

Things Corporate Counsel Should be Aware of Regarding Offering Sweepstakes and Contests

Published on the Association of Corporate Counsel website, September 2016.

Conducting lawful sweepstakes and contests may not seem arduous but corporate counsel must be aware of issues associated with promotions in order to protect their companies from liability. This article briefly covers a few of these issues.

Gambling Concerns

The Federal government has not traditionally played a major role in the regulation of gaming. Instead, regulation has been viewed as most appropriate for state and local jurisdictions. Most states have commonality in that they typically define gambling as any activity in which the following elements are present: (1) the award of a prize, (2) determined on the basis of chance, including a future contingent event outside of their control, and (3) where consideration is required to be paid. If, however, any one of these elements is removed, the activity is generally lawful.

Removing consideration creates an activity known as a sweepstakes. Most states have adopted a pecuniary/economic value approach to analyzing consideration – some measurable economic value flowing from participants to promoters (e.g., transfer of money). A promotion requiring a purchase or payment to participate presents a clear example of consideration. A less clear situation exists where participants are required to expend some degree of effort that ultimately benefits the promoter (e.g., completing a questionnaire). While no definitive standard exists, the rule of thumb is the more effort required, the greater the likelihood it will be deemed consideration.

Sometimes sweepstakes do not require any consideration for the right to participate and revenues derive from increased sales or fees from third party sponsors. More commonly, however, sweepstakes involve participation by purchase but provide a free method of entry. Here, companies must disclose the existence of the non purchase method of entry in a clear and conspicuous



Karl Rutledge
Partner
702.949.8317 direct
krutledge@lrrc.com



Mary Tran
Associate
702.474.2666 direct
mtran@lrrc.com

Disclosure

Please note that the information provided in this article does not constitute legal advice and is not intended to be and should not be construed as legal advice. Readers with questions specific to the issues raised in this article should consult with qualified legal counsel.

Lewis Roca Rothgerber Christie LLP will continue to monitor developments and progress on Sweepstakes and Contests and we will provide updated information as it becomes available. In the meantime, if you have any questions, please feel free to reach out to Karl Rutledge or Mary Tran.

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manner. Often the words “no purchase necessary” are displayed prominently on all sweepstakes materials. The key being that non-paying participants must have “equal dignity” with purchasers (i.e., equal opportunity to enter, to win and to win the same prizes). Any material disparity (actual or perceived) can invalidate this model.

If consideration remains but chance is removed, generally a lawful skill contest is created. The determination of whether a pay-for-play contest with prizes is a permitted game as opposed to a prohibited game of chance is typically based on the relative degrees of skill and chance present in the game. While states range from adhering to the “any chance” test (i.e., if a game contains any chance impacting the outcome, it is deemed chance-based), to simply prohibiting pay-for-play skill contests regardless of skill level, most states use the predominance test (i.e., if skill predominates over chance, then the contest is permitted).

When evaluating a game on the basis of skill vs. chance, corporate counsel must recognize that several types of chance exist that impact the skilled nature of a contest, including, without limitation, random elements and imperfect information. The game Minesweeper best illustrates the risk of imperfect information. During gameplay, a player may be left with no other option other than to guess between two tiles as to the location of the mine, with one choice leading to success while the other selection will result in defeat. In addition to being aware of the types of chance, corporate counsel should also be mindful of conducting contests in a way that negates skill. For example, a multiple choice test on quantum physics offered to ordinary children would negate skill because they would simply resort to guessing.

Intellectual Property Concerns

Incorporating user-generated content (e.g., video and photo contests) into a promotion is another liability risk. Official rules must include representations and warranties to prevent liability exposure due to privacy, publicity, security, and intellectual property issues. Entrants should represent the submissions are their original work and represent the submissions do not violate laws or infringe the rights of third parties; an indemnification provision is also advised. On any website that displays user-generated content, best practices include a prominently featured “report abuse” functionality and established Digital Millennium Copyright Act procedures and policies.

Sponsors may consider screening submissions to prevent potential liability claims. In a lawsuit between Subway and Quiznos, Quiznos sponsored a contest in which entrants submitted videos comparing sandwiches from the two chains. Quiznos posted some user-generated videos as examples and was sued by Subway for false and misleading advertising under the Lanham Act. The case settled out of court after Quiznos’ motion to dismiss based on the immunity for user-generated content publication found in the Communications Decency Act was denied by the court. Additionally, user-generated content submissions may be considered endorsements so sponsors should ensure that submissions are accompanied by a disclosure of the promotion (e.g., #contest or #sweepstakes). For example, Cole Haan offered a contest on Pinterest in which entrants created boards with Cole Haan shoes and were told to include the hashtag #wanderingsole. The Federal Trade Commission (FTC) investigated the contest and determined the entries were endorsements and that the contest was a material connection between the entrant and Cole Haan which should have been disclosed. Enforcement action was not taken because this was a case of first impression for the FTC.

Official Rules Concerns

Quality official rules are equally important to corporate counsel. At a minimum, official rules should include: (i) promotion start and end date; (ii) eligibility restrictions; (iii) entry methods; (iv) winner selection details (including judging criteria if a skill-based contest); (v) description and retail value of the prize(s); (vi) odds of winning; (vii) where to obtain a winners' list; (viii) limitations of liability; (ix) name and address of the sponsor; and (x) dispute resolution provisions. Consider having entrants check a box affirming they have read the official rules and agree to be bound by such rules.

When utilizing social media, one must be aware of the applicable social media platform's restrictions. Corporate counsel must respect such restrictions and draft the promotion's rules in compliance therewith. This is important because a promotion could be terminated prematurely for noncompliance with the platform's restrictions, which may lead to a violation of the law because the promotion did not follow the course as set forth in its official rules.

Moreover, corporate counsel must be careful to avoid any potential misinterpretation of the company's intent and must anticipate foreseeable issues, such as, ties, prize unavailability, prize damage during shipment, and cheating by participants. It is also essential to clearly state all aspects of the promotion; courts will not be kind to operators that mislead participants. Claims for breach of contract, fraudulent misrepresentation, and violation of false advertising statutes may arise if prize interpretation is in dispute, or if the operator knowingly misled the participants in jest. Two companies that attempted to make a joke out of their contests ended up having the joke backfire. Instead of a Toyota, a restaurant awarded a toy Yoda (Star Wars) and instead of a Hummer H2, a radio DJ awarded a toy model. Both contests resulted in lawsuits which could have been avoided.

With this in mind, companies should understand that official rules are like any other binding contract, except that instead of contracting with another sophisticated company, the company is potentially contracting with thousands of users. Detail, clarity and accuracy are therefore crucial in drafting rules. This is evidenced by attorney general enforcement actions and substantial fines levied by FTC against companies found to be promoting fraudulent schemes and engaging in other forms of false or deceptive advertising on the Internet (i.e., official rules that do not accurately reflect the promotion).

Conclusion

Countless examples exist of companies using promotions to market their products and services. Nevertheless, corporate counsel for companies utilizing sweepstakes and contests for this purpose must recognize they are entering an intricate and specialized industry and must be conscious of the complex legal boundaries in which the company must operate. Quality outside counsel should therefore play a pivotal role in the design, review, and, ultimately, dissemination of any online promotional activities in order to avoid or mitigate potential liability.