



No Purchase Necessary

Sweepstakes and contests have been mainstays of the marketing arsenal, but they can create legal issues for promoters.

By Alan L. Friel

THE CONSUMER products, packaged goods, automotive, fast food, travel, and media industries all rely heavily on sweepstakes and contests to promote products. Although these promotional tools are frequently a cost-efficient way to create a great deal of buzz, they are hardly trouble free—and myriad traps await the unwary promoter. Federal and state authorities regulate and closely monitor sweepstakes and contests. In addition, recent years have seen a great deal of class-action litigation generated in this area. Clearing proposed programs with a lawyer experienced in this area could help save you from the expense and headache of a lawsuit or enforcement action.

The first thing you need to understand is the difference between a lottery, a sweepstakes and a contest. A lottery has three key determinative elements: prize, chance, and consideration. Lotteries in this country are exclusively government run, where permitted, and prohibited outright in many states. In short, you cannot create a lottery as part of a legal promotion and, accordingly, must remove one of the three elements of a lottery from your promotion. In addition, you must navigate around laws against gambling, which is generally defined as payment of consideration for a chance to win something of greater value.

A sweepstakes is a game or other promotion that awards a prize to a winner (or winners) selected based on chance. To keep a sweepstakes from becoming an illegal lottery, there must be no consideration. Consideration can come in many forms: purchase of a product, short message service (SMS) text, 900 number phone charges, subscription fees, or engaging in activities that require substantial time or effort. Attorneys need to look closely for entry requirements that rise to the level of legal consideration. And if such requirements exist, they should structure the sweepstakes with a universally available free alternative method of entry (AME) that provides equality to

entrants who use the AME (to assure that the promotion is a sweepstakes and not a lottery). Or if possible, they should structure objective skill-based selection criteria for the final selection (i.e., create a contest, discussed later). It should be noted that the New York Attorney General recently ruled that an online AME for an off-line promotion was not universally available, and thus not a sufficient form of AME. And, in a recent class action law suit, it is argued that 75% Internet penetration in the United States fails the universally available requirement. In addition, AME may not be enough, under some state laws, to make the promotion legal if the entrants that have paid consideration do not receive something of value for the payment and/or if the promotion does not clearly promote the sale of “real” products or services distinct from the game of chance itself.

In the case of a sweepstakes involving traditional products, the product purchaser has received the product, or was encouraged to buy the product and provided minimal consideration in the process (e.g., received a sales pitch) and the AME entrant has paid nothing. However, SMS text sweepstakes have faced recent legal attacks in Georgia and California under the theory that no value was received by the person who was charged for the text to enter. In consolidated cases before the federal courts in California—including SMS text sweepstakes campaigns in connection with the *American Idol*, *Deal or No Deal*, *1 vs. 100*, and *The Apprentice* television programs—the court denied the defendant’s motion to dismiss the illegal-lottery/gambling-based claims, finding: “Defendants’ offers of free alternative methods of entry do not alter the basic fact that viewers who sent text messages paid only for the privilege of entering the Games. They received nothing of equivalent economic value in return.” *Couch et al. v. Telescope Inc., et al.*, Case 2:07-CV-03647-FMC-VBK (C.D. Cal., order filed November 30, 2007). This might not be the case if the person also received a

ringtone or wallpaper that is sold separately for more than the text charge.

History of Cases

However, there exists a line of calling card and trading card cases (where the product was of minimal or questionable value), which suggest that such a structure may be deemed a ruse for illegal gambling or lotteries. Indeed, on Dec. 11, 2007, the well-known New York-based plaintiff's firm Milberg Weiss filed a similar class action suit against NBC and others regarding an SMS-text game related to the TV show *America's Got Talent*. *Glass v. NBC Universal Inc. et al.*, Case No. CV07-0844-JFW (C.D. Cal.) (since consolidated with the Couch cases). In that promotion, the paying SMS text entrants received back a "factoid" about the show, for which they were also charged a fee. It remains to be seen if the "factoid" will be deemed a legitimate product with value. Additionally, with respect to some of these text television promotions, the product might be the ability to vote to potentially affect what will happen on the television program, especially if the same charge for such participatory television activities pre-existed the sweepstakes. However, when the free method

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of sweepstakes entry (e.g., the Internet) also permits such voting, as was the case with *The Apprentice* promotion, the text charge appears not to be the cost of the ability to engage in participatory television since voting, not just sweepstakes entry, was available online for free. These and the sure-to-follow text sweepstakes cases will raise a number of issues including: (1) if only third party consideration is paid to the mobile carrier (e.g., basic text charges) and the promoter does not profit from sharing of premium charges, will an AME suffice to make the promotion legal?; (2) if the SMS action is tied into meaningful interaction with a television show, particularly where structured to be apart from the sweepstakes game play and from an AME, will that take it out of the "pay to play" and "game for game's sake" context?; and (3) what types of benefits can be given to SMS

text participants that will be deemed of value apart from a chance to win. Risk can be minimized by structuring the promotion so participants are less likely to be seen as merely paying for a chance to win and not permitting sweepstakes participation by residents of states that have statutes, Attorney General opinions, and case law that suggest that the promotion may be deemed to be an illegal pay-to-play scheme.

Effective Contests

A contest awards prizes, but replaces the element of chance with selection of the winner on the basis of skill or intellect and thus may (in some states) include consideration. In order to set up an effective contest, nothing that would be outcome determinative can be left to chance. A random drawing cannot be used to break a tie of a skill-based contest, without converting the promotion into a sweepstakes or lottery. A currently popular method of judging online contests is to have Web site users judge entries. There is a risk that having users vote in order to determine contest winners brings an element of chance to the determination of winners, and runs the risk of transforming a contest into an illegal lottery if consideration, including substantial time and effort or a license to submitted content, is present. For example, users may arguably just vote for their friends, rather than vote for the best entry based on the judging criteria. The encouragement by a sponsor or promoter of having contest entrants send e-mails to their friends encouraging them to vote for their contest entry, while serving a viral promotion purpose, increases the risk of randomness. As an aside, it also creates a CAN-SPAM (Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003) issue for the promoter. To the extent possible, a panel of qualified judges appointed by the sponsor or promoter is recommended to determine winners based on predetermined objective and definitive criteria. This would help reduce the element of chance that a regulator may argue is inherent in having users vote for winners of contests. Also, the criteria developed to judge contests should be explained to entrants in the official rules and, if any user judging is involved, in all instructions to users regarding their voting. Ways to reduce the risk of having users vote include the following: (1) Provide an opportunity for users to see all eligible entries; (2) allow one vote/per user (per contest or per day if additional submissions are posted

daily); (3) adequately explain the basis for judging criteria (e.g., creativity, proper use of the sponsor's product or service, compelling story line, originality, supports a given message such as pro-environment); and (4) design the voting so that points are given for different criteria and/or so that voting can be weighted on a scale (1 to 10). Some online marketers like to give heavier voting weight to certain users, and this further increases the risk that the voting has an element of chance. In order to reduce the risk, a sponsor might develop objective criteria for awarding such premium voting power. Giving weight in voting based on criteria that merely give the sponsor a commercial advantage (sending viral messages) is not rationally related to maintaining the integrity of an objective judging system—and would likely be insufficient.

Beware of Risks

Online promotions, particularly those calling for user-generated content (UGC) or user promotional activities, present significant legal concerns for advertisers and Web site operators. Even advertising on Web sites that publish UGC could arguably create indirect but real liability for advertisers, depending upon the scope of the advertiser's involvement. The legal issues regarding UGC and user participation in promotions is a topic beyond the scope of this article. In short, however, if an advertiser is determined to engage in such activities, these risks can be reduced by (1) following sweepstakes and contest laws; (2) avoiding inducement or encouragement of illegal or infringing user activities; (3) providing and requiring clear and conspicuous disclosures; (4) securing (and enabling users to secure) the proper rights to content and limiting user activities to the use of noninfringing content; (5) designing and operating any online UGC promotions in a manner that attempts to provide the sponsor with the Communications Decency Act (47 U.S.C. §230) and Digital Millennium Copyright Act (17 U.S.C. §512) protection, and clearing any offline activities and use; (6) exercising due diligence and reasonable discretion in selecting vendors, partners, and host or partner Web sites; and (7) determining who among the sponsor, the promotional firm, and cooperating Web sites will be responsible for potential liability, what indemnities should be made as between these parties, and what insurance coverage is available to cover potential claims.

Indeed, an online UGC contest has already spawned litigation. Quiznos was sued last year by its

fast food rival Subway for a user-generated video contest called the "Quiznos v. Subway TV Ad Challenge"—where contestants were invited to compare a Subway sandwich to Quiznos' products and post video entries on Quiznos' Web site (www.meatnomet.com). In April 2007, a federal district court denied Quiznos' motion to dismiss the Lanham Act (a federal law essentially prohibiting false advertising and unfair competition-like acts) without prejudice, based on putative CDA (Communications Decency Act) immunity (a federal law giving certain immunity to online publishers and users). The court found that it was premature to consider whether the plaintiff could establish no facts that would preclude immunity, *Doctor's Associates, Inc. v. QIP Holder, LLC*, 82 U.S.P.Q. 2d 1603 (D. Conn. April 19, 2007). Although the case may eventually turn on allegations that Quiznos "altered or was otherwise creatively involved with ... the contestant videos," the issue of whether Lanham Act claims constitute "intellectual property" claims for which no immunity applies (or whether injunctive relief remains available notwithstanding a finding of immunity) may also be visited by this litigation. *Cf. Noah v. AOL TimeWarner*, 261

Rules need to be complete, unambiguous, clearly and conspicuously disclosed, and comprehensive to minimize the risk of claims by disgruntled losers and aggressive regulators.

F.Supp2d 532 (E.D. Va. 2003) (applying immunity to a chat room operator for alleged violation of civil rights laws for failure to police hate speech in a chat room, despite a claim that chat rooms are public accommodations—but finding the act does not bar claims of injunctive relief), *aff'd* 2004 US App. Lexis 5495 (Fourth Cir. March 24, 2004); and *Perfect 10, Inc. v. CC Bill LLC*, 340 F.Supp.2d 1077 (C.D. Cal. 2004) (state unfair competition claim based on trademark infringement is not "intellectual property" law within the meaning of the Act), *aff'd as to this issue*, 481 F.3d 751 (Ninth Cir. 2007).

As outlined, although sweepstakes and contests are legal, they are heavily regulated. Conducting a "premium" promotion, instead of a sweepstakes or contest, is one way to avoid the regulation. A prize is

anything of value (even coupons potentially) provided to contestants, based on factors outside of the reasonable control of the participant. A premium, in contrast, is something of value provided to everyone who satisfies criteria that are within that person's reasonable control (e.g., buy a product and get a free premium article)—such that the element of chance is removed from the equation. Premiums can be “while supplies last,” so long as a sufficient number are available during the promotion period and the element of chance does not become a determinative factor. A riskier form of promotion includes something of value (such as coupons or free gifts) but involves an element of chance (e.g., game play) without valuable consideration present. Nonetheless, some states still have issues with these schemes. California even has a limit on the percentage of annual sales—which can involve coupon promotion programs.

If sweepstakes or contests are to be used, it is important to remember that the two are often regulated very differently and regulation also differs by state. The determination of whether a promotion is a contest or a sweepstakes affects certain compliance issues, such as required advertising disclosures; posting of odds, rules, notices, and winners; record keeping; registration and bonding requirements; and contents of the official rules. Generally, sweepstakes are more heavily regulated than contests and have more mandatory legal requirements that must be met. State laws vary, and thus a company preparing to conduct a contest or sweepstakes must comply with the most stringent states' laws—or exclude participants that reside in such states.

Official rules for a sweepstakes or contest, along with a prize acceptance agreement for the winner(s), will serve as the terms of the contract between the sponsor and the entrants—and should be carefully crafted beforehand.

Sponsors are potentially subject to worldwide exposure and liability, if they solicit or accept entrants who are citizens of other jurisdictions. This is especially problematic with respect to Internet promotions, which make use of an inherently international medium. Therefore, all promotions should be expressly limited to residents of the United States, and to the states and territories in which regulatory compliance has been completed.

Promotions that incorporate a direct mail component must comply with the federal Deceptive Mail Prevention and Enforcement Act, as well as a variety of state laws. Some states regulate in-store promo-

tional materials, game piece promotions, and solicitation of store visits or participation in sales presentations. Telemarketing, SMS, and e-mail promotions require special consideration.

Participation in promotions by children also raises legal issues. Only legal adults and emancipated minors have the legal capacity to agree to the official rules, submission agreements, and prize acceptance agreements. Promotions that include an Internet element are also subject to the legal requirements set forth in the Children's Online Privacy Protection Act (COPPA), which restricts the online collection of personal information from children under 13 years old without verified parental consent. “Personal information” identifies the child, including home address and e-mail address. In addition, the Children's Advertising Review Unit of the Better Business Bureaus has special guidelines that regulate promotions to children.

Sponsors, vendors, and their families should not be eligible to participate. Care should be taken in the selection and monitoring of the persons operating the contest or sweepstakes to ensure integrity. McDonald's suffered a serious public relations blow when its vendor, Simon Worldwide Inc., was investigated by the FBI for allegedly tampering with a sweepstakes. Printing errors can result in the failure to give required notices, distribution of too many winning prize pieces, or other problems. Vendors should provide sponsors with a meaningful indemnity. However, one might wonder if the vendor in the multitude of SMS sweepstakes class-action cases that are currently pending has the resources to indemnify its sponsors, to the extent it may be required to do so.

Including a sweepstakes or contest as part of your promotional efforts can certainly help generate consumer interest and awareness. However, these promotional devices require complex regulatory compliance on a state-by-state basis and legal pitfalls await the careless and uninformed promoter. Developing a good set of forms and standard procedures, and clearing each promotion (in all jurisdictions where entrants are eligible) with experienced legal counsel, will help you to conduct successful promotions with minimal risk of liability. ■

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