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International Caribbean Insolvency Symposium

Finding the Cure: Assessing the Ills Affecting the Health Care Industry

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Insolvency Symposium

Finding the Cure: Assessing the Ills Affecting the Health Care Industry

Today's Speakers



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Learning Objectives

- Learn about the state of the healthcare provider sector and why it's relevant to restructuring and insolvency professionals
- Learn about the diverse array of stakeholders involved in financially distressed healthcare situations, and what factors may be important to those constituents when contemplating a bankruptcy
- Learn about certain different approaches to health care restructuring that addresses key constituencies

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But first, why this topic matters

- Annual revenue in the health care industry is over \$4.9 trillion — and health care spending is 17.6% of GDP (Source: CMS)
- 14% of U.S. adults are employed in the healthcare industry
- Healthcare administrative spending accounts for 8% of U.S. GDP, compared to 3% in other nations
- 2/3 of Americans partially blame denials for healthcare coverage and high profits at insurance companies for the murder of United Healthcare's CEO (Source: The Hill)
- Healthcare distress is at its highest level in 14 years, making up nearly 15% of distress filings as of Q3 2024 (Source: Polsinelli | TrBK Distress Indices)
- Distress creates challenges and opportunities

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State of the Industry and Key Players

State of the Industry

- Staff shortages and employee burnout
- Higher costs vs. stagnating payer rates
- Payor denials and payment delays
- Private Equity Investment is down
- Lack of investment in infrastructure
- Longer life expectancy and improved health later in life
- Improved surgical procedures
- Declining patient volumes
- Shift from small nonprofits to large health systems
- Cybersecurity threats and breaches

Private Equity (PE)

- Private equity acquisitions in healthcare have grown rapidly over the past decade, both in skilled nursing and hospital systems.
- As of January 2024, at least 460 hospitals were owned by private equity firms, comprising ~25% of for-profit hospitals in the U.S. (Lown Institute)
- Private equity's involvement in health care has been controversial and has raised concerns about the prioritization of profits over patient care.
- One CMS working paper examining 18,000 nursing home facilities over a 17-year period found that private equity ownership was associated with:
 - increased excess mortality for residents by 10%
 - increased prescription of antipsychotic drugs for residents by 50%
 - decreased hours of frontline nursing staffing by 3%
 - increased taxpayer spending per resident by 11%

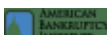
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Private Equity Cases: Steward Health Care

- Steward Health Care, a for-profit system formerly owned by Cerberus, filed chapter 11 in May 2024.
- Steward operated over 30 hospitals across Arizona, Arkansas, Florida, Louisiana, Massachusetts, Ohio, Pennsylvania, and Texas and has more than 400 physician practice locations.
- Partnered with REIT Medical Properties Trust (MPT) to structure a sale-leaseback transaction to provide liquidity.
- Steward CEO cited various healthcare market factors as reasons for chapter 11, including insufficient reimbursement by government payors, decreasing reimbursement rates, increasing labor costs, increased material and operational costs, the Covid-19 pandemic, declines in patient visits and revenue, the continued movement of inpatient services to outpatient settings (resulting in lower margins), a tightening labor market, inflationary pressures, and regulatory and political pressures.
- Challenges to the chapter 11 cases include:
 - State regulatory approval of sales
 - State and federal investigations of Steward
 - Challenges by various case constituents: state AGs, tort patients, doctor groups
 - Threat of hospital closures

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Private Equity Cases: Prospect Medical Holdings

- Prospect Medical Holdings — a Los Angeles-based network of hospitals and affiliated medical groups located in California, Connecticut, Pennsylvania, and Rhode Island.
- Filed chapter 11 petitions on January 11, 2025, to facilitate sales of the company's operations outside of California.
- Previously owned by PE firm Leonard Green & Partners.
- Entered into a sale-leaseback transaction with MPT in 2019.
- Was subject to ongoing investigations in CT and RI and recently released Senate report.
- Being sued by Yale New Haven Health for failure to disclose accurate financial in connection with sale of CT hospitals.

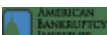
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Regulation Aimed at PE in Healthcare

- Effective January 16, 2024, a new rule promulgated by the Centers for Medicare & Medicaid Services (CMS) expanded disclosure requirements for skilled nursing facilities participating in Medicare (SNFs) and nursing facilities participating in Medicaid (Medicaid Nursing Facilities) with respect to direct and indirect ownership, oversight, managerial, and other information to increase transparency and provide families with necessary data for evaluating such facilities.
- Senate report released January 2025 finds PE compromises patient care to maximize profits.
- New Massachusetts legislation (effective January 2025) requires increased disclosures regarding hospital ownership and finances and mandates higher penalties for failure to disclose. Law also bars the MA Dept. of Public Health from granting a license to establish or maintain an acute care hospital that has leased its main campus from a REIT.

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Skilled Nursing & Assisted Living

- In the U.S., there are ~15,000 skilled nursing facilities (SNF) and ~30,000 assisted living facilities (AL)
- Loss of 15% of SNF workforce and 7% of AL workforce post-COVID
- Substantial increases in wage rates from pre-COVID, in many cases greater than 50%
- Improvements in homecare and surgeries
- Lack of technology
- Bad debt/uncollectible receivables
- Increased regulatory oversight (CMS revalidation)
- Entrance fees for CCRCs

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Health Systems & Hospitals

- There are over 6,000 hospitals in the U.S.
- Hospital margins were ~5.2% in 2023, but 40% of hospitals had negative margins. Margins are even lower for rural hospitals. (Source: KFF)
- Over 700 rural hospitals are at risk of closing (Source: Center for Healthcare Quality & Payment Reform) with common issues:
 - Low reimbursement rates
 - Staffing shortages
 - Low patient volume

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Unique Perspectives and Considerations

| Government | Patients | Lender |
|---|---|---|
| <ul style="list-style-type: none"> ▪ Cash collection & liquidity issues from recoupment/setoff ▪ Regulatory approvals in M&A transactions ▪ State to state differences ▪ Successor liability ▪ Suitability | <ul style="list-style-type: none"> ▪ The case is about care, not just money; additional parties: <ul style="list-style-type: none"> – Patient Care Ombudsman – Resident Committees – State oversight ▪ Is the highest offer the best offer? | <ul style="list-style-type: none"> ▪ Perfection issues ▪ Choice of remedies ▪ Not for profits bring different restrictions ▪ Collecting AR vs. operational requirements ▪ Public relations |

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Distressed Healthcare Alternatives

Foreclosure

Pros

- Get control of asset; become owner of asset
- Completely push borrower out

Cons

- License not transferrable — need a new CHOW
- HIPAA concerns
- Regulatory concerns
- Employment issues
- Insurance issues
- Immediate closure not an option

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Receivership

Pros

- Costs lower
- Speed
- Fewer filing requirements
- Licensing/regulatory
- Public policy/perception
- Record retention
- Automatic stay
- Sale process

Cons

- More filing requirements
- Not true automatic stay
- Less structure/clarity than bankruptcy
- Free and clear sales?
- Creditor/service provider confusion over receiver role
- May lead to bankruptcy anyway

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Chapter 11

Pros

- Opportunity for release
- Can exert control over the timeline and process — to a point

Cons

- No conversion to chapter 7 with not-for-profits
- Influence of other case constituents — court, creditors' committee, UST

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Key Issues in Court Actions

Definition of a Health Care Business

- Section 101(27A) defines a health care business as follows:

(A) means any public or private entity . . . that is primarily engaged in offering to the general public facilities and services for (i) the diagnosis or treatment of an injury, deformity, or disease; and (ii) surgical, drug treatment, psychiatric, or obstetric care; and

(B) includes – (i) any – (I) general or specialized hospital; (II) ancillary ambulatory emergency, or surgical treatment facility; (III) hospice; (IV) home health agency; . . .; and (ii) any long-term care facility, including any (I) skilled nursing facility; (II) intermediate care facility; (III) assisted living facility; (IV) home for the aged; (V) domiciliary care facility; . . . or (V), if that institution is primarily engaged in offering room, board, laundry, or personal assistance with activities of daily living and incidentals to activities of daily living.

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Key Rules for Nonprofits in Chapter 11

- **11 U.S.C. § 363(d)**: trustee may use, sell, or lease property of a not for profit “**only in accordance with nonbankruptcy law**” applicable to the transfer of property by a debtor that is such a corporation or trust.”
- **11 U.S.C. § 541(f)**: Notwithstanding any other provision of this title, property that is held by a debtor that is a corporation described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code may be transferred to an entity that is not such a corporation, **but only under the same conditions as would apply if the debtor had not filed a case under this title.**
- **11 U.S.C. § 1129(a)(16)**: All transfers of property under the plan shall be made **in accordance with any applicable provisions of non-bankruptcy law** that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust.

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Additional Bankruptcy Health Care Provisions

The Bankruptcy Code has three additional provisions relevant to a health care business:

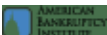
- Section 503(b)(8) allows an administrative expense claim for the actual, necessary costs and expenses of closing a health care business.
- Section 704(a)(12) requires a trustee to use all reasonable and best efforts to transfer patients from a health care business to nearby facility offering substantially similar services and reasonable quality of care.
- Section 351 requires a trustee authorizes destruction of patient records within one year of publishing notice of intent to do so under certain circumstances.

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Patient Care & Patient Care Ombudsman

- The 2005 amendments require the bankruptcy court to appoint a Patient Care Ombudsman (PCO) to represent the interests of patients, **unless there is cause not to do so**. 11 U.S.C. § 333(a).
- The PCO monitors quality of care, may interview patients and staff, and issues reports to the court. This is paid for by the debtor.
- The common trend is for debtors to file motions to avoid the appointment of a PCO or to consent to appointment of a PCO subject to scope and budget limitations or other constraints.



Receivership Operational Issues

- Funding
- Billing and collecting
- Maintaining operational continuity
- Regulatory compliance and oversight
- Reputation management
- Stakeholder management
- Infrastructure investments

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Sale Process

- Subject to regulatory approval (next slide)
- What is highest or best?
- Post-sale/pre-closing funding
- Opco v. Propco
- Operations transfer agreements and management agreements
- Provider agreements

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Regulatory Issues

- Medicare and Medicaid Provider Agreement
 - Contract subject to section 365 or license without cure requirements?
- State Approvals:
 - Suitability/CHOW process
 - Transfer of health care assets
 - Transfer of nonprofit assets
 - Medicaid Provider Agreement
 - Anti-trust
- Federal Approvals:
 - Medicare Provider Agreement
 - Other?
- What if your buyer can't close for regulatory reasons?

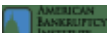
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Sale & Valuation Issues for Nonprofits

- Courts and debtors can consider charitable mission when selecting the best offer and must consider implications of state law when selling nonprofit assets. *In re Gardens Regional Hospital and Medical Center, Inc.*, 567 B.R. 820 (Bankr. C.D. Cal. 2017); *In re United Healthcare Sys., Inc.*, No. CIV. A. 97-1159 (D.N.J. Mar. 26, 1997).
- **Potential limitation:** A recent bankruptcy court decision held that conditions the state attorney general sought to impose on a sale of nonprofit assets were a form of successor liability and a property interest and a sale could be free and clear of those interests. *In re Verity Health System of Calif., Inc.*, Case No. 2:18-BK-20151-ER, 2019 WL 5585007 (Bankr. C.D. Cal. Oct. 23, 2019), vacated, No. 2:18-BK-20151-ER, 2019 WL 6519342 (Bankr. C.D. Cal. Nov. 13, 2019).

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Other Considerations

- How, if at all, does the absolute priority rule apply to a nonprofit?
- Perfection of a security interest in government receivables and proceeds in deposit accounts.
- Cash management concerns.

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Questions?

Faculty

Andrew C. Helman is a partner in the Restructuring, Insolvency and Bankruptcy practice group at Dentons Bingham Greenebaum in Portland, Maine, where he focuses his practice on bankruptcy and insolvency matters and works to restructure all types of businesses, including those in the health care sector. He has served as lead counsel to debtors, trustees, secured parties and others in chapter 11 cases, including having served as independent counsel to a state attorney general in several chapter 11 cases in New England and Delaware. Mr. Helman has particular experience as lead counsel representing rural hospitals in chapter 11 cases, and has successfully confirmed chapter 11 plans that have allowed rural hospitals to continue operating with restructured balance sheets. His practice also includes commercial and insolvency-related litigation. He successfully obtained three temporary restraining orders and a permanent injunction against the U.S. Small Business Administration due to the agency's decision to exclude debtors from participating in the federal Paycheck Protection Program. Mr. Helman frequently writes articles for national insolvency publications and teaches seminars on bankruptcy and fraudulent transfer law. In addition, he formerly co-chaired ABI's Health Care Committee and was honored in ABI's 2019 class of "40 Under 40." Mr. Helman was selected as one of 40 attorneys nationally to participate in the National Conference of Bankruptcy Judges' 2016 NextGen Program. He is ranked in *Chambers* for bankruptcy and restructuring and has been listed in the 2015-20 issues of *Super Lawyers* as a "Rising Star." Mr. Helman received his B.A. *cum laude* from the University of Massachusetts and his J.D. *summa cum laude* from the University of Maine.

Jennifer M. Meyerowitz is chief growth officer and general counsel for SAK Healthcare in Atlanta. Her experience in health care consulting, bankruptcy, restructuring, operational management and advisory services spans more than 23 years, and she has served as an attorney, consultant, investor, advisor, real estate professional and company leader. Ms. Meyerowitz is responsible for implementing SAK's growth strategy, managing operational reporting for facilities and client relations, overseeing the human resources and legal departments of SAK and providing executive-level management to the company. She regularly serves as a receiver, expert witness, board member, third-party manager and fiduciary for various health care entities, including senior living facilities, skilled nursing homes, memory care centers and hospitals. Ms. Meyerowitz previously worked with Summit Investment Management and Keen-Summit Capital Partners, buying distressed debt, selling distressed real estate and negotiating lease portfolios in bankruptcy and restructuring processes. She also served in operations, business-development, consulting and other leadership roles, including as vice president for global legal technology and services companies, with responsibility for development, legal consulting and strategic communications, compliance and logistics, and case-management functions for the company's bankruptcy and restructuring settlement services. Ms. Meyerowitz began her career as a practicing attorney at Alston & Bird LLP, where for nearly 10 years she represented debtors, secured and unsecured creditors, creditors' committees, landlords and tenants, banks and trustees in complex workouts, debt-restructurings, commercial litigation and chapter 11 bankruptcy proceedings. She is an active participant in several industry organizations, serving on their boards, speaking on panels and publishing industry articles. Ms. Meyerowitz is a former global chair of the International Women's Insolvency & Restructuring Confederation and a former chair and co-founder of its Georgia network. She currently serves on the boards of ABI and the Association of Insolvency and Restructuring Advisors, and on the global executive board of the Turnaround Management Association. She also is

involved in various other professional organizations, including having served as a former chair of the Bankruptcy Section of the Atlanta Bar Association and currently serving on various boards and committees in the industry, as well as other nonprofit organizations in her community. Ms. Meyerowitz received her B.A. from the University of Michigan and her J.D. from Emory University School of Law, where she was executive notes and comments editor for the *Emory Bankruptcy Developments Journal*.

Alissa M. Nann is Of Counsel with Foley & Lardner LLP in New York, where she focuses her practice on corporate bankruptcy and restructuring. She represents parties on all sides of bankruptcy — debtors, creditors and creditors’ committees, secured lenders, estate fiduciaries and purchasers of distressed assets — in both chapter 11 and out-of-court workouts. Ms. Nann has significant experience with bankruptcy-related litigation, both in the U.S. and internationally, including representing liquidators in chapter 15 bankruptcy cases, in cross-border litigations involving fraud and insolvency issues, and in related asset-tracing and recovery. She also counsels companies on bankruptcy alternatives such as private sales, dissolutions and structured wind-downs. Prior to joining Foley, Ms. Nann clerked for Hon. Shelley C. Chapman (ret.) in U.S. Bankruptcy Court for the Southern District of New York. She received her B.A. in 2002 with high honors and her J.D. in 2006 from Georgetown University Law Center, where she served as executive editor of the *American Criminal Law Review* and was a member of the Student Bar Association.

Paul Valentine is a senior managing director with KPC Advisory Group in Boston and specializes in the management, development and operation of high-quality, fast-growth, small-to-mid-size organizations. He brings a diverse industry background to KCP, including roles in health care services, medical devices, retail products and manufacturing. His formal education in accounting and finance is further enhanced by his corporate roles in sales, operations and product development, as well as a number of officer roles including the chief executive position. Mr. Valentine focuses his case matters on performance improvement and corporate renewal, providing his clients with strategic and marketing advice while maintaining a solid focus on financial structure and operational efficiencies. He has been a crisis management lead for the Commonwealth of Massachusetts COVID-19 Nursing Facility Command Team, a receiver of skilled-nursing, assisted-living and independent-living facilities and a financial advisor of a textile finishing company, and he has been involved in the restructuring of numerous food manufacturers, processors or distributors, restructuring and refinancing of a digital health consulting firm, refinancing and financial advisory services to a medical device company and strategic development and go-to-market strategy for a sleep therapy developer. His industry specializations are in health care services, medical devices/products, food and manufacturing. Mr. Valentine received his B.S. in accounting in 1986 from Babson College and his M.B.A. in finance and entrepreneurial studies from Babson F.W. Olin Graduate School of Business.