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Anti-Spam Statutes and Cases

Issue: Does state regulation of unsolicited commercial e-mail (spam) violate the dormant Commerce Clause?

I. California

A. Statutes

1. Cal. Bus. & Prof. Code § 17538.4

California Business & Professions Code § 17538.4, known as the “Bowen bill,” regulates the transmission of unsolicited emails. The Bowen bill contains two major provisions. The first provision, laid out in sections (a) through (c), generally prohibits the sending of unsolicited commercial email. There is an exception to this rule. Unsolicited commercial email may be sent if (1) the sender establishes an email address or toll-free telephone number which (2) the recipient can send mail to or call (3) in order to stop receiving unsolicited commercial email from the sender.

The general rule is stated in the first paragraph of section (a): “No person or entity conducting business in [California] shall . . . electronically mail (e-mail) . . . documents consisting of unsolicited advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit.” § 17538.4(a).

Subsection (2) contains the exception to the above rule: Unsolicited commercial e-mail may be sent if the sender “establishes a toll-free telephone number or valid sender operated return e-mail address that the recipient of the unsolicited documents may call or

e-mail to notify the sender not to e-mail any further unsolicited documents.”

§ 17538.4(a)(2).

Sections (b) and (c) impose further restrictions: “All unsolicited . . . e-mailed documents subject to this section shall include a statement informing the recipient of the toll-free telephone number that the recipient may call, or a valid return address to which the recipient may write or e-mail . . . notifying the sender not to . . . e-mail the recipient any further unsolicited documents to the . . . e-mail address, or addresses, specified by the recipient. . . . In the case of e-mail, the statement shall be the first text in the body of the message and shall be of the same size as the majority of the text of the message.”

§ 17538.4(b). “Upon notification by a recipient of his or her request not to receive any further unsolicited . . . e-mailed documents, no person or entity conducting business . . . shall . . . e-mail . . . any unsolicited documents to that recipient. § 17538.4(c).

The second major provision of the Bowen bill requires that unsolicited commercial email be labeled as such. The subject line must begin with the four characters “ADV:”. If the email advertises adult goods, the subject line must begin with the eight characters “ADV:ADLT”. § 17538.4(g).

2. Cal. Bus. & Prof. Code § 17538.45

California Business & Professions Code § 17538.45, known as the “Miller bill,” also regulates the transmission of unsolicited emails. The Miller bill allows email providers, such as Internet Service Providers (ISPs), to sue people who send unsolicited commercial email either (1) from an ISP-administered email address or (2) to ISP-administered email addresses. The ISPs would sue based on trespass to their computer systems and could recover for damages caused by network clogs or crashes.

The Miller bill also makes it illegal to send unsolicited commercial email with a false or misleading return email address (also known as “spoofing”).

B. Cases

1. Ferguson v. Friendfinder, Inc.

Plaintiff, Mark Ferguson, sued defendant, Friendfinder, Inc for sending him unsolicited commercial email under Cal. Bus. & Prof. Code § 17538.4. The case was tried in San Francisco Superior Court in front of Judge David A. Garcia. After requesting additional briefs on the issue of the dormant Commerce Clause, the judge dismissed the plaintiff’s complaint. In his order, the judge stated that § 17538.4 “unconstitutionally subject[ed] interstate use of the Internet to inconsistent regulations, therefore violating the dormant Commerce Clause of the United States Constitution.” Judge’s order sustaining defendants’ demurrer without leave to amend, 6-2-00.

II. Washington

A. Statutes

1. RCW §§ 19.190.010 – 19.190.050

Washington’s Unsolicited Electronic Mail Act (UEMA, RCW §§ 19.190.010 – 19.190.050), makes it illegal to send unsolicited commercial email with a spoofed return address, a false or misleading subject line, or misrepresented or obscured path information. Applies when sending email (1) from a computer in Washington or (2) to an email address that belongs to a Washington resident. Recipient can recover damages of \$500 or actual damages, whichever is greater. ISP can recover damages of \$1000 or actual damages, whichever is greater. Lastly, an ISP can in good faith block *without liability* the receipt or transmission through its servers of email that violates this statute.

B. Cases

1. Washington v. Heckel d/b/a Natural Instincts

Superior Court of the State of Washington, Kings County

Washington Attorney General sued Jason Heckel, an Oregon resident, for sending unsolicited electronic email to Washington residents in violation of the UEMA. The judge dismissed the complaint, stating that the UEMA (1) violated the Commerce Clause of the United States Constitution and (2) was unduly restrictive and burdensome. Judge's order on civil motion granting defendant's summary judgment, 3-10-00. The Attorney General claimed that he would appeal the decision.