LEGISLATIVE ANALYSIS AND PUBLIC POLICY ASSOCIATION

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.

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OHIO SUPREME COURT RULES COLLECTING URINE SAMPLES VIA THE DIRECT OBSERVATION METHOD DOES NOT VIOLATE AN EMPLOYEE'S RIGHT TO PRIVACY

***Donna Lunsford v. Sterilite of Ohio, LLC*, No. 2018-1431 (Ohio filed Aug. 26, 2020).** For information on the facts and previous updates on this case, please refer to the April 2020 issue of the LAPPA *Case Law Monitor*. In a 4-3 decision, the Ohio Supreme Court held that when workers at a private company provide urine samples for drug testing under the "direct observation method," they cannot sue their employer for invasion of privacy. In the case, the employees argued that while they each consented to urine tests and the sharing of the results with their employer, Sterilite, they did not consent to testing under the direct observation method. Although each employee provided, or attempted to provide, a urine sample without objection, the employees assert they did so involuntarily because any Sterilite employee who refuses to take a drug test is subject to immediate termination. The court's majority held that Sterlite can condition employment on an employee's consent to drug testing under the direct observation method. The court rejected the plaintiffs' contention that they consented involuntarily for fear of termination because the employees had the right to refuse the test and, as at-will employees, Sterilite could terminate their employment at any time. In sum, when an at-will employee consents, without objection, to the collection of the employee's urine sample under the direct observation method, the at-will employee has no cause of action for common law invasion of privacy. In contrast, the dissent concludes that the at-will employment doctrine does not supersede an employee's right to obtain redress for a violation of his or her privacy rights. Additionally, the dissent argues that Sterilite has no reasonable justification for using the direct observation method for urine collection over a less intrusive method. Moreover, the dissent maintains that whether or not the employees' alleged implied consent to testing under the direct observation method was the product of their legitimate fear that they would be terminated is a question of fact that should be decided by a jury and not on a motion to dismiss. On September 8, 2020, the plaintiff employees filed a motion for reconsideration. The motion is still pending as of September 28, 2020.

MASSACHUSETTS GENERAL HOSPITAL AGREES TO ADOPT A NON-DISCRIMINATORY POLICY THAT INCLUDES OPIOID USE DISORDER AS A DISABILITY

U.S. Department of Justice Complaint No. 202-36-304 (agreement reached August 7, 2020). Massachusetts General Hospital (MGH) reached an agreement with the civil rights unit of the U.S. Attorney's Office to resolve allegations that it denied a lung transplant to a patient with cystic fibrosis because he used medication to treat opioid use disorder (OUD). In March 2017, MGH rejected an individual for consideration for a lung transplant as, at that time, the patient was actively participating in a supervised drug rehabilitation program but was not engaged in the illegal use of controlled substances. The individual filed a complaint with the U.S. Department of Justice, alleging that the denial of care violated Title III of the Americans with Disabilities Act. The patient eventually received a lung transplant at a different hospital in another state, which the patient and his mother claimed came at great personal expense and inconvenience. During its investigation, the U.S. Attorney's Office found that MGH failed to further evaluate the patient in accordance with its standard transplant consideration process, including failure to consult with appropriate specialists. In the settlement agreement, MGH agreed to implement a policy that it will not discriminate by unnecessarily denying or limiting treatment for individuals on the basis of disability, including OUD and any related medication a patient may be using to treat OUD. MGH most also provide training on the new policy to medical staff and

pay the patient and his mother a total of $250,000 to compensate for their financial expenses and emotional distress.

NURSE ALLEGING EMPLOYER DISCRIMINATION DUE TO OPIOID USE DISORDER MUST DISCLOSE IDENTITY IN LAWSUIT

***Jane Doe v. Main Line Hospitals, Inc.*, No. 2:20-cv-02637-KSM (E.D.Pa. filed Sept. 1, 2020).** The U.S. District Court for the Eastern District of Pennsylvania ruled that a nurse cannot remain anonymous in a lawsuit alleging that her former employer discriminated against her after learning that she is in recovery from opioid use disorder (OUD). Main Line Hospitals terminated the plaintiff in May 2019 after receiving an anonymous letter disclosing that she suffers from substance use disorder. Upon questioning, the plaintiff admitted that she had a history of OUD and attended inpatient rehabilitation four years earlier. The hospital subsequently terminated the plaintiff. In June 2020, the plaintiff filed a complaint under the pseudonym "Jane Doe" against Main Line Hospitals, alleging that the hospital's termination after learning of her OUD violated the Americans with Disabilities Act and the Federal Rehabilitation Act. Doe filed a motion to proceed under a pseudonym, arguing that she needs to litigate her case anonymously because the matter involves sensitive facts concerning her recovery and disclosure of her identity could subject her to stigma. In analyzing the motion, the federal district court first noted that it must conduct a nine-factor balancing test weighing the plaintiff's interest in privacy and fear of harm against the public's strong interest in an open litigation process. Upon consideration, the court found that only three factors weigh in favor of permitting the plaintiff to use a pseudonym: (1) Doe's fears of reputational harm, backlash, and possible relapse; (2) her lack of ulterior motive in using a pseudonym; and (3) the fact that she is a private figure and the public does not have a heightened interest in the case. The court noted that five of the remaining six factors support revealing her identity and one factor does not weigh in either direction. Accordingly, the court held that the plaintiff cannot overcome the strong presumption in favor of requiring parties to publicly identify themselves. The plaintiff has until October 15, 2020 to file an amended complaint to reflect her identity.

NEW JERSEY FAILS TO SHOW PRETEXT IN TERMINATION AFTER POSITIVE DRUG TEST

***Michelle Iapichino v. Hackensack University Medical Center*, No. 2:17-cv-06521-JMV-MF (D.N.J. filed Sept. 15, 2020).** The U.S. District Court for the District of New Jersey granted the defendants' motion for summary judgment after the plaintiff, a former nurse, failed to show discrimination. In November 2015, Michelle Iapichino's employer required her to submit to a drug test for suspicion of impairment while on duty. The drug test returned positive for Suboxone, Klonopin, and marijuana, two of which were not prescribed to her. Iapichino filed for medical leave later in the month. On December 3, 2015, the defendants decided to terminate Iapichino but did not notify her until December 15, 2015. Iapichino subsequently sued her employer, asserting claims for failure to accommodate and (1) disability discrimination claims under the New Jersey Law Against Discrimination (LAD) and (2) retaliation and interference under the Family and Medical Leave Act (FMLA). The defendants removed the case to federal court and moved for summary judgment. During the litigation, Iapichino did not dispute that the employer administered the drug test in accordance with hospital policy but instead argued that the employer applied the policy to her in a discriminatory fashion. The court rejected this argument, concluding that Iapichino failed to provide any evidence of differing application or any examples of a similarly situated nurse who was not terminated after a positive reasonable suspicion drug test. Therefore, the court dismissed her LAD claim because she could not show her termination was pretext for discrimination. The court also dismissed Iapichino's FMLA claims because FMLA expressly allows employers to fire employees for illegal drug use, even if they seek treatment, provided the employer's policy allows it. Additionally, the court found Iapichino's FMLA interference claim invalid because she was not admitted to in-patient treatment until after the decision was made to fire her, and her anxiety and

depression did not qualify for federal protection because she failed to show either qualified as a serious health condition under the FMLA. An appeal has not been filed as of September 28, 2020.

FORMER RAILROAD CONDUCTOR ALLEGES DISCRIMINATION DUE TO METHADONE AND OXYCODONE USE

***Kenton Howard v. Norfolk Southern Corp.*, No. 2:17-cv-02163-RDP (N.D.Ala. filed September 17, 2020)** The U.S. District Court for the Northern District of Alabama dismissed an employer's motion for summary judgment, ruling that a jury must decide whether Norfolk Southern Corporation (Norfolk) violated the Americans with Disabilities Act (ADA) when it placed a conductor on medical hold because of methadone and oxycodone use for pain. Plaintiff, Kenton Howard, worked for Norfolk for several years as a conductor but never revealed his physical issues or his medication use to his employer. In February 2012, Howard took a random drug test that returned positive. Norfolk then ordered an expanded drug screen on Howard, leading to Howard disclosing that he had been taking oxycodone and methadone for years for knee and back pain. After learning this, Norfolk requested that Howard provide them with medical records from every doctor he saw for the pain and placed him on a medical hold, stating that he could not perform railroad service until the company's medical department determined his fitness for service. Norfolk determined that Howard's current pain management regimen was inconsistent with their safety guidelines for a conductor, but that the company would help him find another job not safety sensitive. Norfolk could not find Howard an available alternate position, and in May 2017, Howard resigned from Norfolk. Howard filed suit against Norfolk alleging that Norfolk violated the ADA by failing to accommodate his knee and back pain by placing him in another position at Norfolk. Norfolk filed for a motion for summary judgment. The court denied Norfolk's motion, holding that there is a valid question for the jury about whether Norfolk engaged in disability discrimination by circumventing the ADA's process for determining whether a disabled worker can continue in a job with a reasonable accommodation. In doing so, the court ruled that an employer's determination that a worker's medication use violates company guidelines is not necessarily the same as conducting an individualized inquiry into the ability to perform essential job functions as required by the ADA. Therefore, because it remained unclear how comprehensive Norfolk's review was, or what Howard's level of risk was, the court determined a jury should decide whether Norfolk really believed Howard's medication use barred him from all safety-sensitive jobs. The case remains ongoing.

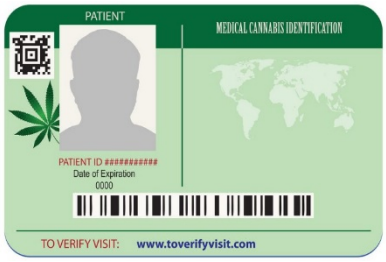
SIXTH CIRCUIT CONCLUSED NURSES NOT DELIBERATELY INDIFFERENT TO DETAINEE'S SYMPTOMS

***Austin Griffith v. Franklin Co., Kentucky*, No. 19-5378 (6th Cir. Filed Sept. 21, 2020).** The U.S. Court of Appeals for the Sixth Circuit, in a 2-1 decision, ruled that a pre-trial detainee who disclosed that he regularly used marijuana and Xanax did not show that the medical staff were deliberately indifferent to his withdrawal symptoms. On November 8, 2015, police arrested the plaintiff, Austin Griffith, for attempted robbery. While in jail, Griffith vomited. Jail personnel placed Griffith in detox, where he continued to vomit, have diarrhea, and dehydrate. The jail nurses attributed his symptoms to withdrawal and treated him with Imodium, Mylanta, and Gatorade. Three days later, a urinalysis test showed an abnormal amount of blood and protein in Griffith's urine. The nurses interpreted this result to mean Griffith had an infection and prescribed him antibiotics. Later, staff moved Griffith out of detox and into the general population at which time he had two seizures and was taken to the hospital. At the hospital, he had a third seizure and doctors diagnosed him with acute renal failure. Griffith subsequently recovered, but continued to suffer from headaches, sleep deprivation, and an increased vulnerability to kidney failure. In October 2016, Griffith filed suit asserting claims for deliberate indifference under the Eighth and Fourteenth Amendments, negligence and gross negligence under Kentucky law, and violations of Ky. Rev. Stat. Ann. § 441.045(3). The defendants moved for summary judgment on all claims. The district court granted the motion, holding that Griffith failed to: (1) demonstrate that his medical care was so insignificant that it demonstrated deliberate indifference by medical staff; (2) adequately advocate for

himself when in general population because he did not submit any medical slips requesting to be seen by a nurse during this time; and (3) introduce evidence demonstrating that he was harmed by any delay in treatment. On appeal, the Sixth Circuit upheld the decision, holding that Griffith failed to show that the nurses knew, or should have known, that he suffered from severe withdrawal symptoms and needed immediate emergency care. While it may have been preferable for the nurses to act more aggressively, the court concluded the nurses treated the symptoms Griffith exhibited, and an error in medical judgment is not sufficient to establish deliberate indifference. The dissenting judge stated that the majority should have used an objective test to determine deliberate indifference as opposed to a subjective standard. An appeal has not been filed as of September 28, 2020.

MICHIGAN PHYSICIAN DOES NOT HAVE A PROTECTED RIGHT TO ISSUE MARIJUANA CERTIFICATIONS TO PATIENTS

***Vernon Proctor v. Karen Krzanowski*, No. 19-2347 (6th Cir. Filed August 13, 2020).** The U.S. Court of Appeals for the Sixth Circuit ruled that two Michigan Department of Licensing and Regulatory Affairs (LARA) employees are immune from a physician's suit challenging their blanket rejection of his certification for patients to receive medical marijuana registry cards because he did not show a clearly established constitutional right to help the patients obtain the substance. In Michigan, an application for a medical marijuana registry card must include a certification from a physician that the patient has a debilitating medical condition. Michigan's Department of Licensing and Regulatory Affairs (LARA) is responsible for granting or denying Michigan residents a card. In 2016, LARA employees began calling Dr. Vernon Proctor's office to verify patient certifications. Proctor asked LARA to put the requests in writing, but LARA refused. In June 2016, Proctor learned that LARA employees would not accept applications accompanied by his certifications allegedly because of Proctor's non-compliance with the verification process. In 2019, Proctor sued two LARA employees alleging that they employees violated his Fourteenth Amendment due process rights by restricting his medical license without prior notice or post-deprivation process. In November 2019, a federal district court granted the employees' motion to dismiss, agreeing that Proctor did not allege a clearly established constitutionally protected property or liberty interest. In affirming the decision, the Sixth Circuit agreed with the district court that whatever deprivation Proctor suffered from LARA rejecting applications bearing his certifications, it fell far short of a full deprivation of his right to practice medicine. The court also held that Proctor's property interest in using his medical license to issue certifications to patients seeking a medical marijuana registry card is far from a clearly established right. The opinion notes that federal courts have consistently rejected the argument that state laws permitting possession of marijuana for medical use can create a constitutionally protected property interest in marijuana or medical marijuana patient cards. Therefore, because Proctor could not clearly establish that the LARA employees violated a liberty or property interest, the defendants are entitled to qualified immunity. An appeal has not been filed as of September 28, 2020.



MARIJUANA GROWER'S PREMIT APPLICATION SCORES ARE SUBJECT TO DISCLOSURE UNDER PENNSYLVANIA'S RIGHT-TO-KNOW LAW

***Matthew Scot Payne v. Pennsylvania Dept. of Health*, No. 579 CD 2019 (Pa. Commw. Ct. filed Sept. 15, 2020).** The Commonwealth Court of Pennsylvania ruled that Pennsylvania's Health Department must release the scores assigned to an unsuccessful application for a medical marijuana grower's permit because those scores are not exempt from disclosure under the state's "Right-to-Know" (open records or sunshine) law. An

entity called BC12, LLC filed an application for a medical marijuana grower-processor permit in Pennsylvania, which the health department rejected as incomplete. BC12's owner, Matthew Scot Payne, contested the decision, arguing the company should have a chance to cure the defect. Payne filed a right-to-know request for the application score sheets, but the health department refused to produce them, asserting that the law's "predicisional deliberations" exemption applied. On appeal of the denial, the state trial court determined that the exemption protects only confidential deliberations. Because the health department released scores assigned to several other applicants, the court ruled that the health department clearly does not consider the scores to be confidential. The court ordered the health department to release the preliminary scores of BC12's application. The court limits the required disclosure to the scores themselves and allows the health department to redact any notes or comments contained in the documents. An appeal has not been filed as of September 28, 2020.

U.S. BORDER PATROL AGENT CHARGED WITH POSSESSION WITH INTENT TO DISTRIBUTE CONTROLLED SUBSTANCES

***United States v. Carlos Victor Passapera Pinott*, No. 4:20-mj-02951-N/A-MSA-1 (D. Ariz. filed Aug. 10, 2020).** Federal authorities arrested Carlos Victor Passapera Pinott, a U.S. Border Patrol Agent assigned to an Arizona station, on multiple counts of conspiracy and possession with intent to distribute controlled substances. The complaint alleges that in the early morning of August 9, 2020, Pinott drove to a remote area of the U.S. border and then to an airport where he loaded two duffel bags into another vehicle. Law enforcement stopped the second vehicle and a search of the duffle bags revealed multiple packages of substances with the characteristics of cocaine (21 kilograms), heroin (1 kilogram), and fentanyl (1 kilogram). The duffle bags also contained approximately 350,000 pills, a sample of which field tested positive for fentanyl. Later that day, a search warrant executed at Pinott's residence uncovered $329,000 in the home and $40,000 in the vehicle Pinott used to transport the drugs. The case is ongoing.

NINTH CIRCUIT AFFIRMS PROSECUTOR'S USE OF DEFENDANT'S PRACTICE-WIDE PRESCRIPTION DATA

***United States v. David Lague*, No. 19-10500 (9th Cir. filed Aug.20, 2020).** In a case of first impression for the U.S. Court of Appeals for the Ninth Circuit, the three-judge panel affirmed the conviction of David Lague, a former physician's assistant at a pain management clinic in California, based in part on evidence of Lague's practice-wide prescription data. In March 2017, the federal government charged Lague with 39 counts of unlawfully distributing Schedule II and Schedule IV controlled substances outside of the usual course of professional practice to five of his former patients. During the trial, the government presented the patient files of the five patients covered by the indictment, and also introduced Lague's practice-wide prescription data from 2015 and 2016. This additional data covered 458 unrelated patients and showed that Lague prescribed opioids at a very high rate compared to other pain management prescribers in California. A jury found Lague guilty of the unlawful distribution charges in July 2018. Lague appealed, arguing that the district court erred by granting the government's motion to present data of his practice-wide prescriptions. Lague asserted that the decision violated the Federal Rules of Evidence (F.R.E.), relying on *United States v. Jones* (570 F.2d 765), a 1978 decision in which the Eighth Circuit said practice-wide data is irrelevant. The government, however, relied on *United States v. Merrill* (513 F.3d 1293), an Eleventh Circuit decision from 2008 that allows the use of practice-wide data to show intent. Faced with this split of authority, the Ninth Circuit concluded that the *Merrill* decision comported better with the text and purpose of F.R.E. 404(b). Applying this standard, the court ruled that uncharged prescriptions of controlled substances in enormous quantities and in dangerous combinations support a reasonable inference that the defendant issued the underlying prescriptions outside the usual course of professional practice and without a legitimate medical purpose. Therefore, because the prescription data made the intent element of the charges more probable, the district court properly admitted

Lague's uncharged prescriptions. An appeal has not been filed as of September 28, 2020.

MICHIGAN PHARMACY HAD NO DUTY TO WARN OF POTENTIAL DRUG INTERACTION

***Estate of Kevin Gottschalk v. Plumbrook Pharmacy,* No. 349274 (Mich. Ct. App. filed Sept. 17, 2020).** The Michigan Court of Appeals affirmed a summary judgment granted to a pharmacy in a lawsuit on grounds that a pharmacy cannot be held liable for medical malpractice. A physician simultaneously prescribed methadone and Valium to Kevin Gottschalk who filled those prescriptions at Plumbrook Pharmacy in Sterling Heights, Michigan. Shortly after, Gottschalk died at his home, and an autopsy determined the cause of death as intoxication by the combined effects of the two drugs. The decedent's estate filed a suit against the pharmacy, alleging medical malpractice. The pharmacy moved for summary judgment, which the trial court granted. The trial court held that because pharmacies are not licensed health care professionals, they are not subject to medical malpractice claims and can only be sued for ordinary negligence. The estate appealed, arguing that a medical malpractice claim could be brought against the individual pharmacist who filled the decedent's prescription for failing to screen for drug interactions, and that the pharmacy would be vicariously liable for the individual pharmacist's actions. In Michigan, however, there is binding precedent that pharmacists and their affiliated pharmacies are not liable for filling valid, compatible prescriptions. Because the trial court must follow prior precedent, the estate's argument is ineffective. Therefore, the appellate court held that the trial court did not err in granting summary judgment to the pharmacy. An appeal has not been filed as of September 28, 2020.

DEFENDANT ASSERTS PROSECUTION IS BARRED BY RECENT AMENDMENTS TO VIRGINIA'S GOOD SAMARITAN FATAL OVERDOSE PREVENTION LAW

***Commonwealth of Virginia v. Kodie Brooke Weatherholtz,* No. CR20000459-00 (Va. Cir. Ct. filed July 9, 2020).** Kodie Weatherholtz is challenging her methamphetamine possession charge under Virginia's Good Samaritan fatal overdose prevention law. The law, initially effective on July 1, 2015, originally provided an affirmative defense to individuals who contacted 911 for a victim of an overdose. Amendments to the law effective on July 1, 2020, changed the nature of the protection from an affirmative defense to protection from arrest or prosecution and expanded the protection to an individual who is experiencing an overdose. In this case, Weatherholtz argues that the amended version of the law applies to her because her indictment took place eight days after the law changed. In contrast, the Commonwealth asserts that the prosecution is justified because the incident involving Weatherholz occurred in 2019. Additionally, the Commonwealth questions whether Weatherholz actually overdosed and alleges that she was in a drug-induced psychosis when the police arrived. The Commonwealth argues that Weatherholz's alleged psychosis at the time is not covered by the intent of the statute or the statute's definition of overdose. A hearing is scheduled for October 6, 2020.

OHIO OPIOID LAWSUIT SCHEDULED FOR TRIAL

***State of Ohio ex rel. Jamison v. McKesson Corp.*, No. CV20180055 (Madison C.P. filed Feb. 26, 2018).** Ohio will be taking major drug distributors to trial starting on October 19, 2020 for their alleged role in Ohio's

opioid crisis. The state filed the suit in 2018 against Cardinal Health, McKesson Corp., AmerisourceBergen Corp., and Miami-Luken. The state's lawsuit claims the companies failed to comply with federal and state obligations, despite knowing that their failures would lead to prescription opioids being diverted from the legitimate supply chain to illegitimate channels of distribution and illegal, non-medical use.

WEST VIRGINIA SUES CVS AND WALMART FOR THEIR ALLEGED ROLE IN THE STATE'S OPIOID CRISIS

***State of West Virginia ex rel. Patrick Morrisey v. CVS Health Corp.*, No. CC40-2020-C-131 (Cir. Ct. filed Aug. 18, 2020)*; State of West Virginia ex rel. Morrisey v. Walmart,* No. CC40-2020-C-132 (Cir. Ct. filed Aug. 18, 2020).** In separate actions, West Virginia's Attorney General sued Walmart and CVS, claiming that the companies failed to monitor and report suspicious orders of prescription painkillers to their retail pharmacies. The lawsuits allege that the companies supplied far more opioids to their retail pharmacies than necessary and, thus, contributed to the opioid epidemic 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 State filed similar lawsuits against Rite-Aid and Walgreens in June 2020 (see the August 2020 issue of the LAPPA *Case Law Monitor* for details). The cases are ongoing.

COURT DISMISSES WHISTLEBLOWERS' FALSE CLAIMS SUIT AGAINST MCKESSON

***United States, v. McKesson Corp.*, No. 4:19-cv-02233-DMR (N.D. Cal. Filed Aug. 18, 2020)** The U.S. District Court for the Northern District of California dismissed a False Claims Act (FCA) case against McKesson Corporation brought by two whistleblowers holding that the relators fail to state a claim upon which relief could be granted. In this *qui tam* case, the relators, two former McKesson employees, claimed they personally witnessed lax security at McKesson distribution centers and other corporate facilities which allowed for the easy theft of products in the supply chain, including Schedule II opioids. (In a *qui tam* action, one or more private individuals, called "relators," bring an action on behalf of the government.) In both 2008 and 2017, McKesson entered into settlement agreements with the United States Department of Justice and the Drug Enforcement Administration regarding McKesson's alleged failure to identify and report suspicious orders of opioids. The relators allege that McKesson violated the federal Controlled Substances Act (CSA) by failing to adopt security measures that adequately prevent diversion of Schedule II opioids. The relators' FCA claim is premised on McKesson's alleged failure to disclose its CSA violations to the federal government when submitting claims for payment under various federal programs. The district court granted McKesson's motion to dismiss for failure to state a claim, holding that the relators do not adequately allege that McKesson violated any regulations or made false representations about its compliance with the CSA. The court added that the relators do not explain how the alleged FCA violations mean that McKesson was not in substantial compliance with the CSA. Because the determination of whether violations occurred and whether McKesson made false certifications to obtain payment on claims turns on a regulation that the government has broad discretion to interpret, the court found that the relators' claim is not of the kind the FCA is meant to address. The relators filed a second amended complaint against McKesson on September 8, 2020. A case management conference is scheduled for December 2, 2020.

SECOND CIRCUIT UPHOLDS NEW YORK'S TAX ON OPIOID MANUFACTURERS AND DISTRIBUTORS

***Association for Accessible Medicines v. Letitia James*, No. 19-183 (2d Cir. Filed Sept. 14, 2020).** The U.S. Court of Appeals for the Second Circuit has upheld New York's tax on the opioid industry. In 2018, the state legislature enacted the Opioid Stewardship Act (OSA or "the Act") under which opioid manufacturers and distributors must make an annual opioid stewardship payment to the "opioid stewardship fund," a special revenue fund established in the joint custody of the State Comptroller and the Commissioner of Taxation and Finance. The proceeds are to support statewide programs that provide opioid treatment, recovery, prevention, and education services. The OSA allows New York to collect $100 million annually from all licensed opioid manufacturers and distributors that sell or distribute opioids in the state, with each licensee responsible for paying a pro-rata share based on its market share of opioid sales. Another part of the Act, known as the pass-through prohibition, bars opioid manufacturers and distributors from passing the costs of the opioid stewardship payment through to their customers. Pharmaceutical industry groups sued the New York Attorney General to block the OSA from going into effect. A 2018 decision by a federal district court invalidated the OSA in its entirety, concluding that the OSA's pass-through prohibition violates the dormant commerce clause and is not severable from the rest of the Act. The New York State Legislature subsequently amended the OSA to remove the pass-through prohibition. On appeal, New York asked the Second Circuit to reverse the district court's invalidation of the remainder of the Act, including the opioid stewardship payment requirement. The Second Circuit concluded that the opioid stewardship payment is a tax (and not a penalty) within the meaning of the Tax Injunction Act (28 U.S.C. §1341), thus the district court did not have subject matter jurisdiction to adjudicate the plaintiffs' challenges to the payment. The court concluded this because funds are statutorily directed to support opioid treatment and prevention programs, which is highly suggestive that the payment requirement serves general revenue-raising purposes often financed by a general tax. Additionally, the revenue generated from the stewardship payment does not defray the state department of health's cost of regulating opioid manufacturers and distributors. Because the Second Circuit reversed the district court's judgment invalidating and enjoining enforcement of the opioid stewardship payment, New York can now collect $200 million from opioid manufacturers and distributors based on 2017 and 2018 market shares. The pharmaceutical plaintiffs filed a request for an extension of time to file a petition for rehearing of the case.

NEW YORK INITIATES INSURANCE FRAUD ACTION AGAINST JOHNSON & JOHNSON

***In re Johnson & Johnson*, New York State Department of Financial Services, Case No. 2020-0034-C (suit filed September 8, 2020).** New York State is suing Johnson & Johnson and its subsidiaries over the companies' alleged role in the state's opioid epidemic. The suit, brought by New York's Department of Financial Services (DFS), alleges that the company committed insurance fraud by encouraging doctors and patients to use its addictive opioid pain killers. DFS claims that the respondents knowingly and intentionally made numerous misrepresentations, directly or through third parties, concerning the safety and efficacy of opioids. Those misrepresentations allegedly caused health care providers to present false claims for payment, in the form of written prescriptions for opioid medications, to insurers regulated by DFS on multiple occasions over the past decades. DFS asserts Johnson & Johnson 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). DFS filed a similar case against another pharmaceutical manufacturer in June 2020 (see the August 2020 issue of LAPPA's *Case Law Monitor*). A hearing is scheduled for January 25, 2021.

INSURER HAS DUTY TO DEFEND RITE-AID OPIOID LITIGATION

***Rite-Aid Corp. v. ACE American Insurance*, No. N19C-04-150 (Del. Super. Ct. filed Sept. 22, 2020).** The Delaware Superior Court ruled that Rite-Aid can sue insurer Chubb to cover legal costs that the pharmacy incurs while defending against lawsuits related to its alleged role in the opioid epidemic. The state trial court held that the opioid cases that have been funneled into the federal multidistrict litigation (MDL-2804), meet the insurance policy's requirement that the resulting costs stemmed from alleged bodily injury. According to the court, the bodily injury that gave rise to the economic costs borne by the government plaintiffs and others could refer to broad injuries from the opioid crisis such as substance use treatment, investigations, and arrests. Since each of these arguably occurred because of bodily injury, the court concluded that all underlying opioid lawsuits alleging similar claims are potentially covered under the policy. Thus, the insurer has a duty to defend the lawsuits. Additionally, the court held that Chubb's coverage of Rite-Aid's legal costs is required regardless of whether the alleged opioid-linked injuries occurred before Rite-Aid's insurance policy took effect. An appeal has not been filed as of September 28, 2020.

PHARMACEUTICAL COMPANY MALLINCKRODT CONSIDERS FILING FOR CHAPTER 11

Mallinckrodt disclosed that it is considering filing for Chapter 11 bankruptcy protection due to its alleged liabilities surrounding the opioid epidemic. The company announced on August 4, 2020 that it is in negotiations with creditors about a potential bankruptcy filing covering the parent company and most of its subsidiaries. This potential bankruptcy filing is not part of the settlement framework announced in February 2020 that would resolve Mallinckrodt's liabilities from its alleged role in the opioid epidemic. Under the February proposal, which was agreed to by most states and U.S. territories, Mallinckrodt would place its generic drug subsidiary into Chapter 11 while keeping the Ireland-based parent company out of bankruptcy.

PURDUE PHARMA BANKRUPTCY PROCEEDINGS

***In re Purdue Pharma L.P.*, No. 19-23649 (Bankr. S.D.N.Y. filed Sept. 15, 2019).**

- On July 30, 2020, the U.S. Department of Justice filed a proof of claim valued up to $18.1 billion against Purdue Pharma based upon its ongoing civil and criminal actions against the company. In the claim, the government valued its civil claims at $2.8 billion, which could be tripled under the law. Additionally, if Purdue is convicted of criminal charges, the government stated it would seek a $6.2 billion fine and the forfeiture of potentially $3.5 billion.
- In August 2020, the National Association for the Advancement of Colored People (NAACP) moved to intervene in Purdue's bankruptcy settlement negotiations, citing concerns that a deal without their involvement would insufficiently address the opioid crisis' impact on communities of color. The NAACP does not seek to usurp the role of other participants or dispute the settlement amount but wants to ensure that some funds are used to assist communities of color that have been disproportionately affected by the crisis. On August 26, 2020, the bankruptcy judge approved the NAACP's request.
- A group of Tennessee plaintiffs with malfeasance claims against Purdue Pharma and its former chairman, Richard Sackler, including five district attorneys in the state, lost an attempt to overturn an injunction barring their lawsuit from proceeding during the bankruptcy. The U.S. District Court for the Southern District of New York affirmed the bankruptcy court's injunction on August 11, 2020.

- According to a joint filing by four dozen states made public in August 2020, Purdue allegedly inflicted more than $2.15 trillion in financial damage on the U.S. economy as a result of pushing highly addictive opioids on Americans for almost two decades. The states' tally includes an array of costs, including money for substance use treatment and health care, increased financing of the criminal justice system, lost revenue for businesses, child welfare, and the lost economic input of victims who were once contributing members of society. The filing comes amid arguments that the proposed global settlement falls short of Purdue's and its owners' share of what local and state governments need for dealing with the financial cost of the opioid crisis.

NOTEWORTHY UPDATES IN NATIONAL OPIOID LITIGATION

***In re National Prescription Opiate Litigation*, No. 17-MD-2804 (N.D. Ohio cons. Dec. 12, 2017).**

- On August 6, 2020, the federal district judge rejected retail pharmacy chains' motions to dismiss lawsuits filed by two Ohio counties, Lake and Trumbull, alleging that the pharmacies' opioid dispensing practices flooded communities with pain pills and were a public nuisance. The court ruled that Ohio public nuisance law applies to Lake county and Trumbull county's nuisance claims, and those cases can continue.
- On September 24, 2020, the U.S. Court of Appeals for the Sixth Circuit overturned the district judge's September 2019 approval of a novel "negotiation class" representing nearly 35,000 municipal entities suing drug companies over the U.S. opioid crisis that would bring every community nationally into their settlement talks. Numerous plaintiffs, defendants, and state attorneys general objected to the plan. When the judge rejected their objections, they asked the Sixth Circuit to decertify the class. In a 2-1 decision by the Sixth Circuit, the court ruled that the judge overstepped his authority by inventing a class action procedure not grounded in the text of the Federal Rules of Civil Procedure. The dissenting judge stated that the federal procedural rules should not be interpreted to restrain district courts' ability to innovate within their boundaries and that courts should be encouraged to be resourceful.

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.

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