Supreme Court, State of Colorado
Colorado State Judicial Building
Two East 14th Avenue
Denver, CO 80203

Certiorari to the Colorado Court of Appeals
Case Number: 04CA1785

Petitioner: Lavonne Robinson, f/k/a Lavonne Bazemore, individually and as representative of a class

Respondents: Colorado State Lottery Division, an agency of the State of Colorado; and Colorado State Lottery Commission, an agency of the State of Colorado

COURT USE ONLY

Case Number: 06SC385

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STATEMENT OF THE ISSUES

The state lottery operates certain instant scratch games in which tickets continue to be sold for months after all represented and advertised prizes have already been awarded, so that subsequent purchasers of scratch tickets have no chance to win any of those prizes. Petitioner, a longtime purchaser of instant scratch lottery tickets, filed suit individually and on behalf of a plaintiff class of instant scratch lottery ticket purchasers, alleging that the sale of lottery tickets, after all represented and advertised prizes have been awarded, fails to provide the purchaser with the benefit of her bargain, which is the chance to win one of those prizes. Petitioner asserted claims against the lottery for, among other things, breach of express and implied contract, breach of the contractual duty of good faith and fair dealing, breach of express and implied warranty, and unjust enrichment. The trial court dismissed the claims under the Governmental Immunity Act, and the court of appeals affirmed. This Court granted the petition for writ of certiorari on the following issues:

Whether the court of appeals erred in holding that petitioner's claims against the state lottery, although pleaded in contract and equity, "sound in tort" and are therefore barred by the Colorado Governmental Immunity Act.

Whether the court of appeals erred in holding that the state lottery was entitled to an award of attorney fees under C.R.S. § 13-17-201.

STATEMENT OF THE CASE

A. The Nature of the Case, the Course of Proceedings, and the Disposition in the Court Below.

Petitioner, a purchaser of lottery tickets, brought this putative class action against the Colorado state lottery and Texaco, Inc., which was licensed to sell lottery tickets to the public. In substance, petitioner alleged that defendants continued to sell lottery tickets for months after all represented and advertised prizes had already been awarded, so that subsequent purchasers of tickets had no chance to win any of those prizes. The complaint asserted claims for, among other things, breach of contract, breach of warranty, and unjust enrichment.

The trial court dismissed all claims for failure to exhaust administrative remedies. The court of appeals reversed, and this Court denied certiorari review.

On remand, the trial court again dismissed all claims, this time on grounds of governmental immunity. The court also awarded attorney fees in favor of the lottery under C.R.S. § 13-17-201. Again, petitioner appealed. The court of appeals reversed the dismissal of claims against Texaco, because Texaco was not a public entity entitled to immunity, but affirmed the dismissal of claims against the lottery

and the award of attorney fees in favor of the lottery. Petitioner then sought review in this Court, which granted her petition for writ of certiorari.

B. Statement of Relevant Facts.

The Colorado State Lottery Division is part of the Colorado Department of Revenue, and is authorized to establish, operate, and supervise certain lottery games and to license retailers to sell its products, including instant scratch game tickets, to the general public. (R. Vol. 1 at 1 paras. 4-5.) The Colorado State Lottery Commission is part of the Lottery Division, and is responsible for promulgating rules and regulations governing the operation of the lottery, including rules governing the number and size of prizes for winning tickets, the method to be used in selling tickets, and the manner and amount of compensation to be paid to licensed sales agents. (*Id.* at para. 6.) The Lottery Division and the Lottery Commission are collectively referred to herein as the Lottery.

Texaco, Inc., is a Texas corporation that has been granted a license by the Lottery Division to sell instant scratch game tickets directly to the general public. (*Id.* at 2 para. 7.) Both Texaco and the Lottery receive money from the sale of instant scratch game tickets. (*Id.* at 1 para. 4.)

In May 2000, petitioner Lavonne Robinson (f/k/a Lavonne Bazemore), a longtime and regular purchaser of instant scratch lottery tickets, filed suit against

the Lottery and Texaco. (Id. at 1-12 (complaint and jury demand)).[1] According to the complaint, the Lottery operates certain instant scratch games in which tickets continue to be sold for periods ranging from a few weeks to several months after all represented and advertised prizes have already been awarded or claimed. (*Id.* at 2 para. 8.) As an example, the complaint alleged that, on July 24, 1998, petitioner purchased, at a Texaco store, "Luck of the Zodiac" scratch game lottery tickets emblazoned with the words "**win up to $10,000**" in bold letters. (*Id.* at 3 para. 13.)[2] Petitioner later discovered, however, that the last of the $10,000 prizes had been awarded on May 13, 1998, seventy-two days before her purchase. (*Id.*)

The complaint alleged that the Lottery tracks the dates on which represented and advertised prizes are awarded, that the Lottery is aware of how many such prizes exist and how many such prizes remain for each game at any given time, and that the Lottery knows when the last such prize for each game has been claimed. (*Id.* at 2 para. 10.) The complaint further alleged that the Lottery does not instruct or require its licensees to stop selling tickets after all represented and advertised prizes have been awarded, but rather encourages the continued sale of

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[1] The complaint and jury demand is attached hereto as Appendix A.

[2] A copy of a "Luck of the Zodiac" ticket was attached to the complaint. *See* App. A at 12. (R. Vol. 1 at 12.)

tickets even after all such prizes have been awarded. (*Id.* at paras. 10 & 11.) The complaint alleged that defendants have consistently refused to solve this problem, even though it has been brought to their attention, and defendants instead have continued to sell tickets and bring in millions of dollars of revenue from tickets purchased when there is no chance of winning the prize that the purchaser is seeking to win. (*Id.* at para. 12.)

The complaint alleged that, in selling tickets after all represented and advertised prizes have been awarded, the Lottery and its licensees have failed to provide purchasers with the benefit of their bargain, which is the chance to win a prize as represented and advertised. (*Id.* at para. 9.) On behalf of herself and a class of instant scratch lottery ticket purchasers, petitioner asserted claims against the Lottery and Texaco (in its individual status and as representative of a class of retail businesses operating as Lottery licensees) for (1) breach of express contract, (2) breach of express warranty under the Colorado Uniform Commercial Code (UCC), (3) breach of implied warranty under the UCC, (4) breach of the implied covenant of good faith and fair dealing, (5) violation of C.R.S. § 24-35-206, (6) violation of the Colorado Consumer Protection Act (CCPA), and (7) restitution and unjust enrichment. (*Id.* at 4-9.) The complaint stated that "[a]ll claims herein pleaded are contractual or statutory in nature or equitable claims arising out of a

contractual relationship." (*Id.* at 1 para. 2.) The complaint sought, among other things, the return of money received from tickets that had been sold after represented and advertised prizes were no longer available and an injunction against the future sale of tickets when represented or advertised prizes are not available. (*Id.* at 10.)

Pursuant to C.R.C.P. 12(b)(1) and (5), the Lottery and Texaco filed motions to dismiss, asserting that petitioner had failed to exhaust administrative remedies and that petitioner's claims were barred by the Colorado Governmental Immunity Act (CGIA). (*Id.* at 33-106, 110-188.) The trial court granted the motions to dismiss for failure to exhaust administrative remedies. (R. Vol. 2 at 352-359.) In a published opinion, a panel of the court of appeals reversed, holding that adequate administrative remedies were not available. (*Id.* at 549-561; *see also Bazemore v. Colo. State Lottery Div.*, 64 P.3d 876 (Colo. App. 2002)). After this Court denied petitions for certiorari filed by the Lottery and Texaco (R. Vol. 2 at 597-598), the case was remanded for further proceedings, including consideration of governmental immunity issues. (*Id.* at 611.)

On remand, following briefing and oral argument,[3] the trial court held that, although petitioner's claims were not pleaded as tort claims, they nevertheless "could lie in tort," and were therefore barred by the CGIA. (R. Vol. 4 at 1110-1117.) In doing so, the court found, as undisputed facts, that on July 24, 1998, petitioner had purchased several "Luck of the Zodiac" instant scratch game tickets at a Texaco Star Mart in Colorado Springs, and that the tickets contained the phrase "Win up to $10,000" on their face, even though all of the grand prizes had already been awarded. (*Id.* at 1109.) The court also agreed with petitioner that the purchase of a lottery ticket does, in fact, create a contract. (*Id.* at 1112.) Nevertheless, the court observed, a claim can lie in tort even if it arises out of a contractual relationship. (*Id.*) Here, said the court, "a review of Plaintiff's complaint reveals that all of her claims arise out of the same set of core allegations, i.e., a fraudulent misrepresentation which induced her to purchase tickets." (*Id.*) According to the court, "[i]f a claim is based on an unfulfilled promise, the claim sounds in contract and would not be subject to the [CGIA]. But

[3] The court of appeals, in its opinion below, inaccurately states that the trial court held "an evidentiary hearing." Slip. op. at 4. In fact, although the proceeding was described as a "*Trinity* hearing" (R. Vol. 7 (5/25/2004 transcript) at 4:6-9), the "hearing" consisted of oral argument only, with no taking of evidence. (*Id.* at 4-80.)

if a claim is based on a misrepresentation, it is fundamentally a tort claim and is subject to the [CGIA]." (*Id.* at 1114.)

On that basis, the court dismissed all claims against the Lottery. (*Id.* at 1121.) Moreover, because the court held that Texaco was acting as a sales agent for the Lottery, the court held that Texaco was a public entity protected by the CGIA, requiring dismissal of all claims against the company. (*Id.* at 1117-1121.) Finally, the court awarded attorney fees in favor of the Lottery, in the amount of $52,514, pursuant to C.R.S. § 13-17-201. (*Id.* at 1203.) In dismissing petitioner's claims under the CGIA, the court noted that it was not examining the merits of the claims, since the only discovery in the case had been limited by the court to issues of governmental immunity. (*Id.* at 1109.)

Petitioner again appealed. In another published opinion, a panel of the court of appeals affirmed in part and reversed in part. *Robinson v. Colo. State Lottery Div.*, 155 P.3d 409 (Colo. App. 2006). Regarding the claims against Texaco, the court agreed with petitioner that the company was not a public entity entitled to immunity under the CGIA, and therefore reversed and remanded for further proceedings. Slip op. at 10-13.

Regarding the claims against the Lottery, however, the court of appeals held that "[t]he essence of [petitioner's] claims was that [the Lottery] negligently

misrepresented to her the possibility that she could win one of the advertised and represented prizes and thereby [the Lottery] fraudulently induced her to purchase scratch game tickets." *Id.* at 8. The court concluded that, because petitioner's contract claims, as well as her claims for restitution and unjust enrichment, "are based on her asserted reliance upon defendants' alleged negligent misrepresentation or fraudulent inducement and the injuries resulting from that reliance," all such claims "sound in tort for purposes of the [CGIA]" and are therefore barred. *Id.* at 8-10.

Finally, the court of appeals held that the trial court properly awarded attorney fees to the Lottery under C.R.S. § 13-17-201, which provides for such an award "[i]n all actions brought as a result of a death or an injury to person or property occasioned by the tort of any other person, where any such action is dismissed on motion of the defendant prior to trial under rule 12(b) of the Colorado rules of civil procedure." *Id.* at 14-18.

SUMMARY OF ARGUMENT

1. The court of appeals erred in holding that petitioner's claims against the Lottery are barred by governmental immunity. The CGIA's grant of immunity is "limited in the sense that immunity extends only to those actions involving 'injuries which lie in tort or could lie in tort,'" and public entities are not immune

from actions arising in contract. *City of Colorado Springs v. Conners*, 993 P.2d 1167, 1173 (Colo. 2000) (quoting C.R.S. § 24-10-106(1)). Here, it is undisputed that the purchase of a lottery ticket creates a contract between the purchaser and the Lottery, with the Lottery offering a chance to win a prize and the customer accepting that offer by purchasing a ticket. Contrary to the opinion below, petitioner is not asserting that the Lottery tortiously induced her to enter into an unfavorable contract, but rather is asserting that the Lottery breached its contractual duty to provide her with the chance to win one of the represented and advertised prizes. Moreover, "a court must examine the nature of the injury and remedy asserted in each case to determine whether a particular claim is for *compensatory relief for personal injuries* and is therefore a claim which lies or could lie in tort for the purposes of the CGIA." *Id.* at 1176 (emphasis added). Here, petitioner is not seeking compensatory relief for personal injuries. Rather, petitioner's various claims seek contractual damages and equitable relief in the nature of restitution and injunction against future violations. Where an action presents claims that are "best characterized as equitable and non-compensatory in nature," the action neither lies in tort nor could lie in tort for purposes of the CGIA, and is not subject to the grant of immunity. *Id.* at 1174.

2. The court of appeals erred in holding that the Lottery is entitled to an award of attorney fees under C.R.S. § 13-17-201. Even if a public entity may recover attorney fees under § 13-17-201 for a successful motion to dismiss based on governmental immunity, it must still establish that the action was "brought as a result of a death or an injury to person or property occasioned by the tort of any other person." *See* C.R.S. § 13-17-201. Here, petitioner brought a contract action, not a tort action. Even if petitioner's action "*could* lie in tort" for purposes of the CGIA, there is nothing in the language of § 13-17-201 that contemplates an award of attorney fees in favor of a public entity whenever it defeats a *contract* action on the grounds that the action *could* lie in tort and is therefore barred by the CGIA. *Sweeney v. United Artists Theater Circuit, Inc.*, 119 P.3d 538, 541 (Colo. App. 2005) (where plaintiff's dismissed claim was "framed as a contract claim," § 13-17-201 is inapplicable, even if plaintiff's claim "should properly have been founded in tort"); *Kennedy v. King Soopers, Inc.*, 148 P.3d 385, 388 (Colo. App. 2006) ("[f]or purposes of applying [§ 13-17-201], we rely on the plaintiff's characterization of the claims in the complaint and do not consider what should or might have been pled," citing *Sweeney*).

ARGUMENT

I. The court of appeals has wrongly expanded the scope of governmental immunity in actions for breach of contract and equitable relief, and has contravened this Court's distinction between tort and contract and this Court's efforts to curtail the expansion of tort law into contractual relationships.

A. Standard of Review.

Because the question of whether the trial court had jurisdiction to hear petitioner's claims is a matter of statutory interpretation, this Court is not bound by the lower court's determinations. *City of Colorado Springs v. Conners*, 993 P.2d 1167, 1171 (Colo. 2000).

B. Discussion.

Since this Court abolished Colorado's common-law doctrine of sovereign immunity in *Evans v. Bd. of County Comm'rs*, 174 Colo. 97, 482 P.2d 968 (1971), public entities have possessed no immunity from suit, except as provided by the CGIA. *Conners*, 993 P.2d at 1173 (citing *Evans*). Because governmental immunity is in derogation of Colorado's common law, the CGIA's grant of immunity must be strictly construed. *Walton v. State*, 968 P.2d 636, 643 (Colo. 1998). The CGIA's grant of immunity is "limited in the sense that immunity extends only to those actions involving 'injuries which lie in tort or could lie in tort.'" *Conners*, 993 P.2d at 1173 (quoting C.R.S. § 24-10-106(1)). Thus, for example, public

entities are not immune from actions for damages arising in contract. *Id.*; *see also, e.g., Berg v. State Bd. of Agric.*, 919 P.2d 254, 258-59 (Colo. 1996) (state has no immunity from action for promissory estoppel, which sounds in contract, not tort).

In the case at hand, it is undisputed that the trial court correctly held that the purchase of a lottery ticket creates a contract between the purchaser and the Lottery. R. Vol. 4 at 1112; *see also, e.g., Brown v. State*, 602 N.W.2d 79, 89 (Wis. App. 1999) ("nearly every other jurisdiction considering the issue has concluded that the relationship between a lottery ticket holder and the state lottery agency is primarily contractual in nature, and that the purchase of a ticket in the proper manner constitutes acceptance of an offer, forming a binding contract," citing cases from numerous jurisdictions). The Lottery offers the chance to win a prize, and the customer accepts that offer by purchasing a ticket, creating a binding contract. *See, e.g., Haynes v. Dep't of the Lottery*, 630 So. 2d 1177, 1179 (Fla. App. 1994).

Here, the court of appeals implicitly acknowledged the contractual relationship between petitioner and the Lottery, but held that petitioner's claims did not arise from the terms of the contract. Slip op. at 5-9. According to the court, "[t]he essence of [petitioner's] claims was that [the Lottery] negligently misrepresented to her the possibility that she could win one of the advertised and

represented prizes and thereby [the Lottery] fraudulently induced her to purchase scratch game tickets." Slip op. at 8. The court said that "[petitioner's] complaint attacks conduct occurring prior to her purchase of scratch game tickets. Therefore, her contract claims are based on her asserted reliance upon [the Lottery's] alleged negligent misrepresentations or fraudulent inducement and the injuries resulting from that reliance. Thus, her claims sound in tort for purposes of the GIA." *Id.*

This was error. Petitioner is not alleging that the Lottery wrongfully induced her to enter into an unfavorable contract. Rather, petitioner is alleging that the Lottery failed to deliver what it offered and petitioner accepted with her payment of the ticket price – namely, the chance to win one of the represented and advertised prizes. By failing to provide petitioner with the benefit of her bargain – a chance to win one of the represented and advertised prizes – the Lottery breached the terms of the contract. *Cf. Moody v. State Liquor & Lottery Comm'n*, 843 A.2d 43, 48-49 (Me. 2004) (the essential elements of a lottery are (1) prize, (2) chance, and (3) consideration, and an interpretation of the contract between lottery and ticket purchaser that removes an essential element would not effectuate the intentions of the contracting parties).

Contrary to the analysis of the court of appeals, petitioner's contract claims are not transmuted into tort claims merely because the complaint may, in some

sense, "attack" conduct that occurred prior to purchase. Slip op. at 8. When a customer responds to an offer for a product by paying the advertised price, and then receives a different product or no product at all, the customer has a claim for breach of contract. That claim does not sound in tort merely because the complaint also points out, for example, that the seller knew or should have known that it would not be able to satisfy the terms of the contract because the seller no longer carried the product in its inventory, or because the seller stocked a product different from the one advertised in the offer.

Furthermore, and contrary to the court's suggestion, *id.*, a claim does not sound in tort merely because the complaint contains factual statements that might be construed as allegations of negligent misrepresentation or fraud. *See, e.g., Brick v. Cohn-Hall-Marx Co.*, 11 N.E.2d 902, 904 (N.Y. 1937) (complaint's allegations of fraud did not transform contract action into action founded upon fraud). Indeed, even where a plaintiff asserts fraudulent inducement as the basis for the return of money paid under a contract, this Court has held that such a claim sounds in contract, not tort, and seeks an equitable remedy rather than tort damages. *Aaberg v. H. A. Harman Co.*, 144 Colo. 579, 581-84, 358 P.2d 601, 602-04 (1960).

Moreover, in recent years, this Court has, with its adoption of the "economic loss rule," aggressively limited, if not wholly eliminated, those circumstances in which a tort claim may be asserted for the breach of a contractual duty that causes economic harm only. *See generally Town of Alma v. AZCO Constr., Inc.*, 10 P.3d 1256 (Colo. 2000); *Grynberg v. Agri Tech, Inc.*, 10 P.3d 1267 (Colo. 2000). Where the "economic loss rule" adopted in *Town of Alma* and *Grynberg* refuses to recognize a tort claim for breach of a contractual duty – for example, the contractual duty to provide the purchaser of a lottery ticket with a chance to win a represented and advertised prize – it makes little sense to say that contractual or equitable claims based on the breach of that contractual duty are nevertheless tort claims for purposes of the CGIA. *Adams v. City of Westminster*, 140 P.3d 8, 11 (Colo. App. 2005) (under the "economic loss rule" adopted in *Town of Alma*, it was "highly doubtful" that plaintiff suffering only economic losses could assert tort claim, so plaintiff's claim for value of contract benefits could not be barred by the CGIA's grant of immunity from actions that lie in tort or could lie in tort).

Nor, in any event, does the language of the CGIA, granting immunity from actions involving injuries that "lie in tort or could lie in tort," expand the scope of immunity to all matters in which the underlying conduct "could also form the basis for a common-law suit for injuries in tort." *Conners*, 993 P.2d at 1173; *see also*

Berg, 919 P.2d at 259 (rejecting defendant's argument that, because the same factual basis underlay claim for promissory estoppel and claim for tortious negligent misrepresentation, both claims were based in tort and barred by the CGIA). Rather, "because the meanings of the terms 'tort' and 'could lie in tort' are vague," this Court has looked to both legislative purpose and case law to determine the scope of immunity. *Conners*, 993 P.2d at 1173. This Court has noted that a central legislative purpose of the CGIA is to limit the otherwise unlimited liability of public entities for compensatory money damages in tort, which could disrupt or make prohibitively expensive the government's provision of essential services and functions. *Id.* (citing C.R.S. § 24-10-102). Mirroring that legislative purpose, this Court's cases interpreting the CGIA "support the view that governmental immunity under the [CGIA] is immunity from actions *seeking compensatory damages from personal injuries*." *Id.* at 1173 (emphasis added).

Thus, although "arguably inconsistent with the CGIA's language," this Court has held that "a court must examine the nature of the injury and remedy asserted in each case to determine whether a particular claim is for *compensatory relief for personal injuries* and is therefore a claim which lies or could lie in tort for the purposes of the CGIA." *Id.* at 1176 (emphasis added).

Here, petitioner is not seeking compensatory relief for personal injuries. Rather, petitioner is seeking contractual damages and equitable relief in the nature of restitution and injunction against future violations. Where an action presents claims that are "best characterized as equitable and non-compensatory in nature," the action neither lies in tort nor could lie in tort for purposes of the CGIA, and is not subject to the grant of immunity. *Id.* at 1174; *see also GEICO Gen. Ins. Co. v. Pinnacol Assurance*, 56 P.3d 1218, 1219 (Colo. App. 2002) (claim for reimbursement was equitable claim not barred by CGIA); *CAMAS Colo., Inc. v. Bd. of County Comm'rs*, 36 P.3d 135, 138-39 (Colo. App. 2001) (claims for fraud and misrepresentation were barred by the CGIA, but claims for breach of contract, quantum meruit, rescission, restitution, and injunction were not).[4]

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[4] After holding that petitioner's contract claims are barred by the CGIA, the court of appeals held that her claims for restitution and unjust enrichment are "similarly" barred, citing, as its sole authority, *Janis v. Cal. State Lottery Comm'n*, 68 Cal. App. 4th 824, 80 Cal. Rptr. 2d 549 (1998). Slip op. at 8-9. *Janis* is not persuasive authority here. First, in *Janis*, the plaintiff was alleging that the state lottery had misled her into playing an illegal Keno game. 80 Cal. Rptr. at 552. There was no allegation that the lottery had breached any contractual duty. *Id.* Indeed, as a matter of California law, playing Keno does not create a contract between the lottery and the player. *Id.* Second, under California law – unlike Colorado law – "generally a private party cannot sue a public entity on an implied-in-law or quasi-contract theory, because such a theory is based on quantum meruit or restitution considerations which are outweighed by the need to protect and limit a public entity's contractual obligations." *Id.* at 552-53.

To summarize: The opinion of the court of appeals is a significant and erroneous departure from this Court's most recent discussions of the scope of the CGIA's grant of governmental immunity from actions involving injuries that "lie in tort or could lie in tort," most notably *Conners*. Moreover, the opinion sets forth an improper test for distinguishing between tort and contract claims based upon whether the complaint contains allegations of wrongful conduct prior to contract formation, regardless of whether the claims are based on breach of contractual terms, and is contrary to this Court's recent efforts, most notably in *Town of Alma* and *Grynberg*, to clarify the distinction between tort and contract actions and to curtail the expansion of tort law into contractual relationships.

II. The court of appeals has wrongly expanded the scope of C.R.S. § 13-17-201 to provide for an award of attorney fees in an action for breach of contract and equitable relief.

A. Standard of Review.

The issue of whether C.R.S. § 13-17-201 mandates an award of attorney fees is a matter of statutory interpretation, and is therefore subject to de novo review by this Court. *See, e.g., Klinger v. Adams County Sch. Dist. No. 50*, 130 P.3d 1027, 1031 (Colo. 2006).

B. Discussion.

C.R.S. § 13-17-201 provides for an award of attorney fees "[i]n all actions brought as a result of a death or an injury to person or property occasioned by the tort of any other person, where any such action is dismissed on motion of the defendant prior to trial under rule 12(b) of the Colorado rules of civil procedure." Because § 13-17-201 is in derogation of the common-law American Rule that requires parties to bear their own legal expenses, the provision must be strictly construed. *Sotelo v. Hutchens Trucking Co.*, Case No. 05CA2054, ___ P.3d ___, ___, 2007 Colo. App. LEXIS 1120, at *2-*3 (Colo. App. June 14, 2007). Moreover, an award of attorney fees is available under § 13-17-201 only if the *entire* action is properly dismissed under C.R.C.P. 12(b). *Sotelo*, ___ P.3d at ___, 2007 Colo. App. LEXIS 1120, at *3-*6.

Citing *Smith v. Town of Snowmass Village*, 919 P.2d 868 (Colo. App. 1996), the court below stated that "[t]his section is applicable to a motion to dismiss under C.R.C.P. 12(b)(1) for lack of subject matter jurisdiction under the [CGIA]," and affirmed the trial court's award of $52,514 in attorney fees to the Lottery. Slip op. at 4, 14-18.

The court of appeals erred. Assuming that a public entity may recover attorney fees under § 13-17-201 for a successful motion to dismiss based on

governmental immunity, it must still establish that the action was "brought as a result of a death or an injury to person or property occasioned by the tort of any other person." *See* C.R.S. § 13-17-201. Here, petitioner brought a contract action, not a tort action. Even if petitioner's action "*could* lie in tort" for purposes of the CGIA, there is nothing in the language of § 13-17-201 that contemplates an award of attorney fees in favor of a public entity whenever it defeats a *contract* action on the grounds that the action *could* lie in tort and is therefore barred by the CGIA.

Indeed, the ruling below conflicts with two recent published opinions of the court of appeals. In *Sweeney v. United Artists Theater Circuit, Inc.*, 119 P.3d 538 (Colo. App. 2005) – which was issued during the course of appellate briefing below and was addressed by both sides in their respective briefs – the court of appeals affirmed the trial court's dismissal of plaintiff's contract claims, holding that the claims were not based on contractual duties, so plaintiff had failed to state a claim for breach of contract. 119 P.3d at 539-41. The court of appeals, however, reversed the trial court's award of attorney fees under § 13-17-201. "We have concluded that plaintiff's action should properly have been founded in tort under § 13-21-115 [the Colorado Premises Liability Act]. Plaintiff's claim was, nevertheless, *framed* as a contract claim, and it was the purported contract claim that was dismissed. Hence, § 13-17-201, which authorizes attorney fee awards

when a tort claim is dismissed prior to trial, is inapplicable." *Id.* at 541 (emphasis added).

In *Kennedy v. King Soopers, Inc.*, 148 P.3d 385 (Colo. App. 2006), issued after the petition for certiorari was filed in the instant case, the court of appeals likewise held that, "[f]or purposes of applying [§ 13-17-201], we rely on the plaintiff's characterization of the claims in the complaint and do not consider what should or might have been pled." *Kennedy*, 148 P.3d at 388 (citing *Sweeney*). "Because plaintiff's claims were pled as torts, the dismissal of plaintiff's case triggered a mandatory award under § 13-17-201," even though the trial court, in dismissing the claims, had effectively determined that the action was grounded on the federal law of collective bargaining agreements rather than tort law. *Id.* The holding in *Kennedy*, like the holding in *Sweeney*, flatly contradicts the ruling below.

Federal courts, finding *Sweeney* to be persuasive, have likewise denied defendants' motions for attorney fees under C.R.S. § 13-17-201 where the dismissed claims were not pleaded as state tort claims. *See Bethel v. United States*, Civil Action No. 05-cv-01336-PSF-BNB, 2006 U.S. Dist. LEXIS 82089, at *3-*5 (D. Colo. Nov. 9, 2006) (in refusing to award attorney fees under § 13-17-201 following dismissal for lack of jurisdiction under Rule 12(b)(1), the court

observed that "Colorado courts have determined that C.R.S. § 13-17-201's mandatory fee award does not apply where the claim dismissed was not brought as a state law tort claim, "citing *Sweeney*); *AST Sports Science, Inc. v. CLF Distrib. Ltd.*, Civil Action No. 05-cv-01549-REB-CBS, 2006 U.S. Dist. LEXIS 47905, at *2-*6 (D. Colo. July 14, 2006) (citing *Sweeney* to deny defendant's claim for attorney fees under C.R.S. § 13-17-201 following dismissal of claims for lack of personal jurisdiction, where plaintiff's complaint was generally pleaded in contract rather than tort).

Here, petitioner framed her action in contract, and it was the purported contract action that was dismissed. Hence, in accordance with the reasoning in *Sweeney*, the court of appeals should have held that § 13-17-201 was inapplicable. The award of attorney fees under § 13-17-201 warrants reversal.

CONCLUSION

In this case, petitioner paid for a chance to win a prize. She did not receive what she paid for, so she sued to get her money back. The courts below recharacterized her straightforward contract and unjust enrichment claims into tort claims for negligent or fraudulent misrepresentation, dismissed her claims under the CGIA, and awarded over $52,000 in attorney fees against her, based on the dismissal of tort claims that were never even pleaded. This was wrong, and

contrary to this Court's prior construction of the CGIA as well as the construction of C.R.S. § 13-17-201 adopted by two other panels of the court of appeals in recent published opinions. The judgment of the court of appeals should be reversed, as to both the dismissal of claims against the Lottery and the award of attorney fees pursuant to C.R.S. § 13-17-201.

Dated this 20th day of July 2007.

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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 20th day of July 2007, service of the foregoing was effected by placing a true copy thereof in the United States Mail, postage prepaid, addressed as follows:

Andrew M. Katarikawe
Assistant Attorney General
Tort Litigation Section
Office of the Attorney General
1525 Sherman Street, 5th Floor
Denver, CO 80203

APPENDIX A

DISTRICT COURT, COUNTY OF DENVER, STATE OF COLORADO

Civil Action No.: 00CV2344 Division:

COMPLAINT AND JURY DEMAND

LAVONNE BAZEMORE, individually and as representative of a class,

Plaintiff,

v.

COLORADO STATE LOTTERY DIVISION, an agency of the State of Colorado; COLORADO STATE LOTTERY COMMISSION, an agency of the State of Colorado; and TEXACO, INC., a Texas corporation, individually and as representative of a class,

Defendants.

NATURE OF THE CASE

1. This is an action brought as a class action, pursuant to Rule 23, Colo.R.Civ.P., against Defendants and class members for breach of contract and deceptive trade practices for their actions in promoting and selling certain lottery instant scratch game tickets (also known as "Scratchers").

2. All claims herein pleaded are contractual or statutory in nature or equitable claims arising out of a contractual relationship.

3. Plaintiff LaVonne Bazemore was a Colorado resident at all times relevant herein, but is now a Florida resident. For at least five years, Plaintiff purchased various instant scratch game tickets on a regular basis. Plaintiff played with the expectation that she could win the advertised and represented prizes.

4. Since its inception, the Colorado Department of Revenue, through its State Lottery Division, has sold and promoted various instant scratch game tickets and made information about the status of prizes available to the Defendants and class members. For different periods of times, Defendants and class members sold lottery tickets to consumers and received fees and revenues from such sales of instant scratch game tickets.

5. Defendant Colorado State Lottery Division ("Lottery") is a division of the State of Colorado Department of Revenue and is authorized to establish, operate and supervise certain lottery games and to license retailers to sell its products to the general public.

6. Defendant Colorado State Lottery Commission is a commission within the Colorado State Lottery Division and it is the duty of the Commission to promulgate rules and regulations *governing the* operation of the lottery, including but not limited to rules governing the numbers and sizes of the prizes on

the winning tickets, the method to be used in selling tickets, the manner and amount of compensation to be paid licensed sales agents necessary to provide for the adequate availability of tickets to prospective buyers, and the payment of prizes to the holders of winning tickets. It is also the duty of the Commission to carry on a continuous study and investigation of the lottery for the purpose of ascertaining any defects or abuses in the administration and operation of the lottery and to immediately report any matters which require an immediate change to prevent said abuses.

7. Defendant TEXACO, INC., is a Texas corporation authorized to do business in the State of Colorado. TEXACO, INC., and members of the Defendant class (hereinafter also referred to as "Defendant Retailers") are retail businesses which are licensees and agents of the Lottery and on behalf of the Lottery sell instant scratch game tickets directly to the general public.

FACTUAL ALLEGATIONS

8. COLORADO STATE LOTTERY DIVISION, COLORADO STATE LOTTERY COMMISSION, TEXACO, INC. and the Defendant Retailers (hereinafter referred to as "Defendants"), as a regular practice, sell many instant scratch games for a significant period of time after all represented and advertised prizes are awarded or claimed when players have no chance of winning the prize that embodies the game. Defendants will sell these prize-less tickets for anywhere from a few weeks to several months after all the represented and advertised prizes are claimed.

9. Defendants are aware that scratch tickets that do not have the prize represented and advertised available, do not offer the scratch player the benefit of the bargain and do not conform to the descriptions and affirmations made about the scratch games, and they know that an instant scratch ticket without grand prizes would not sell.

10. The Lottery knows when the last prize is claimed. The Lottery tracks the dates each prize is given away, is aware of how many prizes exist and how many remain for each scratch game, and updates such information regularly. It does not instruct or require Defendant Retailers to cease selling prize-less scratch game tickets or to inform the scratch players that such tickets do not conform to the representations and descriptions. On the contrary, the Lottery understands the Defendant Retailers continue to sell these prize-less tickets and condones or encourages such sales.

11. Defendants know when represented and advertised prizes are no longer available. At that point, they do not cease selling scratch tickets that are prize-less or inform the scratch players that such tickets do not conform to the representations and descriptions. On the contrary, the Defendants, knowing that the tickets are incapable of winning the prizes advertised or represented, continue to encourage the purchase of and sell scratch tickets that have no more represented prizes available.

12. By ignoring the fact that they are selling scratch tickets that cannot win the prize used to induce purchase, Defendants bring in millions of dollars per year in revenue from tickets purchased when the scratch player has no chance of winning the prize that he or she sought to win. The Defendants have consistently refused to solve this problem, even though it has been brought to their attention, as recently as December 1997, where the *Colorado Springs Independent*'s Malcolm Howard wrote of these abuses, an article that led to an investigation by the Colorado State Auditor.

13. Such wrongful conduct means that the Defendants are taking money from instant scratch game players hundreds of times per day and not providing those players with what they contracted for and what

they were promised. For example, on July 24, 1998, Plaintiff purchased several tickets for the "Luck of the Zodiac" game from Defendant Texaco, Inc. As the Defendant was well aware, seventy-two (72) days earlier, on May 13, 1998, the final grand prize of $10,000 was awarded and no others existed. Plaintiff was not notified by Defendants of the fact that the last grand prize had been awarded nearly nine weeks earlier and that Plaintiff – and anyone else playing after May 13, 1998 – had no chance of winning the advertised prize of $10,000. At the time she purchased her tickets, they were emblazoned in bold letters with the words **"win up to $10,000."** A copy of a "Luck of the Zodiac" ticket is attached as Exhibit A. Even today, the Defendants market and sell tickets that do not have the represented prizes available at stores across Colorado, all while purposely failing to inform the scratch players.

14. Defendants and class members are aware that a disproportionate share of lottery players are low income, less educated and minority, and that the essence of a lottery – if run fairly – is that most players will lose most of the time. Defendants are aware that the reality of the scratch games is that they are simply a regressive tax on lower-income, undereducated or minority citizens who play Scratchers and other lottery games. Defendants are also well aware that the perception held by lottery players is that the games developed and promoted by Defendants are fair, egalitarian and attractive forms of risk-taking, when in fact the Lottery, through its monopoly power on gambling, exacts a tax of almost 50% before returning proceeds to players. Based on their conscious choice to sell tickets that did not have a chance to win the represented prize, Defendants were not satisfied with odds rigged in their favor. To secure additional revenues, Defendants chose to overreach and sell tickets when there was no chance of winning, knowing that the additional revenues would come primarily from lower-income, uneducated and minority citizens.

CLASS ACTION ALLEGATIONS

Plaintiff Class

15. Plaintiff brings this suit as a representative of a class consisting of all persons who purchased instant scratch game tickets from Defendants and class members when a represented or advertised prize was unable to be won because such prize had already been claimed or was withheld from the lottery pool.

16. The class is so numerous that joinder of all members is impracticable. It is estimated that several million instant scratch game tickets have been sold when the represented or advertised prizes no longer existed or were not available, and many of the purchasers thereof may be unknown.

17. There are questions of law or fact common to the class. Members of the class purchased Scratcher tickets from Defendants and class members and were exposed to Defendants' and Defendant class members' false representations of prizes. Whether Defendants and Defendant class members breached their contracts involves questions of law and fact common to all members of the Plaintiff class.

18. The claims of the representative party are typical of the claims of the class. Plaintiff purchased instant scratch tickets from the Defendants and Plaintiff class members and was exposed to Defendants' and Defendant class members' representations on prizes. Like all other class members, she was damaged by the Defendants' and class members' sales of instant scratch game tickets after grand prizes were claimed, their manipulation of certain grand-prize-winning tickets that rendered Defendants' and class members' representations and advertisements false, deceptive and misleading, and Defendants' and class members' knowing failure to notify instant scratch players of these facts.

19. Plaintiff, as a representative party, will fairly and adequately protect the interests of the class.

Her interests are completely adverse to those of the Defendants and class members, and there is no conflict of interest between her claims and those of other class members. Plaintiff's counsel specialize in representing plaintiffs in consumer class actions and have never opposed certification of a class or represented Defendants and class members and thus have no conflict in undertaking this representation.

Defendant Class

20. Similarly, the number of class members is so numerous that joinder of all members is impracticable. It is estimated that the Lottery has licensed several hundred retailers for instant scratch games.

21. There are questions of law or fact common to the class as Defendants TEXACO, INC. and class members all have contracted with the Lottery to merchandise its products. The defenses of Defendant TEXACO, INC. are typical of the defenses of the class. TEXACO, INC. Defendants and Defendant class members employed common sales techniques and made similar representations, generally as administered and outlined by the Lottery, the revenues derived from instant scratch sales can be readily ascertained from the records of the Lottery, and each retailer is governed by the rules and regulations of the Lottery. In addition, TEXACO, INC. and Defendant class members are juridically linked in that they all pursue a common course of conduct, i.e., complying with the rules and regulations promulgated by the Lottery, in retailing the instant scratch tickets. TEXACO, INC. and Defendant class members have sold lottery tickets to the general public and have received a sales commission or fee for doing so.

22. Defendant TEXACO, INC., as a representative party, will fairly and adequately protect the interests of the class. Their interests are completely adverse to those of the Plaintiff, and there is no conflict of interest between their claims and those of other class members. Defendant TEXACO, INC. is similarly situated with Defendant class members.

As to Both Classes

23. For both the Plaintiff Class and Defendant Class, this case should be maintained as a class action pursuant to C.R.C.P. 23(b)(3) because the prerequisites of C.R.C.P. 23(a) have been satisfied and because the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and because a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Individual actions by other purchasers would be a wasteful use of court resources. The relief sought in the action relates to recovery to the class and, secondarily, to the next-best use.

FIRST CLAIM FOR RELIEF
Breach of Contract–Express Contract

24. Plaintiff realleges all preceding paragraphs as if fully set forth herein.

25. A contract existed between Defendants and class members and Plaintiff and class members wherein Plaintiff and class members agreed to buy certain lottery Scratcher tickets and did in fact buy said tickets and Defendants and class members agreed to sell such tickets and did sell said tickets. Plaintiff and class members, as consideration, generally paid Defendants and class members $1 to $2 per Scratcher ticket and Defendants and class members provided Plaintiff and class members with a Scratcher ticket that provided the opportunity to win certain represented and advertised prizes.

26. For a substantial portion of instant Scratcher sales the represented and advertised prize(s) did not exist. Defendants and class members failed to perform or offer consideration in that, at the time of the sale of the tickets to Plaintiff or class members, someone had won and claimed the represented and advertised prize(s), thereby eliminating any chance the Plaintiff or class members had of winning the represented and advertised, and previously claimed, prize(s). Defendants and class members do not notify instant scratch game players if represented and advertised prizes are already claimed, despite the fact that they knew or should have known this information. Further, Defendants and class members displayed Scratchers that advertised and represented certain prizes that Defendants and class members knew or should have known didn't exist, in an effort to induce Plaintiff and class members to purchase Scratcher tickets.

27. Defendants and class members further failed to perform in that the Lottery had arranged for the grand prizes to be spread out evenly over the course of the instant scratch game promotion, ensuring that, at the time of the sale of the instant scratch game tickets to the Plaintiff or class members, some of the represented and advertised grand prizes were not available to be won by Plaintiff and class members, thereby destroying the essence of a "lottery": that each ticket has an equal chance of winning the represented and advertised prizes offered and that the prizes will be distributed in a random and neutral way. Again, Defendants and class members knew of the manipulation of prizes and their unavailability. Defendants and class members did not inform instant scratch game ticket purchasers that there is artificial manipulation – versus random distribution – of the winning tickets even though doing so could easily be done by Defendants and class members.

28. Defendants' and class members' failures to perform caused Plaintiff and class members damage, including but not limited to the money expended for lottery tickets when either the represented and advertised prize did not exist or was unwinnable because of Defendants' and class members' failure to notify Plaintiff and class members of the availability of prizes.

SECOND CLAIM FOR RELIEF
Breach of Contract – UCC Express Warranty

29. Plaintiff realleges all preceding paragraphs as if fully set forth herein.

30. Defendants, in the course of selling the instant scratch tickets to Plaintiff and class members, affirmed that there were prizes or described the instant scratch tickets to include certain prizes by declaring advertised and represented prizes were available to scratch game players. The Defendants' actions include printing such affirmations and descriptions on the scratch tickets themselves and displaying them, or placing such affirmations or descriptions in advertisements.

31. Such affirmations and descriptions are part of the basis of the bargain between the Plaintiff and class members and Defendants. They were prepared by Defendant Lottery and furnished to potential purchasers to induce Plaintiff's and class members' purchase of scratch tickets, became part of the basic bargain between Plaintiff and class members and Defendants, and created an express warranty that the scratch tickets would conform to the description.

THIRD CLAIM FOR RELIEF
Breach of UCC Implied Warranties

32. Plaintiff realleges all preceding paragraphs as if fully set forth herein.

33. At all times herein mentioned, Defendants impliedly warranted to Plaintiff and members that their Scratchers were merchantable in that they are fit for the ordinary purposes for which such goods are used, i.e., that they will provide the consumer with the chance to win a certain prize.

34. At all times herein mentioned, Defendants impliedly warranted to Plaintiff and members that its Scratchers were fit for a particular purpose. Defendants knew the particular purpose for which the Scratchers were required, and had reason to know that consumers rely on the skill and judgment of Defendants and the Defendant Retailers to select and furnish Scratchers that have the expected prizes.

35. Defendants' Scratchers were not merchantable and were not fit for their particular purpose, which was to provide the consumer with a chance to win a particular prize.

36. As a result of Defendants' conduct, Plaintiff and members are entitled to damages as set forth below.

FOURTH CLAIM FOR RELIEF
Breach of Implied Covenant of Good Faith and Fair Dealing

37. Plaintiff realleges all preceding paragraphs as if fully set forth herein.

38. Defendants and class members have a duty to Plaintiff and class members to deal with them fairly and in good faith in executing contracts. Moreover, the State Lottery Division expects its licensees to operate in a manner which serves the public interest, serves the security and efficient operation of the lottery, and in a manner necessary to protect the public interest and trust in the lottery. C.R.S. § 24-35-206, 1 C.C.R. 206-1. The public understands and expects Defendant Retailers, as well as the State, to operate in a manner consistent with that provided for in the statute. A lottery by definition requires fairness, equality of opportunity, and neutrality in winner selection. The Rules and Regulations governing the sales of lottery tickets acknowledge as much in the regulations governing Defendants' and class members' activities.

39. Defendants and class members breached their duty to deal fairly and in good faith with the Plaintiff and class members by:

(a) Representing and advertising prizes that did not exist and were not available to lottery players.

(b) Representing and advertising prizes that were unwinnable because of the artificial manipulation of the availability of prizes.

(c) Failing to notify lottery players in a timely fashion that all represented prizes had been claimed and were not available.

(d) Failing to notify lottery players that the availability of prizes was artificially

manipulated.

These failures and breaches destroy the essence of the lottery and are deceptive, misleading, false and wrong. *See* C.R.S. § 6-1-105(1)(u) ("A person engages in a deceptive trade practice when, in the course of such person's business, vocation, or occupation, such person fails to disclose material information concerning goods, services, or property which information was known at the time of an advertisement or sale if such failure to disclose such information was intended to induce the consumer to enter into a transaction.") and C.R.S. § 18-5-301 ("A person commits a class 2 misdemeanor if, in the course of business, he knowingly makes a false or misleading statement in any advertisement addressed to the public or to a substantial segment thereof for the purpose of promoting the purchase or sale of property or services."). The Lottery itself expects to receive reliable and accurate information, and providing it with false and misleading information in the course of claiming a prize is a criminal act. *See* C.R.S. § 24-35-212. If this is owed in claiming a prize, Plaintiff and class members should expect no less from Defendants and class members in selling the opportunity to win a prize.

40. Plaintiff and class members have all been directly and proximately injured in their affairs and property by Defendants' and class members' conduct, and such injury includes the loss of the benefit of the bargain and the monies paid for the lottery tickets.

FIFTH CLAIM FOR RELIEF
Violation of C.R.S. § 24-35-206

41. Plaintiff realleges all preceding paragraphs as if fully set forth herein.

42. The State Lottery Division and the State Lottery Commission had a duty imposed upon them by statute to Plaintiff and class members to operate in a manner which serves the public interest, serves the security and efficient operation of the lottery, and in a manner necessary to protect the public interest and trust in the lottery. C.R.S. § 24-35-206, 1 C.C.R. 206-1. As agents of the State Lottery Division and State Lottery Commission, Defendant Retailers are expected to adhere to the same standards, and the public understands and expects all Defendants to operate in a manner consistent with that provided for in the statute. A lottery by definition requires fairness, equality of opportunity, and neutrality in winner selection. The Rules and Regulations governing the sales of lottery tickets acknowledge as much in the regulations governing Defendants' and class members' activities.

43. Defendants and class members breached their duty to serve the public interest, serve the security of the lottery and conduct their business in a manner necessary to protect the public interest and trust in the lottery by:

(a) Representing and advertising prizes that did not exist and were not available to lottery players.

(b) Representing and advertising prizes that were unwinnable because of the artificial manipulation of the availability of prizes.

(c) Failing to notify lottery players in a timely fashion that all represented prizes had been claimed and were not available.

(d) Failing to notify lottery players that the availability of prizes was artificially

manipulated.

These failures and breaches destroy the essence of the lottery and are deceptive, misleading, false and wrong. *See* C.R.S. § 6-1-105(1)(u) ("A person engages in a deceptive trade practice when, in the course of such person's business, vocation, or occupation, such person fails to disclose material information concerning goods, services, or property which information was known at the time of an advertisement or sale if such failure to disclose such information was intended to induce the consumer to enter into a transaction.") and C.R.S. § 18-5-301 ("A person commits a class 2 misdemeanor if, in the course of business, he knowingly makes a false or misleading statement in any advertisement addressed to the public or to a substantial segment thereof for the purpose of promoting the purchase or sale of property or services."). The Lottery itself expects to receive reliable and accurate information, and providing it with false and misleading information in the course of claiming a prize is a criminal act. *See* C.R.S. § 24-35-212. If this is owed in claiming a prize, Plaintiff and class members should expect no less from Defendants and class members in selling the opportunity to win a prize.

44. Plaintiff and class members have all been directly and proximately injured in their affairs and property by Defendants' and class members' conduct, and such injury includes the loss of the benefit of the bargain and the monies paid for the lottery tickets.

SIXTH CLAIM FOR RELIEF
Violation of the Colorado Consumer Protection Act

45. Plaintiff realleges all preceding paragraphs as if fully set forth herein.

46. Defendants' and class members' actions complained of herein are deceptive trade practices that have the capacity to and do deceive consumers. Such acts include:

a. Defendants and class members advertise Scratchers with intent to sell Scratchers that are not as advertised after the represented or advertised prizes are claimed;

b. Defendants and class members knowingly make a false representation as to the characteristics and benefits of Scratchers in that they represent and advertise prizes that they know are unavailable, either because they do not exist and are not available to lottery players or because of the artificial manipulation of the availability of prizes.

c. Defendants and class members fail to disclose material information concerning Scratchers when that information is known at the time of an advertisement or sale and such failure to disclose such information is intended to induce the consumer to enter into a transaction, including:

(a) Failing to notify lottery players in a timely fashion that all advertised or represented prizes had been claimed and no longer exist.

(b) Failing to notify lottery players that the availability of prizes

has been artificially manipulated.

Defendant TEXACO, INC. and class members are informed by the Colorado State Lottery Division as to when prizes in each game are claimed via newsletter, yet they do not disclose this information to lottery players.

47. Defendants' and class members' conduct described above violates C.R.S. § 6-1-105.

48. All of the conduct alleged herein occurs and continues to occur in Defendants' and class members' business. Defendants' and class members' conduct is part of a pattern or generalized course of conduct repeated on thousands of occasions daily. Thus, Defendants' and class members' conduct impacts the public interest.

49. Plaintiff and class members have all been directly and proximately injured in their business and property by Defendants' and class members' conduct, and such injury includes the purchase of tickets that do not provide the represented and advertised value and tickets that they otherwise would not have purchased.

SEVENTH CLAIM FOR RELIEF
Restitution/Unjust Enrichment

50. Plaintiff realleges all preceding paragraphs as if fully set forth herein.

51. Defendants' and class members' actions complained of herein have unjustly enriched Defendants and class members, in that Plaintiff and class members have conferred a benefit on Defendants and class members in the form of monies paid by Plaintiff and class members for scratch game tickets which Plaintiff and class members would not have purchased had they known that the prizes represented and advertised therein were unavailable, unwinnable, or previously claimed.

52. Defendants and class members have appreciated and benefited from the monies paid by Plaintiff and class members for the lottery tickets that would not have been purchased had the true facts been known.

53. Defendants' and class members' retention of Plaintiff's and class members' monies and the profits earned from the sale of these tickets unjustly enriches Defendants and class members.

54. Defendants are aware that a disproportionate share of lottery players are low income, less educated and minority, and that the essence of a lottery – if run fairly – is that most players will lose most of the time. Defendants are aware that the reality of the scratch games is that they are simply a regressive tax on lower-income, undereducated and minority citizens, who play Scratchers and other lottery games.

55. The circumstances described in this Complaint make it inequitable for Defendants and class members to retain such profits, and such inequity requires restitution of these profits to Plaintiff and class members.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff on behalf of herself and the class prays for judgment against Defendants and class members and that, as part of that judgment, the Court:

A. Certify a plaintiff class and a Defendant class under Colorado Rules of Civil Procedure Rule 23(b)(2) and/or (b)(3) and according to the requests herein under this cause of action;

B. Award Plaintiff and each class member actual damages;

C. Award Plaintiff and each class member appropriate damages, including the restitution of the revenues received either after a represented and advertised prize was no longer available or when it was unwinnable;

D. Establish a claims-in procedure for Plaintiff and class members;

E. Order, from the unclaimed damages, the funding and establishment of an ombudsman to ensure that Defendants and Defendant class members comply with rules and regulations, state laws, and consumer protection standards;

F. Order that the next-best use be permitted for the benefit of instant scratch players and that the remaining unclaimed damages be returned as additional instant scratch prize money to be distributed in the smallest practicable increments so as to achieve the broadest return possible;

G. Enjoin Defendants from selling instant scratch tickets for games that do not have a represented or advertised prize available;

H. Declare that, for instant scratch-type games, Defendants and class members must refrain from representing or advertising grand prizes that are not available unless they notify lottery players at the time of purchase of the nonavailability of each represented and advertised prize and as to any artificial manipulation of the availability of prizes;

I. Award Plaintiff and the class prejudgment interest and postjudgment interest from the date of the harm at the highest rate allowed by law, the costs of suit, and attorneys' fees; and

J. Award all other relief to which Plaintiff and the class members may be entitled at law or in equity.

DATED this 10th day of May, 2000.

NORTON FRICKEY, P.C.

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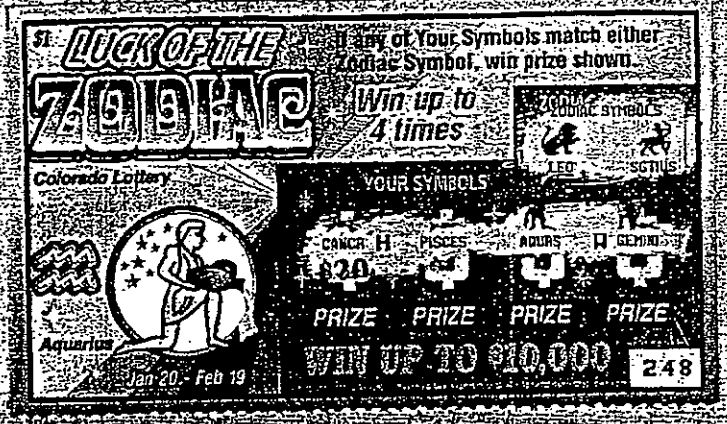
PLAINTIFF DEMANDS A TRIAL BY A JURY OF SIX



Mark Ferrandino, Director

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Tickets must be claimed at the Lottery, or by mail, within 180 days of the announced end of game. Ticket purchasers must be at least 18 years old. See brochure for additional information. All cash prizes not claimed within 181 days after end of game are forfeited. All tickets, transactions, and winners are subject to Lottery Rules and State Law. Tickets are void and not entitled to prize payment if they fail to meet requirements of game rules or are forgeries in any manner. Liability for a void ticket is limited to replacement of ticket or refund of retail sales price.

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