

# Healthcare Valuation: Industry Updates & What to Expect in 2024

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NACVA and the CTI's  
2023 Business Valuation & Financial Litigation Super Conference  
December 14-15, 2023

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## Todd A. Zigrang, MBA, MHA, FACHE, CVA, ASA, ABV

Todd A. Zigrang is the President of Health Capital Consultants (HCC), where he focuses on the areas of valuation and financial analysis for hospitals, physician practices, and other healthcare enterprises. Mr. Zigrang has over 27 years of experience providing valuation, financial, transaction and strategic advisory services nationwide in over 2,000 transactions and joint ventures involving acute care hospitals and health systems; physician practices; ambulatory surgery centers; diagnostic imaging centers; accountable care organizations, managed care organizations, and other third-party payors; dialysis centers; home health agencies; long-term care facilities; and, numerous other ancillary healthcare service businesses. Mr. Zigrang is also considered an expert in the field of healthcare compensation for physicians, executives and other professionals.

Mr. Zigrang is the co-author of the “Adviser’s Guide to Healthcare – 2nd Edition” (AICPA, 2015), numerous chapters in legal treatises and anthologies, and peer-reviewed and industry articles such as: The Guide to Valuing Physician Compensation and Healthcare Service Arrangements (BVR/AHLA); The Accountant’s Business Manual (AICPA); and, Valuing Professional Practices and Licenses (Aspen Publishers). Additionally, Mr. Zigrang has served as faculty before professional and trade associations such as the ABA; NACVA; the American Society of Appraisers (ASA); Medical Group Management Association (MGMA); Physician Hospitals of America (PHA); the Institute of Business Appraisers (IBA); the Healthcare Financial Management Association (HFMA); and, the CPA Leadership Institute.





## Jessica L. Bailey-Wheaton, Esq.

Jessica L. Bailey-Wheaton serves as Senior Vice President & General Counsel of Health Capital Consultants (HCC), where she focuses on the areas of project management and consulting services related to the impact of federal and state regulations on healthcare transactions. In that role, she provides research services necessary to support certified opinions of value related to the Fair Market Value and Commercial Reasonableness of transactions related to healthcare enterprises, assets, and services. Additionally, Ms. Bailey-Wheaton heads HCC's Certificate of Need (CON) and regulatory consulting service line.

Ms. Bailey-Wheaton is the co-author of numerous peer-reviewed and industry articles in publications such as: *The Health Lawyer* (ABA); *Physician Leadership Journal* (AAPL); *The Journal of Vascular Surgery*; *The Value Examiner* (NACVA); and *QuickRead* (NACVA). She has previously presented before NACVA, the ABA, the American Health Law Association (AHLA), and the National Society of Certified Healthcare Business Consultants (NSCHBC).

She serves on the editorial boards of NACVA's *QuickRead* and AHLA's *Journal of Health & Life Sciences Law*. Additionally, she serves as Special Topics Leader with AHLA's Hospitals & Health Systems Practice Group; Liaison for the Young Lawyers Division (YLD) Health Law Committee; and, Vice Chair for the ABA Health Law Section Membership Committee. Ms. Bailey-Wheaton is a member of the Missouri and Illinois Bars and holds a Juris Doctorate, with a concentration in Health Law, from Saint Louis University School of Law.



# Session Agenda

- Updates in the Healthcare Industry
  - End of Public Health Emergency – Implications
  - Executive Branch Actions
  - Judicial Branch Actions
  - Healthcare Subsector Updates
- Updates in Healthcare Valuation
  - Areas of Increasing Opportunity
  - Physician Compensation
  - Value-Based Care Compensation



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# COVID-19 PHE Officially Ends

- COVID-19 public health emergency (PHE) ended on May 11, 2023
- Granted the federal government temporary powers to help alleviate the effects of the pandemic, particularly in the healthcare sector
- Resulted in investments of \$4.4 million through multiple legislative packages and the enactment of over 200 regulatory waivers
- While many exceptions/waivers/flexibilities have ended, others have been extended by federal agencies



# Site-Neutral Payment Policy Changes?

- Congress actively considering several bills related to site-neutral payment
  - 17 drafts floating around Capitol Hill during this session
- Proposed legislation would lower the price that Medicare pays hospitals for common outpatient services (e.g., x-rays, general checkups) and match what it pays outpatient facilities such as physician offices and ASCs
- Currently, outpatient departments owned by hospitals (HOPDs) earn > 2x what offices/ASCs earn for providing the same services



# Increasing Competition in Healthcare

- Biden Administration has issued numerous executive orders to promote competition, particularly in the healthcare industry
- FTC & DOJ released draft update to Merger Guidelines (will likely result in stricter oversight)
- Emboldened FTC scrutiny of hospital mergers has resulted in a number of scrapped hospital deals over the past 2 years
- FTC published a policy paper and fact sheet asserting that use of Certificates of Public Advantage laws (COPAs) by states in regulating healthcare mergers can negatively impact healthcare costs, quality of care, and hospital staff wages
- FTC published a proposed rule that would ban employers from imposing non-competes on their employees



# FTC Proposal on Non-Compete Clauses

- January 5, 2023 proposed rule would ban employers from imposing non-competes on their employees (across all industries)
- Non-compete agreements: “employment provisions that ban workers at one company from going to work for, or starting, a competing business within a certain period of time after leaving a job.”
- FTC estimates that banning non-competes would increase wages up to \$300 billion per year and expand career opportunities for approximately 30 million Americans

“Noncompete Agreements” By Alexander Colvin and Heidi Shierholz, Economic Policy Institute, December 10, 2019, <https://www.epi.org/publication/noncompete-agreements/> (Accessed 1/20/23).



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# FTC Lawsuit Targets Private Equity

## ➤ Defendants:

- US Anesthesia Partners
- Welsh, Carson, Anderson & Stowe (private equity firm)

## ➤ Alleged to have:

- Entered into price-setting agreements with other practices
- Executed a roll-up scheme, acquiring, merging, and consolidating multiple smaller companies into its portfolio
- Entered into a market allocation arrangement with a competitor

## ➤ First litigated serial acquisition challenge

## ➤ Targets a minority stakeholder (private equity firm)



# Physician-Owned Hospitals

- Is the return of physician-owned hospitals (POHs) imminent?
- Over past several decades, healthcare providers and policymakers have claimed that POHs have a negative impact on the healthcare industry
- The negative outlook on POHs seems to have softened in recent years, as studies have been published challenging these claims
- A recent white paper by DOJ and FTC officials with the American Medical Association (AMA) pushes for the removal of barriers for POHs
- February 21, 2023, Senators Bill Cassidy (R-La.) and James Lankford (R-Okla.) introduced the *Patient Access to Higher Quality Health Care Act*, to rescind the ACA's ban on the creation and expansion of POHs

\*Hospital Competition and Restrictions on Physician-Owned Hospitals\* By Brian J. Miller, Jesse Ehrenfeld, Michael Smith, and Matthew Mandelberg, American Enterprise Institute, February 14, 2023, <https://www.aei.org/research-products/report/hospital-competition-and-restrictions-on-physician-owned-hospitals/> (Accessed 3/22/23).



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# Health System Mergers

- Kaiser Permanente's \$5 billion “mega deal” to acquire Pennsylvania health system Geisinger Health
  - Acquisition will result in a healthcare “behemoth”: annual revenue > \$100 billion, nearly 50 hospitals, > 25,000 physicians
- BJC HealthCare + St. Luke's intention to form an integrated academic health system by end of 2023
  - Acquisition will result in a \$10 billion, 28-hospital system
- A new strategy among hospitals and health systems to avoid antitrust scrutiny?



# Payment System Updates

- 2024 Inpatient Prospective Payment System (IPPS)
  - Payments increased 3.1% for FY 2024
  - Will increase hospital payments by \$2.2 billion.
- 2024 Medicare Physician Fee Schedule (MPFS)
  - Payments will decrease 3.4% for 2024 (conversion factor: \$32.74)
  - Final Rule includes changes to the MSSP
  - Extends COVID PHE telehealth flexibilities until end of 2024
- 2024 Outpatient Prospective Payment System (OPPS)
  - Payments will increase 3.1% for 2024
  - Final rule includes increased price transparency enforcement



# Agency-Developed Payment Models

## ➤ ACO REACH

- Launched January 2023 (will run through 2026)
- 132 ACOs comprised of 132,000 providers treating 2.1 million beneficiaries
- Updated version of discontinued Global & Professional Direct Contracting Model
- ACO participants receive up-front payments to help manage care (ACOs receive more money for treating higher-risk patients)
- 2 forms of risk sharing:
  - Professional – Capitated payments for primary care + risk sharing (50% shared savings/losses)
  - Global – Capitated payments for primary care specialty care + risk sharing (100% shared savings/losses)
- Includes new health equity measures



# Agency-Developed Payment Models

## ➤ Making Care Primary (MCP) Model

- Will launch July 2024 (will run through 2034)
- Voluntary pilot program limited to providers in Colorado, Massachusetts, Minnesota, New Jersey, New York, North Carolina, & Washington
- 3 Participation Tracks:
  - **Track 1:** Intended for participants who require support to incorporate value-based care into their organization (Reimbursement = FFS)
  - **Track 2:** Participants expected to partner with medical specialists and social service organizations to institute care management programs and screen patients for behavioral health conditions (Reimbursement = 50% FFS/50% prospective)
  - **Track 3:** Participants expected to expand upon above tracks by using quality improvement frameworks to optimize/improve workflows, improve care integration, and develop social services and specialty care partnerships (Reimbursement = 100% prospective)



# Agency-Developed Payment Models

## ➤ States Advancing All-Payer Health Equity Approaches and Development (AHEAD) Model

- Will run from 2024 through 2034 (Model performance years start either January 2026 or 2027)
- Voluntary pilot program for states (which may be awarded up to \$12 million)
- 3 Cohorts:
  - **Cohort 1:** For states that can implement the AHEAD Model as soon as possible. Performance year will begin in January 2026, with 9 total years of performance.
  - **Cohort 2:** For states that are ready to apply, but need more time to prepare for the model implementation. Performance year will begin in January 2027, with 8 total years of performance.
  - **Cohort 3:** For states that need more time to apply. Performance year would also begin January 2027, with 8 total years of performance.



# Recent OIG Advisory Opinions

- Advisory Opinion 22-20 allows nurse practitioner (NP) support in certain hospital departments, subject to several safeguards, as it presents a low risk for fraud or abuse
- AO Requestor = acute care hospital that provides inpatient and outpatient hospital-based services
  - Set forth proposed plan to provide NPs to assist in rendering certain care to patients of Participating Physicians, which patients are admitted or in observation status in two designated medical units
- OIG found arrangement implicates AKS but is low risk, because it is restricted to 2 non-surgical, non-specialty units, all NP duties are done in collaboration with physicians, unlikely to increase Medicare costs

"Re: OIG Advisory Opinion No. 22-20" By Robert K. DeConti, Assistant Inspector General for Legal Affairs, Letter to [Redacted Name], December 14, 2022, [https://oig.hhs.gov/documents/advisory-opinions/1062/AO-22-20\\_Ot53Mmd.pdf](https://oig.hhs.gov/documents/advisory-opinions/1062/AO-22-20_Ot53Mmd.pdf) (Accessed 1/12/23)



# Recent OIG Advisory Opinions

- Advisory Opinion 23-06 rejected a proposed purchase of the technical component of certain laboratories' anatomic pathology services
- AO Requestor = Operator of anatomic pathology labs across U.S.
  - Set forth proposed plan to purchase the technical component of anatomic pathology from the laboratory
  - Requestor would perform the professional component and bill commercial insurance providers for both components. Requestor would then pay laboratory a per-specimen, FMV fee for the technical component
- OIG found arrangement implicates AKS because it may generate remuneration
  - Acknowledged AKS safe harbor for personal services and management contracts may apply but requirements weren't met because the Requestor couldn't certify that aggregate services wouldn't exceed what was reasonably necessary

"Re: OIG Advisory Opinion No. 23-06 (Unfavorable)" Office of Inspector General, Department of Health and Human Services, September 25, 2023, <https://oig.hhs.gov/documents/advisory-opinions/1131/AO-23-06.pdf> (Accessed 10/13/23).



# Recent OIG Advisory Opinions

- Advisory Opinion 23-07
- AO Requestor = Multispecialty physician practice with 2 ASCs
  - Set forth proposed plan to pay each physician-employee a bonus equal to 30% of the net profits from facility fees at ASCs attributable to the procedures rendered by that employee. The bonuses would be added to the employee's base compensation.
- OIG found arrangement would not generate any remuneration that was prohibited because the arrangement met the requirements and was protected by a regulatory safe harbor for bona fide employees

"Re: OIG Advisory Opinion No. 23-07 (Favorable)" Office of Inspector General, Department of Health and Human Services, October 13, 2023, <https://oig.hhs.gov/documents/advisory-opinions/1132/AO-23-07.pdf> (Accessed 10/27/23).



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# Executive Order on AI

- Signed October 30, 2023
- Establishes new standards for AI, particularly as regards privacy, security, and safety
- Healthcare-specific provisions:
  - HHS must develop an AI task force within 90 days (responsible for developing frameworks and policies on the responsible use and deployment of AI and AI-enabled technology)
  - Task force has 1 year to develop guidance for quality and safety monitoring of AI-enabled technology and incorporation of equity in new AI models
  - HHS must establish a safety program that can receive reports and can remedy unsafe practices in healthcare settings that involve use of AI



# Supreme Court's Decision in FCA Case

- *Schutte v. SuperValu* and *Proctor v. Safeway* (7<sup>th</sup> Circuit)
- Legal Question: “If respondents’ claims were false and they actually thought that their claims were false—because they believed that their reported prices were not actually their “usual and customary” prices—then would they have ‘knowingly’ submitted a false claim within the FCA’s meaning?”
- Unanimous Opinion: The focus should be on what the defendant thought *at the time* of submission for a false claim
- Decision will likely limit ability of FCA defendants to pursue motions to dismiss based on the argument of objective reasonability

“United States et al. ex rel. Schutte et al. v. Supervalu Inc. et al.” Slip Opinion, 598 U. S. \_\_\_\_, 2-3 (2023), available at: [https://www.supremecourt.gov/opinions/22pdf/21-1326\\_6jfl.pdf](https://www.supremecourt.gov/opinions/22pdf/21-1326_6jfl.pdf) (Accessed 6/6/23).



# Healthcare Sub-Sector Updates

- Hospitals
- Physician Practices
- Ambulatory Surgery Centers
- Diagnostic Imaging Centers
- Dialysis Centers
- Post-Acute Care
- Urgent Care
- Laboratories
- Oncology
- Behavioral Health



# Impact from Private Equity Investment

- PE firms announced or closed an estimated 863 deals in 2022, making last year the second-highest on record for activity in the sector, after 2021
- PE firms have pumped more than \$750 billion into U.S. healthcare during the past 10 years
- Attractive healthcare sectors for Private Equity
- Private Equity Transactions differ from other Healthcare Transactions



# Healthcare Valuation: Areas of Opportunity

- Healthcare Data
- Health Tech
- Remote Patient Monitoring (RPM)
- Remote Therapeutic Monitoring (RTM)
- Management Services Arrangements



# Updates in Physician Compensation

- Shifting RVU Weights
- Use of Advanced Practice Providers (APPs)
- Changes in Shared/Split Visits
- Impacts of Staffing Issues



# Value-Based Care (VBC)

- VBC Entities
- Value-based compensation models and metrics
- Payment to providers for not performing services



# *Thank You!*



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