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**Consumer groups defend New Hampshire Prescription Data Privacy Law:
Brief filed by American University Law Professor and AARP counsel says court erred in
striking down N.H. Data Mining Law**

New Hampshire's first-in-the nation law banning the sale of prescription drug information that identifies patients and prescribers for commercial marketing purposes does not restrict free speech and serves compelling governmental interests, according to a brief filed today by an American University law professor on behalf of AARP and organizations representing physicians, state legislatures, consumers and public policy advocates.

The New Hampshire opinion striking down the regulation of prescription data mining by drug companies "is deeply flawed and is bound to be overturned by the First Circuit," explained Sean Flynn, Associate Director of the AU's Washington College of Law Program on Information Justice and Intellectual Property.

Professor Flynn explained:

Prescription data trading is not speech. The so-called commercial speech doctrine only protects speech to the public, e.g. through commercial advertisements. The Supreme Court has never held that every exchange of information between private contracting parties for purely commercial purposes is subject to First Amendment scrutiny. The Court has instructed quite the opposite, noting that such an interpretation would call into question the ability to regulate antitrust, workplace discrimination, corporate fraud, and a large amount of other commercial regulation that necessarily impacts the free exchange of information in commercial transactions.

If the New Hampshire court's decision were allowed to stand, a massive amount of legislation at the state and federal level safeguarding consumer and citizen information from commercial marketing uses would be called into question – from laws protecting the privacy of internet transactions, video rentals, do not call

lists, credit card information, DMV records, and other identifying information that marketers would like to use to target their marketing to consumers. There is no First Amendment right for marketers to have access to any identifying data they want to guide their efforts.

Even if a data mining law is held to regulate commercial speech, it is clear that there are sufficient justifications for such regulation. Commercial speech is not afforded the same level of protection as political, philosophical or cultural speech. The Supreme Court has recognized legitimate state interests in regulating – and even banning – commercial speech that is “deceptive or misleading,” exerts an “undue influence,” or that threatens professional standards.

The Act combats undue influence in pharmaceutical prescribing. There are few more important government roles in our health system than combating the undue influence of pharmaceutical marketing in prescribing decisions. Access to individualized prescribing data multiplies the influence of this already tilted playing field by permitting marketers to tailor their sales pitches to the specific drugs used by the target prescriber. The other side normally has little opportunity to respond because there is virtually no economic incentive for the manufacturers of generic drugs to send sales representatives.

The Act restrains costs and promotes public health. The general interest of states in reducing undue influence by pharmaceutical marketing is compounded by the enormous costs of such influence to society. These costs are measured not only in dollars, but in the prescribing of drugs that are less effective, and often harmful, to patients.

- Nearly a third of the five-fold increase in U.S. spending on drugs over the last decade can be attributed to the increased efficacy of pharmaceutical marketing efforts that shift doctors’ prescribing from existing, effective, and lower cost (often generic) therapies to new and more expensive treatments.
- One study referenced in the New Hampshire legislative history showed, for example, that marketing branded calcium channel blockers for high blood pressure treatment instead of the less expensive generic therapies that are rated as *more effective* by national treatment guidelines increased U.S. health expenditures by \$3 billion in 1996 alone.
- And in the case of Vioxx, aggressive marketing using prescriber data helped facilitate the widespread adoption of a drug that was far more dangerous to patient health than existing alternatives or than the company’s marketing messages admitted.

The Act enforces standards in the medical profession. Prescription data mining provides the key tool for pharmaceutical companies to literally pay prescribers – with meals, gifts, vacations and high-value low-work “consultancies” and board appointments – for the use of their products. This incorporation of prescribers into the commission structure of pharmaceutical sales incentives debases the

medical profession and, the more the practice becomes public, breaks the chain of trust between doctor and client.

The Act protects doctors against vexatious sales. Prescribers may be the most marketed-to class of “consumers” in the world. The rise of data mining was paralleled by a massive increase in detailing. Spending on detailing increased by nearly three hundred percent and the number of detailers doubled to one in every 4-5 office based physicians. The average primary care physician interacted with nearly 30 sales representatives each week in 2004. Doctor complaints about the increasing aggressiveness of detailers have become the stuff of front page news articles in national papers. Much of the increase in the aggressiveness of detailing can be attributed to the available of prescribing data and its use to not only track prescription writing, but link such writing directly to sales bonuses.

The Act protects patient privacy. There can be no doubt that patients have the strongest possible interest in not having their treatment histories subjected to surveillance and lobbying by pharmaceutical companies. But this interest cannot be protected by the removal of patient names alone. With access to prescriber identities and “anonymized” patient data, a pharmaceutical company can identify specific patients with identification numbers and track that patient’s treatment over time. Thus, the company can observe and respond to a the switching of a prescription with an individualized marketing campaign at the patient’s physician—without the patient ever knowing. This insertion of the pharmaceutical company into the monitoring and influence of the patient’s treatment is an invasion of privacy of the most odious kind – one that directly affects the treatment course of the patient for the pecuniary interest of another through a breach of confidentiality that is nearly impossible to detect.

A copy of the brief can be found at www.pijip.org

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