



Patient Access to Opioids

Litigation Update

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Individuals who are prescribed opioid medications have filed lawsuits against pharmacies and prescribers. The plaintiffs allege that policies designed to prevent diversion and misuse of opioids have discriminated against them in violation of civil rights laws. Claims have been filed under the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, Section 1557 of the Affordable Care Act, and state anti-discrimination statutes. These cases are premised upon a variety of legal theories, including both intentional misconduct and disparate impact claims. This litigation tracker highlights developments in these cases.

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Hansen et al v. CVS Pharmacy, Inc. (2021) | United States District Court for the Eastern District of Kentucky

- Status: Ongoing
- In June 2021, CVS contacted Dr. Hansen, a pain management specialist, regarding recent prescription practices. On July 28, 2021, CVS notified Hansen that CVS pharmacists would refuse to fill prescriptions Hansen ordered.
- On August 4, 2021, Hansen filed his Complaint against CVS with the United States District Court for the Eastern District of Kentucky. The complaint alleges that CVS, by refusing to fill prescriptions, implied the prescriptions he wrote in the past were improper and would cause Hansen to lose 250 patients who use CVS. Hansen requested a temporary restraining order against CVS for refusal to fill prescriptions.
- On August 11, 2021, District Court Judge William Bertelsman ruled CVS was enjoined from refusing to fill prescriptions written by Hansen.
- The temporary restraining order will remain in place as the trial proceeds.

Bradley v. CVS Pharmacy, Inc. (2020) | Court of Appeal of California, Second Appellate District

- Status: Ongoing
- In June 2020, CVS stopped filling controlled substance prescriptions issued by Dr. Bradley, a physician who specializes in pain management. CVS cited concerns about Bradley's prescribing patterns, specifically the uptick in hydrocodone and diazepam prescriptions between 2018 and the start of 2020.
- Bradley filed his initial complaint on June 25, 2020. The trial court denied Bradley's temporary restraining order, which prompted Bradley to file a motion for a preliminary injunction on July 20, 2020.
- The trial court then denied Bradley's preliminary injunction. The Court based this conclusion on the doctrine of exhaustion of administrative remedies. The Court stated Bradley should have first sought relief from the California State Board of Pharmacy. This

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pharmacy board is responsible for enforcing state rules governing pharmaceutical licensees. Bradley appealed.

- The Court of Appeals of California, Second Appellate District, affirmed the trial court's ruling. However, the Appellate Court held that applying the doctrine of primary jurisdiction is more appropriate. This doctrine is traditionally used "where a claim is originally cognizable in the courts," but involves issues "which, under a regulatory scheme, have been placed within the special competence of an administrative body." The Board of Pharmacy is uniquely positioned to rule on a pharmacist's duty to dispense prescribed or ordered drugs and devices. The Court concluded that the action shall remain stayed to permit Bradley to pursue a complaint with the Board.

Smith v. Walgreens Boots Alliance, Inc. (2020) | United States District Court for the Northern District of California

- Status: Ongoing
- In August 2020, Susan Smith [sued](#) Walgreens and Costco for discriminating against her when she tried to fill her opioid prescription at their pharmacies. Smith, who has a disability chronic pain syndrome, has been prescribed morphine since 2011. Smith alleges that Costco and Walgreens maintain policies that act as total or near total bans on opioid prescriptions and discriminate against her based on her disability. Smith brought claims under both federal statutes (Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and Section 1557 of the Affordable Care Act) and state civil rights laws.
- On February 3, 2021, the court granted the pharmacies' motions to dismiss. The court found that Smith did not assert a claim for discrimination against Costco as she alleged that Costco had a total ban on opioid sales, not a refusal to sell to individuals with disabilities. The court also found that Smith's allegations about Walgreens's policies were not enough to support an intentional discrimination claim, although limits on dose and duration could be supported under a disparate impact or reasonable accommodation approach. The court allowed Smith to file an amended complaint, which was filed on March 22, 2021.

[Fuog v. CVS Pharmacy, Inc. \(2020\)](#) | United States District Court for the District of Rhode Island

- Status: Ongoing
- On August 6, 2020, Edith Fuog [sued](#) CVS Pharmacy and CVS Caremark, alleging claims under the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and Section 1557 of the Affordable Care Act. Fuog brought the lawsuit on behalf of herself and other individuals with disabilities whose opioid prescriptions were rejected by CVS. Fuog alleged a variety of internal CVS policies regarding opioid prescriptions, including limitations on dosage and duration, the use of internal databases to "blacklist" individuals seeking to fill opioid prescriptions, and medical record requirements. Ultimately, Fuog argued that the policies interfered with the practitioner-patient relationship, discriminated against patients based on age and disability, and focused more on risk management than the needs of the patient.
- On October 16, 2020, CVS moved to dismiss the lawsuit, arguing that: (1) Fuog cannot challenge policies given that she did not allege they were applied to her, (2) the complaint failed to state a claim against Caremark, (3) disability discrimination claims cannot be utilized to second guess a pharmacy's "bona fide healthcare judgment," and

(4) the challenged CVS policies applied to all CVS customers, regardless of disability, foreclosing a federal disability claim. The court held a hearing on the motion to dismiss on February 18, 2021.

Gorney v. VA (2019) | United States District Court for the District of Arizona

- Status: Concluded
- On August 2, 2019, Dale Gorney filed suit against the Veterans Administration, alleging that the VA suddenly discontinued his opioid prescription and required urine drug testing (UDT) to obtain new opioid prescriptions. Gorney's primary claims cited Title II of the Americans with Disabilities Act (ADA) and his claimed constitutional right to opioids. The plaintiff also asserted claims under the Fourth Amendment due to mandatory UDT and challenged the constitutionality of the Federal Controlled Substances Act.
- In February 2020, the VA moved for summary judgment, arguing that: (1) the ADA does not apply to the federal government, (2) disability claims under the proper authority (Section 504 of the Rehabilitation Act) cannot be based on "reasoned medical treatment decision[s]," (3) there is no constitutionally protected liberty-interest in opioid prescriptions, (4) mandatory UDT is a reasonable search for opioid prescription recipients, and (5) Gorney was not allowed to challenge the constitutionality of the Federal Controlled Substances Act. Gorney never filed a response to the motion for summary judgment.
- On September 15, 2020, Judge Cindy Jorgenson found for the VA on all arguments, and dismissed the case. First, the mandatory UDT was related to the valid interest in preventing opioid addiction and overdoses, and was tailored to that goal, surviving Fourth Amendment search analysis. Second, because the federal government is not covered by the ADA, disability discrimination complaints must be considered under the Rehabilitation Act. Here, Gorney did not prove that he was discriminated against because of his disability, and failed to prove that the decision to wean him off the opioid prescription was based in disability stereotyping rather than reasoned medical decision-making. Third, Gorney did not adequately demonstrate a property interest in the opioid prescription, as there must be a "unilateral expectation of it." As a result, the VA did not deprive him of a constitutionally protected right to his prescription. Finally, the Controlled Substances Act had nothing to do with the decision to wean Gorney off his prescription, and Gorney cannot challenge the Act's constitutionality.

Goldsmith v. CVS Pharmacy (2019) | United States District Court for the Central District of California

- Status: Settled
- On December 9, 2019, Gary Goldsmith sued CVS Pharmacy for refusing to fill his opioid prescription and confiscating the document, preventing Goldsmith from filling it elsewhere. Goldsmith alleges that he suffered severe pain and several days of opioid withdrawal because of CVS's actions, and was unable to fill his prescription until six days later. Goldsmith asserted claims under the California Civil Rights Act, the state's unfair business practice statute, and common negligence claims.
- In January 2020, Garfield Beach CVS, the location where the events occurred, moved to dismiss the claims. Garfield Beach CVS argued that Goldsmith did not allege an underlying disability and failed to establish that the prescription was denied because of

his disability. The defendant also argued that there was no “unlawful,” “unfair,” or “fraudulent” business practice in denying the prescription, precluding claims under the unfair business practice statute. Finally, the defendant argued that the negligence claim should have been alleged under a professional negligence theory.

- On May 5, 2020, Judge André Birotte, Jr., dismissed Goldsmith’s civil rights and unfair business practice claims, but allowed Goldsmith to amend his complaint. Judge Birotte found that Goldsmith had sufficiently pled a negligence claim.
- Goldsmith filed his amended complaint on May 26, 2020, reasserting his state civil rights and unfair business claims as well as a new ADA claim.
- On June 5, 2020, defendant Garfield Beach CVS filed a motion to dismiss, arguing the claims remained insufficient to survive in court.
- On July 24, 2020, Judge Birotte denied the defendant’s motion to dismiss on all claims. First, Goldsmith sufficiently pled that he has a disability and was denied public accommodations because of his disability. The court pointed to Goldsmith’s allegation that the pharmacist viewed him as an “illegal drug addict,” thus meeting the ADA standard for disability, and it was plausible the pharmacist refused to fill his prescription and confiscated his documentation because of Goldsmith’s disability. Because the ADA claim survived, the California civil rights claim also survived, as the state statute requires that any violation under the ADA is also a violation of the state statute. Finally, because the plaintiff successfully alleged an unlawful violation of the ADA and state civil rights law, the plaintiff successfully pleaded an unlawful and unfair act under the state unfair business practice law.
- On April 6, 2021, the court dismissed the case after the parties announced they had reached a settlement.