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ALL IN: SWEEPSTAKES AND CONTESTS IN THE AGE OF UBIQUITOUS BETTING

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Preface

The following outline, like any outline presented at a conference, is not legal advice. It is also not meant to be encyclopedic; there is no attempt to include every issue and case that might be relevant to the topic of sweepstakes and contests. We seek to offer a basic approach to sweepstakes and contests viewed through a particular, modern lens, which hopefully will help brands and the agencies that support them think about today's risks associated with running prize-based promotions.

Introduction: The Modern Merger of Prize Promotion and Online Gaming Entertainment

A. As promotional "games" become more complex, more interactive, more realistic, and more engaging, a blurring of the lines emerges between promotional games and gaming entertainment. Indeed, long before the Internet, there were promotional games offering prizes that sought to envelop the participants in an entertaining and immersive environment. Those environments might involve visiting a store or engaging in some sort of physical activity like a ring-toss game, a BINGO-type experience, or even matching numbers obtained for free from a store with numbers on automobiles racing in a pre-filmed race. *See Kroger Co. v. Cook*, 17 Ohio App. 2d 41, 244 N.E.2d 790 (Ct. App. Ohio 1968) (sales promotion – Kroger's "Rags to Riches" promotion – held not a lottery or gambling because no purchase was required to obtain game cards corresponding with race car results).

B. Gaming – a word with many meanings and connotations – has become enmeshed in our everyday lives often with real-world legal implications. *See Prakash v. Meta Platforms, Inc.*, 2024 Cal. Super. LEXIS 1627 *217 (Cal. Super. Ct. Jan. 3, 2024) (discussing the psychological implications of gamification in the context of social media); Juho Hamari, The Convergence of Gaming and Gambling?, GAMIFICATION RES. NETWORK (Nov. 29, 2017), www.gamification-research.org/2017/11/the-convergence-of-gaming-and-gambling [perma.cc/P3YA-P2LH].

C. As gaming entertainment has grown, two dynamics can be observed related to realism.

1. Realism as an overriding goal of game development – In many instances games are becoming more and more "realistic" in that they look real. The improvement of graphics and CPU technology has made it possible to create immersive experiences that allow for interactions through avatars that are closer and closer to that which we humans experience as reality.

2. Realism as an experiential outcome – Think about the realism of gamified health or diet apps. One can compete either against oneself of others with the goal of self-betterment. One can also compete in other ways, including accrual of wealth, such as with a stock-picking game or even gig-economy apps that enable individuals to use skills, perseverance, ingenuity, and stamina to increase wealth, often combining the gamification of the app with real-world activities. Indeed, when outcomes are tangible and "make sense" to us in the real world, the game reaches a heightened sense of realism.

D. In a paper written at Stanford, entitled "Understanding Realism in Computer Games through Phenomenology," Gek Siong Low, then a Master's Degree candidate, now a Technical Director at Ufinity Pte. in Singapore, wrote, "perception alone is not sufficient to lead us to feel that the game world is 'real.' The bottom line is that we interact with the world. We cannot perceive a virtual game world as being 'real' unless it reacts to us in a 'realistic' way." Writing about video games in 2001, long before Pokémon Go and the Meta Quest headsets, Low was curious about whether virtual reality and augmented reality games would produce the sort of "realism" that would truly seem real.

E. To borrow a quote from “Topdog/Underdog” by Suzan-Lori Parks, “Money makes it real.” A game is just a game; the infusion of money and the risk of loss or gain is a jolt of reality to the bloodstream. Gameplay with stakes and the potential to win real-world returns is as “real” as it gets. The massive video game industry seeks realism; realism requires human interactivity; the risking of value embodies an instant infusion of real-world interactivity. In the most simplistic of conceptions, the world of video games, which is a dominant, global human phenomenon, is a penetrating force in world culture.

F. Marketers, always attuned to pervasive cultural forces, are intensely aware of this dynamic, and they are watching as gaming and gambling (to the extent those concepts are distinguishable) pervades many aspects of society.

G. As powerful as the “gambling instinct” may be as an exhilarant and as a link between entertainment and reality, many if not most cultures throughout the modern world are wary of it. Indeed, from a U.S. perspective gambling has been a prohibited or regulated activity since the founding of the first American colonies. In fact, in 1631, the Massachusetts Bay Colony outlawed gambling. There are many reasons why the Puritans, Calvinists, and so many others banned gambling. But, what is more interesting is how it has become ubiquitous in our modern culture.

1. According to the American Gaming Association (AGA), 86% of U.S. adults have reported gambling at least once in their lifetime. In 2020, the total gross gaming revenue (GGR) from commercial casinos in the U.S. amounted to approximately $30 billion. Close to 70% of men in the U.S. and nearly 60% of women in the U.S. participate in gambling activities. In the 30-49 aged demographic the participation rate is even higher, with 72% of men engaging in gambling activities.

2. Despite the historical distrust of gambling, cultural acceptance and increased legalization by many states, combined with easy access to online gambling, low-cost smart phones, celebrity endorsements, and corporate sponsorships are all contributing to an amplification of this phenomenon. And, it is in the online and mobile media where the growth is truly spectacular. According to Grand View Research, the global online gambling market size was valued at $63.53 billion in 2022 with an expected growth rate of 11.7% through 2030.

H. The legalization has not meant a lack of regulation. To the contrary, gaming and gambling continue to be regulated heavily. Thus, we are not seeing everyday brands suddenly turning their websites into online casinos. But, we are seeing brands seeking to tap into the “realism” that online gambling and gaming provides. We see promotions that have gaming themes; we see promotions that look like video games; we see video game promotions that seek to use traditional promotion marketing tactics but are not traditional marketing.

I. Just as a sweepstakes has come to exist in the shadow of lottery law, there is an increasing number of promotional games and prize offerings that live in the shadow of gambling. With this widespread growth of online gaming as a feature of modern life, our approach this year is to examine the law related to prize promotions through the lens of online gaming and even gambling.

II. Overview of Gambling Laws in the U.S. and Sources of Enforcement

A. What are the applicable laws?

1. Federal Laws

a) Gambling Statutes - Wire Act; Illegal Gambling Business Act; Travel Act; Wagering Paraphernalia Act and Johnson Act; Anti-Lottery Act; Unlawful Internet Gambling Enforcement Act.

b) Related and ancillary laws - Money laundering statutes; RICO; securities and fraud laws.

(1) *See Colvin v. Roblox Corp.*, 2024 U.S. Dist. LEXIS 54224 (N.D. Cal. Mar. 26, 2024) (motion to dismiss granted on RICO allegation arising out of use of Robux on online casinos).

2. Consumer protection laws - The FTC Act.

3. State unfair and deceptive acts and practices (UDAP) statutes.

a) All states have laws that prohibit deceptive acts and practices (UDAP).

b) Representing that a particular service is lawful, implicitly or expressly, when in fact it is unlawful gambling, can be a violation of a UDAP statute.

c) Either as part of the sought recovery under a UDAP statute or under a stand-alone gambling loss recovery act, such as Washington State's Code § 4.24.070, individual plaintiffs or a class of individuals who lose "money or anything of value at or on any illegal gambling games" can sue to recover from the organizer/proprietor of the game "the amount of the money or the value of the thing so lost."

d) Actions under UDAP or gambling recovery statutes usually come in the form of class actions, but state AGs can also enforce them, as well.

e) Recovery of losses can also be sought under a theory of "unjust enrichment."

4. Federal and State UDAP Theories Can be the Operative Lever to enforce gambling laws.

a) Deception – A promotional structure or the execution of a promotion that misrepresents or omits a material fact that is likely to mislead consumers acting reasonably under the circumstances and is material – i.e., it is likely to affect the consumer's conduct or decisions with regard to a product or service.

b) Unfairness – A promotional structure or the execution of a promotion that creates substantial injury to consumers, which injury the consumers could not reasonably have avoided themselves, and is not outweighed by any countervailing benefits to consumer.

c) Lack of promotional purpose – Prize-based enterprises that are not promotions at all but rather business models that may be gambling enterprises.

B. State gambling and lottery laws

1. Criminal gambling statutes – Virtually every state has some form of gambling statute. There are different types of statutes, but generally they require some payment or risking of money or other thing of value; the opportunity to gain money or other thing of

value; and chance. Although the laws vary, they generally fall into the following categories:

a) Bet/Wager States- Those states prohibit offering games (regardless of whether based on chance, skill, or a mixture) wherein participants must make a "bet or wager" to participate. In those states, the "risking" or "staking" of something of value is critical to the analysis.

b) Indirect Consideration States - The element of "risk" is not as important as whether the sponsor of a game accepts any money whatsoever; money paid to the sponsor plus the hope of earning larger returns is sufficient to create a risk of violation. In some states, skill games can run afoul of the gambling law.

c) Gambling Device States - The Gambling Device states are those states that have laws that distinguish between legally permissible devices intended for amusement and prohibited devices intended for gambling or wagering.

(1) *See, e.g., In re Three Pa. Skill Amusement Devices*, 306 A.3d 432 (Comm. Ct. Pa. 2023). Applying the predominate factor test, the court inquired whether so-called POM machines were so "intrinsically connected with gambling" that they would constitute a gambling device per se. Finding evidence that some skill was present in at least some of the games, the court could not determine that the machines constituted gambling devices per se. The court ordered that the confiscated machines be returned to their owner.

d) Some states have a general gambling statute and a gambling device statute.

III. Viewing Sweepstakes and Contest Law Through a Gambling Lens

A. The ubiquity of gambling in much of the United States today tends to desensitize the public, including marketers and consumers (and possibly regulators) to the basic tenets of gambling. Games that may have seemed to be clear gambling enterprises in the past are increasingly being proposed by marketers to address the cultural relevance of betting and wagering.

B. Standard Definition of a Lottery. A promotion can constitute an illegal lottery if there are three basic elements present in its structure: (1) a prize; (2) the element of chance; and (3) consideration. *See, e.g.*, *F.T.C. v. American Broadcasting Co., Inc.*, 347 U.S. 284, 291 (1954); *California Gasoline Retailers v. Regal Petroleum Corp.*, 50 Cal. 2d 844, 853-854(Cal. 1958) (three elements necessary to constitute a lottery…: (1) The disposition of property, (2) upon a contingency determined by chance, (3) to a person who has paid a valuable consideration for the chance of winning the prize, that is to say, one who has hazarded something of value upon the chance).

1. Prize: Traditionally, a "prize" is something of value.

a) <u>Analysis</u>: Things that are sold at retail are easily recognizable as "prizes." But, prizes can be bespoke experiences. Just because it may be difficult to quantify the value of something does not mean it is not a "prize." What about something as ethereal as "bragging rights"? The "winner" of such "bragging rights" may not have received anything that could rise to the level of "something of value." *See Ward v. Crow Vote LLC*, 634 F. Supp. 3d 800 (C.D. Cal. 2022), *aff'd*, 2024 U.S. App. LEXIS 12205 (9th Cir. May 17, 2024) (business model

where participants could pay for votes and could vote for free but prizes went to "competitor-chefs" who were competing to get the most votes was not gambling under Arizona law because the participants did not stand to win anything other than the knowledge that their favored chef was victorious).

b) In a modern contest or sweepstakes be careful of how status within a community can be monetized. Consider whether recognition or status fixed on-chain might be alienable on a secondary market. In today's promotional environment, status could be a "prize."

2. Chance: Social gaming has made the determination of chance exceedingly important. As we explore below, the dichotomy between chance and not-chance/skill is still a critical analysis where consideration and prize are present. But, often in a sweepstakes context, chance is obvious because the game involves a random drawing or an instant-win mechanism. "Chance" is generally the dynamic whereby a consumer does not exercise any control of whether he or she obtains the offered prize or at least not ultimate control. Factors outside of the consumer's control (other than merely entering) determine whether or not one's entry will result in receipt of a prize.

3. Consideration: Generally, "consideration" is the element that requires the most attention from a lottery perspective. While the "peppercorn" and the economic benefit theory approaches to consideration espoused by older cases (*e.g*, the *Lucky Calendar* case and the "bank night" theater promotion cases; *State v. McEwan*, 343 Mo. 213 (Mo. 1938) have been almost entirely abandoned, non-purchase/non-monetary theories of consideration continue to be a factor when structuring a chance-based promotion. However, as a practical matter, the lottery concerns of such non-monetary consideration theories are overshadowed by the potential for claims under UDAP theories.

a) Analysis: "Time and effort" theoretically can be consideration for lottery purposes. A modern view of sweepstakes and contests understands this sort of non-monetary consideration as a proxy for action that unfairly or deceptively drives many consumers toward a purchase. Thus, although we see remnants of "time and effort" and other non-monetary consideration theories arise in the context of a lottery analysis, a better modern interpretation is that non-monetary consideration is most likely to constitute a lottery problem when it is potentially actionable under a UDAP theory.

(1) Some old "bank night" cases that are still "on the books" hold that acts of registering and attending the drawings at the request of the theater constituted consideration for lottery purposes. *See, e.g., Affiliated Enterprises, Inc. v. Waller*, 40 Del. 28 (Del. 1939).

(2) Some "must be present to win" cases still could be good law technically. *See, e.g.*, *State v. Eckerd's Suburban, Inc.,* 53 Del. 103 (Del. 1960)(winning ticket numbers were posted on signs in the center of the defendant's store and in the windows facing the outside, necessitating a store visit to determine if a consumer had won and to claim the prize, or else the consumer would forfeit the prize).

(3) Some state laws defining a "lottery" suggest that some forms and amounts of "time and effort" could be consideration for lottery purposes. *E.g.,* Iowa Code § 725.12(4) (consideration includes "a substantial expenditure of effort," although the statute excludes from the meaning of this phrase registration for participation, a store visit for entry, or "acts of a comparable nature," but prohibits a requirement that winners be present to win). *See, also*, Neb. Rev. Stat. § 9-701(3)(e)("any other

consideration" expressly excludes certain non-monetary acts, implying potentially that other required non-monetary acts might be deemed "other consideration").

(4) The *Brundage* case. Much handwringing has occurred over the years regarding a case involving Michigan law. *People v. Brundage*, 381 Mich. 399 (Mich. 1968).

(a) In that case, the Michigan Supreme Court held that the indirect consideration of a store visit could be consideration of lottery purposes because of the broad language of the lottery statute.

(b) In 1996, the Michigan criminal law concerning lotteries was amended to include a specific carve out for lotteries conducted as a "promotional activity." Specifically, the traditional prohibition of disposing of any property by way of a lottery now does not apply "to 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." MCLS § 750.372(2).

(c) A "modern view" of *Brundage* and legislative evolution regarding "indirect consideration":

(i) A "promotional activity" was defined as an "activity that is calculated to promote a business enterprise or the sale of its products or services, but does not include a lottery or gift enterprise involving the payment of money solely for the chance or opportunity to win a prize or a lottery or gift enterprise that that may be entered by purchasing a product or service for substantially more than its fair market value."

(ii) This provision illustrates a core aspect of modern sweepstakes and other prize promotions. They must be "promotional." They cannot be businesses for the sake of themselves. They must promote another good or service and must be temporary in nature. The concept of "clearly occasional and ancillary" is essential to the promotional nature of a program. This aspect has played out in cases over the last two decades and is an essential consideration with regard to many emerging business models that incorporate prizes of various types.

(iii) At least in Michigan, the key to running a lawful sweepstakes actually isn't *the presence* of an AMOE. *See, e.g., F.A.C.E. Trading, Inc. v. Dep't of Consumer & Indus. Servs.*, 270 Mich. App. 653, 717 N.W.2d 377, 2006 Mich. App. LEXIS 1169 (Mich. Ct. App. 2006). The key is ensuring that the consideration involved in the promotion is not "money solely for the chance or opportunity to win a prize or a lottery or gift enterprise that that may be entered by purchasing a product or service for substantially more than its fair market value."

(5) Attorneys General from time to time have opined as to the applicability of non-monetary consideration as sufficient for a finding that a promotion is an illegal lottery. *See, e.g.,* 90 Op. Att'y Gen. Fla. 98 (1990); 70 Op. Att'y Gen. Mo. 83 (1983); 1997 Op. Atty' Gen. R.I. 19 (1992); 1997 Op. Att'y Gen. S.C. 51 (1997). In each of these instances, the time, effort, and attention involved some activity that was bringing consumers very close to a purchase or involved actions that were very likely to result in direct consideration to the sponsor.

(a) Through a modern lens, these regulators appear to be interpreting the consideration element more as a tactic that either unfairly or deceptively lured consumers into making a purchase based on the chance to win a prize rather than the quality and desirability of the good or service offered for sale.

4. Traditionally, lotteries are a form of gambling, and gambling generally requires some sort of monetary component. Thus, under most federal and state gambling and lottery laws, a payment or purchase constitutes "consideration," although sometimes states treat a payment and a purchase differently. (As described above, under Michigan law, a payment for a chance to win a prize would not meet the carve out under the lottery statute, whereas a purchase at the regular prize of the sponsor's good or service may meet the carve out.) There are various types of monetary consideration one usually encounters in the promotional context.

a) In most states, a requirement that a person purchase a product or service (even if not the sponsor's) will constitute consideration in a promotional context.

(1) Although the traditional view is that any sort of outlay could be consideration, the modern view is that transactions costs associated with communications (and not associated with the sponsor) are not consideration.

(a) A good example is internet access. No state legislature has expressly stated that having access to the internet is consideration even if the promotion is limited to online entry. At least one state regulator – in Florida – has expressly stated that internet access is not consideration. And, Puerto Rico expressly excludes internet access from the definition of consideration for lottery purposes. Furthermore, the Unlawful Internet Gambling Enforcement Act (31 U.S.C. §§ 5361 et seq.) expressly excludes internet access from the definition of consideration.

(2) Postage is not consideration.

(3) Text Message and Data Charges. Similar to internet access, there has not been any clear articulation that these third-party charges could constitute consideration.

(a) If text message charges or other telecommunications charges result in a payment to the sponsor, however, consideration more likely would be deemed to be present.

(b) Another risk in connection with text messages and promotions is compliance with the Telephone Consumer Protection Act ("TCPA") and related abuses related to

robocalling, once again underscoring the UDAP principles in a promotional context.

b) In modern promotional contexts, "money" or "purchases" are not always clear. The advent of cryptocurrency, NFTs, and a variety of other tokens that can be earned or purchased in various ways complicate the question of whether a person is "making a purchase or payment." Some modern interactions that may constitute consideration include:

(1) Purchasing a game or a membership on a platform that permits entry into games of chance.

(2) Purchasing collectables that can be redeemed or validated in order to earn entries into a drawing for a prize.

(a) <u>Analysis</u>: Consider how loyalty programs differ from sweepstakes. Generally, a loyalty program produces access to more items, discounts on items, or access to premium items that are only available to loyalty program members. Loyalty programs by their nature tend to involve purchases. That is what evidences loyalty. Premiums that are accessed by virtue of reaching a certain tier or level in the loyalty program are not prizes in a sweepstakes sense. They are awards that are earned. When loyalty programs mix with chance, there can be questions about whether the items have now become prizes, and consequently, the purchases may constitute consideration for lottery purposes.

(3) Donating to charities.

(a) *See Knuttel v. Omaze, Inc*., 2022 U.S. Dist. LEXIS 65091 (C.D. Cal. Feb. 22, 2022) (dismissed *per se* violation of UDAP statute by virtue of an illegal lottery because of the existence of an AMOE).

(i) *Omaze* suggests that donations to charity can constitute consideration for lottery purposes. In that case, the availability of a satisfactory AMOE negated the element of consideration.

(ii) Although many of the UDAP claims were dismissed, some were not, including violation of a specific sweepstakes provision requiring that the official rules for a sweepstakes disclose when the final winner or winners will be determined. The case also demonstrates how plaintiff can use UDAP laws to maintain actions against promotions.

(4) Signing up for a recurring charge. Even if there is a free trial period, if there is a negative option whereby inaction results in a charge, the agreement to the terms of the program likely constitute consideration.

C. Sources of Sweepstakes and Contest Law

1. Lottery law is generally a creature of state law because it is criminal in nature. And, although the elements of prize, chance, and consideration are the most common features of state lottery laws, as we have already seen, how those elements are understood or weighted can vary by state.

2. State regulation of sweepstakes and contests can have its origin in the state's lottery law. As discussed above, under Michigan law, MCL 750.372(2), a person may conduct a lottery or gift enterprise "as a promotional activity that is clearly occasional and ancillary to the primary business of that person." To fit within the exception, the activity must be calculated to promote the business, must not involve payment of money solely for the chance to win a prize, and must not involve purchase of a product or service for substantially more than fair market value. Thus, the concept of a "sweepstakes" emerges as an express exception to the lottery law.

3. In some states, sweepstakes emerge separately from gambling laws. In those instances, the UDAP principles are emphasized. For example, under Massachusetts law, M.G.L. c. 93A, § 2(c) authorizes the Attorney General to promulgate regulations addressing gambling issues from the perspective of UDAP principles. *See* 940 CMR 30.01, *et seq*.

4. Federal law on gambling and lotteries is relevant, but largely depends on the way in which a commercial scheme is construed under state law. Where there are federal definitions of a "lottery," they tend to be enforced narrowly.

a) 18 U.S.C. § 1955 – Prohibits illegal gambling businesses.

(1) U.S. v. Arvay, 2024 U.S. Dist. LEXIS 135710 (D. Col. Jul. 31, 2024).

(a) The U.S. Attorney in Colorado brought an action against certain individual for running an illegal gambling business under 18 U.S.C. § 1955 based on physical locations where consumers could play a computer based game accessed through the payment of a proprietary cryptocurrency that could be purchased and sold at the locations. Under § 1955(b)(1)(i), a business is only an "illegal gambling business" if it violates the state or local law where it is conducted. Thus, it was necessary to understand whether the computer game violated Colorado law. Reviewing the Colorado gambling device statute and the definition of gambling in that statute, the court held that the government had sufficiently alleged the elements necessary in its affidavit to support a search warrant of the defendant's premises.

b) 18 U.S.C. § 1301 – Prohibits the transportation or carrying of lottery tickets in interstate commerce.

c) 8 U.S.C. § 1302 – Prohibits the mailing of gambling material (lottery tickets or actual gambling paraphernalia). The statute does not prohibit mailings that contain advertisements for gambling activity that is lawful where conducted (e.g., ads for licensed casinos).

d) 18 U.S.C. § 1304 – Prohibits the broadcasting of lottery information. (18 U.S.C. § 1307 exempts from this prohibition advertisements for state-run lotteries in states where the lotteries are conducted.)

e) 18 U.S.C. § 1306 – Prohibits financial institutions from offering lotteries.

f) 47 C.F.R. § 73.1211 – Prohibits television or radio stations from broadcasting advertisements or transmitting information on lotteries.

g) 47 C.F.R. § 76.213 – Prohibits cable television system operators from advertising or transmitting information on lotteries.

h) 39 U.S.C. § 3001 *et seq*. – Declares materials containing false representations and lotteries to be non-mailable and strictly regulates sweepstakes offered through the mail (Deceptive Mail Prevention and Enforcement Act).

i) 39 U.S.C. § 3005 – Permits mailing of state-run lottery materials within the state.

j) 26 U.S.C. § 5723(c) and 27 C.F.R. § 275.71 – Prohibits certificate coupons or other lottery devices from being placed on tobacco product packaging.

5. Enforcement of Federal Lottery Laws

a) Federal Communications Commission - As indicated above, 18 U.S.C. § 1304 prohibits the broadcasting of lottery information. *See F.C.C. v. American Broadcasting Company*, 74 S.Ct. 593, 347 U.S. 284 (1954) (the statute did not apply to giveaway programs that did not require participants to purchase anything, pay admission, or leave their home to visit the promoter's place of business). The FCC enforces its authority to regulate the broadcast of lotteries through Section 73.1216 of the Commission's rules (the "Contest Rule").

(1) *In the Matter of IHM Licenses*, *LLC* No.: EB- IHD-19-00029572 (Mar. 1, 2022) (failure to conduct a contest in accordance with the official rules).

(2) *In the Matter of Sound Ideas, LLC*. No.: EB-IHD-17-00023521 (Dec. 17, 2018) (license failed to award the advertised prizes, and instead kept them for its own employee).

(3) *In re Greater Boston Radio, Inc*., No.: EB-08-IH-5305 (Feb. 28, 2013) (on air description of prize did not match the official rules).

(4) *Boonville Broadcasting Company, Inc*. No.: EB-09-IH-1908 (Mar. 20, 2014) (licensee changed the rules after the contest had begun)

(5) *CBS Radio Holdings, Inc.* No.: EB-11-IH-1374 (Aug. 21, 2012) ("cutest baby contest" allowed for votes to be counted after the end date in violation of the official rules).

b) United States Postal Service – As indicated above 39 U.S.C. § 3001 *et seq*. empowers the postmaster general to designate materials containing false representations and lotteries to be non-mailable material. It also provides a private right of action in certain circumstances. *See Wright v. Publrs. Clearing House, Inc.*, 439 F. Supp. 3d 102 (E.D.N.Y. 2020) (court granted PCH's motion to dismiss with respect to the DMPEA claims based on the Plaintiff's failure to

allege that they elected to be excluded from the list of names and addresses used by the promoter of a sweepstakes because the DMPEA only provided private rights to action if an individual received one or more mailings after they elected to be excluded).

(1) Applies to direct mail sweepstakes and contests only.

(2) Newspaper and magazine advertisements sent through the mail to subscribers are exempt if the advertisement is not directed to a specifically named individual or does not offer the opportunity to order a product or service.

(3) Direct mail solicitations not complying with the statute are deemed “non-mailable matter” and subject to mail detention and prosecution by the United States Postal Service.

(4) Requires the following disclosures in all sweepstakes mailings containing sweepstakes entry materials (a term not defined in the statute):

(a) No purchase necessary;

(b) A purchase does not enhance your chance of winning;

(c) Sponsor name and street address; and

(d) Complete official rules and entry procedures including:

(i) All material terms and conditions; and

(ii) Nature and value of prizes and odds (numeric)

(5) The first two disclosures above must be “more prominent” than the other disclosures and must be presented three times: (i) in the mailing; (ii) on the order or entry device; and (iii), and in the official rules.

(6) Prohibits:

(a) Offering any advantage to purchasers over nonpurchasers.

(b) Misrepresenting that a person is a winner.

(c) Misrepresenting that a purchase enhances one's chance of winning.

(d) Requiring purchase or payment as a condition of entry into the sweepstakes.

(7) Name Removal Notification System

(a) Sweepstakes mailings must include address or tollfree number that recipients (or recipient's legal guardian) can call to have name removed from mailing list.

(b) Removal requests must be honored within 60 days.

(8) Grants authority to Postal Service to sue in any jurisdiction throughout the U.S. civil penalties can be imposed up to $3,000,000.

(9) Sweepstakes mailers that do not include entry materials, but merely advertise the sweepstakes and direct consumers elsewhere (e.g., online or point-of-sale) need only include name removal information.

c) Federal Trade Commission ("FTC")

(1) The FTC charged that the company uses "dark patterns" to mislead consumers about how to enter a sweepstakes by misleading consumers into believing that a purchase was necessary to win or would increase their chances of winning. *F.T.C v. Publishers Clearing House LLC*, Case No: 23-cv-4735 (E.D.N.Y. June 26, 2023) (complaint).

(a) Under a Stipulated Order executed on May 5, 2023, Publishers Clearing House was enjoined from:

(i) Misrepresenting that a purchase was necessary to enter a sweepstakes;

(ii) Misrepresenting that a purchase will improve one's chances of winning a sweepstakes;

(iii) Misrepresenting that an individual is likely to win, or is close to winning, a sweepstakes;

(iv) Misrepresenting that any particular characteristic of an individual in any way suggests that the individual has a greater likelihood of winning a sweepstakes;

(v) Misrepresenting that an individual has been specially selected among sweepstakes participants;

(vi) Misrepresenting whether an individual has entered a sweepstakes or the means by which an individual may enter a sweepstakes;

(vii) Misrepresenting the odds of winning, the deadline for entering, or any other action in connection with a Sweepstakes;

(viii) Misrepresenting the need for promptness or urgency in responding to any promotion of a sweepstakes entry opportunity or offer related to the sweepstakes;

(ix) Misrepresenting any action taken or to be taken by the sweepstakes sponsor, including, but not limited to, placing consumers on a special winners' list, awarding a prize in the same vicinity as the consumer, or planning to deliver a prize to the consumer;

(x) Misrepresenting any action that must be taken by the participating individual to be eligible to win the sweepstakes, to claim a prize number on a winner selection list, or to avoid disqualification, forfeiture. Or cancellation of the opportunity to win the Sweepstakes; and

(xi) Misrepresenting the total costs of any product to be ordered; any fees or costs associated with returning the product; that ordering a product was "risk free"; the purpose of the Sponsor's collection, use, or disclosure of any personal information; and any other fact material to consumers concerning any Sweepstakes entry or entry opportunity.

(2) The Stipulated Order, also mandate the format of disclosure of various as well as detailed mandatory language that Publisher Clearing House was required to use to disabuse consumers of any misunderstanding regarding all material aspects of the sweepstakes.

(a) The settlement represents one of the most extensive and draconian examples of regulatory oversight of sweepstakes offers in more than 20 years.

(b) Plus, Publishers Clearing House was required to pay $18.5 million as "monetary relief."

(2) The FTC has taken legal action against deceptive sweepstakes operations that targeted senior citizens.

(a) In the first case, the FTC and the State of Missouri charged a sweepstakes operation that sent tens of millions of personalized mailers, mostly to senior citizens, falsely indicating that the recipient had won or was likely to win a substantial cash prize, as much as $2 million, in exchange for a fee ranging from

$9 to $139.99. FTC v. Next-Gen, Inc., No. 4:18-CV-00128-DGK, 2020 U.S. Dist. LEXIS 263011 (W.D. Mo. June 3, 2020).

(b) In the second case, the FTC found that sweepstake operators worked with Indian telemarketers to trick older Americans into buying bogus technical support services. FTC v. Genius Techs., Ltd. Liab. Co., No. 3:18-cv-03654-JST, 2019 U.S. Dist. LEXIS 240826 (N.D. Cal. Mar. 14, 2019).

(c) Both enforcements were led by the U.S. Department of Justice, and aimed at limiting illegal sweepstakes throughout the country, especially schemes that exploited senior citizens.

(3) *FTC v. Walmart Inc.*, 2024 U.S. Dist. LEXIS 117532 (N.D. Ill. Jul. 3, 2024). The FTC sued Walmart for executing money transfers made as part of a widespread fraud scheme. The basis of the complaint was Walmart's alleged "substantial assistance to telemarketers, knowing that the telemarketer is engaged in a practice that violates the [Telemarketing Sales Rule (TSR)]" in violation of 16 C.F.R. § 310.3(b).

(a) Although the FTC's complaint alleged that fraudsters had represented to their victims that they had won a prize and had to pay to obtain the prize, the complaint did not specify the goods or services being sold or offered, as required by the TSR, requiring dismissal of the TSR claim as applied to the lottery scam.

(b) Despite the dismissal of the TSR claims, the court maintained the FTC's claims under § 5 of the FTC Act.

d) United States Department of Justice

(1) Pic-A-State Pa., challenge the Interstate Wagering Amendment, which amended 18 U.S.C. § 1301 (1994) by prohibiting the transmission in interstate commerce of information to be used for the purpose of procuring a lottery ticket. Their operation was designed to avoid the longstanding prohibition on the interstate traffic in lottery tickets by keeping the tickets themselves in the state of origin and transferring only a computer-generated receipt to the customer. The Court held that the Amendment regulated lotteries, which was an activity that affected interstate commerce. *Pic-A-State Pa. v. Reno*, 76 F.3d 1294 (3d Cir. 1996).

e) Commodities Futures Trading Commission (CFTC)

(1) In one of the most interesting developments in 2024 that reflected the prevalent nature of gambling in our society today, the CFTC attempted to defend its interpretation of the Commodity Exchange Act (CEA) making it unlawful to offer event contracts on the outcome of U.S. congressional elections because such contracts would "involve…gambling."

(2) An "event contract" is a form of derivative "future" contract whereby the purchaser of an event contract takes a yes/no position on whether the underlying event will happen. E.g., "Will the snowfall in

Boston exceed 24 inches in January, 2025?" The price of an event contract is based on the current probability that an event will occur. Thus, like stocks, the price of an event contract is variable. When a contract expires, the seller must pay the buyer if the underlying event on which the buyer took a "yes" position occurs, but the buyer gets paid nothing if it does not. Event contracts can be used to mitigate risk.

(3) Designated contract markets (DCMs) that are approved by the CFTC may list for trading new contracts by filing a self-certification with the Commission that the new contract complies with the CEA and the Commission's regulations or by requesting Commission approval.

(4) Subject to the qualifications for trading in futures, and depending on the event contracts listed by a DCM, a person could essentially take a position on any number of outcomes, theoretically including the outcome of a U.S. election. The similarity to gambling is unmistakable. In both cases, you have individuals on either side of a contingent outcome. The probability of the outcome is baked into the price of the "bet" or "investment." The outcome of the event that is the subject of the contract determines whether the buyer of the contract receives any money. And, like gambling, whether one receives money or not is binary. You "win" or you "lose."

(5) In Kalshiex LLC v. CFTC, 2024 U.S. Dist. LEXIS 163925 (D.D.C. Sept. 12, 2024), a DCM, Kalshi, challenged the CFTC's determination that it could not offer event contracts on U.S. congressional elections. The CFTC relied on its authority to act in the public interest and that the contracts involve unlawful activity or gaming.

(a) The contracts at issue related to a prediction as to whether one party would keep control of the House of Representatives or the Senate. (E.g., "Will the U.S. Senate be controlled by the Democrats after the 2024 general elections?") Buyers who correctly predicted the electoral outcome would receive one dollar per contract, and purchasers who make the incorrect prediction would receive nothing for their investment.

(b) The CFTC issued an order prohibiting Kalshi from listing its congressional control contracts for trading based on a special rule issued by Congress giving the CFTC authority to review and approve the event contracts. Under the special rule, the CFTC can determine that an event contracts are contrary to the public interest if the contracts "involve (i) activity that is unlawful under any Federal or State law; (ii) terrorism; (iii) assassination; (iv) war; (v) gaming; or (vi) other similar activity determined by the Commission, by rule or regulation, to be contrary to the public interest."

(i) Note that Congress was equally concerned about a contract involving "gaming" as it was about a contract involving an "assassination."

(ii) The CFTC's position as to what constitutes "gaming" was particularly interesting. The CFTC's interpretation was that a contract involving a sporting event like the Super Bowl would not fall under the

"gaming" category because events like the Super Bowl themselves are games, not "gaming." "Gaming" should apply only if they involve bets or wager. In essence, the CFTC equated "gaming" with "gambling." However, the court held that the word "gaming" requires that there be a "game" at its core, and that game may or may not involve bets or wagers. Unlike many federal and state laws that regulate "games" based on whether they involve "bets or wagers," the CEA does not. Therefore the court held that "gaming" as used in the special rule, meant playing gamine or playing games for stakes.

(iii) The court then examined whether an event contract focused on the outcome of congressional elections "involved" gaming or some other prohibited activity. The court held that it did not. While the CFTC could surmise that in essences an event contract on congressional elections "amounted to" betting on elections, such a reading of the special rule was too broad an interpretation. The activity at issue – congressional elections – was neither a "game" nor was it an unlawful activity. To say that congressional elections "involved" gaming, even if construed to mean some sort of staking of something of value, would essentially confer on the CFTC the authority to declare any activity as unworthy of being the subject of an event contract.

(c) The Kalshiex case is first major case to discuss an administrative agency's approach to gaming and gambling after the U.S. Supreme Court's decision in Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024). It could be an important decision as governmental agencies continue to wrestles with the limits on gaming and gambling in the U.S. under their respective mandates.

D. Promotional Games and their Relationship With "Loot Boxes" in the Video Game Context

1. Retail "Surprise Boxes" – Some retailers have offered items, often at a steep discount, as long as the purchaser agrees that there will be no returns and that she will not know exactly what she is getting for the price. In these promotional scenarios, the promotional value is driven by the promise of receiving a certain amount of value for a discounted price, even though the precise nature of the items received for the discounted price is unknown.

a) Set Active offers "Set Surprise," a deal in which a buyer can get discounted apparel with no returns and no choice as to the items other than size.

b) Madhappy is a Los Angeles-based clothing brand that offers an "Optimist Box," which is a mystery package including for example, a "$300 box with at least $750 worth of value" consisting of "a unique package of Madhappy products from throughout the years. Vintage styles, store exclusives, and rare collaborations. Every Optimist Box is individually curated and packaged by our team."

c) Even major brands like Whole Foods Market has teamed up with Too Good To Go, a Danish social impact company, to help reduce food waste by

offering mystery packages of prepared foods or bakery goods at steep discounts. For example, a customer could purchase a Prepared Foods Surprise Bag containing items like soups and ready-to-eat meals for $10 with a value of $30. Or a customer could purchase a Bakery Surprise Bag featuring breads, muffins, scones, and cookies priced at $7 with a value of $21.

d) In each of these cases, the consumer understands the value he is getting. The consumer is paying less than the retail value in part because she does not know precisely what items will be in the "mystery box."

2. What if upon check out, a marketer asks the consumer whether he would like to spend an extra $10 in order to get a "mystery box" containing one additional item that has a value of at least $10, but could be worth substantially more? Is that the same as the retail surprise boxes described above?

a) A discernible difference is that in this scenario, the consumer is asked to pay money for an item that may have the value of money paid or may have a substantially greater value. Whether or not the consumer receives something of equivalent value or something of greater value is a matter of chance. The difference in the item is not only a matter of character but of intrinsic value. Whereas in the retail "surprise boxes" discussed above the marketer often is clear about the value that the consumer will receive, in this scenario, the marketer is making the potential increase in value the premium to be obtained by chance.

b) Many states might view "mystery box" to be a form of gambling where the item and the value varies. Consumers pay money for a chance to receive something of commensurate value with the money paid or something of greater value. Although it is true that the consumer always gets something that has a value at least equal to the money paid, she does not know what that item is or whether she will receive something of greater value.

(1) In a normal sweepstakes context, the consumer is asked to purchase a specified item with a set retail value and, as an ancillary to the purchase, she obtains a chance to win a prize of a set value. Here, the consumer is asked to pay money, and she does not know which item she will receive or how valuable it will be, although she may be guaranteed that it will not be less valuable than the money paid.

(2) Does the guarantee of receiving at least an item with a value commensurate with the money paid take the scenario out of the definitions of gambling or a lottery? Probably not. Even if the consumer were told what the base item would potentially be, and the consumer either receives the base item ***or*** a premium item, the consumer would be purchasing a chance of receiving something of greater value than the money paid.

(3) If the consumer were to receive the base item (worth $10) and also receive a chance to obtain something of greater value, the structure would still violate many state lottery laws unless the consumer of receive the chance of obtaining the greater value item without making a purchase.

c) This type of promotional enhancement feels similar to in-game "mystery boxes – often called "loot boxes" – that are prevalent in video games. Although "loot boxes" can take many different forms, a common form is some sort of visual

representation of “box” or “chest” that can be opened by a player for a payment of real money or in-game currency. By revealing the contents of the “box” or “chest,” the player obtains one or more items that are useful in the game, but do not have real-world value outside of the game.

(1) The content’s lack of real-world value outside of the game is of critical importance to the legality of “loot boxes” in the United States. There is no “loot box” law in the U.S. General gambling/lottery and unfair/deceptive acts and practices principles apply to “loot boxes” inside of video games. Traditional “loot boxes” such as described above appear to be permitted in the U.S. as long as the prize consists of in-game items, even if they vary in rarity, or in-game tokens, provided that none of the items or tokens can be converted into real-world value. See Mai v. Supercell Oy, 648 F. Supp. 3d 1130 (N.D. Cal. 2023), vacated by Mai v. Supercell Oy, 2024 U.S. App. LEXIS 11317 (9th Cir. Cal., May 9, 2024) (Ninth Circuit agreed with lower court’s determination that those who “lost money” engaging in loot boxes did not have standing because they experienced no cognizable loss, having received what they paid for).

(2) Caution is warranted in any sort of “loot box” mechanism that acts like an in-game casino. Case law in some states, notably Washington, have viewed in-game tokens that permit continued gameplay to be a “thing of value” for gambling purposes in the context of online “social casino”-style apps. See, e.g., Larsen v. PTT, LLC, No. 3:18-cv-05275-TMC, 2024 U.S. Dist. LEXIS 103771 (W.D. Wash. June 11, 2024).

d) As with “loot boxes,” a mystery box can act as an enhancement to a purchasing experience. In the retail context, it would be like paying a dollar to spin a wheel with the possibility of landing on an item that is worth a dollar or on an item that is worth more than a dollar. It could add fun and excitement to an everyday purchasing experience. Yet, where a consumer is required to pay consideration for a chance to win something that may be of greater value than the money paid, a lottery may exist, even if the consumer always gets an item. And, like “loot boxes,” where consideration is always a factor, it is essential that there be some other safeguard to avoid an illegal lottery or a gambling violation.

3. “Mystery box” promotions are more defensible where:

a) The price is communicated to be a set discount from the fair market value or approximate retail value of the item or items sold by the marketer, not an opportunity to obtain something of greater value than the money paid; and

b) The reason for the discount is justified in part by the opaque nature of the offer (not knowing exactly which items are included in the box).

IV. THE ALTERNATIVE METHOD OF ENTRY (“AMOE”)

A. The Nature of the AMOE: What it is and what it isn’t

1. An AMOE is not an automatic path toward immunity. Often we see promotion marketers focus exclusively on whether an AMOE exists, and once they confirm its existence, they rest assured that their prize promotion is lawful. To the extent the existence of an AMOE removes liability from lottery law, which it does not do in all

circumstances, it is only part of the analysis, especially for modern prize promotions where the analysis is heavily focused on UDAP principles.

2. An AMOE is often an irrelevant concept for prize promotions outside of the U.S. In the vast majority of jurisdictions across the globe, a prize promotion by its nature is not gambling. And even if it were, the existence of another method of entry that permits entry without making a purchase does not make the consideration element disappear. Thus, an AMOE is almost never the end of the analysis in any jurisdiction outside of the U.S.

3. An AMOE can negate the element of consideration under the lottery laws of most U.S. states.

a) *E.g., Suski v. Marden-Kane, Inc.,* No. 21-cv-04539-SK, 2022 U.S. Dist. LEXIS 157448 (N.D. Cal. Aug. 31, 2022) (Coinbase promotion was not an illegal lottery because there was a mail-in AMOE), *aff'd Suski v. Coinbase, Inc*., 55 F.4th 1227 (9th Cir. 2022); *cert. granted*, *Coinbase, Inc. v. Suski*, 2023 U.S. LEXIS 4372 (Nov. 3, 2023) (No. 23-3).

b) *E.g., Glick v. MTV Networks, Div. of Viacom Int'l, Inc.*, 796 F. Supp. 743 (S.D.N.Y. 1992) (in light of cost-free means of entering the sweepstakes the court found that promotional sweepstakes was not the sort of activity which encompassed illegal gambling).

4. An AMOE generally does not work in cases where the underlying enterprise is not promotional or occasional in nature.

a) Many U.S. states do not recognize the AMOE as a means of avoiding the gambling/lottery laws where a game is offered for its own sake as a business or other money-making scheme. Those states sometimes view offers of games for the games' sake as gambling disguised as a promotion. *See e.g., Barber v. Jefferson Cnty. Racing Ass'n, Inc*., 960 So. 2d 599, 614 (Ala. 2006) (the availability of free chances is not necessarily dispositive of whether the game is a gambling scheme and does not negate the element of consideration); see also, *State v. Fellows*, 471 S.W.3d 555, 567 (Ct. App. Tex. 2015) (the mere pretense of free prizes, designed to evade the law, will not negate the element of consideration, and the primary subject of the transaction must be the promoted product and not the sweepstakes game itself).

b) Similar cases or attorney general opinions are found in at least Alaska; Arkansas; California; Mississippi; New York; Nevada; North Dakota; and Wisconsin.

c) Georgia has codified this position.

(1) For instance, the definition of an unauthorized "lottery" under Georgia law broadly includes "the payment of cash or other consideration or the payment for merchandise or services and the option to participate in or play, ***even if others can participate or play for free***, a no skill game or to participate for cash, other consideration, other evidence of winnings, or other noncash prizes by lot or in a finite pool on a computer, mechanical device, or electronic device whereby the player is able to win a cash or noncash prize, other consideration, or other evidence of winnings." O.C.G.A. § 16-12-20(4) (emphasis added). Thus, if a promoter is not promoting any good or service other than the game itself, the exceptions to gambling and lottery laws that allow for the use of

an AMOE are not likely to be availing under the facts as we currently understand them.

d) The issue of games for the game's sake is a common modern issue, especially in the context of social gaming and other gambling-adjacent business models. But, it can arise in scenarios that can seem very "promotional." *See, e.g., Couch v. Telescope, Inc., 2007 U.S. Dist. LEXIS 104142 *18* (C.D. Cal. 2007)(viewers could enter a chance-based promotion that was offered in conjunction with a television show, but court found that "Defendants' offers of free alternative methods of entry [did] not alter the basic fact that viewers who sent in text messages paid only for the privilege of entering the Games. They received nothing of equivalent economic value in return.").

e) *See also Texas v. Ysleta Del Sur Pueblo*, 2016 U.S. Dist. LEXIS 70159 (May 27, 2016) ("donation" method of entry in this case was that it was not "promotional" in nature and led to a finding that the sweepstakes was unlawful).

f) *See, generally, Wilson v. Yotta Techs. Inc.*, 2023 U.S. Dist. LEXIS 199746 (E.D. Mo. Nov. 7. 2023) (mobile gaming app that awards real world prizes and relies on a sweepstakes model to justify games of chance with real prizes and a purchase method of entry, accompanied by an AMOE).

(1) Yotta is a good example of a site that has gamblified financial services. Although the sweepstakes offered by Yotta are void in several states, including Idaho, Louisiana, Nevada, and Washington according to the official rules, there is little basis for viewing the chance-based drawings as promotional in nature.

(2) This case in 2023 did not address the legality of the app. Rather, the case was brought by a pro se consumer whose Yotta account was frozen for some reason, thereby denying the consumer of chances to win prizes and an inability to use the financial services facilitated through his Yotta account. The court dismissed the complaint due to lack of subject matter federal jurisdiction based on the amount in controversy.

5. In most states, AMOEs must be clearly and conspicuously disclosed and offer all participants a method of playing without making a purchase of any kind. Traditionally, promoters have required mail-in requests or other methods that may be more cumbersome than the purchase method.

6. Reflecting the relevance of UDAP principles in the structuring of a lawful promotion, a promoter must not hide the AMOE in the hope of driving most consumers toward the purchase method of entry. For instance, the court in Black N. Assocs. v. Kelly, 722 N.Y.S.2d 666 (4th Dep't. 2001) held that a game where consumers could purchase multiple paid entries at once while simultaneously being restricted to one entry per day using the AMOE violated N.Y. gambling law.

a) A key element of structuring the AMOE is evaluating whether the organizing sponsor has created such disincentives as to make the AMOE illusory. Although this traditionally has been viewed as a lottery issue, *Pepsi Cola Bottling Co. v. Coca-Cola Bottling Co*., 534 So. 2d 295 (Ala. 1988), a modern analysis examines this issue from the perspective of UDAP principles, *i.e.,* has the marketer unfairly made the "free" alternative method of entry so difficult as to turn the "free" entry option into a misrepresentation as to the "free" nature of the promotion.

(1) CVS sponsored a sweepstakes for a "Trip of a Lifetime" to Hawaii where ads explained that consumers who visited a CVS store, purchased digital pictures, and used a CVS ExtraCare card were automatically entered into the sweepstakes. However, CVS did not make entry forms available at its stores for any other consumers. The AG settled with CVS stating that alternate methods of entry do not require a purchase and should be advertised with equal prominence as methods of entry that require a purchase. Press Release, N.Y. Att'y Gen., CVS to Amend Sweepstakes Promotions (July 8, 2004), available at https://ag.ny.gov/press-release/2004/cvs-amend-sweepstakes-promotions.

(2) A Great Atlantic and Pacific Tea Company ("A&P") sweepstakes allowed consumers with an A&P Bonus Savings Card to be automatically entered in the sweepstakes when they bought certain products. However, A&P failed to adequately disclose the alternate method of entry that did not require a purchase. As a result, A&P agreed to pay a fine as part of the settlement. Press Release, N.Y. Att'y Gen., Promotion To Stop Requiring Waiver Of "do Not Call" Protection (May 3, 2005), available at https://ag.ny.gov/press-release/2005/promotion-stop-requiring-waiver-do-not-call-protection.

(3) The print ad copy for a Tylenol sweepstakes listed four steps for entering the sweepstakes, the first step being to buy Tylenol. 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. The ad also included the language no purchase necessary, but that language appeared in fine print near the bottom of the ad. The AG contended that the buy Tylenol message was so prominent that the free AMOE was not equally available to customers. Press Release, N.Y. Att'y Gen., Tylenol Manufacturer to Amend Sweepstakes Ads (Sept. 10, 2004), available at https://ag.ny.gov/press-release/2004/tylenol-manufacturer-amend-sweepstakes-ads.

b) In order to be effective, the AMOE must put the consumer in the same position as a purchasing consumer both from the perspective of the prizes offered and the odds of winning. The purported AMOE must not be difficult to locate or otherwise place the non-paying consumer in a far less advantageous position than one who pays for entries – the so-called requirement of "equal dignity." States that reference or allude to this requirement include: Alabama, Alaska, Arizona, Arkansas, California, Indiana, Iowa, Michigan, Minnesota, Mississippi, New York, North Carolina, North Dakota, Ohio, Texas, Washington, and Wisconsin.

(1) Typical "equal dignity" structural problems that can lead to potential liability for failure to provide a realistic AMOE include:

(a) Giving more chances to win to those who purchase than to those who enter for free.

(b) Making the odds of winning better for those who purchase than for those who enter for free.

(c) Limiting the free AMOE option to a subset of consumers rather than making it available to all eligible persons.

(d) Creating different paths of entry whereby the timing of the promotion cannot support an AMOE throughout the promotion period.

(e) Running out of free AMOE game pieces so that a purchase method is the only method for a substantial proportion of the promotion period.

(f) Imposing other hurdles or disadvantages to those who might want to enter via the AMOE.

I. PRIZE PROMOTIONS BASED ON SKILL

B. Promotions versus Gaming

1. As with the AMOE, the analysis of whether a contest involving skill is lawful often begins by examining whether it is promotional in nature. One looks at whether the promotion is actually promoting a good or service. Promotional contests promote the sale of products or services. They are offered occasionally and are ancillary to the business of the promoter. In contrast, contests that exist for their own sake tend to offer participants the ability to compete for valuable prizes using some element of skill but without the promotion of some other good or service. The former often can involve the purchase of the advertised product or service; the latter generally involves an entry fee or similar payment.

2. Entirely free skill-based games present lower risks in terms of the gambling considerations, but they still may be subject to UDAP principles.

C. Identifying Skill

1. In both promotional contests and commercial gaming, it is important to discern whether skill is actually determining winners and losers. This is important in both cases but increases in importance when the contest or competition is not entirely free to play.

2. Assessing the presence or dominance of skill is sometimes easy but other times it requires an expert analysis. Ultimately, it is a fact-intensive analysis. Under the common law, many courts in many jurisdictions have assessed games based on whether chance or skill "predominates." In assessing a particular game, courts have generally considered a variety of factors, including:

a) The nature of the tasks a person is asked to perform. There are some tasks that courts have found to be inherently skill-based and others that are inherently chance-based.

(1) Tasks that courts have found to be inherently chance-based include:

(a) Backgammon

(b) Poker

(c) Blackjack

(d) Dice games

(e) Pinball games

(f) Lotto, bingo and keno

(g) Casino-type games

(2) Courts will point to elements such as the spin of a wheel, the shuffle of a deck of cards, the throw of dice, and even the impact of gravity in the context of pinball. Thus, a court will look at certain games and decide whether they are inherently and necessarily chance-based. That can be the end of the analysis, but sometimes there are other facts that can lead the court to determine that adjustments have been made to eliminate the inherent chance-based nature of the task.

(3) Tasks that courts have found to be inherently skill-based include:

(a) Athletic ability

(b) Manual dexterity

(c) Knowledge-based games

(d) Creative skills, such as writing, cooking, photography

(e) Endurance

(f) Strategic games, including bridge, checker, and chess

(i) Note that bridge, a card game, has been viewed as being inherently skill-based. One must be careful with any particular holding to understand the facts that the court was considering. In many skill-based tasks, there can be a substantial amount of chance found, particularly if one examines traditional versions of these games as opposed to modern, computer-based versions or even games that are themed with a particular skill-based game but involve a variation that infuses a substantial amount of chance.

b) Whether participants possessing skills have a consistent advantage over non-skilled players. A careful analysis – sometimes with the help of an expert – can be helpful in demonstrating that one can only win consistently if one possesses the requisite skills and can exercise them within the context of the game. A good example of this might be poker. It is clear that there are good poker players and bad ones. But, a bad poker player can have a winning hand. So, if the task is to play a hand of poker and win or lose based on that hand, then it is hard to say that skill predominates. It may be a better argument that a tournament that is based on 100 hands of poker is predominantly skill-based because it may be statistically provable that skilled poker players will win consistently over lesser poker players when evaluated over many hands.

c) Whether an element of chance ultimately decides winners or losers in a game. A game may be inherently skill-based and allow for the exercise of skill, but a game may still be deemed chance-based if there is some material element

that makes the final determination a matter of chance. For example, the following situations could be deemed chance-based:

(1) A decidedly skill-based competition that results in a tie that is broken by a flip of a coin or even by a public vote where the public is not competent to evaluate the skills that are required by the contest's task.

(2) A skill-based competition where the criteria are not known to all participants.

(3) A skill-based, juried competition where the judges are not given objective criteria or are not competent to evaluate the skills that are required by the contest's task.

d) Fantasy v. Gambling

(1) One of the nuanced areas of prize-based businesses has featured the question of whether the knowledge of sports, leagues, and the abilities of individual players in those sports and leagues is sufficient to fall into a non-gambling classification.

(2) See 2023 Va. Op. Atty. Gen. 58, 2023 Va. AG LEXIS 23 (Dec. 12, 2023). The fact pattern presented consisted of "fantasy games" that offered the customer a defined selection of athletes, each of whom was assigned a target outcome for a certain statistical category, such as passing yards or receiving yards in football. The customer had to select at least two athletes from the list and then would wager on whether each selected athlete would achieve a given statistical outcome in a specified sporting event. The more athletes a customer selected, the higher the multiplier for the prize payout. The contests were single-player games and customers did not compete against other players. They just played against the metrics established by the operator. The Virginia A.G. analyzed the elements of "fantasy sports" and "sports betting," and determined that the (1) lack of any evaluation of the "relative knowledge and skill" of players and (2) lack of success measured across several events rather than a "single performance of any individual athlete were determinative factors.

D. Promotional Skill-based Contests with Consideration

1. The classic skill-based contest requiring a purchase might have involved a puzzle found in a newspaper that had to be purchased. *See, e.g., Phila. Record Co. v. Leopold*, 40 F. Supp. 346 (S.D.N.Y. 1941) (newspaper sponsor sought injunctive relief against third party who, for a fee, would help consumers solve the sponsor's puzzles).

2. More common today are contests that involve the use of the advertised product. For example, one might need to purchase a branded cake mix to compete in a baking contest. Or one might need to purchase a weight-loss dietary supplement to compete in a weight-loss competition.

a) Prize promotions arising out of competitive video gameplay (akin to eSports) are a typical type of promotion that requires at least the use of a branded video game, even if purchase is not required.

b) The key element in all such tournaments is that gameplay is skill-based.

3. The risk level from a lottery or gambling perspective tends to be low when such contests are promotional in nature, occasional, and clearly involve skill-based tasks (e.g., baking), even though consideration is involved. However, there are some states where contests with consideration, even those that are promotional in nature, could raise additional concerns from a gambling perspective.

a) In Arizona, there is a licensing regime for "amusement gambling." Amusement gambling is an exception to the general prohibition on gaming, and specifically applies to "intellectual contests." Ariz. Rev. Stat. § 13-3301(1).

4. Even in the promotional context UDAP principles are still a reason for careful drafting of rules and advertising. Of particular note are statutes that are sometimes called "prize/gift notification" statutes. These statutes deal with express or implied representations about prizes or gifts that offered in connection with a required purchase or other valuable consideration. These statutes can sound similar to a lottery prohibition, but they are based on UDAP principles, not gambling. Accordingly, they are generally focused on advertising that misleads consumers or unfairly lures consumers into making a purchase on the promise of a special gift or prize, often in the context of a high-pressure sales presentation. States with such provisions include:

a) Arkansas

b) Arizona

c) California

d) Connecticut

(1) Prohibits advertising a sweepstakes if there is any condition or restriction attached to the receipt of any prize a person wins in the sweepstakes, unless the condition or restriction to claim the prize is through any method which does not require any purchase, payment of a fee or any other consideration.

(2) Completing publicity or liability releases, eligibility affidavits or assuming liability for federal, state or local taxes, federal, state or local licenses or registration fees or other similar costs does not constitute a condition or restriction.

e) Georgia

f) Hawaii

g) Illinois

h) Maryland

(1) There is a peculiar consumer protection provision that could apply to a skill contest for promotional purposes that involves consideration. Md. Ann. Code § 13-305(b). A person may not notify any other person by any means, as part of an advertising scheme or plan, that the other person has won a prize, received an award, or has been selected or is eligible to receive anything of value if the other person is required to purchase goods or services, pay any money to participate in, or submit to a sales promotion effort.

(2) "Games of skill" that do not involve "sales promotion efforts" are exempt from the prohibition, but what about games of skill that do involve a "sales promotion effort"?

(3) And, what does "sales promotion effort" include? From the context of the statute, a "sales promotion effort" might include a required purchase. If so, then a skill contest that includes a required purchase may be subject to the following limitation: the prize cannot exceed the greater of: (1) $40; or (2) the lesser of (i) 20% of the purchase price of the goods or services that must be purchased; or (ii) $400.

i) Nevada

j) New Jersey

k) North Carolina

(1) *Surgeon v. TKO Shelby, LLC*, 385 N.C. 772, 898 S.E. 2d 732 (N.C. 2024).

(a) In *Surgeon v. TKO Shelby, LLC*, 385 N.C. 772, 898 S.E. 2d 732 (N.C. 2024), a car dealership sent out a flyer advertising a sweepstakes. The call to action promised consumers a chance to win one of six grand prizes, including a 2018 Nissan Sentra or $20,000 in cash.

(b) In the middle of the flyer there was a scratch-off area that revealed a contest code. There was language on the flyer that described the scratch-off area as a "scratch and match" game, with the invitation to scratch and reveal a number assigned to a prize thus becoming a "guaranteed winner" of the prize associated with their number.

(c) In fact, all of the cards revealed the same code and all of them pointed to the 2018 Nissan Sentra/$20,000 cash prize. However, when consumers including the named plaintiffs called the special "hotline" to claim their prize, they were invited to come to the dealership. Upon arriving at the dealership, the consumers were informed that the number disclosed in the scratch-off box was meaningless. There was a separate "activation code" located in a red box under the contest instructions that was the actual unique game code associated with predetermined matching prizes, which were listed on a poster displayed at the dealership. The named plaintiffs came to the dealership only to learn that they had not actually won the 2018 Nissan Sentra, but instead won $2.

(d) The plaintiff sued under a UDAP theory as well as common law negligence. Under such theories, the plaintiffs would be entitled to seek redress for their injuries. However, the action was filed as a class action, and the issue before the court was whether the trial court erred in certifying the class.

(e) The Supreme Court of North Carolina held that the trial court did, indeed, err in granting certification of the class. A

major factor in the Court's determination to vacate the class certification and remand the case for further consideration was that the trial court certified a class consisting of everyone who received a flyer and subsequently visited the dealership, when in fact the rules specified that consumers had to call a hotline number and *then* visit the dealership. Accordingly, there would be some members of the class who might not have a contractual right to any prize, which could create conflict within the class regarding the proper measure of the redress.

l) North Dakota

m) Oklahoma

n) Oregon

o) Rhode Island

p) South Carolina

q) Tennessee

(1) *Gina v. Burt*, 2024 U.S. Dist. LEXIS 174637 (E.D. Tenn. Sept. 26, 2024) (plaintiff sought recovery of gambling losses arising from gameplay of social gaming apps and successfully defeated the game publishers' attempt to remove the state action to federal court).

r) Utah

s) Vermont

t) Washington

u) West Virginia

v) Wyoming

5. The key to most, though not all, of those statutes is clear and conspicuous disclosure of all of the material terms and conditions.

E. Pay-to-play Gaming with Prizes and its Relationship with Gambling

1. Unlike promotional skill-based games that may require a purchase in order to play, games that exist for their own sake and constitute the business itself raise more serious gambling issues. We need to think about these sorts of businesses because today gaming and gambling surround us, and marketers want to be where people are spending time. Therefore, even though a non-promotional skill-based game may not a mechanism that a brand would sponsor directly, a brand may want to advertise on, in, or near such gaming. Consequently, we often receive questions from brands about a particular gaming scheme to determine how and to what extent it should feel comfortable sponsoring or advertising in or around such gaming.

2. Pay-to-play games generally are social, online games that involve some level of interactivity and can involve varying amounts of skill. Pay-to-play games generally offer some sort of recognition of whether a participant is performing well or poorly (although

many are very simple so that virtually everyone can achieve some level of success in the games).

3. Many such games are "free" to start. However, participants can make purchases to either enhance their gameplay experience or to continue playing after exhausting their free opportunities to play.

4. Other games are based on a subscription or purchase model. These can appear very similar to a videogame that one might purchase and play interactively.

a) See *Coy v. Lilith Games (Shanghai) Co.,* No. 19-cv-08192-JD, 2022 U.S. Dist. LEXIS 142625 (N.D. Cal. 2022) (Plaintiffs claim that Defendants engaged in deceptive practices by luring them into spending $8,000 to $15,000 on in-game purchases of gems to pay rigged loot box card and wheel games that had unfavorable odds dismissed with leave to amend).

5. Assuming that some money is spent on the game or gameplay, the salient legal issues from a gambling perspective begin to take form when the recognition of success results in something of value being bestowed on the successful participant. Once "something of value" is awarded to successful participants, gambling laws can come into play.

6. Nowhere has this produced more litigation than in the realm of social casino-style games.

a) *Kater v. Churchill Downs Inc.*, 886 F.3d 784 (9th Cir. 2018) was one of the most important cases in this area because it held that a casino-styled game platform constituted illegal gambling under Washington law. The key to the case was whether the "virtual chips" that could be won and wagered on the site constitutes a "thing of value." What was critical about this case was that even without a "cash out" option, the chips could constitute a "thing of value" from a gambling perspective because the virtual chips extended the privilege of playing games on the platform, and that privilege of extended playtime fell within Wash. Rev. Code § 9.46.0285's definition of a "thing of value" and consequently the game met the definition of an illegal gambling game. See Wash. Rev. Code § 9.46.0237. Again, the issue was not the criminal aspect of gambling that produced the risk (the online casino settled lawsuits for over $150,000,000), it is the consumer protection laws in action. *Kater* interpreted Washington's Recovery of Money Lost at Gambling Act ("Money Lost Gambling Act"). The plaintiff had alleged that she lost over $1,000 worth of virtual chips while playing the online virtual casino game. The lawsuit was filed under the Money Lost Gambling Act as class action pursuant to Wash. Rev. Stat. § 4.24.070.

b) Several other lawsuits have been filed within the 9th Circuit on the same or similar theory, sometimes resulting in significant settlement payments depending on whether there is an applicable gambling loss statute. The case law surrounding what is a "thing of value" is still developing. Moreover, the UDAP theories are proving to be the most tenacious.

(1) *Ochoa v. Zeroo Gravity Games LLC*, No. CV 22-5896-GW-ASx, 2023 U.S. Dist. LEXIS 91215 (C.D. Cal. May 24, 2023) (Plaintiffs' claim for injunctive relief survived under California's consumer protection statutes, with court noting that "California has a strong, broad, and long-standing public policy against judicial resolution of civil disputes arising out of gambling contracts or transactions," but the court dismissed the plaintiffs' illegal gambling claim because they were claims to recover

gambling losses with no form of relief under California law). *See also Mai v. Supercell Oy*, 2023 U.S. Dist. LEXIS 685 (N.D. Cal. Jan. 3, 2023) (loot boxes); *Coffee v. Google, LLC*, No. 20-cv-03901-BLF, 2022 U.S. Dist. LEXIS 4791 (N.D. Cal. Jan. 10, 2022) (loot boxes); *Taylor v. Apple, Inc.*, No. 20-cv-03906-RS, 2021 U.S. Dist. LEXIS 265916 (N.D. Cal. Mar. 19, 2021) (loot boxes).

(2) *Wilson v. PTT, LLC*, No. C18-5275RSL, 2021 U.S. Dist. LEXIS 11618 (W.D. Wash. Jan. 21, 2021) (class certified in case involving Money Lost Gambling Act); *Benson v. Double Down Interactive, LLC,* No. 2:18-cv-00525-RBL, 2020 U.S. Dist. LEXIS 143970 (W.D. Wash. Aug. 11, 2020) (denying certification of interpretive issue to Washington Supreme Court); *Fife v. Sci. Games Corp*., No. 2:18-cv-00565-RBL, 2018 U.S. Dist. LEXIS 212908 (W.D. Wash. Dec. 18, 2018) (use of "virtual coins" that can be won or lost as "things of value").

7. Because of the possible application of gambling loss statutes, the risk of sizable settlements resulting from class actions is a risk for these sorts of non-promotional, social gaming offerings. But, what is the practical risk for the brand who wants to advertise in connection with such an offering? In thinking about risk of association with an offering that is pay-to-play and offers "things of value" or even money as prizes, it is useful to consider the spectrum of gambling regulation in the U.S.

a) Betting/Wagering

(1) The "bet/wager" states are those states that prohibit offering contests wherein participants must make a "bet or wager" to participate. Generally speaking, a "bet or wager" means risking money or other thing of value in the hopes that they will receive a larger return. In those states, gambling will depend on whether participants are "risking something of value." A payment of a fee or a purchase of a product is generally not a bet or wager. The concept of betting or wagering often equates to having the ability to win back what you are risking. Thus, if you pay a fee that you will never get back for the privilege of playing a game, there may not be a "bet or wager."

b) Consideration States

(1) Some states go further than the traditional "bet/wager" view and include all forms of consideration in their definitions of "gambling." Under this type of analysis, the element of "risk" is not as important as whether the sponsor of a contest accepts any money whatsoever; money paid to the sponsor plus the hope of earning larger returns is sufficient to create a risk of violation. For example, case law in California has established that three elements must be present for an activity to qualify as gambling (for example, see *Trinkle v California State Lottery*, 105 Cal. App. 4th 1401, 1407, 129 Cal. Rptr. 2d 904, 907–08 (2003)): (i) A prize; (ii) Awarded through an event of chance; and (iii) In exchange for consideration. Pennsylvania courts have also adopted the traditional, three-element definition that gambling includes (*Commonwealth v Dent*, 2010 PA Super. 47, 992 A.2d 190, 192 (Mar. 25, 2010, Sup. Ct. Pa.); *Commonwealth v. Two Electronic Poker Game Machines*, 502 Pa. 186, 465 A.2d 973, 977 (1983)).

c) Anti-Lottery States

(1) Anti-Lottery states are those states that use their lottery laws in tandem with their gaming provisions to restrict "pay to play" contests. These states tend to view the dichotomy between chance and skill more conservative. That is, the question of whether chance or skill determines winners is dependent on whether any chance is involved rather than whether there is a predominance of chance.

8. Accordingly, when evaluating a pay-to-play platform or a game for purposes of assessing risk, brands should start by considering whether the payment is a "bet or wager."

a) Casino games very often fit that description. Anything themed as a casino game should be a red flag.

b) Consider how else participants could be risking something of value in the hopes of recovering not only their wagered property but of taking the wagered property of other participants (or that of the "house").

c) In contrast to a bet/wager model, do participants pay a fee to participate in a game for entertainment purposes? Money paid for entertainment, even if that entertainment consists of a competition with prizes, is less risky under "bet/wager" state statutes because there is no expectation that one is trying to recover property that has been staked on the outcome of the contest.

9. The next consideration is how much skill predominates the outcome of the contest or competition.

a) Most states make a clear demarcation that the definition of gambling does not include a game that is based on the skill of the participants who are competing for or earning "things of value" or "real-world rewards" ("RWR") through their participation. *See, e.g.,* Opinion of the Justices No. 373, 795 So. 2d 630, 634-35 (Ala. 2001). Brands should look for some level of assurance that any platform or service it is sponsoring or advertising on has performed some analysis on whether skill or chance predominates.

(1) Brands should require game publishers to explain how they know that skill predominates over chance. Look for a reasonable level of substantiation that statistically it would be nearly impossible to win consistently without the exercise of skill.

(2) This may take the form of an affidavit by a statistician or a demonstration that the publisher utilizes an algorithmic device to ensure that skill rather than chance predominates in the determination of winners.

b) Because there are some states that have articulated an anti-lottery approach to gambling, games with any level of chance may pose a risk for a game that involves consideration and prizes. *See Crazie Overstock Promotions, LLC v. State*, 377 N.C. 391, 858 S.E.2d 581 (N.C. 2021) (company selling goods online and in stores with a rewards program where customers could receive points by purchasing gift cards, mailing in a post card, or making an in-store request, held to be running an illegal lottery despite some skill elements). Brands should look for whether the gaming platform has suppressed or geoblocked its games in particular states. In particular, look for suppression of states including:

(1) Arizona

(2) Arkansas

(3) Connecticut

(4) Indiana (particularly if the game involves cards or dice)

(5) Iowa (particularly if the game involves cards or dice)

(6) Louisiana

(7) Maine (particularly if the game involves cards or dice)

(8) Maryland

(9) Montana

(10) South Carolina

(11) South Dakota

(12) Tennessee

10. Finally, consider whether the platform mimics a regulated game such as BINGO or that piggyback onto a governmental-authorized lottery or unauthorized gaming. State regulators are more likely to be wary of gaming platforms that threaten to cut into the state's revenue stream. Many states have authorized sports betting, and a growing number of states allow regulated fantasy sports and even online casino gambling. Brands should tread very carefully if they engage with a platform that purports to offer any form of sports betting, fantasy sports, or casino gambling without a license.

II. Specific Sweepstakes and Contest Issues

A. Modern sweepstakes and contests still involve many traditional elements, such as retail outlets, in-pack game pieces, administrative and government oversight, and a variety of disclosure issues. All of these elements are best understood within the area of UDAP principles.

B. Retail Stores

1. Store Visits – As discussed above, store visits are almost never deemed consideration anymore. However, one must always be concerned about hidden purchase requirements. Thus, when there is a store visit, the right question to ask is what must a consumer do when she gets to the store? How close must she get to a purchase in order to enter? The closer one gets to having to make a purchase in order to be eligible to enter, the greater the likelihood that consideration exists from a lottery perspective. Moreover, consumers will have been misled into believing that no purchase is required whereas there was in fact a purchase requirement. In essence, an undisclosed purchase requirement can translate into a UDAP violation.

2. Posting of Rules and Winners – Another area that makes a retail promotion different is the way in which some states' laws have continued to focus on the way a retail promotion is promoted and how winners are made public. Even though the FTC eliminated its Trade Regulation Rule concerning Games of Chance in the Food Retailing and Gasoline Industries over 25 years ago, there are still state laws that identify a retail

promotion as potentially more subject to UDAP violations perhaps because of the proximity between entry and a purchase potential.

a) Required posting of rules:

(1) Connecticut

(2) Florida

(3) Massachusetts

(4) Michigan

(5) New York

(6) Rhode Island

(7) Washington

b) Required posting of winners lists:

(1) Massachusetts

(2) Rhode Island

3. Registration – Although there are important (and much more heavily enforced) registration requirements in other states, Rhode Island continues to require registration for a sweepstakes whereby "a retail establishment offers the opportunity to receive gifts, prizes, or gratuities, as determined by chance, in order to promotion its retail business, where the total announced value of the prizes offered to the general public is in excess of $500.00."

4. Local Regulation – Retail promotions can raise unique issues because of their physical nature.

a) *See, e.g.,* NYC Administrative Code 10-115, which restricts "pulling-in" pedestrians.

b) *See, also*, https://www.nytimes.com/2023/08/04/nyregion/union-square-kai-cenat-twitch-giveaway.html. A 21-year-old online influencer/personality made an online announcement on August 2, 2023, that he would be hosting a giveaway of video game consoles/equipment at 4 pm on August 4, 2023, in Union Square, NYC. The city was unaware of this and did not approve it. Thousands of individuals were present at the part at the time of the giveaway – people were seen standing on cars, climbing city buses, throwing items such as bottles, fighting, and police were unable to control the situation for some time. The influencer/personality was arrested and the city was planning on charging him with inciting a riot/unlawful assembly.

F. In-Pack/On-Pack Game Materials

1. Traditional in-pack/on-pack promotion

a) The classic conception of an in-pack or on-pack promotion is akin to the "golden ticket" concept made famous by "Willy Wonka and the Chocolate Factory." Putting aside the fact that there was no AMOE in that fictional promotion, the essential promotional elements of a legitimate sweepstakes are present. There is a sales promotion which involves a purchase of product (presumably at its regular price); there is chance because you do not know which package or product contains the winning element; and there is a prize. These promotions can take many forms and often the focus is on how best to structure the AMOE.

b) There are many ways to establish an AMOE that meets the requirements discussed above. To structure an in-pack/on-pack promotion across all U.S. jurisdictions, the key element is that all eligible participants must have been able to obtain a chance to win the prize without making a purchase. Typically that requires a complex seeding process where by a certain number of "dummy" packs are established (physically or virtually). The number of "dummy" packs relates to an assessment of the likely incidence of non-purchase requests (usually based on experience with similar promotions). Then, the randomized distribution of "prize moments" is accomplished by the sponsor (or even better by its agent who will work with the package printers and manufacturing functions of the sponsor) across all of the packs created and all of the "dummy" packs. Thus,

theoretically 100% of the winning prize moments could be inside of dummy packs that could be obtained only via the AMOE; and theoretically 100% of the winning prize moments could be inside of packs that are in the retail channel. It is also possible that there could be a myriad combinations that represent a random distribution of prizes across all possible entries, accompanied by a purchase or free.

c) Traditionally, there are several weaknesses associated with this sort of promotional structure.

(1) Sponsors can make the AMOE so burdensome that no consumers (or virtually no consumers) participate in that manner. *Pepsi Cola Bottling Co. v. Coca-Cola Bottling Co.*, 534 So. 2d 295 (Ala. 1988).

(2) Even if the AMOE is as easy as a mail-in request, there can be equal dignity problems especially if a cap is placed on the number of AMOE requests one can make but no limit is placed on the number of specially-marked products that can be purchased.

(3) Because of the need to create "dummy" packs of some type and the possibility that prize notifications might be inside of packs that are never purchased (at least not before the expiration of the promotion), there could be situations where the largest advertised prizes are never awarded.

d) Most of these concerns raise consumer protection issues, and sponsors must keep these issues in mind when structuring an in-pack/on-pack promotion. Moreover, there are even some U.S. jurisdictions that have addressed them specifically.

(1) Wisconsin – Under Wisconsin law, there is an exception for a broad prohibition against in-pack promotional schemes. *See Bohrer v. City of Milwaukee*, 2001 WI App 237, 248 Wis. 2d 319, 635 N.W.2d 816 (Ct. App. Wis. 2001). That exception requires that:

(a) Participation is available, free and without purchase of the package, from the retailer or by mail or toll-free telephone request to the sponsor for entry or for a game piece;

(b) The label of the promotional package and any related advertising clearly states any method of participation and the scheduled termination date of the promotion;

(c) The sponsor on request provides a retailer with a supply of entry forms or game pieces adequate to permit free participation in the promotion by the retailer's customers;

(d) The sponsor does not misrepresent a participant's chances of winning any prize;

(e) The sponsor randomly distributes all game pieces and maintains records of random distribution for at least one year after the termination date of the promotion;

(f) All prizes are randomly awarded if game pieces are not used in the promotion; and

(g) The sponsor provides on request of a state agency a record of the names and addresses of all winners of prizes valued at $100 or more, if the request is made within one year after the termination date of the promotion.

(2) Minnesota – Minnesota law similarly addresses in-pack promotions, but it does so in the context of the definition of a "lottery" as opposed to merely an unfair or deceptive act. Specifically, under Minnesota law, "A lottery is a plan which provides for the distribution of money, property or other reward or benefit to persons selected by chance from among participants some or all of whom have given a consideration for the chance of being selected." Under the statute, however, an in-pack promotion is not a "lottery" as long as the structure meets the following requirements:

(a) Participation is available, free and without purchase of the package, from the retailer or by mail or toll-free telephone request to the sponsor for entry or for a game piece;

(b) The label of the promotional package and any related advertising clearly states any method of participation and the scheduled termination date of the promotion;

(c) The sponsor on request provides a retailer with a supply of entry forms or game pieces adequate to permit free participation in the promotion by the retailer's customers;

(d) The sponsor does not misrepresent a participant's chances of winning any prize;

(e) The sponsor randomly distributes all game pieces and maintains records of random distribution for at least one year after the termination date of the promotion;

(f) All prizes are randomly awarded if game pieces are not used in the promotion; and

(g) The sponsor provides on request of a state agency a record of the names and addresses of all winners of prizes valued at $100 or more, if the request is made within one year after the termination date of the promotion.

(3) Thus, for an in-pack promotion, under Wisconsin and Minnesota law, there are several unique requirements, including that there be a "second chance" drawing for unawarded prizes.

(4) Florida – Although there is no express provision in Florida's prize promotion statute that would require a second-chance drawing, in 1999, Florida's Attorney General sued retailer "Service Merchandise" for operating an "unlawful lottery and game promotion." The AG alleged that the retailer violated the Florida gaming statute that stated it is unlawful to fail to award prizes offered in a promotion (even though the retailer had a

provision in its rule that stated unclaimed prizes would not be awarded). The AG took the position that all "major prizes" needed to be awarded in a second chance drawing. Although Florida has not brought additional cases based on this case, there is an argument that a sponsor should be required to conduct a second chance drawing for any unclaimed major prizes in Florida.

(5) Puerto Rico – To the extent Puerto Rico were included in a promotional prize offering especially in an instant-win/in-pack context, there may be a risk that its rules governing sweepstakes could require a second chance drawing. Although the rules do not expressly require such a drawing, they do require that some reasonable effort be made to award prizes to "alternate" winners.

(6) Even with traditional in-pack/on-pack promotions, general UDAP principles could come into play in many states, even those that do not have specific provisions addressing in-pack/on-pack promotions. The language in the official rules that unclaimed prizes will not be awarded could be helpful, but depending on how the promotion is advertised, e.g., how much one or a few grand prizes are touted, there could be questions of whether consumers are misled by the failure of the sponsor to award the prize offered or even to ensure that the winning pack is put into the channel of commerce or made available. Thus, sponsors should always at least consider whether a second-chance drawing or other safeguard might be warranted.

2. The modern view of in-pack/on-pack promotions

a) Interactive aspects make free AMOEs accessible for far more people, but maintaining equal dignity in obtaining free "entries" continues to be an issue. Because online methods are easy for consumers, the use of non-electronic AMOEs in connection with otherwise interactive "in-pack" promotions may be viewed as potentially unfair.

b) Collection games with products that come in "blind packs" may be viewed as "in-pack" games of chance. The issue for these sorts of "games" is whether they are in fact promotional in nature or merely part of the nature of the product.

c) Many promotions involving NFTs can have similar "blind pack" aspects. Thus, in many modern promotions involving tokens or other elements that are on-chain, questions can arise as to whether a sweepstakes is even involved and whether the AMOE is effective.

G. Direct "Mail" Promotions and Disclosure Requirements Generally

1. Traditionally, sweepstakes mailings were are ubiquitous and involved some of the most classic large-scale sweepstakes, e.g., Publisher's Clearinghouse, Reader's Digest. Those promotions were "promotional" in that they promoted items such as magazine subscriptions, and records (and "tapes" – cassettes, reel to reel, 8-track). They also sometimes promoted discount clubs or other services that involved recurring charges. What made these promotions unique was the way in which the entry process engaged consumers in selecting the prizes they would like to win and somehow indicating that selection on the entry form. In effect, the entry forms made it seem that the likelihood of winning was greater than it was. Somehow the consumers' actions, which sometimes included affixing stickers depicting cars or vacation packages to an

entry form, seemed to give the impression that consumers were closer to winning than they actually were.

2. Although they were sweepstakes by their nature, and sometimes there were questions about whether there was some form of "de facto" consideration required in order to keep getting the mailings, the real underlying legal issue was always based on UDAP principles. *See Haskell v. Time, Inc.*, 965 F. Supp. 1398 (E.D. Cal. 1997).

3. The involvement level associated with entry sometimes led consumers to believe that their chances would improve if they made a purchase. Thus, in some cases, there were stickers depicting various albums or magazines that the consumer might like to purchase. Sometimes there would be a dizzying array of stickers that would either enable the consumer to enter for free or indicate the consumer's desire to enter into a subscription for magazines or albums, etc.

4. These promotional tactics led to consumer complaints, which in turn led to legislative and judicial action. In fact, many of the largest direct mail promotion marketers entered into massive nationwide settlements in the 1990s and 2000s under UDAP principles and theories.

5. Many of the UDAP principles that are reflected in the actions against Publishers Clearing House and similar sponsors were applied broadly to any direct mail sweepstakes promotion, and some of those legislative and administrative rules promulgated to address the sort of prize notices that were endemic to the direct mailers were written broadly enough to apply to many other types of prize and gift promotions. *See* Deceptive Mail Prevention and Enforcement Act, 39 U.S.C. § 3001 *et seq*.

6. State Prize and Gift Notification Statutes

a) Almost all prize/gift notification statutes require clear and conspicuous disclosure of material information concerning sweepstakes.

(1) Some states even specify the format of disclosures, e.g., Colorado, where a sponsor of a direct mail sweepstakes must include the official rules, in full, regardless of whether entry materials are included in the mailing, and the rules must be in a special section, entitled "Consumer Disclosure" (in 12 pt. bold type) in which certain specific information must be disclosed in 10 pt. type.

(2) At least one state – Texas – has a monetary threshold of $50,000 before applicability of its draconian disclosure provisions.

(3) Florida and Puerto Rico define "material terms" for purposes of required disclosures in any sweepstakes.

(i) In Florida, all print advertising must contain "material terms," which by regulation include:

(a) Name of the operator and game promotion;

(b) That no purchase is necessary to enter or play the game promotion;

(c) Start and end dates for entering the game promotion, consistent with the official full rules and regulations, including exact times if applicable;

(d) Who is eligible or not eligible to participate in the game promotion, with respect to age or geographic location; and

(e) Disclosure of where the game promotion is void.

(ii) In Puerto Rico, “abbreviated rules” are defined as including:

(a) The end date of the promotion;

(b) All eligibility requirements for entry;

(c) The name of the promoter;

(d) A statement that no purchase is necessary to enter or play the game; and

(e) Disclosure of where the full Official Rules can be obtained.

(4) Many states expressly require disclosure of the name and address of the sponsor.

(a) Arkansas

(b) California

(c) Florida

(d) Connecticut

(e) Hawaii

(f) Illinois

(g) Indiana

(h) Iowa

(i) Kansas

(j) Minnesota

(k) New Mexico

(l) South Dakota

(m) Utah

(n) Wisconsin

(o) Wyoming

(5) Many states require disclosure of a verifiable retail value of each prize offered.

(a) Arkansas

(b) Connecticut

(c) Colorado

(d) Florida

(e) Georgia

(f) Hawaii

(g) Indiana

(h) Iowa

(i) Kansas

(j) Louisiana

(k) Maryland

(l) Massachusetts

(m) Michigan

(n) Minnesota

(o) South Dakota

(p) Utah

(q) Wisconsin

(r) Wyoming

(6) Many states require disclosure of the odds of winning each prize offered.

(a) Arkansas

(b) California

(c) Connecticut

(d) Georgia

(e) Hawaii

(f) Indiana

(g) Iowa

(h) Kansas

(i) Louisiana

(j) Maryland

(k) Massachusetts

(l) Minnesota

(m) New Mexico

(n) South Dakota

(o) Utah

(p) Wisconsin

(q) Wyoming

(7) Many states require disclosure whether a participant will be subject to a sales presentation.

(a) California

(b) Florida

(c) Georgia

(d) Indiana

(e) Iowa

(f) Kentucky

(g) Louisiana

(h) Michigan

(i) South Dakota

(j) Utah

(k) Wisconsin

(l) Wyoming

(8) Many states require disclosure that the recipient of a gift or prize must pay shipping and handling.

(a) Arkansas

(b) California

(c) Hawaii

(d) Indiana

(e) Iowa

(f) Kansas

(g) Minnesota

(h) South Dakota

(i) Utah

(j) Wisconsin

(k) Wyoming

(9) Many states require disclosure of any other restriction or limitation on eligibility that could apply.

(a) Arkansas

(b) California

(c) Connecticut

(d) Georgia

(e) Indiana

(f) Iowa

(g) Kansas

(h) Massachusetts

(i) Minnesota

(j) South Dakota

(k) Utah

(l) Wisconsin

(m) Wyoming

b) Not all of these requirements apply to all types of promotions. Some will only apply to "written materials"; some relate to direct mail; others depend on the involvement of a sales presentation. Accordingly, depending on how location-specific the promotion is, there may not be any express requirement to disclose a particular type of information. However, the modern view of sweepstakes and contests is based on UDAP principles. Even if there is no specific law that requires disclosure of a particular piece of information, general UDAP statutes (as one can see from the FTC's enforcement of § 5 of the FTC Act) can give regulators – and consumers under state UDAP statutes – ample

ammunition to pursue actions against brands who create confusion by failing to provide consumers with adequate information about a prize or gift enterprise.

7. Other unique disclosure requirements affecting certain written promotional materials can apply.

a) The timing of the selection of winners is typically not a required disclosure. However, New Mexico is the exception to this rule. New Mexico requires that the sponsor state the scheduled announcement date for determination of winners in print advertising. (This applies to skill- as well as chance-based promotions where consideration is required.)

b) Although California's prize/gift statute requires many disclosures that could apply if there is a sales presentation (as noted above), its statute more broadly applies to situations where merely a store visit is required.

c) Connecticut requires that game pieces bear particular disclosures including the number of prizes, their value and relative odds of winning, all in a type size at least one-third the size of the largest type on the game piece.

d) Massachusetts requires extensive disclosures on any entry blank including eligibility requirements, whether attendance at the time of the drawing is required, and whether an affidavit of eligibility might be required.

8. Focusing on the UDAP principles rather than lottery laws helps to underscore that disclosure is not necessarily dependent on whether skill or chance predominates. In fact, many states require disclosures for games of skill. Modern enforcement is based on deception and unfairness. The more a consumers stands to lose by virtue of a promotion in terms of money, time, property, rights, or any else of value, the greater the need to ensure that consumers are made fully aware of the attendant risks. States that require prize promotion disclosures even in skill-based contexts include:

a) Arkansas

b) California

c) Iowa

d) Kansas

e) Minnesota

f) North Dakota

g) Utah

h) Wyoming

H. Registration and Bonding

1. It is axiomatic that failure to provide a prize that is offered as part of the sweepstakes or contest to a person who has been determined to be eligible and to have won the prize is a deceptive act or practice. (*See* Fla. Stat. § 849.094(2)(b); Neb. Rev. Stat. § 9-701(3)(c).) Every state and federal UDAP law would create a cause of action for either the government or a consumer to pursue. But, some states have created

safeguards to ensure that consumers in their states are easily made whole if the sponsor of a prize promotion does not fulfill its obligations under the law to award the prizes as promised.

2. Florida

a) A promotional game of chance must be registered at least seven days prior to the first announcement of the game.

b) This requirement only applies if the total announced prize value exceeds $5,000.

c) The registration materials must be accompanied by a filing fee of $100 and either proof of a trust account for the State's benefit or a surety bond in an amount equal to the total announced value of all prizes offered.

3. New York

a) The sponsor of a promotional game of chance must register the promotion at least 30 days prior to the first announcement of the game.

b) This requirement only applies if the total announced prize value exceeds $5,000.

c) The registration materials must be accompanied by a filing fee of $100 and either proof of a trust account for the State's benefit or a surety bond in an amount equal to the total announced value of all prizes offered. One difference in New York compared to Florida is that in applicable games the sponsor may post a bond that is proportional to the approximate number of game pieces of chance that are designated for the New York market.

4. Rhode Island

a) As noted above in connection with retail promotion, chance-based prize promotions in promotion of retail establishments must be registered with the Secretary of State.

b) This requirement only applies if the total announce prize value exceeds $500.

c) The registration materials must be accompanied by a filing fee of $150. There is no bond requirement.

5. Arizona

a) As noted above in connection with "amusement gambling," Arizona allows for certain types of contests of skill that require a purchase. Such contests must be registered with the state prior to the start of the promotion.

b) There is no bond requirement, nor is there a prize value threshold.

I. Winners Lists

1. Because it is so basic to the legality of a prize promotion that the prizes be awarded as promised, it is also a basic precaution to make a record of the winners of

prizes in a promotion. This would be essential in any state where a consumer alleges under a UDAP statute that the promotion sponsor has not awarded the prizes. But there are also specific state requirements that mandate the preparation and presentation of winners lists, at least with regard to winners of major prizes.

a) Florida

b) Georgia

c) Maryland

d) Massachusetts

e) Minnesota

f) New York

g) Rhode Island

h) Tennessee

i) Texas

j) Wisconsin

2. How long one should keep those lists may depend on the size of the prize pool, the nature of the prize, and the nature of the sales promotion. Some jurisdictions require the retention of records, including winners lists. Again, the focus is on the awarding of prizes. Some states do not limit their requirements to games of chance or in fact focus on games of skill (California).

a) California

b) Florida

c) Minnesota

d) New Mexico

e) New York

f) Rhode Island

g) Texas

h) Wisconsin

3. Although this edition of the outline does not address telemarketing sweepstakes, we note that under the FTC's Telemarketing Sales Rule, there is a two-year record retention requirement that would apply to prize promotions.

III. Official Rules as a Contract

A. It is well-established that promotional terms and conditions are a contract between the promoter and the participating consumer. Official rules of sweepstakes and contests are no different.

B. Official rules of a sweepstakes or a contest often are unilateral in nature (meaning that a consumer accepts them by virtue of some action such as filling out an entry form and depositing it into a bowl), but the relationship between the sponsor and the participating individuals can be much more complicated and there can be an array of complicated and corresponding obligations and rights established with a set of such rules.

C. Like any good contract, the official rules of a prize promotion should have two primary goals: (1) to reduce the likelihood of mistake, confusion, and misunderstanding; and (2) to protect the sponsor against claims of deceptive or unfair acts or practices. Although the official rules of the prize promotion can also help to explain why a promotion is not an unlawful gambling or lottery scheme, the modern conception of sweepstake and contests is best viewed from the perspective of avoiding a UDAP violation. Goal #1 above leads to goal #2.

D. Be aware of regulatory and self-regulatory formalities when drafting official rules.

1. The “No Purchase Necessary” language may be required to appear in a particular format depending on the nature of the promotion.

2. Consider any applicable trade-specific language or self-regulatory guidelines that might apply in a particular context.

E. Official rules will be construed in the manner most favorable to the consumer. The sponsor will have drafted them. It is this incumbent upon the sponsor to be very precise.

1. Template rules can be used for low-value prize pools where the risks are low, and boilerplate is often fine; however, the official rules will be most useful when they are customized for a particular promotional goal.

2. Defining a promotional goal is one of the most important first steps in crafting a set of official rules. This is important for chance as well as skill contests. Knowing what one wants to achieve from a promotional perspective can help to make the official rules as useful as possible.

3. Once the promotional goal is determined (there can be more than one), then the next step is to flesh out the provisions that will enable the promoter and the consumer to coexist clearly and peaceably throughout the process, even when their interests may not be consistent.

F. Key provisions of official rules

1. <u>Define the parties</u>. There will be a sponsor. There will be an entrant. There may be other participants, like an agent or administrator, or judges. Get these parties defined and use the right defined terms throughout.

2. <u>Establish eligibility for the entrant</u>. This provision can be used for many purposes. It can help to tie the promotional goals to the structure of the promotion by limiting entry to those who are truly the target audience of the marketer. It can also help to limit fraud. Under some circumstances, particularly where a marketer seeks to only offer the promotion to past customers, it can maintain a closed universe of participants who have made purchases in the past but are not required to purchase anything further to enter the promotion.

3. Establish the contours of the promotional period from a timing perspective. There may be subsets of time within the entire promotional period, and each should be defined carefully and consistently.

4. Define precisely what the entrant must do to participate. This section is probably the first time in the official rules when the sponsor is carefully balancing its promotional goals with ways to protect itself against abuse. That means that there will be limitations set on how a person can enter the promotion.

5. Identify precisely what the sponsor or its agent will do in order to determine winners. This is a critical moment in the official rules, because in the event of litigation, this is an obligation that the sponsor must perform 100% correctly. Thus, the wording is critical. It is also a balance between specificity and flexibility. Although building in maximum flexibility might seem beneficial, it can appear to be so imprecise as to imply a lack of accountability, which can be a negative factor when discussing the promotion with a regulator. The specificity of determining winners can also enable the sponsor to enforce disqualifications as necessary.

6. Identify the prizes precisely. Obviously, this is another critical provision, and many state laws come into play when describing the number of prizes available, the prizes themselves, and their value. It is also critical to specify the odds of winning each prize or prize category. Prizes can come with limitations. This is the time to specify those limitations robustly. Winners will hold sponsors not only to the stated nature of the prizes but to any aspect that is implied in the advertising. While the official rules cannot contradict what is shown in the advertising, at least ensure that the official rules contain a precise description of the prizes.

7. Focus on intellectual property. Use of “gamification” to generate ideas, innovation, and applications for existing technology has become a very common type of prize-based promotion. Tying back to the promotional goals, it is critical to determine the extent to which the sponsor is seeking to take a property interest in any of the intellectual property created pursuant to the promotion. Even if the sponsor does not wish to own the intellectual property produced in the promotion, the sponsor may want to be able to use, share, or publish it. In the modern form of contests involving user-generated content (“UGC”), sponsors must consider whether their promotional platforms could be subject to protection under the Digital Millennium Copyright Act (“DMCA”) and whether it has conformed with the DMCA to take advantage of its immunity provisions. Another possible twist in modern contests is whether a sponsor requires that videos are created on a particular format. If a video contest does not specify, and contestants enter using TikTok with music from the TikTok commercial library, would entry violate the copyright in the music (assuming the video is somehow copied and shared off of the TikTok platform)? New forms of generative artificial intelligence are making the analysis of whether UGC is “original” even more difficult.

8. Verify. Before a sponsor or its agent determines that an eligible person is a winner, what level of verification should be performed? What would be reasonable under the circumstances? On the one hand, too stringent a verification protocol could slow down winner determination and frustrate the promotional goals. Overly strict verification, could also impose costs or burdens on the entrant to such an extent that it may rise to the level of unfairness. On the other hand, too light (or no) verification might leave open too many opportunities for consumer fraud. Many factors will go into this determination, and verification should be highly customized to the promotion at issue. Related to the issue of verification is whether affidavits or other declarations of eligibility should be employed.

9. Analyze publicity rights. Traditionally, sponsors liked to publish the names of winners. Today, privacy concerns make that sort of practice unwise and unpopular. So

why do we still have publicity rights provisions? In modern promotions that might share user names, profiles, handles, or other personal identifiers among entrants or even with the public in a promotional context, it is wise to ensure that the sponsor has the right to use and publish the identify of any entrant in conjunction with the promotion. But, as to actual publicity use, sponsors should obtain enforceable releases from any person whose publicity rights the sponsor will use for advertising purposes. The collection of personal information as part of the promotion is a matter of privacy and data security, and that issue is usually dealt with by reference to the sponsor's privacy policy. Differentiate between publicity use and data privacy.

10. Analyze specific contingencies. Usually the boilerplate begins at this point, which is fine as a starting point. But, the greatest value of good rules drafters is the ability to identify foreseeable problems under the specific circumstances of the promotion. There are many sorts of common promotional problems, and each of them should be interpreted through the lens of the particular promotion that is being run.

a) How should lost, late, illegible, or otherwise defective entries be treated? Usually they are void.

b) How might a consumer try to "game" the promotion? Is there a way she could get more entries than you expect or want? How might the sponsor limit the foreseeability of such attempts to seek an advantage?

(1) Limit mail entries to one per outer envelope?

(2) Prohibit reproduced entry forms?

(3) Impose limits on entries? Should they be limited per-person, per-household, per-email address, etc.? A combination of limitations? Is "and" or "or" the right conjunction? (Usually "or" is correct because the sponsor means to make either limitation determinative.)

(4) Prohibit the use of software-generated, robotic, programmed, script, macro or other automated entries?

c) How will unclaimed prizes be handled?

11. Be reasonable with limitations of responsibility and liability. Although it is tempting to believe that one can craft a limitation of liability that will enable a sponsor to escape all costs and responsibilities for whatever might go wrong in a promotional context, UDAP principles will generally not permit a sponsor to renege on its responsibilities including any injury that the promotion might cause to consumers. That said, a well-crafted provision that disclaims as many specific contingencies that are legitimately out of the sponsor's (or its agent's) control will help in providing significant protection in the event of a technical or other glitch in a promotion. Similarly, there are important responsibilities that the consumer cannot ignore, such as the payment of taxes, which generally is the winners' responsibility.

12. Be thoughtful with an approach to disputes. It is useful to think of disputes in terms of layers.

a) The core layer involves disputes about how the promotion is run. A strong set of rules gives the sponsor or its administrator/agent a clear roadmap as to how the promotion will run. Most of these administrative determinations are the "balls and strikes" of the promotion, and as in baseball, you cannot dispute

the umpire's call. Thus, for many of these administrative determinations, the administrator will be considered the "judge" for purposes of resolving a dispute. The "judge's decisions" as to these administrative aspects should be final.

b) The next layer involves disputes that occur because of third-parties. For example, there may be confusion arising from more than one person using an email account. It is hard for the administrator to make a decision in that sort of case, and so it is useful to have another form of dispute resolution. That is why we often include a provision specifying that in the event of a dispute arising because of multiple users of an email address or mobile account, the identity of the entrant will be determined by whose name is on the authorizing documents for the account. Another example of disputes in this layer might be the valuation for an NFT prize. Rather than the sponsor stating what the value is, an object outside standard such as a specified secondary marketplace as of a particular date might be an efficient way to resolving disputes.

c) The last layer is a dispute that arises because of a UDAP issue of some sort. This is generally the layer that is most critical, and so it is important to define the sort of disputes that will fall in this category and how they will be resolved.

(1) Curing problems. It is reasonable for a sponsor and its administrator/agent, upon learning of a problem, to take appropriate action that will protect the promotion itself as well as the interests of the participants. Thus, there should be an opportunity for the sponsor to adjust the official rules as necessary or otherwise take action that will remedy a problem or failure, even if that means canceling the promotion but giving all eligible persons who have entered a chance to win the prizes in another format. Certainly, it is reasonable to take action to deal with hacking, including to terminate, modify, amend, suspend or cancel the promotion and, if desired, to select winners among entries received as of the date of such event.

(2) Litigation. Once it is clear that there is no way to cure a problem arising in a promotion to the satisfaction of an entrant, it becomes necessary to think through how best to limit liability. Limitations on litigation in consumer contracts, especially where there is little chance that they have been read by consumers, can be difficult to enforce. But, if a provision is carefully – and consistently – drafted, courts sometimes will enforce arbitration provisions and other alternative dispute resolution options. *See Johnson v. Jefferson Cty. Racing Ass'n,* No. 1061398, 2008 Ala. LEXIS 129 (Ala. June 27, 2008); *Suski v. Coinbase, Inc.,* 55 F.4th 1227 (9th Cir. 2022)*; aff'd,* 144 S. Ct. 1186, 218 L. Ed. 2d 615 (2024) (see discussion below); *see also Root v. Robinson*, No. 5:20-cv-00239-M, 2021 U.S. Dist. LEXIS 117942 (E.D.N.C. June 23, 2021) (sponsor failed to establish that plaintiff/consumer was aware of, saw, or agreed to be bound by an arbitration provision). As long as the official rules are made readily available to all participants, courts may enforce reasonable limitations on certain types of liability (e.g., punitive) or even limitations on class actions. Even choice of law provisions can be controlling if the language is clear and accessible through the official rules.

(3) Arbitration provisions have been a significant area of development. *Coinbase, Inc. v. Suski*, 144 S. Ct. 1186, 218 L. Ed. 2d 615 (2024) emphasizes the importance of careful drafting, conspicuous

terms, and conscious choices when determining what terms should be in a promotion's agreement. It must be clear that participants of a promotion or sweepstakes intended to agree to the terms of that promotion, and it is the responsibility of the contract drafter to make the agreement clear.

(a) At issue in the case was whether it is up to a judge or an arbitrator to decide which two agreements is controlling in the dispute between Coinbase and its aggrieved users. The decision about which contract prevails, in turn, would determine if the dispute proceeds in arbitration or in court.

(b) Upon creating their Coinbase accounts, users agreed to resolve any disputes with Coinbase in arbitration, but a subsequent agreement said disputes over the contest should be heard in court in California. When users accused the company of violating California's false advertising law by tricking them into paying to participate in a sweepstakes that offered prizes in dogecoin, they brought a class action suit in federal court.

(c) A federal judge in California refused Coinbase's request to force the dispute into arbitration, and the 9th U.S. Circuit Court of Appeals affirmed. The U.S. Supreme Court agreed to hear the case.

(d) The U.S. Supreme Court held that where there are two, separate contracts that conflict as to whether to arbitrate or go to court, a court (not an arbitrator) must decide which contract governs the disagreeing parties. When a court determines which contract governs, the court should consider the intent of the parties to be bound to arbitration.

(e) The fact that the sweepstakes rules were agreed to after the Coinbase user agreement was not determinative, but it may be used as evidence of the parties' intent to not be bound by the arbitration provision in the Coinbase user agreement should a dispute arise regarding the sweepstakes.

(f) The Court explained the four different levels of disputes that can arise under arbitration agreements and how the different disputes are to be resolved.

(i) A first level dispute is a contest over "the merits of the dispute," and the resolution depends on relevant facts and applicable law.

(ii) A second level dispute is a contest over whether the parties agreed to arbitrate the merits of a dispute.

(iii) A third level dispute is over who should have the power to decide the second matter.

(iv) A fourth level dispute – such as was the subject of the case before the Court – is where there are conflicting agreements on who decides arbitrability. To

resolve a fourth level dispute, contract principles are employed. A court – not an arbitrator – controls contract disputes.

(a) A court does not yield to the delegation clause and allow an arbitrator to decide arbitrability because that would make arbitration contracts more powerful than other contracts – and they are not.

(b) Because this issue stems from separate, conflicting contracts, a court must follow the precedent of courts deciding contract disputes.

(c) To maintain the standard of viewing arbitration agreements as equal to other contracts, the Court affirmed the Ninth Circuit's decision that a court decides which contract governs where a contract with a forum selection clause contradicts a contract with an arbitration agreement.

(v) By rejecting all Coinbase's arguments, the Supreme Court highlighted the importance of intent and consent when parties assent to agreements – including arbitration agreements. Arbitration/delegation provisions do not enjoy "superiority" over other contracts. Determining which contract supersedes should be done on a case-by-case basis to determine what the the parties agreed to, though the Court left to state law how that determination of divining intent shall be accomplished.

(g) See *Nessim v. Fliff, Inc.*, 2024 U.S. Dist. LEXIS 79453 (C.D. Cal. Jan. 5, 2024) (class action alleging operation of an illegal, unregulated online sports book against a gaming app that purported to be a sweepstakes stayed pending the result of arbitration as provided by a delegation provision in the app's sweepstakes rules.

(h) *See Woodward v. Smartmatch Ins. Agency*, 2024 U.S. Dist. LEXIS 170174 (N.D. Ill. Sept. 20, 2024) (plaintiff in TCPA class action maintained that her suit should not be subject to an arbitration clause that defendants alleged had been agreed to when plaintiff entered a survey sweepstakes to win $25,000).

13. <u>Consider other disclosures required by some states</u>. As noted above, there are many states that have a variety of disclosure requirements. Although some of those requirements may be targeted at direct mail promotions, others may apply more broadly. Accordingly, strong official rules in the U.S. will address the availability of a winners list.

* * *

Like any general outline, this outline is not a replacement for legal advice. Please use the services of a lawyer with experience in the area of promotion marketing when structuring a prize promotion. If there are areas of promotion marketing that are not covered in this outline – there are many – that would be of interest or use in future editions, please let the author know at jfeldman@reedsmith.com.