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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON)	
)	
)	
)	
Plaintiff,)	
)	
vs.)	No. 91-2-11299-1
)	
)	
TCI CABLEVISION OF)	
WASHINGTON, INC. AND)	
TCI)	
Defendants.)	

COURT'S ORAL DECISION

Before the HONORABLE ROBERT S. LASNIK
June 4, 1991

A P P E A R A N C E S

For the Plaintiff:

JANET REIS and PAULA SELIS
Attorneys at Law

For the Defendant:

MARSHALL NELSON, DAVID MARX, JR.
and BRUCE EASTER
Attorneys at Law

Cheryl D. Anderson, RPR, CSR
Official Court Reporter

COURT'S ORAL DECISION

1
2 THE COURT: Please be seated,
3 thank you. I do want to thank all the counsel
4 involved for the very excellent briefing and
5 arguments today.

6 The issue before the Court is whether or not
7 TCI's marketing of its ENCORE service is so patently
8 unfair or deceptive that a preliminary injunction is
9 required to prevent an immediate danger of actual
10 and substantial injury to the public's rights under
11 the Consumer Protection Act.

12 The burden of proof is on the State to
13 establish each of the three elements in a
14 preliminary injunction: A clear legal or equitable
15 right of the public; that this right is in danger of
16 immediate invasion from certain acts of the
17 defendant; and that these acts will result in actual
18 and substantial injury to the public.

19 In addition, this Court must weigh the
20 requests for a preliminary injunction with
21 consideration of certain established legal
22 principles. One, a preliminary injunction will not
23 issue in a doubtful case. Another, a preliminary
24 injunction is an extraordinary remedy under law. We
25 are also instructed that the relative interests of

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the parties must be looked at in light of the equities involved since the Court is acting as a court of equity in preliminary injunction matters. Finally, it must be made clear this is not a trial on the merits which decides the ultimate rights of the parties under the lawsuit in question.

While the Court is not resolving the ultimate dispute between the parties, the Court is instructed to consider whether the party asking for the preliminary injunction is "likely to succeed on the merits at trial".

This is the legal framework against which the Court must weigh the evidence presented in the exhibits and affidavits and the argument of counsel to determine whether the State has met its burden of proof in requesting that the Court exercise its extraordinary powers to hold the status quo until a decision on the merits can be made.

Now there was not a lot of discussion about what is the status quo. I'm certain from the prospective of TCI, the status quo would be to let them go forward with their ENCORE service; and the status quo from the State's perspective would be to prevent them from charging people for the ENCORE service.

1 The legal right at issue is the right of the
2 473,000 Washington residents who are TCI customers
3 to be free from "unfair or deceptive acts or
4 practices" in how they are treated by their cable TV
5 provider.

6 The State alleges that TCI's marketing scheme
7 for its new ENCORE services violated that right by
8 subjecting these people to at least a \$1.00 per
9 month charge, starting in July of this year, for a
10 premium channel they never ordered. Through a
11 negative option plan, the burden is on the customer
12 to take the initiative to cancel ENCORE before July
13 or TCI will beginning charging for this "optional
14 service" and the charge could stay at \$1.00 or go up
15 to \$4.95 or somewhere in between based on the other
16 choices that the customer makes for optional
17 service.

18 TCI responds it has undertaken the most
19 extensive efforts ever expended to ensure that this
20 negative option plan is described fully to its
21 customers in clear language through multiple
22 mailings, and that canceling ENCORE will be easy for
23 customers to do by phone and mail. In addition, TCI
24 claims its sales representatives are instructed to
25 err on the side of the customer in any disputes for

1 the foreseeable future to ensure that nobody who
2 does not want ENCORE will be forced to pay for it.
3 And, finally, TCI argues that it has reasonable
4 business reasons for utilizing this marketing plan
5 that serve both the company's interests and the
6 customer's interests by allowing TCI to provide more
7 choice to its customers at lower rates than a
8 different marketing plan could deliver.

9 The law governing consumer protection or fair
10 trade practices in this state is very similar to
11 that at the federal level. RCW 19.86.020 provides
12 that unfair methods of competition and unfair or
13 deceptive acts or practices in the conduct of any
14 trade or commerce are hereby declared unlawful.
15 This language is virtually identical to the federal
16 law which preceded it. Trial courts are directed by
17 our legislature to seek guidance from these federal
18 court decisions, and we're also instructed to
19 liberally construe the Consumer Protection Act so
20 that its beneficial purposes may be served.

21 The phrase at issue "unfair or deceptive acts
22 or practices" is purposely, but not
23 unconstitutionally, vague. This language was
24 specifically chosen because of its flexibility to
25 meet the evolving problems posed by new technology,

1 new schemes, creative advertisers and the like.

2 Back in 1914 a House Conference Report before
3 congress noted that it is impossible to frame
4 definitions which embrace all unfair practice.
5 There is no limit to human inventiveness in this
6 field. Even if all known unfair practices were
7 specifically defined and prohibited, it would be at
8 once necessary to begin over again. If congress
9 were to adopt the method of definition, it would
10 undertake an endless task.

11 Suffice it to say that the unfairness standard
12 has proven to be a dynamic analytical tool capable
13 of a progressive, evolving application to keep pace
14 with a rapidly changing economy. As consumer
15 products and marketing practices change in number,
16 complexity, variety and function, standards of
17 fairness to the consumer have also changed, and the
18 FTC noted that observation.

19 Finally, we have the observation of Judge
20 Learned Hand that the beauty of that language is it
21 allows for discovery over time of those unexpressed
22 standards of fair dealing which the conscience of
23 the community may progressively develop.

24 This phrase "unfair or deceptive acts or
25 practices" has specifically been upheld as

1 constitutional by the Washington Supreme Court in
2 1972, which found the language had "sufficiently
3 well established meaning in common law and federal
4 trade law to meet any constitutional challenge".
5 The U.S. Supreme Court calls the process "the
6 gradual process of judicial inclusion and
7 exclusion".

8 Case law establishes that the State need not
9 prove actual deception or an intent to deceive if
10 the act in question had the capacity or tendency to
11 deceive or injure, it is unfair and it is unlawful.

12 This is the backdrop against which the Court
13 makes its analysis of the facts and the law. We are
14 dealing with a standard that is purposefully but not
15 unconstitutionally vague or unfair or deceptive
16 practice, and it is a process that allows for
17 judicial inclusion and exclusion over time, and it
18 is recognized to reflect the standards of fair
19 dealing when the conscience of the community may
20 progressively develop. This is the framework then
21 for which the Court will now proceed to deliver the
22 decision.

23 It is the Court's decision that there is a
24 likelihood that the negative option plan devised to
25 market ENCORE does fall within the purview of this

1 phrase and is an unfair or deceptive act or
2 practice. In determining that the State is likely
3 to prevail on this claim the Court has considered
4 that TCI's efforts to inform consumers of the plan's
5 components far exceed those of the defendant's in
6 other Washington and federal cases cited by the
7 State where the ads contained either lies, serious
8 misrepresentations or hid essential facts from
9 consumers. The Court also has considered that TCI
10 has an arguable claim that under RCW 19.86.920 it
11 has a defense by virtue of the fact that its acts
12 are "reasonable in relationship to the development
13 and preservation of business". However, based on
14 the facts developed to this point, the State has met
15 its burden of proof, they have established that
16 there is a clear legal right at issue and a risk of
17 immediate harm of a substantial nature to justify
18 this Court issuing a preliminary injunction.

19 The injury is being subjected to unfair acts
20 which force consumers to take affirmative steps to
21 avoid paying for a channel they never ordered. Of
22 course, the injury can be financial in nature if
23 473,000 people are charged \$1, and it adds up to
24 \$473,000, that's not an unsubstantial amount of
25 money. Obviously, a certain number have already

1 opted out and more will opt out over time, but the
2 point is not just that money that belongs in the
3 pockets of the consumer may end up in the pockets of
4 the company until the merits of the case are
5 decided.

6 The affidavits and complaints attached to the
7 affidavits indicate that the conscience of the
8 community has been seriously piqued by the actions
9 of TCI in this area and reflect a very strong
10 likelihood that this type of marketing is out of
11 step with the conscience of the community because it
12 affects and has an impact on each person who
13 receives the mailing; it makes them angry, it makes
14 them upset, they are bombarded with junk mail, they
15 are bombarded with requests all their lives through
16 the mail and through telephone calls and the like.
17 This one has exceeded, based on the evidence
18 presented to the Court at this point, the parameters
19 of fair dealing.

20 The Court does not feel it is reasonable to
21 accept TCI's contracts analogy, to find that TCI
22 cable customers are the functional equivalent of
23 Book-of-the-Month Club members. They have not
24 signed up to be subjected to this type of marketing
25 plan.

1 The FTC, when it heard evidence when it was
2 asked to ban negative option plans completely,
3 specifically referred to testimony of a
4 psychologist, Ernest Vanderhay, who said some people
5 are procrastinators, they will not affirmatively do
6 things and they purposefully join clubs because that
7 way they know they are going to get a book or a
8 record every month and a burden is always on them to
9 do something to send it back; and that
10 psychologically that function served certain people
11 well, to allow them that option.

12 There is no such showing here that the 473,000
13 customers of TCI want the company to tell them
14 whether new channels are added, that they should
15 watch them unless they do something to avoid
16 watching them. Therefore the Court is strongly
17 influenced by the fact that at both the state and
18 the federal level there are laws against mailing of
19 unordered merchandise.

20 Now these statements about those statutes
21 clearly do not apply to what TCI has done here, but
22 by analogy they demonstrate the fact that over time
23 evolving standards of community conscience, this
24 type of marketing is at least likely to run afoul of
25 the Consumer Protection Act.

1 Senator Magnuson introduced the bill in 1970
2 that became the federal law in this area. And
3 Senator Magnuson proposed the purpose of the
4 amendment was in order to control the unconscionable
5 practice of persons who ship unordered merchandise
6 to consumers and then trick or bully them into
7 paying for it.

8 The Ninth Circuit Court of Appeals observed in
9 a case involving this statute that involved the old
10 and pernicious practice of mailing unsolicited
11 merchandise. I want to reiterate here that TCI
12 cannot be put in the same category as the old and
13 pernicious practitioners out there who had no
14 relationship with anybody at all or who had some
15 relationship they were attempting to abuse in terms
16 of foisting on them material they don't want and
17 trying to bully them into paying for it but the
18 basic framework of consumer protection, that is,
19 that the people in their homes do not want to be
20 sent, whether it include the mails or through the
21 airways or through the telephone, services or goods
22 or merchandise that they have not affirmatively
23 requested and that they have not affirmatively asked
24 for and it is a very strong sentiment that leaves
25 the Court to believe that it should exercise its

1 extraordinary powers and enter the preliminary
2 injunction in question.

3 So let me turn to a copy of the proposed order
4 that was modified today and, Mr. Nelson, except for
5 your violent disagreement with the Court's
6 conclusion, do you have problems with the specific
7 language of the proposed order?

8 MS REIS: I have the original which I
9 will hand up to you.

10 Your Honor, if I might, I'm not sure if it was
11 brought to your attention why we modified this, I
12 would like you to know we modified it, and really
13 only very slightly, because TCI about eleven or
14 twelve o'clock our time today issued a press release
15 announcing they were going to modify their sales
16 program. We rushed off a little two-page
17 explanation of that to you this morning.

18 THE COURT: I did read that.

19 MS REIS: We had a couple of
20 typographical errors in it.

21 We modified this slightly so it would include
22 any variation on the negative option theme,
23 including the one they have proposed now which still
24 requires consumers to take some action to reject the
25 service, namely subtracting a \$1.00 charge

1 particularly -- I believe it's in paragraph --

2 THE COURT: Six on page three.

3 MS REIS: I think there is a slight
4 modification to accommodate that, I'm not sure which
5 line it was but we have added -- because we wanted
6 to make sure that this ruling today would include
7 any modifications to what is otherwise a negative
8 option marketing.

9 MR. NELSON: Your Honor, I just want to
10 clarify two things. First, if there is any
11 possibility that you have not seen the billing
12 change, the change in billing language, I think you
13 probably should look at that.

14 THE COURT: I haven't. I only got the
15 letter from you to the AG's of late yesterday, I did
16 not actually see the press release.

17 MR. NELSON: We were under the
18 impression that you had the affidavit of Mr.
19 Kashinski that has the new billing language on it.

20 MS REIS: Which we received at 1:00
21 this afternoon.

22 MR. NELSON: It was literally announced
23 today, there was nothing else we could do on it.
24 The only thing that concerns me is whether the
25 ruling --

1 THE COURT: It doesn't affect the
2 Court's ruling in terms of another way for the
3 customer to cancel by subtracting and not paying.

4 MR. NELSON: That was the first
5 clarification; and then to make sure that the
6 Findings that are in the proposed order match that,
7 I think they do.

8 MS REIS: That's in paragraph six, we
9 have added at the last sentence --

10 MR. NELSON: The second point is just a
11 logistical one. There are things that may be in
12 the mail and in the works that may arrive in the
13 customer's homes, and we want a clarification that
14 if there is an injunction to cease certain conduct,
15 it wouldn't stop things that have already happened
16 and cannot stop.

17 THE COURT: Well, clearly if anything
18 was put into the stream of commerce prior to the
19 Court's injunction, it could not be held to be
20 violative of the Court's injunction. I don't think
21 that needs to be clarified but --

22 MR. NELSON: I think you have just done
23 it, thank you.

24 MS REIS: So it is clear, that things
25 that have already been printed and may be on the

1 verge to be delivered to mail must not now be
2 delivered to mail just because they have been
3 generated.

4 THE COURT: That goes without saying.
5 There is a certain amount of time, it says, that the
6 defendant shall immediately inform their agent,
7 services and employees. Realistically, if someone
8 ran out and dialed the 1-800 number, I wouldn't
9 expect that person to know what Judge Lasnik has
10 done. There ordinarily would have to be some kind
11 of intent to subvert the injunctive process for
12 anyone to be subjected to any contempt for violation
13 of the injunction. But the thrust, I'm sure the
14 defendants are well aware, is that they must take
15 immediate steps to comply with the injunction, in
16 other words, to seek other legal ways to avoid
17 complying with the injunction. But with those two
18 things specified, I will go ahead and sign the
19 original if there is no other objection, counsel,
20 and we will put in that it was on this fourth day of
21 June at 3:55 in the afternoon.

22 Now we have not addressed the issue of what
23 the next step is in terms of the trial on the
24 merits, and we don't need to do that today. I'm
25 certain that you will want to think over your

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appellate remedies in the meantime but if there is a
desire to have some sort of a status conference in
the immediate future to talk about what the next
step is, just contact Ms DeHaan to set that up.

MS REIS: We probably should try to
come to an agreement and contact you.

THE COURT: Thanks again. Court will
be in recess.

* * *

1 STATE OF WASHINGTON)

2) ss.

3 COUNTY OF KING)

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5 C E R T I F I C A T E

6
7 I, CHERYL D. ANDERSON, Official Court
8 Reporter for the Superior Court of the State
9 of Washington, County of King, do hereby
10 certify:

11 That the foregoing proceedings
12 were taken by me stenographically and later
13 reduced to writing under my personal
14 supervision;

15 That the transcript contains a
16 full, true and accurate record of the
17 proceedings that occurred at the time and
18 place stated therein.

19
20
21
22
23 *Cheryl Anderson*

24 Cheryl D. Anderson, RPR, CSR

25 Official Court Reporter