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IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MARK MUMMA AND MUMMAGRAPHS, INC.,

Appellants/Defendants.

v.

OMEGA WORLD TRAVEL, INC., CRUISE.COM, INC.,
AND GLORIA BOHAN,

Appellees/Plaintiffs.

FILED

MAR 10 2006

U.S. Court of Appeals
Fourth Circuit

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MAR 13 2006 11
U.S. COURT OF APPEALS
FOURTH CIRCUIT

TABLE OF CONTENTS

TABLE OF CONTENTS..... 1

TABLE OF AUTHORITIES 11

I. THE APPELLEES HAVE IMPROPERLY PRESENTED FACTS AS “UNDISPUTED” WHICH WERE IN DISPUTE BASED ON COMPETENT EVIDENCE AND TESTIMONY IN THE RECORD BELOW..... 1

 A. Appellant Mummagraphics, Inc. is an Internet Access Service ... 1

 B. The nature of the e-mail messages sent from Cruise.com to MGI 2

II. THE CAN-SPAM ACT DOES NOT PREEMPT THE OKLAHOMA STATUTES.... 2

 A. The CAN-SPAM Act does not limit state action solely to the area of fraud. 2

 B. The Oklahoma Statutes do not create any irreconcilable conflict with the provisions of CAN-SPAM..... 3

III. THE OKLAHOMA STATUTES DO NOT VIOLATE THE DORMANT COMMERCE CLAUSE..... 3

 A. Congress has expressly authorized the states to act in this area. 3

 B. The Oklahoma Statutes do not impose an undue burden on interstate commerce .. . 4

CONCLUSION..... 5

TABLE OF AUTHORITIES

U.S. Supreme Court Cases

Camps Newfound Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997) 3

Maryland v. Louisiana, 451 U.S. 725 (1981) 3

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 4

Southern Pac. Co. v. Arizona ex. rel. Sullivan, 325 U.S. 761 (1945)..... 3

Wyoming v. Oklahoma, 502 U.S. 437 (1992)..... 4

U.S. Courts of Appeal Cases

Edelman v. Lynchburg College, 300 F.3d 400 (4th Cir. 2002) 1

Envtl. Tech. Council v. Sierra Club, 98 F.3d 774 (4th Cir. 1996) 4

Pinney v. Nokia, 402 F.3d 430 (4th Cir. 2005)..... 3

Federal Statutes

17 U.S.C. § 7702..... passim

17 U.S.C. § 7707..... passim

47 U.S.C. § 231..... 1

State Statutes

15 Okl. St. Ann. § 776.1 *et seq.* passim

15 Okl. St. Ann. § 761.1 *et seq.* passim

I. THE APPELLEES HAVE IMPROPERLY PRESENTED FACTS AS "UNDISPUTED" WHICH WERE IN DISPUTE BASED ON COMPETENT EVIDENCE AND TESTIMONY IN THE RECORD BELOW.

This Court reviews the grant of summary judgment *de novo*, viewing the disputed facts in the light most favorable to the Appellant. See Edelman v. Lynchburg College, 300 F.3d 400, 404 (4th Cir. 2002). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c) (emphasis added). Here, the Appellees have identified a number of facts as "undisputed," despite the existence of testimony and evidence in the record below, and properly before this Court, that at the very least puts those facts in dispute.

A. Appellant Mummagraphics, Inc. is an Internet Access Service.

Appellees' statement that Mummagraphics, Inc. ("MGI") is not an Internet Access Service Provider, is expressly contradicted by the Plaintiffs' own allegations in the Complaint as well as the deposition testimony of Mark Mumma ("Mumma") individually and as the designated deponent for MGI. (P2 at ¶ 5, 7, P396-97).

The CAN-SPAM Act refers to the definition of "Internet access service" established by the Communications Decency Act. 17 U.S.C. § 7702 (11); 47 U.S.C. § 231(e)(4). That is:

The term "Internet access service" means a service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers. Such term does not include telecommunications services.

By the Appellees' own statements as well as Appellant's uncontested testimony, MGI provides web hosting, e-mail, and other Internet-based services to customers and is, accordingly, an Internet access service as defined by the CAN-SPAM Act.

B. The nature of the e-mail messages sent from Cruise.com to MGI.

Appellees have stated that the e-mail address from which the Appellees' illegal e-mail messages was sent (i.e., "cruisedeals@cruise.com") accurately identified the sender of the messages. In fact, Appellees' have previously testified that that e-mail address was non-functional, and that not a valid e-mail address. (P376).

II. THE CAN-SPAM ACT DOES NOT PREEMPT THE OKLAHOMA STATUTES.

A. The CAN-SPAM Act does not limit state action solely to the area of fraud.

The plain language of the preemption clause in the CAN-SPAM Act does not limit state action solely to the prohibition of fraud. Specifically, the CAN-SPAM Act states

This chapter 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 to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto.

15 U.S.C. § 7707(b)(1) (emphasis added). The CAN-SPAM Act makes express reference to "fraud" and "fraudulent activity" in other provisions. The plain language of the preemption clause, including the preemption exception, permits states to enact and enforce laws and regulations that prohibit "falsity and deception" in the context of commercial e-mail. Statutory and common-law fraud are themselves expressly excluded by a totally different portion of the preemption clause, § 7707(b)(2).

B. The Oklahoma Statutes do not create any irreconcilable conflict with the provisions of CAN-SPAM.

Any consideration of the issue of preemption under the Supremacy Clause (U S Const Art 6. cl. 2) must start with the basic assumption that Congress did not intend to displace state law. Pinney v. Nokia, Inc., 402 F.3d 430, 453 (4th Cir 2005) (citing Maryland v. Louisiana, 451 U.S. 725, 746 (1981)). Here, Congress has given the states express permission to act to prevent falsity and deception in commercial e-mail messages. Appellees position that this necessarily preempts state laws such as 15 Okl. St. Ann. § 776.1 and 15 Okl. St. Ann § 761.1 ("the Oklahoma Statutes") is absurd as it necessarily follows that there is some level of falsity and deception in commercial e-mail which is permissible under federal law. That is, that the State of Oklahoma is preempted from protecting its citizens from deceptive commercial e-mail messages, despite the CAN-SPAM Act's express exclusion of such laws from preemption

III. THE OKLAHOMA STATUTES DO NOT VIOLATE THE DORMANT COMMERCE CLAUSE.

A. Congress has expressly authorized the states to act in this area.

The Constitution empowers Congress "[t]o regulate Commerce ... among the several states." U.S. Const. art I, § 8, cl. 3. Over time, courts have found a negative aspect embedded in this language--an aspect that prevents state and local governments from impeding the free flow of goods from one state to another. This has come to be known as the "dormant Commerce Clause." The dormant Commerce Clause does not affect state or local regulations directly authorized by Congress. See Southern Pac. Co. v. Arizona ex rel. Sullivan, 325 U S 761, 769 65 S. Ct. 1515, (1945). Instead, the dormant Commerce Clause acts as a brake on the states' authority to regulate in areas in which Congress has not affirmatively acted See Camps Newfound Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 571, 117 S. Ct 1590 (1997).

Here, Congress has not only affirmatively acted in this area, but has delineated those areas in which the states are permitted to act. The jurisprudence interpreting and applying the dormant Commerce Clause cannot apply in any setting in which the Oklahoma Statutes are operating within the express exclusion from preemption established by the CAN-SPAM Act

B. The Oklahoma Statutes do not impose an undue burden on interstate commerce.

Analysis of a dormant Commerce Clause challenge to a state statute proceeds on two tiers: a discrimination tier and an undue burden tier. See Env'tl. Tech. Council v. Sierra Club, 98 F. 3d 774, 785 (4th Cir.1996). Under the discrimination tier, "[w]hen a state statute clearly discriminates against interstate commerce, it will be struck down unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." Wyoming v. Oklahoma, 502 U.S. 437, 454-55, 112 S. Ct. 789 (1992) (internal quotation marks and citations omitted). Under the undue burden tier, "[w]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S. Ct. 844 (1970)

Here, there is no argument that the Oklahoma statute does not act in any manner whatsoever related to economic protectionism. Rather, any argument that the dormant commerce clause is implicated necessarily involves the "undue burden tier." The Oklahoma Statutes impose a simple requirement on those individuals and entities that wish to advertise their products or services via e-mail messages sent to Oklahoma residents or through Oklahoma computer networks: honesty. The Appellees' dormant commerce clause challenge to the Oklahoma Statutes adopts the position that it is somehow an "undue burden" on interstate

commerce for e-mail marketers to honestly and properly identify themselves and their computer resources when engaging in business that reaches the State of Oklahoma. Under the specific facts of this appeal, the Appellees' necessarily knew each e-mail address to which they were directing their commercial e-mail messages. (See Appellees' Brief at p 10) Further, from the day of Mumma's initial contact with the Appellees through the date of the last illegal e-mail message sent by Cruise.com, the Appellees were aware that they were illegal sending e-mail messages into the state of Oklahoma.

CONCLUSION

For the foregoing reasons, the district court's grant of summary judgment in favor of Appellees should be reversed.

Respectfully submitted this 9th day of March, 2006




Kelly O. Wallace
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CERTIFICATES OF FILING AND SERVICE

I hereby certify that on this 10th day of March, 2006, I caused two true and accurate copies of the foregoing RESPONSE BRIEF OF APPELLANT to be served by DHL Express Service, postage prepaid, on counsel for Appellees James Hodges, Esquire, The Hodges Law Firm, P.C., 803 Sycolin Road, Suite 300, Lessburg, Virginia 20175, and Thomas J Powell, The Law Offices of Thomas J. Powell, 10565 Lee Highway, Suite 102, Fairfax, Virginia 22030.

I hereby certify that on this 10th day of March, 2006, I caused eight true and accurate copies of the foregoing RESPONSE BRIEF OF APPELLANT to be served by DHL Express Service on the Clerk for the Fourth Circuit Court of Appeals, 1100 East Main Street, Richmond, Virginia, 23219.



Kelly O. Wallace

CERTIFICATE OF COMPLIANCE

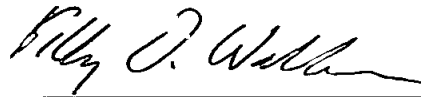
This Reply Brief of Appellant has been prepared using:

Microsoft Word

Times New Roman: 12 point type.

Exclusive of the Table of Contents, Table of Authorities, Certificate of Compliance, and Certificates of Filing and Service, this Reply Brief Contains 1,305 words

I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions. If the Court so directs, I will provide an electronic version of the Brief and/or a copy of the word or line printout.



Kelly O. Wallace