

## Opioid Litigation in America – The Blame Game

By: Nina Marino

In the late 1990s, pharmaceutical manufacturers assured the American public that opioids were non-addictive. Clearly that was false. Between 1999 and 2018, 232,000 people died from prescription opioid addiction. For the last five years, America has been struggling with who to blame for the opioid epidemic that has swept through this country. Litigation, both civil and criminal, has been filed with the goal of making the responsible parties pay either in money or with their freedom. This article will examine some of the recent litigation generated by the opioid epidemic.

In 2016 in the wake of rising opioid addiction, the CDC released guidelines for prescribing opioids for chronic pain. These guidelines promulgated a one size fits all for prescribed pain medication. While the guidelines were responsive on some level to the problems caused by overprescribing, many doctors, insurers, and pharmacists misinterpreted the guidelines as mandatory, and either reduced or eliminated writing, filling, and covering prescriptions for pain medication. This knee jerk reaction caused patients' dosages to suddenly and arbitrarily be reduced or eliminated altogether.

Beginning in 2016, patients with pain still had the pain, but doctors willing to prescribe became rarer and harder to find, making it increasingly difficult for patients to obtain medication. The deprivation of needed pain medication led to unemployment, depression, and suicide. Many people turned to the black market to get pharmaceuticals and, when they could not get those, turned to heroin and other illegal drugs as well as black-market pharmaceuticals.

Doctors who continued to prescribe saw a surge in their patient population. Most of these doctors sought to alleviate or reduce the pain their patients were experiencing. Others over prescribed and became known as "pill mills." Many of these "pill mill" doctors were prosecuted and sentenced to long prison sentences. In 2018, former Attorney General Jeff Sessions commented that, "[i]n the midst of the deadliest drug epidemic in American history, we need all hands-on deck." In response, DEA efforts surged, arresting dozens of people and taking dispensing authority away from nearly 150 medical professionals. In the fervor to prosecute doctors and hold them accountable for over prescribing and even overdosing to the point of death, many were wrongly targeted -and imprisoned. Despite assurance by the Department of Justice and other prosecutorial agencies that only large volume prescribers would be subject to government investigations and prosecution, these criminal cases strongly discouraged doctors from prescribing pain medication at all.

Doctors were not the only stakeholders to change practices in the wake of the CDC guidance. Pharmacies issued policies against filling opioid prescriptions. These policy driven prescription exclusions and limitations essentially interfered with the doctor-patient relationship. The situation was such that even if pain sufferers could get a prescription from a doctor, which was increasingly difficult, the pharmacy would not fill it as written.

In 2019, the authors of the CDC guidelines publicly acknowledged that the guidelines were flawed. In a June 16, 2020 letter to the CDC, the American Medical Association stated that “[t]he nation no longer has a prescription opioid-driven epidemic” and “[w]e can no longer afford to view increasing drug mortality through a prescription drug-myopic lens.” The AMA reaffirmed that the policies adopted by pharmacies were the result of the 2016 CDC guidance that is now widely recognized as having been misapplied.

These developments paved the way for patients who were denied pain medication by pharmacies to file suit. Two national class action lawsuits have recently been filed in two districts across the country against the largest pharmacy chains in the country for discrimination under the Americans with Disabilities Act, the Rehabilitation Act of 1973 and the anti-discrimination provisions of the Affordable Care Act. The lawsuits, *Smith v. Walgreens Boots Alliance, Inc., et al.*, Case No.: 20-cv-05451, filed in the Northern District of California, and *Fuog v. CVS Pharmacy, Inc., et al.*, Case No.: 20-cv-00337, filed in Rhode Island District Court, allege that the plaintiffs were discriminated against by the pharmacies for suffering from pain and were denied their medication. The lawsuits allege that the nationwide policies implemented by CVS, Walgreens, and Costco that limited or excluded filling opioid prescriptions resulted in plaintiffs who presented a valid prescription for opioid medication being ridiculed by pharmacists and staff, embarrassed for needing pain medication, likened to common drug users, and denied needed medications.

The irony lies in the fact that these same pharmacies were also being sued by state governments, including Attorneys Generals for Florida, Kentucky, and Ohio, for filling opioid prescriptions. Lawsuits filed against all the biggies: Walgreens, CVS, Walmart, Rite Aid, have accused these retailers of contributing to the opioid epidemic and demanded millions of dollars in damages. Most recently, in February, Florida Attorney General Ashley Moody opposed the defendant pharmacies’ effort to cross complain against 500 unidentified doctors. Moody called the cross complaint a “publicity stunt” and asked the court to reject it. The defendant pharmacies responded by arguing that their role is, and has always been, to simply fill prescriptions doctors write and that they should not be held responsible as they are neither doctors nor are they medically trained. *State of Florida, Office of the Attorney General, Department of Legal Affairs v. Purdue Pharma L.P., et al.*, Case No.: 2018-CA-001438. As it stands right now, pharmacies are simultaneously being sued for filling prescriptions and for not filling prescriptions. When it comes to opioid prescriptions, it is dammed if you do and dammed if you don’t.

Pharmaceutical manufacturers certainly have not escaped scrutiny either. U.S. pharmaceutical executives are now on notice that they could be held criminally liable for fueling the opioid epidemic after the founder of the drug maker Insys Therapeutics was sentenced to five and half years in prison for bribing doctors to prescribe prescription opioids. In this first of its kind prosecution brought by the District of Massachusetts, the DOJ charged Insys executives with RICO – a heavy handed charge historically reserved for mob and gang prosecutions. *USA v. Insys Therapeutics, Inc., Insys Pharma, Inc.*, Case No.: 2019-cr-10191-210748.

Whether you blame the pharmacies, the manufacturers or the doctors, people are the collateral damage. In the blame game of litigation, there is only one thing we know for sure: opioids are addictive, and many have fallen victim to the epidemic in one form or another.