Recent Lawsuit Part of Larger Push for Stricter Corporate Practice of Medicine Enforcement Across the Country

The American Academy of Emergency Medicine Physician Group recently sued Envision Healthcare, alleging that the company uses shell business structures to evade corporate practice of medicine laws. The lawsuit is part of a larger push for stricter enforcement of statutes prohibiting medical practice ownership by corporations not owned by licensed doctors.

Plaintiff American Academy of Emergency Medicine Physician Group (AAEMPG) originally filed its complaint against Envision Healthcare Corporation and Envision Physician Services, LLC (collectively referred to as "Envision") in the Superior Court of California in December 2021. Envision removed the case to the Northern District of California in January 2022. According to a press release, AAEMPG filed the lawsuit in response to Envision's "takeover of an emergency department contract at Placentia Linda Hospital," part of the Tenet Health Hospital System.[1]

AAEMPG is a Milwaukee-based company that provides business and administrative services to physician groups and is a subsidiary of the American Academy of Emergency Medicine, a physician professional society. Owned by the investment firm KKR & Co., Inc., Envision Healthcare Corporation is a national hospital-based physician group headquartered in Nashville, Tennessee. It operates emergency departments throughout the United States and owns and manages Co-Defendant Envision Physician Services, LLC.

AAEMPG's Allegations

Despite inclusion of other allegations that Envision is offering unlawful kickbacks in exchange for patient referrals, using illegal restrictive covenants in its contracts with physicians, and otherwise engaging in various unfair business practices, AAEMPG primarily alleges that Envision is violating California's corporate practice of medicine prohibition. Specifically, AAEMPG claims that Envision is creating "shell corporations" through which it exerts direct or indirect control over the policies and management of its physician groups:

> Envision's business model is to circumvent the ban by purchasing, controlling, or creating [] separate subsidiary licensed Professional Medical Corporations. Those entities, controlled entirely by Envision, exist only on paper to undertake functions the law permits only physicians to undertake, such as employing physicians or providing medical coverage for hospitals.[2]

According to AAEMPG, after creating these types of corporations, Envision "either installs straw-man owners or its executives as owners and corporate officers" and binds them with side agreements to sell the entities to Envision upon request for nominal amounts.[3] Moreover, AAEMPG claims that Envision requires physician members or owners to execute agreements restricting their authority and to enter into management services agreements with Envision to "mimic a traditional legitimate relationship whereby physicians independently choose a management services organization."[4] Once the entity has entered into a management services agreement with Envision, AAEMPG argues that Envision exercises "profound and direct control" over the

[1] Press Release, American Academy of Emergency Medicine Physician Group, AAEM-PG Files Suit Against Envision Healthcare Alleging the Illegal Corporate Practice of Medicine (last updated Dec. 21, 2021), https://www.aaemphysiciangroup.com/news-and-updates/aaem-pg-files-suit-envision-healthcare-alleging-the-illegal-corporate-practice-of-medicine.
[2] First Amended Complaint at 7, American Academy of Emergency Physician Group, Inc. v. Envision Healthcare Corporation, *et al*., No. 3:22-cv-00421-AGT (N.D. Cal. Feb. 18, 2022).
[3] *Id.* at 10.
[4] *Id.*

entity—"diminishing physician independence and freedom from commercial interests" and violating California's corporate practice of medicine prohibition.[5]

In response to AAEMPG's allegations that Envision is violating California's prohibition on the corporate practice of medicine, Envision offers two main counterarguments. First, Envision argues that the California Legislature has entrusted the regulation of the ban on corporate practice of medicine with the California Medical Board, and resolution of AAEMPG's claims requires a determination of "complicated concerns of public policy which were entrusted to [the California Medical Board] by the Legislature, including whether an entire class of entities performing valuable services within the medical field are, in fact, not permissible; the details of specific types of compensation arrangements and the specifics of individual factors that may be taken into account in referrals; and the specific delineation between whether numerous categories of nuanced administrative activities can permissibly be conducted."[6] Thus, the California Medical Board is the proper decision maker as to whether Envision is running afoul of California's ban on corporate practice of medicine.

Second, Envision argues AAEMPG fails to allege how Envision's arrangement is unlawful because AAEMPG's "own Complaint admits that the entity which provides medical services at the hospital is a physician group, overseen by a physician."[7] Envision categorizes its activities as nothing more than "non-medical business services designed to streamline the business aspects of a medical practice so that the physicians can focus on treating patients."[8] Without allegations that Envision consulted with patients, provided diagnoses, prescribed or administered drugs, conducted surgeries, or overruled any medical decisions, Envision argues that its arrangement is permissible under California law.

California has one of the strictest prohibitions on corporate practice of medicine in the country. Specifically, California law prohibits unlicensed persons, including corporations, from practicing or holding themselves out as practicing medicine.[9] Established California Supreme Court precedent states that, "[t]he ban on the corporate practice of medicine generally precludes for-profit corporations—other than licensed medical corporations—from providing medical care through either salaried employees or independent contractors."[10]

Recent Trends

Approximately thirty-three states have some sort of ban on the corporate practice of medicine—the purpose of which is to eliminate "the chance of dominion of the professional decisions of the practitioner by commercial interests."[11] Recently, there has been a push towards stricter enforcement of these corporate practice of medicine laws. This trend has appeared in similar challenges in other states (including Missouri, Texas, and Tennessee) and highlights a growing discomfort with the use of management service organizations to comply with corporate practice of medicine laws.

For example, in Missouri, a physician filed suit against a publicly traded physician management company alleging that it fired him for voicing concerns over staffing issues.[12] Though the suit was a wrongful termination case, the Missouri Court of Appeals ensured it highlighted the corporate structure of the management company, noting that "[b]ecause regulations prohibit publicly traded companies or for-profit corporations from owning physician practice groups, [the company's] business model is to create a separate subsidiary legal entity for

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[5] *Id.* at 11.
[6] Defendants' Motion to Dismiss at 17–18 (Doc. No. 11), American Academy of Emergency Physician Group, Inc. v. Envision Healthcare Corporation, *et al*., No. 3:22-cv-00421-AGT (N.D. Cal. Feb. 18, 2022).
[7] *Id.* at 25.
[8] *Id.* at 26.
[9] *See* Cal. Bus & Prof. Code § 2052 ("[A]ny person who practices or attempts to practice … any system or mode of treating the sick or afflicted in this state … without having at the time of so doing a valid, unrevoked, or unsuspended certificate as provided in this chapter or without being authorized to perform the act pursuant to a certificate obtained in accordance with some other provision of law is guilty of a public offense…."). *See also* Cal. Bus. & Prof. Code § 2400 ("Corporations and other artificial legal entities shall have no professional rights, privileges, or powers.").
[10] *People v. Cole*, 38 Cal. 4th 964, 970, 135 P.3d 669, 672 (2006).
[11] *Drucker v. State Bd. of Med. Examiners*, 143 Cal. App. 2d 702, 712, 300 P.2d 197, 203 (1956).
[12] *Brovont v. KS-I Med. Servs., P.A.*, 622 S.W.3d 671 (Mo. Ct. App. 2020).

each state and in some circumstances for each location at which it supplies physicians to provide emergency medical services."[13] The company then appoints a physician owner of these subsidiaries "to comply with the regulations, which prohibit a publicly traded company from providing medical services."[14]

The court observed that though the management company was "careful to maintain corporate formalities between itself and its various subsidiaries," several factors indicated that the parent corporation directly controlled the subsidiaries.[15] First, the management company simply paid a salary to the physician owners of the subsidiaries, and all of the subsidiaries' profits flowed to the parent company. Second, the payroll, human resources, and other operations of each subsidiary were controlled by the parent company. Lastly, the subsidiaries were managed and operated by agents who were directly connected to the parent corporation.

Significance of Lawsuit

As private equity investments play an increased role in the delivery of health care services, many in the industry are eyeing the *Envision* lawsuit. Importantly, a victory for AAEMPG could trigger stricter regulation and prosecution of corporate practice of medicine prohibitions in other states— including in Georgia. Moreover, stricter scrutiny of arrangements under corporate practice of medicine laws not only implicates private equity owned subsidiaries but also the larger management services organization structure as a whole.

In 1982, the Georgia General Assembly repealed Georgia's formal statute prohibiting the corporate practice of medicine. However, through a patchwork of various sections of the Georgia Code, case law, and other authorities, Georgia qualifies as one of the thirty-three states with some sort of prohibition on the corporate practice of medicine.[16] Thus, corporate arrangements (especially in the private equity context) must be scrutinized to ensure compliance with Georgia law.

If you have any questions about this legal update or how the corporate practice of medicine could apply to your arrangement, please contact a member of MMM's healthcare team.

[13] *Id.* at 678.
[14] *Id.*
[15] *Id.* at 679.
[16] *See generally* O.C.G.A. § 33-20-18 ("No provision of this chapter shall be construed as authorizing the corporate practice of medicine; and health care corporations shall not practice medicine."); *Sherrer v. Hale*, 248 Ga. 793, 796, 285 S.E.2d 714, 717 (1982) ("[I]t is true that a business cannot lawfully practice one of the so-called 'learned professions….'"); Ga. Comp. Med. Bd., Monthly Meeting Minutes, Executive Director's Report, para. 9 (June 7–8, 2012) ("[T]he Medical Board can only license physicians to practice in Georgia, not corporations. The corporate practice of medicine has not been defined by the state legislature.").