

Appeals Court Upholds State Ban on the Commercial Use of Prescriber-Identifiable Data

On November 18, 2008, the First U.S. Circuit Court of Appeals upheld the constitutionality of a New Hampshire law barring the practice of using prescription information that identifies doctors for commercial purposes. The law was enacted in the belief that access to this data by pharmaceutical sales representatives was used to induce physicians to prescribe expensive brand-name drugs rather than less expensive generics at a significant cost to the state. The decision affects the ability of data-miners, pharmacies, benefits managers and insurance companies to sell or otherwise use prescriber-identifiable data for commercial purposes in New Hampshire.

The statute was challenged by two data-mining companies, IMS Health Incorporated and Verispan, LLC, on First Amendment grounds. Data mining companies like IMS and Verispan purchase prescription data from pharmacies, strip it of information identifying patients, and compile it with other data to produce information about doctors' prescription-writing habits. It then sells this "prescriber-identifiable data" to interested purchasers, primarily pharmaceutical companies. Pharmaceutical companies in turn use the data to tailor their marketing and sales strategies based on a physician's prescribing history.

Following expedited discovery and a four-day bench trial, the district court found the governmental interests advanced in support of the law insufficient and held the relevant portions of the Prescription Information law invalid. On November 18, the appeals court overruled the lower court's decision and held that the law passed constitutional muster.

In *IMS Health, Inc. v. Ayotte*, the appeals court held that the law was aimed at conduct, not speech, and thus did not interfere with the plaintiffs' First Amendment rights. The court also held, in the alternative, that even if the law was considered a restriction on protected commercial speech, the restriction was warranted by the state's interest in making health care more cost-effective. The state argued that stripping pharmaceutical companies of their ability to use prescriber-identifiable data as a marketing tool will decrease the quantities of brand-name drugs dispensed, and thus reduce or contain overall health costs reimbursed by the state.

While the immediate effect of the decision is limited to New Hampshire, the court's decision may well have a broader impact as other states have enacted legislation similar to that challenged in New Hampshire. For example, a federal district court in Maine struck down a similar law on the same grounds invalidated by the First Circuit's opinion, and a Vermont district court is currently deciding whether Vermont's version of the law can survive a constitutional attack.

The First Circuit's decision is not the only significant development in this area. Even prior to the decision, the revised PhRMA Code on Interactions with Healthcare Professionals, which goes into effect in January 2009, calls on companies to develop policies regarding the use of prescriber data, educate company employees and agents as to those policies, and identify an internal person to respond to inquiries on the policies. As a result, pharmaceutical companies will need to take immediate

action regarding the use of prescriber-identifiable data affected by the First Circuit opinion for commercial purposes. Companies should also consider reviewing their marketing plans on a national basis to make sure their internal policies are compliant with local regulations and with the revised PhRMA Code as the law continues to develop in this area.

Contact Information

If you have any questions about *IMS Health, Inc. v. Ayotte* and its effect on your business activities, please do not hesitate to contact your regular Ropes & Gray attorney.

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