Memorandum

To: REDACTED

From: Jeff Merrick, 503-665-4234

Date: February 2, 2010

Re: Suing a Pharmacy Under Oregon's Law of Strict Product Liability

1. Redacted

2. Redacted

3. Oregon law permits a claim of strict product liability against the pharmacy.

A. Summary.

There is no definitive authority on whether Oregon's law of strict product liability applies to a pharmacy and / or infusion facility. The limited Oregon law on the topic supports a claim. Also, our facts are better than the typical scenario. My legal analysis follows.

B. Oregon has no blanket rule against pharmacy liability.

Some states exempt pharmacists from strict liability for dangerous drugs. *E.g., Bichler v. Willing,* 58 AD 2d 331, 334, 397 NYS 2d 57, 59 (1st Dep't 1977), *but see, Gensler v. Sanolfi-Aventis*, 2009 WL 857991 (ED NY 2009) (Pharmacist exception does not prohibit claim against wholesale distributor); *Murphy v. E.R. Squibb & Sons*, 40 Cal 3d 672, 710 P2d 247 (1985)(may not sue California pharmacy), *but see, Martin v. Merk & Co., Inc.,* 2005 WL 1984483 (ED Cal 2005) (Pharmacist exception is for those who provide services. Wholesale distributor is subject to strict product liability.). Fortunately, there is no Oregon authority exempting pharmacies.

C. Learned intermediary doctrine does not insulate Oregon pharmacies.

Many states rely on the learned intermediary doctrine to eliminate lawsuits against pharmacies, particularly for failure to warn cases. *E.g., Walls v. Alpharma USPD Inc.*, 887 So2d 881 (Ala, 2004). Oregon's Supreme Court held that the learned intermediary doctrine does not insulate a pharmacist from strict product liability. *Griffith v. Blatt, et. al*, 334 Or 456, 51 P3d 1256 (2002).

D. Is [redacted] a "Seller?" It seems to be.

(1) Oregon law differs from the law of jurisdictions, which exempt pharmacies from product liability claims because they are not "sellers."

(a) Oregon's Product Liability Law

Oregon law provides for strict product liability claims, including against sellers of unreasonably dangerous products. ORS 30.900 & 30.920(1). Service providers are not subject to strict product liability. *Watts v. Rubber Tree, Inc.*, 121 Or App 21, 853 P2d 1365 (1993). The legislative intent is to follow the Restatement (Second) of Torts § 402A. ORS 30.920(3).

RESTATEMENT (SECOND) OF TORTS, §402A, comment f states, in part, as follows:

> *f. Business of selling.* The rule stated in this Section applies to any person engaged in the business of selling products for use or consumption. It therefore applies to. . . any wholesale or retail dealer or distributor. . . . **It is not necessary that the seller be engaged solely in the business of selling such products.** Thus the rule applies to the owner of a motion picture theatre who sells popcorn or ice cream, either for consumption on the premises or in packages to be taken home. . . .The basis for the rule is the ancient one of the **special responsibility for the safety of the public undertaken by one who enters into the business of supplying human beings with products which may endanger the safety of their persons** and property, and the forced reliance upon that undertaking on the part of those who purchase such goods. . . . [emphasis added]

(b) Some Jurisdictions Absolve Pharmacies.

Despite comment f's acknowledgement that an entity need not be a seller, only, some courts have substituted a "predominate purpose" test to determine if a doctor or pharmacist provided a service or sold a product. *E.g., Porter v. Rosenberg*, 650 So2d 79, 80 (Fla Dist Ct App), *rev. denied*, 661 So 2d 825 (1995). The rationale underlying opinions immunizing pharmacists focuses, mostly, on the use of professional skill and judgment:

> It seems clear to us that the pharmacist is engaged in a hybrid enterprise, combining the performance of services and the sale of prescription drugs. It is pure hyperbole to suggest, as does plaintiff, that the role of the pharmacist is similar to that of a clerk in an ordinary retail store. With a few exceptions, only a licensed pharmacist may dispense prescription drugs, and as indicated above there are stringent educational and professional requirements for obtaining and retaining a license. A pharmacist must not only use skill and care in accurately filling and labeling a prescribed drug, but he must be aware of problems regarding

> the medication, and on occasion he provides doctors as well as patients with advice regarding such problems. In counseling patients, he imparts the same kind of information as would a medical doctor about the effects of the drugs prescribed. A key factor is that the pharmacist who fills a prescription is in a different position from the ordinary retailer because he cannot offer a prescription for sale except by order of the doctor. In this respect, he is providing a service to the doctor and acting as an extension of the doctor in the same sense as a technician who takes an X-ray or analyzes a blood sample on a doctor's order.

Murphy v. E.R. Squibb & Sons, Inc., 40 Cal 3d 672, 678-79, 221 Cal Rptr 447 (1985). Our situation contrasts with the above emphasis on professional service. Here, an institutional drug outlet, provided [redacted] to another health care professional, who infused Mrs. X. There was virtually no opportunity to exercise any professional judgment in the handing-over of the drug.

(c) Some jurisdictions treat pharmacies like other intermediate product sellers.

Some courts acknowledge that pharmacies may be product sellers subject to strict product liability. Said one:

> To the extent that the plaintiff here bases his strict liability count against Defendant Payless on the pharmacy's role in the chain of distribution, standing between the patient and the drug manufacturer and doctor, the claim is valid. For purposes of the strict liability claim, the allegation is not directed at the conduct of the pharmacist but rather the nature of the product as it made way through the stream of commerce.

Heredia v. Johnson, 827 F Supp 1522, 1525 (D Nev 1993); *also, King v. Warner-Lambert Co.*, 2002 WL 988167 (D Nev 2002) (unreported case relying on *Heredia* to remand case).

Other courts, too, have found that plaintiffs pleaded all elements necessary to state a product liability claim against health care providers. *E.g., Basso v. Boston Scientific Corp.*, 2008 WL 5252198 (Conn Super 2008) (alleged hospital in the business of selling medical device); *Kaibjanian v. Thomas Jefferson University Hosp.*, 717 F Supp 1081 (ED Pa 1989) (Hospital could be considered seller of contrast medium.); *also, Eby v. Hershey Medical Center*, 1993 WL 769035 (Pa Com Pl 1993) (relying on *Kaibjanian*); *but see, In re Breast Implant Product Liability Litigation*, 331 SC 540, 503 SE 2d 445 (1998) (questioning continuing validity of *Kaibjanian*).

Cases from other jurisdictions indicate that, absent any blanket pharmacy exemption, the question remains whether the defendant is a "seller" under Oregon law, as informed by 402A.

(d) Oregon cases seem to treat pharmacies like other intermediate product sellers.

Two Oregon cases potentially bear on whether a pharmacy could be considered the seller of [redacted].

In *Docken v. Ciba-Geigy*, 86 Or App 277, 282, 739 P2d 591, *rev. denied*, 304 Or 405 (1987), plaintiff sued the drug manufacturer, prescribing physician and pharmacies, including for strict product liability. The court upheld the trial court's dismissal based on a violation of Oregon's fact pleading rules; plaintiff failed to allege that the pharmacist was in the business of selling the drug. Oregon lawyers cite *Docken* as suggesting that health providers who are in the business of selling products may be liable under strict product liability. *See,* DOMINIC VETRI & MICHAEL WILLIAMS, *Product Liability, in* TORTS at §19.10 (Oregon State Bar, 2006).

In *Griffith v. Blatt, et. al*, 334 Or 456, 51 P3d 1256 (2002), plaintiff sued the manufacturer of a prescription lotion, the prescribing physician, and the pharmacist. She alleged strict liability against the pharmacist. All the pharmacist did was fill the prescription precisely the doctor instructed by adding a label that said, "As directed."

The *Griffith* trial court and Court of Appeals held that the learned intermediary doctrine insulated the pharmacist. Oregon's Supreme Court reversed. The learned intermediary doctrine is a defense to negligence, it held. The court declared that the **learned intermediary doctrine has no application to a strict liability claim**. 334 Or at 468.

Perhaps more directly on point is that Oregon statutes direct courts to follow 402A. 402A says an entity can be both a seller AND something else. Those jurisdictions that look for a "predominate purpose" depart from 402A, contrary to Oregon law.

So, Oregon law on the topic points in a different direction from those states that have upheld dismissals of product liability claims against pharmacists. Consequently, it appears that Mrs. X could sue [Potential Defendant] in its capacity as a drug outlet.

(2) Our facts distinguish this case from negative, non-binding authority.

[Redacted]

4. Conclusion.

[Redacted]