

LETTER OPINION

2001-L-14

April 19, 2001

The Honorable Dwight Wrangham
House of Representatives
State Capitol
Bismarck, ND 58505-0360

RE: Engrossed Senate Bill 2407

Dear Representative Wrangham:

I am writing in response to your request about the constitutionality of Engrossed Senate Bill 2407 (SB 2407). Since the bill has not been filed with the Secretary of State, my comments are prefaced upon the presumption that it will be duly enacted.

In general, the North Dakota Constitution guarantees the right to make a lawful contract and the United States Constitution prohibits infringement of interstate trade. However, both of these constitutional protections are subject to regulation when justified by a need to ensure the public's health and safety. When it comes to the gaming industry, the need to protect the public's health and safety has been recognized by the courts, and gaming is a highly regulated industry in this country. Marchetti v. United States, 390 U.S. 39 (1968); State v. Brown, 486 N.W.2d 816 (Minn. Ct. App. 1992).

In North Dakota we have extensive statutory and administrative rule provisions governing the conduct of manufacturers and distributors of gaming products doing business in this state. For instance, N.D.C.C. § 53-06.1-14 requires all manufacturers and distributors of pull tabs, bingo cards, or pull tab dispensing devices be licensed. Restrictions are imposed relating to the sale, marketing, or distributing of the items, and who may be a distributor. There is also a requirement that a fee be paid in advance to this office to cover the cost of a records check of an applicant for a license. See also, N.D.A.C. chs. 99-01.3-15 (Distributors) and 99-01.3-16 (Manufacturers of pull tabs, paper bingo cards, pull tab and bingo cards dispensing devices, and bingo card marking devices). Consequently, manufacturers must make a business decision whether they will engage in these highly regulated activities within the state of North Dakota.

Senate Bill 2407 requires a manufacturer to sell deals of pull tabs or paper bingo cards to a licensed distributor unless one of five exceptions applies. The dealer may refuse to sell the products if 1) a specific deal of pull tabs is sold on an exclusive basis; 2) the manufacturer does not sell deals of pull tabs or paper bingo cards to any distributor in the state; 3) the distributor has not provided the manufacturer with proof of satisfactory credit or is delinquent on any payment owed to the manufacturer; 4) the distributor has not met the manufacturer's minimum order quantity and freight terms; or 5) a gaming law or rule prohibits the sale.

When evaluating the constitutionality of a statute, the basic rule of construction is that statutes are presumed to be constitutional, and the burden of overcoming that presumption is placed on the person challenging the statute. In re M.D., 1999 ND 160, 598 N.W. 2d 799. Given the highly regulated nature of the gaming industry, SB 2407 does not appear to unduly impair contractual obligations or unnecessarily impede interstate commerce. All licensed manufacturers are treated the same. Considering the uniformity of treatment and the highly regulated state of the gaming industry, it is my opinion that SB 2407 is constitutional.

You also present several other questions regarding actions of a manufacturer in relation to that manufacturer's business decisions. For ease of review I have listed each question individually with my response.

- 1) May a manufacturer be forced to market its product to a distributor even though the manufacturer made a legal decision not to do so?

Unless one of the five exceptions is applicable, SB 2407 prohibits the manufacturer from refusing to sell deals of pull tabs or bingo cards to a licensed distributor.

- 2) Does a manufacturer have a right to demand minimum standards in the distribution of its product, and may the manufacturer refuse to sell a product to a distributor who does not meet the minimum requirements?

Although it is unclear as to what minimum standards or requirements you are referring, SB 2407 provides considerable latitude to a licensed manufacturer to deal with the licensed distributors. The licensed manufacturer retains the right to sell a specific deal of pull tabs on an exclusive basis to a licensed distributor, thereby permitting that manufacturer to refuse to sell such items to other distributors. The right to sell an item on an exclusive basis seems to provide substantial flexibility to the licensed manufacturer in ensuring that its product is marketed in the manner it intends.

- 3) Does a manufacturer have the right to price its product as it determines and charge more or less or give discounts as the manufacturer sees fit?

The bill does not regulate pricing. Although the pricing conduct of a licensed manufacturer may, in certain limited circumstances, result in claims that the manufacturer engaged in unfair trade practices, such issues would arise solely from the specific fact-based conduct of the manufacturer. Whether a licensed manufacturer violates the state's unfair practices law or other laws, such as the Sherman Anti-trust Act, would be answered after a careful examination of the conduct of an individual licensed manufacturer in relation to those statutory or constitutional requirements.

- 4) If a manufacturer has a limited supply of a product and has reason to believe that one distributor will eventually use the entire inventory, can the manufacturer be forced to sell a part or all the inventory to a different distributor?

The bill does not impact the ability of a manufacturer to make such business decisions. The licensed manufacturer can only sell the product or items it has. If the licensed manufacturer has a limited supply of product for sale with an order or contract that has been made for the balance of the supply, there will be no more product to sell to other persons. If the licensed manufacturer has knowledge that it may have a reduced supply of product or items, that manufacturer may decide to limit the orders to any single distributor to provide a limited supply of items to other distributors.

It is well within the province of the Legislature to determine whether there is a need for legislation to deal with the issues encompassed by SB 2407. Having made that determination, the Legislature can properly determine that SB 2407 may eliminate, or at least substantially lessen, claims of unfair sale and distribution of gaming products. In my opinion SB 2407 does not cross any constitutional line in attempting to achieve those goals.

Sincerely,

Wayne Stenehjem
Attorney General

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