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Jean Prendergast

ing, the circuit court concluded that the high-pressure sales tactics, rather than the notices themselves, caused the residents to purchase memberships. The court vacated the entire order. The Division appealed the circuit court ruling to the Court of Special Appeals of Maryland.

Illegal Solicitations Subject to Regulation

The appellate court found the notices misleading and consequently analyzed whether the Division could regulate them. Since most of the false and misleading conduct transpired outside Maryland, the court questioned the state's ability to control the notices. The court also considered to what extent the Division could regulate the out-of-state conduct that made the solicitations defective.

OWC argued that the regulations were invalid if they affected out-of-state conduct because Maryland lacked the power to control conduct occurring within other states. The court disagreed, holding that the Division could regulate any notices sent to Maryland residents which violated the Act, even if those notices originated out-of-state. After finding the notices misleading, the court held that the Division could regulate them.

Although the Division could regulate the communications sent into Maryland, the court opined that any attempt to control the sales promotion efforts or the redemption scheme, both of which occurred entirely outside of Maryland, was an impermissible intrusion on out-of-state conduct.

Restitution Allowed to Extent Consumer Relied on Notice

The Division argued that the Act allowed restitution for consumers' damages which occurred "in connection with" a violation of the Act, and that OWC's sales activities were "in connection with" such illegal solicitations. Therefore, the Division wanted the court to order OWC to pay restitution for the entire transaction in each case. The court, however, rejected this argument. The court relied on *Consumer Protection v. Consumer Publishing*, 501 A.2d 48 (Md. 1985), which held that while proof of actual reliance was not necessary to justify a general restitution provision, actual restitution could be ordered only for consumers who stated that they were deceived by and relied on the offending communications.

The appellate court stated that since the notice here made no mention of campsites or memberships there was a very remote possibility that a Maryland resident purchased a campsite membership in reliance on the solicitation. The court thus concluded that the sales tactics were not sufficiently "in connection with" the notices and consequently precluded restitution for the purchases.

However, despite refusing to order restitution for the membership purchases, the court determined that some relief could be ordered. The court held that the Division could require OWC to refund an amount equal to the cost of the trip to Marylanders who claimed that, without ultimately purchasing a membership, they visited OWC campgrounds in reliance on a notice which violated the Act. Marylanders who did purchase a campground membership, however, would not be eligible for this refund. The court also held that the Division could order OWC: (1) to refund all redemption fees charged to obtain the prizes, or (2) to pay the value of prizes to those persons currently holding certificates of redemption who OWC also misled into thinking the prizes would be awarded unconditionally upon their arrival at the campsites.

Lower Court Order too Far-reaching

The appellate court thus held that the lower court erred in striking the Division's entire administrative order because Maryland could regulate communications, such as OWC notices, which violated the Act. However, the court upheld the earlier dismissal of the order attempting to regulate practices that occurred completely outside Maryland. Finally, the court concluded that OWC could be ordered to refund travel costs and redemption fees to those residents who relied on the notices in travelling but who did not purchase campground memberships. ❖

— Peter McNamara

Attorneys Must Disclose Potential Conflicts of Interest in Multi-Party Representation

In ***Eriks v. Denver***, 824 P.2d 1207 (Wash. 1992), the Washington Supreme Court held that attorneys must disclose potential conflicts of interest between clients they represent to avoid violating the Code of Professional Responsibility ("Code"). The court also found that a breach of professional responsibility may require an attorney to reimburse clients for fees paid, plus prejudgment interest.

Attorney Represents Both Investors and Promoters

In 1977, Cliff Johnson, Percy Goodwin, and others ("promoters") sold tax shelter investments in master sound recordings. By 1981, the Internal Revenue Service ("IRS") challenged various tax credits and deductions taken by the investors of the tax shelters. These challenges to the tax shelter caused the promoters to create the Master Recording Trust Fund ("Fund"), a joint legal defense fund for promoters and investors who contributed to the fund. The promoters then hired attorney William Denver ("Denver") to represent all the members of the fund.

Prior to undertaking the joint representation of the Fund contributors, Denver knew that the IRS might disallow the investors' tax credits and deductions. Furthermore, he realized that if the IRS denied the investors' tax claims, the investors might have potential legal claims against the promoters causing a conflict of interest. The conflict would arise because Denver would simultaneously represent the investors and promoters, who would have different interests. Consequently, Denver discussed the potential conflicts with the promoters; however, he failed to disclose any such information to the investors.

In 1983, a tax court hearing revealed extensive problems with the master sound recording appraisals and titles. Nonetheless, Denver continued to represent the Fund investor members, without advising them of their rights with respect to the promoters. Furthermore, Denver, after being asked by the investors, declined to advise them of their legal recourse available against the promoters. Instead, Denver recommended that the investors settle with the IRS and seek independent legal counsel if they decided to pursue claims against the promoters.

Court Finds Conflict of Interest

The Fund investors filed a class action suit against Denver, alleging negligent representation, violation of the Code, and liability under the Consumer Protection Act ("CPA") for unfair and deceptive practices. The trial court granted the investors' class status, and then bifurcated the trial into two phases. The first phase addressed issues common to all parties. The second phase dealt with individual claims of negligence and malpractice.

The trial court granted partial summary judgment to the investors, ruling that an actual conflict of interest existed in Denver's simultaneous representation of the promoters and investors. The trial court concluded that Denver violated Code Disciplinary Rule 5-105, thereby breaching his fiduciary duty to the investor clients. The court then ordered Denver to reimburse the investors for contributions paid to the trust fund, including prejudgment interest.

The trial court, however, denied the investors' motion for summary judgment to declare Denver's acts violative of the CPA. The court also rejected the investors' request for treble damages under the CPA, finding such relief inappropriate.

The court of appeals subsequently certified the case, and the Supreme Court of Washington granted review of the trial court's rulings.

Denver Violated the Code

The court found that whether an attorney's actions violate the Code regarding the duty to notify clients of potential conflict of interest was a question of law. As a result, the court rejected Denver's argument that summary judgment was improper since expert affidavits supported his position and created a factual issue. The court reasoned that the trial court was not obligated to consider affidavits, which contained mere conclusions of law, not fact. Thus, the trial court properly disregarded the affidavits and considered provisions of the Code in determining whether an actual conflict of interest existed.

In judging whether Denver violated the Code as a matter of law, the court looked to Code Disciplinary Rules 5-105(A) and (B), which required an attorney to decline or discontinue employment where it was certain or likely that such representation would adversely affect a client. The Code, however, allowed an exception to the general ban on multiple representation if two requirements were met: (1) where it was obvious that the attorney could adequately represent all parties; and (2) where all clients were made aware of the risk of conflict. The court analyzed Denver's conduct in light of these exceptions.

The court relied on the Ethical Considerations of the Code in concluding that Denver violated the Code. The court stated that Denver's situation represented precisely the type of misconduct that the rules sought to prevent. Furthermore, Denver forced his clients to seek alternative counsel due to his inability to provide adequate representation. Citing the Model Rules of Professional Conduct, the court noted that Denver breached a duty of loyalty to his clients because he was unable to properly serve their needs.

The court interpreted the Code broadly, reasoning that its purpose was to protect the public from attorney misconduct and potential harm from multiple representation that incorporates conflicting interests. The Ethical Considerations expressly state that multiple representation is not favored if a potential conflict of interest exists. The court also emphasized the importance of affording clients an opportunity to independently evaluate their need for representation. The court stated that to achieve this goal, attorneys must respect their client's right to be notified of potential risks. In Denver's case, the investors were never afforded the opportunity to decide whether Denver would serve their needs. This arose from Denver's failure to discuss potential difficulties with them.

A Breach of Professional Ethics Warrants Reimbursement of Fees

The Supreme Court of Washington determined that the trial court's order compelling Denver to reimburse the investor members of the Fund was appropriate because he violated the Code and committed breach of fiduciary duty. The court rejected Denver's argument that the plaintiffs had to prove causation and damage. The court stated that those were elements of a malpractice suit and were inapplicable in this action. Furthermore, the court determined that repayment of fees was a reasonable means to redress injury resulting from breaches of professional responsibility.

Applicability of Consumer Protection Act is a Question of Fact

The Supreme Court of Washington affirmed the trial court's denial of the plaintiffs' motion for summary judgment requesting a declaration that Denver violated the CPA as a matter of law.

The court determined that in order to prove a violation of the CPA, the investors had to prove that the Denver's act (1) was unfair or deceptive, (2) occurred in the conduct of trade or commerce, (3) affected the public interest, and (4) caused injury to the plaintiff in his or her business or property. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 796 P.2d 531 (Wash. 1986). To establish that misconduct occurred in commerce or trade, the investors had to demonstrate that the legal services in question related to "entrepreneurial aspects" of the practice of law.

The investors argued that if Denver had not concealed his potential conflict of interest, they would not have employed him. The investors contended that this deceptive practice constituted part of the "entrepreneurial aspect" of Denver's practice because he was able to secure them as paying clients.

The court did not agree with the investors' argument because a material issue of fact existed as to whether Denver acted for the purpose of increasing profits or gaining clients. The court therefore reasoned that the investors did not prove Denver's intent to conceal the risk of conflict in order to further his personal entrepreneurial interests.

Finally, the court rejected the investors' claim that the trial court erred in refusing to award treble reimbursement damages or attorney's fees. The court reasoned that the question of Denver's liability under the CPA remained unresolved, and thus damage awards were premature. However, the court speculated that even if a CPA violation was found, the trial court had complete discretion to decide whether to award attorney's fees. Furthermore, the trial court's decision on this issue would not be overturned absent a manifest abuse of discretion.

Dissent Rejects Conflict of Interest Disclosure Requirement

In his dissent, Justice Johnson maintained that the CPR encompassed situations where conflicts of interest were likely, not merely possible. He reasoned that since there was a factual issue concerning Denver's failure to disclose a likely conflict of interest, the conclusion that Denver violated the CPR was unfounded. Furthermore, Johnson argued that the majority's holding placed an unreasonable burden on attorneys because there were potential conflicts of interest in almost every case of multiple representation, and an attorney cannot foresee every conceivable situation.

Dissent Advocates Mandatory Award of Attorney's Fees

Justice Johnson also dissented with respect to the scope of the trial court's discretion in awarding attorney's fees under the CPA. He maintained that since the statute mandates attorney's fees, the trial court only had discretion in the amount of the fees. ❖

— Jean Prendergast

Consumer Protection Act Applies to Business Purchase of a Sign

In ***Sign-O-Lite Signs, Inc. v. DeLaurenti Florist, Inc.***, 825 P.2d 714 (Wash. 1992), the Washington Court of Appeals held that the Consumer Protection Act ("CPA") applied to the purchase of a sign. Additionally, the court held that in the CPA violation, the lower court properly awarded attorney's fees to the consumer.

Sign on the Dotted Line

Ann DeLaurenti ("DeLaurenti") owned and operated DeLaurenti Florists, Inc., a floral shop located in a shopping plaza. In April 1986, DeLaurenti learned that the plaza had adopted a policy that required all shops in the plaza to advertise with Channelume signs. Realizing that her current wooden sign was unfit, DeLaurenti sought bids and estimates from various sign manufacturers for the cost of a Channelume sign.

Chuck Kelly was a representative of Sign-O-Lite Signs, Inc. ("Sign"), a manufacturer of custom Channelume signs. When Kelly learned of DeLaurenti's interest in buying a sign, he solicited DeLaurenti at her floral shop and offered to submit a bid. DeLaurenti agreed, and consequently Kelly later called DeLaurenti and quoted her a six year lease for a sign at $91.04 per month, or a purchase price for the sign of $2,901.60. Sign's bid for the sign was lower than any other company that DeLaurenti contacted, and therefore, she accepted Sign's offer.

Subsequently, Kelly visited DeLaurenti's floral shop and presented her with a document that he wanted her to sign. Before signing the document, DeLaurenti informed Kelly that she did not have her reading glasses present. However, Kelly assured her that the document only authorized Sign to begin work; DeLaurenti signed the document. DeLaurenti did not see Kelly write anything on the documents while he was at the store.

Kelly failed to provide DeLaurenti with a copy of the signed document or any other description of the terms of the purchase. Instead, DeLaurenti relied solely on the representations that Kelly extended particularly to her, the $91.04 per month lease charge and the $2,901.60 total purchase price for the sign.

Later, Sign sent DeLaurenti an invoice for $297.42 per month for the lease of the sign. Since this price was over three times the rate Kelly quoted her, DeLaurenti refused to pay the invoice. DeLaurenti later demanded copies of the documents that she signed. When she received the copies, DeLaurenti noticed that the lease charge of $297.42 per month was written on a line in the document. Realizing that the agreement was not anything that she bargained for, DeLaurenti refused to