S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

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Opinion No. 13-54

Constitutionality of Statute Regulating Use of Bank Names, Trademarks, and Loan Information

QUESTION

Is Tenn. Code Ann. § 45-2-1709(a)(1)(D) and (E), which regulates commercial speech and prescribes criminal penalties, constitutional?

OPINION

Yes. The statute's regulation of commercial speech and prescription of criminal penalties for violations of such regulations are constitutionally permissible.

ANALYSIS

In 2011 the General Assembly amended the Tennessee Banking Act to regulate a person's use of certain trade names, trademarks, and loan information in solicitations offering products or services. Tenn. Code Ann. §§ 45-2-1709(a)(1)(D) and (E). Subsection (D) requires a solicitor who uses a trade name or trademark belonging to certain financial institutions to make specific disclosures in the advertisement of products or services in order to prevent confusion or deception as to the source, affiliation, or sponsorship of the offerings:

> It is unlawful for a person to use the trade name or trademark, or a confusingly similar trade name or trademark, of any bank, savings and loan association, savings bank or subsidiary or affiliate of any bank, saving and loan association, saving bank or subsidiary in a solicitation for the offering of services or products if such use is likely to cause confusion, mistake or deception as to the source of origin, affiliation or sponsorship of such products or services; or, to use the trade name or trademark, or confusingly similar trade name or trademark, to that of any bank, savings and loan association, savings bank or subsidiary or affiliate of any bank, saving and loan association, saving bank or subsidiary in any manner in a solicitation for the offering of services or products unless the solicitation clearly and conspicuously states the following in bold-face type on the front page of the solicitation:
>
> (i) The name, address and telephone number of the person making the solicitation;
>
> (ii) A statement that the person making the solicitation is not affiliated with the

> bank, savings and loan association, savings bank or subsidiary or affiliate of any bank, saving and loan association, saving bank or subsidiary; and
>
> (iii) A statement that the solicitation is not authorized or sponsored by the bank, savings and loan association, savings bank or subsidiary or affiliate of any bank, saving and loan association, saving bank or subsidiary.

Tenn. Code Ann. § 45-2-1709(a)(1)(D). Subsection (E) governs the use of loan information. If a person other than the lender or someone authorized by the lender uses a loan number, loan amount, or other non-publicly available loan information in the advertisement of services or products, the solicitation must contain specific disclosures regarding the identity of the solicitor and the source of the loan information:

> It is unlawful for a person, other than the lender or a person authorized by the lender, to use a loan number, loan amount, or other specific loan information that is not publicly available in a solicitation for the purchase of services or products, unless the solicitation clearly and conspicuously states the following in bold-face type on the front page of the solicitation:
>
> (i) The name, address, and telephone number of the person making the solicitation;
>
> (ii) A statement that the person making the solicitation is not affiliated with the bank, savings and loan association, savings bank or subsidiary or affiliate of any bank, saving and loan association, saving bank or subsidiary;
>
> (iii) A statement that the solicitation is not authorized or sponsored by the bank, savings and loan association, savings bank or subsidiary or affiliate of any bank, saving and loan association, saving bank or subsidiary; and
>
> (iv) A statement that the loan information used was not provided by the bank, savings and loan association, savings bank or subsidiary or affiliate of any bank, saving and loan association, saving bank or subsidiary.

Tenn. Code Ann. § 45-2-1709(a)(1)(E). Violation of either subsection is a Class C misdemeanor. Tenn. Code Ann. § 45-2-1709(a)(2). A Class C misdemeanor is punishable by a term of imprisonment of not greater than thirty days, or a fine not to exceed $50, or both. Tenn. Code Ann. § 40-35-111(e)(3). The Commissioner of the Department of Financial Institutions is to report criminal violations to the appropriate District Attorney General and the Tennessee Bureau of Investigation. Tenn. Code Ann. § 45-2-1717(a).

Both subsections (D) and (E) are constitutional in their regulation of commercial speech. The United States Supreme Court defines "commercial speech" as "expression related solely to the economic interests of the speaker and its audience" that does "no more than propose a commercial transaction." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). The First Amendment to the United States Constitution

safeguards commercial speech from unwarranted governmental intrusion, but since commercial speech occupies "a subordinate position in the scale of First Amendment values," *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978), it enjoys a more limited measure of protection than noncommercial speech. Commercial speech, therefore, may be regulated to insure the free flow of truthful and legitimate commercial information to consumers. *Friedman v. Rogers*, 440 U.S. 1, 9 (1979).

The United States Supreme Court has established a four-part test to determine whether governmental regulations that prohibit or limit commercial speech satisfy the First Amendment. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980). However, where the government merely requires disclosures that target potentially deceptive or misleading commercial speech, the less-restrictive framework set out in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), is applied. As the United States Supreme Court explained:

> We do not suggest that disclosure requirements do not implicate the advertiser's First Amendment rights at all. We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.

Zauderer, 471 U.S. at 651; *see also Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249-53 (2010) (applying *Zauderer* reasonable relation test to requirements that agencies providing debt relief services disclose that debt relief may involve bankruptcy relief); *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 558 (6th Cir. 2012) (applying *Zauderer* to determine the constitutionality of disclosure requirements in commercial packaging and advertising); *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 641 (6th Cir. 2010) (same). Likewise, the Tennessee Supreme Court utilizes the *Zauderer* framework to evaluate the constitutionality of disclosure requirements under Article I, § 19, of the Tennessee Constitution. *BellSouth Adver. & Publ'g Corp. v. Tennessee Regulatory Auth.*, 79 S.W.3d 506, 520 (Tenn. 2002); *Douglas v. State*, 921 S.W.2d 180, 185 (Tenn. 1996).

This Office has previously opined that an absolute ban on any nonconsensual use of a lending institution's name or logo where the use of the name or logo is not deceptive or misleading in solicitations for products or services would be found unconstitutional under the First Amendment and Article I, § 19. Tenn. Att'y Gen. Op. 08-84 (April 4, 2008). Such is not the case here, however. Tenn. Code Ann. § 45-2-1709(a)(1)(D) does not ban a solicitor's use of a financial institution's trade name or trademark, except where such use would be likely to cause confusion, mistake, or deception, and effectively requires that such use be accompanied by specific disclosures in the solicitation itself. Similarly, Tenn. Code Ann. § 45-2-1709(a)(1)(E) provides that a solicitor may use non-publicly available loan information as long as certain accompanying disclosures are made. The statutes, therefore, will satisfy the First Amendment and Article I, § 19, if their disclosure requirements: (1) are reasonably related to the State's interest in preventing deception of consumers; and (2) are not unduly burdensome. *Zauderer*, 471 U.S. at 651; *BellSouth Advertising*, 79 S.W.3d at 520.

The provisions of Tenn. Code Ann. §§ 45-2-1709(a)(1)(D) and (E) do not offend either the First Amendment of the United States Constitution or Article I, § 19 of the Tennessee Constitution when reviewed under the aforementioned standards. Subsection (D) requires a solicitor who uses a trade name or trademark (or a confusingly similar trade name or trademark) belonging to another financial institution to: (1) disclose the name, address, and telephone number of the solicitor; (2) state that the solicitor is not affiliated with the affected financial institution or any of its subsidiaries or affiliates; and (3) state that the solicitation is not authorized or sponsored by the affected financial institution or any of its subsidiaries or affiliates. Under subsection (E), a solicitor who uses non-publicly available loan information must make these same disclosures, as well as state that the loan information used in the solicitation was not provided by the affected financial institution or any of its subsidiaries or affiliates. To help insure that consumers see these messages, both statutes require the disclosures to be made in bold-face type on the front page of the solicitation. Without the statutory disclosures, consumers could be more easily misled into believing that the advertised offering is sponsored or authorized by the financial institution associated with the trade name, trademark, or loan information included in the solicitation. Thus, the first step of the *Zauderer* test is satisfied since the disclosures required by the statutes plainly and reasonably relate to the State's interest in preventing the flow of potentially deceptive information to consumers.

In evaluating the second step of the *Zauderer* test to determine whether the statutory disclosure requirements are unduly burdensome, consideration should be given to the reasonableness of the fit between the regulations that are employed and the governmental interests that are served:

> What our decisions require is a "'fit' between the legislature's ends and the means chosen to accomplish those ends," –a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served"; that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to the governmental decisionmakers to judge what manner of regulation may best be employed.

BellSouth Advertising, 79 S.W.3d at 521 (quoting *Bd. of Trs. of State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989) (citations omitted)). In this case, the State has an important interest in preventing the deception of consumers through regulation of potentially misleading solicitations that contain the trade name, trademark, or non-public loan information associated with a financial institution that has no connection to the advertised offering. The chosen means to advance this interest are disclosure requirements that inform consumers about the identity of the solicitor, the sponsorship of the solicitation, and the source of the loan information used in the solicitation. These requirements do not substantially affect a solicitor's ability to communicate its own commercial information to consumers in the marketplace, nor are the requirements otherwise disproportionate to the important governmental interest that is served. The statutory disclosure requirements, therefore, do not impose an undue burden on solicitors of products or services.

The criminal sanctions imposed for a violation of Tenn. Code Ann. §§ 45-2-1709(a)(1)(D) and (E) are likewise constitutional. The General Assembly may generally impose criminal sanctions for violations of laws regulating commercial speech as long as such laws are not unconstitutionally vague. The Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution require that these offenses be defined so that ordinary people can understand the conduct prohibited and so that arbitrary and discriminatory enforcement is not encouraged. As the United States Supreme Court has explained:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)); *see also Chambers v. Stengel*, 256 F.3d 397, 400 (6th Cir. 2001) (applying *Grayned* to determine whether statutes criminalizing solicitation of accident victims by attorneys within thirty days of the accident are unconstitutionally vague). The Tennessee Supreme Court also applies the principles established in *Grayned* to determine whether criminal statutes enacted by the General Assembly are unconstitutionally vague under Article I, § 8, of the Tennessee Constitution. *State v. Pickett*, 211 S.W.3d 696, 704-05 (Tenn. 2007); *State v. Lyons*, 802 S.W.2d 590, 591 (Tenn. 1990). A relatively strict construction of the statutes and case law is warranted since criminal penalties are at stake. *Chambers*, 256 F.3d at 400; *State v. Marshall*, 319 S.W.3d 558, 563 (Tenn. 2010). It is the duty of the court, however, "to adopt a construction which will sustain a statute and avoid constitutional conflict if its recitation permits such a construction." *Lyons*, 802 S.W.2d at 592.

The language of the subsections at issue here does not run afoul of the due process provisions of the federal or Tennessee Constitutions. The disclosures required by Tenn. Code Ann. §§ 45-2-1709(a)(1)(D) and (E) are unambiguous. It is also plain that the required disclosures must be made in bold-face type on the front page of the solicitation. Further, subsection (D)'s application to solicitations for products or services that contain the trade name or trademark, or a "confusingly similar" trade name or trademark, belonging to a covered financial institution is sufficiently clear, as is subsection (E)'s application to solicitations containing "specific loan information that is not publicly available." Although the statutes do not provide definitions for such terms, the words used may be understood when taken in their "natural and ordinary sense" and within "the context of the statements of law contained in relevant statutes and court rulings." *Lyons*, 802 S.W.2d at 592-93. Indeed, whether a person's use of a trademark is "confusingly similar" to the trademark of another has been interpreted for decades in the context of cases decided under the Lanham Act. *See, e.g., Leelanau Wine Cellars,*

Ltd., v. Black & Red, Inc., 502 F.3d 504, 515-17 (6th Cir. 2007); *Daddy's Junky Music Stores, Inc. v. Big Daddy's Family Music Ctr.*, 109 F.3d 275, 280, 283-84 (6th Cir. 1997); *Induct-O-Matic Corp. v. Inductotherm Corp.*, 747 F.2d 358, 361 (6th Cir. 1984). In addition, Tennessee's trademark laws have been applied to cases involving the use of similar trade names to determine "the likelihood of confusion among consumers." *Men of Measure Clothing, Inc. v. Men of Measure, Inc.*, 710 S.W.2d 43, 47 (Tenn. Ct. App. 1986); *see also Century Homes of Knoxville, Inc. v. Associated Sunbelt Realtors, Inc.*, 621 S.W.2d 756, 759 (Tenn. Ct. App. 1981). Persons of ordinary intelligence, therefore, may readily comprehend the statutes' requirements and prohibitions.

Moreover, the language of the subsections is sufficiently precise to provide a limiting standard to law enforcement officials. The mere fact that enforcement may require the exercise of some judgment does not render a statute void for vagueness. *Grayned*, 408 U.S. at 114. Further, speculative danger of arbitrary or discriminatory application will not support a vagueness challenge, particularly where, as here, there is no record of the statutes actually being enforced in an arbitrary or discriminatory manner. *Hoffman Estates*, 455 U.S. at 503; *State v. Burkhart*, 58 S.W.3d 694, 700 (Tenn. 2001). Although there may be hypothetical situations in which application of Tenn. Code Ann. §§ 45-2-1709(a)(1)(D) and (E) could present questions of possible vagueness, the subsections as written are not unconstitutionally vague on their face.

ROBERT E. COOPER, JR.
Attorney General and Reporter

WILLIAM E. YOUNG
Solicitor General

JOE SHIRLEY
Senior Counsel

Requested by:

The Honorable Greg Gonzales
Commissioner
Tennessee Department of Financial Institutions
414 Union Street, Suite 1000
Nashville, TN 37219