



## State of North Carolina

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December 2, 2010

**VIA FACSIMILE AND UNITED STATES MAIL**

Honorable Reuben F. Young  
Secretary  
North Carolina Dept. of Crime Control and Public Safety  
4702 Mail Service Center  
Raleigh, NC 27699

Sheriff Sam S. Page  
Office of the Sheriff  
Rockingham County  
P.O. Box 128  
Wentworth, NC 27375

Re: Advisory Letter: The Effect of the Honorable John O. Craig's November 30, 2010 Order and the Honorable Paul C. Ridgeway's November 29, 2010 Order on the Ability of Law Enforcement Agencies in North Carolina to Prosecute Violations of N.C. GEN. STAT. § 14-306.4

Dear Secretary Young and Sheriff Page:

This letter is in response to your inquiry as to the ability of law enforcement agencies in North Carolina to enforce N.C. GEN. STAT. § 14-306.4 in light of Judge John O. Craig's November 30, 2010 Order and Judge Paul C. Ridgeway's November 29, 2010 Order – each of which addressed the constitutionality of N.C. GEN. STAT. § 14-306.4. These two orders were entered in separate lawsuits. The first lawsuit was *Hest Technologies, Inc. v. State, et al.* which was filed in Guilford County Superior Court (hereafter “the *Hest* Lawsuit”). The second lawsuit was *Sandhill Amusements, et al. v. State, et al.* which was filed in Wake County Superior Court (hereafter “the *Sandhill* Lawsuit”). These two lawsuits were filed by separate companies who each sell products in connection with a machine-based sweepstakes operation utilizing electronic video images to reveal the results of the sweepstakes to participants. Each lawsuit contained essentially identical claims challenging the constitutionality of N.C. GEN. STAT. § 14-306.4 – most notably, a claim alleging that N.C. GEN. STAT. § 14-306.4 violated the right to free speech guaranteed under the First Amendment to the United States Constitution and the parallel provision of the North Carolina Constitution (referred to collectively below as “the First Amendment”). As discussed in more detail below, final judgments have now been rendered by the trial courts in both lawsuits.

## BACKGROUND

### I. Overview of N.C. GEN. STAT. § 14-306.4 .

North Carolina General Statute § 14-306.4 provides in pertinent part as follows:

[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.

N.C. GEN. STAT. § 14-306.4(b).

The portion of N.C. GEN. STAT. § 14-306.4 that was the focus of the two lawsuits was the statutory definition of the phrase “entertaining display,” which states as follows:

“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:

- a. A video poker game or any other kind of video playing card game.
- b. A video bingo game.
- c. A video craps game.
- d. A video keno game.
- e. A video lotto game.
- f. Eight-liner.

- g. Pot-of-Gold.
- 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.

N.C. GEN. STAT. § 14-306.4(a)(3).

## **II. Judge Craig's Order in the *Hest* Lawsuit.**

Judge Craig ruled that N.C. GEN. STAT. § 14-306.4 is constitutional and serves as a permissible exercise of the State's police powers to regulate gambling, except for subpart (i) of the statutory definition of the phrase "entertaining display" (which is quoted above). He determined that this provision was overly broad and constituted a prior restraint of speech. However, he also ruled that law enforcement officials are free to take enforcement action against the categories of games falling within subparts (a)-(h) of the statutory definition of the phrase "entertaining display" (which are also quoted above). He further noted that games fitting within subpart (i) remain subject to compliance with the remainder of the North Carolina General Statutes.

## **III. Judge Ridgeway's Order in the *Sandhill* Lawsuit.**

Unlike Judge Craig, Judge Ridgeway found no constitutional defects in either subpart (i) or any other portion of N.C. GEN. STAT. § 14-306.4. Accordingly, his order upheld this statute in all respects.

## **ANALYSIS**

The only area of disagreement between Judge Craig and Judge Ridgeway concerns subpart (i). Both judges have held that the remainder of N.C. GEN. STAT. § 14-306.4 is constitutional in all respects.

This means that law enforcement agencies are free to enforce the remaining provisions of N.C. GEN. STAT. § 14-306.4 as of December 1, 2010. Any machine-based sweepstakes falling within N.C. GEN. STAT. § 14-306.4 is illegal if the sweepstakes operation utilizes electronic simulations in a video format of video poker (or any other type of video card game), video bingo, video craps, video keno, video lotto, eight-liner, Pot-of-Gold, or video games based on or involving

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the random or chance matching of different pictures, words, numbers, or symbols not dependent on the skill or dexterity of the player.

Moreover, because N.C. GEN. STAT. § 14-306.4 includes the phrase “by way of illustration and not exclusion” with regard to the games listed in subparts (a)-(h), any such machines that simulate games that are of the same “type” as the games listed in subparts (a)-(h) are likewise illegal under N.C. GEN. STAT. § 14-306.4. For example, if a sweepstakes operation is using a video simulation of Pot-of-Gold but calling it “Pot of Silver,” the machine is in violation of N.C. GEN. STAT. § 14-306.4. Thus, the “by way of illustration and not exclusion” language substantially broadens the reach of this statute by preventing operators from simply changing the name of the game being offered (or changing one or more minor details about the game) and then falsely claiming to be in compliance with the law.

However, Judge Craig’s ruling precludes the enforcement of N.C. GEN. STAT. § 14-306.4 with regard to games that do not fall within subparts (a)-(h) and instead fall within the “catch-all” provision in subpart (i). Furthermore, it is our view that the effect of this order may not be limited to Guilford County. Judge Craig has declared subpart (i) to be unconstitutional and the State of North Carolina is a named defendant in the lawsuit. Although Judge Ridgeway has reached a different conclusion as to the constitutionality of subpart (i) in a separate case in Wake County, our courts have not clearly defined the extent of the jurisdiction of Superior Court judges under these circumstances. As such, until the appellate courts resolve the conflicting rulings in these two cases, it is our advice that law enforcement authorities should not attempt to enforce subpart (i) of N.C. GEN. STAT. 14-306.4.

We have today filed a Notice of Appeal of Judge Craig’s order and intend to ask the appellate courts to resolve the question of the constitutionality of subpart (i) as expeditiously as possible. Until this issue is resolved, all other provisions of the statute should be enforced.

If you have any additional questions, please feel free to contact us. This is an advisory letter. It has not been reviewed and approved in accordance with the procedures for issuing an Advisory Opinion of the Attorney General.

Very truly yours,



Mark A. Davis  
Special Deputy Attorney General