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STATE OF VERMONT

**SUPERIOR COURT
Washington Unit**

**CIVIL DIVISION
Docket No. 443-7-14 Wncv**

**STATE OF VERMONT
Plaintiff**

v.

**LIVING ESSENTIALS, LLC, and
INNOVATION VENTURES, LLC
Defendants**

DECISION

The State’s Motion for Partial Summary Judgment (MPR 30)

The State has filed a motion for summary judgment seeking collateral estoppel against the Defendants on a specific fact: that three of many advertising claims related to “5-hour ENERGY®” that are at issue in this consumer protection case lacked substantiation. The State necessarily seeks, in conjunction with the application of collateral estoppel, a ruling that the “substantiation doctrine” applies. The State relies on the judgment of a State of Washington trial court.

Trial courts exercise broad discretion in determining when to apply the doctrine of offensive non-mutual collateral estoppel. *Parklane Hosiery*, 439 U.S. 322, 331 (1979). “Nonmutual issue preclusion is not available as a matter of right.” 18A Wright & Miller, et al., Fed. Prac. & Proc. Juris. § 4465 (2d ed.); see also *Trepanier v. Getting Organized, Inc.*, 155 Vt. 259, 265 n.2 (1990) (“The use of offensive collateral estoppel is more controversial than the use of defensive collateral estoppel, and generally requires additional considerations.” (citing *Parklane Hosiery*, 439 U.S. at 329–31 (1979))). In this case, the court concludes that application of the doctrine is not appropriate.

To apply the doctrine, the court first would have to adopt the “substantiation doctrine” as a matter of law and do so in substantially the same way that the Washington trial court did. This court has already ruled, however, that it would be premature to adopt and apply such a doctrine in Vermont without consideration of all the facts: “[t]here is no binding authority and the issue is not so straightforward that the court is inclined to consider it absent an exploration ‘in the light of facts as developed by the evidence.’” Decision on Defendants’ Motion to Dismiss and to Strike 1 (filed Feb. 26, 2015). Applying collateral estoppel as urged by the State would prevent the court from considering a novel legal issue in the illuminating context of the evidence about all the advertising claims in the case, and not just the three identified by the State. The court again declines to do that.

Additionally, the Washington case currently is on appeal. The risk is that the outcome of

that appeal could require later changes to this case if this court were to apply collateral estoppel now. There is authority for taking that risk. See Restatement (Second) of Judgments § 13 cmt. f, g. The Restatement suggests that, if the risk materializes, “a party, upon a showing that the earlier judgment has been nullified and that relief from the later judgment is warranted, may by appropriate proceedings secure such relief.” *Id.* § 16 cmt. c. However, whether doing so makes sense depends on the specifics of the case and the particular effects of any change on appeal. In such a heavily litigated case as this, having to revise a judgment later, and/or revise the doctrine of law applied and the legal analysis related to it, would be complicated and burdensome to the parties and court resources. If a judgment had resulted in remedies that had been implemented, they would need to be undone. Efficiency is best achieved in this case by avoiding such risks entirely.

Finally, it is not clear that applying collateral estoppel would result in any appreciable efficiencies in this case in other respects, such as limiting the scope of discovery or the presentation of evidence. The State is seeking substantial penalties and other relief. Even if this motion were granted and liability established as to the three advertising claims, the court would still need to evaluate the evidence related to the three claims in connection with considering remedies.

For these reasons, the court concludes that this case is not a good fit for the doctrine of offensive non-mutual collateral estoppel.

The State’s motion for partial summary judgment is denied.

Dated at Montpelier, Vermont this ____ day of August 2017.

Mary Miles Teachout
Superior Judge