

Legal Update from Flagler Law Group



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Brian Flagler founded Flagler Law Group in the spring of 2006 to serve the legal needs of publishers, designers, producers, and distributors of Christian media. With a combined 20+ years in the industry, we know Christian publishing. We believe that our experience handling matters for a diverse variety of Christian publishers, ministries, and other organizations **from the publishing perspective** significantly contributes to the value that we offer our clients.

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The Online Sales Tax Debate: Illinois Strikes Down State Law

Illinois added the latest chapter in the ongoing debate regarding sales tax and online retailers. As expert tax attorney Martin Eisenstein* describes below, the Illinois Supreme Court struck down the state law allowing the collection of sales tax for online transactions. The decision diverged with a similar case in New York in which the state online sales tax law was allowed to stand (Amazon and Overstock have appealed the New York decision). The difference of opinion among states means the issue could be headed for the U.S. Supreme Court. And without any forthcoming federal solution from Congress, it also means the murky law surrounding the collection of online sales tax will have to wait a bit longer for clarity.

** Mr. Eisenstein's firm Brann & Isaacson represented the prevailing party before the Illinois Supreme Court.*

From Martin Eisenstein:

The Illinois Supreme Court ruled on October 18 that the Illinois web affiliate nexus statute (Public Act 96-1544) was preempted by federal law and is therefore "void and unenforceable." The Internet Tax Freedom Act (ITFA), first passed by Congress in 1998, and repeatedly extended, prohibits "discriminatory taxes on electronic commerce." The majority opinion concluded that the Illinois statute constituted the very type of discrimination that the federal law was intended to prohibit, i.e., states targeting transactions conducted over the Internet for tax treatment that is different from that applied to other methods of selling. This is an important victory for Internet merchants, as well as for their web advertising affiliates.

Because the state Supreme Court struck down the Illinois nexus provision as being in violation of the ITFA, the Court found it unnecessary to address the PMA's constitutional objections to the law, including the claim that Public Act 96-1544 was unconstitutional under the Commerce Clause of the U.S. Constitution. The trial court had concluded that the web affiliate law was void on both ITFA and Commerce Clause grounds.

The fact that the Supreme Court did not address the Commerce Clause argument is of no significance. It is significant, however, that the Court found that performance marketing relationships with Internet affiliates are "inherently national or international in scope and disseminated to a national or international audience." This distinction of online marketing from conventional in-state advertising is an important recognition, by a highly regarded appellate court, of the non-local nature of Internet advertising and may be a basis to challenge other comparable statutes.

The ruling by the Illinois Supreme Court that Public Act 96-1544 is "void and unenforceable" results in a judicial finding that the statute

was never legally valid and, therefore, it is not currently in effect. This means that retailers are free to reinstate their Illinois affiliates whose contracts were terminated out of fear of the “click through” nexus law. Of course, companies must still be wary of any additional activity that may be conducted by web affiliates on their behalf, such as active solicitation of prospective customers and other in-state promotional efforts. The court ruling does not displace, or supersede, traditional, physical presence agency-nexus standards. If Illinois affiliates engage in activities that go beyond the posting of Internet links, there remains the risk that those affiliates could create nexus for out-of-state retailers under existing nexus principles that are unrelated to the statutory provision that was struck down by the state Supreme Court.

The Illinois Supreme Court decision entitled *Performance Marketing Ass’n v. Hamer* can be found at <http://www.state.il.us/court/Opinions/SupremeCourt/2013/114496.pdf>.



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