

Sweepstakes & Sunshine: A Review of Florida's
Game Promotion Statute
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Florida residents have become accustomed to seeing signs for “Internet Sweepstakes Cafés” throughout the State. These businesses allow patrons to use computers to play instant “sweepstakes” games, as a means of promoting other goods or services, under Florida’s “Game Promotion”² Statute. And while this business model has risen in popularity in recent years, the legal issues have yet to be settled.

Typically, the operators of these cafés sell Internet access time to consumers in connection with their gaming activity. In theory, the businesses allow the public to use their facilities to purchase time on the Internet, and that “consumer service” is promoted by one or more sweepstakes games played on video terminals available at the location. The purchase of Internet time is generally associated with credits, which can be used to participate in the instant sweepstakes game, where winners are ultimately revealed through entertaining game play.³ The winning ‘tickets’ or ‘chances’ provided to players are pre-determined by the sweepstakes software, and winners are typically rewarded with cash, prizes, or more sweepstakes chances. Most sweepstakes software allows the winning tickets to be revealed immediately through an ‘auto-reveal’ option selected by the player, or they can be revealed more slowly through games that resemble a slot machine or another casino game.

Because of their overt similarities to Vegas-style games, many entrepreneurs, academics, and law enforcement officials have come to question the legality of these operations. Are they permitted by relevant statutes or are they simply flying under the radar until caught by law enforcement authorities? The answer is far from clear, but Florida’s “Game Promotion” Statute provides a compelling legal argument for these businesses.

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² § 849.094(1)(a), *Fla. Stat.* (2010) – “Game promotion” means, but is not limited to, a contest, game of chance, or gift enterprise, conducted within or throughout the state and other states in connection with the sale of consumer products or services, and in which the elements of chance and prize are present.

³ Sweepstakes games are permitted under Florida law so long as the operator of the gaming activity abides by all game promotion requirements set forth in § 849.094. However, commercial Bingo games and sports betting are specifically excluded from the protection that is, in essence, provided by compliance with the Game Promotion Statute. § 849.094, *Fla. Stat.* (2010). Conditions on Bingo games are located in § 849.0931, *Fla. Stat.* (2010).

The key to providing legal gambling under the “Game Promotion” Statute is the close association of some legitimate consumer good or service which the gaming activity is required to “promote.” The Statute was originally passed to allow companies like McDonalds to give away game cards, such as their popular Monopoly game promotion, which provides customers with a chance to win a free hamburger, or perhaps a cash prize, as a means of generating interest in their primary product; hamburgers. It is when the gaming activity becomes the primary draw for a given business – with the consumer good or service secondary – that the intent of the Statute may be undermined, and attention from law enforcement can result. But, given the public’s interest in electronic sweepstakes games, some Internet cafes have become more popular for their promotional activity than their primary consumer service – Internet time. Several such businesses have been threatened, prosecuted and/or shut down by the authorities, who claim they are engaged in illegal gambling activities, not legitimate game promotions.⁴ However, no convictions have resulted from these investigations, and the Game Promotion Statute has still not been authoritatively construed by any published court decision in Florida.

Like most states, Florida prohibits all forms of unlicensed gambling including lotteries, bingo, cards and slot machines.⁵ Wagering on contests of skill is likewise generally prohibited.⁶

⁴ In August of 2009, law enforcement raided Allied Veterans Internet café in Longwood, Florida. No arrests were made, but they succeeded in keeping the business closed by threatening the landlord with arrest if he allowed it to reopen. Available at: http://articles.orlandosentinel.com/2010-12-04/news/os-internet-cafes-sidebar-20101203_1_internet-cafes-kelly-b-mathis-sweepstakes-law (last visited January 3, 2011). On April 14, 2010, the Multi-Agency Drug Enforcement Taskforce (MADET) of the Marion County Sheriff’s Office raided three Internet cafes in Marion County. In Ocala, Jeffrey Reed, owner of the Cyber Zone E-Café was arrested and charged with keeping a gambling house, promotion of a lottery and possession of coin-operated devices. John R. Andrews, the manager of Cyber Zone, was arrested and charged under § 849.01, *Fla. Stat.* (2010), with keeping a gambling a house. In addition, Kamaljit Rai, owner of Gatorcafe II, was arrested after MADET raided his establishment, charging him possession of gambling devices, keeping a gambling house and conducting an illegal lottery. Available at: <http://www.ocala.com/article/20100414/ARTICLES/100419846> (last visited January 3, 2011). As of December 10, 2010, the case against Jeffrey Reed was closed after Prosecutors dropped the charges. Available at: <http://www.ocala.com/article/20101214/ARTICLES/101219869> (last visited January 3, 2011). During the same raid, Tim and Jeanee Crisante, operators of Marion Internet Services were charged with operating a gambling house and possessing slot machines. Being the only case resulting from the Marion County raids having gone to trial this far, a jury found the Crisantes not guilty on all counts in October of 2010. See *State of Florida v. Crisante*, Case No. 2010-CF-1543 (Fla. Marion Cty. Ct. 2010). On March 30, 2009, the Metropolitan Bureau of Investigation, a task force comprised of agents from the Orlando Police Department and Orange County Sheriff’s Office, raided an Orlando Internet café, Plinko Business Centers. Four of the establishment’s operators were charged with racketeering, keeping a gambling house, engaging in unlawful financial transactions, unlawful possession or operation of a coin operated device and conducting an Illegal lottery, respectively. All five of the charges against each defendant were dismissed in November of 2010. See *State of Florida v. Jules Ross, et. al.*, Case No. 2009-CF-004445 (Fla. Orange Cty. Ct. 2010).

⁵ See, Ch. 849, *Fla. Stat.* (2010)

However, the Game Promotion Statute permits both contests and games of chance to be offered to the public, so long as the gaming activity is provided as a promotion for consumer goods or services, and also as long as the required procedures are followed. Most of the legal requirements imposed by Florida law relate to the manner in which the game promotion is conducted by the individual or corporate entity operating⁷ the Internet café. For example, Florida law requires that a retailer: (1) post all applicable rules and regulations pertaining to played promotions at any facility providing the respective gaming promotion;⁸ (2) provide the state Department of Agriculture & Consumer Service with those respective rules and regulations (which must be fixed, as the rules may not be modified upon filing);⁹ (3) publish a copy of any applicable rules and regulations in all advertising materials used in connection with the game promotion; and (4) include the contact information (e.g. – a telephone number) where any rules and regulations may be obtained.¹⁰

⁶ § 849.14, *Fla. Stat.* (2010) – Whoever stakes, bets or wagers any money or other thing of value upon the result of any trial or contest of skill, speed or power or endurance of human or beast, or whoever receives in any manner whatsoever any money or other thing of value staked, bet or wagered, or offered for the purpose of being staked, bet or wagered, by or for any other person upon any such result, or whoever knowingly becomes the custodian or depository of any money or other thing of value so staked, bet, or wagered upon any such result, or whoever aids, or assists, or abets in any manner in any of such acts all of which are hereby forbidden, shall be guilty of a misdemeanor of the second degree.

⁷ § 849.094(1)(b), *Fla. Stat.* (2010) – defines “Operator” as “any person, firm, corporation, or association or agent or employee thereof who promotes, operates, or conducts a game promotion, except any charitable nonprofit organization.”

⁸ § 849.094(3), *Fla. Stat.* (2010) – Gaming operators must conspicuously post the rules and regulations of the game promotion filed with the Department of Agriculture & Consumer Service in each and every retail outlet or place where the game promotion may be played or participated in by the public.

⁹ § 849.094(3), *Fla. Stat.* (2010) – Gaming operators must file a copy of the rules and regulations of the game promotion, and list of all prizes and prize categories with the Department of Agriculture and Consumer Services at least seven (7) days before the commencement of the game promotion, in all instances where the total announced value of the prizes offered is greater than five-thousand dollars (\$5,000). These rules and regulations may not be altered, modified or changed after filing them with the Department of Agriculture & Consumer Service. Additionally, the gaming operator must transmit a non-refundable filing fee of one hundred dollars (\$100) for each submission of the game promotion rules to the Department of Agriculture & Consumer Service, to pay the costs incurred in administrating and enforcing revisions of Florida law.

¹⁰ § 849.094(3), *Fla. Stat.* (2010) – Gaming operators must publish a copy of the rules and regulations in all advertising materials used in connection with the game promotion. Operators must also include a toll-free telephone number or mailing address where the full rules and regulations may be viewed, heard or obtained for the full duration of the game promotion (if all of the specific rules and regulations are not included in all advertising of the game promotion.)

Gaming operators must establish a surety bond or a trust account pertaining to prizes, with a balance sufficient to cover the valued sum of the prizes offered.¹¹ In all game promotions where the total announced value of the prizes offered is greater than five thousand dollars (\$5,000), the operator must also: (1) provide the Department of Agriculture & Consumer Service with a certified list of the names and addresses of all persons who have won prizes which have a value of more than twenty five dollars (\$25.00); (2) indicate the value of such prizes; and (3) list the dates on which such prizes were won – all of which must occur within sixty (60) days after the winners have been finally determined.¹² Furthermore, retailers must maintain a list of winners¹³ and provide the list to anyone requesting such documentation or publish said list within two (2) months of the conclusion of the promotion.¹⁴

Authorities claim that Internet cafés are illegal because their use of interactive computers providing casino-style gaming essentially allows the businesses to offer access to illegal slot machines or unregulated lottery activity, using the safe harbor provided by the Game Promotion Statute as a “ruse” or “sham.” It is important to note that Florida’s Game Promotion law does not specifically require that the consumer good or service be the “primary draw” or main reason for the customers’ patronage. In fact, the Statute allows businesses to offer any game of chance or contest as a means of promoting any consumer goods and services, so long as certain rules are followed.¹⁵ However, law enforcement officials have interpreted the statute more narrowly.¹⁶

¹¹ § 849.094(4)(a), *Fla. Stat.* (2010) – In any instance where the total announced value of prizes offered is greater than five-thousand dollars (\$5,000), gaming operators must establish a trust account in a national or state chartered financial institution, with a balance sufficient to pay the total prizes offered; or, obtain a surety bond in the amount equal to the total amount of the prizes offered.

¹² § 849.094(5), *Fla. Stat.* (2010) - Every operator of a game promotion in which the total announced value of the prizes offered is greater than five-thousand dollars (\$5,000) shall provide the Department of Agriculture and Consumer Services with a certified list of the names and addresses of all persons, whether from this state or from another state, who have won prizes which have a value of more than twenty-five dollars (\$25), the value of such prizes, and the dates when the prizes were won within sixty (60) days after such winners have been finally determined.

¹³ § 849.094(5), *Fla. Stat.* (2010) – gaming operators must maintain a list of winning entries for at least ninety (90) days after the close or completion of the game promotion.

¹⁴ § 849.094(5), *Fla. Stat.* (2010) – gaming operators must provide a list of winners, without charge, to any person who requests it; or, in lieu of providing a list, publish the list of winners in a Florida newspaper of general circulation within sixty (60) days after the winners have been determined, and provide the Department of Agriculture & Consumer Service with a certified copy of the publication containing the information about the winners.

¹⁵ § 849.094, *supra* note 2. (Larry there is no “note” in this Statute., Is this fn referring to the sub-section dealing with what is prohibited? If so, I’d cite it like this: § 849.094(2), *Fla. Stat.* (2010).

¹⁶ See Attorney General Opinions referenced *infra*.

The primary theory under which gambling activity through the Game Promotion Statute is legal is due to the lack of “consideration,” which is a necessary element to meet the definition of “gambling.”¹⁷ Customers must not be required to purchase goods or services, or pay any entry fee, in order to take part in the gaming activity offered by the business, in order to participate in the gaming activity.¹⁸ Otherwise, the sweepstakes offered by these Internet cafes would simply be illegal lotteries.¹⁹ Thus, on its face, the Game Promotion Statute applies to the existing Internet cafés, which allow customers to participate in the sweepstakes without purchasing Internet time. This requirement is met in a number of different ways, by different operators, but most establishments permit customers to request a certain number of free ‘chances’ upon request, without requiring any purchase of Internet time.²⁰

Should a Florida game promotion fulfill the previously mentioned requirements from the Department of Agriculture & Consumer Service, the promotion must still comply with the basic obligation of offering a good or service to the gaming customer.²¹ Even though the good or service in question (e.g. – phone cards, Internet time) may be perceived to be secondary to the gaming activity, the offering of such goods or services is imperative to the legality of a game promotion operation.

Notably, however, a business operating a game promotion can get into legal trouble if the consumer goods or services are incidental or illusory. The legal sufficiency of the promoted goods or services is a crucial issue that has resulted in two advisory legal opinions from the Florida Attorney General.²² In 1998, the Office of the Attorney General issued an Opinion to the public, finding that “the purchase of a telephone calling card with an attendant ticket for a sweepstakes attached that awards prizes by chance constitutes an illegal lottery pursuant to §

¹⁷ § 849.08, *Fla. Stat.* (2010) – “gambling” means whoever plays or engages in any game at cards, keno, roulette, faro or other game of chance, at any place, by any device whatever, for money or other thing of value, shall be guilty of a misdemeanor of the second degree.

¹⁸ See, §849.094(e), *Fla.Stat.* (2010). Thus the common disclaimer; “No purchase necessary” in many game promotions offered by mainstream businesses.

¹⁹ The three elements of gambling as expressed by Florida case law are: (1) a prize; (2) awarded by chance; (3) for consideration. See, *Little River Theatre Corporation v. State ex rel. Hodge*, 185 So. 855 (Fla. 1939); *Dorman v. Publix-Saenger-Sparks Theatres*, 184 So. 886 (Fla. 1938).

²⁰ The number of chances provided free of charge may impact the legal analysis. For example, if only 100 chances are provided to free players, while other players can pay for thousands of chances at a time, the free play may not be found to be on equal footing with the paid play. Thus far the Florida courts have not addressed how many chances must be provided free of charge for the business model to comply with the law.

²¹ § 849.094, *Fla. Stat.* (2010).

²² *A.G.O.* 2007-48; *A.G.O.* 98-07.

849.09 of the Florida Statutes.”²³ This business model is notably similar to that currently used by Internet cafés – however Internet time is substituted with long distance telephone time. However, the AG deemed game promotions associated with telephone cards to be illegal gambling.²⁴ Since the receipt of the prize depended on an element of chance, the machine used in the promotion constituted an illegal slot machine²⁵ as prohibited by Florida law. The Attorney General’s office found that although the device in question did provide a good to the customer (i.e. – the calling card), the “incidental delivery of merchandise will not remove a machine from the proscriptions of section 849.15,” citing *Deeb v. Stoutamire*.²⁶ Oddly, no attempt was made to explain this conclusion, or reconcile it with the plain wording of the Statute, which makes no reference to “incidental” delivery of merchandise, as compared with some other form of delivery.

Subsequently, in 2007, the Florida Attorney General’s Office once again visited the issue of whether telephone card sweepstakes games violated the State’s gaming laws. Coming to the same conclusion that it did almost a decade earlier, the Opinion found that the use of interactive computer terminals in a somewhat standard “calling card sweepstakes” promotion constituted utilization of a slot machine in violation of Florida law.²⁷ The Attorney General again relied on the “element of chance” rationale in *Deeb* in finding that the business model did not comply with

²³ A.G.O. 98-07.

²⁴ *Id.* Lotteries other than those operated by the State are generally prohibited by the Florida Constitution and by statute. Sections 7 and 15, Art. X, *Fla. Const.*; § 849.09, *Fla. Stat.* Neither § 849.09, *Fla. Stat.* (2010), which prohibits lotteries, nor the Constitution actually defines the word “lottery.” *M. Lippincott Mortgage Investment Co. v. Childress*, 204 So.2d 919, 921 (Fla. 1st DCA 1967); *Blackburn v. Ippolito*, 156 So. 2d 550, 553 (Fla. 2d DCA 1963), *cert. denied*, 166 So. 2d 150 (Fla. 1964).

²⁵ § 849.16, *Fla. Stat.* (2010) describes the prohibited machines or devices as follows: (1) Any machine or device is a slot machine or device within the provisions of this chapter if it is one that is adapted for use in such a way that, as a result of the insertion of any piece of money, coin, or other object, such machine or device is caused to operate or may be operated and if the user, by reason of any element of chance or of any other outcome of such operation unpredictable by him or her may: (a) Receive or become entitled to receive any piece of money, credit, allowance, or thing of value, or any check, slug, token, or memorandum, whether of value or otherwise, which may be exchanged for any money, credit, allowance, or thing of value or which may be given in trade; or (b) Secure additional chances or rights to use such machine, apparatus, or device, even though it may, in addition to any element of chance or unpredictable outcome of such operation, also sell, deliver, or present some merchandise, indication of weight, entertainment, or other thing of value.

²⁶ 53 So.2d 873, 874 (Fla. 1951) (A coin operated “crane game” qualifies as a slot machine or device within the meaning of Ch. 849, *Fla. Stat.*)

²⁷ § 849.016, *Fla. Stat.* (2007).

the Game Promotion Statute.²⁸ Since the award of the prize was governed by chance, and supported by consideration, the elements of gambling were present. The Advisory Opinion concluded that machines which determined sweepstakes winners by chance may be characterized as slot machines which are illegal in Florida.²⁹ However, determination of whether a particular game or business model violates any of the provisions set forth in Chapter 849, *Fla. Stat.* (2010), is a judgment that must be made by local law enforcement based on the particular facts of each case.³⁰

While operators of many Florida gaming establishments assert that they are not violating the law, the authorities often take a contrary view. Numerous raids and arrests have occurred throughout the State. Local law enforcement officials are likely concerned with the fact that these Internet sweepstakes cafés “look” and “feel” too much like illegal gambling, even if their operation may be technically permitted by Statute. Considering the volume of Internet cafés operating throughout the State, it is only a matter of time before the legalities are clarified – either through new legislation or via court decisions.

Prosecutors may fear pushing the issue too far, because that will ultimately force a court to decide – one way or the other. This concern may be partially responsible for the fact that most raids on these establishments do not result in convictions or published court opinions.

The risks are substantial to operators caught up in a criminal prosecution, however. Any gambling offense can constitute a predicate act, triggering application of serious criminal charges including money laundering, conspiracy and racketeering. These offenses can result in up to thirty years imprisonment, tens of thousands of dollars in fines, and possible forfeiture of the café’s business assets.³¹

Given the public’s continued demand for more gambling activity in Florida, Internet café operators will almost certainly continue to test the boundaries of the Game Promotion Statute in

²⁸ *State Department of Business and Professional Regulation, Division of Alcoholic Beverages v. Broward Vending, Inc.*, 696 So.2d 851 (Fla. 4th DCA 1997) (“In the instant case, the owner of the machine admitted that chance is an element of the game. Indeed, if a player does not manipulate the levers to improve the score, the machine is preset for the player to win 55% of the time, although that percentage could be modified by an adjustment of the machine. While skill will significantly improve the player's winning percentage, it does not eliminate the element of chance in the machine itself. The machine is not like the bowling machine, which requires solely the skill of the player to slide the puck and knock down the pins, the machine merely tabulating the score. Here, the game is set to play itself and to record a certain win/loss ratio. Thus, the element of chance is inherent in the game.”)

²⁹ *A.G.O.* 2007-48

³⁰ *Id.*

³¹ § 895.04, *Fla. Stat.* (2010); § 775.082, *Fla. Stat.* (2010).

this State. Repeal of the Statute is not a realistic option, from a political perspective, since that would significantly impact mainstream businesses seeking to use prize giveaways to promote their businesses. However, the Florida Legislature could decide to tighten up the existing Statute and make compliance with the existing safe harbor provisions much more difficult to achieve for the businesses currently operating in the gray areas. In the meantime, Florida's Internet sweepstakes café will be forced to play the odds, and hope for the best from the courts or the Florida Legislature.

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