PDMP case pits patient privacy against law-enforcement intrusion

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Fear that law-enforcement scrutiny may deter a patient from seeking medical treatment or make a physician reluctant to prescribe pain medications to patients is “speculative,” a federal appeals court ruled recently in a case regarding the privacy of records held in prescription drug-monitoring databases. Concern about potential privacy intrusion doesn’t qualify as an imminent injury that can be addressed in court, the court said.

On this and other procedural grounds, a three-judge panel from the 9th U.S. Circuit Court of Appeals reversed a U.S. District Court ruling that prohibited the U.S. Drug Enforcement Administration (DEA) from accessing records in the Oregon Prescription Drug Monitoring Program (PDMP) without a warrant based on probable cause.

The legislation that created the Oregon PDMP in 2009 stipulated that law-enforcement access be allowed only after the issue of a court order based on probable cause requested by a law-enforcement investigation involving the “person for whom the requested information pertains.”

So, when the DEA attempted to access the database using administrative subpoenas not subject to judicial review, the Oregon PDMP refused to comply—stating that it would be against state law to do so. The state agency also sued in federal court for a judgment on whether the federal subpoena could override state law.

The American Civil Liberties Union Foundation of Oregon, along with a physician and four patients, intervened in the case arguing that the Fourth Amendment of the U.S. Constitution granted them a reasonable expectation of privacy over their confidential medical records.

“It is difficult to conceive of information that is more private or more deserving of Fourth Amendment protections,” U.S. District Judge Ancer Haggerty wrote in his Feb. 11, 2014, ruling.

Unwarranted disclosure could harm care

The DEA appealed, arguing that the risk of public disclosure stemming from a future records request was “especially non-imminent and speculative” and that their request for PDMP data did not “unreasonably intrude upon any legitimate privacy expectation” as medical information is “regularly shared with a variety of third parties.”

“Whatever right to privacy an individual may have in his medical information, it is not absolute,” the DEA stated in its appellate reply brief.

The Litigation Center of the American Medical Association and the medical association from the states covered by the 9th Circuit (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada and Oregon) filed an amicus brief in support of the Oregon PDMP and the interveners. The brief advised the court that unwarranted disclosure of PDMP data could compromise care.

The brief specifically argued against the DEA point that patient information is already regularly shared.

“The patient’s high expectation of privacy is not diminished when a patient fills a prescription provided by her physician for her treatment, merely because the state then collects and centralizes that data,” the Litigation Center brief stated.

It also cited a report from the Congressional Research Service, which found “that physicians may fear prosecution if they prescribe in good faith, and that studies have shown that physicians may use less efficacious drugs to treat patients out of fear that law enforcement will focus on prescriptions for more potent medications.”

Patient-physician relations at risk

The brief concluded by arguing the integrity of the patient-physician relationship was at stake.

“Patients must be able to expect that their communications and treatment will remain private, an expectation that is manifestly essential to a doctor’s ability to get the whole picture from the patient to enable accurate diagnosis and effective treatment,” the brief stated. “The state is entitled to establish a PDMP for health care purposes and safeguard against its being repurposed by law enforcement.”

The appeals panel heard arguments Nov. 7, 2016, in Portland, Oregon. In its ruling, the three judges stated that the ACLU and the five individuals did not have legal standing in the case and that Oregon’s statute was preempted by the federal Controlled Substances Act.

By removing the ACLU and the others from the case, Circuit Judge Margaret McKeown wrote that “we reverse without reaching the merits of the Fourth Amendment claim.” She added that Oregon still has the right to contest subpoenas.

McKeown cited a 2013 U.S. Supreme Court decision in which Amnesty International USA had sued then Director of National Intelligence James Clapper. The court ruled that interveners’ injuries had to be “concrete, particularized and actual or imminent,” and “fairly traceable to the challenged action.”

“We acknowledge the particularly private nature of the medical information at issue here and thus do not question the seriousness of intervenors’ fear of disclosure,” McKeown wrote. “Nor do we imply that this concern is unreasonable. Nevertheless, we are bound by *Clapper*, which rejected a comparable argument.”

No decision has been made yet regarding whether to appeal the decision before the U.S. Supreme Court or before an 11-judge, or en banc, panel of 9th Circuit judges. An Oregon Health Authority representative said attorneys are reviewing the three-judge panel’s opinion and will meet later this month to discuss its impact and options for going forward.

Leo Beletsky, an associate professor of law and health sciences at Northeastern University in Boston, said he sees the proceedings as a bellwether case that could lead to more PDMP legal challenges in a struggle between patient and physician concerns about privacy and law-enforcement efforts to secure routine access to prescribing data.

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