

THE RECORDER

123RD YEAR NO. 238

WWW.CALLAW.COM

\$1.00

FRIDAY, DECEMBER 10, 1999



JASON DOW

DAVID MILLSTEIN: The plaintiffs' attorney is leading the fight against a management services agreement between a physicians group and Catholic Healthcare West. The case could be the first to decide whether such agreements violate state law.

Surgical Strike on Health Care Group

Managed care companies are closely watching legal fracas over S.F. emergency room pact

By MIKE MCKEE

Catholic Healthcare West took what has turned out to be a controversial step last year when it bought the administrative arm of a San Francisco-based group of emergency room physicians for \$36 million.

The Phoenix company, one of the largest hospital systems in the western United States, planned to manage the group's day-

to-day business operations through a wholly owned subsidiary called Meriten Physician Management Co. Inc. Clinical services were left under the control of the 100-plus doctors in San Francisco's Emergency Physicians Medical Group (EPMG), which had hospital contracts in California, Arizona, Nevada and Hawaii.

But on Thursday, Meriten and the doctors' group were in San Francisco Superior Court preparing to defend themselves against allegations that Catholic Healthcare's deal violates federal anti-kickback laws and defies California law aimed at preventing lay corporations from controlling doctors' medical decisions. Trial could begin any day.

The case — *Affiliated Catholic Healthcare Physicians v. Emergency Physicians Medical Group*, 993954 — is being

See HOSPITAL page 7

Hospital Management Pact Under Scrutiny

Continued from page 1

closely watched by health care experts, who say it could be the first in California to decide whether a management services agreement between a physicians group and a lay entity violates the state's prohibition on the corporate practice of medicine.

Specifically, Affiliated Catholic Healthcare Physicians (ACHP) contends that the agreement gives Catholic Healthcare West (CHW) a financial incentive, via a management fee, to refer patients to facilities staffed by EPMG, and places emergency room doctors in the position of possibly making health care decisions for financial, rather than medical, reasons.

Defense lawyers say "no such concerns" exist. "The undisputed facts demonstrate," Laura Guthrie, an associate in the S.F. office of Los Angeles' Latham & Watkins, wrote in court papers, "that the agreement between Meriten and EPMG does not constitute the unlawful practice of medicine, and that the management fee is not a referral fee."

Even so, the California Medical Association (CMA) was concerned enough to have its lawyers draft a plaintiffs-side *amicus curiae* brief that it hopes to get admitted as part of the case record. The brief has been joined by four other medical groups, including the American Academy of Emergency Medicine.

"The corporate practice of medicine bar is a vital protection for all patients in the state because it ensures that a physician's loyalty and judgment is to the patient first and foremost, and does not have the potential to be corrected or compromised by lay control," CMA attorney Astrid Meghrigian, who wrote the brief, said Thursday. "This law provides a structural safeguard which prohibits any economic or clinical

control over a physician. Medical practice is too sacred in this state to have it compromised by economic interests."

Defense lawyer Guthrie wouldn't comment Thursday. But in court documents she accused the plaintiffs of launching an attack on "a staple element of the health care system — the management services organization."

"The question presented," she wrote, "is this — whether physicians must themselves perform all of the business support and data collection functions necessary to maintain a practice, unaided by other entities; or whether physicians may be allowed to engage outside entities to perform these functions, as long as the physi-

clude St. Mary's Medical Center in San Francisco, Seton Medical Center in Daly City and O'Connor Hospital in San Jose.

Affiliated Catholic doctors said the agreement, which lets EPMG handle clinical services while granting Meriten business functions, gives Catholic Healthcare West "pervasive control" over EPMG physicians' decisions and violates anti-kickback laws by letting the corporation improperly share in the doctors' profits.

"One of the primary purposes of fee-sharing prohibitions . . . is to discourage those who have the ability to control patient flow from being influenced to refer patients to doctors or facilities out of financial incentive," lead plaintiffs' attorney

'Medical practice is too sacred in this state to have it compromised by economic interests.'

— Astrid Meghrigian, CMA attorney

cians maintain ultimate control over the practice of medicine, the treatment of patients and the running of their businesses."

EPMG is represented by Stephen Goff, a partner in Sacramento's McDonough, Holland & Allen.

Affiliated Catholic Healthcare Physicians, a Los Angeles-based consortium of about 350 emergency room doctors, originally filed suit against Meriten and EPMG in March 1998 in an attempt to block Catholic Healthcare West — a nonprofit company that operates 48 hospitals in California, Arizona and Nevada — from buying the non-clinical operations of EPMG. Local facilities that could be affected in-

clude St. Mary's Medical Center in San Francisco, Seton Medical Center in Daly City and O'Connor Hospital in San Jose.

clude St. Mary's Medical Center in San Francisco, Seton Medical Center in Daly City and O'Connor Hospital in San Jose. Affiliated Catholic doctors said the agreement, which lets EPMG handle clinical services while granting Meriten business functions, gives Catholic Healthcare West "pervasive control" over EPMG physicians' decisions and violates anti-kickback laws by letting the corporation improperly share in the doctors' profits. "One of the primary purposes of fee-sharing prohibitions . . . is to discourage those who have the ability to control patient flow from being influenced to refer patients to doctors or facilities out of financial incentive," lead plaintiffs' attorney David Millstein, a partner at San Francisco's Millstein & Associates, wrote in court papers.

"When CHW hospitals contract with physician groups to staff their emergency rooms, CHW is essentially referring ER patients to those physicians on an ongoing basis," he wrote. "CHW has a dramatic incentive to choose EPMG over another physician group. . . . CHW [officials] will gain (according to their own admission) 6 percent of the doctors' revenue for 30 years."

In court papers, defense lawyer Guthrie defended the overall agreement, saying such arrangements are "quite common-

place within the health care industry." Meriten makes no medical decisions for EPMG physicians, she said, and the revenue the company shares with the physicians under a percentage formula is reasonable under legislative rules because "it fairly reflects the services provided."

It wasn't clear Thursday which judge will preside over the trial, but plaintiffs' co-counsel Joseph Breall said the proceedings should last four weeks.

Breall, a partner at S.F.'s Breall & Breall, is lead attorney for a related case in San Francisco federal court. In *Emergency Health Associates v. Catholic Health West*, 99-1316, Breall seeks \$4.8 million in damages on behalf of James Severance, who for 27 years handled ER services contractually with St. Joseph's Hospital, a CHW-owned facility in Phoenix. Severance claims he was ousted unfairly in 1998 when St. Joseph's chose to contract with EPMG.

Breall said that case is on hold, pending the outcome of the broader case in *Affiliated Catholic Healthcare Physicians*.

On their Web site, ACHP officials sympathized with Severance and worried that a similar fate could await them if the EPMG-Meriten arrangement is upheld: "ACHP believes that if this bellwether event is allowed to occur unchallenged, it spells the end of the private practice of medicine."

Plaintiffs' lawyer Millstein agreed. "Once you let CHW control the practice of emergency room doctors, it's just a matter of time before other entities that own hospitals decide that it's within their interests to control physicians," he said. "It's the dark side of managed care."

Associate editor Mike McKee's e-mail address is mmckee@therecorder.com.