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pay the invoices that Sign subsequently mailed to her.

Sign filed a collection suit against DeLaurenti, alleging breach of contract and unjust enrichment on DeLaurenti's part. DeLaurenti counterclaimed and alleged that Sign violated the CPA. The Washington trial court held that Sign violated the CPA and awarded DeLaurenti treble damages and attorney's fees. Sign appealed the decision to the Washington Court of Appeals.

Sign's Arguments Unplugged by Appellate Court

The appellate court first addressed Sign's argument that the trial court erroneously submitted the CPA claim to the jury because insufficient evidence existed to support it. The court noted that a CPA violation occurs when (1) the action complained of is a deceptive act or practice; (2) the action occurs in the conduct of trade or commerce; (3) sufficient evidence of public interest is presented; (4) injury to a business transpires; and (5) a causal link exists between the deceptive act and the injury.

The court found that DeLaurenti demonstrated all the elements of a CPA violation and upheld her claim under the CPA. First, the court stated that Kelly's misleading DeLaurenti into believing that she was signing a work authorization form constituted an unfair act or practice in trade. Second, the court found that Kelly's capacity as Sign's agent presented sufficient evidence of an impact on the public interest. The court also found that DeLaurenti suffered injury to her business, therefore meeting the fourth element of a CPA violation, because Delaurenti had to spend time addressing the contract dispute rather that attending the store. Lastly, the court concluded that the deceptive act directly caused the injury to DeLaurenti's business. Thus, the appellate court affirmed the trial court's finding that Sign violated the CPA.

Treble Damages Too Much

The court, however, agreed with Sign's contention that treble damages were improper since DeLaurenti could not prove any actual damages. In its determination, the court concluded that attorney's fees were not actual damages as contemplated by the CPA. Furthermore, the court concluded that DeLaurenti's general and uncorroborated estimate of her lost profits also failed to constitute actual damages. Therefore the court held that since DeLaurenti could not prove any actual damages, her claim for treble damages was unsubstantiated.

Attorney' Fees were Reasonable Awards

Although Sign did not dispute that the CPA entitled DeLaurenti to attorney's fees, it did argue that the trial court improperly calculated the award of attorney's fees. The court, however, reasoned that the trial court had discretion in awarding attorney's fees, and thus, upheld the trial court's determination. Furthermore, the appellate court noted that in its determination, the trial court segregated the fees to the extent possible between the CPA theories and other legal theories presented by DeLaurenti. The appellate court deemed such action appropriate, and therefore concluded that the lower court acted within its discretion.

Dissent Argued that Shop was Not Significantly Injured

In his dissent, Judge Scholfield stated that the evidence of injury to the floral shop was insufficient to support the award of attorney's fees. To support this claim, Scholfield stated that neither attorney's fees in prosecuting a CPA violation nor the time devoted to the CPA litigation were sufficient proof of injury. Thus, Scholfield concluded that DeLaurenti failed to present sufficient evidence that she suffered a legally recognizable injury. ❖

— Ellen M. Sfikas

Toll-Free Phone Line Failed to Provide Adequate Warning Under California Statute

In ***Ingredient Communication Council, Inc. v. Lungren***, 4 Cal. Rptr. 2d 216 (Cal. Ct. App. 1992), the California Court of Appeals held that a toll-free phone line warning system failed to clearly and reasonably warn consumers about dangerous chemicals contained in consumer products and therefore violated California's Safe Drinking Water and Toxic Enforcement Act of 1986.

Failure to Warn

California's Safe Drinking Water and Toxic Enforcement Act of 1986 ("Act") forbade any person or entity from intentionally or knowingly exposing anyone to a chemical associated with cancer or birth defects without first giving "clear and reasonable" warning. The Act acknowledged that generalized warnings such as product labels, posted notices, and notices in news media adequately warned consumers, assuming that they were "clear and reasonable." The California State Health and Welfare Agency ("Agency") administered the Act and promulgated regulations defining appropriate conduct under the Act.

The Ingredient Communication Council, Inc. ("Council") is a non-profit corporation consisting of thirty-seven manufacturers, retailers, and agricultural producers involved in marketing thousands of products in California stores. Founded in 1987, the Council sought to help its members comply with the Act. The Council established a consumer warning system based on a toll-free phone line in conjunction with newspaper advertising and signs posted in stores. Although the Council's advertisements and signs failed to identify those products which required warnings under the Act, they invited consumers to call a toll-free number and inquire about specific products.

The Council brought an action against California's attorney general, seeking both an authoritative interpretation of regulations promulgated under the Act and a declaration that its system clearly and reasonably warned consumers. The attorney general responded by seeking a declaration that the system failed to provide clear and reasonable warning. The trial court held that the system violated the regulations and therefore violated the Act. The Council appealed, contending that the trial court: 1) misinterpreted the regulations' "safe harbor" warning provisions; 2) applied the wrong standard in evaluating the system; and 3) based its decision upon insufficient evidence.

Toll-Free Phone Schemes Are Not Clear and Reasonable Per Se

Since violations of the Act result in civil liability, the Agency promulgated regulations containing "safe harbor" warning methods. The Agency deemed the safe harbor methods per se clear and reasonable, thus removing the need for factual determinations of clearness and reasonableness. The Agency also established the following warning methods for consumer products as clear and reasonable per se: product labels with specified text; shelf signs with specified text; and a scheme of signs, public advertising, and toll-free phone services that provide clear and reasonable warning. Thus, of the three warning schemes listed, only the toll-free phone line independently required clear and reasonable warning.

Although the Council conceded that toll-free phone lines could not qualify as "pure" safe harbor methods, it argued that the extra condition of clear and reasonable warning only required it to provide a quality phone line as compared to other toll-free phone lines. The California Court of Appeals rejected this argument. The court relied on the Agency's *Final Statement of Reasons,* which denied toll-free phone lines safe harbor status because the Agency did not consider them clear and reasonable per se.

The Council also argued that no bright line existed between safe harbor and non-safe harbor warnings. They maintained that even product labels and shelf signs must be reasonably presented to qualify as safe harbor methods. The court, however, rejected this argument because the Council overstated the regulations' threshold requirement that product labels and shelf signs be easily noticeable. Moreover, the court found no language in the regulation creating an intermediate standard between safe harbor and non-safe harbor warnings. Thus, whether the system compared favorably to other toll-free phone lines was irrelevant to whether it clearly and reasonably warned consumers.

The Trial Court Applied the Correct Standard of Review

The regulations provided that whenever the Act required a clear and reasonable warning the method of transmitting that warning, must be reasonably calculated, considering alternative methods, to make the warning available to consumers before exposure. The trial court held that reasonable calculation implied effectiveness in operation. The Council, however, contended that even if the trial court correctly viewed the system as a non-safe harbor method, it erred by requiring that the system operate effectively. The Council argued that reasonable calculation contemplated only the situation when it created the system, not whether the system effectively warned consumers at an unspecified later date.

The appellate court considered this interpretation too narrow. The court held that an initial calculation of a warning's effectiveness may prove unreasonable in light of experience. The court stated that adhering to an incorrect initial judgment about a warning method's efficacy violated the Act's requirement of clear and reasonable warning.

The Council also argued that the trial court's requirement that the system effectively convey warnings conflicted with the regulations' language stating such warnings merely be made available before exposure. The appellate court rejected this argument too, because it viewed effective conveyance and availability as consistent, when considered in context. The court construed availability as the probability of consumers perceiving a warning message. Similarly, effective conveyance described the likelihood of consumers seeing or hearing a warning before exposure, not whether they understood that warning and acted upon it.

Consequently, the system's invitation to inquire about specific products through the toll-free phone line failed to make the required warnings available within the regulations' meaning because consumers could receive the warning only through considerable effort. The court also held that although the Council need not use the most effective warning method possible, it could not reject measures which would significantly improve the warnings' effectiveness without significantly increasing costs.

Ample Evidence Supported the Trial Court's Decision

The Council also argued that the trial court erred because it based its decision upon insufficient evidence. The appellate court acknowledged the Council's evidence suggesting public apathy about the Act. The court also recognized that adopting safe harbor warning methods would increase costs and that product labels and shelf signs sometimes fail. The court held, however, that evidence of the system's failure to clearly and reasonably warn consumers amply supported the trial court's decision.

The record showed that the system provided only 488 warning messages in its first year, even though over 26,000 calls reached the system. The court of appeals held that this evidence alone created an inference that the system failed to clearly and reasonably warn consumers. The attorney general's expert witnesses, moreover, testified that consumers probably would not spend time to identify specific products and then phone to receive warnings. The experts explained that impulse motivates two-thirds of grocery buying decisions and that consumers typically decline to research inexpensive purchases.

Expert testimony also established that the Council's store signs were inconspicuous, that the newspaper advertisements were infrequent, and that the phone line's taped messages would likely discourage all but the most diligent consumers. The court recognized that the small number of warnings the Council provided in its first year resulted from consumers' assumption of product safety, rather than from their apathy. One expert testified that the least effective product label would convey warnings required under the Act more effectively than the Council's toll-free phone system. ❖

— Matthew Brady

Only Plaintiffs Can Constitutionally Receive Punitive Damages

In ***Smith v. States General Life Ins. Co.***, 592 So. 2d 1021 (Ala. 1992), the Alabama Supreme Court held that a trial court lacks the authority to allocate a portion of a constitutionally valid punitive damage to any entity other than a plaintiff.

Fraudulent Insurance

Martin B. Smith ("Smith") purchased a medical insurance policy from Fred White ("White"). At the time of the purchase, White represented to Smith that the insurance company would reconsider certain conditions excluded from the policy one year later. White stated that if, upon the reconsideration of the policy a year later, Smith's physical condition remained stable or improved, the insurance company would delete the exclusions.

The actual policy, which was issued by States General Life Insurance Company ("States"), included States' standard "Reconsideration Privilege." This provision also indicated that States would consider deleting any exclusions one year after the issuance of the policy.

Smith sued States, White, and White's employer, The Barton Agency ("Defendants"), claiming fraud in and about the sale of a policy for medical insurance coverage. Smith alleged that the Defendants never intended to reconsider the policy exclusions. In addition, Smith stated that the Defendants intended to deceive him in an effort to induce him to buy the policy.

Smith filed his claim and presented his case to a jury. The jury awarded Smith punitive damages of $250,000 and compensatory damages of $600. The Defendants filed several post-trial motions asserting that the punitive damage award was excessive.

Sorry Insurance Company

Based on its conclusion that the punitive damage award was within the jury's authority, the trial court denied the Defendants' motions. The trial court based its evaluation of the punitive damages on statutory law and two Alabama cases, *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986) and *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989). In accordance with the applicable statute, Ala. Code § 6-11-23, and these cases, the court found that the punitive damage award was proper and an appropriate tool with which to punish the Defendants.

Specifically, the trial court noted that the award represented a windfall to Smith and would injure, but not seriously affect, States. The court also determined that the punitive award was not related to the compensatory award. In addition, the court considered the high degree of reprehensibility and the pattern of conduct employed by States. Although the court found that States had ample opportunity to remedy the situation, it noted that States had neither acknowledged nor made any attempt to remedy the wrong.

The trial court proceeded to allocate one-half of the punitive damages awarded to Smith to the American Heart Association. In so doing, the court relied on the concurring opinion in *Fuller v. Preferred Risk Life Ins. Co.*, 577 So. 2d 878 (Ala. 1991) in which Justice Shores stated that trial courts have the inherent power to allocate punitive damages. Within this power, the court could allocate an award in a way that would serve the purposes behind punitive damages to a greater degree than to grant the whole award to the plaintiff. An appeal was filed and taken to the Alabama Supreme Court.

Punitive Damage Award Was Proper

The Supreme Court of Alabama upheld the $250,000 punitive damage award. The court noted that based on the trial court's findings, there was no evidence indicating that the jury's verdict was founded on improper motives

Announcement

Mini-Van Recall

Ford Motor Co. and Nissan Motor Co. have recalled some 1993-model mini-vans because the vehicles may have suffered accidental fuel hose cuts during assembly. The 1,700 vehicles recalled are the Mercury Villager and the Nissan Quest, which are the products of a joint venture between Ford and Nissan and which are built side-by-side at a plant in Avon Lake, Ohio. The fuel-hose problem may cause fuel leaks in those vehicles.