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Seventh Circuit Upholds Prison System's Inmate Treatment

Shannon Fruth

Pyles v. Fahim, 771 F.3d 403 (7th Cir. 2014)

In *Pyles v. Fahim*, 771 F.3d 403 (2014), the Seventh Circuit held that a prisoner's claim of deliberate indifference was correctly dismissed at the screening stage, as the existence of a slippery surface alone is insufficient to demonstrate a hazardous condition of confinement. The court also affirmed summary judgment against Dr. Fahim and Wexford Health Sources ("Wexford"), explaining that a disagreement with discretionary medical treatment alone does not rise to the level of Eighth Amendment violation.

Christopher Pyles, a prisoner at Menard Correctional Center in Menard, Illinois, injured himself when he slipped and fell on a slippery stairway located inside the prison. A month before the accident, in June 2009, Mr. Pyles sent an emergency grievance to the prison warden, Donald Gaetz, complaining about the stairway and stated he was worried about his safety because of its close proximity to the showers. Pyles alleged that the showers allowed water to be tracked in from the inmates' shower shoes. In this grievance, Mr. Pyles requested additional precautions be taken to reduce this slipping hazard. No one replied to Mr. Pyles's grievance, and no improvement was made to the stairway.

On July 25, 2009, Mr. Pyles fell on the stairway and tumbled down the stairs, striking his head on a step and injuring his back. Mr. Pyles lost consciousness and was temporarily paralyzed from the waist down. The Correction Center took Mr. Pyles to a local hospital, where CT scans revealed no spinal

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When Is a Whistleblower Just Blowing Smoke? Eighth Circuit Halts Lawsuit by ESRD Facility Nurse

Matthew Chayt

Is declaring yourself a whistleblower an airtight defense against a complaint about on-the-job performance? One Minnesota nurse discovered the answer the hard way in January when the Eighth Circuit decided *Pedersen v. Bio-Medical Applications of Minnesota*.

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damage, but an MRI was still recommended. The hospital airlifted Pyles to another hospital in St. Louis, Missouri, which performed an MRI and additional CT scans. The attending doctor diagnosed him with a spinal contusion and both a physical therapist and occupational therapist saw Mr. Pyles. Those specialists recommended physical therapy to improve Mr. Pyles's functional mobility.

Mr. Pyles returned to Menard after five days, but remained in the prison infirmary for an additional four days, after which he was released into the prison's general population. Mr. Pyles continued to complain about extreme lower back pain and sought care six times over the next two months. His providers prescribed a painkiller and took X-rays, which revealed post-traumatic arthritic changes in Mr. Pyles's spine.

In September 2009, Dr. Fahim joined Wexford, a company that provided medical care to Menard immates, as the medical director at Menard. Upon Dr. Fahim's first examination of Mr. Pyles, Dr. Fahim did not detect any abnormality; however, he did prescribe a muscle relaxer and instructed Mr. Pyles on exercises and stretching for his back. Mr. Pyles requested an MRI, but Dr. Fahim disagreed. In subsequent examinations in May and October of 2010, Dr. Fahim increased the dosages of Pyles's medications and prescribed a corticosteroid, an anticonvulsant, and a drug used to treat osteoarthritis. Mr. Pyles was also seen by other medical personnel, and none reported the need for additional medical care or diagnostic studies. A new X-ray taken in May of 2010 only showed mild degenerative changes in Mr. Pyles' spine. In August 2011, Dr. Fahim left Menard Prison, but a number of subsequent physician's notes supported Dr. Fahim's view.

Mr. Pyles brought an action in federal court in May 2011, and claimed an Eighth Amendment violation because Warden Gaetz was deliberately indifferent to the risk of the stairway injury, and that Dr. Fahim and Wexford deliberately ignored Mr. Pyles's injuries. Mr. Pyles claimed that Dr. Fahim ignored his complaints of worsening back pain and failed to address the underlying cause. The district court dismissed the claim at screening, reasoning that Mr. Pyles did not plead sufficient facts to state a claim that Warden Gaetz was deliberately indifferent to the possibility of injury.

The parties consented to proceed before a magistrate judge sitting as the district court. The district court, in granting summary judgment for Wexford and Dr. Fahim, concluded that Mr. Pyles lacked sufficient evidence to demonstrate deliberate indifference during the relevant period. The court concluded that a disagreement about appropriate medical care was not a constitutional violation and that there was no Wexford policy to support such a violation.

The Seventh Circuit reviewed the district court's decision *de novo*, stating that the burden is on the prisoner to demonstrate an Eighth Amendment violation by evidence of the prison official's actions. To state a claim for deliberate indifference, Mr. Pyles needed only to allege that Warden Gaetz deliberately ignored a prison condition that objectively presented a serious risk of harm. To prevail on Mr. Pyles's medical claim, he was required to first show that he objectively suffered from a serious medical condition, and second, that Dr. Fahim knew of this condition and disregarded the risk. Disagreement, however, between a prisoner and his doctor, or as between two medical professionals, are insufficient alone to establish a violation. As to the claim against Wexford, Mr. Pyles was required to show that a company policy was the "direct cause" or a "moving force" behind the injury.

First, the Court considered the claim against Warden Gaetz and disagreed with the heightened pleading standard required by the district court, which required that Mr. Pyles show that Warden Gaetz acted with a culpable state of mind. The court stated that such proof should come at a later stage of the proceedings, and not at the complaint stage. The district court also concluded that Mr. Pyles's claims failed because a staircase is not unique to confinement but would be used by other prison employees, and not just prisoners. The court reasoned that this view is too restrictive, and that prison life cannot be equated with life outside. The mere fact that others use the stairway does not automatically render the claim meritless.

The Court agreed, however, with the central point of the district court's analysis that the hazard of which Mr. Pyles complained "is not sufficiently serious to invoke the Eighth Amendment." Federal courts have consistently held that slippery surfaces alone cannot constitute a hazardous condition of confinement. The Seventh Circuit determined that despite the improper pleading standard applied, the district court correctly dismissed the claim.

The Court then addressed Mr. Pyles's claims against both

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When Is a Whistleblower Just Blowing Smoke? Eighth Circuit Halts Lawsuit by ESRD Facility Nurse

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Lisa Pedersen was a patient care technician ("*PCT*") at Bio-Medical Applications of Minnesota ("*BMA*"), a company that operates dialysis clinics for ESRD patients. Over time, she completed additional schooling to become a licensed practical nurse and then a registered nurse. BMA duly promoted Pedersen to a per diem nurse at BMA.

Part of the daily operations at BMA facilities entailed drawing and shipping blood samples to independent laboratories for processing. The blood samples must be refrigerated until packaged in a special container with ice packs and sent via overnight to the lab. If a blood sample rises above 46 degrees Fahrenheit, the sample may be compromised and yield inaccurate testing results.

Because of apparent room for error in the process, BMA's procedures did not require BMA staff to automatically start over and collect new samples if some had been inadvertently left out of refrigeration. Instead, the company instructed staff to determine if the samples were still cool, then ship them as planned, only redrawing a sample if the results were skewed in comparison to the patient's prior lab results.

In April 2012, one of BMA's PCTs discovered a box of blood samples that had been left overnight and packed incorrectly. Patients told Pedersen, when she arrived for work, that blood samples had been "left out again." The PCT touched the specimens and noted they were still cool, refrigerated them, and then repackaged them in the correct box and sent them to the lab. After analyzing the results of the tests on the samples, BMA concluded that none of the samples had been compromised by being left out overnight.

A few days later, Pedersen participated in a patient care planning meeting and raised the issue of the improperly packaged blood samples. The clinic manager informed the nephrologist that none of the samples had been compromised, but Pedersen went over the clinic manager's head, contacting the area manager for BMA, to report the blood sample problem again. The area manager told Pedersen, "Don't tell the doctor. We don't tell the doctors. We are going to take care of this in the clinic." Pedersen, undeterred, continued to report the blood sample issue over the next several days to other, more senior-level BMA staff, including a regional vice president.

Even as Pedersen undertook what she would later claim was a "whistleblower" effort, her supervisors were gathering evidence that her performance was unsatisfactory. A patient allegedly reported that Pedersen had slapped her on the arm a few weeks earlier, a charge that Pedersen denied. In addition, Pedersen apparently impersonated the clinic manager on several occasions, argued with staff in front of a patient, and discussed a patient's medication with a physician who was not the patient's doctor. Finally, Pedersen was accused of telephoning a patient to ask her to bake a pie for Pedersen—an allegation that Pedersen admitted was true.

Pedersen then went on medical leave, during which time the area manager and clinic manager discussed ways to justify firing Pedersen. BMA offered that Pedersen could return subject to a corrective action plan under which she would have to refrain from misrepresenting herself, exhibit respectful and professional behavior, and follow all policies and procedures concerning documentation and physician communication. Pedersen and BMA, however, could not agree on terms for her return to work. In September 2012, with Pedersen having been absent without leave for several months, BMA informed Pedersen that her employment had been terminated due to "abandonment" of her job. Pedersen alleged she had been *de facto* discharged because of the conditions placed on BMA's offer for her to return.

Pedersen filed a lawsuit against BMA (*Pedersen v. Bio-Medical Applications of Minnesota*) alleging that, in violation of the Minnesota Whistleblower Act (the "*MWA*"), BMA retaliated against her for reporting BMA's "mishandling" of the April 11 blood specimens and the "cover up" of that "mishandling." District Court Judge Richard Kyle and, on appeal, Eighth Circuit Court of Appeals Judges Kermit Bye, William Riley and Roger Wollman all determined that Ms. Pedersen could not maintain a case against BMA under the MWA, and granted summary judgment to BMA.

Enacted in 1987, the MWA prohibits an employer from taking adverse action against an employee who, in good faith, "reports a violation or suspected violation of any federal or state law . . . to an employer" or "reports a situation in which the quality

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of health care services provided by a health care facility . . . violates a standard established by federal or state law or a professionally recognized national clinical or ethical standard and potentially places the public at risk of harm." Whistleblower status in Minnesota, then, is not so easily attained.

In order to prevail under the MWA, Pedersen first had to show that in pointing out the problem with the unattended blood samples, she was engaging in conduct protected by the MWA. Pedersen had argued she was bringing vital information to the company's attention, but Minnesota courts have long established that telling an employer about an already-known violation does not constitute a "report" under the MWA. In Pedersen's situation, multiple staff members knew of the problem with the blood samples, had already taken action to check with a lab about the risks of compromised results, and actually did review lab results to ensure that the samples at issue had not been affected by being left out overnight. Nor did Pedersen provide her information to a third party, such as an enforcement agency. Therefore, Pederson's comments could not have constituted an MWA "report."

Second, even if Pedersen's complaints constituted "reports" under the MWA, her suit could not proceed because those "reports" did not point to a law or ethical standard that had been violated. Pedersen had argued that she was reporting a violation of Minnesota's Nursing Practice Act, but as District Judge Kyle pointed out, that statute says nothing about the handling or transportation of blood samples or when doing so might be unlawful. Pedersen attempted several other novel arguments to claim she had acted to prevent the violation of a law or standard, including citing to CMS interpretive guidance that incorporates the internal procedures of a dialysis provider. But Pedersen was unable to persuade a judge that these tenuous links constituted a legal or ethical rule she could claim to have defended through her actions. Indeed, given that the blood samples were ultimately not shown to have been affected by being left out overnight, it was not clear that a problem even existed at BMA.

According to the Eighth Circuit panel that ruled against Pedersen, the key legal question was whether, in the absence of direct evidence of retaliation, Pedersen could present a prima facie case that the allegations BMA presented to support her termination were in fact a pretext for a retaliatory firing. The Eighth Circuit said they would "not second-guess BMA's business decisions to suspend, demote and then terminate Pedersen because of her performance, absence and refusal to return to work." BMA had met its burden of production of evidence documenting legitimate reasons for every adverse action taken against Pedersen.

In support of Pedersen's suspension, BMA pointed to the slapping incident and other misconduct (see above). BMA was able to explain the demotion BMA had planned to impose on Pedersen's return from medical leave based on her long absence, during which BMA had issued new policies and procedures on which Pedersen would have to be retrained. Finally, with regard to Pedersen's termination itself, BMA produced evidence that Pedersen had failed to return to work after an approximately four month absence.

When, in light of BMA's contentions about the case, the burden shifted to Pedersen to show how these were sham explanations for maltreatment by BMA, Pedersen could not meet the challenge. Under Eighth Circuit precedent, Pedersen had to "both discredit [the] asserted reason for the [adverse action] and show the circumstances permit drawing a reasonable inference that the reason for [Pedersen's firing] was retaliation." According to Pedersen, her alleged poor performance was clearly pretextual because BMA's discipline against her was for actions taken ***before*** her reports about the blood samples—and yet, BMA did not decide to discipline her until the dispute over blood samples began. But BMA had shown that it did not know of Pedersen's behavioral and other problems until later. Pedersen also asserted that BMA willfully exaggerated her performance deficiencies, but finally could not substantiate her claims that BMA had an ulterior motive.

The *Pedersen v. Bio-Medical Applications of Minnesota* case may include some colorful details, but it illustrates an important legal principle: whistleblowing statutes, and the whistleblowers who invoke them, are not all created equal. State whistleblowing statutes impose meaningful and often very specific requirements about what may be reported, how, and in what circumstances. Some whistleblowers have valid claims but others, despite exhaustive legal arguments, lack the necessary proof of retaliation. ■

The Patient as a Captive Audience: Fourth Circuit Overturns Controversial Abortion Statute in Stuart v. Camnitz

Matthew Chayt

In July 2011, the North Carolina legislature, overriding the Governor's veto, enacted the Woman's Right to Know Act (the "*WRKA*"), an anti-abortion law expressly designed to dissuade women from obtaining abortions and otherwise obstruct the performance of abortions in North Carolina. But the law's controversial provisions have added it to the long list of abortion statutes that have faced federal legal challenges, in part due to the direct interference in the physician-patient relationship that judges determined it would cause.

The WRKA's most divisive component is the so-called "display of real-time view" requirement (the "*DRTVR*"), which mandates an ultrasound at least four and no more than 72 hours before an abortion. The provider must display the ultrasound images to the pregnant patient and simultaneously explain what the display is depicting. The provider's description must include the presence, location and dimensions of the fetus and "a medical description of the images, which shall include the dimensions of the embryo or fetus and the presence of external members and internal organs, if present and viewable." The DRTVR further provides that the pregnant woman may avert her eyes from the images and refuse to hear the provider's explanation of the images. As a practical matter, this means that the provider may give the patient eye blinders and headphones so that the patient can ignore the state-mandated presentation.

Whether viewed as a valiant attempt to save a life or a paternalistic effort at coercion, there is no denying that the DRTVR contemplates a potentially bizarre, even disturbing, scene in the examining room. But the DRTVR's most serious legal vulnerability was the fact that, in the eyes of judges and pro-choice activists alike, it infringed on one of the basic freedoms protected by the U.S. Constitution: freedom of speech. At the District Court level, Obama appointee Judge Catherine Eagles determined that the DRTVR was "an impermissible attempt to compel … providers to deliver the state's message in favor of childbirth and against abortion."

On appeal at the Fourth Circuit, Circuit Judges Allyson Duncan, William Traxler and J. Harvie Wilkinson III—appointees of George W. Bush, Bill Clinton and Ronald Reagan, respectively—agreed unanimously with Judge Eagles that the DRTVR is unconstitutional. In the December 22, 2014 opinion on *Stuart v. Camnitz* by Judge Wilkinson, the Fourth Circuit explained the threat posed by the DRTVR to the First Amendment.

Judge Wilkinson noted that First Amendment jurisprudence is complex and to resolve a question of regulated speech, courts must first determine what level of scrutiny to apply. The Court readily concluded that the DRTVR was intended to "convey a particularized message" and was therefore content-based. After all, North Carolina's "avowed intent" was to discourage abortion. And that message "does not lose its expressive character because it happens to be delivered by a private party"—in this case, a physician. Further, the fact that the DRTVR compels rather than forbids speech does not save the provision. First Amendment cases have long recognized that the First Amendment "includes both the right to speak freely and the right to refrain from speaking at all."

The defendants (the State of North Carolina) had argued that the type of speech compelled by the DRTVR should be of no concern because the DRTVR only requires the physician to state facts about what the ultrasound shows, devoid of editorial opinion about those facts. But the mere fact that the speech required by the DRTVR is factual, for the Fourth Circuit, "does not divorce the speech from its moral or ideological implications."

The defendants also argued that the DRTVR was constitutional, notwithstanding the fact that it regulates speech, because the DRTVR is one of many examples of the state's power to prescribe rules and regulations for the profession of medicine. They pointed out that, as numerous courts have likewise concluded, states may lawfully regulate medicine by establishing licensing qualifications, obliging the payment of dues to a professional organization, proposing ethical codes, setting practice standards, and more.

But the Fourth Circuit pointed to a thread of jurisprudence contending that a "continuum" of review applies to laws affecting

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the First Amendment rights of professionals. Citing a recent Ninth Circuit decision affirming a ban on the use of "ex-gay therapy" on minors, the Fourth Circuit stressed the distinction between professional speech and professional conduct. Ultimately, the Fourth Circuit concluded that the intermediate scrutiny standard used in certain commercial speech cases would be appropriate for *Stuart v. Camnitz*, because it would take into account the strong competing interests at work in the case.

North Carolina did have an interest in regulating professional conduct, the Fourth Circuit explained, but its interest was "less potent in the context of a self-regulating profession like medicine." In other words, the Fourth Circuit did not accept North Carolina's argument that the DRTVR was just a regulation of North Carolina physicians like any other, particularly where there were so many competing interests in play.

One of those competing interests, of course, is a woman's right to choose an abortion, as established by *Roe v. Wade* and subsequent cases. Reviewing precedent in other Circuit Courts (including *Lakey*, a Fifth Circuit case discussed in the last issue of *Legal Medicine Perspectives*), the Fourth Circuit determined that other Circuits had read too much into watershed Supreme Court cases of the past. Supreme Court jurisprudence on abortion, the Fourth Circuit argued, does not support the idea that physicians give up their First Amendment rights in the context of treatment surrounding abortions.

Further, previous cases gave little indication what level of judicial scrutiny to apply to abortion laws that regulate expression to the "extraordinary extent" of the DRTVR. North Carolina based much of their argumentation on one of the most crucial Supreme Court abortion cases of all, *Planned Parenthood v. Casey*, but the Fourth Circuit was not persuaded. Judge Wilkinson's opinion determined, to the contrary, that other states' interpositions into the informed consent process that had been challenged in past cases like *Casey* were not in the same league as the DRTVR.

The Fourth Circuit's fundamental question in *Stuart*, as First Amendment case law requires, was whether the DRTVR provision of the WRKA directly advanced a "substantial government interest" and was drawn to that interest and proportional to the burden placed on speech. As noted above, the *Stuart* court clearly perceived the government interests involved, and did not contest that North Carolina had substantial interests in, among other things, protecting life, promoting the psychological health of women seeking abortions, and maintaining the integrity and ethics of the medical profession.

Where the DRTVR fell short was in its outsized burden on speech without a direct correlation to a state interest. The Fourth Circuit cited several elements that "markedly depart from standard medical practice": a) requiring the physician to speak to a patient who, attorneys for North Carolina conceded, might not be listening, b) rendering the physician the mouthpiece of the state's message, and c) omitting a therapeutic privilege exception (see below). In allowing for the possibility that the female patient might be willfully ignoring the mandated presentation, North Carolina had created a scenario where the patient does not even ***receive*** the speech compelled by the WRKA, and therefore that same forced speech by the physician not only distorted the physician-patient relationship, but lacked the constitutionally necessary connection to the state's interest in the protection of life.

The Fourth Circuit never reached the question of whether the DRTVR's requirements imposed an "undue burden" on a woman seeking an abortion within the meaning of *Planned Parenthood v. Casey*, and instead rested its decision on its First Amendment analysis. The problem of the DRTVR was thus less its imposition on the patient, and more the burden it placed on the ***physician***.

Nevertheless, Judge Wilkinson's opinion returned again and again to the scene conjured by the DRTVR: a female patient, barely clothed and in the midst of a highly personal examination, subjected to an unsettling presentation by a doctor to whom she must be able to entrust her well-being. "Abortion may well be a special case because of the undeniable gravity of all that is involved," conceded the Fourth Circuit, "but it cannot be so special a case that all other professional rights and medical norms go out the window."

The Fourth Circuit cited evidence from a physician that the representations required by the DRTVR could be harmful to patients—particularly for women who have been victims of sexual assaults, or whose fetuses are nonviable or have severe, life-threatening developmental abnormalities. And

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ACLM Member Spotlight: Bill Hinnant, MD, JD, FCLM

1. Do you practice medicine and/or law, and in what capacity and position?
I am a practicing urologist focusing chiefly on office urology, but performing substantial endoscopy, laser procedures, micro and minor surgery and hormone replacement. We also manage a medi-spa in the same building. I am also a health lawyer. My legal practice has associated attorneys and focuses on Health Litigation, White Collar Crime, Medical Malpractice, Wrongful Death, Personal Injury, Administrative Law, Peer Review and Credentialing Issues, Social Security Disability, Workers Compensation, ERISA litigation and Insurance Law.

2. How long have you held those positions?
I've practiced medicine and law concurrently for over 15 years, but became a physician nearly 30 years ago. It's a little hard to believe.

3. When did you become a member of ACLM?
I became an ACLM member in the mid to late 1990s while still a law student.

4. Why are you a member of ACLM?
While many of the College's members see it as their secondary organization, it has always been my primary organization. It's an eclectic group of interesting, very intelligent and highly motivated individuals with broadly varied interests. All share a deep commitment to legal medical education, both internally and for the public at large. Despite its members' obvious achievements, the College includes some of the most friendly, down-to-earth and collegial individuals I've ever known. Virtually all are willing to help the less experienced and provide an opinion as to difficult medicolegal issues. Its a privilege to know each of them. Many of us have worked together professionally and have formed life-long friendships. Even when we have differences of opinion, all are respectful.

5. Why did you become a health lawyer?
In traveling and looking closely at the American Health System versus those others around the world, it became apparent to me that our system is not sustainable on a long term basis. Our cost profile is out of line with similar industrialized nations and our quality measures do not correlate to what we spend. Needless to say, it became apparent to me that this would breed conflict, yet offer opportunity, both requiring legal expertise to properly address. Our health infrastructure is by far the world's best, yet we have substantial problems with allocation, cost, physician availability in rural areas, quality of care and disproportionate top-down control. Our for-profit motive, the employer-provided insurance model and interjection of third-party payers in my opinion pose barriers to cost-effective delivery. I wanted to have some role in addressing the change that was obviously forthcoming.

6. Did you practice in any other area of law before you became a health lawyer, and if so, what area?
I have always practiced the full gamut of health law. As a student, I was taught and quickly learned that health law allows you to explore a broad arena of legal disciplines in the narrow context of health care. As a physician, I find that challenging, yet with a familiar backdrop.

7. Describe an excellent day at the office for you.
Well, I occasionally have a day where I do a vasectomy reversal in the morning and go to court to close the probate matters on a profitable wrongful death case in the afternoon. Days like that, when I say, "you know, no one else on Earth probably did those two things today," are always excellent. The best follow-up is if your patient gets a much wanted pregnancy. Any highly productive day is an excellent day.

8. What do you consider your greatest achievement in your career?
The fact that I have a wife I love and four children who have completed their educations and are successful. I'm also proud that I've been exposed to all the world's cultures through travel and continue to be curious and learn every day.

9. What has been the biggest change you have seen in the health care system during your career?
This is an easy one. It's the complete loss of physician autonomy that has accompanied the physician employment phenomenon along with the emergence of managed care and the flurry of mergers and acquisitions within our corporate health structure. Unfortunately, I think it's hurt the physician-patient relationship.

10. What do you think is the biggest challenge the health care system faces today?
The challenge of providing care that is accessible, affordable and of high quality to all Americans regardless of age, race, sex or social class.

11. What words of wisdom – about anything – would you want to pass on?
"Join the ACLM and enlist new members; you'll enrich their lives and they yours." ■

Update on Medicare Sustainable Growth Rate

Gretchen Leach

The U.S. House Energy and Commerce Subcommittee on Health held a hearing on January 21 and 22 to discuss the recently reignited debate about how to reform or repeal the Medicare Sustainable Growth Rate ("SGR"). Also at issue is the question of how to handle the deadline for modifications to fee schedules, now that the temporary "doc fix," or "doc fix patch," is set to expire at the end of March. A "doc fix" is a suspension or adjustment of the fee schedule update, and Congress has used this tool numerous times in the past to prevent physician payment rates from being cut by the SGR. Such temporary doc fixes can buy time for meaningful reform on the issue to take place.

Throughout the United States, the Centers for Medicare and Medicaid Services ("CMS") utilize the SGR to control Medicare spending for physician services. (SGR replaced CMS's previous cost-controlling mechanism, the Medicare Volume Performance Standard, in the Balanced Budget Act of 1997 to amend the Social Security Act.) The purpose of the SGR is to ensure that the yearly expense increase per Medicare beneficiary does not grow faster than the national gross domestic product ("GDP"). CMS sends a yearly report to the Medicare Payment Advisory Commission, a nonpartisan legislative branch agency that informs the U.S. Congress about the past year's expenditures and target expenditures for the future.

Each year's report contains a conversion factor designed to change physician payments in the forthcoming year to match the target SGR. Physician fee rates are updated on March 1 of each year to conform to this scheme. The SGR has long been a lightning-rod for controversy and many physician groups (including the American Medical Association) have advocated permanent reform of the SGR.

The trouble is that, although stakeholders in the issue seem united in their belief that the SGR should be abandoned altogether, they have been divided on how to fund a permanent repeal. Health Subcommittee Chairman Joe Pitts (R-PA) estimated in his opening statement that repealing SGR would cost roughly $140 billion.

In March of 2014, the U.S. House of Representatives passed H.R. 4015, the SGR Repeal and Medicare Provider Payment Modernization Act of 2014. This bill, if enacted into law, would have repealed the SGR, maintained payment rates for the rest of 2014, and increased Medicare's payment rates by .5 percent each year for services provided from 2015 through 2018. However, H.R. 4015 was amended so that its passage would have repealed sections of the Affordable Care Act ("Obamacare"). The Obama administration threatened to veto the bill if it passed, but this proved unnecessary because it was defeated in the Senate.

At the January House Energy and Commerce Subcommittee on Health, many of the witnesses who were present requested that policies concerning SGR from H.R. 4015 be taken up again by new legislation. They also discussed how a permanent repeal could be funded.

Former Senator Joseph Lieberman, who spoke on the first day of the hearing, suggested using benefit modernization, Medigap reform, higher premiums for beneficiaries with higher incomes, and increasing the eligibility age as potential methods to pay for repeal. Other suggested reforms were combining Parts A and B of Medicare with unified deductible and coinsurance, accelerating and expanding competitive bidding for durable medical equipment, recovering overpayments to Medicare Advantage plans, equalizing Medicare payments for physician services between hospital outpatient and office settings, increasing transitional care and chronic care management support, prescription drug proposals geared toward cost savings, and ensuring full use of all clinicians.

The hearing witnesses, speakers, and health analysts both in and outside of the hearing have demonstrated many divergent funding ideas over the past month. There does not appear to be any clear consensus on how to fund SGR removal, despite the discussions.

This development leaves the door open for Congress to try to come up with a different temporary doc fix. ■

Indiana Court Adds to Sparse HIPAA Liability Precedent, Ruling in Favor of Patient

Phillip G. Palmer Jr.

Walgreen Co. v. Hinchy, No. 49A02-1311-CT-950, 2014 WL 6130795 (Ind. Ct. App. 2014).

Plaintiff Abigail Hinchy filed a lawsuit against a Walgreen Company pharmacist, Audra Withers, and Walgreen Company (Walgreens) alleging negligence, professional malpractice, and invasion of privacy, after she learned that Withers had accessed and disclosed her medical prescription information for personal reasons. Following trial, a jury returned a verdict in favor of Hinchy for $1.44 million, and the court entered this judgment. On Walgreens' appeal, the Indiana appellate court affirmed the lower court's entry of the jury verdict.

Between Fall 2006 and Spring 2010, Hinchy engaged in sexual relations with Davion Peterson ("Peterson"). During this time, Hinchy had all of her birth control pills and prescription medications filled at a Walgreens pharmacy. In 2009, Withers began dating Peterson. During this relationship, Peterson discovered he had contracted genital herpes and that Hinchy had become pregnant with his child. In May 2010, Peterson's and Hinchy's child was born.

Soon after, Peterson informed Withers about the child and about the possibility that she had been exposed to a sexually transmitted disease (STD). After receiving this information, Withers became worried about having an STD and subsequently looked up Hinchy's prescription profile on the Walgreens computer system while at work to see if she could gather any information about Hinchy.

On May 29, 2010, Peterson sent multiple text messages to Hinchy. In these messages, Peterson stated he had in his possession a print out showing Hinchy had failed to fill her birth control prescription and that if she had taken her birth control the pregnancy would have been prevented. He threatened to disclose her information to her family. Hinchy then attempted to find out how Peterson obtained her prescription profile and called some local Walgreens pharmacies. She was unable to get any information that explained Peterson's ability to get the print out and her search for answers ceased.

In 2011, Hinchy learned that Peterson had married Withers and that Withers was a Walgreens pharmacist where Hinchy filled her prescriptions. Immediately, Hinchy notified Walgreens of her suspicions about Withers disclosing her information to Peterson. A few weeks later in April 2011, Michael Bryant, a Loss Prevention Detective, notified Hinchy that, "a HIPAA/privacy violation had occurred, Withers had viewed Hinchy's prescription information without consent and for personal purposes, and Walgreen[s] could not confirm that Withers had revealed that information to a third party."

Hinchy subsequently filed a complaint against Withers and Walgreens. The action against Withers was for negligence/professional malpractice and invasion of privacy for disclosing private facts and for intrusion. The action against Walgreens was for the same as those against Withers under *respondeat superior* liability, as well as for negligent training and negligent supervision and retention.

Walgreens moved for summary judgment and the trial court granted the motion in regards to the negligent training count against Walgreens and the invasion of privacy by intrusion count against Withers. The rest of the motion was denied and the case went to trial.

The four-day jury trial ended in the jury finding in favor of Hinchy, awarding damages of $1.8 million. Non-party Peterson was responsible for 20 percent of the award, while Withers and Walgreens were jointly responsible for the remaining 80 percent.

On appeal a number of issues arose. The most significant issue was whether the trial court erred in denying Walgreens' motion for summary judgment and not entering in a directed verdict in its favor on Hinchy's *respondeat superior* and negligent retention and negligent supervision counts.

The Court reviewed the issues using a *de novo* standard and began by addressing the issue of Walgreens' *respondeat superior* liability. Utilizing the Restatement (Third) of Agency's definition of respondeat superior, "an employer is subject to vicarious liability for a tort committed by its employee acting within the scope of employment." § 7.07(1) (2006). "An employee's act is not within the scope of employment when it occurs within an *independent course of conduct* not intended by the employee *to serve any purpose of the employer*." *Id.* at 7.07(2).

Indiana Court Adds to Sparse HIPAA Liability Precedent, Ruling in Favor of Patient continued on page 10

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Further, it is generally the duty of the fact-finder to determine whether an employee's actions were within the scope of employment; this is true even if some of the actions were unauthorized. Therefore, "[o]nly if *none* of the employee's acts were authorized is the question a matter of law that need not be submitted to the trier of fact." Conduct which is of the same general nature as that authorized, or which the tortfeasor holds the ability to commit because of his or her employment, weighs in favor of a finding of *respondeat superior*.

Next, the Court compared the facts to *Ingram v. City of Indianapolis*, 759 N.E.2d 1144 (Ind. Ct. App. 2001). In *Ingram,* a police officer used his police powers to detain women and then solicit them for sex. The Court in *Ingram* found the actions were of the same general type authorized, or at least incidental to that which was authorized, by his employer and held that whether these actions fell within the scope of his employment was a question for the trier of fact.

The Court found that, because Withers was at the Walgreens store, using the Walgreens equipment, on the clock, when the violation occurred and Hinchy was a customer to whom Withers owed a duty of privacy protection as a pharmacist, some of her actions were of the type authorized. Therefore, under *Ingram*, whether Withers acted within the scope of her employment was a question that properly was given to the jury.

As to the issue of the trial court's error in allowing the jury to rule on the claims of negligent retention and supervision, the Court explained that, because both parties conceded that Walgreens could not be found liable for *both respondeat superior* and the negligence claims, and because this Court found that *respondeat superior* was properly given to the jury, it declined to address the those issues.

Although Walgreens did not appeal the verdict itself, the Court examined whether there was underlying liability to support a finding of *respondeat superior*. The Court dodged the issue of whether the tort of public disclosure of private facts was enough to support liability here, but decided that liability existed as to the professional malpractice of the pharmacist. "Indiana law provides that '[a] pharmacist shall hold in strictest confidence all prescriptions, drug orders, records, and patient information.'" Ind. Code § 25-26-13-15(a).

Therefore, the Court found that Withers unquestionably had a duty of confidentiality to Hinchy as a customer and by disclosing her information a breach occurred. Hinchy also put forth evidence to support damages, thus, the Court affirmed the jury verdict based upon the negligence/professional malpractice of Withers, and upheld the *respondeat superior* liability of Walgreens.

After addressing and dismissing two procedural matters, it tackled the final issue of whether the $1.8 million verdict was excessive and awarded due to improper factors. In reviewing jury awards, the courts give a great deal of discretion; however, this discretion is not limitless. "Where a damage award 'is so outrageous as to indicate the jury was motivated by passion, prejudice, partiality, or the consideration of improper evidence, we will find the award excessive.'" *Zambrana v. Armenta*, 819 N.E.2d 881, 890 (Ind. Ct. App. 2005).

The Court laid out a number of pieces of evidence, that weighed in favor of Hinchy receiving compensation, including the emotional stress Hinchy underwent while enduring extortion due to the divulging of the private information to Peterson by Withers, along with having this private information being disclosed to her family. The Court also found the jury's reduction of the award by 20 percent for Peterson's actions was strong evidence demonstrating that the jurors did not act with improper motives and that they carefully weighed the evidence.

Therefore, the Court affirmed the trial court's decision because it found there was sufficient evidence to support *respondeat superior* liability on the part of Walgreens, there was a violation of the duty of confidentiality when Withers accessed Hinchy's patient prescription profile and disclosed that information to a third party, and there was enough evidence presented to support the jury's verdict award.

Walgreen Co. v. Hinchy is one of the first cases in the country to uphold a judgment under HIPAA against a health care provider for privacy violations committed by one of its employees. If other cases follow, large health care providers will have to address the issue of major liability if their employees divulge private information. ■

DC Circuit Rejects Religious Groups' Challenge to ACA Contraceptive Mandate

Michael Morthland

Priests for Life v. U.S. Department of Health and Human Services, 2014 WL 5904732 (D.C. Circuit 2014).

In *Priests for Life v. U.S. Dept. of Health and Human Services*, the United States Court of Appeals for the District of Columbia grappled with the question of whether the Affordable Care Act's regulatory accommodation for religious nonprofits was constitutional. Specifically, the plaintiffs/appellants argued that the opt-out program violated their First Amendment and equal protection rights, as well as the Religious Freedom Restoration Act (RFRA). The Court of Appeals affirmed the lower court's judgment in part and reversed in part.

The plaintiffs, consolidated for the purposes of appeal, initially brought separate parallel cases in the district court. The *Priests for Life* plaintiffs filed a complaint challenging the coverage requirement and accommodation as an unjustified substantial burden on their religious exercise in violation of RFRA. The plaintiffs also raised a host of other challenges under the First Amendment (Speech and Religion Clauses) along with the Equal Protection Clause of the Fifth Amendment. The lower court granted the government's motion to dismiss the claim, and denied the cross-motion for summary judgment.

The remaining Plaintiffs, the Archdiocese of the District of Columbia, Thomas Aquinas College, Catholic University of America, and the church-plan plaintiffs (together known as the RCAW Plaintiffs) challenged the accommodation under RFRA and the First Amendment. The Court rejected Catholic University's RFRA claim and granted that of Thomas Aquinas College, determining that the accommodation was not a substantial burden on Catholic University's religious exercise. However, the Court also determined that summary judgment was appropriate for Thomas Aquinas College because the accommodation could impose a "series of duties and obligations" constituting a substantial burden on the College. *Roman Catholic Archbishop of Wash. V. Sibelius (RCAW)*, No. 13-1441 (D.D.C. Dec. 20, 2013).

Conducting its own analysis, the Court of Appeals first addressed the issue of standing. The RCAW district court found that the church-plan plaintiffs lacked standing to challenge the accommodation. However, the Court determined that, like all the other similarly situated plaintiffs in the case, the church-plan plaintiffs allege that their religious beliefs forbid them from "availing themselves of the accommodation because doing so would render them complicit in a scheme aimed at providing contraceptive coverage."

The Court then turned its attention to the RFRA claims proffered by the plaintiffs. However, before doing so, the Court sought to explain the wide-reaching and expansive effect that the ACA had on the United States. The Court paid particular attention to the intent and purpose of the contraceptive mandate. The Court focused on the previously inadequate coverage for women, and the disadvantage they faced in the workforce. The contraceptive mandate was created to create equal opportunities for women, the Court explained, in order to remain "healthy and productive members of the job force." 45 CF.R. § 147.130(a)(1)(iv)(HHS).

The overwhelming objections to the contraceptive mandate by religious nonprofits prompted the Departments of Health and Human Services and Treasury ("Departments") to create two avenues for religious organizations to exclude themselves. First, the Departments categorically exempted "religious employers," defined as churches or the exclusively religious activities of any religious order. Second, the Departments created a mechanism for nonprofit "eligible organizations" (i.e., groups that are not houses of worship but are religious in nature) to opt out of having to pay for contraceptive coverage.

In sum, the opt-out mechanism "was designed to dissociate the objecting organizations from contraceptive coverage while ensuring that the individuals covered under those organizations' health plans—people not fairly presumed to share the organizations' opposition to contraception or to be co-religionists—could obtain coverage for contraceptive services directly through separate plans from the same plan providers." 78 Fed. Reg. 39,874.

Turning to the RFRA claim, which "lay at the heart of the case," the Court determined that the accommodation did not substantially burden plaintiffs' religious exercise. RFRA

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provides that the federal government may not '"substantially burden" a person's religious exercise, even if the burden results from a rule that applies generally to religious and non-religious persons alike, unless the burden: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C. § 2000bb-1. "In other words, if the law's requirements do not amount to a substantial burden under RFRA, that is the end of the matter. Where a law does impose a substantial burden, Congress has instructed that 'we must return to the compelling interest test set forth in *Sherbert v. Verner*, 374 U.S. 398, 407 . . . (1963), and *Wisconsin v. Yoder*, 406 U.S. 205, 216 . . . (1972)."

The Court began its analysis of the RFRA claim by discussing the difference between the current facts and those presented in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). In the *Hobby Lobby* case, closely-held corporations had no "third option" as the plaintiffs did here to opt-out. The plaintiffs could avoid both providing the contraceptive coverage and the penalties by opting out altogether.

The Court then provided a maxim, explaining that freedom of religious exercise is protected yet not absolute. A burden does not rise to the level of being substantial when it places "'[a]n inconsequential or *de minimis* burden' on an adherent's religious exercise." *Livetan v. Ashcroft*, 281 F.3d 1313, 1320-21 (D.C. Cir. 2002). Moving to the plaintiffs' argument, the Court first refused to accept the sincerity of plaintiffs' beliefs as the end-all be-all of a substantial burden on plaintiffs' religious exercise. Indeed, the Court determined that the opt-out mechanism imposes a *de minimis* requirement. "The organization must send a single sheet of paper honestly communicating its eligibility and sincere religious objection in order to be excused from the contraceptive coverage requirement." By doing so, the government then takes over in order to provide contraceptive coverage. The Court likened the accommodation's workings as the written equivalent of raising one's hand in response to the government's query as to which eligible organizations want to opt-out. The accommodation still leaves organizations free to express to their employees their continued opposition to contraceptive coverage.

The Court finally determined that the accommodation is not a trigger to contraceptive coverage, does not authorize or facilitate contraceptive coverage, and does not act as a conduit for contraceptive coverage; nor do the regulations specific to the self-insured plaintiffs create a substantial burden.

The Court then turned its attention to the test applied in *Hobby Lobby,* a supplemental brief by plaintiffs while the current action was taking place. The United States Supreme Court in *Hobby Lobby* applied a substantial-burden and strict-scrutiny analysis. The *Hobby Lobby* Court had already assumed, without deciding that the governmental interest in "guaranteeing cost-free access" to contraceptive was "compelling." The contraceptive coverage was added to the ACA after the Institute of Medicine observed that "high costs regularly cause[d] women to forego contraception completely or to choose less effective methods . . . ." IOM Report at 109. The government agreed it used the least restrictive means to ensure contraceptive coverage while accommodating religious exercise.

The Court then addressed the plaintiffs' various constitutional claims. First, the Court addressed the Free Exercise of Religion claims. Specifically, the plaintiffs claimed that the contraceptive coverage requirement violates the Free Exercise Clause of the First Amendment because "it categorically exempts houses of worship from the contraceptive coverage requirement and temporarily relieves grandfathered plans from the requirement to cover any preventive services without cost sharing, while not exempting plaintiffs." However, the Free Exercise Clause does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability. In the case at bar, the contraceptive coverage requirement was a religiously neutral aspect of a much larger national effort to expand health coverage to make it more efficient and effective.

Next, the Court determined that the coverage requirement does not violate the plaintiffs' rights to expressive association. The plaintiffs argued that the government's mandate that they promote the government's objective of expanding access to contraceptives, which they view as immoral, undermines the organizations' very reason for existence. Despite this, the Court found that the plaintiffs were still able to express their opinions condemning the use of contraception, and the contraception mandate.

The plaintiffs argued that the regulations impermissibly compelled their speech in three ways. First, Plaintiffs claim the regulations required them to authorize and facilitate health care coverage for counseling that encourages and promotes contraception. Second, plaintiffs argued that completing the self-certification form required them to express a particular

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view, namely that they oppose providing their plan participants with coverage for contraceptive services, it deprives them of the freedom to speak on this issue on their own terms. Third, plaintiffs objected to the regulations because they require that plaintiffs' plan participants receive notice of the availability of payments for contraceptive services. The Court dismissed each of these contentions, finding that none of them actually involved any compelled speech.

The last substantial argument raised by the plaintiffs was their challenge of the accommodation under two Establishment Clause claims: (1) that the regulations impermissibly discriminate between types of religious institutions by making a general distinction between churches and other houses of worship, and nonprofit organizations that may have a religious character or affiliation; and (2) that the regulations entail excessive entanglement between the government and religious institutions. However, the Court determined that these arguments could not surmount the long-established policy drawing recognized and permissible distinctions between houses of worship and religious nonprofits.

Plaintiffs' remaining arguments included that the accommodation was in violation of internal church governance; that it was a violation of the plaintiffs' equal protection rights and of the Administrative Procedure Act. The Court spent minimal time on these arguments and dismissed them quickly, as they addressed the majority of the substantive issues earlier in the opinion.

In sum, the DC Circuit rejected all of the plaintiffs' challenges to the regulations. In doing so, the Court affirmed the district court's opinion in *Priests for Life* in its entirety. As for the RCAW decision, the Court vacated the lower court's grant of summary judgment for Thomas Aquinas and its holding as to the unconstitutionality of the non-interference provision, and in turn affirmed the remainder of the decision. ■

Seventh Circuit Upholds Prison System's Inmate Treatment

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Dr. Fahim and Wexford. Mr. Pyles contended that the district court erred in granting summary judgment for both parties, arguing that Dr. Fahim continued in a course of treatment he knew to be ineffective and refused to schedule Mr. Pyles for an MRI or refer him to a specialist. The parties agreed that Mr. Pyles's back pain is objectively serious. The dispute's actual focus was whether Dr. Fahim's refusal to schedule an MRI or send Mr. Pyles to a specialist permitted an inference that Dr. Fahim possessed the required culpability for liability under the Eighth Amendment. The Court noted that a decision to forgo a diagnostic test such as a MRI is an example of medical judgment, and Mr. Pyles failed to submit evidence that demonstrated that this exercise of medical judgment departed significantly from accepted medical professional standards.

The choice of whether to refer a prisoner to a specialist involves the exercise of medical discretion, but if refusal was blatantly inappropriate, it may support a claim of deliberate indifference. The Court pointed to multiple instances where a refusal to refer a prisoner to a specialist was held to be deliberate indifference. For instance, in *Jones v. Simek*, 193 F.3d 485 (7th Cir. 1999), summary judgment was wrongly entered where the physician had recognized that the prisoner suffered from a serious nerve problem but refused to refer the prisoner to a neurologist.

However, in this case, there was no prior indication of a serious long-term medical issue, nor was the need for a specialist obvious. According to the Seventh Circuit, a jury could not conclude on these facts that Dr. Fahim inflicted cruel and unusual punishment on Mr. Pyles by not referring him to a specialist. The undisputed evidence demonstrated that Dr. Fahim was not deliberately indifferent, and in fact altered Mr. Pyles's medication. While Mr. Pyles may have sought a different treatment, disagreement with a reasonable course of medical treatment is insufficient to prevail on an Eighth Amendment claim.

Finally, the Court concluded that Wexford could not be held liable because there was no underlying constitutional violation, and there was no policy in place which demonstrated deliberate indifference had there been a constitutional violation. Therefore, the court upheld the district court's decision to dismiss Mr. Pyles's conditions-of-confinement claim at screening and the grant of summary judgment for Mr. Pyles's medical claims. ■

Eighth Circuit Uses Plain Meaning Analysis to Determine that Vitamin A Regimen for Retinitis Pigmentosa Constituted a Pre-Existing Condition

John Zimmerman

Kutten v. Sun Life Assur. Co. of Canada, 759 F.3d 942 (8th Cir. 2014).

In *Kutten v. Sun Life Assur. Co. of Canada*, the United States Court of Appeals of the Eighth Circuit examined whether it was reasonable for an insurer ("Sun Life"), who was offering a long-term disability plan ("the Plan") governed by Employee Retirement Income Security Act ("ERISA"), to conclude that an insured's ("Kutten") daily use of vitamin A supplementation at his doctor's direction qualified as "medical treatment" under the Plan's pre-existing condition clause. The Court ultimately held this use of vitamin supplementation qualified as a "medical treatment" and that Kutten was properly denied benefits under the Plan.

In 1994, Kutten was diagnosed with a progressive eye disease known as retinitis pigmentosa that would eventually lead to his blindness. Kutten's physician directed him to begin taking a significant dose of an over-the-counter vitamin A palmitate supplement. The National Eye Institute also supported this course of treatment even though it was not a cure and would merely delay his inevitable blindness.

In June 2010, Kutten purchased the Plan from Sun Life through his company. The Plan offered $6,000 in maximum gross benefits per month. The Plan also included a provision that excluded pre-existing conditions. The Plan definition stated, "Pre-existing condition means during the 3 months prior to the Employee's Effective Date of Insurance the Employee received *medical treatment*, care or services, including diagnostic measures, or took prescribed drugs or medicines for the disabling condition." (*Emphasis added.*)

In September 2010, Kutten's eye condition forced him to stop working. He applied for benefits under the Plan in October 2010. Sun Life then determined that Kutten's condition fell within their definition of a pre-existing condition because they determined the vitamin supplementation was considered a "medical treatment" that occurred within the qualifying three month period.

Kutten filed suit in February 2012, which was followed by cross-motions from both parties for summary judgment. The district court ruled in favor of Kutten's motion for summary judgment, finding that Sun Life abused its discretion when construing the pre-existing condition clause to apply to Kutten's taking of supplements. The district court stated that "Sun Life's broad interpretation of the phrase 'medical treatment' was contrary to the Plan's plain language and rendered portions of the clause meaningless and internally inconsistent." Sun Life appealed the district court's decision.

The first issue the Eighth Circuit addressed was whether Sun Life's decision was considered an abuse of discretion. A dispositive factor in insurance dispute cases is that when plan providers have offered a "reasonable interpretation" of a disputed provision, courts may not replace the interpretation with one of their own. For an administrator's interpretation to not be an abuse of discretion, it must be reasonable. To determine "reasonableness" courts will examine whether the administrator's interpretation: (1) is consistent with the plan's goals; (2) renders any of the plan's language meaningless or internally inconsistent; (3) conflicts with ERISA; (4) has been followed similarly in the past; and (5) is contrary to the clear language of the policy.

Here, the Court decided that the narrow question was whether it was reasonable for Sun Life to conclude Kutten's vitamin A supplements constituted a "medical treatment." The two reasonableness factors focused on by both parties were whether the administrator's interpretation rendered language meaningless or internally inconsistent, and whether the interpretation was contrary to clear language of the policy.

To determine whether the administrator's interpretation rendered the language meaningless or internally inconsistent, the Court examined Kutten's argument on the pre-existing condition clause. Kutten argued for a rigid construction of the pre-existing condition clause and that the word "or" should be treated as disjunctive conjunction. Using "or" as a disjunctive conjunction would cause the words "medical treatment" to be separate from "prescribed drugs or medicines." The district court agreed with this argument because it found the use of the word "or" made clear that the Plan did not include prescribed drugs or medicines under the umbrella of "medical treatment."

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Eighth Circuit Uses Plain Meaning Analysis to Determine that Vitamin A Regimen for Retinitis Pigmentosa Constituted a Pre-Existing "Treatment"

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Kutten further argued that if "prescribed drugs or medicines" were excluded from the phrase "medical treatment," then vitamin A supplements must be excluded from the phrase as well because vitamin supplements required even less medical intervention than "prescribed drugs or medicines." Construing the phrase "medical treatment" to include vitamin supplements, but excluding "prescribed drugs or medicines" would create an internal inconsistency. Therefore, Kutten argued, because Sun Life's interpretation rendered the provision internally inconsistent, then the administrator's interpretation was unreasonable.

Here, relying on precedent, the Court refused to treat the word "or" as disjunctive and held that the terms listed in the pre-existing condition provision contemplated a broad array of potential types of medical intervention that were covered. This was mainly because drawing a sharp distinction between "prescribed drugs or medicines" and "medical treatment" was a virtually impossible task because the words "prescribed drugs or medicines" are commonly understood as "medical treatment." The Court found there was no internal inconsistency or meaningless language.

Next, when analyzing whether the interpretation was contrary to the clear language of the policy, the Court stated that it was not searching for the "best or preferable interpretation" of the pre-existing condition clause's language. Rather, the Court would only determine whether the interpretation of the terms conformed to their ordinary meaning. If they did, then the interpretation was reasonable and there was no abuse of discretion. To determine whether the terms conformed to their ordinary meaning, the Court looked at *Webster's Third New International Dictionary* definitions of "medical" and "treatment." After reviewing these definitions, the Court concluded that the definitions supported an interpretation that the ordinary meaning of the phrase "medical treatment" included Kutten's vitamin A supplements.

Kutten's final argument, with which the dissenting judge agreed, was that Sun Life's policy was poorly drafted and that Sun Life was simply attempting to evade its policy's terms. Dissenting Judge Bye argued that the majority seemed to have ignored the policy language and instead applied its own definition of what should have been included within the pre-existing condition clause. The judge believed that judicial activism was occurring and stated, "[i]t is not this Court's prerogative to assist a plan administrator in evading its own poorly-chosen policy language."

In response to this argument, the court agreed that the pre-existing condition clause could have been clearer, but they returned to the dispositive factor governing the abuse-of-discretion rule which states, "where plan fiduciaries have offered a 'reasonable interpretation' of disputed provisions, courts may not replace [it] with an interpretation of their own." *King v. Hartford Life & Acc. Ins. Co.,* 414 F.3d 994, 999 (8th Cir. 2005). The Court also noted that it was reasonable to conclude Sun Life designed the pre-existing condition clause to exclude coverage in circumstances where a substantial increase in coverage coincided with a claim for long-term disability, and this supported the "reasonableness" factor of being consistent with the plan's goals. As to the other "reasonableness" factors, the Court held there was no indication of Sun Life's interpretation contravening ERISA's requirements or that Sun Life had taken inconsistent positions in the past.

The Court ultimately held that Sun Life's interpretation was reasonable and that Sun Life did not abuse its discretion in denying Kutten's claim for benefits under the Plan. ■

The Patient as a Captive Audience...

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yet the WRKA failed to include a "therapeutic privilege" exception—an exception other contested abortion laws have incorporated—that would have permitted doctors to decline or at least wait to convey the mandated information on the basis of a professional judgment that completing the DRTVR presentation at a particular time would result in serious psychological or even physical harm. These potential harmful effects on the patient may have been, legally speaking, collateral damage in a case that was more about speech, but they undeniably were part of the *Stuart* court's equation.

North Carolina disputes the Fourth Circuit's decision in *Stuart v. Camnitz*, and lawyers for the state say they will be appealing to the Supreme Court, but the oral arguments and ruling, if any, will occur in the Supreme Court's next term, which begins in October 2015. ■

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