Issue Presented: What is a physician's or pharmacist's liability for prescribing or dispensing controlled substances to his/her patient or customer in light of the prescription monitoring program statutes?

An educational overview of caselaw regarding potential civil liability of physicians and pharmacists or pharmacies toward third parties and patients/customers for drug related issues. Please note that this memo is not intended to address the law in every state regarding this issue, nor is it intended for anything other than educational purposes.

This issue encompasses two types of liability or duty – the liability of a physician or pharmacist to his/her patient or customer (usually in the form of medical malpractice cases) and the liability of a physician or pharmacist to third parties (typically negligence actions involving automobile accidents). Only one case specifically mentions the state's PMP statute and it is in the context of third person liability.

Sanchez v. Wal-Mart Stores, et al, 221 P.3d 1276 (Nev. 2009). The plaintiffs in this case were injured when a customer of a Wal-Mart pharmacy, among others, hit two men while driving as they were standing on the side of the road, one of whom died and suit was brought by his heirs. The plaintiffs alleged that the pharmacies were negligent in that they were aware of the defendant driver's prescription habits and continued to fill her prescriptions. Multiple pharmacies and physicians treating the defendant driver had been provided a "Task Force letter" by the state Board of Pharmacy indicating that the defendant driver had obtained 4,500 hydrocodone pills from 13 pharmacies in a one year period of time. Plaintiffs' claims included allegations that the pharmacies owed a duty of care to unidentifiable third parties who might be injured by the defendant driver and negligence per se based on violations of statutes regarding dispensing drugs and maintenance of customer records.

The court specifically found that in order to be successful on a claim for negligence the plaintiffs must show that a duty of care was owed to them, that the defendants breached that duty, that the negligent act was the proximate cause of their injuries, and damages. First, the court found that under current Nevada law, there was no duty of care owed to plaintiffs by the defendants. However, the Board of Pharmacy amended its regulations subsequent to the events in this case to provide that if, in his professional judgment, a pharmacist declines to fill a prescription because he believes that a prescription is 1) fraudulent, 2) potentially harmful to the patient's health, 3) not for a legitimate medical purpose, or 4) that filling the prescription would be unlawful, the pharmacist is direct to contact the prescribing physician and resolve those concerns. If, after talking with the physician, the pharmacist believes that the prescription is fraudulent, harmful to the patient's health, or not for a lawful or legitimate medical purpose, the pharmacist is directed not to fill the prescription. The court noted that those amendments *might* create a duty, but declined to say whether such a duty was actually created.

On the negligence per se claims, the court found that the PMP statute was not enacted for the benefit of the general public and was not intended to protect the general public from the type of injuries sustained, and, therefore, the claim of negligence per se failed. The court specifically mentioned that the legislative history of the PMP bill provided evidence of this finding, stating that, "[w]hen suggested to the legislators that another purpose of the computerized program was to identify drug abusers early on before they become 'serious drug users, kill themselves or someone else,' a legislator responded that the Legislature is not responsible for people's personal decisions."

The court further stated that the statute was implemented and designed to prevent prescription drug abuse, that pharmacists and physicians are forbidden from releasing the information obtained in the

database to anyone else, and that only the Board may release the information received and retained in the database. Further, the statute does not require that pharmacists or physicians take any action after receiving a "Task Force letter." The court specifically found that the duty of care owed by physicians and pharmacists by virtue of the PMP statute was a duty owed to the person for whom the prescription was written or dispensed, not the general public.

The key points to take away from the *Sanchez* case are 1) the lack of duty imposed by the statute on physicians and pharmacists to take any action after receiving information from the PMP database; 2) the legislative intent behind enacting the statute, and the fact that it was not enacted for the benefit or protection of the general public; and 3) that the duty owed was to the patient. These points will be key in any future PMP cases as persuasive authority as it relates to third party liability cases and possibly to patient cases as it does find a duty owed by the statute to patients/customers.

In other states where the PMP statutes do not include an exemption of liability for a physician or pharmacist for accessing or not accessing the database before prescribing or dispensing, the analysis should remain the same as it has always been in the context of third person liability cases – whether a duty of care is owed by the physician or pharmacist to the third party, and whether that duty was breached.

The states have reached different conclusions on the duty of care with regard to third parties, and most seem very fact specific and dependent upon the law on that state. Various courts have found that there is a duty of care to warn the patient about the adverse effects of the drug prescribed, but have declined to extend that duty when making the decision to actually prescribe the drug. Other states have declined to find any duty at all on the part of physicians to non-patient third parties. A few of the third party liability cases are summarized below.

Burroughs v. Magee, 118 S.W.3d 323 (Tenn. 2003), finding that public policy grounds precluded a finding of duty of care in making decision to prescribe drugs to alleged drug addict as "individual treatment decisions are best left to patients and their physicians," but doctor does owe a duty of care to unidentifiable third parties to warn patient about adverse effects of drugs.

Forlaw v. Fitzer, 456 So.2d 432 (Fla. 1984), finding that the mere act of prescribing a controlled substance, without a showing of bad faith or beyond the scope of physician's practice, to a known drug addict is not enough to render physician liable to third parties.

Lester v. Hall, 970 P.2d 590 (N.M. 1998), finding no duty on the part of a physician to a non-patient for prescription-involved situations based on public policy, legislative limitations on malpractice actions, and the reasoning of other jurisdictions.

McKenzie v. Hawaii Permanente Medical Group, 47 P.3d 1209 (Hawaii 2002), finding that there is no duty where the drug is *not* a controlled substance "where the alleged negligence involved 'prescribing decisions' as to whether to prescribe the medication in the first instance, and the dosage prescribed," but there is a duty to warn about possible adverse effects. (Case did not involve addiction.)

Osborn v. US, 166 F.Supp.2d 479 (S.D.W.V. 2001), finding that where doctor knew patient was addicted to drugs and continued to prescribe said drugs such treatment violated the standard of care and that the negligent treatment of patient was the proximate cause of plaintiffs' injuries. The key point was that the court specifically found that the malpractice statute of West Virginia allowed for a medical malpractice case to be brought by third parties against physicians for injuries they sustained as the result of the physician's negligent treatment of his patient. Absent that finding, there would have been no liability on the part of the physician to the non-patient plaintiffs. It is also important to note that the court found that the doctor's continued treatment of patient with controlled substances was a violation of the standard of care when he knew the patient was addicted.

Watkins v. US, 589 F.2d 214 (5th Cir. 1979). Court found that doctor's conduct was negligent, that the auto accident at issue was a foreseeable consequence of his negligence, and he was, therefore, liable to the plaintiffs for their injuries. Specifically, the court found that the doctor failed to take an accurate history or obtain other medical records in the same facility before treating Airman/driver with a large prescription (100 tablets) for Valium, and that such conduct was negligent.

Similarly, the Oregon Court of Appeals in the case of *Zavalas v. Oregon Dept. of Corrections*, 861 P.2d 1026 (1993) found that the defendant doctor's treatment of defendant driver was negligent in that he failed to take a complete medical history and did not give the defendant driver a proper examination which would have revealed needle marks on her arms so that his prescription for Xanax was improper. Court found that under these circumstances, a physician may be liable to non-patient third parties for his negligent treatment of the patient.

Other cases involve the direct administration of drugs to a patient by a physician who then goes out and is involved in an accident and, in those cases, courts have typically found a duty of care on the part of the physician. *Cheeks v. Dorsey*, 846 So.2d 1169 (Fla.App.Dist.4 2003) and *Taylor v. Smith*, 892 So.2d 887 (Ala. 2004) concerned patients who were receiving methadone treatment for drug addiction. The courts in both cases found a duty of care existed on the part of the administering physician to third parties where physician did not first determine that the patient was ingesting other drugs despite evidence that patient was high on other drugs at the time the methadone was administered. The *Cheeks* case appears to be limited to those circumstances where the patient is administered the drug rather than prescribed, the court stating "where the variables are … known to the doctor or health care provider at the time the drug is administered, and the effects are immediate. When one administers a drug which, when combined with other drugs or alcohol, may severely impair the patient, the doctor's failure to take the proper precautions (i.e., verify whether the patient is already under the influence of another drug) is an affirmative act which creates the risk that unidentifiable third parties might be injured. Under these circumstances, there is, most certainly, a duty to unidentifiable third parties who may be injured as a result." The *Taylor* court similarly found a duty of care on the part of the administering physician who had injected patient with methadone despite having 13 of 14 prior drug screens turn up positive for other drugs.

Essentially, there is no clear answer on what kind of liability, if any, the PMP statutes will impose on physicians who either obtain information from the database and then don't act on it or don't obtain the information at all as far as third parties are concerned. It is dependent upon the current law of negligence in the state, i.e., whether the jurisdiction has previously imposed a duty of care on the physician in situations involving prescription decisions or not, and whether the PMP statute itself absolves the physician of liability.

The second part of the issue involves claims by patients for medical malpractice against physicians or pharmacists for causing or continuing their addiction and other injuries sustained as a result of the addiction. Once again, the states are not in agreement on the duty owed, and it also seems to be very fact specific. However, unlike in the third party cases above, there are certain defenses available to defendant physicians and pharmacists in these cases that aren't necessarily available to them in third party cases.

Of particular interest is the case of *Hooks SuperX, Inc. v. McLaughlin*, 642 N.E.2d 514 (Ind. 1994) because of its references to the pharmacy's computerized program which kept track of plaintiff's prescriptions. The Indiana Supreme Court found that where a pharmacy is refilling a patient's prescriptions for a dangerous drug "at an unreasonably faster rate than the rate prescribed, the pharmacist has a duty to cease refilling the prescription pending direct and explicit directions from the prescribing physician." The court found that pharmacists already possessed the power, by statute, to refuse to refill prescriptions if, in their opinion, doing so would aid or abet a drug addiction so requiring a pharmacist to do so under the facts presented in this case (where a patient is filling prescriptions twice

as fast as directed) does not create an adversarial position between pharmacists and physicians. Further, the court noted that the pharmacy had in place a computerized system which allowed the pharmacist to review the prior history of a patient's prescriptions and, therefore, the pharmacist had easy access to patient's entire prescription history and use of such a system was not a hardship financially on the pharmacy. "The determination of whether due care was exercised in a particular case may involve such issues as the frequency with which the pharmacist filled prescriptions for the customer, any representations made by the customer, the pharmacist's access to historical data about the customer …" The court went on to say, "We are confident that the skilled pharmacists of our state, particularly when aided with computerized customer information records, will be readily able to determine when a prescription is being refilled at an unreasonably faster rate than the rate prescribed."

The court, therefore, found a duty of care on the part of the pharmacist in this case. However, Indiana has an exemption from liability for practitioners (defined to include both physicians and pharmacists) for seeking or not seeking information from the PMP, unless the information is obtained and used negligently, which leaves the question of whether accessing the information and then doing nothing with it in circumstances such as those presented in the *Hooks SuperX* case would constitute negligence.

Following are summaries of a few of the more important cases involving liability to a patient.

Argus v. Scheppegrell, 472 So.2d 573 (La. 1985), finding that physician violated his duty of care to patient in prescribing amphetamine and barbiturate drugs for weight control when patient was teenager (18-19yo), 5' 6" tall and weighed 97lbs, that physician was negligent in continuing to prescribe drugs in increased dosages after promising mother that he would stop prescribing when she informed him that daughter had become addicted, and that his continuing to prescribe said drugs was the proximate cause of daughter's death by overdose. Court of appeals noted that there could hardly be a more blatant disregard for a duty by a doctor toward his patient. Louisiana Supreme Court held that doctor's claim of negligence against the mother failed as there was no evidence mother had breached her duty by failing to take further precautions after hiding pills and leaving another child to watch over daughter while she attended meeting in the same building.

Further, on the doctor's claim of contributory negligence against the daughter/patient, the court held that the patient's negligence cannot be both a foreseen risk which imposes a duty on the physician and at the same time a defense to an action for damages for breach of that duty. In other words, her actions can't both impose a duty and excuse the duty. This holding is limited to situations where there is a disparity in the positions of the parties, i.e., uneducated teenage girl and physician who'd been practicing for 20 years.

Ballenger v. Crowell, 247 S.E.2d 287 (N.C.App. 1978). Important finding in this case is that the North Carolina Court of Appeals held that a patient is permitted to rely on his doctor without becoming a culpable partner in what turns out to be his doctor's negligence in response to doctor's claim of contributory negligence, and that knowing patient was addicted, continuing to prescribe controlled substances and failing to break the addiction could be negligence and a breach of the duty of care.

Conrad-Hutsell v. Colturi, 2002 WL 1290844(Ohio App. 6 Dist.), finding that voluntary assumption of the risk was not an available defense, but that both implied assumption of risk and contributory negligence were available to defend against medical malpractice claim for plaintiff's addiction.

Los Alamos Medical Center v. Coe, 275 P.2d 175 (N.M. 1954), still cited as good authority. Mrs. Coe was prescribed morphine for pain for a period of about a year, became addicted and sued for malpractice. The court found that the doctor was negligent as, instead of attempting to discover the source of the plaintiff's pain, he simply continued to prescribe morphine which led to her addiction and subsequent need for withdrawal. The doctor alleged contributory negligence on the part of the plaintiff as she didn't take the drug as directed, and would often contact his office for more drugs and sometimes lie about her pain and the need for the medication. Plaintiffs countered with evidence that

both Mr. and Mrs. Coe questioned the doctor about how much morphine she was taking and whether there was a risk of addiction, and he assured them there was not. The court found that a patient has the right to rely on the professional skill of his physician and is not bound to question that unless he becomes fully aware that the physician has not been and is not giving proper treatment.

Messinger v. Forsman is an unreported case out of Nebraska (2006 WL 1163955) that is the first of the cases discussed herein to deal with a patient who sought drugs from multiple physicians and received multiple drugs from multiple pharmacies in different states. Patient's mother filed suit against physician after patient overdosed and died. Plaintiff's expert testified that physician did not cause patient's addiction and, further, that if taken as prescribed, he would not have died, and jury found in favor of physician. However, the appeals court reversed and remanded based on the trial court's failure to give an instruction on contributory negligence (actually comparative fault although it is still referred to in Nebraska as contributory negligence, it is not a complete bar to recovery) and jury could have found that both physician and patient were negligent without barring recovery.

Orzel v. Scott Drug Company, 537 N.W.2d 208 (Mich. 1995). Plaintiff sued pharmacy for negligently supplying him with controlled substance causing him to become addicted. The facts of this case are particularly important with regard to PMP statutes. The plaintiff obtained methamphetamines by prescription from pharmacy defendant for a period of six months. Plaintiff claimed negligence in filling the prescriptions without asking for identification, or allowing an adequate interval in time between filling the prescriptions as the pharmacy would, at times, fill them prior to the expiration of 30 days, and that such negligence constituted a breach of duty and caused or contributed to plaintiff's addiction and resulting injuries. Plaintiff admitted to buying the drug illegally, obtaining prescriptions from more than one pharmacy, presenting prescriptions written for other people, and receiving prescriptions from multiple physicians. Jury found for plaintiffs, but found plaintiffs 50% at fault so the award was reduced accordingly. The trial court granted defendant pharmacy's motion for judgment notwithstanding the verdict finding that the plaintiff's illegal conduct acted as a bar to his recovery. The court of appeals reversed, finding that comparative fault principles should apply and, further, that even if plaintiff's illegal actions barred his recovery, he was insane at the time and should not be held accountable. The Michigan Supreme Court reversed and affirmed the ruling of the trial court based on the "wrongful conduct rule."

The wrongful conduct rule basically states that "a person cannot maintain an action if, in order to establish his cause of action, he must rely, in whole or in part, on an illegal or immoral act or transaction to which he is a party." The rationale is that courts "should not lend their aid to a plaintiff who founded his cause of action on his own illegal conduct," and that where both plaintiff and defendant are equally wrong, "the law will not lend itself to afford relief to one as against the other, but will leave them as it finds them." However, the mere fact that plaintiff engaged in wrongful conduct will not automatically bar his claim. "To implicate the wrongful conduct rule, the plaintiff's conduct must be prohibited or almost entirely prohibited under a penal or criminal statute." The court stated that where it is a violation of a safety statute, such as a speed limit or traffic law, it does not rise to the level of serious misconduct and will not bar recovery. However, where it is, as in this case, repeated violations of the controlled substances act, the type of violation and the number of times plaintiff violated the statutes will act as a bar to recovery. The court categorized his behavior as "serious illegal conduct," and found the application of the wrongful conduct rule to be appropriate under these facts.

The court went on to say that an exception may apply where the parties are not equally guilty, where the defendant's culpability is greater than plaintiff's, such as where the plaintiff "has acted under circumstances of oppression, imposition, hardship, undue influence, or greater inequality of condition or age …" but did not find that exception applicable in this case as both parties were equally guilty.

Pappas v. Clark, 494 N.W.2d 245 (Iowa App. 1992), Court of Appeals affirmed motion to dismiss of physician and pharmacies for claim of negligence in husband's death due to overdose of cocaine after he became addicted to prescription drugs based on the illegal conduct of husband in procuring the drugs. Husband had written himself prescriptions and represented to pharmacies via phone that he

was a doctor in order to obtain prescriptions. Court ruled that husband's fraudulently obtaining prescriptions from defendant pharmacies and in using illegal drugs, including the fatal dose of cocaine, constituted illegal acts which precluded wife/plaintiff from recovery.

Price v. Purdue Pharma, 920 So.2d 479 (Miss. 2006), finding that claim against physicians, pharmacies and drug manufacturers was barred by wrongful conduct rule where plaintiff obtained multiple prescriptions from multiple doctors during concurrent time period. When Medicaid advised doctors that patient was receiving multiple prescriptions from multiple doctors, all doctors ceased prescribing OxyContin for plaintiff and he filed suit. Applying the wrongful conduct rule, the Mississippi Supreme Court upheld the granting of defendants' motions for summary judgment – "If a plaintiff cannot open his case without showing that he has broken the law, a court will not aid him."

In those cases where the patient is receiving treatment from only one physician and becomes addicted as a result of prescriptions written by that physician, it's unlikely the PMP statutes will have much bearing. The physician knows what prescriptions he or she is writing, and accessing the database wouldn't provide him or her with any new information. Therefore, the analysis should remain the same for those types of cases post-PMP laws as it was before – was there a duty of care owed, and was that duty breached. Whether the duty was breached will depend upon the particular facts of the case. However, physicians and pharmacists have at their disposal the defensive claims of contributory negligence (complete bar to recovery) and comparative fault (plaintiff's damages offset by his/her percentage of fault).

In cases where the patient is receiving treatment from multiple physicians and pharmacies, or otherwise obtaining prescription drugs illegally, the "wrongful conduct rule" can be claimed as a defense, in addition to contributory negligence and comparative fault.

In most of these patient cases, the physicians and/or pharmacists have acted wrongly, either over-prescribing drugs, filling prescriptions without a prescription, or otherwise assisting the patient in obtaining more drugs than s/he should have, so where physicians and pharmacists are abiding by the standard of care and are not in violation of controlled substances laws, the PMP laws should have no effect whatsoever and should not expose them to more liability than they are already exposed to by virtue of their professions.