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5 KEY TAKEAWAYS

Sweepstakes Law – NYC Bar Association's CLE Program on Marketing and Advertising Law

Barry M. Benjamin, managing partner of the New York office and chair of Kilpatrick Townsend's Advertising and Marketing group, was honored to present at the New York City Bar Association's continuing legal education program, Marketing and Advertising Law: Social and Digital Media after a Year of Transformation. The session covered recent events in sweepstakes law. The session focused on the basics of the laws and regulations around sweepstakes and skill contests, and highlighted recent promotion disasters to highlight the relevance of the area in today's highly engaged advertising marketplace.

5 key takeaways from the presentation, include:

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Do Not Require Consideration. To avoid an illegal sweepstakes that violates the lottery laws, a promotion must eliminate one of the three elements of a lottery: prize, chance, and consideration. Usually this means eliminating consideration - not requiring a purchase or entry fee, by including a free, alternative method of entry ("AMOE") to those who do not wish to make the purchase or provide whatever consideration the sponsor requires. This is not just theoretical, as enforcement proceedings were brought against seemingly innocuous programs such as in 2015, 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. For more, click here.

Carefully Draft and Enforce the Official Rules. 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 (acceptance), 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. And, the sponsor must train staff to enforce the official rules as written. In March 2022, the Federal Communication Commission fined an iHeartMedia radio station $20,000 for disqualifying previous prize winners of prizes within 90 days of their prize, when the official rules actually indicated disqualification within 30 days. For more, click here.

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Clearly Disclose the AMOE. It is crucial when structuring and advertising a promotion, that when monetary consideration is part of the entry mechanism, that the AMOE is clearly and conspicuously disclosed. In July 2021, Coinbase ran a sweepstakes where trading doge coin constituted an entry for the chance to win. However, dissatisfied consumers filed a class action lawsuit because they alleged that the AMOE was not adequately disclosed, meaning that all entrants were misled into believing that only by trading doge coin, could anyone enter to win. For more, click here.

Pick a Winner When You Say You Will. When advertising a promotion, people pay

Pick a Winner When You Say You Will. When advertising a promotion, people pay attention, especially people who have entered to win. They pay particular attention to how the winners will get selected, and when. This was a problem in December 2020, for the ironically named influencer group "Not a Content House" (ironic because producing content was exactly what they did). They advertised a sweepstakes whereby winners would be flown to their location to meet and interact with the group. Yet, on the day they were to announce the winner, expectant entrants were met with deafening silence. No winner was announced. Indeed, nothing was announced. The group had forgotten – in the midst of a Covid crisis, but still – to select and announce a winner. It stirred significant backlash from their ardent fans. For more, click here.

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Enforce the Rules When Selecting a Winner. As indicated above, the official rules constitute a contract between the sponsor and all entrants, and entrants must abide by the official rules. Which means, obviously, that sponsors must enforce their official rules strictly and completely. The Natural History Museum of London learned this lesson the hard way, after they selected a winner in their Wildlife Photographer of the Year in 2017. The winning photo was a shot of an anteater underneath starry skies, next to a termite mound. Someone, though, suspected a rat. After a thorough investigation by a team including five scientists, they concluded that the anteater was actually a stuffed animal – a fake. The winner protested, but the sponsor's conclusions were final, as the rules indicated they would be. For more, click here.

Sweepstakes and skill contests continue to be popular tools for companies to market their goods and services. When handled improperly, these promotions can generate expensive and embarrassing consequences, ranging from mere bad publicity to significant civil and criminal liability. These negative outcomes are not just theoretical, as shown in the examples above. Most promotions, though, are handled correctly, and can generate tremendous customer interest, website and social media traffic, revenue, and brand awareness. One final takeaway – be among those who do it right.

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