

Health Care Law

New Jersey's Prescription Drug Monitoring Program

Opening the door to expanded tort liability

By Patricia A. Lee and Neil V. Shah

A recent Nevada Supreme Court decision, *Sanchez v. Wal-Stores, Inc.*, 221 P.3d 1276 (Nev. 2009), may forecast how New Jersey courts will define drug dispensers' duty of care to protect unidentified third parties from pharmacy customers whose potential prescription drug abuse is known (or should be known) from reports available through state-run Prescription Drug Monitoring Programs ("PDMP"). At present, 34 states have operational PDMPs and seven other states, including New Jersey, have enacted legislation to establish PDMPs. Like most states, New Jersey's PDMP statute, N.J.S.A. Sections 45:1-44 to 1-50, establishes a statewide electronic database designed to collect designated data on controlled substances dispensed in the state and to distribute the information to authorized users. Pursuant to these

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PDMPs, several states have taken the initiative to alert pharmacies, doctors, and wholesale drug distributors about customers and patients who are potentially abusing prescription drugs, both as a matter of public safety and in an effort to rein in health care spending.

The central question in *Sanchez* was whether eight pharmacy defendants owed a duty of care to two automobile accident victims injured in June of 2004 by a pharmacy customer, Ms. Copening, who was driving under the influence of controlled prescription drugs. According to the complaint, the defendant pharmacies had received a warning from the Nevada Prescription Controlled Substance Abuse Prevention Task Force, informing them that Ms. Copening had obtained approximately 4,500 doses of prescription painkillers at 13 different pharmacies between May 2002 and May 2003. Based on this notification, plaintiffs alleged that the pharmacies were negligent in continuing to fill Ms. Copening's prescriptions. Notably, the complaint did not allege any irregularities on the face of the prescriptions or that drugs were dispensed contrary to a doctor's order. Nevertheless, the plaintiffs asserted that Nevada's PDMP statute created a duty of care for pharmacies to protect the general public from harm caused by a known potential drug abuser.

In resolving the issue, the Nevada Supreme Court analyzed whether a special relationship existed between the pharmacy and the victims to warrant an exception to the general rule that there exists no common-law duty to control the dangerous conduct of another or to warn others of the dangerous conduct. In a 5-2 decision, the Nevada Supreme Court held that the pharmacies did not have a duty of care to protect the plaintiffs. The Court relied upon *Dent v. Dennis Pharmacy, Inc.*, 924 So.2d 927, 929 (Fla. Dist. Ct. App. 2006), which found no duty to an unidentifiable, anonymous member of the driving public. Integral to the Court's holding was the finding that the Nevada legislature had not created a statutory duty for pharmacies to take action after receiving a letter from the Task Force. The dissenting opinion disagreed, stating that a special relationship between the parties existed to prevent foreseeable harm, which included a duty to investigate Ms. Copening's prescriptions or refuse to fill them, thus protecting plaintiffs from possible injury. The dissent further opined that a pharmacist's negligent performance of its professional standards of care warranted extending a negligence claim to third parties.

Due to the lack of a special relationship, the majority in *Sanchez* found it unnecessary to address whether proximate cause was also lacking. The trial court, however, held that even if a statutory duty existed as to third parties, Nevada's bar against dram shop liability negated any showing of proximate cause where a pharmacy, like a bartender, provides an impairing substance to a customer who subsequently harms a third party.

Applying the majority's rationale to New Jersey's PDMP, the language in N.J.S.A. Sections 45:1-44 to 1-50 does not appear to support an express statutory duty of care to third parties to use reported information to monitor or deny prescriptions to a customer. The PDMP law states in pertinent part that it "shall [not] be construed to require or obligate a pharmacist to access or check the prescription monitoring information prior to dispensing medications beyond that which may be required as part of the pharmacist's professional practice." N.J.S.A. Section 45:1-46(d)(2). This provision is consistent with all but one of the other states with PDMP statutes, 19 of which have provisions granting immunity to pharmacies that ignored or failed to utilize the database before dispensing a covered drug. Only Nevada actually requires consultation of the PDMP database, and even then, under limited circumstances, however, this provision was deemed insufficient for the Nevada Supreme Court to impose liability. The language of any implementing regulations to be adopted, as well as the content of the PDMP reports themselves, may ultimately guide whether New Jersey's PDMP statute can give rise to a third-party negligence claim against pharmacies.

The lack of an express duty in New Jersey's PDMP statute will not end the inquiry. Third-party plaintiffs will argue that New Jersey courts should look to the regulations governing pharmacy practice to determine whether a duty exists. Notably, the *Sanchez* decision declined to address whether subsequently revised Board of

Pharmacy regulations created a special relationship that could justify imposing a duty in favor of third parties where a pharmacy has actual or constructive knowledge of a customer's potential drug abuse. The revised Nevada regulations provide instructions where a pharmacist declines to fill a prescription reasonably believed to be fraudulent, harmful to the patient's health, not for a legitimate medical purpose or unlawful. The similarity to N.J.A.C. Section 13:39-7.15 leaves the door open for distinguishing *Sanchez* based on the professional obligations of pharmacists.

Plaintiffs may also seize upon the divergent standards of dram shop liability under New Jersey law to distinguish the holding in *Sanchez*. States like Nevada continue to abide by the notion that "while it may be foreseen or it may be a natural result of furnishing an alcoholic beverage to an intoxicated person that he himself will get hurt it is not at all clear that he will naturally assault someone, drive a car and injure or kill another, or do some other tortious act." *Rappaport v. Nichols*, 31 N.J. 188 (1960). Unlike Nevada, however, New Jersey is among the majority of states that have abandoned the common-law rule, and since 1960, has held that where "alcoholic beverages are sold by a tavern keeper to a minor or to an intoxicated person, the unreasonable risk of harm not only to the minor or the intoxicated person but also to members of the traveling public may readily be recognized and foreseen."

Parallels to drug dispensers are inevitable, particularly where PDMP notifications should reasonably alert a pharmacy

to potential drug abuse and raise concerns about a customer's impairment from such abuse. Nevertheless, dram shop analysis is not an exact fit. As discussed in *Sanchez*, imposing pharmacy liability may impact the physician-patient relationship. Courts have long been hesitant to impose a duty on pharmacists, either to warn or stop dispensing, when presented with a valid prescription. See, e.g., *Adkins v. Mong*, 425 N.W.2d 151, 154 (Mich. Ct. App. 1988) (pharmacist had no duty to monitor or intervene with customer's reliance on drugs prescribed by physician). Exceptions to this immunity have developed over time, see *Hooks SuperX, Inc. v. McLaughlin*, 642 N.E.2d 514, 519 (Ind. 1994) (pharmacist with access to patient's history over five-year period had a duty to cease refilling addictive prescriptions at faster rate than prescribed). Yet considerable authority remains to impede extending to third parties any duty of pharmacists to intervene with a patient's valid prescription.

Plaintiffs have a hard road ahead to circumvent *Sanchez*'s rejection of tort liability to unidentified third parties, even where a pharmacy has detailed information about a customer's gross over-utilization of prescription drugs. However, with growing concern about the effects of prescription drug abuse on public safety and escalating health care costs, PDMPs could become more ubiquitous and refined under state law. It stands to reason that the standard of care governing dispensers may grow commensurately, and the universe of individuals to whom their duty of care may well expand to third parties. ■