



## Client Alert

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### Supreme Court Hears Arguments in Prescription Drug Data-mining Case

On April 26, 2011, the U.S. Supreme Court heard oral arguments on the issue of whether a state law restricting pharmaceutical companies' access to physician prescribing information for marketing purposes violates the First Amendment protection of commercial speech.

The case, *Sorrell, et al. v. IMS Health, et al.* (No. 10-779), involves a section of Vermont's Prescription Confidentiality Law, which limits the sale and use of pharmaceutical data that identifies physician prescribing habits. Pharmacies routinely collect this prescribing information and make prescriber-identifiable (PI) data publicly available (with patient identifying information redacted) for various uses. Data-mining companies purchase the data and sell it to pharmaceutical companies, which often use the information to tailor marketing and physician detailing programs.

The Vermont law prohibits the data-mining companies from selling, and the pharmaceutical companies from using, physician prescribing patterns for marketing purposes without the express consent of the prescriber. In passing the law in 2007, Vermont's legislature stated that, among other goals, the statute's aim was to promote the use of less costly drugs and to ensure prescribers receive unbiased information.

Data-mining companies IMS Health, Verispan LLC (now SDI Health LLC), and Source Healthcare Analytics, along with the Pharmaceutical Research & Manufacturers of America (PhRMA), challenged the law as an unconstitutional restriction on commercial free speech and sued the State's Attorney General, William Sorrell. The United States District Court for the District of Vermont upheld the law as a permissible restriction on protected speech, finding that Vermont had a right to protect the public from increasing prescription drug costs. The Second Circuit Court of Appeals subsequently reversed, finding the law was an unconstitutional restriction on commercial speech. The Second Circuit pointed out that the law does not ban data-mining altogether, or even the use of such information. In fact, the law permits the sale, transfer or use of PI data for other purposes, such as law enforcement and other state programs, but not marketing. As a result, the Second Circuit ruled that the State cannot constitutionally seek to "alter the marketplace of ideas" in favor of generics by restricting the speech of brand-name pharmaceutical companies. Vermont subsequently petitioned the Supreme Court for certiorari.

This is the second time such a law has been presented to the Supreme Court. New Hampshire, Maine and Vermont have all passed laws making it illegal to distribute information about doctors' prescribing practices or to use it for marketing. The First Circuit Court of Appeals upheld similar laws in New Hampshire in 2009 and in Maine in 2010. Data-mining companies unsuccessfully appealed the New Hampshire law to the Supreme Court, which let the First Circuit ruling stand. The Supreme Court granted certiorari in the *Sorrell* case to settle the split between the circuits.

Vermont contends that if the Court finds restricting access to prescribing data for marketing purposes unconstitutional, such a ruling would call into question all data privacy laws. The state argues that the data only exist because federal laws require that pharmacies retain prescription information. Limiting access to such information, Vermont argues, is not a restriction on commercial speech but a permissible limitation on the dissemination of private information. The state argues that pharmacies have no First Amendment right to the information simply because the government mandates its collection. The state's brief argues that the law in no way controls or restricts the information in pharmaceutical companies' marketing messages. Instead, it allows doctors to opt to keep their prescribing information private, by requiring prior consent.

The data-mining companies, on the other hand, argue that the law is not about privacy, and the Vermont legislature is simply attempting to control costs by restricting the marketing of brand-name prescription drugs. The companies emphasize that the information is also used to disseminate important and FDA-approved information about medications to doctors who need it to evaluate treatment options. PhRMA's brief argues that Vermont cannot simply "impos[e] discriminatory burdens on speech because the State disfavors a speaker or message." The data-mining companies also note that the State of Vermont uses the same data for a counter-detailing program encouraging providers to prescribe generic medications. The data-mining companies and PhRMA argue that the statute unconstitutionally focuses on brand-name manufacturers to hinder their marketing efforts.

In oral arguments, the Justices focused on the law's limited applicability to pharmaceutical manufacturers and marketers. Although the Vermont Assistant Attorney General attempted to frame the statute as a privacy measure, the Justices' questions made it clear that the court views the case as a question of the boundaries of permissible restrictions on commercial speech. Justice Scalia, in particular, repeatedly questioned how the law protects privacy when the information can be used for other purposes without the prescribing physician's consent. Vermont's Assistant Attorney General argued that the law enables doctors to "avoid an intrusive and invasive marketing practice." Some of the Justices countered by suggesting that doctors could simply decline to meet with the sales representative, or the law could permit physicians to opt-out, rather than requiring them to opt-in.

The court questioned whether the statute's true purpose is to encourage the use of generic drugs by discouraging the sale of brand name drugs. Justice Scalia noted that preventing direct-to-physician marketing is not the same as protecting privacy; and Chief Justice Roberts characterized the law as "restricting the flow of information to the doctors" and "censoring" marketing messages to encourage the use of generics.



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This case has important implications for both pharmaceutical manufacturers and healthcare professionals, and the Justices' questions during oral argument provide no clear indication of the court's ultimate ruling. Even if the court rules against Vermont in this case, it seems open to the possibility that a state may, in a less restrictive manner, limit access to prescribing information in the interest of privacy. The court is expected to issue an opinion before the summer recess.

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