

## HEALTHCARE REFORM FOLLOWING THE 2010 REFORM ACTS

Each year in its Annual Survey, the *Columbia Business Law Review* selects a major business law topic and presents a group of student notes exploring relevant legal and economic developments in that area. Following the recent passage of the Patient Protection and Affordable Care Act<sup>1</sup> and the Health Care and Education Reconciliation Act of 2010,<sup>2</sup> this year's Survey focuses on healthcare reform. As the Survey notes explain in detail, these legislative developments have significantly altered the legal framework governing healthcare in the United States, sparking high-profile litigation and strident public debate. The notes explore a variety of issues arising out of these statutes, including, for example, the effects of the healthcare reform acts on both ERISA preemption and the tools courts use to define pharmaceutical markets in antitrust cases. They also suggest avenues for potential further reforms that could be adopted given this new framework.

In *External Review Process Options for Self-Funded Health Insurance Plans*, David Goldin discusses the Patient Protection and Affordable Care Act's new requirements for the external review processes for denial-of-care decisions by health care insurers, reviewing the impact that ERISA preemption previously had on state regulation of such decisions. Under the new Act, insurers must adopt external review processes that either comply with state law or that meet certain other requirements, including minimum standards promulgated by the Secretary of Health and Human Services. The note analyzes various options available to the Secretary in establishing what those minimum standards might entail.

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<sup>1</sup> Pub. L. No. 111-148, 124 Stat. 119 (2010).

<sup>2</sup> Pub. L. No. 111-152, 124 Stat. 1029 (2010).

In *Is ERISA Preemption Superfluous in the New Age of Health Care Reform?*, Mallory Jensen discusses the relationship between the new healthcare acts and the preemption of state laws relating to employer-provided health benefits under the Employee Retirement Income Security Act of 1974 (ERISA), which had long stymied various state healthcare reform efforts. The note examines the text, purpose, and likely judicial interpretation of ERISA's preemption provision as it may be applied to the 2010 healthcare acts' state implementation model and future state healthcare efforts arising both within and outside the federal reform. The note also analyzes potential problems that ERISA preemption may still pose for state efforts.

In *Whistle While You Work: How the False Claims Act Amendments Protect Internal Whistleblowers*, John Nicolaou discusses recent amendments to the False Claims Act targeted toward employer retaliation against whistleblowers who uncover fraud on the government, including healthcare fraud. These amendments include amendments from the Patient Protection and Affordable Care Act. The note argues that there is uncertainty with respect to how these amendments will be interpreted in the context of whistleblowing internal compliance employees, who were historically excluded from bringing whistleblower retaliation claims against their employers. The note proposes that courts can best further congressional intent with respect to those employees by constructing a standard of employer knowledge for whistleblower retaliation claims that both recognizes Congress's intent to expand protection against retaliation and also encourages such employees to report concerns internally before bringing false claim suits.

Finally, in *Product Market Definition in Pharmaceutical Antitrust Cases: Evaluating Cross-Price Elasticity of Demand*, Anish Vaishnav discusses the application of the market definition doctrine to pharmaceutical markets in antitrust cases. Specifically, the note argues that the focus of traditional tests on the cross-elasticity of demand in the market insufficiently accounts for unique features of pharmaceutical markets and, as a result, leads courts to find

overly narrow markets. The note identifies approaches courts can take to make better market definition determinations and argues that these approaches are both practical and consistent with precedent.

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