



For Immediate Release

October 5, 2007

Paper Assesses Constitutionality of State Pharmaceutical Data Usage Limitations

In order to most effectively convey information about their products and efficiently utilize their advertising budgets, pharmaceutical companies rely upon prescription transaction information. A number of states have passed or are considering laws which prohibit the use of such data in directing promotional materials and activities to doctors. As a new Washington Legal Foundation WORKING PAPER argues, First Amendment principles and precedents clearly dictate that such laws should be struck down as unconstitutional.

This WLF WORKING PAPER, *IMS Health v. Ayotte: The First Amendment And Prescriber-Identifiable Data* was authored *pro bono* by **Donald B. Ayer**, a partner with the law firm Jones Day. Mr. Ayer is a noted First Amendment scholar and appellate advocate who has argued seventeen times before the U.S. Supreme Court. Mr. Ayer filed an *amicus* brief on behalf of a health information company at the District Court level in the *IMS Health* case.

Companies such as IMS Health collect data on the prescribing practices of doctors, and pharmaceutical companies utilize that data, which specifies physicians but not the patients receiving the prescription, in many ways, including to target their marketing. In a purported effort to protect patient and physician privacy, as well as to reduce healthcare costs, New Hampshire in 2006 passed a law prohibiting the sale and use of such “prescriber-identifiable data” for drug marketing purposes.

Mr. Ayer first describes the New Hampshire law and then delves into the constitutional challenge IMS Health filed against it on July 26, 2006. In late April 2007, a federal District Court judge found that the law violated IMS Health’s commercial speech rights. The WORKING PAPER meticulously details the arguments each side proffered to the court, and describes the court’s rationale for finding the law unconstitutional. As Mr. Ayer writes, the court focused on the state’s failure to closely tailor its “solution” to the problems it sought to resolve. The opinion also noted that there were alternative means the state could have pursued that wouldn’t have impinged upon speech rights.

In the next two sections of the paper, Mr. Ayer explains how two other states – Maine and Vermont – have recently adopted laws which also regulate commercial uses of prescriber-identifiable data, and how those states attempted to circumvent the strictures of the *IMS Health* ruling. Despite those states’ efforts to pass compliant laws, Mr. Ayer argues, constitutional challenges by aggrieved parties such as IMS Health would likely lead to Maine and Vermont’s laws being struck down as well.

Mr. Ayer concludes by noting that unless states such as Maine and Vermont first attempt to regulate the use of prescriber-identifiable data in ways that don’t impact First Amendment-protected speech, courts will likely follow the lead of *IMS Health* and hold data restriction laws unconstitutional.

The *IMS Health* case is currently on appeal to the U.S. Court of Appeals for the First Circuit. Washington Legal Foundation, which filed a brief supporting IMS’s First Amendment rights in the District Court, will be filing an *amicus* brief in support of IMS on appeal. Mr. Ayer is also counsel of record to another *amicus* at the appellate level, Wolters Kluwer Health, Inc. Briefs supporting the Respondent are due October 19. A copy of WLF’s brief in the trial court is available at <http://www.wlf.org/upload/AyotteBrief.pdf>.

Copies of this educational paper, WLF WORKING PAPER, Number 151 (October 2007), can be obtained by forwarding a request to: Publications Department, Washington Legal Foundation, 2009 Massachusetts Avenue, NW, Washington, D.C. 20036, or calling (202) 588-0302.

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