LEGISLATIVE ANALYSIS AND PUBLIC POLICY ASSOCIATION

Case Law Monitor

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

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NEW ILLEGAL DRUG POSSESSION LAW IN WASHINGTON STATE

In February 2021, the Washington Supreme Court, in *State of Washington v. Shannon B. Blake,* found Washington's felony drug possession statute unconstitutional because it criminalized possession even when the person did not knowingly possess drugs. (For more information on this case, please refer to the June 2021 issue of the LAPPA *Case Law Monitor*, available here). Two months after the ruling, the Washington State Legislature passed Senate Bill 5476, a temporary measure referred to as the "*Blake* Fix," that reduced the penalty for possessing illegal drugs from a felony to a misdemeanor. The *Blake* Fix contained a sunset provision terminating it on July 1, 2023, absent future legislative action. Without such action, Washington would have no statewide criminal penalty for possession of illegal drugs. After failing to reach a compromise solution during the regular 2023 legislative session, Governor Jay Inslee called the legislature back for a special legislative session. During the special session, the legislature reached a deal memorialized in Senate Bill 5536. Under that bill, the intentional possession or public use of small amounts of illegal drugs will be a gross misdemeanor, punishable by up to six months in jail for the first two offenses and up to a year after that. Additionally, the bill encourages police and prosecutors to divert cases for treatment or other services. Furthermore, the bill allocates funds for diversion programs and short-term housing for people with substance use disorders. On May 16, 2023, both legislative chambers voted to pass the bill and the governor signed it the same day. The new provisions take effect on July 1, 2023, preventing any lapse in policy.

U.S. DEPARTMENT OF JUSTICE'S COMPLAINT AGAINST PENNSYLVANIA COURT SYSTEM DISMISSED

***United States v. The Unified Judicial System of Pennsylvania*, U.S. District Court for the Eastern District of Pennsylvania, Case No. 2:22-cv-00709-MSG (motion to dismiss granted April 21, 2023).** A federal district court dismissed the U.S. Department of Justice's (DOJ) complaint against Pennsylvania's court system because court-related administrative entities cannot be held liable for judicial decision-making in individual cases. For previous updates on this case, please refer to the April 2022 issue of the LAPPA *Case Law Monitor*,

available here. DOJ sued the Pennsylvania judicial system, known as the Unified Judicial System of Pennsylvania (UJS) alleging violations under Title II of the Americans with Disabilities Act (ADA). The basis of the lawsuit was that a small number of Pennsylvania county courts allegedly adopted illegal policies prohibiting individuals with opioid use disorder from taking medication for addiction treatment (MAT) while participating in court-operated drug treatment programs. The UJS filed a motion to dismiss the complaint asserting that it cannot be held responsible for the supervision conditions of criminal offenders imposed by local county level judges. The UJS also asserted that the DOJ failed to demonstrate any sort of systemic ADA violation which would trigger UJS's liability as the administrative entity of the entire court system. The DOJ argued that because the Pennsylvania Supreme Court has the power to prescribe and modify rules governing the administration of treatment courts, the UJS is the proper party to be sued. A federal court judge granted UJS's motion to dismiss, holding that while court-related administrative entities often have systemwide oversight responsibilities, they cannot be held liable for judicial decision-making in individual cases. Furthermore, the judge found DOJ's allegations concerning six of the eight counties mentioned in the complaint insufficiently pled because DOJ failed to identify any individuals harmed by the alleged policies. Although the judge granted UJS's motion to dismiss the complaint, it provided DOJ with the opportunity to amend its complaint. DOJ filed an amended complaint on May 22, 2023.

NORTH DAKOTA SUPREME COURT DENIES PEER SUPPORT SPECIALIST'S MEDICAID PROVIDER APPLICATION

***Joseph Jahner v. North Dakota Department of Health and Human Services*, Supreme Court of North Dakota, Case No. 20220313 (opinion filed April 13, 2023).** The Supreme Court of North Dakota ruled that the North Dakota Department of Health and Human Services (Department) did not improperly deny a peer support specialist's application to become a Medicaid eligible provider due to his prior convictions. Joseph Jahner, a peer support specialist, applied to the Department in December 2020 to become an enrolled provider with Medicaid. In June 2021, the Department denied Jahner's application, stating that its Medicaid Provider Enrollment Screening Policy (Policy) prohibits Jahner from such classification because of his criminal history. Between 2002 and 2017, courts convicted Jahner of 13 crimes, including negligent homicide, reckless endangerment, aggravated assault, assault, and menacing. Under N.D. ADMIN. CODE 75-02-05-04.1(9) (West 2023), the Department may deny an application to become a Medicaid provider if "[t]he applicant has been convicted of an offense in N.D. ADMIN. CODE 75-02-05-11, which is determined by the Department to have a direct bearing upon the applicant's ability to be enrolled as a Medicaid . . . provider, or the Department determines, following conviction of any other offense, the applicant is not sufficiently rehabilitated."

After the denial, Jahner requested a hearing before an administrative law judge (ALJ). The ALJ recommended reversing the Department's decision, concluding that the Department did not thoroughly review Jahner's criminal history to determine if his offenses bore directly on the position of peer support specialist. The Department, however, did not adopt the ALJ's recommendation and affirmed its decision denying Jahner's application. Jahner appealed the decision to a state trial court, and in August 2022, the court reversed the Department's decision. The trial court concluded that the Department: (1) failed to sufficiently identify a criminal offense directly bearing on the position of peer support specialist; and (2) did not properly consider Janer's level of rehabilitation. The Department appealed the trial court's ruling to the Supreme Court of North Dakota. On appeal, the Department argued it found Jahner insufficiently rehabilitated because he committed several "direct bearing" offenses, including some committed while still on probation or parole for prior offenses. The Supreme Court found the Department's denial of Jahner's application in accordance with the law and not an arbitrary decision. The court reversed the trial court's judgment and reinstated the application denial. This ruling does not prevent Jahner from working as a peer support specialist, for which the Department conceded he is "uniquely qualified," but does prevent him from seeking reimbursement from Medicaid for his services.

TENTH CIRCUIT RULES UTAH'S DENIAL OF MEDICAL CANNABIS LICENSE DOES NOT VIOLATE THE 14TH AMENDMENT

***JLPR, LLC v. Utah Department of Agriculture and Food*, U.S. Court of Appeals for the Tenth Circuit, Case No. 22-4052 (opinion filed April 18, 2023).** The U.S. Court of Appeals for the Tenth Circuit ruled that a Utah company's complaint, which alleged the state's denial of a medical cannabis cultivation license application violated the U.S. Constitution, failed to plead its claims sufficiently. In 2018, Utah passed the Utah Medical Cannabis Act (UTAH CODE ANN. § 16-61a-101, *et seq*. (West 2023)), which allows the Utah Department of Agriculture and Food (DAF) to award a limited number of medical cannabis cultivation licenses. JLPR, LLC (JLPR) applied for a license in 2019, but DAF did not select its application. JLPR challenged the denial through all state administration phases and sought judicial review in a state intermediate appellate court, which affirmed DAF's decision. In 2021, JLPR filed an 11-count federal complaint against the state, DAF, the Utah Division of Purchasing and General Services, several individual state employees, and two medical cannabis businesses that did receive licenses. The complaint included claims for violations of due process and equal protection under the 14th Amendment. All defendants filed motions to dismiss the complaint, which were granted in May 2022. The district court ruled that JLPR's complaint did not describe "a cognizable liberty or property interest to support its due process claim, nor did it plead a factual basis for its equal protection claim." JLPR appealed the ruling to the Tenth Circuit. On appeal, JLPR argued that it has a property interest in a state cannabis cultivation license because of its status as the "most qualified applicant." The Tenth Circuit rejected this argument, holding that JLPR does not have a legitimate claim of entitlement to a medical cannabis cultivation license because Utah's Medical Cannabis Act does not guarantee a license to any applicant who meets the necessary criteria. The Tenth Circuit also ruled that the district court properly dismissed JLPR's equal protection claims because DAF had a rational basis to deny JLPR a medical cannabis distribution license and there is no evidence to suggest DAF unduly favored other applicants. JLPR filed a petition for a rehearing *en banc* on May 2, 2023, which the court denied on May 18.

THIRD CIRCUIT AFFIRMS FIRING PENNSYLVANIA EMPLOYEE DUE TO POSITIVE CANNABIS TEST IS NOT DISCRIMINATION

***Cherie Lehenky v. Toshiba America Energy Systems Corp.*, U.S. Court of Appeals for the Third Circuit, Case No. 22-1475 (opinion filed May 19, 2023).** The U.S. Court of Appeals for the Third Circuit affirmed a ruling that an employee fired after testing positive for cannabis is unable to sue the company for disability discrimination where the company did not know of the alleged disability. For previous updates on this case, please refer to the April 2022 issue of the LAPPA *Case Law Monitor*, available here. In the case, Cherie Lehenky alleged that she uses cannabidiol (CBD) oil derived from hemp to treat a disability. Toshiba America Energy Systems Corp. (Toshiba) terminated Lehenky's employment after she tested positive for cannabis. In 2022, a federal district court dismissed Lehenky's claims for disability discrimination and disparate impact. On appeal to the Third Circuit, the court ruled that Lehenky's own pleadings and argument preclude a disability discrimination claim. The court observed that there is no evidence Toshiba knew of Lehenky's disability, and she previously stated that the positive drug test was the "sole basis" for her termination. The court concluded her disparate impact claims also fail because Lehenky did not adequately plead that Toshiba's drug policy places a disparate impact on people with a disability. According to the policy, any employee taking prescription or over-the-counter drugs that could be deemed illegal under the policy must provide documentation of the drug and dosage to Toshiba human resources. Lehenky did not report her use of CBD oil to Toshiba. As a result, pursuant to the policy, Toshiba could consider her a user of an illegal drug and terminate her employment. According to the terms of the policy, an employee without a disability wishing to use CBD oil must produce the same documentation as one with a disability. Lehenky failed to present any facts that employees without disabilities are more capable of producing the necessary documentation. Thus, the Third Circuit found that Toshiba's drug policy does not fall more harshly on a protected class. The court affirmed the ruling of the district court and held that Lehenky may not amend her complaint.

NEW JERSEY'S RECREATIONAL CANNABIS LAW DOES NOT CREATE A PRIVATE CAUSE OF ACTION

***Erick Zanetich v. Walmart Stores East, Inc., et al.*, U.S. District Court for the District of New Jersey, Case No. 1:22-cv-05387 (motion to dismiss granted May 25, 2023).** In a case of first impression, a federal district court ruled that New Jersey's recreational cannabis law does not contain a private cause of action allowing workers to sue employers for job discrimination. In January 2021, Erick Zanetich applied for a job at one of Walmart Stores East, Inc.'s (Walmart) facilities. Walmart offered Zanetich the job subject to him submitting to and passing a drug test. Zanetich took the drug test and tested positive for cannabis. As a result, Walmart rescinded Zanetich's job offer. On June 13, 2022, Zanetich filed suit in state court on behalf of himself and others similarly situated asserting two claims: (1) violation of the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMMA; N.J. STAT. ANN. § 24:6I-52 (West 2023)); and (2) failure to hire and/or termination in violation of New Jersey public policy. Walmart removed the case to federal court. In a subsequent motion to dismiss, Walmart argued that CREAMMA does not contain a private cause of action and that New Jersey common law does not recognize a cause of action based on an employer's failure to hire. Zanetich, in turn, asserted that CREAMMA provides an implied private cause of action and that his common law cause of action is cognizable as both a wrongful termination and failure to hire claim.

CREAMMA explicitly prohibits employers from taking certain adverse actions due to an individual's use of cannabis. The statute, however, does not address how this provision is enforced, nor what, if any, remedies are available. Both parties acknowledged that CREAMMA contains no explicit private cause of action. As for an implied private cause of action, the district court ruled that there is no indication the New Jersey Legislature intended to allow an individual to pursue a private cause of action for a violation of CREAMMA. CREAMMA empowers the newly created Cannabis Regulatory Commission (CRC) to regulate, investigate, and prosecute violations of its provisions. The court determined that this demonstrates a legislative intent to have CRC handle all aspects of the enforcement of the statute. Furthermore, CREAMMA differs from other employment statutes adopted by the New Jersey Legislature, such as the Conscientious Employee Protection Act (N.J. STAT. ANN. § 10:5-12.11 (West 2023)) and the New Jersey Law Against Discrimination (N.J. STAT. ANN. § 34:19-13 (West 2023)), which explicitly provide a private cause of action. The court reasoned that this means the Legislature knows how to create a private cause of action in the employment context and will expressly do so to show its intent. The court also rejected Zanetich's claim that Walmart's decision violates state public policy. In New Jersey, while there is a common law cause of action for wrongful termination, there is no cause of action for failure to hire. Given that Walmart conditioned Zanetich's employment on passing a drug test, the court found he was never employed and, thus, never terminated. In reaching its conclusion, the court recognized that its decision leaves Zanetich without a remedy and "essentially renders the language of [CREAMMA's] employment provision meaningless." The court noted that if the Legislature intends for there to be a private cause of action, it should amend CREAMMA to clearly evidence that intent. Alternatively, if the Legislature intends for the CRC to enforce CREAMMA's employment provision, then the CRC should adopt regulations to exercise that power. Zanetich appealed the decision to the U.S. Court of Appeals for the Third Circuit on May 31, 2023.

VIRGINIA'S PHARMACY BOARD PROPERLY DENIED MEDICAL CANNABIS GROWER'S PERMIT

***PharmaCann Virginia, LLC v. Virginia Board of Pharmacy*, Court of Appeals of Virginia, Case No. 0616-22-2 (opinion filed April 4, 2023).** A Virginia intermediate appellate court ruled that the Virginia Board of Pharmacy (Board) did not abuse its discretion when it revoked PharmaCann Virginia LLC's (PharmaCann) conditional approval to grow cannabis plants for not proceeding in timely fashion. Under VA. CODE ANN. § 54.1-3442.6 (West 2023), the Board may issue one pharmaceutical processing facility permit for each of the

five health service areas (HSA) in Virginia. In December 2018, the Board conditionally approved PharmaCann's application to be the pharmaceutical processor in HSA 1. The Board's conditional approval order stated that PharmaCann "will have one year from the date of this order to complete all regulatory requirements for the acquisition of a permit." A year after receiving a conditional approval order, PharmaCann had not started construction on its processing facility. As a result, the Board found the company out of compliance with the regulatory requirements of the permit. PharmaCann submitted a corrective action plan to the Board in which it proposed to complete construction by December 2020. Due to the COVID-19 public health emergency, the Board did not consider the plan until June 2020, leading PharmaCann to request an extension to June 2021 to complete construction. At the June 2020 hearing, the Board denied PharmaCann's extension request, rescinded the Board's conditional approval, and denied PharmaCann's application. PharmaCann appealed the Board's decision to a state trial court arguing that the Board: (1) lacks the authority to revoke a conditional approval; (2) unjustifiably treated PharmaCann differently from similarly situated applicants; and (3) failed to afford PharmaCann procedural due process. The trial court affirmed the Board's decision, and PharmaCann appealed. On appeal, the intermediate appellate court rejected PharmaCann's argument that the Board lacks authority to revoke a conditional approval holding that Board regulations permit it to disqualify any applicant that fails to meet the one-year deadline. The court determined that there is nothing in Virginia law that requires the Board to grant PharmaCann's extension request. Additionally, the court ruled that the Board did not treat PharmaCann differently from any other applicants. The Board presented evidence that other applicants who received additional time to complete the necessary requirements before receiving a permit were further along in the process than PharmaCann at the one-year mark. Finally, the court determined that the Board afforded PharmaCann procedural due process because the company knew that denial of the permit was one possible outcome of the June 2020 hearing.

CALIFORNIA BEVERAGE COMPANY FACES CLASS-ACTION LAWSUIT OVER KRATOM INGREDIENT

***Romulo Torres v. Botanic Tonics, LLC, et al.*, U.S. District Court for the Northern District of California, Case No. 3:23-cv-01460-TSH (suit filed March 28, 2023).** Plaintiff Romulo Torres filed a proposed class-action lawsuit in California against Botanic Tonics, LLC and 7-Eleven, Inc. over allegations each entity falsely advertised and misrepresented the character of the beverage product "Feel Free Wellness Tonic" (Feel Free). Botanic Tonics advertises Feel Free as a "safe, sober, and healthy alternative to alcohol" and characterizes it as a "kava drink." Kava is an extract made from the *Piper methysticum* plant, which is native to the South Pacific and acts as a moderate depressant, inducing a sense of calm or relaxation. The complaint asserts that, contrary to marketing, Feel Free's primary ingredient is kratom, not kava. Kratom is an herb derived from a leafy Southeast Asian tree, known formally as *Mitragyna speciosa*. When consumed in small doses, kratom produces a mild stimulant effect; in moderate to high amounts, kratom produces opioid-like effects.[1] According to the complaint, in December 2021, Torres, an individual in alcohol use disorder recovery, tried Feel Free after purchasing it from a 7-Eleven store. Torres claims that within three months, he developed an addiction to the product, drank 10 Feel Free beverages per day, and spent $3,000 per month on the product. Torres claims that at times he could not function without Feel Free and suffered severe withdrawal symptoms when he attempted to stop using the product. In fall 2022, Torres underwent medical detox and entered a rehabilitation facility. Torres further asserts that Feel Free caused him to lose his job, severely impacted his family and work, and undermined his recovery. Torres alleges that Botanic Tonics never disclosed to consumers the amount or concentration of kratom in Feel Free or that Feel Free may cause significant side effects. Additionally, Torres claims that the scope of Feel Free's negative effects on public health would be more limited but for Botanic Tonics' partnership with 7-Eleven stores. Allegedly, 7-Eleven participates in a joint venture with Botanic Tonics to increase profits through the expansion of the market for Feel Free. Torres asserts claims individually and collectively under the California Unfair Competition Law

[1] For more information about kratom, please refer to LAPPA's "Regulation of Kratom in America: Update" factsheet, available here.

(CAL. BUS. & PROF. CODE § 17200, *et seq.*), the California False Advertising Law (CAL. BUS. & PROF. CODE § 17500, *et seq.*), common law fraud, breach of the implied warranty of merchantability, and unjust enrichment. Torres asks the court to certify the case as a class action and seeks restitution, disgorgement, equitable relief, costs and expenses of litigation, including attorneys' fees, and punitive damages.

INSURER DOES NOT HAVE TO INDEMNIFY PROVIDER IN OHIO WRONGFUL DEATH SUIT

***Stephanie Blundell v. Frank Lazzerini, et al.*, Court of Appeals of Ohio, Fifth District, Case No. 2022 CA 00115 (opinion filed April 20, 2023).** An Ohio intermediate appellate court ruled that an insurer does not have the obligation to indemnify a healthcare provider involved in a wrongful death suit due to the provider's criminal acts. In August 2014, Jaimie Lynn Hayhurst died from acute intoxication from the combined effects of multiple drugs, including alprazolam, fentanyl, and oxycodone. Hayhurst's physician, Frank Lazzerini, prescribed the drugs found in her system. In May 2018, Stephanie Blundell, the administratrix of Hayhurst's estate, filed a medical malpractice and wrongful death suit against Lazzerini and his medical practice in Ohio state court. In June 2019, a jury in a separate criminal case against Lazzerini found him guilty of 187 criminal counts, including involuntary manslaughter of Hayhurst and the unauthorized writing of prescriptions for a controlled substance for other than legitimate medical purposes. In February 2022, at a status hearing in the medical malpractice case, Lazzerini's insurer, Healthcare Underwriters Group, Inc. (Insurer), informed Blundell of its plans to seek a court declaration that it owes no obligation to provide insurance coverage in the Hayhurst matter due to a policy exclusion for criminal acts. The Insurer filed a motion for summary declaratory judgment, which the court granted. Blundell appealed the ruling of the trial court, arguing that the court erred because the language in the policy is overly vague and contrary to public policy. The insurance policy at issue states that the Insurer can exclude coverage of an insured for "a liability resulting from any violation of any applicable local, federal, or state law, and for any liability resulting from any criminal or fraudulent act by the insured." On appeal, the intermediate appellate court affirmed the trial court, determining that the plain language of the policy clearly excludes coverage for any liability resulting from a criminal or fraudulent act. Thus, due to Lazzerini's criminal conviction, the policy does not cover the allegations made by Blundell. Blundell also argued that the Insurer's denial of coverage for "merely negligent medical care" is against public policy. However, the court rejected this argument because the Insurer denied coverage due to a criminal act serving no legitimate medical purpose, not negligent medical care.

PARENTS FILE WRONGFUL DEATH ACTION AGAINST PENNSYLVANIA COUNTY AND COUNTY PRISON

***John Fantino, et al. v. County of Westmoreland, et al.*, U.S. District Court for the Western District of Pennsylvania, Case No. 2:21-cv-00910-WSH (amended complaint filed April 20, 2023).** John and Debbie Fantino, the parents of Elizabeth Fantino (Fantino), filed a lawsuit against Westmoreland County and Westmoreland County Prison (WCP) prison staff on behalf of Fantino's estate over allegations she died while in custody at WCP. On September 12, 2019, police arrested Fantino pursuant to two separate bench warrants for probation violations. Fantino suffered from opioid use disorder and local police knew her, and her use of drugs, well. The police transported Fantino to Butler County Prison (BCP), where medical staff treated her symptoms of withdrawal. On September 15, 2019, BCP transferred Fantino to WCP. According to the complaint, upon intake, a certified nurse's assistant at WCP failed to conduct an evaluation for important signs or symptoms of withdrawal as required. The complaint also alleges that there is no evidence any WCP staff requested, received, or reviewed Fantino's medical records or BCP intake screening. The complaint further asserts that had WCP obtained Fantino's medical records, WCP staff would have provided proper withdrawal management. During the day on September 16, 2019, corrections officers' security check entries show no remarks about Fantino's condition generally or if the officers even got close enough to her to ensure breathing.

When staff announced dinner later in the day, Fantino did not respond. At that time, WCP staff realized she was not breathing and called for emergency medical services. Paramedics found Fantino unresponsive, pulseless, and cold to the touch, and the coroner pronounced her dead a half hour later. An autopsy revealed Fantino's cause of death as acute combined drug toxicity involving fentanyl, sertraline (Zoloft), amphetamine, and methamphetamine. Fantino's parents assert that if Fantino continued to receive withdrawal management services and proper medical care, she would not have attempted to self-manage her withdrawal symptoms as evidenced by her conduct while at BCP, when she was receiving proper detoxification treatment. The estate brings forth a wrongful death suit pleading violations of Fantino's Eighth Amendment rights under the U.S. Constitution, corporate liability, and negligence. Fantino requests damages for pain and suffering, loss of consortium, and financial losses, as well as punitive damages. The defendants filed their answer to the complaint on June 5, 2023.

KENTUCKY DRUG TESTING COMPANIES TO PAY $1.7 MILLION TO RESOLVE FALSE CLAIMS ACT ALLEGATIONS

***United States ex rel. Nam Nguyen and Misty Nall v. Blue Waters Assessment & Testing Services, et al.*, U.S. District Court for the Eastern District of Kentucky, Case No. 5:21-CV-00297-DCR (settlement reached May 9, 2023).** Two Kentucky-based businesses that conduct urine drug tests for the state's family court system agreed to collectively pay over $1.7 million to resolve civil allegations for improperly billing those tests to Medicare and Kentucky Medicaid. Blue Waters Assessment and Testing Services, LLC (BATS) provides services relating to urine drug testing, including the collection of specimens from individuals ordered by family courts to receive drug testing as part of their cases. BATS sent the specimens to VerrLab JA, LLC, a clinical laboratory that does business under the name BioTap Medical (BioTap). BioTap performed the drug tests and billed them to Medicare and Medicaid. This billing arrangement violates the False Claims Act (31 U.S.C. § 3729) because Medicare and Medicaid only reimburse for laboratory tests used for the purposes of medical diagnosis or treatment and not for tests performed for non-medical reasons, such as those performed pursuant to a court order. Prosecutors alleged that BioTap knew the court-ordered nature of the urine drug tests at issue but billed those tests to Medicare and Medicaid anyway. Under the terms of the settlement agreements, BioTap agreed to pay almost $1.5 million to resolve allegations it submitted false claims. BATS and its owner, David Waters, agreed to pay $250,000 for their alleged roles in the submission of false claims.

PROSECUTORS REACH $5 MILLION MEDICARE FRAUD SETTLEMENT WITH GEORGIA PAIN CLINIC

***United States v. Mark Ellis, et al.*, U.S. District Court for the Middle District of Georgia, Case No. 19-cv-107 (notice of settlement March 30, 2023).** According to the U.S. Attorney's Office for the Middle District of Georgia (Attorney's Office), Dr. Mark Ellis and his practice, Ellis Pain Center, allegedly submitted bills to Medicare for urine drug tests that his practice either did not perform at all or did not perform for patients' medically necessary treatment. The Attorney's Office opened an investigation into the clinic for potential violations of the federal False Claims Act in 2015. In November 2019, the Attorney's Office filed charges in federal district court against the clinic. After years of litigation, Ellis and the other defendants agreed in March 2023 to resolve the allegations against them by paying $5 million to the United States.

UNETHICAL TREATMENT PROVIDERS IN ARIZONA TARGETED INDIGENOUS PEOPLE AND DEFRAUDED MEDICAID

On May 17, 2023, Arizona Governor Katie Hobbs announced during a press conference that for nearly three years, more than 100 behavioral health residential and outpatient treatment centers in the Phoenix area

fraudulently billed Arizona Medicaid for services they did not provide. The centers targeted Native Americans from reservations experiencing homelessness, mental health disorder, or substance use disorder. The treatment centers held some patients against their will, rarely gave the promised treatment, and even filed Medicare claims using the names of deceased individuals or young children. Arizona Attorney General Kris Mayes stated during the press conference that, to date, there are 45 indictments and about $75 million in recovered funds. The ongoing investigation involves both the U.S. Attorney's Office and the Federal Bureau of Investigation.

U.S. DEPARTMENT OF JUSTICE CHARGES MULTIPLE MEMBERS OF THE SINALOA CARTEL

In April 2023, the U.S. Department of Justice (DOJ) announced unsealed indictments in three jurisdictions against several leaders of the Sinaloa Cartel, a transnational drug trafficking organization based in Sinaloa, Mexico. According to DOJ, the Sinaloa Cartel is one of the most powerful drug cartels in the world and is largely responsible for the manufacturing and importing of fentanyl for distribution in the United States. Once led by Joaquin Guzman Loera, aka "El Chapo," the Sinaloa Cartel's members and associates, including the sons of Guzman Loera—collectively known as the Chapitos—smuggled significant quantities of drugs through Mexico and into the United States. Following Guzman Loera's arrest in January 2016 and extradition to the United States in January 2017, the Chapitos allegedly assumed their father's role as leaders of the Sinaloa Cartel. The three indictments are:

- ***United States v. Ivan Archivalo Guzman Salazar, et al.*, U.S. District Court for the Southern District of New York, Case No. 1:23-cr-00180-KPF (suit filed April 4, 2023).** In the Southern District of New York, the DOJ filed fentanyl trafficking, weapon, and money laundering charges against 28 defendants, which include: (1) three of the Chapitos; (2) top lieutenants and leadership of the Sinaloa Cartel; (3) alleged manufacturers and distributors of the Sinaloa Cartel's fentanyl; (4) managers of the armed security that protects the Sinaloa Cartel's drug trafficking operations; (5) money launderers who repatriate the Sinaloa Cartel's drug proceeds back to Mexico; and (6) multiple chemical precursor suppliers in China. According to court documents, Ivan Guzman Salazar, Alfredo Guzman Salazar, Ovidio Guzman Lopez, and their co-conspirators allegedly controlled extensive, multi-faceted, and international operations covering the fentanyl trade.
- ***United States v. Ivan Archivalo Guzman Salazar, et al.*, U.S. District Court for the Northern District of Illinois, Case No. 1:09-cr-00383 (suit filed December 14, 2022).** In the Northern District of Illinois, the DOJ filed narcotics, money laundering, and firearm charges against four of the Chapitos: Ivan Guzman Salazar, Alfredo Guzman Salazar, Joaquin Guzman Lopez, and Ovidio Guzman Lopez. According to court documents, the charges stem from a decades-long, collaborative, multi-district effort between the DOJ's Narcotic and Dangerous Drug Section, the Northern District of Illinois, the Southern District of California, and law enforcement partners. The indictment alleges that between May 2008 and April 2023, the Chapitos operated a drug trafficking criminal enterprise.
- ***United States v. Nestor Isidro Perez Salas*, U.S. District Court for the District of Columbia, Case No. 1:21-cr-00146 (suit filed February 22, 2021).** In the District of Columbia, the DOJ filed narcotics, firearms, and witness retaliation charges against Nestor Isidro Perez Salas, who is allegedly one of the Chapitos' lead assassins. According to court documents, Perez Salas is a leader and commander of the "Ninis," a violent group charged with providing security for the Chapitos. From at least 2012 until February 2021, Perez Salas allegedly conspired to distribute and manufacture cocaine and methamphetamine for importation into the United States, used a firearm in furtherance of the alleged drug-trafficking offense, and killed, attempted to kill, threatened, and caused bodily injury to another to intimidate a government witness and informant.

OHIO DOCTOR ACQUITTED IN PATIENT DEATHS SUES HEALTH SYSTEM FOR MALICIOUS PROSECUTION

***William Husel v. Trinity Health Corporation*, U.S. District Court of the Eastern District of Michigan, Case No. 2:23-cv-10845-SJM-DRG (suit filed April 12, 2023).** William Husel, the Ohio doctor acquitted in the deaths of 14 patients who died after ingesting fentanyl, filed a lawsuit for malicious prosecution against Trinity Health Corporation (Trinity), the Catholic health system that employed him.[2] For more information about the underlying case, *State of Ohio v. William Husel*, see the June 2022 issue of the LAPPA *Case Law Monitor*, available here. Husel alleges that Trinity: (1) actively sought his indictment and prosecution by the Franklin County, Ohio Prosecutor's Office; (2) provided the office with knowingly inaccurate and misleading information; and (3) knowingly withheld material information proving that he committed no crime. The complaint asserts that Trinity's primary purpose for these actions was to distract the public from its own administrative failings and to support a religiously based approach to end-of-life care by equating non-Catholic views on the "sanctity of life" with homicide. Because of Trinity's malicious campaign against him, Husel asserts that he suffered grave damages and experienced economic, physiological, and physical harm. Husel seeks a jury trial and at least $20 million in damages.

SECOND CIRCUIT RULES DRUGS SEIZED FROM HOTEL ROOM ADMISSIBLE AS EVIDENCE

***United States v. Timothy Schleede*, U.S. Court of Appeals for the Second Circuit, Case No. 22-440 (opinion filed May 15, 2023).** The U.S. Court of Appeals for the Second Circuit affirmed the sentence of a defendant who claimed that police illegally searched his hotel room before getting a warrant. Timothy Schleede appealed his 2022 conviction entered by a New York federal district court following a conditional guilty plea to possession with intent to distribute more than 40 grams of fentanyl and distribution of fentanyl in violation of 21 U.S.C. § 841. The district court sentenced him to 70 months' imprisonment and four years' supervised release. On appeal, Schleede challenged the district court's denial of his pretrial motion to suppress the drugs seized from his hotel room. Schleede asserted that police found the drugs in his hotel room using an unreasonable search and seizure under the Fourth Amendment of the U.S. Constitution. In general, evidence seized after an unlawful entry is subject to exclusion, but the "independent-source doctrine" provides that if law enforcement obtains a search warrant after an unlawful entry and seizes evidence pursuant to that later warrant-backed search, that evidence is admissible if the warrant derives from sources independent of the prior unlawful entry. For this exception to apply, the government must demonstrate that: (1) probable cause derived from sources independent of the illegal entry supports the warrant; and (2) information gleaned from the illegal conduct did not prompt the decision to seek the warrant. Here, the affidavit supporting the warrant application stated that members of the Ulster (N.Y.) Regional Gang Enforcement Narcotics Team recruited an informant to buy drugs from the defendant and observed Schleede exit the hotel before completing the sale. The informant confirmed that Schleede sold him the drugs. Officers arrested the defendant after witnessing a perceived second drug sale and confirmed Schleede's hotel room with hotel management. The Second Circuit concluded that the affidavit supporting the warrant application "contained ample information from independent, untainted sources to establish probable cause to believe that Schleede's room at the Residence Inn Hotel contained drugs, including fentanyl." The court also ruled that the decision to seek a warrant was not motivated by what the officers found in the hotel room because they began applying for a search warrant right after the informant purchased drugs from Schleede, and before they entered the hotel room. Based on this determination, the court found the evidence seized from the hotel room admissible under the independent-

[2] Malicious prosecution is defined as the institution of a criminal or civil proceeding for an improper purpose and without probable cause. The tort claim requires proof of four elements: (1) the initiation or continuation of a lawsuit; (2) lack of probable cause for the lawsuit's initiation; (3) malice; and (4) favorable termination of the original lawsuit. *Malicious prosecution*, BLACK'S LAW DICTIONARY (11th ed. 2019).

source doctrine and affirmed the judgment of the district court. Schleede has until June 28, 2023, to file a petition for rehearing or rehearing *en banc*.

NEVADA PHYSICIAN'S INDICTMENT FOR VIOLATIONS OF THE CONTROLLED SUBSTANCES ACT DISMISSED

***United States v. Orlandis Wells*, U.S. District Court for the District of Nevada, Case No. 2:19-cr-00216 (motion to dismiss granted May 10, 2023).** A federal district court dismissed an indictment against a Nevada physician based on the U.S. Supreme Court's June 2022 decision in *Ruan v. United States* regarding a defendant's knowledge. For more information on the *Ruan* case, please refer to the August 2022 issue of the LAPPA *Case Law Monitor*, available here. In August 2019, prosecutors indicted Orlandis Wells, a board-certified physician, on 32 counts of violating the Controlled Substances Act (CSA; 21 U.S.C. § 841). Following the *Ruan* decision, Wells filed a motion to dismiss, arguing that the indictment failed to state an offense. In *Ruan*, the U.S. Supreme Court held that prosecutors must prove beyond a reasonable doubt that a defendant knowingly or intentionally acted in an unauthorized manner. The indictment at issue in this case did not allege that Wells knowingly and intentionally acted in an unauthorized manner. Because the indictment did not allege the elements essential to establish a claim under § 841 of the CSA, the district court judge found the indictment was facially invalid. Thus, the judge dismissed the indictment without prejudice, thereby allowing charges to be refiled later if prosecutors discover additional relevant information.

TENNESSEE "ROCK DOC" CONVICTED FOR OPIOID DISTRIBUTION

***United States v. Jeffrey W. Young, Jr.*, U.S. District Court for the Western District of Tennessee, Case No. 1:19-cr-10040-JDB-1 (Verdict reached March 31, 2023).** Nurse practitioner Jeffrey Young operated a medical practice called Preventagenix in Jackson, Tennessee. Branding himself the "Rock Doc," he promoted a self-produced reality TV program about the party-like atmosphere at his practice. According to court documents and evidence at trial, Young freely prescribed controlled substances such as oxycodone and fentanyl to friends and family. Hundreds of patients, including a pregnant woman and multiple women with whom he had inappropriate sexual relationships, received over one million medically unnecessary pills. A joint effort by United States Attorneys and the U.S. Department of Justice's Appalachian Regional Prescription Opioid Strike Force resulted in Young's indictment in April 2019. Prosecutors charged Young with conspiracy to unlawfully distribute and dispense controlled substances, maintaining a drug-involved premises, and 13 counts of distributing controlled substances. A federal jury convicted Young on March 31, 2023. His sentencing hearing will be held on August 3, 2023.

OKLAHOMA PHYSICIAN AND PHARMACIST CHARGED WITH MANSLAUGHTER FOR OVER-PRESCRIBING DRUG

***State of Oklahoma v. Justin Lee and Alexander Frank*, Oklahoma District Court (Oklahoma City), Case No. CF-2023-2233 (suit filed May 11, 2023).** Oklahoma Attorney General Gentner Drummond filed charges against an Oklahoma City doctor and pharmacist over allegations that they gave a patient five times the amount of medication that should have been prescribed. In May 2020, a 75-year-old individual entered Bellevue Health and Rehabilitation to recover from an at-home fall. According to court documents, Alexander Frank, the medical director of the rehabilitation center, approved an incorrect and dangerous dose of methotrexate. Methotrexate is an anti-rheumatic drug used to treat certain types of cancers and autoimmune diseases. High doses of methotrexate can cause serious or even fatal toxic reactions. Based on the patient's condition, the proper dose is 20 milligrams of methotrexate every seven days. The attorney general alleges that Frank incorrectly prescribed the patient 20 milligrams of methotrexate once a day for seven days. In addition

to the faulty prescription, an investigation revealed that Justin Lee, a pharmacist, ignored computer-generated warnings about the size of the dose and failed to follow the computer-generated instructions requirement to verify the dose before filling the prescription. Over the course of five days, the patient ingested 100 milligrams of the drug—five times the proper amount for a week-long period. After five days, rehabilitation center staff found the patient unresponsive and placed the patient on a ventilator. The patient died 10 days later. The attorney general charged Frank with second-degree manslaughter and neglect by a caretaker and charged Lee with second-degree manslaughter.

U.S. POSTAL WORKER IN CONNECTICUT CHARGED WITH COCAINE DISTRIBUTION AND MAIL THEFT

***United States v. Shawn R. Fuller*, U.S. District Court for the District of Connecticut, Case No. 3:23-cr-00075-JAM (suit filed April 26, 2023).** The U.S. Attorney's Office for the District of Connecticut announced that a federal grand jury indicted Shawn Fuller, a U.S. Postal Service mail carrier, with cocaine distribution and mail theft offenses. According to court documents, authorities placed Fuller under investigation for stealing packages. In April 2023, an investigator observed Fuller at the post office opening two packages, removing items from the package, and placing the items in the trunk of his car. Fuller then left work for the day. During a subsequent stop by police for a motor vehicle violation, a police K9 alerted officers to the possible presence of narcotics. A search of Fuller's trunk revealed approximately four kilograms of cocaine. Prosecutors charged Fuller with one count of possession with intent to distribute cocaine, which carries a maximum term of imprisonment of 20 years, and three counts of theft of mail by a postal employee, which carries a maximum term of imprisonment of five years on each count. At present, Fuller is out on bond.

FOURTEEN INDIVIDUALS CHARGED IN CONNECTICUT FOR COUNTERFEIT PILL TRAFFICKING

***United States v. Willis Taylor et al.*, U.S. District Court for the District of Connecticut, Case No. 3:23-cr-00062 (Charges filed April 4, 2023).** Recently, the Federal Bureau of Investigation and Drug Enforcement Administration jointly investigated counterfeit oxycodone tablets laced with fentanyl and counterfeit Adderall tablets containing methamphetamine in the New Haven, Connecticut, area. According to court documents, the investigation discovered a group of 14 individuals coordinating the manufacture and distribution of these pills. Officers seized two kilograms of fentanyl, three kilograms of cocaine, thousands of adulterated counterfeit oxycodone and Adderall tablets, an industrial mixer, four pill presses, over $200,000 in cash, and five firearms. Law enforcement arrested 13 individuals in March 2023, with the fourteenth already in state custody at that time. In April 2023, a New Haven grand jury charged each of the 14 defendants with conspiracy to possess with intent to distribute controlled substances and conspiracy to distribute controlled substances. Two of the alleged co-conspirators face additional charges for possession of a firearm by a felon and possession of a firearm in furtherance of a drug trafficking crime.

TEXAS MEN PLEAD GUILTY TO DISTRIBUTING MISBRANDED DRUGS

***United States v. Evan Field et al.*, U.S. District Court for the Western District of Texas, Case No. 5:23-cr-00140 (Guilty pleas entered March 28 and April 4, 2023).** According to court documents, Evan Field and Michael Diaz of New Braunfels, Texas, created a drug-reselling business in 2019. Field created a website in September 2019, and the two men bulk-purchased synthetic opioids, benzodiazepines, and other drugs, primarily from China. Field, Diaz, and their employees then repackaged the drugs and sold them through their

website. The website included disclaimers that the drugs were "for research purposes only" and "not for human consumption," but the owners allegedly knew that customers placed orders for personal consumption. On March 7, 2023, after a joint investigation by the Food and Drug Administration and the Drug Enforcement Administration, prosecutors charged Field and Diaz with conspiracy to defraud the United States and trafficking of misbranded drugs. Field pled guilty to the charges on March 28, and Diaz entered the same plea on April 4. Both defendants will be sentenced on August 8, 2023.

CALIFORNIA COUPLE GUILTY OF CONSPIRACY TO DISTRIBUTE METHAMPHETAMINE AND FENTANYL IN PENNSYLVANIA

***United States v. Bryce Stanger et al.*, U.S. District Court for the Middle District of Pennsylvania, Case No. 4:21-cr-00264 (Guilty pleas entered April 11, 2023).** In August 2021, Pennsylvania State Police stopped married couple Bryce and Tanya Stanger of San Yisidro, California, in Union County, Pennsylvania for traveling nine miles per hour over the speed limit. A search of the vehicle revealed 30 pounds of crystal methamphetamine and one kilogram of fentanyl. Prosecutors charged the Stangers with conspiracy to distribute methamphetamine and fentanyl in February 2022. They both pled guilty to the charges in April 2023. The sentence remains forthcoming.

WALMART EXECUTIVES MUST FACE INVESTOR LITIGATION BASED ON COMPANY'S LIABILITY FOR CONTROLLED SUBSTANCE HANDLING

***Ontario Provincial Council of Carpenters' Pension Trust Fund, et al. v. S. Robson Walton, et al.*, Delaware Chancery Court, Case No. 2021-0827-JTL (opinions filed April 12, 2023 and April 26, 2023).**

- On April 12, 2023, a Delaware trial court judge issued a novel ruling for a group of pension funds, holding that each brought their claims within a reasonable time after learning of Walmart's alleged controlled substances violations. The plaintiffs' lawsuit accuses Walmart's board and executives of making a conscious decision to prioritize profits over adherence to the law. The decision expands on an approach the same judge used in another Delaware Chancery Court pension fund case involving AmerisourceBergen. (For more information on *Lebanon County Employees' Retirement Fund, et al. v. Steven H. Collis, et al.*, please refer to the February 2023 issue of the LAPPA *Case Law Monitor*, available here). In that case, the court held that ignoring corporate red flags and deliberately prioritizing profits over legal compliance should both be viewed as "a sequence of wrongful acts, each of which gives rise to a separate limitations period." The suit against Walmart's board and senior officers echoes the allegations made in the *Lebanon County* case. In reaching this conclusion, the judge acknowledged that the "barrage of cases filed against Walmart in 2016 and 2017" gave the pension funds and other investors some reason to suspect the company might not be fulfilling its legal obligations, but he ultimately ruled that, under the proper framework, those disputes fell within the limitations period.
- On April 26, 2023, the Delaware judge issued a 123-page opinion on the case's merits, holding that a majority of Walmart's board either faces significant legal exposure or has extensive ties with the company's founding family. Under those circumstances, the pension funds do not need to request an internal investigation before filing a suit, which is normally a prerequisite to bringing shareholder derivative claims. The judge stated that the case involves three separate but related liability theories about each of the three categories of wrongdoing: (1) breaching a settlement with the Drug Enforcement Administration; (2) failing to fulfill legal obligations as a pharmacy chain; and (3) violating the law as a drug distributor. The court dismissed the claims targeting Walmart in its role as a drug distributor but let the rest of the case move forward.

WEST VIRGINIA SETTLES OPIOID LITIGATION WITH KROGER

***State of West Virginia ex rel. Patrick Morrisey v. Walgreens Boots Alliance, Inc., et al.*, Circuit Court of Putnam County, West Virginia, Case No. CC-40-2020-C-82 (settlement announced May 4, 2023).** The last defendant remaining in this case, Kroger agreed to pay West Virginia $68 million to settle allegations that it failed to maintain effective controls against opioid diversion. The settlement includes a $34 million payment upfront and then two $12 million payments due on June 30, 2024, and June 30, 2025. Smaller payments will be made for the next seven years after that to reach the full $68 million figure. Had Kroger not entered into the settlement agreement with the state, a trial would have begun on June 5, 2023. The Kroger settlement leaves no more active defendants in the case. West Virginia previous settled with Walgreens in January 2023 (see the February 2023 issue of the LAPPA *Case Law Monitor*, available here, for more information).

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).**

- Former U.S. Bankruptcy Court Judge Robert Drain, who approved the $6 billion global opioid settlement for Purdue Pharma prior to retiring in June 2022, joined Skadden, Arps, Slate, Meagher & Flom (Skadden), the law firm that serves as Purdue Pharma's (Purdue) special counsel. On April 14, 2023, Skadden filed a letter with the bankruptcy court stating that there is an "ethical wall" between Purdue and Judge Drain and that he "will not have any involvement in, or be apportioned any fees relating to, Purdue matters." Under the New York rules of professional conduct, Drain may not work on any matter that he heard as a jurist. The rules also note that judges cannot negotiate for employment at a firm arguing before him, indicating that talks between Drain and Skadden commenced following his retirement.
- On May 2, 2023, Purdue asked the bankruptcy judge to approve bonuses for its top three executives worth up to $6.7 million, including up to $2.9 million for its CEO Craig Landau. Purdue's proposed incentive plans for the executives would pay them between $5.7 million to $6.7 million if they meet certain goals. According to the filing, Purdue agreed to cut Landau's bonus by $352,000 after discussions with creditor groups. Following the reduction, Purdue's unsecured creditors committee and a group of government and other litigation claimants stated they will not object to the bonus proposal this year. Bankruptcy Judge Sean Lane considered the bonus plan at a May 23 hearing but has not yet issued a ruling on the matter.
- On May 16, 2023, Purdue filed a notice with the bankruptcy court that it will proceed to sell its consumer drug unit, Avrio Health LP, for $397 million to Atlantis Consumer Healthcare, after no other qualified bids emerged from a planned auction. Proceeds from the sale will go to a pool of funds that Purdue's bankruptcy estate will use to pay creditors.
- On May 30, 2023, the U.S. Court of Appeals for the Second Circuit reinstated Purdue's $6 billion global bankruptcy settlement originally approved by Judge Drain in September 2021. (For more information about the Second Circuit's review of this deal, please refer to the February 2022 issue of LAPPA's *Case Law Monitor*, available here.) The deal will shield members of the Sackler family, who own Purdue, from all current and future civil legal claims over their role in the company's prescription opioid business. The Sacklers' liability protection does not extend to criminal prosecutions, should any ever be filed. The Second Circuit spent more than a year reviewing the case after a federal district court, in December 2021, found it improper for Purdue's bankruptcy deal to block future opioid-related lawsuits against the Sackler family. Reversing this decision, the Second Circuit held that the bankruptcy code permits corporate owners not in bankruptcy to receive liability protection under certain circumstances. The ruling gives the Sacklers immunity protection in exchange for payment of up to $6 billion. Roughly $750 million from that payout will go to individuals across the U.S. who became addicted to OxyContin and to the families of those who died from

overdoses. Payments are expected to range from about $3,500 to $48,000. The latest version of the settlement must still be approved by a bankruptcy court judge before it can be finalized. The U.S. Department of Justice has not yet announced whether it would appeal the ruling to the U.S. Supreme Court.

OHIO SUPREME COURT RULES OHIO SETTLEMENT DISTRIBUTION FOUNDATION SUBJECT TO PUBLIC RECORDS ACT

***State of Ohio ex rel. Harm Reduction Ohio v. One Ohio Recovery Foundation*, Supreme Court of Ohio, Case No. 2022-0966 (opinion filed May 11, 2023).** The Ohio Supreme Court ruled that 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, is subject to the state's Public Records Act (OHIO REV. CODE ANN. § 149.43 (West 2023)). For previous updates about this case, please refer to the October 2022 issue of the LAPPA *Case Law Monitor*, available here. In June 2022, Harm Reduction Ohio (HRO), a nonprofit drug policy organization, sent a public records request to One Ohio. One Ohio denied the request arguing that it is not a "public office" and, therefore, not bound by the Public Records Act. HRO filed an action in August 2022 seeking a writ of mandamus directing One Ohio to allow access to the requested records. The key issue in this case is whether One Ohio is a "public office" under the Public Records Act, which defines "public office" as including "any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government." One Ohio asserts that it is "a private, not-for-profit entity" that is not subject to the Public Records Act. In general, private entities are not subject to the Public Records Act, but they can be if there is "a showing by clear and convincing evidence that it is the functional equivalent of a public office." Under the functional equivalency test established in *State of Ohio ex rel. Oriana House, Inc. v. Montgomery* (854 N.E.2d 193), a court must analyze the following factors to determine whether an entity is the functional equivalent of a public office: (1) whether the entity performs a government function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the entity was created by the government or to avoid the requirements of the Public Records Act. Based on these factors, the Supreme Court concluded that One Ohio is the functional equivalent of a public office for the purposes of the Public Records Act. The court justified its ruling by noting that One Ohio's board is made up of people selected by local and state government leaders and that public agencies are heavily involved in its operation. Additionally, the court noted that state and local governments created One Ohio via a Memorandum of Understanding and delegated to the organization the task of spending public money. Based on this determination, the court granted HRO's writ of mandamus ordering One Ohio to provide HRO with the public records applicable to its June 2022 public records request.

WALGREENS AGREES TO PAY SAN FRANCISCO $239 MILLION TO SETTLE OPIOID LAWSUIT

***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 (settlement reached May 17, 2023).** For previous updates on this case, please refer to the October 2022 issue of the LAPPA *Case Law Monitor*, available here. Walgreens Boots Alliance Inc. (Walgreens) agreed to pay $230 million to resolve claims by San Francisco that it mishandled opioids. The settlement comes nine months after a federal judge found Walgreens liable for contributing to a public nuisance by failing to adequately stop suspicious orders of opioids. The settlement will be paid out over the course of 15 years and includes a $57 million payment in the first year.

FORMER INSYS DIRECTORS AGREE TO SETTLE WITH CREDITORS AS PART OF BANKRUPTCY CASE

***Insys Therapeutics*, U.S. Bankruptcy Court for the District of Delaware, Case No. 19-11292 (suit filed June 10, 2019).** On April 14, 2023, some of the former directors of Insys Therapeutics, Inc. (Insys) agreed to a potential $175 million settlement with creditors regarding claims that the directors failed to properly oversee salespeople who illegally marketed the company's fentanyl-based drug spray, Subsys. The agreement resolves allegations that four board members turned a blind eye to bribes paid to doctors who prescribed Subsys. Former Insys Chairman and Chief Executive Officer John Kapoor, who is now serving a five-and-a-half-year prison sentence, is not a party to the settlement. (Please refer to the August 2022 issue of the LAPPA *Case Law Monitor*, available here, for information on the litigation involving John Kapoor). Under the terms of the deal, filed as part of the company's bankruptcy plan, the ex-directors will pay $850,000, insurance will pay $1.5 million, and creditors' attorneys will litigate with other insurers in hopes of covering the remainder of the money.

ABOUT LEGISLATIVE ANALYSIS AND PUBLIC POLICY ASSOCIATION

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

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

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