

Recent Court Actions Impacting the Substance Use Disorder Field

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Who is the Legal Action Center?



- National policy and law organization
- Policy and legal work to end discrimination against and protect the privacy of people with:
 - Substance use disorders
 - Criminal records
 - HIV/AIDS
- Aims to expand access to alcohol/drug treatment in the criminal justices system and elsewhere

WHAT WE'LL DISCUSS TODAY

Recent court activity important to the SUD care field

- Background and issues raised
- Status and what we might expect next
- Larger implications for the SUD care field

Cases discussed focus on

- Availability of medication-assisted treatment (MAT) in corrections
- Acceptability of certain health insurer practices in managing MH/SUD benefits
- Legality of Medicaid work requirements
- Constitutionality of the Affordable Care Act

ACCESS TO MAT IN CORRECTIONS

- Highlighting the recent successes in litigation challenging the denial of Medication-Assisted Treatment (MAT) in correctional settings.
 - The cases include:
 - *Pesce v. Coppinger* (D. Mass.)
 - *Smith v. Aroostook County* (D. Maine, 1st Cir.)
 - *Smith v. Fitzpatrick* (D. Maine)
 - *Kortlever v. Whatcom County* (D. Wash.)
 - Class Action
 - *DiPierro v. Hurwitz* (D. Mass.)
 - Federal Bureau of Prisons (BOP)
 - We will explore the defendants' policies regarding MAT, the plaintiffs' experiences, the plaintiffs' claims, the relief sought, the arguments raised, and the outcomes of the cases.
- We will also take a brief look at the work of the DOJ Opioid Initiative.

RESOURCES:

Court Orders for Preliminary Injunction:

- *Pesce v. Coppinger* (D. Mass): https://www.aclum.org/sites/default/files/field_documents/20181126_pesce_order.pdf
- *Smith v. Aroostook* (D. Maine.): https://www.aclumaine.org/sites/default/files/field_documents/smith_aroostook_order.pdf
- *Smith v. Aroostook* (1st Cir.): https://www.aclumaine.org/sites/default/files/field_documents/smith_appeal_order.pdf

Legal Action Center (LAC) MAT Toolkit:

<https://lac.org/mat-advocacy/>

- Sample Treatment Provider Letter Supporting MAT: <https://lac.org/wp-content/uploads/2016/12/Sample-Treatment-Provider-Letter.pdf>
- DOJ Opioid Initiative – Statements and Settlements: <https://lac.org/department-of-justice-addresses-mat-discrimination/>
- Report on Strategies for Implementing MAT in Drug Courts: <https://lac.org/resources/substance-use-resources/medication-assisted-treatment-resources/medication-assisted-treatment-in-drug-courts-recommended-strategies/>
- And many other resources and information.

RESOURCES (cont'd):

Research Describing the Importance and Efficacy of MAT:

- Study by Sarah Larney et. al, *Opioid Substitution Therapy As A Strategy To Reduce Deaths In Prison: Retrospective Cohort Study*, <https://bmjopen.bmj.com/content/4/4/e004666>.
 - “We have demonstrated a very strong association between receipt of OST (opioid substitution therapy) and lowered mortality among opioid-dependent prisoners. After adjusting for demographic and criminal history factors, compared to time not in OST, being in OST was associated with a 74% lower hazard of dying in prison.”
- Study by Evans E. et al., *Mortality Among Individuals Accessing Pharmacological Treatment For Opioid Dependence In California*, <https://www.ncbi.nlm.nih.gov/pubmed/25644938>.
 - Patients are more likely to suffer from overdose and potential death as a consequence of forced withdrawal. Death is three times as likely for people out of treatment versus when in treatment.
- Study by Michelle McKenzie, et. al., *A Randomized Trial of Methadone Initiation Prior to Release from Incarceration*, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3278074/>.
 - Finding that MAT initiation prerelease is associated with increased enrollment in MAT post release, and reduced time to enter a community-based MAT programs.
- Study by Josiah Rich et al., *Methadone Continuation Versus Forced Withdrawal On Incarceration In A Combined US Prison And Jail: A Randomised, Open-label Trial*, [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(14\)62338-2/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(14)62338-2/fulltext).
 - “Forced withdrawal from methadone on incarceration reduced the likelihood of prisoners re-engaging in methadone maintenance after their release.” (Article Summary).

POLICIES OF THE DEFENDANTS

JAIL/PRISON POLICIES REGARDING THE PROVISION OF MAT

LOCALITIES/FACILITIES

Pesce v. Coppinger - *Smith v. Aroostook County* - *Smith v. Fitzpatrick* - *Kortlever v. Whatcom County* - *DiPierro v. Hurwitz*

The localities and correctional facilities of the various defendants in the five cases included:

- *Pesce v. Coppinger*: Essex County, Massachusetts – Middleton House of Corrections
- *Smith v. Aroostook*: Aroostook County, Maine – Aroostook County Jail
- *Smith v. Fitzpatrick*: Aroostook County, Maine – Maine Department of Corrections/Aroostook County Jail
- *Kortlever v. Whatcom County*: Whatcom County, Washington – Whatcom County Jail
- *DiPierro v. Hurwitz*: Federal Bureau of Prisons

MAT POLICIES

Pesce v. Coppinger - *Smith v. Aroostook County* - *Smith v. Fitzpatrick* - *Kortlever v. Whatcom County* - *DiPierro v. Hurwitz*

Generally, each of the defendants had a MAT policy that included the following:

- MAT was prohibited in the jail and prison facilities.
- Individuals entering custody who were on MAT were forced to go through withdrawal.
- Exception for pregnant women.

PLAINTIFFS

SUMMARY OF KEY FACTS

PLAINTIFFS

Pesce v. Coppinger - *Smith v. Aroostook County* - *Smith v. Fitzpatrick* - *Kortlever v. Whatcom County* - *DiPierro v. Hurwitz*

Generally, all of the plaintiffs' experiences with opioid use disorder (OUD) and MAT included:

- Struggling to find treatments that worked (including trying detox programs and naltrexone);
- Finally achieving active recovery after being prescribed MAT – with either methadone or buprenorphine;
- Facing forced withdrawal upon entering the relevant facilities to serve their sentences;
 - The two named plaintiffs in the *Kortlever v. Whatcom County* class action had already been forced to withdraw from their medications when the lawsuit was filed;
- Fearing the physical and psychological pain of the imminent forced withdrawal they faced; and
- Fearing the consequences of withdrawal post release, including the heightened risk for relapse, overdose, and death.

PLAINTIFFS (cont'd)

Pesce v. Coppinger - *Smith v. Aroostook County* - *Smith v. Fitzpatrick* - *Kortlever v. Whatcom County* - *DiPierro v. Hurwitz*

Geoffrey Pesce:

- After years of struggling to find a recovery program that worked, Mr. Pesce was finally in active recovery for 2 years because his doctor prescribed MAT – specifically, methadone.
- In July 2017, Mr. Pesce’s mother was unexpectedly unable to drive him to his methadone treatment facility. He elected to drive himself for fear of relapse, though his drivers license was suspended. He was pulled over for driving 6 miles over the speed limit and was charged with speeding and driving with a suspended license. He faced 60 days imprisonment in the Middleton House of Corrections where MAT would not be available.
- Mr. Pesce feared that withdrawal would interrupt his recovery and the immense progress he had made in reconnecting with his family, particularly his son.

Brenda Smith:

- Ms. Smith suffered from OUD, but with the help of MAT – specifically, buprenorphine – had been in active recovery for 10 years. She was due to be incarcerated for 40 days and would be forced off of MAT.
- Ms. Smith had previously been forced off of MAT for short periods of time. She knew and feared the painful physical and psychological symptoms of withdrawal.
- She feared that withdrawal could trigger a relapse, and that she might not be able to overcome the ramifications, for what would be a much longer period of withdrawal than she previously experienced (40 days compared to 7).

PLAINTIFFS (cont'd)

Pesce v. Coppinger - *Smith v. Aroostook County* - *Smith v. Fitzpatrick* - *Kortlever v. Whatcom County* - *DiPierro v. Hurwitz*

Zachary Smith:

- Mr. Smith suffered from co-occurring disorders, including anxiety, severe depression, and OUD. With the help of MAT – specifically, buprenorphine – Mr. Smith was in recovery for more than five years.
- Mr. Smith faced a period of incarceration of 9 months and 1 day.
- Mr. Smith, who had previously been forced off of MAT at the same jail in which his pending sentence would be served, was greatly fearful of being forced into withdrawal.
- He feared the physical symptoms – body aches, nausea, shaking, sweating, dizziness, dehydration, and vomiting – as well as the psychological symptoms – decompensation, severe depression, and suicidality.

Gabriel Kortlever:

- After becoming addicted to opioids as a teenager, Mr. Kortlever was prescribed MAT – specifically, buprenorphine – and was in active recovery.
- Mr. Kortlever entered into custody of the Whatcom County Jail and was forced into withdrawal. His symptoms of fatigue, vomiting, hot and cold flashes, lack of appetite, restlessness, anxiety, and depression lasted for weeks. He said that withdrawal from Suboxone was worse than withdrawal from heroin.
- Mr. Kortlever feared that after this painful experience he would not return to MAT, and those thoughts caused even greater anxiety and depression.

PLAINTIFFS (cont'd)

Pesce v. Coppinger - *Smith v. Aroostook County* - *Smith v. Fitzpatrick* - *Kortlever v. Whatcom County* - *DiPierro v. Hurwitz*

SY Eubanks (*Kortlever v. Whatcom County*):

- After becoming being prescribed opioids following an injury and eventually becoming addicted as a teenager, Mr. Eubanks was in active recovery for more than 15 years with the help of MAT – most recently, buprenorphine. He had struggled for years to find a treatment that worked.
- Mr. Eubanks entered the custody of Whatcom County Jail and was forced into a painful withdrawal. Mr. Eubanks was fearful of what would occur upon his release, because in the past withdrawal had derailed his recovery progress.

Stephanie DiPierro:

- Ms. DiPierro suffered from co-occurring bipolar disease, anxiety, and OUD. After becoming addicted to opioids, and unsuccessfully trying to overcome her disorder through multiple detoxification programs for more than 10 years, Ms. DiPierro finally achieved recovery in the late 2000s after she was prescribed MAT – specifically, methadone.
- After failing to report that that she was paid for providing care to a friend with mobility and other needs, she pled guilty to federal charges of benefits fraud. She was set to be incarcerated for 1 year and 1 day in a BOP facility where she would be forced off of MAT.
- Ms. DiPierro feared that withdrawal would lead to an increased risk of relapse, that could have deadly consequences, especially considering withdrawal in light of her bipolar disorder.

PLAINTIFFS' CLAIMS

EXPLANATION OF CLAIMS PLAINTIFFS ALLEGED

EIGHTH AMENDMENT

Pesce v. Coppinger - *Smith v. Aroostook County* - *Smith v. Fitzpatrick* - *DiPierro v. Hurwitz*

The plaintiffs alleged that failing to providing MAT is *deliberately indifferent* to the plaintiffs' medical needs, in violation of the Eighth Amendment.

Eighth Amendment of the United States Constitution:

- Prohibits cruel and unusual punishment.
- In the context of prison medical services, state or federal prison officials violate the Eighth Amendment when:
 1. Incarcerated individual has serious medical need (OUD is a serious medical need), and
 2. Officials are knowingly, purposefully, and *deliberately indifferent* to the serious medical need.

AMERICANS WITH DISABILITIES ACT (ADA)

Pesce v. Coppinger - *Smith v. Aroostook County* - *Smith v. Fitzpatrick* - *Kortlever v. Whatcom County* - *DiPierro v. Hurwitz* *

The plaintiffs alleged that failing to providing MAT deprives plaintiffs access to the jails'/prisons' medical programming on the basis of their disabilities, in violation of the ADA.

Title II of the ADA:

- State and local applicability.
- Prohibits discrimination based on disability. OUD (drug addiction) is generally a disability.
- A person's rights are violated when 1) the person has a disability, and 2) the person is denied the public entity's services/programs/activities, 3) because of their disability.

* In this case, the plaintiff claimed a violation of the Rehabilitation Act § 504, which functions in the same way as the ADA but is federally applicable. Plaintiff also brought a claim under the Administrative Procedures Act (5 U.S.C. § § 704 & 706), which allows challenges to unlawful agency actions, findings, and conclusions that are arbitrary, capricious, an abuse of discretion, or otherwise unlawful.

ADA (cont'd)

Pesce v. Coppinger - *Smith v. Aroostook County* - *Smith v. Fitzpatrick* - *Kortlever v. Whatcom County* - *DiPierro v. Hurwitz*

○ Theories of discrimination:

- *Disparate Treatment* – Intentional discrimination because of disability.
- *Reasonable Accommodation* – Refusal to accommodate a disability so that a person has meaningful access to the relevant service/program/activity.
- *Disparate Impact* – When a facially neutral policy has a disproportionate impact on members of a protected group.

RELIEF SOUGHT

IN EACH OF THE CASES, THE PRIMARY FORM OF RELIEF SOUGHT BY THE PLAINTIFFS WAS INJUNCTIVE RELIEF

TYPES OF RELIEF SOUGHT

Pesce v. Coppinger - *Smith v. Aroostook County* - *Smith v. Fitzpatrick* - *Kortlever v. Whatcom County* - *DiPierro v. Hurwitz*

- Across the five cases, plaintiffs requested multiple types of relief, such as:
 - Permanent and Preliminary Injunction;
 - Money Damages; and
 - Plaintiffs Costs and Attorney's Fees.

- All of the plaintiffs in the five cases requested preliminary injunctive relief, ordering the defendants to provide MAT.

PRELIMINARY INJUNCTION

Pesce v. Coppinger - *Smith v. Aroostook County* - *Smith v. Fitzpatrick* - *Kortlever v. Whatcom County* - *DiPierro v. Hurwitz*

- All plaintiffs moved for or sought a preliminary injunction.
- If a plaintiff is granted preliminary injunction, the defendant must cease violating the plaintiff's rights, pending the conclusion of the case.
- Generally, a court will grant a preliminary injunction, if plaintiffs demonstrate:
 1. Likelihood of success on the merits (their rights have likely been violated);
 2. They will suffer irreparable harm without preliminary relief;
 3. The balance of equities between the parties tips in favor of plaintiffs; and
 4. Stopping the violation is in line with the public interest.

ARGUMENTS/RULINGS

AS TO EACH OF THE ELEMENTS OF PRELIMINARY INJUNCTION, THE PLAINTIFFS AND DEFENDANTS MADE SOME OF THE FOLLOWING ARGUMENTS

1) Likelihood of Success on the Merits – 8th Amendment

Pesce v. Coppinger

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Smith v. Aroostook County

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Smith v. Fitzpatrick

The plaintiffs and defendants made the following arguments as to the likelihood of success on the merits for the 8th Amendment claims (deliberate indifference to a serious medical need). **The court found for the plaintiff in *Pesce*.**

Plaintiffs' 8th Amendment Arguments:

- OUD is a serious medical need as evidenced by the plaintiffs' doctors prescribing methadone/buprenorphine;
- Forcing plaintiffs off of MAT could lead to serious, painful, and potentially life-threatening complications;
- OUD is a chronic life-threatening disorder, for which physician prescribed medication is medically necessary;
- MAT is the medical standard of care, defendants cannot simply provide easier less efficacious treatment;
- There are no reasonable alternatives for plaintiffs who have not been able to achieve active recovery except with their prescribed MAT medications;
- The defendants have not identified any legitimate security concerns regarding oral administration of methadone/buprenorphine;
- Defendants have been made aware of the plaintiffs needs for MAT, to which they are deliberately indifferent.

1) Likelihood of Success on the Merits – 8th Amendment (cont'd)

Pesce v. Coppinger

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Smith v. Aroostook County

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Smith v. Fitzpatrick

Defendants' 8th Amendment Arguments:

- Managed withdrawal and non-MAT treatment programs are at least subpar care;
- MAT is the plaintiffs' preferred treatment but it is not necessary to meet the 8th Amendment standard of care;
- Non-MAT and Vivitrol work just as well as Buprenorphine/Methadone;
- As to safety and security of the facilities, the court should defer to the jail administrators;
- There is a prohibition against MAT because it is dangerous and likely to be diverted.

1) Likelihood of Success on the Merits – 8th Amendment (cont'd)

Pesce v. Coppinger

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*Smith v. Aroostook County**

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*Smith v. Fitzpatrick***

In *Pesce*, the *court* held that the plaintiff demonstrated that his 8th Amendment rights were likely violated.

- The only treatment that has worked for plaintiff is methadone;
- The jail knew of the plaintiff's needs for methadone; however, based on its policies of denying everyone MAT, it would be deliberately indifferent to the plaintiff's needs;
- Vivitrol is not interchangeable with methadone;
- Plaintiff's doctor prescribed methadone.

*The court in *Smith v. Aroostook*, ruled only on the ADA claim and not the 8th Amendment claim.

**In *Smith v. Fitzpatrick*, although the case was briefed, the parties ultimately settled.

1) Likelihood of Success on the Merits – ADA

Pesce v. Coppinger

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Smith v. Aroostook County

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Smith v. Fitzpatrick

The plaintiffs and defendants made the following arguments as to the likelihood of success on the merits of the ADA claims (discrimination on the basis of disability). **The courts found for the plaintiffs in *Pesce* and *Smith v. Aroostook*.**

Plaintiffs' ADA Arguments:

- Individuals diagnosed with substance use disorders (SUD) who are in active recovery qualify as having a disability under the ADA;
- Defendants discriminate against individuals with OUD because they are withholding treatment that is the standard of care;
- By providing MAT to only pregnant women, defendants are discriminating against non-pregnant individuals and refusing to make a reasonable accommodation;
- The defendants are discriminating against individuals with OUD by refusing to provide appropriate treatment, as they would for other illnesses/disabilities;
- Defendants discriminate against individuals with OUD because they have policies providing for safe administration of other controlled substances.

1) Likelihood of Success on the Merits – ADA (cont'd)

Pesce v. Coppinger

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Smith v. Aroostook County

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*Smith v. Fitzpatrick**

Defendants' ADA Arguments:

- Plaintiffs are not excluded from medical services, they just want different services;
- Disagreement is not discrimination.

The *courts* held that the plaintiffs demonstrated that their ADA rights were likely violated.

- The jail denied plaintiffs' requests for methadone/buprenorphine without considering their specific medical needs or, in *Smith*, the doctor's treatment plan for plaintiff;
- There is no justification for denial because there a number of ways to safely provide methadone/buprenorphine;
- The jail provided methadone to an incarcerated pregnant woman without issue and so the jail is capable of making the accommodation;
- Jail medical staff had no interest in learning about MAT.

*In *Smith v. Fitzpatrick*, although the case was briefed, the parties ultimately settled.

PRELIMINARY INJUNCTION
2) Irreparable Harm

Pesce v. Coppinger

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Smith v. Aroostook County

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Smith v. Fitzpatrick

The plaintiffs and defendants made the following arguments as to irreparable harm. **The courts found for the plaintiffs.**

The *plaintiffs* argued that if forced to withdraw, they would suffer irreparable harm:

- Plaintiffs would be forced into acute withdrawal with painful physical symptoms, and withdrawal would create a high risk of relapse;
- Forced withdrawal places individuals at greater risk of overdose and death.

2) Irreparable Harm (cont'd)

Pesce v. Coppinger

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Smith v. Aroostook County

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*Smith v. Fitzpatrick**

The *defendants* argued that the plaintiffs would not suffer irreparable harm:

- Plaintiffs will not suffer irreparable harm because they will get medications to treat their withdrawal;
- Plaintiff was incarcerated previously without MAT and returned to treatment and can do so again;
- Plaintiff will not suffer long term consequences.

The *courts* held that depriving the plaintiffs MAT would result in irreparable harm, explaining:

- Plaintiffs will suffer irreparable harm through painful withdrawal, possible relapse, and possible death if forced off of MAT.

*In *Smith v. Fitzpatrick*, although the case was briefed, the parties ultimately settled.

3) Balance of Equities

Pesce v. Coppinger

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Smith v. Aroostook County

-

Smith v. Fitzpatrick

The plaintiffs and defendants made the following arguments as to the balance of equities. **The courts found for the plaintiffs.**

The *plaintiffs* argued that the harm of denying the plaintiffs MAT was greater than the burden on the jail if told to provide MAT:

- Forced withdrawal and the consequences and complications far outweigh any administrative burden of providing MAT, especially when the defendants already do so for pregnant individuals;
- Any safety concerns of the defendants regarding administration of illicit drugs have been managed by other penal institutions around the county that provide MAT; and
- Defendants cannot deny health care based on budget concerns.

3) Balance of Equities (cont'd)

Pesce v. Coppinger

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Smith v. Aroostook County

-

*Smith v. Fitzpatrick**

The *defendants* argued that the burden of implementing MAT programs outweighed the burden of forced withdrawal and the ramifications that follow:

- It is a greater burden on the jail to risk safety and security than for plaintiffs to suffer withdrawal.

The *courts* held that the plaintiffs' burdens of withdrawal outweighed the defendants' burdens of implementing MAT, explaining:

- There is a greater burden on plaintiffs if they are denied MAT than on the jails if they must provide MAT;
- There are a number of means through which to safely provide MAT.

*In *Smith v. Fitzpatrick*, although the case was briefed, the parties ultimately settled.

3) Public Interest

Pesce v. Coppinger

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Smith v. Aroostook County

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Smith v. Fitzpatrick

The plaintiffs and defendants made the following arguments as to the public interest. **The courts found for the plaintiffs.**

The *plaintiffs* argued that providing MAT is in line with the public interest, which is increasingly effected by the opioid crisis:

- It is in the public interest to take steps forward in treating the deadly opioid crises;
- Not providing MAT exacerbates the opioid crisis.

3) Public Interest (cont'd)

Pesce v. Coppinger

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Smith v. Aroostook County

-

*Smith v. Fitzpatrick**

The *defendants* argued that prohibiting MAT, which is done for safety and security of facilities, is in line with the public interest:

- It is in the public interest to defer to the jail and its concerns about safety and security.

The *courts* held that the plaintiffs remaining in active recovery was in line with the public interest:

- The public interest is served by the plaintiff remaining in active recovery, keeping her housing, and being able to care for her children (*Smith*);
- Even considering the jail's safety concerns, the public interest is served by the plaintiffs remaining in active recovery.

*In *Smith v. Fitzpatrick*, although the case was briefed, the parties ultimately settled.

SUCCESSFUL OUTCOMES FOR PLAINTIFFS IN ALL CASES

IN TWO OF THE CASES THE COURT GRANTED THE PLAINTIFFS PRELIMINARY INJUNCTION

- ONE CASE WAS APPEALED TO AND UPHELD BY THE FIRST CIRCUIT

THREE OF THE CASES SETTLED WITH THE JAILS/PRISONS AGREEING TO PROVIDE MAT

PRELIMINARY INJUNCTION GRANTED

Pesce v. Coppinger

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Smith v. Aroostook County

- Preliminary injunctions were granted in *Pesce v. Coppinger* and *Smith v. Aroostook County*.
- The facilities in those counties – Middleton House of Corrections and Aroostook County Jail – were compelled to provide MAT to the plaintiffs for the full periods of their incarceration (60 days and 40 days, respectively).

APPEAL TO THE FIRST CIRCUIT

Smith v. Aroostook County

Unsuccessful Aroostook Arguments on Appeal:

The lower court did not accord substantial deference to the jail regulations prohibiting MAT, which were designed to promote safety and security.

- A court's deference to the jail's policies includes consideration of the impact that the accommodation will have on staff, other inmates, and the allocation of resources.
- Providing MAT would be a substantial investment of money and other resources.

The County's other arguments included that the evidence presented did not support the lower courts findings. The County attempted to reassert its arguments, and the reasons for which it believed the court should have ruled in its favor.

- Aroostook also tried to distinguish its provision of MAT to a pregnant woman by saying that that woman was only in custody for a few days, and withdrawal could cause fetal harm.

First Circuit Ruling:

The preliminary injunction was upheld, after the First Circuit considered the record in the lower court and the parties' briefs.

SETTLEMENTS

Smith v. Fitzpatrick

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Kortlever v. Whatcom County

-

DiPierro v. Hurwitz

Smith v. Fitzpatrick – Settlement Agreement:

- The Maine Department of Corrections agreed to order, dispense, and administer buprenorphine or an equivalent medication to Mr. Smith throughout the course of his nine-month and-one-day sentence.

Kortlever v. Whatcom County – Court Approval of Class Action Settlement Pending

- Plaintiffs moved for class certification early on.
- Generally, the Whatcom County Sheriffs Office agreed to:
 - Class defined as: Non-pregnant people who have an OUD and who are incarcerated, or who will be incarcerated in the future, at the Whatcom County Jail.
 - Implement written policies for MAT (mainly buprenorphine maintenance and induction) and Medically Assisted Withdrawal applicable to the county jail; as well as
 - Guidelines for training and implementation.

DiPierro v. Hurwitz – Agreement

- Prior to a judicial ruling, the BOP agreed to provide MAT to Ms. DiPierro.
- The parties are working toward finalizing agreement.

U.S. DEPARTMENT OF JUSTICE (DOJ)

OPIOID INITIATIVE

ACTIONS TO REMOVE DISCRIMINATORY BARRIERS TO MAT

ABOUT THE OPIOID INITIATIVE

US Department of Justice

- The DOJ has stated that denying access to MAT can violate the ADA.
- Individuals who are denied access to MAT can file a complaint with the DOJ.
- The DOJ has written letters and entered settlement agreements compelling the provision of MAT, in places of public accommodation and government entities, including:
 - Skilled Nursing Facilities
 - Primary Medical Care
 - Child Welfare
- Title III of the ADA applies to places of public accommodation: health care providers, hospitals or other service establishments, as well as a social service center establishments.

DOJ OPIOID INITIATIVE (cont'd)

Skilled Nursing Facility Settlement

Settlement Agreement between the U.S. and Charlwell Operating Nursing Facility, LLC (Charlwell House):

- Charlwell House is a private 124-bed health and rehabilitation center located in Norwood, Massachusetts.
- The patient/complainant alleged violations of Title III of the ADA after Charlwell House refused to accept him for treatment at the facility because he was being treated with Suboxone.
- Even though Charlwell House had adopted a written policy of allowing admission of individuals on MAT, the DOJ determined that when Charlwell House refused to accept the complainant solely because he was on Suboxone, it demonstrated that in practice it imposed eligibility criteria that screened out individuals with OUD.

DOJ OPIOID INITIATIVE (cont'd)

Skilled Nursing Facility Settlement

- The DOJ investigation revealed that Charlwell house did not admit any patients prescribed MAT for OUD, in 2017.
- Charlwell House agreed not to discriminate against individuals on the basis of disability, including disability on the basis of OUD.
- Among other terms of the settlement, Charlwell House was directed to:
 - Create a non-discrimination policy that would be reviewed by the DOJ;
 - Implement employee training;
 - Create document logs for MAT patients; and
 - Pay a civil penalty of \$5,000.

DOJ OPIOID INITIATIVE (cont'd)

Primary Medical Care Settlement

Settlement Agreement between the U.S. and Selma Medical Associates, Inc. (Selma Medical):

- Selma Medical is a medical facility that provides primary and specialty care in Winchester, Virginia.
- The complainant alleged violations of Title III of the ADA when Selma Medical refused to schedule him for a new patient family practice appointment, after he disclosed that he took Suboxone.
- Discriminatory Practice: Selma Medical had a practice of regularly refusing to accept individuals as patients if they were on MAT.
- The DOJ concluded that by turning the complainant, and others, away because he was on MAT, Selma Medical violated the ADA.

DOJ OPIOID INITIATIVE (cont'd)

Primary Medical Care Settlement

- Among other terms, the settlement agreement directed Selma Medical to:
 - Cease violation of the ADA and discrimination against people on MAT;
 - Submit for DOJ review and approval a non-discrimination policy;
 - Train employees on the ADA by a trainer approved by the DOJ;
 - File annual reports with the DOJ for the length of the settlement agreement;
 - Pay \$30,000 to the complainant; and
 - Pay a civil fee of \$10,000.

DOJ OPIOID INITIATIVE

Child Welfare

DOJ Letter to the New York Attorney General's Office (NY AGO) about the need to educate Sullivan County about the ADA's application to individuals on MAT.

- The DOJ informed the NY AGO about MAT and its efficacy, the ADA and its protections of people on MAT, and how to prevent discrimination against individuals on MAT.
- The DOJ stated that the ADA prohibits courts from:
 1. Denying MAT participants the benefits of their services, programs, or activities;
 2. Excluding MAT participants from their services, programs, or activities; or
 3. Otherwise subjecting MAT participants to discrimination, by reason of their disability.
- The DOJ gave the example that a court cannot deny a parent visitation with her child by reason of the parent's past history of OUD or current use of MAT. Nor can a court impose a blanket rule requiring parents to stop participating in MAT in order to gain custody of the children.

Acceptability of Certain Health Insurer Practices in Managing MH/SUD Benefits

Background

- Use of the federal MH/SUD Parity Act and other laws in the courts to challenge health insurer management of MH and SUD benefits

Case: *Wit v. United Behavioral Health*

- National class action suit brought in the U.S. District Court for the Northern District of California
 - 11 plaintiffs, on behalf of 50,000 patients sued UBH, as plan administrator, alleging their claims were denied based on flawed medical necessity criteria
- The court ruled for the plaintiffs, finding that UBH's medical necessity criteria was inconsistent with generally accepted standards of MH/SUD care

Acceptability of Certain Health Insurer Practices in Managing MH/SUD Benefits (*cont'd*)

Highlights of the *Wit* decision

- The court noted that UBH's guidelines were developed to cut costs they projected the company would incur when the federal MH/SUD Parity Act became effective
- The court found that UBH's internal guidelines limited coverage to "acute" rather than chronic care
- The court found that UBH misled regulators by suggesting that their guidelines were consistent with ASAM criteria, as required by several state laws
- The court identified several components of what constitutes "generally accepted standards of care"

Acceptability of Certain Health Insurer Practices in Managing MH/SUD Benefits (*cont'd*)

What may happen next

- Focus on remediation
- Practice change?
 - Scope: UBH is the largest managed MH/SUD organization, serving over 60 million members
 - Will the medical necessity criteria plans use to manage MH/SUD benefits be overhauled so that it is consistent with generally accepted standards of care?
- Additional suits brought under the Parity Act and other federal and state laws?
- Leveraging the *Wit* decision in our collective policy advocacy to improve access to MH and SUD care

Legality of Medicaid Work Requirements

Background

- For the first time, CMS issued policy guidance encouraging states to use waivers to institute work requirements in their Medicaid programs.
- Several states have sought and received CMS approval for Medicaid work requirements. Arkansas was the first state to begin implementation of work requirements in their Medicaid program last year.
- CMS placed initial focus on work requirements for non-disabled/pregnant/parenting Medicaid beneficiaries (largely beneficiaries who were a part of the ACA expansion population) but states have begun to design work requirement programs for additional beneficiaries

Legality of Medicaid Work Requirements (*cont'd*)

Cases: *Stewart v. Azar* (Kentucky) and *Gresham v. Azar* (Arkansas)

- Brought in the U.S. District Court for the District of Columbia on behalf of a number plaintiffs who would be impacted by this policy
- Over the past year, the court has twice held for the plaintiffs and has blocked implementation in KY and halted further implementation in AR

Highlights of the decision:

- The court criticized HHS for not considering whether work requirements would help states provide medical assistance, a central purposes of the Medicaid program, and for not estimating how many people would lose coverage
 - In Arkansas, over 18,000 people lost Medicaid coverage

Legality of Medicaid Work Requirements (*cont'd*)

What may happen next

- Appeal of the AR and KY decisions
- Impact in the states that have received CMS approval for work requirements, are awaiting approval or have been considering applying for waiver approval?
- Impact in certain states on the Medicaid expansion?
- Continued advocacy to oppose Medicaid work requirements by the health consumer and allied communities

Constitutionality of the Affordable Care Act

Background

- Continued legal challenge to the ACA

Case: *Texas v. Azar*

- Suit challenging the constitutionality of the ACA was brought by a group of state Attorneys General in the U.S. District Court for the Northern District of Texas
- In December, the court held that the ACA's individual mandate was unconstitutional, that it couldn't be severed from the rest of the law and that the entire law was therefore invalidated.
- The decision was appealed to the 5th U.S. Circuit Court of Appeals in New Orleans; a hearing has been scheduled for July.

Constitutionality of the Affordable Care Act *(cont'd)*

What may happen next

- Continued discussion of the potential impact of eliminating the ACA
 - Political implications
- July hearing
 - Many legal experts believe the initial ruling will be overturned
- Continued litigation on other parts of the ACA
- Additional federal and state legislation related to various parts of the law

QUESTIONS ?

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