

**PRACTITIONER EDUCATION IN THE UTILIZATION  
OF PRESCRIPTION MONITORING PROGRAM (PMP)  
DATA**

**HAROLD ROGERS PRESCRIPTION DRUG  
MONITORING PROGRAM NATIONAL MEETING  
JUNE 8, 2011  
WASHINGTON, D.C.**

**LEGAL ISSUES GOVERNING PRACTITIONERS' ACCESS AND USE OF  
PMP DATA**

Does a state statute or regulation impose a requirement/obligation regarding a PMP on a physician or pharmacist in the prescribing or dispensing of a controlled substance?

What is a physician's or pharmacist's potential liability for prescribing or dispensing a controlled substance given the existence of a PMP law and program?

## **PMP ACTS/REGULATIONS AND OTHER STATE STATUTES/REGULATIONS**

### **GENERAL THEMES**

- **Seven (7) states have statutes, regulations or enacted bills that require a prescriber to access or check the PMP in specified circumstances: Colorado, Delaware, Louisiana, Nevada, Ohio, Oklahoma and West Virginia.**

- **Three (3) states have statutes, regulations or enacted bills that recommend or encourage prescribers or dispensers to access or check the PMP: Arkansas, Colorado, Maine.**

- **Eighteen (18) states, as a general rule, explicitly say in their PMP acts that neither prescribers nor pharmacists are required or obligated to access the PMP database.**

► **Notable Exceptions:**

- 1. New Jersey's language stating that prescribers and dispenser need not check the database applies only beyond that which may be required as part of the practitioner or pharmacist's professional practice.**
- 2. Oklahoma's law requires a registrant who dispenses, administers, or prescribes methadone to check the patient's prescription profile with the central repository (see page 6).**
- 3. West Virginia's regulations require that practitioners access the database to confirm that a patient who is in an opioid or methadone treatment program is not seeking prescription medications from multiple sources (see page 7).**

- **Approximately ½ of the 48 state PMP laws include language that would provide immunity from civil liability for accessing/requesting, not accessing, using or not using PMP data.**

## REQUIREMENT TO ACCESS PMP DATA

7 Colo. Code Regs. §1101-3:18

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### (5) Chronic Opioid Management Report

(a) When the authorized treating physician prescribes long-term opioid treatment, s/he shall use the Division of Workers' Compensation Chronic Pain Disorder Medical Treatment Guidelines and also review the Colorado State Board of Medical Examiners' Policy # 10-14, "Guidelines for the Use of Controlled Substances for the Treatment of Pain." Urine drug tests for chronic opioid management shall employ testing methodologies that meet or exceed industry standards for sensitivity, specificity and accuracy. The test methodology must be capable of identifying and quantifying the parent compound and relevant metabolites of the opioid prescribed. In-office screening tests designed to screen for drugs of abuse are not appropriate for chronic opioid compliance monitoring.

(1) Drug testing shall be done prior to the initial long-term drug prescription being implemented and randomly repeated at least annually.

(2) When drug screen tests are ordered, the authorized treating physician shall utilize the Colorado Prescription Drug Monitoring Program (PDMP).

(3) While the injured worker is receiving chronic opioid management, additional drug screens with documented justification may be conducted. Examples of documented justification include the following:

(i) Concern regarding the functional status of the patient

(ii) Abnormal results on previous testing

(iii) Change in management of dosage or pain

(iv) Chronic daily opioid dosage above 150 mg of morphine or equivalent

(4) The opioids prescribed for long-term treatment shall be provided through a pharmacy.

(5) The prescribing authorized treating physician shall review and integrate the screening results, PDMP, and the injured worker's past and current functional status on the

prescribed levels of medications. A written report will document the treating physician's assessment of the patient's past and current functional status of work, leisure activities and activities of daily living competencies.

Del Code Ann tit. 16, §4798

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(e) A prescriber, or other person(s) authorized by the prescriber, shall obtain, before writing a prescription for a controlled substance listed in Schedule II, III, IV or V for a patient, a patient utilization report regarding the patient for the preceding 12 months from the computerized program established by the Office of Controlled Substances when the prescriber has a reasonable belief that the patient may be seeking the controlled substance, in whole or in part, for any reason other than the treatment of an existing medical condition. The prescriber shall review the patient utilization report to assess whether the prescription for the controlled substance is necessary.

La. Rev. Stat. Ann. §48:7831.

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6. The medical director is responsible for applying to access and query the Louisiana Prescription Monitoring Program (PMP).

a. The PMP is to be utilized by the medical director and the pain specialist as part of a clinics' quality assurance program to ensure adherence to the treatment agreement signed by the patient.

Nev. Rev. Stat. Ann. §639.23507

A practitioner shall, before writing a prescription for a controlled substance listed in schedule II, III or IV for a patient, obtain a patient utilization report regarding the patient for the preceding 12 months from the computerized program established by the Board and the Investigation Division of the Department of Public Safety pursuant to NRS 453.1545 if the practitioner has a reasonable belief that the patient may be seeking the controlled substance, in whole or in part, for any reason other than the treatment of an existing medical condition and:

1. The patient is a new patient of the practitioner; or

2. The patient has not received any prescription for a controlled substance from the practitioner in the preceding 12 months.

The practitioner shall review the patient utilization report to assess whether the prescription for the controlled substance is medically necessary.

H.B. 93, 129<sup>th</sup> Gen. Assem., Reg. Sess. (Oh. 2011)

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Sec. 4715.302.(A) As used in this section, “drug database” means the database established and maintained by the state board of pharmacy pursuant to section 4729.75 of the Revised Code.

(B) The state dental board shall adopt rules in accordance with Chapter 119. of the Revised Code that establish standards and procedures to be followed by a dentist regarding the review of patient information available through the drug database.

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Sec. 4723.487. (A) As used in this section, “drug database” means the database established and maintained by the state board of pharmacy pursuant to section 4729.75 of the Revised Code.

(B) The board of nursing shall adopt rules in accordance with Chapter 119. of the Revised Code that establish standards and procedures to be followed by an advanced practice nurse with a certificate to prescribe issued under section 4723.48 of the Revised Code regarding the review of patient information available through the drug database.

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Sec. 4725.092. (A) As used in this section, “drug database” means the database established and maintained by the state board of pharmacy pursuant to section 4729.75 of the Revised Code.

(B) The state board of optometry shall adopt rules in accordance with Chapter 119. of the Revised Code that establish standards and procedures to be followed by an optometrist who holds a therapeutic pharmaceutical gents certificate regarding the review of patient information available through the drug database.

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Sec. 4729.162. (A) As used in this section, “drug database” means the database established and maintained by the state board of pharmacy pursuant to section 4729.75 of the Revised Code.

(B) The state board of pharmacy shall adopt rules in accordance with Chapter 119. of the Revised Code that establish standards and procedures to be followed by a pharmacist regarding the review of patient information available through the drug database.

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Sec. 4730.53. (A) As used in this section, “drug database” means the database established and maintained by the state board of pharmacy pursuant to section 4729.75 of the Revised Code.

(B) The medical board shall adopt rules in accordance with Chapter 119. of the Revised Code that establish standards and procedures to be followed by a physician assistant who holds a certificate to prescribe issued under this chapter regarding the review of patient information available through the drug database.

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Sec. 4731.055. (A) As used in this section:

(1) “Drug database” means the database established and maintained by the state board of pharmacy pursuant to section 4729.75 of the Revised Code.

...

(B) The state medical board shall adopt rules in accordance with Chapter 119. of the Revised Code that establish standards and procedures to be followed by a physician regarding the review of patient information available through the drug database.

Okla. Stat. Ann. tit. 63, §2-302

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M. Beginning November 1, 2010, each registrant that prescribes, administers or dispenses methadone shall be required to check the prescription profile of the patient on the central repository of the Oklahoma State Bureau of Narcotics and Dangerous Drug Control.

W. Va. Code R. §64-90-40.

Toxicology Screens.

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40.16. The program shall comply with policies and procedures developed by the designated state oversight agency and the West Virginia Board of Pharmacy to allow access to the prescription Drug Registry maintained by the West Virginia Board of Pharmacy:

40.16.a. Before the administration of methadone or other treatment in an opioid treatment program;

40.16.b. After any positive drug test; and

40.16.c. At each ninety-day treatment review.

40.17. Each Prescription Drug Registry access shall confirm that the patient is not seeking prescription medication from multiple sources.

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**RECOMMENDATION/ENCOURAGEMENT TO ACCESS PMP DATA**

S.B. 345, 88<sup>th</sup> General Assembly, Reg. Sess. ( Ark. 2011)

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(d) Practitioners are encouraged to access or check the information in the controlled substance database created under this subchapter before prescribing, dispensing, or administering medications.

7 Colo. Code Regs. §1101-3.17 Ex.5, 6

Maximum Duration: 2 weeks. Use beyond two weeks is acceptable in appropriate cases. Refer to Chronic Pain Guidelines which gives a detailed discussion regarding medication use in chronic pain management. When prescribing beyond the maximum duration, it is recommended physicians access the Colorado PDMP (Prescription Drug Monitoring

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Program). This system allows the prescribing physician to see all controlled substances prescribed by other physicians for an individual patient.

02-313, 02-373, 02-380, 02-383, 02-396 Code Me. Code R. §III

1. Evaluation of the Patient -- A medical history and appropriate physical examination must be obtained, evaluated and documented in the medical record. The medical record should document the nature and intensity of the pain, current and past treatments for pain, underlying or coexisting diseases or conditions, the effect of the pain on physical and psychological function and history of substance abuse. It is recommended that the State's Controlled Substance Prescription Monitoring Program Database (PMP) be utilized. The medical record also should document the presence of one or more recognized medical indications for the use of a controlled substance.

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7. Reportable Acts -- Generally, information gained as part of the clinician/patient relationship remains confidential. However, the clinician has an obligation to deal with persons who use the clinician to perpetrate illegal acts, such as illegal acquisition or selling of drugs; this may include reporting to law enforcement. Information suggesting inappropriate or drug-seeking behavior, should be addressed appropriately and documented. Use of the PMP is recommended.

### **NO REQUIREMENT TO ACCESS PMP DATA**

●General Rule: Eighteen (18) states explicitly say in their PMP acts that neither prescribers nor pharmacists are required or obligated to access the PMP database: Alabama, Alaska, Georgia, Indiana, Iowa, Illinois, Kansas, Maryland, Minnesota, New Jersey, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, West Virginia, Wisconsin and Wyoming.

●Notable Exceptions:

1. New Jersey's language stating that prescribers and dispenser need not check the database applies only beyond that which may be required as part of the practitioner or pharmacist's professional practice.
2. Oklahoma's law requires a registrant who dispenses, administers, or prescribes methadone to check the patient's prescription profile with the central repository (see page 6).

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3. West Virginia's regulations require that practitioners access the database to confirm that a patient who is in an opioid or methadone treatment program is not seeking prescription medications from multiple sources (see page 7).

**IMMUNITY FROM CIVIL LIABILITY FOR ACCESSING/REQUESTING, NOT  
ACCESSING, USING OR NOT USING PMP DATA**

● Many of the 48 state PMP laws, approximately ½, include language that would provide immunity from civil liability for accessing/requesting, not accessing, using or not using PMP data.

Alaska Stat. §17.30.200

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(h) Dispensers or practitioners may not be held civilly liable for damages for accessing or failing to access the information in the database.

Ariz. Rev. Stat. Ann. §36-2609

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B. Unless a court of competent jurisdiction makes a finding of malice or criminal intent, the board, any other state agency or any person or entity in proper possession of information pursuant to this article is not subject to civil liability or other legal or equitable relief for any of the following acts or omissions:

1. Furnishing information pursuant to this article.
2. Receiving, using or relying on, or not using or relying on, information received pursuant to this article.
3. Information that was not furnished to the board.
4. Information that was factually incorrect or that was released by the board to the wrong person or entity.

Del. Code Ann. tit. 16, §4798

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(g) Unless a court of competent jurisdiction makes a finding of gross negligence, malice or criminal intent, the Office of Controlled Substances, any other state agency, any prescriber or dispenser, or any person or entity in proper possession of information pursuant to this statute is not subject to civil liability, administrative action or other legal or equitable relief for any of the following acts or omissions:

- (1) Furnishing information pursuant to this section.
- (2) Receiving, using or relying on, or not using or relying on, information received pursuant to this section.
- (3) Information that was not furnished to the Office of Controlled Substances.
- (4) Information that was factually incorrect or that was released by the Office of Controlled Substance to the wrong person or entity.

Fla. Stat. Ann. §893.055

(1) As used in this section, the term:

- (a) “Patient advisory report” or “advisory report” means information provided by the department in writing, or as determined by the department, to a prescriber, dispenser, pharmacy, or patient concerning the dispensing of controlled substances. All advisory reports are for informational purposes only and impose no obligations of any nature or any legal duty on a prescriber, dispenser, pharmacy, or patient. ...

...

(12) A prescriber or dispenser may have access to the information under this section which relates to a patient of that prescriber or dispenser as needed for the purpose of reviewing the patient's controlled drug prescription history. A prescriber or dispenser acting in good faith is immune from any civil, criminal, or administrative liability that might otherwise be incurred or imposed for receiving or using information from the prescription drug monitoring program. This subsection does not create a private cause of action, and a person may not recover damages against a prescriber or dispenser authorized to access information under this subsection for accessing or failing to access such information.

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S.B. 36, 2011 Leg. (Ga. 2011)

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## §16-13-63

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A dispenser or prescriber shall not have a duty and shall not be held civilly liable for damages to any person in any civil or administrative action or criminally responsible for injury, death, or loss to person or property on the basis that the dispenser or prescriber did or did not seek or obtain information from the electronic data base established pursuant to Code Section 16-13-57.

Idaho Code Ann. §37-2730A

...

(4) Unless there is shown malice or criminal intent or gross negligence or reckless, willful and wanton conduct as defined in section 6-904C, Idaho Code, the state of Idaho, the board, any other state agency, or any person, or entity in proper possession of information as herein provided shall not be subject to any liability or action for money damages or other legal or equitable relief by reason of any of the following:

- (a) The furnishing of information under the conditions herein provided;
- (b) The receiving and use of, or reliance on, such information;
- (c) The fact that any such information was not furnished; or
- (d) The fact that such information was factually incorrect or was released by the board to the wrong person or entity.

720 Ill. Comp. Stat. Ann. 570/318

(j)

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(8) If there is an adverse outcome because of a prescriber or dispenser making an inquiry, which is initiated in good faith, the prescriber or dispenser shall be held harmless from any civil liability.

Ind. Code Ann. §35-48-7-11.1

...

(l) A practitioner is immune from civil liability for an injury, death, or loss to a person solely due to a practitioner seeking or not seeking information from the INSPECT program. The civil immunity described in this subsection does not extend to a practitioner if the practitioner receives information directly from the INSPECT program and then negligently misuses this information. This subsection does not apply to an act or omission that is a result of gross negligence or intentional misconduct.

Iowa Code Ann. §124.553

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6. Nothing in this section shall require a pharmacist or prescribing practitioner to obtain information about a patient from the program. A pharmacist or prescribing practitioner does not have a duty and shall not be held liable in damages to any person in any civil or derivative criminal or administrative action for injury, death, or loss to person or property on the basis that the pharmacist or prescribing practitioner did or did not seek or obtain or use information from the program. A pharmacist or prescribing practitioner acting reasonably and in good faith is immune from any civil, criminal, or administrative liability that might otherwise be incurred or imposed for requesting or receiving or using information from the program.

Kan. Stat. Ann. §65-1688

No person authorized to prescribe or dispense scheduled substances and drugs of concern shall be liable to any person in a civil action for damages or other relief for injury, death or loss to person or property on the basis that such person authorized to prescribe or dispense scheduled substances and drugs of concern did or did not seek or obtain information from the prescription monitoring program prior to prescribing or dispensing scheduled substances and drug of concern to a patient.

S.B. 883, 2011 Leg. (Md. 2011)

§21-2A-08

...

(B) A prescriber or dispenser, acting in good faith, is not subject to liability or disciplinary action arising solely from:

- (1) Requesting or receiving, or failing to request or receive, prescription monitoring data from the program; or
- (2) Acting, or failing to act, on the basis of prescription monitoring data provided by the program.

Minn. Stat. Ann. §152.126

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Subd. 9. Immunity from liability; no requirement to obtain information. (a) A pharmacist, prescriber, or other dispenser making a report to the program in good faith under this section is immune from any civil, criminal, or administrative liability, which might otherwise be incurred or imposed as a result of the report, or on the basis that the pharmacist or prescriber did or did not seek or obtain or use information from the program.

(b) Nothing in this section shall require a pharmacist, prescriber, or other dispenser to obtain information about a patient from the program, and the pharmacist, prescriber, or other dispenser, if acting in good faith, is immune from any civil, criminal, or administrative liability that might otherwise be incurred or imposed for requesting, receiving, or using information from the program.

H.B. 83, 62<sup>nd</sup> Legislature, Reg. Sess. (Mt. 2011)

...

Section 8. Prescription drug registry-immunity.

(2) Unless a court of competent jurisdiction finds that a person or entity committed an unlawful act pursuant to [section14], a person or entity in proper possession of information

pursuant to [sections 1 through 15] is not subject to civil liability or other legal or equitable relief for any of the following acts or omission:

- (a) furnishing information pursuant to [sections 3 through 7];
- (b) receiving, using or relying on, or not using or relying on information received pursuant to [sections 3 through 7]; or
- (c) relying on information that was entered into the registry in error, was factually incorrect, or was released by the board to the wrong person or entity.

N.D. Century Code §19-03.5-05

Nothing in this chapter requires a prescriber or dispenser to obtain information about a patient from the central repository prior to prescribing or dispensing a controlled substance. A prescriber, dispenser, or other health care practitioner may not be held liable in damages to any person in any civil action on the basis that the prescriber, dispenser, or other health care practitioner did or did not seek to obtain information from the central repository. Unless there is shown a lack of good faith, the board, any other state agency, a prescriber, dispenser, or any other individual in proper possession of information provided under this chapter may not be subject to any civil liability by reason of:

1. The furnishing of information under the conditions provided in this chapter;
2. The receipt and use of, or reliance on, such information;
3. The fact that any such information was not furnished; or
4. The fact that such information was factually incorrect or was released by the board to the wrong person or entity.

Ohio Rev. Code Ann. §4729.79

...

(D) A pharmacist or prescriber shall not be held liable in damages to any person in any civil action for injury, death, or loss to person or property on the basis that the pharmacist or prescriber did or did not seek or obtain information from the database.

Okla. Stat. Ann. tit. 63, §2-309D

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D. Notwithstanding the provisions of subsection B, registrants shall have no requirement or obligation to access or check the information in the central repository prior to dispensing or administering medications or as part of their professional practices. Registrants shall not be liable to any person for any claim of damages as a result of accessing or failing to access the information in the central repository and no lawsuit may be predicated thereon. Nothing herein shall be construed to relieve a registrant from any duty to monitor and report the sales of certain products pursuant to subsection E of Section 2-309C of this title.

Or. Rev. Stat. Ann. §431.966

...

(7) Nothing in ORS 431.962 to 431.978 and 431.992 requires a practitioner or pharmacist who prescribes or dispenses a prescription drug to obtain information about a patient from the prescription monitoring program. A practitioner or pharmacist who prescribes or dispenses a prescription drug may not be held liable for damages in any civil action on the basis that the practitioner or pharmacist did or did not request or obtain information from the prescription monitoring program.

S.C. Code Ann. §44-53-1680

...

(D) Nothing in this chapter requires a pharmacist or practitioner to obtain information about a patient from the prescription monitoring program. A pharmacist or practitioner does not have a duty and must not be held liable in damages to any person in any civil or derivative criminal or administrative action for injury, death, or loss to person or property on the basis that the pharmacist or practitioner did or did not seek or obtain information from the prescription monitoring program. A pharmacist or practitioner acting in good faith is immune from any civil, criminal, or administrative liability that might otherwise be incurred or imposed for requesting or receiving information from the prescription monitoring program.

S.D. Codified Laws §34-20E-11

Nothing in this chapter requires a prescriber or dispenser to obtain information about a patient from the central repository prior to prescribing or dispensing a controlled substance. A prescriber, dispenser, or other health care provider may not be held liable in damages to any

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person in any civil action on the basis that the prescriber, dispenser, or other health care provider did or did not seek to obtain information from the central repository. Unless there is shown a lack of good faith, the board, a prescriber, dispenser, or any other person in proper possession of information provided under this chapter is not subject to any civil liability by reason of:

- (1) The furnishing of information under the conditions provided in this chapter;
- (2) The receipt and use of, or reliance on, such information;
- (3) The fact that any such information was not furnished; or
- (4) The fact that such information was factually incorrect or was released by the board to the wrong person or entity.

Tenn. Code Ann. §53-10-310

...

(d) Any dispenser, individual or entity shall not be subject to a suit for civil damages nor held civilly liable for the failure to check the database or for actions taken after reasonable reliance on information in the database.

Vt. Stat. Ann. tit. 18, §4285

A dispenser or health care provider shall be immune from civil, criminal, or administrative liability as a result of any action made in good faith pursuant to and in accordance with this chapter, but nothing in this section shall be construed to establish immunity for the failure to follow standards of professional conduct or the failure to exercise due care in the provision of services.

Wash. Rev. Code Ann. §70.225.040

...

(5) A dispenser or practitioner acting in good faith is immune from any civil, criminal, or administrative liability that might otherwise be incurred or imposed for requesting, receiving, or using information from the program.

W.Va Code Ann. §60A-9.5

...

(d) Good faith reliance by a practitioner on information contained in the West Virginia Controlled Substances Monitoring Program database in prescribing or dispensing or refusing or declining to prescribe or dispense a schedule II, III or IV controlled substance shall constitute an absolute defense in any civil or criminal action brought due to prescribing or dispensing or refusing or declining to prescribe or dispense;

Wyo. Stat. Ann. § 35-7-106

...

(d) Unless there is shown malice, gross negligence, recklessness or willful and wanton conduct in disclosing information collected under this act, the board, any other state agency and any other person or entity in proper possession of information as provided by this section shall not be subject to any civil or criminal liability or action for legal or equitable relief.

## CASE LAW/COURT OPINIONS

- (1) Liability to Third Parties
- (2) Liability to Patient/Customer

### THIRD PARTY LIABILITY

***SANCHEZ VS. WALMART, ET. AL*** – Discussion of NV PMP statute (Nev. Rev. Stat. Ann. §453.1545) by NV Supreme Court in ruling that pharmacies did not owe a duty of care to plaintiffs as unidentified third parties.

Plaintiffs: Family of decedent (Sanchez) and injured victim (Martinez) and his wife

#### **Plaintiffs' Allegations**

- Common law negligence
  - ◆ Pharmacies owed a duty of care to unidentified third parties who might be injured by a pharmacy customer who was driving under the influence of controlled prescription drugs.

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◆Pharmacies were negligent because they continued to fill the driver's (Copenig) prescriptions after notification of her prescription filling activities in a letter by NV Controlled Substance Prescription Task Force.

- Negligence Per Se

◆NV statutes on dispensation of prescription drugs and maintenance of customers' records were enacted to protect the public from unlawful distribution of controlled substances.

◆Pharmacies were negligent in violating these NV laws.

### **NV Supreme Court Rationale – Common law negligence**

- Common law negligence action has four (4) elements:

1. Duty of care
2. Breach of duty
3. Breach was proximate cause of injury/harm
4. Damages

- Court reviewed whether duty of care to Plaintiffs existed because of (1) a special relationship or (2) a public policy duty created by NV PMP statute (Nev. Rev. Stat. §453.1545)

#### 1.Duty of care – special relationship

- General Rule: No duty to prevent dangerous conduct of others or to warn others of the dangerous conduct.

- Exception: Affirmative duty to aid others when:

1. special relationships exists between parties or between the defendant and identifiable victim, and
2. harm created by defendant's conduct is foreseeable.

◆Professional relationships – special relationship created when:

1. plaintiff has direct relationship with defendant, or
2. plaintiff is known or identified third party to whom defendant owes a legal

duty.

●NV Supreme Court – No special relationship in Sanchez case because Plaintiffs:

1. had no direct relationship to defendants, and
2. were unidentified members of the general public.

## 2. Duty of Care – NV PMP Statute (Nev. Rev Stat. Ann. §453.1545)

●Plaintiffs claimed that NV PMP statute created a public policy duty to protect general public and thus established duty of care to third parties

●NV Supreme Court - NV PMP law did not create public policy duty to protect third parties.

1. Board of Pharmacy and Investigation Division of Department of Public Safety are only ones allowed to share information in PMP database. Prescribers and pharmacies expressly prohibited from disclosing any information.
2. Nothing in PMP law required pharmacies to take action to protect public after receiving a Task Force letter.
3. Legislative intent was that NV PMP law for purpose of enhancing recordkeeping by allowing more thorough and accurate information to be available to enforcement and regulatory authorities and for transmission by Task Force.

## **NV Supreme Court Rationale – Negligence Per Se**

●NV Supreme Court – statutes and regulations Plaintiffs relied on did not create a duty of care to third parties because they were not intended to protect the general public or against any injury Plaintiffs as third parties might have sustained.

## **Important Discussion by NV Supreme Court in a Footnote that may be Relevant to Future Cases.**

1. Court noted that in 2006 Board of Pharmacy amended its regulations and such amendment might have created a special relationship sufficient to find a duty of care to third parties. However, Court made no definitive ruling on whether the amendment did in fact create a duty to third parties.

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2. Amended language - If pharmacist declines to fill a prescription for designated reasons, he/she is required to consult with the physician to resolve concerns. If after consultation, the pharmacist believes the prescription is fraudulent, harmful to the patient's health, unlawful or not for a legitimate medical purpose, the pharmacist is mandated not to fill the prescription.

**OTHER STATE CASES** – Diverse rulings dependent on facts of case and state law.

- Some courts have found no duty of care to third parties.
- Some courts have found no duty of care to third parties regarding prescribing decisions. Of these courts, some have imposed a duty of care to third parties to warn patients about adverse effects of drugs.
- Two cases found duty of care to third parties when physician directly administered drug to patient who then injured/harmed third party plaintiffs.

### **LIABILITY TO PATIENT/CUSTOMER**

**HOOKS SUPERX, INC. V. MCLAUGHLIN** – Discussion of IN PMP by Indiana Supreme Court in ruling that pharmacy had a duty of care to patient/customer. Court found that pharmacist had a duty to cease filling a prescription pending direct and explicit direction from the prescribing physician when the pharmacist was refilling a patient's prescription for a dangerous drug "at an unreasonably faster rate than the rate prescribed."

#### **IN Supreme Court Rationale**

1. Pharmacists already had statutory authority to refuse to refill prescriptions to avoid aiding or abetting a drug addiction.
2. IN PMP could provide pharmacists with prior history of patient's prescriptions.
3. Skilled pharmacists, aided by the PMP, could determine when a prescription was being refilled at an unreasonably faster rate than the rate prescribed.

**OTHER STATE CASES** – Diverse rulings dependent on facts of case and state law.

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- Affirmative defenses may be available to defendant physicians or pharmacists.

1. Contributory negligence

- ◆ Plaintiff failed to exercise standard of ordinary care required for his/her own protection and was contributing cause of harm.

- ◆ Complete bar to recovery

2. Comparative fault/negligence

- ◆ Plaintiff's negligence assigned a percentage of total negligent conduct and any award of damages is reduced by that percentage.

3. Wrongful conduct

- ◆ Plaintiff cannot maintain a cause of action that is based in whole or in part on his/her own serious illegal conduct, e.g. repeated violations of controlled substances act.

- ◆ Generally complete bar to recovery

- ◆ Exception may apply if defendant's culpability is greater than plaintiff's because plaintiff acted under undue influence, hardship, oppression or greater inequality of condition or age.