RECENT DEVELOPMENTS—CONSTITUTIONAL LAW

AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION V. DEAN

202 F. Supp. 2d 300 (D. Vt. 2002)

The United States District Court for the District of Vermont ruled on the constitutionality of two Vermont statutes that prohibit the distribution of indecent or obscene materials to minors.

A group of business and membership-based advocacy organizations challenged that two Vermont statutes, 13 V.S.A. Sections 2802 and 2802a, violate the First Amendment and the dormant Commerce Clause. Section 2802 prohibits disseminating indecent material to a minor in the presence of a minor; and § 2802a prohibits *knowingly* disseminating indecent material to a minor through the Internet or other electronic means.

The court first determined that two of the plaintiffs, the American Civil Liberties Union (ACLU) of Vermont and Sexual Health Network, Inc., had standing to challenge section 2802a. Both parties provide through their websites materials potentially "harmful" to minors and therefore have a credible or well-funded fear of being prosecuted under the statute. The court, however, found that Sexual Health Network does not have a standing to challenge section 2802.

The court held that § 2802a violates the First Amendment. In doing so, the court primarily relied on *Reno v. ACLU*, 521 U.S. 844 (1997), in which the Supreme Court unanimously held that a federal statute with a language similar to § 2802a was unconstitutional under the First Amendment. Similar to *Reno*, the court found that § 2802a broadly restricted indecent but constitutionally protected speech by adults, because: (1) the law forces every speaker on the Internet to abide by Vermont's standards; (2) there is no financially and practically effective ways to verify age on the Internet; and (3) the defendants fail to demonstrate why less restrictive provisions would not be as effective as § 2802a in protecting minors from sex exploitation. In response to the defendants' argument that § 2802a only punishes individuals with "actual knowledge" that a minor is receiving the "indecent" material, the court stated that online speakers cannot readily verify the age of an online "heckler" nefariously seeking to chill and suppress certain online speech.

The court further held that § 2802a violates the dormant Commerce Clause, because it regulates Internet commerce occurring wholly outside Vermont's borders. Although the court recognized that Vermont has a legitimate local interest in protecting children from sex predators, given the lack of proven effectiveness of § 2802a, the court concluded that the local benefits are outweighed by the burden on interstate commerce. Therefore the court permanently enjoined Vermont from enforcing § 2802a.

RIO PROPERTIES, INC. V. RIO INTERNATIONAL INTERLINK

284 F.3d 1007 (9th Cir. 2002)

The Court of Appeals for the Ninth Circuit ruled on the appropriateness of the use of email for court-ordered alternative service of process under Federal Rules of Civil Procedure 4(f)(3).

Rio Properties, Inc. (RIO) is a Las Vegas hotel and casino operator. Rio International Interlink (RII) is a Costa Rican entity operating an Internet sports gambling business, initially at www.riosports.com and later at www.betrio.com. RIO brought a trademark infringement suit against RII and attempted to locate RII for service of process. RII's contacts in the United States refused to accept service on RII's behalf, and RIO was unable to locate RII in Costa Rica. The district court then authorized alternative service under Rule 4(f)(3), ordering service by mail to RII's attorney and international courier, both in the United States, and by email to the email address listed as the preferred contact method on RII's website. The district court denied RII's motion to dismiss for insufficient service of process and lack of personal jurisdiction. When RII later failed to comply with discovery orders, the court entered default judgment against RII.

RII appealed the denial of the motion to dismiss as well as the entry of default judgment. The Ninth Circuit affirmed on all counts. In particular, the Ninth Circuit held that email could be an appropriate method to effect service of process if it is ordered by the district court under Rule 4(f)(3). The Ninth Circuit noted that it was the first federal court of appeals to rule on this specific issue. Based on the language, structure, and associated advisory committee notes of Rule 4(f), the Ninth Circuit first determined that it was not necessary to attempt all feasible alternatives before the district court could authorize alternative service under Rule 4(f)(3). It further found that the Constitution only requires that the method selected for service be reasonably calculated to provide notice and an opportunity to respond. The court recognized the difficulty of ensuring the receipt of email and the potential problems in transmitting attachments, but it also noted that many companies, including RII, relied primarily on email for communication. The Ninth Circuit held that it would leave to the district court the discretion to balance the limitations of email service against its benefits in any particular case. In light of RII's attempts to evade service of process in the instant case, the court approved the district court's decision.

In affirming the exercise of specific jurisdiction, the court ruled that RII's radio and print advertising in Nevada constituted forum-related activities from which the claim arose, and that there is no alternative forum available. Finally, in affirming the entry of default judgment, the Ninth Circuit held that the district court acted within its discretion because of RII's repeated attempts to evade service of process and its failure to comply with the district court's discovery order.

FERGUSON V. FRIENDFINDERS, INC.

95 Cal. App. 4th 1255 (2002)

The California Court of Appeals ruled that California Business and Professions Code § 17538.4, regulating unsolicited commercial e-mail (UCE), does not violate the dormant Commerce Clause.

Ferguson sued Friendfinders, Inc. and Conru Interactive, Inc. for sending him UCE in violation of the California Business and Professions Code § 17538.4. The superior court dismissed all of Ferguson's claims, largely on the grounds that § 17538.4 violated the dormant Commerce Clause. Ferguson appealed, and the California Court of Appeals reversed.

Section 17538.4 requires that UCE senders identify their e-mail messages by placing the letters "ADV:" in the subject line and provide a toll-free telephone number or valid return e-mail address through which senders can opt out from further e-mails. The statute is limited to UCEs that are delivered to a California resident via an email service provider's service or equipment located in California.

The California Court of Appeals reiterated the Supreme Court standard in adjudicating constitutionality issues involving the dormant Commerce Clause: a statute does not violate the Commerce Clause if it (1) does not discriminate against or directly regulate or control interstate commerce (strict scrutiny analysis) and (2) serves a legitimate local public interest which outweighs any burden imposed on interstate commerce (the balancing test). Under the strict scrutiny analysis, the court found that § 17538.4 only regulates individuals or entities that (1) do business in California, (2) utilize equipment located in California, and (3) send UCEs to California residents. According to the court, these limitations distinguished the instant case from *Healy v. The Beer Institute*, 491 U.S. 324, 109 S.Ct. 2491 (1989). In *Healy*, the Supreme Court struck down a Connecticut statute that required out-of-state shippers of beer to affirm that their price charged to Connecticut wholesalers was no higher than that charged to the neighboring states. The Supreme Court held that the Connecticut statute had the practical effect of controlling beer prices in other states. Here, the court held that the three limitations effectively restricted the scope of the statute and rejected the defendants' argument that geographic limitations on § 17538.4 are ineffectual in regulating the Internet and that the statute conflicts with other state's laws. The court also rejected the defendants' argument that it is impossible to determine the geographical residence of a UCE recipient.

Under the balancing test, the court found that UCEs are easy and inexpensive to create, yet difficult and costly to eliminate, especially when UCE senders use deceptive tactics to disguise the origin and nature of their emails. The court concluded that protecting a state's citizens from economic damage caused by the deceptive UCE constitutes a legitimate local purpose, and that the requirement imposed by § 17538.4 does not burden interstate commerce but facilitates it by eliminating fraud and deception.