

1993

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Recommended Citation

Jennifer C. Clarke *Supreme Court Strikes Ban on In-Person Solicitation by CPAs*, 6 Loy. Consumer L. Rev. 23 (1993).

Available at: <http://lawcommons.luc.edu/lclr/vol6/iss1/8>

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The Eighth Circuit concluded, however, that the consumer expectation test is not the clear standard for determining what is unreasonably dangerous under Missouri law. The court followed the precedent of the Missouri Supreme Court which has been reluctant to establish a strict definition for the term "unreasonably dangerous." Noting that the instruction which was given to the jury contained a broadly worded definition of unreasonably dangerous, the court concluded that the instruction was fair to both sides. The court found, therefore, that the jury was properly allowed to make the ultimate determination of whether the contact trip nailer was unreasonably dangerous.

Contributory Fault Defense Requires a Plaintiff's General Knowledge

Bostitch further argued that it should have received its requested jury instruction on the contributory fault defense. Contributory fault is a complete defense to a strict product liability action in Missouri. In order to assert such a defense, the defendant is required to prove that the plaintiff knew of the danger associated with his actions, and voluntarily and unreasonably exposed himself to a known risk. The defendant must also show that the plaintiff's conduct caused or contributed to the damage sustained. Bostitch maintained that it proved these elements based on the testimony and circumstances of the accident.

The Eighth Circuit held that Bostitch should have received the benefit of the contributory fault instruction. The court did not agree with the trial court's conclusion that Drabik had to have specific knowledge that his head was in the precise range of the nailer. Instead, the court found that a showing of Drabik's general knowledge that the product posed a significant risk of causing the accident in question was sufficient to warrant the instruction. The court found that Bostitch proved Drabik had general knowledge of the risk of accidental discharge when using a contact trip nailer. The court concluded that testi-

mony concerning Drabik's knowledge of the product created a jury question as to whether Drabik voluntarily and unreasonably accepted the risk which resulted from his actions.

Evidence of Other Injuries Must Be Substantially Similar To Evidence In Case On Trial

Finally, Bostitch contended that it was unduly prejudiced by the admission of evidence involving other injuries allegedly caused by pneumatic nailers. Drabik, however, maintained that the evidence of other injuries presented at trial was substantially similar to the accident in question and properly admitted.

The Eighth Circuit concluded that the trial court abused its discretion by admitting extensive evidence of injuries that were not substantially similar to Drabik's. This evidence prejudiced Bostitch and discredited its expert witness in the eyes of the jury. The court held that the admission of other accident evidence is limited to those events which are substantially similar to the events in the case at trial. The court determined that this limitation would ensure that trials remain focused on the accident which forms the basis of the case. ♦

Nicole Rudman

Supreme Court Strikes Ban On In-Person Solicitation By CPAs

In *Edenfield v. Fane*, 113 S.Ct. 1792 (1993), the United States Supreme Court held that a Florida ban on in-person solicitation of prospective clients by certified public accountants (CPA), Fla. Admin. Code Ann. r. 21A-24.002(2)(c)(1992), violated the First Amendment where the solicitation was for a lawful commercial transaction with truthful, non-deceptive information. The Court found that the ban did not

directly serve the state's legitimate interests of protecting consumers and maintaining CPA independence.

Building a Client Base

Respondent Scott Fane, a CPA, moved to Florida from New Jersey where in-person solicitation by CPAs was legal. Unable to effectively build a new practice using other methods of solicitation, he sued the Florida Board of Accountancy (Board), challenging the constitutionality of the state's ban on in-person solicitation. Fane asserted that the ban presented a serious obstacle to a CPA attempting to gain new clients because most businesses would be willing to rely on the CPAs already serving them.

The District Court for the Northern District of Florida granted summary judgment to Fane, enjoining enforcement of the ban as applied to CPAs soliciting clients in the business context, and the Eleventh Circuit Court of Appeals affirmed. The United States Supreme Court granted *certiorari* and affirmed the Eleventh Circuit's decision.

Court Finds State's Interests Substantial

The Court first established that in-person solicitation by CPAs constitutes commercial expression which is protected by the First Amendment. The purpose of the First Amendment in the commercial context is to safeguard broad access to complete and accurate information and to allow both the solicitor and the prospective client to openly discuss their potential relationship. The Court noted, however, that unlike private speech, commercial speech is linked inextricably with the commercial arrangement that it proposes.

Because the state's interest in the underlying transaction gave it a legitimate interest in the expression itself, the Board was required to meet only an intermediate standard of review to survive First Amendment scrutiny. The Court followed the *Central Hudson* test which required the Board to prove: 1)

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that the state had a substantial interest in regulating the activity and 2) that the law was tailored in a reasonable manner to serve the state's interests without overly restricting the protected speech. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 564 (1980). The Court found that the Board failed to meet the second requirement of the *Central Hudson* test.

The Board argued that the ban protected several substantial interests. It asserted that the ban ensured that consumers were not being misled by fraudulent statements. It also contended that the ban protected consumers' privacy interests by preventing persistent CPAs from overreaching and using aggressive tactics. Furthermore, the Board argued that the ban was necessary to maintain the fact and appearance of CPA independence. The Board reasoned that solicitation would compromise the independence necessary to audit fairly a business or attest to its financial statements because a CPA in need of business might be prone to ethical lapses. Finally, the Board argued that the public perception of CPAs as independent would be undermined by lifting the ban.

Interests Not Directly Served By Ban

The Court acknowledged that the state's interests were substantial. Nevertheless, the ban failed the second prong of the *Central Hudson* test, which required a regulation impinging on commercial expression to advance the state's interest directly. The Court noted that the Board presented no evidence to support its contentions that in-person solicitation by CPAs would lead to fraud, overreaching, or compromised independence. In fact, studies in the field indicated that such consequences were unlikely. Furthermore, the Court pointed out that the blanket ban was over-inclusive, preventing in-person solicitation by honest CPAs as well as fraudulent or overbearing CPAs.

The Board argued in the alternative that the ban constituted a reasonable restriction on the manner in which CPAs

may communicate with prospective clients rather than a direct regulation of the commercial speech itself. In rejecting that argument, the Court noted that, even if the ban were a content-neutral time, place, or manner restriction on speech, the ban would still fail to serve the state's interests in an effective or direct way, and thus could not be upheld.

Prophylactic Rule Unnecessary

Finally, the Board argued that a total ban on CPA solicitation was necessary because the solicitation usually occurred in private offices where it would be difficult to regulate or monitor. The Board relied on *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447 (1978), which upheld a ban on all in-person solicitation by lawyers.

The Court distinguished the instant case from *Ohralik*. The Court pointed out that lawyers, trained in the art of persuasion, usually deal with uninformed and perhaps desperate clients. In contrast, CPAs approach experienced business executives who have the time and resources to evaluate a CPA's offer of services. The Court concluded that, given the differences in clientele, solicitation by lawyers is more likely to lead to misconduct than solicitation by CPAs, and thus a blanket ban on CPA solicitation is unnecessary.

Blackmun Disapproves Intermediate Scrutiny

Justice Blackmun joined the Court's opinion but wrote separately to voice his disapproval of the majority's finding that commercial speech free from fraud or duress is entitled to only an intermediate level of First Amendment protection.

O'Connor Criticizes Majority's Focus as Too Narrow

Justice O'Connor found the Court's focus on whether the object of the solicitation may be harmed to be too narrow. According to Justice O'Connor, the state has the broader authority to prohibit commercial speech which, though harmless to the listener, may be

damaging to the reputation of the speaker's profession. She also analogized the case to *Ohralik*, because attorneys as well as CPAs have professional expertise that can be used to mislead or coerce a naive potential client. Finally, she contended that the majority avoided analyzing the actual ban under *Central Hudson* by improperly casting the case as an "as-applied" challenge even though the ban applied to all CPAs. She read the majority opinion as implying that the ban satisfies *Central Hudson* by virtue of its failure to state otherwise. Accordingly, Justice O'Connor would reverse the lower court and uphold the ban on solicitation. ♦

Jennifer C. Clarke

Insurer May Deny Coverage for Artificial Heart Transplant

In *Loyola Univ. of Chicago v. Humana Ins. Co.*, 996 F.2d 895 (7th Cir. 1993), the United States Court of Appeals for the Seventh Circuit held that an insurer which denied coverage for an artificial heart implant reasonably interpreted its policy's exclusions. The court found that the insurer did not waive its requirement of obtaining prior approval before a subsequent human heart transplant could be covered and held that the insurer could rely on this requirement when denying coverage.

The Insurance Policy

Billy Via, a 44-year-old, was a qualified participant under a group health plan provided by Humana Insurance Company (Humana). After suffering a heart attack, he was admitted to Loyola University Medical Center (Loyola) on July 9, 1988, to undergo coronary artery bypass surgery. Prior to his surgery, Via assigned the benefits under his health plan to Loyola. Humana authorized his admission to Loyola for seven days of care.