

The Growing Threat of Forced Disclosure of Association Communications

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Presentation Topics

- The Role of Associations in Legislation and Regulation
- Associational Political Activity
- Litigation that Challenges Legislation
- What Protections are Available for Association Communications
- Recent Caselaw Developments
- What Next?



The Role of Dealer Associations

- Education
- Advocacy
- Communication



Association Political Activity



- History
 - First Amendment:
 - Right to Petition Government
 - Right to Associate:
 - “[W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”
 - *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984)
 - “[T]he First Amendment safeguards an individual's right to participate in the public debate through political expression and political association.” *McCutcheon v. FEC*, 572 U.S. 185, 203 (2014).

OEM Constitutional Challenges



- Constitutional Challenges of State Dealer Statutes
 - *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox, Co.*, 439 U.S. 96 (1978).
 - *Deere & Company v. State*, 130 A.3d 1197 (N.H.)
 - *Alliance of Auto. Mfrs., Inc. v. Currey*, 610 Fed.Appx. 10 (2d Cir. 2015)
 - *Association of Equip. Mfrs., v. Burgum*
 - *Alliance of Auto. Mfrs., Inc. v. Jones*, Case No. 4:08cv555-MCR/CAS (N.D. Fla. Sept. 11, 2013)
 - *Tesla Motors, Inc. v. Johnson*, Case No. 1:16-cv-1158 (W.D. Mich. 2017)
 - *Lupient Milwaukee, Inc., v. Nissan North America, Inc.* Case No. 18-cv-02023-JPS (E.D. Wl. 2018)
- Contracts Clause
- Dormant Commerce Clause
- Equal Protection
- Due Process
- Lanham Act

How is Protection Asserted?

- By a Party –
 - Objection to a Discovery Request/Deposition Question
- By a Non-Party –
 - Motion to Quash Third-Party Subpoena (*Lupient Milwaukee, Inc., v. Nissan North America, Inc.* (Case No. 18-cv-02023-JPS, ECF 32)).

Protection Against Disclosure of Association Information



- The First Amendment Privilege (Historically)
 - “The Supreme Court has long recognized that compelled disclosure of political affiliations and activities can impose just as substantial a burden on First Amendment rights as can direct regulation.” *AFL-CIO v. FEC*, 333 F.3d 168 (D.C. Cir. 2003).
 - “[W]here, as here, the Commission compels public disclosure of an association’s confidential internal materials, it intrudes on the ‘privacy of association and belief guaranteed by the First Amendment as well as seriously interferes with internal group operations and effectiveness.” *Id.* at 177-78 (emphasis added).
 - “The freedom to associate with others for the common advancement of political beliefs and ideas lies at the heart of the First Amendment.” *Perry v. Schwarzenegger*, 591 F.3d 1147, 1152 (9th Cir. 2010).
 - “Compelled disclosures concerning protected First Amendment political associations have a profound chilling effect on the exercise of political rights.” *Id.* at 1156 .
 - “Implicit in the right to associate with others to advance one’s shared political beliefs is the right to exchange ideas and formulate strategy and messages, and to do so in private.” *Id.*
 - “Questions concerning the constitutionality of state law are not decided upon review of campaign contributions, candidate support, a citizen's view of the law, or the like.... A decision on the merits of these claims does not hinge on the opinions or activities of FADA or even the motives or opinions of the legislators passing the Amendments.” *Alliance of Auto. Mfrs., Inc. v. Jones*, Case No. 4:08cv555-MCR/CAS, 2013 WL 4838764 (N.D. Fla. Sept. 11, 2013)

Recent Caselaw Developments

- *Tesla Motors, Inc. v. Johnson*, Case No. 1:16-cv-1158 (W.D. Mich. Dec. 11, 2017)
 - Granted Motion to Compel Internal Association Lobbying Communications
- *Association of Equip. Mfrs., v. Burgum*, Case No. 1:17-cv-00151 (D. N.D. July 2, 2019)
 - Granted Motion to Compel Internal Association Lobbying Communications

What Now?

- Association Activity
 - Business as Usual?
 - Duty to Maintain Records?
 - Board Minutes
 - Emails
 - Bill Drafts
 - Lobbying Strategies
 - Outlook Calendar
 - Texts



Questions & Discussion

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- What do you think?