

PUBLICATION

Privacy versus Free Speech: Watching *Sorrell v. IMS Health, Inc.*

May 05, 2011

Sorrell v. IMS Health, Inc. is an important case that tests the bounds of commercial free speech and the ability of states to restrict the sale of prescriber information for marketing purposes without the prescribing physician's consent. Pharmaceutical, data analytics, medical device companies and others should closely watch for the U.S. Supreme Court's decision, which could dramatically alter the prescription information industry.

In 2007, Vermont passed the Prescription Confidentiality Law, which, subject to several exceptions, prohibits health insurers, self-insured employers, electronic transmission intermediaries and pharmacies or similar entities from selling or licensing "regulated records," which are defined as "information or documentation from a prescription dispensed in Vermont and written by a prescriber doing business in Vermont." Under the law, prescription information cannot be used for marketing or promoting a prescription drug without the prescriber's consent. The law also prohibits pharmaceutical manufacturers and marketers from using prescriber-identifiable information for marketing or promoting a prescription drug without the prescriber's consent.

IMS Health, Verispan, Source Healthcare Analytics and the Pharmaceutical Research and Manufacturers of America (PhRMA) challenged the law, alleging, among other things, that the law violates the First Amendment by controlling the content of messages pharmaceutical marketers present to physicians. The U.S. District Court for the District of Vermont found the law constitutional, while the Court of Appeals for the Second Circuit reversed. Vermont appealed to the Supreme Court.

Extensive amicus briefs (so called friend of the court briefs) were filed with the Court from a diverse group of parties, including the United States, 35 individual states attorneys general and the District of Columbia, the *New England Journal of Medicine*, the American Association of Retired Persons, various consumer advocacy groups and the Washington Legal Foundation.

During the hearing before the Supreme Court, it was reported that both conservative and liberal Justices appeared skeptical of Vermont's stated interests of protecting the privacy of prescribing information, controlling health care costs and promoting less costly drugs. Several Justices appeared concerned that Vermont's real interest was to attempt to force physicians to prescribe generic drugs by censoring what physicians hear to ensure they do not have full information about new brand name drugs. However, at least one Justice appeared sympathetic to Vermont, likening the law to a past practice of catalogues selling consumers' names and addresses to other catalogue companies. Similar laws passed by New Hampshire and Maine have been upheld as constitutional by the Court of Appeals for the First Circuit.

Any business that uses, sells or purchases prescriber or other identified health information should closely watch for the Supreme Court's decision. If the law is upheld, businesses can expect many states to pass similar legislation, potentially reducing or eliminating a viable market. If the law is overturned, the industry can expect states to craft legislation attempting to circumvent the Supreme Court's decision. The case is Supreme Court docket number 10-779 and a decision is expected before July. A copy of the hearing transcript can be found by clicking [here](#).

Businesses should carefully monitor the legislatures in states within their footprints and stay informed regarding litigation over similar issues. For more information regarding this case, please contact your Baker

Donelson attorney or any of the attorneys in the Drug, Device & Life Sciences, Health Law practices or State Public Policy Groups.