IN THE SUPERIOR COURT OF PENNSYLVANIA
No. 1345 EDA 2004
(Consolidated with Nos. 1190, 1450, 1451 and 1517 EDA 2004)

PENNSYLVANIA ORTHOPAEDIC SOCIETY,
on behalf of its members and all others similarly situated individuals,
v.
INDEPENDENCE BLUE CROSS, *et al*.

ROBERT P. GOOD, M.D., on behalf of himself and all others similarly situated,
v.
INDEPENDENCE BLUE CROSS, *et al.*,

JOHN R. GREGG, M.D. and VINCENT J. DISTEFANO, M.D., on behalf of themselves and all others similarly situated,
v.
INDEPENDENCE BLUE CROSS, *et al*.

APPEAL OF THE AMERICAN MEDICAL ASSOCIATION

Appeal from the April 22, 2004 Order of the Philadelphia County Court of Common Pleas, No. 3482 December Term 2000, No. 0002 December Term 2002, No. 0005 December Term 2002

CONSOLIDATED REPLY BRIEF OF APPELLANT THE AMERICAN MEDICAL ASSOCIATION

Philip H. Lebowitz
DUANE MORRIS LLP
I.D. No. 36294
One Liberty Place
1650 Market Street
Philadelphia, Pennsylvania 19103-7396
(215) 979-1819

Jon N. Ekdahl
Leonard A. Nelson
Steve I. Ro
AMERICAN MEDICAL ASSOCIATION
515 N. State Street
Chicago, Illinois 60610
(312) 464-4600

Attorneys for Appellant
American Medical Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Other Authorities

ARGUMENT

This appeal involves Freedom of the Press, Freedom of Speech, Freedom of Association, and other fundamental rights guaranteed by the First Amendment and the Pennsylvania Constitution. As it pertains to the AMA, this case extends far beyond whether certain parties improperly solicited opt outs from a settlement class, but calls upon this Court to address the limits of judicial power in this context to impose prior restraints on third parties.

Paragraph 6 of the lower court's April 22, 2004 order (the "Gag Clause") barred the AMA from printing any stories about the proposed class action settlement (the "Settlement") and the conduct of the lower court in its various news publications. The AMA, which is the world's most widely read publisher of news relating to medicine, could not even print a simple news item or editorial on the topic without risking sanctions for violating a court order. The Gag Clause also barred the AMA from providing consultation and information to its members who were part of the plaintiff class.

In response to the AMA's appeal[1], Defendants and Plaintiffs argue that the Gag Clause was justified because the AMA was somehow conspiring with, or being used by, the Milberg, Weiss, Bershad & Schulman LLP law firm ("Milberg") in order to solicit physicians to opt out of the Settlement. This assertion has no basis in fact and, more significantly here, is completely unsupported in the record.

The only roles played by the AMA in this case were to urge the parties to clarify ambiguities in and generally improve the Settlement for the benefit of the plaintiff class, to offer an *amicus curiae* memorandum to the lower court, and to offer affidavits and witnesses to the

[1] This Reply Brief is in response to the appellee briefs of both Defendants Independence Blue Cross and Released Parties and Plaintiffs Pennsylvania Orthopedic Society and Drs. John R. Gregg, Vincent DiStefano and Robert Good.

parties and the court. The AMA did nothing wrong. As a result, the lower court's "remedial" order was inappropriate because, as to the AMA, there was nothing to remedy. The AMA therefore respectfully requests that this Court vacate the Gag Clause in the April 22, 2004 order (the "Order") as it pertains to the AMA.

A. The AMA Was Not Party to Any Improper Communications and Did Not Solicit Opt Outs, Either by Itself or in Concert with Others.

Defendants and Plaintiffs fail to cite *any* evidence to establish that the AMA participated in any miscommunication or misconduct. The lower court made *no* findings that the AMA interfered directly or indirectly with the class certification process prior to its imposition of the Gag Clause.

The principal argument upon which Plaintiffs and Defendants rely to justify the Gag Clause is that the AMA acted in concert with Milberg and with other medical societies to solicit opt outs from the plaintiff class. (Defs' Brief at 65; Plfs' Brief at 33.) There is simply no support for this in the record. There is certainly no justification for a broadly worded prior restraint on communication.[2]

Defendants cite *Belt v. Emcare*, 299 F. Supp. 2d 664, 669 (E.D. Tex. 2003), for the proposition that a finding of one party's abuse is sufficient to justify a communication ban on "related entities." (Defs' Brief at 66.) In *Belt*, a case involving the imposition of a communications ban to protect a "collective action" under the Fair Labor Standards Act (similar to a class action), the court issued a restraint on all of the defendants, even though there was only

[2] In support of their argument that the AMA acted in concert with other medical societies, Defendants point to PMS R1583a, 1584a, 1588a, 1593a, 1628a, and 1655a. The statements to which these citations refer, however, make *no* reference to the AMA, and they are not based on evidence pertaining to the AMA because there is none. Plaintiffs cite only Tr. 368-369; R. 1892a-1893a. These statements merely show that the AMA offered to consult with Milberg on CPT and procedural coding issues, as it has offered to consult with *every* interested party, including Defendants, Plaintiffs, and the lower court itself.

evidence of miscommunication from the primary defendant. *Id.* All of the defendants, however, were "related entities," in that the primary defendant had *contracted* with the other defendants to provide them employment and management services. Those employment and management services were the subject of the lawsuit. Thus, all the defendants were contractually aligned in connection with the suit.

In the present case, the AMA has no contractual ties with any of the other medical society appellants that relate to this lawsuit. It has no financial relationship whatever with Milberg, even in matters unrelated to this lawsuit. Moreover, *Belt* dealt solely with commercial speech, which requires a lower level of protection than the communications restrained in this case. The *Belt* court also noted that *ex parte* communications with potential class members in a "collective action" case under the Fair Labor Standards Act can be more egregious than such communications would be in a class certification case, since "potential class members must opt into the collective action rather than opt out as in a class action." *Id.*

In the end, of course, the record must speak for itself. Even under the most liberal construction, it simply does not support a claim that the AMA colluded in some sort of wrongful activity.

B. On its Face, the Gag Clause was not "Narrowly Tailored" and was "Overbroad."

Defendants assert that the "narrowly tailored" requirement need not apply, since the solicitation of opt outs constitutes commercial speech.[3] (Defs' Brief at 61-62.) With respect to the AMA, however, the Gag Clause goes far beyond the solicitation of opt outs. The Gag Clause prevented the AMA from printing news stories or political editorials about the case or the

[3] In its Conclusions of Law, the lower court itself applied the strict scrutiny ("narrowly tailored") standard of review, rather than the lower standard afforded for commercial speech.

conduct of the proceedings below. It also prohibited the AMA from consulting with its members about the fairness of the Settlement and from directing its members to other information sources. The Gag Clause barred clearly innocent forms of speech.

Defendants also argue that the Gag Clause was "narrowly drawn" and not "overbroad," because: (1) it allowed for prescreening of communications; (2) medical societies were free to respond to telephone calls or other individualized inquiries; and (3) it only applied to medical societies that acted in concert with PMS and MSNJ. (Defs' Brief at 64-67.)

The required submission of speech to an official for approval is the "simple, most blatant form" of a prior restraint. (AMA's Brief at 28). Moreover, any communication by the AMA regarding this case, even if approved by the lower court, would have invited further communications from its members, making a process of ongoing prescreening untenable. In addition, the cases Defendants cite concerning prescreening are readily distinguishable. *Kleiner v. First Nat. Bank of Atlanta*, 751 F.2d 1193, 1204 (11th Cir. 1985), and *Hampton Hardware, Inc. v. Cotter & Co.*, 156 F.R.D. 630, 633 (N.D. Tex. 1994), involved "commercial speech," since the enjoined parties were defendants and had a financial interest in seeking the opt-outs. *Haffer v. Temple Univ.*, 115 F.R.D. 513 (E.D. Pa. 1987), also involved interested defendants and their counsel. In *Cobell v. Norton*, 212 F.R.D. 14, 31 (D. D.C. 2002), the court specifically noted that its prescreening requirement would not include communications constituting the "regular sorts of business communications with class members that occur in the ordinary course of business." No such exception was made in the Gag Clause.

Defendants also ignore the Gag Clause's clear language when they assert that the medical societies were free to respond to telephone calls or other individualized inquiries from its members. (Defs' Brief at 66, citing advisory statements made by Judge Sheppard *after* the Gag

Clause was imposed.) The express language of the Gag Clause makes *no* exception with respect to telephone calls or individual inquiries. Furthermore, "member inquiries" are just one of many forms of protected speech that was unconstitutionally restrained. *See* AMA's Brief at 27.

Defendants and Plaintiffs argue that the Gag Clause was not overbroad, since it was not meant to restrain the speech of *every* medical society. In fact, Plaintiffs state:

> The Order...restricts ***only*** the actions of the two medical societies that the trial court had actually found had issued inaccurate and misleading statements about the settlement, and those persons and entities acting in concert with them." (Emphasis in original.)

(Plfs' Brief at 31.) Conspicuously omitted from Plaintiffs' characterization, however, is the term, "medical societies/associations, ***including but not limited to***, the Pennsylvania Medical Society and the Medical Society of New Jersey...are enjoined..." (Emphasis added.) (AMA's Brief at 3.) This term indicates that medical societies other than PMS and MSNJ may be bound, regardless of whether they acted "in concert" with someone else. It was for the lower court to draw its order narrowly, not for the AMA to guess at its meaning.

Finally, Plaintiffs contend that the AMA (and other Appellants) failed to suggest to this Court more appropriately tailored language for a potential restriction on communications. (Plfs' Brief at 36-38.) This is blatantly untrue. *See* AMA's Brief at 15-17, 27-28.

C. Rule 1713(a) Does Not Permit a Restraint on Communications To Be Imposed Against Individuals That are Not "Counsel" or "Parties."

No authority is cited by appellees that supports the lower court's broad application of Rule 1713(a) against a non-party with no financial interest. The *sole* case upon which Defendants' rely regarding non-parties, *Jack Faucett Associates, Inc. v. AT&T*, 1985 WL 25746, *1 (D. D.C. Oct. 18, 1995), imposed an injunction against a company that sought to benefit financially by soliciting assignments of class members' claims in exchange for 50% of the

members' share of any recovery. (Defs' Brief at 61.) The court in *Faucett* found this solicitation improper, and held that in representing the class members' claims, the enjoined company had been engaging in the unauthorized practice of law. 1985 WL 25746 at *6-7. None of these facts even remotely apply to the AMA.

Moreover, *every* case cited in the lower court's order, the Defendants' Motion to Restrain Communications, and Defendants' and Plaintiffs' Appellee Briefs involved either no restraint on communications or a restraint on only *parties* or their financially interested *counsel*. *See Georgine v. Amchem Prods., Inc.*, 160 F.R.D. 476, 490-98 (E.D. Pa. 1995) (court invalidated opt-outs but did not restrain communications); *In re Sch. Asbestos Litig.*, 842 F.2d 671, 683 (3rd Cir. 1988) (defendants' attorneys restrained); *In re McKesson HBOC, Inc. Secs. Litig.*, 126 F. Supp. 2d 1239, 1242-1246 (N.D. Cal. 2000) (defendants' attorneys restrained); *Impervious Paint Indus., Inc. v. Ashland Oil*, 508 F. Supp. 720, 724 (W.D. Ky. 1981) (court enjoined defendants); *Hampton*, 156 F.R.D. at 633 (court enjoined defendants).

The AMA, by contrast, had no pecuniary or personal stake in the outcome of this litigation. Its interests were directly in line with those of the plaintiff class, so any "miscommunication" or "abuse" on its part would have run contrary to its mission of assisting members.

D. Although This Court Cannot Fully Remedy the "Past Wrong" Suffered by the AMA, the AMA's Appeal is Reviewable under Exceptions to the Mootness Doctrine.

Defendants argue that the AMA seeks relief that would not remedy any "past wrong," and so a judgment in its favor would be purely "advisory." (Defs' Brief at 58.) The AMA's appeal, it contends, fails the redressibility requirement and is moot. *Id.* The consistent body of decisions by the Pennsylvania courts holding that an action involving an issue of public

importance or one that will likely recur may still be reviewable, even if the relief sought on appeal may not remedy a "past wrong" or would lead to an "advisory opinion," is set forth in the AMA's Brief at 32-34.

Of the five cases the AMA cited with regard to the exceptions to the mootness rule, Defendants only attempted to distinguish *one* of them, *Commonwealth v. Benn*, 451 Pa. Super. 538, 541, 680 A.2d 896, 898 (1996). Defendants argue that *Benn* is distinguishable because it dealt with a "jurisdictional" issue, whereas the present case deals with issues of judicial "discretion."[4] (Defs' Brief at 60.) This is a largely semantic distinction and does not reflect the issues before this Court – namely, whether a trial court supervising a class action settlement may restrict the ability of third parties to communicate with class members without any factual basis for such a restriction. This is a matter of sweeping importance and likely to arise again. The Defendants' assertion that this issue is not evading review because other parties' appellate issues will be heard is specious because only the AMA presents the prior restraint issue in this particular context.

Should this Court adopt Defendants' interpretation of the redressibility requirement and the mootness doctrine, it would essentially render every case involving an exception to the mootness doctrine null. The cases cited by Defendants concerning the redressibility requirement and mootness are clearly distinguishable. For instance, *Pennsylvania Housing Auth. v. Pennsylvania State Civ. Serv. Comm'n*, 556 Pa. 621, 629-30 (1999), and *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998), both involved lawsuits interpreting statutes (*PHA* was brought under the Military Affairs Act and *Citizens* was brought under the Emergency Planning

[4] While some other appellants may have raised issues involving the lower court's discretion, the AMA has not. Imposing a prior restraint without any factual finding in support is an error of law and is so reviewed on appeal.

and Community Right-To-Know Act, "EPCRA") by third-parties (a state agency and an environmental advocacy group, respectively) on behalf of those who were actually injured. In the present case, the AMA itself suffered irreparable harm by loss of its right to speech. The AMA is not raising this appeal on behalf of other injured persons.

Also, in *Citizens*, the court held that resolution of the issue involving EPCRA was not so "important," as to necessitate an exception to the redressibility requirement. *Citizens*, 523 U.S. at 110. By contrast, issues involving jurisdiction and free speech, such as in the present case, have repeatedly been found to be sufficiently "important." *See First Union Nat'l Bank v. Realty Investors Corp.*, 2002 PA Super. 360, 812 A.2d 719, 724 (2002), and *Benn*, 451 Pa. Super. at 541, 680 A.2d at 898.

Defendants cite *Erie Ins. Exchange v. Claypoole*, 449 Pa. Super. 142, 673 A.2d 348 (1996), *Powell v. McCormack*, 395 U.S. 486 (1969), *Fidelity Bank v. Pennsylvania Turnpike Com.*, 498 Pa. 80, 444 A.2d 1154 (1982), and *Pennsylvania Coal Mining Ass'n v. Commonwealth, Dep't of Env't Res.*, 498 Pa. 1, 4, 444 A.2d 637, 368 (1982), for the proposition that courts should refrain from rendering advisory opinions in moot cases. The issues in these cases, however, were not of great public interest or capable of repetition. *Dow Jones & Co. v. Kaye*, 256 F.3d 1251 (11th Cir. 2001), is inapplicable because the gag order against the press was stayed pending resolution of the suit. In the present case, however, *supersedeas* was denied and the Gag Clause was not stayed.

Under the argument advanced by Defendants and Plaintiffs, government, in any of its branches, could infringe First Amendment freedoms by a one-time action with impunity, so long as the period of the infringement ended before a court could rule. Those in support of the infringement could argue that a ruling would merely be "advisory" or "symbolic." Symbolism,

however, goes to the heart of the First Amendment because a "symbolic" decision may be the principal means to prevent a future improper prior restraint, whose damage is inflicted as soon it is imposed and is not amendable to more traditional remedies. *See Commonwealth v. Genovese,* 337 Pa. Super. 485, 487 A.2d 364 (1985) (court symbolically reversed a prior restraint of media to report on a trial even after the trial had ended).

Finally, one of the rationales for the mootness doctrine is that courts are limited to decisions presenting an actual "case or controversy," (*Rivera v. Pa. Dep't of Corr*., 2003 PA Super. 447, *4, 837 A.2d 525, 528 (2003)), and there can be no real controversy over a point as to which one of the parties is "indifferent." *Chicago & N. W. Transp. Co. v. Ry. Labor Executives Assoc.*, 908 F.2d 144, 156 (7th Cir. 1990). Here, both Defendants and Plaintiffs are actively contesting the AMA's appeal. While appellees' reasons are best known to them, it is reasonable to conclude that Defendants can foresee finding themselves in similar litigation again, seeking to restrain communication with the settlement class perceived to be contrary to the company's interest. Class counsel, similarly, appear driven to preserve for future cases the settlement court's authority to limit the ability of independent third parties to communicate with a class. In a practical sense, therefore, the AMA's appeal presents a controversy that is very much alive and hotly contested.

E. The AMA Did Not Waive its First Amendment Rights Simply Because it Chose not to Submit a Communication for Approval by the Lower Court.

Defendants and Plaintiffs cite *no* authority to suggest that the AMA's decision not to submit a communication for approval by the lower court waived its First Amendment rights. This supposed requirement is a complete invention of their own, with no legal basis. Furthermore, the AMA could not possibly have obtained full relief even if the lower court had

approved every communication that the AMA might have presented to it because of the close relationship and ongoing interaction between the AMA and its members.

Defendants misread *Greer v. Spock*, 424 U.S. 828, 840 (1976) and *Commonwealth Dep't of Envtl. Res. v. Jubelirer*, 531 Pa. 472, 488 (1992). (Defs' Brief at 67, n. 47.) *Greer* dealt with a military base's regulation requiring review of political pamphlets prior to their distribution at the base. The court found that while the regulation on its face was not unconstitutional, it might be *applied* "irrationally, invidiously, or arbitrarily," and thus violate free speech. Therefore, in order to test the constitutional *application* of the regulation, the court held that a submission of a pamphlet was necessary. Similarly, *Jubelirer* dealt with the *application* of a statute, rather than a *facial* challenge. Moreover, it did not even deal with a First Amendment issue or a prior restraint. By contrast, the AMA raised a *facial* challenge to the constitutionality of the Gag Clause. Thus, testing the "boundaries" or "limits" of the Gag Clause was unnecessary, since the language of the order itself was offensive.

Defendants also cite *In re George F. Nord Bldg. Corp.*, 129 F.2d 173 (7th Cir. 1942), for the proposition that First Amendment rights may be waived. *George* challenged a restraint on communications which the enjoined party had agreed upon. The court held that the right to free speech may be waived if the enjoined party has "consented" to such an order. In the present case, the AMA never consented to the Gag Clause.

F. The AMA's Due Process Rights were Violated, Because the AMA had no Notice that it Might be Enjoined and Because Judge Sheppard Refused to Permit the AMA to be Heard.

The only response Defendants offer to the AMA's argument that its due process rights were violated is that the AMA was served with Defendants' Reply Memorandum in Support of its Motion to Restrain Communications. (Defs' Brief at 61, n. 39.) Thus, Defendants claim that

the AMA was "'on notice' that action might be taken against it." This reply, as well as the motion itself, makes *no* mention of the AMA and the failure to serve it apparently reflects the movants' view that the AMA would not be affected by the motion. Moreover, no evidence is cited within the motion papers demonstrating any concerted action between the AMA and the other medical societies. Given this lack of reference to the AMA, the AMA reasonably concluded that no action would be taken against it in connection with the motion.

CONCLUSION

For the foregoing reasons, the AMA respectfully requests that this Court vacate the Gag Clause in the April 22, 2004 Order as it pertains to the AMA.

Respectfully submitted,

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Philip H. Lebowitz
Duane Morris LLP
I.D. No. 36294
One Liberty Place
1650 Market Street
Philadelphia, PA 19103
(215) 979-1819

Jon N. Ekdahl
Leonard A. Nelson
Steve I. Ro
American Medical Association
515 N. State Street
Chicago, IL 60610
(312) 464-4600

Attorneys for American Medical Association

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