Insights: Alerts

Five Key Takeaways: Promotional Tactics/Pitfalls and Opportunities in Coupons, Rebates, and Experiential Marketing (including the Pokemon GO phenomenon)

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Barry M. Benjamin, partner in the New York office and chair of Kilpatrick Townsend's Advertising and Marketing group, was honored to present at the 2016 ANA/BAA 38th Marketing Law Conference, held November 9-11, 2016 in Chicago. Mr. Benjamin moderated a panel discussion titled "Promotional Tactics / Pitfalls and Opportunities in Coupons, Rebates, and Experiential Marketing (including the Pokemon GO phenomenon)." Starting with the legal basics of promotional marketing tactics of coupons, rebates, loyalty programs, and premium offers, the panel quickly brought the program forward to discuss the latest initiatives in experiential marketing, and concluded with an overview of the worldwide phenomenon that is Pokemon Go. Takeaways from the presentation include:

- Coupons and rebates are among the oldest of promotional tactics to draw people into a store to drive sales. All promotional offers should be treated as contracts with consumers, as they include the very basics of offer and acceptance. The terms and conditions of the offer constitute the contract terms.
- Disasters happen. Terms and conditions for every promotional offer are key to limiting risk for sponsors, regardless of the position of the sponsor – retailer, manufacturer, or elsewhere in the value chain. Terms and conditions are contract terms that once accepted by consumers through a purchase or taking any other action invited by the sponsor, may be set in stone. Accordingly, sponsors should think through all potential negative consequences for their promotional offer, and account for a resolution in the terms and conditions.
- Disclose clearly the T&Cs. Clear and conspicuous disclosure of terms and conditions are necessary to ensure that they are enforceable. Terms that are hidden, not clearly explained, not clearly linked, or otherwise not obvious, viewable, or available to the consumer may not be enforced by a court if challenged. The FTC's "clear and conspicuous" disclosure standard will prevail.
- FTC Advertising Rules Govern. Many FTC rules and regulations governing the advertising and sales process should be consulted during the process of coming up with the terms of the offer, advertising the offer, and administering the fulfillment process. This includes the FTC's clear and conspicuous disclosure standard, as well as the Mail, Internet, or Telephone Order Merchandise Rule, Guide Concerning Use of the word "Free" and Similar Representations, Guides Against Bait Advertising, the Guides Against Deceptive Pricing, and potentially others.
- Experiential marketing can be fraught with risk. Among the tactics marketers use to distinguish themselves is experiential marketing. Types of experiences are unlimited, and the lawyer's role in creating the process and the campaign can be key to limiting the company's exposure to downside negative consequences. Among the goals for the lawyer is understanding the marketer's intentions for how best to exploit the program, and ensuring that any and all methods to engage and publicize the experience are legally covered. This includes

obtaining appropriate releases, making sure insurance is in place, and limiting personal injury possibilities.

No marketing program is going to be entirely free of risk. The lawyer's job is to try to visualize all of the things that could go wrong with a program, and protect the client against those disasters. Marketers are continually and thankfully coming up with new and different ways to drive sales – the legal process needs to thoughtfully and carefully figure out the best way to let these imaginative programs thrive in a marketplace filled with risk.