

Patents & The Progress of Personalized Medicine: Biomarkers Research as Lens

*Matthew Herder**

I. INTRODUCTION

“Personalized medicine” has enormous capital at the moment. It is the promise that start-up biotech firms and mainstay pharmaceutical companies alike claim they will deliver,¹ the cornerstone of proposals for healthcare reform,² the subject of the penultimate report by former President George Bush’s Advisory Council on Science and Technology,³ and the object of legislation once introduced by newly elected President Barack Obama.⁴ With industry, policy-makers, and politicians all seemingly on board, there appears to be great interest in removing any barriers to realizing

* Matthew Herder, B.Sc. (hons), L.L.B., L.L.M., J.S.M., Visiting Professor, Loyola University Chicago School of Law, 2008-2009. This article is based on a presentation given at Loyola University Chicago School of Law’s Second Annual Beazley Symposium on Access to Health Care, “Perspectives on Patents Versus Patients: Can they Co-Exist?” in November 2008. The author would like to thank Professor Cynthia Ho for helpful feedback early in the writing process as well as the editorial staff of the *Annals of Health Law* for their tremendous efforts translating this article into its final form.

1. See generally Biotechnology Industry Organization, Targeting Disease Through Pharmacogenomics & Personalized Medicine, <http://www.bio.org/healthcare/personalized/> (last visited Feb. 10, 2009).

2. See BRUCE QUINN, CROSSING THE THREE CHASMS: COMPLEX MOLECULAR TESTING AND MEDICARE REGULATIONS 2 (2008), <http://www.foleyhoag.com/~media/Files/Publications/Generic/2008%20Foley%20Hoag%20Crossing%20Chasms%20Molec%20Med.ashx>.

3. See generally PRESIDENT’S COUNCIL OF ADVISORS ON SCI. & TECH., PRIORITIES FOR PERSONALIZED MEDICINE (2008), http://www.ostp.gov/galleries/PCAST/pcast_report_v2.pdf [hereinafter PCAST].

4. The *Genomics and Personalized Medicine Act of 2007* was introduced by then-Senator Barack Obama on Mar. 23, 2007. A modified version of the legislation, the *Genomics and Personalized Medicine Act of 2008*, was subsequently introduced by Rep. Patrick Kennedy on July 15, 2008. Neither bill passed, but the specifics of the latter bill will be discussed *infra* Part II.A. See generally *Genomics and Personalized Medicine Act of 2007*, S. 976, 110th Cong. (2007); *Genomics and Personalized Medicine Act of 2008*, H.R. 6498, 110th Cong. (2008).