

STORAGE NAME: h0087b.jud

DATE: February 5, 1999

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
JUDICIARY
ANALYSIS**

BILL #: HB 87

RELATING TO: Game Promotions

SPONSOR(S): Representatives Rayson & Valdes

COMPANION BILL(S): SB 86(i)

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

- (1) JUDICIARY YEAS 8 NAYS 0
 - (2) REGULATED SERVICES
 - (3) GOVERNMENTAL RULES & REGULATIONS
 - (4) CRIME & PUNISHMENT
 - (5)
-

I. SUMMARY:

This bill revises statutory requirements governing game promotions used for sale, promotion, or advertising of consumer goods and services. The bill specifically includes sweepstakes and certain other game enterprises within the statute's coverage. It also provides 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 prohibits sending game promotional and advertising materials to a person who has requested not to receive such materials. The bill also establishes certain content and format standards governing game promotional and advertising materials, including required disclosure statements on envelopes and advertising materials.

The bill revises the game promotion statute to clarify the existing conditions and prohibitions applicable to game promotions, enhancing enforcement authority. The bill also reorganizes the statute to include additional definitions and prohibitions. The bill addresses recurring enforcement problems and ensures that: 1) prizes are awarded, 2) game rules and regulations are distributed, 3) lists of winners are maintained by operators, and 4) the public at large is less likely to misunderstand materials received.

The bill has an effective date of October 1, 1999.

The bill appears not to have a significant fiscal impact.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

(1) *Section 849.094, Florida Statutes, regulating game promotions.*

Certain promotions, such as contests, games of chance, and gift enterprises, are authorized in connection with the sale of consumer products and services pursuant to section 849.094, Florida Statutes. Game promotion involves the practice of operating a contest in which participants may win a prize or money through such means as collecting game pieces, matching numbers or pictures, or instantly winning. Section 849.094 provides conditions which must be met while conducting such promotions and specifies prohibited activities.

Currently, this section requires operators of sweepstakes with prizes worth more than \$5,000 to submit game rules to the Department of State, pay a \$100 filing fee, and establish a trust account to ensure the availability of the prizes. The operators must also send the department a list of winners. The law prohibits an operator from failing to award prizes; circulating false or deceptive literature in connection with the game; arbitrarily disallowing any entry; requiring an entry fee or product purchase to play; requiring a franchisee or lessee to participate in the promotion; or allocating a winning number to a particular franchise, period of the contest, or geographic area. The law further directs operators to register a copy of the promotional rules with the Department of State; maintain a trust account or surety bond in an amount equal to the value of the prizes offered; and provide a list of the winners' names and addresses. A violation of the law is punishable as a second degree misdemeanor (maximum 60 days' imprisonment and \$500 fine.) Operators in violation also are subject to actions for injunctions brought by the Department of State or the Department of Legal Affairs as well as civil penalties of \$1,000 per violation.

The Department of State and Department of Legal Affairs have experienced recurring misinterpretations and confusion concerning in enforcing section 849.094 due to its perceived ambiguities. The state has recently brought various enforcement actions under the statute. These actions arose out of numerous complaints about allegedly false or misleading practices regarding certain sweepstakes promotions. Generally, these complaints revolve around misunderstandings: a person receives the promotional materials in the mass mail-outs, which appear to be announcing that the recipient has won a particular prize, often a multimillion dollar prize. There are disclaimers elsewhere in the "fine print" of the materials. But compared to the apparent announcement of the person's winning status, these disclaimers are much smaller in size, and easily overlooked or misread. Many people, often elderly, have either spent large sums of money in order to win a prize or have flown to the state to claim large prizes, which they believed they had already won, allegedly because the disclaimers were insufficient.

To respond to this situation, and to facilitate enforcement of section 849.094, the Department of State recommended substantial changes in 1994 and 1995, which were designed to strengthen the regulation of games promotions. These changes failed to pass in the Legislature, and in 1997 and 1998 the department recommended repealing the law because, in the opinion of the department, it lacks sufficient regulatory authority. The 1998 Legislature removed the department's funding for the regulatory program, but did not repeal the law. Effective August, 1998, a budget amendment reinstated limited funding for the program, through June, 1999, in order to give the Legislature time to take further action, if any, during the 1999 Regular Session.

NOTE: See “The Regulation of Sweepstakes” (1998), an interim study prepared by the Committee on Business Regulation and Consumer Affairs. (This interim study also notes that, currently, there is no federal law regulating sweepstakes, although there have been recent and ongoing attempts to enact federal legislation.)

(2) *Commercial free speech*

Both the Florida Constitution’s Article 1 Section 4 and the United States Constitution’s First Amendment guarantees of free speech are similar in scope. The First Amendment protects commercial free speech from unwarranted governmental regulation, but it accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. Both the state and the federal government are free to prevent the dissemination of commercial speech which is false, misleading or deceptive. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985). The State of Florida has done so in Sections 817.41(1) and Chapter 501, Part II, Florida Statutes discussed below.

Commercial free speech receives a limited form of First Amendment protection as long as it concerns lawful activity and is not misleading or fraudulent. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, U.S. 557 (1980). The first step in the four part test of Central Hudson to determine whether commercial speech is misleading. If the speech is misleading, it will not be accorded First Amendment protection. Even if commercial speech is found not to be misleading, it may still 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 in being narrowly tailored to achieve the objective.

The State of Indiana prohibited the use of the word “lottery” in any corporate name without obtaining State Lottery Commission permission. An action was brought which asserted the limitation was a violation of free speech. Citing a U.S. Supreme Court decision upholding Puerto Rico’s ban on advertising of gambling parlors, *Posadas DePuerto Rico Ass’n v. Tourism*, 478 U.S. 328 (1986), the Indiana Court upheld the prohibition of the use of the word lottery. *L.E. Services, Inc. v. State Lottery Commission of Indiana*, 646 N.E.2d 334 (Ind 4 DCA 1995).

Specific language and font sizes were required to be included in misleading invoices in *Syndicated Publications, Inc. v. Montgomery County, Maryland*, 921 F. Supp. 1142 (S.D. Md. 1996) in which the court accepted in discussion Postal Service Regulation CO31 Sec. 1.1- 1.2 which requires misleading invoices to bear the notice: “THIS IS NOT A BILL. THIS IS A SOLICITATION. YOU ARE UNDER NO OBLIGATION TO PAY THE AMOUNT STATED ABOVE UNLESS YOU ACCEPT THIS OFFER.”

In addition, a complete governmental ban on misleading commercial speech has been approved by the Supreme Court when the form of communication is more likely to deceive the public than to inform it. *Friedman v. Rogers*, 440 U.S. 1 (1979) and *Central Hudson Gas, supra*.

(3) *Federal Preemption of Printing on Envelopes*

Preemption can occur in three ways: (1) Congress may expressly provide that federal law supplants state authority in a particular field; (2) Congress' intent to preempt may be implicit in regulating so pervasively in a particular field so as not to leave any room within which the state may act; and (3) state law is preempted to the extent that it actually conflicts with federal law. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

No express preemption concerning envelopes exists in the Postal Regulations. In *Syndicated Publications, Inc. v. Montgomery County, Maryland, supra*, the court found no evidence to suggest that Congress intended to preempt the entire field of invoice-like solicitations. In fact, the particularity of the regulation suggests that Congress merely intended to regulate the *mailability* of such solicitations. In fact, the legislation proposed does not make it impossible to comply with both state and federal law. Accordingly, there is no preemption to prohibit the language required on the envelope.

(4) *False, misleading, and deceptive advertising.*

Section 817.41(1), Florida Statutes, 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 (s. 817.40(5).) This is essentially a tort action in which 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).)

(5) *Deceptive and Unfair Trade Practices.*

Part II of chapter 501, Florida Statutes, is entitled the Florida Deceptive and Unfair Trade Practices Act. One of the stated purposes of the act 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).) The act declares that such acts or practices are unlawful (s.501.204(1).) The statute authorizes the Department of Legal Affairs and the various offices of the state attorney to bring the following actions: an action to obtain a declaratory judgment that an act or practice violates the statutes; an action to enjoin violators; or 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).) A wilful violator of the act is liable for a civil penalty up to \$10,000 for each violation (s. 501.2075). However, when a violator of the act wilfully 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 maximum amount of the civil penalty that may be imposed rises to \$15,000 for each violation (s. 501.2077(2).)

(6) *Florida Attorney General's action against sweepstakes operator under s. 849.094 and the Florida Deceptive and Unfair Trade Practices Act.*

In February 1998, the Office of the Attorney General filed a civil action, under part II of chapter 501, the Florida Deceptive and Unfair Trade Practices Act, and s. 849.094, 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 allegedly 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 civil action is active and ongoing. If HB 87 becomes law, the amendments to section 849.094 would not operate to affect the legal outcome of any pending case. Rather, the bill would apply prospectively, i.e., to violations of s. 849.094, as amended, committed on or after October 1, 1999.

B. EFFECT OF PROPOSED CHANGES:

The amendments to s. 849.094 proposed by the bill would accomplish the following.

(1) Expand or add statutory definitions.---

- ▶ Codifies the Attorney General's present inclusion of "sweepstakes" within the definition of a "game promotion," and provides that the section applies to game promotions conducted in Florida or offered to Florida residents, for promotion or advertisement of a consumer product or service contemporaneously offered to the public, as well as sale. The definition specifically includes enterprises commonly known as "matching," "instant winner," or "preselected sweepstakes" involving the distribution of winning numbers or game pieces designated as such in the game promotion rules.
- ▶ Expands the definition of "operator," to include under certain circumstances a person or entity authorized to "sponsor" a game promotion, or in whose name a game promotion is in any manner sponsored, promoted, operated, or conducted.
- ▶ Defines "older person" as an individual 60 years of age or older.

(2) Create or revise statutory prohibitions.---

- ▶ Prohibits an operator from sending game promotion advertising and promotional material to a person, if the person or his or her guardian or agent, has requested that the person's name be deleted from the distribution. An operator must process the request within 60 days.
- ▶ Prohibits failure to award by alternate means unclaimed prizes worth \$100 or more. However, an exception is created to the current prohibition against failure to award prizes, generally; under s. 894.049 as amended, it would not be illegal to fail to award a prize having an announced value less than \$100, if the winner could determine from a game piece that he or she had won a designated prize.
- ▶ Prohibits a purchase requirement as a condition of entering a game promotion. The bill also makes it illegal to represent that an entry fee, payment, purchase, or proof of purchase is a condition for entering a game promotion, or would enhance the chances of winning.

- ▶ Prohibits failure to make specified disclosures clearly and conspicuously on any envelope containing the game promotion advertising and promotional material distributed by mail to the public. These disclosures must be published in a certain size (16-point font). Also, among other requirements, they must include the statement "You have not already won"; the name and physical address of the operator; and a toll-free number of the operator for the public to call in questions about the game promotion. Certain disclosures also must appear on the first page of all such mail. The bill specifies that these new provisions would not apply to certain statutorily defined prize and gift promotional offers, however.

(3) Imposes additional duties upon game operators when prizes total more than \$5,000.---

- ▶ Requires the operator to file a statement with the Department of State providing the beginning and ending dates of the game promotion, which is the present practice of the Department. This statement must be included in the copy of the game promotion rules and regulations, which the operator must file under current law.
- ▶ Requires the operator to make the rules and regulations available to the public without charge upon request, and have them published in a minimum size (12-point font; current law already imposes certain publication requirements, but does not specify font size.) The bill further specifies that radio, television, newsprint and magazine advertisements may indicate the availability of the rules and regulations without them being included in the actual advertisement.
- ▶ Maintain for a three-year period a list of the names and addresses of all winners of prizes valued more than \$100. The operator also must provide a copy of the list of winners without charge, immediately upon request by the Department of State, Department of Legal Affairs, or Office of the State Attorney. These new requirements would take the place of existing statutory provisions, under which an operator currently must provide to the Department of State a certified winners' list, or a certified copy of a Florida newspaper containing certain information on the winners. In addition, the bill clarifies that the filing of any information or documents by the operator, or their acceptance by the Department of State, is not a determination of either compliance or applicability with respect to any provision of section 849.094.

(4) Enhances criminal and civil penalties when victims are older than 60.---

- ▶ Increases the degree of the criminal offense level for the violation to a first-degree misdemeanor, punishable by imprisonment up to one year and a fine up to \$1,000. The bill retains the current second-degree misdemeanor offense for violations committed against other persons.
- ▶ Increases the maximum amount of the civil fine applicable to the violation to \$5,000. The bill retains the current maximum civil penalty amount of \$1,000 for violations committed against other persons. The bill also provides specifically that an "operator" may be subject to either of these civil penalties.

(5) *Facilitates departmental rulemaking.---*

- ▶ Amends existing provisions relating to rulemaking authority of the Department of State under s. 894.049 to clarify that this authority is pursuant to specified provisions of the Administrative Procedure Act (chapter 120, Florida Statutes.)

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?

Yes. The Department of State currently regulates game promotions and this bill would permit promulgation of new rules by the Department of State to administer the new substantive provisions of the act.

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

Yes. The Department of State, Department of Legal Affairs, and offices of the state attorney would have new enforcement responsibilities under the act. The persons or entities operating game promotions also would have to assume new duties to comply with the act.

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

No.

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

No agency or programs 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. The protections provided by the existing law and the proposed amendments are financed in large part by the registration fees paid by the game promotion industry. See section 849.094(3), Florida Statutes.

4. Individual Freedom:

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

No. The bill adds new lawful restrictions to the conduct of game promotions.

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

Yes. The bill would impose various new disclosure requirements upon game promotion advertising and promotional materials, such as regulations of font size and other publishing options, and the new restrictions against mailings to requesting addressees.

5. Family Empowerment:

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

The bill does not provide services to families, per se, although it provides new protections to individual elderly residents of Florida.

- (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:

The bill does not create or change any program providing services to families, per se, or to children.

- (1) parents and guardians?

N/A

- (2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

Section 894.049, Florida Statutes, is amended.

E. SECTION-BY-SECTION ANALYSIS:

Section One includes all substantive provisions discussed elsewhere herein.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None.

2. Recurring Effects:

The bill reduces the amount of material filed with the Department of State, thereby reducing the cost of enforcement.

3. Long Run Effects Other Than Normal Growth:

According to the Department of Legal Affairs and Department of State, the proposed changes will not affect the cost of enforcing the game promotion laws.

4. Total Revenues and Expenditures:

None which this writer has been able to determine.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

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3. Long Run Effects Other Than Normal Growth:

None.

C. **DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

1. Direct Private Sector Costs:

Game promotion operators will be required to pay the costs of awarding all prizes and conforming or making certain disclosures or statements in materials distributed with game promotions; while recipients of game promotional materials may be saved some costs, to the extent that the new provisions would discourage false or misleading materials. On balance, the actual economic impact of these provisions upon the private sector is not known.

2. Direct Private Sector Benefits:

Enhanced enforcement of s. 894.049 is intended to provide additional protection to the public against false or misleading game promotional materials.

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

The potential effect on the industry is uncertain, though not likely to constrain business.

D. **FISCAL COMMENTS:**

The bill has not been considered by the Criminal Justice Estimating Conference. However, the Department of State and the Office of the Attorney General thus far have not anticipated the need for additional resources to implement the bill. The Department of Legal Affairs considers the bill to have various provisions that are clarifying or self-executory in nature, or that would facilitate departmental enforcement of s. 849.094.

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 it. The bill does not require counties or municipalities to spend funds or take an action requiring expenditure of funds.

B. **REDUCTION OF REVENUE RAISING AUTHORITY:**

The bill does not reduce the authority that municipalities and counties have to raise revenue in the aggregate

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

The bill does not reduce the percentage of the state tax shared with counties or municipalities.

V. COMMENTS:

(1) Commercial free speech is not unlawfully restricted; nor has Congress preempted the states in what additional information may be required on envelopes.

(2) As to the penal provisions in s. 849.094(8)(a) and (b), as amended, this subsection may raise questions as to the interplay between the respective criminal and civil liabilities for violations of rules adopted under the section. Article I, section 18 of the Florida Constitution, relating to administrative penalties, prohibits the imposition of a sentence of imprisonment or other penalty, except as provided by law. Penal provisions, such as those of s. 894.049, are conventionally construed strictly. As amended by HB 87, paragraphs 849.094(8)(a) and (b) both would appear to permit imposition of penalties adopted for violation of "any of the rules adopted pursuant to this section," regardless of gravity. Insofar as the Department of State is granted additional rulemaking authority in s 849.094(8), as amended, the penalty provisions relating to violations of rules may benefit from further clarification, perhaps through addition of cross-references to specific subunits within the section.

(3) As to the rulemaking provisions in s. 849.094(7), as amended, the amendatory language could be clarified and made more specific on such questions as whether to add a specific reference to the Department of State's authority to "enforce" as well as administer the provisions of section 849.094.

(4) As to more technical statutory matters, the section catchline could be further amended to reflect more closely the substantive amendments to the section. Also, section 721.111(2), Florida Statutes, relating to prize and gift promotional offers, contains apparently specific references to the requirements of s. 849.094(1), (2), and (7), all of which provisions are amended or renumbered by HB 87. To indicate whether subsection 721.111(2) would be interpreted as incorporating the amended version of s.849.094 or a previous statutory version, a new, separate section of the bill could be added to amend or reenact s.721.111(2), as needed.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The amendment does not contain the mandatory language requirements of Section (2) (h), and (i) of the original bill, or require the operator to award all prizes. Comments 2, 3 and 4 on page 12 of the bill analysis may not have been adequately addressed in the amendment. It might also be appropriate to have bill drafting review the title.

VII. SIGNATURES:

COMMITTEE ON JUDICIARY:

Prepared by:

Staff Director:

Jo Ann Levin

Don Rubottom