LEGISLATIVE ANALYSIS AND PUBLIC POLICY ASSOCIATION

Case Law Monitor

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

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CALIFORNIA AGENCY IMPROPERLY ALLOWED CANNABIS BILLBOARDS ALONG HIGHWAYS

***Matthew Farmer v. Bureau of Cannabis Control*, San Luis Obispo, California Superior Court, Case No. 19-CV-0597 (opinion filed November 20, 2020).** On November 20, 2020, a California state trial court judge ruled that California's Bureau of Cannabis Control (BCC) overstepped its power when it adopted a regulation allowing cannabis advertising billboards along freeways. In 2016, Californians approved Proposition 64, which legalizes cannabis for adult use and directs the BCC to administer and enforce the law. Proposition 64 contains a provision that prohibits licensed cannabis businesses from "advertis[ing] or market[ing] on a billboard or similar advertising device located on an Interstate Highway or on a State Highway which crosses the California border." (Cal. Bus. & Prof. Code § 26152(d)). The BCC later issued rules interpreting the restriction to prohibit cannabis billboards and other outdoor advertising "located within a 15-mile radius of the California border on an Interstate Highway or on a State Highway that crosses the California border." (Cal. Code Regs. tit. 16 § 5040(b)(3)). Matthew Farmer, a San Luis Obispo County resident and father of two children, filed the suit due to concerns over his children seeing cannabis ads while traveling along U.S. Highway 101. In the suit, Farmer asserted that the BCC's regulation conflicts with state law and his status as a taxpayer gives him standing to challenge the rule. The trial judge granted Farmer's request for declaratory judgment and ordered the BCC to meet and confer with him to propose an order to withdraw the regulation and likely develop stricter guidance on cannabis advertising on interstate and state highways. On January 11, 2021, the court entered a final order requiring BCC to take all action necessary to revoke Cal. Code Regs. tit. 16 § 5040(b)(3) and inform state cannabis licensees of the change to the regulation. BCC provided this notice on January 21, 2021.

FIFTH CIRCUIT REINSTATES WORKER WITH PREVIOUS POSITIVE DRUG TESTS

***Union Pacific Railroad Co. v. American Railway and Airway Supervisors' Assoc., et al.*, U.S. Court of Appeals for the Fifth Circuit, Case No. 18-50110, --- Fed.Appx. --- (opinion filed December 16, 2020).** In a 2-1 decision not selected for publication in the Federal Reporter, the U.S. Court of Appeals for the Fifth Circuit ordered Union Pacific Railroad Company (Union Pacific) to reinstate a former employee who previously tested positive for cocaine and amphetamines. Roland Beltran, a member of the labor union American Railway and Airway Supervisors' Association (ARASA), worked as a car foreman for Union Pacific. In December 2010, Beltran tested positive for cocaine after a random drug test. Subsequently, Union Pacific reinstated Beltran, but only pursuant to a last-chance agreement, which stated that if Beltran violated Union Pacific's drug and alcohol policy again within a ten-year period, he would be dismissed permanently. In November 2014, Beltran tested positive for amphetamines and methamphetamine. Union Pacific conducted an investigation and hearing on the matter, during which Beltran testified that he ingested prescription and over-the-counter medications that could have led to a false-positive result. However, Union Pacific's medical review officer (MRO) testified that none of the medications Beltran reportedly took would cause a false positive for methamphetamine. In January 2015, Union Pacific terminated Beltran's employment. In accordance with their collective bargaining agreement, ARASA moved the matter to arbitration before a public law board (PLB). The PLB ordered Beltran to return to work without back pay but with his seniority and other benefits intact. In response, Union Pacific filed suit in Texas federal court seeking to set aside the ruling of the PLB. The district court granted Union Pacific's motion and vacated the arbitration ruling

concluding that the PLB decision violates public policy. On appeal, the Fifth Circuit reversed the decision, holding that Union Pacific failed to show that the arbitrator's conclusion that the second drug test resulted in a false positive and that Beltran should be reinstated was at odds with the MRO's determination. The court ruled that an arbitrator overseeing a case may disagree with an MRO's determination if the ultimate remedy does not conflict with other regulated procedures. In this case, the federal transportation laws governing random drug test procedures do not require the arbitrator to follow the MRO's conclusion about the validity of a test for purposes of personnel decisions. Therefore, the court ruled that the PLB's arbitration award did not violate public policy. While not completely disagreeing with the majority, the dissenting judge stated that there may be situations in which the arbitrator's ruling would violate public policy, such as if Beltran could only work in a safety-sensitive position. Union Pacific filed a petition for rehearing *en banc* (in front of all Fifth Circuit judges) on January 13, 2021. A response/opposition to the rehearing *en banc* by ARASA was due on February 1, 2021.

INDIANA RECOVERY HOUSE SPARKS LEGAL BATTLE IN FEDERAL COURT

***City of Crown Point, Indiana v. Pinnacle Treatment Centers, Inc., et al.*, U.S. District Court for the Northern District of Indiana, Case No. 2:20-cv-00359-PPS-JPK (suit filed September 1, 2020); *Pinnacle Treatment Centers, Inc. v. City of Crown Point, Indiana*, U.S. District Court for the Northern District of Indiana, Case No. 2:20-cv-00336-PPS-JPK (suit filed September 18, 2020).** On September 1, 2020, the City of Crown Point, Indiana filed a lawsuit against two companies, CapGrow Holdings (CapGrow) and Pinnacle Treatment Centers (Pinnacle), alleging that the recovery home (home) operated by the two companies violates the local zoning code. In this case, CapGrow acquired a residential property in Crown Point, Indiana and leased the home out to Pinnacle, a provider of alcohol and substance use disorder treatment, for use as temporary lodging for some of its patients. The home in question is zoned residential R-1, with only the following uses permitted: (1) single-family dwelling; (2) public and parochial schools; (3) public parks and playgrounds; (4) churches; (5) essential services; and (6) accessory uses. The zoning code's definition of "family" includes five or fewer persons unless additional residents are related by blood or marriage. Crown Point asserts that eight to ten non-related individuals stay in the home at any given time, and thus, by using the home as temporary lodging for more than five unrelated individuals, CapGrow and Pinnacle violate the zoning code. After the defendants failed to file a petition with Crown Point for a land use variance, the city filed a suit in state court seeking a permanent injunction enjoining, restraining, prohibiting, and preventing the defendants from operating the home in violation of the zoning code. Crown Point also asks the court to enter a declaratory judgment declaring that the defendants must submit a complete and proper use variance petition or a petition to rezone the home. On October 6, 2020, the defendants removed the case to federal court.

Meanwhile, Pinnacle filed a separate class lawsuit against Crown Point on September 18, 2020 in federal court on behalf of itself and all past, current, and future patients of the home. Pinnacle asserts that the individuals living at the home are disabled under the federal Fair Housing Amendments Act (FHAA) due to their history of substance use disorder. Because the home houses disabled individuals, Pinnacle argues that Crown Point has violated, and continues to violate, the FHAA by failing to provide the home with a reasonable accommodation. The reasonable accommodations desired by Pinnacle could include: (1) not enforcing any Crown Point ordinance that requires the residents to be members of the same family, so long as individuals meeting the definition of disabled under the FHAA reside at the property; and (2) not enforcing any Crown Point ordinance that prevents residents undergoing treatment for substance use disorder or otherwise disabled under the FHAA from living at the property. Pinnacle asks the court to enjoin Crown Point preliminarily and permanently from violating the FHAA.

On January 19, 2021, the court consolidated the cases for the purposes of discovery and all pretrial proceedings but left open the question of how the trials should proceed. Additionally, on January 19, the

parties agreed to stay the cases for 60 days to allow Pinnacle to pursue a variance with the local board of zoning appeals. Pinnacle must file a status report on or before March 22, 2021.

DRUG RING BUSTED AT THREE NORTH CAROLINA UNIVERSITIES

On December 17, 2020, federal prosecutors announced a bust of a large-scale drug trafficking ring throughout the campuses of the University of North Carolina at Chapel Hill, Duke University, and Appalachian State University. Federal authorities arrested 21 people, including many former students. Suspects in the case allegedly transported hundreds of kilograms of cocaine, LSD, MDMA ("Molly"), mushrooms, steroids, human growth hormone, Xanax, and other narcotics and sold these drugs out of fraternity houses. In November 2020, Francisco Javier Ochoa, Jr., a California man identified as the primary supplier to the drug ring, pled guilty and received a 73-month prison sentence and was ordered to pay a $250,000 forfeiture judgment. The investigation found that Ochoa shipped cocaine and other narcotics from California to North Carolina via the U.S. Postal Service. In addition to Ochoa, seven other individuals involved in the drug ring pled guilty to some of the charges against them. The criminal cases are ongoing in the U.S. District Court for the Middle District of North Carolina.

SAFE INJECTION SITES

***United States v. Safehouse*, U.S. Court of Appeals for the Third Circuit, Case No. 20-1422, --- F.3d --- (opinion filed January 12, 2021).** For previous updates on this case, please refer to the December 2020 issue of the LAPPA *Case Law Monitor*, available here. On January 12, 2021, the U.S. Court of Appeals for the Third Circuit, in a 2-1 decision, ruled that a proposed safe injection site in Philadelphia violates the federal "crack house statute." (21 U.S.C. § 856). The Pennsylvania District Court originally ruled that 21 U.S.C. § 856 does not preclude the Safehouse injection site because the site's purpose is to offer medical care, encourage treatment, and save lives. However, the Third Circuit reversed the district court's ruling, holding that Safehouse would violate the law if it "knowingly and intentionally" opens its site to visitors for the purpose of using drugs. Although the court noted that drug use is not the sole purpose of Safehouse, and it offers many other services in addition to the consumption room, the court held that many of Safehouse's services revolve around visitors using drugs within the building, which is enough to satisfy the statute. The majority found that the safe injection site clearly falls within the plain meaning of 21 U.S.C. § 856 and therefore, determined it unnecessary to look past the statutory text and to the legislative intent behind the law. Additionally, the majority ruled that applying §856 to Safehouse is a valid exercise of Congress's power over interstate commerce. In sum, while the majority found Safehouse's motives benevolent and applauded its effort to innovatively address the opioid crisis, the court stated that it must apply the law as written and not change it based on policy. The dissenting judge believed that the majority improperly construed the crack house statute to criminalize otherwise innocent conduct by an entity not named or described in the law. Additionally, the dissent argued that the government did not meet its burden of showing that drug use is one of Safehouse's motivating purposes. The Third Circuit remanded the case to the district court to consider Safehouse's assertion that the Religious Freedom Restoration Act provides a defense in this case to the government's enforcement of the Controlled Substances Act.

NINTH CIRCUIT FINDS JAIL NURSES ARE NOT ENTITLED TO QUALIFIED IMMUNITY

***Ana Sandoval, et al. v. County of San Diego, et al.*, U.S. Court of Appeals for the Ninth Circuit, Case No. 18-55289, --- F.3d --- (opinion filed January 13, 2021).** The U.S. Court of Appeals for the Ninth Circuit issued a partially split panel decision that three nurses at the San Diego Central Jail are not entitled to qualified immunity from claims that each failed to provide adequate medical care to a pre-trial detainee who overdosed and died while in custody. In February 2014, law enforcement officers arrested probationer Ronnie Sandoval for possession of methamphetamine and took him to the San Diego Central Jail. Unbeknownst to the officers, Sandoval swallowed a large amount of methamphetamine shortly prior to arrest in the hopes of avoiding discovery. While in jail, a deputy noticed that Sandoval was excessively sweating and disoriented, prompting him to bring Sandoval to the medical station. A nurse instructed the deputy to place Sandoval in a medical observation cell. The particular cell in which Sandoval was placed, however, was used as a mixed-use cell, meaning that it was used for medical observation when necessary, but could also be used just as a temporary isolation cell. Other than being informed by another staff member, there was no system in place for a staff member to know whether or not an individual in that cell needed to be medically observed. The nurse then failed to check on Sandoval during the remaining six hours of his shift and did not inform his replacement nurse about Sandoval's condition. The nurse on duty when Sandoval was placed in the mixed-use cell claimed that he believed Sandoval had been taken off of medical observation and was left in that particular cell for isolation. After eight, unmonitored hours, a sergeant walked by Sandoval's cell and noticed him unresponsive. A nurse on duty was instructed to call for paramedics but refused to do so and instead summoned emergency medical technicians (EMTs). It is of note that in San Diego, EMTs will not transport an unresponsive patient and thus, paramedics are needed when a patient is unresponsive. When the EMTs arrived at the jail, they informed the nurses that they would not be able to transport Sandoval in his current condition. Paramedics finally arrived 47 minutes after Sandoval was first observed to be unresponsive. Sandoval subsequently died after failed resuscitation efforts.

Sandoval's wife filed suit in state court against three nurses at the jail and the County of San Diego. The complaint alleged that: (1) the individual nurses violated Sandoval's Fourteenth Amendment rights by failing to provide Sandoval with adequate medical care; and (2) the county's policy of using a mixed-use medical observation cell also violated the law because it had the potential to harm a detainee. The defendants removed the case to federal court and moved for summary judgment, which the federal district court granted. On appeal, the Ninth Circuit reversed the district court's decision, and further held that the nurses were not entitled to qualified immunity. The court held that Sandoval's right to adequate medical care while in custody is well-established and that nurses acting reasonably would know their actions could amount to reckless disregard for his condition. Using an objective standard, the court found that the nurses acted deliberately indifferent to Sandoval's rights. The Ninth Circuit also reversed the district court's grant of summary judgment to San Diego County, finding that the plaintiff put forward sufficient circumstantial evidence to support the conclusion that the use of a mixed-use medical observation cell could lead to injury or death of a detainee. One of the panel judges concurred in the decision with respect to two nurses, but in dissent argued that the third nurse should be entitled to qualified immunity because Sandoval's widow did not sufficiently allege that the nurse subjectively knew about his condition. The Ninth Circuit remanded the case for further proceedings.

MICHIGAN'S MCLAREN HEALTH CARE REACHES DRUG DIVERSION SETTLEMENT

Settlement reached January 19, 2021. Michigan company McLaren Health Care Corporation (McLaren) agreed to pay the United States $7.75 million to resolve allegations that it violated certain provisions of the federal Controlled Substances Act (CSA). This represents the nation's largest settlement of its kind involving allegations of drug diversion at a health care system. According to a U.S. Drug Enforcement Administration (DEA) investigation, two McLaren pharmacies dispensed Schedule II drugs without written prescriptions and ignored "red flags" that McLaren's pharmacist-in-charge diverted those drugs. Additionally, several McLaren facilities allegedly violated the CSA's recordkeeping provisions, including failing to notify the DEA of known controlled substance thefts by employees. As part of the settlement with the U.S. government, McLaren admitted that: (1) the two pharmacies did not have written prescriptions for approximately 1,255 Schedule II prescriptions filled between May 2014 and February 2018; (2) a third McLaren pharmacy distributed controlled substances to an unregistered treatment facility between November 2015 and November 2017 without making a good faith inquiry into the DEA registration status of that facility; (3) a McLaren hospital did not notify the DEA of certain thefts of controlled substances between July 2007 and May 2019; (4) theft and diversion of controlled substances occurred at certain McLaren locations; and (5) some corporate policies failed to meet the requirements of the CSA and its regulations. As part of the settlement, McLaren entered into a three-year memorandum of agreement with the DEA that, among other things, prescribes the system's drug-handling responsibilities, mandates external controlled substance audits, and requires McLaren to institute a broad-based educational program focused on preventing drug diversion in the workplace.

INSYS THERAPEUTICS' FOUNDER PERMANENTLY BANNED FROM U.S. DRUG WORK

Food and Drug Administration Docket No. FDA-2020-N-1337 (debarment effective November 30, 2020). The U.S. Food and Drug Administration (FDA) issued a debarment notice for John Kapoor, the founder of Insys Therapeutics. In January 2020, a Massachusetts federal district court judge sentenced Kapoor to five and one-half years in prison for a racketeering scheme to boost sales of prescriptions of Subsys, the company's opioid painkiller designed for cancer patients. As a result of the FDA's action, once Kapoor is released from prison, he will be prohibited from providing services in any capacity to a person that has an approved or pending drug product application. Previous information about Kapoor's case can be found in the February 2020 issue of the LAPPA *Case Law Monitor*, available here.

INSYS THERAPEUTICS' FOUNDER SETTLES WITH NEW JERSEY OVER ROLE IN THE OPIOID CRISIS

***Gurbir Grewal v. Insys Therapeutics Inc., et al.*, Superior Court of New Jersey, Chancery Division, Case No. MID-C-1-18 (consent judgment issued January 21, 2021).** John Kapoor, the former CEO of Insys Therapeutics, agreed to pay the State of New Jersey $5 million to settle allegations over his role in fueling the opioid crisis. The settlement resolves a civil lawsuit filed in 2017 by the New Jersey Attorney General and the Division of Consumer Affairs against Kapoor asserting violations of the New Jersey Consumer Fraud Act and False Claims Act. According to information released by the Attorney General, Kapoor will make an initial $1

million lump sum payment to New Jersey, followed by another $4 million in one lump sum after Kapoor satisfies the monetary obligation imposed in his federal criminal case. The Attorney General indicates that New Jersey will use most of the settlement amount to fund the state's efforts to combat the opioid crisis, with the remainder divided among state agencies affected by the fraudulent scheme. The settlement also prohibits Kapoor from owning any New Jersey business or possessing more than ten percent of stock in any company doing business in the state. Kapoor did not admit liability in connection with the New Jersey settlement. The settlement with the Attorney General does not resolve New Jersey's ongoing claims against Insys, which filed for Chapter 11 bankruptcy protection in June 2019.

OKLAHOMA SEEKS $9.3 BILLION IN DAMAGES FROM JOHNSON & JOHNSON

***State of Oklahoma, ex rel., Mike Hunter v. Johnson & Johnson, et al.*, Oklahoma Supreme Court, Case No. DF-118474 (suit filed December 9, 2019).** For previous updates and facts about this case, please refer to the December 2020 issue of the LAPPA *Case Law Monitor*, available here. In a briefing submitted to the Oklahoma Supreme Court on December 7, 2020, Oklahoma asks the court to order Johnson & Johnson to pay more than $9.3 billion to cover the entire anticipated cost of combatting the state's opioid crisis. In 2019, a state trial court ordered Johnson & Johnson to pay $465 million for its role in the oversupply of opioids in the state. Johnson & Johnson and several subsidiaries appealed the verdict. On appeal, Oklahoma argues that the awarded damages are too low and would only cover one year of the state's abatement plan. The state asserts that there is undisputed evidence showing that Oklahoma's opioid crisis will take 20 years to abate and the court should require Johnson & Johnson to provide complete relief. Alternatively, Oklahoma's brief presents a plan in which Johnson & Johnson would be ordered to pay $465 million every year for 20 years or until the trial court determines the crisis has been abated, whichever comes first. The pharmaceutical company appellants have until February 9, 2021 to file their combined reply brief and answer brief.

AMERISOURCEBERGEN MUST TURN OVER OPIOID FILES TO PENSION FUNDS

***AmerisourceBergen Corp. v. Lebanon County Employees' Retirement Fund*, et al., Delaware Supreme Court, Case No. 60, 2020, --- A.3d ---, (opinion filed December 10, 2020).** The Delaware Supreme Court ruled that AmerisourceBergen Corp. must turn over files to two pension funds investigating AmerisourceBergen's leaders over the drug distributor's role in the opioid crisis. Affirming a January 2020 trial court decision, the Supreme Court held that a corporate shareholder proceeding under a proper investigatory purpose generally does not have to identify the particular course of action that it will take or establish that the wrongdoing under investigation is actionable. Thus, AmerisourceBergen's argument that the pension funds only wanted access to its files because the funds would be suing was not a valid defense. The two pension plans originally made the records requests after several plaintiffs filed lawsuits related to the opioid crisis against AmerisourceBergen. The pension funds argued that the company should account to its investors about whether wrongdoing by the company's board is to blame for its legal exposure. The court decision forces AmerisourceBergen to make significant disclosures to a Teamsters health plan and a municipal pension. The Supreme Court remanded the case to the trial court for further proceedings.

CALIFORNIA STATE AGENCIES DO NOT HAVE TO TURN OVER OPIOID DATA IN MARKETING SUIT

***Board of Registered Nursing v. Superior Court of Orange County*, California Court of Appeals, Fourth District, Case No. D077440, --- Cal.Rptr.3d. --- (opinion filed January 15, 2021).** A California intermediate appellate court ruled that four California agencies do not have to produce data related to opioid prescriptions, complaints, and deaths as part of the state's deceptive marketing suit against pharmaceutical companies. This case stems from a suit filed by California against several pharmaceutical companies who allegedly engaged in deceptive marketing practices to encourage doctors to prescribe opioids by misrepresenting their safety for non-cancer pain. As a result of the lawsuit, the defendant pharmaceutical companies sought to obtain extensive information regarding opioid prescriptions and use in California. The pharmaceutical companies served business records subpoenas on the California Medical Board, Pharmacy Board, Board of Registered Nursing (Nursing Board), and the California Department of Justice (DOJ), broadly seeking documents and communications related to opioid use, opioid use disorder, opioid treatment, and opioid related disciplinary proceedings over the preceding 30 years. The pharmaceutical companies considered the documents necessary because they allegedly directly relate to matters of causation, comparative fault, apportionment, and damages in their case. The Pharmacy Board, the Medical Board, and the DOJ objected to production, and the Nursing Board filed a motion for a protective order. A state trial court ordered the agencies to produce the documents subject to redaction of some personal identifying information contained in the documents. On appeal, the state agencies asserted that the documents sought: (1) do not meet the standards for nonparty discovery because the defendants did not give notice to individuals whose personal information might be released; and (2) are protected by the constitutional right to privacy. The intermediate appellate court agreed with the California agencies. Relying on California statutory law addressing deposition subpoenas seeking "personal records pertaining to a consumer" (Cal. Civ. Proc. Code § 2020.410(d)), the court held that because the subpoenas sought the personal information of investigated or disciplined health care professionals without redaction, the defendants must provide notice to these individuals. Although the trial court allowed for the redaction of personal identifying information of patients, complaining parties, and witnesses, the appellate court noted that the personal identifying information of the investigated or disciplined health care professionals was not redacted. Accordingly, the state agencies properly refused to produce such information because the pharmaceutical companies did not provide notice to these individuals. The appellate court also ruled that the individuals' interest in confidentiality outweighs the pharmaceutical companies' interest in obtaining the documents, which the court thought had little or no relevance to California's complaint. The appellate court directed the trial court to grant the Nursing Board's motion for a protective order and vacate its production orders, to be replaced by orders denying the motions to compel production.

U.S. DEPARTMENT OF JUSTICE ALLEGES WALMART VIOLATED THE CONTROLLED SUBSTANCES ACT

***United States v. Walmart, Inc., et al.*, U.S. District Court for the District of Delaware, Case No. 1:20-cv-01744-CFC (suit filed December 22, 2020).** In December 2020, the U.S. Department of Justice (USDOJ) filed a civil complaint against Walmart in federal court in Delaware alleging that Walmart unlawfully dispensed controlled substances from the pharmacies it operates and unlawfully distributed controlled substances to those pharmacies throughout the opioid crisis. In the complaint, the USDOJ asserts that Walmart violated the federal Controlled Substances Act (CSA) by knowingly filling thousands of controlled substance prescriptions not issued for legitimate medical purposes or in the usual course of medical or pharmacy practice. Additionally, the USDOJ claims that Walmart, as the operator of its own distribution centers, received thousands of suspicious orders for prescriptions that it failed to report to the U.S. Drug Enforcement

Administration (DEA) as required by the CSA. If Walmart is found liable for violating the CSA, it could face civil penalties of up to $67,627 for each unlawful prescription filled and $15,691 for each suspicious order not reported. The USDOJ is also asking the court for injunctive relief to address and restrain Walmart's violations of the law. The case is ongoing, and next steps have not yet been announced. In related news, Walmart filed a declaratory judgment action against the federal government in a federal court in Texas in October 2020 in an effort to preempt claims from the USDOJ. Additional information on this case (*Walmart Inc. v. U.S. Department of Justice, et al.)* is available in the December 2020 issue of the LAPPA *Case Law Monitor*, available here. In the Texas declaratory judgment action, the government filed a motion to dismiss on December 4, 2020 for lack of jurisdiction. Walmart submitted its response in opposition to the motion on January 6, 2021. A hearing on the motion to dismiss occurred on January 26, 2021.

WALMSRT SUED BY SHAREHOLDERS OVER ITS ROLE IN THE OPIOID CRISIS

***Richard Stanton v. Walmart Inc. et al.*, U.S. District Court for the District of Delaware, Case No. 1:21-cv-00055-UNA (suit filed January 20, 2021).** A proposed class of shareholders filed suit against Walmart Inc. in Delaware federal court claiming that the company concealed its role in the opioid crisis and the extent to which it unlawfully distributed controlled substances from pharmacies. Richard Stanton seeks to represent shareholders who acquired Walmart stock between March 30, 2016 and December 22, 2020. Stanton claims that the defendants violated Section 10(b) of the Exchange Act (15 U.S.C. § 78j(b)) and Rule 10b-5 promulgated thereunder by the Securities Exchange Commission (SEC) by concealing Walmart's alleged role in the opioid crisis in public statements to investors. The complaint alleges that after the "truth" came out in the Department of Justice's lawsuit (*United States v. Walmart, Inc., et al.*, discussed above), Walmart's stock price fell by almost two percent. Additionally, the complaint alleges that the individual defendants in the suit, C. Douglas McMillon, Walmart's Chief Executive Officer and President, and M. Brett Biggs, Walmart's Chief Financial Officer and Executive Vice President, violated Section 20(a) of the Exchange Act (15 U.S.C. § 78t) by participating in the alleged unlawful conduct that artificially inflated the market price of Walmart securities. Stanton asks the court for damages on behalf of himself and the class.

PURDUE PHARMA BANKRUPTCY PROCEEDINGS

***In re Purdue Pharma L.P.*, No. 19-23649 (Bankr. S.D.N.Y. filed Sept. 15, 2019).**

- On December 15, 2020, the bankruptcy court granted Purdue Pharma's (Purdue's) latest motion for more time to file its Chapter 11 plan. This is the third extension received by the company. Purdue asserted that it needs more time to resolve issues surrounding the litigation against the company's owners before it can file its Chapter 11 plan. The new deadline to file the reorganization plan is February 15, 2021. As part of the motion, Purdue also asked to push back the deadline for votes on the plan to May 17, 2021.
- On December 17, 2020, two members of the Sackler family that owns Purdue, David and Kathe Sackler, appeared before a U.S. Congressional committee investigating the family and the company's role in the national opioid addiction and overdose epidemic. At the hearing, the Sacklers acknowledged that Purdue's OxyContin played a role in the opioid epidemic but did not apologize or admit any wrongdoing with respect to their individual roles. At the hearing, Kathe Sackler stated that knowing what she knew previously, there was nothing she would have done differently. The hearing came three weeks after Purdue pled guilty to three criminal charges as part of a settlement with the U.S. Department of Justice.

PHARMACEUTICAL COMPANIES SUBJECT TO TENNESSEE'S DRUG DEALER LIABILITY ACT

***Jared Effler, et al. v. Purdue Pharma L.P., et al.*, Supreme Court of Tennessee, Case No. E2018-01994-SC-R11-CV, --- S.W.3d --- (opinion filed December 17, 2020).** For previous updates on this case, please refer to Volume 1, Issue 1 of the LAPPA *Case Law Monitor*, available here. The Supreme Court of Tennessee ruled that pharmaceutical companies can be sued under Tennessee's Drug Dealer Liability Act (DDLA). (Tenn. Code Ann. § 29-38-101, *et seq*.). This case began in 2017 when seven state district attorneys, and two Baby Doe plaintiffs harmed by exposure to opioids in utero, sued several drug companies under the DDLA. The plaintiffs alleged that the companies knowingly participated in the illegal drug market by intentionally flooding East Tennessee with prescription opioid medications, leading to widespread substance use, misuse, and diversion of opioids into the black market. A state trial court ruled that the DDLA did not apply and dismissed the case, but an intermediate court of appeals reversed. On appeal to the state supreme court, the court had to determine whether: (1) the district attorneys have standing to sue under the DDLA; and (2) the DDLA applies to drug companies based on allegations that the drug companies knowingly participated in the illegal drug market. The Tennessee Supreme Court ruled that the district attorneys do not have standing to sue under the DDLA because the Act does not mention district attorneys in the enumerated list as potential parties to a suit. The attorneys argued that the Act grants them standing under Section 106(a) as "governmental entities." (Tenn. Code Ann. § 29-38-106(a)). However, the court ruled that the absence of district attorneys from the enumerated list of parties who may bring a claim under the DDLA demonstrates that the legislature did not intend for district attorneys to have standing to sue under the Act. Additionally, the court found that the attorneys' broad discretion in administering criminal justice does not translate into an entitlement to bring a civil suit not authorized by the DDLA. Nevertheless, the state supreme court ruled that the Baby Doe plaintiffs state a claim against the drug companies under the DDLA. The court determined that the plain meaning of the language of the DDLA suggests that it applies to a corporation that knowingly distributes or commits an act intended to facilitate the production, marketing, distribution, or sale of opioids to a person who does not have a valid prescription. The Baby Doe plaintiffs asserted that the drug companies knew that and intended for unscrupulous doctors, pill mills, or others on the street to distribute the drugs to persons not registered to receive them. The court ruled that if the Baby Doe plaintiffs can prove their allegations at trial, a jury could reasonably conclude that the drug companies knowingly participated in the illegal drug market. The court remanded the case to the trial court in Campbell County, Tennessee for further proceedings.

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/.