



Marketing and Advertising: Can I Postpone or Cancel My Sweepstakes, Contest, Raffle or Other Promotion Because of Coronavirus (COVID-19)?

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Sweepstakes, contests, raffles and other promotions can be a fantastic way to engage with your customers and build brand awareness. Many companies have launched such promotions prior to COVID-19 and may now wish to cancel or postpone those promotions. The golden rule is never to change the official rules once the promotion has started, as it is a contract between the company and the entrants. Keeping that in mind, how do companies protect themselves from potential liability if they need to postpone or even cancel promotions as they try to adjust to the myriad of Coronavirus business complications?

Review the Official Rules

When determining whether a promotion can be altered, the first step is reviewing your Official Rules. The Official Rules serve as the contract between the business and the entrants.

1. Force Majeure Clause

A Force Majeure clause is a commonly used contractual provision that excuses both parties from liability in the event of natural disasters, acts of God, declarations of war or other events that are unforeseen by both parties.

- If the Official Rules have a Force Majeure clause and disclose pandemics or global health events among the unforeseen events, then it's possible that there may be a valid claim that the promotion should be postponed or canceled. The clause should be reviewed to determine if any triggering events must occur, such as a government declaration of a state of emergency, before the clause is enforceable.
- If the Official Rules have a Force Majeure clause that does not refer to epidemics or pandemics, it

is unknown whether a broad Force Majeure clause would cover COVID-19. There is a risk that courts may not view COVID-19 as an unforeseen act of God, and that the Force Majeure clause may not excuse a company's liability for postponing or canceling the promotion. Typically, courts have construed Force Majeure clauses narrowly.

2. Is the Promotion Tied to an Event?

If the promotion is tied to an event that has been canceled, there is a possibility that the promotion may be postponed or canceled. The promotion should be reviewed in further detail to determine whether it was tied to a specific event and date, or whether the promotion was tied to an occurrence. A promotion for tickets to an entertainer's concert on a specific date at a specific venue may be interpreted differently than a promotion for tickets to an entertainer's concert.

3. Other Clauses that Relate to the Postponement or Cancellation of the Promotion

A promotion may be postponed or canceled without liability if there is another provision that a business can rely upon. For example, the Official Rules may have a clause relating to the integrity of the promotion which may state that, if the integrity of the promotion is compromised, the promotion may be postponed or canceled. If a compromising event has occurred independently, the promotion may be postponed or canceled pursuant to the clause relating to the integrity of the promotion.

In addition, if the promotion is a charitable raffle, the Official Rules may state that the remedy for a breach of contract is a return of the price paid for the raffle tickets. If only a few raffle tickets have been purchased, a charitable organization may be able to refund the price paid for the raffle tickets and cancel or postpone the raffle.

Finally, many sweepstakes rules contain a modification/cancellation clause that generally allows the sponsor to modify the sweepstakes for a variety of reasons, or even in the sponsor's sole discretion. But those modification/cancellation clauses tend to be interpreted very narrowly by courts and should only be used as a remedy of last resort. That is because many states regulate sweepstakes and contests (so they're not considered illegal gambling) under specific sweepstakes laws, or generally apply consumer protection laws. For instance, some states require the prize to be awarded without exception. Changing the Official Rules once the promotion has started could be viewed as an unfair and deceptive trade practice, depending on the state and the circumstances. Therefore, any material change to the Official Rules may not only upset your entrants, but also may raise suspicion by state regulatory agencies.

Common Law Relief

What if your Official Rules did not contain a Force Majeure or other helpful clause? There still may be hope. There are several common law doctrines that may provide additional protection if a promotion is postponed or canceled: impossibility, impracticability and frustration of purpose. Generally, financial hardship is not a valid reason to invoke any of the common law doctrines.

1. Impossibility

The doctrine of impossibility of performance may be relied upon if performance of the promotion is objectively impossible. Typically, courts have construed claims of impossibility narrowly, and temporary impossibility may not be sufficient to cancel the promotion. If the promotion is for a new car, it is unlikely that the doctrine of impossibility would apply.

2. Impracticability

The doctrine of impracticability may be relied upon if performance of the promotion is infeasible. As with the doctrine of impossibility, courts typically have construed claims of impracticability narrowly. The fact that a promotion may now be inconvenient or unprofitable likely will not excuse liability if the promotion were to be postponed or canceled. If the promotion is for a new car and there are only a few submissions, making the promotion unprofitable, it is unlikely that the doctrine of impracticability would apply.

3. Frustration of Purpose

The doctrine of frustration of purpose may be relied upon if performance remains possible, but the reason for entering into the contract for both parties has been frustrated by an unforeseen event, and the value of the performance has thus been substantially decreased or destroyed. A promotion for a new car likely will not be able to claim frustration of purpose. However, the prize should be analyzed to determine if there is a claim for frustration of purpose. If the prize is a new car and the winner was to be brought on stage at a major auto race to meet celebrity drivers, then there may be an argument that the purpose of the promotion was frustrated.

Should the Promotion Continue as Planned?

Whether a promotion may be canceled or postponed will depend upon the specific promotion. The Official Rules must first be examined. Additionally, there are many other factors to consider -- governing law, any social media platform-specific requirements and factors unique to your promotion. Even if you think you are protected by a Force Majeure clause or a common law doctrine, you need to make sure any changes you make do not create new problems under state-specific sweepstakes and consumer protection laws.

If you have any questions on next steps for your promotion, please direct any questions to Amber Duncan or Jackie Knapp. We are here to help in these uncertain times.

Please note: This alert contains general, condensed summaries of actual legal matters, statutes and opinions for information purposes. It is not meant to be and should not be construed as legal advice. Readers with particular needs on specific issues should retain the services of competent counsel.

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