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U.S. SUPREME COURT

Justices Weigh In on Pharma Marketing, Corporate Speech, Data Privacy

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Special to the Legal

The U.S. Supreme Court's June 23 decision in *Sorrell v. IMS Health, Inc.* is among the 2010 term's most important. The opinion addresses a core marketing approach in the more than $300 billion U.S. pharmaceutical industry, exemplifies the court's developing, muscular, corporate-speech jurisprudence, and provides a window into data privacy issues the court will face in upcoming terms.

'DETAILING'

The court struck down, 6-3, on First Amendment grounds a Vermont law forbidding the use of physicians' prescribing histories for marketing purposes. The prescribing histories, which are stripped of patient-identifying information but do contain prescriber-identifying information, are collected from pharmacies and analyzed by data mining companies.

The data mining companies then sell the information to pharmaceutical companies, which use the information to target their promotional activities, specifically the in-person promotional calls referred to in the industry as "detailing." The Vermont law, the Prescription Confidentiality Law (PCL), barred the sale, license or exchange for value, without prescriber consent, of any prescriber-identifying information if the data were to be used "for marketing or promoting a prescription drug."

The Vermont Legislature expressly identified three state interests supporting the PCL's restrictions: privacy interests of prescribers, increased health care costs to the state, and a concern that detailing causes prescribers to make decisions on "incomplete and biased information." The Legislature stated that, through the law, it intended to alter the "marketplace for ideas on medicine safety and effectiveness," which it considered "frequently one-sided."

KEY HOLDINGS

The Legislature's candid statement that it sought to alter the marketplace of ideas led the court to conclude, in an opinion with Justice Anthony M. Kennedy writing for the six-member majority, that the PCL "imposes an aimed, content-based burden on detailers." The PCL, the court found, "has the effect of preventing detailers — and only detailers — from communicating with physicians in an effective and informative manner." This targeted burden on speech triggered heightened scrutiny requiring Vermont to show "at least that the statute directly advances a substantial government interest and that the measure is drawn to achieve that interest."

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The court found that, because the PCL restricts distribution of prescriber-identifying information only for marketing purposes, it was under-inclusive and therefore not effectively drawn to advance Vermont's interest in preserving prescriber confidentiality. According to the court, under the PCL, "pharmacies may share prescriber-identifying information with anyone for any reason save one: They must not allow the information to be used for marketing."

The court also bluntly concluded that the PCL did not advance patient safety and cost concerns in a permissible way: "Those who seek to censor or burden free speech often assert that disfavored speech has adverse effects. But the fear that people would make bad decisions if given truthful information cannot justify content-based burdens on speech." Drawing on this classic First Amendment rationale, the court found that Vermont's proper remedy was not to "hamstring its opposition," as it did with the PCL, but to allow more speech.

Justice Stephen G. Breyer, joined by Justices Ruth Bader Ginsburg and Elena Kagan, dissented, arguing that the PCL was a garden-variety economic regulation and that, like other similar regulations, it was necessarily targeted at particular speakers and content. As such, he argued, it should not be subjected to heightened scrutiny.

Breyer, quoting then-Justice William Rehnquist's dissent in *Central Hudson Gas & Electric v. Public Service Commission of New York*, described the majority's decision as a "retur[n] to the bygone era of *Lochner v. New York*, in which it was common practice for this Court to strike down economic regulations adopted by a State based on the Court's own notions of the most appropriate means for the State to implement its considered policies."

The four most important noteworthy aspects of the court's opinion in *Sorrell* are the following:

• **No. 1: The Court's Roadmap for Future, Permissible Regulation of the Use of Prescriber-Identifying Information.**

The court's under-inclusiveness rationale for striking down Vermont's law, we think, reveals the court's receptivity to more complete bans on the sale of prescriber-identifying data. Importantly, the court accepted Vermont's notion — also advanced by several amicus briefs — that "for many reasons, physicians have an interest in keeping their prescriptions confidential." The constitutional infirmity, the court continued, was the law's under-inclusive protection of that interest: The PCL makes "prescriber-identifying information available to an almost limitless audience" excluding only "a narrow class of disfavored speakers."

In a blend of rationale and dicta, the court notes that had the PCL broadly prohibited the distribution of prescriber-indentifying information, not just prohibiting use for pharmaceutical marketing, the law might not have been struck down: "If Vermont's statute provided that prescriber-identifying information

could not be sold except in narrow circumstances then the State might have a stronger position." Given that, in addition to Vermont, a dozen states and the District of Columbia have already proposed limiting the pharmaceutical industry's use of prescriber-indentifying information, Kennedy's opinion may serve as a roadmap to future, more-comprehensive prohibitions.

Two aspects of the court's reasoning are striking. First, the court seems to take as a given a prescriber's "privacy" interest in his or her prescription writing history and elevates that interest to a near-constitutional dimension.

The court, by way of comparison, cites the Health Insurance Portability and Accountability Act (HIPAA), writing, "the State might have advanced its asserted privacy interest by allowing the information's sale or disclosure in only a few narrow and well-justified circumstances."

In our view, this interest is less obvious than the court suggests. Does a lawyer have a "privacy" interest in the identity of his or her clients or the cases he or she files in court? Likewise, does an accountant have a privacy interest in the clients whom he audits? Certainly, clients of lawyers and accountants have strong privacy interests, just as patients do; the professional's interest, however, is surely substantially less. For the court to suggest that physicians' privacy interest is on par with their patients' is surprising, particularly given the strong public interest in regulating the practice of medicine.

Second, the PCL's under-inclusiveness is far more illusory than the opinion suggests; there may be little practical difference between the PCL and broader laws the court suggests could withstand heightened scrutiny. Because pharmaceutical manufacturers are the significant buyers of the data, there is no economic incentive to collect and aggregate prescriber-identifying data if they cannot be used for pharmaceutical marketing. Thus, the supposedly under-inclusive PCL itself might effectively have resulted in the broad ban on the distribution of prescriber-identifying information that *Sorrell* implies would have been permissible.

• No. 2: Another Example of the Roberts Court's Muscular Protection of Corporate Speech.

Both *Sorrell* and *Brown v. Entertainment Merchants Association*, decided just a few days later, mark a continuation of the current court's willingness, widely discussed in the wake of its decision last term in *Citizens United v. Federal Election Commission*, to afford corporations broad First Amendment protection. This is particularly notable because — unlike *Citizens United*'s protection of political speech, which receives the greatest First Amendment protection — *Sorrell* involved advertising, typically given substantially less protection.

Commercial speech — particularly advertising — has also always been subject to economic regulation, which, as the dissent notes, "necessarily draws distinctions on the basis of content"; such regulations are generally "speaker-based, affecting only a class of entities, namely, the regulated firms." To create constitutional barriers to regulation, Breyer wrote, is to "embark[] upon an unprecedented task — a task that threatens significant judicial interference with widely accepted regulatory activity."

Unlike Citizens United*'s protection of political speech, which receives the greatest First Amendment protection,* Sorrell *involved advertising.*

The majority's application of the First Amendment, in contrast, applies free market principles to the marketplace of ideas. Quoting his own 1993 opinion in *Edenfield v. Fane*, Kennedy writes: "The commercial marketplace, like other spheres of our social and cultural life, provides a forum where information and ideas flourish. ... [T]he general rules is that the speaker and the audience, not the government, assess the value of the information presented."

• No. 3: The Roberts Court's Willingness to Use Federal Power to Abrogate State Legislation.

Sorrell is also noteworthy because it may evidence a shift from the Rehnquist Court's reluctance to use federal power to abrogate state legislation, to the Roberts Court's apparent greater willingness to interpret corporations' constitutional rights to trump state legislation. This shift is starkly framed by Breyer's quotation from Rehnquist's dissent in *Central Hudson,* an opinion written in 1980, before Rehnquist was able to command a frequent majority in support of curtailing federal limitations on state power.

Interestingly, given that Kennedy himself frequently joined with Rehnquist in decisions deferring to state autonomy, the majority opinion in *Sorrell* makes no mention of this. It remains to be seen, however, whether the Roberts Court will as aggressively expand federal legislative and executive authority or whether this trend will be limited to striking down state burdens on corporate speech.

• No. 4: *Sorrell* as a Leading Indicator of Other Issues on the Court's Docket.

The *Sorrell* opinion also provides a glimpse into the court's thinking on informational privacy issues that are likely to appear repeatedly on the court's future docket. *Sorrell* unabashedly recognizes the importance of individual privacy interests: "Privacy is a concept too integral to the person and a right too essential to freedom to allow its manipulation to support just those ideas the government prefers."

The opinion also recognizes that informational privacy issues presented by changing technology will require regulation: "The capacity of technology to find and publish personal information, including information required by the government, presents serious and unresolved issues with respect to personal privacy and the dignity it seeks to secure." The court's acknowledgement that privacy concerns are a government interest significant enough to justify regulations on speech suggests its willingness to find constitutional well-tailored limitations of other forms of data mining such as Internet browsing and search histories or credit card transactions.

Because *Sorrell* was written by Kennedy and addresses a health-care-related issue, it is tempting to scrutinize the opinion for Kennedy's thinking on the challenge to the Affordable Health Care for America Act. We think, however, it very difficult to tease out of the opinion his view on the core issue in that challenge, namely whether the AHCAA's individual mandate is a constitutional exercise of federal legislative power. The legal issues and the underlying interests presented in the two cases are too different. •

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