

Ancillary Services Under Attack: The Battle at the State Level

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Orthopaedic Association

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Ancillary Services Under Attack: Katten's Perspective

- Lead Counsel on State-Based Ancillary Services Battles
 - Supreme Court of Washington (POPTS)
 - Maryland Court of Appeals (In-Office Imaging)
- Counsel to state/federal coalitions
 - Five coalitions, 60 medical practices, 1,500 physicians
 - Orthopaedics, Urology, Gastroenterology, Medical Oncology, Emergency Medicine
 - Protection of in-office ancillary services (advanced diagnostic imaging, physical therapy, radiation therapy, pathology)

Ancillary Services Under Attack: Great American Philosophers

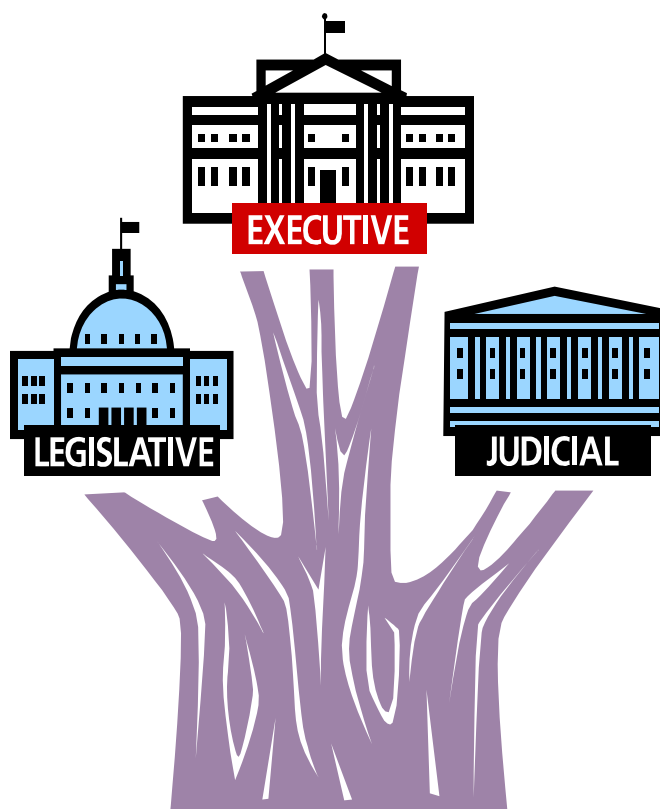
“Those who cannot remember the past are
condemned to repeat it.”

-- George Santayana

“It’s like déjà vu, all over again.”

-- Yogi Berra

Ancillary Services Under Attack: All 3 Branches of Government Critical



- Focus on State Legislature Critical, But Not Sufficient
- Executive Branch: State Attorneys General and Medical Licensing Boards Critical to State-Based Ancillary Services Battles
- Judicial Branch: Must Adopt an All for One and One for All Approach

Ancillary Services Under Attack: The Impact of the Executive Branch

State Medical Licensing Boards

- Typically have enforcement authority (including interpretive authority) over patient referral laws, medical practice acts
- Risky not to have medical specialty represented on Board
- North Carolina Medical Board
 - 12 members appointed by Governor
 - Serve no more than two consecutive three-year terms
 - Current composition (3 family medicine physicians, colon/rectal surgeon, neurological surgeon, ENT surgeon, anesthesiologist, OB/GYN, physician assistant, 3 public members)

Ancillary Services Under Attack: The Impact of the Executive Branch

State Medical Licensing Boards – Case Study

- Maryland State Board of Physicians
 - State Patient Referral Law enacted in 1993
 - MRI, CT, RT carved out of in-office ancillary exception
 - Distinct Exemptions (direct supervision, group practice)
 - Orthopaedic Surgeons lawfully use in-office MRI '93-'04
 - 2004: Board-certified radiologist serving as Board Chair
 - Board rules orthopaedic surgeons prohibited from furnishing in-office MRI

Ancillary Services Under Attack: The Impact of the Executive Branch

The Influence of State 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.
- AG Opinions, standing alone, can eliminate an ancillary service (see, e.g., Delaware AG Opinion on POPTS)

Ancillary Services Under Attack: The Impact of the Executive Branch

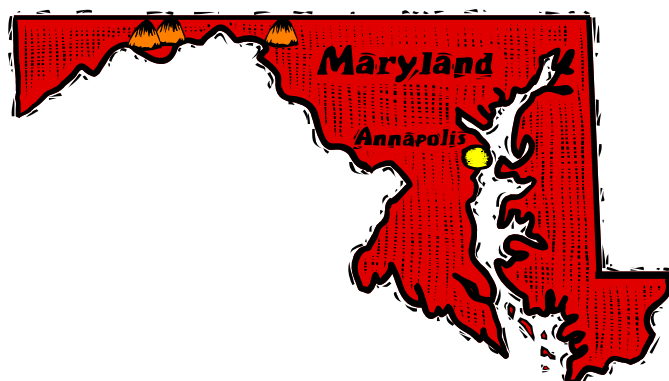
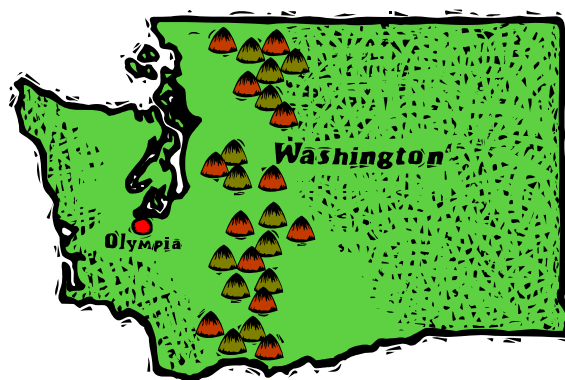
AG Influence – Maryland Case Study

- 1993-2004: Orthopaedic surgeons furnish in-office MRIs consistent with state Patient Referral Law
- Jan. 2004: State AG issues opinion that the carve out of MRI from in-office ancillary services exemption trumps group practice exemption
- Feb. 2006: State AG issues opinion that carve out of MRI from in-office ancillary services exemption trumps direct supervision exemption
- Dec. 2006: Board of Physicians issues ruling adopting AG analysis

AG Influence – SC Case Study

- 1998: SC Legislature amends Physical Therapy Act adding language precluding physicians and PTs from dividing, transferring, rebating fees by means of any consideration, **including payment of wages**
- Late 1998: SC Board of Physical Therapy issues statement that amendments do not inhibit physician employment of PTs
- 1998-2004: POPTS continues lawfully in SC
- 2004: State AG issues opinion that amendments preclude physician-PT employment relationships
- Physical Therapy Board reverses course and endorses AG opinion

Ancillary Services Under Attack: The Impact of the Judicial Branch



Small Cases – Lasting Effects

- The most significant cases involving in-office imaging and POPTS have targeted small practices
- WA POPTS Issue – BFOA suit filed against 5-physician orthopaedic practice
- MD Imaging Issue – Duys case filed against 3-physician orthopaedic practice

Ancillary Services Under Attack: The POPTS Court Case in WA State

- The Issue: Whether physician owners of a medical practice can employ PTs who furnish therapy to the group's patients
- Columbia Physical Therapy v. Benton Franklin Orthopedic Associates et al.
 - 2005 case filed against 5-physician orthopaedic practice
 - Became strategic effort by APTA to build on Sloan
 - PT group filed claims under state anti-rebate statute, professional services corporation act, consumer protection act, and common law practice of medicine

Ancillary Services Under Attack: The POPTS Court Case in WA State

- Only the second case to reach a state supreme court on POPTS
- Unanimous, 9-0 decision in favor of orthopaedic surgeons (3/18/10)
- 23-page ruling holds physicians can employ physical therapists in their medical practices and refer patients to those therapists for the furnishing of physical therapy
- Levels playing field with 2006 South Carolina Sloan decision
- All for One and One for All Approach
 - Immediate recognition that case was bigger than BFOA with likely statewide implications
 - WSOA/WSMA/AAOS support from trial level through Supreme Court
 - Commitment of WSOA leadership was a key to victory

Ancillary Services Under Attack: The POPTS Court Case in WA State

- Case turned on analysis of PSCA
 - Without statutory authorization, common law would typically preclude members of a learned profession from organizing in a professional service corporation (PSC)
 - RCW 18.100.050(1) permits individuals “duly licensed . . . to render the same professional services” to organize and become shareholders of a professional corporation
 - RCW 18.100.080 prohibits PSCs from engaging in any business other than rendering of professional services for which the PSC was incorporated
 - **RCW 18.100.050(5)(a) & (b) create separate lists of licensees who “may own stock in and render their individual professional services through one PSC” – physicians listed in (a) and physical therapists in (b)**

Ancillary Services Under Attack: The POPTS Court Case in WA State

- Key questions
 - Is PSCA concerned only with “who may own a PSC” or also with “whom the PSC may employ”?
 - By offering physical therapy services, is BFOA engaging in a business other than the practice of medicine?
- Answers from Supreme Court
 - PSCA impacts ownership and employment
 - “Physical therapy is part of the practice of medicine.”
 - “In employing physical therapists, BFOA does not go beyond the practice of medicine, the professional service for which it was formed.”
 - Legislative authorization of employment of PTs means no violation of corporate practice of medicine doctrine.

Ancillary Services Under Attack: The POPTS Court Case in WA State

- More to worry over than just Physical Therapy Acts
- PSCAs as vehicle for attacking POPTS
 - Review statutory definition of “practice of medicine”
 - Hook for Columbia was PSCA segregating physicians and physical therapists in different provisions covering whom may “own and render services” in a PSC
- Intangibles
 - Columbia pressing for monopoly/limit on patient choice
 - Strategic mistake for Columbia to sue the employee PTs
 - Value in emphasizing integrated care model
 - Value in disclosure form with other options for physical therapy

Ancillary Services Under Attack: The Imaging Court Cases in Maryland

- 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.
 - strategic decision to play defense, rather than offense
 - 2005 case filed against 3-physician orthopaedic practice
 - Coalition of orthopaedic, urology, emergency medicine groups came to defense of defendant group practice
 - Court ruled for orthopaedic group – carve out of MRI from one exemption does not trump other exemptions

Ancillary Services Under Attack: The Imaging Court Cases in Maryland

- The effect of the Duys case
 - Victory protected against insurer reimbursement claims
 - Non-radiology practices have continued in-office imaging on strength of Duys for five years
 - Board of Physicians' adverse ruling in 2006 and circuit court affirmance created split with Duys
 - The issue is now before Maryland's highest court to resolve the split in the circuit courts (Potomac Valley Orthopaedic Associates v. Board of Physicians)
 - Critical amicus curiae support from AAOS and other national medical associations

Ancillary Services Under Attack: The Impact of the Legislative Branch

- Beware of Copycats
 - Maryland Patient Referral Law (efforts to replicate imaging monopoly for radiologists in PA (2010) and WA (2007-2008))
 - Efforts to undermine POPTS through PSCAs
 - NC HB 1374 (4/20/10 – one month after WA State Ruling)
 - Aimed to make PT a distinct professional service, plus language that would have grandfathered existing POPTS but risked interpretation of no new POPTS
- Cultivate legislator relationships before you have an “ask”
- Identify opportunities for coalition building across specialties
 - Treating physicians should team together on imaging battles
 - WA POPTS case obtained support from ACS, AUA, AMSSM

Ancillary Services Under Attack: The Impact of the Legislative Branch

- Prepare for blurring of lines on federal-state battles
- APTA (POPTS issue), ACR (imaging issue) likely to draw on federal activity in making case at state level
 - Medicare Payment Advisory Commission
 - Threat to physical therapy as in-office ancillary service under federal Stark law
 - Greater emphasis on integrated care models (90%, EHR)
 - GAO study at request of Congressmen Waxman, Levin, Stark
 - (i) prevalence, patterns, and trends in physician self-referral for advanced imaging, (ii) spending on advanced imaging services, (iii) extent to which self-referral may have led to increases in provision of and Medicare spending for advanced imaging

Ancillary Services Under Attack: Final Thoughts



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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 .