

MAURICE AND HELEN DRIVER
VS. No. 84-1500-III
J.C. BRADFORD & COMPANY
and E.M. FROEDGE

) IN THE CHANCERY COURT
) FOR THE STATE OF TENNESSEE
) 20TH JUDICIAL DISTRICT
) DAVIDSON COUNTY
) PART THREE

MEMORANDUM

The defendants have moved to dismiss the claims the plaintiffs assert under the Tennessee Consumer Protection Act, T.C.A. § 47-18-101, et seq. The suit arises out of the plaintiffs' purchase of a single premium deferred annuity (SPDA) from the defendant J.C. Bradford & Company through one of its brokers, the defendant E.M. Froedge. The facts stated in the complaint must be taken as true when considering the motion to dismiss.

J.C. Bradford is a regional securities brokerage firm and in 1982 was an agent for companies affiliated with Baldwin-United Corporation selling the SPDA's. The complaint alleges that Bradford made false, deceptive and misleading representations to the plaintiffs concerning the SPDA's which induced the plaintiffs to make the purchase. Included was the representation that the \$75,796 investment, which was to have returned 14.5%, was risk free. Baldwin-United and its subsidiaries have failed, the plaintiffs will not realize any return on their investment and recovery of the principal is doubtful.

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In addition to other claims, the plaintiffs charge that Bradford and Froedge violated the Consumer Protection Act. The defendants have moved to dismiss asserting that their conduct is exempted by the Act, that the Act is unconstitutional, and that the complaint does not state a claim under certain parts of the Act. The Attorney General of Tennessee has intervened to support the coverage and constitutionality of the Act.

Goods and Services

The Consumer Protection Act lists a number of acts and practices which are unlawful. The three which the plaintiffs say the defendants committed are as follows:

(5) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have;

(7) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;

(21) Engaging in any other act or practice which is deceptive to the consumer.

T.C.A. § 47-18-104(b) (5) (7) (21)

The first two alleged deceptive acts apply only to "goods" and "services". Single premium deferred annuities are

neither as those terms as are defined by the Act.¹ The portion of the complaint which alleges causes of action under paragraphs 5 and 7 of T.C.A. § 47-18-104 should be dismissed.

Exemption

The Consumer Protection Act provides an exemption for

Acts or transactions required or specifically authorized under the laws administered by or rules and regulations promulgated by, any regulatory bodies or officers acting under the authority of this state or of the United States.

T.C.A. § 47-18-111(a)(1)

The insurance industry regulatory statutes grant to insurance companies "the right to grant and sell annuity, or contract loans based on life annuity." T.C.A. § 56-2-203.

The Court cannot accept the defendants' contention that because an insurance company has the right to sell annuities, fraudulent practices by a securities brokerage firm in selling annuities are exempted from coverage by the Tennessee Consumer Protection Act.

Courts in other states have addressed the same issue under similar statutory exemptions. Some courts have narrowly

1/ "Goods" means any tangible chattels leased, bought, or otherwise obtained for use by an individual primarily for personal, family or household purposes or a franchise, distributorship agreement, or similar business opportunity;

"Services" means any work, labor, or services including services furnished in connection with the sale or repair of goods or real property or improvements thereto;

T.C.A. § 47-18-103(4)(7)

construed the exemption² while others have construed the exemption broadly.³ The Tennessee Legislature has instructed the courts that the Consumer Protection Act is to be "liberally construed" to promote the Act's policies. Included in those policies is the protection of consumers from unfair and deceptive acts or practices and to provide a legal means for maintaining ethical standards between businesses and consumers. T.C.A. § 47-18-102.

Hardly any business enterprise in the contemporary economy engages in transactions which are not authorized by some statute, ordinance or regulation. It is inconceivable that the General Assembly would direct that the Act be liberally construed to prohibit unfair and deceptive business practices and at the same time exempt many, if not most, consumer transactions from the Act's coverage.

Rather, what the Legislature must have intended was to exempt an act or transaction which would violate the Consumer Protection Act but which is engaged in with the approval of some regulatory agency. If a business, in good faith, does something because it was required by law to do it or because

2/ Attorney General v. Diamond Mortgage Co., 327 N.W.2d 805 (Mich. 1982); In re: Real Estate Brokerage Antitrust, 622 P.2d 1185 (Wash. 1980).

3/ Ferguson v. United Insurance Company of America, 293 S.E.2d 737 (Ga. App. 1982); State v. Piedmont Funding Corp., 382 A.2d 819 (R.I. 1978).

it was specifically authorized to do it, it will not violate the Consumer Protection Act even if it was within the scope of the Act's prohibitions. The purpose of the exemption seems simple enough. Businesses should not face liability under the Consumer Protection Act if the conduct is either required by law or specifically authorized by it. Making false and misleading statements in the sale of annuities is neither required nor specifically authorized by any statute.⁴

Constitutionality

The defendants claim that the Consumer Protection Act unconstitutionally abridges freedom of speech under the Tennessee and United States Constitutions.⁵ The asserted constitutional violations must be measured in light of the allegations in the complaint. The plaintiffs charge that the

4/ For example, if a regulation of the United States Department of Agriculture specifically authorizes meat producers to call a certain product "country ham", even though it is not produced in the country and not cured by hanging it from the rafters of a country smokehouse, sales of such hams would be exempted from the Consumer Protection Act, even though it is false and misleading to call them country hams. But, if a meat producer sold horse meat as country hams, that would not be exempted from the Consumer Protection Act, notwithstanding that the USDA regulations specifically authorize the sale of certain products of country hams.

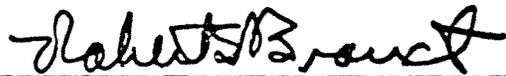
Likewise, if a regulation authorized automobile dealers to advertise as new cars, cars which have been driven up to 5,000 miles, the dealer's advertisement of the cars as new would be exempted from the Tennessee Consumer Protection Act, even though the cars are not new. However, if a dealer sold a car with 10,000 miles and falsely represented it as new, the transaction would not be exempted.

5/ Tenn. Const. art. I, §9; U.S. Const. amend. I

defendants knowingly made material misrepresentations. That is not constitutionally protected speech. The Court should not consider a constitutional challenge based upon a theoretical set of facts at variance with the facts as they appear in the complaint.

The term "any act or practice which is deceptive to the consumer" may be vague in other contexts; it is not vague in the context of a prominent security brokerage firm making false statements to its clients to induce them to make purchases. As applied in this case, the Consumer Protection Act is not unconstitutional.

For the reasons stated, the defendants' motion to dismiss is denied in part and granted in part. An appropriate order will be entered.



ROBERT S. BRANDT
CHANCELLOR

December 19, 1984

cc: Michael E. Terry
Dennis Meaker
Ames Davis
Thomas E. Hansom
Steven A. Hart, Asst. Atty. Gen.