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Commercial

Underperforming and Nonperforming Health Care Facilities

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SAK Healthcare | Atlanta

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Dawi Consulting, LLC | St. Louis

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2024 Midwestern Bankruptcy Institute

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Introduction to the Panel

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Economics of the Healthcare Industry

- PE investment has stalled in healthcare
- Labor market disruption – prices and supply
- Underperformance of hospitals, physician services companies, senior housing, skilled nursing homes
- Medical Supplies
- Food Costs
- Lack of Technology
- Reimbursement Rates
- Life expectancy increased



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Economics of the Healthcare Industry

- Fraud in Medicare/ Medicaid
- Bad Debt / Uncollectible Receivables
- Slow Reimbursements from Medicare/Medicaid
- Cyber Breaches at Managed Care
- Infrastructure Costs to Build
- Entrance Fees for CCRCs



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Industry Trends: Headwinds

“Over the next decade, the number of people of working age (between the ages of 15-65) will decline in the US by over 3 percent.” – World Bank

Increase in REIT and Private Equity acquisition activity in both Seniors and Skilled Nursing Homes in 2024 versus 2023.



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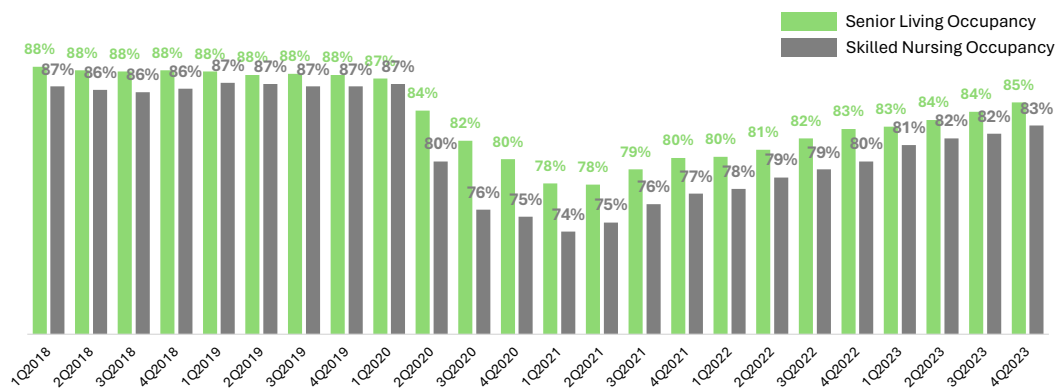
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Positive Occupancy Trends

- Both Senior Living and Skilled Nursing Home occupancy expected to fully recover to pre-pandemic levels driven by the inevitable increase in demand from an aging population.

National Average Occupancy



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Impact of Private Equity on the Healthcare Industry

- Private equity (PE) has become a major player in the US healthcare sector, investing in largely in biotechnology and pharmaceuticals, but also in hospitals, nursing homes, physician practices, and more.
- Nationally, between 2019-2023, PE deals to acquire health care service providers totaled \$46.9 billion and represented over half of all PE deals in the broad health care economy. PE firms now own approximately 8% of all private hospitals in the U.S.
- PE participation certainly has the potential for positive impacts, they also raise concerns about patient care and costs. See S. 4503 – Corporate Crimes Against Healthcare Act of 2024 (Introduced by US Senators Elizabeth Warren (D-Mass.) and Ed Markey (D-Mass.))

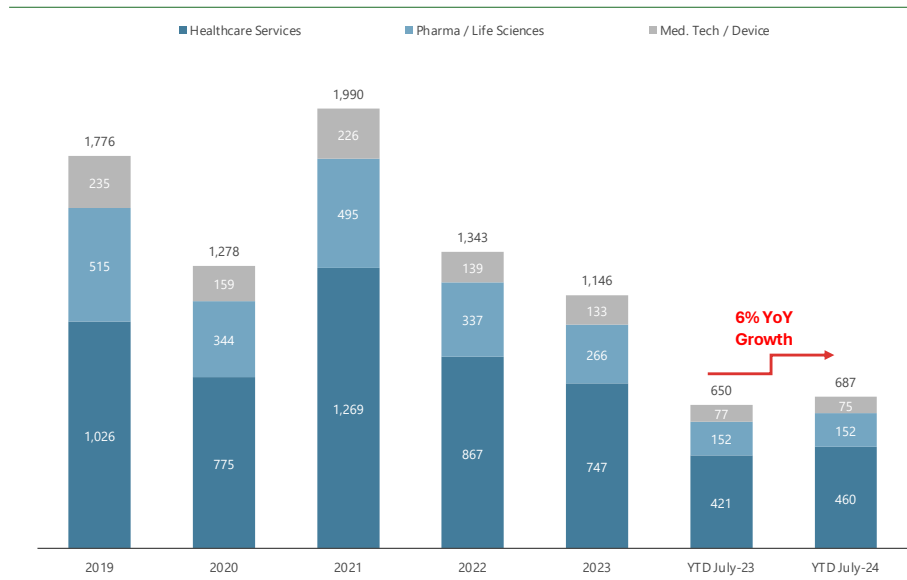
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Where is the M&A Activity in Healthcare?

Annual U.S. HC M&A Transaction Volume



Source: S&P Capital IQ. Data as of 12/31.
Note: Transaction count is based on announcement date.

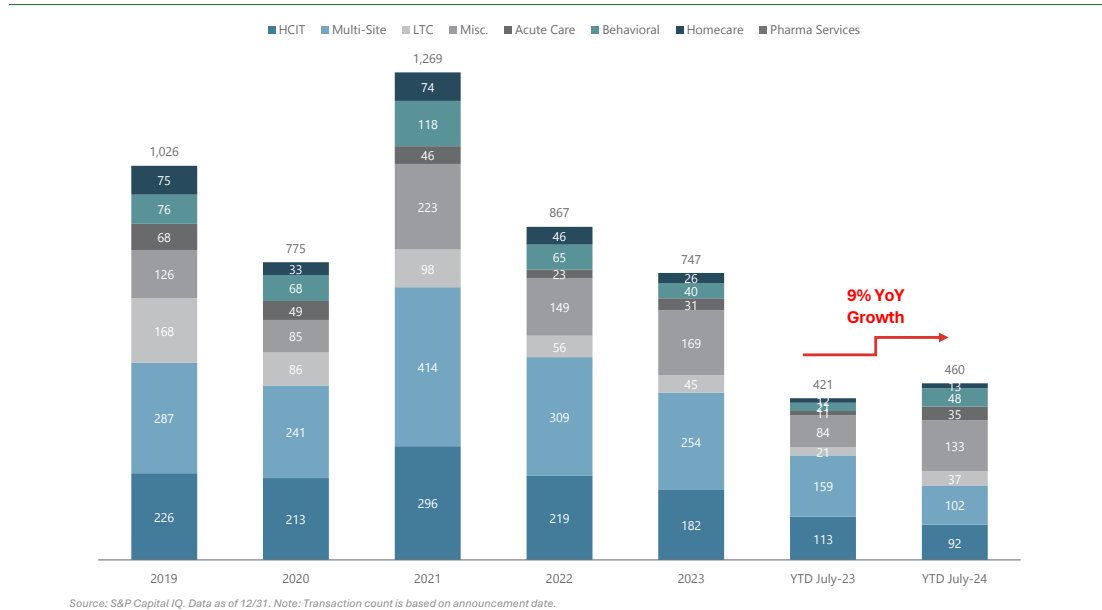
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Where is the M&A Activity in Healthcare?

Annual M&A Volume by Sub-Sector



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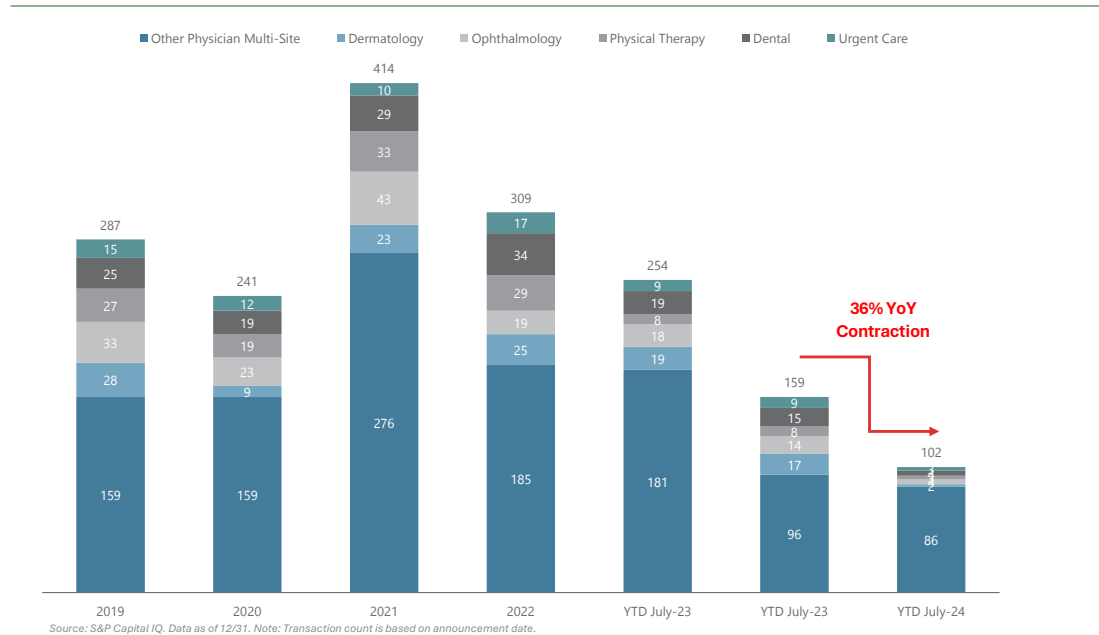


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Where is the M&A Activity in Healthcare?

Select Multi-Site M&A Volume by Size and Sub-Sector



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Sale of Healthcare Assets

- Operations Transfer Agreement
- CHOW
- Regulatory Notifications/Requirements
- Managed Care Agreements
- Insurance
- Resident Agreements for Senior Living
- Employees
- Communication Issues



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Unique Issues in Healthcare

- Patient Care Ombudsman
- Do Bankruptcy Courts have Jurisdiction to deal with Medicaid / Medicare Disputes?
- Is the Medicare provider agreement an executory contract or a statutory entitlement and why does it matter?
- HIPAA concerns
- Licensing Issues
- Fiduciary Duties – Duty of Care, Duty of Loyalty, Duty of Obedience and Duty to Creditors



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Patient Care Ombudsman

- Section 333(a) of the Bankruptcy Code provides for the appointment of a Patient Care Ombudsman (“PCO”) by the United States Trustee “to monitor the quality of patient care and to represent the interests of the patients” in any case under chapter 7, 9, or 11 in which the debtor is a “health care business. It is the duty of the Patient Care Ombudsman to:
 - (1) monitor the quality of patient care provided to patients of the debtor, to the extent necessary under the circumstances, including interviewing patients and physicians;
 - (2) issue regular reports to the Bankruptcy Court on the status of the quality of patient care.

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Does the Bankruptcy Court Have Jurisdiction?

- Some courts say “No” based on the legislative history. *In re Bayou Shores SNF*, 828 F.3d 1297 (11th Cir. 2016): “Because we are persuaded that the 1984 amendments to § 405(h) were a codification and not a substantive change, we ... hold that § 405(h) bars § 1334 jurisdiction over claims that ‘arise under [the Medicare Act].’”
- Other courts (3rd, 5th and 9th Circuits) say “Yes” and have held that the statutory bar on federal jurisdiction over unexhausted Medicare disputes does not apply to bankruptcy court jurisdiction under 28 U.S.C. §1334. *In University Medical Center*, 973 F.3d 1065 (3rd Cir. 1992); *In re Benjamin*, 932 F.3d 293 (5th Cir. 2019) (“With respect to the majority of our sister circuits, we reject the non-textual approach exemplified by the Eleventh Circuit and join the Ninth Circuit in applying the third sentence’s plain meaning—a meaning that, everyone agrees, does not bar §1334 jurisdiction.”); *Sullivan v. Town & Country Home Nursing Servs., Inc. (In re Town & Country Home Nursing Servs., Inc.)*, 963 F.2d 1146 (9th Cir. 1992).

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Provider Agreement: Executory Contract or Not?

- *PAMC, Ltd. v. Sebelius*, 747 F.3d 1214, 1221 (9th Cir. 2014) ("We have, on occasion, stated that providers and others have contracts with the government in this area, but our decisions have turned on the regulatory regime rather than on contract principles. ... [Here we hold that] '[u]pon joining the Medicare program, however, the hospitals received a statutory entitlement, not a contractual right.'"); *In re Verity Health System of California, Inc.*, 606 B.R. 843 (2019) (Comprehensive discussion holding Medicaid provider agreement a statutory entitlement rather than an executory contract.).
- *In re Vital Signs Homecare, Inc.*, 396 B.R. 232, 239 (Bankr. D. Mass. 2008) ("[M]ajority of bankruptcy courts considering the Medicare-provider relationship conclude that the Medicare provider agreement, with its attendant benefits and burdens is an executory contract.").

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Foreclosure Not Good Option

- Ownership of healthcare facility
- Lose license; have to do a CHOW; license is not transferable upon foreclosure
- HIPAA concerns
- Regulatory Concerns
- Employment Issues
- Insurance Issues
- Immediate closure not an option

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Receivership vs. Bankruptcy

- Costs
- Speed
- Fewer Filing Requirements
- Licensing / Regulatory
- Public Policy / Perception
- Record Retention
- Automatic Stay
- Sale Process



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Insurance Coverage Issues

- Insurance Issues
 - Named Insured
 - Property & Liability; D&O Coverage
 - Cancellation Notices
 - Specialty Brokers Essential
 - Tail Coverage
 - Court orders for protection



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Disposal Of Medical Records

- The Health Information Portability and Accountability Act of 1996 (“HIPAA”), 45 CFR §164.530 (j)(2), requires a covered entity to retain the documentation for 6 years from the date of its creation or the date when it last was in effect, whichever is later. Many states have similar laws.
- Section 351 of the Bankruptcy Code preempts federal and state law and allows the trustee to publish notice in appropriate newspapers, stating that patient records will be destroyed if they are not claimed by the patient or an insurance provider within 365 days of publication of the notice.



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Withholding Government Payments and the Automatic Stay

- Federal and state statutes/regulations permit CMS or various state agencies to suspend Medicare and/or Medicaid payments to providers for various reasons, including “credible allegations of fraud.”
- However, courts have held that absent evidence of ongoing fraud, these suspensions violate the automatic stay. *True Health Diagnostics LLC v. Alex M. Azar et al. (In re THG Holdings LLC)*, 604 B.R. 154, 160 (Bankr. D. Del. 2019); *Medicar Ambulance Co., Inc. v. Shalala (In re Medicar Ambulance Co., Inc.)*, 166 B.R. 918, 928 (Bankr. N.D. Cal. 1994); *Borrego Community Health Foundation v. California Department of Health Care Services (In re Borrego)*, Case No. 22-02384, Adv. No. 22-90056 (Bankr. S.D. Cal. 2022).



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Thank you!

•Questions?



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Faculty

Samuel R. Maizel is a partner at Dentons US LLP in Los Angeles and leads the firm's health care industry restructuring efforts nationwide. His practice includes bankruptcy matters as well as financial restructurings, both in and out of court. Mr. Maizel has served as lead counsel to debtors, trustees, buyers of assets, state attorneys generals and creditors' committees, and has served as a trustee, examiner, patient care ombudsman and consumer privacy ombudsman in chapter 7, 9 and 11 cases. His most recent debtor representations include Curitec, a durable medical equipment supplier that filed in Houston; Borrego Community Health Foundation, a chain of 19 federally qualified health care centers that filed in San Diego; Astria Health, a chain of nonprofit hospitals that filed in Yakima, Wash.; and Verity Health System of California, a chain of six hospitals and the second-largest nonprofit hospital bankruptcy case in U.S. history, which filed in Los Angeles. Mr. Maizel has lectured extensively, is widely published, and has been interviewed on television and radio. He is the only lawyer in the U.S. ranked in both health care and bankruptcy by *Chambers and Partners* and *The Best Lawyers in America*. A Fellow of the American College of Bankruptcy, Mr. Maizel was named a "Legal Visionary" by the *Los Angeles Times* in 2023; recognized as one of its "Top 100 Lawyers for 2022" by the *Los Angeles Business Journal*; awarded the "Outstanding Lawyer Award" for distinguished service as outside counsel to nonprofit organizations by the American Bar Association in 2022; and named by the *Daily Journal* as one of California's "Top Healthcare Lawyers" in 2021. In addition, Global M&A Network named him "Restructuring Lawyer of the Year" in 2020. In addition, he has been listed in *Super Lawyers* every year since 2007. Mr. Maizel received his B.S. in 1977 from the U.S. Military Academy at West Point, his M.A. from Georgetown University in government in 1983 and his J.D. in 1985 from George Washington University School of Law, where he won the Jacob Burns Prize for excellence in appellate advocacy and served as president of the Moot Court Board.

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*.

Andrew R. Turnbull is a managing director with Houlihan Lokey in Chicago and a senior member of the firm's Midwest Financial Restructuring Group. For more than 30 years, he has specialized in assisting companies, lenders, creditors and investors in financially distressed situations. His experience includes conducting acquisitions and divestitures of financially troubled businesses, raising various forms of capital, and negotiations relating to the restructuring of private and public securities, both in chapter 11 and in out-of-court situations. Mr. Turnbull has worked in a variety of industries during his career, although for last 10 years or so he has been focused primarily on the health care sector. He spends most of his time on health care-related mandates. Mr. Turnbull's transaction experiences include work relating to Brookdale Senior Living, Carestream Health, Nashville Senior Care, ProMedica, Promise Healthcare, Provision Healthcare, Quorum Health, Randolph Health, The Stayton at Museum Way and Verity Health System. He is also a frequent speaker on various topics, including trends in restructurings and distressed M&A, particularly relating to health care. Before joining Houlihan Lokey in 2004, Mr. Turnbull was a director at PricewaterhouseCoopers Corporate Finance LLC, where he led its Chicago restructuring practice. He is a member of ABI and the Turnaround Management Association. Mr. Turnbull received his B.S. in biology from the University of Western Ontario and an Honors Business Administration degree from the Ivey Business School at the University of Western Ontario.

Daniel R. Wiggins, CTP is CEO of Dawi Consulting in St. Louis and has more than 30 years of experience in financial and operational improvements, turnarounds, restructurings and transactions. Prior to establishing Dawi Consulting, he worked at turnaround firm MorrisAnderson & Associates for 17 years. Prior to a consulting career, Mr. Wiggins held roles in management and executive financial and operational positions at domestic and international companies with revenues ranging from \$30 million to over \$1 billion. He also has expertise in advising management teams and boards of directors in several industries, including construction, distribution, health care, manufacturing and transportation. He frequently leads negotiations with clients' key suppliers, customers, and lenders — particularly during restructuring initiatives. In addition to advisory and consulting roles, Mr. Wiggins also serves as interim CEO, CFO or CRO, in advisory roles in bankruptcy matters, and as a court-appointed receiver. He is a member of the Turnaround Management Association and ABI, and he is a Certified Treasury Professional alumnus. He received his B.A. in marketing and his M.B.A. in finance and accounting from the University of Southern Mississippi.