The Regulatory & Policy Levers Affecting Private Equity Growth

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NIHCM Webinar: Understanding the Growth and Influence of Private Equity in Health Care
Premise:

• PE and corporate investors are extremely adept at identifying and exploiting health care market failures (hence, functions as a divining rod)

• Identifying the revenue playbook will point to the policy response
Playbook: Hospital-Based Physicians

E.g., Emergency, Anesthesiology, Radiology, Hospitalists

• Exploit market failure and payment loophole: Surprise out-of-network billing.

• Stay out-of-network as a revenue strategy.

• Threat of surprise billing to increase in-network rates.

Policy Response: No Surprises Act of 2020 (and state surprise billing laws before that)
Playbook: Office-Based (Proceduralists)

E.g., Dermatology, Ophthalmology, Gastroenterology, Orthopedics

• Office-based, outpatient specialties not target of hospital-buyers
• Predominantly fee-for-service. Steady commercial and Medicare revenue stream + cash revenue (e.g., Lasik, cosmetic derm)
• Wraparound services (e.g., physician-administered drugs, pathology, physical therapy)
• Increase volume of patients, procedures, intensity of procedures, reduce staffing levels
Playbook: Value-Based Payment, Primary Care Practices

• “Platform” model builds extensively on existing “must have” group. Partner with payers to create vertically integrated pay-vider.

• Aggressively code of diagnoses to garner higher risk-adjusted payments from MA plans

• Grow MA population, maximize capitated “budget,” reduce costs with utilization management

• Capture patient data and referrals for other service offerings (e.g., pharmacy)
Policy Lever: Close payment loopholes

1. Close payment loopholes exploited by PE investors
   • E.g., The No Surprises Act, state surprise billing laws

2. Change Medicare Part B payment system for physician-administered drugs

3. Increase Medicare Advantage coding-intensity adjustment, increase recoupment of overpayments via RADV audits, increase difficulty for star ratings
Policy Lever: Antitrust Enforcement

1. Increase antitrust scrutiny to counteract vertical consolidation
   • But, physician practice acquisitions “fly under the radar”
   • FTC/DOJ reluctant to challenge vertical and cross-market mergers (e.g., CVS-Oak Street)

2. Federal government:
   • Remove exemption for reporting smaller physician deals
   • FTC should study PE-driven consolidation in physician markets

3. States can pass laws to scrutinize below-the-radar deals
Policy Lever: Fraud and Abuse Enforcement

1. Increase fraud and abuse enforcement to address up-coding, unnecessary care, self-referrals for wrap-arounds

2. PE-firms, corporate owners are deep pockets who can be found liable for knowing participation in revenue strategies of up-coding, unnecessary services, self-referrals (in violation of False Claims Act)

3. Complex structure of platform + add-on practices can violate Stark Law, Anti-Kickback Statute
Policy Lever: State Employment, Corporate Practice of Medicine Laws

1. Restrict the scope, duration, and applicability of physician non-competes

2. Restrict “non-disparagement” gag clauses for patient care or fraud and abuse

3. Strengthen the corporate practice of medicine laws to restrict lay-control over clinical concerns and practice management
Policy Lever: Targeting PE itself

1. Closing the carried interest tax loophole
   - PE 20% investment profits taxed at long-term capital gains rate (20%) vs ordinary income (37%), not subject to self-employment taxes.
   - Inflation Reduction Act (2022) would have fixed, but Krysten Sinema insisted it be taken out.

2. Transparency of PE ownership in health care
   - Recent House E&C bill would require providers to publicly report parent company, ownership structure, and key transactions.
Takeaways

• Corporate investors have flooded the market, increasing the financialization of healthcare

• This poses sufficient risks to warrant an immediate policy response

• We already have many tools to address the risks of corporate investments in physician practices, but they may need sharpening

• The policies should target the market failures, payment loopholes, consolidation themselves

• Ultimately, these policy levers may be insufficient to address corporatization of health care
Private Equity and the Corporatization of Health Care

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