

To: *Law and the American Health Care System* Adopters

From: David Frankford & Sara Rosenbaum

Re: The 2012-2023 Supplement

Greetings! Happy 2023, adopters, and we hope you are all as well as possible in 2023, which is certainly a vast improvement over the prior three years although the pandemic is still with us, as is the war and it has become clear from horrendous climate events that humanity indeed does face an existential crisis. Still, we'll just continue to deal with our not-so-little niche in the world, health law in the United States.

Nothing this year comes close to last year's decision in *Dobbs*. As a reflection of that fact, our changes to the Supplement are much more humble, consisting of an insert explicating the Supreme Court's decision in *Talevski*, preserving the possibility of private causes of action to enforce Medicaid rights under a section 1983 cause of action. However, as we make clear in the note we wrote, private enforcement of Medicaid hangs by a thread. *Talevski* makes clear that this is an opinion limited to the unique factual circumstances of the case and the specific rights-creating language of the Federal Nursing Home Reform Act. How many other Medicaid provisions the Court might conclude are rights-creating is anyone's guess; what a remarkable state of affairs for a program responsible for insuring 90 million people. Further, with the change in the composition of the Court since *Armstrong*, we wonder whether that avenue for enforcing state obligations under Medicaid will remain intact. However, that is for the future and so all we have done is to indicate that the noose on private enforcement stays tight and in the future is likely to be made even tighter.

Otherwise, the Supplement remains the same as last year's. For the reasons we stated last year we have retained the pre-*Dobbs* materials on *Whole Women's Health* and associated matters discussed in the notes that follow. We left that material in for two reasons. First, a description of post-*Roe-Casey* doctrine is essential to understanding the complicated scheme that preceded *Dobbs*. Second and related, reading about that scheme—and really only presented in thumbnail form—helps set up the discussion in the notes following *Dobbs* regarding how little the Supreme Court actually decided and the consequent vast array of remaining legal questions, impacts and practical questions. We are reminded of the period in which “repeal and whatever” of the ACA was still in play. Because the ACA had by then become so embedded in so many ways in a vast sector, the possibility of somehow tearing it out of the healthcare sector meant that whatever would emerge simply could not be predicted. Likewise, the rights backed by *Roe* and *Casey* are so embedded in so many diverse ways in the fabric of the nation and health care system that it is still impossible one year later to predict precisely the multitude of *Dobbs*'s impact on law and society. For all these reasons, the prior material is presented completely intact. Of course, our decision to leave that material in and to add the section on *Dobbs* allows you, our adopters, to pick and choose and to shape what you assign to the needs of your particular courses.

Likewise we have also retained the introduction we wrote three years ago, entitled “*The Coronavirus Feeds on the Pathologies of the American Health Care System*,” to be inserted before Chapter One. Although the pandemic has receded from the minds of many, including many policy makers, it is not over, as you all know, in that we are currently in yet another summer spike, it is still very much a force in less fortunate parts of the world, chance mutations could cause it to come roaring back everywhere and in any event long-COVID is a problem with which the finance and delivery system will continue to struggle for years if not decades. Moreover, the introduction is less about the pandemic than what the pandemic has revealed about our finance and delivery

system. All the points made in that introduction still hold, unfortunately. As we wrote the past three years, you could choose to teach this material at the end of Part Two because it works just fine there too. We both have taught it on the first day of class because it is still the case that the introduction sets up almost the rest of the entire course.

As before, on the book's webpage, we have posted syllabi for you, and a set of slides that serve as an overview of the health system and its numerous problems. One of us, David, goes through the slides the first class as background, while telling the students that the slide deck is meant to be a reference source throughout the course. The deck is meant to be overinclusive so that you might pick and choose.

We sincerely hope you enjoy teaching the material,

Sara and David