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POLICY & ACTION FROM CONSUMER REPORTS

HEALTH POLICY  
REPORT  
MARCH 2017

## Up in the Air: Inadequate Regulation for Emergency Air Ambulance Transportation

### EXECUTIVE SUMMARY:

Market shifts in emergency air ambulance services have surfaced serious consumer concerns and regulatory gaps. Troubling changes in the industry have led to an increase in the number of consumers receiving unexpected and exorbitant medical bills for air ambulance services. Further, an oversupply in the air ambulance market has contributed to unnecessary overuse of this life-saving service. Although states want to create consumer protections in this area, federal preemption has largely prevented the regulation by state governments.

Consumers need to beware of using these services, which sometimes are not medically necessary and often not in insurance networks. However, when buying health insurance, savvy consumers can try to find coverage that has local air ambulance providers in the plan network. Consumers living in rural areas may be solicited to buy "membership programs" offered by some air ambulance operators, but should consider these offers with caution. While the cost may be low, they will only cover expenses beyond insurance if the air transport membership company is the one that handles the emergency.

In order to address these issues, Congress should amend the Airline Deregulation Act to allow for greater state regulation; meanwhile, states should gather information about their emergency air ambulance landscapes, warn consumers about potential financial risks related to air ambulance transportation, and craft legislation to address consumer concerns where they can.

When patients need to be airlifted to medical care in an emergency, the first priority is getting them to the right healthcare provider as quickly as possible. Patients are at a disadvantage in this urgent situation because they cannot determine whether air transport is a medical necessity, nor are they equipped to direct which air ambulance provider should pick them up. That can lead to surprise expenses when the air ambulance provider turns out not to have a contract with the patient's health plan, even if the consumer has insurance. The patient may then be billed for the full charge of the flight or the balance left after any payment by the insurer for the out-of-network coverage.

Over the last 15 years, there has been a dramatic change within the air ambulance industry, with a rapid expansion of operators entering the market, particularly increasing the number of vehicles run by for-profit carriers. Those market changes have had far reaching effects on the costs patients must pay for services, and have resulted in patients receiving unexpected, exorbitant bills for tens of thousands of dollars for emergency transportation that the patient assumed would be covered by insurance. Unfortunately, federal law has often preempted

state regulation designed to protect consumers from air ambulance balance billing, leaving patients without desperately needed consumer protections.

## Air Ambulance History – A View From 8,000 Feet

Air ambulance providers typically operate under one of three business models, defined by the entity that owns the aircraft and provides the medical services onboard<sup>1</sup>:

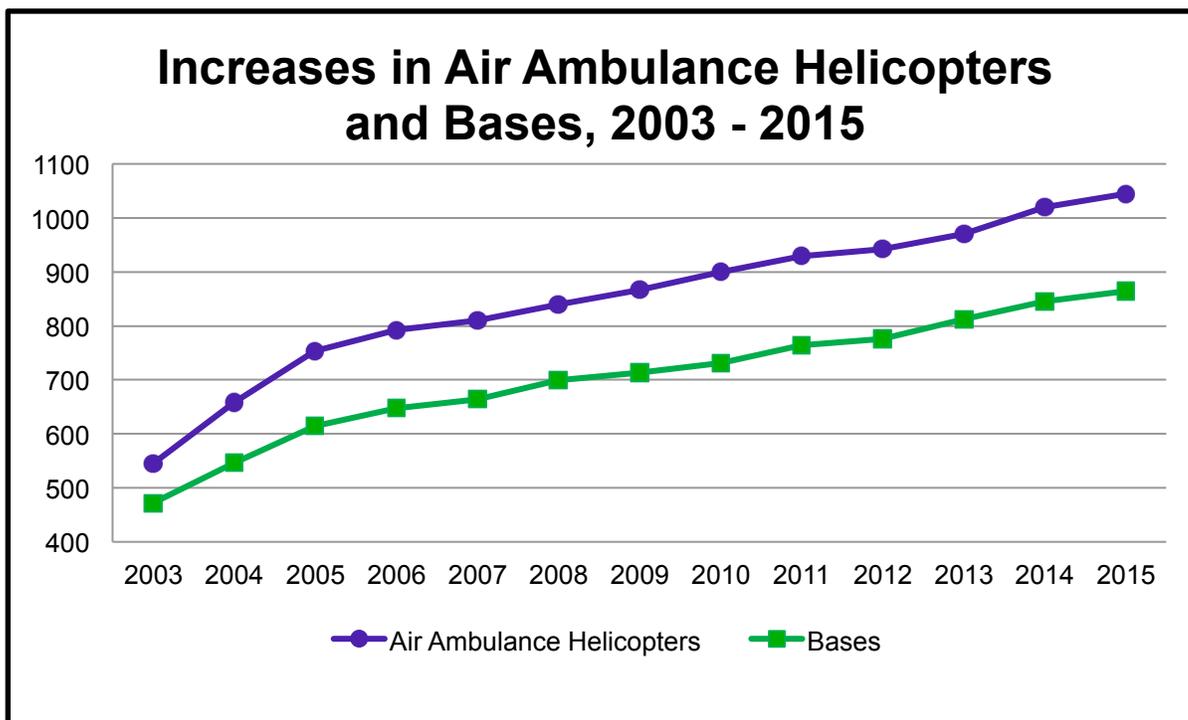
- Hospital-based: a hospital controls the business by providing medical services and staff, while generally contracting out for the pilots, mechanics, and aircraft.
- Independent: operations are not controlled or run by a specific medical facility. Independent for-profit or nonprofit providers directly employ the medical and flight crews to provide air ambulance services.
- Government operator: a state or municipal government or military unit owns and operates the air ambulances.

Air ambulance services are utilized both to transport patients from the scene of an accident to the hospital, as well as for inter-hospital transfers when a patient requires treatment at a different facility. Some air ambulance providers have both helicopters and fixed wing airplanes available,<sup>2</sup> though the majority of emergency medical transports take place in a helicopter.<sup>3</sup> Most air ambulances come with medically trained personnel and some degree of medical equipment.

Prior to 2002, most air ambulances were owned and operated by hospitals.<sup>4</sup> In 2002, after negotiated rulemaking with health industry stakeholders and public comment on its proposed rule, Medicare officials created a national fee schedule for air ambulances based on a thorough investigation of the “reasonable cost” for emergency medical services (EMS). This schedule increased the Medicare reimbursement rate for helicopter air ambulance transport, in particular raising the rate for rural transports.<sup>5</sup>

As a result of the increase, for-profit operators were able to expand their presence in the air ambulance industry greatly. While there were virtually no for-profit air ambulance operators in 2002,<sup>6</sup> more than half of the industry is now controlled by four for-profit operators.<sup>7</sup> Since the reimbursement increase went into effect, for-profit operators have added hundreds of new air ambulance bases and vehicles nationwide: in 2003, there were 545 helicopters flying out of 472 air bases in the United States;<sup>8</sup> by 2015, those numbers had nearly doubled, with 1,045 helicopters at 864 bases.<sup>9</sup> Further, although air ambulance transports made up less than one percent of total ambulance claims in 2011, they represented eight percent of the total Medicare spending on ambulance services because of their high price tag.<sup>10</sup>

Some of this expansion has likely been driven by the closure of clinics and hospitals in rural parts of the country. More than 80 rural hospitals have closed since 2010,<sup>11</sup> and 673 rural hospitals were vulnerable to closure in 2016.<sup>12</sup> Air ambulance services are sometimes the only viable way to get patients in rural communities the immediate emergency care they need.



However, substantial regulatory gaps have fueled the industry’s rapid and unfettered growth. The federal Airline Deregulation Act of 1978 explicitly preempts states from regulating the “rates, routes, or services of any air carrier.”<sup>13</sup> Civilian air ambulances were a relatively new practice in the 1970s, and the Act’s legislative history does not indicate that air ambulances were even under consideration by Congress when crafting the new aviation law, alluding only to commercial, commuter, and mail services.<sup>14</sup> Nonetheless, subsequent court rulings and Department of Transportation statements have concluded that air ambulances are “air carriers,” in the same category as commercial airlines and chartered planes, holding that states are therefore generally preempted from regulating their services.<sup>15</sup> There may be areas in which states can still regulate – for example, requirements for such items as patient oxygen masks, stretchers, and patient assessment devices to be onboard air ambulance aircraft<sup>16</sup> – but courts will scrutinize whether any state efforts to regulate air ambulances would significantly impact the economics of flying the aircraft.<sup>17</sup>

A number of states have tried to regulate various aspects of the industry over the past several years, but air ambulance operators have successfully challenged the majority of these efforts by relying on these judicial decisions and Department of Transportation opinions. Many experts are concerned that the higher Medicare reimbursement rates, combined with minimal regulation, have transformed an essential life-saving service into an industry fraught with safety concerns and little oversight.

## Consumer Concerns – Skyrocketing Bills but Lacking Oversight

The increased commercialization of the air ambulance industry appears to be driving several

trends that put consumers at greater risk of getting very large bills not covered by their insurance.

As the number of freestanding for-profit operators has increased, so too has the financial pressure on them to develop aggressive business models in order to earn profits to satisfy investors. This creates an incentive for air ambulance providers to remain out of insurance networks, allowing them to charge whatever they wish, but putting patients at risk of receiving unexpectedly large bills. No governmental body appears to have data to determine whether the rates being charged by these commercial operators are fair, appropriate, or justified by the actual expenses of providing the service. When states have tried to regulate the industry in response to growing the consumer complaints, they have been prevented on the grounds of federal preemption.

### The Pressure of Private Equity

As with any for-profit enterprise, the pressure to produce profit comes from the company's duty to its investors. Private equity firms have taken an increased interest in investing in emergency medical services nationwide, and the same is true for air ambulance services, where private equity firms have invested heavily. In fact, after Air Methods' investors encouraged the industry's largest operator to "go private," and to stop trading on the stock market – in part, because the insight the public financial reports offer into the company's operations is damaging to its public image – the company recently entered into an agreement to be acquired by a private equity firm called American Securities, LLC.

Sources: Danielle Ivory, Ben Protes, Kitty Bennet, When You Dial 911 and Wall Street Answers, The New York Times (Jun. 25, 2016); Business Wire, Voce Capital Sends Letter to Board of Air Methods Corporation (Jan. 30, 2017); GlobeNewswire, Air Methods Announces Cooperation Agreement with Voce Capital (Mar. 22, 2016); Air Methods, Air Methods Enters into Definitive Agreement to Be Acquired by American Securities (Mar. 14, 2017).

The result is a highly competitive atmosphere where for-profit air ambulance companies can essentially charge whatever they want.

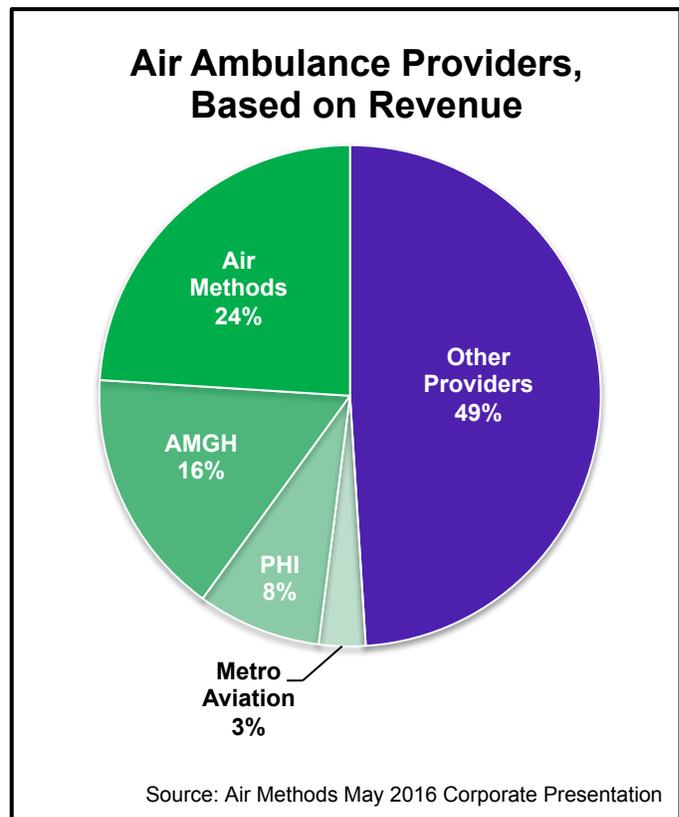
## Surprise Medical Bills Burden Consumers

Unexpected air ambulance bills are often the result of a common practice known as "balance billing" – when a provider charges patients for outstanding balances beyond what the insurance company has paid the provider. Consumers are generally protected from this practice if their insurance company has a contract with the air ambulance provider, but out-of-network providers are not bound by in-network rate agreements. For an out-of-network bill, the health plan will pay nothing or pay a fixed payment less than the billed charges, and the patient is responsible for the balance. As the Maryland Health Care Commission found, in an emergency situation "[a]lthough a patient plays no role in selecting an air ambulance company, the patient may be responsible for a sizeable bill depending on the payor insuring the patient and the air ambulance company flying the mission."<sup>18</sup>

Air ambulance providers assert that this problem is exacerbated by the disparity between the cost of providing air ambulance transportation and the reimbursement rate currently paid by Medicare and Medicaid. The Medicare "base rate" for air ambulances is currently \$3,496.75 in metropolitan areas and \$5,245.13 in rural locations,<sup>19</sup> but air ambulance providers often claim that their operating expenses are much higher than this.<sup>20</sup> Since air ambulance operators do not make detailed cost data public, there is currently no way to

evaluate the true underlying cost of air ambulance travel amongst various providers. The prevalence of air ambulance companies contracting with providers reportedly varies from state to state and insurance carrier to carrier, but there is evidence to suggest that some for-profit carriers evade joining networks, allowing them to balance bill.<sup>21</sup>

Air Methods, the largest for-profit air ambulance provider in the US, has been at the forefront of the industry's expansion, earning a sevenfold increase in profit over the last ten years.<sup>22</sup> A recent calculation estimated that in 2009 Air Methods' average charge was \$17,262,<sup>23</sup> but by 2016 it had skyrocketed to \$ 50,199.<sup>24</sup> Air Methods accounts for nearly 25 percent of all air ambulance revenue in the country, and it posted a profit of \$108 million in 2015, on revenue of \$1.1 billion.<sup>25</sup>



In 2015, Air Methods made approximately \$1,100 in profit per patient, based on the 100,000 transports the company said it had that year<sup>26</sup> – despite a company spokesman's assertion that the company loses money on 70 percent of its customers, since many are covered by Medicaid or Medicare which have limits on reimbursement.<sup>27</sup> Air Methods officials have also acknowledged that the company routinely balance bills patients for far more than the actual cost for a flight.<sup>28</sup>

The scope of consumer discontent about sky-high air ambulance billings and insurance coverage gaps is illustrated by several recent news reports and state investigations:

- The North Dakota Insurance Department received 25 consumer complaints between 2013 and April 1, 2016. Twenty of these complaints were against Air Medical Resource Group, a for-profit provider who charged a total of \$884,244 for the 20 flights, an average of \$44,212 per flight. Just 33 percent of the charges were covered by the patients' insurance.<sup>29</sup>
- The Maryland Insurance Administration held hearings in 2015 to investigate a string of consumer complaints regarding air ambulance billings ranging from \$20,000 to over \$40,000.<sup>30</sup>
- Insurance departments from nine states received 55 consumer complaints about a combined \$3.8 million in air ambulance charges – an average charge of \$70,000 per trip.<sup>31</sup>
- A sampling of 19 air ambulance bills received by Montana residents showed that the average cost per flight for an out-of-network ambulance flight was \$53,397.<sup>32</sup>

As the cumulative charges for privately-insured patients increase, health insurance companies are resisting paying higher and higher bills, questioning whether the increases are justified by the expense of providing the service or the rates charged by comparable providers.<sup>33</sup>

In most states that have investigated consumer complaints about balance billing, the network status of the air ambulance companies has been a key issue. For example, as of 2015 there were 13 air ambulance services operating in Montana, but only about half contracted with insurance providers.<sup>34</sup> Similarly, recent cases of large balance bills in Maryland feature instances where the air ambulance providers were out-of-network because contract negotiations had broken down with insurers.<sup>35</sup>

“There is certainly a case where you can say there is price gouging and certain air ambulance companies taking advantage of the fact that it is an emergency, that they’re not regulated by state or federal law to charge whatever they want,” according to Sandy Ahn of Georgetown’s Health Policy Institute.<sup>36</sup> And many of these for-profit providers are aggressive about collecting on those debts. “They’ll call you, they’ll send threatening letters. They’re really using a scare tactic to really scare consumers.”

Air Methods is known in the industry for its aggressive collection tactics, using debt collectors and filing lawsuits against hundreds of patients and their families.<sup>37</sup> Before transporting patients, Air Methods generally requires patients or their families to sign a consent form that makes them “personally and fully responsible” for any amount not covered by insurance, but it does not include any indication of what the cost will be.<sup>38</sup> This omission has enabled Air Methods to go after patients’ personal assets, through wage garnishment or other forms of debt collection, if the bill wasn’t covered by insurance.

In March 2016, ABC News reported that Air Methods had filed hundreds of debt collection lawsuits against transported patients and their families over the last five years, including 104 lawsuits in South Carolina alone.<sup>39</sup> In Maryland, patients testifying at a 2015 hearing complained about receiving balance bills from \$20,000 to \$40,000 from air ambulance companies,<sup>40</sup> followed by weekly calls from bill collectors, who threatened to put liens on their homes.<sup>41</sup>

### Consumer Story

**Kathryn Green**  
Greenwood, Mississippi

Kathryn called 911 after her husband fell and suffered a head injury at home, and the EMTs decided to call an air ambulance. Unfortunately, a provider that was not in her health insurance provider’s network was called, and Kathryn received a bill for \$50,950 from Rocky Mountain Holdings, a subsidiary of Air Methods. “I don’t know what I am going to do,” Kathryn stated.

Sadly, Kathryn’s husband passed away after a week in the hospital, but Rocky Mountain Holdings pursued collection of the bill. “Their business is making money off sick people. I don’t understand that,” explains Kathryn. The initial bill from Rocky Mountain was for \$58,142, but because the provider was out of their insurance network, her insurance only covered \$7,192 of the total. Kathryn was aggressively pursued by an in-house collections department for months. “I could not afford a funeral for my beloved husband. I maxed out a credit card to pay for his cremation,” Kathryn shared. “I am not against air ambulances. They can be life-savers, I would imagine. However, I am against the use of extortionate billing practices.”

If a patient asserts that he or she cannot afford the bill, the air ambulance companies may suggest the possibility of a reduced bill if the patient proves financial hardship. Air Methods' application for such a reduction, known as a "special consideration application," asks patients to submit income and employment information, household expense information, copies of three months of pay stubs, as well as three months of checking, savings, and investment account statements, and a copy of their most recent income tax return.<sup>42</sup>

Applicants also agree to provide access to a credit report. Delays submitting the application, or missing information, can cause it to be rejected. Final decisions regarding the application are made "at the sole discretion of the Company's special consideration committee."

The availability of these bill reduction programs may be helpful to some patients, but the process of requesting and submitting this information raises many concerns. Patients fundamentally do not want to be caught in the middle of billing disputes between providers and insurers, especially after a serious accident, injury, or illness. Consumers enroll in private and public insurance coverage expressly to have peace of mind and be protected against this very situation. Furthermore, at the time the application must be completed, consumers are often coping with the aftermath of a major medical event. Because this may be when patients and their families are in the process of rehabilitation and recuperation as patients, caring for others, or grieving the loss of a loved one, it may be extremely challenging to gather and submit the extensive detailed financial information in the required time frame.

And unlike a more conventional charity care program with a hospital or health care provider, the air ambulance company has commercial revenue goals that may directly conflict with providing bill reductions for economic hardship. The air ambulance provider is not a neutral arbiter in this dispute. Hospital charity care is subject to state and federal rules and oversight, but generally speaking there is no independent oversight body that monitors

### Consumer Story

#### Karyn Hill

Fort Myers, Florida

Karyn's husband had an allergic reaction to a wasp's sting while in a rural area of Florida. A friend called the paramedics, but when the ground ambulance arrived Karyn's husband the paramedics were unable to intubate him. Concerned that he wasn't getting enough oxygen as a result of his respiratory system shutting down, the EMTs then called for an air ambulance. Fortunately, once they arrived at the scene, the paramedic aboard the air ambulance was able to intubate Karyn's husband, and he was then flown to a local hospital for treatment.

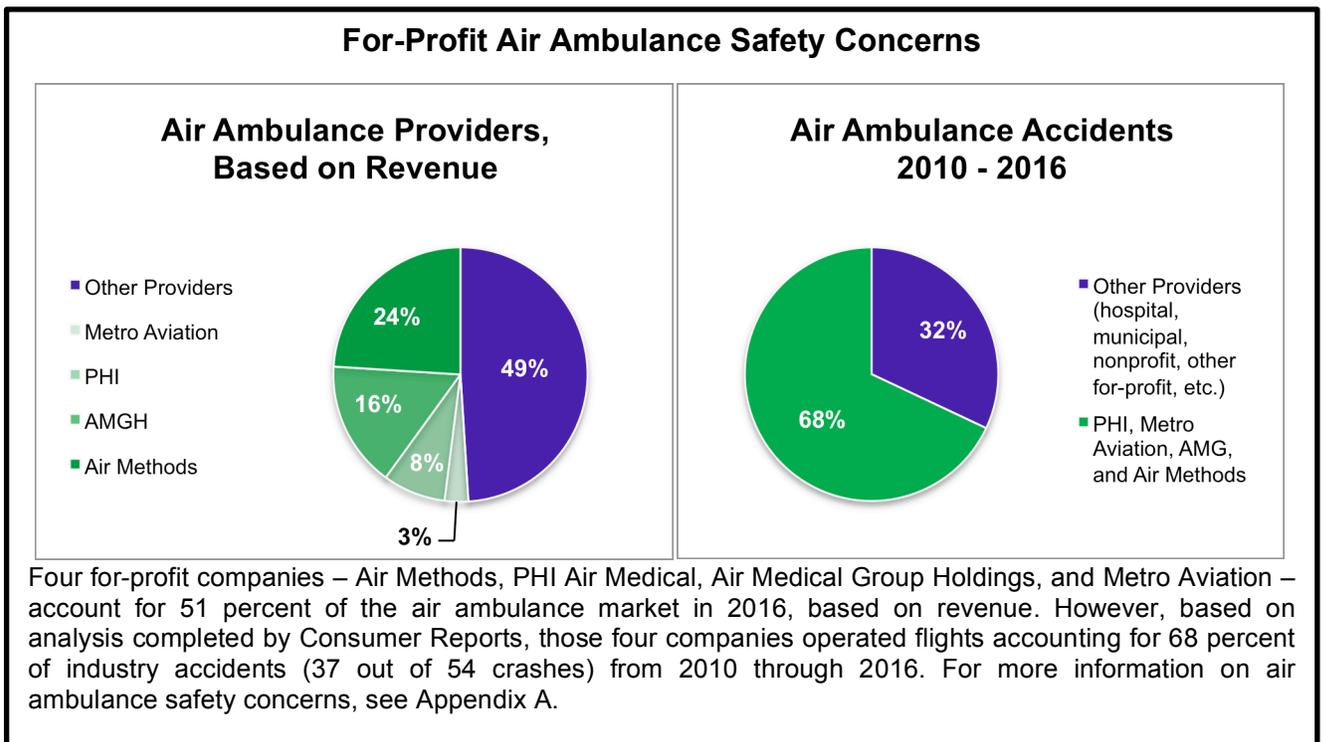
The family ended up receiving a bill for \$34,454, of which her insurance covered \$4,172. The remaining \$30,282 is now in collections, and has begun to affect the family's finances. "I don't understand how, in an emergency situation, this becomes the consumer's problem," says Karyn. "There have to be certain rules that protect the patient when they're unconscious and really have no choice in the matter." Karyn's husband was transported by Air Methods, which sent them financial disclosure forms asking them to divulge information about the family's finances to see if they qualify for a reduction in their bill. Even then, there is no guarantee that the company will reduce their bill, nor is there any appeals process for the decision. "We're apprehensive about providing them with our personal financial information because they could still come after us," explains Karyn. "Of course I'm glad they saved my husband, but the cost has had a devastating impact on our family."

whether patients who should qualify for financial assistance for air ambulance transport actually receive it.

Some air ambulance companies offer membership programs as “protection” from these big bills – and as a revenue stream for themselves. For an annual fee of about \$60 to \$100, patients face no cost for the company’s services beyond what their health insurance covers. These plans are marketed heavily, and aimed at spreading the costs of services among a bigger pool of patients. Even city and county governments contract with these providers, paying for the membership plans with local tax dollars and privatizing the funding for these services.<sup>43</sup> These memberships may be billed as a form of supplemental insurance, but often are exempted from the regulations that apply to traditional insurance plans. And there’s another crucial catch: in an emergency, a patient most likely can’t choose which air ambulance service is going to be called to transport them. If another air ambulance company provides the service, their membership will offer no protection from the cost.

### Oversupply Leads to Overutilization

While the recent expansion of the air ambulance industry has brought air ambulance services into new rural areas, in larger metropolitan areas much of the growth represents a duplication of services,<sup>44</sup> which has created stiff competition within the industry. Air ambulance operators typically have high fixed costs, which they assert account for up to 80 percent of their monthly expenses, and operators may collect no revenue unless they transport patients.<sup>45</sup> With so many competitors operating in close proximity, operators often can’t afford to pass up any opportunity for a flight. Moreover, there have been reports of overutilization and dispatch interference by unscrupulous actors within the industry.



When the National Transportation Safety Board (NTSB) held hearings on air ambulance safety in 2009,<sup>46</sup> the agency heard accounts of rampant problems stemming from this ultra-competitive environment.<sup>47</sup> The NTSB heard reports of helicopters flying in bad weather, stealing dispatch calls from other operators, and flying to accident scenes even when no one had called them in. Some operators would accept a second dispatch call before they had completed their first, leading to unnecessary delays in transporting patients. Others created close ties with ground EMS services and hospitals, hiring staff members from the local ground ambulance company, with knowledge that paramedics would be more likely to call their friend when they needed an air ambulance.<sup>48</sup> Testimony alleged that the profit-driven environment meant air ambulance operators often flew patients who could have been safely transported by ground, costing both patients and taxpayers thousands of dollars per trip.

In 2012, the Journal of the American Medical Association published a study suggesting that air-ambulances do improve patient care. The study reported that patients transported to Level I trauma centers had a better chance of survival when flown by helicopter, and patients transported to Level II trauma centers had a survival advantage of 15 percent, when comparing helicopter transport to ground ambulance service.<sup>49</sup> However, competition within the industry has resulted in overutilization of services for people for whom air transport may not actually be necessary.<sup>50</sup>

Research suggests that some patients that could be as well – or better – served by ground ambulance transport are instead being transported by much more expensive air ambulances. For example, a recent analysis at the University of Arizona found that a third of patients transported by air ambulance were only minimally injured, and benefitted in no way from being transported by air.<sup>51</sup> And a 2012 assessment of air ambulance services on behalf the Oklahoma State Department of Health cited a case in which a ground ambulance crew handed off a patient to a helicopter crew at a trauma scene, and then the same ground ambulance met the helicopter at the landing pad after the flight to transport the

### Consumer Story

**Jennie Stout**  
Ocala, Florida

Jennie's 13 year old daughter Ashlyn fell into the ashes of a day-old fire, and suffered burns to both hands and both legs from the knees down. Despite not meeting the criteria to be flown by an air ambulance, the EMS first-responders called for a helicopter to take her to the nearest burn center. In the moment, Jennie didn't think to ask if her daughter needed to be flown to the burn center. "You want the best thing for your loved one, and you don't know what it is," says Jennie about the decision to take the helicopter. While Ashlyn flew in the helicopter, Jennie's husband drove the family car, arriving at the hospital at the same time the air ambulance did. "It didn't save any time," according to Jennie. "That is one of the things that was very frustrating."

Unfortunately, the Stouts soon learned that there was no in-network provider for air ambulance services in their area through their health insurance. Despite having met their deductible and out-of-pocket maximum for the year, they received a surprise bill for \$25,000 from Med-Trans, the out-of-network air ambulance provider who transported their daughter. Their insurance company paid \$5,000, but the Stout family remains liable for \$20,000. "We make \$60,000 a year, paid \$13,500 in insurance premiums that year, and paid \$10,000 out of pocket as the result of this accident. Yet are expected to pay this bill." They hired a lawyer to fight the bill, but it has now been sent to collections and remains as a dark cloud over the family's finances. "The damage is done for us now. But I would love to know that there aren't other families going through this kind of battle if they don't have to."

same patient to the receiving center.<sup>52</sup> That review also emphasized that with no publicly-owned air ambulance services, the state had left the task of providing air medical transport to the free market, and so some degree of competitive behavior was to be expected. And competition within the industry is not expected to decrease anytime soon; a recent market analysis by Fast Market Research predicts that the air ambulance market will grow another 9.97 percent before 2020, driven largely by an “increase in [the] number of service providers.”<sup>53</sup>

In short, although the public clearly needs air ambulance services to be available for life-saving services in some emergency situations, it is unclear whether air ambulances are medically necessary for many of the people who are currently being transported in them. And despite that fact, more and more people are being transported by air ambulance every year due to the competitive nature of the industry, and then being saddled with outrageous surprise bills for those services.

## The Preemption Problem: State Regulation Doesn't Fly

The Airline Deregulation Act (ADA) of 1978 explicitly preempts states from regulating the “rates, routes, or services of any air carrier,”<sup>54</sup> and was drafted with the intent of keeping national commercial air travel competitive.<sup>55</sup> Air ambulances have been interpreted as “air carriers” within the meaning of the ADA, and courts have interpreted the Act as protecting them from state regulation of their rates, routes, and the services provided as well.<sup>56</sup> While aviation safety requirements are well-defined by the Federal Aviation Administration (FAA), state health officials have been foreclosed from establishing health-related standards for air ambulance transport if the standards have a sufficient impact on prices.<sup>57</sup> As a result, the medical care provided by air ambulances depends largely on the internal standards and commitment to quality from the operators themselves, with little oversight or accountability required by an outside regulator.

Because the ADA’s preemption clause is broadly drafted, the rule has been interpreted to restrict a wide array of even the most commonsense state restrictions. And with the closure of more and more rural hospitals around the country, state officials agree that the law is financially harming more and more patients who may have to rely on air ambulances to get them to faraway hospitals in emergency situations.<sup>58</sup> Various states have attempted to enact laws to protect consumers from out-of-network air ambulance bills, but as states have attempted to regulate air ambulance programs and ensure their integration with state and local emergency medical services (EMS), carriers have responded with lawsuits asserting that these restrictions are preempted by the ADA. “A number of organizations have really used that provision to strike down state regulation for healthcare,” according to Tom Judge, executive director of LifeFlight of Maine, a nonprofit hospital-based helicopter critical care system.<sup>59</sup>

In a 2008 Federal District Court case, *Med-Trans Corporation v. Dempsey Benton*, the court struck down a North Carolina law requiring new air ambulance programs to show there was a need for their services.<sup>60</sup> In that case, a for-profit air ambulance provider based in South Carolina sued the state of North Carolina, claiming ADA preemption of the state’s

certificate-of-need law as well as requirements for the company to be affiliated with an EMS provider and to have an EMS peer-review committee. Though the court stated that it was “loath to disturb the carefully coordinated state and local EMS systems,” the ruling reluctantly sided with Med-Trans, finding that the challenged regulation provided local governments with a mechanism by which they could prevent an air carrier from operating within the state.<sup>61</sup>

The decision emboldened air ambulance operators to fight other state or local regulations that they argue might affect their bottom line. In the years since the ruling, air ambulance operators have sought rulings from the Department of Transportation (DOT) on whether a particular state regulation was preempted by the ADA, often relying on the Med-Trans ruling for support.<sup>62</sup>

There are several areas in which states retain the authority to regulate air ambulances, including medical staff qualifications and sanitary conditions; the medical environment and control of temperature in aircraft; and medical equipment and supplies, provided it does not amount to economic regulation.<sup>63</sup> However, in an effort to protect their citizens from out-of-network charges and balance bills, states have continued to try to find ways to create consumer protections for patients transported by air ambulance. For example, in 2015 North Dakota enacted a law that created a “primary air ambulance carrier list” for operators who contracted with the major insurance carriers in the state.<sup>64</sup> If an operator refused to contract with insurance providers, it was put on a secondary list and called only when a primary operator was not available. The law also established air ambulance service zones and required hospital staff or emergency medical providers to make a reasonable effort to inform the patient and their family of the estimated response time for air transport compared to transportation by ground ambulance. However, the for-profit air ambulance operator Valley Med Flight sued the state of North Dakota, arguing that the state was trying to usurp federal law and the ADA. The court ruled in favor of Valley Med Flight, calling the contested state law “well-intentioned and enacted in good faith,” but stating that it was clear that Congress “has assumed the field in the arena of air carrier regulation and noble intent does not save the law from preemption.”<sup>65</sup>

Federal preemption arguments raised by air ambulance carriers have severely impeded states from protecting consumers’ financial security. Action needs to be taken to ensure that states have the authority to enact those safeguards, and to regulate the air ambulance industry to the same extent it does other essential health services, including ground ambulance transportation.

## Recommendations – Our Pre-Flight Checklist

As a nation, we have struggled to secure, affordable, and high-quality medical care for all Americans. At a minimum, we should ensure that in critical emergency situations timely, appropriate medical care – including transportation to that care – is available to all. Certain federal laws address this in part. For example, the federal Emergency Medical Treatment and Labor Act (EMTALA) requires anyone coming to the emergency department of a hospital participating in Medicare to be stabilized and treated, regardless of their insurance

status or ability to pay.<sup>66</sup> Additionally, the Affordable Care Act requires that where a health plan provides coverage for emergency services it may not require prior authorization or charge consumers cost-sharing in excess of their in-network costs for such hospital services.<sup>67</sup> But assuring availability of reliable, affordable emergency medical air transport has not been attained. A commitment to addressing that lapse should be a key government function, whether placed at the federal, state, county, or city level, though uniform treatment across the nation would require a federal solution. While this paper does not prescribe the path to a national guarantee here, we believe it is worthy of further consideration by policymakers.

In the immediate future, discrete and specific Congressional action would clear the path for state-by-state consumer protections. And, even without that, there are some modest steps states can take.

## Congressional Action

The federal Airline Deregulation Act currently prevents states from fully performing the traditional state government function of protecting their residents' health and safety, and that loophole is leaving consumers in danger of huge, unexpected medical transport bills. States have repeatedly enacted statutes or promulgated regulations aimed at protecting consumers on air ambulance issues, but in a majority of cases the industry has thwarted those efforts by successfully raising federal preemption arguments. There is no substitute; Congress must act now.

Amending the Airline Deregulation Act to give states authority to oversee air ambulance providers would create the opportunity for states to address important pricing, billing, and utilization issues:

- There is currently no **transparent process for rate-setting** for air ambulances, which leaves consumers largely at the mercy of providers. Rates should be adequate to ensure that providers are able to operate and provide essential services, but without public oversight there is essentially no limit to how much air ambulances can charge, nor any verification that the charges are fair. If the Airline Deregulation Act were amended, states could create a process for reviewing and approving the rates charged by air ambulance providers to prevent price gouging.
- In the current system, consumers are often stuck in the middle of billing disputes between air ambulance providers and insurance companies. In cases where a consumer is balance billed or the claim is denied by the insurance carrier as being “medically unnecessary,” consumers are currently on their own to negotiate separately with both the air ambulance provider and their health insurance company. If the Airline Deregulation Act were amended, states could **hold consumers harmless** and create an independent dispute resolution process for air ambulance providers and insurers to resolve any reimbursement disputes, removing the consumer from the conflict.
- When too many air ambulances are operating in an area with too few patients, prices go up without corresponding improvements in medical outcomes. If the Airline

Deregulation Act were amended, states could implement and strengthen processes, such as Certificate of Need programs, to provide for more **orderly health care planning** and determine whether there is a need for new air ambulances. Over-supply, rather than lowering prices, may in fact be leading to inappropriate over-use of emergency air ambulance services, leading to higher premiums and out-of-pocket costs for consumers, as well as questionable safety experiences.

- Consumers with health insurance are often surprised to learn that there are no in-network air ambulance providers in their plan, and end up horrified by the massive surprise medical bills they receive as a result. If the Airline Deregulation Act were amended, states could require plans to have air ambulance providers as a **component of “network adequacy.”** Then, states could create a preferred list of in-network air ambulance providers that contract with all or most health plans in the state, to be called first in emergencies. This would help prioritize emergency air ambulance service providers that participate in networks, thereby limiting consumer cost-sharing.

The National Association of Insurance Commissioners has made it a top legislative priority to amend the Airline Deregulation Act to explicitly allow states to regulate air ambulance network and pricing issues. In 2016, Senators John Hoeven of North Dakota and Jon Tester of Montana proposed amendments to the Federal Aviation Administration reauthorization legislation, which would have granted states more power to regulate air ambulances.<sup>68</sup> Senator Tester has recently introduced legislation, the Isla Rose Life Flight Act, which would allow state governments to regulate air ambulance billing and pricing practices to ensure policies are transparent for patients.<sup>69</sup> We urge Congress to take action to protect consumers in 2017 by approving this legislation.

## State Action

Although state regulation of air ambulances is preempted in many instances, there are still several steps states can take to protect their residents:

- States or localities should **gather as much information as possible about the emergency air ambulance landscape** in their jurisdiction. They can hold informational hearings to elicit public testimony on the consumer experience in their jurisdiction, for example. Hearings like these have been held in Maryland<sup>70</sup> and Montana,<sup>71</sup> and have shed light on the negative impact market changes have had on emergency services. States can also investigate possible arrangements between hospital operators and air ambulance companies which could create conflicts of interest. For example, referral arrangements could be affecting which hospitals patients are transported to based on financial remunerations rather than hospital proximity or medical specialization.

State external medical review systems, often under the state health insurance regulatory agency, also likely have data about how disputes amongst consumers, air ambulance providers, and insurers are being sorted out regarding “medical necessity” determinations and non-payment disputes. A careful review of those

complaints can help discern how the Emergency Medical System (EMS) and hospitals in the state are handling the dispatching and coordination of emergency air services. Local EMS providers near Bend, Oregon, for example, have used this information to devise protocols for when to call for air transport and what provider to call in order to avoid the sometimes problematic dynamics among competing air ambulance providers.<sup>72</sup> Emergency dispatch coordinators there have created an algorithm which ensures that the closest and most appropriate air resource comes to the scene of the accident, rather than randomly choosing one provider over another.

- Public education can also play an important role in **warning consumers about potential financial risks**, and states and localities are best positioned to do this. For example, it is important to engage the media and government communications channels to ensure that dispatchers, emergency rooms, doctors, and consumers understand the financial risk to consumers from balance billing by private air ambulance services.<sup>73</sup>

Another topic about which the public would benefit from unbiased information is membership programs. These programs may seem attractive as a kind of supplemental insurance, but if the provider called to the scene in an emergency is not with which the one the patient has a membership with, the consumer may have no protection from a very costly medical bill. Consumers should be educated about the limitations of these membership programs.

- States could also consider **crafting legislation to address consumer concerns** outside of the preempted areas of law.<sup>74</sup> This is tricky given the broad language of the Airline Deregulation Act, but some states are trying to thread that needle. States could consider expanding their minimum coverage requirements, and mandate that all health policies under state regulation include coverage for emergency air ambulance transport. This would ensure that there are fewer patients lacking coverage to defray the cost of their air transport, as well as help spread the cost to a larger base of covered consumers.

Further, ensuring that states impose bans on balance billing of consumers would allow the state to assert its traditional role in protecting residents' health, while leaving the regulation of services, routes, and aviation equipment with the FAA. West Virginia recently enacted such a law to protect consumers covered by the "Public Employees Insurance Act" from balance billing by air ambulance companies.<sup>75</sup> And Colorado has recently passed a bill which gives the state board of health rule-making authority to set minimum standards for licensure of air ambulance services, as well as authority to take disciplinary action, including the assessment of civil penalties, for violation of the rules.<sup>76</sup>

## Consumer Action

Unfortunately, there is little that consumers can do to avoid surprise air ambulance bills. As described above, Consumers need to beware about using emergency air ambulance services

which sometimes are not medically necessary and often not in insurance networks. However, there are a few things consumers can do:

- When buying health insurance, savvy consumers can try to find coverage that has local air ambulance providers in the plan network.
- Consumers living in rural areas may be solicited to buy "membership programs" offered by some air ambulance operators. They should be wary about these. While the cost may be low – as little as \$65 per year – they will only cover expenses beyond insurance if the air transport membership company is the one that handles the emergency. In an emergency situation, consumers have little to no power to direct which provider is dispatched to the scene.
- Consumers who have already received an air ambulance bill can ask their health plan to advocate on their behalf, challenge the bill directly with the provider, and file a formal complaint with their state insurance regulator.

## Conclusion

When patients need to be airlifted to medical care in an emergency, the first priority is getting them to the right healthcare provider as quickly as possible. But patients who survive a medical emergency should not also be faced with the undue burden of over-the-top air ambulance bills. It is imperative that policymakers ensure consumer have access to life-saving care in emergencies, as well as protecting them from financial ruin as a result of that care. Action must be taken at both the state and federal level, and it is needed now.

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*Angela Elizabeth Perry, Policy Analyst for Consumers Union in the West Coast Office, prepared this report.*

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### CONSUMERSUNION.ORG

**Headquarters Office**  
Truman Avenue  
Yonkers, New York 10703-1057  
(914) 378-2029

**Washington Office**  
1101 17th Street, NW #500  
Washington, DC 20036  
(202) 462-6262

**West Coast Office**  
1535 Mission Street  
San Francisco, CA 94103-2512  
(415) 431-6747

**South West Office**  
11801 Domain Blvd, 3<sup>rd</sup> Floor  
Austin, TX 78701  
(512) 477-4431

# APPENDIX A

## Safety Concerns

Concerned with air ambulance safety for decades, the NTSB has conducted multiple in-depth investigations into air ambulance safety, published reports in 2006 and 2010, and listed air ambulance safety on the NTSB's Most Wanted List from 2008 to 2015. Between 1988 and 2009, the NTSB issued over 50 air ambulance-related recommendations to the federal government and the air ambulance industry.<sup>77</sup> While some of those recommendations have been implemented,<sup>78</sup> many are still outstanding or have been deemed closed due to “unacceptable action” by the NTSB. For example, a recommendation sent to the FAA suggesting that criteria be established for air ambulance helicopter pilot training, including training for how to handle unexpected weather conditions, poor visibility, and hazards unique to air ambulance operations, was not implemented in the FAA's most recent set of rules for commercial helicopter pilots, and the recommendation has been marked “closed – unacceptable action” by the NTSB.<sup>79</sup>

For air ambulance companies, profitability largely depends on achieving the lowest operating costs and transporting the highest number of patients. Reports indicate that some helicopter operators determine how many flights they need in order to break even each month, and pressure pilots by keeping them apprised of their progress in meeting that goal.<sup>80</sup> “Unfortunately, everybody in the business knows that if your base isn't flying much then your employment is going to be at risk,” according to Kurt Williams, president of the National EMS Pilots Association.<sup>81</sup> And there is some evidence to indicate that the increase in the number of flights, combined with extensive cost cutting measures, has had an impact on safety.

From 2003 to 2008, air ambulance accidents occurred at historical levels, fluctuating between 11 and 15 accidents per year, and 2008 was the most fatal year on record.<sup>82</sup> Although that rate has decreased in recent years,<sup>83</sup> safety concerns persist within the industry, and there appear to be differences in the safety records of nonprofit versus for-profit air ambulance providers. Researchers found that from 1998 to 2012, for-profit air ambulance operators averaged seven to eight crashes per year, while not-for-profit or public operators averaged one crash every year or two.<sup>84</sup> Although these results were contested by the Association of Air Medical Services,<sup>85</sup> an analysis of recent NTSB accident data shows that for-profit air ambulance companies continue to have more accidents than other providers. Between 2010 and 2016, the four largest for-profit air ambulance companies – Air Methods, PHI Air Medical, Air Medical Group Holdings, and Metro Aviation – operated flights which account for 68 percent of industry accidents (37 out of 54 crashes), even though they accounted for only 51 percent of the air transport market based on revenue in 2016, and even less in years prior.<sup>86</sup>

Twin-engine helicopters are generally considered safer than single-engine helicopters, and in Europe most operators require use of twin-engine aircraft, yet in the US there are now more single-rotor helicopters in use.<sup>87</sup> A twin-engine helicopter generally has more sophisticated avionics such as an auto-pilot, terrain awareness, and weather radar, all of

which can add significantly to safety. Further, in the event of engine trouble with one engine in a twin-engine helicopter, the second engine is there to ensure the flight continues to go smoothly.<sup>88</sup> When operating in rough terrain, experts usually recommend a twin-engine helicopter. In 2004, only 41 percent air ambulances in the US were single-engine helicopters, but by 2014 single-engine aircraft outnumbered twin-engine models 513 to 485.<sup>89</sup> Experts say that trend is being driven primarily by for-profit operators, because single-engine helicopters often cost half of what a twin-engine model costs, although they also come with more safety concerns.<sup>90</sup>

Another area of concern for consumers is the qualifications of the medical staff who will treat them onboard the air ambulance. From 2008 to 2014, although there was an increase of nearly 230 air ambulance helicopters nationwide, the number of physicians flying onboard dropped from 600 doctors to 563.<sup>91</sup> The number of basic-level or intermediate-level EMTs, meanwhile, increased from 557 to 846, and the number of paramedics rose from 4,476 to 5,356.<sup>92</sup> The data show that patients are safer flying with a physician onboard; a recent study concluded that rate of fatality of patients treated by flight nurse-physician teams is significantly lower than that of patients treated by nurse-paramedic teams.<sup>93</sup>

All of these trends have lowered costs for operators, potentially at the expense of safety for the patients they transport. And when considered in conjunction with the highly competitive nature of the industry, as well as the lack of regulatory oversight these operators enjoy, it seems clear that changes must be made to ensure patients have access to safe and affordable care.

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- <sup>53</sup> <http://www.digitaljournal.com/pr/3014992>.
- <sup>54</sup> 49 U.S.C. § 41713(a)(1) (2017).
- <sup>55</sup> The Airline Deregulation Act had five stated priorities, which were as follows: (1) the maintenance of safety as the highest priority in air commerce; (2) placing maximum reliance on competition in providing air transportation services; (3) the encouragement of air service at major urban areas through secondary or satellite airports; (4) the avoidance of unreasonable industry concentration which would tend to allow one or more air carriers to unreasonably increase prices, reduce services, or exclude competition; and (5) the encouragement of entry into air transportation markets by new air carriers, the encouragement of entry into additional markets by existing air carriers, and the continued strengthening of small air carriers. H.R. Rep. No. 95-1179 (1978) (Conf. Rep.), available at <https://www.congress.gov/bill/95th-congress/senate-bill/2493>.
- <sup>56</sup> *E.g.* *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422 (2014); *Med-Trans Corp. v. Benton*, 581 F. Supp. 2d 721 (E.D. N.C. 2008); *Valley Med Flight, Inc. v. Dwelle et al* (1:15-cv-00070), North Dakota District Court. *See also* DOT Guidelines for the Use and Availability of Helicopter Emergency Medical Transport (Apr. 2015), available at [https://www.ems.gov/pdf/advancing-ems-systems/Reports-and-Resources/Guidelines\\_For\\_Helicopter\\_Emergency\\_Medical\\_Transport.pdf](https://www.ems.gov/pdf/advancing-ems-systems/Reports-and-Resources/Guidelines_For_Helicopter_Emergency_Medical_Transport.pdf).
- <sup>57</sup> *See* 2017 New Mexico Report, *supra* note 3, at p. 9 (“Although the DOT has indicated that state regulations serving primarily a patient care objective are properly within the states’ regulatory authority, it has also indicated that a state medical program, ostensibly dealing with only medical equipment and supplies aboard the aircraft, could be so pervasive or so constructed as to be indirect regulation of prices, routes, or services, which is preempted.”).
- <sup>58</sup> Mattie Quinn, Air Ambulances, an Unregulated Lifeline, Cost \$80,000 for Some Patients, *Health and Human Services* (Jun. 7, 2016), available at <http://www.governing.com/topics/health-human-services/gov-air-ambulance-costs.html>.
- <sup>59</sup> Markian Hawryluk, Air Ambulances Lack Oversight on Medical Care, *The Bulletin* (Dec. 28, 2014) [hereinafter *Hawryluk: Air Ambulances Lack Oversight*], available at <http://www.bendbulletin.com/newsroomstafflist/2717304-151/air-ambulances-lack-oversight-on-medical-care>.
- <sup>60</sup> *Med-Trans Corp. v. Benton*, 581 F. Supp. 2d 721, 732-33 (E.D.N.C. 2008).
- <sup>61</sup> *Id.*
- <sup>62</sup> *See generally* DOT Letter to Tex., DOT Letter to CA, DOT Letter to Hawaii, DOT Letter to EPA, DOT Letter to ACCT, *supra* note 15.
- <sup>63</sup> National Association of State EMS Officials (NASEMSO), Air Medical Services Committee Brief Outline of the Federal Pre-emption Issues in Regulating Air Medical Services (Oct. 2011) [hereinafter 2011 NASEMSO Outline], available at <https://www.nasemso.org/Projects/AirMedical/documents/HelicopterEMS.pdf>.
- <sup>64</sup> H.B. 1255, 64th Leg. Assemb., (N.D. 2015), available at <http://www.legis.nd.gov/assembly/64-2015/bill-index/bi1255.html>.
- <sup>65</sup> *Valley Med Flight, Inc. v. Dwelle et al* (1:15-cv-00070).
- <sup>66</sup> 42 U.S.C. § 1395dd(a) (2017).
- <sup>67</sup> 42 U.S.C. § 300gg–19a(b) (2017). However, out-of-network physicians may, unless prohibited by state law, still balance bill patients for charges in excess of their reimbursement by the health plan.
- <sup>68</sup> Press Release, Tester Stands Up for Consumers, Tackles Increasing Medical Costs (Apr. 7, 2016), available at [https://www.testersenate.gov/?p=press\\_release&id=4473](https://www.testersenate.gov/?p=press_release&id=4473).
- <sup>69</sup> Press Release, Tester Unveils Legislation to Protect Montanans from Exorbitant Air Ambulance Costs (Feb. 21, 2017), available at [https://www.testersenate.gov/?p=press\\_release&id=5020](https://www.testersenate.gov/?p=press_release&id=5020).
- <sup>70</sup> *See* Md. Health Care Commission Report, *supra* note 18.
- <sup>71</sup> H.R. J. Res. No. 29, 64th Leg. (Mont. 2016), available at <http://leg.mt.gov/css/committees/interim/2015-2016/Economic-Affairs/Committee-Topics/Ambulance/ambulance-memberships.asp>.
- <sup>72</sup> Markian Hawryluk, Air Ambulances Lack Oversight on Medical Care, *The Bulletin* (Dec. 28, 2014), available at <http://www.bendbulletin.com/newsroomstafflist/2717304-151/air-ambulances-lack-oversight-on-medical-care>.

- <sup>73</sup> National Association of Insurance Commissioners (NAIC), Consumer Alert: Understanding Air Ambulance Insurance, available at [http://www.naic.org/documents/consumer\\_alert\\_understanding\\_air\\_ambulance\\_insurance.htm](http://www.naic.org/documents/consumer_alert_understanding_air_ambulance_insurance.htm) (last visited Mar. 7, 2017).
- <sup>74</sup> See generally 2011 NASEMSO Outline, *supra* note 61, for a list of areas of law not preempted by the ADA.
- <sup>75</sup> H.B. 4315, 2016 Regular Session (W.Va 2016), available at [http://www.legis.state.wv.us/Bill\\_Status/Bills\\_history.cfm?input=4315&year=2016&sessiontype=RS&btype=bill](http://www.legis.state.wv.us/Bill_Status/Bills_history.cfm?input=4315&year=2016&sessiontype=RS&btype=bill).
- <sup>76</sup> H.B. 16-1280, Gen. Assemb. (Colo. 2016), available at [http://www.leg.state.co.us/clics/clics2016a/csl.nsf/fsbillcont3/D9FB6B8B19DABD5087257F2400668653?open&file=1280\\_enr.pdf](http://www.leg.state.co.us/clics/clics2016a/csl.nsf/fsbillcont3/D9FB6B8B19DABD5087257F2400668653?open&file=1280_enr.pdf).
- <sup>77</sup> Robert L. Sumwalt, NTSB Board Member, Current Issues with Air Medical Transportation (May 4, 2011), available at [http://www.nts.gov/news/speeches/rsumwalt/Documents/Sumwalt\\_050411.pdf](http://www.nts.gov/news/speeches/rsumwalt/Documents/Sumwalt_050411.pdf).
- <sup>78</sup> Federal Aviation Administration, Fact Sheet—FAA Initiatives to Improve Helicopter Air Ambulance Safety (Feb. 20, 2014), available at [https://www.faa.gov/news/fact\\_sheets/news\\_story.cfm?newsId=15794](https://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=15794).
- <sup>79</sup> NTSB, Safety Recommendation A-09-087, available at [https://www.nts.gov/about/employment/\\_layouts/nts.recsearch/Recommendation.aspx?Rec=A-09-087](https://www.nts.gov/about/employment/_layouts/nts.recsearch/Recommendation.aspx?Rec=A-09-087) (last visited Mar. 7, 2017).
- <sup>80</sup> Jim Moore, Price of Refusal: Helicopter EMS, and the Pressure to Fly (Jan. 15, 2015), available at <https://www.aopa.org/news-and-media/all-news/2015/january/15/price-of-refusal>.
- <sup>81</sup> See Hawryluk: Air Ambulance Industry Raises Safety Concerns, *supra* note 47 (quoting Kurt Williams).
- <sup>82</sup> U.S. Gov't Accountability Office, GAO-07-353, Aviation Safety: Improved Data Collection Needed for Effective Oversight of Air Ambulance Industry (2007), p. 48, available at <http://www.gao.gov/assets/260/256762.pdf>.
- <sup>83</sup> Ira J. Blumen & Daniel L. Lemkin, AMPA Principles and Direction of Air Medical Transport, Chapter 62, (2006).
- <sup>84</sup> Fahim Habib et al., Probable Cause in Helicopter Emergency Medical Services Crashes: What Role Does Ownership Play?, *Journal of Trauma and Acute Care Surgery*, 77(6), 989-993 (2014), available at <https://ucdavis.pure.elsevier.com/en/publications/probable-cause-in-helicopter-emergency-medical-services-crashes-w>.
- <sup>85</sup> Association of Air Medical Services response to Habib study on HEMS safety issues (on file with author).
- <sup>86</sup> We reached these numbers after conducting an internal study with our statistics team at Consumer Reports. The results are based on a Chi-Square Goodness-of-Fit Test, where we compared the actual vs. the expected number of accidents in for-profit and nonprofit air ambulances between 2010 and 2016. The four largest providers of air ambulance services (along with their subsidiaries) collectively own a 51% market share, and we used market share as a conservative proxy for the actual number of flights operated by those companies. We analyzed accident data from the National Transportation Safety Bureau for the years 2010 - 2016, and identified which air ambulance accidents were operated by these four companies and their subsidiaries. We ultimately found that, while these four companies were expected to be involved in 27.54 accidents based on their market share, the actual number of accidents operated by these four providers was 37. Market share data was based on SEC filings between 2010-2016 and public information regarding these companies and their subsidiaries.
- <sup>87</sup> Grant Turnbull, Critical Thinking, RotorHub (HEMS Feature), Feb/March 2015, at 25, available at [http://www.metroaviation.com/downloads/rh-01-15\\_p24-29.pdf](http://www.metroaviation.com/downloads/rh-01-15_p24-29.pdf).
- <sup>88</sup> Adam Twidell, Twin Engine vs. Single Engine Helicopters: Which Should You Choose?, *Private Fly* (Dec. 3, 2014), available at <http://blog.privatefly.com/twin-engine-vs-single-engine-helicopters-which-should-you-choose>.
- <sup>89</sup> See Hawryluk: Air Ambulance Industry Raises Safety Concerns, *supra* note 47.
- <sup>90</sup> Adam Twidell, Twin Engine vs. Single Engine Helicopters: Which Should You Choose?, *Private Fly* (Dec. 3, 2014), available at <http://blog.privatefly.com/twin-engine-vs-single-engine-helicopters-which-should-you-choose>.
- <sup>91</sup> See Hawryluk: Air Ambulances Lack Oversight, *supra* note 58.
- <sup>92</sup> Note: European medical services generally transport the doctor to the patient, with a doctor aboard every air ambulance. This allows emergency patients to be evaluated and treated without delay. See Dick WF, Anglo-American vs. Franco-German Emergency Medical Services System, *Prehosp Disaster Med.*, pp. 29-35 (Jan.-Mar. 2003), available at <https://www.ncbi.nlm.nih.gov/pubmed/14694898>.
- <sup>93</sup> William Baxt et al., Hospital-Based Rotocraft Aeromedical Emergency Care Services and Trauma Mortality: A Multicenter Study, *Annals of Emergency Medicine* (Vol. 14, Issue 9), pp. 859-864 (Sept. 1985), available at <http://www.sciencedirect.com/science/article/pii/S019606448580634X>.