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# RADIO STATION BEHIND "HOLD YOUR WEE FOR A WII" PROMOTION SHUTS DOWN

by Joseph Lewczak

This lesson provides a sober reminder of how important it is to not ask people to do stupid things for promotions.

In early February 2017, Entercom License LLC, the owner of Sacramento, CA, radio station KDND, asked the Federal Communications Commission to dismiss its license renewal application. This request came as a result of the FCC questioning whether the station's actions in its previous license term failed to serve the public interest, which, if found, would have led to a denial of its license renewal.

You may recall KDND as the radio station behind the now infamous "Hold Your Wee for a Wii" contest broadcast live during the station's Morning Rave Show in 2007. The winner of the contest, and a Nintendo Wii, was to be the person who was able to drink eight ounces of water every 10 minutes for the longest period of time without urinating or vomiting. As a result of the dubious contest, one of the participants, Jennifer Lea Strange, died of hyponatremia—water intoxication—leaving behind a husband and three children. Ms. Strange's death led to a civil action for wrongful death, which settled after a jury entered a $16.5 million judgment against KDND.

This 10-year journey to the loss of a valuable broadcasting license in such a prominent market is not surprising, given the facts. The FCC reiterated, in its Hearing Designation Order and Notice of Opportunity for Hearing, issued in the fall of 2016, all of the mistakes the station made in conducting the contest, including:

>> The station's awareness of the dangers in conducting the contest and its callous disregard for them

>> Failure to warn participants of the dangers of water intoxication

>> A failure to protect participants from those dangers

>> The changing of the rules after the contest had begun.

These factors led the FCC to conclude that KDND conducted an inherently dangerous contest. In any event, the ultimate outcome serves as a critically important reminder for any marketer that wants to conduct a contest involving or impacting the physical or medical well-being of participants.

As an attorney in the field of promotions law for over 20 years, I've seen my fair share of wacky (and dangerous) contest ideas. Among them: UGC contests involving parkour, or free running (where participants jump off of buildings); eating contests of all stripes; various formulations of scavenger hunts; and contests involving multiple physical challenges designed to mimic life in elite military units. Some of these actually took place. Others (rightfully) were rejected before they saw the light of day. The fact of the matter is that marketers can ask consumers to do things to enter a promotion that might harm them, as long as they aren't being asked to do something that is

inherently dangerous, appropriate precautions are taken given the nature and degree of the risk involved, and the marketer understands the extent of, and is prepared to take, the legal and practical risks that cannot be mitigated.

The law that applies here is based in torts (civil wrongs that cause injuries and damages) and not promotions or advertising. The general legal standard to consider is one of negligence. For there to be negligence, the person bringing the claim must prove that the person or entity acting negligently owed a duty of care to the person injured, that such duty was breached, and that such breach was the cause of the damages. Critical to the question of the duty of care is whether the risk to the injured party, and therefore the harm, was foreseeable. If the risk was foreseeable, then the sponsor of the promotion may be liable for the harm to the entrant(s). In any event, everyone is required to use at least ordinary care to prevent others from being injured as the result of their conduct.

One case that I often refer to in advising my own clients dates back to 1975 in California—Weirum v. RKO General, Inc. In Weirum, the defendant radio station sponsored a contest in which a DJ drove around to different locations in Los Angeles and offered a prize to the first listener to find him at each location in the city. A lawsuit arose when two teenage listeners caused a car accident in which a man was killed while they were speeding to a location to win the contest. The California Supreme Court affirmed the trial court's ruling in favor of the man who was killed. The court found that the contest did create an unreasonable risk of harm to the motoring public, including the victim, by encouraging high speed automobile driving in a metropolitan area, and that the risk was foreseeable by the radio station. The station was therefore found negligent and a judgment in favor of the victim was upheld.

With such a legal standard, it may seem impossible, or at least imprudent, to conduct any promotion that has the possibility of causing harm to the participants. After all, aren't most potential harms in these instances foreseeable? Choking on a hot dog in an attempt to eat the most in 10 minutes; getting hit by a car during a scavenger hunt in New York City; or cutting your finger in a timed cooking competition—all of these are foreseeable harms. But there are defenses to a claim of negligence in these situations, most notably the defense of consent, assumption of the risk and waiver. In general, if participants have been adequately informed of the risk they may encounter, and explicitly (or implicitly) accept the risk, the sponsor should not be found liable. The primary vehicle for such consent is usually a document like a Waiver of Liability or a Dangerous Activity Release.

While I would never tell a client not to have participants sign a Waiver of Liability in situations like these, it's important to note that the waiver may not always be a silver bullet. First of all, the enforceability of these types of documents varies from state to state, so be sure to check applicable state laws before relying on this defense. Some states disfavor such documents for public policy reasons (where the good of the community overrides contract concerns, and such a contract may not be enforceable). Second, in general, even if the waiver is enforceable in the state where a participant was injured, it must meet certain requirements. For example, without being specific as to any particular state law, a waiver should: be as specific as possible to the potential dangers and harm involved; avoid legalese and use plain language that is easy to read and understand; include any specific language or font size required by state laws; not be commingled with other documents such as registration forms or official rules; and not disclaim liability for gross negligence.

With that as a backdrop, should promotion sponsors avoid these types of promotions altogether? The answer is no, but there are some important things to consider:

**1)** How dangerous is the activity you're asking participants to engage in? The more dangerous, the higher the risk. A simple scavenger hunt is likely on the lower end of the spectrum, while a contest that lets participants live out their secret spy fantasies with live ammunition is definitely on the higher end of the scale.

**2)** Can the risks associated with the activity be lessened? If they can, you should take steps to do so. For example, can the competition be held in a closed area to avoid interaction with the public? Can you have one or more doctors or EMTs available in the case of an emergency? Can participants be given training and/or appropriate safety gear to help minimize physical harm? Consider all of the possible options to make the activity as safe as possible.

**3)** Even if the risks can be controlled, might there still be brand or reputational damage if participants were injured? As a marketing lawyer, one of the most important things I can do is warn my clients of potential bad PR or reputational damage. Even if the legal risks can be minimized, a publicity hit may not be good for the bottom line.

**4)** Can you get participants to sign a Waiver of Liability? If you can, you should. This might foreclose certain social media-based promotions that allow participants to enter by merely responding to a call to action without completing an entry form or signing a waiver.

**5)** Can you limit the activities in question to one state or to a limited group of states? This will give you the more effective ability to ensure that any waiver or liability documents comply with state law(s). This doesn't suggest that you should be precluded from conducting a nationwide contest, but the cost of ensuring legal compliance and limiting risk may be higher to do so.

It is possible to avoid a fate similar to radio station KDND when engaging in promotions that might put participants in harm's way. They key is to be smart about what you are asking consumers to do, consider worst case scenarios (no matter how remote), ensure that you are taking appropriate safety precautions, and engage your legal counsel to help minimize legal risks.



## ABOUT THE AUTHOR

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