InfoPAK℠

Navigating US Legal Issues in Modern Advertising Campaigns

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This InfoPAK provides an overview of US legal issues that commonly arise in modern advertising campaigns and promotions. The goal of the InfoPAK is to explain the US legal framework under which common advertising and promotions issues are analyzed and provide some guidance in navigating the legal and regulatory requirements an advertiser might face.

Unless otherwise expressly specified, the laws, regulations, courts and agencies mentioned in this InfoPAK are US laws, regulations, courts and agencies.

First, we address false advertising claims, the importance of substantiation and the varying degrees of substantiation necessary for specific types of claims. Starting with false advertising claims provides the lens through which advertisers evaluate advertising campaigns and promotional material. Evaluating false advertising claims will also serve as the backdrop for all the other issues discussed in this InfoPAK. Second, we spend some time discussing the use of people in advertising campaigns, focusing on influencer marketing and right of publicity claims. Third, we address ways to protect the privacy of children under 13 years of age in accordance with the US Children's Online Privacy Protection Act ("COPPA"). Finally, the last three sections of this InfoPAK address specific types of promotions and advertising claims: conducting legal contests and sweepstakes; structuring cause marketing campaigns; and making truthful, substantiated U.S. origin claims. The treatments of these topics are illustrative more than they are exhaustive. Nevertheless, this InfoPAK aims to assist in-house and outside counsel alike in spotting issues and addressing concerns raised by modern advertising practices.

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I. Advertising Claims and Substantiation

Consumers are bombarded with advertising for products and services. The information used to advertise products and services aids consumers in determining the benefits of a product, comparing the features and benefits of products from various sources, and in some cases, justifying spending more for one brand of the same product. Accordingly, consumers need to be able to trust that objective, provable information contained in advertising is truthful, non-misleading and substantiated by evidence that supports the information.

Advertisers have a vested interest in making sure that they convey truthful information through their advertisements. Otherwise, they risk eroding the trust of consumers, while giving competitors an opportunity to disrupt business by asserting a false advertising claim. This section gives guidance to advertisers to assist them in making sure their claims do not violate US federal or state laws that were enacted to ensure truth in advertising.

A. US Legal Framework

At the federal level, two primary sources of law govern advertising claims: the US Trademark Act (the "Lanham Act") and the US Federal Trade Commission Act ("FTCA"). The Lanham Act, particularly Section 43(a), proscribes false or misleading statements and establishes a federal cause of action for "false advertising."[1] US courts have interpreted the elements of a false advertising claim under the Lanham Act as: "(1) a false statement of fact by the defendant in a commercial advertisement about its own or another's product; (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience; (3) the deception is material, in that it is likely to influence the purchasing decision; (4) the defendant caused its false statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to defendant or by a lessening of the goodwill associated with its products."[2]

The FTCA grants the US Federal Trade Commission ("FTC") authority to regulate advertisements with the goal of protecting consumers. Section 5 of the FTCA declares that "[u]nfair or deceptive acts or practices in or affecting commerce are hereby declared unlawful."[3] This section, in combination with Section 12(a) of the FTCA establishes the authority for false advertising enforcement in the FTC[4] (Section 12(a) discusses the dissemination of false advertisements and states that "[i]t shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement . . . (2) [b]y any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in or having an effect upon commerce, of food, drugs, devices, services, or cosmetics"). Section 13(b) then authorizes the FTC to seek preliminary and permanent injunctions for violations of the FTCA.[5]

The FTC, which brings administrative actions under the provisions of the FTCA, issued its *Policy Statement on Deception* in 1983 to address the factors the FTC considers in evaluating false advertising claims.[6] The FTC enumerated three primary factors: (1) "a representation, omission or practice that is likely to mislead the consumer;" (2) "the perspective of a consumer acting reasonably in the circumstances;" and (3) "the representation, omission, or practice must be a 'material' one."[7] In summary, the FTC "will find deception if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment."[8]

In addition to federal law, most US states have passed Unfair and Deceptive Trade Practices Acts, with some adopting the US Uniform Unfair and Deceptive Trade Practices Act to govern state law claims.[9] Several states have also passed false advertising statutes as a supplement or alternative to the Uniform Unfair and Deceptive Trade Practices Act.[10]

Advertising claims may also be subject to industry-specific laws and regulations. For example, the US Textile and Wool Acts provides a number of rules for advertising clothing,[11] and advertising practices associated with food and drug advertisements are heavily regulated as well.[12] Television networks have also promulgated Network Advertising Guidelines that articulate important factors in determining which advertisements are proper for television viewing.[13]

B. Identifying the False or Misleading Statement

Advertising statements generally fall into two categories: (i) puffery, which is not actionable as false or misleading advertising, and (ii) express or implied claims, which can be the subject of a false advertising claim. It is important to evaluate the entire context of the statement (or advertisement) to identify the category in which the offending statement falls.

Puffery is a non-specific, favorable, often exaggerated, boastful statement relating to a product or service or a general claim of superiority that is so vague that it can be understood as nothing more than a mere expression of opinion.[14] By way of example, the following statements, standing alone, are non-actionable puffery:

- America's Favorite Pasta[15];
- [Nescafe] "delivers consistently great flavor" and "Highest quality ingredients"[16];
- "the Most Advanced Home Gaming System in the Universe"[17];
- "less is more"[18]; and
- "anything closer would be too close for comfort."[19]

In contrast, an express or implied claim communicates an objective, provable fact to consumers.[20] Express claims are easy to identify because they involve statements that directly represent the fact at issue.[21] The following are examples of express claims:

- "Car Brand X has the most horsepower in its class";
- "longer engine life and better engine protection";[22]
- "50% Less Mowing"[23]; and
- "stops pain immediately."[24]

Implied claims are more difficult to identify because they present the fact in an oblique or indirect way.[25] Accordingly, it is important to consider whether a direct statement in an ad conveys an objectively provable fact to the consumer. For example, in an ad for cheese slices, Kraft stated that each slice was made with five ounces of milk, which was a true statement. [26] The ad was nevertheless held to be misleading because it falsely implied that each slice of cheese contained as much calcium as five ounces of milk. Similarly, an ad claiming that a product offered "the strong relief of aspirin" was found to imply that the product actually contained aspirin.[27]

The line between puffery and an actionable claim is not always clear. A subjective opinion can be transformed into an actionable claim when viewed in context with other words, slogans, pictures or demonstrations. *Pizza Hut v. Papa John's*[28] provides a good example of how the context of an advertisement can change a subjective statement of opinion to an actionable statement of fact.

At issue in the case was Papa John's use of its trademarked slogan "Better Ingredients. Better Pizza."[29] In affirming the jury's verdict, the United States Court of Appeals for the Fifth Circuit first considered the slogan standing alone and stated that "it is clear that the assertion by Papa John's that it makes a 'Better Pizza' is a general statement of opinion regarding the superiority of its product over all others. This simple statement . . . epitomizes the exaggerated advertising, blustering, and boasting by a manufacturer upon which no consumer would reasonably rely."[30] Accordingly, the slogan, viewed in isolation, is non-actionable puffery.[31]

However, Papa John's also used its slogan in commercials that compared the ingredients it used to make its sauce and dough to that of its competitors, including Pizza Hut.[32] The court concluded that the slogan, when used in combination with the comparisons of Papa John's sauce and dough, conveyed the message that Papa John's uses "better ingredients," which produces a "better pizza." Put another way, by including the ingredient comparison in the ads, Papa John's gave definition to the word "better" such that it was no longer a general statement of opinion, but was an objectively measurable statement of fact.[33]

C. Demonstrating That an Actionable Claim Is Deceptive and Material

A challenger must demonstrate that false or misleading claims are deceptive or likely to deceive consumers and are "material" to consumers' purchasing decisions. Although US courts often state these as two separate elements necessary to prove a false advertising claim, in practice, these elements merge and are evaluated together. In fact, materiality centers on whether the false or misleading statement deceives, or is likely to deceive, consumers. The challenger's burden of establishing materiality differs depending on whether the offending claim is literally false or literally true but misleading.

I. Literally False Claims: US Courts Presume That Consumers Are Deceived

"In analyzing whether an advertisement . . . is literally false, a court must determine, first, the unambiguous claims made by the advertisement . . . , and second, whether those claims are false."[34] Courts generally find literal falsity applies only to unambiguous messages conveyed by advertising claims.[35] The "greater the degree to which a message relies upon the viewer or consumer to integrate its components and draw the apparent conclusion . . . the less likely it is that a finding of literal falsity will be supported."[36]

Some courts also recognize claims that involve a statement that, while not literally false on its face, is nevertheless literally false given the circumstances (or false by necessary implication).[37] Such claims arise "when, considering the advertisement in its entirety, the audience would recognize the claim as readily as if it had been explicitly stated."[38] In determining whether a claim is false by necessary implication, courts inquire whether, based on a facial analysis of the product name or advertising, the consumer will unavoidably receive a false message.

For example, in *Cuisinarts, Inc. v. Robot-Coupe International Corp.*, the United States District Court for the Southern District of New York found literal falsity by necessary implication in an advertisement for professional food processors.[39] The defendant stated that all fine French restaurants chose Robot-Coupe's professional processors over those of competitor Cuisinart, thus necessarily implying that Cuisinart not only produced a professional model food processor (which it did not), but also that the restaurants in question had chosen the Robot-Coupe over the Cuisinart model (which they had not).[40]

Similarly, the United States Court of Appeals for the Third Circuit in *Novartis Consumer Health, Inc.* analyzed whether statements associated with the advertising of Mylanta Night Time Strength were literally false by necessary implication. Although the product advertised nighttime relief, the product formulation was that of an extra strength antacid, without any additional enhancements or sleep aids. Holding that the name of the product—Mylanta Night Time Strength—necessarily implied that it was specially formulated for nighttime relief of heartburn, the court upheld the lower court's decision.[41]

Courts presume materiality when the statement at issue is literally false. If an advertisement is false on its face, a competitor harmed by it can obtain an injunction without having to show extrinsic evidence that consumers were actually deceived. In *Cashmere & Camel Hair Manufacturers Institute v. Saks Fifth Avenue*, for example, the United States Court of Appeals for the First Circuit found that a presumption of consumer deception attached to literally false label statements, such as those where blazers containing less than 1% of cashmere were advertised as "10% cashmere" and where labeling the blazers as "cashmere" rather than "recycled cashmere" was literally false.[42] Furthermore, if the challenger is seeking a preliminary injunction against a literally false claim, the court may presume that irreparable injury will result should the injunction be denied.[43] Basically, if a claim is literally false, courts will presume actual deception.[44]

2. Literally True but Misleading Claims: Evidence of Actual Deception Required

Unlike literally false statements, the standard for literally true but misleading claims requires a challenger to show that the statements at issue have in fact misled or deceived consumers.[45] Challengers will often rely on consumer surveys to show either consumer deception or lack thereof.[46] This additional burden of proof was explained by the United States Court of Appeals for the Sixth Circuit in *American Council of Certified Podiatric Physicians and Surgeons*: "[w]here statements are literally true, yet deceptive, or too ambiguous to support a finding of literal falsity, a violation can only be established by proof of actual deception . . . . A plaintiff relying upon statements that are literally true yet misleading cannot obtain relief by arguing how consumers could react; it must show how consumers actually do react."[47]

In *Sandoz Pharmaceuticals Corp. v. Richardson-Vicks, Inc.*, Sandoz failed to establish that an advertisement for Vick's Pediatric Formula 44 was misleading to consumers absent any consumer survey evidence.[48] The United States Court of Appeals for the Third Circuit explained that "where the advertisements are not literally false, plaintiff bears the burden of proving actual deception by a preponderance of the evidence."[49] The court reasoned that the "effect of the advertisement on the consumer is the critical determination, and it must be demonstrated by a Lanham Act plaintiff regardless of whether the claim is facially ambiguous."[50] Thus, Sandoz's false advertising claim against a literally true but misleading statement could not succeed without evidence of actual consumer misinterpretation.

D. Substantiating Claims

An advertising claim must be substantiated. The concept of substantiation arose in the US Federal Trade Commission in the mid-1980s, with the holding of the United States Court of Appeals for the District of Columbia Circuit in *Thompson Medical Co., Inc. v. FTC*.[51] Unlike prior jurisprudence, this case and the ensuing *FTC Policy Statement Regarding Advertising Substantiation* established that advertisers could no longer make statements without a "reasonable basis" for their claims, and that all claim substantiation must occur prior to the advertisement and cannot later be established through post-advertisement testing.[52] More than twenty years later, the rule is widely accepted as the standard in federal court.

The Federal Trade Commission's *Policy Statement Regarding Advertising Substantiation* sets forth the substantiation requirement for advertising.[53] "When the substantiation claim is express (e.g., "tests prove", "doctors recommend", and "studies show"), the Commission expects the firm to have at least the advertised level of substantiation."[54] The FTC has also stated that the level and type of substantiation needed to support a claim is based on the type of claim that is made.[55]

At the first level, puffery requires no substantiation at all, since it is not actionable. The next level requires the advertiser to have a "reasonable basis" for any product claim that makes "objective assertions about the item or service advertised," but does not provide "an express or implied reference to a certain level of support."[56] In making this "reasonable basis" determination, the FTC evaluates six factors: "(1) the product involved; (2) the type of claim made; (3) the benefits of a truthful claim; (4) the ease of developing substantiation; (5) the consequences to the consumer of a false claim; and (6) the amount of substantiation which experts in the field consider reasonable."[57] For challengers of the advertisement, evidence showing the assertion's falsity is required.

The highest level of proof is necessary when an advertisement, either explicitly or implicitly, claims to be supported by testing or scientific research, or indicates any specific level of support.[58] These claims, sometimes called "establishment claims," require the advertiser to show the same level of substantiation as presented in the advertisement. With establishment claims, false advertising can be shown by demonstrating that the tests on which the statement relies are "not sufficiently reliable to permit one to conclude with reasonable certainty that they established the proposition for which they were cited."[59] Thus, the standard of proof for a challenger is lowest for establishment claims, as the challenger must show only that the tests fail to support the advertiser's claim, rather than proving that the product lacks the claimed characteristic.

An advertiser must have a "reasonable basis" for making a claim. In assessing whether they do, they must evaluate: (1) the type of product; (2) the type of claim; (3) the ease of developing substantiation for the claim; (4) the consequences of a false claim; and (5) the amount of substantiation experts in the relevant field believe is reasonable.[60] Advertisers must have a "reasonable basis for advertising claims *before* they are disseminated."[61]

The shoes company Skechers' substantiation for claims made related to its SHAPE-UP shoes provides an instructive example of how the FTC evaluates evidence that purports to substantiate claims. Skechers advertised its Shape-ups would "help people lose weight, and strengthen and tone their buttocks, legs, and abdominal muscles," including claims like "Shape Up While You Walk" and "Get in Shape without Setting Foot in a Game."[62] In 2012, the FTC filed a lawsuit for a permanent injunction in the Northern District of Ohio to stop the sale of the allegedly "toning footwear."[63]

In the complaint, the FTC alleged that Skechers "represented that the clinical studies conducted on the Shape-ups footwear products were independent case studies" when in fact, "two of the four studies conducted on the . . . products were conducted by" a paid endorser who was "married to a senior vice president of marketing at Skechers."[64] Of the two studies described, one did not include a control group (*i.e.*, "a group of participants who wore standard fitness shoes to serve as a comparison") and the second contained "altered and incomplete" data with some participants gaining weight or fat and others' weight loss being falsely attributed to wearing Skechers' shoes, when they were not wearing Skechers' shoes at all.[65]

Ultimately, Skechers agreed to pay $40 million to settle the claim. While this certainly does not meet the "credible and reliable" standard set forth by the FTC, advertisers should strongly consider the parameters of their supporting study (or better yet, studies) before disseminating claims based on them; even small logical leaps or the addition of marketing context or collateral can give rise to an unintended – but reasonable – interpretation with a big cost.

E. Determining Whether the False or Misleading Statement Is Actionable

The Lanham Act requires that the false or misleading statement of fact appear in commercial advertising or promotion in order to be actionable. In order for a false or misleading statement to constitute "commercial advertising or promotion" under the Lanham Act it must be: (1) commercial speech; (2) by a defendant who is in commercial competition with plaintiff; (3) for the purpose of influencing consumers to buy defendant's goods or services; and (4) disseminated sufficiently within the relevant industry.[66] For purposes of this discussion, it is assumed that statements made by a competitor to an actual or potential customer satisfy the first three prongs of this test. The discussion will focus on whether the false or misleading statement was disseminated to a significant segment of the relevant public to trigger a claim under the Lanham Act.

Whether an offending statement is made in commercial advertising or promotion is rarely an issue when it appears in traditional media and is nationally distributed. This issue arises, however, when the offending statement is disseminated through unconventional means such as email, word of mouth, or during private contract negotiations. As a general matter, whether a statement made by a competitor is significantly disseminated to constitute advertising or promotion will depend in large part on the size of the relevant market and whether the offending statement reached a sufficient percentage of that market. While US courts have not articulated the percentage of the relevant market the statement must reach, they have repeatedly held that distributing a false or misleading statement to one or two actual or potential customers in an industry comprised of thousands of potential customers is insufficient.[67]

When sales representatives or individual employees disseminate false or misleading statements and direct those statements to individual customers by email, sales presentation, telephone and in other one-on-one situations, courts are most concerned with whether these statements are isolated or whether they were so pervasive that the message penetrated a significant segment of the relevant market. The following cases illustrate this point:

- *Lists Distributed by Sales Representatives*: In *Avon Products, Inc. v. S.C. Johnson & Son, Inc.*,[68] the United States District Court for the Southern District of New York concluded that disseminating approximately 100 versions of a list containing a false statement that was distributed by various sales representatives over a twenty-year period in at least ten states constituted significant distribution even though the actual number distributed was unknown and the relevant purchasing public indisputably numbered in the millions.
- *Distributing Statements by Email and at Tradeshow*: In *Gordon & Breach Science Publishers S.A. v. American Institute of Physics,*[69] the same court held that the defendant's distribution of the offending statements at a conference targeting its core audience and in emails to the core group was commercial advertising under the Lanham Act.

- *Presentation Materials*: In *Seven-Up v. Coca-Cola*,[70] the United States Court of Appeals for the Fifth Circuit found that Coca-Cola's use of presentation materials during negotiations with representatives of eleven bottlers was commercial advertising. In so holding, the court defined the relevant industry as the seventy-four independent bottlers Coca-Cola targeted to convince them to change their brands. Accordingly, the court concluded that Coca-Cola's dissemination to less than fifteen percent of the relevant industry was sufficient to constitute advertising under the Lanham Act.
- *Telephone Calls by Single Person*: In *National Artists Management Co., Inc. v. Weaving*,[71] the plaintiff's former president and then-owner of a newly formed competing business made the offending statements to about ten of plaintiff's thirty ticket-booking clients. The United States District Court for the Southern District of New York held that such oral statements were commercial advertising and promotion because it was customary in the industry to advertise by word of mouth. In addition, having contacted about thirty percent of the relevant industry, the defendant sufficiently disseminated the offending statements.
- *Negotiated Transactions*: In *Johnson Controls, Inc. v. Exide Corp.*,[72] plaintiff, a battery manufacturer, alleged that defendant made false and misleading statements to a single customer in the context of negotiating a transaction. The United States District Court for the Northern District of Illinois concluded that the defendant's accused representations were not sufficiently disseminated to trigger a Lanham Act claim. Similarly, in *First Health Group Corp. v. BCE Emergis Corp.*,[73] the United States Court of Appeals for the Seventh Circuit concluded that the accused statements made by defendant during private contract negotiations were not advertising under the Lanham Act.
- *Oral Statements by Sales Representative*: In *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.*,[74] the United States Court of Appeals for the Second Circuit held that a sales representative's twenty-seven oral statements regarding plaintiff's products in a marketplace of thousands of customers were insufficient to satisfy the Lanham Act requirement that the representation be disseminated widely to constitute advertising and promotion.

As illustrated by the foregoing cases, courts are unlikely to find that isolated false or misleading statements made by a competitor is commercial advertising or promotion sufficient to maintain a Lanham Act claim. The statements must reach a significant portion of the relevant market to trigger the protection of the Lanham Act. Nevertheless, businesses harmed by isolated false or misleading statements may seek relief under defamation and tortious interference laws, which are discussed in more detail below.

F. Disclaimers and Disclosures

Disclosures and disclaimers are often used by advertisers to correct potential misperceptions by consumers. Although such devices may sometimes be sufficient to cure otherwise deceptive advertising, they often fail to be effective. In particular, merely placing a small or inconspicuous disclaimer at the bottom or in the corner of an advertisement that would otherwise be misleading usually does nothing to fix the advertisement's misleading message. Even when advertisers go so far as to prominently display the disclaimer or qualifying phrase on their advertisements, such language may not negate a message that may be deceptive as a whole.

Nevertheless, courts have sometimes approved disclaimers that explain a potentially misleading message.[75] For example, in *Potato Chip Institute v. General Mills*, the United States Court of Appeals for the Fourth Circuit noted that "it is well settled that if the contested phrase is susceptible to two meanings so that an explanatory phrase will preclude deception, it is sufficient to require the addition of the explanation rather than prohibit using the ambiguous phrase."[76] In that case, the court held that the term "potato chip" conveyed a specific impression in the minds of consumers such that they would be misled into thinking the product was made from raw potatoes. When used in conjunction with such phrases as "fashioned from dried potato granules," however, this statement was sufficient to ensure that consumers would not be misled. The court did note, nonetheless, that advertisements for the product on television, in which only the term "potato chip" was used, would no longer be permitted.[77]

Claims such as "Rated No.1" and "Proved the Best" can also often mislead unless accompanied by a disclosure of the essential facts and the tests on which the claims are made. Such disclosures should include the identity of the organization making the tests upon which the claims are based, the type of tests that were conducted (i.e., lab, clinical), and in what specific respects the product is deemed to be superior. Furthermore, if the advertiser owns or controls the agency making the statement, this fact should be prominently displayed.

For example, the United States Court of Appeals for the District of Columbia Circuit held that the term "manufacturer's list price" in a retailer's advertisement misled the public into believing that this price was the price at which the product was customarily sold by competitors in the area. The disclaimer, printed in small print at the bottom of the advertisement and purporting to explain the meaning of the term "manufacturer's list price" was held insufficient to correct the deceptive use of the term.[78]

In evaluating the sufficiency of disclaimers, courts look to the overall impression created by the advertisement. In *American Home Products Corp. v. Johnson & Johnson*,[79] the United States District Court for the Northern District of Illinois held that "[i]f the advertisement contains a definition or disclaimer which purports to change the apparent meaning of the claims and render them literally truthful, but which is so inconspicuously located or in such fine print that readers tend to overlook it, it will not remedy the misleading nature of the claims."[80] The court further noted that the meaning of an advertisement to the target audience—and hence, the effectiveness of a disclaimer—is best established through well-designed surveys.[81]

G. Comparative Advertising

A frequently used strategy in advertising is the comparison of a product to a competitor's similar product. In the United States, comparative advertising is permissible, but only so long as the advertiser can adequately substantiate all claims, whether or not those claims directly reference particular competitors. Comparative advertising encompasses both superiority and parity claims, as well as claims that are implicit in their comparison to other products. In certain other countries, comparative advertising is prohibited or may give rise to trademark infringement or other claims by the competitor whose product is compared. Before engaging in comparative advertising in a new country, it is prudent to consult counsel well-versed in the advertising and unfair competition laws of that country.

1. Superiority Claims

Superiority claims are those that make the assertion, whether explicitly or implicitly, that the product advertised is better than all others in the marketplace, or better than the product sold by a specific competitor. In making claims of superiority, statements that a product has the "most sales," or is the "oldest" or "biggest" in the market are objective claims, requiring the advertiser to substantiate such claims by showing that his product truly is the "oldest," "biggest," or had the "most sales" last year. More generalized superiority claims, such as use of the word "best" in advertising, in contrast, are so broad as to be subjectively superior and thus considered non-actionable puffery.

The line between subjectively and objectively superior claims is not always clear. For example, in *Johnson & Johnson-Merck Consumer Pharmaceuticals Co. v. Rhone-Poulenc Rorer Pharmaceuticals, Inc.*,[82] Rhone-Poulenc made the claim that its *Extra Strength Maalox Plus* antacid was the "strongest antacid there is" in television commercials. Although the statement appeared capable of verification through objective testing, the United States Court of Appeals for the Second Circuit held in favor of Rhone-Poulenc, stating that such a general statement was not actionable as false advertising absent consumer surveys showing that the advertisements misled the public into thinking Maalox was a superior product.[83]

2. Parity Claims

Parity claims are those which compare the advertiser's product to others in the marketplace and assert that its product is "as good as" the competitor's. Like superiority claims, parity claims must also be substantiated if they are objectively verifiable.

In *Procter & Gamble Co. v. Chesebrough-Pond's Inc.*, for example, both manufacturers sued each other for false advertising associated with hand and body lotions.[84] While Procter & Gamble's advertisements contained claims of superiority, Chesebrough claimed parity for its Vaseline Intensive Care Lotion, making statements such as, "[w]hen it comes to relieving dry skin, no leading lotion beats Vaseline Intensive Care Lotion."[85] Both parties provided clinical tests to substantiate their assertions and the district court held that neither party could show that the other's tests were invalid or misleading. The United States Court of Appeals for the Second Circuit upheld the district court's decision, allowing both parties to continue their advertising, concurrently making both superiority (Procter & Gamble) and parity (Chesebrough) claims.[86]

H. Claims Requiring Special Attention

There are a few types of claims that are the subject of special scrutiny by regulators and consumers. Advertisers should take care to note any elevated or special standards that may apply to their products. Representative examples of claims requiring special attention include:

1. Health Claims

Health claims are statements made in relation to products or services targeted at improving health or fitness, or that relate to a healthcare product. Unsurprisingly, health and safety claims require a high level of substantiation, and must be backed by "competent and reliable scientific evidence," which is defined by US courts as "tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results."[87] Any testing completed for this purpose should be tailored to support the specific claim being made. Moreover, if the underlying facts supporting a claim eventually change (e.g., because the product is reformulated), the claim may become misleading and should be halted.

The US Federal Trade Commission has long monitored and challenged weight loss claims. This is one area where the FTC's focus continues even in recent years.[88] In 2010, the FTC filed a complaint in the Western District of New York alleging that Iovate Health Sciences and related companies marketed products as supporting improbable weight loss or improbable recovery times (*e.g.*, 32 lbs, 94% faster recovery) from illness.[89] Iovate's advertisements often cited reliance on a study to support its claims.[90] After the FTC challenged the truthfulness of the claim and the underlying evidence that purported to support it, Iovate settled the following month for $5.5 million.

2. All-Natural Claims

The issue of whether a product is natural has recently been the subject of public focus. In 2016, the US Food and Drug Administration ("FDA") requested public comments on the use of the term, and, although there is some guidance, it has not issued regulations.[91] That same year, the FTC brought multiple claims against companies marketing cosmetic products as "all-natural," but which actually contained synthetic chemicals like dimethicone and polyethylene.[92] Those enforcements, however, targeted companies marketing their products as "all" or "100%" natural; the bright line is easier to follow because it means no artificial ingredients or chemicals are added to the products at issue. Advertisers should nonetheless be careful in making claims that their products are simply "natural," particularly as the FTC, FDA and consumers have indicated an interest in defining the term more precisely.

Since the 1980s, the FTC has maintained that it has the right to determine whether a company is using the term "natural" deceptively on a case-by-case basis.[93] The FDA promised in February 2018 they will have "more to say on the issue soon."[94] While the FDA and the FTC hedge on a definition for "natural", consumers have taken these matters into their own hands by filing class actions around the country. Courts have occasionally punted the issue, staying issues pending input from the FDA or the FTC on the ground that these agencies have "primary jurisdiction."[95] But that has not stopped companies from having to pay expensive settlements in the interim.

In 2017, The Honest Company (co-owned by movie star Jessica Alba) settled a class action for $7.35 million after consumers filed a lawsuit in the Southern District of New York that also required the company not to "place on labels for the [affected products] statements" that the products are "all-natural" or "100% natural" after plaintiffs alleged that certain products contained synthetic ingredients as well as substances classified by the federal government as toxic.[96] Major brands like Annie's (owned by General Mills), Breyers and Ben & Jerry's ice cream, Aveeno face moisturizer, and Seventh Generation dish soap have all similarly been targeted as making "natural" claims when the products contain synthetic or artificial ingredients.

3. Environmental Claims

Many consumers are interested in purchasing products and services that are environmentally friendly, and this is certainly not lost on advertisers. As with other claims, however, environmental claims must also be substantiated. The FTC has promulgated "Green Guides," last updated in 2012, that are "designed to help marketers avoid making environmental claims that mislead consumers."[97] The "Green Guides" contain guidance regarding (1) certifications and seals of approval, (2) carbon offsets, (3) "free-of" claims, (4) "non-toxic" claims, (5) renewable energy claims, and (6) renewable materials claims in advertising.[98]

The Green Guides set out guidelines for use of specific terminology in advertising, but do not purport to define the terms scientifically or offer proper performance standards for those terms.[99] For example, when an advertisement or product package makes an unqualified "degradable" claim, the marketer "should have competent and reliable scientific evidence that the entire item will completely break down and return to nature (i.e. decompose into elements found in nature) within a reasonably short period of time after customary disposal."[100]

Likewise, under the Green Guides, manufacturers should mark a product or package as "recyclable" only if "it can be collected, separated, or otherwise recovered from the waste stream through an established recycling program for reuse or use in assembling another item."[101] Furthermore, advertisers should only claim that a product or package is recycled or contains recycled content if "it is composed of materials that have been recovered or otherwise diverted from the waste stream, either during the manufacturing process (pre-consumer), or after consumer use (post-consumer)."[102] Additionally, if a product contains used, reconditioned, or remanufactured parts, and a marketer wishes to tout this fact, the marketer "should clearly and prominently qualify the recycled content claim to avoid deception about the nature of such components."[103] It is also important to note that, before labeling a product "recycled," manufacturers must indicate the percentage of recycled content, unless it is 100%.[104] Lastly, use of the universal recycling symbol indicates that a product is both recyclable and made of recycled materials.[105] If either of the two indications is untrue, the advertiser must indicate which does not apply.[106]

I. Practical Tips for Addressing False Advertising from a Competitor

In a competitive business environment, companies may be quick to strike at a competitor's suspected false advertising claims. Before the strike, it would be prudent to consider the following:

- Check, then double check, the claim at issue. If the competitor is making a claim about their own product, find out everything possible about the claim. Advertisers need not publish their substantiation, so not everything will necessarily be publicly available. Enough should be public, though, to make an educated guess as to the truth or falsity of the claim.
- Check with independent sources. If possible, have the offensive claims reviewed by people outside the client's company to confirm that such people view the claims the same way the company does. This may not be possible if there are timing constraints, or if the client's company wishes to maintain privilege or avoid exposing trade secrets or other strategic information. Nevertheless, an outside review can be helpful, particularly when the business clients are too close to a problem and potentially lack objectivity. Advertising is always judged by the message the reasonable consumer receives, and company employees may not be able to "stand in the shoes of" the reasonable consumer.
- Expect a counterclaim and trust but verify. If the company's own advertising claims have not been reviewed, that should be done immediately. If asserting a challenge against a competitor, expect a counterclaim. Even if the claims are, in fact, perfectly substantiated, the competitor may assert a challenge merely for the leverage it could bring.
- Make a phone call. For competitors that expect to make competitive advertising claims, it is a good idea for the lawyer to have a good relationship with the competitor's lawyer. A quick phone call may resolve the issue before the company incurs significant legal fees.
- Write a demand letter. Without a phone call, a demand letter is usually the first step in making direct contact with the competitor. This may provide a fast resolution if the competitor will agree to resolve the dispute without further action. This will show the competitor that the company is keeping an eye on them and demonstrate some measure of goodwill by complaining privately, without immediately filing an action. The decision to send a demand letter will depend on the circumstances. There is no guarantee that the competitor will even respond, and even if the competitor agrees, nothing prevents the competitor from going back on its word and changing its mind.

Furthermore, sending a demand letter may well tip the company's hand to the competitor as to strategy, thoughts, and potential actions, and may give the competitor time to launch a counter-offensive.

II. Influencer Marketing

With the expansion of social media and the introduction of new digital platforms, brands are looking to connect with consumers in fast, real-time, personalized ways. Brands have gravitated towards and embraced the opportunity to participate in influencer marketing through these different social media. With influencer marketing, brands can connect with consumers by engaging a specific individual to post and share information about a product or service. These posters, who are known as "influencers," generally have a large or specific audience that brands want to target. This multimillion-dollar business has boomed in recent years with new platforms and opportunities to connect with consumers.

Influencer marketing can take place in a variety of situations; for example, an influencer may post: (1) a YouTube video, reviewing make-up products; (2) on Facebook, touting a new restaurant; (3) a fashion blog entry, noting new clothing brands; (4) a video on Snapchat, which includes a discount code for purchasing workout equipment; or (5) on Instagram, highlighting a unique travel destination. The common thread with each of these different types of marketing avenues is the ability to connect on a personalized level with the consumer and provide targeted advertising for a specific product or service.

However, these mediums and opportunities for using influencer marketing have opened the doors for emerging legal issues and considerations. Specifically, brands must be aware of, and analyze the implications of, advertising laws, and incorporate disclosures into the posts to alert consumers of the relationship between the influencer and the advertiser.

A. US Legal Framework

Influencer marketing is guided by general advertising laws. Specifically, 15 U.S. Code § 45 provides that "unfair or deceptive acts or practices in or affecting commerce . . . are . . . declared unlawful."[107] This regulation has broad and wide implications and applies to the use of influencer marketing and sponsored advertising. Brands have the responsibility to ensure that influencers who have a material connection to the brand, either in terms of compensation, employment, free goods or services or other consideration, explicitly disclose the connection. A disclosure ensures that consumers are not misguided, or deceived, by the reasons or motivations behind a post, comment or endorsement.

The US Federal Trade Commission has also provided its guidance in the Guides Concerning Use of Endorsements and Testimonials in Advertising (the "Guidelines").[108] The Guidelines, as explained by the FTC, "reflect the basic truth-in-advertising principle that endorsements must be honest and not misleading. An endorsement must reflect the honest opinion of the endorser and can't be used to make a claim that the product's marketer couldn't legally make."[109] The Guidelines are intended to assist advertisers, consumers, and influencers in understanding the basic principles, best practices and required disclosures for an influencer who is posting about a product or service for which he or she has received compensation.

The Guidelines explain that disclosures must be included in any type of post, no matter the medium or platform, where there is a relationship with the advertiser. If there is the implication that the influencer is sponsoring, or endorsing a product or service, and there is a material connection with the advertiser, there must be a disclosure within the post.[110]

The question then becomes what constitutes an adequate disclosure? It is understood that the disclosure will vary depending on the medium on which it is posted, but the underlying requirement is that the disclosure must "provide the essential information"[111] and must be "worded in a way that's understandable to the ordinary reader."[112] The best disclosure fully explains the relationship between the influencer and advertiser, and is clear, prominent, and conspicuous. For example, if an influencer is given a free product, the optimal disclosure would state "Company X gave me this product to try . . . ."[113] The disclosure can be included directly in the text of a post or explicitly stated within a video.

The FTC has also provided recommendations for what it means to "make a disclosure clear and conspicuous." This includes making the disclosures "close to the claims to which they relate; in a font that is easy to read; in a shade that stands out against the background; for video ads, on the screen long enough to be noticed, read, and understood; and for audio disclosures, read at a cadence that is easy for consumers to follow and in words consumers will understand."[114] These general rules can be applied for every type of post and on every social media platform.

In addition, specific guidelines apply to the different social media platforms because consumers see and read the sponsored posts in different ways. On Instagram, it is important that the disclosure is included within the first three lines of text; if there is additional text, the remaining text will be truncated and consumers will need to click "more" to read the entire post, something they may not do.[115] For Instagram and Snapchat stories, the disclosure should be superimposed over the video and be "easy to notice and read in the time that […] followers have to look at the image."[116] On Twitter, where the length of the post is limited by the number of characters, simple words can be included as disclosures. For example, one can use "#sponsored," "#promotion," "#paid ad," or "#ad."[117] Again, the point is that the disclosure be clear and conspicuous and that "people get the information they need to evaluate sponsored statements."[118]

B. Instructive Cases and Orders

Most of the legal guidance regarding influencer marketing has come from the US Federal Trade Commission, either in the Guidelines or through FTC complaints and notices to influencers and advertisers. A few of the more instructive cases are below.

- ***CSGOLotto, Trevor Martin, and Thomas Cassell*.[119]** In the FTC's first enforcement action against social media influencers, the FTC filed a complaint against Trevor "TmarTn" Martin and Thomas "Syndicate" Cassell, who posted endorsements of the gambling website CSGOLotto, without disclosing that they were the owners of the site.[120] In addition, the influencers allegedly paid other well-known influencers to post about the website, without requesting that the influencers include disclosures in their posts. The action was eventually settled, requiring that Martin, Cassell, and the CSGOLotto company "clearly and conspicuously disclose any material connections with an endorser or between an endorser and any promoted product or service."[121]

- ***Cole Haan***.[122] Here, the FTC took issue with Cole Haan's "Wandering Sole" contest on Pinterest, which asked participants to create Pinterest boards with images of five Cole Haan shoes and photographs of the contestants' "favorite places to wander."[123] The person who posted the most creative entry would win a $1,000 shopping spree. Cole Haan told participants to include the hashtag "#WanderingSole" with their photos, but Cole Haan did not tell or require participants to make it clear that they posted the pins in order to enter a contest. The fact that this material connection (that a pin resulted in a contest entry) was not disclosed in entrants' posts concerned the FTC. Although the FTC ultimately did not bring an enforcement action, the FTC stated, in its closing letter, that "entry into a contest to receive a significant prize in exchange for endorsing a product through social media constitutes a material connection that would not reasonably be expected by viewers of the endorsement." In the FTC's view, the #WanderingSole hashtag did not effectively communicate the material connection between Cole Haan and the contest participants.
- ***Lord & Taylor, LLC***.[124] Lord & Taylor partnered with online fashion magazine Nylon to engage Instagram influencers for a marketing campaign to promote a specific paisley dress.[125] Lord & Taylor gave the dress to fifty influencers and paid them to post photos of themselves in the dress on Instagram during a particular weekend in March 2015, and Nylon ran an article and posted a photo to its own Instagram account promoting the dress. Although Lord & Taylor pre-approved the posts, Lord & Taylor did not require, among other things, that the influencers disclose that they were paid to post the photos or had received the dress for free. The FTC complaint charged Lord & Taylor with three violations: (1) that Lord & Taylor falsely represented that the Instagram posts reflected the independent statements of impartial fashion influencers; (2) that Lord & Taylor failed to disclose that the influencers were the company's paid endorsers; and (3) that Lord & Taylor falsely represented that the Nylon article and Instagram post reflected Nylon's independent opinion about the dress. The case settled with requirements for stricter oversight and a more robust mechanism for monitoring campaigns and necessary disclosures.[126]
- ***Warner Bros. Home Entertainment Inc***.[127] Warner Bros. conducted a marketing campaign for the video game *Middle Earth: Shadow of Mordor*.[128] Warner Bros hired an influencer marketing agency to execute a YouTube campaign with top gaming influencers. A select group of YouTubers were given a pre-release version of the video game and were each paid anywhere

from a few hundred to tens of thousands of dollars to promote the game on their channels. The influencers were instructed to create and post gameplay videos that promoted the game in a positive way and not to disclose any bugs or glitches they encountered. In addition, the influencers were told to disclose the sponsorship in the description box below the video, which often resulted in the disclosure being "below the fold" and visible only if consumers clicked on a "show more" link. A year after the campaign had ended, the FTC filed a complaint against Warner Bros. The FTC took the position that the marketing campaign misled consumers by suggesting that the videos reflected the independent or objective views of the influencers and that the disclosures were inadequate. The Guidelines clearly state that the disclosure must be near the top of the description box, above the "Show More" button, and for videos, the Guidelines require that influencers also include a verbal disclosure close to the beginning of the video. Under the FTC's order, Warner Bros. is "barred from failing to make such disclosures in the future and cannot misrepresent that sponsored content, including gameplay videos, are the objective, independent opinions of video game enthusiasts or influencers."[129]

- ***FTC Warning Letters***. In April 2017, the FTC sent out more than 90 letters to remind "influencers and marketers that influencers should clearly and conspicuously disclose their relationships to brands when promoting or endorsing products through social media."[130] The letters were the result of petitions filed by the D.C.-based non-profit organization Public Citizen and affiliated organizations; this was the first time that the FTC contacted influencers directly to warn them about the way in which the influencers either improperly, or failed completely, to disclose their relationships with advertisers. In addition to explaining the purpose for including disclosures, and the best practices for doing so, the letters specifically addressed three trends within disclosures. The FTC noted that "when multiple tags, hashtags, or links are used, readers may just skip over them," and therefore the disclosures are not considered conspicuous. The FTC also noted that shortened, or abbreviated, disclosures are not necessarily clear. For example, "#sp," "Thanks [Brand]," or "#partner" do not necessarily describe that the post is sponsored.[131] And, the FTC reminded influencers that consumers must be able to see the disclosure clearly without having to search for it within the post.
- After the initial warning letters were sent, the FTC wrote follow-up letters to some of these influencers in September 2017.[132] These letters cited specific posts that the FTC determined were not in compliance with the Guidelines. Instead of just being a general "warning letter," these follow-up letters asked the influencers to inform the FTC as to whether there was a "material connection to the brands in the identified social media posts." The FTC also requested that if the influencers do have a connection, that they specifically detail the steps that they will take to ensure that "they clearly disclose their material connections to brands and businesses."[133]

C. Practical Considerations and Best Practices

Brands must be sensitive to the need for adequate disclosures in all sponsored advertisements. Of course, the most important rule is to ensure that the relationship between the influencer and the brand is fully, clearly, and prominently disclosed, but there are additional important considerations.

First, many social media platforms are creating new tools for directly indicating that a post is sponsored by a brand. It is important not to rely on these tools to inform consumers about the relationship for a few reasons. First, if a consumer is unaware, or not knowledgeable about a specific social media tool, the consumer may not understand that the post is sponsored. Additionally, the tool may ultimately be removed from the platform, leaving the post without any type of disclosure. If the disclosure is included directly within the text or video, then both the brand and the influencer will be confident that the disclosure will last the entire life of the post. Lastly, these tools may not provide the influencer with the opportunity to include a full disclosure or provide a way to accurately describe the relationship behind the post.

Many brands want to create custom hashtags for their marketing campaign, and will try to incorporate the words "ad" or "sponsored" to comply with the disclosure requirements. However, these hashtags may be too lengthy or confusing, making it difficult for the average consumer to understand that the hashtag is a marketing disclosure. If a brand wants to include a custom hashtag, it is recommended that the influencer also include a simple tag such as "ad" or "sponsored" so that a clear and conspicuous disclosure is included within the post.

Brands should always keep the Guidelines in mind when new social media platforms emerge. The new platforms may provide different ways for sharing content, which may not always provide the traditional text options. Accordingly, it is important for both the brands and the influencers to be creative and ensure that the post explains the relationship and that the post is sponsored.

When engaging an influencer to post about a certain product or service, a brand should take the initiative to provide the influencer with the necessary tools to properly comply with the Guidelines. This includes informing the influencer about his or her responsibility for disclosing the relationship. If a product is shared with an influencer for free, and there is no contractual relationship to post about the item, then the brand should include a note explaining that if the influencer decides to post about the product, then he or she must explain that the item was given to the influencer for free. In the alternative, if there is a contractual relationship between the influencer and the brand, then the brand may want to include specific requirements regarding the posts. This could include, the specific language to include, the specific hashtags to use, the language not to use, or even exactly what the picture or video should look like.

It is also important for the brand owners to pre-approve posts, if feasible, and monitor the posts once they are published. A brand owner's responsibility to ensure that the posts comply with the Guidelines does not end when the instructions are provided. Instead, the brand owner must continue to confirm that the disclosures are accurately included, and if they are not, provide the influencer with instructions on how to correct the post.

In sum, the following are a few best practices to help minimize the legal risks when engaging influencers in advertising:

- Contractually require influencers to abide by the Guidelines and provide clear instructions on how and when to disclose. Consider providing the actual disclosure language to the influencer.
- Monitor influencers' posts and ensure that disclosures are present and sufficient.
- Do not use ambiguous disclosures such as #ambassador, #partner, #sp, #spon, or #thanks. The FTC has stated that disclosures should use clear and unmistakable language.
- Make sure that disclosures accompany the post in a prominent location and do not bury the disclosures in links or text below a video or image.
- Do not simply reply on a platform's own disclosure tool. The disclosure obligation rests with the brand, and the brand should make sure that its disclosures are sufficient and lasting.
- Do not assume that a relationship is obvious. While it may seem that everyone would know that a celebrity has a business relationship with a product, the best practice is to err on the side of caution and disclose.
- If participants enter a contest or sweepstakes with social media posts, the FTC will likely view this as a material connection and a disclosure must

III. Right of Publicity

The desire to create engaging, relevant advertising, coupled with a nearly endless stream of photos, celebrity images, selfies and social media posts, can tempt brands to use these images in advertising without considering the potential violations of the right of publicity. While nearly every in-house counsel has been asked about using a person's image or a celebrity name in a company-sponsored social media posting, the "legal" answer is usually unsatisfying to the business clients and ultimate decisions are often the product of risk calculation. Needless to say, right of publicity claims can be costly, particularly where celebrities are involved, and the name or likeness is used in connection with advertising.

Broadly defined, the right of publicity protects an individual's right to control the commercial use of his or her name, likeness, image, and recognizable parts of his or her identity. In the United States, the right of publicity is not governed by federal law; rather the scope and application of this right is defined by state law, and varies considerably from state to state, with some states codifying the right in statute only, others recognizing only a common law right, and still others recognizing the right in both statute and common law. In addition to the legal risks that arise from infringing this right, there are also a plethora of public relations risks that brands must consider.

A. US Legal Framework

Protection of the right of publicity arises under US states' common law and statutes, and therefore varies state-by-state as to both the extent of the protection and its scope. Generally, the right of publicity protects against the misappropriation of "the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for the purpose of trade."[134] Typically, an individual need not be a celebrity or have previously traded on his or her identity in order to maintain a cause of action for a violation of the right of publicity.

In 1903, New York was the first US state to implement a publicity law to prohibit the use of the name, portrait, or picture of any living person without prior consent for "advertising purposes."[135] Now, more than half of the states in the United States recognize the right of publicity, either via common law or by statute. Some states allow for the protection of an individual's right of publicity even after the individual's death.[136] The law of the deceased individual's domicile at the time of death will determine whether a post-mortem right of publicity claim is available to the individual's estate or heirs.

In California, for example, there are both statutory and common law protections for the right of publicity, including a post-mortem right of publicity.[137] Generally, at common law, a plaintiff must show that a defendant "(1) used plaintiff's identity; (2) appropriated plaintiff's name and likeness to defendant's advantage, commercial or otherwise; (3) lack of consent; and (4) resulting injury."[138]

New York and California have perhaps the most well-known right of publicity statutes. New York's Civil Rights Law provides that "[a]ny person whose name, portrait, picture or voice is used within [the State of New York] for advertising purposes or for the purposes of trade without the written consent first obtained . . . may maintain an equitable action . . . and may also sue and recover damages for any injuries sustained by reason of such use."[139] Under the New York statute, there are only two elements "the commercial use of a person's name or photograph, and the failure to procure the person's written consent for such use."[140]

In California, "[a]ny person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling [goods or services], without such person's prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof."[141]

Not only have US courts applied the right of publicity to protect a person's name, voice, and image, they have also construed right of publicity to protect less obvious forms of identity, such as nicknames,[142] sound-alike singers,[143] and look-alike actors.[144]

The right of publicity does have its limits. In the context of expressive works, a person's right to control the use or portrayal of his or her likeness diminishes as the person's celebrity or public figure status increases. As courts have recognized, the right of publicity threatens two core values protected under the First Amendment of the US Constitution: (1) the importance of an uninhibited marketplace of ideas and (2) the need to further the right of self-expression.[145] Accordingly, the First Amendment often protects both factual and fictionalized works that are based on or utilize a real person's name, likeness or biography. Rarely, however, do these exceptions apply to advertising.

B. Instructive Cases

Any use of a well-known figure's name, image or likeness for a commercial purpose, without explicit authorization from the individual, should be carefully reviewed and analyzed to confirm that the use does not infringe on one's right of publicity. As these cases below demonstrate, such use can be actionable, costly, and can negatively impact a brand.

- ***Carson v. Here's Johnny Portable Toilets, Inc.***[146] Johnny Carson, famous from his years hosting the Tonight Show, brought an action against a portable toilet company that sold toilets under the name "Here's Johnny" – the famous slogan used to introduce Carson on the Tonight Show – and used the phrase "The world's most famous commodian" in its advertising.[147] The United States Court of Appeals for the Sixth Circuit held that both uses were intended to evoke the thought and impression of Carson in the minds of consumers in connection with these products. Although Carson did not "own" the phrase and there was no evidence of public confusion, the court still held that the toilet company violated Carson's right of publicity because the phrases infringed on Carson's right to control the commercial use of his identity. This case was particularly noteworthy because the infringing use was based on a simple slogan that was unequivocally connected to, and allowed consumers to identify easily, a famous individual.
- ***Midler v. Ford Motor Co.***[148] When Bette Midler denied Ford Motor Co.'s request to sing a song to sell its cars, Ford hired impersonators who created her same musical sound. Midler filed a lawsuit against Ford after the song was released and consumer confusion arose. The United States Court of Appeals for the Ninth Circuit held that Ford's deliberate imitation of Midler's sound, for a commercial purpose, was a misappropriation of her identity. The court further noted that the sound and vocal stylings are attributes of one's identity, specifically stating that "voice is as distinctive and personal as a face. The human voice is one of the most palpable ways identity is manifested."[149]
- ***Jordan v. Jewel Food Stores, Inc.***[150] Following Michael Jordan's induction into the Basketball Hall of Fame in 2009, Sports Illustrated ran a special issue to commemorate Jordan's achievement and celebrate his career. Sports Illustrated offered grocery stores free ad space in exchange for selling the issue in their stores. Chicago grocery store chain Jewel-Osco created its own one-page ad for the issue congratulating Jordan, a fellow Chicagoan. The ad referenced Jordan's name and showed a pair of basketball shoes with the number 23 on the tongue. The ad displayed the Jewel-Osco logo and its slogan, but the ad did not mention the specific products that Jewel-Osco sold nor did it reference any third-party product sold by the store. In short, there was no "call to action" for the sale of a product or service.

- Jordan sued Jewel-Osco for five million dollars plus punitive and treble damages, claiming that Jewel had misappropriated his identity under the federal Lanham Act, the Illinois Right of Publicity Act, the Illinois deceptive business practices statute, and the common law of unfair competition. Although the district court found the ad to be protected speech under the First Amendment, the United States Court of Appeals for the Seventh Circuit reversed, ruling that the ad was commercial speech and therefore entitled to reduced constitutional protection. In the court's view, the ad went beyond merely congratulating Jordan; it promoted Jewel's stores and the commercial message was dominant. This decision created a stir in the advertising community since the ad contained no image and no "call to action," with many concerned that using a celebrity's identity in any commercial message would present high legal risk.
- ***Jones v. Corbis Corp.***[151] Shirley Jones, of The Partridge Family fame, sued Corbis Corporation for violating her statutory and common law rights of publicity. Corbis maintains several websites that contain a library of images owned by cultural institutions, news wire services, and professional photographers. These institutions and photographers license Corbis to distribute copyright sublicenses on their behalf. Corbis's website contained sample images of photographs of Jones on the red carpet. In her suit, Jones alleged that Corbis violated her rights of publicity by displaying the sample images of her likeness on its website without her consent. The district court found for Corbis on a motion for summary judgment. Although Jones argued a lack of consent, the United States District Court for the Central District of California found that she consented to having individual photographers at red carpet events to photograph her likeness and distribute the images. For at least one event, a notice was posted at the entrance of the red carpet stating that entry onto the red carpet constituted consent to be photographed and having one's likeness used in connection with the event. In addition, the court found that Jones understood that it would be contrary to well-established industry practices for a celebrity to consent to the sale and distribution of her photographs, but not consent to the display of the photographs to potential customers to facilitate sales.
- ***Heigl v. Duane Reade Inc.***[152] Duane Reade, a drug store chain, was sued after it tweeted a paparazzi photo of Katherine Heigl, a celebrity actress, walking out of one of its stores. Duane Reade tweeted the photo with a caption reading, "Love a quick #DuaneReade run? Even @KatieHeigl can't resist shopping #NYC's favorite drugstore." Heigl argued in her lawsuit that the photo implied a relationship between her and the store, and that the store misappropriated the photograph for the store's commercial gain.[153] The case garnered national attention, as Heigl requested more than six million dollars in damages.[154] The case eventually settled, and the store paid an unidentified monetary sum to Heigl's charity.[155] This case is often cited as a cautionary tale about the risks of tweeting celebrity images.

On the other hand, during the 2014 Grammy Awards, Arby's tweeted at Pharrell Williams about his hat (which resembled the hat in Arby's logo), without seeking permission to use his name. Although this was risky on Arby's part, Williams was willing to play along and tweeted back "Y'all tryna start a roast beef?" This disparate treatment of similar advertising messages suggests that the practical risk depends on the subject of the message and makes it difficult to draw hard and fast lines when advising business clients.

C. Best Practices

The desire for brands to be "part of the conversation" and to create fun, engaging messaging means it is unlikely that a modern advertising team will agree to never use a celebrity name, or a photograph from an event, in the absence of a complete rights clearance. It is also important to recognize whether an advertisement, marketing campaign, or even a social media post evokes a celebrity, who may take issue with the use even if the connection is not obvious. That being said, there are certain practices a brand can adopt to help mitigate the risks of a right of publicity violation.

- Work with the business clients to gauge risk tolerance and establish guardrails around social media messaging and what is permissible. Make sure team members are monitoring social media to address issues as they arise.
- Obtain consent if possible. Brands often want to use photographs from their events, so consider obtaining consents and releases ahead of the event if possible, obtaining signed releases on the spot, obtaining consent on camera, and/or posting signage stating that photos and videos are being created and participation in the event constitutes consent.
- Be particularly careful when children are involved. Obtaining consent for the use of a child's image requires parental or guardian consent (which may be repudiated), and using a child's image without consent risks significant backlash.
- Ask for permission if feasible, but be prepared not to go forward if permission is denied. Many individuals, particularly non-celebrities, will appreciate a simple request to use their photo in a social media post. Document these requests and the responses in case consent needs to be shown. This simple task of asking for permission in advance of the use can save a brand financially (in the case of a lawsuit) and save it from negative publicity (in the case of public backlash by the individual).
- Vet the non-obvious. Cartoons, quotes, sounds, drawing, numbers; all of these things when used in a certain context, can portray to a consumer a celebrity's, or well-known figure's, likeness. By asking consumers, before releasing an advertisement or campaign, brands can ensure that they have done their due diligence to try to ensure that no rights of publicity are violated.
- Recognize that the right of publicity is distinct from copyright. While purchasing a license to a paparazzi image may eliminate copyright concerns, it does nothing to address the subject's right of publicity.

- Where the person's identity is incidental, consider obscuring the person in the image.

Take special care when using a name or image on packaging or in print advertising, where complying with a cease and desist demand is much more difficult and damages may accrue more quickly.

IV. The US Children's Online Privacy Protection Act (COPPA)

Advances in technology and access to new culture platforms have made it difficult to protect the privacy of children on the internet.

In 1998, the United States Congress passed a law aimed at helping parents protect their children from the obvious and hidden perils of the internet. The law, entitled the Children's Online Privacy Protection Act ("COPPA"), was aimed at ensuring that parents were aware of and consented to the collection of personal information from children under 13 by companies operating websites or providing services through the internet. This section examines the COPPA and describes the steps a company can take to comply with the COPPA, which has a broad reach and tricky technical requirements.

A. US Legal Framework

As with all advertising, the US Federal Trade Commission has the authority to bring actions against children's advertisements that are unfair and deceptive. The FTC is also charged with enforcing the COPPA.[156] Specifically, the COPPA provides that it is "unlawful for any operator of a Web site or online service directed to children, or any operator that has actual knowledge that it is collecting or maintaining personal information from a child, to collect personal information from a child in a manner that violates the regulations prescribed under this part."[157] Under the COPPA, an operator must:

(a) Provide notice on the Web site or online service of what information it collects from children, how it uses such information, and its disclosure practices for such information (§312.4(b));

(b) Obtain verifiable parental consent prior to any collection, use, and/or disclosure of personal information from children (§312.5);

(c) Provide a reasonable means for a parent to review the personal information collected from a child and to refuse to permit its further use or maintenance (§312.6);

(d) Not condition a child's participation in a game, the offering of a prize, or another activity on the child disclosing more personal information than is reasonably necessary to participate in such activity (§312.7); and

(e) Establish and maintain reasonable procedures to protect the confidentiality, security, and integrity of personal information collected from children (§312.8).[158]

The FTC has issued guidance to businesses explaining how to comply with the COPPA. It issued the most recent guidance in 2017 entitled Six-Step Compliance Plan for Your Business (the "Plan") to address developments in the marketplace.[159]

B. The Six-Step Compliance Plan

Although the language of the COPPA appears straightforward, the Plan helps businesses understand how the FTC will interpret the regulation and best practices for compliance. Below is a summary of the Plan that highlights potential traps for the unwary.

Step 1: Determine Whether the COPPA Applies. The first step in determining whether the COPPA applies requires that the regulation be dissected and terms be defined as the FTC will define them when evaluating any potential violation. The plain language of the regulation provides that the COPPA applies to a company if any of the following is true:

- The company's website or online service is directed to:
  - children under 13 and the company collects personal information from them;
  - children under 13 and the company lets others collect personal information from them;
  - a general audience, but the company has actual knowledge that it collects personal information from children under 13; or
- The company operates another service, such as running an ad network or plug-in, and it has actual knowledge that it collects personal information from users of a website or service directed to children under 13.

The list above repeats four terms that the FTC defines in the Plan to assist companies in determining whether they are subject to the COPPA – "website and online services," "directed to children under 13," "personal information," and "collect."

Website and Online Services. The Plan confirms that "website and online services" will be read broadly to include:

- mobile apps that send or receive information online (like network-connected games, social networking apps, or apps that deliver behaviorally-targeted ads);
- internet-enabled gaming platforms;
- plug-ins;
- advertising networks;
- internet-enabled location-based services;
- voice-over internet protocol services; and
- connected toys or other Internet of Things devices.

Directed to Children Under 13. The phrase "directed to children under 13" requires guidance because the FTC interprets it to mean more than websites and online services that specifically target children as the primary audience. Rather, the FTC has developed a non-exhaustive list of factors for evaluating the content and context of the website or online service regardless of the primary target audience. For example, the FTC considers:

- the subject matter of the site or service;
- the visual and audio content;
- the use of animated characters or other child-oriented activities and incentives;
- the age of models;
- the presence of child celebrities or celebrities who appeal to kids;
- ads on the site or service that are directed to children; and
- other reliable evidence about the age of the actual or intended audience of the website or online service.

If a company website or online service is "directed to children under 13" as determined by the foregoing list of factors, the company should, at minimum, apply the COPPA safeguards only to users under the age of 13. To do so, the company should not collect personal information from any users without first collecting age information. For users who respond that they are under age 13, the company should not collect any personal information until it has obtained verifiable parental consent.

Personal Information. Personal information is likely more expansive than one would imagine without guidance from the FTC. According to the FTC, personal information includes any one of the following:

- Full name;
- A physical address including street name and name of a city/town;
- Online contact information;
- A screen or user name (or persistent online identifier such as cookies);
- Telephone number;

- Social security number;
- A photograph, video, or audio file containing a child's image or voice;
- Geolocation information sufficient to identify a street name and name of a city/town; or
- Information concerning a child or the child's parents that the operator collects online and combines with one of the above identifying factors.[160]

Collect. The COPPA prohibits websites and online services from collecting personal information. "Collect" means to:

- request, prompt, or encourage the submission of information, even if it is optional;
- let information be made publicly available (for example, with an open chat or posting function) unless the company takes reasonable measures to delete all, or virtually all, personal information before postings are public, and delete all information from the company's records; or
- passively track a child online.

Step 2: Post a COPPA-Compliant Privacy Policy. If a company is subject to the COPPA, the second step the company should take is to post a COPPA-Compliant Privacy Policy, which must include:

- *A list of all companies collecting personal information*. The list should include the name of all third-party operators that collect personal information from children under 13. Contact information (*i.e.* address, telephone number and email address) of third-party operators is also required; however, if multiple companies are collecting personal information, it is permissible to provide contact information for only one company as long as that company will respond to all inquiries from parents about the site or service's practices.
- A description of the personal information collected and how it is used. The privacy policy must tell parents:
  - the types of personal information collected from children;
  - how the personal information is collected — directly from the child or passively, *e.g*. through cookies;
  - how the personal information will be used (*e.g.*, for marketing to the child, notifying contest winners, or allowing the child to make information publicly available through a chat room); and
  - whether personal information collected from kids is disclosed to third parties. If the company does, the privacy policy must list the types of businesses the company discloses information to, and how they use the information.
- *A description of parental rights***.** The privacy policy must tell parents:

- that the company will not require a child to disclose more information than is reasonably necessary to participate in an activity;
- that they can review their child's personal information, direct the company to delete it, and refuse to allow any further collection or use of the child's information;
- that they can agree to the collection and use of their child's information, but still not allow disclosure to third parties unless that is part of the service (for example, social networking); and
- the procedures to follow to exercise their rights.

The privacy policy should be available on a link located on the homepage of the website or any page on which personal information is collected. If the website is a general audience website, a link to the privacy policy should be included on the homepage of the children's portion of the website.

Step 3: Provide Direct Notice to Parents. The COPPA requires that parents receive direct notice of the company's information collection practices for collecting any personal information from children under 13. The notice to parents must disclose:

- that the company collected their online contact information for the purpose of getting their consent;
- that the company wants to collect personal information from their child;
- that their consent is required for the collection, use, and disclosure of the information;
- the specific personal information the company wants to collect and how it might be disclosed to others;
- a link to the online privacy policy;
- how the parent can give their consent; and
- that if the parent does not consent within a reasonable time, the parent's online contact information will be deleted from the company's records.

Step 4. Obtaining Verifiable Parental Consent. The FTC gives companies some flexibility in how they obtain verifiable parental consent ("VPC"), requiring only that the method be designed to ensure the person providing the consent is a parent. Nonetheless, the FTC provides a list of methods it finds acceptable for obtaining VPC:

- *Consent Form*. Print and sign a consent form and send it back by fax, mail, or electronic scan;
- *Electronic Payment*. Require parents, in connection with a monetary transaction, to use a credit card, debit card, or other online payment system that provides the account holder with a list of discreet transactions;
- *Telephone or Video*. Allow the parent to call to connect with trained personnel through a toll-free number or a video conference;

- *Government ID*. Parents can provide a copy of a form of government-issued ID that the company can check against a database, as long as the company deletes the identification from the company's records when the verification process is finished;
- *Knowledge-based challenge questions*. Ask parents questions that would be difficult for someone other than the parent to answer;
- *Facial Recognition*. Verify a picture of a driver's license or other photo ID submitted by the parent and then comparing that photo to a second photo submitted by the parent, using facial recognition technology; and
- *Email Plus*. If the company will not be disclosing the child's personal information to third parties or making it public, it can send an email to the parent for return by email and take an additional confirmation step such as asking for a phone number or mailing address so that the company can follow up or, after a reasonable time, send another message to confirm consent.

Step 5. Parents' Ongoing Rights to Children's Information. The company's job is not done once it obtains VPC. Rather, it has an ongoing obligation to provide basic information to parents on request. Specifically, the company must provide parents with:

- the ability to review the personal information collected from their children;
- a way to revoke consent and prohibit further retention or processing of their child's personal information; and
- a way to delete their child's personal information.

Step 6. Protect the Security of Children's Information. It is not enough to obtain parental consent from parents before obtaining personal information. Once the company has followed all the steps to obtain children's personal information, it must take steps to protect that information. The FTC does not outline the level of security necessary to comply with the COPPA. It does, however, provide guidance for basic principles for maintaining the confidentiality, security and integrity of information collected and maintained:

- Minimize the data collected initially;
- Share data only with service providers and third parties that are capable of maintaining its confidentiality, security and integrity and obtain assurances from these parties that they will abide by the obligation to do so;
- Retain data only for as long as it is necessary to fulfill the reason it was collected in the first place; and
- Securely dispose of information once the company no longer has a legitimate reason to retain it.

C. Enforcing the COPPA

Under US law, both state and federal courts can hold a company liable for civil penalties of up to $42,530 per violation.[161] The amount of civil penalties a court can issue against the COPPA violator depends on a number of factors, including (a) the egregiousness of the violations, (b) whether the operator is a repeat violator, (c) the number of children involved, (d) the amount and type of personal information regarding children that is collected, (e) how the child's or children's personal information was used, (f) whether such personal information was shared with third parties, and (g) the size of the company.[162]

The FTC and state Attorneys General are authorized to bring actions for COPPA violations. Although there is no private right of action authorized by the COPPA, some class action lawyers have asserted state claims on behalf of individuals based on violations of the COPPA. Below are some illustrative cases in which COPPA violations were asserted:

1. Collecting Personal Information Without Verified Parental Consent

The FTC sent warning letters to China-based Gator Group Co. Lts.[163] and Tinitell, Inc.,[164] both app developers, cautioning them that their practice of collecting children's geolocation data without parental consent may be in violation of the COPPA. Gator marketed a smartwatch device and app combination to children. The apps collected the child's name, tracked the child and allowed the parent to set an alarm for when the child left a geo-fenced "safe zone." Similarly, Gator marketed an app "designed for kids, with calling and smart location features" that connected to a smartphone that was worn by the child as a wristwatch, which could locate and call the child.

The FTC warning letter informed the companies that they must comply with US privacy laws regardless of where they are based. The FTC noted that, while the apps give parents peace of mind by enabling them to track their child's location, that benefit does not negate the company's obligation to inform parents about what information is being collected and stored and the way third parties may access that data. The warning letters illustrate that the COPPA extends to foreign-based websites and online services that direct their product and marketing to US consumers.

2. Examining Whether a Website Is Directed to Children under 13

Twenty-three advocacy groups submitted a petition to the FTC asking that it investigate YouTube for alleged violation of the COPPA.[165] They claim that, although YouTube is designed for an audience 13 years old and older, the service nevertheless directs content and advertising to children under the age of 13 and collects their personal information without providing notice to and obtaining it from parents.

To support their petition, the groups cited a 2017 study finding that 80% of US children ages 6 through 12 use YouTube daily. In addition, the groups state that

YouTube also has actual knowledge that many children are on YouTube, as evidenced by disclosures from content providers, public statements by YouTube executives, and the creation of the YouTube Kids app, which provides additional access to many of the children's channels on YouTube . . . YouTube even encourages content creators to create children's programs for YouTube. Through the YouTube Partner Program, YouTube and creators split revenues from advertisements served on the creators' videos.[166]

Further, the groups state that YouTube discloses in its privacy policy that it collects personal information, including geolocation, unique device identifiers, mobile telephone number and persistent identifiers that trace users over time and across the internet.[167] Because children under 13 use (and often times own) these devices through which this service is provided, they are being tracked as well. According to these groups, YouTube is violating the COPPA and the FTC should investigate.

As of this writing, the FTC was still considering the complaint. This petition raises some interesting issues about whether a service can be considered "directed to children under 13" if there is circumstantial evidence supporting an allegation that the operator had actual knowledge that it was collecting personal information from children.

3. Failure to Protect the Security of Children's Information

In 2018, the FTC settled its action against VTech Electronics Limited ("Vtech"), the provider of digital learning games and mobile applications. This became the FTC's first ever COPPA-related case involving children's toys with online service features.[168] In 2015, a hacker breached VTech's network and accessed its customer's personal information, including the personal information of approximately 638,000 children that were linked to their parent's data page.[169] The FTC alleged that VTech had nothing in place to make sure that the children's information on their network was encrypted.[170] VTech also did not have a mechanism in place to verify that a person setting up an account on their network was a parent or a child.[171]

The FTC alleged that VTech misrepresented its privacy policy to users by implying that a customer's information was encrypted when, in reality, this was not the case.[172] In the end, VTech paid a civil penalty of $650,000 and agreed to restrain permanently from future violations of the COPPA and misrepresenting its security and privacy practices. VTech was required to implement an information security program that is subject to random audits by the FTC for the next 20 years.[173]

D. The COPPA Compliance Checklist

The following checklist should assist companies that collect information to determine if they are subject to the COPPA and, if so, what they need to do to comply with the regulation:

- Is the website or on-line service directed to children under 13?
- Does the company provide personal information collected from children under 13 to third parties?

- Does the company have actual knowledge that it is receiving personal information of children under 13?
- Does the company collect personal information of children under 13?
- What personal information is collected?
- How is the personal information collected?
- How is the personal information used?
- Are there appropriate and adequate security measures in place for the security, retention, and deletion of the child's personal information?
- Does the parent have proper notice that their child's personal information will be collected, used, or disclosed?
- Did the parent provide verifiable consent for the collection, use, and disclosure of their child's personal information?
- Are there methods in place for the parent to review and delete their child's personal information?

V. Contests and Sweepstakes

Contests and sweepstakes continue to be popular tools for companies to market their goods and services. If handled correctly, these promotions can generate consumer interest, website and social media traffic, revenue, and brand awareness. But when handled improperly, contests and sweepstakes can create expensive and embarrassing consequences, ranging from bad publicity to civil and criminal liability. Below is an overview of key legal issues to consider under US law when structuring, conducting, and advertising promotions, as well as practical advice for complying with applicable state and federal laws and regulations.

A. Sweepstakes Versus Games of Skill

Sweepstakes and games of skill should be structured to avoid implicating laws that prohibit private lotteries. A lottery is generally any game possessing the elements of prize, chance, and consideration.[174] US federal and state law bars anyone other than the state from conducting a lottery.[175] But by removing any one of the aforementioned three elements, a company may legally sponsor a promotional game without violating the law.

Whether a promotion is a game of chance (sweepstakes) or a game of skill (contest) depends on which element of a lottery is removed: prize, chance, or consideration. A prize is anything of value awarded to the winner of a game.[176] It could be money, a trip, a car, a pair of concert tickets, a television, or an iPad. Yet, because the prize is typically what attracts consumers to participate in a promotion, it makes little sense to eliminate the prize element.

Removing the element of consideration results in a game of chance, such as a sweepstakes. In contrast, removing the element of chance results in a game of skill, such as a contest. Accordingly, games of skill may require consideration without running afoul of lottery laws, assuming that the element of chance is actually eliminated or reduced as much as possible, depending on the applicable state laws.

In a game of chance, the sponsor awards a prize to a winner that is chosen at random.[177] The game itself takes many forms, including sweepstakes and instant-win games. Because a game of chance includes the elements of prize and chance, a sponsor must ensure that participants are not required to provide consideration. Indeed, a sponsor must understand what constitutes consideration and if consideration is present, it must offer participants a free alternative method of entry ("AMOE").

Generally speaking in a game of skill, the sponsor awards a prize to a winner based on his or her submission of responses to prompts, answers to questions, or solutions to problems that require "a substantial degree of skill" to derive.[178] Games of skill include photography contests, essay contests, bake-offs, and trivia contests, among others. Games of skill do not include contests that involve predicting the outcome of a future event or making an educated guess.[179]

B. US Legal Framework

Promotions are governed by both federal and state law. Examples of applicable federal law include the US Federal Trade Commission Act[180] and the Deceptive Mail Prevention and Enforcement Act.[181] Federal agencies that oversee this area include the US Federal Trade Commission, the US Postal Service, the US Federal Communications Commission, and the US Department of Justice. State statutes also govern games of chance and games of skill, which are enforced by state attorneys general or local district attorneys. Besides governmental actors, private individuals may also enforce lottery laws through civil actions.

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

1. Florida

In Florida, a sweepstakes sponsor must register the sweepstakes with the Florida Department of Agriculture and Consumer Services and must establish a trust account or obtain a surety bond at least seven days before the start of any sweepstakes in which the prizes have a retail value greater than $5,000.[182] The trust account must have a balance sufficient to pay the total value of all prizes offered, while the amount of the surety bond must equal the total value of all prizes offered.[183] If a sweepstakes sponsor has conducted promotions in Florida for five consecutive years without incident, it may apply for a waiver of the bonding requirement.[184]

To register the sweepstakes, the sponsor must submit a completed application, a copy of the sweepstakes official rules, and a $100 filing fee.[185] Once the official rules have been submitted, they may not be altered.[186] Florida also requires that the official rules be posted in all retail outlets and in all advertising copy; however, the ad copy need only include the material terms of the official rules and the sponsor's website address, a toll-free telephone number, or an address where the full official rules may be viewed, heard, or obtained during the sweepstakes.[187] At the end of the sweepstakes, a certified list of winners of all prizes valued over $25, the value of those prizes, and the dates when those prizes were won must be filed with the Florida Department of Agriculture and Consumer Services within sixty days after the winners are finally determined.[188]

2. New York

New York similarly requires a sweepstakes sponsor to file an application for registration with the Secretary of State of New York and either establish a trust account or obtain a surety bond if the sweepstakes is conducted in connection with the sale of consumer products or services, and the total value of the prizes offered exceeds $5,000.[189] Among other things, a copy of the official rules and a $100 filing fee must accompany the application.[190] These must be filed at least thirty days before the sweepstakes begins.[191] The official rules, the geographic area covered by the promotion, and the prizes available must be conspicuously and prominently posted in every retail outlet where the game may be played and in every related advertisement.[192] Once the promotion is over, a list of winners of all prizes valued over $25, a description of those prizes, and the date when those prizes were delivered must be filed with the Secretary of State of New York within ninety days after the completion of the sweepstakes.[193]

3. Rhode Island

Even more stringent than Florida and New York, Rhode Island law requires a sponsor to register with the secretary of state before operating any promotion "in which a retail establishment offers the opportunity to receive gifts, prizes, or gratuities, as determined by chance" and the total value of the prizes exceeds $500.[194] To register the sweepstakes, the sponsor must pay a $150 filing fee and provide a statement of (1) "the minimum number of participating objects to be made available;" (2) "the minimum number of prize winning objects that will be included . . .;" (3) "the proportionate opportunity of winning prizes;" (4) "the minimum value of [the] prizes . . .;" and (5) the rules of the promotion, including "the period of time and the geographic area to be covered by the [promotion]."[195]

Unlike Florida and New York, Rhode Island does not require sponsors to post a bond or establish a trust account. Although sponsors are not required to file with the state a list of winners of all prizes valued over $25, a description of those prizes, or the date when those prizes were delivered, sponsors must maintain a list of winners for at least six months after the promotion is completed.[196]

Setting these three states aside, a sponsor must generally be prepared to consider the laws and regulations of each state where it plans to operate a sweepstakes. Indeed, because navigating all applicable state regulations is critical to a successful promotion, sponsors should plan well ahead of time to ensure compliance.

C. Structuring Promotions

1. Structuring Sweepstakes

a. Identifying and Eliminating Consideration

A sweepstakes participant provides consideration when he or she gives the sponsor money or something of value in exchange for the opportunity to play the game.[197] For instance, consideration exists when a donation or purchase of a product or service is necessary to enter the sweepstakes. But consideration may also be nonmonetary. Thus, consideration may be present when, to enter the game, a participant is first required to expend a substantial degree of effort. For example, a participant might be required to complete a lengthy survey, write a testimonial, make multiple trips to a store location, or otherwise devote a substantial amount of time to participate in a sweepstakes. In each of these scenarios, consideration is likely present.[198] In contrast, consideration is likely absent from activities requiring minimal effort, such as listening to the radio, watching a television program, or visiting a single store on one occasion, without any requirement to purchase an item or pay a fee.[199]

If consideration is present in a sweepstakes, the sponsor must provide a free AMOE. A free AMOE allows participants to enter a sweepstakes without purchasing a product, paying money, exerting substantial time and effort, or otherwise parting with anything of value in order to play the game. Often used AMOEs include submitting an entry form by mail or obtaining an entry form by calling the sponsor.[200]

b. All Methods of Entry Must be Treated Alike

A sponsor must ensure that each method of entry is given equal treatment. For example, a sponsor could violate lottery laws if it gave those sweepstakes entrants who purchased a product better odds of winning than those who entered by using a free AMOE.[201] The purchased-based method of entry and free AMOE must also be equally available. Indeed, a sponsor may not directly or indirectly encourage sweepstakes participants to enter the game by making a purchase.

Litigation involving the manufacturer of Tylenol, CVS drugstores, and supermarket chain A&P shows the importance of making all methods of entry equally available to participants. Specifically, the New York Attorney General brought enforcement actions against these companies because they each emphasized the purchase-based method of entry over the free AMOE.

In Tylenol's case, the print ad copy for a Tylenol sweepstakes listed four steps for entering the sweepstakes. The first was to buy Tylenol.[202] 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.[203] While the ad also included the language "no purchase necessary," that language appeared in fine print near the bottom of the ad. The Attorney General argued that the *buy Tylenol* message was so prominent that the free AMOE was not equally available to customers.[204]

The New York Attorney General also pursued CVS (a commercial pharmacy and goods store) for appearing to give better exposure to the purchase-based method of entering an in-store sweepstakes.[205] Specifically, CVS allowed participants to enter its sweepstakes automatically when they purchased certain products in-store with a CVS ExtraCare card.[206] Although CVS also had a free AMOE, it was available only on the company's website and not in the store. Accordingly, the Attorney General argued that visitors to the store who wished to participate in the sweepstakes without making a purchase were not given the same opportunity to win as those who participated by making in-store purchases.[207]

Finally, A&P (a grocery store) agreed to pay $102,000 in fines after failing to prominently advertise the free AMOE in its "A&P Frozen Food Month 2013 Sweepstakes."[208] Particularly, individuals who bought more than $50 in frozen-food products using an A&P Club Card were automatically entered in the sweepstakes at checkout.[209] But A&P failed to adequately disclose the free AMOE.[210] Indeed, while store circulars stated that "Every time your spending reaches $50 on frozen food, you're automatically entered for a chance to WIN!," the disclosure that a participant could enter the sweepstakes through the mail without a purchase was only displayed in fine print.[211] What is more, A&P did not post the official rules in its stores.[212] The New York Attorney General stated that A&P's failure to adequately disclose the alternate method of entry, caused consumers to be largely unaware that there was a free method to enter the sweepstakes.[213] Accordingly, the overwhelming majority of entrants and winners were consumers who made in-store purchases.[214]

These cases illustrate that simply having a free AMOE will not, by itself, immunize a sponsor from running into problems with consideration. The sponsor must further ensure that the free AMOE is as accessible and prominent as the purchase-based method of entry.

2. Structuring Contests

a. Eliminating Chance

The greatest challenge in structuring a contest is ensuring that chance is not inadvertently introduced at any point in the contest. Most US states use the "dominant element test" to evaluate whether skill or chance dominates in determining the winner of a contest.[215] If chance dominates, it is not a game of skill, even if some skill is required to participate in the game. Several factors are considered under the dominant element test. First, players "must have a distinct possibility of exercising skill and have sufficient data upon which to calculate an informed judgment [to the extent required by the game]. The test is that, without skill, it would be absolutely impossible to win the game."[216] Second, the general class of players must possess the skill; the game cannot be limited to a specific skill that only a few possess.[217] Third, the players' skills or efforts must sufficiently govern the final result, and cannot be just one part of a larger scheme.[218] Finally, "[t]he standard of skill must be known to the participants, and this standard must govern the result."[219]

A few states apply the more conservative material element test. Under that standard, if the element of chance is present to any material degree, the game will be deemed one of chance rather than skill, even if skill is the dominant factor.[220] A backgammon tournament would not be deemed a game of skill, according to the material element test, because the rolling of dice before each turn is a material aspect of the game.[221]

Still fewer states apply the any chance test. Under this even more restrictive standard, a game is deemed one of chance if any element of chance is present.[222]

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

b. Other Requirements

While a sponsor may generally require consideration in a skill contest, some states restrict certain kinds of consideration.[223] Further, Arizona imposes registration requirements for games of skill that require a purchase to enter.[224] Particularly, the contest sponsor must file an application together with, among other things, a copy of the official rules (including rules applicable in the case of a tie) and a sworn statement that no increment has been added to the price of the product that a contestant must purchase in order to participate.[225] The names and addresses of the prize winners must be filed with the Arizona Attorney General's office within ten days after all prizes have been awarded.[226]

c. Scoring and Judging Criteria

To emphasize the dominance of skill in a game of skill, sponsors should devote substantial attention to scoring and judging. The contest requirements, the applicable objective judging criteria, and the relative weight given to each criterion should all be clearly identified. It is also important to state the judges' qualifications and explain the method of judging each entry.

3. Preparing the Official Rules

Every promotion should be governed by official rules that state all material terms of the promotion, including the eligible participants, the methods of entry, the types and value of prizes, the method of selecting winners, the duration of the promotion, and any restrictions that may apply. Many of these disclosures are required by state laws. Even if not mandated, all are recommended.

The official rules should be clear, unambiguous and viewed as a contract between the sponsor and game participants. They should also be posted conspicuously wherever participants may enter the game, including on the internet and in retail outlets. Once published, the rules may not be modified.

a. Eligibility

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

Taking these considerations lightly could lead to headaches and bad publicity. In 2013, Salesforce ran a contest called the "Salesforce 1 Hackathon" offering a $1 million prize to the winner. The problem was that the announced winner included an ex-Salesforce employee, which led to complaints of cheating.[227] There was also an outcry because the winning team built its app using pre-existing code and it was unclear whether this contravened the rule that the app must "have been developed solely as part of this Hackathon."[228] While Salesforce eventually determined that the rules allowed use of preexisting code, it conceded that the individuals judging the contest were not briefed on this issue, thus leaving them unable to "evaluate the entries that contained the pre-existing code."[229] In response to the controversy, Salesforce announced that it was giving a second $1 million prize to the team that was the runner-up.[230]

b. Method of Entry

The "how to enter" provisions of the official rules must describe the free AMOE in addition to any purchase-based method of entry. Indeed, as a best practice, the official rules and all advertising related to the promotion should clearly and prominently disclose that no purchase or payment is necessary.

The official rules should also clearly set forth the start and end dates of the promotion. And each of these dates should be the same for all participants regardless of their method of entry. Otherwise, the game might be considered an illegal lottery. For example, in games of chance, the free AMOE is often a mail-in entry form, and it is common to state in the official rules that the entry form must be postmarked or received by a certain date. But if the postmark date or the received-by date precedes the end date of the sweepstakes, there will be a period in which the purchase-based entry is available but the free AMOE is not. And the absence of a free AMOE during this period of time can convert an otherwise lawful sweepstakes into an illegal lottery. Thus, to avoid this situation, the postmark deadline for mail-in entry forms should coincide with the end date of the sweepstakes, and the received-by date should be sometime after the postmark deadline.

c. Prizes and Selection of Winners

Another important area that the official rules must address is the method of selecting winners and the prizes they will receive. Particularly, the official rules must describe the number of prizes to be awarded, the nature and approximate retail value of each prize, how the prizes will be awarded, the odds of winning, when the winner or winners will be selected, and how they will be selected.

And because the prize itself is what typically draws participants to a sweepstakes or contest, the rules must describe the prize in sufficient detail. For instance, if the prize is a vacation or a trip, the official rules should explain the duration of the trip, the trip dates, the destination, and details concerning transportation, accommodation, meals, and any spending money. It is also a good practice to set forth what the prize does not include. The official rules should thus explain to participants that all federal, state, and other tax liabilities arising from the game are the sole responsibility of the winner.

d. Releases and Limitations of Liability

The official rules should explain the sponsor's obligations and responsibilities, as well as the rights that the participant is granting to the sponsor by virtue of entering the promotion. Illustrative provisions commonly featured in official rules contain the following caveats:

- "Sponsor is not responsible for lost, late, stolen, incomplete, illegible, inaccurate, undelivered, delayed, or misdirected entries."
- "Sponsor reserves the right, in its sole discretion, to modify or terminate this sweepstakes in the event of any act, occurrence, or reason that it believes would corrupt the integrity, administration, or fairness of the sweepstakes."
- "By participating in the sweepstakes, participants agree to release, discharge, and hold harmless sponsor, its respective parents, affiliates, subsidiaries, advertising and promotion agencies, and other individuals engaged in the development or execution of this sweepstakes, from any liability, claims, losses, and damages arising out of or relating to their participation in this sweepstakes or the acceptance, use, misuse, or possession of any prize received in this sweepstakes."
- Often the official rules of a sweepstakes may state "Offer void where prohibited, and subject to federal, state and local laws." This limitation may refer to specific states whose restrictions are unacceptable to the sponsor. But a sponsor should be aware that officials of such states are unlikely to honor a clause like this unless a sponsor specifically refers to the state.
- "Entry constitutes permission to use winner's name and likeness for publicity purposes without further compensation, except where prohibited by law." This is an example of a publicity release, which is useful to a sponsor when it wishes to use the winner's name or photograph after the prize is awarded to publicize the promotion. It is important to note that, in Tennessee, a sponsor cannot require a participant to sign a publicity release in order to receive a prize.

e. Some Other Issues to Consider

If the sweepstakes or contest involves participants who provide intellectual property ("IP"), the Sponsor must decide whether it wishes to own any IP transferred or if obtaining a license to the IP contained in the game entries will suffice.

If a promotion is conducted over the internet or on social media, the sponsor must comply with all applicable terms of use. For instance, Facebook, Instagram, Twitter, Snapchat, Pinterest, and YouTube each have their own unique set of policies governing promotions.[231] These guidelines often require that promotion participants release the platform from any liability related to the promotion. They will also typically require the sponsor to clearly disclose that the platform is not sponsoring, endorsing, administering, or formally affiliated with the promotion. Yet because guidelines may vary by website or platform, a sponsor must carefully consider all applicable rules and guidelines to ensure that its promotion is authorized.

Should a sweepstakes or contest use personal or location data, the sponsor must also ensure that the promotion complies with its own internal privacy policies, which may prohibit storage or use of personal data.

Additionally, if sponsors of promotions open eligibility to children under the age of 13, they must comply with the US Children's Online Privacy Protection Act (COPPA), which applies to the collection, use, or disclosure of personal information from or about children.[232]

Finally, sponsors should also ensure that the official rules take into account technical issues that may arise when running an online promotion. For instance, what will happen if the website hosting a sweepstakes goes down? And what is to be done with multiple, duplicate, or lost entries? Addressing these matters in the official rules will go a long way in containing the potential fallout if and when a technical issue arises.

4. Advertising

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

- The phrase "no purchase necessary" and the description of the free AMOE;
- Locations where the game is void;
- Eligibility requirements, including age and geographic location;
- Beginning and end dates and times, if applicable;
- Odds of winning;
- Sponsor's name;
- That the game is subject to complete official rules; and
- The location where those rules can be obtained.

Materials sent through the US Postal Service that include entry forms for a sweepstakes or contest must comply with the disclosure requirements contained in the US Federal Deceptive Mail Prevention and Enforcement Act ("DMPEA").[233] If the promotion is a sweepstakes, the materials must disclose not only that "no purchase is necessary to enter" but also that "a purchase will not improve an individual's chances of winning."[234] All terms and conditions of the sweepstakes or contest must also be disclosed, including entry procedures; the name and address of the sponsor; estimated odds of winning; the quantity, estimated retail value, and nature of each prize; and the schedule of any payments made over time.[235] Moreover, sponsors must make reasonable efforts to prevent the mailing of such materials to anyone who asks to be removed from their sweepstakes mailing list and must maintain records of all such requests for a period of five years.

The DMPEA contains similar requirements for materials advertising games of skill. These materials must disclose the name and address of the sponsor; the rules of the skill contest, including, if applicable, the number of rounds or levels and the cost to enter each one; the fact, if applicable, that additional rounds may have increased levels of difficulty; the estimated number or percentage of participants who may correctly solve the skill contest or the approximate number or percentage of participants who correctly solved the past three skill contests conducted by the sponsor; the identity and qualifications of the judges (if judged by anyone other than the sponsor); the method of judging; the date by which the winner will be determined; the process for awarding the prizes; the quantity, estimated retail value, and nature of each prize; and the schedule of any payments made over time.[236]

D. Best Practices

To avoid the traps hidden in US state and federal regulations, companies and their lawyers should carefully consider whether to structure a promotion as a sweepstakes or a contest, taking into account the legal differences and requirements associated with each option. With proper planning, a sweepstakes or contest can offer great value to sponsors while also providing an enjoyable experience to consumers. The following are a few best practices to keep in mind when conducting sweepstakes and contest promotions:

- While tempting, do not merely copy the rules of another promotion. The rules should be tailored to the specific promotion and account for how the promotion will actually be conducted.
- Start planning for promotions early to give sufficient time to review the rules and comply with any registration or bonding requirements.
- Be careful to avoid the existence of non-obvious consideration in sweepstakes. If participants are required to take a photo of themselves inside an entertainment venue, a purchase of a ticket was likely required and, therefore, consideration is present. Instead, consider permitting participants to take a photo of themselves outside the venue.
- Always provide a link to the company's privacy policy somewhere in the official rules or on the promotion's landing page. Do not include provisions in the rules that might contradict the company's stated privacy policy.

- Where permitted, require winners to execute affidavits of eligibility and a liability release forms to protect against legal issues after the promotion has ended.
- When drafting publicity releases and terms concerning IP in the rules, be realistic about what the company will actually do with participants' names, images, IP, and the like. For promotions where a photo is required, for example, a non-exclusive, worldwide, royalty-free, perpetual license may be sufficient.

Give thought to prize values. Bonding and registration requirements may be avoided if the prizes do not exceed $5,000 in value. Also, high value prizes can create unintended headaches and hardships for the winners, since the winners will be responsible for income taxes related to the prizes. The tax burdens can be significant for winners who win expensive trips or other items that are not easily converted to cash.

VI. Cause Marketing

Many companies turn to cause marketing to meet consumers' expectations that, in addition to generating profits, companies are good corporate citizens. "Cause marketing" generally refers to the marketing practice of linking a company and its products to an issue or cause in order to improve sales and enhance the corporation's image, all while benefiting the designated cause. Cause marketing programs are typically designed to be mutually beneficial collaborative arrangements between a for-profit business entity and a non-profit organization. Although cause marketing programs can vary in the execution, this type of advertising has the ultimate goal of raising charitable funds, raising the for-profit entity's profile, and generating sales.

A. Forms of Cause Marketing

Perhaps the most well-known and earliest example of cause marketing was a promotion run in 1983 by American Express. American Express advertised that, for each purchase made with an American Express card, American Express would contribute one penny to the renovation of the Statue of Liberty. The campaign was a resounding success by both philanthropic and commercial measures. Not only did the campaign generate $1.7 million in contributions to the Statue of Liberty restoration project, the campaign also generated a substantial increase in American Express card usage by consumers.[237]

Cause marketing has since become a popular marketing tool and can take a variety of forms, such as selling a product or service with a promise to make a donation, sponsorships and specially commissioned products, soliciting customer donations at checkout, and licensing arrangements.

Examples of recent cause marketing programs include:

- Walgreens sells red noses for Red Nose Day, a fundraising campaign run by Comic Relief USA to help children in poverty. Walgreens sells the red noses for one dollar, and gives fifty cents of the purchase price to the Red Nose Fund.

- Starbucks partners with (RED) to raise funding for the Global Fund to Fight AIDS on World AIDS Day. As part of the campaign, Starbucks donates ten cents for every beverage sold by participating stores in the United States and Canada.
- Costco provides consumers the opportunity to donate to Children's Miracle Network Hospitals at checkout.
- Many companies sponsor the Susan G. Komen Race for the Cure events.

B. US Legal Framework

Cause marketing campaigns can implicate state commercial co-venturer ("CCV") laws, state professional fundraiser laws, and federal tax laws, among others. More than forty US states have laws governing charitable solicitations.

1. Charitable Sales Promotions and Commercial Co-Venturers

A "charitable sales promotion", as defined by Virginia law, is "advertised sales that feature the names of both the commercial co-venturer and the charitable or civic organization and that state that the purchase or use of the goods, services, entertainment, or any other thing of value that the commercial co-venturer normally sells will benefit the charitable or civic organization or its purposes."[238] In short, this is a promotion where purchasing a certain product will result in a donation (either in a fixed amount or a percentage) to a charity.

Although "commercial co-venturer" is variously defined by US states, a "commercial co-venturer" is generally defined as a "*person who for profit is regularly and primarily engaged in trade or commerce other than in connection with the raising of funds or any other thing of value for a charitable organization and who advertises that the purchase or use of goods, services, entertainment, or any other thing of value will benefit a charitable organization.*"[239] Some states have broader definitions for a "commercial co-venturer." Massachusetts, for example, includes in its definition "any person who for profit or other commercial consideration, conducts, produces, promotes, underwrites, arranges or sponsors a performance, event, or sale to the public of a good or service which is advertised in conjunction with the name of any charitable organization or as benefiting to any extent any charitable purpose."[240]

Approximately twenty US states have laws governing the commercial co-venturer arrangement. Commercial co-venturer laws generally are designed to protect consumers and charities against fraudulent or misleading advertising and to ensure that donations reach the charities.

While local laws will govern promotions conducted in individual US states, nationwide promotions should comply with the laws of all fifty states. In general, the basic legal requirements imposed by these statutes include the following.

- **Contracts.** The commercial co-venturer and the charity must have a written contract, often signed by two officers of the charity, concerning the charitable sales promotion. Certain US states require specific provisions be included in the contract, such as a description of the goods or services to be offered to the public, the geographic area of the promotion, the promotion's beginning and ending dates, the manner in which the charity's name will be used, provisions for final accounting by the commercial co-venturer, an estimate of the total donation, and the date and manner in which the charity will receive its benefit.
- **Disclosures.** The commercial co-venturer must make certain disclosures in its advertising. For example, some states require disclosure of the name of the charity, its contact information and the purpose for which the donated funds will be used. Approximately twelve US states require that commercial co-venturers disclose, in their advertising, the amount of the donation on a per-unit basis.[241]
- **Bonding and Registration**. The commercial co-venturer must register in some states, such as Alabama, Hawaii, Illinois, Massachusetts, Mississippi and South Carolina, and be bonded in Alabama and Massachusetts, prior to the commencement of the charitable sales promotion. Illinois regulates certain commercial co-venturer activities via its "charitable trusts" laws, which require registration and annual reporting.[242]
- **Filing.** A copy of the contract must be filed prior to the start of the charitable sales promotion, with this typically being handled by the charity.
- **Accounting and Reporting**. US state statutes often require the commercial co-venturer to complete an accounting at the end of the sales promotion and retain its records for three years. Certain states, such as Alabama, Mississippi and South Carolina require the commercial co-venturer also to file a report following the conclusion of the promotion, while Massachusetts requires an annual report.

Although failing to comply with state commercial co-venturing laws can result in penalties ranging from fees to criminal charges, the regulatory enforcement that has taken place has generally been limited to misrepresentations. Attorneys General have not typically focused their enforcement efforts on the technical requirements of commercial co-venturer obligations, but companies are nonetheless advised to take their compliance obligations seriously. Some of these statutes also contain private rights of action, including, in some cases, allowing class-action lawsuits, which significantly increase the risks and stakes for the companies that become targets of those suits. And, any negative publicity resulting from a state enforcement action can quickly erase the goodwill a company seeks to create with a commercial co-venture.

For example, General Mills was the subject of an investigation by the Georgia Attorney General's office for its charitable promotion run on its Yoplait yogurt.[243] In 1999, Yoplait promised to donate fifty cents to charity for every yogurt lid consumers mailed back to the company.[244] Consumers, however, had to look under the lid to see the company's disclosure that its maximum donation would be $100,000. Customers sent in more than eight million lids, which would have led to a contribution of over four million dollars. The Georgia Attorney General's office argued the disclosure was insufficient to avoid deception because it required purchase of the product. General Mills settled the matter with the Attorney General and agreed to make an additional donation.

2. Professional Fundraiser Laws

Many US states also have statutes regulating "professional fundraisers." The "classic" professional fundraiser is the company that is hired by a charity to call upon donors, but the legal definitions have the potential to encompass less obvious scenarios. *A professional fundraiser differs from a commercial co-venturer in that* a professional fundraiser solicits contributions, for compensation, and does so outside of the sales promotion.

A "professional fundraiser" is typically defined as a "*person who directly or indirectly . . . for compensation or other consideration plans, manages, conducts, carries on, or assists in connection with a charitable solicitation or individually solicits or who employs or otherwise engages on any basis another person to solicit in this state for or on behalf of any charitable organization . . . .*"[245] US statutes governing professional fundraisers are often drafted broadly enough to include situations where the company is not engaged by a charity, when the company does not receive compensation from the charity or the donations received, and when the company only receives "other consideration" which could include goodwill.

The majority of the US states require professional fundraisers to register, and the laws governing professional fundraisers are much stricter. Several states require professional fundraisers to comply with more extensive bonding, registration, reporting and contracting requirements. Some states, such as Florida, require extensive disclosures prior to or in connection with the solicitation. Due to the nature of professional fundraiser laws and the potential liability, companies should be careful to make sure that the promotion does not result in compensation to the company. Below are a couple of common scenarios that could implicate professional fundraiser laws.

- **Checkout Charity.** "Checkout charity" refers to the situation where a retailer invites customers to make a voluntary donation at checkout, without any purchase required. While it is possible that states could take the position that the increased goodwill that a retailer may experience by running a checkout charity program is "compensation," the retailer should be able to avoid the "professional fundraiser" designation if (a) the retailer is not compensated in any way and (b) all of the donated funds are given to the charity. The retailer should also be careful about handling consumer-donated money because handling these donations could implicate Illinois's "charitable trust" laws or Massachusetts's broad commercial co-venturer laws even though no product is being sold.[246]
- **Website Donations**. Another situation that potentially implicates professional fundraiser laws is the website donation. A typical example is a company that gives consumers a discount for online purchases of certain goods. The discount comes either in the form of a coupon or a donation to one or more of the company's pre-selected charities. The commercial co-

venturer laws are likely avoided because the company is inviting consumers to make direct donations of their own money to the charity. And, while there may not be obvious "compensation" to the company operating the website, the company is still soliciting donations for the charity and holding the donations for the consumers. An expansive reading of "compensation" could include ad revenues from increased site traffic or goodwill generated from the promotion. There may also be "compensation" in the form of commissions paid by the manufacturers of the goods designated for the promotion.

3. Unrelated Business Income Tax

Sponsorships and sales of specially designed products can provide revenue streams to charities and generate "free" publicity but, without careful planning, these can also run the risk of creating taxable income for the charity. Under the Unrelated Business Income Tax (the "UBIT"), a charity may be liable for tax on income from business activities that are "unrelated" to the charitable purpose that forms the basis of its tax exemption.[247] While a charity might reasonably accept some occasional modest income from activities not related to its charitable mission, too much unrelated business taxable income might jeopardize the charity's tax-exempt status. As a result, charities typically prefer to avoid incurring UBIT if possible.

In the case of sponsorships, the IRS has rules governing the type of benefits that charities can provide to sponsors without incurring UBIT. The rules focus on the type of signage and exposure that a charity can provide the sponsor in connection with the sponsored event.[248] The rules distinguish between a charity's appropriate forms of "acknowledgement" for a sponsor's support and a charity's "advertising" for a sponsor that could trigger UBIT.

Specially designed or commissioned products are often created as a means to promote a charitable mission, raise charitable funds, and highlight a corporation's support of a particular charity. If the charity promotes the product actively, advertises for the for-profit company or otherwise calls upon consumers to purchase products, the income generated from the sale of such specially commissioned products could also run the risk of triggering the UBIT. In general, charities should avoid any active marketing role in the cause marketing campaign and simply receive appropriate income from it. It is also recommended that charities avoid making any obligations to provide substantial services or benefits beyond the use of the charity's name or brand, in return for participating in a cause marketing campaign.

C. Structuring Cause Marketing Programs

Given the regulatory requirements surrounding commercial co-ventures and professional fundraisers, companies often seek to structure their cause marketing programs to avoid implicating these laws. While this can certainly be done, the trade-off may be a less compelling campaign. For example, rather than using sales to generate a donation, a company could simply donate a fixed amount, for example, US$200,000.00, to a charity in exchange for the right to use the charity's name for a fixed period of time to acknowledge the company's support of the charity. In this example, the company's donation has nothing to do with the amount of sales generated, and the company would likely avoid most state commercial co-venturer laws. The company should nonetheless be careful to avoid the appearance of an endorsement by the charity and some states, such as Massachusetts, could take the view that advertising the charity's name is sufficient to create a commercial co-venture relationship. The company should also, of course, make sure the statement is accurate and, if the statement is on packaging that may well outlast the donation, the statement should reference the timing of the donation.

Companies could also elect to avoid those states with more burdensome commercial co-venture requirements. This, however, may not be an option for campaigns that are likely to bleed over into these states and it results in "holes" in a national campaign that may be difficult to explain to consumers.

Companies seeking to avoid professional fundraiser laws should be careful not to state or imply that a consumer will be contributing to a charity through the company. These companies should also not charge a premium for the products involved in charitable sales promotion.

D. Practical Considerations and Best Practices

There are a number of problems to avoid and practical considerations to heed when running a cause marketing campaign. For example, companies often want to protect themselves from the promotion that is too popular, which happens when a campaign is so successful that the company risks donating "too much," or from the promotion that is largely ignored. Charities also often require a minimum donation to enter into a commercial co-venture. In those cases, companies may seek to place a cap or set a minimum on the amount that will be donated. The accurate, per-unit donation amount would be disclosed in the advertising, but the total donation is subject to either a cap ("up to $500,000"), a guaranteed minimum, or both. While the company should disclose any applicable maximum or minimum, mere disclosure may not be sufficient. The problem arises when a consumer is misled, even if unintentionally, into believing their purchase will affect the donation. If the cap has already been reached and no additional donation will be generated by the purchase, then the consumer's purchase was superfluous. Likewise, if the minimum has not been met, but the company was obligated to donate the minimum regardless of the purchase, the consumer's purchase was also superfluous.

For a capped donation, the risk of an actionable misrepresentation increases if the offer continues to be communicated for a substantial period of time after the cap is reached. For a minimum donation, the risk increases if the minimum is well above anticipated sales, such that sales for a long period of time (and perhaps for the life of the campaign) had no effect on the donation. As a result, if caps and minimums are desired, the company should take steps to make sure the scope of the offer has a reasonable connection to the disclosed cap or minimum. For example, if there is a maximum donation, only a limited number of specially marked packages could be printed or the company could forecast the amount of time the offer should be valid in order to reach the cap. If there is a minimum donation, the minimum should be set low enough that it can be reached within a reasonable period of time.

Similar issues arise with flat donations, where companies agree to give a fixed amount to a charity that does not increase or decrease with sales. In these cases, companies should be very careful in their advertising to make sure that consumers are not receiving the false message that a product purchase results in a donation. Instead, the company making a flat donation to charity could simply acknowledge the company's support of the charity and disclose the amount of the donation. As noted above, flat donations also generally avoid commercial co-venturing laws.

Companies also tend to use vague terms such as "a portion of proceeds", "part of the sales price", or "net profits" in advertising their charitable sales promotions. Regardless of whether the company is trying to hide the actual donation amount or is simply unable to come up with a per-unit donation amount in advance, the issue is a lack of transparency. A "part of the sales price" could mean five cents; proceeds may mean revenue or profits; and consumers are unlikely to know how "net profits" are calculated. While these terms should be avoided, if a percentage is to be donated, it is recommended that the percentage be based on the retail purchase price, as opposed to "profits" or "proceeds."

In 2012, the New York Attorney General released its "Five Best Practices for Transparent Cause Marketing",[249] which provides helpful guidance to make sure that consumers are properly informed about the nature of a cause marketing campaign. Those practices focus on how promotions are communicated to consumers. Companies that follow these practices are likely to lower the risk of regulatory or legal action.

Since every cause marketing campaign is unique, companies are advised to consult with their advertising counsel before launching any cause marketing campaign. However, the following are a few best practices to help minimize the legal risks in typical cause marketing programs:

- Select a reputable charity that complies with its own reporting and registration requirements.
- Execute a written contract with the charity, making sure that it includes any provisions required by applicable state laws.
- Review promotional and advertising materials to ensure compliance with any state law-mandated disclosures.
- Make sure the promotional and advertising materials are transparent regarding the per-unit donation amount.
- Make sure the promotional and advertising materials do not mislead consumers as to the effect purchases will have on a charitable donation.
- Timely register and bond the campaign in applicable jurisdictions.
- Be aware of situations that may give rise to UBIT for the charity.

VII. "Made in the U.S.A" Claims

The recent focus on US manufacturing has caused some companies to look for ways to advertise the fact that their products are produced domestically. Making claims that products are "Made in the U.S.A." should not, however, be taken lightly. Not only is there significant public relations risk if these claims are not truthful, but companies may also risk violating US laws explicitly governing origin claims and grabbing the attention of consumers (and the plaintiff's bar) who are scrutinizing these claims.

A. US Legal Framework

All products imported into the United States must be marked with their country of origin, which is enforced by US Customs under Section 304 of the Tariff Act of 1930. Although most products manufactured in the United States are not required to list the United States as the country of origin, many companies believe that making such a claim gives them a competitive advantage with consumers looking to buy American-made products. If a marketer or manufacturer decides to market their product with a US origin claim, the claim must be truthful, not misleading and must be substantiated prior to making the claim. Otherwise, making such a claim will expose the marketer or manufacturer to challenges from the US Federal Trade Commission (FTC) under the US Federal Trade Commission Act, from competitors under the Lanham Act, and from consumers and state Attorneys General under state laws that prohibit false and deceptive advertising or otherwise govern country of origin claims.[250]

The US Federal Trade Commission Act ("FTCA") is the primary statute under which the FTC is empowered to protect consumers from false or misleading claims related to the US origin claims.[251] Under Section 5 of the FTCA, the FTC is, "empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."[252] The FTCA defines "unfair or deceptive acts or practices" to include "acts or practices involving foreign commerce that . . . (i) cause or are likely to cause reasonably foreseeable injury within the United States; or (ii) involve material conduct occurring within the United States."[253]

The remedy for violating the FTCA with respect to US origin claims includes all remedies available to the FTC for unfair and deceptive acts or practices including restitution to domestic and foreign victims.[254]

In 1997, the FTC issued a statement to provide guidance regarding its enforcement policy with respect to the use of "Made in the U.S.A." and other US origin claims in advertising and labeling, *i.e*. the Enforcement Policy Statement on US Origin Claims.[255] The statement, like the FTCA, articulates the FTC's policy with respect to US origin claims made voluntarily by marketers and manufacturers. Moreover, if the product is being exported, the manufacturer or marketer must consult with the country of origin laws or rules of the country to which the product is being imported for compliance.[256]

Certain products fall outside of the scope of the FTCA and are required by other US statutes to bear the country of origin on labels affixed to the products. For example:

- The Smoot-Hawley Tariff Act (the "Tariff Act") gives the US Customs Service and the US Secretary of the Treasury the power to administer the requirement that imported goods be marked with a foreign country of origin (for example, "Made in Taiwan").[257] When an imported product incorporates materials and/or processing from more than one country, US Customs considers the country of origin to be "the last country in which substantial transformation took place."[258] This "substantial transformation" test is defined as the manufacturing process that results in a new and different product with a new name, character, and use that is different from that which existed before the change.[259]
- The US Textile Fiber Products Identification Act requires that textile fiber products subject to the act be stamped, tagged, or labeled with the name of the country where the product was processed or manufactured; if processed or manufactured in the United States, it should be identified as such.[260]
- The US Wool Products Labeling Act requires that wool products that are subject to the act include a stamp, tag, label or other means of identification of the name of the country where the product is processed or manufactured.[261]
- The US Fur Product Labeling Act requires that fur and fur products disclose, on a label affixed to the products and in any advertisement or notice intended to promote the sale of the products, the country of origin of any imported furs used in the products.[262]

Manufacturers and advertisers should consider how the FTC evaluates US origin claims made voluntarily by manufacturers and marketers for compliance with the FTCA.

B. Express or Implied "Made in the U.S.A." Claims

A representation regarding the origin of a product can be made with either express or implied claims. Express claims of origin are easy to spot; the claim explicitly states "Made in U.S.A.," "Made in America," or "American Made." On the other hand, implied claims may be more difficult to identify and the unknowing manufacturer or marketer could mistakenly make an implied claim of origin.

To identify an implied claim of origin, the US Federal Trade Commission focuses on the overall impression created by the advertisement, label, or promotional material. This requires a review of the words and symbols in context. This query most commonly arises when the manufacturer or marketer uses symbols commonly associated with the United States, such as the American flag, a map of the United States, the bald eagle or references to US offices. For example, an ad for a product featuring a manager describing the "true American quality" of the work produced at the company's American factory is likely to convey to consumers that the products advertised are made in the United States. Although there is no express representation that the company's product is made in the United States, the overall — or net — impression the ad conveys to consumers is that the product is of US origin.[263]

Generally, the use of a brand name owned by a well-known American company, without more, will not constitute an implied claim of US origin. Similarly, simply listing the US address of a company on product packaging, in a non-prominent manner, will not likely constitute a US origin claim.[264]

C. Qualifying Standards and US Origin Claims

There is no requirement for manufacturers or marketers to make a country of origin claim unless the product is an automobile, textile, wool, or fur product. If a country of origin claim is made, however, it must be truthful and substantiated. When reviewing US origin claims, the US Federal Trade Commission looks at whether the claims are unqualified or qualified to determine what needs to be substantiated and what evidence will be considered to substantiate a claim. Like all advertising claims, US origin claims must be substantiated *before* the claim is made.

1. Unqualified US Origin Claims

Unqualified US origin claims, such as "Made in the U.S.A.," "Made in America," "American Made," "Built in the U.S.A.," "Produced in the U.S.A.," or "Manufactured in the U.S.A.",[265] communicate to consumers that "all or virtually all" of the product has been made in the United States.[266] In other words, all significant parts, processing, and labor that go into the product must be of US origin. In addition, the "US" in the term "US origin" refers to the fifty states, the District of Colombia, and the US territories.[267] Products labeled with unqualified US origin claims should not contain (or contain only a negligible amount of) foreign content.

There is no bright line test for determining if all or substantially all of a product originates in the United States. At a minimum, however, to make an unqualified US origin claim, the final assembly or processing of a product must take place in the United States.[268] Final assembly or processing is interpreted to mean that the product has been last "substantially transformed" in the United States.

"Substantially transformed" is a standard used by the US Customs Service, in accordance with the Tariff Act, which states that an article that consists in whole or in part of materials from more than one country is an article of the country in which it has been substantially transformed into a new and different article of commerce with a name, character, and use distinct from that of the article or articles from which it was so transformed. Accordingly, a product consisting of components or processes from another country can only claim US origins if the component parts were transformed into a different product with a different name in the United States. Finally, even where a product was substantially transformed in the United States, if it were then sent to another country for final assembly, an unqualified US origin claim would violate the FTCA. Instead, a qualified claim would be required to disclose to consumers that assembly took place outside the United States.

The FTC considers other factors after the above-described threshold inquiry to determine whether all or virtually all of a product was made in the United States. These factors include:

- how much of the product's total manufacturing costs can be assigned to US parts and processing versus foreign parts and processing;
- how far removed is any foreign content attributable to the finished product; and
- the costs of goods sold or inventory costs of finished products. [269]

The evaluation of these factors is not formulaic and is considered on a case-by-case basis. The weight of any given factor will be based on the nature of the product at issue.

2. Qualified US Origin Claims

A qualified "Made in the U.S.A." claim discloses the extent, amount or type of a product's domestic content or processing; it indicates that the product is not entirely of US origin.[270] A qualified US origin claim is appropriate for products that include US content or processing, but does not meet the criteria for making an unqualified US origin claim (i.e., the product consists of a substantial amount of foreign content). Therefore, manufacturers and marketers must exercise great care in making these types of claims and ensure that it has evidence to substantiate their claims. To be compliant with the FTCA, any qualified disclosure should be clear, prominent and understandable to prevent deception.

Qualified US origin claims can be general or specific, *e.g.* "70% U.S. content"; "Made in the U.S.A of U.S. and imported parts" and "Couch assembled in U.S.A from Italian leather and Mexican frame."[271] Marketers should be careful, however, when using qualified claims that take the form of a general US origin claim accompanied by qualifying information about foreign content, (e.g. "Made in the U.S.A. of U.S. and imported parts" or "Manufactured in U.S. with Indonesian materials"). The FTC interprets such qualified claims to mean that the product was last substantially transformed in the United States. The key is to make sure that the language used to qualify the country of origin claim is clear, accurate and substantiated.

D. Federal Trade Commission's Enforcement of US Origin Claims

There is no lack of illustrative cases in which the FTC has asserted violations of the FTCA for making false US origin claims. In 2017, a consumer filed a complaint with the FTC, alleging that Bollman Hat Co., based in Lancaster, Pennsylvania, used deceptive labels on its hats. Headwear sold by Bollman included labels bearing the phrases "American Made Matters," "Choose American" and "Made in USA since 1868."[272] The FTC's investigation into the Bollman products proved that more than seventy percent of its headwear products were wholly imported as finished products. Of the remaining styles, most contained significant imported content.[273] Therefore, the FTC challenged Bollman's unqualified claims as false.

Bollman eventually settled with the FTC in January 2018. In the settlement agreement, Bollman was prohibited from making unqualified US origin claims for its products unless it could show that the products' final assembly or processing (all significant processing) took place in the US, and that all or virtually all ingredients or components of the product are made and sourced in the US as well.[274] The settlement agreement further stated that a qualified "Made in the U.S.A." claim must include a clear and conspicuous disclosure about the extent to which the product contains foreign parts, ingredients, and processing.[275]

The FTC has also challenged unqualified US origin claims directed to entire product lines. In its complaint against Kubota Tractor Corporation, the FTC alleged that Kubota's advertisements that its T-Series and TG-Series Lawn Tractors were "Made by Kubota in the U.S.A." misrepresented that the entire lines of T-Series and TG-Series Lawn Tractors were "Made in the U.S.A."[276] The FTC claimed that models within each tractor line contained significant foreign parts. In addition, the FTC alleged that Kubota misrepresented that the individual models were "Made in U.S.A." because the models contained significant foreign parts. The proposed settlement prohibits Kubota from misrepresenting the extent to which any lawn tractor or lawn tractor product line is made in the United States.

The FTC alleged that Johnson Worldwide Associates, Inc., a marketer of over 500 outdoor recreation-related consumer products, made false and misleading advertising claims that its Super Mono fishing line was "Made in the U.S.A." because the line was not "all or virtually all" made in the United States.[277] The complaint also challenged packaging claims that the fishing line was "Made in the U.S.A. of American and Japanese components" as being false or misleading because the line was completely made in Japan and only the packaging and incidental materials contained US components or processing. The proposed settlement requires Johnson to cease and desist from misrepresenting the extent to which its fishing products are made in the United States.

The FTC also challenged claims made by USDrives Corporation, a manufacturer and marketer of CD-ROM drives that were assembled in the United States until May 1998, when it moved its assembly operations to Asia.[278] Specifically, the FTC alleged that USDrives misrepresented on packages that its CD-ROM drives were "Made in the U.S.A," although they were actually assembled in the United States of primarily imported parts. In addition, the FTC alleged that the company's labeling used symbols of the United States, such as a red, white, and blue flag logo, the American eagle, and the Statue of Liberty, which communicated an unqualified US origin claim. An inconspicuous statement "Made in China" placed on the bottom and side panels of packages of CD-ROM drives that were made in China did not negate, and in fact contradicted, the representation that the products were made in the United States. The proposed settlement prohibits USDrives from misrepresenting the extent to which any CD-ROM drive is made in the United States.

E. Practical Considerations

Making US origin claims that comply with the US Federal Trade Commission's Enforcement Policy Statement on U.S. Origin Claims is not difficult, but it does require that a marketer or manufacturer pay close attention to the express and implied message communicated on labels, packaging and other advertising. The answers to the questions below will provide the information necessary to assess whether a qualified or unqualified US origin claim is appropriate:

- Determine if the claim is actually a US origin claim. Be sure to review the final ad to determine if the ad incorporates US symbols that imply that the product advertised is made in the United States.
- Is the claim unqualified? If so,
    - Was the product assembled and substantially transformed in the United States?
    - Were the components and other elements of the product made in the United States?
- Is the claim qualified? If so,
    - Is the statement true and accurate?
    - If the ad states the product was "made" in the United States of parts imported from another country, was the product last substantially transformed in the United States?
- If the Tariff Act requires marking the product with a country of origin other than the United States, it would be misleading to include an unqualified US origin.
- Even if a product complies with the FTC's standards, verify that the product also complies with any specific standards in the states in which the product will be sold.

Confirm that the descriptions that are placed on the product, its package, and on other advertising match. If there is a discrepancy, consider clarifying why the discrepancy exists. The discrepancy could, for example, be attributed to the fact that the package was made in the United States, but the actual product was not.

VIII. About the Authors

Tywanda Lord specializes in trademark and advertising counseling and litigation. She represents brand owners across a broad spectrum of industries including sports and intimate apparel, consumer products, and hospitality. Ms. Lord leverages her diverse background to advance her clients' business objectives, and she regularly partners with clients to develop practical and creative solutions to legal issues. Her approach to litigation has led to excellent results for clients in federal courts across the United States and in cancellation and opposition proceedings in the US Patent and Trademark Office. Ms. Lord also proactively advises clients on a variety of issues to minimize the risk of disputes while maximizing the visibility of clients' brand, including trademark clearance and portfolio management and managing social media advertising campaigns and the intellectual property and right of publicity issues that accompany them. Ms. Lord currently serves on the Executive Committee of Kilpatrick Townsend & Stockton and is a member of the State Bar of Georgia Diversity Steering Committee. More information about Ms. Lord may be found at https://www.kilpatricktownsend.com/en/People/L/LordTywandaHarris.

Laura Miller helps brand owners build and protect their brands domestically and abroad. She focuses her practice on branding, advertising, and brand protection and enforcement. Laura has particular experience with the apparel, food and beverage, life sciences, logistics and software industries. Ms. Miller represents advertisers in connection with the legal aspects of their advertising and promotional marketing businesses. Ms. Miller has drafted numerous agreements in the advertising space, including talent agreements, sweepstakes and contest rules, social media agreements, influencer agreements, and agency agreements. Ms. Miller also crafts brand protection strategies, manages domestic and international trademark portfolios, and handles litigation and enforcement efforts in the administrative and federal courts. More information about Ms. Miller may be found at https://www.kilpatricktownsend.com/en/People/M/MillerLauraC.

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IX. Additional Resources

For additional guidance regarding the topics addressed above, please consult the following:

A. Other Articles

- US Federal Trade Commission's Policy Statement on Deception, *available at* https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf
- The FTC's Guides Concerning the Use of Endorsements and Testimonials in Advertising, *available at* https://www.ftc.gov/sites/default/files/documents/one-stops/advertisement-endorsements/091005revisedendorsementguides.pdf
- The FTC's .com Disclosures: How to Make Effective Disclosures in Digital Advertising, *available at* https://www.ftc.gov/system/files/documents/plain-language/bus41-dot-com-disclosures-information-about-online-advertising.pdf
- The FTC's Endorsement Guides: What People Are Asking, *available at* https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking
- The FTC's Guides for the Use of Environmental Marketing Claims, *available at* https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-issues-revised-green-guides/greenguides.pdf
- Five Best Practices for Transparent Cause Marketing, *available at* https://www.charitiesnys.com/Five%20Best%20Practices%20for%20Transparent%20Cause%20Marketing.pdf
- The FTC's Enforcement Policy Statement on U.S. Origin Claims, *available at* https://www.ftc.gov/public-statements/1997/12/enforcement-policy-statement-us-origin-claims#e2

B. ACC Resources

- "Best Practices for Developing and Protecting Strong Brands", InfoPAK, 2016, *available at* https://www.acc.com/resource-library/best-practices-developing-and-protecting-strong-brands
- "Top Ten Considerations for Performing Intellectual Property Due Diligence", Top Ten, 2018, *available at* https://www.acc.com/resource-library/top-ten-considerations-performing-

intellectual-property-due-diligence-united

- "Copyright Fair Use", InfoPAK, 2017, *available at* https://www.acc.com/resource-library/copyright-fair-use-united-states

X. Endnotes

[1] Trademark Act of 1946, 15 U.S.C. § 1125(a)(1) (2012).

[2] *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997); *see also U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 922–23 (3d Cir. 1990).

[3] 15 U.S.C.A. § 45(a)(1) (2012).

[4] *Id.* § 52(a).

[5] *Id.* § 53(b).

[6] *FTC Policy Statement on Deception*, *appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984), *available at* http://www.ftc.gov/bcp/policystmt/ad-decept.htm.

[7] *Id.*

[8] *Id.*

[9] *See, e.g.*, COLO. REV. STAT. ANN. §§ 6-1-101 to 6-1-115 (2013) (1966 revision); GA. CODE ANN. §§ 10-1-370 to 10-1-375 (2013); MINN. STAT. §§ 325D.43–.48 (2013) (1966 revision); OHIO REV. CODE ANN. §§ 4165.01-4165.04 (2013) (1966 revision); OKLA. STAT. ANN. tit. 78, §§ 51–55 (2013); OR. REV. STAT. ANN. §§ 646.605–.656 (2013) (amended 2013) (1966 revision); *see also* http://statelaws.findlaw.com/consumer-laws/deceptive-trade-practices.

[10] *See, e.g.*, CAL. BUS. & PROF. CODE ANN. § 17500 *et seq.* (West 2013); GA. CODE ANN. §§ 10-1-420, -421 (2013); N.Y. GEN. BUS. LAW § 350 (McKinney 2013). *See also* *http://statelaws.findlaw.com/consumer-laws/deceptive-trade-practices*

[11] *See Facts for Business: Threading Your Way Through the Labeling Requirements Under the Textile and Wool Acts*, *available at* https://www.ftc.gov/tips-advice/business-center/guidance/threading-your-way-through-labeling-requirements-under-textile

[12] *See, e.g.*, Bruce I. McDaniel, *What Constitutes "False Advertising" of Drugs or Devices Within §§ 5 and 12 of the Federal Trade Commission Act (15 U.S.C.A. §§ 45, 52)*, 49 A.L.R. FED. 16 (1980).

[13] *See, e.g.*, *ABC Television Network Advertising Standards and Guidelines*, *available at* https://abcallaccess.com/app/uploads/2016/01/2014-Advertising-Guidelines-.pdf.

[14] *See, e.g.*, *Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 497 (5th Cir. 2000).

[15] *Italian Am. Pasta Co.* v. *New World Pasta*, 371 F.3d 387 (8th Cir. 2004).

[16] Nestle USA, Report #4263, *NAD Case Reports* (Jan. 2005).

[17] *Atari Corp. v. 3DO Co.*, 31 U.S.P.Q.2d 1636, 1636 (N.D. Cal. 1994).

[18] *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1145 (9th Cir. 1997).

[19] *Gillette Co. v. Norelco Consumer Prods. Co.*, 946 F. Supp. 115, 130 (D. Mass. 1996).

[20] *See, e.g.*, *Pizza Hut,* 227 F.3d at 495–96.

[21] *Kraft, Inc. v. FTC*, 970 F.2d 311, 319 n.4 (7th Cir. 1992).

[22] *Castrol Inc. v. Pennzoil Co.*, 987 F.2d 939, 941, 946 (3d Cir. 1993).

[23] *Southland Sod Farms*, 108 F.3d at 1145 (stating that "50% Less Mowing" is "a specific and measurable advertisement claim of product superiority based on product testing and, as such, is not puffery").

[24] *Am. Home Prods. Corp. v. Abbott Labs.*, 522 F. Supp. 1035 (S.D.N.Y. 1981).

[25] *Kraft,* 970 F.2d at 311.

[26] *Id*.

[27] *In re Thompson Med. Co.*, 104 F.T.C. 648, *aff'd*, 791 F.2d 189 (D.C. Cir. 1986).

[28] 227 F.3d 489 (5th Cir. 2000).

[29] *Id.* at 491.

[30] *Id.* at 498; *see also Am. Italian Pasta Co.,* 371 F.3d at 392 (holding "America's favorite pasta" statement to be puffery).

[31] *Pizza Hut*, 227 F.3d at 491.

[32] *Id.* at 500–03.

[33] *Id.* at 501–02. Ultimately, the Court found that the misleading statements were not material to the consumer purchasing decision and, as a result, Papa John's prevailed in the suit. The case nevertheless offers a good example of the contextual factors that can transform even the most evident puffery into an actionable statement of fact.

[34] *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 290 F.3d 578, 587 (3d Cir. 2002)

[35] *Id.* at 587.

[36] *Novartis Consumer Health, Inc.*, 290 F.3d at 587 (quoting *United Indus. Corp.,* 140 F.3d at 1181).

[37] *U-Haul Int'l, Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1040 (9th Cir. 1986).

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38 *Clorox Co. Puerto Rico v. Procter & Gamble Commercial Co.,* 228 F.3d 24, 35 (1st Cir. 2000).

39 No. 81CIV731-CSH, 1982 WL 121559 (S.D.N.Y. June 9, 1982). Although unreported, this case has been heavily cited in subsequent cases. *See, e.g.*, *Novartis Consumer Health, Inc.*, 290 F.3d at 578; *Southland Sod Farms*, 108 F.3d at 1139; *Castrol Inc.*, 987 F.2d at 941.

40 *Id.*

41 *Novartis Consumer Health, Inc.*, 290 F.3d at 587.

42 284 F.3d 302 (1st Cir. 2002).

43 1A LOUIS ALTMAN & MALLA POLLACK, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 5:23 (4th ed. 2008).

44 *See, e.g., U-Haul Int'l, Inc.*, 793 F.2d at 1040.

45 *Am. Home Prods. Corp. v. Johnson & Johnson*, 577 F.2d 160, 165–66 (2d Cir. 1978); *Sandoz Pharms. Corp. v. Richardson-Vicks, Inc.*, 902 F.2d 222, 228–29 (3d Cir. 1990).

46 *See, e.g., Am. Home Prods.*, 577 F.2d at 166–68.

47 *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery*, 185 F.3d 606, 614 (6th Cir. 1999) (internal quotation marks omitted). *See also Sandoz Pharms. Corp.*, 902 F.2d at 229.

48 902 F.2d 222.

49 *Id.* at 228–29 (internal citation omitted).

50 *Id.* at 229.

51 791 F.2d 189 (D.C. Cir. 1986).

52 *FTC Policy Statement Regarding Advertising Substantiation*, *appended to Thompson Med. Co.*, 104 F.T.C. 648, 839 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *available at* http://www.ftc.gov/bcp/guides/ad3subst.htm.

53 https://www.ftc.gov/public-statements/1983/03/ftc-policy-statement-regarding-advertising-substantiation.

54 *Id.*

55 *Id.*

56 *Id.*

57 1A LOUIS ALTMAN & MALLA POLLACK, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 5:21 (4th ed. 2013).

[58] *FTC Policy Statement Regarding Advertising Substantiation*, *supra* note 52.

[59] *Castrol*, 987 F.2d at 958 n.13 (quoting *Procter & Gamble Co. v. Chesebrough-Pond's Inc.*, 747 F.2d 114, 119 (2d Cir. 1984)). *See also United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1182 (8th Cir. 1998).

[60] *Pfizer Inc.*, 81 F.T.C. 23 (1972).)

[61] *FTC Policy Statement Regarding Advertising Substantiation*, *supra* note 52.

[62] *See* https://www.ftc.gov/news-events/press-releases/2012/05/skechers-will-pay-40-million-settle-ftc-charges-it-deceived.

[63] Complaint at ¶ 1-2, *F.T.C. v. Skechers U.S.A.*, Case No. 1:12-CV-01214 (N.D. Ohio).

[64] *Id*. at ¶ 7.

[65] *Id*. at ¶ 15-16.

[66] *Seven-Up Co. v. Coca-Cola Co.*, 86 F.3d 1379, 1384 (5th Cir. 1996).

[67] *See Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.,* 942 F. Supp. 209, 215 (S.D.N.Y. 1996); *Gordon & Breach Science Publishers v. A.I.P.,* 859 F. Supp. 1521, 1535–36 (S.D.N.Y. 1994)

[68] 984 F. Supp. 768, 795 (S.D.N.Y. 1997).

[69] 859 F. Supp. 1521, 1544 (S.D.N.Y. 1994).

[70] 86 F.3d 1379, 1385 (5th Cir. 1996).

[71] 769 F. Supp. 1224, 1234-35 (S.D.N.Y. 1991).

[72] 152 F. Supp. 2d 1075, 1082 (N.D. Ill. 2001).

[73] 269 F.3d 800, 803-804 (7th Cir. 2001).

[74] *Fashion Boutique of Short Hills, Inc.*, 942 F. Supp. at 215.

[75] *See, e.g.*, *Potato Chip Inst. v. Gen. Mills, Inc.*, 333 F. Supp. 173 (D. Neb. 1971), *aff'd*, 461 F.2d 1088 (8th Cir. 1972).

[76] 461 F.2d at 1089.

[77] 333 F. Supp. at 181.

[78] *Giant Food, Inc. v. FTC*, 322 F.2d 977, 986 (D.C. Cir. 1963).

[79] 654 F. Supp. 568 (S.D.N.Y. 1987).

[80] *Id.* at 590.

81 *Id.*

82 19 F.3d 125 (3d Cir. 1994).

83 *Id. See also Chesebrough-Pond's Inc.*, 747 F.2d 114.

84 747 F.2d 114.

85 *Id.* at 116.

86 *Id.* at 120.

87 *See e.g.*, F.T.C. v. Nat'l Urological Grp., Inc., 645 F. Supp. 2d 1167, 1186 (N.D. Ga. 2008), *aff'd*, 356 F. App'x 358 (11th Cir. 2009).

88 *See e.g., FTC v. NutriMostLLC*, Case No. 2:17-cv-00509-NBF (W.D. PA) (initiating lawsuit for claiming the NutriMost Ultimate Fat Loss System would help people lose 20 to 40 pounds in 40 days without a restrictive diet, where consumers were actually required to eat 500 calories or less per day to achieve those results).

89 Complaint, *F.T.C. v. Iovate Health Sciences USA, Inc. et al*, Case No. 10-CV-587 (W.D.N.Y.)

90 *Id.*

91 *See* https://www.regulations.gov/document?D=FDA-2014-N-1207-0001.

92 *See* https://www.ftc.gov/news-events/blogs/business-blog/2016/04/are-your-all-natural-claims-all-accurate.

93 48 Fed. Reg. 23270 (May 24, 1983).

94 Julie Creswell, *Is it 'Natural'? Consumers, and Lawyers, Want to Know*, N.Y. TIMES, Feb. 16, 2018, https://www.nytimes.com/2018/02/16/business/natural-food-products.html.

95 *See e.g., In re KIND LLC "Healthy & All Natural" Litig.*, 209 F. Supp. 3d 689, 696 (S.D.N.Y. 2016) ("More importantly, staying this action until the FDA offers guidance at the federal level would almost certainly help harmonize court rulings—an important consideration in view of the fact that 'Congress [did] not want to allow states to impose disclosure requirements of their own on packaged food products, most of which are sold nationwide" in order to avoid the need for "[m]anufacturers . . . to print 50 different labels.'") (citing to *Turek v. Gen. Mills, Inc.*, 662 F.3d 423, 426 (7th Cir. 2011); *Rosillo v. Annie's Homegrown Inc.*, No. 17-CV-02474-JSW, 2017 WL 5256345, at *1 (N.D. Cal. 2017) ("the Court finds that it is appropriate to stay this action pursuant to the primary jurisdiction").

96 *See In re Honest Marketing Litigation*, Case No. 16-CV-00125 (S.D.N.Y.)

97 *See* https://www.ftc.gov/policy/federal-register-notices/guides-use-environmental-marketing-claims-green-guides.

[98] FTC, *FTC Issues Revised "Green Guides:" Will Help Marketers Avoid Making Misleading Environmental Claims* (Oct. 1, 2012), *https://www.ftc.gov/news-events/media-resources/truth-advertising/green-guides*; *see also* Kilpatrick Townsend & Stockton LLP, *Know Exactly What You Mean Before Claiming It's "Green"* (Oct. 15, 2013), https://www.kilpatricktownsend.com/~/media/Files/articles/LPearsonAdvertisingBasics.ashx (detailed overview of revised "Green Guides" provisions).

[99] 16 C.F.R. § 260 (2012), available at https://www.ftc.gov/news-events/media-resources/truth-advertising/green-guides; see also FTC, Environmental Claims: Summary of the Green Guides (2012) https://www.ftc.gov/news-events/media-resources/truth-advertising/green-guides. Note that the Green Guides are not binding and "do not confer any rights on any person and do not operate to bind the FTC or the public." See 16 C.F.R. § 260.1.

[100] *Id.* § 260.8(b).

[101] *Id.* § 260.12.

[102] *Id.* § 260.13.

[103] *Id.* § 260.13(d).

[104] *Id.* § 260.13 (c).

[105] *Id.* § 260.13 (d) (Example 8).

[106] *Id.*

[107] 15 U.S.C. § 45(a)(1).

[108] FED. TRADE COMM'N, THE FTC ENFORCEMENT GUIDES: WHAT PEOPLE ARE ASKING, *available at* https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking.

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *CSGOLotto, Trevor Martin, and Thomas Cassell*, No. C-4576 (Nov. 28, 2017), *available at* https://www.ftc.gov/enforcement/cases-proceedings/162-3184/csgolotto-trevor-martin-thomas-cassell.

[120] Press Release, Fed. Trade Comm'n, CSGO Lotto Owners Settle FTC's First-Ever Complaint Against Individual Social Media Influencers (Sept. 7, 2017), *available at* https://www.ftc.gov/news-events/press-releases/2017/09/csgo-lotto-owners-settle-ftcs-first-ever-complaint-against.

[121] *Id.*

[122] *Cole Haan*, No. 142-3041 (F.T.C. Mar. 20, 2014).

[123] Fed. Trade Comm'n, Div. of Advert. Practices, Letter from Assoc. Dir. Mary K. Engle to Christie Grymes Thompson (March 30, 2014), *available at* https://www.ftc.gov/system/files/documents/closing_letters/cole-haan-inc./140320colehaanclosingletter.pdf.

[124] *Lord & Taylor, LLC*, No. C-4576 (F.T.C. May 23, 2016), *available at* https://www.ftc.gov/system/files/documents/cases/160523lordtaylordo.pdf.

[125] Press Release, Fed. Trade Comm'n, Lord & Taylor Settles FTC Charges It Deceived Consumers Through Paid Article in an Online Fashion Magazine and Paid Instagram Posts by 50 "Fashion Influencers", *available at* https://www.ftc.gov/news-events/press-releases/2016/03/lord-taylor-settles-ftc-charges-it-deceived-consumers-through.

[126] Press Release, Fed. Trade Comm'n, FTC Approves Final Lord & Taylor Order Prohibiting Deceptive Advertising Techniques, *available at* https://www.ftc.gov/news-events/press-releases/2016/05/ftc-approves-final-lord-taylor-order-prohibiting-deceptive.

[127] *Warner Bros. Home Entertainment Inc.*, No. C-4595 (F.T.C. Nov. 17, 2016), *available at* https://www.ftc.gov/enforcement/cases-proceedings/152-3034/warner-bros-home-entertainment-inc-matter.

[128] Press Release, Fed. Trade Comm'n, Warner Bros. Settles FTC Charges It Failed to Adequately Disclose It Paid Online Influencers to Post Gameplay Videos, *available at* https://www.ftc.gov/news-events/press-releases/2016/07/warner-bros-settles-ftc-charges-it-failed-adequately-disclose-it.

[129] Press Release, Fed. Trade Comm'n, FTC Approves Final Order Requiring Warner Bros. to Disclose Payments to Online Influencers, *available at* https://www.ftc.gov/news-events/press-releases/2016/11/ftc-approves-final-order-requiring-warner-bros-disclose-payments.

[130] Press Release, Fed. Trade Comm'n, FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship, *available at* https://www.ftc.gov/news-events/press-releases/2017/04/ftc-staff-reminds-influencers-brands-clearly-disclose.

[131] *Id.*

[132] Fed. Trade Comm'n, Div. of Advert. Practices, Letter from Assoc. Dir. Mary K. Engle (Sept. 6, 2017), *available at* https://www.ftc.gov/system/files/attachments/press-releases/los-propietarios-de-csgo-lotto-resuelven-la-primera-demanda-jamas-entablada-contra-influyentes-de/instagram_influencer_warning_letter_template_9-6-17.pdf.

[133] Lesley Fair, FED. TRADE COMM'N, *Business Blog*, (Sept. 7, 2017), https://www.ftc.gov/news-events/blogs/business-blog/2017/09/three-ftc-actions-interest-influencers.

[134] Restatement (Third) of Unfair Competition § 46 (Am. Law Inst. 1995).

[135] 1903 N.Y. LAWS CH. 132, §§ 1-2 (current amended version at N.Y. CIV. RIGHTS. LAW § 50-51(McKinney 2018)).

[136] *See, e.g.,* CAL. CIV. CODE § 3344.1 (West 2018) (protecting publicity rights for seventy years following such person's death).

[137] *Id.*

[138] *Eastwood v. Super. Ct.*, 149 Cal. App. 3d 409, 417 (1983), *superseded by statute*, Cal. Civ. Code § 3344 (West 2018).

[139] N N.Y. CIV. RIGHTS LAW § 51 (McKinney 2018).

[140] *Shamsky v. Garan, Inc.*, 167 Misc.2d 149 (N.Y. Sup. Ct. 1995).

[141] CAL. CIV. CODE § 3344 (West 2018).

[142] *See Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978).

[143] *See Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), abrogated by Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014).

[144] *See Allen v. Nat'l Video, Inc.*, 610 F. Supp. 612, 630 (S.D.N.Y. 1985).

[145] *See, e.g.*, *Elizabeth Taylor v. The Nat'l Broad. Co. Inc.*, No. BC110922, 1994 WL 762226 (Cal. Super. Ct. Sept. 29, 1994); *Rosemont Enters. v. Random House, Inc.*, 58 Misc. 2d 1 (Sup. Ct., N.Y. Cty. 1968).

[146] *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983).

[147] *Id.*

[148] *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

[149] *Id.* at 463.

[150] *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509 (7th Cir. 2014).

[151] *Jones v. Corbis Corp.*, 815 F. Supp. 2d 1108 (C.D. Cal. 2011).

[152] *Heigl v. Duane Reade Inc.*, No. 1:14-cv-02502 (S.D.N.Y.).

[153] Id., *available at* http://online.wsj.com/public/resources/documents/0410_heiglsuit.pdf.

[154] Alan Duke, *Katherine Heigl files $6 million suit against drugstore chain over tweet*, CNN, April 10, 2014, *available at* https://www.cnn.com/2014/04/10/showbiz/katherine-heigl-duane-reade-lawsuit/index.html.

[155]Aaron Vehling, *Duane Reade, 'Knocked Up' Star Settle Suit Over Photo Use*, Law360, Aug. 28, 2014, *available at* https://www.law360.com/articles/571835/duane-reade-knocked-up-star-settle-suit-over-photo-use.

[156] https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions#Safe%20Harbor%20Programs.

[157] 16 C.F.R. § 312.3.

[158]*Id.*

[159] https://www.ftc.gov/tips-advice/business-center/guidance/childrens-online-privacy-protection-rule-six-step-compliance.

[160] 16 C.F.R. § 312.2.

[161] https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions#General%20Questions.

[162] *Id.*

[163]
https://dlbjbjzgnk95t.cloudfront.net/1038000/1038152/coppa_gator_group_co_ltd_letter_4-26-18.pdf.

[164] https://dlbjbjzgnk95t.cloudfront.net/1038000/1038152/coppa_tinitell_inc_letter_4-26-18.pdf.

[165] http://www.commercialfreechildhood.org/sites/default/files/devel-generate/tiw/youtubecoppa.pdf.

[166] *Id.*

[167] *Id.*

[168] http://www.dglaw.com/press-alert-details.cfm?id=844.

[169] https://www.ftc.gov/news-events/press-releases/2018/01/electronic-toy-maker-vtech-settles-ftc-allegations-it-violated.

[170] http://www.dglaw.com/press-alert-details.cfm?id=805.

[171] https://www.ftc.gov/news-events/press-releases/2018/01/electronic-toy-maker-vtech-settles-ftc-allegations-it-violated.

[172] *Id.*

[173] *Id.*

[174] *See, e.g.*, TEX. GOV'T CODE ANN. § 466.002(5) (West 2017) (A lottery is "the procedures operated by the state under this chapter [466] through which prizes are awarded or distributed by chance among persons who have paid, or unconditionally agreed to pay, for a chance or other opportunity to receive a prize."); GA. CODE ANN. § 16-12-20(4) (West 2018) (A lottery is "any scheme or procedure whereby one or more prizes are distributed by chance among persons who have paid or promised consideration for a chance to win such prize, whether such scheme or procedure is called a pool, lottery, raffle, gift, gift enterprise, sale, policy game, or by some other name.").

[175] *See, e.g.*, 18 U.S.C. § 1307 (2012); N.C. GEN. STAT. ANN. § 14-290 (West 2017); FLA. STAT. ANN. § 849.09(2) (West 2018).

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

[177] *See United States v. Gotti*, 459 F.3d 296, 341 (2d Cir. 2006) (a game of chance is one in which "the outcome depends in a material degree upon an element of chance, notwithstanding that the skill of the contestants may also be a factor therein") (quoting N.Y. PENAL LAW § 225.00(1)); *see also* FLA. STAT. ANN. § 849.094(1)(a) (West 2018) ("'Game promotion' means, but is not limited to, a contest, game of chance, sweepstakes, or gift enterprise, conducted by an operator within or throughout the state and other states in connection with and incidental to the sale of consumer products or services, and in which the elements of chance and prize are present.").

[178] *See In re Glendinning Cos.*, 109 F.T.C. 4 (Jan. 13, 1987) (defining a game of skill as "any promotional contest or device in which the award of a prize or anything of value to the participants is determined on the basis of the winning answers or solutions submitted by participants through the exercise of a substantial degree of skill in determining the winning answers or solutions to the questions or problems which are the subject of the contest or device"); *People ex rel. Love v. Schapiro*, 77 N.Y.S.2d 726, 728 (N.Y. City Magis. Ct. 1948) (stating that a game is one of skill where the element of luck or chance is "subordinate to the proficiency or skill of the player in the determination of the outcome of the game").

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

[180] 15 U.S.C. §§ 41-58 (2012).

[181] 39 U.S.C. § 3001(a), *et seq*. (2012).

[182] FLA. STAT. ANN. § 849.094(4) (West 2018).

[183] *Id.*

[184] *Id.* § 849.094(4)(b).

[185] *Id.* § 849.094(3).

[186] *Id.*

[187] *Id.*

[188] *Id.* § 849.094(5).

[189] N.Y. GEN. BUS. LAW § 369-e(1)(4) (McKinney 2018).

[190] *Id.* § 369-e(1).

[191] *Id.*

[192] *Id.* § 369-e(2).

[193] *Id.* § 369-e(5).

[194] R.I. GEN. LAWS ANN. § 11-50-1 (West 2018).

[195] *Id.*

[196] R.I. GEN. LAWS ANN. § 11-50-3 (West 2018).

[197] *See* Jackpot in free game counts in limitation of jackpots, Op. Att'y Gen. Fla. No. 95-21 (Mar. 21, 1995) (stating that consideration may exist where there is a benefit to the promoter).

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

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

[200] *Haskell*, 857 F. Supp. at 1404 (holding that the payment of postage to mail in an entry form was not valuable consideration); *Glick v. MTV Networks*, 796 F. Supp. 743, 748 (S.D.N.Y. 1992) (finding that a $2 charge for using a 900 number to enter a game of chance was not "something of value"); *Pepsi Cola Bottling Co. of Luverne, Inc. v. Coca Cola Bottling Co.*, 534 So. 2d 295, 297 (Ala. 1988) (finding that game participants' ability to obtain entry cards for the promotion by calling or writing the sponsor was a free method of entry).

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

[202] Press Release, N.Y. Att'y Gen., Tylenol Manufacturer to Amend Sweepstakes Ads (Sept. 10, 2004), *available at* https://ag.ny.gov/press-release/tylenol-manufacturer-amend-sweepstakes-ads.

[203] *Id.*

[204] *Id.*

[205] Press Release, N.Y. Att'y Gen., CVS to Amend Sweepstakes Promotions (July 8, 2004), *available at* https://ag.ny.gov/press-release/cvs-amend-sweepstakes-promotions.

[206] *Id.*

[207] *Id.*

[208] *Schneiderman: A&P ran misleading sweepstakes*, TIMES UNION: CAPITAL CONFIDENTIAL BLOG (June 6, 2013), *available at* https://blog.timesunion.com/capitol/archives/188547/schneiderman-ap-ran-misleading-sweepstakes/.

[209] *Id.*

[210] *Id.*

[211] *Id.*

[212] *Id.*

[213] *Id.*

[214] *Id.*

[215] *See, e.g., In re Advisory Opinion to Governor*, 856 A.2d 320, 328 (R.I. 2004) ("The majority of jurisdictions adhere to the 'dominant factor' doctrine."); *Opinion of the Justices*, 795 So.2d 630, 635-36 (Ala. 2001) (collecting cases from several jurisdictions that apply the dominant element test); *Dep't of Corr. v. Workers' Comp. Appeals Bd.*, 90 Cal. Rptr. 2d 716, 720 (Cal. Ct. App. 1999) (discussing the statutory language "predominant as to all causes" and holding that such language was intended to require "greater than [] 50 percent").

[216] *Morrow v. State*, 511 P.2d 127, 129 (Alaska 1973).

[217] *Id.*

[218] *Id.*

[219] *Id.*

[220] *See, e.g., Thole v. Westfall,* 682 S.W.2d 33, 37 n. 8 (Mo. Ct. App. 1984) ("In Missouri, chance must be a material element in determining the outcome of a gambling game. It need not be the dominant element"); *Boardwalk Regency Corp. v. Attorney Gen. of State of N.J.*, 457 A.2d 847, 848–51 (N.J. Super. Ct. Law Div. 1982).

[221] *Boardwalk Regency Corp*, 457 A.2d at 850.

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

[223] *See, e.g.,* 13 VT. STAT. ANN. § 2143b (West 2018) (stating that, apart from the cost of mailing an entry, sponsors are prohibited from requiring participants to "venture money or other valuable things"); MD. CODE ANN., COM. LAW § 13-305(B) (West 2018) (subject to certain exceptions, prohibiting a sponsor from requiring another person to purchase a product or service, pay any money, or engage in a sales promotion effort to participate in a contest); FLA. STAT. ANN. § 849.094 (West 2018) (prohibiting the pooling of entry fees to serve as the jackpot for a winning prize).

[224] ARIZ. REV. STAT. §§ 13-3311 (2018) (amended by 2018 Ariz. Legis. Serv. Ch. 338 (S.B. 1293)).

[225] *Id.*

[226] *Id.*

[227] Josh Constine, *Salesforce Says Hackathon Winner Didn't Cheat But Declares Tie, Gives Two Finalists $1M Each*, TechCrunch, (Dec. 2, 2013), *available at* https://techcrunch.com/2013/12/02/salesforce-hackathon-tie/.

[228] *Id.*

[229] *Id.*

[230] *Id.*

[231] *See* Promotions on Pages, Groups, and Events (Facebook), *available at* https://www.facebook.com/policies/pages_groups_events/; Promotion Guidelines (Instagram), *available at* https://help.instagram.com/179379842258600; Guidelines for Promotions on Twitter, *available at* https://help.twitter.com/en/rules-and-policies/twitter-contest-rules; Promotions Rules (Snapchat), *available at* https://support.snapchat.com/en-US/a/promotions-rules; Pinterest Brand Guidelines, *available at* https://business.pinterest.com/en/pinterest-brand-guidelines; YouTube's Contest Policies and Guidelines, *available at* https://support.google.com/youtube/answer/1620498?hl=en.

[232] *See* 15 U.S.C. § 6502 (2012).

[233] 39 U.S.C. § 3001 (2012).

[234] *Id.* § 3001(k)(3)(A)(ii)(I)-(II).

[235] *Id.* § 3001(k)(3)(A).

[236] *Id.* § 3001(k)(3)(B)

[237] *See Martin Gottlieb, Cashing In On Higher Causes, N.Y. TIMES, July 6, 1986.*

[238] VA. CODE ANN. § 57-48 (West 2018).

[239] *NY EXEC. LAW § 171-A(McKinney 2018).*

[240] MASS. GEN. LAWS ch. 68, § 18 (West 2018).

[241] ARK. CODE ANN. § 4-28-408(c)(2) (West 2018); CONN. GEN. STAT. ANN. § 21a-190g(c) (West 2018); NY EXEC. LAW § 174-c (McKinney 2018).

[242] 760 ILL. COMP. STAT. 55/6 (West 2018).

[243] Deborah L. Jacobs, *Disclosure Runs Into 140-Character Limits*, N.Y. TIMES, Nov. 10, 2010, https://www.nytimes.com/2010/11/11/giving/11CAUSE.html.

[244] *Id.*

[245] *NY EXEC. LAW § 171-A (McKinney 2018).*

[246] 760 ILL. COMP. STAT. 55/655/3; MASS. GEN. LAWS ch. 68, § 18.

[247] Unrelated Business Income Tax, IRS, https://www.irs.gov/charities-non-profits/unrelated-business-income-tax.

[248] 26 C.F.R. §1.513-4.

[249] Eric Schneiderman, Att'y Gen, of State of N.Y., *Five Best Practices for Transparent Cause Marketing* (Sept. 20, 2012), https://www.charitiesnys.com/cause_marketing.html

[250] The standards for "Made in the USA" claims vary by state. In California, such claims are allowed only "if all of the articles, units, or parts of the merchandise obtained from outside the United States constitute not more than 5 percent of the final wholesale value of the manufactured product" or if the manufacturer can demonstrate that it cannot produce or obtain a certain article, unit or part within the United States for reasons other than cost, and the article, unit or part does not constitute more than 10 percent of the final wholesale value of the manufactured product. CAL. BUS. & PROF. CODE §17533.7.

[251] https://www.nist.gov/standardsgov/compliance-faqs-made-usa.

[252] 15 U.S.C. § 45 (a)(2) (2012).

[253] *Id*. § 45 (a)(4)(A).

[254] *Id*. § 45 (a)4(B).

[255] *Enforcement Policy Statement on U.S. Origin Claims*, *available at* https://www.ftc.gov/public-statements/1997/12/enforcement-policy-statement-us-origin-claims.

[256] https://www.nist.gov/standardsgov/compliance-faqs-made-usa.

[257] 19 U.S.C. § 1304 (2012).

[258] *Id.*

[259]https://www.ftc.gov/system/files/documents/plain-language/bus03-complying-made-usa-standard.pdf.

[260] 15 U.S.C. § 70b(b)(4) (2012).

[261] *Id*. § 68(b).

[262] *Id*. § 68(b)(c).

[263] https://www.ftc.gov/system/files/documents/plain-language/bus03-complying-made-usa-standard.pdf.

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264 *Id.*

265 *iSpring Water Sys., LLC*, 82 Fed. Reg. 10010 (Fed. Trade Comm'n Feb. 9, 2017) (proposed consent order).

266 *Id.*

267 https://www.ftc.gov/system/files/documents/plain-language/bus03-complying-made-usa-standard.pdf.

268 *Id.*

269 https://www.nist.gov/standardsgov/compliance-faqs-made-usa.

270 https://www.ftc.gov/system/files/documents/plain-language/bus03-complying-made-usa-standard.pdf.

271 *Id.*

272 *See* Jeff McGaw, *FTC orders Bollman Hat Co. to stop 'deceptive' Use of 'Made in U.S.A' certification*, Reading Eagle, January 24, 2018, *available at* http://www.readingeagle.com/money/article/ftc-orders-bollman-hat-co-to-stop-deceptive-use-of-made-in-usa-certification.

273 *Id.*

274 *Id.*

275 *Id.*

276 *Kubota Tractor Corp.*, No. C-3863 (F.T.C. Apr. 6, 1999).

277 *Johnson Worldwide Assocs., Inc.*, No. C-3862 (F.T.C. Apr. 6, 1999).

278 *USDrives Corp.*, No. C-3866 (F.T.C. Apr. 6, 1999).