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MUNICIPAL LAW ALERT

State's Highest Court Creates New Cause of Action Against Third-Party Drug Testing Laboratories for "Negligent Testing"

On October 10, 2013, the New York State Court of Appeals held by a 4-3 margin in *Landon v. Kroll Laboratory Specialists* that an individual may proceed with a lawsuit against Kroll Laboratory Specialists, Inc. (Kroll), a drug testing laboratory, for the alleged negligent testing of a biological sample.

Plaintiff Landon was convicted of forgery in 2002 and sentenced to five years of probation. A condition of his probation was that he submit to random drug testing arranged via a county probation department which contracted with Kroll to conduct such testing. In December 2007, Landon's probation officer directed him to provide an oral fluid sample for testing. That same day, Landon had an independent blood test for the purpose of protecting himself from a potential false positive test result. The blood test came back negative for illicit and controlled substances. The Kroll test, however, detected the presence of marijuana in the oral sample and Kroll informed the probation department that Landon had tested positive for THC. The probation department filed a violation of probation (VOP) proceeding against Landon, seeking to have him reincarcerated.

Landon was arraigned on the VOP petition on January 2, 2008 – one day before his term of probation was set to expire. He provided the court and the probation department with the negative result from his independent blood test. Nevertheless, the VOP proceeding went forward, requiring a number of court appearances, and was ultimately resolved in his favor.

Not fully satisfied, Landon sued Kroll alleging that it acted negligently and with deliberate indifference to his rights when it issued the positive test result. The basis for his claim was that Kroll's cutoff level was substantially lower than industry, state or federal standards and Kroll failed to disclose those differences in its drug test report. Landon also asserted in his complaint that he was required to serve an extended term of probation by reason of Kroll's negligence, resulting in a loss of freedom, emotional and psychological harm and monetary loss in the form of attorneys' fees to defend the VOP petition.

State Supreme Court granted Kroll's motion to dismiss the complaint for failure to state a claim. However, the Appellate Division reversed, holding that Landon had stated a cause of action against Kroll for negligent testing of his specimen. The Court of Appeals, in a decision authored by Chief Judge Lippmann, ruled that notwithstanding the lack of a contractual relationship between the two, Kroll owed Landon a duty to perform his drug test in accordance with relevant professional standards. The majority of the Court ruled that Landon should be permitted to go forward with his negligent testing claim, but expressed no opinion as to whether he would eventually prevail on the merits of his claim.

In a sharp dissent, Judge Pigott observed that the majority's opinion opens the door for not only probationers and parolees who are subject to mandatory drug testing to sue laboratories for negligent testing, but also gives job applicants and employees the same ability to sue. Judge Pigott noted that it was the probation department's use of the test results, not Kroll's, which allegedly caused harm to Landon. He suggested that the county would likely

find itself an additional defendant in the lawsuit and that it could then commence a third-party action against Kroll for breaching its contract with the county. Interestingly, and as Judge Pigott pointed out, Landon did not deny having marijuana in his system, he only charged Kroll with using an inappropriate cutoff level for triggering a positive test. He did not allege that Kroll mishandled, tampered with, improperly collected or misidentified his sample.

The takeaway from this case for employers is that drug testing laboratories could now have greater liability exposure for their testing procedures and results. This could increase the costs of employee drug testing, clutter the courts with additional lawsuits and affect the terms of contracts negotiated between employers and third-party laboratories for drug testing services.

If you have any questions or would like more information on the issues discussed in this communication, please contact any of the following Hancock Estabrook attorneys:

Melinda Burdick Bowe

315.565.4507

mbowe@hancocklaw.com

John F. Corcoran

315.565.4515

jcorcoran@hancocklaw.com

James E. Hughes

315.565.4529

jhughes@hancocklaw.com

Robert J. Thorpe

315.565.4555

rthorpe@hancocklaw.com

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