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OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

March 8, 2002

The Honorable John M. Knotts, Jr.
Member, House of Representatives
323-D Blatt Building
Columbia, South Carolina 29211

Re: Vending Machines With Promotional Play Feature

Dear Representative Knotts:

You have requested an opinion from this Office concerning the legality of a particular vending/video machine with a promotional play feature. Specifically, you ask "whether or not FREESPIN® and FREEDRAW® Collectors Card Vending Machines with their Promotion Free Spin/Free Draw Game Feature are legal to operate in South Carolina." You have enclosed a picture of the machine and a "Summary of Invention" which describes the operation of the machine.

You also indicate that the machine appears "to meet the criteria set forth in Section 12-21-2710 which specifically exempts 'vending machines which are constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance.' [The machines] also appear to meet the criteria set forth in Section 61-4-580(3) for free promotional games of chance."

For the reasons stated more fully below, it is my opinion that the Free Spin and Free Draw machines referenced in your request are illegal games of chance which are expressly prohibited by S.C. Code Ann. §12-21-2710.

Law / Analysis

S.C. Code Ann. §12-21-2710 provides, in pertinent part, as follows:

It is unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State any vending or slot machine, or any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value, or other device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo, or craps,

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or any machine or device licensed pursuant to Section 12-21-2720 and used for gambling or any punch board, pull board, or other device pertaining to games of chance of whatever name or kind, including those machines, boards, or other devices that display different pictures, words, or symbols, at different plays or different numbers, whether in words or figures or, which deposit tokens or coins at regular intervals or in varying numbers to the player or in the machine.

In Squires v. South Carolina Law Enforcement Division, 249 S.C. 609, 155 S.E.2d 859 (1967), our Supreme Court considered the predecessor of Section 12-21-2710 which contained the same operative language and held that “[i]t is clear that the Legislature, by the enactment of the statutes here involved, did condemn any devices pertaining to games of chance.” The information provided, as well as other resources uncovered, indicate that the Free Spin and Free Draw machines are devices pertaining to games of chance made contraband *per se* by the language of Section 12-21-2710.

In the *Freespin Official Rules* provided with your opinion request, there is a brief description of the operation of the promotional game. It is indicated that to play the game, one would:

... push the start button. The game will then stop and notify the customer if he has a winning or losing spin. Should the customer win more than the free promotional points awarded through either entry method ... he may claim a cash prize equal to the value given to the points by that particular vending machine (point values may vary from 1c to 25 cents).

The Rules also provide information on the “*Odds of Winning*” and indicate that on “average there is a 1:2 chance of a winning combination.” This brief description and the fact that there are included in the rules odds of winning would seem to indicate that the machine is in fact a game of chance.

Additional insight into the nature of this machine is provided by the patent information related to it. This machine has been patented as the “Collector Card/Phone Card Dispensing System with Promotional Free Spin/Free Draw Game Feature.” The Abstract for the patent describes the machine as follows:

A system for dispensing collector's series cards to a collector includes a currency acceptor and card dispenser controlled by a computer. As a promotion to encourage the sale of the collector's cards, the system includes a game sub-system that provides the purchaser with an opportunity to play a game of chance with the credits that the person receives with each collector's series card purchased. The purchaser may then save such credits or play them, and to the extent that a person wins, a promotional prize will be awarded.

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Clearly, the description shows the machine as a game of chance.

Further, this machine has been the subject of recent litigation in the State of Indiana concerning its status as an illegal gambling device. On July 25, 2001, the Indiana Court of Appeals decided the case of Jack Eiser Sales Company, Inc., v. Wilson, 752 N.E.2d 225 (2001). This case involved the exact machine which is the subject of this opinion request, the Free Spin machine manufactured by a Tennessee company called Worlds of Games. In the Eiser case, the Free Spin is described as a machine, which for the price of a dollar ejects a sports card, and then allows a player to use 20 promotional credits to play a video game in which three rows of pictures spin randomly until the player pushes a button, at which point the pictures stop and the player earns prize credits that can be redeemed for cash based on the configuration of pictures. The Indiana Court of Appeals found this game to be an illegal gambling device. Id. at 229. The Court so held despite Eiser's claims that the playing of the machine lacked the consideration element necessary to show actual gambling. Id.

Even further, the Tennessee Attorney General has issued an opinion concerning the legality of collector card vending machines which simultaneously provide an opportunity to win cash by playing a video game (Free Spin/Free Draw). The operation of the machine is described as follows:

... when payment (usually one dollar) is inserted into the machine, a "collector card" (or possibly a prepaid telephone card) is issued. Simultaneously the purchaser also receives a set number of credits that must be used at that time for playing a video (poker or slot machine type) game to possibly accumulate more credits to be paid off in cash or other valuable prizes.

The Tennessee Attorney General opined that "[i]t is evident that the features of the vending/video gaming machines in question present players with the opportunity to win a 'profit whose return is ... contingent upon chance.'" See TN. OP. ATTY. GEN. (Dated July 30, 1999).

Given the various descriptions of the operation of the Free Spin/Free Draw machine, it is more than apparent that the machine is a device pertaining to a game of chance prohibited by Section 12-21-2710. Moreover, the machine appears to be a slot machine or a simulation thereof which is specifically addressed in the statute. Machines with similar features of operation have previously been considered by our Supreme Court and declared to be in violation of the law. See State v. One Coin-Operated Video Machine, 321 S.C. 176, 467 S.E.2d 443 (1996).

As you mentioned in your letter, Section 12-21-2710 does provide an exception for certain devices. Section 12-21-2710 states that "... the provisions of this section do not extend to ... vending machines which are constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance (emphasis added). As, however, the award of promotional prizes and cash in the case of the Free Spin/Free Draw machine is determined by

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random chance, this exception is not applicable.

You have also questioned whether the Free Spin/Free Draw machine is given protection from our State's gambling laws by S.C. Code Ann. §61-4-580(3). That section of the law provides in pertinent part as follows:

No holder of a permit authorizing the sale of beer or wine or a servant, agent or employee of the permittee may knowingly commit any of the following acts upon the licensed premises covered by the holder's permit:

... (3) permits gambling or games of chance except game promotion including contests, games of chance, or sweepstakes in which the elements of chance and prize are present and which comply with the following:

(a) the game promotion is conducted or offered in connection with the sale, promotion or advertisement of a consumer product or service, or to enhance the brand or image of a supplier of consumer products or services;

(b) no purchase payment, entry fee, or proof of purchase is required as a condition of entering the game promotion or receiving a prize;

(c) all materials advertising the game promotion clearly disclose that no purchase or payment is necessary to enter and provide details on the free method of participation.

In a previous opinion, this Office rejected the argument that Section 61-4-580 immunizes a gambling device from the State's gambling laws. See OP. ATTY. GEN. (Dated January 8, 2001). In that opinion, we stated that Section "61-4-580 was designed to provide merely a safe harbor for beer and wine permit holders from administrative licensing sanctions, but not a zone of amnesty for video gambling criminal sanctions ... [i]f the elements of gambling are present ... §61-4-580 does not protect [the] game from criminal penalties ... [a]dministrative licensing penalties and criminal penalties are totally separate and apart from one another and have no effect on each other. See, State v. Young, 3 Neb. App. 539, 530 N.W.2d 269 (1995)." The same logic applies here. Section 61-4-580 does not make legal those devices which the legislature has designated as contraband *per se*.

Finally, the manufacturer's claim that the machine is somehow made legal because it does not require consideration to play is simply incorrect. First of all, the presence of consideration is irrelevant when the machine itself is contraband *per se*. The machine is illegal, regardless of its intended use or operation. See State v. 192 Coin-Operated Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000); See also Jack Eiser Sales Company, Inc., v. Wilson, 752 N.E.2d 225 (2001). Secondly, attempting to disguise the consideration element by providing some collector's card is ineffectual. As the Tennessee Attorney General determined "... the payment price connected with the so-called 'collector cards' is not objectively independent from the dominant desire to attempt to win cash." See TN. OP. ATTY. GEN. (Dated July 30, 1999).

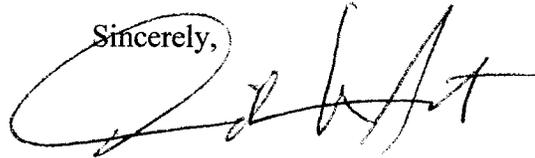
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Conclusion

Based on the foregoing, it is my opinion that the FREESPIN® and FREEDRAW® Collectors Card Vending Machines with their Promotion Free Spin/Free Draw Game Feature fall within the prohibitions of S.C. Code Ann. §12-21-2710. Therefore, possession of the machine in South Carolina would be illegal.

This letter is an informal opinion only. It has been written by a designated Assistant Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General and not officially published in the manner of a formal opinion.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Avant', written over a circular scribble.

David K. Avant
Assistant Attorney General

DKA/an