

LEGAL LANDMINES IN PAIN MANAGEMENT

Healthcare Law Practice Group

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Since the 1975 United States Supreme Court case of *US v. Moore*, it has been clear that a licensed physician with a DEA registration can be prosecuted for violation of the Controlled Substances Act (“CSA”) if the physician knowingly or intentionally prescribes or dispenses a controlled substance outside of the usual course of professional practice. Recent developments, however, pose additional legal landmines for physicians and mid-level providers who prescribe controlled substance pain killers, such as oxycodone (Schedule II) or hydrocodone (Schedule III), for their patients.

In an effort to stem enormous increases in the abuse of prescription pain killers, the Michigan Bureau of Health Professions has sent to every licensed physician, medical resident, physician assistant, and advance practice nurse residing in Michigan a copy of the Federation of State Medical Boards’ booklet, *Responsible Opioid Prescribing: A Physician’s Guide*. The Bureau’s accompanying press release states that the booklet “provides concrete steps that can be taken to reduce risks and improve patient care in those cases where opioid therapy should be considered as part of a patient’s treatment plan.” The Bureau is now also sending copies of the booklet to every licensed optometrist, podiatrist and psychologist residing in Michigan.

Federal enforcement authorities are targeting CSA violators with both civil and criminal actions. Under recent statutory amendments, if a provider illegally prescribes controlled substances to a Medicare Part-D patient and the patient has that prescription filled, the prescribing provider can be sued for violation of the federal civil False Claims Act. Violators are subject to penalties of three times the amount of damages sustained by the government, plus civil penalties of \$5,500 to \$11,000 for each claim or prescription, as well as exclusion from federal healthcare programs, including Medicare and Medicaid.

At a recent meeting of Michigan health lawyers, an Assistant U.S. Attorney announced that the *Responsible Opioid Prescribing* booklet will play a role in the government’s criminal prosecution of physicians who violate the CSA by improperly prescribing pain killers. Specifically, the booklet will be listed on search warrants applicable to physicians under investigation. If the government finds the booklet while executing the search warrant, it will be used as evidence that the targeted provider was aware of the parameters of acceptable professional prescribing conduct. Conversely, if the booklet is not located during the search, its absence will be used as evidence that the targeted provider prescribed the drugs with deliberate indifference or reckless disregard of legal parameters.

The same Assistant U.S. Attorney also issued a special warning to providers who improperly

prescribe oxycodone (i.e., OxyContin®). While first violations are punishable by a minimum of 5 years and a maximum of 20 years in prison plus a fine of up to \$250,000, if the violation resulted in death or serious bodily injury, the government will seek the CSA's enhanced penalties: a minimum of 20 years and a maximum of life in prison plus a fine of up to \$1,000,000. Providers who improperly prescribe oxycodone can face those penalties even if their patient sold or gave the drug to a third person who subsequently died of an overdose.

In view of these developments, physicians and other providers should consult their licensing board's Guidelines for the Use of Controlled Substances for the Treatment of Pain and implement a prescription-abuse detection and prevention program that includes appropriate use of the Michigan Automated prescription System. An experienced health lawyer can provide valuable assistance in avoiding these pain management landmines.

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