

# Unanswered Questions after *Dobbs* Part I: Pharmacies

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As most of us know, on May 2, 2022, POLITICO reported it had received a leaked draft of the United States Supreme Court's forthcoming opinion in *Dobbs v. Jackson Women's Health Organization*, in which the Court purportedly plans to overturn *Roe v. Wade* and *Planned Parenthood of Southeast Pennsylvania v. Casey*, two of the seminal cases serving as the foundation of women's reproductive health rights for the last 50 years.

The decision has the very real potential to turn the world upside down for many health care entities, from providers and pharmacies to manufacturers and payers. If the federal constitutional right to obtain an abortion vanishes overnight, allowing states to prohibit or restrict abortion access, the developments will unfold at breakneck speed and will vary dramatically from one state to the next. Navigating this complex new landscape will require nuanced legal advice.

Reed Smith's Reproductive Health Working Group is perfectly positioned to address these issues for any client in the industry. Composed of lawyers with broad industry experience, our team has been working on these issues since learning of the leaked *Dobbs* opinion to understand the myriad challenges we anticipate our clients might soon face, many of which were nearly unfathomable only a few months ago. In many cases, there are far more questions than answers.

In our first installment of "Unanswered Questions," we explore the potential implications of the *Dobbs* opinion for pharmacies. Here are several examples of the thorny scenarios that will arise (or in some cases already are arising, for example in Texas):

## Abortifacients

- What obligations apply to pharmacists dispensing abortifacients labeled as abortifacients, labeled for other indications, and/or off-label?
- Should pharmacies monitor and/or affirmatively document the reason behind certain drug prescriptions before dispensing to confirm that they are not being prescribed to cause an illegal abortion?
- What kinds of red flags might put a pharmacy on notice that it may be dispensing medication to treat potentially illegal abortions (e.g., supply and distribution patterns)?
- Will there be an increased expectation placed on pharmacists to police non-abortifacient medications that might otherwise cause miscarriage or birth defects?
- Are pharmacies at risk of litigation/enforcement if a pharmacist fills a prescription for an abortifacient for a resident of another state where abortion is restricted?
- What happens if a patient is dispensed a prescription in an allowable state, only to self-administer the prescription in a prohibited state (or have the abortion conclude in a prohibited state)? Should pharmacies require patients to complete an attestation that they will not travel across state lines after receiving such a prescription?
- Can pharmacies be liable for failing or refusing to dispense an abortifacient? What if it is to avoid serious injury or death, and what qualifies? What if the patient suffers fatal complications from a miscarriage or ectopic pregnancy because they did not receive their abortifacient medication promptly?

## Exceptions

- Is it possible to dispense a drug, such as an abortifacient, to prevent serious injury or death under the law? How do states define "serious injury"? Does it vary?

- Does a miscarriage count? Ectopic pregnancy? Is it possible to dispense pursuant to an exception in one scenario but not the other?
- Are there other exceptions that might apply in the pharmacy context, e.g., rape or incest, possibility of birth defects?
- To what extent will pharmacists and pharmacies be required to be aware of specific exceptions, if any, being utilized for a particular prescription prior to dispensing?

## Telehealth

- To what extent do pharmacists need to be policing the location where the patient resides, the location(s) where the provider is licensed? What additional due diligence may be required to determine the patient's site of service?

## Contraception

- Some states allow pharmacists to prescribe oral contraceptives. How will such laws be impacted if and when *Roe* is overturned?

## Privacy

- How should pharmacies respond to subpoenas or other efforts to obtain documentation of patients' medications and pharmacies' decisions to dispense?
- What are the privacy rights of patients when seeking to fill a prescription? Could these change in states that are protective of a right to abortion in addition to those that take actions to limit abortion?
- What other ways might state agencies (or individuals seeking to bring suit under private attorney general provisions) attempt to obtain information from pharmacies about patients' potential abortions?

## Conscientious and religious objectors

- In states where laws may permit pharmaceutical abortifacients, does the upcoming *Dobbs* opinion affect "objector" status or treatment for pharmacists and employees who refuse to participate in the provision of abortifacients to patients even if the law of the state allows?

## Protestors

- As the site of potential "abortions" moves from abortion clinics (which will no longer be able to perform abortions) to pharmacies (which may be dispensing medication to cause abortions, even without their knowledge), should pharmacies anticipate an increase in protests or other activity previously associated with clinics like Planned Parenthood?

## Conflict of laws

- Can states with abortion restrictions enforce their laws extraterritorially? What amount of activity must occur within a state to provide a jurisdictional hook to enforce (e.g., effects of the abortion are felt in the state; a portion of the prohibited act, such as travel, occurred in the state; state asserted interest in preserving existence of fetus)?
- What will be the impact of states that not only seek to codify the right to an abortion in state law or the state constitution but that also pass laws seeking to protect providers and pharmacists from potential litigation by anti-abortion states (e.g., Connecticut, Illinois)?
- Is the "Dormant Commerce Clause" relevant in these circumstances?

## Preemption

- Can states limit or prohibit FDA-approved medications that may be used to cause an abortion (e.g., drugs indicated as an abortifacient, as well as drugs originally created to treat other conditions, such as stomach ulcers but which also may cause abortions)?

## Increased litigation & enforcement

- What volume of increased litigation can pharmacies expect as a result of changes in state laws, particularly those with private attorney general provisions allowing individuals to bring suit to enforce the state law, including against anyone who "aided or abetted" an abortion (e.g., Texas)? Again, will states be successful in enforcing their laws extraterritorially?

- How should pharmacies respond to increased third party requests for documents and information in support of litigation against providers who prescribed or provided abortions? What if patients have not released HIPAA authorizations?

### Administrative actions

- If a state board of pharmacy initiates an administrative action against a pharmacy for violating a state statute relating to abortion and issues a discipline for that violation, what impact does the reporting of that discipline to other states have, including states that do not have similar laws?

### Potential criminal liability

- Could pharmacies be held criminally liable for aiding and abetting an abortion when dispensing medication that could cause an abortion?
- Could pharmacies be charged with conspiracy to commit murder for prescribing an abortifacient to a resident of a state that defines “personhood” as the moment of fertilization?

### Employee training

- In situations where pharmacist and physician are employed by the same entity, what type of documentation, training, and efforts need to be maintained given that unique situation?
- Should pharmacies consider providing internal employee training on security threats specific to reproductive rights?

Watch for our next installment of Unanswered Questions after *Dobbs*, coming soon. Please reach out to a member of the Reed Smith Reproductive Health Working Group (see team members listed below) or the Reed Smith attorneys with whom you regularly work for more information or guidance on these or related issues. Reed Smith will continue to monitor developments as we anticipate release of the *Dobbs* opinion within the next few weeks.

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