be that, in the paradigm cases of bargains, each party's sole motive in offering or rendering his or her performance is the desire for the performance of the other. But the class of enforceable contracts has never been limited to such classic cases, and it is clear that the consideration requirement may be satisfied even if a promisor's desire for the consideration supplied by the other party is "incidental to other objectives," and known to be so.[140] Cases of complex motivation may qualify as bargains.

Moreover, if one ignores the charitable status of some of the contest or game promoters, moneymaking games fit the traditional unilateral contract model quite well. Formation issues present few problems. The game promoter controls the design and the terms (the rules) of the game, and there is gener-

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137. *Id.* at 370.

138. *Id.* Alas, the event was a dismal failure. Apparently, it was conducted on a warm day, and the gelatin did not congeal. Unfortunately, an opaque froth concealed the liquid state of the gelatin, and one participant jumped in and broke his leg. *Id.* at 370–01. The resulting personal injury suit may explain why the gelatin jump is not used more frequently.

139. For additional examples of the use of money-making games by non-profit organizations, *see* Youngblood v. Bailey, 459 So. 2d 855 (Ala. 1984); Sabre v. Sovary, 1992 WL 43222 (Conn. Super. Ct. Feb. 27, 1992); Hardy v. St. Matthew's Community Center, 240 S.W.2d 95 (Ky. Ct. App. 1951); Leake v. Isaacs, 90 S.W.2d 1001 (Ky. Ct. App. 1936); Harris v. Economic Opportunity Comm'n of Nassau County, Inc., 575 N.Y.S.2d 672 (N.Y. App. Div. 1991); Williams v. Weber Mesa Ditch Extension Co., Inc., 572 P.2d 412 (Wyo. 1977).

140. RESTATEMENT (SECOND) OF CONTRACTS § 81 cmt. b. (1979). *See also* JOHN P. DAWSON, GIFTS AND PROMISES 204 (1980) ("Indeed, securing the other party's promise or performance can be for each the highest or the lowest on the scale of motives. It does not need to be a 'material' motive, provided it is in fact one motive.").

The first *Restatement* went even further by making the actual motives of the parties irrelevant if their transaction exhibited the external manifestations (i.e., the form) characteristic of a bargain. *See* RESTATEMENT OF CONTRACTS § 84(a) cmt. b & illus. 1 (1932). The drafters of the *Restatement (Second)* retreated from the position that casting a transaction in the form of a bargain was sufficient. *See* RESTATEMENT (SECOND) OF CONTRACTS § 71 illus. 5 (1979).

ally little doubt as to what is necessary to enter the game or to win it. The rules of bingo, for example, are well-known, and commercial bingo games usually spell them out, in any event. The doctrine of consideration likewise creates few difficulties. The entrant typically pays a fee in return for whatever entertainment value playing bingo holds for him plus the contingent possiblity of winning a more valuable prize. Indeed, though not necessary to form a contract on the traditional model, the values exchanged may be roughly equivalent. The nominal entry fee may not be wildly disproportionate to the value of the prize discounted by the chance of winning it, so that it may not even be necessary to resort to the old maxim that even a peppercorn may be sufficient consideration.[141]

This apparent fit between the unilateral contract model and moneymaking games is present whether the sponsor is a profit-seeking corporation or a charitable organization. It seems more desirable, in the interest of theoretical coherence, to regard charities which conduct moneymaking games as temporarily engaged in profit-making contractual ventures, rather than as soliciting gifts in the form of contributions and partially reciprocating by gifts in the form of prizes. Treating all moneymaking games as contracts likewise avoids difficult inquiries into the actual motives of the parties—inquiries that would be necessary if moneymaking games were to be divided into gift transactions and contracts.[142]

If the unilateral contract model fits moneymaking games quite well, the analogy often drawn between games and rewards (the simplest of unilateral contracts) does not. To return to a previous example, the owner of a lost pet may communicate to a large number of people an offer of reward for its return, just as the sponsor of a moneymaking game may invite large numbers to play. But the pet owner is not seeking exactly the same thing as the game operator. The pet owner is seeking a single, discrete contract with the one individual who finds his or her pet. The bingo operator, however, seeks something more diffuse. The consideration that flows to the game operator is derived in small increments from a large number of different people, only a small percentage of whom may win prizes. The individual "contracts" of the non-winners (if such fragmented treatment of the relations between the parties is appropriate) appear fairly symmetrical—a nominal fee is paid for minor amusement and a remote chance at a prize. The individual "contract" of the prize winner looks extremely advantageous, at least in hindsight—a nominal fee is exchanged ultimately for a prize of much greater value. If the game is considered as a whole, that is, as if it were one big contract with a lot of par-

141. *See* FARNSWORTH, *supra* note 93, § 2.11.

142. Treating money-making games used by charities as instances of unilateral contracts, rather than gifts, also accords with the (admittedly meager) evidence of the motives of participants in charitable games and contests. In recent years, non-profit organizations have made increasing use of direct-mail sweepstakes as a fund-raising device. *See* Carole M. Gibbons, *The Sweepstakes Appeal: Friend or Foe?*, FUND RAISING MANAGEMENT, July 1988, at 48. However, sweepstakes donors and traditional donors exhibit different psychological profiles. The reward for the traditional donor is the good feeling of helping others, while the reward for the sweepstakes donor is the prize. *Id.* Sweepstakes donors and traditional donors also respond to different types of appeals ("need" letters or "greed" letters) and exhibit different levels of commitment to the cause. *Id.* at 48–49.

ties, the balance of advantage clearly favors the operator.[143] The point is not that we must now answer the vaguely metaphysical question of how many contracts dance on the head of a promotional game. Rather, the point is that, at the simplest level of games, the individual, discrete, symmetrical reward transaction already becomes a poor analogy with which to try to illuminate promotional games.[144]

B. Competitions

A second category of promotional devices consists of contests of skill or effort. The best example is probably provided by the company that offers a bonus to the members of its permanent sales force who achieve a specified level of sales or a prize to the salesperson with the highest sales volume in a particular time period.[145] In a minor variation of the same device, newspapers and other publications once conducted contests (sometimes styled as "voting contests") designed to promote sales of subscriptions.[146] Individuals in the relevant community (who were not usually employees) were offered the opportunity to win a prize by earning "votes," and "votes" were earned by selling newspaper subscriptions. Offers of prizes for employee suggestions[147] or for the best design by an architect[148] also appear in reported cases. Some

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143. Indeed, if the balance of advantage did not favor the operator, it would be foolish to call the game a "moneymaker."

144. The distinction between games and rewards drawn in the text is a generalization, and, like most generalizations, one can envision exceptions to it. One can imagine a reward offer that, like a promotional game, is designed to obtain a small benefit from each of a large group of people. An offeror seeking to locate lost campers or a downed plane in a stretch of rugged terrain, for example, might offer a reward for the express purpose of drawing a crowd of searchers, on the theory that combing the entire area with a large group of people provides the best chance of success. My point is not that reward offers and promotional games never resemble each other, but rather that the benefit derived from a promotional game is typically diffuse and incremental, while that sought by a reward offeror is typically more discrete.

145. *See* Brown v. Morrisey & Walker, Inc., 150 A. 330 (N.J. 1930); Nationwide Ins. Co. v. Workmen's Compensation Appeal Bd., 344 A.2d 756 (Pa. Commw. Ct. 1975); Magruder v. Hagen-Ratcliff & Co., 50 S.E.2d 488 (W. Va. 1948).

146. *See* Hertz v. Montgomery Journal Publishing Co., 62 So. 564 (Ala. Ct. App. 1913); Shorey v. Daniel, 27 Ariz. 496, 234 P. 551 (1925); Long v. Chronicle Publishing Co., 228 P. 873 (Cal. Ct. App. 1924); Butters v. Brawley Star, 191 P. 987 (Cal. Ct. App. 1920); Goodhart v. Mission Pub. Co., 123 P. 210 (Cal. Ct. App. 1912); Gainesville News v. Harrison, 199 S.E. 559 (Ga. Ct. App. 1938); Smead v. Stearns, 155 N.W. 307 (Iowa 1915); Youngblood v. Daily & Weekly Signal Tribune, 131 So. 604 (La. Ct. App. 1930); Mooney v. Daily News Co. of Minneapolis, 133 N.W. 573 (Minn. 1911); Barker v. Lewis Pub. Co., 131 S.W. 924 (Mo. App. 1910); Leonard v. Pennypacker, 89 A. 26 (N.J. 1913); Wigg v. Orphan Aid Soc'y, 143 S.E. 9 (S.C. 1928); Monroe v. Smith, 165 N.W. 532 (S.D. 1917); Holt v. Wilson, 55 S.W.2d 580 (Tex. Civ. App. 1932). *See also* Millsaps v. Urban, 171 S.W. 1198 (Ark. 1914) (popularity contest requiring purchase of goods); Dion v. St. John Baptiste Soc'y, 19 A. 825 (Me. 1890); Amlie Strand Hardware Co. v. Moose, 224 N.W. 158 (Minn. 1929) (voting contest requiring purchase of goods); Valentin v. El Diario La Prensa, 427 N.Y.S.2d 185 (N.Y. Civ. Ct. 1980) (voting contest requiring individual newspaper purchase or purchase of "page" rather than subscription); Draughon's Practical Business College v. Dorsett, 166 S.W. 495 (Tex. Civ. App. 1914) (scholarship solicitation contest).

147. *See* Minges v. City of Birmingham, 36 So. 2d 93 (Ala. 1948); Carlini v. United States Rubber Co., 154 N.W.2d 594 (Mich. Ct. App. 1967); Milich v. Schenley Indus., Inc., 387 N.Y.S.2d 640 (N.Y. App. Div. 1976). *See also* United States v. Amirikian, 197 F.2d 442 (4th Cir. 1952) (prize for best essay concerning progress in arc welding).

148. *See* Tilley v. County of Cook, 103 U.S. 155 (1880); Lucas v. United States, 25 Cl. Ct. 298 (1992); Walsh v. St. Louis Exposition & Music Hall Ass'n 2 S.W. 842 (Mo. 1887); Palmer v. Central Bd. of Educ., 70 A. 433 (Pa. 1908); Cope v. Hastings, 38 A. 717 (Pa.

businesses have occasionally conducted slogan, jingle, or testimonial contests,[149] presumably for the purpose of acquiring material to be used in advertising. The opinion of Justice Douglas quoted in Part I appeared in a case involving a prize for the best original symphonic work by a native-born composer of the Western Hemisphere.[150]

Contests of the kind described in the preceding paragraph fit the traditional unilateral contract model better than most other promotional devices. Indeed, it is virtually impossible to distinguish them from simple reward cases. In each case, the offeror of the prize is bargaining in a very direct way for a result (such as increased sales) or a product (for example, the best symphony) he or she genuinely desires, and the efforts of the contestants are induced by the promise of the prize.

Even in the context of such straightforward contests, however, minor doctrinal difficulties can arise. For example, assume that a wholesale grocery company employs a sales force, each member of which, at the time of his or her initial hiring, promises to use his or her best efforts to sell the company's goods. If the company then offers a prize for the highest sales volume in a particular period, it might be argued that the promise of a prize is unsupported by consideration, as each salesperson is doing no more than what he or she is under a pre-existing legal duty to do.[151]

Somewhat different difficulties could have been (but were not) raised in *Robertson v. United States*.[152] The winner of the musical composition contest described in that case had composed the winning symphony between 1936 and 1939.[153] The prize offer, however, was not made until 1945.[154] It therefore could have been argued that the prize promise was gratuitous because so-called "past consideration" is not truly induced by the promise and consequently fails to constitute consideration at all.[155]

The foregoing difficulties are, however, minor doctrinal quibbles at worst. In the hypothetical case of the sales contest, the pre-existing duty rule can be avoided by judicial manipulation of the scope of the salesperson's initial duties of employment.[156] In addition, the pre-existing duty rule itself is now

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1897). *See also* American Family Pizza v. Taylor, 573 So. 2d 956 (Fla. Ct. App. 1991) (box decorating contest); Bays v. United States Camera Publishing Corp., 171 N.W.2d 232 (Mich. Ct. App. 1969) (photography contest); Trego v. Pennsylvania Academy of Fine Arts, A. 819 (Pa. 1886) (competition for historical painting); Holt v. Wood, Harmon & Co., 14 Pa. C. 499 (Pa. County Ct. 1894) (competition for best name for village).

149. *See* Lewis v. Kroger Co., 109 F. Supp. 484 (S.D. W. Va. 1952); *Minges*, 36 So. 2d 93; Krueger v. Elder Mfg. Co., 260 S.W.2d 349 (Mo. Ct. App. 1953); Lucky Calendar Co., Inc. v. Cohen, 120 A.2d 107 (N.J. 1956); Southwestern Land Co. v. McCallam, 136 P. 1093 (Okla. 1913).

150. Robertson v. United States, 343 U.S. 711 (1952).

151. The example is inspired by Magruder v. Hagen-Ratliff & Co., 50 S.E. 2d 488 (W. Va. 1948). For a discussion and critique of the pre-existing duty rule, *see* FARNSWORTH, *supra* note 93, §§ 4.21–4.22.

152. 343 U.S. 711 (1952).

153. *Id.*

154. *Id.* at 711–12.

155. For a discussion of the doctrine that past consideration is not sufficient consideration, as well as its many exceptions, see FARNSWORTH, *supra* note 93, §§ 2.7, 2.8.

156. If the initial scope of the employees' duties are sufficiently constricted, participation in the contest may be construed as the assumption of a new obligation and therefore as new consideration for the promise of a prize or bonus. See FARNSWORTH, supra note 93, at § 4.21.

riddled with exceptions,[157] and at least one commentator has called for its outright abandonment.[158] The "past consideration" objection in the case of the musical composition contest is similarly easy to avoid. The prize offer in question required contestants not only to submit a musical work, but to grant the Detroit Orchestra certain rights with respect to it, including movie synchronization rights, recording rights, and first performance rights.[159] If a peppercorn can constitute consideration, provided only that it is the subject of actual bargaining, the potentially valuable production rights extracted as a condition of participation in the contest clearly pass muster.

There is, however, a subclass of competitions that appears more difficult to fit within the traditional unilateral contract model and which, in particular, strains the analogy to the ordinary reward cases. That subclass is composed of offers of a prize for the possession of insignificant qualities or knowledge or for the superior exercise of trivial skills. Offers of a prize to the person who catches the most or the largest fish[160] (or a particular fish),[161] who counts the dots in a particular picture,[162] who solves a word or picture puzzle,[163] or who guesses the total popular vote in an election,[164] all fall within this category. Some such contests approach the bizarre. For example, there is a reference in one decision to a water park owner who offered a prize to the person who could float the longest.[165] The winner apparently did so for eight days.[166]

Trivial skills contests[167] clearly differ from rewards in that the act performed by the successful contestant is often of no possible direct economic,

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157. *Id.* §§ 4.21,4.22, at 289–93.

158. *Id.* § 4.22, at 294–95.

159. Robertson v. United States, 343 U.S. 711, 712 (1952).

160. *See* Plough Broadcasting Co., Inc. v. Dobbs, 293 S.E.2d 526 (Ga. Ct. App. 1982); Newmac/Bud Light Team Bass Circuit v. Swint, 486 So. 2d 255 (La. Ct. App. 1986); Lynd v. State, 784 S.W.2d 480 (Tex. Ct. App. 1990); Lee v. Elk Rod & Gun Club, Inc., 473 N.W.2d 581 (Wis. Ct. App. 1991). The author hereby acknowledges, but ignores, the criticism of his colleagues who protested the inclusion of fishing in the category of trivial skills.

161. Simmons v. United States, 197 F. Supp. 673 (D.Md. 1961).

162. Minton v. F.G. Smith Piano Co., 36 App. D.C. 137 (App. D.C. 1911); Schreiner v. Weil Furniture Co., 68 So. 2d 149 (La. Ct. App. 1953).

163. McInnes v. Publishers Serv. Co., 174 F.2d 647 (2d Cir. 1949) (picture puzzle); Hearst Publishing Co. v. Abounader, 16 Cal. Rptr. 244 (Cal. Ct. App. 1961) (word game); Groves v. Carolene Prods. Co., 57 N.E.2d 507 (Ill. App. Ct. 1944) (word building contest); Scott v. People's Monthly Co., 228 N.W. 263 (Iowa 1929) (word building contest); Groves v. Byrnes, 231 N.W. 926 (Minn. 1930) (word building contest); Holt v. Rural Weekly Co., 217 N.W. 345 (Minn. 1928) (word puzzle); Ritz v. News Syndicate Co., 183 N.Y.S.2d 850 (N.Y. App. Term. 1959) (word puzzle). The newspaper and magazine word contests shade into the category of games described *infra* part III.C. in that they typically require something of value (i.e., a subscription, a newspaper purchase, or an exhibition of the paper to friends) as a condition of participation.

164. Waite v. Press Publishing Ass'n, 155 F. 58 (6th Cir. 1907). *See also* Moreno v. Marbil Prods., Inc., 206 F.2d 543 (2d Cir. 1961) (guessing the price of merchandise displayed).

165. *In re* Dillon, 113 B.R. 46 (Bankr. D. Utah 1990).

166. *Id.* at 48. One assumes from the absence of any reference to the hospitalization of the winner for hypothermia that the floating period was not continuous.

167. For examples in addition to those cited *supra* at notes 158–64, *see* FCC v. American Broadcasting Co., Inc., 347 U.S. 284 (1954) (television "giveaway" shows); Gillmore v. Procter & Gamble Co., 417 F.2d 615 (6th Cir. 1969) (matching clues to cities); National Amateur Bowlers, Inc. v. Tassos, 715 F. Supp. 323 (D. Kan. 1989) (bowling tournament); Youst v. Longo, 233 Cal. Rptr. 294 (Cal. 1987) (harness race); Winston v. National Broadcasting Co., Inc., 282 Cal. Rptr. 498 (Cal. Ct. App. 1991) (television game show);

or even sentimental, value to the sponsor. The offeror of a reward for return of a stolen automobile or a lost pet has a direct interest in the subject matter of the offeree's performance. A correct guess as to a number of dots or votes, or the ability to float for eight days, is valueless in itself.

Nevertheless, it is possible to fit even trivial skills contests within the traditional unilateral contract model, if not into the analogy to rewards. First, and most obvious, the trivial performance is often expressly bargained for, perhaps in an advertisement or other writing containing a set of well-defined rules. Second, even if the trivial performance is itself valueless, it is often possible to ascertain an end to which the trivial performance is a means, and that end may itself be desirable to the offeror. For example, in one "count the dots" contest conducted by a piano retailer, the dots in question surrounded a picture of a particular piano model.[168] Presumably, contestants were forced to stare at the picture of the piano for long periods of time in order to participate, and that might very well have been viewed by the sponsor as a desirable state of affairs. Similarly, the floating contest described above was apparently designed to promote the business of a commercial water park,[169] and the attention a shriveled eight-day floater would attract might very well be valuable to such a business. It is certainly possible to characterize even a trivial performance as part of a bargained-for exchange if it is at least of indirect value in this way.

Finally, though trivial, the performances requested in such contests are, to varying degrees, difficult or time-consuming. Thus, although the contests may not require the contestants to incur any out-of-pocket expenditures, the opportunity costs incurred by contestants could very well be significant.[170] Because opportunity costs should be included in the notion of detriment (or

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Weirum v. RKO Gen., Inc., 119 Cal. Rptr. 151 (Cal. Ct. App. 1975), *aff'd* 123 Cal. Rptr. 468 (Cal. 1975) (competition to locate roving disc jockey); Kelly v. Banda, 157 S.E.2d 782 (Ga. Ct. App. 1967) (predicting championship professional football teams); Ottensmeyer v. Baskin, 625 P.2d 1069 (Haw. Ct. App. 1981) (beauty contest); Paley v. Coca Cola Co. 197 N.W.2d 478 (Mich. Ct. App. 1972) (bottle cap question and answer contest); Bridges v. Georgiana, 511 A.2d 1255 (N.J. Super. Ct. 1985) (beauty contest); Holt v. Columbia Broadcasting Sys., Inc., 253 N.Y.S.2d 1020 (N.Y. App. Div. 1964) (television quiz show); Clark v. National Broadcasting Co., 209 N.Y.S.2d 60 (N.Y. Sup. Ct. 1960) (television quiz show); Davidson v. National Broadcasting Co., 204 N.Y.S.2d 532 (N.Y. Sup. Ct. 1960) (same); Goldberg v. Columbia Broadcasting Sys. Inc., 205 N.Y.S.2d 611 (N.Y. Sup. Ct. 1960) (same); Hoff v. Daily Graphic, Inc., 230 N.Y.S. 360 (N.Y. Sup. Ct. 1928) (movie title contest); Shapiro v. Prudential Theaters, 328 N.Y.S.2d 28 (N.Y. Dist. Ct. 1972) ("Mr. and Mrs. Long Island" contest); Myles v. WAVI Broadcasting Corp., 1981 WL 2892 (Ohio Ct. App. 1981) (radio station "word discovery" contest); LeFlore v. Reflections of Tulsa, Inc., 708 P.2d 1068 (Okla. 1985) ("Miss Legs of Tulsa" contest); Cobaugh v. Klick-Lewis, Inc., 561 A.2d 1248 (Pa. Super. Ct. 1989) (hole-in-one contest); Hall v. Bean, 582 S.W.2d 263 (Tex. Civ. App. 1979) (boat race); Bryant v. Deseret News Publishing Co., 233 P.2d 355 (Utah 1951) (predicting score of football game); Seattle Times Co. v. Tielsch, 495 P.2d 1366 (Wash. 1972) (forecasting winners of football games); Davidson v. Times Printing Co., 116 P. 18 (Wash. 1911) (newspaper contest offering prize for "apprehension" of "Mr. Raffles" and recitation of advertised greeting); Wilkerson v. Wegner, 793 P.2d 983 (Wash. Ct. App. 1990) (halter futurity). *See also* the golf tournament cases cited *supra* note 135.

168. *See* Minton v. F.G. Smith Piano Co., 36 App. D.C. 137, 139–40 (D.C. 1911).

169. *See Dillon*, 113 B.R. at 48.

170. For instance, most people can think of better things to do with eight days of their lives than float in a swimming pool.

reliance),[171] a bargain for such a performance calls for a "detriment to the promisee," which satisfies the traditional test for consideration. Thus, there is little difficulty in bringing competitions—trivial or significant—within the scope of the traditional unilateral contract model.

C. Games Incidental to a Sale at Market Price

A somewhat more problematic category of promotional devices consists of cases in which a chance at a prize is offered in connection with the sale of something else. For example, at one time, movie theaters conducted "bank night" schemes, in which anyone who purchased a ticket of admission was eligible to participate in a drawing for a prize.[172] Drawings for door prizes at trade shows or social functions at which an admission fee is charged are functionally identical.[173]

Slightly more complicated, but functionally similar, examples are provided by the games of chance often conducted in conjunction with sales of goods. At one time, "suit clubs" were a common promotional device used by tailors.[174] Each member of a group of participants would agree to make monthly or weekly payments toward the purchase of a suit (at regular price) from the tailor sponsoring the "club." Each payment period, one participant would be selected (by drawing or otherwise) as the "winner" for that period, and he would receive the suit without further payments. The same process would continue until each participant had either "won" or made enough payments to pay off his contract for the suit.

More familiar contempory examples are the variety of promotional games in which game pieces are available on or inside packages containing ordinary grocery products or in which a portion of the product package is necessary to play the game.[175] There is normally no separate charge for the

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171. *See* Mark Petlit, Jr., *Private Advantage and Public Power: Reexamining the Expectation and Reliance Interests in Contract Damages*, 38 HASTINGS L.J. 417, 420 (1987).

172. *See* Doskey v. United Theatres, Inc., 11 So. 2d 276 (La. Ct. App. 1942); Shanchell v. Lewis Amusement Co., Inc., 171 So. 426 (La. Ct. App. 1936); Cuffman v. Blunkall, 124 S.W.2d 289 (Tenn. Ct. App. 1938); Society Theater v. City of Seattle, 203 P. 21 (Wash. 1922).

173. *See* Lawton v. United States, 144 F. Supp. 638 (E.D. Va. 1956); Youngblood v. Bailey, 459 So. 2d 855 (Ala. 1984); Blair v. Lowham, 276 P. 292 (Utah 1929); Matta v. Katsoulas, 212 N.W. 261 (Wis. 1927).

174. People v. Hecht, 3 P.2d 399 (Cal. App. Dep't Super. Ct. 1931); Bills v. People, 157 P.2d 139 (Col. 1945); State v. Moren, 51 N.W. 618 (Minn. 1892).

175. *See* Carlson v. Coca-Cola Co., 483 F.2d 279 (9th Cir. 1973) (answers on soft drink cartons and bottle caps); Gillmore v. Procter & Gamble Co., 417 F.2d 615 (6th Cir. 1969) (entries accompanied by detergent box tops); Green v. G. Heileman Brewing Co., Inc., 755 F. Supp. 786 (N.D. Ill. 1991) (game tickets available on beer cartons); Lewis v. Kroger Co., 109 F. Supp. 484 (S.D. W. Va. 1952) (top of coffee bag must accompany entry); Minges v. City of Birmingham, 36 So. 2d 93 (Ala. 1948) (bottle cap must accompany entry); Paley v. Coca-Cola Co., 197 N.W.2d 478 (Mich. Ct. App. 1972) (pictures on underside of bottle caps and cans); Krueger v. Elder Mfg. Co., 260 S.W.2d 349 (Mo. Ct. App. 1953) (entry must be accompanied by garment tag); Johnson v. New York Daily News, 450 N.Y.S.2d 980 (N.Y. Sup. Ct. 1982), *rev'd* 467 N.Y.S.2d 665 (N.Y. App. Div. 1983) (entry blank appearing in copies of newspaper); Hoff v. Daily Graphic, Inc., 230 N.Y.S. 360 (N.Y. Sup. Ct. 1928) (game using drawing and coupon appearing inside newspaper). *See also* Pepsi Cola Bottling Co. of Luverne, Inc. v. Coca-Cola Bottling Co., Andalusia, 534 So. 2d 295 (Ala. 1988) (bottle cap promotion; caps available by purchase or free); State *ex rel.* Stephan v. Pepsi-Cola Gen. Bottlers, Inc., 659 P.2d 213 (Kan. 1983) (same); Kroger Co. v. Cook, 265 N.E. 2d 780

game piece, and one occasionally encounters stacks of the same product, some of which contain game pieces and some of which do not, all at the same price.

In all of the foregoing examples, the game participant must buy something—a product or admission to an event—in order to play the game of chance.[176] Quite often the game sponsor asserts that whatever must be purchased is purchased at its normal or fair market price, and that the chance at a prize (or, in the case of a suit club, the chance at a deep discount) is included as a gift. Sometimes, the language associated with gifts is used in the material promoting or advertising the game. If such assertions were to be taken seriously, promotional games incidental to sales would constitute an exception to the normal unilateral contract analysis of promotional games. The conditional prize promises contained in such games would amount to gratuitous appendages to an otherwise unremarkable bargain transaction.

The analysis of such promotional devices as sales coupled with a gratuitous chance at a prize is usually[177] asserted in litigation against an opposing

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(Ohio 1970) (bottle cap liner contest; caps available by purchase or mail); Mid-Atlantic Coca-Cola Bottling Co., Inc. v. Chen, Walsh & Tecler, 460 A.2d 44 (Md. 1983) (bottle cap promotion; caps available by purchase or free); Smith v. State, 127 S.W.2d 297 (Tex. Crim. App. 1939) (stamps to play game available in exchange for wrappers, containers, etc.; facsimiles authorized); Coca-Cola Bottling Co. of Wisconsin v. La Follette, 316 N.W.2d 131 (Wis. Ct. App. 1982) (bottle cap liner contest; caps available by purchase or by mail).

176. For additional examples, see FTC v. R.F. Keppel & Bros., 291 U.S. 304 (1934) ("break and take" penny candy, offering coins, discounts or prizes inside candy wrappers); Horner v. United States, 147 U.S. 449 (1893) (purchasers of bonds issued by Austrian Empire participate in drawing for early repayment and bonus payments); Fernandez v. Fahs, 144 F. Supp. 630 (S.D. Fla. 1956) (drawing requiring purchase of ticket to minor league baseball game); Reynolds v. United States, 118 F. Supp. 911 (N.D. Cal. 1954) (sweepstakes drawing among newspaper subscribers); Millsaps v. Urban, 171 S.W. 1198 (Ark. 1914) (voting contest in which voting coupons issued based on merchandise purchases); Hearst Publishing Co. v. Abounader, 16 Cal. Rptr. 244 (Ct. App. 1961) (newspaper subscription necessary in order to play word game); Holmes v. Saunders, 250 P.2d 269 (Cal. Ct. App. 1952) (drawing requiring subscription to periodical); Standridge v. Williford-Burns-Rice Co., 96 S.E. 498 (Ga. 1918) (tickets to drawing issued on basis of merchandise purchases); Dennis v. Weaver, 121 S.E.2d 190 (Ga. Ct. App. 1961) (tickets to drawing issued on basis of gasoline purchase); Lang v. Merwin, 59 A. 1021 (Me. 1905) (nickel cigar purchase entitles patron to pull slot machine lever); Amlie Strand Hardware Co. v. Moose, 224 N.W. 158 (Minn. 1929) ("voting contest" in which votes awarded for purchases or payment of overdue accounts); State v. Powell, 212 N.W. 169 (Minn. 1927) (tickets to drawing issued on basis of merchandise purchases); R.J. Williams Furniture Co. v. McComb Chamber of Commerce, 112 So. 579 (Miss. 1927) (tickets to drawing issued for purchase of merchandise or payment on account); State v. Cox, 349 P.2d 104 (Mont. 1960) ("Chinese lottery" requiring purchase of merchandise); Carl Co. v. Lennon, 148 N.Y.S. 375 (N.Y. Sup. Ct. 1914) (sale of small numbered banks; subsequent drawing of numbers); Valentin v. El Diario La Prensa, 427 N.Y.S.2d 185 (N.Y. Civ. Ct. 1980) (voting coupons appearing in newspaper); Southwestern Land Co. v. McCallam, 136 P. 1093 (Okla. 1913) (essay contest limited to purchasers of lots in subdivision); Rountree v. Ingle, 77 S.E. 931 (S.C. 1913) (tickets to drawing issued on basis of purchases); Featherstone v. Independent Serv. Station Ass'n of Tex., 10 S.W.2d 124 (Tex. Civ. App. 1928) (tickets to drawing issued based on amount spent on gasoline and related services); Davidson v. Times Printing Co., 116 P. 18 (Wash. 1911) (newspaper subscription required); Wilkerson v. Wegner, 793 P.2d 983 (Wash. Ct. App. 1990) (horse show limited to foals sired by two stallions).

177. Of course, if the "sale-plus-gift" analysis were accepted, its utility would extend far beyond the lottery cases. In the Kraft case discussed *supra* part I, for example, such an analysis would be enormously useful to the defendant. If payment for a package of cheese is consideration only for the cheese, and not for the promise of a minivan (conditional upon obtaining matching halves of its picture), the promise of the van is a gift promise. If so, it is

party who contends that a particular promotion is an illegal lottery.[178] The proponent of the lottery theory must, of course, establish the usual elements of prize, chance and consideration, and it is only the last element that normally presents any difficulty. In order to establish that consideration has been paid for the chance to win a prize, the proponent of the lottery theory attempts to characterize such promotional devices as unitary transactions—specifically, as unilateral contracts. The price paid is said to be an aggregate price for both the event or good sold and the chance at a prize.[179] The payment of the price of admission to an event or the market price of goods is thus consideration for the admission or product itself, as well as for the chance. Indeed, the contingent promise of a prize is only made as an inducement, in addition to the merits of the event or product, to make such a payment.

Generally speaking, arguments such as those of the preceding paragraph have carried the day, and, with a few exceptions, games that require the purchase of an admission ticket or of goods have been vulnerable to attacks on the basis of state lottery laws. The cases classifying such games as lotteries appear to reason from premises about the law of contracts to conclusions about criminal offenses. One suspects, however, that the actual grounds of decision are in the reverse order, that is, that the results of the cases are more dependent upon policy-based hostility to lotteries and, by extension, games of chance, than upon any serious contractual analysis. That suspicion is fueled, in part, by dicta in several cases reciting the evils of gambling or lotteries or condemning the belief that it is possible to obtain "something for nothing."[180] In part, the same suspicion is fueled by the absence of any serious

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unenforceable while executory, or, at the very least, some reason (other than bargain consideration) must be found to enforce it.

178. The argument is made both in cases in which a purchase or payment is absolutely required and those in which it is not required but a substantial portion of participants purchase or pay. *See Ex parte* Gray, 23 Ariz. 461, 466, 204 P. 1029, 1031 (1922); Bills, 157 P.2d at 142; Boyd v. Piggly Wiggly S., Inc., 155 S.E.2d 630, 636 (Ga. Ct. App. 1967); G.A. Carney Ltd. v. Brzeczek, 453 N.E.2d 756, 760 (Ill. App. Ct. 1983); State v. Fox Kan. Theater Co. 62 P.2d 929, 931–933 (Kan. 1936); *R.J. Williams Furniture Co.*, 112 So. at 580; State v. McEwan, 120 S.W.2d 1098, 1100 (Mo. 1938); *Cox*, 349 P.2d at 106; Shapiro v. Prudential Theaters, 328 N.Y.S.2d 28, 30 (N.Y. Dist. Ct. 1972); Great Atl. & Pac. Tea Co. v. Cook, 240 N.E.2d 114, 118–19 (Ohio Ct. C.P. 1968), *aff'd sub. nom.*, Kroger Co. v. Cook, 244 N.E.2d 790 (Ohio Ct. App. 1968), *aff'd* 265 N.E.2d 780 (Ohio 1970); Maughs v. Porter, 161 S.E. 242, 245 (Va. 1931); Society Theater v. City of Seattle, 203 P. 21 (Wash. 1922). *See also* Lawton v. United States, 144 F. Supp. 638, 640 (E.D. Va. 1956) (tax case).

179. Again the "aggregate price" argument appears both in cases in which a purchase or payment is absolutely required and those in which it is not required but at least some participants purchase or pay. *See* California Gasoline Retailers v. Regal Petroleum Corp. of Fresno, Inc., 330 P.2d 778, 787–88 (Cal. 1958); *Holmes*, 250 P.2d at 270; *Bills*, 157 P.2d at 142; *Boyd*, 155 S.E.2d at 636; *G.A. Carney Ltd.*, 453 N.E.2d at 760; *Fox Kan. Theatre Co.*, 62 P.2d at 934; Shanchell v. Lewis Amusement Co., Inc., 171 So. 426, 427–29 (La. Ct. App. 1936); *Powell*, 212 N.W. 169; *McEwan*, 120 S.W.2d at 1100; *Cox*, 349 P.2d at 106; Lucky Calendar Co. v. Cohen, 117 A.2d 487, 495–96 (N.J. 1955); *Carl Co.*, 148 N.Y.S. at 376; People v. Shafer, 289 N.Y.S. 649, 653 (Monroe County Ct. 1936); People v. Psallis, 12 N.Y.S.2d 796, 798 (N.Y. Magis. Ct. 1939); *Great Atl. & Pac. Tea Co.*, 240 N.E.2d at 118–19; State v. Big Chief Corp., 13 A.2d 236, 241 (R.I. 1940); *Featherstone*, 10 S.W.2d at 127; *Maughs*, 161 S.E. at 245. *See also Reynolds*, 118 F. Supp. at 912 (tax case).

180. Once again, the condemnation of lotteries because they encourage the belief it is possible to obtain "something for nothing" is not confined to cases in which a purchase of goods or payment of an admission fee is required. *See, e.g.*, FCC v. American Broadcasting Co., 347 U.S. 284, 291 (1954) (dictum); People v. Hecht, 3 P.2d 399, 402 (Cal. App. Dep't Super. Ct.

attempt to ascertain whether the price at which the good or event admission is sold is really a competitive market price, so that the "sale-plus-gift" theory might be supportable on the facts of the case. Finally, the suspicion is fueled by the flimsiness of some of the arguments used to support the lottery theory. For example, it is often argued that prizes are funded out of the theater's or the seller's receipts. Therefore, the price of admission to a theater or of a particular good is consideration not only for the movie or the good, but for a chance at a prize as well.[181] One might wonder, of course, how else a theater or seller of goods (or any other business) could possibly fund prizes except out of business receipts, whether the prizes were classified as gifts or as part of the sale contract. If either gifts or fulfillment of contractual obligations must be funded out of business revenues, then funding cannot be the basis for distinguishing between them.

Even if the engine driving the lottery cases is some combination of anti-gambling policy and the Protestant work ethic, however, there is little reason why a genuine contractual analysis should reach a contrary result by adopting the game promoter's characterization of such games as gifts distinct from, though contemporaneous with, true market exchanges. It should be emphasized that, in this category of promotional games, some form of monetary payment (the price of admission to an event or of a particular tangible good) is an absolutely necessary condition of both participation in the game, on the one hand, and admission to the event or receipt of the good on the other. Indeed, in most such cases game participation or the chance at a prize is publicized before the sale, and it is usually fairly obvious that game participation is only offered by one in the business of selling as an added inducement to buy. It is difficult to imagine a more straightforward example of the bargaining process in the classic sense. If what appears to be a single transaction is suddenly to be bisected into two, one of which is to be classified as a gift, some reason must be given for the additional theoretical complexity. Apart from a simple desire to avoid criminal prosecution for violation of state lottery laws, however, no such reason is apparent. Accordingly, most of the promotional games

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1931); Chenard v. Marcel Motors, 387 A.2d 596, 599 (Me. 1978) (dictum); *Lang*, 59 A. 1021; State v. Moren, 51 N.W. 618, 619 (Minn. 1892); Mobil Oil Corp. v. Danforth, 455 S.W.2d 505, 508-09 (Mo. 1970); *Cox*, 349 P.2d at 107; State v. Grant, 75 N.W.2d 611, 614 (Neb. 1956); *Lucky Calendar Co.*, 117 A.2d at 493-94; *Kroger Co.*, 244 N.E.2d at 798 (concurring opinion); Smith v. State, 127 S.W.2d 297, 298 (Tex. Crim. App. 1939); Albertson's Inc. v. Hansen, 600 P.2d 982, 992 (Utah 1979) (dissenting opinion); State v. Reader's Digest Ass'n, Inc., 501 P.2d 290, 298 (Wash. 1972); Seattle Times Co. v. Tielsch, 495 P.2d 1366 (Wash. 1972); State *ex rel.* Schillberg v. Safeway Stores, Inc., 450 P.2d 949, 956 (Wash. 1969).

181. The use of the "prize funding" argument is also broader than the class of games requiring a purchase or payment of a fee. *See, e.g.*, Caples Co. v. United States, 243 F.2d 232, 237 (D.C.Cir. 1957) (dissenting opinion); *Bills*, 157 P.2d at 143; State v. Eckerd's Suburban, Inc., 164 A.2d 873, 875 (Del. 1960); *G.A. Carney, Ltd.*, 453 N.E.2d at 758; Midwest Television, Inc. v. Waaler, 194 N.E.2d 653, 656 (Ill. App. Ct. 1963); Jones v. Smith Oil & Ref. Co., 15 N.E.2d 42, 44 (Ill. App. Ct. 1938); Idea Research & Dev. Corp. v. Hultman, 131 N.W.2d 496, 500 (Iowa 1964); Jones v. Fowler, 185 So. 40, 41 (La. Ct. App. 1938); Glover v. Malloska, 213 N.W. 107, 108 (Mich. 1927); *Cox*, 349 P.2d at 106 (dictum); *Great Atl. & Pac. Tea Co.*, 240 N.E.2d at 119; *Lucky Calendar Co.*, 117 A.2d at 495-96; United Stations of N.J. (US) v. Kingsley, 240 A.2d 702, 708 (N.J. Super. Ct. 1968); *Big Chief Corp.*, 13 A.2d at 238-239; *Maughs*, 161 S.E. at 245. *But see* Cudd v. Aschenbrenner 377 P.2d 150, 158 (Or. 1962) (rejecting as immaterial the source of funding for prizes).

requiring a purchase of some kind fit rather neatly into the traditional unilateral contract model.[182]

D. Games Requiring No Purchase

1. First Doubts About the "Element" of Consideration

Perhaps as a result of the ever-present threat of lottery laws, promotional games that require neither a payment nor a purchase as a condition of participation have been quite common for a number of years. Indeed, the most common form of the motion picture theater "bank night" is one that, unlike those described in the preceding subsection, does not require payment for a ticket of admission.[183] Those eligible for a prize drawing include not only those who pay to see the film, but anyone who has registered (free of charge) and who happens to be present outside the theater when the winner is announced. The widely advertised sweepstakes conducted by magazine clearinghouses are similar. One need not buy any magazines to enter; one need only respond to a mailing by affixing various stamps to a free entry blank and "sending it in."[184] The Publix supermarket "Wheel of Fortune" promotion described in Part I also belongs in this category. One could obtain a game piece upon request while visiting a Publix store; it was not necessary to buy any groceries.[185] Supermarket promotions of this kind are fairly common.[186]

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182. There are exceptional cases in which "on-pack" promotions seem more appropriately classified as gifts. Ironically, as I began writing this Article, I became a winner in the Coca-Cola Pop Music Vending Promotion. I bought a can of Coca-Cola from a vending machine at the usual price—a price which has not varied in at least five years. Affixed to this particular can, however, was a peel-off label containing the promise of an audiocassette tape of popular music, contingent only upon my mailing in the label with a notification of my address. The odd aspect of this promotion was that there was no advance notice of the promotion—no signs on the vending machine and no media advertising in my area. My purchase of the can of Coke was not, and could not have been, induced by the promise of the tape. My inclination, therefore, is to regard the promise of the tape as a conditional gift promise. (Incidentally, the promise was kept.)

183. *See* People v. Cardas, 28 P.2d 99 (Cal. App. Dep't Super. Ct. 1933); Dorman v. Publix-Saenger-Sparks Theatres, Inc., 184 So. 886 (Fla. 1938); St. Peter v. Pioneer Theatre Corp., 291 N.W. 164 (Iowa 1940); *Fox Kan. Theatre Co.*, 62 P.2d 929; *McEwan*, 120 S.W.2d 1098; State v. Eames, 183 A. 590 (N.H. 1936); *Shafer*, 289 N.Y.S. 649; Simmons v. Randforce Amusement Corp., 293 N.Y.S. 745 (N.Y. Mun. Ct. 1937); State v. Danz, 250 P. 37 (Wash. 1926). *See also Eckerd's Suburban, Inc.*, 164 A.2d 873 (drug store drawing similar to bank night); Blackburn v. Ippolito, 156 So. 2d 550 (Fla. Dist. Ct. App. 1963), *cert. denied* 166 So. 2d 150 (Fla. 1964) (grocery store drawings similar to bank night); State v. Bussiere, 154 A.2d 702 (Me. 1959) (supermarket drawing similar to bank night); People v. Brundage, 150 N.W.2d 825 (Mich. Ct. App. 1967), *rev'd* 162 N.W.2d 659 (Mich. 1968) (retail store drawing similar to bank night); Goodwill Advertising Co. v. State Liquor Auth., 244 N.Y.S.2d 322 (N.Y. Sup. Ct. 1962) (supermarket drawing similar to bank night); *Big Chief Corp.*, 13 A.2d 236 (scheme similar to bank night employed by market).

184. At this point, it would normally be appropriate to indicate that a copy of the sweepstakes entry form is on file with the Author. It is not. I sent mine in. *See also* Stilson v. Reader's Digest Ass'n, Inc. 104 Cal. Rptr. 581 (Ct. App. 1972); Quinones v. Gem Collectors Int'l, Ltd., 459 N.Y.S.2d 684 (N.Y. Sup. Ct. 1983); *State v. Reader's Digest Ass'n*, 501 P.2d 290.

185. *See supra* notes 37–55 and accompanying text.

186. *See* Gold Bond Stamp Co. v. Bradfute Corp., 463 F.2d 1158 (2d Cir. 1972); Kroger Co. v. Burleson, 432 S.W.2d 847 (Ark. 1968); Tierce v. State, 178 S.E.2d 913 (Ga. Ct. App. 1970); Boyd v. Piggly Wiggly S., Inc., 155 S.E.2d 630 (Ga. Ct. App. 1967); Winn-Dixie Stores, Inc. v. Boatright, 155 S.E.2d 642 (Ga. Ct. App. 1967); People v. Eagle Food Ctrs., 202 N.E.2d 473 (Ill. 1964); People v. Schaeffer, 194 N.E.2d 804 (Ill. App. Ct. 1963);

At least initially, such promotional games seem inappropriate subjects for the application of the traditional unilateral contract model. Everyone knows that theaters are in business to sell tickets, that publishers are in business to sell magazines, and that supermarkets are in business to sell groceries. Yet, in this category of promotional games, the game sponsor expressly declines to bargain for the sale that is the direct object of its desire. No sale is required as a condition of participation in the game. Moreover, the action the sponsor is apparently bargaining for—presence outside a theater, a card in the mail, a trip to the store or watching a television show—is itself apparently of negligible value and, in contrast to the competitions discussed in Part II.B., performing such actions requires little effort. At first glance, therefore, there seems to be a colorable argument that consideration for the prize promise is absent and that the unilateral contract model is not applicable.

2. First Response: Peppercorns and Williston's Tramp

One could, of course, try various doctrinal maneuvers in order to bring this category of games into line with the unilateral contract model. One could resort to the peppercorn theory of consideration and argue that the action for which the game sponsor bargains, no matter how trivial or ministerial, requires that the game participant forego a legal right (the right to refrain from that action) and thus constitutes sufficent legal detriment to satisfy the classical test of consideration. Licking stamps or standing outside a theater may not be worth much or require much effort, but no one is legally obligated to do it. Therefore, if a magazine distributor or theater owner wants to bargain for it, a unilateral contract results.

Such an argument may very well have doctrinal support,[187] but it is subject to two possible objections in the specific context of promotional games. First, the most prominent United States Supreme Court decision in this area at least arguably rejects the peppercorn theory. In *FCC v. American Broadcasting Co.*,[188] the Court considered a challenge to FCC regulations promulgated to enforce a federal criminal statute prohibiting the broadcast of lotteries, gift enterprises, and similar schemes.[189] The regulations in question effectively prohibited several popular radio and television "giveaway"

Lucky Calendar Co. v. Cohen, 117 A.2d 487 (N.J. 1955); *Goodwill Advertising*, 244 N.Y.S.2d 322; Kroger Co. v. Cook, 265 N.E.2d 780 (Ohio 1970); Cudd v. Aschenbrenner, 377 P.2d 150 (Or. 1952); State *ex rel.* Schilling v. Safeway Stores, Inc., 450 P.2d 949 (Wash 1969); Kayden Indus. v. Murphy, 150 N.W.2d 447 (Wis. 1967).

187. *See* Marco Sales Co. v. FTC, 453 F.2d 1 (2d Cir. 1971); *Blackburn*, 156 So. 2d at 550; Midwest Television, Inc. v. Waaler, 194 N.E.2d 653 (Ill. App. Ct. 1963); Idea Research & Dev. Corp. v. Hultman, 131 N.W.2d 496 (Iowa 1964); State *ex rel.* Glendinning Cos. v. Letz, 591 S.W.2d 92 (Mo. Ct. App. 1979); State *ex rel.* Line v. Grant 75 N.W.2d 611 (Neb. 1956); *Randforce Amusement Corp.*, 293 N.Y.S. 745; Knox Indus. Corp. v. State, 258 P.2d 910 (Okla. 1953); Geis v. Continental Oil Co., 511 P.2d 725 (Utah 1973); Maughs v. Porter 161 S.E. 242 (Va. 1931); *State v. Reader's Digest Ass'n*, 501 P.2d 290; *Safeway Stores, Inc.*, 450 P.2d 949. *But see* Opinion of the Justices, 397 So. 2d 546 (Ala. 1981) (rejecting minor acts as consideration sufficient to support a charge of conducting a lottery); Clark v. State, 80 So. 2d 308 (Ala. Ct. App. 1954), *cert. denied*, 80 So. 2d 312 (Ala. 1955) (same); *Eagle Food Ctrs., Inc.*, 202 N.E.2d 473 (same).

188. 347 U.S. 284 (1954).

189. *Id.* at 285–87.

shows.[190] The shows generally restricted those eligible to be "winners" to members of the viewing or listening audience and generally required contestants to answer questions, identify melodies, or perform some other fairly insignificant action.[191] The FCC regulations made prize awards conditioned on such viewing, listening, or trivial action grounds for denial of a license, a license renewal, a construction permit, or other operating authorization.[192]

The Court intially affirmed the district court's holding that the FCC had the power to enforce the lottery prohibition by regulation,[193] and the parties agreed upon the traditional definition of a "lottery," containing the elements of prize, chance and consideration.[194] The critical issue was whether the regulations were a permissible interpretation of what consititutes consideration.[195] The Court specifically held that merely listening to a broadcast could not reasonably be classified as consideration, and it struck down the regulations that effectively gave the lottery statute a contrary interpretation.[196]

Since listening to a radio or television program would, if bargained for, satisfy the requirements of the peppercorn theory of consideration, the case may create some doubt about the the continuing vitality of that theory in the context of promotional games and similar devices. However, such an interpretation of *FCC v. American Broadcasting Co.* is not unavoidable. Chief Justice Warren's opinion emphasized that the construction of a criminal statute was at issue[197] and that criminal statutes are to be construed strictly.[198] As a result, it is possible to read the case as authority for the proposition that "consideration" means something different and more rigorous in the context of a criminal statute than it does in the context of an ordinary contract, rather than as a retreat from the peppercorn theory of consideration as a matter of contract law. Moreover, it may be that the case is inapposite to the category of games now under discussion, for Chief Justice Warren saw a substantial difference between games that require only listening to broadcast media and games that require a contestant to "purchase anything or pay an admission price *or leave his home to visit the promoter's place of business* ...."[199] Some of the games now under consideration seem to require a visit to the sponsor's store or other place of business, and it is possible to interpret the Court's opinion as classifying store visits as a species of consideration (or, at least, as not ruling out such a classification).[200]

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190. The shows included "Stop the Music," "What's My Name," and "Sing It Again." *Id.* at 286–87.

191. *Id.*

192. *Id.* at 288–89.

193. *Id.* at 289.

194. *Id.* at 290.

195. *Id.* at 291.

196. *Id.* at 293–94, 296.

197. The case was not a criminal prosecution, however, but a challenge brought by the major television networks to regulations promulgated to enforce a criminal statute. *Id.* at 284, 289, 296.

198. *Id.*, at 296. *See also* People v. Eagle Food Ctrs., Inc., 202 N.E.2d 473 (Ill. 1964); Simmons v. Randforce Amusement Corp., 293 N.Y.S. 745 (N.Y. Mun. Ct. 1937).

199. *American Broadcasting Co.*, 347 U.S. at 295 (emphasis added).

200. The Court's opinion is ambiguous on this point. It is also possible to interpret the Court's opinion in a fashion contrary to the interpretation given in the text. It is possible, that is, to read the case as suggesting that store visits do not amount to consideration because the Court

Even if *FCC v. American Broadcasting Co.* can be sidestepped in this manner, however, there is a more fundamental problem with a mechanical appeal to the peppercorn theory of consideration as justification for applying the traditional unilateral contract model to promotional games that require no purchase. The classical theory of consideration was never quite that simple. Specifically, it was never a tenet of consideration doctrine 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. Classical consideration theory clearly recognized the possibility of a conditional gift promise. The most famous example, invented by the asserted architect of classical theory, is Williston's "tramp hypothetical."[201] 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."[202] It would be silly to regard the promise as a bargain, induced by the promisor's desire that the tramp take a stroll.[203] 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.[204] Thus, conditional sentence form is not a completely reliable sign of the presence of a bargain. Moreover, in assessing whether a promise conditional in form is a bargain or a conditional gift promise, the key inquiry probably is whether the action specified in the condition is something that would be of value to the promisor.[205]

Indeed, the Williston "tramp hypothetical" seems almost tailor-made for promotional games or contests in which no purchase or fee is required.[206] In the case of the Publix supermarket "Wheel of Fortune" promotion, for example, it could be argued that a visit to a store to pick up a game card is of little value to Publix if the visitor buys no groceries. The card itself is free, and visiting the store is just a condition one must fulfill if one wishes to take advantage

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also cited, with apparent approval, instructions of the Solicitor of the Post Office Department denying that a requirement that a contestant register at a store amounted to consideration sufficient to sustain a charge of conducting a lottery. *Id.* at 294–95 n.15.

201. *See* 1 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 112, at 445 (3d ed. 1957). Williston may be forgiven, on grounds of age, death, and congenital formalism for a somewhat politically incorrect characterization.

202. *Id.* at 445.

203. *Id.*

204. *Id.* at 446.

205. *Id.* at 445–46.

206. For judicial use of the Williston "tramp hypothetical" in the context of promotional devices, *see* Affiliated Enters. v. Waller, 5 A.2d 257 (Del. Super. Ct. 1939); Dorman v. Publix–Saenger–Sparks Theatres, 184 So. 886 (Fla. 1938); Maughs v. Porter, 161 S.E. 242 (Va. 1931). There is another opinion, People v. Mail & Express Co., 179 N.Y.S. 640 (N.Y. City Ct. 1919), that does not mention the tramp hypothetical but that offers interesting parallels to it. A newspaper distributed free numbered cards to New York City residents. It was not necessary to buy a paper to receive a card. *Id.* at 641. Each card entitled its holder to a chance in a prize drawing. *Id.* The winning numbers were published in the newspaper, but it was not necessary to buy a paper to monitor the winning numbers because the publisher made free copies available for reading at various places in the city. *Id.* at 641, 647. Like Williston's tramp, the holder of a winning card was only required to call at a particular place (the newspaper's office) in order to claim his or her prize. *Id.* at 645. The court apparently accepted the conclusion that the prize was a conditional gift (as the Williston hypothetical suggests), for the court concluded that any purported "contract" was void for lack of consideration and that the obligation to pay the prize was moral, not legal. *Id.* at 645, 646.

of the gift of a (highly contingent) right to a prize. The mailing of a publishers' clearinghouse sweepstakes entry without ordering any magazines is analogous. It is of little or no value to the publisher or clearinghouse, and therefore might plausibly be viewed as merely a condition of a gratuitous promise. It thus seems initially plausible to argue that promotional games requiring neither payment of an admission fee nor a purchase of a product as a condition of participation are not unilateral contracts but gift transactions. Moreover, the "peppercorn" theory of consideration does not avoid this conclusion because it is doubtful that the very minimal conditions of game participation are really bargained-for "peppercorns." They appear more like mere conditions attached to a gratuitous promise.

3. The Judicial Response: De Facto *Sales Increases and the Three Musketeers Theory*

Arguments of the kind suggested in the preceding paragraph have almost never been raised, and are even less often addressed, in reported decisions involving games requiring no purchase. Perhaps because, once again, the majority of cases are lottery cases, the courts have tended to focus on whether the "consideration" element of the lottery offense means "simple contract" consideration or "pecuniary" consideration.[207] They seldom consider at any length whether "simple contract" consideration is really present, and usually conclude, in a cursory paragraph or two, that the consideration requirement is satisfied.

The courts that find the consideration requirement satisfied in games requiring no purchase or payment do so on a variety of unsatisfactory grounds. Some courts conclude that the prize promises in games requiring no purchase are nevertheless promises supported by consideration because they are designed to increase sales and, in some instances, actually do so.[208] The courts that adopt this reasoning never bother to consider some of its potentially troublesome implications. For example, does it follow that games that are marketing failures (games that, for example, are not followed by a sales

207. *See* notes 120–23 and accompanying text.

208. *See* Blackburn v. Ippolito, 156 So. 2d 550, 553 (Fla. Dist. Ct. App. 1963), *cert. denied*, 166 So. 2d 150 (Fla. 1964); Idea Research & Dev. Corp. v. Hultman, 131 N.W.2d 496, 498 (Iowa 1964); State *ex rel.* Frizzell v. Highwood Serv., Inc. 473 P.2d 97, 100 (Kan. 1970); State v. Fox Kan. Theatre Co., 62 P.2d 929, 933 (Kan. 1936); State *ex rel.* Glendenning Cos. v. Letz, 591 S.W.2d 92, 101 (Mo. Ct. App. 1979); Lucky Calendar Co. v. Cohen, 117 A.2d 487, 496 (N.J. 1955); United Stations of N.J. (US) v. Kingsley, 240 A.2d 702, 708–09 (N.J. Super. Ct. 1968); Great Atl. & Pac. Tea Co. v. Cook, 240 N.E.2d 114, 120 (Ohio Ct. C.P. 1968), *aff'd on other grounds sub nom.*, Kroger Co. v. Cook, 244 N.E.2d 790 (Ohio Ct. App. 1968), *aff'd*, 265 N.E.2d 780 (Ohio 1970); State v. Big Chief Corp., 13 A.2d 236, 240–41 (R.I. 1940); Albertson's Inc. v. Hansen, 600 P.2d 982, 988–89, 993 (Utah 1979) (dissenting opinions); State v. Reader's Digest Ass'n, Inc., 501 P.2d 290, 297 (Wash. 1972); State *ex rel.* Schillberg v. Safeway Stores, Inc. 450 P.2d 949, 955–56 (Wash. 1969); Society Theater v. City of Seattle, 203 P. 21, 22 (Wash. 1922). *But see* Pepsi Cola Bottling Co. of Luverne, Inc. v. Coca-Cola Bottling Co., Andalusia, 534 So. 2d 295 (Ala. 1988); Opinion of the Justices, 397 So. 2d 546 (Ala. 1981); California Gasoline Retailers v. Regal Petroleum Corp. of Fresno, Inc., 330 P.2d 778 (Cal. 1958); Mobil Oil Corp. v. Attorney Gen., 280 N.E.2d 406 (Mass. 1972); People v. Brundage, 150 N.W.2d 825 (Mich. Ct. App. 1967), *rev'd*, 162 N.W.2d 659 (Mich. 1968); Cudd v. Aschenbrenner, 377 P.2d 150 (Or. 1962); State v. Socony Mobil Oil Co., 386 S.W.2d 169 (Tex. Civ. App. 1964).

increase)[209] are not contracts, while those that are more successful generate contractual rights? More importantly, the courts that purport to find consideration in a *de facto* sales increase usually simply ignore the fact that the game sponsor (the promisor) has expressly disclaimed the necessity of making a purchase in order to play the game, and therefore does not appear to be bargaining for a sale in the traditional sense. Our legal categories are, of course, ours to define as we choose, and the courts may redefine "consideration" so as to dispense with the mutual inducement so essential to the classical theory of consideration.[210] At that point, however, they have abandoned (or, at least, very substantially modified) the traditional unilateral contract model of promotional games they purport to be applying.

Other courts find consideration for the promises contained in promotional games by a slightly different, though related, path. For example, some of the courts point out that, even though a game or other promotional device requires no purchase or fee, a number of the individuals who participate actually do buy goods from the sponsoring grocery store or magazines from the sponsoring magazine distributors or admission tickets to the sponsoring movie theater. Those who do buy, it is said, supply consideration for the contingent promise of a prize, and the consideration they supply supports the same promise to others.[211] These cases present what might be called a "Three Musketeers" theory of consideration—one (or, at least, some) for all and all for one.

There is nothing strange or unusual about a contract in which one party supplies monetary or other consideration in return for a promise which runs to another person.[212] However, if the Three Musketeers theory is elaborated in more detail, it becomes unsatisfactory as a theory of consideration with which to illuminate promotional games (and force them into the unilateral contract model). In the case of a supermarket promotional game like the Publix case, for example, it may very well be true that a number (perhaps most) of the participants actually buy groceries. Some may even be induced to do so by the

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209. The question in the text is far from academic. While data concerning the effectiveness of games is not plentiful, techniques for the evaluation of marketing devices continue to improve. A study by one company suggested that only 16% of 1,000 tested sales promotions (which includes games as well as other devices) produced increased revenues in excess of their costs. *See* Thomas Exter, *Advertising and Promotion: The One-Two Punch*, 12 AM. DEMOGRAPHICS, Mar. 1990, at 19, 20.

210. For judicial decisions apparently applying the inducement requirement of the doctrine of consideration, *see* cases cited *supra* note 123.

211. *See Blackburn*, 156 So. 2d at 554; Tierce v. State, 178 S.E.2d 913, 915–16 (Ga. Ct. App. 1970); Boyd v. Piggly Wiggly S., Inc. 155 S.E.2d 630, 639 (Ga. Ct. App. 1967); Midwest Television, Inc. v. Waaler, 194 N.E.2d 653, 656–57 (Ill. App. Ct. 1963); Jones v. Smith Oil & Ref. Co., 15 N.E.2d 42, 44 (Ill. App. Ct. 1938); *Idea Research & Dev. Corp.*, 131 N.W.2d at 499; *Fox Kan. Theatre Co.*, 62 P.2d at 934 (Kan. 1936); Mobil Oil Corp. v. Danforth, 455 S.W.2d 505, 506–08 (Mo. 1970); State v. McEwan, 120 S.W.2d 1098, 1101 (Mo. 1938); *United Stations of N.J. (US)*, 240 A.2d at 708; Valentin v. El Diario La Prensa, 427 N.Y.S.2d 185, 186 (N.Y. Civ. Ct. 1980); People v. Psallis, 12 N.Y.S.2d 796, 799 (N.Y. Mag. Ct. 1939); Animal Protection Soc'y of Durham, Inc. v. State, 382 S.E.2d 801, 807 (N.C. Ct. App. 1989); *Kroger Co.*, 265 N.E.2d at 782–83; *Big Chief Corp.*, 13 A.2d at 239, 240; *Socony Mobil Oil Co.*, 386 S.W.2d at 174 (dissenting opinion); Smith v. State, 127 S.W.2d 297, 298 (Tex. Crim. App. 1939). *But see California Gasoline Retailers*, 330 P.2d at 784); Cudd v. Aschenbrenner, 377 P.2d 150, 156 (Or. 1962).

212. *See* RESTATEMENT (SECOND) OF CONTRACTS § 71(4) (1979).

promotional material associated with the game. Others may buy what they happen to need anyway and pick up a game card as an afterthought. Some may have come to the market because of the game, and some may be regular customers who show up out of habit or because the location is particularly convenient. Others may come to the store specifically to pick up a game card and leave without buying anything. The Three Musketeers theory supposes that all these people are parties, along with the game sponsor, to one big contract. The customers collectively are on one side, and the game sponsor is on the other. The sponsor makes a prize promise (albeit a highly contingent one) to all the customers, and the customers who buy groceries (or perhaps that subset composed of those who are induced to buy goods by the game, in spite of the sponsor's express disclaimer of the need to do so) supply the consideration necessary to support the promise running to all.

The grand contract posited by the Three Musketeers theory is quite clearly a legal fiction, not the result of a multiparty negotiation process. There is no harm in legal fictions, of course, provided that there is some reason to use them and that the factual distortion they require is not too severe.[213] In this instance, however, the fiction is just too hard to square with the factual context. The numerous game participants do not (and probably cannot) know each other.[214] They normally do not communicate with each other at any time.[215] Apart from the fact that those who buy groceries may not be induced to do so by the game (which does not require it), the actual buyers certainly do not intend by making a purchase to make some other participant a third party beneficiary, to confer upon him any benefit, or to earn him any rights.[216] In short, each game participant seems to be "in it for himself," and there does not seem to be the kind of community of interest one would expect of the grand collective enterprise posited by the Three Musketeers theory.[217]

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213. The "contract implied in law" is probably the most familiar of such fictions, and it is used for the perfectly reasonable purpose of preventing unjust enrichment.

214. This lack of knowledge or communication becomes even more clear when one considers manufacturer-sponsored games like the Kraft "Ready to Roll" promotion discussed *supra* part I. It seems absurd to regard all the purchasers of Kraft Singles American Cheese in the cities of Chicago and Houston as parties to a single grand game contract.

215. One does, of course, occasionally find multiparty contracts in which some of the participants neither know nor communicate with each other. Real estate limited partnerships with numerous investor/limited partners sometimes exhibit such features. However, such agreements are drafted and documented quite formally, and it is clear that the limited partners all share a common interest in (and will profit ratably from the success of) the partnership project. Such agreements are therefore distinguishable from the typical game context.

216. Indeed, assuming the class of game participants is composed of some purchasers and some non-purchasers, it is virtually impossible to meet the traditional requirements for making the non-purchasers third party beneficiaries of the sponsor's prize promise on the basis of consideration supplied by the purchasers. As noted in the text, there is unlikely to be either direct or circumstantial evidence that the purchasers intend to benefit the non-purchasers, and it may be assumed that the non-purchasers have no pre-existing creditor relationship to the purchasers. In the terminology of the *Restatement*, it follows that the non-purchasers could not be "intended" beneficiaries of the contractual relationship between the purchasers and the game sponsor; they could at most be "incidental" beneficiaries. RESTATEMENT (SECOND) OF CONTRACTS § 302 (1979). However, only intended beneficiaries, not incidental beneficiaries, acquire enforceable contractual rights against a promisor (in this case, the game sponsor). *Id.* at §§ 304, 315.

217. *Cf.* State v. Moren, 51 N.W. 618 (Minn. 1892) (noting absence of community of interest among "members" of suit club); Stevens v. Cincinnati Star–Times Co., 73 N.E. 1058 (Ohio 1905) (no class relief available to participant in pay-to-play vote-guessing contest in absence of showing of community of interest with other participants).

Thus, neither the theory that a *de facto* sales increase amounts to consideration nor the Three Musketeers theory is a satisfactory explanation of how the consideration "requirement" is satisfied. Accordingly, neither of these theories can explain how games requiring no purchase or fee fit within the traditional unilateral contract model.

4. A Better Solution: Professor Eisenberg's Theory

Some courts, however, come much closer to the truth by identifying the desire to increase "traffic flow" as the motive behind promotional games or, more formally, by finding the consideration for the promises contained in a promotional game, not in increased sales, but in increased "traffic."[218] Two of the examples under discussion—the theater "bank night" and the Publix supermarket promotion—require, as a practical matter, that contestants be present in or near the sponsor's place of business at some point.[219] If one

218. *See* Gold Bond Stamp Co. v. Bradfute Corp., 463 F.2d 1158, 1160 (2d Cir. 1972); Caples Co. v. United States, 243 F.2d 232, 237 (D.C. Cir. 1957) (dissenting opinion); People v. Eagle Food Ctrs, Inc., 202 N.E.2d 473, 474 (Ill. 1964); Midwest Television, Inc. v. Waaler, 194 N.E.2d 653, 657 (Ill. App. Ct. 1963); Idea Research & Dev. Corp. v. Hultman, 131 N.W.2d 496, 498 (Iowa 1964); Mid-Atlantic Coca-Cola Bottling Co., Inc. v. Chen, Walsh & Tecler, 460 A.2d 44, 46 (Md. 1983); State *ex rel.* Glendinning Cos. v. Letz, 591 S.W.2d 92, 101 (Mo. Ct. App. 1979); United Stations of N.J. (US) v. Getty Oil Co., 246 A.2d 150, 155 (N.J. Super. Ct. 1968); Knox Indus. Corp. v. State, 258 P.2d 910, 914 (Okla. 1953); Smith v. State, 127 S.W.2d 297, 299 (Tex. Crim. App. 1939); Albertson's Inc. v. Hansen, 600 P.2d 982, 989 (Utah 1979) (dissenting opinion); Geis v. Continental Oil Co., 511 P.2d 725, 727 (Utah 1973); State *ex rel.* Schillberg v. Safeway Stores, Inc., 450 P.2d 949, 956 (Wash. 1969); State v. Laven, 71 N.W.2d 287, 289 (Wis. 1955). *But see* Opinion of the Justices, 397 So. 2d 546 (Ala. 1981); Clark v. State, 80 So. 2d 308 (Ala. Ct. App. 1954), *cert. denied*, 80 So. 2d 312 (1955); Cross v. People, 32 P. 821 (Colo. 1893); Dumas v. Todd, 92 S.E.2d 265 (Ga. Ct. App. 1956); People v. Brundage, 150 N.W.2d 825 (Mich. App. 1967), *rev'd*, 162 N.W.2d 659 (Mich. 1968).

219. For examples of "bank night" promotions and supermarket games requiring a visit to the store, see cases cited *supra* notes 183, 186. For additional examples of promotional devices requiring a registration at, or a visit to, the sponsor's place of business, see *Caples Co.*, 243 F.2d 232 (television bingo game requiring cards obtainable from stores selling sponsor's products); Fernandez v. Fahs, 144 F. Supp. 630 (S.D. Fla. 1956) (prize drawing at minor league baseball game); California Gasoline Retailers v. Regal Petroleum Corp., Inc., 330 P.2d 778 (Cal. 1958) (prize drawing sponsored by gasoline stations); Kelly v. Banda, 157 S.E.2d 782 (Ga. Ct. App. 1967) (radio and television manufacturer's football contest requiring deposit of entry blank at dealer's showroom); *Dumas*, 92 S.E.2d 265 (prize drawing at auction); Harlem-Irving Realty, Inc. v. Alesi, 425 N.E.2d 1354 (Ill. App. Ct. 1981) (prize drawing at opening of shopping center addition); *Midwest Television, Inc.*, 194 N.E.2d 653 (prize drawing sponsored by retail stores); Jones v. Smith Oil & Ref. Co., 15 N.E.2d 42 (Ill. App. Ct. 1938) (service station prize drawing); *Idea Research & Dev. Corp.*, 131 N.W.2d 496 (television bingo game requiring cards obtainable at sponsors' stores); Mobil Oil Corp. v. Attorney Gen., 280 N.E.2d 406 (Mass. 1972) (promotional games at gasoline stations); Glover v. Malloska, 213 N.W. 107 (Mich. 1927) (prize drawing conducted by service stations); Seale-Lily Ice Cream Co. v. Buck, 15 So. 2d 213 (Miss. 1943) (prize drawing sponsored by ice cream stores); Mobil Oil Corp. v. Danforth, 455 S.W.2d 505 (Mo. 1970) (promotional game at gasoline stations); State *ex rel.* Line v. Grant, 75 N.W.2d 611 (Neb. 1956) (prize drawing sponsored by automobile dealer); *Getty Oil Co.*, 246 A.2d 150 (various promotional games conducted by gasoline stations); Endres v. Buffalo Auto. Dealers Ass'n. Inc., 217 N.Y.S.2d 460 (N.Y. Sup. Ct. 1961) (drawing at auto show); Carl Co. v. Lennon, 148 N.Y.S. 374 (N.Y. Sup. Ct. 1914) (prize drawing by retail store; winner's number displayed in store window); People v. Psallis, 12 N.Y.S.2d 796 (N.Y. Mag. Ct. 1939) (prize drawing conducted by owner of lunch wagon); Knox Indus. Corp. v. State, 258 P.2d 910 (Okla. 1953) (prize drawing conducted by service station and auto parts chain); Finch v. Rhode Island Grocers Ass'n, 175 A.2d 177 (R.I. 1961) (door prize at trade fair); First Tex. Sav. Ass'n v. Jergins, 705 S.W.2d 390 (Tex. Ct. App.

adopts the traditional view that the only contract formed is the discrete transaction between the ultimate prizewinner and the sponsor, and if one further supposes that the winner has made no purchase, his or her mere presence on the scene seems quite valueless to the sponsor. For that reason, the implication of Williston's tramp hypothetical seems to be that, notwithstanding the peppercorn theory, the mere presence of the contestant cannot be the consideration needed by the traditional unilateral contract model.

Moreover, the failure of the "*de facto* sales increase" and Three Musketeers theories of consideration elaborated above seems to counsel against regarding a promotional game more collectively, as one big contract between the game sponsor, on the one hand, and all the participants on the other. At this point, however, it is necessary to recall a feature of promotional games first noted above in Part I.A. In "pay-to-play" commercial games, the benefit to the sponsor—and that for which the sponsor bargains—is supplied, not by the winner alone, but incrementally by each contestant's payment of a nominal fee. It is this feature of games that distinguishes them from simple rewards. Similarly, in the case of a supermarket game requiring no purchase, it seems obvious that what the store owner is seeking is the incremental effect of large numbers of contestants entering the premises. It may be that a crowded store is not valuable in itself, but the store owner knows that if he or she can draw a crowd, a certain percentage of its members will buy groceries, either because of convenience, the phenomenon of impulse buying,[220] or the fact that the store's prices and/or goods really are better than competitors'. This is the kernel of truth in judicial references to increased "traffic" as consideration for a prize promise.

At this point, however, the analysis of promotional games presents an apparent puzzle. If the Three Musketeers theory demonstrates the oddity of treating a promotional game as one grand contract, to which all contestants (successful and unsuccessful) are parties, the incremental and statistical nature of the benefit to the sponsor illustrates the oddity of regarding it as an offer to a great multitude that is only accepted by a single prize winner, thereby forming a discrete unilateral contract. It seems inappropriate, therefore, to regard a promotional game either as one large contract including all participants as parties or as an offer that ripens into a contract for only the winner(s).

1986) (prize drawing by savings and loan); Cashway Bldg. Materials, Inc. v. McCurdy, 553 S.W.2d 787 (Tex. Civ. App. 1977) (prize drawing at grand opening of store); State v. Socony Mobil Oil Co., 386 S.W.2d 169 (Tex. Civ. App. 1964) (television bingo game using cards obtainable at gasoline stations); Brice v. State, 242 S.W.2d 433 (Tex. Crim. App. 1951) (prize drawing at grand opening of store); Smith v. State, 127 S.W.2d 297 (Tex. Crim. App. 1939) (stamp collection game conducted by organization of retail stores); *Geis.*, 511 P.2d 725 (scratch-off matching game conducted by service stations); Walters v. National Beverages, Inc., 422 P.2d 524 (Utah 1967) (drawing sponsored by soft drink bottler and automobile dealer); Maughs v. Porter, 161 S.E. 242 (Va. 1931) (drawing at auction).

220. According to one study, two-thirds of all buying decisions are made in the store. *See* Kalish, *Supermarket Sweepstakes*, MARKETING & MEDIA DECISIONS, Nov. 1988, at 33, 34; Osborn, *The Coming Store Wars*, 13 MARKETING COMMUNICATIONS, July 1988, at 23. Indeed, over half the customers studied arrived at the store with no list or brand-specific plan. Osborn, *supra*, at 22.

The solution to this apparent puzzle is suggested by Professor Eisenberg's analysis of a very different problem.[221] In discussing the traditional rule that an illusory promise is not consideration for a return promise, Professor Eisenberg suggests that certain forms of socially useful transactions that often run afoul of the rule—for example, contracts giving one party an absolutely unlimited termination right—are misconceived as unsuccessful bilateral agreements.[222] Rather, he argues, they are successful unilateral agreements in which the apparently disadvantaged party—the party, for example, who grants the other an unlimited termination right—is really bargaining for an act.[223] The act for which the disadvantaged party is bargaining is the grant of a chance to impress the opposite party, at no risk to the latter.[224] By making the agreement and perhaps commencing business dealings, the party with the unlimited termination right effectively grants a chance to draw him or her further into a mutually beneficial course of business.[225]

The promotional game for which no purchase is required seems to fit this model of "bargaining for a chance" admirably. In the Publix case, for example, the only thing that the sponsor seems to be bargaining for is the presence of the contestant in the supermarket. But the contestant who responds by going to the store is placed in a position in which he or she is subject to the influence of unrelated in-store advertising, attractive packaging, price specials, and all the other devices supermarkets use to peddle groceries. It is thus quite realistic to regard the sponsor as bargaining for a chance, in the sense that he or she is seeking to induce the contestant into a position in which other inducements (or sheer inertia) result in sales.[226] And if enough

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221. *See* Melvin A. Eisenberg, *The Principles of Consideration*, 67 CORNELL L. REV. 640 (1982).

222. *Id.* at 649.

223. *Id.*

224. *Id.* at 649–651.

225. *Id.*

226. While Professor Eisenberg's conception of "bargaining for a chance" has not been adopted expressly in any reported case, one occasionally observes instances in which judges appear to be struggling toward it. *See, e.g.*, Caples Co. v. United States, 243 F.2d 232, 237 (D.C. Cir. 1957) (dissenting opinion suggesting that "consideration" for lottery purposes may be satisfied by necessity of store visit in order to pick up bingo-style card and consequent exposure to salesmanship); Lewis v. Kroger Co., 109 F. Supp. 484, 487 (S.D. W. Va. 1952) (noting purpose of requiring official entry blank); Clark v. State, 80 So. 2d 308, 309 (Ala. Ct. App. 1954) (noting that registrant need not be exposed to solicitation or pass through store's display area in order to register for drawing); State v. Bussiere, 154 A.2d 702,706 (Me. 1959) (noting that participants' only risk is exposure to normal sales pressure at supermarket); State v. Grant, 75 N.W.2d 611, 613 (Neb. 1956) (noting purpose of drawing was to induce people into showroom and expose them to dealer's exhibits); Lucky Calendar Co. v. Cohen, 117 A.2d 487, 490 (N.J. 1955) (noting purpose of requiring deposit of coupons in store); Knox Indus. Corp. v. State, 258 P.2d 910, 914 (Okla. 1953) (noting that participants must obtain ticket at sponsor's place of business and be subjected to sales appeal); Smith v. State, 127 S.W.2d 297, 299 (Tex. Crim. App. 1939) (characterizing game pieces as "bait"); Geis v. Continental Oil Co., 511 P.2d 725, 727 (Utah 1973) (including attraction to store and exposure to advertising as aspects of "consideration" in lottery case); Maughs v. Porter, 161 S.E. 242, 244 (Va. 1931) (recognizing that some who attend drawing without intention of bidding on lots may be induced to bid while attending); State *ex rel.* Schillberg v. Safeway Stores, Inc., 450 P.2d 949, 956 (Wash. 1969) (noting that game participant must be exposed to advertising in order to play); State v. Laven, 71 N.W.2d 287, 289 (Wis. 1955) (stipulation to commercial benefit of increased traffic and exposure to advertising).

people respond to the game by going to the store, that is, if "traffic" builds, there is a statistical likelihood sales will increase.[227]

The movie theater owner who sponsors a "bank night" seems entirely analogous. If his or her prize drawing induces enough people to come to the theater lobby, or even the sidewalk outside, it is likely that a certain number will buy tickets to see the movie, even if it is not a condition of participating in the drawing. The theater owner likewise appears to be "bargaining for a chance." While the case of the publisher's clearinghouse sweepstakes appears superficially different because the entrant need not leave his or her home, it nevertheless seems to be another instance of bargaining for a chance. It can hardly be an accident that the stamps that must be pasted to an entry form in order to enter "for free" are buried in the middle of other stamps that depict the magazines held out for sale and that can also be pasted on the form to order magazines. Again, given the phenomenon of impulse buying, it may be that, if enough people attend to the promotional material for the purpose of finding the "free" entry stamps and entering the sweepstakes, a percentage of them will buy magazines. Thus, it is not far-fetched to regard even bargaining for that kind of sustained, concentrated attention as "bargaining for a chance."[228] Perhaps even more obvious examples of "bargaining for a chance" are the various radio contests that require participants to listen to a particular station in order to play.[229] Aside from the fact that station advertising rates are set by market share at critical periods,[230] the contest sponsor quite obviously hopes that the game participant will tune in for the contest and then leave the dial alone.

Some of the best examples of promotional games fitting Professor Eisenberg's analysis are described in In re *Elsinore Shore Associates*.[231] In that case, a bankrupt Atlantic City casino sought to expunge a claim filed in the bankruptcy proceeding by an advertising agency.[232] The advertising

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227. *See, e.g.*, Idea Research & Dev. Corp. v. Hultman, 131 N.W.2d 496, 498 (Iowa 1964) (reporting percentages of persons asking for game cards who make purchases); State v. Letz, 591 S.W.2d 92, 101 (Mo. Ct. App. 1979) (providing statistics on increased customer counts and sales during the period promotional games were conducted).

228. *See also* Minton v. F.G. Smith Piano Co., 36 App. D.C. 137 (D.C. 1911) (participants required to count dots surrounding picture of particular model of piano); Schreiner v. Weil Furniture Co., 68 So. 2d 149 (La. Ct. App. 1953) (particpants required to count dots surrounding particular model of television).

229. *See, e.g.*, Sweeney v. WYSA (Sunny 103) Radio Station, 574 So. 2d 769 (Ala. 1991); Weirum v. RKO Gen., Inc., 119 Cal. Rptr. 151 (Ct. App. 1975), *vacated* 123 Cal. Rptr. 468 (cal. 1975); Szczuka v. Bellsouth Mobility, Inc., 375 S.E.2d 667 (Ga. Ct. App. 1988); Gallo v. Century Broadcasting, 330 A.2d 780 (N.H. 1974); Swanson Broadcasting, Inc. v. Clear Channel Communications, Inc., 752 S.W.2d 165 (Tex. Ct. App. 1988). Even more obvious (and usually more sinister) examples of "bargaining for a chance" are found in those cases in which a seller of vacation property promises a free prize (not just the opportunity to participate in a prize drawing) to *everyone* who visits the property and listens to a sales pitch. *See, e.g.*, United States v. DeFusco, 930 F.2d 413 (5th Cir. 1991); Weiss v. Winner's Circle of Chicago, Inc., 1992 WL 51659 (N.D. Ill. Mar. 6, 1992); Consumer Protection Div. v. Outdoor World Corp., 603 A.2d 1376 (Md. Ct. Spec. App. 1992); Martin v. Western Reserve Trails, 1991 WL 179596 (Ohio Ct. App. Sept. 13, 1991). The sinister aspects of the latter schemes are usually that the prizes are not really free and/or that the sales pitch is fraudulent or involves high-pressure tactics.

230. *Swanson Broadcasting, Inc.*, 752 S.W.2d 165.

231. 102 B.R. 958 (Bankr. D.N.J. 1989).

232. *Id.* at 959.

agency's claim was based on the contention that the casino had misappropriated the agency's ideas for a promotion.[233] The casino defended on the grounds that the agency's ideas were not novel, in light of material already in use by the casino and others, and that another agency had independently developed and supplied the promotional device actually used.[234] While the dispositive intellectual property issues in the case are of little interest for purposes of this article, the Bankruptcy Court's opinion describes in some detail the various game designs and permutations considered by the casino over a period of time.

The promotion at issue was designed to solve a traffic flow problem within the casino.[235] The casino was a multi-level building with various gambling devices, shops and restaurants located on the several levels.[236] Apparently, the casino had experienced a consistent problem in attracting patrons to the upper levels of its facility. Customers characteristically entered the casino from an entrance on the Atlantic City boardwalk, used the first level facilities for a short period of time, and then moved on down the boardwalk without exploring any other level.[237] Various proposals were developed in order to assure a wider distribution of customers throughout the casino. One proposal was a "bonus slot" promotional game requiring persons present in the casino to match three symbols on a game card with three symbols on an actual casino slot machine.[238] While the proposal did not require gambling as a condition of participation, the game cards were designed to require that the contestant match slot machines on a particular level and in particular zones.[239] By controlling the zones in which a match would win a prize, the casino could create incentives for customer traffic in the upper levels where it had been sparse. A variant of this proposal specified a "treasure map" format for the game piece, so that the customer would be directed to the bank of slot machines at which a match would win a prize.[240] A further variant eliminated the need to match slot machine displays, substituting a requirement that a picture on the contestant's game piece match the picture on a special electronic display unit.[241] The electronic display units, of course, were to be placed in locations at which additional customer traffic was desired.[242] The promotion that was finally used abandoned the "matching" component of the game altogether and substituted a series of forty-five daily sweepstakes drawings.[243] Again, no casino play was required, but an entry form had to be deposited in one of a series of special receptacles strategically located where additional traffic was desired.[244] The common threads to all of the proposals were, first, a requirement that the participant be present not just at the sponsor's business,

233. *Id.*
234. *Id.* at 969–77.
235. *Id.* at 961.
236. *Id.*
237. *Id.* at 961, 964.
238. *Id.* at 961–62.
239. *Id.* at 962.
240. *Id.* at 962–65.
241. *Id.* at 965.
242. *Id.* at 966.
243. *Id.* at 967–69.
244. *Id.* at 968.

but at a particular targeted location within the facility, and, second, an apparent assumption that, if enough people were drawn to the hitherto underused areas, gambling would increase. The *Elsinore Shores* proposals thus seem to be particularly good examples of a sponsor's use of a game to "bargain for a chance" to induce the customer into additional business dealings—in this case, business dealings in the form of gambling at an otherwise underused portion of the business.

Professor Eisenberg's model of "bargaining for a chance" is expressly characterized as a species of unilateral contract, and it appears to solve the problem in consideration doctrine created by Williston's tramp hypothetical. The presence of the participants is usually the subject of express bargaining, and, at the very least, it is impossible to play the game (or claim the prize) without being present. A game with such characteristics is distinguished from a conditional gift because the presence of large numbers of participants confers a benefit (albeit one probabilistic in character) upon the sponsor. Thus, it appears that promotional games requiring presence at a business, but no purchase, can be squeezed, with some strain, into the traditional unilateral contract model.

Moreover, use of the Eisenberg analysis also suggests an answer to a question alluded to earlier, that is, whether a promotional game is to be regarded as a single large-scale contract with the sponsor on one side and all the contestants on the other, as an offer to a multitude that is only accepted by one individual (the prize winner), or as something else. Consider, for example, one of the prize drawings used in the *Elsinore Shores* promotion. Given the difficulties that beset the Three Musketeers theory, it seems anomalous to argue that the casino has a single contract with all of the persons who have deposited entry forms, though only one of them will actually fulfill the condition attached to the promise of the prize. However, given that each entrant has supplied that for which the casino has bargained (that is, his presence), and the incremental and probabilistic nature of the benefit increased traffic confers, it seems equally anomalous to say that only the prize winner and the casino have a bargain. It seems most natural to conclude that the casino has a separate bargain with each entrant, formed when the customer visits the premises and deposits his entry form, but granting rights that are conditional, to be sure, on further events (that is, success in the drawing).

Obviously, if the drawing is conducted as advertised, it does not matter whether it is characterized as a single multiparty contract, a general offer that results in only a single discrete contract with the prize winner or a series of discrete conditional contracts with all of the participants, only one of which will generate a vested right when all conditions precedent have been fulfilled. The person whose number is drawn has vested rights against the sponsor, and, as to the others, there is either no contract or no breach (because of failure of condition precedent). But suppose that for some reason, the casino cancels or fails to conduct the drawing. If formation does not occur until the prize winner is selected, there is no contract, and no one, it seems, has any rights against the sponsor. Characterization of the game either as a single large-scale contract or, more acceptably, as a series of "bargains for a chance" avoid this result. Moreover, the question to be resolved has been transformed from a question of consideration into a less problematic question of either for-

mation or interpretation. Has the offeree provided enough of the requested performance to form a contract, and, if so, what rights against the sponsor have accrued?

Furthermore, the "bargains for a chance" characterization suggests a solution to this formation problem. The visit to the sponsor's premises usually occurs at the inception of the game, when the contestant picks up a game card or deposits an entry blank. The contestant has thus supplied, very early in the relationship, that for which the sponsor has bargained. This suggests that the point of contract formation likewise should be set early.[245] This can be accomplished in one of two ways. One could make prize offers in this kind of case irrevocable under *Restatement (Second)* section 45 once performance has commmenced (that is, once the contestant has visited the sponsor's premises). Alternatively, one could invoke the rule that "substantial compliance" with the terms of an offer constitutes acceptance and give a liberal construction to the notion of "substantial compliance" so that a visit to the sponsor's premises qualifies.

In sum, promotional games requiring neither a purchase nor payment of a fee generate conceptual difficulties for the traditional unilateral contract model. Those conceptual difficulties cannot be avoided by a mechanical application of the peppercorn theory of consideration or by the most common judicial responses to them. They can, however, be resolved, and certain formation issues are resolved as a bonus, if such games are classified as unilateral contracts in which the game sponsor bargains for the presence of the participant, and so "bargains for a chance" to influence him or her further.

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245. Setting contract formation early can, of course, lead to remedial problems, but these seem less difficult than the consideration problems avoided by the "bargain for a chance" model. Suppose, to return to the example of the *Elsinore Shores* drawing, the casino cancels the drawing after the entrants on the premises have deposited their entry forms. The "bargain for a chance" analysis entails that contracts with the entrants have been formed, but that the right of each entrant to the prize is conditional on his or her number being drawn. If it becomes impossible to conduct the drawing, or in fact it is never conducted, it is not possible to isolate a prize winner and award the value of the prize to a single individual. The obvious alternative is to award each entrant the value of the prize discounted by his chances of winning it. This approach was followed in a contract action for the value of a prize in a true lottery, Van Gulik v. Resource Dev. Council for Alaska, Inc., 695 P.2d 1071 (Alaska 1985). The rules of the lottery in question provided for a sequential drawing of tickets. The holder of the last ticket drawn was to be the winner of the grand prize of $10,000. *Id.* at 1071–72. The last three tickets in the bin were held by Plaintiff Van Gulik and Defendants Cooper and McGowan. At that point, the lottery operators made three errors. First, they drew two tickets simultaneously, which proved to be those of Cooper and McGowan. *Id.* at 1072. Second, they overlooked the fact that Van Gulik's ticket was still in the bin and announced that Cooper and McGowan could either share the grand prize or compete in a run-off drawing between the two of them. *Id.* Third, when Van Gulik's ticket was discovered and a dispute between the three ticketholders ensued, the operators held a drawing (later declared invalid) of all tickets sold, thereby eliminating any chance to complete the original drawing or hold a compromise drawing among the final three. *Id.* While the court noted the impossibility of knowing exactly what would have happened had the drawing been conducted perfectly, it is clear that Van Gulik's ticket would have been either the penultimate or the ultimate ticket drawn. *Id.* at 1073–74. The court therefore gave Van Gulik the choice of an award of the value of his conditional right—50% of the $10,000 prize—or an opportunity to submit to a final drawing between his ticket and one other. *Id.* at 1074.

E. Promotional Games Requiring Neither a Purchase Nor Presence at a Place of Business

1. A Further Problem with the "Element" of Consideration

Thus, with some mental gymnastics, promotional games that require no purchase, but that do require either a visit to the sponsor's place of business or sustained attention to other promotional material, can be brought within the scope of the traditional unilateral contract model. There remains, however, a class of promotional games that resists such treatment even if the traditional unilateral contract model is expanded to include Professor Eisenberg's notion of "bargaining for a chance." Particularly in the last two decades, it has become common to find promotional games for which neither a purchase (or admission fee) nor presence at a place of business is a condition of participation.[246] For example, the rules of the Kraft "Ready to Roll" matching game specifically provided that free game pieces were available by mail. Bottle cap promotions conducted by soft drink manufacturers also frequently provide the opportunity to obtain bottle caps without actually buying any soft drinks or going to the grocery store.[247]

This marginal class of games is impossible to fit into the traditional unilateral contract model. The mutual inducement required by the classical doctrine of consideration seems absent. If the game sponsor is a food manufacturer, for example, it is an obvious assumption that the real object of its desire is increased sales or, at the very least, increased traffic in the retail outlets at which its products are sold. Yet it is precisely purchases and customer presence for which the sponsor expressly disclaims any intent to bargain. It is not just that nothing is said about purchases or customer presence at a particular location; the necessity of buying or visiting a store is specifically and expressly denied the status of a condition of participation by the terms of the purported "offer."[248] The sponsor is, in effect, expressly denying that the prize promise is given in exchange for increased sales or traffic. It is thus difficult or impossible

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246. *See* FCC v. American Broadcasting Co., Inc., 347 U.S. 284 (1954); Lewis v. Kroger Co., 109 F. Supp. 484 (S.D. W. Va. 1952); Clark v. State, 80 So. 2d 308 (Ala. 1954); California Gasoline Retailers v. Regal Petroleum Corp., Inc., 330 P.2d 778 (Cal. 1958); Minton v. F.G. Smith Piano Co., 36 App. D.C. 137 (D.C. 1911); ACF Wrigley Stores, Inc. v. Olsen, 102 N.W.2d 545 (Mich. 1960); State v. Letz, 591 S.W.2d 92 (Mo. Ct. App. 1979); Journal Square Merchants Ass'n v. McNamara, 117 A.2d 498 (N.J. 1955); United Stations of N.J. (US) v. Getty Oil Co., 246 A.2d 150 (N.J. Super. Ct. 1968); Kroger Co. v. Cook, 244 N.E.2d 790 (Ohio Ct. App. 1968), *aff'd*, 265 N.E.2d 780 (Ohio 1970); Albertson's Inc. v. Hansen, 600 P.2d 982 (Utah 1979); State v. Reader's Digest Ass'n, 501 P.2d 290 (Wash 1972); State v. Laven, 71 N.W.2d 287 (Wis. 1955).

247. *See* Pepsi Cola Bottling Co. v. Coca-Cola Bottling Co., Andalusia, 534 So. 2d 295 (Ala. 1988); Mid-Atlantic Coca-Cola Bottling Co., Inc. v. Chen, Walsh & Tecler, 460 A.2d 44 (Md. 1983); *Kroger Co. v. Cook*, 265 N.E.2d 780; Coca-Cola Bottling Co. of Wisconsin v. La Follette, 316 N.W.2d 129 (Wis. Ct. App. 1982).

248. It is this aspect of the marginal class of promotional games that distinguishes it from the "mixed motive" contracts specifically recognized in *Restatement (Second) of Contracts* § 81. It is one thing to recognize a class of bargains in which the offeror's promise does not "of itself" induce the return promise or performance, in the sense that the return promise or performance was given for a variety of motives and might even have occurred in the absence of the offeror's promise. It is quite another to assume a purported bargain in the face of a recitation by the purported offeror/promisor that his promise is *not* given in exchange for a return performance of a particular kind.

to regard increased sales or retail traffic as the inducement for the prize promise, even if such increases, in fact, occur.

Prize promises in games requiring neither purchases nor customer presence are, nonetheless, conditional in form, and such promises therefore exhibit at least the appearance of the bargaining process. However, the conditions recited—for example, scratching off the coating over particular letters or numerals, matching the halves of a picture, or spelling out words with bottle caps—are valueless to the game sponsor or anyone else. It thus appears that such games put the "peppercorn" theory of consideration directly in issue. If such games are to be regarded as traditional unilateral contracts, then it must be the case that the consideration "requirement" is satisfied if any performance, no matter how trivial, is genuinely bargained for. More importantly, in determining whether such trivial performances are truly the subject of bargain or merely the conditions attached to a gift, one encounters the problem raised by Williston's tramp hypothetical. The very fact that the conditions of participation or play are valueless is at least some evidence that such promotional games should be classified as conditional gifts rather than bargains. If so, the unilateral contract model has ceased to be a satisfactory explanation of promotional games.

2. The Possibility of a "Commercial Gift"

At this point, it becomes necessary to deal with a fairly obvious objection. There may be some to whom the very possibility of treating a promotional game as a species of gift (conditional or otherwise) sounds absurd. Such games, after all, are not amusements at a family picnic. They are used in a commercial context, and, though there may be problems in fitting some of them into a unilateral contract model, they are used for commercial purposes. At the very least, they are used to generate good will. Thus, there is a certain conceptual oddity or impropriety in placing such games in the same category as gifts, especially if one regards intra-family gift promises as the classic examples of donative promises.

Such an argument is, essentially, the rejection of the very possibility of a commercial gift, on the grounds that it is an incoherent notion. Such an outright rejection cannot be jusified. First, it is not difficult to think of examples of commercial gifts. The unsolicited free product samples that arrive in the mail are perhaps the most obvious examples. If such actual commercial gifts are common, there is nothing conceptually more problematic about recognizing the existence of commercial gift promises. Indeed, in a series of tax cases in the 1950's, taxpayers who had won prizes in promotions of various kinds specifically sought to avoid the taxation of prizes as income on the grounds that the prizes were gifts.[249] In one such case, *Fernandez v. Fahs*,[250] the taxpayer prevailed on his contention that an automobile won at a ball park drawing was a gift, in part because the court concluded that his performance (attendance at

249. Glenn v. Bates, 217 F.2d 535 (6th Cir. 1954); United States v. Amirikian, 197 F.2d 442 (4th Cir. 1952); Simmons v. United States 197 F. Supp. 673 (D. Md. 1961); Fernandez v. Fahs, 144 F. Supp. 630 (S.D. Fla. 1956); Lawton v. United States, 144 F. Supp. 638 (E.D. Va. 1956); Reynolds v. United States, 118 F. Supp. 911 (N.D. Cal. 1954); Robertson v. United States, 93 F. Supp. 660 (D. Utah 1950), *rev'd*, 190 F.2d 680 (10th Cir. 1951), *aff'd*, 343 U.S. 711 (1952).

250. 144 F. Supp. 630 (S.D. Fla. 1956).

a minor league baseball game) was not induced by the prize promise.[251] The taxpayer was an avid baseball fan and would have attended anyway.[252] Thus, failure to satisfy the traditional element of consideration led to the classification of a prize promise in the commercial context as a gift.

Moreover, not every device used to generate good will (or, more generally, for commercial purposes) qualifies as a bargain. Much advertising, for example, consists of little more than trumpeting the merits or the price of particular products (or, indeed, simply associating the product with desirable images), and no one is tempted to classify such advertising as bargaining even if it does create good will. Indeed, it seems fairly obvious that either a gift or a bargain could be an appropriate vehicle for the creation of good will.

3. Allegations of Hypocrisy

It is apparent, therefore, that the possibility of classifying promotional games requiring neither purchases nor customer presence as conditional gifts may not be rejected *a priori*. One determined to treat them as unilateral contracts could argue, however, that any appearance that promotional games are gifts is a sham. Everyone "just knows," it might be argued, that the Kraft game was designed to sell cheese, that bottle cap promotions are designed to sell soft drinks, and that supermarket games are designed to get customers into the store. Recitations in game rules that free game pieces are available by phoning a toll-free number or through the mail should be regarded as lies that sponsors tell in order to avoid prosecution under the lottery laws or in order to create a false appearance of generosity.

Precursors of the foregoing argument are found in many of the cases in which the critical issue is whether or not a particular promotional device is an illegal lottery. The courts frequently allude to the ingenuity of lottery promoters or express concern that apparently innocent rules or aspects of promotional devices may be subterfuges designed to disguise a lottery.[253] Occasionally, courts have expressly drawn the conclusion that providing a few free chances at a prize will not prevent the classification of a device as a lottery if such classification is otherwise appropriate.[254] There are also fairly recent ex-

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251. *Id.* at 632.

252. *Id.* at 631.

253. *See* FCC v. American Broadcasting Co., 347 U.S. 284 (1954); People v. Hecht, 3 P.2d 399 (Cal. App. Dep't Super. Ct. 1931); Bills v. People 157 P.2d 139 (Colo. 1945); Dorman v. Publix-Saenger-Sparks Theatres, Inc., 184 So. 886 (Fla. 1938); Blackburn v. Ippolito, 156 So. 2d 550 (Fla. Ct. App. 1963); Garland v. Isbell, 76 S.E. 591 (Ga. 1912); Boyd v. Piggly Wiggly S., Inc., 155 S.E.2d 630 (Ga. Ct. App. 1967); Midwest Television, Inc. v. Waaler, 194 N.E.2d 653 (Ill. App. Ct. 1963); Jones v. Smith Oil & Ref. Co., 15 N.E.2d 42 (Ill. App. Ct. 1938); State v. Fox Kan. Theatre, 62 P.2d 929 (Kan. 1936); Mobil Oil Corp. v. Danforth, 455 S.W.2d 505 (Mo. 1970); State v. McEwan, 120 S.W.2d 1098 (Mo. 1938); State v. Grant, 75 N.W.2d 611 (Neb. 1956); Lucky Calendar Co., Inc. v. Cohen, 117 A.2d 487 (N.J. 1955); Animal Protection Soc'y of Durham, Inc. v. State, 382 S.E.2d 801 (N.C.Ct. App. 1989); Kraus v. City of Cleveland, 94 N.E.2d 814 (Ohio Ct. Comm. Pl. 1950); Cudd v. Aschenbrenner, 377 P.2d 150 (Or. 1962); State v. Big Chief Corp., 13 A.2d 236 (R.I. 1940); State v. Socony Mobil Oil Co., 386 S.W.2d 169 (Tex. Civ. App. 1964); Brice v. State, 242 S.W.2d 433 (Tex. Crim. App. 1951); State v. Danz, 250 P. 37 (Wash. 1926).

254. *See Bills*, 157 P.2d 139; G.A. Carney, Ltd. v. Brzeczek, 453 N.E.2d 756 (Ill. App. Ct. 1983); Glover v. Malloska, 213 N.W. 107 (Mich. 1927); State v. Letz, 591 S.W.2d 92 (Mo. Ct. App. 1979); Journal Square Merchants Ass'n v. McNamara, 117 A.2d 498 (N.J. 1955); United Stations of N.J. (US) v. Getty Oil Co., 246 A.2d 150 (N.J. Super. Ct. 1968);

pressions of a judicial resolve to inquire "not into the name, but into the game."[255]

It must be conceded that the courts' fears of evasion and subterfuge are not entirely groundless. Indeed, it is easy to find cases in which the purported availablity of free chances to win a prize is a sham. In *G.A. Carney, Ltd. v. Brzeczek*,[256] for example, a small Chicago newspaper conducted a promotion (called the "Daily Devil") in which participants tried to match the numbers drawn in the Illinois State Lottery.[257] The easiest way to obtain an entry form was to purchase a newspaper, but the rules of the promotion also provided that free entry forms were available at the newspaper's offices.[258] As it turned out, the newspaper had no real offices.[259] It also had no phone number.[260] The newspaper's address was identical to that of its sole proprietor, and his address was that of the Chicago "residential hotel" in which he lived.[261] No entry in the building directory identified the building in question as the offices of the paper, and anyone familiar with Chicago rooming houses will not be surprised to learn that the manager did not distribute entry forms or assist people in locating the "office" of the paper.[262] (Indeed, anyone familiar with criminal "numbers" operations should be suspicious by now.) The court quite correctly concluded that the purported availability of free opportunities to enter was a sham and classified the promotion as a lottery.[263]

Nevertheless, it would be a mistake to assume that all promotional games in which the rules disclaim the necessity of a purchase or customer presence in order to participate are similarly hypocritical. To return to the examples used in Part I, Kraft, Inc. and Beatrice Companies, Inc. are major national corporations. Publix is a major supermarket chain in Florida, and Hollywood Park, though local, is by no means an insignificant economic unit. All are a far cry from a fly-by-night local newspaper run out of a rooming house. Finding the office or phone number of any of them would not be difficult. More importantly, in some of the reported decisions involving this marginal class of games, there are indications that substantial numbers of free opportunities to play the game were actually provided.[264] Thus, regarding

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Featherstone v. Independent Serv. Station Ass'n of Tex., 10 S.W.2d 124 (Tex. Civ. App. 1928); Maughs v. Porter, 161 S.E. 242 (Va. 1931).

255. Holmes v. Saunders, 250 P.2d 269, 270 (Cal. Ct. App. 1952); *Animal Protection Soc'y of Durham*, 382 S.E.2d at 807.

256. 453 N.E.2d 756 (Ill. App. Ct. 1983).

257. *Id.* at 758.

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.* at 761.

264. *See* Pepsi Cola Bottling Co. v. Coca-Cola Bottling Co., 534 So. 2d 295, 296-97 (Ala. 1988) (25,000 free game cards distributed); Clark v. State, 80 So. 2d 308, 310 (Ala. Ct. App. 1954) (of 5,000-6,000 weekly registrants for televised drawing, 600 register by mail); Tierce v. State, 178 S.E.2d 913, 914 (Ga. Ct. App. 1970) (game card mailed to everyone listed in Calhoun, Georgia telephone directory); Mid-Atlantic Coca-Cola Bottling Co. v. Chen, 460 A.2d 44 (Md. 1983) (over 44,000 free bottle caps distributed); Swanson Broadcasting, Inc. v. Clear Channel Communications, Inc., 752 S.W.2d 165, 167 (Tex. Ct. App. 1988) (game pieces in 300,000 direct mail flyers). *See also* California Gasoline Retailers v. Regal Petroleum Corp., 330 P.2d 778, 786-87 (Cal. 1958) (where participants could have received tickets free,

disclaimers of the need to purchase goods or visit a store in order to play a game as outright lies is simply inconsistent with the facts of at least some cases.

4. An Expansion of the Problem

It thus appears that there is no easy way to squeeze promotional games requiring neither a purchase nor customer presence into the traditional unilateral contract model. As noted earlier, this does not necessarily mean that the promises of prizes in such games are legally unenforceable. There are now a number of reasons to enforce a promise other than the fact that it might be part of a bargain.[265] The problem, however, is that this class of promotional games does not fit alternative bases for legal enforcement much better than it fits the traditional unilateral contract model.

Promissory estoppel, of course, is well-entrenched as an alternative basis of liability on promises,[266] and it has the great virtue of avoiding the vagaries of the doctrine of consideration entirely. The estoppel theory grounds liability in the promisee's justifiable and detrimental reliance,[267] and no attention need be paid to the question of whether the reliance was the subject of bargaining. However, in the case of promotional games requiring neither purchase nor a store visit, the participants characteristically do very little by way of reliance. The acts specified in the game rules as conditions of winning—scratching off game cards, matching halves of pictures, collecting bottle caps, or filling out entry blanks—require little or no out-of-pocket expenditure. Indeed, in the Kraft case, Kraft's answer to the class action complaint contained an offer (in support of a rescission defense) to reimburse any out-of-

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percentage of purchasers and non-purchasers not decisive on question of consideration); Cross v. People, 32 P. 821 (Colo. 1893) (chances at raffle available by mail); State v. Pepsi-Cola Gen. Bottlers, Inc., 659 P.2d 213, 215 (Kan. 1983) (free bottle caps available by mail or by visiting plant); State v. Bussiere, 154 A.2d 702, 706 (Me. 1959) (no lottery where free participation is a reality, not a fiction); Jersey Creamery, Inc. v. Board of Milk Control, 502 P.2d 30, 31 (Mont. 1972) (contestant may make his own application form); People v. Psallis, 12 N.Y.S.2d 796, 799 (N.Y. Mag. Ct. 1939) (no violation of lottery laws where evidence establishes free participation); Albertson's, Inc. v. Hansen, 600 P.2d 982, 984 (Utah 1979) (game pieces apparently available by mail); State *ex rel.* Schillberg v. Safeway Stores, Inc., 450 P.2d 949, 952 (Wash. 1969) (25% of prize slips distributed to persons who made no purchase). *But see* Mobil Oil Corp. v. Danforth, 455 S.W.2d 505, 506 (Mo. 1970) (number of persons who receive game piece without a purchase was small); State v. Letz, 591 S.W.2d 92, 101 (Mo. Ct. App. 1979) (over 99% of participants obtained game pieces by store visit; less than 1% obtained game pieces by phone or mail); Journal Square Merchants Ass'n v. McNamara, 117 A.2d 498, 499 (N.J. 1955) (only 5,000 out of half million coupons distributed outside sponsoring stores); Kroger Co. v. Cook, 265 N.E.2d 780, 781 (Ohio 1970) (majority of game pieces distributed to purchasers); Smith v. State, 127 S.W.2d 297, 298 (Tex. Crim. App. 1939) (participant may make facsimile of game pieces, but only 1% of entries contain facsmiles); Featherstone v. Independent Serv. Station Ass'n of Tex., 10 S.W.2d 124, 127 (Tex. Civ. App. 1928) (number of free tickets given was "negligible"); State v. Laven, 71 N.W.2d 287, 288 (Wis. 1955) (television bingo game held lottery, even though game participant could obtain card by mail or make his own).

265. For a convenient catalogue of the various kinds of promises enforceable even in the absence of consideration, see RESTATEMENT (SECOND) OF CONTRACTS §§ 82–92.

266. *Id.* § 90.

267. *Id.*

pocket reliance incurred by game participants.[268] The reliance costs incurred by participants, it seems, were the least of the company's worries.

The category of "reliance," of course, is not exhausted by out-of-pocket expenses. It also includes opportunity cost.[269] But again, the acts specified as conditions of winning in this marginal class of games usually require little time or effort, and therefore presumably carry negligible or zero opportunity costs. The notion of reliance also includes "beneficial reliance" activity, that is, behavior designed to increase the value to the recipient of the opposite party's anticipated performance.[270] However, in most promotional games, the odds of winning are extremely remote (unless, as in the Kraft or Beatrice cases, the game contains a design flaw). The highly contingent nature of the prospect of winning a prize makes it reasonable to assume that reliance in the form of value-maximizing activity will likewise be minimal or non-existent. Promissory estoppel thus seems unsatisfactory as a basis for enforcing promises made in the context of a promotional game.

Restitution theories also offer little hope of supporting a prize claim in the marginal class of promotional games.[271] At least pay-to-play games or games requiring a purchase or customer presence require participants to confer an easily discernible benefit on the sponsor. The sponsors of the marginal games now under discussion do not bargain for such benefits, and, even if there are benefits in the form of increased sales or traffic, such benefits may or may not be easily provable. Even if they are, however, it should be

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268. Answer and Counterclaim of Defendant Kraft, Inc. to Consolidated Class Action Complaint at 14–15, *In re* Kraft "Ready to Roll" Litigation, No. 89 CH 5016 (Cir. Ct. Cook County filed Aug. 18, 1989). There are exceptional cases in which game participants incur significant expenses in the course of playing a promotional game. One group of London businessmen formed a syndicate and invested 8,000 pounds in tea bags in order to play a scratch-off game sponsored by Ty-phoo Tea. *See* David Churchill, *The Prize Is Market Share*, FINANCIAL TIMES, Sept. 6, 1984, § I, at 8. Likewise, there are exceptional cases in which game participants invest substantial time or effort in pursuit of a prize. *See, e.g.*, United States v. DeFusco, 930 F.2d 413 (5th Cir. 1991) (recipients of prize notification required to visit timeshare properties); Bunting v. Atlantic Ref. & Mktg. Corp., 1991 WL 160927 (E.D. Pa. Aug. 15, 1991) (plaintiffs submitted between 80,000 and 100,000 sweepstakes entry forms); Consumer Protection Div. v. Outdoor World Corp., 603 A.2d 1376 (Md. Ct. Spec. App. 1992) (recipients of prize notification must visit out-of-state campground and listen to lengthy sales pitch). These unusual cases are amenable to classical contractual analysis. However, they are very different from games in the marginal category.

269. *See* Robert Cooter & Melvin A. Eisenberg, *Damages for Breach of Contract*, 73 CAL. L. REV. 1432, 1440–42 (1985); Pettit, *supra* note 171, at 420.

270. *See* Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1266–70 (1980).

271. Claims for unjust unrichment are occasionally made in the context of promotional games, but the success rate in the reported decisions is low. *See* Davidson v. National Broadcasting Co., 204 N.Y.S.2d 532 (N.Y. Sup. Ct. 1960) (dismissal of unjust enrichment claim by contestant in rigged television quiz show); Goldberg v. Columbia Broadcasting Sys., Inc., 205 N.Y.S.2d 611 (N.Y. Sup. Ct. 1960) (same); Stevens v. Cincinnati Times–Star Co., 73 N.E. 1058 (Ohio 1905) (unsuccessful class action for rescission and recovery of entry fees in pay-to-play vote-guessing contest). *See also* Hardy v. St. Matthew's Community Ctr., 240 S.W.2d 95 (Ky. Ct. App. 1951) (unsuccessful attempt by defendant prize bailee to confine plaintiff prize claimant to restitution of price of raffle ticket); Palmer v. Central Bd. of Educ., 70 A. 432 (Pa. 1908) (in proceeding for injunctive relief, both expectation and restitution remedies held incapable of ascertainment and, therefore, inadequate). *But see* Marceaux v. V.F.W. Post 2130, 337 So. 2d 923, (La. Ct. App. 1976) (bingo contestant recovers value of prize on grounds that defendant would otherwise be unjustly enriched).

recalled that, in virtually all promotional games, the benefit conferred on the sponsor—in the form of entry fees or increased sales or increased traffic—is conferred by many people in very small increments. Certainly, a restitution theory would not support a claim to a large prize by a single individual. Aside from the fact that the value of the game to its sponsor need not correspond to the value of the prize, there is no reason why, on a restitution theory, any single individual should recover more than the rather modest value of his or her own entry fees or his or her own contribution to the sponsor's increased sales or traffic. At best, therefore, a restitution theory would support some kind of class relief in which each participant received a nominal award.[272] Indeed, such a remedy arguably provides a just result in cases of game failure. There are certain rather obvious practical problems in measurement of the benefit and in finding a game participant with sufficient incentive to bring suit, but these may very well be overcome by the cleverness and countervailing incentives of the practicing bar. The point, therefore, is not that a restitution theory is conceptually or normatively inappropriate. It is neither. Rather, the point is that it is very different from the unilateral contract model normally used to categorize promotional games, not only because it abandons the contractual requirements of formation and consideration, but because it abandons the expectation measure of damages. It is reasonable to assume that Kraft, for example, would much rather have disgorged any sudden rise in its profits on the sale of Kraft Singles cheese for the short period of the "Ready to Roll" sweepstakes than pay the value of the grand prize (a $17,000 van) to each of the 10,000 individuals who actually claimed that amount as expectation damages.

The marginal category of promotional games requiring neither purchases nor customer presence as a condition of participation thus defies easy legal categorization. Other promotional games seem to fit the unilateral contract model, sometimes comfortably and sometimes only with the aid of a crowbar, but games in the marginal category seem not to fit that model at all. In addition, they generally are not good candidates for enforcement by promissory estoppel. As a result, any easy doctrinal basis for enforcement via an award of expectation damages is absent. Class-based restitution awards remain a possibility, but it is likely that evidentiary difficulties in establishing or quantifying the benefit conferred (if, for example, a manufacturer shows no significant increase in sales or a grocery store keeps no record of foot traffic) may leave some promotional games without a clear basis for a remedy in traditional contract law. Accordingly, it is necessary to address the question of whether the prize promises found in this marginal category of games should be enforced at all.

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272. *Cf.* Kugler v. Market Dev. Corp., 306 A.2d 489 (N.J. Super. Ct. 1973) (action by state attorney general under Consumer Fraud Act; defendant conducting "pay-to-play" sweepstakes ordered to deposit $25,000 as fund from which to make restitution to those who paid $15 "service charge" in order to claim prizes).

IV. TO ENFORCE OR NOT TO ENFORCE

A. Games and Gifts

It is important to bear in mind that the chief source of difficulty in determining the appropriate legal treatment of promotional games requiring neither a purchase nor customer presence is that they seem indistinguishable from conditional gifts. While most gift promises are unenforceable in the absence of reliance, there are exceptions. In jurisdictions following section 90(2) of the *Restatement (Second) of Contracts*, for example, executory charitable donations are enforceable even in the absence of proof of reliance. Accordingly, it may be a useful starting point to inquire why there is a class of unenforceable gift promises and whether the reasons given apply to prize promises contained in promotional games in the marginal category.[273]

It sometimes seems that gift promises are not enforced because people assume, somewhat unreflectively, that they are commercially unimportant.[274] Such an assumption is mistaken. Charitable subscriptions, for example, can only be described overall as rather big business in this country. Moreover, to argue that promotional games should not be enforced because they are commercial gifts, and commercial gifts are economically unimportant, would be question-begging. As noted earlier, promotional games are economically important; if they are a species of gift, then gifts may not be assumed to be economically insignificant.

One more respectable reason sometimes given for not enforcing gift promises is that too often they are made without adequate deliberation.[275] The negotiation, exchange, and mutual inducement characteristic of a bargain perform a cautionary function.[276] Parties to bargains may thus be presumed to understand that serious interests may be at stake and that they should therefore act prudently. The same is not true of parties to a gift. Arguably, gifts and gift promises (especially in the family context) are often motivated by surges of emotion and made impulsively. It would therefore be either excessively harsh or unfair to hold a person to every gift promise.

Of course, no one believes that all gift promises are made impulsively,[277] and the percentage that are carelessly made is fairly debatable. It is clear,

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273. I refer to "marginal" promotional games as a shorthand method of describing promotional devices that do not require, as a condition of participation, either the payment of a fee, the purchase of a product, or a visit to a particular place of business.

274. *See* Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 815 (1941). For an argument that contracts scholarship has heretofore regarded the executory gift as "rare, suspect, and trivial," as well as a useful survey of articles supporting that claim, see Jane B. Baron, *Gifts, Bargains, and Form*, 64 IND. L.J. 155, 181–86 (1989). For an argument that the traditional hostility toward gift promises is unjustified, see Andrew Kull, *Reconsidering Gratuitous Promises*, 21 J. LEGAL STUD. 39 (1992).

275. *See* Melvin A. Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 5 (1979). *But see* Kull, *supra* note 274.

276. *See* Fuller, *supra* note 274, at 800, 815, 816–17.

277. Perhaps because some gratuitous promises are made after adequate deliberation, Williston, among others, believed that there should be some device, comparable to the common law seal, that would enable one who wished to make an enforceable donative promise to do so by satisfying merely formal requirements. *See* Eisenberg, *supra* note 275, at 8 (quoting Williston).

however, that promotional games have little in common with the rash gift promise of an old uncle filled with emotion (or drink) at a family reunion. Even if promotional games are difficult to distinguish doctrinally from conditional gifts, they are not introduced impulsively. Typically, promotional games are not the work of amateurs; they are produced by professional agencies[278] and purchased by, or licensed to, commercial entities pursuing a business plan. Promotional games may indeed go awry, as the sample cases discussed in Part I indicate, but it is not because they are the products of sudden emotional fits.

Alternatively, it has been suggested that gift promises are not legally enforced because an enforcement scheme would be too complicated. Professor Eisenberg has noted that, in European systems in which gift promises are enforceable, special defenses are available to the promisor.[279] If, for example, the promise renders the promisor unable to meet his or her family obligations or other legal obligations, he or she may have a defense of improvidence.[280] If the promisee's conduct shows extreme ingratitude, that fact may likewise provide the promisor with a defense.[281] Enforcing gift promises thus requires the creation of special correlative defenses.[282] The scheme works well enough in Europe, but Professor Eisenberg expresses his doubts that grafting it onto the common law system would be worth the effort and complexity.[283]

Even if Professor Eisenberg has provided a good reason for not enforcing gratuitous promises generally,[284] however, promotional games would seem to fall outside the scope of his argument. Even in the case of promotional games requiring neither purchases nor customer presence, it seems doubtful that recognition of the enforceability of the prize promises offered by commercial entities would offend our sense of justice unless we likewise recognized a defense of ingratitude. Recognition of a defense of improvidence seems equally unnecessary. While the *Kraft* case illustrates that a promotional game can go wrong so badly that it threatens the financial health of a large corporation, the traditional contractual defense of mistake seems more appropriate to the printer's error that led to the extraordinary number of claimants, rather than to some new and special defense of improvidence. Thus, even if a general legal recognition of executory gift promises would require new defenses and new complexity, legal enforcement of the smaller class of prize promises contained in promotional games of the marginal variety would not.

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278. See *FTC Staff Report*, *supra* note 4, at 397–98, 425–34.

279. Eisenberg, *supra* note 275, at 12–15.

280. *Id.* at 14–15.

281. *Id.*

282. The main purpose of the correlative defenses, particularly that of improvidence, is to protect the donor's estate from depletion and thereby protect the civil law regime of forced heirship. *See* JOHN P. DAWSON, GIFTS & PROMISES (1980); Baron, *supra* note 274, at 192–93; Kull, *supra* note 274, at 59.

283. Eisenberg, *supra* note 275, at 15–18.

284. One could question the necessity of the correlative defenses noted by Professor Eisenberg if gratuitous promises were made enforceable in a common law system lacking any equivalent to the civil law regime of forced heirship. *See* authorities cited *supra* note 282. It is therefore not entirely clear that the additional complexity he foresees would really be necessary. Such questions are, however, beyond the scope of this article.

It thus appears that the reasons traditionally given for not enforcing gift promises do not apply to the prize promises contained in promotional games. The next logical step is to inquire whether there are reasons peculiar to promotional games (particularly of the marginal variety) to deny enforcement of the prize promises such games contain.

B. Other Reasons Not to Enforce

The dispositive issue in most promotional game cases is whether the game in question is an illegal lottery.[285] Many of the courts facing that question cannot resist colorful discussions of the evils of lotteries. Some courts see that evil as the potential for impoverishment of the individual who hazards his assets in the vain hope of winning a prize.[286] Such dictum is totally irrelevant to promotional games that require neither a purchase nor the customer's presence as a condition of participation. Other courts, however, find the evil inherent in the lottery to be its tendency to make participants believe it is possible or desirable to "get something for nothing."[287] Given the extremely trivial nature of the actions participants in promotional games must perform (at least in games in the marginal category), it seems that this variety of judicial condemnation would extend to promotional games as well.

To those of us raised to believe that nothing counts as work unless it makes your back sore, the condemnation of a desire to get something for nothing strikes a resonant chord. However, the Protestant work ethic has not, in fact, been enacted into law, and there are two serious problems with using the "something for nothing" principle as a barrier to legal enforcement of promises contained in promotional games. First, those who invest in real estate, shares of stock, or government bonds do so in order to make money through captial appreciation, dividends, or interest, none of which requires "sweat equity." It is true, of course, that such investments may require expertise acquired with some effort, and they may perform useful social functions (capital pool formation, national debt financing, etc.), both of which are arguably absent in the context of promotional games. But investors differ in sophistication, and investments differ in social utility, and drawing the line between the useful and the useless is not always easy. Second, in an era in which state-sponsored lotteries are on the rise and the public attitude towards

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285. *See* cases cited *supra* notes 113–16.

286. *See* Cross v. People, 32 P. 820 (Colo. 1893); People v. Eagle Food Ctrs., Inc., 202 N.E.2d 473 (Ill. 1964); St. Peter v. Pioneer Theatre Corp., 291 N.W. 164 (Iowa 1940); ACF Wrigley Stores, Inc. v. Olsen, 102 N.W.2d 545 (Mich. 1960); People v. Brundage, 150 N.W.2d 825 (Mich. Ct. App. 1967), *rev'd*, 162 N.W.2d 659 (Mich. 1968); Goodwill Advertising Co. v. State Liquor Auth., 244 N.Y.S.2d 322 (N.Y. Sup. Ct. 1962); People v. Psallis, 12 N.Y.S.2d 796 (N.Y. Mag. Ct. 1939); Cudd v. Aschenbrenner, 377 P.2d 150 (Or. 1962); Featherstone v. Independent Serv. Station Ass'n of Tex., 10 S.W.2d 124 (Tex. Civ. App. 1928); Albertson's, Inc. v. Hansen, 600 P.2d 982, 992 (Utah 1979) (dissenting opinion); State *ex rel.* Schillberg v. Safeway Stores, Inc., 450 P.2d 949 (Wash. 1969).

287. *See* People v. Hecht, 3 P.2d 399 (Cal. App. Dep't Super. Ct. 1931); Chenard v. Marcel Motors, 387 A.2d 596 (Me. 1978); State v. Moren, 51 N.W. 618 (Minn. 1892); Mobil Oil Corp. v. Danforth, 455 S.W.2d 505 (Mo. 1970); State v. Cox, 349 P.2d 104 (Mont. 1960); State v. Grant, 75 N.W.2d 611 (Neb. 1956); Lucky Calendar Co. v. Cohen, 120 A.2d 107 (N.J. 1956); Kroger Co. v. Cook, 244 N.E.2d 790, 798 (Ohio Ct. App. 1968) (concurring opinion); *Albertson's, Inc.*, 600 P.2d at 992 (dissenting opinion); State v. Reader's Digest Ass'n, Inc., 501 P.2d 290 (Wash. 1972); *Safeway Stores, Inc.*, 450 P.2d 949. *See also* FCC v. American Broadcasting Co., 347 U.S. 284, 291 (1954) (similar position taken by FCC).

gambling seems to be relaxing,[288] it seems more than mildly hypocritical to single out promotional games as a peculiar subject for condemnation. The principle that it is wrong to expect something for nothing has been too far eroded to provide an adequate reason to refuse to enforce the promises contained in promotional games.

Another possible reason not to enforce the promises contained in promotional games is the allegation that games pollute or distort the market for goods or whatever else they are used to sell.[289] Indeed, when the Federal Trade Commission investigated games of chance in the food retailing and gasoline retailing industries in the 1960s, there were those who argued for a complete ban on promotional games on the grounds that such games had a pernicious effect on the market.[290] It could be argued that the only appropriate bases for competition in sales of goods are price and quality. Games introduce extraneous inducements that distract customers from these more appropriate grounds of rational choice. To make matters worse, the costs of games are passed on to customers in the form of price increases. And if games are effective, then even those who would otherwise avoid them in favor of selling at lower prices are forced to use them as a defensive measure.[291]

It is possible to attack the foregoing argument on a number of points. Some individuals may be offended by the argument's mildly paternalistic flavor. Libertarians might argue that if consumers are willing to pay slightly more for groceries that are coupled with the remote chance at a prize provided by a game, that is an interesting example of risk preference, but hardly grounds for condemning games. Others might argue that the price effects or coerced defensive use of games are not that clearly established.

The more fundamental problem with the argument that promotional games pollute the market, however, is that, if its premises are true, it justifies much more than simply refusing to enforce the promises made in such games. It justifies an outright statutory ban on promotional games. The Federal Trade Commission rejected requests for such a ban when it promulgated its rules governing games of chance in the food and gasoline retailing industries, and only a few states have outright prohibitions of promotional games in specified

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288. The relaxing public attitude towards gambling has been noted (not always with approval) in several cases. *See* Marco Sales Co. v. FTC, 453 F.2d 1 (2d Cir. 1971); State v. American Holiday Ass'n, Inc., 151 Ariz. 312, 727 P.2d 807 (1986); Boyd v. Piggly Wiggly S., Inc. 155 S.E.2d 630 (Ga. Ct. App. 1967); Doskey v. United Theatres, Inc., 11 So. 2d 276 (La. Ct. App. 1942); *Chenard*, 387 A.2d 596; Miller v. Radikopf, 228 N.W.2d 386 (Mich. 1975). *See also* Edge Broadcasting Co. v. United States, 956 F.2d 263(16) (Table, text in WESTLAW) (4th Cir. 1992) (noting that 33 states now sponsor lotteries).

289. *See Boyd*, 155 S.E.2d 630; Idea Research & Dev. Corp. v. Hultman, 131 N.W.2d 496 (Iowa 1964); State v. Pepsi-Cola Gen. Bottlers, Inc., 659 P.2d 213 (Kan. 1983); Mobil Oil Corp. v. Attorney Gen., 280 N.E.2d 406 (Mass. 1972); *Cox*, 349 P.2d 104; *Lucky Calendar Co.*, 117 A.2d 487 (N.J. 1955); United Stations of N.J. (US) v. Getty Oil Co., 246 A.2d 150 (N.J. Super. Ct. 1968); United Stations of N.J. (US) v. Kingsley, 240 A.2d 702 (N.J. Super. Ct. Ch. Div. 1968); Royal Farms, Inc. v. Minute Maid Co., 236 N.Y.S.2d 368 (N.Y. Sup. Ct. 1962); *Featherstone*, 10 S.W.2d 124; *Albertson's, Inc.*, 600 P.2d at 992 (dissenting opinion).

290. *See FTC Staff Report*, *supra* note 4, at 414–15, 487–91. In one early case, FTC v. R.F. Keppel & Bro., 291 U.S. 304 (1934), the Commission used a variant of the "market pollution" argument in its successful effort to prohibit a promotional scheme (known as "break and take" packaging) in the penny candy trade.

291. *See Getty Oil Co.*, 246 A.2d at 156, 161; *Kingsley*, 240 A.2d 702; *Featherstone*, 10 S.W.2d 124.

industries.[292] None has an across-the-board prohibition of such games. If the argument that games pollute the market does not justify cutting off the supply of games at the source, however, it seems curious to resort to it as grounds for refusing to enforce the prize promises games contain. If promotional games remain readily available, it is not clear that failing to enforce prize promises will discourage people from playing them or from allowing them to influence their choice of goods or of retail outlets. If market pollution is truly a concern, therefore, it would make more sense to choose the most effective means of preventing it—outright prohibition—rather than an inferior means.[293] Moreover, it is doubtful that our social commitment to market purity is even close to that presumed in the "market pollution" argument. The truth seems to be that a whole range of devices for selling goods or services is permitted, and very few of them are confined to the provision of information about price and quality. Attractive packaging and media advertising, for example, go well beyond simple information. It is difficult to find a principled basis for banning or restricting the enforceability of promotional games if the other non-informational sales inducement devices are tolerated.[294] Thus, the characterization of promotional games as a form of pollution of the market is mere pleasant rhetoric, not a serious statement of principle that is consistently followed.

A final possible reason for declining to enforce prize promises contained in promotional games is suggested by the Beatrice and Kraft promotions introduced in Part I. Beatrice was faced with a claim for $21 million from a single individual and a few of his friends. Assuming the accuracy of press reports, 10,000 people claimed the first prize in the Kraft promotion, and Kraft's exposure just to mini-van claimants was $170,000,000. It is not clear how high the exposure would have risen by the addition of claims for bicycles, skateboards and free cheese. Claims of that size are difficult for even large corporations to swallow. More importantly, it is reasonable to assume (particularly in the case of the Kraft promotion) that the potential liability generated by the game was

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292. In response to perceived unfair practices in promotional games in the food and gasoline industries, the FTC exercised its authority under § 5 of the Federal Trade Commission Act, ch. 311, 38 Stat. 717, 719 (1914) (current version at 15 U.S.C. § 45 (1988)), and issued regulations found at 16 C.F.R. § 419.1 (1981). *See also FTC Staff Report*, *supra* note 4, at 459–72, 479–83. For examples of state statutes banning or severely restricting games of chance in certain industries, *see infra* note 358.

293. It should be added that, from a normative point of view, it makes more sense to target those who elect to sponsor promotional games than those who play them if avoiding market pollution is a worthy goal. Prohibitions of promotional games restrict the conduct of those who would otherwise initiate the games directly; merely refusing to enforce prize promises penalizes the players directly and has, at best, an indirect and marginal effect on the sponsor.

294. Of course, the determined adherent of the market pollution argument would respond that all non-informational marketing devices should be banned or curtailed, and, at that point, it is very difficult to refute him. I certainly do not wish to assume the burden of arguing that the world would be a much impoverished place if there were no slick advertising, glossy packaging, or promotional games. It would, however, be a very different world, in the sense that the legal framework necessary to support such restrictions would be very different from our own. An attempt to impose a total ban on non-informational advertising, for example, would pose serious consititutional problems under our current legal framework because the Supreme Court (in its infinite wisdom) has determined that commercial speech enjoys some First Amendment protection. It is not my goal to construct or justify the brave new (and somewhat more austere) world of market purity. I am more concerned with providing a more satisfactory theoretical explanation of the proper treatment of promotional games in a legal framework not radically different from the one we have.

drastically disproportionate to any benefit (in the form of increased sales of cheese) anticipated by the sponsor at the time the game was introduced. It is arguable that such extreme disproportion counsels against strict enforcement, particularly when prize claimants were permitted to participate free and were required to do little or nothing of any importance.[295]

Disproportionality between anticipated benefit and potential liability, however, has not historically functioned in contract law as a reason to deny enforcement of a promise altogether. Indeed, the real point of the interminable references to hawks, robes and peppercorns is that an enforceable promise does not presuppose an exchange of equivalent values.[296] The function of disproportionality in the exchange is much more limited. In extreme cases, a lop-sided exchange may be part of the basis for a defense of unconscionability.[297] In other cases, disproportionality between anticipated benefit and potential liability may be the basis only for a limitation of remedies. The formulation of the rule of *Hadley v. Baxendale*[298] in the *Restatement (Second) of Contracts*, for example, permits a court to restrict recoverable damages to avoid disproportionate compensation.[299] The provision setting forth the requirements of promissory estoppel likewise permits the limitation of remedy "as justice requires."[300] Thus, apart from any consideration of the culpability of game sponsors faced with staggering liability, the relative disproportion between the anticipated benefits of games and the potential liability when games go awry does not seem to support the contention that prize promises should be unenforceable altogether. At most, it provides some support for remedial flexibility.

The arguments raised in this Part would seem to exhaust the possible reasons for refusing to enforce the prize promises contained in promotional games. It may therefore be helpful to summarize the analysis so far. We have isolated an important class of promises—prize promises contained in promotional games requiring neither customer presence nor a purchase—that have proved difficult to classify. They do not fit the traditional unilateral contract model, even though that model may be a satisfactory explanation of other promotional games. They also fall short of the requirements of alternative bases of contractual enforcement, although some of them may generate appropriate restitution claims. On the other hand, there seems to be no compelling reason to refuse enforcement of the promises contained in promotional games—even those marginal games that require neither a purchase nor customer presence. The similarity of such games to conditional gifts does not compel it, and there are no policy reasons peculiar to games that compel the conclusion that they should be unenforceable. It is, therefore, appropriate to

295. In several recent divorce cases, courts have noted the absence of serious labor in the production of lottery winnings and used that fact as a reason to divide lottery proceeds equally among warring spouses, regardless of which of them purchased the winning lottery ticket. *See In re* Marriage of Mahaffey, 564 N.E.2d 1300 (Ill. App. Ct. 1990); Alston v. Alston, 582 A.2d 574 (Md. Ct. Spec. App. 1990); Ullah v. Ullah, 555 N.Y.S.2d 834 (N.Y. App. Div. 1990).

296. *See* RESTATEMENT (SECOND) OF CONTRACTS § 79(b) (1979).

297. *See* U.C.C. § 2–302 (1977).

298. 9 Exch. 341, 156 Eng. Rep. 145 (1854).

299. RESTATEMENT (SECOND) OF CONTRACTS § 351(3) (1979).

300. RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1979). For a discussion of several RESTATEMENT provisions expressly providing for limitation of relief in appropriate circumstances, *see* W.F. Young, *Half Measures*, 81 COLUM. L. REV. 19 (1981).

consider whether there are reasons of a different character for enforcing the prize promises contained in games in the marginal category.

C. Factors Favoring Enforcement

Initially, there are adherents of one school of thought who would insist that nothing further need be shown in order to demonstrate that promises contained in marginal promotional games should be enforced. Lord Mansfield is said to have suggested that any promise seriously and deliberately made should be enforceable, although his suggestion was decisively rejected in very short order.[301] More recently, Charles Fried, in exploring the theoretical basis for both the moral obligation generated by promises and the legal enforcement of promises, seems to arrive ultimately at a variant of Mansfield's position.[302] Fried is generally credited with the revival of the "will theory" of contract,[303] in the sense that he argues that the very act of promising generates a moral obligation.[304] He grounds the moral obligation to keep promises on Kantian notions of respect for the autonomy of moral agents and the iniquity of betrayal of trust.[305] He then seems to infer the desirability of legal enforcement fairly directly from the moral obligation to keep promises,[306] rejecting the doctrine of consideration along the way as an internally inconsistent and morally suspect notion.[307] At several points in his theory, of course, Fried permits various countervailing policies to qualify the obligation to keep (and to enforce) promises.[308] Nevertheless, it seems to be a corollary of his theory that, unless such a countervailing policy justifies exclusion of a particular class of promises from the general rule, all classes of promises[309] should be enforceable. Thus, if no specific reasons can be given for refusing to enforce the prize promises contained in marginal promotional games, nothing further need be said to justify their enforcement.

Although Fried's theory would provide a tidy and convenient stopping point for the analysis of promotional games, it is, to put it mildly, controversial. At the opposite end of the spectrum from Fried is P.S. Atiyah, who denies that the mere act of promising is of great moral significance in itself.[310] A promise,

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301. *See* GRANT GILMORE, THE DEATH OF CONTRACT 18 & nn. 32–33 (1974). *But see* Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111 (1991) (arguing the descriptive claim that courts, in fact, tend to enforce promises deliberately made, using the presence of reliance as an indication of deliberation).

302. *See* CHARLES FRIED, CONTRACT AS PROMISE (1981). There are, of course, classes of promises that even Fried would prefer not to enforce, but Fried is appropriately placed in the same tradition as Mansfield because of his distaste for the doctrine of consideration and his criticism of the traditional treatment of executory gift promises. *Id.* at 28–39.

303. *See* A.S. Burrows, *The Will Theory of Contract Revived*, 38 CURRENT LEGAL PROBS. 1985, at 141 (1985) (book review); Anthony T. Kronman, *A New Champion for the Will Theory*, 91 YALE L.J. 404 (1981) (book review).

304. FRIED, *supra* note 302, at 1–8.

305. *Id.* at 16–17.

306. *Id.* at 17.

307. *See id.* at 28–35.

308. *Id.* at 38, 43, 57–64, 79–82, 92–111.

309. Fried would insist that a promise must, in some sense, be "accepted" in order to be binding, and therefore would probably prefer to say that "agreements" are presumptively binding. *See id.* at 43. For present purposes, the refinements Fried introduces to the will theory are not relevant.

310. P.S. ATIYAH, PROMISES, MORALS, & LAW 7, 130, 138–143 (1981).

in Atiyah's view, is not the *source* of an obligation, legal or moral.[311] Rather, it performs the evidentiary function of marking or admitting an obligation actually created by something else—for example, invited reliance, a benefit conferred or half-completion of a contemplated exchange.[312] The promise provides both a formal vehicle for recognition of the existence of the obligation and a more precise definition of its scope.[313] Given Atiyah's examples of behavior that actually creates obligations (part performance of exchanges, conferring benefits, serious reliance, etc.),[314] it is not surprising that his list of enforceable promises roughly corresponds to the traditional categories of bargains, restitutionary obligations, and reliance-based obligations.[315] In sharp contrast to Fried, therefore, Atiyah is not of the view that legal enforcement of a promise may be presumed to be justifiable because of the moral force of promising.[316] Rather, in Atiyah's view, the moral practice of promising and the legal regime of contract overlap substantially and probably serve common purposes, so that justification for both the morally binding character of promises and their legal enforcement must be found in some socially-defined set of entitlements outside the practice of promising.[317] The picture that emerges from Atiyah's account of promising and contract is that the moral force of a promise is not only weaker than is commonly supposed—too weak, indeed, to support the edifice of contract—but is something that itself calls for justification by reference to some other source of obligation.

The continuing theoretical disagreement between Fried and Atiyah has reached something of a stalemate,[318] and it is neither necessary nor within my

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311. *Id.* at 184–194.
312. *Id.*
313. *Id.*
314. *Id.* at 3–7, 33–38, 141–46, 177, 184–95.
315. The correspondence to standard contract doctrine does disappear when Atiyah discusses the purely executory exchange of promises. Because Atiyah believes the paradigm cases of obligation-creating behavior consist of reliance and "payment"(in the loose sense of conferring a benefit or partial performance of an exchange), any bargain that consists of a mere exchange of promises is, for Atiyah, a derivative case of contract, not a core example. *See id.* at 5–7, 42–44, 202–12. Atiyah recognizes that an exchange of executory promises is now regarded as a standard instance of bargain, but he believes his own view is both historically and normatively justified. Atiyah's historical thesis concerning the primacy of benefit and reliance as sources of contractual obligation is argued in great detail in his earlier work, *P.S. Atiyah, The Rise & Fall of Freedom of Contract* (1979).
316. ATIYAH, *supra* note 310, at 125–26.
317. *Id.* at 123–30.
318. The stalemate results from the fact that both Fried and Atiyah attempt to establish theses critical to their respective arguments by examples designed to appeal to our ordinary moral intuitions, and the results are inconclusive. For Fried, the critical thesis is that the act of making a promise is capable of generating a moral obligation where none existed before. *See* FRIED, *supra* note 302, at 1. In part, this thesis is supported by neo-Kantian arguments concerning the autonomy of the moral agents, their social need for a device by which binding commitments may be made, and, most significantly, the notion that breaking a promise is an abuse of invited trust and so a use of another person as a mere means to one's own ends. *Id.* at 7–17. This aspect of Fried's argument has been criticized for generality so extreme as to amount to content neutrality. *See* Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489, 490, 516–23 (1989) (arguing that Fried's theory has no specific implications concerning the default rules of contract law). To the extent Fried offers more specific grounds for believing that promises generate new moral obligations, he simply suggests that any other features of typical promissory contexts that might be alternative sources of the moral obligation arising out of such contexts are found, on examination, to be inadequate.

capacity to resolve it here. The importance of the debate between Fried and Atiyah, for present purposes, is that it makes it necessary to go beyond the convenient stopping point in the analysis of promotional games that Fried's theory suggested. It is necessary to examine additional reasons[319] favoring the enforcement of prize promises contained in promotional games falling into the marginal category.

Specifically, neither the knowledge of another's reliance nor the receipt of a benefit from another accounts for the moral obligation, for, in the absence of a promise, it is easy to find examples of reliance or receipt of benefits that generate no moral or legal obligation to compensate another. Two specific examples illustrate Fried's effort to support this claim. First, Fried argues, if one person opens a restaurant next to an existing hotel run by another, the restaurant operator may very well draw trade away from the hotel dining room and thus derive a benefit at the hotel operator's expense. That benefit, however, imposes no moral or legal obligation on the restaurant operator. *See* FRIED, *supra* note 302, at 9–10. Similarly, if one person rents an apartment relying on his next door neighbor's habit of playing chamber music, the neighbor violates no obligation by changing the venue of the chamber group, even if he knows of the reliance. *Id.* at 10. In Fried's view, this establishes that it is the act of promising, not reliance or receipt of a benefit, that creates the moral obligation and explains contractual obligation. *Id.* at 11.

For Atiyah, the critical thesis is that it is reliance or receipt of a benefit that generates both moral and legal obligation, even in the promissory context. Again, this thesis is supported by much general argument, including a rather exhaustive critique of previous attempts to establish the thesis that acts of promising do create obligations *ex nihilo*. *See* ATIYAH, *supra* note 310, chs. 2–4. At critical points, however, Atiyah also resorts to examples to establish his thesis. At one point, he imagines two neighbors, one of whom is so punctual that the second, with the knowledge of the first, sets his watch by the first's departure for work. In the event the first neighbor is ill one morning, Atiyah claims, it is at least arguable that the first is obligated to give the second some form of notice, even in the absence of any promise. *Id.* at 36–37. Thus, reliance is capable of generating obligation even in the absence of a promise, and the same is true of benefits conferred. *Id.* at 34–36.

Testing a theoretical claim by appeal to the moral intuitions evoked by hypothetical examples is thoroughly familiar and perfectly appropriate. However, in the context of the Fried-Atiyah controversy, two points need to be made. First, it is not clear that the examples used by either side will evoke a uniform response among lawyers or philosophers, a fact that at least Atiyah appears to recognize. ATIYAH, *supra* note 310, at 36–37. More importantly, even if each example evokes the response desired, the subsidiary claims established by the examples used are not really contradictory. At most, Atiyah's examples establish that reliance and the receipt of benefits can generate moral and legal obligations in the absence of a promise. At most, Fried's examples establish that reliance and receipt of benefits alone do not invariably generate moral obligations. The two propositions are not contradictory, and, indeed, both are probably true. In a sense, therefore, the stalemate between Fried and Atiyah results from a failure of engagement at critical points.

319. One of the most common reasons given for enforcing promises is unavailable in this context. One of the reasons given for enforcing bargain promises is that doing so facilitates business planning and exchange. *See* Malcolm P. Sharp, *Pacta Sunt Servanda*, 41 COLUM. L. REV. 783 (1941). The theory is that specialization, and therefore exchange, is desirable, but must take place over time. Enforcing bargains, it is argued, facilitates rational exchange and prudent business planning by assuring each party that he will either receive what has been promised or its monetary equivalent. This justification for promissory enforcement is unavailable precisely because the promises under discussion—prize promises in promotional games in the marginal category—look as much like conditional gifts as they do bargained exchanges. Moreover, it is difficult to imagine anyone using a promotional game as a business planning device. Even if a promotional game is likely to be successful in increasing sales or traffic, the magnitude of the increase is hardly predictable. The sponsor is thus unlikely to make any precise business plans (other than prize funding preparations) upon the basis of anticipated game response. And, given the normally remote chance of winning, it is difficult to imagine any contestant actually planning his life around success in a promotional game.

One reason for enforcing this category of prize promises is suggested by an analogy to some of the old lottery cases. Not all of the lottery cases were criminal prosecutions of the sponsor of a game or other promotional device. Some were suits by disappointed prize claimants in which the game sponsor raised the defense that the game was a lottery[320] and, therefore, was illegal.[321] The tactic frequently succeeded,[322] and there is a certain intuitive offensiveness about cases in which it did. The "lottery" promoter was permitted to extract whatever benefit he could from participants and then walk away without supplying his half of the contemplated exchange.[323] While the courts

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320. *See* Waite v. Press Publishing Ass'n, 155 F. 58 (6th Cir. 1907); Dorman v. Publix–Saenger–Sparks Theatres, Inc., 184 So. 886 (Fla. 1938); Standridge v. Williford–Burns–Rice Co., 96 S.E. 498 (Ga. 1918); Boyd v. Piggly Wiggly S., Inc., 155 S.E.2d 630 (Ga. Ct. App. 1967); Winn–Dixie Stores, Inc. v. Boatright, 155 S.E.2d 642 (Ga. Ct. App. 1967); St. Peter v. Pioneer Theatre Corp., 291 N.W. 164 (Iowa 1940); Doskey v. United Theatres, Inc., 11 So. 2d 276 (La. Ct. App. 1942); Shanchell v. Lewis Amusement Co., Inc., 171 So. 426 (La. Ct. App. 1936); Chenard v. Marcel Motors, 387 A.2d 596 (Me. 1978); Leonard v. Pennypacker, 89 A. 26 (N.J. 1913); Hoff v. Daily Graphic, Inc., 230 N.Y.S. 360 (N.Y. Sup. Ct. 1928); Shapiro v. Prudential Theaters, 328 N.Y.S.2d 28 (N.Y. Dist. Ct. 1972); Simmons v. Randforce Amusement Corp., 293 N.Y.S. 745 (N.Y. Mun. Ct. 1937); Finch v. Rhode Island Grocers Ass'n, 175 A.2d 177 (R.I. 1961); Geis v. Continental Oil Co., 511 P.2d 725 (Utah 1973); Maughs v. Porter, 161 S.E. 242 (Va. 1931); Williams v. Weber Mesa Ditch Extension Co., Inc., 572 P.2d 412 (Wyo. 1977). *See also* Holmes v. Saunders, 250 P.2d 269 (Cal. Ct. App. 1952) (lottery defense to conversion action); Kelly v. Banda, 157 S.E.2d 782 (Ga. Ct. App. 1967) (lottery defense to action for money had and received); Dennis v. Weaver, 121 S.E.2d 190 (Ga. Ct. App. 1961), *aff'd*, 122 S.E.2d 571 (lottery defense to trover action); Leake v. Isaacs, 90 S.W.2d 1001 (Ky. Ct. App. 1936) (lottery defense to claim and delivery action); Miller v. Radikopf, 228 S.W.2d 386 (Mich. 1975) (lottery defense to action on contract to split lottery proceeds); Amlie Strand Hardware Co. v. Moose, 224 N.W. 158 (Minn. 1929) (lottery defense to replevin action); Rountree v. Ingle, 77 S.E. 931 (S.C. 1913) (lottery defense to action to recover prize from rival contestant); Cuffman v. Blunkall, 124 S.W.2d 289 (Tenn. Ct. App. 1938); Blair v. Lowham, 276 P. 292 (Utah 1929) (lottery defense to conversion action); Matta v. Katsoulas, 212 N.W. 261 (Wis. 1927) (lottery defense to replevin action).

321. Lotteries are a species of illegal contract, and the general rule is that a court will not enforce or aid either party to an illegal agreement, but rather will leave the parties to the illegal agreement where it finds them. *See* Tavares v. Commissioner, 275 F.2d 369 (1st Cir. 1960); Youngblood v. Bailey, 459 So. 2d 855 (Ala. 1984); Millsaps v. Urban, 171 S.W. 1198 (Ark. 1914); *Holmes*, 250 P.2d 269; Bloodworth v. Gay, 96 S.E.2d 602 (Ga. 1957); *Standridge*, 96 S.E. 498; *Kelly*, 157 S.E.2d 782; *Boyd*, 155 S.E.2d 630; *Dennis*, 121 S.E.2d 190; David Shelton Amvets Post 60 v. Sam, 389 So. 2d 785 (La. Ct. App. 1980); *Doskey*, 11 So. 2d 276; *Shanchell*, 171 So. 426; *Chenard*, 387 A.2d 596; *Miller*, 228 S.W.2d 386; *Amlie Strand Hardware Co.*, 224 N.W. 158; Cochran v. Dellfava, 517 N.Y.S.2d 854 (Rochester City Ct. 1987); Stevens v. Cincinnati Times–Star Co., 73 N.E. 1058 (Ohio 1905); *Rountree*, 77 S.E. 931; *Geis*, 511 P.2d 725; *Blair*, 276 P. 292; *Maughs*, 161 S.E. 242; *Williams*, 572 P.2d 412.

322. *See Waite*, 155 F. 58; *Standridge*, 96 S.E. 498; *Boyd*, 155 S.E.2d 630; *Winn–Dixie Stores, Inc.*, 155 S.E.2d 642; *Doskey*, 11 So. 2d 276; *Shanchell*, 171 So. 426; *Geis*, 511 P.2d 725; *Maughs*, 161 S.E. 242; *Williams*, 572 P.2d 412.

323. Particularly offensive are what might be called the "double whammy" cases, in which a game sponsor defends a prize claim by attempting to impale the prize claimant on the horns of a disjunctive dilemma. The sponsor argues as follows: either the promise of a prize is supported by consideration, or it is not. If it is not, there is no contract and no recovery. If the prize promise is supported by consideration, the scheme is an illegal lottery and utterly unenforceable. Either way, the prize claimant loses. *See Boyd*, 155 S.E.2d 630; *Maughs*, 161 S.E. 242. *See also St. Peter*, 291 N.W. 164 ("double whammy" argument unsuccessful); *Simmons*, 293 N.Y.S. 745 (same).

were not entirely inattentive to this problem,[324] they never really succeeded in solving it.[325]

The promotional games now under discussion are somewhat different in that, unlike true lotteries, they do not seem to be the sort of bargain envisioned by the traditional unilateral contract model. Yet, the same sort of intuitive offensiveness recurs if one considers the option of providing no remedy at all in the event the prize promise is broken. Even if they are not bargains, one must presume that even marginal promotional games are used for some reason and that the reason must in some way relate to benefits (sales, traffic, or simple publicity) to the business entities that use them. Whether such benefits are bargained for or not, it seems unjust to permit the sponsor to derive them from the game and then walk away at the crucial moment.

The foregoing argument is relatively modest not only because it relies on a fairly vague, intuitive sense of fairness, but also because it only attacks a regime of total non-enforcement. It does not purport to support one particular enforcement regime over another (for instance, enforcement by an award of expectation damages to a purported prize winner as opposed to a restitution award distributed over the class of participants). It would thus be desirable to

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324. Occasionally courts would repeat Mansfield's observation that the defense of illegality "sounds at all times very ill in the mouth of defendant." *See Rountree*, 77 S.E. at 932; *Maughs*, 161 S.E. at 244 (quoting Holman v. Johnson, 1 Cowp. 341, 343 (Eng. 1775)).

325. Efforts to circumvent the usual consequence of illegality were only possible in a narrow range of cases and were not often successful even within that range. If the prize claimant's action could be brought against some person other than the game sponsor—e.g., a bailee, an agent, or a person with whom the claimant had an agreement to pool resources and split the prize—perhaps the claimant could prevail on the theory that his recovery was on an independent collateral contract, not the underlying illegal agreement. *See, e.g.*, *Youngblood*, 459 So. 2d 855; *Bloodworth*, 96 S.E.2d 603 (agreement to pool tickets and split proceeds held contrary to public policy); *Kelly*, 157 S.E.2d 782 (unsuccessful attempt to enforce prize-sharing agreement through action for money had and received); *Dennis*, 121 S.E.2d 190 (unsuccessful attempt to assert gift theory); Leake v. Isaacs, 90 S.W.2d 1001 (Ky. 1936) (recovery on agency theory); *Miller*, 228 N.W.2d 386 (collateral agreement to split Irish Sweepstakes proceeds enforced); *Rountree*, 77 S.E. 931 (unsuccessful assertion of collateral contract); Cuffman v. Blunkall, 124 S.W.2d 289 (Tenn. Ct. App. 1938) (agent may not assert illegality of transaction against principal); *Blair*, 276 P. 292 (pooling arrangement held not to constitute collateral agreement); Matta v. Katsoulas, 212 N.W. 261 (Wis. 1927) (recovery against bailee allowed). In the unlikely event that the prize claimant could persuade the court that the claimant and the game sponsor were not *in pari delicto*, the claimant might recover. *See* Gold Bond Stamp Co. of Georgia v. Bradfute Corp., 463 F.2d 1158 (2d Cir. 1972) (prize supplier and game designer held not *in pari delicto* where designer recklessly represented to supplier that promotion was legal, designer created, designed and supervised entire promotion, and designer's negligence caused errors in game); *Youngblood*, 459 So. 2d 855 (parties to illegal lottery ticket resale agreement not *in pari delicto* where buyer knew check given in payment was drawn on account with insufficient funds); Hardy v. St. Matthew's Community Ctr., 240 S.W.2d 95 (Ky. 1951) (purchaser of lottery ticket and holder of lottery not *in pari delicto*); *Cochran*, 517 N.Y.S.2d 854 (relief refused to participant in illegal chain distribution scheme; court refuses to be "referee amongst thieves"); *Stevens*, 73 N.E. 1058 (dictum recognizing narrow "repentance" exception to usual rule); *Rountree*, 77 S.E. 931 (purchaser of lottery ticket *in pari delicto* with seller); Monroe v. Smith, 165 N.W. 532 (S.D. 1917) (public policy exception to *in pari delicto* rule); *Geis*, 511 P.2d at 728–29 (dissenting opinion arguing that sponsor and contestant are not equally culpable). On rare occasions, special state statutes have conferred a right to restitution of money or property delivered in connection with an illegal transaction. *See, e.g.*, Garland v. Isbell, 76 S.E. 591 (Ga. 1912); Finch v. Rhode Island Grocers Ass'n, 175 A.2d 177 (R.I. 1961).

find somewhat more specific reasons for enforcing prize promises in games requiring neither purchase nor customer presence.

One possible reason draws, oddly enough, on some of the insights of relational contract theory. This may seem paradoxical initially, for it is generally thought that relational theory not only had its genesis in the analysis of long-term contracts, but that it best illuminates an ongoing series of business exchanges between the same parties. The promotional game, on the other hand, seems to be the quintessential "one shot" deal, if it is a deal at all. The paradox is only apparent, however. One commentator has suggested that the fundamental tenets of relational theory are: 1) that the agreement process involved in economic exchange takes place incrementally over time, not in one (or a series) of discrete bargains; and 2) that there are norms and objectives operative in this relational process other than simple wealth maximization.[326] This suggests that some light may be thrown on the proper treatment of promotional games by considering the context in which they are used.

Specifically, one occasionally finds suggestions from advertising or marketing professionals that promotional games are only one component in a good marketing strategy.[327] It has been suggested, for example, that promotional games, when well-designed and executed, can improve sales or customer traffic, sometimes fairly dramatically.[328] But the improvement may prove to be only a temporary advance unless the game is supplemented. If a manufacturer uses a promotional game to boost sales, for example, he or she may find that the gains produced are lost fairly quickly unless something is done to build long-term "brand loyalty" by other means, of which the most obvious is advertising.[329] However, it is the long-term relationship—encapsulated by the sense that his or her products are "your brand" of soap or corn flakes—that the manufacturer has as a goal. Thus, even though promotional games may not be discrete bargained-for exchanges in the sense of classical contract, they are nevertheless related to long-term exchange relationships (e.g., consistent purchase of a particular brand or patronage of a particular store) in much

326. William C. Whitford, *Ian Macneil's Contribution to Contracts Scholarship*, 1985 WIS. L. REV. 545, 546–550 (1985). As Professor Whitford's title implies, the acknowledged dean of the relational school is Ian Macneil, although he has been joined to some extent by various proponents of the economic approach to law. For a catalogue of the seminal articles, *see id.* at 545–553 and accompanying notes.

327. *See* Paul L. Edwards, *Sales Promotion Comes into Its Own*, ADVERTISING AGE, July 28, 1986, at 65; Exter, *supra* note 209, at 18; Arthur Shapiro, *Advertising Versus Promotion: Which Is Which?*, J. ADVERTISING RES. June/July 1990, at RC–13, RC–15.

328. *See* Richard Edel, *Manufacturers Create Package of Ads, Incentives, Promotions*, ADVERTISING AGE, Feb. 6, 1986, at 22, 24; Edwards, *supra* note 327, at 65; Nathaniel Frey, *Ninth Annual Advertising & Sales Promotion Report*, 13 MARKETING COMM., Aug. 1988, at 9, 10.

329. *See* Edwards, *supra* note 327, at 65; Mark Landler, *What Happened to Advertising*, BUS. WK., Sept. 23, 1991, at 66; Shapiro, *supra* note 327, at RC–14. *But see* Frey, *supra* note 328, at 20 (noting erosion of the traditional distinction between advertising and sales promotion); William A. Robinson, *The Best Promotions of 1988*, MARKETING COMM., May 1989, at 64 (noting expansion of functions of sales promotion); Shapiro, *supra* note 327, at RC–13, RC–16 (noting erosion of traditional distinction between advertising and promotion).

the same way that an introduction or an initial handshake is related to a long-term friendship.[330]

Thus, the fact that marginal promotional games, *when viewed in isolation*, simply cannot qualify as traditional unilateral contracts does not prove that the prize promises they contain should not be enforced. Such games are not designed to be used in isolation. Games are one of a number of marketing tools, and the various tools are generally used in groups or, at least, sequentially. While no single tool, when examined in isolation, may look much like a bargain, the point of using the whole array of tools is to foster long-term product loyalty and exchange relationships.

To be sure, the relation between promotional games and such long-term exchange relationships may be contingent, indirect, and perhaps tenuous, particularly for promotional games falling into the marginal category. However, the mere existence of such a relation is enough to qualify the promises contained in promotional games for legal enforcement.

Such a conclusion may sound counterintuitive in light of the customary assumption that, in the common law tradition, at least, some reason must be given for promissory enforcement. If bargain consideration was once the strongest (or even the exclusive) reason for enforcement, serious reliance or the need to avoid unjust enrichment are now firmly established as equally strong reasons. But, whether because of oft-repeated language in cases or because of the structure of the first-year course in contracts, we are inclined to assume that the class of enforceable promises is limited to those that can be connected fairly directly to a discrete bargain, to a specific benefit conferred, or to identifiable acts of detrimental reliance.

In the last dozen years or so, however, scholars who pay as much attention to what courts do as to what they say have noted the progressive attenuation of the aforementioned traditional "grounds of promissory enforcement." As noted earlier, bargain consideration long ago relinquished any claim to be the exclusive basis for promissory enforcement, and it has been argued that it is no longer even the primary basis.[331] Moreover, the very notions of "reliance" and "benefit" have been the subject of continuous evolution and attenuation. John Dawson seemed particularly fond of cases in which recovery in restitution was permitted in spite of the apparent absence of a "benefit" with any ascertainable market value that had been "appropriated" in any realistic sense.[332] More recently, studies of promissory estoppel cases have in-

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330. Though it is clear that game sponsors view promotional games "relationally," i.e., as the introductory phase of a long-term business relationship, it might be objected that individual game participants do not necessarily do so. However, research by Professors Thel and Yorio suggests that, in deciding which promises to enforce, the courts generally focus on characteristics (such as seriousness or deliberation) of the promisor (i.e., the game sponsor, in this context), rather than the promisee and attend to characteristics of the promisee (such as reliance) only to the extent necessary to cast light on what the promisor expected or should have expected. See Yorio & Thel, *supra* note 301. If so, the relational perspective of the game sponsor is the critical factor in deciding whether or not promises in marginal promotional games should be enforced.

331. For the view that contract law is being reabsorbed into tort law, see GRANT GILMORE, THE DEATH OF CONTRACT (1974).

332. *See* John P. Dawson, *Restitution Without Enrichment*, 61 B.U. L. REV. 563, 576–600 (1981). One of Dawson's major objectives in the article was "to show that in most of the standard work they do restitution remedies in American law do not depend in any way on a

dicated both the increased use of reliance-based recovery in the commercial context and the attenuation of the notion of reliance through the emergence of a class of cases in which the "reliance" demonstrated by a successful claimant consisted merely of action consistent with an assumption a promise would be kept, not of action resulting in any identifiable "detriment" characterizable as economic loss.[333] The progressive erosion of the "elements" of the recognized bases for promissory enforcement quite naturally presents the question of whether any substantive conditions on the enforceability of promises remain viable.[334] By 1985, Professors Farber and Matheson drew the conclusion that, whatever our doctrine, a promise is enforceable, as a practical matter, if it is made "in furtherance of an economic activity."[335] More recently, Professor James Gordon similarly concluded that any promise characterizable as "commercial" or "related to an exchange of values" is enforceable.[336] All three recommend the adjustment of doctrine and theory in the direction of consistency with practice.[337]

Thus, it is no longer possible to be rigid or doctrinaire in applying any of the traditional bases for promissory enforcement. Therefore, the fact that the promises contained in promotional games requiring neither a purchase nor customer presence are not paradigm cases of bargains, perfect estoppel cases, or ideal restitution cases should not automatically lead to the conclusion that they should be placed outside the class of enforceable promises. As it turns out, there are many cases of enforceable promises that stretch the notions of bargain, reliance and benefit to (or beyond) the limit, and such cases call for a reconceptualization of our traditional views about the "grounds" of promissory liability. If all that such marginal cases seem to have in common is that they are "in furtherance of economic activity" or "commercial," then the promises contained in marginal promotional games may comfortably be classified with them. The game promises are, in effect, the introductory phase of a

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showing that someone has been or will be 'enriched' in anything like this sense of an increase in aggregate wealth." *Id.* at 577.

333. *See* Randy E. Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations*, 15 HOFSTRA L. REV. 443, 448, 457 (1987); Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the Invisible Handshake*, 52 U. CHI. L. REV. 903, 910–14 (1985); Yorio & Thel, *supra* note 301, at 152–60 (1991).

334. In referring to a "substantive" condition or restriction on contractual enforcement, I have in mind the type of function that classical theory ascribed to the doctrine of consideration, that is, the classification of promises as enforceable or unenforceable depending on the presence of a characteristic purportedly making some promises inherently more worthy of protection than others. I do not intend to refer to other kinds of reasons for denying enforcement to particular promises, such as the familiar formation requirements, excuse doctrines or affirmative defenses. The latter are neither pertinent to, nor affected by, this stage of the argument.

335. Farber & Matheson, *supra* note 333, at 930.

336. James D. Gordon III, *Consideration and the Commercial-Gift Dichotomy*, 44 VAND. L. REV. 283 (1991); James D. Gordon III, *A Dialogue About the Doctrine of Consideration*, 75 CORNELL L. REV. 987 (1990).

337. The proposals of Professors Farber, Matheson and Gordon would still presumably exclude the executory gift promise from the class of enforceable promises in the absence of reliance or special formality. For an expression of doubts that gifts and exchanges are easily distinguished, as well as doubts that the differences in treatment traditionally accorded them are justified, *see* Baron, *supra* note 274 and Kull, *supra* note 274. See also Adam J. Hirsch, *The Problem of the Insolvent Heir*, 74 CORNELL L. REV. 587, 630 (1989) ("[T]he distinction between a contract and a gratuitous transfer is thus blurrier than it appears at first glance.")

marketing strategy designed to build exchange relationships (brand or store loyalty), and such a strategy deserves the name "economic activity" or the adjective "commercial" if anything does. Accordingly, regarding even marginal promotional games as appropriate subjects for contractual enforcement serves the aim of theoretical coherence in at least two ways. First, it avoids the complexity of creating two categories of promotional games, an enforceable class that fits the traditional unilateral contract model and an unenforceable or "gift" class which does not. Second, it brings the treatment of marginal promotional games into harmony with the treatment of "marginal" promissory estoppel, restitution or bargain cases by recognizing the context of exchange (or proposed exchange) as the critical test of promissory enforcement.[338]

V. RUMINATIONS ON REMEDIES

The preceding discussion establishes a justification for continuing contractual enforcement of the promises contained in promotional games, even if some of them cannot be forced to fit the traditional unilateral contract model or, for that matter, alternate traditional grounds of promissory enforcement. Before concluding, however, it is worthwhile to consider, briefly and somewhat tentatively, whether some other enforcement regime would be preferable to contract. The obvious alternative candidates are a tort remedy or some form of statutory/regulatory regime.

In a sense, tort claims arising out of promotional games are nothing new. Fraud allegations of various kinds are not unusual in cases in which par-

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338. Before leaving the subject of reasons to enforce or not to enforce prize promises in marginal promotional games, it is necessary to say a word about the potential implications of economic theory. Presumably, legal liability for the costs of defective promotional games should be placed on the cheapest cost avoider, on the theory that the internalization of such costs will result in an optimal level of precaution. In the context of game failure, however, it is difficult to identify the cheapest cost avoider *a priori*, for at least two reasons.

First, one must identify the costs of game failure with which one is concerned. If the costs in question consist of the subjective disappointment of game participants in cases of defective games, it is likely such costs can be avoided either by a further investment in careful game design and execution or by a shift by participants to alternate sources of amusement. If, as is likely, there are other equally satisfying (but less risky) sources of amusement (e.g., video game arcades) available at roughly equivalent expenditures of money, time or effort, empirical research would be necessary to determine whether increased investment in precaution or a consumer shift to other activities is a lower cost solution.

On the other hand, if one begins with the assumptions that promotional games will, or should be, available and that people will play them, one must focus the analysis on the costs of detection and prevention of game design or execution defects. A second problem arises at this level. Promotional games are often designed and produced by outside marketing or advertising agencies and sold to the businesses that actually sponsor them. *See FTC Staff Report, supra* note 4, at 397, 425–35. Because it is probable that the marketing or public relations departments of the sponsoring businesses vary in size, skill and expertise, whether the cheapest cost avoider is the sponsor or the agency may vary from case to case.

Nevertheless, as between the game participant and the sponsoring business, it does seem likely that the latter will have superior expertise in the prevention and detection of game defects. Moreover, both in England and in this country, promotion insurance is now available to game sponsors. *See* Chicago Downs Ass'n, Inc. v. Chase, 944 F.2d 366 (7th Cir. 1991); David Gerrie, *Cover Story; Sales Promotion Insurance*, MARKETING, Feb. 1, 1990, at 37; McCrum, *supra* note 3. This suggests that, as between game sponsor and game participant, the former is likely to be the cheapest cost avoider. Thus, economic analysis suggests (if somewhat ambiguously and tentatively) a regime of sponsor liability.

ticipants regard the game sponsor's conduct as particularly odious.[339] Competitors of game sponsors and rival contestants long ago learned to plead cases sounding in unfair competition or tortious interference with business.[340] Games with an element of danger have generated personal injury cases,[341] and tort actions for defamation or invasion of privacy have been brought when injury to more intangible interests occurs in the context of a promotional game.[342]

None of the foregoing traditional torts, however, provides a general remedy for the more common disappointed claimant in cases of game failure like those discussed in Part I. In such cases, the participant's grievance is that a promised prize has been denied, but there is no indication that the game was fraudulent at its inception. As things now stand, potential tort liability is thus at the periphery of the promotional game, not at its core.

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339. *See* Younker v. Disabled Am. Veterans Serv. Found., 137 F. Supp. 497 (E.D.N.Y. 1954), *aff'd*, 228 F.2d 958 (2d Cir. 1955); Sweeney v. WSYA (Sunny 103) Radio Station, 574 So. 2d 769 (Ala. 1990); Kroger Co. v. Burleson, 432 S.W.2d 847 (Ark. 1968); Millsaps v. Urban, 171 S.W. 1198 (Ark. 1914); California Gasoline Retailers v. Regal Petroleum Corp. of Fresno, Inc., 330 P.2d 778 (Cal. 1958); Butters v. Brawley Star, 191 P. 987 (Cal. Ct. App. 1920); Goodhart v. Mission Publishing Co. 123 P. 210 (Cal. Ct. App. 1912); Minton v. F.G. Smith Piano Co., 36 App. D.C. 137 (1911); Plough Broadcasting Co., Inc. v. Dobbs, 293 S.E.2d 526 (Ga. Ct. App. 1982); Groves v. Carolene Prods. Co., 57 N.E.2d 507 (Ill. App. Ct. 1944); Smead v. Stearns, 155 N.W. 307 (Iowa 1915); Holt v. Rural Weekly Co., 217 N.W. 345 (Minn. 1928); Bridges v. Georgiana, 511 A.2d 1255 (N.J. Super. Ct. 1985); Kugler v. Market Dev. Corp., 306 A.2d 489 (N.J. Super. Ct. 1973); Quinones v. Gem Collectors Int'l, Ltd., 459 N.Y.S.2d 684 (N.Y. Sup. Ct. 1983); Clark v. National Broadcasting Co., 209 N.Y.S.2d 60 (N.Y. Sup. Ct. 1960); Davidson v. National Broadcasting Co., Inc., 204 N.Y.S.2d 532 (N.Y. Sup. Ct. 1960); Goldberg v. Columbia Broadcasting System, Inc., 205 N.Y.S.2d 610 (N.Y. Sup. Ct. 1960); Myles v. WAVI Broadcasting Corp., 1981 WL 2892 (Ohio Ct. App. 1981); Wishing Well Club, Inc. v. City of Akron, 112 N.E.2d 41 (Ohio Ct. Comm. Pl. 1951); LeFlore v. Reflections of Tulsa, Inc., 708 P.2d 1068 (Okla. 1985); Monroe v. Smith, 165 N.W. 532 (S.D. 1917); Whataburger, Inc. v. Rutherford, 642 S.W.2d 30 (Tex. Ct. App. 1982). *See also* Sousa v. State Sweepstakes Comm'n, 401 A.2d 1067 (N.H. 1979) (negligence); Schmidt v. Three Lakes Chamber of Commerce, 417 N.W.2d 196 (Wis. Ct. App. 1987) (negligence).

340. *See* Moreno v. Marbil Prods., Inc., 296 F.2d 543 (2d Cir. 1961); Gemeroy v. Leopold, 79 F. Supp. 458 (S.D.N.Y. 1948); Youst v. Longo, 233 Cal. Rptr. 294 (Cal. 1987); *California Gasoline Retailers*, 330 P.2d 778; Jones v. Smith Oil & Ref. Co., 15 N.E.2d 42 (Ill. App. Ct. 1938); Glover v. Malloska, 213 N.W. 106 (Mich. 1927); *Bridges*, 511 A.2d 1255; United Stations of N.J. (US) v. Getty Oil Co., 246 A.2d 150 (N.J. Super. Ct. 1968); United Stations of N.J. (US) v. Kingsley, 240 A.2d 702 (N.J. Super. Ct. 1968); Royal Farms, Inc. v. Minute Maid Co., 236 N.Y.S.2d 368 (N.Y. Sup. Ct. 1962); Featherstone v. Independent Serv. Station Ass'n of Tex., 10 S.W.2d 124 (Tex. Civ. App. 1928). *See also* Green v. G. Heileman Brewing Co., Inc., 755 F. Supp. 786 (N.D. Ill. 1991) (trademark infringement); Lewis v. Kroger Co., 109 F. Supp. 484 (S.D.W.Va. 1952) (copyright infringement); *In re* Elsinore Shore Assocs., 102 B.R. 958 (Bankr. D.N.J. 1989) (wrongful appropriation of ideas for promotion); Jersey Creamery, Inc. v. Board of Milk Control, 502 P.2d 30 (Mont. 1972) (alleged violation of milk price control regulations); Swanson Broadcasting, Inc. v. Clear Channel Communications, Inc., 752 S.W.2d 165 (Tex. Ct. App. 1988) (trademark infringement and misappropriation of promotional ideas).

341. *See* Weirum v. RKO Gen., Inc., 119 Cal. Rptr. 151 (Ct. App. 1975), *aff'd*, 123 Cal. Rptr. 468 (Cal. 1975); McCoy Restaurants, Inc. v. Griffith, 569 So. 2d 764 (Fla. Ct. App. 1990); Long v. State, 551 N.Y.S.2d 368 (N.Y. App. Div. 1990); Lee v. Elk Rod & Gun Club, Inc., 473 N.W.2d 581 (Wis. Ct. App. 1991).

342. *See* Stilson v. Reader's Digest Ass'n, Inc., 104 Cal. Rptr. 581 (Ct. App. 1972); Morrison v. National Broadcasting Co., Inc., 227 N.E.2d 572 (N.Y. 1967); Holt v. Columbia Broadcasting System, Inc., 253 N.Y.S.2d 1020 (N.Y. App. Div. 1964); *Clark*, 209 N.Y.S.2d 60; *Davidson*, 204 N.Y.S.2d 532; *Goldberg*, 205 N.Y.S.2d 610; *LeFlore*, 708 P.2d 1068.

At least initially, however, there is something attractive about the idea of a tort remedy in such cases. Part of the difficulty in treating promotional games as contracts is that they often require the participant to do very little of any value in return for the prize promise. Unlike the half-completed business exchange, in which contractual enforcement had its genesis and its most obvious justification,[343] enforcement of promotional games by an award of expectation damages comes much closer to compensating "mere disappointed hopes," which troubles some contract commentators.[344] "Disappointed hopes" seem uncomfortably close to a species of emotional harm, compensation for which would seem to fall more naturally to tort, if it is appropriate at all. One might argue, therefore, that a tort remedy for intentional or negligent infliction of emotional distress would be a conceptually more appropriate remedy in cases of game failure. In the few reported decisions in which disappointed prize claimants have asserted such theories, the response of the courts has ranged from simple unreceptiveness to outright derision.[345] However, in the *Hollywood Park* case discussed in Part I, the plaintiff lost his contract claim on summary judgment but went to trial on a tort theory of intentional infliction of emotional distress and on a restitution claim.[346] The jury returned a general verdict for $500,000.[347]

Nevertheless, the invitation to create a tort remedy for promotional games should probably be declined, for several reasons. First, the torts that would provide a prototype for such a remedy, intentional and negligent infliction of emotional distress, are themselves somewhat unstable. They continue to evolve, and there is still a substantial lack of clarity as to their requirements

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343. *See* Melvin A. Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 743–7 (1982); Fuller, *supra* note 274, at 815–16.

344. Atiyah, for example, argues that the assertion of the need to protect the promisee's subjective expectations is the weakest part of the traditional utilitarian case for regarding promises as legally and morally binding. *See* ATIYAH, *supra* note 310, at 42–44. *See also* Eisenberg, *supra* note 275, at 3 ("[L]ost expectation—a special form of disappointment—is among the least intense of injuries, and the psychological state aroused by a donative promise is often closer to hope than to anticipation.").

345. In Whitobsky v. Ford Motor Co., 409 F.2d 487 (5th Cir. 1969), the plaintiff alleged that the defendants had negligently informed her she had won a new Mustang in a promotional game and then later told her she was not the winner after all. The Court held that, under Louisiana law, she could not recover damages for mental anguish in contract or in negligence. In McDonald v. John P. Scripps Newspaper, 257 Cal. Rptr. 473 (Ct. App. 1989), a contestant who finished second in a county spelling bee sought damages from the contest sponsor for alleged impropriety in allowing an ineligible contestant to compete and win first prize. The trial court had sustained a demurrer to the complaint, and the California Court of Appeals affirmed on the grounds that "two things are missing here—causation and common sense." *Id.* at 474. In the course of its opinion, the Court expressed its "puzzlement as to how this case even found its way into court," *id.*, and observed that the "courts try to give redress for real harms; they cannot offer palliatives for imagined injuries." *Id.* at 477. I will spare the reader the Court's paraphrases of Wordsworth, Vince Lombardi and Grantland Rice. *Id.* at 474, 475, 477. It is sufficient to note that the plaintiff's counsel narrowly escaped sanctions for prosecuting the appeal. *Id.* at 476–77.

346. Memorandum of Points and Authorities in Support of Hollywood Park Operating Co.'s Motion for a New Trial and Motion for Judgment Notwithstanding the Verdict at 3, Mission Nat'l Ins. Co. v. Hollywood Park Operating Co., No. SWC 79936 (Cal. Super. Ct., L.A. County filed Dec. 30, 1990).

347. *Id.* at 5.

and scope.[348] Second, the proposed tort remedy for disappointed hopes for a prize would amount to the recognition of a rather pure form of emotional distress recovery, unaccompanied by the serious reliance characteristic of "contorts,"[349] the extreme and outrageous conduct characteristic of the bulk of the cases involving intentional infliction of emotional distress,[350] or the physical harm or threat characteristic of the cases involving negligent infliction of emotional distress.[351] I am somewhat skeptical that the public or the courts would be willing to accept such an unadorned form of emotional distress recovery, particularly in the absence of any limiting principle that would confine it to promotional games. Disappointment may be just too common to be the subject of a potentially broad-ranging remedy.[352] Finally, even if expectancy damages sometimes seem a bit excessive in cases like the Kraft "Ready to Roll" sweepstakes, the expectancy created by a prize promise normally has the virtue of being easy to compute in dollars. Quantifying the emotional injury involved in the state of disappointment is a great deal more difficult. Indeed, the difficulty of placing a numerical value on emotional harm is probably one reason emotional distress recoveries have been largely kept out of the law of contract.[353] For the foregoing reasons, a general tort remedy for cases of game failure does not seem to be a promising alternative.

A more intriguing possibility is suggested by the observation that the modern common law of contracts is essentially a residual category of liability. Some scholars have observed that the recent history of contract law is a tale of the progressive replacement of whole areas traditionally governed by contract (e.g., employment law, antitrust law or insurance law) with specific, and often technical, statutory or administrative schemes.[354] It is worth considering whether removing promotional games from the scope of contract law and instituting a system of regulation and administrative remedies would be beneficial.

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348. *See* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 12, 54 (Lawyer's 5th ed. 1984 & Supp. 1988).

349. The obvious example is Hoffman v. Red Owl Stores, Inc., 133 N.W.2d 267 (Wis. 1965), in which the court applied a promissory estoppel theory to protect the plaintiff's demonstrable reliance in spite of the fact that the "promise" upon which he relied was not sufficiently definite to pass muster as a conventional "offer." It has been suggested that the case "may fit better into that field of liability for blameworthy conduct we know as tort, instead of that field of liability based on obligations voluntarily assumed that we call contract." FARNSWORTH, *supra* note 93, § 3.26 at 208. For a discussion of the conceptual difficulties in the area of overlap between contract and tort, *see* Richard E. Speidel, *The Borderland of Contract*, 10 N. KY. L. REV. 163 (1983).

350. *See* KEETON, *supra* note 348, § 12.

351. *Id.*, § 54.

352. *See* McDonald v. John P. Scripps Newspaper, 257 Cal. Rptr. 473 (Ct. App. 1989). The court stated:

> Courts of Justice do not pretend to furnish cures for all the miseries of human life. They redress or punish gross violations of duty, but they go no farther; they cannot make men virtuous: and, as the happiness of the world depends upon its virtue, there may be much unhappiness in it which human laws cannot undertake to remove.

Id. at 476.

353. *See* RESTATEMENT (SECOND) OF CONTRACTS § 353 cmt. a (1979). *But see* KEETON, *supra* note 348, § 12 at 55, § 54 at 360 (arguing that recovery for mental anguish is no more difficult to measure than other well-accepted items of loss).

354. *See, e.g.*, LAWRENCE M. FRIEDMAN, CONTRACT LAW IN AMERICA 23–25 (1965).

Of course, statutory and administrative regulation of promotional games is nothing new. Postal regulations and Federal Communications Commission rules prohibiting the dissemination of lottery materials by mail or other media have been on the books for a long time.[355] The Federal Trade Commission, under its power to prevent "unfair or deceptive acts or practices" in commerce, issued regulations governing games of chance in the food retailing and gasoline retailing industries.[356] The FTC regulations impose certain information disclosure and preservation requirements and prohibit various ways of "rigging" promotional games.[357]

State regulation of promotional games is even more pervasive, sometimes under "little FTC Acts" modeled on the federal statute and sometimes under more specific legislation. Some states prohibit games of chance or other contests in specific businesses.[358] Others prohibit the use of certain words or phrases deemed particularly likely to mislead.[359] A number of states effectively forbid game sponsors to require a purchase as a condition of the opportunity to play a promotional game.[360] A few states require the materials for any promotional game to be submitted to a specific state official for review prior to the commencement of the game.[361] Some require bonds or similar assurances of financial ability to fulfill any prize obligations.[362] In addition, information preservation and disclosure requirements similar to those imposed by the FTC are fairly common.[363]

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355. *See, e.g.*, 18 U.S.C. § 1302 (1988); 39 U.S.C. §§ 3001, 3005 (1988) (lottery material constitutes nonmailable matter); 18 U.S.C. § 1304 (1988); 47 C.F.R. § 73.1211 (1991) (FCC prohibition of broadcast of lottery information). Interestingly, FCC and Postal Service opinions may differ as to what constitutes a lottery. Further, state law may use a definition different from either federal agency. *See* ROSDEN & ROSDEN, *supra* note 127, § 54.

356. 16 C.F.R. §§ 419.1–419.10 (1992).

357. *Id.*

358. *See, e.g.*, KY. REV. STAT. ANN. § 260–705 (Baldwin 1991) (milk marketing business); MD. ANN. CODE art. 16, § 144A (1989) (motor fuel sales); N.H. REV. STAT. ANN. § 287–B:1 (1987) (retail gasoline stations); PA. STAT. ANN. tit. 63, § 455.604 (1991) (real property sales); VA. CODE ANN. § 18.2–242 (Michie 1988) (product subject to both state and federal excise tax).

359. *See, e.g.*, CAL. BUS. & PROF. CODE § 17539.1(11) (Deering 1985) (use of the word "lucky"); CONN. AGENCIES REGS. § 42–110b–19 (1989) (misleading use of the word "free"); LA. REV. STAT. ANN. § 51:1721:1 (West 1987) (misleading use of terms "congratulations," "you have won," or "you are the winner of"). *See also* 16 C.F.R. § 251 (1991) (guidelines on the use of the word "free" and similar representations in promotions).

360. In most states, such a purchase requirement would consititute consideration and make the game an illegal lottery. *See, e.g.*, CAL. PENAL CODE § 319 (Deering 1985); N.H. REV. STAT. ANN. § 647.1 (1987); N.M. STAT. ANN. § 30–19–1(c) (Michie 1978). Some states have statutory provisions that prohibit making a purchase a condition of participation in a contest in specified industries. *See, e.g.*, HAW. REV. STAT. § 468–4 (Supp. 1991) (telephone solicitations); MO. REV. STAT. § 339.100(12) (Vernon 1989) (sale, purchase or lease of property); UTAH ADMIN. R. § A96–01–6 (1991) (alcoholic beverages).

361. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13–3311 (1989) (amusement gambling, intellectual contests); FLA. STAT. ANN. § 849.094 (West 1976) (any contest offering prizes greater than $5000); MONT. CODE ANN. § 37–53–401 (1991) (time-share property contests); N.Y. GEN. BUS. LAW § 369–e (1984) (any contest offering prizes greater than $5000); R.I. GEN. LAWS § 11–50–1 (1985) (any contest offering prizes greater than $500).

362. *See, e.g.*, FLA. STAT. ANN. § 840.094 (West 1976); N.Y. GEN. BUS. LAW § 369–3 (1984); WASH. REV. CODE ANN. § 64.36.320 (West Supp. 1991) (bond required for time-share property promotions).

363. *See, e.g.*, CAL. BUS. & PROF. CODE § 17537.1 (Deering 1985); FLA. STAT. ANN. § 849.094 (West 1976 & Supp. 1991); TENN. CODE ANN. § 47–18–104 (Supp. 1991); TEX.

No state, however, has taken the further step of providing a comprehensive scheme of regulation and administrative remedies designed to supplant contract remedies for promotional games entirely. Specifying in detail what such a scheme would look like would require a separate article, but a few features are fairly obvious. Presumably, the enabling legislation, like much current legislation, would be quite general, consisting primarily of a prohibition of "unfair" or "deceptive" activity. Allocation of responsibility for promotional games to an existing or new state agency would be necessary, as would specific rulemaking, monitoring and enforcement authority. The content of the substantive rules of the system, and the disclosures required of game sponsors, could be derived from the best existing state schemes. A system designed to replace contract law could also include a separate system of administrative tribunals for disappointed prize claimants, competitors suffering market injury from promotional games, or others with grievances connected with promotional games and contests.

While such a regulatory and administrative program has never been tried, or even proposed, it would arguably offer certain advantages over normal contractual enforcement. First, the system could be designed to incorporate more remedial flexibility than current contract law. A fairly general proscription of unfair or deceptive activity could allow administrative tribunals to give the functional equivalent of expectation damages to prize claimants if that were appropriate, or to decline to do so in cases, like the *Kraft* case, in which such a remedy seems disproportionate or excessive. In such cases, the kind of class-based restitution remedy suggested earlier, or even the type of "substitute contest" Kraft actually tried to conduct, might be available as remedies. Administrative regulation and enforcement under broad statutory authority might allow the enforcing agency or private claimants to tailor relief to the specific substantive needs of the case.

Moreover, the imagined regulatory and administrative scheme might offer one other advantage not afforded by normal contractual enforcement. Under the traditional unilateral contract model, the offeror remains "master of the offer." As a result, the sponsor of a promotional game has virtually complete control over the content of the game's rules and, if he or she includes the appropriate language, over the interpretation of the rules.[364] The ability of the courts to examine the substantive fairness of the rules or the sponsor's interpretation of them is quite limited. There would be no need, under a regulatory and administrative scheme, to preserve that degree of "offeror control." Administrators would presumably be free to examine the substantive fairness of the game's rules directly.

In spite of the initial attractiveness of such a non-contractual administrative and regulatory scheme, however, there are several reasons why it is likely to remain nothing more than an interesting thought experiment for the foreseeable future. First, such a system obviously entails significant costs, and it is doubtful, in an era of financially strapped state governments, that legislatures could be persuaded to incur them. Second, the people who design pro-

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PROP. CODE ANN. § 222.006 (West Supp. 1992). The FTC information and preservation requirements for promotional games of chance in connection with food and gasoline retailing are found in 16 C.F.R. § 419 (1991).

364. *See supra* notes 93–99 and accompanying text.

motional games are advertising and marketing professionals in a fairly concentrated market,[365] and their expertise substantially exceeds that of the average state bureaucrat. One can imagine a worst-case scenario in which the relevant state agency is "captured" and the agency head becomes a "sleazy ad-man" type, replete with pinkie rings and gold chains. Even in the absence of such drastic "capture," however, the potential dependence of regulatory agencies upon the regulated entities for information and cooperation was noted by commentators long ago.[366] Finally, one of the most striking features of promotional games, contests and similar devices is their sheer number, reflected in both the large volume of reported decisions involving such devices and the widespread media reports of other disputes involving them. It may be that promotional games are now so frequent that no state agency could keep track of all of them adequately.[367]

It thus seems likely that, whether contractual enforcement is the ideal regime or not, it will continue to be the vehicle for enforcement of the promises contained in promotional games. In this article, I have attempted to demonstrate that such enforcement is both theoretically justified and probably preferable to alternative enforcement mechanisms. However, at least in the case of marginal promotional games, continuing to enforce prize promises as contractual undertakings requires the kind of reconceptualization of the basis of contract which has emerged in recent scholarship. In short, "contract" is still the name of the game, but both the nature of the game and the meaning of the name have changed.

365. *See FTC Staff Report*, *supra* note 4, at 397, 425–35.

366. *See, e.g.*, Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975).

367. Since many promotional schemes are conducted on a nationwide or regional basis, there is a potential for an additional problem, i.e., determining the appropriate extraterritorial reach of any state regulatory scheme. *See* Consumer Protection Div. v. Outdoor World Corp., 603 A.2d 1376 (Md. Ct. Spec. App. 1992). The problem of extraterritorial application of statutes and regulations is beyond the scope of this article.