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## New Hampshire Prescription Data Ban Ruled Unconstitutional

A federal district court ruled on April 30, 2007, that New Hampshire's law banning the sale of prescription data violates the First Amendment because it improperly restricts commercial speech.<sup>1</sup> The statute, known as the "Prescription Information Law," expressly prohibits the transmission or use of prescriber-identifiable data for commercial purposes associated with the advertising and marketing of prescription drugs and is the first of its kind in the nation.<sup>2</sup> It was enacted last year with the twin goals of protecting the privacy of doctors and patients and lowering the costs of prescription drugs.

The law was challenged by IMS Health Incorporated and Verispan, LLC, both "data mining companies" that purchase prescription data from pharmacies and sell it to drug companies for use in marketing activities. During a bench trial, the plaintiffs argued that the Prescription Information Law is a content-based restriction on non-commercial speech. They also argued that, even if the law is viewed as a restriction on commercial speech, it is unconstitutional because it does not directly advance a substantial government interest. The State argued in response that the law restricts use of unprotected factual information rather than constitutionally protected speech. It also asserted that, even if the law regulates commercial speech, it passes the intermediate-scrutiny test because it directly serves the State's substantial interests in protecting prescriber privacy, promoting public health, and controlling health care costs.

### Restriction on Speech

The court first concluded that the Prescription Information Law does in fact restrict "speech" protected by the First Amendment because laws that "target[ ] factual information, rather than viewpoints, beliefs, emotions, or other types of expression" are not exempt from the requirements of the First Amendment.<sup>3</sup> As examples, the court cited cases in which the Supreme Court held that disclosure of a rape victim's name and disclosure of drug prices do not violate the First Amendment. It further explained that the New Hampshire law indirectly restricts speech by preventing pharmaceutical companies from using prescriber-identifiable information in their marketing efforts.<sup>4</sup>

### Intermediate Scrutiny

Applying the definition of "commercial speech" set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,<sup>5</sup> the court determined that intermediate scrutiny applied in evaluating the plaintiffs' claim because the challenged provision regulates commercial speech. The court concluded that the Prescription Information Law is a commercial-speech restriction

<sup>1</sup> *IMS Health Inc. v. Ayotte*, No. 06-cv-280-PB (D.N.H. Apr. 30, 2007).

<sup>2</sup> N.H. Rev. Stat. Ann. § 318:47-f.

<sup>3</sup> See *Fla. Star v. B.J.F.*, 491 U.S. 524, 540-41 (1989); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Counsel, Inc.*, 425 U.S. 748, 762 (1976).

<sup>4</sup> See *Minneapolis Star & Tribune Co. v. Minn. Comm'n of Revenue*, 460 U.S. 575, 585 (1983) (holding that a special tax on ink and paper used in production of a publication violates First Amendment).

<sup>5</sup> 447 U.S. 557, 564 (1980).

“because it restricts only speech that is ‘solely in the individual interest of the speaker and its specific business audience.’” Under *Central Hudson*, truthful commercial speech that does not promote unlawful activity can be limited only if three criteria are satisfied: (1) the law is in support of a substantial government interest, (2) the law directly advances the government interest asserted, and (3) the law is not more extensive than is necessary to serve the interest asserted.<sup>6</sup>

### Substantial Government Interest

The State contended that the Prescription Information Law advances its interests in protecting prescriber privacy, promoting public health, and containing health care costs. With respect to its interest in protecting prescriber privacy, the State argued that the law serves this interest by “limiting unwarranted intrusions into the decision-making process of the prescribing physicians.” To support its contention, the State relied on cases recognizing its interest in protecting the tranquility of the home from unwanted or improper commercial solicitation.<sup>7</sup> The court concluded, however, that those cases were inapplicable because this case does not involve solicitations that invade the tranquility of the home or target vulnerable victims. Moreover, the State did not show that pharmaceutical companies use prescriber-identifiable data to coerce or harass health care providers or in a manner that intrudes upon the doctor-patient relationship. As a result, the court rejected the State’s argument that the law can be justified on the basis that it promotes prescriber privacy.

### Advancement of a State Interest

The court accepted the State’s premise that pharmaceutical companies use prescriber-identifiable data to make detailing more persuasive but rejected its argument that the Prescription Information Law directly advances the State’s interests in promoting public health and containing health care costs.

Regarding the State’s claim that increasing the effectiveness of detailing undermines public health, the court held that the State did not show that “brand-name drugs are more injurious to the public health than generic alternatives.” It also dismissed the State’s claim that use of prescriber-identifiable data should be prohibited because this information is used to target so-called “early adopters” of newly approved drugs. According to the court, the State did not show that early adopters are more likely to be influenced by detailing than other prescribers or that newly approved drugs are generally more dangerous than older drugs.

The court further determined that the law cannot be justified as a cost-containment measure because the State failed to prove that the reduction in health care costs can be achieved without compromising patient care. It noted that recently approved brand-name drugs are sometimes more effective than generic equivalents of older drugs. Even when the drugs are equally effective, some patients may benefit from taking the brand-name drug. A ban on prescriber-identifiable data, however, “affects both helpful and harmful brand-name prescribing practices in the same way.”

Finally, the court explained that the State’s arguments suffered from a “fundamental flaw”; namely, that the State does not have a substantial interest in protecting health care providers from sales techniques that use prescriber-identifiable data to enhance the effectiveness of truthful speech on the assumption that detailing will cause providers to make “inadvisable prescribing decisions.” It

<sup>6</sup> *Id.* at 566. The court noted that the “party seeking to uphold a commercial speech restriction bears the burden of proof with respect to all three elements.” *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002).

<sup>7</sup> See *Fla. Bar v. Went For It, Inc.*, 515 U.S. 616, 630 (1995); *Edenfield v. Fane*, 507 U.S. 761, 769 (1993); *Carey v. Brown*, 447 U.S. 455, 471 (1980).

noted that the Supreme Court has “previously rejected the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information.”<sup>8</sup> The court further observed that “[h]ealth care providers are highly trained professionals who . . . certainly are more able than the general public to evaluate truthful pharmaceutical marketing messages.”

### More Extensive than Necessary

Even if the Prescription Information Law did advance the State’s interests in promoting public health and containing health care costs, the court concluded that it was more extensive than necessary to serve those interests. It explained that the State could address those same concerns in a number of other ways that would not restrict protected speech.

First, the State could deal with concerns that pharmaceutical companies are improperly using samples, gifts, and meals to induce providers to prescribe their products by adopting gift limits or bans, similar to those adopted by other states, such as Minnesota and California.<sup>9</sup> Second, the State could counteract pharmaceutical detailing by implementing strategies to educate providers about the cost implications of their prescribing decisions and/or the advantages of generic drugs. Such strategies could include “best practice” guidelines, counter-detailing programs, and requirements that providers participate in continuing medical education programs that focus on these issues.<sup>10</sup> Third, the State could address concerns that use of prescriber-identifiable data drives up Medicaid costs by properly implementing cost-containment measures for drugs covered by Medicaid, including a preferred drug list and prior authorization requirements.

### Appeal Likely

The State has already announced that it plans to appeal the court’s decision to the United States Court of Appeals for the First Circuit. Likely grounds for appeal include a challenge to the court’s determination that the State failed to show that the law advanced its interests of protecting public health and containing health care costs and that it was more extensive than necessary to serve those interests. The State may also reassert its argument that the law does not implicate the First Amendment at all.

<sup>8</sup> *Thompson*, 535 U.S. at 373; see also *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996) (noting that “bans against truthful, non-misleading commercial speech . . . usually rest solely on the offensive assumption that the public will respond ‘irrationally’ to the truth. The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good”) (citation omitted). The court added that, “if the State is concerned that truthful detailing is causing health care providers to make inadvisable prescribing decisions, ‘the remedy to be applied is more speech, not enforced silence.’” *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J. concurring).

<sup>9</sup> See, e.g., Minn. Stat. Ann. § 151.461 (2007); Cal. Health and Safety Code § 119402(d)(1) (2007).

<sup>10</sup> See, e.g., W. Va. Code Ann. § 5-16C-9(5) (2006) (authorizing the development of counter-detailing programs).

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