LEGISLATIVE ANALYSIS AND PUBLIC POLICY ASSOCIATION

Case Law Monitor

DECEMBER 2024

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

IN THIS ISSUE...

ADA CLAIM AGAINST ILLINOIS COMPANY TO PROCEED TO TRIAL

***David McBride v. Axium Foods, Inc.*, U.S. District Court for the Northern District of Illinois, Case No. 3:21-cv-50202 (opinion filed November 15, 2024).** An Americans with Disabilities Act (ADA; 42 U.S.C. 12112) suit against the Illinois snack food manufacturer Axium Foods, Inc. (Axium) will proceed to trial after a federal district court dismissed the company's motion for summary judgment. The plaintiff, David McBride, is in recovery from opioid use disorder (OUD) and takes a daily dose of methadone to alleviate his cravings. On June 14, 2019, McBride applied for a "corn chip process operator" position at Axium. On June 21, 2019, Axium offered McBride a conditional offer of employment contingent on him passing a drug screen and a physical examination. The doctor that performed McBride's physical examination concluded that he was "cleared without limitations and able to perform essential job functions" but also stated that he "must not perform safety sensitive positions, *i.e.* work at heights." The evaluation did not describe what "safety sensitive" means, nor did the record show whether the position for which McBride applied would require him to work "at heights." McBride's urine drug screen was negative for all the tested substances including methadone and opiates. During a tour of the Axium facilities with the company's human resources manager, Jeff Kizer, on a date that is disputed by the parties, McBride informed Kizer of his history of OUD and his methadone use. McBride claims that Kizer then told him that he could not work at Axium while on methadone and rescinded his conditional job offer. Kizer disputed that he withdrew the job offer and claimed that he informed McBride that Axium would offer him an accommodation with the same pay and hours or that he could obtain a functional capacity exam to clear him for "work at heights."

On August 8, 2019, McBride filed discrimination charges against Axium with the Equal Employment Opportunity Commission, and on May 18, 2021, he filed this action in federal court alleging two counts of discrimination under the ADA: one seeking compensatory damages for the rescission of the offer and another for injunctive relief to enjoin Axium from enforcing its alleged "policy of discrimination against disabled persons." On May 2, 2024, Axium filed a motion for summary judgment stating that McBride failed to establish that he was otherwise qualified to perform the essential functions of the position. The court denied Axium's motion for summary judgment finding sufficient evidence that McBride was able to satisfactorily perform the job functions with or without an accommodation. The court cited McBride's medical evaluation, which cleared him for the essential functions to work at Axium, in its reasoning for denying the motion for summary judgment. The court noted that the additional entry in the medical evaluation recommending that McBride not work in a safety sensitive position or "at heights" raises questions but determined that those questions are best meant for a jury to resolve. On December 5, 2024, the court referred the case for a settlement conference. *(Return to In This Issue)*

WRONGFUL DEATH SUIT FILED AGAINST PHILADELPHIA POLICE AFTER MAN DIES OF WITHDRAWAL WHILE IN CUSTODY

***Kathy Lau v. City of Philadelphia, et al.*, U.S. District Court for the Eastern District of Pennsylvania, Case No. 2:24-cv-06352-JMY (suit filed November 27, 2024).** The administrator of the estate of a homeless man who died while in custody of the Philadelphia Police Department has filed a lawsuit against the city, the police department, 12 police officers, a nurse, and the health care company Yescare for failing to properly treat and manage the decedent's withdrawal symptoms. On September 5, 2023, police officers approached Jonathan Lau as he matched the description of a person who committed a theft. A search of the National Crime Information Center database found that Lau had a bench warrant from York County, Pennsylvania for failing to report for probation. The officers took Lau into custody and transported him to the Philadelphia Police Department Detention Unit. According to the complaint, Lau did not receive any medical care upon arrival at the detention unit despite exhibiting "obvious" signs of severe withdrawal. On September 7, 2023, a correctional officer completed a medical checklist form and indicated that Lau stated that "he is a heroin addict and is going through withdrawal." The correctional officer indicated on the form that she did not observe any "visible signs of alcohol and/or drug withdrawal." The next day, a member of the detention unit staff attempted to perform an "opiate and benzo assessment" on Lau, but he refused the assessment. Later in the day, staff observed Lau slumped over in his cell and observed stale vomit. A nurse employed by Yescare recommended that Lau be transported to the hospital, but Lau was not transported due to a failure of the staff to follow through with the recommendation. Hours later, an officer found Lau unresponsive in his cell where he was pronounced dead. The complaint asserts that the defendants failed to properly investigate and treat Lau's withdrawal symptoms and left him in his cell to suffer for approximately four days. The suit brings forth claims of negligence, wrongful death, and violations of the Fourteenth Amendment of the U.S. Constitution for deficient and inadequate medical care. The administrator of the estate is asking for a sum in excess of $150,000 in compensatory damages. *(Return to In This Issue)*

BRONX DAYCARE OWNER PLEADS GUILTY IN CHILD FENTANYL POISONING CASE

***United States v. Grei Mendez, et al.*, U.S. District Court for the Southern District of New York, Case No. 1:23-cr-00504-JSR (guilty plea entered October 29, 2024).** For previous updates in this case, please refer to the August 2024 issue of the LAPPA *Case Law Monitor*, available here. Grei Mendez, the owner of the Bronx daycare facility where four children were sickened by fentanyl poisoning, one of whom died, has pleaded guilty to federal charges. Mendez's charges included conspiracy to distribute narcotics resulting in death, possession with intent to distribute narcotics resulting in death, and possession with intent to distribute narcotics resulting in serious bodily injury. She faces a minimum of 20 years in prison. Three other defendants in the case have previously pleaded guilty, including Mendez's husband, Felix Herrera Garcia. In October 2024, the court sentenced Herrera Garcia to 45 years in prison. The other two defendants, Renny Antonio Parra Paredes and Jean Carlo Amparo Herrera, received 30-year and 10-year prison sentences, respectively. The case proceeds against Carlisto Acevedo Brito, the man who lived inside the daycare facility, as he has not entered a plea deal. *(Return to In This Issue)*

CALIFORNIA MAN CHARGED WITH DISTRIBUTION OF PROTONITAZENE RESULTING IN DEATH

***United States v. Benjamin Anthony Collins*, U.S. District Court for the Central District of California, Case No. 2:24-cr-00689 (indictment issued November 15, 2024).** A federal grand jury has indicted Benjamin Anthony Collins from Santa Clarita, California with one count of distribution of protonitazene resulting in death (21 U.S.C. § 841). Protonitazene belongs to the nitazene class of synthetic opioids which are more potent than fentanyl. This case is believed to be the nation's first death-resulting criminal case involving this substance. According to the indictment, in April 2024, Collins knowingly and intentionally sold pills containing protonitazene to the 22-year-old victim and arranged to sell the victim a bulk supply of the pills in the future. The victim consumed the pills soon after receiving them and died shortly afterward. His mother found him unresponsive in his car and called 911. Police arrested Collins on November 18, 2024, and he pleaded not guilty. He is currently being held in jail without bond. The court has scheduled a trial date for January 14, 2025. If convicted, Collins faces a mandatory minimum sentence of 20 years in federal prison. *(Return to In This Issue)*

FIFTH CIRCUIT RULES SECOND AMENDMENT DOES NOT SUPPORT DISARMING A SOBER PERSON BASED SOLELY ON PAST SUBSTANCE USE

***United States v. Paola Connelly*, U.S. Court of Appeals for the Fifth Circuit, Case No. 23-50312 (opinion filed August 28, 2024).** The Fifth Circuit has ruled that the Second Amendment of the U.S. Constitution does not support disarming a sober person based solely on past substance use. On December 28, 2021, El Paso, Texas police officers responded to a report of shots fired at Paola Connelly's home. Upon arrival police found Paola's husband standing at a neighbor's door firing a shotgun. After police arrested her husband, Connelly informed the officers that her husband and neighbor used crack and powdered cocaine. She also admitted that she would occasionally use cannabis as a sleep aid and for anxiety. The record stated that there was not any evidence that Connelly was under the influence of cannabis at the time the events occurred. A sweep of the house revealed drug paraphernalia and unsecured firearms and ammunition, including a pistol purchased by Connelly. A grand jury indicted Connelly with violating 18 U.S.C. § 922(g)(3) by possessing firearms and ammunition as an unlawful user of a controlled substance and 18 U.S.C. § 922(d)(3) by providing firearms and ammunition to an unlawful user of controlled substances. Connelly filed a motion to dismiss her indictment arguing that §§ 922(g)(3) and 922(d)(3) were unconstitutional under the Second Amendment. The district court agreed with Connelly holding that §§ 922(g)(3) and 922(d)(3) were facially unconstitutional (*i.e.* unconstitutional when applied to anyone) and that § 922(g)(3) was unconstitutional as applied to her. The government appealed.

Precedent establishes a two-step process for Second Amendment challenges. First, the court must determine whether the Second Amendment's plain text covers an individual's conduct. Then, the court must determine "whether the challenged regulation is consistent with the principles that underpin our regulatory tradition." The government has the burden of demonstrating that the challenged regulation is "'relevantly similar' to laws our tradition is understood to permit," and it does so by finding and explaining "historical precursors" supporting the challenged law's constitutionality. The court determined that Connelly has a presumptive right to bear arms based on the plain text of the Second Amendment, so the government offered three historical analogues to support its argument that § 922(g)(3) is constitutional as applied to Connelly: (1) laws disarming the mentally ill; (2) laws disarming "dangerous" individuals; and (3) intoxication laws. The court rejected all three historical analogues finding that while they may provide support for banning the carrying of firearms while an individual is actively intoxicated, they do not support the disarming of individuals based on habitual or occasional drug use. Thus, as applied to Connelly, § 922(g)(3) restricts her Second Amendment rights far

more than the U.S.'s history and tradition of firearms regulation can support. Thus, § 922(g)(3) is unconstitutional as applied to Connelly. However, the court determined that §§ 922(g)(3) and 922(d)(3) are facially constitutional because the U.S.'s history and tradition of firearms regulation shows that there are some circumstances where §§ 922(g)(3) and 922(d)(3) would be valid, such as banning actively intoxicated individuals from carrying weapons. In sum, the Fifth Circuit affirmed the dismissal of Connelly's § 922(g)(3) charge and reversed the district court's ruling that §§ 922(g)(3) and 922(d)(3) were facially unconstitutional. On September 10, 2024, the government filed a motion for reconsideration, but the court denied that motion. *(Return to In This Issue)*

OREGON LAW PROHIBITING VAPE PRODUCT PACKAGING THAT IS ATTRACTIVE TO MINORS RULED UNCONSTITUTIONAL

***Paul Bates, et al. v. Oregon Health Authority, et al.*, Oregon Court of Appeals, Case No. A180270 (opinion filed October 16, 2024).** An Oregon Court of Appeals has ruled that a statute prohibiting the sale of inhalant delivery systems (*i.e.*, e-cigarettes and vapes) that are packaged in a manner attractive to children violated the Oregon Constitution's right to free speech. In 2015, the Oregon Legislature enacted various laws addressing inhalant delivery systems. One such law made it unlawful to "distribute, sell, or allow to be sold an inhalant delivery system if the inhalant delivery system is packaged in a manner that is attractive to minors as determined by the [Oregon Health Authority] by rule." (OR. REV. STAT. § 431A.175(2)(f) (West 2024)). The Oregon Health Authority subsequently promulgated rules regarding packaging of inhalant delivery systems, including OR. ADMIN. R. 333-015-0357 (West 2024), which prohibited inhalant delivery system product packaging from using cartoons, celebrity endorsements, animals, sweet flavors, and certain descriptors for other flavors likely to appeal to minors. The plaintiffs filed a complaint against the Oregon Health Authority seeking declaratory and injunctive relief, asserting that § 431A.175(2)(f) and its regulations violated Article I, Section 8 of the Oregon Constitution by "impermissibly infringing upon the right to free speech through the prohibition of truthful, non-misleading communication of information about legal products based on the content of the communications." Both parties filed motions for summary judgment. The circuit court dismissed the claims, ruling that it did not have jurisdiction over the plaintiffs' challenge to the regulation and that challenges to an agency regulation must be brought in the court of appeals. On appeal, the court focused on § 431A.175(2)(f)'s phrase "packaged in a manner that is attractive to minors." The court concluded that the word "attractive," as it refers to the manner in which a product is packaged, refers to the packaging's expressive content and not to the utility or function of the package. Therefore, the "attractiveness" of the manner of packaging is expressive speech. The court ruled that because § 431A.175(2)(f) restrains expression and does not regulate the effect of a sale to a minor or a minor's later use of the product, the statute is an unconstitutional restriction of speech under the Oregon Constitution. The court remanded the case to the circuit court to enter a judgment consistent with its opinion. *(Return to In This Issue)*

OKLAHOMA LABORATORY FACES FALSE CLAIMS ACT SUIT FOR IMPROPERLY BILLED URINE DRUG TESTS

***United States, et al. v. Coordinated Care Health Solutions LLC, et al.*, U.S. District Court for the Western District of Oklahoma, Case No. 5:24-cv-01185-JD (suit filed November 15, 2024).** The federal government and the state of Oklahoma have jointly brought forth a lawsuit against the Oklahoma-based laboratory Coordinated Care Health Solutions (Coordinated Care) and its laboratory director alleging violations of the False Claims Act (31 U.S.C. § 3729). The plaintiffs claim that Coordinated Care improperly billed federal health care programs and the state Medicaid program for unnecessary urine drug tests. According to the complaint, Coordinated Care billed for tests in a manner that resulted in federal health care programs being charged for the highest and most expensive level of drug testing regardless of the medical needs of the patient. Additionally, the company would disguise non-reimbursable urine drug tests as blood tests in order to get

around Oklahoma Medicaid's prior authorization requirement for definitive urine drug testing services. The complaint brings forth violations of the False Claims Act and the Oklahoma Medicaid False Claims Act (OKLA. STAT. ANN. tit. 63, § 5053.1 (West 2024)), in addition to claims of payment by mistake, unjust enrichment, and common law fraud. The plaintiffs seek damages and civil penalties. *(Return to In This Issue)*

RETIRED DEA AGENT CONVICTED OF FRAUD AND DRUG TRAFFICKING CONSPIRACY

***United States v. Joseph Bongiovanni*, U.S. District Court for the Western District of New York, Case No. 1:19-CR-227 JLS (jury verdict reached October 10, 2024).** A federal jury has convicted a retired U.S. Drug Enforcement Administration (DEA) agent of conspiracy to defraud the U.S. and conspiracy to distribute controlled substances. Joseph Bongiovanni served as a DEA Special Agent from 1998 to 2019 and was stationed out of Buffalo, New York for most of his career. According to evidence offered at trial, Bongiovanni allegedly used his position to sabotage investigations into individuals connected to Italian organized crime and accepted over $250,000 in bribes. Bongiovanni shared sensitive law enforcement information, including the existence of active investigations and the identities of police informants, to protect friends and associates that were under criminal investigation. He also opened a DEA case file so that other law enforcement officials at the local, state, and federal levels would defer to him in any investigation involving the individuals he was protecting. Bongiovanni and his associates were further alleged to have conspired to distribute cocaine, methamphetamine, cannabis, and heroin. In October 2019, after Bongiovanni had retired from the DEA, a grand jury indicted him in the Western District of New York on charges of conspiracy to defraud the U.S., conspiracy to distribute controlled substances, accepting a bribe as a public official, obstruction of justice, and making false statements to an agency of the U.S. His first trial resulted in a mistrial, but on October 10, 2024, a second jury convicted Bongiovanni on seven counts: one count of conspiracy to defraud the U.S., one count of conspiracy to distribute controlled substances, four counts of obstructions of justice, and one count of false statements to law enforcement. His sentencing hearing is scheduled for June 9, 2025. The charges carry a maximum penalty of 20 years in prison and a $250,000 fine. *(Return to In This Issue)*

KRATOM COMPANY SUES FDA OVER THE AGENCY'S WARNING INVOLVING THE COMPANY'S PRODUCTS

***Martian Sales, Inc. v. U.S. Food and Drug Administration, et al.*, U.S. District Court for the District of Columbia, Case No. 1:24-cv-03031-RBW (suit filed October 23, 2024).** Martian Sales, Inc. (Martian Sales), the trademark owner of O.P.M.S. Black Liquid Kratom (O.P.M.S. Black), has filed suit against the U.S. Food and Drug Administration (FDA) over a warning that the agency issued about the safety of the company's products. On July 26, 2024, the FDA issued a public warning advising consumers not to consume O.P.M.S. Black due to the products being "linked to serious adverse health effects, including death." Martian Sales claims that the FDA issued the warning without any evidence to support its claims and that it published the warning with the intention of singling out and punishing the company. By refusing to withdraw the warning, Martian Sales claims that the FDA has caused, and continues to cause, injury to the company by damaging the company's brand and image and negatively affecting its sales. Martian Sales brings forth claims of an arbitrary and capricious agency action in violation of the Administrative Procedures Act (5 U.S.C. § 706(2)(A)) and a violation of constitutional due process. The company is asking the court to issue a permanent injunction requiring the FDA to remove the July warning. *(Return to In This Issue)*

HEMP INDUSTRY STAKEHOLDERS CHALLENGE CALIFORNIA'S NEW HEMP REGULATION

***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).** A California state court has denied a request from hemp industry stakeholders to issue a temporary restraining order against California's emergency ban on hemp food products with detectable THC levels. On September 13, 2024, the California Department of Public Health posted the "Notice of Proposed Emergency Regulatory Action; Serving Size, Age, and Intoxicating Cannabinoids for Industrial Hemp; DPH-24-005E" on the Office of Administrative Law's website. On September 23, 2024, the emergency regulation went into effect and added new regulations to the California Code of Regulations on industrial hemp (CAL. CODE REGS. tit. 17, subchapter 2.6 (West 2024)) in the following areas: (1) increase the age restriction to 21 years; (2) expand the definition of THC; and (3) make significant changes in the serving sizes and packaging of hemp products. Within the emergency regulation's new provision that creates serving size and package requirements for all hemp products intended for human consumption, the plaintiffs claim that it creates a brand-new standard for hemp. Per the new regulation, hemp products must now contain "no detectable levels of total THC." (CAL. CODE REGS. tit. 17, § 23100 (West 2024). The plaintiffs argued that this new standard "essentially bans the manufacture, warehousing, distribution, offer, advertisement, marketing, or sale of hemp products in California that contain any detectable levels of THC, which applies to the vast majority of hemp products in California." The complaint asserted that the emergency regulation illegally amends and modifies the definition of hemp by requiring "no detectable levels of THC" in hemp products and conflicts with the California Uniform Controlled Substances Act's definition of hemp which expressly permits 0.3 percent THC in hemp products. (CAL. HEALTH & SAFETY CODE § 11018.5 (West 2024)). The plaintiffs also asserted that the emergency regulation conflicts with the federal definition of hemp as established by the 2018 Farm bill, which permits up to 0.3 percent of delta-9 THC on a dry weight basis. (7 U.S.C. § 1639o). The plaintiffs asked the court to issue a temporary restraining order against the implementation of the emergency ban to allow interstate sales to continue, but the court denied the request holding that the state has a significant interest in closing the loophole that allows hemp manufacturers to sell products with high levels of THC outside the regulated cannabis market. The court also ruled that any lost revenue the plaintiffs may face is not irreparable harm when weighed against the state's interest in protecting health and safety, especially for children. Additionally, the court noted that even with the emergency ban in place, the companies can still sell food products without detectable levels of THC, non-food products with THC, and products through the legal cannabis system with a license. Finally, the court determined that the plaintiffs are not entitled to a restraining order that would allow interstate sales to continue because the emergency ban's restrictions on warehousing and manufacturing means that there are no products to be sold. The defendants filed their answer on October 30, 2024. On November 20, 2014, the plaintiffs filed a request for dismissal. *(Return to In This Issue)*

JUDGE ALLOWS HEMP SHOP TO REMOVE "ILLICIT CANNABIS" SIGNS FROM STOREFRONTS

***MNG New York Holdings, LLC d/b/a CBD Kratom v. New York State Cannabis Control Board et al.*, New York Supreme Court (New York County), Case No. 160287/2024 (temporary restraining order issued November 7, 2024).** A New York state judge has issued a temporary restraining order allowing the operator of two Manhattan hemp stores to remove signs that had been placed on the storefronts by state cannabis regulators following raids of the stores. In New York, the "adult-use cannabis" regulations (N.Y. CANNABIS LAW § 61, *et seq.* (McKinney 2024)) are separate and distinct from the hemp regulations (N.Y. CANNABIS LAW § 90, *et seq.* (McKinney 2024)). Each article provides for a licensing scheme for each type of product, including: (1) license types: (2) fees; (3) license renewal; (4) laboratory testing; (5) packaging and labeling; and (6) record keeping and tracking. In April 2024, the New York legislature amended the "Marihuana Regulations and Taxation Act" (N.Y. CANNABIS LAW § 138-a (McKinney 2024)) to provide additional

enforcement powers to localities and the New York State Office of Cannabis Management (OCM) against illicit sales and marketing of adult-use cannabis. This amendment did not apply to hemp. On July 17, 2024, "a group of heavily armed individuals wearing police jackets and bulletproof vests" along with an OCM inspector raided the petitioner's hemp businesses to inspect the store's inventory. According to the complaint, the inspector did not have a search warrant and seized various products based on a product's labeling. Each product seized had a certificate of analysis proving that it was a lawful hemp product, but the inspector did not examine the certificates. The complaint asserted that none of the seized products were tested for non-compliance with the hemp regulations, and the certificates of analysis corresponding to the seized products were never assessed. On October 15, 2024, OCM conducted another raid against the petitioner's businesses. After the October raid and absent a hearing, OCM posted notices on the petitioner's storefronts reading "WARNING: THIS BUSINESS IS ORDERED TO STOP ILLEGAL ACTIVITY" and "ILLICIT CANNABIS SEIZED." The petitioner asserted that the respondents have failed to differentiate between legal hemp and illegal adult-use cannabis and improperly applied N.Y. CANNABIS LAW § 138-a to licensed hemp businesses lawfully operating under the hemp regulations. Additionally, the petitioner claimed that the respondents' posting of the notices were a clear violation of due process under the Fourteenth Amendment to the U.S. Constitution. The petitioner filed a request for a temporary restraining order to have the notices removed to avoid irreparable harm to his business. On November 7, 2024, the judge granted the petitioner's request for a temporary restraining order allowing him to remove the signs from the storefronts until final adjudication. *(Return to In This Issue)*

TEXAS HEMP BUSINESSES SUE CITY OVER IMPROPER SEARCH AND SEIZURE

***Hemp Industry Leaders of Texas, et al., v. City of Allen, et al.*, U.S. District Court for the Eastern District of Texas, Case No. 4:24-cv-00944-SDJ (suit filed October 22, 2024).** A group of hemp business owners have filed suit against the city of Allen, Texas, the city's police department, and the U.S. Drug Enforcement Agency (DEA) over a series of allegedly unlawful raids, arrests, searches, and seizures on hemp businesses selling legal products. Under both federal and Texas law, hemp must contain a delta-9 THC concentration of no more than 0.3 percent (7 U.S.C 1639o and TEX. AGRIC. CODE § 121.001 (West 2024)). Products containing more than 0.3 percent delta-9 THC are considered illegal. The Allen Police Department, in partnership with the DEA, had products sold at the plaintiffs' stores analyzed for the concentration of THC. The laboratory reported that the products tested contained between seven to 78 percent THC, with the average being a concentration of 29 percent. The Allen police department and the DEA used the high concentration of THC in the products as the basis for warrants to search the businesses, seize products, and arrest the owners. Six hemp business owners were arrested for manufacturing and distribution of controlled substances and the defendants seized approximately $10,000 in inventory from the stores. The Hemp Industry Leaders of Texas (HILT) are claiming that the warrants for the raids were obtained using unreliable and outdated hemp testing methods that falsely inflated the concentration of THC within the products, making them appear to be illegal. Specifically, HILT claims that the method of testing that was used failed to account for the conversion of THCA, a non-psychoactive compound that occurs naturally in hemp, into delta-9 THC, as the hemp was heated during the testing process. Because the warrants were based on false information, HILT claims that the defendants lacked probable cause to apply for and obtain a search warrant for the businesses. As such, HILT argues that the search and seizures were conducted unlawfully and in violation of the Fourth Amendment of the U.S. Constitution and that the defendants violated HILT's due process rights under the Fifth and Fourteenth Amendments of the U.S. Constitution. HILT also brings forth claims of conspiracy to violate civil rights, abuse of process, false arrest, and regulatory taking. The plaintiffs are seeking the return of all seized inventory and injunctive relief. *(Return to In This Issue)*

FIFTH CIRCUIT RULES THAT RESTRICTING CANNABIS ADVERTISING DOES NOT VIOLATE FIRST AMENDMENT

Fifth Circuit Rules That Restricting Cannabis Advertising Does Not Violate First Amendment
***Clarence Cocroft, et al. v. Chris Graham, et al.*, U.S. Court of Appeals for the Fifth Circuit, Case No. 24-60086 (opinion filed November 22, 2024).** In a case of first impression, the Fifth Circuit has ruled that Mississippi's near total ban on medical cannabis advertising does not violate the First Amendment of the U.S. Constitution. In 2022, Mississippi enacted the Mississippi Medical Cannabis Act (MISS. CODE ANN. § 41-137-1, *et seq.* (West 2024)), which authorized the sale and use of cannabis for certain medical purposes. The rules promulgated under the Act prohibit medical cannabis "advertising and marketing in any media, including but not limited to broadcast, electronic and print media." (15 MISS. CODE R. § 9.1.1 (West 2024)). The prohibition also extends to mass text and email communications, displays of medical cannabis products in windows or public view, and solicited or paid reviews, testimonies, or endorsements from patients, caregivers, or practitioners. However, the rules authorize licensed medical cannabis establishments to participate in certain branding activities to publicize their businesses which includes establishing a website or social media presence and listings in business directories. Clarence Cocroft, who owns a medical cannabis dispensary in Mississippi, filed a lawsuit against several state defendants arguing that Mississippi's near-total restriction on the advertising of medical cannabis violated the First Amendment. Cocroft claimed that the advertising restrictions harm his business because he cannot advertise in ways that allow him to effectively reach new customers and inform the public about his dispensary's location, products, and prices. Cocroft asserted that the First Amendment Free Speech Clause protects his right to engage in such advertising because Mississippi law has authorized the underlying commercial transaction. The district court granted the defendants' motion to dismiss for failure to state a claim, holding that medical cannabis advertising does not qualify for First Amendment protection because federal law criminalized the underlying transactions. On appeal, the Fifth Circuit affirmed the district court's ruling, holding that commercial speech does not receive First Amendment protection if the underlying commercial conduct is illegal. The federal Controlled Substances Act (CSA; 21 U.S.C. § 801, *et seq.*) criminalizes cannabis and makes activities involving cannabis, including medical cannabis, illegal. Because of the Supremacy Clause, "the CSA is the law in Mississippi regardless of what state law might say." Thus, because the CSA makes cannabis illegal in Mississippi, the First Amendment does not pose an obstacle to the state's commercial speech restrictions. *(Return to In This Issue)*

CALIFORNIA CANNABIS DISPENSARY CANNOT DEDUCT BUSINESS EXPENSES ON FEDERAL TAXES

***Patients Mutual Assistance Collective Corp. Inc. v. Commissioner of Internal Revenue*, U.S. Tax Court, Case No. 2265-20 (opinion filed October 21, 2024).** The U.S. Tax Court issued a ruling that a California medical cannabis dispensary is prohibited from deducting donations and business expenses from its federal taxes because its business falls under the Controlled Substances Act (CSA; 21 U.S.C. § 801, *et seq.*). Patients Mutual Assistance Collective Corp. (PMACC) is a California-based medical cannabis dispensary. In its 2016 federal tax return, PMACC reported a $354,000 tax liability based on an income of $1.04 million. In November 2019, the Internal Revenue Service (IRS) sent PMACC a notice of deficiency and a 26 U.S.C. § 6662 penalty for its 2016 taxes. The IRS determined that PMACC's 2016 tax liability should have been $13.71 million based on a $39.19 million income. This significant discrepancy was due to differing interpretations of 26 U.S.C. § 280E of the federal tax code which prohibits a business from claiming a tax deduction if its business consists of trafficking in controlled substances that are illegal under federal law or state law where such business is conducted. PMACC, which had claimed tax deductions for business expenses, charitable contributions, and asset depreciation, filed a petition for redetermination of the deficiency arguing that Section 280E should not apply because medical cannabis is legal in California. PMACC further argued that Section 280E is unconstitutional because it is an unapportioned direct tax or an excessive fine in

violation of the Eighth Amendment of the U.S. Constitution. Additionally, PMACC claimed that the CSA is unconstitutional as applied to state-legal intrastate cultivation, manufacture, distribution, and possession of cannabis. The court rejected PMACC's arguments, stating that even though cannabis is legal in California, Section 280E still applies because cannabis remains illegal under federal law. Additionally, the court held that Section 280E is constitutional under Tax Court precedent and that the CSA is constitutional under U.S. Supreme Cour precedent (*Gonzales v. Raich*, 545 U.S. 1 (2005)). Because Section 280E applies, PMACC is liable for the full tax liability for 2016 plus a penalty. *(Return to In This Issue)*

MISSOURI COURT FINDS COUNTY AND CITY GOVERNMENT CANNOT BOTH CHARGE CANNABIS TAX

***Robust Missouri Dispensary 3 LLC v. St. Louis County*, Missouri Court of Appeals for the Eastern District, Case No. ED112642 (opinion filed November 12, 2024).** A Missouri court of appeals has ruled that only one local government entity within a jurisdiction can impose cannabis sales taxes on dispensaries. In a 2022 referendum, Missouri voted to amend its constitution to legalize recreational cannabis. This constitutional amendment further authorized local governments to collect a sales tax of no more than three percent on all non-medical cannabis sales. In April 2023, both St. Louis County and Florissant, Missouri, a city within St. Louis County, enacted a three-percent tax on retail cannabis sales. Robust Missouri Dispensary (Robust) in Florissant paid its tax to the city government, but when St. Louis County demanded that the dispensary pay the additional county tax, Robust filed a declaratory judgment suit against the county. Robust argued that, because its business was located in the incorporated city of Florissant, the county was not its local government, and thus the county was not authorized to collect the tax. The trial court granted summary judgment to the county, and Robust appealed. The court of appeals reversed the trial court's ruling, holding that only a single local government can impose a cannabis tax within the same jurisdiction under the Missouri Constitution. The court determined that a county can only impose a cannabis tax on dispensaries within unincorporated parts of the county. The court enjoined the further collection of retail sales taxes by multiple local governments. A similar suit is pending in the Missouri Court of Appeals, Western District. (*Vertical Enterprise. LLC v. Buchanan County*, Case No. WD87291). *(Return to In This Issue)*

WASHINGTON MAN SUES DEA, DOJ OVER CANNABIS RESCHEDULING PROCEDURE

***David Heldreth v. Merrick B. Garland, et al.*, U.S. District Court for the Western District of Washington, Case No. 2:24-cv-01817-KKE (suit filed November 4, 2024).** A Washington state man has brought a claim against the Department of Justice (DOJ), the Drug Enforcement Administration (DEA), and their respective leaders, as well as an administrative law judge from the DEA, claiming that they have violated federal law by refusing to include him or his company in cannabis rescheduling proceedings. David Heldreth, described in the complaint as a shareholder in a cannabis research company and having family who is Cherokee, asserts that the DOJ and DEA have excluded both tribal and small business representatives from the rulemaking process to move Cannabis from Schedule I to Schedule III under the federal Controlled Substances Act (21 U.S.C. § 801, *et seq.*). Heldreth asserts that this exclusion violates Executive Order 13175, Consultation and Coordination with Indian Tribal Governments (65 Fed. Reg. 67249, Nov. 9, 2000), which requires the federal government to consult with tribal governments on any matter with tribal implications. Heldreth points to the enforcement requirements that will fall on tribal governments if cannabis is rescheduled as the basis for his argument that a rescheduling effort implicates tribes. Additionally, Heldreth argues that the Regulatory Flexibility Act, as part of the Small Business Regulatory Enforcement Fairness Act (110 Stat. 857, 5 U.S.C. §601 note), requires the federal government to provide notice to small businesses before conducting any rulemaking. According to Heldreth's complaint, this was not done. Heldreth asserts these exclusions are punitive and based on a bias against him personally by DEA Administrator Anne Milgram because Heldreth

has brought numerous claims and complaints against both the DEA and the DOJ related to cannabis research. On November 25, 2024, Heldreth filed a motion for a temporary restraining order to prevent a preliminary hearing about the proposed rulemaking, which the court denied. No hearings have been scheduled on the merits of the case. *(Return to In This Issue)*

MICHIGAN APPEALS COURT RULES CANNABIS LEGALIZATION STATUTE DOES NOT APPLY TO POSSESSION WITH INTENT TO DISTRIBUTE CANNABIS CHARGES

***People of the State of Michigan v. Julia Kathleen Soto*, Michigan Court of Appeals, Case No. 370138 (opinion filed October 7, 2024).** A woman in Michigan has lost an appeal to dismiss the charges against her stemming from her arrest for possession of cannabis. In 2022, police arrested Julia Soto after conducting a raid of her home that uncovered almost 20 pounds of cannabis along with over $10,000 cash. Prosecutors charged Soto with possession with intent to distribute between five and 45 kilograms of cannabis under MICH. COMP. LAWS § 333.7401(2)(d)(ii), which is a felony. However, she claimed that the wording of Michigan's cannabis legalization law, the Michigan Regulation and Taxation of Marihuana Act (MRTMA; MICH. COMP. LAWS § 333.27951, *et seq.*), prevented the state from charging her with a felony. The prosecution argued that intent-to-distribute is not covered under the legalization statute. Instead, this offense falls under the public health code, which allows prosecution for amounts over what is considered personal use. The MRTMA allows possession of cannabis in quantities under two and a half ounces and provides for misdemeanor charges for possessing between two and a half and five ounces of cannabis. The trial court agreed with the prosecution and denied Soto's motion to dismiss. On appeal, the court looked at whether the MRTMA supersedes the criminal statute barring possession of larger amounts of cannabis with intent to sell. The court determined that because the MRTMA is silent on possessing large quantities with intent to distribute, it does not apply, and instead, the case should be determined using the Public Health Code. On December 2, 2024, Soto filed an application for leave to appeal to the state's supreme court. *(Return to In This Issue)*

NEW YORK MEDICAL CANNABIS INDUSTRY ASSOCIATION SUES STATE OVER $20 MILLION CANNABIS LICENSE FEE

***New York Medical Cannabis Industry Association, Inc. v. New York State Cannabis Control Board, et al.*, Supreme Court of New York, Albany County, Case No. 911952-24 (suit filed December 4, 2024).** The New York Medical Cannabis Industry Association (NYMCIA), which is comprised of nine registered medical cannabis providers, filed a lawsuit against New York state challenging the constitutionality of a $20 million special licensing fee required for medical cannabis operators seeking to enter the state's adult-use cannabis market. In 2023, New York's Office of Cannabis Management established regulations allowing registered medical cannabis providers to enter the adult-use cannabis market if they paid four payments of $5 million. (N.Y. COMP. CODES R. & REGS. tit. 9, § 120.4(b)(11)). The NYMCIA claims that this fee is much higher than what other states charge for a cannabis license. The plaintiffs assert that the punitive fee prevent medical cannabis operators from dispensing adult-use cannabis and discriminates against the organization's members, many of whom are large companies operating outside of the state and involved in all stages of the cannabis supply chain. The suit argues that the fee is unconstitutional because it: (1) violates the separation of powers doctrine because the rule does not align with New York's Marihuana Regulation and Taxation Act (N.Y. Cannabis Law § 63 (McKinney 2024); (2) constitutes an impermissible tax in the guise of an administrative fee; (3) violates the Equal Protection Clause of Article 1, § 11 of the New York State Constitution; and (4) violates the Takings Clause of Article 1, § 7 of the New York State Constitution. The NYMCIA is asking the court to enjoin the state from enforcing the fee and require the state to refund any payments already made. *(Return to In This Issue)*

MICHIGAN FILES OPIOID SUIT AGAINST PHARMACY BENEFIT MANAGERS

***Dana Nessel v. Express Scripts, et al.*, Michigan Circuit Court (Wayne County), Case No. 2024-015674-NZ (suit filed October 24, 2024).** Michigan Attorney General Dana Nessel has filed suit against the pharmacy benefit managers, (PBMs) Express Scripts, Inc. and OptumRx, over their alleged roles in the opioid crisis. PBMs operate as intermediaries between insurers and drug manufacturers. The suit claims that the PBMs illegally worked with opioid manufacturers to give their products favorable placement on drug formularies in exchange for rebates and other fees. Additionally, the suit asserts that the PBMs' online pharmacies improperly dispensed opioids and failed to address overprescribing and diversion. Nessel brings forth claims of public nuisance, negligence, and violations of the Michigan Drug Dealer Liability Act (MICH. COMP. LAWS § 691.1601, *et seq.* (West 2024)), and is asking the court to order the PBMs to abate the public nuisance and to pay other damages. *(Return to In This Issue)*

JURY FINDS MCKESSON AND AMERISOURCEBERGEN LIABLE IN BALTIMORE OPIOID CASE

***Mayor & City Council of Baltimore v. Purdue Pharma L.P., et al.*, Circuit Court of Maryland (Baltimore City), Case No. 24-C-18-000515 (jury verdict reached November 12, 2024).** For previous updates about this case, please refer to the October 2024 issue of the LAPPA *Case Law Monitor*, available here. After a six-week trial, a jury found drug distributors McKesson and AmerisourceBergen liable for $266 million in compensatory damages due to their roles in contributing to Baltimore's opioid crisis. McKesson and AmerisourceBergen will pay the city $192 million and $74 million, respectively. The jury assigned 70 percent responsibility for the public nuisance to McKesson and 27 percent to AmerisourceBergen, with the remaining three percent being attributed to other factors, such as the illegal drug trade. In October 2024, the court issued a ruling prohibiting the jury from awarding punitive damages, holding that there was not enough evidence to support the use of punitive damages in the case. The abatement phase of the trial to determine how much abatement money the companies might have to pay is scheduled to begin on December 11, 2024. *(Return to In This Issue)*

WALMART BOARD AGREES TO SETTLE PENSION FUND CASE

***Ontario Provincial Council of Carpenters' Pension Trust Fund, et al. v. S. Robson Walton, et al.*, Delaware Chancery Court, Case No. 2021-0827 (settlement reached October 14, 2024).** For previous updates in this case, please refer to the June 2023 issue of the LAPPA *Case Law Monitor*, available here. Walmart Inc.'s (Walmart) senior leaders have agreed to a $123 million settlement to resolve a pension fund lawsuit alleging that they played a role in fueling the opioid epidemic by ignoring the company's mishandling of prescription opioids. The Walmart board members denied any wrongdoing as part of the settlement and stated that they were settling to "solely eliminate the burden, expense, disruption, and distraction inherent in further litigation." According to court filings, the settlement will be paid by Walmart's insurers. The settlement agreement will require court approval before it goes into effect. *(Return to In This Issue)*

INSURANCE COMPANIES REACH SETTLEMENT WITH INDIVIOR OVER SUBOXONE FRAUD CLAIMS

***Health Care Service Corp., et al. v. Indivior, Inc.*, Virginia Circuit Court (Roanoke County), Case No. CL20-1474 (settlement reached July 8, 2024).** Drug manufacturer Indivior, Inc. (Indivior) reached an $85 million settlement with a group of insurance companies[1] to settle Suboxone-related fraud and antitrust claims. The insurance companies, who opted out of the multidistrict antitrust suit against Indivior, filed suit in 2020 alleging that Indivior engaged in a fraudulent and anticompetitive scheme to prevent generic competition by converting their Suboxone products from tablets to film. The parties reached the settlement prior to the scheduled July 15, 2024 trial date. *(Return to In This Issue)*

KROGER FINALIZES OPIOID SETTLEMT WITH 30 STATES

(Settlement finalized November 4, 2024). For previous updates about this settlement, please refer to the October 2023 issue of the LAPPA *Case Law Monitor*, available here. Kroger has finalized its $1.37 billion opioid settlement with 30 states. The payments are expected to begin in early 2025. The company previously stated that the settlement is not an admission of wrongdoing or liability. In addition to the monetary payments, Kroger agreed to injunctive relief that requires its pharmacies to monitor, report, and share data about suspicious activity related to opioid prescriptions. *(Return to In This Issue)*

COURT RULES INSURERS DO NOT HAVE A DUTY TO DEFEND PUBLIX IN OPIOID LITIGATION

***Publix Super Markets, Inc. v. ACE Property and Casualty Insurance Company, et al.*, U.S. District Court for the Middle District of Florida, Case No. 8:22-cv-2569-CEH-AEP (opinion filed October 29, 2024).** A federal district court ruled that several insurance companies do not have a duty to defend Publix Super Markets, Inc. (Publix) in suits related to its role in the opioid epidemic. Since 2021, Publix has been named in over 60 lawsuits for claims that it knowingly or willfully failed to protect consumers from the dangers of opioids. These cases involve government plaintiffs, such as states and counties, who are seeking damages for the costs associated with overdose deaths, opioid use disorder treatment, criminal activity, and healthcare services due to increased access to opioids through retail pharmacies such as Publix. Publix has requested their insurers to defend them in the claims based on the policy agreements for coverage. The insurers all stated that they would not provide coverage because the underlying suits did not allege damages "because of bodily injury," as required by their policy agreements. Instead, the insurers claimed that the damages sought were economic only and intended for government entities, not specific individuals, and that the lawsuits did not allege any particular bodily injury. Publix countered that the damages ultimately stemmed from harm to individuals affected by opioid use. The court sided with the insurers, concluding that the injuries in those cases were purely economic, and thus, the insurers did not have a duty to defend Publix in the underlying suits. Accordingly, the court denied Publix's motion for partial summary judgment and ordered the company to show cause why summary judgment should not be granted in favor of the defendants within 21 days. On November 15, 2024, Publix filed a motion for the court to enter a final judgment in the matter in favor of the insurance companies so that the company could file an appeal with the Eleventh Circuit. *(Return to In This Issue)*

[1] Aetna, Inc. Blue Cross Blue Shield of Massachusetts, Inc., Health Care Service Corp., Blue Cross Blue Shield of Florida, Inc., and Molina Healthcare, Inc.

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 2024 issue of the LAPPA *Case Law Monitor*, available here. A federal bankruptcy court judge has extended the injunction that protects the Sackler family from civil opioid sales related lawsuits until December 23, 2024. Purdue Pharma had requested that the extension go until January 9, 2025. The extension came after mediators filed a report stating that progress is being made in striking a deal with opioid litigation claimants following the U.S. Supreme Court's rejection of the previous proposal. According to the mediators' report, multiple Sackler family members have signed off on a tentative settlement. *(Return to In This Issue)*

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, 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/.