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Foreword

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Foreword

The *Annals of Health Law* Editorial Board is proud to present our Winter 2011 Issue. In May 2010, the *Annals of Health Law* Editorial Board began reviewing the copious article submissions. Although we had numerous ideas for the theme of this Issue, we often have little control over the topics submitted to us. Luckily, the authors' submissions lit the way and we were able to construct a cohesive issue. This Issue delves into a broad array of regulatory topics facing the health-care industry. We believe each article offers a unique opinion and are proud to publish them.

The Issue's first article analyzes Illinois Public Act 94-677, which the Illinois Supreme Court overturned in *Lebron v. Gottlieb Memorial Hospital* in early 2010, holding that a cap on compensatory damages in malpractice cases violated the separation of powers clause in the Illinois Constitution. The authors, Marianne Buckley, Leonard Nelson, and Amanda Swanson, discuss many of the useful provisions that went down with the law. These provisions included areas such as medical liability insurance law, physician discipline, public disclosure of information, the admissibility of physician statements into evidence, and expert witness standards. This article offers a unique opinion on the areas of the law other than the cap on damages, which received the majority of attention.

In the second article, Patrick Sutton provides an in-depth survey of the Stark Law, which prohibits physician self-referrals. This article examines the efficacy of the Stark Law and asks whether it actually impedes innovation and integrated delivery of healthcare. Sutton begins by looking at the current structure, turns to arguments for and against the law, then offers some proposals to better the law. He concludes with a broader message, which argues that better alignment of financial incentives created by current payment mechanisms is necessary before we can truly limit overutilization.

In the next article, Richard Doan discusses the federal government's use of the False Claims Act to curtail and recover fraudulent payments under Medicare and Medicaid. The article argues that the federal courts have overused the False Claims Act to recover in events of mistake, but not fraud. Doan proposes the use of alternative modes of recovery for the common-law doctrines of "payment by mistake" and "unjust enrichment" to address the payment of non-fraudulent, albeit false, Medicare & Medicaid claims.

The Issue also discusses pharmacy benefit management (PBM) companies, which often act as a middleman between insurers and manufacturers in designing pharmaceutical plans. Mark Meador begins by discussing the infrastructure of the PBM industry, then analyzes concerns and conflicts of interest stemming from PBMs' relationship with

mail order pharmacies, prescription drug pricing, and their manipulation of manufacturer rebates and discounts. The article concludes that a regulatory framework is necessary for PBMs and discusses some of the existing proposals for such a framework. Meador believes that this framework is needed to create transparency and lessen conflicts in the PBM industry.

This Issue wraps up with an excellent article focusing on the tension between public health laws and Constitutional guarantees of liberty, such as the Due Process Clauses of the Fifth and Fourteenth Amendments. Allan J. Jacobs demonstrates that public health laws may place limitations on individual liberty through actions, such as forced medication and quarantine. He discusses judicial treatment of such tension and proposes a different level of scrutiny – self denoted as “enhanced public health scrutiny.” This level of scrutiny, while rigorous, is more flexible than strict scrutiny, and will uphold public health legislation if it protects an inchoate class of people who may not yet be identifiable, who will incur a specific disease or injury absent the law, but who will not experience this disease or injury if the law is enforced.

The *Annals* staff is thankful and honored for the opportunity to publish these exceptional articles and work closely with such a distinguished group of authors. We would like to thank the authors for their extraordinary professionalism and cooperation throughout the editorial process. We would also like to thank the entire *Annals of Health Law* staff for their diligent work. Also, I would like to particularly thank Mallory Golas, Publications Editor, *Annals of Health Law*, for her exceptional work in organizing our editorial teams and ensuring that this Issue evolved into its current form. Lastly, we would like to thank the Beazley Institute for Health Law & Policy for their continued assistance. Without their tremendous support, top notch issues like this would not be possible.

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