


**Health Care Transactions**



The business of relationships.

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**Types of Health Care Transactions**

- Merger & Acquisition
- Financing
- Leasing
- Joint Venture
- Corporate Restructuring
- Affiliation
- Provider Participation Agreement
- Service Agreement
- Management Contract
- Licensing

2

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**Health Care Transactions**

- Focus on selected legal issues of particular interest in health care transactions
- Paradigm – Acquisition of Pennsylvania nonprofit hospital by investor-owned company



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### Agenda

- Fiduciary Duties of Directors and Officers
- Attorney General and Orphans' Court Review
- Medicare Change of Ownership
- Licensure Reviews and Approvals

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### Fiduciary Duties of Directors and Officers

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### Fiduciary Duties of Directors and Officers

- Duty of Loyalty
  - Directors and officers owe a duty of loyalty to a nonprofit corporation
  - They must exercise their power and authority in the best interests of the corporation, rather than their own personal interests



This "fiduciary" thingy really complicates pilaging a corporation.

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**Fiduciary Duties of Directors and Officers**

- Duty of Care
  - Directors and officers must perform duties:
    - In good faith
    - In a manner reasonably believed to be in the best interests of the corporation
    - With such care (including reasonable inquiry, skill and diligence) as a person of ordinary prudence would use under similar circumstances

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**Fiduciary Duties of Directors and Officers**

- Factors a Board may consider:
  - Effects upon groups affected, including members, employees, suppliers, customers and creditors of the corporation, and upon communities in which offices or other establishments of the corporation are located
  - Short-term and long-term interests of the corporation
  - Resources, intent and conduct of any person seeking to acquire control of the corporation
  - All other pertinent factors

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**Fiduciary Duties of Directors and Officers**

- Business judgment rule
  - Absent breach of fiduciary duty, lack of good faith or self-dealing, any act as the board of directors, a committee of the board or an individual director shall be presumed to be in the best interests of the corporation

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### Fiduciary Duties of Directors and Officers

- Documentation
- Articulated reasons for transaction, such as financial and other circumstances
- Process and consideration of alternatives
- Price and other terms
- Consideration of public interest
- Conflicts of Interest
- Confidentiality

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### Attorney General and Orphans' Court Review

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### Attorney General and Orphans' Court Review

- Nature of Charitable Assets
  - All of the properties of a charitable nonprofit corporation are held in trust as charitable assets. *In re Roxborough Memorial Hospital.*
  - Property committed to charitable purposes shall not be diverted from the objects to which it was donated, granted or devised. 15 Pa.C.S.A. § 5547(b).

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### Attorney General and Orphans' Court Review

- Nature of Charitable Assets
  - Fundamental Transactions: In order to make effective any plan of sale, lease or exchange of assets ... the corporation shall comply with the requirements of section 5547(b). 15 Pa.C.S.A. § 5530(a).
  - *Cy pres* doctrine: If a charitable purpose is not being fulfilled, a court may order an administration or distribution of the estate for a charitable purpose in a manner as nearly as possible to fulfill the intention of the conveyor.

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### Attorney General and Orphans' Court Review

- Nature of Charitable Assets
  - Future Gifts: A gift to be effective in the future to or for a nonprofit corporation which has sold, leased away or exchanged all or substantially all its property and assets after the execution of the document containing such gift shall be effective only as a court having jurisdiction over the assets may order. 15 Pa.C.S.A. § 5550

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### Attorney General and Orphans' Court Review

- Attorney General Review
  - Attorney General, as *parens patriae*, represents the interests of the community-at-large as protector of the public interest in charities
  - Indeed, members of the general public do not have standing to enforce the administration of charities
  - In 1997, following the downfall of AHERF, the Attorney General developed a "Review Protocol for Fundamental Change Transactions"

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## Attorney General and Orphans' Court Review

- Attorney General Review
  - Applicability of Review Protocol
    - "Whenever a nonprofit, charitable health care entity enters into a transaction effecting a fundamental corporate change which involves a transfer of ownership or control of charitable assets."
    - Regardless of the form of the transaction contemplated
    - Regardless of whether the other party or parties to the transaction are a nonprofit, mutual benefit or for-profit organization
    - Exception: transaction is in the usual and regular course of the nonprofit's activities

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## Attorney General and Orphans' Court Review

- Attorney General Review
  - Subjects of Review
    - Diversion
    - Fiduciary duties
    - Fair market value
    - Inurement (*i.e.*, conflicts of interest)
    - Impact on access to health care
    - *Cy pres* (segregation and use of restricted funds remain and use of proceeds be resulting/remaining foundation)

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## Attorney General and Orphans' Court Review

- Attorney General Review
  - Prior Notice to AG's Office
    - Notice must be furnished "at least 90 days prior to the contemplated date of its consummation"

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### Attorney General and Orphans' Court Review

- Attorney General Review
  - Submission of Documents
    - Protocol contains a long list of documents to be submitted to Attorney General's office, including:
      - Organic documents
      - Transaction documents
      - Foundation documents
      - Financial information
      - Valuations
      - Related party transactions

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### Attorney General and Orphans' Court Review

- Attorney General Review
  - Experts/Consultants
    - Use of valuation consultant in one case

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### Attorney General and Orphans' Court Review

- Attorney General Review
  - Public Hearing
    - Published notice
    - Conducting of public hearing
    - Transcription

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**Attorney General and Orphans' Court Review**

- Attorney General Review
  - AG Determination
    - Requirement for Orphans' Court review
    - No objection letter or on record

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**Attorney General and Orphans' Court Review**

- Orphans' Court Review
  - Petition
  - Jurisdiction: Orphans court has jurisdiction over "administration and proper application of property committed to charitable purposes held or controlled by any nonprofit corporation"

23

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**Attorney General and Orphans' Court Review**

- Orphans' Court Review
  - Venue
    - County where the registered office of the corporation is located or (if no registered office) in a county where property held or controlled by the nonprofit corporation is located
    - For a transaction involving multiple nonprofit corporations with registered offices in different counties, it may be possible to consolidate petitions filed in the different counties in a single county

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## Attorney General and Orphans' Court Review

- Orphans' Court Review
  - Intervention/Standing
    - Third parties may desire to intervene in order to block a transaction
    - However, private parties generally lack standing



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## Attorney General and Orphans' Court Review

- Orphans' Court Review
  - Hearing
  - Order
    - Approval of transaction
    - Determination of no diversion
    - Future gifts
    - Fiduciary duties

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## Attorney General and Orphans' Court Review

- Orphans' Court Review
  - Exceptions/Appeals Period
    - 20-day exceptions period
    - 30-day appeal period

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**Attorney General and Orphans' Court Review**

- Specific Issues
  - Decisionmaking Process
  - Conflicts of Interest
  - Adequacy of Consideration
  - History and Continued Viability of Seller
  - Purchaser Contractual Commitments
  - Noncompetition Provisions
  - Advisors
  - Donor Restricted Funds
  - Post-Transaction Accounting

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**Medicare Change of Ownership**

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**Medicare Change of Ownership**

- Classification of Transaction
  - New Medicare Enrollment
  - Change of Ownership
  - No Impact (Change of Information)



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### Medicare Change of Ownership

- Change of Ownership (“CHOW”)
  - Generally, when a new entity becomes the owner of a Medicare provider, the transaction involves a CHOW.
  - Examples of CHOW transactions
    - Sale of Assets
    - Merger where owner of provider is not surviving entity
    - Leasing

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### Medicare Change of Ownership

- Change of Ownership (“CHOW”)
  - Consequences of CHOW
    - Buyer and seller complete relevant sections of Form CMS-855A or 855B
    - Must be reported within 30 days of the effective date of the change
    - MAC/FIs are instructed that applications may be accepted up to 90 calendar days prior to the closing

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### Medicare Change of Ownership

- Change of Ownership (“CHOW”)
  - Consequences of CHOW
    - “Automatic assignment” of Medicare provider agreement; buyer retains seller’s Medicare provider number
    - Buyer succeeds to “terms and conditions” and to any Medicare overpayment and civil money penalty liabilities
    - Interruption of payment pending CMS RO’s issuance of “tie-in notice”

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### Medicare Change of Ownership

- No Impact (Change of Information)
  - Generally, if the entity that owns the provider continues to own the provider, the transaction does not involve a CHOW
  - Examples of Change of Information transactions
    - Sale of stock
    - Merger where owner of provider is surviving entity
    - Management agreement

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### Medicare Change of Ownership

- No Impact (Change of Information)
  - Consequences of Change of Information
    - Provider must report changes to Medicare enrollment data by completing relevant sections of Form CMS-855A or 855B
    - Must be reported within 90 days of the effective date of the change
    - No payment interruption
    - Successor liability under state law

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### Medicare Change of Ownership

- New Medicare Enrollment
  - For a transaction that otherwise would be a CHOW, the new owner may “reject assignment” of the seller Medicare provider agreement
  - New owner must notify CMS RO 45 calendar days prior to closing
  - If a new owner rejects assignment, the new owner will be treated as an applicant for a new enrollment in Medicare

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### Medicare Change of Ownership

- New Medicare Enrollment
  - Consequences of New Enrollment
    - New owner will not inherit the attributes associated with the prior owner's provider number
    - New owner must complete new Medicare enrollment application using Form CMS-855A or 855B

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### Medicare Change of Ownership

- New Medicare Enrollment
  - Consequences of New Enrollment
    - New owner must go through "initial survey", which will not take place until after closing, and are difficult to coordinate
    - Medicare will not pay for services furnished prior to date of successfully completed survey

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### Licensure Reviews and Approvals

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### Licensure Reviews and Approvals

- Highly regulated industry
- Health care providers often have multiple licenses and permits, which are issued by various state, federal and local agencies
- For health care facilities (such as hospitals), the principal license is the facility license issued by DOH under Health Care Facilities Act

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### Licensure Reviews and Approvals

- Health Care Facilities Act standards for licensure:
  - Health care provider is a responsible person
  - Health care facility is adequately constructed, equipped, maintained and operated to safely and efficiently render the services offered
  - Health care facility provides safe and efficient services which are adequate for the care, treatment and comfort of the patients or residents of such facility
  - Substantial compliance with rules and regulations

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### Licensure Reviews and Approvals

- DOH notice requirements under Health Care Facilities Act:
  - A transfer involving 5% or more of the stock or equity of the health care facility: 30 days prior notice
  - A change in ownership or a change in the form of ownership or name of the facility: 30 days prior notice
  - A change of management of a health care facility: notice within 30 days after change
- DOH hospital regs: 90 days prior notice

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### Licensure Reviews and Approvals

- Numerous forms in DOH CHOW packet, including:
  - Licensure Application
  - 10 Questions: "Information Requested of Health Care Providers Applying for a License to Operate a Health Care Facility"
  - Purchaser acknowledgement concerning noncompliance
  - Staff assurances document

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### Licensure Reviews and Approvals

- Third party efforts to block transaction
  - Informal actions
  - Formal actions
    - *Adams v. Department of Health*, 967 A.2d 1082 (Cmwlth Ct. 2009)



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### Licensure Reviews and Approvals

- Completion of Transaction
  - As closing approaches, confirm that DOH has all information needed and is satisfied
  - Upon closing, notify DOH that transaction has taken place, and furnish evidence (such as signed "bill of sale")
  - DOH will "issue" license post-closing dated as of closing

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### Licensure Reviews and Approvals

- Other licenses and permits
  - Medicaid/DPW
  - Laboratory/DOH
  - Pharmacy/Pharmacy Board
  - Radiation Producing Machines/DEP
  - Others

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### Other Issues

- Due Diligence
- Reps and Warranties/Indemnification
- RTKL Issues
- Antitrust
- Kickback/Self-referral
- Tax Exempt Organizations

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### Health Care Transactions

- Questions?

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