

## United States Supreme Court Rules Against Prescription Data Restriction Law

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In an important decision likely to affect the availability of physician-specific, prescriber information to pharmaceutical companies nationwide, the United States Supreme Court has rendered its decision in the case of *Sorrell v. IMS Health, Inc.* In this case, on June 23, 2011, the Court rejected a Vermont statute which forbade pharmaceutical companies from obtaining and using physician-specific, prescriber information in the marketing of their drugs. The Court determined that the statute placed a burden on speech and thereby violated the First Amendment of the United States Constitution.

The case was brought on behalf of an association of brand name drug manufacturers and Vermont "data miners." Data miners are companies who analyze prescriber-identifying information purchased from pharmacies that then produce physician-specific reports on prescribing behavior. Pharmaceutical companies lease these reports from the mining companies and incorporate the information into their marketing strategies. The state of Vermont opposed the lawsuit.

At issue was a section of Vermont's Prescription Confidentiality Law enacted in 2007. Title 18 §4631(d) of the law prohibited pharmacists, and other similar entities, from selling records containing prescriber information, or, from permitting such records to be used for the marketing or promotion of drugs without the prescriber's consent. The statute also prohibited pharmaceutical manufacturers and pharmaceutical marketers from using prescriber-identifying information in the marketing of drugs without first obtaining the prescriber's consent. The statute did not, however, prohibit other users such as the State from obtaining and using this data for purposes other than marketing. These purposes included health care research, enforcing compliance with health insurance formulary lists, "care management" communications sent to patients to educate them on different treatment options available to them, law enforcement operations, and for purposes "otherwise provided by law."

The pharmaceutical and data mining companies argued that the statute unconstitutionally violated their rights under the Free Speech Clause of the First Amendment to the United States Constitution. They claimed the statute unjustly imposed restrictions on 'their' dissemination and use of prescriber-identifying information while imposing no similar restrictions on the State. The State of Vermont, on the other hand, argued that the statute did not restrict speech, but only placed a restriction on conduct because the use of prescriber-identifying information and the sales transfer process was conduct, not speech.

The State also argued that if the statute burdened speech, it burdened only commercial speech; a form of speech which may be subject to governmental regulation. They further claimed that any burden §4631(d) placed on speech was necessary to achieve substantial state interests; including, (1) the protection of medical privacy, including physician confidentiality; (2) the avoidance of harassment by pharmaceutical sales representatives; and (3) to achieve public policy objectives of improving public health and reducing healthcare costs.

The Court, however, determined that the State's asserted interests in support of the statute failed to justify the burdens which the statute imposed on speech. They noted that the statute failed to meet the State's alleged purpose of protecting physician

confidentiality because pharmacies could still, under the statute, share prescriber-identifying information for purposes other than for marketing and with speakers to whom the State supported. The Court then addressed the State's argument that the statute was needed to prevent physician harassment by sales representatives and stated that the content based statute was unnecessary since physicians could simply avoid this consequence by declining to meet with the representatives.

Finally, the Court addressed the State's argument that the statute had the effect of improving public health and reducing healthcare costs, because without prescriber-information, drug representatives would be less likely to influence or alter prescriber decisions and to pressure prescribers into using high cost branded medications. The Court rejected this argument and said that the State could not seek to achieve its policy objectives by restricting "certain speech by certain speakers," or more particularly, by diminishing pharmaceutical representatives' abilities to influence prescription decisions.

*In its 6-3 decision, the Court ruled in favor of the drug mining and pharmaceutical companies and held that the Vermont statute was unconstitutional. The Court determined that "mined" or prescriber-identifying information was "speech" and that speech in aid of pharmaceutical marketing was a form of expression protected by the Free Speech Clause of the First Amendment.*

*Physicians are likely to have varied responses to the Sorrell decision. Some will be in favor of the decision as pharmaceutical companies will be able to use "mined" data to tailor their marketing strategies to more efficiently serve physicians' particular needs. Other physicians, however, may be less enthusiastic about the decision and have concerns about the ramifications it may have to their privacy. In any case, the Supreme Court's decision in Sorrell is significant because it determined that prescriber-identifying information is a form of speech protected under the United States Constitution. ■*