



THE CONSTITUTIONALITY OF DATA PRIVACY LAWS: THE CASE OF IMS V AYOTTE

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I want to talk a little about a case that PIJIP has been working on with many of the public interest groups that are here today.

Last year, in *IMS v. the Attorney General of New Hampshire*, a district court struck down a state law that prohibited firms in possession of prescription records from disclosing or using patient or physician identifying data for marketing purposes.

The district court held that the law regulated commercial speech, which it defined with a rarely used definition of the doctrine as applying when speech is in the commercial interest of the speaker and listener.

It is my firm opinion that data mining regulations are fully within state constitutional authority to enact regulations to protect public health and regulate the medical profession.

We think that the public interest parties will prevail in the First Circuit and the New Hampshire law will be upheld in full.

Let me start with why states are acting in this area.

BACKGROUND ON DATAMINING

Companies like IMS buy prescription records, link them with information from the AMA's databases, and sell them to pharmaceutical companies. Pharmaceutical companies use that data to track – by the hour – what doctors are prescribing.

They don't track patient names – but they do track patients.

This information is then used in what is probably the world's most sophisticated, costly and effective marketing system.

A recent estimate places pharmaceutical marketing budgets in the U.S. at over \$50 billion a year. Pharma spends more on its sales force than any other industry. About 80% of pharmaceutical marketing spending is targeted to doctors. One recent estimate is that the average primary care doctor receives nearly 30 visits from a pharmaceutical sales representative every week.

The pharmaceutical industry describes this process as education. And it surely works. Studies have shown that a visit with a pharmaceutical sales representative is one of the most influential factors – often the most – in a doctor's decision to prescribe a particular drug.

But it is more than information. States are concluding that the industry is exerting a strong measure of undue influence, and that access to prescription data aggravates the problem.

They use the information to identify and reward their best prescribers and to finely tune marketing messages and inducements.

Psychological evidence displays that influence is spread through networks of obligation that are fed through mutual reinforcement. Access to prescription data enables fine tuned reinforcement.

Thanks to marketing disclosure laws in a handful of states, we now know that being brand loyal is the surest way to be paid large sums. The numbers are staggering. Gifting and consulting fees from pharmaceutical companies to individual physicians have exceeded \$900,000, and commonly exceed \$100,000 for the most influential or prolific subscribers.

The evidence from social scientists is overwhelming. Undue influence of marketing statistically increases irrational prescribing, cost of care and harm to patient health.

FIRST AMENDMENT LITIGATION

Two courts have accepted the argument that the commercial speech doctrine bans data privacy protections for prescription records. I believe these cases are fundamentally flawed.

The First Amendment's commercial speech doctrine is about protecting the rights of companies to speak *to consumers* about their products. In the original case, the Court struck a law that regulated the advertising of prices by pharmacies. The reason was that consumers had a strong interest in receiving information that helps them makes informed purchasing decisions. Other cases have had similar fact patterns.

The commercial speech doctrine does not protect any right of companies to monitor data *from consumers* to see whether their sales pitches are successful.

In *Reno v. Condon*, the supreme court upheld the Driver Privacy Protection Act, which forbids disclosure of information from DMV records for marketing purposes (but not for a host of public interest reasons). The court did not address a First Amendment argument because that part of the case had been dropped below. But the court held that "identifying information . . . is a thing in interstate commerce" that can be regulated with economic regulations. Normally economic regulations are subject to rational basis scrutiny. The Court never footnoted an idea that such regulations in this case might be subject to a higher First Amendment standard.

In *Bartnicki*, the Supreme Court has held that a state cannot punish every disclosure of confidential information. In that case, the Court held that punishing a public affairs radio host for airing information of a public concern from a wiretapped conversation was unconstitutional. But the court held that punishing the use of information was a regulation of "conduct" not subject to First Amendment scrutiny.

The New Hampshire court held that datamining laws prohibit a type of disclosure, and therefore are speech restrictions under *Bartnicki*. But *Bartnicki* was speaking of a law that constituted a "naked disclosure" – even of the use of information of a general public concern by a public affairs radio program. That's the core of the First Amendment interest. Regulating the trading of targeted marketing lists does not rise to the same level of First Amendment interest.

Data mining laws do not prohibit the release of information of a public concern.

There are a number of similar laws prohibiting the release or use of consumer data e.g.

- Driver Privacy Protection Act (upheld *Reno v. Condon*)
- Video Privacy Protection Act
- Stored Communications Act
- Electronic Communications Privacy Act
- Fair Credit Reporting Act (upheld *Trans Union v. FTC*)

The future ramifications of giving companies a first amendment right to access and sell data on all of our purchases would be shocking. They now have ATM cards that record not only what you buy but, through metro pass partnerships, where you go. How much of your life is spent creating tradable data over the internet?

The interests here are multiplied because the surveillance is at the core of the doctor-patient relationship. The surveillance corrupts with demonstrable negative impacts – at least in the judgment of legislatures.

In our view, this case is not about the right to speak. It is about the right not to speak. It is about the right – of doctors, of consumers, of all of us – not to speak. It is the right to choose with whom we speak, and to whom we wish to remain silent.