

Georgia Supreme Court Issues Important Decision for Mobile Marketers

On April 21, 2008, the Georgia Supreme Court held that a text-to-win sweepstakes offered in conjunction with NBC's Deal or No Deal television show did not violate state gambling laws. Hardin v. NBC Universal, Inc. et al, No. S08Q0323 (Ga. April 21, 2008). The decision is a significant victory for mobile marketers, but with similar cases pending in other courts, it is still important to exercise caution when planning a mobile sweepstakes.

Laws in every state prohibit companies from requiring consumers to make a purchase or pay money to enter a sweepstakes. Despite this prohibition, however, it is generally lawful to offer a sweepstakes in which people can enter through a method that involves a purchase or payment as long as there is also a free alternate method of entry. The free method of entry must be clearly disclosed and people who enter for free must have the same chances of winning as people who pay.

Last year, marketers ran sweepstakes in conjunction with the *American Idol*, *The Apprentice*, *Deal or No Deal*, and *1 vs. 100* television shows. Each of these sweepstakes allowed consumers to enter by sending a text message that was subject to a \$0.99 charge or by filling out an online entry form for free. After the sweepstakes ended, plaintiffs filed class action lawsuits in California and Georgia arguing that the sweepstakes were unlawful, notwithstanding the free method of entry. The arguments are based, in part, on the notion that individuals who enter using their mobile phones don't get anything of value for the money they pay to enter.

In the *Hardin* case, the Georgia Supreme Court was asked to determine whether Georgia law allows losers of a "lottery" to recover the money they lost. The

relevant law applies to "gambling contracts" which are generally defined as contracts in which two parties agree that one will win and the other will lose depending on the outcome of an event. The Court determined that text message fees do not constitute a "bet or wager" because the fees don't "hang in the balance" and are paid regardless of the outcome of the promotion. Moreover, the sponsor does not have a chance to win the prize since it will be awarded to a consumer. Therefore, the sweepstakes did not violate Georgia's gambling law and plaintiffs are not entitled to recover any money.

CONCLUSION

The Georgia Supreme Court's decision is a clear victory for marketers that want to run text-to-win promotions. However, it is too early to celebrate or to conclude that it is safe to charge premium text fees for entries in sweepstakes. Although the issue may be settled in Georgia, there are still class actions pending in California and the defendants may face a tougher battle there. Marketers should consult with their legal counsel before offering any sweepstakes that allows consumers to enter using their mobile phones.

Please be advised that attorneys in Kelley Drey & Warren's Advertising Law Practice Group have substantial experience assisting clients in structuring a wide variety of promotions, including promotions offered on mobile devices. We are available to assist clients with developing strategies to address issues contained in this Advisory.

For more information about this Client Advisory, please contact:

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