



1994

Recent Developments: Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy: State Bears Burden of Demonstrating That Truthful Disclosure of Certified Financial Planner and Certified Public Accountant Designations in Commercial Speech Is Actually, Inherently, or Potentially Misleading; or Advances a Substantial State Interest by the Least Intrusive Means if It Desires to Restrict Such Speech

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Recommended Citation

Vicencio, Fiorello J.P. Jr. (1994) "Recent Developments: Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy: State Bears Burden of Demonstrating That Truthful Disclosure of Certified Financial Planner and Certified Public Accountant Designations in Commercial Speech Is Actually, Inherently, or Potentially Misleading; or Advances a Substantial State Interest by the Least Intrusive Means if It Desires to Restrict Such Speech," *University of Baltimore Law Forum*: Vol. 25 : No. 2 , Article 7.

Available at: <http://scholarworks.law.ubalt.edu/lf/vol25/iss2/7>

of neutrality in governmental action toward religion by invalidating a statute designed to aid a religious enclave. The decision signaled the Court's recog-

nition of the need to evolve from the frequently criticized *Lemon* test. By not developing a workable standard, the Court left little guidance to legislatures and

lower courts in determining whether a statute passes constitutional muster under the Establishment Clause.

- David A. Prichard

Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy:

STATE BEARS BURDEN OF DEMONSTRATING THAT TRUTHFUL DISCLOSURE OF CERTIFIED FINANCIAL PLANNER AND CERTIFIED PUBLIC ACCOUNTANT DESIGNATIONS IN COMMERCIAL SPEECH IS ACTUALLY, INHERENTLY, OR POTENTIALLY MISLEADING, OR ADVANCES A SUBSTANTIAL STATE INTEREST BY THE LEAST INTRUSIVE MEANS IF IT DESIRES TO RESTRICT SUCH SPEECH.

In *Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy*, 114 S. Ct. 2084 (1994), the United States Supreme Court reiterated the heavy burden incumbent upon state governments attempting to censure or limit constitutionally protected commercial speech when it considered the disclosure of validly held designations of "Certified Public Accountant" (CPA) and "Certified Financial Planner" (CFP), by a person holding herself out as an attorney, in advertising and other communications with the public. The Court held that the State must demonstrate with sufficient specificity, not mere speculation or conjecture, that the public would actually be misled or harmed by the Petitioner's commercial speech, if the State desires to restrict truthful commercial speech. The State must also show that the manner of restriction is no more extensive than that which is necessary to serve the State's interest. In so holding, the Court addressed whether the CFP designation is commonly recognized and, consequently, wheth-

er it would mislead a consumer into thinking that a CFP is certified by the State.

The Petitioner, Silvia Safille Ibanez, is a practicing attorney in Winter Haven, Florida. In addition to being a member of the Florida Bar, Ibanez is licensed by the Respondent, Florida Board of Accountancy (Board), as a CPA, and is authorized to use the designation "Certified Financial Planner" or "CFP" by a private organization known as the Certified Financial Planner Board of Standards (CFPBS).

The gravamen of the Board's complaint is that Ibanez engaged in "false, deceptive, and misleading" advertising when she included her credentials as a CPA and a CFP in her yellow pages listing, under the "Attorneys" section, as well as in her other communications with the public. The Board instituted an investigation, and eventually a complaint against Ibanez, after receiving an anonymous copy of her yellow pages listing. Pursuant to various sections of the Public Accountancy Act, Board Rules, and the Florida Administrative Code, the

Board charged that Ibanez practiced public accounting in an unlicensed firm, that she used a specialty designation that was not approved by the Board (CFP), and that she engaged in “false, deceptive, and misleading” advertising by appending the letters CPA to her name thereby implying that she was bound by the Public Accountancy Act.

During the subsequent administrative hearing, the Board dropped the allegation of practicing public accounting in an unlicensed firm and the Hearing Officer found in favor of Ibanez on the remaining counts for want of requisite proof. Despite the Hearing Officer’s recommendation that the other charges be dismissed, the Board, in its Final Order of the Board of Accountancy (May 12, 1992) (“Final Order”), declared Ibanez guilty on both counts. The District Court of Appeals for the First District affirmed the Board’s decision *per curiam*, upon Ibanez’s appeal. Because this action prohibited review by the Florida Supreme Court, the United States Supreme Court granted certiorari and reversed.

After summarily concluding that the use of the CPA and CFP designations was commercial speech for purposes of the First Amendment, the Court began its analysis by noting a number of cases that have stressed the burden carried by the State when it attempts to restrict the free flow of truthful commercial speech. *Ibanez*, 114 S. Ct. at 2088-89. As these

cases previously held, the restriction of truthful, non-misleading advertising is allowed only if the State demonstrates that the regulation is no more extensive than necessary to materially advance a substantial state interest. *Id.* at 2088 (citing *Central Hudson Gas & Electric Corp. v. Public Service Comm’n of N.Y.*, 447 U.S. 557, 566 (1980)). This is due to the general theory that “disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information.” *Ibanez*, 114 S. Ct. at 2088-89 (quoting *Peel v. Attorney Registration and Disciplinary Comm’n of Ill.*, 496 U.S. 91, 108 (1990)). This position was further reinforced by the Court’s declaration that the justification of restricting truthful commercial speech must be based on real and articulable harms, rather than “mere speculation or conjecture.” *Ibanez*, 114 S. Ct. at 2089 (quoting *Edenfield v. Fane*, 113 S.Ct. 1792 (1993)). The Court reasoned that the value of commercial speech was great enough to impose upon State regulators the significant costs of distinguishing between commercial speech that is truthful and false, helpful and misleading, and harmless and harmful. *Ibanez*, 114 S. Ct. at 2089 (citing *Zauder v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 646 (1985)).

Having established the standard for the restriction of truthful commercial speech, the

Court considered Petitioner’s commercial communications that included use of the CPA designation. *Ibanez*, 114 S. Ct. at 2089. Initially, the Board asserted that although Ibanez did hold a valid CPA license, her use of the CPA designation would lead the public to believe that she was subject to the provisions of the Public Accountancy Act and to the Board itself, when she in fact did not believe this to be the case. *Id.* In her brief to the Court, however, Ibanez withdrew her objections to the Board’s assertion of jurisdiction. *Id.* While Petitioner’s withdrawn objection essentially made the Board’s decision regarding this matter inconsequential, the Court addressed whether Ibanez’s belief as to the Board’s jurisdiction was sanctionable. *Id.*

The Court focused on the Board’s lack of specific evidence of noncompliance by Ibanez as the essential missing element in the Board’s Final Order. *Id.* In fact, the Court noted that the only allegation by the Board of any sanctionable misconduct was the charge of practicing public accounting in an unlicensed firm, which it eventually chose to drop. *Id.* at 2089 n.8. Additionally, the Court stressed that Petitioner’s personal belief that she was beyond the Board’s authority was not a specific act of noncompliance and that sanctioning Ibanez’s use of the CPA designation for that sole reason violated her First Amendment right to free speech. *Id.* (citing *Baird*

v. *State Bar of Arizona*, 401 U.S. 1, 6 (1971)). Thus, the Court held that because Ibanez had an active CPA license, it was unlikely that her truthful representation of her CPA licensure could mislead a consumer. *Id.*

The Court next turned to Ibanez's disclosure of her CFP status, which the Board maintained was subject to the Board's restriction because "certified" inherently misleads the public into assuming that the Board, and therefore the State, has licensed or approved the individual with the CFP status. In analyzing this issue, the Court relied on its opinion, as did the Board, in *Peel v. Attorney Registration and Disciplinary Comm'n of Ill.*, 496 U.S. 91 (1990). *Ibanez*, 114 S. Ct. at 2089-91. In *Peel*, the Court held "that an attorney's use of the designation 'Certified Civil Trial Specialist By the National Board of Trial Advocacy' was neither actually nor inherently misleading," despite the fact that such certification was not granted by the State. *Id.* at 2089-90. In addition, *Peel* stated that certification by *bona fide* specialist organizations (such as the Certified Financial Planner Board of Standards) used in commercial speech, that are not actually or inherently misleading, may not be completely banned. *Id.* at 2090 (emphasis added).

Similar to the Court's consideration of the CPA issue, the Court admonished the Board's failure to offer evidence that distinguished the instant

case from that in *Peel*. *Id.* Because the Board did not substantiate its assertion that the CFP designation was actually or inherently misleading, but rather contended only that deception could occur in hypothetical cases, the Court found that the Board had not overcome the "constitutional presumption favoring disclosure over concealment." *Id.* (quoting *Peel*, 496 U.S. at 111).

Relying upon the concurring opinions of Justices Marshall and Brennan in *Peel*, the Board alternatively maintained that the use of the CFP designation was "potentially misleading," thus allowing the Board to prevent deception or confusion resulting from disclosure of CFP status by employing any measures short of a total ban. *Ibanez*, 114 S. Ct. at 2090. In response, the Court reiterated its requirement that the Board must demonstrate that the dangers to the public, as a result of the specified commercial speech "are real and that its restriction will in fact alleviate them to a material degree." *Id.* (quoting *Edenfield v. Fane*, 113 S. Ct. 1792 (1993)). Moreover, the words "potentially misleading," when used as the sole justification without explanation, are not a catch-all phrase that empower a State organization to restrict truthful commercial speech. *Ibanez*, 114 S. Ct. at 2090 (citing *Edenfield*, 113 S. Ct. 1792). Here again, the Board offered no evidence tending to demonstrate its concern that the CFP designation was

"potentially misleading." *Ibanez*, 114 S. Ct. at 2090.

The Court, however, did acknowledge that the concurring opinion of Justice Marshall in *Peel* found the use of the term "NBTA Certified Civil Trial Specialist" *potentially* misleading. *Id.* at 2091 (emphasis added). Distinguishing the *Peel* concurrence while applying its rationale to the case at hand, the Court noted that *Peel* did not state that all specialty designations were similarly situated. *Id.* The *Peel* court also implicitly acknowledged that other more commonly recognized certifying specialty organizations could certify individuals with designations that would *not* be potentially misleading. *Id.* (emphasis added). As a result, the Court addressed the background of the financial planning field along with a brief analysis of certification requirements. Noting that the terms "Certified Financial Planner" and "CFP" are both "well-established, protected federal trademarks," and that the method of CFP licensure is similar to that of CPA licensure, the Court held that restricting disclosure of the CFP status in commercial speech was violative of the First Amendment. *Id.*

The significance of the *Ibanez* opinion lies not in the Court's decision that the State bears a heavy burden in justifying restrictions upon the use of a validly held CPA designation in commercial speech, but rather in the finding that the disclosure of the CFP designation in

truthful commercial speech is *not* actually, inherently, or potentially misleading under the facts alleged. Because the CFP designation is not considered misleading in any way, under the facts of *Ibanez*, State re-

striction is not allowed under the First Amendment. As noted in the opinion, approximately 27,000 persons have qualified for the CFP designation. Consequently, the Supreme Court's stance on its use by individuals

and restriction by the States becomes important since a person's credentials are often considered by consumers when choosing a service provider -- including financial planners.

- *Fiorello J.P. Vicencio Jr.*

Lesnick v. Hollingsworth & Vose Co.:

***ACTIONS
PURPOSELY
DIRECTED TOWARD
FORUM STATE
REQUIRED TO
SUBJECT OUT-
OF-STATE
DEFENDANT TO
PERSONAL
JURISDICTION.***

In *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939 (4th Cir. 1994), the United States Court of Appeals for the Fourth Circuit held that Maryland courts may not exercise personal jurisdiction over an out-of-state defendant unless the defendant's actions were purposely directed toward the forum state. In so ruling, the court followed the long-standing Supreme Court decisions on minimum contacts. Thus, in order for a state to assert personal jurisdiction, the defendant must have certain minimum contacts with the forum state and the defendant must have reasonably anticipated being subject to suit in the forum state.

Lorillard, Inc. ("Lorillard"), a New York corporation, and Hollingsworth & Vose Co. ("Hollingsworth"), a Massachusetts corporation, with their

principal places of business in New York and Massachusetts, respectively, produced the Kent cigarette. The filter medium was manufactured by Hollingsworth in Massachusetts and shipped to Lorillard's plants in Kentucky and New Jersey, where the final Kent cigarettes with the "Micronite Filter" were manufactured. Hollingsworth provided Lorillard with an estimated 10 billion asbestos-containing filters which Lorillard distributed throughout the nation between 1952 and 1956. Hollingsworth was cognizant of Lorillard's national distribution, but Hollingsworth did not direct any of its business toward the state of Maryland.

Stanley Lesnick, a Maryland resident, regularly smoked Kent cigarettes and died of cancer caused by years of inhaling the cancer-causing agent "cro-