LEGISLATIVE ANALYSIS AND PUBLIC POLICY ASSOCIATION

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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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MOTHER SUES CALIFORNIA TREATMENT CENTER FOR WRONGFUL DEATH AFTER DAUGHTER'S FENTANYL OVERDOSE

***Karri Maureen Ryder v. MFI Recovery Center, et al.*, Superior Court of the State of California (County of Riverside), Case No. CVRI2300682 (suit filed February 8, 2023).** The mother of a woman who ingested a fatal dose of fentanyl while allegedly left unsupervised at a substance use disorder treatment facility filed a wrongful death suit against the facility and Riverside County, California. On July 23, 2022, Melissa Bauman asked her mother, Karri Ryder, to take her to the Arlington Recovering Community and Sobering Center (ARC) for assistance in obtaining sobriety. ARC is in Riverside County, California and operated by MFI Recovery Center (MFI). The lawsuit asserts that upon accepting Bauman as a patient, MFI: (1) had the obligation to ensure familiarity with her longstanding history of substance use disorder; and (2) knew or should have known Bauman was "highly susceptible to succumbing to her urges to use drugs and/or alcohol and would likely seek out help in obtaining them however possible." MFI's operating procedures required staff to perform checks on Bauman every 30 minutes to ensure that she was in a stable condition. However, observation logs later obtained by law enforcement disclosed over 20 times in which MFI staff performed the checks on Bauman late. Additionally, video surveillance showed that MFI staff falsified some of the entries in the observation log. MFI staff found Bauman deceased on the morning of July 26, 2022. An autopsy determined that her cause of death was a fentanyl overdose. In the complaint, Ryder argues that despite knowing that Bauman would be particularly vulnerable, MFI failed to assign staff to sufficiently monitor her behavior while she was a resident at their facilities. Ryder also claims that Riverside County knew of several complaints made by former MFI patients and of other patient deaths that occurred at MFI facilities, and knowingly allowed MFI to continue to operate ARC. Ryder brings forth causes of action for wrongful death based on negligence, dependent adult neglect, intentional misrepresentation, and breach of duties arising under special relationship. Ryder seeks over $10 million in damages for her daughter's pain and suffering and her loss of consortium. According to news outlets, on December 9, 2022, the California Department of Health Care Services shut down ARC's residential treatment wing. As of April 4, 2023, the defendants have yet to file an answer in the case.

MOTHER FILES WRONGFUL DEATH SUIT AGAINST FLORIDA AIRBNB AFTER CHILD'S FENTANYL EXPOSURE

***Lydie Lavenir v. Airbnb, Inc., et al.*, Florida Circuit Court for the 15th Judicial Circuit, Case No. 2022-CA-011956 (suit filed December 6, 2023).** The mother of a 19-month-old girl who died after coming in contact with fentanyl residue in an Airbnb rental has filed a wrongful death suit against Airbnb, Inc. (Airbnb), the owners of the rental property, and the last person to rent the property prior to the family arriving. Lydie Lavenir rented a four-bedroom lake house in an affluent, residential neighborhood in Wellington, Florida for a family vacation scheduled August 6-9, 2021. According to the complaint, the rental had a history of being used as a party house, and, just prior to the Lavenir family arriving, had been rented by a group of approximately one dozen adults who used cocaine and other drugs in the home. Lavenir asserts that both Airbnb and the property owners, Ronald Cortamilia and Yulia Timpy, had actual or constructive knowledge of drugs in the home and failed to warn the family of the potential risk of drug exposure. On August 7, 2021, Lavenir put two of her children down for a nap. When Lavenir when to check on the children an hour later, she found her daughter unresponsive and foaming at the mouth. Paramedics were unable to revive her, and she died at the hospital. The medical examiner detected a lethal level of fentanyl in the child's blood and labeled the cause of death acute fentanyl toxicity. In the suit, Lavenir brings forth claims of wrongful death against Airbnb and the property owners arguing that each had a duty to keep the premise in a reasonably safe condition and to warn guests of any dangerous conditions. Additionally, Lavenir asserts that Airbnb and the property owners had a duty to implement adequate policies and procedures to make rentals safe for guests and to eliminate lethal drugs and risks posed to guests. Lavenir argues that her child's death from acute fentanyl toxicity was a direct and proximate result of Airbnb and the property owners' negligence. Lavenir also brings a wrongful death claim against Aaron Kornhauser, the last renter of the

property, arguing that he owed a duty to the public and foreseeable future guests of the property to exercise reasonable care so that activities and conditions created at the rental during the time he possessed it did not create dangerous conditions for future guests. Lavenir asks the court for compensation for pain and suffering and loss of consortium. On January 16, 2023 and February 17, 2023, Cortamilia and Kornhauser respectively filed their answers to the complaint. Both Cortamilia and Kornhauser assert comparative negligence and third-party liability as affirmative defenses, arguing that Lavenir's negligence was the sole or contributing proximate cause of the child's death. As of April 4, 2023, neither Airbnb nor Timpy have filed their answers to the complaint.

WOMEN ALLEGE NEW JERSEY HOSPITALS' POLICY OF DRUG TESTING PREGNANT PATIENTS IS DISCRIMINATORY

***Kate L. v. Hackensack University Medical Center* and *Kaitlin K. v. Virtua Voorhees Hospital*, New Jersey Department of Law & Public Safety, Division on Civil Rights (suits filed March 8, 2023).** Two women, each represented by the American Civil Liberties Union of New Jersey, filed separate complaints with the New Jersey Division on Civil Rights (DCR) alleging that separate hospitals violated their civil rights by drug testing them without their knowledge or informed consent while there to give birth. Kate L. and Kaitlin K. respectively claim that Hackensack University Medical Center and Virtua Voorhees Hospital's practice of drug testing pregnant patients violates the New Jersey Law Against Discrimination (N.J. Stat. Ann. § 10:5-1 *et seq*. (West 2023)). Both women assert that their drug screens flagged positive for opiates because each consumed a poppy seed bagel the morning they went to the hospital.[1] Based on the results of the drug screen, the hospitals called the New Jersey Department of Child Protection and Permanency (DCPP) to report both women for possible child abuse and neglect. The complaints allege that the hospitals made these calls despite each newborn screening negative for opiates. Both women claim that the report to DCPP led to an invasive and traumatic investigation and broke their trust in medical personnel. Kate L. and Kaitlin K. ask the DCR to order the hospitals to cease and desist their unlawful discriminatory practice of drug testing perinatal patients without their specific, informed consent and in the absence of medical necessity. Both women also ask the DCR to order the hospitals to establish policies, procedures, and training relating to ensuring informed consent for drug testing and preventing pregnancy discrimination. Furthermore, the women request compensatory damages for pain and suffering.

DEFAULT JUDGMENT ENTERED AGAINST WISCONSIN TREATMENT CENTER IN MEDICAID FRAUD CASE

***United States ex rel. Clarence Christiansen v. The Healing Corner, LLC, et al.*, U.S. District Court for the Eastern District of Wisconsin, Case No. 2:19-cv-01791-JPS (default judgment entered February 28, 2023).** A federal district court judge granted a motion for default judgment[2] against Wisconsin-based substance use disorder treatment center, The Health Corner, LLC, and its operator, Dr. Siamak Arassi (collectively, "defendants"), ruling that each failed to defend against a suit alleging Medicaid fraud. From 2015 to 2017, the defendants submitted or caused claims to be submitted to the Wisconsin Medicaid program for reimbursement for Vivitrol (naltrexone) treatments. Vivitrol is an injectable medication used to treat alcohol dependence and prevent relapse to opioid dependence after detoxification. According to the complaint first filed in December 2019, the defendants routinely submitted claims to Medicaid for reimbursement for treatments never actually administered to Medicaid patients. The complaint alleges that the defendants stockpiled the Vivitrol prescribed for, but not administered to, Medicaid patients, and instead administered it to patients who paid cash. Additionally, the

[1] The ingestion of food with poppy seeds can cause a drug test to return a positive result for opiates, even hours after consumption. *See* DEP'T HEALTH AND HUM. SERV. & SUBSTANCE ABUSE AND MENTAL HEALTH SERV. ADMIN., *Medical Review Officer Guidance Manual for Federal Workplace Drug, Testing Programs*, (Mar. 2018), https://www.samhsa.gov/sites/default/files/workplace/mro_guidance_manual_508_final_march_2018.pdf.

[2] A "default judgment" is a judgment entered against a defendant who has failed to plead or otherwise defend against the plaintiff's claim. *Default judgment*, BLACK'S LAW DICTIONARY (11th ed. 2019).

complaint alleges that the defendants obtained free samples of Vivitrol from the drug manufacturer, administered them to Medicaid patients, and then billed Medicaid for the drug. The plaintiffs asserted that the defendants' conduct violated the federal False Claims Act (31 U.S.C. § 3279 *et seq.)* and the Wisconsin False Claims Act (WIS. STAT. ANN. § 49.485 (West 2022)). On January 10, 2023, the plaintiffs filed a motion for default judgment. The judge granted the plaintiffs' motion, holding that the defendants failed to submit any formal opposition brief or any other filing that could be construed as an opposition to a default judgment request. As a result, the judge accepted as true the allegations that the defendants knowingly submitted or caused to be submitted false claims seeking reimbursement for Vivitrol treatments that were medically unnecessary or never administered to a patient. The judge ruled that the defendants owe over $2.3 million in damages based on what is known from the 31 patients' records submitted into evidence.

RHODE ISLAND TREATMENT CENTER OWNER AND THERAPIST CHARGED WITH HEALTH CARE FRAUD

***United States v. Michael Brier*, U.S. District Court for the District of Rhode Island, Case No. 1:23-mj-00012-PAS; and *United States v. Mi Ok Song Bruining*, U.S. District Court for the District of Rhode Island, Case No. 1:23-mj-00011-PAS-1 (suits filed February 28, 2023).** Michael Brier, the owner of Recovery Connection Centers of American, Inc. (RCCA), and Mi Ok Bruining, the former supervisory counselor at RCCA, were arrested in early March 2023 and charged with health care fraud. The affidavit filed in support of criminal charges alleges that Brier, who is not a physician, signed prescriptions using physician names and Drug Enforcement Administration registration numbers without the prescribers' permission. The affidavit also asserts that RCCA routinely overbilled for the actual length of client therapy sessions and occasionally for more hours than physically possible. Bruining admitted in an interview with law enforcement that RCCA would bill counseling sessions for 45 minutes when the sessions lasted less than 15 minutes. According to the affidavit, since April 2018, RCCA received more than $2.4 million in payments for claims submitted to Medicare, more than $7.2 million in payments for claims submitted to MassHealth (Massachusetts Medicaid program), and over $6 million for claims submitted to other health care payors. Allegedly, Brier tried to conceal and launder the proceeds of the scheme through investment accounts, luxury vehicle purchases, student loan payments, home renovations, and an oceanfront vacation home in Panama. Furthermore, the affidavit alleges that Brier made misrepresentations on RCCA's Medicare provider application by concealing his role within the company and failing to disclose his prior guilty plea for tax evasion in 2013. Law enforcement charged Bruining with health care fraud and Brier with health care fraud, aggravated identity theft, money laundering, and falsification of records. The offenses are punishable by varying lengths of prison sentences, three years of supervised release, a fine of either $250,000 or double the gain, and an assessment of $100. After arrest, both Brier and Bruining were released on bail.

FTC SUES TENNESSEE MEDICAL CLINIC OVER DECEPTIVE ADDICTION TREATMENT CLAIMS

***United States v. Dalal A. Akoury, et al.*, U.S. District Court for the Eastern District of Tennessee, Case No. 2:23-cv-00026-DCLC-CRW (suit filed March 16, 2023).** The U.S. Department of Justice has filed a case on behalf of the Federal Trade Commission (FTC) against Dr. Dalal D. Akoury and a set of companies she controls that operate as AWAREmed Health & Wellness Resource Center (AWAREmed) over allegations she made a wide range of false or unsupported claims for substance use disorder treatment services, cancer treatment services, and the treatment of other serious conditions. According to the complaint, since 2018, AWAREmed advertised a range of unproven treatments for patients suffering from substance use disorder, cancer, and other chronic diseases, such as Parkinson's disease and Alzheimer's disease. Akoury described her clinic as the "most effective medical clinic anywhere," and that it "boasts a 98% improvement rate treating just about… anything" including addictions to drugs and alcohol. Despite multiple warnings from the FTC, Akoury continued to disseminate false and unsubstantiated advertisements. The FTC brings forth claims that Akoury and AWAREmed violated: (1) the

FTC Act (15 U.S.C. § 52), which prohibits the dissemination of any false advertisement in or affecting commerce for the purpose of inducing, or which is likely to induce, the purchase of food, drugs, devices, services, or cosmetics; and (2) the Opioid Addiction Recovery Fraud Prevention Act of 2018 (OARFPA; 15 U.S.C. § 45d), which prohibits unfair or deceptive acts or practices with respect to any substance use disorder treatment service or substance use disorder treatment product. The FTC asks the court for a permanent injunction to prevent the defendants from committing future violations of the FTC Act and OARFPA. A proposed order submitted to the court would bar Akoury and the AWAREmed clinic from making unsupported claims and require her to pay a $100,000 civil penalty. On March 21, 2023, the judge granted the order for a permanent injunction and a civil penalty.

OHIO COURT DISMISSES DISABILITY DISCRIMINATION SUIT INVOLVING POSITIVE CANNABIS TEST

***Murray Fisher v. Airgas USA, LLC*, U.S. District Court for the Northern District of Ohio, Case No. 1:21-cv-829 (summary judgment granted March 2, 2023).** An Ohio federal district court granted summary judgment in a disability discrimination case brought by a former employee who disputed his firing over a positive cannabis test. Airgas USA, LLC (Airgas) subjects all of its employees to random drug testing. Its employee handbook states that employees who violate Airgas's drug policies may be subject to immediate termination. Airgas uses HireRight, an independent third-party vendor, to implement its drug testing program. Airgas hired Murray Fisher as a technician in October 2019. In November 2019, Fisher was diagnosed with liver cancer and took a leave of absence from Airgas; he returned to work on October 15, 2020. On October 24, 2020, Fisher began to use a legal hemp product called "Free Hemp" for his cancer-related pain. In November 2020, Fisher tested positive for cannabis during a random drug test. After receiving the positive result, Fisher informed Airgas's human resources director and HireRight's medical review officer about his use of the hemp product that caused him to test positive for cannabis. Fisher requested that his specimen be retested, which Airgas granted. The second test also came up positive for cannabis. Airgas formally terminated Fisher on December 9, 2020 due to the positive drug test. Fisher submitted a request for reinstatement and reiterated that he only used hemp, but HireRight's chief medical officer told Airgas that Fisher's positive cannabis result could not be explained by his use of a legal hemp product.

On March 18, 2021, Fisher brought forth a suit against Airgas in Ohio state court in Cuyahoga County. On April 20, 2021, Airgas removed the case to federal court. Fisher's complaint contained four counts: (1) failure to accommodate; (2) disability discrimination; (3) wrongful termination in violation of Ohio public policy; and (4) failure to warn and correct. On July 18, 2022, Airgas moved for summary judgment on all four claims. Fisher argued that Airgas failed to accommodate his disability because it denied his two requested accommodations: an investigation into his test results and reinstatement. The trial court, however, found neither request reasonable because Fisher failed to show that his hemp use was necessary to treat a limitation caused by his disability. Additionally, Fisher made his request for an accommodation only after he tested positive for cannabis. The court determined that his request amounted to "too little, too late" because an employer's duty to accommodate is only a prospective duty. Fisher further argued that Airgas discriminated against him due to his disability, but the court found that he provided no direct evidence to show that his termination was motivated by his disability. Although Fisher claimed that the drug test was inaccurate, the court determined that even if so, Airgas's decision to rely on the results were reasonably informed based on evidence that the company delayed Fisher's firing until the retest was complete and had HireRight's chief medical officer review the results. The court dismissed Fisher's wrongful termination claim because there is no clear Ohio policy that prohibits employers from firing employees for using legal products to control pain. The court also noted Ohio's policy for state employees which states that "the use of hemp or hemp derived cannabidiol products is not a valid reason to explain a positive drug test for THC." Finally, the court dismissed Fisher's failure to warn and correct the claim as non-viable. Thus, the court granted Airgas's motion for summary judgment on all four claims.

PENNSYLVANIA COURT RULES MEDICAL CANNABIS CAN BE REIMBURSED BY WORKER'S COMPENSATION INSURANCE

***Teresa L. Fegley, as Executrix of the Estate of Paul Sheetz v. Firestone Tire & Rubber*, Commonwealth Court of Pennsylvania, Case No. 680 CD 2021 (opinion filed March 17, 2023).** A Pennsylvania intermediate appellate court ruled in a 5-2 decision that Pennsylvania's Medical Marijuana Act (MMA; 35 PA. STAT. AND CONS. STAT. ANN. § 10231.2102 (West 2022)) does not prohibit insurers from reimbursing injured workers for medical cannabis in cases where the drug is used to treat accepted work injuries. On September 19, 1977, claimant Paul Sheetz injured himself during the course and scope of his employment with Firestone Tire & Rubber (Firestone). After the accident, Sheetz's doctor prescribed him opioids for the pain. Decades later, at the recommendation of his doctor, Sheetz began using cannabis with the hope of eliminating the need for opioids. As a result, Sheetz weaned himself off opioids. On September 18, 2019, a utilization review determination declared that Sheetz's cannabis use was reasonable and necessary. On October 28, 2019, Sheetz filed a petition for penalties alleging that Firestone violated the Pennsylvania Workers' Compensation Act (77 PA. STAT. AND CONS. STAT. ANN. § 1, *et seq.* (West 2022)) by failing to pay for his medical cannabis treatment, despite a utilization review determination declaring such treatment as reasonable and necessary.

On October 15, 2020, a workers' compensation judge denied Sheetz's petition, holding that reimbursement of Sheetz's cannabis treatment would cause Firestone's workers' compensation carrier to violate the federal Controlled Substances Act (CSA; 21 U.S.C. § 841). Sheetz appealed the decision to the Workers' Compensation Appeal Board (appeal board), which affirmed the decision; Sheetz then appealed to the Pennsylvania intermediate appellate court. Section 10231.2102 of the MMA states "[n]othing in this act shall be construed to require an insurer or a health plan, whether paid for by Commonwealth funds or private funds, to provide *coverage* for medical marijuana." (Emphasis added.) The majority distinguished the term "coverage" in the MMA from the term "reimbursement" and held that although an employer or insurer cannot be required to provide "coverage" by paying a provider directly under the MMA, an employer or insurer is responsible for "reimbursing" the cost of cannabis directly to a claimant. The majority ruled that reimbursing a claimant for his or her out-of-pocket expenses associated with the lawful use of medical cannabis as a reasonable and necessary treatment for a work injury does not require an employer's workers' compensation carrier to violate the CSA. The majority concluded that the appeal board erred in its decision to deny Sheetz's petition and ruled that Firestone's failure to reimburse Sheetz's out-of-pocket costs for cannabis to treat his work-related injury is a violation of the Pennsylvania Workers' Compensation Act. The majority reversed the decision of the appeal board and remanded the case to the workers' compensation judge to determine whether a penalty should be imposed against Firestone. The two dissenting judges argued that the MMA cannot be read as requiring a workers' compensation insurer to pay the costs of medical cannabis. Further, the dissenting judges argue that because a provider dispensing cannabis is violating federal law, such treatment cannot be deemed reasonable and necessary under the commonwealth's Workers' Compensation Act. This ruling adds Pennsylvania to the list of states (Connecticut, New Hampshire, New Jersey, New Mexico, and New York) that explicitly allow employees to have their medical cannabis expenses reimbursed. In comparison, seven states (Maine, Massachusetts, Minnesota, Florida, North Dakota, Ohio, and Washington) expressly prohibit workers' compensation insurance from reimbursing medical cannabis related costs.

PENNSYLVANIA MAGISTRATE RECOMMENDS DISMISSING FORMER EMPLOYEE'S DISABILITY DISCRIMINATION SUIT

***Thomas R. Buss v. Penske Logistics LLC*, U.S. District Court for the Middle District of Pennsylvania, Case No. 1:21-CV-00139 (summary judgment recommendation made March 7, 2023).** A magistrate judge for a Pennsylvania federal district court recommended that Penske Logistics LLC's (Penske) motion for summary judgment should be granted in a case involving a former employee terminated after his disability accommodation

request revealed he took several prescribed controlled substances. Thomas Buss worked as a truck driver for Penske. Buss has diagnoses for anxiety disorder, attention deficit disorder, and a mood disorder and takes various medically prescribed controlled substances for those conditions, including opioids and benzodiazepines. In October 2015, Buss requested a leave of absence from Penske to receive substance use disorder treatment, but he did not inform his immediate supervisors of the reason for the request. In May 2017, Penske announced a new safety initiative involving installation of inward and outward facing cameras in all its trucks. After learning of this new initiative, Buss contacted a human resources manager at Penske and explained that the cameras would create significant anxiety for him. Accordingly, Buss requested the accommodation of not having an inward facing camera in the cab of his truck. After Buss made the request, his doctor sent a letter to Penske stating that the accommodation would be medically necessary.

Penske requested additional information from Buss's doctor but found the additional information insufficient. In response, Penske ordered an independent medical examination of Buss. In June 2018, the doctor conducting the independent examination provided Penske with a report describing Buss's medication and his past substance use disorder treatment. Penske terminated Buss's employment because he violated the company's drug and alcohol policy by failing to disclose U.S. Department of Transportation disqualifying drugs and past substance use disorder treatment. Shortly before termination, Buss filed a complaint against Penske with the Pennsylvania Human Relations Commission (PHRC), but Penske was not served with the complaint until 2019. Later, Buss filed suit against Penske in January 2021 bringing forth causes of action for: (1) discrimination in violation of the Americans with Disabilities Act (ADA); (2) discrimination in violation of the Pennsylvania Human Relations Act (PHRA; 43 PA. STAT. AND CONS. STAT. ANN. § 955 (West 2023)); and (3) retaliation under the ADA and PHRA. Penske filed a motion for summary judgment arguing that Buss's complaint did not establish a case of discrimination or retaliation on its face and that it had a legitimate, non-discriminatory, and non-retaliatory reason for terminating Buss's employment.

In response, Buss argued that Penske discriminated against him by failing to make a good faith effort to assist him in seeking an accommodation claim. The magistrate judge, however, rejected this claim, finding that Penske engaged in an "interactive process" in response to Buss's request by conducting an independent medical examination. The judge also ruled that Buss's failure to disclose the prescription drugs he took was a "clear violation" of company policy and served as a legitimate and non-discriminatory reason for Buss's termination. Buss failed to show that Penske terminated his employment because of an alleged disability as opposed to his violation of Penske's drug policy. Finally, Buss argued that Penske retaliated against him in violation of the ADA and PHRA because prior to being terminated, he filed a complaint with the PHRC. The judge determined that this claim also failed because Penske did not learn of his PHRC charge until more than a year after he was fired and there was no evidence that anyone who was involved in Buss's termination knew of the PHRC complaint at that time. Thus, the magistrate judge recommended that Penske's motion for summary judgment be granted. The case now moves to the district court judge for final disposition.

DELAWARE PRISON HEALTH CARE PROVIDER FACES CLASS ACTION OVER ITS PAIN MANAGEMENT POLICY

***Jenail Brown, et al. v. Centurian of Delaware, LLC, et al.*, U.S. District Court for the District of Delaware, Case No. 1:22-cv-00923-GBW (motion to dismiss granted in part and denied in part March 8, 2023).** A federal district court judge ruled that prison health care provider, Centurian of Delaware LLC (Centurian), must face a proposed class action lawsuit asserting that it acted deliberately indifferent to prisoners' medical needs for pain management drugs. The plaintiffs are 24 inmates in the custody of the Delaware Department of Corrections (DDOC) who suffer medical conditions that cause chronic pain. While the plaintiffs' medical conditions vary, they all allege that their chronic pain treatment included long-term prescription opioids. In late 2019, the DDOC implemented the "pain management initiative policy" (policy) which resulted in the plaintiffs tapering off opioid medications. When Centurian took over as the DDOC's health care provider in April 2020, it allegedly continued

to enforce the policy. In the suit, the plaintiffs assert deliberate indifference to serious medical needs in violation of the Eighth Amendment to the U.S. Constitution by both Centurian as a corporation and individual Centurian employees. The plaintiffs claim that Centurian's deliberate indifference occurred because it implemented and enforced the allegedly unconstitutional policy. Centurian moved to dismiss this claim, arguing that it cannot be liable because the DDOC instituted the policy before Centurian became the medical provider. The judge denied Centurian's motion to dismiss the case but granted the motion to dismiss filed by the individual Centurian defendants. The judge rejected Centurian's argument, holding that while Centurian did not initially implement the policy, it did not reassess or terminate the policy's implementation. As for the individual defendants, however, the evidence showed that they continually provided the plaintiffs with medical attention and exercised their professional medical judgment, including providing the plaintiffs with over-the-counter pain medications and other alternative pain remedies. While the plaintiffs may have disagreed with the individual Centurian defendants' treatment methods or found the care inadequate or improper, the judge determined that the individual's actions, or lack thereof, did not support an Eighth Amendment claim. Accordingly, the judge dismissed the complaint against the individual Centurian defendants. This dismissal came without prejudice, however, as the judge granted the plaintiffs' request to amend its complaint with respect to the individual Centurain defendants. On March 22, 2023, the plaintiffs filed a motion for reargument.

COURT FINDS MASSACHUSETTS PROPERLY PROTECTED INMATES DURING COVID-19

***Stephen Foster, et al. v. Carol Mici, et al.*, Massachusetts Superior Court, Suffolk County, Case No. 2084CV00855 (opinion filed March 7, 2023).** For previous updates and facts about this case, please refer to the April 2021 issue of the LAPPA *Case Law Monitor*, available here. In April 2020, the Prisoners Legal Service of Massachusetts filed a class action lawsuit on behalf of individuals in correctional facilities in Massachusetts seeking to reduce the number of people because of COVID-19. The complaint alleged that conditions in Massachusetts prisons and jails exposed prisoners to a serious risk of contracting COVID-19. In February 2021, a Massachusetts trial court denied the emergency motion for preliminary injunction filed by the class. Despite rejecting the emergency motion, the trial court allowed the plaintiffs to move for leave of court to amend their complaint to assert new claims under a "line item" law enacted over the Governor's veto in December 2020 that imposes additional requirements on the Massachusetts Department of Corrections (DOC) during the COVID-19 pandemic.[3]

The plaintiffs filed their amended complaint in March 2021, followed by a partial motion for summary judgment seeking a declaration that the DOC Commissioner (Commissioner) failed to comply with the mandate for "decarceration" as enacted by the Legislature. The defendants filed a cross-motion for summary judgment on all four counts of the plaintiffs' amended complaint.[4] The "decarceration" budget language at issue in this case states ". . . given the continued prevalence and threat of the 2019 novel coronavirus with the department of correction facilities, the commissioner of correction shall release, transition to home confinement or furlough individuals in the care and custody of the department who can be safely released." The plaintiffs argued that this language imposed a new and overriding duty on the Commissioner to release inmates "by awarding more earned good time credits, granting more petitions for medical parole, and implementing a more robust home confinement program." The plaintiffs claimed that the Commissioner failed to follow the law by not using all the available tools to

[3] *See* Chapter 227 of Acts of 2020, Section 2, line item 8900-0001, available at https://malegislature.gov/Budget/FY2021/FinalBudget; and Chapter 24 of the Acts of 2021, Section 2, line item 8900-0001, available at https://malegislature.gov/Budget/FY2022/FinalBudget. Starting in fiscal year 2021 and continuing into fiscal year 2023, the Legislature added a provision in the Acts concerning the early release of prisoners during the COVID-19 emergency. The same essential language appears in each of the three fiscal year budgets. Each year the legislature would enact this provision, but only after it voted to override the Governor's veto of the language.

[4] Count I of the complaint alleges violations of the Massachusetts Declarations of Rights, articles 1, 10, 12, and 26; Count II claims violations of the Eighth and Fourteenth Amendments of the U.S. Constitution; Count III claims violations of MASS. GEN. LAWS ch. 123, § 35 (West 2022) for civilly committed persons; and Count IV is for declaratory relief.

accelerate the early release of prisoners. The defendants, in turn, counterargued that the plaintiffs "cherry pick[ed]" a portion of the law and ignored the part that states "who can be safely released." The defendants asserted that under the law, the Commissioner still has the discretion to make an individual assessment about each inmate, not a categorical one, as to who can be safely released before their sentence has ended. Additionally, the defendants noted that the legislature-funded ombudsperson who served as a DOC watchdog during the COVID-19 pandemic never made any indication that the DOC's release of inmates fell short of what the law required.

In the March 2023 decision, the trial court agreed with the defendants' argument that it did not violate the law, thus denying the plaintiffs' motion for partial summary judgment and granting the defendants' motion for summary judgment on Count IV. The court also granted the defendants' motion for summary judgment on Counts I and II, holding that the plaintiffs failed to show that the Commissioner's choice of public health policies and COVID-19 mitigation strategies were so uninformed or baseless that it rose to the level of deliberate indifference. In sum, the court granted the defendants' motion for summary judgment on counts I, II and IV. The court ordered the parties to submit a stipulation of dismissal for count III, which they did on March 14, 2023. The court entered a final judgment in favor of the defendants on March 20, 2023.

COLORADO PHARMACIST AGREES TO RESOLVE ALLEGATION OF UNLAWFULLY FILLED CONTROLLED SUBSTANCE PRESCRIPTIONS

(Settlement reached March 24, 2023). The U.S. Attorney's Office for the District of Colorado announced that a Lakewood, Colorado pharmacy, the People's Pharmacy, Inc., (People's Pharmacy) and its owner and pharmacist-in-charge, Mahnaz Abharian, agreed to resolve allegations that the pharmacy unlawfully dispensed controlled substances. The U.S. Attorney's Office alleged that between January 2014 and July 2020, People's Pharmacy violated the federal Controlled Substances Act (CSA; 21 U.S.C. § 841) by filling prescriptions not issued for legitimate medical purposes. The prescriptions filled included extremely high opioid dosages and dangerous drug combinations. As part of the settlement, People's Pharmacy agreed to a 3.5 million civil penalty, which required it to relinquish all of its remaining assets. The pharmacy also gave up its Drug Enforcement Administration registration, which will prevent it from dispensing any controlled substances in the future. Furthermore, Abharian agreed to no longer dispense any controlled substances.

RECENT EVENTS IN THE ENDO BANKRUPTCY CASE

***Endo International PLC*, U.S. Bankruptcy Court for the Southern District of New York, Case No. 22-22549-jlg (deal in principle reached March 3, 2023).** For previous updates on this case, please refer to the February 2023 issue of the LAPPA *Case Law Monitor*, available here. On March 3, 2023, Endo International PLC's (Endo) lenders announced a deal in principle that would provide higher payouts to key creditor groups in return for their support of Endo's reorganization plan, which involves a $6 billion asset sale. Under the terms of the deal, Endo's proposed purchases would provide $119 million in cash to private opioid abuse claimants within two years of the sale closing. The official committee of opioid claimants previously complained that the prior deal provided an insufficient payment of $85 million no earlier than 2033 to private plaintiffs. In a separate deal, Endo's unsecured creditors would receive $60 million in cash, plus a potential 4.25 percent equity state in the reorganized company. The two-part deal also provides a way for Endo to settle mass opioid litigation through the establishment of various trusts. The secured lender group buying Endo's assets has additionally agreed to set up an unsecured creditor litigation trust authorized to pursue claims against non-continuing directors, former officers, and other third parties. Endo and its asset buyer have already agreed to establish three separate trusts worth $550 million to pay creditors that are government entities, Native American tribes, and others harmed by Endo's opioid products. On March 28, 2023, U.S. Bankruptcy Judge James Garrity approved Endo's plan to put its assets up for auction.

FEDERAL GOVERNMENT INTERVENES IN WHISTLEBLOWER SUIT AGAINST RITE AID

***United States ex rel. Andrew White v. Rite Aid Corporation, et al.*, U.S. District Court for the Northern District of Ohio, Case No. 1:21-cv-01239-CEF (complaint in intervention filed March 13, 2023).** The U.S. Department of Justice (USDOJ) is intervening in a 2019 whistleblower lawsuit filed by two Rite Aid Corporation (Rite Aid) pharmacists from North Carolina, Andrew White and Mark Rosenberg, who accused the pharmacy chain of dispensing opioids without valid prescriptions or "outside the usual course of the professional practice of pharmacy." According to the complaint, over a five-year period starting in May 2014, Rite Aid pharmacists filled hundreds of thousands of opioid prescriptions not written for a medically accepted reason. The USDOJ asserts that Rite Aid pharmacists filled these prescriptions despite clear "red flags" of their unlawful nature. Furthermore, the USDOJ claims that Rite Aid intentionally deleted internal notes written by Rite Aid pharmacists about suspicious prescribers and directed district managers to tell pharmacists "to be mindful of everything that is put in writing." The lawsuit alleges that Rite Aid violated the False Claims Act (31 U.S.C. § 3729) and unlawfully dispensed controlled substances in violation of the Controlled Substances Act (21 U.S.C. § 829(a), (b), and (c); and 21 U.S.C. 842(a)(1)). Additionally, the USDOJ brings forth claims of payment by mistake of fact and unjust enrichment.

DRUG DISTRIBUTORS FOUND NOT LIABILE UNDER GEORGIA'S DRUG DEALER LIABILITY LAW

***Joseph Poppell, et al. v. Cardinal Health, et al.*, Georgia Superior Court, Glynn County, Case No. CE19-00472 (jury verdict reached March 1, 2023).** A Georgia trial court jury ruled that three drug distributors, Cardinal Health, McKesson Corporation, and J.M. Smith Corporation, did not violate Georgia's Drug Dealer Liability Act (GA. CODE ANN. § 51-1-46 (West 2022)) and Georgia's Racketeer Influenced and Corrupt Organizations Act (GA. CODE ANN. § 16-14-4 (West 2022)) when supplying pharmacies with opioids. The 21 plaintiffs in this case represented the parents, children, and siblings of individuals with opioid use disorder. The plaintiffs claimed that the three distributors improperly distributed opioids to pharmacies and by doing so, contributed to the opioid epidemic and their loved one's opioid use disorder. During the month-long trial, the plaintiffs argued that the distributors failed to establish sufficient controls in supplying the drugs and ignored "red flags" that pharmacies were filling improper prescriptions. The distributors counterargued that they merely served to fulfill orders and that they established sufficient controls within the limitations they had. The distributors noted in their argument that they did not have the ability to view individual prescriptions in order to distinguish between valid and suspicious orders. The jury deliberated for a day and a half before coming back with a verdict in favor of the distributors. This case is thought to be the first lawsuit brought by individual victims of the opioid epidemic against pharmaceutical companies and/or drug distributors under a statute aimed at illegal drug dealers to go to trial.

DEFENDANTS SEEKS DISMISSAL OF WEST VIRGINIA NEONATAL ABSTINENCE SYNDROME LAWSUITS

***In re: Opioid Litigation*, Circuit Court of Kanawha County, West Virginia, Case No. 22-C-9000 NAS (hearing on motion to dismiss held March 24, 2023).** Not all of the numerous West Virginia lawsuits related to opioid manufacturing and distribution are in federal court and part of the national multi-district litigation (*In re National Prescription Opiate Litigation*, U.S. District Court for the Northern District of Ohio, Case No. 17-MD-2804). Most of the cases that remain are in West Virginia state court and were joined by the state's Mass Litigation Panel (MLP) into the action titles *In re Opioid Litigation*, Circuit Court of Kanawha County, West

Virginia, Case No. XX-C-9000-YYY.[5] Previous updates on some of the activity in the West Virginia opioid litigation are available in the April, June, August, and October 2022 issues of the LAPPA *Case Law Monitor*. In August 2022, the West Virginia Supreme Court transferred 19 state court lawsuits to the MLP to join into the ongoing mass state opioid litigation. These 19 cases involve claims for damages against prescription opioid manufacturers and distributors for alleged exposure causing the minor plaintiffs to suffer from Neonatal Abstinence Syndrome ("NAS"). The West Virginia Supreme Court transferred additional cases to the MLP in October 2022. Later in 2022, various defendants filed motions to dismiss the NAS cases due to a lack of evidence, in part because the plaintiffs pleaded their case without naming specific manufacturers. A hearing on the defendants' motions to dismiss took place on March 24, 2023. To date, the MLP judge(s) presiding over the NAS cases have not issued a ruling.

OHIO'S OPIOID SETTLEMENT DISTRIBUTION FOUNDATION SUBJECT TO OPEN MEETINGS LAW

***Harm Reduction Ohio v. One Ohio Recovery Foundation*, Franklin County, Ohio Court of Common Pleas, Case No. 22 CV 005401 (motion for judgment on the pleadings denied March 9, 2023).** For previous updates about this case, please refer to the October 2022 issue of the LAPPA *Case Law Monitor*, available here. In September 2022, One Ohio Recovery Foundation, a nonprofit corporation established in December 2021 to oversee the distribution of funds received by the state through opioid related lawsuits, filed a motion for judgment on the pleadings arguing that it is not subject to Ohio's open meetings law (OHIO REV. CODE ANN. § 121.22 (West 2023)). Ohio's open meetings law requires that all "public bodies" hold open meetings unless the subject matter is specifically excepted by law. The plain language of the statute provides that "any board, commission, committee, council, or similar decision-making body of a state agency, institution, or authority…" is a public body for the purposes of the open meetings law. One Ohio argued that it is not subject to the open meetings law because it is not a public body. In March 2023, an Ohio trial court judge denied One Ohio's motion. The judge determined that One Ohio is a "de facto decision-making body of the state" that determines how state litigation proceeds will be spent. The state created One Ohio through a memorandum of understanding (MOU); thus, without state action, One Ohio would not exist. One Ohio also argued that because formal legislation did not create it, it is not subject to the open meetings law. The judge rejected this argument holding that case law provides that a public body subject to the open meetings law does not need to be created by resolution, statute, or other formal legislative action. Furthermore, the judge noted that the MOU expressly provides that One Ohio "shall conduct public meetings and all documents shall be public as if the Foundation was a public entity." Because the state incorporated that language in the MOU, the judge ruled that One Ohio would be subject to the open meetings law even if it did not meet the criteria set forth in the statute. On March 28, 2023, the parties jointly asked the court to: (1) extend the discovery deadline from May 1, 2023 to June 30, 2023; (2) extend the deadline for motions to July 31, 2023; and (3) vacate the currently scheduled August 7, 2023 trial date.

CALIFORNIA POLICE UNION EXECUTIVE CHARGED WITH ILLEGAL IMPORTATION OF FENTANYL ANALOGUE

***United States v. Joanne Marian Segovia*, U.S. District Court for the Northern District of California, Case No. 5:23-mj-70347-MAG (criminal complaint filed March 27, 2023).** The U.S. Attorney's Office for the Northern District of California filed a federal criminal complaint against Joanne Marian Segovia, the Executive Director of the San Jose Police Officers' Association, over allegations that she illegally imported controlled substances. The complaint asserts that Segovia used her personal and office computers to order thousands of opioids and other controlled substances to her home and agreed to distribute the drugs elsewhere in the United

[5] In this naming convention, "XX" is the year the cases joined into the West Virginia mass litigation, and "YYY" is a descriptor for the type of case (*e.g.*, manufacturer (MFR), pharmacy (PHARM)), neo natal abstinence (NAS)).

States. Allegedly, between October 2015 and January 2023, Segovia received at least 61 shipments of drugs at her home, originating from locations such as Hong Kong, Hungary, India, and Singapore. The complaint also asserts that Segovia used encrypted WhatsApp communications to plan the logistics for receiving and sending drug shipments. The messages discussed details for shipping and payment of drugs and contained hundreds of pictures of tablets, shipping labels, packaging, payment receipts, and payment confirmations. According to the complaint, Segovia continued to order controlled substances even after being interviewed by federal investigators in February 2023. On March 13, 2023, federal agents seized a parcel in Kentucky, containing valeryl fentanyl, addressed to Segovia. The government charged Segovia with attempt to unlawfully import a controlled substance in violation of the Controlled Substances Act (21 U.S.C. § 952(a)). If convicted, Segovia faces a maximum statutory sentence of 20 years.

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 for addiction 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/.