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SUPERIOR COURT
WASHINGTON COUNTY

SUPERIOR COURT OF VERMONT
WASHINGTON SUPERIOR COURT

Washington County Courthouse
Montpelier, Vermont 05602
(802) 828-2091

Thorn Americas, Inc., et al. v. Vermont Attorney General

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ENTRY REGARDING MOTION

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Docket No: 694-12-96 Wncv

Title of Motion:	Motion for Preliminary Injunction
Date Motion Filed:	December 31, 1996
Motion Filed By:	Plaintiff
Date Response Filed:	January 10, 1997

_____ Granted Compliance by:_____

__x__ Denied

_____ Scheduled for hearing on: _____, at _____
Time Allotted _____

_____ Other

Plaintiffs, operators of "rent-to-own" businesses in Vermont, seek a preliminary injunction enjoining the Attorney General from enforcing the provisions of CF 115 which requires disclosure of the "effective annual percentage rate" ("EAPR") in connection with rent-to-own transactions. Plaintiff argues the EAPR requirement (1) violates the First Amendment of the U.S. Constitution; (2) is void because the authorizing statute, 9 V.S.A. § 41b, is vague and an unconstitutional delegation of legislative power; and (3) is contrary to the legislative intent of 9 V.S.A. § 41b and beyond the authority conferred by said statute.

Injunctive relief is appropriate when the movant shows (a) irreparable harm, and (b) either (1) a likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief. International Dairy Foods Association v. Amestoy, 92 F.3d 67, 70 (2nd Cir. 1996). Where the injunction would stay governmental action taken in the public interest pursuant to a statutory scheme, the movant must satisfy the more stringent standard of "likelihood of success on the merits". Id.

In evaluating this standard, the court must first assess the merits of plaintiffs First Amendment claim. The United States Supreme Court has articulated a four-part analysis for determining whether a government restriction on commercial speech is permissible. Id. at 72 (citing Central Hudson Gas & Electric

Corp., v. Public Service Commission, 447 U.S. 557, 566 (1980)). The court must determine whether (1) the expression concerns lawful activity and is not misleading; (2) the government's interest is substantial; (3) the labeling law directly serves the asserted interest; and (4) the labeling law is no more extensive than necessary. Id.

In the present case, the central issue is whether the government's interest is substantial. The Attorney General asserts that the EAPR is an important measure of the cost of a rent-to-own transaction and therefore must be disclosed to minimize consumer confusion and deception. According to the Attorney General, there is a substantial government interest because it has been determined that consumers who wish to compare the cost of rent-to-own offers to other commercial transactions, such as credit sales transactions or other rent-to-own transactions, need an EAPR to make a full comparison. Plaintiffs respond that the Attorney General's only interest in mandating this disclosure is his unsubstantiated assertion that consumers should have this information and this is not a "substantial interest" under International Dairy.

In International Dairy, dairy manufacturers challenged a Vermont law requiring products from cows treated with the hormone rBST be labeled as such. The state justified this law on the existence of "strong consumer interest" in knowing this information, rather than on any inherent health or safety concerns. 92 F.3d at 73. The Second Circuit noted that it was clear that "the state itself has not adopted the concerns of the consumers; it has only adopted that the consumers are concerned." Id. at 73 n.1. Based on the state's asserted justification, the Court issued an injunction holding that "consumer curiosity alone is not a strong enough state interest to sustain the compulsion of even an accurate, factual statement." Id. at 74.

Unlike International Dairy, the state's justification for mandating the disclosure of the EAPR focuses on the importance of EAPRs in comparing rent-to-own transactions to other commercial transactions and the need to provide consumers with this information so as to minimize consumer deception and confusion. "[W]arning[s] or disclaimer[s] might be appropriately required. . .in order to dissipate the possibility of consumer confusion or deception." Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985). Such disclosure requirements are permissible because they do not have as significant an impact on a business' First Amendment interests as do prohibitions on speech. Id.

In this case, the parties have stipulated that a substantial number of rent-to-own customers intend to purchase the rent-to-own items at the beginning of the transaction, although the actual rate of purchase is somewhat smaller. While EAPRs are significant in comparing rent-to-own transactions to credit purchases, consumers themselves cannot calculate EAPRs and plaintiffs would not calculate or disclosure EAPRs to their customers without CF 115. Many commentators are concerned about the potential for consumer confusion and deception in rent-to-own transactions. Based on these facts, the court concludes the state demonstrated that it has

a substantial interest in requiring the EAPR disclosure by rent-to-own businesses in order to "dissipate the possibility of consumer confusion or deception."

Furthermore, the court concludes the state has satisfied the third and fourth prongs of Central Hudson. Disclosure requirements need not be struck down merely because there are other possible means of addressing the same problem. Zauderer at 651-52 n.14. First Amendment rights are protected as long as disclosure requirements are reasonably related to the state's interest. Id. at 651. In this case, the disclosure requirement directly addresses the concerns raised by the state and is reasonably related to the state's interest in providing consumers with information so as to reduce the potential for deception and confusion in rent-to-own transactions. Thus, the court concludes that plaintiffs have failed to demonstrate a likelihood of success on the merits of their First Amendment claim.

The court must next consider plaintiffs claim that 9 V.S.A. § 41b is vague and an unconstitutional delegation of legislative authority. "To withstand the charge of unconstitutional delegation of legislative power, the statute must establish reasonable standards to govern the achievement of its purpose and the execution of the power which it confers. Vermont Home Mortgage Credit Agency v. Montpelier National Bank, 128 Vt. 272, 278 (1970). Once the reasonable standards are set forth, the Legislature may bestow a large grant of authority to an agency in matters affecting the general welfare of the economy. Id.

Pursuant to 9 V.S.A. § 41b(a), "[t]he attorney general shall adopt by rule standards for the full and conspicuous disclosure to consumers of the terms of rent-to-own agreements." The court concludes that this standard is sufficient for 9 V.S.A. § 41b to survive a challenge to its constitutionality. It provides clear guidance to the attorney general as to his or her powers and responsibilities. Those powers are limited to the ensuring the disclosure of the terms of rent-to-own agreements.

In support of their position, Plaintiffs cite to several cases which uphold a legislative delegation to an agency. In those cases, Plaintiffs argue, the Legislature has included detailed statutory powers to guide the agency, rather than simply including twelve words to define the scope of the authority. The court finds this argument unpersuasive. The reasonableness of the standards does not hinge on the number of words the Legislature uses to describe the authority, but looks to the circumstances of each case to determine if the standard is "definite enough to serve as a guide to those who have the duty imposed upon them. State v. Auclair, 110 Vt. 147, 164 (1939). In Auclair, the Vermont Supreme Court upheld the authority of the milk control board to define "natural marketing areas" over which they could fix milk prices, even though the Legislature did not indicate how those areas should be defined. Id. at 165-166. In so doing, the Court noted that "what the board is authorized to designate is adequately defined, and the existence of an arbitrary discretion in making such designations is negatived." Id. at 166.

Similarly, in the present case, the limits on the attorney general's authority is clearly defined. The attorney general is not allowed to limit the EAPR or the rental price of any item. It is merely authorized to provide for the full disclosure of the terms of a rent-to-own agreement. Because the legislature included a reasonable standard to guide the attorney general, Plaintiffs have failed to show a reasonable likelihood of success of their second claim.

Finally, the court considers plaintiffs argument that the EAPR requirement is contrary to the legislative intent and beyond the authority of 9 V.S.A. § 41b. Initially, Plaintiffs argue that disclosure of the EAPR was neither contemplated by the statute nor intended by the Legislature. The court disagrees. In construing a statute, the court's objective is to implement the intent of the Legislature. Valley Realty & Development, Inc. v. Town of Hartford, 7 Vt.L.W. 207, 208 (1996). Where the statute is unambiguous, the court first looks to the plain and ordinary meaning of the statutory language. Id. In this case, there is no indication in the statute that the Legislature did not intend the disclosure of the EAPR. If such a limitation had been intended, language to that effect could have been included in 9 V.S.A. § 41b.

Plaintiffs also argue that CF 115 is beyond the authority of the enabling statute as the EAPR is not a "term" of the rent-to-own contract as contemplated by the authorizing statute. The promulgation of rules by an agency enjoys a presumption of validity. Vermont Association of Realtors, Inc. v. State, 156 Vt. 525, 530 (1991). To survive a constitutional challenge, there must be a nexus between the agency rule, the activity it seeks to regulate, and the scope of the agency's grant of authority. Id.

In this case, the agency is authorized to provide for the full disclosure of the terms of rent-to-own agreements. 9 V.S.A. § 41b(a). According to the parties, "term" means "[c]onditions or stipulations that define the nature and limits of an agreement." The American Heritage Dictionary of the English Language (1980). The EAPR is an important tool in allowing consumers to compare a rent-to-own agreement with other commercial transactions. As such, it is certainly a "condition that defines the nature of the agreement". Moreover, it is not a forced disclosure of an interest rate, as argued by plaintiffs. Because the required disclosure of EAPRs is designed to help alleviate consumer confusion as to the nature of a rent-to-own transaction, the court concludes that CF 115 it within the authority granted by 9 V.S.A. § 41b.

Alan W. Cheever, Presiding Judge Date: 3/7/97

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Date copies sent to: _____ Clerk's Initials _____
Jeffrey McMahan, Attorney for Plaintiff Thorn Americas, Inc.
Jeffrey McMahan, Attorney for Plaintiff Rental Associates, Ltd.
Elliot M. Burg, Attorney for Defendant, J. Wallace Malley, Jr.