Illinois’ Plan B Case: A Compromise But Not a Solution

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A proposed settlement in the case of Vandersand v. Wal-Mart Stores, Inc. would allow pharmacists in Illinois to recuse themselves from filling prescriptions for Plan B or “morning after” pills but require the pharmacy to fill the prescription through another pharmacist.¹

The issue in Illinois came to head in 2005, when, following an executive order on the issue from Governor Rod Blagojevich,² the Illinois Department of Financial and Professional Regulation issued an emergency amendment to the Pharmacy Practice Act requiring all Division I pharmacies to dispense a contraceptive or suitable alternative upon receipt of a valid, lawful prescription. Contraception is defined in the emergency rule as “all FDA-approved drugs or devices that prevent pregnancy.”³ The provision was later added to the pharmacy rules.⁴

In response to the new rule, lawsuits were filed by the Americans United for Life, the American Center for Law and Justice, and the Center for Law and Religious Freedom on behalf of pharmacists who objected to filling prescriptions for Plan B on religious and moral grounds.⁵ While there has been some controversy in requiring pharmacists to provide any form of birth control, the larger issue has revolved around Plan B, which is classified by the Food and Drug Administration as a contraceptive but is viewed by some as an abortive drug. Illinois has the Health Care Right of Conscience Act, under which pharmacists who objected to providing Plan B had been refusing to fill such prescriptions prior to Gov. Blagojevich’s order, making the state an interesting fighting ground on issues regarding extent of a provider’s right of refusal; Blagojevich has argued that pharmacists and pharmacies are not covered by the Act.⁶

In November 2005, four Walgreens pharmacists were placed on unpaid leave for refusing to fill Plan B prescriptions in violation of the new rule. In response to questions about its action, Walgreens said that it had no choice given the Illinois rule,⁷ leading to further controversy over the applicability of the new rule and the Right of Conscience Act. Five Walgreens pharmacists filed suit in the United States District Court for the Central District of Illinois contending that the rule violated their rights under the First Amendment.

³ 29 Ill. Reg. 5586 (April 15, 2005).
⁴ Ill. ADMIN. CODE tit. 68, § 1330.91 (2007).
⁶ Joan Villa, supra note 2.
Amendment and Title VII of the Civil Rights Act of 1964. In a motion to dismiss, Blagojevich argued that the rule was a neutral regulation and was not religiously motivated. Suits were also filed against Walgreens arguing that it acted in violation of the Right of Conscience Act.\(^8\)

The suits did not deter Blagojevich and, in response to continued reports of problems filling Plan B prescriptions and of misinformation being provided to women about whether the drug was in stock at particular pharmacies, he directed the Department of Financial and Professional Regulation to adopt new rules requiring pharmacies to post signs regarding patients’ rights if the drug is not in stock, how to file a complaint, and the hotline number for the Department. The Department also sent letters to all licensed pharmacies and pharmacists reminding them of the applicable law and rules.\(^9\)

The next major action regarding the Illinois law came on July 31, 2007, when an opinion in *Vandersand v. Wal-Mart Stores, Inc.* was filed with the US District Court clerk; the case involves a pharmacist who was placed on unpaid leave by Wal-Mart after refusing to fill Plan B prescriptions.\(^10\) The Opinion, written by Judge Jeanne Scott, was filed in response to Wal-Mart’s Motion to Dismiss Complaint or Stay Proceedings.\(^11\) Wal-Mart argued that it was complying with the rule and that pharmacists are not covered by the Right of Conscience Act. Scott denied the motion, finding that pharmacists are covered by the Act and that a valid claim was made alleging religious discrimination.\(^12\) Vandersand alleged that his opposition to Plan B was part of his religious beliefs, that Wal-Mart knew that his religious beliefs were the reason he would not fill Plan B prescription, and that in response Wal-Mart gave him the option of being fired or taking unpaid leave; he thereby stated a proper claim of religious discrimination.\(^13\) Scott stated that it was unclear whether Wal-Mart could comply with the rule and accommodate Vandersand without suffering undue hardship, thereby precluding dismissal on that claim.\(^14\) Scott further reviewed the Right of Conscience Act and noted that medication is included in the Act’s definition of health care. She rejected Wal-Mart’s argument that the last clause in the definition of health care, which refers to “surgery or other care or treatment,” limits the earlier portions of the definition and the Act therefore would apply only to nurses, physicians, paraprofessionals, or health care facilities. She found that


\(^{9}\) Press Release, Office of the Governor, Rod R. Blagojevich, Governor Blagojevich introduces new rule to ensure women’s access to prescription contraceptives after new tactic to deny women access to birth control surfaces (March 27, 2006), available at http://www.illinois.gov/PressReleases/PrintPressRelease.cfm?RecNum=4738 (last accessed October 11, 2007).


\(^{11}\) *Id.* at p. 1.

\(^{12}\) *Id.* at p. 2.

\(^{13}\) *Id.* at pp. 7-8.

\(^{14}\) *Id.* at pp. 9-10.
under the clear language of the Act, it would apply to Vandersand and other pharmacists.\textsuperscript{15}

The ruling was seen as a clarification of both the Right of Conscience Act and the applicability of the contraception rule – that the Act applies to pharmacists and that the rule applies to pharmacy owners and not individual pharmacists.\textsuperscript{16}

A proposed settlement filed October 5, 2007 in a related case filed by pharmacists and Walgreens against the State of Illinois challenging the rule may indicate the end of this round of the battle over provider conscience rights in Illinois. Under the settlement, pharmacies would be required to fill contraceptive prescriptions, including those for Plan B, without delay, but individual pharmacists are not required to fill prescriptions if they object to doing so. In those situations, the pharmacy owner or another employee would fill the prescription after an off-site pharmacist approves the prescription by phone or fax. The State must amend the existing rule by March 2008 to comply with the settlement.\textsuperscript{17}

The settlement solves the immediate problem – the lawsuit against the State and possibly the other related cases – but fails to address the underlying questions about right of conscience. It also leaves the rule open to challenge by pharmacy owners who object to providing the relevant medications and may only reduce but not alleviate access issues, as it is unclear whether there will be a sufficient network of off-site pharmacists available at all hours to cover the need.

A quote from the Illinois Pharmacists Association’s Executive Director, Mike Patton, summarizes the problem well, “We think the pharmacist should have the right of conscience, but not at the expense of the patient.”\textsuperscript{18} The problem is that there will be situations in which the right of conscience and the rights of the patient can not both be respected. Refusal to fill Plan B prescriptions can impact the ability of the woman to whom it was prescribed\textsuperscript{19} to use the drug as must be used within 72 hours of unprotected intercourse to be effective. If, due to transportation issues or a scarcity of local pharmacies, a woman can not fill her prescription in a timely manner at another pharmacy and there are no other known pharmacists available off-site, there is a clear conflict between the right of conscience for the provider and the right of access for the patient.

\textsuperscript{15} Id. at pp. 11-13.
\textsuperscript{18} Joan Villa, \textit{supra} note 2.
\textsuperscript{19} Please note that under current law only minors need a prescription for Plan B; adult woman may receive it without a prescription.
While the settlement is a good compromise for the existing lawsuit, the Solomon-like solution suggests that the parties gave up on addressing the question of whether the rights of the provider or the rights of the patient trump when no alternative is available. I sincerely doubt that either the pharmacists or the women involved in filling future Plan B prescriptions will truly feel that they “won” in this settlement when they step back to watch the provider shuffle that will now take place in Illinois pharmacies.

As medicine and medical technology advance, particularly in the areas of fertility and end-of-life treatments, the conscience versus access problem will only increase. Ignoring it and living in denial is certainly more pleasant than attempting to address how to balance the needs of the people on all sides of the health care equation. Emotions run high when discussions turn to whether health care providers and their patients are “playing God” by stopping a pregnancy or letting someone die without providing further medical intervention, but if we continue to shrug our shoulders and walk away from difficult and emotional health care issues the rights of all parties will get trampled. Only by sitting down and truly examining these issues and determining a fair and as objective as humanly possible way to determine the outcome in these cases, relying on the legal concepts of autonomy, due process, and informed consent, will progress be made.