



# Laws Targeting

# ♦ ♥ ♣ ♦ “Sweepstakes Cafés” ♦ ♥ ♣ ♦



## May Prohibit Legitimate Promotional Activities

By Kade D. Miller and Karl F. Rutledge

Over the years, promoters have devised schemes in an attempt to evade gambling prohibitions. These are often described by prosecutors as “thinly veiled lotteries.” While the mediums used have evolved over time, the underlying model is merely a new iteration of the original scheme: offering a lottery-like product and incorporating a free method of entry to evade lottery prohibitions. In the late 1990s, the sale of phone cards that also awarded sweepstakes entries was the focus of this model. A notable example was the Lucky Shamrock emergency phone card, which was a one or two minute prepaid long distance phone card, usually sold at market value, that also had a sweepstakes entry attached to the card. The Lucky Shamrock emergency phone card dispensers came in two varieties: one that dispensed the cards with a sweepstakes entry, the results of which were revealed on the card, and one that revealed the sweepstakes results in a display as the card was dispensed. Regardless of delivery and sales method, the Lucky Shamrock Sweepstakes offered a free alternative method of entry.

Although carefully designed to appear to meet the criteria generally prescribed by the courts in approving promotional schemes, a review of the underlying purpose of the Lucky Shamrock emergency phone cards led prosecutors and courts to the conclusion that the Lucky Shamrock Sweepstakes constituted a thinly veiled lottery. Specifically, courts analyzing the model found that the promoters were not attempting to make money from the sale of a legitimate product but from paying customers desiring to win prizes in the sweepstakes. Thus, even though the Lucky Shamrock Sweepstakes was designed to avoid the consideration element by offering a free alternative method of entry, the offering was found to constitute an illegal gambling game in several jurisdictions.

Replacing phone cards with Internet time, this model has recently resurfaced and has lawmakers throughout the country scrambling to address the proliferation of businesses known as “Internet sweepstakes cafes,” “sweepstakes parlors,” or “convenience casinos.” These operations collect more than \$10 billion in revenue a year by entering customers into sweepstakes and revealing the results via casino-like game simulations. State lawmakers’ swift crackdown on such pursuits may have unintended consequences, however, if overly broad and ambiguous statutes targeting Internet sweepstakes cafés inadvertently criminalize other activities.

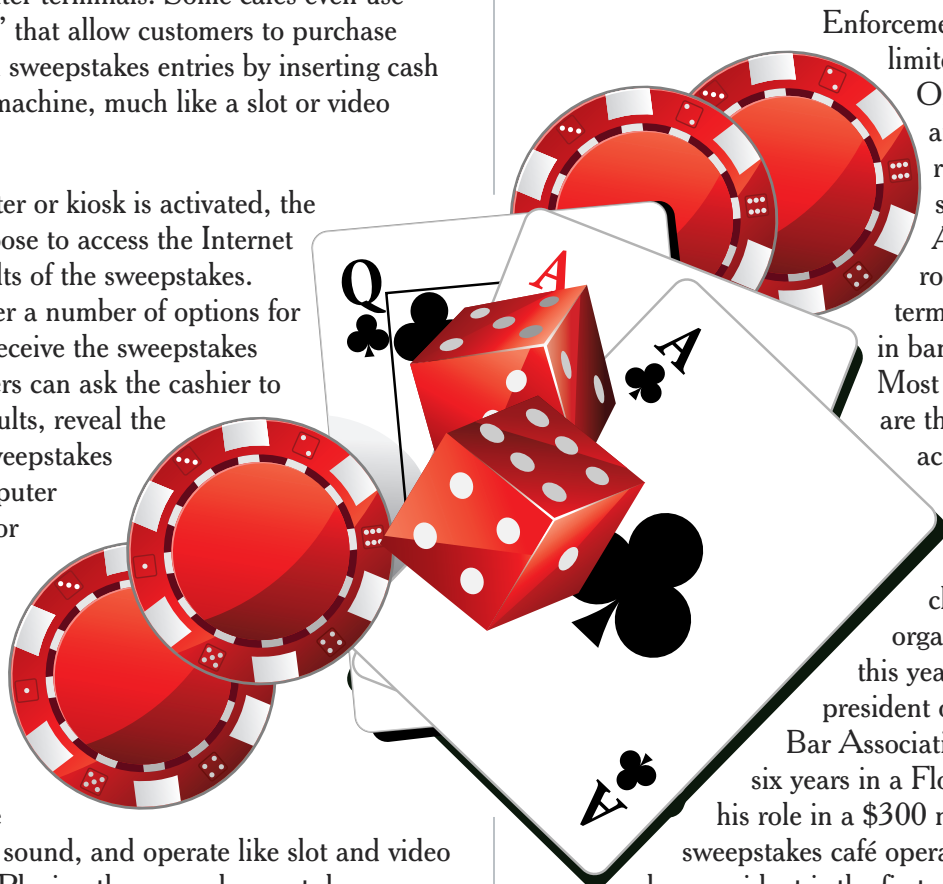
Internet sweepstakes cafés advertise entry into sweepstakes to promote the sale of Internet access and other products. These operations generally sell web-surfing time and often offer copy, fax, and print services. Some cafés even offer free food or drink to encourage their customers to stay. Cafés usually include personal computers arranged in rows on tables for customers. The number of computers may range from only a few to over 100.

When customers purchase Internet access, the purchase includes a proportional amount of sweepstakes entries. For example, at the Allied Veteran’s Café in Seminole County, Florida, twenty dollars awarded the customer 2,000 sweepstakes entries.<sup>1</sup> Both the Internet time and sweepstakes entry points are loaded onto a plastic access card containing a magnetic strip with an electronically encoded personal identification number. The customer swipes the card through an electronic reader to access one of the computer terminals. Some cafés even use “Internet Kiosks” that allow customers to purchase Internet time and sweepstakes entries by inserting cash directly into the machine, much like a slot or video poker machine.

Once the computer or kiosk is activated, the customer can choose to access the Internet or check the results of the sweepstakes. Cafés usually offer a number of options for the customer to receive the sweepstakes results. Customers can ask the cashier to announce the results, reveal the results of each sweepstakes entry on the computer using plain text, or play a video simulation of a casino-style game to reveal the results one at a time. The more popular casino-style game simulations look, sound, and operate like slot and video poker machines. Playing the game does not, however, affect the outcome of the sweepstakes; it is “merely an entertaining method of delivering the results.”<sup>2</sup> If a customer wins the sweepstakes, that customer can redeem his or her points for more Internet time, sweepstakes entries, or cash prizes.

Enforcement of existing and new laws against Internet cafés has increased. In December 2012, the California

Bureau of Gambling Control Issued a law enforcement advisory that “Internet Cafés” selling Internet time in conjunction with “promotional sweepstakes,” are considered illegal gambling operations.<sup>3</sup> Since the announcement, the number of businesses investigated for illegal gambling in California has nearly doubled, from 42 in 2012 to 80 in 2013.<sup>4</sup> Additionally, a Los Angeles City Attorney sued a North Carolina-based corporation in January 2014 on grounds that it supplied five defunct sweepstakes cafés with “illegal gaming systems and lotteries that masquerade as lawful promotional sweepstakes.”<sup>5</sup> The corporation voluntarily stopped selling the software. Most recently, Sherriff’s deputies near Sacramento raided a café where customers spent \$2 apiece on electronic games and purchasing Internet time on computers or telephone cards. The business, “Silk and Stars,” offered sweepstakes games and Internet time along with silk-screened t-shirts.



Enforcement action is not limited to California. In Ohio, federal, state and local police raided six Internet sweepstakes cafés in April 2013, taking roughly 350 video terminals and \$525,000 in bank account funds. Most notably, however, are the recent enforcement actions in Florida, which implicated state officials, legal professionals, and charitable organizations. Earlier this year, the former president of the Jacksonville Bar Association was sentenced to six years in a Florida state prison for his role in a \$300 million Internet sweepstakes café operation.<sup>6</sup> The former bar president is the first of nearly 60 defendants to go on trial for participation in the Allied Veterans of the World Internet cafes.<sup>7</sup>

The outcry against sweepstakes cafés by public officials and enforcement agencies has resulted in legislation to regulate or prohibit their proliferation. For example, the Ohio legislature enacted House Bill (“HB”) 7, which was designed to heavily regulate and limit Internet cafés

and sweepstakes parlors. HB 7 applies only to sweepstakes promotions that employ “sweepstakes terminal devices” at “sweepstakes terminal device facilities” located in the State of Ohio. Moreover, the prohibited activities are limited only to devices that are owned, leased, or possessed by the person conducting the sweepstakes. These restrictions limit the law’s applicability to physical locations where an electronic sweepstakes device is made available for use. It is therefore unlikely that the law would apply to personal electronic devices that are used from home. The limiting language enacted in Ohio seems to ensure that legitimate promotional activities will not be regulated or prohibited by state law as the scope is limited to sweepstakes cafés.

In contrast to Ohio, Florida passed an outright prohibition on sweepstakes cafés through the recent enactment of HB 155, which clarifies current gaming laws concerning slot machines, charitable drawings, game promotions and amusement games.<sup>8</sup> The Florida legislature found that Florida statute § 849.094 “was enacted to regulate certain game promotions and sweepstakes conducted by for-profit commercial entities on a limited and occasional basis as an advertising or marketing tool incidental to substantial bona fide sales of consumer products or services[.]”<sup>9</sup> The legislature stated that the statute “was not intended to provide a vehicle for the establishment of places of ongoing gambling or gaming.” As such, HB 155 revised Florida statute § 849.094, which defines and exempts permissible game promotions or sweepstakes, to limit permissible “game promotion[s]” to those “conducted by an operator” that are “incidental to the sale of consumer products or services.”<sup>10</sup> HB 155 redefined “operator” as a retailer or business who conducts a “nationally advertised” game promotion.<sup>11</sup>

Although Florida continues to exempt game promotions, the exemption is now limited to “nationally advertised” promotions that are “incidental” to the sale of consumer products or services.<sup>12</sup> HB 155 further limited the game promotions exemption to promotions that occur on a “limited and occasional basis . . .”<sup>13</sup> The act does not define “incidental” or “limited and

occasional,” leaving uncertainty as to the limits of these terms. Unlike the Ohio act, the language in HB 155 does little to limit the reach of the act to Internet sweepstakes cafés and convenience casinos. Accordingly, HB 155 effectively removes previously exempted promotional activities from the protection of Florida statute § 849.094 based, at least in part, on subjective determinations regarding whether the offering is “incidental” and offered on a “limited and occasional basis.”

While attempts to make money from customers who desire to win prizes in a sweepstakes, not from the sale of products unrelated to the promotion, is a distinction that underlies the thinly veiled lottery determination, the rush to curb the proliferation of sweepstakes cafés potentially poses disastrous consequences. For instance, by imposing “a limited and occasional” requirement on promotions without definition, the Florida Legislature has created uncertainty and pitfalls for businesses seeking to promote their products and services. While a promotion of perpetual duration would violate the “occasional” requirement, offerings such as McDonalds’ Monopoly promotion, which operates for several months each year, are now subject to the whim of state officials as no clear guidance exists.

Instead of focusing on the number and duration of promotions, regulation should advance patron protection, not moralistic agendas. To this end, attention may be better served by analyzing whether the promotion is merely a ruse designed to offer gambling. For instance, the Indiana Court of Appeals concluded that:

**A distinction exists between promotion of a primary business of selling a meal or a drink for valuable consideration together with a chance to win a business related prize, in kind or, albeit, as a sweepstakes prize which attracts sales, and promotion of a non-primary business related and incidental activity for valuable consideration together with a chance to win a prize unrelated to either the primary business activity or**



**attraction of sales. The difference in the distinction is in the essence of the product: [t]he former promotes sales of the primary business product, e.g., food, while the latter promotes the prize and the product (coupon) is unrelated to either the primary business purpose of the promoter, of the distributor, or of [FACE].<sup>14</sup>**

Accordingly, the more the product or service possesses value independent of the sweepstakes, e.g., a cheeseburger, service or subscription package, the more defensible the offering. This is particularly true if the independent value of the products can be quantified and the products are not priced at levels higher than market value during the promotion. For example, McDonalds' cheeseburgers are available for sale year round, which establishes a value independent from the Monopoly game piece. Moreover, the price of the cheeseburger does not increase when the Monopoly promotion is offered.

In summary, the recent push to enact legislation that addresses Internet sweepstakes cafés has already resulted in hastily drafted laws that potentially limit promotional activities that have enjoyed longstanding acceptance and have significant commercial value. Further lack of foresight will likely result in more states passing broad and vague legislation that grants regulators substantial discretion to determine which activities constitute illegal gambling. Absent narrowly drafted legislation, states can expect inconsistent enforcement and unintended fiscal consequences from increased litigation and subsequent revisions to the law. For example, Florida's hastily enacted legislation is being challenged based on its inherent ambiguity and sweeping inclusion of other activities.

Accordingly, caution must be exercised when drafting laws to address Internet sweepstakes cafés to ensure such laws are not used as a means to advance moralistic agendas but rather to preserve the ability of businesses to promote their products and services.

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- <sup>1</sup> Silver, *supra* note 2 (citing Felix Gillette, *The Casino Next Door*, BLOOMBERG BUSINESSWEEK (Apr. 21, 2011), [http://www.businessweek.com/magazine/content/11\\_18/b4226076180073.htm](http://www.businessweek.com/magazine/content/11_18/b4226076180073.htm)).
- <sup>2</sup> Richard Ducker, *Zoning and Video Sweepstakes Operations*, UNC-Chapel Hill School of Government (Sept. 2012), <http://www.sog.unc.edu/node/2632>.
- <sup>3</sup> BUREAU OF GAMBLING CONTROL, *LAW ENFORCEMENT ADVISORY 11* (Dec. 2012) available at [https://oag.ca.gov/sites/all/files/agweb/pdfs/gambling/Internet\\_cafes.pdf](https://oag.ca.gov/sites/all/files/agweb/pdfs/gambling/Internet_cafes.pdf).
- <sup>4</sup> Charles Rettmuller, *California takes Aim at Internet 'Sweepstakes Cafés'*, <sup>1</sup> POKERUPDATE (June 30, 2014) <http://www.pokerupdate.com/news/law-and-legislation/california-takes-aim-at-Internet-sweepstakes-cafes/>; Don Thompson, *California Cracks Down on 'Sweepstakes Cafés'*, USATODAY (June 28, 2014) <http://www.usatoday.com/story/money/business/2014/06/28/california-cracks-down-on-sweepstakes-cafes/11630543/>.
- <sup>5</sup> *Id.*
- <sup>6</sup> Martha Neil, *Former Bar President gets Six Years in \$300M Web Gambling Case but Says He Expects to Win on Appeal*, ABA JOURNAL (Feb. 12, 2014), [http://www.abajournal.com/mobile/article/former\\_bar\\_president\\_gets\\_six\\_years\\_in\\_web\\_gambling\\_case\\_but\\_says\\_he\\_expect/](http://www.abajournal.com/mobile/article/former_bar_president_gets_six_years_in_web_gambling_case_but_says_he_expect/).
- <sup>7</sup> *Id.*
- <sup>8</sup> H.B. 15, 2013 Leg., (Fla. 2013).
- <sup>9</sup> H.B. 15, 2013 Leg., (Fla. 2013) (emphasis added).
- <sup>10</sup> Fla. Stat. Ann. § 849.094(1)(a) (West 2014).
- <sup>11</sup> Fla. Stat. Ann. § 849.094(1)(b) (West 2014).
- <sup>12</sup> H.B. 15, 2013 Leg., (Fla. 2013) (emphasis added).
- <sup>13</sup> H.B. 15, 2013 Leg., (Fla. 2013) (emphasis added).
- <sup>14</sup> *F.A.C.E. Trading, Inc. v. Carter*, 821 N.E. 2d 38, 43 (Ind. App. 2005); citing Appellant's App. P. 15-16.

