

LEGAL MECHANISMS FOR CONSUMER PROTECTION IN SWEEPSTAKES PROMOTION*

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ABSTRACT

Sales promotion is a marketing strategy that is designed to entice customers to purchase goods or services. Sweepstakes promotion is a form of sales promotions which attract consumers by offering them the chance to win valuable prizes. The most common example of sweepstakes in Thailand is the competition of two drink green tea businesses by launching sweepstakes campaigns in which maybe affects the consumers' decision. Furthermore, some traders misrepresent the likelihood of actually winning through the sophisticated use of graphics which manipulates type size and text to hide the conditions. As a matter of fact, the traders do not have the intention of giving away the prizes.

As a result, a legal issue has been raised about the characteristics of sweepstakes, how businesses benefit from their use and the legal mechanisms to control sweepstakes promotion including whether the consumers' right to claim remedies for financial loss in illegitimate sweepstakes promotion.

Considering foreign laws regarding consumer protection, namely European Union, United Kingdom and Japan, there are specific legislation on consumer protection in sweepstakes promotion. The European Union ("EU") imposed the Directive 2005/29/EC on Unfair Commercial Practices. The UCPD stated a specific concept of false prize winning including claiming to offer prize promotion without awarding the prizes described, which aims to prohibit unfair commercial activity. The United Kingdom has the Consumer Protection from Unfair Trading Regulations 2008 ("CPRs") implemented the Unfair Commercial Practices Directive. While Japan, the Fair Trade Commission enacted the Act against Unjustifiable Premiums and Misleading Representations ("AAUPMR").

Since Thailand is also currently facing the problem in consumer protection in sweepstakes promotion, therefore, this study will explore and compare Thai Law along with foreign Laws which mentioned earlier. Sweepstakes promotion can be controlled in Thai Civil and Commercial Code (the CCC) and Consumer Protection Act (the CPA). However, there are some obstacles or limitation to the application of sweepstakes promotion since Civil and Commercial Code (the CCC) mostly focuses on protecting individual consumers who has rights to claim the remedy according to the contract law or promises but not every sales promotion is applicable to the CCC. While the study of Consumer Protection Act (the CPA) found that the CPA may not cover the marketing strategies such as sweepstakes promotion.

Thus, the author will explore the downfall of the Consumer Protection Act B.E.2522 in order to achieve the suitable recommendation for the amendment of the Act regarding legal measures to control sweepstakes promotion and legal measures on consumers' right to claim the remedy as following;

(1) legal measure to control sweepstakes promotion

The author suggests imposing the important of the principles of sweepstakes promotion in consideration of forbidding the misleading and obscure sweepstakes promotion. According to the Consumer Protection Act B.E.2522, the Committee of Advertising and Sales Promotion was established and assigned the power to enforce legal measures to control sweepstakes promotion by changing the committee of advertising to the committee of advertising and sales promotion. The said legal measures are pre-market control and post-market control. Pre-market control requires the traders to report the suspicious illegitimate sweepstakes promotion to the Committee of Advertising and Sales Promotion whereas post-market control is imposed by the Committee of Advertising and Sales Promotion to prohibit the traders who infringe the law.

(2) legal measure on right to claim the remedy the consumer

The author suggests that the right to terminate the contract must be conveyed to the consumers so the consumers acknowledge their right and able to exercise the right according to the law.

Keywords: Consumer Protection, Sweepstakes Promotion

บทคัดย่อ

กลยุทธ์การส่งเสริมการตลาดได้ถูกออกแบบมา เพื่อดึงดูดผู้บริโภคให้ซื้อสินค้าหรือรับบริการ ซึ่งการส่งเสริมการชิงโชคก็เป็นรูปแบบหนึ่งของการส่งเสริมการขาย ที่เปิดโอกาสให้ผู้บริโภคร่วมสนุกชิงรางวัล ซึ่งตัวอย่างที่เห็นกันทั่วไปของการจับรางวัลชิงโชคในประเทศไทย คือ การแข่งขันกันระหว่างสองธุรกิจน้ำดื่มชาเขียว ที่ได้ต่างปล่อยแคมเปญการร่วมชิงโชครางวัล ที่อาจส่งผลกระทบต่อตัดสินใจในการซื้อสินค้าของผู้บริโภค ที่ยิ่งไปกว่านั้น คือ ผู้ประกอบการบางรายบิดเบือนความเป็นไปได้ที่จะได้รางวัลจริง ผ่านความซับซ้อนของกรaffle ที่แต่งเติมขนาดของตัวอักษร และข้อความที่ซ่อนหลักเกณฑ์เอาไว้ ซึ่งในความเป็นจริงแล้ว ผู้ประกอบการไม่มีเจตนาที่จะแจกของรางวัล

จึงทำให้เกิดเป็นประเด็นกฎหมายขึ้นเกี่ยวกับลักษณะของการชิงโชครางวัล, ธุรกิจเช่นนี้ได้รับประโยชน์อย่างไรจากการชิงโชค, กลไกทางกฎหมายในการควบคุมการส่งเสริมการชิงโชค รวมถึงสิทธิการชดเชยเยียวยาของผู้บริโภคจากการสูญเสียซึ่งทรัพย์สินจากการชิงโชคอย่างไม่ถูกกฎหมาย เมื่อศึกษาถึงกฎหมายต่างประเทศในแง่ของการคุ้มครองผู้บริโภค ซึ่งได้แก่กลุ่มประเทศยุโรป ประเทศอังกฤษ และประเทศญี่ปุ่น ประเทศเหล่านี้มีการบัญญัติกฎหมายในการคุ้มครองผู้บริโภคจากการชิงโชค โดยเฉพาะ ในประเทศยุโรปได้กำหนดกฎหมายการค้าที่ไม่เป็นธรรม ซึ่งได้บัญญัติหลักเกณฑ์โดยเฉพาะของการไม่ได้รับรางวัลจากการชิงโชค รวมถึงสิทธิในการอ้างสิทธิเรียกร้องเพื่อให้ได้มาซึ่งของรางวัล ที่ถูกห้ามว่าเป็นการค้าที่ไม่เป็นธรรม ส่วนในประเทศอังกฤษมีการคุ้มครองผู้บริโภคจากการค้าที่ไม่เป็นธรรม ที่มีการดำเนินการตามแนวของการค้าที่ไม่เป็นธรรมของสหภาพยุโรป ในขณะที่ประเทศญี่ปุ่น สำนักงานคณะกรรมการการค้าอย่างยุติธรรมได้บัญญัติกฎหมายเกี่ยวกับการแสดงข้อความของแจ็กแถม

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ตั้งแต่ที่ประเทศไทยกำลังประสบปัญหาในการคุ้มครองผู้บริโภคจากการส่งเสริมการขายชิงโชค ดังนั้น แนวการศึกษาจะเป็นการสำรวจและเปรียบเทียบกฎหมายของไทยกับกฎหมายของต่างประเทศ ที่ได้กล่าวมาแล้วข้างต้น ซึ่งการส่งเสริมการขายชิงโชคของไทยสามารถควบคุมได้ภายใต้ประมวลกฎหมายแพ่งและพาณิชย์ และพระราชบัญญัติคุ้มครองผู้บริโภค อย่างไรก็ตามยังมีอุปสรรค หรือข้อจำกัดบางอย่างในการปรับใช้กับการส่งเสริมการขายชิงโชค ตั้งแต่ประมวลกฎหมายแพ่งและพาณิชย์เน้นคุ้มครองผู้บริโภคเป็นรายบุคคล ที่มีสิทธิเรียกร้องการเยียวยาได้ตามกฎหมายสัญญาหรือค้ำประกันว่าจะให้รางวัล แต่ไม่ใช่ว่าทุกการส่งเสริมการขายจะปรับใช้กับประมวลกฎหมายแพ่งและพาณิชย์ได้ ขณะที่จากการศึกษาพระราชบัญญัติคุ้มครองผู้บริโภคพบว่าอาจจะไม่ครอบคลุมทุกกลยุทธ์ทางการตลาด เช่นอย่างการส่งเสริมการขายแบบชิงโชค

ดังนั้น ผู้เขียนจึงขอเสนอแนะให้มีการแก้ไขเพิ่มเติมมาตรการทางกฎหมายที่เกี่ยวข้องในการควบคุมการส่งเสริมการขายแบบชิงโชค และมาตรการทางกฎหมายที่เกี่ยวข้องในการชดเชยเยียวยาผู้บริโภค เอาไว้ในพระราชบัญญัติคุ้มครองผู้บริโภค พ.ศ. 2542 ดังนี้

(1) มาตรการทางกฎหมายที่เกี่ยวข้องในการควบคุมการส่งเสริมแบบชิงโชค

ผู้เขียนขอเสนอแนะให้กำหนดหลักเกณฑ์การชิงโชค ที่อาจก่อให้เกิดความเข้าใจผิด และกำหนดคณะกรรมการว่าด้วยโฆษณาและการส่งเสริมการขายขึ้นมา ตามพระราชบัญญัติคุ้มครองผู้บริโภค พ.ศ. 2542 เป็นหน่วยงานที่มีอำนาจในการกำกับดูแลควบคุมการชิงโชค โดยเปลี่ยนชื่อจาก “คณะกรรมการว่าด้วยโฆษณา” เป็น “คณะกรรมการว่าด้วยโฆษณาและการส่งเสริมการขาย” รวมทั้งกำหนดแนวทางการตรวจสอบก่อนที่จะปล่อยการส่งเสริมการขายแบบชิงโชคเข้าสู่ตลาด โดยการกำหนดให้ผู้ประกอบธุรกิจส่งแนวทางการชิงโชคที่สงสัยว่าจะผิดกฎหมายไปให้คณะกรรมการว่าด้วยโฆษณาและการส่งเสริมการขายเป็นผู้ตรวจสอบ และกำหนดแนวทางการตรวจสอบหลังจากที่การชิงโชคเข้าสู่ตลาดแล้ว โดยบัญญัติเพิ่มอำนาจแก่คณะกรรมการว่าด้วยโฆษณาและการส่งเสริมการขายมีอำนาจสั่งห้ามผู้ประกอบธุรกิจที่ฝ่าฝืนกฎหมาย

(2) มาตรการทางกฎหมายที่เกี่ยวข้องในการชดเชยเยียวยาผู้บริโภค

ผู้เขียนขอเสนอแนะมาตรการเพิ่มเติมโดยกำหนดให้ผู้บริโภคมีสิทธิเลิกสัญญาได้ทันที ดังนั้น ผู้บริโภคก็จะรู้ถึงสิทธิของตนเองและสามารถบริหารจัดการสิทธิของตนได้อย่างถูกต้องตามกฎหมาย

คำสำคัญ: การคุ้มครองผู้บริโภค, การส่งเสริมการขายชิงโชค

1. INTRODUCTION

At present, global business scenario depends greatly on sales and sales volume in order to survive the ferocious market system. It is found that sales promotion is an important technique to increase the sale of any product. Traders spend large amounts of budget on publicizing and personal merchandising to inform, persuade and remind consumers. There are different types of sales promotion undertaken by the traders, one is known as sweepstakes¹ which is a very popular marketing strategy of sales promotion in many places. The prize offered in sales promotion can be broadly classified into two categories; the first category is a trip to a foreign location such as Paris, London, or Singapore or Thailand as a promotional attraction. The second category is durable products which can be in the form of car, watch, television, and gold, etc. which attract consumers by offering them the chance to win a valuable prize. Moreover, sweepstakes promotion can directly harm consumers' economic interests when there is no intention to provide the prizes or the prizes are not provided as offered. Since the sweepstakes offer are promoted in bad faith by exploiting misunderstanding of the consumers who thought that they will obtain the prize from sweepstakes promotion. It can be either misleading or aggressive commercial practices which are divided as follows;

1) The traders offer prize promotion without awarding the prizes described; and

2) The traders create the false impression that the consumer has already won but in fact the prizes are unavailable and the customers need to pay an extra amount of money in order to achieve the prizes.

¹ Josette Grech. "Sweepstakes, prize draws and competitions." <http://www.timesofmalta.com/articles/view/20150527/business-news/sweepstakes-prize-draws-and-competitions.569880> (accessed November 3, 2015)

2. LEGAL MECHANISMS TO CONTROL THE SWEEPSTAKES PROMOTION

Legal measures for consumer protection in Thailand is not only following The Consumer Protection Act (“CPA”) B.E. 2522 (1979), but also many specific laws which aim to protect the rights of consumers. Thus, the author shall study the CPA and related laws in legal mechanism control, the supervisor authority, and sanction as following;

2.1 Analysis related law involved sweepstakes promotion

With reference to the definition defined in Section 3 of the CPA. An advertisement states that an “Advertisement” includes any act which, by whatever means, causes the statement to be seen or known by an ordinary person for trading purposes”.

The author discovers that the definition of sales promotion is not provided in Section 3 of the CPA. However, sales promotion has objectively focuses on attracting consumer to make a purchase which is commercially benefited to trader like advertisement. Therefore, sweepstakes offer is one of sales promotion on the fallen subject to advertisement under the CPA. But, when considering the law in this Act. The Act does not impose prohibition the traders uses the sweepstakes promotion which cause damage to the consumer.

However, as the discussed above the author analysis that the principle law and the definition of the word “advertising”, If the traders’ actions do not follow the CPA, the traders found not guilty of crime because the sanction of the CPA is penal code which must be interpreted strictly by the letter of the law only.

Furthermore, according to consideration is to be given according to section 29 of The Competition Act B.E. 2542 (1999), some trades uses sweepstakes promotion to promote high value prize to compete with other businesses. Using this tactics, consumers are likely to switch the brand more often which causes the cease of business.

2.2 Supervisory authority

The study of law that may be involved the sweepstakes promotion above found that no agency has the authority specifically to oversee the use of the sweepstakes promotion. The study of law in UK, The Office of Fair Trading (OFT) was responsible for protecting consumer interests throughout the UK. the British Code of Advertising, Sales Promotion and Direct marketing (the “CAP Code”) as guidance that a consumer must not be required to incur any cost whatsoever in order to ascertain whether they have won a prize, to gain information about their prize, or to claim it. The most important and fundamental aspect of this code is the requirement that advertising must not mislead consumers. The “CAP Code administered by the Advertising Standards Authority and published by the Committee of Advertising Practice which is an industry body made up of those engaged in the advertising industry including advertisers and agencies.

While in Japan, the Act against Unjustifiable Premiums and Misleading Representations (the “AAUPMR”)² regulates excessive extra incentives premiums and representations so as to keep them within a reasonable range. Specially, the sections dealing with unfair trade practices, forbid unjust and deceptive consumer inducement and misleading advertising claims and exaggerated giveaways designed to induce purchase through misrepresentation and coercion. This law is enforced by the premium and representations of the Fair Trade Commission.

The author suggests that the Thailand should impose the committee of advertising to have more power to regulate the operation of sweepstakes promotion by changing the name of Supervise Authority from “the committee of advertising” to “the committee of advertising and sales promotion”. The advantage of this amendment is to both watching over advertising and promoting.

² The Office of Fair Trading. “The Consumer Protection from Unfair Trading Regulations: a basic guide for business.”
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284446/of979.pdf

There are the similarities between advertising and promoting since they both support each other for the greater success of each campaign launching by traders or Business Company.

Moreover, the committee of advertising and sales promotion follows the AAUPMR which is divided into 2 main measures in the same Act; the first is prohibition the prize value such as no more than 20 times the transaction amount of the cost product or exceed JPY 100,000 (limits on the value of premiums) including concern premiums over products' quality. The second is forbidden misleading information.

2.3 Regulation to control

As mention earlier, Thailand has no legal mechanism for consumer protection in sweepstakes promotion. Thus, in this part shall analysis legal mechanism for consumer protection in sweepstakes promotion of European Union with consumer protection against advertising of the CPA in order to find appropriate solutions in Thailand as following;

2.3.1 Pre-market Control Measure

The legal control measure of advertisement in the CPA has pre-market control measure under section 22. In this case, any trader who is doubtful whether the advertisement will violate or does not conform with this Act may apply to the Committee on Advertisement for consideration and opinion on such matter before advertising Section 29 of The Consumer Protection Act B.E. 2522.

While in The UCPD constitutes legislation of the European Union regulating misleading advertising and other unfair commercial practices in business-to-consumer (B2C) transaction. It applies to all commercial practices that occur before (i.e. during advertising or marketing), during and after a business-to-consumer transaction has taken place. It applies not only at the marketing stage, but also "...during and after a commercial transaction in relation to a product" according to UCPD, article 3 (1).

2.3.2 Post-market Control Measure

For post-market control measure, in the case where the Committee on Advertisement concludes that an advertisement violates section 22, the Committee on Advertisement has the power to issue one or several of the following orders in section 27 of the CPA:

- (1) To rectify the statement of method of advertisement;
- (2) To prohibit the use of certain statements as appeared in the advertisement;
- (3) To prohibit the advertisement or the use of such method for advertisement;
- (4) To correct by advertisement the possible misunderstanding of the consumers in accordance with the rules and procedure prescribed by the Committee on Advertisement.

The author thought on post-market control measure regulates advertising and sales promotion, the committee of advertising and sales promotion may make some useful comment before advertisement are launching. In other words, the traders should present the sweepstakes promotion to the committee of advertising and sales promotion before launching into the market to further prevent any loose of the consumers as well creating the good will of the company.

In respect of post-market control measure regulates advertising and sales promotion. The Committee on Advertisement and sales promotion has the power to rectify the statement of method of advertisement, to prohibit the use of certain statements as appeared in the advertisement, or to prohibit the advertisement. The author thinks that it is suitable legal mechanisms to apply with the sweepstakes promotion. In other word, the committee of advertising and sales promotion has authority order the traders rectify the statement, prohibit the use of certain statement and prohibit the advertisement or the use of such method for advertisement.

2.4 Summary of the relevant legal measures related to control sweepstakes promotion in Thailand

As analysis and compare between Thai Law and Foreign Laws above, the author's opinion is the Consumer Protection Act B.E.2522 should amend in case of the sweepstakes promotion as below;

(1)The definition

Adding the definition of "premiums" as used in this Act means any article, money or other kinds of economic gain which are given as means of inducement of customers, irrespective of whether a direct or indirect method is employed, or whether or not a lottery method is used, by an entrepreneur to another party in connection with a transaction involving goods or services which he supplies.,etc.

(2) Supervisory Authority

Imposing the committee of advertising to be more powerful in order to regulate the sweepstakes promotion is essential. The changing from "the committee of advertizing" to "the committee of advertising and sales promotion" give advantages to all since advertising and promoting support each other's works. Thus, in this case, it is no increasing duty to anyone only good not harm.

(3) Regulation to control measure

To regulate the sweepstakes promotion, sweepstakes have no choice but to pay taxes in advance to receive sweepstakes winnings. This method called Pre-market. Pre-market Control proposed the committee of advertising and sales promotion to order the trades to rectify the statement, prohibit the use of certain statements as appeared in the advertisement and prohibit the advertisement

2.5 Consumer legal remedies in sweepstakes promotion

The study found that Legal measure related the remedy of consumers who affect from sweepstakes promotion statue in the Competition Act B.E. 2542 (1999) and The Consumer Cases Procedure Act B.E.2551 (2008) are able to claim remedy in civil law. The sweepstakes offers need to considering about fraud or promises to give back their consumers.

3. ANYLYSIS MEASURES ONCLAIM REMEDY UNDER CIVIL LAW

3.1 The problem of Fraud

Since there is no clear law measure here in Thailand, many traders often send out the sweepstakes promotions to random consumers. Within the promotion itself explained the rules and valuable prizes they can win after sending back some kind of form, application, fees, coupons, gift vouchers. The worst the traders are asking consumers to even making a purchase before joining any campaign available.

Because of these justifiable reliance on fraud or a misrepresentation about some important fact and the contract or obligation have been accepted by the innocent party relying on the deception or misleading, when there is no actual sweepstakes drawing or prizes, the contract is considered voidable according to Section 159 of the CCC. Thus, the contract can be rescinded by consumer who was affected and treated as the contract had never been. However, the contracting party in bad faith is liable for damages resulting from the fraud and such party can only claim compensation for damage resulting from such fraud according to section 161 Civil and Commercial Code.

3.2 The problem of Promises to giving

A person who by advertisement promises that he will give a reward to whoever shall be a certain act is bound to give such reward to any person who does the act, even if such person did not act with a view to the reward according to Section 362 of the CCC. So, the traders offer prize in sweepstakes promotion to the consumers. Contract by advertising between the traders and consumers is occurred under Section 362 of the CCC which, a person who by advertisement promises that he will give a reward to whoever shall be a certain act is bound to give such reward to any person who does the act

4. SUMMARY OF LAWS RELATED TO CLAIM REMEDY OF CONSUMER

As analysis to the legal measures of claim remedies of consumer who was affected from the sweepstakes promotion under civil law and specific law compare with the foreign law. The author would like to propose the rights to claim remedy from sweepstakes fraud specially. Because the right to claim the remedy in civil law is complicated. The consumer has to proceed himself many steps and time-consuming. And in the case of consumer protection where the Board thinks it is fit to institute legal proceedings in the infringement of the consumer's rights or upon receipt of complaints from the consumers whose rights were infringed, the Board has the power to appoint a public prosecutor with the approval of the Director-General of the Department of Public Prosecutions, or an office of the Consumer Protection Board according to section 39

5. CONCLUSION

Sweepstakes promotion is extremely important to increase the consumption of products and services. However, sweepstakes offers used as a marketing strategy may have caused major problems for the consumers since the offer may be ambiguous and can be interpret as suggestions to purchase the products in order to get the prize. The victims are deliberately lured into believing that they

have just won or are likely to win a sweepstakes when in fact they have neither won nor are in fact likely to win such a prize.

6. RECOMMENDATIONS

The followings are recommendations for improving the legal mechanisms for consumer protection in sweepstakes promotion in Thailand. Therefore, the author suggests the Consumer Protection Act (“CPA”) B.E. 2522 should be amended to subject of consumer protection in sweepstakes promotion for consumer protection are effective, up to date, fair, and appropriate as following;

(1)The definition

Adding the definition of "premiums" as used in this Act means any article, money or other kinds of economic gain which are given as means of inducement of customers, irrespective of whether a direct or indirect method is employed, or whether or not a lottery method is used, by an entrepreneur to another party in connection with a transaction involving goods or services which he supplies.,etc.

(2) Supervisory Authority

Imposing the committee of advertising to be more powerful in order to regulate the sweepstakes promotion is essential. The changing from “the committee of adverting” to “the committee of advertising and sales promotion” give advantages to all since advertising and promoting support each other’s works. Thus, in this case, it is no increasing duty to anyone only good not harm.

(3) Regulation to control measure

To regulate the sweepstakes promotion, sweepstakes have no choice but to pay taxes in advance to receive sweepstakes winnings. This method called Pre-market. Pre-market Control proposed the committee of advertising and sales promotion to order the trades to rectify the statement, prohibit the use of certain statements as appeared in the advertisement and prohibit the advertisement

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