Healthcare CHOWs in Bankruptcy Sales*

By Tammy Ward Woffenden

Businesses that operate a healthcare facility, provide healthcare services or manufacture, distribute or sell healthcare products may have multiple operating licenses, certifications and billing provider numbers. Sale of these businesses, including in a bankruptcy, triggers a number of change of ownership ("CHOW") regulations from various state and federal agencies. Failure to follow such requirements could adversely impact the new owner's post-closing operations and reimbursement. Thus, when a healthcare business is subject to sale in a bankruptcy, counsel must determine:

What operating licenses does the business hold? Operating licenses issued by state agencies are frequently required for providers such as hospitals, nursing and assisted living facilities, pharmacies, and home health agencies and hospices. Federal agencies may also require registrations or permits, such as DEA registrations and CLIA certificates. Local governments may also require business licenses and various building and facility permits. Before acquiring a business that holds such licenses, a buyer will need to follow all applicable CHOW filing requirements, which may include significant filings and disclosures, background checks and even advance notice or approval from the licensing authority. Timing of filings and approvals vary, and some licensing authorities may require filing 90 or more days prior to the effective date of the transfer. Failure to timely file CHOW applications and receive appropriate approval may result in a gap in licensure that could disrupt business operations for the buyer.

Is a Certificates of Need ("CON") required? A CON is often issued when healthcare providers open a new facility. When required, a CON is issued by regulators once that business proves a "need" for its services in a particular geographic area. Not all states require a CON and, for those states that do, the process can differ as to what types of providers require a CON and how CHOWs are handled. The CON review is often cumbersome and lengthy, and in states where CON approval is required, the CON is generally required prior to closing and serves as a prerequisite to getting licensed.

Does the business hold Medicare Provider/Supplier Numbers? When providers or certain suppliers are enrolled in Medicare, an asset transfer to a new owner requires CHOW filings from both seller and buyer.[1] For providers—including hospitals, skilled nursing facilities, comprehensive outpatient rehabilitation facilities, home health agencies, hospices and certain rehabilitation clinics—enrollment filings should be submitted "before completion of the [CHOW]" or within 30 days of the effective date of the change to avoid risking deactivation of the billing number.[2] Certain suppliers must also file CHOW enrollment applications within 30 days of the CHOW.[3]

---

[1] 42 C.F.R. § 424.550(b).

[2] *See* 42 C.F.R. § 424.540(a)(2); CMS Program Integrity Manual, §10.4.4.

[3] 42 C.F.R. § 424.540(a)(2)

When undergoing a CHOW, the buyer must determine whether the seller's Medicare agreement will be assigned, which occurs automatically unless buyer refuses to accept assignment and notifies CMS at least 45 days before the CHOW effective date.[4] With assignment, the new owner is subject to all the terms and conditions of the existing agreement and assumes all related penalties and sanctions, including liability for seller's overpayments, unless, under certain circumstances, fraud was involved.[5] In the bankruptcy context, CMS has consistently taken the positon that a provider agreement is an executory contract assigned in accordance with Bankruptcy Code Section 365(b), which would result in buyer assuming Medicare liability for overpayments accrued prior to the sale, unless the seller/debtor negotiates an alternative agreement with the Medicare Regional Office, which may require Bankruptcy Court approval.[6] If the buyer rejects assignment, the Medicare agreement is terminated as of the CHOW date.[7] If the buyer then wishes to participate in Medicare, a new Medicare number will be issued after the buyer undergoes the initial enrollment process and meets all Federal requirements. In such case, there will be a gap between the date of the CHOW and the effective date of the new Medicare number.

It is important to note that some provider types have additional requirements that may apply to CHOWs, such as the home health 36-month rule, which could result in termination of seller's provider number at closing and require buyers to enroll in Medicare as a new home health agency (subject to certain wide reaching exceptions). Further, businesses that maintain national accreditation must notify the accreditation organization to determine CHOW notification and survey requirements and request extension of accreditation to the new owner.

Does the business hold Medicaid Provider Numbers? When a sale involves a provider of Medicaid services, parties should understand how the State Medicaid Agencies and any Medicaid Managed Care Organizations ("MCOs") with which the provider contracts interpret the transaction and what notices, filings, and approvals are required for the buyer to obtain Medicaid billing privileges. States have their own requirements, definitions, processes, and forms for handling ownership changes, and parties to the sale should consult applicable state Medicaid statutes, regulations, Medicaid provider manuals and guidance, and provider agreements in order to ensure proper pre- and post-closing actions are taken. Buyer should also determine how the transaction affects continued payment of Medicaid claims and successor liability. In most states, as with Medicare, taking assignment of a seller's Medicaid contract to avoid an enrollment gap would require the buyer to assume the seller's liabilities tied to the provider number. Many state Medicaid agencies will not transfer or update Medicaid enrollment information until the buyer's Medicare number(s) have been assumed so the timing of Medicare CHOW approval also impacts Medicaid CHOWs.

[4] CMS State Operations Manual, § 3210.5A.

[5] CMS State Operations Manual, § 3210; Centers for Medicare and Medicaid Services, CMS Manual System Pub. 100-06 Financial Management Manual ("CMS Financial management Manual"), Chapter 3, §130.

[6] CMS Financial Management Manual, Chapter 3, §140.6.3.

[7] CMS State Operation Manual, §3210.5A.