

THE BOTTOM LINE

>> While COVID-19 presents many challenges to brands trying to run a sweepstakes or contest at this time, it also presents an opportunity for brands to connect with their customers by opening a channel of communication that could improve customer loyalty and goodwill if the promotions are structured and messaged appropriately.

>> COVID-19 ALERT

Avoiding the Pitfalls While Reaping the Benefits of Sweepstakes and Contests during COVID-19

The sweepstakes and contest industry has been severely impacted by the coronavirus pandemic (COVID-19), with many brands hesitant to engage in these promotions due to fear of seeming “out of touch,” while other brands are looking to cancel or postpone their sweepstakes and contests, particularly if the prize involves a trip or event tickets. If not handled correctly, cancellation or postponement of an ongoing sweepstakes or contest could expose brands to significant legal liability.

While running a sweepstakes or contest during COVID-19 raises some risks, sweepstakes and contests also provide brands with significant opportunities, as they offer brands the ability to engage with their customers at a time when they are feeling increasingly isolated, with the potential of promoting worthy causes and, thereby, increasing customer goodwill and loyalty.

LEGAL WATCHOUTS FOR SWEEPSTAKES OR CONTESTS DURING COVID-19

Sweepstakes and contests are required by law to have Official Rules, which, by their nature, are a contract. As such, if a sponsor were to unilaterally change the Official Rules by canceling or postponing a sweepstakes or contest after it had started, that sponsor would be unilaterally breaching its contract and exposing itself to potential consumer (and possibly regulatory) action.

However, most Official Rules provide sponsors with some ability to change them under certain limited circumstances, such as if “fraud, technical failures, human error or any other factor impairs the integrity or proper functioning of the Promotion, as determined by Sponsor in its sole discretion.”

We call this the “promotion force majeure” clause. As such, this clause should not be mistaken for a “get-out-of-jail free” card that would allow a sponsor to cancel or postpone a sweepstakes or a contest for whatever reason, as the clause is intended to protect a sponsor for events outside of its control that undermine the proper functioning of the promotion, such as cheating, fraud, computer viruses or other technical issues.

Under certain circumstances, the “promotion force majeure” clause could be invoked to protect a sponsor from liability for making changes to the Official Rules due to COVID-19.

For example, if the prize consists of tickets to an event that has been postponed or cancelled due to the pandemic, such as the Olympics or Wimbledon, the sponsor could change the Official Rules to offer another substitute prize because COVID-19 made the original prize unavailable.

The clause may also protect a sponsor's changes to the Official Rules if the promotion could not run properly due to COVID-19, such as (i) if the sponsor could not select a prize winner because it could not access any of its mail-in entries or (ii) if the original entry method was no longer viable, safe or advisable (e.g., requiring in-person transactions at certain locations, such as brick-and-mortar stores or public transit locations).

This "promotion force majeure" clause is not intended to protect a sponsor who, for example, (i) terminates or postpones a sweepstakes or contest because the sponsor did not like the "optics" of running a promotion during COVID-19 or (ii) extends the sweepstakes or contest end date because it wants more entrants to enter its promotion.

Official Rules often contain other provisions that could help a sponsor who is unable to award a trip or event prize due to COVID-19, as most Official Rules allow a sponsor to "substitute a prize of equal or greater value" if the prize becomes unavailable. Accordingly, instead of awarding the Olympics or Wimbledon

tickets referenced above, a sponsor could substitute those tickets for a prize of equal or greater value, such as a cash prize or tickets to next year's events. Similarly, because most people do not want to travel or cannot travel at this time, a sponsor could substitute the original trip prize with a cash prize or another prize of equal or greater value.

Typically sponsors that have bonded and registered their sweepstakes in the states of New York or Florida are subject to a penalty if they change the rules after doing so (as bonding and registration is required for a sweepstakes if the total value of all prizes is over \$5,000). Fortunately, Florida has agreed to waive late penalties if there are changes to the Official Rules that are made as a result of COVID-19. Florida also will allow a sponsor to substitute a trip/sports-related prize for another prize due to COVID-19.

BENEFITS OF SWEEPSTAKES OR CONTESTS DURING COVID-19

Sweepstakes and contests are a powerful tool to help brands connect with their customers, many of whom are feeling more and more isolated as a result of COVID-19. However, sweepstakes and contests will only be effective during these tumultuous times if they are structured and messaged properly.

Not surprisingly, many brands are hesitant to conduct a sweepstakes

or contest at this time, as brands do not want to be viewed as being out of touch or "tone-deaf" to the realities of the pandemic. Indeed, a brand could face significant public relations backlash if it ran a promotion that encouraged consumers to go to the store to buy the brand's essential product (such as soap, hand sanitizer or toilet paper) for a chance to win an all expense-paid spring break cruise to Florida. While this is an extreme example, it demonstrates the extent to which brands need to be sensitive to how their promotions will be perceived by the public.

That said, brands could see a public relations boost and increased customer-loyalty from running sweepstakes and contests during COVID-19 — if done properly. For example, to increase goodwill, instead of awarding trip or event prizes to sweepstakes and contest winners, brands could award gift cards to restaurants and retailers that have been hit hardest by the economic shutdown. Brands could also run contests that award grocery prizes to consumers who are in most need of them. In addition, sweepstakes and contests could be structured to include a charitable element, such as having the winner designate a deserving charity or first-responder to receive the prize instead of the winner.

Providing consumers with games and activities that help them through these trying times also could result in increased customer loyalty and

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goodwill. For example, coloring, painting, photo and recipe contests provide parents with fun activities that the whole family can enjoy.

Platforms, such as Snapchat and TikTok, are providing collaborative challenges on their platform, including family submissions of group videos or singalongs that may even go viral. However, brands will need to keep clearance concerns top of mind when posing such collaborative challenges. While Facebook Live and other livestreamed events offer brands the opportunity to connect with

consumers in real-time by providing trivia nights and similar contests, other brands are taking advantage of video conferencing softwares to connect consumers with unique “first to respond” type experiences — such as virtual cooking classes with a top chef or “masterclasses” with celebrity actors.

To further increase goodwill, brands could structure their sweepstakes and contests so that they are making a donation to a charity or non-profit organization in return for each entry into its promotion.

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