Litigation risk for 'risk free' sports betting promotions

By Robert A. Fumerton, Esq., Anthony J. Dreyer, Esq., and Karen M. Lent, Esq., Skadden, Arps, Slate, Meagher & Flom LLP

MAY 22, 2023

In the wake of the Supreme Court's 2018 decision in *Murphy v. National Collegiate Athletic Association*, which struck down the federal prohibition on sports gambling schemes, the sports betting industry has boomed. Currently, according to the American Gaming Association, 33 states and Washington, D.C. (https://bit.ly/3Vv12Wb) feature live, legal sports betting markets, and the market is growing. With sports betting quickly becoming a multibillion-dollar industry, it has attracted intense scrutiny from both regulators and putative class action plaintiffs.

A recent focus of this scrutiny is the "risk free" promotional offer, often used to attract new customers. For a typical "risk free" offer, new users will wager their own money on an initial bet and, if that bet is lost, the wager is refunded with non-withdrawable credits that can be applied towards future bets. The users would need to win bets placed with those credits to recover their initial wager. In addition, these credits may expire if not used within a specified period of time.

With sports betting quickly becoming a multibillion-dollar industry, it has attracted intense scrutiny from both regulators and putative class action plaintiffs.

Concern that these promotions are not actually "risk free" has prompted certain industry participants to drop the term, opting for alternatives such as "sweat free" and "bonus bets" for new customers who do not win. And regulators in several states, including Massachusetts, Ohio and Pennsylvania, have banned use of the phrase "risk free" in connection with promotional sports betting advertisements. Other regulators, such as the New York Attorney General (https://bit.ly/3AR5tBa), have suggested that "risk free" promotional offers are misleading, and have urged consumers to exercise caution before taking advantage of such offers.

Not surprisingly, these developments have prompted numerous putative consumer class actions challenging "risk free" advertisements as deceptive acts or practices, including a case recently filed in the U.S. District Court for the Southern District of New York asserting claims for, among other things, violations of New York General Business Law sections 349 and 350. See, e.g., *Sale v. BetMGM, LLC.*, No. 1:23-cv-01872 (S.D.N.Y. Mar. 3, 2023). These statutes prohibit consumer-oriented deceptive acts or practices and false advertising, respectively.

To manage risk in connection with "risk free" promotions and other promotional activities, sportsbooks (sports betting operations) should continue to actively monitor the regulatory landscape, which is continually in flux, to ensure that marketing campaigns are compliant with applicable federal and state laws.

Under New York law, much like under other consumer protection statutes and the Federal Trade Commission Act, a practice is deceptive if it is materially misleading to a reasonable consumer acting reasonably under the circumstances. See *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 647 N.E.2d 741, 745 (N.Y. 1995).

One potential defense to these claims is that these advertisements constitute non-actionable puffery. Exaggerated statements or broad non-verifiable claims of superiority generally are viewed as statements upon which no reasonable consumer would rely, making them non-actionable as a matter of law. See, e.g., *Int'l Code Council, Inc. v. UpCodes Inc.*, 43 F.4th 46, 60-61 (2d Cir. 2022). Whether something is "risk free" can be difficult to measure concretely, which would support a puffery defense. Viewed in the context of sports betting, however, courts may construe the phrase "risk free" as a specific and measurable assertion of the relative likelihood of monetary loss: zero.

More likely than not, the viability of a consumer-protection claim challenging a "risk free" promotion will turn on the context in

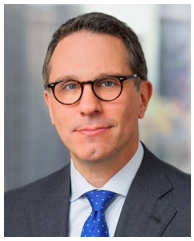
which the statement is made. See *Chen v. Dunkin' Brands, Inc.*, 954 F.3d 492, 501 (2d Cir. 2020) ("context is crucial").

For example, if the advertisements clearly indicate that lost promotional wagers are refunded as time-sensitive credits, they are less susceptible to deceptive practices claims. This defense can be even stronger if customers were required to opt-in to the promotion after reviewing the full terms and conditions for the promotion. Cf., e.g., *FTC v. Johnson*, 96 F. Supp. 3d 1110, 1140 (D. Nev. 2015) (finding disclosures insufficient where presented in small print and not in close proximity to allegedly deceptive "risk-free" claims); *Tait v. BSH Home Appliances Corp.*, No. SACV 10-00711 DOC (ANx), 2011 WL 3941387, at *3 (C.D. Cal. Aug. 31, 2011) (product manual disclaimers insufficient to defeat false advertising claim when manuals were available to consumers only after purchase).

In contrast, a "risk free" promotion likely faces the greatest exposure if it is unaccompanied by any disclaimers or cautionary language that would allow a reasonable consumer to understand the terms of the promotion. This exposure can be heightened when the promotion is broadcast by celebrity endorsers and social media influencers.

To manage risk in connection with "risk free" promotions and other promotional activities, sportsbooks (sports betting operations) should continue to actively monitor the regulatory landscape, which is continually in flux, to ensure that marketing campaigns are compliant with applicable federal and state laws. Any promotional advertising should clearly and conspicuously disclose the terms of the offer, and sportsbooks should undertake efforts to train and monitor celebrity endorsers and social media influencers for compliance with advertising best practices. Sportsbooks can also seek guidance from state gaming enforcement agencies prior to initiating a campaign to further minimize potential risk.

About the authors


Robert A. Fumerton (L) is a partner at **Skadden, Arps, Slate, Meagher & Flom LLP** in the firm's complex litigation and trials group. He represents U.S. and international clients in complex corporate, commercial and securities litigations. He can be reached at robert.fumerton@skadden.com. **Anthony J. Dreyer** (C) is a partner in the IP litigation department at the firm, concentrating on intellectual property, sports, entertainment and licensing disputes. He co-chairs the firm's sports practice and oversees its trademark and copyright practice. He can be reached at anthony.dreyer@skadden.com. **Karen M. Lent** (R) is co-head of the sports practice and head of the New York office's antitrust/competition practice at the firm. She represents clients in antitrust, sports and other complex litigation matters at both the trial and appellate court levels. She can be reached at karen.lent@skadden.com. The authors are based in New York. Christopher Fredmonski, an associate at the firm, contributed to this article.

This article was first published on Reuters Legal News and Westlaw Today on May 22, 2023.