The Senior Living & Long-Term Care attorneys of Foley & Lardner LLP are pleased to provide you with this issue of Legal News: Senior Living & Long-Term Care. This e-newsletter provides information about important new legislation and other legal developments in the Senior Living & Long-Term Care industry. If you wish to continue receiving these periodic e-newsletters, please opt-in by clicking here and providing the appropriate contact information.

Legal News
Senior Living & Long-Term Care

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Articles in This Issue

Industry Events Calendar

A list of upcoming conferences, seminars and meetings in the Senior Living and Long-Term Care industry.

Accomplishments

Find out how the attorneys in Foley's Senior Living & Long-Term Care Practice have been helping companies and organizations in the industry.

Articles in This Issue | TOP

As Many Seniors Choose Alternatives to Traditional Long-Term Care, Demand for Nursing Homes Declines | TOP

Contributed by Nathaniel M. Lacktman, Associate, Foley & Lardner LLP

A report published November 21, 2006 by the Lewin Group indicates that the percentage of very senior adults (aged 85 or older) in nursing homes has sharply declined over the past two decades. The report, titled "Nursing Home Use by 'Oldest Old' Sharply Declines," traces trends in nursing home admissions since 1985. The percentage of adults over 65 years of age in nursing homes decreased 0.6% since 1985, but the rate among those aged 85 or older dropped

7.2%. Meanwhile, the number of people in that age group nearly doubled. If seniors had continued to use nursing homes at the rate they did in 1985, the current nursing home population would be nearly 2 million. Instead, with a current nursing home population of 1.3 million, over 600,000 seniors have elected to not use nursing homes.

Where have these people gone? The report indicates several factors contributing to this decline. An increase in the health and financial wealth of seniors has reduced the need for nursing home care and permitted seniors greater flexibility to choose their preferred services. At the same time, nursing homes have changed, focusing their long-term care on Medicaid residents and their short-term post-acute rehabilitation care on Medicare residents. Furthering the decline in nursing home use has been the substantial increase in the number of alternative long-term care facilities (e.g. assisted living facilities, residential care facilities for the elderly, group homes, and home and community-based services). With a population of 1 million residents, these facilities nearly rival nursing homes. The report also identifies increased availability of private long-term care insurance and active efforts by state legislatures as additional factors contributing to the decline in nursing home use.

The decline in nursing home use has accelerated since 1999, when state and federal lawmakers imposed new initiatives to reduce the number of Medicaid recipients in nursing homes. One of these initiatives is the National Family Caregiver Support Program, part of the 2000 Reauthorization of the Older American's Act. The Program allows states to provide a continuum of caregiver services to best meet caregivers and individual needs, making it possible for seniors with disabilities to remain at home and in their community longer. Other initiatives include President Bush's New Freedom Initiative and Congressional funding for grants from Real Choice Systems Change, providing states seed money and assistance to shift the balance of senior care away from institutions and toward community living.

Nursing home operators should keep these trends in mind when planning for the influx of Baby Boomers. According to the report, "[I]f the demand for nursing homes continues to decline at just half the rate of the national average over the past 20 years, the use rate among older adults would drop from a projected 3.2 percent to 2.5 percent in 2030." Because maximum bed capacity and an increase in resident census is not guaranteed, providers should carefully consider their business model and projected plans for the next 10 and 20 years, as well as the growing market for alternative long-term care options. On average, compared to a skilled nursing facility, it is easier and quicker to obtain a license to operate and assisted living facilities or residential care facilities for the elderly.

You can access a copy of the report at: Nursing Home Use by “Oldest Old” Sharply Declines

New, Stricter CMS Requirements For Physical Restraints Have Facilities In A Bind | TOP

Contributed by Nathaniel M. Lacktman, Associate, Foley & Lardner LLP

Health care facilities who use physical restraints or seclusion in patient treatment will be subject to stricter training requirements and higher standards, according to a new final rule issued by the Centers for Medicare and Medicaid Services ("CMS"). Published on December 8, 2006 the rule finalizes the Patients' Rights Condition of Participation applicable to all Medicare- and Medicaid-participating hospitals and contains standards that ensure minimum protections of each patient's physical and emotional health and safety. The regulations in the final rule are effective January 8, 2007.

The 52-page rule responds to public comments on potential violations of Patients' Rights by improper use of restraints or seclusion. It revises and refines the interim final rule published on July 12, 1999. In the preamble to that interim final rule, CMS explained that it was considering adopting a consistent restraint and seclusion standard that would apply not only to hospitals but to all health care entities which participate in the Medicare or Medicaid programs. CMS asked the public whether it should apply the standards in the interim final rule, or whether it should apply more stringent standards. The large majority of comments supported more stringent standards applied uniformly to all participating providers.

CMS considered the comments and ultimately decided that a detailed, technical approach that would create an identical standard for all providers would not be appropriate. However, it responded to concerns that beneficiaries were receiving care in facilities where no regulatory protections currently exist regarding the use of restraints or seclusion. Because the Patients' Rights concept applies universally, so too should those patients have protections against improper use of restraints and seclusion.

In short, the final rule incorporates the following changes:

- Imposes higher standards for staff training, more frequent training intervals, and specific content and techniques of the training program.
- Facilities must present potential patients/residents or their representatives a formal Notice of Patients' Rights upon admission.
- Broadens the categories of health care practitioners qualified to conduct patient evaluations when seclusion or restraints have been used. Under the final rule, registered nurses and physician assistants may conduct such evaluations in consultation with the treating the physician.
- Establishes stricter reporting requirements for deaths associated with the use of seclusion or restraint (e.g., detailed report must be made within one week).

The final rule may be found at 71 Federal Register 71378 (December 8, 2006), and will be codified at 42 C.F.R. 482.13.

Real Estate-Based Business Owners: Comparing REIT vs. TIC Proposals | TOP

Contributed by Stephen I. Burr, Partner, Foley & Lardner LLP

There are many businesses of all sizes that are real estate-based, that is a significant portion of the assets necessary to operate the business is in the form of real estate. The list of such businesses include hotels, hospitals, senior living facilities and golf courses. Because of the ability of the underlying business to generate cash flow, these types of assets have attracted significant interest from real estate investors looking for a higher return than they are able to realize from the typical apartment building or triple net office investments. Conversely, the owners of these businesses for a variety of reasons may want to take their equity out of their real estate assets, or at least get such assets and their accompanying liabilities off of their balance sheets. However, they do not want to give up control of their real estate, and they want to continue to operate their business on it.

This convergence of interests is not new. Businesses of all sizes have done sale-leasebacks for many years with institutional real estate investors. However, in the past these sale-leasebacks were underwritten primarily on the credit-worthiness of the underlying business, and not in any significant way on the value of the real estate.

In recent years the traditional sale-leaseback world has been greatly expanded, primarily by aggressive REITs which are willing to do such transactions with non-institutional borrowers as the REITs understood and were able to value the real estate independently of the business. These REITs have become a very significant source of capital for certain real estate-based business owners, particularly with respect to hotels, hospitals, senior living facilities and golf courses.

While this REIT-based trend was developing, and completely independent of it, the Tenant in Common (TIC) industry was born. Unlike REITs, which typically raise capital through blind-pool public offerings, the TIC industry raises capital on identified properties through private placements, generally to accredited investors who wish to invest the proceeds from real estate they have sold, deferring taxes on any gain through the like-kind exchange that is built into TIC offerings.

As with REITs, during its early years the TIC industry stuck to plain-vanilla real estate, e.g. apartment and triple net office buildings. However, in the last year or two the TIC industry has followed the REIT industry into sale-leasebacks on hotels, senior living facilities, golf courses and even hospitals. This has presented owners of real estate-based businesses who wish to consider a sale-leaseback with a choice: should you sell to a REIT or do a TIC offering? This choice has lead to a great deal of debate over the relative merits of REIT vs. TIC. What follows is a brief outline of some of the critical differences in the two structures from an owner's perspective.

Contingent Nature of the Transactions

REIT: REIT issues Letter of Intent and then Purchase Agreement, both of which have many conditions, without any nonrefundable deposits. The REIT is spending money on due diligence but is not otherwise at risk. This makes the transaction highly contingent in nature from the Seller's perspective, and can result in last minute readjustments of the pricing of the deal to the detriment of the Seller.

TIC: Purchase Agreement between Seller and a Seller affiliate (the "Sponsor") has few conditions and is in any event completely under the control of the Seller. Only closing risk is that the Offering will not sell, which by historical industry standards is extremely unlikely for an appropriately priced deal underwritten by a credible Managing Broker Dealer.

Due Diligence

REIT: REIT performs and/or obtains from third parties extensive due diligence, which can be lengthy, expensive and burdensome for management. It is also “institutional” in focus which may lead to identification of “problems” which on a practical level are not material, leading to “remedies” in the form of required capital improvements which Seller/Sponsor must pay for.

TIC: Managing Broker Dealer performs due diligence and obtains a third party due diligence report, which the Buyers (the TIC investors) do not typically see. The due diligence is thorough but does not take as long or require management involvement to the same extent as a REIT’s “institutional” due diligence. There is a significantly lower risk of identification of non-material problems requiring expenditures by the Seller.

Timing

REIT: At least 120 days, with little economic incentive for the REIT to move quickly.

TIC: Typically 120 days, but TICs are highly motivated to close to meet their IRS deadlines and the Managing Broker Dealer is also highly motivated to close as they do not get paid until and unless the deal closes.

Purchase Price

REIT: REIT needs to build in return expectations for its investors, which may be higher than for TIC investors because REIT investors are not getting the like-kind exchange tax deferral. REIT also needs to build in return for itself. This may put a ceiling on the Purchase Price that is lower than for a TIC Sponsor. In the current market a REIT may pay 10x cash flow while a TIC Sponsor may pay 12x cash flow. REIT is also less likely to be able to identify precisely all closing costs in advance, which although funded initially by the REIT are built into the Acquisition Cost, which is then multiplied by the rental rate, so in effect the Sponsor/Master Lessee pays such costs over time.

TIC: Purchase Price may be higher as return expectations of its investors may be lower due to like-kind exchange tax deferral. Closing costs are modeled in detail by the Managing Broker Dealer, are largely performance-based and are more within the control of the Seller/Sponsor than in the REIT scenario. All costs, including financing fees, capital improvement reserves, master lessee capitalization and legal fees are paid from offering proceeds.

Lease

REIT:

- Term: Typically 20 years.
- Rent: Rate x Acquisition Cost. The rate may be higher than TIC due to higher investor return expectations and need for return to the REIT.

- Percentage Rent: Typically at least 10% of Revenues (i.e. gross, not net) above current base, cumulative. This could be as much as 50% of the increased NOI.
- Capital Improvement: Funded from Capital Replacement Reserve tightly controlled by REIT which must be replenished from property revenue.
- FF&E/Personal Property: Included in Purchase Price and transferred to REIT.
- Security Deposit/Capitalization of Master Lessee: Typically at least one year's lease payments, in cash, without interest, in an account controlled by REIT.
- Option to Purchase: Master Lessee typically has no option to reacquire property and no control over sale, except perhaps a right of first offer.

TIC:

- Term: At least 5 years but very flexible and determined by Seller/Sponsor/Master Lessee (all affiliates).
- Rent: Rate x Equity Cost, which may be lower than REIT due to use of lower cost senior debt and lower return expectations of TIC investors.
- Percentage Rent: Typically none, i.e. improved performance of the property is for the Master Lessee's benefit.
- Capital Improvements: Capital Replacement Reserve funded from equity proceeds is under Master Lessee's control, subject to requirements of Senior Lender.
- FF&E/Personal Property: FF&E and personal property stay with the Master Lessee and can be used to establish some net worth in the Master Lessee, reducing the capitalization requirements.
- Capitalization of Master Lessee: No security deposit. Capitalization is very flexible, with typically a mixture of cash and non-cash, with lender reserves counted toward any required capitalization. For a project that has sufficient cash to cover debt and equity return, the requirements are very modest. Any required capitalization is under the control of the Master Lessee.
- Option to Purchase: Master Lessee has Fair Market Value option to purchase, typically starting five years out

Management Agreement

REIT: Closely controlled by REIT and fully subordinate to Master Lease.

TIC: Terms and fees more flexible as they are established between affiliates (Master Lessee and Property Manager).

Post-Closing Communication

REIT: Must comply with all REIT reporting requirements, which can be extensive.

TIC: Must comply with Senior Lender reporting requirements and send regular reports to TIC Investors, neither of which typically require REIT level reporting.

This comparison suggests that the TIC offering alternative deserves serious analysis by the owner of any real estate-based business before making the decision to sign up with a REIT. Although the TIC offering structure may seem more complex, the REIT closing process has its own complexities, and the loss of independence and greater reserves inherent in the REIT structure may well justify choosing a TIC offering.

This brief study merely scratches the surface of the complex issues in any such comparison. Real estate-based business owners considering a sale-leaseback should consult professional advisers, particularly legal counsel, who have significant experience with both structures.

Facilities Adding Hospice Care Reduce Hospitalizations | TOP

Integrating hospice care into nursing home care reduces hospitalizations among residents in their final days, a new study finds.

Doctors at Brown Medical School conclude that having access to hospice care in a nursing home reduces by half residents' chances of being admitted to a hospital during their last 30 days of life. That compares to their peers who did not receive hospice care.

Researchers also found that while the majority of nursing homes have arrangements to provide hospice care, residents may not have access to such care. This could occur if caregivers fail to identify the need for hospice among other reasons.

An abstract of the study, which was funded by the Agency of Healthcare Research and Quality, is available on their Web site.

Events Calendar | TOP

February 21-23, 2007 | TOP
American Health Lawyers Association
Long Term Care and the Law 2007
Location: Royal Pacific Resort at Universal Orlando, Orlando, FL
More Details: http://www.healthlawyers.com

February 26-27, 2007 | TOP
American Health Care Association/National Center for Assisted Living
Independent Owner Leadership Conference
Location: Lake Tahoe, NV
More Details: http://ahca.org/events/io.html

March 7-8, 2007 | TOP
National Investment Center For the Seniors Housing and Care Industry
2007 NIC Western Regional Symposium
Location: Red Rock Casino Resort Spa, Las Vegas, NV
More Details: http://nic.org/regional_symposium/

March 19-21, 2007 | TOP

American Association of Homes and Services for the Aging
Future of Aging Services Conference
Location: Marriot Wardman Park Hotel, Washington, DC
More Details: http://www.aahsa.org/conferences/future_conference/default.asp

March 25-27, 2007 | TOP

California Association of Health Facilities
2007 Spring Conference
Location: Hyatt Regency, Sacramento, CA
More Details: http://www.cahf.org/public/quarterly/basicinfo.php

Accomplishments | TOP

Foley Advises Harbor Retirement Associates in Purchase of Assisted Living Communities | TOP

Foley attorneys, Mike Okaty, Gordon Arkin and Sharal Henderson advised Harbor Retirement Associates LLC on a deal to operate the Bristol Park of Coral Springs and Bristol Park of Tamarac assisted living communities in Broward County, Fla. The properties were recently acquired by Newport Beach, Calif., based Nationwide Health Properties, Inc.

Under the terms of the acquisition, Harbor Retirement Associates, based in Vero Beach, Fla., will operate the facilities under its HarborChase brand as HarborChase of Coral Springs and Tamarac, respectively. Financial terms were not disclosed as part of the agreement between the two organizations.