

LEGISLATIVE COUNSEL

Diane E. Wynn-Vine

CHIEF DEPUTIES

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Daniel A. Weitzman

PRINCIPAL DEPUTIES

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Michael R. Kelly
Romulo I. Lopez
Kirk S. Louis
James A. Marsala
William K. Stark
Jill Thom
Michael H. Upton
Richard B. Weisberg

OFFICE OF LEGISLATIVE COUNSEL

State Capitol, Suite 3021
Sacramento, California 95814

TELEPHONE (916) 341-8000

FACSIMILE (916) 341-8020

WEBSITE www.legislativecounsel.ca.gov

E-MAIL administration@legislativecounsel.ca.gov



May 10, 2004

Honorable Kevin Murray
4082 State Capitol

UNSOLICITED COMMERCIAL E-MAIL ADVERTISING - #22332

Dear Senator Murray:

QUESTION

Does the federal Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (15 U.S.C. Secs. 7701 and following) preempt the provisions of Article 1.8 (commencing with Section 17529) of Chapter 1 of Part 3 of Division 7 of the Business and Professions Code?

OPINION

The federal Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (15 U.S.C. Secs. 7701 and following) preempts the provisions of Article 1.8 (commencing with Section 17529) of Chapter 1 of Part 3 of Division 7 of the Business and Professions Code, except Section 17529.5 of the Business and Professions Code and the liability provisions applicable to that section.

ANALYSIS

By way of background, the federal Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (15 U.S.C. Secs. 7701 and following; hereafter the CAN-SPAM Act) was enacted on December 16, 2003, to regulate commercial electronic mail messages under the authority of the commerce clause of the United States Constitution (cl. (3), Sec. 8, Art. I, U.S. Const.; hereafter the commerce clause). Under the commerce clause, Congress has broad authority to enact measures regulating interstate commerce (see *Atlanta*

DEPUTIES

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Motel v. United States (1964) 379 U.S. 241). This authority is complete in itself, and is unlimited except as specified in the United States Constitution (*North America Co. v. Securities and Exch. Commission* (1946) 327 U.S. 686, 704-705).

Article 1.8 (commencing with Section 17529) of Chapter 1 of Part 3 of Division 7 of the Business and Professions Code¹ (hereafter Article 1.8) regulates unsolicited commercial e-mail advertisements. A commercial e-mail advertisement is defined for the purpose of Article 1.8 as meaning "any electronic mail message initiated for the purpose of advertising or promoting the lease, sale, rental, gift offer, or other disposition of any property, goods, services, or extension of credit" (subd. (c), Sec. 17529). Article 1.8 prohibits a person or entity located in California from initiating or advertising in unsolicited commercial e-mail advertisements (hereafter UCEA), prohibits a person or entity from initiating or advertising in UCEA sent to a California e-mail address (Sec. 17529.2), prohibits a person or entity from collecting e-mail addresses or registering for multiple e-mail addresses using automated means for the purpose of initiating or advertising in, or enabling initiating or advertising in, UCEA sent from California or to a California e-mail address (subd. (a) and (c), Sec. 17529.4), prohibits the use of an e-mail address obtained by automated means to initiate or advertise in UCEA sent from California or to a California e-mail address (subd. (b), Sec. 17529.4), and prohibits a person or entity from initiating or advertising in a commercial e-mail advertisement containing certain falsified, misrepresented, obscured, or misleading information (Secs. 17529.5). Article 1.8 also authorizes the recipient of a commercial e-mail advertisement transmitted in violation of these prohibitions, the electronic mail service provider, or the Attorney General to bring an action to recover actual damages,² authorizes these parties to recover specified liquidated damages, and provides for an award of reasonable attorney's fees and costs to a prevailing plaintiff, as specified (Sec. 17529.8).

The question at issue is whether the CAN-SPAM Act preempts the provisions of Article 1.8.³ It is a familiar and well-established principle that the supremacy clause (cl. 2, Art. VI, U.S. Const.) invalidates state laws that "interfere with, or are contrary to, federal law" (*Hillsborough County v. Automated Med. Labs.*(1985) 471 U.S. 707, 712; hereafter *Hillsborough*).

¹ All further section references are to the Business and Professions Code, unless otherwise specified.

² Article 1.8 provides that a cause of action that is in existence prior to January 1, 2004, is governed by the law in effect at the time the cause of action arose (Sec. 4, Ch. 487, Stats. 2003).

³ This opinion does not address the validity of Article 1.8 under the "dormant" commerce clause of, or any other provisions of, the United States Constitution,

State law is preempted by federal law (1) where federal law preempts state law in express terms, (2) where a scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress “left no room” for supplementary state regulation, or (3) where state law actually conflicts with federal law (*Id.*, at p. 713).

The first question under *Hillsborough* is whether the CAN-SPAM Act expressly preempts state law. In this regard, the CAN-SPAM Act states “[t]his Act supersedes any statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, except for any such statute, regulation, or rule that prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto” (15 U.S.C. Sec. 7707(b)(1)). Thus, the CAN-SPAM Act expressly preempts the provisions of a state law governing the sending of commercial e-mail advertisements, except those provisions that prohibit falsity or deception. The CAN-SPAM Act defines a commercial electronic mail message as meaning any “electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service” (15 U.S.C. 7702 (2)).

Sections 17529.2 and 17529.3, and subdivision (b) of Section 17529.4, regulate commercial e-mail advertisements for products and services. Subdivisions (a) and (c) of Section 17529.4 regulate activities that involve e-mail addresses and e-mail accounts and are directly related to the sending of UCEA. These provisions do not regulate activities involving falsity or deception. Therefore, we think that they come under the express prohibition in the CAN-SPAM Act and are thus preempted.

On the other hand, the remaining provision of Article 1.8, Section 17529.5, prohibits commercial e-mail advertisements sent from California or sent to a California e-mail address that (1) contain or are accompanied by a third party’s domain name without the permission of the third party,⁴ (2) contain or are accompanied by falsified, misrepresented, obscured, or forged header information, or (3) have a subject line that would be likely to mislead a recipient about a material fact regarding the contents or subject matter of the message. We think that Section 17529.5 prohibits commercial e-mail advertisements involving falsity or deception and that its provisions, and the related liability provisions in Section 17529.8, are not preempted by the express prohibition in the CAN-SPAM Act.

However, we next review whether the provisions of Section 17529.5, and the related liability provisions, are in actual conflict with any provisions of the CAN-SPAM Act and preempted on that basis. A conflict between federal and state law arises when compliance with

⁴ An e-mail that contains or is accompanied by a third party’s domain name without the permission of the third party may imply that the sender is associated with the third party, that the e-mail was sent with the approval of the third party, or that the third party is the sender of the e-mail, and thus may be deceptive and misleading.

both federal and state regulations is a physical impossibility or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress (*Hillsborough*, supra, at p. 713). Where there is a conflict between federal and state law, state law is nullified to the extent that it actually conflicts with federal law (*Ibid.*).

The CAN-SPAM Act makes it unlawful for a person to initiate the transmission of a commercial e-mail message, or a transactional or relationship message, that contains, or is accompanied by, header information that is materially false or materially misleading (15 U.S.C. Sec. 7704). The CAN-SPAM Act subjects a person who violates these provisions to specified fines and imprisonment (18 U.S.C. Sec. 1037(b)) as indicated above, and imposes fines and penalties if a person (1) accesses a protected computer without authorization, and intentionally initiates the transmission of multiple commercial electronic mail messages from or through the computer, (2) uses a protected computer to relay or retransmit multiple commercial e-mail messages, with the intent to deceive or mislead recipients, or any Internet access service, as to the origin of the messages, (3) materially falsifies header information in multiple commercial e-mail messages and intentionally initiates the transmission of the messages, (4) registers, using information that materially falsifies the identity of the actual registrant, for five or more electronic mail accounts or online user accounts or two or more domain names, and intentionally initiates the transmission of multiple commercial electronic mail messages from any combination of the accounts or domain names, or (5) falsely represents himself or herself to be the registrant or the legitimate successor in interest to the registrant of five or more Internet Protocol addresses, and intentionally initiates the transmission of multiple commercial e-mail messages from the addresses, or conspires to do so (15 U.S.C. Sec. 1037(a)). Section 17529.5 makes it unlawful for a person or entity to advertise using a commercial e-mail advertisement sent from California or to a California e-mail address where the e-mail advertisement contains or is accompanied by a third party's domain name without the permission of the third party, where the e-mail advertisement contains or is accompanied by falsified, misrepresented, obscured, or forged header information, or where the e-mail advertisement has a subject line that a person knows would be likely to mislead a recipient about a material fact regarding the contents or subject matter of the message. Although the CAN-SPAM Act provisions and Section 17529.5 overlap, we think that compliance with both the federal and state regulations is possible and that there is no actual conflict between them.

Finally, in the CAN-SPAM Act, Congress determined that (1) there is a substantial government interest in regulation of commercial e-mail on a nationwide basis, (2) senders of commercial e-mail should not mislead recipients as to the source or contents of the mail, and (3) recipients of commercial e-mail have a right to decline to receive additional commercial e-mail from the same source (15 U.S.C. Sec. 7701). The CAN-SPAM Act was intended to further these objectives. We do not think that the provisions in Section 17529.5, or the related liability provisions in Section 17529.8, stand as an obstacle to the accomplishment and execution of these purposes and objectives. Therefore, we conclude that Section 17529.5, and the liability

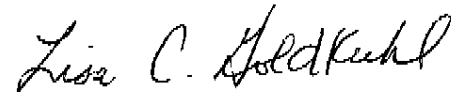
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provisions related thereto, are not in conflict with the CAN-SPAM Act and are not preempted by that act on the basis of an actual conflict between federal law and state law.

Accordingly, it is our opinion that the federal Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (15 U.S.C. Secs. 7701, and following) preempts the provisions of Article 1.8 (commencing with Section 17529) of Chapter 1 of Part 3 of Division 7 of the Business and Professions Code, except Section 17529.5 of the Business and Professions Code and the liability provisions applicable to that section.

Very truly yours,

Diane F. Boyer-Vine
Legislative Counsel



By
Lisa C. Goldkuhl
Deputy Legislative Counsel

LCG:jwb