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# *CASE LAW MONITOR*

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Welcome to the inaugural issue of the *Case Law Monitor*, the bimonthly case law newsletter of the Legislative Analysis and Public Policy Association (LAPPA). Each issue will highlight 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 if you do, tell a friend about it. Feel free to provide feedback at info@thelappa.org.

**In this issue…**

### *Injunction to Stop a Safe Injection Site Denied*

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

In a case of first impression—and one in which 13 *amicus curiae* filed briefs—a federal judge denied the U.S. government's request for a declaratory judgment enjoining the operation of a proposed safe injection site for opioid users in Philadelphia. Defendant Safehouse plans to open an "overdose prevention site" in Philadelphia, which will offer services aimed at preventing the spread of bloodborne diseases, administering medical care, and encouraging drug users to enter treatment. Additionally, Safehouse plans to offer rooms where individuals can inject drugs under medical supervision. Staff will supervise drug consumption and administer naloxone, if necessary, but the staff will not handle or provide controlled substances. In seeking an injunction, the government argued that the medically-supervised consumption rooms violate 21 U.S.C. § 856(a)(2), which is colloquially referred to as the "Crack House" statute. The relevant portion of the statute makes it unlawful for any person to "manage or control any place… and knowingly and intentionally… make available for use, with or without compensation, the place for the purpose of unlawfully… using a controlled substance." Relying on legislative history and principles of statutory construction, the court held that there is no indication that Congress meant to criminalize safe injection sites. According to the court, in order to violate § 856, a significant purpose of the place in question must be to facilitate drug use; allowing some drug use as one component of an effort to combat drug-related problems does not meet the threshold "purpose" requirement. Therefore, because Safehouse's goal is to reduce drug use and not facilitate it, the court held that the "Crack House" statute does not prohibit the proposed safe injection site. While no further actions are currently scheduled in this case, the federal government is expected to appeal this ruling.

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### *Men Sue Massachusetts over Law Allowing Involuntary Commitment for Substance Use Disorder in Correctional Facility*

***John Doe et al. v. Carol Mici, et al.*, Massachusetts Superior Court (Suffolk County), Case No. 1984CV00828 (suit filed March 14, 2019).**

In March 2019, a group of ten men sued the state of Massachusetts over M.G.L.A. 123 § 35, which is commonly referred to as "Section 35." Section 35 allows certain people to seek a court order to involuntarily commit someone for up to 90 days for the purpose of inpatient alcohol or substance use disorder treatment. In the case of men, the commitment can occur at a correctional facility. As of 2016, Massachusetts women may only be involuntarily committed to a treatment facility that is licensed or approved by the Department of Public Health or the Department of Mental Health.

### *Men Sue Massachusetts over Law Allowing Involuntary Commitment for Substance Use Disorder in Correctional Facility continued…*

The ten named plaintiffs were committed to the Massachusetts Alcohol and Substance Abuse Center, which is within a minimum-security prison in Plymouth, Massachusetts. Despite not being charged with any crimes, the men allege they were treated like inmates and forced to wear orange prison jumpsuits, subjected to strip-searches, and placed in segregation. The men assert that Section 35 violates the Americans with Disabilities Act and substantive due process under both the Massachusetts Declaration of Rights and the U.S. Constitution. Additionally, the men argue that Section 35 discriminates against men. In July 2019, the trial court judge certified a class of plaintiffs consisting of all men, placed or housed in a correctional facility solely pursuant to Section 35 from July 2, 2019 through the date of final judgement. At present, the deadline for completing pre-trial discovery is in March 2021.

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### *Federal Bureau of Prisons Provides Methadone to Non-pregnant Inmate*

***Stephanie DiPierro v. Hugh Hurwitz, et al.*, U.S. District Court for the District of Massachusetts, Case No. 1:19-CV-10495-WGY (case settled June 7, 2019).**

In March 2019, Stephanie DiPierro, a woman who was not pregnant, brought a lawsuit challenging the Federal Bureau of Prison's policy of denying non-pregnant inmates' medication-assisted treatment for opioid use disorder. In a settlement dated June 7, 2019, the Bureau agreed to provide methadone treatment to Ms. DiPierro during her incarceration. Prior to pleading guilty to federal crimes, DiPierro had taken prescription methadone for years while in active recovery from opioid use disorder. The lawsuit alleged that the Bureau's policy violates the Eighth Amendment, the Rehabilitation Act, and the Administrative Procedures Act. Pursuant to the settlement, the Bureau agreed to provide DiPierro with her current methadone dose throughout the course of her incarceration. DiPierro's lawyers, the American Civil Liberties Union of Massachusetts, believe that this case is the first time that a non-pregnant inmate will receive methadone while in the custody of the Bureau.

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### *Alaska Department of Corrections Responsible for Opioid Withdrawal-related Death of Inmate in Jail*

***Estate of Kellsie Green vs. State of Alaska, Department of Corrections*, Alaska Superior Court (Anchorage), Case No. 3AN-16-05552CI (case settled April 18, 2019).**

In January 2016, 24-year-old Kellsie Green died inside the Anchorage Correctional Complex from complications related to heroin withdrawal. Green had been in the facility for only five days before she passed away.

### *Alaska Department of Corrections Responsible for Opioid Withdrawal-related Death of Inmate in Jail continued…*

Green's father filed a lawsuit against the Alaska Department of Corrections in March 2016 alleging that despite her withdrawal symptoms, correctional facility staff failed to provide medically-supervised detox, provide Green with intravenous fluids, or respond to her calls for help. The state accepted fault for her death, and in April 2019, both sides agreed to a wrongful death judgment and a $400,000 settlement.

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### *Wrongful Death Alleged against Detoxification Center*

***Bobbie Ziemer, et al. v. Serenity Care Center LLC, et al.*, Arizona Superior Court (Maricopa County), Case No. CV2019-013292 (suit filed October 1, 2019).**

On October 10, 2017, 22-year-old Kinsley Cross died 72 hours after she checked into Serenity Care Center, an Arizona drug detoxification center. Her parents filed a lawsuit against Serenity Care Center, its affiliates, and several individuals alleging that Serenity failed to properly diagnose Cross' underlying medical condition and identify her worsening symptoms. An autopsy revealed that Cross died of complications from pneumonia. The family alleges that her death could have been avoided had she received a proper medical screening and assessment upon her arrival at the center. At present, there are no hearings scheduled in this matter.

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### *Inmates Sue to Obtain Opioid Medications for Chronic Pain*

***Allen, et al. v. New York State Department of Corrections and Community Supervision, et al.*, U.S. District Court for the Southern District of New York, Case No. 19-CV-8173 (suit filed September 2, 2019).**

A group of inmates filed a lawsuit on September 2, 2019 against the New York State Department of Corrections over a policy initiated in 2017 known as the "Medications with Abuse Potential Policy." The policy, created to reduce prescription drug abuse within the prison system, requires inmates to get approval from senior prison system medical staff before filling a prescription for pain medication. Plaintiffs contend that the policy results in a deliberate indifference to their health and safety. Additionally, the inmates argue that medical staff rarely grant approvals and, as a result, they are denied pain medication needed for legitimate medical reasons. Defendants' respective answers to the complaint are due by December 20, 2019.

### *Tainted Breast Milk Results in Mother's Involuntary Manslaughter Charge*

***Commonwealth of Pennsylvania v. Samantha Jones*, Pennsylvania Court of Common Pleas (Bucks County), CP-09-CR-0005353-2018 (guilty plea May 8, 2019).**

In April 2018, Samantha Jones breastfed her son after taking illegal substances and her prescribed methadone. The 10-week-old baby suffered from cardiac arrest after ingesting breastmilk containing methadone, amphetamine, and methamphetamine. The Commonwealth charged Jones with involuntary manslaughter, and Jones pled guilty to the charges on May 8, 2019. She received a sentence of time served plus 36 months of probation. Additionally, she was ordered to complete 100 hours of community service.

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### *Mother Charged with First Degree Murder in Stillborn Birth*

***The People of the State of California v. Chelsea Becker*, California Superior Court (Kings County), Case No. 19CM-5304 (suit filed October 31, 2019).**

On October 31, 2019, California authorities charged 25-year-old Chelsea Becker with felony first-degree murder after she gave birth to her stillborn baby. An autopsy revealed that the baby had methamphetamine in its system, which prompted the death to be ruled as a homicide. California is one of many states in which a person can be charged with a crime for harming a fetus through certain behaviors, such as using drugs while pregnant. Becker admitted to police that she used methamphetamine as recently as three days before the stillbirth. Becker pled not guilty. A preliminary hearing in the case is scheduled for December 5, 2019.

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### *Expansion of Drug Testing Requirement for Unemployment Benefits is Likely to Lead to a Legal Challenge*

***Federal-State Unemployment Compensation Program; Establishing Appropriate Occupations for Drug Testing of Unemployment Compensation Applicants Under the Middle-class Tax Relief and Job Creation Act of 2012*, 84 FR 53037 (final rule published October 4, 2019).**

In October 2019, the U.S. Department of Labor (DOL) published a new final rule giving states the ability to expand the number of people who must pass a drug test in order to receive unemployment benefits. Those who fail the test would not be able to obtain assistance. Pursuant to 42 U.S.C. § 503(l)(1)(A), states can require drug testing as a condition for unemployment compensation eligibility only if: (1) the applicant's most recent employer fired him or her due to the unlawful use of a controlled substance; or (2) suitable work for the applicant "is only available in an occupation that regularly conducts drug testing" as determined by DOL regulation. The previous DOL regulation limited the applicability of number (2) to relatively few, specific "high risk" jobs, such as law enforcement or childcare.

### *Expansion of Drug Testing Requirement for Unemployment Benefits is Likely to Lead to a Legal Challenge continued…*

Under the new rule, states can choose to require drug testing for any occupation in which states conclude that "employers hiring employees in that occupation conduct pre- or post-hire drug testing as a standard eligibility requirement." Several civil rights and workers' rights groups opposed the new rule, asserting that it is an unconstitutional invasion of privacy. The rule took effect on November 4, 2019. To date, it does not appear that any state has modified its drug testing requirements in response.

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### *Termination from Job for Positive Drug Test not a Violation of the ADA*

***Richard Turner v. Phillips 66 Company*, U.S. Court of Appeals for the Tenth Circuit, Case No. 19-5030, 2019 WL 5212903 (opinion filed October 16, 2019).**

The U.S Court of Appeals for the Tenth Circuit affirmed a summary judgment ruling in favor of an employer after an employee brought an Americans with Disabilities Act (ADA) complaint. In April 2017, Phillips 66 terminated Oklahoma crane operator Richard Turner after a random drug test was positive for amphetamines. Mr. Turner alleged that the test results were caused by taking over-the-counter Sudafed and not from illegal drug use. Turner appealed his termination, but the appeal was denied, prompting Turner to file a four-count complaint against the company. Three counts involved alleged violations of the ADA. In October 2019, the Tenth Circuit affirmed the district court's March 2019 ruling for summary judgment in favor of Phillips 66 as to the three ADA claims on the basis that the drug test was not a prohibited "medical examination." The Tenth Circuit cited guidance from the U.S. Equal Employment Opportunity Commission (EEOC) that "a test for the illegal use of drugs does not necessarily become a medical examination simply because it reveals the potential legal use of drugs." Additionally, the Court agreed with the trial court that Turner presented no direct evidence of discrimination and failed to show that the reason for Phillips 66's termination, the positive drug test, was pretext for discrimination. This ruling did not implicate Turner's fourth, state law claim, which the district court remanded to Oklahoma's state court in March 2019. An appeal has not been filed.

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### *Pharmaceutical Companies Subject to Tennessee's Drug Dealer Liability Act*

***Jared Effler, et al. v. Purdue Pharma L.P., et al.*, Court of Appeals of Tennessee, Case No. E2018-01994-COA-R3-CV, 2019 WL 4303050 (opinion filed September 11, 2019).**

On September 11, 2019, the Court of Appeals of Tennessee reversed the ruling of the trial court and held that pharmaceutical companies can be sued under Tennessee's Drug Dealer Liability Act (DDLA).

### *Pharmaceutical Companies Subject to Tennessee's Drug Dealer Liability Act continued…*

The DDLA (Tenn. Code Ann. § 29-38-101, *et seq*.) "provides a civil remedy for damages to persons in a community injured as a result of illegal drug use." The plaintiffs in this case, a number of state district attorneys, claimed that the manufacturer defendants (Purdue, Mallinckrodt, Endo, and Teva) distributed "illegal drugs" and participated in an "illegal drug market" by selling more opioid tablets than could be properly prescribed by physicians and by failing to prevent third parties from illegally diverting or improperly prescribing opioids. In October 2018, a trial court judge granted summary judgment to the manufacturer defendants, concluding that the "DDLA does not apply to manufacturers who are legally producing and distributing opioid medications." On appeal the judgment was reversed, and the case was remanded. The appellate panel ruled that the DDLA does not only apply to "street drugs" or "street dealers," and held that "drug manufacturers cannot … knowingly seek out suspect doctors and pharmacies, oversupply them with opioids for the purpose of diversion, benefit from the process, and then cynically invoke their status as otherwise lawful companies to avoid civil liability." The case was appealed to the Tennessee Supreme Court.

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### *Use of Medical Marijuana as a Violation of Probation*

***Melissa Gass, et al. v. 52nd Judicial District, Lebanon County*, Supreme Court of Pennsylvania, Case No. 118 MM 2019 (suit filed October 8, 2019).**

On October 8, 2019, the American Civil Liberties Union of Pennsylvania filed a class action lawsuit against the 52nd Judicial District of Pennsylvania on behalf of current probationers in the district who are registered marijuana patients under Pennsylvania's Medical Marijuana Act ("PMMA"). Earlier this fall, the judicial district adopted a policy that "Lebanon County Probation Services shall not permit the active use of medical marijuana, regardless of whether the defendant has a medical marijuana card." As a result, a registered patient who tests positive for marijuana would be considered by the court to be in violation of his or her probation. In the complaint, plaintiffs assert that the judicial district's policy fails to follow the PMMA, which states registered patients "shall not be subject to arrest, prosecution or penalty in any manner, or denied any right or privilege . . . solely for lawful use of medical marijuana." Plaintiffs estimate the class size to be at least 60 people. The case was transferred from the Commonwealth Court of Pennsylvania to the Supreme Court of Pennsylvania in late October. The Plaintiffs' initial brief is due to be filed by January 8, 2020.

## *Noteworthy Events in National Opioid Litigation*

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

In December 2017, the Judicial Panel on Multidistrict Litigation (JPML) transferred all opioid-related litigation pending in U.S. federal courts to one district court, the Northern District of Ohio, for consolidated pretrial proceedings. At the outset, the multi-district litigation (MDL) involved approximately 100 cases. Today, the MDL includes over 2,000 cases filed by multiple classes of plaintiffs (governmental entities, hospitals, third-party payors, putative classes of similarly situated persons, and the like) against multiple types of defendants (manufacturers, distributors, dispensers/pharmacies, and pharmacy benefit managers). Moreover, more than 400 state court actions related to opioids remain pending outside the MDL, 89 of which were brought by various states attorneys general. Over the past few months, noteworthy events in the MDL include:

- The first "bellwether" trial aimed at addressing certain claims against three distributors, a manufacturer, and a pharmacy was scheduled for October 2019; shortly before opening statements all defendants but the pharmacy settled with the two Ohio plaintiff counties for approximately $260 million.
- In September, the judge overseeing the MDL (Judge Polster) agreed to implement a novel legal procedure in hopes of increasing the chances for global settlement, certifying a "negotiation class" of potentially 33,000 cities and counties, and giving potential class members until November 22, 2019, to opt out of the class.
- In November, the U.S. Court of Appeals for the Sixth Circuit granted interlocutory appeal of the September order certifying the negotiating class, under Case No. 19-4099.
- In November, Judge Polster set a case management order for "Track One-B," covering the Track One plaintiffs' claims against pharmacy defendants, with the trial scheduled for October 2020.
- In November, Judge Polster recommended to the JPML the immediate "strategic remand" of three cases back to their original transferor courts for trial as the "best way to advance resolution of various aspects of the *Opiate MDL*": (1) *City of Chicago v. Purdue Pharma L.P*. (which focuses on manufacturer defendants); (2) *Cherokee Nation v. McKesson Corp.* (which focuses on tribal issues); and (3) *City and County of San Francisco, Cal. v. Purdue Pharma L.P.* (which names manufacturer, distributor, and pharmacy defendants).

More information about the MDL, including open public access to certain docket entries, can be found at https://www.ohnd.uscourts.gov/mdl-2804.



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