

*Discussion*

The North Carolina Supreme Court affirmed the decision of the assistant clerk based on the evidence provided. In doing so, the court noted that even when his actions are in compliance with the conditions of the trust, the assistant clerk may remove the guardian if his actions constituted waste and mismanagement of the trust assets and if his duties as guardian and trustee were not carried out reasonably and prudently and in a manner that served in the best interest of the beneficiary. Further, as in other areas of the law, the court granted broad deference to the decision made by the trial tribunal, in this case the assistant clerk, and reaffirmed that the correct standard of review for the assistant clerk's decision is abuse of discretion.

Disclosures of financial or other potential conflicts of interest: None.

## Extent of State's Ability to Regulate Information Disclosures From Prescription Drug Monitoring Programs

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**An Oregon State Statute Requiring a Court Order Before Disclosing Prescription Monitoring Information to the Drug Enforcement Agency is Pre-empted by the Federal Controlled Substances Act**

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In *Oregon Prescription Drug Monitoring Program v. U.S. Drug Enforcement Admin.*, 860 F.3d 1228 (9th Cir. 2017), the U.S. Drug Enforcement Administration (DEA) successfully appealed a summary judgment by the U.S. District Court for the District of Oregon in favor of the Oregon Prescription Drug Monitoring Program (PDMP) and several unaffiliated intervenors. The PDMP had brought action against the DEA seeking a declaratory judgment

that, pursuant to state law, the DEA must obtain a court order to enforce administrative subpoenas issued under the Controlled Substances Act (CSA). The Court of Appeals for the Ninth Circuit found that the DEA's ability to issue administrative subpoenas related to investigations granted by the CSA preempted state requirements for court orders before releasing PDMP information. The intervenors had argued that the subpoenas violated their Fourth Amendment rights. The court did not adjudicate the intervenors' claim because they lacked the Article III standing necessary to seek different relief than Oregon had sought.

*Facts of the Case*

Oregon's PDMP is established by Or. Rev. Stat. § 431A.855 (year) (renamed from Or. Rev. Stat. § 431.966 in 2015) and is operated by the Oregon Health Authority. When pharmacies in Oregon dispense drugs classified in DEA Schedules II–IV, they are required to report information, including patient name and prescriber details. The reports comprise Protected Health Information (PHI), which, per state law, may be disclosed only in limited circumstances (Or. Rev. Stat. § 431A.865 (2015)). The DEA had issued two administrative subpoenas requesting PHI from the PDMP. In response, the PDMP brought an action to the U.S. District Court for the District of Oregon seeking a declaration that a request for PHI could be honored only when accompanied by a federal court order. Several parties joined the action as “intervenors,” including individual plaintiffs (four patients and one prescribing doctor). The intervenors argued that the DEA's use of administrative subpoenas violated their Fourth Amendment rights concerning PHI. They sought a declaration and injunction “prohibiting the DEA from obtaining prescription records from the PDMP without securing a probable cause warrant” (*Oregon PDMP*, p 1232).

The patients argued that as consumers of various Schedule II–IV medications, knowledge that the DEA could in the future obtain records of their medication use was causing them psychological distress. They also argued that this could adversely affect their future treatment choices and behavior. The prescribing physician argued knowledge that he could be investigated concerning his Oregon prescribing would change his prescribing behavior and made him more reluctant to prescribe Schedule II–IV

medications. The district court granted the motion to intervene and held that the DEA's using administrative subpoenas to procure information from the PDMP represented a violation of the Fourth Amendment. The DEA appealed the decision to the Ninth Circuit.

#### *Ruling and Reasoning*

The Ninth Circuit reversed the ruling by the district court. The court found that Oregon's statute requiring a court order before disclosing PDMP information conflicted with relevant federal law. The Ninth Circuit noted the Supremacy Clause granted Congress power to expressly pre-empt state laws. In the CSA, Congress had included a pre-emption provision, indicating state law was "preempted whenever 'there is a positive conflict between [a] provision of th[e] CSA and [a] State law so that the two cannot consistently stand together'" (*Oregon PDMP*, p 1236). In analyzing whether this pre-emption provision applied in the current case, the court had to determine whether it was physically impossible to comply with both the state and federal regulations or whether the state regulation would be an impediment to the implementation and achievement of Congress' complete goals and purposes.

The court concluded that there was no physical impossibility preventing compliance with state and federal regulations in the present matter. Therefore, the analysis shifted to whether the state law requiring a court order for release of PDMP information represented "a 'sufficient obstacle' to the operation of 21 U.S.C. § 876 [the "Subpenas" subsection of the CSA]" (*Oregon PDMP*, p 1236). Congress' legislative scheme specified the Attorney General could acquire documents as well as testimony through the use of subpoenas without the need for court orders. Such orders were only required if there was disobedience with subpoenas. Oregon's law required a court order whenever a subpoena was issued. The state law required PDMP information would only be released in compliance with a court order (based upon probable cause) which had been published in response to a request from a law enforcement agency involved in a sanctioned drug-related inquiry involving an individual to whom the asked-for information relates.

The Ninth Circuit noted that Oregon had conceded federal law pre-empted the requirement for

probable cause. However, Oregon argued the "PDMP is required to wait for judicial review and a court order before it c[an] turn over the records" (*Oregon PDMP*, p 1236). The court found this burden of requiring a court order created a positive conflict with the intention of Congress to investigate drug crimes. Therefore, federal law pre-empted the state regulation and the DEA did not need to obtain a court order to compel the PDMP to disclose PHI pursuant to an administrative subpoena. The court noted that, despite this decision, Oregon preserved the right to actively contest a subpoena seeking PHI and thereby trigger the judicial action to enforce a subpoena. The court considered this a vital safeguard given the privacy interest involved in such disclosures.

When considering the intervenors' arguments, the court found that these parties needed to establish independent standing because the relief they sought was distinct from what the state of Oregon sought. The court cited a recent U.S. Supreme Court case (*Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645 (2017)). In that case, the Court found that a plaintiff seeking relief different from that sought by a party with standing in a matter does not have an automatic right to intervene without first establishing their own Article III standing. In the present matter, the intervenors based a relief claim on Fourth Amendment requirements for a warrant and probable cause. The intervenors openly declined to adopt a position regarding the matter of pre-emption. As the intervenors sought relief different from that sought by the state of Oregon, the court concluded that they had to have established independent Article III standing. The court examined and rejected the intervenors' arguments concerning injury. As such, the Ninth Circuit Court of Appeals did not adjudicate the claims for relief by these parties, including the physician.

#### *Discussion*

*Oregon PDMP* reinforces the ability of federal agencies to compel compliance with statutes concerning the routine release of PHI without showing probable cause when it relates to specific government interests. In *Whalen v. Roe*, 429 U.S. 589 (1977), a unanimous Supreme Court held that a state's police power enabled it to establish statewide PDMP programs that could collect and store private data concerning controlled medications. The decision in the

present case reinforces the federal position framing the nature of PDMPs as primarily tools of law enforcement. It argues against patients' and physicians' expectations of privacy concerning prescription records stored by a PDMP.

The DEA has argued the primary purpose of a PDMP is to identify and deter or prevent drug abuse and diversion. PDMPs originally collected only Schedule II substance information. Electronic reporting has enhanced the ability to collect and store PDMP information. In this context, data collection has expanded beyond Schedule II drugs. In an *amicus* brief in this case, the American Medical Association (AMA) stated, "The primary purpose of PDMPs is health care, not law enforcement" (Brief for AMA *et al.* as Amici Curiae Supporting Petitioners at 20, *Oregon PDMP v. DEA*, 860 F.3d 1228 (9th Cir. 2017)). However, this argument is found nowhere in the statute establishing Oregon's PDMP (Or. Rev. Stat. § 431A.855 (2015)). The AMA stated it hoped to prevent patient prescription data from becoming a "law enforcement tool" without "stringent legal requirements for disclosure" (Brief for the AMA, p 2). These arguments were not persuasive to the court in the present matter.

The DEA's argument relied partly on a "third party" doctrine that when a physician writes a prescription, he voluntarily presents individual prescribing data to a pharmacist. The DEA argues that the physician has relinquished some privacy interest. Similarly, the DEA argued a patient who chooses to fill a prescription has relinquished some privacy interest. The inability of the intervenors in this case to establish standing to bring action resulted in the appeals court's not ruling on matters related to the privacy interests they had raised. The holding in *Whalen* addressed many of the same potential concerns and strictly limited the "constitutionally protected 'zone of privacy'" when balancing the privacy of health information versus the needs of law enforcement (*Whalen*, pp 603–604). These decisions have potential implications for future actions by patients and physicians to limit government monitoring and use of data from federal and state databases. Physicians should assume that records in PDMPs can be routinely analyzed by government agencies.

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## Death Following Sports Concussion and Interstate Medical Negligence Claim

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**In Youth Concussion Wrongful Death Case, Negligence Claims Against School Remanded for Review but Interstate Medical Negligence Claim Not Reviewed for Lack of Jurisdiction**

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Andrew (Drew) Swank, a high school junior on a football team in Washington State, died after he sustained a second impact injury within one week. Days after his first injury, a physician concluded that Drew he had sustained a concussion and cautioned against returning to play if his headaches persisted. The day before his next game, his headaches resolved, and the physician cleared him to play. During the game, he demonstrated symptoms of an unresolved concussion, collapsed after a hard impact, and died two days later. In *Swank v. Valley Christian School*, 398 P.3d 1108 (Wash. 2017), the Washington Supreme Court affirmed the trial court's dismissal of the medical negligence claim against the physician. The court found that the state's recently passed law, which restricts a youth's participation in sports if suspected of having sustained a concussion, warranted a cause of action for negligence against the high school and coach. As such, the case was remanded for reconsideration of this claim.

### *Facts of the Case*

Drew Swank was a high school junior and football player at Valley Christian School (VCS). On Friday, September 18, 2009, he sustained an impact during a game and developed neck pain and a headache. He was removed from play. On Monday, he continued to experience headaches and did not attend school or practice. On Tuesday, Dr. Burns, the Swanks' primary care physician, diagnosed a mild concussion. The doctor recommended that Drew refrain from participating in contact sports for three days and if