

Case Law Monitor

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

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PENNSYLVANIA SUPREME COURT RULES THAT FATHER OF OVERDOSE VICTIM CANNOT SUE PHARMACY

Dale E. Albert v. Sheeley's Drug Store, Inc., Supreme Court of Pennsylvania, Case No. 5 MAP 2021 (opinion filed December 22, 2021). In a 5-2 decision, the Supreme Court of Pennsylvania upheld a trial court ruling that the father of a fatal fentanyl overdose victim cannot sue the dispensing pharmacy because the decedent engaged in illegal conduct to obtain the drug. In 2016, Sheeley's Drug Store (Sheeley's) dispensed a fentanyl prescription intended for a cancer patient to her son, Zachary Ross, despite directing the pharmacy not to dispense her prescriptions to anyone but herself or her boyfriend. The patient worried that Ross, who suffers from substance use disorder, would try to pick up and use her pain medication. After picking up the prescription, Ross and his friend, Cody Albert (Cody), who drove Ross to the pharmacy, returned to Ross's house and consumed some of the fentanyl. Later that night, Cody died of a fentanyl overdose. Cody's father, Dale Albert (Albert), filed a negligence suit against Sheeley's seeking wrongful death and survival damages. Albert's complaint alleged that Sheeley's negligently allowed Ross to pick up his mother's fentanyl prescription, which proximately caused Cody's overdose and death. Sheeley's sought summary judgment, arguing that the wrongful conduct rule (also known as the *in pari delicto* doctrine) bars the suit. *In pari delicto* is an equitable doctrine that precludes plaintiffs from recovering damages if their cause of action is based, at least partially, on their own illegal conduct. The trial court entered judgment for Sheeley's, concluding that the doctrine bars recovery because Cody's own criminal conduct caused his death in part. Albert appealed to an intermediate appellate court, arguing that Cody did not engage in illegal conduct, as ingesting controlled substances is not illegal, and he did not play a role in Ross improperly obtaining the fentanyl. The appellate court unanimously rejected that argument. On appeal to the Supreme Court of Pennsylvania, Albert argued: (1) that the trial court had no basis to conclude, at the summary judgment stage, that Cody participated actively in Ross's scheme; and (2) that the illegal possession of a controlled substance is not the sort of crime for which the *in pari delicto* doctrine was intended. The majority rejected these arguments and affirmed the ruling of the lower court. The majority found that text messages between Ross and Cody, in which they discussed obtaining drugs, and Cody's act of driving Ross to the pharmacy, show Cody was actively and voluntarily involved in Ross's scheme. While the majority noted that the "result here may seem harsh," they concluded that the lawsuit "falls squarely" within the doctrine. The dissenting justices disagreed that the evidence showed Cody knew Ross illegally obtained the drugs, and that regardless, Cody's behavior did not rise to the level that would trigger the *in pari delicto* doctrine. The dissent further stated that the majority's holding of allowing simple drug possession to trigger the *in pari delicto* doctrine "close[s] the courthouse doors to an overdose victim's heirs."

TREATMENT CENTER SUES ILLINOIS TOWN FOR BLOCKING OPENING OF NEW FACILITY

***Haymarket DuPage, LLC v. Village of Itasca, et al.*, U.S. District Court for the Northern District of Illinois, Case No. 1:22-cv-00160 (suit filed January 11, 2022).** The Haymarket Center (Haymarket), Chicago’s largest non-profit mental health and substance use disorder treatment center, filed suit against a Chicago suburb, the Village of Itasca (Itasca), alleging that it unlawfully prevented Haymarket from opening a 240-bed treatment facility within the suburb. Haymarket argues that Itasca and key town governmental entities intentionally interfered with the rights of Haymarket, the people with disabilities it serves, and their families. The lawsuit alleges that Itasca officials, including the mayor and the superintendent of Itasca’s public school district, “strategically fostered, intentionally contributed to, and were unduly negatively influenced by [a] ‘not in my backyard’ opposition.” Haymarket accuses Itasca officials of seeking pretexts to reject the proposal amid “discriminatory stereotyping of Haymarket’s mission.” After Haymarket attended more than 35 hearings, the Itasca’s Plan Commission and Board voted unanimously against approving Haymarket’s plan to open a facility in Itasca. Haymarket brings its action for declaratory judgment, permanent injunctive relief, and damages under the Fair Housing Amendments Act, Title II of the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act of 1973. Haymarket asks the court to prevent all defendants from refusing to grant a permit and interfering with the opening and operation of their treatment center. Additionally, Haymarket requests that the court enjoins the defendants from issuing false and biased public statements that denigrate Haymarket, its patients, its leadership, its staff, and its supporters. The defendants’ answers are due by February 3, 2022.

CLASS CERTIFIED IN SUIT BY NEW YORK INMATES CHALLENGING EARLY RELEASE RULES

***Latoya Raymond and Jan Javier Santiago Garcia v. New York State Dept. of Corrections and Community Supervision, et al.*, U.S. District Court for the Northern District of New York, Case No. 9:20-CV-1380 (class certified January 11, 2022).** A New York federal district court certified a class of inmates with disabilities in New York who challenge two of the state’s early release programs as violating federal disability laws. The Shock Incarceration Program (SIP) is a six-month project that rehabilitates non-violent inmates using intense physical training and drug treatment programs. Inmates who successfully complete the SIP are eligible for immediate conditional release. The Comprehensive Alcohol and Substance Abuse Treatment Program (CASAT) is an intensive regime not involving physical exertion used by inmates with disabilities who cannot participate in SIP. Inmates who are ordered by a sentencing court to participate in SIP but do not meet its physical or mental health requirements can transfer into the CASAT program. According to the New York federal court, an inmate without an impairment that precludes him or her from SIP may be sentenced to SIP or may volunteer for it. In either case, he or she can earn eligibility for release in six months by completing the program successfully. In contrast, an inmate ineligible for SIP who completes CASAT can only earn eligibility for release in six months if he or she was originally sentenced to SIP. Inmates who volunteer for SIP, but do not meet its requirements, do not receive a full release upon completing CASAT. Latoya Raymond and Jan Javier Santiago Garcia, two inmates with disabilities, filed suit alleging that the two programs discriminate against them (and others) in violation of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973. The plaintiffs assert that under the current scheme, they cannot obtain early release because their respective sentencing courts did not order them into SIP. The judge granted the plaintiffs’ motion for class certification. Accordingly, Raymond and Santiago Garcia may now represent a class of inmates with disabilities currently incarcerated in New York, that: (1) were not judicially ordered to enroll in SIP at sentencing; (2) cannot take part in SIP because of health reasons; (3) are otherwise eligible to enroll in SIP; and (4) are thus denied an alternative six-month pathway to early release. Discovery is due by April 1, 2022.

NEW YORK INSPECTOR GENERAL REPORTS ON FLAWED DRUG TESTING IN CORRECTIONS

(Report released January 4, 2022). New York State Inspector General, Lucy Land, released a report on January 4, 2022, stating that statewide correctional facilities subjected incarcerated individuals to internal penalties, including solitary confinement, based on a highly flawed drug testing program administered between January and August 2019 by the New York State Department of Corrections and Community Supervision (DOCCS). The investigation found that flawed drug screens impacted more than 1,600 incarcerated individuals. According to the report, DOCCS did not perform confirmation drug testing as required by the drug screen manufacturer, Microgenics Corporation (Microgenics), and failed to properly investigate the reason for significant spikes in positive test results. Additionally, the investigation revealed that Microgenics representatives provided false or misleading information about the test's reliability after learning of incarcerated individuals attempting to challenge drug screen results. On November 5, 2019, after receiving preliminary results from the Office of Inspector General's investigation, DOCCS ceased imposing penalties based on any positive drug tests results using Microgenics systems without first confirming those results with a more specific method and outside laboratory. On January 15, 2020, DOCCS terminated its contract with Microgenics. Upon acquiring another drug testing vendor, DOCCS resumed its Incarcerated Individual Drug Testing Program on February 22, 2021 and revised its Urinalysis Testing Policy to require that all initial positive test results be sent to an outside laboratory for confirmatory testing.

U.S. SUPREME COURT INVITES U.S. BRIEF ON ERISA LIABILITY FOR DRUG PRICING



***Doe 1 v. Express Scripts Inc.*, U.S. Supreme Court, Case No. 21-471 (invitation to file brief December 13, 2021).** Anthem is a health benefits company that offers health care plans to employers and individuals. Express Scripts is a pharmacy benefits manager (PBM) that negotiates with drug manufacturers, contracts with pharmacies, and processes and pays prescription drug claims. In 2009, Anthem and Express Scripts entered into a 10-year PBM agreement, which included Anthem selling three PBM companies to Express Scripts. In exchange for receiving a higher up-front payment for the three companies, Anthem agreed to pay Express Scripts a higher rate for prescription drugs during the 10-year agreement. In

2016, a group of Anthem health plans and individual subscribers filed suit, alleging that Anthem and Express Scripts violated their fiduciary obligations under the federal Employee Retirement Income Security Act (ERISA) by reaching an agreement knowing that it would result in high drug prices. ERISA requires fiduciaries to act “solely in the interest of the participants and beneficiaries” of a plan. Anthem and Express Scripts moved to dismiss the case for failure to state a claim upon which relief could be granted, and a New York federal district court granted the motion in 2018. In December 2020, the U.S. Court of Appeals for the Second Circuit affirmed the dismissal. The Second Circuit found that Anthem was not acting as a fiduciary when it entered into the PBM agreement because the decision to sell a corporate asset is not a fiduciary decision, even if the sale affects an ERISA plan. Express Scripts was not a fiduciary, the Second Circuit reasoned, because a PBM does not exercise discretionary authority when it sets prescription drug prices per the terms of a contract. The plaintiffs petitioned the U.S. Supreme Court for review on June 25, 2021. To date, no grant or denial has yet been given, but on December 13, 2021, the Court invited the U.S. Solicitor General to file a brief expressing the views of the United States on the case. As of January 27, 2021, no such brief has been filed.

MASSACHUSETTS NURSING FACILITY SETTLES OPIOID USE DISORDER DISCRIMINATION ALLEGATIONS

Voluntary Resolution Agreement, The Oaks, OCR Case No. 01-19-351990 (December 22, 2021).

A 2019 complaint filed with the U.S. Department of Health and Human Services' Office for Civil Rights (OCR) alleged that The Oaks, a skilled nursing facility in New Bedford, Massachusetts, refused admission to individuals receiving medication for Opioid Use Disorder (OUD) as a matter of policy. In February 2019, a hospital requested a bed for a patient in need of skilled nursing care, and in April 2019, The Oaks denied the request because the patient was on Suboxone. The Oaks admitted the patient only after he discontinued his Suboxone treatment. In response to the complaint, OCR and the U.S. Department of Justice, through the U.S. Attorney's Office for the District of Massachusetts (DOJ), initiated a review of The Oaks' compliance with 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 disability under the ADA. The OCR and DOJ concluded that The Oaks' policy excluded individuals with disabilities, denied them the ability to benefit from The Oaks' services because of a disability, and imposed eligibility criteria that screened out individuals with disabilities. On December 22, 2021, The Oaks reached an agreement with OCR and DOJ to voluntarily resolve the dispute. Under the terms of the agreement, The Oaks agreed to adopt a non-discrimination policy, revise its admission policy, institute new employee training, and pay a civil penalty of \$5,000 to the DOJ. The OCR and DOJ will monitor The Oaks' compliance for one year and will terminate their review only if The Oaks substantially complies with the agreement.

SIXTH CIRCUIT REQUIRES MICHIGAN SHERIFFS TO FACE SUIT REGARDING INMATE'S DEATH

***Dwayne Greene v. Crawford County.*, U.S. Court of Appeals for the Sixth Circuit, Case No. 20-1715, (opinion filed January 4, 2022).**

On December 4, 2017, law enforcement booked an intoxicated man, Dwayne Greene, into the Crawford County, Michigan jail. Greene soon experienced symptoms of alcohol withdrawal, including delirium tremens. On December 7, Greene collapsed in his cell, suffered acute respiratory failure, and died on December 11. The sheriffs supervising the jail never sought medical treatment for Greene until after his December 7 collapse. On December 8, the sheriffs sought only a mental health evaluation, in which evaluators concluded Greene posed no danger to himself or others. Greene's estate brought a suit under the federal Civil Rights Act (42 U.S.C. § 1983) against: (1) the jail officials for deliberate indifference to Greene's medical needs; and (2) Crawford County for an unconstitutional policy of denying medical care to individuals suffering from delirium tremens. The estate also sued the Northern Lakes Community Mental Health Authority (CMH), the organization that conducted the mental health evaluation. A federal district court granted summary judgment on all claims to CHM and its employees. The jail officials and the County also moved for summary judgment at trial, asserting qualified immunity. The district court denied these motions for six of the jail officials and the county. These seven defendants appealed to the U.S. Court of Appeals for the Sixth Circuit while Green's estate cross-appealed the grant of qualified immunity to the remaining defendants. On January 4, 2022, the Sixth Circuit reversed the district court's summary judgment in favor of one of the sheriffs, dismissed the County's appeal for lack of appellate jurisdiction, affirmed the judgment for the remaining defendants, and remanded the case to the district court for further proceedings. For six of the jail officials, the Sixth Circuit found sufficient evidence that a jury could conclude they acted deliberately indifferent to Greene's medical needs. The court noted that the estate sufficiently established Greene's right not to have "known, serious medical needs" disregarded by jail officials such that qualified immunity does not apply. As a result of the decision, Crawford County and the six jail officials will face a trial in federal district court.

ADDICTION TREATMENT CENTER SETTLES FALSE MEDICARE AND MEDICAID CLAIMS

***U.S. et al. ex rel. Wendy Welch v. CleanSlate Centers, Inc., et al.*, U.S. District Court for the District of Massachusetts, Civil Action No. 17-CV-30038-MGM (settlement reached December 30, 2021).**

Massachusetts-based company CleanSlate owns a network of addiction treatment centers throughout the country. In April 2017, a former employee-turned-whistleblower filed a *qui tam* action under the federal False Claims Act against the company for allegedly making false Medicare and Medicaid claims. The Commonwealth of Massachusetts and the U.S. Department of Justice both intervened in the matter. The complaint against CleanSlate alleged that the company billed Medicare and Medicaid for duplicative and medically unnecessary urine tests from the patients in its facilities.

CleanSlate then referred its laboratory work to labs under its ownership, in violation of anti-referral statutes. Massachusetts law prohibits referrals and testing when the referring entity owns the lab or vice-versa. Plaintiffs further accused CleanSlate of systematically backdating prescriptions for Suboxone, thereby generating additional false claim submissions. On December 30, 2021, CleanSlate agreed to resolve the claims against it by paying \$4.5 million to Medicare and MassHealth, Massachusetts' Medicaid program. The company also entered into a compliance program that includes annual audits reported to the Massachusetts attorney general. Dr. Amanda Louise Wilson, the founder and former owner of CleanSlate, must pay an additional \$8,000 to the Western Mass Training Consortium, a local addiction recovery nonprofit.



AMICUS BRIEFS FILED IN U.S. SUPREME COURT REVIEW OF DOCTORS' "GOOD FAITH" DEFENSE CASE

***Xiulu Ruan v. United States*, U.S. Supreme Court, Case No. 20-1410 (writ of certiorari granted November 5, 2021); *Shakeel Kahn v. United States*, U.S. Supreme Court, Case No. 21-5261 (writ of certiorari granted November 5, 2021).** For previous updates on these now-consolidated cases, please refer to the December 2021 issue of the LAPP Case Law Monitor, available [here](#). On November 5, 2021, the U.S. Supreme Court granted certiorari to 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 petitioners filed briefs with the Court on December 20, 2021. Both petitioners argue that the CSA requires the government to prove that a physician “knowingly and intentionally” acted outside the usual course of professional practice. To ignore the physicians’ subjective intent would result in “malpractice actions parading as prosecutions.” The United States submitted its brief on January 19, 2022. It reasons that the CSA allows room for reasonable error by physicians but does not empower them to invent their own definitions of “medicine” that make no effort to conform to the standards of their colleagues. Several groups filed amicus briefs with the Court, predominantly in support of the petitioners’ arguments. Those opposed to the exclusion of the “good faith” defense include physicians and groups involved in end-of-life care, pain management, due process protection, criminal defense, and libertarian causes. The common concern among these *amici* is that an “objective” standard of physicians’ liability will have a chilling effect on the practice of medicine through fear of excessive prosecution. The Court set oral arguments for March 1, 2022.

SOUTH DAKOTA SUPREME COURT INVALIDATES RECREATIONAL MARIJUANA AMENDMENT

In the Matter of Election Contest as to Amendment A, Supreme Court of South Dakota, Case No. 29547 (opinion filed November 24, 2021). In a 4-1 decision, the Supreme Court of South Dakota found “Amendment A,” which legalized recreational marijuana in the state, invalid. Amendment A, which South Dakotans approved in the November 2020 election, legalized recreational marijuana while also directing the legislature to pass laws governing medical marijuana and hemp cultivation. The majority determined that Amendment A’s provisions embrace three separate and distinct subjects: (1) recreational marijuana; (2) medical marijuana; and (3) hemp. Because the three provisions each have separate objectives and purposes, the majority ruled that Amendment A violated the single subject requirement in the South Dakota Constitution (Article XXIII, § 1). According to the majority, the Amendment drafters’ failure to comply with the single subject requirement meant that voters could not separately vote on each distinct subject. The majority also opined that the proponents of Amendment A failed to identify a single “instance when voters in another state have been asked to approve a constitutional amendment to legalize recreational marijuana, medical marijuana, and hemp in a single vote.”

FEDERAL GOVERNMENT SEEKS PERMANENT INJUNCTION AGAINST TEXAS PHARMACIST

United States v. Zarzamora Healthcare LLC, et al., U.S. District Court for the Western District of Texas, Case No. 5:22-cv-00047-JKP (suit filed January 21, 2022). The federal government recently filed a civil complaint seeking to permanently prevent the owner of a San Antonio, Texas area pharmacy from unlawfully dispensing opioids and other controlled substances. The government alleges that Jitendra Chaudhary, the pharmacist-in-charge and part owner of Rite-away Pharmacy and Medical Supply #2 (Rite-away), unlawfully filled controlled substance prescriptions in violation of the Controlled Substances Act. The complaint asserts that Chaudhary and Rite-away ignored signs of misuse and diversion when filling opioid prescriptions. The complaint also alleges that one patient died from a fentanyl overdose nine days after Rite-away filled her fentanyl prescription. By ignoring the signs of misuse and diversion, the government alleges that Chaudhary acted outside the usual course of professional pharmacy practice and filled prescriptions not issued for a legitimate medical purpose. Additionally, the government alleges that the defendants altered prescriptions that lacked the required information to make them appear in compliance with Drug Enforcement Administration regulations. The complaint seeks civil penalties as well as a permanent injunction to prevent further violations.

CONSTITUTIONAL CHALLENGE TO MASSACHUSETTS INVOLUNTARY COMMITMENT STATUTE FAILS

John Doe et al. v. Carol Mici, et al., Massachusetts Superior Court (Suffolk County), Case No. 1984CV00828 (order on defendants’ partial motion for judgment on the pleadings issued December 29, 2021). For previous updates on this case, please refer to Volume No. 1, Issue No. 1 of the LAPPA *Case Law Monitor*, available [here](#). A Massachusetts trial court judge ruled that the Plaintiffs’ facial challenge to Section 35 (MASS. GEN. LAWS ANN. ch. 123 § 35 (West 2021)) failed and allowed the defendants’ partial motion for judgment on the pleadings. Section 35 allows certain individuals to seek a court order to involuntarily commit someone for up to 90 days for inpatient alcohol or substance use disorder treatment. Men can be committed to a correctional facility for treatment. As of 2016, however, Massachusetts women may only be involuntarily committed to a treatment facility licensed or approved by the Department of Public Health (DPH) or the Department of Mental Health (DMH). In 2019, plaintiffs brought a challenge to the

constitutional validity of Section 35. Defendants moved for partial judgment on the pleadings to the extent that the plaintiffs challenged the constitutionality of the law on its face. In her opinion, the trial judge examined Section 35 through several lenses: (1) whether it constitutes unlawful gender discrimination; (2) whether it amounts to impermissible discrimination based on disability; and (3) whether it violates the equal protection rights of men. With respect to the issue of gender discrimination, the court concluded that the plaintiffs failed to meet their burden because Section 35 does not require all civilly committed men receiving treatment to be confined to a correctional facility. The language of Section 35 only states that a male patient “may” be committed to such a facility. The court reasoned that it could have been that there were not enough DPH or DMH facilities available and, therefore, the Commissioner of Corrections designated a correctional facility for plaintiffs’ confinement during their treatment. On the issue of disability discrimination, the court ruled that Section 35 does not, on its face, treat individuals with alcohol and substance use disorders differently than those without such disorders or with different disorders. Finally, the court disagreed with the plaintiffs’ facial challenge based on substantive due process. Similar to the reasoning regarding gender discrimination, the court ruled that the plaintiffs failed to meet their burden because Section 35 does not require the Commissioner to commit all males to correctional facilities. As all of plaintiffs’ facial challenges to Section 35 failed, the court granted defendants’ partial motion for judgment.

FOURTH CIRCUIT VACATES OPIOID DISTRIBUTION SENTENCE DUE TO INEFFECTIVE COUNSEL

United States v. Precias K. Freeman, U.S. Court of Appeals for the Fourth Circuit, Case No. 19-4104 (opinion filed January 25, 2022). In a split *en banc* decision by the Fourth Circuit, the majority reversed the 17-year sentence of a woman who pled guilty to possession with intent to distribute opioids due to her not receiving effective assistance of counsel. In 2017, Precias Freeman admitted to possessing with intent to distribute hydrocodone and oxycodone and pled guilty without the benefit of a plea agreement. Freeman’s attorney waived multiple arguments on her behalf, including objections to the number of pills she allegedly sold. According to the majority, those objections, if successful, could have reduced Freeman’s sentence by nearly 10 years. Additionally, Freeman’s counsel waived a meritorious objection to the two-level sentencing enhancement for obstruction of justice that Freeman received for moving to North Carolina while released on bond. Freeman had a nonfrivolous argument that this enhancement was improper because she did not move to North Carolina to be deliberately obstructive. Freeman explained that she faced eviction and moved out of necessity. By waiving Freeman’s objection to the upward departure for obstruction of justice, the court found that her counsel lost the opportunity for Freeman to receive a downward adjustment for acceptance of responsibility. The majority ruled that Freeman’s counsel “was unequivocally wrong on the law when he waived her meritorious objections” and that Freeman “clearly received ineffective assistance of counsel.” The court vacated the sentence and remanded for resentencing. The dissenting opinion stated that the majority wrongly declared Freeman’s counsel ineffective without hearing his explanations for the decisions he made.

JUDGE BARS SUMMARY JUDGMENT IN SUIT ALLEGING OPIOID PRESCRIPTION BIAS

Raymond Hartmann v. Graham Packaging Company, LP, U.S. District Court for the Southern District of Ohio, Case No. 1:19-cv-488 (opinion filed January 25, 2022). In 2017, Raymond Hartmann, who takes prescription opioids for chronic pain, applied for a job at Graham Packaging Company (Graham) as a production specialist, which entails operating a forklift and other heavy machinery. Hartmann provided Graham with a physician’s note stating that he takes narcotic pain relievers but that no concerns had been raised over his ability to perform his occupational duties while on these medications. Despite the doctor’s note, Graham informed Hartmann that it would not hire him after concluding that he would represent a safety hazard. Hartmann sued Graham on July 1, 2019, asserting claims under the Americans with Disabilities Act

(ADA) and Ohio’s parallel anti-discrimination statute (OHIO REV. CODE ANN. § 4112.02 (West 2021)). The parties crossed-moved for summary judgment in March 2021. While the evidence shows that Graham regarded Hartmann as being disabled for purposes of an ADA claim, the federal district court determined that a genuine factual dispute remains as to whether Hartmann was otherwise qualified for the forklift operator position despite his disability. The court also found that questions remain on whether Graham conducted a sufficient investigation into whether Hartmann’s condition would actually disqualify him from the job. Because these questions of fact remain, the court rejected each side’s motion for summary judgment. A trial date has not been set.

FIRST CIRCUIT RULES FEDERAL CHARGES CAN PROCEED AGAINST MAINE MARIJUANA GROWERS



***United States v. Brian Bilodeau, et al.*, U.S. Court of Appeals for the First Circuit, Case No. 19-2292 (opinion filed January 26, 2022).** The U.S. Court of Appeals for the First Circuit held that marijuana growers in Maine can be prosecuted under federal drug laws because the growers failed to comply with Maine’s regulations governing marijuana for medical purposes. Maine strictly regulates marijuana growers and allows only small operations to exist. For example, a primary caregiver can assist a maximum of five qualifying patients, and for each patient, the caregiver can possess up to six mature, flowering marijuana plants. Additionally,

beginning in December 2014, Congress attached a rider to an appropriations bill, referred to as the “Rohrabacher-Farr Amendment,” which limits federal prosecutors’ ability to enforce the federal Controlled Substances Act (CSA) with respect to certain conduct involving medical marijuana, by preventing the use of federal funds to interfere with state laws. Between 2016 and 2018, federal law enforcement officers investigated marijuana grower Brian Bilodeau and his association with a drug organization that grows and distributes hundreds of pounds of marijuana per month under the cover of Maine’s medical marijuana program. In February 2018, federal agents executed a search warrant for one of Bilodeau’s grow sites and his residence. Federal agents seized significant quantities of marijuana from the sites, including 321 marijuana plants. The federal government indicted the defendants for the knowing and intentional manufacture and possession of marijuana with intent to distribute in violation of the CSA and conspiracy to do the same. In response, defendants moved to enjoin their prosecutions pursuant to the appropriations rider, arguing that the prosecution involves the prohibited use of federal funds to prevent Maine from implementing its medical marijuana law. A federal district court rejected the defendants’ argument, ruling that the defendants’ patent lack of compliance with Maine law precluded application of the rider. The defendants then filed an interlocutory appeal to the U.S. Court of Appeals for the First Circuit. On appeal, prosecutors asserted that the rider should only apply when a grower fully complies with all state laws and regulations. The defendants, in turn, argued that the rider should apply to most people who have a state license to grow medical marijuana. The First Circuit rejected both parties’ arguments and decided to adopt a middle ground that turns on the facts of a given case but refuses to “fully define its precise boundaries.” In this case, the record clearly shows that the defendants knowingly engaged in “a large-scale black-market marijuana operation” that greatly exceeded Maine’s medical marijuana laws. Therefore, because of the defendants’ lack of compliance with Maine marijuana law, the court held that the rider does not bar prosecution, and a subsequent conviction under the CSA would not hamper the intended effect of Maine’s marijuana laws.

RECENT GLOBAL AND STATEWIDE SETTLEMENTS IN OPIOID LITIGATION

- On December 7, 2021 and January 14, 2022, New Mexico agreed to join the \$26 billion global settlement with: (1) drug distributors Cardinal Health, McKesson Corp., and AmerisourceBergen; and (2) drug maker Johnson & Johnson. Johnson & Johnson will pay New Mexico its share of the settlement in 2022, rather than over the course of several years, if all New Mexico local governments sign onto the agreement by May 31, 2022.
- In January 2022, two more holdout states, Nevada and Georgia, agreed to join the \$26 billion global settlement with the four defendants. The remaining states not participating in this global settlement are Alabama, Oklahoma, Washington, and West Virginia. Additionally, New Hampshire agreed to settle only with the distributors, and Rhode Island joined the global settlement only with Johnson & Johnson.
- On January 25, 2022, Rhode Island, which opted not to join the global opioid settlement with the drug distributors, reached a separate deal with the three distributors to resolve claims against them in a case scheduled for trial in March 2022. (*State of Rhode Island v. Purdue Pharma L.P. et al.*, Rhode Island Superior Court (Providence/Bristol County), Case No. PC-2018-4555). The three distributors agreed to pay the state \$90.8 million to settle, with the money paid out over time until 2038. Eighty percent of the money will go to a statewide opioid abatement fund controlled by the state, while 20 percent will go directly to Rhode Island's 39 cities and towns. For its 80 percent share, the state will convene a committee made up of public health officials, state and local representatives, and community members to administer the statewide fund. Rhode Island will receive \$21.1 million from drugmaker Johnson & Johnson as part of the global settlement.
- On December 23, 2021, Endo International PLC (Endo) announced that it and its wholly owned subsidiaries have entered into a statewide settlement agreement intended to resolve all government related opioid claims in Texas. Endo will pay Texas \$63 million to resolve the claims against it in two cases that were set for trial this year (*County of Dallas v. Purdue Pharma, L.P., et al.*, Texas MDL Pretrial Cause No. 2018-77098; and *County of Bexar v. Purdue Pharma, L.P., et al.*, Texas MDL Pretrial Cause No. 2018-77066). The Texas settlement includes no admission of wrongdoing, fault, or liability of any kind by Endo or its subsidiaries.
- On January 18, 2022, Endo announced that it and its subsidiaries entered into a statewide settlement agreement to resolve all government related opioid claims in Florida. Endo will pay Florida up to \$65 million to resolve the claims against it in a case that was set for trial in Florida state court in April 2022 (*State of Florida, Office of the Attorney General, Department of Legal Affairs v. Purdue Pharma, L.P., et al.*, Florida Circuit Court, Pasco County, Case no. 2018-CA-001438). The settlement includes no admission of wrongdoing, fault, or liability of any kind by Endo or its subsidiaries.
- On December 28, 2021, Collegium Pharmaceutical, Inc. (Collegium) announced that it agreed to pay up to \$2.75 million to resolve all 27 pending opioid-related lawsuits brought against it by cities, counties, and other subdivisions across the U.S. The settlement releases Collegium from liability related to the dismissed cases. Additionally, the company notes that the settlement agreement does not include any admission of liability or wrongdoing. The agreement is subject to approval by all parties. This settlement comes a few weeks after a December 16, 2021 settlement with Massachusetts (*Commonwealth of Massachusetts v. Collegium Pharmaceutical, Inc.*, Massachusetts Superior Court (Suffolk), Case no. 2184CV02859) in which Collegium agreed to pay Massachusetts \$185,000 and agreed to stop marketing its opioid products through "in-person detailing" of the Commonwealth's prescribers and speaker programs with health care professionals. Massachusetts Attorney General Maura Healey alleged that Collegium sales representatives misled health care providers about the potential risks of its opioid drug, Xtampza, by marketing it as a safe and responsible alternative to other opioids.

RECENT EVENTS IN THE NEW YORK STATE OPIOID LITIGATION

In Re Opioid Litigation, New York Supreme Court, Suffolk County, Case No. 40000/2017 (suit filed March 28, 2019).

- For previous updates on this case, please refer to the October 2021 issue of the LAPPA *Case Law Monitor*, available [here](#). On December 8, 2021, Allergan, PLC agreed to pay \$200 million to resolve the state's lawsuit. This settlement left Teva Pharmaceutical Industries LTD., (Teva) as the lone defendant in the public nuisance trial, which began back in June 2021.
- On December 30, 2021, a jury found Teva and its affiliates guilty of helping to create a public nuisance through its marketing and distribution of opioids across New York. A separate trial will determine the damages Teva must pay. The various settlements that the State of New York negotiated with the other defendants previously named in this case netted the state approximately \$1.5 billion. Teva announced that it plans to appeal the ruling.

RECENT EVENTS IN THE 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 December 16, 2021, U.S. District Judge Colleen McMahon struck down Purdue Pharma's (Purdue) bankruptcy plan, thus putting the Purdue global settlement on hold. In her ruling, Judge McMahon stated that federal bankruptcy law does not give a bankruptcy judge the authority to grant third-party releases to people who are not declaring bankruptcy themselves. Purdue and the Sackler family members asked for Judge McMahon to certify their interim appeal to the U.S. Court of Appeals for the Second Circuit. Judge McMahon certified the mid-case appeal on January 7, 2022 and informed the parties that they must ask the Second Circuit to hear the case on an expedited basis due to the urgent opioid crisis and the case's importance. Connecticut, Maryland, Delaware, Rhode Island, Vermont, California, Washington, and the District of Columbia filed motions opposing certification of the interim appeal. The Second Circuit agreed to hear Purdue's appeal on an expedited basis on January 27, 2022. On December 29, 2021, U.S. Bankruptcy Judge Robert Drain extended a preliminary injunction blocking opioid-related litigation against the Sacklers until February 1, 2022. Judge Drain also ordered Purdue, the Sacklers, the states, and other parties to negotiate a new settlement.

UPDATE IN THE MALLINCKRODT BANKRUPTCY PROCEEDINGS

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 December 2021 issue of the LAPPA *Case Law Monitor*, available [here](#). During a January 6, 2022 hearing, U.S. Bankruptcy Judge John Dorsey questioned the fairness of a proposed plan to protect executives and others from future lawsuits. Under Mallinckrodt's \$5.45 billion settlement plan, officers and directors of the company could not be sued in most cases for their alleged role in creating the opioid epidemic. This plan provision is similar to the third-party release issue generating post-plan confirmation litigation in the Purdue bankruptcy. Mallinckrodt argues that the third-party release provision should be approved because its reorganization plan will fall apart without the protections. Judge Dorsey has not yet ruled on the bankruptcy plan. Should he approve the plan, the company will file a restructuring case in Ireland, home of Mallinckrodt's headquarters, to implement some of the features of the U.S. Chapter 11 bankruptcy plan.

DELAWARE SUPREME COURT RULES INSURER HAS NO DUTY TO DEFEND RITE AID

Rite Aid Corp. et al. v. ACE American Insurance Co., Delaware Supreme Court, Case No. 339 (opinion filed January 10, 2022). For previous updates on this case, please refer to the December 2020 issue of the *LAPPA Case Law Monitor*, available [here](#). In a 4-1 decision, the Delaware Supreme Court overturned a lower court's ruling that the insurance company, Chubb, must defend Rite Aid in opioid litigation. In its September 22, 2020 decision, the trial court held that the opioid cases subject to the ongoing multi-district litigation (MDL) met the insurance policy's requirement that the resulting costs stemmed from alleged bodily injury. While the plaintiffs in the MDL (largely governmental entities) seek purely economic damages, the trial court found a causal connection between the plaintiffs' economic damages and the injuries to their citizens from the opioid epidemic. On appeal, Chubb argued that the MDL plaintiffs did not suffer personal injury and thus seek compensation only for their non-derivative economic harms, even if those harms have some causal connection to a bodily harm. While the policy covers damages for "care" related to "the personal injury," Chubb argued that care damages still require a showing of a personal injury suffered by an individual. The Delaware Supreme Court agreed with Chubb's argument. To recover under Chubb's policy as a person or organization that directly cared for or treated the injured person, the plaintiff must prove the costs of caring for the individual's personal injury. In the MDL, the governmental entities seek to recover only their own economic damages. The majority ruled that the lower court erred in holding Chubb responsible for defending Rite Aid because public nuisance lawsuits seeking funds for drug treatment and social services are not the kind of personal injury claims covered under the policy. The majority opinion added that if the MDL plaintiffs ran public hospitals and sued Rite Aid on behalf of those hospitals to recover the costs of treating bodily injuries caused by opioid over-prescription, the policy would most likely have been triggered. However, because the MDL plaintiffs only seek to recover tax dollars spent addressing the opioid epidemic, the insurance policy does not apply. The dissenting justice believed that the policy language is broader than the majority's interpretation.

ALABAMA SUPREME COURT VACATES DECISION TO HOLD OPIOID CASE IN TWO PARTS

Ex parte Endo Health Solutions Inc. et al., Alabama Supreme Court, Case No. 1200470 (writ of mandamus issued November 21, 2021). In a 6-2 decision, the Alabama Supreme Court vacated a trial court's ruling to split a trial against opioid manufacturers, opioid distributors, and retail pharmacies into two parts. Several entities that own or operate hospitals in Alabama filed suit in the Conecuh Circuit Court in 2019 against opioid manufacturers, opioid distributors, and retail pharmacies (collectively, "the defendants") alleging that the defendants' marketing and selling of opioids resulted in an epidemic of opioid use disorder in the state. (*The DCH Health Care Authority et al. v. Purdue Pharma L.P. et al.*, Conecuh Circuit Court, Case No. CV-2019-000007). The plaintiffs asserted multiple theories of liability, including that the defendants created a public nuisance. The trial court entered a case management order directing the parties to try each of the plaintiffs' causes of action separately. Moreover, as part of the case management order, the trial court ordered the public nuisance claim to be tried first and for it to be bifurcated, the first trial involving liability and the second involving special damages. The trial judge bifurcated the trial to avoid unduly burdening the jury. Defendants opposed bifurcating the public nuisance claim and petitioned the Alabama Supreme Court for an order directing the trial court to vacate that portion of the case management order. According to the defendants, in order for Alabama government entities to recover for public nuisance, they must prove they suffered special damages different from that suffered by the general public. The defendants asserted that because of this restriction, the plaintiffs must prove special damages for them to be liable under Alabama's

public nuisance statute. Thus, holding a second trial to determine special damages would be duplicative. The Alabama Supreme Court majority agreed with the defendants and ruled that bifurcating the public nuisance claim would be “a duplication of effort and the squandering of judicial resources.” The court concluded that the trial court exceeded its discretion and issued the defendants’ requested order.

WALGREENS MUST DISCLOSE FINANCIAL INFORMATION FROM THE PAST 25 YEARS

State of Florida v. Purdue Pharma L.P., et al., Pasco County Circuit Court, Florida, Case No. 2018-CA-001438 (motion to compel granted December 10, 2021). On December 10, 2021, a Florida state trial judge ordered Walgreens to turn over documentation about the company’s profits on sales of opioids in Florida from 1996 to the present. The judge gave Walgreens until December 31, 2021 to relinquish the financial information “sufficient to show all rebates, discounts, chargebacks, coupon reimbursements and any other money back it received on opioids” purchased or sold in the state from the past 25 years. Additionally, the judge granted the plaintiff’s motion seeking sanctions against Walgreens for making “misrepresentations in sworn testimony and in proceedings before this court” about profits the company made from the sales of opioids. As a result, the court required Walgreens to provide affidavits from “a knowledgeable finance or accounting employee” by attesting to the sources of the rebate information, how Walgreens’ “deal ledger system” and other databases work, and other related information. On January 5, 2022, Walgreens filed a status report with the court to advise the court that it complied with the court’s December 10 sanctions order. Walgreens also mentioned in its status report that it conducted a search across its electronic records for opioid-related profits calculations for Florida and identified a set of approximately 100 documents that had not been previously produced and provided to the plaintiff.

FORMER MIAMI-LUKEN COMPLIANCE OFFICER ENTERS PLEA AGREEMENT

United States v. Rattini, et al., U.S. District Court for the Southern District of Ohio, Case No. 1:19-cr00081-MWM (plea agreement reached December 15, 2021). For previous updates on this case, please refer to the June 2020 issue of the LAPP Case Law Monitor, available [here](#). On December 15, 2021, James Barclay, the former compliance officer of the now-defunct drug distributor Miami-Luken Inc., entered into a plea agreement to avoid jail time. Barclay pled guilty to misprision of a felony, which is a rarely used charge that means the defendant knew of a felony but failed to report it. The federal district court judge accepted the plea deal and sentenced Barclay to one year of probation. Charges against Miami-Luken remain pending. The former president of Miami-Luken, Anthony Rattini, who prosecutors also named in the 2019 indictment, passed away in November 2021.

FIFTH CIRCUIT DISMISSES WALMART’S CASE AGAINST U.S. DOJ

Walmart Inc. v. U.S. Department of Justice, et al., U.S. Court of Appeals for the Fifth Circuit, Case No. 21-40157 (opinion filed December 22, 2021). 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 Fifth Circuit affirmed the federal district court’s dismissal of 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 Fifth Circuit ruled that sovereign immunity bars Walmart’s suit. Alternatively, even if sovereign immunity does not apply, the company would still have to show the existence of a case or controversy ripe for adjudication. The court ruled that Walmart failed to show that its case is fit for judicial decision. To date, Walmart has not petitioned the U.S. Supreme Court for review.

FORMER INSYS EXECUTIVE ASKS U.S. SUPREME COURT TO OVERTURN HIS CONVICTION

John Kapoor v. United States, U.S. Supreme Court, Case No. 21-994 (petition for writ of certiorari filed January 10, 2022). For previous updates on this case, please refer to the October 2021 issue of the LAPPAs *Case Law Monitor*, available [here](#). John Kapoor, the founder and former executive chairman of drug manufacturer Insys Therapeutics, asked the U.S. Supreme Court to overturn his conviction for conspiring to bribe doctors to prescribe opioids and defraud insurers into paying for them. In 2019, a jury convicted Kapoor and four other Insys executives of violating the Racketeer Influenced and Corrupt Organizations (RICO) Act with respect to the marketing of the fentanyl-based drug spray, Subsys. In January 2020, a federal district court sentenced Kapoor to five and one-half years. The U.S. Court of Appeals for the First Circuit upheld Kapoor's RICO conviction as well as the convictions of the four other former company officials in an August 21, 2021 decision. Kapoor now asks the U.S. Supreme Court to decide whether a non-physician can be convicted of agreeing with a doctor to illegally distribute drugs if the doctor believed he or she acted in good faith. Kapoor also asks the court to weigh whether a court should grant a motion for judgment of acquittal if the evidence of guilt and innocence is evenly balanced.

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.

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