

(Un) Check Your Checkboxes: States not Preempted by FECA

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On January 26, Minnesota Federal District Court Judge John Tunheim dismissed a pending action for declaratory relief brought by WinRed, Inc., seeking to enjoin an ongoing consumer protection investigation brought by the Attorneys General of Minnesota, New York, Connecticut, and Maryland. This decision highlights two important points regarding State Attorneys General (AGs): 1) their consumer protection laws are rarely found to be subject to broad federal preemption, and 2) they often can't be hauled into other states, even if operating as a multistate.

The AG Investigation and WinRed's Lawsuit

In April of last year, the AGs sent a letter to WinRed identifying certain fundraising practices they alleged were misleading, including the use of pre-checked boxes that would obligate donors to a recurring donation. The AGs noted their significant experience in dealing with "negative option" marketing, a subject we have [previously identified](#) as a focus for State AG enforcement. The use of pre-checked boxes is a red flag for States, even those without a specific statute regarding auto-renewals, as they can assert the practice is a deceptive act under their general UDAP laws.

In response, WinRed asserted that the AGs could not conduct their investigation, as they were preempted by the Federal Election Campaign Act (FECA). Because FECA governs fundraising practices of federal political committees, WinRed asserted that the AGs could not read state consumer protection laws to require additional disclosure in advertising beyond those required by FECA. When the AGs replied that they did not agree with the preemption analysis, WinRed filed suit against all four in Minnesota District Court. In its suit, WinRed sought a declaratory judgment asserting express, field, and conflict preemption of state consumer protection laws under FECA. The Court disagreed and held that FECA did not preempt state consumer protection laws, and moreover, it lacked personal jurisdiction over three of the states.

FECA did not Preempt State Consumer Protection Law

First, the Court noted that while FECA includes an express preemption clause at 52 U.S.C. § 30143, it is limited to, "State law with respect to election to Federal office." Looking at the Legislative intent and scope of the preemption regulation, the Court found that the intent was to address organization and registration of political committees and disclosure of receipts and expenditures, not topics under laws of general applicability like consumer protection. Next, the Court rejected WinRed's field preemption claim. While the relevant House Committee Report stated that FECA does "occupy the field with respect to elections to Federal office," this specifically did *not* include the field of consumer

protection. Finally the Court rejected WinRed's conflict preemption argument that applying state consumer protection laws would be an obstacle to obtaining Congress' intent of uniformity in contributions, expenditures, and reporting of federal elections. The Court found that Congress did *not* regulate consumer protection in FECA, and therefore allowing States to enforce their laws would not frustrate Congress' intent.

The Court Lacked Personal Jurisdiction Over New York, Connecticut, and Maryland

WinRed asserted that although the AGs of New York, Connecticut, and Maryland did not purposefully avail themselves to Minnesota law nor did they direct activities at Minnesota, the Court still had jurisdiction under a theory of conspiracy-based personal jurisdiction. The Court disagreed however, holding that conspiracy-based jurisdiction required that the harm of the actions taken as part of the conspiracy must be felt within the borders of Minnesota. Since WinRed is a citizen of Delaware and Virginia, it could not show that the actions it would need to take in response to the requests from those States would take place in Minnesota, and therefore it could not show conspiracy-based jurisdiction.

In a footnote, the Court also addressed another claim by WinRed – that parties subject to multistate investigations might have to seek recourse in multiple jurisdictions and waste resources. The Court found that personal jurisdiction doesn't examine the resources of a plaintiff, but only the burden on the defendant. Here, it would be a burden on the AGs to litigate the case away from their home states. The Court went on to note that finding otherwise might discourage future multistate activity, which could *increase* the burden on companies like WinRed as they respond to various independent inquiries. In addition, this would place a burden on judicial resources as courts would have to determine how much collaboration among AGs establishes jurisdiction.

The Takeaway: The AGs Have Broad Power, and are Watching

While WinRed has already filed a notice of appeal, companies should pay attention to the underlying rulings supporting narrow reads of preemption of consumer protection laws and giving State AGs broad authority to enforce the law in their home states. When it comes to subscription services, AGs are going to be taking a close look at advertisements and solicitations that they believe trick consumers into providing consent. When it becomes difficult for a consumer to provide informed consent, the AGs will investigate.



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