

## Supreme Court Overturns State Law Restrictions on Data-Mining

In a 6-3 decision on June 23, 2011, the U.S. Supreme Court overturned a 2007 Vermont law that restricted data-mining companies from using and selling individual doctor's prescribing patterns without the physician's permission.<sup>1</sup> Vermont argued that the law intended to promote state interest in protecting medical privacy, improving public health, and controlling healthcare costs through encouraging prescription of generic drugs.<sup>2</sup> Data-mining and pharmaceutical companies argued that, in order to encourage generic drug prescriptions, the law was paternalistic towards physicians and prevented them from learning about new, name brand pharmaceuticals.<sup>3</sup> The Court ruled that limitations the Vermont law put on pharmaceutical marketing infringed on the First Amendment right to freedom of speech.<sup>4</sup> This ruling will have significant effects on how states address pharmaceutical controls and healthcare expenditures.

In an attempt to control pharmaceutical companies' aggressive marketing to physicians and lower overall health expenditures, the Vermont law limited the release of physicians' prescribing histories.<sup>5</sup> Prior to the 2007 law, pharmacies sold prescribing information to data-mining companies, which would then package and sell the provider's name and address; quantity and type of medication prescribed; where the prescription was filled; and the patient's gender and age.<sup>6</sup> Pharmaceutical companies would purchase this information to tailor marketing of products to specific physicians based on the physician's prescribing history, in a technique known as "detailing."<sup>7</sup>

Certain representatives of the provider community have voiced concerns over the June ruling. The New England Journal of Medicine's Executive Director, Dr. Gregory D. Curfman, stated that under the Court's decision, pharmaceutical companies may have a greater influence on physicians' prescribing choices.<sup>8</sup> Dr. Norman Ward, Vice President of the Vermont Medical Society (VMS), also spoke out against the court's decision, stating: "*With health care costs so out of control, to promote a playing field that arms those wishing to promote specific, higher-cost, brand name drugs that may or may not have more efficacy than generic drugs seems unwise.*"<sup>9</sup>

In response to these stated concerns by the provider community, data-mining and pharmaceutical companies

note that information obtained from pharmacies are used for purposes other than drug company marketing. Vice President of IMS, a data-mining company, stated that prescription related information obtained from pharmacies is a "*great benefit in terms of improving patient care.*"<sup>10</sup> Pharmaceutical companies claimed that prescribing data can help researchers and the government monitor the safety of new medications and treatments. Justice Kennedy echoed this argument in the Courts decision, stating: "*The free flow of commercial speech 'has great relevance in the fields of medicine and public health, where information can save lives.*"<sup>11</sup>

Other states have endeavored to regulate the pharmaceutical industry, including Arizona, Iowa and Nevada, who attempted to pass legislation protecting prescriber information. Each state court overturned their respective laws, and the Supreme Courts' decision may set precedent to strike similar laws in Maine and New Hampshire.<sup>12</sup> Despite judicial support of data-mining practices, efforts are being made to limit drug companies' marketing approaches. In 2006, the American Medical Association created the Physician Data Restriction Program (PDRP), permitting prescribers to opt out of data-mining policies that share prescribing habits with pharmaceutical companies.<sup>13</sup> From 2008 to 2011, the PDRP enrollment has grown from 18,600 to 27,061 and is expected to continue to increase.<sup>14</sup> While the June decision may significantly impact pharmaceutical operations in Vermont and other states, the ruling acknowledges privacy as a legitimate state interest, which may leave the door open for future legislation regarding data-mining practices.<sup>15</sup>

1 Sorrell v IMS Health Inc., 564 U.S. \_ (2011), slip opinion available at <http://www.supremecourt.gov/opinions/10pdf/10-779.pdf>.

2 "High Court Voids Vermont Ban on Prescription Drug Data Mining" By Mark Sherman, The Washington Times, June 23, 2011, p. 1.

3 "Drug Makers Win Two Supreme Court Decisions" By Adam Liptak, The New York Times, June 23, 2011, p. 3.

4 "Supreme Court Nixes Vt. Prescription Data Mining Restrictions" By Jeff Byers, CMIO News Portal, June 23, 2011, [http://www.cmio.net/index.php?option=com\\_articles&article=28411&publication=56&view=portals](http://www.cmio.net/index.php?option=com_articles&article=28411&publication=56&view=portals) (Accessed 7/1/2011).

5 "Supreme Court Strikes Down Vermont Prescription Data Mining Law" By Marcy Wilder and Eric Bukstein, Health Law Reporter, Vol. 20, No. 1005, June 30, 2011.

6 "Supreme Court Strikes Down Vermont Prescription Data Mining Law" By Marcy Wilder and Eric Bukstein, Health Law

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- Reporter, Vol. 20, No. 1005, June 30, 2011, p. 1; “Data Mining’ Ban Violates Free Speech, Court Rules” By Rich Daly, Psychiatric News, Vol. 46, No. 1, January 7, 2011, p. 1.
- 7 “Drug Makers Win Two Supreme Court Decisions” By Adam Liptak, The New York Times, June 23, 2011, p. 3.
- 8 “Supreme Court Hands Drug Companies Twin Wins” By Nina Totenberg, National Public Radio, June 23, 2011 <http://www.npr.org/2011/06/23/137382574/supreme-court-hands-drug-companies-twin-wins> (Accessed 7/1/2011).
- 9 “Supreme Court Hands Drug Companies Twin Wins” By Nina Totenberg, National Public Radio, June 23, 2011 <http://www.npr.org/2011/06/23/137382574/supreme-court-hands-drug-companies-twin-wins> (Accessed 7/1/2011).
- 10 “High Court Voids Vermont Ban on Prescription Drug Data Mining” By Mark Sherman, The Washington Times, June 23, 2011, p. 2.
- 11 “High Court Voids Vermont Ban on Prescription Drug Data Mining” By Mark Sherman, The Washington Times, June 23, 2011, p. 1.
- 12 “Supreme Court Strikes Down Vermont Prescription Data Mining Law” By Marcy Wilder and Eric Bukstein, Health Law Reporter, Vol. 20, No. 1005, June 30, 2011; “Supreme Court to Tackle Access to Prescription Data” By Alicia Gallegos, American Medical News, February 21, 2011, p. 1.
- 13 “PDRP: The Choice is Yours” American Medical Association, 2011, [http://www.ama-assn.org/ama1/pub/upload/mm/432/pdrp\\_brochure.pdf](http://www.ama-assn.org/ama1/pub/upload/mm/432/pdrp_brochure.pdf) (Accessed 7/5/2011).
- 14 “Supreme Court to Tackle Access to Prescription Data” By Alicia Gallegos, American Medical News, February 21, 2011, p. 1.
- 15 “Supreme Court Strikes Down Vermont Prescription Data Mining Law” By Marcy Wilder and Eric Bukstein, Health Law Reporter, Vol. 20, No. 1005, June 30, 2011.





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