

November 2007

## Cases of Note -- CAN CAN-SPAM CAN SPAM?

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### Recommended Citation

Strauch, Bruce (2007) "Cases of Note -- CAN CAN-SPAM CAN SPAM?," *Against the Grain*: Vol. 19: Iss. 5, Article 31.

DOI: <https://doi.org/10.7771/2380-176X.5298>

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# Cases of Note — CAN CAN-SPAM CAN SPAM?

by **Bruce Strauch** (The Citadel) <strauchb@citadel.edu>

**Omega World Travel, Inc.; Cruise.com, Inc.; Gloria Bohan; Daniel Bohan v. Mummagraphics, Inc.**, United States Court of Appeals for the Fourth Circuit, 469 F.3d 348; 2006 U.S. App. LEXIS 28517 (2006).

Are you sick of being emailed travel agency offers? Well, you're not alone. **Mummagraphics** is a provider of online services that got eleven unwanted commercial email messages from **Omega World Travel** and decided enough was enough. They sued under Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act), 15 U.S.C. §§ 7701 *et seq.* and Oklahoma law and got promptly slammed with summary judgment. So let's learn how to do this the right way.

**Mummagraphics** in Oklahoma City hosts and designs Webpages and registers domain names. It also tellingly operates "sueaspammer.com," a Website devoted to opposing spam.

**Cruise.com** is a subsidiary of **Omega World Travel**. Its Website hawks deals on cruises and sends email advertisements with the hottest "E-deals." A recipient could click on a line to be removed from future ads plus there was a toll-free number and postal address for the same.

Each message said the recipient had signed up for the **Cruise.com** mailing list. Which **Mummagraphics** denied having done.

Mark **Mumma** — hence the company name — did not click the opt out. Rather he called **Omega World Travel's** attorney. He said "only idiots" use opt-out mechanisms because they just lead to more unwanted messages. His operating procedure was to sue. That got the lawyer's attention, and he agreed to remove every domain address listed on **Mummagraphics'** "OptOutByDomain.com" site. But then the lawyer ran up against **Omega's** tech support staff who complained about the effort and didn't immediately remove the addresses. So **Mumma** got another emailed ad.

An even angrier **Mumma** wrote **Omega Travel** threatening a suit for \$150,000 in statutory damages (under Oklahoma law) but offering to settle for \$6,250. **Omega** took down the email address, but did not rush to write a check for six-thou and change.

Whereupon **Mumma** went to his anti-spam Website and posted pictures of the **Bohans**, owners of **Omega**, calling them "cruise.com spammers" who had violated state and federal law. The pictures came from the **Omega** Website.

Well, two can play at this lawsuit game, and the **Bohans** sued in federal court for defamation, copyright infringement, trademark infringement, and unauthorized use of likeness. The district court gave **Mummagraphics** summary judgment on all but the libel issue which is proceeding to trial.

**Mummagraphics** counterclaimed under the laws stated back at the beginning of this thing. And they got stung by summary judgment based on federal law preemption — CANSPAM over Oklahoma statutes. Which led to this appeal.

## So Let's Look at this Preemption Thingy.

First, there is a presumption that Congress does not intend to displace state law. *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981), and "the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lor*; 518 U.S. 470, 485 (1996).

Second, "the purpose of Congress is the ultimate touchstone in every preemption case." *Id.* A court, looking to the language of the statute, should seek "a fair understanding of congressional purpose." *Id.* at 486.

CAN-SPAM reads: "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 of any portion of a commercial electronic mail message or information attached thereto." 15 U.S.C. § 7707(b)(1).

*Got that? CAN-SPAM is designed to combat spam. The states can regulate email fraud.*

But the Oklahoma statute has wonderfully vague language making it unlawful to send email that "contains false ... or misleading information..."

The Oklahoma language goes beyond fraud which applies to lies about material facts — matters at the heart of the contract — lies designed to lure a victim into the contract because they go to what he desires.

"*You asked to be on our email list,*" is not a lie about a material fact. *It will not make you rush to sign up for a cruise.*

Which is to say the Oklahoma statute includes immaterial misrepresentations — which includes any little silly thing. But the CAN-SPAM Act preempts the immaterial lies.

The federal Act says states can prohibit "falsity or deception" in commercial email. "Deception" requires intent, but "falsity" can mean merely "not conforming to the truth." Or it can also convey that tortious intent. *Webster's Third New International Dictionary Unabridged* 820 (1971).

The Fourth Circuit chose to read "falsity" not in isolation, but as part of the whole clause. This adheres to the maxim of *noscitur a sociis* — a word is generally known by the company it keeps. *See,*

*e.g., Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961).

*I've always had trouble with the word "sublime," but this noscitur thing seems to approach it.*

So falsity is linked to deception as a false statement tort — which is to say fraud. CAN-SPAM was not allowing states to outlaw mere errors that do not rise to the level of a tort.

## Benefits and Burdens

Congress was balancing the preservation of a useful commercial tool and the prevention of its abuse. Inexpensive email was a boon to commerce, but the state regulations were a patchwork mess.

*Which is to say this is an area that is truly interstate commerce in the original intent of the Commerce Clause rather than the anything-that-exists-has-an-impact-on-commerce modern interpretation.*

The **Mummagraphics** take on CAN-SPAM language was that insignificant errors could be outlawed by the states. This would undermine the Act and impede "unique opportunities for the development and growth of frictionless commerce." 15 U.S.C. § 7701(a). The **Mummagraphics** loophole would allow the states to make all errors in commercial email actionable.

Commercial email is disseminated widely by a mouse-click into the laws of all jurisdictions. A sender would have to abide by the law of the most stringent jurisdiction.

*i.e. the nuttiest state. Any candidates?*

The regulation of interstate commerce implicitly prohibits states from passing a law that "unduly burdens interstate commerce and thereby 'impedes free private trade in the national marketplace.'" *GMC v. Tracy*, 519 U.S. 278, 287 (1997).

Email addresses do not identify specific locations, so it is difficult to know what laws apply. Civil liability for false statements can squelch innocent speech. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 270-73 (1964). A state that allowed enormous statutory damages would clobber commercial speech.

Oklahoma's was **\$25,000 for each day of violations!!** Okla. Stat. tit. 15 § 776.2C.

*Thus Mumma's cocky settlement demand.*

## Cruise.com Met the CAN-SPAM Requirements.

CAN-SPAM requires that emails include an opt-out return email address. Senders have ten days to comply. **Cruise.com** had this. Suit may only be brought for "a pattern or practice" of violations. Failure to comply with **Mumma's** request does not show a pattern. 🐾

