

Antitrust Implications of Physician Owned Facilities vs. General Hospitals: How *Heartland* Has Changed the Landscape and Considerations for the Future

There is an ongoing debate amongst hospital administrators, physicians, and purchasers of hospital services about the financial impact of *physician owned facilities* (POFs) on general hospitals located in the same geographic markets. *Proponents* of POFs cite benefits such as improved competition leading to lower costs; higher quality; better outcomes; increased efficiency derived from more focus on specific services; more convenient services than offered by general hospitals; better amenities; greater physician control over delivery of service; and, the ability of physician to supplement their otherwise decreasing revenues. Critics of POFs have argued that POFs present an inherent conflict of interest where physician owners of facilities that compete with the hospitals engage in “*cream skimming*”, where physicians refer patients with higher reimbursement rates to their POF, and leave the more costly patients in the care of the general hospital (the converse of this is called “*patient dumping*” which, critics argue, also occurs).¹ Additionally, critics argue that general hospitals rely on these higher reimbursement patients to cross-subsidize other unprofitable services such as emergency room services. Other criticisms include the arguments that POFs duplicate facilities, resulting in overcapacity of the market; that they create incentives for upcoding or overpricing; that they exacerbate staff shortages and result in diminished ER call coverage; that conflicts of interest result in abused or ignored peer review obligations; and, that they result in overall deterioration of hospital board-medical staff relationships.¹

In addition to this ongoing debate, many general hospitals have come under scrutiny by *antitrust* authorities for engaging in potentially *exclusionary practices* in what general hospitals cite as, an effort to respond to the negative financial impact POFs have on general hospitals. In situations where POFs are owned in whole or in part by physicians with privileges on the medical staff of a general acute care hospital, and where the POF competes with that hospital either on an inpatient or outpatient basis, many hospitals have engaged in activities that attempt to shut the POF (e.g., specialty hospital) out of the market. Some of these practices include refusing to assist or cooperate with specialty hospitals; pressuring other members of the medical staff and/or community physicians to not do

business with the specialty hospital; pressuring payors to exclude specialty hospitals from the payors’ networks; and, limiting or terminating physician-investors’ privileges and medical staff membership (“*conflict of interest credentialing*”).¹ In response to these practices, some POFs have initiated antitrust suits, claiming that the general hospitals are engaging in illegal exclusionary boycotts. The two most common claims are that hospitals have denied or restricted staff privileges to physicians that have an ownership interest in a POF that competes with the hospital and that hospitals have engaged in exclusive arrangements designed to restrict the POF’s access to payors.¹

Despite increased antitrust scrutiny in this sector, cases initiated by POFs have repeatedly failed to proceed to trial because they are generally difficult to prove and therefore cannot survive summary judgment. The first case that *was* able to survive summary judgment challenge was *Heartland Surgical Specialty Hospital v. Midwest Division, Inc.*, in which the plaintiff *surgical specialty hospital* (SSH) alleged horizontal conspiracies between multiple health plans and multiple hospitals, as well as vertical conspiracies between the hospitals and payors directly, resulting in pressure on payors, as well as direct agreements with them, to exclude the SSH from their networks.¹ This lawsuit is unique in that it alleges horizontal conspiracies in the POF context, since most lawsuits center around exclusive contracts or the denial or restriction of staff privileges for physicians with interests in POFs. Part of the reason that the *Heartland* case was the first of its kind to be allowed to continue to trial is because antitrust law enforcement has been “*pretty protective*” of hospitals that have taken measures to combat “*cream skimming*” by specialty hospitals.¹ However, antitrust laws still protect against entities with market power from using that market power to pressure others (here, other hospitals and payors) into agreeing to exclude a competitor from the market, and that is where the hospital defendants in this case ran into trouble.

The *Heartland* case eventually settled in Spring 2008 for an undisclosed amount.¹ What *Heartland* demonstrates, however, is how antitrust challenges by POFs will not always fall on the side of the general hospitals. While this precedent has now been established, there are still important and unresolved issues that the courts have yet

(Continued from previous page)

to determine. One of the most important elements of any antitrust challenge is the requirement of an *agreement between competitors in the restraint of trade*. In a majority of these cases, the allegations of agreement are launched at hospital boards that are in supposed agreements with their medical staffs. The circuits are split on whether or not a hospital and members of its medical staff can be considered separate entities for the purposes of forming an agreement to restrain trade.¹ Some circuits argue that the medical staffs are simply a subpart of the larger hospital entity and therefore cannot be judged as making decisions as separate entities. Another important consideration courts are facing is the determination as to whether a hospital's staff privilege decision is merely a "*unilateral act*" rather than any form of conspiracy, as such unilateral decisions are legal (assuming the unilateral activity is not predatory). Finally, courts are also split on the question of whether certain actions taken by hospitals in response to POFs can be considered to have legitimate business justifications (the last step in any rule of reason in antitrust analysis), i.e., if a general hospital can show that its actions are in pursuit of a *legitimate business goal*, such as protecting its ability to cross-subsidize unprofitable services so that it may continue to provide those services to the community or to protect from "*cream-skimming*", then some courts may find the actions justified, even if detrimental to the POF.¹ These questions will be considered repeatedly in the coming year as multiple cases proceed to trial, and it will be critical for all healthcare provider enterprises to stay abreast of the legal developments in this ever-expanding area of antitrust law.

¹ "Antitrust Implications of Competition Between Physician-Owned Facilities and General Hospitals: Competition or Exclusion?" By William E. Berlin, Esq., The Health Lawyer, American Bar Association, Volume 20, No. 5 (June 2008), pg 6.

¹ "Antitrust Implications of Competition Between Physician-Owned Facilities and General Hospitals: Competition or Exclusion?" By William E. Berlin, Esq., The Health Lawyer, American Bar Association, Volume 20, No. 5 (June 2008), pg 6.

¹ "Antitrust Implications of Competition Between Physician-Owned Facilities and General Hospitals: Competition or Exclusion?" By William E. Berlin, Esq., The Health Lawyer, American Bar Association, Volume 20, No. 5 (June 2008), pg 3-5.

¹ "Antitrust Implications of Competition Between Physician-Owned Facilities and General Hospitals: Competition or Exclusion?" By William E. Berlin, Esq., The Health Lawyer, American Bar Association, Volume 20, No. 5 (June 2008), pg 3-5.

¹ Heartland Surgical Specialty Hospital, LLC v. Midwest Division, Inc. d/b/a HCA Midwest Division, et al., 527 F.Supp. 2d 1257 (D. Kan. 2007)

¹ "Physician-owned hospital can pursue antitrust lawsuit," By Amy Lynn Sorrel, AMNews, Nov. 12, 2007, <http://www.ama-assn.org/amednews/2007/11/12/gvsa1112.htm> (accessed 6.30.2008) (quoting Thomas L. Greaney, Professor of Antitrust Law at Saint Louis University in St. Louis, Missouri).

¹ "Antitrust Implications of Competition Between Physician-Owned Facilities and General Hospitals: Competition or Exclusion?" By William E. Berlin, Esq., The Health Lawyer, American Bar Association, Volume 20, No. 5 (June 2008), pg 5.

¹ "Antitrust Implications of Competition Between Physician-Owned Facilities and General Hospitals: Competition or Exclusion?" By William E. Berlin, Esq., The Health Lawyer, American Bar Association, Volume 20, No. 5 (June 2008), pg 5.

¹ "Antitrust Implications of Competition Between Physician-Owned Facilities and General Hospitals: Competition or Exclusion?" By William E. Berlin, Esq., The Health Lawyer, American Bar Association, Volume 20, No. 5 (June 2008), pg 9; see e.g. *Williamson v. Sacred Heart Hospital of Pensacola*, 1993 WL 543002 (N.D. Fla. 1993).



(800) FYI - VALU
*Providing Solutions
in the Era of
Healthcare Reform*

Founded in 1993, HCC is a nationally recognized healthcare economic financial consulting firm

- [HCC Home](#)
- [Firm Profile](#)
- [HCC Services](#)
- [HCC Experts](#)
- [Clients Projects](#)
- [HCC News](#)
- [Upcoming Events](#)
- [Contact Us](#)
- [Email Us](#)

HEALTH CAPITAL CONSULTANTS (HCC) is an established, nationally recognized healthcare financial and economic consulting firm headquartered in St. Louis, Missouri, with regional personnel nationwide. Founded in 1993, HCC has served clients in over 45 states, in providing services including: valuation in all healthcare sectors; financial analysis, including the development of forecasts, budgets and income distribution plans; healthcare provider related intermediary services, including integration, affiliation, acquisition and divestiture; Certificate of Need (CON) and regulatory consulting; litigation support and expert witness services; and, industry research services for healthcare providers and their advisors. HCC's accredited professionals are supported by an experienced research and library support staff to maintain a thorough and extensive knowledge of the healthcare reimbursement, regulatory, technological and competitive environment.



Robert James Cimasi, MHA ASA, CBA, AVA, CM&AA, President. Mr. Cimasi is a nationally recognized healthcare industry expert, with over 25 years experience in serving clients, in over 49 states, with a professional focus on the financial and economic aspects of healthcare industry including: valuation consulting; litigation support & expert testimony; business intermediary and capital formation services; certificate-of-need and other regulatory and policy planning; and, healthcare industry transactions, joint ventures, mergers and divestitures.

Mr. Cimasi holds a Masters in Health Administration from the University of Maryland, and several professional certifications. He has been certified and has served as an expert witness on cases in numerous states, and has provided testimony before federal and state legislative committees.

Mr. Cimasi is a nationally known speaker on healthcare industry topics, is the author of several nationally published books, chapters, published articles, research papers and case studies, and is often quoted by healthcare industry press. Mr. Cimasi's latest book, *"The U.S. Healthcare Certificate of Need Sourcebook"*, was published in 2005 by Beard Books. In 2006, Mr. Cimasi was honored with the prestigious *"Shannon Pratt Award in Business Valuation"* conferred by the Institute of Business Appraisers and was elevated to the Institute's College of Fellows in 2007.



Todd A. Zigrang, MHA, MBA, CHE, Senior Vice-President. Mr. Zigrang has over twelve years experience in providing valuation, financial analysis, and provider integration services to HCC's clients nationwide. He has developed and implemented hospital and physician driven MSOs and networks involving a wide range of specialties; developed a physician-owned ambulatory surgery center; participated in the evaluation and negotiation of managed care contracts, performed valuations of a wide array of healthcare entities; participated in numerous litigation support engagements; created pro-forma financials; written

business plans and feasibility analyses; conducted comprehensive industry research; completed due diligence analysis; overseen the selection process for vendors, contractors, and architects; and, developed project financing.

Mr. Zigrang holds a Masters in Business Administration and a Master of Science in Health Administration from the University of Missouri at Columbia. He holds the Certified Healthcare Executive (CHE) designation from, and is a Diplomat of, the American College of Healthcare Executives and a member of the Healthcare Financial Management Association.



Lance A. Haynes, MSF, Vice President. Mr. Haynes focuses on the area of financial and economic analysis and consulting. His main responsibilities are comprised of business, tangible asset and intangible asset valuations, as well as financial analysis and forecasting for healthcare services related enterprises. Mr. Haynes has performed valuations for many types of ancillary services providers including Surgical/Specialty Hospitals and Ambulatory Surgery Centers, Cardiac Catheterization Labs, Diagnostic Imaging Centers and Kidney Dialysis Centers, and has also performed valuations and financial analyses for Home Healthcare

Providers, Long-term Care Facilities and Physician Medical Practices across various specialties. In addition, Mr. Haynes has performed joint venture service line and lease arrangement valuations for hospitals and physician groups, and has assisted with numerous litigation support engagements. Prior to joining HCC, Mr. Haynes was a Research Associate with Flagstone Securities, a specialty investment bank, located in St. Louis, Missouri, where his main responsibilities included the development and maintenance of company earnings models and proprietary stock indices for publicly traded companies.

Mr. Haynes received his Bachelor of Arts in Finance from the University of Northern Iowa and his Master of Science in Finance from St. Louis University. Mr. Haynes is a Level III candidate in the Chartered Financial Analyst (CFA) Program, and is a member of both the CFA Institute and CFA Society of St. Louis.



Anne P. Sharamitaro, Esq., Vice President. Ms. Sharamitaro focuses on the areas of Certificate of Need (CON); regulatory compliance, managed care, and antitrust consulting. Ms. Sharamitaro was admitted to the Missouri Bar in 2005 after graduating with J.D. and Health Law Certificate from St. Louis University School of Law. At St. Louis University, served as an editor and staff member of the Journal of Health Law, published by the American Health Lawyers Association. She has presented healthcare industry related research papers before Physician Hospitals of America (f/k/a American Surgical Hospital Association) and the National

Association of Certified Valuation Analysts.



Kathryn Young is the Editor of Health Capital Topics and a Research Associate at Health Capital Consultants (HCC). Ms. Young is a third year law student at Saint Louis University School of Law, and will graduate in May 2009 with a J.D. and Certificates in Health Law and International and Comparative Law. She serves as the Senior Articles Editor of the Saint Louis University Journal of Health Law and Policy, and will be published in the Fall 2008 issue. At HCC, Ms. Young provides research support in the areas of fraud and abuse laws, antitrust issues, and various state and federal health care regulations.