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“ANTI-STEERING” INSURANCE LAWS: STATE CENSORSHIP OF CONSUMER INFORMATION TREADS ON FIRST AMENDMENT RIGHTS

by

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Anyone who ever needed their automobile repaired after an accident—which is to say nearly anyone who has ever owned a car—knows the situation. Your car is unexpectedly put out of commission. You need body repairs immediately, and you want the job done right. But you find yourself devoid of options. Perhaps your last body shop experience left you feeling neglected, abused, or taken advantage of. Or maybe this is your first accident. Either way, you just don’t know how to connect with a qualified, experienced, and reliable body shop.

Certain automobile insurance companies have recognized this void and have stepped in to provide policyholders with recommendations for quality body shops. Insurers have found this to be a classic win-win situation—it benefits the policyholder, quality body shops, and even the insurers themselves (so perhaps it is a “win-win-win”).

But such recommendation programs are under fire from states, which have enacted “anti-steering” laws that actively prohibit insurers from making body shop recommendations. Regardless of their merits as social policy, which are dubious, these anti-steering laws cannot be squared with First Amendment principles. Recommendations are speech, whether from a next-door neighbor or an insurance company. Insurers have a right to make them, and consumers have an equally-compelling right to receive them. As a result, even as several states consider enacting such laws this legislative session, courts have rightly begun striking them down as unconstitutional.¹

The Benefits of Insurer Referrals. Automotive insurance companies have unsurpassed institutional knowledge regarding body shops, given their constant exposure to the industry. They can easily identify those shops with the best reputations, guarantees, equipment, and repair techniques. Certain insurers have capitalized on this knowledge by cultivating relationships with body shops to create nationwide networks. When

¹*Allstate v. Abbott*, 495 F.3d 151 (5th Cir. 2007) (Tex. Occ. Code § 2307.006); *Allstate v. Serio*, No. 97 Civ. 0670 (RCC), 2000 WL 554221 (S.D.N.Y. May 4, 2000), *rev’d on other grounds*, 261 F.3d 143 (2001) (N.Y. Ins. Law § 2610(b)); *Allstate Ins. Co. v. South Dakota*, 871 F. Supp. 355 (S.D. 1994) (same).

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policyholders make claims on their automobile policies, these insurers recommend body shops in their network.

These recommendation networks represent the free market at its very best, because everyone benefits. First and foremost, policyholders get the information they need to make informed decisions about their automotive repairs. And they get it from a natural source—their insurance agent, with whom they already have a personal relationship.

The policyholder also enjoys better customer service. Most people—stunt men and demolition derby aficionados aside—don't use body shops very often. Body shops know this and so have little incentive to give their customers special care. Insurers, on the other hand, provide virtually constant referrals to body shops, a situation that forces shops to deliver continually for their customers or risk losing the insurer's recommendation.

Body shops benefit too. Their business increases in recognition of their commitment to quality, as customers are directed to them who might otherwise wander randomly to other, inferior shops.

And insurers themselves receive significant benefits. Not only do they gain competitive advantage by satisfying their policyholders' needs, but they also save money. Body shops will obviously want to be a part of any large insurer's repair network, and so will readily offer insurers discounted prices. And fostering better relationships with body shops also provides a means to better prevent fraud and waste. These same incentives have driven the successful development of preferred-physician networks in the health insurance industry, and they have proven equally powerful in the automotive context.

State “Anti-Steering” Legislation. Given these obvious benefits, one might expect states to meet insurer recommendations with approval, not hostility. But this has not been the case. Six states² currently have laws that prohibit insurers from “steering” policyholders to body shops with unsolicited recommendations. And at least three more³ have recently been considering similar legislation. In fact, the National Conference of Insurance Legislators (“NCOIL”) is considering a model bill which encourages states to include anti-steering language in their insurance regulations.⁴ Other states prohibit insurer recommendations in more indirect ways, by inhibiting joint marketing efforts with body shops or denying each access to the others' trade dress.⁵

These laws pose serious risks to insurance companies and adjustors. A single violation can cost thousands of dollars. Anti-steering laws have been the subject of class action lawsuits in several states alleging millions of dollars in damages and statutory fines.⁶ And the current trend is clearly toward even more regulation. In addition to legislative action in several states, state enforcement efforts are also on the rise. For instance, Connecticut Attorney General Richard Blumenthal recently called for making enforcement of “anti-steering” laws a nationwide priority.⁷

Implications for Commercial Speech under the First Amendment. Bans on insurer recommendations strike at the core value of the First Amendment. Protecting freedom of speech reflects a national belief that the free flow of information, and the exchange of knowledge it represents, is ultimately to be preferred over even well-intentioned government efforts to decide which types of information are “good” for us.⁸ This is a shared

²Ala. Code § 482-1-125-.08(6) (2010); Conn. Gen. Stat. § 38a-354 (2010); Mass. Gen. Laws ch. 90, § 34(O) (2010); Okla. Stat. tit. 36, § 1250.8(F) (2010); R.I. Gen. Laws § 27-10.6(d) (2010); S.C. Code Ann. § 69-16.6 (2010).

³S.B. 16, 2010 R.S. (KY 2010) (withdrawn Jan. 8, 2010); S. 2895, 23rd Leg. (N.Y. 2009); H.5456, Section 1 (RI 2009).

⁴NCOIL Proposed Model Act Regarding Motor Vehicle Crash Parts and Repair § 6(b) (pending approval, 2009).

⁵See, e.g., Tex. Occ. Code § 2307.006(3), (6) (held unconstitutional in *Allstate Ins. Co. v. Abbot*, 3:03-cv-02187 (N.D. Tex. Mar. 9, 2006), *aff'd*, 495 F.3d 151 (5th Cir. 2007)).

⁶See, e.g., *Artie's Auto Body, Inc. v. Hartford Fire Ins. Co.*, No. X08-CV03-0196141S, 2009 WL 3737931 (Conn. Super. Sept. 22, 2009); *Maystruk v. Infinity Ins. Co.*, 96 Cal. Rptr. 3d 494 (Cal. Ct. App. 2009).

⁷Connecticut Attorney General, Press Release (Sept. 1, 2009), available at <http://www.ct.gov/AG/cwp/view.asp?A=3673&Q=446064> (last visited Feb. 10, 2010).

⁸*New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).

value—both for speakers and listeners alike, for both have a stake in the transmission of information. And the identity of the speaker is of no importance. As the Supreme Court reiterated this year in *Citizens United v. FEC*, both individuals and corporations deserve protection under the First Amendment.⁹

This shared commitment has led to protection of “commercial speech”—the type of speech usually involved in economic transactions—under the First Amendment.¹⁰ As the Supreme Court noted, “Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information.”¹¹ Because protection of commercial speech is based on the value of disseminating knowledge however, such speech is protected only to the extent it actually contains information of value. Thus, only truthful, non-misleading information is given protection.¹² And the speech must relate to lawful, rather than unlawful activity—you have no right to advertise an illegal poker game.¹³

Neither of these exceptions applies to “anti-steering” laws, which can be interpreted as a blanket ban on *all* insurer recommendations, preventing truthful and false or deceptive recommendations alike. Further, the underlying transaction is *explicitly* legal—it is based upon the relationship between insurer and policyholder, protected both at common law and by statute.

When the government prohibits commercial speech that involves otherwise lawful activity and is neither false nor misleading, it faces a heavy burden to justify the action—a burden that anti-steering laws cannot sustain.¹⁴ States contend that anti-steering laws are justified because of the need to protect “consumer choice.”¹⁵ They fear that insurers will force or coerce their policyholders to use “tied” shops—which the states believe are motivated to benefit the insurer, not the insured.

Protecting consumers is certainly a laudable goal and one of the State’s essential purposes¹⁶—*in general*. But we should be “especially skeptical” of a state’s decision to keep its citizens in the dark under the malleable and easily-misused guise of “consumer protection.” Such deprivation should instead be reserved for the most particular and compelling circumstances, because states can rarely—if ever—show that *less* information is categorically better than *more*.¹⁷

States’ concern for insurer abuse does not meet this high threshold. The mere potential for truthful material to be presented in an improper manner does not justify a blanket ban on a class of speech.¹⁸ In the absence of a ban, certain policyholders might be abused, but others would be equally likely to benefit from insurers’ recommendations. It would therefore be better to regulate abusive tactics directly, rather than inhibit speech. Policyholders *should* be free to go to the body shop of their choice, and states are free to protect that choice through legislation. States can prohibit insurers from requiring that their policyholders use particular shops.¹⁹ In fact, states could force insurers to inform their policyholders that they have a right to choose their own body shop.²⁰ Likewise, states could prohibit communications *that actually are* deceptive, misleading, or coercive. These alternative regulations would not violate the First Amendment.

⁹*Citizens United v. Fed. Election Comm’n*, 129 S. Ct. 594 (2010).

¹⁰*Virginia Pharm. Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761-62 (1976).

¹¹*Centr. Hudson Gas & Elec. Corp. v. Public Svc. Comm. Of New York*, 447 U.S. 557, 561-62 (1980).

¹²*44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 497 (1996).

¹³*Id.* n.7.

¹⁴*See Central Hudson*, 447 U.S. at 566.

¹⁵*See* Blumenthal Press Release, *supra* note 8.

¹⁶*Ohralik v. Ohio State Bar Ass’n.*, 436 U.S. 447, 460 (1978) (state clearly has an interest in consumer protection).

¹⁷*44 Liquormart*, 517 U.S. at 503.

¹⁸*In re R. M. J.*, 455 U.S. 191, 203 (1982).

¹⁹*See, e.g.,* Colo. Rev. Stat. § 10-4-613(2)(c) (2010); 215 Ill. Comp. Stat. 5/143.30 (2010).

²⁰*Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985) (holding that such “compelled disclosures” are upheld if reasonably related to a state’s interest and are not unduly burdensome).

The specific inference to be drawn from “anti-steering” laws—that consumers must be protected from the force of even a truthful, non-coercive recommendation, relies on an especially pernicious premise. It necessarily implies either that consumers are too spineless to insist that their own preferences on body repair companies be met, or too stupid to do any independent evaluation of information on their own. The value of this information to consumers, not to mention a basic respect for our fellow citizens, requires that we resist such pessimistic assumptions. Protecting policyholders from potentially making bad decisions does not justify banning truthful commercial information.²¹

As for “tied” body shops and potential conflicts of interest—states do have an interest in promoting fair competition. But anti-steering laws serve this interest only by the bluntest possible means—by taking away *any* incentive for insurers to enter relationships with body shops. As noted above, these relationships do have beneficial purposes, even if they come with some risks. Here again, states concerned about “conflicts of interest” are free to regulate the relationship between body shops and insurers to mitigate such conflicts without banning speech. Many do so, whether by prohibiting insurer ownership of body shops, or limiting certain kinds of incentives that each can offer.²² These less-restrictive alternatives make anti-steering laws unjustified.

Similar to many other bans on speech, the true problem with anti-steering laws is that a hidden agenda is at work. It was surely telling that when Attorney General Blumenthal announced his policy for increased enforcement, he was surrounded by body shop owners and body shop industry representatives, not consumers. That is because anti-steering laws are not really meant to protect consumers. They are actually designed to protect body shop owners. Body shops do not want to compete for insurers’ recommendations because many of them know they cannot earn them. Instead, they would rather prevent that competition from occurring altogether, ultimately decreasing efficiency in the market and harming the consumer. A state’s desire to benefit its friends in the body shop lobby most assuredly does not trump the First Amendment interests at stake here, especially when consumers are harmed in the process.²³

Finally, it should be noted that removing the option of anti-steering laws does not deprive states of effective weapons to protect consumers in such transactions. Beyond the regulatory options discussed above, there are plenty of laws already on the books that would adequately protect consumers. Consumer protection laws in all fifty states would protect policyholders that are actually victimized by body shops, and policyholders in most states are owed a duty of good faith by their insurers that would be violated if insurers made recommendations based solely upon market power rather than better service.

Conclusion. In short, anti-steering laws simply do not stand up to scrutiny under the First Amendment. Anti-steering laws sacrifice freedom for protectionism, and they do nothing to protect consumers that other laws cannot do without inhibiting speech. There is simply nothing that justifies states’ desire to have them, and further, nothing that would protect them from constitutional attack in our courts.

²¹*Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002).

²²*See, e.g.*, La. Rev. Stat. § 22:1214.1 (2010).

²³*Centr. Hudson*, 447 U.S. at 574; *44 LiquorMart*, 517 U.S. at 513; *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173, 174 (1999).