



May 24, 2012

Issue Editors**Jeffrey D. Knowles**jdknowles@Venable.com
202.344.4860**Roger A. Colaizzi**racolaizzi@Venable.com
202.344.8051**Gary D. Hailey**gdhailey@Venable.com
202.344.4997**In This Issue****Jeffrey D. Knowles**jdknowles@Venable.com
202.344.4860**Leonard L. Gordon**lgordon@Venable.com
212.370.6252**Gregory J. Sater**gjsater@Venable.com
310.229.0377**Randal M. Shaheen**rmshaheen@Venable.com
202.344.4488**Jonathan L. Pompan**jlpompan@Venable.com
202.344.4383**Ari N. Rothman**anrothman@Venable.com
202.344.4220**Honors and Awards**Winner of the 2010 and 2011
Chambers USA Award for
Excellence**VOTE NOW:**

Do you enjoy the insights provided each week by Venable's Advertising Law News and Analysis? Here's an opportunity to learn directly from Venable attorneys and have them answer your questions on two of the hottest topics facing marketers today. Venable partners **Jeffrey D. Knowles** and **Gregory J. Sater** both have session concepts in contention for a spot on the agenda at the Electronic Retailing Association's **2012 D2C Conference**. The agenda for D2C, the largest direct response industry conference in the nation, is determined via crowdsourcing.

[Click here](#) to learn more about the proposed sessions and [vote](#) for both Sater's "Riding the Social Media Rollercoaster" panel (#18 on the ballot) and Knowles' "Driving Change in Electronic Retailing: Enforcement, Self-Regulation and Legislation" panel (#22 on the Ballot).

Analysis**CFPB Solicits Public Comment on Pre-paid Cards**

On May 23, the Consumer Financial Protection Bureau (CFPB) published an Advance Notice of Proposed Rulemaking indicating that it plans to study the creation of federal regulations for the pre-paid card industry.

The CFPB's press release cites a recent study by the Mercator Advisory Group reporting that the pre-paid market totals \$57 billion and will likely grow at a rate of 42 percent per year from 2010-2014. The release also states that the total dollar amount loaded onto pre-paid cards is projected to hit \$167 billion by 2014.

The CFPB's chief concerns center on the following issues, which will be examined during the rulemaking:

- Fees and Terms Disclosure: The CFPB will evaluate the best way to balance the need for disclosure with the fact that many cards are purchased at retail locations, where space for disclosures is limited;
- Unauthorized Transactions: The CFPB will evaluate the costs and benefits of card issuers providing limited liability protection from unauthorized transactions; and
- Product Features: The CFPB seeks public input about the costs, benefits, and consumer protection issues related to certain product features, such as loans and savings accounts, attached to pre-paid cards.

Over the next 60 days, the CFPB will accept public comments about the pre-paid card industry and issues related to the areas called out in the notice of proposed rulemaking.

[Click here](#) to read an article written by Venable of Counsel **Jonathan L. Pompan**, which discusses the CFPB's notice.

[Click here](#) to read the CFPB's press release and view the full text of the Advance Notice of Proposed Rulemaking.

FTC Judge Rules on Forbidden Claims for the Forbidden Fruit



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



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

The pomegranate has played a prominent role in myth and legend for millennia. A May 21 decision by a Federal Trade Commission (FTC) Administrative Law Judge (ALJ) has, once again, placed the tasty fruit at the center of an epic tale, write Venable partners [Leonard L. Gordon](#) and [Randal M. Shaheen](#) in a recent post on Venable's advertising law blog, www.allaboutadvertisinglaw.com.

The FTC alleged that pomegranate marketer POM Wonderful ran numerous ads making deceptive claims that its products reduced the risk of, prevented or treated a number of maladies, including heart disease, prostate cancer and erectile dysfunction. The FTC also alleged that POM deceptively claimed that it had clinical studies, research and trials to substantiate its advertising claims.

While the ALJ found for the FTC on all counts, he rejected both of the FTC's proffered substantiation requirements. After surveying recent federal court decisions, he found no support for the FTC's position that these health claims need be substantiated by double-blind, randomized, placebo-controlled trials. Instead, he fell back upon the FTC's traditional definition that "competent and reliable scientific evidence" should be determined "by what the evidence shows that experts in the relevant field would deem adequate." In addition, the judge rejected the FTC's proposal that POM be required to seek prior approval from the Food and Drug Administration (FDA) before making disease claims. He found such relief unnecessary and unprecedented. Instead, the judge ordered only that POM have competent and reliable scientific evidence to support such claims.

Although the battle between POM and the FTC is far from over, the ALJ's decision may, for the time being, heighten resistance to the FTC's recent attempts to alter its standard substantiation requirements in many of its orders.

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

New Insurance Helps Small Companies Defend IP

There is a new type of intellectual property insurance, writes Venable partner [Gregory J. Sater](#) in a May 22 piece for *Inside Counsel*, which may level the playing field by enabling smaller companies to defend their intellectual property from infringement by larger competitors.

Smaller companies, Sater writes, are typically at a disadvantage when a larger competitor infringes on a successful piece of intellectual property. Although the smaller company may have a strong case, the harsh reality is that litigation is time-consuming and exceedingly expensive. The larger company usually knows the smaller company will simply not be able to go the distance.

This new insurance, called "intellectual property abatement/enforcement" insurance, provides sufficient resources to enable smaller companies to enforce their IP rights. These policies have the potential to materially change the calculus when the larger alleged infringer analyzes its litigation versus settlement options.

[Click here](#) to read Sater's *Inside Counsel* article.

Appellate Court Ruling Changes Game for Email Campaigns

Balsom v. Trancos, a recent California appellate court decision, has serious implications for companies – and their service providers – using commercial email to market products and services, write Venable attorneys [Jeffrey D. Knowles](#) and [Ari N. Rothman](#) in the May edition of *Response* magazine.

The ruling requires that commercial emails sent from or received in California must contain, in the "from" line, a domain name that is registered to the sender which can be determined by performing a WHOIS look-up, or the name of the sender or marketer on whose behalf the email was sent. According to Knowles and Rothman, the ruling and the size of the California market essentially dictates that direct marketers and the companies they hire – including affiliate networks – can no longer send commercial emails that contain both a generic "from" line and are sent from a proxy/private registered domain name.

[Click here](#) to read the article, which is on page 78 of the publication.

NCN X Spring 2012 - Washington DC

May 22-23, 2012

Venable was the proud host of the Nutrition Capital Network Spring 2012 Investor Meeting on May 22-23, 2012. NCN Investor Meetings are the premier matchmaking and networking events for strategic and private equity investors in the nutrition industry. There were more than 20 nutrition and health & wellness companies seeking capital. Venable partner and event organizer **Todd A. Harrison** addressed the attendees. Venable partner and former FDA Chief Counsel **Ralph S. Tyler** delivered the welcome address.

Upcoming Events

ACI Litigating & Resolving Advertising Disputes - New York

June 19-20, 2012

Venable is a proud sponsor of the ACI Litigation & Resolving Advertising Disputes Conference. Please join Venable's **Thomas E. Gilbertsen** and **Amy Ralph Mudge**. Gilbertsen will speak on the explosion of class action lawsuits, and Mudge will moderate a panel of judges providing the judicial perspective on advertising litigation.

For registration information, please [click here](#).

ACI Hatch-Waxman Boot Camp - San Diego

June 25-26, 2012

Attend this essential event to understand the interplay of intellectual property and FDA regulation relative to pharma/biotech patents in light of Hatch-Waxman and recently released biosimilars guidance. Additionally, ensure that you are aware of the intersection of the America Invents Act with Hatch-Waxman. Please join Venable partner **David G. Adams** when he presents "An In-Depth Look at 180-Day Exclusivity" on June 26, 2012 from 11:15 a.m. - 12:15 p.m. PDT.

For registration information, please [click here](#).

Engredea Asia Market Quickstart - Shanghai

June 29-30, 2012

Developed by Engredea, the Market Quickstart is a teaching program, offered exclusively by New Hope's Engredea Portfolio, that helps companies in the healthy and natural products industry prepare for international business especially in the United States. The program focuses upon companies providing healthy ingredients for supplements, food, beverage and personal care. Please join Venable partner **Claudia A. Lewis-Eng**, who will address the attendees in Shanghai, China on June 29, 2012.

[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.

CALIFORNIA MARYLAND NEW YORK VIRGINIA WASHINGTON, DC

1.888.VENABLE | www.Venable.com

© 2012 Venable LLP. This alert is published by the law firm Venable LLP. It is not intended to provide legal advice or opinion. Such advice may only be given when related to specific fact situations that Venable has accepted an engagement as counsel to address. ATTORNEY ADVERTISING.

[Click here to unsubscribe](#)

575 7th Street, NW, Washington, DC 20004

© 2012 Venable LLP | www.Venable.com | 1.888.VENABLE