



California Appeals Court Issues Important Ruling on Commercial E-mail

The California Court of Appeal has held that California's anti-spam statute (1) is not pre-empted by the federal CAN-SPAM Act, and (2) that it imposes strict liability for anyone who advertises in a commercial e-mail that violates the California statute, whether or not such advertiser has knowledge of the violation.

The plaintiff in *Hypertouch, Inc. v. ValueClick, Inc.*, provides e-mail service to about 100 customers inside and outside California. Hypertouch filed suit against defendants ValueClick, various ValueClick subsidiaries and PrimaryAds, claiming that they violated Cal. Bus. & Prof. Code § 17529.5(a) which provides:

It is unlawful for any person or entity to advertise in a commercial e-mail advertisement either sent from California or sent to a California electronic mail address under any of the following circumstances:

- (1) The e-mail advertisement contains or is accompanied by a third-party's domain name without the permission of the third party.
- (2) The e-mail advertisement contains or is accompanied by falsified, misrepresented, or forged header information. . . .
- (3) The e-mail advertisement has a subject line that a person knows would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message.

Hypertouch claimed that e-mails sent by ValueClick affiliates contained deceptive "Subject" lines, such as "Get a \$300 Gift Card FREE," when in fact a consumer had to pay a fee

or participate in more promotions offers to get the gift card. Hypertouch also alleged that e-mails sent by ValueClick affiliates contained falsified header information because the "From" or "To" fields did not accurately reflect the identity of the sender or recipient of the e-mail.

The federal CAN-SPAM Act includes a provision that expressly pre-empt state statutes that regulate the use of commercial e-mail "except to the extent that any such statute ... prohibits falsity or deception in any portion of a commercial [e-mail]." (15 U.S.C., § 7707, subd. (b)(1).) ValueClick argued that the CAN-SPAM Act pre-empt § 17529.5 because § 17529.5 does not require a plaintiff to establish each element of common law fraud. Although the trial court agreed with this argument and granted summary judgment to the defendants, the appeals court did not agree and reversed.

After consulting the language of § 17529.5 and the CAN-SPAM Act and the legislative history of both laws, the court held that the CAN-SPAM Act's pre-emption provision "was largely intended to target state statutes imposing content requirements on commercial e-mails, while leaving states free to regulate the use of deceptive practices in commercial e-mails in whatever manner they chose."

The court went on to make three important conclusions about California's anti-spam statute:

1. Section 17529.5 does not require the plaintiff to show that the defendant actually made a false or deceptive statement; instead, § 17529.5 makes it unlawful for a person or entity "to advertise in a commercial advertisement" that contains any of the deceptive statements described in subdivisions (a)(1)-(3).

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2. Section 17259.5 does not contain a “scienter” element: the statute makes an entity strictly liable for advertising in a commercial e-mail that violates the substantive provisions described in Section 17529.5(a) regardless of whether the entity knew that such e-mails had been sent or had any intent to deceive the recipient.
3. Section 17259.5 does not require the plaintiff to prove that it relied on the deceptive commercial e-mail message or that it incurred damages as a result of the deceptive message.

This ruling provides a very broad interpretation of § 17529.5 that is likely to aid plaintiffs that bring suit under the statute and may complicate e-mail marketing campaigns that involve affiliates. The court summed up as follows:

Section 17529.5 “permits a recipient of a deceptive commercial e-mail to bring suit regardless of whether they were actually misled or harmed by the deceptive message. This ensures that the use of deceptive e-mail will not go unpunished merely because it failed to mislead its targets. Second, imposing strict liability on the advertisers who benefit from (and are the ultimate cause of) deceptive e-mails, forces those entities to take a more active role in supervising the complex web of affiliates who are promoting their products.”

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