



# Hey, Marketing Department!

Before Running That Sweepstakes, Here are a Few Things to Consider

By Andrew D. Moore and Erin Elliott

In an effort to create interest in its brand, the marketing department at Hypothetical Company (the “Company”) has elected to run a prize promotion in which the winner receives a brand new Apple iPad.<sup>1</sup> The Company has decided to call this promotion, “Company’s Summer iPad Giveaway”. In order to enter and be eligible to win the iPad, the Company requires entrants to purchase \$50.00 in Company’s merchandise online and to register for the promotion online through the Company’s Facebook page. The Company has decided to choose the winner in a random drawing. Following the promotion, the Company will use the winner’s name and picture in a marketing campaign.

As in-house counsel at the Company, there are a host of issues to consider in connection with this prize promotion. As an initial matter, you will need to examine whether the Company is conducting an illegal lottery. Additionally, there are intellectual property questions that must be addressed in connection with the promotion. Because the promotion is being conducted online and individuals will be providing information to the Company, the Company may need to update its online privacy policy.

In this article, we will provide a general overview of how to analyze whether a prize promotion is an illegal lottery or a legal sweepstakes. Additionally, we will look at some case

law pertaining to the free, alternative method of entry for a sweepstakes. Lastly, we will discuss a few additional issues a company should consider before deciding to run a prize promotion.

## Lottery v. Sweepstakes

In general, an illegal lottery involves an unauthorized activity in which the following elements are present: (1) the award of a prize, (2) determined on the basis of chance, (3) where consideration is paid.<sup>2</sup> Generally, a lottery is defined as “any scheme for the disposal or distribution of property, by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining that property, or a portion of it, or for any share or any interest in that property upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance . . . .”<sup>3</sup> If the element of consideration is eliminated in a prize promotion, such that a prize promotion consists of only chance and prize, then the prize promotion generally will be considered to be a legal sweepstakes.

In the example above, the Company’s promotion is clearly an illegal lottery.<sup>4</sup> Individuals are being required to pay money for a chance to win an iPad with the winner being decided via a random drawing. The Company has not eliminated the

element of consideration through the creation of a free alternative method of entry for the prize promotion.

## Alternative Method of Entry

If a company wants to offer a sweepstakes that involves a paid method of entry, the company must offer participants an opportunity to enter the sweepstakes for free in order to avoid conducting an illegal lottery in most states. In order for a prize promotion to be a legal sweepstakes, an individual must be able to enter without having to pay for the chance to win. “A promotional scheme is illegal where any and all persons cannot participate in a chance for the prize and some of the participants who want a chance to win must pay for it.”<sup>5</sup> Therefore, opportunities to participate in a sweepstakes must not only be available via purchase; an alternative method of entry (“AMOE”) must be “freely given away on a reasonably equal basis without respect to” a purchase.<sup>6</sup> The free, AMOE must be as easily available and must be accorded the same status in the sweepstakes as the entries tied to a payment.<sup>7</sup>

In a 1989 case, the Massachusetts Supreme Court analyzed a prize promotion involving a device in which people deposited coins to win a prize; the scheme featured an AMOE in which a participant would mail in a stamped, self-addressed envelope along with a card with the participant’s name and address.<sup>8</sup> The Frate court determined that the promotion involved a “cumbersome requirement to request free play by mail, rather than immediately on the site of the game machine itself . . . [which posed] a significant practical disadvantage to a player wishing to play for free as compared to a paying player.”<sup>9</sup>

Similarly, in examining a game of chance requiring participants to purchase entry forms, an Illinois appellate court determined that an illegal lottery was present because the “obstacles to obtaining a free entry blank [were] so formidable, the publisher’s offer of a free entry blank [had to] be regarded as chimerical.”<sup>10</sup> The publisher in the *G.A. Carney* case sold entry forms to the “Daily Devil” promotion in issues of the *Minority News Review* which were sold for \$1.00, with the free entry forms being available at the office of the publisher.<sup>11</sup> The evidence pertaining to the free AMOE presented to the Illinois appellate court was the following:

The publisher’s name and address do not appear on the three-part entry form itself; there is no listing for the *Minority News Review* in the Chicago telephone directory or in the directory of the building where [the publisher] resides; the hotel staff does not and will not distribute free entry forms for the publisher and will not assist anyone in entering the contest or in locating the “office” of the *Minority News Review*; [the publisher], who has no employees, is not always at his office during normal business hours and will not send free entry forms through the mail; and although he claimed to have given away two or three free entry forms (an infinitesimally small number in relation to the number of issues sold), [the publisher] could not produce any records to substantiate even this claim.<sup>12</sup>

The *G.A. Carney* court determined that an illegal lottery existed; in reaching this determination, the court noted:

The controlling fact in the determination of whether a given scheme or business is a lottery is determined by the nature of the appeal which the business makes to secure the patronage of its customers. If, as here, the controlling inducement is the lure of an uncertain prize, then the business is a lottery.<sup>13</sup>

Conversely, when a company runs a sweepstakes promotion as an advertising strategy to increase sales and provides an AMOE, a court likely will not determine that the prize promotion is an illegal lottery.<sup>14</sup> In a 1983 Maryland case, the sponsor of a prize promotion widely publicized the availability of the AMOE:

Among the various steps [the sponsor] took to insure that consumers were informed of the availability of free caps, [the sponsor] included the mailing address or toll free telephone number for free caps on its Official Rules and other point-of-sale materials. [The sponsor] circulated among its employees information to be distributed to consumers regarding free caps. [The sponsor] actually distributed, either directly or through its [advertising] agent, . . . a substantial number of free caps during the promotion.<sup>15</sup>

While other courts have reached similar conclusions, to date there is no Nevada case law concerning the validity of AMOE’s. In a recent high profile case involving a promotion featured in connection with “American Idol” and “Deal or No Deal”, the producers of those shows settled a class action lawsuit for approximately \$55 million.<sup>16</sup> In these prize promotions, participants sent text messages in an effort to win a prize, with premium text messaging rates applying.<sup>17</sup> The sponsors of the promotion set up a free AMOE online. Based on this free AMOE, defendants moved to dismiss plaintiffs’ claims that the promotion was an illegal lottery.<sup>19</sup> The federal district court, however, did not dismiss the case and, ultimately, the defendants settled the class action for over \$50 million with defendants also agreeing that they would not create, sponsor, or operate any sweepstakes where “entrants are offered the possibility of winning a prize, in which people who enter via premium text message do not receive something of comparable value to the premium text message charge in addition to the entry.”<sup>20</sup>

In less high profile litigation, other courts had determined that the mere presence of an AMOE does not make an illegal lottery into a legal sweepstakes. In *Sniezek v. Colorado Dept. of Revenue*, a Colorado appellate court analyzed a scheme in which a customer could purchase an “Ad-Tab” from a dispensing machine for one dollar per tab.<sup>21</sup> An Ad-Tab is a paper ticket that contains a discount coupon on one side, and a cash prize game piece on the other.<sup>22</sup> A person could also obtain a game piece by requesting one via mail at no charge.<sup>23</sup> Even though a free AMOE was present, the *Sniezek* court determined that the prize promotion was an illegal lottery because the prize promotion did not promote the sale of a product. The prize promotion in this particular case did not involve customers paying consideration and receiving a product of equal value in return.<sup>24</sup> The *Sniezek* court noted that the Ad-Tab scheme “is designed to promote the sale of the ‘win cash’ feature of the Ad-Tab, not the coupon feature, and that the coupon is merely incidental to the game portion of the ticket”. Therefore, the AMOE did not turn an illegal lottery into a legal sweepstakes. To come to this conclusion, the court highlighted the following factual circumstances:

(1) [T]he printing on the machine advertising the chance to win money is more prominent than the advertising for the opportunity to purchase merchandise with a coupon;

(2) [T]he layout of the coupons, their size and color, and the method for determining a winner are nearly identical to a Colorado scratch lottery ticket;

(3) [T]he products available for purchase through the coupons are not displayed anywhere on or near the machine such that it is impossible for a consumer to know in advance what type of product the coupon is for;

(4) F.A.C.E. does not keep track of how much revenue is generated by the sale of merchandise and considers the cost of the merchandise to be an expense associated with doing business; and

(5) [I]n 2002, F.A.C.E. sold over 20 million Ad-Tabs, but only received 40 requests for free entries.<sup>25</sup>

What does all this mean? If a sponsor conducts prize promotions as an occasional and ancillary component of its primary business, the sponsor likely does not need to worry about the state Attorney General paying a visit. And why is that? It is because a sponsor running a prize promotion as an ancillary component of its business for advertising purposes is not interested in running “thinly veiled lotteries”, such as the text message games and tab card games courts have determined to be illegal lotteries.

In an effort to counteract efforts to use the AMOE exception to devise schemes that are essentially lotteries, some states have enacted statutes to clearly state who is allowed to conduct prize promotions. For instance, Nevada law exempts from the definition of a “lottery,” promotions in which individuals have “not paid or promised to pay any valuable consideration by virtue of having” engaged in a transaction in which they received fair value for their payment, accepted products on a trial basis, or been present at a particular time and place “as the sole basis for having received a chance to obtain property pursuant to an occasional and ancillary promotion conducted by an organization whose primary purpose is not the operation of such a promotion.”<sup>26</sup> Michigan exempts from its general lottery prohibition “a lottery or gift enterprise conducted by a person as a promotional activity that is clearly occasional and ancillary to the primary business of that person.”<sup>27</sup> Florida recently amended its statute to include the following definition for “game promotion” – “contest, game of chance, or gift enterprise, conducted within or throughout the state and other states in connection with the sale of consumer products or

services . . . .”<sup>28</sup> As noted by the Florida Department of Agriculture and Consumer Services, in revising the game promotion statute, the Florida Legislature that the statutes governing prize promotions were “enacted to regulate certain game promotions or sweepstakes conducted by for-profit commercial entities on a limited and occasional basis as an advertising and marketing tool and incidental to substantial bona fide sales of consumer products or services.”<sup>29</sup>

## Other Issues to Consider

In addition to including a free AMOE so that the Company’s promotion discussed above is not an illegal lottery, there are intellectual property law concerns related to the Company’s promotion. By including “iPad” in the title of the promotion, the Company is clearly using “iPad” for a commercial purpose. By including “iPad” in the title, the Sponsor has created the impression that Apple is somehow involved in the promotion. As general counsel for the Company, you must either obtain a limited license to use Apple’s registered trademark “iPad” in the title of the promotion or you must rename the promotion.

By wanting to use the winner’s name and likeness for promotional purposes, the Company has created another intellectual property concern. Nevada has a statutory right of publicity. Before the winner’s name and likeness may be used for commercial purposes, the Company must obtain written consent from the winner.<sup>30</sup>

Because the Company is requiring entrants to register for the promotion on the Company’s Facebook page, the Company must be mindful of Facebook’s policies. Given the importance of the Company’s online marketing efforts via Facebook, the Company wants to be sure that it complies with Facebook’s terms of use. Facebook has published promotion guidelines requiring certain disclosures be noted in the official rules for the promotion. The Company needs to include the following in the promotion’s official rules: (1) “a complete release of Facebook by each entrant or participant”; (2) “[a]cknowledgment that the promotion is in no way sponsored, endorsed or administered by, or associated with, Facebook”, and (c) [d]isclosure that the participant is providing information to [Company] and not to Facebook.”<sup>31</sup>

Considering that participants are submitting their registration information for the promotion to the Company and that such registration information includes phone numbers, email address, home address, and employment information, the Company must be sure that it has updated its website privacy policy to account for how it will use the data it collects from the participants in the prize promotion.

## Conclusion

Given the ease with which prize promotions may be conducted online, a company’s marketing department may view sweepstakes as a quick and relatively easy way to market the company. However, the prize promotion arena is fraught with legal issues that many people do not consider. These issues should be considered because the potential for criminal or civil liability is present. For instance, in Nevada “a person who contrives, prepares, sets up, proposes or draws any lottery . . . is guilty of a misdemeanor.”<sup>32</sup> Additionally, a violation of



Nevada's deceptive trade practices statute pertaining to sales promotions may result in the payment of civil penalties if a complaint is brought by the district attorney in any Nevada county or by the Nevada Attorney General.<sup>33</sup>

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<sup>1</sup> For purposes of this article, the term prize promotion will be a generic term to refer to any promotion conducted by a company. A sweepstakes will refer to a promotion in which the winner is decided by a random drawing. A contest will refer to a promotion in which the winner is decided based on skill and judged pursuant to a set criteria of elements. The company running a promotion will be referred to as sponsor.

<sup>2</sup> See *F.C.C. v. American Broadcasting Co.*, 347 U.S. 284, 289-91 (1954).

<sup>3</sup> NRS 462.105(1).

<sup>4</sup> Under Nevada law, a nonrestricted gaming licensee may conduct a promotion at its establishment that would otherwise qualify as a lottery in Nevada only. See Nev. Rev. Stat. 462.105(2).

<sup>5</sup> *People v. Shira*, 62 Cal. App. 3d 442, 459 (Cal. Ct. App. 1976).

<sup>6</sup> Ky. Op. Att'y Gen., 81-259, 2-799, 2-801 (1981).

<sup>7</sup> See, e.g. Tex. Att'y Gen. Op. L0-008 (1997).

<sup>8</sup> *Commonwealth v. Frate*, 537 N.E.2d 1235, 1235-36 (Mass. 1989). We have not provided a discussion of Nevada case law pertaining to the issue of how to structure an alternative method of entry in order to avoid conducting an illegal lottery because Nevada courts have not addressed this issue.

<sup>9</sup> See *Id.*; see also *Commonwealth v. Webb*, 860 N.E.2d 967, 971 n. 11 (Mass. App. Ct. 2007).

<sup>10</sup> *G.A. Carney, Ltd. v. Brzeczek*, 453 N.E.2d 756, 761 (Ill. App. 1983).

<sup>11</sup> *Id.* at 760.

<sup>12</sup> *Id.* at 761.

<sup>13</sup> *Id.*

<sup>14</sup> *Mid-Atlantic Coca-Cola Bottling Co., Inc. v. Chen, Walsh & Tecler*, 296 Md. 99, 104 (Md. App. 1983).

<sup>15</sup> *Id.* at 104.

<sup>16</sup> The settlement involved the refund of all premium text message charges paid by the class (approximately \$50-51 million) and a payment for all of plaintiffs' attorneys' fees and costs (approximately \$5 million).

<sup>17</sup> *Couch v. Telescope Inc.*, 611 F.3d 629 (9th Cir. 2010).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> See *Herbert v. Endemol USA, Inc.*, Final Approval Order and Judgment, Case No. 2:07-cv-03537-JHN-VBK (C.D. Cal. Dec. 20, 2011).

<sup>21</sup> *Sniezek v. Colorado Dept. of Revenue*, 113 P.3d 1280, 1283 (Colo. App. 2005).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*; see also *F.A.C.E. Trading, Inc. v. Todd*, 903 A.2d 348 (Md. App. 2006); *U.S. v. Davis*, 690 F.3d 330 (5th Cir. 2012).

<sup>26</sup> NRS 462.105(3).

<sup>27</sup> Mich. Comp. Laws § 750.372a(2).

<sup>28</sup> Fla. Stat. § 849.094(1)(a).

<sup>29</sup> "Game Promotions/Sweepstakes Information for Businesses", found at <http://www.800helpfla.com/sweepsbus.html>.

<sup>30</sup> See NRS 597.790.

<sup>31</sup> See Section E of "Facebook Pages Terms" found at [https://www.facebook.com/page\\_guidelines.php](https://www.facebook.com/page_guidelines.php) (revised July 1, 2013).

<sup>32</sup> NRS 462.250.

<sup>33</sup> See NRS 598.0999(1)-(2). And, if the sponsor of a promotion "knowingly and willfully" engages in a deceptive trade practice, the sponsor may be found guilty of a misdemeanor and be subject to damages based on "profits derived from the knowing and willful engagement in a deceptive trade practice and treble damages on all damages suffered by reason of the deceptive trade practice." *Id.* at 598.0999(3).

