Syllabus

Health Care Finance
JD 867

Professor Kathy Zeiler
Boston University School of Law
Fall 2024

Class sessions:	M, W 10:45-12:05 Room 209
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Course Description

This 3-credit course will cover the legal structures governing public and private health care finance. Topics include an overview of health care and health care insurance markets, the economics of health care insurance, regulation of employer-sponsored insurance, the Affordable Care Act and related litigation, tax exemption, the basics of Medicare and Medicaid, and proposed health care finance alternatives. Grades will be based primarily on a 3-hour, in-class final examination. Student participation is required and will affect course grades. No prerequisites are required.

Per American Bar Association guidelines and BU Law's Credit Hour Policy,[1] you should anticipate a workload of at least 42.5 hours per credit over the semester, which includes both in-class and out-of-class time.

Course Materials

All required readings can be found on the course Blackboard site.

Announcements and all course documents including class slides will be posted to Blackboard.

[1] http://www.bu.edu/law/current-students/jd-student-resources/curricular-requirements/jd-degree-requirements/#credit-requirements

Class slides are posted following class. As the exam period draws near, I will post previously administered exams and model student answers. These materials will help you prepare for the final exam. All class sessions will be recorded and available for viewing after each class session. You are not permitted to download or record and store the class recordings. Under no circumstances should you distribute class recordings or any class materials including class slides to others.

Reading assignments and homework problems are listed below. Note that the homework problems are intended to help you prepare for class. Do not turn in written answers to me. Simply come to class ready to share and defend your answers.

Laptops are allowed in the classroom. You are limited to using them for class-related purposes only. Please be aware that web browsing and other uses can be distracting to those sitting around you.

Learning Objectives

During the course, we will work together to develop the following competencies:

(a) Knowledge and understanding of substantive law related to health care finance and related procedural law;
(b) Legal analysis and reasoning, problem-solving, client counseling and written and oral communication required for counseling; and
(c) Exercise of proper professionalism.

Assessment

Grades will be based primarily on a three-hour, open-book, open-note **final examination** (laptops permitted; no internet access; you can access materials stored on your hard drive but not on the internet).

In addition, I expect students to be prepared to **participate in class discussions**. We will use a panel system with two groups:

Group 1 (starting Monday, 9/16)	Group 2 (starting Wednesday, 9/18)
Clayton, Vanessa	James, Maxwell
Coe, Nancy	Pirron, Abigail
Ding, Qindi	Qualls, Ryland
Dunn, Jack	Temperino, Aidan
Hartz, Marissa	van Amson, Mia
Iglesias, Sarah	Welch, Kyle

Each group will be on call during every other class session starting September 16. Obvious lack of preparation may negatively impact course grades. For students on the border between grades (e.g., the lowest A- on the exam), a weak participation record will result in a shift down one grade. For example, if you earn the lowest A- on the exam, and you have at least one strike against you in the participation record, you will be shifted down to a B+. If someone is shifted down, the student earning the next highest score will be shifted up (e.g., from a B+ to an A-) unless the student has at least one strike in the participation record. You get a strike if I call on you, and you are absent without notice, absent without a valid excuse (see below) or obviously unprepared. Answering questions incorrectly will not result in a strike unless lack of preparation is obvious. I will not adjust on-call days to make up for classes missed due to excused or unexcused absences. Excused absences will not affect your course grade.

Attendance is important, is required and will be recorded each day. If you know you will be absent on a particular day, you must email me in advance to provide notice. If your absence is excused,[2] it will not negatively impact your grade. If your absence is not excused, I will record the absence as unexcused, and this will count as a strike with the same consequences as noted above. Excessive absences from class may be grounds for disallowing course credit.

Although not part of the formal assessment process, I expect every student to exercise **proper professionalism** in all conversations with colleagues, all conversations with faculty and staff, all on-line communications such as email, etc.

For further information regarding law school attendance and grading policies, please consult the Academic and Disciplinary Regulations available in the JD Handbook.

Disability Accommodations

The School of Law at Boston University is committed to equal access for students with disabilities. If you have a specific disability and require accommodations in this class, please submit the BU Disability & Access Services (DAS) online Intake Form and contact BU DAS to make an appointment by calling (617) 353- before the start or early in the semester, so that appropriate accommodations can be made in a timely manner. BU DAS will provide the Law Registrar with a letter of approved accommodations. Law faculty are only informed of accommodations that may affect the operation of the classroom. Law faculty are not informed of exam accommodations, to support the blind grading process. Contact information for BU DAS is as follows: (617) 353-3658 V/TTY or access@bu.edu. All discussions with, and written materials provided to, BU DAS will be kept confidential.

[2] Valid excuses include: (1) physical or mental health situation or family emergency; (2) religious observance; (3) rescheduled class NOT including any make-up classes noted in the syllabus; (4) other comparably urgent reasons, and not including vacation plans. 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.

Your Well-Being

I value your well-being as a law student and human being. Law school can be a very stressful experience; the same is true for lawyering. You can start now to build a set of tools to help you manage stress, build resilience, take care of yourself, and ultimately thrive as you become a lawyer. I encourage you to practice routine self-care and to reach out whenever you need help, are feeling anxious, stressed, or discouraged, or are worried about a fellow classmate. Furthermore, to learn effectively you must have basic security: a roof over your head, a safe place to sleep, enough food to eat. If you need help, please reach out to Dean Collins, Associate Dean of Student Affairs, at jcollin3@bu.edu, BU Student Health Services,[3] or Lawyers Concerned for Lawyers,[4] a free and confidential service for law students and lawyers. There is never any shame in seeking help. You will be better off, more prepared, and resilient as a result.

Finally, it is my intent that students from all backgrounds and perspectives be well-served by this course, that students' learning needs be addressed both in and out of class, and that the diversity that students bring to this class be viewed as a resource and benefit. It is my intent to present materials and facilitate discussions that are respectful of diversity: gender identity, sexuality, disability, age, socioeconomic status, ethnicity, race, nationality, religion, political leanings, and culture. I encourage suggestions for how I can improve on this front.

[3] https://www.bu.edu/shs/
[4] https://www.lclma.org/

Introduction

1. Overview of the U.S. Health Care Market

Chapter 4: Overview of the United States Health Care System from Teitelbaum and Wilensky, ESSENTIALS OF HEALTH POLICY AND LAW, 4th ed. 2019 (23 pages)

Homework: Americans spend substantially more per capita on health care relative to citizens of other similar countries (see Fig 4-14, p. 64). List as many reasons as you can to explain why this might be so.

2. Health Care Cost Drivers

Atul Gawande, The Cost Conundrum: What a Texas town can teach us about health care, The New Yorker (June 2009) (24 pages)

Atul Gawande, Health Care's Price Conundrum, The New Yorker (December 2015) (4 pages)
(optional: skim Private insurance study referred to in 2015 Gawande article)

Homework: List all possible theories Gawande lays out to explain the disparate costs of medical care across counties. For each theory, what might be the best evidence in support of it? In the end, according to Gawande, what theory best explains observed cost disparities? If that theory is correct, is it something that justifies government intervention? Why or why not? Make a list of possible interventions and the pros and cons of each.

3. Health Care Market Features

Kenneth J. Arrow, Uncertainty and the Welfare Economics of Medical Care, 53 Am. Econ. Rev. 941 (1963) (27 pages; skip mathematical appendix and use Wikipedia to look up unfamiliar terms).

Homework:

1. How is the purchase of health care different from the purchase of shoes? List every difference you can think of.

2. Arrow suggests three different ways an insurer might offer insurance: (1) on a prepaid basis to a doctor group (i.e., each insured pays a fixed amount and receives in exchange all necessary care provided only by doctors in the group), (2) indemnity insurance with a fixed schedule (i.e., each insured pays a fixed amount and receives in exchange a fixed amount per service/good consumed), and (3) indemnity insurance with no fixed schedule (i.e., each insured pays a fixed amount and is reimbursed the cost of all services/goods consumed). What sorts of factors will the insurer need to consider under each model to make sure the insurance product is profitable, i.e.,

the sum of individual policy prices (the fixed amount paid by each insured to the insurer) exceeds total costs to the insurer of promising to cover the insureds' health care costs?

Private Finance

4. Insurance Primer: Part I (the basics—the function of insurance, adverse selection, moral hazard)

Robert W. Klein, A Primer on The Economics of Insurance (2014) (note: apologies—this draft includes numerous typos, but the meaning is clear in all cases; Part III is optional reading)

Homework:

1. Why do individuals purchase health insurance?

2. What is adverse selection?

3. What is moral hazard?

5. Insurance Primer: Part II (adverse selection and moral hazard applications in health care insurance markets)

Mark V. Pauly, Adverse Selection and Moral Hazard: Implications for Health Insurance Markets (2006)

Homework:

1. If the theory of adverse selection operates in insurance markets, what happens if insurers do not know the individual health status of prospective insureds? Assume they can predict total population cost for the coverage period. Work out a step-by-step analysis.

2. How does moral hazard affect health care insurance markets? What methods do insurers use to reduce moral hazard? What problems might these methods cause? How might we regulate to solve them?

6. Health Care Insurance – Historical Perspective

Session 6 reading packet:

- Health Insurance in the United States
- The Health Maintenance Organization Act of 1973 (P.L. 93-222) and Prepaid Group Practice Plans
- Managed Care
- High Deductible Health Plans

Homework: As you read, make a list of concerns that led to the government interventions discussed in the readings. Categorize the concerns into three groups: (1) concerns over access to medical care, (2) concerns over care quality, and (3) concerns over the cost of care. Identify the drivers of access limitations, low quality, and high cost.

7. Employer-Sponsored Health Insurance, State Regulation, and Introduction to Employee Retirement Income and Security Act (ERISA)

Session 7 reading packet:

The Real Reason the U.S. Had Employer-Sponsored Health Insurance
State vs. Federal Insurance Regulation and the McCarran-Ferguson Act
State Regulation of Private Health Care Insurance
Department of Labor's Employment Law Guide (ERISA Basics)
Introduction to ERISA Preemption
New York State Conference of BCBS Plans v. Travelers Ins. Co.
Kentucky Association of Health Plans v. Miller

Homework: Prepare to answer the questions posed in the Notes throughout the reading packet.

8. ERISA Preemption, cont.

Session 8 reading packet:

Retail Industry Leaders Association v. Fielder
Golden Gate Restaurant Association v. City and County of San Francisco
American Medical Security, Inc. v. Bartlett

Homework: Prepare to answer the questions posed in the Notes throughout the reading packet.

9. Determining Medical Appropriateness (and ERISA including introduction to ERISA's Civil Enforcement Provision)

Session 9 reading packet:

Mount Sinai Hospital v. Zorek
Bechtold v. Physicians Health Plan of Northern Indiana
Rush Prudential HMO v. Moran

Homework: What are the best arguments against the Court's decision in Rush that IL's statute does not violate ERISA's civil enforcement provision?

10. Provider Reimbursement (and ERISA)

Session 10 reading packet:

Bodenheimer and Brumbach, Reimbursing Physicians and Hospitals (1994)
Allen v. Clarian Health Partners

Elisabeth Rosenthal, An American Sickness (2017)
Gobeille v. Liberty Mutual Insurance Co.
Bland et al., Strategies for Health System Innovation after Gobeille (2016)
Pegram v. Herdrich

Homework:

1. For each payment type listed in the table at the top of p. 2 in the reading packet, list possible responses by physicians, hospitals, and other impacted players. In other words, what sorts of behaviors does each payment type encourage? What sorts of behaviors are not encouraged? Be prepared to explain the reasons behind your predictions.

2. How might Gobeille's holding be reconciled with Travelers' holding (Session 7)?

11. Institutional Liability and ERISA

Session 11 reading packet:
Boyd v. Albert Einstein Medical Center
Aetna Health Inc. v. Davila

Homework: See n. 2, p. 7 (client counseling exercise)

12. The Affordable Care Act, Part 1 – The Parts

Excerpt from Chaikind et al. 2010. Private Health Insurance Provisions in the PPACA, Cong. Research Serv. (20 pages)

Homework: The ACA contains many provisions designed to regulate insurer behavior. Identify those components and describe what each requires in broad stokes (avoid getting bogged down in the details). Focus on the highlighted components.

13. The Affordable Care Act, Part 2 – How the Parts Work Together

[*NOTE: most of your preparation time for this session should be spent on the homework questions. They are challenging – anticipate spending an hour or two just on the homework questions*.]

Buettgens et al. 2010. Why the Individual Mandate Matters, Urban Institute. (7 pages)
American Academy of Actuaries. 2023. Risk Pooling under the ACA. (4 pages)
Corlette et al. 2020. The ACA's Effect on the Individual Insurance Market, Health Affairs (7 pages)

Homework:

1. Health care insurers can profit by attracting healthy people and offering them insurance coverage at low prices. Under the ACA, insurers (1) cannot turn away anyone willing to accept the offered terms at the offered price, and (2) cannot set prices based on the health status of a single buyer. How might insurers react to these restrictions in an effort to attract healthy people? How do the other insurance components of the ACA mitigate or prevent these sorts of reactions?

2. The ACA includes provisions for direct premium subsidies for low-income buyers. Buyers that will require care with certainty during the coverage period (almost always one year) will receive indirect subsidies. How so?

14. State Authority Pre ACA and ACA Litigation, Part I

Session 14 reading packet:

Enough about the Constitution: How States Can Regulate Health Insurance Under the ACA
Massachusetts' statutory insurance purchase mandate (see link in reading packet; SKIM)
Fountas v. MA Department of Revenue
Texas v. United States

Homework: 1. In Texas v. California, how does the district court characterize the intent of the 2010 Congress with respect to severability of the purchase mandate? The 2017 Congress?
2. Some have argued that private individual health care insurance markets have not unraveled following the repeal of the penalty for not complying with the mandate, at least in part, because the federal government increased premium subsidies in response to the unemployment crisis triggered by the Covid pandemic. What are possible scenarios regarding how health care insurance markets will respond to the expiration of these subsidies?

15. ACA Litigation, Part II

Session 15 reading packet:

King v. Burwell
Burwell v. Hobby Lobby Stores
Braidwood Management v. Becerra

Homework: Prepare to answer the questions posed in the Notes throughout the reading packet.

Public Finance

16. Tax Exemption as Subsidy

Session 16 reading packet:
- Alice A. Noble, Andrew L. Hyams, and Nancy M. Kane, Charitable Hospital Accountability: A Review and Analysis of Legal and Policy Initiatives (Journal of Law, Medicine & Ethics, 1998)
- Exemption Requirements – Internal Review Code §501(c)(3)
- Eastern Kentucky Welfare Rights Org v. Simon
- Provena Covenant Medical Center v. Dept. of Rev.

Homework: Read Revenue Ruling 69-545 (www.irs.gov/pub/irs-tege/rr69-545.pdf). Does the ruling require non-profit hospitals to accept Medicare and Medicaid patients and to operate an active and generally accessible emergency room to maintain its federal tax-exempt status? How would you state the "rule" set forth in the revenue ruling?

17. Introduction to Medicare

KFF Issue Brief: An Overview of Medicare
Session 17 reading packet:
- Excerpt from Huberfeld et al., The Law of American Health Care (2023)
- Shalala v. Illinois Council on Long Term Care, Inc.
- Excerpt from a Congressional Research Service Report titled "Chevron Deference: A Primer" (May 18, 2023)

Homework: Prepare answers to questions posed in the Notes.

18. Medicare and Quality of Care

Session 18 reading packet:
- In the Case of the Estate of W.D.
- Fox Insurance Co. v. CMS
- Burditt v. U.S. Department of Health and Human Services

Homework: Prepare answers to questions posed in the Notes.

19. Medicare Drug Price Regulation

Session 19 reading packet:
- Excerpt from Kaiser Family Foundation, FAQs about the Inflation Reduction Act's Medicare Drug Price Negotiation Program (Aug 8, 2023)
- Merck v. Becerra (amended complaint filed October 19, 2023)
- Amicus Brief filed in Merck v. Becerra

Homework: Prepare answers to the questions posed throughout the readings.

20. Introduction to Medicaid

KFF Issue Brief, Medicaid Financing: The Basics (March 2019)
Section 20 reading packet:
- Excerpt from Huberfeld et al. The Law of American Health Care
- Excerpt from Rosenbaum and Westmoreland, The Armstrong v. Exceptional Child Inc. Medicaid Payment Case: Now What? Health Affairs Forefront, April 30, 2015
- Armstrong v. Exceptional Child Center, Inc.

Homework: Prepare answers to the questions posed throughout the readings.

21. Medicaid Expansion / Medicaid Waivers

Session 21 reading packet:
- Excerpt from Huberfeld et al., The Law of American Health Care (3rd ed., 2023) including 42 U.S.C. §1396a(a)(10)(A). State plans for medical assistance
- NFIB v. Sebelius (portion on constitutionality of Medicaid expansion)
- MACPAC, Section 1115 Research and Demonstration Waivers (June 24, 2019)

Homework: Prepare answers to the questions posed throughout the readings.

22. Medicaid Waivers and Work Requirements Litigation

Session 22 reading packet:
- Excerpt from Madeline Guth and MaryBeth Musumeci, An Overview of Medicaid Work Requirements: What Happened Under the Trump and Biden Administrations? (May 2022)
- Gresham v. Azar
- Rose et al. v. Becerra

Homework: Prepare answers to the questions posed throughout the readings.

How Should We Finance Health Care?

23. Employer-Sponsored Insurance Reform Proposal

Michael. F. Cannon, End the Tax Exclusion for Employer-Sponsored Health Insurance, CATO Policy Analysis (May 24, 2022)

Homework:

1. List three claims or arguments you agree with. For each, what is the strongest argument against?
2. List three claims or arguments you disagree with. Explain why you disagree.

24. Universal Health Coverage Proposal

Liran Einav and Amy Finkelstein, Designing U.S. Health Insurance from Scratch: A Proposal for Universal Basic Coverage (part of Brookings' Hamilton Project; October 2023).

Homework:

1. List three claims or arguments you agree with. For each, what is the strongest argument against?
2. List three claims or arguments you disagree with. Explain why you disagree.