

Expect Investigators to Probe White-Collar Involvement in the Opioid Epidemic in NH

By Patrick Queenan

In 2019, the United States Department of Justice (DOJ) ramped up its efforts to fight prescription opioid abuse across the country. In addition to the efforts to investigate and prosecute street-level drug trafficking, the DOJ and its affiliates have targeted pharmacies, pharmacists, prescribing practitioners, pill mills, and manufacturers. In New Hampshire, the United States Attorney's Office is awaiting a ruling from the First Circuit on whether the New Hampshire Board of Pharmacy will be compelled to produce information from its Prescription Drug Monitoring Program (PDMP) database. As a result of the enforcement trends across the country and the potential availability of PDMP information, federal prosecutors in New Hampshire will certainly seek to expand their efforts to investigate and prosecute the white-collar side of the opioid epidemic.

Enforcement Trends

One of DOJ's seminal enforcement actions this year was brought in the Middle District of Tennessee. There, DOJ brought a civil enforcement action against pharmacies and licensed pharmacists alleging violations of the Controlled Substances Act for knowingly dispensing controlled substances without a valid prescription and distributing and dispensing such substances outside the usual course of the professional practice of pharmacy. In addition to preventing any fur-



ther violations, the government also sought to recover alleged losses to the Medicare program to pay for controlled substances that were not used for a medically-accepted indication and lacked a legitimate medical purpose. The DOJ touted this civil-enforcement action as "First of its Kind" to stop unlawful dispensing of opioids.

According to the allegations, the defendants repeatedly dispensed opioids and other drugs prone to abuse without a legitimate medical reason and the dispensing was tied to multiple deaths and overdoses. According to the complaint, there are approximately 68,000 community pharmacies in the United States and, over the last three years, only three of those 68,000 pharmacies purchased more opioid doses per capita than one of the named-pharmacies in the en-

forcement action.

The DOJ alleges that a "pharmacist may not fill a controlled substance prescription unless it has been issued for a legitimate medical purpose." And such prescriptions may only be filled by a pharmacist acting in the usual course of his professional practice. Consequently, according to the DOJ, a pharmacist is required to refuse to fill a prescription if he or she knows or has reason to know that the prescription was not written for a legitimate medical purpose. The pharmacist has a legal duty to recognize "red flags" or warnings signs that raise (or should raise) a reasonable suspicion that a prescription for a controlled substance is not legitimate.

The DOJ contends that the "existence of such indicia obligates the pharmacist to

conduct a sufficient investigation to determine that the prescription is actually legitimate before dispensing."

The action in Tennessee was brought by the DOJ's Prescription Interdiction & Litigation (PIL) Task Force. The task force is charged with aggressively deploying and coordinating "all available criminal and civil law enforcement tools to reverse the tide of opioid overdoses in the United States, with a particular focus on opioid manufacturers and distributors." And it has done so over the past two years.

Beyond the PIL, other DOJ agencies, such as the Health Care Fraud Unit (HCF), have expanded their reach and resources and pursued large-scale criminal cases and enforcement actions. For example, in 2019, the HCF Unit and U.S. Attorney's Offices in Texas and Massachusetts, charged 41 individuals — including medical providers, clinic owners and managers, pharmacists, pharmacy owners and managers — for allegedly diverting approximately 23 million oxycodone, hydrocodone and carisoprodol pills. This investigation involved the execution of 36 search warrants — which included the search of 15 pharmacies and six pill mill clinics. The charges allege that participating doctors, medical professionals, and pharmacies knew the prescriptions had no legitimate medical purpose and were outside the usual course of professional practice. The HCF is bringing similar cases with

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ably has a duty to apprise a defendant that a guilty plea "carries a risk" of subsequent termination. For other inmates, termination is based on abandonment, which occurs when a parent makes insufficient efforts to support and maintain contact with their child. Although the statute says that "incarceration in and of itself shall not be grounds for termination of parental rights," there is a presumption of abandonment after just six months without communication.

While conviction of some crimes or a court order may limit contact, to avoid termination of parental rights, inmate-parents should communicate, communicate, communicate, in all ways possible and permissible. Guardianship of a child may offer some limited opportunities to avoid termination, depending upon an inmate's crime, family situation, and financial resources. If an inmate thinks he may be a father, in order to preserve future parental rights, he should file his information with the Putative Father Registry (forms available on DHHS's website).

For inmates who are successful in keeping parental rights, there is a program in all three state prisons, called the Family Connections Center, which can help qualifying inmates maintain positive family contacts. Parenting plans in divorce cases can include provisions for prison visitation.

Whether an inmate will have to pay child support is highly fact-dependent.

Large child support arrearages accruing during incarceration are in nobody's interest, and failure to pay arrearages is a felony. Parents who have an existing child support obligation, and seek to reduce it, should file immediately upon incarceration, because modification will be retroactive only to the time it was requested.

An inmate can get no-fault divorced, though imprisonment for more than a year is also grounds for a fault-based divorce. Long-term incarceration will probably negatively affect a divorcing inmate's property division. Whether a divorced inmate pays (or receives) alimony depends upon the facts.

Conflicting orders of the family and criminal courts should be avoided. While having children may not be effective as an argument to soften a criminal sentence, the family court is charged with understanding a defendant's family situation. Thus, criminal bail orders and sentencing conditions should probably defer to contact provisions fashioned in the family court. Finally, although details and time-lines will differ, all of these issues can arise from other states, depending upon the person's history.

Some defendants approach their case with more concern about their children than their liberty. Attention to some of these family court issues may provide opportunities for them to find a workable solution.

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its Strike Forces across the country.

Investigative Tool: Access to PDMP Information

Earlier this year in New Hampshire, the US Attorney's Office, on behalf of the Drug Enforcement Agency (DEA), obtained an order from Chief Judge McCafferty compelling the manager of the New Hampshire PDMP to produce documents in response to a DEA subpoena. On behalf of the manager, the State of New Hampshire has appealed Judge McCafferty's order to the First Circuit.

The case started when the DEA issued an administrative subpoena to the manager of the PDMP. Under the PDMP law, all "prescribers and dispensers" of certain controlled substances are required to submit information to the PDMP database, including the patient's name and address and the type, quantity, and refill regimen of the prescribed substance. The DEA, acting on information from the Board of Pharmacy, is investigating "potential diversion of large amounts of opiates through pharmacies" in New Hampshire. The manager of the Board of Pharmacy, however, refused to comply with the subpoena. The USAO, on behalf of the DEA, filed suit to compel the production of the requested information.

Early in 2019, the District Court issued an order compelling the manager of the Board of Pharmacy to comply with the subpoena. The State, however, appealed to

the First Circuit and has since obtained an order staying the trial court's decision until it rules on the issues presented in the appeal. Presumably, the Board of Pharmacy has yet to produce the requested information to federal investigators.

The parties presented oral argument in October to the First Circuit and are awaiting a ruling. If the trial court's decision is affirmed, access to the PDMP database and information will provide federal prosecutors in New Hampshire with a tremendous investigative tool. They will certainly use this information to build civil enforcement and criminal cases in this district. In fact, the government is already using data analytics to identify fraudulent billing practices in both the Medicare and Medicaid programs. As recently reported in the ABA Journal, lead DOJ lawyers now laud data mining as the "foundation" of how they currently investigate and analyze cases.

Going forward, federal prosecutors in New Hampshire may have access to PDMP information, among other data to analyze, and will likely follow the lead of the PIL Task Force and HCF—on a smaller scale—to find creative ways to prosecute cases in an effort to combat prescription drug abuse across the State of New Hampshire.

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