



November 3, 2009



In This Issue

- [Drug Firms Halt Search Ads After FDA Warning](#)
- [Class Action Filed Over Sidekick Data Loss](#)
- [Judge Dismisses Case Against NebuAd ISPs](#)
- [Committee Urges Repeal of Maine Kid Privacy Law](#)
- [Court Upholds L.A.'s Billboard Ban](#)
- [House Bill Could Cover Financial Service Ads](#)
- [Promotion Marketing Association's 31st Annual Promotion Marketing Law Conference](#)
- [Word of Mouth Marketing Association Annual Summit](#)

Drug Firms Halt Search Ads After FDA Warning

Pharmaceutical companies have responded to an online ad crackdown by the Food and Drug Administration by virtually abandoning search ad marketing.

According to a study by Web metrics measurement firm ComScore, paid search ads by pharmaceutical companies plummeted 84 percent between March 26 of this year and the end of June.

On March 26, the FDA issued letters to 14 drug manufacturers targeting 48 brands for violating the agency's fair balance ad guidelines. The letters stated that sponsored-link search ads for the identified drugs were misleading because they did not include information on the associated risks.

The letters were sent by the FDA even though the guidelines are for print and broadcast, not online or social media. Many drug marketers had operated under the assumption of the unwritten "one-click rule," under which ads that direct the consumer to a Web site offering fair balance, including the appropriate risk information, would pass muster.



Recognized for Excellence in
the areas of Advertising,
Marketing and Media



Named a Top Practice
Nationally for Marketing and
Advertising



Practice leaders included
among the prestigious *Best
Lawyers* in the country

But the warning letters belied that assumption, and drug marketers immediately began to pull paid search ads, according to the study. ComScore found that sponsored link exposures (paid search) fell 59 percent just in the week following the issuance of the warning letters, from 10.5 million paid search ads to 4.3 million. By the end of June, search ads for specific drugs had plunged by 84 percent.

According to ComScore, vanity and unbranded link exposures also declined during the same three-month time period, even though these marketing methods were not targeted by the FDA letters. Unbranded sites, which provide information on the condition and treatment but do not directly promote the brand drug, declined 35 percent between March and June to slightly more than 1 million exposures. Vanity URLs, which generically describe a health condition and then redirect the user to the brand or drug's Web site, declined 11 percent in June to 3.2 million average exposures versus March.

Why it matters: The drug companies may have a good legal argument that the FDA guidelines do not apply to search ads, but they believe that the bad publicity generated by a warning letter – whatever its legal soundness – is not worth the risk. The FDA is holding hearings next month to launch the process of setting online ad guidelines, but the process is expected to take up to a year. It's likely that FDA rules governing online advertising won't be in place until 2011.

[back to top](#)

Class Action Filed Over Sidekick Data Loss

A class action lawsuit has been filed against Microsoft and T-Mobile over a server outage earlier this month that caused the loss of the personal data of thousands of Sidekick smartphone customers. The lawsuit charges T-Mobile, Microsoft, and Microsoft subsidiary Danger with falling short on marketing pledges that the Sidekick data service would securely and automatically back up user data.

The complaint filed in federal court in San Francisco states that “Defendants breached their duty to Plaintiff and the other Class members by failing to adequately insure the safety, security and availability of the data belonging to Plaintiff and the Class members. Specifically, and further, Defendants negligently failed to invest the resources, including hardware, software, procedures, maintenance, security, back up procedures, and the training and testing necessary to insure that the functions and operations Defendants assumed would operate to permit Plaintiff and the members of the Class to access and keep safe and secure that data they entrusted to Defendants.”

The lawsuit, which seeks class action status, requests compensatory damages and injunctive relief for defendants' alleged failure “to protect Sidekick user data, and false advertising,” according to a news release.

UPCOMING EVENTS

November 5-6, 2009
31st Annual Promotion
Marketing Law Conference
Topic: "The Battle of the Brands"
Moderator: [Chris Cole](#)
Fairmont Hotel
Chicago, IL
[for more information](#)

...
November 5-6, 2009
31st Annual Promotion
Marketing Law Conference
Topic: "Sweepstakes & Contests: Lend Me Your Ear and I'll Sing You a Song..."
Speaker: [Linda Goldstein](#)
Fairmont Hotel
Chicago, IL
[for more information](#)

...
November 5-6, 2009
31st Annual Promotion
Marketing Law Conference
Topic: "Who's Sorry Now: Defending against FTC, State AG's, and Class Actions"
Speaker: [Clayton Friedman](#)
Fairmont Hotel
Chicago, IL
[for more information](#)

...
November 18-20, 2009
4th Annual Word of Mouth
Marketing Association Summit

During the weekend of October 3, a server outage at Danger, which developed the Sidekick and manages customers' data plans, disrupted Sidekick data service. In the wake of the outage, T-Mobile and Microsoft announced that Sidekick customers who reset their phones during the outage most likely had lost all of their personal data, such as contacts and calendar appointments. The main servers and their backups had all failed. T-Mobile ended up suspending all Sidekick sales. The next week, the companies announced that some customers' data may yet be retrievable. T-Mobile also has offered affected customers a free month of Sidekick data service and a \$100 gift card.

Why it matters: The disaster demonstrates one of the dangers of relying on cloud computing, or Internet-based resources. Among other costs, it's virtually inevitable that such a catastrophe will result in class action lawsuits.

[back to top](#)

Judge Dismisses Case Against NebuAd ISPs

A federal judge has dismissed a privacy lawsuit against six Internet service providers who worked with NebuAd, the now-shuttered behavioral ad company.

The court in the Northern District of California found that it lacked jurisdiction over the ISPs — Bresnan, CenturyTel, Embarq, Knology, WOW, and Cable One — which had no contact with the state except for their contract with the Redwood City-based NebuAd.

“The six ISP Defendants have sustained their burden of demonstrating that haling them to court in California is unreasonable under these circumstances,” the court wrote. “Exercising jurisdiction over them would not comport with notions of fair play and substantial justice.”

Last year, a group of plaintiffs sued NebuAd and six ISPs over beta tests of a behavioral targeting platform that used deep-packet inspection technology to track users' online activity. The plaintiffs alleged that the platform violated federal wiretap laws and other statutes. The ISPs sought dismissal on the grounds that the court lacked personal jurisdiction because they were not based in the state and none of the plaintiffs were California residents. They also argued that NebuAd alone was responsible for any privacy violations.

Although the court agreed that it lacked jurisdiction, it rejected the ISPs' argument that they were not responsible for any unlawful activity. “Defendants claim they did nothing more than allow NebuAd's devices to be installed. However, adopting that position — and ignoring the consequences (and profits) that flowed from the installation of NebuAd's devices — is precisely the kind of ‘rigid and formalistic’ analysis that this Court must avoid,” the court wrote.

Topic: "FTC Developments"

Speaker: [Anthony DiResta](#)

Paris Hotel

Las Vegas, NV

[for more information](#)

...

December 7, 2009

ERA Spotlight Session

Topic: "Endorsements and Testimonials"

Speakers: [Linda Goldstein](#) of Manatt Phelps & Phillips, Rich Cleland of the FTC and Julie Coons of the Electronic Retailing Association as moderator

Digital Sandbox Networking Event Center

New York, NY

[for more information](#)

...

December 14, 2009

ERA Spotlight Session

Topic: "Endorsements and Testimonials"

Speakers: [Linda Goldstein](#) of Manatt Phelps & Phillips, Rich Cleland of the FTC, Jonathan Gelfand of Product Partners, LLC and Julie Coons of the Electronic Retailing Association as moderator

Hilton Long Beach & Executive Meeting Center
Long Beach, CA

[for more information](#)

...

NebuAd consistently denied any violation of user privacy. The company maintained that all data collected was anonymous because the company didn't know users' names or phone numbers or keep copies of the IP addresses associated with users. NebuAd also said that it did not collect sensitive data and that users could opt out of the platform. But the platform generated controversy because, unlike prior behavioral targeting companies that collected data solely from a network of publishers, NebuAd, through its ISP partners, had access to all Web activity by users. The beta tests prompted Congressional hearings, after which NebuAd shut down.

Why it matters: Privacy lawsuits are very popular in the plaintiffs' bar even when it's not obvious what, if any, damages resulted from the alleged violations. The plaintiffs' attorney who filed the case said he intends to refile complaints against the ISPs in other states. The ISPs are the more inviting targets because NebuAd is defunct. Although the plaintiffs may still be able to collect damages from NebuAd's insurance company, the insurer may resist any such claims on the grounds that willful misconduct is excluded from coverage.

[back to top](#)

Committee Urges Repeal of Maine Kid Privacy Law

A committee of the Maine legislature has voted to recommend the repeal of a privacy law that severely limits collecting or publishing data about minors. According to committee staff attorney Peggy Reinsch, the state's judiciary committee agreed with the state attorney general and a slew of organizations who argued that the statute violates the First Amendment and unconstitutionally restricts interstate commerce.

Reinsch added, however, that the committee is recommending a more limited law addressing the collection of minors' health-related information. "They wanted to applaud the original intent of the bill," she said.

The original law, "An Act To Prevent Predatory Marketing Practices against Minors," bans companies from knowingly gathering personal or health-related information from youth under 18 without parental consent. The bill, which went into effect on September 12, also prohibits companies from selling or transferring health information about minors that identifies them, regardless of how the data was collected.

The Maine legislature enacted the bill earlier this year without opposition. But over the summer, the Maine Independent Colleges Association, Maine Press Association, Reed Elsevier, and NetChoice brought a lawsuit challenging the statute. The plaintiffs agreed to a dismissal of the lawsuit after Attorney General Janet Mills said she would not enforce the act. The court also opined in its dismissal order that the law likely violates the First Amendment.

December 17, 2009

ERA Spotlight Webinar Session

Topic: "Endorsements and Testimonials"

Speakers: [Linda Goldstein](#) of Manatt Phelps & Phillips, Rich Cleland of the FTC, Jonathan Gelfand of Product Partners, LLC and Julie Coons of the Electronic Retailing Association as moderator
[for more information](#)

...

January 21-22, 2010

6th Annual Film, TV & New Media Law Conference

Topic: "Brand Integration Deals"

Speaker: [Jordan Yospe](#)
Millennium Biltmore Hotel
Los Angeles, CA

[for more information](#)

...

January 26-27, 2010

American Conference

Institute's 23rd National

Advanced Forum on

Advertising Law

Speaker: [Linda Goldstein](#)

New York Marriott Downtown

New York, NY

[for more information](#)

...

January 26-27, 2010

American Conference

Institute's 23rd National

Critics of the measure argue that it is unconstitutionally vague and overbroad, because it appears to ban activities such as publishing the names of children under 18 in a newspaper in certain circumstances and impermissibly restricting the rights of teenagers to receive information and participate in social networking sites. They also argue that the law is an unlawful restriction on interstate commerce and is preempted by the federal Children's Online Privacy Protection Act, which limits the ability to collect data about children under 13.

Why it matters: The committee's recommendation that the law be repealed is welcome news for a wide array of companies that were potentially affected by it. But anyone whose business may involve the collection and use of personal data of minors is advised to monitor the Maine legislature for any replacement bill aimed at limiting the collection of minors' information, health-related or otherwise.

[back to top](#)

Court Upholds L.A.'s Billboard Ban

A federal judge has declined to enjoin the enforcement of the Los Angeles City Council's new outdoor advertising law, which prohibits the installation of new digital billboards and multistory supergraphic signs across the city.

The decision came in response to a complaint filed by Liberty Media Corp. seeking an injunction blocking enforcement of the new law and forcing the city to permit the installation of 16 new signs. The court found that Liberty failed to show a likelihood that it would prevail with its procedural arguments against the month-old ordinance. City officials said all 16 signs sought by Liberty were supergraphics, which can cover the entire side of a building.

The council approved a temporary moratorium in December, hoping to buy time to craft an ordinance that would withstand a court challenge. In the weeks after that vote, Liberty challenged the ban, contending that the city had made exceptions for "favored high-profile developments," including the W Hotel in Hollywood. The council responded in August by passing a permanent sign ban as advised by the city attorney's office. Soon after, Liberty argued that the council had violated the state's open meetings law and its own city charter by enacting the law. The court disagreed. "None of these claims has merit," it wrote.

Why it matters: Los Angeles is defending the new law against more than 20 legal challenges from billboard companies. As with all outdoor advertising regulations, L.A.'s new billboard law must comply with First Amendment protections.

[back to top](#)

Advanced Forum on
Advertising Law

Speaker: [Terri Seligman](#)

New York Marriott Downtown
New York, NY

[for more information](#)

...

Newsletter Editors

[Jeffrey S. Edelstein](#)
Partner
jedelstein@manatt.com
212.790.4533

[Linda A. Goldstein](#)
Partner
lgoldstein@manatt.com
212.790.4544

Our Practice

Whether you're a multi-national corporation, an ad agency, a broadcast or cable company, an e-commerce business, or a retailer with Internet-driven promotional strategies, you want a law firm that understands ... [more](#)

[Practice Group Overview](#)
[Practice Group Members](#)

Info, Resources & Links

[Subscribe](#)
[Unsubscribe](#)
[Newsletter Disclaimer](#)
[Manatt.com](#)

House Bill Could Cover Financial Service Ads

A controversial proposal to create a Consumer Finance Protection Agency would establish a whole new regulatory system for financial services advertising.

The legislation would also restructure the Federal Trade Commission, the ad industry's main regulator, by shifting much of its regulatory authority over the financial services industry to the new agency.

The ad provisions are part of a larger package aimed at overhauling regulation of the financial services sector. The bill creates a new agency that would examine lending practices, investigate financial fraud of all kinds, and determine whether loans are issued and marketed fairly. One provision in the bill, which is currently making its way through the House of Representatives, could make media outlets liable for running misleading financial ads.

Unsurprisingly, the Association of National Advertisers and the American Association of Advertising Agencies, along with a slew of other business interests, oppose the bill in its current form. Despite widespread opposition, the legislation is moving quickly through the House, with some observers expecting it to be voted on before Thanksgiving.

The new agency would be in charge of fighting much of the financial fraud now overseen by the FTC. Advertising industry groups argue that this may create confusing areas of regulatory overlap. For example, the legislation gives authority for financial fraud committed via telemarketing to the new agency, but leaves authority for telemarketing fraud in general with the FTC. Proponents of the legislation counter that areas of overlap happen all the time. For instance, the FTC and Food and Drug Administration both oversee drug advertising.

The ANA sent a letter to Barney Frank (D-Mass.), chairman of the House Financial Services Committee, that raises questions about the extent to which knowledgeable staff and resources would be transferred away from the FTC. FTC commissioners also opposed the new agency at hearings in July.

For their part, media groups are concerned that the legislation could impose liability for running misleading ads. In turn, this would require media companies to vet the content of the advertising they buy and sell much more closely.

One provision allows the new agency to create new rules for what is unlawful to run in an ad, and another expands the liability for running an unlawful ad to anyone who "knowingly or recklessly provide[s] substantial assistance to another person." According to the Advertising Coalition, a 14-member coalition of trade groups and big ad companies, "this language could create a very large net that reaches virtually anyone involved in preparing, placing, receiving, televising or printing an advertisement."

Why it matters: The provisions raise concerns for advertising and media companies, which could become subject to a confusion of overlapping agency regimes and new laws. Industry observers argue that eventually such restrictions, if onerous or confusing enough, could have a chilling effect on advertising in the financial services sector.

[back to top](#)

Promotion Marketing Association's 31st Annual Promotion Marketing Law Conference

November 5–6 /Chicago, IL

To Take Advantage of Manatt's VIP Discount, click [here](#). Enter code: sprma

For more information click [here](#)

[back to top](#)

Word of Mouth Marketing Association Annual Summit

November 18–20 /Las Vegas, NV

Topping the agenda for WOMMA's upcoming Annual Summit in Las Vegas is a keynote address by Chuck Harwood, Assistant Deputy Director, Bureau of Consumer Protection, of the Federal Trade Commission, followed by a roundtable panel discussion of ethics, endorsements and disclosure. Roundtable panelists include Manatt partner and WOMMA General Counsel, Tony DiResta.

Click [here](#) to register

[back to top](#)

ATTORNEY ADVERTISING pursuant to New York DR 2-101(f)

Albany | Los Angeles | New York | Orange County | Palo Alto | Sacramento | San Francisco | Washington, D.C.

© 2009 Manatt, Phelps & Phillips, LLP. All rights reserved.