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ADVERTISING LAW

NEWSLETTER OF THE ADVERTISING, MARKETING & MEDIA PRACTICE GROUP OF MANATT, PHELPS & PHILLIPS, LLP

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States May Target Marketers in Downturn

As states seek to restore tax revenue lost in a downturn or recession, they may turn their regulatory sights on marketers, getting more assertive about enforcing laws governing misleading advertising and other areas.

According to lawyers speaking at the Promotional Marketing Association's 2008 Integrated Marketing Conference on April 8, state agencies historically look to close budget gaps in part by issuing fines to marketers and other businesses who violate state regulations.

Speaking at the conference, Manatt partner **William Heberer** said that 2008 has witnessed an increase in the rate of state enforcement actions from previous years. "Our office has definitely seen a spike in state activity in the last few months across many marketing areas: telemarketing, a lot of online marketing, marketing to children, some pure disclosure cases. They're bringing more cases than I've seen in the last three to four years," Heberer said.

Two areas in particular that may experience closer regulatory scrutiny are green marketing and campaigns directed at particular ethnic groups, lawyers said. "I can't say I've seen a case around that yet, but I can foresee seeing a case," Heberer said. "If you engage in a telemarketing campaign to Hispanics or some kind of e-mail offer, but then your Web site or your online loyalty program are only in English, then that

UPCOMING EVENTS

October 21, 2008
ACI: Sports Sponsorship Advertising and IP

Topic:
"When Retired Players Sue: From Coscarart v. Major League Baseball to Parrish v. NFLPA"

Ronald S. Katz

"Morality and an Agreement's Mortality--Taking Appropriate Measures to Avoid the Termination of an Endorsement Deal"

Linda Goldstein

The Carlton Hotel
New York, NY

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October 22, 2008
D.C. Bar CLE Seminar

Topic:
"Copyright Law and Litigation"

Kenneth M. Kaufman

D.C. Bar Conference Center
Washington, D.C.

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November 20-21, 2008
PMA's 30th Annual
Promotion Marketing Law
Conference

Topic:
"Navigating the Potholes: The Evolving Landscape for

person can't enjoy the full use and benefit of a product that was sold to them in Spanish but provided to them in English."

Green marketing may also be subject to more intense examination, since it is a new, rapidly growing area in which marketers will be swimming in relatively untested waters. The Federal Trade Commission is currently contemplating revising its decade-old "green guides" for marketers and is actively seeking enforcement actions to help it establish its authority in this expanding area, lawyers remarked.

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ConsumerAffairs.com Faces Defamation Lawsuit

ConsumerAffairs.com touts itself as an online community for consumers to complain about every manner of consumer problem, from shabby furniture sets to crooked car dealers.

Former journalist James Hood founded the Los Angeles-based Web site 10 years ago. He selected the name to invoke the myriad state agencies that fine businesses for consumer protection violations or channel complaints to state attorneys general, but ConsumerAffairs.com actually sends many complaints lodged on its site to a class-action law firm in Chicago.

The business model of ConsumerAffairs.com has critics like Tom Nemet, owner of Nemet Motors in Queens, charging the site with being more interested in potential class actions than in helping consumers. In March Nemet sued ConsumerAffairs.com for defamation in U.S. District Court for the Eastern District of Virginia, alleging that the site has been publishing "false, malicious and libelous" complaints about his business. Nemet is seeking \$2 million in damages and an order forcing Hood to delete the complaints. Nemet says that his rivals have been using the complaints to hurt his business.

Nemet argues that ConsumerAffairs.com's name is likely to deceive consumers, who confuse it with state agencies such as the New York City Department of Consumer Affairs. He also contends that ConsumerAffairs.com misleads consumers because its true purpose appears to be selling online advertising and referring potential matters to lawyers rather than helping consumers.

Hood counters that the complaints against Nemet are protected speech. The site is funded by ad revenue, including some from plaintiffs' lawyers, although Hood claims that he

Sweepstakes, Games & Contests"

[Linda Goldstein](#)

Topic:

"Consumer Product Safety: Hear from the Regulators How the New Laws Affect Your Promotion"

[Kerrie L. Campbell](#)

Marriott Downtown Magnificent Mile
Chicago, IL

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December 4-5, 2008 Film & Television Law

Topic:

"Product and Music Placement, Branded Entertainment: Issues and Litigation"

[Linda Goldstein](#)

Topic:

"The Value of Fame: Understanding the Right of Publicity"

[Mark S. Lee](#)

Century Plaza Hyatt Regency
Los Angeles, CA

[For more information](#)

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OUR PRACTICE

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doesn't have a commission or bonus arrangement with any firm. Hood guesses that complaints on the site have generated 50 or 60 class actions.

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Europe Wants Faster Purge of Online Data

An advisory group of the European Commission is recommending that Internet service providers purge user information after six months.

The suggestion was made in a 29-page "opinion" issued April 4 by the EC's Article 29 Working Party. It singles out ad-supported search engines, versus search functions embedded in Web sites.

Although the recommendations are not yet enforceable, observers expect that the EC will adopt them.

The Working Party argues that privacy in the use of search engines is key because "an individual's search history contains a footprint of that person's interests, relations, and intentions," which can be exploited by both business and national security functions.

The group wants search engines to:

- Utilize personal data — such as search query histories, IP addresses, and unique cookie identifiers — only for "legitimate purposes."
- Eliminate and anonymize data that is no longer legitimately useful.
- Inform users about data collection and storage practices.
- Set cookies to last "no longer than demonstrably necessary."
- Store search queries separately from a user's IP address or other identifier.
- Allow users access to any stored "personal data," such as past search queries or other information "revealing their behavior or origin."
- Respect the wishes of Internet operators to opt out of having their sites crawled, indexed, and cached through means such as the robots.txt file or the

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Noindex/NoArchive tags.

- Take better measures to keep personally identifiable data out of search results.

Privacy advocates applauded the recommendations. They note that the suggested six-month data retention period is much shorter than those adopted by the biggest U.S. search engines last summer.

Search engines have argued against the recommendations, contending that they have to retain a certain amount of user data to improve the quality of search results, keep services secure from attacks, tailor ads to users, and help in law enforcement probes.

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Do Not Call List Made Permanent

Telephone numbers on the National Do Not Call Registry will not have to be renewed, under the Do-Not-Call Improvement Act of 2007, which became effective in February 2008. More than 157 million phone numbers are now listed on the Registry.

The Federal Trade Commission will continue to purge the list of phone numbers that have been disconnected and reassigned to other customers. Consumers can also take their phone numbers off the list themselves by calling 1-888-382-1222 (TTY 1-866-290-4236) from the phone number they wish to delete.

The new law sets the yearly fees paid by telemarketers to access the Registry in fiscal year 2009 at \$54 for each area code of data accessed or \$14,850 for access to every area code in the Registry, whichever is less. Access to the first five area codes of data is free, and certain organizations will continue to be able to access all data at no charge. For each fiscal year beginning after fiscal year 2009, the fees will be increased at the rate of change of the consumer price index, unless the change is less than 1 percent, in which case the fees will not be adjusted.

The agency also issued a release clarifying telemarketing rules for cell phones:

Cell phone numbers are not being released to telemarketers, contrary to a number of e-mails being sent around the Internet. To be free of most telemarketing calls, it is not even necessary to register cell phone numbers on the DNC list.

Federal Communications Commission rules ban telemarketers from calling cell phone numbers with automated dialers, which are standard in the industry. The national associations representing telemarketers have stated that their members do not intend to start calling consumers' cell phones.

The FTC reminded consumers that there is no deadline to register a home or cell phone number and that registration is free. It does not permit private companies to register consumers, and it cautions that Web sites or phone solicitors that claim they can or will register or confirm a consumer's name or phone number on a national list — especially those who charge a fee — are a scam.

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New York Passes Internet Tax Bill

New York state lawmakers have passed a bill that would force many out-of-state Internet retailers to collect sales taxes on products shipped to addresses in the state.

If signed by New York Governor David Paterson, the law, dubbed the Amazon Tax, would require online retailers like Amazon to collect state taxes because several affiliates are located in the state, even though the retailer itself has no operations or employees in New York.

It is not obvious that the measure would pass constitutional muster. A 1992 U.S. Supreme Court ruling, *Quill v. North Dakota*, held that out-of-state retailers cannot be forced to collect sales tax on products sent to states where they have no physical presence. The question rides on the term "physical presence." New York claims that online retailers such as Amazon have a physical presence in the state because they derive sales through affiliates located there.

The Direct Marketing Association and the National Retail Federation are both assessing the bill's legality. DMA Vice President of Government Affairs Mark Micali stated that the DMA believes the bill "goes against the spirit" of *Quill v. North Dakota*. National Retail Federation Vice President Maureen Riehl said that the NRF's e-tail community "has been pretty worked up about the bill, and I suspect we'll see some court action shortly."

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