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.

IN THIS ISSUE...

GENESIS HEALTHCARE INC. RESOLVES ALLEGATIONS OF OPIOID DISCRIMINATION

(Agreement announced August 9, 2021). Nursing homes operated by Genesis HealthCare, Inc. (Genesis) in Rhode Island and Massachusetts agreed to enter into a resolution agreement with the U.S. Department of Health and Human Services after facing allegations that Genesis denied admission to patients taking medications to treat opioid use disorder. As part of the agreement, 12 nursing homes in the two Northeastern states must: (1) adopt a non-discrimination policy and a new admission policy; (2) provide staff training on the Americans with Disabilities Act; and (3) pay a civil penalty of up to $60,000. The Genesis facilities must pay $10,000 to the U.S. Department of Justice (DOJ) within 30 days of the agreement's effective date. The payment of the remaining $50,000 will be suspended and forgiven if the Genesis facilities materially comply with the terms of the agreement for the two-year duration of the agreement. If, at any time during the two years, the DOJ determines that the Genesis facilities fail to materially comply with the terms, the DOJ will provide written notice reasonably describing the non-compliance and demanding payment of some or all of the suspended payment.

FEDERAL COURT AGAIN DISMISSES PROPOSED CLASS ACTION ACCUSING PHARMACIES OF DISCRIMINATING AGAINST OPIOID CUSTOMERS

***Susan Smith v. Walgreens Boots Alliance, Inc., et al.*, U.S. District Court for the Northern District of California, Case No. 3:20-cv-05451-CRB (order to dismiss issued August 30, 2021).** For previous updates and facts about this case, please refer to the April 2021 issue of the LAPPA *Case Law Monitor*, available here. After previously dismissing plaintiff Susan Smith's initial complaint against Costco and Walgreens for disability discrimination, the U.S. District Court for the Northern District of California granted a motion to dismiss Smith's second amended complaint (SAC). The allegations in the SAC broadly mirror the allegations in the first amended complaint. Smith contends that Costco and Walgreens implemented overly restrictive opioid prescription fulfillment policies and practices that discriminate against disabled individuals. Compared to the first complaint, the SAC narrows the theory of liability and centers on the 2016 opioid prescription guideline from the Centers for Disease Control and Prevention (CDC Guideline). Specifically, the SAC references CDC Guideline recommendations five and six, which cover dosage and supply limit recommendations for primary care physicians. Smith alleges that both Costco and Walgreens improperly used these recommendations to create policies and practices that discriminate against patients with opioid prescriptions that exceed either the recommended dose or recommended duration. The court granted the defendants' motion to dismiss for two independent reasons. First, the SAC failed to plausibly allege that either Costco or Walgreens maintained the allegedly improper dose and duration policy. According to the record, Smith did not view the alleged policies, nor did she obtain any specific details about the contents of the alleged policies. Additionally, the court reasoned that the defendants' refusal to fill Smith's prescriptions could have been based on something other than policy, such as a lack of stock. Second, the court held that Smith failed to allege a proper claim for disability discrimination. Although the SAC asserts that defendants' policies either exclusively or disproportionately discriminated against disabled individuals, there is no adequate allegation that these policies treat disabled individuals any differently than similarly situated non-disabled persons. The court granted the defendants' motion to dismiss without prejudice and allowed Smith to file an amended complaint within 30 days. On September 14, 2021, the court extended Smith's time to file a third amended complaint until October 29, 2021.

INSYS EXECUTIVES WIN REDUCTION OF RESTITUTION ORDER, LOSE ON OTHER APPEALED ISSUES

***United States v. Richard M. Simon, et al.*, U.S. Court of Appeals for the First Circuit, Case No. 20-1368 (opinion filed August 25, 2021).** In a 141-page opinion addressing—as the court terms it—a "gallimaufry" (*i.e.*, confused jumble) of appealed issues, the U.S. Court of Appeals for the First Circuit: (1) affirmed the trial court jury's special findings and verdicts as to all defendants; (2) affirmed the district court's denial of defendants' motions for acquittal or new trials; but (3) vacated $60 million in restitution payments to be made by one or more Insys Therapeutics Inc. executives, remanding the restitution calculation back to the district court for a more accurate determination. In 2019, a jury convicted Insys founder John Kapoor and four other Insys executives—Richard M. Simon, Sunrise Lee, Joseph A. Rowan, and Michael J. Gurry—of violating the Racketeer Influenced and Corrupt Organizations Act with respect to the marketing of the fentanyl-based drug spray Subsys. (Information on previous Insys cases is provided in the February 2020 issue, available here, and February 2021 issue, available here, of the LAPPA *Case Law Monitor*.) At trial, prosecutors sought $306 million in restitution from the defendants, the estimated value of all Subsys prescriptions written between 2012 and 2015. The trial court, trying to avoid a protracted proceeding to determine the value of fraudulent prescriptions reimbursed by insurance companies, limited restitution to 100 percent of the insurance claims paid for Subsys, traceable to 13 doctors who co-conspired with Insys by accepting bribes. On appeal, the First Circuit concluded that the evidence did not support the district court's restitution calculation for two reasons. First, during trial, a government expert witness testified that 80.9 percent—not 100 percent—of all Subsys prescriptions went through the so-called "Insys Reimbursement Center," an arm of Insys dedicated to obtaining prior authorization for payment directly from insurers and pharmacy benefit managers by providing false and misleading patient diagnoses. Thus, not all prescriptions written by co-conspiring doctors could be termed fraudulent. Second, despite ruling earlier that restitution would be limited to conduct of the co-conspiring doctors, the trial court attempted to value fraudulent prescriptions written by doctors facing no allegations of accepting bribes by using the overstated percentage (100 vs. 80.9) of co-conspirator prescriptions as a proxy for that value. The First Circuit remanded the case to the district court to recalculate the restitution amount by considering only the extent to which prescriptions written by the 13 co-conspiring doctors resulted in legitimate insurance claims.

ARIZONA SUPREME COURT DISMISSES OPIOID-BASED NEGLIGENCE CLAIMS AGAINST CVS

***CVS Pharmacy, Inc., et al. v. Janet C. Bostwick*, Supreme Court of Arizona, Case No. CV-20-0120-PR (opinion filed September 1, 2021).** The Arizona Supreme Court ruled that pharmacies do not have a duty to reimburse hospitals for the costs of treating patients with opioid use disorder. In October 2018, Tucson Medical Center (TMC), a non-profit community hospital in Arizona, filed a complaint alleging a broad conspiracy among drug manufacturers, distributors, and marketers (the "marketing and distributor defendants") to establish a "network to promote the use of opioids" by making "misrepresentations and omissions regarding the appropriate uses, risks and safety of opioids, to increase sales, revenue, and profit from their opioid products." In July 2019, TMC filed a first amended complaint (FAC) adding CVS Health Corporation and other CVS entities (collectively, CVS) as defendants. The FAC alleged that CVS, together with the marketing and distributor defendants, made billions of dollars in revenue while hospitals lost millions treating people with opioid use disorder. TMC alleged that all defendants, including CVS, are liable for negligence, wanton negligence, negligence per se, negligent distribution, nuisance, and unjust enrichment. CVS moved to dismiss the complaint, arguing that: (1) Arizona's medical lien statutes, specifically, ARIZ. REV. STAT. ANN. §

33-934, preclude TMC's claims against it; and (2) CVS does not owe a duty to protect TMC from the harm alleged in the complaint. The trial court denied CVS's motion to dismiss, permitting all causes of action against CVS to proceed. In response, CVS filed a petition for special action (review) by an intermediate appellate court, but it declined jurisdiction. However, the Arizona Supreme Court granted review of the trial court's decision not to dismiss the negligence claims against CVS. TMC alleges that, by various acts of negligence, CVS inflicted economic harm on the hospital both in the form of uncompensated care it was required to provide to patients with opioid use disorder and for additional expenses it incurred as a result of the opioid epidemic. Although Arizona's medical lien statutes (ARIZ. REV. STAT. ANN. §§ 33-931 to 936) authorize hospitals to impose a lien against "all claims of liability or indemnity . . . for damages accruing to the person to whom the [hospital's] services are rendered . . . on account of the injuries that gave rise to the claims and that required the services," Arizona law prohibits the assignment of personal injury claims, and TMC cannot circumvent this by asserting a direct claim for uncompensated care against a third party that it contends caused personal injuries to its patients. Absent coverage by the medical lien statutes, the court concluded that TMC may not assert a claim against a third party for uncompensated patient care. The court also ruled that TMC's negligence claims for direct damages failed because CVS does not owe a legally cognizable duty, public policy based or otherwise, that would allow TMC to assert a negligence claim against CVS to TMC. While the court recognized the tremendous costs imposed on hospitals by the opioid epidemic, it noted that it is up to Congress and the Arizona legislature, not the courts, to create methods to alleviate those costs. The court reversed the trial court's ruling denying CVS's motion to dismiss TMC's negligence claims and remanded the case back to the trial court. The public nuisance and unjust enrichment claims remain pending against CVS.

OHIO REACHES TENTATIVE SETTLEMENT WITH OPIOID DISTRIBUTOR

***State of Ohio ex rel. v. McKesson Corporation, et al.*, Madison County, Ohio Common Pleas Court, Case No. CV 20180055 (settlement reached September 16, 2021).** Ohio reached an $808 million settlement with Cardinal Health, AmerisourceBergen, and McKesson Corp. over their alleged role in the state's opioid epidemic. Until recently, Ohio worked with other state attorneys general on a universal settlement with the three companies as part of the national multi-district opioid litigation (MDL), but an upcoming pre-trial hearing in this state court case provided Ohio with leverage to reach their own settlement. Per the Ohio settlement, no other state may receive more money in a settlement agreement with these companies than Ohio due to the inclusion of a "most-favored nation status" provision in the deal. Additionally, the three companies agreed to pay Ohio's attorneys' fees, a provision not included in the universal deal being negotiated by other attorneys general in the MDL. The settlement framework provides that 30 percent of the funds will go to local governments, 15 percent to the state, and 55 percent to a foundation that provides opioid related grants for programing throughout the state. The settlement will be paid out over 18 years. Out of all the local governments in Ohio that sued the three opioid distributors, only one jurisdiction to date has expressed that it will not join the state's deal. Scioto County, a rural county in southern Ohio, rejected the deal, reasoning that its share of the settlement will not be sufficient to reimburse its costs of dealing with the opioid epidemic. Had the companies not agreed on the settlement, the trial would have begun on October 4, 2021.

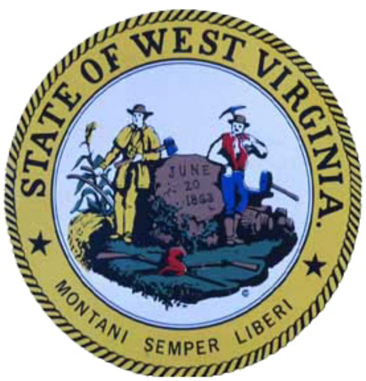
UPDATES IN THE NATIONAL OPIOID LITIGATION

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

- Just prior to the August 20, 2021, deadline for states to commit to the $26 billion opioid settlement with drug distributors Cardinal Health, McKesson Corp., and AmerisourceBergen and drug maker Johnson & Johnson, five states (Georgia, New Mexico, Oklahoma, Washington, and West Virginia) announced that they would not sign on to the proposed settlement. A sixth state, New Hampshire, announced that it would agree to the settlement with the three distributors but not the agreement with Johnson & Johnson. On September 4, 2021, the four companies announced that enough states had agreed to the settlement for them to move ahead with the deal. At that time, the distributors stated that 42 states[1] agreed to join their part of the settlement, but Johnson & Johnson did not immediately report how many states agreed to its part of the settlement. The next step for both sides is to get local governments to sign on to the deal and agree to dismiss their lawsuits. This phase will continue until January 2, 2022. At that time, the four defendants will again decide whether enough jurisdictions have joined to implement the deal.

- Rite Aid Corp. affiliates settled claims made in separate lawsuits by two Ohio counties, Lake and Trumbull, that it contributed to the opioid epidemic. On August 26, 2021, U.S. District Judge Dan Polster granted a motion to remove Rite Aid from the two cases. The terms of the settlement are not public, and the settlement must still be approved by the Lake County and Trumbull County Commissioners. Walgreens, Walmart, CVS, and Giant Eagle remain as defendants. A combined trial in the two cases brought by Lake and Trumbull Counties, classified as "track three" in the multi-district litigation, is scheduled to begin on October 4, 2021.

WEST VIRGINIA CITIES CANNOT CURE DISMISSED COMPLAINT AGAINST HOSPITAL ACCREDITING ORGANIZATION



***City of Charleston, West Virginia, et al. v. The Joint Commission, et al.*, U.S. District Court for the Southern District of West Virginia, Case No. 2:17-cv-04267 (opinion issued September 20, 2021).** Four West Virginia cities, Charleston, Huntington, Kenova, and Ceredo (collectively, "the cities"), lost their second attempt to hold The Joint Commission (TJC), a nationwide hospital accrediting organization, liable for damages caused by the opioid epidemic. On November 2, 2017, the cities filed a suit against TJC and its wholly-owned subsidiary Joint Commission Resources, Inc. pertaining to their roles in promulgating pain management standards used in accrediting healthcare organizations that allegedly led to the overprescribing of opioids. The cities brought three causes of action against TJC on behalf of themselves and others similarly situated: (1) negligence, gross negligence, and willful conduct (Count 1); (2) unjust enrichment (Count 2); and (3) declaratory judgment (Count 3). On January 29, 2018, TJC moved to dismiss the complaint for failure to state a claim. On July 20, 2020, the federal district court granted TJC's motion to dismiss. In its ruling, the court determined that Count 1 failed because of the economic loss doctrine, in that the plaintiffs claimed economic losses and did not allege a "special relationship" or "privity of contract" with the defendants that would establish a duty of care.[2] The court also determined that the complaint did not adequately plead proximate causation, a necessary element for both the Count 1 and Count 2 claims.[3] On August 17, 2020, the cities filed motions to vacate the judgment and for leave to amend the complaint. In the motion, the cities argued that their proposed amended complaint avoids the economic loss doctrine defects identified by the court because the plaintiffs now allege physical harm to the cities' property. This physical harm, as alleged, includes environmental pollution, disruptions to quality of life, loss of recreational opportunities, community blight, increased spread of infectious diseases, and water contamination. Additionally, the cities contended that the amended complaint solves other defects of the

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[1] As of September 4, 2021, prior to the announcement of the distributor settlement with Ohio, the distributors identified the non-participating states as: Alabama, Georgia, Nevada New Mexico, Oklahoma, Washington, West Virginia, and Rhode Island. Rhode Island is not participating in the three distributors' settlement but has joined Johnson & Johnson's deal.

[2] The economic loss doctrine or rule is the principle that a plaintiff generally cannot recover for financial harm that results from injury to the person or property of another. Many states recognize an exception to this rule when the defendant commits fraud or negligent misrepresentation, or when a special relationship exists between the parties. Economic-loss rule, *Black's Law Dictionary* (11th ed. 2019).

[3] A proximate cause is a cause that directly produces an event and without which the even would not have occurred. *Cause*, BLACK'S LAW DICTIONARY (11th ed. 2019).

original complaint by identifying a "special relationship" with TJC, showing the foreseeability of plaintiffs' harms, and pleading additional facts about proximate cause that emphasize TJC's "power and influence over medical practices." The district court, however, concluded that the cities' proposed amendments fail to adequately address the original deficiencies. According to the court, the historical examples provided in the amended complaint to support foreseeability are too vague and do not remotely relate to the physical harms alleged by the cities. Additionally, the court found no evidence that a duty of care exists between TJC and the cities, noting that, ultimately, courts have an "obligation to draw lines beyond which no duty of care exists." Furthermore, the court ruled that the proposed amended complaint also fails to adequately plead proximate cause because of the numerous independent actions occurring between TJC's conduct and the injuries suffered by the cities. Therefore, because the issues from the original complaint remain in the proposed amended complaint, the court found the amendment futile. Consequently, the court denied the cities' motion for leave to file an amended complaint and their motion to vacate the judgment.

NEW YORK ENTITIES SETTLE OPIOID SUIT AGAINST ENDO

***In re Opioid Litigation*, New York Supreme Court, Suffolk County, Case No. 40000/2017 (suit filed March 28, 2019).** On September 9, 2021, New York State, Nassau County, and Suffolk County agreed to a $50 million settlement to end their opioid-based lawsuits against generic pharmaceutical maker Endo International (Endo). Under the deal, Endo and its subsidiary will pay $22.3 million to the state attorney general's office and $13.85 million to both Suffolk and Nassau Counties. Endo will not admit to any wrongdoing as part of the settlement. The settlement occurred as the underlying trial, which commenced June 29, 2021, proceeded. The trial will continue against several remaining defendants, including Teva Pharmaceuticals and Allergan Finance.

LOUISIANA SETTLES OPIOID LITIGATION WITH ENDO AND TEVA

Settlements announced September 28, 2021. On September 28, 2021, Endo International (Endo) announced that it reached an agreement in principle with the Louisiana Attorney General's office to settle all opioid-related cases and claims of the state and other Louisiana governmental persons and entities in exchange for $7.5 million. The settlement, including Endo's payment, requires 100 percent participation by Louisiana's political subdivisions. The state has until October 28, 2021, to inform Endo of how many jurisdictions are participating in the settlement. Per the settlement, Endo will not admit to any wrongdoing, fault, or liability. Additionally, on the same day, Teva Pharmaceuticals (Teva) announced a settlement agreement with the Louisiana Attorney General's office. Under the settlement's terms, Teva will pay Louisiana $15 million over 18 years and provide an additional donation of "medications to aid in opioid use disorder recovery."[4] The agreement is contingent on state confirmation, by November 2, 2021, that all political subdivisions will release Teva as part of the settlement.

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 September 1, 2021, U.S. Bankruptcy Judge Robert Drain approved the bankruptcy reorganization plan for Purdue Pharma (Purdue). The plan contains the controversial provision that permanently shields Purdue's owners, the Sackler family, and their associates from future opioid lawsuits. While the family will give up

[4] Although these drugs are not described in further detail, it appears that the reference is to Teva's generic form of naloxone hydrochloride nasal spray (approved by the Food and Drug Administration in 2019, but subject to ongoing patent litigation).

ownership of the company and pay $4.5 billion in cash and assets over the next nine years, they do not have to admit any wrongdoing and will retain a large portion of the fortune they made from the company. During the court proceeding where he accepted the plan, Judge Drain stated, "I wish the plan had provided for more, but I will not jeopardize what the plan does provide." Additionally, Judge Drain remarked that, although he felt the settlement should have been larger, it was negotiated fairly. Attorneys General for nine states (California, Connecticut, Delaware, Maryland, New Hampshire, Oregon, Rhode Island, Vermont, and Washington) and the District of Columbia opposed the deal, as did the U.S. Department of Justice (DOJ).

- On September 13, 2021, Judge Drain approved up to $7.1 million in payments to five Purdue executives. This money includes incentive payments of $4 million to $5.4 million for 2021 results, which depend on Purdue's ability to meet financial goals, as well as $1.7 million in long-term incentives. Judge Drain stated that he did not consider the incentive payments to be "bonuses" because, even if paid out in full, the amounts fall in the middle of the total compensation range for executives at major pharmaceutical companies.
- On September 16, 2021, William K. Harrington, the U.S. trustee for the DOJ, filed a motion to halt confirmation of the bankruptcy plan while the DOJ appealed Judge Drain's decision to approve it. Harrington argued that the court should grant his request for a stay because the federal government "has a substantial possibility of success on appeal and because the harm that would result from denying a stay outweighs any potential harm from granting one." Additionally, Harrington asserted that the deal takes away the rights of those with a valid legal claim against the Sackler family. As of late September 2021, attorneys general from California, Connecticut, Maryland, Rhode Island, Washington, and the District of Columbia also announced appeals, as have several Canadian jurisdictions. A hearing will be held in either mid-October or early November to determine whether Purdue must wait to put its bankruptcy plan into effect while the appeal process unfolds.

CHEROKEE NATION SETTLES WITH OPIOID DISTRIBUTORS

***The Cherokee Nation v. McKesson Corporation, et al.*, U.S. District Court for the Eastern District of Oklahoma, Case No. 6:18-cv-00056-RAW-SPS (settlement reached September 28, 2021).** McKesson Corp., AmerisourceBergen, and Cardinal Health agreed to pay more than $75 million to resolve claims that they fueled an opioid epidemic in the Cherokee Nation's territory in Oklahoma. The settlement will be paid out over six and one-half years. This agreement marks the first settlement between opioid distributors and a tribal government. The Cherokee Nation's suit remains pending against CVS Health, Walgreens Boots Alliance, Inc., and Walmart, Inc. A trial is expected in mid-2022.

SIXTH CIRCUIT DECLINES TO GIVE ROHRABACHER-FARR AMENDMENT PROTECTIONS TO MICHIGAN DISPENSARY OWNER

***United States v. Daniel Dario Trevino*, U.S. Court of Appeals for the Sixth Circuit, 7 F.4th 414, Case No. 20-1104 (opinion filed July 30, 2021).** The U.S. Court of Appeals for the Sixth Circuit upheld the conviction of a Michigan cannabis dispensary owner for failing to comply with the state's law allowing marijuana for medicinal use. Daniel Trevino owns Hydro World, LLC, a cannabis dispensary chain. The Michigan Medical Marihuana Act[5] (MMMA) (MICH. COMP. LAWS. ANN. § 333.26424) allows state-licensed qualifying patients and primary caregivers to possess limited quantities of marijuana for medical purposes. Individuals convicted

[5] In Michigan, governing state laws and the corresponding administrative rules spell "marihuana" with an "h." This spelling stems from the federal Marihuana Tax Act of 1937. In non-formal communication, the state uses "marijuana" with a "j."

of a drug-related felony in the past, however, cannot register as caregivers. Additionally, Michigan law does not allow the sale of marijuana between patients and exempts these sales from criminal liability. Trevino registered as a patient under the MMMA but could not register as a caregiver because of a prior felony conviction involving cocaine. In 2016, the Drug Enforcement Administration executed a search warrant at several locations connected to Trevino which uncovered marijuana plants, processed marijuana, sales logs, cash, and other marijuana-related items. A federal grand jury charged Trevino with multiple substantive marijuana offenses as well as one count of conspiracy to manufacture, distribute, and possess marijuana with intent to distribute. A jury convicted Trevino on all 10 counts, and the court sentenced him to over 15 years in prison. On appeal, Trevino argued that he should not have been prosecuted at all due to a congressional appropriations rider known as the "Rohrabacher-Farr Amendment" (also referred to as Section 538), which bars the U.S. Department of Justice from spending funds to prevent states from implementing their own laws permitting marijuana use for medicinal purposes. The Sixth Circuit rejected this argument, relying on *United States v. McIntosh* (833 F.3d 1163), a 2016 case from the U.S. Court of Appeals for the Ninth Circuit, which is the only prior circuit court decision addressing the significance of Section 538. In *McIntosh*, the Ninth Circuit held that individuals who "strictly comply" with state laws covering marijuana for medicinal use may receive the protection of Section 538. In this case, because Trevino is a registered patient and not a registered caregiver, and because Michigan law prohibits patient-to-patient marijuana sales, any sales Trevino made were illegal under Michigan law. Thus, because Trevino did not comply with the MMMA, the court declined to apply any protections that Section 538 might provide. The Sixth Circuit affirmed the ruling of the district court. Trevino filed a petition for an *en banc* rehearing on August 8, 2021, which was denied on September 21.

PENNSYLVANIA WORKERS HAVE A PRIVATE RIGHT OF ACTION UNDER THE COMMONWEALTH'S MEDICAL MARIJUANA ACT

***Pamela Palmiter v. Commonwealth Health Systems Inc.*, Superior Court of Pennsylvania, Case No. 498 MDA 2020 (opinion filed August 10, 2021).** In a case of first impression for Pennsylvania appellate courts, an intermediate appellate court ruled that workers have a private right of action under the Commonwealth's Medical Marijuana Act (MMA) (35 PA. STAT. AND CONS. STAT. ANN. §§ 10231.101-10231.2110). Commonwealth Health Systems, Inc. (CHS) fired Pamela Palmiter in January 2019 after she tested positive for marijuana during a scheduled employment-related drug test. Prior to the drug test, Palmiter disclosed to the laboratory performing the testing that she had a medical marijuana certificate. In February 2019, Palmiter sued CHS asserting five causes of action: (1) violation of the MMA; (2) breach of contract; (3) invasion of privacy; (4) wrongful discharge; and (5) intrusion on seclusion. In response, CHS argued that Palmiter failed to state a claim under any of her causes of action. The trial court dismissed the breach of contract, invasion of privacy, and intrusion on seclusion claims but allowed the violation of MMA and wrongful discharge causes of action to continue. CHS appealed the decision, alleging that the MMA does not provide a private right of action. On appeal, the court held that while the MMA does not expressly authorize a direct claim by Pennsylvania employees against their employers, a private right of action can be implied. The court reached this conclusion because the statute does not confer exclusive enforcement authority to the Pennsylvania Department of Health. Additionally, although the Pennsylvania legislature did not expressly create a private right of action within the MMA, the court found that the MMA proclaimed a public policy prohibiting discrimination and retaliation against employees based on their marijuana use. Furthermore, Palmiter's wrongful discharge claim is viable because it relies on the public policy against discrimination announced by the legislature. The appellate court affirmed the order of the trial court and remanded the case for further proceedings. The ruling in this case aligns with a federal court decision in September 2020 by the U.S. District Court for the Eastern District of Pennsylvania in *Hudnell v. Thomas Jefferson University Hospitals, Inc.* (case details provided in the December 2020 LAPPA *Case Law Monitor*, available here).

U.S. SUPREME COURT DECLINES TO HEAR TWO TAX-RELATED MARIJUANA CASES

***Eric D. Speidell v. United States*, U.S. Supreme Court, Case No. 20-1332 (writ of certiorari denied August 23, 2021); and *Standing Akimbo v. United States*, U.S. Supreme Court, Case No. 20-645 (writ of certiorari denied August 23, 2021).** The U.S. Supreme Court declined to hear two cases brought by marijuana businesses against the Internal Revenue Service. In August 2021, the Supreme Court denied a writ of certiorari to both *Eric D. Speidell v. United States* (case details provided in the June 2021 issue of the LAPPA *Case Law Monitor*, available here) and *Standing Akimbo v. United States* (case details provided in the August 2021 issue of the LAPPA *Case Law Monitor*, available here). Both cases concern 26 U.S.C. § 280E, a section of the tax code that bars businesses trafficking Schedule I or II controlled substances from deducting the cost of ordinary and necessary business expenses from income. This is *Standing Akimbo*'s second denial of certiorari.

NINTH CIRCUIT DISMISSES PETITION FOR JUDICIAL REVIEW OF MARIJUANA SCHEDULING

***Suzanne Sisley, et al. v. U.S. Drug Enforcement Administration, et al.*, U.S. Court of Appeals for the Ninth Circuit, Case No. 20-71433 (opinion filed August 30, 2021).** The U.S. Court of Appeals for the Ninth Circuit dismissed a marijuana advocacy organization's request for judicial review of the Drug Enforcement Administration's (DEA) response to a petition for rescheduling because the organization failed to exhaust its administrative remedies. In January 2020, Stephen Zyszkiewicz, a state prisoner in California, and Jeremy Bowers, a medical cannabis epilepsy patient, submitted a one-page, handwritten petition to the DEA requesting that DEA reschedule marijuana or remove it from the controlled substance schedules altogether. The DEA responded in April 2020, noting that while the January letter was not in the proper format, DEA welcomed the opportunity to respond to their concerns. In its response, the DEA provided reasons for denying an earlier petition to reschedule marijuana submitted to the agency in 2011 by the Rhode Island and Washington governors. Zyszkiewicz viewed the DEA's answer as a denial of his petition and unsuccessfully sought judicial review. In May 2020, Suzanna Sisley, MD, the Scottsdale Research Institute, LLC, the Battlefield Foundation, and three veterans (collectively, "petitioners") filed a petition in the Ninth Circuit for a

review of the DEA's April 2020 response to Zyskiewicz and Bower's petition. Importantly, the petitioners did not seek to intervene in Zyszkiewicz's petition before the DEA nor had they filed a petition of their own before the DEA. In their Ninth Circuit action, the petitioners asserted: (1) that the DEA's interpretation of "no currently accepted medical use" under the U.S. Code pertaining to the placement of substances in Schedule I (21 U.S.C. § 812(b)(1)(B)) with respect to cannabis is arbitrary and capricious or otherwise contrary to law; and (2) that certain provisions regarding the initial scheduling of drugs (21 U.S.C. § 811(d)(1)) constituted an unconstitutional delegation of legislative power. Zyszkiewicz's petition to the DEA contained neither argument. In response, the DEA argued that: (1) the petitioners lacked standing under Article III to bring the Ninth Circuit petition; and (2) they failed to exhaust their administrative remedies under the Controlled Substances Act prior to filing suit. In particular, the DEA asserted that the petitioners lacked standing because they asserted only generalized grievances caused by marijuana's placement in Schedule I and not a particularized injury. The Ninth Circuit rejected the DEA's standing argument, concluding that although the petitioners brought forth some generalized harms, they also properly asserted direct and particularized harms, including the fact that the current scheduling of cannabis limits the veterans' access to treatment with marijuana through the Department of Veterans Affairs. However, the Ninth

Circuit ruled that the petitioners failed to exhaust their administrative remedies before petitioning the court. The court held that nothing prevents petitioners from filing a petition of their own before the DEA and that no convincing reasons exist to excuse their failure to do so. Therefore, because the petitioners failed to exhaust their administrative remedies with the DEA, the court dismissed their petition for judicial review. One judge concurred in the decision, in part, because he did not agree that the petitioners have Article III standing.

AMAZON AND FORMER EMPLOYEE SETTLE MEDICAL MARIJUANA BIAS SUIT

***Nathan Miller v. Amazon.com Services, Inc., et al.*, U.S. District Court for the Eastern District of Pennsylvania, Case No. 2:21-cv-00944-ER (dismissed August 31, 2021).** For previous updates and facts about this case, please refer to the August 2021 issue of the LAPPA *Case Law Monitor*, available here. Nathan Miller, a former Amazon warehouse worker, sued Amazon and Quest Diagnostics in March 2021 alleging that Amazon fired him illegally for testing positive for marijuana. The court previously dismissed Quest Diagnostics from the suit in June 2021. On August 31, 2021, the court reported that Amazon and Miller settled all issues and dismissed the case with prejudice. The terms of the settlement are not public record.

UNITED HEALTHCARE SETTLES MENTAL HEALTH PARITY SUIT

***Martin J. Walsh v. United Behavioral Health, et al.*, U.S. District Court for the Eastern District of New York, Case No. 1:21-cv-04519-AMD-RML (settlement reached August 11, 2021).** United Healthcare Insurance Co., United Behavioral Health, and Oxford Health Insurance, Inc. (collectively "United Healthcare") agreed to settle allegations that each violated the federal mental health parity law. The U.S. Department of Labor (DOL) alleged that United Healthcare cut their baseline reimbursement rates for out-of-network, non-physician mental health providers by 35 percent, while only imposing similar reductions on non-physician medical and surgical providers in "limited circumstances." Additionally, the DOL claimed that the companies used a utilization review program to limit benefits for outpatient mental health more aggressively than programs in place for similar medical and surgical benefits. Under the Mental Health Parity and Addiction Equity Act (29 U.S.C. § 1185a) mental health and substance use disorder treatments must be covered on the same terms as medical and surgical benefits. Under the terms of the agreement, United Healthcare will pay $10 million to resolve claims by government and private litigants, $2.5 million to resolve claims brought by the DOL, $1.1 million to resolve claims brought by the New York Attorney General, and over $2 million in penalties. Additionally, as part of the agreement, United Healthcare agreed to cease the violations, improve its disclosures to plan participants, and commit to future compliance.

DEFENDANT'S PRESENCE IN CAR DURING DRUG PICK-UPS DOES NOT JUSTIFY INCREASED SENTENCE

***United States v. Hannah Patch*, U.S. Court of Appeals for the First Circuit, 9 F.4th 43, Case No. 20-2063 (opinion filed August 16, 2021).** The U.S. Court of Appeals for the First Circuit ruled that a federal district court improperly gave a defendant a harsher sentence for riding in a car with her boyfriend as he went to obtain drugs from his supplier. In February 2019, a federal grand jury charged Hannah Patch with maintaining a drug-involved premise. Prosecutors presented evidence that Patch allowed her boyfriend, Joshua Weldon, to use her apartment as a base of operations for his drug-trafficking activities. Patch pled guilty and admitted that she knew the drug-trafficking ring stored and processed controlled substances at her apartment. According to

U.S. Sentencing Guidelines, a defendant convicted of maintaining a drug-involved premise who has no other participation in the underlying offense should receive a lower offense level than a defendant who participates. (U.S. SENTENCING GUIDELINES MANUAL § 2D1.8). The district court, however, held that Patch bore more culpability than simply maintaining the premise because she accompanied her boyfriend on several resupply trips. Thus, the court did not apply the offense level cap under § 2D1.8(a)(2) to Patch and sentenced her to 34 months imprisonment. Patch appealed the decision, asserting that she should receive the benefit of the offense level cap because she did not participate in the drug operation beyond providing her apartment. Evidence produced at trial showed that Patch accompanied her boyfriend on a few occasions to pick up drugs from his supplier but did not show that she performed any other activities furthering the drug operation, such as driving the car, serving as a lookout, or interacting with the supplier. Based on this record, the First Circuit determined that Patch's mere presence at the scene of the pick-ups is insufficient to constitute participation. Additionally, even assuming Patch knew the purpose of the trips, the court ruled that her knowledge alone is insufficient to show participation in the drug operation. Accordingly, the court found Patch entitled to the offense level cap under § 2D1.8(a)(2) and that the district court miscalculated her sentence. The court vacated Patch's sentence and remanded the case for resentencing.

ABOUT LEGISLATIVE ANALYSIS AND PUBLIC POLICY ASSOCIATION

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