



Consumer contests, sweepstakes and giveaways: Risk and Reward

Matthew V. Wilson

Contests, sweepstakes and giveaways are popular promotional tools used to attract and reward customers, bolster brand awareness, garner competitive advantages, and ultimately, generate revenues. However, while the benefit and rewards may seem obvious, such programs also involve a range of potential risks and liabilities, varying from negative publicity and embarrassment to criminal and civil penalties. This article provides a generalized description of the legal landscape associated with prize promotion programs.

Lotteries

A legal prize promotion must be designed and administered in a manner that complies with state lottery laws. For legal purposes, a “lottery” is any activity that involves each of the following three elements: (1) prize, (2) chance, and (3) consideration. In other words, if a prize is awarded to a winner selected by chance, in which instance the winner was required to pay an entry fee, purchase a product, or provide some other form of consideration to enter or participate, the activity qualifies as a lottery. Generally, with the limited exception of certain state-sanctioned games of chance such as bingo and charitable raffles, state gambling laws prohibit any private person or business from sponsoring or administering a lottery. A legal prize promotion, therefore, must eliminate one of the three “lottery” elements in order to pass legal muster. To achieve this end, most promotions either (a) allow for a free method of entry (“Sweepstakes”), or (b) determine the winner(s) based upon an exercise of bona a fide skill (“Contest”).

Sweepstakes and Contests

Avoidance of the “lottery” designation, however, is only the first step necessary in formulating a legal promotion. Prize promotions must also comply with various federal laws, such as, the Federal Trade Commission Act and Deceptive Mail Prevention and Enforcement Act, and a convoluted web of overlapping state consumer-protection laws. The body of laws and regulations that govern the design and administration of prize promotions originate from all levels of government with a common paternalistic objective of protecting consumers and other would-be participants. As one might expect, the piecemeal legal framework associated with prize promotions is highly decentralized and somewhat disjointed. As such, the implementation of a national or multi-state promotion will necessarily involve the application of many, and often times inconsistent, legal requirements. This reality necessarily means that the quest for a “one-size-fits-all” promotion model can be a highly risky endeavor and is discouraged. In all instances, best practice dictates that each promotion model be analyzed from the perspective of each jurisdiction in which persons are eligible to participate.

Official Rules

One common legal requirement that applies to the administration of all prize promotions is the adoption and publication of “Official Rules.” Under Federal and state laws, the “Official Rules” establish a contractual relationship between the promotion’s sponsor and the consumer entrants. The Official Rules, in effect, are deemed a binding offer by the sponsor to a defined class of entrants, inviting participation in the promotion pursuant to the terms and conditions established by the rules. Applicable law requires that such rules include factual disclosures such as entry details,

eligibility restrictions, odds of winning, the methodology for selecting the winner, and a description and value of the prize. In addition to these mandated provisions, the rules should also include legal disclaimers designed to protect the sponsor from liabilities associated with consumer promotions. Depending on the structure of the specific promotion (e.g., methods of entry, channels of advertising, and entrant notification procedures), federal and state laws, and industry guidelines, may prescribe additional specific disclosures in both the rules and any promotion-related advertising.

Other Legal Issues to Consider

- Promotions may raise less obvious legal issues, entirely outside of the traditional consumer law spectrum, such as, tax, trademark, copyright, privacy, publicity and libel.
- Promotions administered via social media platforms (e.g., Facebook®, Twitter®, or Instagram®) will involve the application of the specific platform's policies and procedures, which may include disclosure requirements, disclaimers and prohibited activities.
- Contests that utilize "public voting" must clearly describe the voting criteria and adhere to such criteria in order to avoid being characterized as a game of chance, and potentially, an illegal lottery.
- Promotions that solicit, use, and/or publish user-generated content will involve an array of intellectual property and privacy issues that should be addressed in the official rules and individuals affidavits and waiver documents.
- Sponsors must be cognizant of the legal issues involved in using registered trademarks and copyrighted materials in any promotion, whether used in connection with the promotion's advertising, the official rules, or the underlying prize.
- Certain industry-specific promotions, such as, promotions associated with alcoholic beverages, tobacco, motor fuels and gasoline, dairy products, financial institutions and banking, and insurance, are heavily regulated or prohibited by federal, state and local law.
- Some states require registration and bonding of certain promotion, while others require the publication of winners' lists.
- Promotional activities that may reasonably create an image of consumer "endorsement" of a product or business (e.g., requiring a participant to "like" or "share" content on Facebook® or "pin" content on Pinterest®) may require disclaimer language to avoid being "false and deceptive" under the FTC Act.

A promotional marketing campaign can be a highly rewarding endeavor for those that play within the rules. In addition to promoting a business or product, such campaigns have proven useful in attracting new consumers and enhancing customer loyalty. Prize promotions also provide an opportunity for firms to display their creativity, technological know-how and market relevance by utilizing new technologies and popular social media platforms. While the stakes are high, the potential reward inherent in a successful promotional campaign is easily attainable with sufficient legal planning and oversight.

PLEASE NOTE: THIS ARTICLE PROVIDES GENERAL GUIDELINES IN ADMINISTERING, DRAFTING TERMS AND CONDITIONS, AND EXECUTING SWEEPSTAKES AND SKILL CONTEST PROGRAMS. ALL RULES AND RELATED ADVERTISING COPY SHOULD BE REVIEWED IN ADVANCE BY LEGAL COUNSEL.

Authors and Contributors

Matthew V. Wilson

Of Counsel, Atlanta Office
404.873.8551
matthew.wilson@agg.com

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Atlanta Office

171 17th Street NW
Suite 2100
Atlanta, GA 30363

Washington, DC Office

1775 Pennsylvania Ave., NW,
Suite 1000
Washington, DC 20006

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