

# Case Law Monitor

APRIL 2022

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](mailto:info@thelappa.org).

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## U.S. SUPREME COURT CONSIDERS REVIEWING STATE COURT SPLIT OVER FEDERAL PREEMPTION OF STATE MARIJUANA LAWS

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***Susan Musta v. Mendota Heights Dental Center, et al.*, U.S. Supreme Court, Case No. 21-676 (call for Solicitor General's brief February 22, 2022); *Daniel Bierbach v. Digger's Polaris, et al.*, U.S. Supreme Court, Case No. 21-998 (call for Solicitor General's brief February 22, 2022).** In February 2022, the U.S. Supreme Court invited the U.S. Solicitor General to file a brief on behalf of the United States in two separate cases seeking review on federal preemption of state marijuana laws. In 2003, Minnesota dental hygienist Susan Musta injured her spine while attempting to catch a falling patient. In 2019, after several surgeries spanning 16 years and numerous treatments that failed to alleviate her pain, she received approval to use medical marijuana. Musta sought reimbursement from her employer via its insurer, following Minnesota's workers' compensation law. Her employer and insurer refused to reimburse her on the grounds that the federal Controlled Substances Act's prohibition of marijuana possession preempts any state order requiring reimbursement for marijuana. The Minnesota Workers' Compensation Court concluded that federal law imposes no such prohibition on reimbursement, and the Workers' Compensation Court of Appeals affirmed. The Minnesota Supreme Court reversed the decision, although it acknowledged "the ongoing tension between the states and the federal government regarding cannabis regulation, and the objectives of the Minnesota workers' compensation system." In 2004, Daniel Bierbach suffered a work-related ankle injury from an all-terrain vehicle he was driving. In 2018, he enrolled in Minnesota's medical marijuana program due to his continuing pain and sought reimbursement from his employer. Like Musta, his request was denied, the Workers' Compensation Court found in his favor, the Workers' Compensation Court of Appeals affirmed, and the Minnesota Supreme Court reversed. Musta and Bierbach separately sought writs of certiorari from the U.S. Supreme Court on November 4, 2021 and January 11, 2022, respectively. State supreme courts across the U.S. are split on whether federal prohibition of marijuana preempts state laws that require reimbursement for

medical marijuana; Maine, like Minnesota, ruled that federal law does preempt state law, but the New Hampshire and New Jersey highest courts found the opposite. The U.S. Supreme Court has not granted either petition for certiorari, and likely will not, prior to the filing of the Solicitor General’s brief. The brief has not yet been filed in either case.

## ORAL ARGUMENT HELD AT U.S. SUPREME COURT IN DOCTORS’ “GOOD FAITH” DEFENSE CASES

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***Xiulu Ruan v. United States*, U.S. Supreme Court, Case No. 20-1410 (oral argument heard March 1, 2022); *Shakeel Kahn v. United States*, U.S. Supreme Court, Case No. 21-5261 (oral argument heard March 1, 2022).** For previous updates on these now-consolidated cases, please refer to the February 2022 issue of the LAPP *Case Law Monitor*, available [here](#). On March 1, 2022, the U.S. Supreme Court heard oral arguments in a pair of cases to resolve a circuit split over what constitutes “good faith” efforts by doctors to meet their obligations under the federal Controlled Substances Act (CSA) when dispensing controlled substances. The justices’ questions focused on differentiating between doctors who violate the standard of care despite a sincere belief that they are acting within professional norms—a regulatory violation—and doctors who criminally overprescribe medication. Chief Justice Roberts raised hypotheticals about a driver exceeding the speed limit out of ignorance versus one who knew the speed limit but thought it should be higher. Justice Alito began a discussion of the grammatical function of adverbs while parsing the CSA’s exception that forbids the distribution of controlled substances “except as authorized.” The justices’ questions did not appear to follow usual ideological divides and gave little clue to how the case will ultimately be decided.

## REPORT CONCLUDES INDIANA STATE NURSING BOARD DISCRIMINATES AGAINST NURSES USING MAT

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**DJ # 204-26S-205 (investigation report release March 25, 2022).** The U.S. Department of Justice (DOJ) found that the Indiana State Board of Nursing (Nursing Board) violated the Americans with Disabilities Act by prohibiting nurses who take medication for addiction treatment (MAT) from participating in the Indiana State Nursing Assistance Program (Program). The Program assists in rehabilitating and monitoring nurses with substance use disorders and often requires nurses to participate in the Program in order to maintain an active license or have one reinstated. The DOJ opened the investigation in response to a complaint from a nurse asserting that she could not participate in the Program because she takes MAT. The investigation confirmed the complainant’s assertion, as the letter of findings released March 25, 2022 asks the Nursing Board to work with the DOJ to resolve the civil rights violations identified during the investigation.

## FEDERAL CIRCUIT UPHOLDS INVALIDATION OF ADAPT PHARMA’S NARCAN PATENTS

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***Adapt Pharma Operations v. Teva Pharmaceuticals USA, Inc.*, U.S. Court of Appeals for the Federal Circuit, Case No. 20-2106 (opinion filed February 10, 2022).** For previous updates on this case, please refer to the August 2021 issue of the LAPP *Case Law Monitor*, available [here](#). In a 2-1 split decision, the U.S. Court of Appeals for the Federal Circuit upheld a June 2020 ruling issued by a New Jersey district court which invalidated Adapt Pharma Inc.’s (Adapt) patents for naloxone nasal spray (Narcan) as “obvious.” In the context of patent infringement, “obvious” means that prior to a patent’s issuance, a person with ordinary skill in “the art” (here, manufacturing drugs) could combine aspects of existing treatments (that is, use “prior art”) to reach the patented solution. The Federal Circuit majority agreed with the district court that using a naloxone

nasal spray to treat opioid overdose was not a new concept in March 2015, the time of invention. The majority ruled that after the U.S. Food and Drug Administration (FDA) issued a request for an improved naloxone product in April 2012, a “skilled artisan” (here, a drug manufacturer) would have been able to combine existing technology to create a product similar to Adapt’s patent. This ruling paves the way for Teva Pharmaceuticals and other pharmaceutical companies to make generic versions of Narcan 15 years earlier than if courts had found the patents valid. The dissenting judge argued that Adapt’s formulation only seems obvious in hindsight and that the majority’s misapplication of the law will disincentivize pharmaceutical companies to search for drug improvements and deter research in the areas in which the FDA has mentioned the need for improvement. On March 14, 2022, Adapt filed a petition in the Federal Circuit for a rehearing *en banc*.

## U.S. DEPARTMENT OF JUSTICE FILES SUIT AGAINST PENNSYLVANIA COURT SYSTEM

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***United States v. The Unified Judicial System of Pennsylvania, U.S. District Court for the Eastern District of Pennsylvania, Case No. 2:22-cv-00709-MSG (suit filed February 24, 2022).*** The U.S. Department of Justice (DOJ) filed suit against the Unified Judicial System of Pennsylvania (UJS) asserting that its policies violate Title II of the Americans with Disabilities Act (ADA). In the complaint, the DOJ identifies three individuals with opioid use disorder who assert discrimination by UJS courts, specifically, the Northumberland and Jefferson County Courts of Common Pleas. Two of the individuals assert that the Jefferson County Court ordered all probationers to stop using their prescribed medication for addiction treatment (MAT). The third individual mentioned in the complaint asserts that the Northumberland County Court required her to stop using her prescribed MAT to graduate from drug court. The DOJ asked the Pennsylvania district court to order UJS to adopt or revise its policies to explicitly state that no UJS court may discriminate against, exclude from participation, or deny the benefits of their services to qualified individuals with disabilities because they take prescribed MAT. Additionally, the DOJ asks the court to award compensatory damages to the complainants for injuries caused by the ADA violations. Three weeks before filing the suit, attorneys from the DOJ’s Civil Rights Division sent a letter to UJS notifying it that the courts engaged in discriminatory practices.

## MASSACHUSETTS TRIAL COURT SETTLES DISABILITY DISCRIMINATION CASE

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The U.S. Attorney’s Office for the District of Massachusetts reached a settlement with the Massachusetts Trial Court system (Trial Court) to resolve allegations that its drug courts violated the Americans with Disabilities Act by discriminating against individuals with opioid use disorder. The agreement stems from a complaint filed with the U.S. Attorney’s Office asserting that the Trial Court discriminated against drug court participants taking medication for addiction treatment (MAT). According to the complaint, as a condition of participating in drug court, participants face pressure and, in some cases, commands to stop taking MAT, without obtaining permission to do so by a medical professional. Additionally, the complaint asserts that drug court personnel, none of whom are medically trained, required or pressured drug court participants to specifically and exclusively take naltrexone (Vivitol) as a condition of participation in the drug court, without regard to whether a health professional recommended that specific treatment option over others. Under the terms of the settlement agreement, all 25 Massachusetts drug courts must implement a new policy in which only licensed prescribers or opioid treatment programs can make decisions regarding a participant’s treatment plan, including the type of medication and dosage. Per the policy, drug courts and drug court personnel may not interfere with individualized assessments for MAT and will not express a preference for, or mandate, one form of MAT over another.

## MOTHER SUES KENTUCKY JAIL AFTER DAUGHTER DIES IN RESTRAINT CHAIR WHILE DETOXING

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***Debbie Arlinghaus v. Campbell County Detention Center, et al.*, U.S. District Court for the Eastern District of Kentucky, Case No. 2:22-cv-00012-WOB-CJS (suit filed January 7, 2022).** The mother of a Kentucky woman sued the Campbell County (KY) Detention Center for wrongful death after her daughter, Jessica Vanover, died while she was in custody. Police originally arrested Vanover for public intoxication due to a controlled substance. At the time of her arrest, Vanover informed police that she relapsed with methamphetamine. While in custody at the detention center, Vanover physically assaulted a deputy. In response, the deputy placed Vanover in a restraint chair. The deputy monitored Vanover in the restraint chair for two hours before his shift ended. After the deputy left work, Vanover remained in the restraint chair overnight and spent a total of 16 hours in the restraint chair before she died. The plaintiff's complaint alleges that the restraint chair's instructions inform the user that detainees should not be left in the chair for more than two hours unsupervised or eight hours with proper medical supervision. Additionally, the complaint alleges that the chair's manufacturer does not recommend that any individual be restrained for more than 10 hours, as it could cause injury or death. The plaintiff asserts that the defendants acted with deliberate indifference to Vanover's medical needs, despite knowing that she recently used methamphetamine, and failed to provide her with medical treatment. Furthermore, the plaintiff argues that the continued use of the restraint chair constituted a "malicious and sadistic" use of force in direct violation of the Eighth Amendment of the U.S. Constitution. The defendants removed the case to federal court on February 9, 2022 and filed their answer on February 18. A docket call was scheduled for April 5, 2022.

## LAWSUIT ALLEGES NEW YORK JAIL'S POOR CONTROL OF CONTRABAND LED TO INMATE'S DEATH

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***Susan Rollins v. County of Nassau, et al.*, U.S. District Court for the Eastern District of New York, Case No. 2:22-cv-00808-GRB-ARL (suit filed February 12, 2022).** The mother of a man who died from a fentanyl overdose in December 2018 in a Nassau County (NY) jail, filed a wrongful death lawsuit against the county and county officials. Susan Rollins asserts that her son, Kevin Rollins, died because county officials ignored a drug-related contraband problem at the jail. The complaint argues that the county knew of the contraband issue but failed to take any corrective action. The complaint cites a January 2021 story from a local media outlet that revealed that county jail officials seized controlled substances or drug paraphernalia 237 times in a four-year period ending in summer 2019. Additionally, the complaint mentions a New York State Commission of Correction's report from 2021 that found that the jail had an inadequate policy for contraband searches. The lawsuit asserts these reports demonstrate the jail's "long and disturbing history" of neglecting the health and safety of inmates and violating the Fourteenth Amendment rights of pre-trial detainees. Rollins maintains that the reckless and unconstitutional conduct of the county and county officials directly caused her son's death. Rollins asks the court to award her compensatory and punitive damages for all claims for relief in an amount no less than \$20 million. The defendants' answer to the complaint was due by March 29, 2022.

## SETTLEMENT REACHED IN NORTH CAROLINA WRONGFUL DEATH SUIT

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***Jason Blackwell v. Derrick Palmer, et al.*, U.S. District Court for the Western District of North Carolina, Case No. 1:20-cv-00146-MR-WCM (settlement reached January 3, 2022).** A lawsuit filed by the estate of Joshua Long, a man who died after overdosing on methamphetamine while in the custody of the Cherokee

County (NC) Sheriff's Department, reached a settlement for \$1.8 million. In the June 2020 complaint, Long's estate alleged that the Sheriff Department's failure to provide Long with any medical screening or to react to his potential ingestion of an unknown quantity of a controlled substance and then failing to send him for emergency medical treatment in a timely manner resulted in Long's death. The estate asserted a wrongful death claim, arguing that Long should have been sent for medical evaluation hours before his medical emergency intensified.<sup>1</sup> On January 3, 2022, the federal district court judge approved the settlement.

## INMATES FILE CLASS ACTION AGAINST NEW YORK JAIL OVER ITS MAT BAN

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***M.C. and T.G. v. Jefferson County, New York, et al., U.S. District Court for the Northern District of New York, Case No. 6:22-cv-00190-DNH-ATB (suit filed March 1, 2022).*** The New York Civil Liberties Union filed a class action lawsuit against Jefferson County (NY) over its policy of denying medication for addiction treatment (MAT) to people with opioid use disorder. The lawsuit names plaintiffs M.C. and T.G. who represent a class of individuals currently incarcerated at the Jefferson County Jail (jail) who stopped taking their MAT due to jail policy. The jail has a blanket policy of denying prescribed MAT to inmates unless the inmate is pregnant. According to the complaint, even when a physician prescribes MAT as medically necessary, the jail's medical staff nonetheless refuses to provide the inmate with MAT. The plaintiffs assert that the defendants' conduct violates Title II of the Americans with Disabilities Act, the Eighth and Fourteenth Amendments of the U.S. Constitution, the New York State Civil Rights Law, and the New York State Human Rights Law. The plaintiffs ask the court to enjoin the defendants from enforcing the MAT ban against the plaintiffs and from interrupting the plaintiffs' prescribed MAT treatment while detained in the defendants' custody. The defendants' answers were due March 28, 2022.

## SECOND CIRCUIT FINDS NEW YORK MEDICAL DIRECTOR NOT LIABLE FOR PATIENT'S DEATH

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***Christopher Buchanan, et al. v. Frederick Hesse, U.S. Court of Appeals for the Second Circuit, Case No. 21-649 (opinion filed March 21, 2022).*** For previous updates on this case, please refer to the April 2021 issue of the LAPP Case Law Monitor, available [here](#). The U.S. Court of Appeals for the Second Circuit affirmed the summary judgment of a medical director of a residential substance use disorder treatment facility in New York in a medical malpractice action surrounding the death of a female patient at the facility with whom he never met and never personally treated. The Second Circuit determined that the federal district court properly determined that Christopher and Lauri Buchanan, the parents of the decedent, failed to raise a genuine dispute of material fact to rebut evidence that Dr. Frederick Hesse lacked a doctor-patient relationship with the decedent. On appeal, the Buchanans argued that even if Hesse had no personal contact with their daughter, he still committed malpractice by failing to properly supervise the staff and oversee the medical services provided at the treatment facility. The court rejected this argument, finding that even if the Buchanans could provide such proof, they would still have to show that such act or omission proximately caused their daughter's death. Furthermore, there was no evidence to suggest that Hesse was responsible for overseeing the clinical staff assigned to monitor the decedent the night that she died. No further appeal has been filed at this time.

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<sup>1</sup> Seeking to help prevent situations like Joshua Long's death from occurring, LAPP published its [Model Withdrawal Management Protocol in Correctional Settings Act](#) in July 2021. The Model Act: (1) requires evidence-based treatment of substance use disorders, including the use of FDA-approved medications; (2) requires correctional settings to establish and implement administrative and clinical protocols when detaining individuals at risk of withdrawal; and (3) provides state legislators, policymakers, and those in the correctional and health care professions with a comprehensive framework to better respond to withdrawal symptoms and related mental health crises of individuals in custody to decrease their mortality while in correctional settings.

## KENTUCKY BEHAVIORAL MEDICINE CLINIC SETTLES OPIOID USE DISORDER DISCRIMINATION CASE

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### **King's Daughters Medical Center, USAO Case No. 2021V00109 (settlement reached January 25, 2022).**

A complaint filed by an unnamed person against the U.S. Department of Justice (DOJ) alleged that King's Daughters Medical Center (KDMC), a private hospital in Kentucky, refused treatment at its Outpatient Behavioral Medicine Clinic to patients with a history of alcohol or drug use, a recent prescription for medication to treat opioid use disorder (OUD), or drug-related criminal convictions. The unnamed complainant sought an appointment at KDMC for treatment for post-traumatic stress disorder, but KDMC refused the complainant because she had received a prescription for OUD medication within the previous six months. She filed a complaint with the DOJ alleging that KDMC's policies violate Title III of the Americans with Disabilities Act (ADA). The ADA forbids places of public accommodation from discriminating against individuals because of a disability, and OUD is a recognized disability under the ADA. The DOJ concluded that KDMC's policy excludes individuals with disabilities, denies them the ability to benefit from KDMC's services because of a disability, and imposes eligibility criteria that denied services to individuals with disabilities. On January 25, 2022, KDMC reached an agreement with the DOJ to resolve the dispute. Under the terms of the agreement, KDMC agreed to adopt a nondiscrimination policy, revise its admission policy to address OUD discrimination, provide training on the ADA and OUD to admissions personnel, pay a civil penalty of \$50,000 to the United States, and pay the complainant \$40,000 for pain and suffering.

## NEW YORK NURSE WHO LOST MEDICARE PRIVILEGES MUST EXHAUST ADMINISTRATIVE REMEDIES

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### ***Louis Pawlowski v. Xavier Becerra, et al.*, U.S. District Court for the Western District of New York, Case No. 1:21-cv-00931-LJV (motion to dismiss granted March 2, 2022).**

A New York federal district court ruled that a nurse practitioner who lost his Medicare billing privileges must exhaust his administrative remedies before filing a lawsuit. In July 2021, Louis Pawlowski received a letter from the Centers for Medicare and Medicaid Services (CMS) stating that he engaged in a pattern of prescribing drugs that represented a threat to the health and safety of Medicare beneficiaries in violation of 42 C.F.R. § 424.535(a)(14)(i) and revoking his Medicare billing privileges. This regulation provides that a professional's Medicare privileges may be revoked if CMS determines that the individual's pattern of prescribing drugs is abusive or represents a threat to the health and safety of Medicare beneficiaries or both, including prescribing controlled substances in excessive dosages that are linked to patient overdoses. The letter noted that Pawlowski prescribed excessive dosages of opioids linked to three patient overdoses. The letter also informed Pawlowski that CMS would place him on a preclusion list, barring him from submitting an application to re-apply for Medicare privileges for 10 years. On August 16, 2021, Pawlowski filed a lawsuit against the U.S. Department of Health and Human Services (HHS) asserting that HHS violated his due process rights when it notified him that his Medicare enrollment would be revoked. The same day, Pawlowski moved for a temporary restraining order and a preliminary injunction. The government subsequently moved to dismiss the case, in part because he did not exhaust his administrative remedies prior to filing suit. Pawlowski argued that his suit should receive immediate judicial review because traversing the lengthy process of exhausting his administrative appeals would destroy his practice and jeopardize the well-being of his patients. The federal district court rejected this contention, ruling that Pawlowski's concerns did not excuse him of the requirement to exhaust his administrative remedies because he could still see patients while an administrative appeal was pending. Because Pawlowski did not qualify for any exceptions from the exhaustion requirement, the court granted the government's motion to dismiss and denied Pawlowski's motion for a preliminary injunction.

## OKLAHOMA HEALTH CARE WORKER TERMINATED FOR TIME IN REHAB CAN PROCEED WITH DISCRIMINATION SUIT

***Kelly George v. Community Health Centers Inc., U.S. District Court for the Western District of Oklahoma, Case No. 5:21-cv-00464 (opinion filed March 8, 2022).*** While working for Community Health Centers Inc. (CHC), Kelly George developed an addiction to oxycodone. On June 3, 2020, George texted her supervisor that she needed to enter inpatient rehabilitation treatment for 30 days. On July 6, 2020, George called the human resources department at CHC to inform them of her completion of the treatment program and that she wanted permission to return to work. Human resources informed George that she could re-apply for her old position. George did not re-apply for her old position and, about a month later, received a letter from CHC stating that her employment ended July 7, 2020. George filed suit against CHC, asserting two causes of action: (1) discrimination based on a disability and failure to reasonably accommodate a disability, in violation of the Americans with Disabilities Act (ADA) and the Oklahoma Anti-discrimination Act; and (2) retaliatory termination due to a disability. CHC moved for summary judgment. A federal district court in Oklahoma denied CHC's motion. According to the court, although the ADA provides that an employee cannot be "a qualified individual with a disability" if the employee "currently engag[es] in the illegal use of drugs when the covered entity acts on the basis of such use," Congress created a safe harbor to protect individuals recovering from substance use disorder who are no longer using substances. Under 42 U.S.C § 12114(b), an employee may be a qualified individual with a disability if he or she: (1) successfully completes a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs or has otherwise been rehabilitated successfully and is no longer engaging in such use; or (2) participates in a supervised rehabilitation program and no longer engages in such use. An employee's eligibility for the safe harbor must be determined on a case-by-case basis, and the safe harbor's protection depends on a totality of the circumstances inquiry into whether the employer had a reasonable belief of ongoing drug use or relapse and a reasonable belief that the employee would be unable to perform his or her job. In this case, the court found that CHC presented no evidence that it contemplated the issue of ongoing drug use or relapse, or that it had any reasonable belief that George would be unable to do essential job duties moving forward. The court noted that by inviting George to re-apply for her position, CHC indicated that it did not think George was not fully rehabilitated or could not perform her duties. Thus, the court ruled that a factfinder could conclude that George was a qualified individual with a disability. CHC also argued that George's disability discrimination claims failed because she did not request a reasonable accommodation. However, the court found that a jury might consider George's text message to her supervisor for unpaid leave to be a request for a reasonable accommodation. Finally, the court held that a jury could find George's discharge to be retaliation for seeking an accommodation. Thus, because CHC failed to conclusively rebut any element of George's case, the summary judgement failed. On March 14, 2022, the parties reached a confidential settlement.

## FIRING PENNSYLVANIA EMPLOYEE DUE TO POSITIVE MARIJUANA TEST IS NOT DISCRIMINATION

***Cherie Lehenky v. Toshiba America Energy Systems Corp., U.S. District Court for the Eastern District of Pennsylvania, Case No. 2:20-cv-04573 (opinion filed February 22, 2022).*** A Pennsylvania federal district court ruled that an employee fired after testing positive for marijuana is unable to sue the company for disability discrimination. In February 2019, Cherie Lehenky's employer informed her of her random selection to undergo workplace drug testing in accordance with the company's Drug Free Workplace Policy (drug policy). Lehenky, who suffers from panniculitis, takes an over-the-counter cannabidiol (CBD) product to manage her pain. After submitting her drug test, Lehenky emailed the company's human resources department to inquire about documentation she would need to provide regarding the CBD. Human resources did not respond to her inquiry. Lehenky's drug test came back as positive for marijuana and the company terminated her as a result. In response to the termination, Lehenky filed suit against the company alleging that it violated



the Americans with Disabilities Act (ADA) and the Pennsylvania Human Relations Act. The company moved to dismiss the lawsuit. In ruling for the defendant, the federal district court agreed with Lehenky that she is disabled under the ADA. The court, however, found no evidence that her employer knew of her disability prior to the termination decision. Additionally, the court noted that Lehenky agreed to the company's drug policy as a condition of her employment and thus knew, or should have known, its terms. Per the drug policy, the company required any employee taking prescription or over-the-counter drugs that could be deemed illegal under the policy to provide documentation of the drug and dosage to human resources. The drug policy stated that the failure to report the use of any of these substances could result in disciplinary action, up to and including termination. As Lehenky did not report her CBD use to human resources until after she submitted her drug test, the court determined that Lehenky's failure to comply with company policy—not her disability—caused the employer's termination. The court granted the defendant's motion to dismiss. Lehenky filed an appeal with the U.S. Court of Appeals for the Third Circuit on March 16, 2022.

## COLORADO ENTITLED TO RESTITUTION FOR EVADED MARIJUANA TAXES

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***The People of the State of Colorado v. Ton Thai Le, Colorado Court of Appeals, Case No. 19CA1997 (opinion filed March 17, 2022).*** In a case of first impression, a Colorado intermediate appeals court ruled that the Colorado Department of Revenue (Department) is a victim entitled to restitution in a case where a criminal defendant evaded marijuana excise taxes. Ton Thai Le was among 31 co-defendants indicted on numerous felony charges stemming from their roles as high-ranking members of a Colorado-based drug trafficking organization that illegally cultivated and distributed marijuana. Le pled guilty to, among other offenses, evasion of state taxes, and his plea agreement required him to pay restitution jointly and severally with any co-defendants. Colorado sought payment of unpaid marijuana excise taxes, but Le argued that the state's Restitution Act (COLO. REV. STAT. ANN. § 18-1.3-603 (West 2022)) does not allow that. The trial court agreed with Le, holding that as a matter of law the Department could not recover such taxes on behalf of Coloradans under state law. On appeal, the intermediate appellate court considered whether the Department is a victim under the Restitution Act such that the agency itself may collect restitution for the unpaid taxes. The court noted that “federal courts have invariably held that losses incurred by tax evasion or fraud constitute a direct harm to those governmental entities that collect taxes such that they can recover restitution.” Applying that reasoning in this case, the court concluded that the Department is a victim under the Restitution Act for two reasons. First, because the Department has an interest in unpaid excise taxes, and Le's evasion adversely affected that interest, the Department was “aggrieved by” Le's criminal conduct. Second, the Restitution Act specifically allows for “any person harmed by an offender's criminal conduct in the course of a scheme, conspiracy, or pattern of criminal activity” to be a victim. Thus, the court held that the Department is a victim under the Restitution Act where a criminal defendant failed to pay the Department marijuana excise taxes to which it is entitled. The court reversed the ruling of the trial court and remanded the case back to the trial court to determine the appropriate amount of restitution.

## OREGON TAX COURT RULES AGAINST MARIJUANA-RELATED INCOME TAX DEDUCTIONS FOR 2015

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***Department of Revenue v. James Wakefield, Oregon Tax Court, TC 5404, (opinion filed February 3, 2022).*** James Wakefield, a legal seller of marijuana under Oregon law, incurred business expenses that would have been deductible under § 162(a) of the federal Internal Revenue Code if not for § 280E of that Code, which prohibits deducting expenses incurred in trafficking federally controlled substances. Oregon incorporates federal definitions of taxable income for its state income tax law. In 2014, though, Oregon voters approved Measure 91, which, among other things, “disconnected” § 280E from Oregon law. This created an

exception that allowed the deduction of business expenses for the sale of controlled substances starting in 2015. The Oregon legislature subsequently passed multiple amendments to Measure 91, narrowing the exception to marijuana sales specifically rather than all controlled substances. When Wakefield claimed marijuana-related expenses on his Oregon personal income tax return for 2015, the Department of Revenue (Department) disallowed the deductions. Wakefield appealed the decision to the Tax Court’s Magistrate Division, which granted summary judgment in his favor. The Department then appealed to the Oregon Tax Court, which ruled in the Department’s favor. The Tax Court found that the Oregon legislature’s amendments to Measure 91 had reincorporated § 280E and other federal provisions on the calculation of taxable income. When the legislature passed a narrower “disconnection” of § 280E for marijuana sales, it applied to tax years 2016 and later. Thus, Wakefield could not claim the deductions for calendar year 2015. Wakefield has not appealed the decision as of the date of this writing.

## SIXTH CIRCUIT ALLOWS MALPRACTICE SUIT TO PROCEED BECAUSE OF CONFLICT BETWEEN MICHIGAN AND FEDERAL PROCEDURAL RULES

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***Sandra Albright v. Carl Christensen, et al.*, U.S. Court of Appeals for the Sixth Circuit, Case No. 21-1046, (opinion filed January 31, 2022).** After suffering injuries in a car accident, Sandra Albright developed an addiction to opioids used to treat her chronic pain. She sought substance use disorder treatment from Dr. Carl Christensen but discontinued treatments when she began experiencing muscle spasms, pain, contortions, restlessness, and feelings of temporary paralysis. Albright sued Christensen in Michigan federal court, with the venue based on federal diversity jurisdiction. Christensen successfully moved for summary judgment on the grounds that Albright had not complied with Michigan’s pre-suit notice requirements for malpractice suits. Michigan law requires plaintiffs to give defendants written notice at least 182 days before filing suit and file an affidavit of merit signed by a health professional, neither of which Albright did. Albright appealed to the U.S. Court of Appeals for the Sixth Circuit, arguing that Michigan’s notice rules do not apply in federal court where rules of civil procedure generally follow state law unless they conflict with federal rules in cases relying on diversity jurisdiction. The Sixth Circuit found that Michigan’s notice requirement conflicts with Rule 3 of the Federal Rules of Civil Procedure, which requires only the filing of a complaint with a short and plain statement of the case to commence a civil action. The court observed that state rules can govern when a suit commences, but not how it commences, without conflicting with the federal rules. The Sixth Circuit reversed the dismissal and remanded the case to Michigan district court for continued proceedings.

## FEDERAL COURT DISMISSES CHALLENGE TO WEST VIRGINIA’S SYRINGE SERVICES PROGRAM LAW

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***Milan Puskar Health Right, et al. v. Bill J. Crouch, et al.*, U.S. District Court for the Southern District of West Virginia, Case No. 3:21-cv-00370 (opinion filed March 31, 2022).** For previous updates and facts about this case, please refer to the August 2021 issue of the LAPP *Case Law Monitor*, available [here](#). A federal district court granted the defendants’ motion to dismiss in a case involving West Virginia’s Syringe Services Programs Act (Act) (W. VA. CODE ANN. §§ 16-64-1 *et seq.* (West 2022)). The Act, which became effective on July 9, 2021, establishes an oversight scheme for syringe services programs in West Virginia. It requires syringe services programs to obtain a license from the Office of Health Facility Licensure and Certification, to distribute syringes with a goal of a 1:1 model, and to be part of a comprehensive harm reduction program that offers or refers participants to other services. On June 28, 2021, the court granted the plaintiffs’ motion for a temporary restraining order, thereby blocking the law from taking effect. However, on July 15, 2021, the court dissolved the June 28, 2021 temporary restraining order and denied the plaintiffs’ request for a preliminary injunction. The defendants filed a motion to dismiss on July 23, 2021, arguing that

the plaintiffs' amended complaint should be dismissed because the Act is not unconstitutionally vague. The court agreed with the defendants stating that the statute at issue is a civil economic regulation and therefore subject to a "less stringent vagueness test" than a criminal law. Furthermore, the court ruled that administrative agencies can clarify such laws, if necessary, and that less clarity is required in purely civil statutes because the consequences of violating them are less severe. While the court acknowledges that some sections of the Act reflect "poor draftsmanship," it ruled that it cannot conclude that the inconsistencies "render the language so vague as to violate [the] plaintiffs' due process rights." The plaintiffs also claimed in their amended complaint that § 16-64-10(d) discriminates against existing syringe services program providers because the section requires them to offer the full array of harm reduction services by the effective date of the statute but allows new providers until January 1, 2022 to do the same. The court determined that this section clearly discriminates between new and existing providers and that there is no rational basis for doing so. However, because the January 1, 2022 compliance date has passed, the relief sought by the plaintiffs is moot because the grace period has expired. Thus, the court ruled that the plaintiffs did not allege sufficient facts to support their claims and granted the defendants' motion to dismiss.

## SETTLEMENTS INVOLVING JOHNSON & JOHNSON AND THE "BIG THREE" DRUG DISTRIBUTORS AMERISOURCEBERGEN, CARDINAL HEALTH, AND MCKESSON

- On February 1, 2022, Native American Tribes reached a \$590 million global settlement-in-principle with drugmaker Johnson & Johnson and the drug distributors, AmerisourceBergen, Cardinal Health, and McKesson. Although approximately 400 tribes and intertribal organizations, representing about 80 percent of tribal citizens, filed lawsuits over opioid distribution, all 574 federally recognized tribes will be allowed to participate in the settlement. Under the deal, Johnson & Johnson will pay \$150 million over two years, and the three distributors will contribute \$440 million over seven years. About 15 percent of the settlement will go toward lawyers' fees, and the remaining 85 percent will be spent on drug treatment and related abatement programs. The deal will take effect when 95 percent of the tribes with lawsuits against the companies agree to the settlement.
- On February 25, 2022, the three drug distributors agreed to proceed with the comprehensive agreement first announced in July 2021 to settle most of the opioid lawsuits filed against them by state and local governments. Each of the three distributors independently determined that there is sufficient participation by states and local governments. In all, 46 states and roughly 90 percent of eligible local governments signed on to the deal, according to the companies' assessment. The four non-participating states are Alabama, Oklahoma, Washington, and West Virginia. Approximately \$19.5 billion will be paid out by the three distributors over the next 18 years, with AmerisourceBergen paying \$6.1 billion, Cardinal Health paying \$6 billion, and McKesson paying \$7.4 billion. The initial payments begin in April 2022. The settlement requires that 85 percent of the funds be allocated to programs that will help address the ongoing opioid crisis through treatment, education, and prevention efforts. Johnson & Johnson also previously agreed to contribute an additional \$5 billion to the settlement. None of the companies acknowledge any wrongdoing as part of the settlement.
- On March 14, 2022, the House Oversight and Reform Committee (Committee) sent a letter to U.S. Treasury Secretary Janet Yellen and U.S. Attorney General Merrick Garland to request that they investigate the income tax deductions of the four companies. The Committee asserts that the four companies may try to "put taxpayers on the hook for billions of dollars in settlement costs" by claiming tax deductions for their settlement agreements. The letter requests that Secretary Yellen and Attorney General Garland "determine whether these tax maneuvers comply with the law" and to do "everything in [their] power to ensure transparency and accountability for the companies and executives."

## RECENT EVENTS IN THE PURDUE PHARMA BANKRUPTCY, INCLUDING SETTLEMENT DISCUSSIONS

### ***In re Purdue Pharma L.P., U.S. Bankruptcy Court for the Southern District of New York, Case No. 19-23649 (suit filed Sept. 15, 2019).***

- A group of Senate Democrats led by Senator Richard Blumenthal (CT) sent a letter to the U.S. Department of Justice (DOJ) on February 16, 2022 urging it to open an investigation into whether members of the Sackler family personally engaged in criminal conduct in connection with Purdue Pharma's (Purdue) role in the opioid epidemic. The letter asks U.S. Attorney General Merrick Garland to consider possible criminal charges for the Sackler family in addition to the DOJ's previously resolved civil and criminal investigations into Purdue.
- After over two months of talks mediated by U.S. Bankruptcy Judge Shelly Chapman, Purdue reached a new proposed nationwide settlement on March 3, 2022. This deal follows an earlier settlement that had been appealed by nine states (California, Connecticut, Delaware, Maryland, New Hampshire, Oregon, Rhode Island, Vermont, and Washington) and the District of Columbia. Nine of the ten jurisdictions (all but New Hampshire) participated in the mediation. In this new settlement, the Sackler family agreed to pay between \$5.5 and \$6.0 billion, marking an increase from the \$4.5 billion previously offered by the Sacklers. The increase in money appears to satisfy the state attorneys general who opposed Purdue's earlier proposed settlement on the grounds that the Sacklers were not paying enough to fight the opioid epidemic and deter corporate wrongdoing. The new deal would resolve civil claims that seek money from the Sackler family but would not extinguish any potential criminal liability. According to news reports, attorneys general who held out for the higher settlement said they agreed to settle with the Sacklers despite the civil immunity provision because they do not want to further delay payments to opioid victims.
- Shortly after the announcement of the new settlement, more than 20 states filed objections to the settlement arguing that the updated agreement includes a "side deal." The new settlement provides for \$277 million to be split among the nine states and the District of Columbia that appealed the previous settlement. The objecting states do not object to the Sackler family paying more money but argue that any additional monies should be split according to the plan's existing distribution scheme. The U.S. Trustee Program, the arm of the DOJ that oversees the administration of bankruptcy cases, argued in a court filing on March 8, 2022 that the latest settlement does little to address the issues that made the new deal necessary because it still forces opioid victims to release members of the Sackler family from future lawsuits. According to the Trustee, putting the new settlement into effect is contingent on Purdue winning its already-pending appeal concerning the original settlement before the U.S. Court of Appeals for the Second Circuit regarding the validity of third-party releases in bankruptcy. The Trustee also echoed the concerns of more than 20 states that have objected to the new settlement because it diverts a disproportionate amount of the new money to the handful of states that fought to overturn the prior deal.
- On March 9, 2022, U.S. bankruptcy Judge Robert Drain rejected the objections to the March 3<sup>rd</sup> settlement, ruling that the \$277 million deal is akin to a separate settlement and that all states, even if not included in the \$277 million subset, will still receive more money under this new plan. Judge Drain approved the new settlement on March 9, 2022. As part of the new deal, the attorneys general from the previously appealing nine states and the District of Columbia have agreed to withdraw from the Second Circuit appeal, leaving only the DOJ and three personal injury victims as the remaining appellants in the appeal. Oral arguments for the appeal regarding the first settlement are scheduled for April 29, 2022 before the Second Circuit.
- On March 10, 2022, victims of OxyContin addiction spoke directly to members of the Sackler family during a virtual hearing overseen by Judge Drain. Judge Chapman, who mediated the new settlement, recommended that Judge Drain set aside time during a hearing to allow victims to speak to the court and that at least one member from each of the two branches of the Sackler family attend. Theresa Sackler, David Sackler, and Richard Sackler all attended the hearing but were barred from responding to comments made during the hearing.

## SETTLEMENTS INVOLVING TEVA PHARMACEUTICALS

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- On February 7, 2022, Teva Pharmaceuticals Industries Ltd. (Teva) reached a \$225 million settlement with Texas to resolve claims that the company helped fuel the opioid epidemic in the state. Teva agreed to pay \$150 million over 15 years and provide \$75 million worth of naloxone products to the state. Teva did not admit to any wrongdoing as part of the settlement. Teva previously settled with Oklahoma in June 2019 and Louisiana in September 2021.
- On March 21, 2022, the Rhode Island Attorney General announced that the state reached a settlement with Teva and Allergan to resolve claims over the companies' roles in fueling the opioid epidemic in the state. The settlement came the day that opening statements were set to begin in state court against the two companies in *State of Rhode Island v. Purdue Pharma, L.P., et al.*, Providence/Bristol County, Rhode Island Superior Court, Case No. PC-2018-4555. According to the announcement, Rhode Island will receive \$28.5 million (\$21 million from Teva and \$7.5 million from Allergan) over the next 13 years. Additionally, Teva will provide the state with one million naloxone nasal sprays and 67,000 bottles of Suboxone over the next 10 years, at a combined value of more than \$78 million. The companies did not admit any wrongdoing as part of the settlement. The other defendants in the Rhode Island case previously settled with the state.
- On March 30, 2022, CVS Health Corp. (CVS) and Teva announced that it reached settlements with Florida to resolve opioid related lawsuits. CVS will pay \$484 million to the state over the next 18 years, while Teva will pay \$177 million over the next 15 years and will provide \$84 million worth of naloxone to Florida over the next 10 years. Neither admitted liability or wrongdoing as part of the settlement. Walgreens remains the only defendant in the state's opioid litigation, styled *State of Florida v. Purdue Pharma, L.P., et al.*, Pasco County Circuit Court, Florida, Case No. 2018-CA-001438 (settlements reached March 30, 2022). Jury selection in the case began on April 5, 2022.

## ENDO INTERNATIONAL LITIGATION AND SETTLEMENTS

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- On February 28, 2022, a Tennessee judge found Endo International PLC. (Endo) liable by default in the opioid-marketing case *Clay County v. AmerisourceBergen Drug Corp., et al.*, Circuit Court for the State of Tennessee, County of Cumberland, Case No. CCI-2018-cv-6347. The judge entered the default judgment against Endo after finding the company intentionally concealed documents from the Tennessee municipalities suing the company over its opioid marketing practices. Endo now faces a damages only trial in 2023 that will decide how much the company will have to pay for mishandling opioids. The 13 counties involved in the suit want as much as \$23 billion from Endo and the other defendants, which include Teva, CVS, and Walgreens. This marks the second time a judge has issued a default judgment against Endo in an opioid related case in Tennessee. In April 2021, another trial court judge entered a default judgment against Endo for withholding documents during discovery. In that case, a damages trial was scheduled to begin in July 2021, but Endo reached a \$35 million settlement to resolve the case just days before the trial. Information about this previous Endo case is available in the August 2021 issue of the *LAPPA Case Law Monitor*, available [here](#).
- On March 30, 2022, the West Virginia Attorney General's Office announced that the state will receive a \$26 million settlement from Endo to resolve allegations that the company played a role in the state's opioid epidemic. The settlement money will go to develop programming to help fight substance use disorder in West Virginia. As part of the settlement, Endo has agreed not to make any false or deceptive statements about opioids or to encourage or promote the use of opioids for pain treatment. This settlement came less than a week before opening arguments in the case *In re Opioid Litigation*, Circuit Court of Kanawha County, West Virginia, Case No. 21-C-9000 MFR. The trial began on April 4, 2022 against the remaining defendants: Janssen Pharmaceuticals Inc., Teva, and Allergan.

## UPDATE IN THE MALLINCKRODT PROCEEDINGS

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***In re: Mallinckrodt PLC*, U.S. Bankruptcy Court for the District of Delaware, Case No. 20-12522-JTD (suit filed Oct. 12, 2020).** For previous updates on this case, please refer to the February 2022 issue of the *LAPPA Case Law Monitor*, available [here](#). On February 3, 2022, U.S. Bankruptcy Judge John Dorsey issued an opinion stating that he would approve Mallinckrodt's bankruptcy exit plan. The plan calls for handing control of the company to creditors and routing opioid litigation claims to a trust set aside for their settlement and payment. Mallinckrodt will pay \$1.75 billion to settle the more than 3,000 opioid-related lawsuits filed against the company. Mallinckrodt stated that it plans to file an examinership proceeding in Ireland to complete its reorganization, which may take approximately 100 days.

## PENNSYLVANIA DISTRICT ATTORNEYS DENIED RELIEF IN LAWSUIT OVER PROPOSED SETTLEMENT

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***Commonwealth of Pennsylvania v. Attorney General*, Commonwealth Court of Pennsylvania, Case No. 233 MD 2021 (Plaintiffs' complaint for declaratory relief dismissed February 4, 2022).** For previous updates on this case, please refer to the August 2021 issue of the *LAPPA Case Law Monitor*, available [here](#). A Pennsylvania court dismissed a complaint for declaratory relief filed by the Commonwealth of Pennsylvania, by and through the Philadelphia District Attorney, Larry Krasner, and the Allegheny County District Attorney, Stephen A. Zappala, Jr. (collectively, "DAs"), over the Commonwealth's participation in the opioid settlement involving the "big three" distributors and Johnson & Johnson. Because the settlement agreement purports to extinguish their actions in the trial court by resolving all claims against the distributors and Johnson & Johnson, the DAs filed the complaint for declaratory relief seeking a judgment: (1) declaring that the Attorney General lacks the authority to release the DAs' claims; and (2) enjoining the release of the DAs' claims filed under the law against the distributors and Johnson & Johnson. The court determined that, as of the February 2022 decision, it is impossible for it to declare the respective rights of the parties regarding the settlement agreement because the agreement is not executed and may still be modified. The court also determined that it would be impossible for it to enjoin Pennsylvania's Attorney General from releasing the DAs' claims under an agreement that has yet to be executed. As a result, any opinion the court would issue at this stage of the proceedings would be an impermissible advisory opinion. The DAs filed an appeal to the Pennsylvania Supreme Court on March 7, 2022.

## SIXTH CIRCUIT RULES CARDINAL HEALTH'S INSURANCE CASE BELONGS IN STATE COURT

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***Cardinal Health, Inc. v. National Union Fire Insurance Company of Pittsburgh, PA*, U.S. Court of Appeals for the Sixth Circuit, Case No. 21-3770 (opinion filed March 30, 2022).** The U.S. Court of Appeals for the Sixth Circuit ruled that Cardinal Health's suit to force its insurer to defend or pay for its defense in cases regarding the opioid epidemic must be tried in an Ohio state court. Cardinal Health, a pharmaceutical distributor, sought defense costs for opioid litigation under its insurance policies with National Union Fire Insurance (National Union) which has consistently reserved its right to deny coverage. Cardinal Health filed a declaratory judgment action in Ohio state court related to the rights and obligations of the parties under the policies, including whether National Union has a duty to defend Cardinal Health or pay Cardinal Health's defense costs in ongoing opioid litigation. National Union removed the suit to federal court pursuant to diversity jurisdiction. Cardinal Health moved to remand the case back to state court, asking the district court to decline jurisdiction. The federal district court granted Cardinal Health's motion and remanded the case to state court. National Union filed an appeal seeking relief pursuant to the Declaratory Judgment Act which gives federal courts discretion on whether to keep a removed case or send it back to state court. There

are several factors that must be considered, including whether a federal court decision would settle the controversy or create state-federal court “friction.” The Sixth Circuit ruled that the district court properly found that keeping the case in federal court would create friction because there are several other cases pending in Ohio state courts that present the same issue, including a case before the Ohio Supreme Court, that, once decided, will provide guidance to all courts considering similar issues. Additionally, the Sixth Circuit noted that the novel issues of Ohio law in the case should be decided by a state court. Thus, the court ruled that the federal district court did not abuse its discretion by remanding the case to state court.

## FORMER PHARMACEUTICAL DISTRIBUTOR CEO CONVICTED OF CONSPIRACY

***United States v. Laurence Doud*, U.S. District Court for the Southern District of New York, Case No. 19-cr-00285 (verdict reached February 2, 2022).** On February 2, 2022, a jury convicted Laurence Doud, the former executive officer of Rochester Drug Co-operative, Inc. (RDC), of conspiring to: (1) unlawfully distribute oxycodone and fentanyl; and (2) defraud the Drug Enforcement Administration (DEA). The jury found that Doud knowingly and intentionally violated federal narcotics laws between 2012 and 2017 by distributing opioids, through RDC, to pharmacy customers knowing the drugs were being sold and used illicitly. The jury also determined that Doud took steps to conceal RDC’s illicit distribution of controlled substances from the DEA and other law enforcement authorities. According to prosecutors, Doud made the deliberate decision not to investigate, monitor, or report to the DEA any pharmacy customers that Doud and other executives at RDC knew diverted controlled substances for illegitimate use. As a result, Doud impeded the DEA’s ability to identify and prevent the illicit dispensing of controlled substances by several of RDC’s pharmacy customers. A jury convicted Doud of: (1) one count of conspiracy to distribute controlled substances, which carries a maximum sentence of life in prison and a mandatory minimum sentence of 10 years; and (2) one count of conspiracy to defraud the United States, which carries a maximum prison term of five years. Doud’s sentencing is set for June 29, 2022.

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