

**MD Court of Special Appeals rules anti-spam law to get new life.
Daily Record (Baltimore, MD)
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Index of articles > Business > Business publications > Daily Record (Baltimore, MD)
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Maryland's anti-spam law is constitutional as applied to a lawsuit filed by a state resident against an alleged spammer from New York, the state's second-highest court has held. The decision reverses last year's ruling by a Montgomery County judge who dismissed the suit, finding that the Maryland Commercial Electronic Mail Act was unconstitutional as applied. Yesterday, the Court of Special Appeals reversed that decision, allowing the suit to proceed in circuit court. "I'm very excited that the court finally recognized formally the power of the state to regulate these

types of communications and also elevated the status of electronic communications, and also recognized the power of the state to protect individuals in Maryland from false and misleading communications," said Michael S. Rothman, who represented appellants MaryCLE LLC and NEIT Solutions LLC. The lawyer who represented e-mailer First Choice Internet Inc., and its owner, Joseph Frevola, criticized the decision and said he may seek further review. Attorney Andrew M. Dansicker said yesterday's opinion has broadened "personal jurisdiction in Maryland beyond any kind of reasonable interpretation of that concept." Rothman said he expects an appeal. "After all the hard work, it's great to see the court reach the right result, but unfortunately this is going to be taken up on appeal, so I imagine the real battle is just starting," Rothman said. To tell the truth, the key questions before the Court of Special Appeals were whether the alleged spammer could be sued in Maryland and whether the state's 2002 anti-spam law is constitutional. That law forbids the sending of commercial e-mails containing "false or misleading information" to Maryland residents and allows spam recipients to recover damages. Montgomery County Circuit Judge Durke G. Thompson ruled last year that First Choice and its owner, Joseph Frevola, were not subject to the law because they did not purposely direct e-mails here and did not know where the e-mails would be opened. Otherwise, Thompson reasoned, the law would violate the U.S. Constitution's Commerce Clause because it attempted to regulate commerce occurring outside Maryland. The Court of Special Appeals disagreed. "First Choice directly caused the emails to be sent to Maryland, among other states," Judge Sally D. Adkins wrote for a three-judge panel. "It is thus reasonable for First Choice to expect to answer for those emails in Maryland, or any other state to which they were sent." The court rejected First Choice's argument that complying with the law would be too burdensome since in some cases it is impossible to figure out the location of an e-mail user. "The burden of complying with [the law] is to disseminate truthful, non-deceptive e-mails; it is not to determine the location of e-mail recipients," Adkins wrote. Addressing the Commerce Clause issue, the court agreed with the Washington Supreme Court, which examined an anti-spam law similar to Maryland's and found it constitutional. "We similarly agree with the Washington court that [the law] does not regulate exclusively extraterritorial conduct because its focus is not on when or where recipients may open the proscribed messages. Rather, the Act addresses the conduct of spammers in targeting [Maryland] consumers'," the court held. The intermediate appellate court also held that Frevola may be held personally liable for violating the anti-spam law. The Office of the Attorney General, which filed a brief supporting MaryCLE, applauded the decision. "This type of spam is at its best a time consuming annoyance, but at its worst is a vehicle for transmitting viruses and spyware to unsuspecting e-mail recipients," an OAG spokesman noted in an e-mailed statement. Private enforcement MaryCLE (pronounced "miracle") was founded by Eric Menhart, a recent graduate of George Washington University Law School. According to the opinion, Menhart set up an e-mail account with the domain name maryland-state-resident.com and used it to sign up for a Web site that provided his e-mail address to First Choice, which started sending him spam e-mails. Menhart claimed he replied to the e-mails and asked to be removed from the mailing list, but never got an answer and kept receiving spam. The parties in this

case differ about MaryCLE's purpose. Menhart claims he wants to protect consumers on the Internet."If you're allowing the state of Maryland to protect its residents from false and misleading communication e-mails, then you give them the power to protect its citizens from basically anybody who they can get jurisdiction over, and hopefully this will reduce the amount of false and misleading commercial e-mail out there and really rescue the medium of e-mail, which is no less than what we're after," Rothman said. Dansicker, though, said Menhart is simply out to extort money from Internet marketers by threatening to bring suits under the anti-spam law. Frevola shut down First Choice after Menhart sued because of the threat of other lawsuits, the lawyer said. "Basically this just discourages businesses that do Internet business from doing business in Maryland," Dansicker said. The Court of Special Appeals decision means that "if you send an e-mail out and if the person who receives it thinks it could be misleading in some way, they can sue you." But Michael Oliver, a Towson-based lawyer who was not involved in this case but focuses on technology law, says that may not be a flaw in the law but a feature. "I think that's a valid business," Oliver said. "When [the] Legislature decided private persons should be able to enforce the statute the Legislature knew that these types of corporations and entities would crop up and enforce the statute. I think the Legislature probably hopes that would happen."

WHAT THE COURT HELDCase: MaryCLE LLC et al. v. First Choice Internet Inc. et al., CSA No. 2321, Sept. Term 2004. Reported. Opinion by Adkins, J. Filed Jan. 26, 2005. Issues: Did the circuit court err in dismissing the suit for lack of personal jurisdiction? Holding: Yes; reversed and remanded. Maryland has personal jurisdiction over the appellees, and the Maryland Commercial Electronic Mail Act does not violate the Commerce Clause of the U.S. Constitution.

Counsel: Michael S. Rothman for appellant; Andrew M. Dansicker for appellee.