

Playing the Game by the Rules: A Practical Guide to Sweepstakes and Contest Promotions

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Contests and sweepstakes are popular promotional techniques used widely in franchising. If handled correctly, they can be effective tools to generate consumer interest, revenue, and brand awareness. If handled improperly, however, they can have expensive and embarrassing repercussions, ranging from negative publicity to civil and criminal liability. This article provides an overview of key legal issues to consider when structuring, conducting, and advertising such promotions, as well as practical advice for complying with applicable state and federal laws and regulations.

STRUCTURING PROMOTIONS— STATE LOTTERY LAWS

Lottery is generally defined as any game in which the elements of prize, chance, and consideration are present.¹ Most states reserve the right to conduct lotteries and penalize nongovernmental entities for conducting games that feature all three elements of a lottery.² By eliminating any one element, i.e., prize or chance or consideration, a franchise system can legally sponsor a promotional game without violating state lottery laws.

A prize can be anything of value awarded to the winner of a game.³ Money, trips, cars, event tickets, and electronics are typical prizes awarded. Because it is the prize that entices consumers to participate in promotional games, eliminating the element of prize is not a good option for those seeking to avoid state lottery laws. Either chance or consideration is typically eliminated, depending on the preference of the sponsor, because this can be done without compromising the allure or success of the game.

Games of Chance

A game of chance is one in which the sponsor gives away a prize to a winner who is chosen by a random event outside the winner's control.⁴ Games of chance take many forms, including sweepstakes and instant-win games. Because games of chance necessarily include the elements of prize and chance, the sponsor must ensure that participants are not required to provide consideration to participate. Thus, the sponsor must be able to identify those activities that constitute consideration and must offer participants a free alternative method of entry (AMOE) when consideration is present.

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Identifying and Eliminating Consideration

Consideration is present when the sweepstakes participant gives the sweepstakes sponsor money or something of value and receives an opportunity to play the game.⁵ Consideration is most certainly present when the purchase of a product or service is required for entry in the sweepstakes. Not all consideration involves the payment of money or the purchase of a product or service; consideration may also be found in nonmonetary methods of entry if a substantial degree of effort by the participant is required. When a prospective contestant must complete lengthy surveys, make multiple trips to a store location, refer a friend, or otherwise devote a substantial amount of time in order to participate in a sweepstakes, consideration likely is present.⁶ On the other hand, activities requiring minimal effort, such as

listening to the radio, watching a television program, or visiting a single store on one occasion, without being required to make a purchase or pay a fee, likely are not consideration.⁷

If consideration is involved in the sweepstakes, there must be a free AMOE. As the name suggests, a free AMOE allows participants to enter a sweepstakes without purchasing a product, paying money, devoting a substantial amount of time and effort, or otherwise giving anything to the sweepstakes sponsor in exchange for the opportunity to participate. Frequently used free AMOEs include submitting an entry form by mail or obtaining an entry form by calling the sponsor.⁸

On its face, offering a free AMOE to eliminate the element of consideration from a sweepstakes seems fairly simple, but sweepstakes sponsors often fail to appreciate the full range of circumstances that can constitute consideration. Moreover, the advent of new technologies used to enter sweepstakes can add to the difficulty of identifying consideration. For example, completing and submitting an entry form online is now a commonly used and widely recognized free AMOE. At one time, however, the State of Florida took the position that entering a game via the Internet constituted consideration because of the cost associated with subscribing to an Internet service provider.⁹ Florida has since changed its position, acknowledging that Internet

access is commonplace and pervasive; potential participants likely would not subscribe to an Internet service solely for the purpose of entering a game; and the Internet is accessible and free in public libraries and other community centers. Congress adopted this reasoning in the Federal Internet Gambling Prohibition Act, which expressly excludes Internet access from the definition of *consideration*.¹⁰

Text messaging and other emerging methods of entry may be subject to the same sort of evolving analysis by regulators charged with determining what constitutes consideration. Because text messaging, at least for now, is not a well-established method of entering a sweepstakes, sponsors that allow this method of entry are also offering a free AMOE as a hedge against the risk that text message entry will be deemed to constitute consideration.¹¹ As this practice illustrates, if there is any question about whether a method of entry may constitute consideration, the safest route is to offer participants a confirmed free AMOE.

Pay-to-Play Games

In a traditional sweepstakes or other game of chance, any consideration provided by the participant is for the purchase of a legitimate product or service or something else of value. Sweepstakes sponsors should be wary of structuring a sweepstakes in which the consideration is provided only for the opportunity to play the game. Such a pay-to-play structure may violate state lottery and gambling laws, and offering a free AMOE will not legitimize this otherwise unlawful game.¹²

As with all matters related to sweepstakes and games of chance, identifying what constitutes a pay-to-play game is not always straightforward. For example, in *Hardin v. NBC Universal, Inc.*, plaintiffs alleged that a text messaging game conducted during the broadcast of NBC's *Deal or No Deal* violated Georgia's gambling law.¹³ Participants could enter and play the game by text messaging from their cell phones at a charge of ninety-nine cents per message. The game sponsors and promoters also offered a free AMOE. Plaintiffs argued that because they did not receive anything of value for the premium charge, the money they paid to enter the contest was an illegal bet. The court rejected this argument, finding that the text messaging fees did not amount to illegal bets because the fees were paid per text message regardless of the outcome of the promotion.¹⁴

Game sponsors in *Couch v. Telescope, Inc.* moved to dismiss similar claims asserted by a class of individuals on virtually the same facts, although California's lottery law was the controlling authority.¹⁵ The game sponsors in *Couch* argued that their game was a lawful lottery because, in addition to the text message entry method, there was a free AMOE.¹⁶ In refusing to dismiss the action, the *Couch* court stated that "[d]efendants' 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."¹⁷

Courts and state attorney generals have also questioned the legality of sweepstakes in which the product or service purchased merely facilitates participation in the game. For example, in *Barber v. Jefferson County Racing Association*, the game promoter sold Internet time on an encoded card that also provided a predetermined number of sweepstakes entries.¹⁸ The purchased cards were used at a terminal, which simulated a slot machine, that "read" the entries on the card.¹⁹ The purchase of Internet time was held to be incidental to the customer's purchase of an opportunity to play the game. The availability of a free AMOE did not convert this otherwise unlawful gambling scheme into a lawful sweepstakes.²⁰

ALL METHODS OF ENTRY MUST BE TREATED ALIKE

Even after a sweepstakes sponsor has identified consideration and offered a free AMOE, the sponsor could nevertheless violate state lottery laws if it does not give each method of entry equal treatment. For example, a sponsor may not give better odds of winning to participants who enter a sweepstakes by purchasing a product than to those who enter by using a free AMOE.²¹ Moreover, the purchase-based entry method and the free AMOE must be equally available to participants. A sponsor may not directly or indirectly encourage participants to enter via the purchase-based method.

Litigation involving the makers of Tylenol and CVS drugstores demonstrates the importance of making all methods of entry equally available to participants. New York's attorney general brought enforcement actions against

these companies because they both overemphasized the purchase-based method of entry and deemphasized the free AMOE.

Specifically, the print ad copy for a Tylenol sweepstakes listed four steps for entering the sweepstakes, the first step being to buy Tylenol.²² The words *buy Tylenol* appeared prominently in all caps in the print ad copy for the sweepstakes, which also included coupons to purchase Tylenol brand products.²³ The ad also included the language *no purchase necessary*, but that language appeared in fine print near the bottom of the ad. The attorney general contended that the *buy Tylenol* message was so prominent that the free AMOE was not equally available to customers.²⁴

The New York attorney general also pursued CVS for appearing to give better exposure to the purchase-based method of entering an in-store sweepstakes.²⁵ Specifically, CVS allowed participants to enter its sweepstakes automatically when they purchased certain products with a CVS ExtraCare card.²⁶ Although CVS also had a free AMOE, it was available only on the company's website and not in the store. Consequently, the attorney general contended, visitors to the store who wanted to participate without making a purchase were not given the same opportunity to win as those who participated by making purchases.²⁷

As these cases illustrate, simply having a free AMOE, in itself, is not enough to avoid problems with consideration.

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pay-to-play game is not always
straightforward.**

The free AMOE must be made as accessible as the purchase-based method of entry.

STATE-SPECIFIC REQUIREMENTS

Sweepstakes sponsors must also consider all relevant laws and regulations in the states where the sweepstakes will be conducted. A detailed analysis of the laws and regulations of every state is beyond the scope of this article, but special requirements for games of chance enacted by a few states with particularly stringent requirements—Florida, New York, and Rhode Island—are summarized below.

Florida

In Florida, a sweepstakes sponsor must register the sweepstakes with the Department of Agriculture and Consumer Services and must establish a trust account or obtain a surety bond at least seven days before the start of any sweepstakes in which the prizes have a retail value greater than \$5,000.²⁸ The amount of the surety bond must equal the total retail value of all prizes offered.²⁹ Sweepstakes sponsors that have conducted promotions in Florida for five consecutive years without incident may apply for a waiver of the bonding requirement.³⁰

To register the sweepstakes, the sponsor must submit a completed application, a copy of the sweepstakes official rules, and a \$100 filing fee.³¹ Once the official rules have been submitted, they may not be altered. Florida also requires that the official rules be posted in all retail outlets and in all advertising copy; however, the ad copy need only include the material terms of the official rules and the sponsor's website address, a toll-free telephone number, or a mailing address where the full official rules may be viewed, heard, or obtained during the sweepstakes.³² Once the sweepstakes is over, a certified list of winners of all prizes valued over \$25 must be filed with the Department of Agriculture and Consumer Services within sixty days after the winners are finally determined.³³

New York

Like Florida, New York requires a sweepstakes sponsor to file an application for registration with the secretary of state and either establish a trust account or obtain a surety bond if the promotion is conducted in connection with the sale of consumer products or services, the elements of chance and prize are present, and the total value of the prizes offered exceeds \$5,000.³⁴ A copy of the official rules and a \$100 filing fee must accompany the application. These must be filed at least thirty days before the promotion begins.³⁵ The official rules, the geographic area covered by the promotion, and the prizes available must be conspicuously and prominently posted in every retail outlet where the game may be played and in every related advertisement.³⁶ Once the promotion is over, a certified list of winners of all prizes valued over \$25 must be filed with the State of New York within ninety days after the winners are finally determined.³⁷

Rhode Island

Rhode Island requires registration with the secretary of state for any promotion "in which a retail establishment offers the

opportunity to receive gifts, prizes, or gratuities, as determined by chance" and the total value of the prizes exceeds \$500.³⁸ The registration must be filed before the promotion begins. To register the sweepstakes, the sponsor must pay a \$150 filing fee and provide a statement of (1) "the minimum number of participating objects to be made available"; (2) "the minimum number of prize winning objects that will be included"; (3) "the proportionate opportunity of winning prizes"; (4) "the minimum value of [the] prizes"; and (5) the rules of the promotion, including "the period of time and the geographic area to be covered by the contest."³⁹

Rhode Island does not require sponsors to post a bond or establish a trust account.

Although sponsors are not required to file a list of winners with the state, they must maintain a list of winners for at least six months after the promotion is completed.

Other State Law Traps

The following examples of additional—and not particularly intuitive—state-specific requirements underscore the need for sponsors to consider the laws and regulations of each state in which a promotion will be conducted.

- Some states, such as Vermont, prohibit sponsors from requiring nonpaying participants to put return postage on a self-addressed envelope sent to obtain the official rules or other information about a sweepstakes.⁴⁰
- The West Virginia attorney general has issued an informal opinion requiring sponsors of bottle-cap promotions to provide free bottle caps to retail outlets.⁴¹
- Wisconsin requires sponsors of certain promotions to provide retailers with a sufficient supply of entry forms or game pieces to permit free participation by their customers.⁴²

Because the ability to navigate these and many other state regulations is critical to a successful promotion, sponsors should plan well ahead of time to ensure compliance.

GAMES OF SKILL

A game of skill, generally speaking, is one in which prizes are awarded to participants based on their submission of responses to prompts, answers to questions, or solutions to problems that require "a substantial degree of skill" to derive.⁴³ Games of skill include photography contests, essay contests, bake-offs, and trivia contests, among others. Games of skill do not include contests that involve predicting the outcome of a future event or making an educated guess.⁴⁴

Eliminating Chance

The biggest challenge in structuring a game of skill is ensuring that chance is not inadvertently introduced at any point in the contest. Most states use the "dominant element test" to evaluate whether skill or chance dominates in determining the winner of a contest.⁴⁵ If chance dominates, it is not a game of skill, even if some skill is required to participate in the game. Several factors are considered under the dominant element test. First,

players “must have a distinct possibility of exercising skill and have sufficient data upon which to calculate an informed judgment [to the extent required by the game]. The test is that without skill it would be absolutely impossible to win the game.”⁴⁶ Second, the general class of players must possess the skill; the game cannot be limited to a specific skill that only a few possess.⁴⁷ Third, the players’ skills or efforts must govern the final result, not just part of a larger scheme.⁴⁸ Finally, “[t]he standard of skill must be known to the participants, and this standard must govern the result.”⁴⁹

A few states apply the more conservative material element test. Under that standard, if the element of chance is present to any material degree, the game will be deemed one of chance rather than skill, even if skill is the dominant factor.⁵⁰ A backgammon tournament would not be deemed a game of skill, according to the material element test, because the rolling of dice before each turn is a material aspect of the game.⁵¹

Still fewer states apply the any chance test. Under this even more restrictive standard, a game is deemed one of chance if any element of chance is present.⁵²

Whichever test applies, game sponsors should be careful not to introduce chance into a skill contest. The choice of a winner of any skill contest should be based on preestablished skill criteria, even in the event of a tie. For example, if two participants receive the same top score in an essay contest, the ultimate winner should not be determined by a coin flip or a random drawing. Instead, the contest should anticipate this situation and should provide a method to resolve ties through a further test of skill or award top prizes to both participants.

Consideration May Be Restricted

Although a sponsor generally can require consideration to participate in skill contests, some states restrict certain kinds of consideration. Vermont, for example, prohibits requiring any kind of entry fee, service charge, or purchase to enter or continue to remain eligible in a game of skill, contest, sweepstakes, giveaway, or other promotion.⁵³ Maryland prohibits requiring the purchase of a product to participate in a contest.⁵⁴ Florida prohibits the pooling of entry fees to serve as the jackpot for a winning prize.⁵⁵ Arizona prohibits requiring a payment or fee to advance in a contest or be eligible for a prize.⁵⁶

Arizona also imposes registration requirements for games of skill that require a purchase to enter.⁵⁷ The contest sponsor must file an application, together with a copy of the official rules (including rules applicable in the case of a tie) and a sworn statement that no increment has been added to the price of the product that a contestant must purchase in order to participate.⁵⁸ The names and addresses of the prize winners must be filed with the Arizona attorney general’s office within ten days after all prizes have been awarded.⁵⁹

Scoring and Judging Criteria

To underscore the dominance of skill in a game of skill, sponsors should devote substantial attention to scoring and judging. The contest requirements, the criteria on which each entry will be judged, and the relative weight given to each criterion should

be clearly identified. It is also important to state the judges’ qualifications and explain the method of judging each entry.

PREPARING THE OFFICIAL RULES

Every promotion should be governed by official rules that state all material terms of the promotion, including who is eligible, how to enter, what the prizes are and how much each one is worth, how winners are selected, how long the game will last, and what restrictions may apply. Many of these disclosures are required by state laws. Even if not mandated, all are recommended.

The official rules are the sponsor’s contract with game participants. The rules should be posted conspicuously wherever participants may enter the game, including on the Internet and in retail outlets. Once published, the rules may not be modified. They should be clear and unambiguous, not repetitive, and not overly dense.

Eligibility

The eligibility provisions of the official rules should identify the pool of individuals who can participate in the game. Eligibility requirements should be expressly stated and should take into account the nature of the promotion and the prize. Consideration should be given to the age, geographic location, residence, and citizenship of potential participants. For example, if the prize is a car, the game may be restricted to participants with a valid driver’s license. If the prize is a trip to Las Vegas, the game may be restricted to participants over twenty-one years old. To avoid the appearance of impropriety, employees of the sponsor and its advertising and promotion agencies and members of their immediate families should be ineligible to participate, and the official rules should include a statement to that effect.

Failing to give adequate consideration to eligibility requirements can lead to expensive consequences, bad publicity, and unnecessary complications. For example, a Spanish-language radio station in Chicago held a promotion in 2005 in which the prize was a car previously owned by a famous Mexican-American singer.⁶⁰ When the radio station learned that the winner of the promotion was not a legal resident of the United States, it refused to give her the car. The station explained that it was required by law to obtain a valid Social Security number or tax identification number from any recipient of a prize valued at more than \$500 so that it could issue the appropriate tax form.⁶¹ The winner and other prize recipients sued the radio station, claiming the station had never stated a requirement that participants must be U.S. citizens or legal residents to be eligible to win.⁶² The litigation and nationwide negative publicity that resulted in this case illustrate the importance of giving thought to the target audience when considering particular eligibility requirements, and of stating all such requirements expressly, before the promotion begins.

How to Enter

The “how to enter” provisions of the official rules must describe the free AMOE as well as any purchase-based entry method. Best practices dictate that the official rules and all advertising of the game disclose “NO PURCHASE NECESSARY” clearly

and conspicuously to emphasize the free AMOE.

The official rules should clearly state the start and end dates, which should be the same for all participants regardless of their method of entry. For games of chance, the free AMOE is often a mail-in entry form, and it is common to state in the official rules that the entry form must be postmarked or received by a certain date. Neither the postmark date nor the received-by date can precede the end date of the sweepstakes; otherwise, there would be a period in which the purchase-based entry is available but the free AMOE is not. The absence of a free AMOE can convert an otherwise lawful sweepstakes into an illegal lottery. Thus, the postmark deadline for mail-in entry forms should coincide with the end date of the sweepstakes, and the received-by date should be sometime after the postmark deadline.

Prizes and Selection of Winners

The official rules must include provisions explaining how winners will be chosen and what prizes they will receive. These provisions must describe the number of prizes to be awarded, the nature and approximate retail value of each prize, how the prizes will be awarded, the odds of winning, when the winner or winners will be selected, and how they will be selected.

Because the prospect of winning a prize attracts people to sweepstakes, particular attention should be devoted to describing the prize. If the prize consists of a vacation or trip, the official rules should include details pertaining to the duration, dates, destination, transportation, accommodations, meals, and spending money. It is also a good idea to disclose what the prize does not include. Participants should be informed, for example, that all federal, state, and other tax liabilities arising from the game are the sole responsibility of the winner.

The official rules should never provide exaggerated or misleading information about the value or nature of prizes.⁶³ For example, a Hooters store manager led participants in an employee-based game to believe that the winner of the game would receive a Toyota, when, in fact, the prize was a toy Yoda action figure.⁶⁴ The winner of the game was not amused and sued the restaurant for the cost of a new Toyota.

Suggested Releases and Limitations on Liability

The official rules should explain the sponsor's obligations and responsibilities as well as the rights that the participant is granting to the sponsor by entering the promotion. Provisions for this purpose commonly featured in official rules include the following caveats:

- "Sponsor is not responsible for lost, late, stolen, incomplete, illegible, inaccurate, undelivered, delayed, or misdirected entries."
- "Sponsor reserves the right, in its sole discretion, to modify or terminate this sweepstakes in the event of any act,

occurrence, or reason that it believes would corrupt the integrity, administration, or fairness of the sweepstakes."

- "By participating in the sweepstakes, participants agree to release, discharge, and hold harmless sponsor, its respective parents, affiliates, subsidiaries, advertising and promotion agencies, and other individuals engaged in the development or execution of this sweepstakes, from any liability, claims, losses, and damages arising out of or relating to their participation in this sweepstakes or the acceptance, use, misuse, or possession of any prize received in this sweepstakes."

The releases and permissions granted by participants in official rules are sometimes impossible to enforce, particularly if they are found to violate public policy or other laws. Sponsors should be particularly wary of using personal information to contact game participants, even if the participant has granted the sponsor permission to do so in the official rules.

In 2007, the Federal Trade Commission (FTC) sued Craftmatic for placing telemarketing calls to game participants using telephone numbers provided on game entry forms.⁶⁵

According to the FTC, neither Craftmatic's sweepstakes rules nor its entry form asked participants to give their express authorization to be contacted by the sponsor. The FTC argued that by failing to obtain the participants' express permission, Craftmatic violated the national do not call registry.⁶⁶ Craftmatic settled with the FTC for \$4.4 million in civil penalties.⁶⁷

In 2005, the New York attorney general accused the Great Atlantic & Pacific Tea Company and Kitchen Magic, Inc. of similar violations of New York State's do not call registry.⁶⁸ A&P's sweepstakes entry form specifically stated that by entering the sweepstakes, game participants granted Kitchen Magic permission to call them regarding its products and services, even if their telephone numbers were registered with any state or federal do not call lists.⁶⁹ New York's attorney general argued that because the language purporting to grant Kitchen Magic permission to call was buried in the official rules or in locations on the entry form that participants may not have seen, consumers were essentially "duped into waiving their right to privacy in order to enter a sweepstakes."⁷⁰ A&P and Kitchen Magic resolved this dispute for \$100,000.⁷¹

ADVERTISING

All advertising or promotion of a game should be consistent with the game's official rules. Some states require that advertisements for a game of chance must clearly and conspicuously disclose abbreviated rules that include, at a minimum, the following information:

- The phrase *no purchase necessary* and the description of the free AMOE

The releases and permissions granted by participants in official rules are sometimes impossible to enforce.

- Locations where the game is void
- Eligibility requirements, including age and geographic location
- Beginning and end dates and times, if applicable
- Odds of winning
- Sponsor's name
- The fact that the game is subject to complete official rules
- Location where complete official rules can be obtained

Any materials sent through the U.S. Postal Service that include entry forms for a sweepstakes or game of skill must comply with the federal Deceptive Mail Prevention and Enforcement Act (DMPEA).⁷² If the promotion is a sweepstakes, the materials must disclose not only that “no purchase is necessary to enter” but also that “a purchase will not improve an individual’s chances of winning.”⁷³ All terms and conditions of the sweepstakes or contest must also be disclosed, including entry procedures; the name and address of the sponsor; estimated odds of winning; the quantity, estimated retail value, and nature of each prize; and the schedule of any payments made over time.⁷⁴ Moreover, sponsors must make reasonable efforts to prevent the mailing of such materials to anyone who asks to be removed from their sweepstakes mailing list and must maintain records of all such requests for a period of five years.

The DMPEA contains similar requirements for materials advertising games of skill. These materials must disclose the name and address of the sponsor; the rules of the skill contest, including, if applicable, the number of rounds or levels and the cost to enter each one; the fact, if applicable, that additional rounds may have increased levels of difficulty; the estimated number or percentage of participants who may correctly solve the skill contest or the approximate number or percentage of participants who correctly solved the past three skill contests conducted by the sponsor; the identity and qualifications of the judges, if judged by anyone other than the sponsor; the method of judging; the date by which the winner will be determined; the process for awarding the prizes; the quantity, estimated retail value, and nature of each prize; and the schedule of any payments made over time.⁷⁵

IMPLEMENTING PROMOTIONS SYSTEMWIDE

Franchise agreements should address the obligations of franchisors and franchisees with respect to contests and sweepstakes, which can play an important role in enhancing the brand. To promote uniformity and to meet consumers’ expectations, franchisors should consider requiring all franchisees to participate in the promotions they sponsor and should limit ad hoc promotions by individual franchisees or groups of franchisees.

In any event, if certain franchisees do not participate in a systemwide game, the franchisor should clearly indicate that the promotion is not available at those locations and should direct consumers to the free AMOE for entry into the game.

CONCLUSION

To avoid the traps hidden in state and federal regulations, franchisors, franchisees, and their attorneys should consider

carefully whether to structure a promotional game as a game of chance or a game of skill, taking into account the legal and practical implications associated with each option. With proper planning, a sweepstakes or contest can provide commercial benefits to franchisors and franchisees, as well as an enjoyable experience for their customers.

ENDNOTES

1. *See, e.g.*, TEX. GOV'T CODE ANN. § 466.002(5) (Vernon 2004) (A lottery is “the procedures operated by the state under this chapter [466] through which prizes are awarded or distributed by chance among persons who have paid, or unconditionally agreed to pay, for a chance or other opportunity to receive a prize.”); GA. CODE ANN. § 16-12-20(4) (West 2007) (A lottery is “any scheme or procedure whereby one or more prizes are distributed by chance among persons who have paid or promised consideration for a chance to win such prize, whether such scheme or procedure is called a pool, lottery, raffle, gift, gift enterprise, sale, policy game, or by some other name.”).

2. *See, e.g.*, N.C. GEN. STAT. ANN. § 14-290 (West 2007); FLA. STAT. ANN. § 849.09(2) (West Supp. 2009).

3. *See, e.g.*, State v. Dahlk, 330 N.W.2d 611, 616 (Wis. Ct. App. 1983) (prize is “something that may be won by chance”) (internal quotations omitted).

4. *See* United States v. Gotti, 459 F.3d 296, 341 (2d Cir. 2006) (A game of chance is one in which “the outcome depends in a material degree upon an element of chance, notwithstanding that the skill of the contestants may also be a factor therein.”); *see also* FLA. STAT. ANN. § 849.094(1)(a) (West Supp. 2009) (“‘Game promotion’ means, but is not limited to, a 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, and in which the elements of chance and prize are present.”).

5. *See* 1995 Fla. Op. Att’y Gen. No. 95-21 (Mar. 21, 1995) (stating that consideration may exist where there is a benefit to the promoter).

6. State v. Reader’s Digest Ass’n, Inc., 501 P.2d 290, 297 (Wash. 1972) (holding that “the time, thought, attention and energy expended by members of the public in studying . . . advertising” constitutes consideration); Seattle Times Co. v. Tielsch, 495 P.2d 1366, 1369 (Wash. 1972) (finding consideration where participants were required to spend hours following a football forecasting contest and the benefit flowed to the promoter); *see also* Blackburn v. Ippolito, 156 So. 2d 550, 554–55 (Fla. Dist. Ct. App. 1963) (contest requiring weekly visits to store to play was consideration under state lottery law).

7. *See* Haskell v. Time, Inc., 857 F. Supp. 1392, 1404 (E.D. Cal. 1994) (requiring a sweepstakes participant to travel to the store to deposit entry form is not consideration) (citation omitted); *see also* Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin, 770 F. Supp. 480, 486 (W.D. Wis. 1991) (listening to or watching a radio or television program or visiting a single store or other place on one occasion without being required to make a purchase or pay a fee is likely not consideration).

8. *Haskell*, 857 F. Supp. at 1404 (holding that the payment of postage to mail in an entry form was not valuable consideration); Glick v. MTV Networks, 796 F. Supp. 743, 748 (S.D.N.Y. 1992) (finding that a \$2 charge for using a 900 number to enter a game of chance was not “something of value”); Pepsi Cola Bottling Co. of Luverne, Inc. v. Coca

Cola Bottling Co., 534 So. 2d 295, 297 (Ala. 1988) (finding that game participants' ability to obtain entry cards for the promotion by calling or writing the sponsor was a free method of entry).

9. BILL CARMODY, *ONLINE PROMOTIONS: WINNING STRATEGIES AND TACTICS* 3 (2004).

10. 31 U.S.C.A. § 5362 (West Supp. 2009).

11. *See, e.g.,* Hardin v. NBC Universal, Inc., 660 S.E.2d 374 (Ga. 2008); Couch v. Telescope Inc., Case 2:07-CV-03916-FMC-VBK (C.D. Cal. Nov. 30, 2007) (game promoters allowing game entry via text message also included a free AMOE).

12. *See, e.g.,* F.A.C.E. Trading, Inc. v. Dep't of Consumer & Indus. Servs., 717 N.W.2d 377, 389 (Mich. Ct. App. 2006) (holding that the product discount participants purchase to enter the game was incidental to game itself, and the free AMOE did not legitimize the game); F.A.C.E. Trading, Inc. v. Carter, 821 N.E.2d 38, 43 (Ind. Ct. App. 2005) (confirming that the product discount aspects of the game were "merely a subterfuge for a gambling device"); *In Re* Shorts Bar of Rochester Inc. v. State Liquor Auth., 794 N.Y.S.2d 266, 267 (N.Y. App. Div. 2005) ("Here, there is substantial evidence supporting the inference that purchasers of the 'Ad-Tab' cards sold by petitioners paid their consideration not for the discount coupons on the cards but rather for the opportunity to win prize money.").

13. *Hardin*, 660 S.E.2d at 374.

14. *Id.* at 376.

15. *Couch*, Case 2:07-CV-03916-FMC-VBK.

16. *Id.*

17. *Id.*

18. 960 So. 2d 599, 604-05 (Ala. 2006), *cert. denied*, 551 U.S. 1131 (2007).

19. *Id.* at 612.

20. Fla. Op. Att'y Gen. 2007-48, 2007 WL 3357167.

21. *Animal Prot. Soc'y v. State*, 382 S.E.2d 801, 807 (N.C. Ct. App. 1989) (finding that the fact that patrons obtained entry into the game without purchasing items did not remove consideration because those who did not purchase items received fewer entry forms than those who purchased items and paid for their chances).

22. Press Release, N.Y. Att'y Gen., Tylenol Manufacturer to Amend Sweepstakes Ads (Sept. 10, 2004), *available at* www.oag.state.ny.us/media_center/2004/sep/sep10a_04.html.

23. *Id.*

24. *Id.*

25. Press Release, N.Y. Att'y Gen., CVS to Amend Sweepstakes Promotions (July 8, 2004) (on file with author), *available at* www.oag.state.ny.us/media_center/2004/jul/jul08a_04.html.

26. *Id.*

27. *Id.*

28. FLA. STAT. ANN. § 849.094(4).

29. *Id.*

30. *Id.* § 849.094(4)(b).

31. *Id.* § 849.094.

32. *Id.* § 849.094(3).

33. *Id.* § 849.094(5).

34. N.Y. GEN. BUS. LAW § 369-e(1), (4) (McKinney 1996).

35. *Id.* § 369-e(1).

36. *Id.* § 369-e(2).

37. *Id.* § 369-e(5).

38. R.I. GEN. LAWS § 11-50-1 (2002).

39. *Id.*

40. *See* Vermont Consumer Fraud Rules, CF 109 (Contests & Prizes) (issued by Vt. Att'y Gen.), *available at* www.atg.state.vt.us/display.php?smod=97.

41. Tsan Abrahamson, *The Promotion That Went South: A Look at the Hazards of Product Sweepstakes and Contests*, 15:6 BUS. L. TODAY, July/Aug. 2006.

42. WIS. STAT. § 100.16(2) (2004).

43. One court defined a game of skill as "any promotional contest or device in which the award of a prize or anything of value to the participants is determined on the basis of the winning answers or solutions submitted by participants through the exercise of a substantial degree of skill in determining the winning answers or solutions to the questions or problems which are the subject of the contest or device." *In re* Glendinning Cos., 109 F.T.C. 4 (Jan. 13, 1987).

44. *See, e.g.,* Stevens v. Cincinnati Times-Star Co., 73 N.E. 1058, 1060-61 (Ohio 1905) (holding that a newspaper-sponsored game inviting readers to pay fifty cents to guess the number of votes a state official would get in an upcoming election was an illegal game of chance despite the skill that particular guessers might possess from their own political knowledge); *People ex rel. Ellison v. Lavin*, 71 N.E. 753, 755 (N.Y. 1904) (holding that a promotion inviting customers to guess how many cigars the United States would collect taxes on in November 1903, in order to be eligible for a prize of up to \$5,000, was a game of chance because the sponsor sought to make the game as fair as possible so that little or no skill was required).

45. States that appear to follow the dominant element test include California, Connecticut, Georgia, Idaho, Indiana, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, and South Dakota. *See, e.g.,* Dep't of Corr. v. Workers' Comp. Appeals Bd., 90 Cal. Rptr. 2d 716, 720 (Ct. App. 1999) (discussing the statutory language "predominant as to all causes" and holding that such language was intended to require "greater than 50 percent"); *People ex rel. Love v. Schapiro*, 77 N.Y.S.2d 726, 728 (Magis. Ct. 1948) (stating that a game is one of skill where the element of luck or chance is "subordinate to the proficiency or skill of the player in the determination of the outcome of the game").

46. *Morrow v. State*, 511 P.2d 127, 129 (Ala. 1973).

47. *Id.*

48. *Id.*

49. *Id.*

50. States that appear to follow the material element test include Alabama, Hawaii, Missouri, New Jersey, Oklahoma, and Oregon. *See, e.g.,* Boardwalk Regency Corp. v. Attorney Gen., 457 A.2d 847, 848-51 (N.J. Super. Ct. Law Div. 1982).

51. *Id.* at 850.

52. *State v. Gambling Device*, 859 S.W.2d 519, 523 (Tex. App. 1993) (interpreting the applicable Texas statute "to apply to contrivances that incorporate any element of chance, even if the exercise of skill also influences the outcome").

53. VT. STAT. ANN. tit. 13, § 2143B (2002).

54. MD. CODE ANN., COM. LAW § 13-305(B) (West 2005).

55. FLA. STAT. ANN. § 849.094.

56. ARIZ. REV. STAT. §§ 13-3301 to -3312 (2001).

57. *Id.* § 13-3311.

58. *Id.*

59. *Id.*
60. Rummana Hussain, *No Green Card, No Free Car: Raffle Winner Sues, Says She Faces Threat of Deportation*, CHI. SUN TIMES, Jan. 25, 2007, at 8.
61. *Id.*
62. Steve Patterson, *Radio Station Awards Corvette to Illegal Immigrant; Another Suing Winner Settles, but 2 Others Refuse Deal*, CHI. SUN TIMES, Oct. 5, 2007, at 22.
63. Like all advertising, advertising and promoting a promotional game must be truthful and nondeceptive. 15 U.S.C. § 52 (2006).
64. *See Berry v. Gulf Coast Wings, Inc.*, Case No. 01-2642 (Fla. Bay County Ct. July 24, 2001).
65. *United States v. Craftmatic Indus., Inc.*, Civil Action No. 2:07-cv-04652-LDD (E.D. Pa. Nov. 6, 2007).
66. *Id.*; 16 C.F.R. § 310.4(b)(1)(iii)(B).
67. *Craftmatic Indus.*, Civil Action No. 2:07-cv-04652-LDD (Nov. 8, 2007) (order granting permanent injunction).
68. Press Release, N.Y. Att’y Gen., Promotion to Stop Requiring Waiver of Do Not Call Protection (May 3, 2005), available at www.oag.state.ny.us/media_center/2004/may/may03a_05.html.
69. *Id.*
70. *Id.*
71. *Id.*
72. 39 U.S.C.A. §§ 3001–3017 (West 2007 & Supp. 2009).
73. *See id.* § 3001(k)(3)(A)(ii)(I)–(II) (Matter is not acceptable in the mail if it “does not contain a statement that discloses in the mailing, in the rules, and on the order or entry form, that no purchase is necessary to enter such sweepstakes; [and] (II) does not contain a statement that discloses in the mailing, in the rules, and on the order or entry form, that a purchase will not improve an individual’s chances of winning with such entry.”).
74. *Id.* § 3001(k)(3)(A).
75. *Id.* § 3007(k)(3)(B).