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Blog Post

State Attorneys General Flex in a Post-*Dobbs* World – Can Complying with Federal Regulatory Guidance Constitute Racketeering Activity?

February 13, 2023

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Are State Attorneys General expanding their reach in this Post-Dobbs world? On February 1, 2023, twenty state Attorneys General signed letters to both CVS and Walgreens warning the giant retail pharmacies against mailing medications that could potentially be used to induce abortions. These letters are most notable for the legal posture they assume. The state Attorneys General penning this letter are purporting to emphasize enforcement of federal law (18 U.S.C. § 1461), *not* the state law of the respective states these Attorneys General represent. Press reports state that CVS and Walgreens plan only to distribute abortion-inducing medications where it is legal to do so. Nevertheless, these warning letters assert that each Attorney General has the right to enforce federal law—typically the purview of *federal* prosecutors—against any retail pharmacy that mails abortion-producing medications within, to, or from jurisdictions that are less restrictive with respect to abortions.

18 U.S.C. § 1461 (mailing obscene or crime-inciting matter), the proverbial hammer cited in the two warning letters, criminalizes using the mail to send any medicine, among other things, for the purposes of "producing" an abortion. Perhaps acknowledging

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the atypical nature of a state Attorney General attempting to invoke a federal criminal statute, the twenty state Attorneys General here cross-reference a federal anti-racketeering statute, known as the Racketeer Influenced and Corrupt Organizations Act ("RICO"). 18 U.S.C. §§ 1961 *et seq*. Section 1461 is among the statutes listed in the definition of "racketeering activity." 18 U.S.C. § 1961(1). Therefore, the warning letters highlight that a violation of § 1461 could give rise to civil liability under RICO. *See* 18 U.S.C. § 1964(c). In turn, the state Attorneys General contend that they, along with other private parties, have proper standing to assert a claim in federal court nationwide to enforce § 1461.

Like many risk-oriented issues raised in our post-*Dobbs* world, these warning letters pose novel legal questions. More than 650 cases have cited to § 1461 since the first published opinion in the 1870s. Yet, we are aware of no case that has sought to couple the concept of abortion and the federal racketeering statute. The dearth of guidance leads practitioners (healthcare and law practitioners, alike) to many significant questions and considerations:

1. Even if using the mail to facilitate abortions may be considered "racketeering activity" under the definition set forth in RICO, that definition does not itself create liability. RICO criminalizes, and by extension creates civil penalties, only against certain patterns of racketeering activity enumerated in the RICO statute. 18 U.S.C. § 1962 (a)-(d). The warning letters do not explain how the potential mailing of certain abortion-inducing medications could fit one or more of the statutorily defined patterns.
2. What legally cognizable harm might the state Attorneys General articulate to create standing to file suit under § 1964(c) if, as mentioned, a "mailing" does not touch upon a particular state attorney general's jurisdiction?
3. RICO provides civil relief only for damages to a "business or property." 18 U.S.C. § 1964(c). The

twenty state Attorneys General do not explain how they might meet this RICO standard for a private civil suit against retail pharmacies. Nor do the letters explain how damages might be quantified.

4. For medications that are used for both abortive and non-abortive patient care (such as methotrexate, which can be used for inducing an abortion as well as treating rheumatoid arthritis), what, if any, duty does a retail pharmacy have to police the intent of the prescriber and/or the patient?

There is also a fundamental question about federal preemption. On January 3, 2023, the Food and Drug Administration ("FDA") modified its risk evaluation and mitigation strategy for mifepristone, an abortion drug that is utilized in tandem with misoprostol to terminate an early term pregnancy, in part to broaden the ability of retail pharmacies to dispense that drug (FDA Action). How would courts balance a regulatory environment in which the FDA has approved dispensing certain prescriptions, on the one hand, and state Attorneys General efforts to seek civil liability against retail pharmacies that act consistent with such FDA Action?

Finally, as noted in the letters mentioned above, this dispute also raises the specter of potential future criminal prosecution by a new administration in 2024, which may have different prosecutorial priorities than the current administration. Even if retail pharmacies may be free to mail pertinent medications now, 18 U.S.C. § 1461 has a five-year statute of limitations. Based on this look back, current conduct may be subject to prosecution in the future if leaders with a different set of prosecutorial priorities assume the White House in 2024. Ultimately, in our post-*Dobbs* world, healthcare practitioners face a host of risks, the totality of which cannot be summarized in a blog post and may not be readily apparent at this time. It is critical for practitioners to partner with experienced healthcare

and litigation counsel to manage the scope and breadth of that risk as best as possible.
