

## DOJ/FTC Request for Information on Merger Enforcement

### Comments from the American Academy of Emergency Medicine

Thank you for looking into this important issue. In 2018, the AMA conducted their yearly Physician Practices Benchmark Survey and concluded that for the first time, more physicians were employees rather than owners of their practices<sup>1</sup>. While this may not seem like a significant finding, the systematic consolidation and buy-out of private practice physicians is detrimental to both patients and physicians. Physicians take the Hippocratic oath upon embarking in the practice of medicine, an ethical code of conduct which requires that their duty be first and foremost to their patients. This code obligates physicians to put the needs of the patients first, both in the practice of medicine and their business; whereas, non-physician owned/operated practices lack this ethical code, leading to poor patient care and higher healthcare costs to patients. The most deleterious of these employers are Emergency Department corporate management groups (CMGs) with private equity backing and/or ownership (Teamhealth, Envision (previously Emcare), APP, Schumacher, USACS, etc.). Emergency departments act as the safety net for medical care in this country, providing care to patients in their most vulnerable moments. While these companies argue that they have no undue effect on physician practice, this could not be further from the truth.

CMGs obtain contracts from hospitals to staff the emergency department on a small scale and turn these into larger consolidations over time, dominating entire hospital networks and geographical regions. Due to the piecemeal nature of the acquisitions, these mergers are often overlooked as a source of anti-competitive and unfair business practices. Additionally, thirty-three states have instituted the corporate practice of medicine (CPOM) doctrine, a law prohibiting layperson ownership of medical practices. However, these laws are often not enforced or bypassed through “paper owners”. For example, the recent wrongful termination case of Brovont v. Emcare<sup>2,3</sup> illustrated that a single physician “owner” who was not involved in the daily operations was listed on hundreds of subsidiaries’ contracts, even in states like Texas with strong existing CPOM laws. Often when CPOM laws are enforced, the punitive fines imposed are small and seen as “the cost of doing business,” because what is a \$400,000 fine in comparison to hundreds of millions in revenue to a private equity backed company<sup>4</sup>? To curtail the corporate abuses of one CMG, the American Academy of Emergency Medicine Physician Group has brought a lawsuit against Envision in the state of California for the illegal corporate practice of medicine<sup>5</sup>.

The anti-competitive business practices of CMGs also extend into the employment and medical practice of physicians. The CMG determines who is hired and how many physicians are staffed at one time. There is a common and well-known practice in the industry for CMGs to understaff physicians and create unsafe patient environments by choosing to replace physicians with less costly, under-trained non-physician practitioners (NPP). They also encourage physicians to chart more, up-code patient’s bills, and pressure physicians to achieve arbitrary operation metrics that are often antithetical to best practices. They force physician supervision of NPPs and institute unsafe staffing ratios. They increase patient costs by charging out of network fees and increasing surprise billing<sup>6</sup>. The encouragement of inappropriate admissions<sup>7</sup> and arbitrary metrics and protocols have also led to poorer patient outcomes and increased patient costs. They also determine how much the physician is paid by collecting their professional fees directly and then illegally fee-splitting. Fee-splitting, in which the compensation for professional services is shared or split with a party who did not render the services, is common practice for CMGs. Physicians

are prevented from seeing how much is billed and collected in their names, which can lead to fraudulent billing practices and suppression of wages. Physicians who inquire about billing are also often terminated.

Because of CMG domination of the workplace market (up to 40% of emergency departments are currently staffed by CMGs) in many parts of the country, there are no work options outside of corporate groups. Emergency Physicians (EPs) are unable to compete with these large CMGs in obtaining Emergency Department contracts and are forced to sign non-interference clauses as a condition of employment. EPs are also forced to sign restricted covenants in their employment contracts barring them from seeking employment at other hospitals in their immediate area. Employment contracts also include clauses waiving due process for physicians, which were originally guaranteed to members of the hospital medical staff through the Healthcare Quality Improvement Act of 1986 and are affirmed by the Joint Commission via the Comprehensive Accreditation Manual for Hospitals. Physicians are left with no choice but to sign these contracts, and are terminated, often for reasons unrelated to patient care, without a fair hearing of their peers. We have seen this time and again where physicians were terminated for whistleblowing regarding patient safety issues. An autonomous physician not beholden to business interests can better advocate for patients and the entire healthcare system. The Ming Lin case in Seattle should be a stark reminder that physicians who speak up for the safety of staff and patients will be removed to protect the bottom-line<sup>8</sup>.

The corporate consolidation and business practices in Emergency Medicine are harming our patients and the entire healthcare system. The anti-competitive and suppressive action of private equity backed companies cannot be allowed to continue unchecked. The American Academy of Emergency Medicine urges the Federal Trade Commission to conduct a 6B investigation into the effects of emergency medicine staffing group mergers and acquisitions by private equity.

#### References:

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