

Syllabus

Competition Law in Health Care

LAW JD 867 A1

Boston University School of Law

Spring 2020

Professor Dionne Lomax
Questrom School of Business
dlomax@bu.edu
Office hours: T/Th 11:00-12:30
Questrom 660

Professor Kathy Zeiler
School of Law
kzeiler@bu.edu
Office hours: W 3:20-4:20
Law Tower 1604B

Class sessions: Wednesdays 4:20-6:20
 Law Complex, Redstone 519

Assistant: Bridget Donovan
Phone: 617.353.2885
Email: donovanb@bu.edu
Office: Law Tower 1604

Description

This seminar will examine the role that competition law and regulation play in the health care industry in the United States. Antitrust enforcement agencies believe strongly that promoting competition in health care is critical to control health care costs. Many of those involved in the health care industry disagree. Some health care professionals argue that we can cut costs and improve care only through increased collaboration and cooperation. The seminar will consider the clash of these views by examining how competition is treated in the Affordable Care Act, what weight antitrust enforcement agencies give to values other than competition, the accelerating trend towards consolidation in the health care industry today, and integration among providers, including increasing hospital acquisition of physician groups.¹

Per American Bar Association guidelines and BU Law's Credit Hour Policy,² you should anticipate a workload of at least 42.5 hours per credit for the semester, which includes both in-class and out-of-class time. This is roughly 10 hours each week the seminar is in session (2 hours in class and 8 hours outside of class on average).

Materials

We will read a variety of academic journal articles and various other materials. The reading list that follows is divided into 13 sets of readings that correspond to the 13

¹ This seminar does not satisfy the upper-class writing requirement. We do not offer the CR/NC/H option. A student who fails to attend the initial meeting, or to obtain permission to be absent from either the instructor or the Registrar, may be administratively dropped from the seminar. Students who are on a waitlist for a seminar are required to attend the first seminar meeting to be considered for enrollment.

² <http://www.bu.edu/law/current-students/jd-student-resources/curricular-requirements/jd-degree-requirements/#credit-requirements>

seminar sessions. Announcements and seminar documents will be posted to the Blackboard site.

Optional Background Resources:

Christine White, Saralisa Brau, and David Marx Jr. ANTITRUST IN HEALTHCARE: A COMPREHENSIVE GUIDE (2nd ed.). American Health Lawyers Association (June 2017).

ANTITRUST HEALTH CARE HANDBOOK (4th ed.) ABA Section of Antitrust Law (Feb. 2010).

DOJ on Antitrust Regulation in Health Care
<https://www.justice.gov/atr/health-care>

FTC/DOJ. 2004. Improving Health Care: A Dose of Competition

Chapter 4. Competition Law: Hospitals

www.usdoj.gov/atr/public/health_care/204694/chapter4.htm

Chapter 6. Competition Law: Insurers

www.usdoj.gov/atr/public/health_care/204694/chapter6.htm

Chapter 7: Industry Snapshot and Competition Law: Pharmaceuticals

<https://www.justice.gov/atr/chapter-7-industry-snapshot-and-competition-law-pharmaceuticals>

To help us learn the correct pronunciation of your name and your preferred pronouns, please utilize the “Name Coach Recording” tool on the left hand menu of the course’s BlackBoard site.

Objectives

Through the readings and class discussions, this seminar will explore theories, arguments and empirical findings related to competition in health care and health care insurance markets. In addition to developing knowledge and understanding of legal theory, this course will develop legal analysis, oral and written communication skills, and reasoning skills.

Specifically, upon successfully completing this seminar, you should be able to:

1. Display knowledge of the theory behind basic competition law as it relates to health care and health care insurance markets;
2. Deploy legal reasoning at the intermediate level;
3. Identify the strengths and weaknesses of theories and arguments related to the relevant doctrine and existing and proposed regulations;
4. Identify and critique the rationale for substantive competition law;

5. Recognize and evaluate policy issues presented by competition law; and
6. Demonstrate intermediate competency in teamwork skills and in oral and written communication.

Assessment

Whether and at what level you've met the course objectives will be assessed through evaluation of in-class discussions (as both discussion leaders and participants) and response papers.

Grades will be determined as follows:

In-class participation	20%
Discussion leads	30%
Response papers	50%

In-class participation: We expect you to be fully prepared for class and to participate regularly and thoughtfully during each class session. Attendance is required. If you expect to miss class, advanced notification by email to us is required. Absences will be excused for limited reasons.³

Discussion leads: Following drop/add, you will be assigned some number of class sessions for which you will be expected to work with other discussion leaders to plan and lead the discussion of the assigned readings during class. Discussion plans must be emailed to us **no later than noon on the Monday prior to the class you will lead**. Comments will be returned to you no later than 4pm the following day. Each member of the group will receive the same grade.

Response papers: Starting in week 4, you will be required to submit (through Blackboard) short summaries of and responses to the required reading materials. Start each memo by summarizing, in one page or less, the main ideas and contributions of the materials. The remainder of the memo should offer responses. Examples of responses include critiques, possible implications of the arguments the author does not address, challenges to the author's assumptions and/or methodology, and ideas for possible extensions or unexplored avenues worth considering. The memo also should include at least one discussion question (highlighted in bold type) that discussion leaders might take up.

All seminar participants will be able to access the submitted memos. We suggest taking some time to read a few of the memos before coming to class.

³ Valid excuses include (1) serious medical situation or family emergency; (2) religious observance; (3) official participation in a Law School approved moot court event held out of town; (4) rescheduled class; (5) other comparably urgent reasons, and not including vacation plans, minor illness, or work conflicts. Absences due to job interviews will be excused, but attempts should be made to schedule interviews at times other than when class is in session.

Each memo should be at least two but not more than three pages in length, typed in 12-point, Times New Roman font, double-spaced, and with one-inch margins all around. No footnotes are allowed. References can be included on an additional page. Please include page references when you make specific claims about what the author wrote. Memos (in word format) must be uploaded to the Blackboard site by **5 p.m. on the Monday prior to each class session**. Graded memos will be returned to you at the beginning of the class session.

The response paper portion of your grade will be based on your 8 highest scoring memos. Each memo will be graded on a scale from 1 to 5. Memo grades will be reduced 1 point for each day late (prorated). You will earn a 0 on weeks that you do not upload a memo by Wednesday at noon.

Although not a part of our formal assessment, we expect every student to exercise proper professionalism in conversations with colleagues, conversations with faculty and staff, and on-line communications such as email, etc.

Introduction

1. JANUARY 15: CHALLENGES IN THE HEALTH CARE INDUSTRY

Atul Gawande, Overkill, *The New Yorker*, May 4, 2015

Quealy and Sanger-Katz, The Experts Were Wrong About the Best Places for Better and Cheaper Health, *New York Times*, Dec 15, 2015

Discussion Preparation (do not turn in):

Make a list of problems plaguing the health care industry. Do you think we experience similar problems in other industries, e.g., the airline industry, the auto industry? Why or why not?

2. JANUARY 22: VIEWS ON THE BEGINNINGS OF COMPETITION REGULATION IN HEALTH CARE

James Blumstein. 1994. Health Care Reform and Competing Visions of Medical Care: Antitrust and State Provider Cooperation Legislation, *Cornell Law Review*, 1459-1506

Peter Carstensen. 1995-1996. The Reconstruction of Legal-Economic Relations: Achieving Workable Competition, 153-164

Clark Havighurst. 2001. Health Care as a (Big) Business: The Antitrust Response, *Journal of Health Politics, Policy and Law*, 939-954

Discussion Preparation:

Make a list of each author's fundamental concerns. What assumptions are behind the concerns? In what ways are the various concerns and assumptions consistent with the others or in conflict with them?

3. JANUARY 29: SOME MODERN ISSUES—INTEGRATED DELIVERY SYSTEMS

Julie Barnes. 2012. Moving Away From Fee-for-Service. *The Atlantic*, 1-5

Richard B. Amerling. 2015. Should the U.S. Move Away From Fee-For-Service Medicine? *The Wall Street Journal*, 1-6

Paul B. Ginsburg. 2005. Competition in Health Care: Its Evolution Over the Past Decade, *Health Affairs*, 1-11

Roscoe B. Starek III. 1996. Antitrust Issues in Integrated Health Care Delivery Systems, FTC Statement

Alain C. Enthoven. 2009. Integrated Delivery Systems: The Cure for Fragmentation, *American Journal of Managed Care*, S284-S290

Sharis A. Pozen. 2010. U.S. Department of Justice, Statement of Sharis A. Pozen, Antitrust Laws and Their Effects on Healthcare Providers, Insurers, and Patients," 1-17

Discussion Preparation:

What features of the health care delivery system make competition regulation necessary? What features make such regulation difficult? Why?

Supply Side**4. FEBRUARY 5: PROVIDER CONSOLIDATION AND ITS EFFECT ON COMPETITION**

Austin Frakt. 2019. Hospital Mergers Improve Health? Evidence Shows the Opposite, *The New York Times* (2 pages)

Deborah Feinstein. 2014. Antitrust Enforcement in Health Care: Proscription, not Prescription, Fifth Annual Accountable Care Organization Summit (16 pages)

Gregory Vistnes. 1999-2000. Hospitals, Mergers, and Two-Stage Competition, *Antitrust Law Journal* (22 pages; skip over the math)

Medicare Payment Advisory Commission (2017), *Report to the Congress: Medicare and the Health Care Delivery System*, Washington (DC), **Chapter 10**, Provider Consolidation: The Role of Medicare Policy (21 pages)

Mark Holmes. 2015. Financially Fragile Rural Hospitals: Mergers and Closures, *North Carolina Medical Journal* (4 pages)

5. FEBRUARY 12: PRICE TRANSPARENCY

CMS Final Rule Regarding Price Transparency Requirements for Hospitals to Make Standard Charges Public (effective Jan 1, 2021) (22 pages)

Federal Trade Commission Comments Regarding Amendments to the Minnesota Government Data Practices Act Regarding Health Care Contract Data, 2015 (8 pages)

Katherine L. Gudiksen, Samuel M. Chang, and Jaime S. King. 2019. The Secret of Health Care Prices: Why Transparency is in the Public Interest (20 pages)

Anna D. Sinaiko and Meredith B. Rosenthal. 2016. Examining A Health Care Price Transparency Tool: Who Uses It, And How They Shop for Care, *Health Affairs* (9 pages)

Altrarum Health Care Value Hub, Research Brief No. 27, June 2018 (5 pages)

6. FEBRUARY 19: MEDICAL SCHOOLS AND LICENSURE

Note: The first article in this set addresses the important issue of the impacts of barriers to entry on minorities. The language is ugly and offensive, but we're hoping it will help us recognize the history and provide a starting point for working through the implications.

Reuben A. Kessel. 1970. The A.M.A. and the Supply of Physicians, *Law & Contemp. Probs.* (16 pages)

George L. Priest. 2010. Timing “Disturbances” in Labor Market Contracting: Roth’s Findings and the Effects of Labor Market Monopsony, *J Labor Econ.* (25 pages)

Edward C. Halperin and Robert B. Goldberg. 2016. Offshore Medical Schools Are Buying Clinical Clerkships in U.S. Hospitals: The Problem and Potential Solutions, *Academic Medicine* (5 pages)

Sandeep Vaheesan and Frank Pasquale. 2018. The Politics of Professionalism: Reappraising Occupational Licensure and Competition Policy, *Ann. Rev. of L. and Soc. Sci.* (13 pages)

7. FEBRUARY 26: CERTIFICATE OF NEED REGULATION

Milton I. Roemer. 1961. Hospital Utilization and the Supply of Physicians, *JAMA* (4 pages)

Patrick John McGinley. 1995. Beyond Health Care Reform: Reconsidering Certificate of Need Laws in a “Managed Competition” System, *FSU Law Review* (**through Part IV**) (32 pages)

Joseph M. Miller. 2008. Competition in Healthcare and Certificates of Need. Statement of the Antitrust Division, US DOJ Before the FL State Committee on Health and Human Services Appropriations (9 pages)

Emily Whelan Parento. 2016. Certificate of Need in the Post-Affordable Care Act Era, *Kentucky Law Journal* (**intro 205-209, Part IV 237-255**) (24 pages)

8. MARCH 4: THE IMPACT OF INSURER CONDUCT AND MERGERS ON COMPETITION

American Medical Association. 2019. Update to Competition in Health Insurance: A Comprehensive Study of U.S. Markets (**pages 1-9 only; skim tables**) (9 pages)

FTC/DOJ, 2004. Improving Health Care: A Dose of Competition, Chapter 6: Competition Law: Insurers (**Parts I, II and IV**) (24 pages)

Jose R. Guardo, David W. Emmons, Carol K. Kane. 2013. The Price Effects of a Large Merger of Health Insurers: A Case Study of United Sierra-Health, Health Management, *Policy and Innovation* (**skip appendix**) (11 pages)

Leemore Dafny. 2015. Health Insurance Industry Consolidation: What Do We Know From the Past, Is It Relevant in Light of the ACA, and What Should We Ask?, Testimony before Senate Committee on the Judiciary (16 pages)

W. Stephan Smith. 2013. When Most-Favored is Disfavored: A Counselor's Guide to MFNs, *Antitrust* (4 pages)

Demand Side

9. MARCH 18: INSURERS AS AGGREGATORS OF CONSUMERS

FTC/DOJ, 2004. Improving Health Care: A Dose of Competition, Chapter 6: Competition Law: Insurers (**Part III**) (7 pages) (**posted in Session 8 materials**)

Asako S. Moriya et al. 2010. Hospital Prices and Market Structure in the Hospital and Insurance Industries, *Health Economics, Policy and Law* (18 pages)

C. Scott Hemphill and Nancy L. Rose. 2018. Mergers that Harm Sellers, *Yale Law Journal* (32 pages)

10. MARCH 25: CONSUMERS AND INFORMATION

Mark A. Hall and Carl E. Schneider. 2012. Can Consumers Control Health-Care Costs?, Forum for Health Economics and Policy (**skip Parts 3 and 4**) (17 pages)

Amitabh Chandra et al. 2016. Health Care Exceptionalism? Performance and Allocation in the US Health Care Sector, *American Economic Review* (**Introduction, Part I, Part II A and B (skip C), Part IIIA, Part IV and Conclusion**) (17 pages)

Keith M.M. Ericson et al. 2017. Nudging Leads Consumers in Colorado to Shop but not Switch ACA Marketplace Plans, *Health Affairs* (7 pages)

Chernew et al. 2019. Are Health Care Services Shoppable? Evidence from the Consumption of Lower-Limb MRI Scans, NBER Working Paper (**skip appendix**) (15 pages)

Innovation

11. APRIL 1: PHARMACEUTICALS AND IMPORTATION PROPOSALS

David Henry and Andrew Searles. 2012. Pharmaceutical Pricing Policy. In MDS-13: MANAGING ACCESS TO MEDICINES AND HEALTH TECHNOLOGIES (20 pages)

Patricia M. Danzon. 2014. Competition and Antitrust Issues in the Pharmaceutical Industry (Report to the Regional Competition Center for Latin America) (**pp. 19-39**) (21 pages)

Margaret Kyle. 2010. Parallel Trade in Pharmaceuticals: Firm Responses and Competition Policy. In INTERNATIONAL ANTITRUST LAW & POLICY: FORDHAM COMPETITION LAW (19 pages)

12. APRIL 8: STATE REGULATION OF TELEMEDICINE

Telemedicine Policy by State as of November 2019 (skim through first column)

Carl F. Ameringer. 2011. State-Based Licensure of Telemedicine: The Need for Uniformity but not a National Scheme. *Journal of Health Care Law & Policy* (31 pages)

2016 FTC Letter to Alaska State Legislature re: stance on telehealth provisions in proposed state legislation (7 pages)

Shirley V. Svorny. 2017. Liberating Telemedicine: Options to Eliminate the State-Licensing Roadblock. *Policy Analysis, Cato Institute* (12 pages)

Theodosia Stavroulaki. 2019. Mind the Gap: Antitrust, Health Disparities and Telemedicine, *American Journal of Law & Medicine* (17 pages)

13. APRIL 15: HAVEN AND INDUSTRY DISRUPTION

Leonard L. Berry. 2019. Service Innovation is Urgent in Healthcare. *AMS Review* (12 pages)

Mandy Jackson. Jan 2018. Mysterious Amazon/Berkshire/JPMorgan Partnership Could Disrupt Health Care, Pharma. The Pink Sheet (3 pages)

Stephen Gossett. 2019. How Amazon's Healthcare Venture "Haven" Could Impact All Aspects of the Healthcare Industry. *builtin.com* (6 pages)

Margot Sanger-Katz and Reed Abelson. Jan 2018. Can Amazon and Friends Handle Health Care? There's Reason for Doubt. *New York Times* (2 pages)

Peter Wehrwein. 2018. The Gawande Pick: Incrementalism Not Amazonification for American Health Care. *Managed Care Magazine* (2 pages)

Nicolas P. Terry. 2018. "Prime Health" and the Regulation of Hybrid Healthcare. *N.Y.U. J. of Intell. Prop. & Ent. Law* (**skip Part IV except for section on Certificate of Need Laws**) (37 pages)