

PROMOTIONS: TRIPS & TRAPS FOR THE UNWARY

by: Susan E. Gindin

Contests and Sweepstakes are popular ways for organizations to generate excitement and publicity for their products. However, structuring legal Promotions is complicated—especially if the Promotion is conducted nationally or in more than one state. This is because Promotions are primarily governed by state laws which not only vary in content, but also are unpredictable in some respects.

What's more, consequences for violations can be substantial. For example, within the past few years, the New York Attorney General collected \$77,000 from CVS and \$52,000 from the makers of Tylenol to settle lawsuits based on these companies' failures to fully publicize "no purchase necessary" in their Sweepstakes. The New York AG also collected \$150,000 from a Mitsubishi car dealer as a result of the car dealer's scratch-off ticket promotion which the AG found deceptive. Also, a Massachusetts-based Sweepstakes company paid \$400,000 in fines to settle charges brought by 19 states that its Sweepstakes solicitations were not truthful and accurate. Further, it's not just Attorneys General who bring lawsuits. Disgruntled losers in Promotions sometimes bring suits as well. For example, some Georgians recently sued NBC Universal and the producer of the popular "Deal or No Deal" television show because participants were charged 99 cents to enter the interactive Lucky Case Game Sweepstakes through text messages via their cell phones, and the Georgians claimed that the Sweepstakes violated the Georgia lottery statute.

This article provides a brief overview of some of the legal and practical considerations for conducting Contests and Sweepstakes (collectively, "Promotions") in the United States.

Legal Framework of Promotions

At the outset, it is important to note the legal framework of Promotions by distinguishing between an illegal lottery and a legal Promotion. Although the states with lotteries have made exceptions for state-run lotteries, for everyone else, an illegal lottery consists of three elements:

- A Prize;
- The element of Chance in the awarding of the Prize; and
- "Consideration" (or an amount the entrant pays to the Sponsor to enter or an equivalent investment in time).

The Promotion will be legal if one of the three elements is eliminated. Therefore, a Promotion without required Consideration, but with a Prize and Chance is legal, and is referred to as a "Game of Chance" or a "Sweepstakes." Similarly, a Promotion without Chance but with a Prize and Consideration is legal, and is referred to as a "Game of Skill" or a "Contest." For Sweepstakes, Entrants must be able to enter without charge, and winners must be selected by Chance from the qualifying entries (those entries

which have met the requirements of the Sweepstakes rules). With Contests, Contestants must perform some type of skilled act, the qualifying entries must be judged and scored by objective measurable criteria, and the Contestant with the highest score among the entries wins the Prize. Because there is no Chance involved in a Contest, Sponsors may require payment of an entrance fee.

Unfortunately, Sponsors are sometimes surprised to learn that the Promotions which they intended to meet legal requirements are in fact deemed to be illegal lotteries by some states. For example, one Sponsor's Contest to guess the number of beans in a jar was held not to be a measure of skill and the Contest was deemed an illegal lottery. With Contests, Sponsors must ensure that Contest is a game requiring skill and that the winner is determined via objective measurable judging criteria. With Sweepstakes, a potential problem is that Consideration may be found even though there is no required fee or purchase for entry. For example, the New York Attorney General's charges against the Tylenol and CVS Sweepstakes noted above arose because neither Promotion had sufficiently publicized the fact that Entrants could enter without a purchase. Some state statutes hold, or courts have found, Consideration in requiring Entrants to make substantial expenditure of effort or if the action results in a substantial commercial benefit for the Promotion's Sponsor. Therefore, Sponsors of a Sweepstakes requiring that a Sweepstakes Entrant provide the email addresses of five friends or a requirement that the Entrant provide personal information beyond a point of contact should evaluate whether one of the states will consider such actions to constitute Consideration. In such situations, Sponsors may want to consider also providing free entry to avoid their Sweepstakes being deemed illegal lotteries.

As noted, Promotions are primarily regulated by the states. Although the requirements of the states are similar, state laws differ widely in detail. Examples of these variations in some state laws include the following:

- Registration and bonding is required by a few states, including New York and Florida, which require registration and bonding for Sweepstakes with a total Prize value of \$5,000 or more.
- Colorado has very specific requirements for Sweepstakes advertised by direct mail. For example, the statement of official rules must be printed in contrasting type face of at least ten-point type and all dollar values must be stated in Arabic numerals.
- Massachusetts requires Sponsors to post on all entry blanks broad disclosures such as eligibility requirements and whether winners will be required to execute affidavits of eligibility.
- Tennessee prohibits a Sponsor from requiring winners to agree to an announcement or use of a winner's name, voice, image and/or likeness for advertising, publicity and promotional purposes without compensation.
- Iowa includes "a substantial expenditure of effort" in its definition of Consideration.

Federal Trade Commission Requirements

While Promotions are governed primarily by state laws, Sponsors must also heed Federal Trade Commission (FTC) requirements. For example, Section 5 of the FTC Act comes into play in that it regulates advertising law, including false or misleading statements, and therefore it governs statements made regarding a Promotion. The FTC also governs email through the CAN SPAM law (and may soon govern advertising through text messaging), and therefore Sponsors advertising their Promotions electronically must heed the CAN SPAM law and regulations. The FTC also governs online communications to children under thirteen through the Children's Online Privacy Protection Act (COPPA) and the FTC governs any misstatements made in entities' privacy policies. A Sponsor must ensure that use of all personal information that is collected as part of the Promotion is consistent with its privacy policy, and Sponsors are advised to include a link to their privacy policies as part of the rules.

Intellectual Property and Specific Industry Requirements

In addition, as with all advertising, Sponsors must avoid infringing third party intellectual property. In particular, Sponsors must avoid suggesting a false sense of association or sponsorship with a third party, for example if the Prize is related to a third-party brand, like an airline or hotel, and the Promotion solicitation and publicity include the name of the third party. This may result in the third party bringing an infringement suit or demand that the Sponsor immediately cease any use of the third party's name or brand during an ongoing Promotion.

Furthermore, certain industries, such as the alcohol, tobacco, dairy products, gasoline, financial institutions and banking, and insurance industries have specific additional regulations for Promotions.

Drafting Promotion Rules

Clearly, there is much to consider in structuring a Promotion. For Promotions with a national reach, Promotion rules should be drafted to meet requirements of the strictest state laws as well as FTC requirements and any specific industry requirements. Promotions that are available outside the U.S. present even greater difficulties and are not addressed in this article.

Sponsors should keep in mind that official rules are a contract between the Sponsor and Contestants, and must be carefully crafted to anticipate potential problems, because a Sponsor may not change rules midstream. Among other requirements specific to the Promotions or jurisdictions in which they are being conducted, the rules must contain the following:

- Sponsor's name and address (physical address required in many states)
- Date and time of deadline for entries (including time zone for online Promotions)
- Instructions for entry
- Description of Prizes and retail value of Prizes
- Odds (or if the odds cannot be determined, a statement that the odds

depend on the number of entries received)

- Restrictions such as age and geographic eligibility requirements
- Manner in which winners are selected
- Statement that taxes are the sole responsibility of the winner
- Location and date on which the determination of the winner will be made
- Statement regarding when an Entrant can expect to hear from the Sponsor, and how the consumer can get a copy of the rules and a copy of the winners' list
- Statement regarding any time limit for collecting the Prize
- "Void where prohibited" statement
- Any further requirements to obtain a Prize (for example, in order to claim the Prize, winner will be required to execute an Affidavit Of Eligibility and to execute a Publicity Release agreeing to the Sponsor's use of the winner's name and likeness for advertising purposes)
- For Sweepstakes: include prominent "No purchase necessary" statements as well as instructions for free method of entry
- For Contests: include statement regarding the objective measure of how entries will be judged.
- For Contests: state what happens in the event of a tie—(cannot choose randomly because doing so adds back the element of Chance)

Additional Concerns for Promotions using Internet and Other Digital Technologies

The Internet, SMS text messaging, and other "new media" technologies provide many new opportunities to reach consumers and generate excitement about products. At the same time, they raise many new potential technology-related problems, and additional legal concerns. Online Promotions are more complicated because Sponsors must comply with specific online considerations in addition to all the legal requirements for Promotions in the offline world. Fraud in various forms is particularly widespread with online Promotions, and Sponsors will want to institute rules and technological fixes that thwart fraudulent activities. For example, a common problem with online Promotions is that systems may be manipulated so that robots or "bots" produce multiple entries. It may help to limit one entry per natural person to avoid the multiple entries created by bots.

Among other considerations for online Promotions, it is particularly important to disclaim responsibility for certain potential problems associated with the technology, for example for lost, late, corrupted, or misdirected entries, whether due to technical or computer malfunctions or otherwise. Also, Sponsors should reserve the right to cancel, terminate, modify or suspend the Promotion in the event that the Promotion is not capable of running as planned (and Promotion rules should specify how a winner will be selected in such event). Further, the official rules should be placed in a conspicuous location on the website as well as on the same page as the entry form (perhaps in a prominent link or scroll box). In order to avoid any question as to whether the online official rules were posted conspicuously, a wise course is to use technology which

requires the Entrant to check a box indicating that the Contestant has read and accepts the rules before the online entry can be submitted.

This article is a brief overview of some of the considerations involved in structuring a legal Promotion. Isaacson Rosenbaum provides clients with full service legal services for Promotions. Whatever your needs in structuring a legal Promotion-- from drafting official rules, affidavits of eligibility and publicity releases, to reviewing your advertising for your Promotion and/or coordinating registration and bonding, Isaacson Rosenbaum's Intellectual Property Practice Group is available to assist you.

This article is a publication of Isaacson Rosenbaum P.C. and is intended to provide information on recent legal developments. This article does not create or continue an attorney client relationship nor should it be construed as legal advice or an opinion on specific situations.

© 2008 Isaacson Rosenbaum P.C.