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COURT UPHOLDS NEW HAMPSHIRE LAW BANNING SPEECH ON DRUG PRESCRIPTIONS

(IMS Health Inc. v. Ayotte)

The U.S. Court of Appeals for the First Circuit in Boston this week declined to reconsider its rejection of a First Amendment challenge to a New Hampshire law that blocks access to critical healthcare information. The law criminalizes the collection and disclosure of information about the prescribing practices of physicians.

The one-sentence order declining to grant rehearing was a setback for WLF, which filed a brief in the case, *IMS Health Inc. v. Ayotte*, urging that the court reconsider its November 2008 dismissal. WLF argued that the New Hampshire law violates the First Amendment by prohibiting disclosures of truthful information, even disclosures arising outside the context of advertising. WLF argued that such bans are only rarely permissible and only then when based on showings of the most compelling of government needs.

WLF has now filed three briefs in this matter: once in 2006 when the case was before the district court (which struck down the law), once in 2007 in connection with New Hampshire's appeal from that decision, and again last month in support of the rehearing petition. WLF has pledged to support the plaintiffs' anticipated petition for review of the case in the U.S. Supreme Court.

In its November 2008 decision rejecting the plaintiffs' claims, the court held that the First Amendment was not even applicable to the challenged law, which the court characterized as a regulation of commercial practices rather of speech. It held, alternatively, that the law was a permissible restriction on commercial speech -- because (it determined) the restriction directly advanced New Hampshire's interest in reducing sales of brand-name prescription drugs. The court this week declined a request to reconsider the November 2008 decision.

"The First Circuit decision is likely to encourage other States to follow New Hampshire's lead in prohibiting the dissemination of information about doctors' prescribing patterns," said WLF Chief Counsel Richard Samp following denial of the rehearing petition. "New Hampshire seems to believe that banning the dissemination of truthful information will somehow reduce its Medicare/Medicaid costs, despite the absence of any empirical evidence to support that belief. But if more such laws are

adopted, the loser will be the American healthcare system. The information that New Hampshire is trying to ban plays a vital role in health care; it is used to monitor the safety of medications, implement drug recalls, and rapidly communicate information to doctors about innovative new treatments," Samp said.

The case involves New Hampshire's Prescription Restraint Law, which took effect in 2006. The Act provides that no "prescriber-identifiable data" relative to prescription information may be used or transferred for any commercial purpose. IMS Health Inc. and Verispan LLC, two companies in the business of collecting and distributing health information on a nationwide basis, filed suit against the Act, alleging that it violates their First Amendment rights. The Act has prevented them from collecting and distributing information about what drugs are being prescribed by New Hampshire doctors, even though the companies ensure that no information about individual patients is ever included in their data. New Hampshire argues that the law will make it harder for drug companies' sales forces to convince doctors to prescribe higher-cost brand name drugs, because the absence of doctor-specific prescribing information will make it harder for drug companies to identify which doctors are most susceptible to sales pitches.

In its brief urging that the rehearing be granted, WLF argued that when government regulators seek to uphold content-based speech restrictions, the burden of proof always falls on government to justify those restrictions, regardless whether the speech at issue is fully protected political speech or is "commercial speech" -- a category of speech generally afforded a somewhat reduced level of First Amendment protection. WLF argued that New Hampshire failed to demonstrate that its speech ban would result in lower health care costs or that other, non-speech regulations would not be equally effective. WLF took particular issue with the First Circuit's conclusion that New Hampshire's law is a mere regulation of conduct and should not be viewed as speech regulation at all. WLF argued that because New Hampshire's only objection to the plaintiffs' activities is the content of the information it is transferring (*i.e.*, the prescribing habits of New Hampshire doctors), the law can only be deemed an effort to regulate speech. WLF argued that the appeals court's this-is-not-speech ruling is a dangerous abridgment of First Amendment rights.

The Washington Legal Foundation is a public interest law and policy center with supporters in all 50 States, including many in New Hampshire. It devotes a significant portion of its resources to protecting the speech rights of the business community.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's brief is posted on its web site, www.wlf.org.