

HEALTHCARE MERGERS & ACQUISITIONS

Spring 2022

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PROGRAM SUMMARY

Overview

This BBS program will focus on healthcare mergers and acquisitions. A comprehension of this subject matter involves the law and practice surrounding mergers and acquisitions, as well as the law and practice of the healthcare regulatory sphere. Initially, the two fields will be covered separately, allowing us to proceed to marry the two topics into a knowledge base for this practice area. We will cover how M&A transactions are initiated, the steps in a typical acquisition, preliminary agreements, structuring the deal (merger, stock purchase or asset purchase) and the operation and negotiation of the acquisition agreement (and how it will differ if there is representations and warranty insurance). We will touch on the antitrust issues that are key in mergers and acquisitions, as well as the fiduciary duty issues that directors face in considering the approval of deals.

We will also overview the business of healthcare companies, including payment models and the motivations for doing a deal, as well as the basic elements of the federal and state healthcare regulations that come into play in a sale of a healthcare business. We will review structures for various types of transactions (including transactions with not-for-profits, acquisitions of hospitals with physician ownership, acquisitions of surgery centers with surgeon ownership and for-profit/not-for-profit joint ventures).

Often lawyers are asked to perform discreet tasks in a healthcare M&A transaction. This program will allow you to understand your work in the context of the overall transaction, and the business environment of the modern, complex healthcare sector.

Goals for the Program

At the end of the program, we hope that participants will:

- Understand the process by which healthcare transactions are consummated, including the initiation of a deal, structuring the deal, basics of the acquisition agreement and post-closing issues,
- Appreciate the basics of the federal and state healthcare payment and regulatory structures that impact healthcare deals, including Medicare and Medicaid, the Anti-Kickback Law, the Stark Law, the False Claims Act, HIPAA and state licensure and CON regulations, and

- Be familiar with the nuances of a healthcare acquisition agreement, and how these agreements differ from one involving a non-healthcare company.

Materials for Further Reading; Crosswords

This program will be presented without the need for participants to do any outside reading. Nonetheless, suggestions for further, relevant materials are included in this program summary. There are two resources that cover the basic subject matter of the program. They are the *M&A Practice Guide*, 2021 Edition, published by LexisNexis, and *Fundamentals of Health Law*, published by AHLA, 7th Edition. We can access these two works for you if you are interested. We will also use as reference materials the *ABA Model Stock Purchase Agreement* and the *ABA Model Merger Agreement*, which will be made available to you online. Finally, we will highlight provisions of the ABA's *Corporate Director's Guidebook*. If you desire to do additional investigation, there are included in the syllabus suggested articles available on-line. Other materials will be distributed in hard copy during some of the program sessions.

But we can't leave homework out of the program all-together. I will be distributing cross-word puzzles at the end of the sessions that will help solidify your grasp of acronyms and terminology common in this practice area. The healthcare industry uses more acronyms than any other business sector. I have no support for this assertion, but I am sure I am right. The participant who turns in the most perfect cross-words will win a prize!

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TOPIC	FURTHER SUGGESTED READING
WEDNESDAY, APRIL 20 – CLASS 1	
<p>TOPIC 1: GENERAL INTRODUCTION</p> <ul style="list-style-type: none"> • What is M&A? • What is healthcare M&A? • Levels of acuity • Introduction to Medicare and Medicaid • Vocabulary for healthcare deals 	
<p>TOPIC 2: HEALTHCARE PAYMENTS MODELS</p> <ul style="list-style-type: none"> • Fee-for service payment model • Value-based care • Benefits of value-based care • Alternative payment structures used in value-based care 	<ul style="list-style-type: none"> <input type="checkbox"/> Section 3.10 of <i>Fundamentals of Health Law</i> <input type="checkbox"/> Veradigm, “What is Value-Based Healthcare? A Comprehensive Guide”, available at https://veradigm.com/what-is-value-based-healthcare/
WEDNESDAY, APRIL 27 – CLASS 2	
<p>TOPIC 3: WHAT MOTIVATES HEALTHCARE DEALS</p> <ul style="list-style-type: none"> • Reasons why a buyer might want to do an acquisition • Reasons why a seller might want to do a disposition 	<ul style="list-style-type: none"> <input type="checkbox"/> Sections 1.01 and 1.02 of <i>M&A Practice Guide</i> <input type="checkbox"/> Section 12.1 of <i>Fundamentals of Health Law</i> <input type="checkbox"/> PWC, "Health Services: Deals 2022 Outlook," available at https://www.pwc.com/us/en/industries/health-industries/library/health-services-deals-insights.html

TOPIC	FURTHER SUGGESTED READING
<p>TOPIC 4: INTRODUCING THE PLAYERS AND PROJECT COMMODORE – FOR-PROFITS (PUBLIC AND PRIVATE) AND NOT-FOR-PROFITS</p> <ul style="list-style-type: none"> • Capital structure of providers: for-profits and not-for-profits • Indicia of not-for-profits entities • Benefits of Section 501(c)(3) entities • Introduction of Project Commadore 	<ul style="list-style-type: none"> ❑ Sections 6.1 to 6.2.3.2 of <i>Fundamentals of Health Law</i> ❑ BDO, “Establishing the Groundwork for Joint Ventures between Nonprofit and For-Profit Organizations”, available at https://www.bdo.com/blogs/nonprofit-standard/november-2014/establishing-the-for-joint-ventures ❑ Sections 5.2.16 and 5.5.2.2 of <i>Fundamentals of Health Law</i>
<p>TOPIC 5: OVERVIEW OF THE M&A PROCESS</p> <ul style="list-style-type: none"> • Strategic acquirers vs. financial buyers • Private vs. public targets • Steps in a typical acquisition • Initial overtures • No shops and exclusivity • NDAs • Letters of intent • Due diligence • Negotiation of acquisition agreement 	<ul style="list-style-type: none"> ❑ Sections 1.03 to 1.06, 4.01 – 4.03, 5.01 to 5.05, and 6.01 to 6.20 of <i>M&A Practice Guide</i> ❑ Ancillary Documents A (Confidentiality Agreement) & B (Letter of Intent) to <i>ABA Model Stock Purchase Agreement, Volume II</i> ❑ Sections 12.2, 2.4 to 12.9 of <i>Fundamentals of Health Law</i>
WEDNESDAY, MAY 4 – CLASS 3	
<p>TOPIC 6: SELECTING A DEAL STRUCTURE</p> <ul style="list-style-type: none"> • Asset transactions • Stock deals • Mergers (including 3 types of mergers) 	<ul style="list-style-type: none"> ❑ Sections 2.01 to 2.07; 2.14 to 2.18 of <i>M&A Practice Guide</i> ❑ Sections 12.3.1 and 12.3.1.2 of <i>Fundamentals of Health Law</i>
WEDNESDAY, MAY 11 – CLASS 4	
<p>TOPIC 7: HEALTHCARE REGULATORY OVERVIEW</p> <ul style="list-style-type: none"> • Government approvals • Medicare and Medicaid 	<ul style="list-style-type: none"> ❑ Sections 2.4, 3.2, 4.1 to 4.4, 5.1 to 5.8, 9.1, 9.2.1 and 9.3.1 of <i>Fundamentals of Health Law</i> ❑ DOJ release – Flower Mound Hospital, available at https://www.justice.gov/opa/pr/flower-mound-hospital-pay-182-million-settle-federal-and-state-false-claims-act-allegations

TOPIC	FURTHER SUGGESTED READING
<ul style="list-style-type: none"> • State licenses • CONs • Fraud and abuse laws • Anti-kickback statute • Stark law • False claims act • HIPAA 	<p>MGMA "Physician Self-Referral Law (Stark) Law, available at https://www.mgma.com/advocacy/issues/federal-compliance/physician-self-referral-stark-law</p> <ul style="list-style-type: none"> ❑ "Stark/AKS Comparison Chart", available at https://oig.hhs.gov/documents/provider-compliance-training/939/StarkandAKSChartHandout508.pdf ❑ "Avoiding Medicare Fraud and Abuse: A Roadmap for New Physicians," Publication of Department of Health and Human Services, available at https://oig.hhs.gov/documents/physicians-resources/947/roadmap_web_version.pdf
WEDNESDAY, MAY 18 – CLASS 5	
<p>TOPIC 8: ARCHITECTURE OF THE ACQUISITION AGREEMENT</p> <ul style="list-style-type: none"> • Transaction structure and consideration • Purchase price adjustments and earnouts • Representation and warranties • Covenants • Conditions • Termination and indemnification 	<ul style="list-style-type: none"> ❑ Sections 8.01 to 8.15, 9.01 to 9.10 of <i>M&A Practice Guide</i> ❑ Committee Chair's Preface, §§2.1 and 2.2 and Article 3 (scan Article 3), <i>ABA Model Stock Purchase Agreement</i> ❑ Committee Chair's Preface and §§1.1 to 1.5 of <i>ABA's Model Merger Agreement</i> ❑ Bloomberg Law, Earnout Provisions, available at https://www.goulstonstorr.com/whats-market-blog/earnout-provisions
<p>TOPIC 9: DRILL DOWN ON SELECTED AGREEMENT PROVISIONS</p> <ul style="list-style-type: none"> • No litigation representation • Critical definitions • Relationship to closing conditions • Impact on indemnification 	<ul style="list-style-type: none"> ❑ <i>In re IBP, Inc. S'holder Litigation</i>, 789 A.2d 14 (Del. Ch. 2001) ❑ Sections 10.1 to 10.07 and 12.01 to 12.9 of <i>M&A Practice Guide</i> ❑ Definition – Material Adverse Change, Knowledge of Sellers, Loss and Sections 8.1, 8.12, 11.2 and 11.6 of <i>ABA's Model Stock Purchase Agreement</i>

TOPIC	FURTHER SUGGESTED READING
WEDNESDAY, MAY 25 – CLASS 6	
<p>TOPIC 10: REPRESENTATIONS & WARRANTY INSURANCE</p> <ul style="list-style-type: none"> • Emergence of buy-side RWI • Scope of coverage • Key components of a RWI policy • Policy period • Exclusions 	<ul style="list-style-type: none"> <input type="checkbox"/> Sections 18.01 to 18.07 of <i>M&A Practice Guide</i> <input type="checkbox"/> SRS Acquiom, "Escrows vs. Representations and Warranty Insurance," available at https://www.srsacquiom.com/resources/escrows-vs-representations-warranties-insurance/
<p>TOPIC 11: ANTITRUST REGULATORY ISSUES</p> <ul style="list-style-type: none"> • Sherman Act • Clayton Act • Hart-Scott-Rodino Act 	<ul style="list-style-type: none"> <input type="checkbox"/> Section 2.15 of <i>M&A Practice Guide</i> <input type="checkbox"/> Sections 7.1 to 7.4 of <i>Fundamentals of Health Law</i> <input type="checkbox"/> The White House, "Executive Order on Promoting Competition in the American Economy," available at https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/
<p>TOPIC 12: BOARD FIDUCIARY DUTIES IN M&A CONTEXT</p> <ul style="list-style-type: none"> • Business judgment rule • <i>Revlon</i> duties • <i>Unocal</i> standard • Entire fairness 	<ul style="list-style-type: none"> <input type="checkbox"/> Sections 3.03 – 3.05 of <i>M&A Practice Guide</i> <input type="checkbox"/> Chapter 3 of <i>Corporate Director's Guidebook</i>
<p>TOPIC 13: WHY DEALS FAIL</p> <ul style="list-style-type: none"> • Factors that cause combinations to fail 	

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