LEGISLATIVE ANALYSIS AND PUBLIC POLICY ASSOCIATION

Case Law Monitor

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

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TENNESSEE COUNTY AGREES TO END DISCRIMINATION BASED ON MAT

***United States v. Cumberland County, Tennessee*, U.S. District Court for the Middle District of Tennessee, Case No. 23-cv-00001 (suit/proposed consent decree filed January 18, 2023).** The U.S. Department of Justice filed a complaint and proposed consent decree in Tennessee federal district court to resolve allegations that Cumberland County (population 61,000) violated Title I of the Americans with Disabilities Act (ADA; 42 U.S.C. § 12101 *et seq.*). The lawsuit alleges that the Cumberland County Sheriff's Department discriminated against an unnamed correctional officer on the basis of his disability by failing to make reasonable accommodations and permit his continued employment while taking medication for addiction treatment for opioid use disorder. The Sheriff's Department also constructively discharged him by forcing him to resign. Under the terms of the consent decree, which has not yet been approved by the court, the County must implement policies and procedures regarding non-discrimination in employment and train personnel on the requirements of Title I of the ADA. The County will also pay $160,000 to the former correctional officer. The decree will become effective on the date that the court approves and enters it, and the case will be dismissed 18 months after entry of the decree.

DISABILITY RIGHTS ADVOCATES SUE NEW MEXICO CORRECTIONS DEPARTMENT OVER MAT POLICY

***Disability Rights New Mexico v. Alisha Tafoya Lucero, et al.*, U.S. District Court for the District of New Mexico, Case No. 1:22-cv-00954-JHR-JFR (suit filed December 15, 2022).** The non-profit organization Disability Rights New Mexico (DRNM) brought forth a complaint for violations of civil rights on behalf of its constituents—individuals with disabilities, specifically those with opioid use disorder (OUD) within the New Mexico Corrections Department (NMCD)—who are being discriminated against and denied their medication for addiction treatment (MAT). DRNM asserts that: (1) NMCD has a policy of not providing MAT to anyone in its custody except for pregnant individuals; and (2) the defendants require anyone currently receiving MAT who enters their custody to stop taking their physician prescribed medication. The complaint alleges that the defendants' *de facto* ban on MAT is discriminatory and rooted in stigma. DRNM brings forth claims that the defendants violate the ADA, Section 504 of the Federal Rehabilitation Act, Section 1557 of the Patient Protection and Affordable Care Act, and the Eighth Amendment of the U.S. Constitution. DRNM asks the court to: (1) declare the defendants' practice of prohibiting MAT for OUD upon entry into custody to be unlawful; and (2) issue a permanent injunction requiring the defendants to provide continuity of MAT to all individuals in NMCD custody. The defendants filed a motion to dismiss on January 27, 2023.

PENNSYLVANIA PLAINTIFF CAN SEEK PUNITIVE DAMAGES IN METHADONE DISCRIMINATION CASE

***Jeanna Godwin v. The George Washington, LP.*, U.S. District Court for the Western District of Pennsylvania, Case No. 2:22-cv-01066 (motion to dismiss denied December 30, 2022).** A federal district court ruled that a Pennsylvania hotel must face the threat of punitive damages over a claim that it rescinded an applicant's job offer after learning of her prescribed methadone use. In August 2021, The George Washington Hotel (hotel) extended an offer of employment as a banquet bartender to plaintiff Jeanna Godwin. A week later, Godwin met with the hotel's hiring manager to complete pre-employment paperwork. During this meeting, the hiring manager mentioned that Godwin would be subjected to onsite drug testing. In turn, Godwin disclosed her ongoing prescription for methadone and stated that she could provide the manager with her physician's certification. A few hours later, the hiring manager called Godwin and informed her that the hotel rescinded its employment offer because she would not be able to pass a drug test. Godwin filed suit in July 2022 against the hotel asserting that it discriminated against her on the basis of a disability or perceived disability. Godwin's complaint alleges disability discrimination in violation of the Americans with Disabilities Act (ADA; 42 U.S.C. § 12101 *et seq.*) and the Pennsylvania Human Relations Act (43 PA. STA. AND CONS. STAT. ANN. § 955 (West 2022)) and asks the court for compensatory and punitive damages. The hotel moved to dismiss the request for punitive damages. Under federal law, a plaintiff may recover punitive damages if she "demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual" (42 U.S.C. § 1981a(b)(1) (2022)). In response, the hotel argued that Godwin does not allege any facts to support the allegation that the hotel knew that it acted in violation of federal law. In rejecting the hotel's argument, the court noted that Godwin alleges she notified the hotel that prescribed methadone is the only substance she takes, after which the hotel withdrew its offer of employment. The court determined that these alleged facts could support a claim for punitive damages if the hotel made its decision with knowledge that it violated the law. Thus, the court ruled that Godwin's allegations are sufficient at this state of the proceedings to remain viable. The court dismissed the hotel's motion to dismiss the request for punitive damages without prejudice, meaning that the hotel can seek to dismiss the request later, if the extent of provable facts changes. The parties participated in a mediation session on January 4, 2023 but did not resolve the case.

ALABAMA MEDICAID WITHDRAWS SOBRIETY REQUIREMENT FOR HEPATITIS C TREATMENT

(Settlement reached December 5, 2022). The U.S. Department of Justice (DOJ) secured a settlement agreement with Alabama's Medicaid Agency (Agency) to ensure that Alabama Medicaid recipients with Hepatitis C (HCV) who also have a substance use disorder have equal access to hepatitis treatments. Prior to the agreement, the Agency had a longstanding sobriety restriction policy (policy) that denied coverage of HCV medication for any person who consumed any alcohol or illicit drugs within six months prior to starting treatment. The policy also barred Medicaid payment for HCV medication if a person used illicit drugs while using the medication. A complaint filed with the U.S. Attorney's Office for the Northern District of Alabama alleged that this policy violated the Americans with Disabilities Act (42 U.S.C. § 12101 *et seq.*) by discriminating against individuals who have HCV and a record of substance use disorder. Although the Agency disagreed with this legal interpretation and admitted no wrongdoing, it settled with the Civil Rights Division of the DOJ. Under the terms of the agreement, the Agency withdrew its sobriety requirement restrictions and agreed to pay for HCV medication regardless of a patient's drug or alcohol use. The Agency must also notify Medicaid recipients and providers about this change in policy and remedy any instances where it applied the prior policy.

NEW JERSEY TREATMENT FACILITY AGREES TO PENALTIES FOR KICKBACK VIOLATIONS

***United States v. Camden Treatment Associates LLC*, U.S. District Court of the District of New Jersey, Case No. 1:22-cr-00807-RBK (deferred prosecution agreement and settlement entered December 2, 2022).** Camden Treatment Associates (CTA) is an opioid use disorder treatment facility in New Jersey. CTA's owner is related to the owner of a separate company that provides methadone mixing services. Between 2009 and 2015, CTA entered into an exclusive arrangement with that company for its methadone services. In exchange for its exclusive business, the methadone company paid kickbacks to CTA's owner from its profits. Later, in 2016, CTA obstructed a Medicaid audit by submitting falsified documents to justify its claims for payment. The U.S. Department of Justice (DOJ) filed a criminal information[1] in federal court charging CTA for violations of the federal Anti-Kickback Statute (42 U.S.C. § 1320a-7b(b) (West 2022)) and obstruction of a Medicaid audit. In December 2022, CTA reached an agreement with the DOJ to resolve these criminal and civil violations. Under the agreement, CTA admitted to its wrongdoing and, as part of a three-year deferred prosecution agreement that avoids conviction, must pay a $1.5 million criminal penalty, abide by new compliance requirements, and provide regular written reports on its performance. CTA further agreed to pay $1.65 million to resolve civil claims that it submitted false claims to Medicaid related to the kickback relationship with the methadone company. Provided that CTA adheres to the terms of the agreement, it will not face prosecution for the kickback scheme.

KENTUCKY MEDICAL CENTER PAYS $4.39 MILLION TO SETTLE DRUG DIVERSION CLAIMS

(Settlement reached December 7, 2022). A federal investigation into the Pikeville Medical Center (PMC) in Kentucky uncovered that PMC violated multiple provisions of the federal Controlled Substances Act (CSA; 21 U.S.C. § 801, *et seq.* (2022)) between January 2016 and September 2018. Because of PMC's failure to accurately record its inventory and dispensing history, one pharmacy technician was able to secretly divert over 60,000 doses of oxycodone, hydrocodone, and methadone to her husband who sold those substances to members of the community. In October 2020, the pharmacy technician and her husband pled guilty to engaging in a criminal conspiracy to distribute controlled substances. More recently, PMC entered into a three-year agreement with the Drug Enforcement Administration (DEA) to settle claims regarding its own responsibility for the diversion scheme. As part of the settlement, PMC will permit DEA agents to randomly inspect its facilities. Additionally, PMC must conduct and report full inventories twice yearly, report suspicious controlled substance incidents quarterly, and provide new mandatory employee training on laws and regulations governing the handling of controlled substances. In addition, PMC will pay a $4.39 million penalty, the third largest ever penalty for a hospital system's CSA violations.

FLORIDA DOCTOR SENTENCED 20 YEARS FOR SUBSTANCE USE DISORDER TREATMENT BILLING FRAUD

***United States v. Michael Ligotti*, U.S. District Court for the Southern District of Florida, Case No. 9:20-cr-80092-RAR (sentenced January 9, 2023).** A federal district court sentenced a Florida doctor, Michael Ligotti, to 20 years in prison for engaging in a multi-year scheme to bill health care benefit programs for

[1] A "criminal information" is a formal charging document that describes the criminal charges against a person and the factual basis for those charges. It differs from a criminal indictment in that an information does not involve a grand jury. *Reporting on Criminal Cases – Journalist's Guide*, U.S. COURTS (last accessed Jan. 27, 2023), https://www.uscourts.gov/statistics-reports/reporting-criminal-cases-journalists-guide#criminal_complaints.

fraudulent tests and treatments for patients seeking drug and alcohol use disorder treatment. According to court documents, Ligotti served as the medical director for over 50 sober homes, substance use disorder treatment facilities, and clinical testing laboratories in Palm Beach County, Florida. From 2011 to 2020, Ligotti signed standing orders for expensive, medically unnecessary urine drug tests for patients at these facilities. These facilities would then send patients' urine samples to clinical laboratories for testing and bill health care benefit programs for the unnecessary tests. In exchange for Ligotti's test authorization, the treatment centers required their patients to regularly visit Ligotti's clinic, Whole Health LLC, for additional treatment and testing, or allowed Ligotti's staff to come to the facilities to conduct tests and treatment there. As a result of this conduct, health care benefit programs faced bills over $746 million and paid approximately $127 million for fraudulent urine drug tests and addiction treatments. Ligotti pled guilty to conspiracy to commit health care and wire fraud in October 2022 and surrendered his medical license.

DOCTORS' CONVICTIONS PARTLY VACATED IN LIGHT OF SUPREME COURTS' *RUAN* RULING

***United States v. Xiulu Ruan and John Patrick Couch*, U.S. Court of Appeals for the Eleventh Circuit, Case No. 17-12653 (opinion filed January 5, 2023).** Two doctors convicted of unlawfully dispensing opioids had part of their convictions vacated by the U.S. Circuit Court for the Eleventh Circuit in light of the recent U.S. Supreme Court decision in *Ruan v. United States* (information on the *Ruan* case is available in the August 2022 issue of the LAPPA *Case Law Monitor*). On remand to the Eleventh Circuit, the court faced the issue of whether the jury instructions for criminal intent complied with the Supreme Court's ruling. Under *Ruan*, to obtain a conviction under the Controlled Substances Act (CSA; 21 U.S.C. § 801, *et seq.* (2022) via 21 U.S.C. § 841 (2022)), "the government must prove beyond a reasonable doubt that a defendant: (1) knowingly or intentionally dispensed a controlled substance; and (2) knowingly or intentionally did so in an unauthorized manner." The Eleventh Circuit determined that the jury instructions, which indicated that a prescription for a controlled substance is lawful if done in "good faith" and in accordance with accepted medical standards, did not adequately convey that the defendants must have "knowingly or intentionally" prescribed outside of the usual course of their professional practices. The Eleventh Circuit ruled that this error in the jury instructions was not a harmless error as it relates to the convictions for dispensing controlled substances in violation of the CSA. However, the Eleventh Circuit ruled that the error was harmless as it related to other convictions in the case, which included ones for conspiracy to violate the CSA, conspiracy to commit health-care fraud, conspiracy to violate the federal Anti-kickback Statute (42 U.S.C. § 1320a-7b (2022)), conspiracy to commit mail or wire fraud, conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. §1962 (2022)), money laundering, and conspiracy to commit money laundering. Thus, the court vacated the doctors' substantive drug convictions under 21 U.S.C. § 841 but affirmed the other convictions. The Eleventh Circuit remanded the case to federal district court for a new trial regarding the vacated counts and resentencing for the surviving counts.

OHIO APPELLATE COURT UPHOLDS NURSE'S LICENSE SUSPENSION

***Wesley B. Black v. Ohio Board of Nursing*, Court of Appeals of Ohio, Tenth District, Case No. 22AP-218 (opinion filed December 29, 2022).** An intermediate appellate court in Ohio declined to overturn the Ohio Board of Nursing's (nursing board) sanction against nurse Wesley B. Black for administering large doses of fentanyl, to two terminally ill patients, on a doctor's order. On two separate occasions, Black administered

fentanyl to a terminally ill patient on "comfort care"[2] protocol on the order of Dr. William Husel.[3] On both occasions, the patient died within 30 minutes of receiving the fentanyl. A report presented to the nursing board stated that the doses of fentanyl ordered by Dr. Husel for the two patients were "grossly in excess of any amount of [fentanyl] that, from an objective standpoint, could reasonably be considered as directed at the relief of the actual or anticipated pain or discomfort of the patient." Based on this evidence, the nursing board suspended Black's nursing license because he should have known, or had reason to believe, that the doses of fentanyl ordered by Dr. Husel for the two patients would be harmful or potentially harmful to the patients. The nursing board also found that Black failed to question anyone about the order or consult with any other member of the health care team about any concerns about the harmfulness or potential harmfulness of Dr. Husel's order. Black sought appeal of the nursing board's decision in Ohio trial court, arguing that the nursing board failed to apply the immunity from professional discipline for a health care provider of comfort care allowed by OHIO REV. CODE ANN. § 2133.11 (West 2022). The trial court affirmed the nursing board's order. Black then appealed to the intermediate appellate court. On appeal, Black argued that when determining if he qualified for immunity, the trial court should have used a subjective standard instead of an objective one. The appellate court, however, determined that Black's subjective intent at the time of fentanyl administration was irrelevant. Instead, the court noted that whether Black qualified for immunity under Section 2133.11 depended on whether the fentanyl administration "had the objective purpose of diminishing pain or discomfort and not for the purpose of postponing or causing death, even though the measure may appear to hasten or increase the risk of the patient's death." The court ruled that because the evidence presented to the nursing board indicated that the doses of fentanyl were grossly in excess from an objective standpoint, Black did not meet the objective standard required by the statute. Thus, the court held that Black did not receive immunity under Section 2133.11 and affirmed the ruling of the trial court.

GEORGIA LAW VIOLATED HIPAA BY FAILING TO PROVIDE RECORDS

(Settlement reached January 3, 2023). Life Hope Labs (Life Hope) is a diagnostic laboratory based in Sandy Springs, Georgia. In August 2021, the Office for Civil Rights at the U.S. Department of Health and Human Services (HHS) received a complaint alleging that Life Hope refused to provide an estate representative with a copy of her deceased father's medical records from the facility. She requested the records in July 2021 but did not receive them until February 2022. HHS deemed this a failure to provide timely access to records, a violation of the Health Insurance Portability and Accountability Act (HIPAA). Life Hope agreed to implement a corrective action plan, subjecting it to two years of monitoring by HHS and ordering it to pay $16,500 to resolve the investigation.

MEDICAL CANNABIS USERS IN NEVADA HAVE PRIVATE RIGHT OF ACTION FOR EMPLOYER ACCOMODATIONS

***Freeman Expositions, LLC. v. Eighth Judicial District Court*, Supreme Court of Nevada, Case No. 83172 (opinion filed December 1, 2022).** In a case of first impression, the Supreme Court of Nevada (Supreme Court) ruled that Nevada's medical cannabis law (NEV. REV. STAT. ANN. § 678C.850 (West 2022)) provides a private right of action to an employee where an employer does not provide reasonable accommodations for the use of medical cannabis off-site and outside of working hours. James Roushkolb worked for Freeman

[2] OHIO REV. CODE ANN. § 2133.01(C)(3) (West 2022) defines "comfort care" as any medical or nursing procedure, treatment, intervention, or other measure that is taken to diminish the pain or discomfort of a declarant or other patient, but not to postpone the declarant's or other patient's death.

[3] Prosecutors accused Dr. William Husel of killing intensive care patients at Columbus' Mount Carmel Hospital by prescribing fatal doses of fentanyl for them. A jury acquitted him of 14 counts of murder in April 2022. For more information on this case, please refer to the June 2022 issue of the LAPPA *Case Law Monitor*, available here.

Expositions, LLC (Freeman) and suffered a job-related injury. Following the incident, Freeman required Roushkolb to take a drug test, under which he tested positive for cannabis. At the time of the drug test, Roushkolb held a valid state medical cannabis card. Pursuant to an applicable collective bargaining agreement, Roushkolb faced a zero-tolerance drug and alcohol use policy. Accordingly, Freeman terminated Roushkolb. Roushkolb filed suit in state court in November 2019, asserting five claims against Freeman: (1) unlawful employment practices under NEV. REV. STAT. ANN. § 613.333 (West 2022) (discrimination for the lawful use of a product outside of work); (2) tortious discharge; (3) deceptive trade practices; (4) negligent hiring, training, and supervision; and (5) violation of the medical needs of an employee under the state's medical cannabis statute. In July 2020, Freeman moved to dismiss all counts. The state trial court dismissed the claim for deceptive practices but allowed the other claims to proceed. Freeman then petitioned the Supreme Court in July 2021 for a writ of mandamus, seeking clarification on a significant and potentially recurring question of law in need of clarification, namely "whether the parties to a collective bargaining agreement may discharge employees pursuant to negotiated drug policies in light of Nevada's legalization of marijuana use."

Before the Supreme Court, Freeman argued that the trial court should have dismissed Roushkolb's duty to provide a reasonable accommodation claim because Nevada's medical cannabis law does not provide a private right of action. In rejecting this assertion, the court noted that although Nevada's medical cannabis law does not expressly state that an employee has a private right of action should an employer not attempt to accommodate medical cannabis users, the law does provide an implied right of action. Due to this implied right of action, Freeman failed to show that writ relief was necessary to remedy the district court's declining to dismiss that claim. While the district court properly declined to dismiss the claim under the state medical cannabis law, the Supreme Court ruled that it erred by not dismissing the claims for tortious discharge, unlawful employment practices under NEV. REV. STAT. ANN. § 613.333 (West 2021), and negligent hiring, training, or supervision. The court concluded that Roushkolb's claim for tortious discharge failed because Nevada's medical cannabis law does not create a policy so strong that it shields workers who use medical cannabis from being fired. Additionally, the court determined that Roushkolb's claim for job protections for the lawful use of products outside the workplace failed because, while medical cannabis is legal in the state, it remains illegal under federal law. Finally, the court ruled that Roushkolb's claim of improper training and supervising on Nevada's medical cannabis law failed because the only wrongful conduct was his discharge—an action by the company, not another employee. In sum, the court granted the mandamus relief in part and denied it in part and directed the clerk of the Supreme Court to issue a writ of mandamus directing the trial court to grant Freeman's motion to dismiss with respect to three of the four remaining claims.

MASSACHESETTS INDIVIDUAL GRANTED EXPUNGEMENT OF CANNABIS RELATED RECORDS

***Commonwealth of Massachusetts v. K.W.*, Supreme Judicial Court of Massachusetts, Case No. SJC-13153 (opinion filed September 8, 2022).** In 2018, Massachusetts enacted an omnibus package of criminal justice reforms that included, among other things, two distinct pathways by which an individual could seek expungement of certain criminal records. One of those pathways is known as "reason-based" expungement (MASS. GEN. LAWS ANN. ch. 276 § 100K (West 2022)). This pathway allows a court to order the expungement of a record created as a result of a criminal court appearance if the court determines that the record results from "an offense at the time of the creation of the record which at the time of expungement is no longer a crime." The court has the discretion to order an expungement "based on what is in the best interest of justice." In 2019, K.W. filed a petition in state trial court seeking expungement of two cannabis related records from 2003 and 2006. These records involved charges or convictions of possession of an amount of cannabis that is no longer criminalized. The trial judge denied K.W.'s petition for expungement, holding that it was not in the interest of justice to destroy all records relating to the charges. K.W. filed a motion for reconsideration and the same judge denied the motion. K.W. then filed an appeal for direct appellate review by the state's highest

court. On appeal, the court determined that based on the legislative history of the 2018 criminal justice reform act, there is a strong presumption in favor of expungement for petitioners who meet the reason-based pathway requirements. Based on this consideration, the court concluded that judges considering whether reason-based expungement is in the "best interest of justice," must balance the petitioner's strong presumption in favor of expungement against any significant countervailing concern. If no substantial countervailing concern is raised, a judge must grant the petition for expungement. In this case regarding K.W.'s petition, the record does not suggest any countervailing factors that might weigh against allowing K.W.'s efforts to expunge his cannabis related records. Thus, the court concluded that the municipal court judge abused his discretion when he denied K.W.'s petition. The court remanded the case to the trial court and ordered it to allow the petition for expungement.

INSURERS BARRED FROM BRINGING RACKETEERING SUIT AGAINST INDIVIOR

***Humana, Inc. v. Indivior, Inc., et al.*, U.S. Court of Appeals for the Third Circuit, Case No. 21-2573 (opinion filed December 15, 2022).** The U.S. Court of Appeals for the Third Circuit ruled that Humana Inc. and Centene Corporation (collectively "insurers") are ineligible to seek racketeering damages from Indivior Inc. (Indivior) over its alleged scheme to corner the opioid cessation market. (For more information about the multi-district anti-trust litigation against Indivior, see the August 2020, October 2022, and December 2022 issues of the LAPPA *Case Law Monitor*.) According to the insurers, Indivior engaged in a nationwide racketeering effort to convince insurers to place Suboxone film on their formularies. The insurers brought a suit in federal court alleging substantive and conspiracy offenses in violation of the Racketeer Influenced and Corrupt Organization Act (RICO; 18 U.S.C. § 1962 (2022)), as well as various state law claims. The district court dismissed the insurers' complaints with prejudice, reasoning that the insurers alleged their RICO claims based on a theory of injury caused by their downstream reimbursement of Suboxone film. The district court held that because the insurers merely reimbursed the purchase of Suboxone film, they were "indirect purchasers" of the drug and therefore lacked standing under the indirect-purchaser rule. Such rule prohibits a plaintiff who is two or more steps removed from the alleged RICO violation from bringing a RICO claim. The insurers appealed, asserting that the indirect-purchaser rule does not apply to them. On appeal, the insurers admitted to being indirect purchasers of Suboxone, but argued that they suffered direct injuries when they reimbursed prescriptions for Suboxone. The Third Circuit, however, found that the insurers' characterization fits the description of a "third-party payor" who is barred from recovery in a RICO action by the indirect-purchaser rule. Thus, the district court correctly held that the insurers lacked RICO standing. The Third Circuit also rejected a separate allegation made by the insurers that Indivior defrauded them into including Suboxone on their formularies. The court rejected the claim because the insurers failed to specify how Indivior induced their behavior.

CALIFORNIA JURY FINDS INSURER'S DELAYED CARE LED TO OPIOID DEPENDENCY

***Elaine Courtney v. Health Net, Inc., et al.*, Los Angeles County Superior Court, Case No. 18STCV05327 (jury verdict reached December 12, 2022).** A California trial court jury reached a verdict requiring health insurance provider, Health Net, to pay $6.9 million in compensatory damages and $7.5 million in punitive damages to plaintiff, Elaine Courtney, after finding that the company delayed or denied care without proper cause, resulting in harm to Courtney. The plaintiff filed suit against Health Net after her attempts to have surgery for a pelvic prolapse issue that began in February 2017 faced delay for months. According to the health plan, Courtney should have received a surgical consult appointment within 96 hours after receiving a referral to a colorectal specialist, but she was told that the correct specialist was not available to her under her Health Net Medi-Cal plan. While waiting for an available specialist, Courtney began taking prescribed opioid

medications for pain management. Courtney did not receive her surgery with the specialist until December 2017. Courtney claimed that because of the delay in getting her surgery, she became dependent on her opioid pain medication. Courtney argued at trial that if she did not have to wait months for surgery, she would not have been on long-term opioid therapy, thus greatly reducing her risk of developing opioid dependency. Health Net filed an objection to the proposed judgment on January 5, 2023.

DEA SERVES ORDER TO SHOW CAUSE ON TRUEPILL PHARMACY

(Order served December 15, 2022). The U.S. Drug Enforcement Administration (DEA) served an "order to show cause"[4] on Truepill, a digital retail pharmacy that allegedly wrongfully filled thousands of prescriptions for stimulants used in the treatment of Attention Deficit/Hyperactivity Disorder (ADHD). Truepill acts as the pharmacy for various telehealth companies that market ADHD treatments directly to consumers using advertisements and social media. According to the order to show cause, between September 2020 and September 2022, Truepill filled more than 72,000 controlled substance prescriptions, 60 percent of which were for stimulants. On multiple occasions, Truepill dispensed controlled substances pursuant to prescriptions not issued for a legitimate medical purpose. An investigation revealed that Truepill filled prescriptions that exceeded the 90-day supply limit and/or were written by prescribers without proper state licensing. In response to the order to show cause, Truepill must justify or explain its actions, or face the rescinding or suspension of its controlled substance registration.

TWO FLORIDA DRUG TRAFFICKERS RECEIVE PRISON SENTENCE FOR PILL PRESS OPERATION

***State of Florida v. Jeffrey Williams*, Circuit Court of the Second Judicial Circuit (Leon County, Florida), Case No. 2022-CF-2447-A; and *State of Florida v. Charice Williams*, Circuit Court of the Second Judicial Circuit (Leon County, Florida), Case No. 2022-CF-2447-B (sentences issued December 19, 2022).** Florida Attorney General Ashley Moody announced that state prosecutors secured prison sentences for two drug traffickers running a pill press operation in the state. Jeffrey Williams, and accomplice Charice Williams, trafficked multiple substances, including phenethylamines, cocaine, and methamphetamine. Jeffrey Williams pled guilty to two counts of trafficking phenethylamines, conspiracy to traffic methamphetamine, trafficking in methamphetamine, use of a two-way device, trafficking cocaine, possession of a pill press, tampering with evidence, maintaining a drug house, fleeing or eluding at high speed, and a felon in possession of a firearm. The court sentenced Jeffrey Williams to 10 years in prison. Accomplice Charice Williams pled guilty to a count of trafficking cocaine and conspiracy to traffic methamphetamine, and the court sentenced her to five years in prison.

SIXTH CIRCUIT RULES INSURERS DO NOT HAVE TO DEFEND DRUG DISTRIBUTOR ON OPIOID LAWSUITS

***Westfield National Insurance Company v. Quest Pharmaceuticals Inc.*, U.S. Court of Appeals for the Sixth Circuit, Case No. 21-6026 (opinion filed January 13, 2023).** The U.S. Court of Appeals for the Sixth Circuit has ruled that two commercial general liability insurers do not have a duty to defend Quest Pharmaceuticals, Inc. (Quest) against lawsuits alleging that the company helped to fuel the opioid epidemic in cities and counties across the U.S. Quest is a Kentucky based distributor of generic drugs that is facing 77 opioid related lawsuits. The suits allege that Quest engaged in misconduct that has contributed to the opioid

[4] In this instance, an order to show cause is an administrative action to determine whether a DEA Certificate of Registration should be revoked.

epidemic and bring forth claims that the company violated the Racketeer Influenced and Corrupt Organization Act (18 U.S.C. § 1962 (2022)) and created a public nuisance. The underlying plaintiffs' damages include "significant expenses for police, emergency, health, prosecution, corrections, rehabilitation, and other services." Quest reported the suits to its insurers, Westfield National Insurance Co. (Westfield) and Motorist Mutual Insurance Co. (Motorists). The Westfield and Motorists insurance policies contain the same language in their relevant portions, specifically that the "[insurer] will pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies." The policies further explain that "damages because of bodily injury include damages claimed by any person or organization for care, loss of services or death resulting at any time from the bodily injury."

After learning of the pending litigation against Quest, Westfield and Motorists filed separate actions in Kentucky federal court seeking declaratory judgments that each did not owe a duty to defend or indemnify Quest in the underlying lawsuits. Both insurers moved for summary judgment, which the district court granted, concluding that the policies' coverage of damages "because of bodily injury" does not extend to the claims alleged in the underlying lawsuits. Quest appealed the rulings to the Sixth Circuit, which consolidated the cases. On appeal, Quest argued that the underlying lawsuits are 'because of bodily injury" because they would not have been brought but for injuries caused by opioid use and addiction. The insurers argued that the claims are not "because of bodily injury" because they fail to allege any particular bodily injury and seek only economic damages for costs. The Sixth Circuit agreed with the district court that the lawsuits against Quest are not "because of bodily injury" within the meaning of the policies. The Sixth Circuit based its conclusion on the recent decision by the Ohio Supreme Court in *Acuity v. Masters Pharmaceutical Inc*, which ruled that lawsuits brought against Masters Pharmaceutical Inc. by government entities seeking to recover public service costs related to the opioid epidemic are not "because of bodily injury under the applicable insurance policy." (For information on *Acuity*, please refer to the October 2022 issue of the *LAPPA Case Law Monitor*, available here.) Thus, because the lawsuits brought by local governments and other entities are meant to recover costs incurred due to the opioid epidemic and not for any specific bodily injuries, they do not trigger the insurers' duties to defend or indemnify Quest. Therefore, the Sixth Circuit affirmed the district court's grants of summary judgment in favor of Westfield and Motorists.

WASHINGTON SUES ALBERTSONS, KROGER, AND RITE AID

***State of Washington v. Rite Aid Corp., et al.*, King County Superior Court, Washington State, Case No. 22-2-20910-1 SEA (suit filed December 21, 2022).** Washington Attorney General Bob Ferguson filed a lawsuit against Albertsons, Kroger, and Rite Aid over allegations that the pharmacy chains helped fuel the opioid epidemic in the state. The complaint asserts that the three pharmacy chains ignored federal regulations and knowingly oversupplied prescription opioids into the state. The suit alleges that the pharmacy chains illegally, recklessly, and negligently filled opioid orders without adequately investigating suspected cases of fraud or overprescribing. The lawsuit asserts that the pharmacies' conduct constitutes an unfair business practice that violated the state Consumer Protection Act (WASH. REV. CODE ANN. § 19.86.020 (West 2022)). Additionally, the suit claims that the pharmacies' conduct violated the state's public nuisance law. The state asks the court to award penalties of $7,500 for each violation of the Consumer Protection Act and take injunctive actions to prevent further damage to communities.

WALMART REACHES STATE TARGET FOR NATIONWIDE SETTLEMENT

(Announced December 20, 2022). For previous information on this settlement, please refer to the December 2022 issue of the LAPPA *Case Law Monitor*, available here. On December 20, 2022, Walmart announced that it entered into settlement agreements with all 50 states, the District of Columbia, Puerto Rico, and three other

U.S. territories as part of its $3.1 billion nationwide opioid settlement. This participation level exceeds the 43 states required to join the nationwide settlement framework by December 15, 2022 for it to move forward. The settlements intend to resolve all opioid-related lawsuits brought against the company by state and local governments. The settlement will take effect if a sufficient number of cities and counties also join. These settlements do not include any admission of liability.

WEST VIRGINIA SETTLES WITH WALGREENS

***State of West Virginia ex rel. Patrick Morrisey v. Walgreens Boots Alliance, Inc., et al.*, Circuit Court of Putnam County, West Virginia, Case No. CC-40-2020-C-82 (settlement announced January 18, 2023).** West Virginia Attorney General Patrick Morrisey announced that the state reached a settlement with Walgreens for $83 million. The settlement resolves a lawsuit that alleged that the pharmacy chain failed to maintain effective controls against diversion as a distributor and as a dispenser, contributing to the oversupply of opioids in the state. Walgreens agreed to pay the settlement within an eight-year period. Kroger is the last remaining defendant in this litigation.

TEVA SETTLES WITH WALGREENS

(Announced January 9, 2023). For previous updates on this settlement, please refer to the August 2022 issue of the LAPPA *Case Law Monitor*, available here. Teva Pharmaceuticals (Teva), a U.S. affiliate of Teva Pharmaceutical Industries Ltd., announced that it has reached a sufficient level of participation to move forward with its $4.25 billion nationwide opioid settlement agreement. Teva either already settled with, or confirmed participation from, 48 of the 50 states. Teva will now begin the sign-on process for cities and local governments. The settlement does not include any admission of wrongdoing.

SHAREHOLDER SUIT AGAINST AMERISOURCEBERGEN BOARD MEMBERS DISMISSED

***Lebanon County Employees' Retirement Fund, et al. v. Steven H. Collis, et al.*, Delaware Chancery Court, Case No. 2021-1118-JTL (motion to dismiss granted December 22, 2022).** In December 2021, a group of shareholders filed suit against AmerisourceBergen's Board of Directors (board) in Delaware trial court over allegations that the board failed to take actions to prevent opioid diversion. The shareholders alleged that the company's board breached its fiduciary duties and should be held personally liable for its decisions. In December 2022, the court rejected the board's argument that any harms amounted to results of decisions made many years ago, well outside the statute of limitations. In a novel ruling, the judge found the suit timely, treating the board's decisions as a series of wrongful acts, each of which was subject to its own limitations period. As a result, allegations about decisions made after October 2016, when the company's role in the opioid crisis became public, are still timely. A week later, the trial court granted the board's motion to dismiss for failure to plead "demand futility," holding that AmerisourceBergen's board members' actions to keep opioids out of the black market were sufficient to avoid liability.[5] The judge dismissed the lawsuit saying it was "fatally undermined" by the ruling in *City of Huntington, West Virginia, et al v. AmerisourceBergen Drug Corporation, et al* (for more information on this case, please refer to the August 2022 issue of the LAPPA *Case Law Monitor*, available here). In the *Huntington* case, a West Virginia federal court found on the merits that AmerisourceBergen had an adequate anti-diversion program in place. Based on this ruling, the judge

[5] "Demand futility" is a term of art in corporate shareholder derivative litigation. When bringing such a suit with respect to alleged wrongdoing by the directors or owners, the plaintiffs must plead "with particularity that the board of directors (or majority owners) take action to address the alleged wrongdoing or explain why such demand would have been futile." *BCL § 626(C): Demand Futility*, FREIBERGER HABER LLP (Jan. 24, 2022), https://fhnylaw.com/bcl-%C2%A7-626c-demand-futility/.

determined that there was hard evidence against the plaintiffs' claim. On January 9, 2023, the plaintiffs filed a motion to withdraw and reconsider the dismissal, based on new litigation against AmerisourceBergen filed by the U.S. Department of Justice on December 29, 2022, described below.

U.S. DEPARTMENT OF JUSTICE FILES SUIT AGAINST AMERISOURCEBERGEN

***United States v. AmerisourceBergen Corporation, et al.*, U.S. District Court of the Eastern District of Pennsylvania, Case No. 2:22-cv-05209-GJP (suit filed December 29, 2022).** The U.S. Department of Justice (DOJ) filed a civil complaint against AmerisourceBergen Corporation and two of its subsidiaries, AmerisourceBergen Drug Corporation and Integrated Commercialization Solutions, LLC (collectively "AmerisourceBergen") over claims that the company violated federal law and contributed to the opioid epidemic. The complaint alleges that from 2014 to the present, AmerisourceBergen violated the federal Controlled Substances Act (via 21 U.S.C. § 832 (2022) and 21 U.S.C. § 842 (2022)) by failing to report at least hundreds of thousands of suspicious orders of controlled substances to the U.S. Drug Enforcement Administration (DEA) as required by law. The alleged unlawful conduct includes filling, and failing to report, numerous orders from pharmacies that AmerisourceBergen knew likely facilitated the diversion of prescription opioids. The DOJ's complaint lists several pharmacies that AmerisourceBergen allegedly knew had significant "red flags," suggesting the existence of the diversion of prescription drugs to illicit markets. The complaint asserts that despite the red flags, AmerisourceBergen continued to distribute drugs to the pharmacies for years and reported only a few suspicious orders to the DEA. The complaint further alleges that AmerisourceBergen not only ignored red flags indicating diversion but also relied on internal systems to monitor and identify suspicious orders that were wholly inadequate. The DOJ claims that these systems flagged only a fraction of suspicious orders, thus enabling diversion and demonstrating AmerisourceBergen's failure to report orders to the DEA. The government seeks civil penalties and injunctive relief. If AmerisourceBergen is found liable, it could face escalating civil penalties depending on when each violation occurred and the type of controlled substance at issue. This includes: (1) up to $10,000 for each reporting violation before November 2015; (2) up to $16,864 for each violation between November 2015 and October 2018; and (3) up to $109,374 for each violation relating to a suspicious opioid order not reported after October 2018. AmerisourceBergen has until February 28, 2023 to submit its answer to the court.

JUDGE DISMISSES LAWSUIT HOLDING UP DISTRIBUTION OF OPIOID SETTLEMENT FUNDS IN MICHIGAN

***Ottawa County v. State of Michigan, et al.*, Wayne County, Michigan Circuit Court, Case No. 22-013439-CZ (dismissed January 13, 2023).** A Michigan trial court judge dismissed a lawsuit filed by Ottawa County, Michigan over its share of the state's opioid settlement funds. The filing of the lawsuit delayed the distribution of $81 million in opioid settlement funds throughout Michigan. Ottawa County is among 269 counties, municipalities, and townships across Michigan that signed onto opioid settlements which will distribute $388 million to local governments over the span of 18 years. Ottawa County is set to receive $2.6 million in funds during that time frame. After agreeing to the settlement, Ottawa County sued Michigan Attorney General Dana Nessel, arguing that the funds are being wrongly disbursed and that Ottawa County residents deserve more than the $2.6 million that the county is set to receive. One of the conditions of signing onto the settlement was to agree to not challenge or undermine it. The judge ruled that because Ottawa County signed onto the settlement agreement and the agreement is binding, it has no standing to sue. With the judge granting the attorney general's request for summary disposition, distribution of the settlement funds will start by the end of January 2023.

RECENT EVENTS IN ENDO BANKRUPTCY CASE

***Endo International PLC*, U.S. Bankruptcy Court for the Southern District of New York, Case No. 22-22549-jlg**

- For previous updates on this case, please refer to the October 2022 issue of the LAPPA *Case Law Monitor*, available here.
- On January 6, 2023, officially appointed committees for unsecured creditors and opioid claimants (collectively "committees") filed an objection with the bankruptcy court over Endo International PLC's (Endo) proposal to hand its business over to senior lenders in a sale worth more than $6 billion. The committees argue that the Chapter 11 sales process, as currently proposed, would unjustly harm them by handing over valuable assets that should instead be used to bolster their recoveries from Endo. The proposed sale agreement would establish three separate trusts worth $550 million for government entities, Native American tribes, and others harmed by Endo's opioid products. While the government entities resolved their issues over the proposed arrangement, the committees argue that the deal provides an insufficient payment of $85 million no earlier than 2033 to private plaintiffs.
- On January 23, 2023, opioid claimants and other creditors of Endo asked the bankruptcy court for standing to sue Endo executives and secured lenders arguing that the company is letting valuable claims and assets slip away in bankruptcy. The committees representing unsecured creditors and opioid claimants (committees) asserted in a court filing that Endo improperly agreed to give away billions in valuable assets in exchange for nothing. Under its proposed plan to exit bankruptcy, Endo would hand its business over to senior lenders in exchange for about $6 billion of debt forgiveness unless a third party comes forward with a higher bid at auction. The committees argue that legal actions should be brought to challenge certain lenders' claims to various Endo deposit accounts holding more than $1 billion and the value of equity in Endo's non-debtor Indian subsidiaries where half the company's employees work. The committees also seek standing to sue over three pre-bankruptcy transactions between 2019 and 2021 that transferred billions of dollars of unsecured debt into new secured financing. Another lawsuit would target Endo's officers and directors for awarding themselves about $95 million in bonuses shortly before the company filed for bankruptcy in August 2022.

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 for addiction 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/.