IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 081477

ROGER WINBORNE, GREG MORRELL, CHARLES HOLLIDAY and JOHN DeHAVEN,

Appellants,

v.

THE VIRGINIA LOTTERY and the EXECUTIVE DIRECTOR OF THE VIRGINIA LOTTERY,

Appellees.

BRIEF OF APPELLEES

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2) Whether the Virginia Lottery and its Executive Director are charged by law with the physical operation and maintenance of Lottery retailers' privately-owned facilities, such that the Appellees can be held liable for alleged architectural barriers at such facilities that violate the ADA or the VDA.

3) Whether the remedy sought by Appellants—the retrofitting, renovation, or alteration of the Lottery retailers that they allege are not fully handicapped accessible—is an available remedy under the ADA or the VDA.

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I. STATEMENT OF THE CASE

This case was filed by four disabled individuals (the "Appellants"), alleging that sixteen private commercial retailers in Virginia—three of which have since closed—were not accessible to people with disabilities. The original sixteen retailers were convenience stores and/or gas stations that sold Virginia Lottery tickets ("Lottery Retailers"). Specifically, the Appellants complain that they are being excluded from playing for and winning lottery prizes in Virginia because alleged architectural barriers at the sixteen named retailers (such as unpaved parking areas, lack of disabled parking, lack of wheelchair ramps, etc.) prevent disabled persons from entering the establishments.

The Lottery Retailers are private commercial entities not owned or operated by the Virginia Lottery. The Virginia Lottery has no power to make physical changes to retailers' buildings or control their day-to-day operations. The Virginia Lottery contracts with and licenses these private retailers to sell tickets and game cards for Virginia Lottery games, as well as tickets for the "Mega Millions" Lottery and the "Win For Life" game[1], at locations throughout the Commonwealth. Licensed retailers receive a

[1] The "Mega Millions" Lottery is a multistate jackpot game played in California, Georgia, Illinois, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Texas, Virginia and Washington. "Win for Life" is a multistate game played in Virginia, Kentucky and Georgia.

percentage of revenue from lottery ticket sales as compensation for such sales; however, the Virginia Lottery is without power to earmark this compensation paid to Virginia Lottery Retailers for a particular project, such as architectural remediation, or to control the expenditure of compensation paid to the retailers. Currently, there are approximately 5,000 licensed Virginia Lottery retailers.

The Virginia Office for Protection and Advocacy ("VOPA"), formerly known as the Department for Rights of Virginians with Disabilities, serves as counsel for Appellants in this case. VOPA is an independent state agency charged with implementing various disabilities laws in Virginia pursuant to Virginia Code § 51.5-39.2.

The Appellants have never disputed that the sixteen Virginia Lottery Retailers named in this case are separate and independent legal entities possessing authority to sue and be sued, hire employees, insure their property and personnel, and pay claims. Further, the Appellants specifically allege that it is the retailers which have excluded Appellants from their premises. Joint Appendix ("JA") at 2-3. Notwithstanding the foregoing, the Appellants have chosen not to confront the retailers regarding the accessibility violations alleged to exist on each of their properties. Instead, Appellants have sued the Virginia Lottery.

II. STATEMENT OF FACTS / PROCEDURAL HISTORY

On July 25, 2005, Appellants filed their Petition against the Virginia Lottery and its Executive Director in the Richmond Circuit Court asserting violations of Title II of the Americans with Disabilities Act ("ADA")[2], the Virginians with Disabilities Act ("VDA")[3] and the Lottery's regulations.[4] Based upon these claims, the Appellants asked the Circuit Court for the following relief against the Virginia Lottery:

1. Declaratory judgment setting forth Appellants' rights to fully and equally access Lottery products.

2. A permanent injunction requiring the Lottery to:

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[2] Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101, *et seq*. ADA Title II applies to state and local governments and is implemented through regulations contained in 28 CFR Part 35. Title II does not apply to private businesses. ADA Title III applies to private businesses of public accommodation, such as Lottery Retailers, and is implemented in 28 CFR Part 36. Appellants' claims are based upon ADA Title II, not Title III, however. The definition and examples of "public accommodations," as provided by the U.S. Department of Justice, are: "private entities who own, lease, lease to, or operate facilities such as restaurants, retail stores, hotels, movie theaters, private schools, convention centers, doctors' offices, homeless shelters, transportation depots, zoos, funeral homes, day care centers, and recreation facilities including sports stadiums and fitness clubs." *See* "A Guide to Disability Rights Laws – September 2005" (U.S. Department of Justice, Civil Rights Division, Disability Rights Section).

[3] VA. CODE §§ 51.5-40, *et seq*.

[4] 11 VAC 5-31-40; 11 VAC 5-31-70; 11 VAC 5-31-130; and 11 VAC 5-31-160 . The claims based upon the Lottery's regulations were nonsuited by Appellants in February 2007.

a. Require new & prospective Lottery Retailers' compliance with ADA, VDA and Lottery Regulations prior to licensure.

b. Require existing Lottery retailers' compliance with ADA, VDA and Lottery Regulations as a condition of remaining licensed.

c. Periodically review existing Lottery Retailers' compliance.

d. Suspend or terminate licenses of non-compliant Lottery Retailers "or to take other ameliorative steps".

3. Award attorneys' fees and costs as permitted by law.

Following the filing of the Petition in 2005, the Appellants prosecuted their case at a leisurely pace, with the exception of the period between December 2006 and March 2007, when Appellants served approximately 577 discovery requests on the Virginia Lottery. The Appellants never requested a pretrial scheduling order, nor did they attempt to set the case for trial. As no trial took place, no evidence was ever submitted into the record; hence, Appellants' references throughout their Brief to "the evidence in this case" are inaccurate.

On December 14, 2007, the Appellants filed a Motion for Partial Summary Judgment. On February 20, 2008, the Virginia Lottery filed a Motion for Partial Summary Judgment relating to Count IV of the Petition (alleging violations of the ADA). The Circuit Court ruled from the bench at a hearing held April 4, 2008, denying the Appellants' Motion for Partial

Summary Judgment, granting the Virginia Lottery's Motion for Partial Summary Judgment, and dismissing the Appellants' case, stating as follows:

> The Court will find that the Virginia Lottery does not offer a program, service or activity within the meaning of the ADA or the VDA. The Court has reviewed the statutes. The Court has reviewed Paxton, which is the case from West Virginia. And the Court declines to follow Paxton because of Bacon [v. City of Richmond, 475 F.3d 633 (4th Cir. 2007)]. Bacon, as you're aware, is the Fourth Circuit case from 2007 in which the Fourth Circuit found that the City of Richmond was not responsible for School Board's ADA violations because the City of Richmond did not have operational control over the buildings.[5]
>
> JA at 333-334.

Continuing further, the Circuit Court stated:

> In Bacon, the Fourth Circuit said the City was not charged by law with the operation, maintenance or establishment of the system that's responsible for providing public education for children. And here the Lottery Commission is not charged by law with the operation, maintenance and operation [*sic*] of the entity of the system, and that is the retailer that is responsible for selling lottery tickets to buyers. So the Court, for those reasons, is granting the Lottery Commission's motion for partial summary judgment.

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[5] Appellants, in their brief before this Court, continue to place substantial reliance upon the West Virginia Supreme Court's decision in Paxton v. Department of Tax and Revenue (192 W. Va. 213, 451 S.E.2d 779 (1994)). Whatever minimal persuasive authority may have been provided by Paxton has been clearly superseded by the Fourth Circuit's later decision in Bacon v. City of Richmond (475 F.3d 633 (4th Cir. 2007)).

JA at 334-335.[6]

Simply put, the Circuit Court ruled that based on the decision in Bacon, the Virginia Lottery does not control the day-to-day physical operations of each of the approximately 5,000 Lottery retailers in Virginia, and, therefore, it cannot be liable for remedying violations that may have been committed by those private commercial entities.

This appeal followed.

III. QUESTIONS PRESENTED AND STANDARD OF REVIEW

Notwithstanding the manner in which the Appellants have framed the questions presented in this case—which is based largely upon a significantly inaccurate quotation of the Circuit Court's ruling—the essential questions before the Court are:

1) Whether the Virginia Lottery offers a "program," "service" or "activity" within the meaning of the ADA or VDA;
2) Whether the Virginia Lottery and its Executive Director are charged by law with the physical operation and maintenance of Lottery

[6] Appellants' significantly inaccurate quotation of the transcript of the Circuit Court's ruling appears in Appellants' Brief at pages 5, 7, 9 and 30. The Appellants misquote the Circuit Court as having ruled that the Virginia Lottery is not charged by law with the operation and maintenance of the "Lottery system". As is obvious from the accurately quoted language above, the Circuit Court ruled that the Lottery is not charged by law with the operation and maintenance of the Lottery Retailers.

retailers' privately-owned facilities, such that the Appellees can be held liable for alleged architectural barriers at such facilities that violate the ADA or the VDA; and

3) Whether the remedy sought by Appellants—the retrofitting, renovation, or alteration of the Lottery retailers that they allege are not fully handicapped accessible—is an available remedy under the ADA or the VDA.

This case was disposed of by the Circuit Court on competing motions for partial summary judgment presenting the Circuit Court with questions of law as to the interpretation of federal and state statutes. Interpretation of a statute is a pure question of law subject to *de novo* review by this Court. Renkey v. County Bd. of Arlington County, 272 Va. 369, 373, 634 S.E.2d 352, 355 (2006) (*citing* Virginia Polytechnic Inst. v. Interactive Return Serv., 271 Va. 304, 309, 626 S.E. 2d 436, 438 (2006)).

IV. ARGUMENT

A. THE VIRGINIA LOTTERY OFFERS NO "PROGRAM", "SERVICE" OR "ACTIVITY" WITHIN THE MEANING OF THE ADA OR VDA.

The Virginia Lottery offers no "program, service or activity" within the meaning of the ADA or VDA that would subject it to the provisions of either statute. The role of the Virginia Lottery is to generate revenues for the Commonwealth to support kindergarten through 12th grade public

education. Such a revenue-producing function does not fall within the scope of programs, services or activities subject to accessibility mandates of the ADA or VDA.

Although the ADA provides no definition of "program, service or activity", the U.S. Department of Justice has provided guidance as to what types of things constitute a "program, service or activity" under Title II of the ADA (applicable to state and local governments):

> Title II requires that State and local governments give people with disabilities an equal opportunity to benefit from all of their programs, services, and activities (e.g. public education, employment, transportation, recreation, health care, social services, courts, voting, and town meetings).[7]

The Justice Department also has provided guidance as to the implementing regulations for ADA Title II (28 CFR Part 35) that shed light on what categories are covered by the terms "programs" or "activities".

> …[T]here are two major categories of programs or activities covered by this regulation: those involving general public contact as part of ongoing operations of the entity and those directly administered by the entities for program beneficiaries and participants. Activities in the first category include communication with the public (telephone contacts, office walk-ins, or interviews) and the public's use of the entity's facilities. Activities in the second category include programs that provide State or local government services or benefits.[8]

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[7] "A Guide to Disability Rights Laws – September 2005," (U.S. Department of Justice, Civil Rights Division, Disability Rights Section).

[8] 28 CRF Part 35, Appendix A (Preamble to Nondiscrimination on the Basis of Disability in State and Local Government Services) (July 26, 1991).

Thus, it is not true, as Appellants suggest, that the entertainment inherent in playing Lottery games, or the cash prizes sometimes won as a result of playing them, constitute a "program, service or activity" within the meaning of ADA Title II.

B. EVEN ASSUMING *ARGUENDO* THAT THE VIRGINIA LOTTERY DOES OFFER A "PROGRAM", "SERVICE" OR "ACTIVITY" WITHIN THE MEANING OF THE ADA OR THE VDA, THAT "PROGRAM", "SERVICE" OR "ACTIVITY" IS NOT "PLAYING AND/OR WINNING THE LOTTERY".

Even assuming *arguendo* that the Virginia Lottery does offer or support a program, service or activity within the ambit of the ADA or the VDA, that program, service or activity is production of revenues to support local public education—not, as Appellants assert (Petition for Appeal, pp. 13-14), the offering for sale of Lottery tickets or provision of opportunities to win Lottery prizes. Manifestly, there is no right of any kind—constitutional, statutory or otherwise—to purchase Lottery tickets.

All Virginia Lottery proceeds go to support local public education, thus benefiting children in grades K-12 and the localities in which they live. Appellants have never alleged, nor can they, that they have somehow been excluded by the Virginia Lottery from participating in the benefits of local public education in the Commonwealth.

In any event, even if the Circuit Court's finding that the Virginia Lottery offers no "program" or "service" under the ADA was in error, the Circuit Court's ruling granting the Virginia Lottery's Motion for Partial Summary Judgment should be upheld as correct for any or all of the reasons set forth below. *See* Helvering v. Gowran, 302 U.S. 238, 245, 58 S. Ct. 154,158 (1937) (holding that in the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason); *see also*, Harrison & Bates, Inc. v. Featherstone Associates Limited Partnership, *et al*., 253 Va. 364, 369, 484 S.E.2d 883, 886 (1997) (holding that in a proper case, where the correct conclusion has been reached but the wrong reason given, this Court does not hesitate to sustain the result and assign the right ground).

C. THE ADA AND THE VDA PROHIBIT THE REAL REMEDY SOUGHT BY APPELLANTS AS A MATTER OF LAW.

As explained below, it is readily apparent that the true and only legitimate objective of the Appellants is to achieve handicapped accessibility to the sixteen Lottery retailers which they allege are in some way deficient in that regard.

Appellants have argued as follows:

> If Lottery retailers refuse to become accessible to Appellants and other people with disabilities, Respondents can and must 'wave Lady Luck's magic wand' and turn those inaccessible Lottery retailers into former Lottery retailers; Respondents may then replace them with accessible businesses. …[I]f Lottery retailers refuse to become accessible, Respondents will 'wave Lady Luck's magic wand' and the businesses will cease to be Lottery retailers, to be replaced by accessible retailers.

JA at 218 (emphasis added).

Based upon a plain reading of the preceding, it is clear and beyond doubt that the real remedy Appellants seek is retrofitting, renovation, or alteration of the Lottery retailers that they allege are not fully handicapped accessible. Indeed, that remedy is the expected and commonsense goal, even though Appellants are improperly attempting to obtain it by employing the threat of denial or revocation of a Lottery retail license as the sanction for failure to comply with accessibility standards. It would be disingenuous to present any other basis for the notion that the Lottery has any responsibility for the physical facilities of private entities which are licensed to sell state revenue generating products on behalf of the Lottery. Clearly, simply seeking to impose a no-license sanction for an alleged accessibility shortcoming achieves no appropriate or judicially cognizable goal in and of itself. In the event the Virginia Lottery were to revoke an existing retailer's license to sell Lottery tickets, the only sure result of such a revocation would be that lottery tickets would cease to be sold at that location—period.

Thus, the net result of the requested sanction is not greater accessibility of Lottery products to disabled persons; rather it is reduced availability of those products to everyone in the Commonwealth—along with concurrent reductions in revenues available to support K-12 education in the Commonwealth. Accordingly, it must be recognized that the real remedy sought by Appellants is the retrofitting, renovation, or alteration of the physical facilities of any Lottery retailer which may be shown to be accessibility deficient.

The VDA prohibits requiring retrofitting, renovation or alteration of buildings. Subsection D of § 51.5-44 of the VDA provides as follows:

> Nothing in this title shall be construed to require retrofitting of any public transit equipment or to require the retrofitting, renovation, or alteration of buildings or places to a degree more stringent than that required by the applicable building code in effect at the time the building permit for such building or place is issued.[9]

The plain language of § 51.5-44 D makes it indisputable that the VDA is not available as a basis for such relief. Given the limitations prescribed by § 51.5-44 D, the VDA-based claims set forth in Appellants' original Petition were properly dismissed by the court below.

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[9] Appellants do not allege that any of the sixteen retailers identified in their original Petition do not comply with the applicable building code in effect at the time the building permit for each such building or place was issued.

Similarly, the ADA does not require alteration of retailer facilities. As discussed, private retail establishments are subject to the accessibility requirements of Title III of the ADA, implemented through regulations contained in Part 36 (§ 36.101 *et seq.*) of Title 28 of the Code of Federal Regulations. Part 36 makes clear that ADA discrimination prohibitions apply to places of public accommodation only if such facilities are newly constructed for first occupancy after January 26, 1993,[10] or altered after January 26, 1992.[11] There is no allegation that any of the sixteen retailers about which complaint has been made were either newly constructed or subject to alteration after the relevant dates. Accordingly, there is no basis under the ADA to compel the facility changes Appellants are essentially demanding.

Simply stated, Appellants' goal in suing the Virginia Lottery is to force Lottery Retailers to make physical changes to their locations so as to become accessible to people with disabilities. The problem with Appellants' strategy is two-fold. First, the Virginia Lottery cannot force Lottery Retailers to make the physical changes sought by Appellants. Indeed, no one can, because that remedy is specifically excluded from the

[10] *See* 28 CFR 36.401 ("New construction").
[11] *See* 28 CFR 36.402 ("Alterations").

remedies available under the properly applicable title of the ADA and § 51.5-44 D of the VDA.

Suing A in the hope that B will take some wished-for action, where B is neither bound by a ruling as to A, nor required by law to take such action, is a fundamentally flawed, if not abusive, utilization of the judicial system. Appellants obviously hope that when faced with the prospect of losing its license to sell lottery tickets, a retailer will be coerced into making the expenditures necessary to retrofit its building according to Appellants' wishes. Unfortunately, such hopes amount to nothing more than speculation, which simply does not constitute a valid legal claim for a valid remedy under the ADA or the VDA.

Second, Appellants cannot sue the Virginia Lottery to obtain specific relief against Lottery Retailers where the ADA and the VDA exclude the relief sought were Appellants to sue those retailers directly. A fundamental principle of jurisprudence states that a party may not obtain indirectly what it is prohibited from obtaining directly under the law. *See*, *e.g.*, Clinchfield Coal Co. v. Robbins, 261 Va. 12, 541 S.E.2d 289 (2001); Campbell v. Commonwealth, 246 Va. 174, 431 S.E.2d 648 (1993). Yet, that is precisely what Appellants sought to do.

D. THE VDA SHOULD NOT APPLY MORE BROADLY THAN THE ADA.

VOPA and its governing board have failed to promulgate regulations as required by Virginia Code §§ 51.5-39.5A5 and 51.5-40. In the absence of the necessary implementing regulations, the Lottery, or any other entity which might otherwise be subject to the requirements of § 51.5-40, is without notice, proper guidance or sufficient information to be charged with knowledge of or responsibility for any requirements that might be placed upon them by § 51.5-40. Appellants have repeatedly urged that no regulations have been promulgated because their counsel, VOPA, has determined that none are necessary. The Lottery disagrees and urges that § 51.5-40 was intended as a very broad and generalized statement of policy which the General Assembly expected to be animated through the promulgation of regulations. Appellants cannot ignore the plain and express language of § 51.5-40, to-wit: "the Virginia Office for Protection and Advocacy <u>shall</u> promulgate such regulations as may be necessary to implement this section. Such regulation <u>shall be</u> consistent, whenever applicable, with regulations imposed under the Federal Rehabilitation Act of 1973, as amended, and the Federal Americans With Disabilities Act of 1990." (Emphasis added.)

Even if no implementing regulations were necessary, Appellants' complaint can rise no higher than the generalized language of § 51.5-40. The responsibilities and remedies provided under the VDA are wholly statutory in nature; accordingly, only those requirements and remedies which are expressly enumerated are in effect. In other words, the language of the statutes must be strictly construed with no expansion through interpretation. Thus, as written, § 51.5-40 offers Appellants no basis for relief. Nothing in the VDA can be read to establish that the Lottery, a revenue producing agency, provides any benefits, programs or activities which would be subject to the generalized non-discrimination provisions of the VDA or § 51.5-40 in particular. More importantly, there is absolutely no language in § 51.5-40 or anywhere else in the VDA that would permit the Court to make the counterintuitive leap of logic necessary to determine that the Virginia Lottery is responsible for the accessibility of independent, privately operated retail entities.

Although, for the reasons stated above, it would be improper to do so, even if § 51.5-40 is given a broad interpretation, the very most one could read into it is an attempt to import into the VDA applicable requirements of the ADA. As noted previously, even under Title II of the ADA, Appellants are not entitled to relief. The regulations implementing ADA Title II

(addressing government program accessibility), in pertinent part, state as follows:

> § 35.150 Existing facilities.
>
> (a) General. A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This paragraph does not --
>
> > (1) Necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities;[12]

At the very most, the Lottery is obligated to make the overall function of Lottery products and sales accessible. Appellants have not alleged, nor could they allege, that Lottery products are not readily and broadly available to all persons, including individuals with disabilities. Nothing in the VDA (nor in the ADA) requires the Lottery to be responsible for or to police the accessibility compliance level of each individual, privately owned and operated retail location.

E. JUDICIAL DECREES MUST BE LIMITED TO PARTIES FOUND LIABLE FOR A LEGAL VIOLATION.

In 2007, the United States Court of Appeals for the Fourth Circuit decided Bacon v. City of Richmond, 475 F.3d 633 (4th Cir. 2007). The case

[12] 28 CFR § 35.150 (1991).

involved a dispute over whether the city was required to fund system-wide retrofitting of city schools under Title II of the ADA without any determination that the city discriminated against or otherwise excluded plaintiffs from its services and activities. The City contended that, because Virginia law vests the School Board with exclusive control over City schools, it (the City) was not responsible for the ADA violations. The Fourth Circuit agreed, finding that the City did not, in fact, exercise any control over the physical operation of its public schools. That duty, the Court found, belonged to the School Board, and not to the City. It was the School Board that directly controlled capital improvement projects for its schools, and it was the School Board that had thus breached its duty to comply with applicable federal and state disability laws. Therefore, reasoned the Court, only the School Board could be tasked with remedying the violations. The Court found that injunctive relief may not issue against an entity (the City) that played no part in depriving any plaintiff of the rights guaranteed by the ADA. To impose responsibility in the absence of fault and causation would stretch the law of remedies beyond limit. Bacon, 475 F.3d at 639-40.

The Plaintiffs nevertheless contended that fault was irrelevant because the City provided capital funding to its public schools, so that by

virtue of its "power of the purse," the City bore some responsibility for correcting ADA violations in the schools. The Court disagreed, again emphasizing that the City exercised no operational control over City school buildings, school services or activities. The Court pointed out that the School Board was charged with caring for, managing and controlling school property, and that the School Board was a separate and independent legal entity possessing authority to sue and be sued, hire employees, insure school property and personnel, and pay claims. *See* Bacon, 475 F.3d at 640. In stark contrast, the City had no power to make physical changes to school buildings or control the day-to-day operation of local school buildings and their services and programs. *See* Bacon, 475 F.3d at 641. Further, the City could not specify how the funds it appropriated to City schools could be spent, *i.e.*, whether for capital improvements or otherwise. *Id*.

Additionally, the Court in Bacon emphasized that the Plaintiffs' claim that the City alone bore financial responsibility for ADA noncompliance by virtue of its status as a funder of the local school system overlooked the fact that the School Board received funding from other sources. Bacon, 475 F.3d at 642. To single out the City for responsibility when it was but one source of funds raised serious equitable concerns, because under

such a theory of "funding liability," any number of state and federal agencies that were involved in funding the education of disabled children would be necessary parties. *Id.* The Court held,

> To make funding entities responsible for the statutory violations of funding recipients would stretch the contours of Title II. Title II does not contemplate funding liability for an independent public entity that neither controls the challenged services nor discriminated against plaintiffs because of disability. It does not impose guarantor liability or make funding entities ADA insurers for funding recipients. … To hold that a city or State by virtue of its funding authority is liable for injury caused solely by a separate and independent corporate body is a novel and unprecedented theory. It would also expose many different entities to extensive liability. For it will be the rare case where plaintiff will be unable to identify a source of outside funding.
>
> Bacon, 475 F.3d at 642-43.

In the instant case, Appellants did not allege, nor could they, that the Virginia Lottery maintains control over the physical operations of each of the approximately 5,000 privately-owned commercial retailers licensed to sell lottery tickets to the public. Indeed, the Lottery has no power to make physical changes to gas stations or convenience stores, or to control their day-to-day operations. It is these retailers who are responsible for caring for, managing and controlling their own property.

Counsel for Appellants doggedly ignores the fact that, like the school board in Bacon, gas stations and convenience stores selling Lottery tickets

are separate and independent legal entities possessing authority to sue and be sued, hire employees, insure their property and personnel, and pay claims. Yet Appellants refuse to sue the very entities they allege are out of compliance with the ADA and VDA. Instead they simply ask this Court to assume those entities are out of compliance and then impose responsibility on another entity—the Lottery. The Appellants thus request precisely the type of remedy prohibited by the 4th Circuit in Bacon.

The importance of the Bacon ruling—that only responsible parties be held liable—is perhaps best demonstrated, however, by the Appellants' insistence that simply withholding or revoking a Lottery license will cause a Lottery retailer to invest in capital improvements to its property. In reality, however, Appellants can offer no evidence whatsoever to support their assumption that Lottery license revocation will lead directly to capital improvements, which will lead directly to accessibility. The only sure result of revocation of a retailer's Lottery license is that Lottery tickets will no longer be available to anyone who visits that retailer. The Lottery has no power to dictate how a retailer's percentage compensation for Lottery ticket sales is spent by that retailer, and it most certainly is without power to force a retailer to invest in capital improvements using the retailer's profits or funding from other sources.

The theory of funding liability itself was rightfully recognized by the Fourth Circuit in Bacon as dangerous policy. In the instant case, the potential consequences of embracing the funding liability theory are not difficult to imagine. To date, Appellants have sued only the Lottery for conditions alleged to exist at certain convenience stores. At some point in time, the Alcoholic Beverage Control Board might be sued for conditions existing at a restaurant holding a license to serve alcoholic beverages. The Department of Gaming and Inland Fisheries might be sued for conditions existing at a bait shop or sporting goods store if that store sells fishing licenses, or the Department of Agriculture and Consumer Services might be sued for conditions at a gas station where it has certified the accuracy of the fuel pumps. Moreover, it is certain that many Lottery retailers also are licensees of other state agencies or holders of certifications issued by other state agencies.

The point made by the Court in Bacon was that under the funding liability theory, all funders would be necessary parties to all funding liability litigation, resulting in numerous publicly-funded government entities shouldering the expense of defending litigation against all except the private commercial entity actually responsible for the alleged violations.

As with any equity case, the nature of the violation determines the scope of the remedy. Bacon, 475 F.3d at 638 (*quoting* Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 16 (1971)). At its most basic, this principle limits the reach of judicial decrees to parties found liable for a legal violation. *Id*. To prevail under Title II of the ADA, the Appellants must show "either that [they] w[ere] excluded from participation in, or denied the benefits of, a program or service offered by a public entity, or subjected to discrimination by that entity." Bacon, 475 F.3d at 639 (*quoting* Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 499 (4th Cir. 2005) (emphasis added)).

It is the Lottery retailers, not the Virginia Lottery, that have the duty to physically maintain Lottery retailer locations. Remedies may be imposed only on responsible parties. Injunctive relief may not issue, where, as here, the Virginia Lottery played no part in depriving any Petitioner of the rights guaranteed by the ADA. *See*, *e.g.*, Bacon, 475 F.3d at 639 (*citing* Rizzo v. Goode, 423 U.S. 362, 377 (1976)). To impose responsibility in the absence of fault and causation would stretch the law of remedies beyond limit. As for Title II, it cannot be read to impose strict liability on public entities that neither caused Appellants to be excluded nor discriminated

against them. *See* Bacon, 475 F.3d at 639-40. A remedy unmoored to any finding of fault is not a remedy at all. *Id*.

V. CONCLUSION

Appellants seek to stretch the settled law of remedies beyond limit by imposing responsibility on the Virginia Lottery and its Executive Director in the absence of fault and causation. Neither ADA Title II nor the VDA impose strict liability on public entities that neither caused Appellants to be excluded from Lottery Retailers nor discriminated against Appellants based upon their disabilities. Finally, both ADA Title II and the VDA specifically prohibit the remedy sought by the Appellants.

Based upon the foregoing, the Virginia Lottery and its Executive Director respectfully request denial of Appellants' Petition for Appeal, and for all such other and further relief as the Court may deem just or appropriate under the circumstances.

Respectfully submitted,

THE VIRGINIA LOTTERY AND THE EXECUTIVE DIRECTOR OF THE VIRGINIA LOTTERY

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CERTIFICATE

I hereby certify on this 9th day of December, 2008, that in compliance with Rule of Supreme Court of Virginia 5:26(d), I have filed twelve (12) true and accurate paper copies of the foregoing Brief of Appellees, by hand delivery, and one (1) electronic copy in Word format, by electronic mail to scvbriefs@courts.state.va.us, with the Supreme Court of Virginia; and I have mailed three (3) true and accurate paper copies of the Brief of Appellees via first class mail, postage prepaid, to counsel for the Appellants.

/s/ Amy K. Dilworth