



# Transfer of Health Insurance/ Managed Care Business

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# Today's Presenters



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## Introduction

- Transfer of health insurance/managed care contracts can be complicated transactions involving multitude of issues
- Focus first on structural issues and then on some particular issues, such as Antitrust and HIPAA
- Seeing more situations where sellers desire to transfer health insurance/managed care contracts
- Sellers include:
  - Health care systems that want to exit the health insurance business
  - Health insurers/HMOs that desire to exit a particular market due to:
    - Operating losses
    - Difficulty in serving particular market
    - Desire to focus on other markets, etc.

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## Possible Transaction Structure

- Several different transaction structures are available to transfer health insurance business
  - Merger of target into acquiror
  - Purchase stock of target
  - Assumption reinsurance/transfer of assets
  - Migration of business
- Other possible but less common structures do exist

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## Merger into Acquiror

- Transaction
  - Target merges into acquiror
    - Possible alternative: Merger of target into new acquiror subsidiary
- Advantages
  - One combined entity will be best able to consolidate operations and expenses
  - One consolidated entity with larger surplus
  - Avoid cumbersome nature of other possible structures
  - Avoids need for multiple third party consents
  - Specifically authorized by statute (in most states)

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## Merger into Acquiror (cont'd)

### ■ Disadvantages

- Only works if all health insurance business (and only health insurance) is in the merging entity
- Acquiror inherits all liabilities
- May need shareholder/policyholder vote of acquiror
  - Target's shareholder/policyholder approval may also be required
- Acquiror must administer target's policies on an ongoing basis
- Target loses separate identity/licenses
- Acquiror needs to secure certificate of authority/other approvals in target's state
  - Possible alternative: Acquiror puts business in a subsidiary, which obtains approvals and conducts business in the other state(s)

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## Purchase Stock of Target

### ■ Transaction

- Acquiror acquires target stock
  - If target is a mutual insurer or other form of non-stock company, target will first have to convert to a stock company or transfer assets into a stock company

### ■ Advantages

- Stock sale may simplify transaction
  - Avoids need for multiple consents
- Separate entity in each state
- Target maintains licenses
- Acquiror may not need to secure a separate certificate of authority

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## Purchase Stock of Target (cont'd)

### ■ Disadvantages

- Only works if all health insurance business (and only health insurance business) is in the entity whose stock is being acquired
- Substantial purchase price for target's stock
  - Possible loss of surplus/reduction in ratings
- Acquiror owns a company with all target's liabilities
- Acquiror must administer target's policies on an ongoing basis
- If a conversion is required, some difficulties may arise:
  - Applicable statutes may not allow conversion or demutualization
  - DOI approval of conversion
  - Policyholder vote may be required for target's conversion
  - Conversion to stock company may entitle policyholders/charity to distribution of cash/stock/other consideration
  - Lengthy conversion process

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## Assumption Reinsurance/Transfer of Assets and Liabilities to Acquiror

### ■ Transaction

- Target transfers subscriber contracts and other assets to acquiror
- Acquiror assumes all (or most) liabilities of target
- Acquiror payment to target
- Target remains in existence

### ■ Advantages

- May be able to leave behind unrelated business and/or specified assets and liabilities
- Need not pay for surplus (which could be left behind)
- May be only authorized mechanism
- Possibly avoid demutualization/conversion issues
- Target's status does not apply to acquiror operations
- Allows acquiror to pay amount and leave target/regulators to determine disposition of funds

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## Assumption Reinsurance/Transfer of Assets and Liabilities to Acquiror (cont'd)

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### ■ Disadvantages

- Possible requirement of individual or group policyholder's consent to novation of their contract
  - Some states will require that each policyholder consent to a transfer
  - Some court decisions: No novation if no consent
- Cumbersome to transfer other assets and liabilities
  - Possible need for consent of holders of other types of contracts
- May not succeed in leaving liabilities with target
- Acquiror must administer target's policies on an ongoing basis

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## Assumption Reinsurance/Transfer of Assets and Liabilities to Acquiror (cont'd)

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### ■ Disadvantages

- Acquiror "purchase" of assets for liabilities assumed
  - What is "purchase price"
- Unclear role for continuing shell of target
  - What disposition of remaining assets
  - What future role of target
- Regulatory issues
  - Acquiror will need a license in target state

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## Migration of Business to Acquiror

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- Transaction
  - Target cancels or does not renew business
  - Policyholders offered a new acquiror contract
  - Parties agree whether to transfer other assets/liabilities
  
- Advantages
  - Avoid need to renew target's contracts
  - Acquiror administers business on its own systems
  - May be able to acquire business without substantial payment
  - May be able to leave specified assets and liabilities
  - Need not pay for surplus (which could be left behind)
  - Possibly avoid demutualization/conversion issues
  - Possibly avoid charitable foundation issues
  - Allows acquiror to pay amount and leave target/regulators to determine disposition of funds

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## Migration of Business to Acquiror (cont'd)

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- Disadvantages
  - Need consent/application from policyholders to obtain business
  
  - Cumbersome to transfer assets and liabilities
    - Need consents of holders of other types of contracts to be transferred
  
  - Acquiror “purchase” of business
    - What is “purchase price”
  
  - May not succeed in leaving liabilities with target

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## Migration of Business to Acquiror (cont'd)

### ■ Disadvantages

- Unclear role for continuing shell of target
  - What disposition of remaining assets
  - What future role of target
  
- Regulatory issues
  - Ceding company will most likely require DOI approval of termination/nonrenewal/transfer
  - Termination/nonrenewal must comply with law
  - Acquiror will need a license in target state

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## Other Specific Issues

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## Transactional Issues (More Common in Asset/Migration Transactions)

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- Communication with policyholders/regulators
- Transfer of
  - All prior health insurance liabilities
  - Only future health insurance liabilities
- Systems
  - Transfer of systems?
  - Seller provides administrative support for a specific period?
- Employees/employee benefits
  - Will acquiror hire some/all of target's employees
  - What is to be done with the target's benefits and plans?
- Providers
  - Transfer of providers contracts?
  - Will a consent be required from providers?

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## Transactional Issues (More Common in Asset/Migration Transactions) (cont'd)

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- Other types of contracts
  - Transfer?
  - Will a consent be required from these vendors?
  - Avoid contracts with restrictive covenants
- Insurance
  - Transfer general liability/malpractice insurance?
  - Note that many insurance policies have anti-assignment clauses
- Indemnity
  - Matters covered
  - Deductible, maximum dollar amounts
  - Time limits
- Tax

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## Antitrust/Hart-Scott-Rodino

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- If both plans are doing business in the same market, need an antitrust review to
  - See if acquisition will pass antitrust muster
    - Need to define relevant product or service market and geographic areas
    - Review acquiring party's market share
    - Review whether the transaction can be challenged as an abuse of monopoly power or conspiracy to monopolize
  - Ensure that due diligence is properly conducted to avoid anti-competitive effects
    - Will need to ensure that competitive information is properly handled

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## Antitrust/Hart-Scott-Rodino (cont'd)

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- Review contract terms to ensure antitrust compliance
- Factors to consider if the transaction fails
  - Is there any aspect of the transaction that can be characterized as price-fixing, bid-rigging or market allocation
- Depending on size of transaction/parties, may need to comply with the Pre-Merger Notification Filing rules

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# HIPAA

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- Guaranteed renewability: If assume of inherit target's policies/contracts, must continue to renew target's policies/contracts (with exceptions)
  - Possible modes of relief
    - HIPAA allows a discontinuance of particular product lines, but will need to afford other products and notices and comply with state law
    - HIPAA allows modifications of coverage
    - "Migration" approach
  - Guaranteed accessibility

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# HIPAA (cont'd)

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- Pre-existing condition exclusions
  - Acquiror will inherit "enrollment date" from prior insurer(s)
- Disclosure of PHI
  - Due diligence
  - Transfer of files on closing
- Caution: State law may also affect renewability/accessibility/privacy issues

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## DOI Clearance

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- Approval of transaction may be necessary in:
  - Target's state
  - Transferor's state
  - Transferee's state
  - State(s) where enrollees reside?
  
- Other types of approvals (in states where target does business)
  - Certificate of authority for acquiror
  - Policy forms
  - Rates
  - Assumption certificates

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## Charitable Issues

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- In some cases, one of the entities involved may be a charity
  - A selling hospital system may be a charity
  
- Review applicable law to see if need a report to or approval from
  - State attorney general
  - Court
  
- Purchase price could be contested by AG or consumer groups
  
- Possible payment of amount to a Foundation (if target is a charity)

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## Other Issues to be Considered

- Medicare/Medicaid business
- Other forms of government business
  - FEHBP
  - Indian Health Service
  - Military
  - State government entities
- BCBS Issues
- Tax Issues

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## Questions & Answers

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