

Steering Clients Away From Illegal Promotions

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If your client doesn't know a little about promotions law before trying a sweepstakes, it may have already lost the contest.

YOUR CLIENT HAS A PLAN to increase sales: every customer who makes a store purchase of more than \$100 will be entered into a drawing for a \$1000 gift certificate. Another client wants to do an online tell-a-friend program to increase the size of her mailing list: customers who provide her with a name will be automatically entered into a drawing for a free car.

Still another wants to give away a coupon for free milk with every purchase of a box of his Crunchios cereal. They all sound like reasonable and legitimate ways to promote a business, but are they legal?

The answer is, it depends. In truth, navigating the waters of contests, sweepstakes, giveaways, and other promotions, can be fraught

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with unseen dangers. Because the bulk of promotion law is determined by individual states, what's legal in Nevada may be proscribed in Arizona. To make matters worse, at the state level, there is generally no single body that fully encompasses promotions law, making the task of simply finding the appropriate statute sometimes like locating a needle in a haystack. It's not surprising, therefore, that many attorneys would rather re-take the bar than answer questions about whether their client's wine giveaway is legal in Montana. Still, a little knowledge may be helpful at the beginning stages of developing a promotion. This article is designed to equip attorneys with a basic understanding of contest and sweepstakes law, and give them tools for helping their clients determine what sort of promotion will best suit their goals.

BASICS OF PROMOTIONS • The basic legal rule in the U.S. is that a promotion may involve only two of the three elements of prize, chance, and consideration. Virtually all promotions award a prize, or else no one would enter. Thus, what determines how a promotion will be categorized—and consequently, what law is applied—is which of the remaining two elements is also included. Promotions can and do take many forms, but in the aggregate, it is easiest to divide them into four categories: lotteries, contests, sweepstakes, and giveaways.

Lotteries

A lottery, similar to state LOTTO jackpot games, is a pay-to-play promotion that involves a prize, the element of chance (like a drawing), and consideration (typically the payment of money). Pay-to-play lotteries are illegal in all 50 states with most states reserving the right to conduct a state lottery.

Sweepstakes

Sweepstakes, or games of chance, eliminate the element of “consideration.” The winner is determined by random drawing from among a pool of entries. No form of consideration is required to enter a sweepstakes.

Contests

By contrast, contests, known as games of skill, eliminate the element of “chance.” The winner is determined from among a pool of entries by using specific judging criteria to score whatever skill is the subject of the promotion. In other words, some form of consideration accompanies each entry, (an essay, an original slogan, physical strength, and so on), and the winner is determined by the highest scoring entry. In contests, because consideration is an element of the contest, no significant chance element can enter in. Thus, in short, sweepstakes involve a prize and the element of chance while contests involve a prize and consideration. Any promotion that involves a prize, consideration, and chance is illegal and can subject a company to significant legal penalties.

Giveaways

Giveaways generally omit the element of chance. Typically, in a give-away, a customer gets something of value pursuant to an affirmative act, such as making a purchase (typically called a “premium”) or attending an event. Most giveaways do not give rise to the most problematic legal issues, since everyone who meets the criteria generally gets a prize. That noted, attorneys should advise clients to have enough product available to accommodate a reasonably estimated number of people. Companies that use the giveaway merely as an advertisement gimmick to increase sales but supply an unrealistically low number of prizes may run afoul of unfair business practice laws and invite false advertising claims.

While the law regarding contests and sweepstakes is fairly clear, running a legal promotion is not always easy. As marketers compete for a finite number of customers and dollars, their promotion ideas often run afoul of the law, despite best intentions. The following are some common missteps that may affect companies trying to launch a successful promotion.

THE CONSIDERATION FACTOR • When running a sweepstakes, consideration of any kind must be eliminated, which is why most sweepstakes rules bear the common phrase “no purchase necessary.” Still, many clients run into problems even at this early point. Typically, a sweepstakes is a promotions device used to entice potential customers to buy a product, visit a store or a web site, or learn more about a product. Depending on the circumstances, doing these things may constitute consideration.

The AMOE

The easiest and most common way to eliminate consideration is to offer an alternate method of entry (“AMOE”). For instance, if the promotion states that there’s an entry in each specially marked box of cereal, or under a bottle cap, or in each six-pack of batteries, the rules and advertisements should also direct the customer on how to enter without making a purchase. A customer could be directed to call a toll-free number for a free game piece. Or, he might be directed to a web site link, or be invited to send a 3x5 card to an address. These options are all viable alternatives to purchasing a product, but it is not enough to simply offer an AMOE; it must also be on equal footing with the purchase method of entering a sweepstakes.

Equal Footing

The equal footing provision means that a person must not have a better chance of winning if he or she makes a purchase. In addition,

the sweepstakes sponsor must allow free entrants to enter as many times as purchasing entrants can enter and be allowed the same number of entries for free as a purchaser would get for a purchase. For instance, if there are six game pieces offered in a six-pack of soda, then someone using the AMOE (mail-in or phone-in) must get six game pieces per request. Finally, the AMOE must have equal dignity; that is, the sponsor cannot require the free entrant to go through a complicated process to enter.

Equal Visible Prominence

Although it is not often enforced, in addition to the foregoing, most states mandate that the AMOE must have equal visible prominence. Two recent cases in New York may be the harbinger of change, however, so it is important to let clients know that there may be some risk in attempting to bury the AMOE in the fine print. In September 2004, the New York Attorney General entered into a settlement with a division of McNeil-PPC, the makers of Tylenol, regarding a sweepstakes offering. While the sponsor did put the requisite no purchase necessary language in the print ad, it was in fine print legal copy, and was contradictory to the primary message of the ad, which stated that the first step in entering the sweepstakes was to “BUY TYLENOL.” Similarly, in June of 2004, the New York Attorney General settled with CVS Corporation for burying its AMOE in the rules, making the AMOE difficult to find on the website, and not always having the free entry forms available at the stores. The decisions in these cases are unusual and may be isolated, but they may also represent a new paradigm in consumer protection.

Survey-To-Win Promotions

Consideration may also be a factor in survey-to-win promotions, which are an increasingly popular method of collecting valuable

customer data. Such promotions work like this: In exchange for filling out a survey, the customer will be automatically entered to win a valuable prize or prizes. Generally, these promotions are Internet-based. If the survey is limited to a small number of questions that take just a few minutes to complete, a company is not likely to run into problems. On the other hand, a survey that asks a considerable number of questions, requires the customer to reveal a great deal of personal information, and takes the customer a long time to complete may run into consideration problems. Avoiding this problem is easy: companies can either opt for a shorter survey, or place a click-thru button on the survey that allows a customer to enter the sweepstakes without completing the survey. Although marketers are often loath to provide this option, practically speaking, most customers fill out the survey regardless of the click-thru option.

Refer-A-Friend Promotions

Similarly, companies have latched onto the refer-a-friend method of attracting new business, asking existing customers to refer a friend for a chance to win a prize. Although generally the practice is acceptable, there is a valid minority view that "consideration" may also be construed as a benefit to the company. Given the relative value of a personal referral and the prevalence of "viral marketing" practices like this, some lawmakers take the view that referrals amount to consideration, and thus, a truly free AMOE should be provided. To date, no cases have been tried on this matter, but pursuant to the new federal CAN-SPAM Act, closer scrutiny will be paid to viral marketing practices.

Cellular Phone Promotions

Given the proliferation of mobile phones and the boom in text-messaging in recent years, cel-

lular promotions are gaining popularity. Companies who require text messaging to enter a sweepstakes must make certain that there is not cost associated with the text message since a monetary charge would amount to consideration. As wireless and mobile communications continue to grow, we are likely to see greater restrictions placed on cellular promotions and more involvement by the FCC in the regulation of promotions.

NO CHANCE IN A CONTEST • Like the problem of consideration in a sweepstakes, the element of chance can inadvertently become part of an otherwise legitimate game of skill. Most commonly, chance creeps in because of a company's failure to identify appropriate and measurable judging criteria or to use qualified judges.

Qualified Judges

In a game of skill, contestants are asked to do something for an opportunity to be judged "the best," and accordingly, win a prize. The law requires that a sponsor of a contest provide qualified judges and determine beforehand how the submissions by contestants will be judged, including the weight given to each category. If a contest involves the submission of an essay, the criteria for judging the contest must be consistent with judging good writing (quality of the story, grammar, prose, clarity of writing, etc.) and judges must be qualified to make a skill determination. For instance, while it may be appropriate for a copywriter at a company to judge writing excellence, it is likely not appropriate for a marketing executive who majored in English, or an attorney who does a lot of legal writing to judge submissions. Unqualified judges and unspecified judging criteria mean that chance is more likely to determine the outcome.

Is It Really Skill?

Testing for things that do not really qualify as a bona fide skill is another way companies fall short of a legal promotion. For instance, picking the results of a professional sporting event, or determining the number of jelly beans in a jar are not considered skill contests. Similarly, math problems that are so simple that they require no real effort do not test the skill of the contestant.

Fantasy Games

Some contests include a small chance element by virtue of the type of contest. Fantasy sports games, for example, can straddle the legal line. In cases where there is a mixed skill and chance promotion, the legality of the promotion turns on whether the “dominant element” of the promotion is skill-based. There are four criteria that must be in a mixed promotion:

- The contestant must have the opportunity to exercise the judged skill;
- Contestants must be given sufficient data to “calculate” an informed judgment;
- The skill component must govern the outcome; and
- The standard of the skill being judged must be known to the entrants and that standard has to govern the result.

Tie Breakers

Even where there is no element of chance in a contest, companies can still run afoul of the law if two or more contestants receive a tie score and the sponsoring company has not made an allowance for such a scenario. Ties cannot be broken by random drawing, although many companies mistakenly put this provision in their rules. Well-drafted rules will assume the likelihood of a tie and have a provision for such a case. Companies may provide that in the event of a tie, the entries will be re-scored. Another method that corrects the problem is to identify

one of the judging criteria as being the dominant factor, and, in the event of a tie, the single score of that criteria will be used (followed by a second factor, and so on).

BEWARE THE PRIZE • What should arguably be the easiest aspect of a promotion can also present the biggest problems to the sponsor. The right prize can be the cornerstone of a successful promotion, but the wrong prize can have detrimental public relations ramifications, destroy the promotion, and subject the sponsor to further administrative issues. In addition, some industries heavily regulate the awarding of their products as prizes, so it’s important to know the rules regarding where dangers lie. Finally, in a national promotion, sponsors may have to abide by specific state requirements before determining a prize.

State Bond And Surety Requirements

Sweepstakes that have a total awarded prize value of \$5000 or more must post a surety bond in Florida and New York equal to the total prize value of the sweepstakes. For New York, the bond must be posted 30 days before the onset of the promotion. In Florida, sponsors need only post seven days before the onset of the promotion. Rhode Island requires that retail promotions be registered, although no bond is required. Companies that want to offer a large grand prize or a large number of prizes should plan ahead. In cases where the sponsor does not want to post a bond, or the promotion begins too soon to post a bond, the rules should state “not valid in Florida or New York,” which is generally sufficient to excise liability in these states.

Inappropriate Prizes

Certain prizes may be considered inappropriate by the industries that regulate them. The alcohol, tobacco, livestock, gasoline, dairy prod-

uct, finance, and insurance industries have special guidelines regarding when and how products in these industries can be used in promotions and awarded as prizes. For instance, some states have laws prohibiting the use coupons for milk and dairy products, others proscribe the awarding of animals as prizes. California does not allow the awarding of alcoholic beverages, except in extremely limited cases, while Arkansas does not allow in-store alcohol premiums to be given out. In the case of gift cards, which are becoming increasingly popular, most states do not allow expiration dates (although many do still have escheat laws on the books), so a nationwide promotion will typically mean that the prize cannot have an expiration date.

Time And Place

Careful consideration should also be given to where the promotion is marketed. The Internet, retail locations, television broadcasting, and others all have their own unique set of issues and each venue should be scrutinized for possible problems. If the promotion is Internet based, companies may have to comply with the Children's Online Privacy Protection Act (COPPA). In addition, careful language should be added to the rules to account for computer glitches, misdirected entries, and interruptions by hackers, and flammers. In all cases, the rules should contain a link to a company's privacy policy and the privacy policy should be checked to make sure it provides for such things as passing along information to fulfillment houses or other third parties that may be assisting with the promotion.

Retail Visits

If the program requires a retail visit, companies should make sure all employees know how to direct customers to enter. A recent CVS Drugstore promotion in New York resulted in a major action against the company by the Attorney General, partly because store employees told customers that they had to make a purchase to enter.

Television

Television promotions should also be scrutinized. Watch-and-win television promotions, which usually involve a secret word, should have a provision in the rules for the unlikely—but not impossible—event that the secret word is not displayed. Like the Internet, since television promotions may be viewed by children, sponsors should carefully consider how the promotion is directed.

CONCLUSION • Promotions have become an integral part of the marketing landscape and are no doubt here to stay. And even though most legal practitioners prefer not to go to great research depth in advising their clients, having a basic understanding of how promotions operate and what general principle govern contests and sweepstakes can help clients immensely in the beginning stages. The more information a client has before launching a promotion, the more successful it will be and the less likely that promotion will invoke the ire of the many regulatory agencies that monitor these things. Steering clients in the right direction is a good start in helping them manage the process.

PRACTICE CHECKLIST FOR Steering Clients Away From Illegal Promotions

Given the almost infinite possibilities for running a promotion, companies can often be confused about which promotion is best for their needs. Although there are no rules associated with picking a right promotion, if a client can articulate the goal of the promotion, it may help to point her in the right direction.

- A company that has a specialized product and wants to increase its mailing list may want to consider a refer-a-friend program using its existing customer base. These can be structured as a sweepstakes (refer a friend and get entered to win), a giveaway (refer a friend and receive a free gift). If instead, a company wants increased traffic to its web site may want to run a simple online sweepstakes, with a prize consistent with the offerings on the site.

- Some companies have a highly specialized or technical customer base and a large-scale sweepstakes would attract people who would likely never use the product. This represents a waste of effort. In these cases, a contest may be a better option than a sweepstakes. For instance, a graphic software company might formulate a contest that requires contestants to create graphics using the company's products.

- Retail locations that want to increase foot traffic may want to promote an in-store sweepstakes or a giveaway. One large national chain structured a successful promotion that used both a sweepstakes and a giveaway to increase traffic: each customer received a small chocolate (giveaway) and a scratch-off game piece. The game piece revealed an instant discount for anything in the store (10 percent, 20 percent, 30 percent) which could be used on that day. Customers could also fill out the back of the game piece and be entered to win a shopping spree. Note that the customer was allowed to scratch off the discount before making the purchase. In this way, no actual purchase was necessary before finding out the discount.

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