Catastrophe Claims: Insurance Coverage for Natural and Man-Made Disasters, June 2024 Update

John K. DiMugno
Steven Plitt
Dennis J. Wall

§ 18C:6.50. Private Equity and Medicare
By Dennis J. Wall

This is not a natural disaster. "We" are not responsible for this disaster. The business model of private equity firms, perhaps more than people, is responsible for an existing disaster the outline of which we have not seen before, as they say: Private equity firms (or funds) have vastly increased their involvement recently in healthcare services funded at least in part by Medicare and Medicaid, with disastrous results for many Medicare and Medicaid beneficiaries.

Without attempting to provide a more comprehensive analysis of private equity here than is necessary to understand the attraction that Medicare and Medicaid hold for private equity, it will be enough to start out by recognizing the two main driving factors of private equity. First, private equity requires a reliable source of funding. Second, private equity often involves a vulnerable population.

Medicare and Medicaid certainly provide both of these.

Areas of healthcare frequently targeted[1] by private equity firms include:

- Physicians' practices.[2]
- Hospitals.[3]
- Assisted living facilities,[4] and
- Nursing homes.[5]

Each area depends for its existence, in whole or in part, on Medicare or Medicaid funding, or both.[6]

The changes in ownership of what might be called here, in a non-technical sense, 'managing organizations,' i.e., those businesses responsible for the operation of the particular healthcare service, are of course the result of price in all cases and of "outsourcing" the operational issues in other cases, such as physicians' practices.[7]

The business model of private equity must be understood, at least in skeletal outlines, in order to understand the role that private equity firms are playing in the current state of healthcare—at least insofar as it is paid for by Medicare and Medicaid—in the United States.

Private equity depends on secrecy. The formation of its structures and the conduct of its affairs are not reported and they are not generally known. The simplest definition of Private Equity (PE) is "ownership of (or an interest in) an entity that is not publicly traded."[8]

Private equity investors have access to large pools of money and seek the highest rate of return on their investments that is available in a short time frame, including "university endowment funds, pension funds, wealthy people, and other companies."[9]

One of their tools consists of leveraged buyouts. The private equity firm investing for a pool of investors acquires a controlling or other interest in a business partly by using the investors' money and mostly by paying a much large share of the acquisition price through a loan. The loan (or "leverage") is ordinarily the lion's share of the acquisition funding, and the loan is assumed by the acquired business. Land and buildings owned by the acquired business are collateral for the loan used for leverage.[10]

"The acquired hospital must then generate revenue to pay down that debt."[11] This is just as true of any other acquired business as it is of the acquired hospital.

It is in the nature of private equity's business model to invest other people's money, a process something on the order of 'maximizing profit while socializing risk.' For example, "nursing home operators tend to seek operating loans – often referred to as revolving lines of credit – because they don't want their money tied up in the business."[12]

"Lease backs" are another tool in the private equity investors' toolkit. The acquired business is made to pay off the loans it is forced to assume in the course of being bought out. The acquired business must sell its land and buildings to make the loan payments. The acquired business then replaces its ownership with a lease of the buildings and realty it formerly owned. "Lease back" refers to the resulting corporation which still operates the facility, as now generating income for its lessor, which is usually if not always the private equity firm which acquired it in the first place. The transaction may involve no change in location, only a change in ownership.[13]

Whenever private equity is involved, there are also many, many fees. The fees are set out in a Management Services Agreement or MSA. An MSA can include fees for services which the private equity firm never rendered to the acquired business. Fees have been charged "to extend the maturity date of loans," "float fees" have been assessed for immediate availability of funds, charges for "lending lines" have been applied that the operator did not use, and often there is "a minimum balance fee[.]"[14]

In sum, the business model of private equity is based on short-term profits, on immediate and high return on investment.[15] This model results in the acquired corporation assuming debt and needing to raise money. The acquired business eventually if not immediately raises money by cutting costs.

An obvious way to cut costs is to cut jobs, or, in the parlance favored in finance, to reduce staff. Cost-cutting after acquisition by private equity is what happens with hospitals,[16] assisted living facilities,[17] and nursing homes.[18]

Cuts have also been made to protocols and processes after private equity firms have acquired businesses, including healthcare practices such as hospitals.[19]

In addition, services have been reduced, including at nursing homes.[20]

The results in healthcare are particularly onerous. Many if not all private equity practices are a bad fit with healthcare. This is true of hospitals acquired by private equity, for a stark example.

"Patients are more likely to fall, get new infections, or experience other forms of harm during their stay in a hospital after it is acquired by a private equity firm, according to a new study led by researchers at Harvard Medical School."[21]

The study referenced in the preceding quotation was published in the Journal of the American Medical Association (JAMA) on December 26, 2023. The study examined conditions that were acquired in the hospital by Medicare beneficiaries in the years between 2009 and 2019.

The researchers, physicians at Harvard Medical School, examined "662,095 hospitalizations at 51 private equity-acquired hospitals and 4,160,720 hospitalizations at 259 matched control hospitals using 100% Medicare Part A claims data[.]"[22]

"[T]he individual conditions were defined by the US Centers for Medicare & Medicare Services":

- 27.3% increase in **falls by Medicare patients** at private equity hospitals after the hospitals were acquired by private equity firms.
- 37.7% increase in **"central line-associated bloodstream infections" for Medicare patients** after private equity firms acquired the hospitals in which they were patients. This despite the fact that private equity hospitals placed 16.2% fewer central lines.
- Over all, a 25.4% increase in **"hospital-acquired conditions" by Medicare patients** in private equity hospitals "[a]fter private equity acquisition[.]"[23]

Adverse results for Medicare and Medicaid beneficiaries, or the likelihood of adverse results in the future, have been reported and predicted since at least 2021 concerning "nursing facility quality," which reportedly has declined after acquisition by private equity firms. As the Centers for Medicare and Medicaid Services wrote on November 17, 2023 while proposing a final rule:

> A November 2021 analysis published in the *Journal of the American Medical Association* contained similar findings concerning PEC-owned [private equity company-owned] nursing facilities. Titled "Association of Private Equity Investment in US Nursing Homes with the Quality and Cost of Care for Long-Stay Residents," the report stated that PECs seek annual returns of 20% or more; with this pressure to generate high short-term profits, private-equity-owned nursing homes might reduce staffing, services, supplies, or equipment, which could adversely affect quality of care. The analysis concluded that: (1) private equity acquisition of nursing facilities was associated with higher costs and increases in emergency department visits and hospitalizations for ambulatory sensitive conditions; and (2) per the study's findings, more stringent oversight and reporting on private equity ownership of nursing homes may be warranted. The previously mentioned concerns about nursing home ownership are not limited to PECs. Other types of private ownership, such as REITs, have generated similar concerns.[24]

Onerous results following acquisition by private equity firms appear in relation to other healthcare providers, such as physicians' practice groups, for example.[25]

Private equity firms have not been the target of lawsuits by the federal government for their involvement in the adverse results of their increasing investment in healthcare providers. That changed at the end of 2023. It changed in the context of physicians' practice groups.

In the first case of its kind, *Federal Trade Commission v. U.S. Anesthesia Partners, Inc.*,[26] the FTC brought an antitrust lawsuit against a private equity firm. The claims alleged in the complaint all come back to a central allegation that a private equity firm and its associated entities hiked the cost of reimbursement rates for anesthesia services in Texas through a conspiracy based on the acquisition of competitors.

Schemes based on the elimination or the winnowing of competitors are part of the private equity business model. These schemes are known as "roll-ups," and among other things, roll-ups have been alleged by the FTC in its lawsuit.[27]

Although large swaths of the Federal Trade Commission's allegations were blacked out or redacted in the version of the FTC complaint that was filed at the inception of the lawsuit in September 2023, a "Redacted Public Version" of the complaint has since been made available to the public.[28] The amounts by which the defendant private equity firm increased its profits or received in revenues remain blacked out, for some reason.[29]

Given the adverse effects on Medicare and Medicaid beneficiaries reported in hospitals, physicians' practices, assisted living facilities, and nursing homes, various solutions have been proposed to counter the adverse effects associated with private equity acquisition of healthcare services for Medicare and Medicaid recipients.

The Department of Health and Human Services proposed Minimum Staffing Standards to Enhance Safety and Quality in Nursing Homes in September 2023,[30] and in November 2023 the Centers for Medicare and Medicaid Services proposed a final rule concerning Disclosures of Ownership which would include disclosures concerning newly defined "private-equity companies" or PECs.[31]

Some States regulate conversions of not-for-profit hospitals to for-profit hospitals.[32]

Other solutions include recommendations for enhanced antitrust scrutiny,[33] which is apparently already under way at least in the FTC,[34] and that "regulators – particularly Medicare[35] – need to provide a lot more oversight over private equity acquisitions and similar purchases of health-care practices. This should include making sure these transactions don't raise prices or affect quality of care."[36]

"Medicare and other payers – as well as regulators – need to be far more forceful in ensuring that providers don't shirk their duty to keep patients safe. This is especially true of private-equity-owned practices, but it extends beyond them as well."[37]

That brings up a problem with regulation of the role of private equity firms in the acquisition and operation of healthcare practices. Private equity firms defend themselves from allegations of liability for the operation of healthcare facilities, and from allegations of liability for the operation of businesses of all kinds for that matter, by distancing themselves from the corporations which actually operate the business in question, be it a hospital or a factory. Private equity firms acquire such businesses, but they do not tend to operate them. Instead, they (ostensibly) tend to leave the operation of the business in question to the acquired corporation.[38]

A final proposed solution to mention here is to cap profits. "By preventing the siphoning off of Medicare and Medicaid dollars to excessive profits, we would drive out people who look at this as an investment and are less focused on resident care."[39]

Until and unless one or more of these proposals is adopted, private equity will continue to acquire healthcare providers and the results will continue to be much the same as they are now.

Footnotes

* Professor Gerard Anderson of Johns Hopkins, quoted by Margot Sanger-Katz, Warren's Plan Targets Insurers. Buttigieg Aims at Hospitals, New York Times, Saturday, November 9, 2019, p. B4, accessible at https://www.nytimes.com/2019/11/06/upshot/buttigieg-health-care-plan.html?searchResultPosition=14.

1 Private equity has invested $1 Trillion in U.S. healthcare in the past decade. Jake Miller, What Happens When Private Equity Takes Over a Hospital, HARVARD MEDICAL SCHOOL, online Dec. 26, 2023, https://hms.harvard.edu/news/what-happens-when-private-equity-takes-over-hospital.

2 *See* Ashish K. Jha, Private Equity Firms Are Gnawing Away at U.S. Health Care, WASHINGTON POST, online Jan. 10, 2024, https://www.washingtonpost.com/opinions/2024/01/10/private-equity-health-care-costs-acquisitions/. Dr. Jha is the Dean of Brown University's School of Public Health. He was a coordinator of COVID-19 response for the Administration of President Joe Biden.

3 Private equity firms own some "30% of all proprietary for-profit hospitals[.]" PESP (Private Equity Stakeholder Project) Private Equity Hospital Tracker, undated, last accessed on Friday, Dec. 29, 2023, https://pestakeholder.org/private-equity-hospital-tracker/.

4 Douglas MacMillan and Christopher Rowland, Understaffed and Neglected: How Real Estate Investors Reshaped Assisted Living, WASHINGTON POST, online Dec. 17, 2023, https://www.washingtonpost.com/business/2023/12/17/assisted-living-industry-real-estate/.

5 "Private-equity investment in nursing homes, to take just one example, has grown from about $5 billion at the turn of the century to more than $100 billion today." Roge Karma, The Secretive Industry Devouring the U.S. Economy / Private Equity has Made One-fifth of the Market Effectively Invisible to Investors, the Media, and Regulators, THE ATLANTIC, online Oct. 20, 2023, https://www.theatlantic.com/ideas/archive/2023/10/private-equity-publicly-traded-companies/675788/.

6 For example, "Medicare and Medicaid spend more than $100 billion a year on nursing homes and continuing care retirement communities[.]" Anita Raghavan, "They Were Traumatized": How a Private-Equity Associated Lender Helped Precipitate a Nursing-Home Implosion, POLITICO, online Dec. 24, 2023, https://subscriber.politicopro.com/article/2023/12/nursing-homes-private-equity-fraud-00132001. *See*, in addition, Jessie Hellman, Data Shows Nursing Home Closure Often Linked to Care Issues, TRIBUNE NEWS SERV. / ORLANDO SENTINEL online Jan. 19, 2024, https://www.orlandosentinel.com/2024/01/19/data-shows-nursing-home-closure-often-linked-to-care-issues/:

[T]he [nursing home] industry continues to demand funding from taxpayers….

* * *

It's infamously opaque how nursing homes spend Medicaid funds. Experts say facilities cut staffing to the bone to increase profits or channel funding into related-party transactions.

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> One of the most powerful tools CMS [the Centers for Medicare and Medicaid Services] has to enforce nursing home regulations is Medicare payment denials. That tool is typically used as a last resort when facilities have otherwise failed to fix deficiencies.

[7] *See* Dr. Ashish Jha, *Private Equity Firms Gnawing U.S. Health Care*, *supra*.

[8] Lisa Lilliott Rydin, Guide / Private Equity, Venture Capital, and Hedge Funds, HARVARD LAW SCHOOL LIBRARY, last updated Oct. 2, 2023, https://guides.library.harvard.edu/law/private_equity.

[9] HARVARD LAW SCHOOL LIBRARY GUIDE, *supra*. This source also describes these investors as persons "who are better able to understand and financially handle the risks of such investments." Perhaps this description unintentionally translates that either private equity investors are in a good position to foresee the results of their actions, or that they intend them.

[10] HARVARD MEDICAL SCHOOL, *supra*.

[11] HARVARD MEDICAL SCHOOL, *supra*.

[12] *'They Were Traumatized,'* POLITICO, *supra (focus on Nursing Homes)*.

[13] *See Understaffed and Neglected*, WASHINGTON POST, *supra (examining Assisted Living Facilities in particular)*. The sale of buildings followed by leasing the same buildings happens whether the operator of senior-living homes is the *original* owner or *a corporation invented* by the private-equity firm that acquired the business. *See Understaffed and Neglected*, WASHINGTON POST, *supra*.

[14] *'They Were Traumatized,'* POLITICO, *supra (focus on Nursing Homes)*.

Private equity's employment of loans, lease backs, and fees are all examined in HARVARD MEDICAL SCHOOL, *supra*, and in PESP PRIVATE EQUITY TRACKER, *supra*.

[15] Reed Abelson and Margot Sanger-Katz, Serious Medical Errors Rose After Private Equity Firms Bought Hospitals, NEW YORK TIMES, online Dec. 26, 2023, https://www.nytimes.com/2023/12/26/upshot/hospitals-medical-errors.html?searchResultPosition=1.

[16] Dr. Ashish Jha, *Private Equity Firms Gnawing U.S. Health Care*, *supra*.

[17] "About 43 percent of assisted-living workers, excluding new hires, left their jobs in 2022[.]" *Understaffed and Neglected*, WASHINGTON POST, *supra*.

[18] The private equity "industry" is improving profit margins "by cutting back on staffing while relying more on psychoactive medication." Roge Karma, *The Secretive Industry*, THE ATLANTIC, *supra (specifically addressing the example of nursing homes acquired by private equity firms)*.

[19] Dr. Ashish Jha, *Private Equity Firms Gnawing U.S. Health Care*, *supra*.

20 Roge Karma, *The Secretive Industry*, THE ATLANTIC, *supra (specifically addressing the example of nursing homes acquired by private equity firms)*.

21 HARVARD MEDICAL SCHOOL, *supra*.

22 Sneha Kannan, MD, Joseph Dov Bruch, PhD, and Zirui Song, MD, PhD, Changes in Hospital Adverse Events and Patient Outcomes Associated With Private Equity Acquisition, Key Points / Findings, JAMA, online Dec. 26, 2023, https://jamanetwork.com/journals/jama/article-abstract/2813379 (abstract; the full article is behind a paywall).

23 JAMA, Abstract / Design, Setting, and Participants; Main Outcomes and Measures; and Results, *supra*. In addition, *see* PESP PRIVATE EQUITY TRACKER, *supra*.

24 Medicare and Medicaid Programs: Disclosures of Ownership and Additional Disclosable Parties Information for Skilled Nursing Facilities and Nursing Facilities; Medicare Providers' and Suppliers' Disclosure of Private Equity Companies and Real Estate Investment Trusts, "A Rule by the Centers for Medicare & Medicaid Services [published] on 11/17/2023," https://www.federalregister.gov/documents/2023/11/17/2023-25408/medicare-and-medicaid-programs-disclosures-of-ownership-and-additional-disclosable-parties.

25 *See* Dr. Ashish Jha, *Private Equity Firms Gnawing U.S. Health Care*, *supra*.

26 Federal Trade Commission v. U.S. Anesthesia Ptrs., Inc. (S.D. Tex. No. 4:23-cv-03560). Download Federal Trade Commission v. U.S. Anesthesia Ptrs., Inc. Complaint DE 1 filed Sept. 21 2023 (S.D. Tex. No. 4.23.cv.03560), a 106-page complaint which the FTC originally filed on September 21, 2023.

27 A clear and understandable definition of "roll-up schemes" is found, for example, in FTC v. U.S. Anesthesia Ptrs., Inc., "Redacted Public Version" of Complaint, DE 69,¶ 4, at p. 3, filed Oct. 26, 2023 (S.D. Tex. Case No. 4:23-cv-03560), Download FTC v. U.S. Anesthesia Ptrs., Inc. Redacted Public Version (of FTC Complaint) DE 69 filed Oct. 26 2023 (S.D. Tex. No. 4.23-cv-03560).

28 FTC v. U.S. Anesthesia Ptrs., Inc., "Redacted Public Version" of Complaint, DE 69, filed Oct. 26, 2023 (S.D. Tex. Case No. 4:23-cv-03560), Download FTC v. U.S. Anesthesia Ptrs., Inc. Redacted Public Version (of FTC Complaint) DE 69 filed Oct. 26 2023 (S.D. Tex. No. 4.23-cv-03560).

29 For example, *see* Paragraph 21, page 11 of Download FTC v. U.S. Anesthesia Ptrs., Inc., Redacted Public Version (of FTC Complaint) DE 69 filed Oct. 26 2023 (S.D. Tex. No. 4.23-cv-03560).

It is worth noting that a group called The American Investment Council has been permitted to file an amicus brief. The Federal Rules of course require the issues and Argument on each issue to be stated on the Table of Contents page of briefs. In this case, the AIC's very first stated Argument is that "private equity greatly benefits the American economy." FTC v. U.S. Anesthesia Ptrs., Inc., Brief of the American Investment Council as Amicus Curiae, p. iii, DE 117, filed Jan. 3, 2024 (S.D. Tex. No. 4:23-cv-03560), Download FTC v. U.S. Anesthesia Ptrs., Inc., Brief of American Investment Council as Amicus Curiae DE 117 filed Jan. 3, 2024 (S.D. Tex. No. 4.23-cv-03560).

This case is significant. The author addressed it in articles published on his Claims and Bad Faith Law Blog from the time the lawsuit was first filed, starting on September 29, 2023 and continuing on October 2, 2023 and on October 4, 2023 about the complaint filed in September 2023 by the Federal Trade Commission against U.S. Anesthesia Partners, Inc., et al. As noted in the text, this was the first time that the FTC sued a private equity firm for allegedly increasing the price and thereby restricting the availability of patients' care.

30 Press Release, Dep't of Health & Human Serv's, HHS Proposes Minimum Staffing Standards to Enhance Safety and Quality in Nursing Homes (Sept. 1, 2023), https://www.hhs.gov/about/news/2023/09/01/hhs-proposes-minimum-staffing-standards-enhance-safety-quality-in-nursing-homes.html.

31 Medicare and Medicaid Programs: Disclosures of Ownership and Additional Disclosable Parties Information for Skilled Nursing Facilities and Nursing Facilities; Medicare Providers' and Suppliers' Disclosure of Private Equity Companies and Real Estate Investment Trusts, "A Rule by the Centers for Medicare & Medicaid Services [published] on 11/17/2023,"https://www.federalregister.gov/documents/2023/11/17/2023-25408/medicare-and-medicaid-programs-disclosures-of-ownership-and-additional-disclosable-parties. This final rule was scheduled to take effect on January 16, 2024, which is the day on which I am writing about it.

32 For example, Connecticut and Rhode Island provide for review of proposed conversions of not-for-profit hospitals to for-profit hospitals, by their respective State Attorneys General and Public Health Departments: Conn. Gen. Stat. §§ 19a-486a to 19a-486i, current with all enactments of the 2023 Regular Session and the 2023 September Special Session; Tit. 23, R.I. GEN. LAWS 1956 Ch. 17.14 and in particular § 23- 17- 14- 7, current with effective legislation through Chapter 398 of the 2023 Regular Session of the Rhode Island Legislature.

33 Dr. Ashish Jha, *Private Equity Firms Gnawing U.S. Health Care*, *supra*.

34 *See* the discussion, *supra*, of the antitrust lawsuit filed by the FTC, FTC v. U.S. Anesthesia Ptrs., Inc., "Redacted Public Version" of Complaint, DE 69, filed Oct. 26, 2023 (S.D. Tex. Case No. 4:23-cv-03560), Download FTC v. U.S. Anesthesia Ptrs., Inc. Redacted Public Version (of FTC Complaint) DE 69 filed Oct. 26 2023 (S.D. Tex. No. 4.23-cv-03560).

35 Medicare is not itself a regulator, but Medicare is administered by a regulator, the Centers for Medicare and Medicaid Services or CMS. The intent of the quoted recommendation is, in context, clearly meant as a recommendation for greater CMS regulation. The following quotation in the text also clarifies this recommendation, if any further clarification should be needed.

36 Dr. Ashish Jha, *Private Equity Firms Gnawing U.S. Health Care*, *supra*.

37 Dr. Ashish Jha, *Private Equity Firms Gnawing U.S. Health Care*, *supra*.

38 What has been reported about the acquisition of assisted living facilities by private equity firms, is as true about many other healthcare acquisitions as well: "Investors prefer to buy the buildings that house senior homes – instead of buying equity in the businesses – because they gain rental income and valuable property portfolios without being directly exposed to the legal risks of caring for a fragile population." *Understaffed and Neglected*, WASHINGTON POST, *supra*.

39 *'They Were Traumatized,'* POLITICO, *supra, quoting* Sam Brooks, Director of Public Policy at National Consumer Voice for Quality Long-Term Care. As a first step in this proposed solution, there would be greater transparency "in how nursing homes spend the billions of dollars they get each year from Medicare and Medicaid." *'They Were Traumatized,'* POLITICO, *supra.*