

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE
NOV 20 9 59 PM '06

IMS HEALTH INCORPORATED, a Delaware corporation; and VERISPAN, LLC, a Delaware limited liability company,)	Case No. 06-CV-280-PB
)	
Plaintiffs,)	
)	
v.)	
)	
KELLY A. AYOTTE, as Attorney General of the State of New Hampshire,)	
)	
Defendant.)	

MEMORANDUM OF *AMICUS CURIAE* COALITION FOR HEALTHCARE COMMUNICATIONS IN SUPPORT OF PLAINTIFFS' PRAYER FOR PERMANENT INJUNCTION

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INTRODUCTION

New Hampshire's Prescription Restraint Law (or "new law") prohibits, with important and discriminatory exceptions, the sale or use of prescriber-identifiable prescription data "for any commercial purpose" including "*advertising, marketing, promotion*, or any activity that could be used to influence sales or market share of a pharmaceutical product. . . ." N.H. Rev. Stat. Ann. §§ 318:47-f, 318-B:12, IV (2006) (emphasis added). As the State candidly acknowledged in its opposition to Plaintiff's Motion for Preliminary Injunction, the "new law" is not designed to safeguard prescriber privacy. Indeed, prescriber-identifiable data can continue to be sold and used in New Hampshire for all non-commercial purposes including "public interest" publications discussing an individual physician's prescribing practices. The data also can be used for the excepted commercial purpose of "counter-detailing" by insurers who seek through "formulary compliance" to affect physician prescribing practices. The new law's real objective is to limit the efficiency and effectiveness of pharmaceutical marketing by innovator, branded companies. The State speculates that this restraint might cause New Hampshire physicians to prescribe older, generic drugs instead of newer branded drugs and that this substitution might reduce total prescription drug costs. In other words, the State is attempting to regulate the prescribing conduct of New Hampshire physicians for economic purposes by restraining the speech of disfavored commercial entities that provide truthful and non-misleading information to those physicians. As the State itself said:

The Act represents a reasonable step toward protecting prescribers from the industry's effort to convince a prescriber to either switch to a particular brand of drug or begin prescribing where he or she was previously not prescribing a prescription drug.

Gov't Obj. to Prelim. Inj. (Doc. No. 27:1) at 7-15, 19 ("Gov't PI Obj.").

Amicus the Coalition for Healthcare Communications (“CHC”) believes that the new law cannot survive constitutional scrutiny even if assessed in the context of message tailoring or “targeted marketing” to prescribers by innovator pharmaceutical companies. If assessed in the context of the limitation also imposed on the use of prescriber-identifiable prescription data for commercial “targeted marketing” purposes by certain CHC members engaged in providing continuing medical education services and medical literature to New Hampshire physicians, the “new law” is clearly constitutionally indefensible. Unless the State believes, contrary to 40 years of Supreme Court constitutional precedent, that it may suppress commercial speech at its whim, it cannot constrain the ability of the CHC’s members to communicate with their physician audiences in the absence of any claimed connection between those communications and the prescribing practices the State intends to affect. In short, the “new law” cannot pass constitutional muster at its core and is not even arguably constitutional at its periphery.

For four decades, the Supreme Court of the United States has repeatedly struck down under the First Amendment attempts to place restrictions on advertising, marketing, and commercial solicitation.¹ In doing so, the Court has explained that:

The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented. Thus, even a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment.

¹ See *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002) (soliciting of compounded pharmaceutical drugs); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (tobacco and cigar advertisements near schools and playgrounds); *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173 (1999) (legal gambling advertisements); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (alcoholic beverage advertisements); *Edenfield v. Fane*, 507 U.S. 761 (1993) (in-person solicitation by accountants); *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (advertising and marketing of pharmaceutical drugs).

Thompson v. W. States Med. Ctr., 535 U.S. 357, 367 (2002) (quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993)). New Hampshire’s new law violates this fundamental constitutional tenet and thus must suffer a similar fate. By seeking to hobble speakers who wish to effectively introduce truthful communications into the marketplace of ideas, the new law strikes at the very heart of the First Amendment. *W. States*, 535 U.S. at 366-67 (“[T]he free flow of commercial information is indispensable . . . [and] a ‘particular consumer’s interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.’” (quoting *Va. Bd. Of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976))).

Amicus curiae the CHC agrees with Plaintiffs that the new law does not simply strike at the CHC members’ and pharmaceutical manufacturers’ commercial speech rights but also has the (perhaps unintended but very real) effect of potentially curtailing numerous forms of non-commercial communications among and between numerous other entities. The new law also outruns the State’s alleged rationale by sweeping within its ambit the communications of the CHC’s members who use prescriber-identifiable data to craft marketing and other communications to physicians to promote privately administered continuing medical education (“CME”) programs, public relations, and advertising in medical journals. The CHC recognizes, however, that this Court may first look at impacts on the State’s intended targets—pharmaceutical manufacturers, and their marketing agents, including sales representatives known as “detailers”—to judge the new law. Gov’t PI Obj. at 31; *see also* N.H. Rev. Stat. Ann. § 318:47-f (2006) (“[c]ommercial purpose includes . . . any activity that could be used to influence sales or market share . . . or evaluate the effectiveness of a professional pharmaceutical detailing

sales force”). Because the State’s effort to hamper their marketing speech alone violates the First Amendment, no other application of the new law can survive.

STATEMENT OF INTEREST

The CHC comprises trade associations and their members who engage in medical education, publishing and marketing of prescription products and services, including drugs, devices, and biologics. Trade association members include the American Association of Advertising Agencies, the Association of Medical Publications, the Healthcare Marketing and Communications Council, the Medical Marketing Association, and the Healthcare Businesswomen’s Association. These members make extensive use of prescriber data for a variety of marketing purposes that enable them to increase the effectiveness and efficiency of education and communication programs on behalf of the manufacturers of prescription products. The absence of these data would interfere substantially with the ability of member companies to meet their clients’ needs, educate prescribers, and improve patient care. Moreover, a ban on commercial use of these data will effectively eliminate their availability for the non-commercial research, public policy planning, and safety uses that are supported by commercial marketing and research and revenues. Thus, the CHC has a considerable interest in the outcome of this case. *See also* Assented-To Motion of the Coalition for Healthcare Communications for Leave To File Memorandum as *Amicus Curiae* in Support of Plaintiffs’ Prayer for Permanent Injunction (filed Nov. 30, 2006).

BACKGROUND

As Plaintiffs have detailed in their memoranda, innovator pharmaceutical and biotech entities use prescriber-level data to shape communications that advance many purposes, including educational, scientific, and safety objectives. *E.g.*, Pls.’ Memo. in Support of Mot. for Prelim. Inj. (Doc. No. 5:2) at 6-7 (“Plaintiffs’ PI Memo.”). The Supreme Court has made clear

that a statute can violate the First Amendment both for its “intended” impediment to commercial expression and its “unintended” burdens on other beneficial speech. *W. States*, 535 U.S. at 376-77 (“If the Government’s failure to justify its decision to regulate speech were not enough to convince us that the [Food and Drug Administration Modernization Act] advertising provisions were unconstitutional, the amount of beneficial speech prohibited by the FDAMA would be.”). The primary purpose of this *amicus* brief is to focus on the constitutional encroachments of the “intended” speech restrictions, i.e. the “advertising, marketing, promotion or any [other commercial] activity” at the center of the new law. N.H. Rev. Stat. Ann. § 317:47-f (2006).

Prescriber-identifiable data are used by manufacturers to gain a full understanding of the current market realities for their drugs, and thus to effectively develop a comprehensive marketing program to most effectively and efficiently inform and educate prescribers. This program includes in some cases direct contact with authorized prescribers (“detailing”). Prescriber-identifiable data allows marketers both to understand the patient base of the prescribers (in a way that simply knowing a specialty, for example, does not) and to understand their prescribing preferences. All of this information allows the manufacturer to tailor its messages to prescribers. It also increases the value of these communications to the prescriber by enabling messages that are customized to their needs. Without such information, marketers and prescribers will communicate less efficiently, and important information on new medications and educational opportunities may not reach prescribers who might find it highly useful.

Prescriber-identifiable data are used to engage in various types of targeted marketing. For example, prescriber-identifiable data are used by CHC members to: (1) select invitees to, tailor the curriculum at, and evaluate the effectiveness of company-sponsored physician education courses and programs; (2) tailor journal advertising to the needs of subscribers and

evaluate its effectiveness; (3) select the recipients, tailor the messages, and evaluate the effectiveness of direct marketing media; and (4) as recognized by the legislature, tailor in-person “detailing” communications to the practice needs of authorized prescribers. There are numerous other marketing uses of prescriber data, including by commercial enterprises that provide certified CME courses to select invitees and tailor the curriculum to the needs of the audiences. Although, as Plaintiffs explain, the full reach of the new law is not clear, *e.g.*, Plaintiffs’ PI Memo. at 54-58, it appears that all of these arguably commercial uses of prescriber-identifiable data are now prohibited.

ARGUMENT

I. THE NEW LAW DIRECTLY AND COMPLETELY BANS THE USE OF PRESCRIBER-IDENTIFIABLE DATA TO ENHANCE THE EFFECTIVENESS OF COMMERCIAL SPEECH.

Plaintiffs have aptly explained why the new content-based law directly and indirectly restricts fully protected non-commercial speech and is subject to strict scrutiny under the First Amendment.² *E.g.*, Plaintiffs’ PI Memo. at 24-47. We agree. Nonetheless, even if one were to focus only on the words of the statute, it is clear that, at the very least, the new law restricts commercial speech by banning the use of prescriber-identifiable data to tailor targeted commercial communications. The new law provides that prescription records containing such data “shall not be licensed, transferred, used, or sold . . . for *any* commercial purpose,” where “commercial purpose” is defined to include, among other things, “*advertising, marketing, promotion, or any activity that could be used to influence sales or market share of a*

² Indeed, even as between the sales representative and prescriber, the communications at issue are at the very least a mix of commercial speech and fully protected scientific communications. *See, e.g., Miller v. California*, 413 U.S. 15, 34 (1973) (“The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or *scientific* value.” (emphasis added)); *Bd. of Trs. of Leland Stanford Junior Univ. v. Sullivan*, 773 F. Supp. 472, 474 (D.D.C. 1991) (“It is . . . settled . . . that the First Amendment protects *scientific expression and debate* just as it protects political and artistic expression.” (emphasis added)).

