

1996

## Accident Victims' Right to Privacy Upheld Over Attorneys' Free Speech Rights

Sara E. Neff

Follow this and additional works at: <http://lawcommons.luc.edu/lclr>



Part of the [Consumer Protection Law Commons](#)

---

### Recommended Citation

Sara E. Neff *Accident Victims' Right to Privacy Upheld Over Attorneys' Free Speech Rights*, 8 Loy. Consumer L. Rev. 289 (1996).  
Available at: <http://lawcommons.luc.edu/lclr/vol8/iss4/10>

This Recent Case is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola Consumer Law Review by an authorized administrator of LAW eCommons. For more information, please contact [law-library@luc.edu](mailto:law-library@luc.edu).

---

EFTA. Under the IFCA claim, the court denied the defendants' motion for summary judgment. The court assessed the statutory text, and cited *Kedziora v. Citicorp Nat'l Servs.*, 780 F. Supp. 516, 534 (N.D. Ill. 1991) for the proposition that a deceptive practice may be one that is "misleading," and whether or not a business form is misleading is a question of fact. The

court found that a reasonable trier of fact could find the direct deposit form misleading. Additionally, the court declined to find as a matter of law that Cobb did not suffer damages from the repayment arrangement. Reconsideration of the matter was denied on June 6, 1996. *Cobb v. Monarch Fin. Corp.*, 1996 WL 308279 (N.D. Ill. June 6, 1996).

## *Accident victims' right to privacy upheld over attorneys' free speech rights*

by Sara E. Neff

Attorneys must wait 30 days to solicit Texas accident victims and their families through the mail. The United States Court of Appeals for the Fifth Circuit recently rejected the proposition that a 30-day ban on attorneys' direct mail solicitation of accident victims or their families is unconstitutional in *Moore v. Morales*, 63 F.3d 358 (5th Cir. 1995). In an action between attorneys and various commercial entities and the Attorney General of Texas, the United States Court of Appeals reversed the district court's ruling in favor of the attorneys. The court of appeals concluded that a Texas statute prohibiting attorneys from direct mail solicitation of accident victims or their families within 30 days of the accident advanced Texas' interest in protecting the privacy of accident victims and their loved ones and did not violate the attorneys' constitutional right to free speech.

The United States Court of Appeals for the Fifth Circuit refused to address the constitutionality of the statute as applied to other licensed groups such as physicians, surgeons, chiropractors, and private investigators. The court noted that other groups have not challenged the ban.

### **Texas legislature protects privacy of accident victims**

In 1993, the Texas legislature enacted Texas Penal Code § 38.12(b)(1), which limits the right of several groups of licensed professionals, including attorneys, to solicit accident victims or their families. TEX. PENAL

CODE § 38.12(b)(1) (1994). The provisions of this statute serve several functions. First, the statute prevents licensed professionals from soliciting accident victims directly through the mail until 30 days have passed. Second, the statute restricts accident report access for 180 days following an accident and prevents solicitation of criminal and civil defendants through mail until 30 days after the initiation of legal proceedings. In addition, the statute enables victims to indicate, on the face of the accident report, whether they wish to be solicited.

### **District court found 30-day ban on solicitation unconstitutional**

The attorneys challenged the 1993 statute on the grounds that it violated their right under the First and Fourteenth Amendment of the U.S. Constitution. The district court agreed, finding that the provisions of the statute presented an unreasonable impediment to commercial free speech. Thus, the district court declared the challenged provisions of the statute unconstitutional.

### **The 30-day ban must satisfy constitutional test**

On appeal, the court tested the 30-day ban for constitutionality using the three prong test established in *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). In order to hold the 30-day ban on attorneys' direct mail solicitation of accident victims and their families constitutional, the court must find (1) a

---

substantial interest exists in upholding the statute; (2) the statute materially advances that interest; and (3) the statute is drawn sufficiently narrowly to advance that interest. The Court of Appeals rejected the Texas attorneys' argument that the state of Texas possessed no substantial interests and that the 30-day ban did not advance these interests. Therefore, the Court of Appeals found that the first two prongs of the *Central Hudson* test had been met.

The court based its finding that Texas possessed a valid interest in protecting the privacy of accident victims and their families in part on the State's extensive evidence. The State of Texas established that a large number of complaints concerning direct mail solicitation. Expert testimony revealed that such solicitation can be detrimental to the victim or family and that a 30-day ban provides protection from the potential detrimental effects of solicitation.

In addition, recipients of the direct mail solicitation testified that the solicitation "immediately following an accident outraged them, invaded their privacy, and contributed to their emotional distress." These individuals stated that, they would have been better able to cope with the intrusive nature of solicitation had the solicitation taken place after a month following the accident. Accordingly, the United States Court of Appeals for the Fifth Circuit concluded that the state of Texas had an interest in protecting the privacy of the victims and their families and that the ban sufficiently protected this privacy.

The Texas attorneys then argued that the statute failed to meet the third prong of the *Central Hudson* test

because the statute was not drawn too narrowly. The attorneys argued that Texas accident victims already possessed a way to curb solicitation because the victims could indicate that they did not want to be solicited on the accident report. However, the court rejected this argument for two reasons. First, the fact that a victim can indicate he or she does not want to be solicited neither protects the family of the victim nor does it protect the victim if the victim is injured to the extent that he or she cannot sign the report. Second, the court indicated that the State is not required to use the "least restrictive means in promoting its interest." The third prong only requires that the regulation's restrictions be reasonably tailored to fit the desired objective. The court ultimately found this requirement to be satisfied.

### **Attorneys can exercise free speech after 30 days**

In conclusion, having satisfied all three prongs of the *Central Hudson* test, the *Moore* court declared the statute constitutional. The court held that a solicitation ban is an appropriate means to protect Texas victims' right to privacy. Beware attorneys: you may not solicit accident victims in Texas directly through the mail until the 31st day after an accident.

*Editor's Note:* On February 20, 1996, a petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit was denied. *Ventura v. Morales*, 116 S. Ct. 917 (1996).