

ADVERTISING, MARKETING & PROMOTIONS

>> ALERT

NEW MAINE MARKETING LAW IS LIKELY UNCONSTITUTIONAL

On September 9, 2009, The United States District Court of Maine ruled that the Maine marketing law, The Act to Prevent Predatory Marketing Practices Against Minors, is likely unconstitutional. The action, brought by the trade group NetChoice, publishing company Reed Elsevier, the Maine Independent Colleges Association and the Maine Press Association, called for an injunction of the law on the grounds that:

- >> It is overly broad
- >> It violates the First Amendment
- >> The federal Children's Online Privacy Protection Act, which addresses the online collection of personal information from children younger than age 13, pre-empts Maine's law.

The Plaintiffs brought the action against the State of Maine and "John Doe," whom they defined as "an individual with the standing and intent" to file a private lawsuit against the Plaintiffs for violating the law.

Independently of one another, the Plaintiffs each have concerns regarding the Act. The trade organizations are concerned that the law would bar newspapers from publishing stories about minors, including stories about high school sports and honor rolls, and may also bar colleges from marketing

to prospective students. Reed Elsevier joined the law suit because its LexisNexis databases contain a variety of information about minors and NetChoice believes the law's requirement for "verifiable parental consent" would make a wide range of marketing to minors unfeasible.

While the parties agreed to dismiss the action, in part due to the fact that the Maine Attorney General has stated that she will not enforce the law and the legislature will reconsider the law when it reconvenes, the court did find that the Plaintiffs had "met their burden of establishing a likelihood of success on the merits of their claims that Chapter 230 is overbroad and violates the First Amendment."

The court's ruling is consistent with the Attorney General's opinion that the legislation is overly broad in regulating commercial speech stating that "the Attorney General has acknowledged her concerns over the substantial over breadth of the statute and the implications... and accordingly has committed not to enforce it." However, the court did not issue an injunction and the law still went into effect on September 12, 2009.

In addition to its ruling, the court discouraged private parties from filing lawsuits under the law by stating that "as a result, third parties are on notice

that a private cause of action [under the law] could suffer from the same constitutional infirmities."

THE BOTTOM LINE

While the Act went into effect on September 12th, the District Court has stated that the law is likely unconstitutional and the Attorney General has publically stated that she will not enforce the law — the future and practical effect of this law remains to be seen.

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