

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 1180

SPONSOR: Senator Campbell

SUBJECT: Game Promotions

DATE: March 3, 2000

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Akhavein</u>	<u>Poole</u>	<u>AG</u>	<u>Favorable</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 definition of game promotion. Sweepstakes are contests, games of chance, and gift enterprises in which participants may win a prize or money through such means as collecting game pieces, matching numbers or pictures, or instantly winning. The bill 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. It also prohibits game promotion advertising and promotional material from being sent 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 sections 721.111 and 849.094, Florida Statutes.

II. Present Situation:

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 a sweepstakes. The misunderstanding usually occurs because the person receives promotional materials that appear to announce 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. 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 December 1999 Demographic Estimating Conference Database shows that as of April 1, 1999, 18.4 percent of Florida's population was 65 years of age or older. This means that approximately 2.82 million Florida citizens may be targeted for sweepstakes mailings.

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.

Attorney General's Action Against Sweepstakes Operators

Currently, the Office of the Attorney General is handling six to eight cases and investigations involving sweepstakes. The Office often pursues sweepstakes in conjunction with other states as part of a multi-state group of Attorneys General, which typically pursues sweepstakes promotions having national impact. The two recurring issues that are being reviewed are:

- Representations which mislead consumers into thinking they have won.
- Representations which either expressly or by implication indicate that the purchase of items, such as magazines, will increase the chances of winning.

Of the cases under litigation or review, below are the three most significant:

Guaranteed and Bonded: This sweepstakes is sponsored by Time, Inc. An investigation was opened May 13, 1999, and a Letter of Request for Documents and Information was sent to the company. The Guaranteed and Bonded promotion is also being looked at by other states. Connecticut and Washington have sued and there is a large multi-state negotiation effort currently in progress with the company. Florida is monitoring the multi-state group and pursuing its own investigation.

Publishers Clearing House(PCH): This promotion involves the now famous Prize Patrol theme. The Office of the Attorney General opened an investigation of PCH in November 1997 based on consumer complaints. To date, the Office of the Attorney General has received hundreds of complaints against the company, concerning the misrepresentations stated above. Over 100 Floridians who were surveyed indicated that they had stayed home at a given time because they were misled into believing they had won and that their winnings would be delivered to their

homes by PCH. PCH typically runs several intertwined promotions nationally. In 1999, the number of national disseminations of PCH promotions topped 400 million. In Spring 1999, a multi-state group of Attorneys General started negotiating with PCH to resolve concerns with its practices. Negotiations broke down because a claims process for consumer reimbursement could not be established to the satisfaction of several states, including Florida. In June 1999, a private class action was filed and on Sept. 22, 1999, the Florida Attorney General's Office filed suit. Currently, around 35 states are suing PCH. PCH has filed a motion to dismiss Florida's case which is expected to be heard in March 2000.

American Family Publishers (AFP): This sweepstakes has been represented by Ed McMahon and Dick Clark as celebrity spokespersons. Numerous consumers have traveled to AFP offices in Tampa to claim their prizes, under the mistaken impression they had won. In December 1996, the Office of the Attorney General began investigating AFP's practices with 20 other states. Some states have settled, but Florida's Attorney General's Office was not satisfied with the settlement because it was not specific enough. Concerns were heightened because AFP had offices in Tampa. In February 1998, the Florida Attorney General filed suit against AFP, and the Attorneys General of Indiana, West Virginia, South Carolina, and Connecticut filed suit soon thereafter. A private class action was also filed in February 1998 and a settlement of this litigation was reached in May 1999. AFP filed bankruptcy in October 1999.

The AFP settlement contains several proscriptions and prescriptions, including, clear and conspicuous disclosure requirements, prohibitions on use of the term "winner," and prohibitions against emulating government or "official" documents. Under the settlement, Florida received its attorney's fees and costs amounting to \$166,000. Due to the class action and AFP's bankruptcy, a \$32 million settlement fund has been set up, out of which \$1.3 million is guaranteed for reimbursement of Florida consumers. A claims process for reimbursement commenced on February 4, 2000, and continues until May 2000. Florida customers are eligible if purchases were made between January 1992 and December 1999. The first \$40 per year will be deducted from each consumer's recovery. The Office of the Attorney General is currently advising known complainants and Florida customers of the AFP settlement and the process for obtaining a claim form and submitting the claim.

Federal Legislation

Senate Bill 335 by Senator Collins was passed by Congress on November 19, 1999. The bill is cited as the "Deceptive Mail Prevention and Enforcement Act" and is designed to address several types of deceptive mailing, including sweepstakes and government look-alike mailings. The bill prohibits sweepstakes companies from sending out material proclaiming a recipient a winner unless the person has actually won a prize. It allows consumers to request that their names be removed from a particular mailing list and allows consumers to bring a private lawsuit against sweepstakes companies for failure to remove the person's name. It further prohibits the sale or rental of such list of "removed names" to any other person for commercial use. It requires sweepstakes mailings to clearly and conspicuously display the following information:

- A statement that no purchase is necessary to enter the contest;
- A statement that a purchase would not improve the recipient's chances of winning;
- All terms and conditions of the sweepstakes promotion; and
- A clearly stated estimate of the odds of winning each prize.

The bill also strengthens the authority of the United States Postal Service in the areas of subpoena authority, nationwide stop mail authority and the ability to impose civil penalties. Section 109 of Senate Bill 335, titled "STATE LAW NOT PREEMPTED" provides that:

- This law shall not be construed to preempt any provision of state or local law that imposes more restrictive requirements, regulations, damages, costs, or penalties;
- No determination by the Postal Service that any particular piece of mail or class of mail is in compliance with the law shall be construed to preempt any provision of state or local law; and
- Federal law shall not be construed to prohibit an authorized state official from proceeding in state court on the basis of an alleged violation of any general, civil, or criminal statute of the state or any specific state civil or criminal statute.

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" that 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 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. Amends s. 721.111, F.S., to conform a cross-reference to changes this bill makes to s. 849.094, F.S.

Section 3. Provides that this act shall take effect October 1, 2000.

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, the Department of State's Division of Licensing, and the Department of Agriculture and Consumer Services do not anticipate the need for additional resources to implement the provisions of this bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

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