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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FEDERAL COURT DISMISSES SOME OF THE CLAIMS BROUGHT FORTH AGAINST A KRATOM MANUFACTURER

***Patrica Geers v. Unlimited Imagination, LLC*, U.S. District Court for the Western District of Texas, Case No. 7:24-cv-00034-DC-RCG (motion to dismiss granted in part May 5, 2024).** For previous updates on this case, please refer to the April 2024 issue of the LAPPA *Case Law Monitor*, available here. A federal district court has partially granted a kratom manufacturer's motion to dismiss for failure to state a claim. Patrica Geers filed a lawsuit against Unlimited Imagination, LLC (defendant) on behalf of her son's estate after he died from mitragynine intoxication. Geers brought forth claims of negligence, negligent misrepresentation, breach of implied warranty, and product defects. The defendant filed a motion to dismiss, arguing that Geers failed to state a plausible claim for relief. For the negligence claim, the defendant argued that Geers failed to adequately plead that it owed the decedent any statutory, contractual, or common law duty. The court noted that under Texas law, product manufacturers, which the defendant was alleged to be, have various duties. Specifically, manufacturers have a duty in negligence actions to "provide a product that is reasonably safe for its foreseeable use." The court determined that Geers clearly pleaded a manufacturer's duty under Texas law by alleging that the defendant "had a duty to provide [the decedent], a foreseeable user, a safe product free of inherent dangers." The defendant then argued that its alleged failure to warn the decedent about the risks or adequately instruct him on the proper use of the product is "directly refuted by the complaint" because the photographs found in the complaint show various warnings and instructions on the product packaging. The court noted that breach of that duty is a question of fact and that whether the warnings were inadequate is disputed and best left to a jury. The defendant's last argument regarding the negligence claim was that Geers' allegations of marketing and advertising breaches were conclusory and implausible. The court determined that the dismissal of any marketing defect allegations at this early stage in the litigation is unwarranted. For the advertising breaches, however, the court noted that Texas does not recognize a common law claim for false advertising. The court determined that pleading false advertising allegations under a common law negligence claim is not appropriate under Texas law and ruled that any false advertising allegations should be dismissed.

For the negligent misrepresentation claim, the court noted that the Texas Supreme Court has never recognized a negligent misrepresentation claim for physical injuries, only for monetary loss. In this case, the alleged injury is physical, so Geers' ability to bring a negligent misrepresentation claim is unclear under Texas law. The court determined that it would not attempt to guess how the Texas Supreme Court would rule on this issue, so it dismissed the negligent misrepresentation claim. Regarding the breach of implied warranty claim, Geers did not address any of the defendant's dismissal arguments. The court ruled that a plaintiff's failure to

defend a claim in response to a motion to dismiss constitutes abandonment, and, thus, granted the defendant's motion to dismiss for this claim. Geers' final cause of action was a strict liability product defect claim. The elements of such a claim are: "(1) a defective product that (2) was unreasonably dangerous, (3) did not substantially change from its original condition when it reached the consumer, and (4) caused the plaintiff's injuries." For the first element, the defective product can be one with either a marketing, design, or manufacturing defect. In this case, Geers alleged that the product was defective in all three ways. The court agreed with the defendant's arguments that Geers failed to plead all of the requisite elements for her manufacturing and design defect claims. A manufacturing defect claim implies that there is a safe way to manufacture the product, but some mistake in the manufacturing process caused a dangerous defect. The court noted that Geers contradicted herself by stating in her negligence claim that kratom itself is toxic and unfit for human consumption. To properly plead a manufacturing defect claim, Geers would have to show that kratom-based products are generally manufactured for safe consumption, but the defendant's product deviated from that manufacturing plan. The court also noted that the same contradiction occurs with the design defect claim. Geers was required to plead that a safer alternative design existed, but if kratom is unfit for human consumption, then no safer alternative kratom based products exist. The court found Geers' only plausible strict liability claim to be under the marketing defect theory. For marketing defect claims, a manufacturer has a "duty to warn if it knows or should know of the potential harm to a user because of the nature of its product." The court, however, determined that Geers failed to allege this duty in her amended complaint. As a result, the court dismissed the product defect claim. Geers did not request leave to amend, so the court dismissed the negligent misrepresentation, breach of implied warranty, and product defect claims with prejudice. Geers' negligence claim remains viable.

NEW YORK MAN BRINGS DISCRIMINATION SUIT AGAINST JAIL FOR FAILURE TO PROVIDE METHADONE TREATMENT

***Koree Wilson v. Fulton County New York, et al.*, United States District Court for the Northern District of New York, Case No. 9:24-cv-00261-LEK-DJS (suit filed February 22, 2024).** Koree Wilson, a former inmate in Fulton County, New York has filed a federal civil rights action alleging discrimination in the administration of his medical care while incarcerated at Fulton County Correctional Facility (jail). Wilson claims that he was deprived of his prescribed methadone during the course of multiple stays in the jail. The complaint names the county, the sheriff in charge of administration, the company contracted to provide medical services, and one nurse on staff at the jail. Each defendant is accused of taking part in unlawful discrimination against Wilson based on his substance use disorder. Wilson states that during three separate occasions when he was detained at the jail, the administration and medical staff refused to provide him with methadone. During one stay, the jail waited several days after his intake before providing Wilson with his methadone, causing him to suffer severe withdrawal symptoms. On two subsequent visits, the jail refused to ever provide him with his methadone, and Wilson was forced to withdrawal during the duration of those stays. As a result of the forced withdrawal, Wilson claims that, upon release, he was required to restart his methadone at a lower dose than he was previously prescribed due to his medication being discontinued during incarceration. Additionally, during his third incarceration, Wilson was transferred to a state prison where he was denied methadone treatment due to not having received care while in the jail. Wilson's complaint involves four separate federal civil rights claims, including discrimination under the Americans with Disabilities Act (42 U.S.C. § 12101, *et seq.*), violations of the Eighth and Fourteenth Amendments of the U.S. Constitution, the Rehabilitation Act (29 U.S.C. § 794), and the New York State Human Rights Act (N.Y. EXEC. LAW § 296 (West 2024)). The complaint demands, among other things, pecuniary compensation for the pain and suffering of withdrawal as well as the increased risk of relapse due to the denial of necessary medical care. Wilson has until June 3, 2024 to move for default judgment or, in the alternative, file another status report with the court. On May 10, 2024, the defendants filed an answer to the complaint.

COURT SIDES WITH COMPANY IN PERCEIVED DISABILITY DISCRIMINATION CASE

***Steve Arndt v. L. Perrigo Co.,* U.S. Court of Appeals for the Sixth Circuit, Case No. 23-1734 (motion for summary judgment granted April 17, 2024).** A federal circuit court judge affirmed a decision granting summary judgment to a company accused of firing an employee based on discrimination. In 2021, the L. Perrigo Company (Perrigo) terminated electrician Steve Arndt after he tested positive for cannabis on a random drug screening. Arndt initially challenged his termination directly with Perrigo stating the result was due to the hemp oil in the lip balm he had used earlier in the day. Perrigo consulted with a medical review doctor at the third-party testing service who informed the company that he would not "place much credence" in the lip balm theory. Based on the information from the medical review doctor, Perrigo affirmed Arndt's termination. Arndt then filed a complaint in federal court alleging discrimination based on his age and because the company "regarded him" as being disabled. According to the Americans with Disabilities Act (42 U.S.C. § 12101, *et seq.*), a person does not need to be actually disabled to be afforded protections—it is enough if the person is discriminated against due to a perceived disability. In the complaint, Arndt stated that his employer regarded him as being a person with a substance use disorder when they terminated him for cannabis use. The district court sided with Perrigo, granting summary judgment on all claims. Arndt filed an appeal with the Sixth Circuit, but the appellate court affirmed. In its decision, the Sixth Circuit noted that Arndt had failed to offer any proof that Perrigo perceived him as disabled rather than just "a person who had failed a drug test." The judge also noted that the failed drug test provided Perrigo with a valid reason to fire Arndt, which negated the age bias allegation. Arndt argued that the company's reason for terminating him was pretextual because he did not actually test positive for an *illegal* drug, but the court found that he failed to provide any evidence backing up his lip balm claim, and even if he had, Perrigo investigated it and had an honest belief that Arndt's positive result was because of drug use.

TEXAS MANUFACTURING COMPANY AGREES TO SETTLE DISABILITY DISCRIMINATION LAWSUIT

***Equal Employment Opportunity Commission v. The Modern Group, LTD, et al.*, U.S. District Court for the Eastern District of Texas, Case No. 1:21-CV-451 (settlement reached May 15, 2024).** The Modern Group, LTD (TMG), a manufacturing and service company, and one of its subsidiaries, Dragon Rig Sales and Service, LLC (Dragon Rig) (collectively "defendants") have agreed to settle a U.S. Equal Employment Opportunity Commission (EEOC) disability discrimination lawsuit. The EEOC filed this lawsuit on behalf of Alexander Dare, alleging that the defendants discriminated against him in violation of the Americans with Disabilities Act (ADA; 42 U.S.C. § 12112(a)) when they revoked his conditional offer of employment. In February 2019, Dragon Rig interviewed Dare and offered him a conditional job offer as a welder. Dragon Rig's foreman requested that Dare complete a pre-employment drug screen, which is mandatory for all of Dragon Rig's new hires. Dare disclosed to the third-party drug testing company that he takes methadone and Xanax to treat his opioid use disorder and anxiety. Dare never directly informed anyone at Dragon Rig about his prescribed medications. The defendants' medical review officer (MRO) marked Dare's drug screen as "negative: has prescriptions" but included the following note: "his drug screen is negative but both the methadone and especially the high dose Xanax are sedating so he cannot work in a safety sensitive position or operate equipment." The MRO did not communicate with or examine Dare or his medical records before submitting the drug screen results and his note to Dragon Rig. Based on the MRO's comments, the defendants decided to withdrawal Dare's conditional offer of employment. The consent decree settling the suit requires the defendants to pay $35,000 to Dare as well as implement management training and policy revisions related to the ADA and anti-discrimination. Prior to entering the consent decree, the court, on March 25, 2024, denied the defendants' motion for summary judgment.

FEDERAL JUDGE GRANTS PARTIAL MOTION FOR SUMMARY JUDGMENT IN WRONGFUL DEATH CASE INVOLVING A MASSACHUSETTS JAIL

***Maura O'Neill v. City of Springfield, et al.*, U.S. District Court for the District of Massachusetts, Case No. 3:20-cv30036-MGM (motion for summary judgment granted in part and denied in part April 18, 2024).** For previous updates on this case, please refer to the April 2020 issue of the LAPPA *Case Law Monitor*, available here. A federal judge granted in part and denied in part a motion for summary judgment in a wrongful death case involving the death of a woman while she was in the custody of law enforcement in the Western Massachusetts Regional Women's Correctional Center (WCC). Madelyn Linsenmier died on October 7, 2018 from complications of a heart valve infection related to her opioid use disorder. Linsenmier's family sued the City of Springfield, three police officers, the Hamden County Sheriff's Department (HCSD), and two HCSD staff members for violating the Fourteenth Amendment of the U.S. Constitution for being deliberately indifferent to a serious medical need, violating Title II of the Americans with Disabilities Act (ADA; 42 U.S.C. 12132), and wrongful death. In January 2024, HCSD and the two HCSD employees named in the suit filed a motion for summary judgment.

HCSD correctional officer Eileen Barrett performed the initial intake of Linsenmier upon her arrival at WCC. According to the original complaint, HCSD staff was aware that Linsenmier suffered from opioid use disorder (OUD). Barrett asked Linsenmier a number of intake questions, including whether she was experiencing any pain. Linsenmeir responded that she had pain in her leg and in her "torso," and Barrett recorded her response in the jail management system (JMS). There is no evidence that the Springfield police officers who transported Linsenmeir to WCC communicated Linsenmeir's prior complaints of chest pain to Barrett or anyone else at WCC. Following the intake process, Barrett escorted Linsenmier to the medical department for a medical intake with HCSD nurse Maureen Couture. There is no evidence that Barrett verbally informed Couture of Linsenmier's leg and torso pain. There is also no evidence that medical staff reviewed the responses recorded in the JMS. HCSD practice at the time was that booking staff would call the medical department if the inmate was in medical distress or experiencing a medical emergency. The judge determined that the record did not support a claim of deliberate indifference to a serious medical need in violation of the Fourteenth Amendment against Barrett because there was no evidence from which a jury could infer that she had actual knowledge of the impending harm. Video evidence of the intake process did not show any obvious signs that Linsenmier was experiencing a serious medical issue. Additionally, the court noted that the fact that Barrett did not call the medical department or inform the nurses about Linsenmeir's torso pain supports an inference that Barrett, who was not a medical professional, did not perceive a substantial risk of serious harm. While the judge granted Barrett's motion for summary judgment for the deliberate indifference claim, he denied the motion for summary judgment regarding the deliberate indifference claim against nurse Couture. The judge ruled that video evidence, which did not include audio, suggested that Linsenmeir informed Couture of her chest pain because Couture was seen pointing at her chest while engaged in conversation with someone off camera. The judge concluded that a jury could find that Couture exhibited a deliberate indifference to Linsenmeir's serious medical needs by failing to perform a physical examination or take her vital signs.

The judge granted both Barrett and Couture's motions for summary judgment regarding the wrongful death claims against them. Under the Massachusetts Tort Claims Act (MTCA; MASS. GEN. LAWS ANN. ch. 258, § 2 (West 2024)), "claims based on the negligent or wrongful conduct of public employees who acted within the scope of their employment may only be brought against the public employer and not against the individual employees." However, claims based on intentional torts may be brought against an individual employee. Under the MTCA, recklessness is considered negligent, rather than intentional, conduct. Accordingly, for the purposes of the MTCA, the plaintiff must show that the defendants intended to cause harm. While the facts support that Couture acted recklessly, the judge determined that they do not support the type of intentional

wrongful act required by the MTCA. Additionally, the court determined that Barrett did not act recklessly or intend to cause harm. Thus, the MTCA compelled the judge to rule that both Couture and Barrett were entitled to summary judgment regarding the wrongful death claims against them.

The judge denied HCSD's motion for summary judgment regarding the ADA claim. HCSD argued that state sovereign immunity under the Eleventh Amendment of the U.S. Constitution barred the claim because: (1) the plaintiff cannot demonstrate that HCSD violated the ADA; (2) the alleged conduct does not violate the Fourteenth Amendment; and (3) the alleged conduct is not the type which would validate the ADA's abrogation of sovereign immunity. The judge disagreed with HCSD's argument, holding that the record supports a jury finding that WCC staff denied Linsenmeir medical care because of her OUD. Moreover, the judge determined that a jury could find that the alleged denial of medical care, in addition to violating the ADA, violated the Fourteenth Amendment under the deliberate indifference standard, thus abrogating state sovereign immunity under the Eleventh Amendment. In sum, the judge granted Barrett and Couture's motions for summary judgment for the wrongful death claims, and Barrett's motion for summary judgment for the deliberate indifference claim. The judge denied Couture's motion for summary judgment for the deliberate indifference claim, and HCSD's motion for summary judgment regarding the ADA claim. The case is scheduled for trial in September 2024.

BOSTON POLICE DEPARTMENT OFFICERS SET TO FACE TRIAL IN WRONGFUL DEATH SUIT

***Lynnel Cox v. City of Boston, et al.*, U.S. District Court for the District of Massachusetts, Case No. 22-11009-RGS (motion for summary judgment denied May 14, 2024).** A federal judge has allowed a wrongful death suit brought by the mother of a man who died while in pretrial custody to continue against the City of Boston. On July 14, 2019, at 1:00 AM, Boston police officers arrested Shayne Stilphen and brought him to the police station. According to court records, Stilphen suffered from opioid use disorder (OUD) and used opioids multiple times a day. Upon arriving at the station, the officers brought Stilphen to a holding cell. While in the holding cell, Officer Ismael Almeida searched Stilphen's pockets, after which Stilphen spoke with Officer Paul Michael Bertocchi. The parties agree that Stilphen did not tell Almeida or Bertocchi that he had ingested drugs that day. The officers testified that they believed Stilphen was acting "normally" during and immediately after the search. While being fingerprinted by Officer Catia Freire in the booking area, Stilphen was reportedly bent at the knees and was leaning and swaying. At multiple points, Bertocchi and Freire assisted Stilphen in staying balanced. While being photographed, Stilphen repeatedly "dozed off and slumped before reviving himself." Almeida completed the intake form and reported Stilphen as "alert" as opposed to "under the influence of drugs." After booking, Almeida, Bertocchi, and Freire took Stilphen to an individual cell. Immediately after the officers shut the door to the cell, Stilphen began slowly slipping into "a contorted, bent-over sitting position." Ten minutes later, Bertocchi offered Stilphen something to eat and drink, which he accepted. The parties agree that, at this point, Stilphen began ingesting drugs that had been overlooked by the officers during the searches of his person at arrest and booking. This pattern continued for the next several hours with Stilphen generally sitting in a contorted, bent-over position and occasionally sitting up to ingest drugs. Various officers, including Almeida and Brian Picarello, walked past Stilphen's cell every 15 minutes and occasionally stopped and peered into his cell. Around 6:00 AM, Almeida found Stilphen unresponsive in his cell. Emergency medical services (EMS) arrived soon after and took Stilphen to the hospital where he died shortly after arrival. An autopsy determined that the cause of death was acute fentanyl, despropionyl fentanyl (4-ANPP), heroin, cocaine, and benzodiazepine intoxication.

Boston Police Department (BPD) Lieutenant Detective Michael Connolly and Sergeant Detective Lucas Taxter were subsequently assigned to investigate Stilphen's death. The detectives initially determined that "after observing Stilphen appear to nod off in the holding cell and his inability to stand still in an upright position for the entire booking process," the officers should have known that Stilphen was likely under the influence of drugs when he arrived at the station and after being placed in a cell. The detectives further

concluded that the officers should have asked for EMS assistance before placing Stilphen in his cell, or at the very least, immediately after he ingested drugs, and that the officers' failure to do so violated BPD Rule 318 § 3, which states that "any unusual appearance or behavior displayed by a prisoner shall receive immediate attention." However, after taking into account the subjectivity of the situation and considering what behavior would be unusual to the officers at the station, both detectives revised their opinions and concluded that the officers did not violate Rule 318. Lynell Cox, Stilphen's mother, filed suit as the administrator of his estate against the City of Boston and Officers Almeida, Bertocchi, Freire, and Picarello (individual defendants). Cox alleged that the defendants collectively violated Stilphen's due process right to adequate medical care while in pretrial custody under the Fourteenth Amendment of the U.S. Constitution and violated Title II of the Americans with Disabilities Act (ADA; 42 U.S.C. § 12132). Additionally, Cox asserted that the individual defendants caused Stilphen's wrongful death in violation of MASS. GEN. LAWS ch. 229, § 2 (West 2024). The defendants moved for summary judgment.

For the Fourteenth Amendment claim the court must determine whether Stilphen had a serious medical need and whether the defendants exhibited a deliberate indifference to that need. The defendants argued that Stilphen did not have a serious medical need prior to overdosing in the cell, but the court dismissed that argument, holding that First Circuit precedent has held that a serious medical need exists when an individual's symptoms suggest he or she is "dangerously drunk or high." The defendants also claimed that they did not believe that Stilphen was at risk of overdosing until he became nonresponsive. The court noted that determining whether the officers acted with deliberate indifference requires an assessment of their states of mind and credibility, which is inappropriate for the summary judgment stage. Thus, the court denied summary judgment on the Fourteenth Amendment claim. For the ADA claim, Cox must show that the officers failed to treat Stilphen because of an unwillingness to take into account, with sufficient seriousness, the needs of an individual suffering from OUD. Cox argued that the officers' actions were informed by a stereotype of individuals with OUD rather than on an individualized inquiry into Stilphen's condition. The court ruled to deny summary judgment for the ADA claim, holding that a reasonable jury could conclude that the officers, based on a discriminatory stereotype of individuals with OUD, chose not to pursue prompt medical intervention despite Stilphen's demeanor. Lastly, Cox pursued a wrongful death claim based on a theory of intentional conduct. The court noted that Cox's allegations regarding this claim most closely resembled the crime of involuntary manslaughter. Involuntary manslaughter requires a showing that the defendant knew, or should have known, that his or her conduct created a high degree of likelihood that substantial harm would result to another. The court determined that there is a genuine dispute of fact in the record as to the individual defendants' states of mind and that the question of intent is better suited for a jury. Accordingly, the court denied summary judgment for the wrongful death claim. In sum, the court denied all of the defendants' motions for summary judgment and set a jury trial for August 12, 2024.

WIFE OF CONVICTED LAB OWNER MUST FACE CONSPIRACY CLAIM

***Caitlin Secamiglio v. Norma Hope Baker*, U.S. District Court for the Eastern District of Kentucky, Case No. 20-cv-305 (opinion filed May 20, 2024).** The wife of a convicted toxicology laboratory owner will continue to face a conspiracy claim that she helped LabTox, LLC (LabTox) improperly bill Medicare and Kentucky Medicaid for urine drug tests in violation of the False Claims Act (FCA; 31 U.S.C. § 3730). On July 14, 2020, whistleblower Caitlin Secamiglio filed a suit against LabTox, its owner, Ron Coburn, its compliance officer, Erica Baker, and Coburn's wife, Norma Hope Baker (Baker) over allegations that they violated the FCA by billing the government for drug tests they knew were not medically necessary. On August 19, 2021, the U.S. filed a complaint-in-intervention solely with respect to defendants LabTox, Coburn, and Erica Baker. On January 18, 2022, Secamiglio filed an amended complaint which retained Baker as a defendant. In the amended complaint, Secamiglio claimed that Baker and Coburn had an agreement that LabTox would belong to Coburn, but it would be listed as being owned by Baker for the specific purpose of defrauding potential creditors in the event that Coburn was found to have defrauded the U.S. The amended complaint also asserted

that Baker directed LabTox, Coburn, and Erica Baker to continue to submit false claims in order to continue receiving fraudulent profits. In December 2023, after a jury convicted them of health care fraud, a federal judge sentenced Coburn to 46 months in prison and Erica Baker to six months in prison, followed by six months of home confinement. In February 2024, Coburn and Erica Baker agreed to pay $10.4 million in civil judgments to resolve FCA allegations. On March 8, 2024, Baker moved to dismiss Secamiglio's amended complaint for failure to state a claim. The court ruled that the conspiracy claim can proceed against Baker because the amended complaint has sufficient detail. Specifically, the court noted that Secamiglio sufficiently alleged that Baker and Coburn established LabTox, and listed Baker as the owner, despite having an agreement that Coburn was the true owner. Additionally, the court determined that the complaint satisfied federal pleading rules by stating that Coburn and Baker "conspired to create a legal fiction, and maintained it over time, for the purpose of obscuring ownership and shielding assets in the event the FCA violations were discovered." The court did, however, dismiss the counts alleging presentation of false claims and use of false records, holding that Baker's legal ownership of LabTox alone does not provide factual support for the claim that she directed others to submit false claims.

FORMER DEA AGENT SENTENCED FOR ROLE IN BRIBERY SCHEME

***United States v. Manuel Recio*, U.S. District Court for the Southern District of New York, Case No. 1:22-cr-00281-JPO-2 (sentenced May 14, 2024).** The U.S. District Court for the Southern District of New York sentenced Manuel Recio, a former U.S. Drug Enforcement Administration (DEA) supervisor, to three years in prison for bribing a former DEA co-worker to leak intelligence to Miami defense attorneys. In November 2023, a jury convicted Recio of conspiracy to bribe a public official, conspiracy to commit honest services wire fraud, and honest services wire fraud.[1] According to court documents, Recio retired from his job as the Assistant Special Agent in Charge for the Miami DEA field office in November 2018. Upon his retirement, Recio began operating his own business, which provided private investigative services to criminal defense attorneys. Recio made an agreement with DEA Special Agent John Costanzo Jr. in which he would provide benefits to Costanzo in exchange for Costanzo providing him with non-public information about DEA investigations. Costanzo provided Recio with information obtained from the Narcotics and Dangerous Drugs Information System, a DEA database that contains information about individuals who are or have been under investigation by the DEA. Recio would then pass this information, which included the anticipated timing of indictments and arrests, to criminal defense attorneys to help them recruit new clients. In exchange for the information, Recio provided Costanzo with money and gifts, including plane tickets and a down payment on a condo. In April 2023, the court sentenced Costanzo to four years in prison for his role in the bribery scheme.

NEW JERSEY CANNABIS LAW IS NOT PREEMPTED BY FEDERAL LAW

***Mary A. Botteon, et al. v. Borough of Highland Park, et al.*, Superior Court of New Jersey, Appellate Division, Case No. A-1227-22 (opinion filed May 1, 2024).** A New Jersey appellate court has ruled that federal law does not prevent New Jersey and its municipalities from licensing and regulating recreational cannabis retailers. In February 2021, the New Jersey legislature enacted the Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMMA; N.J. STAT. ANN. § 24:6I-31, *et seq*. (West 2024)). Relevant to this case, CREAMMA states that "a municipality may enact ordinances or regulations, not in conflict with CREAMMA: (1) governing the number of cannabis establishments, distributors, or delivery services, as well as the location, manner, and times of operation, and (2) establishing civil penalties for violation of an ordinance or regulation governing such activity." (N.J. STAT. ANN. § 24:6I-

[1] Honest services fraud is "a scheme or artifice to deprive another of the intangible right of honest services." (18 U.S.C. § 1346). To be guilty of violating the honest services fraud statute, you must owe a duty of honest service to someone and have deprived that person or entity of the duty owed by accepting a bribe or kickback from another person. Eric Harvey, "Honest Services fraud," *Find Law*, August 15, 2023, https://www.findlaw.com/criminal/criminal-charges/honest-services-fraud.html.

45(a) (West 2024)). On August 17, 2021, the Borough of Highland Park (Borough) adopted Ordinance 21-2027, which amended its municipal code to permit cannabis retailers, on-site consumption lounges, and delivery services to operate in the Borough, subject to operating, licensing, and tax regulations. Then on March 15, 2022, the Borough adopted Ordinance 22-2044, which clarified the regulations governing medical cannabis dispensaries, cannabis retailers, and delivery services, and further clarified the licensing process. On May 24, 2022, 12 residents of the Borough filed suit against the Borough and several municipal officials claiming that the ordinances violated various state and federal laws, including the Supremacy Clause of the U.S. Constitution. The defendants moved to dismiss the complaint, asserting that it was untimely and otherwise procedurally deficient and that it failed to state any claims upon which relief could be granted. The trial court dismissed the complaint with prejudice and the plaintiffs appealed. On appeal, the plaintiffs argued that not only are the Borough's ordinances preempted by federal law, but CREAMMA itself is federally preempted by the federal Controlled Substances Act (CSA; 21 U.S.C. § 801, *et seq.*).

Under the Supremacy Clause of the U.S. Constitution, federal law preempts state law in several circumstances, categorized as either express or implied preemption. Express preemption is when Congress explicitly preempts state law. In the alternative, there are two forms of implied preemption: field and conflict. Field preemption applies where the "scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it." Conflict preemption exists when either: (1) compliance with both federal and state regulations is a physical impossibility; or (2) state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." In the 2021 case of *Hager v. M&K Construction* (247 A.3d 864), the New Jersey high court held that express and field preemption were not applicable to CREAMMA because the CSA explicitly leaves room for state law to operate. The court in *Hager* focused on conflict preemption and noted that "the case for preemption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest and has nonetheless decided to tolerate whatever tension there is between them." Noting that Congress has periodically included language in annual appropriations riders that has prohibited the U.S. Department of Justice from using allocated funds to prosecute conduct that is legal under state medical cannabis laws, the *Hager* court ruled that conflict preemption does not apply to CREAMMA. The plaintiffs argued that the reliance on *Hager* is misplaced because the Congressional appropriations riders mentioned in the opinion have pertained to medical cannabis, not recreational cannabis. The defendants conceded on the differences asserted by the plaintiffs but argued that sufficient ground remained to hold that CREAMMA is not preempted. The court agreed with the defendants, holding that it is not "impossible" for the CSA and CREAMMA to be in effect simultaneously and that CREAMMA does not pose an "obstacle" to enforcement of the CSA if federal officials chose to prosecute New Jersey residents more aggressively for violations of federal cannabis laws. The court also noted in its decision that other courts have reached similar conclusions about the coexistence of the CSA with state laws allowing and regulating the usage of medical or recreational cannabis. In sum, the court ruled that CREAMMA is not federally preempted by the CSA, and because the Borough's ordinances are authorized by CREMMA, they are likewise not preempted. The court remanded the case for further proceedings.

NEW YORK JUDGE VOIDS THIRD-PARTY CANNABIS MARKETING REGULATIONS

***Leafly Holdings Inc., et al. v. New York State Office of Cannabis Management, et al.*, State of New York Supreme Court, Albany County, Case No. 908706-23 (opinion filed April 5, 2024).** A New York state judge has invalidated a series of regulations regarding third-party cannabis marketing. In December 2022, the New York State Office of Cannabis Management (OCM) and New York State Cannabis Control Board (CCB) published proposed regulations for the adult-use recreational cannabis market in New York. Among these regulations were restrictions on marketing and promotion through "a third-party platform, marketplace, or aggregator" that lists cannabis products. Leafly Holdings (Leafly), a company that provides centralized information about a variety of cannabis retailers, and Stage One, a New York cannabis dispensary, submitted

comments to OCM to express their concerns about the third-party regulations. These restrictions, they argued, would hamper commercial promotion, hurt consumers by making it difficult to access relevant information, and violate the New York constitution by prohibiting lawful, non-misleading commercial speech. The OCM and CCB adopted the regulations without changes, and Leafly and Stage One challenged the regulations in New York state court in Albany County as arbitrary and capricious. The court agreed with the petitioners. Based on a lack of justification for the OCM and CCB's action, the court found the challenged third-party regulations arbitrary and capricious. In addition, the court determined that the regulations were unconstitutionally vague and violated the petitioners' free-speech rights. On April 5, 2024, the court declared the regulations null and void.

FORMER USER SUES CANNABIS BRAND OVER VAPING DEVICE

***John Doe v. Stiiizy Inc., et al.*, California Superior Court (Marin County), Case No. CV0002999 (suit filed May 29, 2024).** A California man has filed a lawsuit against the cannabis brand Stiiizy, Inc. (Stiiizy) over events that occurred while using its products when he was a minor. Stiiizy sells cannabis vapes, and the suit alleges that the company markets its products to teenagers. According to the complaint, Stiizy targets minors by giving its products names such as "gelato" and "dreamsicle" and by featuring attractive young users in its advertisements. Stiiizy also claims that its products promote wellness and relaxation and can reduce stress and anxiety. The plaintiff, who is identified as John Doe, began using Stiiizy vape products when he was 15 to cope with anxiety, eventually increasing his use to multiple times a day. Doe took a month break from vaping while on a family vacation and when he resumed his habit, he experienced symptoms of cannabis-induced psychosis. Doe then spent more than a week in a behavioral health hospital where a psychiatrist prescribed him anti-psychotic medication. The suit claims that the cannabis-induced psychosis and its aftermath effected his grades and athletic performance and decreased his college admission odds. Doe claims that Stiiizy failed to warn customers of the health risks associated with vaping cannabis and concealed the dangers, in some part, by marketing its vapes as "mental health products for the anguished teen." Doe brings forth claims of negligence, strict products liability for the failure to warn and design defect, negligent misrepresentation, fraudulent concealment, breach of implied warranty, and fraud. Doe asks the court for past and future non-economic damages, and past and future economic damages, including medical expenses, loss of earnings, and impaired earning capacity. The complaint also requests punitive damages.

HEALTH INSURER MUST REEXAMINE WHETHER WILDERNESS THERAPY IS A COVERED BENEFIT

***L.L. v. Anthem Blue Cross Life and Health Insurance Company, et al.*, U.S. District Court for the District of Utah, Case No. 2:22-CV-00208-DAK (opinion filed May 2, 2024).** A federal district court has ruled that the Anthem Blue Cross Life and Health Insurance Company (Anthem) must reconsider whether it will cover the cost of wilderness therapy. L.L. is a participant in the DLA Piper Welfare Benefit Plan (Plan) offered by his former employee, DLA Piper LLP. Anthem administers the health insurance benefits offered by the Plan. From June 2019 to August 2019, L.L.'s daughter, J.L., participated in a wilderness therapy program at Wingate Wilderness Therapy (Wingate) in Kane County, Utah. Wingate is a licensed treatment facility that provides sub-acute treatment to adolescents with mental health, behavioral, and substance use disorder issues. J.L. attended the Wingate program to address issues related to depression, anxiety, self-harm, suicidality, anger, drug use, and school performance. L.L. filed a claim with the Plan seeking $33,000 in benefits on J.L.'s behalf. The defendants denied the claim after determining that J.L.'s treatment at Wingate was not covered under the Plan. Specifically, the defendants stated the claim was not approved because there is little to no proof that wilderness therapy improves health outcomes and that it is considered to be an investigational form of treatment. L.L. appealed the denial and asserted that outdoor behavioral care was a necessary and appropriate intervention to treat J.L. To support his assertion, L.L. provided the defendants with peer-reviewed

studies and a letter from Michael Gass, Ph.D., an expert in the outdoor behavioral health field. Anthem upheld the denial stating that the services that J.L. received at Wingate were considered investigational and thus not covered by the Plan. Anthem also stated that it had received a recommendation to uphold the denial from an "external reviewer medical doctor." After exhausting his administrative remedies, L.L. filed suit in federal court and both parties filed a motion for summary judgment.

The standard of review employed by a court when reviewing an Employee Retirement Income Security Act of 1974 (ERISA; 29 U.S.C. § 1001, *et seq.*) benefits claim is whether the denial of benefits was "arbitrary and capricious." Under the arbitrary and capricious standard, a claims administrator's denial of benefits will be upheld if it is "reasonable and supported by substantial evidence." ERISA requires that claims administrators engage with a claimant's arguments by providing some explanation for the denial. Administrators must provide claimants with a rationale for the decision, including an explanation of why they disagreed with or declined to follow the views presented by the claimant. Meaningful dialogue under ERISA requires fiduciaries to "address medical opinions, particularly those which may contradict their findings in their denial letters." A denial letter simply stating that the claims administrator reviewed all the information provided by the claimant is not considered meaningful dialogue under ERISA. The court determined that Anthem failed to engage in meaningful dialogue with L.L. and failed to successfully address and refute L.L.'s argument that J.L.'s care was not investigational. The court noted Anthem's denial letters merely restated their original conclusions and failed to mention or address any of the contradictory information L.L. submitted. A full and fair review of a denial of benefits requires the decision maker to consider evidence presented by both parties prior to reaching a decision. Thus, the court ruled that the defendants acted arbitrarily and capriciously because they failed to explain how they reached their conclusion and completely disregarded the evidence L.L. submitted. The court remanded the case to Anthem for further administrative review.

NINTH CIRCUIT REVIVES LAWSUIT OVER UNITEDHEALTH'S SUBSTANCE USE DISORDER TREATMENT COVERAGE

***Ryan S. v. UnitedHealth Group, Inc.,* U.S. Court of Appeals for the Ninth Circuit, Case No. 22-55761 (opinion filed April 11, 2024).** Ryan S., a subscriber of UnitedHealth Group, Inc. (UnitedHealth) insurance, filed a proposed class-action lawsuit alleging that UnitedHealth had violated the federal Mental Health Parity and Addiction Equity Act (Parity Act; 29 U.S.C. § 1185a) by reviewing benefits claims for outpatient, out-of-network mental health and substance use disorder (SUD) treatment more stringently than similar claims for medical or surgical treatment. In 2020, the federal district court in the Central District of California granted UnitedHealth's motion to dismiss on the grounds that Ryan S. had failed to allege that his claims had been categorically denied and that he had not identified his own similar medical/surgical claims that had been treated more favorably. Ryan S. appealed to the Court of Appeals for the Ninth Circuit. On April 11, 2024, the court issued its opinion reversing the district court's dismissal of the Parity Act claim and claim of breach of fiduciary duty, holding that Ryan S.'s claim for relief was adequately pleaded. A plaintiff, the court ruled, may allege a plausible claim without having to allege a categorical practice of differential treatment for mental health and SUD claims as compared to medical or surgical claims. The court, however, affirmed the lower court's dismissal of a separate claim that UnitedHealth had violated the terms of Ryan S.'s healthcare plan, because Ryan S. had not identified any specific terms that had been violated. Proceedings involving the Parity Act and fiduciary duty claims have been remanded to the federal district court. A status conference is scheduled for June 10, 2024.

FTC FILES COMPLAINT AGAINST ONLINE ALCOHOL TREATMENT SERVICE FOR SHARING USER INFORMATION

***United States v. Monument, Inc.*, U.S. District Court for the District of Columbia, Case No. 1:24-cv-01034 (complaint and proposed order filed April 11, 2024).** The Federal Trade Commission (FTC) has taken action against Monument, Inc. (Monument), an alcohol use disorder treatment company, over allegations that the company disclosed users' personal health data to third-party advertising platforms, including Meta and Google, without consumer consent. Monument offers users, depending on their membership level ranging from a monthly charge of between $14.99 to $249, access to online support groups, community forums, online therapy, and access to physicians who can prescribe medications that assist in treating alcohol use disorder. The company collects personal information from consumers when they sign up for the service including their names, email addresses, dates of birth, phone numbers, physical addresses, copies of their government issued IDs, and information about their alcohol consumption and medical history, as well as their IP addresses and device IDs when they start using the service. According to the FTC's complaint, Monument claimed on its website that users' personal information would be "100 percent confidential" and that the company would not disclose such data to third parties without users' consent. Monument also claimed that it complied with the Health Insurance Portability and Accountability Act (HIPAA; 45 C.R.F. Parts 160 and 164), but an outside assessor hired by the company found that it had not fully complied with HIPAA's requirements. From 2020-2022, Monument allegedly disclosed users' personal information, including their health information, to numerous third-party advertising platforms. The FTC claimed that Monument disclosed information from as many as 84,000 users. The complaint alleged that Monument's practices violated the FTC's law on unfair and deceptive practices (15 U.S.C. § 45) and the Opioid Addiction Recovery Fraud Prevention Act of 2018 (OARFPA; 15 U.S.C. § 45d) which prohibits deceptive acts or practices with respect to any substance use disorder treatment service or product. As part of a proposed order settling the FTC allegations, Monument will be banned from disclosing health information for advertising and must obtain a user's affirmative consent before sharing health information, for any other purpose, with third parties. The proposed order also prohibits the company from misrepresenting its data collection and disclosure practices and imposes a $2.5 million civil penalty for violating OARFPA. Additionally, Monument must put in place a comprehensive privacy program that includes safeguards to protect consumer data and address the issues the FTC identified in its complaint. A judge must approve the proposed order before it takes effect.

FORMER MCKINSEY & CO. PARTNER SUES COMPANY FOR DEFAMATION

***Arnab Ghatak v. McKinsey & Company, et al.*, New York County Supreme Court, Case No. 153908/2024 (suit filed April 26, 2024).** Arnab Ghatak, MD, a former partner at McKinsey & Company (McKinsey), has filed a lawsuit against the consulting firm and its global managing partner, Bob Sternfels, claiming that they defamed him and made him a "scapegoat" to distract attention from the company's work with Purdue Pharma. McKinsey fired Ghatak in 2021 for allegedly violating the company's document retention policy. Ghatak claims that he never improperly deleted any materials, and that McKinsey did not have evidence to support any kind of improper deletion by him. The suit asserts that McKinsey improperly deleted evidence that Ghatak had preserved after state attorneys general began investigating McKinsey's opioid related consulting work. The suit also claims that Sternfels misled Congress when he testified before a committee of the U.S. House of Representatives in 2022 that two partners were terminated for violating a document retention policy, which Ghatak claims did not actually exist. Ghatak states that McKinsey and Sternfels' lies destroyed his reputation and made it impossible for him to remain gainfully employed after his termination. Ghatak brings forth claims of defamation, breach of fiduciary duty, and malicious interference with prospective employment. He is asking the court for compensatory and punitive damages.

U.S. DEPARTMENT OF JUSTICE INVESTIGATING TD BANK FOR LAUNDERING MONEY RELATED TO ILLICIT FENTANYL

U.S. Department of Justice Investigating TD Bank for Laundering Money Related to Illicit Fentanyl (reported May 2, 2024). The *Wall Street Journal* has reported that the U.S. Department of Justice (DOJ) is investigating how Chinese drug traffickers and crime groups may have used TD Bank to launder money from illicit fentanyl sales. While TD Bank disclosed last year that it was cooperating with a DOJ investigation into its anti-money laundering compliance program, the focus of the investigation on money laundering related to drug sales had not been previously reported. According to the Wall Street Journal, the DOJ launched the investigation after agents uncovered an operation in New York and New Jersey that laundered millions of dollars in proceeds from drug sales through TD Bank and other banks. The DOJ's investigation of TD Bank's anti-money laundering practices is being led by the U.S. Attorney's Office in New Jersey.

WALMART DEFEATS SHAREHOLDER SUIT OVER ITS ROLE IN THE OPIOID CRISIS

***In re Walmart Inc. Securities Litigation,* U.S. District Court for the District of Delaware, Case No. 1:21-cv-00055 (opinion filed April 8, 2024).** For previous updates on this case, please refer to the February 2021 issue of the LAPPA *Case Law Monitor*, available here. (Case previously cited as *Richard Stanton v. Walmart Inc. et al.*) In 2021, a proposed class of shareholders filed a lawsuit against Walmart, Inc. (Walmart) for violations of the Securities Exchange Act (15 U.S.C. § 78j(b)) and Securities Exchange Commission (SEC) regulations. The shareholders alleged that Walmart had concealed its role in the opioid crisis and its potential criminal liability in public statements to shareholders and that its stock price dropped nearly five percent because of news concerning federal investigations of Walmart's conduct. On April 8, 2024, the U.S. District Court for the District of Delaware ruled on several consolidated cases, siding with Walmart, holding that the company did not mislead the shareholders. The court determined that Walmart had disclosed to investors all situations "where a liability is reasonably possible and may be material," and that the shareholders failed to present any legal authority for their contention that being the subject or target of a federal investigation constitutes a liability. The court also noted that once federal prosecutors determined that Walmart would be indicted, the company disclosed to shareholders that it was being investigated. The court dismissed the proposed class action. On April 29, 2024, the shareholders filed an appeal with the Third Circuit.

FEDERAL COURT DISMISSES SOME OF THE CLAIMS BROUGHT FORTH AGAINST MCKINSEY BY PARENTS OF CHILDREN WITH NEONATAL ABSTINENCE SYNDROME

***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 (opinion filed May 16, 2024).** For previous updates on this case, please refer to the April 2024 issue of the LAPPA *Case Law Monitor*, available here. A federal judge has dismissed five claims filed against McKinsey & Company (McKinsey) by a group of 11 mothers who gave birth to children with neonatal abstinence syndrome (NAS). However, the judge ruled that the negligence and failure to warn claims from the plaintiffs can proceed because precedent has established that McKinsey can be held liable for injuries it or its conspirators inflicted on the public. McKinsey had argued that these claims should be dismissed because they did not intend to harm any of the victims, but the judge ruled that McKinsey's intent was irrelevant because the company's failure to warn consumers about opioid risks harmed the plaintiffs, nonetheless. The judge dismissed the misrepresentation and fraud claims brought forth under the theory of public nuisance, however, ruling that the plaintiffs had not pleaded a special injury. Specifically, the judge held that the plaintiffs failed to explain how they were

uniquely harmed by their exposure to opioids in comparison to others who suffered injuries from using opioids. Additionally, the judge dismissed the conspiracy claims based on fraud and intentional misrepresentation, holding that the plaintiffs could not reliably prove that their doctors relied on McKinsey and its conspirators' misrepresentations about the benefits and risk of opioid use. The judge dismissed all of the claims brought forth by one plaintiff because her child had reached adulthood at the time of the lawsuit. Thus, she lacked standing to sue.

ALASKA CAN PROCEED WITH OPIOID SUIT AGAINST EXPRESS SCRIPTS

***The State of Alaska v. Express Scripts, Inc., et al.*, U.S. District Court for the District of Alaska, Case No. 3:23-cv-00233 (opinion filed May 22, 2024).** A federal judge has ruled that the State of Alaska can proceed with its lawsuit against the pharmacy benefit manager (PBM) Express Scripts, Inc. (Express Scripts) over its role in contributing to the state's opioid crisis. PBMs are the companies that manage prescription drug benefits on behalf of health insurers. Alaska alleged that Express Scripts contributed to the opioid crisis by colluding with opioid manufacturers to increase prescription opioid sales in the state by favorably placing certain opioids on its formularies and failing to put in place safeguards that would have reduced the illegitimate use and dissemination of opioids. Alaska brought forth a claim of public nuisance and violations of the Alaska Unfair Trade Practices and Consumer Protection Act (CPA; Alaska Stat. Ann. § 45.50.471 (West 2024)). Express Scripts filed a motion to dismiss the claims. Express Scripts argued that Alaska's common law public nuisance claim should be dismissed because the tort of public nuisance is limited to property-based claims and that the state has not plausibly alleged: (1) interference with a public right; (2) that Express Scripts owed a legal duty; or (3) that Express Scripts caused the harms alleged. The Alaska Supreme Court has never ruled on whether a public nuisance claim can be based on the use of a lawful product, so the judge had to determine how the state high court would rule if faced with that question. Based on state precedent defining a public nuisance broadly as "an unreasonable interference with a right common to the general public," the judged determined that the Alaska Supreme Court would not limit the tort of public nuisance to property-based claims and would allow claims based on the use of a lawful product. The judge also ruled that Alaska adequately alleged the elements of a public nuisance claim because it identified several collective rights with which Express Scripts' conduct allegedly interfered. The judge noted that Alaska did not merely allege that Express Scripts' conduct injured Alaskans' health but rather alleged a range of harms that impact Alaskans as a group, including an increase in the sale and use of illicit drugs in communities, higher rates of child abuse and neglect, and increased burdens on government services. Express Scripts argued that Alaska did not plausibly allege a legal duty, but the court ruled that the state, by alleging that Express Scripts violated a public right, effectively alleged that the company violated the general duty not to create a nuisance. Finally, Express Scripts asserted that the public nuisance claim fails because Alaska has not alleged that the company's conduct was the legal cause of the alleged harm. Express Scripts also argued that it lacks control over how doctors prescribe opioids or how patients take them. Under Alaska law, "proximate cause requires only that the general kind of harm be foreseeable for an actor's conduct to be considered the proximate cause of the plaintiff's injuries." The judge ruled that the state sufficiently pled proximate cause because the general kinds of harms alleged in the suit—the oversupply of opioids in Alaska and attendant societal consequences—were foreseeable.

In addition to denying Express Scripts' motion to dismiss the public nuisance claim, the judge denied its motion to dismiss the CPA claim. Express Scripts argued that Alaska failed to plausibly allege causation as required by the CPA, but the judge ruled that the state does not need to allege a specific injury. Instead, the state must only show that an act or practice is either unfair or deceptive. The judge found the state's complaint to be "replete with allegations" that Express Scripts' conduct was deceptive. Lastly, Express Scripts argued that the state's claims against the company as a PBM are expressly preempted by the Employee Retirement

Income Security Act (ERISA; 29 U.S.C. § 1001, *et seq.*) and the Medicare Act (42 U.S.C. § 1395, *et seq.*). The judge ruled that the claims are not preempted by ERISA because the existence of ERISA covered plans is not essential to the state's claims. The judge, however, granted Express Scripts' motion to dismiss claims under the Medicare Act (42 U.S.C. § 1395 *et seq.*), holding that Medicare Part D preempts the state's claims to the extent that they seek to impose liability for Express Scripts' administration of Part D plans. Thus, Alaska may maintain its public nuisance and CPA claims insofar as they do not implicate Medicare Part D claims.

OPIOID DISTRIBUTORS ENTITLED TO PARTIAL NEW YORK TAX REFUND

***AmerisourceBergen Drug Corp., et al. v. New York State Department of Health, et al.*, New York Supreme Court, Appellate Division, Case No. CV-23-0150 (opinion filed May 23, 2024).** In a 3-2 decision, a New York intermediate appellate court ruled that opioid distributors are entitled to a partial refund of some of the funds they paid into a state fund meant to address the opioid crisis. In 2018, the New York legislature enacted the Opioid Stewardship Act (OSA; N.Y. PUB. HEALTH LAW § 3323 (McKinney 2024)), which created an opioid stewardship fund, the money of which was derived from an opioid surcharge and would be used for substance use disorder services and monitoring the prescribing and dispensing of controlled substances. The OSA required a $100 million annual payment by all manufacturers and distributors of opioids in the state, to whom OSA refers as "licensees." A licensee's share of the payment was proportional to the total morphine milligram equivalents that a licensee sold in the state in the preceding calendar year. Even though the OSA became effective in July 2018, the law required licensees to make a retroactive payment for the 2017 and 2018 calendar years. The OSA contained a pass-through prohibition, which provided that "no licensee shall pass the cost of their ratable share amount to a purchaser, including the ultimate user of the opioid." Pharmaceutical industry groups challenged the constitutionality of the OSA in the U.S. District Court for the Southern District of New York, seeking declaratory judgment and injunctive relief. The district court determined that the pass-through prohibition of the OSA violated the Dormant Commerce Clause of the U.S. Constitution, as the prohibition had "the effect of discriminating between purchasers of opioids in New York and those outside it." Additionally, the district court concluded that, despite the presence of a severability clause in the OSA, the pass-through prohibition was inseverable from the rest of the statute and, thus, the entirety of the OSA was unconstitutional. After the district court's decision, the legislature amended the OSA to provide that the opioid stewardship payment would be collected only for opioid sales that took place in calendar years 2017 and 2018. For subsequent years, the legislature reimposed a tax on the sale of opioids but did not include a pass-through prohibition. After the enactment of the amended OSA, the state elected not to seek reversal of the district court's invalidation of the pass-through prohibition but sought reversal of the district court's invalidation of the remaining provisions of the OSA. On appeal the Second Circuit reversed the district court's ruling invalidating and enjoining enforcement of the opioid stewardship payment and all other provisions of the OSA except for the pass-through prohibition.[2]

In May 2022, opioid distributors, who were not parties to the federal litigation, filed suit in state court arguing that the OSA's remaining provisions were not severable from the unconstitutional pass-through prohibition. In the alternative, the plaintiffs claimed that the OSA was invalid under the Due Process Clauses of the U.S. and New York Constitutions because it was imposed retroactively. The plaintiffs sought a declaration that the OSA is invalid, an injunction against its enforcement, and a refund of over $57 million in opioid stewardship payments. Both parties moved for summary judgment. The lower court granted the defendants' motion for summary judgment, holding that there was no evidence to suggest that the legislature "would have abandoned its intended goal of raising revenue for the prevention and treatment of opioid addiction simply because it could not prevent licensees from passing on the cost of the stewardship payments." The lower court also noted that the OSA was still able to fulfill its primary purpose of raising revenue for the prevention and treatment of

[2] *Association for Accessible Medicines v. Letitia James.* For more information about this case please refer to the October 2020 issue of the LAPPA *Case Law Monitor*, available here.

opioid use disorder without the pass-through prohibition. Additionally, the lower court ruled that the retroactive portion of the OSA did not offend due process. The plaintiffs appealed, arguing that the pass-through prohibition may not be severed from the remainder of the OSA because enforcing the opioid stewardship payment without the pass-through prohibition would "negate the legislature's entire purpose in enacting the OSA, *i.e.*, to hold opioid licensees financially accountable for their culpable role in creating the national opioid epidemic." The majority rejected that argument, holding that the primary purpose of the opioid stewardship payment is to raise revenue for the treatment and prevention of opioid use disorder, which could be accomplished without the pass- through prohibition. The majority also noted that the legislature made its intent known when it amended the OSA to impose an excise tax on future opioid sales with no prohibition on passing the cost to the consumer. This demonstrated that the legislature wanted the tax to remain in place, even if the pass-through prohibition was invalidated. Had the legislature intended otherwise, it could have removed the severance clause or rescinded the tax for 2017 and 2018 when it amended the OSA.

The plaintiffs also argued that the retroactive opioid stewardship assessment for 2017 and 2018 violated their substantive due process rights to retain their property. When assessing the constitutionality of a retroactive tax, the factors to consider "are (1) the taxpayer's forewarning of the change in the legislation and the reasonableness of reliance on the old law, (2) the length of the retroactive period, and (3) the public purpose for retroactive application." For 2018, the majority concluded that the tax was valid because the length of the retroactive period was not excessive. The majority also noted that the 2018 assessment was justified by a "rational legislative purpose– to quickly raise revenue to fund treatment and prevention programs for opioid use disorder." If the OSA was purely prospective, then the state would have had to wait until January 2021 to collect opioid stewardship payment revenue. The majority, however, did not find the 2017 assessment to be valid because of the long period of retroactivity and lack of a compelling justification. Thus, the majority found the OSA to be valid for 2018 and invalid for 2017. The majority remanded the case to the lower court for a determination of the amount of any refund due to the plaintiffs. The dissent argued that the pass-through prohibition was so integral to the purpose of the act that it could not survive without it.

CITY OF PHILADELPHIA REACHES SETTLEMENT WITH WALGREENS IN OPIOID CASE

***City of Philadelphia v. CVS Indiana, LLC, et al.*, Philadelphia County Court of Common Pleas, Case No. 210902183 (settlement announced April 19, 2024).** The City of Philadelphia, Pennsylvania announced that it has reached a settlement with Walgreens over allegations that the pharmacy chain played a role in perpetuating the opioid crisis in the city. Under the terms of the agreement, Walgreens will pay the city $110 million over five years. The city will receive the first payment from the settlement in September 2024. Philadelphia plans to use the funds to remediate the harm caused by the opioid crisis in its most impacted neighborhoods through the implementation of substance use education, treatment, prevention, and community engagement efforts. Walgreens did not admit to any wrongdoing or liability as part of the settlement.

WASHINGTON STATE REACHES SETTLEMENT WITH KROGER IN OPIOID CASE

***State of Washington v. Rite Aid Corp., et al.*, King County Superior Court, Washington State, Case No. 22-2-20910-1 SEA (settlement reached April 23, 2024).** For previous updates on this case, please refer to the February 2023 issue of the LAPPA *Case Law Monitor*, available here. Kroger has agreed to pay $47.5 million to the State of Washington and its local governments to settle allegations that the grocery and pharmacy chain negligently filled opioid orders without adequately investigating red flags of fraud or overprescribing. The funds will be paid over 11 years. Local governments that have filed a lawsuit and those that have a population of more than 30,000 will need to approve the resolution before it is finalized. The suits against Albertsons and Rite Aid remain pending.

AMNEAL PHARMACEUTICALS AGREES TO SETTLEMENT TO RESOLVE OPIOID LAWSUITS

Amneal Pharmaceuticals Agrees to Settlement to Resolve Opioid Lawsuits (settlement announced May 3, 2024). The pharmaceutical company, Amneal Pharmaceuticals (Amneal), has agreed to pay $272.5 million to settle lawsuits brought by state and local governments and Native American tribes claiming that the company helped fuel the opioid crisis by failing to act on suspicious opioid orders. Amneal will make payments over the next 10 years, including $92.5 million in cash and $180 million worth of naloxone. The settling parties can choose to opt out of receiving naloxone and instead receive 25 percent of the product's value in cash up to $45 million over the last four years of the agreement. The company values a naloxone two-pack at $125. The settlement in principle is contingent upon a sufficient number of jurisdictions electing to opt into the final agreement. Amneal did not admit to any wrongdoing as part of the settlement.

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 (guilty plea entered April 18, 2024).** For previous updates on this case, please refer to the April 2024 issue of the LAPPA *Case Law Monitor*, available here. On April 18, 2024, Endo Health Solutions Inc. (Endo) pleaded guilty to one misdemeanor count of introducing misbranded drugs into interstate commerce in violation of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 331). As part of the guilty plea, Endo admitted that from April 2012 through May 2013 certain company sales managers were aware that sales representatives were marketing Opana ER to prescribers as tamper and/or crush resistant, despite a lack of clinical evidence supporting those claims. Endo also admitted that it was responsible for the misbranding of Opana ER by marketing the drug with a label that failed to include adequate directions for its claimed abuse deterrence. On May 3, 2024, a court ordered Endo to pay $1.086 billion in criminal fines and an additional $450 million in criminal forfeiture. The DOJ reached an agreement in Endo's bankruptcy case to settle its monetary claims arising from the guilty plea. Endo's corporate affiliates emerged from bankruptcy on April 23, 2024.

RECENT EVENTS IN THE RITE AID BANKRUPTCY PROCEEDINGS

***In re Rite Aid Corporation*, U.S. Bankruptcy Court for the District of New Jersey, Case No. 23-18993 (suit filed October 15, 2023).**

- For previous updates on this case, please refer to the February 2024 issue of the LAPPA *Case Law Monitor*, available here. Rite Aid Corporation (Rite Aid) is facing pushback on its proposal to pay its new chief executive officer (CEO) $20 million under its bankruptcy exit plan. On April 15, 2024, groups representing tort claimants filed an objection to the company's inclusion of an employment guarantee in the plan for CEO Jeffrey Stein. If a bankruptcy judge approves Rite Aid's plan, Stein will receive a $20 million "success fee" when the company emerges from bankruptcy. Additionally, Stein would collect a $300,000 monthly salary. The claimants argued that the thousands of individuals and communities that were harmed by Rite Aid's misconduct would collectively receive less money than Stein. The objection states that Stein would be paid "at least four times" the amount that CEOs of other bankrupt companies have been paid. A separate committee of unsecured creditors and a group of 14 states, represented by Pennsylvania, have joined in the tort claimants' objection.[3] The U.S. Trustee, the U.S. Department of Justice's bankruptcy watchdog, also challenged the bankruptcy plan, citing issues with what it claims are overly broad releases and improper injunction proceedings. Furthermore, Maryland filed an objection stating that the bankruptcy proceedings have provided inadequate notice to creditors.

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[3] The ad hoc group of states consists of the Attorneys General of California, Connecticut, Delaware, Idaho, Michigan, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Vermont, Virginia, and Washington.

- On May 14, 2024, a claimant group comprised of people experiencing the effects of neonatal abstinence syndrome asked the court to rule that they should receive a payout from Rite Aid's insurance policies. The claimants assert that Rite Aid is liable because it negligently prescribed opioids, and its insurers have an obligation to pay out that liability. The claimants have asked the court to determine the extent to which they have an interest in the policies and the extent to which those interests are the property of Rite Aid's estate. They have also asked the court to rule that the insurance proceeds cannot be transferred to other creditors who do not have a claim under them and that the insurers have an obligation to pay for whatever Rite Aid would be liable if it was not in bankruptcy.

RECENT EVENTS IN THE PURDUE PHARMA BANKRUPTCY PROCEEDINGS

***In re Purdue Pharma L.P.*, U.S. Bankruptcy Court for the Southern District of New York, Case No. 19-23649 (suit filed Sept. 15, 2019).** For previous updates on this case, please refer to the October 2023 issue of the LAPPA *Case Law Monitor*, available here. On April 17, 2024, a bankruptcy judge approved Purdue Pharma's (Purdue) request to pay up to $7.2 million in bonuses to three of the company's top executives. The ruling allows Purdue to pay its chief executive officer, chief financial officer, and general counsel bonuses if they meet certain goals during the 2023 fiscal year. The approved employee pay package also included about $21 million in retention pay for non-executive employees and up to $7.8 million in additional targeted retention payments for certain employees. There were not any objections to the executive incentive plan this year, in contrast to prior years when U.S. Senators, the U.S. Department of Justice, and state attorneys general opposed such payouts.

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/.

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