Supreme Court Strikes Vermont Data Mining Law and Protects Pharmaceutical Marketing

July 13, 2011

On June 23, the U.S. Supreme Court issued a 6-3 decision in *Sorrell v. IMS Health Inc.*, declaring a Vermont law designed to prevent data mining unconstitutional. The Vermont Prescription Confidentiality Law at issue restricted the use, sale, and disclosure of pharmacy records revealing physicians' prescribing practices.

Data mining of pharmaceutical information occurs when pharmacies sell "prescriber-identifying information" to "data miners" who prepare reports on such information in order to sell to pharmaceutical manufacturers. The pharmaceutical manufacturers then employ "detailers" who use such reports to target physicians. It should be noted that prescriber-identifying information does not include patient identifiable information and, as a result, the case did not raise issues under the Health Insurance Portability and Accountability Act (HIPAA).

The Vermont Prescription Confidentiality Law was designed to prevent data mining by precluding pharmacies and similar entities from selling prescriber-identifying information or disclosing such information for marketing purposes, absent the prescriber's consent. Pharmaceutical manufacturers were likewise precluded from using prescriber-identifying information for marketing purposes, absent the prescriber's consent. Notwithstanding these provisions, the law did allow the prescriber-identifying information to be used for a variety of purposes, including healthcare research, compliance evaluations, care management communications, and law enforcement operations. The Vermont law's restriction on pharmaceutical marketing was intended in part to promote the use of generic drugs.

In finding that the law imposed both content- and speaker-based burdens on protected expression, the Court ultimately ruled that Vermont's justifications for the law failed to meet the requisite level of heightened judicial scrutiny applied. The Court found that prohibiting pharmacies from selling prescriber-identifying information to marketers while allowing pharmacies to sell the same information to other parties constituted viewpoint discrimination, as it restricted speech by restricting information distribution. The Court explained that while "Vermont may be displeased that detailers who use prescriber-identifying information are effective in promoting brand-name drugs," this does not mean that a state may enact a law that would "burden the speech of others in order to tilt public debate in a preferred direction."

The Court rejected Vermont's justifications for the law's burdens on speech, namely that it protected medical privacy, reduced healthcare costs, and improved public health. While the Court recognized that physicians have an interest in maintaining the confidentiality of their prescription decisions, the Court

also noted that by allowing pharmacies to use the prescriber-identifying information for other reasons, the law failed to achieve this objective. The Court also rejected Vermont's public policy rationale because the law restricted "certain speech by certain speakers" to achieve these policy goals. The Court added that "the 'fear that people would make bad decisions if given truthful information' cannot justify content-based burdens on speech."

Justice Breyer led the dissent, joined by Justices Ginsburg and Kagan, arguing that the heightened level of scrutiny was inappropriately applied by the majority since the law was directed at regulating commercial activity rather than restricting speech. Commercial speech is offered less protection than free speech under the First Amendment. The dissent opined that Vermont's public policy goals were a legitimate government regulatory interest sufficient to justify the law's indirect and incidental restriction on commercial speech.

While the Court struck down the Vermont data-mining prevention law, it did leave room for other states to enact similar laws. The Court noted that had the Vermont law "provided that prescriber-identifying information could not be sold or disclosed except in narrow circumstances," it may not have violated the First Amendment.

The *Sorrell* case is significant because it could provide a basis for challenging other laws that seek to restrict the dissemination of private information. The decision is also particularly important for pharmaceutical companies because it supports the continued use of prescriber data to inform physicians about prescription medications and their characteristics.

If you have any questions or would like more information on the issues discussed in this LawFlash, please contact any of the following Morgan Lewis attorneys:

San Francisco

W. Reece Hirsch	FDA & Healthcare	415.442.1422	rhirsch@morganlewis.com
Heather Deixler	FDA & Healthcare	415.442.1317	hdeixler@morganlewis.com

Houston

R. (Ted) Edward Cruz	Appellate Litigation	713.890.5137	tcruz@morganlewis.com
Allyson N. Ho	Appellate Litigation	713.890.5720	aho@morganlewis.com

About Morgan, Lewis & Bockius LLP
With 22 offices in the United States, Europe, and Asia, Morgan Lewis provides comprehensive transactional, litigation, labor and employment, regulatory, and intellectual property legal services to clients of all sizes—from global Fortune 100 companies to just-conceived startups—across all major industries. Our international team of attorneys, patent agents, employee benefits advisors, regulatory scientists, and other specialists—nearly 3,000 professionals total—serves clients from locations in Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, Washington, D.C., and Wilmington. For more information about Morgan Lewis or its practices, please visit us online at www.morganlewis.com.