

5 KEY TAKEAWAYS

Basics of Promotion, Sweepstakes, Contests, and Gaming

Barry M. Benjamin, partner in the New York office and chair of Kilpatrick Townsend's Advertising and Marketing group, presented at the 2018 ANA/BAA 40th Marketing Law Conference, held earlier this month in Chicago. As one of the first speakers at the conference, Mr. Benjamin's presentation – "Basics of Promotion, Sweepstakes, Contests, and Gaming" – focused on equipping those new to the industry with the knowledge, language, and vocabulary necessary to best understand all of the upcoming programming. He covered the basics of sweepstakes and skill contests, as well as the rapidly-evolving legal landscape and court decisions impacting fantasy sports and sports gambling.

Key takeaways from the presentation include:

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A "sweepstakes" is a general term used to refer to any random drawing, game of chance, or prize / gift promotional program where prizes are awarded to winners on the basis of chance. Sweepstakes must be constructed so as to not run afoul of the 50-state lottery and gambling laws, which reserve to the State the right to conduct lotteries (exceptions are carved out for games such as bingo and charitable raffles). Legally, a "lottery" consists of three elements: prize, chance, and consideration. For a private company to run a legal sweepstakes and not violate the lottery laws, a promotion must eliminate one of these three elements. Usually this means eliminating consideration – not requiring a purchase or entry fee.

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Consideration can be present in a chance promotion without violating the lottery laws if a free, alternative method of entry ("AMOE") is available to those who do not wish to make the purchase or provide whatever consideration the sponsor requires. However, the AMOE entries must be given the same chance of winning as purchase entries, and individuals utilizing the AMOE must be afforded "equal dignity" with purchasers. These issues are not just theoretical, as enforcement proceedings have been brought against seemingly innocuous programs such as when the over-subscribed Ironman Triathlon organization used a paid entry-fee lottery system to select those who could run in the race. To resolve lottery law violation allegations with the Dept. of Justice, the group paid \$2.7+ million.¹

¹ <https://www.justice.gov/usao-mdfl/pr/world-triathlon-corporation-ironman-forfeits-more-27-million-lottery-proceeds>

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The official rules of any promotion are the “contract” between the sponsor and the entrants. The rules represent the offer by the sponsor which, upon entry, become a binding agreement. After the promotion begins, the rules cannot be changed. It is therefore essential for the rules not only to contain the disclosures mandated by law, but also clear direction to the consumer as to how to participate. Companies should view official rules as a desired aspect of the promotion rather than an administrative burden – the rules will have enforceable legal disclaimers that protect the sponsor from risks that may arise.

The legal status of fantasy sports is not yet settled and continually evolving. Fantasy sports are hybrid games containing elements of both skill and chance. While each fantasy game must be assessed independently to determine the extent to which (if at all) skill predominates over chance, the majority of fantasy sports are generally viewed as being predominately skill games under federal and state law. Traditionally, prior to 2006 fantasy sports games were not formally legally defined by statute or regulation, but generally considered legal only if taking place over the course of an entire season. It is only over the course of an entire season that the intellect, knowledge, and experience of a player – their true skill in selecting players over time – when skill will prevail over chance. In 2006, the U.S. Congress passed the Unlawful Internet Gambling Enforcement Act (“UIGEA”). Designed to specifically render illegal a multitude of forms of online gambling over the Internet, the UIGEA included exclusions from illegality certain fantasy sports games. State courts and legislatures continue to wrestle with the legal status of fantasy sports, in particular daily fantasy sports games. In October 2018, a court in New York State held that the state legislature’s approval of daily fantasy sports games was insufficient to overcome the prohibition against gambling in the state constitution.

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As for sports gambling, the U.S. Supreme Court recently held that the federal government cannot prohibit states from legalizing sports gambling.² In doing so, the Court struck down a federal law, the Professional and Amateur Sports Protection Act (“PASPA”), that prohibited state legislatures from taking any steps to legalize sports gambling. PASPA also contained a specific restriction on advertising sports gambling. While some may mistakenly believe that PASPA ‘legalized’ sports gambling, it did not. Rather, PASPA involved a states’ sovereignty issue, where the Supreme Court ruled that the federal government’s attempt to prohibit states from legalizing and regulating sports gambling was an unconstitutional exercise of federal power. The end result is that no blanket federal ban exists on sports gambling, and it is left to each individual state to decide whether and how to legalize and regulate it.

Sweepstakes and skill contests continue to be popular tools for companies to market their goods and services. If handled correctly, these promotions can generate customer interest, website and social media traffic, revenue, and brand awareness. But when handled improperly, these promotions can create expensive and embarrassing consequences, ranging from bad publicity to civil and criminal liability.

² *Murphy v. National Collegiate Athletic Association*, 138 S.Ct. 1461 (2018).