

STORAGE NAME: h4227b.cp
DATE: April 15, 1998

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
CRIME AND PUNISHMENT
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: HB 4227

RELATING TO: Game Promotions

SPONSOR(S): Rep. Rayson

COMPANION BILL(S): SB 2224 (Similar)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) CRIME AND PUNISHMENT YEAS 6 NAYS 3
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I. SUMMARY:

Section 849.094, F.S., regulates game promotion in connection with sale of consumer products or services.

The bill adds the term "sweepstakes" to the list of contests regulated by s. 849.094, F.S., and expands the statute's list of prohibited conduct to include:

- 1) Sending printed materials concerning a game or contest to any person who has made a request, in writing, not to be sent such materials.
- 2) Using more than one type size, type style or color of print in any letter regarding the "fact, likelihood, or odds of winning a prize."

The bill creates 3 informational requirements to appear on the outside of every envelope:

- 1) The odds of winning any prize advertized on the outside of the envelope,
- 2) The physical address of the operator, and
- 3) The toll-free number of the Florida Secretary Of State, with instructions to call the number for any questions about the contest.

The bill enhances the punishment for violations of the statute from a 2nd-degree (max. 60 days jail, \$500 fine) misdemeanor to a 1st-degree misdemeanor (max. 1 year jail, \$1,000 fine) when committed against a person over 60 years of age.

A strike-everything amendment is riding with the bill.

The effective date is October 1, of the year in which enacted.

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II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

Game Promotion Is Regulated Under the Law

Game promotion is the practice of operating a contest in which participants may win a prize or money through collecting game pieces, matching numbers or pictures, or instantly winning. Section 894.094, F.S., regulates game promotion in connection with the sale of consumer products. The law provides that no operator shall:

- a) Fail to award prizes;
- b) Circulate false or deceptive literature in connection with the game;
- c) Arbitrarily disallow any entry; or
- d) Require an entry fee or product purchase to play.
- e) Require a franchisee or lessee to participate in the promotion;
- f) Allocate a winning number to a particular franchise, period of the contest, or to a geographical area;

The law further directs operators to:

- a) Register a copy of the promotional rules with the Florida Department Of State;
- b) Maintain a trust account or a surety bond in an amount equal to the value of the prizes offered; and
- c) Provide a list of the names and addresses of the winners.

Penalties

Violations of the law are punished as a 2nd-degree misdemeanor (max. 60 days jail, \$500 fine). Operators are also subject to injunctions and civil penalties of \$1,000 per violation, brought by the Florida Department Of State.

Attorney General's Action Against Sweepstakes Operator

In February 1998 the Office of the Attorney General filed a civil action against American Family Publishers and its celebrity spokesmen, alleging that the company engaged in deceptive tactics as part of a mail campaign promoting magazine subscriptions and a sweepstakes. In such mailings, American Family and other companies operating sweepstakes have included statements that may appear to declare an individual a winner, but that are preceded by disclaimer language in a smaller type size specifying, for example, that the individual must actually hold the winning entry and return that entry within a specified period of time in order to receive the prize.

The Florida Attorney General's action was filed under the state's Deceptive and Unfair Trade Practices Act and under the game promotion statute. Among the allegations made by the Attorney General were that the company, 1) falsely suggested that a recipient must purchase a magazine subscription in order to win a grand prize, 2) falsely suggested that the mailing recipient is one of a select group vying for a prize, 3) falsely suggested that a recipient need only respond within a specified number of days and before an alternate winner responds in order to claim the grand prize, and 4) required a more cumbersome entry process for individuals who do not wish to purchase magazine subscriptions. According to the attorney general's office and newspaper accounts, some customers responded to the solicitations by traveling to Tampa, which is American Family Publisher's mailing address, in an attempt to collect prizes they thought they had won.

B. EFFECT OF PROPOSED CHANGES:

New Prohibitions

The bill adds the term "sweepstakes" to the list of contests regulated by s. 849.094, F.S., and expands the statute's list of prohibited conduct to include:

- 1) Sending printed materials concerning a game or contest to any person who has made a request, in writing, not to be sent such materials.
- 2) Using more than one type size, type style or color of print in any letter regarding the "fact, likelihood, or odds of winning a prize."

New Regulations

The bill creates 3 informational requirements to appear on the outside of every envelope:

- 1) The odds of winning any prize advertized on the outside of the envelope,
- 2) The physical address of the operator, and
- 3) The toll-free number of the Florida Secretary Of State, with instructions to call the number for any questions about the contest.

Enhancement Of Penalty

The bill enhances the punishment for violations of the statute from a 2nd-degree (max. 60 days jail, \$500 fine) misdemeanor to a 1st-degree misdemeanor (max. 1 year jail, \$1,000 fine) when committed against a person over 60 years of age.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

Yes. The Department of State will be fielding more inquiries regarding game promotions once their number is affixed to contest envelopes.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

Yes. The bill prohibits the use of multiple colors, type size and fonts when communicating the fact, odd or likelihood of winning a prize through a game promotion. The bill, also, prevents game promotion operators from sending game promotion materials to persons who have requested, in writing, not to receive them.

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

No.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

s. 849.094, F.S.

E. SECTION-BY-SECTION RESEARCH:

Section 1: Amends s. 849.094, F.S. See, Effect Of Proposed Changes.

Section 2: Provides an effective date.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

See, Fiscal Comments.

2. Recurring Effects:

See, Fiscal Comments.

3. Long Run Effects Other Than Normal Growth:

See, Fiscal Comments.

4. Total Revenues and Expenditures:

See, Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

See, Fiscal Comments.

2. Recurring Effects:

See, Fiscal Comments.

3. Long Run Effects Other Than Normal Growth:

See, Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

See, Fiscal Comments.

2. Direct Private Sector Benefits:

See, Fiscal Comments.

3. Effects on Competition, Private Enterprise and Employment Markets:

See, Fiscal Comments.

D. FISCAL COMMENTS:

The bill has not been considered by the Criminal Justice Estimating Conference. Nonetheless, the only criminal justice fiscal implication is contained in the provision which increased the punishment from a 2nd-degree misdemeanor to a 1st-degree for violations against persons over 60 years of age. Such a change amounts to **no fiscal impact**.

The Department Of State was contacted regarding the implementation of a 1-800, toll-free, telephone number as mandated by the bill for answering questions regarding all game promotions. The Director Of Licensing indicated he believed the department could comply with no new funding. If demand becomes so great that new funding is required, the department will be able to implement the phone number with its present funds until new funding can be arranged, next year.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

Because the bill involves a criminal statute, Article VII, Section 18 is inapplicable to the bill.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce anyone's revenue raising authority.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

The bill does not reduce the state tax shared with counties and municipalities.

V. COMMENTS:

Commercial Free Speech

The bill's regulation of printed materials distributed in connection with a game promotion may raise constitutional free speech questions. Such materials would constitute commercial free speech. L.E.Services v. Indiana, 646 N.E. 2d 334 (Ind. 4th DCA 1995)(Statute prohibiting game promoters from using the word "lottery" in their promotions involved constitutional rights to commercial free speech.) The U.S. Supreme Court has said that commercial free speech enjoys constitutional protection if it concerns lawful activity and is not misleading.

However, commercial free speech may be regulated if: 1) there is a substantial governmental interest in the regulation, 2) the regulation directly advances the governmental interest, and 3) the regulation is a reasonable fit that is narrowly tailored to achieve the objective. (See *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557 (1980).) The bill appears to meet these requirements.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

Strike-everything Amendment

The bill was heard by the Committee on Crime and Punishment on April 16, 1998. The committee adopted a strike-everything amendment which made the following changes:

- The materials which are subject to the bill's regulations were changed from "printed materials" to include "advertising and promotional material."
- The bill required individuals to make a written request to the operator, if they want the operator to stop sending promotional materials. The strike-everything amendment requires the operator to delete the individual's name from their distribution list, upon request.

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- The strike-everything amendment specifically exempts time-share gift and promotional offers from the bill's regulations regarding size and color of type, and name-deletion-by-request requirements.
- The bill exempts certain game operators from complying with the trust account requirement (trust account equal to the value of prizes offered) if they have been in operation for 5 years without having been the subject of a civil, criminal or administrative action, and have not been the subject of any consumer complaints. The strike-everything amendment deletes this last (underlined) requirement. Hence, the amendment exempts a game operator from the trust account requirement, even if he or she has been the subject of consumer complaints, as long as they have not been the subject of a civil, criminal or administrative action for five years.

VII. SIGNATURES:

COMMITTEE ON CRIME AND PUNISHMENT:

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