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Synthetics: The Battle for Duluth

A Review of the Municipal Approach Used to End the Retail Sale of Synthetic Drugs in Downtown Duluth, Minnesota

by

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I. INTRODUCTION

At 1:00 a.m. on March 5, 2013, with light snow falling and temperatures hovering around 20 degrees, police responded to reports of a completely naked man calling for help near the intersection of Mesaba Avenue and West 7th Street in Duluth, Minnesota.

As Duluth Police Department ("DPD") officers approached by squad, the man charged their vehicle and began banging on the window and yelling for help. The man was covered in feces and had his own hand up his rectum. As additional officers arrived and attempted to calm the man down, he started screaming and running down the avenue. A substantial and coordinated police, fire and emergency medical response was necessary to restrain the man and transfer him to the emergency medical department at St. Luke's Hospital.

A later exam of the man's rectum led to the removal of six $100 bills and a silver package of a synthetic drug called "RipTide Pipe Cleaner" – a white, powdery, "bath-salt" like substance that, at the time of the incident, was sold at the downtown Duluth head shop known as "The Last Place on Earth" or "LPOE." Subsequent controlled buys of RipTide at LPOE by Lake Superior Gang & Drug Task Force members, followed by chemical testing done by forensic chemists with the Minnesota Bureau of Criminal Apprehension ("BCA"), revealed the presence of Alpha-PVP, a Schedule I controlled substance under Minnesota law.

This is just one horrific example of the kinds of incidents that Duluth police, fire, and emergency medical professionals were responding to at the height of the synthetic drug pandemic in Duluth. On October 7, 2013, Jim Carlson, LPOE's longtime owner, was convicted by the United States Attorney's Office on 51 of 55 counts of violating federal controlled substance analog and drug misbranding prohibitions.

Although the visible public nuisance conditions associated with the sale of synthetic drugs ended immediately in Duluth with the closure of LPOE, synthetic drugs remain a significant national public health threat, particularly for teens and young adults, who often view the drugs as safe or legal alternatives to THC.

On May 7, 2014, federal agents conducted simultaneous raids in 29 states targeting retailers, wholesalers, and manufacturers of synthetic drugs, arresting more than 150 individuals, seizing hundreds of thousands of packages of synthetic drugs, and further seizing $20 million in cash and assets. The DEA disclosed that its nationwide investigations were continuing to uncover a massive flow of drug-related proceeds to countries in the Middle East, including Yemen, Jordan, Syria, and Lebanon.[1]

[1] DEA press release available online at: http://www.justice.gov/dea/divisions/hq/2014/hq050714.shtml.

Just a few days before this national crackdown, 120 people in Dallas and Austin were reported to have overdosed on a common synthetic drug known as "K2."[2] Nationwide, states including Texas, Nevada, Utah, Ohio, Florida, Pennsylvania, Maryland, New Jersey – the list goes on – are reporting increasing issues with both synthetic cathinones and synthetic cannabinoids.[3]

The purpose of this article and accompanying presentation is simply to tell Duluth's story – to relate Duluth's experiences with synthetic drugs (and its legal efforts to combat them) in the hope that our fellow municipal attorneys can avoid having to relearn some of the hard lessons we learned. Duluth believes there are a number of tips, strategies and ideas that municipal practitioners can draw from Duluth's experience in their own battles to address (or keep out) retail sellers of synthetic drugs in their own communities.

II. THE RISE OF A PANDEMIC

For three years, the Last Place on Earth was the epicenter of the designer drug crisis in Minnesota, if not the nation. Between September 2011 and August 2012, Duluth police responded to 2,843 calls for service to LPOE and its surrounding block. Calls for service between July and September 2012 hit over 1,000 calls alone.

For Duluth, the story began in earnest in the summer of 2011, shortly after the Minnesota Legislature passed its first law banning "analogs" of controlled substances and certain known "cannabinoid receptor agonists."[4] In response to the new law, every other retail seller of synthetics in the region stopped selling. LPOE did not – and its profits exploded.

Every morning before the store opened at 10 a.m., a line of customers formed around the block, obstructing sidewalks and entrances to neighboring businesses. Community police were immediately overwhelmed with requests for service. Businesses started finding vomit, urine and human feces in their front entries every morning. Littering, panhandling, sexual solicitation, and verbal abuse of anyone passing near the Last Place on Earth became a daily norm. Polite requests for LPOE customers to clear sidewalks and move away from neighboring entryways were met with threats and intimidation. Duluth "Clean and Safe

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[2] Link to news report available online at http://www.wfaa.com/news/health/Near-120-statewide-overdose-on-synthetic-marijuana-from-Dallas-258028241.html.

[3] U.S. Department of Justice, Drug Enforcement Administration, *National Drug Threat Assessment Summary 2013* at pp. 15-16 (available online at (http://www.justice.gov/dea/resource-center/DIR-017-13%20NDTA%20Summary%20final.pdf).

[4] 2011 Minn. Laws ch. 53, §§ 3-4, 9 (amending Minn. Stat. §§ 152.01, .02, and .027) (effective July 1, 2011) (available online at https://www.revisor.mn.gov).

Team" members were harassed and physically assaulted. Businesses quickly lost foot traffic to personal safety concerns, and employees reported frightening encounters simply trying to walk to and from work.

The Source of the Pandemic

During the summer of 2010, LPOE began selling, among other products, synthetic or designer drugs commonly known and marketed as "legal alternatives," "incense," "bath salts," "watch cleaner," "pipe cleaner," and so on. The products were all labeled "not fit" or "not intended for human consumption," although the owner of the business, Jim Carlson, made public statements indicating his knowledge that customers were using the products to get high. Early on, Carlson admitted that synthetic drug sales were accounting for more than 80% of his business. It was not unusual for LPOE to clear $16,000 a day in revenue (or $6 million a year). At the height of the pandemic, Carlson stated that he was serving over 1,000 customers a day.

The Substantial Public Health Threat

Duluth's emergency room doctors and staff quickly found themselves on the front lines of this emerging public health threat. ER doctors reported a wide range of user reactions to synthetic drugs including vomiting, profound agitation, psychosis, elevated heart rates, elevated blood pressure, hyperthermia, paranoia, panic attacks and seizures. Patients exhibited aggression and combativeness, requiring frequent security activations and the use of physical restraints. Treatment often included heavy sedation and, in the most serious cases, intubation, ventilation support, and admission to ICU or mental health units. Duluth's ER doctors and addiction treatment centers reported that the drugs were highly addictive. One local homeless shelter stated that, in stark contrast to heroin addicts, synthetic drug users were frequently unable to get through a single night without violating the shelter's drug ban.

III. THE DRUGS

A closer look at the products sold at LPOE illustrates the danger of allowing these drugs to be sold within a city for any significant length of time.

What are "Synthetic Drugs?"

The term "synthetic drugs" generally refers to two separate categories of drugs: (1) synthetic cannabinoids ("synthetic marijuana," "incense," "K2" or "spice"); and (2) synthetic cathinones or "bath salts." Each category includes myriad varieties of product names, street names and packaging.

Synthetic cannabinoids are manufactured by spraying chemical compounds on organic materials, often appear as green or brown leafy substances,

and are usually ingested by inhaling through straight pipes or "one-hitters." Effects include severe agitation and anxiety, nausea, vomiting, tachycardia (fast, racing heartbeat), elevated blood pressure, tremors and seizures, hallucinations, dilated pupils, suicidal tendencies or aggression. Although incense is generally marketed as a safe and legal alternative to marijuana, synthetic cannabinoids often exhibit a binding affinity with the cannabinoid receptors in the body 100 times that of THC.

Bath salts are man-made chemicals similar to amphetamines, generally have a white, powdery consistency, and can be ingested any number of ways – snorting, smoking, or mixing with water and injecting by needle. Effects are similar to those associated with LSD or methamphetamines. They include elevated heart rate, blood pressure, and body temperature; chest pain; weight loss; tendencies toward violence and aggression; and extreme paranoia, hallucinations, delusions, or crawling sensations that can lead users to harm themselves or others.

Why are Synthetic Drugs So Dangerous?

Synthetic drugs are perilous – particularly for teens and young adults – because users have no idea what they are ingesting or what the physical or psychological effects of the drug will be. As John W. Huffman stated, a creator of the illegal JWH compounds seized in 2011 from LPOE: "These [drugs] are dangerous—anybody who uses them is playing Russian roulette. They have profound psychological effects. We never intended them for human consumption."[5] At the same time, many users (especially young users) are drawn to the products, particularly when they are sold in a retail setting, because they are marketed and sold as safe and legal alternatives to THC, which many view as an innocuous drug. More experienced users are drawn to the drugs because they produce powerful highs, yet are difficult and expensive for authorities to test, detect or prosecute. Three primary factors contribute to the danger of these drugs.

First, given the illicit nature of the industry, chemical compounds are manufactured with zero oversight or quality control. "Hot spots" – portions of a product batch containing higher-than-intended levels of chemical compound – are common in a manufacturing process intended to avoid government notice from the outset.

Second, in an effort to evade state and federal branding and labeling laws, the drugs are labeled and distributed in deceptive packaging that reveals nothing about the contents or effects of the products. In Duluth, we saw myriad varieties of synthetic drugs sold and marketed as "incense," "bath salts," "watch cleaner," "pipe cleaner," "plant food," and so on. Looking at a package, a buyer had no

[5] Zucchino, D. (2011, September 28). Scientist's research produces a dangerous high. *The Los Angeles Times*. Available online at http://articles.latimes.com/2011/sep/28/nation/la-na-killer-weed-20110928.

idea: (1) who manufactured or distributed the drug; (2) the identity of active ingredients in the product; (3) amounts or dosages of ingredients in the product; or (4) potential health risks or effects.

Third, scientists and medical professionals know very little about these drugs – their short and long-term effects on the mind and body, their interactions with other drugs or medications. Little toxicological research has been done on these products, even on synthetic compounds that have now been around for years. By the time research on a particular compound catches up, illicit chemists have long ago altered their formulas in the constant "whack-a-mole" game playing out across the country.

Why are Synthetic Drugs So Hard to Regulate?

Given the severity of the public health threat associated with synthetics, parents and general members of the public are often at a loss as to why local, state and federal authorities can't just "shut it down."

Synthetic drugs present unique challenges for legislators, law enforcement and public attorneys at all levels of government. Traditionally, once a drug problem is on the public radar, legislation, police investigation, and prosecution is relatively straightforward. Police and prosecutors are usually able to apply clear and unambiguous controlled substance regulations to chemical compounds that are simple to test and detect.

The goal of the synthetic drug industry is to stay one step ahead of traditional prosecutorial efforts, and to use important constitutional protections and the general sluggishness of the legislative process to stay clear of government regulation. Street chemists can always alter their chemical compounds faster than legislators can ban them – by the time the ink is dry on a new Presidential or gubernatorial signature, synthetic drug bans are often obsolete.

IV. THE BATTLE FOR DULUTH

Since 2010, Duluth has passed three ordinances addressing the sale of synthetic drugs, and the Duluth City Attorney's Office has prosecuted or defended eight separate civil and criminal lawsuits in state and federal court related solely to the Last Place on Earth. That count does not include the separate criminal prosecutions pursued against Carlson by the United States Attorney's Office and the St. Louis County Attorney's Office (commenced in December 2012 and March 2013, respectively). The following is a summary of the legal battles involving LPOE over the last four years.

The First Ordinance

On August 30, 2010, Duluth became the first city in Minnesota to enact an outright ban on the sale of synthetic drugs. A copy of the ordinance is attached. For purposes of the ordinance, a "synthetic cannabinoid" was defined as "[a] synthetic equivalent of the substance contained in the Cannabis plant," and the definition included certain already well-known synthetic drug compounds, such as JWH-018 and JWH-073. The definition further included products that were treated, sprayed or saturated with any of the listed chemicals, and set out a list of products previously found to have contained banned chemicals (K2, Spice, Mojo, etc.).

Through his attorney Randall Tigue, Carlson immediately sued the city. The suit alleged that the ordinance was preempted by state and federal law and further unconstitutional, both facially and as-applied: (1) as an unreasonable burden on interstate commerce; (2) violative of LPOE's equal protection and due process rights; and (3) as an unconstitutionally vague prohibition.[6] The city defended the suit until the Legislature passed its first ban on synthetic "analogs" and "cannabinoid receptor agonists" effective July 1, 2011. At that point, all sides agreed that the new law – along with the DEA's recent emergency scheduling of certain compounds – had rendered the lawsuit moot, stipulated to dismissal, and the city then rescinded the ordinance.

The September 2011 Search

Duluth police met with Carlson after the new state law went into effect to ensure that he understood its prohibitions. Police subsequently obtained evidence that Carlson had sold a banned JWH compound. Carlson refused to stop selling. Law enforcement responded by searching the premises on September 21, 2011, seizing a substantial amount of synthetic drug product, numerous guns, and nearly $85,000 in cash.

Carlson's Section 1983 Lawsuit Against the City

Carlson reopened almost immediately following the search and sued the city again, this time for damages under 42 U.S.C. § 1983 for a purportedly illegal search, a declaration that nothing seized was forfeitable, and the return of all his property. A protracted legal battle ensued. Carlson was not charged in connection with evidence seized during the search until December 2012.

In the interim, Carlson's attorney, Randall Tigue, sought repeatedly to use the Section 1983 litigation against Duluth to gain access to confidential criminal

[6] *L.P.O.E., Inc. et al. v. City of Duluth et al.*, Civil File No. 10-4133 (RHK-LIB) (D. Minn. 2010).

investigative data (the BCA test results on products obtained during the search). The district court ultimately granted Duluth's motion for summary judgment, and the Court of Appeals later dismissed the appeal as moot following the federal indictment.[7]

LPOE I - The City's First Statutory Public Nuisance Action

As Carlson continued his legal offensive against the city, he also continued selling synthetic drugs to the tune of $16,000 - $20,000 a day. Police calls skyrocketed. City leaders fielded desperate, angry and frustrated pleas from residents, parents, business owners, and medical professionals seeking resolution of the extraordinary nuisance conditions flooding from the business. By the spring of 2012, LPOE's synthetic drug trade had completely taken Old Downtown hostage. The city refused to sit idly by. Beginning in May of 2012, at the direction of Duluth City Attorney Gunnar Johnson, the city began gathering evidence in support of a statutory public nuisance action against LPOE.

Under Minnesota state law, a public nuisance is defined, in relevant part, as any condition that "unreasonably annoys, injures or endangers the safety, health, morals, comfort, or repose of any considerable number of members of the public." Minn. Stat. § 617.81, subd. 2(a)(2)(iii)-(iv) (incorporating by reference Minn. Stat. §§609.74, .745). Prosecuting attorneys, including city attorneys, have the authority to seek temporary and permanent injunctive relief against such nuisances. *Id*., §§ 617.81, subd. 4; .82(c); .83. Proof of two or more nuisance incidents occurring within a building (or the land surrounding it) in the 12 months before trial mandates issuance of a permanent injunction and order of abatement closing the building for one full year. *Id*., § 617.83.

Over the next three months, the city attorney's office met with DPD officers, neighboring businesses, ER doctors, county child protection workers – the list is too numerous to restate – and gathered troubling stories demonstrating the terrible community impact of synthetic drugs sold at 120 E. Superior Street.

The city served its first Notice of Public Nuisance on the business on August 6, 2012. LPOE ignored the notice and kept selling. The city commenced suit on October 9, 2012. Judge Shaun R. Floerke, Chief of Minnesota's Sixth Judicial District, heard the city's motion for temporary injunctive relief on November 9, 2012. In a chaotic scene, fed up business and community leaders packed one side of the courtroom – Last Place on Earth supporters the other.

On January 2, 2013, Judge Floerke granted the city's request for a temporary injunction in part, requiring the business to pay the costs for stationing

[7] *LPOE Inc., et al. v. City of Duluth, various firearms, and $83,510.00 in U.S. Currency*, A13-0243, 2013 Minn. App. Unpub. LEXIS 885 (Sept. 16, 2013).

two additional police officers in front of the business one hour before opening through close. The district court found that, "[f]rom September 2011 to August 2012, Duluth police responded to 2,843 calls for service from the area around LPOE, an average of 237 calls per month . . . [i]t is clear that the sale of these substances is the primary cause of the 81% increase in requests for law enforcement in the area."

LPOE appealed the injunction the very next day – before a hearing on the city's request for permanent injunctive relief could be set. Judge Floerke declined to stay the injunction for police costs during the pendency of the appeal.[8] The appeal, however, allowed Carlson to continue selling synthetics without restriction. The Court of Appeals subsequently affirmed Judge Floerke's temporary injunction in its entirety.[9]

LPOE II – The City's Second Statutory Public Nuisance Action

Although the temporary injunction was an important step toward resolving the nuisance conditions surrounding LPOE, calls for police service kept climbing throughout the spring and summer of 2013. LPOE kept selling, and the enormous burden on police, first responders, and ER doctors remained. Downtown businesses struggled to survive, and a few closed completely.

At the same time, subsequent searches and controlled buys conducted by local and federal law enforcement continued uncovering evidence that LPOE – contrary to its public assurances – was periodically selling controlled substances. On July 25, 2012, as part of a nationwide crackdown on the synthetic drug industry called "Operation Logjam," federal law enforcement agents searched LPOE and seized a large amount of product. Subsequent testing revealed the presence of several JWH compounds banned under Minnesota law. Similarly, following the March 5, 2013 "rectum incident" described at the beginning of this article, Lake Superior Drug and Gang Task Force officers conducted controlled buys of products called "Rip Tide pipe cleaner" and "Everest carpet cleaner" at the store, which were tested and found to contain Alpha-PVP and 4-Me-PHP (banned controlled substances under Minnesota law).

Under Minnesota's Public Nuisance Statute, proof of even a single sale of an illegal substance committed within a building within the previous 12 months is evidence of a nuisance warranting permanent injunctive relief and closure of the building for one year. Minn. Stat. §§ 617.81, subd. 2(a)(1)(v); .83.

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[8] Between January 2, 2013, and the store's closure on July 19, 2013, LPOE paid approximately $250,000 for the added costs of policing nuisance activity on and around the property.

[9] *City of Duluth v. 120 E. Superior St. (LPOE I)*, A13-0027, 2013 Minn. App. Unpub. LEXIS 881 (Sept. 16, 2013).

Synthetic drugs were continuing to hurt people in Duluth every day. The federal indictment against Carlson was moving slowly due to the complexity and enormous amount of evidence involved in the case. The city's first statutory public nuisance action had stalled on appeal. And LPOE was continuing to sell controlled substances. The city served its second notice of public nuisance on the business on May 7, 2013.

Again, LPOE ignored the notice and kept selling. On June 18, 2013, the city commenced its second statutory public nuisance action based on the new evidence of controlled substance violations. The first hearing available was over four weeks later on July 23.

The City's 2013 "Synthetic Drug Establishments" Licensing Ordinance

Meanwhile, the city had gone back to the drawing board to consider its regulatory options. The 2010 synthetics ban had failed. What if the city passed a licensing ordinance targeting the various risks and harms flowing from the unregulated sale of synthetic drugs? Carlson himself had publicly stated that "this product should be regulated, it should be age restricted, and it should tell you what's in it, what herbs are they using, what chemicals are they using, and what is the strength."[10] Throughout this saga, Carlson had further maintained – in line with the industry as a whole – that the products he was selling were not regulated by state or federal law (and were thus perfectly legal).

The city decided to take Carlson at his word. Generally speaking, cities possess the authority to pass regulations intended to protect the health, safety and welfare of their residents, assuming the regulatory field is not otherwise occupied by state or federal law. On June 10, 2013, Duluth passed an ordinance regulating any and all synthetic drug establishments operating within the city. A copy of the ordinance is attached.

The ordinance defined "synthetic drugs" broadly, adopting an objective, "reasonable person" standard to include substances that a reasonable person would believe to be synthetic drugs, or substances that a reasonable person would believe are being purchased or sold as synthetic drugs. Ord. at Sec. 5-44(a). The ordinance did not seek to regulate compounds that were already banned as a matter of state or federal law – only those products that were purportedly legal and unregulated.

Duluth required that establishments selling synthetic drugs be licensed. In order to get a license, the establishment needed to follow basic safety rules like any other business in the city. In particular, synthetic drug products needed to be

[10] Video from CNBC's "Crime, Inc." report available online at http://video.cnbc.com/gallery/?video=3000105544 (see video at 1:25-1:37).

labeled and packaged in a way that informed customers: (a) the name, phone number and address of the manufacturer, packer and distributor of the product; and (b) the identity of all commodities within the package, including "organic and non-organic, chemically synthesized substances and compounds." The ordinance further prohibited sales after 8 p.m. and sales to anyone under the age of 21. *Id*., Sec. 5-48(a).

Carlson's Federal Challenge to the New Licensing Ordinance

The licensing ordinance was set to go into effect on July 11, 2013. On July 9, Carlson moved to restrain enforcement of the ordinance in federal court and challenged the constitutionality of the law. He also briefly discontinued the sale of synthetic drugs at LPOE. The matter was referred to United States Magistrate Judge Leo I. Brisbois on an expedited schedule, and Duluth had 48 hours to prepare its response. All parties appeared before Judge Brisbois on Friday morning, July 12. Carlson's primary claim was that the ordinance was unconstitutional on its face because even applying for the license would require him to incriminate himself in violation of the Fifth Amendment.

Judge Brisbois issued his report and recommendation the following Monday, July 15, recommending denial of Carlson's request for a TRO based on his conclusion that the ordinance was constitutional on its face and did not require an applicant to incriminate himself in violation of the Fifth Amendment. Mid-afternoon on July 18, Chief Judge Michael J. Davis issued his decision adopting Judge Brisbois's report and recommendation and denying Carlson's motion for injunctive relief.[11]

Hope and relief flooded the city. But it would be short lived. Within hours of receiving Chief Judge Davis's decision, Carlson went on live television and announced that he was back open, did not have a license, and would continue selling synthetics.[12]

LPOE III - The City's Third and Final (Common Law) Public Nuisance Action

Relief was quickly replaced by city-wide outrage. However, Carlson's disregard of Chief Judge Davis's decision and the new city ordinance rendered another tool – an ancient municipal tool – available to the city.

Immediately after viewing the broadcast, this author and Deputy City Attorney Alison Lutterman commenced work on pleadings to support the city's

[11] *Carlson v. City of Duluth*, 958 F. Supp. 2d 1040 (D. Minn. 2013).

[12] Video of the live interview available online at: http://www.northlandsnewscenter.com/news/crime/Federal-Ruling-Upholds-Duluth-Synthetic-Ordinances-216072491.html (see video at 1:35 – 2:51).

third and final public nuisance action – a common law public nuisance action – based on Carlson's disregard of a facially constitutional public health regulation.

At 4 p.m. the following day, the city filed its action and moved for emergency relief. Judge Eric L. Hylden heard the city's request for emergency relief shortly thereafter, and signed the temporary restraining order directing Duluth police to secure the premises. Duluth police closed the business at 5:30 p.m. on Friday evening, July 19. The business has never reopened.

On July 23, Judge Floerke heard the city's (now consolidated) motions for temporary injunctive relief in *LPOE II* and *LPOE III*. On July 26, Judge Floerke granted both motions, continued the closure of LPOE, and set a two-day court trial on the city's requests for permanent injunctive relief on August 19-20, 2013.

The Trial

At trial, the city presented evidence that LPOE sold controlled substances on at least four occasions in the previous four months ("Rip Tide pipe cleaner" and "Everest carpet cleaner" containing Alpha-PVP and 4-Me-PHP on March 5 and twice on March 18, 2013, and "Bizarro" containing the federally banned compound XLR-11 on May 17, 2011). The city also offered evidence that, in the 23 days following closure of the business on July 19, the area experienced a 43.9% reduction in calls for police service.

The most gripping testimony at trial was provided by two St. Luke's emergency room doctors. Both doctors testified to the extreme situations they had faced treating severe synthetic drug intoxication. Incredibly, both doctors testified that, before LPOE closed on July 19, they had been treating patients presenting with severe symptoms associated with synthetic drug use at least once per shift. After LPOE's closure, and in the four intervening weeks before trial, neither doctor could recall treating a single patient presenting with similar symptoms.

Where We Are Today

On Monday, October 7, 2013, Carlson was convicted on 51 of 55 counts of violating federal controlled substance analog and drug misbranding provisions. Enough cannot be said for the extraordinary effort federal prosecutors and law enforcement agents dedicated to this difficult and complex case. Nationwide, this conviction has sent a strong message that the potential profits to be gained from engaging in the retail sale of synthetic drugs do not outweigh the risks of prosecution, forfeiture, and imprisonment. As of the date of this article, Carlson has not been sentenced, but LPOE is under the custody and control of the United States Marshals Service, and Carlson is subject to a preliminary order of forfeiture totaling over $6 million dollars.

On November 5, 2013, Judge Floerke granted the city's requests for permanent injunctive relief in *LPOE II* and *III*. Carlson appealed. The Court of Appeals heard the consolidated matter on May 15, 2014. A decision is pending in those appeals.

Since the business closed last summer, downtown Duluth has experienced an extraordinary turnaround. Police calls are down substantially, ER visits related to synthetics have dropped off the map, and businesses are thriving as people return to the area without fear of being solicited, harassed or assaulted.

V. PRACTICAL TIPS: THOUGHTS ON APPROACH IF SYNTHETICS LAND IN YOUR JURISDICTION

Notify and Reach Out to County, State and Federal Partners Right Away

If synthetic drugs make themselves known in your community – whether as a result of retail sales (gas stations, head shops) or a street dealer pushing a significant amount of product – notify and reach out to county, state and federal partners right away to determine if common cause can be made in addressing the problem (i.e., state and federal prosecutors, attorney generals, regional DEA and FDA enforcement offices, state health or pharmacy regulators).

Synthetics present a unique and a complex problem for everyone, and public servants at all levels of government will need to work together in the coming years to address this evolving national public health threat. Generally speaking, the tools in the municipal toolbox are more limited than the tools available to county, state and federal regulators and law enforcement agencies.

However, when local, state and federal authorities all simultaneously tackle their respective pieces of the regulatory and law enforcement puzzle, it becomes very difficult, even for motivated and well-funded sellers, to withstand a coordinated government effort.

Explore Your City, County and State Civil Regulatory Powers

Related to the above, if synthetics arrive on your doorstep, spend some time exploring your city, county or state civil regulatory framework on the front end. You may find an unexpected tool or ally buried in a normally innocuous consumer protection provision, labeling or packaging regulation, weights and measures law, tax law, etc. If such a tool does not exist, it may well be worth pressing your legislative representatives for inclusion of such regulations in upcoming sessions.

For example, in Minnesota, the Attorney General is not the state's top law enforcement officer – that role is left to individual county attorneys. However, the AG does have the authority to issue civil investigative demands (CIDs) before

a lawsuit is even commenced to gain access to a business's books and records and explore suspected violations of the law.

As of May 2014, Minnesota's Board of Pharmacy holds expedited scheduling authority for newly discovered synthetic drug compounds. Further, as of August 1, 2014, the Board will have the power to issue administrative cease and desist orders to businesses suspected of selling illegal synthetic drug compounds or "analogs" of previously banned compounds.

This is one of the new administrative tools for combatting synthetic drugs recommended by the Minnesota Legislature's Select Committee on Controlled Substances & Synthetic Drugs chaired by Duluth Rep. Erik Simonson.[13] It is an approach that was not available to Duluth during its prolonged legal battles with LPOE. The recipient of a cease and desist order can challenge the order administratively, but the law provides an expedited timeframe for administrative review and final decision.

Although untested, this administrative tool could prove very effective in obtaining expedited relief in Minnesota, with the full resources of the Board of Pharmacy and Attorney General's Office backing the cease and desist order from the start.

By way of additional example, Minnesota's Department of Commerce enforces basic labeling, packaging, weights and measures provisions. An administrative enforcement action under state labeling and packaging laws could draw a challenge on the grounds that such provisions are preempted by federal food or drug branding regulations. In terms of weights and measures, however, if a seller is bringing in bulk synthetic drug product, breaking it down into individual packages, and reselling it to customers, the seller could well be in violation of basic weights and measures provisions.

Early in the battle surrounding LPOE, Carlson was receiving bulk shipments of synthetic cannabinoids. Using his own LPOE "No Name" label, he would then weigh out and package the product for resale. Before the Department of Commerce could issue a cease and desist order, however, Carlson anticipated the legal problems associated with receipt of bulk product and discontinued the practice.

Certain county and state public health boards may also possess broad administrative authority under state law to enjoin continuing public health threats or violations.

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[13] The Committee's January 29, 2014 Report & Recommendation is available at: http://www.house.leg.state.mn.us/comm/docs/SelectCommitteeReportRecommendations12914.pdf.

Prosecution

Traditional police investigation and prosecution should remain the go-to approach whenever possible in dealing with synthetics for two reasons: (1) the products sold may well contain controlled substances; and (2) even if the products are "analogs" of controlled substances (making prosecution more difficult), the evidence gathered by police will still likely prove helpful in state administrative actions, state or federal prosecutions, ordinance drafting, or local nuisance prosecutions.

Although the M.O. of the synthetic drug industry is to continually tweak chemical compounds in an effort to stay one step ahead of legislative bans, manufacturers frequently get it wrong, as we witnessed time and again in Duluth.

Accordingly, if you suspect that products of questionable legality are being sold, work with your law enforcement officers to organize controlled buys, followed by chemical testing. If an expressly banned substance is confirmed, the prosecution loses the complexity of an "analog" case.[14]

By contrast, "analog" cases – charges involving the manufacture, distribution, sale or possession of substances intended to mimic the effects of expressly banned substances – are difficult to prosecute because they generally require scientific evidence and testimony related to compounds that have been subjected to little toxicological research or study. It is rare that cities or counties

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[14] Minnesota's catalog of Schedule I controlled substances includes one of the most comprehensive lists of known synthetic drug compounds in the nation. Minn. Stat. § 152.02, subd. 2 (retrievable online at www.revisor.mn.gov).

Many other states faced with significant synthetic drug problems have likewise moved over the past few years to ban comprehensive lists of known chemicals. The Texas Controlled Substances Act includes many common synthetic compounds. (*See* Texas Health and Safety Code, Sec. 481.1031, Penalty Group 2-A, retrievable online at http://www.statutes.legis.state.tx.us). *See also* Fla. Stat. § 893.03(1)(c).

Nevada has moved to ban synthetic compounds through its Executive Branch and Board of Pharmacy. Nev. Admin. Code 453.510 (at numerals 4 and 7) (retrievable online at http://www.leg.state.nv.us).

Maryland recently banned common chemicals used in the manufacture of "bath salts" or synthetic cathinones, but does not yet appear to have banned a comprehensive list of both known synthetic cannabinoids *and* cathinones. Mass. Gen. Laws ch. 94C, § 31, Class C(e) (retrievable online at https://malegislature.gov).

(versus state or – more likely – federal prosecutors) will have the resources to pursue these cases.

Even in non-analog cases, given the novelty of these substances and the emerging synthetic drug trend in general, prosecutors will likely encounter spirited defenses alleging lack of criminal intent. Synthetic drug cases are also more expensive and time-consuming in the sense that arranging for chemical testing and expert testimony will take more cost and effort.

The cost of prosecution may often prove too much for cities and counties to shoulder except in rare or significant cases, rendering it important to explore other tools for addressing the problem.

City Ordinances Coupled with Common Law Remedies

The comparative value of a synthetic drug ban versus a licensing or regulatory ordinance has been outlined above as part of Duluth's experience with LPOE, and both Duluth's 2010 and 2013 ordinances are attached to this article for comparison.

Outright bans are more popular politically, but they are vulnerable to challenge on grounds of state or federal preemption, interference with interstate commerce, or infringement on equal protection or due process rights. If you do not have an existing retail seller of synthetic drugs in your jurisdiction, a ban could prove useful in sending a strong message to anyone thinking of opening up. But if you do have an existing seller, a ban could prove difficult and costly to defend in court.

By contrast, licensing ordinances can be very effective. Cities and counties stand on strong legal ground when regulating to protect the health, safety and welfare of their residents. Drafted properly, such ordinances should withstand the constitutional challenges that outright bans normally attract. Further, in terms of remedies, licensing ordinances are straightforward. If a seller cannot comply with the ordinance, or is unable or unwilling to abide by it, the license can be revoked.

One critical note – Duluth's ordinance did not include a monetary fine for a very important reason: for Duluth, the payment of a fine would have come nowhere near serving as an adequate remedy for the store's failure to comply with the public health and safety regulations stated in the ordinance. Ancient common law in Minnesota – and the country as a whole – provides cities with the ability to commence common law public nuisance actions to enjoin continuing violations of basic public health regulations.

When LPOE refused to comply with the ordinance, the available remedy was not a misdemeanor fine, but an action to enjoin a public nuisance and health

threat under the city's traditional police power (and the court's inherent equitable authority). Leaving out a fine provision takes away the argument that the city has an adequate remedy at law for violations of its ordinance. There is no level of misdemeanor fine (at least not one that a court would enforce) that could adequately address the true costs of the sale of synthetics within a community.

Statutory Public Nuisance Actions

Many states – and cities – have codified the common law of public nuisance, providing specific procedures for city attorneys to pursue public nuisance actions against specific buildings or properties that are used in a way that is injurious to the public health, safety or welfare.

Although Duluth was able to use Minnesota's Public Nuisance Statute[15] to obtain a temporary injunction requiring LPOE to pay $250,000 in police costs for nuisance enforcement around the building, a statutory public nuisance action would not be Duluth's first choice for addressing a synthetic drug problem today. Minnesota's statute is well intended, but its structure was cumbersome and unwieldy in practice, and its provisions often worked at counter purposes to the primary goals of the statute (to close down buildings used to commit controlled substance offenses or that are being used to create conditions that endanger the health, safety, welfare, comfort and repose of the community).

Your state or city public nuisance law may be structured better, and could provide a quicker path to enjoining the use of a building to create the substantial public health threat associated with the retail sale of synthetic drugs. Under Minnesota law, however, Duluth found these actions to be costly, time-consuming and slow. Today, Duluth would look first to local or state administrative options, prosecution, and local ordinances (coupled with common law remedies) to approach the issue.

VI. PUBLIC EDUCATION & AWARENESS

Briefly, it is important to note that, related to online sales of synthetic drugs, there is virtually no tool in the municipal toolbox that can stop individuals from ordering these products online.

It is unlikely that a city will experience anything remotely like Duluth through online sales alone – LPOE was selling to 1,000 customers a day out of a retail store located in the heart of downtown.

Nevertheless, online sales may still impact your community. Just this past April 28, a teen in Lacey Township, New Jersey, experienced a bad overdose from a synthetic drug known as "N-Bomb" – the same drug that killed a

[15] Minn. Stat. §§ 617.80 - .87 (retrievable online at https://www.revisor.mn.gov).

Minnesota teen in the early part of 2014. FBI agents believe the drug was purchased online.[16]

Online sales are a problem that will need to continue to be addressed by federal law enforcement agencies. In the meantime, city leaders and law enforcement officials can and should reach out through local media and school administrators to conduct public awareness campaigns publicizing the dangers of these drugs. Cities should also urge state and federal lawmakers to appropriate funds for public awareness campaigns. It is critically important for teens, young adults and their parents to understand that these products are not legal or harmless versions of marijuana.

VII. CONCLUSION

It is not often that a city like Duluth finds itself on the front end of an emerging national drug threat that state and federal lawmakers have not yet solved. It is not a pleasant position to be in, and Duluth hopes your cities never have to endure a similar experience. If synthetics surface in your jurisdiction, however, Duluth hopes the above story will arm you with adequate tips, strategies and ideas for avoiding a similarly protracted legal battle. The public health threat is simply too great for these drugs to be sold unchecked within a community for any significant length of time.

VIII. FOR MORE INFORMATION

Synthetic Drugs: Overview and Issues for Congress (Lisa N. Sacco & Kristin Finklea) (Sept. 16, 2013) (available online at http://fas.org/sgp/crs/misc/R42066.pdf).

National Drug Threat Assessment Summary 2013, U.S. Department of Justice, Drug Enforcement Administration (available online at (http://www.justice.gov/dea/resource-center/DIR-017-13%20NDTA%20Summary%20final.pdf).

Synthetic Drugs, Office of National Drug Control Policy (available online at http://www.whitehouse.gov/ondcp/ondcp-fact-sheets/synthetic-drugs-k2-spice-bath-salts).

Report and Recommendations, Minnesota Select Committee on Controlled Substances & Synthetic Drugs (January 29, 2014) (available online at http://www.house.leg.state.mn.us/comm/docs/SelectCommitteeReportRecommendations12914.pdf).

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[16] News12 New Jersey (April 28, 2014), *Lacey Township teen overdoses on new synthetic drug known as "N-Bomb"* (retrieved online at http://newjersey.news12.com).