

No. 44. An act relating to amending consumer protection provisions for propane refunds, unsolicited demands for payment, bad faith assertions of patent infringement and failure to comply with civil investigations.

(H.299)

It is hereby enacted by the General Assembly of the State of Vermont:

Sec. 1. 9 V.S.A. § 2461b is amended to read:

§ 2461b. REGULATION OF PROPANE

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(e) When terminating service to a consumer, a seller shall comply with the following requirements.

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(2) Subject to subdivision (h)(5) of this section:

(A) Within 20 days of the date when the seller disconnects propane service or is notified by the consumer in writing that service has been disconnected, whichever is earlier, the seller shall refund to the consumer the amount paid by the consumer for any propane remaining in the storage tank, less any payments due the seller from the consumer.

(B) If the quantity of propane remaining in the storage tank cannot be determined with certainty, the seller shall, within the 20 days described in subdivision (2)(A) of this subsection, refund to the consumer the amount paid by the consumer for 80 percent of the seller's best reasonable estimate of the quantity of propane remaining in the tank, less any payments due from the consumer. The seller shall refund the remainder of the amount due as soon as the quantity of propane left in the tank can be determined with certainty, but no

later than 14 days after the removal of the tank or restocking of the tank at the time of reconnection.

* * *

(4) If the seller fails to mail or deliver a refund to the consumer in accordance with this subsection, the seller shall within one business day make a penalty payment to the consumer, in addition to the refund, of:

(A) \$250.00 on the first day after the refund was due; and

(B) \$75.00 per day for each day thereafter until the refund and penalty payment have been mailed or delivered, provided that the total amount that accrues under this subdivision (B) shall not exceed 10 times the amount of the refund.

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(h)(1) A seller who has a duty to remove a propane storage tank from a consumer's premises shall remove the tank within 20 days or, in the case of an underground storage tank, within 30 days of the earliest of the following dates:

(A) the date on which the consumer requests termination of service;

(B) the date the seller disconnects propane service; or

(C) the date on which the seller is notified by the consumer in writing that service has been disconnected.

(2) Notwithstanding the provisions of subdivision (1) of this subsection, if a consumer requests that a tank be removed on a specific day, the seller shall

remove the tank no more than 10 days after the date requested, or within the period required by subdivision (1) of this subsection, whichever is later.

(3) A seller who fails to remove a propane storage tank in accordance with this subsection shall make a penalty payment to the consumer of:

(A) \$250.00 on the first day after the tank should have been removed;

and

(B) \$75.00 per day for each day thereafter until the tank has been removed and the penalty payments have been mailed or delivered, provided that the total amount that accrues under this subdivision (B) shall not exceed \$2,000.00.

(4)(A) Notwithstanding subdivision (3) of this subsection, no penalty shall be due for the time a seller is unable to remove a tank due to weather or other conditions not caused by the seller that bar access to the tank, if the seller provides within five days of the latest date the tank was otherwise required to be removed:

(i) a written explanation for the delay;

(ii) what reasonable steps the consumer must take to provide access to the tank; and

(iii) a telephone number, a mailing address, and an e-mail address the consumer can use to notify the seller that the steps have been taken.

(B) The seller shall have 20 days from the date he or she receives the notice from the consumer required in subdivision (4)(A)(iii) of this subsection to remove the tank.

(5) A consumer who prevents access to a propane storage tank, such that a seller is unable to timely remove the tank from the property or determine the amount of propane remaining in the tank in compliance with this section, shall not be entitled to a refund for propane remaining in the storage tank pursuant to subsection (e) of this section until the consumer takes the reasonable steps identified by the seller that are necessary to allow access to the tank and provides notice to the seller that he or she has taken those steps, in compliance with the process established in subdivision (4) of this subsection.

Sec. 2. IMPLEMENTATION

The penalties created in 9 V.S.A. § 2461b(h)(3) shall not accrue prior to July 20, 2013.

Sec. 3. 9 V.S.A. § 2461e is amended to read:

§ 2461e. REQUIREMENTS FOR GUARANTEED PRICE PLANS AND PREPAID CONTRACTS

(a)(1) Contract and solicitation requirements. A contract for the retail sale of home heating oil, kerosene, or liquefied petroleum gas that offers a guaranteed price plan, including a fixed price contract, a prepaid contract, a cost-plus contract, and any other similar terms, shall be in writing, and the terms and conditions of such price plans shall be disclosed. Such disclosure

shall be in plain language and shall immediately follow the language concerning the price or service that could be affected and shall be printed in no less than 12-point boldface type of uniform font. A solicitation for the retail sale of home heating oil or liquefied petroleum gas that offers a guaranteed price plan that could become a contract upon a response from a consumer, including a fixed price contract, a prepaid contract, a cost-plus contract, and any other similar terms, shall be in writing, and the terms and conditions of such offer shall be disclosed in plain language.

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Sec. 4. 9 V.S.A. chapter 135 is amended to read:

CHAPTER 135. UNSOLICITED MERCHANDISE; SOLICITATION IN
THE GUISE OF A BILL, INVOICE, OR STATEMENT OF ACCOUNT

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§ 4402. SOLICITATION IN THE GUISE OF A BILL, INVOICE, OR
STATEMENT OF ACCOUNT

(a) In this section:

(1)(A) “Solicitation” means a document that reasonably could be considered a bill, invoice, or statement of account due, but is in fact an offer to sell goods or services to a consumer that were not requested by the consumer.

(B) “Solicitation” does not include an offer to renew an existing agreement for the purchase of goods or services, provided that the offer specifies the date on which the existing agreement expires.

(2) For purposes of subdivision (1)(A) of this subsection, factors to determine whether a document “reasonably could be considered to be a bill, invoice, or statement of account due” may include:

(A) The document is described as a “bill,” “invoice,” “statement,” “final notice,” or similar title.

(B) The document uses the term “remit” or “pay” with respect to a dollar amount, or similar wording.

(C) The document purports to impose a kind of late fee or similar penalty for nonpayment.

(D) The document refers to a dollar figure as an “amount due,” “amount owing,” or similar wording.

(b) It is an unfair and deceptive act and practice in commerce in violation of section 2453 of this title for a person to send to a consumer through any medium a solicitation in violation of the requirements of this section.

(c)(1) A solicitation shall bear on its face the following disclaimer in conspicuous boldface capital letters of a color prominently contrasting with the background against which it appears, including all other print on the face of the solicitation, and that are at least as large, bold, and conspicuous as any other print on the face of the solicitation but not smaller than 30-point type: “THIS IS NOT A BILL. THIS IS A SOLICITATION FOR THE SALE OF GOODS OR SERVICES. YOU ARE UNDER NO OBLIGATION TO PAY THE AMOUNT STATED UNLESS YOU ACCEPT THIS OFFER.”

(2) For purposes of subdivision (1) of this subsection, “color prominently contrasting” excludes any color, or any intensity of an otherwise included color, that does not permit legible reproduction by ordinary office photocopying equipment used under normal operating conditions and which is not at least as vivid as any other color on the face of the solicitation.

(d)(1) The disclaimer required in subsection (c) of this section shall be displayed conspicuously apart from other print on the page immediately below each portion of the solicitation that reasonably could be construed to specify a monetary amount due and payable by the recipient.

(2) The disclaimer required in subsection (c) of this section shall not be preceded, followed, or surrounded by words, symbols, or other matter that reduces its conspicuousness or that introduces or modifies the required text, such as “Legal Notice Required By Law” or similar wording.

(3) The disclaimer required in subsection (c) of this section shall not, by folding or any other means, be made unintelligible or less prominent than any other information on the face of the solicitation.

(4) If a solicitation consists of more than one page, or if any page is designed to be separated into portions, the disclaimer required in subsection (c) of this section shall be displayed in its entirety on the face of each page or portion of a page that reasonably could be considered a bill, invoice, or statement of account due as required in this subsection.

Sec. 5. 9 V.S.A. § 2460 is amended to read:

§ 2460. CIVIL INVESTIGATION

(a)(1) The ~~attorney general~~ Attorney General or a state's attorney whenever he or she has reason to believe any person to be or to have been in violation of section 2453 of this title, or of any rule or regulation made pursuant to section 2453 of this title, may examine or cause to be examined by any agent or representative designated by him or her for that purpose, any books, records, papers, memoranda, and physical objects of whatever nature bearing upon each alleged violation, and may demand written responses under oath to questions bearing upon each alleged violation.

(2) The ~~attorney general~~ Attorney General or a state's attorney may require the attendance of such person or of any other person having knowledge in the premises in the county where ~~such~~ the person resides or has a place of business or in Washington County if ~~such~~ the person is a nonresident or has no place of business within the ~~state~~ State, and may take testimony and require proof material for his or her information, and may administer oaths or take acknowledgment in respect of any book, record, paper, or memorandum.

(3) The ~~attorney general~~ Attorney General or a state's attorney shall serve notice of the time, place, and cause of ~~such~~ the examination or attendance, or notice of the cause of the demand for written responses, at least ten days prior to the date of ~~such~~ the examination, personally or by certified

mail, upon ~~such~~ the person at his or her principal place of business, or, if ~~such~~ the place is not known, to his or her last known address.

(4) Any book, record, paper, memorandum, or other information produced by any person pursuant to this section shall not, unless otherwise ordered by a court of this ~~state~~ State for good cause shown, be disclosed to any person other than the authorized agent or representative of the ~~attorney general~~ Attorney General or a state's attorney or another law enforcement officer engaged in legitimate law enforcement activities, unless with the consent of the person producing the same.

(5) This subsection ~~(a)~~ shall not be applicable to any criminal investigation or prosecution brought under the laws of this or any state.

(b)(1) A person upon whom a notice is served pursuant to the provisions of this section shall comply with the terms thereof unless otherwise provided by the order of a court of this ~~state~~ State.

(2) Any person who, with intent to avoid, evade, or prevent compliance, in whole or in part, with any civil investigation under this section, removes from any place, conceals, withholds, or destroys, mutilates, alters, or by any other means falsifies any documentary material in the possession, custody, or control of any person subject of any such notice, or mistakes or conceals any information, shall be ~~fined~~ subject to a civil penalty of not more than \$5,000.00 \$25,000.00 and to recovery by the Attorney General's or state's attorney's

office the reasonable value of its services and expenses in enforcing compliance with this section.

(c)(1) Whenever any person fails to comply with any notice served upon him or her under this section or whenever satisfactory copying or reproduction of ~~any such~~ material pursuant to this section cannot be done and ~~such the~~ person refuses to surrender ~~such the~~ material, the ~~attorney general~~ Attorney General or a state's attorney may file, in the ~~superior court~~ Superior Court in which ~~such the~~ person resides or has his or her principal place of business, or in Washington ~~county~~ County if ~~such the~~ person is a nonresident or has no principal place of business in this ~~state~~ State, and serve upon ~~such the~~ person, a petition for an order of ~~such the~~ court for the enforcement of this section.

(2) Whenever ~~any a~~ petition is filed under this section, ~~such the~~ court shall have jurisdiction to hear and determine the matter ~~so~~ presented, and to enter ~~such order or~~ one or more orders as may be required to carry into effect the provisions of this section.

(3) ~~Any disobedience of any~~ A person who violates an order entered under this section by ~~any a~~ court shall be punished ~~as a~~ for contempt ~~thereof of~~ court and shall be subject to a civil penalty of not more than \$25,000.00 and to recovery by the Attorney General's or state's attorney's office of the reasonable value of its services and expenses in enforcing compliance with this section.

Sec. 6. 9 V.S.A. chapter 120 is added to read:

CHAPTER 120. BAD FAITH ASSERTIONS

OF PATENT INFRINGEMENT

§ 4195. LEGISLATIVE FINDINGS AND STATEMENT OF PURPOSE

(a) The General Assembly finds that:

(1) Vermont is striving to build an entrepreneurial and knowledge based economy. Attracting and nurturing small and medium sized internet technology (“IT”) and other knowledge based companies is an important part of this effort and will be beneficial to Vermont’s future.

(2) Patents are essential to encouraging innovation, especially in the IT and knowledge based fields. The protections afforded by the federal patent system create an incentive to invest in research and innovation, which spurs economic growth. Patent holders have every right to enforce their patents when they are infringed, and patent enforcement litigation is necessary to protect intellectual property.

(3) The General Assembly does not wish to interfere with the good faith enforcement of patents or good faith patent litigation. The General Assembly also recognizes that Vermont is preempted from passing any law that conflicts with federal patent law.

(4) Patent litigation can be technical, complex, and expensive. The expense of patent litigation, which may cost hundreds of thousands of dollars or more, can be a significant burden on small and medium sized companies.

Vermont wishes to help its businesses avoid these costs by encouraging the most efficient resolution of patent infringement claims without conflicting with federal law.

(5) In order for Vermont companies to be able to respond promptly and efficiently to patent infringement assertions against them, it is necessary that they receive specific information regarding how their product, service, or technology may have infringed the patent at issue. Receiving such information at an early stage will facilitate the resolution of claims and lessen the burden of potential litigation on Vermont companies.

(6) Abusive patent litigation, and especially the assertion of bad faith infringement claims, can harm Vermont companies. A business that receives a letter asserting such claims faces the threat of expensive and protracted litigation and may feel that it has no choice but to settle and to pay a licensing fee, even if the claim is meritless. This is especially so for small and medium sized companies and nonprofits that lack the resources to investigate and defend themselves against infringement claims.

(7) Not only do bad faith patent infringement claims impose a significant burden on individual Vermont businesses, they also undermine Vermont's efforts to attract and nurture small and medium sized IT and other knowledge based companies. Funds used to avoid the threat of bad faith litigation are no longer available to invest, produce new products, expand, or hire new workers, thereby harming Vermont's economy.

(b) Through this narrowly focused act, the General Assembly seeks to facilitate the efficient and prompt resolution of patent infringement claims, protect Vermont businesses from abusive and bad faith assertions of patent infringement, and build Vermont's economy, while at the same time respecting federal law and being careful to not interfere with legitimate patent enforcement actions.

§ 4196. DEFINITIONS

In this chapter:

(1) "Demand letter" means a letter, e-mail, or other communication asserting or claiming that the target has engaged in patent infringement.

(2) "Target" means a Vermont person:

(A) who has received a demand letter or against whom an assertion or allegation of patent infringement has been made;

(B) who has been threatened with litigation or against whom a lawsuit has been filed alleging patent infringement; or

(C) whose customers have received a demand letter asserting that the person's product, service, or technology has infringed a patent.

§ 4197. BAD FAITH ASSERTIONS OF PATENT INFRINGEMENT

(a) A person shall not make a bad faith assertion of patent infringement.

(b) A court may consider the following factors as evidence that a person has made a bad faith assertion of patent infringement:

(1) The demand letter does not contain the following information:

(A) the patent number;

(B) the name and address of the patent owner or owners and assignee or assignees, if any; and

(C) factual allegations concerning the specific areas in which the target's products, services, and technology infringe the patent or are covered by the claims in the patent.

(2) Prior to sending the demand letter, the person fails to conduct an analysis comparing the claims in the patent to the target's products, services, and technology, or such an analysis was done but does not identify specific areas in which the products, services, and technology are covered by the claims in the patent.

(3) The demand letter lacks the information described in subdivision (1) of this subsection, the target requests the information, and the person fails to provide the information within a reasonable period of time.

(4) The demand letter demands payment of a license fee or response within an unreasonably short period of time.

(5) The person offers to license the patent for an amount that is not based on a reasonable estimate of the value of the license.

(6) The claim or assertion of patent infringement is meritless, and the person knew, or should have known, that the claim or assertion is meritless.

(7) The claim or assertion of patent infringement is deceptive.

(8) The person or its subsidiaries or affiliates have previously filed or threatened to file one or more lawsuits based on the same or similar claim of patent infringement and:

(A) those threats or lawsuits lacked the information described in subdivision (1) of this subsection; or

(B) the person attempted to enforce the claim of patent infringement in litigation and a court found the claim to be meritless.

(9) Any other factor the court finds relevant.

(c) A court may consider the following factors as evidence that a person has not made a bad faith assertion of patent infringement:

(1) The demand letter contains the information described in subdivision (b)(1) of this section.

(2) Where the demand letter lacks the information described in subdivision (b)(1) of this section and the target requests the information, the person provides the information within a reasonable period of time.

(3) The person engages in a good faith effort to establish that the target has infringed the patent and to negotiate an appropriate remedy.

(4) The person makes a substantial investment in the use of the patent or in the production or sale of a product or item covered by the patent.

(5) The person is:

(A) the inventor or joint inventor of the patent or, in the case of a patent filed by and awarded to an assignee of the original inventor or joint inventor, is the original assignee; or

(B) an institution of higher education or a technology transfer organization owned or affiliated with an institution of higher education.

(6) The person has:

(A) demonstrated good faith business practices in previous efforts to enforce the patent, or a substantially similar patent; or

(B) successfully enforced the patent, or a substantially similar patent, through litigation.

(7) Any other factor the court finds relevant.

§ 4198. BOND

Upon motion by a target and a finding by the court that a target has established a reasonable likelihood that a person has made a bad faith assertion of patent infringement in violation of this chapter, the court shall require the person to post a bond in an amount equal to a good faith estimate of the target's costs to litigate the claim and amounts reasonably likely to be recovered under § 4199(b) of this chapter, conditioned upon payment of any amounts finally determined to be due to the target. A hearing shall be held if either party so requests. A bond ordered pursuant to this section shall not exceed \$250,000.00. The court may waive the bond requirement if it finds the

person has available assets equal to the amount of the proposed bond or for other good cause shown.

§ 4199. ENFORCEMENT; REMEDIES; DAMAGES

(a) The Attorney General shall have the same authority under this chapter to make rules, conduct civil investigations, bring civil actions, and enter into assurances of discontinuance as provided under chapter 63 of this title. In an action brought by the Attorney General under this chapter the court may award or impose any relief available under chapter 63 of this title.

(b) A target of conduct involving assertions of patent infringement, or a person aggrieved by a violation of this chapter or by a violation of rules adopted under this chapter, may bring an action in Superior Court. A court may award the following remedies to a plaintiff who prevails in an action brought pursuant to this subsection:

(1) equitable relief;

(2) damages;

(3) costs and fees, including reasonable attorney's fees; and

(4) exemplary damages in an amount equal to \$50,000.00 or three times the total of damages, costs, and fees, whichever is greater.

(c) This chapter shall not be construed to limit rights and remedies available to the State of Vermont or to any person under any other law and shall not alter or restrict the Attorney General's authority under chapter 63 of this title with regard to conduct involving assertions of patent infringement.

Sec. 7. EFFECTIVE DATE

This act shall take effect on July 1, 2013.

Date the Governor signed the bill: May 22, 2013