NAMSDL Case Law Update

September 6, 2017

In This Issue

This issue of *NAMSDL Case Law Update* focuses on seven cases related to the access to and use of prescription monitoring program ("PMP") records. The issues addressed in these decisions involve: (1) the preemption of state law by the administrative subpoena provisions of the Controlled Substances Act ("CSA") (21 U.S.C. § 876); (2) privacy rights implicated by accessing PMP records; and (3) whether or not certain login information constitutes protected PMP information. The cases discussed in this issue originate from California, Louisiana, Mississippi, Oregon, Utah, and Virginia. Cases are divided by type of court (federal or state) and then listed in approximate descending order of appellate level.

CASES IN THIS ISSUE

Oregon Prescription Drug Monitoring Program, et al. vs. United States Drug Enforcement Administration, U.S. Court of Appeals for the Ninth Circuit, Case No. 14-35402, 860 F.3d 1228, June 26, 2017.

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Daniel Maddox vs. City of Brandon, Mississippi, et al., U.S. District Court for the Southern District of Mississippi, Case No. 3:15-cv-00866.

Alwin Lewis vs. Superior Court for the State of California and the Medical Board of California, Supreme Court of California, Case No. S219811, 397 P.3d 1011, July 17, 2017.

State of Louisiana v. Bobby L. Brock, Supreme Court of Louisiana, Case No. 15–K–2165, 210 So.3d 276, February 24, 2017.

Derrick Dean, M.D. v. St. Mary Emergency Group, LLC, et al., Court of Appeal of Louisiana, Third Circuit, Case No. 16-1064, 221 So.3d 988, May 17, 2017.

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Federal Cases

Oregon Prescription Drug Monitoring Program, et al. vs. United States Drug Enforcement Administration, U.S. Court of Appeals for the Ninth Circuit, Case No. 14-35402, 860 F.3d 1228, June 26, 2017. Earlier issues of the *NAMSDL Case Law Update* contain a full summary of this case. In 2012, the Oregon PMP sought a declaratory judgment against the U.S. Drug Enforcement Administration ("DEA") that the PMP is not obligated to respond to DEA's administrative subpoenas for PMP information because Oregon law allows disclosure to a federal law enforcement agency only pursuant to "a valid court order based on probable cause." The American Civil Liberties Union ("ACLU") intervened as a plaintiff in the matter on behalf of five individuals (four patients and one physician) to argue with respect to their specific protected health information and Fourth Amendment rights. In 2014, a federal district court granted ACLU's motion for summary judgment on grounds that patients and physicians each have a subjective expectation of privacy in their prescription and prescribing records. As a result, law enforcement must obtain a court order based on probable cause before receiving PMP information in Oregon. DEA appealed the decision to the U.S. Court of Appeals for the Ninth Circuit.

The Ninth Circuit reversed the district court's decision in an opinion issued in June 2017. Relying on a U.S. Supreme Court case issued this year, the Ninth Circuit first held that the intervenors could not establish sufficient standing separate from the Oregon PMP to assert their Fourth Amendment and Administrative Procedures Act claims. Because the DEA's two subpoenas related to individuals other than the intervenors, the Ninth Circuit found intervenors' theory of injury too speculative to be addressed in the case. The Ninth Circuit then held that Oregon's statute requiring a valid court order based on probable cause prior to disclosure of PMP information is preempted by the administrative subpoena provisions of the CSA because it "stands as an obstacle to the full implementation of the CSA" by placing "the initial burden of requiring a court order to enforce the subpoena upon the DEA." The court noted, however, that its holding "preserves Oregon's option to contest subpoenas for protected information and thus trigger the enforcement procedure" described in the CSA (at 21 U.S.C. § 876(c)). Under the CSA, if the subpoenaed party refuses to comply, the DEA can "invoke the aid of any court of the United States within the jurisdiction of which the investigation is carried on or of which the subpoenaed person is an inhabitant, or in which he carries on business or may be found, to compel compliance with the subpoena."

Eve Davis vs. Wal-Mart Stores East, L.P., et al., U.S. Court of Appeals for the Fourth Circuit, Case No. 16-1677, --- Fed. Appx. ---, 2017 WL 1545416, May 1, 2017. Earlier issues of the *NAMSDL Case Law Update* contain a full summary of this case. The Plaintiff is a woman who spent 16 days in jail after arrest for attempting to fill a suspected fraudulent prescription at a Wal-Mart pharmacy in Virginia. The Commonwealth dropped the charges after determining that the prescription was valid. Plaintiff sued Wal-Mart, the Wal-Mart pharmacist who reported the Plaintiff to the police, and the deputy who arrested her. In her complaint, Plaintiff asserted, among other things, that: (1) Wal-Mart and the pharmacist committed negligence and negligence *per se* in knowingly disclosing Plaintiff's PMP information to individuals not allowed under Virginia law to receive such information; and (2) Wal-Mart failed to adequately train its employees on the proper uses of the PMP. In April 2016, a federal district court dismissed (without prejudice) all counts against Wal-Mart and the pharmacist. The Plaintiff appealed the ruling to the U.S. Court of Appeals for the Fourth Circuit.

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On appeal, the Fourth Circuit, in an unpublished decision in May 2017, affirmed in part and vacated in part the dismissal of Plaintiff's claims against Wal-Mart and the pharmacist. The Fourth Circuit affirmed the dismissal of six of Plaintiff's claims, including the negligence *per se* count premised on the disclosure of PMP information. According to the Fourth Circuit, a plaintiff who asserts negligence *per se* under Virginia law must establish that a defendant violated "a statute enacted for public safety." Here, the Plaintiff fails because "there is no indication from the face of the [unlawful disclosure of PMP information] statute that it was 'enacted for public health and safety reasons.'" The Fourth Circuit, however, vacated the dismissal of Plaintiff's claim for negligence *per se* premised on unprofessional conduct by a pharmacy or pharmacist, and remanded the case back to the district court for further proceedings.

U.S. Department of Justice v. Utah Department of Commerce and Utah Division of Occupational & Professional Licensing, United States District Court for the District of Utah, Case No. 16-CV-611, 2017 WL 3189868, July 27, 2017. This case presents a similar legal question as is addressed in the *Oregon PMP* case discussed above, and results in a similar holding. Briefly summarizing, the State of Utah refused to comply with an administrative subpoena seeking PMP records served by DEA on grounds that Utah law requires investigating law enforcement to have "a valid search warrant" to obtain such information. DEA petitioned a federal district court for judicial enforcement of the subpoena, while several other parties intervened to oppose the petition on privacy and constitutional grounds. In a decision issued in July 2017, the district court found for the DEA and required the State to comply with the subpoena within 21 days. As part of the decision, the court first found, unlike in the *Oregon PMP* case, that the intervenors have standing to appear in the case because their interests align with the State. Second, the court observed that the State and the intervenors are "strange bedfellows," because intervenors' allegedly sensitive information is already in the hands of a governmental entity—the State—which collects and controls the information. Third, the court noted, "[p] rescription drugs are a highly regulated industry in which patients and doctors do not have a reasonable expectation of privacy" and thus there is an expectation under the CSA that "the prescription and use of controlled substances will happen under the watchful eye of the federal government." Finally, as in the *Oregon PMP* case, the court held that the CSA's administrative subpoena provision preempts state law, at least as to federal law enforcement access to the information. Nevertheless, the court did infer that that the Utah provision requiring state and local law enforcement to obtain a search warrant remains a valid use of the State's authority.

Daniel Maddox vs. City of Brandon, Mississippi, et al., U.S. District Court for the Southern District of Mississippi, Case No. 3:15-cv-00866. Earlier issues of the *NAMSDL Case Law Update* contain a full summary of this case. Plaintiff filed this case against the City of Brandon, Mississippi and others asserting that one Defendant, an investigator with the Brandon Police Department, improperly accessed Plaintiff's PMP records without a warrant, subpoena, or other judicial process. Plaintiff alleges violations of the Fourth Amendment prohibition against unreasonable search and seizure; Fifth and Fourteenth Amendment prohibitions against deprivation of life, liberty, or property without due process of law; and invasion of privacy. Defendants answered the Complaint and denied any wrongdoing. In the fall of 2016, both sides filed motions for summary judgement. Both motions were filed "under seal" (presumably due to the presence of individual health records), and thus are not reviewable by the public. In March 2017, the federal district court granted Defendants' motion in a decision also issued under seal and dismissed the case with prejudice. Although the court's full decision is not available for review, Plaintiff's subsequent motion for reconsideration (and the court's denial) is available, which sheds some light on the court's reasoning. It appears

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that the court dismissed Plaintiff's state law claims against the City for a failure to wait at least 90 days to file suit after providing notice of the claim, as is required under the Mississippi Tort Claims Act. As for Plaintiff's Fourth Amendment assertions, the court's ruling notes that it found "no controlling authority holding that the Fourth Amendment requires a warrant, subpoena or other judicial authorization for law enforcement officials to obtain an individual's prescription records for controlled substances where state law requires that prescription records for controlled substances be maintained and authorizes disclosure to law enforcement officials." In fact, the court apparently determined that "by far, the majority of courts that have considered this issue have found the Fourth Amendment is not violated in the same or similar circumstances."

State Cases

Alwin Lewis vs. Superior Court for the State of California and the Medical Board of California, Supreme Court of California, Case No. S219811, 397 P.3d 1011, July 17, 2017. Earlier issues of the *NAMSDL Case Law Update* contain a full summary of this case. The Plaintiff, a doctor, filed this case in September 2012, alleging that the Medical Board of California ("Board") violated his patients' privacy rights when the Board accessed his prescription records for all patients through the state's PMP during the Board's investigation into an administrative complaint against him. After the investigation, the Board disciplined Plaintiff for failing to maintain accurate prescription records. Subsequently, Plaintiff sought judicial review of the Board's ruling. At the trial level, Plaintiff argued that the Board violated his patients' informational privacy rights under the California Constitution by accessing their prescription records in the PMP. The trial court denied his petition, stating that the right to privacy is not absolute and must be weighed against the compelling state interest in preventing prescription drug abuse. At the intermediate appellate level, Plaintiff argued that the law allowing the Board to review patient records in the PMP without a warrant or subpoena violated the Fourth Amendment of the U.S. Constitution and Article I of the California Constitution. The Court of Appeals disagreed and found that: (1) there is a lowered expectation of privacy in prescription records versus medical records; but (2) even if the expectation of privacy is heightened, the State has a compelling interest in controlling the diversion and abuse of controlled substances and such interest would trump any such expectation of privacy. Plaintiff then asked the Supreme Court of California for review.

The Supreme Court of California affirmed the appellate court in a decision issued in July 2017. The court first rejected the Board's contention that Plaintiff lacked standing to assert his patients' privacy rights in the case. According to the court, a physician has "an interest in patients seeking appropriate treatment and using appropriate medication," and thus any reluctance on a patient's part to seek treatment because of government access to PMP records affects the physician as well. In addition, these patients could not assert their own rights in the matter because they were never given notice that their PMP records were accessed. However, the court then rejected the Plaintiff's assertion that the Board violated the California Constitution by accessing his PMP records. Using a general balancing of interests test, the court concluded that the "Board's interests in protecting the public from unlawful use and diversion of a particularly dangerous class of prescription drugs and protecting patients from negligent or incompetent physicians" exceed the invasion of the patients' privacy caused by the release or records. Finally, the court held that Plaintiff had forfeited his claim under the Fourth Amendment by failing to raise it at either the administrative hearing or the trial court.

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State of Louisiana v. Bobby L. Brock, Supreme Court of Louisiana, Case No. 15–K–2165, 210 So.3d 276, February 24, 2017. The State of Louisiana charged Defendant with obtaining controlled substances in violation of Louisiana's "doctor shopping" statute. At trial, Defendant sought to suppress evidence of his prescriptions that a state police investigator obtained from Louisiana's PMP without a search warrant, on grounds that this violated his Fourth Amendment protection against unreasonable searches and seizures. The trial court denied the motion and Defendant pled guilty while reserving his right to appeal. On appeal, a Louisiana intermediate appellate court reversed the decision, reasoning that the case of *State v. Skinner*, 10 So.3d 1212 (La. 2009) applied to PMP records. In *Skinner*, the Supreme Court of Louisiana held that the procedural requirements of a statute allowing a health care provider to disclose medical and prescription records pursuant only to a subpoena "do not suffice to comply with the constitutional requirements of probable cause supported by a sworn affidavit for the issuance of a search warrant." Upon review in *Brock*, the Supreme Court agreed with the intermediate court that *Skinner* applies to "require a search warrant before a search of prescription and medical records for criminal investigative purposes is permitted." According to the court, the fact that the investigator "complied with the administrative procedure set out in [Louisiana's access to prescription monitoring information statute] did not excuse his warrantless search."

Derrick Dean, M.D. v. St. Mary Emergency Group, LLC, et al., Court of Appeal of Louisiana, Third Circuit, Case No. 16-1064, 221 So.3d 988, May 17, 2017. After settling a medical malpractice action filed against him, a Louisiana emergency room doctor sued his defense attorney for legal malpractice. As part of the legal malpractice case, the law firm sought to compel the Louisiana Board of Pharmacy ("Board") to disclose "the date, time and portal location" of the doctor's logins to the state PMP specific to the deceased patient. The Board refused to produce the information, relying on Louisiana statutory law (LSA-R.S. § 40:1007(A)), which provides in part that "prescription monitoring information submitted to the board shall be protected health information" and "[p]rescription monitoring information shall not be available for civil subpoena from the board nor shall such information be disclosed, discoverable, or compelled to be produced in any civil proceeding . . . ." A state trial court granted the law firm's motion and the Board appealed. On appeal, the state intermediate appellate court affirmed the decision, concluding that "[a] timestamp, portal location identifier, and search query is not data submitted to the PMP." Moreover, the court added, even if such information constitutes submitted data, it is "not the substantive data that the legislature intended to protect" under the law. With respect to the Board's contention that a search query by itself reveals patient identity, the court disagreed, stating that the query "reveals nothing about the nature of the record contained therein" or such person's prescription drug use.

Research is current as of August 28, 2017. In order to ensure that the information contained herein is as current as possible, research is conducted using nationwide legal database software and individual state legislative websites. Please contact Jon Woodruff at (703) 836-6100, ext. 100 or jwoodruff@namsdl.org with any additional updates or information that may be relevant to this document. This document is intended for educational purposes only and does not constitute legal advice or opinion. This project was supported by Grant No. G1599ONDCP03A, awarded by the Office of National Drug Control Policy. Points of view or opinions in this documents are those of the author and do not necessarily represent the official position or policies of the Office of National Drug Control Policy or the United States Government.