IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Preston Lindey and David Lindey, d/b/a Best Processing Company, Petitioners	:	
v.	:	No. 388 M.D. 2006
Pennsylvania State Police, Bureau of Liquor Control Enforcement,	:	

PER CURIAM O R D E R

AND NOW, this 20th day of February, 2007, it is hereby ORDERED that the above-caption opinion, filed November 21, 2006, shall be designated OPINION rather than MEMORANDUM OPINION, and shall be reported.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Preston Lindey and David Lindey, d/b/a Best Processing Company, Petitioners	:	
v.	:	No. 388 M.D. 2006
Pennsylvania State Police, Bureau of Liquor Control Enforcement, Respondent	:	HEARD: Sept. 5, 2006

BEFORE: HONORABLE BARRY F. FEUDALE, Senior Judge

OPINION BY
SENIOR JUDGE FEUDALE FILED:November 21, 2006

Petitioners in this original jurisdiction action seek to preliminarily enjoin the Pennsylvania State Police, Bureau of Liquor Control Enforcement from confiscating certain coupons and coupon-dispensing machines, referred to as "Ad-Tab" from licensed establishments in the Erie, Pennsylvania area. At issue is whether the coupons and dispensers constitute "gambling devices" pursuant to 18 Pa.C.S. §5513. Such devices are prohibited in licensed establishments according to caselaw and Liquor Control Board regulations.[1]

Petitioners sell and distribute advertising discount coupons known as "Ad-Tabs." These items are marketed under an

[1] Although gambling is not a specific violation of the Liquor Code, Act of April 12, 1951, P.L. 90, as amended, 47 P.S. §§1-101 – 10-1001, a license can be revoked if gambling is conducted on licensed premises. In re Catering Club Liquor License No. CC-4837, 365 A.2d 683 (Pa. Cmwlth. 1981).

agreement between petitioners and F.A.C.E. Trading, Inc., a Wisconsin Corporation. The "Ad-Tabs" are discount coupons good for discounts on a number of products and services, such as hotel stays, clothing, DVD's and board games. In addition to product discounts, however, the "Ad-Tabs" also contain a rub-off section offering the chance to win a cash prize, ranging from $5 up to $250.

The Liquor Control Board, on January 4, 2002, issued Advisory Opinion No. 02-016, concluding that the sale and/or use of "Ad-Tabs" by Board licensees is prohibited under §5.32(f) of the Board's regulations, 40 Pa. Code §5.32(f), and Section 471 of the Liquor Code, 40 P.S. §4-471. The Bureau of Liquor Control Enforcement then began confiscating petitioners' machines located in licensed premises in the Erie area. Petitioners filed the present action in the Court of Common Pleas of Erie County, seeking both equitable and monetary relief. The Common Pleas Court sustained respondent's preliminary objections on subject matter jurisdiction and transferred the case to the Commonwealth Court. We note that no further pleadings have been filed to date in this Court.

In essence, we are asked to determine, for the purpose of entering a preliminary injunction, whether the "Ad-Tab" coupons are primarily a product in which a customer purchases a discount coupon to which there is an incidental "prize" element attached, or rather whether the coupons are simply a thinly disguised lottery scheme marketed under the cover of a "discount coupon."

We begin by noting that a party seeking a preliminary injunction bears the burden of showing:

> (1) that an injunction is necessary to prevent immediate and irreparable harm that cannot be compensated by damages;
>
> (2) greater injury would result from refusing an injunction than from granting it;
>
> (3) that an injunction will restore the parties to the *status quo ante*;
>
> (4) that the petitioning party is likely to prevail on the merits;
>
> (5) that the injunction sought is reasonably suited to abate the offending activity; and
>
> (6) that the injunction will not adversely affect the public interest.

Summit Towne Centre, Inc. v. The Snow Shoe of Rocky Mount, Inc., 573 Pa. 637, 828 A.2d 995 (2003).

Here, the precise issue of whether "Ad-Tabs" constitute a gambling device is one of first impression in Pennsylvania. Petitioners cite two relevant cases from other jurisdictions, including a California case involving the same "Ad-Tabs." In McVeigh v. California Department of Alcoholic Beverage Control, an unpublished trial court opinion from Los Angeles County filed in 2004, the trial judge, in what appears to be a motion to return seized property, concluded that the State's seizure of similar machines and their contents was not lawful, since the machines could not be construed as "slot machines" and the

coupons did not violate California's law against illegal punchboards. While this case may involve an identical product, we decline to give much, if any, persuasive value to an unpublished trial court opinion applying California law.

Petitioners also cite American Treasures, Inc. v. State of North Carolina, 617 S.E.2d 346 (N.C. App. 2005), a case involving pre-paid phone cards that included a "prize element." Although not controlling, we find this case to be somewhat more persuasive. In American Treasures, pre-paid phone cards were sold for $1 each, entitling the purchaser to two minutes of pre-paid long-distance calls. The cards, however, also contained a rub-off area in which prizes were offered in amounts up to $50,000 or prizes such as a Corvette. As to the prize promotion portion, consumers could obtain a free "game piece" without purchasing the phone card simply by writing to a designated address and including a stamped self-addressed envelope. Evidence was adduced that some 11,664 individuals had received such "free" game pieces. Based on this record, the trial court concluded that the game was "incidental" to the sales of the phone cards and did not constitute an illegal lottery and enjoined the State from interfering with the placement of phonecard dispensers in convenience stores selling alcoholic beverages. The Court of Appeals affirmed, noting, however, that the phonecard case differed significantly from earlier cases in which patrons paid more than the value of the item in order to secure a change to win something of greater value, such could be construed as a lottery. Id. at 351. Significantly, the trial court in

American Treasures found that the payment of $1 for two minutes of pre-paid long distance service was not "merely competitive, but one of the best in the industry." Id.

The North Carolina Court, however, noted that where the legal product offered for sale is a "mere subterfuge" for an otherwise unlawful gambling activity, the Court will "strip the transaction of all its thin and false apparel and consider it in its very nakedness [and] look to the substance and not to the form of [the transaction] in order to disclose its real elements . . . ." Id. at 350 (citing State v. Lipkin, 84 S.E. 320 (N.C. 1915)).

The Attorney General also points out that courts of several of our sister states have determined that similar coupons constitute gambling. See F.A.C.E. Trading Inc. v. Dept. of Consumer and Industry Services, 717 N.W.2d 377 (Mich. App. 2006); Sniezek v. F.A.C.E. Trading, Inc., 113 P.3d 1280 (Col. App. 2005); F.A.C.E. Trading, Inc. v. Carter, 821 N.E.2d 38 (Ind. App. 2005). These Courts, considering identical or very similar schemes, have determined that the coupons are merely a subterfuge for the gambling device. The most recent "Ad-Tab" case was decided in Maryland in July, 2006, with the Maryland Court again concluding that the coupons were "gambling devices." The evidence in the Maryland case showed that between 85% and 99% of the persons purchasing the coupons did not redeem them for the "discounts," and, therefore, purchased the

coupons primarily for the cash prize component. F.A.C.E. Trading, Inc. v. Todd, 903 A.2d 348 (Md. 2006).

In this case, the parties stipulated to the entry of exhibits and of a transcript of the hearing before the Hon. John A. Bozza in the Erie Court of Common Pleas prior to that court's transfer of the case. On this record, we cannot conclude, as did the North Carolina Court, that the game is "incidental" to the sales of discount coupons. Rather, the record supports a finding that the coupons are a subterfuge for the gambling device. Of significance, we believe, is the testimony of BLCE agents, who observed that purchasers would typically throw away "losing" coupons in large numbers. More telling, however, is the testimony of Douglas Keys, one of the agents, who, after purchasing "winning" coupons, exchanged them for cash at two different establishments. Keys also requested the return of the "discount coupon" portion, and was told that they could not be returned.

On this record, we cannot conclude that petitioners have shown a clear right to relief for the issuance of a preliminary injunction. Moreover, we find that the balancing of harms in this matter favors the denial of preliminary injunctive relief. Accordingly, the motion for preliminary injunction is DENIED.

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Barry F. Feudale, Senior Judge

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v.	:	No. 388 M.D. 2006
Pennsylvania State Police, Bureau of Liquor Control Enforcement, Respondent	:	

O R D E R

AND NOW, this 21st day of November, 2006, petitioner's motion for preliminary injunction in the above-captioned matter is DENIED.

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Barry F. Feudale, Senior Judge