Report of the Vermont State Auditor

July 13, 2011

LITIGATION REPORT

As Required by Act No. 80, Sec. 22a of the Vermont General Assembly, 2007-2008 Session

(Pharmacy Benefit Manager and Other Prescription Drug-Related Legislation of Act No. 80)

Thomas M. Salmon, CPA
Vermont State Auditor
Rpt. No. 11-06

Mission Statement

The mission of the State Auditor's Office is to be a catalyst for good government by promoting professional audits, financial training, efficiency and economy in government and service to cities and towns.

THOMAS M. SALMON, CPA
STATE AUDITOR

STATE OF VERMONT
OFFICE OF THE STATE AUDITOR

July 13, 2011

Mr. Donald G. Milne, Clerk of the House
115 State Street, Drawer 33
Montpelier, VT 05633-5501

Mr. John Bloomer, Secretary of the Senate
115 State Street, Drawer 33
Montpelier, VT 05633-5501

Legislative Council
115 State Street, Drawer 33
Montpelier, VT 05633-5301

Dear Colleagues:

As required by Act No. 80, Sec. 22a, of the Public Acts of the 2007 Session, we are submitting our second annual report to the General Assembly on the State's litigation costs related to challenges to Act No. 80.

Litigation overview

The statute cited above states:

> **LITIGATION REPORT; AUDITOR**
>
> Beginning January 1, 2008 and annually thereafter, the state auditor shall provide a report to the general assembly with a detailed accounting of all amounts paid by the state with state or federal funds in connection with any litigation challenging the validity of this act or a section of this act. The report shall include costs, fees, damages, amounts paid to expert witnesses, salaries and benefits of state employees who work on the litigation, amounts paid to individuals under contract with the state who work on the litigation, attorney's fees awarded to the other party, any other amounts awarded by the court, and the number of hours spent by state employees involved in the litigation.

As noted in our January 2008 report, upon inquiry with the Attorney General's Office, we learned that two lawsuits had been filed challenging the Act in the United States District Court for the District of Vermont.

These were:

IMS HEALTH INCORPORATED; VERISPAN, LLC; and SOURCE HEALTHCARE ANALYTICS, INC., a subsidiary of WOLTERS KLUWER, HEALTH INC., Plaintiffs, v. WILLIAM H. SORRELL, as Attorney General of the State of Vermont, Defendant.
Civil Action No: 2:07 – cv – 00188 Filed August 29, 2007

PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA (PhRMA), Plaintiff, v. WILLIAM H. SORRELL, in his official capacity as Attorney General of the State of Vermont, JIM DOUGLAS, in his official capacity as Governor of the State of Vermont, and CYNTHIA D. LaWARE, in her official capacity as the Secretary of the Agency of Human Services of the State of Vermont, Defendants.
Civil Action No: 2:07 – cv – 00220 Filed October 22, 2007

The first lawsuit was filed by data-mining firms that acquire information from prescription records, including prescriber-identifiable information, and sell and/or license the information for use in marketing pharmaceutical drugs. The second lawsuit was filed by a pharmaceutical trade association on behalf of pharmaceutical manufacturers.

According to the Attorney General's Office, both cases primarily challenged Section 17 of the Act, which prohibits the use of prescriber-identifiable information in marketing pharmaceutical drugs unless the prescriber consents to that use.

Further, the lawsuit filed by PhRMA also challenges Section 20 of the Act, which creates a remedy under the Consumer Fraud Act for violations of federal law, and Section 21, which imposes a fee on manufacturers of pharmaceutical drugs. Plaintiffs in both cases argued that the Act violates the First Amendment and the Commerce Clause and is preempted by federal law, according to information from the Attorney General's Office.

Pretrial preparations included depositions of approximately 40 witnesses over a period of several months in 2008, according to the Attorney General's Office. A trial was conducted in the federal district court in Brattleboro in July and August 2008. The trial schedule included in last year's report identified witnesses and proposed witnesses in the case. The parties filed written arguments and rebuttals over a period of several months after the trial.

On April 23, 2009, the federal district court issued its decision in the two lawsuits. The court rejected arguments that the law was unconstitutional. Both plaintiffs appealed that decision to the Second Circuit Court of Appeals and asked that Court to enjoin the enforcement of the law

until the appeal was decided. On June 26, 2009, the Court of Appeals denied the request for an injunction, so the law went into effect on July 1, 2009.

On October 13, 2009, the Court of Appeals heard arguments on the merits of the appeal from the federal district court decision. On November 23, 2010, the Court of Appeals panel ruled in a 2 -1 decision that the Vermont law was unconstitutional.

On June 23, 2011, a 6 - 3 majority of the United States Supreme Court affirmed the Court of Appeals decision and rejected Act 80, the Vermont law restricting the use of doctor's prescription records for drug marketing activities.

Cost Summary

We have received and reviewed a cost summary from the business manager of the Attorney General's Office which summarizes the 2010 and 2011 litigation costs related to the legislation passed in Act No. 80 of the 2007 Session, as shown in the table below. The total reported costs for 2010 and 2011 are $193,016.78.

The total direct litigation cost associated with Act No. 80 as of June 30, 2011, is $634,678, including $345,227 in staff salaries and benefits. These costs do not include any attorney's fees or other amounts which may be awarded by the court.

OFFICE OF THE ATTORNEY GENERAL
Act No. 80 Litigation Report Employee Labor Cost Format
Calendar Years 2010 and 2011
(January 1, 2010 to June 30, 2011)

Position Number	Average Hourly Pay Rate 1/01/10 - 6/30/11	Worked Hours	Salaries	Benefits	Total Salaries Benefits
Attorney					
197045	36.96	687.00	25,391.54	4,594.60	29,986.14
197051	36.19	337.00	12,196.03	5,739.95	17,935.98
197011	33.32	0.00	0.00	0.00	0.00
197029	22.00	0.00	0.00	0.00	0.00
197042	24.00	431.00	10,344.00	3,698.00	14,042.00
197058	37.55	0.00	0.00	0.00	0.00
Management					
197001	52.02	32.00	1,664.64	575.02	2,239.66
197002	48.92	16.00	782.72	239.47	1,022.19
Staff					
190012	16.70	24.50	513.53	143.26	656.79
190008	23.71	74.75	1,772.43	1,036.48	2,808.91
	Total Salaries/Benefits	**1602.25**	**52,664.89**	**16,026.78**	**68,691.67**

Specific Case Related Expenditures	**124,325.11**
Total Personal Services and Operating	**193,016.78**

Act No. 80 Litigation Report - Total Costs
7/1/07 - 6/30/11

Personal costs: salary & benefits	**$345,227**
Operation expenses	
Travel expenses	38,251
Subpoena	7,651
Transcripts	69,592
Software support	5,794
Experts	159,927
Miscellaneous *	8,236
Total operating expenses	**$289,451**
Total Litigation Costs	**$634,678**

- Includes $6,205 in operating costs incurred in 2009 which were not itemized

The 2008, 2009 and this report are available on the Auditor's website. The 2008 report contains the following information: (1) Act No. 80 of the Vermont General Assembly, 2007-2008 Session as Appendix I, (2) IMS HEALTH INC; VERISPAN, LLC; AND SOURCE HEALTHCARE ANALYTICS, INC. v. WILLIAM H. SORRELL as Appendix II, and (3) PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA v. WILLIAM H. SORRELL, JIM DOUGLAS, AND CYNTHIA LaWARE as Appendix III. This report contains the syllabus of the Supreme Court Decision.

Please feel free to contact me about this report at anytime.

Sincerely,

Thomas M. Salmon CPA

Thomas M. Salmon, CPA
Vermont State Auditor

Note: Ten copies of this report are being provided to the state librarian and a copy has been posted on our website at: www.auditor.vermont.gov.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

SORRELL, ATTORNEY GENERAL OF VERMONT, ET AL. *v.* IMS HEALTH INC. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 10–779. Argued April 26, 2011—Decided June 23, 2011

Pharmaceutical manufacturers promote their drugs to doctors through a process called "detailing." Pharmacies receive "prescriber identifying information" when processing prescriptions and sell the information to "data miners," who produce reports on prescriber behavior and lease their reports to pharmaceutical manufacturers. "Detailers" employed by pharmaceutical manufacturers then use the reports to refine their marketing tactics and increase sales to doctors. Vermont's Prescription Confidentiality Law provides that, absent the prescriber's consent, prescriber-identifying information may not behold by pharmacies and similar entities, disclosed by those entities for marketing purposes, or used for marketing by pharmaceutical manufacturers. Vt. Stat. Ann., Tit. 18, §4631(d). The prohibitions are subject to exceptions that permit the prescriber-identifying information to be disseminated and used for a number of purposes, *e.g.,* "health care research." §4631(e).

Respondents, Vermont data miners and an association of brand name drug manufacturers, sought declaratory and injunctive relief against state officials (hereinafter Vermont), contending that §4631(d) violates their rights under the Free Speech Clause of the First Amendment. The District Court denied relief, but the Second Circuit reversed, holding that §4631(d) unconstitutionally burdens the speech of pharmaceutical marketers and data miners without adequate justification.

Held:

Vermont's statute, which imposes content- and speaker-based burdens on protected expression, is subject to heightened judicial scrutiny. Pp. 6–15. 2

SORRELL *v.* IMS HEALTH INC.

Syllabus

(a) On its face, the law enacts a content-and speaker-based restriction on the sale, disclosure, and use of prescriber-identifying information. The law first forbids sale subject to exceptions based enlarge part on the content of a purchaser's speech. It then bars pharmacies from disclosing the information when recipient speakers will use that information for marketing. Finally, it prohibits pharmaceutical manufacturers from using the information for marketing. The statute thus disfavors marketing, *i.e.,* speech with a particular content, as well as particular speakers*, i.e.*, detailers engaged in marketing on behalf of pharmaceutical manufacturers. *Cincinnati* v. *Discovery Network, Inc.*, 507 U. S. 410, 426; *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 658. Yet the law allows prescriber-identifying information to be purchased, acquired, and used for other types of speech and by other speakers. The record and formal legislative findings of purpose confirm that §4631(d) imposes an aimed, content-based burden on detailers, in particular detailers who promote brand-name drugs. In practical operation, Vermont's law "goes even beyond mere content discrimination, to actual viewpoint discrimination." *R. A. V.* v. *St. Paul*, 505 U. S. 377, 391. Heightened judicial scrutiny is warranted. Pp. 8–11.

(b) Vermont errs in arguing that heightened scrutiny is unwarranted. The State contends that its law is a mere commercial regulation. Far from having only an incidental effect on speech, however, §4631(d) imposes a burden based on the content of speech and the identity of the speaker. The State next argues that, because prescriber-identifying information was generated in compliance with a legal mandate, §4631(d) is akin to a restriction on access to government-held information. That argument finds some support in *Los Angeles Police Dept.* v. *United Reporting Publishing Corp.*, 528 U. S. 32, but that case is distinguishable. Vermont has imposed a restriction on access to information in private hands. *United Reporting* reserved that situation—*i.e.,* "a case in which the government is prohibiting a speaker from conveying information that the speaker already

possesses." *Id.,* at 40. In addition, the *United Reporting* plaintiff was presumed to have suffered no personal First Amendment injury, while respondents claim that §4631(d) burdens their own speech. That circumstance warrants heightened scrutiny. Vermont also argues that heightened judicial scrutiny is unwarranted because sales, transfer, and use of prescriber-identifying information are conduct, not speech. However, the creation and dissemination of information are speech for First Amendment purposes. See, *e.g.*, *Bartnicki* v. *Vopper*, 532 U. S. 514, 527. There is no need to consider Vermont's request for an exception to that rule. Section 4631(d) imposes a speaker- and content-based burden on protected expression, and that circumstance is sufficient to justify applying heightened scrutiny, even assuming that prescriber-identifying information is a mere commodity. Pp. 11–15.

2. Vermont's justifications for §4631(d) do not withstand heightened scrutiny. Pp. 15–24.

(a) The outcome here is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied, see, *e.g.*, *Greater New Orleans Broadcasting Assn., Inc.* v. *United States*, 527 U. S. 173, 184. To sustain §4631(d)'s targeted, content-based burden on protected expression, Vermont must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest. See *Board of Trustees of State Univ. of N. Y. v. Fox,* 492 U. S. 469, 480–481. Vermont contends that its law (1) is necessary to protect medical privacy, including physician confidentiality, avoidance of harassment, and the integrity of the doctor-patient relationship, and (2) is integral to the achievement of the policy objectives of improving public health and reducing healthcare costs. Pp. 15–17.

(b) Assuming that physicians have an interest in keeping their prescription decisions confidential, §4631(d) is not drawn to serve that interest. Pharmacies may share prescriber-identifying information with anyone for any reason except for marketing. Vermont might have addressed physician confidentiality through "a more coherent policy," *Greater New Orleans Broadcasting*, *supra*, at 195, such as allowing the information's sale or disclosure in only a few narrow and well-justified circumstances. But it did not. Given the information's widespread availability and many permissible uses, Vermont's asserted interest in physician confidentiality cannot justify the burdens that §4631(d) imposes on protected expression. It is true that doctors can forgo the law's advantages by consenting to the sale, disclosure, and use of their prescriber-identifying information. But the State has offered only a contrived choice: Either consent, which will allow the doctor's prescriber-identifying information to be disseminated and used without constraint; or, withhold consent, which will allow the information to be used by those speakers whose message the State supports. Cf. *Rowan* v. *Post Office Dept.*, 397 U. S.

728. Respondents suggest a further defect lies in §4631(d)'s presumption of applicability absent an individual election to the contrary. Reliance on a prior election, however, would not save a privacy measure that imposed an unjustified burden on protected expression. Vermont also asserts that its broad content-based rule is necessary to avoid harassment, but doctors can simply decline to meet with detailers. Cf. *Watchtower Bible & Tract Soc. of N. Y., Inc.* v. *Village of Stratton*, 536 U. S. 150, 168. Vermont further argues that detailers' use of prescriber-identifying information undermines the doctor patient relationship by allowing detailers to influence treatment decisions. But if pharmaceutical marketing affects treatment decisions, it can do so only because it is persuasive. Fear that speech might persuade provides no lawful basis for quieting it. Pp. 17–21.

(c) While Vermont's goals of lowering the costs of medical services and promoting public health may be proper, §4631(d) does not advance them in a permissible way. Vermont seeks to achieve those objectives through the indirect means of restraining certain speech by certain speakers—*i.e.,* by diminishing detailers' ability to influence prescription decisions. But "the fear that people would make bad decisions if given truthful information" cannot justify content-based burdens on speech. *Thompson* v. *Western States Medical Center*, 535
U. S. 357, 374. That precept applies with full force when the audience—here, prescribing physicians—consists of "sophisticated and experienced" consumers. *Edenfield* v. *Fane*, 507 U. S. 761, 775. The instant law's defect is made clear by the fact that many listeners find detailing instructive. Vermont may be displeased that detailers with prescriber-indentifying information are effective in promoting brand name drugs, but the State may not burden protected expression in order to tilt public debate in a preferred direction. Vermont nowhere contends that its law will prevent false or misleading speech within the meaning of this Court's First Amendment precedents. The State's interest in burdening detailers' speech thus turns on nothing more than a difference of opinion.
Pp. 21–24.

630 F. 3d 263, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS,
C. J., and SCALIA, THOMAS, ALITO, and SOTOMAYOR, JJ., joined. BREYER, J., filed a dissenting opinion, in which GINSBURG and KAGAN, JJ., joined. _____ 1 Cite as: 564 U. S. ____ (2011)