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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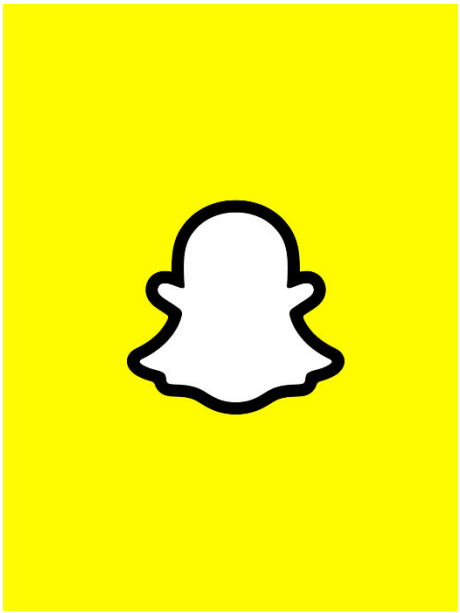
7-ELEVEN MUST FACE CLASS ACTION SUIT INVOLVING THE SALE OF BOTANIC TONICS' KRATOM DRINK

***Romulo Torres v. Botanic Tonics, LLC, et al.*, U.S. District Court for the Northern District of California, Case No. 3:23-cv-01460-TSH (motion to dismiss denied December 21, 2023).** For previous updates on this case, please refer to the June 2023 issue of the LAPPA *Case Law Monitor*, available here. A federal district court has ruled that 7-Eleven must face liability claims over sales of Botanic Tonics' "Feel Free Wellness Tonic" (Feel Free). Botanic Tonics advertises Feel Free as a "safe, sober, and healthy alternative to alcohol" and characterizes it as a "kava drink," but the beverage allegedly contains kratom instead of kava. Plaintiff Romulo Torres sued Botanic Tonics under California's False Advertising Law (CAL. BUS. & PROF. CODE § 17500, et seq.), and 7-Eleven under the unfair practices prong of California's Unfair Competition Law (CAL. BUS. & PROF. CODE § 17200, *et seq*.) for allowing Feel Free to be sold in its stores despite knowing the product was dangerous and addictive. Torres argued that 7-Eleven's decision to allow Feel Free to be sold in its stores, without at least disclosing to consumers how harmful the product could be, constituted an unfair business practice within the meaning of the statute. 7-Eleven filed a motion to dismiss, arguing that it could not be liable under the unfair practices prong unless it had a preexisting duty to disclose that information from some other source of law. The company asserted that because Torres cannot allege fraud under common law, he cannot file an unfair practices claim under the state's Unfair Competition Law. The court acknowledged that it is unclear whether the allegations against 7-Eleven in the complaint state a claim for a violation of the unfair practices prong, but because 7-Eleven's only argument for dismissal is a categorical one, the court was forced to deny the motion to dismiss. 7-Eleven's only argument was that it could never be liable for unfair business practices, even if all the other allegations in the complaint are true, because of the absence of an independent legal duty to disclose the information. The court held that 7-Eleven's argument was incorrect because California courts have made clear that the California Legislature intended for the unfair practices prong of the Unfair Competition Law to reach beyond existing law. The court stated that it would run contrary to the goal of the statute to insist that a duty to disclose must have been created by common law or by statute for liability to exist under the unfair practices prong. On December 29, 2023, 7-Eleven filed a motion to certify an interlocutory appeal. On January 12, 2024, the plaintiffs filed an opposition to 7-Eleven's motion to certify an interlocutory appeal, arguing that the order denying 7-Eleven's motion to dismiss does not raise a controlling question of law and that an interlocutory appeal would not materially advance the litigation. 7-Eleven submitted its response to the plaintiffs' opposition brief on January 19, 2024. A judge has yet to rule on the motion.

EBAY AGREES TO PAY $59 MILLION TO SETTLE CONTOLLED SUBSTANCES ACT ALLEGATIONS INVOLVING PILL PRESSES

(Settlement announced January 31, 2024). The e-commerce company eBay, Inc. (eBay) agreed to pay $59 million to resolve allegations that it violated the Controlled Substances Act (CSA; 21 U.S.C. § 801 *et seq.*) by improperly selling thousands of pill presses and encapsulating machines through its website. Pill presses and encapsulating machines can be used to create counterfeit pills that look indistinguishable from licit pharmaceutical drugs. The CSA regulates pill presses and encapsulating machines through record-keeping and reporting requirements (21 U.S.C. § 830). These requirements are meant to prevent individuals who intend to illegally use these machines from obtaining them and to ensure that the machines are traceable to the end user. The United States alleged that eBay failed to comply with these CSA requirements for the pill presses and encapsulating machines it sold through its website. In addition to the monetary settlement, eBay agreed to maintain and enhance its compliance program with respect to its "prohibited and restricted items" policy as it pertains to the sale of pill presses and encapsulating machines. eBay did not admit to any liability as part of this settlement.

JUDGE RULES LAWSUIT LINKING SNAPCHAT TO DRUG OVERDOSES CAN PROCEED



***Amy Neville, et al. v. Snap, Inc.*, Los Angeles County Superior Court, Case No. 22STCV33500 (motion to dismiss granted in part and denied in part January 2, 2024).** The Los Angeles Superior Court has ruled that Snap, Inc. (Snap), the parent company of the social media messaging app Snapchat, is not immune to a lawsuit involving allegations that the app facilitated the sale of fentanyl-laced counterfeit drugs to minors. In October 2023, a group of parents whose children obtained drugs through Snapchat and suffered a fatal or near fatal fentanyl overdose sued Snap over assertions that the app has become the go-to place for drug traffickers to target minors. The complaint alleged that Snapchat had more than 21 specific design defects, including defective age verification systems and lack of parental controls. Additionally, the plaintiffs asserted that Snapchat's automatic message deletion feature and live mapping feature facilitates illicit drug sales and make the app unreasonably dangerous. The plaintiffs brought forth several claims against the company, including strict product liability, negligence, and wrongful death. Snap filed a motion to dismiss arguing that Section 230 of the 1996 Communications Decency Act (Section 230; 47 U.S.C. § 230) makes the company immune to liability in this suit. Section 230 is meant to shield social media companies from civil lawsuits stemming from content posted by users. Snap asserted that because of Section 230, it could not be liable as a publisher of the third-party drug sellers' content. While the court agreed with Snap on that point, it noted that the plaintiffs' complaint does not attempt to impose liability upon Snap for publishing or failing to moderate the drug sellers' content but instead for its alleged independent tortious conduct. The court noted that the plaintiffs sought to impose liability on Snap because its unique product features encouraged and allowed drug traffickers to use the app to sell drugs to minors. Thus, because the plaintiffs are attacking the design of the app as opposed to the content, the court determined that Snap was not protected by Section 230 in this suit. The court allowed 12 out of the 16 counts to move forward. The four counts for which the court granted Snap's motion to dismiss were the counts related to tortious interference with parental rights, public nuisance, aiding and abetting, and loss of consortium. A status conference is scheduled for February 28, 2024.

ARIZONA MAN CHARGED WITH CHILD ABUSE AFTER SON ALLEGEDLY DIED FROM FENTANYL OVERDOSE

***State of Arizona v. Oswaldo Lozano*, Maricopa County, Arizona Superior Court, Case No. CR2023-154651-001 (suit filed December 5, 2023).** Maricopa County, Arizona prosecutors have filed multiple charges against Oswaldo Lozano over allegations that his two-year-old son died from a fentanyl overdose. According to the indictment, Lozano had been at home with his son and had fallen asleep on the couch. When Lozano woke up, he saw his son lying on the ground, not breathing, next to some blue pills marked "M30." Lozano tried to revive the child with naloxone and chest compressions but was unsuccessful. He then put the child in his truck and drove to a nearby convenience store to ask "unknown transients" if they had any naloxone he could use. After another dose of naloxone failed to revive the child, Lozano called 911 and asked for directions to the nearest hospital. The child was pronounced dead at the hospital and staff notified the police. Detectives discovered at least three pills and a syringe in Lozano's truck, as well as multiple pills in the home. During an interview following his arrest, Lozano admitted to detectives that he had a substance use disorder and used fentanyl pills multiple times a day. The child's mother also informed police that she was aware of Lozano's fentanyl addiction and knew that he had brought pills to the home on at least one other occasion. Lozano has been charged with child abuse, possession of narcotic drugs, and possession of drug paraphernalia. Lozano entered a not guilty plea on December 20, 2023. An initial pre-trial conference was scheduled for February 5, 2024.

FATHER PLEADS GUILTY TO CHILD ENDANGERMANT FOR USING CANNABIS AROUND SON

***State of Iowa v. Johnathan William Peters*, Iowa District Court (O'Brien County), Case No. FECR013094 (guilty plea entered January 24, 2024).** Johnathan Peters of Iowa pleaded guilty to an aggravated misdemeanor charge of child endangerment after an Iowa Department of Human Services' (Department) caseworker removed his three-year-old son from the family home in November 2023. The Department had received allegations that Peters and the child's mother, Victoria Barnes, were using illegal substances in the home. On November 17, 2023, the caseworker notified authorities that the child's hair tested positive for the presence of cannabis. During interviews with investigators, Barnes admitted to smoking cannabis a few times a week at a friend's house but not around her son. Peters informed investigators that he usually smoked cannabis in the garage and sometimes in the house while on a different floor from his son. Both Peters and Barnes were arrested and charged with neglect or abandonment of a dependent person, a class C felony, and a misdemeanor charge of child endangerment. On January 24, 2024, Peters entered a guilty plea, and as part of the agreement, the court dismissed the felony charge. A judge sentenced Peters to 364 days in jail and ordered him to pay an $855 fine. The judge also placed Peters on two years' probation and ordered him to undergo a substance use disorder evaluation. Barnes is scheduled to be arraigned on February 12, 2024.

CALIFORNIA SUPREME COURT ADDRESSES PARENTAL "SUBSTANCE ABUSE" IN THE CONTEXT OF CHILD DEPENDENCY PROCEEDINGS

***In re N.R.*, Supreme Court of California, Case No. S274943 (opinion filed December14, 2023).** California's high court adopted a broad definition of what constitutes parental "substance abuse" (the term used by the court) within the context of dependency proceedings, while also limiting the circumstances under which a parent's substance abuse requires a child to become a dependent of the court. The purpose of California's dependency law is to provide safety and protection to children who are currently being physically, sexually, or emotionally abused, or who are at risk of harm (CAL. WELF. & INST. CODE § 300, *et seq*. (West

2024)). Section 300 of California's dependency law enumerates the various ways in which a child may come within the dependency jurisdiction of the juvenile court. This case focuses on § 300(b)(1)(D), which provides that a juvenile may be adjudged a dependent of the court if "the child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness as a result of . . . the inability of the parent or guardian to provide regular care for the child due to the parent or guardian's mental illness, developmental disability or substance abuse." In November 2020, police officers executed a search warrant at the residence of N.R.'s mother. N.R. was 12 months old at the time of the search, and the parents had joint custody of the child. A social worker had safety concerns regarding N.R.'s living arrangements and asked the mother if the child could stay with its father while the investigation occurred, which the mother allowed. The social worker assessed the father's residence to be "generally positive" and observed N.R. to be "clean, neat, and on target with all developmental milestones." In talking with the social worker, the father denied that he abused any substances and agreed to take a drug test. The father's drug test came back positive for cocaine, and when the social worker asked him about the results, he disclosed that he had used cocaine the weekend before but claimed that he was not an active user. He further explained that he used the cocaine to celebrate his birthday, had not expected he would be asked to take care of N.R. soon thereafter, and had not used any drugs since then. N.R. remained in the father's care for a few weeks until a removal order placed the child in the care of an uncle. Shortly thereafter, a petition was filed in the Los Angeles County Superior Court alleging that N.R. came within the dependency jurisdiction of the juvenile court. The petition alleged that the father had "a history of substance abuse and is a current abuser of cocaine" and stated that the father's substance abuse interfered with providing regular care to N.R. In an April 2021 hearing, the superior court concluded that the father's "substantial drug abuse history" warranted the findings that N.R. came within the court's dependency jurisdiction and should be removed from the father's care and custody.

The father appealed the ruling to the intermediate appellate court, arguing that, while he did use cocaine, his use did not amount to the level of substance abuse that supported a jurisdictional finding. The father urged the court to adopt the meaning of substance abuse articulated in *In re Drake M.* (149 Cal.Rptr.3d 875). In *Drake M.*, the court determined that a finding of substance abuse for the purposes of § 300(b) "must be based on evidence sufficient to: (1) show that the parent or guardian at issue had been diagnosed as having a current substance abuse problem by a medical professional or (2) establish that the parent or guardian at issue has a current substance abuse problem as defined in the current version of the [Diagnostic and Statistical Manual of Mental Disorders (DSM)] at that time." *Drake M.* also concluded that a finding of substance abuse constituted prima facie evidence of the inability of a parent or guardian to provide regular care to a child of "tender years" (referred to as the "tender years presumption"). The father criticized the tender years presumption of the *Drake M.* ruling but nevertheless argued that the evidence before the juvenile court rebutted any prima facie case that might have arisen. The court of appeals affirmed the ruling of the lower court, holding that the evidence supported the juvenile court's exercise of jurisdiction over N.R. because of the father's cocaine abuse. In its holding, the court of appeals did not discuss the meaning of the term "substance abuse," but did invoke the tender years presumption. The court determined that the father had not rebutted the prima facie showing of a substantial risk of serious physical harm established by his substance abuse. The father appealed the ruling to the California Supreme Court.

The issues presented before the court are: (1) whether the legislature intended for substance abuse to be recognized only upon evidence establishing either that the DSM criteria be satisfied or that a parent or guardian has been diagnosed with a substance use disorder by a qualified professional; and (2) whether a finding of substance abuse is properly regarded as prima facie evidence of an inability to provide regular care to a young child. Regarding the first issue, the court determined that neither satisfaction of the relevant DSM criteria nor a professional medical diagnosis is required to show substance abuse under Section 300. The term "substance abuse" is not defined in Section 300, and the court determined that the legislature's failure to define "substance abuse" suggests that the legislators intended for the term to bear its ordinary meaning, which the court found to be "the excessive use of drugs or alcohol." If the legislature wanted the term to bear a more technical meaning, it would have referenced the DSM in either the statute or in the legislative history. Additionally, the court noted that there are several countervailing policy considerations that counsel against

using the DSM criteria for the assessment of substance abuse for the purposes of § 300(b)(1)(D), including that the DSM is designed for clinical application and courts may lack the information necessary to apply the DSM criteria. Similarly, the court ruled that had the legislature intended to require a medical diagnosis of substance abuse, it would have stated so in the statute. Regarding the second issue, the court ruled that the tender years presumption conflicts with legislative intent and must be rejected because it oversimplifies the necessary analysis. The court held that the tender years presumption robs courts of discretion and that it is inappropriate to regard a parent or guardian's excessive use of drugs or alcohol as always being sufficient, by itself, to show that a parent or guardian is unable to provide regular care for a young child. Therefore, to uphold the legislature's intent, courts must determine whether a parent or guardian can provide regular care based on the facts of the case and not a categorical rule. Having rejected the tender years presumption, the court reversed the judgment of the court of appeals and remanded the case for further proceedings.

MOTHER SETTLES WRONGFUL DEATH SUIT AGAINST AIRBNB AFTER CHILD'S FENTANYL EXPOSURE

***Lydie Lavenir v. Airbnb, Inc., et al.*, Florida Circuit Court for the 15th Judicial Circuit, Case No. 2022-CA011956 (settlement announced January 24, 2024).** For previous updates on this case, please refer to the April 2023 issue of the LAPPA *Case Law Monitor*, available here. The mother of a child who died of a fentanyl overdose while staying at a Florida Airbnb property has reached a settlement with Airbnb, Inc. and the property owners, Ronald Cortamilia and Yulia Timpy. The details of the settlement are not publicly available.

FEDERAL JUDGE ADOPTS MAGISTRATE'S RECOMMENDATION TO DISMISS FORMER EMPLOYEE'S DISABILITY DISCRIMINATION SUIT

***Thomas R. Buss v. Penske Logistics LLC*, U.S. District Court for the Middle District of Pennsylvania, Case No. 1:21-CV-00139 (summary judgment granted December 7, 2023).** For previous updates on this case, please refer to the April 2023 issue of the LAPPA *Case Law Monitor*, available here. In March 2023, a magistrate judge for a Pennsylvania federal district court recommended that Penske Logistics LLC's (Penske) motion for summary judgment should be granted in a case involving a former employee terminated after his disability accommodation request revealed he took several prescribed controlled substances. On December 7, 2023, a federal judge adopted the report and recommendation of the magistrate judge and granted Penske's motion for summary judgment. On December 22, 2023, the plaintiff filed a motion for reconsideration. The court has yet to rule on the motion.

THIRD CIRCUIT DOES NOT FIND QUALIFIED IMMUNITY FOR POLICE AFTER ARRESTEE DIES FROM ORALLY INGESTING DRUGS

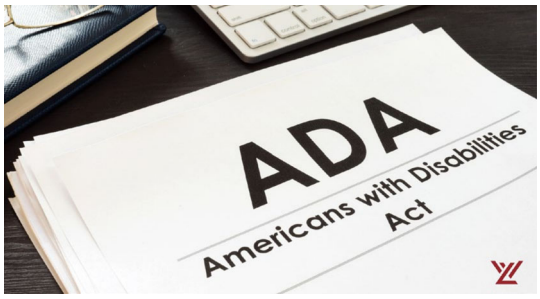
***Sherelle Thomas v. City of Harrisburg, et al.*, U.S. Court of Appeals for the Third Circuit, Case No. 21-2963 (opinion filed December 6, 2023).** In a 2-1 decision, the Third Circuit has ruled that law enforcement officers are not entitled to qualified immunity from a failure to render medical care claim brought against them by the estate of a man who died after ingesting cocaine. In December 2019, two Harrisburg, Pennsylvania law enforcement officers conducted a traffic stop of Terelle Thomas's vehicle. The officers believed that Thomas had ingested a large quantity of cocaine due to the white stains on his lips. They were soon joined by four more officers, with whom they shared their conclusions and determined that Thomas should be arrested. Although the Harrisburg Police Department policy directs that arrestees are to be taken to a hospital if they have consumed narcotics in a manner that jeopardizes their health, the officers took Thomas to the Dauphin County Prison. Prison officials placed Thomas in a cell without providing him with any medical attention, and

two hours later, Thomas collapsed from cardiac arrest. Prison officials then took him to a nearby hospital, where he died three days later of cocaine and fentanyl toxicity. Thomas's estate sued the City of Harrisburg and several law enforcement officers and prison employees in federal court, alleging that the defendants violated Thomas's rights under the Fourteenth Amendment of the U.S. Constitution by failing to render medical care and failing to intervene. The defendants filed motions to dismiss and, as relevant to this appeal, the district court ruled that the law enforcement officers were not entitled to qualified immunity on the failure to intervene and failure to provide medical care claims because the rights are clearly established, and the complaint stated facts sufficient to allege that the officers violated Thomas' rights. The officers filed a collateral appeal, limited to the issue of qualified immunity. On December 6, 2023, the Third Circuit majority affirmed the district court on the question of failure to render medical care but reversed it on the question of failure to intervene. The majority held that when officers are aware that an arrestee has orally ingested a quantity of narcotics sufficient to pose a substantial risk to health or a risk of death, they must take steps to render medical care. In this case, the officers' failure to take Thomas to the hospital despite it being "obvious" that he needed medical attention supported the estate's claim of deliberate indifference to a clearly established right. As for the failure to intervene, the majority held that neither the Third Circuit nor the U.S. Supreme Court had recognized a right to intervene in the context of medical care, so qualified immunity for the officers was appropriate. The dissenting judge argued that the Due Process Clause of the Fourteenth Amendment does not require law enforcement officers to transport a detained suspect who ingested drugs to a hospital. On December 20, 2023, the officers filed a petition for a rehearing *en banc*, but the court denied the petition on January 8, 2024.

ESTATE CLAIMS NEW JERSEY JAIL'S FAILURE TO PREVENT DRUG SMUGGLING RESULTED IN DAUGHTER'S DEATH

***Michelle Trussell v. Monmouth County, et al.*, U.S. District Court for the District of New Jersey, Case No. 3:24-cv-00151 (suit filed January 9, 2024).** Plaintiff Michelle Trussell filed a lawsuit on behalf of the estate of her daughter, Jennifer Ross, against Monmouth County, New Jersey, and employees of the Monmouth County Correctional Institute (MCCI) over allegations that the defendants violated her daughter's civil rights. On September 17, 2022, a Monmouth County Sheriff's officer arrested Jennifer Ross on warrants for failure to appear in drug court. The officer transported Ross to MCCI, where she was processed and detained. During the intake, screening, and booking process, MCCI officials learned of Ross's substance use disorder. Because of her history of substance use disorder, MCCI officials placed Ross on a withdrawal assessment protocol and prescribed her detox medications to ease her withdrawal symptoms. According to the complaint, Ross did not have drugs in her possession when she entered MCCI. On September 20, 2022, Ross ingested a fatal drug cocktail provided to her by someone within MCCI. Officials in the facility were unable to revive Ross, and a medical examiner determined that her death resulted from mixed drug toxicity, including fentanyl. The identity of the person who gave Ross the drugs is unknown to Trussell, and no one has been arrested or charged with distributing the drugs that resulted in Ross's death. Citing multiple criminal complaints that have been filed against MCCI detailing its lax drug screening and detection protocols, Trussell claims that illicit drugs are widely available to detainees at MCCI. Trussell argues that MCCI failed to take adequate or reasonable measures to stop drugs from entering the facility and being distributed to detainees. By failing to place Ross under observation or in a protective setting away from the "omnipresent drug trafficking," Trussell argues that MCCI directly and proximately caused Ross's death. Trussell brings forth claims under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution; the New Jersey Civil Rights Act (N.J. STAT. ANN. § 10:6-2 (West 2024)); the New Jersey Wrongful Death Act (N.J. STAT. ANN. § 2A:31-1 (West 2024)); and the New Jersey Survivor's Act (N.J. STAT. ANN. § 2A:15-3 (West 2024)). Trussell has requested a jury trial and is asking the court for damages and remedies on behalf of Ross's estate and Ross's surviving children.

KENTUCKY JAIL AGREES TO PROVIDE INMATES WITH MEDICATIONS FOR OPIOID USE DISORDER



(Agreement reached December 4, 2023). The federal government reached an agreement with the Big Sandy Regional Jail Authority (Big Sandy Authority) in Kentucky to ensure that individuals with opioid use disorder (OUD) are able to receive medication for addiction treatment while incarcerated. The U.S. Attorney's Office for the Eastern District of Kentucky conducted an investigation of the Big Sandy Regional Detention Center (BSRDC), which is operated by the Big Sandy Authority, after it received a complaint by a medical provider on behalf of one of her patients. The patient, identified as J.F., had been lawfully prescribed buprenorphine to treat his OUD, and the medical provider claimed that J.F. had been denied his medication while incarcerated at BSRDC. The U.S. Attorney's Office investigated whether BSRDC's treatment of J.F. violated the Americans with Disabilities Act (ADA) and whether it had a general practice of refusing to provide buprenorphine to individuals with OUD. The ADA prohibits people with disabilities from being excluded from participation in or denied the benefits of any public entity's services or programs, and OUD is considered a disability. On December 4, 2023, the U.S. Attorney's Office announced that an agreement had been reached with BSRDC. Under the terms of the agreement, BSRDC must provide all three Food and Drug Administration approved OUD medications to those who need it, including to those inmates who did not have a prescription for such treatment prior to incarceration, and jail officials must only make treatment decisions based on individualized determinations from qualified medical personnel. Additionally, BSRDC employees must receive training on ADA requirements and new treatment policies.

NINTH CIRCUIT DOES NOT FIND AN EXPECTATION OF PRIVACY IN STATE PRESCRIPTION MONITORING RECORDS

***United States v. Myron Motley*, U.S. Court of Appeals for the Ninth Circuit, Case 21-10296 (opinion filed December 29, 2023).** The Ninth Circuit ruled that there is not an expectation of privacy when it comes to prescription monitoring records. In July 2018, federal law enforcement began investigating Myron Motley based on a confidential informant's tip. Motley reportedly traveled frequently from his home in California to Nevada, where he illegally bought and sold prescription drugs. Investigators sought information from Nevada's prescription drug monitoring program (PDMP), which tracks drug prescriptions to prevent illegal use of controlled substances. The PDMP report revealed that a doctor had prescribed Motley a quantity of prescription drugs large enough to suggest abuse or diversion. This information supported the request for two warrants to place a GPS tracking device on Motley's vehicle and a warrant to monitor Motley's cell phone. Ultimately, Motley and six co-conspirators were indicted in federal district court in Nevada on multiple charges of conspiracy to possess and distribute oxycodone and hydrocodone. Motley filed a motion to dismiss evidence obtained from the tracking and wiretap warrants, arguing that the use of information from Nevada's PDMP was a warrantless search in violation of the Fourth Amendment of the U.S. Constitution. The district court denied the motion, and a jury convicted Motley on all counts. Motley appealed to the Ninth Circuit, and on December 29, 2023, the court affirmed the district court's ruling. Given the federal government's "long-standing and pervasive" opioid regulations, the Ninth Circuit held that the PDMP search was not a Fourth Amendment violation because Motley did not have a reasonable expectation of privacy in the PDMP database information. The court also noted that, while medical records are generally thought to have an expectation of privacy, PDMP records are not afforded the same level of privacy because they do not contain the same level of "personal and intimate information" that other medical records do. Motley has until March 12, 2024, to file a petition for a rehearing *en banc*.

ARLINGTON, VIRGINIA DOCTOR CONVICTED OF ILLEGALLY PRESCRIBING AND DISTRIBUTING OXYCODONE

***United States v. Kristen Ball*, U.S. District Court for the Eastern District of Virginia, Case No. 1:23-cr-00080 (jury verdict reached December 12, 2023).** Physician Kirsten Ball operated a medical practice out of her home in Arlington, Virginia. In 2014, 2015, and 2021, the Virginia Department of Health Professions investigated Ball for excessive prescribing of oxycodone to her patients. According to evidence presented at trial, Ball conspired with her office manager Candy Calix to prescribe over one million oxycodone pills and falsify records to cover up these prescriptions. Even when some of Ball's patients showed clear signs of drug addiction, failed drug tests, or criminal records for selling illegal or prescription drugs, she continued to prescribe oxycodone. An undercover Federal Bureau of Investigation agent pretending to be a patient recorded conversations in which Ball admitted violating the law. In the spring of 2023, the U.S. Attorney's Office for the Eastern District of Virginia indicted Ball for illegal distribution of oxycodone and conspiracy to distribute oxycodone. On December 12, 2023, a jury found her guilty on 20 counts. Ball's sentencing hearing is scheduled for February 27, 2024, and she faces a maximum penalty of 20 years in prison for each count on which she was convicted. Calix was previously sentenced to seven years in prison on September 28, 2022, for conspiring to distribute oxycodone.

NEW CONVICTION IN INTERNATIONAL DRUG MONEY LAUNDERING OPERATION

***United States v. Gustavo Adolfo Aldana-Martinez, et al.*, U.S. District Court for the Central District of California, Case No. 2:23-cr-00014-RGK (jury verdict reached December 15, 2023).** Three defendants in a money laundering scheme for an international drug trafficking organization have been convicted on federal charges. On December 15, 2023, a jury found Gustavo Adolfo Aldana-Martinez guilty of conspiracy to launder money. The evidence presented at trial showed that Aldana-Martinez accepted wire transfers of trafficker-directed drug proceeds sent from an undercover account run by agents with the Drug Enforcement Administration (DEA). Between 2015 and 2017, Aldana-Martinez laundered approximately $15.5 million. The money laundering enterprise was overseen by Danie Shaun Zilke, who pleaded guilty on December 8, 2023, to conspiracy to aid and abet drug distribution, conspiracy to launder money, and obstruction of an official government proceeding for stealing and attempting to cover up the theft of $150,000 in DEA undercover funds. The third defendant in the case, Jeffrey Mark Thompson, pleaded guilty on November 27, 2023, to conspiracy to aid and abet drug distribution, conspiracy to launder money, and money laundering. When Thompson pleaded guilty, he admitted that he used a fraudulent charity called "Peace Through Water" to launder drug money. All three defendants were named in a federal grand jury indictment filed in January 2023. A fourth defendant in the case, Juan Rachid Dergal-Zulbaran, is currently a fugitive. As a result of the conviction and guilty pleas, the three defendants each potentially face decades in federal prison. Zilke is scheduled to be sentenced on April 1, 2024, while Thompson and Aldana-Martinez face sentencing on April 8, 2024.

DELAWARE SUPREME COURT REINSTATES PENSION FUND'S SHAREHOLDER SUIT AGAINST AMERISOURCEBERGEN BOARD

***Lebanon County Employees' Retirement Fund, et al. v. Steven H. Collis, et al.*, Delaware Supreme Court, Case No. 22, 2023 (opinion filed December 18, 2023).** For previous updates on this case, please refer to the February 2023 issue of the LAPPA *Case Law Monitor*, available here. Delaware's high court has reinstated a pension fund's shareholder suit against AmerisourceBergen board members that the Delaware Chancery Court previously dismissed. In December 2022, the Chancery Court granted the defendants' motion to dismiss,

holding that the plaintiffs' lawsuit was "fatally undermined" by the ruling in *City of Huntington, West Virginia, et al. v. AmerisourceBergen Drug Corporation, et al.* (for more information on this case, please refer to the August 2022 issue of the LAPPA *Case Law Monitor*, available here). In the *Huntington* case, a West Virginia federal court found on the merits that AmerisourceBergen had an adequate anti-diversion program in place. Based on this ruling, the judge determined that there was sufficient evidence against the plaintiffs' claim. In January 2023, the plaintiffs filed a motion to withdraw and reconsider the dismissal based on new litigation against AmerisourceBergen filed by the U.S. Department of Justice (DOJ) (*United States v. AmerisourceBergen Corporation, et al.*; for more information on this case, please refer to the February 2023 issue of the LAPPA *Case Law Monitor*, available here). The plaintiffs argued that the DOJ complaint constituted newly discovered evidence that supported an inference that the board was aware of AmerisourceBergen's non-compliance with the federal Controlled Substances Act (21 U.S.C. §§ 801, *et seq.*). The Chancery Court rejected the plaintiffs' argument, holding that the DOJ complaint did not constitute newly discovered evidence. The plaintiffs appealed the case to the Delaware Supreme Court, arguing that the Chancery Court erred by: (1) allowing the *Huntington* decision to negate the court's conclusion that the allegations in the original complaint were otherwise sufficient to establish that a majority of the AmerisourceBergen board faced a substantial likelihood of liability; and (2) concluding that the DOJ complaint did not constitute newly discovered evidence and refusing to reconsider its opinion in light of the DOJ complaint. The principal issue addressed on appeal was whether the way the Chancery Court considered, and the weight that it gave, the West Virginia Court's factual findings was consistent with the Delaware Rules of Evidence. The plaintiffs argued that the Chancery Court improperly employed Delaware Rule of Evidence (D.R.E.) 202 (judicial notice of law) to consider post-complaint evidence outside of the original complaint. The plaintiffs also asserted that, even if the Chancery Court was permitted to take judicial notice[1] of the West Virginia Court's findings, it erred by giving those findings dispositive weight. The court agreed with the plaintiffs, holding that the Chancery Court's use of D.R.E. 202 to adopt the factual findings of another court in another case was a categorial error and a departure from the "principles that animate the concept of judicial notice." The court noted that, absent the West Virginia decision, the plaintiffs' claims would have survived the defendant's motion to dismiss. Thus, because of the misapplication of judicial notice, the court reversed the Chancery Court's motion to dismiss and remanded the case for further proceedings.

INSURANCE COMPANY MUST PAY LEGAL DEFENSE COSTS IN WALMART'S OPIOID SUITS

***Walmart Inc. v. Ace American Insurance Co., et al.*, Arkansas Circuit Court, Case No. 04CV-22-2835 (opinion filed December 29, 2023).** An Arkansas circuit court has ruled that American Insurance Group, Inc. (AIG) must pay for Walmart, Inc.'s (Walmart) legal defense costs in opioid lawsuits brought by government entities. Walmart has been sued by various government entities that are seeking to recover financial losses stemming from the opioid epidemic. In 2022, Walmart began settling some of these lawsuits and sought defense and indemnity coverage from AIG, but the insurer denied the coverage. In response, Walmart sued AIG and its excess insurers and filed a motion for summary judgment, arguing that the allegations were within the scope of its commercial general liability insurance policies. AIG filed a cross-motion for summary judgment, arguing that it did not owe Walmart a defense obligation because the opioid suits did not allege an "occurrence," defined in the policy as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions." Additionally, AIG argued that it did not have a defense obligation because the opioid suits did not seek damages "because of" bodily injury or property damage. The first issue for the court was whether Walmart's knowing and intentional distribution and dispensing of opioids gave rise to an occurrence. AIG argued that intentional acts can give rise to an occurrence only if they result in unforeseeable harm and asserted that the opioid lawsuits did not allege an occurrence because the "true nature

[1] "Judicial notice" is a court's acceptance, for purposes of convenience and without requiring a party's proof, of a well-known and indisputable fact. An example would be a trial court taking judicial notice of the fact that water freezes at 32 degrees Fahrenheit. *Judicial notice*, BLACK'S LAW DICTIONARY (11th ed. 2019).

of those suits were that Walmart intentionally failed to protect against diversion of opioid medications, and the harm caused by that conduct was 'reasonably foreseeable.'" In contrast, Walmart argued that its distribution and dispensing activities could give rise to an occurrence if they resulted in unexpected or unintended harm. The company asserted that, because the opioid suits contained allegations of negligence and alleged harms that Walmart potentially did not expect or intend, the suits did allege an occurrence under Arkansas law. The court agreed with Walmart, finding that AIG policy clearly anticipates covering intentional and foreseeable harm so long as the harm is unexpected or unintended. Furthermore, the court noted that coverage for liability arising out of the sale or distribution of drugs would be meaningless if the foreseeable adverse consequences of ingesting such drugs were not covered. "Therefore, Walmart's intentional distribution and dispensing of medications, even if it results in repeated exposure to harmful conditions, can give rise to an occurrence under the AIG policies so long as the resulting harm was due to alleged negligence and was not expected or intended," ruled the court. The second issue in the case was whether the opioid suits sought damages because of bodily injury or property damage. The opioid suits alleged that Walmart's dispensing and distribution of opioids were a direct proximate cause of bodily injuries to thousands of individuals and property damage. Therefore, the court determined that the nature or type of liability that Walmart faced in the opioid suits was "because of" or "on account of" bodily injury or property damage under Arkansas law. Thus, the court ruled that the opioid suits triggered AIG's defense obligation because Walmart alleged an occurrence and sought damages because of bodily injuries or property damage.

NINTH CIRCUIT RULES INSURANCE COMPANIES DO NOT HAVE A DUTY TO DEFEND MCKESSON IN OPIOID SUITS

***AIU Insurance Company, et al v. McKesson Corporation, et al.*, U.S. Court of Appeals for the Ninth Circuit, Case No. 22-16158 (opinion filed January 26, 2024).** The Ninth Circuit ruled that National Union Fire Insurance Company of Pittsburgh, Pennsylvania, and ACE Property and Casualty Insurance Company (collectively "insurers") do not have a duty to defend McKesson Corporation (McKesson) against opioid-related litigation. During the relevant period, McKesson held policies issued by the insurers that covered any "bodily injury caused by an occurrence." An "occurrence" is defined in the policies as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions." The insurers sought a declaratory judgment that they did not have a duty to defend McKesson against litigation seeking to impose liability on the company for its alleged role in the opioid crisis. The district court granted the insurers' partial motion for summary judgment, holding that the opioid lawsuits against McKesson did not allege an accident and, thus, they did not have a duty to defend McKesson in the suits. McKesson appealed the district court's ruling, arguing that the court erred in finding that the insurers did not have a duty to defend. In California, precedent defines the term "accident" in a liability insurance policy as "an unexpected, unforeseen, or undesigned happening or consequence from either a known or unknown cause." Furthermore, "an accident does not occur when the insured performs a deliberate act unless some additional, unexpected, independent, and unforeseen happening occurs that produces the damage." On appeal, the court must determine whether: (1) the complaints in the opioid suits allege anything other than strictly deliberate conduct; and (2) if not, whether they allege some additional unexpected, independent, and unforeseen happening which may have produced the damage. The court determined that the allegations in the opioid suits described exclusively deliberate conduct that McKesson could not have plausibly engaged in by accident. Specifically, the suits alleged that McKesson intentionally flooded the market with opioids and ignored various red flags. McKesson argued that because the complaints included standalone causes of action for negligence, they did not allege only deliberate conduct. The court rejected this argument, holding that, while negligence can be proved by unintentional conduct, it can also be proved by conduct that is "allegedly negligent but nevertheless intentional." Having concluded that the opioid suits alleged strictly deliberate conduct, the court then needed to determine whether the suits alleged some additional, unexpected, independent, and unforeseen happening that may have caused the alleged damage. McKesson asserted that the conduct of "downstream actors including doctors, pharmacists, and opioid addicts who turned to heroin more immediately produced the

injuries [alleged in the suits] and must be deemed an additional, unexpected, independent, and unforeseen happening." The court rejected this assertion, holding that McKesson may not have "intended to cause injury or mistakenly believed its deliberate conduct would not or could not produce injury," but such injuries were not unexpected or unforeseen in light of McKesson's intentional acts. Thus, because the opioid suits did not allege an accident, the court ruled that the insurers did not have a duty to defend McKesson in the suits.

FEDERAL SUBOXONE TOOTH DECAY CASES COMBINED: JUDICIAL PANEL CONSIDERING OHIO

***In re: Suboxone (Buprenorphine/Naloxone) Film Marketing, Sales Practices, and Products Liability Litigation*, U.S. Judicial Panel on Multidistrict Litigation, Case No. 3092 (motion for transfer and coordination filed November 14, 2023).** In September 2023, David Sorensen of Ohio filed a product liability lawsuit in federal court against the manufacturers, sellers, and promoters of Suboxone, alleging that he and many other Suboxone users had suffered severe and permanent tooth damage. (For more information, please refer to *David Sorensen v. Indivior, Inc., et al.* in the December 2023 issue of the LAPPA *Case Low Monitor*, available here.) There are now at least 15 federal lawsuits in five judicial districts currently pending, all alleging similar wrongdoing by companies that manufacture, promote, or sell Suboxone. In November 2023, multiple plaintiffs petitioned the U.S. Judicial Panel on Multidistrict Litigation to merge the lawsuits, recommending that the multi-district litigation be assigned to Judge J. Philip Calabrese in the Northern District of Ohio because most of the currently pending Suboxone cases are in that district. At the same time, the defendants filed a brief in support of the motion, preferring a consolidated proceeding to avoid the risks of inefficiency and inconsistent rulings. A panel hearing occurred on January 25, 2024.

CITY OF BOSTON CLAIMS PHARMACY BENEFIT MANAGERS HELPED FUEL OPIOID EPIDEMIC

***City of Boston v. Express Scripts Inc., et al.*, Massachusetts Superior Court (Suffolk), Case No. 2484CV00107 (suit filed January 12, 2024).** The City of Boston filed a lawsuit against Express Scripts Inc. and OptumRx Inc., two of the largest pharmacy benefit managers in the United States, over claims that the companies' actions contributed to the opioid epidemic. Pharmacy benefit managers are the intermediaries between drug manufacturers and insurance companies. The suit claims that the companies: (1) gave Purdue Pharma's OxyContin preferred drug status on the national registry of drugs in exchange for profitable rebates; (2) failed to limit their excessive distribution into communities; (3) dispensed opioids through mail order pharmacies without effectively controlling diversion; and (4) colluded with Purdue Pharma in marketing opioids to increase their sales. Boston argues that the actions of the companies created a public nuisance. The city is asking the court for a permanent injunction to stop the defendants from engaging in the acts and practices that caused the public nuisance and for an order directing them to abate the public nuisance.

PENNSYLVANIA'S ATTORNEY GENERAL CAN USURP AND SETTLE DISTRICT ATTORNEYS' OPIOID LAWSUITS

***Commonwealth of Pennsylvania v. Attorney General*, Commonwealth Court of Pennsylvania, Case No. 283 M.D. 2022 (opinion filed January 26, 2024).** For previous updates on this case, please refer to the April 2022 issue of the LAPPA *Case Law Monitor*, available here. Pennsylvania's Commonwealth Court ruled that Pennsylvania's Attorney General has the authority to settle and release claims brought by two district attorneys under Pennsylvania's Unfair Trade Practices and Consumer Protection Law (UTPCPL; 73 PA. STAT. AND CONS. STAT. ANN. § 201-1, *et seq.* (West 2024)). On May 17, 2022, Philadelphia District Attorney, Larry Krasner, and the Allegheny County District Attorney, Stephen A. Zappala, Jr. (collectively, "DAs") filed a

petition for review for declaratory and injunctive relief, regarding the civil enforcement actions they filed, as authorized by the UTPCPL, in the name of the Commonwealth against certain manufacturers and distributors of opioids, to stop the Attorney General from superseding and settling their claims. The Attorney General originally attempted to extinguish the DAs claims in 2021 when he signed onto the opioid settlement involving the "big three" distributors and Johnson & Johnson on behalf of the Commonwealth. As part of the settlement, the Attorney General agreed to settle and release all claims against the settling defendants, including those previously filed by the DAs. In this suit, the DAs argued that the Attorney General lacks the authority to settle their ongoing, previously filed UTPCPL claims because the law does not provide that the Attorney General may usurp and settle a claim brought by a district attorney. The Attorney General counterargued that the attorney general's broad authority in civil matters empowers him to supersede the authority of a district attorney under the UTPCPL.

Although both the Attorney General and a district attorney may bring concurrent enforcement actions under the UTPCPL, the UTPCPL does not make it clear whether the Attorney General may override or supersede a district attorney when conflict in representation of the Commonwealth occurs. Under the Commonwealth Attorneys Act (CAA; 71 PA. STAT. AND CONS. STAT. ANN. § 732-101, *et seq.* (West 2024)), the Attorney General's authority to supersede a district attorney in a particular criminal prosecution is limited. In a criminal prosecution, the Attorney General must: (1) be invited by a district attorney to step in; or (2) petition the court having jurisdiction over any criminal proceeding to permit the Attorney General to supersede the district attorney. Section 204 of the CAA does not contain similar supersedure authority applicable to civil litigation. The DAs asked the court to interpret the omission as evidence that the Attorney General does not have power to supersede the DAs. The court disagreed with the DAs, holding that, although the General Assembly delegated some authority to district attorneys to bring UTPCPL claims in the name of the Commonwealth, it never limited the Attorney General's authority over UTPCPL matters or civil actions in general. Thus, the court reasoned that, unlike with criminal prosecutions, a supersession provision was not necessary in order for the Attorney General to act on behalf of the Commonwealth in civil actions because the Attorney General's authority to pursue such claims was not altered. Furthermore, the court notes that, as a matter of public policy, any uncertainty or inconsistency about the Commonwealth's position in separate litigation must result in deference to the Attorney General. As the "chief law officer" of the Commonwealth, the Attorney General outranks all district attorneys and is in the best position to represent the public interest in pursuing and resolving the Commonwealth's UTPCPL claims against the settling defendants. Accordingly, the court granted judgment in favor of the Attorney General and against the DAs and declared that the settlements fully release all of the Commonwealth's UTPCPL claims against the settling defendants, including those filed by the DAs.

TEXAS ATTORNEY GENERAL SUES FIVE CITIES OVER THEIR CANNABIS DECRIMINALIZATION POLICIES

***State of Texas v. City of Austin, et al.*, Texas District Court (Travis County), Case No. not yet assigned (suit filed January 31, 2024).** Texas Attorney General Ken Paxton filed a lawsuit against the Texas cities of Austin, San Marcos, Killeen, Elgin, and Denton for decriminalizing cannabis. The lawsuit is based on a reading of Section 370.003 of the Texas Local Government Code, which states that "the governing body of a municipality or a municipal police department may not adopt a policy under which the entity will not fully enforce laws relating to drugs." (Tex. Loc. Gov't Code Ann. § 370.003 (West 2024)). The suit also claims that the Texas Constitution makes it unlawful for municipalities to adopt ordinances that are inconsistent with the laws enacted by the Texas Legislature. (Tex. Const. art. XI, § 5). The Attorney General is seeking a permanent injunction enjoining the defendant cities from enforcing their cannabis decriminalization ordinances, ordering them to repeal their ordinances and fully enforce the drug laws of the state.

PLAINTIFFS CLAIM HUD'S DENIAL OF SECTION 8 HOUSING TO MEDICAL CANNABIS USERS IS UNCONSTITUTIONAL

***Sarah Bloch, et al. v. U.S. Department of Housing and Urban Development and Marcia Fudge*, U.S. District Court for the Western District of Pennsylvania, Case No. 2:23-cv-01660-NR (suit filed September 18, 2023).** Two Pennsylvania residents in need of federal housing assistance that lawfully use medical cannabis are suing the U.S. Department of Housing and Urban Development (HUD) and Marcia Fudge within her official capacity as Secretary of HUD, over claims that the agency unconstitutionally discriminates against low-income and disabled individuals who use medical cannabis. The Quality Housing and Work Responsibility Act (QHWRA; 42 U.S.C. §§13661-13664) is the federal law that governs the Housing Choice Voucher program, which is commonly referred to as "Section 8" housing. This program is federally administered by HUD, with each state being responsible for its implementation. In addition to an income eligibility component, Section 8 applicants must comply with certain applicant screening and tenancy termination requirements related to safety and security in public and federally assisted housing programs. Section 13661(b)(1)(A) of the QHWRA provides that a public housing agency or an owner of federally assisted housing "shall establish standards that prohibit admission to the program or admission to federally assisted housing for any household with a member who the public housing agency or owner determines is illegally using a controlled substance." Additionally, Section 13662(a)(1) of the QHWRA states that a public housing agency or an owner of federally assisted housing "shall establish standards or lease provisions . . . that allow the agency or owner to terminate the tenancy or assistance for any household with a member who the public housing agency or owner determines is illegally using a controlled substance." The QHWRA references the federal Controlled Substance Act (CSA; 21 U.S.C. §§ 801, *et seq.*) to define "a controlled substance" but allows a public housing agency or owner to determine whether an applicant is "illegally using" a controlled substance.

In 2018, Mary Cease filed an application with the Housing Authority of Indiana County, Pennsylvania (HAIC), the local entity responsible for administering federal housing assistance, to apply for Section 8 housing. As part of her application, Cease voluntarily disclosed that she lawfully used medical cannabis under Pennsylvania's Medical Marijuana Act (PMMA; 35 PA. STAT. AND CONS. STAT. ANN. § 10231.101, *et seq.* (West 2024)). In June 2018, HAIC denied Cease's application stating that it "must deny program participation as marijuana is still considered to be an illegal substance by the federal government." After exhausting her administrative remedies, Cease filed suit against HAIC, and a Pennsylvania trial court affirmed HAIC's denial. Cease then appealed to Pennsylvania's Commonwealth Court, an intermediate appellate court with exclusive jurisdiction to hear cases involving government entities. In February 2021, the Commonwealth Court issued an opinion finding that HAIC should not have prohibited Cease's admission under the QHWRA but that it was required to exercise its discretion to determine the eligibility of an applicant that is lawfully using medical cannabis pursuant to the PMMA (*Cease v. Housing Authority of Indiana County*, 247 A.3d 57). Specifically, the court found that: (1) the QHWRA's use of the phrase "shall establish standards that prohibit admission to the program" does not mean the same as "shall prohibit admission"; (2) the phrase "illegally using a controlled substance" is ambiguous in states that have legalized medical cannabis; and (3) that criminal law is a matter left primarily for states to determine within their own jurisdiction and federalism dictates that the federal government must respect Pennsylvania's sovereignty with respect to its decision to legalize medical cannabis. The court held that HAIC was required to "establish fair and reasonable standards for determining in what circumstances admission to Section 8 housing is prohibited for an applicant who is legally using medical marijuana under state law." The court provided the types of standards that should be considered, including the reason for such use, whether it is being used in accordance with legal requirements, and other factors concerning the applicant's background, including behavior during any prior residence in federal subsidized housing and the presence or absence of any prior criminal record. Following the *Cease* decision, HAIC conferred with HUD for guidance as to how it should comply with the decision and what standards it should impose upon new applicants who lawfully use medical cannabis under the PMMA. HUD advised HAIC that if it complied with the *Cease* decision, it would cut off all federal funding to HAIC.

In March 2023, HAIC denied Sara Bloch's application for admittance in the Section 8 housing program solely based on her use of medical cannabis. HAIC did not apply the fair and reasonable standards required by the *Cease* decision to determine whether Bloch's admission should be denied due to its fear that doing so would jeopardize its federal funding from HUD. In September 2023, Bloch and Cease filed suit against HUD and asked the federal district court to: (1) issue a declaratory order stating that the QHWRA does not require HAIC, nor any other housing authorities administering Section 8 funding, to deny admission to applicants lawfully using medical cannabis in accordance with state law; (2) issue a permanent injunction prohibiting HUD and Secretary Fudge from mandating that housing authorities that receive Section 8 funding automatically deny the admission of an applicant that lawfully uses medical cannabis under state law; and (3) issue a permanent injunction prohibiting HUD from withdrawing funding from HAIC for establishing standards for admission to housing for low-income individuals legally using medical cannabis in Pennsylvania. Additionally, the plaintiffs argue that HUD's manner of applying the CSA to the QHWRA violates the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. The plaintiffs assert that the impact of HUD's manner of enforcement of the CSA discriminates against low-income and disabled individuals and that there is no rational basis for HUD to enforce the CSA against Section 8 housing applicants. On January 10, 2024, the plaintiffs filed an amended complaint. The defendants have until February 9, 2024, to file a motion to dismiss.

DOJ AGREES TO REINSTATE DEA AGENT WHO WAS TERMINATED FOR CANNABIDIOL USE

***Anthony Armour v. Department of Justice*, U.S. Court of Appeals for the Federal Circuit, Case No. 23-1340 (voluntary dismissal granted January 22, 2024).** A former counternarcotics agent with the Drug Enforcement Administration (DEA) who was fired for his use of cannabidiol (CBD) voluntarily dismissed his lawsuit against the U.S. Department of Justice (DOJ) after the agency agreed to reinstate him. Anthony Armour, a longtime employee of the DEA, struggled with chronic pain. In 2019, in an effort to avoid taking prescription opioids, Armour ordered a vaporizer and CBD tinctures from an online retailer he considered reputable. In May 2019, Armour took a routine drug test for work and the test came back positive for cannabis. Armour informed his supervisors that he had been using CBD for pain management and turned the products over to investigators. A laboratory analysis of Armour's CBD products showed that two of the three products contained less than 0.3 percent THC by dry weight, meeting the federal definition of legal hemp. The third product tested at 0.35 percent THC, which was within the test's 0.08 percent margin of error.[2] In April 2020, the chair of the DEA's Board of Professional Conduct proposed Armour's removal based on a charge of use/possession of drugs. Additionally, that same month, the DEA amended two sections of its personnel manual to clarify that employees who test positive for THC in a drug test after using CBD products will be subject to disciplinary action. Despite Armour fighting the proposed action, the DEA approved his removal effective July 28, 2020. In January 2023, Armour filed an appeal of the DEA's ruling in the Federal Circuit, arguing that he had been wrongfully terminated. Armour asserted that he had not intentionally used cannabis, that the DEA had no explicit rules regarding CBD use by employees at the time he began his CBD use, and that his termination had been an unduly harsh punishment. Armour asked the court to reverse the DEA's charge and reinstate his job. In response, the DOJ acknowledged that there was not any evidence that Armour had intentionally broken the law but argued that he should have known that CBD use could result in a positive

[2] The federal government legalized hemp in the 2018 Farm Bill. Hemp is legally defined as "the plant Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol (THC) concentration of not more than 0.3 percent on a dry weight basis." When testing hemp products, measurements of uncertainty, similar to a margin of error, must be reported out with the test results. For example, if testing shows that a sample has a THC content concentration level of 0.35 percent with an uncertainty of +/- 0.08 percent, the sample's THC content concentration ranges from 0.27 percent to 0.43 percent. Because 0.3 percent is within that range, the sample has an acceptable THC level for hemp. For more information, please refer to LAPPA's "Federal Hemp Regulation: USDA's Recent Interim Final Rule" factsheet, available here.

drug test. On January 22, 2024, the court granted Armour's voluntary dismissal after the parties reached an agreement. The DOJ agreed to reinstate Armour's job at the DEA and pay him $470,000 in back pay and legal costs. It is not clear what led the government to reverse course.

MALLINCKRODT'S FORMER PARENT COMPANY MUST FACE SUIT BROUGHT BY OPIOID TRUST

***Opioid Master Disbursement Trust II v. Covidien Unlimited Company*, U.S. Bankruptcy Court for the District of Delaware, Case No. 20-50433 (opinion filed January 18, 2024).** A bankruptcy court judge ruled that Covidien Unlimited Company (Covidien), the former parent company of Mallinckrodt PLC (Mallinckrodt), must face a bankruptcy court lawsuit accusing Covidien of unfairly siphoning billions of dollars from Mallinckrodt and leaving Mallinckrodt with financial debt and mass tort liability. A suit filed by a trust created for Mallinckrodt opioid victims as part of its Chapter 11 bankruptcy plan claimed that Covidien moved to separate Mallinckrodt from its broader health product business enterprise as it came under greater scrutiny from authorities over its alleged role in contributing to the opioid crisis. The trust asserted that Covidien, through a 2013 spin-off transaction, siphoned assets from Mallinckrodt while leaving it responsible for all of the opioid litigation.[3] The trust brought forth several claims against Covidien, including intentional and constructive fraudulent transfers. Covidien moved to dismiss the suit, arguing that the claims were either time-barred, implausible, or insufficient. Additionally, Covidien asserted that there was no evidence that in 2013, its directors knew that Mallinckrodt would face opioid litigation in the years to come. The bankruptcy judge dismissed some of the claims but ruled that the trust had pled facts sufficiently plausible to find that the transfers made in connection with the spin-off were actually fraudulent. The judge noted that Covidien both oversaw and actively participated in Mallinkrodt's aggressive opioid sales and marketing tactics, shared in the profits, and structured a spin-off in a way that allowed it to shield itself from liability and left Mallinckrodt without the resources to pay those who were harmed. This ruling brings the trust beneficiaries a step closer to procuring recoveries from Covidien for opioid abatement and compensating victims.

MCKINSEY & CO. REACHES SETTLEMENT WITH HEALTH INSURERS

***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 December 29, 2023).** For previous updates on this case, please refer to the October 2023 issue of the LAPPA *Case Law Monitor*, available here. McKinsey & Company (McKinsey) has agreed to pay $78 million to resolve claims by U.S. health insurers and benefit plans that it helped fuel the opioid epidemic through its consulting work with drug companies, including Purdue Pharma. McKinsey did not admit to any wrongdoing as part of the settlement. Previously, McKinsey paid $641.5 million to resolve claims by state attorneys general and another $230 million to resolve claims by local governments and school districts. The company has also reached settlements with Native American tribes.

STATE OF WASHINGTON REACHES SETTLEMENT WITH JOHNSON & JOHNSON

***State of Washington v. Johnson & Johnson et al.*, Washington Superior Court (King County), Case No. 20-2-00184-8 (settlement announced January 22, 2024).** For previous updates on this case, please refer to the October 2023 issue of the LAPPA *Case Law Monitor*, available here. Johnson & Johnson agreed to pay the State of Washington $149.5 million to resolve opioid-related claims. Under the deal, the state and local

[3] A "spin-off transaction" is when a parent company sells a specific business unit or division to effectively create a new standalone company. "Spin-off," Wall Street Prep, last modified August 1, 2023, https://www.wallstreetprep.com/knowledge/spin-off/.

governments must use $123.3 million of the funds to address the opioid crisis, while the rest of the money can go toward litigation costs. Washington did not participate in Johnson & Johnson's 2021 global settlement and, instead, pursued its own legal action against the company. This deal provides Washington with over $20 million more than if the state had signed onto the global settlement. Johnson & Johnson did not make any admission of liability or wrongdoing as part of the settlement.

RECENT EVENTS IN THE ENDO BANKRUPTCY PROCEEDINGS

***In re Endo International PLC*, U.S. Bankruptcy Court for the Southern District of New York, Case No. 22- 22549-jlg (permission to poll creditors granted January 9, 2024).** For previous updates on this case, please refer to the October 2023 issue of the LAPPA *Case Law Monitor*, available here. A bankruptcy judge has granted Endo International PLC (Endo) permission to poll its creditors on a plan that would hand control of the business to lenders and settle opioid liabilities in deals valued at more than $600 million. As part of Endo's restructuring plan, the company is expected to pay individual opioid victims between $89.7 million and $119.7 million. Additionally, the company has agreed to pay $273 million to more than 40 states and as much as $365 million to the U.S. Department of Justice. The exact amount of the payments depends on whether Endo opts to pay some settlements in full when the company is released from bankruptcy or over time. The opioid victims' committee stated in a court filing that the deal it struck with Endo is not perfect and does not provide enough money to rectify the damage but that it, at a minimum, provides victims with some compensation relatively quickly. The committee also stated that it agreed to the settlement deal, in part, because of problems that have held up similar opioid settlements with other companies, such as Purdue Pharma and Mallinckrodt. The judge is scheduled to consider approving Endo's bankruptcy exit plan in March 2024.

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, treatment in emergency settings, alternatives to incarceration for those with substance use disorders, medication for addiction treatment in correctional settings, and syringe services programs.

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