

Business Law

Avoid Traps in Sponsoring Contests

By Natasha Shabani

Which of the following promotional advertisements embodies an illegal contest or promotion?

A) "Send in your proof of purchase from five cereal boxes for a chance to win a trip to the Super Bowl!"

B) "Get five of your friends to sign up on our Web site and automatically be entered to win an iPod!"

C) "Guess the number of jelly beans in the jar and win a brand new car!"

We have all seen promotions similar to these. But if you have ever paused to read all the fine print underneath the enticing marketing language, you may be curious as to why contest rules typically include phrases such as "No purchase necessary" and "Void where prohibited."

Each of the three scenarios described above is fraught with potential illegalities if the requisite precautions are not taken.

Lotteries

The primary concern when planning a contest, promotion or sweepstakes is to ensure that it does not constitute an illegal lottery. Lotteries may be run only by the 50 states. Thus, non-state-operated lotteries are illegal under federal and state law. A lottery is a contest or promotion that contains the following elements: prize, consideration and chance. To avoid conducting an illegal lottery, at least one of these elements must be eliminated.

A prize is anything of value awarded to a winner of the contest. Because consumers likely would be uninterested in a contest that did not offer a prize, this element is difficult to eliminate.

Consideration is something of value to the contest sponsor that is provided by the consumer as a prerequisite to participating in the contest. Consideration may be monetary (usually an entry fee or having to purchase the sponsor's product or service to participate) or nonmonetary (requiring the consumer to expend a significant amount of time or effort that benefits the sponsor in some way).

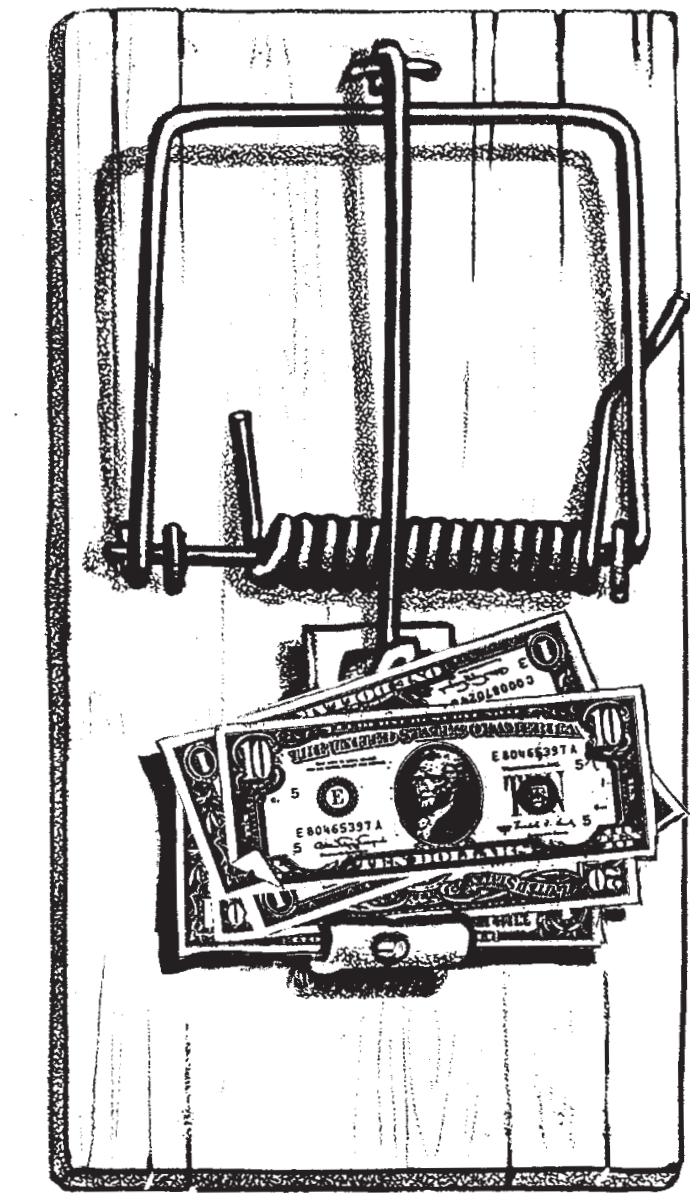
Common examples of nonmonetary consideration include filling out a lengthy registration form or providing the sponsor with personal or sensitive information. Requiring a nominal degree of effort has generally been deemed not to constitute consideration (for example, telephoning a toll-free number, completing a short survey, visiting a store). In the scenarios above, the purchase of cereal in Contest A constitutes consideration, causing friends to "sign up" on the sponsor's Web site in Contest B may constitute consideration, depending on the length of the registration form and the type of information requested, and Contest C does not involve consideration unless participants must pay to submit their guesses.

Removing consideration from a game is relatively easy. The most common way to eliminate consideration is to provide an "alternate method of entry." This is where the commonly seen "no purchase required" language comes in. In Contest A, for instance, an AMOE would allow consumers to participate without purchasing any cereal by instead mailing in a postcard or calling a toll-free number to enter the contest.

In general, AMOE and purchasing entrants must have equal chances of winning. They also must have equal deadlines and equal prizes. Additionally, the AMOE itself cannot rise to the level of consideration, and it must be disclosed in all advertising materials for the contest. The AMOE must not be seen as disadvantageous with respect to the purchase entry method.

The element of chance is present in Contests A and B above because winners are chosen from a pool of entries in a random drawing. Chance may be eliminated by awarding a prize to every entrant. Using the example of Contest B above, chance could be eliminated by awarding an iPod to every person who gets five friends to sign up on the sponsor's Web site. Alternatively, chance may be eliminated by conducting a game of skill, in which winners are selected on the basis of some sort of ability, knowledge, creativity, judgment or expertise, such as photography contests, essay-writing contests, athletic contests or cooking contests.

Skill contests must have objective criteria on which entries are judged, and the judges must have sufficient qualifications to apply such criteria. Arguments have been



made that guessing games such as Contest C are skill contests; however, regulatory authorities have long disagreed, and such guessing promotions are commonly accepted as games of chance.

State Requirements

Although a contest sponsor is confident that its promotion does not constitute an illegal lottery, the sponsor is not in the clear. Sponsors must comply with the laws and restrictions of each state in which the promotion is conducted, bearing in mind that, if the contest takes place over the Internet, then it is accessible throughout the country and must comply with the laws of all 50 states.

State laws vary significantly. A number of rules, however, have general applicability across the 50 states and should be included in virtually all contests' "official" rules. These include entry instructions, the sponsor's name and address, eligibility and geographical limitations, odds of winning, prize descriptions and their approximate retail value, contest duration and entry deadlines, how and when winners will be selected, limitation on the sponsor's liability, and a disclaimer for lost, late or damaged entries.

A few states also require publication of the winners' list and awarding of all prizes, so these elements should be included in nationwide promotions, as well.

Several states have special procedural requirements for certain types of contests. In Arizona, skill contests that require a purchase to enter must be registered with the state attorney general's office. In Florida and New York, games of chance with prizes totaling more than \$5,000 must be registered and bonded, and Rhode Island requires registration for games of chance conducted through retail outlets with prizes in excess of \$500. For many sponsors, excluding citizens of these states from participating in their contest is simpler than complying with these extra, somewhat-burdensome procedural requirements — thus, the commonly seen limitation in many contest rules, "Void where prohibited," or better yet, "Void in Florida, New York, and Rhode Island."

Internet contests, which are technically accessible worldwide, must comply with the laws of not only the 50 U.S. states but also each country in which someone could access the promotion. The laws and regulations of contests and sweepstakes vary widely from country to country. For instance, certain countries prohibit sweepstakes altogether, and other countries require registration and payment of fees. Even Canada has laws that differ greatly from those of the United States, particularly in Quebec, where foreign language requirements apply. International compliance would entail hiring local counsel in every country to provide an analysis of the proposed contest rules and confirmation that they do not violate particular local laws. This is not only prohibitively expensive but also too time-con-

suming to be a plausible option for most contest sponsors.

Thus, U.S. sponsors of online contests tend to limit participation to U.S. residents and perhaps a handful of select foreign countries in which they have checked the rules with local counsel. The key is to clearly and prominently disclose any geographic limitations to entry in the official rules and in other advertising materials.

Trademarks

The sponsors of contests A, B and C are not in the clear, even after complying faithfully with all of the above. The sponsors must exercise caution not to infringe on the trademark rights of others when running their promotions.

The sponsors must be careful in advertising prizes by their brand names without consent from the trademark owners. For instance, if Rutter Hobbs & Davidoff is sponsoring these contests, it lawfully could not name Contest A "The RHD Super Bowl Sweepstakes," Contest B "The RHD iPod Extravaganza" or Contest C "The RHD Prius Giveaway." Each of these would infringe on the trademarks of the National Football League, Apple and Toyota, respectively, and suggest a false association between Rutter Hobbs & Davidoff and these trademark owners. These companies most likely would have to co-sponsor the promotion before agreeing to such use of their trademarks in the contest names.

Rutter Hobbs & Davidoff would, however, be able to identify the Super Bowl trip, the iPod or the Prius by name as prizes in the official rules. It even may be able to use the brand names in promotional materials for its contests, so long as each trademarked brand is used in a factual manner (that is, to identify the prize) rather than in furtherance of promoting the contest. A good general rule of thumb is to stick with identifying the trademarked term within a sentence, where all of the words are of the same font and prominence (for example, "RHD invites you to enter to win an iPod."), and avoid using the trademark in the name of the promotion or in any other prominent way.

Steering clear of illegal lotteries, complying with myriad state (and possibly international) requirements and respecting third-party trademarks are only a sampling of the issues facing contest sponsors. Various additional state and federal laws come into play when running certain types of contests, such as instant-win games, contests offered in retail outlets, and direct-mail promotions; and online contests, regardless of the type, implicate a variety of Internet-specific regulations including anti-spam and privacy laws.

The sponsors of Contests A, B and C each will be able to run their promotions lawfully, so long as they obtain proper legal counsel to ensure that they keep their promotions on the right side of the law.

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