

**National Association for
Homecare and Hospice**

**Legal Considerations in Mergers and
Acquisitions**

Alan E. Schabes, ESQ.
Benesch, Friedlander, Coplan & Aronoff LLP
200 Public Square, Suite 2300
Cleveland, OH 44114
aschabes@beneschlaw.com
216.363.4589

Chicago Cleveland Columbus Hackensack New York San Francisco Shanghai West Virginia Wilmington
www.beneschlaw.com

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1

JUST WHEN YOU THOUGHT EVERYTHING WAS GOING FINE

- [RENO 911! - Drunk Catwalk - YouTube](#)

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2



PRESENTATION AGENDA


- 1 Transactional Background for Home Health and Hospice
- 2 Preparing to Sell and Possible Deal Structures
- 3 Key Due Diligence Issues Encountered

3




POST-ACUTE CARE PROVIDERS ARE SITUATED TO BENEFIT FROM THE HEALTHCARE CONTINUUM SHIFTING FOCUS TO THE HOME

- Hospice and home health are a cost-effective alternative to facility-based care for patients during end-of-life and recovering from illness or injury
- Providers have been targets of consolidation due to high industry fragmentation
- Healthcare systems and home health and hospice operators are beginning to transition toward integrated delivery models that can address patients' needs in home care settings; palliative care utilization expected to further increase demand for hospice services
- Industry has benefited from numerous macroeconomic trends, driving revenue growth, enhancing profitability, and leading to multiple expansion
- Numerous providers are entering into joint venture relationships and beginning to transition into value-based payment arrangement payments
- This is a particularly good time for sellers



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4



HOME HEALTH AND HOSPICE M&A ACTIVITY

Home Health and Hospice M&A Activity Continues Rapid Growth


HOME HEALTH CARE M&A ACTIVITY REMAINS ROBUST

- Market disruption from PDGM payment reform is driving a unique opportunity for larger home health providers to gain market share or acquire smaller, less sophisticated providers
- Despite brief curtail in M&A activity in Q2 2020 due to COVID-19, the pandemic has added heightened focus on home-based care as payors look for safer, cheaper solutions
- PDGM and COVID-19 will further drive arrangements across the care continuum, enabling more collaborative relationships between institutions and agencies and encouraging increased transaction volume through 2021

HOSPICE M&A ACTIVITY RECOVERED FROM COVID-19

- Despite the overall reduced deal flow due to COVID-19, hospice remained the most active vertical within the post-acute care space
- In Q4 2020, Hospice M&A activity recovered significantly from the pandemic lows with 25 completed transactions, representing year-over-year increase of 10 additional transactions
- Over 56% of the deal activity within the broader Home Health, Hospice and Home Care sector involved assets providing Hospice services in 2020

5



WHY AM I CONSIDERING A TRANSACTION?

- Desire for liquidity – "I want to cash in some of my chips"
- Desire for growth and economies of scale
- Desire to diversify, achieve vertical integration and to present a value-based post-acute care solution

6

TRANSACTION GOALS

- Desire for liquidity – "I want to cash in some of my chips"
 - Want speed
 - Want highest valuation
 - Want transaction certainty and finality
 - Want to walk away – "Not so fast!"

7

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TRANSACTION GOALS

- Desire for growth and economies of scale
 - Need to evaluate strategic portion of target and management team and structure
 - Need to evaluate market and market share
 - Need to focus on potential for growth balance against expected return on investment (ROI)

8

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TRANSACTION GOALS

- Desire to diversify, achieve vertical integration and to present a value-based post-acute care solution
 - Need to assess sophistication of potential target
 - Need to assess ability to tackle and control costs and utilization
 - Emphasis on IT solutions to enable patient identification and tracking through the post-acute care continuum
 - Ability to assess and assume risk

BASIC TRANSACTION STRUCTURES

- Transfer of stock/membership units
- Asset sale and purchase
- Merger
- Joint venture

BASIC TRANSACTION STRUCTURES

- Transfer of stock/membership interests
 - Will assume all liabilities
 - May facilitate more rapid closing – depending on licensure and payor contract provisions
 - Requires more extensive due diligence

11

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11

BASIC TRANSACTION STRUCTURES

- Asset sale and purchase
 - Not required to assume all liabilities but are likely to have successor liability for governmental payor liabilities
 - Likely to trigger possible time-consuming change of ownership (CHOW) requirements
 - Can pick and choose which assets are purchased
 - Management structure may be helpful

12

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BASIC TRANSACTION STRUCTURES

- Merger
 - Similar considerations to purchase of equity
 - Need to structure and document post-closing collaborative arrangements

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BASIC TRANSACTION STRUCTURES

- Joint venture
 - Unlikely to result in short-term liquidity benefit
 - Need to strategize post-closing governance
 - OIG Advisory Opinion – 21-18 has placed joint ventures at greater risk

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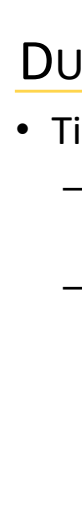
14



DUE DILIGENCE


- Identification, remediation and quantification of issues
- Timing of due diligence
- Scope of due diligence

15



DUE DILIGENCE

- Timing of due diligence
 - Seller – wants due diligence to be concluded quickly and to close off risk of blown deal
 - Purchaser – wants due diligence to continue until closing to provide purchaser with ability to terminate transaction based upon most recent findings



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DUE DILIGENCE

- Scope of due diligence
 - Financial
 - Legal – assessments of contracts, post-closing restrictions, certainty of continued revenue flow and assessment of audits, investigations and litigation
 - Compliance – evaluation of compliance program – "do they really know what is going on?"
 - Billing and coding review – this can easily be the "long pole in the tent" and can jeopardize representation and warranty insurance

17

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HOME HEALTH DUE DILIGENCE

COMPLIANCE WITH GOVERNMENTAL GUIDELINES

- OASIS assessments
- PEPPER reports
- Homebound status

18




HOME HEALTH DUE DILIGENCE

MEDICAL RECORD DOCUMENTATION

- Certification/recertification (Form 485 HOME HEALTH CERTIFICATION AND PLAN OF CARE)
- Face-to-face (F2F) encounters
- Skilled nursing visit notes
- Physician orders
- OP/PT/ST visit notes
- Home Health aide notes
- Support for time-based codes
- Signatures present and legible
- 36-month rule compliance
- Care provided between episodes

19



HOSPICE DUE DILIGENCE

COMPLIANCE WITH GOVERNMENTAL GUIDELINES

- OASIS assessments
- PEPPER reports
- Terminal illness requirements

20




HOSPICE DUE DILIGENCE

MEDICAL RECORD DOCUMENTATION


- Certification/recertification (Form 485 HOME HEALTH CERTIFICATION AND PLAN OF CARE)
- Face-to-face (F2F) encounters
- Physician orders
- Election statements
- Number and length of hospice episodes
- Attending physician designations
- Notice of revocation or transfer
- Number of live discharges

21



SPECIFIC ISSUES IDENTIFIED THROUGH DUE DILIGENCE

- Medical director issues
- Change of ownership/36 Month Rule
- Compensation of sales force
- Integrated health system issues
- Relationships with referral sources
- Length of stay concerns
- Employee/Independent Contractor classification



22

ENCOUNTERING QUI TAM LITIGATION OR OPEN AUDITS IN TRANSACTIONS:

- Difficulty in complying with the complex regulatory and sub-regulatory structure of the home health and hospice reimbursement systems creates an industry replete with audits by various Medicare contractors.
- UPICs, ADRs and TPEs are common.
- Qui tam actions are common also.
- UPIC and other audits often have a "worst case" scenario that can serve as the basis for determining the size of an escrow.
- Consider paying off the amount claimed in full, stopping the interest accrual, and pursuing a refund by proceeding with appeals as a way of satisfying a buyer.
- Estimate damages based on an analysis of medical records subject to a qui tam driven civil investigative demand.

23

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23

QUESTIONS?

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24