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Federal Judge Dismisses Challenge to Maine Law Restricting Marketing to Minors under 18

On September 9, 2009, a federal judge in Maine agreed with retailers, marketers, and media companies that the recently enacted Maine law "An Act To Prevent Predatory Marketing Practices Against Minors" is likely unconstitutional. Nonetheless, the judge dismissed the challenge to the Act on the ground that the state Attorney General does not intend to enforce it.

The Act, which became effective on September 12, 2009, broadly prohibits the collection, receipt, and use of personal information and health-related information from minors under 18 for marketing purposes without first obtaining verifiable parental consent. The Act also prohibits "predatory marketing" which is broadly defined as the use of any personal information or health-related information regarding a minor for the purpose of marketing a product or service to that minor or promoting any course of action for the minor relating to a product.

The overly broad requirements and limitations of the Act were reportedly not the intent of the Maine legislature. The original version of the bill was focused on protecting children's health information, requiring parental consent before the collection and use of certain health-related information of minors. The bill, however, was amended at the last minute to include a new and expansive definition of personal information, which as a practical matter prohibits direct marketing of products and services to Maine residents under the age of 18.

Personal information means "individually identifiable information, including: (1) an individual's first name, or first initial, and last name; (2) a home or other physical address; (3) a social security number; (4) a driver's license number or state identification card number; and (5) information concerning a minor that is collected in combination with an identifier described in this subsection." Health-related information is defined as "any information about an individual or a member of the individual's family relating to health, nutrition, drug or medication use, physical or bodily condition, mental health, medical history, medical insurance coverage or claims or other similar data."

Similar to the federal Children's Online Privacy Protection Act (COPPA), the Act defines verifiable parental consent as "any reasonable effort, taking into consideration available technology, including a request for authorization for future collection, use and disclosure described in the notice, to ensure that a parent of a minor receives notice of the collection of

personal information, use and disclosure practices and authorizes the collection, use and disclosure, as applicable, of personal information and the subsequent use of that information before that information is collected from that minor."

The Act provides for (1) relief as an unfair trade practice (enforced by both the state Attorney General and private rights of action specified in the Maine Unfair Trade Practices Act), (2) a private right of action for injunctive relief and/or damages, including attorneys' fees (monetary damages may be trebled for willful violations), and (3) a civil violation with monetary fines of not less than \$10,000 and not more than \$20,000 for a first violation, and not less than \$20,000 for each subsequent violation.

Facing a September 12, 2009 effective date, retailers, marketers, and media companies filed an unsuccessful lawsuit seeking to enjoin the enforcement of the Act on the grounds that the law violates the First Amendment and the Commerce Clause of the Constitution and is preempted by COPPA. State lawmakers are expected to revise the Act next year. In the meantime, although the order dismissing the challenge to the Act indicates the state Attorney General does not intend to enforce the Act, the order does not prevent possible private causes of action under the Act.

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