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Buying and Selling Long-Term Care Facilities: Overcoming Complex Regulatory and Business Challenges

Navigating CONs, Reimbursement, Licensure, Medicare and Medicaid Issues, Valuation, Anti-Kickback, and More

WEDNESDAY, AUGUST 26, 2015

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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PRESENTATION

Buying and Selling Long-Term Care Facilities:

Overcoming Complex Regulatory and Business Challenges

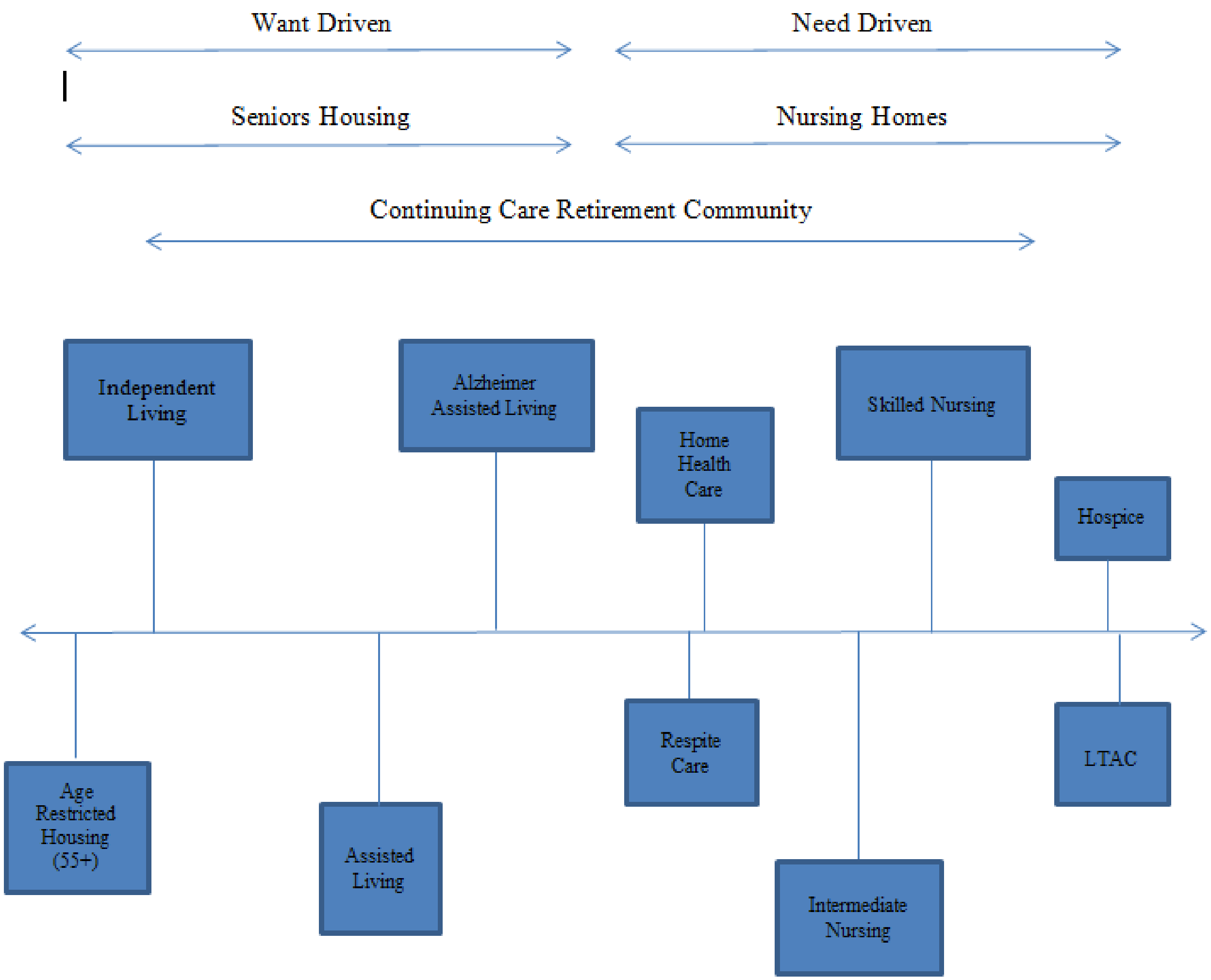
For Strafford Publications

August 26, 2015

BAKER DONELSON

HUSCH BLACKWELL

Long Term Care Industry – Overview



Current environment for buying and selling long-term care facilities

- SNF versus ALF
- Surge in development of ALF / Alz
- Buyers in the market:
  - Strategic buyers
  - REITs
- Overview of the sell side process
- Different approaches in the process between REITs and strategic buyers

Licensure Issues

- Identify all LTC licenses and other licenses.
- How does buyer obtain license for each activity?

Licensure – Change of Ownership

- In every SNF operations transfer, can have at least 4 different processes:
  - Licensure
  - Medicare
  - Medicaid
  - Certificate of Need (CON)

- Licensure is typically by State Department of Health, or similar state agency

Licensure – Change of Ownership (continued)

- Licensure process varies by state, but typically
  - Advance notice
  - Application
  - Survey?
  - Approval
  - Paper License Issued

- Buyer may not have license before closing.
- Buyer and lender need to understand licensing process.
- Comfort letter that buyer has applied for a license and agency believes a license will be issued.

Certificate of Need

- Check Certificate of Need requirements.
  - Some states require CON approval for a CHOW (e.g. Massachusetts, Hawaii)
  - Other states: letter of non-reviewability (e.g. South Carolina) or Notification (e.g. Tennessee, if operated less than two years)

Other approvals

- Corporate Integrity Agreements
  - If SNF is subject to a CIA, there is a separate process for transfer approvals with O.I.G.

Reimbursement

Next, we will turn to:

- Medicaid and Medicare
- Billing/Process
- Successor Liabilities

Certification – Medicaid

- Check state laws for Medicaid requirements.
  - Some states follow Medicare definitions.
  - Other states (*e.g.*, Florida) more broadly define a "change of ownership".
  - State processes are all different
  - Some states issue new Provider Agreements/Provider Numbers. Some assign to Buyer
  - Almost always filed post-closing, although many states require advance notice of intent to file
  - Missouri example

Certification – Medicaid (continued)

- How does buyer apply for Medicaid? Transfer or new agreement? Is there Medicaid successor liability?
- When will buyer be approved for Medicaid? Buyer and lender need to understand the Medicaid process since Medicaid may be bulk of facility revenue.
- Include licensure and certification contingency in every letter of intent.

Certification – Medicare

- Stock sale may not result in a change of ownership under Medicare.

- Notice required.
  - Removal, substitution or addition of a partner is change of ownership under Medicare.
  - Merger of a provider corporation into another corporation is change of ownership under Medicare.
  - Consolidation of two corporations into new corporation is change of ownership under Medicare.

Certification – Medicare (continued)

- LLCs are still not addressed in 42 C.F.R. § 489.18. Some LLCs structured like corporations.
- Other LLCs are structured like partnerships.
- Many states now allow entities to “convert” into other types of entities.

Medicare – CMS 855A Form

- File the CMS 855A form as soon as possible with the proper MAC.
  - Both buyer and seller file 855A in a CHOW.
  - MAC has sixty (60) days.

- Assignment is not complete until a “tie-in” notice is issued (60 – 90 days or more).

- If buyer accepts provider agreement, approval is retroactive to the effective date, but claims may need to be held for many months.

CMS 855A Form

- Use new CMS 855A form revised 7/1/2011.
- Available from CMS website and from your FI.
- New CMS 855 forms should be available soon.

Pointers for Handling CHOWs

- File early and call often
- Plan ahead for seller portion
- Workarounds on cash flow interruptions

  --"At risk" Interim Management Agreements

Successor Liability

Medicare Provider Agreement

42 C.F.R. 489.18(c)

Upon a change of ownership (a “CHOW”) of a nursing facility, the existing operator’s Medicare provider agreement is ***automatically assigned*** to the Buyer, unless the Buyer ***rejects*** the existing provider agreement and ***applies for a new agreement***.

Medicare

- Will provider agreement be assumed?
  - **Assumption of seller's Medicare liabilities for repayments, CMPs and others.**
  - Interrupted cash flow/non-payment for services rendered.
  - CMS 855A asks whether new provider is accepting assignment of the prior provider's provider agreement.

Medicare Successor Liability
Landmark Legal Cases

United States v. Vernon Home Health Care, Inc. (Fifth Circuit, 1994)

Held: An overpayment made to the prior operator of a home health agency could be offset by CMS against Medicare payments to the Buyer of the same home health agency. Based on 42 CFR § 489.18(c) noted above.

Deerbrook Pavilion, LLC v. Shalala (Eighth Circuit, 2000)

Held: Civil Monetary Penalties imposed on a prior operator of a nursing facility can be asserted against the Buyer.

Medicare Successor Liability
Landmark Legal Cases (continued)

Result of these two cases:

A purchaser accepting assignment of an existing Medicare provider agreement accepts full liability for any overpayments and Civil Monetary Penalties against the prior owner.

Successor Liability – Medicare

- Can you “reject” existing provider agreement?
- Yes, BUT…

- Old operator must withdraw from the program.
- Medicare payments are cut off until the new provider agreement is in place. To obtain a new Medicare provider agreement, purchaser must pass a full, unannounced survey.
- CMS prohibits State Survey Agencies (“SSAs”) from conducting the required unannounced survey until the SSAs have completed **<u>all</u>** of their higher priority workload.
- 2013 CMS directive - CMS looks with suspicion on any survey conducted shortly after a CHOW and speculates that any such prompt survey may have been announced to the new owner.

Successor Liability – Medicare (continued)

Result:

A purchaser rejecting assignment of an existing Medicare provider agreement will go 6 months to 1 year or more with no Medicare payments.

Payments not retroactive.

Few purchasers elect to reject existing Medicare provider agreement and apply for a new agreement.

Successor Liability – Medicare (continued)

- *Vernon* and *Deerbrook* force every buyer to be more careful than before about due diligence in a purchase.
- The CMS 855A asks whether the new provider is accepting assignment of the prior provider's provider agreement.

Successor Liability

- See also *BP Care, Inc. v. Thompson*, 337 F.Supp.2d 1021 (S.D. Ohio 2003), *aff'd on other grounds*, 398 F3d 503 (6th Cir. 2005). Quite a few cases which follow *Vernon* and *Deerbrook Pavilion*.

How Does Medicare Successor Liability Play Out?

Desk reviews/Recoupments

Audits

- RAC, MAC, ZPIC and state-level audits.
- Contingency fee contractors
- Can extend for up to 5 years following a CHOW
- Auditor’s power of extrapolation

Benefits of Accepting Assignment of Seller's Provider Agreement:

The approval process should take 60-120 days but when the approval comes, it **relates back to the effective date** of the CHOW.

Detriments to the New Owner of Accepting Assignment of Seller's Provider Agreement:

Assumption of seller's Medicare liabilities for repayments, civil monetary penalties and potentially other liabilities.

Detriments to the New Owner of Accepting Assignment of Seller's Provider Agreement: (continued)

- The new owner is treated like any other new Medicare provider.

- The new owner will need to go through an initial Medicare certification process.
  - The amount of time required depends on your state and the kind of provider.
  - Expect to wait at least 9 months.
  - Some have been able to avoid long waits.

How to Accept

SECTION 2: IDENTIFYING INFORMATION *(Continued)*

F. Change of Ownership (CHOW) Information

Both the seller/former owner and the new owner should complete this section. (As the new owner may not know all of the seller/former owner's data, it should furnish this information on an "if known" basis.) The seller/former owner must complete Sections 1A, 2F, 13, and either 15 or 16. (Section 6 must also be completed if the signer has never completed Section 6 before.) The new owner must complete the entire application.

Legal Business Name of "Seller/Former Owner" as reported to the Internal Revenue Service		
"Doing Business As" Name of Seller/Former Owner *(if applicable)*	Old Owner's Medicare Identification Number *(if issued)*	
Old Owner's NPI	Effective Date of Transfer *(this can be a future date) (mm/dd/yyyy)*	Name of Fee-For-Service Contractor of Seller/Former Owner

Will the new owner be accepting assignment of the current "Provider Agreement?" ☐ YES ☐ NO

CMS 855A (07/11) p. 13

Recap of Steps: How to Get the Keys to the Magic Kingdom

- File CMS 855A and all attachments.
- File civil rights forms.
- MAC reviews CMS 855A.
- MAC recommends approval to CMS RO.
- CMS RO gives approval and issues tie-in notice.
- MAC sends a “welcome” letter to applicant at the facility address shown.
- Applicant completes the welcome package; returns to the MAC.

Billing After the CHOW

- New provider can bill only after all steps above are completed (can be 120 days or more).

Billing After the CHOW (continued)

Section 15.7.7.1.5 of the Provider Integrity Manual.

- In a CHOW, the contractor [MAC] shall continue to pay the old owner until it receives the tie in/approval notice from the RO…It is ultimately the responsibility of the old and new owners to work out any payment arrangements between themselves while the contractor and RO are processing the CHOW.

But 42 CFR § 424.550(a) states:

A provider of supplier is prohibited from selling its Medicare billing number or privileges to any individual or entity, or allowing another individual or entity to use its Medicare billing number.

Other Successor Liability – Regulatory Liabilities

Regulatory Liabilities - Overview

- Survey History
- Special Focus Facility
- OIG Investigations
- Corporate Integrity Agreements

Regulatory Successor Liabilities

A. Survey Process

- LTC Facilities are subject to “Surveys” by SSA
- Can be annual or complaint
- Remedies for violations include:
  - Civil Monetary Penalties
  - Denial of Payment for New Admissions
  - Directed Plan of Correction
  - Decertification (loss of provider agreement)
  - Loss of License
  - Receivership
  - Closure

Regulatory Successor Liabilities (continued)

A. Survey Process (*continued*)

- Why does Purchaser care?
- Existing operator could be in the process of obtaining Civil Monetary Penalties, decertification or closure.
- Potential direct liability for purchaser.

Regulatory Successor Liabilities (continued)

B. Special Focus Facility (SFF)

- Initiative by CMS to put special attention on the lowest performing facilities

- Two surveys per year

- “Fast track” to decertification

Regulatory Successor Liabilities (continued)

C. OIG Investigations

- OIG investigates healthcare fraud and abuse
- Purchaser's Concern: Persecuting the good guys instead of prosecuting the bad guys

Regulatory Successor Liabilities (continued)

E. Corporate Integrity Agreements

- Routinely used by the government in connection with False Claims Act actions

CIAs have been used in connection with:

- Billing and coding
- Quality of care that fails to meet recognized standards
- Prohibited referrals or compensations arrangements
- Pretty much any conduct that the government can allege that violates the False Claims Act

Result: This Company has a new business partner, which is the OIG and probably an independent monitor. This partner cares a lot about certain things and will require the Company's attention.

Regulatory Successor Liabilities (continued)

- Other Successor Liability
  - Qui Tam
  - Litigation – Straddle Residents
  - Employment claims
  - Taxes – payroll taxes and tax liens

Contract and Indemnity Issues

Indemnification

- By seller for pre-closing items.
- By buyer for post-closing items.
- Claim procedure.
- Legal fees and costs.
- Threshold or “basket” before claims can be asserted.

- Time limit for filing claims
  - Some restrictions on contractual status of limitations.
  - Other ways limiting the duration of warranties.

- Maximum dollar amount of claims
- Environmental matters.

Dealing with Successor Liability: Indemnification

- Indemnification is usually key to resolution of buyer's concerns

- Seller Solutions
  - Have a strategy
  - Some indemnification will be required
  - Use LOI process
  - DISCLOSE

- Buyer Solutions
  - Be flexible
  - Be thorough in your due diligence

Dealing with Successor Liability: Indemnification

Seller Indemnity.

- Helpful if the seller entity has sufficient assets

- Almost never works as the exclusive remedy for single asset entity

Backing up the Indemnification

- **Corporate Guaranty.**
  - Guaranty from corporate parent company or affiliate with sufficient assets
  - Personal guaranties from principals.
  - Depends on the financial strength of the principals

- **Post-closing escrow**
  - Limitations on a cash escrow:
    - amount of cash (what to do about catastrophic claims) and
    - length of escrow period
  - Because of these limitations, escrow is usually paired with another approach

Backing up the Indemnification (continued)

- **Post-closing letter of credit**
  - Subject to same limitations as cash escrow on amount and duration
  - Banks require collateral
  - Bank fees
- **Holdback of purchase price**
  - Same limitations as post-closing escrow
- Seller-financing note, with right to offset

Backing up the Indemnification: Lease Issues

- **Right to offset lease payments**
  - Must have sufficient time to recoup possible liabilities
  - Buyer incurs an immediate loss and recoups over time

- **Liabilities are secured by Note/Mortgage**
  - Liabilities incurred by buyer become liabilities secured by a note and mortgage against the facility in favor of buyer

- **Deduct liability from purchase price**
  - If there is a lease or purchase option, liabilities incurred by buyer are deducted from the purchase price
  - Add accelerated opportunity to purchase facility

Dealing with Successor Liability

In highly distressed operations, Purchaser will consider closing operations and restarting clean:

- New provider agreements
- Change the focus of the regulators - SSA, CMS or OIG
- Major renovation/rebranding
- Change resident mix

Contract Issues

- **Employees**
  - Vacation/sick/PTO/FICA
    How handled? Transferred on Closing Statement (and assumed by Buyer) or paid out to employees by Seller?
  - Any excluded employees?
  - Buyer to select those to hire
    (process for hiring some not all)
  - Buyer obligation to hire substantially all employees (WARN Act reference)
  - Seller to terminate all employees at Effective Time; Buyer to offer employment to employees at Effective Time

Contract Issues (continued)

- **Benefit Accruals**
  - Understand whether seller will pay out
  - Understand accrual requirements in your state
  - Are limits allowed on balance rollover?
  - Alternate work schedules?
  - Do employees earn benefits while on holiday or vacation?
  - When must terminated employees receive payment?
  - Look at 12 months of payroll history for informal Bonus program and expectations

Due Diligence

- Insurance-related matters
  - Tail insurance
  - Special issues if Buyer is currently leasing/managing/selling

- Sellers - compile due diligence before starting the process
- Buyers stand ready with their due diligence list to accompany LOI
- Be organized on the front end.
- Put together all of the information that will need to be evaluated in electronic format.

Due Diligence (continued)

- Information to gather and organize include:
  a. Detailed Financials (in excel format is best)
     i. Previous 2 years – Year End
     ii. Current Year-to-date, by month
     iii. Because operating entity and real estate entity are usually separate, it is important to have real estate tax and insurance expense identified and broken out.
  b. Census and Occupancy data. Break out data by payor type for the financial period that corresponds with the financials.
  c. Property Description – Square footage and acreage. Is there any acreage for development? Building layout (fire escape floor plan). Number of private, semi private, 3-bed, 4-bed rooms.
  d. Most recent department of health survey.

HIPAA

- Providers can disclose PHI in connection with “Health Care Operations”.

- “Health Care Operations” includes the “sale, transfer, or merger…of the covered entity…and due diligence related to such activity.”

- No resident consent is required.

Financing Source

- Financing of Medicare and Medicaid accounts receivable.
  - The statute provides:

    "(c) No payment which may be made to a provider of services under . . . shall be made to any other person under an assignment . . ."

  42 U.S.C. § 1395g(c), Medicare;

  42 U.S.C. § 1396a(a) (32), Medicaid.

Seller Financing

- Specify the terms and conditions (term, interest rate, guarantors, security, pre-payment rights).
- Attach forms of seller-financing documents.
- For buyer, seller to sign any subordination agreement of buyer's first-mortgage lender.
- For seller, subordination agreement must be satisfactory to seller.

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