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CASE LAW MONITOR

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Each issue of *Case Law Monitor* highlights unique cases from around the United States in the areas of public health and safety, substance use disorders, and the criminal justice system. Every other month, LAPPA will update you on cases that you may have missed but are important to the field. We hope you find the *Case Law Monitor* helpful, and please feel free to provide feedback at info@thelappa.org.

In this issue…

Michigan Attorney General Sues Opioid Firms under Michigan's Drug Dealer Liability Act

***State of Michigan, ex rel., Dana Nessel v. Cardinal Health, Inc., et al.*, Circuit Court for the County of Wayne, Michigan, Case No. 19-016896-NZ (suit filed December 17, 2019)**

Michigan's Attorney General filed suit against Cardinal Health, McKesson, AmerisourceBergen, and Walgreens on December 17, 2019, for the companies' alleged role in the opioid epidemic in Michigan. The complaint alleges that the defendants failed to maintain effective controls over the diversion of prescription opioids and distributed quantities of drugs well beyond the need for legitimate medical use. By not properly ensuring that the drugs ended up in proper hands, the state continues, the defendants did not fulfill their duty to protect Michigan communities. In addition to public nuisance and negligence claims, the state seeks to hold the defendants accountable under Michigan's Drug Dealer Liability Act (DDLA) (M.C.L.A. 691.1601). The DDLA, enacted in 1994, can apply to a defendant who enters an illegal drug market, even if the business is otherwise "legal." Governmental entities and corporations can be found liable under the DDLA if they unlawfully distribute controlled substances that cause injuries or damages. The state asks the court to order the defendants to pay economic and exemplary damages. A status conference for this case is scheduled for March 20, 2020.

Physician Required to Turn Over Patient Records in Opioid Investigation

***Morrill v. Maryland Board of Physicians*, Court of Special Appeals of Maryland, --- A.3d ---, 2019 WL 6974287 (decided December 20, 2019)**

The Court of Special Appeals of Maryland affirmed the judgment of a Maryland trial court denying a motion to quash a subpoena for medical records in an opioid investigation. The Maryland Board of Physicians (Board) received a complaint against Dr. Ann Morrill, alleging that she overprescribed opioid pain medications to a patient, even after being notified of the patient's misuse of the drugs. As part of the investigation into this complaint, the Board subpoenaed medical records from nine additional patients of Dr. Morrill. Dr. Morrill filed a motion to quash the subpoena, asserting that the request for the additional records is unduly burdensome, too expensive to comply with, and irrelevant to the Board's investigation. The Circuit Court for Baltimore County denied the motion to quash the subpoena. On appeal, the intermediate appellate court affirmed the ruling, holding that the subpoena is authorized by statute and does not go beyond the Board's statutorily granted powers, the records relate to the Board's investigation, and the subpoena is not indefinite or too overbroad.

Inmates Sue Over the Denial of Their MAT Medications in Prison

***Sclafani, et al. v. Mici, et al.*, U.S. District Court for the District of Massachusetts, Case No. 1:19-cv-12550-LTS (suit filed December 19, 2019)**

The ACLU of Massachusetts filed a lawsuit on behalf of three incarcerated men challenging the Massachusetts Department of Corrections' (DOC) refusal to provide the men with medication assisted treatment (MAT) for opioid use disorder (OUD) diagnosed before prison. The DOC's policy is that it will provide inmates with MAT for only 90 days, after which the medication is stopped until the last 90 days of the sentence. The plaintiffs allege that the DOC's refusal to provide ongoing MAT (buprenorphine, in this case) violates the Eighth Amendment and the Americans with Disabilities Act. The suit seeks a temporary restraining order and preliminary injunction requiring the DOC to provide the plaintiffs with buprenorphine while incarcerated. During a hearing on December 23, 2019, the parties agreed that two of the men could continue taking buprenorphine. At present, the third plaintiff is at a facility that does not provide MAT, but in the future, he will have the option to move to a different facility where he could restart MAT. A joint status report for this case is due by February 14, 2020.

Methadone Use and the Americans with Disabilities Act

***Equal Employment Opportunity Commission v. Steel Painters LLC*, U.S. District Court for the Eastern District of Texas, Case No. 1:18-cv-00303-MAC (motion for summary judgment denied January 14, 2020)**

The Equal Employment Opportunity Commission (EEOC) brought a suit on behalf of Matthew Kimball against his former employer, Steel Painters LLC, alleging that the company violated the Americans with Disabilities Act (ADA). Steel Painters hired Kimball in September 2016 as a certified industrial painter. At the time of his hiring, Kimball disclosed that he took prescription methadone to manage his opioid use disorder. The company asked Kimball to complete a "safety sensitive employee medication approval form for prescription medication" and have it signed by a physician. Kimball's physician refused to sign the form due to the medical clinic's policy against medical personnel disclosing patient information to third parties. Nevertheless, the physician provided a letter verifying that Kimball was prescribed methadone. The company's administrative manager fired Kimball, allegedly because the employer could not verify that Kimball could do the job safely due to the incomplete form. The EEOC filed suit against the company asserting that they fired Kimball because of his history of disability. Steel Painters filed a motion for summary judgment, but the court denied the motion, finding that a reasonable jury could conclude that Kimball's firing was pretext for discriminatory animus toward employees using methadone. The judge noted that Kimball was the first person the company asked to complete this safety form, and he was not allowed to be evaluated by a company physician. Additionally, in previous conversations, the administrative manager proposed a way to avoid hiring another methadone user. This suggested that she is biased against people who use methadone. The case is scheduled for trial in April 2020.

Suit Brought on Behalf of Child with Neonatal Abstinence Syndrome

***Barry Staubus, et al. v. Purdue Pharma, LP, et al.*, Sullivan County Circuit Court in Kingsport, Tennessee, Case No. 82CC3-2017-CK-41916 (suit filed June 13, 2017)**

Tennessee's First, Second, and Third Judicial District Attorneys General filed a suit against Purdue Pharma and its related companies, Mallinckrodt Pharmaceuticals and Endo Pharmaceuticals, for their alleged role in creating Tennessee's opioid epidemic. The case is dubbed the "Sullivan Baby Doe lawsuit" because it relates to a child born with neonatal abstinence syndrome in Sullivan County, Tennessee. A former physician and two individuals who are accused of having a role in diverting drugs to the illegal opioid drug market are also named as defendants. The plaintiffs claim that a 20-year fraudulent marketing campaign downplayed the effects of opioids and as a result fueled an opioid epidemic in the state. The trial is scheduled for May 18, 2020.

Safe Injection Sites

***United States v. Safehouse, et al.*, U.S. District Court for the Eastern District of Pennsylvania, Case No. 19-CV-00519, 2019 WL 4858266 (opinion issued October 2, 2019)**

For details on the facts of this case, please refer to the December 2019 LAPPA Case Law Monitor. Safehouse filed a motion for final declaratory judgment on January 6, 2020. The court's October 2, 2019 order is a non-final interlocutory order based solely on the pleadings. Safehouse now requests that the court enter a final declaratory judgment declaring that, as a matter of law, 21 U.S.C. § 856 (known colloquially as the "crack house" statute) does not prohibit Safehouse from providing its proposed overdose prevention services.

Former Pharmaceutical Executive Sentenced for His Role in the Opioid Crisis

***United States v. Babich et al.*, U.S. District Court for the District of Massachusetts, Case No. 1:16-cr-10343-ADB, (sentenced January 23, 2020)**

The former chairman of Insys Therapeutics, John Kapoor, was sentenced to five and a half years in prison for his role in a bribery and kickback scheme that helped to fuel the opioid crisis. A jury found Kapoor guilty of mail and wire fraud as well as racketeering charges in May 2019. Kapoor and others at the company were accused of paying millions of dollars in bribes to doctors to prescribe an oral fentanyl spray made by the company, known as Subsys. The drug was only FDA-approved for breakthrough cancer pain. Prosecutors had asked for a 15-year sentence for Kapoor, but he received only five and a half years. Additionally, the former vice president of sales for Insys was sentenced to 26 months in prison.

Tennessee Lawsuit against Drug Distributor Made Public

***State of Tennessee, ex rel., Herbert H. Slatery III v. AmerisourceBergen Drug Corp.*, Circuit Court of Knox County, Tennessee, Case No. 1-345-19 (suit filed October 3, 2019)**

Tennessee's Attorney General filed a lawsuit in October against pharmaceutical supplier AmerisourceBergen for the company's alleged role in fueling Tennessee's opioid epidemic. The complaint claims that the company knowingly distributed millions of opioids to Tennessee pharmacies over the years despite red flags indicating that the drugs were being diverted. The Attorney General alleges that Amerisource violated the Tennessee Consumer Protection Act and the Tennessee Racketeer Influenced and Corrupt Organizations (RICO) Act, as well as created a public nuisance. The state seeks unspecified damages and requests that the defendant lose its right to distribute prescription drugs in Tennessee. The state filed the lawsuit under a temporary seal because Amerisource asserted that the complaint contains proprietary information. On December 19, 2019, a judge backed the Knoxville News Sentinel's bid to unseal the case and make the complaint public. The judge held that the public interest and right to know in this case are significant and outweighed Amerisource's privacy claim.

Workers Compensation Covers Marijuana Costs in New Jersey

***Vincent Hager v. M&K Construction*, Superior Court of New Jersey, Appellate Division, 2020 WL 218390, Case No. A-0102-18T3 (decided January 13, 2020)**

In a case of first impression in New Jersey, an appellate court affirmed the decision of a worker's compensation judge that ordered an employer to reimburse its employee for the employee's use of medical marijuana. Vincent Hager suffered a work injury in 2001 that included nerve damage. The nerve damage causes Hager to experience lower back pain, which doctors attempted to treat over the years with surgery, physical therapy, and opioids. With none of these methods successful in relieving the pain, and Hager facing opioid addiction, a physician suggested that he try marijuana for medicinal purposes, which is legal in New Jersey. Hager sought workers compensation coverage for the cost of the marijuana. A worker's compensation judge ordered the employer to reimburse Hager. The company appealed the decision, claiming that the federal Controlled Substances Act (CSA) preempts New Jersey's Compassionate Use Medical Marijuana Act (MMA) and that paying for the marijuana would amount to aiding and abetting possession of an illegal substance. The appellate court rejected the employer's contentions because M&K's role is one of reimbursement of costs. According to the court, the company would not possess, manufacture, or distribute marijuana, so there is no discernable conflict between the CSA, MMA, and the workers compensation order. Additionally, M&K's compliance with the order would not create the specific intent element necessary to establish a crime of aiding and abetting under federal law.

Electronic Health Record Company Accused of Conspiring with Opioid Manufacturer

***United States v. Practice Fusion, Inc.*, U.S. District Court for the District of Vermont, Case No. 2:20-cr-00011-wks (suit filed January 27, 2020)**

Electronic health record (EHR) company, Practice Fusion, has been sued in federal court for alleged violations of the federal anti-kickback statute and conspiracy. In fall 2013, Practice Fusion solicited remuneration from a pharmaceutical company, known only as "Pharma Co. X" in court documents, in exchange for creating a clinical decision support (CDS) alert within its EHR software. The alert was allegedly meant to prompt doctors to take certain clinical actions in order to increase prescriptions of Pharma Co. X's extended release opioids. A marketing employee with no medical training was allowed to draft some of the language of the CDS. Prosecutors in the case claim that the CDS alerts went against accepted medical standards and the alerts failed to ask doctors to consider alternative treatments and provided no warning about the high risk of addiction associated with opioids. The alerts were allegedly designed to suggest opioids even to patients who did not experience severe pain or who only experienced isolated episodes of acute pain over the course of several months. Practice Fusion has agreed to pay $145 million in fines as part of an agreement that will resolve multiple criminal and civil investigations into its software. It is not clear yet if Pharma Co. X will also face sanctions.

Endo Pharmaceuticals Reaches $8.75 million Settlement with Oklahoma (settled January 10, 2020)

In an out-of-court settlement, Endo Pharmaceuticals (Endo) agreed to pay Oklahoma $8.75 million to resolve potential litigation over the company's alleged role in Oklahoma's opioid crisis. Endo did not admit to any wrongdoing or liability as part of the settlement. The majority of the settlement funds will go into the state's Opioid Lawsuit Settlement Fund while $390,000 will be split between the state and federal government to resolve alleged violations of the Oklahoma Medicaid False Claims Act and Oklahoma Medicaid Program Integrity Act. Additionally, under the agreement, Endo cannot promote opioids in the state or provide direct or indirect financial support for materials that promote the use of opioids. Moreover, if Endo later settles litigation with another state and that settlement is more restrictive than the Oklahoma settlement, the additional restrictions will also apply in Oklahoma.

Coverage for Opioids in Workers' Compensation Case is Denied

***Samuel Martin, III v. Newark Public Schools*, Superior Court of New Jersey, Appellate Division, 2019 WL 4896640, Case No. A-0338-18T4 (decided October 4, 2019)**

The Superior Court of New Jersey affirmed a worker's compensation court ruling that denied a petitioner's application for medical and temporary disability benefits. The petitioner, Samuel Martin, injured his back in an employment-related accident in 2011 and received partial disability for his injury in 2014. Martin was prescribed an opioid drug from 2016 through 2017 by a physician who had been treating him for six years. His physician, Dr. Grob, suggested that Martin consider surgery for his injury on multiple occasions, but Martin refused the recommendation each time. In 2017, Martin filed a complaint based on his employer's refusal to pay for his prescriptions after September of that year. At trial, Dr. Grob testified that Martin's injuries would never heal from the use of pain medications and that surgery presented the only treatment to cure or relieve the effects of the injury. In January 2018, Martin visited a pain management specialist once. The specialist testified at trial that Martin chose a reasonable course in taking opioid medication long term but did not assert that the opioid therapy would cure or relieve his back injury. The workers compensation court denied Martin's request for reimbursement, citing that it found Dr. Grob's testimony, who had treated Martin for six years, more credible than the testimony of the pain management specialist Martin saw only one time. Martin appealed the ruling, arguing that the judge improperly gave greater weight to the medical testimony of the treating doctor. On appeal, the court deferred to the compensation judge's factual findings, noting that a judge giving more weight to one physician's judgment than another's is not a reason to reverse a judgment. Martin also argued that the judge misapplied New Jersey law concerning the application for continued palliative care treatment. N.J.S.A. 34:15-15 requires employers to provide treatment to injured employees when the treatment is "necessary to cure and relieve the worker of the effects of the injury and to restore the functions of the injured member or organ where such restoration is possible." Here, the treating doctor testified that the only form of treatment that would cure or relieve Martin's injury would be surgery. According to the court, treatment is only compensable if it is shown that it is "reasonably necessary to cure or relieve the effects of the injury."

Noteworthy Updates in the National Opioid Litigation

***In re: National Prescription Opiate Litigation*, U.S. District Court for the Northern District of Ohio, Case No. 17-MD-2804**

- On January 6, 2020, pharmacies named as defendants in some of the lawsuits asked the judge to reject certain Ohio counties' claims alleging that the pharmacies contributed to the opioid crisis by filling an excessive volume of prescriptions. The pharmacies argue that the doctors and other health care practitioners who wrote prescriptions bear the ultimate responsibility for the improper distribution of opioids to patients. Moreover, as the lawsuits name only large pharmacy chains, such as Walgreens, CVS, and Rite Aid, the pharmacies claim that they are being targeted for their "deep pockets." In support of this, the pharmacies note that the counties did not sue independent drugstores, "pill mills," Internet pharmacies, or pain clinics.

- According to an order issued on December 27, 2020, the defendant pharmacies must disclose up to 14 years of national opioid-dispensing data to the plaintiffs. The pharmacies fought the disclosure, asserting that release could harm patient privacy and that the plaintiffs could get the information from a data tracking program in Ohio. This tracker, however, gathered data only during the past few years. The judge ruled that because the pharmacies' data is the best and most complete source of opioid data, both plaintiffs and defendants should have equal access to the information. The order creates a "roll-out schedule" for sharing the data so that data will be released regarding Cuyahoga and Summit (Ohio) counties first, then for the whole state of Ohio, then for West Virginia and Kentucky, and then finally for the whole country. On January 24, 2020, the ACLU submitted an amicus brief addressing its concerns regarding the disclosure of information. While the ACLU is not in support of either side, it believes that revealing highly sensitive information about patients' medical conditions and history could involve violations of patients' rights under the Due Process Clause and the Fourth Amendment. The ACLU stated in its brief that any discovery order must be narrowly tailored to account for the interests of the patients.

- Currently, around 400 guardians of children born with opioid dependency since 2000 have filed individual lawsuits that are now a part of the multi-district litigation. Some of these plaintiffs filed a motion on January 7, 2020 asking that these guardians be grouped together as part of a class action lawsuit. Additionally, plaintiffs want the judge to create a national registry to identify children diagnosed with neonatal abstinence syndrome, form a medical panel to develop recommendations on the best ways to treat these children, and provide money for those efforts.

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info@thelappa.org
@theLAPPA

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