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Health Care Transactions: How to Get to Closing

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UT HEALTH LAW CONFERENCE

HEALTH CARE TRANSACTIONS: HOW TO GET TO CLOSING

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I. Introduction.

The purpose of this presentation is to provide a summary of some (but certainly not all) of the many of the issues that can arise in the course of a health care transaction involving one or more nonprofit entities. Less focused on the specific provisions of the operative documents or the structuring of the deal, this presentation addresses several “big picture” transactional, regulatory, and tax considerations that, if not appropriately identified and addressed, can unravel a transaction and prevent it from closing.

II. Can You Do the Transaction?

A. *Attorney General Review of Nonprofit Transactions Generally.*

Several states (e.g., California) have laws specifically requiring nonprofit organizations that own a hospital to apply for approval before the hospital can be sold to a for-profit entity (or, a for-profit or a nonprofit entity, as is the case in Louisiana) or convert to for-profit status. The attorneys general in these states generally are charged with reviewing the transaction, although other departments within the state, and even the courts, can be involved in the approval process. Some of these states (e.g., Colorado) even require post-transaction monitoring of the hospital.

Texas law does not include a specific process regarding notification/approval of a health care transaction – which has its pros and cons. Rather, the Attorney General of the State of Texas (the “AG”) is charged with the duty of protecting the public interest in charity, which it exercises through the Charitable Trusts Section. This duty stems from common law doctrines, the Texas Constitution, and various Texas statutes. Statutory grants of authority come from a number of sources, including (a) the Texas Property Code, (b) the Texas Occupations Code, (c) the Texas Business Organizations Code (the “TBOC”), (d) the Texas Health and Safety Code, and (e) Texas Deceptive Trade Practices – Consumer Protection Act (the “DTPA”).

1. *AG Review Process.*

The types of issues investigated by the AG broadly include organizational and management issues, fundraising issues, and use of funds issues. After a complaint is received by the AG, the office will first conduct an informal investigation. If warranted, a formal investigation will be opened and the Office of the AG will then proceed to gather information officially under the tools provided by the

TBOC and/or the DTPA, including requesting to view documents and taking sworn statements.¹

2. *The AG and the TBOC.*

The TBOC grants authority to the AG to monitor the activities of corporations and investigate the actions of charities organized as nonprofit corporations. This includes the power to inspect and examine corporate books and records and ensure that nonprofit corporations are complying with TBOC requirements.

Many of the TBOC requirements that may be investigated by the AG relate to governance of the organization. Directors must discharge their duties in good faith, exercising ordinary care, and in a manner they reasonably believe to be in the best interest of the corporation.² Officers may rely in good faith and with ordinary care on information from officers or employees of the corporation, legal counsel and accountants, unless the officers have knowledge that makes such reliance unwarranted.³

To ensure that nonprofit corporations are using their operations and assets for proper purposes, the AG can use its authority under the TBOC to examine the records and books of corporations doing business in Texas.⁴ Failure to cooperate with such requests can lead to forfeiture of the nonprofit corporation's right to do business in Texas, fines on the officers, and even potentially criminal liability.⁵ These requests are discussed in further detail later in this outline.

Nonprofit corporations operating outside of their stated corporate purposes are subject to actions filed by the AG for liquidation and dissolution.⁶ Short of these steps, the AG can also seek appointment of a receiver to take over the management of such a nonprofit corporation in an attempt to bring it back in line with its purpose, through actions such as appointing a new board of directors.⁷

3. *The AG and the Texas "Charity Care" Act.*

The Texas "Charity Care" Act, enacted in 1993, requires nonprofit hospitals to perform specified amounts of charity care, community benefits planning, and government-sponsored indigent health care.⁸ Hospitals may choose from several calculation methods under the statute to determine whether the amount of such

¹ Susan K. Staricka, *The Attorney General's Authority over Charitable Trusts*, in STATE BAR OF TEXAS 10TH ANNUAL GOVERNANCE OF NONPROFIT ORGANIZATIONS COURSE 1 (2012).

² TEX. BUS. ORG. CODE § 22.221

³ *Id.* §§ 3.105, 22.234, 3.102.

⁴ *Id.* § 12.151.

⁵ *Id.* §§ 12.155, 12.156.

⁶ *Id.* §§ 11.051, 11.301, 11.303, 11.402, 11.405.

⁷ *Id.* §§ 11.402-11.404; *see Greater Fort Worth v. Mims*, 574 S.W.2d 870 (Tex. Civ. App.—Fort Worth, 1978, writ dismissed).

⁸ TEX. HEALTH & SAFETY CODE ANN. § 311.041, *et seq.*

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