Urology Under Attack: The Battle at the State Level

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Presentation of
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Defending Urology: Katten’s Perspective

• Counsel to urology on state/federal levels
  – Over 2,000 urologists across country
  – Large Urology Group Practice Association
  – Access to Integrated Cancer Care
  – Four state-based urology coalitions (FL, MD, NJ, PA)

• Litigated highest profile cases attacking ancillary services
  – Maryland: In-office MRI, CT, RT
  – Washington: Physician-owned physical therapy services

• Common theme: protecting “in-office ancillary services” (imaging, radiation therapy, pathology)
The Need to Go 2-0

- Federal law does NOT preempt state health law
- States can eliminate/restrict what otherwise is protected federally
- Easier to change rules of the game at state level
  - Fewer $$$ required to gain access/influence debate
  - Easier for opponents to steal the mark
The Need to Go 2-0:
State Battles Just Got More Important

• Medicare Payment Advisory Commission spent two years on IOASE
• ACR, ASTRO, CAP pressed MedPAC to recommend repeal of “in-office ancillary services” protection for imaging, radiation therapy, pathology
• MedPAC said NO (June 2011 Report to Congress):
  • “One such option is to narrow the types of services or physician groups covered by the [in-office ancillary services] IOAS exception. However, the Commission is concerned that limiting the IOAS exception could have unintended consequences, such as inhibiting the development of organizations that integrate and coordinate care within a physician practice. In addition, it could be difficult to craft a more limited IOAS exception that distinguishes between group practices that improve quality and coordination and those that use additional services of marginal clinical value. Therefore, we do not currently recommend that the exception be changed.” MedPAC June 2011 Report to Congress p. 28.
Lessons from Florida: The Battle to Protect Integrated Cancer Care
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Florida Patient Self-Referral Act of 1992

- Prohibits health care providers from referring patients for health care services to an entity in which the provider has a financial interest
- Several exceptions
- A referral by a provider in a “group practice” to another provider in the group practice does not constitute a prohibited referral under the statute
Lessons from Florida: The Battle to Protect Integrated Cancer Care

Florida Patient Self-Referral Act of 1992

“Group Practice” – Three Elements

1. Each provider who is a member of the group provides “substantially the full range of services”

2. All services by members of the group are provided “through the group” and are “billed in the name of the group”

3. Overhead expenses of and income from the practice are distributed “in accordance with methods previously determined by members of the group”
Lessons from Florida: The Battle to Protect Integrated Cancer Care

HB 119/SB 1736
The Addition of a Fourth Element to “Group Practice” Definition
(11 lines on page 132 of a 150-page bill)

A group practice providing radiation therapy services must:

• Provide the “full range of radiation therapy services such that no single type of cancer . . . constitutes 40 percent or more of the group’s cases that require professional and technical services for radiation therapy” and

• Health care providers in the group who are referring patients for radiation therapy services cannot own 50 percent or more of the group practice
Lessons from Florida:
The Battle to Protect Integrated Cancer Care

HB 119/SB 1736 – The Stealth Assault

1/5/11: 150-page bill filed in House (3/4/11 in Senate)
3/22/11: HB 119 reported out of HHS Quality Subcommittee
4/18/11: HB 119 reported out of Appropriations Committee
4/20/11: Harmful language added to HB 119 and voted favorably out of HHS Committee
4/24/11: HB 119 reported out of HHS Committee
4/29/11: HB 119 passed as amended 106-6
Lessons from Florida: The Battle to Protect Integrated Cancer Care

April 28 – May 6, 2011

- LUGPA counsel identifies threat to integrated cancer care
- Communication between LUGPA member practices – NJ/FL
- Mobilization of Florida Urologic Physicians Network (FUPN)
  - 100+ urologists in 9 practices treating 500k+ patients
  - Legal counsel, lobbyists, strategic communications team
  - Florida urologists’ leadership/relationships key
Lessons from Florida: The Battle to Protect Integrated Cancer Care

Final Days of Session

• Historic support for amendment to remove harmful addition to “group practice” definition

• 21 of 40 Senators co-sponsored amendment, including Senate President-Elect Gaetz and sponsor of SB 1736 Latvala

• Additional Senators prepared to vote to remove harmful language if issue proceeded to floor vote

• Opponents conceded and floor fight averted

• HB 119 indefinitely postponed/withdrawn from consideration
Lessons from Maryland: The Battle for MRI, CT and Radiation Therapy

• Maryland Patient Referral Law
  – Enacted in 1993 (state counterpart to federal Stark)
  – MRI, CT, RT carved out of in-office ancillary exception
  – Distinct Exemptions (direct supervision, group practice)

• 1993-2004: Non-radiology practices furnish in-office MRI, CT, RT

• 2004: Board-certified radiologist serves as Chairman of Board of Physician (no urologist on Board)

• Board relies on Attorney General opinions and takes position that urologists and other non-radiologists prohibited from furnishing in-office MRI, CT
Lessons from Maryland: The Battle for MRI, CT and Radiation Therapy

• The Issue: Whether the Maryland Patient Referral Law’s carve out of in-office MRI, CT and RT for radiology in one exemption trumps ability of treating physicians to offer services under other exemptions.

• Duys v. Orthopaedic Associates P.A.
  – 2005 case filed against 3-physician orthopaedic practice
  – Coalition of urology, orthopaedic, emergency medicine groups came to defense of defendant group practice
  – Court ruled for physician group – carve out of MRI, CT from one exemption does not trump other exemptions
Lessons from Maryland: The Battle for MRI, CT and Radiation Therapy

- The effect of the Duys case
  - Victory protected against insurer reimbursement claims
  - Urologists and non-radiology practices continued in-office imaging and radiation therapy on strength of Duys for six years
  - Board of Physicians’ adverse ruling in 2006 and circuit court affirmance created split with Duys
  - Issue went to Maryland’s highest court (Potomac Valley Orthopaedic Associates v. Board of Physicians)
  - Critical amicus curiae support from AUA and other national medical associations
Lessons from Maryland: The Battle for MRI, CT and Radiation Therapy

Potomac Valley Orthopaedic et al. v. Board of Physicians

- Jan. 2011 Court of Appeals affirms Board ruling
- No independent analysis – deferred to Board
- Ruling was exclusively on legality of MRI/CT
- No discussion or analysis of legality of radiation therapy
Lessons from Maryland: The Battle for MRI, CT and Radiation Therapy

**Potomac Valley – The Aftermath**

- Board gave medical practices until June 1 to comply
- Maryland has become the only state in the country in which a patient cannot choose to receive in-office MRI/CT
- State Medical Society has established Blue Ribbon Panel to study Patient Referral Law/Imaging Issue
Lessons Learned from State Battles: The Relevance of State Medical Boards

- Enforcement authority over patient referral laws
  - Beware of “gap filling” by state medical boards
  - Boards receive great deference from courts
- Homework!!!!
  - Does your state board have urology representation?
  - How long since a urologist has been on the Board?
- Maryland: Board-certified radiologist as Chair of Board when in-office MRI, CT taken away from non-radiologists
- Florida: Governor’s first appointment – radiation oncologist
Lessons Learned from State Battles: The Relevance of Attorneys General

- Lawyers from AG offices typically serve as counsel to state licensing boards

- Licensing boards defer greatly to legal opinions of AGs

- AG Opinions tend to serve as basis for action by licensing boards on patient referral laws, medical practice acts, anti-kickback statutes, etc.
Lessons Learned from State Battles: Beware of the “Small Case”

Size Doesn’t Matter

- The most significant cases involving attacks on ancillary services have targeted small practices
  - Imaging – Lawsuit in Maryland filed against 3-physician orthopaedic practice
  - Physical Therapy – Lawsuit in Washington State filed against 5-physician orthopaedic practice
- Rulings on statutory interpretation have precedential effect
- Adopt a “One for All, All for One” Approach in Defense
Lessons Learned from State Battles: Cultivating Relationships with Legislators

• Cultivate legislator relationships **before** you have an “ask”
  – Legislative dinners with committees of jurisdiction
  – Site Visits
  – Prostate Cancer Awareness Month Event
• Obtain broadest possible support in urology
  – Geographic diversity is key -- Urban/suburban/rural
  – Small practices critical to long-term advocacy efforts
• Coalition building across specialties critical on IOASE battles
Lessons from State Battles: Beware of Copycats

• There are few new ideas – MedPAC rejection of ACR/ASTRO will shift battle to states
• “Maryland Copycat Effort” Prevalent
  – Washington State
  – Oregon
  – Pennsylvania
  – More likely following Court of Appeals’ decision
• Florida “sneak attack” likely to be repeated
Lessons from State Battles: The Power of Coalitions

• Many battles exceed financial recourses of state societies
• Coalitions of independent urology practices can fill void/complement efforts of state specialty society
  – FAPCA protected radiation therapy
  – MUPAC protected pathology
  – NJPCAC protected radiation therapy, ultrasound
  – UPAC protected advanced imaging, radiation therapy
• Multi-specialty coalitions can be of value on certain issues (e.g., advanced imaging)
Urology Under Attack: “Be at the table, not on the menu”
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If you have any questions about these materials or about battles over ancillary services being fought on the state or federal levels, generally, please feel free to contact Howard R. Rubin, Esq., Katten Muchin Rosenman LLP, 2900 K Street NW, North Tower - Suite 200, Washington, DC 20007-5118, (202) 625-3534.