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LOTTERY APPROACH TO PROMOTIONAL SCHEMES

Plaintiff, assignee of a conditional sales contract for the purchase of a home fire alarm system, sued defendant—purchaser upon default. The assignor-seller had obtained the contract using a referral sales scheme as an inducement, and plaintiff knew of the scheme at the time of assignment. The scheme included a Representative's Commission Agreement in which seller promised to pay purchaser one hundred dollars for each sale made to purchaser's sixty referrals. In addition, seller promised five Bonus Presentation Guarantees of 200 dollars, each payable when seller had contacted fifteen of purchaser's referrals. Seller represented that the referral plan would pay for the fire alarm system priced at 898 dollars, but valued at 225 dollars. The trial court, holding the referral sales scheme a lottery, refused to enforce the conditional sales contract. On appeal, the Washington Supreme Court affirmed. *Held*: A referral sales scheme which awards prizes by chance while exacting consideration is void as a lottery.¹ *Sherwood & Roberts—Yakima, Inc. v. Leach*, 67 Wash. Dec. 2d 618, 409 P.2d 160 (1965).

The Washington court found that the referral sales scheme it was examining included the traditional elements of lottery: prize, chance, and consideration. The promised commissions and bonuses constituted the prize; the conditional sales contract provided the consideration. Ignoring any skill on the part of salesmen who contacted the referrals, the court looked only at the actions of the purchaser and concluded that chance dominated any requirement of skill in the allocation of prizes.² Although the purchaser may have used skill or judgment in

¹ *Accord, In re New York*, 35 U.S.L. WEEK 2187 (N.Y. Sup. Ct. Oct. 3, 1966), where the court, relying upon the decision in the principal case, held a referral sales scheme a lottery. Attorneys general in several states have suggested use of lottery statutes to strike down schemes of referral selling. See 6 DIG. OF OPS. ATT'Y GEN. (1965); 86 Mo. OPS. ATT'Y GEN. (1963); 649 OHIO OPS. ATT'Y GEN. Cf. BERTON, *THE BIG SELI* 147 (1963), and SMITH, *THE BARGAIN HUCKSTERS* 71 (1962), where referral sales schemes are compared to "chain letter" schemes traditionally considered lotteries.

Contra, De Witt Motor Co. v. Bednark, 14 Ohio Op. 2d 25, 169 N.E.2d 660 (C.P. 1960), where the Ohio court rejected the Ohio Attorney General's opinion *supra*; *First Discount Corp. v. CUA*, 117 Ohio App. 105, 190 N.E.2d 695 (Ct. App. 1962); and *Yoder v. So-Soft of Ohio, Inc.*, 30 Ohio Op. 2d 566, 202 N.E.2d 329 (C.P. 1963). *But see Krehbiel v. State*, 378 P.2d 768 (Okla. 1963), and *A.A. Murphy, Inc. v. Taylor*, 383 P.2d 648 (Okla. 1963). *But cf., Dodge, Referral Sales Contracts: To Alter or Abolish*, 15 BUFFALO L. REV. 669, 690 (1966), where the policy of striking down all schemes which re-allocate the profits of the seller to the buyer is questioned.

For a general discussion of the lottery approach to referral selling see Note, 15 KAN. L. REV. 117 (1966).

² The Washington court employed the "dominant element" rule in distinguishing between skill and chance—the rule traditionally used when deciding whether the

selecting referrals, he apparently had no control over the outcome of the plan.³ Concluding that chance permeated the entire scheme, the court stated that the scheme was illegal⁴ and refused to enforce the conditional sales contract which was an integral part of the transaction.⁵

Beginning with the proposition that referral and similar sales schemes can be detrimental to the public interest,⁶ the Washington court in the principal case achieved the proper result. But the decision raises a question of method: Is the lottery approach to business promotional schemes the best way to protect the public interest?

I. THE LOTTERY APPROACH

The classic lottery existed when a person paid for a chance to win a prize. Lottery laws were passed in most American jurisdictions in order to prevent one man from profiting from another man's propensity to seek "something for nothing." One man's exploitation of another man's weaknesses was considered unfair. Lottery laws were designed to eliminate that unfairness, and for the most part they did.

Some business promotional schemes resemble the classic lottery in that they award prizes by chance in consideration for greater business advantage. Such schemes may be considered unfair in the same way in which the classic lottery is thought to be unfair. The businessman often appeals to the "get something for nothing" weakness. But business promotional schemes present additional problems. In the first place a scheme is not only unfair to the customer but to the business competitor who refuses to exploit the weaknesses of his customers. The promoter of a scheme unfairly takes business away from the competitor. Secondly, a business promotional scheme is deceptive. The

outcome of an endeavor depends more on chance than skill. See, e.g., *D'Orio v. Jacobs*, 151 Wash. 297, 275 Pac. 563 (1929). See generally Morse, *The Dominant Element Rule*, 58 DICK. L. REV. 394 (1954).

³ 67 Wash. Dec. 2d at 623, 409 P.2d at 163:

respondents took a chance that the referrals might not be interested; that the salesman might not adequately make his presentation; that the referral might have already been referred by someone else; that the market might be saturated; and that the salesman might not even contact the referral.

⁴ Lotteries are prohibited in Washington under CONST. art 2, §24, and WASH. REV. CODE §9.59.010 (1961), a criminal statute providing for punishment of up to five years in prison or \$1000 fine, or both, for anyone conducting a lottery.

⁵ For a general discussion of the severability of conditional sales contracts from referral sales plans see Dodge, *supra* note 1, at 635.

⁶ See Better Business Bureau, "Referral" Schemes, No. 18 in series "Your Money's Worth," cited in Brief for Att'y Gen. of Wash. as Amicus Curiae, appendix B, *Sherwood & Roberts—Yakima, Inc. v. Leach*, 67 Wash. Dec. 2d 618, 409 P.2d 160 (1965). See generally BERTON, *op. cit. supra* note 1, and SMITH, *op. cit. supra* note 1.

customer may not understand his motivation in participating in the scheme as clearly as he would in case of a classic lottery. The customer may not realize that he pays for the chance to win by purchasing higher priced goods. And he may not be aware of the chance involved in the scheme.

Lottery laws have been applied to certain business promotional schemes in order to protect the public interest. In applying these laws, the courts have not made clear the particular objections to the schemes. Instead they have taken the words prize, chance, and consideration—words which merely *describe* the classic lottery—and have made them into juridical touchstones for determining the legality of business promotional schemes. Such an approach causes courts to direct their inquiry to the meaning of prize, chance, and consideration rather than to the unfairness or deception of a particular scheme. Of course, the presence (or lack thereof) of unfairness or deception may cause courts to favor one meaning over another.⁷ Unfortunately, however, courts can fail to discover in unfair and deceptive schemes the elements of prize, chance, and consideration.

Such failure can be seen in previous judicial applications of lottery law especially in those cases where the presence of consideration is disputed.⁸ For example, if a businessman distributes "lottery" tickets to both purchasers and non-purchasers, he is said to be operating his scheme on the basis of flexible participation; only some participants pay a direct consideration for a chance to win a prize. Courts have taken conflicting approaches when applying lottery laws to flexible participation schemes.⁹ Some have held that consideration must be

⁷ See, e.g., *Dion v. Saint John Baptiste Soc'y*, 82 Me. 319, 19 Atl. 825 (1890), where a scheme at a church fair was held not to constitute a lottery. See also *R. J. Williams Furniture Co. v. McComb Chamber of Commerce*, 147 Miss. 649, 112 So. 579 (1927), where a scheme promulgated by a chamber of commerce to stimulate trade was not found to be a lottery. See Annot., 87 A.L.R.2d 649, 658-59 (1963), for a general discussion of cases where the courts have failed to apply the lottery laws explaining that the promotional schemes lack essential elements.

⁸ See generally WILLIAMS, *FLEXIBLE PARTICIPATION LOTTERIES* (1938), for a discussion of lottery analysis and its problems in connection with flexible participation promotional schemes. Cf. *A.A. Murphy, Inc. v. Taylor*, 383 P.2d 648 (Okla. 1963), where the defendant alleged lottery and fraud when defending against a suit for breach of a contract executed under a referral sales plan. Defendant offered proof only as to lottery. The court rejected the lottery argument and dismissed the fraud allegation for lack of proof. Had defendant not relied on the lottery approach and had he gone to the real issue of misrepresentation, he may have succeeded in his lawsuit.

⁹ See WILLIAMS, *op. cit. supra* note 8, (Supp. 1956), where the author has compiled a list of the two lines of cases. See also Annot., 87 A.L.R.2d 649, 659 (1963): "There is a split of authority as to the legality of schemes where the general public is invited to participate in the drawing for the cash prize."

received from all participants and must directly benefit the promoter.¹⁰ In other cases consideration is defined more broadly,¹¹ and flexible participation schemes are not allowed.

And yet flexible participation schemes may be both unfair and deceptive. They may be unfair because they appeal to the participants' desire to gain "something for nothing," and they may divert business from competitors to the promoter. Such a scheme may be deceptive in that it offers "free" chances even though those chances are not free. A paying participant may pay more for products. A non-paying participant may "pay" for his ticket by expending time and money to obtain a "free" chance. A discussion of consideration in no way uncovers such unfairness and deception. If a court is aware of the unfairness and deception or the lack thereof, equitable decisions in cases of first impression can be reached. But adoption of one approach with regard to consideration—or chance—inhibits future change and burdens courts with inflexible rules resulting in improper characterization of future cases.¹²

The analytical weakness of the lottery approach lends itself to exploitation by business promoters. When courts put some defining limits on the words "prize, chance, and consideration," the business promoter formulates a scheme which arguably may not be within those limits. In that way the business promoter is able to avoid the lottery laws and conduct business promotional schemes which are as unfair and deceptive as the schemes which are subject to the lottery laws. This situation increases the likelihood of improperly characterized cases within a given jurisdiction.

It is possible for a court to expand the accepted notions of prize, chance, and consideration to include almost every scheme. This expansion enables courts to strike down objectionable schemes created by

¹⁰ See *e.g.*, *Yellowstone Kit v. State*, 88 Ala. 196, 7 So. 338 (1889), the leading case in this line of decisions. For a more recent case see *Cables Co. v. FCC*, 243 F.2d 232 (D.C. Cir. 1957).

¹¹ See, *e.g.*, *State v. Danz*, 140 Wash. 546, 250 Pac. 37 (1926).

¹² See, *e.g.*, *California Gasoline Retailers v. Regal Petroleum Corp.*, 322 P.2d 945 (Dist. Ct. App.), *rev'd*, 50 Cal. App. 2d 844, 330 P.2d 778 (1958). In that case two lower courts found sufficient consideration in a trip to a gas station and held a raffle illegal as a lottery. Although it was shown that defendant financed the raffle by charging more for gasoline than competitors (to the damage of his competitors), the California Supreme Court reversed, holding that precedent required direct consideration. *But see, e.g.*, *Caples Co. v. FCC*, 243 F.2d 232 (D.C. Cir. 1957), where the court of appeals may have discarded its previous approach to consideration by holding that a trip to a store was not sufficient consideration. But even when a court is willing to adopt a flexible approach to the consideration element, the real reasons for its decision are obscured in a discussion of consideration.

promoters who tried to avoid the lottery criteria. The Washington court in the principal case adopted this approach by finding that the element of "chance" was present in a referral scheme. This expansive approach may cure certain defects, but it raises another problem. Such an approach runs a risk of subjecting fair and undeceptive business activities to the charge of lottery. For example, suppose *A* offers *B* an interest in a gold mine yet to be discovered. All *B* must do is pay *A* 100 dollars to finance the prospecting operations. *A*, in turn, promises to prospect for gold and to give *B* ninety per cent of all gold he finds. Such a transaction, usually a legitimate undertaking, fits the definition of "lottery" found in the principal case. The criteria of prize, chance, and consideration in their expanded form may not be analytically useful.

Apart from analytical difficulties, the lottery approach to business promotional schemes creates additional problems. Lottery laws are criminal. Many courts are reluctant to apply the criminal law in areas of economic activity. As one court has said: "The undesirability of this type of programming is not enough to brand those responsible for it as criminals. Protection of the public interest will have to be sought by means not pegged so tightly to the criminal statute . . ." ¹³ And, too, public enforcement agencies, by necessity selective in their enforcement of criminal laws, might be prone to relegate to a lower priority activities in the business promotion area. Because of this situation the public interest is usually protected only when private remedies are pursued—a rather infrequent occurrence. Of course, it might be argued that the criminal sanction deters businessmen from adopting questionable promotional schemes. Such deterrence would only be possible in jurisdictions willing to apply the lottery laws to these schemes. But even then criminal prosecution is unlikely. ¹⁴ Consequently, any deterrent effect is minimal.

The lottery approach does have one redeeming feature. At this time it is an approach which could be universally applied throughout the United States to attack unwanted promotional activities. Every American jurisdiction has laws prohibiting private lotteries. Were each jurisdiction to look through the false touchstones of prize, chance, and consideration to the unfairness or deceptions of a particular

¹³ *Caples Co. v. FCC*, 243 F.2d 232, 234 (D.C. Cir. 1957).

¹⁴ See Comment, *Laws, Lotteries, and Business Promotion*, 8 KAN. L. REV. 110, 111 (1959): "It is obvious that the so-called 'civil' actions are but 'nipped-in-the-bud' criminal actions, with the civil method chosen by discretion of the prosecuting attorney when bringing action against a good faith business promoter . . ."

scheme, the lottery approach could work. But the preceding discussion suggests that the lottery approach can not overcome its own weaknesses and thus serve as an effective weapon against unfair and deceptive promotional practices.

II. ALTERNATIVES TO THE LOTTERY APPROACH

A. *The Tort Approach*

Referral selling and other promotional schemes could be attacked by using the tort theory of misrepresentation. While not presenting in this note a detailed discussion of the misrepresentation theory,¹⁵ there are several aspects of the theory which should be mentioned. In the first place, the misrepresentation theory tends to be as doctrinaire and inflexible as the lottery approach. For example, in Washington a person wishing to establish the tort of misrepresentation would have to prove "by clear, cogent, and convincing evidence" the presence of these nine elements:¹⁶

(1) a representation of an existing fact, (2) its materiality, (3) its falsity; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person to whom it is made; (6) ignorance of its falsity on the part of the person to whom it is made; (7) the latter's reliance on the truth of the representation; (8) his right to rely upon it; (9) his consequent damage.

In the principal case the representation by the salesman that the defendant would obtain the fire alarm system "free" provides, it would seem, the requisite nine elements. But the Washington court has said: "Generally fraud cannot be predicated upon a representation as to a future event, or a promise to do something in the future."¹⁷ The representation of "free" in the principal case was predicated upon a future event (contacting of defendant's sixty referrals and payment of Bonus Presentation Guarantees); therefore the misrepresentation theory may not have provided an effective defense.

Although inroads into the doctrinal aspects of the tort approach are being made,¹⁸ the existing doctrine does not always ferret out unfair and deceptive business promotional schemes. Of course the tort ap-

¹⁵ See generally PROSSER, TORTS §§ 100-05 (3d ed. 1964).

¹⁶ See *Baertschi v. Jordan*, 68 Wash. Dec. 2d 451, 456, 413 P.2d 657, 660 (1966).

¹⁷ *Id.* at 456, 413 P.2d at 661.

¹⁸ See generally PROSSER, *op. cit. supra* note 15.

proach does not require the use of a criminal sanction in an area of economic activity, but neither does it purvey the authority of statutory law. The tort approach is in no more satisfactory than the lottery approach and may, in fact, be less satisfactory particularly in those jurisdictions where the approach is rigid and doctrinaire.

B. *The Unconscionability Approach*

In situations where unfair and deceptive business promotional schemes require the making of contracts, it is possible that the unconscionability clause of the Uniform Commercial Code (UCC § 2-302) could be used to attack the validity of those contracts. A recent New York decision has applied section 2-302 of the Uniform Commercial Code to a scheme of referral selling.¹⁹ The New York court, relying on the principles enunciated in a recent federal decision,²⁰ said:²¹

The fact that great emphasis was directed to the referral-plan aspect of the transaction lured the victims to become "enrollees". Such transactions were not the usual "armslength" deals of the market place. . . . The glowing representations of the money that would be earned as commissions made by respondents by the only ones in possession of knowledge of the real facts, placed the respondents in a position of a much fairer and more honest course of dealing than would be countenanced in the ordinary course of a commercial transaction.

The New York court goes on to discuss other unfair and deceptive aspects of the promotional scheme and places great emphasis on the magnitude of the price differential between the reasonable market price and the contract price. The holding of "unconscionable" in final analysis, however, seems to rest on a judicial attitude as enlightened as it is rare:²²

No longer do we believe that fraud may be perpetrated by the cry of "caveat emptor". We have reached the point where "Let the buyer beware" is a poor business philosophy for a social order allegedly based upon man's respect for his fellow man. Let the seller beware, too! A free enterprise system not founded upon personal morality will ultimately lose freedom.

The unconscionable approach to business promotional schemes *can* be more useful than the lottery approach. The approach focuses

¹⁹ See *In re* New York, 35 U.S.L. WEEK 2187 (N.Y. Sup. Ct. Oct. 3, 1966).

²⁰ *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965), 41 WASH. L. REV. 621 (1966).

²¹ *In re* New York, 35 U.S.L. WEEK 2187 (N.Y. Sup. Ct. Oct. 3, 1966) (at p. 28 of unreported decision).

²² *Ibid.*

courts' attention on the unfairness and deception in schemes rather than on the indirect touchstones of prize, chance, and consideration. Too, a finding of "unconscionability" does not render the business promoter a criminal; the concept of unconscionability was designed for the commercial world and for the regulation of economic activity.

But the unconscionability approach to business promotional schemes has its weaknesses. In the first place, the effectiveness of the approach depends upon the judicial attitude of a court. Few courts have adopted the attitude of the New York court. Secondly, many courts are reluctant to base their decisions solely upon their own determinations of fairness; they seek recognized criteria by which to justify their own holdings. The concept of unconscionability provides few criteria for determining what practices are unfair and deceptive. Courts may be reluctant to utilize the unconscionability approach simply because it is too vague and imprecise. The Uniform Commercial Code, as the statutory authority for unconscionability, does not suggest any method of remedying such vagueness and imprecision.²³

The unconscionability approach avoids the doctrinal problems of the lottery and tort approaches. The very notion of unconscionability requires courts to examine directly the unfairness and deception of a particular scheme. But it is questionable whether this approach could ever achieve wide judicial acceptance. Though analytically more precise than the lottery approach, the unconscionability approach may not be better from a practical standpoint because of the problems of judicial attitude and judicial acceptability.

C. The Consumer Protection Law Approach— The Washington Model

Washington's Consumer Protection Act provides in part: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."²⁴ This statute directs the attention of the court to the very notions of

²³ UNIFORM COMMERCIAL CODE § 2-302 reads:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

The determination of "unconscionable" is a matter of law to be decided by the court. The court can not consult a body of experts (or a great volume of precedent) to aid it in its decision-making.

²⁴ WASH. REV. CODE § 19.86.020 (Supp. 1965).

unfairness and deception that have been discussed above. The consumer protection law approach is direct; it does not rely upon the indirection of prize, chance, and consideration. Analytically this approach is much more satisfactory than the lottery approach.

Furthermore, application of the Washington Consumer Protection Act should avoid the problems of judicial attitude and judicial acceptability as discussed in the unconscionability approach.²⁵ The Washington legislature has expressly provided that federal law relating to unfair methods of competition and deceptive practices would guide interpretation of the Consumer Protection Act:²⁶

The legislature hereby declares that the purpose of this act is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair competition. It is the intent of the legislature that, in construing this act, the courts be guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters. . . . To this end this act shall be liberally construed that its beneficial purposes may be served

The court is required to protect the public from unfair and deceptive business activities. The doctrine of caveat emptor is explicitly abandoned. And the court does not have to decide the meaning of "unfair" and "deceptive" without reference to relevant authority. Federal law can provide useful criteria.

A study of federal cases, as well as Federal Trade Commission rulings,²⁷ indicates the criteria that can be used to define "unfair" and "deceptive." In an early federal case, *FTC v R.F. Keppel & Bro.*,²⁸ the Supreme Court, applying section 5 of the Federal Trade Commission Act,²⁹ counterpart of the Washington statute, discussed the meaning of "unfair competition" and "deceptive practices" in such a way as to avoid the doctrinal snares of a lottery approach. Though the lower court found the scheme to be a lottery and, therefore, an unfair act under section 5, the Supreme Court refused to rely on the lottery argument and dealt with the substantive issues involved including the

²⁵ See text accompanying note 22 *supra*.

²⁶ WASH. REV. CODE § 19.86.920 (Supp. 1965).

²⁷ Through its rulings, the FTC prescribes the correct method of promoting the sale of goods and services and strikes down deceptive acts through cease and desist orders. See, e.g., 29 Fed. Reg. 2379 (1964), where the FTC prohibited "using in any manner a sales plan, scheme, or device wherein false, misleading, or deceptive statements or representations are made in order to obtain leads or prospects for the sale of merchandise or services."

²⁸ 291 U.S. 304 (1933).

²⁹ 15 U.S.C. § 45 (1963).

type of person at whom the scheme was directed and the resulting harm to that person and business competitors.

Federal cases suggest the following criterion for determining the unfairness of a business promotional scheme: Did the scheme appeal to man's propensity to "get something for nothing?"³⁰ If so, the scheme constitutes an unfair trade practice. If the person engaging in this unfair trade practice thereby gains an advantage over his competitors, a second notion of unfairness is presented and he is said to be engaging in an unfair method of competition.

Criteria for determining whether a particular promotional scheme is deceptive resemble misrepresentation criteria stripped of their doctrinal baggage.³¹ The following criteria are suggested by the federal body of law.³² (1) Misrepresentation—did the promoter misrepresent facts by positive statements or non-disclosure? In analyzing a referral scheme a court might ask if the purchaser was told that his referral commission would pay for the product—that the product would, in effect, be "free" to him.³³ A court might also determine if the pur-

³⁰ See *Calvine Cotton Mills, Inc.*, 51 F.T.C. 294, 299 (1954), where Commissioner Carretta in a special concurring opinion, said:

However, I think it should be made clear that, in my opinion, respondent's practice is not being condemned because it is a technical lottery, but because it is a method of merchandising which constitutes an unfair trade practice It is clear that respondent's sales promotion plan was intended to appeal to the gambling instincts of purchasers and prospective purchasers and therefore contrary to public policy.

See *Bear Sales Co.*, No. 8627, FTC, (1965).

³¹ The criteria, although similar to those found in the common law tort of fraud, have been liberalized to eliminate much of the fraud *doctrine* which could inhibit analysis. For example, a passive non-disclosure is treated the same as an active misrepresentation when both induce the purchaser to act to his detriment. Also, intent to deceive is not required if, in fact, the deception occurs. The reasonable man standard seems to have been expanded to include the "gullible consumer." See generally PROSSER, *TORTS* §§ 100-05 (3d ed. 1964).

A fraud approach has been used by the federal government to rid the mails of referral selling schemes. Under the authority of the Postal Fraud Statute, 18 U.S.C. § 1341 (1958), 129 firms were investigated in 1963. See Brief for the Att'y Gen. of Wash. as Amicus Curiae, appendix (Letter from Chief Inspector Montague to Att'y Gen. O'Connell), *Sherwood & Roberts—Yakima, Inc. v. Leach*, 67 Wash. Dec. 2d 618, 409 P.2d 160 (1965).

³² FTC rulings, though part of the "body of federal law," may not be direct precedents for Washington court interpretations of WASH. REV. CODE § 19.86.020 (Supp. 1965). WASH. REV. CODE § 19.86.920 (Supp. 1965), quoted *supra* note 25, directs the Washington court to "be guided by the interpretation given by the federal courts . . ." to similar federal statutes. (Emphasis added.) Of course, federal court decisions will reflect in many situations the approach taken by the body of experts in the FTC.

³³ See 29 Fed. Reg. 399 (1964), where the FTC in issuing a cease and desist order said that use of the word "free" was misleading, and required that at the outset a scheme must be set forth "so as to leave *no reasonable probability* that the terms of the advertisements or offer might be misunderstood." (Emphasis added.) See also 29 Fed. Reg. 257 (1964), where the FTC determined that any representations concerning anticipated income from referrals or products could not exceed that which the com-

chaser was told about market saturation, a fact or probability known to the promoter of the referral scheme.³⁴ (2) Inducement—did the misrepresentation cause the purchaser to act? A court might inquire into the marketability of the product without the referral scheme, or the ability of the purchaser to pay for the product without using anticipated referral commissions. (3) Damage—was anyone damaged? The court might make this determination by ascertaining the market price and comparing it to the contract price of the product.

Having discovered unfairness or deception in a particular scheme, a court acting under consumer protection laws does not have to use the criminal law to strike down the scheme. And a person damaged by an unlawful trade practice may elicit aid from the Consumer Protection Division of the Attorney General's Office.³⁵ Such a person need not institute a private action or wait for a county prosecutor to instigate proceedings in order to gain relief. Despite the many advantages, only Washington and Hawaii have consumer protection laws modelled after the Federal Trade Commission Act.

In the principal case it was held that referral selling was illegal because it was a lottery, and the scheme was not examined in the light of Washington's Consumer Protection Act.³⁶ Because of the analytical and practical advantages discussed above, it is submitted that, in the future, consumer protection laws should be used to determine the

pany could prove was the normal amount received. The FTC would not allow a representation that a buyer could earn enough to pay for the product purchased unless such representation corresponded to normal experiences of people under the referral scheme. *But see, e.g.*, FTC, 70 Advisory Op. Dig., (July 1966), as cited in 35 U.S.L. WEEK 2031 (July 6, 1966), where the FTC used a lottery approach to attack a sales scheme that gave away "free" sewing machines with the purchase of the cabinet. Instead of examining deceptions in the advertising or fairness of the cabinet price, the Commission fell back on a traditional lottery approach to attack the scheme.

³⁴ See 67 Wash. Dec. 2d at 624, 409 P.2d at 163, where the court explains the phenomenon of market saturation.

³⁵ See generally Mindell, *The New York Bureau of Consumer Frauds and Protection—A Review of its Consumer Protection Activities*, 11 N.Y.L.F. 603 (1965).

³⁶ The applicability of WASH. REV. CODE § 19.86.020 (Supp. 1965) to the facts in the principal case was brought to the court's attention through the attorney general's amicus brief, *supra* note 6. The attorney general argued that because the scheme was a lottery it was an unfair and deceptive practice under the consumer protection laws, but did not point out to the court the advantages of using the consumer protection law exclusively. The Washington court refused to apply WASH. REV. CODE § 19.86.020 stating that it was not at issue, 67 Wash. Dec. 2d at 627, 409 P.2d at 165, meaning apparently that the statute was neither pleaded by counsel nor necessary to the just disposition of the case. Nothing, however, should have prevented the court from disposing of the principal case by applying the Consumer Protection Act instead of the lottery statute.

legality of business promotional schemes.³⁷ Where such an approach is not available, any or all of the other approaches should be employed in the hope of eliminating unfair and deceptive business promotional schemes.

³⁷ See 5 CCH TRADE REG. REP. ¶ 50,150 (1965), where the FTC advocated the use of consumer protection laws similar to Washington's to strike down referral selling and other schemes. The FTC encouraged all states to enact such laws in order to provide effective consumer protection for their citizens. It was pointed out that states with provisions similar to § 5 of the Federal Trade Commission Act could profit from the FTC's fifty years of experience and over 800 court decisions interpreting § 5.

For an alternative method of handling referral sales contracts see Dodge, *supra* note 1, at 692-96, where it is suggested that states pass specific legislation that would (1) prohibit selling or offering for sale any consumer goods or services at a price unreasonably higher than the usual or ordinary price and (2) limit either the percentage of sales made on referral or limit the buyer's debt reducible by referral commission payments. Such legislation may solve most problems inherent in referral selling, but a consumer protection act would give the same protection while covering more schemes.