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Students Enrolled in Non-Accredited Course Not Aggrieved Consumers

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in Lanham Act cases, a claimant claiming false advertising of product superiority must affirmatively prove that the product is equal or inferior in order to prevail.

The court acknowledged that Castrol was required to affirmatively prove that Pennzoil's product was equal or inferior, but held that Castrol had sustained this burden of proof. The court noted that Castrol had tested both its products and Pennzoil's under the Stay-in-Grade and HTHS standards. Both Pennzoil and Castrol met the Stay-in-Grade requirements. However, while all Castrol motor oils and most Pennzoil motor oils met the HTHS standards, Pennzoil's 5W-30 and 10W-30 oils failed to pass this test. Therefore, the court held that Castrol had adequately proven that Pennzoil's products were equal, or in some cases inferior, to Castrol's motor oils.

Moreover, the court found that Castrol had properly discredited the evidence with which Pennzoil sought to substantiate its viscosity breakdown claim. Pennzoil based its claim on the fact that its motor oils had suffered less viscosity loss percentage than Castrol oils in the ASTM D-3945 test. However, Castrol proved that the ASTM D-3945 test was never intended to compare the viscosity breakdown of oils of different polymer classes, and could not perform this function accurately. Since Pennzoil and Castrol are oils of different polymer classes, the court held that Pennzoil's advertising claims were literally false.

Pennzoil's Claim to Better Engine Protection False by Implication

Pennzoil next contended that the district court erred in deciding that its claims of superior engine protection were false by necessary implication. The appellate court, however, disagreed with this contention. The court noted that Pennzoil's advertisements claimed, although falsely, that Pennzoil outperforms any leading motor oil against viscosity breakdown. Pennzoil also claimed that viscosity breakdown led

to engine failure and that Pennzoil provided better protection against engine failure. This left consumers with the necessary implication that Pennzoil protected better against engine failure because it outperformed any leading motor oil against viscosity breakdown. Having found the viscosity breakdown claim to be literally false, the court ruled that the engine failure claim must also be false by necessary implication.

False Speech Not Protected By The First Amendment

Pennzoil argued that the district court's injunction violated Pennzoil's right to free speech under the First Amendment to the United States Constitution. Pennzoil contended that the order would prohibit Pennzoil from claiming that its motor oils provided superior protection against viscosity breakdown at any time in the future. Thus, even if Pennzoil improved its product so that the prohibited statement became true, it would still be barred from stating this truth. Therefore, Pennzoil argued that the injunction was an unconstitutional restraint on its free speech.

The court rejected this argument, holding that the First Amendment does not protect false commercial speech. The court stated that Pennzoil's claim that its motor oils provided better protection against viscosity breakdown was false at the present time and therefore was not protected by the First Amendment. The court suggested that Pennzoil could apply for a modification of the injunction if its viscosity breakdown claim became true at some later date.

Dissent Urges that Consumer Survey Evidence Crucial

The dissent argued that both the majority and the district court improperly ignored the consumer survey evidence presented by Pennzoil. It noted that Pennzoil had introduced a consumer survey which purported to demonstrate that consumers largely ignored Pennzoil's claims of superior engine protection and greater protection against

viscosity breakdown. The dissent urged that because the Lanham Act was intended to provide a private remedy to a commercial plaintiff whose commercial interests have been harmed by a competitor's false advertising, the critical question was not the content of the advertisement, but the message it conveyed to consumers. ♦

— Colby M. Green

Students Enrolled in Non-Accredited Course Not Aggrieved Consumers

In *Finstad v. Washburn Univ. of Topeka*, 845 P.2d 685 (Kan. 1993), the Kansas Supreme Court held that students who were not aggrieved consumers as defined by the Kansas Consumer Protection Act could not sue to recover damages from enrolling in non-accredited courses. Additionally, the court found that no legally recognizable claim for education malpractice exists.

False Statement of Accreditation

Washburn University of Topeka ("Washburn") began offering a court reporting program in 1984. In 1985, the University hired Debra Smith ("Smith"), a Certified Shorthand Reporter and a Registered Professional Reporter, as the instructor for this new program. Until 1989, Smith's students judged her satisfactorily in instructor evaluations. However, in the fall of 1989, students began complaining about poor instruction in the court reporting program. As a result, Washburn undertook remedial measures against Smith, who subsequently resigned in the spring of 1990.

At the commencement of the court reporting program in 1984, Washburn sought course accreditation from the National Shorthand Reporters Asso-

ciation. The Association, however, did not approve the course until the summer of 1990. Although the 1985-1987 academic catalogue correctly stated that the "University will apply for full accreditation with the NSRA, which is expected in 1986," the next catalogue, issued for 1987-1989, contained a false statement of accreditation.

The catalogue also included a section on the University's School of Applied and Continuing Education, which offered the court reporting program. Although this section listed the accrediting agencies that had approved other programs within this school, it did not contain any accreditation statement relating to the court reporting program.

Within one week after Washburn noticed the false claim of accreditation, it began placing white tape over the statement in all undistributed catalogues. In addition, the Washburn administration conducted announcements to classes regarding the error and stating that the University was presently seeking accreditation. All other brochures available to students correctly stated that Washburn sought accreditation for the course.

Several court reporting students filed a lawsuit against Washburn alleging that the false statement of accreditation in the catalogue was a violation of the Kansas Consumer Protection Act ("Act"), KAN. STAT. ANN. 50-623 to 50-644 (1973). The students also claimed the University committed "educational malpractice" in its conduct and supervision of the court reporting program.

The trial court granted judgment for Washburn, noting that it was necessary for the students to show that Washburn's violation of the Act had caused them some injury. The students appealed this decision to the Kansas Supreme Court.

Students' Claims

The students, who did not claim that they relied on the false statement of

accreditation when they enrolled at Washburn, argued that the Act did not require proof of reliance on the false statement. The students contended that the Act merely required them to show that they were consumers engaged in a consumer transaction with Washburn and further, that Washburn committed an act defined as "deceptive" under the Act. Moreover, since the Kansas Attorney General was allowed to bring a suit under the Act without bringing it on behalf of an "aggrieved consumer," the students asserted that they too should be allowed to sue, even if they were not aggrieved.

Causal Connection Required Under the Act

The Supreme Court of Kansas upheld the trial court's grant of judgment in favor of Washburn. Although the false statement of accreditation was a *per se* violation of the Act under this amendment, the court indicated that this actual violation was not sufficient to allow the students to recover. Accordingly, the court held that a consumer could not recover under the Act without a showing that the consumer was aggrieved by the violation.

In its decision, the court relied upon the definition of "aggrieved" included in an earlier Kansas Supreme Court case, *Fairfax Drainage Dist. v. City of Kansas City*, 374 P.2d 35 (Kan. 1962). In *Fairfax*, the court said an aggrieved party was someone who had a substantial grievance, who had been denied a personal or property right, or upon whom a burden or obligation had been imposed. The court found that the students had not met this standard because they had not relied on the false statement of accreditation. In fact, many were unaware of the statement. The court also noted that the students had not suffered any loss or injury because of the false statement. Accordingly, although the students were consumers under the Act, they were not aggrieved by Washburn's violation of that act.

Educational Malpractice Not a Recognized Claim

The Kansas Supreme Court also upheld the trial court's judgment on the claim of educational malpractice, noting that no American court has recognized this as a legal claim. The students based their argument on the low pass rates of Washburn students taking the statewide certification examination. While the court acknowledged these statistics, it noted that there was no proof that the instruction in the court reporting course caused the low pass rates.

According to the court, several public policy concerns weighed against recognizing a new cause of action for educational malpractice. The court identified the lack of a measurable standard of care and the potential for a flood of lawsuits as compelling policy reasons against recognizing a tort claim for educational malpractice. In addition, the court was reluctant to involve the state's courts in monitoring the daily operations of schools. Finally, the court noted that the difficulties in establishing a causal connection between the educational process and an individual student's success also weighed against recognizing this new type of tort claim. ❖

— JoAnne Juliano Giger

Fair Debt Collection Practices Act and Consumer Protection Act Inapplicable to Consumer Cash on Delivery Transactions

In *Sterling Mirror of Maryland, Inc. v. Gordon*, 619 A.2d 64, (D.C. App. 1993), the District of Columbia Court of Appeals held that neither the Fair Debt Collection Practices Act nor