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Federal District Court Rules That New Hampshire's Broad Prohibition on Transfer and Use of Physician Prescribing Data Violates the First Amendment

TERRI D. KEVILLE AND WILLIAM S. BERNSTEIN

In the authors' view, a recent federal court decision striking down a New Hampshire privacy law shows an appropriate concern for maintaining the free flow of beneficial health information

In a 53-page memorandum and order, the United States District Court for the District of New Hampshire recently granted the request of two health data companies, IMS Health Incorporated (“IMS”) and Verispan, for a permanent injunction against enforcement of a New Hampshire law that makes it a crime — a felony for businesses — to transfer or use for commercial purposes information about doctors’ prescribing behavior. In doing so, the court took an important first step toward reversing a policy trend that could thwart nascent health information exchange efforts designed to improve the quality of U.S. health care.¹

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This decision had been anxiously anticipated by a broad range of health care industry players, including, particularly, the pharmaceutical industry — which relies on data about physician prescribing practices to target its marketing efforts. The decision may well be the first of many arising from an ongoing public policy debate that (up to this point) has managed to confuse two distinct issues: (1) the concern over pharmaceutical marketing practices and their asserted effect on drug prices, and (2) the concern over health care privacy rights. Also tangled up in this debate is the ability of various health care stakeholders to enhance the efficiency and quality of U.S. health care by facilitating the exchange of health information. Because the New Hampshire statute criminalizes the exchange of physician prescribing data for commercial purposes, it has the unwanted side effect of halting some data uses that can improve patient care.

Specifically, the New Hampshire law at issue prohibits any pharmacy (whether retail, mail order, or Internet), pharmacy benefits manager, insurance company, electronic transmission intermediary, or other “similar entity” from licensing, selling, using or transferring information about prescriptions written by New Hampshire prescribers, for any commercial purpose. The law defines “commercial purpose” to include any activity that could be used to influence or even to evaluate the prescribing behavior of physicians. (There are statutory exceptions only for pharmacy reimbursement, formulary compliance, care management, utilization review, and health care research.)

BACKGROUND

In *IMS Health Incorporated v. Kelly Ayotte, as Attorney General of the State of New Hampshire*, co-plaintiffs IMS and Verispan asserted that the law violated their First Amendment right to freedom of speech. In the court’s decision granting injunctive relief to IMS and Verispan, the court relied upon U.S. Supreme Court precedent to reject the New Hampshire Attorney General’s argument that the First Amendment did not apply to prescribing data. Instead, the court found that the New Hampshire law was subject to intermediate constitutional scrutiny as a restriction on

truthful commercial speech. The law failed to pass constitutional muster under that standard (as articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*)² for two principal reasons:

1. The statute's restrictions on truthful commercial speech did not directly serve the State's asserted interests in promoting public health and containing health care costs; and
2. There are alternatives that would promote the State's interests as well or better than this law, without restricting free speech. This law's restrictions are more extensive than necessary to serve the asserted interests of the State.

As IMS and Verispan explained to the court, the law squarely threatens them and other health information organizations that combine, mine and sell data about health care provider prescribing practices. Indeed, the exchange of prescriber-identifiable prescription information by various health care stakeholders for many beneficial uses is at risk as a result of laws like this, which also are pending in at least 20 other state legislatures.

THE NEW HAMPSHIRE STATUTE

In passing this law, the New Hampshire Legislature purported to find that restrictions on the use or disclosure of prescriber data were necessary for two reasons: (1) to protect doctors from the perceived detrimental influence of pharmaceutical sales representatives; and (2) to reduce the price of prescription drugs in New Hampshire by preventing pharmaceutical companies from promoting more expensive brand-name drugs over generics. Although the Legislature did almost no fact-finding before passing the law (which diminished the degree of deference accorded to the Legislature's action by the court), the Legislature concluded that disclosure of prescribing data to pharmaceutical companies gives sales representatives too much insight into prescriber behavior, leading to confrontation or coercion of prescribers, and to over-prescribing of brand-name drugs. The legislators apparently also presumed that prescribing

brand-name drugs necessarily is bad for patients.

The court disagreed. The court recognized that there may be medical reasons to choose a brand-name drug over a generic. The court also found that there was no credible evidence in the record to show that doctors are coerced by pharmaceutical representatives, or that doctors actually make bad treatment decisions because of pharmaceutical marketing. Therefore, the court rejected the New Hampshire Attorney General's contention that the law's restriction on free speech would directly advance the state's asserted interest in improving public health.

LESS-RESTRICTIVE METHODS

The court also noted that the Legislature did not consider less-restrictive methods of accomplishing its stated goals. The court described alternative means (already in use by other states) by which a state could regulate pharmaceutical marketing and reduce its prescription drug costs without restricting truthful commercial speech.

IMS, Verispan and a broad swath of organizations involved in health information exchange believe strongly that cutting off the flow of information about doctors' prescribing practices will not lower health care costs, and instead will harm public health by prohibiting pharmacies and similar entities from communicating lawfully obtained, truthful information that is used to improve the quality and efficiency of U.S. health care. In an *amicus curiae* brief³ in support of IMS and Verispan, the National Alliance for Health Information Technology, the eHealth Initiative, and SureScripts explained to the court how the New Hampshire law would disrupt and undermine important national initiatives to use health information to improve care, such as public health surveillance and reporting, development and implementation of emergency preparedness and response systems, post-market adverse drug event surveillance, and clinical research. The court's decision to strike down the New Hampshire law shows an appropriate concern for maintaining the free flow of beneficial health information.

THE FUTURE

The New Hampshire Attorney General filed a notice of appeal on May 31, 2007, and the case is now pending in the First Circuit Court of Appeals. Both Maine Vermont recently passed similar legislation, and the Massachusetts Legislature is scheduled to consider such a law in September — which will make the First Circuit’s decision in *IMS v. Ayotte* even more important.⁴

NOTES

¹ 2006 N.H. Laws § 328, codified at N.H. Rev. Stat. Ann. §§ 318:47-f, 318:47-g, 318-B:12(IV) (2006).

² 447 U.S. 557 (1980).

³ http://www.imshealth.com/vgn/images/portal/CIT_40000873/6/16/79613062Surerscripts.pdf. The authors of this article authored the NAHIT/eHi/SureScripts amicus brief. Other amicus briefs were submitted on both sides of the case by interested organizations.

⁴ Maine passed LD 4 on June 29, 2007, extending the current state prohibition on the sale of prescription drug information that directly or indirectly identifies the patient to encompass information that directly or indirectly identifies the practitioner who ordered the drug. The law includes an “opt-out” provision for prescribers that can be designated when renewing their license.

Vermont’s S.115, signed into law on June 9, 2007, creates a new prescriber data-sharing program, requiring a prescriber to “opt-in” or give consent for his or her identifying information to be used for purposes other than pharmacy reimbursement, formulary compliance, patient care management and other narrowly tailored uses. Both the Maine and Vermont laws take effect January 1, 2008.

In 2007, similar legislation has been considered in more than 20 states across the country. Nineteen states have rejected the legislation to date.