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CLIENT ALERT

**SEPTEMBER 2014**

# ONLINE MARKETING "MAGIC" INSTALLMENT 2: THE COVER-UP IS WORSE THAN THE CRIME

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For many of our clients, we draft and negotiate contracts and recommend business strategies on the front end aimed at minimizing disputes. We also get involved when disputes and litigation arise on the back end. This dual-role provides us with the opportunity to minimize potential harm by contracting for transparency when reviewing vendor agreements. However, many clients do not submit all of their contracts for legal review. At a minimum, therefore, we encourage clients to proactively read the "fine print" when entering into any significant contract or endeavor.

However, strategic deal terms alone cannot prevent a transaction from going sideways. What if you still fall victim to a marketing scam despite your best efforts? What do you do now? How do you determine whether it is a case of fraud or simply an unsuccessful campaign? Can you just file an action against the vendor and rely on discovery to obtain all the relevant information you are going to need?

Proving fraud in this space can be extremely difficult. You may become suspicious of a vendor's Internet marketing campaign that has produced little or no results, but a lot of smoke does not mean you can prove there was a fire. By the time you have figured out there was a problem the vendors will cite data compression, data extraction, and other technical difficulties that prevent them from producing evidence of their performance. Even if the contract contemplates this situation, the vendor can use its superior technical knowledge to thwart your efforts by handing over falsified results or producing data that is nearly impossible to understand. The vendor's hope is to create a system of fraud so complicated and foreign to a fact finder that it prevents you from proving the scheme's existence.

In this installment, I will briefly review these and other common problems that may arise when attempting to prove the existence of fraudulent Internet-based marketing schemes. I will then explain how litigation holds, spoliation (a legal term for the destruction of evidence), and novel burden-shifting rules assist in overcoming the typical hurdles.

## *Pay-Per-Click Advertising*

There are several different types of Internet-based marketing options. As the name suggests, in pay-per-click advertising, you pay the vendor each time an individual clicks on your ad and is re-directed to your website. However, a vendor can artificially generate clicks using computer programs called “bots” or “click farms” that pay people to continuously click on ads.

## *Cost-Per-Impression Advertising*

In cost-per-impression advertising, you pay every time a certain number of people view their ad. Vendors may use “invisible traffic” to generate cost-per-impression advertising revenue at your expense.

## *Permission-Based E-mail Marketing*

Permission-based e-mail marketing is when you pay a vendor to send advertisements to an e-mail list the vendor has compiled. Unfortunately, as the last article described, reality often falls short of your expectations when: (1) the list you bought does not match the promised attributes; (2) the e-mails are never sent; or (3) the e-mails are sent to “ghost” e-mail addresses that do not reach people who are actually interested in the advertised products.

The issues with pay-per-click and cost-per-impression fraud came to a head around 2006 as technological advances have now made it easier to determine which clicks are legitimate and which are fake. Google and Facebook have played a large part in cleaning up these practices after being implicated in litigation for a failure to monitor this type of fraud in several federal court cases in 2010, 2011, and 2012. Nonetheless, if you are a victim, as noted, it is potentially difficult to uncover or prove fraud because vendors coordinate the programs and have complete control over the underlying data that would reveal who is in fact clicking on the advertisements. They can easily manipulate the analytics they offer as proof of their campaign’s legitimacy, which makes independent verification a complicated task.

Addressing e-mail marketing fraud remains a more difficult situation because large companies like Google lack a strong incentive to confront the problem. They have never been implicated in fraudulent email marketing campaigns because their only involvement is providing the e-mail addresses.

## Legal Solutions

If you believe you may be the victim of marketing fraud, there are two important legal principles for non-lawyers to understand that greatly assist in overcoming the difficulties of proving the case: **the Litigation Hold and Burden Shifting**.

### *Litigation Holds*

*Zubulake v. UBS Warburg LLC* is a 2003 Federal Court decision that remains one of the leading cases regarding "litigation holds" and the spoliation of evidence. It provides a three-part test for implementing sanctions where evidence has spoliated:

1. Whether the party had control over evidence and an obligation to preserve it at the time it was destroyed;
2. Whether the party had a culpable state of mind; and
3. Whether the evidence was relevant.

It is easy to show that the vendor had control over the information, but a major question arises as to when exactly the "litigation hold" should have started. In other words, when should the bad guy have known they had an obligation to segregate and safeguard (and not delete) documents, draft e-mails, sent e-mails, trashed e-mails, etc. The obligation to preserve evidence arises when a party should know a dispute is brewing. Although what constitutes "notice" can vary from state to state, the best practice is to send a formal written demand letter once there is any indication that a problem may exist with a marketing program. That letter will create a hard date that many opponents make the mistake of ignoring.

The initial inquiry is a critical moment. You do not need to allege fraud in an initial letter, just clearly state there is going to be a dispute if they do not answer your questions and resolve the issues. We always advise our clients to never settle for a vendor's vague explanations.

### *The Cover-Up is Worse than the Crime*

When parties ignore their obligations to maintain evidence (well prior to actual litigation) courts will later assume they purposely destroyed damaging evidence that would have helped prove the opposing party's case. In addition to assuming the lost evidence was adverse to the defendant, courts can also impose monetary sanctions in the form of punitive damages or attorneys' fees, or even, in rare cases, issue a decision on the whole case based on this conduct. The potential for money sanctions is tempting, but, as described below, requesting the court to shift the burden of proof is often a more powerful remedy.

### *Burden Shifting*

Burden shifting can offer you a tremendous advantage. Typically, if you have been wronged, courts require you to satisfy the "burden" of presenting evidence that demonstrates the opposing side's fault. Courts in several states have acknowledged the need for shifting the burden of proof when spoliation has occurred. Essentially, the vendor must now show it acted properly. A burden shift will almost guarantee your success at trial and provide substantial leverage during settlement negotiations. If the evidence has been spoliated, the vendor may be incapable of producing anything that demonstrates actual performance. Hidden or destroyed evidence is sometimes even better than the real thing.

What do you think is less of a burden: (1) Catching your child with his/her hand in the cookie jar while you happen to have a camera handy to snap a picture, or (2) Having your child be responsible for explaining how their hand wasn't in the cookie jar after a cookie went missing.

## Your Obligations

Finally, you should be aware of your own duty to preserve electronically stored information, particularly as more and more retailers transition towards electronic record keeping. The benefits of burden shifting are available not only for you when combating fraudulent marketing, but also for parties bringing actions against you. You should be aware that preserving evidence includes both a duty to refrain from affirmative efforts to destroy evidence and a duty to intervene in order to prevent the loss of data due to passive, routine operations. You should maintain electronic records for at least the statute of limitations period, and, once given notice of a potential dispute, they should identify and suspend any features in their system that may automatically delete potentially relevant information. As described above, spoliated evidence can lead to disastrous consequences for any defendant, including you.

## Conclusion

It is essential that you insist on front end transparency with vendors when entering into costly contracts for internet marketing campaigns. If you are nonetheless a victim of fraud, you may still be able to employ litigation holds, spoliation sanctions, and burden shifting arguments to use the vendor's technical expertise and control of information to your advantage.