



Prescription Policy Choices

PO Box 204
Hallowell, ME 04347

Phone 207-512-2138
Fax 207-622-3302

Email info@policychoices.org
Web www.policychoices.org

Legal Project Defends Pathbreaking State Policies

Sharon Treat, Legal Project Director

Is someone peering over your doctor's shoulder when she writes you a prescription? Yes indeed, unless you live in the State of New Hampshire, where a 2006 law preventing the use of individually identified prescriber information for drug marketing purposes was recently upheld by the courts. Maine and Vermont have their own versions of this law, which protects the integrity of the doctor-patient relationship, improves public health, and addresses skyrocketing health care costs which are fueled by ever-increasing pharmaceutical spending.

Access to individualized prescription data allows drug companies to target their marketing, gifts, consultancies, and other perks to their most favored prescribers, in effect incorporating them into the commission structure of their sales forces. The data-mined information is used to target and encourage prescribers to switch from prescribing cost-effective generics to newer drugs that cost more but may not be more effective and can have side effects that are not well known to the medical community.

The federal government has been slow to address issues of drug industry marketing and influence on the medical profession, and the states are in largely uncharted territory. Each of the three state data-mining laws has been challenged in court. The big data-mining companies, including IMS Health and Surveillance Data, Inc., joined by the Pharmaceutical Research and Manufacturers of America (PhRMA) (representing drug companies) are challenging the authority of states to regulate these activities. This litigation initially halted implementation of the state laws; and while it has had a chilling effect on the willingness of some Legislatures to move ahead, more than a dozen have considered doing so.

PPC took the lead defending these important laws¹, achieving some big successes. PPC's legal team, headed by Professor Sean Fiil-Flynn of American University's Washington College of Law, filed "friend of the court" briefs in support of the data-mining laws in all three states. The New Hampshire law, initially thrown out by its US District Court, was unanimously upheld and reinstated on appeal by a three-judge panel of the First Circuit Court of Appeals, which relied heavily on legal arguments made by PPC in its brief and in oral argument. The US Supreme Court on June 29 refused to review the decision, giving the green light to New Hampshire to enforce the law.

¹ Joining PPC in the amicus brief were the National Legislative Association on Prescription Drug Prices (NLARx) and consumer, physician, and seniors organizations including AARP, Community Catalyst, the National Physicians Alliance, and the New Hampshire Medical Society.

This decision, *IMS Health, Inc. v. Ayotte*² is also precedent in a lawsuit challenging the Maine law.³

In the *Ayotte* decision, the majority found New Hampshire's law does not regulate speech, but rather regulates only the conduct of health information companies that aggregate and sell prescription records. The concurring judge agreed on the result, but relied on different reasoning to uphold the law, concluding it does affect the speech of pharmaceutical marketers, but is justified by the state's overriding interest in promoting cost containment in the pharmaceutical sector.

The 148-page decision reviews the voluminous evidence amassed by New Hampshire demonstrating the negative effects on the health care system of allowing pharmaceutical marketers to use prescription record tracking to target marketing efforts. The decision is significant for both policy and legal reasons.

"It's an important decision for data privacy advocates," Fiil-Flynn explained. "In a small number of other cases, courts have applied the First Amendment to the regulation of consumer identification lists and other uses of information for commercial purposes. The First Circuit bucked this dangerous trend, admonishing that the First Amendment does not protect every exchange of information from traditional social and economic regulation."

Now that the Supreme Court has given the go-ahead to enforce this law, PPC is hopeful other states will be encouraged to consider similar policies. In April, the US District Court for the District of Vermont, which is in the Second Circuit, held that the Vermont's prescription data mining law is constitutional.⁴ The comprehensive and thoughtful decision recognized as legitimate the state's public health as well as cost control purposes in enacting the law.

The Vermont case has been appealed, and once again, PPC has taken the lead in helping with a "friend of the court" brief, currently due the first week of September. With the New Hampshire case successfully concluded, PPC is hopeful that other courts will follow suit.

² *IMS Health, Inc. v. Ayotte*, 550 F. 3d. 42 (1st Cir. 2008), cert. denied, No. 08-1202 (US June 29, 2009). More than 40 industry associations and conservative legal think-tanks, joined the data companies seeking Supreme Court review.

³ The Maine case, *IMS Health, Inc. v. Mills*, formerly *IMS Health, Inc. v. Rowe*, 532 F. Supp. 2d 153 (D. Me. 2007), was also initially overturned by the lower court and is being appealed (No-08-1248, 1st Cir. filed Aug. 27, 2007). The appeal was stayed pending the First Circuit decision in *IMS v. Ayotte*, and then pending the Supreme Court's decision on granting certiorari. The appeal can now proceed.

⁴ *IMS Health, Inc. v. Sorrell*, No. 1:07-CV-188 (D. Vt. Apr. 23, 2009)