

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

IN THE MARION SUPERIOR COURT
CIVIL DIVISION, ROOM 7
CAUSE NO. 49D07-0701-CT-730

JEFF KOEHLINGER and JEFF FRAZER,)
Individually and as representatives)
of a class of all similarly situated persons,)

Plaintiffs,)

vs.)

THE STATE LOTTERY COMMISSION)
OF INDIANA,)
d/b/a THE HOOSIER LOTTERY,)

Defendant.)

FILED

DEC 23 2011

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**ORDER REGARDING THE HOOSIER LOTTERY'S
MOTION FOR PARTIAL SUMMARY JUDGMENT**

This cause comes before this Court on the Hoosier Lottery's Motion for Partial Summary Judgment against all class members who were not identified by the August 15, 2011 deadline for the Class to identify "all class members who will be offering individualized proof of reliance and damages." The parties submitted briefs and supporting materials, and the Court heard oral argument on the Lottery's motion on December 1, 2011.

The Court has considered the relevant case law, the extensive record in this case, the papers filed with the Court, and the oral argument on the Motion for Partial Summary Judgment. For the reasons discussed below, the Court defers ruling on the Motion currently before it and orders the parties to publish the Supplemental Notice of Class Action, a copy of which is attached to this Order, within 30 days of the date of this Order. Details regarding the publication process to be followed with respect to the Supplemental Notice of Class Action are set forth elsewhere in this Order. The Court further orders Class Counsel to file within three days of the

close of publication of the Supplemental Notice of Class Action an updated class member list identifying all class members known to Class Counsel. The Court will then enter a separate order granting the Hoosier Lottery's Motion and entering judgment against all class members who have not been identified by Class Counsel.

Background

Pleadings, Class Certification & Summary Judgment. This case has been pending since January 5, 2007, when the plaintiffs filed their complaint against the Hoosier Lottery setting forth various claims. Plaintiffs alleged they and others who purchased non-winning tickets in the "\$250,000 Cash Blast" game were harmed when the Hoosier Lottery overstated the number of unclaimed prizes.

The Court summarizes the undisputed facts as follows: The overstatement of unclaimed prizes appeared on the Lottery's website and in certain materials distributed to Lottery retailers during a 14-month period in 2005 and 2006. Approximately \$20 million worth of non-winning Cash Blast tickets were sold during the overstatement period. The Lottery immediately corrected and disclosed the mistake upon its discovery. Subsequently, beginning in January 2007, the Lottery offered coupons to persons who purchased non-winning Cash Blast tickets during the overstatement period.

On July 3, 2008, this Court certified a class defined as "all persons who purchased non-winning tickets in the Hoosier Lottery's Cash Blast game (Instant Game No. 743) from May 18, 2005 until July 6, 2006." In late 2009, the parties filed cross motions for summary judgment. This Court granted the Lottery's motion in its entirety on March 3, 2010. The Class immediately appealed that order.

Appellate Proceedings. On September 7, 2010, the Indiana Court of Appeals affirmed summary judgment on plaintiffs' negligence, negligent misrepresentation, Deceptive Consumer Sales Act, and three equitable claims. *Koehlinger v. State Lottery Comm'n of Indiana*, 933 N.E.2d 534, 541-43 (Ind. Ct. App. 2010), *reh'g denied, trans. denied*. The court reversed and remanded on the Class's contract claim:

We conclude that the trial court erred to the extent that it granted summary judgment in favor of the Lottery on Appellants' contract rescission claim and remand for trial on the issue of detrimental reliance. If a player can prove to the trial court that he or she relied on the Lottery's misinformation to his or her detriment, that player will be entitled to rescission.

Id. at 541.

The Court of Appeals gave specific instructions on how this Court must proceed on remand, explaining that each class member must make individualized evidentiary showings of reliance and prejudice in order to prevail on a rescission claim. The court stated that “[p]roof that one purchased a Cash Blast ticket in reliance on the misinformation is not sufficient, standing alone, to show prejudice.” *Id.* at 540 n.5. The court provided multiple examples of individualized showings that would and would not satisfy plaintiffs' burden of proving reliance and prejudice. *See id.* Judge Riley's dissent emphasized the majority's direction that proof of damages be individualized. She stated that “the majority’s solution still requires each individual class member to establish detrimental reliance.” *Id.* at 543 (Riley, J., dissenting).

The Class's Petitions for Rehearing and Transfer were denied by the Court of Appeals and the Indiana Supreme Court, respectively.

Remand. Following a pre-trial conference with the parties on June 30, 2011, and the parties' submission of proposed orders, this Court entered a Case Management Order on August 1, 2011.¹ That Order established the following deadlines:

- (i) August 15, 2011 – Deadline for Class Counsel to identify all class members who will be offering individualized proof of reliance and prejudice;
- (ii) October 30, 2011 – Defendant's deadline for service of written discovery on class members identified by Class Counsel;
- (iii) March 30, 2012 – Defendant's deadline for completion of deposition of class members identified by Class Counsel;
- (iv) April 30, 2012 – Defendant's deadline for filing of dispositive motions.

On August 15, 2011, the Class produced two lists identifying a total of 650 individuals as class members. The Lottery, thereafter, filed the present motion, seeking partial summary judgment against those class members who were not identified by the August 15, 2011 disclosure deadline.

Discussion

The Lottery requests that this Court enter summary judgment against unidentified class members. The Lottery argues that because the Court of Appeals required individual class members to prove reliance and prejudice in order to prevail on their rescission claim, only those class members who are known to the parties and who will be offering individualized proof can go forward with their claim.

The Class argues that the entry of summary judgment against unidentified class members presents Due Process concerns because the published Class Action Notice did not require class members to identify themselves to Class Counsel. The Class further argues that summary

¹ A scrivener's error was corrected by way of the Court's August 3, 2011 amended Case Management Order.

judgment against unidentified class members would be inconsistent with this Court's class certification order. Finally, the Class contends that class members cannot be required to individually prove reliance and prejudice because that issue was not briefed or decided by the Court of Appeals.

In response to concerns raised by Class Counsel about notice and due process, the Lottery proposed that this Court grant its motion without prejudice, order publication of a supplemental notice of class action, give Class Counsel the opportunity to update its list identifying all known class members, and then enter judgment with prejudice against class members who have not been identified.

The Court finds that the Lottery's proposal to issue a supplemental class notice is a fair and reasonable solution. Only those class members who prove that they relied upon and were prejudiced by the Lottery's overstatement can obtain rescission. This process cannot begin until individual class members are identified. This is not a typical situation where absent class members can do nothing during the litigation phase of this matter and later seek to recover from a settlement fund. The Court of Appeals instructed that Class Members must prove reliance and prejudice on an individualized basis to the trial court. The Class Representatives cannot do this for absent class members, and the Hoosier Lottery is entitled to know which individuals will be offering proof of reliance and prejudice. Supplemental notice is therefore warranted.

The parties are ordered to publish Supplemental Class Notice no later than thirty days after the entry of this Order. The Supplemental Class Notice shall be published on Class Counsel's class action website, www.hoosierlotteryclassaction.com, on the Hoosier Lottery's website, www.hoosierlottery.com, and at Hoosier Lottery retailers, which are the same locations where the class members claim to have learned of the Lottery's overstatement and where the

original Class Action Notice was published. The Supplemental Class Notice shall be published continuously at those locations for no less than thirty days. Class Counsel shall, within three days of conclusion of the publication period, supplement the August 15, 2011, class member list by filing a list of all class members known to Class Counsel.

The Court of Appeals' opinion is law of the case, and this Court must follow the Court of Appeals' specific instructions. *See IHSAA v. Schafer*, 913 N.E.2d 789, 793 (Ind. Ct. App. 2009) ("The law of the case doctrine provides that an appellate court's determination of a legal issue binds both the trial court and the appellate court in any subsequent appeal involving the same case and substantially the same facts.").

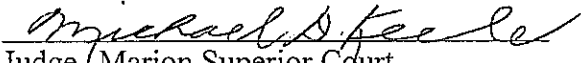
In sum, only those class members who prove that they relied on the Lottery's overstatement and were prejudiced as a result of buying Cash Blast tickets can prevail on the Class's rescission claim. Class members who do not identify themselves to Class Counsel will be barred from recovery. As a matter of judicial efficiency, this Court must set a deadline whereby class members who do not step forward are precluded from asserting a claim. The Lottery's proposed supplemental notice is a reasonable solution that is fair to both the class members and the Lottery.

Conclusion

For the foregoing reasons, the Court defers ruling on the Motion currently before it and orders the parties to publish the Supplemental Notice of Class Action, a copy of which is attached to this Order, in a manner consistent with this Order. The Court further orders Class Counsel to file within three days of the close of publication of the Supplemental Notice of Class Action an updated class member list identifying all class members known to Class Counsel. The

Court will then enter a separate order granting the Hoosier Lottery's Motion and entering judgment against all class members who have not been identified by Class Counsel.

So ORDERED this 23RD day of December, 2011.


Judge, Marion Superior Court
Civil Division, Room 7

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SUPPLEMENTAL NOTICE OF CLASS ACTION

To: All persons who purchased non-winning tickets for the Hoosier Lottery's Cash Blast game (Instant Game No. 743) between May 18, 2005 and July 6, 2006.

This Supplemental Notice is given pursuant to Rule 23 of the Indiana Rules of Civil Procedure and pursuant to an Order of the Marion Superior Court. This Supplemental Notice relates to and takes the place of the Notice of Class Action that was originally published on October 2, 2008.

The purpose of this Supplemental Notice is to inform all persons who purchased non-winning tickets to the Hoosier Lottery's Cash Blast game (Instant Game No. 743) between May 18, 2005 and July 6, 2006, that they **must take immediate action in order to preserve and pursue potential claims against the Hoosier Lottery.**

If you purchased non-winning tickets to the Hoosier Lottery's Cash Blast game (Instant Game No. 743) between May 18, 2005, and July 6, 2006, and want to pursue a claim against the Hoosier Lottery, **YOU MUST contact counsel for the Plaintiff Class and provide your name and contact information. The failure to do so will result in the LOSS OF YOUR POTENTIAL CLAIM relating to the Cash Blast game against the Lottery.**

Class Counsel's contact information is set forth below:

Richard A. Waples
WAPLES & HANGER
410 North Audubon Road
Indianapolis, Indiana 46219
info@wapleshanger.com

Class members must provide their names and contact information to Class Counsel within thirty (30) days of this Notice's publication, or _____, 2012. Class members who have already provided their name and contact information to Class Counsel do not have to contact Class Counsel again, although you should inform Class Counsel if your contact information has changed or changes in the future.

THE FAILURE TO PROVIDE YOUR NAME AND CONTACT INFORMATION TO CLASS COUNSEL BY _____, 2012, WILL RESULT IN THE LOSS OF YOUR POTENTIAL CLAIM AGAINST THE HOOSIER LOTTERY.

You may learn more about the lawsuit and review documents relating to this case at the following website: www.hoosierlotteryclassaction.com

Contacting Class Counsel and providing your name and contact information DOES NOT guarantee that you will recover anything from the Hoosier Lottery through this litigation. The suit is contested and no decision has been made as to whether the Hoosier Lottery is liable and, if so, whether it must make payments to anyone. Providing your name and contact information only ensures that your claims are not immediately dismissed.

Do not call the Court or the Hoosier Lottery regarding questions about this lawsuit. Please contact counsel for the Plaintiff Class in writing or by accessing the class action website.

Publication Date: _____

Dated: _____, 2011

BY ORDER OF THE COURT:
MARION SUPERIOR COURT