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Opinion No. 08-87

Constitutionality of SB 3418 as Amended Relating to Prohibition of Deceptive Geographic Business Names and Listings

QUESTION

If enacted, would SB 3418 as amended, which prohibits the use of deceptive geographic business names and listings in local phone directories, automated systems, and the Internet, be vulnerable to a constitutional challenge?

OPINION

If enacted, we do not foresee that SB 3418 would be subject to a facial constitutional challenge based on the Commerce Clause, the First Amendment, or the Supremacy Clause.

ANALYSIS

Description of Bill as Amended

The original SB 3418 prohibits the act of misrepresenting the geographic location of a person by listing a fictitious business name or an assumed business name in a local telephone directory. SB 3418, 105th Gen. Assem. (2008). The original bill contains two operative components. The first component makes the act of misrepresenting a person's geographic location through a business name a violation of the Tennessee Consumer Protection Act ("TCPA"). *Id.* The second component concerns listings. This second component makes failing to identify the locality and state of a person's business a violation of the TCPA if the person's listing misrepresents their geographic location, calls to the listed number are routinely forwarded or otherwise transferred to a person's business location that is outside the local calling area, and the person does not have a business location, branch, affiliate, or subsidiary, or agent located in the local calling area or a contiguous county to the local calling area. *Id.*

An amendment filed by Senator Southerland contains four key changes to the original bill. First, the amendment expands the bill's reach to cover listings or names in automated "411" directories and on the Internet. SB 3418, 105th Gen. Assem. (2008) (Am. 1). Second, the "act of misrepresenting" must be done with the "intent to mislead." *Id.* Third, the amendment creates a new exemption for the act of listing a number for a call center. *Id.* Fourth, the amendment deletes the

reference to "local telephone directories" in the introductory language to the two operative provisions.

An amendment filed by Senator Kurita replaces the language "through a business name or listing with the intent to mislead" in the introductory language to the two operative provisions with the phrase "through a business name or listing in a local telephone directory or the Internet with the intent to mislead." SB 3418, 105th Gen. Assem. (2008) (Am. 3).

This analysis is focused on the three most relevant constitutional provisions implicated by the proposed legislation, namely the Commerce Clause, the First Amendment, and the Supremacy Clause to the United States Constitution.

A statute that is challenged on constitutional grounds is presumptively valid. *Muller Optical Co. v. EEOC*, 743 F.2d 380, 386 (6th Cir. 1984). Courts "must attempt to preserve the legislation in question, if possible." *Id.*

Commerce Clause

The Commerce Clause states that "Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States." U.S. Const., Art. I, § 8, cl. 3. Despite no express basis in the text of the Constitution, the United States Supreme Court has "long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority*. --- U.S. ---, 127 S.Ct. 1786, 1792-93 (2007) (citing *Case of the State Freight Tax*, 15 Wall. 232, 279 (1873)).

Elsewhere, the United States Supreme Court has stated directly that subjects of interstate trade or commerce must be legitimate to fall within the protection of the Commerce Clause. *Sligh v. Kirkwood*, 237 U.S. 52, 60 (1915). Here, it would seem that commercial conduct that is inherently deceptive would not be subject to protection. "[H]owever, a finding that state legislation furthers matters of legitimate local concern, even in the . . . consumer protection area[], does not end the inquiry." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 336 (1977).

In order to determine whether a statute violates the dormant Commerce Clause, a court must first ask whether it "regulates evenhandly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce." *Oregon Waste Sys., Inc. v. Dept. of Environmental Quality of the State of Oregon*, 511 U.S. 93, 99 (1994). For purposes of this inquiry, "discrimination" means treating in-state and out-of-state economic interests differently such that in-state interests are benefitted and out-of-state interests are burdened. *Id.*

Statutes that are discriminatory on their face are subject to more rigorous scrutiny. *Philadelphia v. New Jersey*, 437 U.S. 617, 617 (1978). If discrimination is shown, the burden shifts to the State "to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake."

Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 353 (1977). If, however, a state law "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 (1970). "In either situation the critical consideration is the overall effect of the statute on both local and interstate activity." *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579 (1986).

SB 3418 seems to both regulate evenhandedly and have a negligible effect on interstate activity. The bill imposes no restrictions on an out-of-state business with a truthful and non-misleading business name or listing. The bill does not impose a requirement for all out-of-state persons or businesses to list their locality and state. Rather, the bill's operative provisions are triggered by a deceptive act, namely, "the act of misrepresenting the geographic location of a person through a business name or listing" (or through a "local telephone directory" or the "Internet" in Senator Kurita's amendment) "with intent to mislead" (under both Senator Southerland's and Senator Kurita's amendments). SB 3418, 105th Gen. Assem. (Tenn. 2008) (as amended).

The bill as amended contains a curative component that makes non-deceptive a business listing with a geographic component that would otherwise be deceptive, if the business discloses their locality and state clearly and conspicuously. SB 3418, 105th Gen. Assem. (Tenn. 2008) (as amended). Further, the bill as amended links the curative disclosure provision to three other conditions that serve to define the geographic reach of what constitutes a deceptive geographic listing. *Id.* Under the bill as amended, persons or businesses with a deceptive geographic listing must also not have a location, branch, affiliate, or subsidiary within the local calling area or a contiguous county to the local calling area to be subject to the curative disclosure. *Id.* Both in-state and out-of-state actors who commit the "act of misrepresenting the geographic location of a person" and fulfill the bill's other components are subject to the bill's application. The bill seeks to ensure that geographic representations contained in business names and listings are truthful and non-misleading.

The First Amendment

The proposed bill does not seem to be subject to a facial challenge on First Amendment grounds. The proposed bill seeks to regulate commercial speech. "The Constitution . . . accords lesser protection to commercial speech than to other constitutionally guaranteed expression." *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 563 (1980).

The proposed bill as amended seeks to proscribe deceptive or misleading commercial speech. The United States Supreme Court has stated, "The government may ban forms of communication more likely to deceive the public than to inform it . . . ." *Central Hudson Gas and Electric Corp.*, 447 U.S. at 564. Deceptive or misleading commercial speech is not and has never been protected by the First Amendment. *Id.* at 566.

The Supremacy Clause

State statutes may be preempted by the express intent of Congress, by a conflict with a congressional enactment, or by implication if Congress occupies a regulatory field with sufficient depth and breadth. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 540-41 (2001). Preemption "is not lightly to be presumed." *California Federal Savings v. Guerra*, 479 U.S. 272, 281 (1987). "Because consumer protection law is a field traditionally regulated by the states, compelling evidence of an intention to preempt is required in this area." *General Motors v. Abrams*, 897 F.2d 34, 41-43 (2nd Cir. 1990).

There is no law passed by Congress that expressly preempts states from regulating deceptive advertising whether or not conducted on the Internet. The Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), is the federal equivalent to the Tennessee Consumer Protection Act, which is the Act amended by the proposed bill. There is no basis for conflict preemption with the Federal Trade Commission Act. The Tennessee Consumer Protection Act is to be construed and interpreted consistently with the definitions given to unfair and deceptive practices in the Federal Trade Commission Act. Tenn. Code Ann. § 47-18-115. For field preemption analysis, consumer protection law is a field traditionally regulated by the States. See *General Motors v. Abrams*, 897 F.2d 34, 41-43 (2nd Cir. 1990). When Congress legislates in a field traditionally occupied by the states, courts "start with the assumption that the historic police powers of the States were not to be superseded by [federal law and agency action] unless that was the clear and manifest purpose of Congress." *Pacific Gas & Electric Co. v. Energy Resources Comm'n*, 461 U.S. 190, 206 (1983). Congress has not expressed such clear and manifest purpose with the Federal Trade Commission Act.

The most relevant federal statute that specifically addresses the regulation of commercial speech on the Internet is the Communications Decency Act, 47 U.S.C. § 230. The Act states that "no provider or user of an interactive computer service [which as defined includes Internet service providers] shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). The Act preempts conflicting state law. 47 U.S.C. § 230(e)(3). The proposed bill does not raise any preemption issues under the Act because Internet service providers are expressly exempted under the terms of the bill. SB 3418, 105th Gen. Assem. (2008) (as amended).

Based on our analysis under the dormant Commerce Clause, the First Amendment, and the Supremacy Clause, we do not believe that SB 3418 as amended would be subject to a facial constitutional challenge.

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