

# Southern California Association for Healthcare Risk Management

## The Critical Role of Risk Management in Mergers and Acquisitions

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10:30 a.m. – Noon

At the Rancho Las Palmas Resort

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# OVERVIEW

- Types of Transactions
- Structure of Definitive Agreements
- Fiduciary Duties
- Due Diligence – Mechanics
- Due Diligence – What/Why?
- Material Risks
- Deal Protection
- Past Role of Risk Manager
- Future Role of Risk Manager

# TYPES OF TRANSACTIONS

- Asset Purchase
- Stock Purchase
- Merger
- Affiliation of Nonprofits
- Joint Venture
- Management Agreement

# STRUCTURE OF DEFINITIVE AGREEMENTS

- Mechanics of Transaction/Structure
- Consideration/Purchase Price
- Representations and Warranties
- Covenants
- Conditions to the Deal
- Investigation/Due Diligence
- Indemnification
- Related Agreements
- Time Frames to Close

# FIDUCIARY DUTIES

- **Duty of Care**
  - Where due diligence emanates from
  - What would a reasonable person do in a like position in the conduct of his/her own affairs
  - Reliance Right (within area of competence, professional expertise)
- **Duty of Loyalty**
  - Absence of a conflict of interest
- **Business Judgment Rule**
  - If meet fiduciary duties, no liability to the corporation or its shareholders

# DUE DILIGENCE - MECHANICS

- Request List/Disclosure List
- Antitrust Guidelines
- Data Room
- Virtual Data Rooms
- Importance of Inventory of Documents Produced
- Importance of Report

# DUE DILIGENCE – WHAT/WHY

- Buy Side:
- Materiality thresholds need to be set
- What are we buying? What are we getting?
- What are the prospects for the business?
- Are there material liabilities/concerns?
- Anticipated losses or down-turns in business
- Cataloging information about the business

# DUE DILIGENCE – WHAT/WHY (cont.)

- Sale Side:
- Disclosures
- Necessary steps to effect transfer:
  - Consents
  - Notices
  - Approvals
- Both Sides:
- Constraints
  - Legal
  - Contractual
- Antitrust Concerns
- Cultural Issues



# MATERIAL RISKS

- Regulatory Compliance: Stark, Antikickback, Civil Money Penalties
  - Material Investigation
  - Integrity Agreement
- Material Litigation
  - Class action/wage and hour
  - Environmental matters
  - Antitrust
- Criminal Investigation or Inquiry
- Loss of Tax Exempt Status or Right to Participate in Medicare
- Certain Union Activity

# DEAL PROTECTION

- Break Up or Termination Fees
- No Shop
- Confidentiality Provisions
- Representations and Warranties
- Indemnification
  - Representations and warranties
  - Breach of definitive agreement
  - Pre-closing activities
- Indemnification Escrow (5-20% of the purchase price; 2-4 years)
- Medicare Provider Number

# PAST ROLE OF RISK MANAGER

- Organize Response to Request for Documents
- Oversee Antitrust Guidelines
- Review insurance policies
- Provide information on litigation and claims
- Oversee Nondisclosure Agreement
- Respond to Specific Questions

# FUTURE ROLE OF RISK MANAGER

- Step up to the Big Table
- Manage Due Diligence Process
- Prepare Due Diligence Report to Management
- Be the Due Diligence Resource