

Legal Lens

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HOW RICH HOSPITALS PROFIT FROM PATIENTS IN CAR CRASHES

Hospitals nationwide are placing liens on accident settlements as a method of obtaining reimbursements for caring for patients after a car injury. Reporters from *The New York Times* followed Monica Smith, a 45-year-old woman who visited Parkview Regional Medical Center in Fort Wayne, Indiana following a car injury. Although Medicaid could have covered her costly care, the hospital opted to put a lien for five times the Medicaid reimbursement amount on her accident settlement, a practice that remains legal under hospital lien laws. By collecting under a lien, the hospital profits from money which would otherwise go to patients as pain and suffering compensation and amounts to charging a Medicaid patient as an uninsured patient at full price. In most states, hospital lien laws were written in the early 20th century, prior to widespread health insurance coverage among the general population to allow hospitals to provide care without the uncertainty of reimbursement. These laws are now mostly invoked in instances like Smith's, though some cap the lien amount or restrict

collections to nonprofit hospitals. However, in states without such restrictions, hospital lien laws are generally invoked by the wealthiest institutions. Patients end up suffering from lowered credit scores and are left without the means to pay for follow-up care. In an attempt to tackle the problem, Indiana passed a bill requiring hospitals to bill a patient's insurer prior to pursuing a lien. The law did not specify Medicaid, however, and Parkview Regional Medical Center continued its lien practices, fending off at least nine lawsuits on the issue since the law was passed. It argues Medicaid does not qualify as health insurance, and instead, is government assistance. The hospital declined an interview, but said in a written statement that the hospital has discontinued this practice and that "Parkview has always taken a conservative and fair approach to collections."

Sarah Kliff and Jessica Silver-Greenberg, *The New York Times*, Feb. 1, 2021
<https://www.nytimes.com/2021/02/01/upshot/rich-hospitals-profit-poor.html>

MCKINSEY SETTLES FOR NEARLY \$600 MILLION OVER ROLE IN OPIOID CRISIS

A \$573 million settlement was reached in February between McKinsey & Company, a consulting firm, and 47 states. The settlement was reached after documents in the lawsuit revealed McKinsey drove sales of Purdue Pharma's OxyContin during the opioid crisis, leading to more than 450,000 deaths over

the past two decades. One of McKinsey's acts included advising Purdue to sell high-dose pills. This is a rare instance in which a party that profited from the opioid epidemic is being held accountable. McKinsey did not admit wrongdoing but agreed to court-ordered restrictions on its work with some addictive narcotics and agreed to publish thousands of documents related to its opioid work on a public database. While this settlement is worth more than McKinsey received for their work over the years, they were held to a higher role of accountability because McKinsey not only offered management advice, but two senior partners led the firm in implementing the plans to drive sales. This settlement may not be the end, as local governments in some jurisdictions have also filed suits. The Biden administration also could act.

Michael Forsythe and Walt Bogdanich, The New York Times, Feb. 3, 2021,
<https://www.nytimes.com/2021/02/03/business/mckinsey-opioids-settlement.html?action=click&module=Top%20Stories&pgtype=Homepage>

'INCREDIBLY CONCERNING' LAWSUIT THREATENS NO-CHARGE PREVENTIVE CARE FOR MILLIONS

The Affordable Care Act is again being challenged, and this time, preventative care services are on the chopping block. A Texas federal judge seems poised to rule in favor of eliminating preventative services on religious and free-market grounds. The case, *Kelley v. Azar*, is a class action suit, in which the

plaintiffs argue that those deciding which preventative services must be offered for free are not appointed by the president and confirmed by the Senate, and therefore those decisions cannot be binding. The plaintiffs also argue that "Congress cannot delegate responsibility to executive branch agencies to make binding regulatory decisions without providing clear guidance." Under the ACA, most plans must cover certain preventative services, including cancer screenings, vaccines, and contraceptives. The requirement has made such benefits more accessible to Americans, which, if ended, "would mean a lot of people would forgo preventive services and end up with much worse medical problems," according to Tim Jost, a retired Washington & Lee University law professor, in an interview with *Kaiser Health News*. If the Texas federal judge issues a preliminary injunction blocking access to preventative services, the Biden administration is likely to appeal to the Fifth Circuit, also a conservative court. Meanwhile, the Supreme Court will likely issue its ruling in *California v. Texas* soon. Though health has improved as a result of access to preventative services like cancer screening, including an increase in early-stage colon cancer diagnoses, it is unclear if insurers would continue coverage for these services without a mandate. Legal experts expect the case to make its way to the Supreme Court.

Harris Meyer, *Kaiser Health News*, March 26, 2021,
<https://khn.org/news/article/lawsuit-targets-health-law-no-charge-coverage-of-preventive-exams-like-mammograms/>

‘VACCINE PASSPORTS’ ARE ON THE WAY, BUT DEVELOPING THEM WON’T BE EASY

With President Biden’s pledge to start regaining some sense of normalcy this summer, “vaccine passports” have become a new topic for standardizing proof of vaccinations as businesses begin to reopen. The public can apply for passports on their phone and free of charge, possibly display a scanned code like airport boarding passes. The European Union is racing to develop similar digital certificates as summer begins and the public gets the urge to travel. Issues remain to be addressed regarding data privacy and health-care equity. There is a balance between ensuring everyone has access to receive credentials while also creating a passport that cannot be hacked or counterfeited. Another issue is the number of passport designs already underway, with at least 17 passport projects identified so far from the World Health Organization to IBM’s, which is being tested in New York. Federal officials in the U.S. defended the project, asserting the Administration is moving carefully to ensure it is built well. The Biden administration must balance encouraging shots with not becoming a government mandate that could turn bad quickly. There is also the issue of determining how to handle those who cannot be vaccinated. While the passport could potentially motivate skeptics to get vaccinated so they could more easily visit family, take vacations, and resume everyday life, there are still many details to address before the Biden administration rolls out vaccine passports. Brian Anderson, a physician at Mitre, said the goal of passports to “[c]reat[e] an environment for those vulnerable populations to get back

to work safely — and to know that the people coming back to their business are ‘safe,’ and vaccinated — would be a great scenario.”

Dan Diamond, Lena H. Sun, and Isaac Stanley-Becker, *Washington Post*, March 28, 2021, <https://www.washingtonpost.com/health/2021/03/28/vaccine-passports-for-work/>

BIDEN SEEKS TO BOLSTER HOME HEALTH CARE IN INFRASTRUCTURE PLAN

President Biden has proposed a \$400 billion bill which would fund home and community-based care, including long-term care coverage under Medicaid. The bill would raise wages for home-care workers and reduce home care Medicaid waiting lists. Including Medicaid, the U.S. spent nearly \$380 billion on long-term care services and support in 2018, and demand is increasing. Still, wages lag behind at about \$12.15 hourly for home-health aides. Meanwhile, about 820,000 people nationwide, most with disabilities, remain on community-based care waiting lists. By making home support and care services mandatory for Medicaid, and funding the requirement, the wait lists could shorten.

Alex Ruoff, *Bloomberg News*, March 31, 2021, https://www.bloomberglaw.com/product/blaw/bloomberglawnews/health-law-and-business/XCLIVMQS000000?bc=W1siU2VhcmNoICYgQnJvd3NliwiaHR0cHM6Ly93d3cuYmxvb21iZXJnbGF3LmNvbS9wcm9kdWN0L2JsYXcvc2VhcmNoL3Jlc3VsdHMvMjY0ZjBhZTQ2YzlkY2FIZmVmZTlhZDVmNDE2OTY2NzgiXV0-24dae282d1fc060494dd0d1659dfd6385dbfed56&bna_news_filter=health-law-and-business&criteria_id=264f0ae46c9dcaefefe9ad5f41696678

JUDGE RULES PURDUE MUST ANSWER QUESTIONS ABOUT DOCUMENTS SHOWING ANY LINK BETWEEN OXYCONTIN, BIRTH DEFECTS

In 2014, about 32,000 babies were born with neonatal abstinence syndrome (NAS), which dramatically increased from ten years before. NAS is “a group of conditions caused when the baby withdraws from certain drugs while exposed in the womb.” NAS causes birth defects and long-term problems in heart defects, spina bifida, cleft palates, and more. The syndrome has commonly been linked to opioid use while pregnant, specifically OxyContin. Purdue Pharma filed for reorganization in bankruptcy court in response to lawsuits that the company downplayed the risks of its painkillers and encouraged doctors to prescribe large amounts. Attorneys for 3,000 NAS children are attempting to obtain animal toxicology studies from Purdue that would link OxyContin to NAS. Based on information received from other companies affiliated with Purdue, lawyers assert that Purdue still has other documents to provide, including findings on studies done. According to the NAS attorneys, the judge has directed them to review all obtained documents and then would allow deposition of the records custodian. The lawyers are looking for toxicology reports, including those not submitted to the FDA, to prove the linkage between OxyContin and NAS.

Ed Silverman, Statnews.com, April 7, 2021,
<https://www.statnews.com/pharmalot/2021/04/07/purdue-oxycontin-birth-defects-sackler/>

FEDERAL-STATE HEALTH WAIVER TALKS ARE LESS INDULGENT, MORE OPEN

President Biden is starting strong in his tenure by being open with the public about rolling back Medicaid waivers. The U.S. Department of Health and Human Services recently provided notice to some states that it is rolling back the must-work rule for adults on Medicaid. This process aligns with administrative law playbooks, giving notice and the opportunity for a hearing in front of an HHS review board, decreasing the likelihood of litigation down the road. This is very different from past administrations whose Medicaid pilot programs involved backroom discussions and secret deals. This all changed with the passage of the Affordable Care Act in 2010, which introduced notice-and-comment requirements to waiver programs. Letters were sent out in March and April to alert four states that HHS was rolling back prior approval of the pilot programs under Section 1115 of the Social Security Act. Every waiver has a provision for the federal government to change the terms or conditions, but it has not been used until now. Work requirements led to 18,000 people being dropped from Medicaid in Arkansas within seven months. HHS stated it is ill-advised to require poor adults to work to receive health care during the pandemic.

Christopher Brown, BloombergLawnews.com. April 20, 2021,
https://www.bloomberglaw.com/bloomberglawnews/health-law-and-business/XDFQI5U0000000?bna_news_filter=health-law-and-business#jcite

ANOTHER SODA TAX BILL DIES. ANOTHER WIN FOR BIG SODA

Efforts to implement taxes on sugary drinks remain unsuccessful in many states and locales – most recently, California – as soft drink companies pour millions of dollars into lobbying efforts. A California bill that died in April would have undone a 2018 law that bars California cities from instituting their own sugary drink tax until 2031. Soft drink companies spent \$5.9 million on lobbying in California in the last four years, dining with public officials and donating to their campaigns and charities in exchange for support against a sugary drink tax. Lobbyists tend to be people

well connected to lawmakers, who know how legislatures operate from the inside. Public health officials argue that successful lobbying has tampered efforts to cut down on sugary drink consumption, which can contribute to diabetes and obesity. Four California cities with sugary drink taxes were grandfathered into the 2018 law. Other places with soda taxes include Boulder, Colorado; Philadelphia, Seattle, and the Navajo Nation. Those taxes contribute to public health department funds.

Samantha Young, Kaiser Health News, April 21, 2021,
<https://khn.org/news/article/another-soda-tax-bill-dies-another-win-for-big-soda/>