

Health Law Webinar

Health Care Transactions: Key Issues and
Strategic Considerations

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Overview

- Motivations for a Transaction
- Overview of a Deal
- Deal Structure
- Regulatory Issues
- Process and Preparation
- Other Key Transaction Documents
- Opportunities & Pitfalls

Types of Health Care Transactions

- Acquisitions
- Joint ventures
- Service line management

Motivations

Seller

- Recruitment challenges
- Overhead
- Decreasing reimbursement
- Health care reform
- Access to capital
- Perceived security
- Reluctance of new professionals to buy-in

Buyer

- Growth
- Patient base
- Value-based care

Reservations

Seller:

- Lack of autonomy and independence
- Frustration with inefficiencies
- Difficult to “reverse” the deal

Buyer:

- Post-closing engagement
- Appropriate incentives

Potential Buyers/Partners

- Hospitals
- Other practices
- Current employed professionals
- Private equity
- Other

Process

- Get your house in order
 - Legal/compliance, financial, stakeholder support
- Confidentiality Agreement
- Letter of Intent (optional)
 - Advantages and disadvantages
 - Binding vs. nonbinding
 - Key terms

Process

- Due diligence
 - Assemble team
- Negotiate and execute legal agreements
 - Key issues and solutions
- Satisfy closing conditions and obtain approvals
 - Dealing with third parties
- Closing of transaction

Structure Options

- Stock purchase
 - Purchase shares of clinic stock/ownership
 - Capital gain to physician owners
 - Buyer takes on liabilities of Seller (e.g., malpractice claims, debt)
- Asset purchase
 - Certain assets are purchased/sold; certain may be left behind (e.g., accounts receivable)
 - Ordinary income / some capital gain
 - Seller will need to pay obligations from proceeds of sale (e.g., bank debt)

Asset Purchase

- Types of assets that might be purchased:
 - Tangible:
 - Accounts Receivable (if not purchased, then Buyer may collect for a collection fee)
 - Equipment
 - Supplies
 - Fixtures
 - Intangible:
 - Goodwill (e.g., going concern value, assembled workforce, trade name)
 - Covenants not to compete
 - Patient lists

Stock Purchase

- Potential benefits
 - Tax ID number
 - Licenses
 - Third party payer arrangements
- Downside
 - All liabilities remain part of acquired practice
 - known and unknown liabilities
 - indemnification provisions might be insufficient

Regulatory Issues

- Antikickback
- Stark
- Antitrust
- Tax exemption (for nonprofit/tax exempt entities)
- Licensing/Change of Ownership
- HIPAA/Privacy laws
- Corporate practice

Antikickback

- It is illegal to offer, solicit, make or receive any payment intended to influence referrals under a federal health care program
- The government applies the “one purpose” test:
 - If one purpose of the payment is to influence referrals, the payment is illegal
- “Sale of Practice” Safe Harbor
- Not required to meet a safe harbor
- Similar state laws may apply

Stark

- Prohibits a physician from making a referral to a provider for “designated health services” if the physician has a financial relationship with the provider, unless an exception applies:
 - Isolated Transaction Exception
 - Value-Based Care
 - Fair Market Value

Impact on Transaction

- Preparing for transaction
 - Review agreements with referral sources
 - Internal policies
- Structuring transaction
 - Earnouts
 - Compensation arrangements

Antitrust

- Overview
- Hart-Scott-Rodino (HSR) filings
- Due diligence
 - Timing
 - Competitively sensitive information (“CSI”)
 - Consider using a third party to analyze CSI
- Gun Jumping
- Execution

Tax Exemption

- Overview/Key Concepts
 - No private benefit
 - Fair market value
- Preparing for the Transaction
 - Valuation
 - Consider using third-party valuation firm
 - Also relevant for AKS and self-referral analyses
 - Role of legal counsel?
- Structuring the Transaction
 - Purchase agreement
 - Compensation arrangements (employment/service agreements)

Change of Ownership Process

- Medicare
- Medicaid
- State licensing
- Certificate of Need

Health Information

- HIPAA
 - PHI may be disclosed in a “sale, transfer, merger, or consolidation of all or part of the covered entity with another covered entity, or an entity that following such activity will become a covered entity and due diligence related to such activity.”
- 42 CFR Part 2
- State Law

Health Information

- HIPAA Policies and Procedures
- Employee Training
- Security Risk Assessment
- Breaches
- Business Associate Agreements

Corporate Practice of Medicine (“CPOM”) Prohibition

- Prohibits corporations from employing professional or owning professional practices
- Applies to many disciplines (e.g., dentistry, nursing)

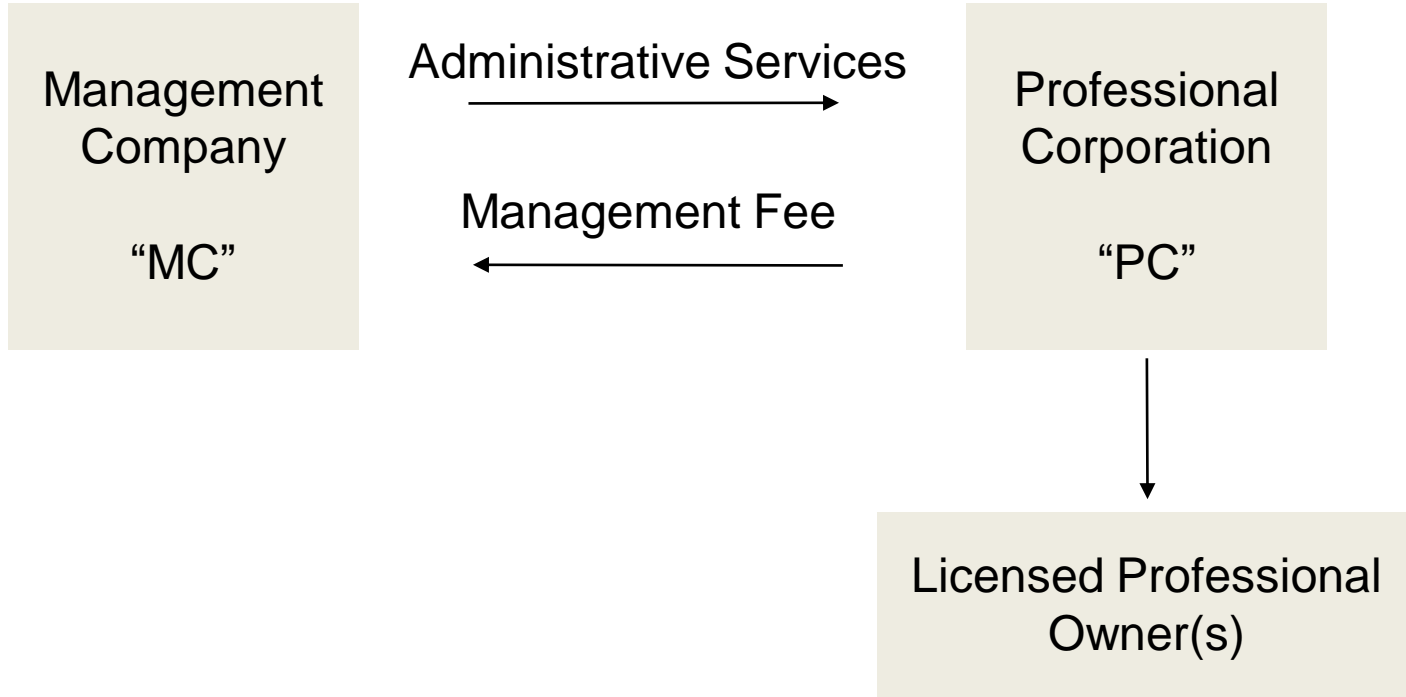
CPOM Prohibition, cont.

- Potential Ramifications for Violating the CPOM Prohibition
 - Injunction against continued operation of practice
 - Criminal prosecution for engaging in the unauthorized practice of medicine
 - Entire arrangement could be declared void

CPOM Prohibition, cont.

- Potential Ramifications for Violating the CPOM Prohibition (cont.)
 - Refusal to pay claims
 - Loss of “private practice”, “physician office” and similar exceptions from state licensing requirements (CON, lab license, etc.)

Friendly PC Arrangement



Friendly PC Arrangement

- Common Aspects of Management Agreement
 - Long-term
 - Restrictions on termination
 - Restrictive covenant
 - Management fee
- Other Agreements re: Continuity of Ownership

Employment

- Physicians/providers are typically a key attraction:
 - Do they fit the Buyer's criteria for employment (e.g., credentialing and privileges)?
 - What if one or more do not want to sell?
 - Key terms include term and termination events, compensation, duties, locations, hours, benefits, time-off
 - Other key terms include change of control provisions (i.e., Buyer's ability to assign to a new buyer without consent), governance, covenant not to compete

Employment, cont.

- Support Staff
 - Is employment of support staff important to Buyer or Seller?
 - Will support staff agree to employment with Buyer?
 - Union issues

Restrictive Covenants

- Will the Buyer require a covenant not to compete?
- Geographic and temporal scope
- Important to consider if certain events should cause covenant not to compete to become unenforceable (e.g., Buyer decides to sell/merge with another organization)
- Seller rights in the event of a breach

Transition Agreements

- Depending on deal structure, Buyer may want a temporary arrangement covering:
 - EHR transition
 - Support services
 - Payer contracting
- Consider scope, indemnification, duration, and appropriate compensation

Representations and Warranties

- Seller makes certain promises about its business
 - Basic business operations, compliance with laws, indebtedness, may include nuanced regulatory matters
- Buyer may seek recovery against Seller for breaches of reps and warranties
- Consider limits to liability of Seller and its owners
- Impact of COVID-19
- Relationship to disclosure schedules

Due Diligence

- UCC Searches
- Contract Review
 - Assess contracts that may require third party consents or notification in connection with sale (e.g., computer system, third party payer contracts)
- Regulatory Review
- Leases
- Financial Statements
 - Importance of considering Buyer's financial statements and future viability
- Privilege considerations

Other Key Considerations

- If it's not in writing, the promise doesn't exist from a legal perspective
- People change
- The health care environment is changing rapidly; no one is sure of the future
- New players in the marketplace

Opportunities and Pitfalls

- Regulatory filings and required timing
- COVID-19
- Bring in advisors early
 - Understand impact of changes to structure

Presenters



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