

IN THE
UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF NEW HAMPSHIRE

CASE NO. 1:06-cv-00280-PB

IMS HEALTH INCORPORATED, a Delaware)
corporation; and VERISPAN, LLC, a Delaware)
liability company,)
)
Plaintiffs,)
)
vs.)
)
KELLY A. AYOTTE, as Attorney General of)
the State of New Hampshire,)
)
Defendant.)
_____)

**BRIEF OF *AMICI CURIAE* eHEALTH INITIATIVE, NATIONAL ALLIANCE FOR
HEALTH INFORMATION TECHNOLOGY, AND SURESCRIPTS, LLC
IN SUPPORT OF PLAINTIFFS**

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I.

INTEREST OF *AMICI CURIAE* eHEALTH INITIATIVE, NATIONAL ALLIANCE FOR HEALTH INFORMATION TECHNOLOGY, AND SURESCRIPTS, LLC

Amici are organizations devoted to advancing the use of health information technology to help transform healthcare from today's inefficient, paper-based system to a better-connected electronic system that can reduce waste, curb medical errors, and help rein in runaway costs. Each organization believes that better communication and use of healthcare information can improve patient care and safety significantly. *Amici* have joined together to submit this brief because their missions – and the missions of their members and stakeholders – to improve the healthcare system are threatened by the misguided New Hampshire statute at issue in this case, and other similar legislation being considered elsewhere around the country – which may be adopted if the New Hampshire Prescription Restraint Law (N.H. Rev. Stat. Ann. §§ 318:47-f, 318:47-g, 318-B:12) law is allowed to stand.

At the heart of this case lies New Hampshire's unwarranted, severe restriction of communication about physician prescribing behavior, even when the information does not disclose patient identities.¹ *Amici* assert that the Prescription Restraint Law criminalizes information exchanges that improve healthcare nationwide, while doing absolutely nothing to accomplish the New Hampshire Legislature's stated objectives.

The Prescription Restraint Law applies – subject to narrowly limited and vaguely specified exceptions – to the license, transfer, use, or sale (*i.e.*, any exchange) of patient deidentified, prescriber identifiable prescribing information that could be used “to influence or

¹ In framing this lawsuit, plaintiffs IMS Health Incorporated and Verispan, LLC chose not to challenge the New Hampshire Prescription Restraint Law as it applies to patient-identifiable data. *See* Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction (“Plaintiffs' Memorandum”) at 1. Therefore, this *amicus* brief focuses on information that does *not* disclose patient identity, but does disclose the identity of the prescribing practitioner, which we refer to herein as “patient-deidentified/prescriber-identifiable” information or data.

evaluate the prescribing behavior of an individual health care professional.”² Ironically, the very purpose of the vast majority of health information technology/quality improvement projects being developed around the nation today seek to do the very things the New Hampshire Legislature has forbidden – to evaluate and influence positively the treatment decisions, including the prescribing decisions, of health professionals.

The reason for this is simple. Healthcare quality in the United States is highly variable and inconsistent, with more Americans dying each year from preventable medical errors than from AIDS or breast cancer. Institute of Medicine (“IOM”), *To Err is Human: Building a Safe Health System* (1999). That is why this case is so important. Criminalizing the use of patient deidentified/prescriber identifiable data – for any reason, but especially for reasons as vague and ill-defined as those behind the Prescription Restraint Law – will undermine efforts to make health information available and transparent. Simply put, in order to improve healthcare quality and efficiency, we need to know more – not less – about what physicians do and why they do it.

In enacting the Prescription Restraint Law, the New Hampshire Legislature apparently wanted to protect patient privacy. But, in addition to the fact that patient privacy already is protected by federal and state law, this stated purpose of the New Hampshire Prescription Restraint Law is wholly inconsistent with its actual scope and content. On its face, the Prescription Restraint Law applies not only to patient-identifiable information, but also to patient-deidentified/prescriber identifiable information; that is, information that indicates prescribers’ identities but does *not* reveal who the patients are. Prescribers and other healthcare providers do not and should not have a “privacy” interest in patient-deidentified information

² N.H. Rev. Stat. Ann. §§ 318:47-f.

about their professional conduct that would shield it from all scrutiny by those who have appropriate roles to play in evaluating and influencing it for the better.

Significantly, when Congress enacted the federal patient privacy law (the Health Insurance Portability and Accountability Act of 1996, or “HIPAA,” 42 U.S.C. § 1320d *et seq.*), Congress was careful to distinguish between “health information” and “individually identifiable health information,” finding that only the latter was worthy of protection from disclosure. This distinction made by Congress is critical to improving the quality and efficiency of the U.S. healthcare system, in that it recognizes the right of the public, healthcare payers, and a broad range of other organizations to evaluate, critique, and disclose the actual performance of physicians and other healthcare providers, and to develop new programs and services based on that performance information. In this sphere, as in many others, the key to progress is found in Justice Brandeis’s observation that sunlight is the best disinfectant.³

The New Hampshire Legislature also thought the Prescription Restraint Law could reduce healthcare costs by limiting doctors’ exposure to the influence of pharmaceutical company sales representatives. While controlling healthcare costs is a laudable and necessary goal, any connection between the Prescription Restraint Law and the goal of cost containment is imaginary, and unsupported by any rational theory of logic or healthcare economics. The Prescription Restraint Law places no restrictions whatever on pharmaceutical manufacturers or their “detailers,” and ignores the approaches that other states have adopted to address perceived excesses of pharmaceutical detailing by placing restrictions on marketing and inappropriate promotional activities. Instead, the Prescription Restraint Law illogically assumes that

³ “Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.” *Buckley v. Valeo*, 424 U.S. 1, 67, and n.80 (1976) (quoting Louis Brandeis, *Other People’s Money*, 62 (1933)).

