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Honors and Awards

Top ranked in *Chambers USA*
2013

Announcement

Enjoy the Holiday and Take a Break

Venable's *Advertising Law News and Analysis* will not publish next week, July 4, or the following week, July 11. From everyone here at Venable, have a safe and enjoyable Independence Day. We look forward to returning to your inbox on July 18, when we will publish *Advertising Law News and Analysis*' second anniversary issue.

News

Former AmEx Chief Advertising Counsel Joins Venable

On June 24, Venable announced that **Po Yi**, the former chief advertising counsel at American Express, has joined the firm as a partner in Venable's New York office.

As chief counsel to the Chief Marketing Officer and Global Advertising and Brand Management group, as well as to the company's New Member Marketing and Consumer Card Marketing groups, Ms. Yi played an instrumental role in executing American Express' iconic advertising campaigns over the past five years.

This included supporting one of the country's most innovative and successful sponsorship programs and playing a key role in expanding American Express' presence in digital and social media. She also negotiated and managed alliances with premier entertainment, sports, social media and technology brands.

[Click here](#) to read the press release announcing Ms. Yi's arrival at Venable.

[Click here](#) to read Ms. Yi's biography.

Analysis

Here's My Number, Text Me Maybe?

A recent California case involving text messages sent by online payment platform PayPal, adds to the growing number of cases that have grappled with the Telephone Consumer Protection Act's (TCPA) prior express consent requirement, write Venable attorneys **Ellen T. Berge** and **Annie H. Lee** in a recent post to Venable's advertising law blog, www.allaboutadvertisinglaw.com.

In the PayPal case, a federal judge ruled that a consumer had consented to receive text messages from PayPal when he voluntarily gave his cell phone number to the company. However, Berge and Lee write, a few weeks prior to the PayPal case, a Florida federal district court rejected the argument that the mere act of providing a phone number constitutes consent, at least in the debtor-creditor context.

In light of this uncertain landscape, companies would be wise to obtain consent from consumers that is clear and unmistakable, rather than rely on "implied" consent through an individual's conduct. Making the change immediately is a good idea because new Federal Communications Commission (FCC) rules that



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



Top-Tier Firm *Legal 500*

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take effect in October 2013 will require companies to have "prior express written consent" before using an autodialer to call or text consumers for marketing purposes. Under these new requirements, Berge and Lee write, the mere provision of a phone number will clearly not suffice as consent.

[Click here](#) to read the full text of the post by Berge and Lee on Venable's advertising law blog, www.allaboutadvertisinglaw.com.

Picking up the Tab for Disgorgement

In many advertising cases, the Federal Trade Commission (FTC) seeks disgorgement as equitable monetary relief. However, a June 11 decision by New York's highest court may have altered the legal landscape when it comes to questions about whether there is insurance coverage for advertisers faced with disgorgement claims, write Venable partner [Leonard L. Gordon](#) and summer associate Emma Wischusen* in a recent post to Venable's advertising law blog, www.allaboutadvertisinglaw.com.

The case concerned J.P. Morgan's suit against its insurers for coverage of \$160 million in disgorgement paid to the Securities and Exchange Commission (SEC) by Bear Stearns prior to the firm's acquisition by J.P. Morgan. Because Bear Stearns had insurance coverage for liabilities incurred by wrongful acts, J.P. Morgan maintains that its insurance should have covered the disgorgement payment.

Although a lower court dismissed the case, noting that disgorgement would not be much of a deterrent if insurance companies pick up the tab, the Court of Appeals refused to dismiss the case. The Court was bothered by the lack of precedent for disgorgement payments that include restitution for money that landed in someone else's pocket, as was the case in the Bear Stearns matter.

Although this case is far from over, this decision may provide ammunition for companies seeking to have their insurers pick up some or all of the tab for disgorgement paid to the FTC. This is especially important given the increasingly wide net the FTC is now casting when naming defendants involved in alleged illegal conduct, and its efforts to hold those entities jointly and severally liable for equitable monetary relief.

[Click here](#) to read the full blog post by Gordon and Wischusen* on Venable's advertising law blog, www.allaboutadvertisinglaw.com.

* Wischusen is a Venable summer associate and is not admitted to practice law.

Obama to Nominate New FTC Commissioner

Last week, the White House announced that President Obama will nominate Terrell McSweeney to fill the open Democratic commissioner seat at the FTC. Over the past decade, Ms. McSweeney has worked on numerous national political campaigns and held policy positions in the executive branch. She currently serves as Chief Counsel for Competition Policy and Intergovernmental Relations in the Antitrust Division of the Department of Justice.

Venable partners [Amy Ralph Mudge](#) and [Randal M. Shaheen](#), and summer associate John Mavretich*, write in a recent post to Venable's advertising law blog that if she is confirmed by the Senate, they expect Ms. Sweeney to focus more of her attention and priorities on competition and antitrust matters rather than consumer protection, at least initially.

Since Chairman Leibowitz stepped down, there have been an equal number of commissioners on either side of the fence – Republican Commissioners Ohlhausen and Wright, and Democratic Commissioner Brill, and Chairwoman Ramirez. If she is confirmed, McSweeney will give the Democrats a third seat and a majority on the Commission.

[Click here](#) to read the full text of the post by Mudge, Shaheen, and Mavretich* on Venable's advertising law blog, www.allaboutadvertisinglaw.com.

* Mavretich is a Venable summer associate and is not admitted to practice law.

Upcoming Events

[ACI's Advanced Regulatory and Compliance Summit on Food and Beverage Marketing & Advertising - Washington, DC](#)

July 16-18, 2013

At the third Advanced Regulatory and Compliance Summit, gain practical knowledge about meeting SSA standards, labeling challenges for energy and caffeine drinks, COPPA reform, and how to maintain the delicate balance of marketing to children amid the obesity epidemic. Venable partner [Todd A. Harrison](#) will present on best labeling practices amid the rise of safety concerns and increased Congressional scrutiny.

[Click here](#) to learn more.

[NBJ Summit 2013 - Dana Point, CA](#)

July 23-26, 2013

Bringing together nutrition industry leaders and influential power brokers, the 16th Annual NBJ Summit is the premier leadership event for strategic thinking and discussion on the progress, opportunities and challenges facing the industry. Venable partners [Todd A. Harrison](#) and [Claudia A. Lewis](#) will join panels alongside industry thought leaders and senior executives to advise upon key regulatory matters affecting the medical foods segment and nutrition industry at-large.

[Click here](#) to learn more.

[DRMA Summer Networking Bash - Irvine, CA](#)

July 25, 2013

Connect with direct response marketing industry leaders and professionals at the Venable-sponsored DRMA Summer Bash. The DRMA is an alliance of professional marketers that facilitates business opportunities through networking, education, branding and exposure.

[Click here](#) to learn more.

[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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