PRIVATE EQUITY IN HEALTH CARE: BARBARIANS AT THE GATE?

Robert I. Field, Barry Furrow, David R. Hoffman, Kevin Lownds, and Hilary Pearsall∗

ABSTRACT

Private equity investment in health care has increased dramatically over the past several years, reaching 1,171 transactions worth a total of $105.3 billion in 2020. However, this growing investment strategy comes with its disadvantages. Private equity acquisitions follow a different business model than traditional for-profit ownership in health care. As a result, investors claim that they inject needed funds into financially struggling facilities, while critics see a grab for short-term profits that often strips facilities of resources, compromises quality care delivery and leaves many of them bankrupt. Moreover, private equity firms have been subjects of fraud enforcement actions under the federal False Claims Act. Ultimately, research indicates that private equity in health care often leads to underfunding of facilities, reduced staffing, and poorer overall quality.

The long-term care sector, 70% of which is already under for-profit ownership, has been a particularly common target for private equity acquisition. Nursing homes, which serve a predominantly frail and elderly population, are especially vulnerable to these effects. The

∗ Robert I. Field, Professor of Law, Thomas R. Kline School of Law, and Professor of Health Management and Policy, Dornsife School of Public Health, Drexel University. Barry R. Furrow, Professor of Law and Director, the Health Law Program, Drexel University. David R. Hoffman, Practice Professor of Law, Thomas R. Kline School of Law, and President, David Hoffman & Associates, PC, a national health care compliance consulting firm. Hilary Pearsall, JD & MPH candidate, Thomas R. Kline School of Law and Dornsife School of Public Health, Drexel University. Kevin Lownds, Deputy Chief in the Office of Attorney General Andrea Joy Campbell, Medicaid Fraud Division. Kevin investigates and prosecutes health care fraud in federal and state court. Kevin has been in the Medicaid Fraud Division since May 2017 and has conducted investigations and led prosecutions of providers including mental health clinics and their private equity investors, nursing homes, home health agencies, physicians, and clinical laboratories. This Article represents the opinions and legal conclusions of its author(s) and not necessarily those of the Office of the Attorney General.

complexity and opacity of the corporate structures can be difficult for quality regulators to oversee. This Article builds on the perspectives of speakers at a conference on private equity in health care held at the Drexel University Thomas R. Kline School of Law in April 2022 to describe the issues involved and to recommend reforms. This Article proposes that reforms should include federal requirements for greater transparency of ownership structures, tying Medicaid reimbursement more directly to direct care costs, and imposing minimum staffing levels. A more effective measure might be to ban private equity ownership of nursing homes altogether.

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INTRODUCTION

Private equity has been steadily growing as a component of the overall American economy. In 2019, total assets under private equity management across all industries were about $3 trillion.[1] Its investments in health care providers accounted for about 60% of buyout transactions in the industry.[2] This represented ninety-six deals in 2019, an increase from eighty-four in 2018.[3] A total of $46.7 billion was invested that year in deals involving providers in North America, an increase from $29.6 billion in 2018.[4]

Private equity's growth is driven by an aggressive financial strategy that emphasizes profit maximization as its overriding goal.[5] This has raised considerable concern. Critics of the sector point to data indicating worse health outcomes for patients treated at facilities operating under private equity ownership.[6]

1. *See* MEDICARE PAYMENT ADVISORY COMM'N, REPORT TO THE CONGRESS: MEDICARE AND THE HEALTH CARE DELIVERY SYSTEM 76 (2021).

2. *Id.* at 81.

3. *Id.*

4. *Id.*

5. *See, e.g.*, Felix Barber & Michael Goold, *The Strategic Secret of Private Equity*, HARV. BUS. REV. (Sept. 2007), https://hbr.org/2007/09/the-strategic-secret-of-private-equity.

6. *See, e.g.*, Atul Gupta, Sabrina T. Howell, Constantine Yannelis & Abhinav Gupta, *Does Private Equity Investment in Healthcare Benefit Patients? Evidence from Nursing Homes*, BECKER FRIEDMAN INST. FOR ECON. AT THE UNIV. OF CHI. (Feb. 17, 2021), https://bfi.uchicago.edu/insight/finding/does-private-equity-investment-in-healthcare-benefit-patients-evidence-from-nursing-homes/. Some of the business practices of private equity investors are replicated by other kinds of for-profit owners of health care enterprises. *See* DAVID SNOW, PRIV. EQUITY INT'L

In April 2022, the Health Law Program of the Drexel University Thomas R. Kline School of Law held a conference to explore the landscape of private equity ownership in health care.[7] Researchers and legal experts presented perspectives on the private equity business model and data on its effects on patient outcomes with the goal of seeking ways to hold the sector more accountable to patients.[8] This Article presents key points raised at this conference along with additional analysis and data. Part I explains the private equity business model. Part II presents the results of research on the impact of this business model on health care delivery, and in particular, on long-term care. Part III describes the federal False Claims Act as a mechanism that currently exists for oversight and enforcement of billing practices and includes case law examples. Part IV presents opportunities for reform. Part V presents overall conclusions.

I. THE PRIVATE EQUITY BUSINESS MODEL

Private equity firms acquire a total or partial ownership interest in an entity that is not publicly traded.[9] The standard private equity model for operating an entity's business emphasizes financial efficiency and maximization of short-term returns, often to the neglect of health care effectiveness.[10] Therefore, it is not surprising that research would find the model to be associated with lapses in quality and issues in

MEDIA, PRIVATE EQUITY: BRIEF OVERVIEW 2 (2007). While the focus of this Article is on the specific practices of private equity, similar concerns are raised by other private investment models that use aggressive techniques to extract profits, often at the expense of patient care. *See* Sachin H. Jain, *Practicing Medicine in the Era of Private Equity, Venture Capital and Public Markets*, FORBES (July 27, 2020, 3:00 PM), https://www.forbes.com/sites/sachinjain/2020/07/27/practicing-medicine-in-the-era-of-private-equity-venture-capital-and-public-markets/.

7. *When Worlds Collide: The Effects of Private Equity on Health Care*, DREXEL UNIV. GRADUATE COLL., https://drexel.edu/graduatecollege/news-events/events/details/?eid=35558&iid=94900 (last visited Apr. 10, 2023).

8. *See id.*

9. Lisa Lilliott Rydin, *Private Equity, Venture Capital, and Hedge Funds*, HARV. L. SCH. LIBR., https://guides.library.harvard.edu/law/private_equity (Aug. 17, 2022).

10. *See* Jain, *supra* note 6.

billing compliance.[11] While private equity firms often inject needed resources into enterprises to address quality of care concerns, as discussed in Part II, their primary goal remains the growth of investment value.[12]

That growth has succeeded dramatically in spurring investment, with private equity health care transactions increasing by twenty-five-fold, including buyouts and other investments, during the twenty-year period between 2000 and 2020.[13] In 2020, there were 1,171 transactions with a total value of $105.3 billion.[14] In 2000, there had been just 123 transactions with a total value of roughly $5 billion.[15] In the decade between 2010 and 2020, large private equity funds, including Blackstone, Apollo Global Management, The Carlyle Group, KKR & Co, and Warburg Pincus, spent more than $340 billion acquiring health care entities around the world.[16]

A. *Why is Health Care Appealing to Private Equity*

Health care has several features that make it especially appealing for private investors of any sort. First, it is noncyclical.[17] Health care will always be needed. As a result,

11. *See* Sajith Matthews & Renato Roxas, *Private Equity and its Effect on Patients: A Window into the Future*, INT'L J. HEALTH ECON. & MGMT. (May 23, 2022), https://link.springer.com/article/10.1007/s10754-022-09331-y; *Fact Sheet: Private Equity is the Driving Force Behind Surprise Medical Billing*, AMS. FOR FIN. REFORM (Oct. 15, 2021), https://ourfinancialsecurity.org/2021/10/fact-sheet-private-equity-is-the-driving-force-behind-surprise-medical-billing/.

12. *See infra* Part II.

13. *See* Eileen Appelbaum & Rosemary Batt, *Financialization in Health Care: The Transformation of US Hospital Systems* 60 (Ctr. for Econ. & Pol'y Rsch., Working Paper No. 2022-1, 2021), https://cepr.net/wp-content/uploads/2021/10/AB-Financialization-In-Healthcare-Spitzer-Rept-09-09-21.pdf [hereinafter *Financialization in Health Care*].

14. *Id.*

15. *Id.*

16. Gretchen Morgenson & Emmanuelle Saliba, *Private Equity Firms Now Control Many Hospitals, ERs and Nursing Homes. Is It Good for Health Care?*, NBC NEWS (May 13, 2020, 5:55 AM), https://www.nbcnews.com/health/health-care/private-equity-firms-now-control-many-hospitals-ers-nursing-homes-n1203161.

17. *See Financialization in Health Care*, *supra* note 13, at 59 ("Health care is an attractive sector for PE investing because, unlike other sectors, health care is recession resistant and provides a secure and steady source of cash flow as third-party government and private insurers guarantee payments.").

demand and revenue remain steady regardless of the state of the broader economy, and it is largely immune from recessions.[18] Second, the aging of the population guarantees growing demand over time. The number of Americans aged sixty-five and over was 39.6 million in 2009 and 54.1 million in 2019.[19] It is expected to reach 80.8 million by 2040 and 94.7 million by 2060.[20] The incidence of many diseases, both acute and chronic, increases with age along with the need for care.[21]

The third reason is that bills are mostly paid by third parties in the form of private insurance and government programs, which insulates providers from patient financial inadequacy and allows them to charge higher prices.[22] For nursing home residents, most of this coverage is guaranteed to beneficiaries by the federal and state governments through Medicare and Medicaid.[23] The Affordable Care Act extended health coverage to more than twenty million people who were previously uninsured, which further expanded the pool of customers for whom payment for many of their services is assured.[24] Fourth, for the long-term care sector, there has traditionally been considerable fragmentation with a range of different kinds of

18. *See id.*

19. *Projected Future Growth of Older Population*, ADMIN. FOR CMTY. LIVING, https://acl.gov/aging-and-disability-in-america/data-and-research/projected-future-growth-older-population (May 4, 2022).

20. *Id.*

21. *Public Health and Aging: Trends in Aging --- United States and Worldwide*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 14, 2003), https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5206a2.htm.

22. *See Financialization in Health Care*, *supra* note 13, at 78 ("[T]hird party payers — governments and commercial insurance companies — continued to set prices based on various criteria that changed over time," which provided "opportunities to make easy money in . . . rural areas . . . where the healthcare infrastructure was underdeveloped.").

23. *See, e.g.*, *Issue Brief: Nursing Home Residents in Jeopardy if Medicaid Becomes a Block Grant*, CTR. FOR MEDICARE ADVOC. (Feb. 1, 2017), https://medicareadvocacy.org/what-will-happen-to-nursing-home-residents-if-medicaid-becomes-a-block-grant-program/; *How Can I Pay for Nursing Home Care?*, MEDICARE.GOV, https://www.medicare.gov/what-medicare-covers/what-part-a-covers/how-can-i-pay-for-nursing-home-care (last visited Apr. 12, 2023).

24. *See Chart Book: Accomplishments of Affordable Care Act*, CTR. ON BUDGET & POL'Y PRIORITIES (Mar. 19, 2019), https://www.cbpp.org/research/health/chart-book-accomplishments-of-affordable-care-act.

ownership arrangements.[25] This creates opportunities for consolidation that can create market power.[26] Fifth, in long-term care, many nursing homes are inefficiently run, providing opportunities for cost cutting.[27]

For these reasons, health care, and especially long-term care, presents unique opportunities for private investment.[28] For no investment sector is this more apparent than for private equity.[29] It is more nimble than more traditional investment vehicles, which tend to be larger, and by focusing on acquisitions of privately held entities, it has more flexibility than it would have in acquiring publicly traded companies.[30]

B. *The Private Equity Business Structure*

Not all private equity acquisitions take the same form, but most rely on one or more of four basic components. These include: (1) a complex corporate structure that shields investors from liability for lawsuits and claims of creditors and from penalties resulting from substandard care; (2) reliance on borrowed money to finance acquisitions; (3) sale of real estate assets of the acquired facility to a related entity; and (4) vertical integration with providers of ancillary services to increase reimbursement.[31]

25. *See HHS Releases New Data and Report on Hospital and Nursing Home Ownership*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Apr. 20, 2022), https://www.cms.gov/newsroom/press-releases/hhs-releases-new-data-and-report-hospital-and-nursing-home-ownership.

26. *See id.*

27. *See* THE NAT'L ACAD. OF SCI., ENG'G, & MED., THE NATIONAL IMPERATIVE TO IMPROVE NURSING HOME QUALITY: HONORING OUR COMMITMENT TO RESIDENTS, FAMILIES, AND STAFF 495 (2022).

28. *See, e.g.*, *id.* at 495–97.

29. *See, e.g.*, Zawn Villines, *What Is Private Equity in Healthcare?*, MED. NEWS TODAY (Nov. 10, 2021), https://www.medicalnewstoday.com/articles/private-equity-in-healthcare.

30. *See* Barber & Goold, *supra* note 5.

31. *See Financialization in Health Care*, *supra* note 13, at 58; *Commercial Real Estate Investor & Private Equity Liability*, FIRST NAT'L REALTY PARTNERS (Mar. 2, 2022), https://fnrpusa.com/blog/commercial-real-estate-investor-private-equity-liability/ ("When working with a private equity firm, much of this liability mitigation work is completed by the firm itself. In doing so, they are able to leverage their experience and expertise to minimize investment liability for both themselves and their investors.").

In a typical private equity business structure, investors have the status of limited partners.[32] They are usually large institutional investors, such as pension funds and institutional endowments, but they may also include some wealthy individuals.[33] The private equity firm serves as general partner.[34] As much as 98% of invested capital flows to one or more private equity funds owned by the firm, and the remaining 2% goes as fees to the general partner.[35] The funds in turn create portfolio companies that acquire the facilities.[36] In addition to using invested funds, the companies use loans from banks and other financial institutions to finance the acquisitions.[37] They also pay management and advisory fees to the firm for its services as general partner.[38] Profits from operations flow to the funds, which distribute them to the limited partners and to the firm.[39] The structure is summarized in Figure 1 below.[40]

32. *See Financialization in Health Care*, *supra* note 13, at 58.

33. *See* SNOW, *supra* note 6, at 7.

34. *See* EILEEN APPELBAUM & ROSEMARY BATT, PRIVATE EQUITY AT WORK: WHEN WALL STREET MANAGES MAIN STREET 7 (2014) [hereinafter PRIVATE EQUITY AT WORK].

35. *See id.*

36. *See, e.g.*, *id.*; *Behrman Capital Portfolio Company Tandem Health Care to Acquire Diakon Lutheran Long Term Care Facilities*, BEHRMAN CAPITAL (Apr. 25, 2005), https://www.behrmancap.com/behrman-capital-portfolio-company-tandem-health-care-to-acquire-diakon-lutheran-long-term-care-facilities/ ("Behrman Capital, a private equity investment firm based in New York and San Francisco, announced today that its portfolio company Tandem Health Care, Inc., a provider of long-term care services, has signed a definitive agreement to acquire fifteen skilled nursing care, assisted living and independent living facilities . . . .").

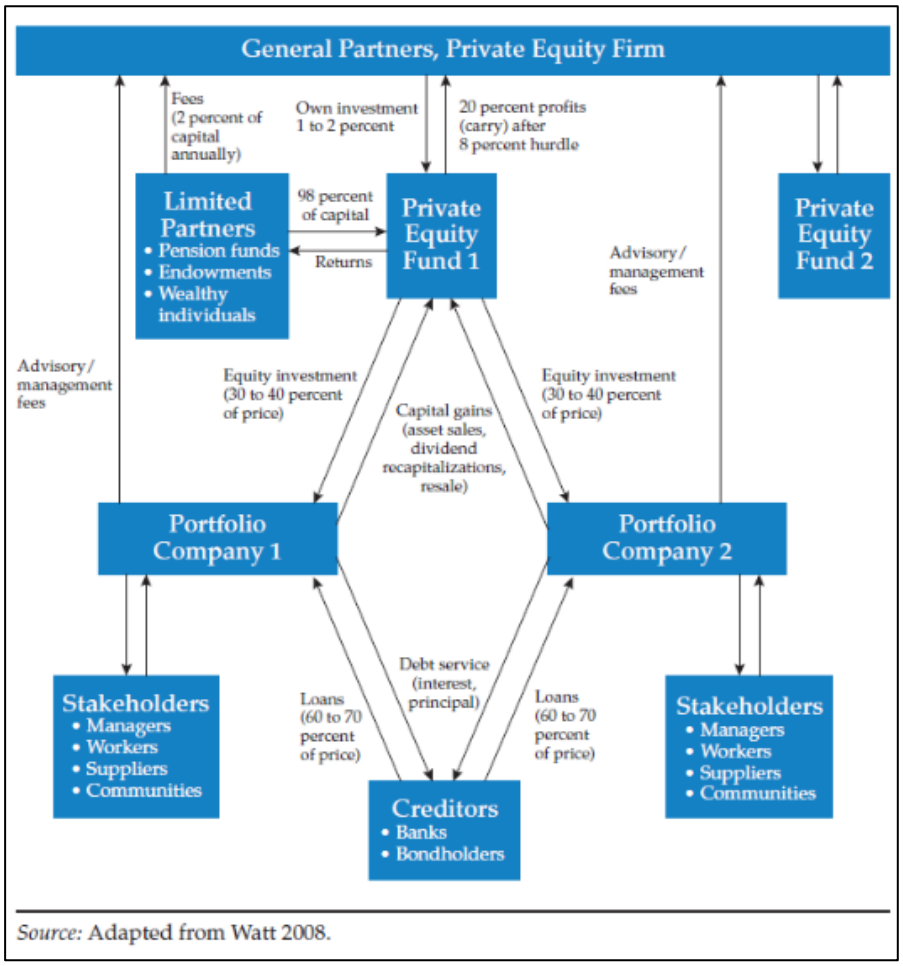
37. *See, e.g.*, PRIVATE EQUITY AT WORK, *supra* note 34, at 7; *Lending to Private Equity Firms*, CHAPMAN AND CUTLER LLP, https://www.chapman.com/practices-Lending-to-Private-Equity-Firms (last visited Apr. 12, 2023) ("Our private equity lending practice . . . includes . . . loans made to portfolio companies [that] provide bridges to capital calls or meet other short-term needs of the funds.").

38. *See* PRIVATE EQUITY AT WORK, *supra* note 34, at 7.

39. *See id.*

40. *See id.*

Figure 1
TYPICAL PRIVATE EQUITY CORPORATE STRUCTURE POST-ACQUISITION



Under this arrangement, the portfolio companies are responsible for the debt that is incurred and for any liability arising from operations.[41] As separate entities, the firm, the funds, and the investors are all insulated from both debt repayment and liability.[42] As an added protection, the

41. *Id.* at 7, 53.
42. *See id.*

complexity of the arrangements can make it difficult for creditors and regulators to parse out who owns what and where assets are held.[43]

The debt that is assumed to fund the acquisition can be substantial and can account for as much as 70% of the cost.[44] It is often obtained by using the company that owns the facility as collateral, a practice known as a "leveraged buyout" (LBO).[45] There is often a high loan-to-equity ratio that allows investors to use less of their own money in the acquisition but also increases the risk of default.[46] The high debt load additionally benefits the firm by making the operating company appear unprofitable, further shielding its assets from plaintiffs seeking damages for deficient care and from regulators seeking to impose penalties for violations.[47] The private equity firm couples the fund's capital with a loan commitment by the fund to acquire a portfolio company, which it holds for approximately four to five years.[48] During these years, the private equity firm tries to increase the value of the portfolio company in order to make a profit when it is sold.[49] The profits in such an exit are distributed among the fund investors and the private equity firm.[50]

43. *See* Charles Duhigg, *At Many Homes, More Profit and Less Nursing*, N.Y. TIMES (Sept. 23, 2007), https://www.nytimes.com/2007/09/23/business/23nursing.html; *see also* Aline Bos & Charlene Harrington, *What Happens to a Nursing Home Chain When Private Equity Takes Over? A Longitudinal Case Study*, J. HEALTH CARE ORG., PROVISION, AND FINANCING, 2017, at 1, 1–2 (providing a detailed development of nursing home chain operations when purchased by private equity).

44. MEDICARE PAYMENT ADVISORY COMM'N, *supra* note 1, at 78.

45. Will Kenton, *Leveraged Buyout (LBO) Definition: How It Works, with Example*, INVESTOPEDIA, https://www.investopedia.com/terms/l/leveragedbuyout.asp (Mar. 31, 2023).

46. *See id.*; SNOW, *supra* note 6, at 9.

47. *Top Ten Regulatory and Litigation Risks for Private Funds in 2022*, PROSKAUER (Feb. 1, 2022), https://www.proskauer.com/blog/top-ten-regulatory-and-litigation-risks-for-private-funds-in-2022.

48. *See* Juha Joenväärä, Juho Mäkiaho & Sami Torstila, *Prolonged Private Equity Holding Periods: Six Years Is the New Normal*, J. ALT. INVS., Summer 2022, at 1, 1; SNOW, *supra* note 6, at 9.

49. *See* SNOW, *supra* note 6, at 9.

50. *See id.* at 3.

Real estate transactions create another source of profit for investors and provide an additional shield from liability.[51] The real estate on which a facility sits is sold to a real estate investment firm, which is typically owned by the private equity firm or by the same investors.[52] The facility then leases the real estate back from the entity.[53] In addition to rent, the lease often obligates the facility to pay property taxes, insurance, management fees, and maintenance costs.[54] This creates an additional source of income for the investors, while making the facility's financial state even more precarious.[55] As a result, many facilities have been forced into bankruptcy within a few years of their acquisition, leading to their closure or to limits on operations.[56] In these situations, the investors face no liability for the facility's debts but own a separate company that has a significant real estate asset.[57]

Vertical integration takes advantage of the piecemeal way in which government programs, most notably Medicare, reimburse for services.[58] On average, Medicaid covers approximately 75% of nursing home residents and Medicare covers about 11%, but with its higher payment rates, "Medicare

51. *See* Tyler Swann, *How Private Equity Can Leverage Sale-Leasebacks to Generate Long-Term Value*, GLOBEST.COM (Oct. 12, 2021, 3:45 AM), https://www.globest.com/2021/10/12/how-private-equity-can-leverage-sale-leasebacks-to-generate-long-term-value/; MELEA ATKINS, ROOSEVELT INST., THE IMPACT OF PRIVATE EQUITY ON NURSING HOME CARE: RECOMMENDATIONS FOR POLICYMAKERS 5–6 (2021), https://rooseveltinstitute.org/wp-content/uploads/2021/04/RI_NursingHomesandPE_IssueBrief_202104.pdf.

52. ATKINS, *supra* note 51, at 5.

53. *Id.*

54. *See Sale-Leaseback Transactions: Why, When, and How*, STOUT (May 1, 2017), https://www.stout.com/en/insights/article/sj17-sale-leaseback-transactions.

55. *See, e.g.*, *id.*

56. *See* ATKINS, *supra* note 51, at 6–7.

57. *See id.* at 5.

58. *See* Adam Hayes, *Vertical Integration Explained: How It Works, with Types and Examples*, INVESTOPEDIA, https://www.investopedia.com/terms/v/verticalintegration.asp (Aug. 26, 2022) ("Vertical integration is a strategy that allows a company to streamline its operations by taking direct ownership of various stages of its production process rather than relying on external contractors or suppliers.").

patients can account for [up to] 30% of [a facility's] revenue."[59] Medicare allows facilities to fragment expenses for reimbursement.[60] Expenses for long-term care patients include more than just room and board.[61] Residents often need other resources, such as pharmaceuticals, rehabilitation services, and, in some cases, acute care.[62] Business operations require numerous support services, such as payroll, recruitment of staff, facility maintenance, and overall management.[63] All of these can be outsourced, and under a vertically integrated structure, the companies performing them are subsidiaries of the private equity firm.[64]

With the subsidiaries in place, many ancillary clinical services can be fragmented and spun off of them,[65] such as laboratory,

59. Maria Castellucci, *Nursing Homes Brace for New Medicare Payment System*, MODERN HEALTHCARE (May 25, 2019, 1:00 AM), https://www.modernhealthcare.com/post-acute-care/nursing-homes-brace-new-medicare-payment-system.

60. *See* Mark Kander, *How Medicare Reimbursement Works in Skilled Nursing Facilities*, AM. SPEECH-LANGUAGE-HEARING ASS'N (June 1, 2014), https://leader.pubs.asha.org/doi/10.1044/leader.BML.19062014.26; *Bundled Payments for Care Improvement (BPCI) Initiative: General Information*, CTRS. FOR MEDICARE & MEDICAID SERVS., https://innovation.cms.gov/innovation-models/bundled-payments (Nov. 8, 2022); Lori Timmins, Carol Urato, Liza M. Kern, Arkadipta Ghosh & Eugene Rich, *Primary Care Redesign and Care Fragmentation Among Medicare Beneficiaries*, 28 AM. J. MANAGED CARE e103, e104 (2022); *Addressing Fragmentation in the Health Care of Medicare and Medicaid Beneficiaries*, THE COMMONWEALTH FUND, https://www.commonwealthfund.org/grants/addressing-fragmentation-health-care-medicare-and-medicaid-beneficiaries (last visited Apr. 12, 2023).

61. *See* Ryan Brooks, *Understanding the Healthcare Needs and Spending of Senior Housing and Nursing Home Residents*, NAT'L INV. CTR. (Sept. 14, 2022), https://blog.nic.org/understanding-the-healthcare-needs-and-spending-of-senior-housing-and-nursing-home-residents. Nursing homes receive more than $85 billion each year from Medicare and Medicaid. ATKINS, *supra* note 51, at 2. They also received more than $12 billion in COVID-19 relief and an estimated $11 billion in loans and advance Medicare payments. *Id.* at 2–3; *see also* Jessica Silver-Greenberg & Jesse Drucker, *Nursing Homes with Safety Problems Deploy Trump-Connected Lobbyists*, N.Y. TIMES (Aug. 16, 2020), https://www.nytimes.com/2020/08/16/business/nursing-home-safety-trump.html.

62. *See* Brooks, *supra* note 61.

63. Mark Gilreath, Steven Morris & Joel V. Brill, *Physician Practice Management and Private Equity: Market Forces Drive Change*, 17 CLINICAL GASTROENTEROLOGY & HEPATOLOGY 1924, 1925 (2019).

64. *See* ATKINS, *supra* note 51, at 7; MEDICARE PAYMENT ADVISORY COMM'N, *supra* note 1, at 89–90.

65. *See* ATKINS, *supra* note 51, at 7.

radiology, pharmacy, and specialty medical staffing.[66] The corporate umbrella may also include related kinds of service providers that can capture referrals from or make referrals to a nursing home, such as home health, hospice, mental health, emergency room staffing, specialty clinics, and physician practices.[67] For many residents in skilled nursing facilities, those services can be billed to Medicare separately from the basic nursing home inpatient charges.[68]

Once a facility has been acquired, private equity firms can extract further value through operational changes.[69] This typically includes reducing staffing levels and cutting wages, often accompanied by efforts to resist unionization.[70] Changes such as these can impact the quality of care, as discussed in Part IV, but any negative effects on marketing the facility tend to be

66. *See* Gary M. Kirsh & Deepak A. Kapoor, *Private Equity and Urology: An Emerging Model for Independent Practice*, 48 UROLOGIC CLINICS N. AM. 233, 234 (2021).

67. *See id.*

68. *See* Elijah Oling Wanga, *How Medicare Skilled Nursing Facility Reimbursement Rates Work*, EXPERIENCE CARE (Mar. 4, 2022), https://experience.care/blog/medicare-skilled-nursing-facility-reimbursement-rates/. Skilled nursing homes are paid a basic fee for inpatient services based on the mix of services that residents receive. *See id.*; Elijah Oling Wanga, *4 Factors That Affect Case Mix Index (CMIs) in SNFs and Hospitals*, EXPERIENCE CARE (Oct. 8, 2021), https://experience.care/blog/4-factors-that-affect-case-mix-index-cmis-in-snfs-and-hospitals/ [hereinafter *4 Factors That Affect Case Mix Index (CMIs) in SNFs and Hospitals*]. The more services a facility's residents need, the higher the reimbursement. *See 4 Factors That Affect Case Mix Index (CMIs) in SNFs and Hospitals*, *supra*. For some residents, including those who stay longer than 100 days after an acute care hospital discharge, outpatient services may be billed separately for each service. *See id.*

69. *See Financialization in Health Care*, *supra* note 13, at 59.

70. *See id.* at 63–64; Gretchen Morgenson, *Working for Companies Owned by Well-Heeled Private-Equity Firms Can Mean Lower Wages for Employees*, NBC NEWS (Oct. 9, 2021, 6:00 AM), https://www.nbcnews.com/business/personal-finance/working-companies-owned-well-heeled-private-equity-firms-can-mean-n1281146. Some rural hospitals that had been acquired by private equity firms have been forced to close after implementing cutbacks that adversely affected the quality of care. *See, e.g.*, Sarah Jane Tribble, *Buy and Bust: Collapse of Private-Equity-Backed Rural Hospitals Mired Employee in Medical Bills*, KAISER FAM. FOUND. HEALTH NEWS (Aug. 16, 2022), https://khn.org/news/article/noble-health-private-equity-rural-hospitals-missouri-employees-medical-bills/?utm_medium=email&utm_source=rasa_io&utm_campaign=newsletter.

minimal because it is difficult for prospective residents to assess quality before entering a facility.[71]

For investors, private equity has an added benefit in the favorable tax treatment of investment returns.[72] They are characterized as "carried interest,"[73] which is taxed at the long-term capital gains rate of 20%, rather than the ordinary income rate, which can be as high as 37%.[74] In a typical fund arrangement, limited partners receive 80% of the profits, which are taxed in this way.[75] In effect, the lower tax rate represents an indirect government subsidy equal to the difference between the amount of tax owed at capital gains rate and ordinary income rate.[76] Over several years, there have been repeated efforts in Congress to close the tax loophole for carried interest, but so far, none have succeeded.[77] In a survey of fund managers conducted in 2021, 81% of respondents said that closing the loophole would negatively affect their firms, but some respondents also felt that closing it would make the industry

71. *See* David M. Cutler, *Where Are the Health Care Entrepreneurs? The Failure of Organizational Innovation in Health Care* 23–24 (Nat'l Bureau of Econ. Rsch., Working Paper No. 16030, 2010), http://www.nber.org/papers/w16030 ("[A] lack of good quality data means that [health care] consumers have a difficult time determining which providers are better [or] worse").

72. *See* Press Release, Tammy Baldwin: U.S. Senator for Wis., Senators Baldwin, Manchin, Brown Introduce Tax Reform Legislation to Close Carried Interest Tax Loophole (May 12, 2021), https://www.baldwin.senate.gov/news/press-releases/carried-interest-fairness-act-2021.

73. *See generally id.* (discussing the Carried Interest Fairness Act, which would require raising the tax on carried interest income from 20% to 37%).

74. *See id.*; Chris Morris, *What Is the Carried Interest Loophole—and What Does It Mean for VCs and Private Equity?*, FAST CO. (Aug. 5, 2022), https://www.fastcompany.com/90773730/what-is-the-carried-interest-loophole-private-equity-vc-firms.

75. Alan K. Ota, *Democrats See End to Carried Interest Tax Break in Sight*, LAW360: TAX AUTH. (May 14, 2021, 6:06 PM), https://www.law360.com/tax-authority/articles/1384836/democrats-see-end-to-carried-interest-tax-break-in-sight.

76. *See supra* notes 72–75 and accompanying text.

77. Alan Rappeport, Emily Flitter & Kate Kelly, *The Carried Interest Loophole Survives Another Political Battle*, N.Y. TIMES (Aug. 5, 2022), https://www.nytimes.com/2022/08/05/business/carried-interest-senate-bill.html.

less attractive to investors and thereby lower the chances that new funds would be created.[78]

One result of the outsized investment returns that the structure of private equity enables[79] has been a high number of bankruptcies of acquired entities.[80] One study found that 20% of private equity-owned companies have filed for bankruptcy, a rate ten times that of companies that are public.[81] Companies acquired through LBOs are often destabilized by depression of worker wages and reduced commitment of resources, which further increases the risk of bankruptcy.[82] The acquired company must manage high levels of debt while its private equity acquirer has extracted profits through high fees and dividend payments.[83]

An example of a transaction following this private equity pattern is the acquisition of an operator of more than 600 residential facilities called BrightSpring by KKR & Co. in 2019.[84]

78. *See* Rod James & Carmela Mendoza, *Survey: How Carried Interest Reform Could Impact PE Firms*, PRIVATE EQUITY INT'L (Oct. 7, 2021), https://www.privateequityinternational.com/survey-how-carried-interest-reform-could-impact-pe-firms/.

79. From 1993 to 2018, private equity funds in the U.S. have averaged a yearly net return (net IRR) of approximately 13%. THÉO BOURGERON, CAROLINE METZ & MARCUS WOLF, TRANSFORMATIVE RESPONSES TO THE CRISIS, THEY DON'T CARE – HOW FINANCIAL INVESTORS EXTRACT PROFITS FROM CARE HOMES: A STUDY ON PRIVATE EQUITY INVESTMENTS IN CARE HOMES IN FRANCE, GERMANY AND THE UK 5 n.6 (2021), https://transformative-responses.org/wp-content/uploads/2021/10/Finanzwende-Boell-Foundation_2021_They-Dont-Care-Private-Equity_BourgeronMetzWolf.pdf. IRR may be considered an inadequate measure for true returns of private equity funds because these firms typically extract substantial fees from true returns, roughly six to seven percent per year. *See id.*; *see also* KPMG INT'L, EVALUATING PRIVATE EQUITY'S PERFORMANCE 7 (2016), https://assets.kpmg/content/dam/kpmg/pdf/2016/06/evaluating-private-equitys-performance.pdf.

80. *See Everything Is Private Equity Now*, BLOOMBERG: BUSINESSWEEK, https://www.bloomberg.com/news/features/2019-10-03/how-private-equity-works-and-took-over-everything (Oct. 8, 2019, 4:10 PM).

81. *See* Brian Ayash & Mahdi Rastad, Leveraged Buyouts and Financial Distress 4 (July 19, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3423290.

82. *Everything Is Private Equity Now*, *supra* note 80.

83. *Id.*

84. Kendall Taggart, John Templon, Anthony Cormier & Jason Leopold, *The Private Equity Giant KKR Bought Hundreds of Homes for People with Disabilities. Some Vulnerable Residents Suffered Abuse and Neglect.*, BUZZFEED NEWS, https://www.buzzfeednews.com/article/kendalltaggart/kkr-brightspring-disability-private-equity-abuse (Apr. 29, 2022, 1:35 PM).

The cost of the acquisition was $1.3 billion, and KKR took on almost $3.5 billion in debt in a series of loans to fund the acquisition, pay off old debt, and purchase new companies.[85] BrightSpring was left to service that debt, paying "more than $135 million [per] year in interest" and several million dollars more for transaction and advisory fees.[86] To cut costs, BrightSpring kept wages low after the acquisition, and staffing shortages followed.[87] Nevertheless, the company expanded its operations and "now operates in [fifty] states[,] serving over 350,000 people daily across its different healthcare divisions."[88] An investigative report found a marked increase in complaints of serious quality lapses after the acquisition.[89]

C. *The Allure of Private Equity Investment*

At a time when physician-owned practices in particular are buckling under the pressures of economic instability and competition with larger hospitals, private equity may be seen as a tempting life boat to grow their practice or secure fast monetary gain.[90] Private equity managers argue that arrangements with health care businesses can produce a number of benefits.[91] In particular, they "can nurture failing or underperforming companies and set them up for faster growth."[92] In addition, the large returns they produce benefit a

85. *Id.*

86. *See* Letter from Elizabeth Warren, Ron Wyden, Bernard Sanders & Patty Murray, U.S. Senate, to Joe Bae & Scott Nuttall, Co-Chief Exec. Officers, KKR & Co. Inc. 3 (May 19, 2022), https://www.warren.senate.gov/imo/media/doc/2022.05.18%20Letter%20to%20KKR%20on%20BrightSpring%20Health%20Services.pdf.

87. *See* Taggart et al., *supra* note 84.

88. *Id.*

89. *See id.*

90. *See generally* AM. HOSP. ASS'N, EVOLVING PHYSICIAN-PRACTICE OWNERSHIP MODELS 1, 5–7 (2020), https://www.aha.org/system/files/media/file/2020/02/Market_Insights_MD_Ownership_Models.pdf (placing side-by-side private equity health care acquisitions' advantageous economies of scale with physician-owned practices' need for improvements to compete with hospital systems).

91. *See, e.g.*, Taggart et al., *supra* note 84.

92. *See Everything Is Private Equity Now*, *supra* note 80.

range of investors, including pension funds and universities.[93] Under-performing companies can thereby become thriving businesses that create more jobs, make more money for shareholders, and develop new technologies.[94]

Success stories are abundant in the business literature, including in publications such as the *Harvard Business Review*.[95] The auto parts manufacturer Accuride is one example.[96] The company suffered "as a unit within the giant Firestone Tire and Rubber Company."[97] "Accuride's business—making truck wheels and rims—was peripheral to Firestone's core business" and so it was "starved for resources and managerial attention."[98] In 1986, Accuride was bought by Bain Capital, a private equity firm that injected capital into it.[99] The company immediately invested in an automated plant that allowed it to reduce costs, increase capacity, and better appeal to customers.[100] As a result, Accuride's competitors were caught off guard and the company significantly increased sales and profits and doubled its market share.[101] It was sold by Bain eighteen months later, earning the firm twenty-five times its initial investment, and the company continues to thrive.[102]

93. *See* Morgan Sciumbato, *Pension Funds Investing in Private Equity*, B.U. SCH. OF L. REV. OF BANKING & FIN. L., https://www.bu.edu/rbfl/2022/03/28/pension-funds-investing-in-private-equity/ (last visited Apr. 12, 2023); Mary Romano, *How Alternative Investments Saved the Day for Big University Endowments*, BARRON'S (Oct. 14, 2022, 8:11 PM), https://www.barrons.com/articles/how-alternative-investments-saved-the-day-for-big-university-endowments-51665792713.

94. *See Everything Is Private Equity Now*, *supra* note 80 (describing how private equity operates to revive companies outside the realm of health care); Romano, *supra* note 93.

95. *See* Paul Rogers, Tom Holland & Dan Haas, *Lessons from Private-Equity Masters*, HARV. BUS. REV. (June 2002), https://hbr.org/2002/06/lessons-from-private-equity-masters.

96. *See id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

Private equity has also extended the reach of many for-profit investors.[103] For example, in February 2020, Humana partnered with private equity firm Welsh, Carson, Anderson & Stowe to create sixty-seven primary care clinics focused on the needs of elderly patients.[104] In September 2022, Humana announced that it plans to buy out the private equity firm's share over the course of five to ten years and will own and operate the clinics on its own, having launched the effort with its assistance.[105]

For middle-market private equity firms,[106] smaller practices are a prime opportunity to engage in the health care system at a lower cost of investment. In an increasingly fragmented health care ecosystem, many services are now provided in outpatient independent practices.[107] For some smaller providers, sustaining a health care private practice has become more financially daunting as a successful business model now requires more sophisticated and expensive information technology and more complex business arrangements.[108] Practice owners often invest a significant amount of personal funds into their business.[109] Private equity investment offers an opportunity to reduce the personal risk involved by providing an outside source of liquidity.[110] Practice owners view private equity investment as a chance to achieve their own personal

103. *See* Heather Landi, *Humana to Shell Out $550M to Buy Clinics from PE Partner*, FIERCE HEALTHCARE (Sept. 20, 2022, 2:00 PM), https://www.fiercehealthcare.com/payers/humana-shell-out-550m-buy-clinics-pe-partner.

104. *Id.*

105. *Id.*

106. While there is general disagreement over the definition of "middle market," some also further distinguish three sub-markets: the lower middle market ($25 to $100 million), the core middle market ($100 to $500 million), and the upper middle market ($500 million to $1 billion). Brian DeChesare, *Middle Market Private Equity: The Most Accessible Exit Opportunity?*, MERGERS & INQUISITIONS, https://mergersandinquisitions.com/middle-market-private-equity/ (last visited Apr. 12, 2023) (explaining that there is disagreement over the definition of "middle market"); *see* LAURA KATZ OLSON, ETHICALLY CHALLENGED: PRIVATE EQUITY STORMS US HEALTH CARE 67 (2022).

107. *See* Lola Butcher, *The Future of Private Equity in Healthcare*, 7 PHYSICIAN LEADERSHIP J. 57, 57 (2020).

108. *See* Villines, *supra* note 29.

109. Kirsh & Kapoor, *supra* note 66, at 240.

110. *Id.*

financial stability by retaining an equity stake in their business and increasing the likelihood of greater liquidity following a private equity sale.[111]

Data regarding private equity investments in health care can paint a convincing picture of success. For example, a study comparing hospitals acquired by private equity firms with non-acquired hospitals found that private equity-owned hospitals had higher scores on several measures of financial performance.[112] With an established toolkit of management expertise and professional networks, private equity has the potential to benefit various aspects of health care business management by creating efficiencies in business operations.[113] Private equity firms often have a network of "suppliers, vendors, and partners" that they can more easily tap into than an independent practice could.[114] Further, private equity presents a potential win for patients when practices might otherwise have closed their doors because of financial challenges.[115]

Outside of health care, private equity has a track record of implementing models of operational reform.[116] Because of this, a health care practice might expect to gain expertise in management to build a sales and marketing team, improve or even rebuild software platforms, upgrade information technology (IT) security, or address holes or deficiencies in the executive management team.[117] A common solution is to implement new technology that supports scalable operational

111. *Id.*

112. Anaeze C. Offodile II, Marcelo Cerullo, Mohini Bindal, Jose Alejandro Rauh-Hain & Vivian Ho, *Private Equity Investments in Healthcare: An Overview of Hospital and Health System Leveraged Buyouts, 2003–17*, 40 HEALTH AFFS. 719, 723 (2021).

113. *See Private Equity Operational Efficiency: 3 Steps to Differentiate*, ALTVIA, https://altvia.com/operational-efficiency-differentiation-private-equity/ (last visited Apr. 12, 2023).

114. Kirsh & Kapoor, *supra* note 66, at 241.

115. *But see* Tribble, *supra* note 70.

116. *See* Umar Ikram, Khin-Kyemon Aung & Zirui Song, Commentary, *Private Equity and Primary Care: Lessons from the Field*, NEW ENG. J. MED. CATALYST, Nov. 19, 2021, at 1, 2–3.

117. *See id.* at 2–5.

improvements like standardized workflows that facilitate effective and efficient clinical activities.[118]

Several practice areas and health care models have become especially attractive targets for private equity investment in the last decade.[119] These include physician practices,[120] telemedicine,[121] health care information and other technology,[122] behavioral health,[123] and aging at home.[124] Private equity has found success in implementing new technology to improve operational efficiency, including in health care organizations.[125] Because of this, health care technology is an area of growing investment interest for private equity, and a draw for providers with outdated technology systems.[126]

118. *See id.*

119. *See* Jane M. Zhu, Lynn M. Hua & Daniel Polsky, *Private Equity Acquisitions of Physician Medical Groups Across Specialties, 2013-2016*, 323 JAMA 663, 663–64 (2020).

120. *See id.*; *see also* Jane M. Zhu, *Private Equity Investment in Physician Practices*, PENN LEONARD DAVIS INST. HEALTH ECON. (Feb. 15, 2020), https://ldi.upenn.edu/our-work/research-updates/private-equity-investment-in-physician-practices/.

121. *See* Christina Severin & Michael Curry, *Telehealth Funding: Transforming Primary Care and Achieving Digital Health Equity for Underresourced Populations*, HEALTH AFFS. (Sept. 9, 2021), https://www.healthaffairs.org/do/10.1377/forefront.20210908.121951/.

122. *See* Zhu et al., *supra* note 119; Zhu, *supra* note 120.

123. Benjamin Brown, Eloise O'Donnell & Lawrence P. Casalino, *Private Equity Investment in Behavioral Health Treatment Centers*, 77 J. AM. MED. ASS'N PSYCHIATRY 229, 229–30 (2020).

124. *See* Joyce Famakinwa, *Private Equity Backing Becoming 'Qualifying Criteria' for Home Care Franchise Companies*, HOME HEALTH CARE NEWS (Nov. 14, 2021), https://homehealthcarenews.com/2021/11/private-equity-backing-becoming-qualifying-criteria-for-home-care-franchise-companies/.

125. *See* Rebecca Hinds & Caroline Schwanzer, *3 Ways Private Equity Firms Use Technology as a Competitive Advantage*, AFFINITY, https://www.affinity.co/blog/private-equity-firms-use-technology (last visited Apr. 6, 2023); Andrew Ellis, *Private Equity's Role in the Future of Healthcare*, NH BUS. REV. (Aug. 16, 2019), https://www.nhbr.com/private-equitys-role-in-the-future-of-healthcare/.

126. RICHARD M. SCHEFFLER, LAURA M. ALEXANDER & JAMES R. GODWIN, AM. ANTITRUST INST. & PETRIS CTR., SOARING PRIVATE EQUITY INVESTMENT IN THE HEALTHCARE SECTOR: CONSOLIDATION ACCELERATED, COMPETITION UNDERMINED, AND PATIENTS AT RISK 20, 36 (2021), https://www.antitrustinstitute.org/wp-content/uploads/2021/05/Private-Equity-I-Healthcare-Report-FINAL.pdf; Ellis, *supra* note 125; Angela Humphreys, *What Will Private Equity Investment in Healthcare Look Like in 2020?*, MEDCITY NEWS (Feb. 20, 2020, 2:09 PM), https://medcitynews.com/2020/02/what-will-private-equity-investment-in-healthcare-look-like-in-2020/; *see* David Champagne, Alex Devereson, Jamie Littlejohns & Dmitry Podpolny,

Private equity investors have used their resources to increase outreach to potential patients by investing in strategic marketing campaigns and technology.[127] LifeStance, a behavioral health company, is currently "one of the nation's largest providers of virtual and in-person outpatient mental health care" across the country.[128] With private-equity support, LifeStance scaled their online presence and increased activity on their platform, leading to increased patient volume.[129] Similar results in other health care specialty practice areas highlight private equity's drive to increase profits by prioritizing increased patient utilization and higher prices for care.[130]

D. *Risks to Health Care Providers from Private Equity Investment*

Private equity's investments in health care also led to negative patient outcomes. For instance, its entry into the behavioral health market has raised significant concerns regarding patient safety. In the words of one commentator, "private equity's tendency to demand outsized returns in a sector that is already vastly underfunded, and serves vulnerable populations, raises serious concerns about its

Private Equity Opportunities in Healthcare Tech, MCKINSEY & CO. (May 23, 2019), https://www.mckinsey.com/industries/private-equity-and-principal-investors/our-insights/private-equity-opportunities-in-healthcare-tech.

127. *LifeStance Health Partners with TPG, Summit Partners, and Silversmith to Expand Behavioral Health Access*, BUS. WIRE (Apr. 16, 2020, 11:39 AM), https://www.businesswire.com/news/home/20200416005666/en/LifeStance-Health-Partners-with-TPG-Summit-Partners-and-Silversmith-to-Expand-Behavioral-Health-Access; Ikram et al., *supra* note 116, at 2, 5.

128. *How Cardinal Helped the Country's Largest Mental Health Care Provider Scale Digital Marketing to 500+ Locations.*, CARDINAL DIGIT. MKTG., https://www.cardinaldigitalmarketing.com/healthcare-case-study/behavioral-health-digital-marketing-ppc-seo/ (last visited Apr.3, 2023).

129. *See id.*; *LifeStance Health Partners with TPG, Summit Partners, and Silversmith to Expand Behavioral Health Access*, *supra* note 127.

130. *See* discussion *infra* Section I.D.

potential impact on patient care."[131] For instance, private equity marketing has led to "a surplus of eating disorder beds and pressure to fill these beds."[132] Studies have shown that "[private equity] owned dialysis centers in concentrated markets have higher hospitalizations, lower survival rates and declines in staffing";[133] "[private equity] owned hospitals showed fewer [full time equivalent employees], worse patient satisfaction scores and generally worse quality metrics compared to non-[private equity] owned hospitals,"[134] and they have pursued preferential service lines based on profit by, for example, adding interventional cardiology while ending psychiatric care.[135] Finally, physician extenders have been hired "to work in unsupervised settings to generate additional revenue."[136] One such firm performed intralesional injections and skin biopsies in nursing homes where 75% of the residents had Alzheimer's Disease and would not benefit from them.[137]

A 2020 study of for-profit ownership of emergency room physician practices showed higher prices, upcoding, and excessive imaging utilization and admissions.[138] On the other hand, a 2021 study of private equity acquisitions of dermatology practices showed some increased volume but little

131. EILEEN O'GRADY, PRIV. EQUITY STAKEHOLDER PROJECT, UNDERSTAFFED, UNLICENSED, AND UNTRAINED: BEHAVIORAL HEALTH UNDER PRIVATE EQUITY 2 (2020), https://pestakeholder.org/wp-content/uploads/2020/09/PESP-behavioral-health-9-2020.pdf.

132. Sajith Matthews & Renato Roxas, *Private Equity and its Effect on Patients: A Window into the Future*, INT'L J. HEALTH ECON. & MGMT. (May 23, 2022), https://link.springer.com/article/10.1007/s10754-022-09331-y.

133. *Id.*

134. *Id.*

135. *Id.* ("This study demonstrates restricting access to certain crucial services (A), while charging higher prices for the more profitable service lines (C).").

136. *Id.*

137. *Id.*

138. *See* Zack Cooper, Fiona Scott Morton & Nathan Shekita, *Surprise! Out-of-Network Billing for Emergency Care in the United States*, 128 J. POL. ECON. 3626, 3659–61, 3673 (2020); *see also* Erin C. Fuse Brown & Mark A. Hall, *Private Equity and the Corporatization of Health Care*, 76 STAN. L. REV. (forthcoming 2024) (manuscript at 1) (on file with author) (noting that private equity investment in physician practices can produce several negative effects including "increase[d] costs and lower quality . . ., overutilization and up-coding, constraints on physicians' clinical autonomy, and compromises in patient care").

evidence of increased prices.[139] Another 2022 study, of anesthesiology practices between 2012 and 2017, found that prices increased after facilities contracted with private equity-backed physician management companies.[140] Ultimately, while private equity data shows some limited positive outcomes like higher patient engagement, the data overall reveals greater risks to patient safety.

II. HEALTH OUTCOMES WHEN PRIVATE EQUITY TAKES OVER NURSING HOMES

While outpatient medical practices have experienced a mix of positive and detrimental effects from engagement with private equity,[141] data on the nursing home industry tells a different story. Nursing home care is complex, requiring a wide range of staff and services within each facility.[142] As discussed below, the care model does not fare well under private equity ownership.

A. *Private Equity's Interest in Nursing Homes*

At first blush, private equity's appetite for nursing homes does not seem to fit within this economic model of private equity superiority: acquiring and "flipping" for-profit ventures that were doing poorly in the marketplace but can, in theory, be revived by new management and new tools.[143] The interest in nursing homes reflects instead the opportunity to apply other

139. *See* Robert Tyler Braun, Amelia M. Bind, Yuting Qian, Manyao Zhang & Lawrence P. Casalino, *Private Equity in Dermatology: Effect on Price, Utilization, and Spending*, 40 HEALTH AFFS. 727, 727, 733 (2021).

140. Ambar La Forgia, Amelia M. Bond, Robert Tyler Braun, Leah Z. Yao, Klaus Kjaer, Manyao Zhang & Lawrence P. Casalino, *Association of Physician Management Companies and Private Equity Investment With Commercial Health Care Prices Paid to Anesthesia Practitioners*, 182 J. AM. MED. ASS'N INTERNAL MED. 396, 402 (2022).

141. *See* discussion *supra* Sections I.C, I.D.

142. *See generally* LAUREN HARRIS-KOJETIN, MANISHA SENGUPTA, JESSICA PENN LENDON, VINCENT ROME, ROBERTO VALVERDE & CHRISTINE CAFFREY, U.S. DEP'T OF HEALTH AND HUM. SERVS., LONG-TERM CARE PROVIDERS AND SERVICES USERS IN THE UNITED STATES, 2015–2016, at 11–17 (2019).

143. *See* Rydin, *supra* note 9.

tools that private equity uses to extract profits: contractual arrangements that impose high fees on the purchased firm and high profits upon divesture of the struggling nursing home.[144]

The United States has more than 15,000 nursing homes, which care for more than 1.3 million residents.[145] About 70% of these facilities are for-profit,[146] and about 9% of those are owned by private equity funds.[147] However, the exact extent of private equity ownership is difficult to determine because of the complex corporate structures they employ.[148] A report by the Medicare Payment Advisory Commission found that an obstacle to capturing accurate ownership data for nursing homes and some hospitals is that many "are part of complex corporate structures with multiple levels and subsidiaries."[149] Therefore, it is possible that the amount of private equity investment in health care broadly, and in nursing homes specifically, is larger than these numbers indicate.[150]

As discussed in Part I, several features of the health care industry make it especially attractive for private equity investment.[151] Beyond these, nursing homes have several additional advantages. First, the market for nursing homes is a healthy one, in the sense that demand for nursing home beds will continue to grow, as the population ages.[152] While there may be an increase in home health care in the future as a result of nursing home deficiencies exacerbated by the COVID-19

144. *See* ATKINS, *supra* note 51, at 2.

145. *Id.*

146. *See id.*

147. *Id.*; Atul Gupta, Sabrina T. Howell, Constantine Yannelis & Abhinav Gupta, *Does Private Equity Investment in Healthcare Benefit Patients? Evidence from Nursing Homes* 13 (Nat'l Bureau of Econ. Rsch., Working Paper No. 28474, 2021), https://www.nber.org/system/files/working_papers/w28474/w28474.pdf.

148. MEDICARE PAYMENT ADVISORY COMM'N, *supra* note 1, at 72.

149. *Id.*

150. *See id.*

151. *See* discussion *supra* Section I.A.

152. *See* JENNIFER M. ORTMAN, VICTORIA A. VELKOFF & HOWARD HOGAN, AN AGING NATION: THE OLDER POPULATION IN THE UNITED STATES 7–9 (2014), https://www.census.gov/content/dam/Census/library/publications/2014/demo/p25-1140.pdf.

pandemic,[153] nursing homes are an important source of health care for individuals with chronic conditions that affect one's daily living activities.[154]

Second, nursing homes offer a steady income stream from the combination of public funding through Medicaid, Medicare, and private contributions from residents and their families.[155] This income stream sets a stable minimum income stream floor, by contrast to retail businesses which can lose market share rapidly as consumer demand changes or the company's management deteriorates.[156]

Third, many nursing homes sit on desirable real estate.[157] Separating this real estate from the nursing home operation opens up new revenue sources for private equity management.[158] Private equity firms in the nursing home sector do not follow the playbook used by typical leveraged buyouts which look for underperforming companies to improve and resell for a profit quickly.[159] Instead, they "identif[y] nursing home chains in relatively good financial health" that own real estate, with the goal of profiting from those holdings to leverage debt at low interest rates.[160] This financialization of nursing home assets leaves the core business weakened while the

153. *See Nursing Shortage: What the Future Holds for Nursing Homes*, ASSISTEDLIVING.ORG, https://www.assistedliving.org/nursing-homes/nursing-shortage-what-the-future-holds-for-nursing-homes/ (last visited Apr. 2, 2023); NAT'L ACADS. OF SCIS., ENG'G, & MED., THE NATIONAL IMPERATIVE TO IMPROVE NURSING HOME QUALITY 74–76 (2022).

154. Elaine K. Howley, *Nursing Home Facts and Statistics 2023*, U.S. NEWS HEALTH (Feb. 7, 2023), https://health.usnews.com/best-nursing-homes/articles/nursing-home-facts-and-statistics.

155. *See* Gupta et al., *supra* note 147, at 6. *But see How Can I Pay for Nursing Home Care?*, MEDICARE.GOV, https://www.medicare.gov/what-medicare-covers/what-part-a-covers/how-can-i-pay-for-nursing-home-care (last visited Feb. 23, 2023).

156. *See* Marshall Fisher, Vishal Gaur & Herb Kleinberger, *Curing the Addiction to Growth*, HARV. BUS. REV. (Jan. 2017), https://hbr.org/2017/01/curing-the-addiction-to-growth.

157. Gupta et al., *supra* note 147, at 33.

158. *See id.*

159. Rebecca Orfaly Cadigan, David G. Stevenson, Daryl J. Caudry & David C. Grabowski, *Private Investment Purchase and Nursing Home Financial Health*, 50 HEALTH SERV. RSCH. 180, 192 (2015).

160. *Id.*

investors make profits from the real estate that is "extracted" from the value of the nursing home.[161]

Fourth, regulatory control of the nursing home industry is weak. Government regulators are hard-pressed to inspect and sanction the thousands of nursing homes in the United States.[162] A 2022 report from the National Academies of Sciences, Engineering, and Medicine (NASEM) summarized the regulatory failures as follows:

> The COVID-19 pandemic . . . reveal[ed] and amplif[ied] long-existing shortcomings in nursing home care such as inadequate staffing levels, poor infection control, failures in oversight and regulation, and deficiencies that result in actual patient harm. . . . [T]he way in which the United States finances, delivers, and regulates care in nursing home settings is ineffective, inefficient, fragmented, and unsustainable. Despite significant measures to improve the quality of nursing home care in OBRA 87, the current system often fails to provide high-quality care and underappreciates and underprepares nursing home staff for their critical responsibilities.[163]

161. *See* Rosemary Batt & Eileen Appelbaum, with Tamar Katz, *The Role of Public REITs in Financialization and Industry Restructuring* 46–47 (Inst. for New Econ. Thinking, Working Paper No. 189, 2022), https://www.ineteconomics.org/uploads/papers/WP_189-Batt-Appelbaum-Public-REITS-2.pdf.

162. *See* Letter from Bob Casey, Jr., Chairman, U.S. Senate Special Comm. on Aging, to Denise Milledge, Dir., Bureau of Health Provider Standards, Alabama Dep't of Public Health (Sept. 12, 2022) (on file with the U.S. Senate Special Comm. on Aging).

> The OIG issued a report last year that found [71%] of nursing homes nationally had gone at least [sixteen] months without a standard survey as of May 31, 2021, with backlogs of nursing homes surveyed ranging from [22%] to [96%] by state. As of mid-August, CMS data show that 4,500 nursing homes ([29.8%] of the national total) are overdue for annual standard surveys.

Id.

163. THE NATIONAL IMPERATIVE TO IMPROVE NURSING HOME QUALITY: HONORING OUR COMMITMENT TO RESIDENTS, FAMILIES, AND STAFF, *supra* note 27 (emphasis in original).

Fifth, the use of tort liability—a private regulatory tool to deter nursing home poor quality care that creates patient harm—faces an uphill battle in recovering compensation for injured patients, as for-profit ownership allows for strategies that obscure or conceal the entity that is financially responsible.[164]

Sixth, current regulatory tools such as the star system used by the Centers for Medicare & Medicaid Services—rating nursing homes so that the purchases of care for family members can make more informed decisions about which homes have the highest quality—work poorly.[165] One study found that the public report card system, organized into "star ratings" that looked at staffing, inspections, and outcome measures, had "near-zero correlation between the report cards and our survival-based quality estimates."[166] The authors noted that "[n]ot only do such practices heighten the risks of financial and operational failures, they can also lead to a lack of transparency and accountability, poorer working conditions for staff, lower quality care for residents and potentially higher prices for care."[167]

164. *See* Rohit Pradhan, Robert Weech-Maldonado, Jeffrey S. Harman, Mona Al-Amin & Kathryn Hyer, *Private Equity Ownership of Nursing Homes: Implications for Quality*, J. HEALTH CARE FIN., June/July 2014, at 1, 4.

165. *See* Andrew Olenski & Szymon Sacher, *Estimating Nursing Home Quality with Selection* 1, 5–6 (Nov. 5, 2022) (unpublished paper) (on file with SSRN), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4054786 ("We estimate a mortality-based Bayesian model of nursing home quality accounting for selection. We then conduct three exercises. First, we examine the correlates of quality, and find that public report cards have near-zero correlation. Second, we show that higher quality nursing homes fared better during the pandemic: a one standard deviation increase in quality corresponds to 2.5% fewer Covid-19 cases. Finally, we show that a 10% increase in the Medicaid reimbursement rate raises quality, leading to a 1.85 percentage point increase in [ninety]-day survival.").

166. *Id.* at 2–3.

167. BOURGERON ET AL., *supra* note 79, at 11. This private equity toolkit has been applied in Europe but with fewer negative effects. *See generally id.* at 37, 39; *see also* GRACE BLAKELEY & HARRY QUILTER-PINNER, INST. FOR PUB. POL'Y RSCH., WHO CARES? THE FINANCIALISATION OF ADULT SOCIAL CARE 7–8 (2019), https://www.ippr.org/files/2019-09/who-cares-financialisation-in-social-care-2-.pdf. The authors analyze three key factors that link ownership form causally to quality of nursing home care: (1) Workforce: "private providers have lower levels of staffing,

B. *Private Equity Strategies Unique to Nursing Home Ownership*

Critiques of private equity ownership of nursing homes are mounting. One area of concern relates to Ambulatory Care-Sensitive Conditions (ACSC), which are defined as "a set of conditions such as asthma and diabetes, where the need for emergency admissions is thought to be avoidable."[168] One study found that "long-stay residents of PE firm–owned nursing homes were 11.1% more likely to have an ACS ED visit and 8.7% more likely to experience an ACS hospitalization after acquisition compared with residents of non-PE firm–owned, for-profit nursing homes."[169] Private equity-owned nursing homes also had higher Medicare costs by 3.9%.[170]

1. *Sale-leaseback transactions*

Sale-leaseback transactions present a special opportunity for private equity profits that can reduce quality.[171] As discussed in Part II, "[p]rivate equity companies that purchase a chain of nursing homes often legally restructure the corporation by separating the nursing homes, the operating company, and any other assets into separate limited liability companies (LLCs)."[172] The real estate sale produces profits immediately, and "the nursing home [is saddled] with new monthly lease

higher staff turnover," lower pay, and less training; (2) Instability: the English care market has experienced provider closure in local councils, leading to resident distress and death; (3) Size: larger homes dominate the market, but these larger homes have poorer quality ratings than do the smaller nursing and residential homes, and "private equity backed providers . . . [have] a growing share of the market" for larger homes. *See* BLAKELEY & QUILTER-PINNER, *supra*.

168. Karen Hodgson, Sarah R. Deeny & Adam Steventon, *Ambulatory Care-Sensitive Conditions: Their Potential Uses and Limitations*, 28 BMJ QUALITY & SAFETY 429, 429 (2019).

169. Robert Tyler Braun, Hye-Young Jung, Lawrence P. Casalino, Zachary Myslinski & Mark Aaron Unruh, *Association of Private Equity Investment in US Nursing Homes with the Quality and Cost of Care for Long-Stay Residents*, 2 JAMA HEALTH F. 1, 8 (2021).

170. *Id.*

171. Sebastian Obando, *Investors Are Showing Greater Interest in Nursing Home Acquisitions*, WEALTHMGMT. (July 22, 2019), https://www.wealthmanagement.com/seniors-housing/investors-are-showing-greater-interest-nursing-home-acquisitions.

172. ATKINS, *supra* note 51, at 5.

payments."[173] If the nursing home was purchased in an LBO, these lease payments mean higher "debt obligations and interest payments."[174] Lease payments may increase by as much as 75% and interest payments by about 325%, leaving the nursing home in a fragile financial position.[175]

In the recent National Imperative to Improve Nursing Home Quality report, it was noted that:

> Many nursing homes separated their operating companies from their asset and property companies in an effort to shield parent companies from liability and reduce regulatory oversight. Real estate investment companies (REITs) have dramatically expanded their ownership since the Housing and Economic Recovery Act of 2008 allowed REITs to buy health care facilities. These companies lease their facilities and property to nursing home operating companies at sometimes exorbitant rents.[176]

It is important to differentiate the relationship between the landlord and the nursing home operator under the private equity model from that under typical commercial entities.[177] Batt and Appelbaum explain that Real Estate Investment Trusts (REITs) "use sale-lease back agreements with healthcare operating companies in which the companies are tenants and the REITs are landlords" to give the private equity firm a safe dividend, while leaving the nursing home holding all the risk of financial failure such as bankruptcy.[178] The private equity owner has, in effect, stripped the assets from the nursing home

173. *Id.*

174. *Id.*

175. *See* Gupta et. al, *supra* note 147, at 34.

176. THE NATIONAL IMPERATIVE TO IMPROVE NURSING HOME QUALITY: HONORING OUR COMMITMENT TO RESIDENTS, FAMILIES, AND STAFF, *supra* note 27.

177. *See* Batt et al., *supra* note 161, at 6.

178. *Id.*

while charging inflated rents to the nursing home manager.[179] None of this money is used to improve resident care.[180] The nursing home is now loaded down, as Batt and Appelbaum put it, "with 'triple net' leases in which they pay rent subject to annual escalator clauses (and continue to pay the costs of property maintenance and improvements, taxes, and insurance)."[181] Most crippling is the lease requirement that rent is "absolute" without right to reduction for material defects and damages coupled with a waiver of any right to abatement of rent.[182]

The non-operating landlord has, in effect, a controlling interest in the nursing home business without fear of professional liability litigation, penalties from government regulators, exclusion from federal health care programs, and obligations to make a capital investment in the property.[183] When licensure issues surface and regulatory pressure is applied, leading to finding the operator in violation of material covenants in the operating lease, the landlord can simply remove the operator without accountability to the tenants, i.e., the residents of the nursing home.[184] The driving force behind this financial arrangement, however, is the landlord's demand for the exorbitant monthly rent payments, management fees,

179. *See id.*

180. *See id.*

181. *Id.*; James Chen, *Triple Net Lease (NNN) Meaning, Uses, and Benefits for Investors*, INVESTOPEDIA, https://www.investopedia.com/terms/t/triple-net-lease-nnn.asp (Feb. 26, 2022) ("A triple net lease (triple-net or NNN) is a lease agreement on a property whereby the tenant or lessee promises to pay all the expenses of the property, including real estate taxes, building insurance, and maintenance. These expenses are in addition to the cost of rent and utilities. In contrast, in standard commercial lease agreements, some or all of these payments are typically the responsibility of the landlord.").

182. *See* Batt et al., *supra* note 161, at 6; *see also* GREGORY G. GOSFIELD, HEALTH LAW HANDBOOK §13:3, at 2 (Alice G. Gosfield ed., 2013).

183. *See* Batt et al., *supra* note 161, at 24; Joseph E. Casson & Julia McMillen, *Protecting Nursing Home Companies: Limiting Liability Through Corporate Restructuring*, 36 J. HEALTH L. 577, 580–85 (2003). *See generally* L. Scott Bardowell, Presentation at the Drexel University Thomas R. Kline School of Law Conference: When Worlds Collide: The Effects of Private Equity on Health Care (Apr. 10, 2022) (on file with author).

184. *See* Batt et al., *supra* note 161, at 24.

and threat of removal of the operator.[185] Care for the residents is continually compromised, leading to regulatory enforcement actions, yet the underlying threat—the financial relationship between the landlord, REIT or private equity firm, and the operator—has not been mitigated.[186] Rather, these entities remain unaccountable for the lack of quality care delivery to the residents.[187]

For example, HCR ManorCare, a large nursing home chain, was bought by a private equity firm in 2007.[188] Four years later, the firm sold the real estate that encompassed HCR ManorCare's 552 facilities to a related entity, producing $6.1 billion in profits.[189] These proceeds were used to pay off the original acquisition loan, allowing the investors to recoup their $1.3 billion investment.[190] The sale and leaseback arrangement meant that HCR ManorCare was obligated to lease the properties back, leaving it with large debt and interest payments.[191] Quality of care suffered badly.[192] The number of violations at HCR ManorCare homes rose about three times faster than at other U.S. nursing homes.[193] Seven years later, in 2018, the chain filed for bankruptcy.[194]

185. S*ee id.* at 23–24.

186. *See id.*

187. *Id.* at 46.

188. *Id.* at 23.

189. Peter Whoriskey & Dan Keating, *Overdoses, Bedsores, Broken Bones: What Happened When a Private-Equity Firm Sought to Care for Society's Most Vulnerable*, WASH. POST (Nov. 25, 2018, 9:04 PM), https://www.washingtonpost.com/business/economy/opioid-overdoses-bedsores-and-broken-bones-what-happened-when-a-private-equity-firm-sought-profits-in-caring-for-societys-most-vulnerable/2018/11/25/09089a4a-ed14-11e8-baac-2a674e91502b_story.html.

190. *Id.*

191. *See id.*

192. *See id.*

193. *Id.*

194. *Id.*

2. *Vertical integration and residents as "essential customers"*

Private equity firms also use a strategy of vertical integration, relying on residents as "essential customers."[195] This strategy makes nursing home residents captive customers of products and services sold by companies owned by the same investors.[196] Residents must then pay fees for "monitoring" or "management," rehabilitation services, staffing help, and pharmacy.[197] As the CEO of a private equity–backed nursing home chain explained, "[w]e created a rehab company, we created a hospice company, a pharmacy company, a staffing company. . . . So we create companies to create value."[198] Other examples include facility management;[199] payroll services;[200] and medical devices such as ventilators.[201]

Supporters of private equity firms have contended that such vertical integration is efficient, saving money by controlling the suppliers of goods and services for the nursing home system.[202] However, it is also a direct and effective way to control the suppliers they rely on rather than shopping in the market, thereby gaining the power to set high prices for the services they purchase and to pour the excess rents back into investors'

195. ATKINS, *supra* note 51, at 6–7.

196. *See* Bos & Harrington, *supra* note 43, at 8.

197. ATKINS, *supra* note 51, at 6–7.

198. Bos & Harrington, *supra* note 43, at 5.

199. *See* Ryan Mills & Melanie Payne, *Neglected: Florida's Largest Nursing Home Owner Represents Trend Toward Corporate Control*, NAPLES DAILY NEWS, https://www.naplesnews.com/story/news/special-reports/2018/05/31/floridas-largest-nursing-home-owner-part-growing-nationaltrend/581511002/ (Jan. 24, 2019, 4:01 PM) (discussing how individual nursing homes pay fees including rent, management, and rehabilitation services to their parent company Consulate Health, a billion-dollar company).

200. Matthew Goldstein, Jessica Silver-Greenberg & Robert Gebeloff, *Push for Profits Left Nursing Homes Struggling to Provide Care*, N.Y. TIMES (May 7, 2020), https://www.nytimes.com/2020/05/07/business/coronavirus-nursing-homes.html.

201. *Id.*

202. *See* Hayes, *supra* note 58.

pockets without regard to the availability of cheaper suppliers.[203]

3. *Legal restructuring and threats to transparency*

Although nursing homes are subject to a set of federal and state regulations that govern the quality of care they provide, enforcement of quality of care in nursing homes requires transparency of ownership to trace quality metrics and to allow families of injured patients to sue nursing homes for quality lapses.[204] The complex and opaque ownership structures that private equity firms typically create negates transparency and diffuses ownership and responsibility.[205] One example of such an arrangement is Fillmore Capital, which "created Pearl Senior Care LLC to purchase Golden Living."[206] Pearl Senior Care owned Drumm Investors, LLC; Drumm owned Golden Horizons, the operation company, and Geary Property Holdings, the real estate company."[207] Nursing home operations were split into more than ten LLCs and each individual nursing facility into its own LLC.[208]

203. *See* Xenia Shih Bion, *Is Vertical Integration Bad for Health Care Consumers?*, CAL. HEALTH CARE FOUND. (June 21, 2019), https://www.chcf.org/blog/is-vertical-integration-bad-consumers/.

204. *See Nursing Home Enforcement,* CTRS. FOR MEDICARE & MEDICAID SERVS. https://www.cms.gov/Medicare/Provider-Enrollment-and Certification/SurveyCertification Enforcement/Nursing-Home-Enforcement (Dec. 1, 2021, 7:02 PM); CTRS. FOR MEDICARE & MEDICAID SERVS., NURSING HOME ENFORCEMENT - FREQUENTLY ASKED QUESTIONS, https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertification Enforcement/Downloads/NH-Enforcement-FAQ.pdf (last visited Mar. 2, 2023) [hereinafter NURSING HOME ENFORCEMENT - FREQUENTLY ASKED QUESTIONS].

205. *See* David E. Kingsley & Charlene Harrington, *Financial and Quality Metrics of a Large, Publicly Traded U.S. Nursing Home Chain in the Age of Covid-19*, 52 INT'L J. HEALTH SERVS., 212, 213 (2022).

206. Bos & Harrington, *supra* note 43, at 6.

207. *Id.*

208. *See id.* at 6, 9.

Restructuring arrangements such as this makes state and federal oversight more difficult.[209] Without data and visibility, regulators are blinded.[210] One study examined a nursing home chain in California and found that "[p]rofits were hidden in the chain's management fees, lease agreements, interest payments to owners, and purchases from related-party companies."[211] The complex nature of the corporate arrangement is illustrated by Figure 2 below. [212]

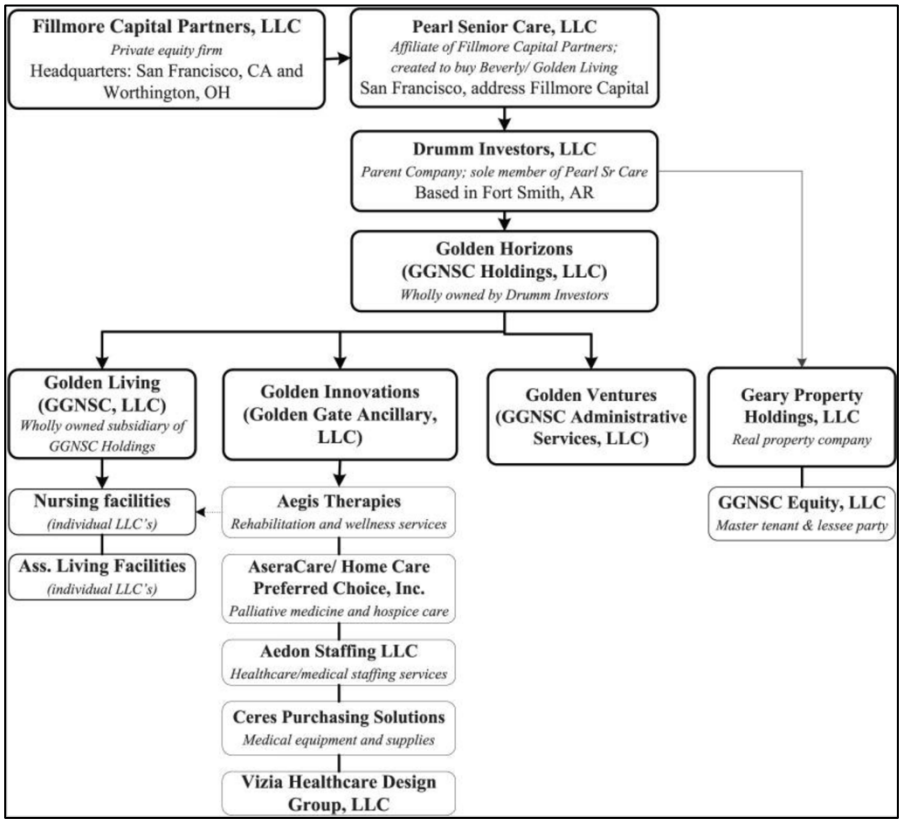
209. *See* Charlene Harrington, Leslie Ross & Taewoon Kang, *Hidden Owners, Hidden Profits, and Poor Nursing Home Care: A Case Study*, 45 INT'L J. HEALTH SERVS. 779, 779 (2015) (finding "a regional for-profit nursing home chain in California" needed "[g]reater ownership transparency and financial accountability requirements . . . to ensure regulatory oversight and quality of care").

210. *See id*. at 780, 796.

211. *Id.* at 779.

212. Bos & Harrington, *supra* note 43, at 9.

Figure 2
PRIVATE EQUITY STRUCTURE OF FILLMORE CAPITAL, LLC



Another example, the Ensign Group, is a large system that grew from "five [nursing homes] with 710 beds in 1999" to 259 nursing homes in 2022.[213] Over 95% of Ensign's revenues come from its nursing homes, with 91.6% coming "from Medicare and Medicaid in 2020."[214] This heavy reliance on government funding has given the company "stable, inflation-adjusted

213. Kingsley & Harrington, *supra* note 205, at 215; *The Ensign Group Acquires Skilled Nursing Facility in Texas*, GLOBENEWSWIRE, (Aug. 1, 2022, 6:00 PM), https://www.globenewswire.com/en/news-release/2022/08/01/2489201/21305/en/The-Ensign-Group-Acquires-Skilled-Nursing-Facility-in-Texas.html.

214. Kingsley & Harrington, *supra* note 205, at 219.

revenues over time."[215] Ensign has implemented a corporate structure consisting of twenty-two portfolio companies which own 409 separate entities that operate 228 facilities. [216] The nursing facilities operated under a master lease arrangement with the property company through which the facilities paid for rent, "maintenance, insurance, and property taxes."[217] On top of that, "Ensign charged depreciation and expenses for its properties."[218] Kingsley and Harrington note "[t]he complexity of its organizational structure to manage about 228 facilities appears designed to shield the company from liability and regulatory oversight, obscure its high profits, and keep taxes low . . . ."[219]

Ensign has enjoyed high profitability with substantial financial resources to operate its nursing homes.[220] Yet, in spite of the resources Ensign has accumulated, it continues to keep its staffing levels low—"below the national average and . . . the level recommended by experts."[221] Kingsley and Harrington observe that

> Ensign has maintained below-average staffing without regard to its CMS staffing ratings, the care needs of its residents, and the workloads of its nursing staff. With the relatively low staffing levels, it was not surprising that Ensign facilities had slightly higher than average deficiencies in 2020 to 2021 and facility survey ratings below average.[222]

By moving assets into a company separate from operating companies, such nursing home systems lower their tax rates,

215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. *See id.* at 220.
221. *Id.*
222. *Id.*

shield parent companies from liability, reduce regulatory oversight, and hide profit margins.[223] "CMS requires disclosure of all entities and individuals with 5% or more ownership interest in any [nursing home], [but] the complexity of multilayered corporate structures of large chains" like Ensign hides profits.[224] Government regulators are ill-equipped and hard-pressed to work through the intricate ownership structure.[225] Lawyers representing injured nursing home residents are similarly handicapped in their search for responsible defendants.[226] Substantial legal discovery is required to trace these ownership linkages and locate a "responsible" party.[227] Observers have argued for greater oversight of financial accountability to ensure effective oversight of the quality of care. [228]

C. *Adverse Resident Impact of Private Equity*

Two aspects of the operation of nursing homes under the private equity business model stand out as major contributors to reductions in the quality of care and resident safety: reductions in nurse staffing and increased use of antipsychotic medication.[229] Among their most deleterious effects are higher mortality rates.[230] Research has shown that private equity ownership increases ninety-day mortality by 1.7 percentage points, or 10% of baseline mortality among nursing home residents.[231] These percentages translated to approximately

223. *See* Harrington et al., *supra* note 209, at 779.

224. *See* Kingsley & Harrington, *supra* note 205, at 221.

225. *See* GOV'T ACCOUNTABILITY OFF., IMPROVING NURSING HOME QUALITY AND INFORMATION 1 (2022), https://www.gao.gov/assets/gao-22-105422.pdf.

226. *See* Harrington et al., *supra* note 209, at 794.

227. *See id.*

228. *Id.* at 779 ("Greater ownership transparency and financial accountability requirements are needed to ensure regulatory oversight and quality of care.").

229. *See* Gupta et al., *supra* note 147, at 3–4.

230. *Id.* at 4.

231. *See id.* at 2–3.

20,150 deaths over the course of twelve years, from 2005 until 2017.[232]

1. *Reductions in staffing costs*

This cost-cutting strategy has led "to a 3% decline in [nursing assistants'] hours per patient-day" and an "[o]verall staffing decline[] [of] 1.4%."[233] Nursing assistants provide the vast majority of caregiving hours and perform crucial services such as mobility assistance, personal interaction, and cleaning to minimize infection risk and ensure sanitary conditions.[234]

Licensed practical nurses (LPNs) are typically tasked to perform medication administration and other duties at the direction of physicians and registered nurses (RNs).[235] A major study evidenced a decrease in LPN usage and an increase of 8% in RN hours.[236] However, the need for RNs to meet "skilled care" regulatory requirements, and more importantly from a private equity perspective, support enhanced billing for skilled services, are possible explanations for this increase since RN hours are only a small percentage of overall staffing hours.[237] The negative outcomes associated with inadequate staffing point to the lack of frontline caregivers.[238]

Current federal nursing home regulations state that nursing facilities

232. *Id.* at 11, 20.

233. *Id.* at 4.

234. *See generally What Nursing Assistants and Orderlies Do*, BUREAU OF LAB. STAT., https://www.bls.gov/ooh/healthcare/nursing-assistants.htm#tab-2 (Dec. 6, 2022) (describing the typical responsibilities of nursing assistants).

235. *See* Kirsten Slyter, *LPN vs. RN: Exploring the Differences*, RASMUSSEN UNIV. (Mar. 24, 2022), https://www.rasmussen.edu/degrees/nursing/blog/lpn-vs-rn-advantages-of-being-registered-nurse/. Registered nurses (RNs) provide direct care to patients, while licensed practical nurses (LPNs) typically assist doctors or registered nurses. *Id.*

236. Gupta et al., *supra* note 147, at 30–31.

237. *See Skilled Nursing Facility (SNF) Care*, MEDICARE.GOV, https://www.medicare.gov/coverage/skilled-nursing-facility-snf-care (last visited Apr. 2, 2023).

238. *See* Gupta et al., *supra* note 147, at 4.

> must employ sufficient staff with the appropriate competencies and skills sets to carry out the functions of the food and nutrition service, taking into consideration resident assessments, individual plans of care and the number, acuity and diagnoses of the facility's resident population in accordance with the facility assessment required at §483.70(e).[239]

The facility assessment is a regulatorily mandated assessment tool that requires self-evaluation by the facility related to resident acuity and staffing levels.[240] Accurate completion of this self-evaluation tool sets the floor for staffing needs by the facility to meet the needs of its residents.[241]

For-profit nursing homes routinely determine staffing levels based on census and reimbursement as opposed to resident acuity.[242] A 2017 study found that for-profit facilities "had [16%] fewer staff than nonprofits after accounting for differences in residents' needs."[243] The approach taken by for-profit facilities has resulted in inadequate staffing to meet the individualized needs of the residents and violates regulatory requirements.[244]

For several years, an increased number of competent nurses working in nursing homes has been recommended to improve

239. 42 C.F.R. § 483.60(a).

240. *Id.* § 483.70(e).

> The facility must conduct and document a facility-wide assessment to determine what resources are necessary to care for its residents competently during both day-to-day operations and emergencies. The facility must review and update that assessment, as necessary, and at least annually. The facility must also review and update this assessment whenever there is, or the facility plans for, any change that would require a substantial modification to any part of this assessment.

Id.

241. *See id.*

242. *See* THE NATIONAL IMPERATIVE TO IMPROVE NURSING HOME QUALITY: HONORING OUR COMMITMENT TO RESIDENTS, FAMILIES, AND STAFF, *supra* note 27, at 63, 94–96, 113–14, 280.

243. Charlene Harrington, Susan Chapman, Elizabeth Halifax, Mary Ellen Dellefield & Anne Montgomery, *Time To Ensure Sufficient Nursing Home Staffing and Eliminate Inequities in Care*, J. GERONTOLOGY & GERIATRIC MED., June 2021, at 1, 1 [hereinafter *Time to Ensure Sufficient Nursing Home Staffing and Eliminate Inequities in Care*].

244. *Id.*

the quality of care.[245] There have been numerous attempts to quantify the appropriate minimum nurse staffing levels.[246] Federal requirements are currently under review to identify the appropriate staffing levels based on resident acuity, and CMS has proposed a "multi-faceted approach" to the development of a mandated minimum staffing requirement for 2023.[247] In the interim, CMS has enhanced its Nursing Home Five-Star Quality Rating System to include "weekend staffing rates for nurses and information on annual turnover among nurses and administrators."[248]

Regardless of the appropriate minimum staffing levels, the private equity model not only ignores the regulatory framework to ensure adequate staffing, but it also cuts staffing dramatically as part of its strategy to make nursing homes more profitable.[249] As one study concluded, "[p]rivate [e]quity . . . companies . . . have excelled at extracting profits from nursing homes by reducing staffing and services."[250] RN salaries in nursing homes are significantly lower than in hospitals and nursing assistant wages are near or below those of entry-level jobs.[251] Seventeen percent of nursing assistants live below the

245. *See* THE NATIONAL IMPERATIVE TO IMPROVE NURSING HOME QUALITY: HONORING OUR COMMITMENT TO RESIDENTS, FAMILIES, AND STAFF, *supra* note 27, at 509–11.

246. *See* Terry Hawk, Elizabeth M. White, Courtney Bishnoi, Lindsay B. Schwartz, Rosa R. Baier & David R. Gifford, *Facility Characteristics and Costs Associated with Meeting Proposed Minimum Staffing Levels in Skilled Nursing Facilities*, 70 J. AM. GERIATRICS SOC'Y 1198, 1199, 1202–03 (2022). Recommended staffing levels have included "4.1 total nurse staffing hours per resident day (HPRD)," including 0.75 registered nurses (RNs) HPRD, 0.54 licensed practical nurses (LPNs) HPRD, and 2.8 certified nursing assistants (CNAs) HPRD. *Id.* at 1199. A recent study found 95% of nursing homes fail to meet all recommended minimum staffing levels. *See id.* at 1202.

247. Pauline Karikari-Martin, *Centers for Medicare & Medicaid Services Staffing Study to Inform Minimum Staffing Requirements for Nursing Homes*, CMS.GOV (Aug. 22, 2022), https://www.cms.gov/blog/centers-medicare-medicaid-services-staffing-study-inform-minimum-staffing-requirements-nursing-homes.

248. *CMS Enhances Nursing Home Rating System with Staffing and Turnover Data*, CMS.GOV: NEWSROOM (July 27, 2022), https://www.cms.gov/newsroom/press-releases/cms-enhances-nursing-home-rating-system-staffing-and-turnover-data.

249. *Time to Ensure Sufficient Nursing Home Staffing and Eliminate Inequities in Care*, *supra* note 243, at 1.

250. *Id.*

251. *Id.* at 2.

federal poverty line, many work more than one job, and injury rates are high.[252] In fact, nursing home workers may have had one of the deadliest jobs in 2020.[253]

The nursing home industry has long argued that it does not have sufficient funding for increased minimum staffing requirements.[254] "[I]mplementing a staffing minimum of 4.1 hours per resident day would require 94% of nursing homes to increase staffing levels just to be in compliance, according to data from accounting and consulting firm CliftonLarsonAllen in partnership with [the American Health Care Association]."[255] Attaining the recommended minimum staffing levels nationwide is estimated to cost $7.25 billion based on current wage rates.[256]

Nevertheless, empirical data supports enhanced staffing to improve resident outcomes. Nursing homes with less than .75 RN staffing hours per resident day have been found to be twice as likely to have COVID-19 infections.[257] A Connecticut nursing home study concluded that every twenty minute increase in RN

252. *See* PARAPROFESSIONAL HEALTHCARE INST., U.S. NURSING ASSISTANTS EMPLOYED IN NURSING HOMES: KEY FACTS 6, 7 (2019), https://www.phinational.org/wp-content/uploads/legacy/phi-nursing-assistants-key-facts.pdf ("Nursing assistants are 3.5 times more likely to be injured on the job than the typical U.S. worker [and] [17%] live below the federal poverty line, compared to [9%] of all U.S. workers."); *see also* Courtney Harold Van Houtven, Nicole DePasquale & Norma B. Coe, *Essential Long-Term Care Workers Commonly Hold Second Jobs and Double- or Triple-Duty Caregiving Roles*, 68 J. AM. GERIATRIC SOC'Y 1657, 1659 ("One-sixth of [long-term care] workers had a second job, where they worked an average of [twenty] hours per week.").

253. Tanya Lewis, *Nursing Home Workers Had One of the Deadliest Jobs of 2020*, SCI. AM. (Feb. 18, 2021), https://www.scientificamerican.com/article/nursing-home-workers-had-one-of-the-deadliest-jobs-of-2020/.

254. *See* Matthew Giovenco, *Lessons the Long-Term Care Industry Can Learn from the Covid-19 Pandemic*, 51 STETSON L. REV. 123, 146 (2021); *see also* Hawk et al., *supra* note 246, at 1204; Jordyn Reiland, *AHCA's Parkinson: Unfunded Federal Staffing Mandate Would Be 'Lights Out' for Nursing Homes Across the Country*, SKILLED NURSING NEWS (Aug. 22, 2022), https://skillednursingnews.com/2022/08/ahcas-parkinson-unfunded-federal-staffing-mandate-would-be-lights-out-for-nursing-homes-across-the-country/.

255. Reiland, *supra* note 254.

256. Hawk et al., *supra* note 246, at 1204.

257. *Time to Ensure Sufficient Nursing Home Staffing and Eliminate Inequities in Care*, *supra* note 243, at 1.

staffing reduced infections by 22% and deaths by 26%.[258] The COVID-19 pandemic evidenced that nursing homes with higher numbers of nurse aides and total nursing personnel had lower COVID-19 outbreaks and fewer deaths.[259] Nursing homes in eight states with higher star ratings on staffing had lower odds of COVID-19 infections.[260] Specifically, in California, nursing homes with lower star ratings for staffing had higher COVID-19 infections and deaths.[261] Nursing homes with five star ratings for overall quality and for RN staffing had lower cumulative COVID-19 infections and deaths. [262]

2. *Antipsychotic drug use*

Without enough staff to provide care, nursing home personnel often turn to non-compliant conduct to ease the burden on caregivers.[263] A recent New York Times investigation noted that "at least [21%] of nursing home residents—about 225,000 people—are on antipsychotics."[264] Studies have shown that when staffing levels decrease, antipsychotic drug use tends

258. Yue Li, Helena Temkin-Greener, Gao Shan & Xueya Cai, *COVID-19 Infections and Deaths Among Connecticut Nursing Home Residents: Facility Correlates*, 68 J. AM. GERIATRICS SOC'Y. 1899, 1903 (2020).

259. *See* Rebecca J. Gorges & R. Tamara Konetzka, *Staffing Levels and COVID-19 Cases and Outbreaks in U.S. Nursing Homes*, 68 J. AM. GERIATRICS SOC'Y. 2462, 2465 (2020).

260. Jose F. Figueroa, Rishi K. Wadhera & Irene Papanicolas, Kristen Riley, Jie Zheng, E. John Orav & Ashish K. Jha, *Association of Nursing Home Ratings on Health Inspections, Quality of Care, and Nurse Staffing With COVID-19 Cases*, 324 J. AM. MED. ASS'N 1103, 1104 (2020).

261. Mengying He, Yumeng Li & Fang Fang, I*s There a Link Between Nursing Home Reported Quality and COVID-19 Cases? Evidence from California Skilled Nursing Facilities*, 21 J. AM. MED. DIRS. ASS'N 905, 906 (2020); Charlene Harrington, Leslie Ross, Susan Chapman, Elizabeth Halifax, Bruce Spurlock & Debra Bakerjian, *Nurse Staffing and Coronavirus Infections in California Nursing Homes*, 21 POL'Y, POL., & NURSING PRAC. 174, 178–79 (2020).

262. Christianna S. Williams, Qing Zheng, Alan J. White, Ariana I. Bengtsson, Evan T. Shulman, Kurt R. Herzer & Lee A. Fleisher, *The Association of Nursing Home Quality Ratings and Spread of COVID-19*, 69 J. AM. GERIATRICS SOC'Y 2070, 2075 (2021).

263. *See, e.g.*, Katie Thomas, Robert Gebeloff & Jessica Silver-Greenberg, *Phony Diagnoses Hide High Rates of Drugging at Nursing Homes*, N.Y. TIMES, https://www.nytimes.com/2021/09/11/health/nursing-homes-schizophrenia-antipsychotics.html (Oct. 15, 2021) [hereinafter *Phony Diagnoses & Nursing Homes*].

264. *Id.*

to increase.[265] Private equity-owned nursing homes have been shown to increase the use of antipsychotics by three percentage points, or 50% of the mean, which implies that about 15% of the total effect on mortality is attributable to antipsychotics.[266]

Antipsychotics have also been shown to increase the mortality rate among nursing home residents.[267] As noted in the CMS guidance to nursing home surveyors:

> Antipsychotic medications (both first and second generation) have serious side effects and can be especially dangerous for elderly residents. When antipsychotic medications are used without an adequate rationale, or for the sole purpose of limiting or controlling expressions or indications of distress without first identifying the cause, there is little chance that they will be effective, and they commonly cause complications such as movement disorders, falls with injury, cerebrovascular adverse events (cerebrovascular accidents (CVA, commonly referred to as stroke), and transient ischemic events) and increased risk of death. The FDA Boxed Warning which accompanies second generation anti-psychotics states, "Elderly patients with dementia-related

265. T. Joseph Mattingly II, *A Review Exploring the Relationship Between Nursing Home Staffing and Antipsychotic Medication Use*, 4 NEUROLOGY & THERAPY 169, 171 (2015).

266. *Compare* Gupta et al., *supra* note 147, at 27 (finding that private equity owned nursing homes increase the chances of starting antipsychotics), *with* Robert Tyler Braun, Hye-Young Jung, Lawrence P. Casalino, Zachary Myslinksi & Mark Aaron Unruh, *Association of Private Equity Investment in US Nursing Homes with the Quality and Cost of Care for Long-Stay Residents*, JAMA HEALTH F. 8 (Nov. 19, 2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8796926/?report=printable ("There were no differences between PE firm-owned nursing homes and non-PE firm-owned nursing homes in the likelihood of residents receiving antipsychotics . . . .").

267. Gupta et al., *supra* note 147, at 12.

> psychosis treated with atypical anti-psychotic drugs are at an increased risk of death."[268]

Research shows that the use of sedative antipsychotics medications, such as Haldol, significantly increases the risk of death from heart problems, falls, and infections when administered to elderly patients with dementia-related psychosis.[269]

Beyond the increased risk of mortality, improper use of antipsychotic medications as a substitute for adequate staffing constitutes a violation of numerous nursing home regulations.[270] All too often, psychotropic medications are ordered for residents exhibiting minor behavioral issues without regard to the medical necessity for the drugs and in violation of the informed consent requirements in nursing home regulations.[271] The New York Times investigation noted that simply adding a diagnosis of schizophrenia to a patient's

268. CTRS. FOR MEDICARE & MEDICAID, STATE OPERATIONS MANUAL APPENDIX PP – GUIDANCE TO SURVEYORS FOR LONG TERM CARE FACILITIES 560, https://www.cms.gov/files/document/appendix-pp-guidance-surveyor-long-term-care-facilities.pdf (last visited Apr. 3, 2023) (citing *Information for Healthcare Professionals: Conventional Antipsychotics*, FDA (June 16, 2008), www.fda.gov/Drugs/DrugSafety/PostmarketDrugSafetyInformationforPatientsandProviders/ucm124830.htm [https://web.archive.org/web/20170701091502/https://www.fda.gov/Drugs/DrugSafety/PostmarketDrugSafetyInformationforPatientsandProviders/ucm124830.htm]). "The FDA issued a similar Boxed Warning for first generation antipsychotic drugs." *Id.* (citing *Information for Healthcare Professionals: Conventional Antipsychotics*, *supra*).

269. Elaine K. Howley, *Antipsychotic Drugs in Nursing Homes*, U.S. NEWS (Jan. 17, 2023, 9:08 AM), https://health.usnews.com/health-news/best-nursing-homes/articles/antipsychotic-use-in-nursing-homes; *see* FOOD & DRUG ADMIN., HALDOL BRAND OF HALOPERIDOL INJECTION 1 (2005), https://www.accessdata.fda.gov/drugsatfda_docs/label/2019/015923s095lbl.pdf (explaining the potential dangers of haloperidol including, *inter alia*, the increased risk of mortality among elderly patients).

270. Howley, *supra* note 269; *see* DANIEL R. LEVINSON, MEDICARE ATYPICAL ANTIPSYCHOTIC DRUG CLAIMS FOR ELDERLY NURSING HOME RESIDENTS 6–7 (2011); *see also Phony Diagnoses & Nursing Homes*, *supra* note 263.

271. *See* HUM. RTS. WATCH, "THEY WANT DOCILE": HOW NURSING HOMES IN THE UNITED STATES OVERMEDICATE PEOPLE WITH DEMENTIA 47–49, 56–68 (2018), https://www.hrw.org/sites/default/files/report_pdf/us_nursinghomes0218_web.pdf [hereinafter "THEY WANT DOCILE"] (describing situations in which nursing home staff used antipsychotic medicine for convenience and detailing cases where staff failed to obtain informed consent in nursing home settings).

file allows nursing homes to subvert antipsychotic use reporting requirements.[272] In effect, nursing homes continue to use antipsychotic medications as chemical restraints for residents with dementia who are acting out in lieu of adequate staffing and care delivery systems and other non-pharmacological interventions.[273]

Staffing minimums, while critically important, do not necessarily guarantee quality care delivery. A focus on staff competencies and staff recruitment strategies is needed to effectively deliver quality care and protect residents.[274] The failure to educate staff on evidence-based practice in the nursing home setting contributes to the lack of patient-centered care.[275] In the words of a report of the National Academies of Science, Engineering, and Medicine (NASEM),

> The teaching nursing home was conceptualized as a way to increase research, improve resident health outcomes, expand staff training, and improve knowledge about geriatric care. The model was considered to be successful and has been shown to improve attitudes about nursing homes and working with older adults, decrease staff turnover rates, improve outcomes, and lower costs.[276]

The commitment to retention and reducing staff turnover includes employee compensation and education that are not

272. *Phony Diagnoses Hide High Rates of Drugging at Nursing Homes*, *supra* note 263; Howley, *supra* note 269.

273. *See* Howley, *supra* note 269 (noting that antipsychotic drugs are sometimes referred to as "chemical straightjackets"); "THEY WANT DOCILE", *supra* note 271, at 3–4.

274. *See* THE NATIONAL IMPERATIVE NURSING HOME QUALITY: HONORING OUR COMMITMENT TO RESIDENTS, FAMILIES, AND STAFF, *supra* note 27, at 508–17.

275. *See Why Patient-Centered Care Is So Important*, WOLTERS KLUWER (Oct. 5, 2022), https://www.wolterskluwer.com/en/expert-insights/why-patientcentered-care-is-so-important (explaining the importance of evidence-based practice for person-centered care).

276. THE NATIONAL IMPERATIVE NURSING HOME QUALITY: HONORING OUR COMMITMENT TO RESIDENTS, FAMILIES, AND STAFF, *supra* note 27, at 119–20 (citation omitted).

routinely provided when profit is the primary motive.[277] The NASEM Report found that

> the successful recruitment and retention of a high-quality nursing home workforce depends on providing more than 'adequate' compensation for their work. Rather, competitive compensation is needed (comparable to that in other health care settings and job opportunities) for their current and expanding roles in conjunction with the many different types of efforts that will be needed to improve the desirability of these jobs.[278]

III. FALSE CLAIMS ACT OVERSIGHT: THE FALSE CLAIMS ACT

Health care regulation is extensive, with multiple federal and state entities charged with oversight and enforcement of these regulations.[279] When providers engage in fraudulent conduct that leads to negative patient/resident outcomes, federal and state law enforcement officials rely on the False Claims Act (FCA) as the primary civil tool to seek accountability.[280]

As private equity investment in health care continues to increase, the FCA[281] has become the principal mechanism by which its investors can face liability for the conduct of their portfolio companies.[282] The law prohibits a person from

277. *See id.* at 508–09, 513–15.

278. *Id.* at 509.

279. Robert I. Field, *Why Is Health Care Regulation So Complex?*, 33 PHARM. & THERAPEUTICS 607, 607 (2008).

280. *See Justice Department's False Claims Act Settlements and Judgments Exceed $5.6 Billion in Fiscal Year 2021*, U.S. DEP'T OF JUST. (Feb. 1, 2022), https://www.justice.gov/opa/pr/justice-department-s-false-claims-act-settlements-and-judgments-exceed-56-billion-fiscal-year ("The False Claims Act is one of the most important tools available to the department both to deter and to hold accountable those who seek to misuse public funds.").

281. 31 U.S.C. §§ 3729–32.

282. *See* Ethan P. Davis, Principal Deputy Assistant Att'y Gen., U.S. Dep't of Just., Speech to the Institute for Legal Reform, U.S. Chamber of Commerce (June 26, 2020), https://www.justice.gov/civil/speech/principal-deputy-assistant-attorney-general-ethan-p-davis-delivers-remarks-false-claims; Lee Turner Friedman, Jennifer S. Windom, Ralph C.

"knowingly present[ing], or caus[ing] to be presented, a false or fraudulent claim for payment or approval" to the government.[283] It also prohibits a person from "knowingly conceal[ing] or knowingly and improperly avoid[ing] or decreas[ing] an obligation to pay or transmit money or property to the Government,"[284] a cause of action typically referred to as "reverse false claims,"[285] as well as conspiracies to violate the FCA.[286]

The "knowing" provision of the FCA requires no specific proof of intent to defraud and can be established through actual knowledge, deliberate ignorance, or reckless disregard of the falsity of the claims in question.[287] In recent years, however, after the Supreme Court's ruling in *Universal Health Services v. United States ex rel. Escobar*,[288] courts have given increased emphasis to the FCA's "materiality" requirement.[289] As the Supreme Court noted, this "demanding" standard "look[s] to the effect on the likely or actual behavior of the recipient of the

Mayrell & Jason A. Shaffer, *Investors Beware: Private Equity Firms Continue to Face Potential Liability Under the False Claims Act for Their Portfolio Companies' Conduct*, KRAMER LEVIN (Aug. 2, 2023), https://www.kramerlevin.com/en/perspectives-search/investors-beware-private-equity-firms-continue-to-face-potential-liability-under-the-false-claims-act-for-their-portfolio-companies-conduct.html. Numerous states have enacted their own false claims acts modeled on the FCA with many of the same provisions. Those state statutes are typically interpreted consistently with the federal FCA and are frequently relied on as a mechanism to recover state Medicaid dollars spent on allegedly fraudulent services. *See State False Claims Act Reviews*, U.S. DEP'T OF HEALTH AND HUM. SERVS. OFF. OF INSPECTOR GEN., https://oig.hhs.gov/fraud/state-false-claims-act-reviews/ (last visited Jan. 30, 2023).

283. § 3729(a)(1)(A).

284. *Id.* § 3729(a)(1)(G).

285. Scott Gallisdorfer, *Provider Beware: Recent FCA Cases Emphasize the Importance of Diligently Addressing Potential Overpayments*, BASS BERRY SIMS (Mar. 9, 2011), https://www.insidethefalseclaimsact.com/category/reverse-false-claims.

286. *See* § 3729(a)(1)(C).

287. *Id.* § 3729(b)(1).

288. 579 U.S. 176, 194–96 (2016).

289. *See, e.g.*, United States *ex rel*. Nargol v. DePuy Orthopedics, Inc., 865 F.3d 29, 34–35 (3d Cir. 2017) (illustrating the importance of the materiality requirement in stating a claim for relief under the FCA); *see also* 31 U.S.C. § 3729(b)(4) ("[T]he term 'material' means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.").

alleged misrepresentation."[290] Accordingly, plaintiffs or government enforcers proceeding under the FCA for submission of false claims to government health care payors must demonstrate not just that the defendants caused submission of claims without complying with specific government requirements, but that those requirements were material to the payor's payment decisions.[291]

A. *Private Equity Enforcement Under the FCA*

There have been five FCA resolutions with private equity defendants involving health care entities to date, that have been publicly disclosed, and in many of those resolutions, the private equity defendants paid significantly less than their portfolio companies, as reflected in Table 1 below.[292] Only two of those cases, *United States ex rel. Medrano v. Diabetic Care Rx LLC.* and *United States ex rel. Martino-Fleming v. South Bay Mental Health Care, Inc.*, have litigated the question of private equity liability under the FCA for the conduct of portfolio companies.[293]

290. *Escobar*, 579 U.S. at 193–94 (quoting RICHARD A. LORD, WILLISTON ON CONTRACTS § 69:12, (4th ed. 2003)).

291. *Compare* United States *ex rel.* Escobar v. Universal Health Servs., Inc., 842 F.3d 103, 111–12 (1st Cir. 2016) (reversing the dismissal of a complaint alleging UHS's FCA violations, by explaining that "UHS's alleged misrepresentations were not garden-variety breaches. At the core of the MassHealth regulatory program in this area of medicine is the expectation that mental health services are to be performed by licensed professionals, not charlatans"), *with* D'Agostino v. ev3, Inc., 845 F.3d 1, 7, 12 (1st Cir. 2016) (affirming dismissal and noting that, in the wake of plaintiff's allegations, "[t]he fact that CMS [did] not den[y] reimbursement for [the drug] . . . casts serious doubt on the materiality of the fraudulent representations that [plaintiff] alleges").

292. *See infra* tbl.1.

293. *See infra* tbl.1.

Table 1
HEALTH FACILITY FCA RESOLUTIONS WITH PRIVATE EQUITY OWNERS

Case Name	**Private Equity Defendant**	**Settlement Amount**	**Private Equity Settlement Amount**
United States ex rel. Rose v. Fortress Investment Group, LLC. et al.	Fortress Investment Group, LLC	$8.86 million	Not separately specified[294]
United States ex rel. Johnson v. Therakos, Inc.	The Gores Group	$11.5 million	$1.5 million[295]

294. *See United States Recovers over $8 Million in False Claims Act Settlements for Fraud Against the VA and Medicare*, U.S. DEP'T OF JUST. (May 5, 2016), https://www.justice.gov/usao-or/pr/united-states-recovers-over-8-million-false-claims-act-settlements-fraud-against-va-and.

295. *See Former Owners of Therakos, Inc. Pay $11.5 Million to Resolve False Claims Act Allegations of Promotion of Drug-Device System for Unapproved Uses to Pediatric Patients*, U.S. DEP'T OF JUST. (Nov. 19, 2020), https://www.justice.gov/usao-edpa/pr/former-owners-therakos-inc-pay-115-million-resolve-false-claims-act-allegations.

United States ex rel. Mandalapu v. Alliance Family of Companies, Inc.	Ancor Holdings LP	$15.3 million	$1.8 million[296]
United States ex rel. Medrano and Lopez v. Diabetic Care Rx LLC	Riordan, Lewis & Haden Inc.	$21.36 million	Not separately specified[297]
United States ex rel. Martino-Fleming v. South Bay Mental Health Center, Inc.	H.I.G. Capital, LLC and H.I.G. Growth Partners, LLC	$29 million	$19.95 million[298]

296. *See EEG Testing and Private Investment Companies Pay $15.3 Million to Resolve Kickback and False Billing Allegations*, U.S. DEP'T OF JUST. (July 21, 2021), https://www.justice.gov/opa/pr/eeg-testing-and-private-investment-companies-pay-153-million-resolve-kickback-and-false.

297. *See Compounding Pharmacy, Two of Its Executives, and Private Equity Firm Agree to Pay $21.36 Million to Resolve False Claims Act Allegations*, U.S. DEP'T OF JUST. (Sept. 18, 2019), https://www.justice.gov/opa/pr/compounding-pharmacy-two-its-executives-and-private-equity-firm-agree-pay-2136-million.

298. *See Private Equity Firm and Former Mental Health Center Executives Pay $25 Million Over Alleged False Claims Submitted for Unlicensed and Unsupervised Patient Care*, MASS.GOV: OFF. OF ATT'Y GEN. MAURA HEALEY (Oct. 14, 2021), https://www.mass.gov/news/private-equity-firm-and-former-mental-health-center-executives-pay-25-million-over-alleged-false-claims-submitted-for-unlicensed-and-unsupervised-patient-care; *see also Newman & Shapiro Announces $25 Million Settlement with Private Equity Firm H.I.G. and Two Executives to Resolve Whistleblower Case Alleging Medicaid Billing Fraud at South Bay Mental Health Center*, PR NEWSWIRE (Oct. 14, 2021, 12:12 PM), https://www.prnewswire.com/news-releases/newman--shapiro-announces-25-million-settlement-with-private-equity-firm-hig-and-two-executives-to-resolve-whistleblower-case-alleging-medicaid-billing-fraud-at-south-bay-mental-health-center-301400607.html.

B. *False Claims Act Examples*

1. Medrano

The *Medrano* case was brought by a whistleblower against Diabetic Care Rx, LLC d/b/a Patient Care America (PCA), a compounding pharmacy, two individual defendants, and Riordan, Lewis & Haden, Inc. (RLH), a private equity investor with a controlling share in PCA, in December 2015.[299] The United States intervened in the case and filed a complaint in intervention in February 2018.[300] The United States and the whistleblower alleged that PCA, RLH, and the individual defendants caused false claims to be paid by the federal military health insurance program TRICARE through three schemes.[301]

The first alleged scheme involved "several outside marketing companies [that were hired] to generate patient referrals for topical creams."[302] The marketers were entitled to 50% of PCA's profit from these referrals, which the government and whistleblower alleged constituted a kickback that tainted the claim as "false" for purposes of the FCA.[303] In the second scheme, PCA and a marketing company allegedly agreed to pay patients' copayments on prescriptions and disguised those payments as coming from a "sham charitable organization," a kickback which the plaintiffs also alleged tainted the claim under the FCA.[304] Finally, the plaintiffs alleged that PCA

299. United States *ex rel.* Medrano v. Diabetic Care RX, LLC, No. 15-CV-62617, 2018 WL 6978633, at *1 (S.D. Fla. Nov. 30, 2018).

300. *Id.*

301. *Id.* at *2–3.

302. *Id.* at *3.

303. *Id.* at *2–3. A violation of the federal Anti-Kickback Statute can "taint" a claim for purposes of the FCA if the government shows that defendants "made kickbacks with the intent of inducing referrals, and [d]efendants knowingly paid remuneration in exchange for referrals." *Id.* (quoting United States *ex rel*. Schaengold v. Mem'l Health Inc., No. 4:11-CV-58, 2014 WL 7272598, at *13 (S.D. Ga. Dec. 18, 2014); *see, e.g.*, United States *ex rel.* Schaengold v. Mem'l Health, Inc., No. 4:11-CV-58, 2014 WL 7272598, at *13–14 (S.D. Ga. Dec. 18, 2014) (finding that the complaint sufficiently plead a violation of the federal Anti-Kickback Statute by showing that the compensation arrangements made with physicians were intended to induce referrals).

304. *Medrano*, 2018 WL 6978633, at *3–4.

submitted claims to TRICARE for prescriptions that patients or their physicians had not authorized.[305] Notably, the United States and whistleblower alleged that RLH had initiated PCA's entry into the topical cream business and sought to increase PCA's value to sell it in five years.[306] The plaintiffs claimed that, through its ownership, management, and direction, RLH knew of these schemes and caused the false claims to be submitted to TRICARE.[307]

With respect to RLH's knowledge of the kickback scheme, the magistrate judge found that RLH had sufficient knowledge to meet the FCA standard of marketing a kickback scheme.[308] The magistrate judge then turned to causation, finding that the complaint adequately alleged RLH caused the false claims pursuant to the marketing kickback scheme, as "RLH took steps to advance the marketing kickback scheme that ultimately led to the presentment of claims to TRICARE. . . . RLH knew of and approved PCA's agreements with the Marketers, knew of the AKS's prohibition against kickbacks, and nevertheless funded $2 million in commissions to the Marketers."[309] Ultimately, though, the magistrate judge recommended dismissal of the complaint on Rule 9(b) grounds, finding that the complaint had failed to "allege that the Defendants expressly certified compliance with any law or regulation, including the AKS, as part of the claims submission process"[310] or "contain any

305. *Id.*

306. *Id.* at *1.

307. *See id.* at *11.

308. *Id.*

> RLH was advised by counsel that paying commissions to marketers could violate the AKS [Anti-Kickback Statute] and that compliance with the AKS was a material requirement for reimbursement from TRICARE . . . RLH [also]: (i) approved of PCA's decision to use marketers to generate referrals; (ii) knew that TRICARE was the source of the majority of PCA's revenue; (iii) received monthly financial statements, which reported the monthly compounding revenue and the commission paid to the Marketers; and (iv) RLH funded $2 million in commissions to the Marketers in January 2015.

Id.

309. *Id.* at *13.

310. *Id.* at *8, *10, *15.

allegations regarding the specific representations Defendants made to TRICARE when submitting a claim."[311]

The district court adopted the magistrate judge's recommendations on Rule 9(b), dismissing the complaint without prejudice, but did not address the RLH knowledge and causation issues, determining that "such conclusions were not necessary."[312] Ultimately, before the Court could rule on motions to dismiss an amended complaint filed by the plaintiffs, the parties reached a $21.36 million settlement.[313] That resolution included a $21.05 million settlement with PCA and RLH, though it did not delineate which party was responsible for paying what portion of the settlement.[314]

2. *H.I.G.'s liability in* Martino-Fleming

The *Martino-Fleming* case centered on South Bay Mental Health Center, Inc., a collection of outpatient mental health clinics in Massachusetts.[315] South Bay was founded in 1986 by Peter Scanlon.[316] In 2012, private equity investors H.I.G. Capital, LLC and its capital affiliate, H.I.G. Growth Partners, LLC joined forces with Kevin Sheehan, a behavioral health care specialist, to acquire South Bay from Scanlon.[317]

The principal allegation of the claim of the Commonwealth of Massachusetts and the whistleblower was that South Bay had systematically failed to comply with Massachusetts Medicaid program regulations requiring unlicensed mental health clinicians to receive supervision from an independently licensed professional.[318] The Commonwealth and the

311. *Id.* at *10.

312. *Id.* at *6–7.

313. *See Compounding Pharmacy*, *supra* note 297.

314. *Id.*

315. Massachusetts *ex rel.* Martino-Fleming v. S. Bay Mental Health Ctr., Inc., 334 F. Supp. 3d 394, 399 (D. Mass. 2018).

316. *Id.*

317. *Id.*

318. *See id.* at 398.

whistleblower further claimed that Scanlon, Sheehan, and H.I.G. were aware of the noncompliance and did not correct it.[319] South Bay settled with the Commonwealth in February 2018,[320] but H.I.G., Scanlon, and Sheehan did not settle so litigation proceeded as to their liability.[321]

The FCA allegations were that H.I.G. knowingly caused South Bay to submit false claims for unqualified, unsupervised behavioral health services.[322] These allegations claimed that H.I.G. was aware of the noncompliant supervision at South Bay through a series of meetings and internal company initiatives to address employee turnover that also identified supervision deficiencies.[323] Further, it was alleged that H.I.G. had rejected recommendations to correct the supervision deficiencies at South Bay.[324] H.I.G. attempted to argue that "[its] alleged failure to stop South Bay's policy and practice of submitting false claims for services by unqualified and unsupervised clinicians is insufficient to impose FCA liability."[325] The Court rejected this view and denied H.I.G.'s motion to dismiss, finding that "knowingly ratif[ying] the prior policy of submitting false claims by rejecting recommendations to bring South Bay into regulatory compliance constitutes sufficient participation in the claims process to trigger FCA liability."[326] The Court also allowed the Commonwealth to proceed on its unjust

319. *See id.* at 398, 400.

320. Press Release, Maura Healey, Att'y Gen., Mass. Off. of Att'y Gen., Mental Health Center to Pay $4 Million Under AG Settlement for Illegally Billing MassHealth for Unlicensed Patient Care (Feb. 8, 2018). South Bay agreed to pay four million dollars and implement a five-year independent compliance monitoring program at its clinics. *Id.*; Press Release, Maura Healey, Att'y Gen., Mass. Off. of Att'y Gen., Private Equity Firm and Former Mental Health Center Executives Pay $25 Million Over Alleged False Claims Submitted for Unlicensed and Unsupervised Patient Care (Oct. 14, 2021) [hereinafter Press Release, Private Equity Firm and Former Mental Health Center].

321. *See* United States *ex rel.* Martino-Fleming v. S. Bay Mental Health Ctr., Inc., No. 15-13065, 2018 WL 4539684, at *1 (D. Mass. Sept. 21, 2018).

322. *Id.* at *4.

323. *Id.* at *2–3.

324. *Id.* at *3.

325. *Id.* at *4–7.

326. *Id.*

enrichment claim.[327]

Accordingly, the FCA case against H.I.G. proceeded based principally on a theory of FCA causation through H.I.G.'s awareness of the supervision deficiencies and rejection of recommendations to correct those deficiencies.[328] The Court issued its summary judgment ruling on May 19, 2021, ultimately siding with the plaintiffs.[329] The Court also sided with the Commonwealth and whistleblower on causation, finding that not only was H.I.G. informed of the issues with supervision at South Bay, but H.I.G. had the power to correct those issues by authorizing the hiring of more licensed supervisors, which H.I.G. did not do.[330]

Shortly after a summary judgment ruling and prior to a trial in the case, the parties reached a global settlement worth

327. Massachusetts *ex rel.* Martino-Fleming v. S. Bay Mental Health Ctr., Inc., 334 F. Supp. 3d 394, 405, 409–10 (D. Mass. 2018).

328. *See* United States *ex rel.* Martino-Fleming v. S. Bay Mental Health Ctrs., Inc., 540 F. Supp. 3d 103, 129–30 (D. Mass. 2021). At summary judgment, H.I.G. claimed that the plaintiffs had not presented evidence that it knew of the supervision violations nor that it had caused the submission of false claims associated with those violations. *Id.* On knowledge, the plaintiffs countered that, not only did H.I.G. know about South Bay's noncompliance through the internal initiative, but that a chief clinical officer at the company sent emails to H.I.G. outlining the lack of licensed supervisors at South Bay two years later. *Id.* at 114, 129–30. The plaintiffs further argued that H.I.G. officials confirmed that they were aware of the Medicaid supervision requirements, so, taken together, these pieces of evidence were sufficient to establish knowledge of South Bay's noncompliance under the FCA and Massachusetts FCA. *Id.* at 129–30.

329. *Id.* at 129 ("I conclude that the Plaintiffs have pointed to sufficient evidence to raise a genuine dispute of material fact about H.I.G.'s knowledge of noncompliance. First, through the testimony of H.I.G. designee and Board member [Steven] Loose, they show that H.I.G.'s leadership understood that South Bay's revenues were tied to Medicaid. They also showed that H.I.G. understood that Medicaid had terms and conditions of payment. Second, they point to evidence that H.I.G.'s members were aware that MassHealth regulations required certain forms of supervision. . . . Third, the Plaintiffs point to evidence that H.I.G. members were informed that clinicians at South Bay were provided with inadequate supervision.").

330. *See id.* at 130 ("[Plaintiffs] point to the evidence that, two years after the Tiger Teams recommendations were presented . . . [H.I.G.] received a report . . . showing that the relevant recommendations were not implemented. There is sufficient evidence in the record that . . . H.I.G. had the power to fix the regulatory violations which caused the presentation of false claims but failed to do so.").

$25 million.[331] H.I.G. funded $19.95 million of that settlement individually, making it the largest settlement involving private equity liability under the FCA, and the largest amount a private equity company has been individually required to pay to resolve FCA allegations.[332]

3. *Curo's liability in* Anderson

Beyond cases described above that have settled, at least one still-active case has examined the question of liability for private equity actors under the FCA.[333] In *United States ex rel. Anderson and Mathis v. Curo Health Services, Inc.*, the government intervened in a *qui tam* alleging that a group of Tennessee hospice providers submitted claims for patients for hospice services for which the patients did not qualify.[334] The patient-level hospice operator in this case was Avalon Hospice ("Avalon"), which owned twenty-seven hospice agencies in Tennessee.[335] "Curo Health Services Holdings, Inc. [("Curo")] is a large operator of hospice chains founded by a private equity firm . . . [which] purchas[ed] smaller providers, including, in 2011, Avalon's then-parent company, Regency Healthcare Group, LLC ("Regency")."[336] The government alleged that Curo was liable for Avalon's submission of false claims for patients who were ineligible for hospice, as Curo was not only actively involved in assessing patient eligibility for hospice care, but Curo pressured Avalon to admit patients into hospice, including through scrutinizing decisions not to admit patients, providing financial incentives for increased admissions, and training physicians to avoid phrases undermining a terminal

331. *See* Press Release, Private Equity Firm and Former Mental Health Center, *supra* note 320.

332. *See id.*

333. *See* United States ex rel. Anderson & Mathis v. Curo Health Services Holdings, Inc., No. 3:13-cv-00672 (Lead), No. 3:20-cv-00168 (Member), 2022 WL 842937, at *4, *7 (D. Tenn. Mar. 21, 2022).

334. *Id.* at *4, *7–8.

335. *Id.* at *4.

336. *Id.*

prognosis.[337] The government also alleged that Curo became aware of issues with Avalon's admissions practices and failed to correct those issues and/or return any ill-gotten gains to the Medicaid program.[338]

Curo argued that it could not be held liable for Avalon's conduct on a causation theory, as it was not "actually the entit[y] evaluating individual patients, filling out COTIs [Certifications of Terminal Illness], or filing claims for payments."[339] In particular, Curo claimed that because none of its practices, such as providing financial incentives for admissions targets, were inherently unlawful, it could not be held liable for any false claims Avalon may have submitted.[340] The Court sided with the government, finding that Curo's practices need not be independently unlawful if the practices caused false claims to be submitted to the government and that "the governments have clearly and with particularity pleaded the elements necessary to establish liability on behalf of Avalon's corporate parents."[341]

C. *The Implications of FCA Enforcement*

Together, *Medrano*, *Martino-Fleming*, and *Anderson* provide an overview of the way how FCA liability can be established for private equity investors in portfolio health care companies. *Medrano* holds that if a private equity investor is aware of the potential risks of a course of conduct and proceeds with actions to direct that conduct anyway, their actions may be sufficient to establish scienter and causation under the FCA.[342] *Martino-Fleming* adds that even if the private equity investor did not create the regulatory issue, if that investor is presented with

337. *See id.* at *4–6.

338. *Id.* at *6.

339. *Id.* at *14.

340. *Id.* at *15.

341. *Id.*

342. *See* United States *ex rel.* Medrano v. Diabetic Care RX, LLC, No. 15-62617, 2018 WL 6978633, at *11, *13 (S.D. Fla. 2019).

recommendations to correct a regulatory issue, has the power to correct that issue, and fails to do so, the private equity investor could still face liability.[343] *Anderson* further holds that if the private equity investor's policies, even if not independently unlawful, have the effect of incentivizing conduct that results in the submission of false claims, that may be sufficient to establish causation liability under the FCA.[344]

The *Medrano*, *Martino-Fleming*, and *Anderson* cases all involved a situation where private equity's push for growth arguably exacerbated the alleged fraud. In *Medrano*, RLH pushed PCA to start selling topical creams as part of its strategy to grow the company's revenues in anticipation of a future sale, which in turn led to the decision to hire marketers to further increase PCA's topical cream business.[345] In *Martino-Fleming*, the principal issue at South Bay was a lack of licensed supervisors; H.I.G. expanded the pool of unqualified clinicians who needed supervision by pushing for more growth.[346] By not adopting recommendations to hire licensed supervisors for those individuals, H.I.G.'s actions arguably accelerated South Bay's noncompliance with Massachusetts Medicaid regulations.[347] Similarly, in *Anderson*, the incentives and trainings offered by Curo encouraged Avalon to admit hospice patients even if those patients did not meet Medicaid eligibility requirements.[348]

While these cases did not rely explicitly on the private equity push for growth as a basis for finding liability, this business model had the effect of pushing portfolio companies over the brink into noncompliance with government regulations. It will inevitably engender further government and whistleblower

343. *See* United States *ex rel.* Martino-Fleming v. S. Bay Mental Health Ctrs., Inc., 540 F. Supp. 3d 103, 129–30 (D. Mass 2021).

344. *Anderson*, 2022 WL 842937, at *15.

345. *Medrano*, 2018 WL 6978633, at *1, *3.

346. *See Martino-Fleming*, 540 F. Supp. 3d, at 112–13.

347. *See id.* at 129–30.

348. *See Anderson*, 2022 WL 842937, at *4–6.

scrutiny and enforcement actions.

IV. ETHICS AND COMPLIANCE PROGRAM GUIDANCE ACCOUNTABILITY

Nursing homes have served as the basis for ethics and compliance program guidance documents from the HHS-Office of Inspector General (OIG) for decades. Among other elements, the OIG instructs nursing homes on how to create an effective ethics and compliance program.[349] As part of its guidance, the OIG identifies compliance risk areas such as "quality of care and residents' rights, employee screening, vendor relationships, billing and cost reporting, and record keeping and documentation."[350] In August 2022, the OIG identified related party transactions as a focal point in evaluating SNF costs and their impact on resident care.[351]

In 2019, all nursing homes were mandated to have a compliance and ethics program in effect.[352] The performance of

349. *See* Publication of the OIG Compliance Program Guidance for Nursing Facilities, 65 Fed. Reg. 14289, 14291–304 (Mar. 16, 2000) (describing the elements of an effective compliance program); OIG Supplemental Compliance Program Guidance for Nursing Facilities, 73 Fed. Reg. 56832, 56835–847 (Sept. 30, 2008) (providing additional considerations for effective compliance programs including guidance on identifying areas that present liability risks).

350. *Publication of the OIG Compliance Program Guidance for Nursing Facilities*, *supra* note 349, at 14,292.

351. *See Skilled Nursing Facilities' Medicare Payments to Related Parties*, U.S. DEP'T HEALTH & HUM. SERVS. OFF. OF INSPECTOR GEN., https://oig.hhs.gov/reports-and-publications/workplan/summary/wp-summary-0000721.asp (last visited Apr. 5, 2023).

> Understanding skilled nursing facilities' (SNFs') costs is crucial to understanding the factors that contribute to nursing home performance and how nursing homes deliver care to beneficiaries. The cost of services, facilities, and supplies furnished to a provider by an organization related to the provider by common ownership or control may be included in the allowable cost of the provider in an amount equal to the related organization's cost. However, such cost must not exceed the price of comparable services, facilities, and supplies that could be purchased elsewhere. Medicare requires that a reported amount be the lower of either the actual cost to the related organization or the market price for comparable services, facilities, or supplies, thereby removing any incentive to realize profits through these transactions.

Id.

352. 42 C.F.R. § 483.85(b) (2022).

reasonable due diligence by a private equity firm engaged in purchasing and owning a nursing home must include an effectiveness evaluation of the organization's compliance and ethics program.[353] The knowing failure to have such a program has been argued to evidence "reckless disregard" under the Federal False Claims Act.[354]

Besides external oversight through the OIG and under the FCA, owners of nursing homes and boards of directors of private equity firms have fiduciary duties related to oversight.[355] A fiduciary relationship between owners and operators and residents is established based on the physical and cognitive vulnerabilities of the resident and the level of trust placed by the resident and their family in the nursing home to meet the resident's care needs.[356] A claim of aiding and abetting

> (a) Definitions. For purposes of this section, the following definitions apply:
>
> *Compliance and ethics program* means, with respect to a facility, a program of the operating organization that—
>
> (1) Has been reasonably designed, implemented, and enforced so that it is likely to be effective in preventing and detecting criminal, civil, and administrative violations under the Act and in promoting quality of care; and
>
> (2) Includes, at a minimum, the required components specified in paragraph (c) of this section.
>
> *High-level personnel* means individual(s) who have substantial control over the operating organization or who have a substantial role in the making of policy within the operating organization.
>
> *Operating organization* means the individual(s) or entity that operates a facility.

Id. § 483.85(a).

353. *Id.* § 483.85(e).

354. *See, e.g.*, United States *ex rel.* Hunt v. Merck-Medco Managed Care, L.L.C., 336 F. Supp. 430, 440–41 (E.D. Pa. 2004) (arguing that the defendant satisfied the submitted false claims in "reckless disregard" under the FCA by having compliance programs that were "non-existent or insufficient").

355. *See* ARIANNE N. CALLENDER, DOUGLAS A. HASTINGS, MICHAEL C. HEMSLEY, LEWIS MORRIS & MICHAEL W. PEREGRINE, CORPORATE RESPONSIBILITY AND HEALTH CARE QUALITY: A RESOURCE FOR HEALTH CARE BOARDS OF DIRECTORS 3–4 (2007); *see also* Gail Weinstein, Warren S. de Wied & Philip Richter, Caremark *Liability for Regulatory Compliance Oversight*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 8, 2019), https://corpgov.law.harvard.edu/2019/07/08/caremark-liability-for-regulatory-compliance-oversight/ ("[T]o fulfill their duty of loyalty . . . directors must make a good faith effort to implement an oversight system and then monitor it.") (internal quotation marks omitted).

356. Schenck v. Living Ctrs.-East, Inc., 917 F. Supp. 432, 438 (E.D. La. 1996); Stetts v. Manor Care of Williamsport PA, Pa. No. 16-0983, at *24–29 (C.P. Lycoming December 30, 2021)

a breach of a fiduciary duty may be established against corporate defendants when owners know of an alleged breach of a fiduciary duty and provide substantial assistance or encouragement in effecting the breach.[357]

Additionally, a *Caremark* claim—a "claim[] that directors breached [a] fiduciary duty of loyalty by not making 'a good faith effort to oversee the company's operations'"[358]—can also be based on a director's "utter failure" to implement any reporting or information system or controls or "having implemented such a system or controls, consciously fail[ing] to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention."[359] Under an *Abbott* claim, a "sustained and systematic failure of the board to exercise oversight" based on knowledge of violations of law, and inaction to prevent or remedy the noncompliant conduct over time, can establish director liability.[360]

The extensive regulation of the nursing home industry provides owners and board members with the requisite

("[A]lthough a fiduciary relationship generally arises in a financial context, 'the relationship between a nursing homes and its residents can be fiduciary in nature,' because . . . 'the residents reside in the home, [and] the family has comparatively limited access and opportunity to learn if the resident is neglected or otherwise mistreated. [Therefore,] [i]f entrusting one's money to a receiver or conservator created a business relationship, one would hope at least in principle that entrusting a valued family member to the care of a business entity such as a nursing home would carry similar responsibilities.'") (quoting *Schenck*, 917 F. Supp. at 438).

357. *Stetts*, *supra* note 356, at 29; Synthes, Inc. v. Emerge Med., Inc., 25 F. Supp. 3d 617, 674–75 (E.D. Pa. 2014).

358. Weinstein, de Wied & Richter, *supra* note 355.

> *Caremark* established that, with respect to a board's oversight obligation, only a "sustained or systematic failure of the board to exercise oversight—such as an utter failure to attempt to assure a reasonable information and reporting system exists—will establish the lack of good faith that is a necessary condition to [personal] liability [of directors]."

Id.

359. *See id.*; *see e.g.*, City of Detroit Police & Fire Ret. Sys. v. Hamrock, C.A. No. 2021-0370-KSJM, 2022 WL2387653, at *26 (Del. Ch. June 30, 2022) (granting defendants' motion to dismiss where plaintiff failed to adequately allege *Caremark* liability); Stone v. Ritter, 911 A.2d 362, 373 (Del. 2006) (affirming dismissal of plaintiffs' derivative complaint where directors "acted in good faith in exercising their oversight responsibilities").

360. *In re* Abbott Lab'ys Derivative S'holders Litig., 325 F.3d 795, 808–09 (7th Cir. 2003).

knowledge of regulatory failures resulting from deficiencies cited by state and federal surveyors.[361] The survey process provides the exact nature of care deficiencies, including the scope and severity of these regulatory compliance failures.[362] Once deficiencies are cited, the nursing home must submit a plan of correction that must be approved by regulators in order for the facility to come back into compliance and keep federal and state funds under Medicare and Medicaid flowing to the facility.[363] For example, a deficiency issued based on a lack of staffing on the part of the nursing home, while contemporaneously a demand by ownership for census to be increased without regard to resident acuity, is evidence of the type of conduct that can impose liability on owners and board members.[364] The failure to act in a prudent fashion related to known risks associated with the understaffing of nursing homes support accountability for the consequences of resident harm.[365]

The owner and board's due diligence and ongoing legal oversight obligation must include an ongoing evaluation of the elements of the ethics and compliance program to include compliant financial and care delivery processes.[366] The

361. *See Nursing Home Enforcement*, CTRS. FOR MEDICARE & MEDICAID SERVS., https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationEnforcement/Nursing-Home-Enforcement (last visited Apr. 15, 2023).

362. *Id.*

363. *See* NURSING HOME ENFORCEMENT - FREQUENTLY ASKED QUESTIONS, *supra* note 204, at 1, 3.

364. *See* Shawna M. McDonald, Laura M. Wagner & Nicholas G. Castle, *Staffing-Related Deficiency Citations in Nursing Homes*, 25 J. AGING & SOC. POL'Y 83, 91, 95 (2013) (studying "the relationship between nursing home characteristics and deficiency citations specific to staffing" and finding "a strong association between poor quality of care and deficiency citations for staffing"); *supra* notes 355–56, 358–59 and accompanying text (explaining how with *Caremark* claims, boards of directors can be held liable for breaches of fiduciary duties related to oversight).

365. *See* McDonald et al., *supra* note 364, at 84 ("State surveyors have reported that insufficient staffing levels continue to be a major factor contributing to poor quality in nursing homes."); *supra* notes 355–56, 358–59 and accompanying text (explaining that in *Caremark* claims, boards of directors can be held liable for breaches of fiduciary duties related to oversight).

366. 42 C.F.R. § 483.85(e) (2022).

compliance mandate is defined in the Department of Justice's (DOJ) Evaluation of Corporate Compliance Programs to include "three 'fundamental questions'":

> 1. "Is the corporation's compliance program well designed?"
>
> 2. "Is the program being applied earnestly and in good faith?" In other words, is the program adequately resourced and empowered to function effectively?
>
> 3. "Does the corporation's compliance program work" in practice?[367]

The DOJ further noted that the "critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is *tacitly encouraging or pressuring employees to engage in misconduct*."[368]

The purpose of the mandated ethics and compliance program is to identify risks, including financial and care delivery-related risks, to ensure resident safety.[369] Therefore, there is a clear legal obligation of the board of directors to act in good faith to ensure that a reasonable compliance structure is in place.[370] The failure to implement an effective ethics and compliance program places the facility at risk for enforcement activities and director liability especially when knowledge of non-compliant conduct,

367. U.S. DEPARTMENT OF JUSTICE CRIMINAL DIVISION, EVALUATION OF CORPORATE COMPLIANCE 1–2 (2020) (quoting JUSTICE MANUAL 9-28.800(B), CORPORATE COMPLIANCE PROGRAMS).

368. *Id.* at 2 (emphasis added) (quoting JUSTICE MANUAL 9-28.800(B), CORPORATE COMPLIANCE PROGRAMS).

369. *See 483.85 Compliance and Ethics Program*, CTRS. FOR MEDICARE & MEDICAID SERVS., https://qsep.cms.gov/data/352/ComplianceandEthics.pdf (last visited Apr. 15, 2023).

370. *See, e.g.*, Marchand v. Barnhill, 212 A.3d 805, 820–21 (Del. 2019) ("But *Caremark* does have a bottom-line requirement that is important: the board must make a good faith effort—*i.e.*, try—to put in place a reasonable board-level system of monitoring and reporting.").

including endangering the safety of residents, is apparent.[371] These failures evidence bad faith on the part of the directors as it pertains to their fiduciary obligations and a *Caremark* claim could then be sustained.[372]

As noted previously, the H.I.G. matter proceeded on a theory of FCA causation through awareness of the supervision deficiencies and rejection of recommendations to correct those deficiencies.[373] A private equity firm, landlord, or REIT that is aware of the facility's prior regulatory compliance history and current non-compliant performance, especially when controlling capital improvements and demanding financial reports and bed occupancy data, can be shown to have sufficient knowledge and control over the operating organization to implicate FCA liability.[374] Additionally, the refusal by the landlord to approve needed capital improvements, at the expense of safety of nursing home residents, makes a compelling case for government investigation and possible prosecution.[375]

371. *See id.* (explaining that *Caremark* requires directors to "make a good faith effort to oversee the company's operations"); *supra* notes 349–54 (describing the requirement for nursing homes to have a compliance and ethics program).

372. *See, e.g.*, *Marchand*, 212 A.3d at 824 (reversing dismissal of plaintiff's *Caremark* claim where plaintiff sufficiently plead facts to show a corporate board failed to establish a "reasonable compliance system and protocols" in violation of their fiduciary duties); *see also* Meredith Kotler, Pamela Marcogliese & Marques Tracy, *Recent Delaware Court of Chancery Decision Sustains Another* Caremark *Claim at the Pleading Stage*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 25, 2020), https://corpgov.law.harvard.edu/2020/05/25/recent-delaware-court-of-chancery-decision-sustains-another-caremark-claim-at-the-pleading-stage/.

373. *See supra* Part III.A.2.b.

374. *See, e.g.*, United States *ex rel.* Martino-Fleming v. South Bay Mental Health Centers, 540 F. Supp. 3d 103, 129–30 (D. Mass. 2021) (denying defendants' motion for summary judgment where plaintiff provided sufficient evidence that defendant knew of noncompliance with health regulations and failed to remedy it despite having knowledge and control over the situation); *see also* Johnjerica Hodge, Ryan Meyer & Ny'esha Young, *Private Equity Firms Must Prepare for Growing FCA Liability*, LAW360 (Oct. 28, 2022, 3:50 PM) https://www.law360.com/articles/1543358/private-equity-firms-must-prepare-for-growing-fca-liability ("After investing, private equity firms must exercise extreme caution in their efforts to grow the business to ensure they do not violate government regulations.").

375. *See* NURSING HOME ENFORCEMENT - FREQUENTLY ASKED QUESTIONS, *supra* note 204, at 1–2 (explaining that the level of severity of a deficiency is determined by the imminency of harm

V. REGULATORY REFORM TO IMPROVE NURSING HOME QUALITY OF CARE

Regulatory enforcement is clearly important to improving the quality of care in nursing homes.[376] Mukamel et al. looked at seven measures of quality and found that, for four of these measures, a significant relationship exists "between stronger regulation and better quality."[377] Their study is evidence of the effect that regulation can have.[378]

Other tools for improving nursing home quality of care are also available. These include mandating transparency of ownership,[379] tying Medicaid reimbursement to direct care,[380] enacting mandatory staffing requirements,[381] and prohibiting private equity ownership altogether.[382] The recommendations described below offer avenues for improving quality of care by addressing issues that are common throughout health care but that are amplified under the private equity business model.[383]

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to residents and the consequences for nursing homes that fail to correct deficiencies); *see also* Barry S. Landsberg & Terri D. Keville, *Nursing Homes Face Quality-of-Care Scrutiny under the False Claims Act*, HEALTHCARE FIN. MGMT. ASS'N (Jan. 2001), https://go.gale.com/ps/i.do?id=GALE%7CA69297986&sid=googleScholar&v=2.1&it=r&linkaccess=abs&issn=07350732&p=AONE&sw=w&userGroupName=anon%7E8c8fa614 ("[L]ong-term care providers can best avoid problems by limiting the opportunities for anyone to make allegations of substandard care in their facilities.").

376. *See supra* Part IV; *see also* Dana B. Mukamel, David L. Weimer, Charlene Harrington, William D. Spector, Heather Ladd & Yue Li, *The Effect of State Regulatory Stringency on Nursing Home Quality*, 47 HEALTH SERVS. RSCH. 1791, 1807 (2012) ("This study demonstrates that quality regulation of nursing homes improves the quality of care they provide.").

377. Mukamel et al., *supra* note 376, at 1806.

378. *See id.* at 1806–09.

379. THE NAT'L ACAD. OF SCI., ENG'G, & MED., *supra* note 27, at 18.

380. *Id.* at 16.

381. *Id.* at 9.

382. *See* ATKINS, *supra* note 51, at 9 (recommending that Congress "[b]an private equity firms and similar private investment funds from purchasing nursing homes").

383. Similarly, to mitigate the negative effects of private equity investment on physician practices, a recent analysis suggests stronger antitrust oversight, more rigorous fraud and abuse enforcement, and stronger enforcement of "state laws [that] regulat[e] the corporate practice of medicine . . . ." *See* Fuse Brown & Hall, *supra* note 138 (manuscript at 2). The authors also noted the possible effects of the No Surprises Act, which limits the amount that out-of-state network providers can bill for services that are not covered by insurance. *Id.*

A. *Transparency of Ownership Structures*

Private equity strategies often involve the creation of layers of corporate entities to protect assets and avoid liability, use of related-party transactions, and undercapitalization of nursing homes based on arrangements such as sale-leasebacks.[384] To address this, CMS should promulgate amended regulations pursuant to its authority under Section 6101 of the Affordable Care Act.[385]

Specifically, CMS should require more transparent reporting of financial and ownership information with clear calculation formulas and restrictions on lease arrangements.[386] First, nursing home providers, at the time of application for a license and annually thereafter, should be required to submit to the state regulating agency (in Pennsylvania, the Department of Health) financial information from all operating entities, license holders, and related parties in which the organization has an ownership or control interest of 5% or more and that provide any service, facility, or supplies to the nursing facility.[387] Second, nursing home providers should be required to provide to the state regulating agency detailed documentation providing a visual representation of the organization's structure including all related parties in which the organization has an ownership or control interest of 5% or more and that provide any service, facility, or supplies to the nursing facility.[388] Third, nursing home providers should be required to provide to the state regulating agency an annual consolidated

384. *See supra* Sections I.B, II.B.

385. 42 U.S.C. § 1320a–3(c).

386. *See supra* Section II.B.3 (describing the complex and opaque ownership structure that private equity firms create in the nursing home field); *supra* Section II.B.1 (describing sale-leaseback transactions in the nursing home context).

387. ATKINS, *supra* note 51, at 5 (describing the difficulty in holding private equity firms accountable because of restructuring that occurs when private equity companies purchase nursing homes); *see* Braun, *supra* note 169 (explaining the need for "more stringent oversight and reporting" in ownership of private equity owned nursing homes); *supra* note 224 and accompanying text.

388. *See supra* Figure 2.

and certified audited financial cost report for the entire company, i.e., parent and all related-party companies, including management and property companies.[389] Fourth, fair market value (FMV) calculations for determining rent payments[390] and management fees[391] made by nursing home providers receiving Medicare or Medicaid funding should be submitted to state Medicaid agencies for validation.[392] These calculations should be submitted to state regulators at the time of purchase and at the time of any rent or management fee increases imposed. Finally, triple net lease operating agreements should be prohibited in the financing of nursing homes.[393]

389. *See* Charlene Harrington, Anne Montgomery, Terris King, David C. Grabowski & Michael Wasserman, *These Administrative Actions Would Improve Nursing Home Ownership and Financial Transparency in the Post COVID-19 Period*, HEALTHAFFAIRS (Feb. 11, 2021), https://www.healthaffairs.org/do/10.1377/forefront.20210208.597573/; U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-700, SKILLED NURSING FACILITIES: CMS SHOULD IMPROVE ACCESSIBILITY AND RELIABILITY OF EXPENDITURE DATA 5, 22 (2016).

390. *What Is Fair Market Rent and How Is It Calculated?*, THE MGMT. GRP. (Feb. 15, 2022), https://tmgnorthwest.com/what-is-fair-market-rent/ ("Fair market rent is the monthly amount of rent a property type is likely to receive in a particular area.").

391. Chris David, *Fair Market Value of Management Fees*, HEALTH VALUE GRP. (Feb. 18, 2021), https://healthvaluegroup.com/management-fee-fmv/ (discussing the best methods for determining the fair market value of management fees in the health care space).

392. *See* Harrington et al., supra note 389 (explaining that Medicare cost report data are not audited so funds may not be spent as allocated); *see also* JOAN W. FELDMAN & DAVID M. GLASER, HEALTH CARE COMPLIANCE ASS'N, COMPENSATION ARRANGEMENTS, ANTI-KICKBACK STATUTE, STARK, AND FAIR MARKET VALUE 6–7, https://assets.hcca-info.org/Portals/0/PDFs/Resources/Conference_Handouts/Healthcare_Enforcement/2018/W5_Feldman_Glaser_2.pdf (last visited Apr. 6, 2023) (explaining why fair market value is important in health care transactions where the providers receive payments under federally funded programs as an element of Anti-Kickback Statute safe harbors).

393. *See* Jeff Shaw, *Owners, Operators Get in Sync*, SENIOR HOUS. BUS. (Feb. 3, 2022), https://seniorshousingbusiness.com/owners-operators-get-in-sync/ (describing nursing homes as an "operations intensive business" in which the triple-net leasing model is unsuitable); Alex Zorn, *Why Private Owners/Operators May Be Riskier for Nursing Homes than REITs, Private Equity*, SKILLED NURSING NEWS (Apr. 19, 2022), https://skillednursingnews.com/2022/04/why-private-owner-operators-may-be-riskier-for-nursing-homes-than-reits-private-equity/ (attributing the risk of triple-net lease structures for nursing homes to the lack of ability to have input in the operational management of the facility).

B. *Medicaid Reimbursement Tied to Direct Care Costs*

To address the issues associated with staffing deficiencies and resident care delivery failures, Medicare and Medicaid reimbursement rates should be increased to supplement resources for addressing shortcomings in the quality of care.[394] These increases should require that a minimum percentage of reimbursement rates be used solely for direct care improvements.[395]

Several states have enacted laws that require a percentage of expenses be dedicated to direct patient care spending.[396] Pennsylvania enacted a requirement that 70% of daily Medicaid reimbursement funds go toward direct care starting in 2023. [397] From a regulatory perspective, the state should take steps to ensure the accuracy of data reported by nursing homes to enforce compliance with this requirement.

394. *See* INST. OF MED. COMM. ON IMPROVING QUALITY CARE IN LONG-TERM CARE, IMPROVING THE QUALITY OF LONG-TERM CARE 237–38 (Gooloo S. Wunderlich & Peter O. Kohler eds., 2001) (suggesting that the relationship between cost and quality is complicated, but that there is a minimum level of reimbursement below which adequate quality is close to impossible); s*ee generally* PRIVATE EQUITY AT WORK, *supra* note 34, at 60 (noting hospitals receive an average payment of ninety-seven cents for every dollar of service provided to a Medicare patient and ninety-three cents for Medicare patients).

395. *See* Andrew Olenski & Szymon Sacher, Estimating Nursing Home Quality with Selection 1 (Nov. 5, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4054786. Where the regulated Medicaid reimbursement rate is commonly cited as the primary cause of low quality care, the authors reached three conclusions about quality: (1) public report cards, which serve as the primary system of quality measurement, are subject to manipulation and therefore, do not accurately represent quality standards; (2) higher quality nursing homes fared better during the pandemic where one standard deviation increase in quality corresponded to 2.5% fewer Covid-19 cases; and (3) a 10% increase in the Medicaid reimbursement rate would raise the quality of care provided. *Id.* at 2–3.

396. *See* Susan Jaffe, *3 States Limit Nursing Home Profits in Bid to Improve Care*, KAISER HEALTH NEWS (Oct. 25, 2021), https://khn.org/news/article/3-states-limit-nursing-home-profits-in-bid-to-improve-care/.

397. 72 PA. STAT. AND CONS. STAT § 1603-T(a)(1) (West 2022). In New York, a similar requirement was enacted but has been challenged by the nursing home industry. *See* Complaint at 6, Home for the Aged of the Little Sisters of the Poor v. Bassett, No. 21-cv-01384 (N.D.N.Y. Dec. 29, 2021).

C. *Federal Mandatory Staffing Requirements*

A national minimum staffing requirement should be enacted at the federal level. The Biden Administration has tasked CMS with performing a staffing study with the intent to create one within the next year.[398] A federal requirement would be more effective than separate, and possibly inconsistent, state rules.[399] With a staffing minimum in place, nursing homes will be in a better position to ensure that individualized care can be adequately provided.[400]

D. *Federal Ban of Private Equity Firms Ownership of Nursing Homes*

The simplest and most effective measure would be to ban private equity ownership of nursing homes outright.[401] The private equity firms currently in the nursing home business would be compelled to divest within five years.[402] A more adequate payment system would likely attract corporate

398. Fact Sheet: Protecting Seniors by Improving Safety and Quality of Care in the Nation's Nursing Homes, The White House (Feb. 28, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/28/fact-sheet-protecting-seniors-and-people-with-disabilities-by-improving-safety-and-quality-of-care-in-the-nations-nursing-homes/ (recommending establishing a minimum nursing home staffing requirement to ensure quality care for residents because staffing and the quality of care nursing home residents receive are "closely linked") [hereinafter *Protecting Seniors*].

399. *See How Laws Are Made and How to Research Them*, USA.GOV, https://www.usa.gov/how-laws-are-made (Aug. 10, 2022) (asserting that federal laws apply to everyone living in the United States); *Understanding the Difference Between Federal and State Law*, MASTERCLASS, https://www.masterclass.com/articles/federal-law-vs-state-law-explained (Sept. 7, 2022) (distinguishing federal law applicability from state law).

400. *Protecting Seniors*, *supra* note 398.

401. *See* ATKINS, *supra* note 51, at 9; James M. Berklan, *Private Equity Investment 'Powder Keg' Should Be Banned in Nursing Homes, Congress Advised*, MCKNIGHTS (May 3, 2021), https://www.mcknights.com/news/private-equity-investment-powder-keg-should-be-banned-in-nursing-homes-congress-advised-2/.

402. *See* ATKINS, *supra* note 51, at 9.

owners who are more committed to quality care than private equity firms.[403]

CONCLUSION

Private equity firms have targeted health care entities for investment by promising investors significant financial returns with minimal financial risk.[404] The promised returns are based on aggressive business strategies that include cutting staffing needed to deliver care, increasing payments from payers, and imposing exorbitant rental and management fees on acquired entities.[405] Yet at their core, these high returns are funded to a significant extent by federal and state reimbursement dollars.[406] This means it is the taxpayers who are really footing the bill.[407] Moreover, the beneficiaries of this generosity are often non-compliant with billing and other regulations, which costs governments even more.[408] And if this were not enough, these transactions often result in harm to patients and nursing home residents.[409]

The reforms discussed in Part V, coupled with more aggressive enforcement against private equity-owned facilities that violate the law, could offer protection against many of these abuses.[410] As a start, more widespread public understanding of the impact of private equity on the health care delivery system would help to build support for change. A

403. Perhaps the time has come to regulate the nursing home industry using "public utility" regulation as the model. *See* Nicholas Bagley, *Medicine as a Public Calling*, 114 MICH. L. REV. 57, 60 (2015). An appropriate rate for reimbursement may propel well-intentioned providers into nursing home ownership. *See id.* at 98–101. For example, in California, multiple cases have been brought against Pacific Gas and Electric Company to remediate conduct that harmed the community. *See, e.g.*, Stipulated Final Judgment at 2–3, People v. Pac. Gas & Elec. Co. (Super. Ct. Sonoma County, 2022) (No. 270567); Complaint at 1–2, People v. Pac. Gas & Elec. Co. (Super. Ct. Sonoma County, 2021) (No. SCR-7452284) (Complaint for Civil Penalties, Injunctive Relief).

404. *See supra* Section I.C.

405. *See supra* Sections II.B.1–2, II.C.1.

406. *See supra* Section II.B.

407. *See supra* Section II.B.

408. *See supra* Part III.

409. *See supra* Section II.C.

410. *See supra* Part V.

sense of urgency is needed before private equity investment pervades more of American health care, and there is nothing left to protect.