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Corporate Responsibility: The Duty to Rescue and Access to Medicine

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Rebecca E. Wolitz, *A Corporate Duty to Rescue: Biopharmaceutical Companies and Access to Medications*, 94 **Indiana L.J.** __ (forthcoming 2019), available at SSRN.

For far too many Americans, prices of pharmaceutical medications pose a major threat to access and, ultimately, wellness. Indeed, drug costs in the United States pose a problem fraught with challenges, one that has led scholars to focus on achieving a lasting regulatory solution. None has been forthcoming. Given the intractability of the problem, creative solutions that go beyond attempting to devise the perfect recipe of governmental intervention are welcome additions to the legal scholarship. In this vein, a particularly creative new article seeks to investigate whether biopharmaceutical companies owe an ethical duty to provide their medications to those who cannot afford them.

In *A Corporate Duty to Rescue: Biopharmaceutical Companies and Access to Medications*, Rebecca Wolitz grapples with this question. In her piece, Professor Wolitz presents a complete and critical analysis of the structure, enforceability, and workability of a "corporate duty to rescue" (CDTR). Defining a CDTR as the "application of a moral duty to rescue to for-profit companies" regarding access to their products, Wolitz's analysis is significant, kicking off a conversation that should precede any "self-regulatory changes [corporations] justifiably could be urged to implement." Indeed, as she notes, "a CDTR is particularly interesting as it offers a moral foundation for corporate self-regulation."

After situating her work among other scholarship from authors who have proposed the adoption of a CDTR, Professor Wolitz begins her analysis by examining whether a CDTR would be legally enforceable by tort law. After concluding that a CDTR "as a form of external regulation under current tort law appears unpromising," she instead argues that CDTR should be considered as a corporate governance tool. In support of this formulation, she convincingly argues that both the corporation's profit motive and its shareholder primacy structure would not, by themselves, prevent the corporation from discharging a CDTR. To drive home the point, she also argues that discharging a CDTR would likely be protected by the business judgment rule (BJR) because of its operational, as opposed to structural, character.

Professor Wolitz next analyzes current corporate efforts to secure patient access to needed medications. These efforts include forbearance of patent rights, voluntary licenses, donations, price reductions, and patient assistance programs. Although they are framed as potential "means for discharging obligations of corporate rescue," Professor Wolitz argues that because they are not undertaken due to a "moral obligation to rescue, so much as good business sense or even optional charity," they may not discharge a moral duty. Part of this is because of the opacity problem that continues to obfuscate what the duty actually requires of corporations.

Additionally, as Professor Wolitz argues, general challenges—"thorny moral issues"—to the CDTR's application continue to exist. In this part, she takes apart the five features of a duty to rescue—a rescuee, a capable rescuer, an emergency situation, a rescue receipt of significant benefit, and minimal cost to the rescuer. Going element by element, Professor Wolitz highlights the tensions involved in seeking to apply a CDTR, concluding that their complexities make the applicability of the rescue doctrine in the context of access to medicines uncertain, and at least non-obvious, in need of more study. She uses this analysis not to deride those arguing for an explicit duty, but as a call for additional work in the area.

Professor Wolitz finishes her analysis by focusing on two specific normative issues that are implicated by the CDTR. The first is whether a corporation's efforts to discharge a CDTR would conflict with its obligations to shareholders, a

position that Professor Wolitz generally dismisses. The second concern focuses on whether or not biopharmaceutical companies bear any responsibility for the fact that patients face high prices in the first place. This, of course, would have major impacts on the applicability of the rescue doctrine generally, largely because a rescuer that is responsible for causing peril to the rescuee faces different and additional moral duties.

In examining whether biopharmaceutical companies are responsible for any "wrongful causal contribution to harm via pricing," Wolitz notes that there are "practices pervasive in the biopharmaceutical industry" that "at least raise this possibility." These include anticompetitive efforts undertaken by biopharmaceutical companies and their influence over political debate and legal regulation—where she powerfully focuses on their lobbying prowess. Ongoing challenges raise the possibility that, at least where biopharmaceutical companies are engaged in harmful conduct that may cause or contribute to the pricing crisis in the first place, surface-level focuses on a CDTR—without an appropriate accounting for this other corporate conduct—may seem incomplete.

In all, Professor Wolitz's article is a compelling and forceful analysis of the CDTR in the context of drug pricing. Her arguments are thoughtfully presented and well-articulated. And her suggestions—looking for solutions to the drug-pricing crisis that come from outside government regulation—reset the conversation in a powerful and meaningful way. In an era in which creative, well-reasoned scholarship is needed in the area of drug pricing, Professor Wolitz's article is a much-welcomed contribution.

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