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# Recent Developments: F.A.C.E. Trading v. Todd: Games of Chance Bundled with the Purchase of Consumer Products, Where the Nature of the Product Is Incidental to the Playing of the Game, Constitute Illegal Gaming

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## RECENT DEVELOPMENT

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### ***F.A.C.E. TRADING V. TODD: GAMES OF CHANCE BUNDLED WITH THE PURCHASE OF CONSUMER PRODUCTS, WHERE THE NATURE OF THE PRODUCT IS INCIDENTAL TO THE PLAYING OF THE GAME, CONSTITUTE ILLEGAL GAMING.***

**By: Kristy Haller**

The Court of Appeals of Maryland held that certain consumer products, such as discount cards partnered with the chance to win a cash prize, will constitute illegal gaming. *F.A.C.E. Trading v. Todd*, 393 Md. 364, 903 A.2d 348 (2006). The Court determined that the Ad-Tab™ discount card game is such a product, and therefore a violation of sections 12-101(d) and 12-104 of the Criminal Law Article of the Maryland Code. *Id.*

F.A.C.E. Trading, Inc. (“F.A.C.E.”) operates a discount card sales operation, known as Ad-Tabs™, in over 30 states. Cards can be purchased from a dispensing machine for one dollar a piece and provide consumers with discounts ranging from \$5.00 to \$30.00 that can then be used for various products. Pull-off tabs offering the consumer chances to win cash prizes of up to \$200 are located on the front of the card. Consumers are able to choose the discount card for a particular company’s products. However, consumers are not made aware of the exact nature of how the discount is to be redeemed. Additional requirements such as a month-long wait or extra payments are often prerequisites for redeeming the discount cards. The dispensing machine at issue in this case was located at Captain’s Pizza in West Ocean City, Maryland, where it was placed adjacent to the Maryland State Lottery machine. Signs advertising the chance of winning cash prizes with the purchase of an Ad-Tab™ discount card were displayed in the windows of the establishment and on the dispensing machine. Chances to win the cash prizes without purchasing the Ad-Tab™ discount card were made available through mail-in cards attached to the side of the machine or by calling a toll-free number. If the Ad-Tab™ discount card resulted in a winning cash prize, the customer could redeem it for cash at the store.

In response to a letter sent by Joel J. Todd, the county's State's Attorney, informing F.A.C.E. that the Ad-Tab™ dispensing machine in Captain's Pizza was going to be removed, F.A.C.E. filed an action in the Circuit Court for Worcester County requesting a declaratory judgment and injunctive relief. The State responded with a motion for summary judgment, which was granted. The trial court declared the Ad-Tab™ discount cards to be illegal gaming, but also declared that the dispensing machines could not be classified as illegal slot machines as described under section 12-301 of the Criminal Law Article. F.A.C.E. appealed the decision, and the Court of Appeals of Maryland issued a writ of certiorari.

The Court affirmed the circuit court's decision, holding that the Ad-Tab™ discount cards are illegal gaming and violate sections 12-101(d) and 12-104 of the Criminal Law Article. *F.A.C.E. Trading*, 393 Md. at 375, 903 A.2d at 354. These sections provide a "broad prohibition" and are further enforced by section 12-113 of the Criminal Law Article, which mandates courts to liberally construe statutes "relating to gambling and betting to prevent the activities prohibited." *F.A.C.E. Trading*, 393 Md. at 376-77, 903 A.2d at 355.

The Court distinguished the present case from *Mid-Atlantic Coca-cola v. Chen*, noting that unlike the Coca-cola promotion in that case, the product discount aspect of the Ad-Tab™ discount cards "is merely incidental to the game of chance." *F.A.C.E. Trading*, 393 Md. at 375, 903 A.2d at 354 (citing *Mid-Atl. Coca-cola v. Chen*, 296 Md. 99, 460 A.2d 44 (1983)). In *Mid-Atlantic Coca-cola*, a Coca-cola promotion offered consumers the chance to win prizes instantly by buying Coca-cola products that offered the potential of an instant-win bottle cap. *F.A.C.E. Trading*, 393 Md. at 380, 903 A.2d at 357 (citing *Mid-Atl. Coca-cola*, 296 Md. at 104, 460 A.2d at 46). The Court noted that in *Mid-Atlantic Coca-Cola*, consumers were not buying the Coca-cola products solely for the hope of receiving a winning bottle cap, and consumers were not "purchasing bottles of soft drink from establishments, and throwing away the soft drink because their principal interest was to gamble." *F.A.C.E. Trading*, 393 Md. at 381, 903 A.2d at 358.

In the Coca-cola promotion, the potential of a winning bottle cap was viewed as a gift, given to a very small percentage of consumers with no actual consideration being given for the chance to win a prize. *F.A.C.E. Trading*, 393 Md. at 380, 903 A.2d at 358. While the Coca-cola promotion was for a limited time only, the discount cards were never sold without the chance to win a prize. *Id.* at 383, 903 A.2d at

359. This further illustrated the difference between the two products and their end goals, selling soft drinks versus selling chances to win cash prizes. *Id.* Based on the low rate of redemption of the Ad-Tab™ discount cards, the Court determined that at least 85% of the consumers buying the cards were only interested in the gambling aspect of the cards. *Id.*

Looking at all of the information contained in the record, the Court demonstrated how the discount cards were essentially an illegal gambling operation for cash prizes. *Id.* at 383, 903 A.2d at 359. Among these factors was Captain's Pizza's advertising of the Ad-Tab™ discount cards, highlighting the cash prize aspect of buying the cards instead of specifics on what the cards offered. *Id.* at 382, 903 A.2d at 359. The Court also pointed out that cash prizes could be redeemed right away at the store. *Id.* at 382, 903 A.2d at 358. By contrast, in order to take advantage of the discount cards, consumers often had to wait lengthy time periods and spend additional money. *Id.* The Ad-Tab™ dispensing machine's close proximity to the Maryland State Lottery machine was yet another factor because it linked the Ad-Tab™ dispensing machine to other forms of gambling. *Id.* at 383, 903 A.2d at 359.

The Court also mentioned the evidence given by Thomas V. Manzari, an investigator for the Maryland State Lottery who went to Captain's Pizza and purchased \$20.00 worth of the Ad-Tab™ discount cards, as being supportive of this view. *Id.* at 368, 903 A.2d at 350. Manzari cashed in three of his cards that were one-dollar winners, but the store manager then kept the winning cards. *Id.* Thus, if Manzari had hoped to utilize the cards for their purpose as discount cards, he was unable to do so. *Id.* at 382-83, 903 A.2d at 359.

With this decision, the Court joined the ranks of several other states, including Colorado, Michigan and New York, that have already ruled on the illegal nature of the Ad-Tab™ discount cards. *Id.* at 383-84, 903 A.2d at 359-60. Illegal gambling concerns are a common occurrence before the Court and *F.A.C.E. Trading* was not the first case concerning advertising of promotional games as a way of attracting consumers to the product in the hope of enticing them to make a purchase. *Id.* at 377-78, 903 A.2d at 355-56.

As companies become more and more competitive, they will invent ever more creative and inventive ways to attract consumer dollars. Related enterprises, such as the Captain's Pizza in this case, also stand to benefit from products like the Ad-Tab™ discount cards that may

draw customers into their establishments. Give-away promotions will no doubt be among the lures companies and retailers will utilize to entice consumers into their stores. With this decision, the Court sets out important distinctions as to the limits of what these promotions may entail, thus placing businesses on notice. Tying a game of chance to a particular product, as a means of product promotion, is no longer a valid ploy to get around Maryland's gambling prohibitions when the product is viewed as incidental to playing the game.