LEGISLATIVE ANALYSIS AND PUBLIC POLICY ASSOCIATION

Case Law Monitor

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

IN THIS ISSUE...

ESTATE OF TEXAS MAN SUES KRATOM MANUFACTURER FOR WRONGFUL DEATH

***Patrica Geers v. Unlimited Imagination, LLC*, U.S. District Court for the Western District of Texas, Case No. 7:24-cv-00034-DC-RCG (suit filed February 1, 2024).** The estate of a Texas man who died after ingesting kratom has filed a wrongful death suit against the product manufacturer, Unlimited Imagination, LLC d/b/a The Kratom King (Kratom King). Keifer Geers suffered from a painful bowel disorder and thought that kratom would relieve his pain. From 2010 until just 10 days before his death, Geers purchased his kratom from Kratom King's online store on a monthly basis. On April 14, 2022, Geers and his mother were at the airport preparing to take a trip, and as Geers walked toward security, his mother noticed his face suddenly turn blue. Geers then stumbled and collapsed, falling to the floor. Airport technicians attempted to resuscitate Geers, but they were unsuccessful. An ambulance transported Geers to the hospital where he was pronounced dead. An autopsy revealed Geers' cause of death to be mitragynine toxicity. Mitragynine is the main psychoactive compound in kratom. The estate claims that Kratom King failed to warn Geers about the risk of addiction, illness, or death associated with kratom use. Additionally, the estate argues that Kratom King should have disclosed that kratom is considered an adulterated substance by the U.S. Food and Drug Administration and that it is not safe for human consumption. Moreover, the suit claims that Kratom King falsely promoted its kratom products as safe and effective in treating pain, anxiety, and other health problems.

The suit brings forth claims of negligence, negligent misrepresentation, breach of implied warranty, and product defects. The estate requested wrongful death damages to compensate Geers' mother, survival damages to compensate the estate, and punitive damages. The estate requested a jury trial. Texas has a Kratom Consumer Health and Safety Protection Law (Tex. Health & Safety Code Ann. § 444.001 to 444.007 (West 2024)) that sets limitations on the possession, distribution, sale, and manufacture of kratom products and establishes kratom product labeling requirements. However, this law was enacted on September 1, 2023, which was after Geers' passing.[1]

ESTATE SUES HOSPITAL FOR WRONGFUL DEATH FOR FAILING TO PREVENT FENTANYL DIVERSION

***Patti L. Wilson for the Estate of Horace Earl Wilson v. Asante and Dani Marie Schofield*, Oregon Circuit Court (Jackson County), Case No. 24CV09759 (suit filed February 26, 2024).** The estate of a man who died from sepsis after being administered fentanyl infusions that had been adulterated has filed a wrongful death suit against the Asante Rouge Regional Medical Center (RRMC) and the nurse who diverted the fentanyl. On January 27, 2022, Horace Wilson presented to RRMC for care after falling from a ladder. A CT scan revealed that Wilson had lacerated his spleen, and the next day he received a splenectomy. During his stay in the intensive care unit, Wilson began to display signs of an infection. On February 5, 2022, doctors diagnosed Wilson with sepsis after blood cultures identified bacterial growth in his blood. During Wilson's time in the intensive care unit, nurse Dani Marie Schofield administered fentanyl to him through an infusion via his central line. It was later revealed that Schofield was diverting fentanyl for her personal use and replacing the missing fluid in the infusion bags with non-sterile tap water. Thus, bacteria were introduced into Wilson's bloodstream each time Schofield gave him an infusion. On February 25, 2022, Wilson died of multi-system organ failure as a result of sepsis. On November 22, 2023, Schofield made an agreement with the Oregon Board of Nursing to refrain from practice pending the completion of an investigation. In December 2023, officials from RRMC contacted the police regarding a former employee that they believed was involved in the diversion of fentanyl resulting in adverse patient outcomes. After informing the police, RRMC contacted affected patients and their relatives to inform them that a nurse had been replacing fentanyl with tap water, which caused some patients to experience bacterial infections. The estate claims that RRMC knew or should have known of the high likelihood of opioid diversion by one of its employees given the prevalence of such acts throughout the country. The complaint asserts that RRMC exhibited negligence by failing to: (1) prevent the introduction of bacteria into Wilson's central line; (2) inspect the fentanyl solution that was being administered to Wilson; (3) establish and follow protocols to ensure the security of fentanyl and preventing the foreseeable diversion of fentanyl by employees; and (4) properly supervise Schofield in her administration of fentanyl to Wilson. The estate is asking the court for $10 million for Wilson's pain and suffering, $975,000 for incurred medical expenses, and $500,000 for his surviving heirs for loss of consortium.

FAMILY SUES OREGON COUNTY AFTER WOMAN DIES BY SUICIDE IN JAIL

***Kent Sawyer v. Deschutes County, et al.*, U.S. District Court for the District of Oregon, Case No. 6:24-cv-00267-MK (suit filed February 9, 2024).** The estate of a woman who died by suicide while in custody of the Deschutes County Sheriff's Office Adult Jail (jail) has filed a wrongful death suit against the county and employees of the jail. In February 2022, police arrested Kendra Sawyer for a probation violation and transported her to jail. Sawyer reported to jail officials that she suffered from opioid use disorder and was at risk of experiencing withdrawal symptoms. According to Sawyer's family, jail staff failed to provide any treatment to Sawyer to alleviate her withdrawal symptoms while in custody, despite her suffering from great

[1] For more information about kratom laws, please refer to LAPPA's "Kratom: Summary of State Laws," available here.

physical and mental pain. Less than 24 hours after booking, jail staff found Sawyer hanging from a towel in her cell. Law enforcement and medical staff were unable to revive Sawyer, and she was pronounced dead early the next day. On February 9, 2024, Sawyer's family filed a lawsuit in federal district court against Deschutes County and several jail officials on behalf of her estate. The complaint claims that the county was grossly negligent in its duty to provide reasonable safety and medical and mental health care for Sawyer and that it violated her substantive due process rights under the Fourteenth Amendment of the U.S. Constitution by being deliberately indifferent to her health and safety needs. The estate has asked the court for compensatory and punitive damages and has requested a jury trial.

MOTHER CLAIMS SNAPCHAT CONTRIBUTED TO HER DAUGHTER'S FATAL OVERDOSE

***Diane Howard v. Snap Inc.*, Nevada District Court (Clark County), Case No. A-24-889099-C (complaint filed March 13, 2024).** The mother of a woman who died from an overdose has sued Snap, Inc. (Snap), the owner of the social media app Snapchat, over allegations that the app contributed to her daughter's death. In March 2021, 20-year-old Avianna Cavanaugh of Nevada died of a fentanyl overdose. During the police investigation of her death, police found messages from a drug dealer on Cavanaugh's Snapchat. The messages suggested that Cavanaugh intended to purchase Xanax or oxycodone but received counterfeit pills containing lethal quantities of fentanyl, instead. On March 13, 2024, Cavanaugh's mother a filed suit in Clark County District Court against Snap for wrongful death, product liability, negligent distribution and marketing, and neglect. The complaint alleges that Snapchat facilitated the drug dealer's contact with Cavanaugh and that the app's automatic message deletion feature made it less likely for their communications to be discovered by law enforcement or Cavanaugh's mother. The hearing date has not yet been set.

ATLANTIC CITY, NEW JERSEY NEEDLE EXCHANGE ALLOWED TO KEEP OPERATING

***South Jersey Against AIDS, Inc, et al. v. City of Atlantic City*, Superior Court of New Jersey (Atlantic County), Case No. ATL-L-003104-21 (settlement reached February 8, 2024).** A needle exchange program in Atlantic City, New Jersey operated by South Jersey Against AIDS, Inc. (SJAA), is able to continue its operations as a result of a settlement reached with city officials. SJAA's Oasis Harm Reduction Center (Oasis) is the sole provider of syringe services in Atlantic City. In June 2021, the city council adopted Ordinance No. 32 of 2021, which repealed Oasis' enabling ordinance and terminated SJAA's authorization to operate Oasis' syringe access program effective October 21, 2021. On September 29, 2021, SJAA filed a lawsuit against Atlantic City arguing that the city council adopted Ordinance No. 32 without regard to the impact it would have upon the health and safety of the community. SJAA also claimed that the ordinance violated the New Jersey Civil Rights Act (N.J. Stat. Ann. § 10:6-2 (West 2024)), the New Jersey Law Against Discrimination (N.J. Stat. Ann. § 10:5-1, *et seq.* (West 2024)), and Article 1, Paragraph 1 of the New Jersey Constitution by depriving individuals of essential health care services and jeopardizing their "safety and happiness." SJAA filed a motion seeking to temporarily restrain the city from enforcing the ordinance, which the court granted on December 2, 2021. In January 2022, the governor approved legislation that amended the Bloodborne Disease Harm Reduction Act (N.J. Stat. Ann. § 26:5C-25, *et seq.* (West 2024)). The amendments defined what entities are eligible to provide harm reduction services in the state and added a provision granting the New Jersey Department of Health (DOH) the sole authority to terminate an entity's authorization to provide harm reduction services. On August 15, 2023, the DOH issued a letter to SJAA advising it that pursuant to the amendments and their associated regulations, SJAA is "grandfathered in" as a registered harm reduction center and is authorized to continue to operate the Oasis facility at its current location through December 31,

2025, at which time it may apply to extend its registration. In the February 8, 2024 order of settlement, the city acknowledged that SJAA is a registered harm reduction center authorized by DOH to operate in Atlantic City through December 31, 2025 and that it has no authority to terminate the operation of the Oasis facility at its current location, including the distribution of syringes. The court ruled Ordinance No. 32 null and void, and permanently enjoined the city from taking any action to enforce it. Per the settlement, the city is required to provide SJAA with no less than 10 days' written notice of any proposed land use or other regulations or ordinances that would prohibit or limit the operation of the Oasis facility at its current location, the operation of a harm reduction center in the city, or the distribution of syringes within the city. Additionally, if either party indicates a desire to relocate the Oasis facility, the parties are required to meet and confer in good faith to identify a mutually agreeable alternate location for the facility within Atlantic City.

CALIFORNIA DEPARTMENT OF PUBLIC HEALTH SUES LOCAL GOVERNMENTS OVER SYRINGE EXCHANGE BANS

***California Department of Public Health v. El Dorado County Board of Supervisors, et al.*, Superior Court of California (County of El Dorado), Case No. 24CV0463 (suit filed March 8, 2024).** The California Department of Public Health (department) has filed a lawsuit against El Dorado County and the city of Placerville over claims that the local governments have enacted unlawful ordinances to ban syringe exchange programs. In 2005, the California Legislature enacted the Clean Needle Syringe and Exchange Project Act (Cal. Health & Safety Code § 121349.1 (West 2024)), which allowed cities and counties to authorize syringe exchanges in their jurisdictions. In 2011, the California Legislature amended the law to allow the department to authorize syringe exchange programs in any location. In December 2023, El Dorado County adopted Ordinance No. 5189, which made it "unlawful and a public nuisance for any person to create, establish, operate, conduct, or participate in a syringe exchange program within the unincorporated areas of the County of El Dorado." In February 2024, the city of Placerville adopted Ordinance No. 1715, which was similar to the El Dorado County ordinance. The department asserts that the two ordinances are preempted by state law. A hearing on the state's motion for preliminary injunction is scheduled for May 24, 2024.

FEDERAL JUDGE DISMISSES PHILADELPHIA'S SAFE INJECTION SITE CASE

***United States v. Safehouse, et al*, U.S. District Court for the Eastern District of Pennsylvania, Case No. 2:19-cv-00519-GAM (motion to dismiss granted April 3, 2024).** For previous updates on this case, please refer to the August 2023 issue of the LAPPA *Case Law Monitor*, available here. A federal judge has granted the U.S. Department of Justice's (USDOJ) motion to dismiss in the case involving the Philadelphia-based nonprofit organization, Safehouse, which sought to open a supervised injection site in the city. In January 2021, the Third Circuit held that Safehouse's plan to open a supervised injection site would violate the federal "crack house statute" (21 U.S.C. § 856). Following the ruling, the Third Circuit remanded the case to the District Court for the Eastern District of Pennsylvania to consider Safehouse's claim that 21 U.S.C. § 856 cannot be enforced against it under the terms of the Religious Freedom Restoration Act (RFRA; 42 U.S.C. § 2000bb *et seq.*) and the Free Exercise Clause of the First Amendment of the U.S. Constitution. On July 21, 2023, the USDOJ filed a motion to dismiss for failure to state a claim arguing that because Safehouse is not, itself, a religious organization, it cannot assert the religious rights of its board members. Safehouse asserted that its work is inspired and informed by Judeo-Christian beliefs about the need to "preserve life, provide shelter to our neighbors, and do everything possible to care for the sick" and that the threat of prosecution under the crack house statute chills its exercise of religious rights. The judge granted the USDOJ's motion to dismiss, holding that Safehouse is not a religious entity. The judge noted that neither Safehouse's articles of incorporation nor its Form 1023 (*i.e.*, its application for tax-exempt status with the Internal Revenue Service) set forth any religious mission or activity. The judge ruled that Safehouse, as an entity unaffiliated with any

specific faith or religious institution, cannot claim protection for its non-religious actions based solely on the religious motivations of its founders.

PENNSYLVANIA COURTS REACH SETTLEMENT TO RESOLVE ALLEGED AMERICANS WITH DISABILITIES ACT VIOLATIONS

***United States v. The Unified Judicial System of Pennsylvania*, U.S. District Court for the Eastern District of Pennsylvania, Case No. 2:22-cv-00709-MSG (settlement reached February 1, 2024).** For previous updates on this case, please refer to the June 2023 issue of the LAPPA *Case Law Monitor*, available here. The U.S. Attorney's Office for the Eastern District of Pennsylvania has reached an agreement with the Unified Judicial System of Pennsylvania (UJS) to resolve allegations that UJS courts violated the Americans with Disabilities Act (ADA; 42 U.S. Code § 12101, *et seq.*) by preventing individuals under court supervision from taking legally prescribed medication for addiction treatment (MAT). The settlement agreement resolves the 2022 lawsuit against the UJS, the Supreme Court of Pennsylvania, and the Blair, Jefferson, Lackawanna, and Northumberland County Courts of Common Pleas by the U.S. Attorney's Office. Under the agreement, UJS courts will pay $100,000 to the victims and will train all Pennsylvania state court criminal judges and treatment court professionals on the ADA and MAT. The named county courts will adopt anti-discrimination policies related to MAT, and the Administration Office of Pennsylvania Courts will encourage all of its other county courts to adopt similar policies. Lastly, the UJS courts will be required to report their compliance efforts to the U.S. Attorney's Office.

NEW MEXICO CORRECTIONS DEPARTMENT TO BEGIN PROVIDING BUPRENORPHINE TO CERTAIN INCARCERATED INDIVIDUALS

***Disability Rights New Mexico v. Alisha Tafoya Lucero, et al.*, U.S. District Court for the District of New Mexico, Case No. 1:22-cv-00954-JHR-JFR (settlement reached March 5, 2024).** For previous updates on this case, please refer to the February 2023 issue of the LAPPA *Case Law Monitor*, available here. A federal district court has approved a settlement between Disability Rights New Mexico (DRNM) and the New Mexico Corrections Department (NMCD) to allow incarcerated individuals with opioid use disorder (OUD) to continue taking buprenorphine when they enter custody. Specifically, this settlement requires NMCD to start providing buprenorphine to individuals entering NMCD custody who are currently on that medication. Additionally, the settlement will allow pregnant and lactating people currently receiving buprenorphine while incarcerated to stay on buprenorphine after birth and after they are no longer lactating as long as the drug is clinically indicated. NMCD will also be required to submit a quarterly report to DRNM about the number of individuals being screened and treated for OUD under the settlement agreement. The settlement agreement does not require NMCD to start people on buprenorphine if they were not on it prior to entering custody. However, by July 1, 2026, NMCD must begin assessing all incarcerated individuals and provide all forms of medication for addiction treatment to all who need it pursuant to N.M. STAT. ANN. § 24-1-5.11 (West 2024).

COURT SIDES WITH ILLINOIS HOSPITAL IN EMPLOYEE DISCRIMINATION CASE

***Wendy Lohmeier v. Gottlieb Memorial Hospital and Loyola University Medical Center*, U.S. District Court for the Northern District of Illinois, Case No. 1:19-cv-08136 (motion for summary judgment granted March 5, 2024).** A federal district court in Illinois has granted a motion for summary judgment in favor of Gottlieb Memorial Hospital and Loyola University Medical Center in a suit brought by a former employee, Wendy Lohmeier. The suit involved Lohmeier's termination as a nurse in the intensive care unit after the hospital determined Lohmeier was under the influence of opioids and was likely responsible for narcotic

medication that was missing. Lohmeier alleged that her termination was the result of discrimination based on race and national origin as well as disability, rather than any wrongdoing. In October 2019, Lohmeier exhibited signs of intoxication while working at the hospital. On the same date, two incidents of narcotic pain medication diversion occurred on the floor where Lohmeier worked. During both diversion events, Lohmeier entered the locked medication storage room within seconds of the medication going missing, according to electronic security records attached to the medication dispensing machine. After each incident, management questioned staff about the missing medication. While questioning Lohmeier, the managing nurse noticed slurred speech and required Lohmeier to be evaluated in the emergency room for fitness to continue her shift. Lohmeier took a drug test during the evaluation which came back positive for opioids. Lohmeier claimed that the positive test was due to a recent bout with shingles, which required her physician to prescribe narcotic pain medication. However, she had never reported the prescription to her supervisor, as required by the hospital's personnel policy. After an investigation into her apparent violations of the hospital's drug free workplace policy and the suspected diversion of opioid medication, the hospital terminated Lohmeier. This case ensued. The complaint alleged eight different claims, based on Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*), the Americans with Disabilities Act (42 U.S.C. § 12101, *et seq.*), the Family and Medical Leave Act (FMLA; 29 U.S.C. § 2601, *et seq.*), and the Illinois Human Rights Act (775 Ill. Comp. Stat. Ann. 5/1, *et seq.* (West 2024)). Lohmeier claimed that she was discriminated against due to her race and national origin (Salvadorian), as well as her disability (shingles and mental health disorders). She asserted that the hospital singled her out for the missing narcotics because of her race and that hospital management had failed to consider her shingles or her diagnoses of depression and anxiety when they terminated her. Additionally, Lohmeier claimed that the hospital failed to allow her to use her FMLA benefits during the investigation period. The defendants contended that Lohmeier did not have a basis for her claims, as she was terminated for her clear violation of hospital policy as well as evidence of her medication theft. The hospital moved for summary judgment, which the court granted as to all claims. The court stated in its decision that Lohmeier had failed to establish a basis for a single one of her claims. Specifically addressing her discrimination claims, the court determined that Lohmeier had failed to demonstrate that the hospital treated her any differently than a similarly situated employee because there were no other employees who exhibited signs of intoxication at work. On March 27, 2024, Lohmeier filed an appeal with the Seventh Circuit.

FEDERAL COURT HOLDS LAST CHANCE AGREEMENT DID NOT REQUIRE COMPANY TO KEEP A WORKER EMPLOYED

***Thomas P. Powers v. Coil Tran LLC*, U.S. District Court for the Northern District of Indiana, Case No. 2:23-cv-00086 (opinion filed February 13, 2024).** A federal district court ruled that a "last chance" document (LCD) (an agreement between an employer and an employee or union that provides the employee with a "last chance" to keep his or her job after committing serious misconduct) did not require a company to continue to employ a worker with opioid dependency. After being prescribed opioid painkillers for chronic pain in 2016, Thomas Powers developed an opioid dependency. His employer, Coil Tran LLC d/b/a Hobart Electronics (Hobart), believed that this dependency affected his work performance. In 2021, Powers signed an LCD in which he was allowed to keep his job in exchange for ceasing opioid use and joining a drug assistance program. The agreement subjected Powers to these conditions for two years, but it also stated that it did not affect his status as an at-will employee. Hobart subsequently terminated Powers' employment, and on November 15, 2023, Powers filed a wrongful termination suit in federal district court, bringing forth claims of violations of the Americans with Disabilities Act (ADA; 42 U.S.C. § 12101, *et seq.*), common law retaliatory discharge, breach of contract, and promissory estopple. Hobart filed a motion to dismiss the common law retaliatory discharge, breach of contract, and promissory estopple claims. Powers argued that the LCD constituted an agreement binding Hobart not to fire him for reasons related to his opioid use for the duration of the agreement. The court disagreed, holding that the LCD did not create an obligation on the company's part to keep Powers employed. The court noted that while the LCD provided that Powers' employment would be terminated if he failed to meet the agreed upon conditions, it did not offer a guarantee that his employment

would continue if he met those conditions. Furthermore, the LCD explicitly stated that Powers remained an at-will employee. The court granted Hobart's motion to dismiss. Powers' discrimination and retaliation claims under the ADA remain viable.

EMPLOYEE WHO LOST JOB OVER FALSE-POSITIVE DRUG TEST CANNOT SUE TESTING COMPANY

***Rosemary Tourneur v. National Railroad Passenger Corp., et al.*, U.S. District Court for the Eastern District of Pennsylvania, Case No. 2:23-cv-01580 (opinion filed March 13, 2024).** A federal district court has ruled that a woman who lost her job due to a false positive drug test cannot sue the third-party testing service or the doctor who performed the test. On September 9, 2021, Rosemary Tourneur accepted a conditional offer of employment with Amtrak and submitted a hair sample for a required drug test. The sample tested positive for cocaine. Tourneur, who was pregnant at the time, informed Amtrak that she was taking labetalol, a blood pressure medication that is known to cause false positive drug screens, but Amtrak did not give Tourneur the opportunity to take a second drug test. On October 6, 2021, Amtrak rescinded Tourneur's offer of employment. In April 2023, Tourneur sued Amtrak, the drug testing company, and the supervising doctor in federal district court for wrongful discharge and negligence. The testing company and doctor filed a motion to dismiss. The court granted these motions, holding that the wrongful discharge claim did not apply because neither the testing company nor the doctor were ever Tourneur's potential employers. The court further found that the defendants did not owe Tourneur a duty of care to remediate her alleged false positive drug screen, undermining the negligence claim. Tourneur's claims against Amtrak were not at issue in this opinion, and those claims will be adjudicated separately.

SIXTH CIRCUIT AFFIRMS THE DISMISSAL OF THE DISABILITY DISCRIMINATION CASE OF A FORMER DEPUTY SHERIFF

***Lonnie Maxson v. Dallas Baldwin*, U.S. Court of Appeals for the Sixth Circuit, Case No. 23-3702 (opinion filed March 26, 2024).** The Sixth Circuit affirmed the dismissal of a disability discrimination case involving a former deputy sheriff who tried to illegally fill an opioid prescription and who tested positive for cannabis. Lonnie Maxson, a former deputy sheriff with the Franklin County, Ohio Sheriff's Department (department), suffered from a longstanding back condition for which he was prescribed pain medication. The condition ultimately led to Maxson developing a substance use disorder. On February 18, 2021, Maxson triggered Ohio's Automated Rx Reporting System when, while visiting a hospital emergency room, medical staff refused to refill his existing opioid prescription. A nurse reported the incident to Maxson's supervisors, and the next day he was placed on administrative leave and given a drug test. The test came back positive for cannabis. On April 14, 2021, the department decided to pursue criminal charges against Maxson for deception to obtain dangerous drugs. As part of the investigation, the department conducted an interview of Maxson, during which he appeared to be going through withdrawal. Maxson took another drug test during this time, which came back negative for all substances. On April 23, 2021, Maxson pleaded guilty to a reduced charge of misdemeanor attempt to commit an offense and agreed to spend two years in the "Helping Achieve Recovery Together" program in exchange for the plea. The next week, the department notified Maxson that his employment would be terminated effective April 30, 2021. The department stated that Maxson's arrest, positive cannabis test, and misdemeanor guilty plea violated several department policies and that he was being terminated on that basis. Maxson filed a lawsuit against Sheriff Dallas Baldwin, alleging disparate treatment and failure to accommodate under Title I of the Americans with Disabilities Act (ADA; 42 U.S.C. § 12112). Baldwin moved to dismiss the complaint on November 21, 2022, and on July 27, 2023, the district court granted the motion. Maxson appealed, arguing that his substance use disorder was the true reason for his termination. Under the ADA, addictions that substantially limit a major life activity are considered covered disabilities, but an employee who is currently engaging in the illegal use of drugs when the employer acts on

the basis of use is not considered to be a qualified individual entitled to ADA protections. Baldwin argued that Maxson's illegal use of cannabis excluded him from ADA protection. While there is no "bright-line rule" for determining when an employee is currently engaging in drug and alcohol use, courts have repeatedly found that individuals who have used drugs in the weeks or months prior to their termination were current drug users under the ADA. Considering all the circumstances leading up to Maxson's termination, the court determined that the department's belief that Maxson's illegal drug use was an ongoing problem when it fired him was reasonable. The court affirmed the district court's motion to dismiss, concluding that Maxson failed to allege that he was a qualified individual with a disability under the ADA at the time of his termination.

SIXTH CIRCUIT REVERSES SUMMARY JUDGMENT IN DISABILITY DISCRIMINATION SUIT INVOLVING POSITIVE CANNABIS TEST

***Murray Fisher v. Airgas USA, LLC*, U.S. Court of Appeals for the Sixth Circuit, Case No. 23-3286 (opinion filed January 31, 2024).** For previous updates on this case, please refer to the April 2023 issue of the LAPPA *Case Law Monitor*, available here. The Sixth Circuit has reversed a district court's summary judgment ruling in a disability discrimination case brought by a former employee who disputed his firing over a positive cannabis test. Doctors diagnosed Murray Fisher with liver cancer while he was an employee at Airgas USA, LLC (Airgas). To manage the symptoms associated with his cancer treatment, Fisher began taking a legal hemp product called "Free Hemp." In November 2020, Airgas selected Fisher for a random drug test. The drug testing contractor, HireRight, reported to Airgas that Fisher's sample tested positive for cannabis. Fisher denied using cannabis and requested a retest, explaining that his hemp use might have caused a false positive. Airgas agreed to the retest but did not inform HireRight that Fisher had been using hemp. Additionally, Airgas did not ask HireRight if a hemp product would have caused a false-positive result for cannabis. Fisher's retest came back positive for cannabis and Airgas terminated him. Fisher sought reinstatement with the company, but Airgas's Vice President of Human Resources informed Fisher that HireRight's Chief Medical Officer said that his use of a legal hemp product would not have caused a positive cannabis result. Ultimately, Airgas refused to reinstate Fisher.

Fisher sued Airgas in state court claiming that the company had engaged in disability discrimination in violation of Ohio Rev. Code Ann. § 4112.02 (West 2024). Airgas removed the case to federal court and filed a motion for summary judgment. In March 2023, the district court granted Airgas' motion for summary judgment holding that Airgas' stated reasons for firing Fisher were not pretextual. Fisher appealed the ruling to the Sixth Circuit. The district court granted summary judgment on the basis of the "honest-belief rule," which holds that "if an employer proves that it honestly believed in a non-discriminatory reason for firing an employee, the employee cannot establish that the reason is pretextual even if it is later shown to be mistaken or baseless." To demonstrate an honest belief, the employer "must provide evidence that it made a reasonable informed and considered decision based on reasonable reliance on particularized facts that were before it when it fired the employee." In this case, Airgas resubmitted Fisher's sample for testing and fired him when the retest came back as positive for cannabis. The court found that Airgas did nothing to investigate the possibility that Fisher's hemp use might have caused a false positive result when it resubmitted his sample for testing. By failing to conduct any sort of investigation into the test results, the court determined that Airgas did not establish that it made a "reasonably informed and considered decision" to terminate Fisher under the honest-belief rule. Airgas argued that it made its decision to terminate Fisher based on information provided by HireRight's Chief Medical Officer, but the court rejected this argument, holding that the only facts that matter for purposes of the honest-belief rule are those that occur before the employer fired its employee. Having ruled that Airgas did not fulfill the requirements of the honest-belief rule, the court reversed the district court's grant of summary judgment and remanded the case for further proceedings. On February 14, 2024, Airgas filed a petition for a hearing *en banc*, but on March 8, 2024, the court rejected the petition.

INSPECTION COMPANY MUST FACE DISABILITY DISCRIMINATION LAWSUIT

***Clark Jones v. Acuren Inspection Inc.*, U.S. District Court for the District of Connecticut, Case No. 3:23-cv-01054 (motion to dismiss granted in part and denied in part March 15, 2024).** A federal judge has issued an order granting in part and denying in part a testing and inspection services company's motion to dismiss in a suit filed by a former employee alleging discrimination and infliction of emotional distress. Clark Jones began working for Acuren Inspection Inc. (Acuren) as a laboratory technician in 1993. In 2001 and 2005, Jones had back and spine surgeries and has since suffered from back and spinal pain. In an effort to alleviate some of his pain, his doctor prescribed him pain medication and medical cannabis. In 2021, Acuren announced that it was going to begin requiring all employees to undergo drug testing. After this announcement, Jones notified human resources and his supervisor about his prescriptions and medical cannabis use. Jones took his drug test in December 2021, and on December 9, 2021, his regional manager informed him that he failed the drug test due to his medical cannabis use. The regional manager informed Jones that he was supposed to fire him, but he decided to place him on a suspension instead. Jones would be allowed to return to work if he completed a drug program, passed a drug test, and agreed to random drug tests in the future. Jones attempted to stop using his pain medication and medical cannabis but started using them again after five days of excruciating pain. On December 18, 2021, Jones contacted an Acuren human resources representative and informed her that he could not proceed with the drug program and could not provide a negative test result due to his need for medical cannabis. The parties disagree as to whether Jones resigned or Acuren fired him, but on December 23, 2021, Jones received a message stating that his benefits would end on December 31, 2021.

On June 30, 2023, Jones filed a complaint in Connecticut Superior Court alleging disability discrimination in violation of the Connecticut Fair Employment Practices Act (CFEPA; Conn. Gen. Stat. Ann. § 46a-60 (West 2024)) and violations of the Palliative Use of Marijuana Act (PUMA; Conn. Gen. Stat. Ann. § 21a-408p (West 2024)). Jones also brought forth claims of intentional infliction of emotional distress and negligent infliction of emotional distress. Acuren removed the case to federal court and on August 14, 2023, filed a motion to dismiss the disability discrimination and emotional distress claims. Regarding the disability discrimination claim, Acuren argued that Jones failed to allege that he notified the company of his disability. Acuren also argued that refusing to allow an employee to consume medical cannabis cannot be the basis for a disability discrimination claim under CFEPA because it can only be brought under PUMA. In response, Jones argued that the company was fully aware that he suffered from debilitating back and spinal pain and took an adverse employment action against him because of it. The court found that Jones sufficiently put forth a *prima facie* disability discrimination case but ruled that the fact-based inquiry as to whether Jones put Acuren on notice of his disability is for the summary judgment stage. Additionally, the court determined that Acuren's argument that Jones cannot pursue a disability bias claim under CFEPA because he also sued under PUMA is premature, at best. Accordingly, the court denied Acuren's motion to dismiss the disability discrimination claim under CFEPA. The court, however, granted Acuren's motion to dismiss the claims for intentional inflection of emotional distress and negligent infliction of emotional distress for failure to state a viable cause of action.

PENNSYLVANIA UNION WORKER CAN PROCEED WITH MEDICAL CANNABIS CLAIM

***Zosima Miller v. Brandsafway Industries, LLC*, U.S. District Court for the Western District of Pennsylvania, Case No. 2:23-cv-00305 (partial motion to dismiss granted March 15, 2024).** A federal judge ruled that a union worker who lost her job after a positive drug test can proceed with allegations under Pennsylvania's medical cannabis law but dismissed her wrongful discharge claim. Zosima Miller uses medical

cannabis to treat her generalized anxiety disorder. In June 2022, BrandSafway Industries, LLC (BrandSafway) hired Miller as an industrial painter. Miller is a member of the International Union of Painters and Allied Trades Local 57, and her employment was subject to a collective bargaining agreement (CBA). At the time of her hiring, Miller provided her supervisor with a copy of her medical cannabis card. On June 20, 2022, Miller underwent a routine random drug test, and on June 27, 2022, the test results came back positive for cannabis. Miller immediately informed the testing company of her medical cannabis card, but BrandSafway terminated her employment that same day for violating the company's drug and alcohol policy. On December 8, 2022, Miller filed a lawsuit against BrandSafway in the Court of Common Pleas of Allegheny County alleging violations of Pennsylvania's Medical Marijuana Act (PMMA; 35 Pa. Stat. and Cons. Stat. Ann. § 10231.2103 (West 2024)) and wrongful termination in violation of public policy. BrandSafway removed the case to federal court and filed a motion to dismiss. Around the same time, Miller filed a complaint with the Pennsylvania Human Relations Commission raising a claim under the Pennsylvania Human Relations Act (43 Pa. Stat. and Cons. Stat. Ann. § 951, *et seq.* (West 2024)) that the defendant terminated her based on her disability of having generalized anxiety disorder.

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BrandSafway made three main arguments in support of its motion to dismiss: (1) Miller's claims are completely preempted and can only be brought under § 301 of the Labor Management Relations Act (LMRA; 29 U.S.C. § 185); (2) Miller's common law wrongful discharge claim is not available to unionized employees and the PMMA does not provide a source of public policy to support a wrongful discharge claim in any event; and (3) the facts asserted in the complaint and those submitted to the Pennsylvania Human Relations Commission are inconsistent and contradictory, resulting in Miller being judicially estopped from pursuing any purported claim under the PMMA.[2] Regarding the preemption argument, the judge noted that a state law claim is preempted by § 301 of the LMRA only if the claim is: (1) founded directly on rights created by a CBA; or (2) substantially dependent on the analysis of a CBA. Generally, the LMRA does not have a preemptive effect where there are state rules that proscribe conduct, or establish rights and obligations independent of a labor contract, or where the state law claim can be resolved without substantially interpreting the CBA itself. The judge ruled that Miller's PMMA claim is not preempted by § 301 of the LMRA because the PMMA establishes rights and obligations that are independent of the labor contract, and the claim can be resolved without interpreting the CBA. The judge noted that the CBA contains a general prohibition against the use of controlled substances in the workplace and does not make the resolution of the PMMA claim "inextricably intertwined" with the CBA.

For the wrongful discharge claim, the judge noted that Miller was a union employee, not an at-will employee. Miller's status as a union employee prevents her from bringing a wrongful discharge claim, and therefore, the judge dismissed that claim. Finally, the judge disagreed with BrandSafway's assertion that Miller's PMMA claim was inherently inconsistent with her allegations in the filing with the Pennsylvania Human Relations Commission. The judge stated that a plaintiff can plead alternative legal theories in support of different claims for relief, particularly when the factual allegations plausibly support the inference that there were alternative reasons for the employer's material adverse action. The judge also mentioned that as a general matter, pleading inconsistent claims is permissible under the Federal Rules of Civil Procedure (Fed. R. Civ. P. 8(d)(3)). Thus, the judge ruled that BrandSafway was not entitled to dismissal based on its incompatible causation defense. In sum, the judge granted BrandSafway's motion to dismiss the wrongful discharge claim and denied the motion with respect to the other claims. The judge dismissed the wrongful discharge claim without prejudice in the event that Miller becomes unable to pursue her PMMA claim.

[2] "Judicial estoppel" is a bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true. *Estoppel*, BLACK'S LAW DICTIONARY (11th ed. 2019).

FEDERAL COURT RULES MANUFACTURER OF "PROP PILLS" CAN BE SUED FOR COUNTERFEITING

***United States v. Robert Davis*, U.S. District Court for the Eastern District of Pennsylvania, Case No. 2:20-cr-00106 (opinion filed January 30, 2024).** A federal court declined to dismiss a trafficking counterfeit goods case against a maker of pills used as props. From 2015 to 2019, Robert Davis sold replicas of oxycodone, hydrocodone, and Xanax tablets for use as props in films and videos. The "prop pills" did not contain any active pharmaceutical ingredients. According to evidence presented in court, Davis also sold these replicas to drug dealers, who used the fake pills to increase the apparent size of their inventories. In May 2023, federal prosecutors charged Davis with trafficking in counterfeit goods, in violation of 18 U.S.C. § 2320(a)(1). Davis filed a motion to dismiss the charges, arguing that the statute did not apply to his conduct because he had not sold the replica pills as actual pharmaceuticals. The District Court for the Eastern District of Pennsylvania disagreed, holding that the issue was that Davis had used the authentic pills' marks to sell counterfeit goods, not that he had sold counterfeit drugs. The court noted that the counterfeiting charge is based on "post-sale confusion," which occurs when a direct purchaser buys the counterfeit product in the hope that a subsequent purchaser will be confused and duped. The court stated that it did not matter that Davis advertised his products as props because there is potential evidence that the prop drugs would reach end-users who were unaware of their counterfeit nature. A jury trial is scheduled for April 15, 2024.

FOURTH CIRCUIT OVERTURNS 861 COUNTS OF DRUG DISTRIBUTION BY A DOCTOR

***United States v. Joel Smithers*, U.S. Court of Appeals for the Fourth Circuit, Case No. 19-4761 (opinion filed February 2, 2024).** The Fourth Circuit has vacated the drug distribution convictions of a former doctor in light of a 2022 U.S. Supreme Court decision. Joel Smithers, a former doctor of osteopathy in Virginia, was convicted of 861 criminal counts related to drug trafficking and sentenced to 40 years in prison. He appealed his conviction to the U.S. Court of Appeals for the Fourth Circuit, where he argued that the jury in the district court had been given inappropriate instructions. The district court had instructed the jury that it could convict Smithers if it found he acted "without a legitimate medical purpose or beyond the bounds of medical practice." In Smithers' view, this violated the 2022 U.S. Supreme Court decision *Ruan v. United States* (142 S.Ct. 2370), which held that a doctor must knowingly and intentionally act in violation of medical standards to be convicted under the federal Controlled Substances Act (21 U.S.C. § 801, *et seq.*). (For more information on the *Ruan* case, please refer to the August 2022 issue of the LAPPA *Case Law Monitor*, available here.) Smithers argued that the district court's jury instructions improperly allowed for conviction based on an objective standard—"outside the bounds of medical practice"—without considering Smithers' subjective intentions. The Fourth Circuit agreed, holding that that the jury instructions had indeed violated *Ruan*. On February 2, 2024, the court vacated Smithers's convictions and ordered a new trial.

OHIO DOCTOR ACQUITTED IN PATIENT DEATHS LOSES MALICIOUS PROSECUTION SUIT

***William Husel v. Trinity Health Corporation*, U.S. District Court of the Eastern District of Michigan, Case No. 2:23-cv-10845-SJM-DRG (motion to dismiss granted March 28, 2024).** For previous updates on this case, please refer to the June 2023 issue of the LAPPA *Case Law Monitor*, available here. A federal district court has dismissed the malicious prosecution suit filed by William Husel, MD, the Ohio doctor acquitted in the deaths of 14 patients who died after ingesting fentanyl, against Trinity Health Corporation (Trinity). Husel claimed that Trinity actively sought his indictment and prosecution by maliciously providing the Franklin County Prosecutor's Office with knowingly inaccurate and misleading information and

knowingly withholding exculpatory evidence. Husel also claimed that Trinity instituted a public outreach campaign designed to lead to his indictment and prosecution. Trinity filed a motion to dismiss arguing that Husel had failed to rebut the presumption that probable cause existed for his prosecution. Under Ohio case law, a claim for malicious prosecution has three elements: (1) malice in instituting or continuing the prosecution; (2) lack of probable cause; and (3) termination of the prosecution in favor of the accused. Trinity claimed that Husel failed to plead a lack of probable cause because an indictment from a grand jury creates a presumption that probable cause existed for the prosecution. This presumption can be rebutted if there is substantial evidence showing that the indictment resulted from perjured testimony or that the grand jury proceedings were significantly irregular. Husel argued that the presumption should be rebutted because Trinity lied to the prosecutor's office, which resulted in them presenting misleading testimony to the grand jury. The court noted that while Husel insinuated that false or misleading information was presented to the grand jury, he never explicitly identified which Trinity staff member presented the false or misleading information. The court also stated that Husel failed to explain how the allegedly false or misleading information was relevant to his indictment. Furthermore, Husel did not allege that the grand jury proceedings were irregular. The court ruled that Husel failed to plead allegations sufficient to show a lack of probable cause and granted Trinity's motion to dismiss without prejudice.

FORMER U.S. POSTAL WORKER REACHES PLEA DEAL IN COCAINE DISTRIBUTION AND MAIL THEFT CASE

***United States v. Shawn R. Fuller*, U.S. District Court for the District of Connecticut, Case No. 3:23-cr00075-JAM (plea deal entered February 16, 2024).** For previous updates on this case, please refer to the June 2023 issue of the LAPPA *Case Law Monitor*, available here. Former U.S. Postal Service mail carrier Shawn Fuller, who was indicted with cocaine distribution and mail theft offenses, has reached a plea agreement with the U.S. Attorney's Office for the District of Connecticut. Fuller agreed to plead guilty to a violation of 18 U.S.C. § 1709 (theft of mail matter by officer or employee). This offense carries a maximum penalty of five years of imprisonment and a maximum fine of $250,000. Fuller is scheduled to be sentenced on June 20, 2024.

TREATMENT CENTER CANNOT SUE SCHOOL DISTRICT AND FIRE DEPARTMENT OVER THE DENIAL OF ITS ZONIG APPLICATION

***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 (motion to dismiss granted February 27, 2024).** For previous updates on this case, please refer to the February 2022 issue of the LAPPA *Case Law Monitor*, available here. A federal court has ruled that a non-profit substance use disorder treatment center does not have standing to sue a local fire department and school district over the rejection of its zoning application. Haymarket Center (Haymarket) is the largest non-profit substance use disorder treatment provider in Chicago and was interested in expanding to other parts of the state. Haymarket purchased an old hotel in DuPage County and attempted to get zoning approval for the treatment center it planned to open in the Village of Itasca (village). After two years of meetings and negotiations, the village denied Haymarket's application. In January 2022, Haymarket filed a lawsuit against the village and the Itasca Plan Commission, the Itasca Mayor, the Itasca Fire Protection District No. 1 (fire district), the Itasca Public School District 10 (school district) and the school superintendent who all opposed Haymarket's plan. The complaint alleged violations of the Fair Housing Act (42 U.S.C. 3601 *et seq.*), Title II of the Americans with Disabilities Act (42 U.S.C. § 12131, *et seq.*), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), and state law. The fire district, the school district, and the superintendent moved to dismiss, arguing that Haymarket did not have standing to sue them. A plaintiff has standing to sue if he or she has suffered an injury in fact that is "fairly traceable" to the defendant's challenged conduct and that is likely to be redressed by a favorable judicial decision. Haymarket alleged that it suffered an injury when the village denied its zoning application. The question at issue was whether the alleged injury

(*i.e.*, the denial of the application) is "fairly traceable" to the actions of the fire district, school district, and superintendent. Traceability requires a causal nexus between the injury and the defendant's conduct. The court determined that the denial of Haymarket's application is not "fairly traceable" to the conduct of the fire district, school district, and superintendent because these defendants were not the decision makers. While the fire district, school district, and superintendent all voiced their opposition to Haymarket's plan, they did not have a vote in the approval of the application. The court noted that the power to approve the proposed application lied solely with the Itasca Plan Commission and that there was not any evidence to suggest that the opposition of the fire district, school district, and superintendent predetermined the denial of the application by the commission. Thus, the court granted the three defendants' motion to dismiss for lack of standing. The three other defendants remain parties to the lawsuit.

ARIZONA SUED FOR FAILING TO PREVENT SOBER LIVING HOME FRAUD

***Carletta Leslie, et al. v. State of Arizona, et al.*, Arizona Superior Court (Maricopa County), Case No. CV2024-004688 (suit filed March 7, 2024); and *Priscilla Y. Largo, et al. v. State of Arizona, et al.*, Arizona Superior Court (Maricopa County), Case No. CV2024-004681 (suit filed March 7, 2024).** Two separate lawsuits have been filed against the state of Arizona, the Arizona Department of Health Services (AZDHS), and the Arizona Health Care Cost Containment System (AHCCCS) over allegations that they failed to prevent and address a Medicaid fraud scandal involving sober living homes. The first suit was brought on behalf of the estate of Carson Leslie. On September 28, 2022, employees of the Victory Group Home picked up Leslie, who was believed to be heavily intoxicated, in Flagstaff, Arizona and drove him three hours away to Peoria, Arizona. Police later found Leslie's dead body in the street in front of the Victory Group Home. A medical examiner determined that Leslie died of alcohol poisoning. The second suit was brought on behalf of the estate of Fernando Largo. On March 7, 2023, police found Largo dead in a room at the Regency Inn Motel. The motel room in which police found Largo was registered to the outpatient treatment center, Opportunity Changes. It is alleged that Largo underwent a sober living intake with Opportunity Changes and was then left alone in a room at the motel. The medical examiner determined that Largo died of the combined effects of fentanyl, methamphetamine, and alcohol intoxication. Both Leslie and Largo were Native American and members of the Navajo Nation.

Both suits bring forth claims of negligence against the state, AZDHS, and AHCCCS, arguing that they directly and proximately caused the deaths of Leslie and Largo by failing to exercise reasonable care in the management and oversight of Medicaid and government funds that are used to pay for substance use disorder (SUD) treatment services for Native Americans. The plaintiffs claim that the Medicaid fraud scandal involving the sober living homes cost taxpayers two billion dollars due to providers falsely billing for SUD treatments that were not actually rendered. The suits also claim that the state defendants "ignored, shunned, and marginalized the Native American advocates who were desperately and tirelessly trying to solve the crisis." In addition to the negligence claims against the state defendants, the suits also bring forth claims against the Victory Group Home, Opportunity Changes, and a number of their employees for negligence, consumer fraud in violation of the Arizona Consumer Fraud Act (Ariz. Rev. Stat. Ann. § 44-1521, *et seq.* (West 2024)), and negligent misrepresentation. The plaintiffs in both suits are asking for compensatory damages for pain and suffering and punitive damages.

PRESS RELEASE ABOUT POTENTIAL OVERDOSE REVERSAL DRUG IS NOT SPEECH PROTECTED BY CALIFORNIA "ANTI-SLAPP" LAWS

***BioCorRx, Inc., et al. v. VDM Biochemicals, Inc., et al.*, California Court of Appeals, Fourth District, Case No. G061535 (opinion filed February 9, 2024).** For previous updates on this case, please refer to the December 2023 issue of the LAPPA *Case Law Monitor*, available here. On November 20, 2023, a California intermediate appellate court granted VDM Biochemicals, Inc.'s (VDM) emergency petition for rehearing. On February 9, 2024, the appeals court issued its new opinion, again ruling that BioCorRx, Inc.'s (BioCorRx) press releases about an opioid overdose treatment that it was developing did not qualify as protected speech under California's anti-strategic lawsuit against public participation ("anti-SLAPP") law. California's anti-SLAPP statute (Cal. Civ. Proc. § 425.16 (West 2024)) provides for a special motion to strike a complaint where the complaint arises from activity exercising the rights of petition and free speech. California law, however, prohibits anti-SLAPP motions in response to certain actions against a business that arise from commercial statements or conduct of the business (Cal. Civ. Proc. § 425.17 (West 2024)). The court determined that BioCorRx's statements fell under the commercial speech exemption because they were written about a core business operation in order to attract investors, not to inform the general public. The court's ruling overturned the trial court's ruling, which had granted BioCorRx's anti-SLAPP motion against VDM. The court remanded the case to the trial court for further proceedings.

KENTUCKY ATTORNEY GENERAL SUES KROGER OVER ITS ALLEGED CONTRIBUTIONS TO THE OPIOID CRISIS

***Commonwealth of Kentucky, ex rel. Russell Coleman v. The Kroger Co., et al.*, Kentucky Circuit Court (Bullitt), Case No. 24-CI-00154 (suit filed February 12, 2024).** Kentucky Attorney General Russell Coleman has filed a lawsuit against the grocery chain Kroger over allegations that the company's pharmacies helped fuel the opioid crisis in the Commonwealth. The suit claims that Kroger failed to implement an effective monitoring program to stop suspicious opioid orders. Kroger allegedly distributed almost 194 million hydrocodone pills to its Kentucky pharmacies between 2006 and 2019 and did not report a single suspicious prescription in the Commonwealth between 2007 and 2014. The Attorney General brings forth claims that Kroger violated the Kentucky Consumer Protection Act (Ky. Rev. Stat. Ann. § 367.110, *et seq.* (West 2024)) and created a public nuisance. The suit seeks civil penalties of $2,000 for each alleged willful violation of the Kentucky Consumer Protection Act. The Attorney General also asked the court to order Kroger to abate the public nuisance.

FEDERAL JUDGE DISMISSES TWO OF THE GOVERNMENT'S CLAIMS AGAINST WALMART IN OPIOID SUIT

***United States v. Walmart, Inc., et al.*, U.S. District Court for the District of Delaware, Case No. 1:20-cv01744-CFC (motion to dismiss granted in part and denied in part on March 11, 2023).** For previous updates on this case, please refer to the August 2022 issue of the LAPPA *Case Law Monitor*, available here. On February 6, 2024, Walmart Inc. (Walmart) filed a motion to dismiss three of the four counts alleged against it by the federal government. The government alleged in the three challenged claims that Walmart violated various provisions of the Controlled Substances Act (CSA; 21 U.S.C. § 801, *et seq.*). On March 11, 2023, a federal judge granted Walmart's motion to dismiss for two of the charges and denied the company's motion to dismiss a third charge. In Count IV of the complaint, the government alleges that "during the Distribution Violations Period, from June 26, 2013 through November 29, 2017, Walmart refused or negligently failed to report suspicious orders to the [Drug Enforcement Administration (DEA)] in violation of 21 U.S.C. § 842(a)(5) and 21 C.F.R. § 1301.74(B)." Section 842(a)(5) makes it unlawful for "any person to

refuse or negligently fail to make, keep, or furnish any record, report, notification, declaration, order or order form, statement, invoice, or information required under subchapter I or subchapter II of the CSA." Section 1301.74(b) requires each DEA registrant to "design and operate a system to disclose to the registrant suspicious orders of controlled substances and to inform the DEA of suspicious orders when discovered by the registrant." Walmart argued that Count IV should be dismissed because nothing in either of the CSA's two subchapters required a DEA registrant during the Distribution Violations Period to make, keep, or furnish reports of suspicious orders to the DEA. The government did not dispute that the CSA did not directly impose a suspicious order reporting requirement during this timeframe but argued that because the Attorney General promulgated § 1301.74(b) pursuant to subchapter I of the CSA, Walmart's failure to submit suspicious order reports to the DEA violated the CSA-imposed reporting obligation under § 842(a)(5). The judge found the government's argument to be flawed because although subchapter I of the CSA empowered the Attorney General to promulgate regulations during the Distribution Violations Period, it did not require the Attorney General to promulgate a regulation. Thus, even though § 1301.74(b) may have been promulgated under subchapter I of the CSA, the CSA did not require the Attorney General to promulgate § 1301.74(b) or any of the reporting requirements set forth within it. The judge ruled that the reporting requirements in § 1301.74(b) were not required under the CSA. Therefore, a failure to comply with the reporting requirements of § 1301.74(b) during the Distribution Violations Period was not unlawful under § 842(a)(5). The judge also mentioned that after the Distribution Violations Period ended, Congress amended the CSA to include in § 832(a) the suspicious order reporting requirement set forth in § 1301.74(b). The revision of § 832(a) to include § 1301.74(b)'s reporting requirement would have had no purpose or effect if § 1301.74(b) already fell within the scope of § 842(a)(5). In sum, the judge agreed with Walmart and dismissed Count IV.

Count III of the complaint alleged that Walmart repeatedly violated 21 U.S.C. §§ 842(a)(1), 829(a) and (b), and 21 C.F.R. § 1306.06 "because it, through its agents and employees, did not adhere to the usual course of the professional practice of pharmacy in filling prescriptions for controlled substances." Section 842(a)(1) makes it unlawful "to distribute or dispense a controlled substance in violation of § 829 of the CSA." Section 829 prohibits the dispensing of controlled substances by a pharmacist without a prescription. Section 1306.06 provides that "a prescription for a controlled substance may only be filled by a pharmacist acting in the usual course of his professional practice and either registered individually or employed in a registered pharmacy, a registered central fill pharmacy, or registered institutional practitioner." Walmart argued that Count III should be dismissed because: (1) neither § 842(a)(1) nor § 829 make it unlawful to fail to adhere to the usual course of the professional practice of pharmacy in filling prescriptions for controlled substances; (2) civil penalties and injunctive relief are not available remedies for violations of § 1306.06; and (3) the complaint does not allege facts that imply that Walmart violated the terms of §1306.06. The government argued that a pharmacist's failure to comply with § 1306.06's requirement that "a prescription may only be filled by a pharmacist acting in the usual course of his professional practice" constitutes a violation of § 829 that can be remedied with civil penalties and injunctive relief under § 842(c)(1)(A) and § 843(f). The judge rejected the government's argument holding that neither § 829(a) nor (b) authorizes the dispensing of controlled substances; both subsections merely prohibit the dispensing of controlled substances by a pharmacist without a prescription. Thus, unless a pharmacist has dispensed a controlled substance without a prescription, there is no violation of § 829(a) or (b) and there is no basis for imposing a civil penalty under § 842(c)(1)(A) or granting an injunction under § 843(f). Furthermore, § 1306.06 can only be violated when: (1) a person who is not a pharmacist fills a prescription for a controlled substance; or (2) when a pharmacist fills a prescription not in the usual course of his or her professional practice. Thus, the judge ruled that a pharmacist cannot simultaneously violate § 1306.06 and § 829 because the act of filling a prescription takes the pharmacist outside the scope of § 829. Accordingly, the judge agreed with Walmart that Count III fails to state a cognizable claim because neither § 842(a)(1) nor § 829 make it unlawful to fail to adhere to the usual course of the professional practice of pharmacy in filling prescriptions for controlled substances, and civil penalties and injunctive relief are not available remedies for violations of § 1306.06.

Count II of the complaint alleges that Walmart "repeatedly violated 21 U.S.C. §§ 842(a)(1), 829(a) and (b), and 21 C.F.R. § 1306.04(a) because it, through its agents and employees, knowingly dispensed controlled

substances pursuant to prescriptions that were either not issued in the usual course of professional treatment, not for a legitimate medical purpose, or both." The government argued, and Walmart conceded, that knowingly filling an ineffective prescription in violation of § 1306.04(a) constitutes a violation of § 829, which in turn constitutes a violation of § 842(a)(1) that subjects the violator to a civil penalty under § 842(c)(1)(A) and a potential injunction under § 843(f). Walmart, however, argued that Count II should be dismissed because the law prohibits the government from establishing a corporation's liability by combining one employee's knowledge with another employee's unknowing actions. The judge cited the 1918 Third Circuit case of *Browning v. Fidelity Trust Co.* (250 F. 321) in his decision as to why he had to reject Walmart's motion to dismiss Count II. In *Browning*, the court held that "knowledge of a corporation's employee can be aggregated with the act of another employee to impose liability on the corporation for knowingly or negligently engaging in a prohibited act." The judge determined that under *Browning*, "a Walmart compliance team member's knowledge of the ineffectiveness of a prescription is chargeable to the corporation itself and the filling of that prescription by Walmart with the knowledge of the ineffective prescription imputed to it constitutes a violation of § 1306.04(a)." In sum, the judge granted Walmart's motion to dismiss Counts IV and III and denied the company's motion to dismiss Count II. Neither party has filed an appeal at this time.

FOURTH CIRCUIT ASKS WEST VIRGINIA SUPREME COURT WHETHER OPIOID DISTRIBUTION CAN CAUSE A PUBLIC NUISANCE

***City of Huntington, West Virginia, et al. v. AmerisourceBergen Drug Corporation et al*, U.S. Court of Appeals for the Fourth Circuit, Case No. 22-1819 (certified a question of law March 18, 2024).** For previous updates on this case, please refer to the August 2022 issue of the LAPPA *Case Law Monitor*, available here. The Fourth Circuit has asked West Virginia's high court to determine whether AmerisourceBergen Corp., Cardinal Health Inc., and McKesson Corp. (collectively "the distributors") can be held liable for creating a public nuisance in the state. Specifically, the Fourth Circuit certified the following question to the West Virginia Supreme Court: "Under West Virginia's common law, can conditions caused by the distribution of a controlled substance constitute a public nuisance and, if so, what are the elements of such a public nuisance claim?" If the West Virginia Supreme Court answers in the negative, the Fourth Circuit will affirm the lower court's August 2022 decision in favor of the distributors. The district court judge had ruled that the common law of public nuisance did not apply to the plaintiffs' case. However, if the West Virginia Supreme court holds that the public nuisance cause of action can be used to remedy the conditions the distributors allegedly caused by distributing controlled substances in amounts they knew or should have known exceeded legitimate demand, then the distributors will likely face a new trial. There is currently no controlling West Virginia case law on whether a common law public nuisance cause of action can be used to remedy injuries caused by distributing dangerous products.

MAGISTRATE JUDGE RECOMMENDS REMANDING CHEROKEE NATION'S SUIT AGAINST MORRIS & DICKSON CO. TO STATE COURT

***The Cherokee Nation v. Morris & Dickson Co., LLC*, U.S. District Court for the Eastern District of Oklahoma, Case No. 6:23-cv-00237-RAW-DES (recommendation to remand issued March 19, 2023).** A federal magistrate judge has recommended that the Cherokee Nation's motion to remand to state court be granted. On June 8, 2023, the Cherokee Nation filed a suit in the District Court for Sequoyah County, Oklahoma against Morris & Dickson Co., LLC. (Morris & Dickson) over allegations that the company oversupplied the market in and around the Cherokee Nation with opioids and failed to maintain effective controls against diversion. The Cherokee Nation brought forth claims of negligence and unjust enrichment. On July 12, 2023, Morris & Dickson removed the case to federal court, asserting that the federal Controlled Substances Act (21 U.S.C. § 801, *et seq.*) was the primary support for the Cherokee Nation's state law

negligence claims. On August 4, 2023, the Cherokee Nation filed a motion to remand to state court. The magistrate judge did not find a substantial question of federal law in the case and recommended that the Cherokee Nation's motion to remand be granted. Any objections to the magistrate judge's recommendation are due by April 17, 2024.

HIKMA REACHES AGREEMENT IN PRINCIPLE FOR A NATIONWIDE OPIOID SETTLEMENT

Hikma Reaches Agreement in Principle for a Nationwide Opioid Settlement (agreement in principle announced February 1, 2024). Hikma Pharmaceuticals PLC and its wholly owned subsidiary Hikma Pharmaceuticals USA, Inc. (collectively, Hikma) have reached an agreement in principle to resolve opioid lawsuits brought against it by U.S. states, local governments, and tribal nations. The agreement will resolve most of the more than 900 lawsuits filed against Hikma involving allegations that the company failed to monitor suspicious orders of opioids. Hikma will pay up to $115 million in cash and donate $35 million worth of naloxone if all conditions of the agreement are satisfied and a threshold number of states and local governments opt in to participate. Hikma did not admit to any wrongdoing or liability as part of the settlement agreement.

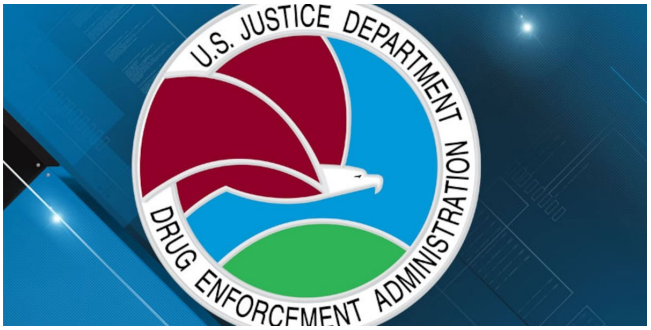
AD AGENCY PUBLICIS HEALTH REACHES $350 MILLION OPIOID MARKETING SETTLEMENT

(Settlement announced February 1, 2024). Publicis Health (Publicis), a subsidiary of the France-based marketing company Publicis Groupe SA has agreed to pay $350 million to settle allegations that it developed predatory and deceptive marketing strategies for Purdue Pharma. From 2010 to 2019, Publicis worked with Purdue Pharma on marketing campaigns for OxyContin and other opioids produced by the company and allegedly used strategies that were designed to deceptively increase opioid use. Publicis is required to pay $350 million, which will be divided among the participating states, within 60 days of the agreement. Additionally, the settlement prohibits Publicis from accepting any future contracts or engagements related to the marketing or sale of opioids. Publicis is also required to release internal documents related to its work with opioid manufacturers and consultants so that they can be included in an online document repository for public view. Publicis did not admit to any liability or wrongdoing as part of the settlement. The settlement is a result of a coalition of state attorneys general co-led by New York Attorney General Letitia James and Colorado Attorney General Phil Weiser.

JUDGE APPROVES MCKINSEY'S SETTLEMENT WITH LOCAL GOVERNMENTS AND SCHOOL DISTRICTS

***In re: McKinsey & Co., Inc. National Prescription Opiate Consultant Litigation*, U.S. District Court for the Northern District of California, Case No. 3:21-md-02996-CRB (settlement approved February 2, 2024).** For previous updates on this case, please refer to the February 2024 issue of the LAPPA Case Law Monitor, available here. A federal judge has approved McKinsey & Company's (McKinsey) proposal to pay $230 million to local governments and school districts to settle claims that the company helped fuel the opioid epidemic through its consulting work with Purdue Pharma and other opioid manufacturers. Under this approved agreement, McKinsey will pay $207 million to the class-action's lead plaintiffs —the cities of Santa Cruz, California; Pope County, Illinois; and Eddyville, Illinois—and $23 million to school districts throughout the U.S. A judge has not yet approved a $78 million settlement to which McKinsey agreed in December 2023 to pay health insurers and benefits providers.

DEA REACHES SETTLEMENT WITH MORRIS & DICKSON CO.



DEA Reaches Settlement with Morris & Dickson Co. (settlement announced February 7, 2024). The Drug Enforcement Administration (DEA) has reached a settlement with pharmaceutical distributor Morris & Dickson Co., LLC (Morris & Dickson) for failing to maintain effective controls against the diversion of controlled substances. Between January 2014 and April 2018, Morris & Dickson shipped potentially suspicious orders of controlled substances to customers without noting any red flags of diversion. Additionally, the company failed to adequately design and operate a system to alert the DEA of suspicious orders of controlled substances and failed to report the suspicious orders in violation of 21 C.F.R. 1301.74(b). In May 2018, the DEA served Morris & Dickson with an order to show cause and an immediate suspension of registration, which immediately suspended the company's DEA Certificates of Registration (COR) and proposed to permanently revoke those CORs. In May 2019, the DEA held an administrative hearing on the order to show cause before an administrative law judge, and the judge recommended that both of Morris & Dickson's CORs be revoked. On May 30, 2023, DEA Administrator Anne Milgram published a final order revoking both CORs. As part of the February 2024 settlement, Morris & Dickson has admitted to all wrongdoing previously determined by the DEA and will surrender one of their two DEA CORs. Additionally, the company will be required to maintain a compliance program and comply with a heightened DEA reporting requirement for five years. Morris & Dickson also agreed to forfeit $19 million as part of the settlement.

JUDGE APPROVES INDIVIOR, INC.'S SETTLEMENT WITH DIRECT PURCHASERS

***In re Suboxone Antitrust*, U.S. District Court for the Eastern District of Pennsylvania, Case No. 2:13-md-02445-MSG (settlement approved February 28, 2024).** For previous updates on this case, please refer to the December 2023 issue of the LAPPA *Case Law Monitor*, available here. A federal judge has approved the $385 million settlement between a group of direct purchasers and Indivior, Inc. over claims that the drugmaker abused its monopoly over Suboxone. The judge called the settlement "fair, reasonable, and adequate." Additionally, the judge approved $120.6 million in attorneys' fees.

ALABAMA REACHES SETTLEMENT WITH CARDINAL HEALTH AND CENCORA

(settlement announced March 14, 2024). Alabama Attorney General Steve Marshal announced a $220 million settlement with Cardinal Health and Cencora (formerly AmerisourceBergen) to resolve litigation over the distributors' role in the opioid crisis in the state. According to the terms of the agreement, the companies will pay a combined $220 million in abatement funds over 10 years. The funds will be used to remediate the harm caused by the opioid crisis in the state and will be shared with local governments and public hospitals. The companies will also pay the state's attorneys' fees. Alabama did not participate in the "Big Three" distributors' national settlement. The state previously settled with McKesson, the other Big Three distributor, in April 2022 for $141 million.

RECENT EVENTS IN THE ENDO BANKRUPTCY PROCEEDINGS

***In re Endo International PLC*, U.S. Bankruptcy Court for the Southern District of New York, Case No. 22- 22549-jlg (agreement with DOJ reached February 29, 2024; Chapter 11 plan approved March 19, 2024).**

- Endo Health Solutions Inc. (Endo) has reached an agreement with the U.S. Department of Justice (DOJ) to resolve criminal and civil investigations related to the company's sale and marketing of its opioid drug, Opana ER. Under the proposed criminal resolution, Endo has agreed to plead guilty in federal court to a one-count misdemeanor information charging it with violating the Federal Food, Drug and Cosmetic Act by introducing misbranded drugs into interstate commerce (21 U.S.C. § 331). The criminal resolution also includes a criminal fine of $1.086 billion and an additional $450 million in criminal forfeiture. Furthermore, the criminal resolution includes a corporate criminal release regarding conduct relating to the sale, marketing, and distribution of Opana ER but does not release any individual criminal liability. As for the civil investigations, Endo agreed to a $475.6 million civil settlement to resolve its civil liability under the False Claims Act (31 U.S. Code § 3729). The DOJ reached an agreement in Endo's bankruptcy case to settle its monetary claims arising from the criminal and civil settlements, as well as additional tax and healthcare related claims. Under the bankruptcy agreement, Endo will pay the federal government up to $464.9 million over 10 years.
- On March 19, 2024, a federal judge approved Endo's Chapter 11 exit plan. This ruling will effectively end the company's bankruptcy which began in August 2022. Endo will be taken over by its lenders and it anticipates exiting Chapter 11 in the second quarter of 2024. The plan resolves the opioid suits against the company and cuts $5.5 billion in debt. In addition to the federal government bankruptcy settlement mentioned above, Endo is expected to pay individual opioid victims between $89.7 million and $119.7 million as well as $273 million to more than 40 states.

UPDATE IN THE RITE AID BANKRUPTCY CASE

***In re Rite Aid Corporation*, U.S. Bankruptcy Court for the District of New Jersey, Case No. 23-18993 (preliminary agreement reached March 26, 2024).** For previous updates on this case, please refer to the December 2023 issue of the LAPPA *Case Law Monitor*, available here. Rite Aid has reached a preliminary agreement to transfer ownership to its senior bondholders and settle certain lawsuits over its alleged role in the opioid crisis. Under the agreement, Rite Aid's senior bondholders will swap their claims for 90 percent of the stock in the reorganized company, while senior lenders would be paid in full in either cash or in new loans. If the deal is approved, it would cut more than $2 billion of the company's debt. The official committee of tort claimants, which represent plaintiffs who filed opioid related lawsuits against Rite Aid, would share with other holders of general unsecured claims a total cash amount of up to $47.5 million, 10 percent of the company's stock, and some potential proceeds from insurance policies. The deal is supported by members of an ad hoc group of states that have opioid-related claims against the company. Rite Aid has also reached an agreement in principle with the U.S. Department of Justice to resolve claims that the company violated the False Claims Act (31 U.S.C. § 3729) and the Controlled Substance Act (21 U.S.C. § 829(a), (b), and (c); and 21 U.S.C. 842(a)(1)) for knowingly filling unlawful prescriptions for controlled substances. Additionally, Rite Aid reached an agreement with McKesson, one of its suppliers of pharmaceutical products, for a new contract and payments to settle McKesson's claims for goods previously delivered. Rite Aid expects to get final court approval of its bankruptcy restructuring plan by the end of April 2024.

ABOUT THE 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, treatment in emergency settings, alternatives to incarceration for those with substance use disorders, medication for addiction treatment in correctional settings, and syringe services programs.

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