Update on Ball v. Kasich Lawsuit, December 7, 2018

Guardians filed a response on Friday December 7th to State and County Board Defendants Motion to Dismiss crossclaims filed by Guardians in the Ball v. Kasich class action.

Also on December 7th, Chief Judge Edmund Sargus issued an opinion rejecting Disability Rights Ohio's (DRO's) *third* attempt to certify a broad class. Judge Sargus wrote, "Plaintiffs arguments are not well taken." Arguably at this point, the case is more about Guardians' (ICF) claims against the State than it is DRO's claims. DRO originally sought to bring a case on behalf of 27,800 people. Now, it has been whittled down to maybe 400. At most. But, Guardians argue the class is *NIL* as there are *under-subscribed* exit waivers available to all ICF residents who may choose to move to waiver services.

Guardians believe our crossclaims are important and eminently necessary. Guardians are fighting back and standing up for the right of DD Medicaid beneficiaries to be informed of and ultimately access ICF care. Guardians' write in their response,

- To be clear at the outset, Guardians are all for expanding choice. But the ICF choice – the entitlement from which people can then "waive" must actually remain a viable choice.
- The gist of Guardians' Claims is simple: Defendants have systematically thwarted and denied the ICF entitlement to eligible residents. As a result, today thousands of eligible Ohioans sit on "wait lists" for "waiver" services not knowing they have an immediate entitlement to an ICF bed. This happens by design – the Defendants' design – not by accident. And it is illegal, meaning it violates both federal and state law.
- All should wonder and ask: why have ICF services decreased from 100% to less than 15% today as the choice for beneficiaries? Is it because the vast majority of eligible Ohioans reject the ICF option, or instead, because they are kept ignorant of it? The answer to that question requires discovery, not dismissal at the infancy of the case.
- *Olmstead*, of course, was simply one application of the ADA. It did not speak directly to Guardians' claims, although Justice Kennedy forewarned against the perverse result that has resulted in subsequent years from the *mis*interpretation of the holding when he wrote: "It would be unreasonable, it would be a tragic event, then, were the Americans with Disabilities Act of 1990 (ADA) to be interpreted so that States had some incentive, for fear of litigation, to drive those in need of medical care and treatment out of appropriate care and into settings with too little assistance and supervision." Fast forward twenty years and Justice Kennedy's prescient analysis leads us, sadly, to Guardians' claims today.