

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 86

SPONSOR: Senator Campbell

SUBJECT: Game Promotions

DATE: January 11, 1999

REVISED: 1/20/99 _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Akhavein</u>	<u>Poole</u>	<u>AG</u>	<u>Fav/1 amendment</u>
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

This bill revises the statutory requirements governing game promotions used in connection with the sale of consumer goods and services, by specifically including sweepstakes within the statute's coverage and by providing for increased criminal and civil penalties when a game promotion operator commits an unlawful practice against a person who is 60 years of age or older. The bill declares it unlawful to send game promotion advertising and promotional material to a person who has requested not to receive such materials, and it establishes some content and format standards governing certain game promotion materials.

This bill amends section 849.094, Florida Statutes.

II. Present Situation:

Deceptive & Unfair Trade Practices

Part II of ch. 501, F.S., is the "Florida Deceptive and Unfair Trade Practices Act," one of the stated purposes of which is to "protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce" (s. 501.202(2), F.S.). The act declares that such acts or practices are unlawful (s. 501.204(1), F.S.). The statute authorizes the Department of Legal Affairs and the office of the state attorney to bring: 1) an action to obtain a declaratory judgment that an act or practice violates the statute, 2) an action to enjoin violators, or 3) an action on behalf of one or more consumers for the actual damages caused by an act or practice in violation of the act (s. 501.207(1), F.S.). A willful violator of the Deceptive and Unfair Trade Practices Act is liable for a civil penalty not exceeding \$10,000 for each violation (s. 501.2075, F.S.). However, when a violator of the act willfully engages in a practice that victimizes or attempts to victimize a senior citizen or a handicapped person, and the violator knew or should have known that the practice was unfair or deceptive, the civil penalty may not exceed \$15,000 for each violation (s. 501.2077(2), F.S.).

False, Misleading, and Deceptive Advertising

Section 817.41(1), F.S., provides that it is unlawful for any person to make or disseminate any misleading advertisement. Misleading advertising includes statements that are known, or through the exercise of reasonable care or investigation could or might have been ascertained, to be untrue and misleading and that are made in order to sell or dispose of property or services, or to induce the public to enter into any obligation relating to such property or services (s. 817.40(5), F.S.). A person who prevails in a civil action for violation of the misleading advertising statute is entitled to costs, including reasonable attorney's fees, and may be awarded punitive damages in addition to actual damages (s. 817.41(6), F.S.).

Game Promotion/Sale of Consumer Products or Services

Laws regulating game promotions in connection with the sale of consumer products or services were enacted in 1971. A game promotion is defined by statute as a contest, game of chance, or gift enterprise, conducted in connection with the sale of consumer products or services, in which the elements of chance and prize are present (s. 849.094(1)(a), F.S.). Sweepstakes are included, though not specifically named in the definition. Under s. 849.094, F.S., it is unlawful for a person, business, or association promoting, operating, or conducting a game promotion to:

- Design or conduct a game promotion, in connection with the promotion of consumer products or services, in which the winner may be predetermined or the game may be manipulated in order to allocate a winning game to certain lessees, agents, or franchises; or to allocate a winning game to a particular geographic area or to a particular period of the game promotion;
- Arbitrarily remove, disqualify, disallow, or reject any entry;
- Fail to award prizes offered;
- Print or circulate false, deceptive, or misleading advertising materials in connection with the game promotion; or
- Require an entry fee, payment, or proof of purchase as a condition of entering a game promotion (s. 849.094(2), F.S.).

Game promotion operators who offer prizes valued at over \$5,000 are required to file the rules and regulations of the game with the Department of State (department) and a list of prizes offered at least seven days before the start of the game promotion. The department charges a nonrefundable filing fee of \$100 which is deposited into a trust fund to pay for the costs incurred in administering and enforcing the provisions of s. 849.094, F.S. The operator must establish a trust account large enough to pay or purchase all prizes offered. However, the department may waive the trust-account or surety-bond requirement in the case of an operator who has conducted game promotions in Florida for at least 5 consecutive years and who has not had any civil, criminal, or administrative action instituted against the operator by the state for violation of the game promotion statute during that 5-year period (s. 849.094(4), F.S.). Additionally, within 60 days, the operator must send the department a list of persons who have won prizes valued at over \$25. The operator must provide a list of winners, without charge, to any person who requests it. As an alternative, the operator may publish the same winner information in a Florida newspaper of general circulation within 60 days after such winners have been determined and must provide to

the department a certified copy of the publication (s. 849.094(5), F.S.). Anyone violating the law is guilty of a second degree misdemeanor and is subject to a \$1,000 civil fine for each violation.

There are many types of sweepstakes, and many are offered through direct mailings that entice consumers to purchase a product when they enter a contest hoping to win a prize. Under Florida law, a game promotion must have a beginning and an end date, and cannot require a purchase or payment in order to win. However, the promotional literature often fails to clearly indicate that no purchase is necessary, and that the chances of winning are not increased when a purchase is made.

The sweepstakes industry has expanded from a single Reader's Digest contest in 1962 to more than 400 million mailings per year. It is believed that many of them are targeted at the elderly. Newspapers have published accounts of elderly people traveling to Tampa to collect what they erroneously believed were their winnings from American Family Publishers' sweepstakes. According to the U.S. Department of Commerce Bureau of Census, after California, Florida has the second largest number of citizens who are 65 years of age and older. The state's August 1998 Demographic Estimating Conference Database shows that 18.4 percent of Florida's population is 65 years of age or older. This means that approximately 2.6 million Florida citizens may be targeted for sweepstakes mailings.

Attorney General's Action Against Sweepstakes Operator

While not the only company to use unfair or deceptive practices, thirty-seven states have filed suit against the American Family Publishers for deceptive advertising practices in their sweepstakes promotions. 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 are that the company falsely suggested that a recipient must purchase a magazine subscription in order to win a grand prize, falsely suggested that the mailing recipient is one of a select group vying for a prize, 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 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.

Thirty-three states reached an agreement with American Family Publishers in March 1998, under which the company paid \$2.25 million in penalties to the states. Florida, and three other states that also sued the company, refused to join in the settlement believing that it was too lenient.

There is currently no federal law specifically regulating sweepstakes. Two United States senators have initiated an investigation of marketing practices of the largest sweepstakes companies that will be conducted jointly by two subcommittees of the Senate Governmental Affairs Committee. The investigation will examine whether the elderly are targeted and exploited by mass mailers.

III. Effect of Proposed Changes:

Section 1. Amends s. 849.094, F.S., to redefine the term “game promotion” to include sweepstakes. “Game promotion” would include, but not be limited to, enterprises commonly known as “matching,” “instant winner,” or “preselected sweepstakes” which involve the distribution of winning numbers or game pieces designated as such in the game promotion rules. Redefines “operator” to include anyone who sponsors a game promotion. Defines “older individual” as an individual who is 60 years of age or older.

Provides that it is unlawful for any operator to:

- Fail to award by alternate means those prizes having an announced value of \$100 or greater which remain unclaimed at the conclusion of the game promotion;
- Require a purchase as a condition of entering a game promotion, or to represent that an entry fee, payment, purchase, or proof of purchase is a condition of entering a game promotion or will enhance the chances of winning;
- Send advertising and promotional material in connection with a game promotion to any person when there has been a request that the person’s name be deleted from such distribution; and
- Fail to clearly and conspicuously print certain disclosures on any envelope containing advertising and promotional material distributed in connection with a game promotion to the public through the mail.

Requires an operator to provide the Department of State with the beginning and ending dates of the game promotion. Provides criteria for font size of rules and regulations of promotion materials distributed to the public through the mail and requires that rules and regulations be made available to the public without charge upon request.

Requires operators of a game promotion in which the total announced value of the prizes offered is greater than \$5,000 to maintain for three years a list of prize winners who have won prizes that have a value of greater than \$100. Requires the operator to provide a copy of the list of winners, without charge, immediately upon request of by the Department of State, the Department of Legal Affairs, or the Office of the State Attorney. Deletes the authority for an operator to publish the same information about the winners in a Florida newspaper and to provide the Department of State with a certified copy of the publication.

Increases the penalty for an unlawful act or violation of a rule pursuant to this section to a misdemeanor of the first degree when such violations are against a person 60 years of age or older. Increases civil penalties to not more than \$5,000 for each violation when the violation is against an older individual.

Section 2. Provides that this act shall take effect October 1, 1999.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Operators of game promotions that engage in unlawful practices against persons who are 60 years of age or older may be subject to more stringent criminal penalties and higher civil penalties than currently authorized in the game promotion statute. Game promotion operators will also be required to make certain disclosures or statements in certain materials distributed in connection with game promotions. To the extent such provisions discourage misleading game promotion materials, recipients of such materials will benefit. The actual economic impact of these provisions on the private sector is not known.

C. Government Sector Impact:

The Office of the Attorney General does not anticipate the need for additional resources to implement the provisions of this bill. The Department of State's Division of Licensing has indicated that it is requesting \$31,282 for fiscal year 1999-2000 for one full time position.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

#1 by Agriculture and Consumer Services:

This amendment:

- Makes technical and clarifying changes.
- Redefines the term “game promotion” to include sweepstakes. “Game promotion” would include, but not be limited to, enterprises commonly known as “matching,” “instant winner,” or “preselected sweepstakes” which involve the distribution of winning numbers or game pieces designated as such in the game promotion rules. Redefines “operator” to include anyone who sponsors a game promotion. Defines “older individual” as an individual who is 60 years of age or older.
- Provides that it is unlawful for any operator to:
 - Fail to award by alternate means those prizes having an announced value of \$100 or greater which remain unclaimed at the end of the game promotion;
 - Require a purchase as a condition of entering a game promotion, or to represent that an entry fee, payment, purchase, or proof of purchase is a condition of entering a game promotion or will enhance the chances of winning; and
 - Fail to clearly and conspicuously print in 16-point font, certain disclosures on any envelope containing advertising and promotional material distributed in connection with a game promotion to the public through the mail.
- Requires an operator to provide the Department of State with the beginning and ending dates of the game promotion. Provides criteria for font size of rules and regulations of promotion materials that offer a chance to enter and that are distributed to the public through the mail. Requires that rules and regulations be made available to the public without charge upon request. Requires advertisements to provide the address and telephone number where rules and regulations can be obtained.
- Prohibits an operator to distribute advertising or promotional material in connection with a game promotion to any person when there has been a request that the person’s name be deleted from such distribution. Such a request must be processed by the operator within 60 days after receipt.
- Requires operators of a game promotion in which the total announced value of the prizes offered is greater than \$5,000 to maintain for two years a list of prize winners who have won prizes that have a value of greater than \$100. Requires the operator to provide a copy of the list of winners, without charge, immediately upon request of by the Department of State, the Department of Legal Affairs, or the Office of the State Attorney. Deletes the authority for an operator to publish the same information about the winners in a Florida newspaper and to provide the Department of State with a certified copy of the publication.

- Authorizes the Department of State to take administrative action to enforce a violation of this act.
- Provides that any person, firm, corporation, agent, employee, or operator who engages in any acts or practices stated in this section to be unlawful is guilty of a misdemeanor of the second degree. Increases the penalty to a misdemeanor of the first degree if an operator commits an unlawful act or practice against an older individual.
- Provides that any person, firm, corporation, association, agent, employee, or operator who violates any provision of this section or any of the rules adopted pursuant to this section shall be liable for an administrative fine or civil penalty of not more than \$1,000 for each such violation. Increases the penalty to not more than \$5,000 for each violation when the violation is committed against an older individual.
- Provides that this act shall take effect October 1, 1999.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
