**8th Amendment, PDAB and State Corrections Departments**

The prescription drug manufacturers’ trade association, PhRMA, has begun to raise the specter of legal challenges to a PDAB upper payment limit (UPL) because the UPL could violate of the Constitutional rights of incarcerated individuals against cruel and unusual punishment – the Eighth Amendment.

Incarcerated individuals would only be adversely affected **IF** a pharma company boycotted the PDAB state in a specific effort to harm all state residents (not just incarcerated people). Essentially PhRMA would create a crisis with the hope that a stakeholder will sue the state Corrections officials based on the Eighth Amendment. This is utterly out of bounds on the part of PhRMA and an outrageous industry plan to undermine affordability.

The following clear criteria from federal court Eighth Amendment decisions limit the extent to which the law can be successfully applied:

* **when** ‘…serious medical harm from conditions that exceed contemporary bounds of decency in a mature society…’
* **only when** ‘…only inflicting unnecessary and wanton pain…’
* **when** ‘…prison officials know of, yet disregard, an excessive risk to a prisoner’s health…’
* **when** ‘…prison officials were subjectively, deliberately indifferent to an inmate’s health or safety…’
* **not when** ‘… delays or denials of Covid testing of asymptomatic incarcerated individuals that results from statewide test scarcity not particular to the incarcerated population…’

A drug specific boycott cannot generate an Eighth Amendment lawsuit because:

* A UPL is a statewide, all payer, all purchaser, payment limit.
* A UPL is not particular to Corrections
* A UPL is not a choice of Corrections
* A UPL is not a budgetary decision of Corrections

The court decisions and precedents should make clear that it would be hard to mount a specific Eighth Amendment challenge when a pharma company chooses to literally harm the entire state population through a retaliatory drug boycott.

A UPL will benefit all state residents who need a drug with a UPL and benefit many government agencies that purchase drugs.

PhRMA should think twice about threats to harm individuals in need of treatments; but if they continue to propose harm, and then create harm, this would not be an Eighth Amendment issue. A pharma company retaliation against the people of a state would not reflect “deliberate indifference” on the part of the state Corrections department.

Importantly, no one should accept as a fact of life that a pharmaceutical company will prohibit sales to a state if its drug is subject to a UPL.

The UPL is intended to increase access to an otherwise unaffordable drug product. This means that there will MORE sales of the product with a UPL than in the absence of the UPL. It is not acceptable for a pharma company to threaten harm to state residents because they do not like a state policy. These are threats and intimidation. Actual retaliation (rather than bluster) may not be legal.

A pharma company action to hold hostage those patients who need their drug shows intent to harm state residents (whether in the correctional system or otherwise). There are state and federal laws against monopoly behavior and market manipulation that harm consumers. This could be particularly true when *the stated intent* of the monopolist is to harm consumers in order to maintain the ability to act with impunity in the US market.

In summary, a UPL should not generate a successful Eighth Amendment lawsuit.