

**CORPORATE CAREGIVING: THE CASE FOR A NEW
CORPORATE STRUCTURE IN NEW JERSEY NURSING HOMES
AND WHY DELAWARE'S PUBLIC BENEFIT CORPORATION
MODEL FALLS SHORT**

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ABSTRACT

Given the significant amount of New Jersey government spending on nursing home services and the critical role nursing homes play in society, it is necessary that the interests of certain non-shareholder stakeholders, namely nursing home residents and payors, are given due consideration in nursing home corporate decision-making. Delaware's Public Benefit Corporation Model is one available option to instill non-shareholder interests into corporate decision-making and to balance them against those of shareholders. While the model holds promise for some health care entities, it falls short as a sure means to instill non-shareholder interests in to nursing home corporate decision making. This is so because the model ultimately does not change the incentives underlying shareholder primacy. Thus, a modified public benefit corporation model that demands more accountability of directors and executives to non-shareholder stakeholders is required.

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INTRODUCTION

There are over 350 nursing homes in New Jersey,¹ serving roughly 46,000 residents on average daily, or approximately 0.5% of the State's population.² Nearly 75% of these homes are run by for-profit entities.³ New Jersey regulations require that at least 45% of a licensed nursing

1. *Long-Term Care Resources: Nursing Home Facility Data*, N.J. DEPT OF HEALTH, <https://www.nj.gov/health/ltc/nursing-homes/> [<https://perma.cc/VN9X-7PM9>] (last visited June 19, 2026).

2. See *2020 Census Data*, N.J. DEPT OF LAB. & WORKFORCE DEV., <https://www.nj.gov/labor/labormarketinformation/demographics/us-census-data/2020census.shtml> [<https://perma.cc/7ADL-B3KD>] (last visited June 19, 2026) (noting New Jersey's population of 9,288,994 as of the last census on April 1, 2020); MANATT, RECOMMENDATIONS TO STRENGTHEN THE RESILIENCE OF NEW JERSEY'S NURSING HOMES IN THE WAKE OF COVID-19 10 (2020), <https://www.nj.gov/health/mgmt/documents/A%20Manatt%20Report.pdf> [<https://perma.cc/5TVH-2F4G>] (noting an average daily nursing home census of 45,847 residents in 2018).

3. MANATT, *supra* note 2, at 16.

home bed complement be occupied by patients eligible for Medicaid,⁴ the State's public health insurance program for low-income individuals.⁵ As of February 2024, the average monthly number of Medicaid beneficiaries in nursing homes was 24,000, and the average cost to the State per Medicaid beneficiary per month was \$7,280.05, or an annualized State expenditure of just under \$2.1 billion—roughly 3.6% of Governor Murphy's FY25 proposed state budget of \$56 billion.⁶

Given the substantial amount of government—i.e., taxpayer—money going to these for-profit entities and the essential role they play in society to house and care for elderly residents, there is a clear public interest in ensuring they provide high-quality care. And while that interest, to some degree, is addressed through external regulation,⁷ it will at times conflict with the interests of corporate decision-makers behind many of the for-profit nursing homes, who, by design, answer first to shareholders.⁸ To address this conflict between public and shareholder interests, this Note will analyze the effectiveness of Delaware's Public Benefit Corporation (PBC) model in instilling public-interest considerations into corporate decision-making at private for-profit New Jersey nursing homes and argue that a modified PBC model is necessary.

First, the Note will discuss the unique characteristics of the New Jersey nursing home industry and why the infusion of public and other non-shareholder interests—e.g., residents, payors, etc.—into corporate decision-making is desirable from a public policy perspective. Then, it will examine Delaware's Public Benefit Corporation law as originally adopted and since amended, and the circumstances that led to its establishment. Next, it will consider the case for and the proliferation of

4. N.J. ADMIN. CODE § 8:33H-1.15 (2025).

5. *NJ FamilyCare/Medicaid*, N.J. DEP'T OF HUM. SERVS. DIV. OF MED. ASSISTANCE & HEALTH SERVS., <https://www.nj.gov/humanservices/dmahs/individuals-families/familycare/> [<https://perma.cc/L5Z2-QBVR>] (last visited June 19, 2026). Most of New Jersey's Medicaid-eligible nursing home residents are enrolled in Managed Long Term Services and Supports (MLTSS), New Jersey's Medicaid managed care program for the delivery of long-term care services. *Medicaid Managed Long Term Services and Supports (MLTSS)*, N.J. DEP'T OF HUM. SERVS. DIV. OF MED. ASSISTANCE & HEALTH SERVS., <https://www.nj.gov/humanservices/dmahs/individuals-families/familycare/mltss/> [<https://perma.cc/3S3Q-E6GZ>] (last visited June 19, 2026); see MANATT, *supra* note 2, at 10 ("As of February 2020, about 20,500 Medicaid beneficiaries residing in nursing homes were enrolled in managed long term services and supports (MLTSS) and 6,500 were in fee-for-service.").

6. STATE OF N.J., THE GOVERNOR'S FY 2025 BUDGET D-204, B-3 (2024) [hereinafter N.J. GOVERNOR'S FY 2025 BUDGET], <https://www.nj.gov/treasury/omb/publications/25budget/pdf/FY2025-Budget-Detail-Full.pdf> [<https://perma.cc/G2RE-M6NC>].

7. See *infra* Section I.a. discussing state and federal regulation of nursing homes.

8. See *infra* Section I.b. discussing shareholder primacy theory.

public benefit corporations in the health care industry. Finally, it will identify the PBC model's shortcomings and argue that a modified PBC is needed to instill public interests into corporate decision-making.

I. NEW JERSEY NURSING HOMES AND THE INHERENT CONFLICT BETWEEN GOOD CARE AND CORPORATE PROFIT

A. Nursing Home Regulatory Framework

Nursing homes are highly regulated entities, subject to oversight both at the state and federal levels. In New Jersey, the Department of Health is responsible for licensing and inspecting nursing homes,⁹ and the Department of Human Services, which operates the State's Medicaid program, functions as the government payor for nursing home services on behalf of Medicaid beneficiaries.¹⁰ At the federal level, the Centers for Medicare & Medicaid Services (CMS) within the Department of Health and Human Services is responsible for certifying nursing homes to make them eligible for Medicaid reimbursement.¹¹

Since 2014, there has been a push at the state and federal levels to curb the use of institutionalized care for older adults and expand the use of "home and community based services."¹² Ten years into this shift, as

9. See *Health Facilities*, N.J. DEP'T OF HEALTH, <https://www.nj.gov/health/healthfacilities/about-us/facility-types/index.shtml> [https://perma.cc/6TU4-KT8K] (last visited June 19, 2026); N.J. ADMIN. CODE § 8:39 (2025).

10. See *Contract Between State of New Jersey Department of Human Services Division of Medical Assistance and Health Services and _____, Contractor, Article Nine: Managed Long Term Services and Supports*, N.J. DEP'T OF HUM. SERVS. (Jan. 2026), <https://nj.gov/humanservices/dmahs/documents/providers-stakeholders/hmo-contract.pdf> [https://perma.cc/JDD4-D2FB] (current contract between the Division of Medical Assistance and Health Services and the managed care organizations responsible for administering New Jersey's Medicaid program which includes the MLTSS program for nursing home services); DEP'T OF THE TREASURY OFF. OF MGMT. & BUDGET, STATE OF NEW JERSEY APPROPRIATIONS HANDBOOK FISCAL YEAR 2024-2025 B-129-30 (2025), <https://www.nj.gov/treasury/omb/publications/25approp/AppropriationsHandbookFull.pdf> [https://perma.cc/93AF-NP5A] (outlining the minimum Medicaid per diem rate paid to nursing homes).

11. See *Nursing Homes*, CMS.GOV (May 27, 2026, at 08:25 ET), <https://www.cms.gov/medicare/health-safety-standards/quality-safety-oversight-general-information/nursing-homes> [https://perma.cc/JY7M-UQCC] ("Skilled nursing facilities (SNFs) and nursing facilities (NFs) are required to be in compliance with the requirements in 42 CFR Part 483, Subpart B, to receive payment under the Medicare or Medicaid programs.").

12. See Andrew Kitchenman, *New Era Begins for Long-Term Care in NJ as Healthcare Model Shifts*, NJ SPOTLIGHT NEWS (July 1, 2014), <https://www.njspotlightnews.org/2014/07/14-06-30-more-nj-residents-now-have-access-to-long-term-care-as-healthcare-model-shifts/> [https://perma.cc/655C-2LWE]; *Home and Community Based Services*, CMS.GOV (Jan. 10, 2014), <https://www.cms.gov/newsroom/fact->

the population ages¹³ and more residents receive home and community-based care,¹⁴ the census of New Jersey nursing homes, at least among Medicaid residents, has decreased.¹⁵ However, nursing homes today are required to provide more clinical care rather than just custodial care.¹⁶

Recognizing this change in the level of care needed and the enhanced vulnerability of the nursing home population,¹⁷ New Jersey and CMS have implemented several new laws and rules to improve infection control and resident care.¹⁸ Such reforms include mandating staff ratios,¹⁹ implementing quality-based incentive payments,²⁰ requiring the

sheets/home-and-community-based-services [https://perma.cc/8XD2-92BE]. In 2014, the Centers for Medicare & Medicaid Services (CMS) released a final “home and community-based (HCB) settings rule . . . to ensure that states receiving federal Medicaid funds meet the needs of individuals who choose to receive their long-term services and supports in their home or community, rather than in institutional settings.” *Home and Community-Based Services Settings Rule*, N.J. DEP’T OF HUM. SERVS.: DIV. OF MED. ASSISTANCE & HEALTH SERVS., <https://www.nj.gov/humanservices/dmahs/providers-stakeholders/overview/hcbs.shtml> [https://perma.cc/HA2V-CPT3] (last visited June 19, 2026).

13. See *Our Changing Population: New Jersey*, USAFACTS, <https://usafacts.org/data/topics/people-society/population-and-demographics/our-changing-population/state/new-jersey/> [https://perma.cc/DP88-WVQ6] (last visited Feb. 23, 2025) (“[T]he 65+ group was the fastest growing between 2010 and 2022 with its population increasing 35.4%.”).

14. Compare STATE OF N.J., THE GOVERNOR’S FY 2018 BUDGET D-181 (2017), <https://www.nj.gov/treasury/omb/publications/18budget/pdf/FY18BudgetBook.pdf> [https://perma.cc/X38R-HWPJ] (showing 11,917 average monthly clients of community-based long term care services in FY 2015), with N.J. GOVERNOR’S FY 2025 BUDGET, *supra* note 6, at D-204 (showing 48,290 average monthly clients of community-based long term care services in the estimated FY 2025).

15. Compare STATE OF N.J., THE GOVERNOR’S FY 2018 BUDGET D-181 (2017), <https://www.nj.gov/treasury/omb/publications/18budget/pdf/FY18BudgetBook.pdf> [https://perma.cc/X38R-HWPJ] (showing 28,494 average monthly residents of nursing home services in FY 2015), with N.J. GOVERNOR’S FY 2025 BUDGET, *supra* note 6, at D-204 (showing 24,605 average monthly residents of nursing home services in the estimated FY 2025).

16. See Brett Johnson, *Silver Tsunami: How Health Care Association of N.J. is Leading Conversation – and Actions – Around Long-Term Care Services*, ROI-NJ.COM (Oct. 27, 2024), <https://www.roi-nj.com/2024/10/27/healthcare/silver-tsunami-how-health-care-association-of-n-j-is-leading-conversation-and-actions-around-long-term-care-services/> [https://perma.cc/AK6B-R966].

17. This was made painfully clear during the COVID-19 pandemic. See MANATT, *supra* note 2, at 19.

18. See *infra* notes 19–23 and accompanying text.

19. N.J. STAT. ANN. § 30:13-18 (West 2021); Medicare and Medicaid Programs; Minimum Staffing Standards for Long-Term Care Facilities and Medicaid Institutional Payment Transparency Reporting, 89 Fed. Reg. 40876-01 (May 10, 2024) (to be codified at 42 C.F.R. pts. 438, 442, 483).

20. E.g., N.J. GOVERNOR’S FY 2025 BUDGET, *supra* note 6, at D-213–14 (describing the Medicaid performance add-on payments available to nursing homes that meet certain

employment of infection preventionists,²¹ mandating a higher minimum wage for certified nurse aides,²² and establishing “direct care” ratios requiring 90% of Medicaid funding to nursing homes be used for “direct care” to residents.²³

These measures have been met with resistance from the industry, which claims it lacks the resources to comply.²⁴ In response, the State has enacted several Medicaid rate increases since 2020.²⁵ But amidst

quality metrics); *Nursing Home Quality*, N.J. DEP’T OF HUM. SERVS.: DIV. OF MED. ASSISTANCE & HEALTH SERVS., <https://www.nj.gov/humanservices/doas/resources/nursing/> [<https://perma.cc/6BN2-AGXN>] (last visited June 19, 2026) (describing New Jersey’s Quality Incentive Payment Program for nursing homes).

21. N.J. STAT. ANN. § 26:2H-12.87(f) (West 2021).

22. N.J. STAT. ANN. § 34:11-56a4(i) (West 2024) (providing that “the minimum wage for long-term care facility direct care staff members shall be in an amount that is \$3 higher than the prevailing minimum wage”). Most of the direct care in nursing homes is provided by certified nurse aides (CNAs), licensed practical nurses (LPNs), and registered nurses (RNs), with CNAs providing the bulk of the staff hours. *See Staffing for Nursing Homes*, MEDICARE.GOV, <https://www.medicare.gov/care-compare/resources/nursing-home/staffing> [<https://perma.cc/TN9W-7GNT>] (last visited June 19, 2026).

23. N.J. STAT. ANN. § 30:4D-7cc(c) (West 2020).

24. *See, e.g.*, Jessica R. Towhey, *Ordered to do ‘The Impossible,’ Nursing Homes Sue Over State’s ‘Unconstitutional’ Staffing Mandate*, MCKNIGHTS LONG-TERM CARE NEWS (Sep. 8, 2024), <https://www.mcknights.com/news/ordered-to-do-the-impossible-nursing-homes-sue-over-states-unconstitutional-staffing-mandate/> [<https://perma.cc/F2EG-P7PY>].

25. *See, e.g.*, DEP’T OF THE TREASURY OFF. OF MGMT. & BUDGET, THE STATE OF NEW JERSEY APPROPRIATIONS HANDBOOK FISCAL YEAR 2019–2020 B-106, www.nj.gov/treasury/omb/publications/20approp/FullAppropAct.pdf [<https://perma.cc/XXF4-XA25>] (“[E]ach nursing facility shall receive a per diem adjustment that shall be calculated based upon an additional [\$15 million] in State and [\$15 million] in federal appropriations . . .”); DEP’T OF THE TREASURY OFF. OF MGMT. & BUDGET, THE STATE OF NEW JERSEY APPROPRIATIONS HANDBOOK FISCAL YEAR 2020–2021 B-108, www.nj.gov/treasury/omb/publications/21approp/FY21FullAppropAct.pdf [<https://perma.cc/PT8A-QVSE>] (“[E]ffective October 1, 2020 through June 30, 2021, the reimbursement rate for . . . nursing facilities shall be equal to the rate received on September 30, 2020, plus a 10 percent adjustment.”); DEP’T OF THE TREASURY OFF. OF MGMT. & BUDGET, THE STATE OF NEW JERSEY APPROPRIATIONS HANDBOOK FISCAL YEAR 2023–2024 B-125, www.nj.gov/treasury/omb/publications/24approp/AppropriationsHandbookFull.pdf [<https://perma.cc/C7GW-SNMP>] (“[E]ach nursing facility shall receive a per diem adjustment that shall be calculated based upon an additional [\$60 million] in State and [\$60 million] in federal appropriations.”).

continued reports of poor care,²⁶ sudden closures,²⁷ and noncompliance,²⁸ advocates and policy makers have called for greater transparency of nursing home ownership and financials to better ascertain the financial health of the corporate entities behind the brick and mortar nursing homes to determine if the problem is indeed low Medicaid rates or corporations prioritizing the interests of shareholders, namely profit, over the interests of residents.²⁹

B. Corporate Structure and Conflicts of Interest

To the extent that three-quarters of New Jersey's nursing homes operating as for-profit entities³⁰ are organized as corporations under the laws of Delaware,³¹ the basic agency structure of "directors and managers act[ing] on behalf of the shareholders" applies,³² as does the theory of "shareholder primacy."³³ Shareholder primacy is the view that directors and officers of a corporation "exercise their discretion solely for the benefit of shareholders."³⁴ In the nursing home context, this means that when the interests of shareholders do not align with those of nursing

26. E.g., Ted Sherman & Susan K. Livio, *N.J. Continues Crackdown on Nursing Homes, 2 More Cited for Poor Care and 'Massive Fraud,'* NJ.COM (Jan. 26, 2024, at 15:16 ET), <https://www.nj.com/news/2024/01/nj-continues-crackdown-on-nursing-homes-2-more-cited-for-poor-care-and-massive-fraud.html> [<https://perma.cc/2UTR-Y66V>].

27. E.g., Krystal Knapp, *Princeton Care Center Nursing Home Closes Abruptly, Leaving Families Scrambling to Move Loved Ones*, PLANET PRINCETON (Sep. 2, 2023), <https://planetprinceton.com/2023/09/02/princeton-care-center-long-term-care-facility-closes-abruptly/> [<https://perma.cc/V3XZ-D62Q>].

28. E.g., Lilo H. Stainton, *Nursing Home Operators in Conflict with State Over Short-Staffing Sanctions*, NJ SPOTLIGHT NEWS (Sep. 18, 2024), <https://www.njspotlightnews.org/2024/09/nj-fines-nursing-homes-violating-short-staffing-requirements-nursing-home-operators-sue/> [<https://perma.cc/BNR9-ZJ7Y>] ("In the past six weeks New Jersey officials have cited at least 10 nursing homes for multiple short-staffing violations, assessing a total of at least \$425,000 in fines.").

29. See Brenda Flanagan, *Advocates Urge More Oversight of NJ Nursing Homes and Their Public Funding*, NJ SPOTLIGHT NEWS (Dec. 13, 2024), <https://www.njspotlightnews.org/video/advocates-urge-more-oversight-of-nj-nursing-homes-public-funding-of-them/> [<https://perma.cc/D5JR-QRH2>]; N.J. TASK FORCE ON LONG-TERM CARE QUALITY & SAFETY, FINAL REPORT 41–43 (2024), <https://www.nj.gov/health/ltc/documents/nj-task-force-ltc-quality-and-safety-report.pdf> [<https://perma.cc/B6ZB-9VY4>].

30. See MANATT, *supra* note 2, at 16.

31. This note focuses on Delaware's corporate law as "[t]he majority of large U.S. corporations are incorporated in . . . Delaware [and] . . . Delaware's corporate law is the de facto corporate law of the United States." SPAMANN ET AL., CORPORATIONS IN 100 PAGES 4–5 (3d ed. 2022).

32. *Id.* at 17 (describing that shareholders contribute money to the company and "entrust their money to the directors and managers who run the company").

33. *Id.* at 107 ("Delaware case law endorses shareholder primacy.").

34. *Id.* at 106.

home residents, payors, or regulators, shareholders' interests will likely be prioritized. Such conflict can lead nursing homes to engage in practices that maximize shareholder interests at the expense of these other interested stakeholders.

1. Related-Party Transactions

One practice used to maximize shareholder interests at the expense of other stakeholders, namely payors and residents, is the use (or rather misuse) of "related-party" transactions, or transactions between "entities that share common ownership with the provider[s]."³⁵ A recent study in the National Bureau of Economic Research highlighted the nursing home industry's use of related parties and how "tunneling"—inflating payments to commonly owned entities for the provision of goods and services, namely real estate and management services—is used to hide profits and shield assets.³⁶ The findings "suggest that in 2019, 68% of the [nursing home] industry's profits were hidden through markups on related-party transactions."³⁷ For comparison, the authors quantified how much direct care staffing could be purchased had the hidden profits been reinvested into the homes, noting it would support an average 35.7% increase in registered nurse (RN) hours per resident-day across *all* facilities.³⁸

Not only does "hiding profits" via related party transactions bolster the industry's argument that it does not have the resources to comply with regulatory mandates and thus justify higher Medicaid reimbursements, but it also removes assets from the licensed nursing home, limiting recourse for aggrieved stakeholders, whether they are residents, the payor of services—here, Medicaid, and by extension, NJ taxpayers—or employees.³⁹

Notably, the New Jersey Office of the State Comptroller (OSC) recently released an investigation exposing this exact practice at one of New Jersey's lowest-performing nursing homes, South Jersey Extended

35. Ashvin Gandhi & Andrew Olenski, *Tunneling and Hidden Profits in Health Care* 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 32258, 2025), https://www.nber.org/system/files/working_papers/w32258/w32258.pdf [<https://perma.cc/2927-SCU4>].

36. *Id.* ("['T]unneling,' a term that describes the 'transfer of assets and profits out of firms for the benefit of those who control them . . . as in removing assets through an underground tunnel.'" (citing Simon Johnson et al., *Tunneling*, 90 AM. ECON. REV. 22, 22 (2000))).

37. *Id.* at 3 (alteration in original).

38. *Id.*

39. *See id.* at 4 ("[W]e find that shielding nursing homes' valuable real estate assets from liability reduces malpractice-related costs by 32.4%.").

Care (SJEC).⁴⁰ In that case, millions of dollars were paid to vendors and companies owned by the same individuals controlling the nursing home via “inflated-cost contracts . . . for goods and services their companies substantially failed to provide.”⁴¹ The nursing home’s “straw owner” who admittedly had “absolutely no’ involvement in the day-to-day operations of the facility” received \$1.3 million in distributions, while the businesses owned by the nursing home’s Administrator and by the head of the management company running the home collectively received \$45.5 million in profits.⁴² Meanwhile, the nursing home “was the worst-rated facility in New Jersey”⁴³ and “was on the brink of insolvency,” reporting a “decrease in assets of 89 percent” from 2018 to 2022, “an increase in liabilities of 43 percent, and losses over the five-year period of \$4.8 million.”⁴⁴

While in this instance, the nursing home was owned by a single individual and the related party transactions were occurring between the individuals controlling the nursing home and other businesses they owned,⁴⁵ the same practice can occur where there are multiple owners of the home who could likewise have ownership interests in other companies doing business with the home.⁴⁶ This is especially true when directors and managers are also the homes’ shareholders, as they control them.⁴⁷

2. Private Equity

Another example of for-profit nursing homes prioritizing margins at the expense of non-shareholder stakeholders is their sale to or use of private equity-owned firms. From 2005 to 2015, the share of skilled nursing facilities owned by private equity firms increased from less than 1 percent to nine percent.⁴⁸ To examine this trend, a 2021 study from the

40. *See An Investigation of Fraud, Waste, and Abuse in New Jersey’s Lowest-Rated Nursing Home*, N.J. OFF. OF THE STATE COMPTROLLER (Dec. 12, 2024), <https://www.nj.gov/comptroller/reports/2024/20241212.shtml> [<https://perma.cc/TN6K-TS6X>].

41. *Id.*

42. *Id.*

43. *Id.* (“[F]or the five-year period of OSC’s review, SJEC was the worst-rated facility in New Jersey by CMS standards, receiving a one-star rating in nearly every rating period since at least 2013.”).

44. *Id.*

45. *Id.*

46. *See* Gandhi & Olenski, *supra* note 35, at 7, 40.

47. *See supra* note 32.

48. Steve Maas, *How Patients Fare When Private Equity Funds Acquire Nursing Homes*, NBER DIGEST, Apr. 2021, at 2, <https://live-nber.pantheonsite.io/sites/default/files/2021-03/apr21.pdf> [<https://perma.cc/CUJ7-4B34>].

National Bureau of Economic Research (NBER) used Medicare data from 2005 to 2017 to analyze the effects of private equity buyouts on patient outcomes and costs.⁴⁹ The study found that nursing home buyouts by private equity firms “are associated with higher patient mortality rates, fewer caregivers, higher management fees, and a decline in patient mobility.”⁵⁰ Specifically, it found that the “patient mortality rate during a nursing home stay and the subsequent 90 days is 10 percent higher at facilities owned by private equity firms than at skilled nursing facilities overall.”⁵¹ It further found that the overall costs are “more than 10 percent higher if a patient goes to a private equity-owned nursing home than another home.”⁵²

Private equity sales are usually financed with significant borrowing, often at high interest, resulting in a home’s “average interest payments more than tripl[ing]” post-buyout.⁵³ To produce income for investors, PE managers often engage in sale-lease backs of the nursing home land and building “result[ing] in an average increase in lease payments of 75 percent post-buyout.”⁵⁴ Further, cash on hand was found to “decline[] by 38 percent after a private equity acquisition.”⁵⁵ To cut costs, private equity managers target staffing,⁵⁶ a critical indicator of nursing home quality.⁵⁷ The study found a 3% decrease in hours of direct caregivers, specifically “clinical nursing assistants and licensed practical nurses,” compared to the industry average, as well as an increase in the use of antipsychotic medication.⁵⁸ Meanwhile, studies show that staffing stability, and particularly staffing stability of licensed practical nurses and certified nurse aides, is a key indicator of nursing home quality.⁵⁹

49. Atul Gupta et al., *Owner Incentives and Performance in Healthcare: Private Equity Investment in Nursing Homes* (Nat’l Bureau of Econ. Rsch., Working Paper No. 28474, 2023), https://www.nber.org/system/files/working_papers/w28474/w28474.pdf [https://perma.cc/G5AX-3LXW].

50. Maas, *supra* note 48.

51. *Id.*

52. *Id.* at 3.

53. *Id.* at 2.

54. *Id.*

55. *Id.*

56. *Id.*

57. See Dana B. Mukamel et al., *Association of Staffing Instability with Quality of Nursing Home Care*, JAMA NETWORK (Jan. 10, 2023), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2800160> [https://perma.cc/3Y3L-KFDA].

58. Maas, *supra* note 48, at 2–3 (“Patients admitted to private equity-owned nursing homes are 50 percent more likely to be placed on antipsychotic medication. By sedating patients rather than applying behavioral therapy, nursing homes can reduce staffing needs.”).

59. Mukamel et al., *supra* note 57.

“[T]he [NBER] researchers infer that private equity ownership shifts operating costs away from staffing towards costs that are profit drivers for the private equity fund[.]” in other words, such ownership prioritizes profit over patient care.⁶⁰

C. Same Conflict, Different Context

While staff ratios, minimum wage requirements, and direct care ratios have been implemented to mandate certain spending,⁶¹ quality-based incentive payments have been adopted to reward high quality,⁶² and transparency measures have been introduced to gain a line of sight into potential hidden profits,⁶³ such reforms rely on robust back-end enforcement and do not address the inherent conflict between the interests of shareholders and those of the public and non-shareholder stakeholders ultimately driving the need for reform.

This is not a new conflict in the health care space. Several states, including New Jersey, have adopted the so-called “corporate practice of medicine doctrine.”⁶⁴ Born from concerns around the commercialization of medicine in the late 1800s,⁶⁵ this doctrine “prohibits corporations from practicing medicine or employing a physician to provide professional medical services.”⁶⁶ Indeed, one of the American Medical Association’s stated reasons for developing the doctrine is that “a corporation’s obligation to its shareholders may not align with a physician’s obligation to his patients.”⁶⁷

Coincidentally or not, the health care space, too, has seen and addressed self-serving transactions, specifically as they relate to physicians both at the federal and state levels, in the form of anti-self-referral laws.⁶⁸ These laws generally prohibit physicians from referring patients to certain health services to entities in which the physician has a financial interest.⁶⁹ A financial interest “may be an ownership or

60. Maas, *supra* note 48, at 3.

61. *See supra* notes 19, 22–23 and accompanying text.

62. *See supra* note 20.

63. *See* N.J. STAT. ANN. § 26:2H-46.3 (West 2022); N.J. ADMIN. CODE § 8:97 (2025).

64. *See* Jane M. Zhu, Hayden Rooke-Ley & Erin Fuse Brown, *A Doctrine in Name Only – Strengthening Prohibitions Against the Corporate Practice of Medicine*, 389 NEJM 965, 966 (Sep. 9, 2023).

65. *Id.* at 965.

66. ISSUE BRIEF: CORPORATE PRACTICE OF MEDICINE, AMA 1 (2015), <https://www.ama-assn.org/media/7661/download> [<https://perma.cc/G7QR-4C3M>].

67. *Id.*

68. *See* 42 U.S.C. § 1395nn; N.J. STAT. ANN. § 45:9-22.5 (West 2024).

69. *See Physician Self-Referral*, CMS.GOV (Feb. 9, 2026, at 10:08 ET), <https://www.cms.gov/medicare/regulations-guidance/physician-self-referral> [<https://perma.cc/G2JL-BJ4E>].

investment interest in the entity or a compensation arrangement with the entity.”⁷⁰ Self-referrals are not unlike related-party transactions; the same tension exists between personal financial gain—for physicians in the self-referral context and nursing home owners and operators in the related-party transaction context—and the provision of good care—for patients and nursing home residents, respectively.

The similarities are palpable, and as nursing homes continue to provide more medical care due to the heightened acuity of their residents,⁷¹ the relevance of these physician regulations and the concerns that drove them become hard to ignore.

II. DELAWARE’S PUBLIC BENEFIT CORPORATION

Whether for-profit corporations should be limited to serving only shareholders, rather than a broader array of affected stakeholders—clients, employees, the public, etc.—is a debate at least a century old.⁷² While “shareholder primacy” is the leading theory in Delaware and thus the United States,⁷³ various models have developed to capture an alternative “stakeholder-approach,” including constituency statutes and Certified B-Corporations,⁷⁴ both of which are predecessors to Delaware’s Public Benefit Corporation.⁷⁵

A. *Constituency Statutes and Certified B-Corporations*

Constituency statutes originated in the early 1980s, with Pennsylvania generally accepted as their earliest adopter.⁷⁶ These statutes essentially permit “directors . . . to consider interests other than the interests of the shareholders” when considering the best interests of the company.⁷⁷ While over half the states have adopted some form of constituency statute, Delaware and California have not, meaning most existing US corporations do not have this option unless they

70. *Id.*

71. *See* Johnson, *supra* note 16.

72. *See* Terry L. Corbett, *The Case for a Health Care Benefit Corporation*, 47 CAP. U. L. REV. 183, 191–93 (2019) (describing the “Berle-Dodd” debate regarding the purpose of the corporation and whether it is to maximize returns for shareholders or to serve both “public and private roles and must therefore be managed in the interests of a broader range of stakeholders”).

73. *See supra* notes 31–34 and accompanying text.

74. *See* Corbett, *supra* note 72, at 212–19.

75. *Id.* at 230–33.

76. *Id.* at 213.

77. *Id.* (quoting JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 2:14 (Thomson West, 3d ed. 2010)).

reincorporate in another state.⁷⁸ Further, to the extent their goal is to balance the interests of non-shareholders with those of shareholders,⁷⁹ these statutes are criticized for their permissive and discretionary nature, lack of enforcement, and lack of standing for non-shareholder stakeholders.⁸⁰

In 2006, a nonprofit called B Lab formed “with the idea that . . . business could lead the way towards a new, stakeholder-driven model” and to “harness[] the power of business” to help companies “balance profit with purpose.”⁸¹ Its founders drafted model benefit corporation legislation to promote the creation of statutory benefit corporations.⁸² It also developed a certification scheme for qualifying corporations to become “Certified B Corporations,” meaning the “corporation has met B Lab’s standards as a socially responsible corporation.”⁸³

B. Delaware’s Public Benefit Corporation Statute

In 2013, Delaware amended its General Corporation Law (DGCL) to incorporate a public benefit corporation alternative.⁸⁴ Under the statute, a public benefit corporation (PBC) is defined as:

[A] for-profit corporation . . . that is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner. To that end, a public benefit corporation *shall* be managed in a manner that balances the stockholders’ pecuniary interests, the best interests of those materially affected by the corporation’s conduct, and the public benefit or public benefits identified in its certificate of incorporation.⁸⁵

78. *Constituency Statutes*, STAN. UNIV., https://stanford.edu/dept/gsb-bds/Inkling/CSI_Legal_Structures/ops/s9ml/chapter04/constituency_statutes.xhtml [<https://perma.cc/DUR6-XVA2>] (last visited June 19, 2026).

79. An alternative, more common use is for takeover defense “to entrench the interests of existing management rather than to defend the interests of other stakeholders.” Corbett, *supra* note 72, at 215–16 (quoting Terry L. Corbett, *Healthcare Corporate Structure and the ACA: A Need for Mission Primacy Through a New Organizational Paradigm?*, 12 IND. HEALTH L. REV. 103, 168 (2015)).

80. *See id.* at 215–16.

81. *About B Lab*, B LAB, <https://www.bcorporation.net/en-us/movement/about-b-lab/> [<https://perma.cc/9PPQ-ZKFT>] (last visited June 19, 2026).

82. *See* Corbett, *supra* note 72, at 216–22.

83. *Id.*

84. 79 Del. Laws 122 (2013).

85. DEL. CODE ANN. tit. 8, § 362 (West 2025) (emphasis added). Delaware’s PBC statute requires the balancing of shareholder interests with those of others as opposed to most

PBCs are required to identify the specific public benefit(s) in their certificate of incorporation.⁸⁶ “Public benefit” is defined as “a positive effect (or reduction of negative effects) on 1 or more categories of persons, entities, communities, or interests (other than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature.”⁸⁷ Notably, the statute allows a PBC to choose one or more *specific* public benefits to promote and does not require a PBC to promote a *general* public benefit, a deviation from, and arguably an improvement of, B Lab’s model legislation.⁸⁸

While directors are required to act “in a manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation’s conduct, and the specific public benefit or public benefits identified in its certificate of incorporation,” they do not have a duty to individuals on account of the individual’s interest in the identified public benefit “or on account of any interest materially affected by the corporation’s conduct.”⁸⁹ Thus, such individuals do not have standing to enforce their interest.⁹⁰ Further, “with respect to a decision implicating the balance requirement . . . [a director] will be deemed to satisfy . . . [their] fiduciary duties to stockholders and the corporation if such director’s decision is both informed and disinterested and not such that no person of ordinary, sound judgment would approve,”⁹¹ essentially extending the “business judgment rule” to directors’ decisions regarding the balance requirement.⁹² The law also requires PBCs to report to shareholders at

constituency statutes which merely permit consideration of non-shareholder interests. See discussion *supra* Section II.a.

86. DEL. CODE ANN. tit. 8, § 362(a)(1) (West 2025). For the purposes of this note, the terms “certificate of incorporation” and “charter” will be used interchangeably.

87. *Id.* § 362(b).

88. *Id.* § 362; See Corbett, *supra* note 72, at 228–30 (“[R]equiring a . . . purpose that looks at societal and environmental impact as a whole . . . could . . . exclude corporations with a more specific mission. A corporation with a . . . specific . . . purpose . . . is more likely to pursue that purpose because [it] is more easily identified . . . [and] provide[s] a more workable system of board accountability.” (quoting J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 32–33 (2012))).

89. DEL. CODE ANN. tit. 8, § 365 (West 2025).

90. See *id.*

91. *Id.*

92. The business judgment rule is “a presumption that in running a company, officers and directors were *informed, disinterested, and acted in good faith* to pursue the company’s interests.” SPAMANN ET AL., *supra* note 31, at 37. Unless rebutted, “courts will not scrutinize

least every two years on the “corporation’s promotion of the public benefit . . . and [on] the best interests of those materially affected by the corporation’s conduct.”⁹³

C. The 2020 Amendments

Since its enactment in 2013, Delaware has amended its PBC statute twice, once in 2015 and again in 2020, to increase its utility.⁹⁴ As initially enacted, the law required approval of 90% of the outstanding stock for a conventional corporation to become a PBC and two-thirds of the outstanding stock for a PBC to become a conventional corporation.⁹⁵ This threshold to become a PBC was adjusted downward to a two-thirds majority in the 2015 amendments⁹⁶ and was ultimately eliminated in the 2020 amendments,⁹⁷ thus subjecting PBC conversions to Sections 242(b) and 251 of the DGCL, which require majority voting.⁹⁸ The 2013 enactment included specific appraisal rights⁹⁹ for shareholders who voted against converting to a PBC either by amendment to the corporation’s charter or by merger or consolidation,¹⁰⁰ thus enabling dissenting shareholders to easily leave the converted corporation by selling their shares at the court-appraised fair value.¹⁰¹ These specific appraisal rights were ultimately eliminated in the 2020 amendments,¹⁰² leaving the more general merger and consolidation appraisal rights provided under Section 262 of the DGCL available for dissenting shareholders.¹⁰³

In addition to making it easier for traditional corporations to become PBCs by lowering the voting thresholds and eliminating the specific appraisal rights associated with PBC conversions, the amendments also

the substance of any decisions fiduciaries make and will dismiss a lawsuit that is based merely on any undesirable consequences of those decisions.” *Id.*

93. tit. 8, § 366(b).

94. Michael R. Littenberg, Emily J. Oldshue & Brittany N. Pifer, *Delaware Public Benefit Corporations – Recent Developments*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 31, 2020), <https://corpgov.law.harvard.edu/2020/08/31/delaware-public-benefit-corporations-recent-developments/> [https://perma.cc/3Z6H-3VVN].

95. 79 Del. Laws 122 (2013).

96. 80 Del. Laws 40 (2015).

97. 82 Del. Laws 256 (2020).

98. See Littenberg, Oldshue & Pifer, *supra* note 94.

99. An appraisal right is the right “to an appraisal by the Court of Chancery of the fair value of the stockholder’s shares of stock.” 79 Del. Laws 122 (2013).

100. See *id.*

101. See Gilbert Matthews, *The “Market Exception” in Appraisal Statutes*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 30, 2020), <https://corpgov.law.harvard.edu/2020/03/30/the-market-exception-in-appraisal-statutes/> [https://perma.cc/99BL-CGSD].

102. See 82 Del. Laws 256 (2020).

103. See Littenberg, Oldshue & Pifer, *supra* note 94.

made the model more appealing to potential converters by strengthening director protections.¹⁰⁴ Specifically, the 2020 amendments added explicit language to provide that a director's stock interest in the PBC would not create a conflict of interest as it relates to his duty as a director regarding his decisions affecting the balancing requirement of the law.¹⁰⁵ In other words, one cannot claim a breach of the duty of care by a director as it relates to decisions affecting the balancing requirement based solely on the fact that the director has a stock interest in the PBC "except to the extent that such ownership or interest would create a conflict of interest if the corporation were not a [PBC]."¹⁰⁶

Further, the initial enactment of the 2013 statute included an opt-in provision allowing PBCs to provide in their charter that a "disinterested failure" of a director to fulfill the law's balancing requirement would not, for the purposes of indemnification¹⁰⁷ or exculpation of directors,¹⁰⁸ "constitute an act or omission not in good faith, or a breach of the duty of loyalty."¹⁰⁹ The 2020 amendments made this an opt-out provision.¹¹⁰ Therefore, unless otherwise stated in the PBC's charter and absent a conflict of interest, the failure of a director to fulfill the balancing requirement will not bar him from indemnification by the corporation¹¹¹ (as acts or omissions not in good faith would have),¹¹² nor from exculpation of monetary damages if the PBC adopted a waiver of the duty of care¹¹³ (as acts or omissions not in good faith would have).¹¹⁴

III. PUBLIC-BENEFIT CORPORATIONS IN THE HEALTH CARE INDUSTRY

Generally speaking, the corporate structures available to and historically used by private United States health care industry actors are

104. *See id.*

105. *See* 82 Del. Laws 256 (2020).

106. *Id.*

107. Section 145 of the DGCL regulates "[t]he ability of the corporation to provide indemnification and insurance" and requires directors and officers to have acted in good faith to be indemnified. SPAMANN ET AL., *supra* note 31, at 53–54; DEL. CODE ANN. tit. 8, § 145 (2025).

108. Section 102(b)(7) of the DGCL "authorizes corporations to adopt a charter provision that waives directors' monetary liability for violating the duty of care." SPAMANN ET AL., *supra* note 31, at 44. The provision does not, however, permit eliminating or limiting personal liability of "[a] director or officer for acts or omissions not in good faith." tit. 8, § 102(b)(7).

109. 79 Del. Laws 122 (2013).

110. 82 Del. Laws 256 (2020).

111. *See id.*

112. *See* SPAMANN ET AL., *supra* note 31, at 36–37, 44.

113. 82 Del. Laws 256 (2020).

114. DEL. CODE ANN. tit. 8, § 102(b)(7) (2025).

for-profit and non-profit.¹¹⁵ Each comes with benefits. For-profits can raise equity and are incentivized (and legally bound) to maximize value for shareholders—features that “can promote efficiency while improving resilience and sustainability amidst financial hardship.”¹¹⁶ Non-profits, in recognition of their mission of collective public benefit, are tax-exempt and can receive tax-exempt donations and utilize tax-free bonds for capital improvements.¹¹⁷

Several sources have noted that neither structure is optimal for the delivery of health care today,¹¹⁸ which, as aptly stated in Terry Corbett’s *The Case for a Health Care Benefit Corporation*, “is inherently ‘both a social good *and* a commercial service.’”¹¹⁹ Instead, these sources argue that hybrid models, such as a public benefit corporation or a “health care benefit corporation” may be more effective at meeting the dual interests of community benefit and profits.¹²⁰ This is increasingly true since the passage of the Affordable Care Act (ACA) and the shift to value-based payment arrangements, which attempt to align payments—and thus potential profit—with desired health outcomes.¹²¹ In the past decade or so, a handful of high-profile health care companies have adopted the public benefit corporation structure, two of which are discussed herein.

A. *Mark Cuban Cost Plus Drug Company*

Originally dreamed up in 2015 by Alexander Oshmyansky in response to a “5,000 percent price increase of . . . a previously cheap drug used to treat HIV,”¹²² the Mark Cuban Cost Plus Drug Company (“Cost

115. See Soleil Shah et al., *Public Benefit Corporations: A Third Option for Health Care Delivery?*, HEALTH AFFS. (Mar. 23, 2021), <https://www.healthaffairs.org/content/forefront/public-benefit-corporations-third-option-health-care-delivery> [https://perma.cc/QS8V-8YBC].

116. *Id.*

117. *Id.*

118. See, e.g., *id.*; Corbett, *supra* note 72, at 199–202; Blake Madden, *Why Public Benefit Corporations Are a Game Changer in Healthcare*, HOSPITALITY (Jan. 19, 2023), <https://hospitality.com/articles/2023-01-19/public-benefit-corporations-healthcare-aledade-mark-cuban-cost-plus-drugs/> [https://perma.cc/NN9V-2R7H].

119. Corbett, *supra* note 72, at 244 (emphasis added) (quoting Katherine R. Lofft et al., *Is a Hybrid Just What the Doctor Ordered? Evaluating the Potential Use of Alternative Company Structures by Healthcare Enterprises*, 25 A.B.A. HEALTH L. 9 (2013)).

120. See *id.* at 244–53; Shah et al., *supra* note 115; Madden, *supra* note 118.

121. See Corbett, *supra* note 72, at 264–71.

122. Tom Hays & Colleen Long, *Martin Shkreli, Pharmaceutical Chief Who Increased Price of Lifesaving Drug, Sentenced to 7 Years in Prison*, PBS NEWS (Mar. 9, 2018, at 14:28 ET) (alteration in original), <https://www.pbs.org/newshour/nation/martin-shkreli-pharmaceutical-chief-who-increased-price-of-lifesaving-drug-sentenced-to-7-years-in-prison> [https://perma.cc/3W9C-X5HC]; see Will Maddox, *Meet the Genius Who Convinced Mark Cuban to Sell Drugs*, D MAG. (Oct. 11, 2022, at 13:05 ET),

Plus Drug”) is an online pharmacy that sells generic drugs directly to consumers.¹²³ The company prides itself on its transparent pricing and “[o]perating outside of the insurance companies and pharmacy benefit managers.”¹²⁴ To drive down drug prices, Cost Plus Drug uses a transparent pricing formula of cost—or the negotiated price with manufacturers, which is transparently displayed to consumers—plus a fifteen percent markup “to offset the costs of the business,” a flat five-dollar pharmacy labor fee, and a flat five-dollar shipping fee.¹²⁵ The transparency of the pricing formula sets Cost Plus Drug apart from pharmacy benefit managers (PBMs), which are “notoriously secretive” and extremely consolidated—with “six . . . [PBMs] . . . control[ling] more than 90% of the U.S. prescription drug market.”¹²⁶

Initially set up as a nonprofit, the venture “failed spectacularly” as Oshmyansky was unable to raise adequate funds.¹²⁷ Then, in 2018, on the advice of mentors from Y Combinator,¹²⁸ Oshmyansky launched Osh Affordable Pharmaceuticals as a public benefit corporation, giving him the “fundraising advantage of allowing the company to offer shareholders dividends.”¹²⁹ The company soon raised \$1 million.¹³⁰ From there, Oshmyansky approached Mark Cuban¹³¹ as a potential investor, and the “Mark Cuban Cost Plus Drug Company” was born.¹³² At a recent event at the University of Pennsylvania, Cuban noted that while he would not have been able to get into the pharmaceutical market at the pace he did

<https://www.dmagazine.com/publications/d-magazine/2022/october/mark-cuban-cost-plus-drugs-alex-oshmyansky/> [<https://perma.cc/FR85-SH27>].

123. Maddox, *supra* note 122.

124. *Id.*; Pharmacy Benefit Managers are “middlemen” that negotiate rebates from pharmaceutical manufacturers on behalf of insurance companies “in exchange for favorable placement on formularies.” Hoag Levins, *Mark Cuban Explains his Battle Against Pharmacy Benefit Managers*, PENN LDI (Dec. 4, 2024), <https://ldi.upenn.edu/our-work/research-updates/mark-cuban-explains-his-battle-against-pharmacy-benefit-managers/> [<https://perma.cc/KA7S-UJK8>].

125. Maddox, *supra* note 122; *see* Levins, *supra* note 124; *Our Mission*, MARK CUBAN COST PLUS DRUG CO., <https://www.costplusdrugs.com/mission/> [<https://perma.cc/4A5X-REC6>] (last visited June 19, 2026).

126. Levins, *supra* note 124 (alteration in original).

127. Maddox, *supra* note 122.

128. *Id.* (describing Y Combinator as “the Silicon Valley technology accelerator that has launched Dropbox, Airbnb, Reddit, Twitch, and others.”).

129. *Id.*

130. *Id.*

131. Mark Cuban was the billionaire owner of the Dallas Mavericks and cast member of ABC’s *Shark Tank*. *See Profile, Mark Cuban*, FORBES, <https://www.forbes.com/profile/mark-cuban/> [<https://perma.cc/2NKA-EJ3W>] (last visited June 19, 2026); *Shark Tank, Meet the Cast*, ABC, <https://abc.com/cast/878a9d2c-3a2a-4c62-9193-0207045e6724> [<https://perma.cc/M2S4-EM4V>] (last visited June 19, 2026).

132. Maddox, *supra* note 122.

without his personal wealth, another advantage for the company was its structure as a PBC, which allows the company to “balance the pursuit of profits with . . . commitments to create positive social change.”¹³³ Unlike traditional corporations, PBCs are protected from shareholder lawsuits when pursuing their stated public benefit “in ways that don’t necessarily maximize short-term profits.”¹³⁴

B. Aledade

In early 2023, Aledade announced its transition to a public benefit corporation structure under Delaware General Corporation Law.¹³⁵ Self-described as “the nation’s largest network of independent primary care,” Aledade operates several “Accountable Care Organizations”—or ACOs—to “help practices and health centers improve patient outcomes and generate sustainable revenue.”¹³⁶ As noted in its 2023 Public Benefit Report,¹³⁷ Aledade’s public benefit purpose “is to deliver better health, better care and lower costs, creating a health care system that is good for patients, good for practices and good for society.”¹³⁸ The founder and CEO, Farzad Mostashari, notes that the company decided to become a PBC because he wanted “primary care doctors . . . to know we will serve [them] and work for [their] interests over the long run. To make it so, we have literally built [them] into the very charter that defines Aledade’s purpose.”¹³⁹

Its inaugural Public Benefit Report describes how Aledade is meeting its stated purpose of improving patient health outcomes,¹⁴⁰ helping

133. Levins, *supra* note 124.

134. *Id.*

135. See 2023 PUBLIC BENEFIT REPORT: DOING MORE GOOD TOGETHER, ALEDADE 9, https://aledade.com/hubfs/Aledade_Public_Benefit_Report_2024-compressed.pdf [<https://perma.cc/DFR5-49F8>]; Heather Landi, *Aledade, Mark Cuban’s Drug Company and a Handful of Others are Public Benefit Corporations. Could it be the Rx to Improve Healthcare?*, FIERCE HEALTHCARE (Feb. 3, 2023, at 13:00 ET), <https://www.fiercehealthcare.com/providers/aledade-transitions-public-benefit-corporation-heres-why-handful-healthcare-companies> [<https://perma.cc/2KLG-JS7X>].

136. *Value-Based Care for Primary Care*, ALEDADE, <https://aledade.com/> [<https://perma.cc/RVG6-V9TC>] (last visited June 19, 2026). “Accountable Care Organizations (ACOs): Groups of doctors, hospitals, and other health care professionals that work together to give patients high-quality, coordinated service and health care, improve health outcomes, and manage costs.” *Accountable Care and Accountable Care Organizations*, CMS.GOV, <https://www.cms.gov/priorities/innovation/innovation-models/aco> [<https://perma.cc/2B4T-5CWY>] (last visited June 19, 2026).

137. Such report is required pursuant to section 366 of the Delaware General Corporation Law. DEL. CODE ANN. tit. 8, § 366 (2025).

138. 2023 PUBLIC BENEFIT REPORT, *supra* note 135, at 9.

139. *Id.* at 3.

140. *Id.* at 13–17.

practices succeed in value-based payment arrangements,¹⁴¹ and reducing unnecessary spending in the system.¹⁴² Namely, the company cited that in 2023 alone, it helped patients avoid over 64,000 unnecessary hospitalizations and emergency department visits.¹⁴³ Over 90% of Aledade's partner practices earned shared savings through value-based arrangement programs.¹⁴⁴ And from a societal benefit perspective, it helped bring "health care spending for ~1 million lives \$801 million below CMS spending targets, [and] returned \$262 million to the taxpayer"¹⁴⁵

IV. ADOPTING A MODIFIED PBC STRUCTURE IN NEW JERSEY NURSING HOMES

A. *Limitations of Delaware's PBC Model*

While the examples from the previous section highlight some of the advantages of a public benefit corporation structure in the health care context, there are shortcomings to Delaware's PBC model that will ultimately limit its effectiveness in instilling public interest into corporate decision making.

1. Appointment of Directors

Delaware's PBC statute requires PBC management (board directors and executives or officers) to balance "the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the public benefit or public benefits identified in its certificate of incorporation."¹⁴⁶ And while directors are generally insulated from judicial review of their business decisions on behalf of the corporation,¹⁴⁷ and could thus pursue the balancing requirement in a way that does not benefit the shareholders without facing judicial scrutiny,

141. *Id.* at 18–26.

142. *Id.* at 27–35.

143. *Id.* at 15.

144. *Id.* at 20.

145. *Id.* at 29.

146. DEL. CODE ANN. tit. 8, § 362(a) (2025).

147. See *The Delaware Way: Deference to the Business Judgment of Directors Who Act Loyally and Carefully*, DELAWARE.GOV, <https://corplaw.delaware.gov/delaware-way-business-judgment/> [<https://perma.cc/A3UC-CDQQ>] (last visited June 19, 2026) ("Delaware law affords directors making [decisions for the corporation] a set of presumptions—known as the 'business judgement rule'—that, so long as a majority of the directors have no conflicting interest . . . in the decision, . . . [it] will not later be second-guessed by a court if it is undertaken with due care and in good faith.").

directors still have a strong interest in making decisions that benefit shareholders over others.¹⁴⁸ This is true because usually shareholders elect directors.¹⁴⁹ Under the DGCL, shareholders elect board directors unless the certificate of incorporation states otherwise,¹⁵⁰ and the PBC sections of the DGCL do not alter that authority.¹⁵¹

Therefore, while directors at a PBC are not legally liable for exercising the balancing requirement in ways that prioritize non-shareholder—e.g., public—interests over shareholder pecuniary interests, they risk their position as board directors in doing so. To remove this non-legal tip on the scale towards prioritizing shareholder interests over others, one would have to reform how directors are chosen to serve on boards and who has authority over that process.¹⁵² Possible reforms could include giving non-shareholder stakeholders authority to participate in the director elections, or reserving a certain number of board seats to be chosen exclusively by non-shareholder stakeholders.

2. Executive Compensation

Another non-legal constraint that promotes corporate decision-making that favors shareholder interests over non-shareholder interests is executive compensation.¹⁵³ Basing a percentage of executive pay on the corporation's performance is common.¹⁵⁴ A 2022 survey of S&P 100 companies—which “have an aggregate market capitalization . . . equal to more than half of the entire U.S. stock market”¹⁵⁵—found that the average “percentage of CEO pay contingent on the achieving performance goals was 85.5 percent [and t]he median was 91 percent.”¹⁵⁶ The survey looked at performance compensation based both on purely financial metrics and “ESG” metrics, or those tied to “environmental, social, and governance” goals.¹⁵⁷ While the performance goals in roughly half of the surveyed

148. See STEPHEN M. BAINBRIDGE, *THE PROFIT MOTIVE: DEFENDING SHAREHOLDER VALUE MAXIMIZATION* 73–78 (Cambridge Univ. Press 2023).

149. See *id.*

150. tit. 8, §§ 141, 211.

151. *Id.* §§ 361–68.

152. See BAINBRIDGE, *supra* note 148, at 73–78 (“[T]he voting rules will tend to align director incentives with shareholder interests.”).

153. See *id.* at 75–77.

154. See Lucian A. Bebchuk & Roberto Tallarita, *The Perils and Questionable Promise of ESG-Based Compensation*, 48 J. OF CORP. L. 37, 47–51 (2022).

155. *Id.* at 47–48.

156. BAINBRIDGE, *supra* note 148, at 75.

157. Bebchuk & Tallarita, *supra* note 154, at 40 (“In response to skepticism about whether corporate leaders have adequate incentives to create value for stakeholders, some supporters of stakeholderism have posited that corporate leaders can be incentivized to improve stakeholder welfare by tying their compensation to [ESG] goals.”).

companies included some “ESG” metrics in addition to financial metrics, most companies did not disclose the weight of “ESG-based” metrics.¹⁵⁸ But for those that did, “[i]n most cases, ESG metrics account[ed] for only 1.5%-3% of the total CEO pay.”¹⁵⁹ Thus, most of the performance-based pay, which makes up the bulk of executives’ salaries, is based on financial performance.¹⁶⁰

Such financial-based performance compensation creates strong incentives for executives to make decisions that prioritize profit. And while the survey goes on to discuss why integrating more “ESG-based” metrics into executive compensation is ultimately a limited solution to creating value for non-shareholder stakeholders,¹⁶¹ the fact that so much of the executive’s compensation is based on the corporation’s financial performance is yet another tip on the scale towards prioritizing shareholder interests over non-shareholder stakeholder interests that the Delaware PBC model does nothing to counter.

3. Standing and Fiduciary Duties

One glaring feature of Delaware’s PBC model that inhibits it as a means to instill public interest in corporate decision making is its lack of standing rights for non-shareholder stakeholders who have an interest in the PBC’s stated public benefit.¹⁶² In traditional corporations, “[c]orporate directors and officers owe fiduciary duties to both the shareholders and the corporate entity.”¹⁶³ These duties¹⁶⁴ are enforced through lawsuits brought by shareholders, either directly if enforcing a duty owed to shareholders, or derivatively if enforcing a duty owed to the corporation (i.e. to redress some harm done to the corporation).¹⁶⁵

Non-shareholders, or in this case, stakeholders who have an interest in the stated public benefit or the directors’ and officers’ exercise of the balancing requirement, cannot bring lawsuits on behalf of the corporation.¹⁶⁶ They cannot sue either to enforce the balancing

158. *Id.* at 52.

159. *Id.*

160. *See id.* at 49–51.

161. *See generally id.* (discussing structural problems with using ESG compensation metrics).

162. *See* DEL. CODE ANN. tit. 8, § 365 (2025).

163. BAINBRIDGE, *supra* note 148, at 74.

164. The “duties” here refer to the duty of loyalty and the duty of care. The duty of loyalty “requires fiduciaries to act so as to advance the principal’s interests and bars them from promoting their own interests at the principal’s expense,” while the duty of care “requires fiduciaries to exercise power competently.” SPAMANN ET AL., *supra* note 31, at 36.

165. BAINBRIDGE, *supra* note 148, at 74.

166. *See* tit. 8, § 365.

requirement or to redress a harm to the corporation as a result of improper exercise of the balancing requirement.¹⁶⁷ And while Delaware's PBC model mandates the balancing of stated public interests,¹⁶⁸ the lack of standing for non-shareholder stakeholders relieves directors of accountability in equitably and diligently exercising the requirement. Indeed, it limits the enforcement of the requirement to shareholders alone whose personal financial interests may deter intervention. Thus, the lack of standing for non-shareholders and lack of fiduciary duties on directors to non-shareholders is yet another tip on the scale favoring shareholder interests over others.

(i) Fiduciary Duties in Health Care

The concept of fiduciary duty is particularly salient in the health care context as it has already been applied and accepted. The history of fiduciary obligations of physicians to patients can be traced back to the eighteen hundreds¹⁶⁹ and has been characterized by "trust, reliance, and dependence."¹⁷⁰ Nearly a century later, a California appellate court "declared that '[t]he doctor-patient relationship is a fiduciary one'" and several courts have since followed.¹⁷¹

While a fiduciary relationship is said to exist between an individual provider and a patient,¹⁷² questions remain as to what fiduciary duties, if any, are owed by institutional providers, such as hospitals and nursing homes, to patients. Analyzing this question in the context of hospital-based care, Terry Corbett argues that with the shift away from the insular physician-patient duo and the rise of integrated health delivery systems anchored in institutions "comes the corresponding need to acknowledge that the same characteristics . . . that have historically characterized . . . the fiduciary relationship between patients and their individual physicians now appl[y] equally to the relationship between patients and hospitals as 'institutional delivery-of-care providers.'"¹⁷³

167. *See id.*

168. *See id.*

169. *See* Corbett, *supra* note 72, at 294 ("[T]he first time that a legal opinion used the term 'fiduciary' to describe a physician was an American case in 1848.") (quoting Maxwell J. Mehlman, *Why Physicians are Fiduciaries for Their Patients*, 12 IND. HEALTH L. REV. 1, 60 (2015)).

170. *Id.* at 298.

171. *Id.* at 294–95 (quoting Thomas L. Hafemeister & Richard M. Gulbrandsen, Jr., *The Fiduciary Obligation of Physicians to "Just Say No" if an "Informed" Patient Demands Services that are not Medically Indicated*, 39 SETON HALL L. REV. 335, 369 (2009)).

172. *Id.*

173. *Id.* at 298 (quoting Susan M. Wolf, *Toward a Systemic Theory of Informed Consent in Managed Care*, 35 HOUS. L. REV. 1631, 1648–49 (1999)).

The same is true for nursing homes as licensed health care institutions.¹⁷⁴ The same characteristics of trust, reliance, and dependence apply between the residents of nursing homes and their caretakers and health care providers employed by the homes.

This need for greater responsibility of health care boards of directors has not gone unnoticed by the federal government.¹⁷⁵ A joint publication by the U.S. Department of Health and Human Services Office of Inspector General and the American Health Lawyers Association stated:

With a new era of focus on quality and patient safety rapidly emerging, oversight of quality also is becoming more clearly recognized as a core fiduciary responsibility of health care organization directors. Health care organization boards have distinct responsibilities in this area because promoting quality of care and preserving patient safety are at the core of the health care industry and the reputation of each health care organization.¹⁷⁶

Further, in 2008 the Chief Counsel to the OIG testified to a U.S. House Subcommittee that the OIG had been “working to raise awareness and provide . . . resources for hospital board members regarding their direct legal and fiduciary accountability for the quality and safety of the care delivered” and that “oversight of quality is a core fiduciary responsibility of health care organization boards of directors.”¹⁷⁷

Acknowledging a fiduciary duty in a physician-patient context, and, significantly, in an institutional provider-patient context, yet not assigning an enforceable fiduciary duty on directors of nursing homes to residents undermines the PBC as an effective means to instill residents’ interests in corporate decision making in nursing homes.

4. Reporting

Under the DGCL, PBCs are required at least every two years to provide a statement to their shareholders detailing the “promotion of the

174. See discussion *infra* Section IV.c.1.

175. See generally ARIANNE N. CALLENDER ET AL., CORPORATE RESPONSIBILITY AND HEALTH CARE QUALITY: A RESOURCE FOR HEALTH CARE BOARDS OF DIRECTORS, www.jenner.com/a/web/990P5u4sDAZKnUh4fELP4i/4HRMZQ/Corporate.pdf?1320339250 [<https://perma.cc/HF4Y-PDTD>] (addressing “the unique fiduciary [responsibilities] of directors of health care organizations in the corporate compliance context”).

176. *Id.* at 2.

177. Corbett, *supra* note 72, at 302–03 (quoting Brian M. Peters & Robin Locke Nagele, *Promoting Quality Care & Patient Safety: The Case for Abandoning the Joint Commission’s “Self-Governing” Medical Staff Paradigm*, 14 MICH. ST. U.J. MED. & L. 313, 357 (2010)).

public benefit” identified in the corporation’s charter.¹⁷⁸ The statement must note the objectives established by the board to promote the benefit, the standards used to measure progress in promoting the benefit, objective information based on the standards “regarding the corporation’s success in meeting the objectives,” and “[a]n assessment of the corporation’s success in meeting the objectives.”¹⁷⁹

The law does not require that these statements be made available to the public nor that a third-party standard be used to validate or certify the corporation’s success in promoting the public benefit.¹⁸⁰ Rather, it is permissive, stating that the corporation *may* choose to make such information public and use third-party standards.¹⁸¹ Leaving the determination of whether a corporation is successful in promoting its stated public benefit solely to the board and not requiring that such information be made public further limits the corporation’s accountability to non-shareholder stakeholders and undermines the model’s ability to instill non-shareholder interests in corporate decision-making.

B. Modified PBC for New Jersey Nursing Homes

Given the Delaware PBC model’s limitations in effectively instilling non-shareholder interests into corporate decision-making,¹⁸² New Jersey should pursue a modified version of that model for its nursing homes. At a minimum, the modified version should require for-profit nursing homes to incorporate as PBCs but with the following alterations: 1) require public disclosure of statements provided to shareholders regarding the corporation’s progress in achieving the public benefit; 2) require the use of a specific third-party certification mechanism to determine whether the corporation is succeeding in achieving the public benefit; 3) tie a specified portion of executive compensation to performance in achieving the public benefit; and 4) require standing for certain non-shareholder stakeholders—at the very least, nursing home residents and payors who make up a certain percentage of the homes’ revenues—to bring claims against the corporation for failing to meet the PBC balancing requirements. Such reforms would build accountability to non-shareholder stakeholders into the structure of nursing home operations

178. DEL. CODE ANN. tit. 8, § 366 (2025).

179. *Id.* § 366(b)(3)–(4).

180. *See id.* § 366. This is unlike the B-corp certification model which relies upon third-party certification to ensure corporations are successfully fulfilling their stated public benefits. *See supra* text accompanying notes 81–83.

181. tit. 8, § 366(c)(2)–(3).

182. *See discussion supra* Section IV.a.

and put non-shareholder interests on a more equal footing with shareholder interests.

C. New Jersey's Levers for Requiring a Modified PBC

A key feature of American corporate law is that corporations are governed by the laws of the state in which they incorporate.¹⁸³ As previously discussed, most corporations choose to incorporate in Delaware and thus are subject to the Delaware General Corporation Law (DGCL).¹⁸⁴ However, New Jersey, through the Department of Health's licensing authority and the Department of Human Services' Medicaid administration authority, could impose conditions on nursing home licensure or Medicaid participation to implement the corporate structure reforms discussed herein.

1. Licensing

The Commissioner of the New Jersey Department of Health is vested with broad statutory authority to adopt rules and regulations that set "standards and procedures relating to the licensing of health care facilities,"¹⁸⁵ including nursing homes.¹⁸⁶ The rules and regulations promulgated pursuant thereto are "intended to assure the high quality of care delivered in long-term care facilities" and include rules regarding "access to care, continuity of care, comprehensiveness of care, coordination of services, humaneness of treatment, conservatism in intervention, safety of the environment, professionalism of caregivers, and participation in useful studies."¹⁸⁷

While the regulations do not prohibit or require certain organizational structures, they do contemplate facility ownership and provide specific requirements "in the case of group or corporate management of a facility,"¹⁸⁸ suggesting the Department's authority to institute rules regarding organizational structure. Health care facilities are prohibited from operating in the state unless they possess a valid license from the Department of Health.¹⁸⁹ Thus, New Jersey could make the modified PBC organizational structure a condition of nursing home licensure to mandate the model.

183. SPAMANN ET AL., *supra* note 31, at 4–5.

184. *Id.*

185. N.J. STAT. ANN. § 26:2H-5(b) (West 2025).

186. *Id.* § 26:2H-2.

187. N.J. ADMIN. CODE § 8:39-9.1 (2025).

188. *Id.*

189. N.J. STAT. ANN. § 26:2H-12.

2. Medicaid Participation

The Commissioner of Human Services is statutorily required to provide medical assistance, including nursing home services, to qualifying Medicaid applicants.¹⁹⁰ To effectuate this mandate, the Commissioner is authorized to promulgate rules and regulations.¹⁹¹ Pursuant to this authority, the Department has adopted regulations outlining requirements for nursing facilities to participate in the Medicaid program.¹⁹² The Commissioner could expand those regulations to require that participating nursing homes be organized as modified PBCs, as described herein, to mandate the change. Further, because New Jersey administers its Medicaid program predominantly via a contract with five managed care organizations¹⁹³—which are then responsible for administering the Medicaid benefits to their members and creating provider networks¹⁹⁴—the State could also alter that contract to require participating nursing homes to be organized as modified PBCs.

CONCLUSION

The adoption of Delaware's PBC model alone will not succeed in instilling a public-interest focus into corporate decision-making at New Jersey's private for-profit nursing homes. This is true because the PBC model does not ultimately change the incentives underlying shareholder primacy—namely that shareholders elect directors,¹⁹⁵ executive compensation is often tied to the financial performance of the corporation,¹⁹⁶ and non-shareholder stakeholders do not have standing rights to enforce the stated public benefit, nor are fiduciary duties owed to them.¹⁹⁷ However, adopting a modified PBC model that addresses these shortcomings requires greater transparency of how corporations promote their public benefit, and providing additional third-party enforcement of the public-benefit balancing requirement would better ensure non-shareholder interests are appropriately weighed. And New Jersey, through its licensing authority of health care facilities and its

190. *Id.* § 30:4D-6.

191. *Id.* § 30:4D-17.15.

192. N.J. ADMIN. CODE § 10:166-1.3 (2025).

193. *See NJ Medicaid & Managed Care*, N.J. DEPT OF HUM. SERVS. DIV. OF MED. ASSISTANCE & HEALTH SERVS., <https://www.nj.gov/humanservices/dmahs/providers-stakeholders/provider-resources/mcicaid/> [<https://perma.cc/C2KY-2QLE>] (last visited June 19, 2026).

194. *See supra* note 10.

195. *See discussion supra* Section IV.a.1.

196. *See discussion supra* Section IV.a.2.

197. *See discussion supra* Section IV.a.3.

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authority to administer the Medicaid program, could compel such a change.