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State: IN

Federal Suit against Mandatory Drug Testing Fuels Debate: Top [2014-02-19]

By Mark Larson, reporter

A lawsuit filed in January by the American Civil Liberties Union against the Medical Licensing Board of Indiana claims it is unconstitutional to require annual drug testing of patients as a condition of their treatment with opioid pain medication.

A handful of states around the country have tried to control opioid dispensing because of concerns that widespread overprescribing has led to addictions and overdoses by patients. Between 1999 and 2010, the Centers for Disease Control and Prevention found overdoses more than quadrupled nationally, which mirrored its statistics showing a four-fold increase in opioid sales for the same time period.

The CDC found prescription drug overdoses in Indiana were associated with 14.4 deaths per 100,000 people in 2010. That exceeded the national average of 12.4 per 100,000, putting the state in the upper third nationally of states with an overdose problem. Some observers applaud the ACLU suit in Indiana as a needed defense against drug tests they say are ordered too often, don't produce results and are a costly way for physicians to make extra money.

Others say the tests in question aren't "presumptive" tests conducted at the doctor's office, but "confirmatory." Confirmatory tests, they say, are done in outside labs to help make sure treatment doses are correct and working.

Confirmatory tests, according to the ACLU suit, titled [Wierciak v. Individual Members of the Medical Licensing Board](#), are more specific and expensive than a presumptive test, and they're used to identify specific drugs and confirm a positive or negative test.

Presumptive drug tests are less specific, identifying whether a sample contains classes of drugs, the suit says, adding, they do not necessarily detect lower concentrations of drugs. The suit does not name any one type of test in making its allegations of unconstitutional drug testing.

The ACLU suit, filed in federal court in Indianapolis, seeks a court order to prohibit requiring patients sign a treatment agreement that allows drug testing at least once a year.

The suit takes aim at a new [emergency rule](#) passed in October by the board that requires patients receiving more than 15 mgs of opioids daily for three consecutive months to sign a treatment agreement consenting to "confirmatory" testing at least once a year.

The new rule also stipulates that if test results reveal "inconsistent medication use patterns or the presence of illicit substances, a review of the treatment plan shall be required." But the drug tests aren't required until Jan. 1, 2015.

The ACLU filed the lawsuit on behalf of James Wierciak, a Hamilton County resident who has been prescribed Vicodin, an opioid, for more than 18 years to manage chronic pain from a variety of health problems. The ACLU is seeking class-action status to represent all patients similar to Wierciak who are

impacted by the Indiana Medical Licensing Board rule.

In an affidavit filed with the suit, Wierciak says that he is unable to take non-narcotic pain relievers, such as Advil and Motrin because of kidney damage. He states that he strongly objects to the requirement that he undergo periodic drug testing in order to continue his Vicodin prescription, which interferes with the patient-doctor relationship, but he will not be able to continue taking the medication unless he signs a contract consenting to periodic drug testing.

Kenneth Falk, legal director of the ACLU of Indiana, said in a press release when the suit was filed, "The mandatory drug testing simply goes too far," and violates Fourth Amendment protection against unjustified searches. Falk was unavailable for comment Tuesday.

Mark Collen, a California-based artist who suffers from a herniated disc, wrote in a [2012 article](#) for the Journal of Pain & Palliative Care Pharmacotherapy, that profits – not patient care – are driving a proliferation of drug testing. He doubts any drug test results accurately determine whether a patient is following a treatment program.

"The reality is if you look at the science, which physicians are supposed to do, the procedures of drug testing are not evidence based," Collen said Tuesday in an interview. "It doesn't benefit patients. So who does it benefit?"

He suspects drug tests ordered by physicians are "fear-based, they're afraid of being prosecuted, they don't know what to do." Collen said he's "the only one in medical literature" challenging required drug testing for patients getting opioid medication.

"Certain segments are doing it for money; there's no question in my mind," Collen said of physician-ordered drug testing. "Overall, they can't prove that there's any patient benefit to it. It's not a simple matter."

On the other hand, Michael Gavin, president of Prium, a medical-cost management firm, said Indiana's attempt to control dangerous opioid use for chronic pain is laudable.

Gavin sees drug testing as the same as routine diagnostic practices of doctors: MRIs, taking blood pressure or clinical monitoring needed for patient safety and the effectiveness of other medications.

Drug testing benefits both the doctor and the patient, he said, when a patient's drug test shows him or her taking dangerously high doses of opioids. He said some tests can also show that the patient's genetic makeup isn't allowing opioids to work effectively in killing pain. In such cases, other alternative treatments can be prescribed, Gavin said.

But Gavin said he also understands Collen's point about abuse of drug testing. He said physician-ordered drug testing "is often abused."

"It's a way for physicians to bill insurance companies and they're often inaccurate," Gavin said.

But Gavin maintained confirmatory drug testing done "in an outside lab environment," isn't the same and gives accurate results.

Gavin suspects the ACLU suit "has got a long way to go" in winning its cause. But if it is successful, he said, "It sets back the fight against opiate abuse in a significant way," in that it could discourage other states from trying a similar opioid control.

He called the Indiana medical-licensing board's new rule, "The first of its kind that I'm aware of. It's a proactive step to stem the tide of opioid use and abuse."