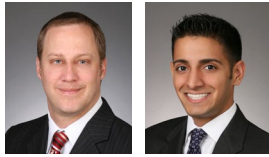


PROMOTING YOUR GAME WITH A GAME: LEGAL TROUBLE SPOTS TO WATCH OUT FOR WITH SWEEPSTAKES AND CONTESTS



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In-house client:
“A new car!”

In-house attorney: “Am I a contestant on *The Price is Right*?”

In-house client: “No, that’s what we want to give away in our own promotional contest.”

In-house attorney: “But I’m an intellectual property attorney.”

In-house client: “The corporate attorneys said to talk to you...”

Ever had this happen to you? In the drive to reduce costs and overhead, intellectual property attorneys, and in-house counsel in particular, are increasingly asked to take on tangential areas of work. Where do you even start in this situation? What legal hurdles do you need to overcome in order to give away that car in the first place? Your internal client has decided that a contest or sweepstakes of some sort would be a great way to promote your company’s product, and it’s up to you to make sure they do it correctly. A sweepstakes, contest or other promotion can be a great way to generate some buzz about a new product, but you need to ensure you are complying with various state and federal laws that regulate contests, sweepstakes and lotteries. Otherwise, your contest might instead win you an unexpected visit from law enforcement or federal regulators.

Even though it might not seem like it, running a promotion where you give away a prize not only implicates various federal and states laws relating to promotions themselves, but also implicates gambling and other gaming laws. In particular, one big issue you’ll want to watch out for when setting up your promotion is to steer clear of laws that prohibit running lotteries. While many states run their own lotteries, it’s typically against state law for a private entity, like your company, to do so. Sweepstakes and contests, on the other hand, typically avoid these laws, and are okay for a private entity to engage in, as long as you comply

with applicable law. So what’s the difference between a lottery, a sweepstakes and a contest?

A person participating in a lottery usually pays a fee (or provides something else of value) for a chance to win a prize. By contrast, a sweepstakes typically involves chance — and a prize — but not an entry fee or anything else of value. And in a contest, a participant may provide a fee or something else of value in hopes of winning a prize, but the outcome is not limited to chance. Rather, the prize in a contest is awarded based on a participant’s use of at least some measure of skill.¹

Assuming you want to go ahead with setting up a sweepstakes, you’ll likely want to make sure you don’t require any fee or require anything else of value to enter. This seems simple enough, but it can be tricky in practice. For example, what if you’re thinking about entering people into your sweepstakes if they agree to download and install a new video game that your company is releasing? Even if your game itself is free, this might run afoul of the lottery rules and regulations, because the participant’s agreement to download and install your game might be considered as the participant providing you (or your company) with something of value — namely, the promise to download and install your game. One way you might be able to avoid this issue (depending on which states’ laws are in play) is by providing at least one form of completely “free” entry. Perhaps you’ve seen this before, where sweepstakes rules indicate that, to enter for free, you can send a postcard with your name and address to the sweepstakes administrator. So, in the last example, even if someone doesn’t want to agree to download and install your game, you might provide a website or snail mail entry form that nevertheless allows a participant to enter the sweepstakes without agreeing to download and install your software.

Alternatively, if instead of running a sweepstakes where you must provide free entry, suppose you want to charge an entry fee or require each participant to provide something of value in order to enter. In such a case, you might set up your promotion as a contest in which **MORE**➤

1. See e.g. California Business and Professions Code §§17539.5, 17539.15, and 17539.55.

you award a prize based on a participant's skill in completing some task. For example, you might select a winner of a contest based on how well competing participants play your new game during a particular timeframe (e.g., during a promotional event). Whoever scores the most points during the event is the winner, so the prize is awarded based on some demonstrated skill instead of pure chance. This is another way to avoid being categorized as a lottery. In other words, having your new customers enter a contest (instead of a sweepstakes), and requiring participants to compete based on skill, is another way that you can prevent your promotion from being characterized as a chance-based lottery. You therefore might want to have your new users show off their gaming skills a little bit before awarding them with that flashy new outfit for their in-game character or a fluffy and loyal pet to follow them around in your virtual world.

Once you've safely navigated the piranha-infested waters of "lottery land" and established your promotion as a sweepstakes or a contest, there are a few more things you'll likely need to watch out for to avoid falling into any other legal trouble spots. For example, some states have laws that require you to register your sweepstakes if the prize you're offering is valued above a certain amount of money.² Some states also have laws and regulations that can require you to disclose the rules of your sweepstakes or contest to the people who are participating in it, and maybe even publish the rules for the general public to read.³ Sweepstakes, contests and lotteries are regulated differently in each state, and these are only some examples of the types of concerns you may need to address when you're designing your promotion.

A few other things that you might need to consider, again depending on the states' laws that might apply to your promotion, include what types of disclosures, disclaimers and provisions you would like to include in the rules for your promotion. For example, many states require that you include a disclaimer explaining that no purchase is necessary to enter, and in some states, including California, there may even be regulations that affect how this disclaimer should

be presented in your rules and other promotional materials.⁴ Other disclosures, disclaimers and provisions you might want to include in your rules may exclude your own employees from participating, require disclosure of the odds of winning each prize, state the date when the winner or winners will be determined and provide information about how a participant can request a list of the people who ultimately won. Some of these disclosures might also be required by law.⁵ Different states can have different requirements about what needs to be included in the rules, so you'll definitely want to look into the particular requirements that may be applicable to your specific promotion.

All in all, sweepstakes and contests can be great ways to get people interested in your products and in your company, but you have to avoid violating a number of different laws and regulations, including those that govern gambling and lotteries, as well as those that relate to promotions. The penalties for breaking these laws can be steep, and can range from fines and civil liability in some instances, all the way to criminal liability. The issues discussed here illustrate only some of the potential pitfalls that you might encounter in running a sweepstakes or contest to promote your products and your company. If you're thinking about running these kinds of promotions for your company, or if you have questions about these examples or want to make sure that you avoid other potential issues, you should strongly consider consulting a lawyer who can help ensure your promotion is a success. In addition, there are companies that provide sweepstakes and contest management services that can help make sure that you and your promotion comply with all applicable state and federal laws and regulations. By ensuring you are operating within the law, your promotional event will not only be rewarding for your customers, but should also reward you with the positive promotional advertising you were looking for in the first place.

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2. See e.g. New York General Business Law § 369-e; Florida Statutes § 849.094.

3. See e.g. California Business and Professions Code § 17539.1; Florida Statutes § 849.094.

4. See e.g. California Business and Professions Code § 17539.15.

5. See e.g. California Business and Professions Code § 17539.2.