LEGISLATIVE ANALYSIS AND PUBLIC POLICY ASSOCIATION

Case Law Monitor

April 2021

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.

IN THIS ISSUE...

Oklahoma Parents Can Be Charged with Child Neglect for Drug Use During Pregnancy

Federal Court Dismisses Proposed Class Action Accusing Two Chain Pharmacies of Discriminating against Customers Seeking Opioids

Wife of Drug Lord "El Chapo" Arrested on International Drug Trafficking Charges

New York Treatment Facility's Medical Director Not Liable for Patient's Death

Former Amazon Worker Alleges Wrongful Termination Due to Medical Marijuana Use

Massachusetts Prisoners Denied Second Preliminary Injunction Request for Early Release Due to COVID-19

Former Railroad Conductor Who Alleged Discrimination Settles with Company

Tennessee Sues Supermarket over Its Alleged Role in the State's Opioid Crisis

Court Dismisses Whistleblowers' False Claims Act Suit Against McKesson a Second Time

Arkansas Attorney General Sues Walgreens Over its Alleged Role in the State's Opioid Crisis

California DOJ Required to Produce Prescription Data to Walgreens

Noteworthy Updates in the National Opioid Litigation

Walmart's Case Against the U.S. DOJ Dismissed

McKinsey and Company Settlements and Related Litigation

Drug Companies Seek Income Tax Deductions for Opioid Settlements

Purdue Pharma Bankruptcy Proceedings

OKLAHOMA PARENTS CAN BE CHARGED WITH CHILD NEGLECT FOR DRUG USE DURING PREGNANCY

***State of Oklahoma v. Kelvin Wayne Allen and Tami Leann Ware*, Oklahoma Court of Criminal Appeals, Case No. S-2019-849 (opinion filed January 28, 2021).** The Oklahoma Court of Criminal Appeals has held for a second time in five months that a mother can be charged with child neglect for illegal drug use during pregnancy. In this latest case, the court also concluded that the father can be charged if he supplied the mother with drugs during the pregnancy. Tami Leann Ware gave birth to her child in 2017. Post-birth testing indicated that both Ware and the child had methamphetamine in their systems, which prompted the hospital to call the authorities. Due to the child's positive drug test, the State Department of Human Services placed the child into protective custody before the newborn ever left the hospital. During her pregnancy, Ware lived with the child's father, Kelvin Wayne Allen. According to the trial court record, Allen purchased drugs for Ware, and the two often ingested methamphetamine together while Ware was pregnant. The pair allegedly admitted to knowing the harm posed to the unborn child from Ware's methamphetamine use. The state charged both Ware and Allen with child neglect and conspiracy to commit child neglect. The defendants filed motions to quash both counts in their respective cases, arguing that an unborn fetus is not a "child" subject to protection under Oklahoma's child neglect statute. The trial court judge granted their motions, and the state appealed. On appeal, the intermediate appellate court determined that *State of Oklahoma v. Green*, 474 P.3d 886 (Okla. Crim. App. 2020) controlled the case. In *Green*, a toxicology report revealed a stillborn baby died due to methamphetamine toxicity. The state charged the mother with child neglect. The trial court in *Green* dismissed the case, finding that an unborn child is not a child under the child neglect statute. The Court of Criminal Appeals reversed, holding that an unborn child constitutes a child for the purposes of the child neglect statute and that a viable fetus may be the victim of child neglect. Accordingly, the same court found that the trial court abused its discretion in granting Ware and Allen's motions to quash because it did not follow the interpretation of the child neglect statute made in *Green*. The court reversed and remanded both Ware and Allen's cases back to the trial court.

FEDERAL COURT DISMISSES PROPOSED CLASS ACTION ACCUSING TWO CHAIN PHARMACIES OF DISCRIMINATING AGAINST CUSTOMERS SEEKING OPIOIDS

***Susan Smith v. Walgreens Boots Alliance, Inc., et al.*, U.S. District Court for the Northern District of California, Case No. 3:20-cv-05451-CRB (order issued February 3, 2021).** A California federal court granted two motions to dismiss a putative class action filed against chain pharmacy defendants but gave the plaintiff an opportunity to amend her complaint in response to the decision. In this case, lead plaintiff Susan Smith argues that Walgreens and Costco go too far in their recent efforts to prevent the unlawful sale of opioids. Smith is a disabled individual who suffers from chronic pain syndrome and other chronic medical conditions. Smith takes opioids to relieve her pain and has been prescribed morphine since 2011. In August 2020, Smith filed a putative class action suit alleging that she faced discrimination and harassment by pharmacists at Walgreens and Costco when attempting to pick up opioid prescriptions and that, on some occasions, the pharmacies would refuse to fill her prescriptions. In September 2020, Smith filed a first amended complaint (FAC) bringing causes of action under the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, the anti-discrimination provisions of the Affordable Care Act, the Unruh Civil Rights Act, and California's Unfair Competition Law. In November, the defendants filed motions to dismiss. The court granted both motions to dismiss.

With respect to Costco, Smith alleged that the company has a specific policy that acts as a total ban on opioid sales and that discriminates against her and the members of the class. The court found, however, that she did not assert a cognizable claim for discrimination because, at most, all she alleges is that Costco does not sell opioids to anyone. As for Walgreens, Smith alleged that the company: (1) blacklists certain individuals and/or their prescribing physicians from seeking to fill opioid prescriptions; (2) implements hard limits on both the dosage and duration of opioid prescriptions; (3) does not sell opioids unless accompanied with one or more prescriptions for non-opioid medication(s); and (4) requires patients to provide comprehensive medical records before purchasing opioids. The court found that Smith did not make a *prima facie* case of intentional discrimination against Walgreens and that only one allegation, the alleged dose and duration restriction, could possibly constitute discrimination under federal law under a disparate impact or reasonable accommodation theory. Moreover, the court concluded that this allegation appeared implausible based on the facts pled. The court allowed Smith to file a second amended complaint to address the deficiencies in her FAC, which she filed on March 22, 2021.

WIFE OF DRUG LORD "EL CHAPO" ARRESTED ON INTERNATIONAL DRUG TRAFFICKING CHARGES

***United States v. Emma Coronel Aispuro*, U.S. District Court for the District of Columbia, Case No. 1:21-mj-00240-GMH (suit filed February 17, 2021).** Emma Coronel Aispuro, the wife of Joaquin "El Chapo" Guzman Loera, the former leader of the Sinaloa Cartel, was arrested and charged in February 2021 for her alleged involvement in international drug trafficking. According to the criminal complaint, Coronel Aispuro participated in a conspiracy to distribute cocaine, methamphetamine, heroin, and marijuana for importation into the U.S. Additionally, the U.S. alleges that Coronel Aispuro conspired with others to assist her husband in escaping from a Mexican prison in July 2015 and planning another prison escape with others prior to her husband's extradition to the U.S. in January 2017. Cornel Aispuro faces a one count criminal complaint of conspiracy to distribute one kilogram or more of heroin, five kilograms or more of cocaine, 1,000 kilograms or more of marijuana, and 500 grams or more of methamphetamine for unlawful importation into the U.S. The case is ongoing.

NEW YORK TREATMENT FACILITY'S MEDICAL DIRECTOR NOT LIABLE FOR PATIENT'S DEATH

***Christopher Buchanan, et al. v. Frederick Hesse*, U.S. District Court for the Southern District of New York, Case No. 7:18-cv-01566-VB (opinion filed February 22, 2021).** The medical director of a residential substance use disorder treatment facility in New York won summary judgment in a medical malpractice action surrounding the death of a patient at the facility with whom he never met and never personally treated. Cydney Buchanan entered the detoxification unit of Arms Acres treatment facility for substance use disorder treatment on November 10, 2015. At the time of Buchanan's admittance, Dr. Frederick Hesse served as the medical director at Arms Acres. Although Dr. Hesse acted as the attending physician for all patients admitted to Arms Acres, he was not typically informed of new admittances to the facility. Usually, Dr. Hesse became involved in a patient's care only if there was a problem that involved the management of the detox residents or if a patient wanted to leave the facility. Otherwise, a physician assistant or a nurse practitioner would prescribe any necessary medication upon admittance. A physician assistant prescribed Suboxone to Buchanan upon admittance. During the night on November 11, 2015, Buchanan vomited twice. Both times, a nurse visually examined Buchanan. The next morning, workers found her unresponsive and transported her to a

hospital, where she was pronounced dead. During Buchanan's stay at the facility, she never met Dr. Hesse. Additionally, Dr. Hesse never discussed Buchanan's care with any of the physician assistants, nor did he receive any calls about her prior to her death. In 2018, Buchanan's father filed suit on behalf of her estate against Arms Acres, Dr. Hesse, and several other members of Arms Acre's staff. The plaintiff subsequently reached a settlement with Arms Acres and all other defendants besides Dr. Hesse. The action against Dr. Hesse alleged medical malpractice, negligent supervision, and common law negligence.

Under New York law, in order to establish a case for medical malpractice, the physician must have owed a duty of care to the patient. Because Dr. Hesse had no contact or communication with Buchanan during her time at the facility, the federal trial court determined that a duty of care was never established and granted summary judgment with respect to that count. The court also granted summary judgment with respect to the negligent supervision count because there was no evidence demonstrating that anyone involved in Buchanan's death committed acts or omissions outside the scope of employment. Regarding the common law negligence claim, the plaintiff argued that Dr. Hesse, as the medical director, was directly and personally responsible for the medical services of the facility and was ultimately responsible for whatever medical care was or was not provided. The court disagreed, citing to regulations promulgated by the New York State Office of Alcohol and Substance Abuse Services and the federal Substance Abuse and Mental Health Services Administration, which do not clearly establish individual liability for medical directors for failing to do their job. The federal court declined to impose an individual duty stemming from regulations appliable to Arms Acres and, thus, granted summary judgment for the common law negligence claim, as well. The plaintiff filed an appeal to the U.S. Court of Appeals for the Second Circuit on March 18, 2021.

FORMER AMAZON WORKER ALLEGES WRONGFUL TERMINATION DUE TO MEDICAL MARIJUANA USE

***Nathan Miller v. Amazon.com Services, Inc., et al.*, U.S. District Court for the Eastern District of Pennsylvania, Case No. 2:21-cv-00944-ER (suit filed March 1, 2021).** A former Amazon warehouse worker alleges that Amazon wrongfully terminated him as a result of his medical marijuana use. Amazon employed Nathan Miller as a seasonal fulfillment associate at a warehouse in Pennsylvania. Due to his history of mental health conditions, Miller used medical marijuana, for which he had a valid certification and license to use in Pennsylvania. Miller's supervisors knew about his license for marijuana use. In July 2020, Miller applied for a permanent, full-time position at the Amazon warehouse. The application required that Miller take a drug test. Prior to taking the drug test, Miller informed the Quest Diagnostics employee conducting the testing and an Amazon human resources employee about his medical marijuana license. On July 21, 2020, Amazon denied Miller full-time employment and terminated him from his seasonal position for failing the drug test due to marijuana use. Although Miller informed a human resources representative that he had a medical marijuana license, the representative told him nothing could be done to reverse the decision. Miller filed a charge of discrimination with the Pennsylvania Human Relations Commission (Commission) regarding his termination. As part of the Commission's investigation, Amazon submitted a statement that after the positive drug test came back, a medical review officer attempted to contact Miller for an explanation, and after Miller failed to respond for two days, human resources made the decision to terminate his employment. Further, Amazon asserted that, per its company policy, Quest Diagnostics cannot take notice of a medical marijuana license and that it is the employee's obligation to provide proof when called by the medical review officer about a positive drug test. Miller, however, argued that Amazon terminated him the day after the

test was administered. Additionally, Miller claimed that Amazon's procedure and the unnecessary involvement of the medical review officer violates medical privacy considerations and intentionally or disparately impacts employees by wrongly subjecting them to termination, embarrassment, and other harms. Subsequently, Miller filed suit against Amazon and Quest Diagnostics for violations of Pennsylvania's Medical Marijuana Act (35 PA. Cons. Stat. § 10231.2103), breach of the implied covenant of good faith and fair dealing, violation of public policy, intrusion on seclusion, and civil conspiracy. The defendants have until April 6, 2021 to respond to the complaint.

MASSACHUSETTS PRISONERS DENIED SECOND PRELIMINARY INJUNCTION REQUEST FOR EARLY RELEASE DUE TO COVID-19

***Stephen Foster, et al. v. Carol Mici, et al.*, Massachusetts Superior Court, Suffolk County, Case No. 2084CV00855 (motion denied February 17, 2021).** For previous updates and facts about this case, please refer to the August 2020 issue of the LAPPA Case Law Monitor, available here. In February 2021, a Massachusetts trial court denied the second motion for preliminary injunction filed by a class of prisoners being held by the Massachusetts Department of Corrections (DOC). After the plaintiffs' first motion for preliminary injunction was denied in June 2020 by the Supreme Judicial Court in Massachusetts, the Supreme Judicial Court transferred the matter to trial court for the litigation to proceed as an emergency matter. The plaintiffs filed a second motion for preliminary injunction on December 23, 2020. As with the first motion, the plaintiffs sought to require the DOC to make specific efforts to reduce the prison population in light of the COVID-19 pandemic. The legal standard announced by the Supreme Judicial Court was whether the plaintiffs could establish an Eighth Amendment violation that prison officials acted or failed to act with deliberate indifference. Adopting this standard, the trial court first noted that the DOC conscientiously sought to prevent COVID-19 infections by implementing policies and procedures such as mask wearing, surveillance testing, increased cleaning, and social distancing. Additionally, the court noted that the DOC modified some initial COVID-19 restrictions on movement and social activity and ended the full lockdown and resumed some of its programing. The plaintiffs argued that despite the DOC's actions, it frequently failed to implement its policies and protocols and did not prevent thousands of inmates from contracting COVID-19 and at least 19 inmate deaths. The plaintiffs also argued that the DOC demonstrated deliberate indifference by refusing to employ numerous lawful means to reduce the inmate population, including furloughs, home confinement, medical and general parole, and maximizing the use of good time credit. While the trial court understood the consequences of any lapses in preventing the spread of the virus, it found that the lapses reflect only sporadic mistakes and lack of sufficient attention to detail, which is far below the standard of deliberate indifference. The court also noted that the Eighth Amendment does not obligate prison officials to take all possible action available to address potential harms. Therefore, the court ruled that the DOC's decision not to use furloughs, home confinement, medical and general parole, or the maximum lawful use of good time credit as methods of inmate reduction does not establish deliberate indifference. Despite rejecting the emergency motion, the trial court allowed the plaintiffs to move on an expedited basis for leave of court to amend their complaint to assert new claims under a "line-item" law enacted over the Governor's veto on December 28, 2020 that imposes additional requirements on the DOC during the COVID-19 pandemic.[1] The plaintiffs filed a motion to amend their complaint on February 18, 2021. The case remains ongoing.

[1] *See* Chapter 227 of Acts of 2020, Section 2, line item 8900-0001, available at https://malegislature.gov/Budget/FY2021/FinalBudget.

FORMER RAILROAD CONDUCTOR WHO ALLEGED DISCRIMINATION SETTLES WITH COMPANY

***Kenton Howard v. Norfolk Southern Corporation*, U.S. District Court for the Northern District of Alabama, Case No. 2:17-cv-02163-RDP (settlement reached March 2, 2021).** For previous updates and the facts on this case, please refer to the October 2020 issue of the *LAPPA Case Law Monitor*, available here. Norfolk Southern Corporation (Norfolk) and Kenton Howard, a former conductor at the company who asserted that the company violated federal disability bias law when it placed him on medical hold because he takes morphine and oxycodone for knee and back pain, reached a settlement on the eve of the trial. Prior to the settlement, the court denied Norfolk's motion for summary judgment in September 2020 and scheduled a jury trial for March 15, 2021. The parties informed the judge on March 2, 2021 about the settlement-in-principle. The judge dismissed the case but informed the parties to advise the court if they could not finalize the settlement document within 60 days. The terms of the agreement are not in the court record.

TENNESSEE SUES SUPERMARKET OVER ITS ALLEGED ROLE IN THE STATE'S OPIOID CRISIS

***State of Tennessee, ex rel. Herbert H. Slatery III v. Food City Supermarkets, LLC, et al.*, Circuit Court of Knox County, Tennessee, Case No. 3-32-21 (suit filed February 4, 2021).** Tennessee's Attorney General sued Food City Supermarkets, a southeast-based chain with 123 locations, over claims that the stores' pharmacies intentionally profited from the opioid epidemic by unlawfully selling tens of millions of prescription opioids in the state. The State asserts that Food City's conduct and its failure to maintain the required effective controls against abuse and diversion directly contributed to the ongoing opioid epidemic in Tennessee. The complaint alleges that the company violated Tennessee's public nuisance statute by ignoring indicators of diversion and failing to maintain effective controls against diversion and created a common law public nuisance by endangering the health of Tennesseans and interfering with the commercial marketplace. The State also asserts that Food City violated Tennessee's Consumer Protection Act. Tennessee asks the court for an order of abatement for the public nuisance that Food City aided and abetted, the costs of abating the nuisance, and damages. The case is ongoing.

COURT DISMISSES WHISTLEBLOWERS' FALSE CLAIMS ACT SUIT AGAINST MCKESSON A SECOND TIME

***United States, et al. v. McKesson Corporation*, U.S. District Court for the Northern District of California, Case No. 4:19-cv-02233-DMR (motion to dismiss granted February 16, 2021).** For previous updates and facts on this case, please refer to the October 2020 issue of the LAPPA *Case Law Monitor*, available here. A federal district court dismissed with prejudice a False Claims Act (FCA) suit against McKesson Corporation, which alleged that the company failed to provide proper security measures at distribution centers that hold opioids. The suit is a *qui tam* case filed by two whistleblowers, or relators. (In a *qui tam* action, one or more private individuals, called "relators," bring an action on behalf of the government.) The California court previously granted McKesson's motion to dismiss the relators' first amended complaint. The relators filed a second amended complaint (SAC) in September 2020, and McKesson again moved to dismiss. In the SAC, the relators allege that McKesson engages in business with the federal government and that, under its government contract, the company must comply with all applicable federal, state, and local laws and regulations. The relators reason that because McKesson settled federal claims against it that it violated Title II of the Comprehensive Drug Abuse and Prevention and Control Act of 1970, the company submitted claims for payment under federal programs while failing to disclose its noncompliance with the terms of the

governing contracts. The relators' claim arises under 31 U.S.C. § 3729(a)(1)(A), which imposes liability against anyone who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval," and 31 U.S.C. § 3729(a)(1)(B), which prohibits "knowingly mak[ing], us[ing], or caus[ing] to be made or used, a false record or statement material to a false or fraudulent claim." According to the court, the SAC does not contain any allegations that McKesson expressly certified its compliance with the applicable authorities each time it submitted a claim for payment under the contract. The relators argued that because the government contracts require McKesson to comply with all applicable laws and regulations, it can be inferred that McKesson expressly certified its compliance each time it submitted a claim. The court, however, did not agree, holding that requiring compliance as part of a contractual agreement is not the same as requiring express certification each time a claim is made. Additionally, the court found that the relators failed to identify any claims that made specific representations about the services McKesson provided. Because FCA liability attaches to claims for payment and not to underlying fraudulent activity, the relators failed to state a claim under the Act. The court granted McKesson's motion to dismiss, and the relators filed an appeal with the U.S. Court of Appeals for the Ninth Circuit on March 16, 2021.

ARKANSAS ATTORNEY GENERAL SUES WALGREENS OVER ITS ALLEGED ROLE IN THE STATE'S OPIOID CRISIS

***State of Arkansas, ex rel. Leslie Rutledge v. Walgreen Company*, Circuit Court of Pulaski County, Arkansas, Case No. 60CV-21-1792 (suit filed March 15, 2021).** Arkansas' Attorney General filed a lawsuit against Walgreens for its alleged role in fueling the opioid crisis in Arkansas. The suit claims that Walgreens failed in its responsibility to report suspicious orders of prescription opioids and ignored red flags about prescriptions dispensed at its Arkansas stores. Arkansas also asserts that Walgreens created a public nuisance in the state and engaged in negligent conduct that created an unreasonable risk of harm to others. Additionally, the complaint alleges that Walgreens violated Arkansas' Deceptive Trade Practices Act. The lawsuit seeks an injunction to force Walgreens to act responsibly and follow federal and state laws and damages for fueling the public health epidemic, as well as civil penalties for each violation of Arkansas' consumer protection laws. The case is ongoing.

CALIFORNIA DOJ REQUIRED TO PRODUCE PRESCRIPTION DATA TO WALGREENS

***City and County of San Francisco, et al. v. Purdue Pharma L.P., et al.*, U.S. District Court for the Northern District of California, Case No. 3:18-cv-07591-CRB (motion to compel issued March 23, 2021).** For previous updates and facts on this case, please refer to the December 2020 issue of the *LAPPA Case Law Monitor*, available here. Walgreens issued subpoenas to two non-party state agencies, the California Board of Pharmacy (Pharmacy Board) and the California Department of Justice (DOJ), seeking various datasets from the state's prescription drug monitoring program, Controlled Substance Utilization Review and Evaluation System (CURES database). Walgreens' theory is that the data will assist in proving alternative causes of the alleged nuisance, including the large number of pharmacies, doctors, and other dispensers of opioids the plaintiff chose not to sue. The state agencies objected to the subpoenas, and Walgreens moved to compel production from both. In granting the motion to compel against the DOJ, the court found the CURES data relevant to Walgreens' defense and not privileged. The court reasoned that Walgreens is entitled to steer its own defense and is entitled to data supporting its claim. In reaching this conclusion, the federal court rejected the DOJ's

argument that CURES data is shielded from disclosure due to the "official information" and related "deliberate process privilege." Additionally, because the data is relevant to Walgreens' defense, the court held that any privacy concerns can be ameliorated. In light of the sensitive information contained in the database, however, the court placed the following conditions on DOJ's production of CURES information: (1) the data must be produced under a protective order and designated as highly confidential; (2) the data must be produced in de-identified form; (3) Walgreens may not use the data to reverse-engineer any identifying information; and (4) Walgreens must pay the DOJ up to $2,000 for the costs of production. While the court granted the motion to compel against the DOJ, it quashed a similar motion against the Pharmacy Board. Because the data that Walgreens sought from the Board is either largely duplicative of what the DOJ will produce or irrelevant, the court determined that there is no basis for Walgreens to receive CURES data from the investigative files of select pharmacists. A discovery hearing is set for April 14, 2021. The trial for this case is scheduled to begin October 25, 2021.

NOTEWORTHY UPDATES IN THE NATIONAL OPIOID LITIGATION

***In re National Prescription Opiate Litigation*, U.S. District Court for the Northern District of Ohio, Case No. 17-MD-2804 (multi-district litigation commenced December 12, 2017).** U.S. District Court Judge Polster issued an opinion on February 1, 2021, denying the Neonatal Abstinence Syndrome (NAS) Guardians' (Guardians) motion for multiple class certifications. As individuals acting as guardians of children diagnosed at birth with NAS, the Guardians allege that they shoulder a great burden of care for children harmed by the defendants. In their pleadings, the Guardians proposed two different nationwide plaintiff classes, two different California statewide plaintiff classes, and two different Ohio statewide plaintiff classes. The proposed nationwide classes assert Racketeer Influenced and Corrupt Organizations Act (RICO) violation claims against certain marketing and supply chain defendants and request relief in the form of medical monitoring, the creation of a science panel, compensatory and punitive damages, and attorneys' fees. The proposed statewide class claims, made against a broader set of defendants, involve RICO claims as well as claims of negligence, civil battery, civil conspiracy, and violations of unfair competition laws. In order for a proposed class to be certified, the class must be "ascertainable," meaning that the class definition is sufficiently definite to be administratively feasible for the court to determine if an individual is in the class. After analyzing the criteria of the proposed classes, the court concluded that the classes proposed by the Guardians are not reasonably ascertainable. For example, one proposed class criteria involved having a child medically diagnosed with opioid-related NAS at or near birth. The court noted, however, that NAS is not easily defined or diagnosed. Additionally, a diagnosis of NAS in a child's medical record, without more information, does not ensure that opioid use caused the child to suffer from NAS. While the court agreed that the opioid epidemic caused serious injuries to many mothers and their newborns, it ultimately ruled that the law does not permit the Guardians to pursue claims against the defendants and seek relief as a class. The Guardians filed a motion for reconsideration on February 16, 2021, which was denied on March 4, 2021.

MCKINSEY AND COMPANY SETTLEMENTS AND RELATED LITIGATION

- On February 4, 2021, McKinsey and Company (McKinsey) agreed to pay $573 million to settle claims made by numerous states that the consulting firm helped fuel the country's opioid epidemic by providing sales analysis and marketing advice to opioid manufacturers, including Purdue Pharma and Johnson & Johnson. According to news reports, the settlement agreement includes 47 states, five territories, and the District of Columbia. Most of the money will be paid out over the next two months and will go to government programs fighting opioid use disorder and providing treatment. Of the states that reported their individual settlement amounts, the sums include: California ($60 million), North Carolina (almost $19 million) and Delaware ($2.58 million). In addition to money, McKinsey agreed to publicly disclose internal documents detailing its work for opioid

companies, which could be used in ongoing litigation by state and local governments against the industry. As part of the settlement McKinsey denied any allegations of wrongdoing. In 2019, McKinsey had stated that it would no longer consult with companies that made opioid-based pain medications.

- On March 22, 2021, McKinsey reached a $45 million settlement with Nevada over claims that the firm's work for opioid manufacturers harmed the state's residents. As one of the three states that refused to join McKinsey's $573 million global settlement, Nevada received more than three times the average settlement with other states (approximately $13 million). West Virginia and Washington also refused to accept McKinsey's original settlement offer. The firm agreed to pay Washington $13.5 million and West Virginia $10 million.
- As of March 2021, more than a dozen cities, counties, and Native American tribes have sued McKinsey in the wake of these settlements seeking funds from the firm. Some of the new McKinsey suits are presently part of the multi-district national opioid litigation in Ohio. The firm, however, is asking a panel of federal judges to group cases against it in Manhattan.

DRUG COMPANIES SEEK INCOME TAX DEDUCTIONS FOR OPIOID SETTLEMENTS

According to news reports, four companies that agreed to pay a combined $26 billion to settle claims about their roles in the opioid crisis plan to deduct some of those settlement costs from their income taxes, thereby recouping around $1 billion each. While the details of the opioid settlements are still being worked out, Johnson & Johnson and three large drug distributors—McKesson, AmerisourceBergen and Cardinal Health—all updated their recent financial projections to include large tax benefits stemming from the expected deal. Cardinal Health, for example, stated that it planned to collect a $974 million cash refund because its opioid-related legal costs constitute a "net operating loss carryback" pursuant to a tax provision Congress included in last year's coronavirus bailout package, known as the CARES act, as a way of helping companies struggling during the pandemic. U.S. tax laws generally restrict companies from deducting the cost of legal settlements from their taxes, with one major exception: damages paid to victims as restitution for misdeeds. Some tax experts say the Internal Revenue Service may challenge the companies' attempts to deduct opioid settlement costs.

PURDUE PHARMA BANKRUPTCY PROCEEDINGS

***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).** On March 15, 2021, Purdue Pharma filed its latest proposed bankruptcy plan. The $10 billion plan calls for handing over the company's assets to trusts for the benefit of states, cities, and counties suing to recoup the money spent dealing with the opioid crisis. The Sackler family would contribute $4.275 billion to the settlement, an increase from the family's original $3 billion offer. In exchange for the company assets and the cash, which is slated to be paid out over nine years, Purdue and the Sackler family would be legally insulated from existing and future opioid lawsuits. The proposed plan calls for an initial $500 million payment to opioid claimants following plan approval. Purdue then expects to generate $1 billion through the end of 2024, which would — along with the payments from Purdue's owners — be funneled to trusts established for states and cities, hospitals, Native American tribes, and personal injury plaintiffs, among others. The states and cities are expected to receive about $250 million of the initial $500 million payment. Some state attorneys general and activists believe that the settlement offer does not include enough money and goes too far in protecting the company and the Sackler family from future liability. The

plan is subject to approval from the bankruptcy court judge. Creditors with claims against Purdue can vote on the plan by July 14, but there is no clear threshold for how much support it needs to be approved.

WALMART'S CASE AGAINST THE U.S. DOJ DISMISSED

***Walmart Inc. v. U.S. Department of Justice, et al.*, U.S. District Court for the Eastern District of Texas, Case No. 4:20-cv-00817-SDJ (motion to dismiss granted February 4, 2021).** For previous updates and facts on this case, please refer to the December 2020 issue of the *LAPPA Case Law Monitor*, available here. A federal district court judge dismissed Walmart's lawsuit accusing the U.S. Department of Justice (DOJ) of scapegoating the company to divert attention from its own failures to effectively address the public health crisis over opioids. The court concluded that Walmart failed to allege agency action sufficient to meet the requirements of sovereign immunity waiver under 5 U.S.C. § 702, which is necessary to maintain its claims against the federal government. The court granted the DOJ's motion to dismiss for lack of jurisdiction and dismissed the case for lack of subject-matter jurisdiction. Walmart filed an appeal with the U.S. Court of Appeals for the Fifth Circuit on March 5, 2021.

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 correctional settings, and the involuntary commitment and guardianship of individuals with alcohol or substance use disorders.

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