Comments of Eleven Attorneys General in Response to the February 29, 2024 Request for Information on Consolidation in Healthcare Markets

June 5, 2024

The Attorneys General of California, Connecticut, Delaware, Illinois, Minnesota, New Jersey, Oregon, Pennsylvania, Rhode Island, Washington, and Washington D.C. (the "States") submit the following Comments in response to the Request for Information on Consolidation in Healthcare Markets issued jointly by the Department of Justice ("DOJ") Antitrust Division, the Department of Health and Human Services ("HHS"), and the Federal Trade Commission ("FTC") on February 29, 2024. This comment offers the perspective of the Attorneys General of the States on the adverse effects resulting from consolidation in healthcare markets, particularly through transactions driven by private equity funds or other alternative asset managers.[1] As co-enforcers of the federal antitrust laws, and enforcers of their own state laws, including consumer protection and antitrust laws, the States have unique perspectives, experiences, and interests in protecting patients, healthcare workers, and innovation in healthcare from harm, including harm arising from such transactions.

I. Introduction and Overview of State Concerns

In this section, the States provide a summary of the key concerns raised through their experience with private equity in light of the distorted incentives that come with private equity investment. These summarized concerns are discussed in more detail in later sections of this comment. In addition, the States provide a brief description of the private equity business model and explain how and why it can fundamentally change the incentives of providers of healthcare services and operators of healthcare facilities in ways that are detrimental to patients and workers in the industry and resulting in or contributing to many of the harms summarized.

A. Summary of the States' Concerns Regarding Private Equity in Healthcare

Here, we provide a brief, executive summary of these concerns, while the incentives and features of private equity firms that drive them are discussed in more detail in Part I.B, *infra.* The experience of the States as enforcers of competition, consumer protection, and other laws has shown that private equity's involvement in healthcare can lead to significant problems. Specifically, the States have found:

- ***Increased debt burdens combined with cost-cutting pressures lead to degraded quality and access:*** When private equity forces portfolio company healthcare providers to incur debts, while at the same time pushing to cut costs to increase short-term profits, the results are often unsustainable. Among other things, these actions can increase the burdens on medical staff, create equipment or supply

[1] While this comment focuses on the impact of private equity and alternative asset managers in healthcare, our concerns about vertically integrated entities in healthcare continues. *See, e.g.,* Public Comments of 23 State Attorneys General (Apr. 21, 2022), https://www.regulations.gov/comment/FTC-2022-0003-0807. And the recommendations discussed therein can also address the effects of vertically integrated entities similarly interested in increasing prices and compromising access and quality in healthcare.

shortages, and lead to the elimination of less profitable lines of business. Combined with other, higher-risk strategies, these can lead to bankruptcies and closures in economic downturns, with patients, workers, creditors, investors, and taxpayers shouldering the losses. *See* Part II.B, *infra*.

- ***Higher risk tolerance facilitates exploitation of market failures or legal loopholes:*** Private equity's business model allows full control of the companies they purchase, with very little of their own funds at stake. Combined with the high returns promised to investors, private equity firms have shown a willingness to take greater risks—pushing the envelope to exploit market failures or legal loopholes—in ways that more risk-averse long-term stakeholders would avoid due to the degradation of long-term relationships with payors or patients. This has led to maximizing profits in fixed-fee arrangements by decreasing the quality or amount of care provided, resulting in poor health outcomes. It has also led to unnecessary procedures being performed or coded, as well as billing practices that result in surprise charges to patients and undue financial hardship. *See, e.g.* Part II.C.2, *infra.*

- ***Consolidation leads to increased prices, and decreased quality and access:*** In order to achieve short-term gains, private equity firms often engage in so-called "roll-up" strategies where they acquire a "platform" company and then purchase other companies to boost revenues and profits. When private equity pursues these strategies in healthcare, it inevitably leads to consolidation and higher market shares. A growing body of research has found that consolidation in a variety of healthcare markets leads to increased prices, while reducing quality of and access to care.[2] *See* Part II.C, *infra*.

- ***The trend towards consolidation is likely to be followed by an extended trend towards vertical integration:*** The short-term nature of private equity funds often ends in the sale of these consolidated businesses to another buyer, or a public offering. As the rolled-up entities become larger and larger, the pool of potential buyers also shrinks. Given the specialized nature of many healthcare services and the expertise required, the States believe that many purchasers are likely to be other players in the healthcare space.[3] Likely buyers include the largest insurers,

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[2] *See, e.g.,* REPORT TO CONGRESS: MEDICARE PAYMENT POLICY 10 (MEDPAC Mar. 2023), *https://www.medpac.gov/wp-content/uploads/2023/03/Mar23_MedPAC_Report_To_Congress_v2_SEC.pdf* ("most of the literature suggests that consolidation increases prices without an improvement in quality"); Zack Cooper et al., *The Price Ain't Right? Hospital Prices and Health Spending on the Privately Insured* (May 2018), *https://www.nber.org/system/files/working_papers/w21815/w21815.pdf*; Cory Capps et al., *The Effect of Hospital Acquisitions of Physician Practices on Prices and Spending*, 59 J. HEALTH ECON. 139 (2018); Caroline Hanson et al., *Do Health Insurance and Hospital Market Concentration Influence Hospital Patients' Experience of Care?*, 54 HEALTH SERV. RES. 85 (2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6606537/.

[3] *See, e.g.,* Souresh Saghafian et al., *The Impact of Vertical Integration on Physician Behavior and Healthcare Delivery: Evidence from Gastroenterology Practices* (Feb. 2023),

such as UnitedHealthcare (already vertically integrated with Optum's pharmacy benefits management, physicians, and related ancillary services) and Aetna (already vertically integrated with CVS pharmacy, pharmacy benefit, and related ancillary services). Such a trend towards consolidation and vertical integration can lead to a variety of competitive concerns.[4]

- ***Control by private equity can lead to a loss of doctor autonomy, impacting patient care*:** The ability of private equity firms to exercise a high degree of control over their portfolio companies often places them at odds with the doctors or other healthcare workers they employ. Private equity groups are willing to engage in high-risk strategies that often cross the line between supporting doctors and engaging in the corporate practice of medicine in states where that is illegal. *See, e.g.* Part II.C.2, *infra*.

B. The Private Equity Business Model and the Incentives It Fosters

As relevant here, private equity refers to investment firms who raise capital and utilize extensive debt financing to take ownership and control over existing businesses.[5] Typically, most of the capital raised by private equity firms comes from pension funds, university endowments, hedge funds, sovereign wealth funds, and wealthy individuals.[6] Private equity firms generally create a special purpose entity for each investment fund raised. These are often structured as limited partnerships, where the private equity firm controls the general partner—empowered to make most decisions including selecting portfolio companies for investment, and working with management at those companies—and the investors are often passive, limited partners who cannot take an active role without risking loss of their limited liability protections.[7] The private equity firm also may limit its liability as the general partner by not serving directly as such, but rather being a shareholder in a corporation that serves as the general partner.[8] The following diagram depicts a typical structure:

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https://www.nber.org/system/files/working_papers/w30928/w30928.pdf (noting the number of physicians who have vertically integrated with hospitals has doubled in the past decade, and the trend is expected to continue).

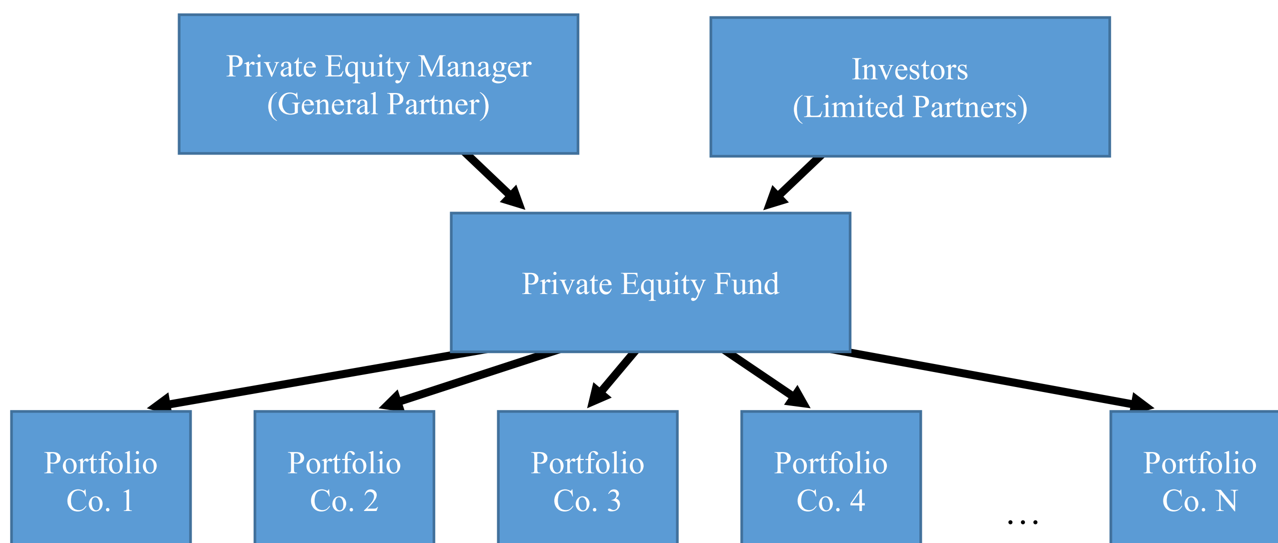
[4] As the Supreme Court, the DOJ, and FTC have recognized, a trend towards vertical integration can indicate competitive concerns sufficient to block mergers. *See, e.g., Brown Shoe Co. v. United States,* 370 U.S. 294, 332 (1962) (affirming the blocking of a merger in part "because the trend toward vertical integration in the shoe industry" suggested competitive concerns); DOJ and FTC Merger Guidelines § 2.7 (2024) ("If a merger occurs amidst or furthers a trend toward vertical integration, the Agencies consider the implications for the competitive dynamics of the industry moving forward").

[5] Eileen Appelbaum & Rosemary Batt, A Primer on Private Equity at Work: Management, Employment, and Sustainability, at 1, 13-14 (CEPR 2012), https://cepr.net/documents/publications/private-equity-2012-02.pdf.

[6] *Id.* at 13. This is typically referred to as a "Leveraged Buyout." *Id.* While private equity firms employ other types of investment strategies, for the reasons discussed in this comment, leveraged buyouts are the most troubling.

[7] *See* DONALD R. CHAMBERS, KEITH H. BLACK & NELSON J. LACEY, ALTERNATIVE INVESTMENTS: A PRIMER FOR INVESTMENT PROFESSIONALS 82-83 (CFA Institute Research Foundation, 2018), https://www.cfainstitute.org/-/media/documents/book/rf-publication/2018/rf-v2018-n1-1.ashx. *See also* Appelbaum, *supra* note 5 at 13-14.

[8] Gregory Brown, *Debt and Leverage in Private Equity: A Survey of Existing Results and New Findings* (Jan. 4, 2021), https://www.uncipc.org/wp-content/uploads/2021/01/IPC-PERC_PE-Debt-Leverage.pdf.



Private equity firms often establish multiple funds over time, staggering the dates of maturity.[9] Funds typically mature in 7-10 years, though some may also allow for 2-3 year extensions.[10] Each fund invests in a limited number of portfolio companies—typically privately held companies—which are selected by the general partner and are not typically known to the limited partners at the time of investment.[11] As previously noted, portfolio companies are typically acquired through the use of extensive debt financing. In a typical arrangement, the fund will pay 30% of the purchase price (with the private equity firm contributing as little as 2%, and the limited partners as much as 98% of this amount), while the remaining 70% is financed with debt that the portfolio company—not the fund or the private equity firm—is obligated to pay.[12] The private equity firm typically takes seats on the board of the portfolio company and can generally replace the company's management if they refuse to cooperate.[13]

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[9] THOMAS P. LEMKE ET AL., HEDGE FUNDS AND OTHER PRIVATE FUNDS: REGULATION AND COMPLIANCE § 13.1 (2021-2022).
[10] CHAMBERS, *supra* note 7 at 83.
[11] LEMKE, *supra* note 9 at § 13.1.
[12] Eileen Applebaum & Rosemary Batt, *Private Equity Buyouts in Healthcare: Who Wins, Who Loses?*, at 6 (Inst. New Econ. Thinking, Working Paper No. 118, 2020), https://www.ineteconomics.org/uploads/papers/WP_118-Appelbaum-and-Batt-2-rb-Clean.pdf. Reportedly, the higher cost of credit has recently driven the 70% financing number down to 50%. *See* Rachel Kakouris, *Amid Investor Caution, Expensive Cost of Debt, LBO Equity Contributions Top 50%,* Pitchbook (Oct. 18, 2023), https://pitchbook.com/news/articles/amid-investor-caution-expensive-cost-of-debt-lbo-equity-contributions-top-50. In addition, limited partners in funds are now reportedly asking private equity firms and their owners to increase their own investments and personal stakes in funds, leading to an increase from an average of 2% last year, to 5% this year. *See* Laura Benitez & Swetha Gopinath*, Private Equity's Titans Are Told to Cough Up Their Own Cash* (Bloomberg, Apr. 17, 2024), https://www.bloomberg.com/news/articles/2024-04-18/private-equity-investors-driving-tougher-deals-as-power-balance-shifts.
[13] *Id.* at 6.

The private equity firm is customarily compensated through a 2% management fee on all funds committed by investors, as well as a 20% incentive fee collected only after the fund exits an investment, and often only on profits exceeding a target preferred rate of return or "hurdle rate."[14] Due to the limited term of funds, most investments by private equity in healthcare have a relatively short time-horizon. Funds typically seek to "exit" an investment in a portfolio company within 4-7 years, typically by selling to another buyer or going public.[15] Valuations on exit are typically based on a multiple of the portfolio company's EBITDA (earnings before interest, taxes, dividends, and amortization), referred to here as "multiples."[16] The EBITDA of a portfolio company can be increased either by (1) increasing revenues, either through organic growth or (more commonly in the short-term) strategic acquisitions; or (2) by cutting costs, for example through better use of technology or (more commonly in the short-term) downsizing the workforce and relying on remaining employees to do more.[17] Multiples—which tend to be the greater driver of returns for private equity funds—tend to increase along with the general market conditions and the macroeconomic environment, but private equity firms can also increase them by growth strategies such as trying for, or emphasizing the potential of, market consolidation.[18] Indeed, because "bigger companies are typically valued at higher multiples,"[19] it is no surprise that the most common strategies for private equity firms in healthcare involve consolidation.[20] To help ensure these strategies succeed, private equity firms tend to target highly fragmented markets, as well as those where consumers or payors lack choice.[21]

Private equity firms have found other ways to extract profits from portfolio companies. For example, portfolio companies are often required to enter into a Management Services Agreement with the private equity firm, which includes "monitoring fee" payments directly to the private equity firm (bypassing the fund and its investors), as well as payment of "transaction costs" associated with the acquisition of other companies.[22] These transaction costs give private equity firms added incentives to engage in consolidation, beyond driving short-term profits and increasing multiples. In addition, private equity firms will often strip assets from portfolio companies in more direct ways that benefit the private equity firms. For example, they may take

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[14] CHAMBERS, *supra* note 7 at 86-87. *See also* Appelbaum, *supra* note 5 at 14.
[15] Richard M. Scheffler et al., *Soaring Private Equity Investment in the Healthcare Sector: Consolidation Accelerated, Competition Undermined, and Patients at Risk*, AM. ANTITRUST INST. 7 (May 8, 2021), https://www.antitrustinstitute.org/wp-content/uploads/2021/05/Private-Equity-I-Healthcare-Report-FINAL-1.pdf.
[16] *Ibid.*
[17] Appelbaum, *supra* note 5 at 16; *see also* MICHAEL BRIGL ET AL., THE POWER OF BUY AND BUILD: HOW PRIVATE EQUITY FIRMS FUEL NEXT-LEVEL VALUE CREATION 5 (BCG & HHL Leipzig School of Management 2012).
[18] BRIGL, *supra* note 17 at 5-6.
[19] Scheffler, *supra* note 15 at 5-6.
[20] PitchBook, Healthcare Services Report: PE Trends and Investment Strategies, at 4 (Q4, 2023) (showing the vast majority of transactions are "add-on" deals).
[21] *See, e.g.* ERIN FUSE BROWN ET AL., PRIVATE EQUITY INVESTMENT AS A DIVINING ROD FOR MARKET FAILURE: POLICY RESPONSES TO HARMFUL PHYSICIAN PRACTICE ACQUISITIONS 5 (USC-Brookings Schaeffer Initiative for Health Policy, Oct. 2021)
[22] Appelbaum, *supra* note 12 at 6-7 (noting that in 2018, 58% of private equity firms required their portfolio companies to pay monitoring fees, while 85.8% required payment of transaction fees); *see also* CHAMBERS, *supra* note 7 at 87 (noting "[s]ome private equity funds are famous—or perhaps notorious—for charging myriad other fees, including fees from transactions, such as deal fees, and ongoing fees, such as advisory and directorship fees").

assets—such as real property—owned by the portfolio company at the time of acquisition, and sell it to entities such as real estate investment trusts ("REITs") that partner with the private equity firm and help finance its acquisitions.[23] In addition, private equity firms also can directly extract value from portfolio companies in the form of forced dividends, which are themselves often financed by increased debts loaded on to the portfolio companies.[24]

Moreover, the private nature of these investments, coupled with the complicated ownership structures that private equity firms utilize, results in a lack of transparency that can mask many of the strategies discussed above from investors, as well as from regulators. This is an intentional feature of the private equity business model, and it can exacerbate many of the other incentives discussed by masking conduct from investors who may be more risk-averse than the private equity firms, due to their larger investment in the funds. To illustrate the point, the SEC's recent announcement of minimal disclosure requirements for private equity funds to their investors[25] has been met with legal challenges from private equity firms, who argue the SEC exceeded its statutory authority with these disclosure requirements.[26]

The private equity business model results in a unique set of incentives and circumstances, compared to traditional providers of healthcare services such as for-profit public companies, non-profit companies, and provider owned-and-operated healthcare practices. Specifically:

- ***Private equity often loads acquired companies with high debt burdens and fees:*** Where private equity uses debt leveraged on to its portfolio companies to acquire them, it adds to the financial burdens on those companies. Management fees, transaction fees, and forced sale of assets with leasebacks, all exacerbate these burdens. In contrast, most public companies, non-profits, and owner-operated practices are focused on maintaining their status as a going concern and will not incur substantial debts without a clear path to servicing them. They tend to prefer long-term strategies that provide flexibility during economic downturns over short-term profits and high leverage.[27]

- ***Limited investment by the private equity firm results in moral hazard:*** When purchasing a portfolio company, amounts invested by the private equity firm itself can be a tiny fraction of the purchase price.[28] Moreover, the structure of transactions—where the private equity firm is often two steps removed from the portfolio company—further limits private equity firm liability for abuses by the portfolio company. With so little of their own capital at risk, and a high level of

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[23] Rosemary Batt, et al., *The Role of Public REITS in Financialization & Industry Restructuring* (Sep. 7, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4209720.
[24] *See* Harriet Clarfelt & Antoine Gara, *Private Equity Owners Pile Debt to Pay Themselves Dividends*, FIN. TIMES (Feb. 5, 2024).
[25] Press Release, SEC Announces the Regulation of Private Fund Advisors (Aug. 23, 2023), https://www.sec.gov/news/press-release/2023-155.
[26] *See, e.g.* Opening Brief for Petitioners, *Nat'l Assoc. of Private Fund Managers v. SEC*, No. 23-60471, ECF No. 41 (5th Cir. 2023).
[27] *See, e.g.* Appelbaum, *supra* note 5 at 15.
[28] *See supra*, note 12.

control over portfolio companies, private equity firms have incentives to force portfolio companies to engage in high-risk strategies. In contrast, most public companies tend to be punished for such behavior by shareholders in the short term, while non-profits and owner-operated practices may avoid them due to long-term reputational harms.

- ***The short-term nature of private equity funds forces a focus on short-term gains:*** Due to the short-term nature of funds, private equity firms tend to focus on strategies that increase revenues and multiples for their portfolio companies in the short-term. Often, this means taking advantage of legal or regulatory loopholes in order to maximize short-term profits, or serial acquisitions to increase revenues through acquiring market power. In contrast, companies that take a long-term outlook often will avoid relying on legal or regulatory loopholes too heavily, because—particularly in healthcare—these may lead to customer outrage and regulatory or legislative actions. In addition, companies with a long-term orientation tend to focus on sustainable growth, rather than on serial short-term acquisitions designed solely to boost revenues.

- ***A focus on increasing exit multiples using add-on strategies leads to market concentration and consolidation:*** In addition, the focus on increasing multiples has led to increased consolidation in a variety of markets, led by private equity firms. For example, one study found a seven-fold increase in physician practices owned by private equity from 2012 to 2021, with market shares of a *single private equity firm* exceeding 30% in 108 metropolitan service areas, and exceeding 50% in 50 metropolitan service areas.[29] As noted above, increased concentration in healthcare usually leads to an increase in prices, without any corresponding increase in quality or access.[30]

II. The Impact of Private Equity Transactions on Healthcare

Private equity has made significant inroads into virtually all aspects of healthcare. A review of the primary areas of private equity involvement in healthcare—hospitals, nursing homes, and physician practices—reveals a host of common practices associated with private equity ownership as well as the sorts of patient and community harms that inevitably follow. In each of these areas, private equity ownership has been accompanied by the now familiar playbook discussed in Part I.B, *supra*. What follows is predictable: increases in consumer prices; reductions in staffing and services, resulting in patient harms; and eventually closures of hospitals and nursing homes, resulting in loss of jobs and healthcare in communities. And because private equity firms often seem to target facilities that are already struggling, the impact of their activity may be felt most heavily in areas that can least afford them: lower income communities and rural communities.

[29] Ola Abdelhadi et al., *Private Equity-Acquired Physician Practices and Market Penetration Increased Substantially*, 2012-21, 43 HEALTH AFF. 354 (2024).
[30] *See supra* note 2

A. Nursing Homes

The growing trend of private equity ownership in the nursing home space is concerning due to the association between private equity buyouts and a decline in patient care. The high number of financial assets available within a nursing home, the guaranteed demand for services, and the guaranteed government reimbursements for care, make these good targets for private equity. The aging "Baby Boomer" generation is expected to increase already unmet demand for nursing homes, especially in more rural areas. This demand, combined with the rising costs of operating a healthcare facility, allows private equity firms to prey on struggling nursing homes to increase their own profits, with little concern for the communities and patients they are sacrificing. Private equity firms continue to be active in this space, despite a decline in deal activity since 2023.[31] This is a sector where patients are particularly vulnerable, and spending is projected to grow to $240 billion annually by 2025.[32]

1. The Organization of Nursing Homes Favors Private Equity Takeovers

One reason for private equity's interest in the nursing homes is the multiplicity of business entities and assets involved. After a buyout, private equity firms often split these pieces of the business into separate limited liability companies, with distinct entities for the nursing home's real estate, staff, pharmacy, medical supplies, and management. [33] This fragmented structure allows private equity firms to charge management fees through the nursing home, as well as lease the property back to the nursing home management entity at exorbitant rates, despite (or, because of) the entities sharing common ownership.

This business practice likely directly harms patients and helps shield the private equity owners from liability. As discussed in Part I.B, the short lifespan of private equity funds incentivizes decreased spending on patient care, and increasing, as much as possible, fees to the management LLC, even if doing so sacrifices quality of services and patient safety. This fragmented organizational structure also diffuses liability, creating additional challenges for government oversight agencies. The financial records of these nursing homes are often difficult to analyze, as funds regularly flow between various separate organizational entities, and any enforcement action requires significant agency resources to discover who the true owners are, as well as how many nursing homes trace back to a common private equity owner.

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[31] PitchBook, *supra* note 20, at 23 (noting a single deal involving skilled nursing in 2023, down from 11 in 2020 and 6 in 2021 and 2022, respectively).

[32] Atul Gupta et al., *Owner Incentives and Performance in Healthcare: Private Equity Investment in Nursing Homes*, 37 REV. FIN. STUD. 1029, 1031 (2024), https://doi.org/10.1093/rfs/hhad082.

[33] Similarly, vertically integrated entities in healthcare have the opportunity to generate significant intercompany revenue via different services provided within the same corporate family. *See, e.g.,* Richard G. Frank & Conrad Mihaupt, *Profits, Medical Loss Ratios, & Ownership Structure of Medicare Advantage Plans*, Brookings (July 13, 2022) (describing payments to health plan(s) and payments when those plans steer enrollees to physicians that belong to the same corporate family).

2. Private Equity Firms Capitalize on the Current Reimbursement Structure

Nursing homes receive about 75% of their funding from state and federal government payors, making them an attractive private equity investment, as both the patient demand for services and the payment for services are constant and reliable. The reimbursement rates for patients involving both fee for service Medicare and Medicaid are often low or even non-negotiable, allowing a set amount per day of care for each patient. While this is meant to reward efficient, managed care, with private equity's short-term focus and high-risk tolerance, in practice it encourages private equity firms to decrease patient spending to maximize profits.

Simply put, the less money that private equity firms spend on staffing and direct patient care, the more they can direct back to themselves through the complex real estate and management schemes discussed above. Moreover, it gives private equity backed nursing homes a financial incentive to engage in discriminatory patient admission, as patients with less complex medical conditions and care needs will likely result in higher profit margins. This practice of selective admissions frequently leaves patients with disabilities, complex care needs, or high-cost prescriptions without care.

Private equity firms also seek to maximize profits by lowering staffing costs through wage reductions and employee benefit cuts, as well as reductions in staff training, reductions in patient nursing hours, and substituting lower-cost Certified Nursing Assistants ("CNAs") for Licensed Practical Nurses ("LPNs") and Registered Nurses ("RNs"). Together, these practices directly compromise the quality of patient care and leave patients more vulnerable to injuries and neglect.

3. Private Equity Takeovers Have a Measurable Impact on Patient Outcomes

Across numerous standard indicators used to assess patient well-being in nursing homes, the data supports the finding that private equity ownership of nursing homes negatively impacts patient outcomes. For example, a 2021 research paper found that patients experience an 11% increase in mortality at private equity-owned nursing homes.[34] The same researchers also found a decrease in mobility (6.2%), an increase in ulcer development (8.5%), and an increase in pain intensity (10.5%) among patients in nursing homes after private equity buyouts.[35] Another 2021 study of data from thousands of nursing homes over several years found that patients in private equity acquired nursing homes were worse off, with private equity acquired nursing homes associated with an 11.1% relative increase in emergency department visits and an 8.7% relative increase in hospitalization.[36]

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[34] *See* Gupta, *supra*, note 32, at 1032.
[35] *Id* at 1062.
[36] Robert Tyler Braun, et al. *Association of Private Equity Investment in US Nursing Homes With the Quality and Cost of Care for Long-Stay Residents*. JAMA HEALTH FORUM 2021;2:e213817, https://jamanetwork.com/journals/jama-health-forum/fullarticle/2786442.

A recent example demonstrating this harm to patients is the temporary closure and subsequent investigation in Pennsylvania of nursing homes owned by private-equity group Bonamour Health Group LLC. Bonamour owns six nursing homes in Western Pennsylvania, all in rural areas where care is already limited. Each nursing home is operated and managed under separately named LLCs. In the fall of 2023, Bonamour defaulted on its $30 million mortgage. At the same time, Bonamour was failing to pay staff and vendors.[37] According to a Center for Medicare & Medicaid Services ("CMS") report from August 2023, Bonamour failed to pay its medical supply vendors, resulting in a lack of wound care, medications, and other medical supplies in the Jefferson Hill Healthcare and Rehabilitation facility.[38] CMS labeled this violation as "immediate jeopardy to resident health or safety," and through a CMS action plan, Bonamour had to pay over $160,000 to restore medical supply services to the Jefferson Hill facility.[39]

In March of 2024, employees walked out of the Jefferson Hills facility due to Bonamour's ongoing failure to pay staff. As a result, the facility closed, and the Pennsylvania Department of Health had to immediately step in and relocate dozens of patients overnight. A federal judge in the Western District of Pennsylvania subsequently ordered a temporary takeover of the five remaining Bonamour nursing homes.[40]

B. Hospitals

Private equity ownership of hospitals has proven particularly problematic, leading to higher prices,[41] worse health outcomes,[42] less staffing,[43] and often to bankruptcies and closures that adversely affect patients, staff, and taxpayers. For example, over the past five years, a number of states have seen a significant impact from private equity financing on their healthcare systems. Formerly non-profit hospitals, and some for-profit entities, have been sold to private equity firms, with the promise of investment in struggling urban and rural hospitals. Yet instead of investing, private equity firms have removed value from the hospitals, primarily through the sale of the hospitals' real estate. The hospitals subsequently are unable to keep up with rent obligations, resulting in staff and service reductions, inability to pay vendors and taxes, and ultimately the closure or sale of the hospitals. When hospitals are forced to close, employees lose their jobs, local governments and school districts lose tax revenue, patients lose access to

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[37] Bob Mayo, *Jefferson Hills Nursing Home Closed,* WTAE Pittsburgh (Mar. 5, 2024), https://www.wtae.com/article/jefferson-hills-nursing-home-closed-pennsylvania-health-department/60102275.

[38] Centers for Medicare and Medicaid Services, S*tatement of Deficiencies and Plan of Correction: Jefferson Hills Healthcare and Rehabilitation* (Aug. 8, 2023), https://www.medicare.gov/care-compare/inspections/pdf/nursing-home/395066/health/complaint?date=2023-08-08.

[39] *Id*.

[40] Bob Mayo, *Jefferson Healthcare Takeover Ruling,* WTAE Pittsburgh (Mar. 8, 2024), https://www.wtae.com/article/jefferson-healthcare-takeover-ruling/60141451.

[41] *See, e.g.,* Joseph D Bruch et al., *Changes in Hospital Income, Use, and Quality Associated with Private Equity Acquisition,* 180 JAMA Internal Med. 1428 (2020); Tong Liu, *Bargaining with Private Equity: Implications for Hospital Prices and Patient Welfare* (Nov. 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3896410.

[42] *See, e.g.* Sneha Kannan et al, *Changes in Hospital Adverse Events and Patient Outcomes Associated with Private Equity Acquisitions*, 330 JAMA 2365 (2023)

[43] *See, e.g.,* Joseph D Bruch et al., *Characteristics of Private-Equity Owned Hospitals in 2018*, 174 Ann. Internal Med. 277 (2021).

medical services, and nearby hospitals are overburdened by the influx of new patients. We discuss a number of examples spanning across states, as well as specific examples in Pennsylvania.

1. Leonard Green and Prospect Medical

The story of Prospect Medical Holdings, Inc. ("Prospect Medical") is possibly the worst example of private equity greed: enriching investors at the expense of low-income, vulnerable patients and for many patients leaving their healthcare lifeline in financial disarray. It also shows how foresight and tenaciousness by state regulators may be able to protect against such egregious conduct.

Prospect Medical owns 16 hospitals in four states: California, Connecticut, Pennsylvania, and Rhode Island—many of which are safety net hospitals. [44] Today, several of these hospitals are in dire financial straits and in poor condition. Efforts to sell some of the hospitals, including in Connecticut and Pennsylvania, have failed to date, leading to significant concerns about Prospect Medical's viability as a going concern, and even its ability to obtain sufficient supplies and staffing to be able to provide necessary services to current patients.[45]

Prospect Medical started out in 1996 as a California physician-run healthcare company but grew quickly via acquisition of various hospitals and an HMO. It also acquired a less-than-stellar reputation in running its hospitals, known for aggressive cost cutting, leading to financial and payment issues as well as lower-than-average quality and patient care. Nevertheless, in 2010, private equity firm Leonard Green & Partners ("Leonard Green") bought a majority share of Prospect Medical in a $363 million leveraged buyout, with the remainder of the company owned by two Prospect Medical executives: Chief Executive Officer ("CEO") Sam Lee and David Topper.

After Leonard Green's acquisition of Prospect Medical, it acquired hospitals under Lee's continued direction, including in Rhode Island, New Jersey, Connecticut and Pennsylvania—despite concerns about financing, debts, and quality.[46] Apparently to deal with mounting debt and financial issues, beginning in 2018, Leonard Green made three aggressive, controversial moves. First, Leonard Green had Prospect Medical borrow $1 billion—most of which went to Leonard Green investors and Prospect Medical executives. Second, in 2019, Leonard Green

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[44] Safety net hospitals provide services to patients regardless of their insurance status or ability to pay.

[45] Private Equity Stakeholders Project, *Prospect safety net hospitals continue to struggle under the legacy of Leonard Green's past ownership* (Nov. 8, 2023), https://pestakeholder.org/news/prospect-safety-net-hospitals-continue-to-struggle-under-the-legacy-of-leonard-greens-past-ownership/; Eric Bedner & Liese Klein, *As its CT Hospitals Struggled, Prospect Medical Took Out a $1.1B Loan*, CT Insider (Dec. 22, 2023), https://www.ctinsider.com/journalinquirer/article/ct-prospect-echn-rockville-manchester-hospitals-18471894.php.

[46] Eileen Appelbaum & Rosemary Batt, *Financialization in Health Care: The Transformation of US Hospital Systems* 73 (Sep. 9, 2021) ("The Centers for Medicare and Medicaid annual quality of care rankings have put all but one of Prospect's hospitals in the bottom 17 percent of all US hospitals. And since 2010, government inspectors have deemed Prospect facilities to pose 'immediate jeopardy' to their patients"), https://cepr.net/wp-content/uploads/2021/10/AB-Financialization-In-Healthcare-Spitzer-Rept-09-09-21.pdf.

obliged Prospect Medical to sell its real property in California, Connecticut, and Pennsylvania to Medical Properties Trust ("MPT"), a REIT headquartered in Alabama, for $1.4 billion, while entering into long-term leases for the facilities.

Not long after, Leonard Green sought to exit its relationship with Prospect Medical by selling its majority share to the two individual owners for $12 million, along with the assumption of over $1 billion in debt.[47] Because the Rhode Island hospitals were included in the sale, this required approval by the Rhode Island Attorney General's Office. In June 2021, the Rhode Island Attorney General issued a decision approving the sale, subject to numerous conditions.[48] These conditions addressed the challenges that the hospitals had been saddled with by its private equity owners. Among these conditions were a prohibition on any sale-lease back arrangement of the Rhode Island hospital real estate, and the establishment of an $80 million escrow fund to ensure Prospect Medical's continued funding of the hospitals and maintenance of lines of service. At that time, Prospect Medical held more than $3.1 billion in liabilities.[49]

While Leonard Green's control over the Prospect Medical hospitals may have ended with their June 2021 sale, the disastrous effects of its ten-year ownership and control continues to adversely impact many of its hospitals and patients. In Rhode Island, despite its prior commitments, Prospect Medical has severely underfunded the two hospitals, leaving them unable to perform certain essential services. In particular, Prospect Medical has failed to pay vendors–with $24 million outstanding as of late October 2023—making it difficult to obtain necessary supplies and forcing the hospitals to cut back on services and cancel numerous operations.[50] As a result, on November 8, 2023, the Rhode Island Attorney General filed suit against Prospect Medical, seeking to enforce Prospect Medical's obligations under the 2021 decision to fully fund the two Rhode Island hospitals.[51]

In addition, MPT disclosed in January 2024 that Prospect Medical has not been paying rent on many of its hospitals for months, raising the possibility that MPT could take legal action

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[47] *Ibid.*

[48] Specifically, the Rhode Island Attorney General required the following: (a) $80 million placed in escrow for hospital operating costs and paying off a loan; (b) an additional $72 million be provided for capital expenditures; (c) a five-year moratorium on sale or leaseback of the Rhode Island hospitals, and thereafter only with Attorney General approval; (d) a prohibition against liens, mortgages or other encumbrances on the hospitals without approval by the Attorney General; and (e) a requirement that the hospitals must be "open and operational" for five years with no reduction of "essential health care services." R.I. Office of the Att'y Gen., *In re Initial Application of Chamber Inc.; Ivy Holdings Inc.; Ivy Intermediate Holdings, Inc.; Prospect Medical Holdings, Inc.; Prospect East Holdings, Inc.; Prospect East Hospital Advisory Services, LLC; Prospect CharterCARE, LLC; Prospect CharterCARE SJHSRI, LLC; Prospect CharterCARE RWMC, LLC*, Decision, ¶¶ 22-34 (Jun. 1, 2021), https://riag.ri.gov/sites/g/files/xkgbur496/files/documents/Prospect_Chamber_Ivy_AG_HCA_Decision.pdf.

[49] Alexa Gagosz, *R.I Attorney General Sues Prospect Medical Holdings, Says His Concern for Its Hospitals is 'Greater Than it Has Ever Been',* BOSTON GLOBE (Nov. 17, 2023), https://www.bostonglobe.com/2023/11/17/metro/ri-sues-hospital-owner-prospect-medical-holdings/.

[50] *Ibid.*

[51] *Ibid.*

against Prospect Medical to enforce these payment terms.[52] Given these troubles and financial uncertainties, its little surprise that Prospect Medical tried to sell several hospitals, including the two in Rhode Island. In 2023 Prospect Medical submitted applications to try to sell the two Rhode Island hospitals to an Atlanta-based non-profit, the Centurion Foundation. According to Centurion's application, the Foundation has no ties to Rhode Island, no prior experience running a hospital, and the entire transaction is to be financed through bonds with no cash investment. The application was accepted for review in late 2023, and state regulators have until mid-June 2024 to decide whether to approve the application.[53]

Prospect Medical's difficulties are not limited to Rhode Island hospitals, but spread to various facilities in other states. In Connecticut, Prospect Medical owns three hospitals (Rockville, Manchester Memorial, and Waterbury) which it purchased in 2016 and which similarly suffered from the 2019 sale and lease-back with MPT, and which are similarly underfunded—owing millions of dollars in back state and local taxes along with owing millions to suppliers and vendors, including physicians, impeding their operations and services.[54] Across the three Prospect hospitals in Connecticut, services and units have been cut, closed, or pared back, with patients in those communities travelling to other hospitals in the state to receive care, causing a precipitous collapse of patient volumes at the Prospect hospitals.[55]

In October 2022, Yale New Haven Health made an offer to buy the three hospitals, but a devastating July 2023 ransomware attack across the entire Prospect Medical system that exposed employee information and a small number of patient records led to a lengthy period of degraded operations, including diversions, patient care lapses, and the closure of various units and services.[56] Before moving forward with its planned acquisition, Yale New Haven Health negotiated an agreement in principle with MPT to acquire the real estate and physical plant of Connecticut's Prospect Hospitals for essentially the same price MPT purchased the assets for in 2019, after collecting $104 million in lease payments over the period. This demonstrates the extractive nature of these sale-and-leaseback arrangements and their adverse impacts on hospital

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[52] *Medical Properties Trust Provides Update on Steward Health Care*, January 4, 2024, available at https://medicalpropertiestrust.gcs-web.com/news-releases/news-release-details/medical-properties-trust-provides-update-steward-health-care

[53] Alexa Gagosz, *As the Private-Equity-Firm Owners Look to Sell, the Future of Two Safety-Net Hospitals in R.I. is at Stake*, BOSTON GLOBE, (Mar. 19, 2024), https://www.bostonglobe.com/2024/03/19/metro/their-private-equity-firm-owners-look-sell-future-two-safety-net-hospitals-ri-is-stake/.

[54] Dave Altimari et al., *Prospect Medical Chain Owes CT $67 million, Tax Liens Show,* CT MIRROR, (Jan. 9, 2024), https://ctmirror.org/2024/01/09/prospect-medical-holdings-ct-hospitals-tax-lien/; Bedner and Klein, *supra* note 45.

[55] Katy Golvala & Jenna Carlesso, *In 2016, Rockville was a Bustling Local Hospital. Then Prospect Medical took Over*, CT MIRROR, (Oct. 29, 2023), https://ctmirror.org/2023/10/29/prospect-medical-holdings-rockville-hospital-vernon-ct/

[56] Dave Altimari & Jenna Carlesso, *Prospect Medical Cyberattack Exposed 24,000 Workers' Private Info*, CT MIRROR (Oct. 2, 2023), https://ctmirror.org/2023/10/02/ct-prospect-medical-holdings-hospital-cyberattack-manchester-rockville-waterbury/; *Dave Altimari & Jenna Carlesso, Inside the Cyberattack at Prospect Medical Holdings' CT Hospitals*, CT MIRROR (Oct. 1, 2023), https://ctmirror.org/2023/10/01/ct-prospect-medical-holdings-hospitals-cyberattack-yale-sale/.

operations.[57] Ultimately, all of these developments caused Yale to renegotiate its bid, including having the State of Connecticut waive several million dollars in back taxes.[58]

A similar story occurred in Pennsylvania, where in 2016, Prospect Medical acquired what was then the Crozer-Keystone Health System (now the Crozer Health System) in Delaware County, a county in Southeastern Pennsylvania, for $300 million. Prior to the Prospect Medical acquisition, Crozer Keystone was a non-profit health system, which consisted of four community hospitals: Springfield Hospital, Taylor Hospital, Delaware County Memorial Hospital and Crozer-Chester Medical Center. Both Crozer-Chester Medical Center and Delaware County Memorial Hospital were safety net hospitals serving primarily poor and minority patients. At the time of purchase, Prospect Medical promised to keep the hospitals open for 10 years.[59]

The purchase of Crozer-Keystone was financed by Leonard Green. In 2019, Prospect Medical entered into a sale and leaseback of the real estate of a number of its hospitals, including the Crozer Health system for $1.55 billion. The real estate was sold to MPT and $457 million of the proceeds from the sale of the real estate was used to pay dividends to Leonard Green. But the hospitals now owed $35 million a year in rent to the REIT and were unable to keep up with that demand.[60]

In 2021, Prospect Medical closed the maternity ward at Delaware County Memorial, and subsequently closed its emergency room, and then ceased providing inpatient services at both Delaware County Memorial and Springfield Hospitals.[61] The closure of both hospitals negatively impacted other hospitals in Delaware County. By June 2022, Main Line Health's Riddle Hospital had experienced a 16% increase in emergency room patients and OB/GYN and behavioral health services. These service areas already had difficulty meeting the needs of patients, and became overextended, all of which its CEO attributed to the closure of Crozer Health hospitals.[62]

Despite receiving some concessions on its mortgage payments from the REIT, Prospect Medical continues to be unable to meet its financial obligations, which is having a widespread

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[57] *Medical Properties Trust Announces Agreement to Sell Connecticut Hospitals*, BUSINESSWIRE, (Oct. 6, 2022) https://www.businesswire.com/news/home/20221005005938/en/Medical-Properties-Trust-Announces-Agreement-to-Sell-Connecticut-Hospitals).

[58] Private Equity Stakeholders Project, *Prospect Safety Net Hospitals Continue to Struggle Under the Legacy of Leonard Green's Past Ownership,* (Nov. 8, 2023), https://pestakeholder.org/news/prospect-safety-net-hospitals-continue-to-struggle-under-the-legacy-of-leonard-greens-past-ownership/;

[59] Harold Brubaker, *Prospect Medical Promises to Invest in Crozer-Keystone System*, PHILADELPHIA INQUIRER (May 4, 2016), https://www.inquirer.com/philly/business/20160505_Prospect_Medical_promises_to_invest_in_Crozer-Keystone_system.html.

[60] Merrill Goozner, *Private Equity and its Hospitals*, WASHINGTON MONTHLY (Mar. 24, 2023). https://washingtonmonthly.com/2023/03/24/private-equity-and-its-hospitals-a-case-study/.

[61] Harold Brubaker, *Crozer Health Is Getting Some Financial Breathing Room under A Restructuring by Its Landlord*, PHILADELPHIA INQUIRER (May 24, 2023), https://www.inquirer.com/health/crozer-health-prospect-medical-medical-properties-trust-financing-mortgage-20230524.html.

[62] Kenny Cooper, *Suburban Hospitals Are Overwhelmed after Crozer Health Shutdowns and Tower Health Closures*, WHYY (June 7, 2022), https://www.phillytrib.com/news/health/suburban-hospitals-overwhelmed-after-crozer-health-shutdowns-and-tower-health-closures/article_83f42404-a32b-58b9-9461-dc76e034f6df.html.

impact on the region in terms of access to healthcare, loss of jobs, and lost revenue. In December 2023, Ridley Park was forced to increase its property tax by 17% to make up the shortfall when Prospect Medical failed to pay its taxes totaling $487,000 for Taylor Hospital.[63] Crozer Health has reduced staffing through layoffs in an effort to lower costs, resulting in hundreds of employees losing their jobs.[64] In January 2024, Crozer-Chester's Surgical Residency program lost its accreditation from the Accreditation Council for Graduate Medical Education.[65] The loss of accreditation could further complicate the sale of the health system to a non-profit entity, which Prospect Medical is currently attempting to do.[66] A prior attempt to sell the health system to Delaware's ChristianaCare system failed in August 2022, due to a significant shift in the economic landscape.[67] If a sale is not successful and the health system continues to collapse, the result will be drastically reduced medical services for the 560,000 residents of Delaware County.[68] The city of Chester, which is 76% African American, has 28% of residents living below the federal poverty level and Crozer-Chester is a major employer for Chester residents.[69] It is also the only hospital in the Philadelphia suburbs with a comprehensive emergency department, trauma center and burn treatment center.[70]

2. Cerberus Capital and Steward Health Care

Steward Health Care ("Steward") offers another example of broken promises by a private equity firm after it purchased a non-profit hospital chain, and the difficult steps taken by State Attorneys General to protect patients from the private equity firm's greed and negligence. Steward is a Texas-based company that owns approximately 33 hospitals, 25 urgent care centers and 107 skilled nursing facilities around the country.[71] It was the creation of private equity firm Cerberus Capital Management ("Cerberus"), which via a 2010 leveraged buyout of $246 million (as well as assumed liabilities of over $200 million) took over and rebranded a struggling non-profit hospital chain in Massachusetts, Caritas Christi Health—after converting it to for-profit

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[63] Briana Smith, *Ridley Park Approves 17% Property Tax Increase at Special Council Meeting*, WHYY (December 29, 2023), https://whyy.org/articles/prospect-medical-holdings-taylor-hospital-property-taxes-ridley-park/

[64] Harold Brubaker, *Crozer Health Is Laying Off 215 People To Reduce Losses*, PHILADELPHIA INQUIRER (Mar. 15, 2023), https://www.inquirer.com/business/health/crozer-health-layoffs-delaware-county-prospect-medical-holdings-20230315.html

[65] Kristina Fiore, *15 Residents in Limbo as Surgical Residency Program Loses Accreditation*, MED PAGE TODAY (Feb. 13, 2024). https://www.medpagetoday.com/special-reports/features/108717.

[66] Kenny Cooper, *This is Terrible for Those Trainees: Crozer-Chester Medical Center to End Surgical Residency Program*, WHYY, (January 11, 2024), https://whyy.org/articles/crozer-chester-medical-center-end-surgical-residency-program/.

[67] *Deal between ChristianaCare Crozer Health Will Not Go Through*, 6ABC, (Aug. 18, 2022), https://6abc.com/christianacare-crozer-health-delaware-hospital-system-deal-called-off/12138219/.

[68] Kenny Cooper, *Crozer Health's Parent Company Has a Long History of Siphoning Millions from its Hospitals*, WHYY (May 23, 2022). https://whyy.org/articles/crozer-health-prospect-medical-long-history-siphoning-millions-hospitals/.

[69] U.S. Census Bureau, *Quick Facts: Chester City, Pennsylvania*, https://www.census.gov/quickfacts/fact/table/chestercitypennsylvania/PST045223 (last viewed April 18, 2024).

[70] Drexel University, *Affiliated Hospitals and Health Systems: Crozer-Chester Medical Center*, https://drexel.edu/medicine/about/affiliated-hospitals/crozer-chester-medical-center/ (last viewed April 18, 2024).

[71] Will Maddox, *Will Steward Health Care System Go Bankrupt?* D Magazine (Mar. 5, 2024), https://www.dmagazine.com/healthcare-business/2024/03/will-steward-health-care-system-go-bankrupt/.

status.[72] Cerberus' initial strategy, it appeared, was to make the hospital chain profitable by improving operating efficiencies, cutting costs, upgrading certain facilities, improving services, and expanding (via acquisition or organically) so as to spread fixed costs and otherwise lower costs while at the same time improving services to attract more patients.[73] To obtain approval by the Massachusetts' Attorney General (required for the transition to for-profit status), Steward also made certain affirmative promises, including investing $400 million in infrastructure and agreeing to certain restrictions for a number of years, *e.g*., no closing or transferring interests in assets, or taking on additional debt, without approval by the Massachusetts Attorney General.[74]

Cerberus spent the next few years after the Steward acquisition expanding. It acquired four acute care community hospitals, as well as several physician practices, and even developed a limited network health insurance plan for small businesses.[75] Nevertheless, despite its expansion efforts in addition to upgrades and investments made pursuant to the agreement with the Attorney General, Steward was unable to make a successful turnaround, or draw enough patients from its primary competitors (Massachusetts General, Brigham and Women's, and Beth Israel Deaconess) to be profitable.[76] Accordingly, Cerberus changed strategy.

Beginning in 2016, now mostly rid of the obligations and restrictions from the agreement with the Massachusetts Attorney General, Cerberus started leveraging and monetizing Steward assets (and acquiring more debt) to obtain cash for further acquisitions outside of Massachusetts. Most notable was the 2016 sale of all its hospital properties to MPT for $1.2 billion, along with a 10% ownership stake in Steward. Steward would then lease the properties back from MPT.[77] Following the sale of the properties to MPT, Cerberus' investors received a generous dividend.[78] But there were also smaller deals with IPC Healthcare for exclusive provider status and Quest Diagnostics for certain lab services.[79]

Rather than use the proceeds to improve and invest in its hospitals, Cerberus used most of the funds to pay its investor or making additional acquisitions, most notably Steward's 2017 acquisition of IASIS Healthcare—a health chain with facilities in Utah, Arizona, Colorado, Texas, Arkansas, and Louisiana—for $2 billion.[80] In 2020 ownership of Steward was transferred to a hospital management group, led by the Founder and CEO of Steward, Ralph de la Torre, and

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[72] Larry Edelman, *How a Private Equity Firm Made a Killing on Steward Health,* THE BOSTON GLOBE, (Jan. 22, 2024), https://www.bostonglobe.com/2024/01/22/business/steward-health-care-private-equity.

[73] Eileen Appelbaum, *Everyone Wondered How a Private Equity Firm Would Make Money in a Leveraged Buyout of a Struggling Non-Profit Hospital Chain – Now We Know*, Center for Economic and Policy Research (Oct. 2016), https://cepr.net/report/everyone-wondered-how-a-private-equity-firm-would-make-money-in-a-leveraged-buyout-of-a-struggling-non-profit-hospital-chain-now-we-know/.

[74] *Id.* at 3-4

[75] *Id.* at 4.

[76] Edelman, *supra* note 72; Appelbaum, *supra* note 73 at 5.

[77] Robert Kuttner, *Reversing Private Equity's Looting of Hospitals*, AMERICAN PROSPECT (Feb. 13, 2024), https://prospect.org/health/2024-02-13-reversing-private-equitys-looting-hospitals/

[78] Larry Edelman, *How a Private Equity Firm Made a Killing on Steward Health Care*, BOSTON GLOBE (Jan. 22, 2024), https://www.bostonglobe.com/2024/01/22/business/steward-health-care-private-equity/.

[79] Edelman, *supra* note 72; Appelbaum, *supra* note 73 at 6.

[80] Edelman, *supra* note 72; Batt, *supra* note 23 at 39-40.

financed by a loan from MPT. Cerberus reportedly made $800 million from its investment in Steward.[81]

After Cerberus' exit, the heavily indebted and financially distressed Massachusetts Steward hospitals have continued to struggle, but mostly remained open and offering essential services.[82] However, in January 2024, MPT announced that Steward—which is the REIT's largest investment—had not paid full rent for months and was currently $50 million behind in unpaid rent for its Massachusetts hospitals, and that MPT might need to take action to protect its interests.[83] As the Steward Massachusetts hospitals are mostly in an underserved eastern part of the state, the prospect that MPT's actions might impede their ability to offer critical services, or worse, force closures of departments or hospitals, has sparked a healthcare crisis in Massachusetts. Steward is involved in a number of lawsuits in Massachusetts related to non-payment of rent to MPT and failing to pay vendors for supplies and salaries to employees. Four Steward-owned hospitals in Massachusetts are facing closure, and Governor Maura Healey has demanded that Steward transfer its ownership of hospitals in the state to other operators.[84]

As part of its business plan, Steward also acquired other hospitals, including Sharon Regional Health System in Pennsylvania.[85] The properties owned there were also sold to MPT in 2016, and since then, Sharon Regional has limited the services it offers to the community. In 2021, Sharon Regional's cancer center was closed[86] and it stopped providing maternity services.[87] Steward recently announced that it would be selling its physician practices, including those associated with Sharon Regional.[88] It is unclear whether Steward's financial issues will

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[81] Robert Wiseman, *Cerberus Says its Investment in Steward Hospitals Yielded an $800 Million Profit*, BOSTON GLOBE (Apr. 2, 2024), https://www.bostonglobe.com/2024/04/02/business/cerberus-capital-management-steward-health-care/.

[82] Jessica Bartlett, *Steward Healthcare's Financial Issues Could Spell Catastrophe For the State,* BOSTON GLOBE (Jan. 19, 2024), https://www.bostonglobe.com/2024/01/19/business/steward-health-care-hospital-closures/; One Steward hospital was closed due to flooding in 2020 and has never reopened, imposing additional strains on the remaining hospital in the area. *See* Tiffany Chen, *Massachusetts Rep. Lynch says Steward Health Care wants to abandon plans to re-open Norwood Hospital*, CBS News (Feb. 22, 2024), https://www.cbsnews.com/boston/news/steward-health-care-norwood-hospital-massachusetts-stephen-lynch/

[83] Medical Properties Trust, *Medical Properties Trust Provides Update on Steward Health Care*, https://medicalpropertiestrust.gcs-web.com/news-releases/news-release-details/medical-properties-trust-provides-update-steward-health-care.

[84] Lance Reynolds, *Steward Health Care's Financial Crisis Will Be Addressed in an April Congressional Hearing*, BOSTON HERALD, (Mar. 2, 2024), https://www.bostonherald.com/2024/03/01/steward-health-cares-financial-crisis-will-be-addressed-in-an-april-congressional-hearing/.

[85] Tanner Mondok, *Steward Health Care Says It Secured $150 million in Financing*, SHARON HAROLD (Feb. 27, 2024), https://www.sharonherald.com/news/steward-health-care-says-it-secured-150-million-in-financing/article_c5cf35f6-d5d2-11ee-b6cd-43065e1a2f30.htmlhttps://www.sharonherald.com/news/steward-health-care-says-it-secured-150-million-in-financing/article_c5cf35f6-d5d2-11ee-b6cd-.43065e1a2f30.html.

[86] *Sharon Regional Medical Center to Close Cancer Center*, WKBN (January 6, 2021), https://www.wkbn.com/news/local-news/sharon-regional-medical-center-to-close-cancer-center/.

[87] *Steward Health to Cut Some Services in Sharon*, WKBN (September 9, 2021), https://www.wkbn.com/news/local-news/steward-health-to-cut-some-medical-services-in-sharon/.

[88] Michael Rocknick, *Steward Looks to Sell its Physician Practices, Including in PA, Ohio*, SHARON HERALD (Mar. 27, 2024), https://www.sharonherald.com/news/steward-looks-to-sell-its-physicians-practices-including-in-pa-ohio/article_9071d142-ec7b-11ee-af2f-4756c20a9fcb.html.

impact the ability of Sharon Regional to continue operating, or whether it will also face closure or sale in the near future. The city of Sharon has a high poverty rate, with 20 % of residents living below the federal poverty level.[89]

Unfortunately, the practices discussed above drove Steward to file for bankruptcy on May 6, 2024.[90] MPT is providing $75 million in debtor-in-possession financing, while Steward seeks buyers for all of its hospitals.[91] While this financing gives MPT a senior position—ahead of other lenders—on Steward's remaining assets, according to Steward's lawyers, it also imposes a June 25 deadline to auction all Steward's hospitals except those in Florida, a deadline which is "not feasible," especially due to the added difficulties caused by the fact that "substantially all" of Steward's hospitals are subject to sale-leaseback transactions with MPT.[92]

3. Hahnemann University Hospital

On September 6, 2019, Hahnemann University Hospital ("Hahnemann"), a safety net hospital, which had provided care in Philadelphia for 171 years, was closed within 18 months of its acquisition by the private equity firm Paladin Healthcare. [93] Paladin Healthcare, through its newly-formed affiliate, American Academic Health Systems, acquired Hahnemann and St. Christopher's Hospital for Children from the for-profit health corporation Tenet Healthcare, which had owned both hospitals since 1998, for $170 million. American Academic Health Systems financed the purchase of Hahnemann through Mid Cap Financial, a subsidiary of Apollo Global Management, a private equity company.[94]

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[89] U.S. Census Bureau, *Quick Facts: Sharon City, Pennsylvania*, https://www.census.gov/quickfacts/fact/table/sharoncitypennsylvania/PST045222 (last viewed Apr. 18, 2024).

[90] Press Release, Steward Health Care System, Steward Health Care Finalizing Financing Deal with Medical Properties Trust to Support Its Restructuring (May 6, 2024), https://www.steward.org/newsroom/2024-05-06/steward-health-care-finalizing-financing-deal-medical. Steward blamed the bankruptcy on delays in the sale of its nationwide physician practice business, as well as "challenges created by insufficient reimbursement by government payors as a result of decreasing reimbursement rates while at the same time facing skyrocketing labor costs, increased material and operational costs due to inflation, and the continued impacts of the COVID-19 pandemic." *Ibid.*

[91] Steve LeBlanc, *Steward Health Care Says It Is Selling the 30+ Hospitals It Operates Nationwide*, AP NEWS (May 8, 2024), https://apnews.com/article/steward-hospital-bankruptcy-264edc6309f7b9eaa309c4113211ce30. While Steward has said that MPT would provide up to an additional $225 million in debtor-in-possession financing, MPT subsequently issued a press release stating that it has "approved the funding of $75 million in debtor-in-possession financing. The Company has not committed to providing additional funding beyond this amount. MPT expects Steward to use the financing to ensure continuity of patient care while accelerating the re-tenanting of hospitals to new operators." Press Release, Medical Properties Trust, Medical Properties Trust Comments on Steward Health Care Restructuring (May 6, 2024), https://www.businesswire.com/news/home/20240506866138/en/Medical-Properties-Trust-Comments-on-Steward-Health-Care-Restructuring.

[92] Colin A. Young, *Steward Outlines Process to Sell, Auction Hospitals*, NBC BOSTON (May 16, 2024), https://www.nbcboston.com/news/local/steward-outlines-process-to-sell-auction-hospitals/3371670/.

[93] Mike Elk, *Private Equity's Latest Scheme: Closing Urban Hospitals and Selling off the Real Estate*, THE AMERICAN PROSPECT (Jul. 11, 2019), https://prospect.org/health/private-equity-s-latest-scheme-closing-urban-hospitals-selling-real-estate/.

[94] Lydia DePillis, *Rich Investors May Have Let a Hospital Go Bankrupt, Now They Could Profit from the Land*, CNN (Jul. 29, 2019), https://www.cnn.com/2019/07/29/economy/hahnemann-hospital-closing-philadelphia/index.html; *see also* Anita Raghavan, *How a Private Equity-Associated Lender Helped Precipitate a*

Hahnemann served a primarily poor population of people of color.[95] As one of nine hospitals in Philadelphia with comprehensive emergency department services, Hahnemann's emergency room treated many of the city's critically ill and injured patients.[96] Philadelphia, where 22% of the residents live below the federal poverty level,[97] otherwise does not have a public hospital.[98]

American Academic Health Systems was not successful in making Hahnemann profitable. In June 2019, it filed for Chapter 11 Bankruptcy and announced that the hospital would close in September 2019 due to ongoing financial difficulties.[99] The Hahnemann hospital real estate was not included in the bankruptcy filing, but rather was held by a separate company, Broad Street Healthcare Properties, which was owned by the President of American Academic Health Systems, Joel Freedman. Mr. Freedman was criticized for prioritizing the potential profit from the sale of the real estate over finding a way to save the hospital.[100]

At the time of its closure, Hahnemann employed 2,500 staff members, all of whom lost their jobs, and provided training to 500 medical residents through Drexel University College of Medicine. [101] The closure of Hahnemann led to 12-20% increase in patients for the emergency rooms for surrounding hospitals.[102] Drexel's medical program was blindsided by the closure, with 40% of its faculty losing their jobs and residents having to be reassigned to other hospitals.[103] Patients lost access to providers they trusted, and experienced difficulty accessing new care.[104] Nearly five years after its closure, Hahnemann Hospital's buildings sit mostly empty.[105]

Nursing-Home Implosion (Dec. 24, 2023) (describing MidCap's diversion of federal nursing home payments), https://www.politico.com/news/magazine/2023/12/24/nursing-homes-private-equity-fraud-00132001.

[95] Joseph P. Williams, *Code Red: The Grim State of Urban Hospitals*, U.S. NEWS & WORLD REPORT (Jul. 10, 2019), https://www.usnews.com/news/healthiest-communities/articles/2019-07-10/poor-minorities-bear-the-brunt-as-urban-hospitals-close.

[96] Tom Avril & Dylan Purcell, *Closing Hahnemann Hospital Could Deprive Some Neighborhoods of a Key Safety Net*, THE PHILADELPHIA INQUIRER (Jul. 2, 2019), https://www.inquirer.com/health/hahnemann-hospital-emergency-room-crowded-20190702.html#loaded.

[97] U.S. Census Bureau, *Quick Facts: Philadelphia County, Pennsylvania*, https://www.census.gov/quickfacts/fact/table/philadelphiacitypennsylvania/PST045222 (last viewed April 18, 2024).

[98] Williams, *supra* note 95.

[99] Nina Feldman, *Hahnemann Closure Will Be a Public Health Emergency, Nurses Union Says*, WHYY (Jun. 26, 2021), https://whyy.org/articles/hahnemann-hospital-ownerer-announces-closure-citing-losses/.

[100] *Ibid.*

[101] *Ibid.*

[102] Avril, *supra* note 96.

[103] Susan Snyder, *Drexel President Announces Job Losses for Clinical Faculty and Staff due to Hahnemann Closure*, U.S. NEWS &WORLD REPORT (Jul. 18, 2019), https://www.inquirer.com/health/drexel-hahnemann-medical-college-close-residents-20190718.html?query=susan%20snyder%20drexel%20hanhemann.

[104] Harold Brubaker, *The Loss of Hahnemann Resonates a Year Later as COVID-19 and Black Lives Matter Protests Roil Philadelphia*, PHILADELPHIA INQUIRER (June 25, 2020). https://whyy.org/articles/the-loss-of-hahnemann-resonates-a-year-later-as-covid-19-and-black-lives-matter-protests-roil-philadelphia/.

[105] Anna Orso & Ryan W. Briggs, *Philadelphia Plans to Use Part of the Former Hahnemann Hospital as a Shelter Space,* PHILADELPHIA INQUIRER (Mar. 20, 2024).

4. Ellwood City Hospital

Private equity firm Americore Holdings, LLC ("Americore") acquired Ellwood City Medical Center in 2017 in exchange for assuming its liabilities and obligations while operating the hospital for the next ten years. Prior to its acquisition by Americore, Ellwood City Medical Center had operated as a non-profit community hospital in rural western Pennsylvania. [106] During the time that it owned the hospital, Americore reportedly engaged in kickback schemes to bill Medicare for tests that were not performed, which led to a federal fraud prosecution. Americore was also found to have mismanaged the hospital and its resources.[107]

On December 31, 2021, Americore filed for bankruptcy and closed the hospital, which resulted in 152 employees losing their jobs.[108] Following the hospital's closure, the medical records line was disconnected and patients were subsequently notified that they had until April 9, 2022 to request copies of their records or all of their records would be destroyed.[109] Americore also failed to pay taxes to both Ellwood City and Ellwood School Board.[110]

Penn Med, LLC a South Carolina-based company, which held the mortgage on the hospital, sold its interest to California-based Pelorus Equity Group ("Pelorus") in July 2020.[111] The bankruptcy court approved the sale of the hospital to Pelorus in June 2022.[112] Pelorus has since entered into agreements with the city and school board relating to the delinquent tax payments.[113] However, the hospital itself sits empty more than three years after its closure. Pelorus recently listed the site as available for lease.[114]

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[106] Nicholas Vercilla, *Trustee: Americore Failed Ellwood City Hospital*, NEW CASTLE NEWS (Jul. 26, 2023), https://www.ncnewsonline.com/news/local_news/trustee-americore-failed-ellwood-city-hospital/article_4ae0e62c-2a57-11ee-b7e2-8706968c96f8.html.

[107] *Ibid.*

[108] Ayla Ellison, *Pennsylvania Hospital Lays off 152 Employees, Falls Behind on Payroll*, BECKER'S HOSPITAL REVIEW (Dec. 26, 2019), https://www.beckershospitalreview.com/finance/pennsylvania-hospital-lays-off-152-employees-falls-behind-on-payroll.html.

[109] Pete Sirianni, *Ellwood City Hospital Officially Closes*, NEW CASTLE NEWS (Feb 1, 2020), https://www.ncnewsonline.com/news/local_news/ellwood-city-hospital-officially-closes/article_0f0d5f45-1473-5b3b-9973-940ead33f337.html; *See also, Records for Former Ellwood City Medical Center to be destroyed April 8 if Not Requested*, ELLWOOD CITY LEDGER (Mar 1, 2022), https://www.ellwoodcityledger.com/story/business/2022/03/01/final-notice-former-ellwood-city-medical-center-records-sent-patients/9329693002/.

[110] Nicholas Vercilla, *Ellwood City Agrees to Accept $450,000 in Owed Taxes for Former Medical Center*, ELLWOOD CITY LEDGER (Dec. 21, 2021). https://www.ellwoodcityledger.com/story/news/2021/12/21/ellwood-city-council-agrees-offer-former-medical-center-taxes/8986008002/.

[111] Patrick O'Shea, *Penn Med Sells Ellwood Hospital Mortgage; Pelorus Equity Takes over Claim to Property*, BEAVER COUNTY TIMES (Jul. 13, 2020), https://www.timesonline.com/story/news/crime/2020/07/13/penn-med-sells-ellwood-hospital-mortgage-pelorus-equity-takes-over-claim-to-property/112700828/.

[112]Nicholas Vercilla, *Sale of Former Ellwood City Medical Center Officially Approved*, ELLWOOD CITY LEDGER (Jun. 24, 2022), https://www.ellwoodcityledger.com/story/news/2022/06/24/bankruptcy-court-finally-allows-sale-of-former-ellwood-city-medical-center-lawrence-county/65363311007/.

[113] Vercilla, *supra* note 110.

[114] Nicholas Vercilla, *Former Ellwood City Property Listed for Lease*, NEW CASTLE NEWS (Oct. 24, 2023), https://www.ncnewsonline.com/news/local_news/former-ellwood-city-hospital-property-listed-for-lease/article_36568dd4-71af-11ee-84c1-13827243e5e7.html.

C. Physician Practices

Private equity's acquisition of physician practices exemplifies how private equity purchasers may use serial acquisitions to consolidate a segment of a market, resulting in market power and increased prices. When acquiring a physician practice, private equity firms target more lucrative medical specialties like dermatology, ophthalmology, and gastroenterology, because these areas include elective procedures and utilize profitable ancillary services like anesthesiology and laser treatments.[115] By consolidating such medical specialties in a local or regional market, private equity firms may be able to leverage their market power to raise prices. For example, one study shows that private equity acquisitions were associated with physician price increases of 14% for gastroenterology, 8.8% for OB/GYN, and 7.1% for orthopedics.[116] Furthermore, the study found larger price increases in specialties where a single private equity firm had a market share of 30% or more.[117] A 2022 study of private equity acquired dermatology, gastroenterology, and ophthalmology physician practices found an increase in claims charged and utilization as compared to a control group.[118]

Private equity promises physician practices capital and technology that would otherwise be difficult for independent physician practices to acquire.[119] However, the funding comes with significant concerns. Private equity firms tend to focus on short-term profits, which increases prices for consumers by having physicians increase the use of expensive treatments and services rather than seeking out lower cost options.[120] Acquisition by private equity increases the debt burden of physician practices, which heightens their risk of failure.[121]

Private equity acquisitions of physician practices has dramatically increased "from 75 deals in 2012 to 484 deals in 2021, or more than six-fold increase in only 10 years."[122] While there is a lack of research on the full extent of private equity acquisitions of physician practices in local markets, scholars recently undertook a study to estimate the local market share of private equity firms within ten physician specialties[123] at the Metropolitan Statistical Area ("MSA") level.[124] They found that in 120 of 384 MSAs, private equity firms collectively held greater than 30% market share in at least one specialty; in 60 of those 120 MSAs, it was greater than 50%.[125]

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[115] Abdelhadi, *supra* note 29, at 355.
[116] Richard M. Scheffler et al., *Monetizing Medicine: Private Equity and Competition in Physician Practice Markets,* AM. ANTITRUST INST. 30 (Jul. 10, 2023), https://www.antitrustinstitute.org/wp-content/uploads/2023/07/AAI-UCB-EG_Private-Equity-I-Physician-Practice-Report_FINAL.pdf.
[117] *Id.*
[118] Yashaswini Singh, et al, *Association of Private Equity Acquisition of Physician Practices with Changes in Health Care Spending and Utilization*. JAMA HEALTH FORUM 2022;3:e222886. doi:10.1001/jamahealthforum.2022.2886, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9440392/.
[119] Abdelhadi, *supra* note 29, at 354.
[120] *Id.*
[121] *Id.*
[122] Scheffler, *supra* note 116, at 6.
[123] The ten specialties are primary care, dermatology, OB/GYN, gastroenterology, ophthalmology, oncology, urology, radiology, orthopedics, and cardiology.
[124] Abdelhadi, *supra,* at 354.
[125] *Id.* at 357.

In 108 MSAs, a single private equity firm held greater than 30% market share in at least one specialty, while in 50 MSAs, it was greater than 50%.[126]

1. U.S. Digestive Health

Recent examples from Pennsylvania demonstrate both the recent dramatic increase in private equity consolidation of physician practices and also how such consolidation has resulted in market power. Private equity-funded U.S. Digestive Health, which is based in Exton, Pennsylvania, has recently acquired several practices to become the largest gastroenterology practice in the region.[127] "U.S. Digestive has more than tripled in size with acquisitions in northern Delaware and across southern Pennsylvania. It has 40-plus offices and 24 surgery centers. The number of doctors has grown to 170 from 70 in 2020."[128] Focusing on private equity's local market share at the MSA level, Pennsylvania has four MSAs in which a single private equity firm possesses at least 50% market share, and five in which a single firm has at least 30% market share.[129]

What we understand now about private equity acquisitions of physician practices is just the tip of the iceberg. These types of acquisitions fall under the radar of federal and state regulators because they do not meet the monetary thresholds for review, creating opportunities for consolidation of market share and increasing prices for consumers.[130]

2. KKR's Acquisition of Envision

Envision offers another example of how private equity incentives can lead to higher prices, poor outcomes, and a loss of autonomy by medical professionals. In October 11, 2018 the private equity firm KKR acquired Envision Healthcare Corporation ("Envision").[131] Valued at over $10 billion at the time KKR took it private, Envision provided hospitals with physician services, primarily in emergency rooms, anesthesiology, and radiology, as well as operating its own surgical centers.[132] The acquisition was financed with about $7 billion in debt.[133] Prior to its acquisition by KKR, Envision had been previously owned by three other major private equity firms.[134]

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[126] *Id.*

[127] Harold Brubaker, *The Influence of Private Equity on Philly-area Doctors' Practices is Growing. A New Study Offers Insight*, PHILADELPHIA INQUIRER (Apr. 1, 2024), https://www.inquirer.com/health/philadelphia-physicians-groups-private-equity-ftc-doj-20240401.html#loaded.

[128] *Id.*

[129] Scheffler, *supra* note 116, at 67.

[130] *Id.* at 14.

[131] Press Release, KKR Completes Acquisition of Envision Healthcare Corporation (Oct. 18, 2018), https://media.kkr.com/news-details/?news_id=d6337494-a1ed-4b62-9535-dbd6952b10cc&type=1.

[132] *Id.; see also* Sujeet Indap, *Private Equity Backed Envision Healthcare Files for Bankruptcy*, FIN. TIMES (May 15, 2023).

[133] Eliza Ronalds-Hannon & Davide Scigliuzzo, *The Debt Deal That Shows How Ugly Things Are Getting For Lenders,* Bloomberg (Oct. 5, 2022), https://www.bloomberg.com/news/articles/2022-10-05/kkr-s-envision-deal-shows-how-ugly-creditor-battles-are-getting.

[134] *See* Maureen Tkacik, *So Long But Not Farewell to Envision*, THE AMERICAN PROSPECT (May 12, 2023), https://prospect.org/health/2023-05-12-so-long-envision-healthcare-bankruptcy/.

Prior to KKR's acquisition, Envision was the subject of a study that examined its practice of engaging in surprise billing, or "balance billing," where patients at in-network hospitals are treated by out-of-network doctors and then directly billed for the balance that the insurance does not cover.[135] Patients often have limited choice when selecting an emergency room, but once admitted they have *no* choice in which doctor they see; often, patients assume if the hospital is in-network the doctors are as well,[136] making this a particularly attractive target for private equity.[137] This study concluded that hospitals that were managed by Envision had high rates of out-of-network billings, had higher rates, and more expensive services.[138]

Public outrage and, among other things, this study spurred Congress to enact the No Surprises Act in 2020, though its implementation was delayed until 2022. Although Envision later said it had phased out the practice in 2020,[139] it was also slashing physician pay and spending substantial sums on advertising designed to thwart passage of the Act.[140] Saddled with substantial debt from KKR's acquisition, and without the benefits of being able to charge higher prices due to surprise billing, Envision was unable to service its debts and filed for bankruptcy protections on May 15, 2023.[141]

In addition to these issues, Envision's story also illustrates another problem with private equity ownership in healthcare: loss of physicians' ability to control treatment of their own patients. In late 2021, Envision was sued by the American Academy of Emergency Medicine Physician Group ("AAEMPG"), a competing provider of administrative support services to

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[135] *See* Zack Cooper et al., *Surprise! Out of Network Billing for Emergency Care in the United States* (Mar. 2018), https://isps.yale.edu/sites/default/files/publication/2018/03/20180305_oon_paper2_tables_appendices.pdf; *see also* Declaration of Paul Keglevic Chief Restructuring Officer of Envision Healthcare Corp. in Support of Debtor's Chapter 11 Petitions, ECF No. 2, Case 23-90342, ¶¶ 29-30 (Bankr. S. Tx. May 15, 2023) (describing serial acquisitions by Laidlaw International in 1997, private equity firm Onex Corporation in 2005, and private equity firm Clayton, Dubilier, & Rice in 2011).
[136] *Id.* at 2.
[137] *See supra* note 21.
[138] Generally, hospitals managed by Envision had an out-of-network Emergency Room ("ER") physician billing rate of 62%, that when Envision took over management of an ER at a hospital with previously low out-of-network billing rates, the out-of-network rates rose by 81%, and that this was also associated with a substantial increase in expensive services coded and a 122% increase in total payments made by the insurer, and an 83% increase in cost-sharing to patients. *See supra* note 135 at 4.
[139] *See* Michael Hiltzik, *This Company Made Billions by Surprise-Billing Helpless ER Patients. Then Justice Arrived,* L.A. TIMES (May 24, 2023), https://www.latimes.com/business/story/2023-05-24/this-medical-firm-made-billions-by-surprise-billing-er-patients-a-legal-crackdown-drove-it-to-bankruptcy; *see also* Keglevic Decl., *supra* note 135 ¶ 5.
[140] *See* Isaac Arnsdorf, *Medical Staffing Companies Cut Doctors' Pay While Spending Millions on Political Ads*, ProPublica (Apr. 20, 2020), https://www.propublica.org/article/medical-staffing-companies-cut-doctors-pay-while-spending-millions-on-political-ads. Notably, while Envision had negotiated contracts to bring many of its providers in-network, the threat of being able to revert to out-of-network status also had been found to increase in-network rates by over 68 percent by another provider of ER services employing that strategy. *See* Cooper, *supra* note 135, at 4-5.
[141] Keglevic Decl., *supra* note 135, ¶ 20. Notably, during the period where Envision was struggling to meet the debt burdens KKR had forced it to undertake, the private equity firm "deferred its management fees from Envision." *Id.* ¶ 10.

physicians groups.[142] In its latest amended complaint, AAEMPG alleges that Envision violates laws against the corporate practice of medicine in numerous ways.[143] It allegedly does this by creating professional medical corporations and installing physicians who are affiliated with or controlled by Envision as the owners, officers, and directors.[144]

Envision then also allegedly causes these physician groups to enter contractual arrangements to further enhance its control. Instead of using Management Service Agreements with the physician group to provide services to those groups, these agreements instead allegedly facilitate Envision's exercise of control over the practice of medicine, by, among other things, controlling which doctors get hired and fired, how much they work, and how many patients they see; and even promulgating best practices and medical protocols that doctors are required to follow.[145] Finally, Envision also allegedly employed a variety of restrictive covenants and non-competes that would prevent employed physicians from starting or working for competing emergency physician groups.[146] Such practices harm doctor's autonomy and ultimately patient care.

III. Claimed Business Objectives Often Do Not Match Outcomes

Proponents of private equity often claim it can benefit healthcare providers by providing needed infusions of capital and managerial expertise; by reducing operational inefficiencies; by leveraging economies of scale; and by increasing access to healthcare through better aligning profit incentives.[147] In addition, private equity firms claim efficiencies by consolidating "back office" functions services such as scheduling, coding and billing, revenue cycle management, and payroll into their hands or into management services organizations they control. [148] For providers, private equity investment is presented as a way to shed all administrative or management responsibilities, and dedicate more time to clinical care.[149]

As discussed in more detail in Part II, the results of private equity acquisitions often bear little resemblance to private equity's stated business objectives. Instead, private equity ownership results in high-risk strategies that often lead to the failure of portfolio companies, leading to less access. To the extent managerial expertise, efficiencies, and economies of scale are brought to

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[142] Gretchen Morgenson, *Doctors Sue Envision Healthcare, Say Private-Equity Backed Firm Shouldn't Run ERs in California* (NBC News, Dec. 21, 2021), https://www.nbcnews.com/health/health-news/doctors-sue-envision-healthcare-say-private-equity-backed-firm-shouldn-rcna9276.
[143] *See Am. Acad. of Emer. Medicine Physician Group, Inc. v. Envision Healthcare Corp.*, Case No. 3:22-cv-00421-CRB, First Amended Complaint, ECF No. 18-2 (N.D. Cal. 2022).
[144] *Id.* ¶¶ 28-36.
[145] *Id.* ¶¶ 37-47.
[146] *Id.* ¶¶ 48-54.
[147] *See, e.g.* Alexander Borsa et al., *Evaluating Trends in Private Equity Ownership and Impacts on Health Outcomes, Cost, and Quality: Systematic Review* (BMJ 2023), https://www.bmj.com/content/382/bmj-2023-075244.full.pdf.
[148] Giving Doctors, Nurses, and Hospitals the Resources to Treat Patients, AMER. INVESTMENT COUNCIL, https://www.investmentcouncil.org/healthcare/, (last visited April 24, 2024).
[149] *Hospitals Depend on Private Equity to Support Better Patient Outcomes and Improve Efficiencies,* AMER. INVESTMENT COUNCIL, (April 15, 2024), https://www.investmentcouncil.org/hospitals-depend-on-private-equity-to-support-better-patient-outcomes-and-improve-efficiencies/.

bear, they are used to increase profits in the short-term, which are not passed on to patients or payors. While this is true more generally in the context of healthcare acquisitions,[150] research shows that it is true for private equity acquisitions in particular.[151] The States' experience thus far is consistent with this research.

A. Increased Cost, Decreased Quality, and Reduced Services

The States' experience with private equity firms belies these firms' assertions about the value they add. After private equity involvement, physicians are often encouraged to up-code for the same care they were previously providing and to order—and bill for—additional tests, procedures, and services, some of which may be medically unnecessary.[152] Such practices are a key driver for increased health care costs. Studies have found statistically significant price increases associated with private equity acquisitions of practices across multiple specialties.[153] Relative to control hospitals that were not acquired by private equity, hospitals acquired by private equity showed statistically significant increases in net income, total charge per inpatient day, emergency department charge-to-cost ratio, and total charge-to-cost ratio.[154]

While private equity trade groups present investment as invariably creating better quality outcomes,[155] this is not borne out by the research. Rather, research has shown an association between private equity ownership and increased in hospital-acquired infections and falls, despite lower patient volumes.[156] Certain surgical complications more than doubled, despite, again, lower surgical volumes. Complications increased even when the patients treated at the private-equity owned hospitals were younger and had fewer comorbidities.[157]

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[150] John Kwoka & Shawn Kilpatrick, *Nonprice Effects of Mergers*, 63 ANTITRUST BULL. 169, 176–77 (2018); *see also* Nancy D. Beaulieu et al., Changes in Quality of Care after Hospital Mergers, 381 NEW ENG. J. MED. 51 (2020) (discussing modestly worse patient experiences and no significant changes in readmission or mortality rates in acquired hospitals post-merger).

[151] Borsa, *supra* note 147 at 13 ("[T]he most unequivocal evidence points to PE ownership being associated with an increase in healthcare costs to patients and payers, primarily by increased charges and negotiated higher rates with payers. Evidence across studies also suggests mixed impacts of PE ownership on healthcare quality, with greater evidence that PE ownership might degrade quality in some capacity rather than improve it…. Proponents of PE in healthcare have argued that PE firms use their managerial expertise to implement operational and financial changes and improve the acquired company's value after an acquisition. While the findings of this review suggest that PE firms do produce organizational changes, we found evidence that these changes are often reflected in greater costs to patients and payers. The fact that no consistently positive effects of PE in healthcare were identified also provides an evidentiary basis to remain cautious about claims that PE ownership is a self-evident benefit to healthcare provision.")

[152] Ashish K. Jha, *Private equity firms are gnawing away at U.S. health care*, WASHINGTON POST, (Jan. 10, 2024), https://www.washingtonpost.com/opinions/2024/01/10/private-equity-health-care-costs-acquisitions/.

[153] Scheffler, *supra* note 116, at 4.

[154] Bruch, *supra* note 41.

[155] *See* supra note 149.

[156] *See* Kannan, *supra* note 42.

[157] *Ibid.*

IV. Recommendations for Government Action

The States' experience and the discussion above illustrates the importance of vigorous enforcement of existing competition laws and other state laws, but also that enforcement of these laws alone is not sufficient. The States urge the DOJ, FTC, and HHS to explore all avenues to prevent conduct by private equity in healthcare that harms patients, healthcare workers, and taxpayers who often end up footing the bill.

A. Increased Transparency of Ownership and Payments

This starts with cooperation on transparency to allow both State and Federal enforcers to identify private equity's involvement in healthcare and its impact on communities, and to intervene early enough to avoid the harms discussed above. As the States noted in comments regarding revisions to the Hart-Scott-Rodino ("HSR") Notification forms,[158] that is one avenue to increase transparency regarding private equity. But State and Federal agencies should continue to explore other mechanisms to increase transparency regarding private equity ownership and control, whether through laws, regulations, or contracts where public entities sponsor healthcare services.

For example, as enforcers, the States have seen an increase in more complex corporate structures, decreasing transparency. Payments to private equity backed healthcare providers are now often diverted to out-of-state entities, either through management fees or dividends. The literature has confirmed that in the absence of transparency, nursing homes in particular can tunnel revenue into related entities distorting the value of Medicaid and Medicare payments to these entities.[159] Medicare payments have also increased to vertically consolidated entities with pharmacy benefits managers, health plans, providers, and related services under common ownership.[160] It is critical that this information be reported, regardless of corporate form.

In particular, HHS should expand its collection of information on the ownership of healthcare entities and the corporate structure of such entities (including related entities), trace payment of federal funds to such entities, and make that information available to other federal and state enforcers. HHS is uniquely positioned, due to the fact that the Medicare program covers roughly 20% of Americans and the vast majority of providers in the United States participate in the program,[161] while additional spending through joint federal-state Medicaid and

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[158] *See* Comments of 21 Attorneys General of the States and Territories in Response to the June 29, 2023 Notice of Proposed Rulemaking Concerning Amendments to the Premerger Notification Rules (Sep 27, 2023), https://www.regulations.gov/comment/FTC-2023-0040-0695.

[159] Ashvin Gandhi & Andrew Olenski, *Tunneling and Hidden Profits in Health Care* (2024) https://www.nber.org/papers/w32258; *See also* MedPAC, PRIVATE EQUITY AND MEDICARE 71 (June 15, 2021) (discussing factors undermining lack of cost transparency on Medicare when private equity groups are involved)

[160] Charles Gray et al., *Disadvantaging Rivals: Vertical Integration in the Pharmaceutical Market* (2023) (discussing increased prices in Medicare Part D plans after consolidation), https://www.nber.org/papers/w31536

[161] *See, e.g.*, Nancy Ochieng & Gabrielle Clerveau, How Many Physicians Have Opted Out of the Medicare Program?, Kaiser Family Fdn. (Sept. 11, 2023) (discussing that less than 2% of physicians in California have opted of the program), https://www.kff.org/medicare/issue-brief/how-many-physicians-have-opted-out-of-the-medicare-program/.

other programs pushes this number up to 40%.[162] This effort would build on HHS' existing efforts to increase transparency in beneficial ownership of nursing homes, hospital pricing, and pharmaceutical rebate payments. As noted above, private equity groups often use a series of intermediary layers which can mix the use of corporations, limited liability companies, and partnerships. Reporting of beneficial ownership should include *all* owners' shares.[163] When federal healthcare payments or control of healthcare services pass through multiple layers of ownership, the American public should know.

In combination with the information that can be disclosed in an HSR notice, these records should inform enforcers' views of the impact of anticompetitive conduct and additional consolidation in healthcare. To the extent such records include entities acquired below the notification threshold, information on ownership and increases in payments over time fill a critical informational gap no other agencies can address.

B. Ban Anticompetitive Contracting in Federal Programs

FTC and HHS should finalize and enforce rules prohibiting contractual provisions that limit competition in healthcare in all federal and joint federal-state healthcare programs in which providers participate. As previously noted by the States, non-competes do not serve a legitimate purpose when limiting access to healthcare services.[164] The ability to impose such contractual provisions only increases as private equity firms consolidate provider practices. Similarly, the finalization of the rules implementing the No Surprises Act demonstrates how federal regulation can address pernicious business practices adopted by private equity groups and other alternative asset managers.

But there are other contractual provisions that decrease competition in healthcare. HHS already regulates contractual provisions in federal programs including network adequacy, prior authorization, and the provision of medically necessary care in Medicare Advantage. Anti-steering and anti-tiering provisions, or other similar terms, are increasingly used by consolidated providers. These types of provisions limit competition with potentially lower cost or higher quality providers and are therefore harmful to patients and competition. HHS should consider a rule prohibiting these arrangements with providers participating in federal and joint state-federal programs.

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[162] Katherine Wilson, National Health Spending (2023), https://www.chcf.org/publication/2023-edition-health-care-costs-101/#related-links-and-downloads.

[163] The Corporate Transparency Act ("CTA"), 31 U.S.C § 5336, serves as an imperfect example of how such a regime would work. Under the CTA, non-exempt corporations are required to report their beneficial ownership to FinCEN, and FinCEN may disclose that information Federal and State law enforcement actions in connection with investigation. The CTA, however, exempts any "investment company" from reporting, 31 U.S.C. § 5336(a)(11)(B)(x), and does not require disclosure of interest smaller than 25% absent "substantial control" over the entity, 31 U.S.C. § 5336(a)(3)(A). As discussed in this comment, these factors are often subject to manipulation by private equity firms, so any additional reporting implemented should require disclosure of *all* beneficial ownership.

[164] *See* Labor and Equity Comments from Attorneys General in Response to Request for Information on Merger Enforcement (Apr. 21, 2022), https://www.regulations.gov/comment/FTC-2022-0003-0817.

C. Joint Enforcement Against Anticompetitive Conduct & Mergers

Coordination among the State and Federal agencies to identify regulations and laws that can be used to address conduct by private equity in healthcare beyond the traditional competition laws is also important. The States have previously noted the benefits of state and federal coordination in comments on merger enforcement, and these include not only obtaining the benefit of each other's experiences but also the benefit of remedies available separately under state and federal laws.[165] For example, many states have laws against corporate practice of medicine that can be enforced by state attorneys general, and can address some of the issues with undue control over healthcare by private equity owners. The States welcome cooperation with the DOJ, FTC, and HHS to identify similar avenues for creative enforcement.

The interests supporting coordination are particularly acute in healthcare, where private equity firms engage in acquisition strategies across multiple states. More so where private equity firms attempt to shield their conduct from liability with complex corporate forms, and lack of transparency on ownership. Enforcement must focus not just on the portfolio companies. It must, instead, recognize the high degree of control that private equity firms exercise over them.

To illustrate the problem, a recent case study from Pennsylvania is informative. In 2015, the Pennsylvania Office of Attorney General filed suit against the private equity owned nursing home chain Golden Living Centers which operated 36 skilled nursing facilities in Pennsylvania.[166] The complaint alleged the skilled nursing facilities were chronically understaffed and failed to provide required services; overburdened staff were unable to meet the needs of facility residents; and residents were left unattended, unwashed, unfed, and uncared-for, resulting in significant avoidable health consequences for residents as well as a loss of dignity, mobility, and comfort.[167]

The suit was brought against a host of parent companies—all of which were based in Texas and Arkansas and were alleged to exercise "indirect" operational and managerial control over multiple nursing homes under the name Golden Living Centers in Pennsylvania.[168] In 2017, Golden Living Centers ceased operating nursing homes in Pennsylvania, although an affiliate retained ownership of the real estate. The litigation concluded in 2021 with a consent decree where the affiliate agreed to penalties of $6 million as well as notice requirements should they ever resume operation of skilled nursing facilities in Pennsylvania.[169]

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[165] *See* Public Comments of 23 State Attorneys General (Apr. 21, 2022), https://www.regulations.gov/comment/FTC-2022-0003-0807.

[166] Golden Living is owned by Fillmore Capital Partners. *See* Eileen O'Grady, *Pulling Back the Veil on Today's Private Equity Ownership of Nursing Homes*, Private Equity Stakeholder Project (2021), https://pestakeholder.org/wp-content/uploads/2021/07/PESP_Report_NursingHomes_July2021.pdf.

[167] Complaint, Commonwealth of Pennsylvania v. Golden Gate National Senior Care, LLC, No. 336 MD 2015 (Pa. Commw. Ct., Sept. 8, 2015).

[168] The entities included Golden Gate National Senior Care, LLC; GGNSC Holdings, LLC; GGNSC Administrative Services, LLC; GGNSC Clinical Services, LLC; and GGNSC Equity Holdings, LLC.

[169] Consent Decree, Commonwealth of Pennsylvania v. Golden Gate National Senior Care, LLC, 336 MD 2015 (Pa. Commw. Ct., 2021).

While the litigation was successful, the private equity owner, Fillmore Capital Partners, was not sued and faced no direct liability. It was based in Ohio, not Pennsylvania,[170] and in such scenarios it may be difficult to establish personal jurisdiction, because plaintiffs are unable to allege sufficient control by the private equity owners.[171]

Similarly, even if the private equity firm were located in the same jurisdiction, the layers of corporate ownership that separate the facility from its private equity owners effectively insulate the private equity firm from liability. Piercing the corporate veil is an equitable remedy requiring a showing justice requires that corporate owners be found independently liable for the harms caused by the corporation. Even in its case against Golden Gate National Senior Care, Pennsylvania's claims for unjust enrichment against the corporate owners of the skilled nursing facilities were found to be premature, because its underlying claims were based on violations of the Pennsylvania Consumer Protection Law by the facilities and piercing the corporate veil would only be warranted in the event that the facilities were unable to satisfy a judgment against them for those violations.[172]

The FTC's recent lawsuit against U.S. Anesthesia Partners also naming the private equity firm ultimately controlling the conduct (Welsh, Carson, Anderson & Stowe),[173] was a good start, but it also illustrates the challenges enforcers face in this area.[174] The States urge a continued focus on holding those with ultimate control accountable, both through the increased transparency discussed above, and vigorous joint federal-state enforcement against those who are actually in control of the anticompetitive conduct, including across state lines where necessary and appropriate.

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The States are committed to addressing the challenges that private equity has brought to healthcare markets and look forward to working on these issues collaboratively with the DOJ, FTC, and HHS.

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[170] About Us, Fillmore Capital, https://www.fillmorecap.com/about-us.

[171] If personal jurisdiction is authorized under the state's long-arm statute, it must also be consistent with due process – i.e., the foreign corporation must "personally avail itself of the privilege of conducting activities in the foreign state," *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), such that it "should reasonably anticipate being hauled into court there," *World-Wide Volkswagen*, 444 U.S. 286, 297 (1980).

[172] *Commonwealth v. Golden Gate National Senior Care, LLC,* 194 A. 3d 1010, 1035 (2018) ("the OAG's efforts to impose liability on Parent Companies are necessary only in the event that it obtains a judgment against the Facilities that the Facilities cannot satisfy").

[173] *See* Press Release, *FTC Challenges Private Equity Firm's Scheme to Suppress Competition in Anesthesiology Practices Across Texas* (Sep. 21, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-challenges-private-equity-firms-scheme-suppress-competition-anesthesiology-practices-across.

[174] *See* Fed. Trade Comm'n v. U.S. Anesthesia Partners, Inc., No. 4:23-CV-03560, 2024 WL 2137649, at *2-3, *4-5 (S.D. Tex. May 13, 2024) (dismissing claims against Welsh, Carson, Anderson & Stowe because, although it set up USAP, and "spearheaded" a strategy to "consolidate practices with high market share in a few key markets," by the time enforcers learned of the practices and brought a lawsuit in 2023, it had already sold off part of its investment and no longer owned a majority stake or controlled the board).

Respectfully submitted,

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