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Committee on Regulated Industries

REVIEW OF ELECTRONIC GAMING EXCEPTIONS FOR ADULT ARCADES AND GAME PROMOTIONS

Issue Description

Senators and Senate professional staff have received many complaints and comments regarding whether adult amusement arcades and electronic game promotions/sweepstakes/Internet cafes are operating legally under ch. 849, F.S., the chapter that governs gambling in the state.

During the 2008 legislative session, the Senate Regulated Industries Committee conducted two days of hearings on these issues and the Chair of the Senate Regulated Industries Committee, Senator Dennis L. Jones, D.C., requested an interim project to review the operation of s. 849.161, F.S., concerning amusement games and machines, and s. 849.094, F.S., concerning game promotions in connection with the sale of consumer products or services. The exemptions under ss. 849.161 and 849.094, F.S., are two distinct provisions and the electronic games played under each exemption are quite different.

Background

Adult Amusement Arcades

During the committee meetings, several issues were identified, such as the inability to identify the location of the adult amusement machines because they are not registered in their own tax classification, the machines are not tested or certified, it is not clear whether the machines can be manipulated internally, there is some question whether the machines operate by an application of skill, it is not clear how the maximum limitation of 75 cents on any game played is being applied, there is currently no agency overseeing or licensing these machines, it is not clear if seniors or the operators are being taken advantage of in some places, and finally, the police do not have clear rules or guidelines or legal authority to know when and if illegal gambling is occurring at these locations.

Over the past several years, law enforcement agencies have closed down or attempted to close down adult amusement arcades in Pinellas County, Hillsborough County, Panama City, Sarasota, and Jacksonville. The Broward County Sheriff's Office has also been very active in the past investigating adult arcades. The Broward State Attorney brought illegal gambling charges last year against the owner of an adult arcade who was also president of the Florida Arcade and Bingo Association. The owner was acquitted by a jury and it is not clear whether additional charges will be filed.¹

Electronic Game Promotions

Utilizing electronic machines as game promotions (also called sweepstakes or Internet cafes) is a relatively new occurrence in Florida. Operators of game promotions are required to register with the Department of Agriculture and Consumer Services (DACS) under s. 849.094, F.S. In a game promotion, a person may conduct a game of chance in connection "with the sale of consumer products or services and which the elements of chance and prize are present." The electronic game promotions usually sell phone cards or Internet time with usage minutes in connection with the game promotions. The cards are used to play an electronic gaming machine that reveals whether a player has won a prize. It is unclear to law enforcement whether these electronic gaming machines are

¹ Jon Burstein, "Patrons cheer Broward jury's decision that game room operates legally," *South Florida Sun-Sentinel*, 15, Aug. 2006, A1.

illegal slot machines or are legal under the game promotion statute. Law enforcement has conducted raids of several phone card sweepstakes and Internet café establishments and closed locations down around the state.

Findings and/or Conclusions

Senate professional staff reviewed the Florida Statutes, rules, relevant case law, other state statutes, and articles concerning adult arcades and game promotions/sweepstakes/ Internet cafes. Interviews were conducted with the staff of the Division of Pari-mutuel Wagering of the Department of Business and Professional Regulation (division), the Florida Department of Law Enforcement (FDLE), the Division of Consumer Services of the Department of Agriculture and Consumer Services, industry experts, and other interested persons. Senate professional staff also sent surveys to the 67 Sheriffs and 20 State Attorneys. (See Appendix I and II). Eight surveys were received from the State Attorneys' Offices. Thirty Sheriffs responded to the survey. Sheriffs in eleven counties did not have any adult arcades or game promotions/Internet cafes.²

Chapter 849, F.S., provides the prohibitions, guidelines, and exceptions, concerning gambling. Gambling is prohibited in Florida, with certain exceptions, by s. 849.08, F.S., which provides that “[w]hoever 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” A person who keeps a gambling house under s. 849.01, F.S., which includes keeping, exercising, or maintaining gaming tables, rooms, implements, apparatus, or other places for the purpose of gaming or gambling, is guilty of a felony of the third degree. The chapter also includes prohibitions regarding employees of gambling houses, renting houses for gambling purposes, and lotteries; and it provides for forfeiture, confiscation, liens, and penalties.

Slot Machine Gaming in Florida

Slot machine gaming was legal in Florida for approximately two years between 1935 and 1937. Chapter 17257, L.O.F. (1935), provided for three classes of “coin-operated devices;” adoption of rules and licensing by the Comptroller; and payment of licensing fees to the Tax Collector. The act was challenged in *Lee v. City of Miami*, 121 Fla. 93, 163 So.486 (Fla. 1935), on the issue of whether coin-operated devices authorized by the act were lotteries prohibited by the Florida Constitution.³ The court held that the “coin-operated devices” were not lotteries per se and could be authorized by the Legislature.

In 1937, the Legislature enacted a prohibition against slot machines. The prohibition against slot machines is codified at ss. 849.15 and 849.16, F.S.,⁴ also with certain exceptions. Section 849.15, F.S., prohibits the leasing, renting or selling of certain slot machines or other devices, “pursuant to which the user thereof, **as a result of any element of chance** or other outcome unpredictable to him, may become entitled to receive any money, credit, allowance, or thing of value or additional chance or right to use such machine or device” (emphasis supplied) Section 849.16, F.S., provides, in part:

- (1) Any device is a slot machine . . . that, as a result of the insertion of any . . . object, such . . . device is caused to operate . . . **by reason of any element of chance** or of any other outcome of such operation unpredictable by him or her, may . . . become entitled to receive any . . . thing of value. . . or
- (b) Secure additional chances or rights to use such machine . . . even though it may . . . present some merchandise, indication of weight, entertainment, or other thing of value. (emphasis supplied)

² Responses are on file with the Senate Regulated Industries Committee.

³ In 1935, the prohibition against lotteries was found in Art. 3, s. 23, Florida Constitution (1885). The prohibition is now found in Art. X, s. 7, Florida Constitution which provides:

SECTION 7. Lotteries.—Lotteries, other than the types of pari-mutuel pools authorized by law as of the effective date of this constitution, are hereby prohibited in this state.

State operated lotteries are authorized by Art. X, s. 15, Florida Constitution, which provides, in part, that “[l]otteries may be operated by the state.”

⁴ Section 849.15, F.S., was originally enacted by s. 1, ch. 18143, L.O.F. (1937), and s. 849.16, F.S., was also originally enacted in 1937 by s. 2, ch. 18143, L.O.F. (1937).

Sections 849.161 and 849.094, F.S., are exceptions to the general prohibitions against gambling and slot machines found in ch. 849, F.S. The provisions in s. 849.16, F.S., remained unchanged until 1967 when that section was amended to exempt arcade amusement centers from the slot machine prohibition in that section. The limitation that a place of business must have at least 50 or more coin-operated amusement games or machines on the premises was also included in that act.⁵

Arcade Amusement Centers

In 1984, the provisions dealing with arcade amusement centers were removed from s. 849.16, F.S., and placed in a newly created s. 849.161, F.S.⁶ The provisions relating to amusement games and machines at any retail dealer who operates a truck stop were added in 1996.⁷

Section 849.161(1)(a)1., F.S., provides that:

Nothing contained in this chapter [ch. 849, F.S.] shall be taken or construed as applicable to an arcade amusement center having amusement games or machines which operate by means of the insertion of a coin and which by application of skill may entitle the person playing or operating the game or machine to receive points or coupons which may be exchanged for merchandise only, excluding cash and alcoholic beverages, provided the cost value of the merchandise or prize awarded in exchange for such points or coupons does not exceed 75 cents on any game played.

Section 849.161(1)(a)2., F.S., provides that the provisions of ch. 849, F.S., shall not be taken or construed to apply to amusement games or machines located at “any retail dealer who operates as a truck stop, as defined in chapter 336⁸ and which operates a minimum of 6 functional diesel fuel pumps.” The machines at a truck stop may operate “by means of the insertion of a coin or other currency” and the points and coupons may be exchanged for “merchandise limited to noncash prizes, toys, novelties, and Florida Lottery products, excluding alcoholic beverages, provided the cost value of the merchandise or prize awarded in exchange for such points or coupons does not exceed 75 cents on any game played.”

An arcade amusement center must have at least 50 coin-operated amusement games or machines on the premises to qualify for this exception.⁹ The provisions of s. 849.161(1), F.S., are not applicable to a coin-operated game or device that entitles a player, by application of skill, to replay the game at no additional cost and that can “accumulate and react to no more than 15 free replays; [that] can be discharged of accumulated free replays only by reactivating the game or device for one additional play for such accumulated free replay; [and that] can make no permanent record, directly or indirectly, of free replays.”

The provisions of s. 849.161(1), F.S., do not apply to:

any game or device defined as a gambling device in 24 U.S.C. s. 1171, [sic]¹⁰ which requires identification of each device by permanently affixing seriatim numbering and name, trade name, and date of manufacture under s. 1173, and registration with the United States Attorney General, unless excluded

⁵ See s. 1, ch. 67-203, L.O.F., codified at s. 849.16, F.S. (1968).

⁶ See s. 2, ch. 84-247, L.O.F. This act attempted to place the arcade amusement center provisions in a newly created ch. 512, F.S. (as s. 512.01, F.S., the only section in the new chapter). The Division of Statutory Revision renumbered that section as s. 849.161, F.S.

⁷ The provisions were added in three different sections in two different bills. See s. 159, ch. 96-320, and s. 79, ch. 96-323, L.O.F. Different provisions amending subparagraph (1)(a)2. and paragraph (1)(b) of s. 849.161, F.S., were also included in s. 69, ch. 96-323, L.O.F., and that version is noted in footnote 1 to s. 849.161, F.S.. For a description of multiple provisions in the same session affecting a statutory provision, see preface to the *Florida Statutes*, “Statutory Construction.”

⁸ Provisions referencing truck stops in ch. 336, F.S., was in s. 336.021(1)(c)3., F.S.; it was deleted by s. 15, ch. 97-54, L.O.F. Section 336.021(1)(c)3., F.S., provided, in part, that a “truck stop” is any retail dealer registered pursuant to chapter 212, excluding marinas, that has declared its primary fuel business to be the sale of diesel fuel.”

⁹ See s. 849.161(2), F.S.

¹⁰ Title 24 of the United States Code relates to hospitals and asylums; chapter 24 of Title 15 of the United States Code relates to transportation of gambling devices.

from applicability of the chapter under s. 1178. This subsection shall not be construed to authorize video poker games or any other game or machine that may be construed as a gambling device under Florida law.

Several different types of establishments are operating under the exemption provided in s. 849.161, F.S. There are arcade amusement centers that cater predominantly to children. ChuckE.Cheese's is an example of this type of center. These centers cater to families with young children.¹¹ Tickets can be won at the games and redeemed for prizes on-site. Facilities known as "adult amusement centers" also operate under this section. Dave and Busters is an example of an adult amusement center that includes different types of games catering to adults.¹² These games include billiards, video games, and other games where tickets can be won and redeemed for prizes on-site. Dave and Busters also serves food and alcoholic beverages to its patrons. Electronic games are also located in truck stops that have six diesel pumps. Finally, electronic games are located at what are known as "senior arcade amusement centers." The Florida Bingo and Arcade Association represent 29 of these establishments in Florida.¹³ According to the association, these arcades have been in operation since 1984. It also uses the term "penny arcades."¹⁴

Some electronic games resemble traditional slot machines but are equipped with a "skill stop button" that supposedly stops the game activity when engaged. The electronic games that resemble slot machines and use a "skill stop button" have caused concern in the law enforcement community that these games may be violating the gambling devices provisions in ch. 849, F.S.

The FDLE addressed the Senate Regulated Industries Committee concerning some of these electronic games.¹⁵ The department indicated that some adult arcades have operated in Florida without any rules, regulations, or industry norms. At issue is the use of particular types of gaming machines. The owners of adult arcade facilities, according to the department, have used vague interpretations of Florida gaming laws to open and operate what appear to be illegal gambling halls. The method of play in these adult arcades has created a grey area for enforcement and prosecution of illegal gambling across the state. The operators maintain that the devices in these adult arcades are legal under Florida law. They also maintain that the machines are not illegal gambling devices because they do not pay out in cash, they pay out only with merchandise in the form of gift cards, and operate by "application of skill" and not as games of chance.

Senior Arcades and Their Patrons

The Senate Regulated Industries Committee received testimony from seniors that frequent the senior arcades.¹⁶ The speakers stressed the importance of the facilities to the entertainment of senior citizens. They also emphasized that the seniors have a place to socialize and enjoy themselves. They enjoy the machines and can sit at the machines and play for hours. The players receive gift cards to stores, such as Publix, Wal-Mart, Walgreens, and Target. According to the testimony, the seniors can use these cards for prescription drugs, food, and eating out. The seniors indicated that they feel safe at these locations. The locations also serve free breakfast, hot lunches, hot dinners, snacks, and non-alcoholic beverages. These have been called "play pens" for seniors. The seniors indicated that the games require skill because they can choose a machine and how to play the games by "holding" the symbols on one or two of the reels in addition to stopping the reels with the skill stop button. The testimony also indicated that many of the seniors who frequent the senior arcades cannot afford to play at the "Vegas-style" slot machine casinos offered at the Broward County pari-mutuel facilities or the Seminole Tribe's facilities.

The president of the Florida Arcade and Bingo Association asserted that the senior amusement arcade centers are no different than the children's amusement arcades except that their patrons are 60, 70, and 80 years of age or

¹¹ See <http://www.chuckecheese.com/company-info> (Last visited October 31, 2008).

¹² See <http://www.daveandbusters.com/Misc/HousePolicies.aspx> (Last visited October 31, 2008).

¹³ See <http://www.floridaarcadeassociation.com/members.htm> (Last visited October 31, 2008).

¹⁴ A penny arcade, according to the association, is an eight or nine line electronic machine where the play is a penny a line so that the maximum is eight or nine cents per play.

¹⁵ Senate Regulated Industries Committee meeting, February 19, 2008.

¹⁶ Senate Regulated Industries Committee meeting, March 4, 2008.

older. In addition to providing seniors with an opportunity to socialize with persons their own age, the association indicated that the facilities usually employ five to seven persons, pay a state and local license fees for each machine, and pay 4 percent of gross sales to the Department of Revenue. According to the association, the types of machines operated at the senior arcade amusement centers by its members are the same type of machines played in the truck stops. The association also indicated that the operations of their members are legal and qualify as arcade amusement centers under s. 849.161(1)(a)1., F.S.

According to the Department of Revenue, no method currently exists to identify how much revenue the senior arcade amusement centers and the machines at the truck stops are remitting to the state because all amusement machines, including pinball games, video games, kid's games, are combined under one reporting category – coin-operated amusement machines. The Senate Regulated Industries Committee heard testimony from the owner of facilities in Bonita Springs and Naples who started her game rooms in 2004 and 2005, respectively. She indicated that she paid \$119,650 in state taxes for the facility in Bonita Springs over a three year period. At the 4 percent tax rate, that is gross revenue of approximately \$2.9 million or \$997,000 per year. The facility in Naples paid approximately \$60,000 in gross receipts taxes. Over the three year period, that is gross revenue of approximately \$1.5 million or \$500,000 per year. The facilities employ 20 persons.

Enforcement

The FDLE has also conducted its own survey of law enforcement agencies around the state. Additionally, the department has identified several issues involved in determining the legal status of these facilities based on its experience in the investigating and providing of assistance in the prosecution of adult arcades.

The department has found that some machines could be set at a variable payout rate. For example, over the past three or four years in Manatee County, law enforcement agencies seized machines in small “back room” operations of less than six machines. In 2006, larger operations were identified with machines that paid out winnings in the form of Visa debit cards and gift cards. Although the operators maintained that the machines were skill-based, the investigations determined that the machines could be set at a variable payout rate of between 55 to 95 percent. These machines were set at 55 percent. It was also determined that the machines were manufactured out-of-state and were supplied on a revenue sharing basis. The manufacturers indicated that the machines were intended for lawful entertainment purposes and not meant for gambling.

The department also found that citizens could be easily cheated of their winnings by the operators of the facilities. In 2007, the Polk County Sheriff's Office raided an adult arcade based upon citizens' complaints that citizens were being cheated. The business had approximately 50 video slot machines that accepted debit cards that were loaded with credit by the staff. The minimum bet was \$1.00. Winners were paid in cash, but complained that they did not receive any payouts unless there was at least \$50 worth of credit remaining on the debit card. Usually the machines would be reset by the attendants to cause the patrons to lose any remaining credits. These machines were manufactured out-of-state, South Carolina. The manufacturer was subsequently closed down by the South Carolina authorities.

The manufacturers/distributors can also be defrauding the operators of the senior arcade amusement centers. Some manufacturers/distributors include an electronic reduction factor installed in the machines they provide and they can manipulate the software to “skim” a larger percentage from the operator without the operator's knowledge.

The FDLE also indicated that in 2008 there have been reports of arcade closures in Delray Beach and Cape Coral. These closures are significant because patrons were never notified and therefore lost any accumulated credit that they had. Furthermore, the owners of the Cape Coral location allegedly re-opened in a different location after telling patrons that they had gone bankrupt after a burglary.

Games of Skill or Chance

One of the difficulties in enforcing or applying the gambling restrictions and exemption in ch. 849, F.S., is determining whether a device or machine is a game of chance or a game of skill. The department indicated that,

after reviewing reports of illegal gambling devices and operations, it is very difficult to determine in an investigation or prosecution whether the proprietors of facilities with suspect machines are in violation of Florida gambling law. The “safe harbor” exemption under s. 849.161, F.S., requires that the game or machine must entitle a person playing or operating the game or machine by application of skill to receive points or coupons that may be exchanged for merchandise. The department emphasized that skill is easy to discern when, for example, the game requires a person to roll or throw a ball into a round hole or cylinder to accumulate points, but it is much more difficult to discern skill when the game involves rotating reels on a video screen run by a computer chip on an electronic gaming machine. It is this type of electronic gaming machine that is commonly seen in the facilities that law enforcement refers to as adult arcades and that law enforcement considers illegal under ch. 849, F.S.

The department indicated that some experts assert that these electronic games are games of chance because they can be altered by the game computer while the game is being played. For example, the order that the symbols appear can be changed so that a player does not win and the jackpot does not exceed the payout percentage set by the game operator. The payout percentage is set by use of a “dip switch” located on the computer board. This is termed “morphing” in the industry. No amount of skill can overcome the game’s manipulation of the game and its result.

The representative from Gaming Laboratories International¹⁷ also testified before the committee. He reiterated the concern about the electronic gaming machines being able to “morph.” In addition he noted that the machines could also be set to “coast.” This is the situation in which the emblems continue to “spin” even though the skill stop button has been engaged. This prevents the emblems from stopping at the time the player activates the skill stop button.

According to the Florida Arcade and Bingo Association, there have been dozens of court cases over the years and no court has ruled that a machine with a skill stop button does not meet the definition of skill. The association maintains that Florida law is very clear: if the facility has 50 machines that operate by insertion of a coin, if you have an operation of skill, if the player receives points or coupons that are exchangeable for merchandise (other than cash or alcohol), and if the value of the merchandise does not exceed 75 cents per game played, then the machine is not a slot machine and falls under exemption to the slot machine provisions of ch. 849, F.S. The association asserts that the electronic machines with a skill stop button are similar to an electronic video game like Pac Man, and that the machines have different skill levels with no set payout. The player can make the determination of what symbols can be held and the player’s determination affects the outcome of the game. According to the association, payouts have never been part of the amusement machine business.

Testimony was presented before the Senate Regulated Industries Committee from a person with nation-wide casino experience, including experience at various Indian casinos. Based on his understanding of the types of machines used at the senior arcade amusement centers, he analyzed the machines to determine whether the technology and mathematics in the machines brought them under the jurisdiction of the federal Johnson Act,¹⁸ which prohibits the transportation of slot machines across state lines without state statutory approval. The Johnson Act allows the transportation of machines that are packed and sealed for transport. He concluded that the machines used at Florida senior arcade amusement centers are not slot machines because they are not equipped with the requisite technology (an EPROM chip),¹⁹ they do not have a fixed percentage of payouts, and they do not have random number generators. He asserted that each one of these elements is a necessary component of a slot machine.

The department and the survey respondents noted that the investigation and prosecution of suspected gambling devices involves great expense to law enforcement agencies in addition to the cost of prosecution. Many times the

¹⁷ Gaming Laboratories International, BMM North America, and Nick Farley and Associates, Inc., are licensed by the Division of Pari-mutuel Wagering to test the slot machines authorized by ch. 551, F.S.

¹⁸ 15 U.S.C. ss. 1171-1178.

¹⁹ An EPROM check stands for Erasable Programmable Read-Only Memory. It is a type of memory chip that retains its data when its power supply is switched off. It can be erased by exposure to UV-C light. See <http://en.wikipedia.org/wiki/EPROM> and <http://www.progshop.com/shop/electronic/eprom-programming.html> (Last visited November 3, 2008).

cases are decided on what is skill and the case is determined by a battle of costly experts to determine whether a game is played by application of skill or whether the game is a game of chance.

The department and the survey respondents recommend amending ch. 849, F.S., to provide better guidance and to clarify the types of gaming devices that qualify under the exemption in s. 849.161, F.S. The clarification should include what qualifies as a skill-based game. Such a clarification would assist law enforcement to ascertain the legality of these games. The department and the survey respondents do not believe that law enforcement and state attorneys should have to rely on competing expert testimony to determine the legality of the games. If these machines are legally authorized, then the department and the survey respondents recommend that the machines be regulated by a state agency to ensure the integrity of the games.

Regulation

Currently, slot machines are authorized in Florida only at the pari-mutuel facilities in Broward and Miami-Dade Counties.²⁰ The slot machines are regulated by the Division of Pari-mutuel Wagering. The regulation includes audits and monitoring the operation of the slot machines.²¹ Staffs from the division and the FDLE are located on the premises. The payout percentage is required to be set at no less than 85 percent.²² The machines are tested and certified by an independent testing laboratory.²³ The manufacturers of the slot machines have the machines tested and sealed before shipping them to Florida.

Another major concern with the machines in adult arcades is the ability of these machines to be tampered with to cheat both the patrons and the operators of these facilities. The department and the survey respondents noted that there is no intensive regulation similar to the regulation of the slot machines at the pari-mutuel facilities. The department and the survey respondents indicated that, without regulation and more specificity or clarification in the law regarding games of chance and games of skill, communities will continue to be unsure whether they have legal amusement centers or illegal gambling houses.

Some counties, such as Seminole County, have prevented the operation of the machines by ordinance. The department also noted that enforcement varies depending on the local jurisdiction. Some state attorneys have issued cease and desist orders against these establishments. Other state attorneys offices leave it up to the local law enforcement agencies to make the determination. The differing enforcement decisions can lead to the perception of disparate or selective enforcement and prosecution practices.

The Florida Arcade and Bingo Association noted that the amusement machines have never been regulated by a state agency. It has expressed the concern regarding previous draft legislation discussed in the House Business Regulation Committee²⁴ that any regulation should be equally applied to children's amusement arcades, machines at truck stops, and senior amusement arcades, and not aimed solely at eliminating all the senior amusement arcades. The president of the Disabled American & Vietnam Veterans does not support any regulation of the senior arcade amusement centers. He believes that the law is clear regarding the conduct of the electronic games at these centers.

Actions by Other States

States have used three methods to attempt to carve out a gambling exception for amusement games. The first is to require that the amusement game be based on skill or the application of skill. States have used different guidelines to determine the degree of required skill. The second method is to limit the payouts that an amusement machine

²⁰ Art. X, s. 23, Florida Constitution, and ch. 551, F.S. The tribal-state compact that purportedly authorized slot machines at the Seminole Tribe's casinos was held invalid by the Florida Supreme Court in *Florida House of Representatives, et al. v. The Honorable Charles J. Crist, Jr., etc.*, 990 So.2d 1035 (Fla. 2008).

²¹ Section 551.103, F.S.

²² Section 551.104(4)(j), F.S.

²³ Section 551.103(1)(c), F.S.

²⁴ The draft was discussed at the House Business Regulation Committee meeting on January 24, 2008. See [http://www.myfloridahouse.gov/Sections/Documents/loadoc.aspx?PublicationType=Committees&CommitteeId=2354&Session=2008&DocumentType=Meeting Packets&FileName=BusinessReg_01_24_08.pdf](http://www.myfloridahouse.gov/Sections/Documents/loadoc.aspx?PublicationType=Committees&CommitteeId=2354&Session=2008&DocumentType=Meeting%20Packets&FileName=BusinessReg_01_24_08.pdf) (Last visited on November 7, 2008).

may dispense. The third method is a combination of the skill requirements and limitation of payouts. However, the amusement exception has created a gray market for gambling in many states. Businesses have taken advantage of loopholes and have placed games in their establishments that may have a degree of skill, but look and play like a slot machine.

Texas provides an amusement game exception that limits payouts to “noncash merchandise prizes, toys or novelties, or a representation of value redeemable for those items, that have a wholesale value available from a single play of the game or device of not more than 10 times the amount charged to play the game or device once or \$5, whichever is less.”²⁵ Texas does not limit the games with a skill requirement. An electronic game machine known as an “eight liner” began to appear. The electronic game machine was similar to a slot machine and awarded tickets that could be redeemed for prizes. The electronic game machine was believed legal only if the payout was below the statutory \$5 limit. Law enforcement stated that it was difficult and costly to prove that operators were violating the payout limits.²⁶ The Texas Supreme Court clarified the legality of the “eight-liner” game machine in 2003 when it ruled that tickets won by the player could not be redeemed for cash, that gift certificates were the equivalent of cash, and that the electronic gaming machine was an illegal slot machine.²⁷

Ohio originally permitted games that required at least 50 percent skill. After a game called “Tic Tac Fruit”²⁸ started to appear in the state, the authorities found it difficult and expensive to prosecute the operators because of the question of skill.²⁹ In response, the Governor of Ohio issued an emergency executive order to temporarily stop the estimated 50,000 games in Ohio.³⁰ The Ohio legislature subsequently banned the games by redefining the skill-based amusement machine to prohibit machines in which the success of the player is or may be determined by a chance event that cannot be altered by the player’s actions, and limited the amount a machine could payout.³¹ Georgia also has an amusement exception similar to the one in Ohio. It limits payouts and addresses the issue of the ‘skill stop’ by providing that the players’ use of a skill stop is not considered the use of skill under Georgia law.³²

Electronic Game Promotions

In 1971, the Legislature enacted s. 849.094, F.S.³³ That section authorizes game promotions in connection with the sale of consumer products. Game promotion, under s. 849.094 F.S., means:

a contest, game of chance, or gift enterprise, conducted with-in 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...³⁴

This provision is intended to allow companies to promote their products or services with a promotion or sweepstakes. An example is McDonald’s Monopoly game. These types of sweepstakes were considered an illegal lottery until the passage of s. 849.094, F.S. There are several requirements under s. 849.094, F.S., for the operation of a sweepstakes/game promotion in Florida, including:

1. Registering the game promotion with the DACS if the prizes offered are greater than \$5,000. This requirement also includes providing a copy of rules which specify eligibility requirements, the exact

²⁵ TEX. PENAL CODE ANN. §47.01(4)(B) (2007)

²⁶ Shannon Edmunds, *Gaming, Gambling, and Eight-liners: Separating Fact From Fiction*, Texas District & County Attorneys Association, May 14, 2004.

²⁷ *Hardy v. Texas*, 102 S.W.3d 123 (Texas 2003).

²⁸ In Tic Tac Fruit, the customer puts the money in the machine, then the video fruit strips spin. When the fruit strips stop the customer is left with a nine-square box that resembles a tic-tac-toe board. The purported skill aspect is deciding, as the clock ticks, which of the squares to keep and which to not.

²⁹ Bill Toland, “Ohio ‘Skill’ Game a Cross-Border Lure,” *Pittsburg Post-Gazette*, 1 May 2006.

³⁰ Reginald Fields, “Strickland, Dann Crackdown on Video Gambling,” *The Plain Dealer*, 22Aug. 2007.

³¹ See OHIO REV. CODE ANN. S. 2915.01(AAA)(1) (2008).

³² See GA. CODE ANN. S.16-25-35 (2008).

³³ See ss. 1-9, ch. 71-304, L.O.F.

³⁴ Section 849.094(1)(a), F.S.

nature of each prize and its associated retail value, and the aggregate value of all prizes to be awarded to the DACS.³⁵

2. Establishing a trust fund or surety bond for the total amount of the prizes offered,³⁶ unless they qualify for an exception under s. 849.094(4)(b), F.S.³⁷

3. Allowing for a reasonable way for a person to enter without purchasing the product.³⁸

Game promotions are conducted by an “operator,” defined 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.”

According to the DACS, game promotions in Florida have historically taken the form of periodically operated contests, e.g., by national fast food franchise chains, television networks, Internet companies, banks, soft drink manufacturers, etc., that give away cash, cars, products, vacations, or similar prizes. Such promotions accept entries only during a stated promotional period, which is followed by a random drawing.

In 2006, DACS received a game promotion filing from a company to put free-standing game promotion machines in truck stops. The machines would dispense phone cards for \$5, and award the consumer a certain number of credits or game points which would have no cash value, but could be used to play a video game. The games resembled traditional slot machines, including three rows of three symbols (cherries, oranges, plums etc.) that appear to spin, and depending on the final configuration, the consumer could earn prize credits which could be redeemed for cash. This company filed 20 separate game promotions in February 2007. The department treated each machine as a separate game promotion. Also in that same month, DACS began to see an influx of similar game promotions in different regions of the state. As of November 6, 2008, there are at least 61 electronic game promotions registered with the DACS.

Several companies in Florida have started to offer sweepstakes promotions in connection with the sale of Internet time and prepaid phone cards. According to representatives from a company that operates sweepstakes promotions at Internet cafes, the customer at an Internet café can buy Internet time and also receive a set number of entries in a sweepstakes. The Internet time and sweepstakes entries can be placed on an electronic card that can be swiped at one of the computers in the Internet café. According to the representative, the sweepstakes have a finite number of predetermined entries and the customer is randomly assigned a set amount of these entries on the basis of the amount of Internet time the customer purchases. For example, if the customer purchased \$10 in Internet time he or she would receive 1000 entries into the sweepstakes. Representatives from the Internet café explained that the central server at the Internet café randomly picks from the predetermined, finite sweepstakes entries at the time when the customer purchases the Internet time. Whether the customer is a winner in the sweepstakes is determined prior to the customer scanning the card at the computer terminal and playing the “Vegas-style” games. If the customer is a sweepstakes winner, he or she can either receive his or her money or use the winnings to purchase additional Internet time and thereby receive more entries into the sweepstakes. The customer can also request a free entry in order to satisfy the no-purchase requirement under s. 849.094(2)(a)(1)(e), F.S.

Representatives for some of these companies recommended that the source code for these machines should be made available for inspection by a licensed testing company. They further recommended that the statutory bond be increased. They also recommended that the DACS be given the authority to certify that the games are true game promotions through testing of the source code and software in the machines. These machines are server-based machines.

³⁵ Section 849.094(3), F.S.

³⁶ Section 849.094(4)(a), F.S.

³⁷ Section 849.094(4)(b), F.S., permits the DACS to waive the requirement of a bond or escrow account if the operator has conducted game promotions in the state for not less than five consecutive years and has not had any civil, criminal, or administrative action brought against him or her in violation of s. 849.094, F.S., in the last consecutive five years.

³⁸ Section 849.094(2)(a)(1)(e), F.S., does not allow the operator to require an entry fee, payment, or proof of purchase as a condition for entering a game promotion.

In testimony before the committee, the FDLE indicated that six businesses were shut down in the northwest area of the state. Each of businesses operated on a phone-card game promotion premise. Some of the patrons stated that they were unaware that the cards had any pre-paid telephone time. The department indicated that the definition under s. 849.094, F.S., fails to provide sufficient guidance to assist law enforcement in determining whether these types of games and electronic gaming machines are illegal under this section. The department and several of the State Attorneys and Sheriffs responding to the survey consider these games and machines illegal under the slot machine provisions of ss. 849.15, 849.16, and 551.102, F.S.

In addition, the department reported it had assisted the Pinellas County Sheriff's Office in their investigation of three electronic game promotion locations. Interviews indicated that the software running the slot machine games on the computers may be managed or manipulated remotely, generally out of the state or country; in this case data was received remotely from Canada. The department also noted that many of these machines have a "kill switch" that can be activated to immediately sever the connection with the server and it deletes all data and prevents analysis of the data. The FDLE has recently shut down three electronic game promotion locations in Perry, Clermont, and Fanning Springs; and the Sheriff in Hillsborough County also shut down an electronic game promotion location in that county.

According to the DACS, there is currently nothing in s. 849.094, F.S., which explains how a game promotion must be conducted. Filing a game promotion with the DACS is not tantamount to acquiring the imprimatur of state approval, it is considered a "file and use" statute and requires no approval by the department prior to commencement. The operator receives a "package complete" letter, but the department takes no position on the validity, efficacy, advisability, or propriety of the game itself. Although the DACS monitors compliance with the statute, it has no authority to determine whether the game in fact is permissible under other gambling prohibitions.

Actions by Other States

Other states have had similar sweepstakes operations that were either banned by legislation or found by the courts to be illegal games of chance. North Carolina experienced a surge of sweepstakes-based games after the state banned video poker in 2006. The sweepstakes games were based on the purchase of a phone card. The games' operators claimed that the sweepstakes operated under the same statute as other sweepstakes, like the popular McDonald's Monopoly game sweepstakes.³⁹ Amid complaints by state and local law enforcement as the computer/video terminals spread rapidly through North Carolina, the North Carolina legislature banned these types of server-based sweepstakes and terminals in 2008.⁴⁰ The North Carolina prohibition defines a server-based game promotion as a system that meets all of the following criteria:

1. A database contains a pool of entries with each entry associated with a prize value.
2. Participants purchase or otherwise obtain by any means, a prepaid card.
3. With each prepaid card purchased or obtained, the participant also obtains one or more entries.
4. Entries may be revealed in any of the following ways:
 - a. At a point-of-sale terminal at the time of purchase or later.
 - b. At a game terminal with a display that simulates a game ordinarily played on a slot machine or a video gaming machine regulated under state law.

In 2006, the Alabama Supreme Court ruled that a sweepstakes promotion at the Birmingham Racetrack amounted to a slot machine under Alabama law.⁴¹ The racetrack had provided a cyber café with basic Internet services, Microsoft office applications, and photocopying services. When a customer purchased Internet time, he or she was also entered into a sweepstakes. The sweepstakes used a central server at the race track to determine if the customer had won or lost as soon as the Internet time was purchased by randomly selecting out of a finite amount of entries. The court found that the sweepstakes contained the three basic elements of gambling: chance, consideration, and prize. The court found that the entire network of computer terminals, servers, and programming amounted to a game of chance. It found that the customer provided consideration by paying for the

³⁹ Gary D. Robertson, "NC House Bill Bars Video-Game Style Sweepstakes," *International Business Times*, July 2, 2008.

⁴⁰ N.C. GEN. STAT. s. 14-306.3(c).

⁴¹ *Barber v. Jefferson County Racing Association*, 960 So.2d 599, 608 (Ala. 2006).

sweepstakes not the Internet time. The fact that a customer could also enter free of charge did not negate this. The awarding of a prize satisfied the final element of gambling.

South Carolina also experienced a wave of phone card dispensers in stores around the state. These machines would dispense a two-minute phone card and a pre-printed game card, which the operators claimed was designed to promote the sale of the phone cards. The phone card dispenser would display “Vegas-style” games to show whether the customer had won. The outcome was determined on the pre-printed cards and not by the machine.⁴² The South Carolina Supreme Court found that the machines were illegal slot machines and not a valid sweepstakes under South Carolina law.⁴³

Options and/or Recommendations

Based upon the findings in this report, Senate professional staff recommends that the Legislature could consider the following actions:

Regarding arcade amusement centers the Legislature could:

- Maintain the status quo and not amend s. 849.161, F.S. It appears that this course of action would be supported by the Florida Arcade and Bingo Association and proprietors of senior arcade amusement centers. However, law enforcement agencies and state attorney offices believe that changes should be made to clarify what is or is not a legal electronic gaming machine.
- Amend s. 849.161, F.S., to assure that the electronic gaming machines are not cheating the operators or the patrons by prohibiting “morphing,” “coasting,” and the setting of a payout percentage.
- Provide a range of regulation, either by the state or local governments, that could include random testing of machines at the individual amusement arcade centers, requiring the machines to be tested and sealed before a manufacturer could transport a machine into Florida, or complete regulation of the facilities through licensure, testing of the machines, and payment of regulatory fees.
- Amend s. 849.161, F.S., to restrict the amount of payouts and types of machines in a manner similar to the legislation adopted in Ohio and Georgia. This would have the effect, according to the Florida Arcade and Bingo Association, of putting the senior arcade amusement centers out of business.

Regarding game promotions the Legislature could:

- Maintain the status quo and not amend s. 849.094, F.S. However, law enforcement agencies and state attorney offices believe that changes should be made to clarify what is or is not a legal game promotion. The companies utilizing electronic gaming machines for game promotions support increased regulation of the industry.
- Amend s. 849.094, F.S., to provide for the testing of the computer source code to assure compliance with the game promotion requirements of s. 849.094, F.S., increase the bond requirements for electronic game promotions, provide for more regulatory authority by DACS, or prohibit the electronic gaming machines from having a kill switch.
- Amend s. 849.094, F.S., to prohibit “server-based” electronic gaming machines in a manner similar to the legislation adopted in North Carolina.

⁴² *Sun Light Prepaid Phone Co. v. South Carolina*, 600 S.E. 2d 61, 63 (S.C. 2004).

⁴³ *Id.* at 65

**Questionnaire on
Review of Adult Arcades Amusement Centers and Internet Cafes
The Florida Senate Committee on Regulated Industries
August 2008**

Name of person completing the questionnaire:

Title of person completing the questionnaire:

Office of person completing the questionnaire:

Telephone number of person completing the questionnaire:

E-mail address of person completing the questionnaire:

Please attach additional sheets if necessary.

Questions

1. Does your county have any adult arcade amusement centers? Yes or No.
2. If you answered "yes" to question 1, please list the names and addresses of the locations, if known:
3. Does your county have any game promotion or internet cafes? Yes or No.
4. If you answered "yes" to question 3, please list the names and addresses of the locations, if known:

If you answered no to questions 1 and 3, then do not complete the rest of this survey and return it at this time.

5. Has your office conducted any investigations or arrests at any of these locations? Yes or No.
6. If you answered "yes" to question 5, please explain the details and outcome of the investigations or arrests?
7. If you answered "no" to question 5, please explain the circumstances:
8. Is there anything that has made it difficult for your office to conduct these types of investigations? Yes or No.
9. If you answered "yes" to question 8 please explain:
10. Please provide any additional information or response that you think would be helpful in the analysis of adult arcade amusement centers and/or internet cafes, including any recommendations you may have that would improve the enforcement of legislation or opinions you may have regarding current law.

Thank you for taking the time to complete this Questionnaire. Replies to the Questionnaire by September 1,

2008, would be appreciated. Replies may be sent via e-mail to imhof.booter@flsenate.gov, fax (850) 410-5120, or regular mail to Booter Imhof, Florida Senate, 330 Knott Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100.

Any information that you provide in this survey is only intended for use by Legislative staff for the purposes of this study.

If you have any questions, please don't hesitate to contact Mr. Imhof via e-mail or at (850) 487-5957.

Florida State Attorneys Survey

Adult Arcade Amusement Centers and Electronic Game Promotions/Internet Cafes

The Florida Senate Committee on Regulated Industries August 2008

Name of person completing the questionnaire: _____

Title of person completing the questionnaire: _____

Office of person completing the questionnaire: _____

Telephone number of person completing the questionnaire: _____

E-mail address of person completing the questionnaire: _____

Please attach additional sheets as necessary.

Questions

1. Has your office investigated or prosecuted any adult arcade amusement centers? Yes or No.

2. If you answered “yes” to question 1, please list the names and addresses of the locations, if known, and the violations charged:

3. Has your office or prosecuted any electronic game promotion or internet cafes? Yes or No.

4. If you answered “yes” to question 3, please list the names and addresses of the locations, if known, and the violations charged:

5. If you answered “yes” to questions 1 and 3, please explain the details and outcome of the investigations or prosecutions?

6. Has your office seized any machines at any of these locations? Yes or No.

7. If you answered “yes” to question 6, please explain the circumstances.

8. If you answered “yes” to question 6, who has been responsible for the storage of the seized machines and has there been any storage issues? Please explain.

9. Does your office have any issues or concerns in accepting, filing, or prosecuting violations of s. 849.01, F.S., in which a business utilizes the arcade amusement statute, s. 849.161, F.S., to offer slot machine type games with the defense that it that requires “an application of skill” and offers a reward with cash, merchandize, or other types of

payouts? If you answered “yes,” please explain.

10. Does your office have any issues or concerns in accepting, filing, or prosecuting violations of s. 849.01, F.S., in which a business utilizes the game promotion statute, s. 849.094, F.S., to operate a sweepstakes business offering slot machine type games with rewards with cash, merchandize, or other types of payouts? If you answered “yes,” please explain.

14. Please provide any additional information or response that you think would be helpful in the analysis of adult arcade amusement centers and/or internet cafes, including any recommendations you may have that would improve the enforcement of legislation or opinions you may have regarding current law.

Thank you for taking the time to complete this Questionnaire. Replies to the Questionnaire by September 12, 2008, would be appreciated. Replies may be sent via e-mail to imhof.booter@flsenate.gov, fax (850) 410-5120, or regular mail to Patrick L. “Booter” Imhof, Florida Senate, 330 Knott Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100.

Any information that you provide in this survey is only intended for use by Legislative staff for the purposes of this study.

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