

Avoiding the Pitfalls of Distressed M&A

LEGAL AND INSURANCE INSIGHTS

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Mitigating Red Flags before They Upend the Transaction

Last year, a Midwest senior living facility hit a breaking point. Leadership turnover was constant, staffing gaps forced reliance on expensive agency nurses, and basic building repairs were delayed until water damage spread through resident rooms. Revenues couldn't keep pace with rising costs, and the facility was in distress, left with few options other than seeking a buyer.

This senior living facility is not alone. Scenarios like this occur regularly across the country, in every region. Staffing shortages, climbing operating expenses, shrinking Medicaid and Medicare reimbursements, and deferred maintenance are pushing many senior living organizations into financial distress.

Nearly 70% of nursing homes are operating with fewer staff than before the pandemic, and almost half are limiting admissions.¹ Even at full occupancy, profitability often remains out of reach.

The result: closures are accelerating, and mergers and acquisitions (M&A) activity has surged to historic levels. In 2024 alone, 708 senior living transactions publicly took place — a 37% increase from 2023 — with most involving distressed sellers.² For buyers and sellers, these distressed deals carry risks that can unravel a transaction or create expensive liabilities post close.

The good news: with the proper legal counsel and insurance protections, even the most troubled facilities can be turned into viable opportunities. This guide will show you how to navigate those risks and position yourself on the right side of senior living M&A, whether you're the "M" or the "A."

WHEN COVERAGE GAPS ARE MISSED

A mid-size senior living organization acquires a distressed senior housing facility, only to discover the seller had stopped paying their property insurance premiums months before closing. The cancellation notices went only to the seller, and the buyer unknowingly operated uninsured for three months.

Imagine: During that gap, a kitchen fire causes \$750,000 in damages — none of it insured. The buyer is forced to pay out-of-pocket, and the incident triggers a lawsuit from residents' families alleging unsafe conditions. What could have been a manageable acquisition turns into an immediate financial and legal crisis.

The lesson: Insurance diligence must go beyond reviewing binders. Confirm policies are active and in good standing.

¹ American Health Care Association "[State of the Nursing Home Sector](#)," March 2024.

² Forvis Mazars Capital Advisors "[Senior Living Merger & Acquisition Perspectives 2024](#)," 2025.

Key Risks in Distressed Senior Living Transactions — And How to Manage Them

A merger or acquisition involving a distressed senior housing organization can be complex and delicate. They don’t just involve buyers and sellers. Creditors, regulators, courts, residents and their families, and even government agencies all play a role. With this many players and agendas, hidden liabilities can quickly derail a transaction.

To protect all parties, it’s critical to anticipate common risks and secure the appropriate insurance coverage. The following table outlines the exposures most likely to surface in a distressed acquisition and the coverage recommends to facilitate a viable transaction.

Key Risk	Insurance Solution
Regulatory Risks Facilities cited for staffing and clinical concerns can lose quality ratings and referral status, impacting revenue.	Contingent Liability Insurance (CLI): Covers known but hard-to-quantify risks, such as ongoing regulatory investigations, so the transaction can proceed.
Clinical-Related Risks Resident falls, misdiagnoses, poor records, and medication errors often stem from inexperienced and understaffed teams.	Professional Liability & General Liability: Protects operators from inheriting professional mistakes and operational claims. Representations & Warranties Insurance: Customized to the transaction, adds protection for unforeseen claims tied to pre-closing activities.
Employee-Related Risks Employment discrimination, wrongful discharge, harassment, injuries	Worker’s Compensation: Provides medical coverage and salary compensation to employees who become ill or injured on the job. Employment Practices Liability: Protects businesses from claims of wrongful acts related to employment, such as discrimination, sexual harassment, wrongful termination and more. Biometric Information Privacy Act (BIPA): Protects citizens’ biometric data from unlawful collection, use and storage by private entities, such as employers and retailers
Cyber & Data Privacy Risks HIPAA violations and cyberattacks targeting patient personal identification information (PII) and protected health information (PHI) can result in fines, lawsuits, and reputational damage.	Cyber Insurance: Covers cleanup, regulatory fines, and legal fees for pre-existing conditions covered after the sale.
Real Estate & Environmental Exposures Deferred maintenance, mold, asbestos, outdated fire suppression, or groundwater contamination can create costly surprises	Environmental Liability Insurance: Covers cleanup, regulatory fines, and legal fees for pre-existing conditions discovered after the sale.
Financial Practices Misappropriated funds and/or unorthodox financial accounting can create lawsuits and regulatory scrutiny, exposing boards and executives to personal liability.	Directors & Officers (D&O) Insurance: Protects leadership from financial loss due to claims tied to managerial decisions, regulatory compliance, or escrow misuse.

Tail Policies: Covering the Past After a Sale

In healthy M&A transactions, buyers can often negotiate indemnities or rely on the seller’s financial strength to handle lingering claims inherited post sale. In distressed sales, that safety net usually isn’t there. Tail coverage becomes the only reliable way to protect both sides from past exposures.

Imagine this: A resident fell and sustained serious injuries two years before an acquisition. The lawsuit against the facility isn’t filed until months after the sale closes. Who pays? Without a tail policy, the buyer may be liable for incidents that occurred long before ownership.

What a tail policy does: Tail coverage extends the protection of an old insurance policy for a set period after the sale. It ensures claims tied to pre-closing events are still covered, even if they surface later. Many coverages, including cyber, management liability (EPL, D&O, and fiduciary liability), and professional liability, qualify for a tail coverage providing continual coverage for one to six years post sale.

How sellers benefit:

- Protects former owners and executives from lawsuits arising post-close from past actions
- Reduces risk of personal financial exposures under new ownership
- Addresses legacy liabilities enhancing the existing value of the organization

How buyers benefit:

- Prevents surprise liabilities from landing on the new owner's balance sheet
- Helps secure lender and investor confidence by demonstrating continuity of coverage
- Provides assurance of operational focus on the future versus inherited lawsuits

Know this: Lenders, buyers, and investors increasingly expect to see tail policies placed as a condition of closing. Whether negotiated into the purchase agreement or purchased directly, they can mean the difference between a clean transfer and a deal plagued by legacy lawsuits.

Smart Structuring: How to Shape Distressed Senior Living Deals to Minimize Risk

Distressed M&A transactions succeed or fail in the details. The right combination of legal strategy and insurance protection can transform a high-risk deal into a manageable one. To strengthen your position as a buyer or seller, focus on four essentials:

1. Involve brokers and counsel early.

M&A deals often involve strict confidentiality rules and NDAs, and buyers may hesitate to involve their brokers or outside advisors too soon. But distressed transactions leave no room for late-stage surprises. Involve both your insurance broker and legal counsel throughout the diligence and sale process.

Early involvement ensures:

- Coverage requirements are priced into the deal
- Enough time to shop policies and negotiate terms
- Legal protections are baked into purchase agreements, disclosure schedules, indemnifications and court filings

Pro Tip: Consider entering your brokerage into the NDA so they can review current policies, loss runs, and financials without breaching confidentiality. This allows them to flag gaps in coverage and structure a program that lenders and regulators will accept.

2. Conduct comprehensive due diligence.

Financial and census data only tell part of the story. Distressed facilities often have incomplete records, so diligence must be both broad and creative. Review at least five years of:

- **Loss history:** Claims, loss runs, and patterns that reveal operational or safety issues
- **Financial records:** Budgets, revenue sources, accounts receivable, and accounts payable
- **Regulatory history:** Surveys, licenses, and corrective plans
- **Legal history:** Litigation and claims
- **Operational data:** Policies, procedures, infection control, staffing levels, turnover rates, patient census, and technology utilized
- **Employee data:** Employment practices liability insurance (EPLI) claims, employee census, employee handbook and manuals

Legal counsel should play a leading role in reviewing contracts with vendors, landlords, utilities, insurance providers, and regulators, as well as examining escrow accounts for CCRCs. These deposits are often mishandled in distressed facilities, and without legal protections in the purchase agreement, buyers may inherit multimillion-dollar liabilities.

3. Leverage insurance to accommodate regulators and lenders.

Depending on how much debt you're incurring in the transaction, investor and lender agreements can be a heightened area of focus in a distressed M&A.

For example:

- A lender may require proof of environmental liability insurance to approve financing for an aging facility
- Regulators may expect confirmation of cyber insurance to ensure patient data is protected under new ownership
- Courts in bankruptcy or receivership may condition approval on continuity of management liability coverage to safeguard residents and families

In this way, insurance is more than just risk transfer. It can be the key to unlocking lender financing and regulatory and/or court approval

4. Protect yourself in the purchase agreement.

The purchase agreement is where legal and insurance protections must come together. Key considerations include:

- Requiring tail coverage for D&O, EPLI, or professional liability policies
- Ensuring continuity of cyber or environmental coverage
- Clearly defining responsibility for legacy claims
- Embedding insurance obligations directly into court orders, if applicable

Legal counsel should also ensure that indemnification provisions are realistic. In a distressed transaction, a seller may not have the financial strength to honor indemnities, making insurance-backed protections the only reliable safeguard.

Distress to Opportunity: The Next Chapter in Senior Living M&A

The challenging senior living landscape, characterized by continued staffing shortages and financial pressures, will likely fuel the ongoing increase in distressed senior housing M&A and consolidation throughout 2025 and beyond.

An experienced broker and legal team that understands senior living is critical to the success of distressed senior living transactions. Strategic, right-sized insurance offers much-needed protection for both buyer and seller and helps deals cross the finish line with greater ease and security for all parties involved.

SAK Healthcare

With a unique combination of knowledge and expertise, and a commitment to preserving the assets of an organization during a turnaround, restructuring or bankruptcy, [SAK Healthcare](#) specializes in advising distressed healthcare facilities that require strategic redirection and turnaround management services. SAK Healthcare has over 300 years collective experience in the healthcare industry, having spent a large portion of that time in turnaround situations, rescuing troubled facilities while maintaining the highest levels of patient and resident care. SAK concentrates on the day-to-day operational and clinical performance of the healthcare facility, from nursing supervision and training and dietary management to census development and facility maintenance, while also providing fiscal oversight and controls.

EPIC Senior Living brings clarity and confidence to distressed senior living M&A transactions. [Contact us](#) to ensure your deal is protected from hidden liabilities, regulatory pitfalls, and insurance gaps that could derail success.