

# First-in-the-nation law pits N.H. against drug industry

**By Paul C. Remus**

There is a new battle between a David, in the form of the state of New Hampshire, and a Goliath, in the form of the pharmaceutical industry's self-styled "health information companies" playing out in U.S. District Court in Concord.

The health information companies are suing to have declared unconstitutional all, or part, of a recent law concerning keeping certain information on prescriptions confidential. The litigation, which so far is apparently unknown even to many members of the medical community, raises important questions that should be discussed more broadly and openly.

House Bill 1346 was enacted into law as 206 Session Law 328, effective June 30, 2006. While there are some ambiguities in the wording of the law, it appears to prohibit the use or sale for commercial purposes of prescription information containing "patient-identifiable" or "physician-identifiable" data. In other words, it prohibits such use or sale of any prescription information that includes the name of the patient for whom it was written or the name of the physician who wrote it.

The law also describes exceptions to what constitutes commercial activity and expressly permits such use or sale of information that contains information only about the geographic area in which the prescription was written or the medical specialty of the doctor who wrote it.

The law targets the long-established and widespread practice of collecting specific information from pharmacies about every prescription they fill and selling it to pharmaceutical manufacturers. Arguably, the law does not add any significant prohibition with respect to prescription information containing patient-identifiable information, as the use or sale of this type of information is already tightly controlled by federal law in the form of the Health Insurance Portability and Accountability Act, better known as HIPAA.

However the New Hampshire law is the first attempt by any state, or the federal government, to regulate the use or sale of prescription information containing physician-identifiable data.

The stated purpose of the New Hampshire Legislature in enacting Law 328 is to reduce the cost of health care. Health information companies purchase physician-identifiable information and configure it to show the specific drugs, and the amounts of such drugs, prescribed by given physicians. This information is used in a number of ways, including its use by drug manufacturers to encourage physicians through published advertisements, mailings and visits by the manufacturers' representatives to prescribe the more expensive drugs they manufacture, as opposed to treating patients with no drugs or less expensive older or generic drugs.

## **Industry arguments**

On July 28, IMS Health Inc. and Verispan LLC, two health information companies, sued to have all, or part, of the law declared unconstitutional. The health information companies' lengthy complaint alleges that the New Hampshire law violates both their 1st Amendment guaranty of free speech and their rights under the Commerce Clause.

The complaint describes at some length the purposes served by the use and sale of physician-identifiable information, including the "effective implementation of prescription drug recall programs, performance of pharmaceutical market studies, efficient pharmaceutical sales and marketing resource allocation, and assessment of drug utilization patterns (e.g., on-and-off label uses and regional variations of physician prescribing behavior)."

In this respect, the complaint lays the foundation for an important debate on the proper use, and the proper scope of regulation, of physician-identifiable information. However, the

complaint does not, in the author's opinion, join the most desirable, and perhaps necessary, parties to the debate.

The health information companies as purchasers and resellers of physician-identifiable information are the appropriate parties to raise issues concerning the constitutionality of restraints on interstate commerce. There are, however, significant questions as to whether they are the appropriate parties to raise issues concerning the 1st Amendment.

The 1st Amendment guarantee of free speech, as valued as it is and should be, is not absolute. It does not, in Justice Holmes' words, protect one who falsely yells "fire" in a crowded theater and causes a panic. The guaranty must, in limited areas, give way to other rights valued by society. Moreover, there is a long line of cases that hold that "commercial speech" is less protected than other kinds of speech.

The rights of the health information companies to free speech, whether or not they exist here, are certainly less persuasive than the rights of the physicians who wrote the prescriptions and the rights of the pharmacies who filled the prescriptions, collecting and holding (if not owning) the physician-identifiable information.

Even the pharmaceutical companies who purchase the information appear to have more persuasive rights in the use of the information for purposes that society values, albeit commercial purposes.

As the first law in the country regulating physician-identifiable information, this case is a "test" case that will have far-reaching influence. It is important that not only the public but other interested groups, such as physicians, pharmacies and the pharmaceutical manufacturers, hear about and join the debate over the New Hampshire law. **NHR**