LEGISLATIVE ANALYSIS AND PUBLIC POLICY ASSOCIATION

LAPPA

Case Law Monitor

DECEMBER 2021

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

IN THIS ISSUE...

Former SUD Counselor Asserts Virginia's "Barrier Crime" Law is Unconstitutional

Michigan Inmate with Opioid Use Disorder Sues County Jail for MAT Access

Safe Injection Sites

U.S. Supreme Court Reverses Two Challenges to Police Officers' Qualified Immunity

Injectable Naloxone Manufacturer Resolves False Claim Allegations

U.S. Supreme Court to Resolve Circuit Split Regarding Doctors' "Good Faith" Defense

Patients Sue Yale University Over Fentanyl Diversion by a Former Nurse

California Ruling Favors Pharmaceutical Companies in Opioid Case

Decedent's Estate Can Collect Insurance Benefits Despite Presence of Methamphetamine

Oklahoma Supreme Court Overturns $465 Million Ruling against Johnson & Johnson

Trial Against Opioid Distributors Begins in Washington

Recent Events in the Opioid Multi-district Litigation

Ninth Circuit Upholds Ban on Medical Use of Marijuana During Supervised Release

New Jersey Plaintiff Cannot Sue Opioid Makers Over Rising Insurance Costs

Alabama Settles with Endo and is in Negotiations with McKesson

Mallinckrodt Bankruptcy Proceedings

Recent Events in the Purdue Pharma Bankruptcy Proceedings

U.S Supreme Court Declines to Review New York's Tax on Opioids

IN THIS ISSUE CONTINUED…

Oregon Sues Endo Over Allegations of Deceptive Opioid Marketing

Pennsylvania Worker Lacked Proof that Marijuana Use Caused Termination

FORMER SUD COUNSELOR ASSERTS VIRGINIA'S "BARRIER CRIME" LAW IS UNCONSTITUTIONAL

***Rudolph Carey, III v. Alison Land*, U.S. District Court for the Eastern District of Virginia, Case No. 1:21-cv-01090-LO-TCB (suit filed September 28, 2021).** A former substance use disorder (SUD) counselor in long-term recovery is suing the Commissioner of the Virginia Department of Behavioral Health and Developmental Services (Department) over a statute that prevents individuals with certain convictions from working as SUD counselors. Under Virginia law (VA. CODE ANN. § 37.2-416 (West 2021)) no one may work in a direct care position for a licensed SUD treatment facility without undergoing a criminal background check. If the background check shows that the prospective employee has a prior conviction for a "barrier crime," the prospective employee is ineligible to work in a direct care position, generally for life. There are 176 widely varying barrier crimes under Virginia law, including both felonies and misdemeanors (VA. CODE ANN. § 19.2-392.02 (West 2021)). In 2004, a jury convicted Rudy Carey of assault and battery on an official. After release from prison in 2007, Carey entered an SUD rehab program. Carey's recovery journey inspired him to work in SUD counseling and, in 2013, Carey began working as a counselor at an SUD treatment facility. At that time, neither Carey nor his employer correctly understood the scope of § 37.2-416, and both believed he could legally work as a counselor despite his criminal record. In 2018, however, another rehabilitation facility bought out Carey's employer. The new owners reviewed § 37.2-416 and, after contacting the Department, learned that the law makes Carey ineligible to work in any direct care position at any licensed SUD facility in Virginia. As a result of this finding, Carey's employer dismissed him from his position. Carey filed suit against the Department arguing that, as applied to SUD counselors, the barrier crime ban is irrational in that it does not protect the public from bad counselors and limits the supply of qualified employees. Carey asserts claims of violations of the Equal Protection, Due Process, and the Privileges or Immunities Clauses of the Fourteenth Amendment of the U.S. Constitution. In his complaint, Carey asks the court for a judgment declaring § 37.2-416 unconstitutional as applied to all people seeking work as SUD counselors. On November 15, 2021, the defendant filed a motion to dismiss for lack of subject matter jurisdiction. A hearing on the motion to dismiss is scheduled for January 14, 2022.

MICHIGAN INMATE WITH OPIOID USE DISORDER SUES COUNTY JAIL FOR MAT ACCESS

***Cyrus Patson v. Grand Traverse Co., Michigan, et al.*, U.S. District Court for the Western District of Michigan, Case No. 1:21-cv-00912-RJJ-RSK (suit filed October 28, 2021).** Cyrus Patson is a 20-year-old man with opioid use disorder (OUD), for which his physician prescribes Suboxone as a twice-daily treatment. While incarcerated in a Grand Traverse County (County) jail in June 2021, jail officials reportedly refused to continue his Suboxone treatment, resulting in painful withdrawal symptoms. In October 2021, the American Civil Liberties Union, on behalf of Patson, filed suit against the County in federal court for violation of his Eighth Amendment protection against cruel and unusual punishment and for discrimination based upon his disability under the Americans with Disabilities Act (ADA). In the complaint, Patson, temporarily released from jail but expected to return in November 2021, asserted that he expects jail officials will refuse his Suboxone treatment again. Patson argues that: (1) medication for addiction treatment (MAT) is an effective and necessary treatment for OUD; (2) without Suboxone he will face "immediate and excruciating symptoms"

of withdrawal; and (3) the jail's denial of treatment is deliberate indifference to a serious medical need in violation of the Eighth Amendment. Patson further argues that OUD is a disability under the ADA, and the jail's refusal to provide him access to Suboxone—while permitting medically-necessary prescribed treatments for other serious medical conditions—discriminates against him on the basis of disability. Patson seeks injunctive relief ordering jail officials to provide him access to MAT, including his prescribed Suboxone dosage, during his incarceration. The defendants' response is due by December 9, 2021.

SAFE INJECTION SITES

***Safehouse v. Department of Justice, et al.*, U.S. Supreme Court, Case No. 21-276 (writ of certiorari denied October 12, 2021).** For previous updates on this case, please refer to the February 2021 issue of the LAPPA *Case Law Monitor*, available here. The U.S. Supreme Court declined to hear an appeal over a proposed Philadelphia safe injection site operated by Safehouse, a non-profit harm reduction organization. The denial of certiorari leaves in place the ruling of the U.S. Court of Appeals for the Third Circuit that operation of the safe injection site would violate the federal "crack house statute" (21 U.S.C. § 856). Ten states,[1] the District of Columbia, 14 cities and counties,[2] Philadelphia's mayor, and Philadelphia's acting health commissioner submitted amicus briefs urging review in support of Safehouse. The U.S. Department of Justice (DOJ) declined to respond to the petition. Despite the denial of certiorari, aspects of the *Safehouse* case continue to be litigated in the District Court for the Eastern District of Pennsylvania regarding Safehouse's assertion that the Religious Freedom Restoration Act provides a defense to the DOJ's enforcement of the Controlled Substances Act. Safehouse filed its amended counterclaim against the DOJ on September 17, 2021 in the Eastern District of Pennsylvania. The government has until January 5, 2022 to respond.

U.S. SUPREME COURT REVERSES TWO CHALLENGES TO POLICE OFFICERS' QUALIFIED IMMUNITY

***City of Tahlequah, Oklahoma, et al., v. Austin P. Bond*, U.S. Supreme Court, Case No. 20–1668 (opinion issued October 18, 2021); *Daniel Rivas-Villegas v. Ramon Cortesluna*, U.S. Supreme Court, Case No. 20–1539 (opinion issued October 18, 2021).** On the same day, the U.S. Supreme Court reversed two decisions from separate appellate circuits denying qualified immunity to police officers accused of using excessive force. In *Tahlequah*, police officers in Oklahoma responded to a domestic disturbance in August 2016 and ended up surrounding a man, Dominic Rollice, holding a hammer. When Rollice refused to drop the hammer and instead raised it, two officers fired their weapons, killing him. Rollice's estate filed suit against the city and officers under 42 U. S. C. § 1983, alleging that defendants violated Rollice's Fourth Amendment rights. In 2019, an Oklahoma federal district court granted the officers' motion for summary judgment, concluding that the officers' judgment was reasonable, and even if not, "qualified immunity prevented the case from going further." In December 2020, the U.S. Court of Appeals for the Tenth Circuit reversed, citing a line of Tenth Circuit precedent that a police officer may be held liable for an objectively reasonable shooting if the officer's reckless or deliberate conduct creates the situation requiring deadly force. *Rivas-Villegas* involved California police officers' 2016 efforts to subdue and arrest a man involved in a domestic disturbance, Ramon Cortesluna, by using a knee on his back for eight seconds to hold him down. Cortesluna filed suit against the officer for violation of his Fourth Amendment rights, but a California federal district court granted summary judgment to the officer in 2018. In October 2020, the U.S. Court of Appeals for the Ninth Circuit reversed, finding the officer's behavior contrary to clearly established law under *LaLonde v. County of Riverside*, 204 F. 3d 947 (9th Cir. 2000). In that case, a suspect lying face-down on the ground without resisting was injured by

[1] Delaware, Illinois, Massachusetts, Michigan, Minnesota, New Mexico, Oregon, Rhode Island, Vermont, and Virginia.

[2] Albuquerque, NM; Austin, TX; Chicago, IL; City and County of San Francisco, CA; King County, WA; Los Angeles County, CA; Multnomah County, OR; New York, NY (which established two safe injection sites in November 2021); Oakland, CA; Pittsburgh, PA; San Diego, CA; Seattle, WA; Somerville, MA; and Washtenaw County, MI.

an officer kneeling on his back. The U.S. Supreme Court, in two *per curiam* opinions (*i.e.,* issued "by the court" unsigned) with no identified dissents, reversed each of these decisions. In each opinion, the Supreme Court indicated that the police conduct at issue could be materially distinguished from the precedent cited by the Ninth and Tenth Circuits. As a result, the Supreme Court found that the officers' conduct did not violate any "clearly established law," and the officers were entitled to qualified immunity.

INJECTABLE NALOXONE MANUFACTURER RESOLVES FALSE CLAIM ALLEGATIONS

***United States ex rel. Socol v. Kaléo Inc.*, U.S. District Court for the District of Massachusetts, Case No. 18-cv-010050 (settlement announced November 9, 2021).** Kaléo, Inc. (Kaléo), a Virginia-based pharmaceutical manufacturer, agreed to a settlement with the U.S. Department of Justice (DOJ) to resolve allegations that it urged the submission of false claims for the drug Evzio and provided kickbacks to prescribers for doing so. Evzio is the brand name of an injectable form of naloxone hydrochloride used for the reversal of an opioid overdose. Insurers frequently required the submission of prior authorization requests before they would approve coverage for Evzio due to its very high price. DOJ alleges that between March 14, 2017 and April 30, 2020, Kaléo directed prescribing doctors to send Evzio prescriptions to certain preferred pharmacies that, in turn, submitted false prior authorization requests for the drug and dispensed Evzio without collecting co-pays from government beneficiaries. DOJ asserts that the company knew of, or deliberately ignored, this misconduct and continued to direct business to these pharmacies. The settlement also resolves allegations that Kaléo provided illegal remuneration in the form of kickbacks to prescribing physicians and their office staff to induce and reward their prescribing of Evzio. Under the terms of the settlement agreement, Kaléo must pay the United States government $12.743 million. Rebecca Socol, a former employee of Kaléo who brought forth the suit under the *qui tam*, or whistleblower, provisions of the False Claims Act, will receive 20 percent of the settlement.

U.S. SUPREME COURT TO RESOLVE CIRCUIT SPLIT REGARDING DOCTORS' "GOOD FAITH" DEFENSE

***Xiulu Ruan v. United States*, U.S. Supreme Court, Case No. 20-1410 (writ of certiorari granted November 5, 2021); *Shakeel Kahn v. United States*, U.S. Supreme Court, Case No. 21-5261 (writ of certiorari granted November 5, 2021).** Defendants Ruan and Kahn are physicians separately convicted of operating "pill mills," distributing opioids on a massive scale through fraudulent prescriptions, in violation of sound medical practice and the federal Controlled Substances Act (CSA). Ruan's trial took place in Alabama while Kahn's trial took place in Wyoming. The U.S. Courts of Appeal for the Eleventh and Tenth Circuits, respectively, upheld each conviction. Under *United States v. Moore*, 423 U.S. 122 (1975), physicians violate the CSA if they dispense controlled substances "other than in good faith…in the usual course of a professional practice and in accordance with a standard of medical practice generally recognized and accepted in the United States." Both Ruan and Kahn's defenses relied upon alleged "good faith" efforts to meet their professional obligations. On appeal, the defendants argued that the respective trial courts erred by refusing to consider whether each "reasonably believed" or "subjectively intended" that their activities met standard medical practice. Presently, the U.S. Courts of Appeal are divided over the meaning of "good faith" in this context. To overcome a good faith defense in the Second, Fourth, and Sixth Circuits, the government must prove that a physician did not "reasonably believe" his prescriptions were within professional norms. In the First, Seventh, and Ninth Circuits, a showing that the physician "subjectively intended" to exceed professional norms is required. In the Eleventh Circuit, a defendant's good faith belief "is irrelevant" to the question. On November 5, 2021, the U.S. Supreme Court granted certiorari to both appeals, yet no briefing schedule or oral argument date is set. Ideally, the Supreme Court's opinion will resolve the present circuit split.

PATIENTS SUE YALE UNIVERSITY OVER FENTANYL DIVERSION BY A FORMER NURSE

***Melissa Cowan, et al. v. Yale University*, Connecticut Superior Court, Judicial District of Waterbury, Case No. UWY-CV21-6063194-S (suit filed November 17, 2021).** Seven former patients of the Yale University Reproductive Endocrinology and Infertility clinic (REI clinic) are suing Yale University (Yale) in state court after allegedly undergoing painful surgeries and procedures with little to no analgesic due to diversion by a nurse. In June 2020, Donna Monticone, a nurse at the REI clinic, started stealing fentanyl for her own use. As Monticone admitted in her criminal case, she used a syringe to withdraw fentanyl from vials and then reinjected saline into them to cover up the tampering. An investigation revealed that approximately 75 percent of the fentanyl given to patients at the REI clinic from June to October 2020 included the saline adulteration. Monticone pled guilty to one count of tampering with a consumer product in March 2021. In their suit against Yale, the plaintiffs, seven women victims of Monticone's actions, allege that Yale failed to implement the most basic, legally mandated, steps to prevent against opioid diversion. Additionally, the complaint asserts that Yale knew or should have known about the high likelihood of opioid diversion by one of its healthcare workers and that it was a serious threat to patient safety. The lawsuit includes civil allegations of medical assault and battery and medical malpractice.

CALIFORNIA RULING FAVORS PHARMACEUTICAL COMPANIES IN OPIOID CASE

***The People of the State of California v. Purdue Pharma LP, et al.*, Superior Court for Orange County, California, Case No. 30-2014-00725287 (tentative decision issued November 1, 2021).** In one of the first cases filed by a governmental entity against opioid manufacturers, a California state trial court judge issued a tentative ruling holding that the counties of Los Angeles, Orange, and Santa Clara and the city of Oakland failed to prove that Johnson & Johnson, Teva Pharmaceutical, Endo International PLC, and Allergan PLC used deceptive marketing to increase unnecessary opioid prescriptions and create a public nuisance. During the trial, which began on April 9, 2021, the plaintiffs argued that the pharmaceutical companies misled health care providers and patients by downplaying the risks associated with opioids while overstating the benefits. The judge, however, ruled that "any adverse downstream consequences flowing from medically appropriate prescriptions cannot constitute an actionable public nuisance." The four jurisdictions sought $50 billion from the pharmaceutical companies to provide for comprehensive opioid abatement programs. The local governments plan to appeal the ruling. A hearing is scheduled for December 15, 2021.

DECEDENT'S ESTATE CAN COLLECT INSURANCE BENEFITS DESPITE PRESENCE OF METHAMPHETAMINE

***Eva Marie Santos v. Minnesota Life Insurance Company*, U.S. District Court for the Northern District of California, Case No. 20-cv-06707-PJH (opinion filed November 15, 2021).** A California federal district court ruled that Minnesota Life Insurance Company (Minnesota Life) wrongly denied accidental death benefits to a decedent's estate after learning that the decedent had methamphetamine in his system at the time of death. In 2018, police found Samuel Chong, an engineer and employee of Apple, Inc., dead in his home during a wellness check. The autopsy report identified the cause of death as blunt force head trauma with subdural hematoma, consistent with a fall backwards. The autopsy also revealed the presence of methamphetamine in Chong's system. Chong had a history of methamphetamine use. The medical examiner ruled Chong's death an accident. At the time of his death, Chong was insured under two group insurance policies issued by Minnesota Life, a group term life insurance policy and a group accidental death and

dismemberment policy. According to its terms, the accidental death policy (policy) pays out when an insured's death results from an accidental injury that is unintended, unexpected, and unforeseen. The policy contains a "drug exclusion" for deaths resulting from, or caused directly or indirectly by, being under the influence of a prescription drug, narcotic, or hallucinogen that is not prescribed by a physician and taken in accordance with the prescribed dosage. When the estate's administrator, Eva Marie Santos, tried to collect on the policy, Minnesota Life denied the claim on the grounds that Chong's system contained a fatal amount of methamphetamine and, thus, the death resulted from an overdose. In September 2020, Santos filed a lawsuit against Minnesota Life for recovery of the accidental death benefit under the policy. The case presented the issues of: (1) whether Chong's death was an accident; and (2) assuming an accidental death, did it fall within the policy's drug exclusion? The district court first found Chong's death accidental because the parties presented no evidence that Chong committed suicide or intentionally overdosed. Minnesota Life argued that because Chong ingested methamphetamine, one could reasonably conclude death to be a substantially certain result. The court rejected this argument because, as a regular user of methamphetamine, Chong likely knew of the risks presented by ingesting an excessive amount of methamphetamine, but knowledge of that potential consequence did not equate with knowledge of a substantially certain result. The court found nothing in the factual record to support that death was a substantial certainty. After finding Chong's death accidental, the court ruled that his death did not fall within the policy's drug exclusion. The drug exclusion applies only when a policyholder dies while under the influence of a "prescription drug, narcotic, or hallucinogen." While doctors occasionally prescribe methamphetamine and it can cause hallucinations in high doses, the court ruled that it is more commonly understood to be an illicit stimulant and not one of the substances specified in the Minnesota Life policy. Because the drug exclusion does not apply to Chong's accidental death, the court ruled that the estate could collect the accidental death benefits. The plaintiff has until January 3, 2022 to file a motion for attorneys' fees.

OKLAHOMA SUPREME COURT OVERTURNS $465 MILLION RULING AGAINST JOHNSON & JOHNSON

***State of Oklahoma ex rel. Mike Hunter v. Johnson & Johnson*, Oklahoma Supreme Court, Case No. DF-118474 (opinion filed November 9, 2021).** For previous updates and facts about this case, please refer to the February 2021 issue of the LAPPA *Case Law Monitor*, available here. In a 5-1 decision (three Justices did not take part in the decision due to disqualification or recusal) the Oklahoma Supreme Court overturned a state trial court's judgment holding Johnson & Johnson (J&J) liable for contributing to the state's opioid crisis. In June 2017, Oklahoma's Attorney General, Mike Hunter, sued J&J asserting that the company bore responsibility for creating a public nuisance in the marketing and selling of its opioid products.[3] In August 2019, the trial court judge found J&J liable under Oklahoma's public nuisance statute (OKLA. STAT. ANN. tit. 50, § 1 *et seq*.) and ordered the company to pay $572 million. The judge later reduced the amount to $465 million after acknowledging he miscalculated damages. J&J appealed the ruling directly to the state supreme court, while Oklahoma cross-appealed contending that J&J should pay for 20 years of the state's opioid abatement plan or approximately $9.3 billion. On appeal, the state supreme court majority held that Oklahoma's public nuisance law does not cover the state's alleged harm and that public nuisance is "fundamentally ill-suited" to resolve claims against product manufacturers. The majority identified three reasons why the state's public nuisance law does not extend to cover J&J's conduct as an opioid manufacturer. First, the manufacture and distribution of products rarely violates a public right. Unlike a case of polluted drinking water or the discharge of sewage on property, both of which have no beneficial uses and only cause annoyance, injury, and endangerment, lawfully prescribed opioids do have a beneficial use. Second, a manufacturer generally loses control of its product once sold. The majority noted that there is no common law duty under Oklahoma tort law for a manufacturer to monitor how consumers use or misuse a product after sale. Finally, the majority worried that accepting the state's contentions would mean that a manufacturer could

[3] Oklahoma also sued Purdue Pharma and Teva Pharmaceutical in the same action. The state negotiated settlements with those companies.

be held perpetually liable for its products under a nuisance theory. The majority believed that extending public nuisance law to the manufacturing, marketing, and selling of products could allow consumers to convert almost every product liability action into a public nuisance claim. In its opinion, the majority expressly stated that the intent of the decision is not to minimize the severity of harm that Oklahoma citizens suffered because of opioids but that, "[h]owever grave the problem of opioid addiction is in Oklahoma, public nuisance law does not provide a remedy for this harm." The dissenting Justice argued that the majority's view of public nuisance is too narrow and that the trial judge's ruling should be upheld but with damages recalculated.

TRIAL AGAINST OPIOID DISTRIBUTORS BEGINS IN WASHINGTON

***State of Washington v. McKesson Corporation, et al.*, King County Superior Court, Washington State, Case No. 19-2-06975-9 (suit filed March 12, 2019).** Washington's trial against the three major opioid distributors, McKesson, Cardinal Health, and AmerisourceBergen, began in state court on November 15, 2021. In the state's lawsuit, Washington's Attorney General Robert Ferguson asserts that the companies violated state consumer protection laws and failed to have tracking systems in place to prevent illegitimate sales and distribution of opioids as required by state law. Washington seeks at least $38 billion in damages, with the defendants claiming that the alleged damages could be as high as $95 billion considering the state's demand for penalties and forfeited profits. Washington is one of eight states that declined to join the proposed $26 billion "global" settlement of opioid litigation nationwide by the three distributors and drug maker Johnson & Johnson. Had it joined the global deal, Washington would have received around $527 million. Attorney General Ferguson, however, stated that such amount would be insufficient to address the opioid crisis in the state.

RECENT EVENTS IN THE OPIOID MULTI-DISTRICT LITIGATION

***In re National Prescription Opiate Litigation*, U.S. District Court for the Northern District of Ohio, Case No. 17-MD-2804 (MDL commenced December 12, 2017).**

- On October 4, 2021, a jury trial in the combined case brought by two Ohio counties, Lake and Trumbull, against Walgreens, Walmart, CVS, and Giant Eagle (known in the MDL as the "Track Three Cases") began in the Northern District of Ohio. On October 24, the defendants filed a motion for mistrial after a juror conducted her own internet research into portions of a defense witness' testimony. According to the motion, the juror brought in pamphlets regarding the availability of free Narcan through a program called Project Dawn and shared it with the other jurors during a recess. After the court discovered the juror's independent research, the juror admitted that she acted in direct response to testimony from a Walgreens witness regarding customers paying for Narcan unless covered by insurance. The court dismissed the juror, but the defendants argued for a mistrial because the outside information provided to the jury allegedly unfairly prejudiced the defendants about a core issue in the case—whether the defendants' actions reflect a profit motive to oversupply opioids. Additionally, the defense claimed the information was "clearly meant to impeach the defense witness who answered the question and testified that Walgreens charges for Narcan." The plaintiffs opposed the defense motion, contending that a mistrial would be unnecessary because the cost of Narcan has no bearing on the question of public nuisance. Additionally, the counties argued that any potential prejudice was cured by the removal of the juror and Judge Polster's instructions to the remaining jurors. On October 26, 2021, Judge Polster denied the defendants' motion for a mistrial and allowed the trial to resume.
- On October 29, 2021, Giant Eagle announced that it settled lawsuits filed by 10 government entities in Ohio, including Lake and Trumbull Counties. The terms of the settlement are not publicly available. Previously, Rite Aid settled with the two counties in August 2021 for $1.5 million (Trumbull County) and a confidential amount (Lake County). As a result of the Giant Eagle settlement, only three defendants, CVS, Walgreens, and Walmart, remain in the Track Three Cases.
- On November 23, 2021, the jury in the Track Three Cases returned a verdict for the plaintiff Ohio counties, read by Judge Polster in open court. The verdict found the three pharmacy defendants guilty of creating a public

nuisance. According to news reports: (1) Judge Polster will oversee a separate trial in April or May 2022 to determine damages (each county seeks over $1 billion); and (2) defendants plan to appeal to the U.S. Court of Appeals for the Sixth Circuit. In light of the issue with the juror and the recent decisions in similar cases in Oklahoma and California, there is no guarantee the verdict will be upheld. The pharmacy defendants have until December 21, 2021 to file their post-trial motions.

NINTH CIRCUIT UPHOLDS BAN ON MEDICINAL USE OF MARIJUANA DURING SUPERVISED RELEASE

***United States v. Richard Langley*, U.S. Court of Appeals for the Ninth Circuit, Case No. 20-50119 (opinion filed November 16, 2021).** The U.S. Court of Appeals for the Ninth Circuit refused to allow a man who was on supervised release from jail to use marijuana for medicinal purposes—despite it being legal in California—because of binding precedent holding that he lacks a fundamental due process right to its use. In 2017, a federal district court sentenced Richard Langley to a 10-year term of supervised release after he pled guilty to a crime. The conditions of Langley's release included that he: (1) not commit a federal, state, or local crime; (2) not illegally possess a controlled substance; and (3) refrain from the unlawful use of a controlled substance. Langley asked the district court to amend the release conditions to permit him to use marijuana for medicinal purposes, as allowed under California law, but the district court denied the request. In 2020, Langley renewed the motion, supporting his argument with a physician's report offering that marijuana is the best medical treatment for Langley's ongoing pain. The district court again denied the motion, holding that, because marijuana possession violates federal law, Langley has no U.S. Constitutional right to use it. Langley appealed the ruling to the Ninth Circuit, asserting that the district court erred because he has a fundamental constitutional right under the Fourteenth Amendment's Due Process Clause to use marijuana prescribed by a physician to treat "intolerable pain." However, in the 2007 case of *Raich v. Gonzales*, 500 F.3d 850, the Ninth Circuit held that "federal law does not recognize a fundamental right to use medical marijuana prescribed by a licensed physician to alleviate excruciating pain and human suffering." Langley argued that the Ninth Circuit is no longer bound by *Raich*'s holding because the *Raich* opinion acknowledged that widespread legal recognition of a practice may provide additional evidence that a right is fundamental. The court, nevertheless, rejected this argument, concluding that Langley misconstrued the rule of precedent. Even if the legalization of marijuana in various states could constitute additional evidence that using medical marijuana is a fundamental right, the court is still bound by the *Raich* decision until "it is overturned by a higher authority." Langley has until January 31, 2022 to file a petition for a rehearing *en banc*.

NEW JERSEY PLAINTIFF CANNOT SUE OPIOID MAKERS OVER RISING INSURANCE COSTS

***Matthew Enriquez v. Johnson & Johnson, et al.*, Superior Court of New Jersey, Appellate Division, Case No. A-1174-19 (opinion filed November 12, 2021).** In an unpublished opinion, a New Jersey intermediate appellate court affirmed that a plaintiff may not sue pharmaceutical companies over increases in health insurance costs. In December 2018, Matthew Enriquez filed a class action suit against Johnson & Johnson, Janssen Pharmaceuticals Inc, Actavis Pharma, Inc., and Actavis LLC (collectively, the defendants) on behalf of New Jersey citizens who either: (1) purchased health insurance policies in the state from 1996 through the present; or (2) paid for any portion of employer provided health insurance from 1996 through the present. The complaint alleged that the defendants fueled the opioid crisis in New Jersey thereby causing insurers to pay the costs of opioid medication and substance use disorder treatments for their insureds, which increased premiums, co-pays, and deductibles for the plaintiff and other class members. Enriquez asserted causes of action for violation of the New Jersey Consumer Fraud Act (CFA), public nuisance, unjust enrichment, negligence, and negligent interference with prospective economic advantage. The defendants moved to dismiss the complaint for failure to state a claim. The trial court judge granted the motion to dismiss, finding

that the CFA claim cannot stand because the defendants did not have contact with the plaintiff and did not make any misrepresentations or omissions to him. Additionally, even if Enriquez's allegations were true, several links of causation separated the defendants from his alleged injury. Moreover, the judge concluded that Enriquez's theory of recovery was "speculative and attenuated" and that it was "highly impracticable" to assert that insurance premiums increased solely due to opioid costs. Finally, the trial court dismissed Enriquez's causes of action for public nuisance, unjust enrichment, and negligence. The intermediate appellate court agreed with the reasoning and ruling of the trial court and affirmed the motion to dismiss.

ALABAMA SETTLES WITH ENDO AND IS IN NEGOTIATIONS WITH MCKESSON

***State of Alabama v. Endo Health Solutions, Inc., et al.*, Montgomery County Circuit Court, Alabama, Case No. CV-2019-901174 (settlement announced October 31, 2021).** Alabama reached a settlement with opioid manufacturer Endo International (Endo) over the company's role in the opioid epidemic and is in settlement talks with opioid distributor McKesson Corp. (McKesson). McKesson revealed the settlement and ongoing negotiations in an October 31, 2021, court filing. In response to the filing, the Alabama state court judge set a new trial date for April 18, 2022. Details of the settlement with Endo are not public information. Alabama is one of eight states that declined to join a proposed $26 billion "global" settlement of opioid litigation nationwide by McKesson, Cardinal Health, AmerisourceBergen, and drug maker, Johnson & Johnson.

MALLINCKRODT BANKRUPTCY PROCEEDINGS

***In re Mallinckrodt PLC*, U.S. Bankruptcy Court for the District of Delaware, Case No. 20-12522 (bankruptcy filed October 12, 2020).** For previous updates on this case, please refer to the December 2020 issue of the LAPPA *Case Law Monitor*, available here. The U.S. Trustee Program (U.S. Trustee) opposes Mallinckrodt's reorganization plan to settle thousands of lawsuits over opioids. In a court filing made on October 13, 2021, the U.S. Trustee argued that the bankruptcy court should reject Mallinckrodt's Chapter 11 plan in its current form. According to the U.S. Trustee, the plan would force creditors to give up potential claims against company directors, officers, and other related professionals, including claims not related to the company's production and sale of opioids. Rhode Island also filed an objection to the plan on the same date, stating that the plan would impermissibly release Mallinckrodt's CEO from potential obligations to the state for deceptive marketing and oversupply of opioids without compensation or adjudication. In November 2021, the company participated in a multi-day hearing seeking approval of its proposed reorganization plan and underlying opioid litigation settlement. However, before U.S. Bankruptcy Court Judge John Dorsey can rule on the plan, the company must first resolve a separate anti-trust lawsuit involving Mallinckrodt's Acthar gel, a product used for the treatment of infantile spasms and multiple sclerosis.

RECENT EVENTS IN THE 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 October 13, 2021, Federal Judge Colleen McMahon denied a request from the U.S. Bankruptcy Trustee to stay the implementation of Purdue Pharma's (Purdue) bankruptcy plan until after the resolution of the appeal. Before Purdue could resume plan implementation, however, Judge McMahon stated that the company must pledge not to undermine the appeal by asserting at a later point that the implementation process progressed past

the point of stopping. On November 9, 2021, Purdue agreed not to take the plan's final steps until late December 2021, after the first round of appeals is decided.

- On October 14, 2021, U.S. Bankruptcy Judge Robert Drain ruled that the bankruptcy plan appeal should remain in a federal district court for now, rather than go directly to the U.S. Court of Appeals for the Second Circuit. The U.S. Bankruptcy Trustee requested that the appeal bypass district court review. Under Judge Drain's ruling, the case will remain with U.S. District Judge McMahon in the Southern District of New York. Oral arguments were held on November 30, 2021.

U.S. SUPREME COURT DECLINES TO REVIEW NEW YORK'S TAX ON OPIOIDS

***Association for Accessible Medicines, et al. v. Letitia James*, U.S. Supreme Court, Case No. 20-1611 (writ of certiorari denied October 4, 2021).** For previous updates on this case, please refer to the October 2020 issue of the LAPPA *Case Law Monitor*, available here. The U.S. Supreme Court declined to review a case involving New York's Opioid Stewardship Act, leaving in place a U.S. Court of Appeals for the Second Circuit decision upholding the law. In a September 2020 ruling, the Second Circuit determined that the annual opioid stewardship payments made by pharmaceutical manufacturers and distributors to the opioid stewardship fund are a tax—as opposed to a penalty—within the meaning of the Tax Injunction Act (28 U.S.C. § 1341). The Tax Injunction Act prohibits federal district courts from restraining tax assessments or collection if state courts can provide an efficient remedy in a case. Thus, opioid makers and distributors must sue in New York state court to challenge the payments required by the law.

OREGON SUES ENDO OVER ALLEGATIONS OF DECEPTIVE OPIOID MARKETING

***State of Oregon ex rel. Ellen F. Rosenblum v. Endo Health Solutions, Inc. et al.*, Multnomah County Circuit Court, Oregon, Case No. 21CV43733 (suit filed November 10, 2021).** Oregon Attorney General Ellen Rosenblum filed a lawsuit against Endo Health Solutions and its subsidiary, Endo Pharmaceuticals, Inc. (collectively "Endo"), over allegations of deceptive marketing regarding their oxymorphone product, Opana. The complaint alleges that Endo misrepresented the risks and benefits of Opana and ignored evidence of the drug's misuse in Oregon and elsewhere. The state brings forth claims under the Oregon Unlawful Trade Practices Act (Oregon UTPA) and the Oregon Racketeer Influenced and Corrupt Organizations Act (Oregon RICO) alleging abuse of vulnerable persons, negligence, and public nuisance. The state asks the court for up to $25,000 for each violation of the Oregon UTPA, $250,000 for each violation of the Oregon RICO Act, and $25,000 for each violation of the Elderly Persons and Persons with Disabilities Abuse Prevention Act. Additionally, the state asks for an injunction prohibiting Endo from marketing its opioids to individuals over 65 or disabled individuals in Oregon. Oregon served the complaint on November 15, 2021.

PENNSYLVANIA WORKER LACKED PROOF THAT MARIJUANA USE CAUSED TERMINATION

***Matthew Reynolds v. Willert Manufacturing Co., LLC.*, U.S. District Court for the Eastern District of Pennsylvania, Case No. 5:21-cv-01208 (opinion filed October 19, 2021).** The U.S. District Court for the Eastern District of Pennsylvania denied a plaintiff's motion for summary judgment after determining that the worker failed to show that his employer illegally rescinded a job offer after he tested positive for marijuana. On October 16, 2020, Willert Manufacturing Company (Willert) offered Matthew Reynolds a job as a maintenance manager subject to a clean drug test. On October 28, Reynolds tested positive for marijuana.

Following the positive result, Reynolds informed both the person performing the test and the testing center's medical review officer that he uses marijuana for medicinal purposes. However, Reynolds did not disclose this fact to anyone at Willert during his initial interview or when he received his offer letter. On November 5, Willert terminated Reynolds for failing the drug test. On February 4, 2021, Reynolds filed suit against Willert in state court alleging that the company violated § 10231.2103 of the Pennsylvania Medical Marijuana Act (PMMA; PA. STAT. AND CONS. STAT. ANN. § 10231.2103 (West 2021)). Willert removed the case to federal court and both parties moved for summary judgment. Because the Pennsylvania Supreme Court has not yet determined the boundaries of the PMMA's prohibition against discrimination, the federal trial court had to predict how the state supreme court would interpret this provision. Under the plain language of the statute, the PMMA prohibits discrimination based on an employee's status as a certified marijuana patient. In contrast, marijuana laws in both Arizona and Minnesota explicitly protect against discrimination due to a positive drug test, in addition to discrimination based on one's status as a medical marijuana cardholder. Considering the plain reading of the statute and the comparison of PMMA's text to statutes of other states, the court predicted that the Pennsylvania Supreme Court would interpret the PMMA to protect only a person's status as a medical marijuana cardholder. Additionally, the PMMA prohibits discrimination that is "solely on the basis of such employee's status" as a cardholder. In comparison, Pennsylvania's primary employment discrimination law, the Pennsylvania Human Relation Act (PHRA), makes employers liable for bias "because of" a protected characteristic. Thus, based on the differences in language between PMMA and PHRA, the federal court predicted that the Pennsylvania Supreme Court would require a plaintiff to show that, but for the status as a marijuana cardholder, he or she would not have suffered an adverse employment action. Using this analysis, the court concluded that Reynolds's discrimination suit under the PMMA fails because he provided no evidence that Willert knew of his cardholder status when it made the decision to fire him. Additionally, Reynolds provided no evidence that the medical review officer told Willert about his marijuana patient status. Based on this lack of evidence, the district court denied Reynolds' motion for summary judgment and granted Willert's motion for summary judgment. As of November 30, 2021, an appeal has not been filed.

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/.

© Legislative Analysis and Public Policy Association - This project was supported by Grant No. G2199ONDCP03A, awarded by the Office of National Drug Control Policy. Points of view or opinions in this document are those of the author and do not necessarily reflect the official position or policies of the Office of National Drug Control Policy or the United States Government.