

Bond Case Briefs

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EMINENT DOMAIN - WEST VIRGINIA

West Virginia Lottery v. A-1 Amusement, Inc.

Supreme Court of Appeals of West Virginia - November 13, 2017 - S.E.2d - 2017 WL 5559867

Holders of permits to operate limited video lottery game (LVL) terminals brought action against state lottery for taking without just compensation, deprivation of property without due process, and civil conspiracy, all of which related to state lottery's decision to require permit holders to use a different software program for their LVL terminals at their expense.

After allowing permit holders to amend their complaint following state lottery's first motion to dismiss for failure to limit the recovery sought to the state's insurance coverage, the Circuit Court found that state lottery had waived immunity, determined that permit holders did not need to limit their regulatory-taking and due-process claims to the limits of the state's insurance policy, and denied state lottery's second motion to dismiss. State lottery appealed.

The Supreme Court of Appeals of West Virginia held that:

- State lottery did not waive its claim of sovereign or qualified immunity;
- The statutory eminent domain procedure, and therefore inverse condemnation, can, in an appropriate case, be utilized to seek compensation for personal property; abrogating *State ex rel. Firestone Tire & Rubber Co. v. Ritchie*, 153 W. Va. 132, 168 S.E.2d 287;
- The proper procedure for pursuing inverse condemnation is to file a complaint in circuit court seeking a writ of mandamus to compel the state to institute condemnation proceedings; abrogating *Stewart v. State Road Commission*, 117 W. Va. 352, 185 S.E. 567; and
- The state insurance policy exception to sovereign immunity applies only to immunity under the state constitution and does not extend to qualified immunity.

State lottery's failure to raise the issue of sovereign or qualified immunity in its first motion to dismiss action for regulatory taking and related claims by holders of permits to operate limited video lottery game (LVL) terminals did not result in a waiver of immunity; state lottery explicitly reserved the right to assert those immunities in a footnote in the first motion to dismiss, state lottery raised the issue of immunity in its second motion to dismiss, which was filed in response to permit holders' amended complaint, and nothing in the rules of civil procedure limited the scope of a second motion to dismiss to the allegations that were changed as between the original and amended complaints.