LEGISLATIVE ANALYSIS AND PUBLIC POLICY ASSOCIATION

Case Law Monitor

December 2020

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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NURSE DROPS SUBSTANCE USE DISORDER DISCRIMINATION SUIT AFTER COURT ORDERS HER TO REVEAL IDENTITY

***Jane Doe v. Main Line Hospitals, Inc.*, No. 2:20-cv-02637-KSM (E.D. Pa. suit dismissed Oct. 14, 2020).** For information on the facts and previous updates in this case, please refer to the October 2020 issue of the LAPPA *Case Law Monitor*, available here. A former nurse asked the court to dismiss her SUD-related employment discrimination suit after the court ruled that she must reveal her name to proceed. Plaintiff filed the notice of dismissal on October 14, a day before the court-ordered deadline to amend her complaint to reflect her true identity.

EEOC ALLEGES EMPLOYEE WRONGFULLY TERMINATED OVER PRESCRIPTION SUBOXONE USE

***Equal Employment Opportunity Commission v. Lonza America, Inc.*, No. 1:20-cv-00311-TRM-SKL (E.D. Tn. filed Nov. 6, 2020).** The Equal Employment Opportunity Commission (EEOC) filed a lawsuit on behalf of Michael Ingram against Lonza America, Inc. (Lonza), a chemical manufacturing company, alleging that the company violated Title I of the Americans with Disabilities Act and Title I of the Civil Rights Act when it unlawfully terminated Mr. Ingram on the basis of a disability. In 2013, Ingram, a 10-year employee of Lonza, began treatment for opioid use disorder which included the use of Suboxone through a medication for addiction treatment (MAT) program. In July 2017, Lonza subjected Ingram to a random drug screen. Ingram tested positive due to his Suboxone use, and Lonza immediately suspended him for violating the company's work rules and policies. Lonza required Ingram to attend psychological counseling through the company's employee assistance program and conditioned his return to work on discontinuing use of the Suboxone. In response, Ingram informed Lonza that he is in a MAT program and provided the company with a copy of his Suboxone prescription and a statement from his doctor. Lonza refused to allow Ingram to return to work. In November 2017, Ingram took another drug test and again tested positive as a result of his Suboxone use. Because of the second positive test, Lonza terminated Ingram's employment for not discontinuing the Suboxone. In this lawsuit, the EEOC asks the court to make Ingram whole by providing him with appropriate backpay, compensation for past and future pecuniary and nonpecuniary losses, and punitive damages. Additionally, the EEOC asks the court to grant a permanent injunction enjoining Lonza from discharging employees because of a disability and to institute and carry out policies, practices, and programs which provide equal employment opportunities for qualified individuals with disabilities or persons requesting reasonable accommodations. The case is ongoing, and no next steps have yet been announced.

NEBRASKA'S SUPREME COURT RULES INSURANCE COMPANY DOES NOT HAVE TO COVER THE COST OF METHAMPHETAMINE DECONTAMINATION

***Jeremy Kaiser v. Allstate Indemnity Company*, 307 Neb. 562 (2020).** The Supreme Court of Nebraska ruled that property loss caused by methamphetamine vapor and residue inside a rental house is not a covered peril under the landlord's rental insurance policy. The plaintiff, Jeremy Kaiser, owns rental property that he insures through Allstate. The policy at issue in this case covered most direct physical loss to the property but excluded from coverage any property loss consisting of or caused by certain perils, including: (1) vapors, fumes, acids, toxic chemicals, toxic gasses, toxic liquids, toxic solids, or waste materials; (2) contamination, including but not limited to, the presence of toxic, noxious, or hazardous gasses, or smog produced from the manufacturing of a controlled substance; (3) vandalism, unless it is sudden or accidental; or (4) any act of a tenant unless the act results in sudden and accidental direct physical loss caused by smoke not caused by the

manufacturing of controlled substances. In May 2013, Kaiser's tenants surrendered the property. Upon inspection of the house, Kaiser found evidence of methamphetamine use, manufacture, or both. Kaiser hired a testing company that discovered methamphetamine vapor and residue throughout the house and recommended decontamination. Kaiser submitted a claim to Allstate for the cleanup costs which Allstate denied. In February 2014, Kaiser filed a complaint against Allstate alleging breach of contract and bad faith. A state trial court granted Allstate's motion for summary judgment, concluding that the policy excludes coverage for Kaiser's cleanup costs. On appeal, Kaiser argued that the policy provides coverage via the "sudden or accidental" exceptions to the exclusions for vandalism and act(s) of a tenant. Kaiser based this argument on the rationale that, as a result of his tenants' producing or using methamphetamine indoors, methamphetamine vapor and residue "quickly bonded to most surfaces in the rental house." The trial record established that the tenants lived in the house for over a year and that Kaiser received reports from neighbors throughout that time that drug-related activity occurred at the house. While Kaiser did not know specifically when the tenants began producing or using methamphetamine, the evidence suggested that the damage to the house occurred on an ongoing basis over a significant period of time. Therefore, the Supreme Court of Nebraska ruled that Kaiser failed to meet the burden of proving that the sudden and accidental exception applies. Kaiser also argued that the district court erred in granting summary judgment because a genuine issue of material fact exists as to whether the tenants caused damage by producing or using methamphetamine. The court ruled that whether the methamphetamine vapor and residue were released through production or use is immaterial to the ultimate conclusion of law, as there is no dispute that methamphetamine vapor and residue caused the loss, and the policy contains a provision that a loss will be excluded from coverage if the predominant cause of the loss is excluded.

TWO INSURANCE COMPANIES MUST DEFEND GIANT EAGLE IN OPIOID CASES

***Giant Eagle, Inc., et al. v. American Guarantee and Liability Insurance Company, et al.*, No. 2:19-cv-00904-RJC (W.D. Pa. Nov. 9, 2020) (order granting declaratory judgment).** A federal district court judge ruled that two excess layer insurance companies must defend the grocery and pharmacy chain Giant Eagle in four lawsuits related to the opioid crisis because their contractual obligations rest on whether the policies potentially cover the damages sought. Giant Eagle faces a number of lawsuits currently a part of the federal multidistrict opioid litigation over its alleged role in contributing to the opioid crisis. During the relevant time period, Old Republic Insurance Company provided primary layer commercial general liability insurance to Giant Eagle, while American Guarantee and Liability Insurance Company (AGLIC) and XL Specialty Insurance Company (XL) provided excess layer coverage. In this declaratory judgment action, Giant Eagle asserted that it spent at least $5.7 million in defending against the underlying lawsuits, but that neither Old Republic nor AGLIC had reimbursed it for any of these purported costs. Moreover, Giant Eagle alleged that AGLIC refused to defend or indemnify it, and XL did not assume a defense. In ruling for Giant Eagle, the court distinguished the excess insurers' duty to indemnify from their broader duties to defend, stating that determining the duty to defend requires the court to look to whether the damages are potentially, rather than actually, covered under the policies. The court found that Giant Eagle established that the underlying lawsuits assert claims that are potentially covered by Old Republic's primary-layer policies, and thus also potentially covered by the AGLIC and XL excess policies. Accordingly, the court found that Giant's Eagle's payment of $5.7 million in defense costs in the multidistrict opioid litigation triggered the duty to defend under the AGLIC and XL policies. A case management conference took place on December 3, 2020, during which the court discussed the status of the case with the parties and the pending motion for reconsideration filed by AGLIC. The plaintiffs have until December 30, 2020 to file a response to the motion.

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

***Donna Hudnell v. Thomas Jefferson University Hospitals, Inc.*, No. 2:20-cv-01621-GJP (E.D. Pa. Sept. 25, 2020) (order granting private cause of action).** In a case of first impression for the Third Circuit (covering Delaware, New Jersey, and Pennsylvania), a federal district court ruled that Pennsylvania's Medical Marijuana Act (MMA) provides a private cause of action, thereby allowing workers to sue their employers for alleged discrimination based on their lawful use of marijuana. The plaintiff, Donna Hudnell, has a Commonwealth-issued license (card) allowing her to use medical marijuana to treat her back pain. After taking a leave of absence from work to have spinal surgery, Hudnell's employer, Thomas Jefferson University Hospital (Jefferson), required her to take a drug test. Hudnell's card expired prior to the test, but she was in the process of getting re-certified. After her test returned positive for marijuana, Jefferson fired Hudnell because, due to her lapsed card, Jefferson could not establish whether the positive test was the result of the lawful or illicit use of marijuana. Hudnell sued Jefferson, with the complaint including an MMA bias. In response, Jefferson argued that Hudnell cannot maintain a claim under the MMA because the statute does not provide a private right of action. In rejecting Jefferson's argument, the district court judge, who when interpreting unsettled Pennsylvania law must predict how the Pennsylvania Supreme Court would rule in the matter, concluded that the legislature intended to give workers the right to privately enforce the MMA even though the law does not expressly provide such a right. The court justified this reasoning based on the fact that: (1) the MMA does not provide for governmental agency enforcement; and (2) a private right of action is consistent with the MMA's purpose, which is to protect cardholders from job discrimination. In her lawsuit, Hudnell also filed disability and race bias claims under the Pennsylvania Human Relations Act and the Philadelphia Fair Practices Ordinance. The court, however, dismissed those counts, holding that she must wait and refile those claims after the Commonwealth's human rights commission either finishes investigating her complaint or fails to do so within one year of the date she filed the claim. Hudnell filed an amended complaint against Jefferson on November 4.

POLICE DID NOT VIOLATE FARMER'S FOURTH AMENDMENT RIGHTS WHEN FARMER VOLUNTARILY SHOWED POLICE HIS MARIJUANA GROWING OPERATION

***United States v. Lee Blomquist*, 976 F.3d 755 (6th Cir. 2020).**
The U.S. Court of Appeals for the Sixth Circuit affirmed the ruling of a Michigan district court holding that police did not violate a marijuana farmer's Fourth Amendment rights by exceeding the scope of a search warrant when the farmer voluntarily consented to giving the police a tour of his marijuana growing operation. The farmer, Lee Blomquist, grew and stored marijuana on his father's property. Local police issued a warrant to search the property after witnessing suspicious activity at the property by a known drug dealer. When the police arrived to search the property, Blomquist claimed he ran a legal medical marijuana operation and offered to show the officers his paperwork. At the officer's request, Blomquist showed the officers the greenhouses and the room where he stored the processed marijuana. Portions of the tour involved going to adjacent land owned by Blomquist's cousin not subject to the warrant. Despite Blomquist's representations about running a legal operation, Blomquist could not distribute medical marijuana in Michigan because of a prior federal drug felony. Moreover, he stored more marijuana on the property than Michigan law allows. Federal authorities charged Blomquist with manufacturing, possessing, distributing, and conspiring to distribute marijuana. Blomquist moved to suppress the evidence obtained during the search, arguing that police violated his Fourth Amendment rights by exceeding the scope of the search warrant in searching greenhouses on his cousin's property. The federal district court denied the motion to suppress, holding that

Blomquist voluntarily consented to the search. On appeal, Blomquist argued that he involuntarily consented to the search because of law enforcement intimidation and coercion. The Sixth Circuit rejected Blomquist's assertions, finding nothing in the record indicating Blomquist faced duress or coercion. The court ruled that the totality of the circumstances showed Blomquist voluntarily consented to the search. Blomquist has until January 21, 2021 to file a petition for rehearing *en banc* (*i.e.*, in front of all Sixth Circuit judges, not just a three-judge panel).

TRIAL COURT DOES NOT CERTIFY REQUEST FOR INTERLOCUTORY APPEAL IN CASE ABOUT INSURER'S DUTY TO DEFEND RITE-AID OPIOID LITIGATION

***Rite-Aid Corp. v. ACE American Insurance*, No. N19c-04-150 (Del. Super. Ct. Oct. 13, 2020) (order denying cert. of appeal).** For information on the facts and previous updates in this case, please refer to the October 2020 issue of the LAPPA *Case Law Monitor*, available here. As noted in the prior *Case Law Monitor*, a Delaware trial court ruled in favor of Rite-Aid on September 22, 2020. On October 2, 2020, the insurer, Chubb, sought interlocutory appeal. The Delaware Superior Court, however, refused to certify Chubb's application for certification of interlocutory appeal. In its request for certification, Chubb stated that the case involves fundamental rules of liability insurance that will govern coverage for the opioid lawsuits filed by government entities. The court, however, did not believe that the issues in Rite-Aid's case against Chubb are significant enough to overcome the threshold requirement for interlocutory appeal that there exists a substantial issue of material importance. Additionally, the court held that despite the complex insurance coverage issue, it does not involve novel legal principles and has no impact on the actual opioid litigation. While the trial court's failure to certify does not preclude the Supreme Court of Delaware from hearing the case, the high court can consider the certification decision when determining whether or not to take the appeal.

WALMART MUST DISCLOSE INTERNAL FILES RELATED TO ITS ALLEGED MISHANDLING OF OPIOIDS

***Norfolk County Retirement System v. Walmart, Inc.*, No. 2020-0482 (Del. Ch. Oct. 6, 2020) (order compelling production of documents); *Police and Fire Retirement System of Detroit v. Walmart, Inc.*, No. 2020-0478 (Del. Ch. Oct. 6, 2020) (order compelling production of documents).** For information on the facts and previous updates in this case, please refer to the August 2020 issue of the LAPPA *Case Law Monitor*, available here. On October 6, 2020, a Delaware state trial judge ruled that Walmart must disclose certain internal files related to its alleged mishandling of opioids sold through the company's in-store pharmacies. The files will be turned over to two pension funds who are accusing Walmart board members of turning a blind eye to excessively large sales of opioids. The court ordered Walmart to provide board discussions about opioid issues dating back to 2010. The case is ongoing, and no next steps have been announced as of yet.

RICO CLAIMS DISMISSED IN SAN FRANCISCO BELLWETHER OPIOID LAWSUIT

***City and County of San Francisco, et al. v. Purdue Pharma L.P., et al.*, No. 3:18-cv-07591-CRB (N.D. Ca. Sept. 30, 2020) (order partially granting motion to dismiss).** San Francisco's bellwether lawsuit seeking to hold drug marketers and distributors liable is moving forward despite the dismissal of the city's racketeering allegations by a federal judge. In a ruling made September 30, 2020, the judge determined that San Francisco

has a valid claim for public nuisance against the drug companies and further ruled that the city validly alleged that the defendants engaged in the distribution, marketing, and sale of opioids in a manner that fueled an illegal secondary market and caused hazardous conditions. The court also declined to dismiss the city's state law claims which allege violations of California tort, false advertising, and unfair competition laws. However, the court dismissed the city's claims under the Racketeer Influenced and Corrupt Organization Act (RICO), holding that the chain of causation between the defendants' alleged conduct and the city's recognized injuries is too tenuous. While San Francisco identified several injuries stemming from the opioid epidemic, the court determined that only its allegations of property damage tied to improper needle and syringe disposal qualify as an injury for RICO purposes, and the chain between this injury and the defendants' conduct involved too many links and intervening acts by third and fourth parties. The trial for this case is scheduled to begin October 25, 2021.

PHARMACEUTICAL MANUFACTURER MALLINCKRODT FILES FOR BANKRUPTCY

***In re: Mallinckrodt PLC.*, No. 20-12522-JTD (Bankr. Del. filed Oct. 12, 2020).** Pharmaceutical manufacturer Mallinckrodt filed for Chapter 11 bankruptcy protection in Delaware on October 12, 2020. According to news releases by Mallinckrodt and others, creditors and claimants will agree on a restructuring plan that hands ownership of the company to bondholders, provides no recovery to equity holders, and sets aside $1.6 billion to resolve all opioid litigation. The filing comes as Mallinckrodt prepares for two trials over accusations that it illegally marketed opioids and failed to properly oversee large shipments of opioids. Under bankruptcy law, litigation against the company will halt while the bankruptcy plan makes its way through the court process. The agreement behind the bankruptcy plan includes certain debtors, state attorneys general, and lawyers for municipalities that sued the company over its role in the opioid epidemic. According to Mallinckrodt, the company will set up a trust to oversee payments from the $1.6 billion fund to claimants and give them warrants to buy a stake in the reorganized company that could total nearly 20 percent.

WALMART FILES DECLARATORY JUDGMENT TO FEND OFF CLAIMS FROM THE DEPARTMENT OF JUSTICE

***Walmart Inc. v. U.S. Department of Justice, et al.*, No. 4:20-cv-00817-SDJ (E.D. Tx. filed Oct. 22, 2020).** Walmart filed a declaratory judgment action against the federal government in an effort to preempt regulators' claims that the company contributed to the opioid crisis by filling suspicious prescriptions for opioids in its pharmacies. The company argues that the U.S. Department of Justice (DOJ) and the U.S. Drug Enforcement Administration are using the company as a scapegoat to divert attention from the government's failures to effectively address the crisis. Walmart filed the suit in anticipation of the DOJ filing its own lawsuit against Walmart alleging the company mishandled opioids. In the complaint, Walmart alleges that it has a robust system to monitor opioid prescriptions and federal regulators are making unreasonable claims against it. Walmart asks the federal court for a declaratory judgment that the defendants may not impose liability under the Controlled Substances Act and its implementing regulations based on: (1) purported red flag obligations; (2) anything short of a knowing violation by Walmart pharmacists; (3) corporate-level dispensing policies; (4) nonexistent distribution duties; or (5) purported failures to submit suspicious order reports. The case is ongoing, and no next steps have been announced as of yet.

U.S. CHAMBER OF COMMERCE AND OTHERS SUPPORT JOHNSON & JOHNSON'S EFFORTS TO APPEAL OKLAHOMA OPIOID JUDGMENT

***State of Oklahoma, ex rel., Mike Hunter v. Johnson & Johnson, et al.*, No. DF-118474 (Okla. filed Dec. 9, 2019).** In October 2020, the Supreme Court of Oklahoma allowed the U.S. Chamber of Commerce, along with more than half a dozen pro-business and public policy groups and individuals, to file *amicus* briefs in support of Johnson & Johnson's bid to overturn a $465 million judgment against the company. In August 2019, a state trial court ordered Johnson & Johnson to pay $572 million to help address the opioid crisis in Oklahoma. The court later reduced the amount by nearly $107 million, acknowledging a miscalculation in determining how much the company must pay the state. In its *amicus* brief, the U.S. Chamber of Commerce argues that there is no basis in Oklahoma law for the manner in which the trial court applied the state's public nuisance statute. The Chamber of Commerce alleges that if the high court does not correct the judgment, Oklahoma may use the public nuisance statute to sue other companies over costs associated with things like the obesity epidemic or climate change. The American Tort Reform Association joined the Chamber of Commerce in its *amicus* brief. The Goldwater Institute also filed an *amicus* brief in support of Johnson & Johnson's appeal, arguing that the public nuisance statue is unconstitutionally vague and that the trial court's ruling violates the freedom of speech by not differentiating between false speech and speech that is only potentially misleading.

GEORGIA'S SUPREME COURT RULES HOSPITAL CAN ADD SUD TREATMENT BEDS WITHOUT OBTAINING NEW "CERTIFICATE OF NEED"

***Premier Health Care Investments, LLC v. UHS of Anchor, L.P.*, No. S19G1491 (Ga. Oct. 5, 2020).** The Supreme Court of Georgia reversed a lower court ruling that a hospital in rural Georgia must obtain a "certificate of need" (CON) before it reconfigures beds for its psychiatric and substance use disorder (SUD) patients. In 2005, the Georgia Department of Community Health (Department) created a rule, referred to as the "Psychiatric Rule," that requires hospitals to obtain a CON prior to establishing or expanding an acute care adult psychiatric and/or SUD treatment program. The rule defines expansion as "the addition of beds to an existing CON-authorized or grandfathered psychiatric and/or substance use disorder inpatient program." (Ga. Comp. R. & Regs. 111-2-2.26 (1)(a) and (2)(c)). In 2010, the defendant-appellant hospital, Premier (d/b/a Flint River), obtained a CON to establish a new, 12-bed adult psychiatric/SUD treatment program at one of its hospitals. Since that time, the hospital has used up to 18 additional beds for psychiatric/SUD patients, but has never exceeded its total licensed capacity of 49 beds. In 2016, plaintiff-appellee Anchor (d/b/a Southern Crescent), a competitor of Premier, complained to the Department that Premier violated its CON by having more than 12 psychiatric/SUD treatment beds. This complaint prompted a series of administrative reviews, which ultimately resulted in the Department concluding that Premier had not violated the law. Anchor subsequently sought judicial review of the Department's decision. A state trial court found for Premier. On appeal, an intermediate appellate court ruled that Premier must obtain a new CON because it redistributed beds for psychiatric/SUD patients beyond the number authorized by the CON. The Supreme Court of Georgia reversed the intermediate appellate court's decision, holding that the statute that governs which services require a CON (Ga. Code Ann. § 31-6-40 (a)) does not list the reallocation of beds as one of the services. Therefore, the court reasoned, because Premier only redistributed beds within an existing CON-approved psychiatric/SUD treatment program without exceeding the total number of approved inpatient beds for the facility, a new CON is unnecessary.

COURT FINDS DEFENDANT NOT ENTITLED TO IMMUNITY UNDER VIRGINIA'S RECENTLY AMENDED GOOD SAMARITAN FATAL OVERDOSE PREVENTION LAW

***Commonwealth of Virginia v. Kodie Brooke Weatherholtz*, No. CR20000459-00 (Va. Cir. Ct. Oct. 2, 2020).** For information on the facts and previous updates in this case, please refer to the October 2020 issue of the LAPPA *Case Law Monitor*, available here. A trial judge ruled that Virginia can prosecute Kodie Weatherholtz for methamphetamine possession because Weatherholtz does not qualify for immunity under Virginia's recently revised Good Samaritan fatal overdose prevention law (law). The law encourages people to call 911 during an overdose by offering immunity from arrest and criminal prosecution for certain drug charges, including possession. The law defines overdose as a "life-threatening condition resulting from the consumption or use of a controlled substance, alcohol, or any combination of such substances." (Va. Code Ann. § 18.2-251.03(A)). In this case, a bystander called 911 while Weatherholz experienced a drug-induced psychosis. According to the court, while Weatherholz's psychosis exhibited dangerous behavior, she faced no immediate risk of death and was not in a life-threatening situation. In support, the court cited testimony that Weatherholz displayed symptoms of psychosis the day before and woke up the day of the arrest continuing her delusional behavior. Because the psychosis continued for an extended period of time, the court ruled that her condition created no sense of urgency. The judge also worried that accepting Weatherholz's condition as an overdose could create a precedent in which the bar for arresting someone is too high. On December 1, 2020, the court held a pre-trial hearing where Weatherholtz pled guilty. As a first-time offender, she is eligible for a deferred disposition, meaning that if she meets the court's obligations during a one-year probationary time period, the court will dismiss her case without a finding of guilt.

SAFE INJECTION SITES

***United States v. Safehouse, et al.*, No. 20-1422 (3rd Cir. 2020) (oral arguments heard November 16, 2020).** For a summary of the facts of this case, please refer to the December 2019 issue of the LAPPA *Case Law Monitor*, available here. The U.S. Court of Appeals for the Third Circuit heard oral arguments for this case on November 16, 2020. The legal question presented is whether the operation of a supervised injection site violates the federal "crack house statute." (21 U.S.C.A. § 856). The law makes it illegal for anyone to maintain a place for the purpose of storing, using, or selling drugs. Much of the argument centered around whether Safehouse's purpose is covered by the statute. The government argued that Safehouse violates the statute because Safehouse's primary purpose is to facilitate drug use. One of the judges rejected this argument, stating that Safehouse plans to not only offer a consumption room, but also offer SUD treatment services and a syringe exchange program. The government's rebuttal to the judge's comment was that drug use on site is the necessary precondition for Safehouse to exist; that is, Safehouse would not be necessary if it did not offer a consumption room because other organizations already offer treatment and syringe exchange services in the Philadelphia area. Safehouse argued that its purpose is not to promote drug use, but instead to offer on-site medical care for drug use that would happen elsewhere if Safehouse did not exist. To provide an analogy for the court, Safehouse compared itself to an emergency room, stating that an emergency room does not exist to promote heart attacks but to treat them. The government responded by asserting that Safehouse argues for policy changes that the law, as currently written, prevents. It is unclear when the Third Circuit's decision will come down. The timing of the decision is relevant to the case because President-elect Joe Biden likely will replace the U.S. Attorney who brought the case.

INDIVIOR SOLUTIONS SENTENCED TO $289 MILLION CRIMINAL PENALTY

***United States v. Indivior Inc., et al.*, No. 1:19-cr-00016-JPJ-PMS (W.D. Va. Nov. 12, 2020).** For information on the facts and previous updates in this case, please refer to the August 2020 issue of the LAPPA *Case Law Monitor*, available here. A federal district court in Virginia sentenced Indivior Solutions to pay $289 million in criminal penalties in connection with a previous guilty plea related to its marketing of the opioid use disorder treatment drug, Suboxone. Altogether, Indivior Solutions will pay $600 million to resolve its civil and criminal liability in this matter. In total, the payments made by Indivior Solutions and its parent companies, Indivior Inc. and Indivior PLC, along with payments made under a 2019 agreement with Indivior's former parent, Reckitt Benckiser Group PLC, and criminal penalties paid pursuant to plea agreements with two former Indivior executives, will exceed $2 billion.

PURDUE PHARMA BANKRUPTCY PROCEEDINGS

***In re Purdue Pharma L.P.*, No. 19-23649 (Bankr. S.D.N.Y. filed Sept. 15, 2019).** The updates discussed below all relate to a settlement agreement entered into between the U.S. Department of Justice (DOJ) and Purdue Pharma (Purdue).

- The DOJ announced on October 21, 2020 that it reached an agreement with Purdue under which Purdue will plead guilty to federal criminal charges as part of a settlement of more than $8 billion. The company will plead guilty to three counts, including conspiracy to defraud the United States and violating federal anti-kickback laws. Under the agreement, Purdue will become a "public benefit company," meaning it will be governed by a trust and not by Purdue's current owners, the Sackler family. The deal does not release the Sackler family from criminal liability, and the criminal investigation involving the family remains ongoing. Under the proposal, Purdue will make a direct payment to the government of $225 million, which is part of a larger $2 billion criminal forfeiture. Additionally, Purdue faces a $3.54 billion criminal fine. The company also agreed to $2.8 billion in damages to resolve its civil liability.
- On November 10, 2020, a group of 24 states and the District of Columbia filed an objection to the settlements between Purdue and the DOJ.[1] The states assert that the deal violates bankruptcy rules because it amounts to a de facto plan of reorganization that is not subject to the plan confirmation requirements and other creditor protections set forth in the Bankruptcy Code. The states claim that if they do not agree to the settlement, they risk losing any potential payout in the bankruptcy because their claims would be diluted by the amount to be paid under the settlement. The states ask the bankruptcy judge to delay approving the settlement until creditors can vote on a bankruptcy plan. Additionally, a group of nine bankruptcy professors filed briefs with the court on the same day stating their concerns that the Purdue deal misuses the bankruptcy system and precludes a full airing of the Sackler family's responsibility for the opioid crisis. The professors argue that Purdue's settlement would essentially force creditors to go along with a separate plan that would release members of the Sackler family from future legal fights.
- Fifteen democratic senators signed on to a letter sent to the DOJ on November 10, 2020 requesting that it drop its efforts to transform Purdue into a public asset. The senators claim the proposed rebranding of the company would pressure state governments to own and operate a company in which they have no interest and that devastated their communities.
- After an all-day hearing on November 17, 2020, a federal bankruptcy court permitted the settlement between Purdue and the DOJ to move forward. In allowing the payment portion of the settlement, the judge described it as a critical building block in the effort to resolve the numerous lawsuits against Purdue. The court also ruled

[1] These states are: California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Idaho, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and Wisconsin.

that some members of the Sackler family can make a $225 million payment as part of a U.S. government settlement over civil claims tied to illegal opioid marketing without trampling on the rights of the company's other creditors. The court concluded that the payment would not frustrate the enforcement of any future judgments between or among states, local governments, and Purdue. The $225 million settlement resolves allegations that board members pressured Purdue executives to pump up OxyContin sales in 2012 when the legitimate market for the drug had dwindled. The judge also approved a reduced bonus of more than $700,000 for Purdue's Chief Executive Officer, who originally sought $1.3 million.

- More than 20 states filed a motion on November 18, 2020 demanding access to confidential documents as part of a probe into whether some members of the Sackler family engaged in misconduct when they managed Purdue. The states claim that the $225 million civil settlement payment provides a substantial reason to believe that some of the Sacklers committed crimes in operating the company and secreting its assets. The states' request is based on the crime/fraud exception to secrecy rules governing lawyer-client communications.
- Purdue officially plead guilty on November 24, 2020 to three federal criminal charges related to the company's role in creating the opioid crisis. Purdue Pharma's Board Chairman, Steve Miller, plead guilty on behalf of the company during a virtual federal court hearing.

NOTEWORTHY UPDATES IN NATIONAL OPIOID LITIGATION

***In re National Prescription Opiate Litigation*, No. 17-MD-2804 (N.D. Ohio filed Dec. 12, 2017).** According to news reports, McKesson Corporation, Cardinal Health, and AmerisourceBergen may pay $21 billion (or more) to resolve lawsuits accusing the companies of mishandling deliveries of opioids and fueling the opioid crisis in the United States. Regulatory filings made by the opioid distributors in early November 2020 disclose that a group of state attorneys general have proposed that the companies pay $21 billion over 18 years to settle more than 3,000 lawsuits filed by state and local governments against the companies. The proposal is $3 billion more than the one offered by the pharmaceutical companies in 2019, which was rejected by many states and municipalities. Cardinal Health and AmerisourceBergen have each reserved about $6.6 billion to settle claims, while McKesson has agreed to pay as much as $8 billion. Lawyers for the governments also are pushing to combine the distributors' settlement with a $5 billion deal to resolve all opioid suits against Johnson & Johnson. Getting the deal finalized will depend on whether or not state and local governments that are not part of the negotiating group support the plan.

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-assisted treatment in prisons, and the involuntary commitment and guardianship of individuals with alcohol or substance use disorders.

For more information about LAPPA, please visit: https://legislativeanalysis.org/.