

A blurred photograph of a casino floor. In the foreground, the side of a slot machine is visible, showing a screen with the letters 'AR' and various buttons. The background is filled with out-of-focus lights in shades of blue, purple, and red, creating a bokeh effect. The overall atmosphere is that of a busy, brightly lit gambling establishment.

“It Ain’t Over ‘Til It’s Over”

Video Gambling Returns to North Carolina

by: Christopher W. Derrick, JD, MPA

A FEW DAYS BEFORE LAST CHRISTMAS, OPPONENTS OF GAMBLING IN NORTH CAROLINA BREATHED A SIGH OF RELIEF WHEN THE STATE COURT OF APPEALS ISSUED ITS OPINION IN *McCracken and Amick, Inc. v. Perdue*,¹ UPHOLDING A 2006 LAW THAT BANNED ALL VIDEO GAMING MACHINES OTHER THAN THOSE OPERATED BY THE EASTERN BAND OF CHEROKEE INDIANS ON TRIBAL LAND. THE APPEALS COURT'S UNANIMOUS DECISION OVERTURNED AN ORDER ISSUED BY A WAKE COUNTY SUPERIOR COURT JUDGE THAT SAID THAT THE LAW² WAS NULL AND VOID BECAUSE THE STATE COULD NOT BAN VIDEO GAMING MACHINES IN THE REST OF NORTH CAROLINA IF AT THE SAME TIME IT ALLOWED VIDEO POKER MACHINES ON THE CHEROKEE RESERVATION PURSUANT TO THE FEDERAL INDIAN GAMING REGULATORY ACT.³

The Charlotte Observer welcomed the Court of Appeals decision, saying that a different ruling upholding the lower court decision “might have led to video poker machines— described by law enforcement officials as the crack cocaine of gambling because of its rapid addictive attractions—in every county in North Carolina.”⁴ A quick look around the state, however, reveals there are video gambling machines operating openly throughout North Carolina. These devices are generally referred to as “sweepstakes machines,” and come in the form of stand-alone touch screen terminals resembling arcade video game machines and ordinary desktop computer terminals linked to special servers. At least for now, sweepstakes machines and the “sweepstakes games” they offer are being allowed to operate outside the scope of the statewide ban on video gaming machines and North Carolina’s general ban on gambling and non-state run lotteries.

As baseball legend Lawrence Peter “Yogi” Berra once said, “It ain’t over ‘til it’s over.” And with sweepstakes machines spreading like wildfire across North Carolina, the fight over statewide video gambling is far from over.

“You Can Observe a Lot by Watching”

The malapropisms and strange logic of Yogi Berra are appropriate for explaining sweepstakes machines and their presence in North Carolina in spite of the state’s gambling laws. Yogi said “you can observe a lot by watching,” and state policy makers could observe (and even learn) a lot by simply watching how these machines operate. Sweepstakes machines have popped up just about everywhere, including local convenience stores, bars, “Internet cafes,” “business centers,” and even stand-alone sweepstakes parlors. Convenience stores and bars typically have up to four machines, but stand-alone facilities can have many more. An Internet sweepstakes parlor a few miles from the state capital building on South

Saunders Street in Raleigh features smoking and no smoking rooms and over 70 computer terminals.⁵

A friend of mine and I visited a convenience store in Maggie Valley this past January to see how these sweepstakes machine games operate. The store clerk said that to play the machines, I would need to buy a “phone card” from him at the store counter.⁶ I told him I wanted two \$5 phone cards, and the clerk ran two \$5 bills through a machine behind the counter, which printed out two receipts. Each receipt listed a 1-800 telephone number and contained five different 10-digit PINs, with each PIN worth \$1 and five minutes of telephone time that expired in one month.⁷ The store clerk put \$5 in credits on two of the four video terminals located in a separate room at the back of the store.

The machines are set up to look and operate like video poker or slot machines.⁸ The first touch screen allowed us to choose from a number of video games including slot games, poker and keno. My friend, who in the past had been an avid player at the Cherokee casino, said that the games available for play were exactly like the video gambling games found at Cherokee in prior years. While I tried to decipher the single set of “Lucky Sweepstakes Phone Card Sweepstakes Rules” posted

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over the machines,⁹ he started playing the video poker games, wagering portions of his \$5 credit for a chance to win a jackpot prize that increased or decreased depending on the amounts he risked. Sweepstakes machines in western North Carolina have offered jackpots as high as \$10,000.¹⁰ My friend’s credit amounts started dwindling as he made 25-cent wagers, and the machine made sounds and flashed bright images on the screen. “Just like the video poker machines in Cherokee,” my friend said. He finally “won” 25-cents on a hand of poker, switched to a keno game, and when his credits dropped to 25-cents, he cashed out. He received a voucher from the machine for his meager winnings. I never wagered any amount on my machine, cashed out on my untouched \$5 in credits, and received a similar voucher.

I showed the clerk my \$5 voucher, and admitted that I never wagered anything. The clerk said that was ok, opened up the cash register and gave me back a \$5 bill.¹¹ I also asked him for a copy of the sweepstakes rules and told him I wanted to get a free play on the machine without buying a phone

card. He said he couldn't give me a copy of the official rules and that the free play option "didn't work." After leaving, I realized the store's objective was obviously to sell the sweepstakes games rather than "phone cards," as I was able to receive 25 minutes of free phone time by simply cashing out without actually playing any games.

About two weeks later, I played the Internet sweepstakes games at the South Saunders Street parlor in Raleigh. The strip shopping center where the facility is located serves as a virtual casino with different businesses (including a trinket shop and "yard sale" store) offering various types of sweepstakes machines. The Internet sweepstakes parlor is housed in a separate building behind the businesses in front. Upon entering, I had to provide the attendant with my driver's license, and my license number served as my ID number for playing the games. The attendant explained that a registered customer gets 100 free sweepstakes credits, and 10 minutes of free Internet time each day that they show up to play, and that the Internet time could be used only on one of the parlor's computers. I gave the attendant an additional \$2 for 200 more in credits (and 20 more minutes of Internet time).

The games offered on the computer terminal were essentially the same as those offered on the machines in Maggie Valley, but there were more of them and they appeared to be newer games. A player plays using sweepstakes credits, with 100 credits equal to one dollar in value. Several of the available games offered jackpots of over \$13,000 if you made the highest possible wager of 650 credits. I lost credits on a few hands of video poker, but then got on a roll playing the "Money Bunny" slot game and had 200 in credits when the power went out and shut all the machines down.

I returned to the sweepstakes parlor a few weeks later, and all I had to do to play was show the attendant my license. I received 100 free sweepstakes

credits for showing up to play that day, and since my account still had 200 credits from the last time I played, I started out with 300 credits. I paid the attendant \$5 more, and played a number of different games for about 30 minutes. Whenever my winnings went over \$1, I used the winnings to purchase more sweepstakes credits on the terminal so I could keep playing. I seemed to do better when I wagered the lowest allowed amount of 25-cents, and I finally quit playing when my sweepstakes credits went below 100.¹² I then asked the attendant to explain how to access my 90 minutes of Internet time, and she used her own account to explain the process. She said that many customers like her never use any of their accrued Internet time, and showed me that her account had thousands of Internet minutes available.

An older gentleman seated near me won \$500 while I was playing, and he was still playing when I left. Serious players like that make sweepstakes machines a significant source of income for businesses offering the games.¹³ The attendant told me that on typical nights there are easily 25 people waiting in line to get a machine at the South Saunders parlor, and almost all of the computer terminals were occupied on the afternoons that I played. Reports indicate that there now may be twice as many Internet sweepstakes parlors as movie theatres in Durham.¹⁴

"Like Déjà Vu All Over Again"

The video gambling industry has been compared to the monster in a teen slasher flick series—it doesn't matter how many times you think you've killed him, he just comes back in a more ridiculous form in an even cheesier sequel.¹⁵ Almost as soon as the statewide ban on video gaming machines went into effect in July 2007, video gambling machine manufacturers began flooding North Carolina with sweepstakes machines. In order to deal with the ban, the gambling industry simply reprogrammed their video poker machines to operate as sweepstakes machines, by offering a method of free play.¹⁶ The industry was empowered by an April 2008 ruling by Guilford County Superior Court Judge John Craig in *Hest Technologies, Inc. v. State*, that said the sweepstakes systems at issue were not illegal under the slot machine and video gaming machine bans found at N.C. GEN. STAT. §§ 14-306 and 14-306.1A.¹⁷

The North Carolina legislature responded by banning "server-based electronic game promotions" through new legislation that became effective on December 1, 2008. The statute defines "server-based electronic game promotions" as a system (1) with a database containing a pool of entries "with each entry associated with a prize value," (2) whereby participants purchase or otherwise obtain a prepaid card, (3) and also obtain one or more entries, (4) which are "revealed" at a point of sale terminal or at

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a game terminal simulating a slot machine or video gaming machine.¹⁸

To get around the new statute banning “server-based electronic game promotions,” the video gambling industry eliminated the use of prepaid cards in their sweepstakes systems and substituted the use of an ID number.¹⁹ In a second round of the *Hest Technologies* case, Judge Craig again ruled in favor of the sweepstakes machine manufacturer, saying in his December, 2008 order that the system at issue “does not violate N.C. GEN. STAT. §14-306.3, nor could any law enforcement official reasonably believe otherwise, as the Hest system does not simulate a game ordinarily played on a slot machine . . . or a video gaming machine,” and “does not use a database that contains a pool of sweepstakes entries with each entry associated with a prize value.”²⁰ In a separate matter, Wake County Superior Court Judge Paul Ridgeway determined in a June 2009 order that the plaintiff sweepstakes machine distributor’s system was “not a server-based electronic game promotion,” and restrained the State from taking any enforcement action against the plaintiffs.²¹ While the Guilford and Wake County rulings do not directly apply to other judicial districts in North Carolina, Richard Drucker, a professor at the UNC School of Government, says that local law enforcement agencies have nevertheless taken note of the rulings and are now reluctant to force the issue of the legality of sweepstakes machines.²²

For North Carolina legislators fighting to stop gambling machines, this nightmare scenario is, as Yogi says, “like déjà vu all over again.” The Senate and House each introduced bills last year that attempt to expand the reach of the statutes defining illegal slot and video gaming machines to include sweepstakes machines.²³ Both bills remained in committee, possibly because of concerns that the bills were too inclusive and might prohibit all ordinary promotional sweepstakes, such as those offered by soft drink bottlers.²⁴ House Speaker Joe Hackney predicts that the General Assembly will address the issue again in the 2010 short session.²⁵ Hackney believes that sweepstakes machines are illegal and “not what the legislature intended.”²⁶

“Our Similarities are Different”

Observers say that playing the sweepstakes machines “looks like gambling and feels like gambling,”²⁷ which seems to be an incredibly understated assessment once one has actually played the games. But the sweepstakes machine industry says that these games are nothing more than legal sweepstakes that may be played for free and that the machines only *simulate* games of chance, because the winner is predetermined and is not determined by the machines themselves. The industry argues that the poker hands and turning slots displayed on the machines are promotional devices only, designed to get people to buy phone or Internet time.²⁸ But



one sweepstakes parlor operator in Asheville agrees with my friend that the games are essentially the same as those offered at the Cherokee casino: “The only difference is ours are sweepstakes and they have phone cards. Other than that, they are the same.”²⁹

For the time being, North Carolina trial courts seem to be buying the gambling industry’s convoluted argument that (as Yogi would put it) “our similarities are different,” and these machines are somehow different from banned gambling devices. In ruling for the sweepstakes machine industry, the judges in Wake and Guilford County appear to have focused on whether the machines could be considered to differ in *any* technical respect from the description of the illegal systems found in the applicable statutes. Their limited approach has created a game for legislators where the odds are stacked wildly in favor of the gambling industry—

legislators must precisely describe an illegal gambling device through a statute, and the gambling industry can win every time by simply tweaking its machines to avoid the technical description found in the statute.

Given the overall nature and operation of these sweepstakes machines and games, are these trial courts correct in finding they are just legal sweepstakes, no different from instant win sweepstakes offered by traditional retailers? Or are these games and devices operating as a form of illegal gambling? Gambling and lotteries (with the exception of the state-run lottery and certain bingo and raffle games) are prohibited in North Carolina.³⁰ N.C. GEN. STAT. §14-292 defines gambling as operating or playing or betting on “any game of chance at which any money, property or thing of value is bet.” North Carolina courts have defined a lottery “as any scheme for the distribution of prizes by lot or chance, by which one, on paying money or giving anything of value to another, obtains a token which entitles him to receive a larger or smaller value, or nothing, as some formula of chance may determine.”³¹ The character and substance of an activity, and not its form, determines whether the activity is an illegal game of chance.³² For that reason, North Carolina courts are supposed to “strip the transaction of all its thin and false apparel and consider it in its very nakedness [and] look to the substance and not to the form of [the transaction] in order to disclose its real elements.”³³

Games of chance include any games where the winners are selected by a random process (and not by skill),³⁴ including via a random drawing, seeded winning game cards, or pre-selected winning numbers. Prohibited games of chance have three basic components: chance, consideration (paying or risking something of value to play), and a prize (anything of value that goes beyond that which is

offered to every player).³⁵ For a game of chance to be legal, one of the three elements must be removed. A “sweepstakes” (as opposed to a lottery or gambling), is a game of chance or promotion where the element of consideration is eliminated, generally by offering a free alternate method of entry (an “AMOE”) into the random drawing or game.

The sweepstakes machines at issue in North Carolina are clearly “games of chance” that offer prizes. Arguments by the gambling industry that sweepstakes machine games are not games of chance because the particular machine, or the system “readers” displaying the games, do not actually determine the winner, are without any legal basis. North Carolina courts have stated that “a game of chance” is a game “determined entirely or in part by lot or mere luck,”³⁶ and when presented squarely with the issue, other state courts have held that the element of chance is satisfied in sweepstakes machine systems at the point of sale when the entries are purchased, even though the “readers” themselves do not assign value to the entries.³⁷

Sweepstakes machine games do appear to offer free AMOEs, although requests for them are not always honored³⁸ and those AMOEs that are actually available may be legally insufficient.³⁹ Even a well-structured AMOE, however, will not necessarily eliminate a gambling violation for a game of chance. A number of states, including North Carolina, have drawn a distinction between games offered in connection with the promotion or sale of a product or service, and those in which no product or service is really being promoted, or the product or service is *incidental* to the game of chance. Courts and attorney generals have specifically reached this conclusion in phone card cases, finding that a gambling violation may be found despite the existence of an AMOE in situations where the telephone card products were rarely used or were deemed to be merely ancillary to the sale of the chance.⁴⁰

The North Carolina Court of Appeals has held that where the pre-paid telephone cards can be considered a genuine product and the associated sweepstakes can be considered a valid promotional tool designed to increase the sale of the product, the game at issue will not be deemed to violate North Carolina’s lottery laws.⁴¹ In *American Treasures, Inc. v. State*, the phone card seller was selling phone cards that each contained a game piece with a scratch off area that revealed whether the customer had won a prize. While the court agreed with the State that there are situations where “it is clear that the product being ‘sold’ is merely ancillary and incidental to the accompanying game of chance,” it found that in this particular case, the sale of the phone cards was “not a mere subterfuge to engage in an illegal lottery scheme, whereby consideration is paid merely to engage in a game of chance.”⁴²



It must be noted, however, that no gambling device was alleged to be involved with the sweepstakes in *American Treasures*. Where pre-paid calling cards have used gaming devices similar to slot machines in promoting the cards and accompanying sweepstakes, courts in other states have consistently ruled that the game of chance is not a legal sweepstakes, but rather illegal gambling.⁴³ For example, in *Sun Light Prepaid Phonecard Co., Inc. v. State of South Carolina*,⁴⁴ the seller of pre-paid phone cards sought the return of its calling/instant win cards and electronic dispensers that had been seized as illegal gambling devices, although free game pieces were available upon request. In denying the seller's request, the South Carolina Supreme Court concluded that the game at issue was a game of chance and that the phone time being sold was "mere surplusage to the game piece," so the phone card itself was a gambling device. The court ruled that the phone card machine was also an illegal gambling device, noting that the machine had a gambling themed video screen and celebratory music when winning cards were dispensed.⁴⁵

A number of other courts have said that phone card sweepstakes are illegal because consumers were found not to be paying for the calling card, but rather for the chance to win.⁴⁶ In making this determination, courts have noted that players did not attach any importance to the telephone cards and that the main purpose of the promotion was to promote the game of chance, and not the sale of the phone cards.⁴⁷ Some courts have also distinguished sweepstakes machines (which provide permanent games with high stakes and a high payout rate), from a traditional promotional sweepstakes (which is temporary and has low stakes and low pay-out rates of one-half of one percent).⁴⁸

In *Barber v. Jefferson County Racing Assoc., Inc.*,⁴⁹ the Supreme Court of Alabama addressed a sweepstakes system very similar to the one found at the Internet parlor in Raleigh and held that the system constituted a slot machine under Alabama law. The "MegaSweeps" system at issue offered sales of Internet access in conjunction with chances to win cash prizes, and consisted of point of sale terminals (where customers purchased Internet time and redeemed any revealed winnings), computer terminals (that provided Internet access), readers (that revealed sweepstakes entries through the playing of slot machine games) and computer servers (that connected the system together). Using reasoning similar to the trial court in Guilford County, the trial court in Barber ruled that the machines at issue were not slot machines or gambling devices under Alabama law because the readers were "dumb terminals," with no element of chance present and no consideration being paid to use the readers.⁵⁰

Looking past the strained reasoning of the trial court, the Alabama Supreme Court found that it was immaterial that the readers did not in them-

Gambling addiction experts say that sweepstakes machines are just as bad as the old video poker machines.

selves assign values to sweepstakes entries and that the element of chance was as much a feature in the MegaSweeps system as in any stand-alone slot machine.⁵¹ The *Barber* court noted that the fact that a substantial number, if not the majority, of customers pay to play the readers, rather than to acquire (or in addition to acquiring) Internet time, and that "customers purchased additional cybertime—with the accompanying entries – even though they already had huge quantities of unused cybertime on their accounts."⁵² The court also refuted the system owners' argument that the system could not be a gambling device because the Internet time was being sold at fair market value, holding that the opportunity for free plays (through an AMOE) did not negate the element of consideration.⁵³ Finally, the *Barber* court said that the MegaSweeps game was easily distinguished from a traditional instant cash promotion run by a soft drink company, because the MegaSweeps game was a permanent, high stakes game that involved the use of an alleged gambling device.⁵⁴

"If you don't know where you're going, you'll wind up somewhere else."

Yogi said that too, and with legislators and trial judges unsure of where they are going on the legality of sweepstakes machines, North Carolina has wound up "somewhere else," suffering from the negative effects of these devices. Gambling addiction experts say that sweepstakes machines are just as bad as the old video poker machines.⁵⁵ Gary Gray, director of the N.C. Council on Problem Gambling, reports that about 90 percent of the new attendees to Gamblers Anonymous meetings say they are hooked on playing at "Internet cafes."⁵⁶ The call logs for Gray's Greensboro-based gambling help line show that three-quarters of his calls over the first eight months of 2009 were related to sweepstakes games.⁵⁷

Meanwhile, local government officials and law enforcement officers are struggling to contain the spread of these machines until steps are "taken in Raleigh to correct the problem."⁵⁸ To fill the gap

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left by state government, towns are attempting to regulate sweepstakes machines under zoning laws or by placing special taxes on sweepstakes establishments.⁵⁹ Ironically, in an effort to legitimize the games and integrate them into the state economy, the sweepstakes machine industry is also asking the state to step in and tax and regulate the games.⁶⁰

In giving directions to his house, Yogi supposedly said, “When you get to a fork in the road, take it.” He meant that in his neighborhood, you could take either direction at the fork in the road and still get to the house. North Carolina is at a fork in the road towards eliminating sweepstakes machines, and can either take the judicial road (by forcing the issue in the appellate courts) or the legislative road (by enacting additional legislation). It should take both.

North Carolina law has long held that courts are required to look to the substance and not the form of a game of chance in determining whether it is illegal.⁶¹ When faced with the issue, appellate courts in other states have focused on the substance of sweepstakes machines, and have consistently ruled that they are gambling devices offering illegal games of chance. A close look at the sweepstakes machine promotions operating in North Carolina makes clear that the phone and Internet time being sold is actually “a mere subterfuge to engage in an illegal lottery scheme, whereby consideration is paid merely to engage in a game of chance.”⁶² Under North Carolina law, sweepstakes machine games are not legal sweepstakes promotions, but are instead illegal games of chance, operating in violation of the existing statewide ban on slot and video gaming machines and the general ban on gambling and

non-state run lotteries. North Carolina’s higher courts should be compelled to make this clear.

At the same time, the General Assembly should proceed down the legislative road toward banning sweepstakes machines and design new legislation that clarifies existing law by providing that an illegal gambling device or slot machine is simply any device used in the advancement of unlawful gambling activity or an unlawful lottery.⁶³ The legislation could also revise the general ban on gambling to clarify that an offense may occur in circumstances where a game of chance is offered in connection with the sale of a product or service, if the product or service being promoted is only ancillary and incidental to the accompanying game of chance.⁶⁴

The battle over video gambling devices in North Carolina “ain’t” over. But it might just be, if North Carolina legislators clarify the current gambling statutes and law enforcement officials put the issue of the legality of sweepstakes machines squarely before the state’s appellate courts. ❖

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ENDNOTES

1) McCracken and Amick, Inc. v. Perdue, No. COA9-431 (N.C.App. 2009), <http://www.aoc.state.nc.us/www/public/coa/opinions/coa2009.htm>.

2) N.C. Gen. Stat. §14-306.1A

3) McCracken and Amick, Inc. v. Easley, Order, No. 08 CVS 019569 (Wake County Superior Court, February 2, 2009).

4) Editorial, “Appeals Court wise to keep video poker ban,” Charlotte Observer, December 27 2009.

5) See Benjamin Niolet, “Sweepstakes stay ahead of the game,” Raleigh News and Observer, December 23, 2009. The News and Observer visited the parlor when 50 machines were on site; there are now over 70.

6) Jon Ostendorff, “Video Sweepstakes a target of new regulations in North Carolina,” Asheville Citizen-Times, December 27, 2009; Niolet, “Sweepstakes stay ahead of the game,” Raleigh News and Observer, December 23, 2009.

7) The 1-800 number and the 10 digit PINs were in tiny print on the receipt. By dialing the number and entering a PIN, I did receive 5 minutes of phone time. However, once the 5 minutes ran out, the call was terminated, and there was no way to enter another PIN and continue talking.

8) Niolet, “Sweepstakes stay ahead of the game,” Raleigh News and Observer, December 23, 2009.

9) The first official rule said “NO PURCHASE NECESSARY,” and provided that the machines could be played without purchasing a phone card by filling out a free play request form at any sweepstakes location or by sending a stamped self addressed envelope to an address in Oklahoma. The rules went on to explain that the “promotional

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points” received with a phone card purchase or from free play requests have “no cash value and may not be redeemed,” but “can be played and any winnings will be credited to you . . . and your winnings can be redeemed.” The rules also provided that you play the promotional points by depressing the play button on the machine, and that once “the card play or hand is complete, a winning hand will be indicated on the screen,” with winning hands credited as sweepstakes points that “can be redeemed for prizes equal to the number of points times the value of each point.” According to the rules, prizes under \$575 are payable at the machine location, but prizes over that amount must be paid through the mail. Because the rules on how to play were vague, I hit the “help” screen touch button on the machine. The “Sweepstakes Instructions” popped up, and explained how to play video poker and that if the poker hand “is one of the winning hands shown on the pay table, the winning amount is added to your credit.”

10) Ostendorff, “Video Sweepstakes a target of new regulations in North Carolina,” *Asheville Citizen-Times*, December 27, 2009.

11) According to the store clerk, the store did not give cash back for anything less than a dollar in winnings, so my friend could not receive anything for his 25-cent voucher.

12) As was the case at the Maggie Valley convenience store, payouts at the South Saunders Street Internet parlor are made only in one dollar increments, so if I had cashed out with less than 100 credits, I would not receive anything. I also was not able to transfer or purchase more sweepstakes credits on the computer terminal once my credits dipped below 100.

13) “One internet sweepstakes operator based in Pilot Mountain made an estimated tax payment to Roanoke County, Virginia that assumes several million dollars of revenue in just that one county.” Christopher McLaughlin, “Internet Sweepstakes Tax Update,” *Coates Canon: NC Local Government Law Blog*, <http://sogweb.sog.unc.edu/blogs/localgovt>, posted March 12, 2010.

14) *Id.*

15) Scott Mooneyham, “Video poker sure seems hard to kill,” *Southern Pines Pilot*, December 29, 2009; Editorial opinion, “Video poker ‘zombie’ won’t remain dead,” *Asheville Citizen-Times*, December 20, 2009. Maybe dealing with the video poker industry is really more analogous to playing the arcade game whack-a-mole. State Rep. Ray Rapp (D–Madison) says legislators have been playing that game with the video gambling industry for years: “Once we pass a law to ban one activity up pops another game that they’ve been able to put on Internet and circumvent the law.” See WTVD Troubleshooter, “Loophole allows slot machines,” April 24, 2009, <http://abclocal.go.com/wtvd>.

16) See Richard Drucker, “Cyber Sweepstakes Anyone?” *Coates Canon: NC Local Government Law Blog*, <http://sogweb.sog.unc.edu/blogs/localgovt>, posted October 12, 2009.

17) *Hest Technologies, Inc. v. State of North Carolina*, Preliminary Injunction, No. 08 CVS 457 (Guilford County Superior Ct. April 16, 2008). In his order, Judge Craig found that the plaintiff machine operators were likely to prevail at trial on their claims that they were operating legitimate server based electronic sweepstakes machines and that such machines did not constitute illegal video poker machines because the game terminals “(1) do not result in the participants receiving or becoming entitled to anything and (2) do not require or involve the insertion of any piece of money or coin other object.” The judge concluded

that “Plaintiffs are likely to succeed on the merits of their claims that the simulated game terminals do not require any payments to activate play, and . . . any payment made by participants is for the purchase of the legitimate and competitively-priced products being sold and marketed by Plaintiffs and all entries to the sweepstakes are free.”

18) N.C. Gen. Stat. §14-306.3(c).

19) Matt Tomsic, “Sweepstakes machine owners find way around ban,” *Star-News*, January 12, 2009.

20) *Hest Technologies, Inc. v. State of North Carolina*, Temporary Restraining Order, No. 08 CVS 457 (Guilford County Superior Ct., December 19, 2008). The judge also found that the Hest system does not allow entries to be “revealed” at a point of sale terminal or game terminal. The order even enjoined law enforcement officers from saying publicly that the machines were illegal.

21) *Sandhill Amusements v. State of North Carolina*, Order for Preliminary Injunction, No. 09 CVS 5719 (Wake County Superior Court, June 26, 2009). Judge Ridgeway’s Order for Preliminary Injunction also provided that the plaintiff and the State had agreed that each retail outlet using plaintiff’s machines would have no more than four sweepstakes machines, would prominently post the game rules and the free play applications, and could not offer the sweepstakes games without an accompanying sale of a phone card or free play coupon.

22) Corey Friedman, “Do sweepstakes machines skirt state video gaming laws?” *Gaston Gazette*, November 13, 2009.

23) S.B. 971, 2009 Sess. (N.C. 2009); H.B. 1277, 2009 Sess. (N.C. 2009).

24) By L.A. Williams, “Video Poker before the General Assembly in Three Bills”, *Christian Action League* post, <http://christianactionleague.org/news>, posted April 24, 2009, quoting Rep. Ray Rapp.

25) Cullen Browder, “Lawmakers take aim at ‘sweepstakes cafes’,” *WRAL Investigates*, March 5, 2010, http://www.wral.com/news/local/wral_investigates/story/7175661/.

26) *Id.*

27) WTVD Troubleshooter, “Loophole allows slot machines,” April 24, 2009, <http://abclocal.go.com/wtvd>

28) A.P. Report, “Sweepstakes parlors dodge NC gambling bans,” December 23, 2009. “The games are just a form of entertainment” to present the sweepstakes tickets, says Chase Brooks, a spokesman for the N.C. Entertainment Group. See Mark Binker, “Sweepstakes Machines are spreading,” *Greensboro News-Record*, September 6, 2009.

29) Jon Ostendorff, “Demetre Theodossis tied to video sweepstakes parlor,” *Asheville Citizen-Times*, December 27, 2009.

30) N.C. Gen. Stat. §14-292; N.C. Gen. Stat. §14-290.

31) *State v. Lipkin*, 169 N.C. 265, 271, 84 S.E. 340, 343 (1915); *State v. Simmons*, 59 N.C. App. 287, 296 S.E.2d 805 (1982); *American Treasures, Inc. v. State*, 173 N.C.App.170, 617 S.E.2d 346 (N.C.App. 2005).

32) *Animal Protection Society v. State*, 95 N.C. App. 258, 268, 382 S.E.2d 801, 807 (1989).

33) *State v. Lipkin*, 169 N.C. 265, 271, 84 S.E. 340, 343 (1915); *American Treasures, Inc. v. State*, 173 N.C.App.170, 617 S.E.2d 346 (N.C.App. 2005).

34) See *Joker Club, LLC v. Hardin*, 183 N.C.App. 92 (2007).

35) *State v. Lipkin*, 169 N.C. 265, 271, 84 S.E. 340, 343 (1915).

36) *Joker Club, LLC v. Hardin*, 183 N.C.App. 92 (2007), citing *State v. Gupton*, 30 N.C. 271, 273-74 (1848).

37) See *Barber v. Jefferson County Racing Assoc., Inc.*, 960 So.2d 599, 610 (Ala. 2006).

38) In the case of the Maggie Valley sweepstakes machines, no free play was available on site and a participant must write in to obtain free play credit(s). (The rules for the sweepstakes did not say how many free play credits a free play request would generate.) I sent in a free play request on 1/21/2010, and about ten days later received the properly addressed envelope back “return to sender not deliverable as addressed.”

39) The AMOE must ensure that participants utilizing the method are on “equal footing” with the paying participants. Any material disparity in opportunity to win between the payment method of entry and the AMOE can render a sweepstakes illegal, such as where there is a real or perceived disadvantage to those who enter for free and where there are more burdensome entry requirements on non-purchase entrants. In the case of the South Saunders Street (Raleigh) computer system sweepstakes games, customers are limited to one set of 100 free credits per day, but can receive unlimited credits via the purchase method. Given the limitations on free entries, the AMOE provided is arguably not equal to the purchase method of entry, and this form of AMOE would likely fail under sweepstakes law principles.

40) *American Treasures, Inc. v. State*, 173 N.C.App.170, 617 S.E.2d 346 (N.C.App. 2005). See generally, e.g., *Sun Light Prepaid Phone Card Co. v. State*, 360 S.C. 49, 600 S.E.2d 61 (S.C. 2004), cert. denied sub nom *Phoncards R Us, Inc. v. South Carolina*, 543 U.S. 1120, 125 S.Ct. 1069, 160 L.Ed.2d 1068, (2005); *Jester v. State*, 64 S.W.3d 553 (Tex. App. 2001); *Midwestern Enterprises, Inc. v. Stenehjem*, 2001 N.D. 67, 625 N.W.2d 234 (N.D. 2001); *Pre-Paid Solutions, Inc. v. City of Little Rock*, 343 Ark. 317, 34 S.W.3d 360 (Ark. 2001); *People Ex. Rel. Lockyer v. Pacific Gaming Technologies*, 82 Cal.App.4th 699, 98 Cal. Rptr.2d 400 (Cal. App. 2 Dist. 2000); *Opinion of the Attorney General of the State of Oklahoma*, Opinion No. 09-24 (November 7, 2009); *Florida Advisory Opinion AGO 98-07* (February 5, 1998), and *Florida Advisory Opinion AGO 2007-48* (September 2, 2007).

41) See *American Treasures, Inc. v. State*, 173 N.C.App.170, 617 S.E.2d 346 (N.C.App. 2005).

42) *Id.* at 179, 351. The *American Treasures* case was distinguished in *Lindey v. Pennsylvania State Police*, 916 A.2d 703 (Pa. Commw. Ct. 2007), where the Commonwealth Court of Pennsylvania ruled that discount coupons and coupon dispenser machines that included a chance to win cash prizes using a rub off section were gambling devices and a “mere subterfuge” for unlawful gambling.

43) See *Sun Light Prepaid Phonocard Co., Inc. v. State of South Carolina*, 600 S.E.2d 61 (S.C. 2004); *Midwestern Enterprises, Inc. v. Stenehjem*, 625 N.W.2d 234 (N.D. 2001); *Jester v. State of Texas*, 64 S.W.3d 553 (Tex. App.

Ct. 2001); *Pre-paid Solutions, Inc. v. City of Little Rock*, 34 S.W.2d 360 (Ark. 2001).

44) *Sun Light Prepaid Phonocard Co., Inc. v. State of South Carolina*, 600 S.E.2d 61 (S.C. 2004).

45) *Sun Light Prepaid Phonocard*, 600 S.E.2d 61 (S.C. 2004). The South Carolina Supreme Court also noted that the machines were promoted to retailers with language such as “Looks Like a Slot Machine Although It’s Not.”

46) *Midwestern Enterprises, Inc. v. Stenehjem*, 625 N.W.2d 234 (N.D. 2001). Other courts have noted that the right to play the game (even if provided through the free-play option) is a “property right” that is being risked every time a customer plays the game, thereby making the machines illegal gambling devices. See *Pre-paid Solutions, Inc. v. City of Little Rock*, 34 S.W.2d 360 (Ark. 2001). In that case, the Arkansas Supreme Court ruled that a slot machine in which consumers paid \$1 for a nominal value calling card and a chance to play game was a gambling device, even when consumers could also mail in for a free-play certificate for the game. The court found this free-play certificate to be a “property right” to play the game, which right was risked (i.e., could be won or lost) every time the customer played the slot machine game.

47) See *Jester v. State of Texas*, 64 S.W.3d 553 (Tex. App. Ct. 2001), where the Texas Court of Appeals addressed a case involving a \$1 slot machine game in which a 3 minute calling card was distributed with the right to play the game.

48) *Midwestern Enterprises, Inc. v. Stenehjem*, 625 N.W.2d 234 (N.D. 2001); *Barber v. Jefferson County Racing Assoc., Inc.*, 960 So.2d 599 (Ala. 2006).

49) *Barber v. Jefferson County Racing Assoc., Inc.*, 960 So.2d 599 (Ala. 2006), cert. denied, 127 S.Ct. 2975 (2007).

50) *Id.* at 608-609.

51) *Id.* at 610.

52) *Id.* at 611.

53) The Barber court held that the system readers were “slot machines to those who play them,” and that the free entries “do not legitimize the high-stakes MegaSweeps any more than some opportunity for free plays could render innocuous a conventional slot machine.” *Id.* at 615. The system owners bragged that they had found and exploited a loophole in the Alabama law banning gambling devices, but the court disagreed saying that Alabama’s gambling laws could not be so easily evaded when their intention was to prohibit “the vicious system of lottery schemes and the evil practice of gaming in all their protean shapes.” *Id.* at 614.

54) *Id.* at 614.

55) Ostendorff, “Video Sweepstakes a target of new regulations in North Carolina,” *Asheville Citizen-Times*, December 27, 2009.

56) *Id.*

57) Mark Binker, “Sweepstakes Machines are spreading,” *Greensboro News-Record*, September 6, 2009.

58) Marla Dalrymple, “County, state struggling with sweepstakes industry,” *Macon News*, 12/23/09.

59) See Christopher McLaughlin, “Internet Sweepstakes Tax Update,” *Coates Canon: NC Local Government Law*

Blog, <http://sogweb.sog.unc.edu/blogs/localgovt>, posted March 12, 2010; Richard Drucker, "Cyber Sweepstakes Anyone?" Coates Canon: NC Local Government Law Blog, <http://sogweb.sog.unc.edu/blogs/localgovt>, posted October 12, 2009.

60) Corey Friedman, "Do sweepstakes machines skirt state video gaming laws?" *Gaston Gazette*, 11/13/09; see Mark Binker, "Sweepstakes Machines are spreading," *Greensboro News-Record*, September 6, 2009. Rep. Earl Jones (D-Guilford) has proposed legislation that would legalize, tax and regulate the machines, something that is supported by such groups as the N.C. Legislative Black Caucus. See Mark Binker, "Jones gaining more support for video poker," *Greensboro News-Record*, July 29, 2009.

61) *Animal Protection Society v. State*, 95 N.C. App. 258, 268, 382 S.E.2d 801, 807 (1989).

62) *American Treasures, Inc. v. State*, 173 N.C.App.170, 179, 617 S.E.2d 346, 351 (N.C.App. 2005). This "subterfuge" is further proven by my experience playing the games in Maggie Valley, when I was able to get 25 minutes of free phone time by merely cashing out without using my sweepstakes credits.

63) Alabama defines gambling devices in such a manner. See Ala. Code § 13A-12-20(10), 13A-12-27(a)(2).

64) See N.C. Gen. Stat. §14-292; *American Treasures, Inc. v. State*, 173 N.C.App.170, 179, 617 S.E.2d 346, 351 (N.C.App. 2005).

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