

Law Firm Client Solicitation Not Protected by Anti-SLAPP Act

An advertising campaign soliciting former dental patients as potential clients for a law firm is commercial speech, which is not protected under the Texas anti-SLAPP statute.

The law firm, Mauze & Bagby, P.L.L.C. (M&B) “ran television, radio, and internet advertisements and developed a website that strongly implied, or even accused, Kool Smiles of performing unnecessary, and at times harmful, dental work on children to obtain government reimbursements,” the Fifth Circuit noted. Kool Smiles runs a nationwide chain of dental clinics that provide care primarily to economically disadvantaged children. In its advertisements, M&B contended that Kool Smiles has been the subject of multiple media reports and governmental allegations of Medicaid fraud and bad medical provision.

Kool Smiles sued under the Lanham Act for trademark infringement, false advertising, and cyber-piracy. It also brought state claims for defamation, business disparagement, injury to business reputation, and trade name and service mark dilution.

M&B filed several motions to dismiss, including a motion under the Texas Citizen’s Participation Act. The law firm argued its advertisements were protected speech and, as a result, the case should have been dismissed under the statute because the lawsuit was an attempt to chill the firm’s First Amendment rights. Anti-SLAPP statutes allow for the dismissal of cases brought to merely silence otherwise protected speech.

The district court denied the motions, finding as to the TCPA claim that the act “does not protect M&B’s speech because its advertisements and website fall into the ‘commercial speech’ exemption to the TCPA.” M&B filed for interlocutory review.

The Fifth Circuit found it had jurisdiction to hear the appeal under the collateral order doctrine and a motion to dismiss based on the TCPA could be filed in a federal court action.

The TCPA’s “commercial speech” provision provides that the TCPA does not apply to a legal action brought against “a person primarily engaged in the business of selling or leasing goods or services” where “the intended audience is an actual or potential buyer or customer.”

The appellate court found “M&B’s intended audience is its potential customers—potential legal clients.” While Texas courts have not specifically interpreted the TCPA, the appellate court found “Texas would most likely hold that M&B’s ads and other client solicitation are exempted from the TCPA’s protection because M&B’s speech arose from the sale of services where the intended audience was an actual or potential customer.”

NCDR, L.L.C v. Mauze & Bagby, P.L.L.C., Fifth Cir. No. 12-41243, issued March 11, 2014.