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Trade Regulation—Funeral Services

Pennsylvania Ban on Trade Name Use Felled; Remainder of Funeral Industry Law Stands

Pennsylvania's ban on the use of trade names in the funeral industry violates the First Amendment, but a number of other components of the commonwealth's Funeral Director Law Feb. 19 withstood challenges in the U.S. Court of Appeals for the Third Circuit (*Heffner v. Murphy*, 2014 BL 44119, 3d Cir., No. 12-3591, 2/19/14).

Chief Judge Theodore A. McKee's opinion reversed nine of the district court's ten conclusions that the law violated multiple provisions of the U.S. Constitution.

The Third Circuit ''surmise[d]'' that many of the district court's conclusions ''stem from a view that certain provisions of the FDL [enacted in 1952] are antiquated in light of how funeral homes now operate. That is not, however, a constitutional flaw,'' the court said.

According to Dan Alban of the Institute for Justice, Arlington, Va., which filed an amicus brief in support of the plaintiffs, ''Certainly, the right to name one's business as one pleases is an important one,'' and the ruling ''is a vindication of the right to free speech in that commercial speech context, so it can't be completely discounted, however narrow it may be.''

However, ''the dark clouds from the rest of the opinion overwhelm any silver lining offered by that portion,'' he told BNA Feb. 24.

Analyzing the plaintiffs' amended complaint, briefs and positions taken by counsel at oral argument, the court determined that the plaintiffs' claims amounted to facial, not as-applied, challenges to the disputed FDL provisions.

As a result, the court applied the ''particularly demanding'' standard of review from *United States v. Salerno*, 481 U.S. 739 (1987), requiring plaintiffs to ''establish that no set of circumstances exists under which the [law] would be valid.''

Applying *Central Hudson* Standard. Section 8 of the FDL mandated that funeral homes operate only under the name of the current funeral director or that of a predecessor, the court said.

According to Alban, the requirement led to some questionable results, including when one of the plaintiffs here ''was actually *prosecuted* for using the name 'Delaware Valley Cremation Center' even though he does actually perform cremations in the Delaware Valley. The [Pennsylvania Board of Funeral Directors] claimed that the name might improperly suggest to consumers that DVCC is the *exclusive* cremation center in the region,'' he said.

In evaluating Section 8's limitations on commercial speech, the Third Circuit applied the test from *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).

Ten Struck Down, Nine Reinstated

The district court originally struck down provisions of Pennsylvania's Funeral Director Law that:

- permit warrantless inspections of funeral establishments by the Pennsylvania Board of Funeral Directors;
- limit the number of establishments in which a funeral director may possess an ownership interest;
- restrict the capacity of unlicensed individuals and certain entities to hold ownership interests in a funeral establishment;
- restrict the number of funeral establishments in which a funeral director may practice his or her profession;
- require every funeral establishment to have a licensed full-time supervisor;
- require funeral establishments to have a ''preparation room'';
- prohibit the service of food in a funeral establishment;
- prohibit the use of trade names by funeral homes;
- govern the trusting of monies advanced pursuant to pre-need contracts for merchandise; and
- prohibit the payment of commissions to agents or employees.

The Third Circuit reversed on all but the prohibition on the use of trade names.

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According to *Central Hudson*, a court considering the validity of a restriction on commercial speech must first ask whether the commercial speech concerns unlawful activity or is misleading. If the speech is neither, the reviewing court must then determine ''whether the asserted governmental interest is substantial.'' If it is, the third and fourth prongs of the inquiry require a court to respectively inquire ''whether the regulation directly advances the governmental interest asserted'' and whether the regulation is ''more extensive than is necessary to serve that interest,'' the Third Circuit said.

Applying the first part of the test, the Third Circuit said, ''Obviously, the Board's asserted government interest in providing accurate information to the public is 'substantial,' '' but it concluded that ''the assignment of trade names to funeral homes is, at best, potentially misleading,'' and unable to survive the *Central Hudson* test.

Under its requirements, ''the government must demonstrate that the challenged law 'alleviates' the cited harms 'to a material degree,' '' the court said.

That requirement is inconsistent with the ''fatally'' underinclusive statutory scheme here, it said.

According to the court, the ''pivotal problem'' here is ''at *Central Hudson*'s third step: by allowing funeral homes to operate under predecessors' names, the State remains exposed to many of the same threats that it purports to remedy'' through its ban on the use of trade names.

''A funeral director operating a home that has been established in the community, and known under his or her predecessor's name, does not rely on his or her own personal reputation to attract business; rather, the predecessor's name and reputation is determinative. Nor does a funeral home operating under a former owner's name provide transparency or insight into changes in staffing that the Board insists is the legitimate interest that the State's regulation seeks to further,'' the court said.

Restricting 'Pre-Need' Contracts. Among the other challenged provisions of the law, two sections regarding ''pre-need'' services, which are contracted for in advance of a person's death, were primarily at issue here.

First, that a funeral director or funeral home's license may be revoked if a licensed funeral director pays unlicensed employees commissions on sales, and second, that a funeral director must deposit 100 percent of any advance payments into an escrow or trust account after entering into a ''pre-need'' contract to provide funeral services, the court said.

The appeals court rejected the plaintiffs' argument that the ban of ''any gratuity'' or ''valuable consideration'' for sales unconstitutionally prohibits anyone but a licensed funeral director from communicating with customers about services or merchandise.

It is ''eminently reasonable'' for a legislature to want to protect consumers ''from dealing directly with salespeople who have a financial interest in 'upselling' more expensive or unnecessary merchandise and services than are appropriate,'' the court said.

''The potential for this evil to manifest itself in the context of sales personnel being rewarded for exploiting the need to afford a loved on a 'proper' or 'respectful' burial or memorial is too obvious to require elaboration,'' the court said. ''Customers looking to purchase funeral arrangements and services are clearly among the most vulnerable consumers to be found in any marketplace,'' it said.

Trust Requirement 'Confusing.' The FDL's 100 percent trust requirement for ''funeral services'' conflicts slightly with the Pennsylvania Future Interment Act, which only requires that 70 percent of the sales price of ''funeral-related property,'' such as caskets, vaults or urns, be held in trust, the court said.

The tension between the two statutes ''creates an obvious problem'' for funeral directors, the court said.

The board has adopted the view that ''a merchandising company that is not itself a licensee,'' but is owned by a licensed funeral director, ''may trust at the FIA-prescribed rate of 70%, so long as the company is not used to evade the FDL's requirements,'' it said.

The court rejected the plaintiffs' argument that the trust requirement does not further the state's asserted interest in consumer protection. The fact that the state's statutory scheme restricts state-certified ''experts'' while exempting unlicensed merchants ''does not necessarily result in an irrational (and therefore unconstitutional) scheme,'' it said.

Pennsylvania's legislature ''could have reasonably 'believed that the public's perception of funeral directors as licensed professionals necessitated stricter standards to protect consumers,' '' the court said.

''Moreover, the potential for consumer abuse and fraud in any scheme that allows merchants to accept payment for goods and services that will not be tendered until some future date is painfully obvious. This is especially true where, as here, the date for the vendor's performance may well be decades after accepting payment,'' the court said.

Did Court Get It Right? According to Alban, the court's analysis of the First Amendment issue ''is exactly what meaningful judicial review looks like,'' but the opinion is inconsistent.

''Except for this one section, the opinion repeatedly accepts the non sequitur that engaging in *any* constitutional review of the challenged laws would be the equivalent of demanding perfection from the legislature and because courts cannot demand perfection, they must not engage in any review. That is simply not what the Constitution requires,'' Alban said.

But one of the opinion's key themes is that ''there's a big difference between a bad law and an unconstitutional law,'' according to Charles L. ''Chip'' Becker, a partner at Kline & Specter P.C., Philadelphia, who practices in the Third Circuit.

In Becker's view, ''The judges seem to be saying that even if the law reflects poor or outdated ideas, it still

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survives constitutional scrutiny and the policy issues are for the legislature,'' he told BNA Feb. 24.

Further, Becker said the ''different backgrounds and temperaments'' of the judges on the panel, as well as their wealth of collective experience, means ''a unanimous opinion on such a broad spectrum of constitutional law is significant.''

Chief Judge McKee, Judge Thomas L. Ambro and Senior Judge Morton I. Greenberg ''between them have over sixty years of service on the Third Circuit,'' he pointed out.

Judges Thomas L. Ambro and Morton I. Greenberg joined the opinion.

James J. Kutz, of Post & Schell P.C., Harrisburg, Pa., argued for the plaintiffs. Chief Deputy Attorney General John G. Knorr III, Harrisburg, Pa., argued for the state.

BY JEFFREY D. KOELEMAY

Full text at http://www.bloomberglaw.com/public/document/HEFFNER_v_MURPHY_No_123591_2014_BL_44119_3d_Cir_Feb_19_2014_Court