STATE OF VERMONT
WASHINGTON COUNTY, SS.

FILED
2004 FEB 12 P 3:16
SUPERIOR COURT
WASHINGTON UNIT

American Council of Life Insurers, et al., Plaintiffs,	)	
v.	)	Washington Superior Court Docket No. 56-1-02 Wncv
Vermont Department of Banking, Insurance, Securities, and Healthcare Administration, et al., Defendants.	)	

Decision on Cross-Motions for Summary Judgment

The Vermont Department of Banking, Insurance, Securities, and Healthcare Administration (BISHCA) promulgated Regulation IH-2001-01 (Regulation) on November 17, 2001, creating a so-called "opt-in" system for the disclosure of nonpublic financial and health information by licensees (generally, insurance companies) under Parts 3 and 4 of Vermont Statutes Title 8. Plaintiffs, five insurance trade organizations whose licensee-members are subject to the Regulation, seek a declaratory judgment invalidating the Regulation. The parties have filed cross-motions for summary judgment. Plaintiffs are represented by Robert B. Hemley, Esq.; BISHCA is represented by Bridget C. Asay, Esq. For the following reasons, Plaintiffs' motion is denied and BISHCA's motion is granted.[1]

The material facts are undisputed. The immediate purpose of the Regulation is to require licensees to provide individuals notification of their privacy policies, to set out the conditions under which nonpublic financial and personal health information may be disclosed to nonaffiliated third parties, and, subject to exceptions, to require licensees to obtain consumer consent prior to disclosure (opt-in). Plaintiffs' attention in this case, and consequently the court's, is focused *generally* on the "opt-in" standard of consumer consent ushered in by the Regulation.

The Regulation was promulgated against the background of a rapidly evolving financial services sector following passage of the "Gramm-Leach-Blily" Financial Modernization Act of 1999 (GLBA). The GLBA repealed in ways and reduced in others the long-lived, statutorily required fragmentation of the banking, insurance, and securities industries. A lead proponent has described it as follows:

---

[1]Plaintiffs filed a motion to strike BISHCA's motion for summary judgment because it was filed after the deadline imposed by the scheduling order. BISHCA responds that Plaintiffs' motion for summary judgment includes a First Amendment argument never before raised in the case and which could not have been foreseen, justifying the late submission of its motion. BISHCA also argues that the court should not address the First Amendment issue at all because it is not raised in the complaint. In light of the court's decision herein, these disputes have little consequence and will be considered moot.

> By establishing a three-way street whereby banks can offer securities, insurance, and other financial products, and securities firms and insurance companies are authorized to offer banking products, the legislation puts the consumer in the driver's seat. By legislating a prudential framework in which these financial products can be offered, Gramm-Leach-Bliley ensures that the banking system remains independent and sound, credit is provided to all segments of America, and consumers and their personal financial information are protected.

James A. Leach, Introduction: Modernization of Financial Institutions, 25 J. Corp. L. 681, 684 (2000). Part of the "prudential framework" (if not part of the "driver's seat") is a set of privacy provisions, foremost among them requirements for the advance notification of the disclosure of nonpublic information and the consumer's opportunity to "opt-out." See 15 U.S.C. § 6802(b). The "insurance authority of the State" is charged with enforcing GLBA privacy provisions as they apply to insurance providers "[u]nder State insurance law." 15 U.S.C. § 6805a(6). States which do not adopt regulations designed to enforce the GLBA's privacy provisions are penalized. 15 U.S.C. § 6805(c). The GLBA's opt-out and related privacy provisions set a floor for consumer protection: conflicting state laws are superceded except insofar as they provide greater protection. 15 U.S.C. § 6807. See generally Individual Reference Services Group, Inc. v. Federal Trade Commission, 145 F.Supp.2d 6, 17-20 (D.D.C. 2001) (succinctly describing the purpose of the GLBA and summarizing legislative history focusing on privacy issues) and Affidavit of Thomas Van Cooper (filed Dec. 6, 2002) (discussing how states have responded to the GLBA and the National Association of Insurance Commissioners model laws and regulations).

Confronting the new era in financial services regulation wrought by the GLBA, BISHCA in 2001 promulgated parallel rules employing the opt-in standard for the banking industry (Regulation B-2001-01), insurance industry (Regulation IH-2001-01), and securities industry (Regulation S-2001-01). See Affidavit of Elizabeth R. Costle (filed Dec. 6, 2002) (discussing the opt-in provisions of Vermont's Fair Credit Reporting Act and the Financial Privacy Law). The legislative committee on administrative rules, 3 V.S.A. § 842, did not formally object to the Regulation. Generally speaking, Plaintiffs' licensee-members are subject to the GLBA's opt-out provision unless it is superceded by BISHCA's opt-in provision.

Only Regulation IH-2001-01 is challenged in this case. Plaintiffs view the Regulation as out of step with the practice of most states and suggest that compliance would be excessively resource intensive and expensive. BISHCA finds that the GLBA's opt-out provisions have been an abject failure at protecting consumers' nonpublic information, necessitating the opt-in approach, which it claims is not unduly cumbersome or expensive. Plaintiffs advance four legal arguments for the invalidity of the Regulation: 1) it falls outside BISHCA's statutory rulemaking authority; 2) it unconstitutionally violates the separation of powers of the legislative and executive branches of government; 3) it is arbitrary and capricious; and 4) the Regulation does not survive First Amendment scrutiny.

Statutory Authority

Plaintiffs' first three arguments essentially are the same: because 1) the legislature did not delegate to BISHCA the authority to adopt an opt-in system, the Regulation 2) constitutionally usurps the role of the legislature, and 3) is not rationally related to BISHCA's enabling authority. Plaintiffs do not directly argue that the delegation to BISHCA is unconstitutionally broad or that BISHCA has invaded a policy-making area constitutionally reserved to the legislative branch. Plaintiffs also do not argue that the Regulation is arbitrary or irrational in any sense other than the extent to which its subject matter may extend beyond BISHCA's enabling authority. Thus, the predominant issue raised in these arguments is whether the Regulation's opt-in provision falls within BISHCA's rulemaking authority.

"[A]gency actions, including the promulgation of rules, enjoy a presumption of validity." Vermont Assoc. of Realtors, Inc. v. State, 156 Vt. 525, 530 (1991). "[A]n agency's regulations must be reasonably related to its enabling legislation in order to withstand judicial scrutiny." In re Club 107, 152 Vt. 320, 323 (1989). Thus, even where the delegation is broad, "[t]here must . . . be some nexus between the regulation and a specifically granted power of the" agency. Id. at 324.

BISHCA relies chiefly on the rulemaking authority set out in 8 V.S.A. § 15(a): "In addition to other powers conferred by this title and Title 18, chapter 221, the commissioner may adopt rules and issue orders as shall be authorized by or necessary to the administration of this title and Title 18, chapter 221, and to carry out the purposes of such titles." That is, the legislature has granted to BISHCA the authority to promulgate rules which carry out the legislative purposes evident in relevant, applicable statutes. Those statutes themselves provide standards applicable to that rulemaking and any policy guidance. As well, the legislature has adopted an overarching declaration of policy:

> It is declared to be the policy of the state of Vermont that:
>
> (1) the business of organizations that offer financial services and products shall be supervised by the commissioner in a manner to assure the solvency, liquidity, stability and efficiency of all such organizations, to assure reasonable and orderly competition, thereby encouraging the development, expansion and availability of financial services and products advantageous to the public welfare and to maintain close cooperation with other supervisory authorities;
>
> (2) all such organizations shall be supervised in such a way as to protect consumers against unfair and unconscionable practices and to provide consumer education.

8 V.S.A. § 10. Viewing sections 15 and 10 in light of their larger statutory framework and the constantly evolving complexities of the entities and industries that BISHCA closely regulates leaves no doubt that the legislature's rulemaking delegation to BISHCA is expansive by design.

Plaintiffs do not directly advance an argument that the legislature's rulemaking delegation to BISHCA is impermissibly broad. In fact, courts routinely uphold such broad rulemaking delegations based on equally broad standards. See generally Richard J. Pierce, Jr. Administrative Law Treatise § 2.6 (discussing constitutionality and appropriateness of exceedingly broad delegations of legislative power to administrative agencies). "Scores of agencies regularly make policy decisions that can be characterized as 'major,' 'important,' or even 'fundamental.'" Id. § 2.6 at 97. Plaintiffs advance that argument indirectly, however, by attempting to restrict the court's attention to the lack of statutory authority specifically directing the adoption of rules such as the Regulation, and on factual arguments regarding the inadvisability of BISHCA's policy choices, rather than any particular conflict between the Regulation and a specific statute.

Nevertheless, as Plaintiffs style it, their argument is that the Regulation impermissibly departs from BISHCA's rulemaking authority, which does not specifically direct BISHCA's foray into the regulation of personal privacy. BISHCA counters that the Regulation assures "reasonable and orderly" competition in the era of the GLBA, encourages the availability of financial services in a manner "advantageous to the public welfare," protects consumers against unfair or unconscionable practices, and aids in the education of consumers. Plaintiffs' supposition that "privacy" is some kind of area naturally outside the scope of financial industry regulation simply ignores the role of insurance and other financial companies as high volume traffickers of consumers' intimate, personal information, the very raw material of the enterprise. Knowledge of the types of personal information involved and the specific consumer and commercial interests in it are the stuff of BISHCA's experience and expertise, and increasingly so in the GLBA era.

"[I]t is not the role of the reviewing court to impose its judgment on whether administrative regulations promulgated with the expertise of an agency are good or bad policy." Vermont Assoc. of Realtors, 156 Vt. at 533. The court's role is to determine whether the Regulation is "reasonably related to the purposes of the enabling act." Id. In this regard, the court observes that the Regulation limits the excursion into privacy issues to those specific to the contact between consumers and the entities BISHCA regulates, and the ways those entities compete. The Regulation is not an attempt by BISHCA to leap out of its role as Vermont's primary regulator of the financial industry to become the public's conservator of privacy. Contrast this case with In re Club 107, 152 Vt. 320 (1989) (voiding the Liquor Control Board's attempt to regulate individual conduct apart from its statutory mission in spite of its broad delegation).

Plaintiffs have not overcome the presumption of validity accorded the Regulation, which the court concludes is reasonably related to the purposes of BISHCA's enabling authority.

First Amendment

Plaintiffs also argue that the Regulation's opt-in provision impermissibly burdens their First Amendment right to free speech. BISHCA claims that the opt-in provision does not involve free speech rights and First Amendment analysis therefore is not appropriate. BISHCA argues alternatively that the Regulation passes constitutional muster. The court agrees with BISHCA's latter argument.

The parties agree that for purposes of First Amendment analysis the speech involved in this case is commercial speech. The First Amendment test for commercial speech is distilled in Central Hudson Gas & Electric Corp. v. Public Service Comm. of New York, 447 U.S. 557, 566 1980 as follows:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

BISHCA does not seriously argue that the commercial speech involved in this case is unlawful or misleading, and Plaintiffs do not seriously contend that the opt-in provision does not directly advance the governmental interest in preserving consumer privacy at the consumer's election. The Central Hudson issues important to this case are whether the governmental interest is "substantial" and whether the opt-in provision is "not more extensive than necessary to serve that interest."

Plaintiffs rely heavily on U.S. West, Inc. v. Federal Communications Comm., 182 F.3d 1224 (10th Cir. 1999), which rejects an opt-in provision promulgated by the FCC under the Telecommunications Act of 1996. The U.S. West court expressed skepticism about – but did not rule on – whether the privacy interest advanced was substantial because the agency record lacked a "more empirical explanation and justification." Id. at 1235. The court went on to hold, among other things, that the opt-in provision was not narrowly tailored to the governmental interest because the FCC failed to consider an obvious alternative, an opt-out strategy, which the court assumed without analysis to be less imposing on free speech. See id. at 1238-39.

Other courts have more readily considered privacy a substantial governmental interest for Central Hudson purposes. For instance, the United States Court of Appeals for the District of Columbia Circuit recently held that "we have no doubt that this interest–protecting the privacy of consumer credit information–is substantial." Trans Union Corp. v. Federal Trade Commission, 245 F.3d 809, 818 (D.C. Cir. 2001) (Trans Union I). In Individual Reference Services Group, Inc. v. Federal Trade Commission, 145 F.Supp.2d 6, 41-43 (D.D.C. 2001), the district court distinguished U.S. West and relied on Trans Union I to reject the claim that the privacy interest asserted in the GLBA is not substantial. See also Trans Union LLC v. Federal Trade Commission, 295 F.3d 42, 53 (D.C. Cir.) (privacy is substantial).

The interest in privacy advanced by the opt-in provision of the Regulation does not differ from the interest in privacy advanced by the opt-out provision of the GLBA and the regulations promulgated thereunder. The court is persuaded that the interest is substantial.

The remaining issue is whether the Regulation is more extensive than necessary. "[T]he Supreme Court emphasize[s] the 'fit' between the restrictions and the governmental interests need

not be 'necessarily perfect, but reasonable.' In other words, the restrictions do not have to represent 'the single best disposition but one whose scope is in proportion to the interest served.'" U.S. West, 182 F.3d at 1246 (Briscoe, J., dissenting) (quoting Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989). While Plaintiffs suggest that the GLBA's opt-out provision "fits" and BISHCA's opt-in provision unreasonably impairs free speech interests, Plaintiffs do not detail with any specificity how the opt-in provision is more extensive than necessary. That is, Plaintiffs do not explain how the opt-in provision inhibits speech other than the speech that is the object of the privacy interest asserted. Plaintiffs merely assert that the opt-out system is less burdensome.

The difference between opting in and opting out appears to be significant. Whether due to the consumer's inertia, understanding, or decision, the parties seem to agree that significantly fewer consumers are likely to opt-in than are likely to not opt-out. That is, the opt-out strategy will leave many more consumers "in" than the opt-in strategy. BISHCA has presented detailed explanations for this dynamic and the closer correlation between consumers' actual preferences and employment of the opt-in strategy than the opt-out strategy. See, e.g., Affidavit of Richard S. Bower (filed Dec. 6, 2002) (discussing in detail the effects of inertia and framing). The opt-in strategy does not suffer unintended consequences, either. Part of the harm the Regulation attempts to prevent is not just an effect caused by the nonconsensual sharing of information (such as embarrassment), but the nonconsensuality of the sharing itself. The opt-out strategy leaves substantially more room for uninformed "decisions" by consumers, whereas the opt-in strategy is predicated on them.

One of the central problems with the opt-out strategy cited by BISHCA is that it induces licensees to making opting out difficult or impossible for consumers, artificially leaving far too many consumers "in." See Affidavit of William Lutz (discussing the great difficulty ordinary consumers have in understanding typical opt-out notices). One approach to solving that problem might have been more tightly regulating the opt-out process consistent with the privacy goal but with less impact on Plaintiffs' commercial speech than the full fledged opt-in strategy. However, the court is persuaded that the opt-in strategy is a reasonable fit, even if not the single best possible. Central Hudson does not require more exacting scrutiny. The court also is mindful of the underlying need to create consistent regulations among the banking, insurance, and securities industries in light of the GLBA. The Regulation's opt-in strategy does not violate Plaintiffs' commercial speech rights.

Order

For the foregoing reasons, Plaintiffs' motion for summary judgment is DENIED and BISHCA's motion for summary is GRANTED.

Dated at Montpelier, Vermont this 27th day of February, 2004.

Alan W. Cook
Superior Court Judge

WASHINGTON SUPERIOR COURT
65 STATE STREET
MONTPELIER, VT. 05601

| Bridget C. Asay, Esq.
| 109 State Street
| Montpelier VT 05609
|

February 12, 2004

American Council Of Life et al vs. Vermont Departm
56-1-02 Wncv