# NOT WHAT THE DOCTOR ORDERED

Every year, at least 1.5 million Americans are injured[1] and more than 7,000 are killed due to medication errors.[2] There seems to be a large pharmacy chain on every corner, and patients depend on these pharmacies to get their prescriptions right.[3] When something goes wrong and the pharmacy improperly fills a prescription, the patient may come to you to evaluate a case.

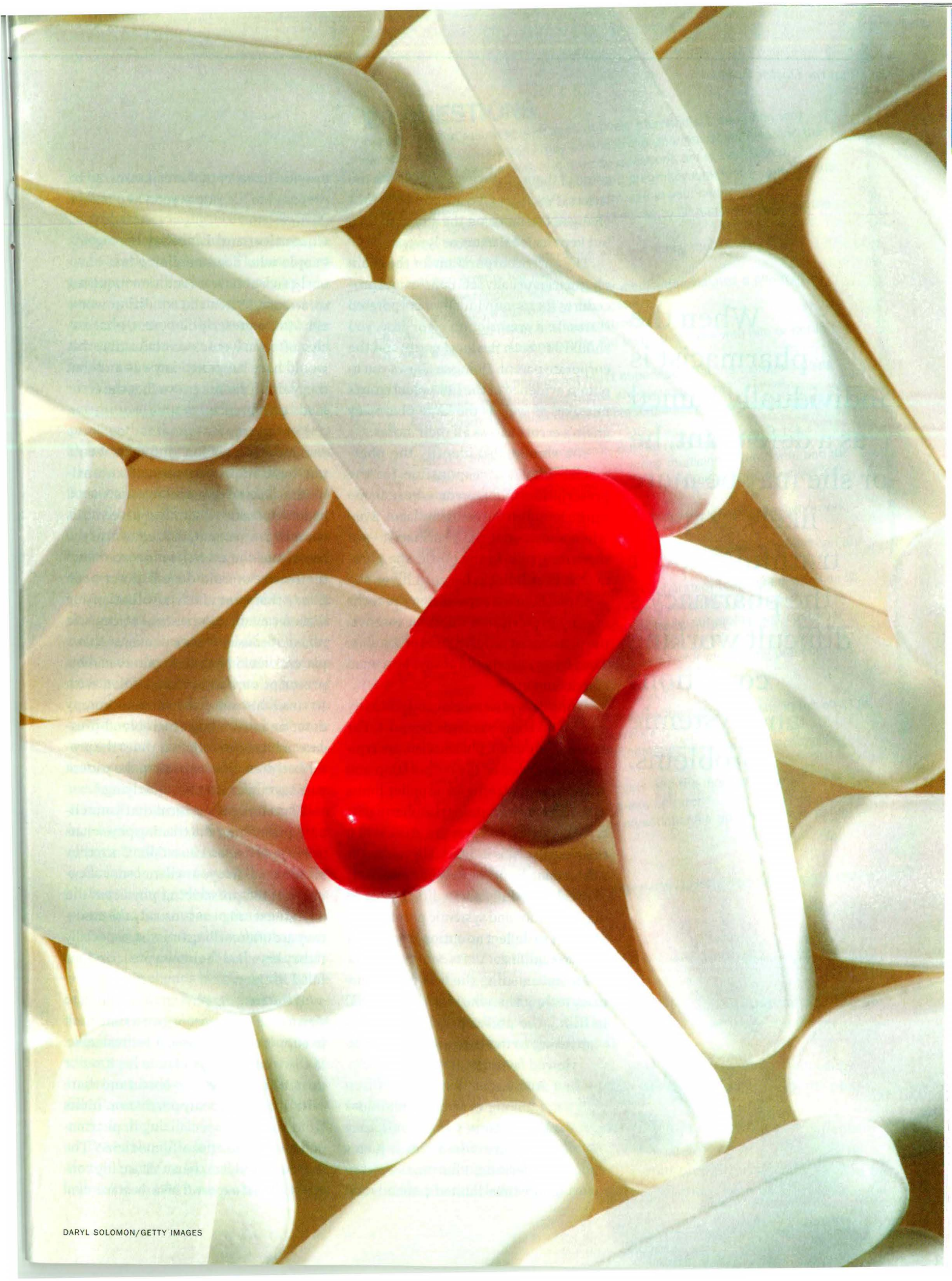
The most frequent errors include filling a prescription with the wrong drug, or at the wrong strength, or with the wrong directions, or for the wrong patient. Appropriate theories of liability include claims for simple negligence and professional negligence of the pharmacist and techs who improperly filled the prescription.

**PRESCRIPTION ERRORS—WHEN A PATIENT GETS THE WRONG DRUG, AT THE WRONG STRENGTH, OR WITH THE WRONG DIRECTIONS—CAN BE SERIOUS AND EVEN DEADLY. WITH THOROUGH PREPARATION, YOU CAN SHOW THAT THE PHARMACY COMMITTED MALPRACTICE.**

*By* || **TRENT B. SPECKHALS**

The employer may be sued under the theory of respondeat superior or vicarious liability for the negligence of its pharmacist and techs. Because the work environment often leads to these errors, you may also sue the pharmacy for its independent negligence and negligent hiring, retention, and training.

Sometimes it is unclear who the responsible parties are. The name on the store's sign may not be the pharmacy's. For example, although CVS Caremark is the parent corporation for CVS pharmacies, CVS has registered dozens of different legal entities with the Georgia secretary of state. Due to acquisitions,



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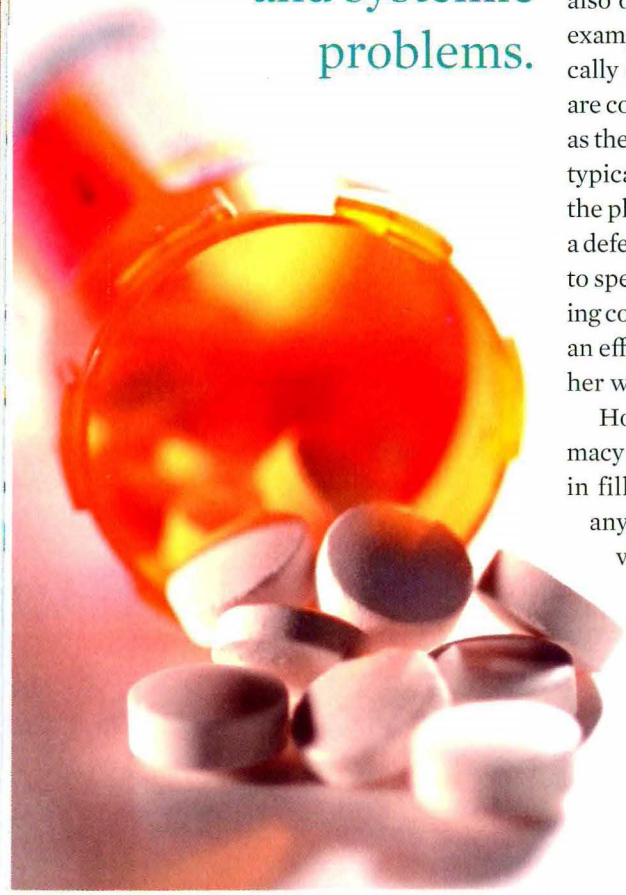


some of them do not even begin with the letters CVS. After CVS acquired Revco, it changed the name on the stores to CVS but kept its legal name as Revco.

The parent corporation for the chain pharmacies usually sets policies and procedures for its individually incorporated stores. In a prescription error case, you should sue both the local entity and the corporate parent. Doing so allows you to obtain evidence of the individual store's mistakes as well as the large pharmacy chain's errors across all their stores.

You should also identify the pharmacist who was responsible for the prescription-filling error, whose name can be found on the medicine label. Even when a tech—not the pharmacist—put the wrong pills in the bottle, the pharmacist is still liable because he or she is responsible for supervising the techs for any prescription filled. In essence, the pharmacist is the captain of the ship. The pharmacist should always be named as a defendant.

Suing the pharmacist individually also offers some strategic benefits. For example, although pharmacists are typically employees of the corporation and are covered under the same policy limits as the pharmacy, naming the pharmacist typically destroys diversity. Also, when the pharmacist is individually named as a defendant, he or she may be more likely to speak truthfully about difficult working conditions and systemic problems, in an effort to deflect attention from his or her wrongdoing.

However, suing the low-paid pharmacy technicians who may have assisted in filling the prescription rarely adds anything to the case and may not be viewed favorably by jurors.

Although pharmacies often are willing to settle small injury claims before you file suit, they rarely are when the injuries are serious. Pharmacies often ignore time-limited demands and provide unacceptable responses, so be prepared to file suit as soon as possible.

### Causation and Liability

People who need medicine are, obviously, sick or have a condition requiring treatment. When the condition worsens after a prescription error, pharmacies often are quick to claim that this would have happened anyway and that the plaintiff cannot prove that the error made a difference.

For example, pharmacies have claimed that a person's infection would not have improved even if an antibiotic—instead of a decongestant—had been dispensed;[4] that ulcerative colitis would have necessitated removal of the large intestine even if an incorrect and ineffective steroid dose had not been filled;[5] that no studies show that getting diabetes medication instead of a muscle relaxant causes kidney damage;[6] that a patient would have died soon even if his prescription had not been filled with 10 times his prescribed chemotherapy dose;[7] and that filling a high-blood-pressure medication with four times the prescribed dose did not result in the patient passing out, aspirating, and dying.[8]

Therefore, it is critical that your client's prescribing and treating physicians are supportive on causation. Once they understand that your client is not alleging that the prescribing physician did anything wrong—as is usually the case—they are often willing to assist, especially if they have had their own prescriptions filled in error.

If the treating physician is willing to sign a medical report or give a statement in support of causation, it is invaluable. If the treating physician is hesitant or unsure, it often helps to obtain and share with him or her supportive opinions from an expert specializing in pharmacology and the effects of medicine. The treating physician then will usually concur with that expert. This is best handled

before you file suit to ensure that your causation case is strong.

A pharmacy negligence case, like many things in trial practice, may appear simple, but it can be complicated. The case seems straightforward: The pharmacy had the prescription, the pharmacy misfilled the prescription, and the patient took the wrong medicine as a result. What could be more cut-and-dry, right?

Wrong. Proving liability for a prescription-filling error is often akin to proving that there was a foreign object in a food product. The defendant can always claim that the plaintiff put the foreign object in the food and then brought suit simply to collect damages.

Similarly, pharmacies and pharmacists often claim that they did not misfill the prescription. If improper medicine is in the bottle (or if there is some correct and some incorrect medicine in it), some defense witnesses have testified that the patient or a family member caring for the patient must have accidentally put the improper medicine in the bottle.

You must ensure that your client or whoever may have helped give the medications to your client did not combine medicines or put them in different containers. For example, obtain prescription histories from all pharmacies that your client's family used in the 5 to 10 years before the incident to see if the medicine that was in the bottle by mistake had been prescribed for anyone in the family.

Obtain admissions that the pharmacy carried the medicine that the pharmacy put in your client's bottle—at the same strength and made by the same manufacturer. Get admissions and documents proving that around the same time your client's prescription was filled with the improper medication, the pharmacy filled prescriptions for others with that same medicine.

When the pills in your client's bottle look nothing like what the proper medicine would have looked like, you can refute the argument that your client put the wrong pills in the bottle. This also shows that the pharmacy improperly had multiple stock bottles open at the same time while filling a customer's prescription.

Pharmacies like to blame patients and claim that they should have realized they got the wrong medicine. You can defeat the defense of contributory negligence by asking the following questions at the pharmacist's and pharmacy representative's depositions.

- Is the pharmacist ultimately responsible for making sure the prescription is filled with the correct medicine?
- Do you agree that patients expect that what they get from the pharmacy will be the correct medication?
- Your pharmacy expects patients to be able to rely on it, correct? And your pharmacy wants the patient to trust and rely on it? You take steps,

## 20 QUESTIONS

I like to ask the following questions at every pharmacist's and pharmacy representative's deposition. They establish the pharmacist's duties and the rules that must be followed, and if these questions are not answered reasonably, they make the pharmacist and pharmacy look foolish and callous. They also support themes you will want to use in your case.

1. Do you agree that a pharmacist is required to fill a prescription with the correct medication?
2. Is it ever OK to fill a prescription with the wrong medicine?
3. Even one error is too many?
4. Filling a prescription with the wrong medication violates a pharmacist and pharmacy's standard of care, correct?
5. And that would mean it is malpractice?
6. Is a pharmacist responsible for the techs that work with him or her in the pharmacy?
7. In other words, a pharmacist must supervise what the techs are doing and ensure that the prescriptions are accurate, right?
8. And a pharmacist must check all prescriptions before they go out to patients?
9. Even if it was a tech who actually put the medicine in the bottle?
10. In other words, if the tech puts the wrong medicine in the bottle and the customer gets that wrong medicine, the pharmacist is responsible for that?
11. And, likewise, a pharmacy is responsible for the pharmacists who work there, correct?
12. Do you agree that it's critical for a pharmacy to take every step it can to prevent prescription-filling errors?
13. Is there anything more important for a pharmacy to do when it comes to filling prescriptions than to make sure they're filled accurately?
14. Do you agree that a pharmacy should never put profits over customer safety?
15. Pharmacists and technicians must be careful when filling prescriptions, correct?
16. And they must double-check their work?
17. Do you agree that rushing or filling too many prescriptions in too short of a time leads to mistakes and errors?
18. What about the pharmacy environment can lead to prescription-filling errors?
19. Do you agree that the busier it gets and the more prescriptions you fill, the more likely it is that you'll make an error?
20. Is there any limit to how many prescriptions a pharmacist can safely fill in an hour or a shift?

*—Trent B. Speckhals*

Under oath and off the record, pharmacists and techs for large chain pharmacies have admitted that they are overworked and understaffed and that prescription-filling errors will continue unless these problems are remedied.

including advertising, to build that trust, right?

- A patient would be unlikely to notice that he or she has the wrong medicine because he or she is relying on the pharmacy, right?
- Who is more likely to notice a wrong medication, the pharmacist or the patient?
- You do not warn or instruct your patients to check their prescriptions to ensure they are correct, do you?
- You are not blaming the patient for your mistake in improperly filling the prescription, are you?
- The patient did nothing wrong, correct?

If the pharmacy representative and pharmacist claim otherwise, they will lose all credibility.

### What to Look For

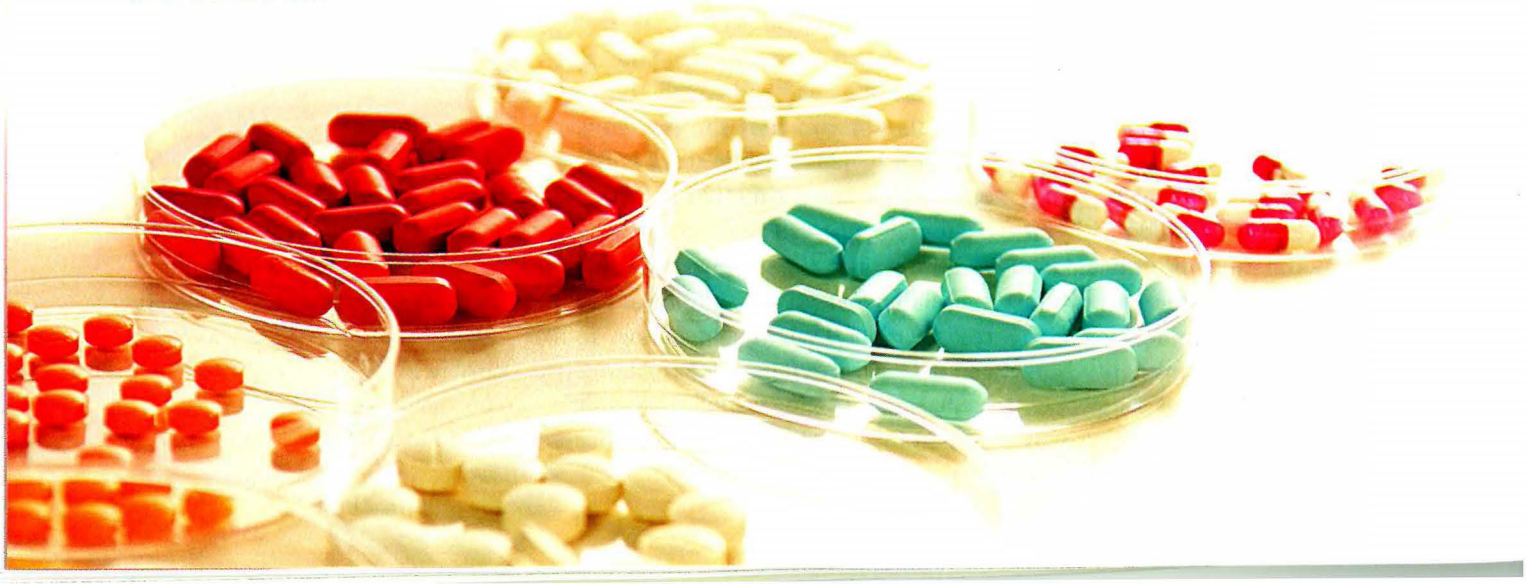
Incident reports can help you defeat the pharmacy's typical defenses because they are filled out soon after the error and often contain admissions that a prescription was improperly filled. Pharmacies create and keep these reports, which are usually distributed to multiple people in the company. Even if they do not contain such admissions, they probably do not include anything that would support the pharmacy's typical defenses.

Especially with large chain pharmacies, a prescription error is not usually an isolated event. Evidence of other similar incidents is useful to combat defendants' claims that they did not make a mistake, that the error was an uncommon and unfortunate event that they regret, or that they are not sure why or how the error happened.

Use evidence of prior and subsequent errors to show the jury that although the corporation knew that a prescription-filling problem existed, it failed to take steps to correct it. Doing this can help shift the jurors' focus from the individual pharmacist, who may be likable and sympathetic, to a corporation that claims to care about its customers but whose actions show otherwise.

Information on a pharmacy's other similar incidents is readily available. Pharmacies routinely track this information, and although they probably will resist providing it or try to limit it to just one store, you should insist on obtaining records of all such incidents throughout the company, especially with large pharmacy chains. To make the information relevant, focus on establishing how all the companies' pharmacies are set up the same way, follow the same policies and procedures, provide employees the same training, and use the same technology.

Repeated errors point to systemic problems such as inadequate staffing



and poorly trained technicians, who are often allowed to fill prescriptions despite having little or no training. Another problem is that too many prescriptions are filled by too few people. Although most states do not limit the number of prescriptions that a pharmacist can fill per hour, experts can help you show that errors increase when speed and profits, rather than accuracy and safety, become the pharmacy's focus. An excellent place to find such experts is at local pharmacy schools; professors there are all too aware of the numerous errors occurring in large chain pharmacies.

Another issue to consider is whether the state licensing board has taken any action against the pharmacist's license. Even when the pharmacist's license is clear, you may find that action has been taken against the pharmacy, especially if it's a large chain—or that some of its other pharmacists have been disciplined for similar errors.

Find out how many pharmacists and techs were working in the pharmacy when the prescription was filled, how long they had been working that day and in the week before, and how many prescriptions were being filled per hour on average that day, week, and month. Often you will find that too many prescriptions were being filled by too few people and there was no way the pharmacist could have adequately checked all the prescriptions. Sometimes pharmacies also violate state regulations on pharmacist-to-tech ratios.

How was the pharmacist compensated? Many pharmacies pay their pharmacists based on financial results, which are driven in large part by the number of prescriptions filled. Some pharmacies also have "ready when promised" or "wait time" reports that track how quickly prescriptions are filled, which may affect a pharmacist's evaluation.

Was counseling offered or provided to the patient? In 1990, the Omnibus Budget Reconciliation Act was passed. It requires that pharmacists offer counseling to all Medicaid and Medicare patients. Nearly every state also has regulations that require pharmacists to offer counseling to patients. Many errors can be caught if the pharmacist takes the time to discuss the prescription with the patient.[9] Still, overworked pharmacists often fail to do so. Some pharmacies have customers sign a sheet that most people believe just indicates that they received their prescription, when it actually says they are declining their right to counseling.

How was technology used? Pharmacies may argue they have done everything possible to fill prescriptions accurately through their use of technology. They will tout their bar code scanners, computers, and automated medication dispensers.

Detailed discovery often shows that these safety systems are overridden, misused, ineffective, and subject to operator error. In one case, a pharmacy chain claimed that it could not have misfilled a prescription because it scans 100 percent of the prescriptions it fills, matching the bar code on the stock bottle to the label on the patient's prescription bottle.[10] But depositions of the pharmacy staff revealed that the bar code scanner was not hooked up to the computer, and a prescription could be filled without scanning. Sometimes, the scanner was broken, its batteries were dead, or it was not used.

In that same case, a pharmacist was deposed at the pharmacy. When he tried to demonstrate the scanner, it did not work. Similarly, all the technology in the world does not help when an $8-per-hour untrained pharmacy tech enters the wrong drug or strength into the computer, which in turn prints out an incorrect label.

Under oath and off the record, pharmacists and techs for large chain pharmacies have admitted that they are overworked and understaffed and that prescription-filling errors will continue unless these problems are remedied. Some are candid enough to admit they are so busy that they rarely have time for lunch or breaks and try to avoid liquids so as to not need one.[11]

Pharmacies have been unwilling to make the changes necessary to ensure that they accurately fill their customers' prescriptions. As in similar instances of corporate misfeasance, the focus is on profits over people. But with the support of treating physicians, qualified experts, and careful discovery, a well-prepared lawyer can reveal these unconscionable practices to the jury, obtaining fair compensation for the client and pushing for change in the industry. ■

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**Notes**

1. Inst. Med., *Preventing Medication Errors* 5 (Philip Aspden et al. eds., Natl. Academies Press 2007).
2. Inst. Med., *To Err Is Human: Building a Safer Health System* 2 (Linda T. Kohn et al. eds. Natl. Academies Press 2000).
3. For example, CVS opened its 7,000th pharmacy last year. *See* CVS Caremark, *History*, http://info.cvscaremark.com/our-company/history.
4. *See e.g. Klein v. Kroger Co.*, No. 08 CV 13723 (Ga., DeKalb Co. Super. filed Dec. 22, 2008).
5. *See e.g. Finberg v. Kroger Co.*, No. 07 CV 6679 (Ga., DeKalb Co. Super. dismissed May 24, 2010).
6. This case, *Brown v. CVS*, was settled confidentially before suit.
7. *See e.g. Espinoza v. Lakeside Pharm.*, No. 2005 CV 96236 (Ga., Fulton Co. Super. dismissed Feb. 27, 2007).
8. *See e.g. Richardson v. CVS*, No. 02 VS-028718-J (Ga., Fulton Co. St. filed Feb. 14, 2002).
9. U.S. Pharmacist, *Identifying Factors That Cause Pharmacy Errors* (Dec. 1, 2008), www.uspharmacist.com/continuing_education/ceviewtest/lessonid/105916 (citing Richard R. Abood, *Errors in Pharmacy Practice*, 21 U.S. Pharm. 122 (1996)).
10. *Finberg*, No. 07 CV 6679.
11. *See e.g. Klein*, No. 08 CV 13723.