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Truth-in-Advertising Law Prohibits Anti-Abortion Group from Advertising as Abortion Information Service

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LESSEES OF DEFECTIVE VEHICLE (from page 83)

treated certain lease transactions as subject to part 2 (Sales) of the Uniform Commercial Code when certain elements of a sale are present. In deciding whether a transaction is subject to part 2 of the Uniform Commercial Code, courts from other jurisdictions found the following factors relevant: whether the sum of the rental payments will amortize the value, with interest, of the goods being rented; whether the term of the lease covers the useful life of the goods; whether there is an option to purchase the goods at the end of the lease for a nominal price; whether the lessee is responsible for damage or loss, insurance coverage, repairs, and replacement of parts; and whether the lessee is required to pay a license fee, security deposit, or taxes.

The court examined the "Retail Buyer's Order" together with the agreement and concluded that the transaction between the Sellers and Frank Griffin possessed elements characteristic of both a sale and a lease. Like a sale, the sum of the Sellers' rental payments would amortize most of the Jeep's value, virtually matching the purchase price noted in the Retail Buyer's Order. In addition, the Sellers had paid all expenses related to vehicle ownership as if they had bought the vehicle outright. On the other hand, like a lease, the agreement contained no option for purchase, although the Sellers argued that

the parties previously had agreed to an option for purchase at the end of the lease period. Ultimately, the court relied upon the clear, unambiguous language of the agreement which expressly stated and restated that the agreement was one of lease rather than sale. The court held that there had been no transfer of title and thus no "sale;" therefore, the agreement was not covered by § 672.608.

Next, the court addressed the Sellers' claim under the Magnuson-Moss Act. The court recognized that the Act was intended to provide broad protection to consumers, but noted that § 2301 of the Act expressly limits its application to a recognized sale and purchase transaction between a "supplier" and "a buyer...of any consumer product." 526 So. 2d at 156. The court reasoned that the Act therefore applies only to a sale of goods, or to a lease of goods that is substantially connected to a sale or purchase of goods. As the court had already determined, the transaction between Frank Griffin and the Sellers was a pure lease transaction. Extending the Act to pure lease transactions, cautioned the court, is an activity better left to the legislature. Accordingly, the court held that the warranty provisions of the Magnuson-Moss Act did not apply to the agreement.

Elizabeth A. Mitchell

TRUTH-IN-ADVERTISING LAW PROHIBITS ANTI-ABORTION GROUP FROM ADVERTISING AS ABORTION INFORMATION SERVICE

In *Mother & Unborn Baby Care of North Texas, Inc. v. State of Texas*, 749 S.W.2d 533 (Tex. Ct. App. 1988), cert. denied, ___ U.S. ___, 109 S.Ct. 2431 (1989), the Texas Court of Appeals held that an anti-abortion organization violated the Texas Deceptive Trade Practices-Consumer Protection Act ("the Act"), Tex. Bus. & Com. Code Ann. §§ 17.41-17.826 (Vernon 1987), by advertising as an abortion information service and then subjecting its unwitting clients to graphic depictions of abortion procedures. The court held that even though the clinic did not actually sell medical services, it engaged in trade or commerce as defined by the Act.

Background

From 1984 through 1986, Mother & Unborn Baby Care of North Texas, Inc., ("the Center") placed advertisements for free pregnancy testing under "Abortion Information & Services" and "Clinics—Medical" in the Yellow Pages of the telephone directory. The organization operated under other names, including the Problem Pregnancy Center and Abortion Action Affiliates Problem Pregnancy Center. A large number of women telephoned the Center requesting abortions. By giving evasive answers to requests for information, the Center misled the women into believing that it was an abortion clinic. Consequently, many of the women scheduled appointments.

After arriving at the Center, a woman typically gave the staff personal medical information and submitted a urine sample for a free pregnancy

test. Because the women were informed that the test results would be ready in only thirty minutes, they frequently chose to wait. During this time, the women were led to a separate room where Center counselors showed them graphic video and slide presentations depicting abortion procedures. Generally, it was only after one of these presentations that the women began to realize that the Center was not an abortion clinic. After the presentations, counselors urged the women not to have abortions. Many of the women became angry or emotionally distressed. During the weeks following the appointments, the Center followed up with notes and phone calls having anti-abortion themes. The telephone company eventually refused to allow the Center to continue advertising itself as an abortion service.

Trial Court

The State of Texas brought suit against the Center and its founder Charles J. Pelletier II. At trial, a jury found the Center and Pelletier liable for fraud and for false, misleading, or deceptive acts or practices. The court enjoined the Center from engaging in its past practices, and ordered that it fully disclose the nature of its business in its future advertisements. In addition, the court assessed civil penalties against the defendants and awarded attorneys' fees to the State. The Center and Pelletier appealed.

Appellate Court

On appeal, the Center raised several points of error. First, the Center claimed that because its conduct did not constitute trade or commerce, the Act was inapplicable to its activities. Section 17.46 of the Act provides that "[f]alse, misleading, or deceptive acts or practices in the conduct of any trade or commerce are...unlawful..." Section 17.45 of the Act defines the terms "trade" and "commerce" as "the advertising, offering for sale, sale, lease, or distribution of any good or service..." The court noted that not only had the Center advertised in the telephone directory, but that it had also distributed pamphlets and provided services, including pregnancy testing and anti-abortion counseling. The court determined that these actions constituted "trade" and "commerce" for the purposes of the Act.

Second, the Center contended that the Act was inapplicable because the Center did not sell its goods and services. The court stated that it was immaterial for purposes of the Act whether the Center provided a service in exchange for money. "Sale" is but one of five transaction types enumerated in the Act. The court found that the Center's clients were "consumers" as defined by the Act because they had sought to purchase services from the Center. The court concluded that the Act applies when, as here, there is an unconscionable course of conduct which adversely affects a consumer.

Third, the Center claimed that it was exempt from the Act because it disseminated information to the public. Section 17.49(a) of the Act exempts certain media from coverage unless they have knowledge of the practices declared to be unlawful under the Act. The court noted that the scope of the media exemption is expressly limited to those who publish advertisements for third parties, and that the exemption is withdrawn if the advertiser learns that the material is deceptive. The court determined that the Center was not a member of the media because it disseminated information for itself. Further, the Center should have been aware that its advertisements were deceptive after the telephone company refused to renew these advertisements. Therefore, even if the Center was a member of the media, it had forfeited any exempted status it may have held.

As their fourth point of error, the Center argued that it was not covered by the Act because it was a not-for-profit corporation. Section 17.47 of the Act states the Texas legislature's intention that courts be guided by decisions under the Federal Trade Commission Act ("the FTCA"), 15 U.S.C. §§ 45-57 (1982 & Supp. V 1987). Accordingly, the Center cited two cases in which federal courts had declined to hold either a blood bank or the National Organization for Women liable for deceptive practices under the FTCA. The Texas court pointed out that the FTCA exempts non-profit groups from its regulations, but that the Act has no such exemption. Consequently, the court rejected the Center's arguments.

In addition to the above points of error, the Center raised several constitutional challenges.

(continued on page 86)

TRUTH-IN-ADVERTISING (from page 85)

The Center contended that because the Act's language was vague and overbroad, it violated both the federal and state constitutions. The court stated that statutes are overbroad if they "sweep unnecessarily broadly and thereby invade the area of protected freedoms." 749 S.W. 2d at 540, citing *NAACP v. Alabama*, 377 U.S. 288, 307 (1964). The Act prohibits false statements or advertisements which harm the public. Such practices are never constitutionally protected. The court thus concluded that the Act was not overbroad in that it applied only to the Center's deceptive, unprotected speech. In addition, in Texas, a court must examine how the statute is applied to the accused. Here, the Act was not applied to the Center specifically to limit its first amendment right to advocate an anti-abortion position, but to prohibit false statements that could injure the public.

The Center also alleged that the Act was void for vagueness in that it failed to give persons of ordinary intelligence fair notice that their conduct was unlawful. Because greater leeway is given to regulating statutes, the court placed the burden of proof on the Center to attack the validity of the Act. The court noted that in cases arising under the first amendment, courts are concerned as to whether a statute is vague "on its face." If a statute is vague on its face, it cannot provide fair notice because it specifies no standard of conduct. The court held that the Center failed to show that the Act was impermissibly vague. Not only does the Act list a number of specific practices as violations, but it also defines many terms used within its text. Given this level of specificity and detail, the court held the Act to be constitutional.

The Center's last constitutional claim was that

its free speech rights were violated. The court held that the Center did not have an unqualified right to distribute anti-abortion material. Freedom of speech is not immune from regulation; it may be abridged when outweighed by a compelling state interest. The court held that the Act is narrowly tailored to fit its purpose: to protect the public from deliberate deception and to provide consumers with a cause of action less burdensome than fraud and breach of warranty. The court found that these purposes constituted a compelling state interest justifying the regulation of the Center's right to distribute anti-abortion material. Further, even if there had been no compelling state interest, it is not unconstitutional to ban false and misleading advertisements.

Finally, the court held that the trial court did not err in assessing civil penalties against Pelletier as an individual. Although the jury had assessed penalties against only the Center, the appellate court agreed with the trial court's finding that because Pelletier had taken such a prominent role in the Center's activities he could not hide behind the "corporate veil." The appellate court affirmed all aspects of the trial court's judgment.

Dissent

The dissent argued that the Act was designed to regulate only commercial activities, not moral conduct. Accordingly, the Act did not apply to defendants because they were merely attempting to get their anti-abortion message to women seeking abortions. The dissent disagreed with the majority's conclusion that this was the type of activity the legislature intended to prohibit.

M. E. Welsh

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