

**WIDENER UNIVERSITY SCHOOL OF LAW**  
**Health Law II: Finance and Regulation (724)**

**Spring 2010**

**Professor Thaddeus Pope**

**Contacts:** Room 325; tmpope@widener.edu; 302-477-2230

**Time and Place:** Mon. 6:30 – 7:55 p.m. & Wed. 8:20 – 9:45 p.m. in L-248

**Midterm Exam:** Monday, March 8, 2010 from 6:35 to 7:50 p.m.

**Final Exam:** Thursday, May 6, 2010 from 6:30 to 9:30 p.m.

**I. Course Description**

The healthcare industry has become perhaps the most regulated in the United States. As providers and other players respond to this regulatory environment, the health law field has become a dynamic and complex area of law. And it is one evidencing a marked growth in legal employment.

Health Law can be divided into five subfields: (i) finance and regulation, (ii) public health, (iii) biotechnology, (iv) bioethics, and (v) patient care. In contrast to *Health Law I* which focuses on liability and patient care issues, *Health Law II* addresses the regulation, structure, and financing of the U.S. healthcare system.

Regulation and structure issues include: (i) how health care institutions are legally organized as business associations; (ii) the charitable tax exemption doctrine; (iii) professional relationships, including medical staff structure and disputes; (iv) fraud and abuse, including the False Claims Act, the Anti-kickback statute, and Stark regulations; (v) health care transactions, and (vi) antitrust.

Access and financing issues include: (i) common law and statutory obligations to provide access; (ii) health care spending, coverage, and reimbursement methods by private insurers; (iii) contract and tort liability of private insurers; (iv) state regulation of private insurance, including ERISA preemption; and (v) public health benefits programs, including Medicare, Medicaid, and SCHIP.

## II. Course Objectives

Upon completion of the course, students will have:

- A. A basic systematic understanding of the core legal principles surrounding health care finance and regulation.
- B. Further honed legal analysis and writing abilities, through (i) exposure to and critique of legal arguments in judicial opinions, legislative reports, and scholarly writing; (ii) participation in classroom discussion; (iii) completion of weekly problems; (iv) completion of a written midterm examination; and (v) completion of a written final examination.
- C. Integration of material learned in other classes, such as: business organizations, tax, civil procedure, and torts.

## III. Required Materials

- A. There is no casebook for this course. All course materials will be distributed through the course TWEN site. I recommend that you download these documents in PDF instead of opening and reading them in HTML.
- B. While we will cover a fair number of court cases, a substantial portion of the material will be comprised of statutes, regulations, government reports, and academic law and policy articles. Due to the rapid and current changes in this area, other materials may be added or substituted.

## IV. Class Schedule

- A. The class will meet on Mondays from 6:30 to 7:55 p.m. and on Wednesdays from 8:20 to 9:45 p.m. in Room L-248.
- B. The class will *not* meet on the following dates: (i) Monday, January 18<sup>th</sup> due to MLK Day, (ii) Monday, March 1<sup>st</sup> due to spring break, (iii) Wednesday, March 3<sup>rd</sup> due to spring break, and (iv) Wednesday, March 24<sup>th</sup> because Friday classes meet that day. The last class meets on Wednesday, April 27<sup>th</sup>.
- C. One or more class sessions *may* be offered in an online format using WebStudy. This means that you will be able to “attend” these sessions from wherever you have Internet access.
- D. Depending on class interest, I am happy to schedule an extra “review” class during the weeks before the final exam. Please email your questions to me at least 24 hours before such session to better enable me to answer them. I am also

happy to meet, at any time during the semester, both with individual students in my office, and with small groups in the 3<sup>rd</sup> Floor Faculty Conference Room.

**V. What to Do First -- in January**

- A. Register for the TWEN site with the email address that you use most regularly.
- B. If you have not used TWEN before, review the student user guide:  
<http://west.thomson.com/documentation/westlaw/wlawdoc/lawstu/twqrst06.pdf>
- C. Register for the WebStudy site (instructions TBA).
- D. Calendar key course dates into your planner.
- E. Register with the Registrar to *type* your midterm and final exams (*strongly* recommended but not required).

**VI. Attendance, Preparation, and Participation**

- A. Attendance: Under American Bar Association rules, 80% attendance is required to allow you to write the final exam. Attendance will be taken by passing class lists for signature at the start of each class session.
- B. Preparation: I employ only a moderate amount of lecture but lots of case method questions and problems. Consequently, students must come to class prepared to discuss the material assigned. All assigned cases must be read and briefed. Analyze each case using the following headings: (i) essential substantive facts, (ii) procedural posture, (iii) issues, (iv) legal principles, (v) reasoning and (vi) holding. Problems must be considered before the applicable class session. You do not need to know the correct answer (if there is one), but know the reading material and make a reasonable effort to think about the issues raised.
- C. Warning about Preparation: Brief the cases *yourself*. Do not make use of commercially prepared outlines before writing your own brief. As Professor DeWolf (at Gonzaga Law) explains, “they are like narcotics. Initially they make you feel good (by taking away your anxiety), but precisely for that reason they have a corrosive effect upon your learning. It is as though you were taking violin lessons, and instead of playing the scales you were assigned by your teacher, you bought a tape of Itzak Perlman playing those scales.”
- D. Class Participation: *All* students are expected to participate in class discussions. If illness or emergency prevents you from being fully prepared, please notify me *before* class. I reserve the right to reward exemplary class participation by raising your grade one step (*e.g.* B+ to A-). Typically, less than 10% of the class receives

such a grade “bump.” Unfortunately, given the mandatory grading curves, I must impose limits and cannot reward all levels of participation in this way.

- E. Laptops: I will use an instant-poll tool in which the entire class “votes” on the answers to orally-posed problems through a browser-supported template. Accordingly, laptops are welcome. If you do not bring a laptop, I expect that you can “vote” through a neighbor’s laptop (after refreshing the browser) or through your cell phone.
- F. TWEN Participation: Students are encouraged to participate not only in class but also through the TWEN discussion boards. Start a new thread or comment on one already in progress. The best posts: (i) are full of insight and analysis (critical thinking), (ii) reference course materials, and (iii) are clearly written (organization & style).
- G. Volunteering: I will frequently ask a question that stumps the person whom I have called on. I will give that person time to think about the question, and see if they can come up with an answer. It will sometimes happen that you have an answer, and instinctively raise your hand to volunteer. I may or may not call on you at that moment. I would prefer your attempt to answer than mine, but best of all is to continue dialogue with the student who was initially called on. Nonetheless, to move things along I may let the volunteer help. Please be sensitive to the fact that the student who is called on often suffers from stage fright, and the most obvious things slip from their mind.
- H. Ask Questions: I begin each class by asking for both administrative and substantive questions. If you want to know what pages we will cover, please ask. If you are having trouble grasping a particular doctrine, please ask. Alternatively, send an email or start a discussion thread on TWEN.
- I. Show & Tell: The topics in this class are constantly in the news and in the plot lines of movies and broadcast shows. If you notice a story that illustrates or discusses a class topic, please send me an email or start a discussion thread on TWEN.

## **VII. Classroom Etiquette**

- A. The classroom environment must be conducive to learning for all students. Distractions made possible by advances in technology may undermine that goal.
- B. Audial: During class, in addition to the usual courtesies, kindly disable and refrain from using cell phones, pagers, and any other communication device other than your laptop computer. And please mute your laptop.

- C. Visual: Please refrain from displaying wallpaper, screen savers, or other material on your laptop computer that you can reasonably expect to be offensive or distracting to other students.
- D. End Time: I will be diligent about starting the class precisely at 6:30 and 8:20 and ending it precisely at 7:55 and 9:45. In return, please do not begin to pack-up while others are still trying to be engaged in the class discourse.

## VIII. Grading

- A. Weekly Quizzes (20%) – see section IX
- B. Midterm Exam (20%) – see section X
- C. Final Exam (60%) – see section XI
- D. To make my calculations more objective and transparent, I convert all the above percentages into points. There are a total of 300 points for the course. The final exam is worth 180 points. The midterm exam is worth 60 points. The weekly quizzes are worth a total of 60 points. Grading methods are more fully explained in the next three sections.

## IX. Required Quizzes

- A. While I will provide informal, oral feedback during class discussions, I do not want the first *formal* feedback that you receive to be your graded midterm or final exam. Therefore, I will assign weekly multiple choice quizzes, each comprised of three questions.
- B. Due Date: You will complete the quizzes before class on the course TWEN site. I will announce and post the quizzes on most Wednesdays. They will be due by 5:00 p.m. the following Monday. I will review the quiz in Monday's class or post a feedback memo.
- C. Grading: I will grade the quizzes. The ten quizzes, in the cumulative, comprise 20% of your total course grade. Each quiz is worth six points (three questions worth two points each) or roughly 2% of your total course grade (300 points).
- D. TWEN: Many students have found it useful to: (i) open and print the quiz, (ii) take it "offline," and then (iii) log-in and submit their answers.

## X. Midterm Exam

- A. Date: The midterm exam is scheduled from 6:35 to 7:50 p.m. on Monday, March 8, 2010 (the Monday after spring break). While the exam is written and graded as a 60-minute exam, you will have 75 minutes in which to complete it.
- B. Weight: The midterm exam comprises 20% of your course grade, 60 of the 300 total course points.
- C. Grades: The only letter grade for this course is the final course grade based on the total 300 points. Nevertheless, to enable you to gauge your relative performance, I will assign letter grades to the midterm exams based on the mandatory curve. While the numeric scores compute (60 of 300 points), the letter grades are informational only.
- D. Everything else about the midterm exam is the same as for the final exam, except that the midterm is only one hour instead of three hours.

## XI. Final Exam

- A. Date: The final exam is scheduled from 6:30 to 9:30 p.m. on Thursday, May 6, 2010.
- B. Weight: The final exam comprises 60% of your course grade, 180 of the 300 total course points.
- C. Format and Length: The final examination will be comprised of three roughly equal parts. The first part will include multiple choice questions. The second part will include short answer questions (10 to 30 minutes). The third part will include a long essay problem (45 to 70 minutes). The essays are essentially hypothetical factual circumstances in which you will be expected to: (i) identify the legal issues, (ii) analyze the problems by applying the correct legal principles, and (iii) argue for a reasonable conclusion.
- D. Coverage: The exam will test those concepts and issues either covered in assigned readings or explored during class lectures and discussions. The exam will roughly reflect the relative time and emphasis on topics in the course. For example, fraud & abuse will be tested more heavily than Medicaid.
- E. Open Book: On the exam, you will be allowed to use any written or printed materials you choose. No electronic devices are permitted.
- F. Warning about Open Book: Having your notes and materials will *not* relieve you of the need to already know the material. Indeed, it is very probable that if you do not study for this exam as you would for a closed-book exam, then you will do very poorly and perhaps not pass.

- G. ExamSoft: I strongly encourage you to register to *type* your midterm and final exams, using your laptop and special security software that you can download from the Law School's website, <<https://www.examssoft.com/widenerlaw>>. Typing your exam allows you to create a work product in a way that will be least distracting from the substance.
- H. Grading: All exams will receive a raw score from zero to 180. The raw score is meaningful only relative to the raw score of the other students in the class. The raw score will be added to the midterm and quiz scores. That total will then be converted to a scaled score, based on the class curve. For example, if the highest raw score in the class were 240/300, then that student would receive an A. The final grades will comport with Law School's grading policies and grading curve.
- I. Grading Criteria: I have posted four years of my *Health Law* exams and exam feedback memos to the library exam database. While some of those exams (especially before 2007) had a broader coverage than we will have in this course, you can still get a good sense of the criteria that I employ in grading. In short, I look for:
1. An ability to muster relevant evidence and authority to make arguments cogently and clearly
  2. An understanding of substantive legal doctrine
  3. An appreciation for broader policy concerns that influence how legal doctrine applies to novel situations
  4. A practical appreciation for the context of care in a hospital setting and for the context of tort litigation
- J. Exam Feedback: Several weeks after the exam, I will post on the TWEN site: (i) a copy of the exam, (ii) a blank scoring sheet and explanatory memo, and (iii) model answers.
- K. Mandatory Curve: This course is cross-enrolled by J.D., L.L.M., M.J., and S.J.D. students. Only the J.D. students are subject to the mandatory curve. The M.J. grades are curved separately. I typically convert L.L.M. and S.J.D. scores into letter grades by reference to the J.D. curve.
- L. Exam Review: All grades are final; there will be no negotiations regarding revisions, except to correct any mathematical or clerical errors in computing the final score. Of course, I will be happy to go over the exam with anyone who schedules an appointment to review the exam. I will give you a copy of *your* exam answers. If – after reviewing these against the exam, the feedback memo, and your notes – you have questions about your exam, please email those to me in advance of our meeting so that I can be sufficiently prepared to ensure a productive and efficient meeting.

## **XII. Office Hours**

I look forward to talking to you outside class. There are several means of doing this:

- A. After class: I will remain in the classroom after each class for all trailing questions, until or unless we are kicked out by another class.
- B. Office: I can typically be found in my office before and after class. If this is not a convenient time, just let me know in class or by email and we can make an appointment with each other. You are welcome to drop in my office anytime, but it is best to confirm a specific time in advance. If you have a specific question, I recommend that you send me the question via email ahead of time. In this way, I can think about your question and offer my best assistance.
- C. Email: Feel free to e-mail me at tmpope@widener.edu. I will try to answer any question as soon as possible.
- D. TWEN: Whether you want to elaborate or clarify the casebook materials or class discussions, you can start a discussion thread on the TWEN site. You are encouraged to provide constructive comments within each other's threads.
- E. Lunch or Coffee: I have found that grabbing a quick lunch (or given the time of this class, coffee/tea) is a good way to get to know each other. If you and one or two other students want to share a bite/coffee/tea, please let me know.

## **XIII. TWEN Site**

The TWEN site will include the following materials:

- A. Required reading materials
- B. PowerPoint slides for each class, posted shortly before each class
- C. MP3 recordings of periodic reviews and summaries
- D. MP3 recordings of selected classes
- E. Weekly Quizzes (see section IX, *supra*)
- F. Statutes, cases, and other materials
- F. Announcements concerning health law writing and career opportunities

**Warning!!** Do not permit the availability of these materials to deter you from preparing and participating in class. I provide these materials to supplement and enhance classroom learning, not to substitute for it. It is important to remember that knowledge acquisition is only one small part of law school education. I plan to do little lecturing during classes. Lectures may seem to provide more value – more content, more certainty. It may seem like you are “learning” more. But this would be poor preparation for the practice of law

where there is little certainty. Furthermore, nonattendance is not an option given University and ABA attendance requirements, and the grading policy described above.

#### **XIV. Study Aids and Reference Materials**

Despite the prevalence of health law courses in U.S. law schools, there are, as yet, few student-oriented ancillary materials. But there are numerous clear and lucid law review articles and background reports. I will provide copies of, or links to, the more useful of these materials on a topic-by-topic basis. And you have direct access to most of these through HeinOnline, Westlaw, and other databases.

There are also some good reference books. You really *do not* need to use any of these sources. I list them here only should you want to consult them to get more depth on certain issues.

##### **A. Study Aids**

1. MARCIA M. BOUMIL ET AL., *MEDICAL LIABILITY IN A NUTSHELL* (West 2d ed. 2003).
2. BARRY R. FURROW, THOMAS L. GREANEY, SANDRA H. JOHNSON, TIMOTHY STOLTZFUS JOST & ROBERT L. SCHWARTZ, *HEALTH LAW* (2d ed. West Hornbook series 2000) (adapted from the 3-volume practitioner series).
3. MARK A. HALL, IRA MARK ELLMAN & DANIEL S. STROUSE, *HEALTH CARE LAW AND ETHICS IN A NUTSHELL* (2d ed. West 1999).
4. ROBERT D. MILLER, *PROBLEMS IN HEALTH CARE LAW* (9<sup>th</sup> ed. Jones & Bartlett 2006).

##### **B. Study Aids for Non-Lawyers**

1. TONIA D. AIKEN, *LEGAL AND ETHICAL ISSUES IN HEALTH OCCUPATIONS* (Elsevier 2008).
2. GEORGE J. ANNAS, *THE RIGHTS OF PATIENTS: THE AUTHORITATIVE ACLU GUIDE TO THE RIGHTS OF PATIENTS* (3d ed. NYU 2004).
3. ROBERT I. FIELD, *HEALTH CARE REGULATION IN AMERICA: COMPLEXITY, CONFRONTATION, AND COMPROMISE* (Oxford 2006).
4. BONNIE FREMGEN, *MEDICAL LAW AND ETHICS* (3d ed. Prentice Hall 2008).

5. CARL HORN, LAW FOR PHYSICIANS: AN OVERVIEW OF MEDICAL LEGAL ISSUES (AMA 2000).
6. JANICE L. KAZMIER, HEALTH CARE LAW (Cengage Learning 2008).
7. MARCIA A. LEWIS & CARL D. TAMPARO, MEDICAL LAW, ETHICS, AND BIOETHICS (6<sup>th</sup> ed. F.A. Davis 2007).
8. GEORGE D. POZGAR & NINA SANTUCCI, LEGAL ASPECTS OF HEALTH CARE ADMINISTRATION (Jones & Bartlett 10th ed. 2007).
8. RONALD W. SCOTT, PROMOTING LEGAL AND ETHICAL AWARENESS: A PRIMER FOR HEALTH PROFESSIONALS AND PATIENTS (Elsevier 2008).

C. **General Reference Materials**

This is, of course, a highly select list. I have not included CLE materials, law review articles, bar journal articles, medical journal articles, or monographs. Many of these types of sources are suggested in other materials. Plus, I will post or link many of these shorter sources on the TWEN site.

1. ABA, ANTITRUST HEALTHCARE HANDBOOK (3<sup>rd</sup> ed. 2005).
2. AMERICAN COLLEGE OF LEGAL MEDICINE, LEGAL MEDICINE (7<sup>th</sup> ed. Elsevier 2007).
3. AMERICAN HEALTH LAWYERS ASSOCIATION, FUNDAMENTALS OF HEALTH LAW (4<sup>th</sup> ed. 2008), Westlaw database AHLA-PAPERS.
4. AMERICAN HEALTH LAWYERS ASSOCIATION, HEALTH LAW PRACTICE GUIDE (West CBC looseleaf) (3 volumes), Westlaw database HTHLPG.
5. ALISON BARNES ET AL., HEALTH CARE LAW DESK REFERENCE (ALI-ABA 2001).
6. JULIE A. BARNES, MANAGED CARE LITIGATION (ABA-BNA 2005 & Supp. 2008).
7. LINDA A. BAUMANN, HEALTH CARE FRAUD AND ABUSE: PRACTICAL PERSPECTIVES (2d ed. ABA-BNA 2007 & Supp. 2008).
8. SCOTT BECKER, HEALTH CARE LAW: A PRACTICAL GUIDE (Lexis 2005), available on LEXIS.
9. BNA HEALTH LAW AND BUSINESS LIBRARY, WEB PORTFOLIOS LIBRARY (BNA Online) (also available in print or CD-ROM).

10. CHRISTINA W. FLEPS, HEALTH CARE FRAUD AND ABUSE COMPLIANCE MANUAL (Aspen looseleaf).
11. ALICE GOSFIELD, MEDICARE AND MEDICAID FRAUD AND ABUSE (Thomson/West 2008).
12. DEAN M. HARRIS, CONTEMPORARY ISSUES IN HEALTHCARE LAW AND ETHICS (Health Admin. Press 2003).
13. KAISER FAMILY FOUNDATION, <http://www.kff.org> (excellent reports on Medicare, Medicaid, and access issues).
14. CAROL C. LAM, PROSECUTING AND DEFENDING HEALTH CARE FRAUD CASES (ABA-BNA 2002 & Supp. 2008).
15. PAUL C. LASKY ED., HOSPITAL LAW MANUAL (Aspen 5-vol. looseleaf).
16. BRYAN A. LIANG, HEALTH LAW & POLICY: A SURVIVAL GUIDE TO MEDICOLEGAL ISSUES FOR PRACTITIONERS (Butterworth Heinemann 2000).
17. ROBERT W. LUNDY ET AL. EDS, TREATISE ON HEALTH CARE LAW (Matthew Bender 5-vol. looseleaf) (available on Lexis).
18. JOHN P. MARREN, MANAGED CARE LAW MANUAL (Aspen looseleaf).
19. JOHN J. MILES, HEALTH CARE AND ANTITRUST Law (West/CBC 2008 (4 volumes)).
20. MARK M. MOY, EMTALA ANSWER BOOK (Aspen 2008).
21. CLAIRE C. OBADE, PATIENT CARE DECISION MAKING: A LEGAL GUIDE FOR PROVIDERS (West CBC looseleaf), Westlaw database PCAREDM.
22. STEVEN E. PEGALIS, AMERICAN LAW OF MEDICAL MALPRACTICE (West CBC 3d ed. 2005).
23. FAY A. ROZOVSKY, CONSENT TO TREATMENT: A PRACTICAL GUIDE (3d ed. Aspen 2006).

C. **Reference Materials by Topic**

| <b>Medicare</b>   | <b>Medicaid</b>   | <b>Private Insurance</b>                  |
|---|---|---|
| Becker ch.7<br>Furrow ch.11<br>Kaiser primers, tutorials<br>Miller ch.9 | Becker ch.7<br>Furrow ch.12<br>Kaiser primers, tutorials<br>Miller ch.9 | Kaiser primers, tutorials<br>Miller ch.10 |

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|--|---|---|
| <p style="text-align: center;"><b>Antitrust</b></p> <p>ABA<br/> ACLM ch.8<br/> Becker ch.9<br/> BNA<br/> Furrow ch.14<br/> Hall ch.4<br/> Lasky ch.3<br/> Lundy ch.9<br/> Marren ch.5<br/> Miles<br/> Miller ch.13</p> | <p style="text-align: center;"><b>Corporate Practice of<br/>Medicine</b></p> <p>BNA<br/> Hall ch.5</p> <hr/> <p style="text-align: center;"><b>EMTALA</b></p> <p>Furrow ch.10<br/> Lundy ch.11<br/> Moy</p> | <p style="text-align: center;"><b>Charitable tax exemption</b></p> <p>Becker ch.4<br/> BNA<br/> Furrow ch.2<br/> Hall ch.5<br/> Lasky ch.19<br/> Lundy ch.3<br/> Miller ch.9</p>          |
| <p style="text-align: center;"><b>False Claims Act</b></p> <p>Baumann<br/> Becker ch.5<br/> BNA<br/> Fleps ch.2<br/> Furrow ch.13<br/> Gosfield ch.5<br/> Lam<br/> Lasky ch.22<br/> Marren ch.12</p>                   | <p style="text-align: center;"><b>Antikickback</b></p> <p>Baumann<br/> Becker ch.5<br/> BNA<br/> Fleps ch.3<br/> Furrow ch.13<br/> Gosfield ch.2<br/> Lam<br/> Lasky ch.22<br/> Marren ch.12</p>            | <p style="text-align: center;"><b>Stark</b></p> <p>Baumann<br/> Becker ch.5<br/> BNA<br/> Fleps ch.4<br/> Furrow ch.13<br/> Gosfield ch.3<br/> Lam<br/> Lasky ch.22<br/> Marren ch.12</p> |
| <p style="text-align: center;"><b>Labor &amp; Employment</b></p> <p>Furrow ch.4<br/> Hall ch.3<br/> Lasky ch.10<br/> Lundy ch.5</p>  | <p style="text-align: center;"><b>Medical staff</b></p> <p>ACLM ch.3<br/> Becker ch.16<br/> Furrow ch.4<br/> Hall ch.3<br/> Lasky ch.15<br/> Lundy ch.6<br/> Miller ch.5</p>                                | <p style="text-align: center;"><b>ERISA</b></p> <p>J. Barnes<br/> Furrow ch.8<br/> Hall ch.5<br/> Marren ch.7</p>   |

**XV. Course Reading Outline**

The outline below is intended to give you a sense of the course coverage. It is *not* a reading schedule. Closely (but not exactly) following its sequence, I will give the specific assignment for the following week during the prior week. The current assignment will always be posted on the TWEN home page. Old assignments will be collected as a TWEN “document.” Other legal sources *will be* added or substituted.

## 1. Health Care Cost and Access

### 1.1. Expanding Access

- Kaiser Family Foundation, *The Uninsured: A Primer* (Oct. 2009).
- DOJ-FTC, *Improving Health Care: A Dose of Competition* ch.5, at 24-28 (2004).

### 1.2. Controlling Costs

## 2. Private Health Insurance

### 2.1. Introduction to Insurance

- Kaiser Family Foundation, *How Insurance Works Primer* (2008).
- DOJ-FTC, *Improving Health Care: A Dose of Competition* ch.5, at 6-14 (2004).
- Tim Jost, *Regulation of Private Health Insurance* (NASI, RWJF 2009).

### 2.2. Contract Liability

- *Mt. Sinai v. Zorek* (N.Y. 1966).
- *Bechtold v. PHP* (7th Cir. 1994).
- *Lubeznik v. HealthChicago* (Ill. App. 1994).
- *Harris v. Mutual Omaha* (S.D. Ind. 1992).
- *Hughes v. Blue Cross N. Cal.* (Cal. App. 1989).
- *Katskee v. BC/BS* (Neb. 1994).

### 2.3. Tort Liability (direct liability for UR)

- *Wickline v. California* (Cal. App. 1986).
- *Pagarigan v. Aetna U.S. Healthcare of California* (Cal. App. 2005).

### 2.4. ERISA 502(a) Preemption of Contract and Tort Liability

- Congressional Research Service, *Summary ERISA* (2008).
- *Aetna v. Davila* (U.S. 2004).
- *Pegram v. Herdrich* (U.S. 2000).
- *Rush Prudential v. Moran* (U.S. 2002).

### 2.5. ERISA Actions: 502(a) Standard of Review

#### 2.5.1. Pre-Glenn

- *Lowell v. DWM Plan* (D. Me. 2004).
- *Fay v. Oxford Health Plan* (2d Cir. 2002).
- *Chambers v. Coventry Health* (E.D. La. 2004).
- *Bullwinkel v. New England Mutual* (7th Cir. 1994).
- *Doe v. Group Hosp. & Medical Servs.* (4th Cir. 1993).

#### 2.5.2. Post-Glenn

- *Metro Life v. Glenn* (U.S. 2008).
- *Klein v. Central States* (N.D. Ohio 2009).

## 2.6. ERISA 514 and State Regulation

- Butler, *Impact of ERISA on State Coverage Initiatives* (RWJF 2009).
- *Golden Gate Rest. Assn v. San Francisco* (on cert 2010).

## 2.7. ERISA 514 and Self Insurance

- *American Med. Sec. v. Bartlett* (4<sup>th</sup> Cir. 1997).

## 2.8. Federal Regulation

### 2.8.1. Introduction

- DOJ-FTC, *Improving Health Care: A Dose of Competition* ch.5, at 1-6 (2004).

### 2.8.2. ADA

- 42 U.S.C. §§ 12101-02, 12181, 12188, 12201, 12205 (2009).
- *Templet v. BC/BS* (E.D. La. 2000).

### 2.8.3. GINA

- GINA, Pub. L. No. 110-233 §§ 2, 101-106 (2009).
- Rothstein, *Is GINA Worth the Wait?* J. L Med. Ethics (2008).

### 2.8.4. COBRA

- A.R.R.A Amendments (2009).
- Dept. Labor on COBRA (2009).

### 2.8.5. HIPAA

- Dept. Labor on HIPAA (2009).

## 2.9. Insurance Reform

- H.R. 3962, 111<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2009) (excerpts).
- Tim Jost, *HDHP & HSA* (2009).

# 3. Public Health Insurance

## 3.1. Introduction

- DOJ-FTC, *Improving Health Care: A Dose of Competition* ch.5, at 14-21 (2004).

## 3.2. Medicare

### 3.2.1. Eligibility and Benefits

### 3.2.2. Payments (esp. DRG), Administration, and Appeals

- Congressional Research Service, *Medicare Primer* (2009).
- [update depending on H.R. 3590]

## 3.3. Medicaid

- Kaiser Family Foundation, *Medicaid Primer* (2009).

## 3.4. CHIP

- Public L. No. 111-3 (2009) (excerpts).

## 4. Non-insurance Access

### 4.1. Common law duties

### 4.2. Statutory duties

### 4.3. EMTALA

#### 4.3.1. Statute and regulations

- 42 U.S.C. § 1395dd.
- 42 C.F.R. § 489.24.

#### 4.3.2. Scope of duty to provide treatment

- *Moses v. Providence Hosp.* (on cert. 2010).
- *Torretti v. Main Line Hosp.* (3d Cir 2009).
- *Kaufmann v. Franz* (E.D. Pa. 2009).

#### 4.3.3. Not a magic band-aid: limited ED resources

- American College of Emergency Physicians, *National Report Card on the State of Emergency Medicine* (2010).

#### 4.3.4. Transition to regulation and compliance

- CMS, *State Operations Manual: Interpretive Guidelines – Responsibilities of Medicare Participating Hospitals in Emergency Cases* (May 29, 2009).
- GAO, *Actions to Terminate Problem Hospitals* (1991).

## 5. Fraud and Abuse

### 5.1. Introduction

- Paul E. Kalb, *Health Care Fraud and Abuse* JAMA (1999).

### 5.2. False Claims Act

#### 5.2.1. Government Enforcement

- 31 U.S.C. §§ 3729-33 (as amended 2009).
- Rhoad, *False Claims Act* (2009).
- *USA v. Krizek* (D.D.C. 1994).
- *USA v. Krizek* (D.C. Cir. 1997).

#### 5.2.2. Qui Tam actions

#### 5.2.3. Implied certification theory

#### 5.2.4. FCA to address “quality” of care

- *Mikes v. Strauss* (2d Cir. 2001).

#### 5.2.5. Corporate Integrity Agreements

- <http://oig.hhs.gov/fraud/cias.asp>

### 5.3. Delaware False Claims Act

- <http://oig.hhs.gov/fraud/falseclaimsact.asp>

## 5.4. Anti-Kickback Statute

### 5.4.1. Statute and regulations

- Anti-Kickback Statute, 42 U.S.C. § 1320a-7b.

### 5.4.2. Prohibition and safe harbors

- *U.S. v. Greber* (3d Cir. 1985).
- *U.S. v. Starks* (11<sup>th</sup> Cir. 1998).
- *Hanlester v. Shalala* (9<sup>th</sup> Cir. 1995).
- OIG Advisory Opinion 01-2 (Mar. 20, 2001).
- *U.S. v. Anderson* (D. Kan. 1999) (excerpts on underlying offense).

## 5.5. Stark I, II, and III

### 5.5.1. Introduction

- Patricia A. Rogers, *Stark for Beginners*, Okla B.J. (2007).
- Alice Gosfield, *Know When the Stark Law Applies to You*, Med. Econ. (2009).

### 5.5.2. Statute and Regulations

- 42 U.S.C. § 1395nn.
- 42 C.F.R. §§ 411.350-361.
- <http://www.cms.hhs.gov/physiciansselfreferral>

### 5.5.3. Cases

- *United States v. Carlisle HMA* (3d Cir. 2009).
- *Goodstein v. McClaren Reg. Med. Ctr.* (E.D. Mich. 2002).

## 6. Medical Staff Issues

### 6.1. Introduction: Hospital v. Medical Staff

- COPs, 42 C.F.R. § 482.22.

### 6.2. Bylaws

- *St. John Med. Staff v. Med. Ctr.* (S.D. 1976).
- *Mahan v. Avera St. Lukes* (S.D. 2001).

### 6.3. Staff Privileges, Credentialing, Peer Review

- *Greisman v. Newcomb Hosp.* (N.J. 1963).
- *Sokol v. Akron Gen. Med.* (6<sup>th</sup> Cir. 1999).
- *Mateo-Woodburn v. Fresno Hosp.* (Cal. App. 1990).
- *Nanavati v. Burdette Memorial Hosp.* (3d Cir. 1988).

### 6.4. Immunity

- HCQIA, 42 U.S.C. §§ 11101 et seq.
- *Poliner v. Texas Health* (5th Cir. 2008).

#### 6.5. Membership in MCO Networks

- *Potvin v. Metro Life Ins.* (Cal. 2000).

## 7. Labor & Employment

### 7.1. Employment-at-Will

- *Salomon v. Our Lady of Victory Hosp.* (2d Cir. 2008).
- *Wright v. Shriners Hosp.* (Mass. 1992).

### 7.2. N.L.R.A.

- 29 U.S.C. § 151.
- *Oakwood Healthcare* (N.L.R.B. 2006).
- *NYU Med. Ctr. v. N.L.R.B.* (2d Cir. 1998).

## 8. Charitable Tax Exemption

### 8.1. Basic Requirements

- For-profit v. Non-profit
- 26 U.S.C. § 501.

### 8.2. Charitable Purpose

#### 8.2.1. Traditional requirements

- IRS Revenue Ruling 69-545.
- *Simon v. E. Ky. Welfare Orgs.* (U.S. 1976).

#### 8.2.2. More demanding requirements

- *Utah Cty. v. Intermountain Healthcare* (Utah 1986).
- Introduction: Senate Joint Committee on Taxation, *Present Law and Background Relating to the Tax-Exempt Status of Charitable Hospitals* (Sept. 12, 2006).
- IRS Form 990, Schedule H.

### 8.3. Private Inurement and Private Benefit

- 26 U.S.C. § 501

### 8.4. Excess Benefit

- 26 U.S.C. § 4958.
- Rev. Rul. 97-21

### 8.5. UBIT

- 26 U.S.C. § 513.

## 9. Antitrust

### 9.1. Introduction

### 9.2. Sherman Act and Boycotts

- 15 U.S.C. § 1.
- *In re Mich. St. Med. Soc’y* (F.T.C. 1983).
- *F.T.C. v. Indiana Fed. Dentists* (U.S. 1986).
- *Cal. Dental v. F.T.C.* (U.S. 1990).

### 9.3. Clayton Act and Mergers

#### 9.3.1. Statute

- 15 U.S.C. § 18.

#### 9.3.2. Herfindahl Hirschman Index

- <http://www.justice.gov/atr/public/testimony/hhi.htm>
- <http://www.unclaw.com/chin/teaching/antitrust/herfindahl.htm>

#### 9.3.3. Cases

- *F.T.C. v. Tenet* (8<sup>th</sup> Cir. 1999).
- *In re Evanston Nw. Hosp.* (F.T.C. 2005).
- *HCA v. F.T.C.* (7<sup>th</sup> Cir. 1986).

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### 10. Joint Ventures

- General Counsel Memo 39,862.
- Revenue Ruling 98-15.
- Revenue Ruling 2004-51.
- *Redlands Surgical v. IRS* (T.C. 1999).
- OID Advisory Opinion 03-12.
- *St. David’s Health Care System v. U.S.* (5th Cir. 2003).

### 11. Corporate Practice of Medicine

- *Berlin v. Sarah Bush Lincoln* (Ill. 1997).

### 12. Certificates of Need

- *Health Council v. Humana* (Ark. 1983).