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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EIGHTH CIRCUIT AFFIRMS THAT PRIVATE DISABILITY POLICIES COVER NURSE ANESTHETIST TERMINATED FOR SUBSTANCE MISUSE

***Ronald Bernard v. Kansas City Life Ins. Co.*, U.S. Court of Appeals for the Eighth Circuit, Case No. 20-1593, 993 F.3d 588 (opinion filed April 5, 2021).** For a summary of the facts and previous updates on this case, please refer to the April 2020 issue of the LAPPA *Case Law Monitor*, available here. The U.S. Court of Appeals for the Eighth Circuit affirmed a Missouri district court's grant of summary judgment, concluding that Kansas City Life Insurance Company (Kansas City Life) improperly denied disability income benefits to Ronald Bernard. In 2017, Bernard's employer terminated him from his position as a certified nurse anesthetist after he admitted to using fentanyl at work. Soon thereafter, Bernard submitted claims for short- and long-term disability income benefits to Kansas City Life. Kansas City Life denied Bernard's claims, concluding that he was not disabled under the terms of the policies. According to Kansas City Life's claim denial letter, Bernard's drug use did not preclude his ability to perform his occupational duties. Bernard challenged the denial of benefits, bringing a civil action against the insurer under section 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1132(a)(1)(B)). At trial, the federal district court granted Bernard's motion for summary judgment. The Eighth Circuit affirmed the decision, agreeing that Kansas City Life's denial of benefits was not supported by evidence and that no reasonable person would believe that Bernard could safely administer anesthesia while under the influence of fentanyl. On May 11, 2021, the Eighth Circuit denied a petition for an *en banc* rehearing filed by Kansas City Life.

MASSACHUSETTS COURT REVERSES IMPAIRED DRIVING CONVICTION DUE TO LACK OF EVIDENCE

***Commonwealth of Massachusetts v. Sean F. Sprowl*, Appeals Court of Massachusetts, Case No. 2019-P-0754, 99 Mass. App. Ct. 1118 (opinion filed April 5, 2021).** In an unpublished opinion, the Appeals Court of Massachusetts reversed a defendant's conviction of operating a motor vehicle under the influence of drugs

because the prosecution provided no expert testimony or other evidence connecting defendant's displayed signs of impairment with the ingesting of fentanyl or methamphetamine. In April 2017, a state police trooper pulled over the defendant, Sean Sprowl, after Sprowl swerved and hit the side mirror of a stopped car. During a search of the defendant, the trooper discovered a prescription bottle for oxycodone pills bearing the defendant's name and a cut plastic straw with a white, powdery residue. The bottle contained two types of pills, one type containing fentanyl and the other type containing methamphetamine, fentanyl, and clonazepam. Based on the trooper's training and experience, the results of a sobriety test, and the circumstances of the accident, the trooper concluded Sprowl drove under the influence of narcotics. After a bench trial, a trial judge found Sprowl guilty of several charges, including operating a motor vehicle under the influence of drugs. Sprowl appealed the conviction, arguing that there was insufficient evidence to establish that his use of a narcotic or a stimulant resulted in his impairment. In reversing the trial court, the intermediate appellate court found that, while a rational judge could infer impairment from the circumstances of the accident, the commonwealth presented insufficient evidence to prove that the defendant's impairment resulted from the consumption of drugs. In reaching this conclusion, the court noted the difference between general knowledge about intoxication from alcohol versus intoxication from marijuana or other drugs. In Massachusetts, a police officer may offer a lay opinion regarding a defendant's level of sobriety or intoxication with respect to alcohol, because the effects of alcohol intoxication are so well known that they are within the realm of common experience. In contrast, an officer cannot offer a lay opinion about defendant's sobriety or intoxication on a charge of operating a motor vehicle under the influence of marijuana because no such general knowledge regarding the effects of marijuana intoxication currently exists. The court concluded that, like marijuana, no such general knowledge exists as to the effects of fentanyl or methamphetamine. Therefore, expert testimony – or at minimum, some evidence – is required to connect any displayed signs of impairment to the defendant's consumption of the substance(s) at issue. Because the prosecution offered no expert testimony or evidence in this case, the court ruled that the conviction could not stand.

COLORADO NURSE WITH SUBSTANCE USE DISORDER LOSES UNEMPLOYMENT BENEFITS FOR FAILING TO TIMELY COMPLY WITH REQUIREMENTS

***Catholic Health Initiatives Colorado v. Industrial Claim Appeals Office, et al.*, Colorado Court of Appeals, Case No. 20CA1010 (opinion filed April 8, 2021).** The Colorado Court of Appeals ruled that a nurse who lost employment because of her substance use disorder does not qualify for unemployment compensation where she failed to timely submit documentation showing participation or registration in a treatment program as required by the applicable statute. The claimant, Katie Muhs, stole and self-injected fentanyl while working as a registered nurse for Catholic Health Initiatives Colorado (Catholic Health). After getting caught and admitting to fentanyl diversion and use on the job, Catholic Health fired Muhs. A month later, Muhs sought unemployment compensation benefits on grounds that she was fired for substance misuse, that she was addicted to fentanyl, and that she had started treatment for acute stress disorder and substance use disorder. The state unemployment insurance division awarded Muhs benefits based on a finding that her substance use disorder rendered her fentanyl theft and use nonvolitional and, thus, she was not at fault for her unemployment. Catholic Health challenged the benefit award arguing that Muhs did not comply with subsection (4)(b)(IV) of the Colorado Employment Security Act (COLO. REV. STAT. ANN. § 8-73-108), which explains how an employee terminated because of a no-fault substance use disorder may qualify for a full benefit award. In particular, Muhs failed to provide the hearing officer with written substantiation of treatment

"within four weeks" of admitting her disorder to the employer. The Industrial Claim Appeals Office (Panel) reviewed the decision and upheld the benefits. Catholic Health then challenged the Panel's order in court, arguing that even if Muhs' use and theft of fentanyl were outside of her control, she still needed to comply with subsection (4)(b)(IV). The intermediate appellate court overturned the decision. The appellate court concluded that the subsection's unambiguous limiting phrase— "but only if"— imposes mandatory and specific requirements and deadlines that an individual with substance use disorder must satisfy to qualify for unemployment benefits. Based on the plain language of the statute, the court held that the Colorado General Assembly clearly intended that a worker follow these requirements to qualify for unemployment benefits. The court did not doubt that Muhs' substance use disorder was beyond her control but found that her failure to comply with subsection (4)(b)(IV) makes her unqualified for unemployment benefits.

FEDERAL GOVERNMENT ALLEGES DELAWARE TREATMENT CENTER FAILED TO KEEP PROPER RECORDS

***United States v. Connections Community Support Programs, Inc., et al.*, U.S. District Court for the District of Delaware, Case No. 1:21-cv-00514-MN (suit filed April 9, 2021).** The United States filed a civil complaint against Connections Community Support Programs, Inc. (Connections), a substance use disorder treatment center in Delaware, as well as three of its current and former corporate officers, alleging that the defendants violated the Controlled Substances Act (CSA) by negligently failing to keep required documentation of distribution and dispensing of controlled substances, particularly methadone and buprenorphine. To ensure that controlled medications are not diverted for sale or misuse, U.S. Drug Enforcement Administration (DEA) regulations impose strict reporting and recordkeeping requirements on the manufacture, distribution, and dispensing of controlled substances. During a March 2019 inspection and audit by the DEA, diversion investigators determined that Connections could not provide records identifying the location of more than 244 bottles of methadone liquid and more than 1,100 doses of buprenorphine. The complaint alleges that Connections has a long history of both failing to maintain proper records and backdating required records. Additionally, the government claims that the corporate officers of Connections: (1) negligently delegated CSA compliance responsibility to individuals they knew were unqualified and ill-suited to those responsibilities; and (2) failed to provide adequate training and supervision for those individuals. Each alleged violation of the CSA recordkeeping requirements carries a civil penalty of up to $15,040. In response to the suit, one corporate officer defendant filed a motion to dismiss for failure to state a claim. The government filed a brief responding to the motion to dismiss on May 18, 2021.

NEW JERSEY SUPREME COURT AFFIRMS THAT WORKERS COMPENSATION COVERS MARIJUANA EXPENSES

***Vincent Hager v. M&K Construction*, Supreme Court of New Jersey, Case No. 084045, 247 A.3d 864 (opinion filed April 13, 2021).** For a summary of the facts and previous updates on this case, please refer to the February 2020 issue of the LAPPA *Case Law Monitor*, available here. The New Jersey Supreme Court unanimously ruled to uphold an intermediate appellate court decision from January 2020 that found an employer responsible for covering the monthly cost of marijuana used for medicinal purposes by a former employee. The employer, M&K Construction (M&K), contended that workers compensation benefits should not cover the cost of Hager's marijuana because the Controlled Substances Act (CSA), under which marijuana remains a Schedule I controlled substance, preempts New Jersey's Compassionate Use Medical

Cannabis Act (Compassionate Use Act). The company also asserted that compliance with the workers compensation order to reimburse marijuana costs could subject it to federal criminal liability for aiding and abetting or conspiracy. Furthermore, M&K argued that it fit within a reimbursement exception to the Compassionate Use Act. In affirming the decision below, the New Jersey Supreme Court rejected all of M&K's arguments. First, the court concluded that M&K does not fit within the Compassionate Use Act's limited reimbursement exception. Although private health insurers and government aid programs do not have to cover marijuana costs under state law, the court determined that private employers are not exempt in workers' compensation cases. The court also agreed with the appellate court that M&K would not be found guilty of aiding and abetting or conspiracy because the company is not directly purchasing or giving Hager marijuana. Finally, using federal case law to decipher congressional intent, the court concluded that M&K can abide by both the CSA and the Compassionate Use Act, and as such, the Compassionate Use Act is not preempted by the CSA. Based on the ruling, the court ordered M&K to reimburse Hager's costs for, and reasonably related to, prescribed marijuana for medicinal use.

CLASS ACTION SUIT FILED IN MISSOURI AGAINST DRUG TESTING COMPANY OVER ALLEGED FALSE POSITIVE RESULTS

***Justin Gonzalez, et al. v. Avertest, LLC*, U.S. District Court for the Eastern District of Missouri, Case No. 4:21-cv-00403-PLC (suit filed February 26, 2021).** Two individuals who allegedly received false positive drug test results from Avertest, LLC d/b/a Averhealth (Averhealth) filed a class action suit in Missouri against the company. Averhealth is a drug testing company that provides drug testing services to entities including drug courts, veterans' treatment courts, mental health courts, family courts, and domestic violence courts. The plaintiffs bring forth a class action on behalf of themselves and all other similarly situated individuals who submitted to drug tests conducted by Averhealth. The plaintiffs allege that Averhealth did not conduct its tests according to acceptable and appropriate standards of toxicology, in part due to Averhealth's failure to employ proper quality control methods. The plaintiffs claim that Averhealth chose to prioritize the speed of test results over ensuring that employees followed proper testing methods. In particular, plaintiff Justin Gonzalez alleges that he received test results showing a false positive for methamphetamine and, as a result, a family court dealing with a child custody case involving Gonzalez ruled that he could not see his children unsupervised. Likewise, plaintiff Darrel Tullock alleges that he received positive test results for drugs he did not ingest, and consequently, a court placed restrictions on his ability to see his child unsupervised. The plaintiffs bring forth causes of action for breach of contract; violation of the Missouri Merchandising Practices Act through unfair practices, deception, omission of a material fact, and misrepresentation; and negligence. The complaint requests that the court award damages and issue a permanent injunction enjoining Averhealth from continuing its negligent practices and violations of the Missouri Merchandising Practices Act. The plaintiffs filed the case in state court, but the defendant removed it to federal court on April 6, 2021. On May 14, 2021, Averhealth filed a motion to dismiss the plaintiffs' amended complaint.

WASHINGTON SUPREME COURT STRIKES DOWN DRUG POSSESSION LAW, LEADING TO LEGISLATIVE CHANGE

***State of Washington v. Shannon B. Blake*, Supreme Court of Washington, Case No. 96873-0 481 P.3d 521 (opinion filed February 25, 2021).** In a case that received considerable media attention and an immediate legislative reaction, the Washington Supreme Court, in a 5-4 decision, ruled that the state's strict liability law

against possessing controlled substances (codified at WASH. REV. CODE ANN. § 69.50.4013) is unconstitutional. Correctional officers found a small bag of methamphetamine in the coin pocket of a pair of jeans worn by a woman taken to jail as part of a stolen vehicle investigation. Prosecutors charged the woman, Shannon Blake, with violating § 69.50.4013. At the time, § 69.50.4013 contained no express requirement that a defendant intend to possess. At trial, Blake asserted the common law (that is, court created, not statutory) defense of "unwitting possession," in that she did not ingest drugs, the jeans were recently purchased second-hand, and she did not know about the drugs in the pocket. The trial court found Blake guilty, noting that Blake did not prove unwitting possession. Blake appealed, asserting that "requiring her to prove unwitting possession to [sic] the charged offense violates due process." An intermediate appellate court affirmed the conviction. The Washington Supreme Court, however, overturned it. While the Supreme Court noted that "at one point in time" it could have read a silent intent requirement into the statute, state Supreme Court decisions rendered in 1981 and 2004 reiterated the strict liability nature of the statute. Given that the state legislature never amended § 69.50.4013 in response to the prior decisions, the Supreme Court overruled the prior decisions and found the statute unconstitutional because "in 2021, we have overwhelming evidence that the legislature intends the simple possession statute to penalize innocent nonconduct" and, relying on Washington, other state, and U.S. Supreme Court decisions, "we have overwhelming legal authority that this violates the due process clauses of the state and federal constitutions." Three justices dissented on grounds that the legislature's "consistent and undiminished" power to enact strict liability crimes is not outweighed by the majority's constitutional analysis. One justice agreed with the majority's decision to vacate Blake's conviction, but would have read a silent intent element into the statute, rather than striking the statute down. In April 2021, the Washington Supreme Court denied the state's petition for reconsideration of the decision.

Once the court found § 69.50.4013 unconstitutional, Washington no longer had a criminal prohibition against possession of small amounts of controlled substances. The decision also implicates thousands of prior cases where defendants received fines or enhanced sentences because of convictions under § 69.50.4013. State lawmakers quickly considered multiple bills drafted in response to the decision. On May 13, 2021, Governor Jay Inslee signed Senate Bill 5476 into law, a sweeping bill that, as described by one news article, adds a "knowing" requirement to the criminal offense, reclassifies the offense as a gross misdemeanor (rather than a felony), vacates first and second-time convictions occurring before February 2021, and encourages defendants to be referred to treatment programs.

FLORIDA SUPREME COURT REJECTS CONSTITUTIONAL BALLOT INITIATIVE TO LEGALIZE MARIJUANA

***Advisory Opinion to the Attorney General re: Adult Use of Marijuana*, Supreme Court of Florida, Case No. SC19-2116 (opinion filed April 22, 2021).** In a 5-2 decision, the Florida Supreme Court struck down a state constitutional ballot initiative to legalize marijuana use for recreational purposes. The Florida Attorney General petitioned the court for an advisory opinion regarding the validity of an initiative sponsored by the group Make it Legal Florida and titled "Adult Use of Marijuana." At issue in the matter was the official ballot summary of the proposed state constitutional amendment. The purpose of a ballot summary is to provide fair notice of the content of the proposed amendment to Florida voters that does not mislead and allows for intelligent and informed votes. The ballot summary for this initiative stated, "Permits adults 21 years or older to possess, use, purchase, display, and transport up to 2.5 ounces of marijuana and marijuana accessories for personal use for any reason." In considering a ballot summary, a Florida court must decide if the language is affirmatively misleading to voters. Here, the Florida Supreme Court found the word

"permits" to be affirmatively misleading because Florida voters could think that it means the recreational use of marijuana will be free of any repercussions, criminal or otherwise. Because the ballot summary did not indicate that marijuana would remain illegal under federal law, the court believed that voters might get confused about its legal status. In a dissenting opinion, one justice asserted that Florida precedent requires the ballot summary to summarize changes to Florida law simply and accurately, not address secondary issues such as federal law. Additionally, the dissent thought the majority opinion underestimates Florida voters and adds hurdles to the citizen-initiative process. Had the initiative been approved, it would have appeared on the 2022 ballot. Now, in order to appear on a future ballot, the initiative must be redrafted, and the signature-gathering process restarted.

KENTUCKY SUPREME COURT RULES REFUSAL OF WARRANTLESS BLOOD TEST CANNOT BE INTRODUCED AS EVIDENCE

***Commonwealth of Kentucky v. Jared McCarthy*, Supreme Court of Kentucky, Case No. 2019-SC-0380-DG (opinion filed April 29, 2021).** The Kentucky Supreme Court ruled that a driver cannot be subjected to an enhanced criminal penalty due to his or her refusal to submit to a warrantless blood test, and that the refusal to consent to such test may not be offered as evidence of his or her guilt in prosecuting a driving under the influence (DUI) charge. This case follows from the 2016 U.S. Supreme Court case of *Birchfield v. North Dakota* (136 S. Ct. 2160), in which the U.S. Supreme Court ruled that: (1) the Fourth Amendment permits a warrantless breath test incident to an arrest for DUI but not a warrantless blood test; and (2) drivers who refuse to submit to a blood test may face civil penalties for that refusal, but not criminal ones.

In the case at hand, a police officer arrested the defendant, Jared McCarthy, for DUI. The officer transported McCarthy to the hospital where he requested McCarthy submit to a blood alcohol test and informed McCarthy of the repercussions under Kentucky law for refusing the test. Specifically, the officer warned McCarthy that under KY. REV. STAT. ANN. § 189A.105(2)(a)(1), if: (1) he refused the test, the fact of the refusal could be used against him in court as evidence of violating Kentucky's DUI law; and (2) he refused the test and was subsequently convicted of DUI, then he would be subject to a mandatory minimum jail sentence twice as long as if he submitted to the test. McCarthy refused the blood test. Following a trial, a jury found McCarthy guilty of DUI and sentenced him to two years in prison. McCarthy appealed, arguing that the trial court erred by: (1) allowing the commonwealth to introduce evidence that he refused to submit to blood testing to explain the reason for a lack of scientific evidence; and (2) preventing him from countering that evidence by asking the arresting officer why he had not obtained a warrant for the blood test. An intermediate appellate court held that *Birchfield* applies to § 189A.105(2)(a)(1) and, thus, McCarthy's refusal could not be used as evidence of guilt in the DUI prosecution. Moreover, based on Kentucky precedent, the appellate court ruled that the commonwealth improperly commented on McCarthy's refusal, especially given the trial court ruling that McCarthy could not comment on the officer's failure to seek a search warrant.

In a 5-2 decision, the Kentucky Supreme Court affirmed the intermediate appellate court's ruling. With respect to the trial court allowing the commonwealth to introduce the refusal to explain a lack of scientific evidence, the Kentucky Supreme Court agreed that the refusal should have been found inadmissible and allowing it violated McCarthy's Fourth Amendment rights. The court also agreed with the intermediate appellate court that, although the refusal evidence was improperly admitted, once it was admitted, McCarthy should have been given the opportunity to raise the issue of the commonwealth's right to seek a warrant for the blood test. Having concluded that the trial court erred, the supreme court ruled that the erroneous admission was not harmless beyond a reasonable doubt, and therefore, McCarthy's conviction warranted reversal. Two justices dissented in part to the holding, stating that while they agreed that McCarthy's refusal to permit the blood draw could not be used to enhance his DUI penalty, they did not agree that the refusal could not be introduced into evidence to explain the lack of scientific evidence. On May 19, 2021, the

commonwealth filed a petition for reconsideration with the Kentucky Supreme Court. McCarthy has until June 8 to respond to the petition.

ALIXAR$_X$ SETTLES WITH FEDERAL GOVERNMENT OVER ALLEGED VIOLATIONS OF THE CSA

***United States ex rel. Gharavi v. AlixaRx, LLC*, U.S. District Court for the Northern District of Georgia, Case No. 1:17-CV-00455-JPB (case settlement May 11, 2021).** AlixaRx, LLC, a national provider of pharmacy services to long-term care facilities, agreed to pay the United States $2.75 million to resolve allegations that it allowed the dispensing of controlled substances without valid prescriptions between January 1, 2014 and December 13, 2017. The federal Controlled Substances Act (CSA) allows pharmacists to dispense Schedule II controlled substances without a written prescription only in true emergency situations and only for the quantity of drugs necessary to treat the patient during the emergency period. Moreover, emergency verbal authorizations must promptly be reduced to writing and signed by a physician within seven days of issuance. A government investigation revealed that AlixaRx routinely abused the CSA's emergency prescription provisions by requesting and obtaining verbal "emergency" refills from prescribers in the absence of any true emergency. Additionally, AlixaRx routinely failed to obtain written prescriptions within seven days after the verbal authorization. The government also asserted that AlixaRx attempted to cover up violations by obtaining backdated prescriptions from the prescribing physicians. According to the U.S. Department of Justice, in addition to the above-alleged violations, the settlement resolves allegations that AlixaRx submitted false claims to Medicare for invalid emergency prescriptions. The settlement is the result of a lawsuit filed by a former pharmacist at AlixaRx's Atlanta hub under the *qui tam* or whistleblower provisions of the federal False Claims Act.

MISSISSIPPI SUPREME COURT OVERTURNS MEDICAL MARIJUANA INITIATIVE

***In re Initiative Measure No. 65: Mayor Mary Hawkins Butler v. Michael Watson*, Supreme Court of Mississippi, Case No. 2020-IA-01199-SCT (opinion filed May 14, 2021).** In a 6-3 decision, the Mississippi Supreme Court overturned the medical marijuana initiative that Mississippi voters approved in November 2020 due to a discrepancy in a state constitutional provision. The ballot measure, Initiative 65, requires the Mississippi State Department of Health to adopt rules and regulations for a medical cannabis program by July 1, 2021 and begin issuing patient cards and treatment center licenses by August 15, 2021. However, an amendment to the Mississippi constitution made in 1992 added Section 273(3), which provides that the number of signatures from each congressional district for a proposed ballot initiative cannot exceed one-fifth of the total number of signatures required to qualify an initiative petition for placement on the ballot. The intent of the section is to ensure an even number of signatures from Mississippi's congressional districts. In 2001, Mississippi lost one congressional district due to a reduction in population. The language in Section 273(3), however, was not updated to "one-fourth" to reflect the new number of districts, thus, making the provision mathematically impossible to satisfy. The Mississippi Supreme Court held that "the drafters of Section 273(3) wrote a ballot-initiative process that cannot work in a world where Mississippi has fewer than five representatives in Congress." In order for the process to work, the majority concluded that the state legislature needed to amend the section. As a result of the discrepancy, the court reversed the secretary of state's certification of Initiative 65 and held all subsequent proceedings void. The three dissenting justices reasoned that because a federal court sets Mississippi's congressional districts, the state should not be prevented from relying on the previously drawn five districts for other purposes. Additionally, the dissent argues that the majority's reading effectively shuts down the initiative process. Unless legislators are called into a special session this year, the issue will not be resolved until the Mississippi legislature reconvenes in 2022.

COMPANY FACES DISCRIMINATION SUIT OVER RESPONSE TO EMPLOYEE'S POSITIVE DRUG SCREEN

***Robert Earle Bownes v. Borroughs Corp.*, U.S. District Court for the Western District of Michigan, Case No. 1:20-cv-00964-HYJ-PJG (motion to dismiss denied May 13, 2021).** A Michigan federal district court ruled that a long-term employee's racial discrimination case against an industrial storage equipment producer can continue. Former employee Robert Bownes worked for Borroughs Corporation (Borroughs) from 1981 until June 2017, when Borroughs terminated him as a result of a positive drug test for marijuana. At the time, Bownes was party to a collective bargaining agreement that indicated Borroughs could permit an employee who tested positive for a controlled substance to complete a rehabilitation/treatment program as a condition for continued employment. Bownes who is African American, asserts that Borroughs did not give him the opportunity to participate in a rehabilitation program, nor did it give him the opportunity to take another drug test. The complaint alleges that Borroughs treated white employees who failed a drug test differently than him and identifies (via initials) six white employees who were given the opportunity to participate in a rehabilitation program and continue working at the company. Based on these allegations, Bownes asserts that Borroughs discriminated against him in violation of 42 U.S.C. § 1981 and Michigan's Elliott-Larsen Civil Rights Act. In response to the complaint, Borroughs filed a motion to dismiss the case for failure to state a viable claim. In the motion, the company argued that: (1) Bownes did not identify an employee who was offered rehabilitation instead of termination after a positive drug test; and (2) it treated Bownes the same as any other employee, citing to a document describing the company's rules. The district court rejected these arguments, however, concluding that identifying workers by their initials is enough to state a plausible race discrimination claim and the existence of a company policy does not rule out the possibility that Borroughs treated Bownes differently from similarly situated white employees. In sum, the court determined that Bownes' complaint states plausible discrimination claims against the company. A discovery scheduling conference is set for June 10, 2021.

MASSACHUSETTS MEDICAL PRACTICE SETTLES INVESTIGATION INTO OPIOID USE DISORDER-BASED DISABILITY DISCRIMINATION

U.S. Attorney's Office Case No. 2019V00192 (settlement reached May 20, 2021). The New England Orthopedic Surgeons (NEOS) reached an agreement with the U.S. Attorney's Office for the District of Massachusetts to resolve complaints made to the U.S. Department of Justice that NEOS violated the Americans with Disabilities Act (ADA) by turning away patients being treated for opioid use disorder (OUD). In 2019, two patients receiving prescribed buprenorphine sought full-joint replacements from NEOS surgeons. While subsequent investigation revealed that NEOS could have accommodated the patients, the practice referred the patients elsewhere because NEOS surgeons were not comfortable with the post-operative pain management protocol necessary for those patients. An individual receiving treatment for OUD is generally considered disabled under the ADA, and denying a medical procedure to that person because he or she takes a medication to treat a disability, when the medical procedure is still possible for persons on the medication, violates the ADA. Under the terms of the settlement agreement, NEOS must adopt a non-discrimination policy, provide training to employees and contractors on the ADA and OUD, and pay the two complainants $15,000 each for pain and suffering.

THE SALVATION ARMY FACES FEDERAL CLASS ACTION ALLEGING DISCRIMINATORY MAT POLICY

***Mark Tassinari v. The Salvation Army National Corp., et al.*, U.S. District Court for the District of Massachusetts, Case No. 1:21-cv-10806-LTS (suit filed May 14, 2021).** A former participant in the Salvation Army's residential Adult Rehabilitation Centers and Programs (ARC program) filed a class action lawsuit against the organization alleging that it has a discriminatory policy regarding medication for addiction treatment (MAT). In 2018, a court ordered Mark Tassinari, who had a long history of opioid use disorder (OUD), to complete the Salvation Army's ARC program as a condition of probation. At that time, Tassinari was not using MAT. About two months into the ARC program, Tassinari's doctor prescribed buprenorphine and, upon his return to the program, the Salvation Army required him to submit to a urine drug screen. Tassinari alleges that he explained to the Salvation Army that he had taken doctor-prescribed buprenorphine and, subsequently, his urinalysis was positive for buprenorphine. According to Tassinari, the Salvation Army immediately expelled him from the ARC program and services, including housing, due to an allegedly nationwide policy and practice of prohibiting participants with OUD from receiving MAT. After being expelled from the ARC program, Tassinari became homeless, suffered a relapse, lost many of his personal belongings, lost contact with his probation officer, and required a lengthy hospitalization. Eventually, Tassinari completed the remainder of his probation at a different residential treatment facility. As part of planning for housing needs after an upcoming release from another treatment program, Tassinari contacted the Salvation Army ARC program in May 2021 to ask if it would accept him for OUD rehabilitation. He disclosed his current prescription for MAT. Although the ARC program acknowledged that it had a bed available, the Salvation Army allegedly informed Tassinari that he could not have the bed because of his ongoing MAT. Shortly thereafter, Tassinari filed a class action lawsuit against the Salvation Army alleging that its MAT policy is discriminatory and violates Title III of the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act, and the federal Fair Housing Act (FHA). Tassinari asks the court to issue a declaratory judgment as well as issue a preliminary and permanent injunction requiring the Salvation Army to come into full compliance with the requirements of the ADA, Rehabilitation Act, and FHA. Specifically, Tassinari wants the court to order the Salvation Army to: (1) immediately issue a written statement and policy providing that all participants in the ARC program nationwide will be permitted to participate in MAT, if prescribed by a physician; and (2) conduct a review of all current participants of the ARC program for possible OUD history and provide them with immediate access to medical treatment to consider whether MAT should be commenced. Tassinari has until August 16, 2021 to provide proof of service of his complaint.

COLORADO DISPENSARIES PETITION U.S. SUPREME COURT TO HEAR IRS CASE

***Eric D. Speidell v. United States*, U.S. Supreme Court, Case No. 20-1332 (writ of certiorari filed March 19, 2021).** Taxpayers who operate marijuana dispensaries in Colorado filed a writ of certiorari seeking U.S. Supreme Court review of a case involving the Internal Revenue Services' (IRS) summonses directed at those dispensaries. The case involves two dispensaries questioning the power of the IRS to enforce a provision in the tax code (26 U.S.C. § 280E) disallowing deductions for business activities relating to controlled substances that are illegal under federal law. The dispensaries object to the IRS's attempts to collect and audit information about their business practices and filed a motion to quash the IRS summonses in Colorado federal court. The dispensaries argued in the alternative that: (1) the IRS investigation is quasi-criminal, exceeds IRS

authority, and is being conducted for an illegitimate purpose; (2) the investigation is in bad faith and constitutes an abuse of process; and (3) even if the investigation is legitimate, the information sought is irrelevant. The district court denied the dispensaries' motion to quash and ruled for the IRS. On appeal, the U.S. Court of Appeals for the Tenth Circuit, in an opinion entered in October 2020, affirmed the district court's ruling holding that the IRS acted with a legitimate purpose and sought information relevant to its legitimate investigatory purpose of examining federal tax liabilities of a taxpayer's business. Additionally, the Tenth Circuit held that the IRS's refusal to grant immunity to the dispensaries did not render their investigation quasi-criminal. After the dispensaries petitioned the U.S. Supreme Court for a writ of certiorari, the federal government filed a brief in opposition to the filing on May 24, 2021. The government argues that the U.S. Supreme Court should not hear the case because almost all of the dispensaries' arguments are directly addressed by earlier court decisions. Additionally, the government notes that the Supreme Court denied petitions brought by other Colorado marijuana businesses challenging IRS authority to investigate possible violations of Section 280E.

INMATE SUES NEW MEXICO CORRECTIONS DEPARTMENT OVER ITS MAT POLICY

***S.B. v. Alisha Tafoya Lucero, et al.*, U.S. District Court for the District of New Mexico, Case No. 1:21-cv-00402-KWR-GJF (suit filed April 29, 2021).** A woman prescribed methadone to manage her opioid use disorder is suing the New Mexico Corrections Department (NMCD) to ensure that she can continue to receive her medication for addiction treatment (MAT) when she is transferred to prison to serve her sentence. The plaintiff, who is identified only as S.B., has been on MAT for two years. In March 2021, a court sentenced her for absconding from probation. The NMCD has a blanket ban on MAT for anyone other than pregnant incarcerated individuals. At her sentencing, S.B. asked the court to issue an order remanding her to Bernalillo County Metropolitan Detention Center (MDC) to slowly withdraw from methadone prior to her transfer to NMCD custody. The court granted this request, and she is currently at MCD and set to transfer out in June 2021. While incarcerated at MDC, S.B. cannot earn good time credit and, as such, her incarceration will be extended. S.B. filed suit against two NMCD leaders to challenge the denial of adequate medical care. In the complaint, S.B. asserts that the denial of her necessary medical care violates her rights under the Americans with Disabilities Act (ADA) and her right to be free from cruel and unusual punishment under the Eighth Amendment of the U.S. Constitution. S.B. seeks emergency, preliminary, and permanent injunctive relief requiring the defendants to provide her with her medically necessary, physician prescribed methadone during her incarceration. Additionally, she seeks declaratory relief in the form of a declaration that NMCD's blanket ban on MAT is a violation of the ADA and the Eighth Amendment. On May 19, 2021, the court granted S.B.'s motion to proceed with the case anonymously. The defendant's answers to the complaint are due on June 4, 2021.

DEFENDANTS' MOTIONS TO DISMISS CHICAGO OPIOID CASE DENIED

***City of Chicago v. Purdue Pharma L.P., et al.*, U.S. District Court for the Northern District of Illinois, Case No. 1:14-cv-04361 (motions to dismiss denied March 31, 2021).** The District Court for the Northern District of Illinois denied several defendants' motions to dismiss the city of Chicago's 395-page fifth amended complaint for failure to state a claim. The suit alleges that opioid industry defendants, including Teva

Pharmaceuticals, Johnson & Johnson, and Janssen Pharmaceuticals, failed to maintain and update suspicious order monitoring systems and alert authorities to the over-prescription of opioids. At present, Chicago asserts its claims in four counts, all brought pursuant to the provisions of the Chicago municipal code. These counts include: (1) engaging in deceptive business practices; (2) engaging in unfair business practices; (3) misrepresentations in connection with the advertisement or sale of goods; and (4) recovery of costs incurred by the city. The case, filed in 2014, was transferred to the Ohio-based multidistrict opioid litigation (MDL) in 2017 and then remanded back to Illinois federal court in December 2019. As part of the opinion, the Illinois district court judge addressed the fact that certain rulings made by the Ohio judge overseeing the MDL are germane to this case. While the Illinois judge finds the MDL rulings instructive, he is not persuaded that he should follow them as binding law of the case. Additionally, the judge maintains that the court should not uncritically adopt the MDL rulings and reject defendants' arguments without reviewing them independently. The case is now in the discovery phase and a discovery status conference is scheduled for June 18, 2021.

CALIFORNIA SUPREME COURT DECLINES TO HEAR CASE ABOUT STATE AGENCIES TURNING OVER OPIOID DATA IN MARKETING SUIT

***Board of Registered Nursing v. Superior Court of Orange County*, California Supreme Court, Case No. S267294 (petition for review denied April 21, 2021).** For a summary of the facts and previous updates on this case, please refer to the February 2021 issue of the LAPPA *Case Law Monitor*, available here. The California Supreme Court denied a request to hear a case addressing whether state medical professional boards should have to produce information on illicit drugs as part of a deceptive marketing suit against opioid manufacturers. The Supreme Court declined to consider the California Court of Appeals' January 2021 ruling rejecting several manufacturers' broad requests to the state Board of Registered Nursing, the state Board of Pharmacy, the Medical Board of California, and state Department of Justice for millions of documents related to opioids, overdoses, complaints, and disciplinary proceedings. The companies made the request as part of their defense after Los Angeles County, Orange County, Santa Clara County, and the city of Oakland sued them for allegedly flooding the state with billions of pills and contributing to the opioid epidemic.

TWO SCHOOL DISTRICTS SUE MCKINSEY & COMPANY OVER OPIOID-RELATED COSTS

***The Board of Education of Mason County, West Virginia, et al. v. McKinsey & Company, Inc.*, U.S. District Court for the Southern District of West Virginia, Case No. 3:21-cv-00280 (suit filed May 5, 2021); and *The Board of Education of Jefferson County, Kentucky v. McKinsey & Company, Inc.*, U.S. District Court for the Western District of Kentucky, Case No. 3:21-cv-00282-DJH (suit filed May 5, 2021).** In separate lawsuits, Kentucky and West Virginia school districts filed class actions against the consulting firm McKinsey & Company, Inc. (McKinsey) over the company's role in providing marketing campaign advice to opioid manufacturers like Purdue Pharma. The districts allege that the company's work with opioid manufacturers helped to create an opioid epidemic that harmed children and drove up educational costs. According to the complaints, educational costs rose due to the rise in opioid use disorder across the country, which led to increased neonatal abstinence syndrome in children, which then led to increases in the numbers of special-need students. As a result, school districts across the U.S. spent billions of dollars on interventions to support the education of these children. The school districts in both suits allege that McKinsey violated the Racketeer

McKinsey & Company

Influenced Corrupt Organizations Act. Additionally, the districts assert that McKinsey's actions involved negligence, conspiracy, and unjust enrichment in addition to creating a public nuisance. In both suits, the districts seek an award of direct and foreseeable damages, including: (1) costs of the special education and supportive needs of children with learning disabilities as a result of exposure to opioids *in utero*, and for children in need of psychological counseling and other supports; (2) costs associated with providing care for children whose parents suffer from opioid-related disability or incapacitation; and (3) costs for providing medical care for patients suffering from opioid-related addiction or disease, including overdoses and deaths. The cases are new, and no next steps have been announced at the time of publication.

MASSACHUSETTS SUES ADVERTISING FIRM OVER ITS ALLEGED ROLE IN THE OPIOID EPIDEMIC

***Commonwealth of Massachusetts vs. Publicis Health LLC*, Massachusetts Superior Court (Suffolk), Case No. 2184CV01055 (suit filed May 6, 2021).** Massachusetts filed suit against Publicis Health LLC (Publicis), a unit of the French advertising firm Publicis Groupe SA, for allegedly fueling the opioid epidemic by helping Purdue Pharma develop deceptive marketing techniques to sell more of its OxyContin painkiller. According to the complaint, Publicis subverted attempts by Massachusetts to reduce unnecessary opioid prescriptions by deceiving doctors and patients about the addiction risks associated with OxyContin. The commonwealth asserts that between 2010 and 2019, Publicis collected more than $50 million in fees from Purdue Pharma and helped the drug company create a public nuisance. In addition to the public nuisance claim, the commonwealth also alleges that Publicis engaged in unfair practices under Massachusetts' consumer protection law. (MASS. GEN. LAWS ch. 93A § 2). Massachusetts asks the court for reimbursement of its costs to curb the opioid epidemic and for damages for harms caused by the public nuisance. Publicis' answer to the complaint is due by September 3, 2021.

WISCONSIN CITIES SUE OPIOID COMPANIES OVER THE COST OF OPIOID EPIDEMIC

Suits filed May 18, 2021. Eleven cities in Wisconsin filed separate, but similar, lawsuits in state court against various opioid manufacturers and distributors over their alleged role in the opioid epidemic. Seven cities (South Milwaukee, Cudahy, Franklin, Oak Creek, Wauwatosa, Greenfield, and West Allis) filed suit in Milwaukee County, while the other four cities (Union Grove, Yorkville, Sturtevant, and the village of Mount Pleasant) filed suit in Racine County. According to the lawyer representing the cities, the cities chose to file their own local lawsuits instead of joining an already ongoing lawsuit so that they would have more control over the process. The lawsuits name as defendants opioid manufacturers Actavis Pharma, Inc.; Allergan Finance LLC; Actavis LLC; Watson Laboratories, Inc.; Endo Pharmaceuticals, Inc.; Endo Health Solutions, Inc.; Par Pharmaceutical, Inc.; Teva Pharmaceuticals USA, Inc.; Cephalon, Inc.; Johnson & Johnson; and Janssen Pharmaceuticals, Inc.; and distributors McKesson Corporation; AmerisourceBergen; Cardinal Health Inc.; and the Walgreen Company. Local pharmacies are also named as defendants in some suits. These lawsuits allege violations of Wisconsin state law rather than federal law. According to the plaintiffs' lawyer, the cities are still working out exactly how much money they would like the companies to pay.

DEFAULT JUDGMENT ENTERED IN CASE FILED ON BEHALF OF CHILD BORN 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 (default judgment entered April 6, 2021).** For a summary of the facts and previous updates on this case, please refer to the February 2020 issue of the LAPPA *Case Law Monitor*, available here. In a case dubbed the "Sullivan Baby Doe lawsuit" because it relates to a child born with neonatal abstinence syndrome, a Tennessee trial court judge entered a default judgment on the issue of liability against the one remaining defendant, Endo Pharmaceuticals (Endo), because the company willfully withheld records during legal discovery to gain an edge at trial. The judgment details a dozen false statements that Endo's attorneys made to the court during the pretrial fact-finding process and states that Endo implemented a strategy to interfere with the administration of justice. The judge also found that Endo withheld hundreds of thousands of documents, many of them directly relevant to the case, and some of the documents contradicted sworn testimony provided by Endo witnesses. In his order, the judge concluded that Endo's behavior was so egregious it warranted default judgment against the company — effectively skipping the civil trial and finding the company liable for harm caused by the opioid crisis. The judge also began a separate legal process to identify attorneys who allegedly made false statements and determine what sanctions they might face. Endo plans on appealing the judge's ruling. A trial is scheduled to begin July 26, 2021 to determine damages. The plaintiffs are asking the court for an award of $2.4 billion. Additionally, hospitals in Tennessee and Virginia now ask the court to make Endo's case documents available to them and the public. In 2019, the hospitals filed their own lawsuit against Endo and other pharmaceutical companies in Green County, Tennessee, which was later removed to federal court. The hospitals contend that they want to avoid running into the same problems the judge cited against Endo.

PURDUE PHARMA BANKRUPTCY PROCEEDINGS

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

- On April 29, 2021, the U.S. Department of Justice's U.S. Trustee Program (USTP) entered a settlement with three large law firms representing Purdue Pharma in its ongoing bankruptcy cases, Skadden, Arps, Slate, Meagher & Flom LLP; Wilmer Cutler Pickering Hale and Dorr LLP; and Dechert LLP (the Firms). The settlement, which is subject to approval by the bankruptcy court, resolves the USTP's concerns about the adequacy of the Firms' disclosures in the Purdue bankruptcy cases. According to the USTP, the Firms failed to adequately disclose a Joint Defense and Common Interest Agreement (Agreement) between Purdue Pharma and the Sackler family that created obligations for the Firms to the Sackler family, the owners of Purdue Pharma. During the bankruptcy case, Purdue Pharma invoked the Agreement to avoid turning over documents to the official committee of unsecured creditors as it conducted its review of the debtors' conduct. Under the settlement, the Firms will surrender $1 million (collectively) in fees earned in the cases and are required to supplement their prior disclosures so that the court and other parties can determine their sufficiency.
- The attorneys general for 24 states and the District of Columbia filed a brief on April 29, 2021 describing Purdue Pharma's proposed bankruptcy plan as "unprecedented," "unjust," and "unconfirmable as a matter of law." Attorneys representing state and local governments, native tribes, and opioid activists have also filed briefs raising legal and ethical concerns about the plan. The primary common concern expressed is that the proposed settlement would shield the Sackler family from liability and set a precedent for other bad actors to use bankruptcy as a means of escaping the consequences of their actions. A division of the U.S. Department of Justice that oversees bankruptcy cases also filed a brief on April 21, 2021 questioning whether the bankruptcy court has the authority and jurisdiction to approve such a plan.
- Judge Drain ruled on May 26, 2021 that he would permit Purdue Pharma's proposal to remake itself as a non-profit company to be put to a vote by the thousands of plaintiffs. Purdue Pharma is expected to mail out

information packets the first week of June that describe the reorganization plan to the roughly 614,000 claimants in the bankruptcy case, with voting to conclude by July 14, 2021. A final confirmation hearing is scheduled for August 9, 2021, at which Judge Drain will likely hear final challenges to the plan.

WALMART ASKS COURT TO DENY NABP'S REQUEST TO FILE AN *AMICUS* BRIEF

***United States v. Walmart, Inc., et al.*, U.S. District Court for the District of Delaware, Case No. 1:20-cv-01744-CFC (*amicus* brief opposing dismissal motion filed May 18, 2021).** For a summary of the facts and previous updates on this case, please refer to the February 2021 issue of the LAPPA *Case Law Monitor*, available here. In this case, the U.S. Department of Justice (USDOJ) filed a civil complaint against Walmart alleging that Walmart unlawfully dispensed controlled substances from the pharmacies it operates and unlawfully distributed controlled substances to those pharmacies throughout the opioid crisis. In February 2021, Walmart moved to dismiss the case for failure to state a claim. In March 2021, the district court allowed two groups of *amici curiae* to file briefs in support of Walmart's motion to dismiss. In May 2021, the National Association of Boards of Pharmacy (NABP) sought authorization to file a brief opposing dismissal. Walmart responded to NABP's motion by filing an opposition to allowing their brief. Walmart alleges that NABP may not support the USDOJ's stance in litigation involving opioid prescriptions because there is an undisclosed contract between the two. The company asserts that the United States retained and paid NABP to assist it as a litigative consultant in the case. In the alternative, Walmart argues that even if NABP could appear as an *amicus curiae*, it lost that opportunity by failing to disclose the contractual agreement to the court. The judge has yet to issue a ruling on either the motion to dismiss or whether to allow NABP's *amicus* brief.

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 correctional settings, and the involuntary commitment and guardianship of individuals with alcohol or substance use disorders.

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