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## Implementing the Affordable Care Act

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**FOREWORD:  
IMPLEMENTING THE AFFORDABLE CARE ACT**

SIDNEY D. WATSON\*

On March 4, 2011 the Saint Louis University School of Law Center for Health Law Studies and the Saint Louis University Journal of Health Law & Policy hosted the 23rd annual Health Law Symposium, *Implementing the Affordable Care Act (ACA): Fairness, Accountability and Competition*. Passed on March 23, 2010, the ACA guarantees all Americans access to quality affordable health insurance. The Congressional Budget Office estimates that by 2019 it will provide insurance to an additional 32 million Americans by expanding Medicaid to cover all poor Americans, reforming the individual and small group private insurance market, and creating new federal income tax credit subsidies to make health insurance premiums affordable for moderate income families. The ACA authorizes new Health Insurance Exchanges to promote private insurance competition and create a more robust marketplace for individual and small group private insurance. It also sets new minimum standards for the content of health insurance plans sold in the individual and small group market, and requires coverage of “essential health benefits” by placing caps on patients’ out-of-pocket liability.

The symposium brought together leading academics and public officials to examine key issues that federal and state governments will need to address as they implement the ACA, including its policy structure that seeks to use increased competition and accountability to expand access to more affordable and better quality health insurance. Almost 200 people participated in the event. The audience included attorneys, medical professionals, University faculty and students, public officials, representatives of health care institutions, insurers, social services agencies and patient advocacy groups. The talks, commentaries and audience discussion are available online at <http://slu.edu/x49259.xml>.

The day began with Jay Angoff, Senior Advisor to the Secretary of the U.S. Department of Health and Human Services, delivering the keynote address in which he provided an overview of the legislation and key implementation issues. Economist Len Nichols, George Mason University

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Director of the Center for Health Policy Research and Ethics and Professor of Health Policy in the College of Health and Human Services, then offered a framework for the day's discussion in his talk, *Competition, Collaboration, or Regulations: When is Each Best in Health Markets?* Thomas (Tim) Greaney, Saint Louis University School of Law Center for Health Law Studies Chester A. Meyers Professor of Law who is a leading expert on competition theory, provided commentary highlighting the antitrust and other legal issues that arise as the ACA attempts to promote new models of health insurance and health care competition.

The conversation then turned to "Building Health Insurance Exchanges." Timothy Jost, Robert L. Willett Family Professor of Law at Washington and Lee University School of Law, addressed, *Health Insurance Exchanges: Difficult Issues*. Timothy McBride, Professor and Associate Dean for Public Health at Washington University in Saint Louis, spoke on, *Creating State Health Insurance Exchanges—Lessons from Federal Employees Health Benefit Plans*. Judy Baker, Director of Region VII U.S. Department of Health and Human Services, and John M. Huff, Director of the Missouri Department of Insurance, each provided their perspectives on key federal and state implementation issues for the new Health Insurance Exchanges.

The next set of speakers focused on "Expanding Across Populations: Exchanges, Medicaid and Private Insurance," identifying challenges that policy makers will need to tackle as the U.S. continues to rely on multiple sources of health insurance with people moving among various types of insurance. Sara Rosenbaum, Hirsh Professor of Health Law and Policy and Chair of the Department of Health Policy at George Washington University Medical Center, gave an address entitled, *At the Edge: The Challenges of Aligning Medicaid and Exchange Populations*. Amy B. Monahan, Associate Professor at the University of Minnesota Law School focused on, *PPACA and the Large Group Market*. Margaret T. Donnelly, Director of the Missouri Department of Health and Senior Services and Ronald J. Levy, Director of the Missouri Department of Social Services, added Missouri state perspectives. Judy Baker spoke again to offer insights from the Regional U.S. Department of HHS.

The symposium concluded with Sarah Somers, Senior Attorney with the National Health Law Project, speaking on accountability in Medicaid in her talk, *Let the Sun Shine In: Transparency and Accountability in Medicaid and Other Publicly-Funded Insurance Programs*. Dr. Ian McCaslin, Director of MOHealth Net, the Missouri Medicaid program, commented along with Judy Baker and myself.

The articles that appear in this symposium issue build on the talks presented at the March 2011 symposium. They reflect the richness of that day's conversations, a variety of disciplinary perspectives, careful scholarship and thoughtful health policy. Professor Nichols' article, which

opens this symposium issue, is titled, *Making Health Markets Work Better Through Targeted Doses of Competition, Regulation and Collaboration*. The article identifies how health market rules can be altered to preserve key freedoms and personal choices while improving distributive justice, economic efficiency and universal access to vital health services. Professor Nichols posits that health reform and economic efficiency can be complementary. The article describes how the ACA provides some, although not all, the tools needed to improve market performance. It then goes on to identify specific market-enhancing legal reforms that, when added to provisions of the ACA, will further improve market competition, access and quality.

Professor Jost examines the ACA's private insurance marketplace reforms in, *Loopholes in the Affordable Care Act: Regulatory Gaps and Border Crossing Techniques and How to Address Them*. The article examines seven types of health insurance that the ACA, either intentionally or through drafting oversights, fails to regulate comprehensively: grandfathered plans, early retiree plans, health care sharing ministries, short term limited duration policies, excepted benefits, association health plans and self insured plans. The article provides a detailed description of each of these forms of health insurance, explains pre-ACA regulatory requirements and unpacks the ACA's new statutory provisions. Professor Jost concludes that while the ACA's failure to regulate most of these forms of health insurance does not pose a significant risk to the ACA's new health insurance marketplace structure, the failure to regulate association health plans and self-insured plans poses a potentially serious threat to the ACA's reform of the individual and small group market and the stability of the new Health Insurance Exchanges. The article urges state and federal policy makers to issue regulatory guidance to clarify that association health plans are subject to the more stringent rules governing the individual and small group market, and to ensure that only large employers who can successfully self-fund their employees' health care costs without the protections that an insurance product offers should be able to claim the less-protective regulatory regime of self-insured status.

In, *ACA, the Large Group Market, and Content Regulation: What's A State to Do?*, Amy B. Monahan also examines the ACA's impact on self-insured plans, exploring the ACA's provisions regulating the content of health insurance coverage and the implications of the ACA requirement that individual and small group insurance cover an "essential health benefits" package that does not reach large employer group health insurance. As the article points out, given the reach of ERISA 514 preemption, large employers who purchase health insurance will remain subject to state laws regulating the content of health insurance coverage while employers who self insure will determine the content of their insurance in a regulatory

vacuum. The article urges state policymakers to use the ACA's new federal "essential health benefits" content regulation as an opportunity to revisit the parameters of their state-level content regulation. Professor Monahan urges state lawmakers to critically re-examine whether existing state content mandates should be retained in the large group market or whether employees and employers would be better served by either adopting the ACA's essential benefit package as a state law requirement for their large group market or doing away with content regulation altogether.

*Creating Multi-State Qualified Health Plans in Health Insurance Exchanges: Lessons for Rural and Urban America from the Federal Employees Health Benefits Program*, turns to the new Health Insurance Exchanges and examines how state and federal policy makers should structure plan offerings to make competition work better in order to assure consumers a meaningful choice of insurance offerings. Sidney D. Watson, Yolonda Campbell and Timothy McBride discuss the new Multi-State Qualified Health Plans ("MSQHPS") that will be offered nationwide through the new Health Insurance Exchanges. MSQHPS are a private insurance alternative to the hotly debated public option, where the United States Office of Personnel Management ("OPM") will negotiate with private insurers to offer the new MSQHPS using a contracting model similar to what it now uses for plans offered through the Federal Employees Health Benefits Program ("FEHBP"). This article uses enrollment data from the FEHBP to analyze the potential role and impact MSQHPS are likely to have on plan choice and competition in the Health Insurance Exchanges. It concludes that OPM will need to be careful to avoid inadvertently creating a dominate set of nationwide MSQHPS that could destabilize the competition the Exchanges are intended to foster.

Sarah Rosenbaum's and Benjamin Sommers' article, *Rethinking Medicaid in the New Normal*, turns to Medicaid and how it intersects with the new Health Insurance Exchange offerings. The article explains Medicaid's historic role as both health insurance and as a funder of safety net social services, and its new role as part of the ACA's layered approach to health insurance with Medicaid for the poorest Americans and Health Insurance Exchange private insurance subsidized through federal premium tax credits for those with slightly higher incomes. The article presents original empirical data drawn from U.S. Census Bureau surveys documenting fluctuations in earnings among low-income Americans showing that half of these households will cross the income line between Medicaid and Exchange private insurance in the course of a year. The authors offer policymakers a number of regulatory approaches to mitigate the potential negative impact of these disruptions in insurance coverage including: using annual enrollment periods, requiring health plans to sell in both Medicaid and the Health Insurance Exchanges so individuals and

families can keep their plan network and primary care providers even as their insurance changes, and using the ACA's new State Innovation Waivers and Basic Health Program options to replace the ACA's insurance layers with a more seamless structure.

In *Sunshine and Accountability: The Pursuit of Information on Quality in Medicaid Managed Care*, Sarah Somers describes the role of managed care in Medicaid and the pre-ACA federal requirements for Medicaid managed care quality reporting, which provides the back story for the ACA's new requirements for more uniform Medicaid quality reporting. The article describes a multi-state research project to obtain and compare quality data for Medicaid Managed Care plans operating in six states. Although federal law requires states and managed care plans to collect and make available a wide variety of quality data that can be used to improve quality of care and target resources, the quality data obtained from the six states typically reflected lackluster performance and little to no targeted efforts at performance improvement. Just as importantly, the research project identified systemic barriers to obtaining Medicaid managed care quality data from both states and managed care plans.

The final two pieces in this symposium are student notes. *The Need for Long-Term Care, Its Costs and Government's Attempts to Address Them*, by Alexander Daskalakis describes Title VII of the ACA entitled the Community Living Assistance Services and Supports Act ("CLASS"), a new voluntary public long-term care insurance program. The article documents the growing need for long term care in this country and the problems with trying to rely on Medicaid or private long term care insurance to fund such services and applauds the ACA for addressing the nation's need for a social insurance model of funding for long term care. However, the article notes that the voluntary nature of the CLASS Act makes it too unstable to be financially sustainable, predicting that too few wage earners will choose to participate in the program—a policy concern that the Obama Administration appears to concur with having recently announced that it will not move forward with implementation. The article concludes by recommending a long-term care insurance mandate similar to the ACA's health insurance mandate for preventive and acute care services is critical to the sustainability of long term care coverage.

*Regulatory Barriers When Implementing E-Prescribing of Controlled Substances: Could Model Language be the Solution?*, by Charles S. Hartig focuses on the growth of electronic prescribing (e-prescribing) and the legal regimes that regulate it. In March 2010 the Drug Enforcement Administration ("DEA") issued a new rule authorizing e-prescribing of controlled substances but, as the article explains, a majority of states have one of three types of confusing and inconsistent licensing statutes that restrict the scope of e-prescribing controlled substances more narrowly than

federal DEA rules now permit. The article urges states to expand scope of practice laws to permit e-prescribing to the limits allowed by federal DEA rules and proposes a structure for a new model state law to modernize and harmonize state licensing laws.

The ACA is possibly the most far-reaching piece of social legislation enacted in the last 100 years. It will restructure health insurance and the health care system. The authors in this issue offer important contributions to the ongoing public conversation about how to expand access to quality and affordable health insurance by creating better, more accountable competition in health insurance. The student editors of the Saint Louis University Journal of Health Law & Policy organized the March symposium and provided the authors with extraordinarily helpful advice and assistance by editing and sourcing the articles in this issue. As the next generation of health lawyers, they will play a key role in implementing its goals of fairness, accountability and competition.