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.

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MULTIPLE DEFENDANTS CHARGED IN FAKE ONLINE PHARMACY SCHEME

***United States v. Francisco Alberto Lopez Reyes, et al*., U.S. District Court for the Southern District of New York, Case No. 1:23-cr-00501-JPC (suit filed September 29, 2024).** The U.S. Attorney's Office for the Southern District of New York has indicted 18 defendants involved in a scheme to advertise, sell, manufacture, and ship counterfeit pills disguised as lawful pharmaceuticals. A network of individuals located in the U.S., the Dominican Republic, and India exploited the online pharmacy market to sell counterfeit pills laced with fentanyl and methamphetamine to unsuspecting victims. The defendants set up multiple online pharmacy websites that were designed to appear as discount pharmaceutical marketplaces. The homepage of one such website stated that it was a "U.S. based online pharma store" that was approved by the U.S. Food and Drug Administration. The pills that the victims received were indistinguishable from actual prescription medications but were produced in industrial-scale pill pressing facilities located in the basements of several residential buildings in New York City. Law enforcement raided at least three of these facilities and two narcotics storage locations, seizing approximately 625,000 counterfeit pills—the majority of which contained fentanyl, para-fluorofentanyl, and/or methamphetamine—10 industrial pill presses, commercial mixers, and industrial-grade gas masks. Between August 2023 and June 2024, at least nine victims —all of whom purchased counterfeit prescription pills from the defendants—died of narcotics poisoning. The U.S. Attorney's Office charged the alleged leader of the scheme with continuing criminal enterprise, narcotics trafficking conspiracy resulting in death, distribution of narcotics resulting in death, and conspiracy to commit money laundering. He faces mandatory life in prison. The remaining defendants were charged with narcotics trafficking conspiracy resulting in death and face a mandatory minimum of 20 years in prison.

FLORIDA ATTORNEY GENERAL CANNOT BLOCK OPIOID LAWSUITS BROUGHT BY STATE SUBDIVISIONS

***Halifax Hospital Medical Center, et al., v. Office of the Attorney General*, District Court of Appeals of Florida (First District), Case No. 1D2023-1394 (opinion filed August 14, 2024).** A Florida Court of Appeals has barred state Attorney General Ashley Moody's plan to block lawsuits brought by state subdivisions in an attempt to preserve the state's opioid settlements. In 2018, Attorney General Moody filed a suit on behalf of the state against certain opioid manufacturers, distributors, and prescribers (collectively "opioid defendants") to combat the opioid epidemic. After the state filed its suit, school boards, legislatively created hospital districts, and the Lee Hospital System (collectively "appellants") filed separate lawsuits against the opioid defendants, alleging similar claims but asserting unique and individualized damages. Attorney General Moody ultimately settled the state's suit against the opioid defendants, which provided compensation to many state political subdivisions but did not provide compensation for the appellants. The releases in the settlement agreements required Moody to dismiss the appellants' claims by intervening in their cases and filing a motion to dismiss. The settlement agreements also stated that "no entity could ultimately receive any portion of the settlements' remediation payment or litigation costs payment unless that entity accepted the terms of the settlement agreement." Thus, unless the appellants waived all of their claims for damages inflicted by the opioid defendants and dismissed their suits, Attorney General Moody would take action against them and seek to extinguish their claims.

In April 2022, Moody filed suit against the appellants in the Circuit Court of Leon County seeking a declaratory judgment finding that she had the authority under common and general law to release the appellants' claims against the opioid defendants. The circuit court entered a declaratory judgment in favor of the attorney general, ruling that she had the power to release claims, including the appellants' legal claims for actual and individual damages different from those generally inflicted on the state as a whole. The circuit court also ruled that the attorney general "acted as the state sovereign who controlled all legal rights and remedies of independent state bodies created by the constitution and general law, and thus, could waive and eliminate the appellants' damage claims against the opioid defendants." On appeal, the court reversed the ruling of the circuit court, holding that the attorney general cannot disavow the substantive vested rights of the appellants. The court noted that, as the state's chief legal officer, the attorney general has limited common law authority as *parens patriae*[1] to litigate claims common to the state at large, but she does not have authority to control the appellants' claims of unique and individual damages. Additionally, the court stated that the attorney general is neither on a level with the governor nor the legislature and that she cannot assert policy prerogatives on their behalf. The legislature can limit the authority of the attorney general to assert her *parens patriae* power to sue or prohibit other governmental entities from suing for damages. The court determined that the legislature limited the attorney general's *parens patriae* power regarding the appellants because the legislature granted them the authority to protect their property interests and to assert legal claims in court. The court ended by stating that the state's settlement with the opioid defendants achieved many goals but that it could not deprive the appellants of their legal right to be made whole for their unique losses.

COLORADO COURT RULES AGAINST PUEBLO CITY COUNCIL IN SYRINGE EXCHANGE PROGRAM SUIT

***Colorado Health Network Inc. and Southern Colorado Harm Reduction Association v. City of Pueblo*, Colorado District Court (Pueblo County), Case No. 2024-CV-30274 (decided August 22, 2024).** For previous updates on this case, please refer to the August 2024 issue of the LAPPA *Case Law Monitor*, available here. A state district court in Pueblo, Colorado has ruled in favor of allowing Syringe Exchange Programs (SEPs) to continue their work in the city despite a city council vote to ban them. In May 2024, Pueblo City Council enacted Ordinance No. 10698, which created a prohibition on SEPs. The American Civil Liberties Union of Colorado, on behalf of two affected SEP providers, sued the city to block the ordinance, claiming that it was preempted by a Colorado law that expressly allows SEPs. (COLO. REV. STAT. ANN. § 25-1-520 (West 2024)). On August 22, 2024, the court issued a final decision that the ordinance was preempted by state law and that the SEPs could continue operating. The court pointed to the overly broad and restrictive language used in the ordinance and its conflict with § 21-1-250. However, the court stated that its analysis would have likely been different if the ordinance's language was narrowly tailored to place limitations or regulations on a SEP's ability to exchange needles without creating a total ban.

FOURTH CIRCUIT REVIVES SUBSTANCE USE DISORDER COUNSELORS' WRONGFUL TERMINATION SUIT

***Kim Shook, et al. v. NCG Acquisitions, LLC,* U.S. Court of Appeals for the Fourth Circuit, Case No. 23-1406 (opinion filed August 14, 2024).** The Fourth Circuit has revived a case involving the termination of three substance use disorder counselors after they reported their supervisor for her actions related to a patient under their care. Kim Shook, Kylie Scolaro-Conti, and John Szwyd (referred to collectively as the "Counselors") initially filed suit claiming unlawful termination in violation of public policy with the District Court for the Western District of North Carolina after they were terminated from their employment with NCG Acquisition, LLC (NCG). The case arose from the death of a client who was being seen by the Counselors for

[1] *Parens patriae* is a doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizens. *Parens patriae*, BLACK'S LAW DICTIONARY (12th ed. 2024).

a substance use disorder. When the client presented with signs of substance use and "extreme mental distress," the Counselors determined that inpatient hospitalization was warranted. The client's probation officer agreed with the recommendation and requested that the Counselors submit documentation to transfer the client to an inpatient setting. The required documentation included a letter from NCG, which, by NCG policy, must be signed by Assistant Director of Outpatient and Community-Based Services, Jessica Tewell. Tewell refused to sign the letter as it was initially drafted and modified the treatment recommendation for the client in the letter from a "higher level of care" to a "different level of care." Without a recommendation for a "higher level of care," the client could not be moved to inpatient hospitalization. The Counselors and the client's probation officer repeatedly asked Tewell to approve the letter with a recommendation for a "higher level of care," but she refused. Left with no alternative, the Counselors submitted Tewell's modified letter. Because the letter did not contain the proper recommendation language, the client was not transferred to inpatient treatment. Three days after the Counselors sent the letter, the client died of an overdose. Upon learning of the client's death, the Counselors contacted Tewell's supervisor to report the incident and voice their concern that Tewell's actions were inappropriate. Nine days after making the report to Tewell's supervisor, NCG terminated the three Counselors.

The Counselors later filed complaints with the North Carolina Department of Health and Human Services who found that Tewell had violated state law by failing to demonstrate competency in her professional conduct. Following this determination, the Counselors filed suit in federal court for wrongful termination, stating that they were terminated in violation of the North Carolina Substance Use Disorder Professional Practice Act, (SUDPPA; N.C. GEN. STAT. § 90-113.3 (West 2024)), which dictates standards for all substance use disorder treatment professionals in the state. Although North Carolina is an "at-will" employment state, meaning anyone can be fired for any reason, there is an exception for terminations that violate public policy. The district court did not address the merits of the complaint but dismissed it because it determined that the pleadings did not use the precise language required by the SUDPPA, and therefore, the pleadings were insufficient. The appellate court disagreed, explaining that exact words are not required to get past the initial hurdle of review. Instead, the court stated that the entire SUDPPA statute and its attendant regulations are a statement of public policy by the state and a complaint must only allege a violation of SUDPPA, along with factual allegations and a general reference to the entire statute. The court reversed the lower court decision and remanded the case for further proceedings.

SEVENTH CIRCUIT MAJORITY DISMISSES FORCED LABOR SUIT AGAINST THE SALVATION ARMY

***Darrell Taylor, et al. v. The Salvation Army National Corporation*, U.S. Court of Appeals for the Seventh Circuit, Case No. 23-1218 (opinion filed August 6, 2024).** In a 2-1 decision, the Seventh Circuit dismissed a forced labor suit against the Salvation Army National Corporation (Salvation Army), which operates residential rehabilitation programs. Individuals can enroll in the rehabilitation programs voluntarily to receive help with homelessness or substance use disorder, or they can be referred to the programs by courts or parole or probation departments. Program enrollment is free, and participants also receive food, clothing, and housing for the duration of the program. Each participant must complete at least 40 hours per week of "work therapy" (*e.g.,* washing dishes or shoveling snow).

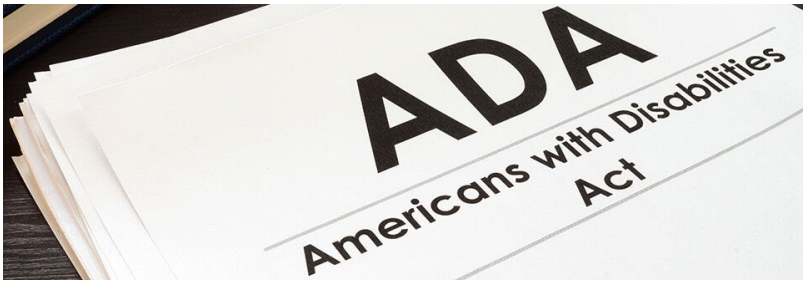
The plaintiffs in this case are three individuals who participated in the rehabilitation program while on parole or probation (the "justice-referred plaintiffs") and two individuals who entered the program voluntarily (the "walk-in plaintiffs"). The plaintiffs claimed that the Salvation Army uses its rehabilitation programs not to rehabilitate people in need but as a "coercive labor arrangement." Their complaint alleged that the Salvation army "targets marginalized individuals . . . in order to obtain a workforce that is reliant on the Salvation Army." The plaintiffs claimed that the Salvation Army staff would regularly remind participants that they would lose access to food and shelter if they left the program and would tell justice-referred participants that if they did not complete their work that they would be "kicked out of the program and likely be incarcerated." The five plaintiffs asserted claims under 18 U.S.C. § 1589(a), which makes it unlawful to obtain labor by

means of "serious harm," "threats of serious harm," or an "abuse or threatened abuse of law or legal process." The Salvation Army filed a motion to dismiss for failure to state a claim, which the district court granted. The plaintiffs filed an appeal with the Seventh Circuit.

To properly state a claim under 18 U.S.C. § 1589(a), each set of plaintiffs must adequately plead that the Salvation Army obtained their labor or services by unlawful, coercive means forbidden by the statute, and did so knowingly. On appeal, the walk-in plaintiffs claimed that the Salvation Army secured their continued participation in the program by threatening them with the serious harm of discontinuing their food, clothing, and shelter. The majority rejected those arguments, holding that the Salvation Army is entitled to stop providing food, clothing, and shelter to someone who no longer wishes to participate in the program. The majority also noted that the Salvation Army is allowed to remind participants that leaving the program will result in the cessation of program benefits. Furthermore, because the walk-in plaintiffs entered the program voluntarily, they were free to leave the program at any time. Thus, the majority agreed with the district court that the walk-in plaintiffs failed to state a claim.

For the justice-referred plaintiffs, the majority noted that they "cannot expect to have the same freedom of choice with respect to their work and living conditions as individuals not subject to the legitimate penal objections of the state." Assuming 18 U.S.C. § 1589 applies to the execution of a lawfully imposed sentence, it would have to be applied in a manner that "acknowledges that the liberty interests that it protects have been curtailed sharply in the case of those subject to the legitimate restraints of a criminal judgment." The majority determined that the justice-involved plaintiffs must "demonstrate how the conduct alleged in the complaint is incompatible with the legitimate constraints of the particular penal judgment imposed on [them.]" Because the complaint failed to meet that obligation, the majority ruled that the justice-referred plaintiffs failed to state a claim and affirmed the district court's dismissal of the complaint. The majority also denied the plaintiffs' motion to file a second amended complaint, finding that the proposed second amended complaint would not have cured the deficiencies of the first amended complaint.

PLAINTIFF CLAIMS EMPLOYER RETAILATED AGAINST HER IN VIOLATION OF THE ADA



***Betsy Vega v. Mobis Parts America, LLC*, U.S. District Court for the District of Connecticut, Case No. 3:24-cv-01478-VAB (suit filed September 16, 2024).** A woman terminated by Mobis Parts America, LLC (Mobis) after testing positive for cannabis has sued the company for disability discrimination. Mobis originally hired Betsy Vega as a temporary employee but was in the process of hiring her as a "regular" employee. In order to complete the transition, Mobis required Vega to take a drug test, which came back positive for cannabis. On March 5, 2022, Mobis terminated her employment. After Vega notified Mobis that she has a prescription for medical cannabis to treat her post-traumatic stress disorder, Mobis told Vega that in order to be rehired, she needed to obtain a medical cannabis card. She did and was rehired as a temporary employee in April 2022. Shortly thereafter, Mobis asked Vega for proof of a high school equivalency diploma (GED). When she did not have proof of her GED, Mobis informed her that she was required to produce such proof within six months from the date she was hired as a "regular" employee, or she would be terminated from the company. On July 5, 2022, Mobis designated Vega as a "regular" employee, and on July 6, 2022, the company terminated her employment citing lack of proof of a GED as the reason for the termination, despite telling her she had six months to show proof. According to Vega, Mobis had given other similarly situated employees six or more months to provide proof of a GED. Vega stated that a supervisor informed her that her termination was not because she lacked proof of a GED, suggesting that it was pretext to cover up discrimination against her

medical cannabis use. In September 2022, Vega filed a complaint against Mobis with the Connecticut Commission on Human Rights and Opportunities and the Equal Employment Opportunity Commission. Vega has now filed suit against Mobis and brings forth claims of disability discrimination, failure to accommodate, and retaliation in violation of the Americans with Disabilities Act (ADA: 42 U.S.C. §12101, *et seq*.). Vega also brings forth claims of disability discrimination, failure to accommodate, and retaliation in violation of the Connecticut Fair Employment Practices Act (Conn. Gen. Stat. Ann. § 46a-60b, *et seq.* (West 20234)), and a violation of the Palliative Use of Marijuana Law (Conn. Gen. Stat. Ann. § 21a-408p (West 2024)). Vega is seeking compensatory damages, back pay, front pay, lost benefits, emotional distress damages, punitive damages, and job reinstatement.

KRATOM MANUFACTURER MUST FACE CONSUMER PROTECTION AND FRAUD CLAIMS IN CLASS ACTION SUIT

***J.J. and C.D. v. Ashlynn Marketing Group, Inc.*, U.S. District Court for the Southern District of California, Case No. 3:24-cv-00311 (opinion filed September 20, 2024).** A federal district court has ruled that kratom manufacturer and distributor, Ashlynn Marketing Group, Inc. (Ashlynn), must face consumer protection and fraud claims in a class action lawsuit alleging that the company failed to disclose the addictive nature of its kratom products. Plaintiff J.J. began purchasing Ashlynn's kratom products in September 2018 after reviewing the packaging and labeling and found nothing that would indicate that kratom was addictive. When J.J. attempted to stop using Ashlynn's products, he experienced intense physical and psychological withdrawal symptoms like those associated with opioid withdrawal, realizing in July 2022, that he was addicted to kratom. Plaintiff C.D. began purchasing Ashlynn's products in 2020. Like J.J., C.D. read the product's labeling prior to purchasing it and did not see any disclosures about kratom's addictiveness. C.D. realized he was addicted to kratom in February 2021 after he experienced withdrawal symptoms when he stopped using Ashlynn's products. Both J.J. and C.D. allege that Ashlynn failed to disclose kratom's addictiveness to its consumers and that if they had known about its addictiveness, they would never have purchased Ashlynn's products. In February 2024, J.J. and C.D. filed a punitive class action suit against Ashlynn, bringing forth six causes of action: (1) violations of California's Unfair Competition Law (UCL; CAL. BUS. & PROF. CODE § 17200 (West 2024)); (2) violations of California's Consumer Legal Remedies Act (CLRA; CAL. CIV. CODE § 1770(a)(5), (7), and (9) (West 2024)); (3) violations of California's False Advertising Law (FAL; CAL. BUS. & PROF. CODE § 17500 (West 2024)); (4) breach of implied warranty; (5) unjust enrichment; and (6) fraudulent omission.

Ashlynn filed a motion to dismiss, citing several arguments as to why the plaintiffs' case should be dismissed in its entirety. First, Ashlynn argued that, based on the original purchase dates of the products, the plaintiffs' claims were time barred under the applicable statutes of limitations, as they presented claims with statutes of limitations ranging from two to four years. The plaintiffs counterargued that their claims were not barred by the statute of limitations due to the application of the discovery rule, which "postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action."[2] In this case, the complaint alleged that both plaintiffs made their initial kratom purchase no later than 2020, so their claims would be barred by the statute of limitations without the benefit of the discovery rule. However, the complaint stated that J.J. and C.D. did not discover their kratom addictions until July 2022 and February 2021, respectively. The court determined that the plaintiffs could not have suspected an injury until they realized they were addicted to Ashlynn's kratom products. The court also found that the plaintiffs adequately alleged that they could not have made an earlier discovery of the addictiveness of kratom or their own personal addictions to kratom because the information available to the plaintiffs about kratom's addictiveness was ambiguous at best, and the addiction "[creeped] up on them with little notice." Thus, the court found that the discovery rule could

[2] If a complaint shows on its face that a claim would be time barred without the benefit of the discovery rule, the complaint must specifically allege facts showing: "(1) the time and manner of the discovery; and (2) the inability to have made earlier discovery despite reasonable diligence."

be applied to the UCL, CLRA, FAL, and fraudulent omission claims, which prevented them from being time barred by the statute of limitations. However, the court ruled to dismiss the implied warranty and unjust enrichment claims because the discovery rule does not apply to those claims.

Second, Ashlynn argued that the plaintiffs failed to state a claim upon which relief could be granted because they did not sufficiently plead the elements of a fraud-based claim. Specifically, Ashlynn claimed that the plaintiffs did not sufficiently allege reliance on any statement or omission and that Ashlynn did not have a duty to disclose kratom's supposed addictiveness. The plaintiffs alleged in the complaint that, had Ashlynn not omitted information regarding the addictive potential of kratom, they would not have purchased its products. Thus, the court determined that the plaintiffs adequately pleaded reliance. The court further noted that a defendant "has a duty to disclose when either (1) the defect at issue relates to an unreasonable safety hazard or (2) the defect is material, central to the product's function, and the plaintiff alleges one of the four *LiMandri* factors." One such factor is the defendant having exclusive knowledge of material facts not known to the plaintiff. (*LiMandri v. Judkins*, 52 Cal. App. 4th 326). The court determined that the plaintiffs sufficiently alleged that kratom's addictiveness poses an unreasonable safety risk by claiming that they experienced withdrawal symptoms similar to opioid withdrawal when they attempted to stop using kratom.

Ashlynn then argued that the plaintiffs did not allege that the company had "exclusive knowledge" regarding kratom's addictive potential. The court noted that a plaintiff only needs to allege that the defendant had superior knowledge of a defect that was not readily apparent and that there is no, or only limited, publicly available information about the defect. The plaintiffs claimed that Ashlynn "received numerous user reports about the addictive potential of kratom" and posted on its website that "scientists [were] still conducting comprehensive studies to determine whether abusing kratom causes addiction, death, and withdrawal symptoms." Moreover, the plaintiffs claimed that Ashlynn "interacted with growers and distributors in Southeast Asia who have disclosed the addictive nature of kratom to [the company]." The court determined that the plaintiffs' allegations, taken together, support an inference that Ashlynn knew or should have known that the products it was selling were highly addictive. Ashlynn argued that the plaintiffs contradicted their allegations by stating in their complaint that "it has been known for decades . . . that kratom is highly addictive and has the potential to cause physical and psychological dependance in regular users." The court, however, determined that, considering the context, the complaint was likely referring to the fact that "the addictiveness of kratom has been well-documented . . . and is an established fact *in medical literature*" (emphasis in original). The court noted that even though medical literature on kratom's addictiveness is publicly available, it would be less accessible to the average consumer than it would be to Ashlynn. Thus, because the plaintiffs adequately alleged that Ashlynn had superior and exclusive knowledge of kratom's addictiveness, the court ruled that the allegations support a duty to disclose. The court dismissed the implied warranty and unjust enrichment claims without leave to amend and denied Ashlynn's motion to dismiss the CLRA and fraud claims. The court also dismissed the UCL and FAL claims without prejudice so that they can be refiled in state court.

FIFTH CIRCUIT AFFIRMS THAT FATAL OVERDOSE AFTER SURGERY NOT AN "ACCIDENTAL DEATH"

***Fonda Wicks v. Metropolitan Life Insurance Company*, U.S. Court of Appeals for the Fifth Circuit, Case No. 23-11247 (opinion filed September 17, 2024).** For previous updates in this case, please refer to the October 2023 issue of the LAPPA *Case Law Monitor*, available here. The Fifth Circuit has affirmed a district court's ruling that the widow of a Texas man who died of an overdose following surgery is not entitled to collect accidental death insurance benefits. Jackie Wicks died from an unintentional overdose while in recovery from gastric sleeve surgery to treat his obesity. His death certificate stated that he died from an anoxic brain injury, with an "unintentional narcotic overdose" as an underlying cause. Wicks' widow filed an accidental death and dismemberment (AD&D) claim with the Metropolitan Life Insurance Company (MetLife). MetLife denied the AD&D claim citing the plan's "illness/treatment exclusion," which states that

benefits will not be paid for any loss caused or contributed to by a physical or mental illness or by the diagnosis or treatment of such illness. MetLife asserted that Wicks' death did not "directly and solely" result from an accidental injury (*i.e.* unintentional overdose) but was instead due to complications following surgery to treat his morbid obesity. After exhausting her administrative remedies, Mrs. Wicks filed suit against MetLife. In August 2023, the district court upheld MetLife's denial of benefits, agreeing that she had failed to carry her burden of establishing that she was entitled to AD&D coverage based on the terms of the plan. Wicks appealed, arguing that when an insurer denies accidental death benefits due to obesity as violating the "direct and sole cause" clause, the death should "be naturally flowing from obesity or closely related to obesity." To be eligible for AD&D coverage under the plan, Mrs. Wicks was required to show that Wicks "sustained an accidental injury that was the direct and sole cause of a covered loss," with "direct and sole cause" being defined as a "covered loss" that "was a direct result of the accidental injury, independent of other causes." Although Mrs. Wicks was able to point to language in Wicks' death certificate stating that his death was caused in part by the post-operative narcotics he received, the court determined that Mrs. Wicks failed to provide evidence that the narcotics were the direct and sole cause of her husband's death. In other words, Mrs. Wicks failed to show that her husband's death was a direct result of an "accidental injury" that was independent of other causes (*i.e.* his morbid obesity). Accordingly, the Fifth Circuit affirmed the district court's judgment upholding MetLife's denial of AD&D coverage.

JUDGE ENTERS CONSENT DECREE AGAINST SACRED HEART REHABILITATION CENTER

***United States v. Sacred Heart Rehabilitation Center, Inc. et al*, U.S. District Court for the Western District of Michigan, Case No. 1:24-cv-00995-HYJ-SJB (consent decree approved September 25, 2024).** A federal judge has approved a consent decree against Sacred Heart Rehabilitation Center, Inc. (Sacred Heart), a behavioral health and addiction treatment services network, and its president and chief executive officer, Paula Nelson, and medical director, Janis Romanik, DO, to resolve allegations that they violated the federal Controlled Substances Act (CSA; 21 U.S.C. § 801, *et seq.*). The U.S. Attorney's Office for the Western District of Michigan claimed that a Drug Enforcement Administration inspection discovered multiple violations of the CSA at a Sacred Heart facility. The complaint asserted that staff would routinely dispense controlled substances to treat patients with withdrawal symptoms before a qualified healthcare practitioner evaluated or examined those patients. The U.S. Attorney's Office also claimed that the facility failed to maintain accurate records of the controlled substances dispensed to patients, take a biennial inventory of controlled substances, and report the theft or loss of missing controlled substances. Under the terms of the consent decree, Sacred Heart will review and revise its controlled substances policies and procedures and hire an independent monitor to inspect its facilities for compliance with the CSA. Sacred Heart is also required to pay a $1 million civil penalty.

MISSISSIPPI SUES PHARMACY BENEFIT MANAGERS FOR CONTRIBUTING TO THE OPIOID EPIDEMIC

***State of Mississippi v. Optum, Inc, et al.*, Chancery Court of Hinds County, Mississippi, Case No. 24-cv-01000 (suit filed August 29, 2024).** Mississippi Attorney General Lynn Fitch has filed a lawsuit against pharmacy benefit managers (PBMs) over claims that they helped fuel the opioid epidemic by increasing opioid utilization in the state. PBMs are the administrators of prescription drug plans for health insurance companies. The complaint names 13 companies as defendants, including OptumRx and Express Scripts, and asserts that the PBMs designed drug formularies that placed opioids on lower tiers with fewer restrictions in order to increase opioid utilization. The suit also claims that the defendants' mail-order

pharmacies failed to maintain effective controls to identify suspicious orders and prevent diversion. The suit brings forth claims of public nuisance, negligence, violations of the Mississippi Consumer Protection Law (MISS. CODE ANN. § 75-24-1, *et seq.* (West 2024)), and unjust enrichment. The state is asking the court to order the defendants to abate the public nuisance that they created and pay civil penalties and restitution.

KENTUCKY FILES SUIT AGAINST EXPRESS SCRIPTS OVER ITS ROLE IN THE OPIOID CRISIS

***Commonwealth of Kentucky, ex rel. Russell Coleman v. Express Scripts, Inc.*, Kentucky Circuit Court (Jessamine County), Case No. 24-CI-00594 (suit filed September 25, 2024).** Kentucky Attorney General Russell Coleman has filed a lawsuit against the pharmacy benefit manager Express Scripts, Inc. (Express Scripts) and its affiliated organizations over their alleged role in creating the opioid crisis in Kentucky. Pharmacy benefit managers are the administrators of prescription drug plans for health insurance companies. The complaint alleges that Express Scripts colluded with Purdue Pharma and other opioid manufacturers to use deceptive marketing practices to increase the sale of opioids. The suit also claims that Express Scripts failed to report or address suspicious opioid orders and dispensed opioids through mail order pharmacies without effective diversion controls in place. The attorney general brings forth claims that Express Scripts violated the Kentucky Consumer Protection Act (KY. REV. STAT. ANN. § 367.110, *et seq*. (West 2024)) and created a public nuisance in the Commonwealth. The attorney general is asking the court to order Express Scripts to abate the public nuisance and to award the Commonwealth civil penalties of $2,000 for each willful violation of the Kentucky Consumer Protection Act.

CVS CANNOT USE INSURANCE POLICIES TO COVER OPIOID LAWSUITS

***In re CVS Opioid Insurance Litigation*, Delaware Superior Court, Case No. N22C-02-045, (opinion filed August 20, 2024).** A Delaware state court has ruled that insurers do not have an obligation to defend or indemnify CVS Health (CVS) in litigation involving the pharmacy chain's role in the opioid epidemic. CVS faced thousands of lawsuits over its role in the opioid epidemic, and upon settling many of the claims, it sought indemnification from several of its insurance companies. Under the policies, CVS was entitled to coverage for claims that sought "damages because of bodily injury or property damage," including "damages claimed by any person or organization for care, loss of services or death resulting at any time from 'bodily injury.'" In 2022, in *ACE American Insurance Co. v. Rite Aid Corp.* (270 A.3d 239), the Delaware Supreme Court held that "claims seeking generalized economic damages to redress the opioid crisis were not claims seeking 'damages because of bodily injury.'" In August 2023, the Delaware Superior Court applied the holding in the *Rite Aid* decision to CVS's request for relief to its insurance claims in defending against the opioid lawsuits (2023 decision). Following the 2023 decision, the parties agreed that the 2,151 opioid lawsuits were not covered by insurance. The parties have now asked the superior court to determine whether coverage applies to the remaining opioid lawsuits that the parties have been unable to resolve. The remaining opioid lawsuits include 62 from governmental entities and 156 from non-governmental entities, including third-party payors and hospitals. The parties filed cross-motions for summary judgment. CVS sought a declaration that the remaining opioid lawsuits at issue allege "damages because of bodily injury and property damage," while the insurers sought a declaration stating that they did not have a duty to defend or indemnify CVS for the remaining opioid lawsuits at issue. After reviewing the remaining suits, the court found that none of them tied their allegations against CVS to an individual's injury or property damage. The court determined that all of the remaining suits sought generalized economic losses, not claims for

damages because of bodily injury or property damage. Accordingly, the insurers did not have a duty to defend or indemnify the remaining suits. The court granted the insurers' motion for summary judgment and denied CVS's motion for summary judgment.

MEDICATION FOR ADDICTION TREATMENT IN CORRECTIONAL SETTINGS

- ***M.C. and T.G. v. Jefferson County, New York, et al.*, U.S. District Court for the Northern District of New York, Case No. 6:22-cv-00190-DNH-ATB (consent decree approved August 29, 2024).** For previous updates about this case, please refer to the June 2022 issue of the LAPPA *Case Law Monitor*, available here. Plaintiffs M.C. and T.G. filed a civil rights class action against Jefferson County (NY) over the Jefferson County Jail's (Jail) policy of banning medication for addiction treatment (MAT) for non-pregnant inmates. On August 29, 2024, the court approved the plaintiffs' consent decree under which the defendants, among other things, must ensure that any individual entering the jail with a current MAT prescription will be able to continue his or her treatment and that individuals without a current MAT prescription will be able to request an evaluation for treatment at intake or thereafter.

- **Washington Jail reaches Settlement with U.S. Department of Justice to Provide MAT (settlement announced September 25, 2024).** The U.S. Attorney's Office for the Western District of Washington has reached a settlement with the Mason County, Washington Jail (jail) to resolve allegations that the jail violated the Americans with Disabilities Act (ADA; 42 U.S.C. 12101) by refusing to provide inmates with medication for addiction treatment (MAT). An investigation revealed that the jail violated the ADA by discontinuing MAT for non-medical reasons. Additionally, the jail did not have any way to prescribe methadone to inmates who medically qualified for it, so any inmates who were receiving methadone prior to entering the jail had to withdraw from methadone and subsequently transition to an alternative medication. Under the terms of the settlement agreement, among other things, medical providers at the jail must prescribe and provide all three forms of MAT approved by the U.S. Food and Drug Administration to treat opioid use disorder (OUD) and must establish a policy that ensures that all inmates are evaluated for OUD at intake.

- ***Tracey Edwards v. Erik Hooks, et al.*, U.S. District Court for the Eastern District of North Carolina, Case No. 5:21-ct-03270-D (opinion filed September 30, 2024).** For previous updates in this case, please refer to the June 2022 issue of the LAPPA *Case Law Monitor*, available here. A federal district court has dismissed a former inmate's suit involving the North Carolina Correctional Institution for Women's (NCCIW) refusal to provide her with medication for addiction treatment (MAT) after she gave birth. NCCIW's MAT program was only available to pregnant individuals, so once Edwards gave birth, she no longer qualified for the program. Instead of providing Edwards with MAT post-pregnancy, the staff gave her oxycodone for nine days to try to taper her withdrawals. Edwards filed suit against NCCIW staff alleging that the refusal to provide her with MAT post-partum violated the Eighth Amendment of the U.S. Constitution, the Americans with Disabilities Act (ADA; 42 U.S.C. § 12101, *et seq*.), and Section 504 of the Rehabilitation Act (29 U.S.C. § 794). For the Eighth Amendment claim, the court ruled in the defendants' favor, holding that Edwards failed to present evidence that any of the defendants subjectively knew that she faced a substantial risk of serious harm and disregarded that risk by discontinuing MAT after she gave birth. The court also sided with the defendants on the ADA and Rehabilitation Act claims, finding that Edwards was not entitled to MAT because she no longer qualified for NCCIW's MAT program after giving birth. The court noted that despite no longer qualifying for the MAT program, staff provided Edwards with an oxycodone taper, which was a reasonable accommodation. The court denied Edwards' motion for summary judgment and granted the defendants' motion for summary judgment.

DRUG DIVERSION IN HEALTHCARE

- ***Melissa Cowan, et al. v. Yale University*, Connecticut Superior Court, Judicial District of Waterbury, Case No. FST-CV21-6057967-S (settlement announced September 9, 2024).** For previous updates about this case, please refer to the December 2021 issue of the LAPPA *Case Law Monitor*, available here. Former patients of the Yale University Reproductive Endocrinology and Infertility clinic (REI clinic) have reached a settlement with Yale University (Yale) after allegedly undergoing painful surgeries and procedures with little to no analgesic due to diversion by a nurse. Seven women initially sued Yale in 2021, but dozens more patients later came forward, bringing the total number of plaintiffs to more than 150 individuals. Details of the settlement are not publicly available.

- ***Patrick Lewallen, et al. v. Asante Rogue Regional Medical Center*, Oregon Circuit Court (Jackson County), Case No. 24CV42281 (lawsuit filed September 3, 2024).** Eighteen former patients of the Asante Rogue Regional Medical Center (RRMC) have filed suit against the hospital claiming that it was negligent in failing to prevent a former nurse from replacing patients' pain medications with non-sterile tap water. The tampered medication bags became contaminated with bacteria, which resulted in bacteria being introduced into patients' bloodstreams upon infusion. The plaintiffs are seeking over $303 million in damages, including medical expenses, lost income, and non-economic damages, such as pain and suffering.

LIABILITY FOR OVERDOSE DEATHS

- ***Matt and Christine Capelouto v. Brandon McDowell*, U.S. Bankruptcy Court for the Central District of California, Case No. 6:23-ap-01041-MH (judgment granted September 16, 2024).** The parents of a woman who died after consuming counterfeit pills laced with fentanyl won a $5.8 million judgment against the man who sold their daughter the pills. In 2019, Alexandra Capelouto contacted Brandon McDowell on Snapchat to purchase Percocet. The pills Capelouto received from McDowell were counterfeit and contained fentanyl. Capelouto consumed the pills and died of a fentanyl overdose. In 2022, McDowell pleaded guilty to possession with intent to distribute fentanyl and was sentenced to nine years. In November 2021, Capelouto's parents filed a civil suit against McDowell for wrongful death, and in December 2023, a judge entered a default judgment against McDowell and awarded the Capeloutos $5 million in damages. McDowell had filed for bankruptcy in December 2022, so in May 2023, the Capeloutos filed an adversary proceeding[3] against McDowall, and on September 16, 2024, the judge entered a judgment for non-dischargeability of debt against McDowell in the amount of $5 million plus $800,000 of interest.

- ***The People of the State of California v. Casey Linder*, Los Angeles County Superior Court, Case No. 24CJCF03707-01 (suit filed June 10, 2024).** Prosecutors in Los Angeles County, California have charged a man with murder in the 2023 overdose death of Mo Ida Solomon. Casey Linder is accused of supplying fentanyl and methamphetamine to Solomon hours before she was found to have fatally overdosed. The state asserts that Linder willingly supplied the drugs to Solomon despite knowing that they were lethal and points to text messages between Linder and Solomon over multiple months, where Solomon requested Linder bring her both heroin and fentanyl. On the night of Solomon's death, she asked Linder for heroin, and he replied that he would bring her "that other stuff," which, the state claims, meant fentanyl. The state also claims that Linder knew that the drugs were deadly. The Los Angeles District Attorney has charged Linder with one count of murder, four counts of selling a controlled substance, and four counts of possession of a controlled substance with intent to sell. Note that California does not have a drug-induced homicide law.[4]

[3] Adversary proceedings are a bankruptcy court's version of a civil action. A debtor, a creditor, or the trustee can initiate an adversary proceeding to accomplish something that cannot be achieved by filing a motion within the bankruptcy case. *See Adversary Proceedings During the Bankruptcy Legal Process*, JUSTIA (visited Sept. 19, 2024), https://www.justia.com/bankruptcy/bankruptcy-procedures/adversary-proceedings/.

[4] For more information on drug-induced homicide laws, please refer to LAPPA's *Good Samaritan Fatal Overdose Prevention and*

- ***Lynnel Cox v. City of Boston, et al.*, U.S. District Court for the District of Massachusetts, Case No. 1:22-cv-11009-RGS (jury verdict reached August 19, 2024).** For previous updates about this case, please refer to the June 2024 issue of the LAPPA *Case Law Monitor*, available here. A federal jury found four police officers not liable for the overdose of Shayne Stilphen who died while in custody at their police station. In June 2022, Stilphen's mother Lynnel Cox, as the representative of his estate, filed suit against the City of Boston, the Boston Police Department, and the four individual Boston police officers in federal district court. Cox's complaint alleged that the officers' failure to administer essential medical care had violated Stilphen's constitutional due process rights under the Fourth Amendment of the U.S. Constitution. The complaint further alleged that the City of Boston had violated the Americans with Disabilities Act (42 U.S.C. § 12102) by discriminating against Stilphen because of his opioid use disorder. Following the court granting Cox's request to try the police officers separately from the other defendants, the jury trial began on August 19, 2024. The jury found in favor of all of the officers on all counts. On September 16, 2024, Cox filed a motion for a new trial on the grounds of incorrect jury instructions and erroneous evidentiary rulings. The four police officers filed their opposition to the motion for a new trial on September 30, 2024.

FOURTH CIRCUIT RULES THC-O MEETS LEGAL DEFINITION OF HEMP

***Tonya Anderson v. Diamondback Investment Group, LLC*, U.S. Court of Appeals for the Fourth Circuit, Case No. 23-1400 (opinion filed September 4, 2024).** While ruling on an Americans with Disabilities Act (ADA; 42 U.S.C. § 12101, *et seq.*) discrimination claim, the Fourth Circuit determined that, as a matter of first impression, THC-O, a synthetic cannabinoid, is not illegal under federal law. Diamondback Investment Group, LLC (Diamondback) hired Tonya Anderson as a contract "liaison." Upon hiring, Diamondback gave Anderson a copy of its employee manual, which stated that an offer of employment is conditioned on a negative test for drugs and alcohol. Anderson suffered from anxiety, muscle spasms, and joint pain and used products derived from hemp to manage her conditions. While she was employed at Diamondback, she took a combination of delta-8 THC, delta-10 THC, and THC-O in a prefilled vaporizer cartridge and used a full spectrum cannabidiol (CBD) oil. Throughout her time at Diamondback, Anderson consumed CBD oil in the morning before work and a draw of her vaporizer at lunch time. Shortly after Anderson began her employment, she submitted her required drug screen. The test came back positive for cannabis, and Diamondback allowed her to retest. During the day of the second test, Anderson emailed her supervisor and Diamondback's owners to inform them that she takes CBD. Anderson did not specify in the email why she took CBD but provided a doctor's note to Diamondback stating that she took over-the-counter CBD products for anxiety and muscle spasms but did not provide more detail. Anderson's subsequent drug screen came back positive for cannabis, and Diamondback terminated her as a result. After her termination, Anderson filed a charge with the Equal Employment Opportunity Commission. She also filed a lawsuit against Diamondback, raising three claims: (1) a wrongful discharge under the ADA; (2) a failure to accommodate a claim under the ADA; and (3) discrimination for the lawful use of a lawful product during non-working hours under N.C. GEN. STAT. ANN. § 95-28.2 (West 2024). Diamondback moved for summary judgment on all claims, which the district court granted.

Anderson filed an appeal with the Fourth Circuit, which affirmed the district court's ruling that Anderson failed to properly establish a wrongful discharge claim and a failure to accommodate claim. For the state law claim, Anderson asserted on appeal that because her use of hemp-derived products was legal, her termination was unlawful under the North Carolina "lawful use of lawful products" statute. Diamondback argued that Anderson failed to state a wrongful discharge claim under § 95-28.2 because it is undisputed that: (1) she was using THC, which is an unlawful product; (2) her use of THC occurred during working hours; and (3) her discharge was pursuant to a bona fide occupational requirement that was reasonably related to employment activities, namely a drug testing policy targeted at maintaining workplace safety and efficiency. Diamondback argued that THC-O was illegal under state and federal law because it is a synthetic cannabinoid. The Agriculture Improvement Act of

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Drug-induced Homicide: Summary of State Laws, available here.

2018 (2018 Farm Bill) amended the federal Controlled Substances Act to exclude certain hemp-derived products from the definition of illegal cannabis and illegal THC. (Pub. L. No. 115-335, § 12619, 132 Stat. 4490, 5018 (Dec. 20, 2018)).[5] Federal law defines "hemp" as "the plant Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis." (7 U.S.C. § 1639o). North Carolina's Controlled Substances Act mirrors the language of the federal statute. (N.C. GEN. STAT. ANN. § 90-94(b)). The critical distinction that separates illegal cannabis and THC from legal hemp under both North Carolina and federal law is the product's delta-9 THC concentration.

To support its assertion that THC-O is illegal, Diamondback relied on an interim final rule promulged by the Drug Enforcement Administration (DEA), which states that all synthetically derived THC remain Schedule I controlled substances.[6] Diamondback further argued that in an opinion letter from February 2023, the DEA clarified that THC-O is a Schedule I controlled substance because it is synthetic and not naturally occurring.[7] However, the court noted that the Ninth Circuit rejected a similar argument as applied to delta-8 THC in *AK Futures LLC v. Boyd Street Distro LLC* (35 F.4th 682; for more information on this case, please refer to the June 2022 edition of the LAPPA *Case Law Monitor*, available here.) In *AK Futures*, the Ninth Circuit held that it did not need to consider the DEA's position on synthetically derived substances because the definition of "hemp" under the 2018 Farm Bill was unambiguous in its application to all products derived from the cannabis plant as long as they did not cross the 0.3 percent delta-9 THC threshold. The court agreed with the Ninth Circuit's ruling that the definition of hemp is unambiguous and, rejected Diamondback's argument that the DEA's interim final rule and opinion letter mandated a finding that THC-O is illegal.

However, the court noted that its ruling on THC-O is of little help to Anderson because she did not offer evidence about the delta-9 THC concentrations of the products she used. Without evidence of the delta-9 THC concentration of Anderson's products, the court determined that no factfinder could reasonably find that the products were lawful. It continued that even if a factfinder assumed that the hemp-derived products Anderson consumed were covered by the lawful products statute, Diamondback would still be entitled to judgment as a matter of law based on the bona fide occupational requirement exception. The court agreed with the district court's ruling that Diamondback's drug and alcohol policy was reasonably related to its employment activities in that it was related to maintaining safety in the workplace. Thus, the court affirmed Diamondback's motion for summary judgment. A concurring opinion agreed that the majority rightly concluded the state-law claim failed but would have left the interpretive question about THC-O's legality for another day.

NEW JERSEY HEMP BUSINESSES SUE STATE OFFICIALS OVER NEW HEMP LAWS

***Loki Brands, LLC, et al. v. Matthew J. Platkin, et al.*, U.S. District Court for the District of New Jersey, Case No. 3:24-cv-09389-ZNQ-TJB (opinion filed October 10, 2024).** A group of hemp businesses have filed suit against New Jersey government officials claiming that a recently enacted state law will cause them financial harm. On September 12, 2024, New Jersey Governor Phil Murphy signed the Hemp Act Amendments bill (S.B. 3235) into law, which amended the New Jersey Hemp Farming Act (N.J. Hemp Act; N.J. STAT. ANN. § 4:28-6, *et seq.* (West 2024)) by narrowing the definition of hemp and hemp products. Prior to the amendment, the N.J. Hemp Act defined "hemp" as "the plant Cannabis sativa L. and any part of that plant, including the seeds of the plant and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis," (N.J. STAT. ANN. §

[5] For more information on the 2018 Farm Bill, please refer to LAPPA's Federal Hemp Regulation: USDA's Recent Interim Final Rule factsheet, available here.
[6] Implementation of the Agricultural Improvement Act of 2018, 85 Fed. Reg. 51639-01, 51641 (Aug. 21, 2020).
[7] DRUG ENF'T ADMIN., DIVERSION CONTROL DIV., OPINION LETTER (Feb. 13, 2023), https://www.greenmarketreport.com/wp-content/uploads/2023/02/DEA-THCO-response-to-Kight.pdf.

4:28-8 (West 2024)), which was identical to the federal definition of hemp established under the 2018 Farm Bill (7 U.S.C. § 1639o). The amendment changed the definition of hemp to be based on the concentration of all THC (*i.e.* total THC) rather than on the concentration of delta-9 THC. The amendment defines "total THC" to include the total concentration of all THC in hemp or a hemp product and any other chemically similar substance, regardless of how it is derived. Prior to the amendment, the N.J. Hemp Act defined "hemp product" as any hemp plant-derived product that had a concentration of delta-9 THC that was equal to or less than 0.3 percent on a dry weight basis. The amendment narrowed the definition of hemp product to include only Cannabis sativa L. derivatives and products with: (1) a concentration of total THC that is equal to or less than 0.3 percent on a dry weight basis; and (2) equal to or less than 0.5 mg of total THC per serving and equal to or less than 2.5 mg of total THC per package. The amendment establishes that all products *made from hemp in New Jersey and sold in New Jersey* that have a total THC greater than 0.5 mg per serving or 2.5 mg per package will be considered "intoxicating hemp products" and permits them only to be sold by Class 5 Cannabis Retailers (emphasis added).[8] However, intoxicating hemp products are exempt from the Controlled Dangerous Substance Act (CDS; N.J. STAT ANN. § 24:21-1, *et seq*. (West 2024)). The plaintiffs argued that the amendment's narrow definitions threaten the existing hemp market and will cause them irreparable financial harm and brought forth claims that the amendment violates the Supremacy Clause by directly contradicting the 2018 Farm Bill and the Dormant Commerce Clause of the U.S. Constitution.

The court mentioned that the amendment changing the definition of "hemp" does not mean that it is unconstitutional or preempted but also noted that the 2018 Farm Bill states that "no state . . . shall prohibit the transportation or shipment of hemp or hemp products . . . through the state." As written with the amendment, state law does not recognize intoxicating hemp products that are cultivated, produced, or manufactured outside of New Jersey and does not exempt them from the CDS. This makes it effectively a crime to transport or ship out-of-state intoxicating hemp products to, or through, New Jersey. Thus, because the amendment would prohibit the transportation or shipment of certain hemp products, the court ruled that it preempted the 2018 Farm Bill. The court also ruled that the amendment violates the Dormant Commerce Clause because it favors New Jersey hemp companies over out-of-state competitors. The court determined that the unconstitutional portion of the amendment is severable from the other provisions and that the state would only be enjoined from enforcing the portions of the amendment that violated the 2018 Farm Bill's preemption provision and the Dormant Commerce Clause. A case similar to this one involving changes to hemp regulations in California has been filed by hemp stakeholders in California state court, and is currently ongoing. (*U.S. Hemp Roundtable, Inc., et al. v. California Department of Public Health, et al.*, Superior Court of California (County of Los Angeles), Case No. 24STCP03095 (suit filed September 24, 2024)).

BALTIMORE REACHES SETTLEMENTS WITH CARDINAL HEALTH, TEVA, WALGREENS, AND JOHNSON & JOHNSON

***Mayor & City Council of Baltimore v. Purdue Pharma L.P., et al.*, Circuit Court of Maryland (Baltimore City), Case No. 24-C-18-000515 (settlements announced August 16, 2024, September 9, 2024, September 10, 2024, and September 16, 2024).**

- For previous updates about this case, please refer to the August 2024 issue of the LAPPA *Case Law Monitor*, available here. On August 16, 2024, Baltimore Mayor Brandon Scott announced that the city reached a $152.5 million settlement with Cardinal Health to resolve claims that the company helped fuel the opioid epidemic. Cardinal Health will pay the entire settlement amount this year. Baltimore declined to join the global settlement involving Cardinal Health, McKesson, and AmerisourceBergen. Had the city joined the global settlement, it would have received less than $70 million over two decades. Baltimore has committed to using

[8] New Jersey's Class 5 Cannabis Retailer License allows licensees to operate a business that can legally purchase/obtain cannabis products from manufacturers, wholesalers, and other retailers for the purpose of sale to consumers. "New Jersey Class 5 Retail License," CANNADELTA (last accessed Oct. 10, 2024), https://canndelta.com/us/new-jersey/new-jersey-class-5-retail-license/.

its recovery from Cardinal Health solely for opioid remediation and to provide funds to various substance use disorder treatment centers and community organizations throughout the city.

- On September 9, 2024, Mayor Scott announced that the city reached an $80 million settlement with Teva Pharmaceuticals (Teva). Teva will make an initial payment of $35 million by the end of 2024 and pay the remainder by July 1, 2025. Baltimore declined to join Teva's national settlement. Had the city joined the settlement, it would have received $11 million paid over 13 years. From the Teva settlement funds, the city will allocate some funds to its 988 system and recovery centers, while the remaining funds will be distributed through the Baltimore City Opioid Restitution Fund.
- On September 10, 2024, the mayor announced that the city reached an $80 million settlement with Walgreens. Walgreens will pay the city $45 million by the end of 2024 and the remainder by December 31, 2025. The city will use the entirety of the settlement for opioid remediation, with funds allocated for peer advisory, recovery centers, outreach centers, and overdose response. The remaining funds will be distributed through the Baltimore City Opioid Restitution Fund.
- On September 16, 2024, news outlets reported that the city reached a settlement with Johnson & Johnson. The details of the settlement are not publicly available.
- The trial against the remaining two defendants—McKesson and AmerisourceBergen —began on September 16, 2024. The judge overseeing the case has allowed the city to introduce evidence of McKesson's 2017 settlement with the U.S. Department of Justice in which the company admitted that it did not properly report suspicious orders of pharmaceuticals or maintain preventative measures to prevent diversion.

"BIG THREE" DISTRIBUTORS REACH SETTLEMENT WITH U.S. HEALTH PLANS

"Big Three" Distributors Reach Settlement with U.S. Health Plans (settlement announced August 30, 2024). McKesson Corp., Cardinal Health, Inc., and Cencora, Inc. (formally AmerisourceBergen) have reached a $300 million settlement to resolve claims by health insurers and benefit plans that they helped fuel the opioid epidemic. McKesson will pay 38.1 percent of the settlement, Cardinal Health will pay 30.9 percent, and Cencora will pay 31 percent. The distributors did not admit to any wrongdoing as part of the settlement. The settlement will need to be approved by a judge before it can go into effect.

RECENT UPDATES 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 (adversary and related proceedings filed August 2024). For previous updates about this case, please refer to the June 2024 issue of the LAPPA *Case Law Monitor*, available here.

- ***Matthew Dundon v. McKinsey & Company, Inc., et al.*, U.S. Bankruptcy Court for the Southern District of New York, Case No. 24-07027-jlg (adversary proceeding filed August 15, 2024).** A trustee for Endo International, PLC's (Endo) bankruptcy plan has filed suit against the consulting firm McKinsey & Company (McKinsey) asserting that the company should pay for the harm it caused Endo through its advice on marketing and selling opioids. The trustee alleges that through "intentional misconduct" McKinsey destroyed the value of Endo. Per the complaint, McKinsey conducted a "sales force blitz" from 2015 to 2016 to increase sales of Endo's oxymorphone drug, Opana ER. The suit claims that because of McKinsey's opioid-related strategies, Endo had to pay more than $1.2 billion in damages and settlements in opioid-related litigation. The suit also asserts that McKinsey helped Endo's officers and directors breach their fiduciary duties by helping drive sales of opioids despite knowing the risks of addiction and litigation. The trustee argues that McKinsey should indemnify Endo for the costs of the strategies that it recommended and that the company enacted. Furthermore, the trustee asserts that the payments that Endo made to McKinsey for its opioid-related consulting services should be considered "constructive fraudulent transfers" because they ultimately led to

Endo's bankruptcy. The suit brings forth claims of contractual indemnification and aiding and abetting breach of fiduciary duty. The trustee is asking the court for recovery against McKinsey in an amount to be determined at trial.

- ***Matthew Dundon v. TPG Capital LP, et al.*, U.S. Bankruptcy Court for the Southern District of New York, Case No. 24-07030-jlg (adversary proceeding filed August 16, 2024).** The trustee filed suit against the private equity firm TPC Capital LP (TPG) arguing that it should pay Endo's unsecured creditors $4.5 billion for its role in the opioid epidemic and for the corresponding injury it inflicted on Endo and its creditors. In 2012, for $738 million, TPG bought Par Pharmaceuticals (Par) which produced generic opioid medications. During the years that TPG owned Par, the company's market share in certain generic opioids increased from 15 percent to 25 percent of the market. During this time, auditors warned Par and TPG that they were not meeting federal requirements for detecting suspicious orders of opioids. In May 2015, TPG sold Par to Endo in a deal valued at approximately $8 billion. Just prior to the sale, TPG caused Par to pay $494 million to TPG and its co-investors. Additionally, in connection with the sale, TPG and various insiders received transfers from Endo totaling approximately $5.4 billion. At the time of the sale, Endo was insolvent. The complaint asserts that the Par sale provided TPG, its co-investors, and limited partners with a large return on investment, while "Endo simply inherited a mountain of further opioid liabilities." The trustee is seeking to hold TPG, as the former owner of Par, liable for "indemnity, reimbursement, and/or contribution for its proportionate liability as a join tortfeasor" in connection with Endo's opioid liability settlements. The suit aims to recover the $494 million dividend that TPG and its affiliates made Par pay before the sale and about $4 billion in transfers that TPG and the insiders received from Endo while the company was insolvent.

- ***Matthew Dundon v. ACE Property & Casualty Insurance Co., et al.*, U.S. District Court for the Eastern District of Pennsylvania, Case No. 2:24-cv-04221 (suit filed August 15, 2024).** The trustee has filed a lawsuit against nearly 40 insurers who have either disputed, or are expected to dispute, their duties to cover Endo's underlying claims related to opioids. The complaint claims that Endo's policies for product liability and commercial general liability insurance cover its liabilities related to opioid litigation and that the insurers are obligated to pay. The trustee is seeking a declaratory judgment that each of the defendants is obligated under each of the insurance policies it issued to provide coverage in full for Endo's liability and defense cost in the underlying claims.

UTAH ANNOUNCES INTENT TO CONTINUE PROCEEDINGS AGAINST RICHARD SACKLER

***In the Matter of Purdue Pharma, L.P., et al.*, Division of Consumer Protection of the Utah Department of Commerce, Case No. CP-2019-005 (intent to proceed filed September 16, 2024).** The Utah Division of Consumer Protection (Division), represented by the Utah Attorney General's office, has announced its intent to resume its 2019 legal action against Richard Sackler, MD, one of the former owners of Purdue Pharma (Purdue). The action was voluntarily stayed after Purdue filed for bankruptcy. However, in June 2024, the U.S. Supreme court rejected the part of Purdue's bankruptcy plan that would have protected the Sackler family from lawsuits. (*Harrington v. Purdue Pharma L.P.*, 144 S.Ct. 2071; for more information on this case, please refer to the August 2024 edition of the LAPPA *Case Law Monitor*, available here.) The suit claims that Purdue and Sackler created a public health crisis by deceptively marketing OxyContin as less prone to misuse and addiction than other opioids. Utah's case will proceed only against Sackler, as Purdue has filed for bankruptcy and entered into a settlement with Utah and other states. The legal action could result in significant fines against Sackler. The Division intends to file a motion for a lift of the stay once the voluntary stay expires and will schedule a status conference as early as possible thereafter. See below for information on the stay's expiration.

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 August 2024 issue of the LAPPA *Case Law Monitor*, available here. A federal bankruptcy court judge has approved Purdue Pharma's (Purdue) request to extend an injunction pausing suits against the Sackler family until November 1, 2024. Purdue claimed that extending the injunction would allow for continued settlement talks with states, opioid victims, and other creditors. The two mediators overseeing the settlement discussions supported the extension, as did a committee representing opioid victims and most states. However, Rhode Island, Washington, and Maryland opposed the request for an extension. Prior to the extension, the injunction was set to expire on September 27, 2024.

ABOUT LEGISLATIVE ANALYSIS AND PUBLIC POLICY ASSOCIATION

The Legislative Analysis and Public Policy Association (LAPPA) is a 501(c)(3) nonprofit organization whose mission is to conduct legal and legislative research and analysis and draft legislation on effective law and policy in the areas of public safety and health, substance use disorders, and the criminal justice system.

LAPPA produces up-to-the-minute comparative analyses, publications, educational brochures, and other tools ranging from podcasts to model laws and policies that can be used by national, state, and local criminal justice and substance use disorder practitioners who want the latest comprehensive information on law and policy. Examples of topics on which LAPPA has assisted stakeholders include naloxone laws, law enforcement/community engagement, alternatives to incarceration for those with substance use disorders, medication for addiction treatment in correctional settings, and the involuntary commitment and guardianship of individuals with alcohol or substance use disorders.

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