

**AN EDUCATIONAL UPDATE FROM
THE SOUTHEAST LAW INSTITUTE™, INC.**

To: SLI Supporters
Date: January 2006
From: A. Eric Johnston
Re: Sweepstakes Gambling at the Birmingham Race Course¹

Voters in Jefferson County approved live and simulcast horse and dog racing and related pari-mutuel betting at the Birmingham Race Course in 1984 and 1991. Well known gambling figure Milton McGregor operates the activities at the Birmingham Race Course. His most recent venture is 1,100 gambling machines which he claims are legal sweepstakes. Although Jefferson County Sheriff Mike Hale raided the race course December 22, 2005, and McGregor filed civil court proceedings to enjoin him, Attorney General Troy King and District Attorney David Barber equivocate. SLI has met with the Attorney General, District Attorney, sheriff's representatives and opponents of gambling to encourage criminal prosecution of this gambling.

Sweepstakes: If It Is Not Gambling, What Is It?

The sweepstakes are played by a patron obtaining an access card and purchasing play time on a computer at the race course which is connected to an internet site or inserting the card into a machine. These reveal if he wins a cash prize. There is no skill involved and winning is completely by chance. The elements of a lottery are (1) a prize, (2) awarded by chance, (3) for a consideration. Article IV, § 65 of the Alabama Constitution prohibits lotteries and our statutes make violations a crime.

In the sweepstakes context, the Alabama Supreme Court decided *Try-Me Bottling Company v. State*, 178 So. 231 (Ala. 1938), holding that a sweepstakes which had monetary denominations under bottle top crowns, to be redeemed for cash, was a lottery. The decision was on the basis that the purchase of the bottle with cap was the consideration to buy a chance to win a prize. Later, the Court decided *Pepsi Cola Bottling Company of Luverne, Inc. v. Coca-Cola Bottling Company, Andalusia*, 534 So.2d 295 (1988), holding that Pepsi was not providing a lottery because in addition to purchasing bottles with caps, it also gave away 25,000 free cards that might award a prize. The element of paying a "consideration" was removed and this was not a lottery. Curiously, the *Pepsi* case did not even mention the *Try-Me* case, which was better reasoned and if it had been considered, the outcome of the *Pepsi* case would have been different.

Attorney General King is reticent to prosecute or seek injunctive relief against the race course sweepstakes because he relies on the *Pepsi* case. We believe this reliance on *Pepsi* is misplaced and the Alabama Supreme Court needs to revisit this issue. Sheriff Hale's actions could precipitate this and regardless of the Attorney General's position, the District Attorney has the opportunity to do the right thing.

General King's position has not always been so. On August 9, 2005 he issued Opinion No. 2005-173 to Bessemer Cutoff Jefferson County District Attorney Arthur Green, Jr. concerning gambling on sweepstakes video machines. The Attorney General relied on *Ex Parte Ted's Game Enterprises*, 893 So.2d 376 (Ala. 2004) which said "the Constitution's broad prohibition on all lotteries is evident because the Constitution explicitly condemns 'any scheme' containing elements that would make the scheme resemble a lottery." The Attorney General explained that "[t]he very purpose of this broad declaration was to put a ban on any effort at evasion or subterfuge." Applying this reasoning, any effort for the Birmingham Race Course sweepstakes to be something other than gambling is a sham.

Sections 11-65-1, *et seq.* 1975 *Code of Alabama* regulate horse and dog racing with pari-mutuel wagering in Class 1 municipalities. These laws are clear that only actual or simulcast horse and/or dog racing with related pari-mutuel wagering activities is permitted. Neither sweepstakes, bingo, nor any other gambling is permitted. A change can only be made if approved by the voters. This has not been done.

Conclusion

The Alabama Supreme Court needs a new case to bring the *Try-Me* and *Pepsi* decisions into agreement. This can only be done if law enforcement authorities zealously pursue legal remedies. Jefferson County Sheriff Mike Hale is willing to investigate and uncover the wrongdoing and we congratulate him. We urge the Attorney General and the Jefferson County District Attorney to enforce the law.²

¹ This Educational Update is a brief summary of a seven page opinion that was prepared for Representative Arthur Payne and ALCAP Executive Director Dr. Dan Ireland for their efforts to oppose unlawful sweepstakes gambling. The information is equally available to law enforcement for their edification and to anyone who requests a copy. Please contact us if you would like a copy.

² By the time readers receive this, there may be further developments. We will keep you informed.

This statement is for educational purposes only. It is not intended to provide legal assistance. We hope if you have questions or know of those who do, you will contact us and we can assist through referral to one of our cooperating attorneys.