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IN THE SUPREME COURT OF FLORIDA

FILED

SID J. WHITE

CANADIAN EXPRESS CLUB, a
foreign business,

OCT 18 1988 ✓

CLERK, SUPREME COURT

By _____
Deputy Clerk *pl*

Petitioner,

vs.

Case No.: 73,074

STATE OF FLORIDA, DEPARTMENT
OF LEGAL AFFAIRS; ROBERT A.
BUTTERWORTH, ATTORNEY GENERAL,

Respondent.

_____ /

On Review of Decision of
the Fifth District Court of Appeals

PETITIONER'S INITIAL BRIEF

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ORIGINAL

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STATEMENT OF THE CASE AND FACTS

Since this matter comes to the Court essentially on the pleadings filed in the lower court, Canadian Express will combine its statement of the case and statement of the facts.

This matter was initiated by the filing of a complaint by the State in the Circuit Court for Orange County, Florida. Appendix 1. The complaint alleges that Canadian Express, a foreign entity, is engaged in a campaign of direct solicitation of Florida consumers to participate in various Canadian lotteries. Some of Canadian Express' promotional literature is attached to the complaint. It should be noted that there is a factual inconsistency between the complaint allegations and the exhibits. The complaint alleges that Canadian Express "offers to procure lottery tickets;" whereas, the exhibits reveal that Canadian Express offers its members an opportunity to participate in a group or pool which, in turn, purchases lottery tickets. Thus, club members do not own a direct interest in any particular lottery ticket but, rather, participate in a pool which purchases various lottery tickets and distributes any winnings to its members.

The complaint contains two (2) counts. The first count alleges that the activities of Canadian Express constitutes a violation of various provisions of Chapter 849, Florida Statutes and that such a violation ipso facto constitutes a violation of

Section 501.204(1), Florida Statutes. Count II relies essentially upon the same theory but alleges further that Canadian Express is subject to civil money penalties pursuant to Section 501.2075, Florida Statutes. In addition to civil money penalties, the complaint seeks injunctive relief and the taxation of costs and attorney's fees.

Various procedural battles ensued, none of which are material up to the filing of Canadian Express' amended motion to dismiss or in the alternative, motion to dissolve. On August 24, 1987, the Circuit Court entered an order granting the motion and dismissing the case with prejudice. Appendix 2. The Circuit Court recited as its reason "that the application of Section 849.09, Florida Statutes (1985), as it pertains to the sale and possession of lottery tickets by other states and foreign governments in the State of Florida, by [Canadian Express] is unconstitutional under the Interstate Commerce clause of the United States Constitution..." The State thereupon filed a timely appeal to the Court of Appeals for the Fifth District ("Fifth District").

Following the submission of briefs to the Fifth District, oral argument was had and, thereafter, the Fifth District issued its opinion, on July 21, 1988, which reversed the order of the Circuit Court and remanded the case for further proceedings. Appendix 3. Canadian Express did not receive

notice of oral argument and its counsel did not attend. Canadian Express filed a timely motion for rehearing, which motion was denied on September 7, 1988. Appendix 4, 5. This appeal ensued.

This case has been consolidated with a related case, styled: Winshare Club of Canada, etc., et. al. v. State of Florida, etc., Case No. 72, 924. The petitioners in the aforementioned case will be referred to hereinafter as the "Winshare Petitioners."

SUMMARY OF ARGUMENT

Canadian Express adopts the summary of argument contained in the initial brief filed by the Winshare Petitioners. In addition, Canadian Express will argue that an important policy distinction exists between the Circuit Court's order holding that Section 849.09 is unconstitutional as applied to the facts of this particular case, as opposed to an order which finds that the statute is generally unconstitutional. Thus, the State is free to prosecute violations of Section 849.09 under other facts and circumstances.

Although the Circuit Court dismissed the State's complaint based upon a finding that Section 849.09 is unconstitutional as applied, another ground exists for affirmance of the dismissal which does not bring the constitutionality of Section 849.09 into question. The State's action is brought under Section 501.204(1), Florida Statutes, which is part of the "Florida Deceptive and Unfair Trade Practices Act." The State has not alleged, nor has it sought to allege, that Canadian Express engaged in any conduct which is deceptive, misleading, or otherwise fraudulent. Rather, the State relies entirely upon an interpretation of the Act which would make a violation of Chapter 849 ipso facto a deceptive or unfair trade practice. Substantial authority under the Federal Trade Commission Act, after which Florida's Act was modeled, rejects this position and leads to the

inevitable conclusion that the mere marketing of a lottery conducted by another state or a foreign government cannot, in and of itself, constitute a deceptive or unfair trade practice. This is so because the Florida voters have made it clear that such lotteries do not offend their "public values." Thus, if the Florida Deceptive and Unfair Trade Practices Act is properly interpreted, the dismissal of the State's complaint can be affirmed without reaching the constitutional issue.

ARGUMENT

- I. SECTION 849.09(1), FLA. STAT. (1985) AS APPLIED IN THIS CASE IS AN UNCONSTITUTIONAL VIOLATION OF THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

Canadian Express essentially agrees with, and adopts, the argument on this point contained in the initial brief filed by the Winshare Petitioners. Thus, no purpose would be served by restating that argument here.

The State will presumably argue, as it did before the Fifth District, that the Commerce Clause does not apply to commerce between foreign nationals and citizens of the United States. This is a specious argument based upon a misreading of the Commerce Clause. To read the Commerce Clause as the State suggests would mean that the phrase "among the several states" is limited in its protection of interstate commerce to trade between the states themselves. Such is clearly not the case. Thus, the phrase "with foreign Nations" clearly applies to, and protects, commerce between foreign nationals and citizens of the United States.

To his credit, the learned Circuit Court Judge limited his ruling as to the unconstitutionality of Section 849.09(1) to the application of said section to the facts of this particular case. Of great significance is the limitation of the scope of the ruling to the marketing of lotteries conducted by other states or foreign governments. Thus, the Court's ruling promotes

competition, while limiting such competition in such a way that leaves the State free to take enforcement action against gaming activities which are not conducted by a governmental entity. That the State would oppose such a finding reveals that its true motivation in this case is pure economic protectionism. The State seeks to protect its own lottery from competition by other government-run lotteries, without making any effort to show a rational distinction between its lottery and other government-run lotteries. This is a classic case which presents to this Court the evils of protectionism which the Commerce Clause was enacted to prevent.

II. THE APPLICATION OF FLORIDA STATUTES SEC. 849.09 AND 501.204(1) IN THIS CASE IS AN UNCONSTITUTIONAL ABRIDGEMENT OF THE FREEDOM OF SPEECH GUARANTEES OF THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Canadian Express agrees with, and adopts, the argument on this point contained in the initial brief filed by the Winshare Petitioners. Thus, no purpose would be served by restating that argument here.

III. THE MERE MARKETING OF A LOTTERY OPERATED BY A FOREIGN GOVERNMENT CANNOT, STANDING ALONE, CONSTITUTE A DECEPTIVE OR UNFAIR TRADE PRACTICE IN FLORIDA.

The lower court dismissed the State's complaint on the basis of unconstitutionality. However, the dismissal must be affirmed if it is justified on any ground. Green v. Bruns, 102 So.2d 610 (Fla. 1958); Blake v. Xerox Corp., 447 So.2d 1348 (Fla. 1984). Therefore, the following ground is offered as an alternative ground in support of the dismissal of the State's complaint.

The State's complaint against Canadian Express Club alleges that it has committed deceptive or unfair trade practices. The only alleged deceptive or unfair trade practices are activities which allegedly violate various provisions of Chapter 849, Florida Statutes. The State has not alleged, nor has it sought to allege, that any of Canadian Express' activities are deceptive, misleading, or otherwise fraudulent or unfair as to consumers.

As support for this proposition in the lower court, the State relied on Federal Trade Commission v. Sperry and Hutchinson Company, 405 U.S. 233 (1972) and Spiegel, Inc. v. Federal Trade Commission, 540 F.2d 287 (7th Cir. 1976). In Spiegel, the court held that "(a) practice is unfair when it offends established public policy and when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to

consumers." Spiegel at 293. The Supreme Court in Sperry and Hutchinson likewise says that the Federal Trade Commission Act should be interpreted in light of "public values". 405 U.S. at 244. The State concludes that since marketing of the Canadian Provincial Lotteries in Florida violates the Florida gambling statute, such activity must offend established public policy and it must be immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.

However, this position was rejected by the citizens of the State of Florida in November, 1986. By an overwhelming margin, the voters of the State of Florida approved an amendment to the Florida Constitution which allows the State to conduct a lottery. Art X, Sec. 15, Fla. Const.. The legislature, pursuant to this new provision in the Florida Constitution, enacted the Florida Public Education Lottery Act ("Lottery Act"). The constitutional amendment and the Lottery Act clearly demonstrate that the public no longer considers government operated lotteries as immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.

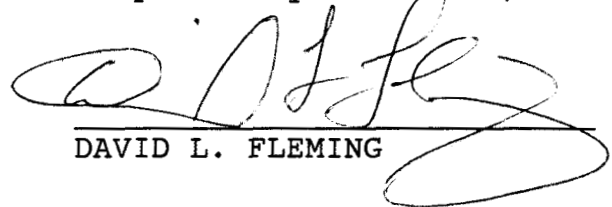
Since the State is now conducting a lottery and selling lottery tickets, it is inconsistent for it to claim that the marketing of lotteries operated by a foreign government is a deceptive or unfair trade practice. It is important to remember that the only charge made against Canadian Express Club is that

it has committed deceptive and unfair trade practices by violating Florida's gambling statute. The State has failed to even attempt to show how selling Florida's lottery tickets is not a deceptive or unfair trade practice while selling Canadian lottery tickets is ipso facto a deceptive or unfair trade practice, nor has the State attempted to allege any unfair or deceptive trade practice other than a technical violation of the gambling statute. Therefore, Section 501.204 may well be read and interpreted to exclude the marketing of government operated lotteries from the conduct prohibited by Section 501.204. This being the case, it would not be necessary to reach the constitutional issue, as the State would not be able to use Section 501.204, connecting it to Section 849.09, to discriminate against foreign commerce.

CONCLUSION

Canadian Express' marketing of Canadian Provincial Lotteries is an activity protected by the Commerce Clause of the United States Constitution. Since the State now conducts its own lottery, there is no explanation for its efforts to thwart Canadian Express' activities other than pure economic protectionism. The vehicle for the State's economic protectionism is its use of the gambling statute. Thus, the gambling statute as applied by the State to the facts of the present case is unconstitutional. However, a correct and reasonable interpretation of the Florida Deceptive and Unfair Trade Practices Act will avoid the constitutional issue. The activities of Canadian Express are clearly not offensive to the public values of the voters of the State of Florida and should, therefore, not be deemed to be a deceptive or unfair trade practice. Accordingly, Canadian Express urges the Court to find that the Fifth District's reversal of the Circuit Court's order of dismissal was erroneous and that the Circuit Court's order of dismissal should be reinstated.

Respectfully submitted,



DAVID L. FLEMING

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the PETITIONER'S INITIAL BRIEF has been furnished to Nikki Ann Clark, Assistant Attorney General, The Capitol, Tallahassee, Florida 32399-1050, George E. Adams, Esquire, 1417 E. Concord Street, Suite 101, Orlando, Florida 32803 and Gene Coker, General Attorney, A.T. & T. Communications, Inc., 1200 Peachtree Street, N.E., Atlanta, Georgia 30357 by U.S. Regular Mail on this the 12th day of October, 1988.


DAVID L. FLEMING