



ROMANCING THE DEAL:

The Art of the Term Sheet and Letter of Intent

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AGENDA

- Introduction
- Role and Importance of a Term Sheet and Letter of Intent (LOI)
- Drafting fundamentals
- Enforceability of No-Shop and Best Efforts clauses -- Review of interpretive case law and select state laws
- Measuring damages when Seller breaches Term Sheet/LOI restrictive covenants
- Examples of Term Sheets:
 - Hospital Merger (Key terms: ?)
 - Physical Therapy Joint Venture (Key terms: ?)
 - Physician Practice Acquisition (Key terms: ?)

INTRODUCTION

- Why use a term sheet?
- Less Complicated to Start
- Less Threatening to Parties
- Organize Thoughts of Clients
- Focus the Parties
- Define Scope of Good-Faith Negotiations



TERM SHEET BASICS

- Purpose of Deal
- Description of the Deal
- Governance and Voting (Supermajority)
- Reserved Powers
- Management
- Term and Termination

TERM SHEET BASICS (cont.)

- What does each Party bring to the table?
- Capital Contribution/Compensation
- ID Definitive Documents
- Restrictive Covenants
- ROFR/ROFO
- Public Announcements and Confidentiality
- Branding

TERM SHEET BASICS (cont.)

- Real Estate Transfer
- Retention of Employees
- Transitional Services
- On-Going Professional Services
- Due Diligence Terms
- Assignment of Contracts; Use of PIN for Medicare Contracting

TERM SHEET VS. LETTER OF INTENT (LOI)

- The obvious
- The Not so obvious
- Impact: Same or different types
 - Not meant to be binding, with the exception of:
 - No Shop – Exclusivity
 - Confidentiality
 - Break-Up

DRAFTING FUNDAMENTALS

- Be as specific as practical of fundamental terms, including limits/buckets on indemnification
- Anticipate breakup/withdrawal before/after transaction is closed
- Provide that both parties shall bear their own costs and expenses
- Obtain signature of parties to LOI or Term Sheet, as appropriate
- Subject legal binding of the transaction to the delivery and execution of definitive documents
- Define Termination Events and Effect

ENFORCEABILITY

- In general - is there a contract?
 - Intention of Parties to be Bound – Be clear and precise
 - Sufficient Term Definition
 - Consideration

See Ueberroth v. Goldner, Papandon, Childs & Deluccia, LLC, Civ. No. 11-3119, 2012 WL 834737 (E.D. Pa. Mar. 12, 2012)

ENFORCEABILITY (cont.)

- Typical Binding Provisions
 - No Shop Clauses
 - Best Efforts
 - Confidentiality/Public Announcements
- Courts have used various theories to award damages for an unconsummated letter of intent, including:
 - Failure to perform a contract, and
 - Failure to negotiate in good faith.

ENFORCEABILITY (cont.)

- Failure to Perform Contract: Key Factor = Intent to Contract
 - Courts first look to the expressed language of Term Sheet of LOI
 - When not expressed, Courts look for:
 - Does LOI or Term Sheet contain all material terms of a standard contract
 - Does the LOI and Term Sheet refer to future anticipated definitive agreements?
 - Does the LOI or Term Sheet contain a combination of both, i.e., material terms and reference to future documents?

ENFORCEABILITY (cont.)

- Failure to Perform Contract: Key Factor = Intent to Contract
 - External Evidence
 - Complexity of transaction
 - Conduct of parties after signing LOI/Term Sheet *See Texaco Inc. v. Pennzoil, Co.* 729 S.W.2d 768, 790 (Tex. App. 1987), *cert. dismissed* 485 U.S. 994 (1988), *appeal dismissed on agreement of the parties*, 748 S.W.2d 631 (Tex. App. 1988).
 - Issuing press releases – Providing “indicative terms, not subjective or hypothetical ones”
- Promissory Estoppel – *See Turner Broadcasting System, Inc. v. McDavid*, 693 S.E.2d 873 (Ga. Ct. App. 2010)

ENFORCEABILITY (cont.)

- Failure to Negotiate in Good Faith
 - Claim: Breach of Duty to Negotiate in Good Faith
 - Threshold: Court finds that the parties in fact entered into a contract via LOI/Term Sheet – Court Inquiry
 - Both Parties Manifest Intent to be Bound,
 - Terms of LOI/Term Sheet Sufficiently Definite to be Enforced, and
 - Consideration.

See Channel Home Centers v. Grossman, 795 F.2d 291, 299
(3d. Cir. 1986).

REMEDIES

- Binding Provision – Specifically provide for Remedy provision and make clear that it is a binding and surviving provision in the LOI/Term Sheet
- Injunctive Relief – Temporary and Permanent
- Dollar Damages
- How are Damages Measured?

Term Sheet and Letter of Intent Examples

EXAMPLE 1: HOSPITAL MMA

HOSPITAL M&A

- PARTIES: Local Hospital and Large MultiState System
- KEY ISSUE: Connection with Independence
- SOLUTIONS: 4Ds
- Deal Type: member substation?
- Dollars?
- Duties?
- Destiny? (impact of merged parties)

HOSPITAL M&A (cont.)

KEY TERMS:

- Form/Structure of Transaction – Merger/Member Substitution/Asset Sale/Stock Purchase
- Identify Regulatory Hurdles
- Identify and Describe the Parties
- Transaction Rationale
- Definitive Agreement
- Governance and Reserved Powers
- Management and Employees
- Medical Staff

HOSPITAL M&A (cont.)

KEY TERMS:

- Charity Care and Philanthropy
- Future Closure or Sale
- Capital and Operational Commitments
- Integration Planning and Transitional Services
- Branding
- Conditions to Closing
- Indemnification or NO Indemnification
- Centralized Support and Allocation of Overhead Methodology

HOSPITAL M&A (cont.)

- Key Terms -- Binding
 - Jurisdiction
 - Termination
 - Confidentiality
 - Public Announcements

HOSPITAL M&A (cont.)

- Key Terms -- Binding
 - Non-Solicitation
 - Due Diligence
 - Expenses
 - Closing
 - Signature/Counterparts

EXAMPLE 2: Hospital - Physical Therapy Joint Venture

PT JV

- PARTIES: Hospital and Private PT Practice
- Key Issue: Billing
- Solution: Structure

PT JV (cont.)

- Key Terms
 - Purpose and Objectives
 - Initial Capital Contribution
 - Additional Capital Calls
 - Transfer Restrictions
 - Dilution
 - Governance – Board Action (Supermajority)/Board Deadlock
 - Member Retained Powers -- “Significant Actions”

PT JV (cont.)

- Key Terms
 - Management
 - Clinical Services
 - Limited Liability of Members
 - Distribution of Profits
 - Change of Control

PT JV (cont.)

- Key Terms
 - Restrictive Covenants – Non-Compete, Non-Solicitation
 - ROFR – De Novo Opportunities
 - Dissolution
 - Indemnification

PT JV (cont.)

- Key Terms -- Binding
 - Definitive Agreement
 - Jurisdiction
 - Termination
 - Confidentiality
 - Non-Solicitation
 - Expenses
 - Closing

EXAMPLE 3: Physician Practice Acquisition

PHYSICIAN PRACTICE ACQUISITION (cont.)

- PARTIES:
- KEY ISSUE:
- SOLUTION:

PHYSICIAN PRACTICE ACQUISITION (cont.)

KEY TERMS

- Purpose/Objective
- Identify Buyer
 - Another Practice
 - Hospital
 - Non-Physician Entrepreneur

PHYSICIAN PRACTICE ACQUISITION (cont.)

KEY TERMS

- Structure
 - Asset/Stock: Hard Assets = Employment
 - Enterprise Model with MSO
 - Captive PC/LLC
- Identify Assets Acquired
- Identify Liabilities Assumed

PHYSICIAN PRACTICE ACQUISITION (cont.)

KEY TERMS

- Employees – Who is the Employer?
 - Separate Employment Agreements with Separate Restrictive Covenants
 - Physician Compensation – How Determined? Base + Bonus? Guarantees?
 - Conditions for Employment – Pre and Post
 - Investment Opportunities in Practice
 - Termination for Cause
 - Loans?

PHYSICIAN PRACTICE ACQUISITION (cont.)

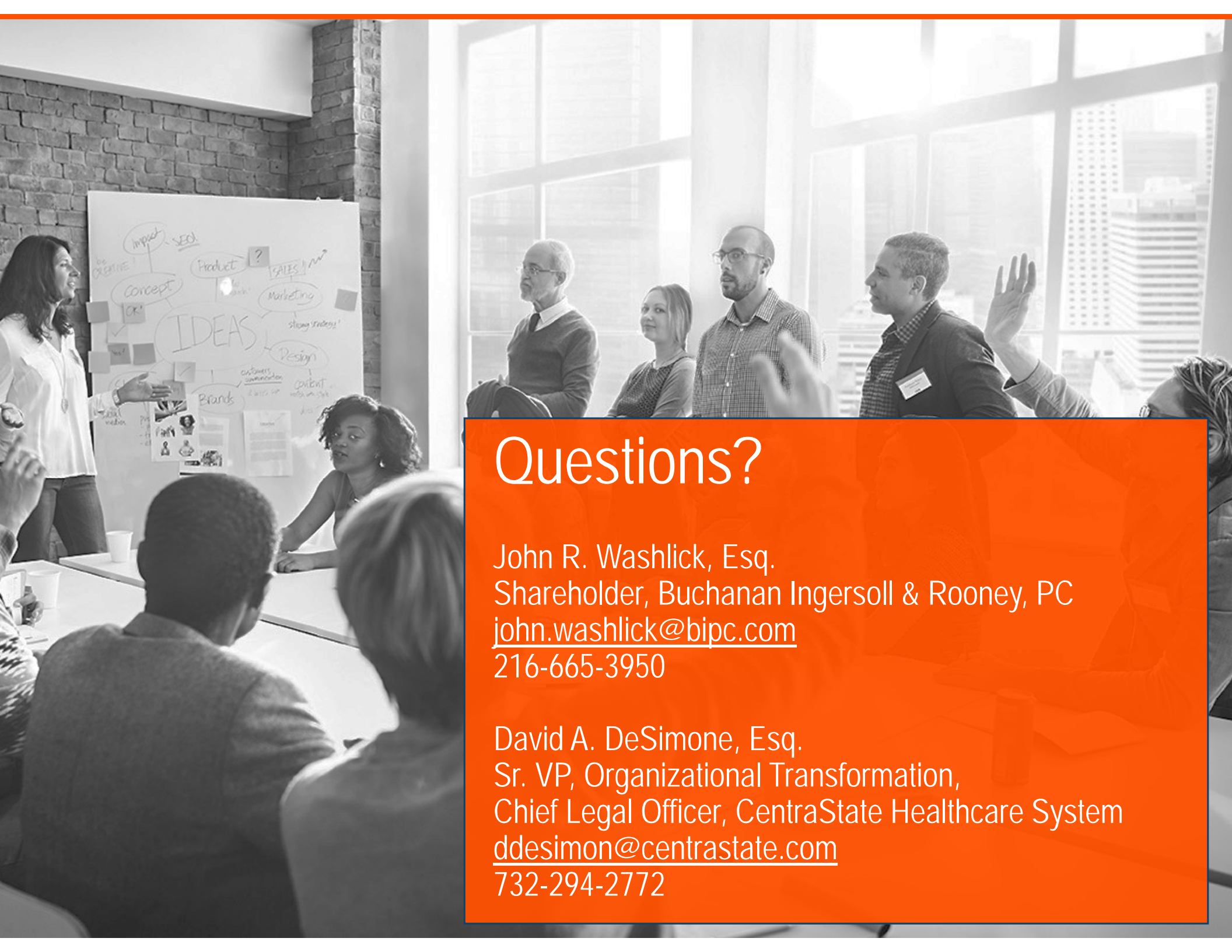
KEY TERMS

- Practice Purchase Price – FMV
- Restrictive Covenants – Non-Compete from Practice and Shareholders/Members
- Due Diligence
- Conditions – Regulatory Compliance and Approvals

PHYSICIAN PRACTICE ACQUISITION (cont.)

KEY TERMS

- CPOM and Management Contracts
 - Management Fee = FMV
 - Marketing Fee based on Percentage of Fees
 - CPOM
 - Fee Splitting
- Insurance and Tail Coverage
- Similar to Example 2



Questions?

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