

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF NEW HAMPSHIRE

IMS HEALTH INCORPORATED, a Delaware)
corporation and VERISPAN, LLC, a Delaware)
limited liability company,)
)
Plaintiffs,)
)
vs.)
)
KELLY A. AYOTTE, as Attorney General of)
the State of New Hampshire,)
)
Defendant.)
_____)

Case No. 06-CV-280-PB

Amicus Brief of
the National Association of Chain Drug Stores
in Support of Plaintiffs' Position

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INTEREST OF NACDS

The National Association of Chain Drug Stores (“NACDS”), is the nation’s largest association of retail drug stores.¹ Its mission is to represent the views and policy positions of member chain drug companies to help them succeed in servicing the needs of the communities they serve. In the state of New Hampshire, NACDS has sixteen members who operate nearly 200 community retail pharmacies.

The passage of 2006 N.H. Laws 328, codified as N.H. Rev. Stat. Ann. §§ 318:47-f & 318:47-g & 318-B:12, IV (2006) (the “Prescription Restraint Law”) has a direct impact on NACDS members’ ability to communicate lawfully obtained, truthful information about prescriptions in its possession relating to New Hampshire’s prescribers. The information at issue is not private and is of great public importance because it enables transparency in the provision of healthcare to all segments of our society. NACDS, whose members are willing speakers in possession of the information at issue in this case, fully supports the plaintiffs and joins in their request that the statute be invalidated as violating the First Amendment. NACDS is not filing a motion for leave to file an amicus brief as the Court’s scheduling order in this case expressly contemplates the filing of amicus briefs by various parties.

NACDS’ BACKGROUND

NACDS was founded in 1933 by six chain executives. Since then, NACDS has worked to

¹ The National Association of Chain Drug Stores (NACDS) represents the nation’s leading retail chain pharmacies. Chain pharmacies operate more than 37,000 pharmacies, employ 114,000 pharmacists, fill more than 2.3 billion prescriptions yearly, and have annual sales of nearly \$700 billion. Other members include more than 1,000 suppliers of products and services to the chain drug industry. NACDS international membership has grown to include 83 members from 24 countries. For more information about NACDS, visit www.nacds.org.

provide the chain drug industry with a unified voice necessary for growth and success. More than 70 years later, NACDS is still dedicated to its original vision, representing the nation's leading retail chain pharmacies and suppliers.

NACDS works to enable and support its members to better meet the ever-changing needs of their patients and customers, while representing the practical, legislative and regulatory needs of community pharmacies across the nation. To continually meet these demands, NACDS regularly launches new programs, creates new organizations, and expands its critical functions in communications, government affairs and member programs and services.

Today, NACDS' membership consists of nearly 200 chain community pharmacy companies. Collectively, chain community pharmacy comprises the largest component of pharmacy practice with over 112,000 pharmacists. The chain community pharmacy industry is comprised of approximately 20,849 traditional chain drug stores, 9,818 supermarket pharmacies, and 6,777 mass merchant pharmacies.

NACDS' membership base operates more than 37,000 retail community pharmacies with annual sales totaling over \$700 billion, including over \$221 billion in sales for prescription medicines, over-the-counter (OTC) medications and health and beauty aids (HBA). Chain-operated community retail pharmacies fill over 71% of the more than 3.2 billion prescriptions dispensed annually in the United States. Additionally, NACDS' membership includes more than 1,000 suppliers of goods and services to chain community pharmacies. NACDS has expanded globally with international membership growing to include over 80 members from nearly 25 countries.

The chief purpose of NACDS is to represent the views and policy positions of member chain drug companies. This purpose is accomplished through the programs and services provided by the association which emphasize:

- a. Involvement in pharmacy and health-related issues;
- b. Promoting the value and role of community retail pharmacy in the health care system;
- c. Ensuring the community retail pharmacy perspective is communicated to and understood by legislators and policy-makers;
- d. Providing appropriate forums for retailers to interact with their suppliers and business partners;
- e. Creating a favorable political and business climate in which NACDS member companies can carry out their business plans;
- f. Developing and promoting policies and programs aimed at improving merchandise distribution and retail operations efficiency;
- g. Ensuring effective channels of communication between members and the association.

NACDS provides a wide range of services to meet the needs of the chain drug industry in accordance with these goals and objectives.

196 NACDS member pharmacies are located in the state of New Hampshire. These members' customers obtain medical treatment in the state of New Hampshire. As part of such treatments, the customers are given prescriptions by their New Hampshire physicians that they then take to any of the retail pharmacies owned by members of NACDS in the state of New Hampshire.

When the customer brings the prescription to the local retail pharmacy, the pharmacy stores the prescription information as part of its records. As reflected by the declaration of August J. Dobish of Rite Aid filed on September 1, 2006 (DE 23.[1]), for many years prior to the passage of the prescription restraint law, members of NACDS have engaged in the practice of licensing, selling or transferring prescriber-identifiable information to companies, such as the plaintiffs, IMS Health Incorporated and Verispan LLC for various purposes which could be prohibited by the statute. The prescription data includes data from prescriptions originating from several states, including the state of New Hampshire. The prescription data that the members of NACDS provide to IMS Health and

Verispan do not contain patient-identifiable information, and so patient privacy is safeguarded. The prescription data does contain the prescriber's name, the name of the medicine listed on the prescription, and the name of the medicine actually sold. Traditionally, such information is not considered private because it does not reveal any of the private or personal patient facts that historically have enjoyed judicial protection from public scrutiny.

The members of NACDS provide prescription records to the plaintiffs in part to assist them and pharmaceutical companies in their efforts to develop efficient means of improving healthcare. NACDS believes that aggregation and analysis of prescriber-identifiable data in prescription records substantially improves public health by allowing for the review of prescription practices and the efficient distribution of information to prescribers concerning best prescription practices.

DISCUSSION

NACDS believes that the plaintiffs have demonstrated in their briefs the various reasons why the Prescription Restraint Law violates the plaintiffs' First Amendment rights to receive and disseminate prescriber-identifiable information originating from the state of New Hampshire for purposes prohibited by the statute.

The State has argued in previous motions that the plaintiffs lack the requisite standing to bring the claims because pharmacies and similar entities are the only ones mentioned in and targeted by the statute. In *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), the Supreme Court invalidated on First Amendment grounds a statute providing that a pharmacist licensed in the state of Virginia would be found "guilty of unprofessional conduct if he '(3) publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount price, fee, premium, discount, rebate or credit terms . . . for any drugs which may be dispensed only by prescription.'" *Id.* 425 U.S. at 751-52 (citation omitted). Even though they were not themselves

subject to the statute's prohibitions, a group of individual consumers of prescription drugs sued the Pharmacy Board claiming that the First Amendment entitles the user of prescription drugs to receive information that pharmacists wish to communicate to them through advertising and other promotional means, concerning the prices of such drugs. *Id.* at 753-54. The Court agreed. It noted that "[f]reedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both. This is clear from the decided cases." *Id.* The Court concluded that "[i]f there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these appellees." *Id.*; *see also Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas. . . . This right to receive information . . . is fundamental to our free society").

The First Amendment rights of the Virginia consumers are no different from the rights enjoyed by the plaintiffs in this case. NACDS members are willing speakers and the protection afforded by the First Amendment extends to them, to the communication about prescriptions written in New Hampshire that NACDS members wish to convey and to the health information companies who wish to receive the prescription information for non-deceptive purposes. The proponents of the legislation touted the statute as being necessary to protect the privacy of New Hampshire doctors, but prescription records contain no private information about the doctors. The only information concerning doctors contained in prescription records generally consists of the doctor's name, office address, telephone number, the name of the medication that the doctor is prescribing and the quantity of the medication to be dispensed. What the prescription records reveal is information about the *professional* decisions made by New Hampshire prescribers, information of great concern to those in the business of manufacturing and selling the medications that the doctors prescribe and the

members of the public consume. Thus, information about what New Hampshire doctors are prescribing cannot be regarded as private, particularly since the information can be made available under the statute to *anyone* who expresses an intent to use it for non-commercial purposes.

The State cannot restrict the free-flow of prescriber-identifiable information solely on the basis of whether the information will be used for commercial or non-commercial purposes without violating the First Amendment rights of the pharmacies and the health information companies. “[T]ruthful statements which are neither misleading nor offensive are protected by the First Amendment even though made for a commercial purpose.” *Splawn v. State of Cal*, 431 U.S. 595, 601 (1977). “[A]ll ideas having even the slightest redeeming social importance ... have the full protection of the guaranties [of the First Amendment],” *Roth v. United States*, 354 U.S. 476, 484 (1957). This premise was echoed in *Virginia Bd. of Pharmacy*, where the Court asked whether commercial speech “is so removed from any exposition of ideas, and from truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, that it lacks all protection.” 425 U.S. at 762 (citations and internal quotation marks omitted). The Court answered this question with a resounding “no.” The Court reiterated its condemnation of the “highly paternalistic” approach which seeks to benefit citizens by keeping them ignorant. There is a “potent alternative” to that approach: “That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.” *Bates v. State Bar of Arizona*, 433 U.S. 350, 365 (1977) (quoting *Virginia Bd. of Pharmacy*, 425 U.S. at 770).

The right to know or to hear or receive information, is in theory one of the principal underpinnings of the First Amendment, but it has usually remained in the shadows of legal battles

over free speech and press in part because most of the major freedom of expression cases have involved private individuals or corporate media asserting their own right, as guaranteed by the First Amendment, to communicate to whomever they pleased. The notion that their intended or prospective audience had a right to hear what they wanted to say was usually a make weight argument. Nonetheless, as the Court pointed out in the *Virginia State Bd. of Pharmacy* opinion, there have been numerous decisions over the past thirty years recognizing First Amendment protection of the right to know, in a variety of contexts. See *Kleindienst v. Mandel*, 408 U.S. 753, 763 (1972); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386; *Stanley v. Georgia*, 394 U.S. at 564; *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Thomas v. Collins*, 323 U.S. 516, 534 (1945); *Martin v. Struthers*, 319 U.S. 141, 143 (1943).

The state of New Hampshire has decided that scientists, researchers and insurance companies can have full access to prescriber-identifiable information but that health information companies, pharmaceutical or biotechnical companies cannot only because the government dislikes the effectiveness of the messages conveyed by these entities with the aid of prescriber-identifiable data. The State's desire to restrict the free flow of the prescriber-identifiable information in the hands of NACDS members cannot be justified as advancing any legitimate governmental interest, much less the substantial governmental interest that is constitutionally required to justify such a blatant suppression of speech. Accordingly, NACDS fully supports the plaintiffs and asks the Court to permanently enjoin enforcement of the Prescription Restraint Law to the extent that it prohibits the licensing, sale, use or transfer of prescriber-identifiable data.

CONCLUSION

For the foregoing reasons, the Court should grant the relief requested the Plaintiffs.

Respectfully submitted,

National Association of Chain Drug Stores

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was delivered via ECF on

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