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January/February 2011

Mobile Sweeps Promos Left in Limbo by Federal Courts - Mitigating Risks is Crucial for Marketers

Marketing campaign review often falls to intellectual property counsel, especially in-house. This requires an understanding of regulatory schemes governing advertising and promotions. Both mobile marketing and sweepstakes are highly regulated and presented traps for the unwary. Mobile sweepstakes are all the rage. This article outlines the issues you need to know when a mobile campaign crosses you desk.

The mobile phone is becoming the chief means of obtaining and sending information and communications for most of us, particularly youth and young adults. It is no surprise then that mobile marketing schemes abound. Sweepstakes have become popular mobile phone promotional tools for marketers because the chance of a prize motivates the interaction. However, because sweepstakes and contests are highly regulated, a marketer using a mobile device must comply not only with mobile-messaging laws and regulations, such as the federal Telephone Consumer Protection Act[1] that requires specific and express consent from a consumer before a marketing message can be sent via text, but also with those regulating sweepstakes, lotteries and gambling. Further, mobile sweeps have raised legal questions regarding the sufficiency of the traditional approach to making a promotional sweepstakes legal – the free alternative method of entry ("AMOE"). A recently decided Federal appeals case that many marketers hoped would provide greater clarity failed to do so. The legal uncertainty is not likely to change soon, particularly given that marketers face a patchwork of 50 state laws and some prior decisions predating mobile technology are unclear or unfavorable.

Indeed, text messaging as a sweepstakes-entry method has brought much consumer litigation in recent years and a recent Federal Court of Appeals decision invites rather than staves off class action law suits against mobile marketers. Class action plaintiff's lawyers purport to represent all allegedly affected consumers and thereby position themselves to extract significant fees by bringing these cases. Marketers, especially big brands with deep pockets, present a tempting target for these actions. Thus, marketers that run mobile sweeps should consider structural approaches that mitigate risks. Further, courts, Attorneys General ("AG") and state legislatures that eventually may clarify the rules for mobile sweeps should adopt a permissive approach that permits, rather than fetters, the mobile promotions industry.

To understand the legal complexities confronting mobile sweeps promoters, one must understand the history of lottery and gambling laws in the United States. Lotteries are exclusively government-run, where permitted, and are prohibited outright in many states. A lottery essentially has three key determinative elements: prize; chance; and consideration. In short, one cannot create a lottery as part of a legal promotion and, accordingly, sponsors must remove one of the three lottery elements from the promotion. In addition, care also must be taken to avoid laws against gambling, generally defined as payment of consideration for a chance to win something of greater value. Consideration can come in forms other than cash wagers or product purchasing, such as short messaging-service ("SMS") text or 900-number phone charges, service fees, collection of consumer contact information for marketing purposes or engaging in activities that require substantial time or effort. Some states have also looked at an intrinsic commercial benefit to the sponsor as a form of consideration.

A sweepstakes is a legal promotion that awards a prize to a winner (or winners) selected by chance, but which lacks consideration. Most states have generally exempted promotional prize-gaming

This article appeared in the January/February 2011 issue of LANDSLIDE, A Publication of the ABA

activities that have an AMOE (i.e., alternative free method of entry) – also known as "flexible participation" – from prohibitions, because no reason exists to be excessively protectionist if players do not have to exchange consideration for participation. This is where the "No Purchase Necessary" condition comes from. However, some states have a taken a narrow approach to flexible participation, particularly when promotions are revenue generating schemes as premium text sweepstakes are, and it is this vulnerability that is being exploited by the class action plaintiff's bar. Indeed, on Dec. 11, 2007, the well-known New York-based plaintiff's firm Milberg Weiss filed a class-action suit against NBC and others regarding an SMS-text game related to the TV show America's Got Talent[2], which was consolidated with a number of similar cases involving other TV show text promotion cases (hereafter the "Couch cases"), and became lead counsel in the consolidated cases.

The promotional marketing industry was anxiously awaiting a Federal appeals court decision in the Couch cases that had gone up to the Ninth Circuit Court of Appeals ("Ninth Circuit") following the federal trial court's ruling that plaintiffs had stated a claim under state laws regarding SMS text sweepstakes campaigns in connection with the American Idol, Deal or No Deal, 1 vs. 100, and The Apprentice television programs. The trial court had denied the defendants' motion to dismiss the claims, finding: "Defendants' offers of free alternative methods of entry do not alter the basic fact that viewers who sent text messages paid only for the privilege of entering the Games. They received nothing of equivalent economic value in return."[3] The defendants then requested, and the trial court certified, an interlocutory appeal seeking a certification to the California Supreme Court as to if a claim had been properly stated under state law. The Ninth Circuit rejected that petition in July, 2010 on technical grounds finding that the legal standard for an appeal and certification – a substantial ground for difference of opinion resulting from conflicting judicial opinions – had not been shown.[4] Notwithstanding debate about the correctness of that finding, the Couch cases will now most likely proceed in the trial court, or settle, and it may be years, if ever, before the legal issue in need of clarification can be resolved.

Lingering Legal Uncertainty Over AMOE

The lingering legal uncertainty for mobile sweeps operators is whether they can use an AMOE to make a mobile sweeps, especially one that utilizes premium charges to generate revenue, a legal venture. As one court explained, the reasoning behind accepting flexible participation or AMOE in taking sweepstakes out of the prohibitions on lotteries and gambling: "when a promoter expects to gain increased sales from a sweepstakes, this benefit is not consideration if consumers needn't purchase to participate"[5]. In earlier years the courts struggled with AMOE, but most states now adopt the AMOE[6] approach and reasoning.

California courts, for example, have accepted the concept of AMOE / flexible participation and also noted that if an AMOE is offered, then the fact that most participants did not take advantage of it is not relevant.[7] The California Supreme Court has concluded that entrants of a prize drawing who made a purchase "could not be said to have paid consideration for the prize tickets since they could have received them for free."[8] But not all courts in all states at all times have agreed. For instance, a Georgia court, looking at consideration from an entrant's perspective, held that if entrants paid consideration by purchasing what the promoter is selling, then the scheme is an illegal lottery.[9] It should be noted that entrants who purchased products there were eligible for a better prize than those who did not make a purchase of at least $10, but this was not the basis of the court's decision. Decisions from the early 1970's by Ohio and Washington courts have reached similar outcomes.[10] Notwithstanding some now largely historical judicial rejection of the flexible participation approach of AMOE, it has become custom and practice for the industry nationwide and for good reason – it protects consumers, does not create gambling in disguise and permits marketers to use a popular and well established form of promotion. The advent of mobile technology should be applied in this context and only schemes that lack a proper AMOE should be prohibited.

A proper AMOE must be clearly disclosed, universally available to all participants and equal in dignity to entries accompanied by consideration. This is typically done by means of the free mail in or online entry method, which entries go into the same drawing for the same prize pool as entrants who bought products or otherwise provided a form of consideration. Because mobile-text sweepstakes may result in some participant charge (though unlimited data plans are now common), and premium-text sweepstakes absolutely result in consumer charges and generation of promoter revenue, AMOE availability as mechanism for a promotion's legality is crucial for the viability of these promotions. As opposed to traditional product promotions, however, mobile-text

sweepstakes present a unique challenge because some states have gambling or lottery statutes, AG opinions or case law prohibiting any "Game for game's sake" where any entrant "pays to play," and so, an AMOE may not make the promotion legal if the entrants who paid consideration via a text charge do not receive something of value for the payment independent of the entry, even in some states that otherwise permit flexible participation.

In the case of a sweepstakes promoting the sale of traditional products, the product purchaser has received a product (e.g., the hamburger or packaged good being promoted) and the AMOE entrant has paid nothing. It could be argued then that when the value associated with the purchase entry appears to be nothing more than a vehicle for a chance to win, consideration is being paid for no purpose but a chance to win and is, thus, a pure wager.[11]

To help understand this in a mobile-text sweepstakes context, look back to how some states have treated 1-900, phone-card, coupon-scheme and trading-card promotions. In these promotions, no product, or a product of minimal value, accompanied a sweepstakes entry, and some jurisdictions concluded that an AMOE, under these circumstances, did not insulate the game from lottery or gambling laws. For instance, the Georgia AG found 1-900 sweepstakes where callers were charged a premium for the call constitute an illegal lottery despite AMOE availability, based on Georgia courts' historical rejection of flexible-participation/AMOE schemes and finding of consideration if any participant "paid consideration in part for a chance to win a prize".[12] Federal courts applying Georgia law applied this same reasoning in a 1984 toll call sweeps case, resulting in a $1 Million punitive damages award being upheld against AT&T.[13] The opposite result, however, has been reached by a court looking at 1-900 toll call sweepstakes with an AMOE under New Jersey law.[14]

The question of whether a product of any value was received by entrants who did not exercise an AMOE has also been examined concerning promotions in which products were savings coupons, collector's trading cards or a minimal-value phone card.[15] In one trading-card case, Alaska's AG found a company selling "informational cards" – ones with an Arctic animal photo on the front and information about the animal on the back – with an attached game piece for $1 was guilty of promoting an illegal game, even though an AMOE was available, because the company had never sold the cards without the game pieces attached, had no intention of doing so and almost all purchasers discarded the "information card" after playing the game piece. The Alaska AG concluded, therefore, that unlike a limited-time retail sweepstakes, the game was the company's product rather than incidental to a real product.[16] The North Dakota Supreme Court affirmed a finding against an operator of vending machines that sold a two-minute pre-paid phone card accompanied by an instant-win game piece for $1, concluding that the phone cards provided no real value to participants and thus "the element of consideration is not missing."[17] The Texas Attorney General reasoned similarly in addressing phone card promotions.[18] Similar schemes were found in other states to be illegal despite the sale of a phone card where the lure of the chance to win was the controlling inducement for the purchase.[19] The California AG warned that such schemes were an illegal lottery, despite an AMOE via a mail-in request for a free game piece, because the point of sale indiscriminately offered a free chance to win.[20] In addition, the California Attorney General Consumer's Sweepstakes Guide states "For a sweepstakes to be legal, you must be given an opportunity to enter without cost of any kind."[21] A California court soon after found that telephone-card vending machines with cash prizes of $1 to $100 provided no value to participants, and so the promotion was a form of illegal gambling, and the machine that dispensed the phone cards and game pieces were illegal gambling devices.[22] The AGs of Alaska, Tennessee and Texas have distinguished these types of vending schemes from limited-time retail-sales sweepstakes promotions where products would otherwise be marketed at the same retail price without any promotional giveaway.[23]

In contrast, a court looking at a phone-card promotion that found real value present aside from a chance to win, held that no gambling-law violation should be found. In Mississippi Gaming Commission v. Treasured Arts, the Mississippi Supreme Court found that a sales scheme in which participants paid $2 to purchase a three-minute pre-paid phone card and receive a scratch-and-win game piece was not an illegal gambling operation because, in part, the operator of the promotion itself had paid nearly $2 to purchase the same phone cards that it was selling to participants for $2 and an AMOE was offered.[24] The fact that participants did not overpay for the phone cards to acquire a game entry led the court to conclude that no illegal gambling had occurred.[25] Accordingly, premium text sweepstakes promoters can minimize their risk by providing real products or services, otherwise available for sale at the same approximate verifiable fair market value, to

entrants who enter a sweeps by text, in addition to providing an online or mail-in AMOE for those that do not elect to buy that product via premium text charge. For instance, ring tones or wallpapers could be sold and delivered via text in exchange for the premium text charge if these digital products are otherwise available and marketed for purchase for at least as much as the premium text charge. The sweepstakes could be operated so as to promote those digital item sales. Such an approach should increase the likelihood that the program would be found to be legal.

The Risk of Operating Text Sweepstakes

Although the 1-900, and phone-card and trading-card cases can be differentiated from mobile sweeps promotions, especially with regard to typical text sweepstakes designed to promote a legitimate product or sale that is independent of the game, until courts apply the law to this new technology, operating a text sweepstakes, particularly when premium charges occur, carries a risk. Premium text sweeps should be avoided unless the premium change is for an otherwise available legitimate product, such as a digital item, sold at fair market value. Also, beware that every state is free to interpret its lottery and gambling laws differently, so it is unlikely that national certainty will ever be possible. Residents of potentially problematic states might be excluded from eligibility.[26]

Meanwhile, courts and AGs, and possibly state legislatures, need to provide industry with clarity on a number of mobile sweeps issues, including:

- If only third party consideration is paid to the mobile carrier (e.g., basic text charges) and the sponsor does not profit from sharing of charges, will an AMOE suffice to make the promotion legal?
- If the SMS action is tied into meaningful interaction with a television show, particularly where structured to be apart from the sweepstakes game play, and an AMOE is offered for the chance to win but not for the opportunity to engage in the participatory television activity, will that take it out of the pay-to-play and game-for-game's-sake context?
- What types of products or benefits can be given to SMS text participants that will be deemed of real value apart from a chance to win that's sufficient to take the scheme out of a pay-to-play situation? and
- Is flexible participation / AMOE truly still disfavored in some states notwithstanding the widespread use of the practice in sweeps operating in these states without any recent objection by regulatory authorities.

The smartphone in our pockets is rapidly replacing the personal computer and will continue to do so as technology and transmission speeds improve. This will increase the demand for mobile marketing. Given the complex and still evolving legal issues regarding mobile sweeps and other marketing, it is essential that marketers using mobile media work closely with regulatory counsel to structure and operate campaigns to minimize the inherent risks associated with these promotions.

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[1] 47 U.S.C. § 227
[2] Glass v. NBC Universal Inc., Case No. CV07-0844-JFW (C.D. Cal.).
[3] Couch v. Telescope Inc., Case Nos. CV 07-3916, 3537, 3643, 3647-FMC (C.D. Cal., order filed Nov. 30, 2007).
[4] Couch v. Telescope Inc., Case Nos. 08-56357, 08-56360 (9th Cir., order filed July 8, 2010).
[5] *See* Pepsi Cola Bottling Co. of Luverne, Inc. v. Coca-Cola Bottling Co., Andalusia, 534 So. 2d 295, 297 (Ala. 1988), *but compare* Featherstone v. Indep. Serv. Stations Assn., 10 S.W.2d 124, 125–27 (Tex. Civ. App. 1928) (inducement of patronage is consideration and AMOE is insufficient).
[6] *Compare* People v. Cardas, 137 Cal. App. Supp. 788 (1933) (movie theater "bank night" drawing not a lottery due to free method of entry) *with* State v. Danz, 140 Wash. 546 (1926) (movie theatre that held "bank night" prize drawing violated lottery law despite free method of entry). The *Cardas* court specifically disapproved of the contrary decision in *Danz*.
[7] Cal. Gasoline Retailers v. Regal Petrol. Corp. of Fresno, Inc., 50 Cal. 2d 844 (Cal. 1958).
[8] *Id.*
[9] Tierce v. State, 122 Ga. App. 845 (1970) (getting card punched at supermarket register qualified consumers for prize drawing).
[10] *See* Kroger v. Cook, 265 N.E.2d 780 (Ohio 1970) (because majority of sweeps entries got entry with product purchase, availability of AMOE insufficient since a portion of grocery product sales proceeds funds the scheme, thus resulting in some entrants paying for a chance to win); State *ex rel*. Schillberg v. Safeway Stores, Inc., 450 P.2d 949 (Wash. 1969) (requiring grocery store visit to get entry, even where no purchase was required, was illegal lottery); *see also* Op. Wash. Att'y Gen., AGLO 1971 No. 51, 1971 WL 122969 (Mar. 24, 1971) (following *Schillberg*).
[11] *See* People v. Shira, 133 Cal. Rptr. 94 (Cal. App. 1962) (distinguishing California cases finding no consideration where an AMOE existed for promotions where a product other than the game itself was being merchandised; court also noted that the AMOE was not available to all)
[12] 1984 Op. Att'y Gen. GA 182 (1984) (finding Georgia law still rejects flexible participation).
[13] Kemp v. AT&T, 393 F.3d 1354 (11th Cir. 2004). More recently, a class action challenging a premium-text sweepstakes under Georgia law permitting the recovery of lost gambling wagers was unsuccessful, the Georgia Supreme Court holding that since the premium-text charge was a fee that did not "hang in the balance" between two parties, it was not "gambling consideration" under the act. Hardin v. NBC Universal, Inc., 283 Ga. 477, 660 S.E.2d 374 (Ga. 2008). However, the decision did not address potential claims that might be brought under the Georgia lottery laws.
[14] Glick v. MTV Networks, 796 F. Supp. 743 (S.D.N.Y. 1992) (AMOE sufficient under New Jersey law to eliminate consideration in 1-900 sweepstakes because entrants could have entered by mailing a request for a toll-free number or mailing an entry card).
[15] *See* F.A.C.E. Trading, Inc. v. Dep't of Consumer & Indus. Servs., 717 N.W.2d 377 (Mich. App. 2006); Sniezek v. CO Dep't of Revenue, 113 P.2d 1280 (Colo. App. 2005); Face Trading v. Carter, 821 N.E.2d 38 (Ind. App. 2005).
[16] Op. Alaska Att'y Gen. No. 663-93-0004 (1992).
[17] Midwestern Enters. v. Stenehjem, 625 N.W.2d 234 (N.D. 2001) (The court noted that the North Dakota lottery law prohibits any entrant from giving consideration to win, that North Dakota had not established an exception to the gambling and lottery laws for retail sales promotions, and that some states have refused to find that an AMOE for retail sales promotions is sufficient to eliminate consideration, thus suggesting that it may have still found the scheme to be a lottery even if it had found that the phone cards were sold for fair market value.)
[18] Tex. Att'y Gen. Op. Letter 97-008 (1997) ("in order to avoid characterization as a lottery, a promotional scheme must also involve the legitimate sale of a product. If a product of little or no value is being sold in conjunction with a sweepstakes ticket, the consideration may be deemed to have been paid for the privilege of entering the sweepstakes.").
[19] *See, e.g.*, Ill. Att'y Gen. Op. No. 98-010, 1998 WL 401609 (1998).
[20] 1:1 Cal. Att'y Gen. Div. of Gambling Control Law Enforcement Advisory (May 17, 1999).
[21] *Consumers: Sweepstakes*, http://ag.ca.gov/consumers/general/sweepstakes.php (as of Jan. 31, 2008).
[22] People *ex rel.* Lockyer v. Pac. Gaming Techs., 82 Cal. App. 4th 699 (2000).
[23] Alaska Att'y Gen. Op. No. 663-00-0212 (2000); Op. Att'y Gen. Tenn. No. 02-089 (2002); Att'y Gen. Tex. Op. Letter 97-008 (1997).
[24] 699 So. 2d 936, 940 (Miss. 1997).
[25] *Id*
[26] States to consider carefully include Alaska, California, Colorado, Georgia, Indiana, Maryland, Minnesota, Montana, New York, North Dakota, Ohio, Texas, and Washington.