VENABLE LLP

advertising and marketing

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We Need Your Vote!

Voting for the crowd-sourced education sessions at the 2013 ERA Great Ideas Summit closes on October 26, 2012. Two sessions featuring Venable attorneys are up for consideration, and we would appreciate your support. The sessions are:

#5 "Up, Down & Sideways: How Enforcement Actions Traverse the Value Chain," featuring Venable partner **Jeffrey D. Knowles**. This session focuses on how and why enforcement actions move from a marketer to its suppliers and from a single supplier to a community of client marketers and/or business associates. Learn why, in today's enforcement climate, you are truly your brother's keeper.

#12 "Email 101 – Build a Best in Class Email Revenue Machine," featuring Venable partner **Gregory J. Sater**. This session highlights strategies to build a best in class email strategy that is sustainable, scalable and compliant.

Click here to cast your vote for both of these informative sessions, and we look forward to seeing you in Miami.

Analysis

NY AG Rewrites the Rules for Cause Marketers

On October 18, the New York Attorney General ("NY AG") released a much-anticipated follow-up to its "Pink Ribbon" cause-marketing initiative. The NY AG's office has often helped set enforcement trends nationwide and this recent guidance, which has far-reaching effects for both charities and companies engaged in cause marketing, will likely be no exception, write Venable attorneys **Jonathan L. Pompan** and **Kristalyn J. Loson** in a recent post to Venable's advertising law blog, **www.allaboutadvertisinglaw.com**.

Last October the NY AG celebrated National Breast Cancer Awareness Month by sending comprehensive questionnaires to more than 40 charities and nearly 150 companies inquiring about details of promotions in which the sale of a product or service is advertised to benefit a breast cancer cause. Based on those responses, the NY AG's office created its "Five Best Practices for Transparent Cause Marketing," which provide insight into what regulators may look for when identifying deceptive and misleading advertising in cause-marketing promotions. The five Best Practices are:

1. Clearly describe the promotion;
2. Allow consumers to easily determine the donation amount;
3. Be transparent about what is not apparent;
4. Ensure transparency in social media; and
5. Tell the public how much is raised.

Although the five recommended Best Practices seem simple enough, write Pompan and Loson, the report encompasses a number of recommendations with a level of detail that go beyond practices currently used by many cause-related marketers. For example, the Best Practices advocate for a "donation information" label for packaging and websites that would be similar to the nutrition label found on food items and would provide key information about the campaign.

In addition, the Best Practices identified a list of recommended disclosures that is noticeably longer than the disclosures required by any existing state statute. The Best Practices also give a nod to modern technology by including standards for social media promotions used by companies to raise money for charity.

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Honors and Awards

Top ranked in *Chambers USA* 2012

Law Firm of the Year, National Advertising, *U.S. News and World Report*, 2011-2012

Top-Tier Firm *Legal 500*

For more information about Venable's award-winning Advertising and Marketing practice, please visit our website at www.Venable.com/Advertising-and-Marketing

According to Pompan and Loson, one step taken by the NY AG essentially guarantees that the Best Practices will become the de facto standard for cause-marketing disclosures. The NY AG's press release about the Best Practices announced that the nation's two largest breast cancer charities had both voluntarily agreed to follow the Best Practices in all of their cause-marketing endeavors. This effectively means that companies who want to hold a "pink ribbon" promotion will also be playing by these new rules. In the highly competitive cause marketing marketplace, write Pompan and Loson, other charitable causes will certainly adapt the Best Practices to avoid losing ground to the pink ribbon charities.

Click here to read the full post by Pompan and Loson on Venable's advertising law blog, **www.allaboutadvertisinglaw.com**.

Click here to read the NY AG's press release and view other materials about the Best Practices.

Sherf Decision Invalidates CA Law Prohibiting Class Action Waivers

The California Court of Appeals' October 16, 2012 decision in *Sherf v. Rusnak/Westlake, et al.* invalidates a California law prohibiting class action waivers in consumer contracts, write Venable attorneys **Thomas E. Gilbertsen**, **Ari N. Rothman** and **Molly T. Cusson** in a recent article.

The *Sherf* decision drew on the United States Supreme Court's 2011 ruling in *AT&T Mobility LLC v. Concepcion*, which noted that the principal purpose of the Federal Arbitration Act is to ensure the enforcement of private arbitration agreements according to their terms in order to streamline proceedings.

According to the authors, the *Sherf* decision reinforces the strong policy favoring the enforcement of arbitration agreements. It allows marketers (including online marketers) to use arbitration waivers to compel arbitration and avoid class actions, even where state law creates a statutory right to bring a class action. However, because generally applicable contract defenses such as fraud, duress, and unconscionability may invalidate arbitration agreements, marketers must continue to make clear and conspicuous disclosures of all contract terms to ensure that their arbitration agreements will be deemed enforceable by the courts.

Click here to read the full article on Venable's website.

With Advertising Liability, the Buck Does Not Stop

Exactly who can be held responsible for a particular advertisement? These days it seems like practically everyone, except perhaps the viewer, write Venable attorneys **Amy Ralph Mudge**, **Randal M. Shaheen** and **Maura A. Marcheski** in a recent post to Venable's advertising law blog, **www.allaboutadvertisinglaw.com**.

Generally speaking, any party involved in the "creation" of a marketing claim is open to liability regardless of the primary source of the product's advertisement, the attorneys write. This means that many parties can be held liable under the theory that they were involved in the creation of the advertisement.

The post cites examples where retailers, licensors and catalog companies have been held liable for false advertising claims although they had no role in the creation of the advertising. In addition, advertising agencies, commercial producers and spokespeople can be held liable if they knew, or had reason to know, that the claims their actions helped to broadcast were false.

When it comes to risk mitigation, an indemnification agreement can be one litigation-focused strategy, but it will not protect a company from Federal Trade Commission (FTC) scrutiny. A better approach, the attorneys write, is to exercise caution with any product claim and to always make a good faith attempt to request and review substantiation materials before publishing, advertising, distributing or selling a particular product. The FTC has indicated that it is better to have made an attempt, even a flawed one, to review substantiation materials than to never have asked for the materials at all.

Click here to read the full post on Venable's advertising law blog, **www.allaboutadvertisinglaw.com**.

Ninth Circuit Disconnects Best Buy's "Dual Use" Robocall Argument

On October 17, the U.S. Court of Appeals for the Ninth Circuit ruled that Best Buy Stores violated the Telephone Consumer Protection Act (TCPA) and Washington state law by failing to obtain consumers' consent before placing prerecorded calls urging them to redeem their rewards points, writes Venable attorneys **Leonard L. Gordon** and **Mikhia E. Hawkins** in a recent article. The ruling reversed a lower court decision that Best Buy's "robocalls" did not violate the TCPA or a similar Washington state law.

The TCPA prohibits, with some exceptions, prerecorded and artificial voice calls to residential telephone lines without the prior express consent of the call recipient. However, robocalls that do not include an advertisement may be placed without the recipient's prior consent.

The Ninth Circuit cited Federal Communications Commission (FCC) policy regarding "dual purpose" calls when it overturned the lower court decision and found that Best Buy's prerecorded calls violated the TCPA because the calls urged consumers to shop at Best Buy, notwithstanding the informational components of the calls. Noting that the plaintiff received robocalls from Best Buy after repeatedly requesting not to receive such calls, the court further determined that the plaintiff did not give prior consent to the calls by agreeing to the rewards program privacy policy.

Marketers should also know that earlier this year, the FCC rules implementing the TCPA were amended to require that consumers provide prior express *written* consent before marketers could robocall them. That requirement goes into effect on October 16, 2013.

Click here to read the full article on Venable's website.

Click here to read the Ninth Circuit's decision.

Update on Legal, Regulatory Developments in Lead Generation Advertising

Earlier this week, Venable attorneys **Jonathan L. Pompan** and **Alexandra Megaris** made a presentation to the LeadsCouncil, an association for the online lead generation industry, on the legal and regulatory developments affecting lead generation advertising.

The presentation covered congressional pressure on the FTC to investigate third-party online advertising used by private sector schools; the Presidential Executive Order on the G.I. Bill to protect service members and veterans; and the latest developments from the Consumer Financial Protection Bureau. Also, state Attorneys General enforcement activity was discussed. The session concluded with a discussion of the role that self-regulation can play to help minimize government intervention and promote consumer protection.

Click here to view the presentation.

Upcoming Events

ad:tech New York - New York City
November 7-8, 2012
ad:tech spans the full ecosystem of advertising, digital marketing and technology that moves business forward. Please join Venable attorneys at our booth on the show floor, #1735.

To schedule a meeting with one of our attorneys, please **click here**.

To register, please **click here**.

34th Annual Promotion Marketing Association Marketing Law Conference - Chicago
November 12-14, 2012
Venable is proud to sponsor the PMA Marketing Law Conference, featuring the nation's leading speakers from the Marketing and Advertising Law Bar and from major brands and prominent regulators. Venable partner **Melissa Landau Steinman** serves as co-chair and will present a session on gift cards and coupons. Joining her as speakers at the conference are Venable partner **Roger A. Colaizzi**, who will address class action and governmental investigation defense, and Venable partner **Leonard L. Gordon**, whose topic is telemarketing law enforcement.

Please join Venable at PMA. To register, please **click here**.

An Update from Washington: Impending Income, Gift and Estate Tax Law Changes

November 13, 2012 - Venable LLP, Baltimore, MD
November 14, 2012 - Venable LLP, Washington, DC
The end of 2012 promises many changes to our tax laws. Please join us as we discuss the outcome of the national election as it relates to overall tax policies. Our panel will address how to cope with the impact these changes will have on your business and your clients.

To register, please **click here**. There is no cost to attend this event.

Click here to subscribe to Venable's Advertising and Marketing RSS feed and receive the Venable team's insight and analysis as soon as it is posted.

Visit Venable's advertising law blog at www.allaboutadvertisinglaw.com**.**

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