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Defendants' method of distributing mailings and statements in their mailings describing their distribution methods.

To be an unlawful business practice, the challenged action must be: (1) illegal; and (2) a business practice. Because Plaintiff failed to show that the distribution method was illegal under the lottery statute, the court granted summary judgment to Defendants.

The court also granted summary judgment to Defendants on the second element of the distribution count, the allegedly illegal statements. The court found that the sweepstakes' representations that "'No Purchase Is Necessary' to win" were not misleading or false, since Plaintiff provided no evidence that these statements were not true.

Pre-Selected Winning Numbers Did Not Mislead Customers

Plaintiff claimed that certain publishers' statements regarding the use of pre-selected winning numbers also constituted misleading and false advertising. These statements referred to the dates of AFP's and PCH's prize drawings and the chances of winning the contests. Plaintiff argued that since these Defendants use pre-selected winning numbers, they misrepresented how often they held the drawings for prizes. The court found, however, that Defendants truthfully stated the frequency of their prize drawings in their mailings.

Additionally, Plaintiff claimed that entries received earlier by the publishers had a greater chance of being the winning entry based on the pre-selected entry scheme. Plaintiff, however, failed to clearly explain this theory to the court. Consequently, the court granted summary judgment to Defendants.

Defendants' Change in Rules Did Not Mislead Consumers

Finally, Plaintiff challenged an alleged change in the prizes and rules of a sweepstakes run by AFP. AFP's Sweepstakes #27 changed six $1 million prizes to one $10 million prize. Plaintiff also claimed that an AFP rule change appeared in some mailings, but was omitted in others, constituting false and misleading statements. The court granted AFP summary judgment on both of these counts, finding that AFP's rules authorized AFP to change prizes, therefore no evidence supported Plaintiff's argument that this rule change misled consumers. The court granted summary judgment due to the insufficiency of Plaintiff's evidence, the unlikelihood of Defendants' statements misleading a reasonable customer, and a plain-reading of Defendants' sweepstakes bulletins.

Thus, except for Plaintiff's claims against AFP's prompt-pay sweepstakes, the court granted summary judgment to Defendants on all of Plaintiff's claims since they were not supported by law or evidence. Although it denied summary judgment to AFP on the issue of whether AFP's prompt-pay sweepstakes required illegal consideration, the court found that all of the other challenged sweepstakes were not illegal under California criminal law. Additionally, the court did not find any of Defendants' sweepstakes advertising or statements regarding their methods of running the sweepstakes false or misleading.

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By Philip Tortorich

Deceit, fraud and misrepresentation – these are the problems that states seek to combat with consumer protection laws. While the state laws do not use the same wording, the main focus of all of these laws is to protect consumers from dishonest suppliers. Courts have had to answer an ancillary issue concerning whether a supplier of goods has standing to sue its competitor under these consumer protection laws. In ***H.D. Oliver Funeral Apartments, Inc. v. Dignity Funeral Services, Inc.*, 964 F. Supp. 1033 (E.D. Va. 1997)**, a district court addressed this issue and held that a supplier did not

have standing to sue its competitor under a Virginia consumer protection act.

H.D. Oliver Funeral Apartments ("Oliver") and Dignity Funeral Services, trading as Altmeyer Funeral Homes, Inc. ("Altmeyer"), were in the business of providing a full range of funeral services to customers in Virginia and nearby states. In January of 1997, Altmeyer advertised its services in a newspaper circulating in Virginia and North Carolina. The ad compared prices of Altmeyer with thirteen other competing funeral homes, including Oliver. Altmeyer also compared total prices among funeral homes. The problem with the ad was not the fact that the comparisons were made but that the prices listed for all of the companies were knowingly false and misleading. Oliver initiated this suit claiming that the ad violated two state statutes: the Comparison Price Advertisement Act, VA. CODE ANN. § 59.1-207.40 (Michie 1992), and the Virginia Consumer Protection Act, VA. CODE ANN. § 59.1-196 (Michie 1992).

Virginia Enacts Consumer Protection Statutes

In 1992, Virginia enacted the Comparison Price Advertisement Act ("CPAA"). The relevant portion of the CPAA states: "no supplier shall in any manner knowingly advertise a comparison price which is based on another supplier's price unless: . . . [t]he supplier can substantiate that the comparison price is the price offered for sale by another supplier." Both Oliver and Altmeyer are suppliers under the CPAA. Under the statute, violations of the CPAA are also violations of the Virginia Consumer Protection Act ("VCPA").

In 1977, Virginia enacted the VCPA, intending it to be "applied as remedial legislation to promote fair and ethical standards of dealings between suppliers and the consuming public." The VCPA prohibits more than thirty specific practices, two of which are relevant to this case. First, it prohibits suppliers from violating the CPAA. Second, it prohibits suppliers from: "[u]sing any . . . deception, fraud, false pretense, false promise, or misrepresentation *in connection with a consumer transaction,*" (emphasis added). A consumer transaction, under the statute, includes four types of dealings. The one at issue in this case is "the advertisement, sale, lease or offering for sale or lease, of goods or services to be used primarily for personal, family or household purposes[.]" Willful violators of the VCPA may be liable for three times the amount of actual damages, attorney fees, and costs.

Altmeyer Contended Oliver Had No Standing to Sue Under the CPAA and VCPA

Oliver's complaint contained many counts. This appeal only dealt with Oliver's second count which alleged that Altmeyer violated the CPAA and the VCPA. Altmeyer moved to dismiss this count on the grounds that Oliver did not have standing to sue under the Acts because Oliver was not a consumer. Specifically, Altmeyer argued that the statutes only protect consumers from suppliers, and Oliver was not a consumer; rather, Oliver was a competitor. Altmeyer contended that the only persons who can make claims under the VCPA are those who have suffered a loss in a consumer transaction. Altmeyer argued that Oliver had not suffered loss as a result of a consumer transaction but rather as a business competitor — a loss not covered under the VCPA — and therefore had no standing to sue.

Oliver, on the other hand, argued that the scope of the VCPA is broad enough to protect competitors since the statute's only limitation on who may recover is "any person who suffered a loss as a result of a violation" and "person" includes a corporation under the statute. Further, Oliver argued that the Virginia legislature did not limit the scope of the VCPA to consumers only, and if it had wanted to limit the scope, it could have done so as it did in other consumer protection acts. Finally, Oliver argued that allowing non-consumers to sue under the VCPA would further the legislative intent of applying the VCPA as remedial legislation.

Whether a competitor is protected under the Virginia statutes had never been addressed in the federal courts or the Virginia appellate courts. The court noted that in ruling on a case without federal precedent, a federal court is permitted to look at decisions of state trial courts. Further, where private parties raise "unsettled questions of state law which involve — apart from normal precedential effect — only the rights of these private parties," a federal court may properly rule on this issue even though the federal decision may not coincide with a later state decision.

Court Rejected Parties' Comparison to Other States' Consumer Protection Laws

Altmeyer and Oliver both argued that the court should look to cases interpreting other states' consumer protection laws as a guide for determining whether a competitor has standing to sue under the Virginia laws. For instance, Altmeyer argued that the Tennessee Consumer Protection Act supported the claim that competitors could not sue under an act similar to the Virginia law. Specifically, Altmeyer argued that the court in *Coyler v. Trew*, 1982 WL 4419, *4 (Tenn. Ct. App. Feb. 12, 1982), held that a competitor did not have standing to sue a competitor for its false advertising. The court in the instant case found a major difference between the Tennessee Act and the VCPA. The Tennessee Act specifically states that only consumers may recover under the statute. The same is not true under the VCPA; the VCPA language is open to interpretation. Therefore, the court in the instant case found the Tennessee court's holding inapplicable.

Altmeyer also tried to analogize to a Florida Act which is similar to the VCPA. However, in the Florida Act, a consumer transaction is defined differently. A consumer transaction in Florida is "a sale . . . or other disposition of an item, a consumer service, or an intangible *to an individual* for purposes that are primarily personal, family or household," (emphasis added). This statutory language prevents a corporation from suing because it is not "an individual." Unlike the Florida Act, a corporation is allowed to sue under the VCPA provided that the business is involved in a consumer transaction. Accordingly, the court in the instant case rejected Altmeyer's comparison to the Florida Act.

Oliver tried to persuade the court that competitors in Virginia should have standing to sue for a violation of the VCPA since competitors in other states have this right under analogous consumer protection acts.

Finally, Altmeyer attempted to use the Pennsylvania Consumer Protection Act to show that competitors do not have standing to sue. Under the Pennsylvania Act, recovery is allowed by "any person who purchases or leases goods or services primarily for personal, family or household purposes." This language differs from the VCPA because the VCPA allows recovery by any person injured by the act. Also, the Pennsylvania Act defines consumer transactions differently than the VCPA. Accordingly, the court in the instant case held that the Pennsylvania Act was "not supportive of the proposition that under the VCPA a business entity may not sue a competitor for false advertising."

Like Altmeyer, Oliver also attempted to analogize to other state acts. Oliver tried to persuade the court that competitors in Virginia should have standing to sue for a violation of the VCPA since competitors in other states have this right under analogous consumer protection acts. For example, Oliver looked to the Delaware Uniform Deceptive Trade Practice Act. Oliver argued that the court in *Roberts v. American Warranty Corp.*, 514 A.2d 1132, 1132 (Del. Super. Ct. 1986), allowed competitors to sue under the Delaware Act, and therefore, competitors in Virginia should also have standing to sue. The court in the instant case rejected this analysis because it found that the real issue in *Roberts* was whether a consumer — not a competitor — had standing to sue under that statute, and the instant case only concerned a competitor. Furthermore, because the *Roberts* court made little mention of the specific wording of the Delaware Act in its opinion, the court in the instant case found it difficult to compare the Delaware Act effectively with the VCPA.

Oliver then tried to analogize to the Illinois Consumer Fraud and Deceptive Business Practices Act to

support its proposition that competitors have standing to sue. However, the Illinois Act specifically provides for a right of recovery by "any person who suffers damages in violation of the Act committed by any other person." As in the VCPA, the term "person" is defined in the Illinois Act to include corporations. However, the Illinois Act was specifically designed to "protect consumers and borrowers and businessmen against fraud, unfair or deceptive acts or practices in the conduct of any trade or commerce." This language made it clear to the court that a competitor in Illinois has standing to sue. Since the Virginia legislature did not state that its intention was to include business protection in the VCPA, the court in the instant case held that the Illinois Act was no help in interpreting the VCPA.

Finally, Oliver tried to use the Colorado Consumer Protection Act to support its contention. Oliver argued that the court in *Heller v. Lexton-Ancira Real Estate Fund, Ltd.*, 809 P.2d 1016, 1022 (Col. Ct. App. 1990), overruled a previous ruling that granted limited recovery only to consumers under the Colorado Act. The language of the Colorado Act stated that "the provisions of this article shall be available to any person in a civil action for any claim against *any person* who has engaged in or caused another to engage in any deceptive trade practice," (emphasis added). Oliver argued that the "any person" language included competitors. The court in the instant case acknowledged that, generally, the Colorado Act supported Oliver's argument. Nonetheless, the court found that the Colorado Act still did not help the court decipher the language of the VCPA because the language of the two acts varied significantly.

VCPA Does Not Protect Competitors

In dismissing the analogies to the other state consumer protection statutes, the court in this case held that the issue of standing depended on the specific language of the Virginia Acts. In general, there are two types of state consumer protection laws. One type limits recovery only to consumers who purchase products "primarily for personal, family or household purposes." Under this construction, businesses do not have standing to sue. The other type of consumer protection law allows recovery by "any injured person." This latter construction permits businesses to sue if they are acting in a consumer capacity. The court included the VCPA in the second type of consumer protection laws because businesses may sue under the statute.

Even though the court found that the Virginia statute fell within this second category of consumer protection statutes, the court held that Oliver did not have standing to sue because Altmeyer was not acting in a "consumer capacity." In determining what a "consumer capacity" was, the court looked to Virginia law concerning statutory construction and found that statutes were to be construed so as to "promote the ability of the enactment to remedy the mischief at which it is directed," (citing *Rector & Visitors of Univ. of Va. v. Harris*, 387 S.E.2d 772, 775 (Va. 1990)).

The intent of the VCPA, as stated in the Act, is to "promote fair and ethical standards of dealings between suppliers and the consuming public." Oliver argued that the Act, as remedial legislation, should be liberally construed. However, the law of remedial legislation requires that remedial legislation be construed liberally, "so as to suppress the mischief and advance the remedy in accordance with the legislature's intended purpose." The court found that if Oliver could argue for a liberal construction of the statute, Oliver could argue that it had standing to sue. However, remedial legislation must be viewed in light of its purported purpose, and the purpose of the VCPA is to suppress deceptive practices of suppliers as they affect the consuming public, not competitors.

Oliver also argued that by forbidding a competitor to sue under the VCPA the injured competitor would be precluded from obtaining relief. While not deciding the issue, the court stated that Oliver could be entitled to sue under certain Virginia statutes which prohibit businesses from publishing advertisements that contain misleading statements.

In sum, the court held that businesses as competitors do not have standing to sue under the VCPA. Therefore, the court ruled that Altmeyer's motion to dismiss was proper because Oliver sued as a competitor, not as a consumer, and therefore lacked standing under the Virginia Acts.