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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COURT UPHOLDS INDIANA MAN'S DRUG INDUCED HOMICIDE CONVICTION

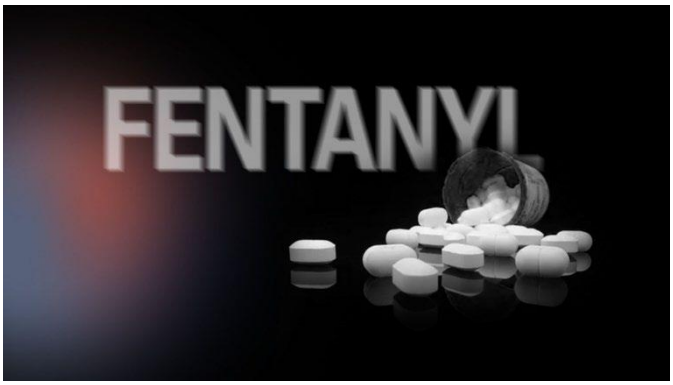
***Kurt Russell v. State of Indiana*, Court of Appeals of Indiana, Case No. 22A-CR-2299 (opinion filed August 8, 2023).** The Indiana Court of Appeals upheld the sentence of the first man convicted of dealing in a controlled substance resulting in death (IND. CODE ANN. §35-42-1-1.5(a) (West 2023); hereafter "DIH statute") in Boone County, Indiana. Kurt Russell and Maxwell Timbrook were friends who often talked about getting and using heroin and other substances. In January 2020, Timbrook texted Russell looking to obtain heroin. In response, Russell purchased heroin from a dealer and resold some of it to Timbrook. After picking up the drugs, Timbrook texted Russell questioning the quantity of drugs he received, to which Russell replied, "Go easy man. Stuff is wicked strong." Later Timbrook texted Russell that the "stuff is pretty good." The next day, Timbrook's mother found him unresponsive, and a coroner pronounced him dead at the scene. An autopsy revealed Timbrook had fentanyl in his system and likely died of a fentanyl overdose.

One of the police officers at the scene found a cell phone near Timbrook's body. However, law enforcement could not extract any data from the phone as it was locked, so the police returned the phone to Timbrook's father who also kept a second, older phone that once belonged to Timbrook. A few weeks later, Timbrook's father remembered a passcode that Timbrook had told him. When he entered the passcode into both phones, he was able to unlock them, and the data stored in Apple's iCloud transferred to both phones. Timbrook's father provided the second, older phone to the police, who extracted Timbrook's text conversations and other data from the phone. With the evidence found on the phone, a jury convicted Russell in August 2022, and the court sentenced him to 25 years in prison.

Russell appealed his conviction arguing that the trial court abused its discretion by admitting evidence found on Timbrook's second, older cell phone. Russell asserted that Indiana Rule of Evidence 1002 prohibits the state from introducing data extracted from the second phone. While the Indiana Rules of Evidence prefer an original writing, recording, or photograph to be submitted into evidence, a duplicate can be submitted in place

of an original unless there is a genuine question about the original's authenticity, or the circumstances make it unfair to admit the duplicate. The intermediate appellate court disagreed with Russell, holding that the trial court did not abuse its discretion in admitting the text messages extracted from the second phone because there was no indication that the messages differed between phones. The two phones were tied to the same phone number and synced automatically with Apple iCloud.

Russell also argued on appeal that the trial court erred in denying his motion for a directed verdict because the state failed to present sufficient evidence to prove that he committed the crime charged. Indiana's DIH statute requires the state to prove a causal connection between the controlled substance delivered by the defendant and the death of the victim. Russell claims that the state failed to show that he "obtained fentanyl (and much less knew it was fentanyl), and that Timbrook ultimately died from the same fentanyl that [he] obtained." The appellate court rejected this argument stating that a reasonable juror could conclude that Russell gave Timbrook fentanyl instead of heroin and knew he was doing so because he gave Timbrook a lower quantity of drugs than Timbrook expected and warned Timbrook about the drugs' strength. Additionally, the court held that Timbrook texting Russell that the "stuff is pretty good" after receiving the drugs from Russell permits a reasonable inference that Timbrook overdosed on the drugs he received from Russell. Russell further attempted to distinguish his actions from those prohibited by the DIH statute by arguing that he did not deliver the drugs to Timbrook within the meaning of the statute. The court found that this argument inaccurately minimized Russell's role in Timbrook's death, as Russell "was an essential link in the chain of delivery between the source of the drugs and Timbrook." The court noted that Russell was the only one of the two who knew the supplier's identity and communicated with the supplier. Furthermore, when Timbrook wanted heroin, he contacted Russell. Having denied both of Russell's arguments, the appellate court affirmed Russell's conviction.



FIRST JURY VERDICT FOR FENTANYL-RELATED HOMICIDE IN CALIFORNIA

***The People of the State of California v. Vicente David Romero*, Superior Court of California, County of Riverside, Case No. SWF2007390 (jury verdict reached August 31, 2023).** A California jury convicted Vicente David Romero of second-degree murder for knowingly supplying fentanyl to Kelsey King, who died from the drug. This marks the first jury verdict for a fentanyl-related homicide in California, which does not have a fentanyl-induced homicide law or any fentanyl-specific criminal provisions.[1] In Romero's five-day trial, prosecutors submitted video footage of Romero saying that he gave a pill to King and split it with him, knowing that it contained fentanyl. Romero's sentencing took place on October 6, 2023. While this case represents the first jury verdict for such a crime in California, it is not the first fentanyl-related murder conviction in the state. The first occurred in *The People of the State of California v. Nathaniel Cabacungan*, which involved a guilty plea. (For more information about the *Cabacungan* case, please refer to the August 2023 issue of the LAPPA *Case Law Monitor*, available here).

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

TWO CHARGED IN CONNECTION WITH FENTANYL POISONING AT NEW YORK DAYCARE

***United States v. Grei Mendez and Carlisto Acevedo Brito*, U.S. District Court for the Southern District of New York, Case No. 1:23-mj-06444-UA (suit filed September 17, 2023).** The U.S. Attorney's Office for the Southern District of New York pressed charges against four individuals for conspiring to distribute fentanyl out of a children's daycare center in the Bronx, New York. Grei Mendez operated a daycare out of a one-bedroom apartment, and Carlisto Acevedo Brito lived inside the bedroom located in the facility. On September 15, 2023, Mendez called 911 to report three unresponsive children in her care. An ambulance arrived at the daycare and took the three children, whose ages ranged from eight months to two years, to a nearby hospital. One of the children, a one-year-old boy, died at the hospital. Medical professionals administered naloxone to the other two children, and they required hospitalization for their injuries. A urine drug test from one of the children confirmed the presence of fentanyl in the child's body. A fourth child also attended the daycare that day but left with a parent two hours before Mendez called 911. The fourth child's parent noticed the child becoming lethargic and unresponsive later in the day and rushed the child to the hospital, where medical professionals administered naloxone and hospitalized the child. With respect to each of the victims, healthcare personnel observed symptoms and injuries consistent with opioid poisoning. Shortly after the victims went to the hospital, law enforcement searched the daycare facility pursuant to a warrant. Officers discovered a package containing one kilogram of fentanyl in a closet. The officers also found two "kilo press" machines and at least one hydraulic press. (Kilo presses are used to press powdered substances into kilogram sized "bricks" in preparation for distribution.) Furthermore, security footage revealed an unnamed co-conspirator, who authorities believed was Mendez's husband, exiting the daycare through a back alley with two shopping bags prior to the arrival of law enforcement, suggesting that Mendez attempted to remove evidence from the daycare center prior to the search. On September 21, 2023, law enforcement conducted another search of the facility and discovered two concealed compartments beneath the floorboards that contained drugs and tools used to package, distribute, and traffic narcotics. Prosecutors charged both Mendez and Acevedo Brito with conspiracy to distribute narcotics resulting in death and possession with intent to distribute narcotics resulting in death. Both counts carry a mandatory minimum sentence of 20 years in prison and a maximum sentence of life in prison. Both Mendez and Acevedo Brito were ordered to be held without bail. On September 23rd and September 26th, police arrested another co-conspirator, Renny Antonio Parra Paredes and Mendez's husband, Felix Herrera-Garcia. Mexican authorities found Herrera-Garcia on a bus traveling to the city of Culiacan in the Mexican state of Sinaloa and extradited him to the U.S.

PENNSYLVANIA HOTEL MUST FACE TRIAL IN METHADONE DISCRIMINATION CASE

***Jeanna Godwin v. The George Washington*, LP., U.S. District Court for the Western District of Pennsylvania, Case No. 2:22-cv-01066 (motion for summary judgment denied in part and granted in part August 23, 2023).** For previous updates on this case, please refer to the February 2023 issue of the LAPPA *Case Law Monitor*, available here. A federal district court ruled that a Pennsylvania hotel must face a trial in a lawsuit alleging that it rescinded an applicant's job offer because of her prescribed use of methadone. On April 24, 2023, the George Washington Hotel (hotel) filed a motion for summary judgment regarding the Americans with Disabilities Act (ADA) claim, punitive damages, and a damages cap. The hotel argued that it had a legitimate, non-discriminatory reason for not hiring Jeanna Godwin because she refused to take a drug test, which it requires for all applicants for bartending jobs. Godwin argued that she did not refuse to take a drug test; rather, she claimed that hours after she revealed to the hotel the fact that she was on a methadone maintenance program, the hotel withdrew her offer of employment. Because there are genuine issues of material fact about whether the hotel discriminated against Godwin in violation of the ADA, the district court denied the hotel's motion for summary judgment. Regarding punitive damages, the hotel argued that Godwin

failed to offer any facts that the hotel knew that it "may be acting in violation of federal law." Under federal law, a plaintiff may recover punitive damages if he or she "demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual" (42 U.S.C. § 1981a(b)(1)). Godwin asserted that upon learning of her past opioid use disorder and methadone maintenance, the hotel rescinded an offer of employment, which demonstrated purposeful, intentional conduct. Again, because of the disputed facts and conflicting testimony, the court denied the hotel's motion for summary judgment. The hotel also argued that even if Godwin prevails in this action, her damages are limited by statute to $50,000 because the hotel employs fewer than 101 employees. (*See* 42 U.S.C. § 1981a(b)(3)(A)). Godwin argued that she may recover damages under the Pennsylvania Human Relations Act (PHRA; 43 PA. STAT. AND CONS. STAT. ANN. § 955 (West 2023)), which does not have a cap on damages, but the court rejected this argument because she did not include a PHRA claim in her most recent amended complaint. As such, the court granted the hotel's motion for summary judgment regarding the damages cap. During an August 30, 2023 hearing, the parties expressed interest in a judicial settlement conference and the court stated that it would explore the possibility. The parties also discussed a trial date during the hearing but did not set one.

PENNSYLVANIA ATTORNEY GENERAL OBTAINS COMMITMENTS FROM NURSING HOMES TO END DISCRIMINATION

(Agreements announced September 21, 2023). Pennsylvania Attorney General Michelle Henry announced that her office secured commitments from several nursing homes to comply with state and federal disability laws by not discriminating against individuals with opioid use disorder or those using medication for addiction treatment by refusing to admit them into their care. The initiative originated from a complaint by a man prescribed Suboxone to treat opioid use disorder. Despite the man's referral from a hospital, multiple nursing homes denied accepting him. The Office of Attorney General's Civil Rights Enforcement Section (Office) examined the admissions policies of the various Pennsylvania skilled nursing facilities for which the complainant sought entry. The Office obtained commitments from these facilities—fashioned as assurances of voluntary compliance, warning letters, or compliance letters—to review and revise their admission policies to conform to the law and to notify their staffs and regular referral sources. In total, the Office received commitments from 38 nursing homes across the Commonwealth. Additionally, the Office obtained $6,000 in restitution and damages for the complainant and $4,000 in costs for the Office to use for future public protection and education purposes.

PATIENT WITH HISTORY OF OPIOID DISORDER ASSERTS DISCRIMINATION BY NEW YORK HOSPITAL

***Shawn Landau v. Good Samaritan Hospital, et al.*, U.S. District Court for the Southern District of New York, Case No. 23-cv-7227 (suit filed August 15, 2023).** Shawn Landau has been in recovery from opioid use disorder (OUD) since 2019 and manages his recovery with methadone. In addition to being in recovery, Landau has diabetes, which affects his body's ability to heal wounds properly and results in occasional infections for which he needs hospitalization. In a lawsuit filed in August 2023, Landau asserts that on two separate occasions when Good Samaritan Hospital (hospital) admitted him for an infection, hospital staff refused to provide him with his daily methadone, despite his medical records clearly stating that he was on a methadone maintenance program. The hospital's denial of methadone resulted in Landau experiencing withdrawal symptoms, including nausea, cold sweats, and restlessness. Moreover, on two occasions, Landau alleges that the hospital denied him home-based intravenous antibiotics via a peripherally inserted central catheter (PICC line) to treat his severe infections. Hospital staff informed Landau that he is not an appropriate candidate for a PICC line because of his history of OUD. When Landau asked one of the hospital physicians why his history of OUD meant the hospital would not discharge him with a PICC line, the physician stated

that "[Landau] would just use the PICC line to inject drugs." Landau tried to explain to hospital staff that he has no desire to use drugs and that he is in recovery. Landau also asked staff to contact a doctor at his recovery program, but hospital staff refused. Because the hospital refused to provide him with a PICC line, for over one month, each day Landau had to travel from his home to an infusion center to receive his antibiotics. In his complaint, Landau asserts that the hospital's refusal to provide him with methadone and a PICC line constitute intentional discrimination and deliberate indifference. Landau brings forth claims under Title III of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, Section 1557 of the Patient Protection and Affordable Care Act, and the New York State Human Rights Law (N.Y. EXEC. LAW § 296 (McKinney 2023)). Landau seeks declaratory relief, injunctive relief, compensatory and nominal damages, and attorneys' fees and costs. Specifically, for the injunctive relief, Landau asks the court to order the hospital "to develop, implement, promulgate, and comply with policies prohibiting future discrimination against [him] and other people with OUD." The defendants requested a pre-motion conference in anticipation of filing a motion to dismiss.

OREGON PATIENT'S SUIT FOR DEFAMATION OVER DOCTORS' MEDICAL RECORD NOTES REVIVED

***Linda Sue Hofer v. Oregon Health and Science University*, Court of Appeals of Oregon, Case No. A172328 (opinion filed September 27, 2023).** For previous updates in this case, please refer to the June 2022 issue of the LAPPA *Case Law Monitor*, available here. The Oregon Health and Science University (OHSU), a public health care system, will now have to defend a patient's suit over allegedly defamatory doctors' notes in her medical record suggesting that she tried to fraudulently acquire a prescription for methadone. In May 2022, the Oregon Court of Appeals rejected Linda Sue Hofer's claims for defamation and negligence and granted OHSU's motion for summary judgment. The court ruled that Hofer's defamation claim failed because OHSU, as a governmental entity, and its physicians, as government officials, could assert absolute privilege with respect to statements made in the course of their public duties that act as a complete bar to liability for defamation. In July 2022, the Oregon Supreme Court issued a ruling in *Lowell v. Medford School District 549C* (515 P.3d 359) that narrowed the application of absolute privilege. In light of the *Lowell* ruling, Hofer filed a petition with the Oregon Supreme Court to vacate the court of appeals' May 2022 ruling. On September 16, 2022, the Oregon Supreme Court granted the petition and remanded the case to the court of appeals to reconsider its decision. To establish a claim for defamation, a plaintiff must show that a defendant made a defamatory statement about the plaintiff and published the statement to a third party. On remand, OHSU argued that Hofer could not prove that the notes had been published to a third party. Hofer responded by arguing that her Washington physician and her office staff saw the notes in Hofer's electronic medical record. OHSU dismissed the fact that Hofer's Washington physician saw the notes by asserting that Hofer asked her to review the OHSU records and that publication to her physician was, therefore, with Hofer's consent. Because there is a question of fact as to publication, the court determined that whether Hofer consented to the publication to her Washington doctor was best left for a jury to determine. The court reversed its May 2022 decision for summary judgment for the defamation claim and remanded the case to the trial court for further proceedings.

ESTATE FILES WRONGFUL DEATH SUIT AGAINST ARKANSAS JAIL AFTER INMATE OVERDOSES

***The Estate of Jacob Allen Jones v. Crawford County, Arkansas, et al.*, U.S. District Court for the Western District of Arkansas, Case No. 2:23-cv-02112-PKH (suit filed August 31, 2023).** The estate of a man who died while in custody of the Crawford County Arkansas Detention Center (jail) filed a wrongful death suit against the county and several employees of the jail. On October 14, 2022, police stopped Jacob Allen Jones and his uncle due to a defective vehicle brake light. Since the two men had criminal histories, the officer

placed them in the back of his squad car for his safety. The officer did not perform a pat down or search the men before placing them in custody. Footage from the squad car's back seat camera depicted Jones ingesting a small plastic bag while in the back of the officer's vehicle. The bag likely contained methamphetamine. The officer took the two men to the jail where they went through booking and entered a housing section. Throughout the night of October 14 and the morning of October 15, Jones appeared ill, as evidenced by the jail's surveillance cameras. Other inmates noticed Jones sweating, shaking, and experiencing seizures and informed jail deputies that Jones needed help. Nonetheless, the deputies allegedly failed to check on Jones. The estate asserts that Jones tried to wave and get the attention of the deputies on duty multiple times without success. Around 12:00 PM on October 15, a group of deputies checked on Jones, finding him unresponsive and foaming at the mouth. They called for the jail's medical personnel three separate times, but they did not respond. The deputies, therefore, had to carry Jones to the booking area of the jail where a nurse provided medical attention. An ambulance took Jones to the hospital where staff performed life saving measures for 30 minutes before he died. An autopsy later revealed that Jones died from methamphetamine toxicity. In the complaint, Jones' estate argues that his death was the direct result of negligence by the county and its employees. The estate asserts that the county violated Jones' civil rights under the Eighth Amendment as applied through the Fourteenth Amendment by failing to protect him from cruel and unusual punishment and depriving him of his right to necessary medical care. The estate seeks to hold the defendants liable for Jones' pain, suffering, and wrongful death and address the loss, grief, and anguish suffered by his surviving family members.

FEDERAL COURT FINDS FATAL OVERDOSE AFTER SURGERY NOT AN "ACCIDENTAL DEATH"

***Fonda Wicks v. Metropolitan Life Insurance Company*, U.S. District Court for the Northern District of Texas, Case No. 4:21-cv-01275 (opinion filed August 14, 2023).** A federal district court ruled that the widow of a Texas man who died of an overdose following surgery is not entitled to collect accidental death insurance benefits. In June 2021, Jackie Wicks underwent elective gastric sleeve surgery with the hope of reducing his weight and improving his health. During the recovery period immediately following surgery, Wicks' surgeon ordered several medications, including morphine, fentanyl, and hydromorphone, for his post-surgery pain. Apparently, the hospital staff administered the medications, and a few hours later, Wicks' wife found him unresponsive and not breathing in his hospital room. Despite efforts to revive him with naloxone, Wicks never regained consciousness, and he died two days later, with his cause of death recorded as an anoxic brain injury, with an "unintentional narcotic overdose" as an underlying cause. At the time of death, Wicks had life insurance and accidental death insurance plans from Metropolitan Life Insurance Company (MetLife). Wicks' widow sought benefits from both policies following her husband's death. MetLife paid the life insurance benefits, but it denied the accidental death benefits on the grounds that Wicks's death was not accidental. After exhausting her administrative remedies with MetLife, in October 2021, Mrs. Wicks sued the insurance company in state court, and MetLife removed the case to federal court in November 2021. In September 2022, Mrs. Wicks filed a motion for summary judgment. The court denied Mrs. Wicks' motion for summary judgment and affirmed MetLife's denial of accidental death benefits, holding that deaths stemming from the proper treatment of a disease are better classified as deaths caused by the underlying disease—in this case morbid obesity—rather than an accident. Furthermore, the court ruled that Mrs. Wicks failed to offer any evidence showing that the hospital negligently administered opioids or that an opioid overdose was the direct and sole cause of Wicks' death. The court noted that the word "overdose" does not necessarily imply negligence; it could mean that a patient could not handle a normally appropriate dosage. Wicks filed an appeal with the U.S. Court of Appeals for the Federal Circuit on September 19, 2023.

FIFTH CIRCUIT STRIKES DOWN FEDERAL GUN POSSESSION BAN FOR CONTROLLED SUBSTANCE USERS

***United States v. Patrick Daniels*, U.S. Court of Appeals for the Fifth Circuit, Case No. 22-60596 (opinion filed August 9, 2023).** The U.S. Court of Appeals for the Fifth Circuit concluded that the federal ban preventing users of controlled substances from possessing a firearm is unconstitutional. In April 2022, law enforcement officers pulled over Patrick Daniels of Mississippi for driving without a license plate. After one officer recognized the smell of cannabis, a search of Daniels' car revealed cannabis cigarettes and two loaded firearms. Daniels admitted to the officers that he smoked cannabis for many years and is a regular user. Partially based on his admission, prosecutors charged Daniels with a violation of 18 U.S.C. § 922(g)(3), which makes it a federal crime for any "unlawful user of…any controlled substance" to possess a firearm. During Daniels' trial, the U.S. Supreme Court decided *N.Y. State Rifle & Pistol Association v. Bruen* (142 S.Ct. 2111), which held that firearm regulation is unconstitutional unless it is "firmly rooted" in the nation's history and tradition of gun regulation. Daniels moved to dismiss the indictment on the grounds that the federal criminal statute is unconstitutional in light of the *Bruen* ruling. The district court denied the motion, and the jury convicted Daniels, who appealed to the Fifth Circuit. The Fifth Circuit reversed Daniels' conviction and dismissed the indictment. Under the Fifth Circuit's application of the *Bruen* standard, the court found that there was not a history or tradition of disarming drug or alcohol users in the 18th or 19th centuries and, thus, the law criminalizing firearm possession under such circumstances violates the Second Amendment of the U.S. Constitution. The government had until September 22, 2023, to file a petition for a rehearing *en banc* but did not do so.

COLORADO TRIAL COURT IMPROPERLY DISMISSED CHARGES

***The People of the State of Colorado v. Dennis Carl Bothwell*, Colorado Court of Appeals, Case No. 22CA0433 (opinion filed September 14, 2023).** The Colorado Court of Appeals reinstated drug charges against a man after a state trial court dismissed them for the prosecution's failure to bring the charges as part of another case. In December 2020, police arrested Dennis Bothwell for breaking into a home. The officers took Bothwell to the Jefferson County jail, where he informed a booking deputy that he recently ingested fentanyl. The booking deputy told the officers that Bothwell would need to go to the hospital for a medical clearance before being left at the jail. The officers took Bothwell to the hospital for brief observation. Upon arrival back at the jail the next morning, officers performed a body search on Bothwell and discovered a small bag containing pills in the pocket of his jeans. Lab tests determined that the pills contained fentanyl.

Bothwell faced charges of first-degree criminal trespass and criminal mischief for breaking into the home. In June 2021, Bothwell resolved the trespass case by pleading guilty to one count of defacing property, and the court sentenced him to one year of probation. Then, in July 2021, for possessing fentanyl at the jail, the district attorney charged Bothwell with introducing contraband and with unlawful possession of a controlled substance. Bothwell moved to dismiss the new charges under COLO. REV. STAT. ANN. § 18-1-408(2) (West 2023) and Rule 8 of the Colorado Rules of Criminal Procedure (mandatory joinder), arguing that the drug case arose from the same criminal episode as the trespass case. The state argued that the mandatory joiner rule did not bar subsequent prosecution under the circumstances because the two cases involved separate criminal episodes that occurred in different locations at different times. The trial court disagreed with the state, ruling that the prosecution should have joined the trespass and the drug cases. The court granted Bothwell's motion to dismiss, and the state appealed.

The purpose of a mandatory joinder rule is to protect the accused from sequential prosecutions based on conduct occurring during the same criminal episode and to conserve judicial and legal resources. In Colorado, joinder is required when all of the following elements are satisfied: (1) a person allegedly commits several offenses in the same judicial district; (2) the state initiates prosecution against the person for some, but not all,

alleged offenses; (3) the prosecutor knows of all of the offenses at the commencement of the prosecution; (4) the offenses pertain to the same act or series of acts arising from the same criminal episode; and (5) the person faced prosecution for some, but not all, of the offenses. If all elements are satisfied, the court must dismiss the subsequent prosecution. On appeal, the state argued that the two cases did not arise from the same criminal episode. The intermediate appellate court agreed with the state holding, that: (1) the charges in the trespass case and those in the drug case did not arise from the same conduct; (2) the evidence needed to prove trespass and criminal mischief is not the same evidence needed to prove the drug charges; and (3) the cases were not otherwise connected in such a way "that their prosecution would involve substantially interrelated proof." Thus, because the two cases "shared no act, mental state, result, circumstance, or defense as to which proof of one would form a substantial portion of the proof of the other," they are not based on the same act or series of acts arising from the same criminal episode. The court concluded that the trial court erred when it dismissed the charges in the drug case and remanded the case with directions to reinstate the drug charges.

TEXAS PHARMACIST CONVICTED IN PILL MILL CONSPIRACY

***United States v. Deanna Winfield-Gates, et al.*, U.S. District Court for the Southern District of Texas, Case No. 4:19-cr-00605-3 (jury verdict reached September 13, 2023).** A jury convicted Texas pharmacist Deanna Winfield-Gates for her role in a "pill-mill" pharmacy conspiracy. According to court documents, from January 2014 to January 2018, Winfield-Gates worked at Health Fit Pharmacy (Health Fit) dispensing large numbers of prescriptions for opioids, benzodiazepines, and muscle relaxants. As a cash-only operation, Health Fit dispensed controlled substances to drug traffickers in exchange for hundreds of dollars, often based on fraudulent prescriptions that the traffickers prepared using stolen identities of doctors. The jury convicted Winfield-Gates of one count of conspiracy to unlawfully distribute and dispense controlled substances. Her three co-defendants previously pleaded guilty to the conspiracy. Winfield-Gates will be sentenced on January 11, 2024, and faces a maximum penalty of 20 years in prison.

TENNESSEE DOCTOR GETS NEW TRIAL AFTER OPIOID DISTRIBUTION CONVICTION

***United States v. Samson Orusa*, U.S. District Court for the Middle District of Tennessee, Case No. 3:18-cr-00342 (opinion filed August 10, 2023).** In 2021, a jury convicted Samson Orusa, a Clarksville, Tennessee doctor, of 36 criminal counts related to running a "pill mill" operation, including charges of illegal distribution of oxycodone, healthcare fraud, and money laundering. A month before Orusa's scheduled sentencing hearing in July 2022, the U.S. Supreme Court decided *Ruan v. United States* (142 S.Ct. 457) which established that the government must prove a doctor accused of over-prescribing medication subjectively knew that he or she acted without a legitimate medical purpose. (For more information on the *Ruan* case please refer to the August 2022 issue of the LAPPA *Case Law Monitor*, available here). In light of the *Ruan* ruling, Orusa filed a motion for a new trial four days before his scheduled sentencing hearing. Despite finding that Orusa's lawyer "intentionally engaged in gamesmanship in order to delay sentencing," the district court partially granted Orusa's motion for a new trial. Although the court believed that the jury had a "robust good faith instruction" at its disposal, it determined a "*Ruan* error" occurred because the court did not inform the jury that it needed to find that Orusa subjectively knew that he prescribed drugs without a legitimate medical purpose. While the error could have been deemed harmless, the court could not definitively state that a properly instructed jury would have found him guilty of unlawfully prescribing oxycodone. Because charges for money laundering and maintaining a drug premise are connected to the unlawful drug distribution charges, the court granted Orusa a new trial for those counts, as well. However, the court denied Orusa's request for a new trial on the healthcare fraud counts because the *Ruan* error did not affect them.

ALABAMA DOCTOR'S LAWSUIT ALLEGING HOSPITAL OVER-PRESCRIBED OPIOIDS DISMISSED

***United States ex rel. Jeffery D. Milner v. Baptist Health Montgomery, et al.*, U.S. District Court for the Middle District of Alabama, Case No. 20-cv-261 (opinion filed September 6, 2023).** A federal district court ruled that an Alabama doctor is barred from bringing a whistleblower lawsuit for opioid billing fraud against his former employer. Jeffery Milner was a contract emergency room physician at Baptist Health's Pratville, Alabama hospital from 2014 to 2017. While there, he reported to his employer that some doctors faced pressure to overprescribe opioids to patients, including some with probable opioid addictions, or risk retaliation. The hospital terminated Milner in late 2017, and in December 2019, he filed a lawsuit in federal district court alleging that Baptist Health violated the anti-retaliation provisions of the federal False Claims Act (FCA; 31 U.S.C. §3730(h)). The court dismissed the complaint with prejudice. Four months later, in April 2020, Milner filed a second federal lawsuit, bringing new claims under the *qui tam* provisions of the FCA and the federal anti-kickback statute (42 U.S.C. § 1320a-7b(b)) to recover money damages due to Baptist Health's allegedly fraudulent Medicare and Medicaid reimbursement practices. In September 2022, the U.S. government declined to intervene in the lawsuit. Baptist Health then moved to dismiss the suit on *res judicata* grounds, arguing that Milner's failure to assert these claims during his first lawsuit barred him from raising them now.[2] Milner argued that the U.S. government's interest in the whistleblower suit defeated the *res judicata* argument. The district court granted Baptist Health's motion to dismiss, holding that a fair reading of the complaints in both suits shows lawsuits based on the same allegations. The court rejected Milner's argument that the U.S. government's interest in the case defeated the *res judicata* argument, finding that, although the government is a party in interest, it expressly declined to intervene in the case and, therefore, has never been a party to the suit. On September 12, 2023, Milner filed an appeal with the U.S. Court of Appeals for the Eleventh Circuit.

ALKERMES REACHED SETTLEMENT WITH TEVA IN VIVITROL PATENT SUIT

***Alkermes, Inc., et al. v. Teva Pharmaceutical Industries USA, Inc.*, U.S. District Court for the District of New Jersey, Case No. 2:20-cv-12470-MCA-MAH (consent judgment and injunction signed September 15, 2023).** Alkermes PLC (Alkermes) settled a patent-infringement lawsuit over Teva Pharmaceutical Industries, LTD's (Teva's) proposed version of Vivitrol (naltrexone) before a federal judge could rule on the pending bench trial. Alkermes sued Teva in September 2020 to block Teva's generic product based on Vivitrol. As part of the settlement, Teva agreed that its generic naltrexone product would infringe upon Alkermes's patent under the assumption that the patent is valid and enforceable. Teva retains the option to contest the "infringement, validity, and/or enforceability" of Alkermes's patent in any future litigation pertaining to any product that is not a generic Vivitrol product. The settlement grants Teva a license to sell its generic Vivitrol product in the U.S. starting January 15, 2027, or earlier under certain circumstances. This market entry date is more than two years before Vivitrol's October 2029 patent expiration date.

[2] "*Res judicata*" is an affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been — but was not — raised in the first suit. *Res judicata*, BLACK'S LAW DICTIONARY (11th ed. 2019).

D.C. CIRCUIT DISMISSES FTC'S ANTITRUST SUIT AGAINST ENDO AND IMPAX

***Federal Trade Commission v. Endo Pharmaceuticals Inc., et al.*, U.S. Court of Appeals for the District of Columbia, Case No. 22-5137 (opinion filed August 25, 2023).** The Court of Appeals for the D.C. Circuit affirmed the dismissal of an antitrust suit against Endo Pharmaceuticals, Inc. (Endo) and Impax Laboratories, LLC (Impax). The U.S. Federal Trade Commission (FTC) filed suit against Endo and Impax and their parent companies in January 2021 over a 2017 agreement between the two companies stating that Endo would not reintroduce a version of its extended release oxymorphone drug, Opana ER, in exchange for a share of the profits of Impax's generic version of the drug. The FTC argued that the agreement violates the Sherman Antitrust Act (15 U.S.C. §§ 1 and 2) by eliminating the potential competition between Endo and Impax and allowing Impax to exercise and maintain a monopoly over extended release oxymorphone tablets. In March 2022, a federal district court dismissed the FTC's action for failure to state a claim, holding that a single patentee granting an exclusive license is allowed under the Patent Act (35 U.S.C. § 261). The D.C. circuit court agreed with the district court's dismissal of the suit, holding that the Patent Act expressly authorizes behavior that closely resembles Endo and Impax's agreement, *i.e.,* permitting a patent owner to "grant and convey an exclusive right under his . . . patents." The appeals court ruled that the FTC failed to offer any support for its assertion that an exclusive licensing agreement is different if the parties are potential competitors. The court determined that the FTC's complaint lacked arguments establishing that Endo and Impax's agreement creates anti-competitive effects greater than that authorized by settled law and precedent.

INDIVIOR REACHES SETTLEMENT WITH HEALTH PLANS 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 August 19, 2023).** For previous updates on this case, please refer to the August 2023 issue of the LAPPA *Case Law Monitor*, available here. On August 19, 2023, Indivior, Inc. (Indivior) reached a $30 million settlement of a class action lawsuit filed by health plans across the country over claims that the company illegally suppressed generic competition for its opioid use disorder medication, Suboxone. A judge must approve the settlement before it can go into effect. Indivior still faces claims by drug wholesalers that bought Suboxone directly from the company, with a trial scheduled in October 2023. In June 2023, Indivior reached a $102.5 million settlement with 41 states and the District of Columbia over the alleged Suboxone monopoly.

WASHINGTON COURT REVOKES ACCESS TO CERTAIN PROTECTED HEALTH INFORMATION

***State of Washington v. Johnson & Johnson et al.*, Court of Appeals of Washington, Division 1, Case No. 84140-8-I (opinion filed July 31, 2023).** A Washington intermediate appellate court reversed a lower court's decision allowing Johnson & Johnson and Janssen Pharmaceuticals (collectively "companies") to gain access to certain consumer prescription data. In 2020, the Washington Attorney General filed a lawsuit against the companies arguing that they violated the state's Consumer Protection Act (WASH. REV. CODE ANN. § 19.86.020 (West 2023)) and created a public nuisance by contributing to the opioid crisis in the state. During discovery, the state produced 11 years of data from a database of all Medicaid claims in the state maintained by the Washington Healthcare Authority (HCA). The data only included the year in which Medicaid services were provided, not the month or the day of the service. After receiving the Medicaid data, the companies moved to compel the state to supplement the Medicaid claims data with the month and day of the services and prescriptions. The companies argued that they needed additional information to determine the extent to which

prescriptions for the companies' opioid medications preceded diagnoses for opioid use disorder as part of its defense. The state objected, arguing that granting a motion to compel the HCA to disclose full dates associated with individual patients would cause the HCA to violate federal privacy laws under both the Health Insurance Portability and Accountability Act's (HIPAA) Privacy Rule and 42 C.F.R. Part 2, which regulates the disclosure of substance use disorder treatment information. To refute the state's argument, the companies submitted a declaration from M. Laurentius Marais, PhD, an expert in applied mathematical and statistical analysis, stating that there is virtually no risk of re-identification of individuals should the month and day data be disclosed. The state submitted an expert report by Latanya Sweeney, PhD, the director of the Data Privacy Lab at Harvard University, who refuted Dr. Marais' declaration, concluding that disclosure of full dates could allow the de-identified data to be associated with patients' identities when joined with other information.

A court-appointed special master, tasked with providing independent assistance to the court in resolving complex discovery issues, issued an order denying the companies' motion to compel, stating that the companies did not meet their burden to show a small re-identification risk. The companies filed an objection to the special master's ruling, and the trial court sustained the companies' objection and reversed the special master's ruling. The trial court believed that the state and special master applied an incorrect standard for evaluating an acceptable level of risk of re-identification. The state filed a notice of discretionary review with the intermediate appellate court, asserting that the trial court erred in ordering it to produce the supplemental data. On appeal, the state argued that Dr. Marais failed to comply with the requirements of the "expert determination method" of producing de-identified health information under HIPAA (45 C.F.R. § 164.514(b)(1)).[3] The appeals court agreed, holding that the trial court abused its discretion when it determined that the companies' expert determination method satisfies HIPAA. With the expert determination method not satisfied, the trial court could only compel the release of the supplemental information if it finds good cause and requires patient notice before enabling disclosure. Thus, the intermediate appellate court reversed the release of the supplemental patient information.

LOS ANGELES COUNTY SUES PHARMACY BENEFIT MANAGERS OVER ROLE IN THE OPIOID CRISIS

***The People of the State of California v. Express Scripts, Inc., et al.*, Superior Court of California, County of Los Angeles, Case No. 23STCV20886 (suit filed August 30, 2023).** Los Angeles County filed suit against a group of pharmacy benefit managers (PBM) (*i.e.*, the intermediaries between drug manufacturers and insurance companies), claiming that the companies helped fuel the opioid crisis in the county. The county asserts that Express Scripts, Inc. and OptumRx Inc. colluded with drug manufacturers to promote opioids as a safe treatment option for moderate pain despite knowing of their highly addictive nature. The suit also names a half-dozen related companies: Express Scripts Administrators, LLC; Medco Health Solutions; ESI Mail Pharmacy Service, Inc.; Express Scripts Pharmacy, Inc.; OptumInsight, Inc.; and OptumInsight Life Sciences, Inc. The county alleges that the PBMs used deceptive and dangerous marketing practices to push dangerous drugs that they knew would earn a large profit. The county also argues that Express Scripts and OptumRx were in a unique position to track the rise of the opioid crisis because they had data on opioid use for the 166 million people covered by their insurance company clients. However, instead of reporting illegitimate prescribing practices and sales, the county asserts that the companies used the data to boost their profits. The county seeks unspecified damages and injunctive relief to halt the PBMs' alleged misconduct. An initial status conference is scheduled for November 9, 2023.

[3] The expert determination method requires HIPAA-covered entities to consult an expert "with appropriate knowledge of and experience with generally accepted statistical and scientific principles and methods for rendering information not individually identifiable" in order to comply with the HIPAA Privacy Rule's de-identification standard. The expert must be able to determine that the risk of identifying an individual using the data, alone or in combination with other information, is extremely small. The expert determination method allows individuals to extract key data points while still protecting patient privacy. "De-identification of PHI According to the HIPAA Privacy Rule," Health IT Security, last modified October 15, 2021, https://healthitsecurity.com/features/de-identification-of-phi-according-to-the-hipaa-privacy-rule.

NATIONAL PRESCRIPTION OPIATE LITIGATION UPDATE

***Trumbull County, et al. v. Purdue Pharma, et al.*, U.S. Court of Appeals for the Sixth Circuit, Case No. 22-3753 (certification order issued September 11, 2023).** For previous updates on this case, please refer to the October 2022 issue of the LAPPA *Case Law Monitor*, available here. In September 2023, the U.S. Court of Appeals for the Sixth Circuit asked the Ohio Supreme Court to answer a question of law for a case in the National Prescription Opiate Litigation involving the appeal of a $650 million judgment granted to Trumbull and Lake (Ohio) Counties. The Sixth Circuit specifically seeks clarification on whether the Ohio Product Liability Act (OHIO REV. CODE ANN. § 2307.71 *et seq.* (West 2023)) allows public nuisance lawsuits based on the sale of legal products. When presented with an issue concerning the interpretation of a state law, a federal court can "guess" how a state's highest court would resolve it. However, if the issue is novel or unsettled, the federal court may request that the state's highest court provide the definitive state law answer through a process called certification. The Sixth Circuit stayed the case under appeal pending the decision of the Ohio Supreme Court.

SOUTH DAKOTA COUNTY DISPUTES PORTION OF OPIOID SETTLEMENT AMOUNTS

***State of South Dakota v. Purdue Pharma LP, et al.*, South Dakota Sixth Judicial Circuit, Hughes County, Case No. 32CIV18-000065 (notices of dispute filed February 16, June 14, and July 28, 2023).** Pennington County, South Dakota, filed three separate notices of dispute in South Dakota's pending case against certain opioid manufacturers and distributors regarding its allocation of settlement proceeds. According to news reports, the county asserts that the state should recalculate its national opioid settlement amounts to pay the county's litigation costs. In 2018, South Dakota's then-Attorney General, Marty Jackley, filed a complaint against opioid manufacturers and distributors. In April 2021, Pennington County agreed to participate in the national opioid multidistrict lawsuit as the only South Dakota local government to do so. The two lawsuits merged when a judge ruled that the multidistrict lawsuit would expand to a class action lawsuit to cover all subdivisions in all states. Three months after Pennington County joined the multidistrict lawsuit, South Dakota's then-Attorney General, Jason Ravnsborg, announced that the state would sign on to the national settlement. This meant that all South Dakota counties and cities would receive settlement money without needing to participate in the lawsuit. Pennington County asserts that the state should recalculate the first three years of local government settlement allotments from one of the companies that settled in court, Janssen Pharmaceuticals (Janssen), to add a "backstop" to have all state subdivisions share the cost of Pennington County's litigation expenses. Pennington County allegedly owes 15 percent of its entire Janssen settlement amount in legal fees, which, as of the third round of settlement allocations, adds up to roughly $14,000, not including future allocations. The state argues that the South Dakota opioid settlement memorandum agreement did not provide for a backstop when Pennington County signed on and that the state is not required to adopt a backstop.

INSURANCE COMPANY MUST COVER NORTH CAROLINA PHARMACY'S OPIOID LAWSUITS

***North Carolina Mutual Drug v. Federal Insurance Company*, U.S. District Court for the Middle District of North Carolina, Case No. 1:22-CV-553 (opinion filed August 17, 2023).** A federal district court ruled that an insurance company must pay for a North Carolina drug wholesaler's legal defense costs and liability in numerous opioid lawsuits. North Carolina Mutual Wholesale Drug Co. (Mutual Drug), a member-owned pharmacy cooperative, is a defendant in several dozen lawsuits for failure to monitor, detect, investigate, and refuse to fill suspicious orders by pharmacies for prescription opioids. Mutual Drug had a claims-made

liability insurance policy[4] from the Federal Insurance Company (FIC) providing reimbursement of defense costs and liability coverage for directors and officers. When sued, Mutual Drug filed claims under its policy, but FIC refused to pay, citing both the "contract" exclusion and the "professional services" exclusion in the policy terms.[5] FIC argued that the lawsuits arose from Mutual Drug's contracts to sell opioids and, therefore, are not insured. Mutual Drug sued FIC in federal district court to seek indemnification. Both parties filed a motion for summary judgment. In August 2023, the district court sided with Mutual Drug, holding that none of the claims against Mutual Drug are based on any contract, and FIC failed to identify any language that relies on or mentions any contract to which Mutual Drug is a party. The court also rejected the insurer's argument about the professional services exclusion because the opioid plaintiffs do not bring forth any such allegations involving such services. In the court's view, FIC's interpretation of the exclusions is so broad that there is little the insurance policy would cover. The court entered summary judgment in favor of Mutual Drug and denied FIC's motion for summary judgment. At a settlement conference on October 3, 2023, the court determined that the parties have reached an impasse and will not be able to settle the case, forcing it to go to trial. The parties have some remaining disputes regarding the language for entry of judgment and have been ordered to file their respective positions with the court by October 10, 2023.

DELAWARE COURT FINDS CVS' LIABILITY INSURANCE DOES NOT COVER STATE OPIOID LAWSUITS

***Ace Property and Casualty v. CVS Health Corp*, Delaware Superior Court, Case No. N22C-02-045 (opinion filed August 25, 2023).** A Delaware trial court ruled that two insurance companies do not have a duty to indemnify CVS Health Corp. (CVS) in the many opioid lawsuits brought against the company. CVS, a longtime liability policyholder of both Chubb Ltd. and American International Group Inc., filed claims with those companies to pay the costs of opioid-related litigation. The insurers denied the claims and ultimately sued CVS in February 2022 in Delaware state court for a declaration that each had no duty to defend or indemnify the company. The companies filed a motion for summary judgment in December 2022. In August 2023, the Delaware trial court found in favor of the insurers, ruling that CVS's liability insurance policy only covered damages resulting from bodily injury and did not cover the negligence and public nuisance claims brought by the state and local governments. The court cited the Delaware Supreme Court's ruling in *Rite Aid Corp. et al. v. ACE American Insurance Co.* (270 A.3d 239), where the Delaware Supreme Court ruled that "underlying claims seeking non-derivative economic loss [do] not allege damages because of bodily injury." (For more information on the *Rite Aid* case, please refer to the February 2022 issue of the LAPPA *Case Law Monitor*, available here). Thus, because the governments' lawsuits against CVS never alleged physical injuries as required by the policies, the court granted the insurers' motion for summary judgment.

CANNABIS ODOR ALONE DOES NOT SUPPORT PROBABLE CAUSE FOR A VEHICLE SEARCH IN MINNESOTA

***State of Minnesota v. Adam Lloyd Torgerson*, Supreme Court of Minnesota, Case No. A22-0425 (opinion filed September 13, 2023).** In a 5-2 decision, the Minnesota Supreme Court ruled that the odor of cannabis, on its own, is insufficient to create probable cause to search a vehicle under the automobile exception of the warrant requirement. In July 2021, a police officer pulled over Adam Torgerson, who was in his car with his wife and child, for having more auxiliary driving lights than permitted by state law. The officer stated that he smelled cannabis and asked Torgerson about the odor. Torgerson stated he did not have cannabis on him and

[4] A claims-made policy provides coverage that is triggered when a claim is made against the insured during the policy period, regardless of when the wrongful act that gave rise to the claim took place. "Claims-made policy," International Risk Management Institute, accessed October 5, 2023, https://www.irmi.com/term/insurance-definitions/claims-made-policy.

[5] The policy defines "professional services" as "services which are performed for others for a fee." The policy does not define the words, "professional," "services," or "fee," separately.

denied having cannabis in the vehicle. A second officer arrived on the scene and stated that he also smelled cannabis. Due to the odor, the second officer informed Torgerson that they had probable cause to search the vehicle. The officers found a film cannister, three pipes, and a small plastic bag in the center console. The film cannister contained a brown crystal-like substance that field-tested positive for methamphetamine. The officers arrested Torgerson, and prosecutors charged him with one count of possession of methamphetamine paraphernalia in the presence of a minor and one count of fifth-degree possession of a controlled substance. Torgerson moved to suppress the evidence and dismiss the complaint, arguing that the officers illegally expanded the traffic stop into a search without the requisite probable cause. The Minnesota trial court agreed with Torgerson, ordered all the evidence obtained from the search suppressed, and dismissed the complaint. The court explained that Minnesota case law does not permit vehicle searches solely because adult passengers smell like alcohol and analogized that that same analysis should apply to cannabis, given that possession of a certain amount of cannabis is a non-criminal petty misdemeanor. The state appealed, and the intermediate appellate court affirmed the district court's suppression order. The appellate court explained that the officers did not have the right to search the vehicle because they did not witness Torgerson drive unsafely or erratically, did not recall Torgerson displaying any evidence of impairment, and did not see any drug paraphernalia in plain view in the vehicle.

The state appealed to the Minnesota Supreme Court, arguing that there is established precedent in the state and from the U.S. Supreme Court that the odor of cannabis alone is sufficient to support a vehicle search. The automobile exception permits police to "search a car without a warrant, including closed containers in the car, if there is probable cause to believe that search will result in a discovery of evidence or contraband." Torgerson argued that under the totality of circumstances test, the odor of cannabis alone cannot create the requisite probable cause to search a vehicle. Probable cause requires something more than mere suspicion but less than the evidence necessary for conviction and is an objective inquiry that depends on the totality of the circumstances in each case. In ruling for Torgerson, the majority first noted that, although cannabis is categorized as a Schedule I controlled substance generally, there are three instances in which the possession of it does not rise to a crime: (1) industrial hemp; (2); medical cannabis; and (3) possession of a "small amount" (less than 42.5 grams) of cannabis, which is a petty misdemeanor.

The majority then looked at the precedent cited by the state to support its assertion, arguing that *City of St. Paul v. Moody* (244 N.W.2d 43) supports its contention that the odor of cannabis alone is sufficient to support probable cause to search a vehicle. *Moody* involved a phone call to police to report the suspicious behavior of people in an illegally parked car with heavily fogged windows. When the passengers opened the door to talk to the police, the officers smelled paint fumes and searched the vehicle. The majority distinguished *Moody* from the case at hand because the circumstances informing the officers' probable cause in *Moody* consisted of considerably more than just the odor of the paint fumes; it also included suspicious behavior by the vehicle's occupants and an illegally parked vehicle. In contrast to *Moody*, the majority found *State v. Burbach* (706 N.W.2d 484) more in line with the case at hand. In *Burbach*, the court determined that the odor of alcohol emanating from an adult passenger at a traffic stop did not provide reasonable suspicion of an open-container violation that would allow expansion of a traffic stop. Because the passenger was of legal drinking age and there was no evidence of intoxication from the driver, the court determined that the smell of alcohol alone did not support probable cause.

Based on *Burbach*, the majority determined that the odor of cannabis should be considered along with the totality of any other circumstances to determine whether there is a fair probability that a search will yield contraband or other evidence that cannabis is being used in a criminal manner. The majority found that, beyond the odor of cannabis coming from the vehicle, there was no evidence to suggest that Torgerson was under the influence while driving or was using cannabis in a criminal manner. Thus, in the absence of any other evidence as part of the totality of the circumstances, the majority ruled that the odor of cannabis, on its own, is insufficient to establish a fair probability that a vehicle search will yield evidence of criminally illegal, drug-related contraband or conduct. The two-judge dissent, however, argued that all cannabis, except for medical cannabis, is contraband in the state and, as such, the smell of it coming from a car leads "a reasonable

and prudent person considering the factual and practical considerations of everyday life to conclude that there likely will be cannabis in the car." The dissent also asserted that, even accepting the majority's premise that possession of small amounts of cannabis is not a crime, the Fourth Amendment of the U.S. Constitution does not require a police officer to know with certainty that the vehicle contains an illegal amount of cannabis.

TEVA REACHES $126 MILLION SETTLEMENT WITH HOSPITALS

(Settlement announced August 2, 2023). Teva Pharmaceuticals (Teva) agreed to pay U.S. hospitals up to $126 million over 18 years to settle claims that its marketing of opioids raised the hospitals' operating costs. Teva also agreed to supply $49 million worth of naloxone to the hospitals over the next seven years. The settlement stems from lawsuits filed by approximately 500 U.S. hospitals and other healthcare providers, although it is unknown which hospitals are part of the proposed settlement. The settlement will be finalized once Teva is satisfied that enough hospitals have agreed to take part. Teva previously reached a $4.25 billion settlement with state and local governments in July 2022. (For more information on Teva's previous settlement, please refer to the August 2022 issue of the LAPPA *Case Law Monitor*, available here).

KROGER REACHES AGREEMENT FOR NATIONWIDE OPIOID SETTLEMENT

(Agreement in principle announced September 8, 2023). The supermarket and pharmacy chain, Kroger, reached an agreement in principle to settle the majority of opioid claims brought against it by states, subdivisions, and Native American tribes. Kroger agreed to pay up to $1.2 billion to states and subdivisions and $36 million to Native American tribes over the course of 11 years. The company will also pay $177 million to cover attorneys' fees and costs over the next six years. States, subdivisions, and Native American tribes may opt-in to participate in the settlement, and Kroger has full discretion to determine whether there is sufficient participation for the settlement to become effective. Initial settlement payments will begin in December 2023 if all conditions are met. Kroger did not admit to any wrongdoing or liability as part of the settlement. Attorneys general from California, Colorado, Illinois, North Carolina, Oregon, Tennessee, and Virginia led the negotiations that produced the proposed settlement.

TENNESSEE REACHES SETTLEMENT WITH FOOD CITY IN OPIOID CASE

***State of Tennessee, ex rel. Jonathan Skrmetti v. Food City Supermarkets, LLC, et al.*, Circuit Court of Knox County, Tennessee, Case No. 3-32-21 (settlement announced September 21, 2023).** For previous information on this case, please refer to the April 2021 issue of the LAPPA *Case Law Monitor*, available here. Tennessee Attorney General Jonathan Skrmetti announced a $44.5 million settlement with Food City Supermarkets in relation to claims that the company failed to maintain effective controls against opioid misuse and diversion. Most of the settlement funds will go to Tennessee's Opioid Abatement Fund to support statewide efforts addressing the opioid epidemic. In addition to the monetary settlement, Food City agreed to provide extra training to pharmacy staff and update its prescription validation process. Food City also agreed to provide dedicated employment opportunities to individuals recovering from opioid use disorder. Food City did not admit to any liability or wrongdoing as part of the settlement.

MCKINSEY & CO. SETTLES WITH LOCAL GOVERNMENTS AND SCHOOL DISTRICTS

***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 (settlement announced September 26, 2023).** For previous updates on this case, please refer to the August 2023 issue of the LAPPA *Case Law Monitor*, available here. McKinsey & Company (McKinsey) agreed to pay $230 million to local governments and school districts to resolve allegations that it helped fuel the opioid epidemic through its consulting work with Purdue Pharma and other opioid manufacturers. The local governments and school districts involved in this settlement are those that opted not to join McKinsey's 2021 settlement with 50 state attorneys general. McKinsey will pay $207 million to the counties and municipalities and $23 million to the public school districts. McKinsey did not admit to any wrongdoing as part of the settlement. The settlement requires a judge's approval before taking effect.

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 August 10, 2023, the U.S. Supreme Court agreed to consider the Biden Administration's challenge to the Purdue Pharma (Purdue) bankruptcy plan. U.S. Trustee William K. Harrington leads the Administration's challenge. The case will be argued before the Supreme Court in December 2023, with a decision expected in the early half of 2024. The implementation of Purdue's $6 billion settlement plan is paused until a decision is handed down. The Supreme Court case is *William K. Harrington v. Purdue Pharma*, Case No. 23-124.

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 (notice of voluntary resolution filed August 15, 2023).** For previous updates on this case, please refer to the August 2023 issue of the LAPPA *Case Law Monitor*, available here. Endo International PLC's (Endo) proposed buyers announced that they will give public school districts suing Endo access to a $3 million opioid abatement fund in exchange for dropping their opposition to the company's proposed $6 billion asset sale. In July 2023, the Rochester City School District and other school districts argued that the purchase would negatively affect the compensation of many entities harmed by Endo's opioid products, including public schools. The fund would provide grants and other funding for more than 100 participating school districts to combat opioid misuse and support remediation programs and would be paid out over a period of three years. In exchange for access to the funds, participating schools would release their claims that Endo's products contributed to the opioid epidemic and agree to support the sale of Endo's assets to its lenders.

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 August 28, 2023, Mallinckrodt PLC (Mallinckrodt) filed for bankruptcy for the second time in less than three years. Under a proposed restructuring deal, Mallinckrodt plans to give opioid victims a final, one-time

$250 million payment, which is $1 billion less than the victims were promised last year. This payment would be in addition to the previous $450 million the company paid to the opioid victims' trust. The proposal would also cut Mallinckrodt's funded debt by about $1.9 billion. In court filings, Mallinckrodt stated that it believed it had addressed its liquidity problem after the earlier reorganization plan cut $1.5 billion from its debt, but declining sales of some of its branded drugs left it unable to manage scheduled payments.

- In addition to filing for the second bankruptcy, on August 28, 2023, Mallinckrodt announced that it faces a grand jury subpoena over sales of controlled substances. The subpoena, which came from the U.S. Attorney's Office for the Western District of Virginia, seeks data and information dating back to 2017 about the company's reporting of suspicious controlled substances orders and communications between the company and the Drug Enforcement Administration regarding those issues. Mallinckrodt states that it is in the process of responding to the subpoena and intends to cooperate in the investigation.

ABOUT THE LEGISLATIVE ANALYSIS AND PUBLIC POLICY ASSOCIATION

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

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

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