

KTS Advertising Law Guides

Sweepstakes and Skill Contests

The Legal Basics

While companies may run promotional giveaways all the time, the legal issues involved can trip up even the most careful legal practitioner. When handled properly, promotions can generate tremendous consumer interest, traffic, revenue, data, and brand awareness. When disaster strikes, however, expensive and embarrassing consequences can follow. It is crucial, therefore, to understand the legal issues involved and ensure compliance with all legal requirements to avoid those terrible consequences.

Legally, a “sweepstakes” is just a game of chance, and games of chance can include any kind of prize giveaway, whether a random draw, raffle, instant win, or scratch game. It is merely a way to describe a promotional structure where prizes are awarded randomly. A legal sweepstakes promotion must be distinguished from a lottery, where entrants must pay for the right to be eligible to win the prize.

Lotteries are regulated by state laws which reserve to the state the right to conduct legal lotteries and other games of chance (the law carves out exceptions for games of chance such as bingo and charitable raffles). At its most basic, a lottery consists of three elements: (1) prize, (2) chance and (3) consideration. Thus, to run a legal sweepstakes and not an illegal lottery, the third element, consideration, must be eliminated from the structure of the promotion. A legal sweepstakes may require some kind of entry fee or product purchase, but it must also permit an equivalent, free method of entry alongside the pay entry method.

Often, what is more difficult than eliminating consideration is recognizing consideration in the first place. While it may be straightforward to recognize an entry fee or product purchase, consideration can be non-monetary; thus it is critical to assess the level of time and effort that an entrant may incur as the entry mechanism. For example, where a consumer must complete a burdensome or lengthy questionnaire to enter a sweepstakes, the sponsor

may not have effectively eliminated the element of consideration. A short and simple survey, on the other hand, is less likely to raise a red flag. As a general rule, the greater the degree of effort required to enter, the greater the risk that non-monetary consideration may be found to exist. Although challenges to games of chance promotions requiring non-monetary consideration have been rare, it is possible that requiring contestants to make significant efforts to enter could be deemed consideration, rendering unlawful an otherwise legal sweepstakes. Therefore, best practices dictate that any significant efforts for entry—such as completing a lengthy survey or making multiple store visits—should be curtailed unless a free method of entry is offered.

Certain states where chance promotions directed to consumers offer prize values totaling over a certain amount have state registration requirements. Florida is the most stringent, requiring sponsors to register promotions offering a total value of all prizes over \$5,000 as well as provide a surety bond or establish a trust account in the total amount of all prizes to be awarded. New York has a similar registration and bond requirement, but enforcement in New York is much less of a factor. Rhode Island requires sponsors of retail chance promotions (the statute is not a model of clarity) to register where the total value of all prizes is over \$500 but does not require a surety bond or establishment of a trust account.

Promotions which award prizes on the basis of evaluating the entrants' skill rather than by random chance award, effectively eliminate the element of chance from the lottery law equation. In a skill contest, the sponsor awards prizes to winners based on pre-established skill criteria, such as artwork or photography contests, essay contests, bake-offs, and trivia contests, among others. Games of skill do not include contests that involve predicting the outcome of a future event or making an educated guess. When running a skill contest, sponsors should be careful not to introduce any element of chance when awarding the prize, that is, the prize recipient should not come down to a coin flip. Instead, the contest should anticipate this situation and should provide a method to resolve ties through a further test of skill or award top prizes to both participants. To emphasize the dominance of skill as the determination of the winner, sponsors should devote substantial attention to scoring and judging. The contest requirements, the applicable objective judging criteria, and the relative weight given to each criterion should all be clearly identified. It is also important to state the judges' qualifications and explain the method of judging each entry.

Some promotions may include both elements of chance and skill (e.g., some fantasy sports games). The legality of the promotion will generally turn on whether chance or skill is the "dominant factor" in determining the outcome. Four factors are generally considered: (1) entrants must have a distinct possibility of exercising skill and have sufficient data upon which to calculate an informed judgment; (2) entrants must have the opportunity to exercise the skill, and the general class of entrants must possess the skill; (3) skill must sufficiently govern the result; and (4) the standard of skill must be known to entrants in advance and this standard must govern the result.

To avoid legal traps, companies and their attorneys should carefully consider whether to structure a promotion as a sweepstakes or a contest, taking into account the legal differences and requirements associated with each option. With proper planning, a sweepstakes or contest can offer great value for sponsors, while also providing an enjoyable experience to customers.

All promotions, whether chance or skill, should have a set of official rules. The official rules of any promotion are considered to be the legal contract between the sponsor of the promotion 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, just as a contract may not be unilaterally changed by one side after it is signed. It is therefore essential for the rules not only to contain the disclosures mandated by law, but also clear direction to the entrants as to how to participate, and legal disclaimers and disclosures protecting the sponsor from anticipated risks of offering the promotion.

When asked a question about whether official rules are necessary for a "small" promotion awarding prizes of limited value, it is recommended that all promotions have official rules. This is simply because the rules contain sponsor-friendly legal disclaimers and liability limitations that bind entrants and will be applied in the event of a disaster (and disasters do happen). The official rules should be viewed not as a burdensome regulatory necessity to comply with consumer disclosure laws, but rather a source of important legal protection for the sponsor in the small likelihood that some problem arises.

As to the rules themselves, they should be clear and unambiguous, logical in the order of presentation, and consumer friendly. They should not be repetitive, contradictory or overly dense. As a contract, any ambiguity in the rules will be interpreted against the party that drafted the rules, i.e., the sponsor. Additionally, care should be taken not to include provisions that may not be applicable to a current promotion, but were applicable to a prior promotion (that is, be careful when using a prior set of rules to draft rules for a new promotion).

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