LEGISLATIVE ANALYSIS AND PUBLIC POLICY ASSOCIATION

Case Law Monitor

August 2020

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…

WEST VIRGINIA PHARMACY SENTENCED FOR ROLE IN DRUG DIVERSION SCHEME

***United States v. Meds2Go Express Pharmacy*, U.S. District Court for the Southern District of West Virginia, Case No. 2:19-cr-00299 (sentenced June 3, 2020).** On June 3, 2020, a West Virginia federal trial court sentenced Meds2Go Express Pharmacy, Inc. (Meds2Go), located in Lincoln County, West Virginia, for money laundering. The conviction arose out of a conspiracy between Meds2Go and Hope Clinic, a pain clinic operating as a pill mill, to dispense compound opioids without legitimate medical purpose. Meds2Go pled guilty to the charges in December 2019 and agreed to shut down as part of the plea agreement. The court sentenced the company to pay $250,000 toward community restitution and forfeiture. The West Virginia Crime Victim's Compensation Fund will receive 65 percent of the amount, and 35 percent will be paid to West Virginia Department of Health and Human Resources, Bureau of Behavioral Health and Health Facilities.

WEST VIRGINIA SUES WALGREENS AND RITE-AID FOR THEIR ALLEGED ROLE IN THE STATE'S OPIOID CRISIS

***State of West Virginia ex rel. Patrick Morrisey v. Walgreens Boots Alliance, Inc., et al.*, Circuit Court of Putnam County, West Virginia, Case No. CC-40-2020-C-82; *State of West Virginia ex rel. Patrick Morrisey v. Rite-Aid Corporation, et al.*, Circuit Court of Putnam County, West Virginia, Case No. CC-40-2020-C-83, (suits filed June 3, 2020).** The West Virginia Attorney General filed lawsuits against Rite-Aid and Walgreens for allegedly failing to monitor and report suspicious orders of prescription painkillers sold in the state. The suits assert that the companies violated the state's Consumer Credit and Protection Act (W. Va. Code § 46A-6-104) and acted in such a way that created a public nuisance. The state asks the court for equitable relief, including, but not limited to, restitution and disgorgement and civil penalties of up to $5,000 for each repeated and willful violation of the Consumer Credit and Protection Act. The cases are ongoing, and no next steps have been announced yet.

NEW YORK INITIATES INSURANCE FRAUD ACTION AGAINST PHARMACEUTICAL COMPANY

***In Re Endo International, PLC., et al.*, New York State Department of Financial Services, Case No. 2020-0022-C (suit filed June 8, 2020).** The New York State Department of Financial Services (DFS) initiated an administrative proceeding alleging insurance fraud against pharmaceutical company Endo International PLC and its subsidiaries. The statement of charges alleges that Endo knowingly furthered a false narrative to legitimize opioids as appropriate for broad treatment of pain by downplaying their addictive effects and risk, misrepresented the safety and efficacy of opioids, and deployed a large sales force to target health care providers directly with these misrepresentations. DFS also alleges that Endo repeatedly marketed a reformulated version of Opana as abuse-resistant without having a legitimate basis for such a claim. According to DFS, these actions constituted acts of intentional fraud or intentional misrepresentation of material facts with respect to claims for insurance products or services; that is, New York health insurance companies—and ultimately insurance consumers—paid for unneeded opioid prescriptions. DFS asserts Endo violated two state insurance laws: New York Insurance Law § 403 (prohibiting fraudulent insurance acts) and New York Financial Services Law § 408 (prohibiting intentional fraud or intentional misrepresentation of a material fact with respect to a financial product or service). A hearing is scheduled for October 26, 2020.

PENSION FUNDS SUE TO OBTAIN WALMART RECORDS

***Norfolk County Retirement System v. Walmart, Inc.*, Delaware Chancery Court, Case No. 2020-0482; *Police and Fire Retirement System of Detroit v. Walmart, Inc.*, Delaware Chancery Court, Case No. 2020-0478 (suits filed June 17, 2020).** Two pension funds filed separate but similar cases against Walmart seeking to obtain records which allegedly show the retailer's role in the national opioid crisis. The funds assert that there is significant evidence that Walmart failed to implement basic compliance protocols to protect its pharmacies and drug distribution business from being used as a cover for the illegal dissemination of opioids.

Both funds also allege that Walmart failed to institute policies to prevent filling prescriptions from pill mill doctors even after some of its own pharmacists flagged suspicious drug orders. Prior to filing suit, both funds asked Walmart in May 2020 to give access to records so each could investigate whether the company's board and senior leadership engaged in corporate misconduct or wrongdoing by failing to implement and maintain controls relating to suspicious orders of opioids. After Walmart denied these requests, the pension funds filed suit under Section 220 of Delaware General Corporation Law. Under Section 220, an investor can seek to have the Chancery Court compel a company to turn over records if the investor can show a proper purpose, such as investigating wrongdoing.

OHIO APPEALS COURT RULES INSURER MUST DEFEND PHARMACEUTICAL DISTRIBUTOR FOR ITS ALLEGED ROLE IN OPIOID EPIDEMIC

***Acuity v. Masters Pharmaceutical Inc.*, Court of Appeals of Ohio, First District, Case No. C-190176 (opinion filed June 24, 2020).** The Court of Appeals of Ohio reversed a trial court's decision, holding that an insurance company, Acuity, must defend Masters Pharmaceutical, Inc. against lawsuits brought by governmental entities for costs incurred combating the opioid epidemic. Masters purchased eight insurance policies from Acuity between July 2010 and July 2018. The policies provide that Acuity will "pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies." Several cities and counties sued Masters, alleging that the company acted negligently in failing to investigate, report, and refuse to fill suspicious orders of prescription opioids, therefore resulting in damages that included increased costs to the governmental entities. An Ohio trial court ruled that Acuity did not owe Masters a duty to defend or indemnify it in the underlying suits because the governmental entities suing Masters do not seek damages "because of bodily injury." Instead, the trial court held that the government entities seek only economic damages, which are not covered by the policies. In addition, the trial court concluded that Acuity was excused from defending against the underlying suits because of the policies' "loss-in-progress" (known loss) provisions, in that Masters knew of the opioid epidemic before purchasing insurance and continued to fill suspicious orders while insured.

On appeal, the Ohio intermediate appellate court reversed the decision. Citing to the policies' definition of "damages"—which includes damages "claimed by any person or organization for care, loss of services or death resulting at any time from the bodily injury"— the appellate court concluded that the policies expressly provide a defense where the underlying claims involve economic damages that occurred because of bodily injury. The court found that there is arguably a causal connection between Masters' alleged conduct, the bodily injury suffered by individuals who became addicted to opioids, overdosed, or died, and the additional costs incurred by the governmental entities, including emergency services, medical care, and substance use disorder treatment. As for the "loss-in-progress" provisions, while the appellate court noted that Masters may

have been aware there was a risk that filling suspicious orders could lead to diversion of its products that would contribute to the opioid epidemic and cause damages to governmental entities, the mere knowledge of the risk is not enough to bar coverage under provisions.

The case was reversed and remanded to the trial court with instructions to grant summary judgment in favor of Masters, requiring Acuity to defend the underlying lawsuits. The court deferred reaching any judgment on the issue of indemnification until final judgment or settlement is reached in the underlying suits.

PURDUE PHARMA BANKRUPTCY PROCEEDINGS

***In re Purdue Pharma L.P., et al.*, U.S. Bankruptcy Court for the Southern District of New York, Case No. 19-23649 (filed September 15, 2019).**

- On June 9, 2020, Purdue Pharma sought bankruptcy court approval to spend $6.5 million to help another pharmaceutical company develop a low-cost, over-the-counter nasal spray treatment to reverse opioid overdose. According to Purdue's court filing, the non-profit Harm Reduction Therapeutics, Inc. (HRT) needs money to complete clinical trials on a spray device to deliver intranasal naloxone, and Purdue is HRT's only financial support. On June 21, 2020, the bankruptcy judge approved the request because without the money from Purdue the project would likely end. The $6.5 million represents less than 0.5 percent of Purdue's cash-on-hand, according to the company's attorney.
- A committee of creditors filed a motion on July 10, 2020 asking the bankruptcy court to require Purdue Pharma to seek permission before making political contributions. Creditors filed the motion after hearing reports that Purdue made contributions to national associations representing state attorney generals and governors. Because Purdue is involved in several lawsuits involving states, the creditors claim that the contributions represent a conflict and could be interpreted as a bribe. As a result of the motion, Purdue announced it would stop giving money to the Democratic and Republican attorney general associations, and both groups agreed to return contributions made since late last year.
- Numerous states, led by the Florida Attorney General, objected to attempts by Native American tribes, hospitals, schools, lawyers for insurance consumers, and opioid-addicted infants to file class action lawsuits against the estate of bankrupt Purdue Pharma. In a filing made on July 16, 2020 with the federal bankruptcy court, Florida alleged that the proposed classes should be blocked because they involve individualized claims for personal injury or are derivative of the claims of others. Florida asserted that the claims brought forth by hospitals, school districts, and insurance customers stating that they paid increased costs because of the opioid-related health problems of others are similar to claims rejected in other bankruptcies regarding cigarette use and prescription drugs. Additionally, Florida claimed that the individual members of the proposed classes have had more than enough time to file individual claims before the deadline, which was extended one month until July 30. Florida also challenged a request for class status for children afflicted with neonatal abstinence syndrome related to their mothers' opioid abuse, stating that such claims involve highly individualized facts and therefore cannot be grouped into a class action. Many other states subsequently followed Florida's lead in objecting.
- The bankruptcy judge informed lawyers on July 23, 2020 that a bankruptcy plan should be ready for court review by February. The plan may be put together this fall after Purdue's owners, the Sackler family, and creditors have a chance to negotiate the final details. Lawyers for the Sackler family informed the judge that their clients will finish turning over historical information, including personal and business emails, to the various creditor groups in October 2020.

PENNSYLVANIA SUPREME COURT RULES INDIVIDUALS UNDER COURT SUPERVISION CANNOT BE PROHIBITED FROM USING MEDICAL MARIJUANA

***Melissa Gass, et al. v. 52nd Judicial District, Lebanon County*, Supreme Court of Pennsylvania, Case No. 118 MM 2019, --- A.3d --- (opinion filed June 18, 2020).** For a summary of the facts and previous updates on this case, please refer to the December 2019 (Volume 1, Issue 1), April 2020, and June 2020 issues of the LAPPA *Case Law Monitor*. In June 2020, the Pennsylvania Supreme Court unanimously held that the 52nd Judicial District's (District) policy prohibiting the active use of medical marijuana while a defendant is under community supervision violates the Pennsylvania Medical Marijuana Act's (MMA) immunity provision. The District argued that the use of medical marijuana conflicts with the general conditions of probation and parole in Lebanon County—that is, compliance with all state and federal criminal laws—and that the policy has beneficial rehabilitative aims. The court found that the District cannot require state-level adherence to the federal prohibition of marijuana because the state legislature specifically acted to legalize the use of marijuana for medicinal purposes. Additionally, the court acknowledged the District's concerns that marijuana use by probationers may cause difficulties with court supervision but stated that those issues, if they arise, need to be addressed by the legislature, not the courts. The court granted the petitioners' request for declaratory and injunctive relief.

DISABILITY DISCRIMINATION CLAIMS SUCCESSFULLY MEDIATED

***Jody Lisby v. Tarkett Alabama, Inc.*, U.S. District Court for the Northern District of Alabama, Case No. 3:16-cv-01835-MHH (case closed July 17, 2020).** For the facts of this case, please refer to the June 2020 issue of the LAPPA *Case Law Monitor*. In March 2020, a federal trial court allowed a disability discrimination lawsuit to proceed against an Alabama company that revoked a job offer to an individual prescribed methadone. On July 8, 2020, the parties advised the court that they reached settlement through mediation. As a result, the jury trial scheduled for August 24, 2020 will not occur. The court granted the parties' joint motion to dismiss with prejudice, with the parties to bear their own costs, attorneys' fees, and expenses. Details of a settlement agreement were not disclosed.

MASSACHUSETTS COURT DENIES INMATES' PRELIMINARY INJUNCTION REQUEST FOR EARLY RELEASE DUE TO COVID-19

***Stephen Foster, et al. v. Carol Mici, et al.*, Supreme Judicial Court for Suffolk County, Massachusetts, Case No. SJ-2020-0212 (opinion filed June 2, 2020).** For a summary of the facts of this case, please refer to the June 2020 issue of the LAPPA *Case Law Monitor*. The Supreme Judicial Court for Suffolk County, Massachusetts denied the plaintiff prisoners' request for a preliminary injunction enjoining the state Department of Corrections (DOC) from: (1) housing any prisoner in a facility where the population exceeds its design-rated capacity; and (2) housing any prisoner in a cell, room, dorm, or other living area where they must sleep, eat, or recreate within six feet of another person. In seeking the injunction, the plaintiffs contend that their conditions of confinement during the COVID-19 pandemic, and the defendants' failure to expedite the release of a greater number of individuals from incarceration, violate their rights under the Eighth and Fourteenth Amendments. While the court acknowledged that there is an increased risk of contracting

COVID-19 in prisons, it concluded that the DOC took steps to try to reduce the harm and protect inmates. The court mentioned that the DOC undertook a variety of measures to combat the spread of COVID-19, including prohibiting outside visitors; isolating symptomatic inmates; providing additional cleaning supplies to inmates; eliminating group programing; and distributing protective equipment to staff and inmates. Given the DOC's actions, the court found it unlikely that the plaintiffs could establish that the DOC is deliberately indifferent to their safety during the COVID-19 pandemic.

Additionally, the court denied the plaintiffs' request for a preliminary injunction to enjoin the DOC from confining individuals who are civilly committed pursuant to M.G.L.A. 123 § 35 (Section 35). The plaintiffs argued that their commitment to a secured facility for substance use disorder treatment during the COVID-19 pandemic violates their substantive due process rights. The plaintiffs' argument relied on the COVID-19 guidance from the Substance Abuse and Mental Health Services Administration (SAMHSA), which states that "because of the substantial risk of coronavirus spread [among individuals congregated] in a limited space such as in an inpatient or residential facility, SAMHSA is advising that outpatient treatment options, when clinically appropriate, be used to the greatest extent possible." The court found, however, that SAMHSA's guidance allows inpatient treatment to be used for individuals for whom outpatient measures are not considered an adequate clinical option. Additionally, the plaintiffs argued that civil commitment for substance use disorder treatment during the COVID-19 pandemic does not sufficiently advance the statute's treatment goals. The court did not agree with that argument and stated that it found no evidence that the dangers of substance use disorders, or the need for treatment, diminished during the COVID-19 pandemic and that there is still a compelling and legitimate government interest in committing individuals for involuntary treatment. The court did rule, however, that going forward, a judge cannot commit an individual under Section 35 unless the judge finds that the danger posed by the individual's substance use disorder outweighs the risk of transmission of COVID-19 in congregate settings. Additionally, the judge must find that commitment is necessary notwithstanding the treatment limitations imposed by quarantine protocols. Moreover, the court added that any individual currently committed pursuant to Section 35 could file a motion for reconsideration of the commitment order.

With the motion for a preliminary injunction denied, the court transferred the case to the Superior Court for litigation to proceed as an emergency matter.

SEVERAL DETROIT AREA PHYSICIANS AND PHARMACISTS INDICTED IN DRUG DISTRIBUTION SCHEME

***United States v. Rankin, et al.*, U.S. District Court for the Eastern District of Michigan, Case No. 2:20-cr-20233-BAF-DRG (suit filed June 10, 2020).** A federal indictment asserts that a Detroit-area scheme involving the unlawful acquiring and distribution of controlled substances began in September 2017 and continued through June 2020. The defendants allegedly organized and operated medical practices and clinics for the purpose of creating prescriptions for controlled substances that could be filled at pharmacies. Each of the defendant prescribers allegedly knowingly prescribed controlled substances outside of legitimate medical practice and for no legitimate medical purpose. Once obtained, the defendants sold the controlled substances for profit on the illegal street market. The indictment claims that, in total, the indicted professionals prescribed more than 1.95 million dosage units of Schedule II controlled substances and 739 prescriptions for promethazine with codeine cough syrup. The pharmacies identified in the indictment allegedly dispensed more than 58,000 dosage units of Schedule II controlled substances at these clinics. The indictment further asserts that the defendant pharmacists failed to exercise their professional responsibility to determine that the prescriptions were issued for a legitimate medical purpose. Most of the unlawful controlled substance prescriptions were paid for in cash, but some "maintenance medications" would be billed to health care benefit programs to make the doctor's prescribing practices appear more legitimate. Bills to the Medicare and Medicaid programs for medically unnecessary prescription drug medications during the course of the conspiracy allegedly exceed $146,000. The indictment alleges violations of unlawful distribution of controlled

substances (21 U.S.C. § 841(a)(1)), aiding and abetting (18 U.S.C. § 2), and criminal forfeiture (21 U.S.S § 853). The plea cutoff and final pre-trial conference is scheduled for August 19, 2020. A jury trial is set for August 31, 2020.

FEDERAL AGENTS UNCOVER A PHILADELPHIA-BASED DRUG TRAFFICKING RING

***United States v. Suarez-Mendoza, et al.*, U.S. District Court for the District of Eastern Pennsylvania, Case No. 2:20-mj-00990 (suit filed June 16, 2020).** According to a federal criminal complaint, from February 2020 until June 2020, seven defendants allegedly operated a drug trafficking ring in Northeast Philadelphia. According to the complaint, defendants packed, stored, and distributed large amounts of heroin throughout the Philadelphia region and Atlantic City, New Jersey. During the execution of a search warrant, federal agents discovered a large-scale heroin packaging operation inside one defendant's Philadelphia residence. The agents found an estimated 16,500 packets of heroin packaged for distribution along with an additional estimated 30,000 to 38,000 packets doused in water in an apparent attempt to destroy evidence. Grinders, scales, and other paraphernalia were also located inside the residence along with a loaded firearm with additional ammunition. In addition, the agents discovered two children in the residence, both under five years old. Prosecutors charged the defendants with possession with intent to distribute. If convicted, two of the defendants face a maximum possible sentence of 40 years in prison. The other five defendants, if convicted, face a maximum possible sentence of lifetime imprisonment. A trial date has not yet been set for this case.

MASSACHUSETTS MAIL ORDER PHARMACY AGREES TO $11 MILLION SETTLEMENT

***Commonwealth of Massachusetts v. Injured Workers Pharmacy LLC*, Massachusetts Superior Court (Suffolk), Case No. 2084CV01348 (settled July 3, 2020).** A Massachusetts mail-order pharmacy, Injured Workers Pharmacy (IWP), agreed via consent judgment to an $11 million settlement to resolve allegations that it failed to implement adequate safeguards against unlawful and dangerous dispensing. The suit, filed by the Massachusetts Attorney General in June 2020, alleged that IWP violated Massachusetts consumer protection law by failing to implement effective policies and procedures for reviewing the legitimacy of prescriptions and by engaging in unlawful marketing practices to drive sales. The consent judgment, entered shortly after case filing, requires IWP to undertake significant changes to its operations and business practices, including: (1) hiring a full-time chief compliance officer; (2) hiring a data analyst to review dispensing data; (3) hiring a pain management specialty pharmacist; (4) upgrading dispensing software; (5) eliminating incentive-based compensation based on volume of controlled substance prescriptions dispensed; and (6) hiring an independent auditor to conduct a one-year compliance audit. The court approved the consent judgment on July 3, 2020.

EX-CEO ENTERS GUILTY PLEA IN CASE ABOUT INDIVIOR'S MISBRANDED SUBOXONE

***United States v. Thaxter*, U.S. District Court for the Western District of Virginia, Case No. 1:20-cr-00024-JPJ-PMS-1 (guilty plea entered June 30, 2020).** The former chief executive officer of Indivior PLC, Shaun Thaxter, pled guilty to a misdemeanor count of violating the Federal Food, Drug, and Cosmetic Act by causing the distribution of misbranded Suboxone film in interstate commerce. Thaxter served as Indivior's top executive from 2009 to 2020. According to the complaint, Thaxter oversaw Indivior's marketing and sales of Suboxone film and, in 2012, he encouraged Indivior's efforts to secure formulary coverage for Suboxone film from MassHealth, Massachusetts' Medicaid agency. Under his direction, Indivior employees devised a

strategy to win preferred drug status for Suboxone film and counteract a non-opioid competitor under consideration by MassHealth. The employees shared false and misleading safety information with MassHealth officials about Suboxone film's risk of accidental pediatric exposure. Shortly after receiving this information, MassHealth announced it would provide access to Suboxone film for Medicaid patients with children under the age of six. According to the terms of the plea agreement, Thaxter agreed to pay $600,000 in fines and forfeiture and faces up to one year in prison. Thaxter will be sentenced on September 29, 2020.

INDIVIOR AGREES TO RESOLUTION AGREEMENT IN CASE CONCERNING MISBRANDED SUBOXONE

***United States v. Indivior Inc., et al.*, U.S. District Court for the Western District of Virginia, Case No. 1:19-cr-00016-JPJ-PMS (resolution entered July 24, 2020).** Indivior recently filed a resolution agreement with the court in a federal district court case in Virginia. The agreement resolves criminal and civil investigations against the company and its subsidiaries. As part of the resolution, Indivior pled guilty to a one-count felony criminal information charging false statements related to a health care matter. In connection with the guilty plea, Indivior admitted to making false statements to promote the Suboxone film to MassHealth. The plea includes a criminal fine, forfeiture, and restitution totaling $289 million. In addition to the financial penalties, the plea agreement also includes provisions that: (1) require Indivior to disband its Suboxone sales force and not reinstate it; (2) require Indivior's CEO to personally certify, under penalty of perjury, on an annual basis that during the prior year (a) Indivior was in compliance with the Federal Food Drug and Cosmetic Act and did not commit health care fraud or (b) list all non-compliant activity and the steps taken by Indivior to remedy these acts; (3) prohibit Indivior from using data obtained from surveys of health care providers for marketing, sales, and promotional purposes; (4) require Indivior to remove health care providers from their promotional programs who are at a high risk of inappropriate prescribing; and (5) make Indivior subject to contempt sanctions by the court and reinstatement of the dismissed charges if it violates the agreement. The court accepted the guilty plea but deferred acceptance of the plea agreement until after the preparation of a presentence report. Sentencing is scheduled for October 20, 2020.

Under the civil settlement, Indivior agreed to pay a total of $300 million to resolve claims that the marketing of Suboxone caused false insurance claims to be submitted to government health care programs. The $300 million settlement amount includes approximately $209.3 million due to the federal government and $90.7 million due to states that opt to participate in the agreement. The civil settlement resolves allegations against Indivior in six lawsuits pending in federal court in the Western District of Virginia and the District of New Jersey under the *qui tam*, or whistleblower, provisions of the False Claims Act. In addition to the criminal and civil resolutions, Indivior executed a five-year Corporate Integrity Agreement with the Department of Health and Human Services' Office of Inspector General, which will require Indivior to implement numerous accountability and auditing provisions. Furthermore, under a separate agreement with the Federal Trade Commission, Indivior agreed to pay $10 million to resolve claims that it engaged in unfair methods of competition in violation of the Federal Trade Commission Act, 15 U.S.C. § 53(b). In total, Indivior agreed to pay almost $600 million to resolve its criminal and civil liability.

SUBOXONE PURCHASERS CAN SUE INDIVIOR AS A CLASS

***In re Suboxone Antitrust Litigation*, U.S. Court of Appeals for the Third Circuit, Case No. 19-3640, --- F.3d --- (opinion issued July 28, 2020).** The U.S. Court of Appeals for the Third Circuit ruled that purchasers of Suboxone can sue Indivior as a class over allegations that the company engaged in a scheme to impede competition from generic versions of the product. This ruling upholds a 2019 decision made by the Pennsylvania federal judge overseeing multi-district litigation involving 12 similar lawsuits about Suboxone. In reaching this conclusion, the Third Circuit rejected Indivior's argument that wholesalers and other direct purchasers of Suboxone failed to show how Indivior's actions violated antitrust laws and caused them to pay

more for the drug. The plaintiffs alleged that Indivior engaged in anticompetitive behavior to coerce patients to switch from a tablet version of Suboxone set to lose patent protection in 2009 to a film version. The lawsuit asserts that because the film version is not equivalent to the tablet, pharmacists could not substitute cheaper, generic tablets when filling prescriptions for the film, thus helping Indivior maintain market dominance. Indivior also argued that the purchasers cannot proceed as a class because their model estimates damages solely in the aggregate. The court rejected this argument, stating that plaintiffs can proceed as a class using a model that estimates aggregate damages even if later decisions will be needed to be made to determine how to allocate any damages among members of the class.

KENTUCKY'S CASEY'S LAW CHALLENGED AS UNCONSTITUTIONAL

In a news release issued on July 1, 2020, Kentucky's Attorney General announced that Kentucky's Casey's Law is being challenged as unconstitutional in the Kentucky Court of Appeals. Formally known as the Matthew Casey Wethington Act for Substance Abuse Intervention (KRS §§ 222.430 to 222.437), Casey's Law allows family members and friends to petition for court-ordered treatment for a loved one struggling with a substance use disorder. The law passed in 2004. For treatment to be ordered, the court must find that an individual suffers from a substance use disorder, presents an "imminent threat of danger to self, family, or others as a result of a substance use disorder" or is substantially likely to pose such a threat in the near future, and can reasonably benefit from treatment. Current law requires the court to examine the petitioner under oath and then set a hearing within 14 days to determine if the person for whom treatment is sought (respondent) should be involuntarily committed to treatment. Court files related to the respondent in Casey's Law proceedings are confidential and thus little public information about the case is available. The news release noted that the Attorney General is defending against the case and arguing that the law is constitutional.

SAFE INJECTION SITES

***United States v. Safehouse, et al.*, U.S. Court of Appeals for the Third Circuit, Case No. 20-1422 (appeal filed February 27, 2020).** For a summary of the facts and previous updates on this case, please refer to the December 2019 (Volume 1, Issue 1), February 2020 (Volume 2, Issue 1), and the April 2020 issues of the LAPPA *Case Law Monitor*. On July 6, 2020, the District of Columbia Attorney General filed an amicus brief on behalf of several state attorneys general, opposing the federal government's effort to stop Safehouse, a Pennsylvania non-profit, from operating a safe injection site. In the brief, the coalition of attorneys general argue that states have the legal right to regulate the practice of medicine that would allow medical interventions like safe injection sites because: (1) states have a well-established role in enacting public health and safety programs; and (2) federal law does not prevent states from enacting innovative public health solutions. Joining the District of Columbia in the amicus brief are the Attorneys General from California, Delaware, Illinois, Michigan, Minnesota, New Mexico, Oregon, Vermont, and Virginia.

U.S. CITIZEN CHARGED WITH VIOLATING THE KINGPIN ACT

***United States v. Bryant Espinoza Aguilar*, U.S. District Court for the Eastern District of New York, Case No. 1:20-mj-00458-RER-1 (suit filed June 18, 2020).** A complaint filed on June 18, 2020, and later unsealed on July 7, 2020, charges Bryant Espinoza Aguilar, the stepson of Sinaloa Cartel leader, Rafael Caro Quintero, with conspiring to commit violations of the Kingpin Act (21 U.S.C. §§ 1904(b)(1), (c)(1) and (c)(2);

1906(a)). The Kingpin Act is an economic sanctions program against narcotics traffickers that is administered and enforced by the Office of Foreign Assets Control (OFAC) of the U.S. Department of Treasury. Espinoza Aguilar is accused of assisting Caro Quintero and his wife by putting their assets in his own name, thereby violating OFAC's prohibition on U.S. citizens from conducting financial transactions with specially designated narcotics traffickers (SDNT). The complaint alleges that Espinoza Aguilar transferred property owned by his mother into his own name and bribed a public official to change the name of the property's owner on public registry documents to protect the property from being restrained as a result of his mother's SDNT designation. The case is ongoing, and no next steps have been announced yet.

JUUL FILES ACTION TO STOP BLACK MARKET VAPING CARTRIDGES

***In the Matter of Certain Vapor Cartridges and Components Thereof*, U.S. International Trade Commission (Washington), Case No. 337-3471 (suit filed July 10, 2020).** Juul Labs, Inc. has initiated an action to halt the black market for Juul compatible e-cigarette cartridges. The company filed a complaint alleging violations of section 337 of the Tariff Act of 1930 at the U.S. International Trade Commission, naming more than four dozen companies who are allegedly importing copycat cartridges for Juul's e-cigarettes. Juul seeks a blanket order that would block imports of any unauthorized cartridges. The type of order Juul is seeking would apply to any pod that can be used with the Juul device that is not expressly authorized by the company. The Commission solicited comments on any public interest issues raised by the complaint until July 24, 2020. The matter remains ongoing.

DRUG TRAFFICKERS PLEAD GUILTY TO CONSPIRACY TO FIREBOMB A PHARMACY

***United States v. William Anderson Burgamy, IV*, U.S. District Court for the Eastern District of Virginia, Case No. 1:20-cr-00150-TSE; *United States v. Hyrum Wilson*, U.S. District Court for the Eastern District of Virginia, Case No. 1:20-cr-00151-TSE (guilty pleas entered July 10, 2020).** A Maryland Darknet vendor and a Nebraska pharmacist pled guilty on July 10, 2020 to charges related to a conspiracy to use explosives to firebomb and destroy a competitor pharmacy. According to court documents, from August 2019 through April 2020, Hyrum Wilson illegally mailed over 19,000 dosage units of prescription medications from his pharmacy to the Maryland home of co-conspirator William Anderson Burgamy, IV. Burgamy then illegally sold the prescription drugs through his Darknet vendor account. The defendants laundered the proceeds of the scheme using Bitcoin payments, wire transfers, and bundles of cash sent through the mail. Because of the scheme's success, Wilson often hit the limits set by his distributor on the amount of prescription drugs that he could obtain and provide to Burgamy. In an attempt to avoid this issue, the two developed a plot known as "Operation Firewood" to break into, steal the opiate supply of, and firebomb a competing pharmacy by using explosives. The defendants believed that destroying Wilson's local competition would increase the volume of prescription drugs that Wilson's pharmacy could obtain. Burgamy and Wilson each pled guilty to conspiracy to use explosives, conspiracy to distribute controlled substances, and money laundering. Burgamy also pled guilty to a firearms offense. Both defendants face a maximum penalty of 20 years in prison on each count. Sentencing is scheduled for November 20, 2020.

SEVENTH CIRCUIT DETERMINES INMATE'S BODY CAVITY SEARCH WAS REASONABLE

***Sharon Lynn Brown v. Polk County, Wisconsin*, U.S. Court of Appeals for the Seventh Circuit, Case No. 19-2698, 2020 WL 3958447, --- F.3d --- (opinion filed July 13, 2020).** In an opinion issued July 13, 2020, the U.S. Court of Appeals for the Seventh Circuit held that a doctor's body cavity search on a female inmate suspected of hiding drugs in her person did not violate the Fourth Amendment. Plaintiff Sharon Brown was an inmate in the Polk County Jail. The day after she arrived at the jail, inmates who shared Brown's housing unit informed jail staff that Brown hid methamphetamine in a body cavity. The staff found the accusation credible and requested a cavity search. Polk County has a policy that allows a body cavity search when an officer has reasonable grounds to believe that the person is concealing weapons, contraband, or evidence in a body cavity, or otherwise believes that the safety and security of the jail would benefit from a body cavity search. The policy also states that the search must be performed only by medical personnel licensed in Wisconsin. A doctor and nurse at a local hospital performed the search on Brown in a private room without any officers present. During the procedure, the doctor's headlamp failed, thus making Brown wait while the doctor looked for an alternative light source. The search revealed no contraband. Brown sued Polk County asserting that the search violated her Fourth Amendment rights because officials did not get a warrant based on probable cause before ordering the search. The district court granted the county's motion for summary judgment based on the conclusion that only reasonable suspicion is needed to justify the search in this situation and that the search was conducted reasonably. The Seventh Circuit affirmed, holding that "a search conducted for the safety of the jail is one that furthers special needs beyond the normal need for law enforcement, and the public interest is such that neither a warrant nor probable cause is required." Because Brown was an inmate at the jail and the presence of drugs is a security concern, the jail officials only needed a reasonable suspicion that she concealed contraband inside her body before moving forward with the search. The Seventh Circuit also found the search reasonable because, pursuant to written policy, medical professionals performed it in a medical setting with a level of privacy. Additionally, the court held that the search took a reasonable amount of time and that the accidental delay due to the broken headlamp could not be attributed to the defendants. An appeal has not been filed as of July 27, 2020.

AIRLINE SUED FOR NOT ALLOWING AN EMPLOYEE TO ATTEND A BUDDHIST RECOVERY GROUP INSTEAD OF ALCOHOLICS ANONYMOUS

***Equal Employment Opportunity Commission v. United Airlines Inc.*, U.S. District Court for the District of New Jersey, Case No. 2:20-cv-09110-KM-JBC (suit filed July 20, 2020).** The Equal Employment Opportunity Commission (EEOC) filed a lawsuit against United Airlines (United) claiming that since at least April 17, 2018, United engaged in unlawful employment practices by discriminating against an employee on the basis of religion by refusing to accommodate his religious beliefs. In January 2018, David Disbrow, a veteran pilot, entered a residential alcohol treatment program after receiving a diagnosis of alcohol use disorder. Due to his diagnosis, the Federal Aviation Administration (FAA) revoked his medical certificate. United operates a Human Intervention Motivation Study (HIMS) program to help pilots who have been diagnosed with substance use disorder regain the FAA medical certificate needed to fly. The only way that a United pilot with a substance use disorder diagnosis can return to work is through United's HIMS program. One of the requirements of the HIMS program is for participating pilots to attend Alcoholic Anonymous (AA) meetings. Disbrow enrolled in United's HIMS program in March 2018. Disbrow attended AA meetings, but also attended meetings of Refuge Recovery, a support group similar to AA but based on Buddhist principles.

Being a Buddhist himself, Disbrow asked United to substitute attendance at Refuge Recovery for AA attendance as a reasonable accommodation to his religious beliefs. United refused to modify its requirement to attend AA meetings. In the lawsuit, the EEOC asserts that as a result of United's refusal to accommodate Disbrow's religious beliefs, he cannot participate in the HIMS program and, thus, he cannot return to work. The EEOC claims that United's unlawful employment practices are intentional and done with malice or reckless indifference to Disbrow's federally-protected rights. The EEOC seeks a court order requiring United to accommodate Disbrow's religion by allowing him to substitute attendance at a Buddhism-based recovery group for AA attendance in its HIMS program. The Commission also requests that United provide Disbrow with compensation for past and future pecuniary and nonpecuniary losses resulting from the unlawful practices and provide punitive damages and backpay. As of July 30, 2020, the court awaits defendant's answer.

ABOUT LEGISLATIVE ANALYSIS AND PUBLIC POLICY ASSOCIATION

The Legislative Analysis and Public Policy Association (LAPPA) is a 501(c)(3) nonprofit organization whose mission is to conduct legal and legislative research and analysis and draft legislation on effective law and policy in the areas of public safety and health, substance use disorders, and the criminal justice system.

LAPPA produces up-to-the-minute comparative analyses, publications, educational brochures, and other tools ranging from podcasts to model laws and policies that can be used by national, state, and local criminal justice and substance use disorder practitioners who want the latest comprehensive information on law and policy. Examples of topics on which LAPPA has assisted stakeholders include naloxone laws, law enforcement/community engagement, alternatives to incarceration for those with substance use disorders, medication-assisted treatment in prisons, and the involuntary commitment and guardianship of individuals with alcohol or substance use disorders.

For more information about LAPPA, please visit: https://legislativeanalysis.org/.