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Recent Cases

Attorneys in Louisiana Have No Right to Examine Accident Reports

In *DeSalvo v. Louisiana*, 624 So.2d 897 (La. 1993), the Supreme Court of Louisiana held that a law mandating confidentiality of state motor vehicle accident reports was constitutional because it did not violate the First Amendment or state constitutional rights of attorneys who sought to use that information in advertising campaigns.

Attorneys Denied Access to Reports

The Louisiana nondisclosure law, LA. REV. STAT. ANN. SECTION 32:398(H), only provided access to motor vehicle accident reports to: parties to accidents, their representatives, attorneys, and insurers, the press, and contractors for on-line records. Prior to the passage of the nondisclosure law, accident reports were public records. The state permitted any person, 18 or older, to inspect or copy accident reports. Attorneys used the reports to obtain the names and addresses of parties to accidents for direct mail solicitations. Passed in 1992, Louisiana's nondisclosure law thwarted attorneys' efforts to solicit clients through direct mail advertising because it barred attorneys from obtaining the names and addresses of people involved in automobile accidents.

Attorneys' Argument

Two of these disgruntled attorneys, Vincent DeSalvo and Jack Harris, sued the state of Louisiana and the Department of Public Safety and Correction, asserting that the nondisclosure law violated their rights under the United States and Louisiana Constitutions on three grounds. First, the plaintiffs claimed that the law unconstitutionally infringed upon their First Amend-

ment rights. Second, they asserted that the law denied them equal protection of the laws. Finally, the plaintiffs alleged that the law violated their right to examine public documents.

The trial court declared the law unconstitutional only on the ground that it violated the plaintiffs' right to equal protection of the laws under the state constitution. The defendants appealed to the Supreme Court of Louisiana.

Not All Speech Is Free Speech

On appeal, the Louisiana Supreme Court examined whether the nondisclosure law violated the lawyers' First Amendment right to engage in advertising. In doing so, it adopted an analysis articulated by the United States Supreme Court to determine what level of protection the First Amendment provides for lawyer advertising.

In general, the First Amendment provides that the government cannot restrict expression because of its message, ideas, subject matter, or content. In its recent interpretations of the First Amendment, the U.S. Supreme Court has rarely imposed restrictions on non-commercial speech because of its content. However, because commercial speech has a greater potential for deception and confusion, the Court has imposed some content-based restrictions on commercial speech. The U.S. Supreme Court has allowed restrictions pertaining to the time, place, and manner of commercial advertising as long as the restrictions meet the following three-part test: 1) the restrictive law is based upon something other than the content or subject matter of the speech; 2) the restrictive law serves an important governmental interest; and 3) the restrictive law allows for alternative methods of communication of the information. Because lawyer advertising is considered commercial speech, the Louisiana Supreme Court analyzed the law and its effect on lawyer advertising according to that test.

The Louisiana Supreme Court found that the nondisclosure law met the first part of this test because the regulation was content-neutral and was not created to interfere with the message plaintiffs wished to deliver. The nondisclosure law did not expressly prohibit the lawyers' advertising because of its content, but merely placed restrictions on the flow of information. Second, the court found the law furthered the governmental goal of protecting an individual's right to privacy, rather than simply attempting to restrict lawyer advertising. The court stated that the nondisclosure law struck a delicate balance between protecting an individual's right to privacy and accommodating the public interests of newsgathering by the media and ratemaking by insurance companies. Finally, the court determined that the law leaves open alternative methods for communicating the information.

The supreme court reasoned that the only effect of the nondisclosure statute on the advertising was that the information for the mailing lists must be obtained from another source. For these reasons, the court held that a less stringent test applied to the nondisclosure law than would apply if the nondisclosure law was a direct prohibition made expressly to prevent communication of a certain message. Under the less stringent test for commercial speech, the court held that the nondisclosure law did not violate the plaintiffs' First Amendment rights.

Law Affords Equal Protection Even for Attorneys

The attorneys next claimed that the disclosure law denied them equal protection under Article I, Section 3 of the Louisiana Constitution. Under the Louisiana Constitution, a law violates equal protection guarantees in three different situations: 1) when the law classifies individuals by race or religious beliefs; 2) when the law clas-

sifies persons on the basis of birth, age, sex, culture, physical condition, or political affiliations, unless such classification furthers a legitimate state purpose; and 3) when any other classification is made which does not further an appropriate state interest.

The Louisiana Supreme Court found that the plaintiffs could not show that the law fell into any of the three classifications. The court determined that the nondisclosure law did not conform to any of the categories in the first two situations under the plain language of the classifications. The court further concluded that the third situation did not apply because, under the court's First Amendment analysis, the nondisclosure law furthered the legitimate state interest of protecting an individual's right to privacy. Therefore, the court held that the nondisclosure law did not violate the plaintiffs' right to equal protection under the law.

Accident Reports No Longer Public Documents

Finally, the plaintiffs contended that the nondisclosure law violated their right under the Louisiana Constitution to examine public documents. The Louisiana Constitution, under Article XII, Section 3, provides that "[n]o person shall be denied the right ... to examine public documents, except in cases established by law." Under the exception contained in the constitutional provision, the court found that access could be denied only where the law states the bar on access to public records "specifically and unequivocally." Here, the nondisclosure law clearly exempted accident reports from the provisions of public records law, and limited their availability to a narrow class of individuals. Finding no ambiguity in the law, the supreme court held that the nondisclosure law withstood a constitutional challenge on public access grounds.

Disagreement over Public Documents

The majority's opinion triggered concurring and dissenting opinions,

both focusing on the public nature of accident reports. In his concurring opinion, Justice Watson stated that the nondisclosure law set a "dangerous and questionable precedent" by restricting such fundamentally public documents from public examination, although granting access to the press. Nevertheless, Watson agreed with the majority's finding that the plaintiffs had not carried their burden of showing that the law violated their constitutional rights.

In a dissent, Justice Kimball agreed with the majority that protecting the privacy rights of individuals is a significant state interest. However, Kimball found that the majority's analysis demonstrated that the law did not further that interest since it allowed the press access to the accident reports. Furthermore, Kimball argued that by enacting the nondisclosure law, the legislature had intruded upon the exclusive province of the Louisiana Supreme Court to regulate lawyers. As a result, the justice concluded that the nondisclosure law violated the First Amendment, the equal protection clause, and the separation of powers principle. ❖

— *Christy Thouvenot*

Seventh Circuit Finds Federal Aviation Act Forecloses Recovery for Airline Ticket Purchasers

In *Statland v. American Airlines, Inc.*, 998 F.2d 539 (7th Cir. 1993), the United States Court of Appeals for the Seventh Circuit held that Section 411(b) of the Federal Aviation Act, 49 U.S.C. app. Section 1381(b), which allows airlines to engage in certain ticketing practices, does not create a private right of action for airline ticket purchasers. The court also found that the Federal Aviation Act of 1958, as amended by the Airline Deregulation

Act, 49 U.S.C. app. Section 1305(a), pre-empts state law claims challenging airline ticket refund policies.

Plaintiff Seeks Damages of \$1.25

Iris Statland purchased an American Airlines ticket with a 10 percent cancellation penalty. Upon cancellation, American Airlines withheld 10 percent of the federal tax paid on the canceled ticket, or \$1.25, in addition to the cancellation fee. Statland subsequently brought a class action suit in the District Court for the Northern District of Illinois to recover her \$1.25, as well as similar refunds on behalf of thousands of other ticket purchasers.

Statland claimed that the ticket she purchased violated Section 411(b) of the Federal Aviation Act, as it did not incorporate any contract provisions allowing American Airlines to keep 10 percent of the federal tax upon cancellation. She also brought four supplemental state law claims: breach of fiduciary duty; violation of the Illinois Consumer Fraud and Deceptive Practices Act; conversion; and breach of contract.

The district court held that Section 411(b) did not give Statland a federal cause of action and dismissed the state claims for lack of supplemental jurisdiction. Statland appealed to the Court of Appeals for the Seventh Circuit.

Section 411(b) Does Not Create a Private Right of Action

Addressing Statland's federal law claim, the Seventh Circuit began with an analysis of the statutory language. The court noted that Section 411(b), describing the Department of Transportation's (DOT) power to regulate airlines ticket practices, is framed as a general command to a federal agency. As such, Section 411(b) does not purport to create rights for airline ticket purchasers. There exists a strong presumption against creating an implied private right of action. Statland's suit seeks to enforce personal rights that are unnecessary to effect congressional intent. The court reasoned that even though