Municipal Regulation of Internet Cafés (Electronic Sweepstakes): What Loophole?

Daniel W. Langley
Fishback, Dominick, Bennett, Ardaman, Ahlers, Langley & Geller LLP

INTRODUCTION:

For the last several years, the State of Florida and its local governments have seen the rise of internet cafés situated in stand-alone outparcels and strip malls conducting pretextual sales of internet time in order to make huge profits from casino-style electronic games they advertise as “sweepstakes.” The operators of these establishments claim that their businesses do not engage in illegal gambling or slot machine operations, but instead that they operate under a loophole in Florida’s gambling laws.

There exists a common misperception that there may exist a “loophole” in Florida’s gambling laws because of the reluctance of some law enforcement agencies and/or state attorney’s offices to investigate and prosecute these establishments for violating provisions of Chapter 849, Florida Statutes, including the slot machine prohibition contained in Section 849.16, Florida Statutes. The pervasiveness of the loophole misperception conjured by internet café lawyers and repeated by the media and state and local government officials along with the lucrative lure of gambling proceeds has encouraged the proliferation of these establishments.

In January 2012, Governor Rick Scott expressed his belief that internet cafés are currently “illegal” and said that “I don’t believe that Internet locations are legal, or should be legal.” During the 2012 legislative session, the Florida House of Representatives and the Senate

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1 Daniel W. Langley is a partner with Fishback, Dominick, Bennett, Ardaman, Ahlers, Langley & Geller LLP (“Fishback Dominick”) located at 1947 Lee Road, Winter Park, Florida 32789. Mr. Langley holds a Bachelor of Science in Finance and Real Estate, a Master in Business Administration and Juris Doctor all from The Florida State University. He is Board Certified in City, County and Local Government Law and AV-rated by Martindale Hubbell. Mr. Langley is the City Attorney for the City of Longwood and serves as Assistant City Attorney for the City of Winter Garden and City of DeBary. Mr. Langley successfully defended the City of Longwood from an inverse condemnation, declaratory judgment and injunctive relief lawsuit brought in February 2010 by an affiliate of internet café/electronic sweepstakes operator Allied Veterans of the World, Inc. Mr. Langley drafted for the City of Winter Garden one of the first municipal ordinances (adopted January 11, 2011) in the State of Florida, which prohibits the use, play, operation or possession of electronic sweepstakes devices (a/k/a commercial gaming devices) within the city’s boundaries. In the Spring of 2012, he was retained by the City of Port Orange to assist as Special Counsel in the prosecution of code enforcement violations under the City of Port Orange’s Simulated Gambling Ordinance.

Mr. Langley extends a special thanks to former Fishback Dominick associate, J. Giffin Chumley, Esq. for his valuable research and assistance in dealing with internet cafés/electronic sweepstakes matters during his time with Fishback Dominick, including with respect to some of the information contained herein.

** The opinions stated herein are the personal opinions of the author and are not necessarily those of any or all of the governmental entities he represents.

2 Lack Of Offender Prosecution (LOOPhole).

introduced conflicting bills concerning electronic sweepstakes. The House Bill (HB 3)\(^4\) proposed to close the so-called “loophole” and expressly prohibited electronic sweepstakes, making it a felony to violate the prohibition. The Senate Bill (SB 380)\(^5\) proposed statutorily authorizing electronic sweepstakes by providing for state and optional local regulation of the electronic sweepstakes industry. The lucrative proceeds from this new so-called “loophole” gaming industry are, in part, what drove the Florida Senate in rejecting the House bill based on an argument that these sweepstakes operations create much needed jobs in a weak economy. Both the House of Representatives and Senate bills died, therefore, the relevant provisions of Chapter 849, Florida Statutes, remain the same.

This presentation is intended to provide an update on pending litigation relating to these establishments, provide an overview of various measures being taken by local governments in response to the proliferation of electronic sweepstakes operations, and clarify Florida law with respect to these establishments.

I. LITIGATION.


Part of the reluctance to prosecute electronic sweepstakes operators for violations of gambling and slot machine statutes may stem from a jury acquittal of a criminal defendant in Marion County. The case involved the prosecution of an internet café owner for possession of a

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\(^4\) House Bill 3 attempted to close the perceived “loophole” in making it unlawful for any organization to engage in, promote, or conduct any drawing through the use of any mechanically or electronically operated machine or devices that is: “Owned, leased, or otherwise controlled by the organization or a partner, affiliate, subsidiary, contractor, or agent of the organization; and operated, played, or otherwise interacted with by an entrant to the drawing in an establishment controlled by or in any way affiliated with the operator.” Moreover, the term “game promotion,” which is illegal for an organization to engage in, was expanded to include “sweepstakes.” The House bill tweaked the definition of “slot machine or device” to include a system or network of devices that, upon activation, which may be achieved by the insertion of “an account number, code” or other “information” such that the device is “directly or indirectly” caused to operate. Finally, the House bill created a rebuttable presumption that a device or system is a prohibited slot machine or device “if it is used to display images of games of chance and is part of a scheme involving any payment or donation of money or its equivalent and awarding anything of value.”

\(^5\) In contrast, the Senate Bill 380 provided for regulation of the electronic game promotions. The Senate bill proposed to require operators of game promotions who provided electronic devices or computer terminals with video display monitors that revealed or displayed the results of a game promotion to file with the Department of Agriculture and Consumer Services “a copy of the rules and regulations of the game promotion and a list of all prizes and prize categories offered.” The filing also needed to include a separate terminal fee of $100.00 for each electronic device or computer terminal that is a component of the game promotion. Moreover, each operator of a game promotion was required to obtain a surety bond in an amount equal to the total value of all prizes offered. Additional filings prior to operation of game promotions were also required. For instance, an independent testing laboratory must provide a certification that the electronic game promotion software operates only games having a preconfigured finite pool or pools of entries; provides an entrant with the ability to participate in the absence of a purchase; does not distinguish an entrant who has made a purchase from one who has not; and uses video displays that do not determine the result. Last, the Senate bill allowed counties or municipalities to adopt provisions further regulating existing or future operators, including the authority to prohibit future operators from providing electronic devices or computer terminals with video display monitors that reveal or display the results of a game promotion or electronic game promotion.
slot machine arising from operating a business that sold phone cards and internet time along with electronic sweepstakes entries. *See State of Florida v. Jeaneen E. Crisante,* Case No. 2010-1543-CF (Fla. Marion Cty. Ct. 2010). What is not reported about this case is what Circuit Court Judge Edwin L. Scott held in his Order Denying Defendant’s Motion to Dismiss the criminal case. Before the case went to a jury, criminal defendant, Crisante filed a Motion to Dismiss along with a detailed memorandum explaining the operation of her internet café business, and that it was a legal game promotion under Section 849.094, Florida Statutes.

On October 4, 2010, Judge Scott denied the Motion to Dismiss and in his Order found that Crisante’s business “was not just in the business of selling long distance telephone time, they are also in the business of offering a chance to win a prize for consideration on a long term basis” and not “a temporary promotion.” Judge Scott’s Order stated that the sweepstakes operations as described by defendant’s own motion to dismiss were similar in operation as those found illegal in an Alabama Supreme Court case, *Barber v. Jefferson County Racing Association,* 960 So. 2d. 599 (S. Ct. Ala. 2007). The Circuit Court relied on the *Barber* case in denying Crisante’s Motion to Dismiss.

Another interesting tidbit about this case is that the defendant called a then-employee of Department of Agriculture and Consumer Services from Tallahassee to testify at trial and such employee provided favorable testimony for the defense. The former Department employee, who gave favorable testimony for the defense, is presently an attorney for the Jacksonville law firm that represented Crisante, which also notoriously represents internet cafés businesses throughout the state.

**B. Allied Veterans v. City of Longwood.**

In *Allied Veterans of the World, Inc., Affiliate 66 v. City of Longwood,* Case No. 10-CA-941-16-W (Fla. Seminole Cir. Ct. 2010), Allied Veterans, an organization claiming non-profit status, sued the City of Longwood for inverse condemnation and declaratory and injunctive relief requesting the Circuit Court to declare its operations as legal, enjoining the City from inferring with Allied’s business operations and requesting damages for taking its leasehold interests.

The lawsuit arose after a local law enforcement investigation and raid of an internet café with a sweepstakes operation as an illegal gambling and slot machine operation. After the police raid, Allied did not reopen its business operations to the public. However, despite no longer operating its business at the raided location, Allied applied for a business tax receipt (f/k/a occupational license) renewal for the following fiscal year. The City rejected Allied’s business tax receipt application based an existing city code provisions that prohibited slot machine operations within the city limits.

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6 See Order Denying Defendant’s Motion to Dismiss, pg. 4. (October 4, 2010)
7 See Transcript of MIRIAM WILKINSON trial testimony on October 15, 2010.
9 See § 205.194, Fla. Stat., requiring professions and businesses regulated by the Department of Business and Professional Regulation and other state regulatory agencies to exhibit an active state certificate, registration or license before a city may issue a business tax receipt.
Allied Veterans claimed that Sections 849.0935 and 849.094, Florida Statutes, protected their “fundraising” operation selling internet time with sweepstakes, and alleged that the City’s denial of a business tax receipt constituted a taking of Allied’s leasehold interest in the raided premises. In its Answer and Affirmative Defenses, the City challenged the legality of Allied Veterans’ operations and its non-profit status. The City aggressively pursued discovery from Allied Veterans, including numerous financial records, which Allied refused to turn over. After being ordered by the court to turn over various financial documents and information pursuant to the City’s discovery requests, instead of turning over documents, Allied Veterans voluntarily dismissed its lawsuit against the City.

C. Allied Veterans v. Seminole County.

Allied Veterans filed suit against Seminole County in the U.S. District Court for the Middle District of Florida (Allied Veterans of the World, Inc. v. Seminole County, Case No. 6:11-cv-00155-JA-GJK), asserting that Ordinance 2011-1 prohibiting the use and possession of simulated gambling devices constituted a deprivation of First Amendment rights, a violation of the Due Process Clause based on vagueness and strict liability, a violation of the dormant Commerce Clause, and is preempted by state law. Allied claims that Seminole County’s simulated gambling devices ban is a content-based restriction on speech.

On May 6, 2011, Judge John Antoon II entered an order denying Allied Veterans’ request for a preliminary injunction, noting that Allied Veterans had failed to demonstrate that it has a substantial likelihood of success on the merits of its case. The district court concluded that the ordinance regulated conduct—not speech. The court stated that the ordinance in no way prohibits access to the internet; it only regulates the simulated gambling devices. Furthermore, although the games played at Operator-Plaintiffs’ establishments may constitute protected speech, the Ordinance only bans the games if all elements of the definition of "simulated gambling device" are present. None of the video games at issue are banned on their own - only the playing of such a game in conjunction with the possibility of a payoff is banned. Therefore, Operator-Plaintiffs are free to provide the video games to their patrons and their patrons are free to play them—and thus make and receive whatever protected message is communicated by the video game—so long as the games are not associated with a payoff.

Allied Veterans sought an interlocutory appeal of the district court’s denial of the preliminary injunction and a stay of trial court proceedings while the appeal is pending from the 11th Circuit Court of Appeal. On September 8, 2011, Judge Antoon not only denied the request for a stay of trial proceedings pending appeal, in his Order, Judge Antoon did a detailed analysis once again holding that Seminole County’s Ordinance is a constitutional regulation not aimed at suppressing speech. Judge Antoon said that Seminole County’s stated purpose of trying to regulate the secondary effects caused by establishments that utilize simulated gambling devices such as disturbances of the peace and good order of the community and hazards to the public health, safety and general welfare of its citizens, is a substantial interest that was undoubtedly within the power of the County to regulate, and the banning simulated gambling devices certainly furthers this interest. The court further stated that even if there were an incidental

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burden on speech caused by the ordinance, it would be “no greater than is essential, and therefore is permissible” because the ordinance is a “neutral regulation [that] promotes a substantial government interest that would be achieved less effectively absent the regulation.”

On March 21, 2012, the 11th Circuit Court, affirmed the district court’s denial of a preliminary injunction by finding that the district court did not abuse its discretion in denying the preliminary injunction.

During the course of the interlocutory appeal, the County propounded numerous document and interrogatory discovery requests upon Allied, which of course Allied refused to comply. The County sought and received an order compelling Allied to produce a substantial portion of the information the County requested.

On May 15, 2012, interestingly, Allied Veterans filed a Motion for Voluntary Dismissal of its claims against Seminole County claiming that on April 30, 2012, Allied transferred ownership of its Seminole County business operations to Digitrac, Inc., and that the new owner does not wish to pursue the litigation. Allied claims that its voluntary dismissal from the litigation will not affect the ultimate issues for decision in the litigation by virtue of the fact that several intervenors remain parties to the litigation and will continue to prosecute the claims asserted in the complaint. Once again, Allied Veterans attempts to run from litigation it filed after it is compelled to produce financial information. Seminole County is opposing Allied Veteran’s Motion for Voluntary Dismissal.

D. City of Jacksonville v. Calvin Smith d/b/a Smitty’s Internet Bar.

The City of Jacksonville adopted an ordinance regulating electronic gaming devices, which in part, requires obtaining a permit and payment of a permit fee by electronic gaming device operators. On August 26, 2011, the City of Jacksonville issued a citation to Calvin Smith for operating an electronic gaming device within his Smitty’s Internet Bar business without a permit in violation of Section 156.104, City of Jacksonville Ordinance Code.

The citation was challenged by Smith in County Court (City of Jacksonville v. Calvin Smith d/b/a Smitty’s Internet Bar, Case No. 16-2011-IN-015903). Smith filed a motion to dismiss the citation asserting that the ordinance regulating electronic gaming devices is impliedly preempted by Sections 849.0935 and 849.094, Florida Statutes, because a comprehensive scheme existed for the regulation of game promotions at the state level. The City argued that its ordinance regulates electronic gaming devices not already regulated by the State of Florida, and its regulation is not inconsistent with Sections 849.0935 and 849.094, Florida Statutes.

On April 4, 2012, Duval County Judge, John A. Moran issued his Order Denying Motion to Dismiss and Finding The Jacksonville Ordinance Code Constitutional. The judge held that state statute does not address the use of electronic gaming devices in conducting game promotions or drawings, and that Jacksonville’s ordinance does not prevent the operator from complying with state statute, and therefore, no conflict exists between the ordinance and the state regulation. Further, the judge held that Jacksonville was not preempted from regulating electronic gaming devices because state regulations set forth in Sections 849.0935 and 849.094,
Florida Statutes, were not detailed and comprehensive as to impliedly preempt the entire field of regulation to the state.


For years, Allied Veterans has made statements to government entities and in pleadings and documents filed in court that Allied and its affiliates are charitable organizations that raise money for veterans’ causes. The Department of Agricultural and Consumer Services (Department or FDACS) took the position that Allied Veterans and its internet café centers are subject to Chapter 496, Florida Statutes, the Solicitation of Contributions Act. The Department demanded Allied Veterans register with the Department and submit its financial records and tax returns to the Department in accordance the requirements of Chapter 496, Florida Statutes.

Curiously, in order to avoid compliance with Chapter 496, Florida Statutes, Allied Veterans took the position that it is not a charitable organization in a declaratory judgment lawsuit it filed on November 4, 2011 against the FDACS. Allied said it is a private membership veterans group merely voluntarily engaging in charitable acts with its own resources from time to time, and not organized for the purpose of engaging in charity or performing charitable acts.

In its Motion to Dismiss, the Department reminded Allied Veterans that in Allied’s Verified Complaint for Declaratory and Injunctive Relief in its federal case against Seminole County, Allied claimed that its primary mission is to assist with veterans’ causes by advocacy, fundraising and making donations to veterans’ health care and it has numerous affiliates throughout Florida to assist with charitable purposes through fundraising. The case is still pending, but venue was transferred to Leon County in May 2012.

F. Megan Crisante v. Jim Coats, individually and in his Official Capacity as Sheriff of Pinellas County, Florida.

On September 2, 2011, Megan Crisante and PMP Café LLC d/b/a Palm Harbor Internet brought a federal lawsuit against Pinellas County Sheriff Jim Coats and two detectives with the Pinellas County Sheriff’s Office in the Middle District of Florida, Tampa Division. The complaint was brought pursuant to 28 U.S.C. § 2201 and 42 U.S.C. § 1983, seeking a judgment declaring Sheriff’s criminal investigatory actions against the plaintiff to be unconstitutional under the First, Fourth, and Fourteenth Amendments to the United States Constitution and seeking damages. On May 2, 2012, the federal court issued an Order granting, in part, the Sheriff’s Motion to Dismiss, which dismissed the plaintiffs’ First Amendment and injunctive relief claim with prejudice and dismissed plaintiffs’ Equal Protection and Replevin counts.

13 Megan Crisante v. Jim Coats, individually and in his Official Capacity as Sheriff of Pinellas County, Florida, Case No. 8:11-CV-2007-T-17TBM (Fla. Middle Dist Ct.).
without prejudice. The judge relied upon and agreed with Judge Antoon’s orders in the *Allied Veterans v. Seminole County* case in its dismissal of the First Amendment claims with prejudice.

**G. Other Case Law/Attorney General Opinions.**

- *Little River Theater v. State ex rel Hodge*, 185 So. 855 (Fla. 1939) (holding a drawing to attract customers into a theater even when no purchase was necessary, was consideration to support a charge of illegal lottery).
- *Deeb v. Stoutamire*, 53 So. 2d 873 (Fla. 1951) (finding a coin operated miniature mechanical bowling alley machine devised to conform to the mechanics of bowling was a game of skill of player, not an illegal slot machine; element of unpredictability was not inherent in the machine).
- *PPI, Inc. v. Fla. Dept. of Business & Reg.*, 698 So. 2d 306, (Fla. 3rd DCA 1997) (stating that exceptions to criminal laws must be strictly construed against person claiming the exception).
- *Fla. Atty. Gen. Op. 055-289* (October 31, 1955) (relying on *Little River Theater* case to opine that a national soap company’s free sweepstakes contest attracting participants to retail businesses to collect stamps was an illegal lottery).
- *Fla. Atty. Gen. Op. 1998-07* (coin operated "crane game" having an unpredictable outcome or chance which is inherent in the machine qualifies as a slot machine or device).

**II. LOCAL GOVERNMENT ORDINANCES**

**A. Prohibition of Electronic Gaming Devices a/k/a Commercial Gaming Devices or Simulated Gambling Devices.**

The following local governments have adopted a prohibition on the operation and possession of electronic gaming devices.

1. Winter Garden
2. Seminole County
3. Orange County
4. Baker County
5. Port Orange

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14 ** Denotes ordinances that are based on City of Winter Garden Ordinance 11-03 adopted January 11, 2011.
These ordinances seek to prohibit the types of electronic gaming payoff devices employed by internet cafés offering sweepstakes or game promotions. The ordinances seek to (1) eliminate any perceived ambiguity that internet sweepstakes operations are somehow legal under Chapter 849, Fla. Stat.; (2) operate in harmony with existing state gambling laws; (3) avoid prohibiting internet access businesses; and (4) avoid inadvertently outlawing commonly accepted games and gambling simulations not involving commercial payouts (e.g., smartphone applications, home video games, arcade games, etc.).

The key to ordinances prohibiting the electronic gaming devices used by internet cafes with sweepstakes operations is the definition of device being prohibited. For example, the Winter Garden ordinance defines a “commercial gaming device” as follows:

*Commercial gaming device* means any electronic, mechanical or electromechanical device that, by the use or insertion of coin, bill, token, slug, form of payment, passcode, electronic or magnetic card in conjunction with the device or other reader or system connected or networked to the device or with the aid of some physical act by the user or commercial establishment representative, the device will allow an operator to use, play or operate the device such that the device displays simulated or actual games of chance, slot machine games, spinning wheels, line ups or arrangements of objects, symbols, colors, fruit, numbers or letters, or any game known as or similar to keno, roulette, faro, game at cards, poker, blackjack, “Fruit Paradise,” “New Cherry,” “Fruit Bonus,” “Triple Jack,” “Magical Odds,” “Mystery J&B,” “Klondike,” or “Reel of Fortune” in such a way as to display, disclose or reveal whether the user is to receive or become entitled to receive a payout, jackpot, or prize, which may include money, credits, tokens, or anything of value, or anything that may be exchanged for money, credits, tokens or anything of value, regardless of whether such payout, jackpot, or prize is made automatically from the device or other reader or system connected or networked to the device, or manually, and such device is located and used, played or operated in or at a commercial establishment in connection with the promotion, sale or purchase of good(s), product(s) or service(s). The term commercial gaming device further includes, without limitation, a “slot machine” as defined by Section 849.16, Florida Statutes. “Commercial gaming device” shall not be construed so as to preclude the lawful use or possession of: (i) reverse vending machines authorized pursuant to Section 849.16(2), Florida Statutes, (ii) amusement games or machines authorized pursuant to Section 849.161, Florida Statutes, (iii) bingo, instant bingo or pull tab machines or dispensers operated in accordance with Section 849.0931, Florida Statutes, (iv) a State of Florida lottery device authorized by Florida Statutes, or (v) any other device expressly authorized by and complying with the Florida Statutes and the Florida Administrative Code. Commercial gaming device shall not be construed to include devices not otherwise prohibited by general law that are not located in or at a commercial establishment and are used, played or operated for non-commercial purposes (i.e., not in connection with the promotion, sale or purchase of goods, products or services).

The City of Winter Garden ordinance and other similar municipal ordinances provide the city with one or more of the following remedies or actions if a violation occurs: (i) institute code enforcement proceedings and prosecute code violations against the violator and the property owner of the real property where the violation occurs; (ii) prosecute the violator for a criminal misdemeanor punishable by a fine not exceeding $500.00 or imprisonment for a term not exceeding 60 days, or by both such fine and imprisonment in the discretion of the court; (iii)
issue a civil citation; and (iv) institute any appropriate action to bring about compliance or remedy, including but not limited to, instituting an action in court to enjoin violating actions, in which case the violating person shall be liable to the City for reimbursement of the City’s attorneys’ fees and costs concerning such action.

B. Permitting and Regulating Electronic Gaming Devices.

1. City of Jacksonville.

   The City of Jacksonville’s current Code of Ordinances provides for the regulation of electronic gaming devices utilizing a series of permitting requirements. The relevant provisions are found at title VI, chapter 156, sections 156.101-156.112. The City of Jacksonville requires all operators using electronic equipment to conduct a drawing by chance conducted in connection with the sale of a consumer product or service, sweepstakes or game promotion to obtain a permit from the Department of Neighborhoods’ Office for each such premise. The permit is valid for one year. The City of Jacksonville limits the total number of permits issued to 20. All applications require a $500.00 application fee, but the following additional permit fees are also required: 1) an Electronic Drawing and Game Promotion Fee of $2,000.00 for Premises with more than five pieces of Electronic Equipment, or $200.00 for Premises with five or fewer pieces of Electronic Equipment, per year; and 2) an annual fee of $50.00 per piece of Electronic Equipment.

   The City of Jacksonville also strictly limits exterior signage of the establishments. Exterior signage is limited to the advertisement of the consumer product and/or service sold on the Premises, and that a sweepstakes held in connection with the sale of said consumer product and/or service is offered. No signs are allowed to be posted on the exterior of the Premises that suggest gambling takes place on the Premises or displays any image commonly associated with slot machines. Moreover, alcoholic beverages and minors are not allowed in the establishments. There is also a number limitation on Electronic Equipment such that establishments shall not operate more than 50 pieces of Electronic Equipment unless Permit Holders were doing so on or before January 1, 2010.

2. Leon County.

   Leon County regulates simulated gambling devices pursuant to the Leon County Code of Ordinances, chapter 11, article XXIII, sections 11-800-11-814. Leon County’s regulation is also based on a series of permitting and fee requirements. Permits are valid for one year and require an application fee of $500.00. Permits are limited to ten for the entire county. Additional permit fees are based on a sliding scale for the number of devices in the establishment. An establishment operating 1 to 20 devices must pay $2,500.00; 21 to 40 devices must pay $5,000.00; 41 to 60 devices must pay $7,500.00; 61 to 80 devices must pay $10,000.00; and 81 to 100 devices must pay $12,500.00. Each establishment is also required to

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15 The City of Jacksonville ordinance was held constitutional by the Duval County Court in City of Jacksonville v. Calvin Smith d/b/a Smitty’s Internet Bar, Case No. 16-2011-IN-015903.

16 Neighboring Wakulla County has an ordinance similar to Leon County’s ordinance regulating simulated gambling devices.
pay an annual inspection fee of $50.00. Permit holders, unless operating prior to June 15, 2011, must not operate more than 100 simulated gambling devices in the establishment.

Exterior signage requirements must be limited to the advertisement of the consumer product and/or service sold at the facility. No signs may be posted that suggests gambling takes place or displays any image commonly associated with slot machines. The establishments are closed to minors and alcoholic beverages are prohibited. Moreover, the gaming businesses must not operate between the hours of 2:00 a.m. and 7:00 a.m.

3. **Zoning Operations to Particular Area.**

Another way of regulating internet cafés with sweepstakes operations would be to restrict the permitted location of such businesses to a limited area by zoning regulations. For example, the City of DeBary has permitted “establishments offering on-site internet or computer access, or phone card sales, the primary activity or business of which is the sale of internet, computer or phone access or time for compensation or value whether for profit or not” only within its industrial (I-1) zoning classification. The cities of Orange City, Deltona, Lady Lake and Gulf Breeze and Volusia County also have zoning regulations concerning internet cafés.

III. **CURRENT STATE LAW PROHIBITS INTERNET CAFÉS ELECTRONIC SWEEPSTAKES OPERATIONS – INVESTIGATE & PROSECUTE.**

A. **HOW INTERNET CAFÉ SWEEPSTAKES OPERATE.**

An internet café or business center with sweepstakes ostensibly sells internet access time to patrons. With each purchase of internet or computer time, patrons receive a number of “sweepstakes entries” (e.g., 100 sweepstakes entries per $1.00 of internet time purchased). Purchased internet time and sweepstakes entries are then tracked through a plastic card, computer account, or other device, whereupon the patron may take that card or account to one of many computer terminals set up throughout the establishment. In many cases, establishment employees instruct patrons as to how they may replenish their accounts and earn additional sweepstakes entries. At some cafés, a café employee may initiate the session at a computer station via a switch or other toggle. Some cafés or business centers require their patrons to sign a form stating that the patron understands that he/she is purchasing internet time and is not, in any way, engaging in illegal gambling as defined by Florida law. Other cafés provide patrons with a limited number of “free” sweepstakes entries each day (e.g., 100 entries per day), claiming that consideration is paid for internet time rather than sweepstakes entries.

Upon purchasing internet time and receiving sweepstakes entries, patrons are invited to use their internet time in the establishment or “reveal” their sweepstakes entries at one of many computer terminals provided throughout the establishment. Some sweepstakes operators claim

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17 Section 3-107, City of DeBary Land Development Code.
18 Section 110-840, City of Deltona Code of Ordinances, appears to be a use-based ban on businesses that use slot machine like devices.
19 Section 72-290(12), Volusia County Code of Ordinances, prohibits “sweepstakes centers” with its thoroughfare overlay zone and within 1,000 feet of a house of worship, school, park, or day care center. Section 72-241, Volusia County Code of Ordinances, permits sweepstakes centers in certain business zoning classifications.
that the entries provided to each patron are predetermined winners and losers. A patron need only “reveal” his/her entries at a terminal to find out whether one or more of his/her entries are a winner.

Sweepstakes operators also claim that the terminals and their simulated games are merely incidental to finding out whether one has received a winning ticket and that patrons have the option of having all of their entries instantly processed at the front desk to determine whether they have won anything. In one investigation, investigators noted that most, if not all, patrons instead opt to reveal their entries at the computer terminals, which feature simulations of popular games of chance such as spinning reel slot machines, keno, and roulette. Patrons intently watch the screen featuring the simulation to see if they have won. Patrons may choose to reveal each entry individually or select multiple entries to be revealed simultaneously, thus ostensibly increasing their chances of obtaining a winning result in a single game. Though the proprietors claim that each entry is predetermined a winner or loser and that the game simulations merely provide an entertaining element of suspense, the patron does not know whether he/she holds one or more winning entries until the sequence finishes and the terminal displays a result. Interviews with patrons have revealed that many patrons are unaware of the allegedly predetermined nature of the sweepstakes and instead believe that each “play” might randomly result in a “win.”

Investigations of an internet café and business centers reveal that very few, if any, patrons appear to actually be using their internet or computer time. Rather, most patrons primarily use the computer terminals to “reveal” their sweepstakes entries and, upon running out of entries, return to the front desk or an automated kiosk to purchase additional internet time to receive more sweepstakes entries. Typically, patrons accumulate large quantities of unused internet time while remaining at the café to “reveal” entries. Many patrons are unaware of how much internet time they have purchased. Undercover investigations of some establishments have revealed that internet café employees and staff repeatedly explain to patrons how they may acquire more sweepstakes entries but neglect to instruct patrons as to how they may use the internet or find out how much internet time is remaining on their accounts. Regardless, patrons are typically apathetic toward their amassed internet time and are instead primarily interested in the number of sweepstakes entries remaining on their accounts.

Often, prizes are not dispensed at the terminals. Rather, a patron must take his/her winning entry to the front desk or cashier to receive his/her prize money. The establishment awards prize money in cash and may offer to exchange such winnings for additional internet time and “sweepstakes” entries.

B. WHY INTERNET CAFÉ SWEEPSTAKES ARE ILLEGAL.

There are numerous prohibitions and regulations concerning gambling under both Florida and federal law; however, the following two prohibitions significantly impact internet cafés and business centers that offer sweepstakes:

1. **Illegal Lotteries.**

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20 Absent independent verification, there is no way to really know whether sweepstakes entries are truly predetermined winners or losers.
Chapter 849, Florida Statutes, establishes Florida’s prohibitions concerning the practice commonly known as “gambling” or “gaming.” The most basic form of gambling is a lottery, which is comprised of the following elements:

i. An offer of a prize;
ii. Awarded by chance;
iii. For a consideration.

Nearly all practices considered by the courts to constitute illegal gambling are defined by the foregoing three elements. Internet cafés claim that their operations do not constitute gambling because either there is no element of chance (pre-determined) or there is no consideration paid for paying the sweepstakes (some free entries and sweepstakes entries free with purchase of internet time).

a) No Purchase Necessary.

“No purchase necessary” is nearly as familiar a tagline as “batteries not included.” We hear it so often in advertising materials that we seldom think about what it means or why so many companies seem to encourage us to enter their contests without buying their products. “No purchase necessary” is an effort to avoid the consideration prong of the unholy trinity of illegal lotteries: (1) an offer of a prize; (2) awarded by chance; (3) for consideration. If no purchase is necessary to participate in a sweepstakes, operators argue that the element of consideration fails, because the “pay to play” element of gambling is lacking.

The Florida Supreme Court has considered this argument in the context of theater “bank night,” during which a theater operated a lottery to attract patrons. Though no purchase was necessary to participate in “bank night,” the Florida Supreme Court found the operation to be an illegal lottery, by stating:

“The results, the success of the plan in swelling the patronage, and consequent income through the scheme of chance are the final proof of a consideration paid and a consideration received. Certainly it cannot be questioned that such is the result intended by the bank night operator. Without it, the bank night would speedily cease to be. That the prize may go to someone who has paid nothing does not negative the fact that many have paid for their chance. Because some have not been drawn into the gambling phase does not render it any the less a lottery, with whatever of evil it engenders, as to the large public who have paid.”

Similarly, internet cafés typically provide a certain, albeit limited, number of free sweepstakes entries per day (e.g., one internet café limited its patrons to 100 free entries per day – the same amount of entries afforded with a $1.00 purchase of internet time). Furthermore, many doubt that the sweepstakes internet café business model would remain viable if stripped of

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22 *Little River Theatre Corp. v. State*, 185 So. 855, 858 (Fla. 1939); see also § 849.09, Fla. Stat.; AGO 2008-35.
23 *Little River Theatre Corp. v. State*, 185 So. 855, 860-61 (Fla. 1939) (quoting *Grimes v. State*, 178 So. 73, 74 (Ala. 1937)); see also *Gulf Theatres, Inc. v. State*, 185 So. 862, 863 (Fla. 1939).
its sweepstakes element. As noted by the Florida Attorney General, the incidental delivery of merchandise will not excuse a violation of § 849.15, Fla. Stat.24

b) No Element of Chance.

Sweepstakes operators often argue that their “predetermined” sweepstakes operations carry no element of chance, because the winning entries are pre-designated as such and are known to the operators prior to distribution.

This argument fails to recognize that the element of chance in gambling is analyzed from the viewpoint of the gambler and not the house.25 Otherwise, owners of gambling houses could regularly “rig” or otherwise “fix” outcomes to avoid prosecution. Obviously, customers of internet cafes do not know in advance whether they are going to win the sweepstakes, thus there is an element of chance involved.

2. Prohibited Slot Machines.

Separate and apart from its ban on gambling, Florida26 also prohibits the use or possession of “slot machines,” which are defined in § 849.16(1), Fla. Stat., as:

i. Any machine or device adapted for use

ii. Such that as a result of the insertion of any piece of money, coin or other object

iii. Is caused to operate; and

iv. If the user, by reason of any element or chance or of any other outcome of such operation unpredictable by him or her.

v. May receive or become entitled to receive any piece of money, credit, allowance, or thing of value or which may be given in trade; or

vi. 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.

Mere ownership or possession of a “slot machine” is sufficient to violate § 849.15, Fla. Stat.27

The internet café operations that the author is familiar meet every element of a slot machine. The statutory definition of slot machine expressly provides that a device remains a slot machine even if in addition to any element of chance or unpredictable outcome of such operation (i.e. uncertain payout), the user also is sold,

24 AGO 2007-48; see also AGO 1998-07 (distribution of sweepstakes tickets attached to phone cards through vending machines constituted both an illegal lottery and an illegal use of slot machines).
25 See § 849.016(1), Fla. Stat. (defining the element of chance as being unpredictable by the gambler).
26 Several municipalities have existing code provisions that mimic state law by prohibiting slot machine operations.
27 It is unlawful “to manufacture, own, store, keep, possess, sell, rent, lease, let on shares, lend or give away, transport, or expose for sale or lease, or to offer to sell, rent, lease, let on shares, lend or give away, or permit the operation of, or for any person to permit to be placed, maintained, or used or kept in any room, space, or building owned, leased or occupied by the person or under the person's management or control, any slot machine or device or any part thereof.” § 849.15(1)(a), Fla. Stat.; see also § 849.23, Fla. Stat. (penalties).
delivered or presented with some merchandise (i.e. internet time or phone card), indication of weight, entertainment, or other thing of value.\(^{28}\)

Internet cafés commonly divide the tasks of purchasing internet time, receiving sweepstakes entries, revealing sweepstakes entries and prize redemption between and among several terminals and employees. The idea here is to spread out the component parts of the operation among several machines or persons so to try to avoid one or more elements comprising an illegal slot machine under Florida law being lacking at any given point in the sweepstakes operations. Though the issue has yet to be determined in Florida, the Alabama Supreme Court, in a well-reasoned opinion, examined a sweepstakes operation and concluded that “a device is no less a slot machine because it operates within a network, that is, because it shares computer-processing equipment with a number of similar devices.”\(^{29}\)

3. **Often Cited Exemptions Do Not Authorize Illegal Activity.**

Typically, operators of internet cafés and business centers advocate the legality of their sweepstakes operations via the following exceptions under state law.

a) **The Charitable/Non-Profit Organization Exception**

Section 849.0935, Fla. Stat., provides charitable and non-profit organizations with a specific exemption from prosecution for violation of Florida’s illegal lottery law (i.e., § 849.009, Fla. Stat.)\(^{30}\) when conducting “drawings by chance” (e.g., charity raffles) under conditions and rules ostensibly designed to reduce the risk of fraud or other bad faith behavior. Notably, the statute defines “drawings by chance” as follows:

“an enterprise in which, from the entries submitted by the public to the organization conducting the drawing, one or more entries are selected by chance to win a prize. The term ‘drawing’ does not include those enterprises, commonly known as ‘matching,’ ‘instant winner,’ or ‘preselected sweepstakes,’ which involve the distribution of winning numbers, previously designated as such, to the public.”\(^{31}\)

Internet sweepstakes operators who claim that they are permitted to conduct gambling activities pursuant Florida’s charitable and non-profit exemptions under § 849.0935, Fla. Stat., fail to mention that:

- § 849.0935(4)(a), Fla. Stat., makes it unlawful for a charitable or non-profit organization to design, engage in, promote, or conduct any drawing in which the

\(^{28}\) See also § 849.11, Fla. Stat., prohibiting pretextual sales or gifts in conjunction with gambling.

\(^{29}\) *Barber v. Jefferson County Racing Ass’n*, 960 So. 2d 599, 609 (Ala. 2006), overruled on other grounds *Tyson v. Macon County Greyhound Park, Inc.*, 43 So. 3d 587 (Ala. 2010).

\(^{30}\) While the exception for Charitable/Non-Profit Organizations is often believed to be a catch-all exemption from prosecution under any of Florida’s gaming laws, the exception is strictly limited to excusing otherwise illegal conduct under § 849.09, Fla. Stat., and does not affect the availability of prosecution for the violation of other gaming prohibitions contained in Chapter 849 (e.g., § 849.0935 does not exempt a charitable organization from prosecution for owning or possessing a slot machine as prohibited in §§ 849.15-849.16, Fla. Stat.).

\(^{31}\) § 849.0935(1)(a), Fla. Stat.
winner is predetermined by means of matching, instant win, or preselected sweepstakes, or in which the selection of the winners is in any way rigged; and

- That § 849.0935, Fla. Stat., merely provides limited protection from prosecution under § 849.09, Fla. Stat., which statute prohibits conducting drawings by chance. § 849.0935, Fla. Stat., offers no protection from violations of other gambling laws contained in Chapter 849, Fla. Stat. (e.g., prohibitions against using or possessing slot machines under § 849.015, Fla. Stat.).

b) The “Sweepstakes Statute”

Section 849.094, Fla. Stat., governs game promotions offered in connection with the sale of consumer products and services, and prescribes certain regulations and practices for businesses that promote, conduct, or operate “game promotions.” The statute defines a “game promotion” as:

“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.”32

Internet café operators commonly claim that their sweepstakes are protected by § 849.094, Fla. Stat., which pertains to game promotions in Florida that are offered in connection with the sale of consumer products or services. Review of § 849.094, Fla. Stat., reveals no express protections from prosecution. The Florida Attorney General has similarly remarked that communications from the Department of Agriculture and Consumer Services clearly advise registrants that the fact that their filing documents have been reviewed and found complete by the department does not mean that the promotion or game is legal and fully compliant with Chapter 849, Fla. Stat.33

Further, § 849.094, Fla. Stat. does not authorize the use of slot machine or devices in conducting game promotions. Moreover, while some non-profit internet sweepstakes operators have claimed protection from § 849.094, Fla. Stat., the statute does not apply to charities.34

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32 § 849.094(1)(a), Fla. Stat.
34 § 849.094(10), Fla. Stat.