# Hypertouch vs ValuClick Spam Email Case: It's Not Over Till Somebody Screams Ouch

May 7 2009, by Mary Anne Simpson

(PhysOrg.com) -- The recent decision by the Los Angeles Superior Court in Hypertouch vs ValuClick, LCO81000 decided on May 4th by Summary Judgment found that the Federal CAN-Spam Act preempted California's rigorous anti-spam, false and misleading email laws. Hypertouch, an Internet service provider got ticked because they alleged some 45,000 emails containing advertisement with fraudulent and misleading headers, were sent to its customers using specious means to collect the emails.

A motion for Summary Judgment was granted to ValuClick Inc and their affiliates because the judge found "no issue of material fact to be tried". The judge found no fraud and no evidence of a single fraudulent email was introduced. Thus, Hypertouch's claims are preempted by Federal law because judges decide matters of law and not juries. Case over, uh not so fast.

First off, the attorneys involved on both sides of the case are what might be called, the 'powerhouses' in the legal profession. Hypertouch Inc is represented by Lawrence Riff of Steptoe & Johnson and ValuClick Inc and their subsidiaries and affiliates are represented by Kevin Rosen of Gibson, Dunn & Crutcher. The record established over the past year sets up a clean and straight-forward appeal to test whether Congress intended to preempt the state's right to set standards for false and misleading spam emails and possibly whether a litigant is held to a higher standard of proving fraud which requires intent in order to avoid preemption.

The rocky road of the federal CAN-Spam Act began in the early 2000s. It was Congress's intent to bring uniformity to laws governing bothersome, annoying and false advertising emails which know no domestic or international borders. Interstate commerce is the bastion for federal law. However, Congress limited CAN-Span's application in section 7701 (a) (12) "because the problems associated with the rapid growth and abuse of unsolicited commercial email cannot be solved by Federal legislation alone, the development and adoption of technological approaches... will be necessary as well."

The CAN-Spam Act was not meant to preclude states from applying laws not specific to emails, like contract, torts, trespass, computer crimes or fraud. More specifically, Congress stated in 15 USC section 7707(c), the Act should not be "construed to have any effect on the lawfulness or unlawfulness, under any other provision of law, of the adoption, implementation, or enforcement by a provider of Internet access service of a policy of declining to transmit, route, relay, handle, or store certain types of electronic mail messages."

I contacted Mr. Riff to inquire on his plans to appeal the May 4th ruling, but I haven't heard back from him yet. He has anywhere from 60-days to 180-days to file a notice of appeal after entry of judgment to perfect his appeal. In the meantime, not to be spooky, I wonder what the new Obama Administration and the little late, but still arrived Congress is going to do with CAN-Spam. As if Congress doesn't have enough on their plate. Maybe, a side of California anti-spam legislation might cut through some financial scams.