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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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INDIVIOR FACES CLASS ACTION ANTITRUST TRIAL OVER SUBOXONE

***In re Suboxone Antitrust Litigation*, U.S. District Court for the Eastern District of Pennsylvania, Case No. 13-md-2445 (motion for summary judgment denied August 22, 2022).** For previous updates on this case, please refer to the August 2020 issue of the LAPPA *Case Law Monitor,* available here. In an 87-page decision, a Pennsylvania federal district court judge denied Indivior's motion for summary judgment, advancing the multidistrict litigation initially filed in 2013 by state attorneys general, drug distributors, and third-party payers, such as insurers, health plans, and patients. Indivior now faces a class action antitrust trial over claims that the company switched to a new version of Suboxone solely to extend its market dominance. The judge cited evidence that Indivior made a transition from the tablet to the sublingual film formulation of Suboxone as part of a scheme to weaken the tablet's market share at a time when its patent protection on that version would cease. The judge ruled that "a reasonable jury could find that [Indivior's] combined actions effectively broke the competitive mechanism in the market" and "deprived consumers of the ability to make a meaningful choice." Indivior argued that concerns regarding patient safety and consumer choice drove the switch to the film version of Suboxone, but the judge determined that those arguments are better left for a jury to decide.

INDEPENDENT PHARMACIES SUE OPTUMRX FOR ALLEGED BAD FAITH REIMBURSEMENT PRACTICES

***Millstadt Pharmacy, et al. v. OptumRx, Inc.*, U.S. District Court for the Southern District of Illinois Case No. 3:22-cv-02152-JPG; and *Evers Pharmacy, et al. v. OptumRx, Inc.*, U.S. District Court for the Southern District of Illinois, Case No. 3:22-cv-02156-JPG (both suits filed August 2, 2022).** Almost 200 independently owned pharmacies sued the pharmacy benefit manager OptumRx asserting that the pharmacies receive lower reimbursements for dispensing prescription drugs than do retail pharmacy chains. Thirty-three Illinois pharmacies and 154 out-of-state pharmacies filed two suits in the Circuit Court of St. Clair County, Illinois. The pharmacies claim that OptumRx engages in "bad-faith manipulation of reimbursement rates," which causes the plaintiffs to suffer economic losses. The complaint alleges that OptumRx operates with "a web of confidential agreements that plaintiffs are never allowed to see, let alone negotiate," and that the company hides how much more it pays large pharmacy chains and mail order pharmacies than independent pharmacies. Additionally, the plaintiffs allege that OptumRx engages in retroactive deductions, in which the company deducts money from payments made to the plaintiffs months later. The suit asserts that the primary reason OptumRx employs these discriminatory practices against independent pharmacies is to injure their businesses and destroy competition so that the favored retail pharmacies can monopolize the prescription drug industry. The plaintiffs bring forth claims of breach of contract, breach of duty of good faith and fair dealing, conversion, unfair competition, and

unfair trade practices. The plaintiffs ask the court for restitution, disgorgement, and other injunctive relief. On September 14, 2022, OptumRx removed both cases to federal court. On September 21, OptumRx filed motions to dismiss in both cases for: (1) failure to state a claim; and (2) lack of jurisdiction.

MASSACHUSETTS SKILLED NURSING FACILITY SETTLES ALLEGATIONS OF DISABILITY DISCRIMINATION

Settlement reached September 8, 2022. The U.S. Attorney's Office for the District of Massachusetts reached an agreement with Next Step Healthcare, LLC (Next Step), the operator of 21 skilled nursing facilities in Massachusetts, to resolve allegations that Next Step violated the Americans with Disabilities Act by turning away patients receiving medication for addiction treatment (MAT) for opioid use disorder (OUD). The government alleged that Next Step denied admission to 548 individuals with prescriptions for MAT who sought entry into Next Step's programs for health issues unrelated to their OUD. Under the terms of the settlement agreement, Next Step: (1) must adopt a non-discrimination policy regarding the provision of services to individuals with disabilities, including individuals with substance use disorder (SUD) or individuals prescribed MAT; and (2) provide training to admissions personnel regarding disability discrimination and SUD. Next Step must also pay a civil penalty of $92,383 to the United States, of which $10,000 is due immediately while the remainder will be suspended and forgiven if Next Step materially complies with the terms of the agreement for the next three years.

INDIANA NURSING BOARD SETTLES ALLEGATIONS OF DISABILITY DISCRIMINATION

Settlement reached September 1, 2022. The U.S. Department of Justice entered into a settlement agreement with the Indiana State Board of Nursing (Nursing Board) to resolve claims that it violated Title II of the Americans with Disabilities Act. The agreement ensures that nurses who take medication for addiction treatment (MAT) for opioid use disorder can remain on their medication while participating in the Indiana State Nursing Assistance Program (Program). The Program helps to rehabilitate and monitor nurses with substance use disorders and is often required for these nurses to maintain an active license or have one reinstated. Under the terms of the settlement agreement, the Nursing Board will allow nurses to participate in the Program while taking MAT that is prescribed by a licensed practitioner as part of a medically necessary treatment plan. Additionally, the Nursing Board must revise its policies to ensure that nurses taking prescribed MAT are not subjected to discriminatory conditions or terms. The Nursing Board must also pay $70,000 in damages to the complainant and periodically report to the government regarding its compliance with the agreement.

FIRED EMPLOYEE'S ALCOHOL-BASED DISCRIMINATION LAWSUIT NOT SUPPORTED BY KENTUCKY LAW

***Markeen Elliot v. Raytheon Inc.*, U.S. District Court for the Western District of Kentucky, Case No. 3 21-cv-00751 (opinion filed August 8, 2022).** In 2020, Markeen Elliott, an employee of the defense contractor Raytheon, complained about the lack of COVID-19 precautions at work, such as personal protective equipment and hand sanitizer. Later that year, he took a leave of absence to receive treatment for alcohol use disorder. Upon his return, Elliott felt ill and quarantined, as required by the company's COVID-19 policy. Before he returned to work, Raytheon terminated his employment. Initially, Elliott attempted to file a grievance with his union, but the union denied it because Elliott did not file it in the manner required by the collective bargaining agreement. In November 2021, he filed a suit in Kentucky state court against Raytheon and the union for discrimination based on his alcoholism, retaliation, wrongful termination, and intentional infliction of emotional

distress. Raytheon removed the case to federal court. To try to force a remand back to state court, Elliott amended his complaint by dropping his Federal Labor Management Relations Act claim. Raytheon subsequently moved to dismiss all claims, which the federal court granted. In reaching this conclusion, the district court held that it could exercise jurisdiction over the case because Elliott's state law cause of action related to the collective bargaining agreement and, thus, federal law controlled. The court further exercised supplemental jurisdiction over the remaining claims in the case because each arose out of the same transaction. The court dismissed Elliott's claim for emotional distress because it relied on an interpretation of the collective bargaining agreement. The court denied the claim of discrimination based on alcoholism because Kentucky's statutory definition of disability specifically excludes current or past alcohol problems. Elliott's final claims—wrongful termination and retaliation based on his COVID-19 precaution complaints—failed because he pled those causes of action under the wrong statute and waived the opportunity to correct the error. Thus, the court granted Raytheon's motion for judgment on the pleadings and denied Elliott's motion to remand.

JUUL AGREES TO GLOBAL SETTLEMENT WITH 32 STATES AND PUERTO RICO

Settlement reached September 6, 2022. JUUL Labs (JUUL) will pay $438.5 million to settle a two-year investigation by 32 states and Puerto Rico into the marketing of its high-nicotine vaping products.[1] Connecticut Attorney General William Tong, who led the investigation, announced the deal on behalf of all jurisdictions. The states and Puerto Rico joined together in 2020 to probe JUUL's early promotions and claims about the benefits of its technology as a smoking alternative. The investigation found that JUUL marketed to underage users and manipulated the chemical composition of its products to make the vapor less harsh on the throats of young and inexperienced users. Additionally, the investigation also revealed that JUUL's original packaging misled consumers in that it did not clearly disclose that it contained nicotine or implied that it contained a lower concentration of nicotine than it actually did. The $438.5 million will be paid out over a period of six to 10 years, with the amount paid increasing the longer the company takes to make the payments. If JUUL chooses to extend the payment period up to 10 years, the final payment amount would reach $476.6 million. JUUL also agreed to several sales and distribution restrictions as part of the settlement, including where the product may be displayed/accessed in stores, online sales limits, retail sales limits, age verification on all sales, and a retail compliance check protocol. JUUL previously settled lawsuits in Arizona, Louisiana, North Carolina, and Washington. The company still faces nine separate lawsuits from other states and hundreds of personal lawsuits brought on behalf of teenagers and others who allege an addiction to the company's vaping products.

GEORGIA FAMILY WINS WRONGFUL DEATH SUIT AGAINST TREATMENT FACILITY AND PHYSICIAN

***Michael Carusillo, III v. Metro Atlanta Recovery Residences, et al.*, Superior Court of DeKalb County, Georgia, Case No. 19A73528 (jury verdict returned August 30, 2022).** A Georgia state court jury awarded the family of Nicholas Carusillo $77 million in a wrongful death suit against Metro Atlanta Recovery Residences (MARR) and MARR physician, Dr. Richard A. Waldman. MARR admitted Carusillo, who struggled with substance use disorder and bipolar disorder, into its treatment facility in August 2017. At the

[1] The 32 states are: Alabama, Arkansas, Connecticut, Delaware, Georgia, Hawaii, Idaho, Indiana, Kansas, Kentucky, Maine, Maryland, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, Nevada, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Vermont, Wisconsin, and Wyoming.

time of admission, Carusillo's bipolar disorder was managed and medically stable via a combination of lithium and quetiapine. A week after admission to MARR, Dr. Waldman took Carusillo off lithium, despite Carusillo's family and therapist warning him that Carusillo should remain on the medication. Carusillo's condition subsequently deteriorated, and MARR staff forced him to leave two weeks later after they found out he possessed a cell phone, contrary to facility rules. MARR released Carusillo to a sober living residence but failed to inform the residence operator about Carusillo's mental health issues. The next day, the residence operator discharged Carusillo after he left the house in violation of curfew. After discharge, Carusillo went unaccounted for until September 22, 2017, when police found him deceased lying on a highway outside of Atlanta. Police determined he died after being hit by multiple vehicles. Testing revealed no drugs in Carusillo's system at the time of death. His father filed a wrongful death suit against MARR and Dr. Waldman alleging that they caused Carusillo to experience a psychotic break by taking him off his medication and releasing him from the facility in an unstable condition. The defendants, however, argued that Dr. Waldman only discontinued Carusillo's medication after he complained of side effects. Additionally, the defense asserted that Carusillo knowingly violated multiple rules while at MARR and was aware that he faced discharge for any further violations. The jury apportioned 75 percent of the fault to MARR and its employees, 25 percent to Dr. Waldman, and zero to Carusillo. The $77 million jury award combines $10 million for Carusillo's pain and suffering, $55 million for the value of his life, $1 million in punitive damages, and the remainder for attorneys' fees and expenses.

SIXTH CIRCUIT OVERTURNS DISMISSAL OF LAWSUIT ON BEHALF OF AN INMATE WHO DIED FROM OVERDOSE

***Estate of Seth Michael Zakora, et al. v. Troy Chrisman, et al.*, U.S. Court of Appeals for the Sixth Circuit, Case No. 21-01620 (opinion filed August 10, 2022).** Seth Michael Zakora, an inmate at the Lakeland Correctional Facility in Michigan, died in his cell on January 22, 2017. Post-mortem tests revealed the cause of death to be accidental fentanyl toxicity. Earlier that morning, another inmate allegedly urged corrections officers to check on Zakora, but these warnings went unheeded. Representatives of Zakora's estate filed suit against several employees and officials of the Michigan Department of Corrections and the Michigan State Police in federal court in Michigan under the federal civil rights statute, 42 U.S.C. § 1983. The complaint alleges that corrections officers' failure to protect Zakora from rampant drug smuggling within Lakeland and their deliberate indifference toward his medical distress constitute violations of Zakora's Eighth Amendment rights. In September 2021, the district court dismissed the claims based on the defendants' qualified immunity. Zakora's estate appealed to the U.S. Court of Appeals for the Sixth Circuit, which overturned the dismissal. To overcome a qualified immunity defense, a plaintiff must plausibly allege facts, and then prove, that the official violated a statutory or constitutional right that was "clearly established" at the time. In reversing the decision, the Sixth Circuit held that the estate's complaint plausibly alleges a constitutional violation based on: (1) the widespread presence of drugs in Lakeland that had led to two other overdoses in Zakora's unit only days before his death; and (2) the officers' failure to timely investigate Zakora's condition. The Sixth Circuit remanded the case back to the district court, which must now consider whether Zakora's constitutional rights are sufficiently established to overcome a qualified immunity defense and survive the defendants' motion to dismiss. On August 24, 2022, the defendants filed for a petition for a rehearing before all of the Sixth Circuit judges.

WEST VIRGINIA DOCTOR CONVICTED OF UNLAWFUL DISTRIBUTION OF OPIOIDS

***United States v. Thomas Romano*, U.S. District Court for the Southern District of Ohio, Case No. 2:19-CR-00202 (verdict reached August 12, 2022).** Thomas Romano is a physician who operated a pain management clinic in Wheeling, West Virginia. According to a federal investigation, as part of his practice, he prescribed opioids and other controlled substances. Some clients traveled hundreds of miles to visit his West Virginia clinic, where Romano only accepted cash for prescriptions: $750 for the initial prescription and $120 per month

afterward. From 2015 to 2019, Romano prescribed over 111,000 pills to nine clients. Prosecutors charged Romano in federal court in Ohio with unlawful distribution of controlled substances, outside the usual course of professional practice, and not for a legitimate medical purpose. At trial, the United States offered evidence that Romano prescribed opioids in dosages that greatly exceeded recommendations and in life-threatening combinations that would fuel his clients' addictions. On August 12, the jury convicted him on 24 counts. No sentencing date has yet been set. Romano faces as much as 20 years imprisonment for each count. On August 26, Romano filed a motion for a new trial or, alternatively, for a mistrial. The government submitted its response to the motion on September 16.

PHYSICIAN WHO PLED GUILTY SENTENCED TO 25 YEARS FOR ILLEGAL PRESCRIBING

***United States v. Martin Escobar*, U.S. District Court for the Northern District of Ohio, Case No. 4:20-cr-00167-DCN-1 (sentencing issued August 8, 2022).** A federal district court in Ohio sentenced Martin Escobar, a former Mahoning County, Ohio physician, to 25 years in prison after he pled guilty to 54 counts of illegally prescribing controlled substances—including two counts of distributing controlled substances that caused the deaths of two patients and one count of distributing a controlled substance to a person under the age of 21—and 31 counts of healthcare fraud. According to court documents, Escobar prescribed controlled substances outside the usual course of professional practice and without a legitimate medical purpose. Prosecutors alleged that Escobar used false diagnoses, falsified patient pain intensity scales in medical charts, and prescribed opioids for prolonged periods without evidence of efficacy to support his unlawful prescription practices. On July 28, 2022, a few days prior to sentencing, Escobar filed a motion to withdraw his guilty plea in light of the U.S. Supreme Court's decision in *Ruan v. United States* (information on the *Ruan* case is available in the August 2022 issue of the LAPPA *Case Law Monitor*). Escobar argued that had he known that the *Ruan* case would require the government to prove knowing action in an unauthorized manner, he would not have pled guilty and instead would have proceeded to trial. On August 4, 2022, the court denied Escobar's motion to withdraw his guilty plea and proceeded to sentencing. On August 9, 2022, Escobar filed an appeal to the U.S. Court of Appeals for the Sixth Circuit, which is still pending.

PENNSYLVANIA PHARMACY SETTLES ALLEGATIONS OF FRAUD AND CONTROLLED SUBSTANCE VIOLATIONS

***United States v. Mitchell Spivack et al.*, U.S. District Court for the Eastern District of Pennsylvania, Case No. 2:2022cv00343 (settlement reached Aug 11, 2022).** Mitchell Spivack, the pharmacist and owner of Spivack, Inc., ran the Pennsylvania retail pharmacy that purchased the most oxycodone in the commonwealth. He and his company allegedly dispensed opioids and other controlled substances over several years even when encountering multiple drug diversion "red flags" in patients. Spivack ignored the implications of requests for large doses or dangerous combinations of drugs, large cash payments for drugs, and "blatantly forged" prescriptions. In addition, Spivack allegedly engaged in fraud by billing insurers for large quantities of drugs the pharmacy never dispensed. On August 11, 2022, the U.S. Department of Justice announced that it reached a consent judgment with Spivack, under which he and his company will pay over $4.1 million in civil damages and penalties and $500,000 in criminal restitution and civil forfeiture. Under the judgment, Spivack is permanently forbidden from prescribing, distributing, or dispensing any controlled substance in the future and from seeking another controlled substance registration from the U.S. Drug Enforcement Administration.

U.S. DEPARTMENT OF JUSTICE DROPS CONTROLLED SUBSTANCE CASE BECAUSE OF U.S. SUPREME COURT'S RUAN DECISION

***United States v. Rattini, et al.*, U.S. District Court for the Southern District of Ohio, Case No. 1:19-cr00081-MWM (indictment dismissed August 11, 2022).** For previous updates about this case, please refer to the February 2022 issue of the LAPPA Case Law Monitor, available here. In July 2019, a federal grand jury charged an Ohio based pharmaceutical distributor, Miami-Luken Inc., two of the company's former officials, Anthony Rattini and James Barclay, and two pharmacists, Devonna Miller-West and Samuel Ballengee, with conspiring to distribute controlled substances. In light of the recent U.S. Supreme Court decision in *Ruan v. United States* (information on the *Ruan* case is available in the August 2022 issue of LAPPA's *Case Law Monitor*), the government filed a motion to dismiss the indictment without prejudice and stipulation against all defendants. On August 11, 2022, the court granted the government's motion to dismiss four of the five defendants. On August 12, 2022, the government filed a motion to dismiss the superseding information and original indictment without prejudice as to the remaining defendant, James Barclay, who pled guilty in December 2021. The court granted the motion on August 26, 2022, and vacated Barclay's previously entered guilty plea.

ORGANIZATION CONTESTS ACTIONS BY OHIO'S OPIOID SETTLEMENT DISTRIBUTION FOUNDATION

***State of Ohio ex rel. Harm Reduction Ohio v. One Ohio Recovery Foundation*, Ohio Supreme Court, Case No. 2022-0966; and *Harm Reduction Ohio v. One Ohio Recovery Foundation*, Franklin County, Ohio Court of Common Pleas, Case No. 22 CV 005401 (both suits filed August 8, 2022).** Harm Reduction Ohio (HRO), a nonprofit drug policy organization, filed two lawsuits against One Ohio Recovery Foundation (One Ohio), a nonprofit established in December 2021 to oversee the distribution of funds received by the state through opioid related lawsuits, over claims that it is not following Ohio public records and open meeting laws. HRO filed its public records suit in the Ohio Supreme Court and its open meetings suit in the Franklin County Court of Common Pleas. In the public records suit, HRO asserts that One Ohio officials did not respond to their request for documents related to One Ohio board meetings and various committee meetings. HRO also alleges that, prior to the creation of One Ohio, Governor Mike DeWine and Attorney General David Yost signed a memorandum of understanding stating that "[One Ohio] and all of its affiliated entities would operate in a transparent manner and that 'documents shall be public to the same extent they would be if [One Ohio] was a public entity.'" Thus, by refusing to make the requested records available for inspection and copying, HRO asserts that One Ohio fails to comply with state open record laws. HRO asks the Ohio Supreme Court to issue a writ of mandamus ordering One Ohio to allow public access to the requested records. In its answer, filed on September 6, 2022, One Ohio argues that as a private, nonprofit entity, it is not subject to state public record laws. Meanwhile, in the suit filed in state trial court, HRO asserts that One Ohio violated state open meeting laws by denying Dennis Cauchon, the president and founder of HRO, entry to a One Ohio board meeting. HRO asks the court to issue preliminary and permanent injunctions against One Ohio prohibiting it from violating open meeting laws. In its answer filed September 12, 2022, One Ohio asserts that as a private nonprofit, it is not subject to state open meeting laws. A discovery conference in the open meetings case is scheduled for December 5, 2022.

CANNABIS-RELATED BALLOT INITIATIVES: ARKANSAS' PERMITTED, NEBRASKA'S AND OKLAHOMA'S DENIED

- ***Eddie Armstrong and Lance Huey v. John Thurston, Supreme Court of Arkansas,* Case No. CV-22-482 (opinion filed September 22, 2022).** In a 5-2 decision, the Arkansas Supreme Court granted a petition to include a cannabis legalization initiative on the state's November 2022 general election ballot. This decision overturned the Arkansas State Board of Election Commissioners' (Board) August 2022 ruling that the initiative contains a misleading ballot title. In declining to certify the initiative for the ballot, the Board concluded that the title omits material information, namely that the proposal would repeal current state tetrahydrocannabinol (THC) dosage limits in food and drink products. In reversing this decision, however, the Arkansas Supreme Court noted that a ballot title does not need to include every possible consequence or impact of a proposed measure, as "[t]he ultimate issue is whether the voter, while inside the voting booth, is able to reach an intelligent and informed decision for or against the proposed and understands the consequences of his or her vote based on the ballot title." The court's majority concluded that the ballot title's failure to explicitly address the elimination of THC dosage limits in food and drink products does not render it insufficient.
- ***Crista Eggers, et al. v. Robert B. Evnen*, U.S. Court of Appeals for the Eighth Circuit, Case No. 22-2268 (opinion filed August 31, 2022).** In a 2-1 decision, the U.S. Court of Appeals for the Eighth Circuit lifted a federal district court injunction blocking Nebraska Secretary of State Robert Evnen (Secretary Evnen) from enforcing the signature distribution requirement under the state's constitutional ballot initiative process. Plaintiffs Crista Eggers and Nebraskans for Medical Cannabis initiated two related petitions to place proposals to legalize cannabis for medical purposes on the state's November 2022 ballot. Among other qualification requirements for ballot placement, the signatories to a petition must "be so distributed as to include five percent of the registered voters of each of two-fifths of the counties of the state." This is called the signature distribution requirement. In May 2022, Eggers sued Secretary Evnen asserting that the signature distribution requirement violates her equal protection rights under the U.S. Constitution because it devalues her signature relative to the signatures of citizens in less populous counties. A Nebraska federal district court entered a preliminary injunction barring Secretary Evnen from enforcing the signature distribution requirement. Evnen appealed. On appeal, the Eighth Circuit reversed the decision. The majority noted that because the signature distribution requirement does not restrict a fundamental right under the U.S. Constitution, merely a right under state law, it must only be supported by a rational basis. The majority determined that the weight of Nebraska's interest in lawfully managing its elections and the fact that the signature distribution requirement appears not to violate the plaintiffs' legal rights tips the balance in Evnen's favor and makes an injunction contrary to the public interest. On September 14, 2022, Eggers filed a petition for a rehearing before all Eighth Circuit judges.
- ***Michelle Tilley Nichols and Michelle Jones v. Paul Ziriax, et al.*, Supreme Court of Oklahoma, Case No. MA-120646 (opinion filed September 21, 2022).** In a unanimous decision, the Oklahoma Supreme Court ruled that Oklahoma voters will not vote on State Question 820 (SQ820), a ballot initiative in the November 2022 general election that would legalize, regulate, and tax recreationally used cannabis. In July 2022, advocates for SQ820 turned in 118 boxes of signature pamphlets to the secretary of state to verify and count the number of signatures. The verification process took almost two months, much longer than anticipated. Upon verification, opponents of the measure filed legal challenges against the initiative, including challenges to the initiative's summary language. Although the court subsequently dismissed those challenges, the opponents may still file for a rehearing. Because of the possibility of a rehearing, it is not possible to meet the deadline for inclusion on this year's printed ballots. Thus, the court dismissed the petitioners' writ of mandamus to order the Oklahoma State Election Board to include SQ820 on the November 2022 ballot. The court concluded that "[t]he statutory process cannot guarantee the availability of a particular election." While SQ820 cannot be placed on the November 2022 ballot, the court found that it may be voted on in the next general election (November 2024) or during a special election should one be set up by the governor or the legislature.

SECOND CIRCUIT HOLDS THAT PLACING CANNABIS IN SCHEDULE I IS CONSTITUTIONAL

***United States v. Alexander and Charles Green*, U.S. Court of Appeals for the Second Circuit, Case No. 19-997 (opinion filed August 31, 2022).** The U.S. Court of Appeals for the Second Circuit ruled that listing cannabis as a Schedule I controlled substance under the Controlled Substances Act (CSA) is constitutional. Over a four-year period, Alexander and Charles Green (collectively "the Green brothers") participated in a cannabis distribution scheme. In March 2014, a federal court grand jury in New York returned a two-count indictment against the Green brothers charging them with conspiracy to possess with intent to distribute 100 kilograms or more of cannabis. In response, the Green brothers filed a joint motion to dismiss the conspiracy charge, arguing that the CSA's classification of cannabis as a Schedule I controlled substance violates their due process and equal protection rights. The Green brothers asserted that cannabis' status as a Schedule I controlled substance has no rational basis because it does not meet the statutory criteria for placement. Specifically, the CSA requires that a substance have no currently accepted medical use in treatment in the U.S. to fall within Schedule I. The Green brothers noted that there are accepted medical uses for cannabis. In December 2016, the district court denied the Green brothers' motion to dismiss, holding that the Schedule I classification of cannabis does not violate their due process and equal protection rights. Although the district court agreed that current cannabis use includes medical purposes, it concluded that "there are numerous conceivable public health and safety grounds" for placing cannabis in Schedule I and, thus, a rational basis for the scheduling exists. The Green brothers appealed the denial of their motion to dismiss. On appeal, the Second Circuit affirmed the ruling, holding that the district court properly rejected the Green brothers' equal protection and due process defenses.

PLAINTIFF SETTLES NEW YORK MEDICAL CANNABIS DISCRIMINATION SUIT

***Christopher Scholl v. Compass Group USA and Eurest Services, Inc.*, U.S. District Court for the Southern District of New York, Case No. 19-cv-6685 (settlement reached August 16, 2022).** For previous updates on this case, please refer to the August 2022 issue of the LAPPA *Case Law Monitor*, available here. Christopher Scholl, a New York resident who filed suit against Compass Group USA (Compass) asserting that the company unlawfully rescinded his job offer due to his medical cannabis use, agreed to settle his disability discrimination claims. In July 2022, a federal district court judge granted partial summary judgment to Compass and dismissed Scholl's disability discrimination claim under New York City Human Rights Law. Prior to the settlement, the trial regarding Scholl's disability discrimination claim under New York State Human Rights Law was set for November 2, 2022. The settlement terms are not public information.

FOURTH CIRCUIT FINDS PRIOR DRUG CONVICTIONS AND CANNABIS IN CAR INSUFFICIENT FOR CIVIL FORFEITURE

***United States v. Dereck McClellan*, U.S. Court of Appeals for the Fourth Circuit, Case No. 20-2251 (opinion filed August 10, 2022).** In January 2019, police encountered Dereck McClellan after he crashed his car into a concrete pillar at a gas station. They arrested him for public drunkenness and driving with an open container of alcohol. While searching the vehicle, the police discovered a small amount of cannabis and nearly $70,000 in cash. McClellan, who possessed two medical cannabis cards—his and his girlfriend's—claimed that the cash came from the profits of his girlfriend's retail business. At the time of the arrest, McClellan had two prior drug-related convictions, one for drug trafficking in 2007 and one for cannabis possession with intent to distribute in 2013. Prosecutors filed a complaint in South Carolina federal district court, seeking to seize the cash because it constituted drug proceeds. The district court granted summary judgment in favor of the

government. On appeal, the U.S. Court of Appeals for the Fourth Circuit reversed. According to the Fourth Circuit, the government failed its burden to establish by a preponderance of the evidence that the money pertained to drug trafficking and, thus, could be subject to forfeiture. The court noted that McClellan's prior convictions were irrelevant to the cash in his car in 2019, and the personal use of cannabis does not establish a link to broader drug trafficking activities. Although the Court conceded that McClellan did not adequately explain the source of the cash, it found that even if a juror thought McClellan lied, that lie does not necessarily result in an inference that the money came from drug proceeds. The court reversed the decision and remanded it to the district court for further proceedings.

RECENT OPIOID LITIGATION SETTLEMENTS INVOLVING WEST VIRGINIA

- ***In re Opioid Litigation*, Circuit Court of Kanawha County, West Virginia, Case No. 21-C-9000 Distributor.** On August 1, 2022, West Virginia Attorney General Patrick Morrisey announced a $400 million settlement between more than 100 West Virginia cities and counties and the "Big Three" opioid distributors: McKesson, AmerisourceBergen, and Cardinal Health (collectively "distributors"). Per the settlement agreement, the funds will be paid out over 12 years. The individual cities and counties must approve of the settlement before it goes into effect. Unlike most states, West Virginia did not take part in the national settlement with the distributors. The $400 million city and county settlement does not include two local governments, the City of Huntington and Cabell County, which sued the distributors in a separate federal lawsuit (*City of Huntington, West Virginia, et al. v. AmerisourceBergen Drug Corporation et al.*, U.S. District Court for the Southern District of West Virginia, Case No. 3:17-cv-01362). On July 4, 2022, a federal judge ruled in favor of the distributors. For more information on the Huntington/Cabell County case, please refer to the August 2022 LAPPA *Case Law Monitor*, available here.
- On August 11, 2022, Attorney General Morrisey announced a settlement with Rite Aid over a lawsuit filed in June 2020 claiming that the company contributed to the opioid crisis in the state. Per the settlement, Rite Aid will provide the state with up to $30 million for recovery efforts.
- On September 20, 2022, Walmart and CVS Health Corp. (CVS) agreed to pay $147 million to West Virginia to settle lawsuits claiming that the pharmacy providers did not properly monitor and report suspicious opioid prescriptions. CVS will pay $82.5 million to the state while Walmart will pay $65 million. The CVS agreement includes an initial payment of $52.5 million, followed by annual payments of $3 million for the next 10 years, including legal fees. These settlement funds will flow to all 55 counties in the state and will be distributed through the West Virginia First Memorandum of Understanding, the state's opioid litigation proceeds plan. Two other pharmacy defendants, Walgreens and Kroger, remain in active litigation with West Virginia.

ENDO FILES FOR BANKRUPTCY AND REACHES TENTATIVE GLOBAL SETTLEMENT DEAL

***Endo International PLC*, U.S. Bankruptcy Court for the Southern District of New York, Case No. 22-22549-jlg (bankruptcy filed August 16, 2022).** The drug manufacturer Endo International PLC (Endo) filed for Chapter 11 bankruptcy protection in federal bankruptcy court in New York after being overwhelmed by opioid litigation. Following the bankruptcy filing, Massachusetts Attorney General Maura Healey announced that state attorneys general for 34 states, the District of Columbia, and the U.S. Virgin Islands reached an agreement in principle whereby Endo and its lenders would pay up to $450 million over 10 years to participating states and local governments.[2] The agreement requires Endo to turn over its opioid-related

[2] Negotiations were led by Maine, Massachusetts, New Hampshire, Pennsylvania, Tennessee, Vermont, and Virginia and were joined by the attorneys general of Arizona, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Idaho, Illinois,

documents for publication online in a public document archive and pay $2.75 million for archival expenses. Additionally, the agreement bans the marketing of Endo's opioids. The resolution is contingent on final documentation and bankruptcy court approval.

TWO OHIO COUNTIES AWARDED $650 MILLION FROM PHARMACY CHAINS IN OPIOID SUIT

***In re National Prescription Opiate Litigation*, U.S. District Court for the Northern District of Ohio, Case No. 17-MD-2804 (MDL commenced December 12, 2017).** For previous updates on this case, please refer to the December 2021 issue of the LAPPA *Case Law Monitor*, available here. On August 17, 2022, U.S. District Judge Dan Polster awarded $650 million in damages to two Ohio counties, Lake and Trumbull, that won a lawsuit against CVS, Walgreens, and Walmart in November 2021. The counties alleged in the suit that the pharmacy chains negligently distributed opioids to customers and created a public nuisance. Lake County will receive $306 million over 15 years, while Trumbull County will receive $344 million over the same period. Judge Polster also ordered the pharmacy chains to immediately pay $87 million to cover the first two years of the abatement plan. CVS, Walmart, and Walgreens filed appeals in the U.S. Court of Appeals for the Sixth Circuit on September 8, 2022. The pharmacy chains may need to pay the $87 million while their appeals are active.

NEW HAMPSHIRE REACHES SETTLEMENT WITH JOHNSON & JOHNSON

Settlement reached September 1, 2022. Drug manufacturer Johnson & Johnson agreed to pay $40.5 million in a settlement with New Hampshire over its role in the state's opioid crisis. Under the terms of the agreement, Johnson & Johnson will make a single payment of $39.605 million to the state and pay approximately $900,000 in attorneys' fees. After the payment of litigation costs and fees to its outside counsel, the state will receive $31.5 million. Under state law, all $31.5 million must be used for opioid abatement purposes, with $4.725 million going to the 23 counties, cities, and towns that filed opioid lawsuits prior to September 1, 2019. The balance of the funds will be deposited into the state's Opioid Abatement Trust Fund. The settlement requires releases by the 23 litigating subdivisions and 18 primary non-litigating cities and towns for the agreement to be final. Johnson & Johnson did not admit to any liability or wrongdoing as part of the settlement. The settlement resolves a trial scheduled to begin on September 7, 2022, in state court. New Hampshire declined to join the national settlement with Johnson & Johnson because the state had devoted significant litigation resources at the time the company announced the national settlement. Had New Hampshire participated in the national settlement with Johnson & Johnson, it would have received about $26.5 million paid out over nine years.

UPDATES IN LAWSUITS INVOLVING WALGREENS

- ***State of Tennessee, ex rel. Herbert H. Slatery III v. Walgreen Company and Walgreens Boots Alliance, Inc.*, Circuit Court of Knox County, Tennessee, Case No. 3-230-22 (suit filed August 3, 2022).** Tennessee Attorney General Herbert H. Slatery III filed a lawsuit against Walgreen Company and Walgreens Boots Alliance, Inc. (collectively "Walgreens") claiming that the company contributed to the state's opioid crisis by failing to maintain effective controls against the misuse and diversion of prescription opioids. The suit asserts that Walgreens created a public nuisance in the state by failing to properly train its pharmacists on how to recognize suspicious activity for opioid misuse and diversion. The state also claims

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Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Rhode Island, South Carolina, South Dakota, Utah, Washington, Wisconsin, Wyoming, and the U.S. Virgin Islands.

that Walgreens violated the Tennessee Consumer Protection Act. (TENN. CODE. ANN. § 47-18-104 (West 2022)). The state seeks unspecified civil penalties against Walgreens and abatement of the public nuisance.

- ***City and County of San Francisco, et al. v. Purdue Pharma L.P., et al.*, U.S. District Court for the Northern District of California, Case No. 3:18-cv-07591-CRB (opinion filed August 10, 2022).** For previous updates on this case, please refer to the August 2022 issue of the LAPPA *Case Law Monitor*, available here. After a two-month bench trial, a federal judge ruled that Walgreens helped exacerbate the opioid crisis in San Francisco. In a 112-page opinion, Judge Charles R. Breyer found Walgreens liable "for substantially contributing to the public nuisance" by failing to adequately stop suspicious orders of opioids. Judge Breyer found that Walgreens did not provide its pharmacists with enough resources to perform the necessary steps to prevent the misuse and diversion of opioids. A subsequent trial will determine the extent to which Walgreens must abate the public nuisance. A pretrial conference for the abatement phase is scheduled for October 27, 2022. Walgreens representatives stated that the company plans to appeal the decision.
- ***Vladimir Gusinsky Revocable Trust v. Stefano Pessina, et al.*, U.S. District Court of the Northern District of Ohio, Case No. 1:22-cv-1717 (suit filed September 23, 2022).** The Vladimir Gusinsky Revocable Trust (Trust) brought forth a verified stockholder derivative complaint against 11 current and former officers and directors of Walgreens. The Trust asserts that Walgreens incentivized and pressured its pharmacists to fill all prescriptions as quickly as possible without any policies requiring them to identify inappropriate prescriptions. The complaint alleges that the defendants caused Walgreens "to turn a blind eye to the opioid crisis" and misled shareholders regarding the company's compliance efforts. As a result of these breaches of the defendants' fiduciary duties, the Trust claims that Walgreens incurred substantial costs. The complaint brings forth causes of action for breach of fiduciary duty, unjust enrichment, and violations of the federal securities laws. The Trust asks the court for damages and an order "[d]irecting Walgreens to take all necessary actions to reform and improve its corporate governance and internal procedures to comply with applicable laws and to protect the Company and its shareholders from a repeat of the damaging event."
- ***Susan Smith v. Walgreens Boots Alliance, Inc., et al.*, U.S. District Court for the Northern District of California, Case No. 3:20-cv-05451-CRB (motion to dismiss granted September 9, 2022).** For previous updates about this case, please refer to the October 2021 issue of the LAPPA *Case Law Monitor*, available here. A federal judge dismissed with prejudice the third amended complaint of a proposed class action lawsuit accusing Walgreens of discriminating against people with disabilities. The plaintiff, Susan Smith, asserted that Walgreens' policy of actively discouraging pharmacists from filling opioid prescriptions that exceed the Centers for Disease Control and Prevention's guideline thresholds discriminates based on disability because "research has suggested a link between opioid prescriptions and disability program participation." Smith also asserted that Walgreens failed to provide meaningful accommodations. The federal court, however, found none of Smith's claims plausibly alleged. The court held that while most or all people with opioid prescriptions exceeding the thresholds might be disabled, Smith failed to plead enough factual content to make her allegation plausible. The court also noted that any customer seeking to fill a high dose prescription might encounter challenges, regardless of disability status. The court ruled that Smith did not plausibly allege that the policy imposes any unique burdens on disabled people. Smith originally sued Costco Wholesale Corp. as well but settled with that company in January 2022 on undisclosed terms.

OHIO SUPREME COURT FINDS INSURER HAS NO DUTY TO DEFEND DISTRIBUTOR FOR ALLEGED OPIOID CRISIS ROLE

***Acuity v. Masters Pharmaceutical Inc.*, Supreme Court of Ohio, Case No. 2020-1134 (opinion filed September 7, 2022).** For previous updates on this case, please refer to the August 2020 issue of the LAPPA *Case Law Monitor,* available here. In a 5-2 decision, the Supreme Court of Ohio ruled that Acuity, an insurer, has no duty to defend Masters Pharmaceutical Inc. (Masters) for its alleged role in the opioid crisis. Cities and counties in West Virginia, Michigan, and Nevada (collectively "the governments") sued Masters alleging that

the company failed to monitor and report suspicious orders of prescription opioids. The governments asserted causes of action for public nuisance, negligence, and violations of the Racketeer Influenced and Corrupt Organizations Act. Between July 2010 and July 2018, Masters purchased eight commercial general liability insurance policies from Acuity. The policies state that under certain circumstances, Acuity has the duty to defend Masters against lawsuits seeking "damages because of bodily injury" and a duty to indemnify Masters for damages it may be legally obligated to pay. Acuity filed a suit seeking a declaratory judgment that it does not owe Masters a duty to defend or indemnify it in the underlying suits. Acuity argued that the underlying suits do not fall within the policy coverage because the governments seek damages for economic injury, not for bodily injury. Masters counterargued that the policies provide coverage because the governments seek, at least in part, "damages because of bodily injury," such as medical and treatment costs they incurred due to opioid use disorder and overdoses sustained by their citizens. The Ohio trial court ruled for Acuity. Masters appealed, and the intermediate appellate court reversed, holding that the policies expressly provide for organizations to claim economic damages, so long as the damages occurred because of bodily injury. Acuity appealed the case to the Supreme Court of Ohio which ruled to reinstate the trial court's decision because the plain language of the policy does not support a broad interpretation of "damages because of bodily injury." The majority held that the phrase "damages because of bodily injury" in the policy "requires more than a tenuous connection between the alleged bodily injury sustained by a person and the damages sought." In the court's view, the governments do not tie their "alleged economic losses to any particular bodily injuries sustained by their citizens, but to the aggregate economic injuries they have experienced because of the opioid epidemic." The dissenting judges would have required Acuity to defend Masters because the policy covers medical expenses due to bodily injury, noting that the governments sought damages for money spent covering citizens' medical bills from emergency services, ambulance costs, and substance use disorder treatment.

ABOUT LEGISLATIVE ANALYSIS AND PUBLIC POLICY ASSOCIATION

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