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THE BUSINESS MAGAZINE OF NORTHWEST FLORIDA

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**850 SPECIAL
REPORT:
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THE BUSINESS OF WATER

Two old friends bottle and sell what they call
the purest water in Florida — from the springs
of Econfina Creek in Bay County

It's the Law

CUSTOMER GIVE-AWAYS

Rules of Promotion

Before you set up a give-away event, be sure you're not legally shooting yourself in the foot

BY MELANIE ANN HINES

One of the most unsettling things that can happen to a legitimate business owner is to learn that the conduct of their company is alleged to be criminal in nature. In many cases, entrepreneurs unwittingly stumble over business regulations that have been upgraded to criminal violations. There are a large number of such rules, so it can be easy to do.

The financial and reputational consequences of such missteps can be enormous. Such dark chapters in the life of a company can often be prevented by studying the rules, seeking legal advice and implementing appropriate risk reduction strategies before embarking on an unknown path.

To illustrate the point, take a look at a classic marketing and branding tool: promotional events that are designed to generate excitement about a company's products. Consumer games, contests or sweepstakes can be run as small local affairs at a festival or other local public event, or they can be broadcast around the world from a company's Internet website. Some may require a bit of skill, some may be more like a random drawing, but all of them result in a prize for one or more participants.

Whether small or large, such contests give business owners a chance to be creative and create a sense of fun for the consumer. Hopefully, they increase brand name recognition. However, such promotions contain hidden dangers for the uninformed. If run without proper legal guidance, such promotions can become nightmares and result in unwanted, negative name recognition. If these promotions run afoul of the law, heavy fines can be imposed, criminal charges can be filed and all associated events become a matter of public record.

Consider a hypothetical promotion. Imagine that a Northwest Florida waterfront luxury resort wants to modernize its advertising with a catchy new slogan summing up its

chief attractions. A contest is announced: The person who submits the best five-word description of the resort will win “an all expense paid romantic weekend getaway package,” including golf and spa privileges, a champagne reception and room service for all meals. The second place prize is a golf course pass and one golf lesson, and the third place prize is a Saturday spa package. The prizes have a total value of \$5,500.

Marketing promotions with total prize packages over \$5,000 are regulated by the Florida Department of Agriculture and Consumer Services. To comply with the law, the resort in the above hypothetical must first register the game with the Agriculture Department and pay an application fee of \$100, at least seven days before the contest begins.

And there are many more steps to follow in order to stay on the right side of the law.

All the rules of the game must be conspicuously posted at the resort. Advertisements about the game must contain all material terms and may not be misleading in any way. A trust account (or a bond) in the total amount of the prize package must be established and maintained throughout the term of the game. The bank or insurance company must notify the Department of the terms of the account or bond at least seven days before the contest begins. (The trust account and bonding requirements can be waived by the Department after a five consecutive year track record of lawful contest promotions.)

A certified list of winners must be provided to the Department within 60 days after the winners are named. The list must be made available without charge to anyone who requests it. Advertisement of the winners can be made in the newspaper and a copy must be provided to the Department. All winning entries must be held by the resort for 90 days after completion of the game. The rules of the game cannot be changed at any time after they are published. The resort cannot arbitrarily reject any entry, cannot predetermine that the contest winner will come from a particular geographic area and cannot require that contestants be actual guests of the resort or have purchased any item at the resort. There can be no entry fee. The resort cannot fail to award the actual prizes offered.

The above contest rules sound simple; the registration process does as well. But let's take

To keep illegal operations out of our state, the Florida Legislature charged the **Department of Agriculture and Consumer Services, Division of Consumer Services**, with the responsibility to oversee game promotions according to Section 849.094, F.S.

Game promotions offering prizes totaling more than \$5,000 must file with the Division 7 days prior to commencement. Even game promotions based in other states must be filed if they are conducted in Florida and/or are open to Florida residents and have prizes valued at more than \$5,000.

In addition, a surety bond or statement of trust is required from the operator unless they have conducted game promotions in Florida for at least 5 consecutive years and they have had no civil, criminal or administrative actions instituted against them for a violation of s. 849.049 F.S. during that 5-year period. This protects citizens who participate by ensuring compensation if the game operator is unable to award prizes offered in the promotion.

The material terms of the rules must be published in all advertising copy. Full rules must be conspicuously posted in all outlets. Game operators must give, at no charge, a list of winners to those who request it.

A violation of the game promotion law can result in a civil penalty of up to \$1,000 per violation, an injunction and, in some cases if appropriate, referral for criminal prosecution. The law does not provide for restitution if a consumer has paid money to the operator.

WHAT IS A GAME PROMOTION?

- » A contest, game of chance or gift enterprise
- » Is conducted in connection with the sale of consumer products or services
- » Has the element of chance and prize

WHAT MAKES A GAME PROMOTION ILLEGAL?

- » Failure to file with the Division of Consumer Services, if required
- » The game is manipulated for winners to be predetermined
- » Businesses sponsoring game promotions are pre-selected to receive winning games
- » The game is manipulated for winners to be determined during a particular time period or geographic area
- » Arbitrarily removing, disqualifying, disallowing or rejecting entries
- » Failure to award prizes
- » Printing or circulating false, deceptive or misleading game promotion literature
- » Requiring an entry fee, payment or proof of purchase to enter

a look at the issues that a novice might not think about. What does “all expense paid” mean? Does it include air transportation? Does it cover long distance telephone calls from the room? All TV movie charges? Endless bar tabs? Does it cover medical expenses incurred by the guests? How does the resort protect against exorbitant “expenses” in this scenario, without being misleading?

It should be clear by now that a lot of attention must be given to the drafting of the game promotion rules and the information about prizes — these must be very specific, citing what is included, what is excluded and setting forth maximum allowances where necessary.

What about the start date and end date of the contest? Sounds easy enough. Just come up with the dates on the calendar and include them in the rules, right? Not so easy!

If hand delivered or email submissions are allowed, then a time deadline is necessary as well. But what happens if the resort's computer goes on the blink or the Internet is very slow on the deadline day? How does the resort make the contest fair to those contestants who relied on the usual speed of the Internet? Should the resort accept late entries due to computer glitches or bad weather that grounds the delivery driver, or should the resort specifically exclude anyone from participating who does not strictly comply with the date and time deadlines?

Again, all rules must be clearly spelled out and must be as fair as reasonably possible. Fairness must extend to all those who enter the contest as well as to all those who want to enter the contest and who make legitimate and appropriate efforts to do so as set forth in the rules. If the rules aren't clear about the deadline and how it will be calculated, then excluded contestants could argue that their reliance on the Internet was reasonable and that with proper proof of a “sent mail” time, they should have access to the contest. In the end, the resort may have bought a lawsuit instead of a new marketing and branding opportunity.

There are many other issues to consider. As examples: whether the “catchy new slogan” must meet certain standards of decorum, whether the participants must be a certain age to play and to win, whether the resort wants to exclude all employees' family members from participating, and,

finally, how the resort will make the determination that the participant and the submission meet the resort's standards. Then there's the issue of when the contestant must collect the prize. How will the resort describe the deadline for "cashing in" on the awards, and how will it deal with exigent circumstances preventing the winner from collecting?

Exigent circumstances beyond the control of the resort must also be anticipated on the front end. Imagine that a hurricane floods the golf course and a complete renovation is necessary. The renovation will take two years, well beyond the deadline for the second prize winner to use their golf pass or to take their one free golf lesson. Can the resort substitute a tennis package for the golf package? If so, does that decision adversely affect those individuals who might have entered the contest to receive a tennis lesson but not a golf lesson? The game promotion rules must address these considerations. The consequences for taking these issues lightly are severe.

The laws related to marketing promotions and sweepstakes are designed to keep the unscrupulous from soliciting money with false promises of a gift or reward. The laws are aimed at Florida entities as well as those out of state entities that advertise their game promotions in

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this state. Promotional games run in violation of these rules can be shut down by court order on petition of the Agriculture Department. The Department can also sue the entity, seeking fines of \$1,000 for each violation. Any person or business, or their agents or employees, who violate these laws can be prosecuted for criminal misdemeanors, punishable by up to 60 days in jail and a \$500 fine. Florida's Attorney General also has

authority to investigate game promotions for any instances of unfair and deceptive trade practices. Federal law also applies to the use of the Internet and the mail-in gaming promotions.

Sound legal advice on the front end is a key component of a marketing campaign involving a game promotion or sweepstakes. Consult a lawyer who has administrative law experience and familiarity with the rules in this area. You may also wish to consult the website of the Department of Agriculture and Consumer Services, where you can download forms, FAQ's and a copy of the laws and regulations regarding gaming promotions. ■

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