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SUMMARY OF FLORIDA FIREARMS CASE INVOLVING DOCTOR'S FREE SPEECH RIGHTS

By: Veronica Rose, Chief Analyst

You asked for a summary of the case involving a Florida law regulating doctors' conversations with patients about guns, commonly called the "Docs v. Glocks" case (*Wollschlaeger, et al. v. Farmer, et al.*, 2012 WL 3064336 (S.D. Fla.)).

SUMMARY

On June 29, 2012, a federal judge permanently barred Florida from enforcing a law prohibiting medical practitioners (collectively doctors) from asking patients if they own guns or have guns in their home. Under the law, doctors could face disciplinary action, including fines and license suspension and termination, if firearm information they recorded in a patient's file was "not relevant to the patient's medical care or safety" or was "unnecessarily harassing." U.S. District Court Judge Marcia Cooke said the law, known as the Firearm Owners' Privacy Act, violated the free speech protections of doctors and patients and was thus unconstitutional.

The Florida Legislature enacted the law partly in response to a Florida couple's claim that a doctor had decided to stop treating their child after the mother refused to answer questions about whether they had guns in their home. Several medical groups and individual physicians challenged the law, claiming that it substantially curtailed their First Amendment rights to discuss gun safety with patients. The state, on the other hand,

claimed the law served compelling government interests, such as protecting an individual's fundamental right under the Second Amendment to keep and bear firearms.

In her ruling, Judge Cooke said the issue was a First, not a Second, Amendment issue. She acknowledged that the law may serve some legitimate government interests. But she concluded that it did not serve a compelling government interest and could not survive strict scrutiny review, which is the standard of review for content-based speech restrictions, or the less demanding standard of review courts sometimes apply to professional speech. She also found portions of the law unconstitutionally vague.

BACKGROUND/FACTS

Firearm Owners' Privacy Act

The Firearm Owners' Privacy Act was enacted in 2011 partly in response to an incident in which a doctor allegedly gave the mother of a minor patient 30 days to find a new pediatrician after she refused to answer questions about whether she had firearms in her home. The law, in part, prohibits licensed health care practitioners or facilities from:

1. intentionally recording any disclosed information on firearm ownership in a patient's medical record knowing the information is not relevant to the patient's medical care or safety, or the safety of others ("record-keeping provision");
2. asking a patient if he or she owns a firearm unless they, in good faith, believe the information is relevant to the patient's medical care or safety, or the safety of others ("inquiry-restriction provision");
3. discriminating against a patient based solely on firearm ownership ("anti-discrimination provision"); or
4. unnecessarily harassing a patient about firearm ownership ("anti-harassment provision") (Fla. Stat. §§ 790.338(1), (2), (5), and (6)).

Violation of the law constitutes grounds for disciplinary sanctions, which may be initiated by the state Department of Health or through a citizen's complaint (Fla. Stat. § 790.338(8)). Sanctions include administrative fines; reprimands; and license suspension, restriction, or termination (Fla. Stat. § 456.07(2)).

Lawsuit Claims

On June 24, 2011, a group of physicians and physician interest groups filed a federal suit to block enforcement of the law, charging that it was unconstitutionally vague and violated the First and Fourteenth Amendments to the U.S. Constitution. The plaintiffs argued that the law had a severe chilling effect on confidential life-saving discussions in that doctors were no longer (1) asking patients about firearm ownership, (2) following up on routine questions about firearm ownership, (3) including questions about firearms on patient intake questionnaires, or (4) counseling patients about firearm safety.

The state claimed that the “primary constitutional right in this litigation” was the Second Amendment right to keep and bear arms. According to the state, the law was necessary to protect (1) this fundamental right, (2) individuals’ privacy rights, and (3) individuals from barriers to receiving medical care arising from discrimination or harassment based on firearm ownership. The state also argued that the law was a permissible regulation of professions.

Preliminary Injunction

On September 14, 2011, the court issued a temporary injunction blocking enforcement of the law, concluding that the plaintiffs stood a good chance of winning in court (*Wollschlaeger v. Farmer*, 814 F. Supp. 2d 1367 S.D. Fl (2011)). “The State has attempted to inveigle this Court to cast this matter as a Second Amendment case,” the judge wrote. But “despite the State’s insistence that the right to ‘keep arms’ is the primary constitutional right at issue in this litigation, a plain reading of the statute reveals that this law in no way affects such rights” (*id.*, at pp. 9 & 10). “In effect,” the judge continued:

the law curtails practitioners’ ability to inquire about whether patients own firearms and burdens their ability to deliver a firearm safety message to patients, under certain circumstances. The Firearm Owners’ Privacy Act thus implicates practitioners’ First Amendment rights of free speech. The act also implicates patients’ freedom to receive information about firearm safety which the First Amendment protects (*id.*, at p. 9).

STANDARD OF REVIEW

Finding that the law restricted speech content, the judge reviewed it under strict scrutiny, the most rigorous First Amendment standard of review. To provide a complete analysis of the issues, the judge also reviewed it under a less stringent standard that courts sometimes apply to professional speech. She concluded that the law would fail both tests; consequently, she did not decide what standard applied. The judge also found the law's inquiry-restriction and anti-harassment provisions unconstitutionally vague (*Wollschlaeger, et al. v. Farmer, et al.*, 2012 WL 3064336 (S.D. Fla.)).

ANALYSIS

Strict Scrutiny

The judge wrote that “the Firearm Owners’ Privacy Act imposes content-based restrictions on practitioners’ speech” (*id.*, at p. 8). It “purports to regulate practitioners’ inquiries, recordkeeping, discrimination, and harassment with respect to one subject matter only—firearm ownership and possession” (*id.*, at p. 8). The anti-harassment and anti-discrimination provisions:

do not proscribe words or conduct directed at an entire class of speech, such as hate speech, or an entire protected class of individuals, such as those within a racial group. Rather the provisions prohibit discrimination and harassment based on one narrow subject viewpoint—the exercise of the right to own and possess a gun (*id.*, at p. 8).

“Content-based statutes that ban or burden constitutionally protected speech are subject to strict scrutiny,” the judge continued (*id.*, at p. 9). To survive strict scrutiny, the state must show that a law is narrowly tailored and the least restrictive means to serve a compelling government interest. The judge concluded that the state could not meet this standard for the following reasons.

Second Amendment Claim. The judge wrote that she did not disagree that the state has an interest in protecting the exercise of the fundamental right to keep and bear arms. But she said she did not find the interest legitimate or compelling because the law “simply does not interfere with the right to keep and bear arms” (*id.*, at p. 10).

Discrimination and Harassment in Medical Care. Judge Cooke acknowledged that the state has a legitimate interest in eliminating barriers to medical care arising from discrimination or harassment. But she said that she did not find that protecting patients from barriers to receipt of medical care arising from discrimination or harassment based on firearm ownership was a legitimate or compelling interest.

She said (1) the legislative debates on the bill revealed that the legislature, in passing the law, relied heavily on anecdotal information but did not appear to have relied on any studies, research, or statistics on physicians' practices or patients' experiences on this issue and (2) the state provided no hard evidence to support its claim that people were being harassed or discriminated against on the basis of firearm ownership or that such actions were widespread or pervasive (*id.*, at p. 10). "Even if evidence of discrimination and harassment exists, this law does not remedy the precise type of incident . . . that the legislators apparently meant to cure" the judge concluded (*id.*, at p. 12).

Privacy Rights. The judge agreed that the state has a legitimate, although perhaps not a compelling, interest in protecting patients' privacy regarding firearm ownership or use but said the state had not shown that confidentiality of the information was at risk. She also said that information about firearm ownership is not sacrosanct and that "existing safety regulations already circumscribe the privacy protections over the limited information the law seeks to protect," including information on gun purchase and gun permit applications (*id.*, at p. 11). Further, according to the judge, state and federal laws protect the confidentiality of medical records and a patient may choose not to divulge information requested by a doctor.

Least Restrictive Means Available. The judge found that the law's inquiry-restriction, record-keeping, anti-discrimination, and anti-harassment provisions were not the least restrictive means to accomplish the state's goal of protecting privacy of patients as to their firearm ownership and use and therefore violated the First and Fourteenth Amendments (*id.*, at p. 12). The least restrictive alternatives to the law would be a law permitting patients to decline to answer inquiries about firearm ownership, she concluded. With regard to the anti-harassment and anti-discrimination provisions, the judge said other content neutral provisions would be a more effective alternative.

Professional Speech Review

In some cases regulating professional speech, the courts use a “less demanding standard” of review, balancing free speech rights against the state’s legitimate interest in regulating the activity in question. To survive this standard, the court must balance First Amendment interests against the state’s legitimate interests in regulating an activity and find that the law has the “requisite narrow specificity.”

The judge acknowledged that the state has a legitimate interest in regulating the medical profession but said:

This law, however, does not have the requisite “narrow specificity.” The Act does not impose a mere incidental burden of speech. Rather, truthful, non-misleading speech is the direct target of the Act. . . .This law chills practitioners’ speech in a way that impairs the provision of medical care and may ultimately harm the patient (*id.*, at p. 12).

“What is curious about this law—and what makes it different from so many other laws involving practitioners’ speech,” Judge Cooke wrote in her decision, “is that it aims to restrict a practitioner’s ability to provide truthful, non-misleading information to a patient (or record such information), whether relevant or not at the time of the consult with the patient” (*id.*, at p. 10).

The purpose of preventive medicine is to discuss with a patient topics that, while perhaps not relevant to a patient’s medical safety at the time, informs the patient about general concerns that may arise in the future (*id.*, at p. 10). . . . The State through this law inserts itself in the doctor-patient relationship, prohibiting and burdening speech necessary to the proper practice of preventive medicine, thereby preventing patients from receiving truthful, nonmisleading information. This it cannot do (*id.*, at p. 11).

VAGUENESS OF LAW

A statute is void for vagueness if it either prohibits or requires performing an act that persons of common intelligence must guess what it means and differ as to its application. Courts have ruled that the vagueness of content-based regulations of speech “raises special First Amendment concerns because of its obvious chilling effect on free speech” (*id.*, at p. 13, citing *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871-72 (1997)).

The Firearm Owners' Privacy Act directs practitioners to refrain from "unnecessarily harassing a patient about firearm ownership during an examination" (anti-harassment provision). The judge agreed with plaintiffs that this provision was unconstitutionally vague and failed to give practitioners sufficient guidance as to what constitutes prohibited conduct (*id.*, at p. 13). "What constitutes 'unnecessary harassment' is left to anyone's guess," she wrote. "It also begs the question—is there conduct that would be permissible because it constitutes necessary harassment?" (*id.*, at p. 13).

The judge agreed with plaintiffs that the phrase "relevant to the patient's medical care or safety, or the safety of others" which is part of the inquiry-restriction provision, was unconstitutionally vague in that it lacked the requisite precision that the First Amendment requires when a statute regulates speech content. "In the context of preventive medicine, which is a forward-looking practice, it is unclear whether the clause means 'relevant at the time of the consult with the patient' or relevant at any time in the future" the judge wrote (*id.*, at p. 13). "Given the vague contours of what the statute prohibits," she concluded, "it unquestionably silences some speakers whose messages would be entitled to constitutional protection" (*id.*, at p. 13, citing *Reno*, 521 U.S. at 874).

For the reasons outlined above, the judge found the inquiry-restriction and anti-harassment provisions void for vagueness in violation of the First and Fourteenth Amendments.

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