A Case for National E-mail Regulation: State UCE Statutes Have Infirmities

By Mark Morris and Troy L. Booher

By April of this year, 30 states had enacted statutes to combat the growing number of unsolicited commercial e-mails (UCE), better known by the term “spam.” A list of the statutes appears in the box on page 361.

Unfortunately, insofar as UCE statutes provide a cause of action for individuals, they do not deter those who send the most bothersome barrage of (usually sexually explicit) unwanted e-mail because the majority of those senders are virtually impossible to locate or are judgment proof, or both. Individual plaintiffs, as opposed to state attorneys general or Internet service providers simply do not have the resources to combat the real problem. Thus, these statutes are seldom effective.

Because the worst offenders generally are unreachable, UCE statutes are used primarily against reputable companies—Internet service providers and telecom companies—that, typically unknowingly, violate them. One disturbing trend is for plaintiffs’ attorneys to send a settlement letter along with a complaint when a company with sufficiently deep pockets arguably violates the statute, knowing that most companies would rather settle for a few thousand dollars than incur the costs of answering. How to defend against this?

HOW TO CHALLENGE

The most (cost) effective defense against this practice, aside from amending the UCE statute to make it less useful to this type of plaintiffs’ attorney or pushing through federal legislation that pre-empts the statute, is to persuade a court to strike down the statute on constitutional grounds. Because UCE statutes seek to regulate commercial e-mails, one obvious avenue of attack is the “dormant commerce clause” of the U.S. Constitution.

1. Almost every state statute that provides an individual cause of action also provides one to Internet service providers. The only exceptions are Idaho, Nevada and North Carolina. Nevada, however, provides the state attorney general a cause of action.


5. U.S. Const. art. I, § 8, cl. 3. Of course, if the regulation is not content neutral, then the First Amendment is the most likely candidate.
constitutional challenge makes, or at least ought to make, sense.

The dormant commerce clause is the name given to what courts take to be the “negative implication of the commerce clause.” This implication is that states lack the power to regulate interstate commerce because Congress possesses it. The doctrine, however, rests on a fiction—the dormant commerce clause cannot simply forbid states to regulate whatever the federal government could regulate under the commerce clause because Congress’s power (since the New Deal anyway) is so expansive that this would leave states effectively powerless. An independent test, not simply a negative implication, is necessary to determine when states have overstepped commerce clause boundaries.

Consistent with this, the U.S. Supreme Court has “articulated a variety of tests in an attempt to describe the difference between those regulations that the Commerce Clause permits and those regulations that it prohibits.” These tests include: (1) whether a state statute explicitly favors in-state over out-of-state economic interests (the “protectionist test”); (2) whether a statute’s practical effect is “to control conduct beyond the boundaries of the state” (the “extraterritorial effect test”); (3) whether a sufficiently negative “effect would arise if not one, but many or every, state adopted similar[,] but inconsistent[,] legislation” (“the inconsistent regulation test”); and (4) whether the benefit the state receives from the statute is clearly outweighed by the burden that it imposes on interstate commerce (the “undue burden test”).

Because UCE statutes do not typically or expressly discriminate openly against out-of-state interests, the protectionist test is not practical. Moreover, because in the UCE setting states are not “market partici-

pants,” one must ignore that aspect of the dormant commerce clause doctrine. Thus, UCE statutes will be examined under only the last three tests.

**STATING THE TESTS**

The notion that UCE statutes violate the dormant commerce clause is straightforward and convincing.

**A. Extraterritorial Effects Test**

First, these statutes fail the extraterritorial effects test because they regulate activities that occur wholly outside the state that has enacted such a statute. “The critical inquiry,” the Supreme Court said in *Healy v. Beer Institute*, “is whether the practical effect of the regulation is to control conduct beyond the boundaries of the state.” There can be little doubt that UCE statutes have the practical effect of regulating extraterritorial conduct—every one of them, with the exception of Maryland’s, applies to non-residents.

- Seven (Arizona, Arkansas, Idaho, Louisiana, Missouri, Nevada and Wisconsin) apply up to the limits of the state’s long-arm statute.
- Five (Connecticut, Iowa, Oklahoma, Utah and Virginia) apply to any e-mail sent through a network within the state.
- Nine (Delaware, Indiana, Kansas, Maryland, Rhode Island, South Dakota, Washington, West Virginia and Wyoming) apply to e-mails where the sender knows or has reason to know that it will reach the state’s residents.
- One (Louisiana) applies when the e-mail is sent to more than 1,000 recipients.
- One (North Carolina) applies to any e-mail sent into or within the state.
- One (Utah) applies to any e-mail sent to a resident of the state.

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10. Id.
• One (Ohio) applies when e-mail is sent to an e-mail address normally accessed by a resident of the state, to an e-mail address normally accessed from a computer in the state, or to an e-mail address for which the bills from the e-mail service provider are sent to a physical address within the state.

• One (Missouri) applies to e-mails sent by a person or entity conducting business in the state.

• Five (California, Colorado, Illinois, Minnesota and Tennessee) apply to e-mail that travels through a provider’s server or equipment in the state to a resident of the state.

The diverse ways in which UCE statutes reach out-of-state senders make it virtually impossible for senders to know with how many statutes govern their conduct, if any, because it is impossible to know, or prohibitively expensive to ascertain, a recipient’s physical location from an e-mail address alone. There is no practical way for a sender to know simultaneously the states through which any given e-mail will traverse a computer network, the states in which an e-mail may end up, and the state of residence for each e-mail recipient, regardless of where recipients may be located at the time they open their e-mail.

As a result, to ensure compliance with UCE statutes, senders will be forced to assume that all statutes apply, no matter where the e-mail actually travels and no matter its destination. To be safe, even when the sender is in, say, Colorado and the recipient, unbeknownst to the sender, is in Vermont, which has no UCE statute, the sender will have to comply with Utah’s UCE statute to be safe. So, states with the most restrictive UCE statutes effectively regulate the conduct of all senders and require e-mails to take a particular form even though many states have elected not to regulate UCE at all. Thus, many UCE statutes have the practical effect of regulating conduct that occurs wholly outside the states borders.

B. Inconsistent Regulation Test

Second, the statutes fail the inconsistent regulation test because they potentially expose those who send UCE to inconsistent regulatory regimes. Twenty-five states prohibit commercial e-mails if the information is falsified;14 eighteen require opt-out instructions or certain contact information, or both;15 nine require “ADV:” in the subject line;16 one requires “ADV” in the subject line, and one requires either “ADV” or “ADVERTISING” in the subject line.18

For UCE with adult-oriented content, two states require “ADV-ADULT” in the subject line;19 six require “ADV:ADLT”20 and one requires “ADULT ADVERTISEMENT.”22

C. Undue Burden Test

Third, most UCE statutes fail the undue burden test because the benefits they provide are clearly outweighed by the burdens they impose on interstate commerce. Because of senders of commercial e-mail do not know which UCE statutes may apply, if any, they must attempt simultaneously to comply with every statute, a task that significantly raises compliance costs. At the very least, the higher costs of doing business on the Internet create lost opportunity costs to consumers.23


15. Arizona, California, Colorado, Delaware, Idaho, Indiana, Iowa, Kansas, Minnesota, Missouri, Nevada, New Mexico, Ohio, Pennsylvania, Rhode Island, Tennessee, Utah and West Virginia.

16. Arizona, California, Colorado, Indiana, Kansas, New Mexico, South Dakota, Tennessee and Utah.

17. Minnesota.

18. Nevada.


20. California, Indiana, Kansas, New Mexico, South Dakota and Tennessee.

21. Utah.

22. Wisconsin.

Coupled with this burden is little, if any, foreseeable benefit to the states. The worst offenders will not be deterred by lawsuits brought by individuals, who have almost no actual damages and generally have very limited statutory damages available. It is simply not worth their time to go after this type of offender. Moreover, for companies that comply with, for example, the subject-line requirements, their e-mails will be readily identifiable as advertising, which leaves consumers with the sense that if an e-mail does not have the identifying marks, then it is not UCE.

Thus, those spammers who are the worst offenders and at whom the statutes primarily are directed, will be more effective when they fail to comply with the statutes. In other words, inboxes will be just as full, and the worst spammers will be more effective. The burdens that most UCE statutes impose on interstate commerce simply are not outweighed by local benefits.

TESTING THE TESTS

A. Federal Cases

By 1999, two federal courts had employed essentially the arguments outlined above to strike down two states’ good faith attempts to regulate communications on the Internet.

In *American Libraries Ass’n v. Pataki*, the U.S. District Court for the Southern District of New York invalidated a New York statute that attempted to regulate communications of sexually explicit materials to minors via the Internet. Foreshadowing her entire discussion, Judge Preska noted from the outset, “Typically, states’ jurisdictional limits are related to geography; geography, however, is a virtually meaningless construct on the Internet.” Thus, Internet regulations are particularly susceptible to challenges on dormant commerce clause grounds because it is easy to impinge on the geographically sensitive sovereignty of sister states.

Judge Preska held that the New York statute ran afoul of the dormant commerce clause in three ways.

First, it failed the extraterritorial effects test. Because entities or persons with websites had no way of ensuring that New York residents are not accessing their sites, they must conform their behavior to the statute even if the communication is only between residents of another state.

Second, it failed the undue burden test. Even though protecting children from pornography is a “legitimate state objective,” the statute unduly burdened interstate commerce because “the chilling effect that it produces is bound to exceed the actual cases that are likely to be prosecuted.” Since it is virtually impossible, moreover, to know the geographic location of Internet users, the costs associated with senders’ attempts to comply with the terms of the statute’s defenses are excessive.

Finally, the statute failed the inconsistent regulations test. Internet regulations, the court declared, demand “consistent treatment and are therefore susceptible to regulation only on a national level.” Because the Internet does not permit one to customize behavior based on geography, a sender must “comply with the regulation imposed by the state with the most stringent standard or forego Internet communication of the message that might or might not subject her to prosecution.”

Following *Pataki*, the 10th Circuit struck down a similar New Mexico statute on almost identical grounds in *American Civil Liberties Union v. Johnson*. Even though the statutes in *Pataki* and *Johnson* concerned websites with adult-oriented content, there is nothing in these courts’ analyses that does not apply with equal force to states’ attempts to regulate UCE.

As one commentator has noted, when “states impose affirmative requirements on commercial e-mail, senders are in the same difficult position as website operators, forced to comply with a superset of all state regulations or not send e-mail altogether.” If anything, the statutes in *Pataki* and *Johnson* likely deserve more judicial...
deference than UCE statutes because they both involved a clear exercise of the states’ police powers. The *Pataki* and *Johnson* analyses almost certainly apply to UCE statutes.

### B. State Decisions

State courts, it is interesting to note, seem less willing to strike down UCE statutes than the federal courts. For instance, the Washington Supreme Court has held that the Washington UCE statute did not violate the dormant commerce clause. It departed from the analyses in *Pataki* and *Johnson* and instead explicitly adopted an interpretation of the dormant commerce clause advanced by Jack L. Goldsmith and Alan O. Sykes in a 2001 *Yale Law Review* article, “The Internet and the Dormant Commerce Clause.”

The authors of that article argue that the extraterritorial effects test, the inconsistent regulations test and the undue burden test are essentially one test. They first point out that the “fact that a state regulation of cross-border harms has an impact on out-of-state actors cannot by itself be the touchstone for illegality under the [extraterritorial effects test]. State regulations are routinely upheld despite what is obviously a significant impact on outside actors.” For example, states and local communities have different “local standards” for obscenity, and these local standards all impact outside actors who distribute arguably obscene materials, but such regulations do not thereby violate the dormant commerce clause. So, they say, the dormant commerce clause analysis cannot simply look to whether a regulation has an extraterritorial effect, but rather must determine whether the extraterritorial effect is excessive. Yet, according to the article’s authors, this is merely an iteration of the undue burden test—whether the statute produces a sufficient benefit to justify the negative extraterritorial effect.

Continuing, the authors argue that the inconsistent regulations test is merely the undue burden test in disguise. The inconsistent regulations test does not simply look to whether different states’ regulations apply to the same actor—which is not uncommon—but also requires a judgment about whether the inconsistent regulations impose a significant burden on the actor. They write that the inconsistent regulations test merely recognizes that “[o]ne of the risks of allowing the states to regulate is the possibility that different regulatory judgments may create costs of compliance with the various state regimes that are clearly out of proportion to the benefits of permitting decentralized regulation.” Again, according to the article’s authors, this is merely an iteration of the undue burden test—whether the statute produces a sufficient benefit to justify the burden imposed by inconsistent regulations.

If the article’s authors are correct, then the only analysis relevant to establishing whether a UCE statute violates the dormant commerce clause is whether the burden imposed by the regulation on interstate commerce outweighs its benefits. The Washington Supreme Court in *Washington v. Heckel* essentially adopted this analysis. After determining that the protectionist test did not apply, the *Heckel* court analyzed only whether the local benefits outweighed the interstate burdens. It characterized the inconsistent regulations test as merely asking whether the difference among statutes created “compliance costs” that are “clearly excessive in relation to the putative local benefits,” and the extraterritorial effect test as merely asking whether the
extraterritorial effect outweighed the local benefits of the statute. Thus, *Heckel* balanced only economic benefits and burdens.

It is difficult to argue that the undue burden test, alone, could invalidate the Washington statute. But this is because that statute is so narrow. In contrast to many UCE statutes, Washington’s merely prohibits e-mail solicitors from using misleading information in the subject line or transmission path of UCE when the sender knows or has reason to know the e-mail is directed to a Washington resident. Applying the undue burden test, the *Heckel* court found that the benefit of limiting the “harm that deceptive commercial e-mail causes Washington businesses and citizens” outweighed the burden it placed on those who know or have reason to know that they are sending fraudulent e-mails to Washington residents.

The court reasoned that the opportunity costs lost from forbidding only falsified commercial e-mails, even those for consumers outside Washington, cannot be substantial. In light of this, the *Heckel* court held that the Washington statute did not violate the dormant commerce clause.

**TYPES OF UCE STATUTES**

To understand how narrow the *Heckel* holding is, it is necessary to make some distinctions among UCE statutes. They fall into two basic categories: those that prohibit conduct—falsifying information and (2) those that require conduct—including an opt-out mechanism or fashioning UCE to be identifiable as adult or advertising, generally by having “ADV:” or “ADULT” in the subject line.

**A. Falsification**

For statutes that forbid only falsified information in UCE, it is difficult to argue that they fail the undue burden test. After all, UCE with falsified information has little economic value. Thus, the only way to avoid the *Heckel* holding for such statutes is to argue that the Goldsmith-Sykes interpretation of the dormant commerce clause is flawed. In other words, one must argue it is the nature of Internet communication itself, not the economic burden UCE places on interstate commerce, that demands national regulation of UCE. Put another way, pure law and economics analysis does not capture all that the dormant commerce clause forbids.

The problems associated with extraterritorial effects are not reducible to a mere comparison of economic burdens and benefits. Rather, at times the problem is that one state’s statute applies to those outside of the state who have no political voice; it is regulation without representation. As Justice Stone observed for the U.S. Supreme Court long ago, “When the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state.”

To illustrate, consider the following. There are currently 20 states that have chosen not to regulate UCE at all. If these states have made a conscious decision not to do so, then their sovereignty is infringed by states whose regulations nevertheless forbid in non-regulating states what they consciously decided to allow. While this effect may not always equate into a dormant commerce cause violation, it will in certain circumstances. For instance, where inconsistent regulations create a “race to the bottom” incentive, whereby the most stringent statutes effectively regulate behavior in all states, then whether these statutes are economically beneficial in the long run is irrelevant. Absent coordinated regulations, one state with the most restrictions practically will set the standards for all.

What this shows is that the “negative implications of the commerce clause derive principally from a political theory of union, not from an economic theory of free trade.

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32. South Carolina State Highway Dep’t v. Barnwell Bros., 303 U.S. 177, 185 n.2 (1938).
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The function of the clause is to ensure national solidarity, not economic efficiency.\textsuperscript{34} The limits of the powers of states cannot rest on a pure law and economics analysis because the federal Constitution “does not require the states to subscribe to any particular economic theory.”\textsuperscript{35}

The U.S. Supreme Court has never held that the dormant commerce clause doctrine can be completely reduced to a balancing of economic benefits and burdens. For example, in \textit{Edgar v. MITE Corp.},\textsuperscript{36} the Court invalidated an Illinois statute that had the effect of regulating takeover offers from out-of-state corporations to out-of-state shareholders of acquiree corporations. Justice White found the statute invalid because it applied “to commerce that takes place wholly outside of the state’s borders, whether or not the commerce has effects within the state.”\textsuperscript{37} This holding was independent from the economic balancing test that followed. Thus, horizontal federalism concerns about state sovereignty are part of dormant Commerce Clause doctrine, yet are independent of purely economic concerns.\textsuperscript{38}

Under this analysis, perhaps even UCE

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\textbf{Arizona:} ARIZ. REV. STAT. § 44-1372 et seq. (2003). \\
\textbf{Arkansas:} ARK. CODE ANN. § 5-4-201 et seq. (2003). \\
\textbf{California:} CAL. BUS. & PROF. CODE § 17538.4 et seq. (West 2003). \\
\textbf{Colorado:} COLO. REV. STAT. § 6-2.5-102 et seq. (2003). \\
\textbf{Delaware:} DEL. CODE ANN. CRIMES AND CRIMINAL PROCEDURES § 931 et seq. (2003). \\
\textbf{Idaho:} IDAHO CODE § 48-603E et seq. (2003). \\
\textbf{Illinois:} ILL. COM. STAT. 815 ILCS 511/1 et seq. (2003). \\
\textbf{Indiana:} IND. CODE § 24-5-22-1 et seq. (2003). \\
\textbf{Iowa:} IOWA CODE § 714E.1 et seq. (2003). \\
\textbf{Kansas:} 2003 KAN. SESS. LAWS 467 et seq. \\
\textbf{Louisiana:} LA. REV. ANN. § 73.1 et seq. (2003). \\
\textbf{Maryland:} MD. CODE ANN., COM. LAW I § 14-2901 et seq. (2003). \\
\textbf{Minnesota:} MINN. STAT. § 325M.01 et seq. (2003). \\
\textbf{Nevada:} NEV. REV. STAT. § 205.4744 et seq. (2003). \\
\textbf{New Mexico:} N.M. STAT. ANN. § 57-12-23 et seq. (2003). \\
\textbf{Ohio:} OHIO REV. CODE ANN. § 2307.64 et seq. (West 2003). \\
\textbf{Oklahoma:} OKLA. STAT. CONTRACTS §776.1 et seq. (2003). \\
\textbf{Pennsylvania:} PA. CONS. STAT. ANN. § 5903 et seq. (West 2003). \\
\textbf{Rhode Island:} R.I. GEN. LAWS § 11-52-1 et seq. (2003). \\
\textbf{South Dakota:} S.D. CODIFIED LAWS § 37-24-6 et seq. (2003). \\
\textbf{Virginia:} VA. CODE ANN. § 8.01-328.1 et seq. (2003). \\
\textbf{Wisconsin:} WIS. STAT. § 944.25 et seq. (2003). \\
\textbf{Wyoming:} WYO. STAT. ANN. § 40-12-401 et seq. (2003). \\
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34. LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 417 (2d ed. 1988).
37. Although this portion of the opinion was joined only by a plurality, the holding was specifically adopted by a majority of the Court in Healy, 491 U.S. at 336.
38. Writing in The Federalist No. 5, Alexander Hamilton stated that each state’s pursuit of “a system of commercial policy peculiar to itself . . . would occasion distinctions, preferences, and exclusions, which would beget discontent.”
In other words, the nature of Internet communications, much like railroads and highways in the U.S. Supreme Court’s transportation cases, requires a unified set of regulations.\(^{40}\) While there may be little doubt that UCE statutes are prohibiting undesirable behavior, it is for Congress, not the individual states, to impose the regulations.

While this may show that the extraterritorial effects test is not reducible to the undue burden test, it may not be enough to show that the Washington statute violates the dormant commerce clause. To see why, one must make a further distinction among UCE statutes that merely prohibit falsification: (1) those that apply only when the sender knows or has reason to know the recipient is a resident of the state\(^{41}\) and (2) those that have no mens rea requirement.\(^{42}\) Washington’s statute is the most narrow type not only because it merely prohibits falsification, but also because it does so only when the sender knows or has reason to know that the sender is dealing with Washington. It is easy to understand how the \textit{Heckel} court concluded that the statute had very little negative impact on interstate commerce. UCE with falsified information has little economic value, and senders who have no reason to believe that their e-mails are going to Washington need not incur the cost to conform their behavior with Washington’s statute.

To attack statutes such as Washington’s, one must examine how the UCE statutes actually operate. For instance, the Washington statute implies that someone knows UCE is directed to a Washington resident when the location of the recipient, according to the statute, “is available, upon request, from the registrant of the internet domain name contained in the recipient’s electronic mail address.”\(^{43}\) Depending on the practical consequences of obtaining recipient information from registrants, the mens rea requirement may not save mere falsification statutes under the extraterritorial effects test. The question is whether the statutes have impermissible extraterritorial effects in practice, not whether they produce more over-all economic benefits than burdens. Thus, it could be that even statutes with a mens rea requirement exceed states’ powers to regulate interstate commerce.

### B. Affirmative Obligations

The bulk of UCE statutes, however, go much further than merely requiring that senders be truthful. Most statutes impose affirmative obligations on senders. Eighteen require opt-out instructions or contact information, or both.\(^{44}\) Ten require either “ADV” or “ADV:” in the subject line.\(^{45}\) One requires either “ADV” or “ADVERTISEMENT” in the subject line.\(^{46}\) These statutes have a more difficult time passing

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39. \textit{See} South-Central Timber Development Inc. v. Wunnick, 467 U.S. 82, 92 (1984), \textit{quoting} South Carolina Highway Dept., 303 U.S. at 185, n.2 (1938) (danger lies in regulation whose “burden falls principally upon those without the state.”)

40. \textit{See} Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 154 (1942) (exercise of commerce power appropriate where national uniformity is “essential”); \textit{Wabash v. Illinois}, 118 U.S. 557, 574-75 (1886) (“For the regulation of commerce . . . there can be only one system of rules, applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system.”).

41. Maryland, Washington and Wyoming.


43. There are similar definitions of “know” in the statutes of Indiana, Kansas, Maryland, South Dakota and Wyoming. The Wyoming statute also applies if the sender has reason to know the e-mail will end in a state that prohibits conduct similar to that prohibited by Wyoming’s statute.

44. Arizona, California, Colorado, Delaware, Idaho, Indiana, Iowa, Kansas, Minnesota, Missouri, Nevada, New Mexico, Ohio, Pennsylvania, Rhode Island, Tennessee, Utah and West Virginia.

45. Arizona, California, Colorado, Indiana, Kansas, Minnesota, New Mexico, South Dakota, Tennessee and Utah.

46. Nevada.
either the extraterritorial effects test or the inconsistent regulations test. This is apparent in examining the analysis of a court that squarely disagrees.

In Ferguson v. Friendfinders Inc., the California Court of Appeal held that California’s UCE statute did not violate the dormant commerce clause. That statute requires each UCE to contain “ADV:” in the subject line and applies to any e-mail sent to a California resident via an electronic mail service provider located in California. While the court purported to examine the statute under all tests, a close examination reveals that the court wholly ignored the extraterritorial effects and the inconsistent regulations tests.

For the extraterritorial effects test, the court stated, “the critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the state.” Yet when examining the extraterritorial effects of the statute, the Ferguson court ignored the most important part of the test—the practical effect of the statute. Instead, the court argued that because, by its own terms, the California statute applies only when the e-mail traverses equipment located in California, it could not be said to regulate any extraterritorial conduct. As the court put it, “By limiting the scope of [the statute] to UCE’s that are transmitted via equipment located in the state, our legislature ensured that the statute would not reach conduct occurring ‘wholly’ outside the state.”

This simply ignores the practical Internet technological reality that UCE senders face. While the statute may apply only to e-mail sent into California, its practical effect is to regulate any e-mail where the sender does not know whether it will go to California. Thus, the Ferguson court simply did not apply the extraterritorial effects test.

The court also failed to apply the inconsistent regulations test. This test requires a court to analyze whether a sufficiently negative “effect would arise if not one, but many or every, state adopted similar [but inconsistent] legislation.” Instead of considering what types of havoc different states’ regulations could create, the Ferguson court based its decision on the fact that the party challenging the statute had not marshaled any evidence of actual inconsistencies under which a sender would be liable under more than one statute. Not only does this ignore the fact that the inconsistent regulations test does not necessarily require actual inconsistencies, it also ignores the fact that practical effect, not the actual outcome of litigation, is the relevant inquiry.

The Ferguson court simply misinterpreted the law. Consider Bibb v. Navajo Freight Lines, Inc., in which the U.S. Supreme Court struck down an Illinois statute requiring special splash guards on semi-trailers trucks that traveled through the state. Because no other state had the same regulations and because it was practically impossible for a carrier operating in interstate commerce to determine which of its equipment would be used in a particular area, a carrier was required to equip all its trailers in accordance with the Illinois statute.” Arkansas had different mudguard requirements, which meant that a carrier had to change mudguards in the middle of a trip that included both Arkansas and Illinois. Thus, if the Illinois statute were upheld, other states could pass additional and inconsistent statutes that would have caused more havoc.

The Court found the Illinois statute to violate the dormant commerce clause, even though it applied only to trucks in Illinois and the Arkansas statute applied only to trucks in Arkansas. Despite the fact that a carrier could not be subject to both statutes for the same action, the statutes were nevertheless impermissibly inconsistent. It is the practical effect of a statute that is important.

Healy v. Beer Institute demonstrates the same point. A Connecticut statute was found to violate the dormant commerce clause because its practical effect was to
control prices in other states. The statute basically required those who sold liquor in Connecticut to do so at the lowest price at which the item was being sold in any border state. Even though a liquor wholesaler could have complied with the statutes in every relevant state, the court looked to the practical effect to find the possibility of inconsistent regulations and impermissible extraterritorial effects.

For a statute to fail the inconsistent regulations test, a defendant need not marshal evidence of how it could be simultaneously liable in two states. The important analysis under the dormant commerce clause regarding UCE statutes is whether their practical effect is to regulate beyond their respective states by subjecting one to the possibility of inconsistent regulations. UCE statutes with opt-out instructions and subject line requirements that have no mens rea requirements effectively regulate UCE senders in all states, including the 21 that have chosen not to regulate UCE. Thus, the California statute, as well as other similar statutes, likely violate both the inconsistent regulations test and the extraterritorial effects test.

Finally, the Ferguson court misapplied the undue burden test essentially because it assumed that California’s statute was identical to Washington’s. The court quoted Heckel extensively and cited “deceptive tactics,” “fraudulent domain names” and “deceptive UCE” as harms that the statute sought to prevent. Yet the California statute does not prohibit falsification, but rather only requires “ADV:” in the subject line. It is difficult to imagine how this alone either will reduce the volume of UCE or will produce any of the benefits the court listed. When discussing the extraterritorial effects test, moreover, the court asserted it was possible to get equipment to detect geographic location, but there was no discussion of the cost of such technology. The court’s undue burden analysis also was deficient.

In short, UCE statutes that impose affirmative obligations on senders and have the practical effect of also imposing this obligation even on UCE with no connection to the respective state, with the result that they fail the extraterritorial effects test. Because these statutes in practice impose different obligation on senders, they also fail the inconsistent regulations test. A mens rea requirement may help to save some of these statutes, but only if what qualifies as knowing actually mitigates this practical effect. At this point, there is no reason to think that such requirements will do so.

CONCLUSION

The argument that UCE statutes, insofar as they provide a cause of action for individuals, run afoul of the dormant commerce clause is a good one. And when combating plaintiffs’ attorneys who bank on their defendants viewing such lawsuits as too expensive to defend, making this argument is a cost effective way to mount a defense. That is, if you can get the court to apply the correct dormant commerce clause analysis.