

Games of Chance—a Risky Proposition

To retain and attract customers, companies and business must be creative in marketing their products and services. An attractive and popular way to do that, is to sponsor games such as contests or sweepstakes.

These are typically less expensive than other methods as costs are often shared by more than one promoting company, and are popular with the public because prizes are

awarded. It is important to keep in mind, however, that this type of marketing is governed by laws which vary by state, and has technical requirements that are not well publicized. As such, games must be well planned and properly executed. This article will provide an overview of the differences between sweepstakes and contests and highlight issues facing those who sponsor these games to the public.

There are three elements to these types of games: Chance, consideration (meaning a payment of some kind, including the effort involved in creating and submitting something) and a prize. Lotteries, which contain all three elements, are state sponsored but otherwise illegal. Contests and sweepstakes contain only two of these three elements and for that reason are allowed. Contests, where people submit something hoping to win a prize, involve consideration (whatever

is being submitted, such as an essay or drawing) and a prize. Sweepstakes have elements of chance and a prize. If a contest were to have an element of chance or, if a sweepstakes were to require consideration, that

contest or sweepstakes would violate the law.

Despite well-planned events, the element of chance sometimes creeps into a contest and

can doom it. For example, where judging criteria is not properly set forth, or if the judges are not qualified to judge the entries, submissions are deemed to be subject to chance. In addition, a contest must require that the entrant exhibit a true skill, though not necessarily an advanced skill, otherwise it may be deemed to include an element of chance (such as “count the jelly bean” contest where no true skill is involved).

A sweepstakes is usually publicized in connection with a purchase. To avoid consideration problems in sweepstakes, such as the purchase of a product, the sponsor will typically make it clear that “no purchase is necessary” and provide for an alternate means of entry. Thus, the availability of entry into the sweepstakes without any purchase protects the sponsor of that sweepstakes from claims that all three elements were present. This language must be visible in the rules of

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the sweepstakes, not buried in the fine print, and the alternate means of entry should not only be available at the sponsor's website, but also at a retail store, typically where that product is sold. Even the largest companies can run afoul of this law. A&P Supermarkets, CVS and the makers of Tylenol recently violated these rules by not providing clear, viable alternate means of entry in their sweepstakes, and were fined tens of thousands of dollars as a result.

Everything must be considered when the rules for the contest or sweepstakes are first drafted because those rules form their basis and are essentially a contract. They must be conspicuous and cannot be changed once the promotion is underway. Consideration paid after the game closes may also become an issue. If a gift certificate is the prize awarded but in a denomination that is insufficient to buy anything meaningful thus forcing the winner to add to the gift certificate to be able to make a purchase, that amount added by the winner may be deemed consideration.

Some states, including New York, require that in some cases, a sponsor post a bond and submit and post a statement containing the details of the game prior to the time a sweepstakes begins (chances of winning a particular prize, for example) and make available a list of the winners once the sweepstakes closes. In addition, the awarding of certain prizes, such as tobacco and alcohol, may be prohibited. If a sponsor wishes to limit

the number of entries from a single source or use the winner in its advertising, that too must be disclosed.

In this day of electronic media, other promotions, including refer-a-friend and completing a survey or questionnaire to win or enter into a drawing to win a prize (usually web-based), must by definition be a variation of the games discussed

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above. However, a sponsor must pay attention to the length and complexity of any survey, as a long and detailed survey or questionnaire may be deemed consideration. Methods that allow the contestant to short-cut the survey obviate that concern. In addition, allowing for entry by mail is advised for web-based games, as Internet access, a requirement for web-based games, may be deemed consideration. Other details which must be included in the contest/sweepstakes rules include age of entrants, proper tie-breaking rules, and provisions concerning computer malfunctions, lost entries and privacy policies.

For further guidance in structuring and offering a contest or sweepstakes, please call us at (212) 765-4567 or info@thesilberlawfirm.com.

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