California's Anti-Spam Statute Has Vast Potential Consequences for Businesses Who Send—or Receive—Unsolicited Commercial Email

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This is the second in Snell & Wilmer's series, "Welcome to California Business Litigation." California business litigation differs substantially from business litigation in most other parts of the United States, particularly for those used to dealing with Federal Rules-based civil procedures. California has exhaustive statutory regimes—among others, the Code of Civil Procedure, the Business & Professions Code, and the Evidence Code—of which businesses litigating in California must be aware in order to optimize their litigation outcomes.

In this series of articles, Snell & Wilmer lawyers familiar with both California and non-California business litigation practices will share a series of tips—both procedural and substantive—that in-house counsel may find useful in navigating the shoals of California business litigation.

Introduction

The average consumer receives an average of 25 or more promotional emails each week.[1] With the onslaught of unsolicited commercial email ("UCE"), or "spam," two decades ago, many states implemented statutes attempting to limit the practice.[2] The vast majority of these statutes were preempted by the federal CAN-SPAM Act of 2003.

California's anti-spam statute, Business & Professions Code § 17529.5, however, consistently has been interpreted as *not* preempted by the federal Act.[3] The statute's provisions, though arcane, counsel great caution for any business marketing itself through unsolicited commercial email, or "UCE"—often referred to as "spam"—for they provide substantial monetary remedies for any "recipient" of such email.

Background

As the California Legislature has recognized,[4] spam is a tremendous drain on resources, costing organizations *billions of dollars* annually. "[S]pam imposes a cost on users, using up

1 Elizabeth Holmes, *Dark Art of Store Emails*, Wall Street Journal, Dec. 18, 2012.

2 *See, e.g., Gordon v. Virtumundo*, 575 F.3d 1040, 1058-64 (9th Cir. 2009) (citing Washington statute Wash. Rev.Code § 19.190.020(1)(a)); *Omega World Travel v. Mummagraphics*, 469 F.3d 348, 352-56 (4th Cir. 2006) (citing Oklahoma statute 15 Okl. Stat. § 776.1A).

3 *E.g.*, *Hypertouch v. Valueclick* (2011) 192 Cal. App. 4th 805, 825.

4 Bus. & Prof. Code § 17529.1(d).

valuable storage space in e-mail inboxes, as well as costly computer bandwidth, and on networks and the computer servers that power them, and discourages people from using e-mail." Beyond the significant costs involved, spam is annoying and wastes time, and is "costly and expensive to eliminate." According to the California Court of Appeal, "Individuals who receive UCE can experience increased Internet access fees because of the time required to sort, read, discard and attempt to prevent future sending of UCE. If the individual undertakes this process at work, his or her employer suffers the financial consequences of the wasted time."[5]

The Anti-Spam Statute Gives Rise to Substantial Damages Exposure

Recognizing the significant burden and financial consequences created by UCE, Section 17529.5 imposes, *in addition to* actual damages, statutory ("liquidated") damages of up to $1,000 for each "unsolicited commercial email advertisement" received by a "recipient," up to $1,000,000 "per incident." The Court of Appeal has held that the statutory damages of Section 17529.5 are mandatory.[6] Since spam emails typically are sent in waves, or blasts, the potential for senders to be held liable for hundreds of thousands of dollars in damages is substantial. The emphasized text above warrants re-emphasis: A Section 17529.5 plaintiff can recover *both* actual *and* statutory damages.

The Statute Raises Multiple Liability Issues

Both "recipients" and "electronic mail service providers" have standing to sue under the statute. The statute applies to both email blasting services and their customers—the ordinary businesses or persons who originate UCE, but use lead generators and other email marketing services to transmit it—so long as the email is "sent from California" or "sent to a California electronic mail address." This formulation raises a variety of interesting choice-of-law and personal jurisdiction issues.

Offending spam emails fall into three categories:

> (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*. This paragraph does not apply to truthful information used by a third party who has been lawfully authorized by the advertiser to use that 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,

5 *Ferguson v. FriendFinders, Inc.* (2002) 94 Cal. App. 4th 1255, 1267.

6 *Hypertouch*, 192 Cal. App. 4th at 841-45 (holding same in context of determining applicable limitations period on § 17529.5 claim).

about a *material fact regarding the contents or subject matter of the message*.

(Emphasis added.)

Category (1) is relatively straightforward. Spam that uses someone else's domain name, besides the sender's, without authorization, may give rise to liability.

Category (2) has been interpreted as requiring that the email's identified sender be both existent and findable. A domain name is "traceable" to the sender, for purposes of the law, if the recipient of an e-mail could ascertain the sender's identity and physical address through the use of a publicly available database.[7] Thus, the Court of Appeal has held, an Internet advertising business's email identifying the sender as "Paid Survey" with an email address of *survey@misstepoutcome.com*, violated the statute, where "Paid Survey" was not the name of any existing company; there was no company named "misstepoutcome," and no website at *www.misstepoutcome.com*.[8] In contrast, according to the California Supreme Court, an email originated by Vonage that identified the sender as *superhugeterm.com* did not violate the statute, because that and other domain names used in Vonage's campaign "actually exist[ed] and [we]re technically accurate, literally correct, and fully traceable to Vonage's marketing agents.[9]

Category (3) is noteworthy because, according to the statute, whether an email is "likely to mislead" does not turn merely upon the contents of the email itself, but upon its subject matter as well. Thus, omission of a material fact from the subject line may give rise to liability, even if the subject line is not misleading when compared only to the contents of the email.

Other Issues to Consider in Applying the Statute

The California anti-spam statute raises a variety of issues, depending on the particular fact setting, for any sender or recipient of UCE:

"Advertiser"

Rather circularly, the statute defines "advertiser" as "a person or entity that advertises through the use of commercial e-mail advertisements." The definition matters because, as described below, the statute only proscribes *unsolicited* commercial email advertisements; through "direct consent" from or a "preexisting or current business relationship" with the recipient, the advertiser can escape liability.

"Advertisement"

The statute does not define "advertisement" as such. Common definitions of "advertise" include "to make known to" or "notify" or "inform."[10] According to Wikipedia, "Advertising is a form of communication used to encourage or persuade an audience (viewers, readers or listeners) to continue or take some

7 *See Balsam v. Trancos, Inc.* (2012) 203 Cal. App. 4th 1083, 1098.

8 *See id*. at 1093, 1098.

9 *See Kleffman v. Vonage Holdings Corp.* (2010) 49 Cal. 4th 334, 340.

10 *See Advertise Definition*, Merriam-Webster.com , http://www.merriam-webster.com/dictionary/advertise (last visited Jan. 25, 2013).

new action. Most commonly, the desired result is to drive consumer behavior with respect to a commercial offering, although political and ideological advertising is also common."[11] Even a cursory glance at these definitions shows that the statute may reach very broadly.

"Commercial Email Advertisement"

The statute does, however, define the composite term "commercial email advertisement," as one "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." Here too, read facially, the statute reaches broadly, since "advertising or promoting . . . disposition of *any* property" qualifies. (Emphasis added.)

"Unsolicited"

The statute defines an "unsolicited" commercial email advertisement as one that meets two criteria: (1) the recipient has not "provided direct consent to receive advertisements from the advertiser," and (2) the recipient does not have a "preexisting or current business relationship" with the advertiser. Both "direct consent" and "preexisting or current business relationship" are statutorily defined terms which raise questions—as yet unresolved by California's appellate courts—as to whether consent to or a relationship with an intermediary, such as a lead generator or email blasting service, can qualify.

Conclusion

Given its substantial potential impact on businesses sending unsolicited commercial email to (or receiving it from) California, in-house counsel for any business sending or receiving UCE will be well served to keep Section 17529.5 in mind.

11 *Advertising*, WIKIPEDIA, http://en.wikipedia.org/wiki/Advertising (last visited Jan. 25, 2013).

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