

THE HISTORY OF INTERNET CAFÉS AND THE CURRENT APPROACH TO THEIR REGULATION

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I. INTRODUCTION

In recent years, a new phenomenon of “convenience gambling” has spread across the country. Utilizing the speed and sophistication of networked computer technology,¹ proprietors are offering the appeal of slot machine gambling in strip mall store fronts under the legal cover of laws drafted for sweepstakes designed in the 1970s and 1980s for Publisher’s Clearing House and the McDonald’s Monopoly game.² However, unlike the games intended to drive sales of commercial products, these new gambling enterprises appear more focused on the typical casino goal of attracting gambling revenue rather than increased profits from the underlying non-gambling business. These new forms of gambling operate under the innocuous moniker of “Internet café,” and are pushing the boundaries of gambling laws and regulations. Quite often, the communities in which they operate are ill-equipped to deal with their oversight.

The term “Internet café” requires further explanation, as it is a bit of a misnomer. On most occasions, patrons of an Internet café are not interested in accessing the Internet, nor are they enjoying the relaxing coffee-infused environment generally imagined when one fashions a mental picture of a “café.” Rather, the type of Internet café at issue in this Article, also known as an “adult amusement arcade” or “convenience casino,” is a place where people go to play electronic sweepstakes games that look and sound almost identical to slot

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¹ For detailed findings of fact of the computer infrastructure of an Internet café operation, see *Barber v. Jefferson Cnty. Racing Ass’n*, 960 So. 2d 599, 604-05 (Ala. 2006).

² Kelly Mathis, *The Truth about Internet Cafes in the Sunshine State*, TAMPA BAY ONLINE (June 2, 2011), <http://www2.tbo.com/news/opinion/2011/jun/02/MEOPINO1-the-truth-about-internet-cafes-in-the-sun-ar-234295/>.

machines found in regulated casinos around the world.³ The name “Internet café” is derived from the commercial product purportedly sold by these operations, i.e. internet time, and the intent of the proprietor to demonstrate facial compliance with state gambling laws.⁴ Many states in which these facilities operate have laws allowing a commercial business to conduct promotional sweepstakes in conjunction with the sale of a “good or service” to its customers.⁵ The sweepstakes serve as a marketing aid to drive sales of the underlying commercial product. These sweepstakes promotions range from the well-known “look under the cap” games of soft drink manufacturers to code numbers on restaurant and store receipts, which when entered following an online consumer satisfaction survey enroll the customer into a prize drawing.⁶

For these Internet cafés, the good or service for sale is Internet time, and the game promotion in connection with the sale of this Internet time is, essentially, an electronic pull-tab. Case law has described “electronic pull tab” devices as a self-contained unit consisting of a computer linked to a video monitor and a printer. The player inserts money and sees a video reproduction of a paper pull-tab ticket. The player electronically reveals concealed numbers to determine whether he or she is a winner. If a winner, the player may cause the machine to print out a winning ticket for redemption by a cashier, or may add the winning amount to a credit balance for further play. The electronic game retains the fundamental characteristics of the paper version of pull-tab: video pull-tabs simply replace the need for paper tabs with electronic tabs that are stored on a computer chip.⁷

The argument of Internet café operators is that their operations are no different from McDonald’s, Coca-Cola, or Home Depot.⁸ Counsel for a coalition of Internet cafés was quoted in Florida as saying:

The sweepstakes is simply a marketing tool used to promote the Internet and telephone time purchased at these cafés, the same type of sweepstakes offered at many checkout counters of large retailers that ask you to go online to complete a survey and the chance to win thousands in gift cards for that retailer.⁹

Despite this purported legal justification in support of their legitimacy, many customers, and even media outlets, are entirely unaware that this “marketing tool” is not the actual underlying business, and that Internet cafés are not essentially casinos. The fact that the games played so closely resemble slot

³ See *Barber*, 960 So. 2d at 608.

⁴ *Mathis*, *supra* note 2.

⁵ For an example of a typical state law that provides safe harbor for commercial game promotions, see FLA. STAT. § 849.094 (2005).

⁶ *Mathis*, *supra* note 2.

⁷ *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 541 (9th Cir. 1994). For various iterations of such devices analyzed by courts, see the case law progeny of the *Sycuan* case.

⁸ See *Mathis*, *supra* note 2.

⁹ *Id.* Although not from the same jurisdiction, the Supreme Court of North Dakota strongly disagrees with this contention. *Midwestern Enter. Inc. v. Stenehjem*, 625 N.W.2d 234, 240 (N.D. 2001) (“it does not follow that simply because low-stakes, temporary promotional sweepstakes with pay-out rates of one-half of one percent that offer free play are not pursued as lotteries, we must conclude high-stakes, permanent games with pay-out rates of sixty-five percent are immune from the definition of a lottery because they also offer limited free play.”).

machines and are located inside facilities that have names such as “Luxxor Casino” or “Lucky 777 Café” further blurs the line as to what the underlying business actually entails.¹⁰

This Article will examine the rise of Internet cafés by tracing their gambling roots back to the early evolution of gray market slot machines, such as mint dispensers, up to more modern pull-tab machines. It will also provide an overview of how local governments, state regulators, attorneys general, and state legislatures are dealing with the spread of Internet cafés and the “simulated gambling machines” played therein. Finally, it will offer some options to communities faced with these gambling operations when state laws provide insufficient guidance, regulation, or law enforcement to address the legitimacy of these operations.

II. HISTORY OF SIMULATED GAMING MACHINES

The Internet café, although a recent development in the gambling “gray market,”¹¹ is at its core an example of the ingenious and inventive ways in which the gambling industry finds means to feed the public’s desire to gamble. One of the first gambling device cases, involving the great-grandparent of the Internet café machines, dates back to the turn of the twentieth century. The case, *Lyman v. City Trust, Safe-Deposit, & Surety Co.*, involved a machine operated in the following way.¹² A nickel was inserted by the patron into one of the many slots on the front of the machine.¹³ Once the nickel went in, a number of reels with different colors would spin, and if the right colors aligned the player could win anywhere from ten cents to one dollar.¹⁴ The Court of Appeals of New York found this machine “to be a contrivance or apparatus by which it is determined who, as between the player and proprietor, is the winner or loser of the money hazarded.”¹⁵ The court added, “[t]he player stakes or hazards his money on a chance, and that is sufficient to make out the gambling. Within the general understanding, such a machine is a gambling device.”¹⁶

In an effort to overcome the effects of the holding above, the next development from the slot machine interests, presented in 1906, resulted in the case of *In re Cullinan*.¹⁷ The new device and commercial scheme associated with its use was described by the court as follows:

¹⁰ Luxxor Casino is an Internet café located in Lehigh Acres, Florida. An employee of this facility was the victim of a violent armed robbery as she attempted to close for the evening on Friday, June 3, 2011. Interestingly enough, the newspaper published a story, with attached surveillance video on its website and reported it as a casino robbery. No mention of sweepstakes or Internet café were reported. See *Lehigh Casino Robbery*, NAPLES NEWS (June 6, 2011), <http://www.naplesnews.com/videos/detail/lehigh-casino-robbery/>.

¹¹ “Gray market” is used as a reference to devices, which attempt to avoid the overt display characteristics of typical gambling devices. See *State v. Vance*, No. E2003-00110-CCA-R3-CD, 2004 WL 746296, at *6 (Tenn. Crim. App. Nov. 15, 2004); see also *Funliner of Ala., LLC v. Pickard*, 873 So. 2d 198, 204 (Ala. 2003).

¹² *Lyman v. City Trust, Safe-Deposit & Surety Co.*, 59 N.E. 903, 905 (N.Y. 1901).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ 99 N.Y.S. 1097 (N.Y. App. Div. 1906).

The alleged gambling was by means of a patented slot machine, known as the Yale Wonder Clock. This machine was about seven feet in height by three feet across, contained an advertising contrivance, a music box, a clock, and four tubes, in which tickets were placed to be rung up upon putting a nickel in the slot on the side of the machine. The tickets were placed in the tubes by the proprietor, and every time the machine was operated a metal disc or ticket was discharged. On the face of the machine, arranged horizontally, were four glass discs, colored white, blue, green, and red, respectively, and whenever the metal ticket or disc was ejected from the machine one of the glass discs was illuminated. The white entitled the player to 5 cents in trade, the blue 10 cents, the green 15 cents, and the red 25 cents. The discs were inscribed correspondingly, "Good for 5c in trade," and so on. The proof shows that the proprietor could distribute these metal discs in the tube as he saw fit. . . . The player, instead of paying cash at the bar for the amount of his purchase, presented his check, and received the same quantity in trade as though he paid the money. There was no rebate or reduction, but obviously the scheme was to entice trade by stimulating the gambling spirit. The player had no knowledge of the arrangement of the metal discs, and played in the hope of securing one or more of those calling for a larger sum, and knew that no loss could accrue to him in any event. The proprietor expected to make up for the few checks in excess of the actual value of the nickel in the increased trade and the consequent profit inuring to him.¹⁸

Despite the fact that the machine returned to the player at least the same value "in trade," the court found the device to be an illegal gambling machine.¹⁹ Condemning its operation, the court stated:

[t]he inventor of the present machine has attempted to obviate the criticism to which other slot machines have been subjected by cunningly returning to the player operating the machine a check or ticket which secures to him in cigars or liquor the amount of his stake. Like most endeavors to adhere to the letter of the law while violating its spirit, he cannot succeed. The present device attractively ministers to the gambling humor the same as other slot machines of substantially similar design. Unless it did this, it would not entice the customer.²⁰

This case is an early example of a mechanized game of chance being used to entice commercial sales. In the early 1930s, in response to similar rulings, gaming machine inventors produced a new device, which in conjunction with the sale of a product satisfied the cravings of patrons in search of a gambling fix.²¹ Known as "mint dispensers," these machines soon found themselves in stores, bars, and restaurants across the country.²² One court described such a machine and its operation as follows:

¹⁸ *Id.* at 1097-98.

¹⁹ *Id.* at 1100.

²⁰ *Id.* at 1099.

²¹ *See generally*, *People v. Gravenhorst*, 32 N.Y.S.2d 760 (N.Y. Sp. Sess. 1942); *Boynton v. Ellis*, 57 F.2d 665 (10th Cir. 1932); *State v. Mint Vending Mach. No. 195084*, 154 A. 224 (N.H. 1931); *State v. Baitler*, 161 A. 671 (Me. 1932); *Green v. Hart et al.*, 41 F.2d 855 (D. Conn. 1930); *Rankin v. Mills Novelty Co.*, 32 S.W.2d 161 (Ark. 1930); *State ex rel. Manchester v. Marvin*, 233 N.W. 486 (Iowa 1930); *Harvie v. Heise*, 148 S.E. 66 (S.C. 1929); *Snyder v. City of Alliance*, 179 N.E. 426 (Ohio Ct. App. 1931); *Painter v. State*, 45 S.W.2d 46 (Tenn. 1932); *Howell v. State*, 40 S.W.2d 782 (Ark. 1931); *Colbert v. Superior Confection Co.*, 6 P.2d 791 (Okla. 1931); *Jenner v. State*, 159 S.E. 564 (Ga. 1931).

²² *Gravenhorst*, 32 N.Y.S.2d at 765; *Boynton*, 57 F.2d at 666; *Mint Vending Mach. No. 195084*, 154 A. at 228; *Baitler*, 161 A. at 671; *Green*, 41 F.2d at 856; *Rankin*, 32 S.W.2d at

[a] machine resembling a cash register with a lever on the side, and in the front, a column of packages of mints. Upon the deposit of a coin and the operation of the lever [sic] a package of mints was released. In addition [sic] the machine caused three cylinders to revolve at different rates of speed. Upon each cylinder were certain symbols and an incomplete sentence. The inscriptions on the three, however, when the cylinders ceased to spin [sic] and when these inscriptions were read together, formed complete sentences of a humorous vein. These machines sometimes delivered metal tokens which were purported to have no cash or trade in value and to be capable of use only for further amusement.²³

Another court, in evaluating the legality of the machine, stated that, despite the delivery of the mints, “[i]t seems clear to us that these tokens or checks which are obtained by chance represent some value and constitute property.”²⁴ Sharing this view, an Ohio court condemned the device and stated:

Its purpose is to increase the sale of mints by appealing to the gambling instinct, and this increase in sales, and other accruing profit by way of advertisement, is a gain to the owner or lessee of the machine, as contemplated and provided against by the statutes and policy of this state We believe that it is not essential to gambling that one should have a chance to lose, but that the player has a chance and lure to get something for nothing. Now, does a patron of this machine *by continuous play receive something of value* from the amusement device? This we answer in the affirmative; for amusement is a thing of value, for which more money is spent perhaps than for any other purpose We are further unable to lay aside the facts that a vending machine can be and is a simple device; that the lure and chance in the appellant’s machine is there to appeal to the gambling propensity in us; that its amusement features are unnecessary in a simple vending machine.²⁵

Despite the delivery of a commercial product and additional provision of amusement via the additional plays of the machine for the consideration paid by the patrons, these types of machines were declared illegal in numerous state and federal decisions throughout the country because a game of chance accompanied the commercial sale.²⁶

In an effort to satisfy the public’s thirst for chance-based amusement, the next development was an early version of the traditional pinball machine,²⁷

161-62; *Marvin*, 233 N.W. at 486; *Harvie*, 148 S.E. at 67; *Snyder*, 179 N.E. at 427; *Painter*, 45 S.W.2d at 46; *Howell*, 40 S.W.2d at 783; *Colbert*, 6 P.2d at 793; *Jenner*, 159 S.E. at 565.

²³ *Gravenhorst*, 32 N.Y.S.2d at 765.

²⁴ *Boynton*, 57 F.2d at 666.

²⁵ *Snyder*, 179 N.E. at 428-29.

²⁶ See *Gravenhorst*, 32 N.Y.S.2d at 777; *Boynton*, 57 F.2d at 667; *Mint Vending Machine No. 195084*, 154 A. at 228; *Baitler*, 161 A. at 672; *Green*, 41 F.2d at 856; *Rankin*, 32 S.W.2d at 162; *Marvin*, 233 N.W. at 487; *Harvie*, 148 S.E. at 69; *Snyder*, 179 N.E. at 429; *Painter*, 45 S.W.2d at 48; *Howell*, 40 S.W.2d at 783-84; *Colbert*, 6 P.2d at 793; *Jenner*, 159 S.E. at 565.

²⁷ One court described the operation of such a machine as follows:

The device involved is the usual type of pinball machine having a horizontal plane on which the actual playing takes place and a vertical plane on which the score is tabulated. The insertion of a coin unlocks the device and releases five balls which the player by means of a small spring plunger can propel up an enclosed runway and out upon the upper portion of the playing surface. The glass-covered playing surface and runway is on an inclined plane, the degree of pitch depending to a large extent upon the adjustments made to bolts or screws imbedded in the underpart of the legs [that] support the machine. This plane is studded with strategically placed bumpers, obstructions, deflecting pins and direction changes. The latter are easily turned by hand in

which allowed the player to win prizes or additional plays of the machine.²⁸ During the course of one trial involving a pinball machine in 1942, one of the Departments of the City of New York conducted a survey that disclosed the presence of 11,080 such machines operating in the city. The study further disclosed that these machines had a gross income of upwards of twenty million dollars annually and an average weekly gross income of upwards of thirty-five dollars per machine, although some earned as high as \$100 during that period.²⁹ The investigation further revealed that between forty and fifty percent of this income was paid out in prizes.³⁰ These facts and figures clearly depicted the enormous business conducted by the pinball interests, and the annual yield in money alone evidenced the existence of a well-organized gambling enterprise carried on as a regular and flourishing business, which the court took into consideration and noted in holding that the games were illegal slot machines.³¹ The court considered the operation of these machines as a “racket” and “a fraud on the innocent public,” which “contribute directly to delinquency among children and instill and develop a desire to gamble among those who frequent them.”³²

A later version of the pinball machine,³³ developed in the late 1950s, was considered in the case of *McKee v. Foster*.³⁴ This case involved a pinball machine that awarded only free plays as a prize. An Oregon court determined that such games were not gambling devices, reasoning that free play has no commercial value and Oregon law required a tangible prize in order to trigger condemnation under its anti-lottery laws.³⁵ While this was the holding under Oregon law, other jurisdictions, including Maryland and Florida, were not as forgiving and continued finding even these types of machines to be illegal slot machines until the mid-1980s, when their state legislatures passed safe harbor

any desired direction so that the owners of the device can predetermine the angle of deflection [that] a ball will take on rebounding from contacts with them. On leaving the runway, the propelled balls enter the playing surface and roll downward at a speed varying with the inclination of the plane and the number of obstacles which may be encountered. When the balls contact the bumpers, a series of electrical impulses are set up that are relayed to the vertical plane or scoreboard, causing the illumination of numbers and indicating the progressive score of the player. These numbers, whether illuminated or not, are always visible. However, when a certain score is obtained, the latter being predetermined by the owners of the machine, small lighted numbers, which were heretofore invisible, are manifested on the scoreboard.

Gravenhorst, 32 N.Y.S.2d at 768.

²⁸ *Id.* at 770.

²⁹ *Id.* at 771. Adjusted for inflation, these machines would handle nearly \$300 million per year with each machine averaging nearly \$490 per week in current U.S. dollars.

³⁰ *Id.*

³¹ *Id.* at 777.

³² *Id.*

³³ Most large cities outlawed early pinball machines in part because there was little element of skill. Despite the addition of flippers in 1947 into later versions of pinball machines, which was an invention intended to overcome the lack of skill inherent to the machine, many bans stayed in place with Chicago, Los Angeles and New York maintaining their prohibition on these devices well into the 1970s. Rich Fahey, *Pinball Goes Underground*, THE BOSTON GLOBE (Oct. 16, 2011), http://www.boston.com/news/local/massachusetts/articles/2011/10/16/in_raynham_and_elsewhere_a_love_affair_with_pinball/?s_campaign=8315.

³⁴ 347 P.2d 585 (Or. 1959).

³⁵ *Id.* at 591-92.

laws protecting pinball machines from seizure under slot machine or lottery statutes.³⁶

By the 1990s, the computer age was in full swing, and its effect on the developers of gray market gambling devices was best evidenced by the development of the electronic pull-tab slot machine. In fact, the modern Internet café is an evolution that has occurred over the last ten to fifteen years from the pull-tab games, the legality of which were actively litigated in the late 1990s and early 2000s. After many of those operations had been found illegal in multiple states, the Internet café spawned in response. Pull-tab cases, like the mint dispenser cases, emerged and evolved as a result of court decisions from across the country. One prominent line of cases involved a machine known as “Lucky Shamrock,” that resulted with similar rulings from courts in New York,³⁷ Ohio,³⁸ Arkansas,³⁹ North Dakota,⁴⁰ and South Carolina,⁴¹ which considered the common question of whether the device was legal under state statutes.

The Lucky Shamrock Vending Machine dispensed pull-tabs that contained a game piece in addition to long-distance calling cards.⁴² Each pull-tab was labeled “Lucky Shamrock Sweepstakes” and was generally purchased for one dollar.⁴³ The calling card was labeled “Lucky Shamrock Prepaid Two Minute Emergency Phone Card” and permitted the holder to place a two-minute telephone call anywhere in the continental United States.⁴⁴ The game piece displayed a series of horizontal and vertical rows of numbers and symbols, and a game piece displaying certain combinations of numbers or symbols entitled the holder to prizes ranging from one dollar to five hundred dollars.⁴⁵ Customers redeemed winning game pieces at the facility operating the machines similar to a typical casino.⁴⁶

The unique feature of the machine was that it scanned a bar code on each pull-tab dispensed and instantly displayed the outcome of the game piece in a video display similar to a slot machine.⁴⁷ Players viewed the spinning reels until they stopped in each “slot,” and electronic sounds and lights announced winning pull-tabs.⁴⁸ Thus, players could view the video and sound displays to determine if they had won, and discard a losing pull-tab without ever opening it.⁴⁹

³⁶ *State v. One Hundred Fifty-Eight Gaming Devices*, 499 A.2d 940, 956-57 (Md. 1985) and *Sinclair v. Benton*, 10 So. 2d 917, 918 (Fla. 1942) (ruling superseded by the passage of FLA. STAT. § 849.161(1)(b) (1996)).

³⁷ *Black N. Assoc., Inc. v. Kelly*, 722 N.Y.S.2d 666, 667 (N.Y. App. Div. 2001).

³⁸ *Freedom Concepts, Inc. v. Ohio Liquor Control Comm’n*, No. 02AP-913, 2003 WL 22054059, at *4 (Ohio Ct. App. Sept. 4, 2003).

³⁹ *Pre-Paid Solutions, Inc. v. City of Little Rock*, 34 S.W.3d 360, 364 (Ark. 2001).

⁴⁰ *Midwestern Enter. Inc. v. Stenehjem*, 625 N.W.2d 234, 241 (N.D. 2001).

⁴¹ *Sun Light Prepaid Phonenumber Co., Inc. v. State*, 600 S.E.2d 61, 62, 65 (S.C. 2004).

⁴² *Id.* at 62.

⁴³ *Id.* at 63.

⁴⁴ *See Black N. Assoc., Inc. v. Kelly*, 722 N.Y.S. 666, 667 (N.Y. App. Div. 2001).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

Operators in New York were shut down after the holding in *Black North Associates*, which stated, “the Lucky Shamrock Vending Machine is not a passive dispensing device; rather, it is an active machine that ‘permits the player to watch the game being played, know that he has a winning ticket prior to opening the ticket[,] and in fact, only use the ticket as a receipt for redemption.’”⁵⁰ This holding, and others that were delivered by courts addressing almost identical operations, eventually led to the demise of Lucky Shamrock, and also led to the rise of more elaborate machines that began coupling mechanized games of chance with commercial products.

Perhaps the most interesting and relevant observation from these cases came from the Second District Court of Appeal in California.⁵¹ In holding that a “VendaTel” pull-tab machine was an illegal slot machine, the court stated:

[u]nlike ordinary vending machines, the VendaTel has a ‘sweepstakes’ feature that pays out money. The VendaTel looks like a slot machine. It acts like a slot machine. It sounds like a slot machine. The trial court nevertheless said that it is not a slot machine. In our view, if it looks like a duck, walks like a duck, and sounds like a duck, it is a duck.⁵²

This sentiment is playing out again in the evaluation by judges and policy-makers of the activities of Internet cafés.

From the early slot machines through the cases involving the latest type of convenience gambling, the Internet café, courts essentially proceed with the same basic analysis to determine whether gambling is inherent in the activity. Three basic elements guide the courts in their evaluations: prize,⁵³ chance,⁵⁴ and consideration.⁵⁵ Each is fairly easy to understand, but as evidenced by the various slot machine decisions discussed prior, game developers became more and more savvy and went to great lengths to hide these elements in an effort to mask the underlying activity.

⁵⁰ *Id.* (quoting *Major Mfg. Corp. v. Dep’t of Revenue*, 651 A.2d 204, 208 (Pa. Commw. Ct. 1994)).

⁵¹ *People v. Pac. Gaming Tech.*, 98 Cal. Rptr. 2d 400 (Cal. Ct. App. 2000).

⁵² *Id.* at 401.

⁵³ In some states, the term “prize” includes not only a tangible item or thing of value, but also the ability to play the game again. *See generally* *Alexander v. Hunnicutt*, 13 S.E.2d 630, 632 (S.C. 1941); *Farina v. Kelly*, 162 A.2d 517, 520 (Conn. 1960); *Ford v. Atty. Gen. of Pennsylvania*, 184 F.Supp. 129 (E.D. Pa. 1960); *Milwaukee v. Burns*, 274 N.W. 273 (Wis. 1937); *Oatman v. Davidson*, 16 N.W.2d 665, 666 (Mich. 1944); *People v. One Machine Known as Circus Days*, 163 N.E.2d 223 (Ill. App. Ct. 1960); *Stanley v. State*, 107 S.W.2d 532, 533 (Ark. 1937); *State v. Doe*, 46 N.W.2d 541 (Iowa 1951); *Thoman v. Grevemberg*, 86 So. 2d 181 (La. 1956); *Westerhaus Co. v. City of Cincinnati*, 135 N.E.2d 318 (Ohio 1956).

⁵⁴ *See* Opinion of the Justices No. 373, 795 So. 2d 630, 635 (2001) (quoting BLACK’S LAW DICTIONARY 231 (6th ed. 1990)) (chance means “a lack of control over events, or the absence of ‘controllable causation’—the opposite of intention”).

⁵⁵ *See generally* *McFadden v. Bain*, 91 P.2d 292, 294 (Or. 1939); *State v. Jones*, 107 P.2d 324 (N.M. 1940) (increased attendance, without paying, is consideration); *see also* *The Kroger Co. v. Cook*, 265 N.E.2d 780, 782-83 (Ohio 1970) (“because some portion of the purchase price of the merchandise bought goes to support the games, payment of such portion by the majority of participants who make purchases constitutes payment of a price to participate in the game, notwithstanding a minority who make no purchases [and] participate for free.”).

Within the context of the Internet café, the prize and chance elements are essentially conceded by the operators, as by its very nature, a sweepstakes game contains a prize, which is awarded by chance. Sweepstakes operators argue that their promotions do not constitute gambling as defined by state statutes as no consideration is given for the opportunity to play a game of chance to win a prize.⁵⁶ The critical element for law enforcement, and ultimately a court, is to determine whether consideration is present or whether the sweepstakes somehow fits within a safe harbor statute that authorizes the activity. As discussed below, this evaluation is unique to every jurisdiction given the subtleties of each state's gambling laws and the case law that interprets them.

III. HOW STATES ARE DEALING WITH INTERNET CAFÉS

Regulation of Internet cafés by the states is highly disparate. Some states have very clear gambling laws, which prevent the operation of such businesses, while others have passive regulations under which Internet cafés claim legitimacy. In these latter states, local governments and their law enforcement are left with the task of deciding for themselves how to deal with these gaming operations. Below is an overview of a handful of states, which for various reasons have positions of prominence in their dealings with these convenience gambling operations.

A. Alabama

The Internet café and devices used in its gambling operation made their way to Alabama in the early part of the twenty-first century. In the case of *Barber v. Jefferson County Racing Association*, the Supreme Court of Alabama looked at this new type of enterprise and tested it against its gaming statutes and nearly 100 years of its gambling common law.⁵⁷ The case involved an activity advertised as "MegaSweeps," which was operated at a greyhound pari-mutuel track near Birmingham.⁵⁸ The enterprise operated fundamentally the same as most Internet cafés currently in operation throughout the country today. The Alabama court summarized the operation as follows:

A consumer wishing to play the readers opens an account by obtaining a magnetically encoded card, either by mail or at the point of sale at the race track. In either event, the account is simultaneously assigned, by the central database and a server, a number of MegaSweeps entries corresponding to the amount of cybertime the consumer obtained. The assignments are selected from any 1 of 20 pools containing 200 million entries in each pool. According to Clifton Lind, Multimedia's chief executive officer, the entries in each pool are "randomized by chance" before they are assigned to a consumer. The consumer activates one of the 1,300 readers by inserting his slide card into a slot on the reader. Once activated, the reader allows a consumer to reveal his entries. The consumer chooses an option and presses a button. Subsequently, the reader server reveals the selected number of entries. Whether those entries correspond to any of the *winning* entries that were assigned to the consumer's account at

⁵⁶ F.A.C.E. Trading, Inc. v. Carter, 821 N.E.2d 38, 42 (Ind. Ct. App. 2005); *Midwestern Enter., Inc. v. Stenehjem*, 625 N.W.2d 234, 237 (N.D. 2001).

⁵⁷ *Barber v. Jefferson Cnty. Racing Ass'n*, 960 So. 2d 599 (Ala. 2006).

⁵⁸ *Id.* at 601.

the point of sale is determined by a computer algorithm. The consumer may continue selecting options until all of his entries have been revealed.

When the consumer “logs off” the reader, his account status is maintained in the central database. The system will print out a report of the transaction, including the amount of winnings, if any. Subsequently, the consumer may collect his winnings at a “cash advance cage.” In the alternative, he may exchange his winnings for *more cybertime* and, consequently, additional MegaSweeps entries, by inserting his card into one of the recharge kiosks and entering the amount of his winnings to be applied toward the purchase of more cybertime.⁵⁹

The MegaSweeps gaming operation was shut down in 2005 after a seizure of the machines by the Jefferson County Sheriff’s Office, which felt that the operation violated Alabama’s prohibition against the possession of gambling devices,⁶⁰ and litigation ensued.⁶¹

The owners of Jefferson County Racing Association proposed that they had found and exploited a “loophole” in the State laws of Alabama.⁶² Indeed, the trial court stated:

The evidence convinces the court that through careful planning the [owners] have found a loophole in the patchwork of Alabama’s anti-gambling laws and they have taken advantage of that loophole. In the words of the Sheriff’s expert witness, Robert Sertell, the owners’ sweepstakes promotion was trying to pull a tractor-trailer through a loophole.⁶³

⁵⁹ *Id.* at 608.

⁶⁰ *Id.* at 601-02. Also, the portions of Alabama’s gambling statutes relevant to this case read as follows:

A person commits the crime of possession of a gambling device if with knowledge of the character thereof he manufactures, sells, transports, places or possesses, or conducts or negotiates any transaction affecting or designed to affect ownership, custody or use of:

- (1) A slot machine; or
- (2) Any other gambling device, with the intention that it be used in the advancement of unlawful gambling activity.

ALA. CODE § 13A-12-27(a)(1)-(2) (1977).

A “slot machine” is defined by Alabama law as,

[a] gambling device that, as a result of the insertion of a coin or other object, operates, either completely automatically or with the aid of some physical act by the player, in such a manner that, depending upon elements of chance, it may eject something of value. A device so constructed or readily adaptable or convertible to such use is no less a slot machine because it is not in working order or because some mechanical act of manipulation or repair is required to accomplish its adaptation, conversion or workability. Nor is it any less a slot machine because apart from its use or adaptability as such it may also sell or deliver something of value on a basis other than chance.

Id. § 13A-12-20(10).

A “gambling device” is defined by Alabama law as,

[a]ny device, machine, paraphernalia or equipment that is normally used or usable in the playing phases of any gambling activity, whether that activity consists of gambling between persons or gambling by a person involving the playing of a machine.

Id. § 13A-12-20(5).

⁶¹ *Barber*, 960 So. 2d at 601-02.

⁶² *Id.* at 614.

⁶³ *Id.* (emphasis omitted). Many cases turn on a battle of experts, wherein one party’s expert, and his or her credibility and resume, is pitted against the other party’s expert. *See* G2, Inc. v. Midwest Gaming, Inc., 485 F. Supp.2d 757, 766 (W.D. Tex. 2007); *United States v. 5 Gambling Devices*, 346 F.Supp. 999, 1001, 1004 (W.D. La. 1972); *United States v. Two Coin-Operated Pinball Mach.*, 241 F.Supp. 57 (W.D. Ky. 1965).

The trial court agreed that the owners had indeed taken advantage of weaknesses in the law.⁶⁴

In addition, the trial court found it “obvious that most of the customers are more interested in getting [the] MegaSweeps entries than they are in using the [Internet kiosks].”⁶⁵ The court further noted that,

[t]he [owners] undertook [the MegaSweeps] to attract customers who wanted to gamble, or, at least, those who could be made to think that they were gambling. [The owners’] advertising through television commercials and billboards promoted playing MegaSweeps as an alternative to attending gambling establishments at Green-track, [Alabama,] or Philadelphia and Biloxi, Mississippi.⁶⁶

The trial court, despite noting that the machines had familiar slot names, “such as Bunch O’Luck, Crazy Blue Streak, Reel Thrills, Sun Dogs, Flamingo 7’s, Major Money. . . . Double Cash Money, and many others,” ultimately ruled for the operators and found that the machines were not slots or an illegal lottery.⁶⁷ The court also noted an additional similarity to a slot machine in the predetermined payout percentage of these machines: 92%.⁶⁸ In fact, the machines were originally manufactured as slot machines but had been modified for use in conjunction with the “peculiar components of the MegaSweeps.”⁶⁹

Citing to an 1887 decision, the Alabama Supreme Court overruled the trial court’s findings, stating,

Alabama’s gambling law . . . is not so easily evaded. It is ‘the policy of the constitution and laws of Alabama [to prohibit] the vicious system of lottery schemes and the evil practice of gaming, in *all their protean shapes*.’ In the computer age, the fact that chance takes place at the point of sale rather than at the readers themselves is simply inconsequential.⁷⁰

The court noted that, while the prize element was obviously present in this scenario, the “chance” and “consideration” elements were far less apparent.⁷¹ For the element of chance, the court noted that even though the outcome of the sweepstakes entries was predetermined and not impacted by playing games on the electronic readers, the element of chance existed at the point of sale.⁷² The court further concluded that if customers were “paying to play the readers, rather than to acquire, or in addition to acquiring cybertime, the element of consideration . . . [was] satisfied.”⁷³ The court’s final holding, and current law in Alabama, stated that “[w]hen integrated as they are with the servers, central database, and related computer equipment, the [MegaSweeps] readers are slot machines as that term is defined by § 13A-12-20(10) and § 13A-12-27,” and are thus illegal in the state.⁷⁴

⁶⁴ *Barber*, 960 So. 2d at 614.

⁶⁵ *Id.* at 612.

⁶⁶ *Id.* (emphasis omitted).

⁶⁷ *Id.* at 606, 608.

⁶⁸ *Id.* at 606.

⁶⁹ *Id.*

⁷⁰ *Id.* at 614 (internal citations omitted).

⁷¹ *Id.* at 611.

⁷² *Id.* at 610.

⁷³ *Id.* at 611 (emphasis omitted).

⁷⁴ *Id.* at 617.

The Internet café cases in Alabama serve as some of the most comprehensive examples of a court system's analysis to determine the legality of these operations using thorough examination of a state's statutes and case law. Unfortunately, as other jurisdictions have not experienced such in-depth analysis, the pathway through another loophole by ingenious software designers and game developers intent on plying their wares on the often underserved gambling public remains open.

B. Texas

In *G2, Inc. v. Midwest Gaming Inc.*, the United States District Court for the Western District of Texas considered the legality of an Internet café operation nearly identical to the Alabama operation.⁷⁵ Although the court ultimately dismissed the case for lack of jurisdiction, it presented legal arguments under Texas and federal statutes worthy of consideration in this Article.⁷⁶ Like other states, the Texas Penal Code criminalizes possession of gambling devices.⁷⁷

As both the chance and prize requirements were readily apparent to the court,⁷⁸ the only element at issue was the consideration element.⁷⁹ The court looked at Texas case law as well as case law from other states and ultimately agreed with the operator that the element of consideration was missing from the sweepstakes operated by the Internet cafe.⁸⁰ In reaching this conclusion, the court looked at the basic case law definition of "consideration," which is defined as "a present exchange bargained for, in return for a promise."⁸¹ The court stated that in the context of a lottery or gift enterprise, "consideration has been found where participants were, in essence, required to purchase a theater ticket in order to hear whether said participant had won, and in order to respond in time to claim the prize."⁸²

⁷⁵ *G2, Inc. v. Midwest Gaming Inc.*, 485 F. Supp. 2d 757, 759-60 (W.D. Tex. 2007).

⁷⁶ *Id.* at 776.

⁷⁷ These devices are defined as,

[a]ny electronic, electromechanical, or mechanical contrivance not excluded under Paragraph (B) that for a consideration affords the player an opportunity to obtain anything of value, the award of which is determined solely or partially by chance, even though accompanied by some skill, whether or not the prize is automatically paid by the contrivance. The term:

(A) includes, but is not limited to, gambling device versions of bingo, keno, blackjack, lottery, roulette, video poker, or similar electronic, electromechanical, or mechanical games, or facsimiles thereof, that operate by chance or partially so, that as a result of the play or operation of the game award credits or free games, and that record the number of free games or credits so awarded and the cancellation or removal of the free games or credits; and

(B) does not include any electronic, electromechanical, or mechanical contrivance designed, made, and adapted solely for bona fide amusement purposes if the contrivance rewards the player exclusively with noncash merchandise prizes, toys, or novelties, or a representation of value redeemable for those items, that have a wholesale value available from a single play of the game or device of not more than 10 times the amount charged to play the game or device once or \$5, whichever is less.

TEX. PENAL CODE § 47.01(4)(A)-(B) (1995).

⁷⁸ *G2, Inc.*, 85 F. Supp. 2d at 769.

⁷⁹ *Id.*

⁸⁰ *Id.* at 770.

⁸¹ *Id.* at 769.

⁸² *Id.* at 770.

However, the court struggled with the precedent established in the case of *Brice v. State*, wherein drawing participants had to register at a store, but did not have to buy anything or even be present to win.⁸³ The court in *Brice* found that even though the store benefitted from the advertising, this did not rise to the level of consideration under Texas law.⁸⁴ The court in the *G2* case did note that courts in Connecticut,⁸⁵ Oklahoma,⁸⁶ and New Jersey⁸⁷ did not follow the rationale of the Texas court in the *Brice* opinion.⁸⁸ The court concluded by saying that merely requiring patronization was not enough to demonstrate that consideration was present under Texas law.⁸⁹ Even though the “charitable sweepstakes” at issue may have violated Texas public policy under its constitution, this operation seemingly sidestepped state law.⁹⁰ The court ruled that “in the absence of explicit prohibition under Texas statutory or common law, Plaintiff’s ‘charitable sweepstakes’ [was], in the opinion of this court, legal.”⁹¹

While the *G2* case, issued in 2007, has not been overruled in Texas, an interesting divergence of case law has resulted. In an earlier case of *Jester v. State*,⁹² the Texas Court of Appeal offered an interesting analysis of a precursor to the Internet café: the phone card vending machine. Similar to the Lucky Shamrock or VendaTel precedent, the court analyzed a phone card dispensing machine that incorporated a game of chance in the dispensing of the phone card.⁹³ In arriving at the conclusion that the machine violated Texas gambling laws, the court looked to the decision in the *Brice* case and stated that “[e]ven *Brice* . . . acknowledged that the mere pretense of free prizes, designed to evade the law, would not negate the element of consideration.”⁹⁴ The court added,

[t]he finding of consideration in this case does not rest on the operator’s intent to increase patronage of a legitimate business. Here, the decision turns on whether the sweepstakes was intended to promote the sale of telephone cards or whether the telephone cards were there as an attempt to legitimize an illegal gambling device.⁹⁵

For Texas, the divergent view in the *G2* decision, which never mentioned—let alone tried to distinguish the *Jester* decision—certainly should illicit pause to proprietors in the state considering an expansion of commercial gambling ventures disguised as commercial game promotions, as the trend appears to support the barring of Internet cafés from operating in Texas.

C. Mississippi

On September 12, 2007, agents of the Mississippi Gaming Commission (“MGC”) raided Paradise Isle Internet café in West Point, Mississippi, seized

⁸³ *Brice v. State*, 242 S.W.2d 433, 434 (Tex. Crim. App. 1951).

⁸⁴ *Id.* at 435.

⁸⁵ *State v. Dorau*, 198 A. 573, 575-76 (Conn. 1938).

⁸⁶ *Knox Indus. Corp. v. State ex rel. Scanland*, 258 P.2d 910, 914 (Okla. 1953).

⁸⁷ *Lucky Calendar Co. v. Cohen*, 117 A.2d 487, 496 (N.J. 1955).

⁸⁸ *G2 Inc. v. Midwest Gaming, Inc.*, 485 F. Supp. 2d 757, 770 (W.D. Tex. 2007).

⁸⁹ *Id.*

⁹⁰ *Id.* at 770-71.

⁹¹ *Id.* at 771.

⁹² 64 S.W.3d 553 (Tex. Ct. App. 2001).

⁹³ *Id.* at 554-55.

⁹⁴ *Id.* at 558.

⁹⁵ *Id.*

computer terminals, a computer server, and a point-of-sale system, and subsequently argued in court in the case of *Moore v. Mississippi Gaming Commission* that the machines at issue were illegal gambling devices.⁹⁶ The Mississippi Gaming Control Act defines a “slot machine” as:

[A]ny . . . contrivance or machine which, upon insertion of a coin, token or similar object, or upon payment of any consideration, is available to play or operate, the play or operation of which, whether by reason of the skill of the operator or application of the element of chance, or both, may deliver or entitle the person playing or operating the machine to receive . . . anything of value, whether the payoff is made automatically from the machine or in any other manner.⁹⁷

Relying on this definition, the Mississippi Supreme Court has held that a gambling device is a slot machine if:

1. Its play or operation requires the insertion of money, tokens or similar objects, or payment of *consideration*; and
2. As a result of playing or operating the device, the player or operator has the potential to win a reward in the form of cash, premiums, merchandise, token, or *anything of value*; and
3. The winning of some part or all of the *potential reward* is dependent in substantial part on an element of chance.⁹⁸

Much like the Internet café operators in Alabama and Texas, the operators here argued that the elements of consideration and chance were missing from the sweepstakes.⁹⁹ The *Moore* court found this argument, at least relating to the issue of consideration, was without merit. The court stated: “it is clear that the customers of the Moores’ [I]nternet café were purchasing prepaid telephone cards to play the computer terminals rather than to make telephone calls. As such, we find that the element of consideration is satisfied.”¹⁰⁰

As for the argument relating to chance, the defendant-operator argued that the element of chance was not present because the outcome of each sweepstakes entry was determined before the customer purchased the telephone card.¹⁰¹ Again, like the court in Alabama, the *Moore* court found that the element of chance existed, stating that although “playing the games at the computer terminals did not impact the outcome of the sweepstakes points, an element of chance still existed because a consumer who purchased a telephone card did not know whether the card contained a winning or losing sweepstakes points.”¹⁰² The court further clarified that “[w]hat the machine ‘knows’ does not affect the player’s gamble.”¹⁰³

Unlike Alabama and Texas, Mississippi had the advantage of a plenary state agency dedicated to the interpretation and policing of its gambling

⁹⁶ *Moore v. Miss. Gaming Comm’n*, 64 So. 3d 537, 539-40 (Miss. Ct. App. 2011).

⁹⁷ MISS. CODE ANN. § 75-76-5(ff) (2010).

⁹⁸ *Miss. Gaming Comm’n v. Henson*, 800 So. 2d 110, 113 (Miss. 2001).

⁹⁹ *Moore*, 64 So. 3d at 539.

¹⁰⁰ *Id.* at 541.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* (citing *Miss. Gaming Comm’n v. Six Elec. Video Gambling Devices*, 792 So. 2d 321, 326 (Miss. Ct. App. 2001)).

laws.¹⁰⁴ Given the significant revenue and employment base attributed to the Mississippi casino industry, the state has declared a vested interest in limiting the circumvention of the gambling dollar from the state regulated and taxed system from which a significant portion of the state treasury is derived.¹⁰⁵

D. Florida

In contrast to the Nevada, New Jersey, and Mississippi gambling industries, Florida has arguably the most diverse gambling industry of any state in the country.¹⁰⁶ Boasting the most pari-mutuel facilities of any state in the United States, a robust tribal casino business anchored by the Seminole Tribe's Hard Rock Casino franchise, racetrack casinos, gambling day-cruise ships, and one of the country's largest lotteries, Florida offers more types of gambling than any state, including Nevada.¹⁰⁷ Despite the enormity and diversity of its

¹⁰⁴ The Mississippi Gaming Commission was created by the State Legislature in 1990. Upon creating the commission, and included in the language of the statute, are the express intentions of the legislature, as it relates to the regulation of gaming in the State, and are expressed as follows:

- 1) The provisions of this chapter shall not be construed to legalize any form of gaming which is prohibited under the Mississippi Constitution or the laws of this state. All legal gaming which is conducted in this state and which is otherwise authorized by law shall be regulated and licensed pursuant to the provisions of this chapter, unless the Legislature specifically provides otherwise. Nothing in this chapter shall be construed as encouraging the legalization of gambling in this state.
- 2) The Legislature hereby finds and declares that lotteries and gaming both consist of the material element of chance. The Legislature is prohibited from legislating upon lotteries and permitted by virtue of its inherent powers to legislate upon gaming as the occasion arises. The Legislature derives its power to legislate upon gaming or gambling devices from its inherent authority over the morals and policy of the people and such power shall not be considered to conflict with the constitutional prohibition of lotteries.
- 3) The Legislature hereby finds, and declares it to be the public policy of this state, that:
 - a) Regulation of licensed gaming is important in order that licensed gaming is conducted honestly and competitively, that the rights of the creditors of licensees are protected and that gaming is free from criminal and corruptive elements.
 - b) Public confidence and trust can only be maintained by strict regulation of all persons, locations, practices, associations and activities related to the operation of licensed gaming establishments and the manufacture or distribution of gambling devices and equipment.
 - c) All establishments where gaming is conducted and where gambling devices are operated, and manufacturers, sellers and distributors of certain gambling devices and equipment must therefore be licensed, controlled and assisted to protect the public health, safety, morals, good order and general welfare of the inhabitants of the state.

MISS. CODE ANN. § 75-76-3 (1990).

¹⁰⁵ *About MGC*, MISS. GAMING COMM'N, <http://www.mgc.state.ms.us/> (last visited Nov. 4, 2011).

The mission of the Mississippi Gaming Commission is to enforce the Gaming Control Act and Charitable Gaming Laws of the State of Mississippi. The MGC will establish and enforce regulations under the authority of those laws in such a manner that will ensure the integrity of the State of Mississippi and maintain the public confidence in both the charitable gaming and casino gaming industries by working in conjunction with the industry.

¹⁰⁶ See *Interactive Map of Casinos in Florida*, WORLD CASINO DIRECTORY, <http://www.worldcasinodirectory.com/florida/map> (last visited Nov. 4, 2011) [hereinafter *Florida Casino Map*].

¹⁰⁷ See *Types of Gaming by State*, AM. GAMING ASS'N, <http://www.americangaming.org/industry-resources/research/fact-sheets/states-gaming> (last visited Nov. 4, 2011).

gambling industry, Florida lacks any comprehensive state policy or enforcement agency governing its gambling laws.¹⁰⁸ In fact, Florida does not have a single gaming agency with the authority to evaluate the activities of Internet cafés, let alone attempt to regulate, or in the alternative, shut them down.¹⁰⁹ Even the state's attorneys general have proven impotent on resolving the issue of the legality of these operations, deferring to local law enforcement to determine their legality.¹¹⁰

Florida appellate courts, however, have a long history of interpreting its gambling laws, as evidenced by one of the first commercial anti-gaming cases in Florida: *Lee v. City of Miami*.¹¹¹ The statute at issue defined "coin-operated skill machines" and read as follows:

Coin-operated skill machines (commonly referred to as Pin-Games, Marble Tables, and similar devices of this type which may have a skill feature) which may or may not pay a reward for skillful operation or upon which operation, premiums may or may not be given for high score or making certain combinations. Such premiums may be awarded either automatically by the machine in the form of checks, tokens, or orders, which designate the value of the premium or premiums or may be indicated by a score card attached to the machine.¹¹²

The question posed to the Florida Supreme Court on appeal was whether or not coin-operated devices, as defined above, constituted unlawful "lotteries" as proscribed by Section 23 of Article 3 of the Florida Constitution of 1886.¹¹³ The court held that the operation and regulation of these machines were not in violation of the anti-lottery provisions of the Constitution, noting:

[i]t is clear that . . . it was the intent of the Legislature to permit the operation of slot machines, or other machines to be operated in such manner by the use of coins that the player depositing the coin would be, upon the play resulting in a certain manner, entitled to receive a greater sum than the sum deposited.¹¹⁴

The court concluded that authority essentially rested with the Florida Legislature to set the boundaries for machine gambling in Florida.¹¹⁵

Without ever expressly overruling or formally receding from *Lee*, the court seemed to qualify this holding in an opinion four years later as it related to the lotteries, when the popular 1930s practice called "bank night," was challenged in *Little River Theatre Corp. v. State*.¹¹⁶ Bank night was a particular night each week when a theater would conduct a random drawing for a cash award.¹¹⁷ The drawing entrants were individuals who had entered the contest

¹⁰⁸ Chapters 849, 550, and 551 of the Florida Statutes all contain most of Florida's gambling related laws, in which the Florida Department of Business and Professional Regulation, the Florida Department of Legal Affairs, and the Department of Agriculture and Consumer Services are granted limited oversight of specific types of gambling activities. *See generally* FLA. STAT., Ch. 550, 551, 849 (2010).

¹⁰⁹ *Id.*

¹¹⁰ *See* Gambling, Telephone Card Sweepstakes, Op. Att'y Gen. Fla. 2007-48 (2007); *see also* Gambling, Veterans' Organizations, Op. Att'y Gen. Fla. 2011-14 (2011).

¹¹¹ 163 So. 486 (Fla. 1935).

¹¹² H.B. 1131, 1935 Leg., Reg. Sess., 1935 Fla. Laws 1985.

¹¹³ *Lee*, 168 So. at 488.

¹¹⁴ *Id.* at 491. (Buford, J., dissenting).

¹¹⁵ *Id.* at 490.

¹¹⁶ 185 So. 855, 856 (Fla. 1939).

¹¹⁷ *Id.*

through the purchase of a theater ticket, or who merely registered at the box office for the drawing without the purchase of a ticket.¹¹⁸ Because the drawings were held in the theaters, often during a feature, the court observed that most winners had purchased theater tickets and that it was at least practically advantageous to have done so.¹¹⁹

In *Little River*, the Florida Supreme Court was faced with the question of whether one theater's bank night violated the state's lottery prohibition.¹²⁰ The court quoted extensively from the high courts of other states and, adopting their methodology, looked for the three elements of a lottery or gambling transaction discussed earlier: prize, chance, and consideration.¹²¹ Easily identifying the first two elements, the court struggled with varying precedents from across the country dealing with whether consideration was present if an entrant was not required to patronize the actual showing in the theater.¹²² Noting the proffered evidence of increased attendance paid inside the theater and unpaid outside the theater, the court concluded that while financial loss was not universal to all entrants to the drawing, financial gain was certainly enjoyed by the theatre's proprietor via the increased attendance.¹²³ As a result, the court found that consideration was present, and as such, the activity violated the state's lottery prohibitions, a finding, that at the time, appeared to be the majority view across the country.¹²⁴

From 1939 until the passage of the first game promotion statute in 1971, Florida's Attorney General and law enforcement agencies consistently interpreted state laws to prevent sweepstakes, drawings by chance, or any other type of gambling enterprise involving prize, chance, and consideration.¹²⁵ During this time, only pari-mutuel wagering-legalized by the Florida Legislature in 1931-was the only form of legal gambling in Florida.¹²⁶ Although much has changed in the technology of gambling machines, little change has occurred in the anti-gambling laws. It is still illegal to play a game of chance,¹²⁷ possess a slot machine,¹²⁸ or operate a gambling house.¹²⁹ However, the core activity

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 860.

¹²⁰ *Id.* at 856.

¹²¹ *Id.* at 858.

¹²² *Id.* at 858-59.

¹²³ *Id.* at 860.

¹²⁴ *Id.* at 861.

¹²⁵ See *Punchboards – Legality*, Op. Att'y Gen. Fla. 046-308 (1946); *Punchboards Offering Cigarettes as Prizes*, Op. Att'y Gen. Fla. 045-89 (1945); *Service Organizations – Lotteries*, Op. Att'y Gen. Fla. 046-116 (1946); *Punch Boards – Legality*, Op. Att'y Gen. Fla. 046-211 (1946); *“Suit Club” – Cross Between Flim Flam Game & Lottery*, Op. Att'y Gen. Fla. 049-362 (1949); *Liquors – Wheel Numbers – Setting Up Lottery Prohibited*, Op. Att'y Gen. Fla. 050-413 (1950); *Lottery Prohibited – “Play Radio” Scheme – Sponsoring Machines*, Op. Att'y Gen. Fla. 054-213 (1954); *Gambling Laws – Lottery*, Op. Att'y Gen. Fla. 056-315 (1956); *Violation of State Lottery Laws – Grocery Store Profit-Sharing Bonus Scheme*, Op. Att'y Gen. Fla. 060-143 (1960); *Lotteries – Nation-Wide Sweepstakes*, Op. Att'y Gen. Fla. 063-153 (1963); *Lotteries – What Constitutes*, Op. Att'y Gen. Fla. 065-25 (1965).

¹²⁶ See generally 1931 Fla. Laws Ch. 14832, No. 194 (1931).

¹²⁷ FLA. STAT. § 849.08 (2010).

¹²⁸ *Id.* § 849.15(1)(a). This prohibition was qualified by a citizen's initiative to the Florida Constitution in 2004, which authorized slot machines at pari-mutuels in Dade and Broward Counties subject to state regulation imposed via Chapter 551 of Florida Statutes.

discussed and prohibited in the *Little River* case—commercial loss leader game promotions—lies at the core of the fastest growing gambling industry in Florida.¹³⁰

Florida law prohibits the possession of any slot machine,¹³¹ which is defined as:

[a]ny machine or device. . . that is adapted for use in such a way that, as a result of the insertion of any piece of money, coin, or other object, such machine or device is caused to operate or may be operated and if the user, by reason of any element of chance or of any other outcome of such operation unpredictable by him or her, may . . . [r]eceive or become entitled to receive any . . . thing of value . . . or . . . [s]ecure additional chances¹³²

Despite this prohibition from machine-based gaming, Internet cafés claim to operate in Florida under an exception from anti-gambling statutes for commercial game promotions found in section 849.094.¹³³ Passed in 1971, this statute addressed the commercial game promotions that were essentially outlawed in the wake of the *Little River* precedent.¹³⁴ The statute allows for the basic framework for operation and registration of commercial game promotions, also known as a promotional sweepstakes, operated in conjunction with the sale of “consumer products or services.”¹³⁵ No definition has been afforded by the Florida Legislature or by Florida courts for “consumer products or services,” and, as a result, the field has been left open for operators to test the boundaries of what types of gambling are legalized through this legislative safe harbor.¹³⁶ In Florida, these game promotions have historically taken the form of periodically operated contests, “conducted by national fast food franchise chains, television networks, Internet companies, banks, soft drink manufacturers, etc., that give away cash, cars, products, vacations, or similar prizes.”¹³⁷

The owners of phone vending machines attempted to exploit the looseness of this statute, but soon faced opposition from Florida’s sheriffs who sought

¹²⁹ *Id.* § 849.01.

¹³⁰ Florida is estimated to have more than 1,000 Internet cafés currently operating, with statewide revenues in excess of \$1 billion. Don Van Natta, Jr., *Critics Label Florida’s Internet Cafés as Magnets for Crime*, THE LEDGER (May 7, 2011), <http://www.theledger.com/article/20110507/NEWS/110509435>.

¹³¹ FLA. STAT. § 849.15(1)(a)-(b) (2010).

¹³² *Id.* § 849.16(1).

¹³³ Game promotion in connection with sale of consumer products or services

(1) As used in this section, the term:

(a) “Game promotion” means, but is not limited to, a contest, game of chance, or gift enterprise, conducted within or throughout the state and other states in connection with the sale of consumer products or services, and in which the elements of chance and prize are present. However, “game promotion” shall not be construed to apply to bingo games conducted pursuant to s. 849.0931.

Id. § 849.094.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *See id.*

¹³⁷ COMM. ON REGULATED INDUS., REV. OF ELECTRONIC GAMING EXCEPTIONS FOR ADULT ARCADES & GAMING PROMOTIONS, S. INTERIM REP. 2009-123, at 9 (Fla. 2008) (Regulators have reported that such promotions typically would accept entries only during a stated promotional period, which is followed by a random drawing.) [hereinafter ELECTRONIC GAMING EXCEPTIONS REP.].

clarification from the state's attorney general as to the legality of such devices.¹³⁸ In 1998, the Sheriff of Clay County inquired as to the legality of an enterprise, which operated as follows:

A special vending machine dispenses a card that provides the purchaser with two minutes of domestic calling time and affixes the sweepstakes ticket. The cost of the card is one dollar. The machine makes use of a technology known as a finite cartridge, which contains 15,000 pre-shuffled cards, each with its unique personal identification number and winning or losing sweepstakes ticket. When these 15,000 cards are sold the sweepstakes has ended. The machine cannot generate new personal identification numbers or sweepstakes tickets. The cartridge is installed within the device and prints the card when the purchaser inserts currency into the device. The dispensing of a card is designed to prevent theft or manipulation or rigging of the sweepstakes. The number of winners is programmed into the cartridge and the odds of winning based on that programming are disclosed in the rules. The sweepstakes allows the purchaser to instantly determine if he or she has won a cash prize by reading a grid of nine numbers or symbols. If the card features three identical numbers or symbols in a row or all nine numbers or symbols are the same, the purchaser may redeem the ticket for a prize ranging in value from one dollar to seven hundred and fifty dollars. The award of the prize is subject to verification by the Texas corporation.¹³⁹

Attorney General Bob Butterworth looked to a past ruling from the Florida Supreme Court in determining that the incidental delivery of a commercial product does not protect a device from the prohibition against slot machines found in sections 849.15 and 849.16.¹⁴⁰ In determining the device was an illegal slot machine, the Attorney General stated, “[i]t appears that the principal function of the device you have described is gambling, that is, the user inserts money and the machine operates to provide the user with a sweepstakes ticket that, by reason of chance, may entitle the recipient to a money prize;” and later added, “[t]he gambling activities you have described may not be disguised as a ‘game promotion’ under the terms of section 849.094, Florida Statutes, in order to avoid the criminal sanctions attendant to the violation of Florida’s gambling laws.”¹⁴¹

Nine years later, another machine-based sweepstakes was analyzed by a different attorney general at the request of the police chief of the City of Cedar Grove.¹⁴² The facts were as follows:

Briefly, the game operates by awarding sweepstakes entries when purchasing long distance phone time on a Phone-Sweeps Phone Card (“Tel-Connect”) or by completing a free entry form and submitting it based on the rules of entry. For each dollar spent on the services, the purchaser receives free sweepstakes points which can be redeemed to play the sweepstakes games. The sweepstakes games are displayed on an interactive computer terminal, the object of which is to line up various symbols and characters in a winning combination. Each ticket contains a configuration of 3 to 25 symbols; winning combinations of which entitle the bearer to money prizes ranging in value from \$1.00 to \$1,000.00. Each terminal communicates with a server,

¹³⁸ See Op. Att’y Gen. Fla. 98-07 (1998).

¹³⁹ *Id.*

¹⁴⁰ *Id.* (citing *Deeb v. Stoutamire*, 53 So. 2d 873, 874 (Fla. 1951)).

¹⁴¹ *Id.*

¹⁴² See Op. Att’y Gen. Fla. 2007-48 (2007).

which causes the terminal's screen to display whether the participant has won any 'win credits' which can be redeemed for cash or prizes. According to information you have supplied, whether the participant wins is determined by the server by randomly selecting the next ticket from a predetermined pool of tickets.¹⁴³

Despite a nearly identical fact pattern, the new Attorney General for Florida, Bill McCollum, chose to recede from the authority expressed by his predecessor Bob Butterworth.¹⁴⁴ In an abdicating opinion, McCollum concluded,

[I]t is my opinion that a determination of whether a particular game or contest violates the provisions of Chapter 849, Florida Statutes, is initially, a determination that must be made by local law enforcement based on the particular facts of each case. If the Tel-Phone game does contain an element of chance inherent in the machine which determines the outcome of the game, the game may be characterized as a slot machine within the meaning of section 849.15, Florida Statutes. However, this office recognizes that the ultimate determination of whether Florida's gambling laws may have been violated must be made by local law enforcement agencies.¹⁴⁵

The rise of the Internet café in Florida followed soon after these opinions related to phone card dispensing machines and their associated sweepstakes.¹⁴⁶ Sheriffs and state attorneys immediately opened investigations into these businesses, and the Florida Legislature initiated hearings into their compliance with Florida law.¹⁴⁷ Without a statewide gaming regulator, an assertive attorney general, or clarification from the Florida Legislature, the state has essentially deferred to local communities to determine for themselves the legality of Internet café operations.¹⁴⁸ The response has been varied, and no reported appellate case has been issued to assist in formulating a statewide position on these operations.

In 2010, a circuit judge in Marion County presided over a criminal case brought by the local sheriff and state attorney against an Internet café operation.¹⁴⁹ In a ruling on a procedural motion to dismiss filed by the defendant prior to the jury trial, Judge Edward Scott essentially adopted the rationale from the Alabama Supreme Court in the *Barber* case.¹⁵⁰ He stated that the Internet café was "in the business of offering a chance to win a prize for consideration," and relying on *Barber*, denied the defendant's motion to dismiss.¹⁵¹ Ultimately,

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* (This opinion was followed by Op. Att'y Gen. Fla. 2008-035 which concluded that a vending machine that dispensed pull-tab instant bingo tickets were prohibited slot machines due to the inherent game of chance contained via the pull tabs. The opinion made no reference to the 2007 opinion nor did it contain the same equivocation or deferral to local law enforcement in its conclusion.)

¹⁴⁶ ELECTRONIC GAMING EXCEPTIONS REP., *supra* note 137, at 9.

¹⁴⁷ See *Senate Calendar*, FLA. LEG. (Mar. 4, 2008), <http://www.leg.state.fl.us/data/session/2008/Senate/Calendars/Daily/sc022908.pdf> (The hearing was scheduled for Tuesday, March 4, 2008 between the times of 2:15 p.m. to 4:30 p.m.).

¹⁴⁸ Don Van Natta, Jr., *Worries About 'Convenience Casinos' in Florida*, N.Y. TIMES, May 6, 2011, http://www.nytimes.com/2011/05/07/us/07sweepstakes.html?_r=1&php=&page_wanted (This is one of many newspaper articles detailing the efforts of cities and counties throughout the state attempting to regulate, ban, or place moratoriums on Internet cafés.).

¹⁴⁹ See *State v. Crisante*, No. 2010-1543-CF-B-X (Fla. Cir. Ct. Marion Cnty. Oct. 4, 2010) (order denying Defendant's motion to dismiss).

¹⁵⁰ *Id.* at * 4.

¹⁵¹ *Id.*

the jury in the case acquitted the accused and was unable to find that the Internet café operator had violated Florida's gambling laws.¹⁵² Despite this verdict, and other courts dismissing or otherwise not prosecuting Internet café operators,¹⁵³ efforts by some of Florida's local officials have continued to block the operation of Internet cafés in their communities.¹⁵⁴

Two notable Florida cases began in 2011, in response to what Pinellas and Seminole County officials referred to as an "increasing proliferation" of Internet cafés.¹⁵⁵ To counteract this "proliferation," Seminole County passed an ordinance banning "simulated gambling devices" defined as "any device that, upon connection with an object, is available to play or operate a computer simulation of any game, and which may deliver or entitle the person or persons playing or operating the device to a payoff."¹⁵⁶ Pinellas County took a different approach and aggressively prosecuted Internet café operators for violations of Florida's gambling laws.¹⁵⁷ Operators challenged the ordinance and the enforcement efforts in federal court.¹⁵⁸

The plaintiffs in *Allied Veterans*, a group of Internet café operators, claimed that the ordinance violated the "United States Constitution in several ways and that they will suffer irreparable injury if [Seminole] County is allowed to enforce the Ordinance."¹⁵⁹ The early rounds of the litigation have favored the County's ordinance as the district court has ruled against the Internet café operators' motions for temporary injunctions against the enforcement of the ordinance.¹⁶⁰

The plaintiffs in *Crisante*, an Internet café operator and the LLC under which the business operates, challenged the constitutionality of a sheriff's action in seizing all of the phone card sweepstakes machines and closing the facility.¹⁶¹ As other Internet café operators have done in other jurisdictions, the plaintiff argues that the operation is "[s]imilar to the McDonald's Monopoly game where each additional order of french fries provides an additional game piece . . . the more telephone minutes purchased, the more sweepstakes entries

¹⁵² Suevon Lee, *Internet Café Owner Found Not Guilty*, Ocala (Oct. 18, 2010), www.ocala.com/article/20101018/ARTICLES/101019699?template=printart.

¹⁵³ See, e.g., *State v. Reed*, 42-2009-CA-004574-AXXX-XX (Marion Cnty.) (dismissed); *State v. Ames*, 602009CF000951XXAFX (Sumter Cnty.) (nolle prosequi).

¹⁵⁴ Internet café moratoriums were passed in the cities of Tavares and North Palm Beach, among others, and bans were also passed in Seminole, Hillsborough, and Orange Counties. In addition, law enforcement executed search warrants at multiple locations in Pinellas County. See *Internet Café News and Information*, FLA. GAMING WATCH, <http://www.florida.gamingwatch.com/internet-cafe-news-and-information2/>.

¹⁵⁵ *Allied Veterans of the World v. Seminole Cnty.*, 783 F. Supp. 2d 1197 (M.D. Fla. 2011); *Crisante v. Coats*, Case No. 8:11-cv-02007-EAK-TBM.

¹⁵⁶ Seminole County, Fla., Ordinance 2011-1 (Jan. 11, 2011), available at http://www.seminolecountyfl.gov/ca/pdf/Ordinance_2011-1.pdf.

¹⁵⁷ *Coats*, No. 8:11-cv-02007-EAK-TBM.

¹⁵⁸ *Id.*

¹⁵⁹ *Allied Veterans of the World*, 783 F. Supp. 2d at 1201.

¹⁶⁰ *Id.* at 1209 (After losing the injunction, the Internet café operators in Seminole County reconfigured their systems to circumvent the ordinance, which required that every step referenced above must occur before a device could be a simulated gambling machine. To-date, the Seminole County Sheriff's office has not acted in response.).

¹⁶¹ *Coats*, No. 8:11-cv-02007-EAK-TBM.

provided.”¹⁶² The five-count complaint alleges violations of the First Amendment, Fourth Amendment, and Fourteenth Amendment to the United States Constitution, in addition, a count for temporary and permanent injunctive relief and a final count requesting return of the plaintiffs’ property, which was allegedly valued at more than \$85,000.¹⁶³

While some communities in Florida have opted for strict prohibition, other communities have embraced Internet cafés as a revenue source; communities such as Duval, St. Johns, and Leon Counties have passed regulatory ordinances allowing a limited number of Internet cafés in their community under strict regulations on their operations.¹⁶⁴ All the while, uncertainty remains with law enforcement agencies as to the legal boundaries that must contain these operations.¹⁶⁵

The Internet café industry claims that their operations are regulated in Florida by the Florida Department of Agriculture and Consumer Services.¹⁶⁶ However, the statute is little more than a “file and use” registry with the state agency that has little or no enforcement authority over the operations. In fact, the Commissioner of the Department, Adam Putnam, stated in relation to the Internet café operators’ claim to operate under a state regulated safe harbor of the sweepstakes statute, “Clarification is needed. There is no question in my mind that there is an ambiguity in the law itself.”¹⁶⁷

An article from the New York Times, published in May 2011, stated, “[the fact] [t]hat these cafés are cash machines—and take in as much as \$100,000 per week—is no secret to robbers” and included information that two current members of the Florida Legislature had ownership interests in Internet cafés.¹⁶⁸ In response to a growing number of criminal activities taking place around Florida’s Internet cafés (including robberies and fatal shootings) and increased calls by law enforcement to clarify the state laws related to their operation, the Florida Legislature has undertaken a review of Florida’s gambling laws to address the increased proliferation of Internet cafés with the state.¹⁶⁹ In addition to this review, a bill was presented in the 2011 legislative session entitled the Simulated Gambling Prohibition and Community Protection Act, and although ulti-

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Duval County Ordinance available at <http://www.coj.net>; Leon County Ordinance available at, FLORIDA GAMING WATCH, <http://www.floridagamingwatch.com/category/library/> (last visited Feb. 7, 2012).

¹⁶⁵ Demorris A. Lee & Jamie Klein, *Sweeps Cafes in Pinellas County Vow to Fight Shut-downs*, ST. PETERSBURG TIMES, July 16, 2011, <http://www.tampabay.com/news/publicsafety/article1180821.ece>.

¹⁶⁶ FLA. STAT. § 849.094 (2010).

¹⁶⁷ Katie Sanders, *Ag Commissioner Adam Putnam wants Legislature to Clarify Legality of Internet Cafes*, THE BUZZ (May 18, 2011, 5:16 PM), <http://www.tampabay.com/blogs/the-buzz-florida-politics/content/ag-commissioner-adam-putnam-wants-legislature-clarify-legality-internet-cafes>.

¹⁶⁸ Van Natta, Jr., *supra* note 148.

¹⁶⁹ COMM. ON REGULATED INDUS., REVIEW OF INTERNET CAFES USED FOR ELECTRONIC GAME PROMOTIONS, S. INTERIM REP. 2012-137, at 150 (Fla. 2011) [hereinafter ELECTRONIC GAME PROMOTIONS].

mately failing to become law, this bill is currently scheduled for reconsideration by the Florida Legislature in 2012.¹⁷⁰

E. Georgia

Another state with a growing Internet café industry that is beginning to present a problem for local law enforcement is the State of Georgia. Georgia attempted to pass legislation that would categorize Internet cafés as an illegal lottery by revising certain definitions of the Georgia statutes; specifically, to redefine the definition of “lottery” found in Georgia, Senate Bill (“SB”) 19, 2011 revised paragraph (4) of the Code Section 16-12-20 to the following:

a lottery shall also include the payment of cash or other consideration or the payment for merchandise and the option to participate in or play, even if others can participate or play for free, a no skill game or to participate for cash or noncash prizes by lot or in a finite pool on a computer, mechanical device, or electronic device whereby the player is able to win a cash or noncash prize.¹⁷¹

Senate Bill 19 allowed for companies like Coca-Cola, McDonald’s and The Home Depot to continue offering its sweepstakes by additionally amending Section 16-12-38 so that the new definition of “lottery” would exclude the following:

[a] National promotion, contest, or sweepstakes conducted by any corporation or wholly owned subsidiary of such corporation, provided that, at the time of such promotion, contest, or sweepstakes, such corporation: (i) Is registered under the federal Securities Exchange Act of 1934; and (ii) Has total assets of not less than \$50 million.¹⁷²

Although SB 19 passed both bodies of the Georgia Legislature by a wide margin,¹⁷³ the governor ultimately vetoed the bill.¹⁷⁴ In a press release detailing the rationale for the veto, the governor’s office provided this explanation:

Senate Bill 19 attempts to provide much needed clarity to a statute that often leads to murky interpretations and unintended results [T]his legislation attempts to clarify for prosecutors that so-called Internet sweepstakes cafes are illegal and subject to prosecution for violating Georgia’s prohibition on gambling. I am vetoing this legislation because I do not believe SB 19 provides sufficient clarity or enforcement powers to shut down internet cafes and I also find that the modifications to the current Class A and Class B classifications of coin operated machines could lead to unintended consequences. I look forward to signing legislation in the near future that would more forcefully address these significant concerns. Accordingly, I VETO SB 19.¹⁷⁵

¹⁷⁰ H.B. 3, 2011 Leg., Reg. Sess. (Fla. 2011), available at <http://www.myfloridahouse.gov/SEctions/Bills/bills.aspx?BillId=47007&>.

¹⁷¹ See S.B. 19, 2011 Leg., Reg. Sess. (Ga. 2011).

¹⁷² *Id.* at Sec. 1(D).

¹⁷³ The bill passed 135-21 in the House, and 43-2 in the Senate. See *2011-2012 Regular Session – SB 19*, GA. GEN. ASSEMB., <http://www.legis.ga.gov/Legislation/en-US/display.aspx?Legislation=32130> (last visited Dec. 20, 2011).

¹⁷⁴ Governor Nathan Deal, *Deal Signs Budget, Issues Veto Statements*, OFFICE OF THE GOVERNOR (May 17, 2011), http://www.georgia.gov/00/press_print/0,2669,165937316_170988643_171435055,00.html.

¹⁷⁵ *Id.*

Even after vetoing the bill, the governor wasted no time in enforcing existing gaming laws,¹⁷⁶ focusing the attention of the Georgia Attorney General's Office and pushing for statewide law enforcement to "stamp out" Internet cafés.¹⁷⁷

F. Virginia

Like many other states, including Florida, Virginia has a long-standing body of anti-gambling laws, but also hosts a large number of Internet cafés. In addition, like other states, Virginia gambling laws include a game promotion statute intended to legalize commercial sweepstakes discussed prior. Much like in Florida, Internet cafés took advantage of the commercial game promotion "loophole" in Virginia. In the face of an onslaught of Internet café openings, the Virginia Legislature acted decisively during the state's 2011 legislative session by passing HB 1584 and SB 1195, which amended its gambling statutes in an attempt to shutter Internet cafés in that state. In doing so, the Virginia Legislature defined illegal gambling as follows:

Illegal gambling means the making, placing or receipt of any bet or wager in the Commonwealth of money or other thing of value, made in exchange for a chance to win a prize, stake or other consideration or thing of value, dependent upon the result of any game, contest or any other event the outcome of which is uncertain or a matter of chance, whether such game, contest or event occurs or is to occur inside or outside the limits of the Commonwealth.

For the purposes of this subdivision and notwithstanding any provision in this section to the contrary, the making, placing, or receipt of any bet or wager of money or other thing of value shall include the purchase of a product, Internet access, or other thing, which purchase credits the purchaser with free points or other measurable units that may be (i) risked by the purchaser for an opportunity to win additional points or other measurable units that are redeemable by the purchaser for money or (ii) redeemed by the purchaser for money, and but for the free points or other measurable units, with regard to clauses (i) and (ii), the purchase of the product, Internet access, or other thing (a) would be of insufficient value in and of itself to justify the purchase or (b) is merely incidental to the chance to win money.¹⁷⁸

The passage of the bills in 2011 led many operators to close down in advance of the new law taking effect, others decided to wait until the last day to shut down, and some decided to stay open, resulting in raids by police and SWAT teams statewide.¹⁷⁹

G. North Carolina

Confronted with one of the nation's largest Internet café industries, North Carolina undertook a comprehensive review of its gaming laws and decided to

¹⁷⁶ Mark Millican, *Internet Cafes Targeted by State*, DALTONNOW (Aug. 24, 2011), <http://daltondailycitizen.com/local/x2080081728/Internet-cafe-may-face-shutdown>.

¹⁷⁷ *Id.*

¹⁷⁸ VA. CODE ANN. § 18.2-325(1) (2011).

¹⁷⁹ See e.g., Bill McKelway, *Gambling Cafes Maintain Toehold in City Despite New Law*, RICHMOND TIMES-DISPATCH, July 8, 2011, <http://www2.timesdispatch.com/news/2011/jul/08/tdmain01-internet-cafes-maintain-toehold-in-city-d-ar-1159125/>.

outlaw Internet cafés statewide.¹⁸⁰ North Carolina's legislators approached the issue in a different manner than Virginia, which warrants comment. Rather than changing the definition of what constitutes illegal gambling, the North Carolina Legislature chose to adopt an entirely new provision in its gambling code with the sole purpose of eliminating what legislators considered illegal game promotions.¹⁸¹

In an effort to establish a constitutional public interest and rational basis for the legislation, the North Carolina lawmakers adopted an elaborate preamble of legislative intent statements along with the substantive legislation.¹⁸² Statements included in the legislative preamble provide a good summary of the state's gambling history as well as the issues facing states that do not have a statewide gaming regulator equipped to deal with the legal complexities inherent to Internet café operations.¹⁸³

In the two-piece legislation enacted by the North Carolina Legislature, the State attempted to provide clear mandates for its law enforcement agencies. The first measure, codified in N.C. Gen. Stat. § 14-306.3, stated that:

- (a) It is unlawful to promote, operate, or conduct a server based electronic game promotion.
- (b) It is unlawful for any person to possess any game terminal with a display that simulates a game ordinarily played on a slot machine . . . or a video gaming machine . . . for the purpose of promoting, operating, or conducting a server-based electronic game promotion.¹⁸⁴

The follow-up measure took a head-on approach to Internet cafés. The Act provided additional definitions to clarify the technologies at issue.¹⁸⁵ N.C. Gen. Stat. § 14-306.4 further added that:

¹⁸⁰ Ogi Overman, *What Happened to the Internet Sweepstakes Ban?*, JAMESTOWN NEWS, May 11, 2011, http://www.jamestownnews.womacknewspapers.com/articles/2011/05/10/news/top_stories/top_stories37.txt. (The first bill passed in 2009 was unsuccessful in its effort to shut down Internet café operations, and actually created increased ambiguity in the law.).

¹⁸¹ N.C. GEN. STAT. § 14-306.3 (2010); *id.* § 14-306.4.

¹⁸² H.B. 80, 2009 Gen. Assemb., Reg. Sess. (N.C. 2009) ("Whereas, the 1791 General Assembly determined that 'all public gaming-tables are destructive of the morality of the inhabitants of this State, and tend greatly to the encouragement of vice and dissipation' (Law of 1791, Chapter 5)"), ("Whereas, the State of North Carolina has previously determined that no video poker machine may be utilized for play under Chapter 18C of the General Statutes"), ("Whereas, since 2006, companies have developed electronic machines and devices to gamble through pretextual sweepstakes relationships with Internet service, telephone cards, and office supplies, among other products; and [w]hereas, companies using electronic machines and devices for sweepstakes have sought, and received, declaratory relief from the courts; and [w]hereas, such electronic sweepstakes systems utilizing video poker machines and other similar simulated game play create the same encouragement of vice and dissipation as other forms of gambling, in particular video poker, by encouraging repeated play, even when allegedly used as a marketing technique.).

¹⁸³ *Id.*

¹⁸⁴ N.C. GEN. STAT. § 14-306.3 (2010).

¹⁸⁵ § 14-306.4 Electronic machines and devices for sweepstakes prohibited. Definitions. – For the purposes of this section, the following definitions apply:

- (1) "Electronic machine or device" means a mechanically, electrically or electronically operated machine or device, that is owned, leased or otherwise possessed by a sweepstakes sponsor or promoter, or any of the sweepstakes sponsor's or promoter's partners, affiliates, subsidiaries or

[I]t shall be unlawful for any person to operate, or place into operation, an electronic machine or device to do either of the following:

- (1) Conduct a sweepstakes through the use of an entertaining display, including the entry process or the reveal of a prize.
- (2) Promote a sweepstakes that is conducted through the use of an entertaining display, including the entry process or the reveal of a prize.
- (c) It is the intent of this section to prohibit any mechanism that seeks to avoid application of this section through the use of any subterfuge or pretense whatsoever[.]¹⁸⁶

Although the result is the same, the different methods by which Alabama, Mississippi, Virginia, and North Carolina dealt with their Internet cafés are a testament to the uniqueness of every state's gambling laws and their enforcement.

H. Massachusetts

In addition to legislative approaches discussed above, a look at Massachusetts offers another example of how states are confronting a rapidly expanding Internet café industry. Like other states with little or no regulated casino gambling industry, Massachusetts has experienced rather robust growth in its Internet café industry in the past three years.¹⁸⁷ Almost daily, Massachusetts newspapers, magazines, and television news stations would detail the opening of a new facility or report on issues surrounding an existing one.¹⁸⁸ The news media even chronicled at least one Massachusetts politician, like those in Florida, who joined the ranks of Internet café proprietors.¹⁸⁹

Massachusetts Attorney General, Martha Coakley, used her authority to regulate unfair and deceptive trade practices in trade and commerce within her

contractors, that is intended to be used by a sweepstakes entrant, that uses energy, and that is capable of displaying information on a screen or other mechanism . . . [.]”

(3) “Entertaining display” means visual information, capable of being seen by a sweepstakes entrant, that takes the form of actual game play, or simulated game play, such as, by way of illustration and not exclusion:

h. A video game based on or involving the random or chance matching of different pictures, words, numbers, or symbols not dependent on the skill or dexterity of the player.

i. Any other video game not dependent on skill or dexterity that is played while revealing a prize as the result of an entry into a sweepstakes.

(5) “Sweepstakes” means any game, advertising scheme or plan, or other promotion, which, with or without payment of any consideration, a person may enter to win or become eligible to receive any prize, the determination of which is based upon chance.

¹⁸⁶ *Id.*

¹⁸⁷ See *Legality of Sweepstakes Cafes Questioned: Internet Sweepstakes Centers Operated by Legal Loophole, Critics Charge*, THE BOSTON CHANNEL (Mar. 31, 2011, 6:38 AM), <http://www.thebostonchannel.com/money/27376404/detail.html#ixzz1Uq2Qx3GI>.

¹⁸⁸ Examples of these new articles include: Kara Dominick, *Expansion Approved for Internet Café*, 22 NEWS WWLP.COM (June 6, 2011, 11:47 PM), <http://www.wwlp.com/dpp/news/local/hampden/Expansion-approved-for-internet-caf%C3%A9>; see also Lee Hammel, *Judge Denies Request for Sweepstakes Cafes*, TELEGRAM.COM (May 19, 2011), <http://www.telegram.com/article/20110519/NEWS/105199436/1246>.

¹⁸⁹ Vivian Ho, *Fall River Councilor Protest Seizures*, BOSTON.COM (Apr. 2, 2011), http://articles.boston.com/2011-04-02/news/29375060_1_internet-cafes-sweepstakes-games-internet-time (The city councilman actually was unabashed in his support of the industry taking issue with the efforts by a state attorney who looked into the legality of his two Internet café operations.).

state to enact emergency regulations to deal with unlawful gambling establishments that she believed posed as “an unacceptable risk to the public health, safety and welfare.”¹⁹⁰ By enacting the regulations¹⁹¹ relating to Illegal Lotteries, Sweepstakes, and De Facto Gambling Establishments,¹⁹² the Attorney General was clear in her intention to shut down Internet café operations in the State of Massachusetts.¹⁹³ The relevant portions of the regulations, which went into effect in June 2011, state as follows:

- (1) It is an unfair and deceptive act or practice . . . for a person to solicit or accept payment for a chance to win a prize.
- (2) With respect to a business or a transaction that involves or purports to involve both a chance to win a prize and the sale or purported sale of a good or service, it is an unfair and deceptive act or practice . . . for any person to engage in a business or engage in a transaction where a gambling purpose predominates over the *bona fide* sale of *bona fide* goods or services.¹⁹⁴

It is noteworthy that in its regulations, Massachusetts used similar language to that found in cases and attorney general opinions discussed earlier from states like Alabama, Florida, California, and Texas. In order to determine whether an operator is operating a legitimate commercial business or merely attempting to disguise a gambling enterprise, the Massachusetts Attorney General looked to a “predominance” test in issuing the following criteria:

The determination . . . whether, with respect to a business or a transaction, a gambling purpose predominates over the bona fide sale of bona fide goods or services, shall consider the facts and circumstances of the business or transaction including, without limitation, the following criteria:

- (a) The portion of goods or services sold that are actually used or redeemed by the customers of the business;
- (b) The portion of customers that engage in lotteries, sweepstakes or similar games without accepting, using or redeeming the goods or services sold or purportedly sold;
- (c) The manner in which the business or the transactions are marketed, advertised, or promoted, including without limitation:
 - 1) signage at the establishment;
 - 2) advertising and other methods of soliciting customers;
 - 3) the business’s interaction with customers at the establishment;
 - 4) the overall atmosphere and environment at the establishment, including whether it appears or is designed to appear similar to a casino or other gambling establishment;
- (d) Whether and the degree to which the establishment provides instructions to customers with respect to: (1) use or operation of the lottery, sweepstakes, other games or gaming devices, as compared to (2) use or operation of goods or services sold or purportedly sold;

¹⁹⁰ See Press Release, Martha Coakley, Att’y Gen. Mass., AG Coakley Issues Permanent Regulation Banning So-Called “Internet Cafes” and “Phone Card Lotteries” That Offer Illegal Gambling (June 24, 2011), available at <http://www.mass.gov/ago/news-and-updates/press-releases/2011/ag-issues-permanent-regs-banning-internet-cafes.html>.

¹⁹¹ 940 MASS. CODE REGS. 30.00 (2011).

¹⁹² See *id.* 30.01-30.06.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 30.04.

(e) The motivation or purpose of either: (1) the customers of the business; or (2) the business in offering a transaction involving a lottery, sweepstakes, similar game or use of gaming devices;

(f) Whether customers are permitted to participate in the lottery, sweepstakes, similar game, use of gaming devices or similar gambling aspect of the business without purchasing the goods or services offered or purportedly offered by the business; and in the event that a free play option is available or purportedly available:

(g) Whether customers who purchase or purportedly purchase goods or services in connection with a lottery, sweepstakes, similar game or use of gaming devices achieve any advantages, whether immediate or over a period of time, in winning a prize over customers who do not purchase or purportedly purchase goods or services.

(h) With respect to businesses that use or purport to use a lottery, sweepstakes, similar game or use of gaming devices to promote the sale of goods or services offered or purportedly offered by the business, whether such promotion is occasional and of limited duration as compared to permanent or of undefined or long-term duration.¹⁹⁵

Similar to the result in Virginia, operators of Internet café businesses had mixed reactions to the newly imposed regulations with some appealing to courts for relief in the hopes of avoiding a shut down by law enforcement.¹⁹⁶

IV. HOW ARE LOCAL GOVERNMENTS DEALING WITH INTERNET CAFÉS?

In states that do not have a state agency or state law enforcement arm with plenary authority to administer and enforce state gambling laws, clarity in state law is required to determine whether an Internet café operation is compliant with the state's gambling proscriptions. In the event the state legislature has not provided this clarity, the determination as to the legality of these operations falls to the local governments, their law enforcement agencies, and their prosecuting attorneys. The options available to these local government officials range from the proverbial "head in the sand" to proactive abolition comparable to the actions of Seminole County, Florida discussed earlier.¹⁹⁷

The powers available to local governments to take proactive steps usually are found in their home rule powers granted by state constitutions or state legislatures.¹⁹⁸ Whether the exercise of these powers involves the use of zoning restrictions to limit the areas at which these businesses might operate or require special use permits prior to the opening of the Internet café, local government

¹⁹⁵ *Id.* 30.05.

¹⁹⁶ See Peter Goonan, *Triple Sevens Cyber Center in Springfield Files Appeal Seeking Special Permit for Cyber Café*, MASS. LIVE (July 7, 2011, 2:49 PM), http://www.masslive.com/news/index.ssf/2011/07/triple_sevens_cyber_center_in_springfield_special_permit_cyber_cafe.html.

¹⁹⁷ See *Gilbert v. City of San Jose*, 7 Cal. Rptr. 3d 692 (Cal. Ct. App. 2003).

¹⁹⁸ BLACK'S LAW DICTIONARY 750 (8th ed. 2004) (defining "home rule" as "a state legislative provision or action allocating a measure of autonomy to a local government, conditional on its acceptance of certain terms."). For examples of how such power is used to augment state gambling statutes, see *Jordan Chapel Freewill Baptist Church v. Dade Cnty.*, 334 So. 2d 661 (Fla. Dist. Ct. App. 1976); see also *F.Y.I. Adventures, Inc., v. City of Ocala*, 698 So. 2d 583, (Fla. Dist. Ct. App. 1997).

officials are beginning to flex their muscles in an effort to curtail this fast growing industry.¹⁹⁹ Currently, moratoriums are a popular tool for local governments who are attempting to gain control of the industry and its impact on their communities.²⁰⁰

For communities that have more favorable opinions of the Internet café industry, officials are embracing these businesses and are passing actual regulatory ordinances designed at maximizing the tax or fee revenues from these operations for the benefit of the citizenry.²⁰¹ Typical of these regulatory ordinances are a cap on the number of Internet cafés allowed in the community, background checks and licensing of proprietors, and certification by independent gaming laboratories as to the fairness and legality of the sweepstakes technologies.²⁰²

On the other hand, officials focused on ridding their community of these gambling businesses are using their authority to pass onerous time, place, and manner restrictions focused on squeezing the profitability from the Internet café, hoping that its proprietors will take its operation elsewhere.²⁰³ Limits on the hours of operation, proximity to schools and churches, caps on the numbers of prizes awarded in a single day, in-depth licensing requirements for individuals involved in the Internet café, and the technologies associated with its operation are typical impositions in communities attempting to dissuade incumbent Internet cafés from continuing their presence.²⁰⁴

A number of states recognize a local government's ability to impose such ordinances where the gambling is not preempted to a state agency or state law enforcement arm. Cities and counties are afforded the authority to interpret or fill gaps in gambling statutes where ambiguity exist, provided they do not make legal that which is illegal or vice versa.²⁰⁵ These gap filling efforts significantly aid law enforcement and prosecuting attorneys in determining what activities are permissible in a community.²⁰⁶ In the absence of local ordinances coupled with ambiguous state laws, the usual result is difficult cases in which a judge and jury are forced to decide the legality of an operation in a battle of expert witnesses. All too often such battles are lost by local governments and their prosecutors, resulting in a waste of precious taxpayer resources.²⁰⁷

¹⁹⁹ *City of Shreveport v. Kaufman*, 353 So. 2d 995, 996-97 (La. 1977) (Although local ordinances may work to strengthen state statutes and constitutions, ordinances cannot be inconsistent with either.).

²⁰⁰ See *Clermont, Fla., Ordinance 2011-07-M* (Mar. 8, 2011).

²⁰¹ See *Duval County and Leon County Ordinances*, *supra* note 164.

²⁰² *Id.*

²⁰³ See generally, *Jordan Chapel Freewill Baptist Church*, 334 So. 2d at 661; *F.Y.I. Adventures, Inc.*, 698 So. 2d at 583.

²⁰⁴ *Jordan Chapel Freewill Baptist Church*, 334 So. 2d at 662-64; *F.Y.I. Adventures, Inc.*, 698 So. 2d at 584.

²⁰⁵ *Edmonds Shopping Ctr. Assoc.*, 71 P.3d at 237; *Myerson*, 327 N.E.2d at 802-03; *Ex parte Powell*, 66 S.W. at 298-99; *Rice*, 3 Kan. at 141.

²⁰⁶ *Edmonds Shopping Ctr. Assoc.*, 71 P.3d at 237; *Myerson*, 327 N.E.2d at 802-03; *Ex parte Powell*, 66 S.W. at 298-99; *Rice*, 3 Kan. at 141.

²⁰⁷ See *State v. Reed*, 42-2009-CA-004574-AXXX-XX (Marion County) (dismissed); *State v. Ames*, 602009CF000951XXAXFX (Sumter County) (nolle prosequi).

V. FEDERAL LAWS AFFECTING INTERNET CAFÉ OPERATIONS

At the federal level, few federal laws exist which directly impact the Internet café industry. However, like the laws identified by the Massachusetts Attorney General, federal laws are already in place regulating fair trade practices that potentially impact the operation of an Internet café and their electronic sweepstakes operations.²⁰⁸ The United States Postal Service and Federal Trade Commission possess jurisdiction to regulate and investigate sweepstakes and contests of skill used in concert with an unrelated commercial business.²⁰⁹ Current federal law does not specifically forbid sweepstakes, but addresses them indirectly by forbidding lotteries, false representation, and unfair trade practices.²¹⁰

The provisions of 39 U.S.C. § 3001 encompass any mailed matter that “includes entry materials for a sweepstakes or promotion that purports to be a sweepstakes.”²¹¹ Therefore, even though a charitable or promotional sweepstakes may allow for free entries, all sweepstakes mail-outs must conform to the requirements set forth in § 3001, particularly, if a state has adopted a view of “consideration” comparable to the *Little River* precedent in Florida.²¹² Internet cafés, by virtue of the dominance of sweepstake gambling in their operations, should be mindful of any use of the mail in the promotion of their businesses due to these regulations. In addition, Federal Trade Commission jurisdiction has been extended in recent years to Internet access and use, and could present a challenge to an Internet café operator depending on how it uses the Internet in its underlying business.²¹³

In addition to the potential implications of Federal Trade Commission and U.S. Postal Service regulations, other federal gambling statutes are brought to bear in the event a state determines the operations are unlawful under state law. From a machine-gambling standpoint, the federal Johnson Act,²¹⁴ relating to the possession of gambling devices, has relevance to the Internet café debate, particularly in states such as Alabama, which have deemed the computer devices underlying the operation illegal slot machines.²¹⁵ In these states, the

²⁰⁸ See 15 U.S.C. § 45 (2006); 39 U.S.C. § 3001 (2006).

²⁰⁹ 15 U.S.C. § 45 (2006); 39 U.S.C. § 3001 (2006).

²¹⁰ See 39 U.S.C. § 3001 (2006).

²¹¹ *Id.*

²¹² *Id.*

²¹³ See 15 U.S.C. §§ 41-58 (2006).

²¹⁴ 15 U.S.C. §§ 1171-78 (2006).

²¹⁵ 15 U.S.C. § 1171 (2006) defines the term “gambling device” as follows:

(1) any so-called “slot machine” or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or

(2) any other machine or mechanical device (including, but not limited to, roulette wheels and similar devices) designed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property

Johnson Act imposes requirements on the manufacture,²¹⁶ shipment,²¹⁷ and possession of gambling devices and their components.²¹⁸ Penalties for violating these provisions are enforced by the U.S. Department of Justice, and range from fines and forfeiture to prison time.²¹⁹

The Johnson Act has highly developed case law interpreting and validating its broad reaching provisions.²²⁰ One case worth noting within the context of an Internet café treatise is *Casino Ventures v. Stewart*, which discusses the relationship between state laws and boundaries established on gambling thereunder and the federal requirements under the Johnson Act.²²¹ The case involved the transportation of slot machines on a “cruise to nowhere”²²² gambling boat operating out of South Carolina. The Fourth Circuit Court of Appeals discussed Congress’ intention in creating the Act, stating in part that, “Congress initially enacted the Johnson Act ‘to support the policy of those States which outlaw slot machines and similar gambling devices, by prohibiting use of the channels of interstate or foreign commerce for the shipment of such machines or devices into such States.’”²²³

The gambling cruise operator, Casino Ventures, argued, and won at the trial level, that the Johnson Act preempted South Carolina’s anti-gambling laws. The holding at the appellate level, overturning the lower court’s ruling, was as follows:

Casino Ventures suggests that in amending the Johnson Act, Congress prohibited states from exercising their core police powers to ban gambling and gaming devices.

²¹⁶ Section 15 U.S.C. § 1173 (2006) deals with the registration of manufacturers and dealers of gambling devices and imposes the following registration requirement:

(1) It shall be unlawful for any person engaged in the business of manufacturing gambling devices, if the activities of such business in any way affect interstate or foreign commerce, to manufacture any gambling device during any calendar year, unless, after November 30 of the preceding calendar year, and before the date on which such device is manufactured, such person has registered with the Attorney General under this subsection, regardless of whether such device ever enters interstate or foreign commerce.

²¹⁷ 15 U.S.C. § 1172 (2006) provides as a general rule:

It shall be unlawful knowingly to transport any gambling device to any place in a State or a possession of the United States from any place outside of such State or possession: Provided, That this section shall not apply to transportation of any gambling device to a place in any State which has enacted a law providing for the exemption of such State from the provisions of this section, or to a place in any subdivision of a State if the State in which such subdivision is located has enacted a law providing for the exemption of such subdivision from the provisions of this section, nor shall this section apply to any gambling device used or designed for use at and transported to licensed gambling establishments where betting is legal under applicable State laws: Provided, further, That it shall not be unlawful to transport in interstate or foreign commerce any gambling device into any State in which the transported gambling device is specifically enumerated as lawful in a statute of that State.

²¹⁸ *Id.*

²¹⁹ *Id.* § 1176.

²²⁰ See e.g., *Casino Ventures v. Stewart*, 183 F.3d 307 (4th Cir. 1999).

²²¹ See generally *id.*

²²² *Id.* at 308. A “cruise to nowhere” is a type of entertainment “where the vessels leave and return to the State without an intervening stop within another state or foreign country, or waters within the jurisdiction of another state or foreign country.” See *State Bd. of Tr. v. Day Cruise Ass’n*, 794 So. 2d 696, 697 (Fla. Dist. Ct. App.), *review denied*, 823 So. 2d 123 (Fla. 2002).

²²³ *Casino Ventures*, 183 F.3d at 311.

We do not agree. States have long regulated in this area. And state primacy here has only been reinforced by congressional enactments, including the one before us, which grant states significant control over the substance of federal criminal laws dealing with gambling. Far from expressing the required 'clear and manifest' purpose to displace state authority, Congress has voiced a desire to retain and defer to state choices in this area. Implying preemption here would defeat, not advance, these federal objectives. For this reason, the judgment of the district court is hereby REVERSED.²²⁴

As clearly stated by the court in *Casino Ventures* and as evidenced by the holdings of various state courts presented earlier, state authority to regulate gambling, including Internet café operations, is further strengthened by the Johnson Act.²²⁵ The provisions of the Travel Act,²²⁶ and the Illegal Gambling Business Act,²²⁷ can be used against individuals who are engaged in unlawful gambling as defined by state law. Individuals should be mindful of these laws whenever they are involved in the operation of an Internet café, the manufacture or possession of Internet café technologies, the interstate transport of such technologies, or the promotion of such businesses, to avoid the perils, which follow a violation of the federal gambling laws.

VI. CONCLUSION

The Internet café craze poses interesting questions for law enforcement, local governments, and state legislatures. Are the devices slot machines? Is the game promotion really an illegal lottery? Should these facilities be regulated and taxed, or banned altogether? Depending on the state and local jurisdiction, as discussed above, the answer to these questions varies greatly depending upon where in the country the question is being asked, and what the desire is within a particular local community. In more liberal jurisdictions, perhaps the Internet café is an acceptable boost to a local economy. In contrast, communi-

²²⁴ *Id.* at 313.

²²⁵ *Id.*

²²⁶ 18 U.S.C. § 1952 (2006). The Travel Act provides that "[w]hoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to—

(1) distribute the proceeds of any unlawful activity; or
(2) commit any crime of violence to further any unlawful activity; or
(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform such an act." *Id.* "Unlawful activity" has been defined by the Travel Act to include "any business enterprise involving gambling." *Id.* Federal courts have ruled that an ongoing illegal gambling business prohibited under state law implicates Travel Act prosecution. *United States v. Corrar*, 512 F. Supp. 2d 1280 (N.D. Ga. 2007).

²²⁷ 18 U.S.C. § 1955 (2006). The Illegal Gambling Business Act prohibits illegal gambling businesses which involve (1) a violation of state law, (2) 5 or more persons who conduct, manage, finance or benefit financially from the business, (3) a business that operates more than 30 days or has gross revenues of \$2000 in any single day. *Id.* While this Act was passed in 1970 to deal with organized crime and syndicated gambling, the threshold levels which implicate prosecution thereunder are well within reach of the modest Internet café according to industry advertising. See *How to Start an Internet Sweepstakes Café*, CASHOUTGAMING.COM, http://cashoutgaming.com/start_internet_sweepstakes_cafe.html (last visited Dec. 20, 2011).

ties like Pinellas and Seminole County, Florida or the State of North Carolina—a state that proudly boasts its anti-gambling history back to the 1700s—Internet café operations may be seen as destructive to the morality of the State's citizens, and put out of business entirely.

Presently, states that have elevated levels of regulated gambling and gaming commissions armed with the broad authority to oversee gambling activities within their borders, have not seen an outbreak of Internet cafés. Although no direct research has been done in this area, it appears that a combination of two factors serve as a deterrent to this cottage industry: the availability of casino gambling, and the increased level of oversight provided by gaming commissions—as seen in New Jersey, Nevada, and Mississippi. In contrast, states with little or no statewide gambling authority have experienced exceptional growth in the size and scope of this type of convenience gambling.

With the increasing attention given to these operations and the federal laws deferring determination of what is gambling to local jurisdictions, Internet café operators should be mindful of where they find themselves. Location is the principle driver of the legality or impropriety of an Internet café operation, which will ultimately determine its success or failure.

