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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FLORIDA KRATOM MANUFACTURER MUST PAY OVER $11 MILLION IN DAMAGES

***Devin Filippelli v. Grow, LLC, et al.*, U.S. District Court for the Southern District of Florida, Case No. 9:22-cv-81731-DMM (final default judgment entered May 12, 2023).** For previous updates on this case, please refer to the December 2022 issue of the LAPPA *Case Law Monitor*, available here. The Estate of Krystal Talavera (Estate) filed a lawsuit against Grow, LLC (d/b/a KD Incorporated and The Kratom Distro) and its owner, Michael Harder (collectively "defendants"), alleging that the defendants' kratom products caused Talavera's death. In March 2023, the defendants withdrew their answer and affirmative defenses and consented to a default judgment (*i.e.*, an admission by the defendants of the well-pleaded allegations in the plaintiff's complaint), citing financial inability to defend against the action. The Estate moved for a default judgment for the claims of strict liability for failure to warn; strict liability for design defect; and negligence. In May 2023, a federal judge granted the motion for default judgment and awarded $4.6 million in economic damages (representing the value of lost earnings and of lost household services). The court then held an evidentiary hearing in June 2023 to determine non-economic damages, which includes loss of consortium and pain and suffering. On July 26, 2023, the judge issued an order awarding the Estate $7 million in non-economic damages, bringing the total damages awarded to the Estate to $11.6 million. As a result of the default judgment, the court cancelled the trial scheduled for July 31, 2023.

WASHINGTON JURY AWARDS $2.5 MILLION VERDICT IN KRATOM-BASED WRONGFUL DEATH CASE

***Sybil Coyne v. Wendianne Rook, et al., Superior Court of Washington*, Cowlitz County, Case No. 20-2-00874-08 (jury verdict reached July 18, 2023).** A Washington trial court jury awarded a $2.5 million verdict in a kratom wrongful death case. The jury found defendant Wendianne Rook and her company, Society Botanicals, LLC (defendants, collectively), liable for the death of Patrick Coyne. According to the complaint, Coyne used Society Botanicals' "Kratom Divine" product to manage his chronic pain. With regular use, Coyne's dependence on the product increased and eventually he began using the product several times a day. In June 2020, Coyne's wife found him unconscious on the couch and called 911; medics pronounced Coyne dead shortly after they arrived. The county coroner determined that Coyne died from the "toxic effects of mitragynine," the main psychoactive component in kratom. Coyne's widow sued the defendants on behalf of his estate alleging that they fraudulently marketed their kratom product as a "cure-all" product with no negative health effects or risk of overdose. The suit brought causes of action for failure to warn, design and manufacturing defect, misrepresentation, negligence, and unfair trade practices under the Washington Consumer Protection Act (WASH. REV. CODE ANN. § 19.86.020 (West 2023)). This case appears to be the first jury verdict in a civil action for damages against a kratom manufacturer or distributor in the United States. It is worth noting that Washington does not have a Kratom Consumer Protection Law or any laws regulating kratom products.[1]

[1] For more information, please refer to LAPPA's "Kratom: Summary of State Laws," available here.

WALGREENS MUST FACE OHIO WRONGFUL DEATH SUIT IN OPIOID DISPENSING CASE

***Estate of Stephen Mehrer v. Walgreens Specialty Pharmacy, et al*, Court of Appeals of Ohio, Tenth District, Case No. 22AP-286 (opinion filed June 22, 2023).** An Ohio intermediate appellate court ruled that the parents of a child who overdosed on opioids can pursue a wrongful death suit against Walgreens Specialty Pharmacy (Walgreens). In October 2009, Stephen Mehrer injured his shoulder during a high school football game and needed surgery to repair a torn rotator cuff. Over the next two months, Walgreens dispensed 260 doses of hydrocodone and oxycodone to Mehrer. According the Mehrer's parents, he became addicted to drugs as a result of the initial opioid pills dispensed by Walgreens. Mehrer entered rehab on five occasions to receive treatment for his substance use disorder, however, despite periods of sobriety, Mehrer overdosed on a combination of fentanyl and oxycodone in October 2017. The Estate of Stephen Mehrer (Estate) sued Walgreens, with the most recent amended complaint filed in March 2020. In the suit, the Estate brought causes of action for negligence, wrongful death, and *respondeat superior*.[2] The Estate alleged that Walgreens over dispensed medication to Mehrer causing him to become addicted to opioids and ultimately overdose. In February 2021, Walgreens filed a motion for summary judgment arguing that the Estate's survivorship claim is untimely, the learned intermediary doctrine[3] precludes the Estate's claims, and the Estate cannot demonstrate that the prescriptions dispensed by Walgreens proximately caused the injury or ultimate death of Mehrer. The Estate argued that there is a reasonable dispute of fact as to whether the dispensed prescriptions caused Mehrer's death and provided an affidavit by Corey Waller, MD, an addiction, pain, and emergency medicine specialist, as support for its claim. In April 2022, an Ohio trial court granted Walgreens' motion for summary judgment, finding that the Estate's claims for negligence and *respondeat superior* are precluded by the statute of limitations. As for the wrongful death claim, the trial court concluded that the Estate cannot demonstrate that Walgreens' actions proximately caused Mehrer's death and found Dr. Waller's affidavit "speculative, and based on assumptions, not facts in the record." The Estate appealed.

On appeal, the Estate argued that the trial court erroneously disregarded Dr. Waller's expert opinion, which established at the very least a dispute of material fact as to the proximate cause of Mehrer's death. In his affidavit, Dr. Waller set forth how exposure to opioids can cause fundamental changes to the brain that are progressive and persistent even years after the drug use is discontinued. Dr. Waller also explained that addiction is a chronic disease that works in cycles of relapse and remission and that a period of sobriety would not have changed the underlying event. Regarding the case at hand, Dr. Waller concluded that there is a causal connection between the opioids prescribed in 2009, Mehrer's later diagnosis of opioid use disorder, and Mehrer's death in 2017. Dr. Waller noted that Mehrer's initial exposure to opioids during adolescence was significant and made him particularly vulnerable to opioid use disorder. Construing the evidence in favor of the Estate, the appellate court determined that "Dr. Waller's expert affidavit rebuts [Walgreens'] arguments and provides sufficient evidence that reasonable minds could find that the prescriptions were the proximate cause of death to the decedent." The court noted that even if the issue of proximate cause relies upon indirect, rather than direct, evidence of causation, it can still be enough to create a genuine issue of material fact. The court ruled that Dr. Waller's affidavit provides the requisite basis for the case to return to the trial court for further review and sustained the Estate's sole assignment of error. As a result, the court remanded the case to the trial court to consider the other grounds in Walgreens' motion for summary judgment and, if necessary, further proceedings consistent with this decision.

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[2] *Respondeat superior* is the doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency. "Respondeat superior," Cornell University, Legal Information Institute, https://www.law.cornell.edu/wex/respondeat_superior.

[3] The "learned intermediary doctrine" is the principle that a prescription drug manufacturer fulfills its duty to warn of a drug's potentially harmful effects by informing the prescribing physician, rather than the end-user, of those effects. *Learned intermediary doctrine*, BLACK'S LAW DICTIONARY (11th ed. 2019).

FATHER SUES LOUISIANA DEPARTMENT OF CHILDREN AND FAMILY SERVICES OVER CHILD'S DEATH

***Mitchell Robinson, et al v. Marketa Walters, et al*, Louisiana 19th Judicial District Court, Case No. C-733771 (suit filed June 23, 2023).** Mitchell Robinson, the father of a two-year-old boy who died of a fentanyl overdose, sued the Louisiana Department of Children and Family Services (DCFS) alleging that case workers failed to remove the toddler from his mother's custody. Robinson argues that DCFS officials knew that the child's mother has a substance use disorder and that the child faced the risk of harm as of at least 2021 but did not open an investigation until the child tested positive for fentanyl in June 2022. According to the complaint, the June 2022 event was the second time in two months that the mother brought the unresponsive child to the hospital, with doctors using naloxone to revive him. The doctors flagged the child for DCFS investigation both times. DCFS case workers, however, never removed the child from the mother's home. After that, a case worker attempted to visit the mother and child, but no one was home, and the case worker never returned to the house. On June 17, 2022, a physician filed a third report with DCFS about the child, but the assigned case worker had taken a leave of absence for sickness, and that worker's supervisor did not reassign the case. According to the complaint, DCFS case workers never met with the child in person at his home or elsewhere before he died on June 26, 2022. The coroner categorized the child's death as a fentanyl overdose. Robinson filed a wrongful death suit against DCFS, former DCFS Secretary Marketa Walters, current DCFS Secretary Terri Ricks, and two unidentified case workers. Robinson seeks compensation for the loss of his son, along with emotional damages for the grief, mental anguish, and distress he suffered because of the death.

CALIFORNIA DOCTOR AND NURSE FACE INVOLUNTARY MANSLAUGHTER CHARGE OVER INMATE'S DEATH

***The People of the State of California v. Friederike Von Lintig and Danalee Pascua*, Superior Court of California, County of San Diego, Case No. CE409255 (suit filed October 21, 2022).** A doctor and nurse must stand trial for their alleged roles in the death of a woman in custody at the Las Colinas Woman's Jail (Las Colinas). Police booked Elisa Serna into Las Colinas on November 6, 2019. Serna informed the intake staff of her history of substance use disorder, risk of withdrawal, and pregnancy. Despite this information, the medical staff did not start Serna on Las Colinas' withdrawal protocol until four days later. On November 11, 2019, medical staff observed Serna having seizures. Dr. Friederike Von Lintig examined Serna and noted her low oxygen saturation level. According to testimony, Von Lintig later told an investigator that she believed the low oxygen saturation level was a "false reading" because Serna appeared awake and alert and resisted when nurses tried to place an oxygen mask on her. Two hours later, medical staff witnessed Serna lying across the seat of the toilet in her cell and requested that Von Lintig return to Serna's cell, but she never did. A few hours later, Serna fell while nurse Danalee Pascua attempted to check her vital signs. The fall resulted in Serna laying on the floor with her head slumped forward and propped up against the wall. Pascua left Serna's cell without moving her from that position. Serna remained on the floor in that position for the next hour. Pascua and other deputies then re-entered her cell and shortly afterward medical staff pronounced Serna dead. The district attorney charged Von Lintig and Pascua with involuntary manslaughter. In July 2023, a California trial court judge concluded there was enough evidence for a jury to determine whether Von Lintig and Pascua are criminally negligent for failing to properly treat Serna. Both defendants pleaded not guilty. A trial date will be set during an upcoming September 13, 2023 hearing. The defendants face up to four years in prison if convicted. In addition to this state court case, Serna's death is the subject of a federal wrongful death lawsuit filed against San Diego County by her family. (*The Estate of Elisa Serna, et al. v. County of San Diego, et al.*, U.S. District Court for the Southern District of California, Case No. 3:20-cv-02096-LAB-DDL).

GUILTY PLEA RESULTS IN CALIFORNIA'S FIRST FENTANYL MURDER CONVICTION

***The People of the State of California v. Nathaniel Cabacungan*, Superior Court of California, County of Placer, Case No. 62-186858 (guilty plea entered July 7, 2023).** On July 7, 2023, 21-year-old Nathaniel Cabacungan pled guilty to second degree murder following the death of a 15-year-old girl who he reportedly dated. Cabacungan supplied the girl with fentanyl that caused her to fatally overdose on June 21, 2022. According to press reports, this is the first murder conviction associated with fentanyl in California. California has neither a specific fentanyl-induced homicide law, nor fentanyl-specific criminal provisions.[4] Cabacungan's sentencing hearing is scheduled for August 16, 2023. He faces a maximum prison sentence of 15 years to life.

TEXAS PHARMACIST CONVICTED AS PART OF OPIOID TRAFFICKING CONSPIRACY

***United States v. Jonathan Rosenfield, et al.*, U.S. District Court for the Southern District of Texas, Case No. 4:19-cr-00600 (jury verdict reached June 9, 2023).** In late August 2019, the U.S. Department of Justice's Health Care Fraud Unit (USDOJ) filed criminal charges against 41 individuals in the Houston, Texas area for their involvement in an alleged conspiracy to dispense controlled substances without a legitimate medical purpose. These medical providers, owners, and managers of clinics and pharmacies allegedly filled fraudulent high-dose prescriptions of controlled substances including oxycodone and hydrocodone. The USDOJ charged pharmacist Sokari Bobmanuel, a purported "crew leader" of this operation, with conspiracy to unlawfully distribute and dispense opioids as well as maintaining a drug-involved premises. According to evidence presented at trial, Bobmanuel regularly charged over $1,000 for a single oxycodone prescription. On June 9, 2023, a jury found Bobmanuel guilty of the charges against her. Bobmanuel's sentencing hearing is scheduled for September 20, 2023, where she faces a maximum penalty of 20 years in prison on each count. To date, 11 other defendants pled guilty to participating in the conspiracy.

UNITED STATES ANNOUNCES CHARGES AGAINST CHINA-BASED CHEMICAL MANUFACTURING COMPANIES

(Indictments unsealed June 23, 2023). On June 23, 2023, the U.S. Department of Justice (USDOJ) announced the unsealing of three indictments in two New York federal court districts charging China-based companies and their employees with crimes related to fentanyl production, distribution, and sales resulting from precursor chemicals.

- ***United States v. Humbei Amarvel Biotech Co., LTD, et al.*, U.S. District Court for the Southern District of New York, Case No. 1:23-cr-00302-PGG (suit filed June 22, 2023).**
  Humbei Amarvel Biotech Co., LTD. (Amarvel Biotech) is a chemical manufacturing company based in Wuhan, China that allegedly exported large quantities of the precursor chemicals used to manufacture fentanyl and its analogues. According to the indictment, Amarvel Biotech openly advertised online that it ships fentanyl precursor chemicals to the United States and to Mexico, where drug cartels operate clandestine laboratories, synthesize finished fentanyl at scale, and distribute the fentanyl into and throughout the United States. The company advertised its ability to use deceptive packaging, denoting the

[4] For more information, please refer to LAPPA's "Good Samaritan Fatal Overdose Prevention and Drug Indued Homicide: Summary of State Laws," available here, and LAPPA's "Fentanyl-specific Criminal Provisions: Summary of State Laws," available here.

contents as dog food, nuts, or motor oil, to ensure "safe" delivery to the United States and Mexico. An undercover investigation by the Drug Enforcement Administration uncovered Amarvel Biotech shipped more than 200 kilograms of precursor chemicals to the United States. The USDOJ charged Amarvel Biotech and some of its executives and employees with fentanyl trafficking, precursor chemical importation, and money laundering.

- ***United States v. Hefei GSK Trade Co., LTD, et al.*, U.S. District Court for the Eastern District of New York, Case No. 1:23-cr-00264-AMD (suit filed June 16, 2023).**
  As alleged in the indictment, Hefei GSK Trade Co., LTD (Hefei) supplied precursor chemicals to the United States and Mexico knowing that the chemicals would be used to manufacture fentanyl. Hefei openly advertised products on social media platforms and shipped packages using public and private international mail. To prevent detection and interception of chemical products at the border, Hefei employed deceptive and fraudulent practices, such as mislabeling packages, falsifying customs forms, and making false declarations at border crossings. Additionally, Hefei attempted to disguise the precursor chemicals by adding "masking" molecules, which slightly alter the chemical signature of the underlying compound. By changing the chemical signature, an altered substance can evade testing protocols and relevant regulations by appearing to be a new substance. Hefei provided instructions for removing the masking molecules upon receipt, thus helping customers obtain banned precursors and produce fentanyl more effectively. The USDOJ charged Hefei with conspiracy to manufacture and distribute fentanyl, the manufacture of fentanyl, conspiracy to distribute a List 1 chemical,[5] distribution of a List 1 chemical, customs fraud conspiracy, introducing misbranded drugs into interstate commerce, and distribution of metonitazene (a Schedule I controlled substance).

- ***United States v. Anhui Moker New Material Technology Co., et al.*, U.S. District Court for the Eastern District of New York, Case No. 1:23-cr-00263-DG (suit filed June 16, 2023).**
  The facts pled in the indictment in this case are similar to those in the Hefei case. The USDOJ charged Anhui Moker New Material Technology Co. and some of its employees with conspiracy to manufacture and distribute fentanyl, the manufacture of fentanyl, customs fraud conspiracy, introducing misbranded drugs into interstate commerce, and conspiracy to distribute butonitazene (a Schedule I controlled substance).

NEW HAMPSHIRE HOSPITAL SETTLES DRUG DIVERSION ALLEGATIONS FOR $2 MILLION

(Settlement reached June 21, 2023). In February 2022, the Cheshire Medical Center (CMC) in Keene, New Hampshire disclosed to the Drug Enforcement Administration (DEA) that a CMC nurse stole 23 bags of intravenous fentanyl solution from an automatic medication dispensing machine. The DEA opened an investigation into CMC. Subsequent audits of CMC revealed an additional 634 bags of fentanyl missing, which were stolen by the same nurse, as well as 17,961 missing units of controlled substances. On June 21, 2023, CMC reached a settlement with the U.S. Attorney's Office for the District of New Hampshire to resolve claims that it failed to keep accurate records of the controlled substances in its possession, in violation of the Controlled Substances Act. CMC agreed to pay $2 million and will abide by strict new security and recordkeeping requirements.

[5] A "List I chemical" is a chemical specifically designated by the Administrator of the Drug Enforcement Administration (in 21 C.F.R. § 1310.02) that, in addition to legitimate uses, is used in manufacturing a controlled substance in violation of the Controlled Substances Act and is important to the manufacture of a controlled substance. 21 C.F.R. § 1300.02.

FTC SUES OWNER AND MARKETERS OF "SMOKE AWAY" FOR DECEPTIVE MARKETING

***United States v. Michael Connors, et al.*, U.S. District Court for the Middle District of Florida, Case No. 2:23-cv-00475-SPC-KCD (suit filed June 29, 2023).** The U.S. Federal Trade Commission (FTC) filed a lawsuit under the FTC Act (15 U.S.C. § 45) and the Opioid Addiction Recovery Fraud Prevention Act (OARFPA; 15 U.S.C. § 45d) against Michael Connors, and the companies he controls, for deceptively marketing "Smoke Away" products as an effective way to quit smoking. The complaint alleges that the defendants' advertising relied on false or unsubstantiated claims, including claims that Smoke Away products eliminate nicotine cravings and withdrawal symptoms and enable consumers to quit smoking easily and quickly. The defendants also allegedly advertised Smoke Away with video testimonials from real Smoke Away users when, in fact, the videos contained actors recruited by the defendants and compensated for their on-screen appearances. This appears to be the FTC's first smoking cessation product challenge under OARFPA. Although OARFPA contains the word "opioid" in the title, the statute covers a broad range of substance use disorders, including tobacco-related addiction. A proposed consent judgment filed on June 29, 2023 would permanently ban Connors and his companies from marketing or selling any substance use disorder treatment product or services, including any smoking cessation product or service. The order also: (1) prohibits the defendants from making health-related advertising claims for other products unless substantiated by competent and reliable scientific evidence; (2) prohibits them from using deceptive consumer testimonials; and (3) imposes a $7.1 million monetary judgment and a $500,000 civil penalty.

PHILADELPHIA SAFE INJECTION SITE UPDATE

***United States v. Safehouse, et al*, U.S. District Court for the Eastern District of Pennsylvania, Case No. 2:19-cv-00519-GAM (motion to dismiss filed July 21, 2023).** For previous updates on this case, please refer to the December 2021 issue of the LAPPA *Case Law Monitor*, available here. The U.S. Department of Justice (USDOJ) filed a motion to dismiss in the case involving the Philadelphia-based nonprofit organization, Safehouse, which is seeking to open a supervised injection site in the city. In January 2021, the Third Circuit held that Safehouse's plan to open a supervised injection site would violate the federal "crack house statute" (21 U.S.C. § 856). Following the ruling, the Third Circuit remanded the case to the District Court for the Eastern District of Pennsylvania to consider Safehouse's claim that 21 U.S.C. § 856 cannot be enforced against it under the terms of the Religious Freedom Restoration Act (RFRA; 42 U.S.C. § 2000bb *et seq.*). Safehouse later added another claim under the Free Exercise Clause of the First Amendment of the U.S. Constitution. On July 21, 2023, the USDOJ filed a motion to dismiss for failure to state a claim arguing that because Safehouse is not, itself, a religious organization, it cannot assert the religious rights of its board members. Additionally, the USDOJ argues that there are many ways for Safehouse's board members to exercise their "broadly stated religious beliefs" that do not involve maintaining a facility for individuals to consume drugs. Furthermore, the USDOJ asserts that Safehouse's need to open a safe injection site is motivated by socio-political or philosophical beliefs, not religious ones. Safehouse has until August 15, 2023 to respond to the motion. The USDOJ's reply to that response is due by September 8, 2023.

NEONATAL ABSTINENCE SYNDROME COMPLAINT AGAINST MCKINSEY DISMISSED

***In re: McKinsey & Co., Inc. National Prescription Opiate Consultant Litigation*, U.S. District Court for the Northern District of California, Case No. 3:21-md-02996-CRB (motion to dismiss granted July 20, 2023).** For previous updates on this case, please refer to the December 2022 issue of the LAPPA *Case Law Monitor*, available here. A California federal district court granted McKinsey & Company's (McKinsey) motion to dismiss actions filed by eight sets of private plaintiffs suing on behalf of minors with neonatal

abstinence syndrome (NAS). The NAS plaintiffs are parents or legal guardians of children born with NAS, who brought forth claims of negligence, fraud and deceit, and public nuisance against McKinsey over the company's role in advising opioid manufacturers, including Purdue Pharma (Purdue). On January 9, 2023, McKinsey moved to dismiss all the NAS plaintiffs' claims. Regarding the negligence claims, McKinsey argued that the NAS plaintiffs failed to establish that McKinsey had a special relationship with the NAS plaintiffs to impose a duty of care. The NAS plaintiffs argued that it was reasonably foreseeable that McKinsey's failure to exercise reasonable care in advising Purdue and developing the marketing and sale strategies would cause harm to the NAS plaintiffs. The court agreed with McKinsey that no source creating a duty between McKinsey and the NAS plaintiffs existed. The court also noted that foreseeability by itself is not enough to establish a duty. Without a duty running from McKinsey to the NAS plaintiffs, the negligence claims fail. The court also ruled that the NAS plaintiffs' allegations of fraud fail because the plaintiffs did not plead any facts showing that the birth mothers or their doctors relied on McKinsey's allegedly false or misleading statements. Finally, the court ruled that the NAS plaintiffs' public nuisance claim fails because the plaintiffs did not adequately plead any special injuries to invoke standing to bring a public nuisance claim. The court stated that the individual NAS plaintiffs do not explain how they were uniquely harmed by their exposure to opioids in comparison to others exposed to opioids. Based on these reasons, the court granted McKinsey's motion to dismiss the NAS complaint for failure to state a claim.

GEORGIA PAIN MANAGEMENT CLINIC SETTLES FALSE CLAIMS ACT ALLEGATIONS

***United States ex rel. Amy Tyson v. Georgia Pain Management, P.C., et al.*, U.S. District Court for the Northern District of Georgia, Case No. 1:18-cv-5520 (settlement reached May 30, 2023).** In a lawsuit filed in federal district court on behalf of the United States under the whistleblower provisions of the federal False Claims Act (FCA; 18 U.S.C. § 287), a former employee of James Ellner, MD and his clinics, Georgia Pain Management PC (Georgia Pain) and Samson Pain Center PC, alleged that the doctor committed violations of the FCA and the Anti-Kickback Statute (42 U.S.C. § 1320a-7b). In the suit, the whistleblower alleges that Ellner and his offices submitted false claims to Medicare and TRICARE (the uniformed services health care program) by billing for evaluation and management services that did not qualify for federal reimbursement. The former employee further claimed that Ellner entered into an arrangement with a urinalysis laboratory in which Georgia Pain referred patients for medically unnecessary tests in exchange for the laboratory paying the salary of a Georgia Pain employee. On May 30, 2023, Ellner and his clinics settled with the United States to resolve the claims against them. The defendants will pay $625,000 to the United States, of which the whistleblower will receive $118,000.

FORMER VICE PRESIDENT OF NETFLIX AND YOUTUBE DISBARRED FOR FALSIFIED DRUG TESTS

***In re Christopher Libertelli*, District of Columbia Court of Appeals, Case No. 23-BG-0243 (opinion issued June 8, 2023).** In March 2023, the District of Columbia's Board of Professional Responsibility (Board) recommended District disbarment for Christopher D. Libertelli, an attorney previously employed at Netflix, YouTube, Skype, and the Federal Communications Commission. According to the Board, Libertelli made false statements and falsified documents to conceal his misuse of prescription drugs, cocaine, and cannabis while acting as a *pro se* litigant in divorce and custody proceedings. Libertelli altered the results of 62 drug tests, while fabricating the results of five tests that he never took at all. Before the District of Columbia Court of Appeals, Libertelli requested leniency on the grounds that his substance use disorder substantially caused his actions. The court disagreed, finding that he failed to make the required showing that a rehabilitated disability substantially affected the misconduct. On June 9, 2023, the court imposed the Board's recommendation and disbarred Libertelli.

PROPOSED CLASS ACTION FILED IN PENNSYLVANIA FOR RECOVERY CLINIC'S DATA BREACH

***Andrea Bernard v. Onix Group, LLC*, U.S. District Court for the Eastern District of Pennsylvania, Case No. 2:23-CV-02556 (complaint filed July 3, 2023).** Andrea Bernard was a patient at Addiction Recovery Services, an entity owned by Onix Group. In March 2023, Onix experienced a ransomware attack, which resulted in unauthorized outside access to patients' private information, including Bernard's. The data breach revealed names, Social Security numbers, birthdates, bank information, and clinical information about patients' care. On July 3, 2023, Bernard filed a suit in Pennsylvania federal district court on behalf of a proposed nationwide class of similarly situated patients. The lawsuit alleges that Onix's negligence and inadequate cybersecurity practices violate the federal Health Insurance Portability and Accountability Act. Bernard and the proposed class seek monetary damages and an order requiring Onix to provide lifetime credit monitoring and identity theft insurance to all members of the class. A trial date has not yet been set.

INDIVIOR REACHES SETTLEMENT IN SUBOXONE ANTITRUST CASE

***In re Suboxone Antitrust*, U.S. District Court for the Eastern District of Pennsylvania, Case No. 2:13-md-02445-MSG (settlement reached June 2, 2023).** For previous updates on this case, please refer to the December 2022 issue of the LAPPA *Case Law Monitor*, available here. On June 2, 2023, Indivior, Inc. (Indivior) reached a $102.5 million settlement with 41 states[6] and the District of Columbia over claims that the company ran an illegal scheme to extend a monopoly over Suboxone. The states sued Indivior in 2016, alleging it violated the Sherman Anti-trust Act (15 U.S.C. § 2) and various state laws by seeking to continue its market dominance by switching to a new version of Suboxone shortly before generics appeared on the market. The settlement is subject to court approval and is not an admission of wrongdoing or liability by Indivior. Under the terms of the settlement, Indivior must notify the states if it introduces new products, petitions the U.S. Food and Drug Administration to change or issue regulations, or undergoes a change in corporate control. Prior to the settlement, there was a September 2023 trial scheduled.

"CANNABIS LIKE SCENT" IS ENOUGH TO WARRANT POLICE SEARCH IN WISCONSIN

***State of Wisconsin v. Quaheem O. Moore*, Supreme Court of Wisconsin, Case No. 2021AP938-CR (opinion filed June 20, 2023).** In a 4-3 decision, the Supreme Court of Wisconsin ruled that a car smelling like cannabis is enough for police to justify searching a person in the vehicle, even if legal substances smell the same. In November 2019, a police officer pulled Quaheem Moore over for speeding. Two officers escorted Moore out of the vehicle and performed an initial safety pat-down. During the pat-down, the officers found a vaping device. One of the officers asked if the vape contained THC. Moore responded that it contained cannabidiol (CBD). One officer remarked that the vehicle smelled like cannabis, and the other officer agreed. Moore denied that the smell was coming from him and informed the officers that the vehicle was his brother's rental car. The officers both agreed that the smell originated from the vehicle and not from Moore himself. Based on the smell, however, the officers performed a more thorough search of Moore. During this second search, an officer found two plastic baggies containing cocaine and fentanyl in a false pocket behind Moore's zipper. Prosecutors charged Moore with possession with intent to deliver narcotics and possession with intent to deliver between one and five grams of cocaine. The officers did not find any cannabis on Moore, and he did not face charges related to cannabis. At trial, Moore moved to suppress evidence of the cocaine and fentanyl,

[6] Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, Wisconsin, and West Virginia.

arguing that the officers lacked probable cause to arrest and therefore search him. The state trial court granted Moore's motion to suppress, and an intermediate appellate court affirmed. The state then petitioned the state supreme court for review based on the 1999 Wisconsin Supreme Court ruling in *State v. Secrist* (589 N.W.2d 387) where "the odor of a controlled substance may provide probable cause to arrest when the odor is unmistakable and may be linked to a specific person or persons because of the particular circumstances in which it is discovered." Further, the *Secrist* court wrote that "the strong odor of marijuana in an automobile will normally provide probable cause to believe that the driver and sole occupant of the vehicle is linked to the drug."

In this case, Moore challenged the link between the cannabis odor and himself on the ground that the officers did not smell it on him, only in his vehicle. The court's majority, however, determined that a reasonable officer would believe Moore was probably connected with the illegal substance that the officers identified, as he was the sole occupant of the vehicle that smelled. Moore also challenged the link between the cannabis odor and himself because the vehicle was not his. The majority again disagreed, ruling that a reasonable officer would likely conclude, absent other facts, that the driver and sole occupant of the vehicle is connected to the illegal substance whose odor was detected in the vehicle. Finally, Moore asserted that the odor of cannabis cannot be unmistakable when there are "innocent explanations" for it, such as the odor of CBD, a legal substance. The majority rejected this argument, holding that while the officers could have reasonably inferred that the smell from the vehicle was CBD, they also could reasonably infer that the smell was THC. The majority further concluded that "an officer is not required to draw a reasonable inference that favors innocence when there is also a reasonable inference that favors probable cause." Based on the totality of the circumstances in the case, the majority ruled that the officers had probable cause to arrest Moore on the belief that he was committing or had committed a crime; thus, the search incident to arrest did not violate Moore's rights under the Fourth Amendment of the U.S. Constitution. In contrast, the three-member dissent concluded that the officers lacked probable cause to arrest Moore, arguing that the *Secrist* decision is outdated and does not account for the subsequent legalization of substances that smell like cannabis, such as CBD and hemp.

PENNSYLVANIA CANNABIS GROWERS ARE NOT REQUIRED TO TEST PRODUCTS AT TWO DIFFERENT LABORATORIES

***Green Analytics North, LLC, et al v. Pennsylvania Department of Health*, Commonwealth Court of Pennsylvania, Case No. 104 MD 2023 (opinion filed June 29, 2023).** In a 5-2 decision, an intermediate appellate court in Pennsylvania ruled that the Pennsylvania Department of Health (Department) exceeded its authority by requiring medical cannabis growers and processers to test their products at two separate laboratories. Section 704 of the Pennsylvania Medical Marijuana Act (PMMA) states that "a grower/processor shall contract with one or more independent laboratories to test the medical marijuana produced by the grower/processor." (35 PA. STAT. AND CONS. STAT. ANN. § 10231.704 (West 2023)). In March 2023, the Department issued a regulation, known as the two-lab requirement, mandating that growers/processors use separate laboratories for testing during the two phases of the manufacturing process: harvest (when the plant is cut down) and final product (right before the growers/processors sell the medical cannabis products to dispensaries). (28 PA. CODE § 1171a.29(c)(2) (West 2023)). A group of cannabis growers and processors sued the Department, arguing that the two-lab requirement exceeds the Department's authority under the PMMA because neither Section 704 nor any other section of the PMMA authorizes the Department to mandate such a requirement. The Department contends that the PMMA gives it the flexibility to implement testing requirements that it deems appropriate in furtherance of its obligation to regulate and enforce the growing and processing of medical cannabis. Pointing to the "one or more" language of Section 704, the intermediate appellate court concluded that "[t]he plain meaning of Section 704 is that growers/processors may contract with *only one* laboratory if they so choose. Notwithstanding, Section 1171a.29(c)(2) of the Department's regulations mandates growers/process to contract with *at least two* separate laboratories." Given this conflict between the PMMA and the regulation, the appellate court noted that precedent requires "where there is a conflict between statute and a regulation purporting to implement the provision of that statute, the regulation

must give way." Because the regulation presents a conflict with the statute, the court concluded that the Department lacks the authority under the PMMA to enact Section 1171a.29(c)(2). As such, the court found Section 1171a.29(c)(2) invalid and unenforceable. The dissent, however, argued that the two-laboratory requirement is a proper exercise of the Department's authority under the PMMA, "which gives the Department the authority to closely regulate the testing process in furtherance of the General Assembly's concern for the safety of consumers of medical marijuana."

CITY VIOLATED NEW YORK LAW WHEN IT TERMINATED WORKER WITH MEDICAL CANNABIS LICENSE

***Thomas Apholz v. City of Amsterdam*, Supreme Court of New York, Montgomery County, Case No. EF2021-129 (jury verdict reached June 30, 2023).** A trial court jury found that Amsterdam, New York (Amsterdam or city) violated state law when city officials terminated a wastewater treatment plant worker with a medical cannabis license for failing a drug test. In March 2017, Thomas Apholz signed a "last chance agreement" with Amsterdam providing for job termination if he refused or failed a drug test. In March 2019, Apholz received a medical cannabis license to treat his chronic pain. In February 2020, Apholz took a random drug test and tested positive for cannabis. On March 6, 2020, the city suspended Apholz, with pay, due to the failed drug test and terminated him 10 days later. Apholz sued Amsterdam, arguing that the city unlawfully discriminated against him for possessing a medical cannabis card. Apholz also asserted that the city failed to accommodate his disability under the New York State Human Rights Law. (N.Y. EXEC. LAW § 296 (McKinney 2023)). The city contended that it did not know of Apholz's disability and, therefore, could not discriminate against him or refuse to accommodate a request. In response, Apholz claimed that he advised the city on numerous occasions that he possessed a medical cannabis certificate and that the city had the responsibility to engage in conversation to determine Apholz's qualifying disability. Apholz also argued that the prohibition in the last chance agreement does not apply to legally prescribed medication. At trial, a jury ruled in favor of Apholz and awarded him $191,762. In addition to the monetary award, the jury awarded Apholz reinstatement at his former job and recovery of his legal fees from the city.

COMPANY MUST FACE MEDICAL CANNABIS DISCRIMINATION CLAIM IN PENNSYLVANIA

***John DellaVecchio v. Cleveland-Cliffs, Inc.*, U.S. District Court for the Eastern District of Pennsylvania, Case No. 22-cv-4932 (motion to dismiss denied May 30, 2023).** A federal district court ruled that Cleveland Cliffs Steel, LLC (Cleveland Cliffs) must face a lawsuit alleging that the company discriminated against a man when it rescinded his job offer following a positive cannabis test. John DellaVecchio has a medical condition that he treats with medical cannabis, which he is certified to receive under the Pennsylvania Medical Marijuana Act (PMMA; 35 PA. STAT. AND CONS. STAT. ANN. § 10231.101, *et seq.* (West 2023)). In April 2022, DellaVecchio interviewed for a position at one of Cleveland Cliffs' facilities. In May 2022, Cleveland Cliffs offered him a job as an associate engineer, which he accepted. As part of the onboarding process, DellaVecchio took a drug test. Prior to the test, he informed Cleveland Cliffs of his certification for, and use of, medical cannabis. At the time of the test, however, DellaVecchio realized he possessed an expired medical cannabis card and informed the testing center nurse. He asked to postpone the appointment because he had a doctor's appointment the next day and could obtain an updated card at that time. The nurse informed him that if he possessed the updated card when he received the results there would be no issues. Based on that information, DellaVecchio went through with the test that day. The next day, DellaVecchio's physician certified his continued prescription for medical cannabis. He received his updated medical cannabis card in the mail on June 12, 2023. On June 15, 2022, Cleveland Cliffs called DellaVecchio to inform him that it rescinded his job offer because of a positive test for cannabis. DellaVecchio informed the caller that he possessed a medical cannabis card, but she said that the card "did not matter."

DellaVecchio sued Cleveland Cliffs in December 2022, alleging discrimination in violation of the PMMA and Pennsylvania public policy. Cleveland Cliffs filed a motion to dismiss the lawsuit, asserting that DellaVecchio's claims should fail because: (1) the PMMA did not provide him protection at the time of his test because of his expired medical cannabis card; and (2) even if he was covered under the PMMA, the law does not recognize a private right of action. DellaVecchio responded by noting that a federal district court judge found a private right of action under the PMMA in *Hudnell v. Thomas Jefferson University Hospital* (537 F. Supp. 3d 852; see the December 2020 issue of the LAPPA *Case Law Monitor*, available here, for more information on this case). Additionally, DellaVecchio argued that having an expired card at the time of the test did not remove him from the class of protected users under the PMMA because Cleveland Cliffs had advance notice of his eligibility and re-certification at the time of the adverse employment action. Cleveland Cliffs replied that the court is not bound by *Hudnell* because the Pennsylvania Supreme Court has not ruled on the issue. Here, the federal district court determined that DellaVecchio alleged facts sufficient to show that he is a member of the class of people protected by the PMMA and that he suffered from an adverse employment action due to plausibly discriminatory behavior by Cleveland Cliffs. The court further determined that absent direct guidance from the Pennsylvania Supreme Court, it is reasonable for the court to predict that the Supreme Court would rule in agreement with *Hudnell*. Thus, the court ruled that DellaVecchio may bring a private right of action under the PMMA and denied Cleveland Cliffs' motion to dismiss. The court also ruled that DellaVecchio established a facially plausible claim under Pennsylvania's public policy doctrine and denied Cleveland Cliffs' motion to dismiss that count, as well. Discovery in the case is due by October 30, 2023.

RECENT EVENTS IN THE ENDO BANKRUPTCY PROCEEDINGS

***Endo International PLC*, U.S. Bankruptcy Court for the Southern District of New York, Case No. 22-22549-jlg (objection to the proposed sale of assets filed July 14, 2023).** For previous updates on this case, please refer to the April 2023 issue of the LAPPA *Case Law Monitor*, available here. On July 14, 2023, a group of Endo International, PLC (Endo) creditors filed objections to the company's proposed $6 billion sale of its assets to a lender group, arguing that the deal will shut out many entities harmed by its opioid products. An objection filed by the Rochester City School District along with other public school district creditors states that the proposal threatens to sideline the needs of public schools and could leave them without any meaningful compensation. Additionally, several Canadian provinces filed a separate objection opposing Endo's sale plan. On July 18, 2023, the U.S. Department of Justice, Department of Health and Human Services, Department of Veterans Affairs, and the Internal Revenue Service filed an objection to the proposed sale arguing that the deal discriminates against the U.S. government and other creditors. The federal agencies assert that the deal will improperly distribute some sale proceeds to certain favored creditors, while leaving the government's claims unsatisfied. The government's objection also asks the court to appoint a Chapter 11 trustee to oversee and investigate Endo's bankruptcy.

RECENT EVENTS IN THE PURDUE PHARMA BANKRUPTCY PROCEEDINGS

***In re Purdue Pharma L.P.*, U.S. Bankruptcy Court for the Southern District of New York, Case No. 19-23649 (suit filed Sept. 15, 2019).** On July 7, 2023, the U.S. Department of Justice (USDOJ) filed a motion to pause the U.S. Court of Appeals for the Second Circuit's reinstatement of Purdue Pharma's (Purdue) $6 billion settlement plan pending the result of its petition for a writ of certiorari to the U.S. Supreme Court (USSC). If the USSC agrees to hear the case, it could take until the end of 2024 for it to make a decision. State governments and other entities harmed by opioids objected to the USDOJ's motion, arguing that they need immediate receipt of the settlement funds. They assert that any further delay will result in harm to victims and opioid-affected communities. The USDOJ, however, believes that the immunity provided to the Sacklers in

the deal is not authorized by the U.S. bankruptcy code and sets a precedent for wealthy corporations and individuals to misuse the bankruptcy system to avoid mass liability. On July 25, 2023, the Second Circuit denied the USDOJ's motion to stay. The ruling allows Purdue to start executing the settlement, though the plan is still subject to final approval by a bankruptcy judge. The USDOJ has until August 28, 2023 to file a writ of certiorari with the USSC.

RECENT EVENTS IN THE MALLINCKRODT BANKRUPTCY PROCEEDINGS

***Mallinckrodt PLC*, U.S. Bankruptcy Court for the District of Delaware, Case No. 20-12522-JTD (suit filed October 12, 2020).**

- On June 5, 2023, Mallinckrodt PLC (Mallinckrodt) announced its consideration of a second bankruptcy filing or other options after its lenders raised concerns over Mallinckrodt's ability to make a $200 million payment to the opioid trust originally due by June 16, 2023. Amid struggles to manage its debt load, Mallinckrodt and/or the opioid trust postponed the payment multiple times to allow Mallinckrodt to evaluate its capital needs and consider its options. Most recently, Mallinckrodt entered a forbearance agreement with some of its note holders to extend the payment's due date to August 15, 2023. Mallinckrodt's board of directors has not announced a path forward regarding the bankruptcy filing.

- On July 7, 2023, a group of shareholders filed a class action lawsuit against Mallinckrodt claiming that the company lied to investors about its financial strength and ability to make the $200 million payment to the trust for victims of the opioid crisis. The plaintiffs seek damages for their securities fraud claims. The case is *Continental General Insurance Company, et al v. Mallinckrodt PLC, et al*, U.S. District Court for the District of New Jersey, Case No. 3:23-cv-03662-ZNQ-JBD.

ABOUT THE LEGISLATIVE ANALYSIS AND PUBLIC POLICY ASSOCIATION

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

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

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