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Sorrell v. IMS Health Inc.: What Marketers Need to Know

Presentation for The DMA
July 11, 2011

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Case Background

- VT's Prescription Confidentiality Act of 2007
 - Pharmacies restricted from sale of anonymized prescriber data for marketing purposes
 - Used by pharma companies to craft targeted marketing to physicians
 - Opt-in regime



Prologue: *LAPD v. United Reporting*

- Challenge to law that only burdened use of data for solicitation;
- Court split on legality;
- Issue postponed until *Sorrell*



The Outcome

- Law raises First Amendment concerns;
- Heightened scrutiny applies;
- Law found to burden protected speech;
- Extended constitutional protection for commercial speech



What about privacy?

- Can't physicians just consent to information sharing?
- Shouldn't physicians be protected from marketers?
- Doesn't use of data undermine the doctor-patient relationship?



Privacy is not enough...

- Physicians might have a “reasonable expectation” in keeping prescription information confidential, BUT
 - Does not justify such a broad law
 - State cannot support privacy only on terms favorable to speech that state prefers



Sorrell's Implications

- Information is not beef jerky!



What does *Sorrell* not do?

- Court declines to declare all restrictions on use of data for marketing purposes unconstitutional;
- Fate of similar law in Maine is open question;
- Opt-in v. opt-out debate postponed.



What this means for marketers

- Closer scrutiny of laws that disfavor certain speakers (marketers)
- Closer scrutiny of laws that disfavor certain types of speech (marketing) through restrictions on data collection or transfer



Broader Implications

- Legislative proposals seeking to regulate commercial data practices face high constitutional hurdles
- Implications for pending privacy legislation such as the Kerry-McCain “Commercial Privacy Bill of Rights Act of 2011” and Do-Not-Track legislation





Thank You!

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