

Keeping Online Promotions on the Right Side of the Law



By Natasha Shabani

Internet contests are increasingly popular tools used by companies for marketing purposes. Consider this hypothetical contest:

"The Rutter Hobbs & Davidoff Website Refer-A-Friend Promotion: For every friend you refer to our

website who signs up for our monthly legal e-newsletter, you will be automatically entered to win an iPod®!"

Online promotions such as this one are fraught with potential illegalities if the requisite precautions are not taken to ensure that the contest is structured properly.

Lotteries. The first and foremost concern is to ensure that a contest does not constitute an illegal lottery. Lotteries, which may only be run by the 50 states, are defined as promotions that contain the elements of prize, chance, and consideration. Sponsors must eliminate at least one of these elements to avoid operating an illegal lottery.

Since consumers would likely be uninterested in a contest that did not offer a prize, this element is typically 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 or non-monetary, such as requiring the entrant to fill out a lengthy registration form. Sponsors may eliminate consideration by providing an "alternate method of entry," or AMOE. In our example, an AMOE would allow consumers to enter the drawing without referring their friends to the Rutter Hobbs website by instead mailing in a postcard or calling a toll-free number. The AMOE must not be seen as disadvantageous or burdensome with respect to the regular entry method.

A sponsor may eliminate the element of chance

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Supreme Court Decision Enhances Manufacturer Freedom to Regulate Distributor Pricing



By Eric Peterson

On June 28, 2007, the U.S. Supreme Court handed down a decision enhancing the ability of manufacturers to regulate distributor pricing. The ruling is important to understand for manufacturers and distributors alike.

The antitrust law at issue, the Sherman Act (15 U.S.C. § 1), provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." Under the Sherman Act, there are two general analytical standards courts apply to determine whether a particular business practice reflects an illegal combination in restraint of trade: The "rule of reason" standard, and the *per se* rule of illegality.

Under the rule of reason, plaintiffs are required to prove that the defendant's challenged practice creates an "unreasonable" restraint on competition. Plaintiffs commonly must show that the defendant's practices created an anticompetitive effect that is harmful to consumers, which can involve the need for retained experts and economists, and in-depth market studies. As a practical matter, this can be complicated, expensive, and time consuming.

The *per se* rule is more forgiving. The *per se* rule applies to business practices that courts deem always or almost always to restrict competition. If a plaintiff can fit the case into a category of claims where the *per se* rule applies, the need to prove the unreasonableness in light of real market forces can become unnecessary. The practical consequence is that a heavy, expensive litigation burden is lifted from the plaintiff's shoulders.

In 1911, the Supreme Court established that it is *per se* illegal under Section 1 of the Sherman Act (15 U.S.C. § 1) for a manufacturer to contract with its distributors

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by awarding a prize to every entrant or by conducting a contest of skill, where winners are selected on the basis of some sort of ability, knowledge, creativity, judgment or expertise.

State Laws. Sponsors must also comply with state laws in each state in which the promotion is conducted, bearing in mind that Internet contests are accessible everywhere and therefore must comply with the laws of all 50 states.

Several rules 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.

Internet contests, accessible worldwide, must also comply with the laws of each country in which someone could access the promotion. The laws of contests vary widely from country to country. International compliance would entail hiring local counsel in every country to provide an analysis of the proposed contest, a prohibitively expensive and time-consuming endeavor. Thus, U.S. sponsors of online contests are better off limiting participation to U.S. residents only.

Trademarks. Contest sponsors must be careful in advertising prizes by their brand names without consent from the trademark owners. For instance, Rutter Hobbs & Davidoff could not name its contest, "The Rutter Hobbs & Davidoff iPod Giveaway." This would infringe upon Apple's trademark and suggest a false association between Rutter Hobbs & Davidoff and Apple. Contest sponsors may, however, identify prizes by name so long as the trademarked brand is used in a factual manner rather than in furtherance of promoting the contest.

Privacy Concerns. The collection of personal information over the Internet implicates privacy laws.

A hyperlink to the sponsor's privacy policy should appear on the online entry form and on any page where personally identifiable information is collected. Internet privacy concerns are on the rise and regulatory scrutiny of practices such as "viral marketing," where contest entrants must provide the names and email addresses of others in order to become eligible to enter (like in our example), may soon occur. Contest sponsors must also comply with COPPA, the Children's Online Privacy Protection Act, a federal statute which addresses the collection of online personal information from children under the age of 13. Unless the contest is geared specifically toward children, most online promotions limit eligibility to those 13 or over.

Other Internet Concerns. Online promotions should always include a clause disclaiming liability for fraud, viruses or other events that compromise the integrity of the contest. Contest rules should limit entries to a particular number, such as one per day, per entrant. The duration of the contest and especially the deadline for entries should be stated not only in terms of dates, but also a precise time in a specific time zone – e.g., 1pm EST. Contest sponsors should ensure that the how-to-play instructions are clear and that any special technical requirements are set forth in the official rules.

Conclusion. Steering clear of illegal lotteries, complying with the myriad of state (and possibly international) requirements, and respecting third party intellectual property and privacy laws are only a sampling of the issues facing online contest sponsors. Sponsors of online contests should obtain proper legal counsel to ensure that they keep their promotions on the right side of the law.

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for the maintenance of a minimum price at which the distributor would sell the manufacturer's goods. On June 28, 2007 in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, the Supreme Court reversed its 1911 decision. Now, a distributor wishing to challenge a retail price maintenance agreement will have to prove that

its particular resale price maintenance agreement unreasonably restrains market competition and is detrimental to consumers. Defendant manufacturers will also have the opportunity to demonstrate the reasonableness for the resale price agreement when they are challenged.

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The *Leegin* decision, by increasing the potential costs of litigation to a plaintiff, and affording to manufacturers the opportunity to demonstrate the reasonableness of a resale price maintenance agreement, may disincentivize plaintiffs from bringing difficult to prove claims. Manufacturers are cautioned, however, not to read more into this new legal regime than is warranted.

Under the Sherman Act, business practices are defined in many respects by whether they are "vertical" or "horizontal" in nature. A vertical arrangement is one that flows from one level in the supply chain to another – such as from manufacturer to distributor. A horizontal arrangement is one that reflects an agreement between competitors at the same level of distribution, such as at the retail level.

The *Leegin* case deals with vertical resale price maintenance agreements. It remains to be seen how courts will deal with resale price maintenance agreements that are compelled by powerful distribu-

tors wishing to impose, through pressure on a manufacturer, a restraint on a smaller or upstart competitor. Although such scenarios are referenced in the *Leegin* decision, it remains possible that lower courts would not regard those references as central to the *Leegin* decision.

If you are a party to, or are considering entering, a resale price maintenance agreement in the post-*Leegin* era, you are encouraged to contact your Rutter Hobbs & Davidoff attorney for advice on how you may be affected.

Eric Peterson is an accomplished litigator and counselor to clients in connection with trade practices and other types of disputes, including antitrust. Eric's clients include high net worth individuals, executives, entrepreneurs and closely held firms. In 2005, 2006 and 2007, Eric was named by Law & Politics Magazine and the publishers of Los Angeles Magazine as one of the top young attorneys in Southern California. Eric can be reached at epeterson@rutterhobbs.com.

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- Drafted a production agreement for the creators of a comedy skit to develop a DVD and pilot.
- Drafted a talent agreement for an interior designer's television show appearance.
- Drafted a license agreement for an animated art designer for creation of "Three Stooges" animated content.

R H D I N T H E N E W S

- November 13, 2007: Rutter Hobbs & Davidoff will be a sponsor of the **6th Annual Attorney-Banker-CPA Networking Breakfast**.
- October 20, 2007: Steven Papkin spoke about "You, The Media, and the Law" at the **TV Guestpert** retreat in Marina Del Rey.
- October 1, 2007: Greg Sater presented "Direct Response Advertising and the Law" at the **Electronic Retailer Association's** Annual Convention in Las Vegas.
- September 2007: Frank Melton was quoted regarding employee termination in the **Fast Company.com** article "Pulling The Trigger."
- August 21, 2007: Andrew Apfelberg was quoted in the **Los Angeles Daily Journal** regarding his handling of the acquisition of clothing retailer Sy Devore.
- August 2007: Fred Fenster was quoted regarding how physicians can screen for potentially litigious patients in the **Plastic Surgery Practice Advisor** article "Screen Patients Carefully to Avoid Those Likely to Sue."
- July 2, 2007: Bernard Resser joined Rutter Hobbs & Davidoff as a Partner in the area of Business Litigation.
- July 2007: **Andrews Litigation Reporter** published Eric Peterson's article "D & O Coverage for Bankruptcy Litigation: Does the 'Insured vs. Insured' Exception Leave Executives Exposed."
- July 2007: Natasha Shabani's article "Running an Online Contest without Running Afoul of the Law" was published in **Los Angeles Lawyer**.

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