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REGULATING THE SWEEPSTAKES INDUSTRY: ARE CONSUMERS CLOSE TO WINNING?

Julie S. James*

I. INTRODUCTION

At age seventy-one, Alexander Mirowski believed he was "one of the luckiest men alive" when he hobbled into the offices of his local newspaper and told the security guard that he wanted to speak to a reporter.¹ Mirowski thought for sure that he was California's latest million dollar sweepstakes winner, based on a stack of official looking documents he had received in the mail from a non-profit organization.² He pointed to not one, but two "Official Registration Certificates" which listed him as a one million dollar winner.³ He convinced himself that his years of entering sweepstakes, sometimes getting up at 4 a.m. to fill out the various forms and attach the stickers guaranteeing bonus prizes for making the "early bird" deadlines, had finally paid off.⁴ He already had plans to give money away to all of his family and help his son build a dream home.⁵ The money, however, had not arrived, and Mirowski thought he smelled a rat.⁶ Believing that the founder of the non-profit organization had "stolen" his money, he wanted the newspaper to investigate and the FBI to get involved.⁷

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2. See id.
3. See id.
4. See id.
5. See id.
6. See id.
7. See Erwin, supra note 1, at B1.
In reality, Mirowski had won nothing. Had he read the fine print on the documents, he might have realized this. He is certainly not alone, however, in being deceived by promotional mailings from companies running sweepstakes. Although most people understand the truth behind sweepstakes when they arrive in the mail, the tactics of these companies deceive countless others like Mirowski, who believe they have actually won or are close to winning big prizes. This belief fuels numerous purchases of magazines, books, CD's, videotapes, and collectibles – none of which the consumer actually wants or needs. More often than not, these companies deceive the elderly, who often live on limited means. This deceit does not end with broken illusions, but also with ruined finances and strained family relations as loved ones try to cope with a family member out of control.

Consumer outrage regarding these practices recently drove the federal government to act. President Clinton signed the Deceptive Mail Prevention and Enforcement Act into law on December 13, 1999. Congress aimed this piece of legislation to protect citizens like Mirowski from deception by savvy sweepstakes promotions. It places new requirements on what information promotional sweepstakes mailings must contain and gives the federal government (specifically the United States Postal Service) greater enforcement power.

This comment examines the Deceptive Mail Prevention and Enforcement Act, and particularly whether it will achieve its legislative goals. A discussion of the sweepstakes industry, the special problem of “sweepstakes psychosis” among the elderly, and prior attempts to regulate the industry at both the federal and state level, is included to illustrate the need for the new law. The focus then turns to

8. See id.
9. See id.
10. See infra Part II.B.
11. See infra Part II.B.
12. See infra Part II.B.
13. See infra Part II.B.
14. See infra note 69. See generally infra Part II.B.
16. See infra Part II.D.
17. See infra Part II.A.
18. See infra Part II.B.
19. See infra Part II.C.
the Act itself, and examines whether its provisions will offer sufficient protection for consumers, especially the vulnerable elderly. Finally, after concluding that parts of the Act lack sufficient force, I propose making the legal protection available to consumers from deceptive sweepstakes promoters even stronger.

II. BACKGROUND

A. The Sweepstakes Industry

In general, sweepstakes conform to the law and constitute a legitimate form of promotion for the direct marketing industry. As successful marketing tools, sweepstakes have been utilized by the industry for over thirty years. Some companies use sweepstakes mailings to sell magazines or other merchandise, while others use them to raise funds or promote various services. Over sixty percent of American companies that promote use sweepstakes.

1. Major Players

Magazine promoters comprise the bulk of the sweepstakes industry. Four main companies dominate the market: American Family Publishers ("AFP"), Publisher's Clearing House ("PCH"), Reader's Digest, Inc., and Time, Inc. These companies flood America's mailboxes with over one billion pieces of mail per year. Americans spend an estimated seven billion dollars annually on magazine

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20. See infra Part II.D.
21. See infra Part IV.A-E.
22. See infra Part V.
23. See infra Part II.C.1.
25. See Postal Hearings, supra note 24 (testimony of Linda A. Goldstein, Promotion Marketing Association).
26. See id.
27. These companies do sell other items (collectibles, videotapes, CD's, etc.), but their main business is selling magazines.
subscriptions alone, and between twenty and thirty-three percent of those sales derive from sweepstakes promotions. Sweepstakes mailings generate nearly one-third of the 156 million new magazine subscriptions sold each year. The magazine sweepstakes industry generates over one billion dollars of magazine revenues per year.

Major sweepstakes companies have greatly increased the size of their prizes and the sophistication of their marketing techniques within the past twenty years. Generally, sweepstakes companies conduct a variety of contests every year, often offering prizes of millions of dollars. These companies use traditional direct marketing principles, including targeting consumers according to timing, frequency, and dollar value of their purchases.

Sweepstakes companies have researched their markets and found that consumers usually make purchases in response to mailings with large prizes, "involvement devices" such as stickers and stamps, and certain types of personal appeals. These companies typically send a large number of mailings to the general public, often followed by targeted mailings to specific lists of repeat customers. Mass mailings may contain personalized references throughout the mailing and often feature symbols, devices, or documents that make them appear to be unique. Sweepstakes companies aim to make mass mailings distinctive from other mail, enticing the recipient to open the envelope. Inside, the consumer often finds a personalized message that might persuade him to

30. See id.
31. See Postal Hearings, supra note 24 (testimony of Michael Pashby, Executive Vice President of Consumer Marketing, Magazine Publishers of America).
33. See id.
35. See id.
36. See id.
37. See id.
38. See id. at 11-12. It is also reported that the direct marketing industry refers to these lists as "sucker lists." See Patricia Ward Biederman, Elderly Subscribe to Contest Obsession, Some Elderly People Take Literally those Envelopes that Scream "You're a Winner!," Others Become so Wrapped up in the Sweepstakes that it Threatens their Savings and Disrupts their Families, L.A. TIMES, Feb. 7, 1998, at A1.
40. See id.
make a purchase.\textsuperscript{41}

Sweepstakes companies place responding customers on a target list. The companies then send those customers even more sophisticated mailings, informing them when they became a customer, how many purchases they have recently made, and when they last entered a contest without making a purchase.\textsuperscript{42} These mailings reinforce the idea that making purchases increases the chance of receiving sweepstakes mailings and winning a prize.\textsuperscript{43} Sweepstakes companies suggest, sometimes with a direct statement, that if the customer does not make a purchase, they may not receive the future sweepstakes mailings necessary to win a prize.\textsuperscript{44} Sweepstakes firms often advertise the same contest in multiple mailings, sometimes confusing targeted or vulnerable recipients and enticing them to make several purchases when they are really entering the same contest.\textsuperscript{45}

2. \textit{Small Operators}

Major magazine promoters are not the only problem when it comes to deceptive sweepstakes mailings. Those familiar with the industry accused some small sweepstakes companies of making millions of dollars by misleading Americans hoping to win valuable prizes.\textsuperscript{46} Little is known about these smaller companies, but they sent out approximately 100 million sweepstakes offers in 1998 and grossed more than forty million dollars in sales.\textsuperscript{47}

\textsuperscript{41} See id. Typical messages include, often in huge print: “It’s down to a 2 person race for $11,000,000” and “You were declared one of our latest sweepstakes winners and you’re about to be paid $833,337.00 in cash!” Margaret Mannix, \textit{Congratulations, You’re a Loser}, U.S. NEWS & WORLD REP., Mar. 22, 1999, at 74. PCH once wrote: “You are scheduled to win the $1,000,000.00 SuperPrize at 6 PM on Thursday, August 20.” AFP offers: “We have reserved an $11 million sum in your name — You have exactly 5 business days to claim it.” These letters all go on to say that the recipient will get the money only “if you have and return the winning entry,” or words with similar effect. Jane Bryant Quinn, \textit{You’re a Big Winner! (Not): Why Dick Clark, Ed McMahon and the Sweepstakes Business Should Blush}, NEWSWEEK, Sept. 27, 1999, at 49.

\textsuperscript{42} See H.R. REP. No. 106-431, at 12.

\textsuperscript{43} See id.

\textsuperscript{44} See id.

\textsuperscript{45} See id.


\textsuperscript{47} See id.
investigation by the Senate found the practices of these companies quite different from those of the bigger companies.48

In general, these smaller companies mail much more aggressively and deceptively than larger promoters.49 Promotions mailed by the North American Bureau of Assets, Inc. ("NABA") provide an example.50 NABA's solicitations attempt to deceive the consumer by disguising both the solicitation and the product.51 One of NABA's promotions represented itself as an "Original Affidavit" from a "prize payout division" in connection with its "$10,000 Cash Opportunity Giveathon."52 This document included language that clearly implied the recipient would receive vouchers for an additional $2,000, over and above the $10,000 prize it claimed the consumer had already won.53 It called this prize a "voucher pak" and a "cashpak," but only mentioned in the last sentence of the last paragraph that the "cashpak" really consists of "redeemable vouchers from national incentive guarantors."54 Nothing more than a discount coupon book, the "cashpak" did not appear to be for sale to the consumer.55 Instead, the document informs the consumer that he must pay a "mandatory release fee" of ten dollars to get his prize.56 This example clearly illustrates how NABA tries to deceive

48. See id.
50. See id. at 6.
51. See id.
52. See id.
53. See id. Specifically, the mailing read:
[Y]ou may not be aware that cash prizes are issued in the aforementioned amount of ten thousand, one thousand, one hundred, and fifty dollars, and additional vouchers entitlement in a two thousand dollar voucher pak. Said cashpak is released with mandatory release fee of ten dollars, and is over and above your previously mentioned cash winnings.

Id.
54. Id. The vouchers were "good for food, entertainment, travel, merchandise, etc." Id.
56. See id. The $2,000 value of the "cashpak" is the estimated value of redeeming every single coupon available. To realize this, the consumer would likely have to purchase thousands of dollars worth of goods and services from those vendors listed in the coupon book. See id.
the consumer into thinking that not only has he won a sweepstakes, but also tricks him into purchasing a product NABA has disguised as something else. Other promotions from NABA suggest that it has used similar tactics to deceive consumers into thinking their chance of winning increases if they purchase one of the company's coupon books.

Smaller sweepstakes operators also deceive consumers through their trade names. The same operator will promote the same sweepstakes using multiple trade names. The unsuspecting consumer might think he had received the opportunity to win different prizes in multiple sweepstakes, when all promotions mailed are actually for the same contest. These companies also use misleading trade names,

57. Another example of a NABA promotion contains the following important paragraph: "[W]e have reserved in your name, a redemption packet valued in excess of $2,000.00 when the value certificates are fully redeemed (see reverse for details). Your initials and release honorarium are required for shipment of this value packet." Id. This is the same coupon book also called a "cashpak" by NABA, but it is now called a "redemption packet" and the purchase price is no longer a "mandatory release fee," but rather a "release honorarium." See id. at 6-7.

58. See id. at 7. For example, one of NABA's sweepstakes promotions contained the following language reminding consumers that NABA's prizes "are determined from private lists of participants who entered a sweepstakes or were involved in a merchandise purchase by mail. It's that simple! Your response to direct mail offers has paid off for you, and we offer you our heartiest congratulations." The promotion continued by linking a purchase to the odds of winning, but only stated once (in small print at the top of the page) that there was "no purchase required." See id.

59. See id. at 12. These smaller companies engage in other deceptive tactics as well. Many imply in their mailings that the consumer has already won the grand prize and guarantee that the consumer will win. See id. at 7. Only upon close analysis does the consumer learn that he can only win the grand prize if he has and returns the winning number. See id. He is a "guaranteed winner" of only a small amount. See id. A sample promotion reads as follows: "[U]pon processing and completion of our Top Prize $10,000 Sweepstakes, the unclaimed cash will be delivered to the determined principal of record, which in this case is you." It is only when reading the "P.S." of the letter and the rules on the back of it, that it becomes clearer that the consumer's odds of winning the $10,000 are one in three million and that the consumer is only guaranteed to win 25 cents. See id. A few small sweepstakes companies even fail to award a prize at all. See id. at 8.

60. See id. at 12.

61. See Senate Hearings, supra note 49, at 13. The promotions cleverly acknowledge that the trade names are not real. The rules on the back reveal that "different graphic presentations of this sweepstakes may be made at the discretion of the sponsor." A consumer may not understand that this cryptic language means the same contest may be promoted under different mailings. See id.
for example, by sending mailings that appear to be from an organization trying to locate someone who has already won a prize or rightfully owns a cash award.\footnote{62}{See id. Examples include: Unidentified Claimant Section, Public Winner Releasing Committee, Cash Release Office, and the Cash Claim and Disbursement Center. See id.} Many of these companies attempt to remain hidden from consumers and out of detection by law enforcement, often using ingenious means.\footnote{63}{See id. at 8.} Furthermore, even when detected, some companies have developed methods to insulate themselves from enforcement actions.\footnote{64}{See id.} Companies commonly rely on front companies to protect the operators from law enforcement.\footnote{65}{See id.} Companies also frequently form a corporation, send promotions out under that structure for a year or two, and then dissolve the corporation when its existence comes to the attention of the government.\footnote{66}{See id. The company then forms a new corporation, putting its operators back in business. See id.} The company then forms a new corporation, putting its operators back in business.\footnote{67}{See id.}

B. Population Especially at Risk: The Elderly

Some senior citizens seem to be particularly susceptible to falling prey to these deceptive sweepstakes promotions. This section looks at what the media has termed “sweepstakes psychosis”\footnote{68}{See Biederman, supra note 38, at A1.} among the elderly. The preliminary results of several studies document the existence of this problem.\footnote{69}{See infra Part II.B.1. Personal testimonials of victims of the game and their caregivers provide further compelling evidence of the problem. A director of social services at a retirement community in suburban Los Angeles, where the average age of the residents is 96, estimated that 30 of the 160 residents there have “sweepstakes frenzy.” See Biederman, supra note 38, at A1. An attorney who heads the committee on elder abuse of the Los Angeles County Bar Association said that he has seen elderly relatives of clients spend $2,000 per month on sweepstakes and related scams. See id. A psychologist who happened to pick up the mail for her 93-year-old mother one day found 20 sweepstakes and contest offers. See id. The media widely reported the chronicle of Richard Lusk, an 88-year-old California resident who bought a $1,700 ticket and hopped on a plane to Florida to collect the grand prize in the American Family Publishers sweepstakes. See id. When he arrived at the address in Florida printed on the envelope, clutching a letter that read “Richard Lusk, final results are in and they’re official: You’re our newest $11 million dollar winner,” AFP distribution
1. Empirical Evidence

Comprehensive data on the full extent of consumers' problems with deceptive mail are not available. Some preliminary efforts, however, do indicate that sweepstakes companies have succeeded in reaching out to almost every potential customer in the country. The elderly appear to employees laughed at him and guards turned him away. See id. By the end of 1998, twenty-five mostly elderly people had flown to Florida looking for AFP headquarters to collect their fortunes. See id.

Publisher's Clearing House similarly deceived Eustace Hall, age 65, who believed he needed to purchase products in order to win. See Mannix, supra note 41, at 74. He always ordered a magazine, tape, or collectible figurine when entering a contest, and believed that since 1992 he had spent more than $15,000 on magazines and merchandise tied to sweepstakes. See id. See also Lawrence M. O'Rourke, Witnesses Lash Out at Sweepstakes Companies, SACRAMENTO BEE, Mar. 9, 1999, at A1 [hereinafter O'Rourke, Witnesses Lash Out].

The troubles of Bobby Bagwell and his family illustrate another problem with sweepstakes promotions—the difficulty in stopping mailings from reaching households. See Lawrence M. O'Rourke, Senate OKs Tougher Sweepstakes Rules: Bill Would Require Greater Disclosure, SACRAMENTO BEE, Aug. 3, 1999, at D1 [hereinafter O'Rourke, Senate OKs]. Bagwell believed he had to buy something every time he sent in an entry, kept authorizing credit card purchases and mailing in checks, and spent more than $21,000 that he did not have. See id. His alarmed daughter-in-law repeatedly asked the sweepstakes companies to remove his name from their mailing lists, but their promotions kept arriving. See id. Bobby's family had his doctors write letters to the companies declaring that their patient could not deal responsibly with their flashy promotions (Bagwell suffers from dementia). See id. Nevertheless, the mail continued. Finally, the family wrote to its U.S. Senator, John Edwards of North Carolina, requesting that he intervene. See id. Only after receiving a letter from Senator Edwards did sweepstakes promotions finally stop flooding Bobby Bagwell's mailbox. See id.

70. See infra Part II.B.2.

71. See Postal Hearings, supra note 24, at 117 (statement of Bernard L. Ungar, Director Government Business Operations Issues, General Government Division). Comprehensive data is unavailable because consumers often do not report their problems, and when they do, no centralized database exists from which such data can be obtained. See id.

72. For example, in a 1992 survey commissioned by the National Consumers League (NCL), 92% of the respondents said that they had, at some time, received a letter or postcard telling them that they had definitely won a prize. Nearly one-third responded to the offer. See id. (testimony of Sara Cooper, Executive Vice President, National Consumers League). A November 1998 survey sponsored by the Government Accounting Office ("GAO") estimated that about half of the adult population in the United States believed that within the proceeding six months, they had received deceptive mail in the form of sweepstakes material or cashier's check look-alikes. See id. (statement of Bernard L. Ungar, Director Government Business Operations Issues, General
make up a disproportionate number of sweepstakes customers, and older people are particularly vulnerable to fraudulent or deceptive sweepstakes and prize offers.

Based on such findings, the American Association of Retired Persons ("AARP") actively participated in educating its members and gathering information regarding potential sweepstakes fraud. In 1997, it placed an article in its monthly publication asking members to monitor their own mail for items that looked suspicious or carried claims that the recipient was a "guaranteed contest winner." AARP asked its members to send in such solicitations, at which point law enforcement officials reviewed the mail for possible legal violations. Members submitted over 10,000 pieces of mail in six months. Members consistently asked the same questions: "Is this a legitimate solicitation?" and "Can you help me get the money I've won or help me get my money back?" AARP found that fifty percent of the submissions potentially required legal action, resulting in 150 federal and state actions against the sponsors of the solicitations.

Research indicates that the elderly are especially prone to deception by official looking mailers, finding that "[e]ven

Government Division).  
73. See Quinn, supra note 41.  
74. See Postal Hearings, supra note 24 (testimony of Sara Cooper, Executive Vice President, National Consumers League). Statistical evidence compiled by the NCL supports this assertion. They run a hotline for consumers to call for advice and to report suspected telemarketing fraud. See id. Many fraudulent telemarketing offers are initiated by sweepstakes promotions received in the mail. See id. Fifty-eight percent of the calls to NCL's hotline from January to June 1999 reporting this type of telemarketing fraud were made by consumers age 60 or older. See id. This statistic is compared to the calls made reporting all other kinds of telemarketing fraud, in which only 24% of the consumers were in this age group. See id.  
75. See Senate Hearings, supra note 49 (testimony of Virginia Tierney, Member, AARP Board of Directors).  
76. See id. The article also solicited information regarding "no risk" investments, get-rich-quick schemes, or solicitations for dubious charities as well as mail that alerted the recipient to call a 1-800 or 1-900 number. See id.  
77. See id.  
78. See id.  
79. Id.  
80. See id. The Attorney General of Maryland requested a similar effort from that state's seniors in 1997. Five hundred senior Maryland residents collected their mail solicitations for a month. Of the more than 10,000 pieces turned in, sweepstakes accounted for nearly half. See Quinn, supra note 41.  
81. See Deceptive Sweepstakes, ARIZ. DAILY STAR, Sept. 4, 1998, at 16A (noting the research of William E. Arnold, director of the gerontology program
when the envelopes contain a warning that a game of chance is involved . . . 78 percent of the [elderly] respondents said they were likely or very likely to open the envelope. One commentator suggested that the sweepstakes companies know the age group most likely to fall prey to their tactics, noting, “Dick Clark and Ed McMahon speak for AFP, so you know that they're not targeting Generation X.”

2. Possible Explanations

No one really knows with certainty why older people frequently fall victim to “sweepstakes psychosis.” Combinations of physiological and social factors likely contribute to the problem.

An expert on aging and memory hypothesized that the greater susceptibility of older adults to deception by sweepstakes promotions derives, in part, from changing cognitive processes that occur as a normal part of aging. These changes may leave some older people less able to evaluate promotional pitches. This expert also speculated that the elderly constitute a generation that is simply more easily misled than their younger counterparts.

The director of social services at a retirement community at Arizona State University).

82. Id. The AARP commissioned a study by the same researcher to identify what drives people to participate in sweepstakes and to ascertain their possible expectations. See Senate Hearings, supra note 49, (testimony of Virginia Tierney, Member, AARP Board of Directors). Some initial results found that 40% of older Americans who receive sweepstakes solicitations respond to them. See id. Among those who respond by purchasing something, the consumer who chooses later billing more frequently continues to participate in sweepstakes than does the consumer who pays in advance. See id. This suggests that those more likely to participate can least afford to do so. The research also found that 23% of those who participate in sweepstakes believe that purchasing something increases their chances to win. See id. Another 17% of participants believe that purchasing something might increase their chances. See id. Combined, these figures reveal that four out of ten sweepstakes participants do not believe that no purchase is necessary in order for them to win. See id.

83. Quinn, supra note 41. The industry seems to deny this claim. For example, Dave Sayer, spokesman for PCH, said that the company does not target the elderly or any other demographic group. See Biederman, supra note 38.

84. See generally Biederman, supra note 38.
85. See id.
86. See id.
87. See id. at A1 (stating, “[t]hey're less cynical about what they read and more trusting about what they see”).
thinks loneliness might fuel "sweepstakes psychosis." As loneliness sends some seniors to the doctor every week, it drives others to play sweepstakes, simply because they need someone with whom to communicate. Many older people also experience financial worries. A daughter whose mother became obsessed with sweepstakes believed her mother feared she would outlive her money and become dependent on family members. The daughter felt that "the common thread" among seniors obsessed with sweepstakes was that they "[were] no longer earning money and this [was] a way not to be a burden."

C. Existing Legal Protection Available to Consumers

Sweepstakes promotions have clearly created a problem for consumers, especially elderly ones. To understand the need for a federal legislative solution to the problem, and specifically, the provisions of the Deceptive Mail Prevention and Enforcement Act, it is important to look at the protective devices available to consumers prior to its enactment. The regulation of sweepstakes has primarily existed at the state level, although at the federal level, the U.S. Postal Service ("USPS") and the Federal Trade Commission ("FTC") have jurisdiction to regulate and investigate sweepstakes to some extent. Under these existing laws, sweepstakes promoters have remained outside the reach of law enforcement, leaving those deceived by their practices without a lasting remedy.

1. Federal Level

Under federal law, both the USPS and the FTC have some authority to regulate sweepstakes. Although current federal law does not specifically cover sweepstakes, it addresses them indirectly in laws forbidding lotteries, false representations, and unfair trade practices.88

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88. See id.
89. See id. For example, the daughter of a widowed father who lives in rural Minnesota thought his frenzy was the result of his wife being gone, and a way of keeping contact with others. Through the mail and phone, the sweepstakes operators "made him feel like he was their friend; tried to build his self esteem." O'Rourke, Witnesses Lash Out, supra note 69, at A1.
90. See Biederman, supra note 38.
91. Id.
93. See id.
The False Representation and Lottery Statute\textsuperscript{94} creates federal jurisdiction over sweepstakes and contains civil provisions authorizing enforcement actions against deceptive mailings.\textsuperscript{95} Under this statute, a sweepstakes remains completely legal as long as it does not obtain money through the mail by means of false representations\textsuperscript{96} or constitute an illegal lottery.\textsuperscript{97}

If a sweepstakes promotion violates this statute, the USPS may take administrative action to return to consumers all mail sent in response to the promotion.\textsuperscript{98} When a sweepstakes promoter violates this statute, the legal action can proceed very slowly.\textsuperscript{99} The statute limits penalties to stopping further mail from being received by the sweepstakes promoter, often after the promoter has profited from the scheme, and issuing cease and desist orders prohibiting future operation of the scheme.\textsuperscript{100} Violation of these orders can result in fines of up to $11,000 per occurrence.\textsuperscript{101}

Federal law also authorizes the U.S. district courts to issue injunctions to prevent consumer losses while the administrative proceedings are pending.\textsuperscript{102} These injunctive

\textsuperscript{94} 39 U.S.C. § 3005 (1999). This statute applies only if the material contains false representations or is an illegal lottery.

\textsuperscript{95} See S. REP. NO. 106-102, at 5.

\textsuperscript{96} See id. Sweepstakes promotions avoid making false representations as long as sweepstakes companies disclose information somewhere in the mailed material stating that "a purchase will not increase [a recipient's] chances of winning" and that "no purchase is necessary." Id. at 9. This disclosure can be in fine print and hidden in the documents.

\textsuperscript{97} See id. at 5. Three legal elements comprise a "lottery": prize, chance, and consideration. See Postal Hearings, supra note 24 (statement of Kenneth J. Hunter, Chief Postal Inspector). Thus, any contest that awards a prize based upon chance and in which the contestant must give consideration in order to be eligible to win constitutes an illegal lottery. See id. There are limited exceptions for mailings from state-operated lotteries and non-profit organizations. See id. A prize can consist of anything of value. See id. Chance is present if winning any prize depends predominantly upon events beyond the entrant's control. See id. Consideration usually consists of a requirement that the participants make a purchase from, or somehow pay money to, the sponsor of the contest in order to qualify to win a prize. See id. If any of these three elements is missing, however, the contest does not violate the statute. See id. Thus, sweepstakes contests can avoid violation by offering a free entry option, and thus no legal consideration. See id.

\textsuperscript{98} See S. REP. NO. 106-102, at 5.

\textsuperscript{99} See id.

\textsuperscript{100} See id.

\textsuperscript{101} See id.

\textsuperscript{102} See id.
orders can range from stopping the delivery of mail responding to the promotion under investigation, to the appointment of a receiver to manage the company sponsoring the promotion, to providing restitution to victims.\textsuperscript{103} The courts may also issue temporary restraining orders and preliminary injunctions permitting the postal service to withhold mail delivery in response to the schemes.\textsuperscript{104} In situations where a promoter receives mail in multiple judicial districts, law enforcement must pursue a separate case in each district.\textsuperscript{105}

The FTC has authority to target deceptive mail promotions under the “unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce” provisions of the Federal Trade Commission Act.\textsuperscript{106} To constitute a deceptive practice, there must be a representation, omission, or practice likely to mislead a consumer.\textsuperscript{107} The FTC evaluates this misrepresentation from the viewpoint of a consumer acting reasonably under the circumstances.\textsuperscript{108}

2. State Level

State laws mirror the federal regulations governing unfair methods and deceptive acts affecting commerce.\textsuperscript{109}

\textsuperscript{103} See id.
\textsuperscript{104} See Postal Hearings, supra note 24 (statement of Kenneth J. Hunter, Chief Postal Inspector).
\textsuperscript{105} See id.
\textsuperscript{106} See id. (prepared statement of Orson Swindle, Commissioner of the Federal Trade Commission on “The Mailing of Deceptive Materials Relating to Games of Chance”). The FTC also uses its authority under the Act to challenge deceptive promotions and educate the public. See id. An example of this effort is Project Mailbox, which was a joint effort between the federal government and the states on the deceptive use of sweepstakes. See id. As a result, numerous actions challenging such actions were brought. See id. The FTC also collects consumer complaint data, through the use of the Consumer Response Center. See id. The FTC database is used to spot trends, identify companies that should be targeted in enforcement actions, and locate witnesses. See id. The FTC also works to educate consumers and businesses about the dangers of deceptive sweepstakes promotions. See id.
\textsuperscript{108} See id.
\textsuperscript{109} See e.g., CAL. BUS. & PROF. CODE \textsection 17000 (West 1999). California’s business code, for example, prohibits business conduct that is likely to deceive the public. See id. \textsection 17200-17209. In order to fall within thereach of this statute, a sweepstakes promotion must violate the restrictions on “unfair competition” or “untrue or misleading advertising.” Id. The test used to determine whether the act has been violated is whether the deceptive statement
Like federal law, state constitutions contain prohibitions against lotteries as well. Most sweepstakes promotions fall short of violating state lottery laws because they lack consideration.

Finding these devices insufficient to combat deceptive practices in the sweepstakes industry, twenty-seven states have enacted regulations that govern the industry in particular. These laws cover many facets of promotions, including general disclosures, odds of winning, number and value of prizes awarded, rules, winners lists, pre-contest filing, simulated checks, prize restrictions, and the use of certain words.

The disclosure requirements of most of these statutes require the promoter to disclose the name and address of the sponsor/promoter, the odds of winning a prize, the number and verifiable retail value of the prizes, and the rules and eligibility requirements to enter the sweepstakes. A few states have laws that contain additional provisions that these disclosures be clear and conspicuous. Some provide specific

would "mislead the reasonable consumer," using extrinsic, objective data. Haskell v. Time, Inc., 965 F. Supp. 1398, 1407 (E.D. Cal. 1997). The penalty for such practices is civil, and includes injunctive relief or fines. See CAL. BUS. & PROF. CODE §§ 17203, 17206 (West 1999). There are also provisions in some states that allow for treble damages in cases involving unfair or deceptive acts against senior citizens. See CAL. CIV. CODE § 3345 (West 1999). There must be an affirmative finding that the defendant knew or should have known that his or her conduct was directed to one or more senior citizens or disabled persons, and the defendant's conduct caused certain substantial losses; or that one or more senior citizens or disabled persons is substantially more vulnerable to the defendant's conduct and actually suffered damage from the conduct. See id.

110. See CAL. CONST. art. IV, § 19. This prohibits the legislature from authorizing any lotteries other than the state lottery and charitable bingo games. Violation of these laws is generally a criminal offense. See CAL. PENAL CODE § 320 (West 1999). It is a misdemeanor to set up a lottery under California's penal code. See id.

111. See supra note 97 and accompanying text. One notable California case held that a magazine sweepstakes is not an illegal lottery under California law. See Haskell v. Time, Inc., 965 F. Supp. 1398, 1403-05 (E.D. Cal. 1997). The district court held that a promotion in which the sponsor sent additional sweepstakes opportunities to customers who had previously purchased magazines did not constitute an illegal lottery because any person was able to send multiple entries by mail without purchasing a magazine. See id.


113. See id.


115. See id.
requirements for certain disclosures. 116

Some states forbid sweepstakes promotions from representing that a consumer is a winner when he in fact has not won. 117 Another possible provision is that materials may not represent that ordering products will have any effect on an entrant's chances of winning, nor may an entry be subject to disadvantage if it does not contain a product order. 118 Other states simply prohibit the use of certain words in prize promotions. 119

In addition to regulations detailing the disclosure requirements of sweepstakes promotions, a few states require sponsors of a sweepstakes to register with the state prior to conducting the contest. In Florida, if the total value of the prizes exceeds $5,000, the operator of the sweepstakes must file a copy of the rules and regulations of the promotion and a list of all prizes and prize categories with the Department of State at least seven days before the commencement of the sweepstakes. 120 Sweepstakes operating in New York offering prizes worth over $5,000 must file a registration statement with the Secretary of State containing the minimum number of prizes to be awarded, the minimum number of prize winning game pieces, the odds of winning, the minimum value of the prizes, the rules of the contest, and the duration

116. New York's statute, for example, requires material disclosures to appear on the first page of the prize notification document (violation results in civil penalty not to exceed $1,000 for each violation). See id. Georgia's statute requires the sweepstakes envelope to contain disclosures such as "commercial solicitation" and the odds of winning, whereas Connecticut's statute requires that the odds of winning appear in immediate proximity to the announcement of the prize (violations result in civil penalties of $5,000 per violation in both Georgia and Connecticut). See id.

117. See CAL. BUS. & PROF. CODE § 17939.15 (West 1999). This law (enacted in 1998) adds explicit regulations dealing with sweepstakes to the Business and Professions Code. See id. Misrepresentations regarding winning are judged by examining a statement in light of its context, taking into account factors such as size, print, color, location and presentation, and portions of messages visible through envelope windows cannot be misleading. See id.

118. See id.

119. For example, Texas prohibits representing that a person solicited to enter is a "finalist," "major award winner," "a grand prize recipient," or "winner," or using other similar words or phrases unless the representation is actually true. See NAAG, supra note 114; TEX. BUS. & COM. CODE ANN. § 40.001 (West 1999).

120. See NAAG, supra note 114; see also FLA. STAT. ANN. § 849.094 (West 1999). Failure to register is a class B misdemeanor, which results in a fine of up to $1,000. See id.
of the contest. In Rhode Island, any sponsor proposing to engage in any sweepstakes that offers the opportunity to receive gifts, prizes, or gratuities must file with the Secretary of State a statement disclosing the number and value of prizes and the rules and regulations pertaining to the promotion.

3. Enforcement in the Courts

Numerous actions against sweepstakes operators illustrate the inadequacies of existing state and federal law. These suits began with a few angry consumers bringing private lawsuits. As consumer complaints began to flood the offices of their state governments, and victims' stories began to garner the attention of the media, state attorneys general began to get involved. This resulted in numerous class action lawsuits against the two biggest sweepstakes promoters, AFP and PCH.

a. Private Lawsuits

Suits by individuals against sweepstakes promoters, demanding the millions they believed were theirs, have largely not succeeded in the courts. These actions generally rely on breach of contract and common law fraud theories, though they also allege violations of state consumer protection statutes.

Plaintiffs claim that sweepstakes promotions constitute offers to form unilateral contracts, which the recipient accepts

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121. See NAAG, supra note 114; see also N.Y. GEN. BUS. LAW § 369e (McKinney 1999). Failure to register is a class B misdemeanor. See id.

122. See NAAG, supra note 114; see also R.I. GEN. LAWS § 42-61.1-1 (1999). Failure to register is a misdemeanor resulting in a fine not to exceed $500. See id.

123. See Quinn, supra note 41.

124. See supra note 69.


127. See Fazio, 142 F.3d at 443, 1998 WL 225062, at *1; Workmon, 118 F.3d at 458; Freeman, 68 F.3d at 286; Sharpe, 25 F.3d at 1040, 1994 WL 224180, at *1; Miller, 663 A.2d at 645.
by submitting his entry (and/or purchasing a product), and which the sweepstakes sponsor breaches by failing to pay him the prize. These actions do not withstand motions to dismiss by the promoter defendants because the language of the mailings is, under most circumstances, conditional: if the recipient’s claim number matches the pre-selected winning number, then the recipient will be entitled to the award. Thus, a condition precedent to the formation of a contract exists, and since it is not satisfied, no contract forms. Courts have also found that the mailings are simply an offer to enter a sweepstakes, and the court must construe the mailing as a whole. If the mailing contains sufficient disclaimers so that a reasonable person would understand that it is merely an offer to participate, no contract forms. Most sweepstakes mailings contain sufficient disclaimers which “limit[] recipients of the prize to those who return an identification number that matches the winning number.”

Suits claiming fraud typically fail as well. In a North Carolina case, plaintiffs alleged that a mailing from AFP constituted common law fraud because the front of the envelope read: “If you return the winning entry in time, I’ll say: CONGRATULATIONS! YOU’RE ONE OF THE ‘NEW MILLIONAIRES,’ AND I’LL GIVE YOU YOUR PRIZE ON NBC TELEVISION!” AFP printed these words in large black and red type, and similar language appeared on the back of the envelope, visible through the envelope’s window. The material inside the envelope explained that AFP pre-selected the winning number and that the recipient needed to return an entry card to find out whether she had won.

128. See Workmon, 118 F.3d at 458.
129. See Kerr v. Time, Inc., 188 F.3d 513 (9th Cir. 1999) (unpublished table decision), 1999 WL 626627, at *1; Workmon, 118 F.3d at 458.
130. See Kerr, 188 F.3d at 513, 1999 WL 626627, at *1.
131. See id.
132. See Workmon, 118 F.3d at 459.
133. See id.
134. Id. at 458.
137. Id.
138. See id.
139. See id.
district court granted AFP's motion for summary judgment, finding that although the language could be fraudulent, the plaintiffs had failed to forecast sufficient evidence of actual injury to recover under a fraud theory. The court of appeals affirmed the grant of summary judgment, but for alternate reasons. It held that the plaintiff's fraud claim was insufficient because the offered evidence failed to show that a reasonable person would rely on the representations in the mailing. Even assuming that the envelope contained a false representation that the recipient had won the sweepstakes, the plaintiffs could not show an essential element of fraud, namely reasonable reliance by the plaintiff on the alleged misrepresentation, because the contents of the mailing explained that they needed to return the entry card to discover whether they had won. Thus, looking at the mailing as a whole, it did not contain misrepresentations upon which a reasonable person could have relied.

In the same case, the court similarly rejected plaintiff's claim that the AFP mailing violated the state's consumer protection statutes. Assuming that the envelope contained

140. See id.
141. See id. at *2.
143. See id.
144. See id.
145. See id. A case involving California's consumer protection statute arrived at likewise results. See Freeman v. Time, Inc., 68 F.3d 285, 286 (9th Cir. 1995). The plaintiff in this case received sweepstakes promotions containing statements in large type that he had won, qualified by language in smaller type that he would win only if he returned a winning prize number. See id. The court of appeals upheld the district court's grant of defendant's motion to dismiss holding that the "reasonable" or "ordinary" consumer standard applied to claims under California's false advertising and unfair business practices statutes. See id. at 290. Under this standard, the plaintiff failed to show that the promotional materials deceived the public, and that the materials did not falsely represent that the recipient had won the sweepstakes. See id. at 289-90. But see Miller v. American Family Publishers, 663 A.2d 643 (N.J. 1995) (holding that plaintiff's similar claim against AFP could continue because plaintiffs had offered enough evidence to withstand the motion to dismiss). Miller is distinguishable in two respects. First, the plaintiffs did not claim that they believed they had actually won the sweepstakes, just that AFP's mailings fraudulently suggest one has a better chance to win if one buys a magazine than if one does not. See Miller, 663 A.2d at 646. The alleged injury was that the plaintiffs in fact did not receive the enhanced likelihood of winning; for their money, they received something less than, and different from, what they reasonably expected. Second, New Jersey claims that its consumer protection laws are some of the strongest in the nation. See id. at 647. They are to be construed liberally in favor of consumers. See id. As such, the test for deceit is
false representations (thus violating the statute), the plaintiffs still needed to show that they suffered actual injury as a proximate cause of that violation. They failed to do so. After they opened and read the contents of the envelope, they could not have reasonably believed they had won the contest. Thus, violation of the statute did not proximately cause any actual injury alleged by the plaintiffs.

b. State Attorneys General Attack

State attorneys general have involved themselves in trying to curb the deceptive tactics used by sweepstakes promoters. Unlike the lawsuits brought by private individuals, these attempts have met with some success. Although no suit has resulted in legal liability, each has settled for sizable amounts of money and agreements for self-regulation.

The first small success occurred in 1994. After the attorneys general of fourteen states charged it with deceptive practices, Publishers Clearing House agreed to modify the language of its mailings, publish the huge odds against winning its big prize (up to 200 million to one), and other reforms.

AFP was next to be attacked. In 1998, it entered into a settlement agreement with thirty-two states and the District of Columbia. The settlement followed a lawsuit alleging that AFP's sweepstakes promotions violated the deceptive
and unfair trade practices acts of the participating states by misleading consumers into believing that they could win the $11 million dollar prize.\textsuperscript{154} The case settled for $1.25 million.\textsuperscript{155} AFP also agreed that its future solicitations would not: 1) call consumers winners or tell consumers they belong to a select group with a better chance of winning unless such statements are true; 2) fail to tell consumers that they need not purchase an item to win; and 3) fail to explain how to enter without placing an order.\textsuperscript{156}

Following this settlement, Attorney General Bob Butterworth of Florida announced another suit against AFP.\textsuperscript{157} He claimed that "in their zeal to sell magazines," AFP had "clearly stepped over the line from advertising hype to unlawful deception."\textsuperscript{158} Indiana and South Carolina joined Florida.\textsuperscript{159} In May 1999, AFP agreed to a settlement of $4 million and an agreement to change its practices.\textsuperscript{160} The settlement provided for restitution to consumers. People who bought magazines through the company's sweepstakes promotions in the four states will share $3 million, while the remaining $1 million will cover the cost of investigation by the states.\textsuperscript{161} AFP did not admit guilt or any wrongdoing in either of these settlements.\textsuperscript{162}

PCH got in trouble again in 1999. In September, it agreed to settle a nationwide class-action lawsuit for roughly $4 million.\textsuperscript{163} Under the terms of the agreement, the company must send out notices of the settlement to about forty million

\textsuperscript{154} See NAAG, supra note 114.
\textsuperscript{155} See id.
\textsuperscript{156} See id.
\textsuperscript{158} Id.
\textsuperscript{160} AFP agreed to notify people who buy large numbers of magazines that no purchase is necessary, to clearly and conspicuously print on its forms that no purchase is necessary and chances of winning are not enhanced by purchases, and to print sweepstakes rules in type that is at least one-ninth of an inch high. See Douglas Frantz, Top Sweepstakes Promoter Settles Suit for $4 Million, N.Y. TIMES ABSTRACTS, May 29, 1999.
\textsuperscript{161} See id.
\textsuperscript{162} See id.
households.\textsuperscript{164}

Following reports of this settlement, several attorneys general announced a suit against PCH on behalf of residents of their states. Bob Butterworth of Florida filed a suit seeking more than $40 million in restitution and penalties.\textsuperscript{165} It alleged that PCH has continued to cultivate the belief that ordering magazines and merchandise will increase the odds of winning its sweepstakes.\textsuperscript{166} He urged Florida residents not to enter into the nationwide class settlement, saying that it was not sufficient.\textsuperscript{167} Missouri's attorney general, seeking unspecified damages on behalf of the state's consumers, also announced a suit.\textsuperscript{168} He also considered the settlement of the class-action inadequate to protect his state's consumers.\textsuperscript{169} Michigan also filed suit, rejecting the class-action settlement as unfair to consumers.\textsuperscript{170} A number of other states filed independent suits.\textsuperscript{171}

D. New Federal Regulation: The Deceptive Mail Prevention and Enforcement Act

The state suits caught the attention of Congress.\textsuperscript{172} Although proud of the efforts made by their home states against deceptive sweepstakes promoters, members of Congress believed that meaningful regulation could only come from the federal level.\textsuperscript{173} They sought to craft legislation that

\textsuperscript{164} See Marketer Will Pay to Settle Suit, Sweepstakes Offers will be Revised, SACRAMENTO BEE, Aug. 27, 1999, at E2 [hereinafter Marketer Will Pay]. PCH also agreed to provide for at least three automatic entries in future sweepstakes for those who sent in entries, allow magazine subscribers an opportunity to cancel their subscriptions and get a refund, and allow those who bought other merchandise through the company the chance to return the items for a refund. See id.

\textsuperscript{165} See Larry Dougherty, State Sues Over Sweepstakes Mail, ST. PETERSBURG TIMES, Sept. 23, 1999, at 1B.

\textsuperscript{166} See id.

\textsuperscript{167} See id. The original settlement amount of $4 million could hardly cover the loss of the millions of potential class members.


\textsuperscript{169} See id.

\textsuperscript{170} See Durbin, supra note 163.

\textsuperscript{171} Included are Arizona, Texas, Connecticut, Indiana, Washington, and Wisconsin. See Wenske, supra note 168.


\textsuperscript{173} See Postal Hearings, supra note 24 (testimony of Frank A. LoBiondo, U.S. Representative).
would provide for the needs of legitimate businesses and the safety of consumers, keeping in mind their responsibility to protect the most vulnerable.\(^{174}\) The process began in September 1998, when a Senate subcommittee\(^{175}\) held hearings\(^{176}\) and introduced the Honesty in Sweepstakes Act of 1998.\(^{177}\)

Senator Susan Collins of Maine introduced the Deceptive Mail Prevention and Enforcement Act in February 1999.\(^{178}\) Congressional hearings followed in March and July.\(^{179}\) President Clinton signed the bill into law on December 13, 1999,\(^{180}\) commenting, "This legislation will protect Americans against those who use sweepstakes and mailings to deceive and exploit the unwary," especially the elderly.\(^{181}\)

The Deceptive Mail Prevention and Enforcement Act amends the False Representation and Lottery Statute.\(^{182}\) It makes new requirements of sweepstakes mailings.\(^{183}\) Sweepstakes promoters must clearly and conspicuously display: 1) a statement in the mailing, including the rules and order form that consumers need not purchase anything to enter the contest; 2) a statement that a purchase would not

\(^{174}\) See id. (statement of James E. Rogan, Congressman).

\(^{175}\) Specifically, it was the Committee on Governmental Affairs, International Security, Proliferations and Federal Services Subcommittee. See S. REP. NO. 106-102, at 11 (1999).


\(^{177}\) See S. REP. NO. 106-102, at 11.

\(^{178}\) See id. at 12.

\(^{179}\) See id. at 14. The March hearings focused on testimony of family members who had been deceived by sweepstakes, testimony from a state attorney general, the AARP, and representatives from AFP, PCH, Time, Inc., and the Readers Digest Association, Inc. See id. at 14-15. The July hearings investigated the deceptive practices of smaller sweepstakes companies. See id.

\(^{180}\) It is to take effect 120 days after the date of enactment. See H.R. REP. NO. 106-431, at 31.
improve the recipient's chances of winning; 3) all terms and conditions of the sweepstakes promotion, including the rules and entry procedures in easy to locate and readable language; 4) the sponsor or mailer of the promotion and the principal place of business or other contact address of the sponsor or mailer; and 5) rules that clearly state the estimated odds of winning each prize, the quantity, estimated retail value, and nature of each prize, and the schedule of any payments made over time.\footnote{184}{See 39 U.S.C. § 3001(k) (1999).}

The law also imposes new obligations on the companies sending out sweepstakes promotions.\footnote{185}{See id. § 3001(l).} Anyone using the mail to send out sweepstakes promotions must adopt reasonable practices and procedures to prevent mailing materials to any person who has stated his desire not to receive such mailings.\footnote{186}{See id.} Not only the consumers themselves, but conservators, guardians, individuals having power of attorney, or a state attorney general can make such requests in writing.\footnote{187}{See id.} Companies must maintain records of these requests for five years.\footnote{188}{See id.}

Additionally, the law requires companies sending sweepstakes promotions to establish individual notification systems, which would allow consumers to remove themselves from the company's mailing list by calling a toll-free number.\footnote{189}{See id. § 3017.} All mailings must contain the contact information for the company's notification system.\footnote{190}{See id.} It establishes a private right of action in state court for consumers who receive subsequent mailings despite a request for removal from a promoter's mailing list.\footnote{191}{See id. § 3007(C).}

The Deceptive Mail Prevention and Enforcement Act increases the enforcement authority of the USPS. The new law grants the USPS subpoena authority,\footnote{192}{See id. § 3016.} nationwide stop mail authority, and the ability to impose civil penalties on violators.\footnote{193}{See id. § 3007(C).} It also increases the amount of civil penalties

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\footnote{184}{See 39 U.S.C. § 3001(k) (1999).}
\footnote{185}{See id. § 3001(l).}
\footnote{186}{See id.}
\footnote{187}{See id.}
\footnote{188}{See id.}
\footnote{189}{See id. § 3017.}
\footnote{190}{See 39 U.S.C. § 3017.}
\footnote{191}{See id.}
\footnote{192}{See id. § 3016.}
\footnote{193}{See id. § 3007(C).}
that the USPS may impose. The fines for sending material that does not comply with the Act are $25,000 for each mailing of less than 50,000 pieces; $50,000 for each mailing of 50,000 to 100,000 pieces; and an additional $5,000 for each additional piece above 100,000. Total penalties, however, cannot exceed $1 million. Furthermore, anyone who evades or attempts to evade the terms of a USPS order through the use of the mail can be liable for twice the amount of the penalties.

The Deceptive Mail Prevention and Enforcement Act does not preempt state law. Nothing in the Act can preempt any provision of state or local law that imposes a more restrictive requirement, regulation, damage, cost, or penalty. Also, nothing in the law prohibits a state official from initiating action in state court on the basis of an alleged violation of any state statute.

III. IDENTIFICATION OF THE PROBLEM

The majority of Americans support more stringent regulation of the sweepstakes industry. Sweepstakes certainly do have their place in the market, as many people enjoy entering them and buying magazines that they want to read or products they wish to use. Sweepstakes also constitute an extremely effective marketing tool for the businesses that use them legitimately. Yet it seems equally certain that sweepstakes promotions frequently mislead some consumers, and that many players do not understand the game, albeit this segment is a minority. Some may consider the protection of this minority a waste of government

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194. See id. § 3012.
195. See id.
197. See id. § 3017. Thus, the maximum liability under the Act is $2 million.
199. See id.
200. See id.
201. See Senate Hearings, supra note 49 (testimony of Virginia Tierney).
202. See id.
203. See supra text accompanying notes 23-33.
204. See Mannix, supra note 69, at 74. According to the vice president of marketing services for AFP, more than four out of five people do not respond to its sweepstakes mailings at all. Of those who do, more than half enter without ordering a thing, "indicating their understanding that no purchase is necessary." Id.
resources. They may also think that spending time and money on people gullible enough to hop on a plane and fly to Florida for a pot of gold that does not exist is absurd. However, the problem exists not with the consumers but with these businesses that seek profits from people who do not understand what they read. The elderly often fall victim to these misunderstandings and need protection.

Federal legislation in this area is necessary due to previous unsuccessful litigation attempts. Current federal law is not sufficient to regulate the industry. State causes of action also fall short of providing adequate regulation. Suits by private citizens almost always fail. Actions brought by attorneys general have resulted in self-regulation by a few of the biggest names in the business, but courts have found no legal wrongdoing, and the settlements themselves generally do not compensate the harmed consumers sufficiently. These suits will have little impact on smaller companies operating as illegitimate businesses. The lawsuits, although generating a lot of hype, have created no new case law to regulate the business in general. Although state regulations that particularly target the sweepstakes industry help, they remain an insufficient solution. They lack uniformity which results in legitimate businesses not knowing what laws they must follow. In addition, only about half the states have such statutes which leaves consumers in the remaining states without protection.

Enacting the Deceptive Mail Prevention and Enforcement Act seemingly solves the problem with uniform and universal minimum standards. However, this new legislation presents a different problem altogether—namely, whether it will offer sufficient and effective regulation of the industry. It is especially important to examine this question.

205. See supra note 69.
206. See supra Part II.A.
207. See supra Part II.B.
208. See supra Part II.C.1.
209. See supra Part II.C.2.
210. See supra Part II.C.3.a.
211. See supra Part II.C.3.b.
212. See supra Part II.A.2.
213. See supra Part II.C.2.
214. See supra Part II.C.2.
215. See supra Part II.C.2.
216. See supra Part II.D.
in light of the group of consumers the law targets to protect—the vulnerable, and in particular, the vulnerable elderly.

IV. ANALYSIS

Investigation into the practices of a variety of companies who run promotional sweepstakes uncovered numerous tactics used that tend to deceive consumers into making unwanted purchases.\(^{217}\) Current laws do not effectively reach promoters utilizing these tactics.\(^{218}\) Furthermore, even when a promoter is or could be found liable for deception, many promoters have found ways to insulate themselves from enforcement and continue operations.\(^{219}\)

Congress intended the Deceptive Mail Prevention and Enforcement Act to alleviate the disastrous effects that these practices have on unwary consumers.\(^{220}\) Of course, only time will reveal the effectiveness of this legislation, and much depends on how rigorously the government enforces it. An initial analysis, however, does reveal that Congress aimed its provisions in the right direction.

A. New Disclosure Requirements

The Deceptive Mail Prevention and Enforcement Act requires companies to make numerous disclosures in all sweepstake promotions, otherwise the USPS may deem the material nonmailable.\(^{221}\) First, all promotions must contain a disclosure that “no purchase is necessary” and that “a purchase will not increase an individual’s chances of winning.”\(^{222}\) These essential disclosures serve to dispel the misconception that consumers must purchase something in order to remain in the running.\(^{223}\)

These disclosures must appear in three places: in the mailing, in the rules, and on the order or entry form.\(^{224}\) This conflicts with the magazine industry’s desire for only one mandatory disclosure.\(^{225}\) Requiring three disclosures of these

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217. See supra Part II.A.
218. See supra Part II.C.
219. See supra Part II.A.2.
220. See supra Part II.D.
222. Id. § 3001(k).
223. See supra Part II.B.
225. See Postal Hearings, supra note 24 (testimony of Michael Pashby,
pertinent messages will help to ensure that the recipient will read them. The term "in the mailing" means a location in the sweepstakes promotion other than the rules or order or entry form that is the most likely document to be read with respect to the promotion.\textsuperscript{226} The term "in the mailing" describes a place that is "designed to be the centerpiece of the promotion."\textsuperscript{227}

Sweepstakes promotions also must state all terms and conditions of the promotion, including the rules and entry procedures.\textsuperscript{228} The rules must contain the estimated odds of winning each prize, the quantity and estimated value of each prize, and the schedule of any payments made over time.\textsuperscript{229} Understandable and non-conflicting rules may help to reduce the amount of consumer confusion.\textsuperscript{230}

The Act also mandates that sweepstakes promoters include a statement that discloses the sponsor or mailer of the promotion and its principle place of business or a contact address.\textsuperscript{231} This disclosure will hopefully stop the practices of promoters who send out promotions for the same sweepstakes under multiple trade names,\textsuperscript{232} or at least will provide consumers with a way to determine whether they have already entered. It will also aid consumers in removing themselves from mailing lists and in taking appropriate action when they receive unsatisfactory merchandise.\textsuperscript{233}

Furthermore, all sweepstakes companies must make required disclosures and disclaimers in a manner that is "clearly and conspicuously displayed."\textsuperscript{234} The definition of "clear and conspicuous" is adopted from the FTC:

> In order to determine whether the disclosure is effectively communicated, the Commission considers the disclosure in the context of all of the elements of the advertisement. Ordinarily, a disclosure is clear and conspicuous, and therefore is effectively communicated, when it is displayed

\textsuperscript{226} See S. REP. NO. 106-102, at 10 (1999).
\textsuperscript{227} Id.
\textsuperscript{228} See 39 U.S.C. § 3001(k).
\textsuperscript{229} See id.
\textsuperscript{230} See supra Part II.B-C.
\textsuperscript{231} See 39 U.S.C. § 3001(k).
\textsuperscript{232} See supra notes 59-62 and accompanying text.
\textsuperscript{233} See supra Part II.B.
\textsuperscript{234} 39 U.S.C. § 3001(k).
in a manner that is readily noticeable, readable... and understandable to the audience to whom it is disseminated.235

Although some sweepstakes legislation contains specific requirements regarding language and type size,236 this Act rejects such an approach for numerous reasons. First, the industry raised concerns that such specific disclosures would violate the First Amendment protection given to commercial speech.237 Second, sweepstakes promotions come in many different forms, and the standards need to be flexible in order to comply with the different formats that various promoters use.238 Finally, the clear and conspicuous standard has a long judicial history which imports a degree of certainty into the legislation and its interpretation.239

In addition, the Act forbids making representations that the sweepstakes operators will disqualify individuals not making purchases from receiving future mailings, makes a requirement that an order or payment must accompany a sweepstakes entry, makes a representation that an individual has won a prize unless true, or contains a representation which contradicts or is inconsistent with sweepstakes rules or any other required disclosure.240 Eliminating these kinds of representations from promotional materials will cut down on the pressure that many individuals feel to purchase something when they receive these promotions.241 They will also help to prevent the broken illusions some feel when they realize that they have not won millions (after a trip to Florida)242 and prevent the confusion that can lead to a misinterpretation of reality.243

Even more importantly, law enforcement is not to interpret these provisions simply by saying that a promoter cannot make a false representation (i.e. "You're a winner!"). Most sweepstakes promotions contain representations that

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237. See Postal Hearings, supra note 24 (testimony of Michael Pashby, Executive Vice President of Consumer Marketing, Magazine Publishers of America).
238. See id.
239. See id.
242. See supra note 69.
243. See id.
are technically accurate but make implied misrepresentations.\textsuperscript{244} The Act defines "representation" as including not only express representations but also implied representations.\textsuperscript{245} In the case of implied claims, law enforcement will determine meaning through an examination of the representation itself, including evaluation of the entire document, the location of various phrases, the nature of the claim, and the nature of the transaction.\textsuperscript{246} The government will judge whether a statement is misleading or deceptive from the standard of the reasonable recipient, unless a promoter has targeted a representation to a particularly vulnerable group, in which case judgment will be from the standpoint of a person from within that group.\textsuperscript{247} These standards will provide flexibility in interpretation and will lead to more effective enforcement against promoters who technically comply with the law but nevertheless deceive consumers.\textsuperscript{248} While the reasonable person standard is fair and well-established, Congress added the relaxed standard for the vulnerable and will offer protection against the truly unscrupulous who intentionally direct their pitches to such groups. It will also make enforcement against them easier than causes of actions that rely on the reasonable person standard alone.\textsuperscript{249}

B. Obligations of Sweepstakes Operators – The Notification System

Once a sweepstakes promoter places an individual on a mailing list, it can be nearly impossible for an individual to get removed from that list.\textsuperscript{250} Sweepstakes mailings often flood mailboxes, which keeps individuals responding and buying.\textsuperscript{251} It can create an incessant cycle, causing tremendous headaches for loved ones trying to intervene.\textsuperscript{252}

The notification requirements will help to alleviate this problem. Much debate surrounded the drafting of the form

\textsuperscript{244} See S. REP. NO. 106-102, at 7.
\textsuperscript{245} See id.
\textsuperscript{246} See id.
\textsuperscript{247} See id. at 7-8.
\textsuperscript{248} See supra Part II.A.1-2.
\textsuperscript{249} See supra Part II.C.3.a.
\textsuperscript{250} See S. REP. NO. 106-102, at 11.
\textsuperscript{251} See supra Part II.A.1-2.
\textsuperscript{252} See supra note 69.
the notification system would take.\textsuperscript{253} Senator John Edwards advocated a nationwide, central notification system, a sentiment reflected in the original bill passed in the Senate.\textsuperscript{254} Under this system, consumers or family members could call a single toll-free number to remove themselves or a loved one from the mailing lists of all companies that send out sweepstakes promotions.\textsuperscript{255} The system would be run by the sweepstakes industry, and include civil penalties for noncompliance.\textsuperscript{256}

The sweepstakes industry opposed this provision.\textsuperscript{257} Instead, it lobbied for a company-by-company approach, where each sweepstakes promoter would need to include in its mailings contact information whereby consumers could easily reach it and remove themselves from its mailing list.\textsuperscript{258} Sweepstakes promoters argued that a national system would impose unnecessary burdens.\textsuperscript{259} Especially troubling was the provision that if the industry did not successfully establish the system within one year, all promotions would become nonmailable.\textsuperscript{260} Leaving notification up to individual companies, they argued, would better serve the consumer. An individual who called could communicate directly with a trained customer service representative, who could then track down variations on names and addresses and discuss refund and cancellation policies.\textsuperscript{261} This solution would serve not only the need to remove certain individuals from mailing lists, but also would provide relief to those consumers who "have made inappropriate purchasing decisions."\textsuperscript{262}

The industry lobbyists prevailed and the enacted legislation contains provisions for the company-by-company notification system.\textsuperscript{263} These provisions will certainly improve the removal process by simplifying for consumers or their

\textsuperscript{254.} See id. at 33.
\textsuperscript{255.} See id.
\textsuperscript{256.} See id. at 25.
\textsuperscript{257.} See Postal Hearings, supra note 24 (testimony of Michael Pashby, Executive Vice President of Consumer Marketing, Magazine Publishers of America).
\textsuperscript{258.} See id.
\textsuperscript{259.} See id.
\textsuperscript{260.} See id.
\textsuperscript{261.} See id.
\textsuperscript{262.} Id.
\textsuperscript{263.} See 39 U.S.C. § 3017(c) (1999).
family members the process of removing themselves from lists. Furthermore, having a private right of action against companies who continue to send solicitations after such a request has been made\(^\text{264}\) will hopefully boost the enforceability of the provision.

The comparative effectiveness of this provision is questionable, however. First, it asks consumers who may receive promotions from many different companies to keep track of those they have requested removal from and those they have not. This could be especially difficult for individuals who are easily confused, have poor organizational skills, or failing memories.\(^\text{265}\) Having one number to call would solve this problem.

Second, the provision does not completely address the fact that mailing lists are sold within the industry.\(^\text{266}\) Although the provision does forbid the selling of any name and address of a person who has specifically requested to be removed,\(^\text{267}\) it does not say anything about the exchange of lists in general. Therefore, consumers or their family members could perpetually occupy themselves with contacting sweepstakes promoters asking the promoters to remove them from their mailing lists.

Finally, concerns regarding the workability of a single system do not seem too hard to overcome, especially if the USPS is involved. Modern technology sorts and tracks mail,\(^\text{268}\) and it seemingly would be quite easy to create a master list of individuals who wish to opt out of receiving sweepstakes promotions. Once the industry and the USPS establish such a system it would actually be less burdensome on companies than having to maintain their own lists. A collaborative effort would allow companies to share resources.

C. Increased Authority of the USPS

Under current law, the USPS lacks authority to
investigate, punish, and stop deceptive mailings from reaching consumers. Because the USPS does not have subpoena authority, it cannot obtain an order to stop deceptive mailings nationwide. It can only seek financial penalties when a company violates a previously imposed order. The Deceptive Mail Prevention and Enforcement Act alleviates these problems by granting the USPS increased authority to enforce the law.

Under current law, the process for stopping mail falling within the nonmailable material definition of the False Representation and Lottery Statute can be extremely lengthy, taking anywhere from two to twelve months. During this time, many deceptive promotions will have been successful in receiving responses. In order to protect consumers, the USPS can ask the Department of Justice to intervene and seek a temporary restraining order ("TRO"). This, however, requires filing of the TRO in the district court of each state where the promoter receives mail. During the TRO process, promoters charged under current law can prolong the proceedings, forestalling the issuance of the TRO.

The postal service must gather information from public records, which prolongs the initial stage of the investigation. This makes it extremely difficult to build a case, especially when dealing with a promoter that uses front companies, multiple trade names, and layers of corporate insulation.

If an investigation does eventually determine that a company sends mail in violation of the statute, the only penalty is to return mail to the sender, and the postal service can return only the specific mail addressed in the action. The government cannot impose any fines until a court

270. See id.
271. See id.
272. See Postal Hearings, supra note 24 (statement of Kenneth J. Hunter, Chief Postal Inspector).
273. See id.
274. See id.
275. See id.
276. See id.
277. See id.
278. See Postal Hearings, supra note 24, (statement of Kenneth J. Hunter, Chief Postal Inspector).
279. See id.
actually issues an order and a company violates it. Cunning promoters can thus technically comply with the cease and desist order but still continue to operate by moving their location to another district or coming up with new schemes not covered in the order.

The new provision solves these problems. Most importantly, it places sweepstakes promotions within the reach of the postal service. The provision for multi-district TROs will allow the postal service to go back to the judge who issued the initial TRO instead of having to refile in other districts to get additional orders. This will make the process much more efficient. It will cut down on the amount of time necessary to obtain a TRO, and thus will quicken the process of halting deceptive promotions from reaching the mailboxes of consumers. It will also be a more efficient use of resources, including those of the USPS, Department of Justice, and district courts because it will reduce the number of filings and hearings. The practice will benefit those under investigation as well. Promoters will not need to defend themselves in multiple districts. Not only is this a financial saving for defendants, but it preserves their funds for situations in which law enforcement could obtain victim restitution.

Granting the postal service subpoena authority will increase its investigative ability and efficiency. It will result in quicker investigations, quicker action, and a reduction in the number of victims. The USPS needs this tool to obtain TROs. It will help to identify victims, track the proceeds of the promotion, and determine the number and size of mailings for the purpose of establishing penalties. The government more easily will be able to identify the true principals in operations that shelter themselves with corporate entities or that operate with multiple trade

280. See id.
281. See id.
283. See Postal Hearings, supra note 24 (statement of Kenneth J. Hunter, Chief Postal Inspector).
284. See id.
285. See id.
286. See id.
names.289

D. Increased Civil Penalties

The increased civil penalties provided for under the new Act290 will have a positive effect on eradicating a number of harmful tactics used by sweepstakes promoters. Prior law offers little in the way of deterrence.291 Profit drives sweepstakes promoters, and the best deterrent is to take the profit out of their activity. The stiff remunerative penalties (up to $2 million) would likely make questionable operators think twice before acting.

Under old law, the penalties for violating a cease and desist order by the USPS were inconsequential.292 If a promoter got in trouble and was ordered to stop operating, he simply closed his operation in one state and jumped across the country to another location to resume business as usual.293 However, if the risk of an extremely expensive penalty for this activity exists, promoters are less likely to continue operating in this way. Knowing that these costly penalties exist might also deter some people who are just thinking about running a deceptive mail promotion. Potential fines of $2 million dollars would likely affect even the largest, most profitable promoters.

E. No Preemption of State Law

The provisions of the Act do not preempt any state laws.294 Thus, the law does not render ineffective any provisions of state or local laws which are more restrictive or that impose greater penalties. States and localities can continue to enact and enforce laws that target deceptive mailings, and other agencies operating under other federal laws may continue to act as well.

The sweepstakes industry fought against this provision, arguing that new federal legislation should preempt all state laws.295 They asserted that allowing state laws to remain
effective would lead to inconsistent and confusing regulations. Some state regulations impose specific language, type size, and placement for disclosures, and the industry argued that companies would need to make duplicate disclosures in order to comply with both the federal and state laws, and that this would unnecessarily burden them. They also argued that duplicate disclosures would likely result in more consumer confusion. This makes little sense, since making one disclosure in compliance with the stricter state standard will satisfy the "clear and conspicuous" standard of the federal law.

Furthermore, allowing states to remain active in pursuing deceptive promoters is absolutely necessary to effective regulation. In the past, the postal service has worked in connection with state attorneys general and various consumer affairs agencies and organizations in an effort to combat the problem of deceptive and fraudulent activities. They share information and complaints, assist one another in identifying witnesses, and coordinate the filing of cases. This joint effort has worked especially well in limiting fraud, and should work equally well to combat sweepstakes promoters. This cooperative effort empowers attorneys general to reach questionable promoters beyond their state borders. Allowing states to maintain their important role allows everyone to work more efficiently, and to some degree, lessens the burden on the federal government. It also provides flexibility in the legislation. For example, a state with a particular interest in a certain type of deceptive practice can enact stricter laws. On the other hand, a state that does not wish to actively target the activities covered can choose to leave enforcement to the federal government.

Executive Vice President of Consumer Marketing, Magazine Publishers of America).

296. See id.
297. See id.
298. See id.
299. See id. (statement of Kenneth J. Hunter, Chief Postal Inspector).
300. See id.
301. See Postal Hearings, supra note 24.
302. See id.
V. PROPOSAL

The Deceptive Mail Prevention and Enforcement Act is an effective first step in working towards a national solution that will curtail the deceptive practices used by many sweepstakes promoters. Its provisions requiring greater disclosure by promoters, increasing the authority of the postal service, and increasing the penalties associated with violation will all have a positive impact on consumer protection in this area. A few shortcomings exist in the act, which, if addressed, would make both protection and enforcement stronger.

First, the company-by-company approach to the notification system leaves much to be desired. A uniform, national system would be much more consumer friendly and would likely be more efficient as well. Individuals or concerned family members wanting to remove themselves from mailing lists should not have to track their progress. This is especially burdensome on the elderly and their caregivers.

Second, states should take full advantage of their retained power under the act. Twenty-three states still do not have legislation that effectively brings deceptive sweepstakes promoters within their reach. Those states should enact legislation to create both state and federal causes of action. Although the postal service will play a very key role in addressing this problem, it should not be left alone to pursue deceptive promoters operating in states that lack legislation of their own.

Third, all states should amend their sweepstakes legislation to require registration prior to legally operating a sweepstakes. This would be relatively easy to do and would not unfairly burden sweepstakes operators who want to run legitimate businesses. State registration would aid in enforcement, as officials would be able to more easily track the activities of certain questionable promoters. Law enforcement could easily locate an individual who leaves one

303. See supra notes 185-91 and accompanying text.
304. See supra Part IV.B.
305. See supra note 69.
306. See supra Part IV.E.
307. See supra Part II.C.2.
308. See supra notes 109-22 and accompanying text.
state where he has been running a sketchy operation when he moves to another state.

VI. CONCLUSION

Misleading sweepstakes promotions have deceived countless consumers and left them with not only broken illusions, but financial ruin and strained family relationships. Evidence suggests that the elderly most often fall victim to these promotions. Available legal protection has been insufficient to effectively monitor and control these businesses, despite the hard efforts of consumers and government officials.

The recently enacted Deceptive Mail Prevention and Enforcement Act is an important step towards reaching a national solution to the problem. It brings sweepstakes operators within the reach of the law and provides greater protection to consumers by requiring pertinent disclosures on these promotions. It will certainly help alleviate the problem.

The Act, however, is not comprehensive enough. A single, nationwide opt-out system would better protect consumers. Regulation of the industry would be strengthened by full state involvement. This would include each state enacting its own sweepstakes regulation, and by providing for in-state registration of any company wishing to operate a sweepstakes promotion. Meaningful involvement by the sweepstakes industry and all state governments will make the Deceptive Mail Prevention and Enforcement Act an effective solution to the problem of confusion and deception experienced by many sweepstakes consumers.

309. See supra Part II.B.
310. See supra Part II.B.
311. See supra Part II.C.
313. See id.
314. See supra Parts IV.B, V.
315. See supra Parts II.C.2, V.
316. See supra Part II.C.2.
317. See supra notes 120-22 and accompanying text.