NAMSDL Case Law Update

February 2016

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This issue of *NAMSDL Case Law Update* presents summaries of both the *Kentucky vs. Purdue Pharma* case, which has been resolved, and the *State of California vs. Lisa Tseng* case, both important cases in the fight against prescription drug abuse. Additionally, NAMSDL continues to follow cases mentioned in previous issues of *NAMSDL Case Law Update*.

Awaiting Action

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Cases Related to Prescription Monitoring Programs

Alwin Lewis vs. Superior Court for the State of California and the Medical Board of California, California Supreme Court, No. S219811. A full summary of this case can be found in the November/December 2015 issue of *NAMSDL Case Law Update*. The latest action in this case was the filing of a consolidated reply to the amicus curiae briefs filed on behalf of the California Medical Board. This case is still pending before the Supreme Court of California.

Anthony Hernandez vs. Walgreen Company, et al, Appellate Court of Illinois, First District, First Division, Case No. 1-14-2990 (unpublished). Plaintiff brought suit on behalf of the Estate of Gilbert C. Hernandez, who died as the result of methadone intoxication. The suit alleged that the defendant pharmacies breached their duty of care to Mr. Hernandez by dispensing methadone prescriptions to him in quantities and time frames that were not appropriate. Plaintiff alleged that a duty of care was supported by the establishment of a prescription monitoring program and that, by failing to check Mr. Hernandez's prescription history, they had violated that duty of care. The trial court granted the defendants' motions for summary judgment and dismissed the case. Plaintiff appealed, and the Appellate Court agreed with the trial court, stating that, "the Act simply does not require any pharmacy to make use of the prescription monitoring program, let alone impose a duty to actively monitor a patient's history …"

Daniel Maddox vs. City of Brandon, Mississippi, et al, U.S. District Court for the Southern District of Mississippi, Jackson Division, Case No. 3:15-cv-00866. Plaintiff brought suit against the City of Brandon, Mississippi and others on claims arising out of Defendant Chris Bunch's access of Plaintiff's PMP records (Defendant Bunch was an investigator with the Brandon Police Department) without a warrant, subpoena, or other judicial process. Plaintiff alleges violations of the Fourth Amendment prohibition against unreasonable search and seizure; Fifth and Fourteenth Amendment prohibitions against deprivation of life, liberty, or property without due process of law; and invasion of privacy. The Defendants have answered the Complaint and denied any wrongdoing. The case is currently pending before the District Court.

Eve Davis vs. Wal-Mart Stores East, L.P., et al, U.S. District Court for the Eastern District of Virginia, Case No. 3:15-cv-00387. Plaintiff Eve Davis suffers from ADHD and mild depression, as a result of which she has a prescription for Adderall. Due to various financial circumstances, the Plaintiff received two one-month supply prescriptions from her prescribing physician at each office visit and would often fill those prescriptions within days of each other. It is undisputed that the Plaintiff would fill no more than two prescriptions in any two-month period. This civil suit arose as a result of the Plaintiff's arrest for allegedly attempting to fill a fraudulent prescription. The charges against the Plaintiff were subsequently dropped, and this civil suit ensued. The Plaintiff has sued Wal-Mart; Brenda Greer, the pharmacist who reported the Plaintiff to the police after reviewing the Plaintiff's prescription history in the prescription monitoring program; and the deputy who arrested her for, among other claims, several counts of negligence and negligence *per se*. The negligence and negligence *per se* claims stem from Defendant Greer's alleged knowing disclosure of the Plaintiff's PMP information to individuals not allowed under Virginia law to receive such information as well as from a claim that Wal-Mart failed to adequately train its employees on the proper and improper uses of the PMP. Currently pending before the court are Wal-Mart's Motion to Dismiss, filed December 26, 2015; Defendant Greer's Motion to Dismiss, filed December 23, 2015; and the Plaintiff's Motion for Leave to File a Second Amended Complaint, filed January 27, 2016. Trial is currently scheduled for June 6, 2016.

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Marijuana and Medical Marijuana Related Cases

Christopher Smith v. City of Berkeley, et al, United States District Court for the Northern District of California, Case No. 15-04227. In 2008, the City of Berkeley Medical Cannabis Commission ("Commission") determined that only three marijuana dispensaries could validly operate under a Berkeley city code provision enacted in 2004. The Plaintiff, a Berkeley resident who was cultivating marijuana in 2004, filed a lawsuit against Berkeley, the Commission and the three dispensaries (collectively, the "Defendants") under the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), alleging that the Defendants had formed an illegal for-profit cannabis monopoly. The Defendants moved to dismiss the case. In an order issued on December 21, 2015, the District Court granted the motion to dismiss. The could found that Plaintiff's interest—the cultivation and sale of marijuana—stemmed from "acts that violate the federal Controlled Substances Act" and, as a result, the court could not aid a party "who founds his claim for redress upon an illegal act." Moreover, the court concluded that there was no overriding public interest that warranted keeping Plaintiff's suit alive, since the Plaintiff "seeks to eliminate alleged racketeering and corruption from an industry that is undisputedly illegal, no different in that regard from a murder-for-hire business."

City of Oakland vs. Loretta E. Lynch, et al, U.S. Court of Appeals for the Ninth Circuit, Case No. 13-15391. A full summary of this case can be found in the October 2015 issue of *NAMSDL Case Law Update*. On January 27, 2016, the City of Oakland ("Oakland") filed a petition with the U.S. Supreme Court (Docket No. 15-941) requesting review of the Ninth Circuit's August 2015 decision to uphold the dismissal of Oakland's case. The U.S. Department of Justice has until February 26, 2016 to file a response to the petition, after which the Supreme Court will decide whether or not to hear the case.

Cristina Barbuto vs. Advantage Sales and Marketing LLC, et al, Suffolk County, Mass Superior Court, No. 1584CV02677. More detailed summaries of this case can be found in the previous issues of *NAMSDL Case Law Update*. In September 2015, Plaintiff filed suit against her former employer alleging discriminatory employment practices in conjunction with her termination for failing a pre-employment drug test. Defendants filed a motion to dismiss all counts of the case on January 8, 2016. The Massachusetts trial court has not ruled yet on the motion.

Feinberg, et al v. Commissioner of Internal Revenue, United States Court of Appeals, Tenth Circuit, Case No. 15-1333. The Internal Revenue Service ("IRS") disallowed business expense deductions made by several owners of a Colorado marijuana dispensary on grounds that their business, while legal under Colorado law, violated federal criminal laws. The taxpayers disputed the disallowance and sued the IRS in U.S. Tax Court ("Tax Court") in May 2013. During the litigation, the IRS sought discovery concerning the business's operations, which the taxpayers declined to provide citing their Fifth Amendment rights against self-incrimination. In response, the IRS moved to compel production of the information, and the Tax Court granted the motion.

Facing the prospect of having to turn over the information as part of the ongoing litigation, the taxpayers sought a writ of mandamus from the U.S. Court of Appeals for the Tenth Circuit ("Tenth Circuit") overturning the decision. (A writ of mandamus is an order from a higher court to a lower court directing it to do, or not do, something. Such writs are rarely granted.) In an opinion issued December 18, 2015, the Tenth Circuit denied the request, holding that the

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taxpayers had not provided sufficient evidence that without an immediate remedy they would face an irreparable injury. Essentially, the Tenth Circuit concluded that any error made by the Tax Court in allowing the discovery (if indeed that was error) could be rectified on appeal after final judgment.

In reaching this conclusion, the Tenth Circuit commented on the rather convoluted legal argument presented by the IRS. On the one hand, the IRS argued that the taxpayers' deductions were not allowable because the business violated federal law. On the other hand, the IRS asserted that the taxpayers could not shield themselves from discovery by the Fifth Amendment because the U.S. Department of Justice had instructed federal prosecutors generally not to prosecute similarly situated taxpayers if the businesses were otherwise abiding by state law.

Upon rejection of the request for a writ, the cased moved back to the Tax Court for completion of the litigation. The Tax Court has ordered the parties to file a joint report about the status of the litigation by February 24, 2016.

Fourth Corner Credit Union vs. Federal Reserve Bank of Kansas City, U.S. District Court for the District of Colorado, Case No. 1:15-cv-01633, Tenth Circuit Court of Appeals Case No. 16-1016. A full summary of this case can be found in previous issues of *NAMSDL Case Law Update*. On January 5, 2016, the court filed an Order dismissing the Complaint against the Defendant on the basis that the court cannot use its equitable powers of relief to facilitate criminal activity which would be the case, in the court's opinion, if it were to rule in favor of the Plaintiff. The Plaintiff filed a Motion to Alter or Amend the Judgment, which was denied, and subsequently filed a Notice of Appeal to the Tenth Circuit Court of Appeals on January 14, 2016 where the case is currently pending.

Fourth Corner Credit Union vs. National Credit Union Administration, U.S. District Court for the District of Colorado, Case No. 1:15-cv-01634. A full summary of this case can be found in previous issues of *NAMSDL Case Law Update*. The only action in this case since the last issue has been the filing of a reply to the Plaintiff's response to the Defendant's Motion to Dismiss. No argument has been scheduled on the Motion at this time.

Garcia v. Tractor Supply Company, United States District Court for the District of New Mexico, Case No. 15-00375. The Plaintiff, a New Mexico man suffering from HIV/AIDS, applied for and received a card authorizing his use of marijuana under the state's Compassionate Use Act ("CUA"). In 2014, he interviewed for and accepted a position with Defendant Tractor Supply Company ("Defendant"). During his interview, he advised Defendant of his illness and participation in CUA. In advance of his start date, Plaintiff took a drug test, which returned a positive result for marijuana. Defendant terminated Plaintiff based on the drug test. After exhausting his administrative remedies, Plaintiff sued Defendant for unlawful termination, arguing the New Mexico's Human Rights Act makes the use marijuana for medical purposes an accommodation of a serious medical condition that must be provided by state employers. The Defendant moved to dismiss the case.

The District Court granted the motion to dismiss in an order dated January 7, 2016. At the outset, the court noted that, unlike states such as Connecticut and Delaware, New Mexico's CUA has no affirmative language requiring state employers to accommodate the medicinal use of marijuana. In the court's view, Defendant had not terminated Plaintiff because of his serious medical condition (HIV/AIDS), but rather because of his positive drug test which was

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neither "a manifestation of HIV/AIDS" nor "conduct that resulted from" the condition. The court distinguished prior New Mexico cases allowing marijuana to be reimbursed under workers' compensation laws, holding that it found "a fundamental difference between requiring compensation for medical treatment and affirmatively requiring an employer to accommodate an employer's [sic] use of a drug that is still illegal under federal law." Finally, the court found instruction in the Oregon Supreme Court decision *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518 (2010) (en banc) in which the Oregon court "found that under Oregon's discrimination laws, the employer was not required to accommodate the employee's use of medical marijuana under the state's disability-discrimination statute, as marijuana is an illegal drug under federal law."

On February 4, 2016, Plaintiff appealed the decision to the U.S. Court of Appeals for the Tenth Circuit, under Case No. 16-2020.

Gerlich v. Leath, United States District Court for the Southern District of Iowa, Case No. 14–00264. Iowa State University ("ISU") grants a student organization license to use ISU logos (such as "Cy the Cardinal") if the organization complies with certain guidelines. In 2012, these guidelines did not allow ISU marks on items the school considered "a liability risk or as inappropriately portraying the University's image, including sex toys, alcohol products, ashtrays, condoms, drug-related items, weapons, knives, toilet paper, and diapers." In October 2012, the ISU chapter of the National Organization for the Reform of Marijuana Laws ("NORML ISU") sought a license to use a logo on a t-shirt. ISU granted the license and a first run of t-shirts was printed. In November 2012, after an article about marijuana legalization in the *Des Moines Register* showed the NORML ISU president in the t-shirt, persons within and outside of ISU (including the Iowa government) began questioning the approval process. At that time, an ISU senior vice-president instructed ISU's trademark office to put a hold on any future NORML ISU t-shirt reorders.

Over the next two months, ISU leaders: 1) investigated whether NORML ISU met all the qualifications to be an officially recognized student organization; 2) required NORML ISU get pre-approval from certain ISU executives for any new logo requests submitted to the ISU trademark office, a step not placed on any other student organization; and 3) informed NORML ISU that no design placing an ISU mark next to a cannabis leaf would be approved. In January 2013, and as a direct result of the issue with NORML ISU, the school revised its licensing policies, providing that "[ISU] marks could not be used to suggest promotion of certain items, including illegal drugs, and . . . could not be used to imply support or endorsement of a particular position on matters of public concern." Moreover, ISU instituted a "tiering system" for licenses, that "gave 'sponsored' organizations permission to use ISU logos, including Cy the Cardinal, but allowed only limited use to 'recognized' student organizations, including NORML ISU." After the changes were implement, NORML ISU was able to get some promotional designs approved, but it often had to adjust the desired design format and, in some cases adjust the message, to gain approval.

In 2014, two students who had been former NORML ISU presidents ("Plaintiffs") sued various ISU executives in a four-count complaint under civil rights law for alleged violations of their First and Fourteenth Amendment rights. At the heart of the complaint, Plaintiffs alleged that: 1) the new trademark guidelines were unconstitutionally overbroad; 2) the new guideless were void on their face as unconstitutionally vague; and 3) Plaintiffs suffered impermissible "viewpoint discrimination" at the hands of ISU. As described by the U.S. Supreme Court, viewpoint discrimination

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involves the concept that "the government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."

Both the Plaintiffs and the Defendants moved for summary judgment, each asserting that they were entitled to judgment as a matter of law and that no set of facts could be proven by the other party that would lead to a different result. In Defendants' motion, they contended that: 1) Plaintiffs did not have "standing" to sue, because NORML (and not the students) was the entity allegedly harmed; and 2) as public officials, Defendants were entitled to qualified immunity from suit since their actions did not violate clearly established law of which a reasonable person in the officials' position would be aware.

In a lengthy order and opinion issued January 22, 2016 that delves deeply into several constitutional issues, the District Court granted in part, and denied in part, the motions to dismiss. The court first found that Plaintiffs had standing to sue, as they had suffered injuries in their individual capacity due to their membership in the group. According to the court, "each active member of NORML ISU, including Plaintiffs, suffered viewpoint discrimination by Defendants, because Defendants' rejection of the group's t-shirt designs hindered each member's ability to spread NORML ISU's message in the way they thought best." Second, the court found that Defendants actions rose to the level of "viewpoint discrimination." The court characterized the actions as both "politically motivated" and imposing "unique administrative scrutiny" on NORML ISU. Third, the court rejected Defendants' contention that their actions, even if discriminatory, were protected under the "government speech doctrine," in which "the government may constitutionally discriminate among political viewpoints when expressing its own policies, directives, and preferred views." Fourth, the court denied Plaintiffs' claim that the new trademark policies were unconstitutionally overbroad, because "the Court does not find a realistic danger that the guidelines will chill the thought and expression of third parties." The court noted that ISU placed no penalty on student groups if they submitted a licensing request that was rejected. Finally, the court rejected Plaintiffs' contention that the new policies were unconstitutionally void on their face for vagueness.

Ultimately, the court decided to impose limited injunctive relief in the Plaintiffs' favor, and ordered that "Defendants are hereby permanently enjoined from enforcing trademark licensing policies against Plaintiffs in a viewpoint discriminatory manner and from further prohibiting Plaintiffs from producing licensed apparel on the basis that their designs include the image of a similar cannabis leaf." On February 4, 2016, Defendants appealed the ruling to the U.S. Court of Appeals for the Eighth Circuit.

Justin L. Smith, et al vs. John W. Hickenlooper, Governor of the State of Colorado, U.S. District Court for the District of Colorado, Case No. 1:15-cv-00462. A full summary of this case can be found in previous issues of *NAMSDL Case Law Update*. On January 22, 2016, the plaintiffs filed an unopposed motion to substitute Scott DeCoste, the new sheriff of Deuel County, Nebraska, for Adam Hayward, the former sheriff of Deuel County. On January 27, 2016, Defendant John Hickenlooper filed a Notice of Supplemental Authority in support of his previously filed Motion to Dismiss which included the court's ruling in *Safe Streets Alliance, et al vs. Hickenlooper, et al* (see case summary in this edition of NAMSDL Case Law Update) which dismissed Defendant Hickenlooper from that case on the grounds that the Controlled Substances Act does not provide a private cause of action to preempt state law

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regulating marijuana, an allegation that the defendant has made in the instant case. No argument has yet been scheduled on the various motions in this case.

Nebraska and Oklahoma v. Colorado, U.S. Supreme Court, Case No. 22O144 Orig. A full summary of this case can be found in the December 2015 issue of *NAMSDL Case Law Update*. The U.S. Supreme Court was scheduled to discuss whether to grant "original jurisdiction" in the matter at its February 19, 2016 internal conference. If jurisdiction is granted, the case will be tried at the Supreme Court. If not, Plaintiffs could file the lawsuit in federal district court. Due to the passing of Justice Antonin Scalia, however, the Court did not hold its conference on that day. The Court's next scheduled internal conference is February 26, 2016. At this time, NAMSDL does not know if the case will be discussed during the February 26 conference.

People of the State of California v. Skytte, Court of Appeal, Third District, California, Case No. C074100. A California man ("Defendant") faced several criminal charges, including cultivating marijuana, selling marijuana and money laundering (under both federal and California law). A jury acquitted him on the two marijuana counts after he advanced a defense that he was entitled to immunity under California's medicinal use of marijuana laws. The jury, however, convicted him of money laundering. (Money laundering is the process of taking the proceeds from an illegal activity and integrating them back into the financial system in a way that appears "clean."). The Defendant appealed the result, contending that he could not be convicted of laundering the proceeds from his marijuana operation because it was legal in California. The court upheld the conviction. In rejecting the Defendant's argument, the court noted that California laws provide only "limited immunity against prosecution for certain specified crimes [and] money laundering is not one of the specified crimes." Moreover, the court noted that the crime serving the basis of the money laundering charge could be something that is a crime in a different jurisdiction. Thus, regardless of the legality of the Defendant's actions under California law, his business was "indisputably illegal under federal law," and there was sufficient evidence for the conviction.

Safe Life Caregivers v. City of Los Angeles, Court of Appeals, Second District, California, Case No. B257809. Nearly 20 medical marijuana collectives and some patients ("Plaintiffs") brought numerous challenges to Proposition D ("Prop D"), a Los Angeles city ordinance enacted by public vote in 2013, which makes it "unlawful to own, establish, operate, use, or permit the establishment or operation of a medical marijuana business" in the city, with the exception of certain businesses that meet numerous requirements. Los Angeles moved to dismiss the complaint, and a California trial court granted the motion. Plaintiffs appealed on numerous grounds. In a to-be-published decision issued January 13, 2016, the appellate court upheld the dismissal. Among other things, the appellate court found: 1) Prop D's enactment did not violate California code requiring certain minimal procedural requirements for all local zoning hearings; 2) the enactment of the California Medical Marijuana Regulation and Safety Act ("MMRSA") in 2015 did not pre-empt Prop D; 3) Prop D does not grant a conditional use permit or variance to those businesses qualifying for exemption without satisfying the procedural or substantive requirements for such a use permit or variance; and 4) California laws, including the newly enacted MMRSA, did not create "a state right to cultivate, distribute, or otherwise obtain marijuana collectively, and thereafter to possess and use it, for medical purposes." In the court's view, although California laws exempt certain actions from criminal liability, such exemption "does not constitute an authorization of those activities."

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Safe Streets Alliance, Phillis Windy Hope Reilly, and Michael P. Reilly vs. John W. Hickenlooper, Jr., Barbara J. Brohl, W. Lewis Koski, and Pueblo County Liquor & Marijuana Licensing Board, et al, U.S. District Court for the District of Colorado, Case No. 1:15-cv-00349. On January 19, 2016, the plaintiffs filed a motion to amend their original Complaint to include the allegation that the recreational marijuana facility that is the focus of the litigation is now operational and emitting an unpleasant odor onto plaintiffs' land. The court ordered that the Plaintiffs file their Second Amended Complaint by February 1, 2016, which Plaintiffs did.

Also on January 19, 2016, the court entered an Order dismissing the State Defendants, John Hickenlooper, Jr., Barbara J. Brohl, and W. Lewis Koski, and the Pueblo Defendants, Board of County Commissioners of the County of Pueblo and the Pueblo Liquor and Marijuana Licensing Board, from the case on the grounds that the federal Controlled Substances Act does not create a private right of action to preempt state law and, therefore, plaintiffs cannot maintain a claim against the State and Pueblo Defendants in this case. The court further found that the Pueblo Defendants were not subject to Plaintiffs' RICO allegations as they are governmental entities and cannot form the requisite criminal intent and/or because exemplary damages are not available against municipal corporations.

On February 8, 2016, the court granted the motions to dismiss of the nine remaining Defendants, effectively terminating the case. Following that, the Plaintiffs filed a Notice of Appeal to the Tenth Circuit Court of Appeals.

State of Colorado vs. Richard Kirk, Denver County District Court, Case No. 14CR1853. A full summary of this case can be found in the October 2015 issue of *NAMSDL Case Law Update*. In October 2015, Defendant changed his plea from "not guilty" to "not guilty by reason of insanity" and was ordered to undergo a psychological evaluation by a court-appointed psychologist. Defendant's scheduled December 17, 2015 court hearing was postponed when the evaluation was not completed by that date. NAMSDL anticipates that Defendant's next scheduled hearing will be set once the evaluation is conducted.

United States of America vs. Pickard, Scheweder, et al, U.S. District Court for the Eastern District of California, Case No. 11-CR-00449. The remaining Defendants in this case are all in the process of reaching plea agreements with the United States. As a result, the scheduled February 2016 trial will in all likelihood be rendered unnecessary.

Miscellaneous Controlled Substance Cases

State of California vs. Lisa Tseng, Superior Court of California, County of Los Angeles, Case No. BA394495-01. A full summary of this case can be found in the September/October 2015 issue of *NAMSDL Case Law Update*. Sentencing for the defendant was held on February 5, 2016, during which the defendant was sentenced to 30 years to life in prison for the overdose deaths of three of her patients, for which Tseng was found guilty of the second degree murder of all three patients. Tseng's attorney has indicated that she intends to appeal both the conviction and sentence.

State of Kentucky vs. Purdue Pharma, Kentucky Circuit Court, Pike County, Case No. 07-CI-01303. A full summary of this case can be found in previous issues of *NAMSDL Case Law Update* and *NAMSDL News*. The State of Kentucky settled its case with Purdue Pharma on December 22, 2015 for a total of $24 million, "more than 50 times

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what Kentucky was originally offered in 2007 to settle the case," according to a statement from Attorney General Jack Conway's office. Pursuant to the Agreed Judgment and Stipulation of Dismissal with Prejudice, after payment of attorneys' fees and expenses, all remaining funds shall be placed in a restricted fund within the Commonwealth of Kentucky for the General Assembly to appropriate for the use of public health initiatives, educational or public safety campaigns, reimbursement or financing of health care services, and infrastructure related to addiction prevention and treatment.

State of Missouri vs. Jason Voss, Missouri Court of Appeals, No. ED101396, 2016 WL 145727. This is a case of first impression in the state of Missouri involving Defendant Jason Voss' conviction of first degree involuntary manslaughter for his role in the overdose death of Douglas Geiger to whom he, among other things, sold heroin and syringes. After providing Geiger with the heroin, Defendant drove him to a hotel, where Geiger asked Defendant how much heroin he should take, and Defendant helped Geiger prepare and inject the heroin. Shortly after Geiger injected the drug, Defendant noticed Geiger's eyes cross, he began rocking back and forth and sweating profusely. Defendant was concerned that Geiger might be having a "bad reaction" as he'd never seen anyone react that way and retrieved a bucket of ice for Geiger to use in case he suffered from an overdose. Defendant left the hotel and expressed his concern about Geiger's well-being to several people on a number of occasions but never went back to the hotel to check on Geiger or call for help. The next morning, Geiger was found dead from a heroin overdose.

After a jury trial, Defendant was found guilty of first-degree involuntary manslaughter for recklessly causing the death of Geiger by consciously disregarding the risk of death to Geiger by both providing Geiger with heroin and failing to summon medical assistance when Geiger showed signs of overdose. Defendant appealed, and the appellate court affirmed. The appellate court found that Defendant created and/or increased the risk of injury to Geiger through his actions and, therefore, the law imposed on Defendant a duty on Defendant to preserve Geiger's life, and Defendant breached that duty by failing to go back to the hotel and check on Geiger and by failing to obtain medical help and, therefore, the Defendant can be held criminally liable for his omissions as well as his actions.

State of West Virginia v. McKesson Corporation, Circuit Court of Boone County, West Virginia, Case No. 16-C-1. (January 8, 2016) – The State of West Virginia (Plaintiff) filed suit against McKesson Corporation (Defendant), a large pharmaceutical distributor, stating that Defendant knew: (1) that there was a prescription drug abuse problem in West Virginia; (2) that the controlled substances it was distributing in the state were susceptible to diversion; (3) that West Virginia law required Defendant to implement effective controls to guard against diversion of Defendant's controlled substances; and (4) it should have stopped, or at least, investigated, what appeared to be suspicious orders of the millions of doses of controlled substances that it shipped into the state.

Noting that Defendant settled similar cases with six other states and entered into an agreement with the U.S. Drug Enforcement Administration (DEA) to "implement new policies and procedures to detect and prevent drug diversion," Plaintiff sought civil damages and injunctive relief from the continuing supply of significant quantities of controlled substances in the state until Defendant develops a system to identify and report suspicious orders under the West Virginia Consumer Credit Protection Act (WVCCPA). Plaintiff alleged that Defendant (1) violated the WVCCPA; (2) was required, and failed, to design and operate a system to identify and report suspicious orders; (3)

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contributed to the epidemic of prescription drug abuse in the state and failed to meet industry, state, and federal standards; (4) contributed to the dispensing of controlled substances for non-legitimate medical purposes, which fueled prescription drug abuse in the state; (5) created a public nuisance through its distribution of millions of doses of controlled substances in the state; (6) acted negligently in failing to monitor and guard the controlled substances against third party diversion; and (7) became unjustly enriched, making substantial profits by its widespread distribution of controlled substances in West Virginia. This case is currently pending before the Circuit Court of Boone County.

United States vs. Stephen J. Schneider and *United States vs. Linda K. Schneider*, Tenth Circuit Court of Appeals, Case Nos. 15-3248 and 15-3247. Full summaries of these cases can be found in the September/October 2015 issue of *NAMSDL Case Law Update*. The court consolidated these cases on January 28, 2016 pursuant to a motion requesting consolidation filed by Stephen Schneider. The consolidated opening brief on the request for resentencing is due on February 24, 2016.

West Virginia Department of Health and Department of Military Affairs and Public Safety vs. AmerisourceBergen, et al, Boone County, WV Circuit Court, Case No. 12-C-141. Full summaries of this case can be found in previous issues of *NAMSDL Case Law Update* and *NAMSDL News*. As previously reported, the Defendants appealed to the West Virginia Supreme Court for an order reversing the Circuit Court's denial of their motion to dismiss. The Supreme Court rejected that request, so the case will continue at the trial level. Following that decision, on February 6, 2016, the Attorney General's office announced that it had settled with Defendant Miami-Luken in this case for $2.5 million. The case will proceed against the remaining defendants with trial set for October 2016.

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