



U.S. SUPREME COURT REVIEW SOUGHT FOR CASE CONCERNING COMMERCIAL INFORMATION

by
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As the nation and world move deeper into an information economy, the government continues to test the bounds of permissible regulation. A very prominent case raising these issues may now be headed to the U.S. Supreme Court. In *IMS Health, Inc. v. Ayotte*, 550 F.3d 42 (1st Cir. 2008), the U.S. Court of Appeals for the First Circuit upheld New Hampshire's Prescription Information Law (PIL). That statute criminalizes the transfer of information about medical prescriptions for the purpose of increasing drug sales. It targets so-called "detailing", where pharmaceutical companies use a doctor's previous prescription history to engage in targeted one-on-one marketing about their products. The New Hampshire legislature tried to obstruct detailing because it believes the process drives up the costs of health care by encouraging patent-protected drug sales.

Lawmakers in New Hampshire knew they couldn't directly regulate detailers' marketing presentations without raising First Amendment concerns. So instead, they attempted to achieve the same result indirectly by making it a crime for pharmaceutical companies to acquire information about doctors' prescription histories, knowing that prescription information helps the detailing process. Not only does it enable detailers to identify potential customers, it also allows them to tailor their marketing messages to the needs of individual physicians.

The PIL seems to violate the First Amendment's free speech guarantee. Washington Legal Foundation filed a brief before the court of appeals making that very point. The statute bans the transfer of information, which is a form of speech. For example, *The New York Times* and *The Wall Street Journal* publish lists of stock prices. The phone book is just a collection of data, not opinion. In fact, a great deal of academic research – consider the study of climatology – rests on the collection and analysis of huge amounts of data. No one would seriously suggest that the First Amendment doesn't apply in all those contexts.

The specific information covered by the PIL deserves at least as much constitutional protection. The use of prescription drugs is a subject of tremendous public interest. The fact that New Hampshire adopted the statute to reduce patent-protected drug use supports that conclusion. Public health organizations, for example, routinely use prescription histories to track medical conditions.

But the First Amendment flaws in New Hampshire's PIL run deeper than the fact that the statute bans constitutionally protected communication. The statute is a classic example of forbidden viewpoint discrimination. The state here is openly trying to skew a conversation. It doesn't want the drug companies talking as effectively to doctors. But the state *does* want doctors to hear the *opposite* message: that patented

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drugs should be used less. With this in mind, the PIL has an exception for insurance company programs that generally prefer less expensive, even if not as effective, drugs. And New Hampshire has adopted an “academic detailing” program designed to persuade physicians to use only those drugs it chooses.

New Hampshire’s attempt to pick sides in free expression is the ultimate First Amendment sin. The point of free speech is that the open exchange of facts and ideas will produce the best results. The government does not have the power to say that it does not want doctors to be open to persuasion from drug companies. The state has every right to express its own view, and to invite insurers to do the same, but it cannot stack the deck against drug companies.

As such, it should have been easy to recognize that the PIL is unconstitutional, and a federal district court reached just that conclusion. Two companies that collect, analyze, and distribute prescription information – IMS Health and Verispan – sued New Hampshire under the First Amendment. The district court received voluminous evidence and found that the statute was unconstitutional. The court recognized that the government cannot make paternalistic decisions about what truthful information should be banned for the public’s own good. If the state wanted to promote less expensive drug options, the court noted, it could do so by providing doctors with information to that effect.

Stunningly, the First Circuit reversed. The court of appeals did not seriously doubt the statute’s flaws. In fact, it embraced the idea that New Hampshire had decided to “level the playing field” of the drug companies’ marketing efforts by making it harder for them to communicate effectively with doctors. The court recognized that there was little if any evidence that the PIL would, in fact, reduce drug costs or improve health care. But it held that the statute did not implicate the First Amendment at all because, in the view of the court, the PIL merely regulated “conduct” and incidentally affected speech of “scant social value.” The distribution of information, the court held, should be treated no differently than the sale of “beef jerky.” Alternatively, the court held that prescription information was at best commercial speech entitled to lessened First Amendment scrutiny, and that the judiciary must defer to New Hampshire’s attempts to combat rising drug costs.

The First Circuit’s decision in *IMS Health* is deeply troubling as a constitutional matter and to advocates for free enterprise. The ruling arises in the vital context of the drug industry, and roughly two-dozen states have enacted or are considering statutes similar to New Hampshire’s. But the ruling sweeps far more broadly. According to the court of appeals, the government has a completely free hand to prohibit the transfer of information for commercial purposes without any First Amendment scrutiny. The implications for regulation of the Internet, as well as every industry that relies on market research and data mining, are sweeping. Under the First Circuit’s decision, those activities are “conduct” rather than “speech” with the consequence that there is essentially no limit to the government’s regulatory power.

Thankfully, a significant effort is underway to persuade the Supreme Court to review and reverse the First Circuit’s decision. IMS Health and Verispan filed a petition for a writ of certiorari on March 27, 2009 (http://www.scotusblog.com/wp/wp-content/uploads/2009/03/ims-health-inc-v-ayotte_petition_final.pdf). An array of industries has recognized that the ruling presents a direct threat to their ongoing operations and has indicated their interest in supporting the petitioners with *amicus* briefs.

It is overwhelmingly likely that the Supreme Court would see this case differently than did the court of appeals. The Justices have been deeply suspicious of regulations of speech that are based on an effort to hide the public from accurate information. For example, they recently invalidated a similar federal ban on the advertising of compounded drugs. The critical step is therefore getting the Court to hear the case.