HALL RENDER
KILLIAN HEATH & LYMAN

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LITIGATION IN HEALTH CARE M&A: THREE KEY CONSIDERATIONS TO MITIGATE RISK

Mergers and acquisitions in the health care industry present unique challenges that are not often present when undertaking similar transactions in other industries. Because of health care's highly regulated nature, parties may falter if a health care transaction is not reviewed and negotiated carefully with respect to the distinct concerns that health care presents. This article discusses certain key considerations related to litigation in the context of such transactions.

In complex health care transactions, litigation may arise from a derailed deal, acquired post-transaction liabilities or any number of other high-risk components of the transaction. Because of the potential for enormous risk and cost that unexpected litigation may exact, all parties should ensure that they carefully assess key aspects of the deal, including:

1. **Due Diligence - Inherited Liabilities and Litigation History**: A key component in transaction due diligence is assessing inherited litigation risks. This includes evaluating ongoing and threatened litigation, compliance issues and outstanding liabilities on contracts and other agreements. A health care entity's compliance program should be carefully assessed to determine pending or threatened *qui tam* actions and the potential for False Claims Act ("FCA") liability. There is a recent trend of personal injury and medical malpractice attorneys acting as whistleblowers in FCA cases. As a result, the parties should critically review the history of personal injury and medical malpractice cases to see where large amounts of medical or hospital records may have been disclosed. This can help the parties identify potential liability and ensure those cases are appropriately shored-up with necessary releases or confidentiality agreements.

   FCA liability is not the only possible litigation risk that could be inherited in a transaction. Entities or providers who are part of a transaction may be subject to court orders, settlement agreements or pending demands. The terms of those orders and settlements should be closely reviewed to determine not only which liabilities may transfer in the transaction, but to ensure all notification requirements are being met prior to closing. Failure to comply with those "administrative" settlement terms could expose either party to additional risk.

2. **Arbitration Clauses**: Pre-planning for potential disputes is critical. The decision to include an arbitration clause in any agreement should be carefully considered in the context of each health care transaction. While arbitration may provide confidential dispute resolution or relaxed discovery standards, the parties may also be required to waive their right to a jury trial. Likewise, arbitration may relax certain other rules of civil procedure.

   When including an arbitration clause, the parties should determine which arbitration rules will apply. While the American Arbitration Association ("AAA") is widely used for commercial disputes, it may be beneficial to specifically indicate that the parties will agree to participate in the American Health Law Association ("AHLA") arbitration process. The health care expertise of the AHLA arbitrators could ensure a more nuanced review of any potential disputes unique to your health care transaction including undisclosed liabilities, indemnification, early termination based on health care compliance and other issues that may arise.

3. **Attorney-Client Privilege and Confidential Information**: Is there any confidential information you do not want exposed during the transaction? Most entities assume that all communications between their attorneys and executives are privileged. But what about work product? What about that fair market valuation for physician compensation that your organization's attorney obtained for you? A transaction provides countless opportunities for the accidental disclosure of health care records, compliance documents and confidential court orders or settlement agreements—all of which need to be carefully managed to ensure that those documents do not end up in the wrong hands. Proper handling of these details is necessary to protect the parties and the transaction. It can also limit the risk associated with potential whistleblowers who have access to new confidential information. Determining who will own attorney-client privileged communications, associated work product and confidential information at the conclusion of the transaction should be addressed at the onset and monitored throughout the transaction.

The intricacies of health care increase the risk of liability and potential litigation during the course of a transaction. Hall Render's attorneys

have the litigation necessary to protect you in your transactions. For more information on Hall Render's Litigation services, click here.

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Throughout 2020, Hall Render's Mergers & Acquisitions Service Line will be publishing a series of articles identifying important, and often unique, aspects of health care transactions that should not be overlooked. Ranging from Real Estate to Reimbursement, this series is designed to highlight key issues and considerations relating to niche components of health care transactions.

- Part 1: **Real Estate Issues in Health Care M&A**
- Part 2: **Information Technology in Health Care M&A**
- Part 3: **COVID-19 in Health Care M&A**
- Part 4: **Post-Acute and Long Term Care Issues in Health Care M&A**
- Part 5: **The Organized Medical Staff in Health Care M&A**
- Part 6: **Graduate Medical Education in Health Care M&A**
- Part 7: **Antitrust in Health Care M&A**
- Part 8: **Litigation in Health Care M&A**
- Part 9: **Labor & Employment in Health Care M&A**

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