On Genetic Rights and States: a Look at South Dakota and Around the U.S.

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SD H.B. 1260, introduced in South Dakota on January 26, 2012, is an act that would govern the use of genetic information. By any standards – and especially by legislative standards – the two-page bill (pdf) is succinct and should not be considered a state variation of GINA, as the bill does not speak to non-discrimination issues.

The bill’s brevity should not, however, be mistaken for a narrowness of purpose. In under 200 words, the South Dakota bill, if passed, would (1) grant property rights to individuals in their DNA samples and genetic information, (2) prohibit surreptitious testing, (3) call into question many forensic and law enforcement uses of DNA, (4) eliminate newborn blood spot screening without explicit consent and (5) impose broadly worded informed consent requirements on all collections and uses of individual genetic data. So much for inefficient government.

Of course, what the South Dakota bill offers in brevity and breadth, it lacks in clarity. No details are provided to explain exactly what sort of property rights in DNA would be bestowed upon individuals, whether there would be statutory carve-outs to consent requirements for routine governmental and other uses (such as collection and forensic analysis of crime scene DNA) or what penalties might be imposed for violations of the new statute, should it be enacted.

And then there are the broadly drafted informed consent requirements. While the importance of securing informed consent for the full range of uses of personal genetic data is unarguable, as we have written previously, state-level attempts to define the informed consent process may be disruptive to research and public health efforts, particularly those spanning multiple states, as potential vertical and horizontal conflicts put investigators (academic researchers and those in the personal genomics industry) in a bind.

As just one example, the South Dakota’s bill requirement that no genetic data or DNA be “sold or given to any federal or state agency, any data bank for storage, or be used for research unless the person gives written informed consent after the test and use of the results is specifically explained” could easily call into question the use of broad consenting approaches that are crucial to large-scale and longitudinal genetic and genomic research. (SD H.B. 1260, Lines 13-15)

Parsing Proposals to Create Property Rights in DNA. Whatever its ultimate fate, South Dakota’s proposal shares at its core a theme that we have highlighted across numerous posts here at the Genomics Law Report, including similar proposals from Vermont, Massachusetts, and Alabama: the desire to confer greater individual rights in and control over genetic data. With that in mind, we offer a line-by-line comparison of how several proposed state statutes would purport to confer ownership rights to individuals over their genetic material and information.

On to the states (emphasis is ours unless otherwise noted):

1. South Dakota (SD H.B. 1260)

“All DNA, genetic information, or results of any genetic test...are the sole property of the person from whom it was derived...” (SD H.B. 1260, Lines 9-11)

2. Alabama (AL H. 79)

“GENETIC INFORMATION...is also the personal property of whom it is taken.” (Page 2, Lines 22-27; Page 3, Lines 1-4)

3. Massachusetts (MA S.B. 1080)

“...it shall be a goal of the Commonwealth to declare genetic information the exclusive property of the individual from whom the information is obtained. (MA S.B.1080, Lines 5-6)

“Genetic material shall be considered real property subject to one’s individual control and dominion in accord with generally held precepts of property law in the Commonwealth.” (MA S.B.1080, Lines 64-65)

4. Vermont (VT H. 368)

“...it is the intent of the general assembly to declare genetic information the exclusive property of the individual from whom the information is obtained.” (VT H.368, Lines 15-17).

“...genetic material shall be considered real property subject to one’s individual control and dominion in accordance with generally held precepts of property law in Vermont...” (VT H.368, Lines 8-11)

When reviewing the state proposals, it is important to keep an eye on both clauses, the type of property (indicated by single underlines) and upon whom the property rights are conferred (indicated by italics).

Many of these phrases are legal terms of art, with distinct legal meanings that are often not in line with common usage. Take note of the following Black’s Law Dictionary (9th Ed) definitions:

• Real Property: “Land and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land.”
• **Personal Property:** “Any movable or intangible thing that is subject to ownership and not classified as real property.”

• **Private Property:** “Property – protected from public appropriation – over which the owner has exclusive and absolute rights”

• **Tangible Property:** “Property that has physical form and characteristics.”

• **Corporeal Property:** “1. The right of ownership in material things. 2. Property that can be perceived, as opposed to incorporeal property.”

• **Qualified Property:** “A temporary or special interest in a thing (such as a right to possess it), subject to being totally extinguished by the occurrence of a specified contingency over which the qualified owner has no control.”

Lawyers love their fine distinctions, which means here that the specific terms that legislators use in crafting genetics rights bills can carry important distinctions. For instance, bills purporting to grant “real property” rights (Massachusetts and Vermont) to genetic material and information, should they pass, would potentially create an awkward blurring of the lines between real property and personal property, which carry many differences, including how such rights may be enforced or transferred to others. It may be that legislators are attempting to confer the same ownership and possessor rights to DNA samples that are afforded to land because casting genetic rights as “real property” would subject any transfers (e.g. sales, bequests, licenses) of DNA samples to the same requirements as land (e.g. transfers of land are unenforceable unless supported by a writing sufficient to satisfy the Statute of Frauds).

Much more importantly, recognition of property rights of any manner in biospecimens and genetic information could vastly change the legal landscape and potentially abrogate the ruling in Moore v. Regents of the University of California, 793 P.2d 479 (Cal. 1990), the landmark California Supreme Court case that rejected John Moore’s claim of property rights in his blood, cells and other biospecimens. In Moore, the court ruled that an individual had no property rights in his cells or other unique products of his body, and thus could not share in the commercial profits generated as the result of research performed on using Moore’s biospecimens. An important rationale underpinning the California Supreme Court’s conclusion was the potentially chilling effect imbuing biospecimens with property rights might have on medical and scientific research. State statutes explicitly creating property rights in individuals’ DNA could put the result in Moore back under the microscope which, while potentially a welcome development for many individuals, could also create significant uncertainty for scientific and medical researchers, particularly those involved in ongoing research.

Similarly, it is unclear whether acknowledging property rights in genetic material and information would potentially renew or bolster legal arguments challenging the constitutionality of DNA fingerprinting upon arrest (as opposed to following conviction), as recognition of property rights could, by extension, create an argument that DNA Fingerprinting upon arrest constitutes an unlawful taking in violation of the Due Process clauses found in the 5th and 14th Amendments.

Similarly, as to the person or persons upon whom property rights (i.e., ownership and possession rights) are conferred by these proposed legislations, it is important to recognize narrow distinctions in phraseology. The clauses, “from whom the information is obtained” and “from whom the information has been derived,” are not likely to be construed similarly. The former is potentially much broader than the latter, particularly in a personal genomics and participatory research age. “From whom the information is obtained” could permit property rights to be extended to third parties not limited to relatives who share genetic information by virtue of shared ancestry. For example, if Annette shares her genomic information from 23andMe with her buddy Svend, and then Svend sells Annette’s genomic information along with his own to his friend Natalie, it follows that Natalie “obtained” Annette’s information from Svend, therefore Svend may be statutorily recognized (purposefully or perhaps unwittingly) as having property rights in Annette’s genomic information such that he could lawfully transfer or license the information to Natalie at his unlimited discretion. Conversely, “from whom the information has been derived” seems to be less generous, conferring property rights only on the individual who submits a DNA sample for analysis. In the previous example this would imply that Svend would have property rights sufficient to sell his own information to Natalie but not Annette’s information.

Of course, none of the discussion above should be taken to suggest that conferring property rights in individuals is a *bad* thing. However, as this discussion should make painfully obvious, it is certainly not a _simple_ thing. While legislators should be applauded for drafting two-page statutes, they should also be mindful of the complexity and the potential implications of their proposals. With all due respect to the South Dakotan legislature – a body with 70 members and only 35 working days this year – the importance of defining a new set of legal rights for a new era of personal genomics, and the challenges inherent in doing so, is yet another reminder of the importance of securing clear federal and international leadership.