

perspectives

January 2012

A publication from
Benesch Friedlander
Coplan & Aronoff LLP

MY BENESCH MY TEAM

Trends and topics in not-for-profit management

Not-for-Profit Spotlight

Betty Brewer's Angels



While there are many positive changes underway in the long-term care industry, the inescapable fact

remains that there are residents who are rarely, if ever, visited by family members or friends. A woman named Betty Brewer noticed this while living at a Central Ohio facility awaiting heart surgery, and decided that once she recovered from surgery she would return as a volunteer, visiting and befriending those residents who seemed so alone.

Betty never had the surgery; she died unexpectedly on April 22, 2008. Cheryl Newman was one of Betty's many friends who mourned her loss, and Cheryl decided that Betty's last wish need not die with her. It was with the help of Benesch's Marty Sweterlitsch that Cheryl, Norma Silvers and the late Jake Brewer founded Betty Brewer's Angels (BBA) as a 501(c)(3) charity in February 2010. BBA's mission is, "reducing the sense of social isolation and depression among residents of long-term care facilities by recruiting and training volunteers to enter into and engage in sustained, individual, interpersonal relationships with identified residents."

Based in Central Ohio, BBA provides emotional and educational support to its volunteers, and acts as an information conduit between volunteers and the facilities they visit. Volunteers visit a selected resident once a week, establishing a friendship with him or her and often accompanying the resident to one or more scheduled facility activities. Feedback from both the Central Ohio facilities as well as from the residents themselves has been overwhelmingly positive. There continues to be many more residents facing long periods of solitude than volunteers available to visit with them. BBA is currently expanding its reach from Franklin County into adjacent areas of Ohio.

Please click [here](#) to learn more about BBA.

Financial Responsibilities of the Non-Profit Board Member – What to Watch For When the Financials Look Bleak



Wendy D. Brewer

Our communities need volunteers willing to serve on non-profit boards and board service is a wonderful way to get more involved in your community. A non-profit corporation has no shareholders and must have a board of directors to provide governance and strategic direction for the organization. For the board member, service is both an honor, and a collection of responsibilities.

One such responsibility is the obligation to conserve and protect the organization's assets. The board must ensure that the assets of the organization are used in a manner consistent with the charitable

purposes or mission of the organization, must see that sufficient funds are allocated to each function within the organization and that the allocation of funds is consistent with the organizational mission.

To assist board members in fulfilling this obligation, management of the organization should provide the board with regular financial reports comparing financial results to the budget and reporting on the status of assets. The board should ensure that financials are audited on an annual basis. Additionally, to meet the board's need to evaluate the cost-effectiveness of programs, many organizations provide internal statements that directly relate expenses shown on their financial statements to specific programs or functions. Take a little time to understand the financial information provided to you as a board member.

Many not-for-profits operate on the proverbial "shoestring" budget, but what happens when it appears that an organization is insolvent or simply cannot seem to cover its expenses?

It is important for board members to focus attention and energy on financial issues in those settings to fulfill their duty to the organization and in order to avoid personal liability. While a non-profit has no shareholders to answer to, the board will be answering to creditors of the organization. When your non-profit is in financial trouble, there are a number of issues to consider to avoid personal liability and satisfy your duty to the organization, its creditors and the community as a whole, a few of which are identified below:

- The Board should be vigilant to ensure that management is paying employment taxes. Board members and officers must be cognizant of the IRC's Trust Fund Recovery Penalty (TFRP). Under IRC § 6672(a), a TFRP may be assessed against a "responsible person" who willfully fails to collect or pay "trust fund taxes." Trust fund taxes include income tax wage withholdings and the employee's share of FICA and Medicare taxes and are to be held in trust for the Government. A "responsible person" is considered to be a person or group of people who has the duty to perform and the power to direct the collecting, accounting and paying of trust fund taxes. In the case of a non-profit, a responsible person may include a board member, a trustee, an officer or an employee of a corporation, or another person with authority and control over funds to direct their disbursement. For willfulness to exist, no evil intent or bad motive is required. Rather, the responsible person must have been, or should have been, aware of the outstanding taxes and either intentionally disregarded the law or was plainly indifferent

(continued on page 3)

Diligence and Purchase Agreement Considerations for Asset Acquisitions



Sara Bunke Evans

When you have decided to acquire the assets of another business, there is often a lot of pressure to get the deal done quickly. The seller wants its money, and you are anxious to close the deal so that your

organization can begin using the assets. However, conducting thorough due diligence prior to the acquisition is essential to ensure that your organization is actually getting what it is paying for. In addition, there are several items that you and your advisors should consider with respect to the legal agreements that will memorialize the acquisition. This article will highlight some of these items as well as things to consider during the due diligence process.

Term Sheets

Before beginning the due diligence process, you should consider whether a term sheet is appropriate to set forth certain terms of the acquisition, such as the purchase price and the assets that will be purchased. Although term sheets are typically non-binding, certain provisions of them may be binding, such as confidentiality or exclusivity provisions. During the due diligence process, you will be privy to a lot of information of the seller, some of which may be confidential. Therefore, it is common that a seller will want to prevent a potential buyer from disclosing any confidential information that is reviewed during the due diligence process. In addition, because the due diligence process can be very expensive and time-intensive, potential buyers often look to protect this investment by requesting a binding exclusivity agreement, which prevents the seller from negotiating with other potential buyers during the exclusivity provision. If a term sheet is not being used in your transaction, you may consider requesting that your organization and the seller enter into a separate exclusivity agreement to meet this objective. Similarly, the seller may request a stand-alone confidentiality agreement if there is not a term sheet containing binding confidentiality restrictions.

Lien Search

During the due diligence process, you and your advisors will review company records of the target in order to confirm the value of the assets and identify any issues that may arise in connection with the transfer of the assets. You should obtain a lien search on the seller to ascertain what liens currently exist on the assets to be transferred, as you will want these liens to be released on or before the closing of the acquisition so that your organization acquires the assets free and clear of any encumbrances. If the seller has outstanding debt that will be paid off with proceeds from the sale of the assets, the seller should provide you with a commitment from its lender indicating that the lender will release its lien on the assets immediately upon receipt of the debt payoff. If real property will be purchased, an environmental assessment of the property may be warranted and may be required by your organization's lender if it is financing the purchase with borrowed funds.

Assignments

You and your advisors should also review any operational contracts, such as vendor agreements, that you will want to have assigned to your organization at the closing. Contracts of this nature often provide that one party to the contract cannot assign the contract without the prior written consent of the other party. Similarly, if the target's business property is a leased premises that you wish to retain post-closing, the lease will likely require the target to obtain the landlord's consent to assignment of the lease. You should ensure that the purchase agreement requires the seller to obtain any necessary consents to assignment as a condition precedent to your obligation to consummate the transaction. During the due diligence and negotiation process, you should also consider whether there are any key employees at the target company that your organization would like to retain as employees after the acquisition. If there are, you may consider requiring that employment agreements with such individuals also be required as a condition to closing.

Representations and Warranties

In addition to setting forth the purchase price and the items that both parties will be required to deliver in order to consummate the acquisition, the purchase agreement will also contain representations and warranties of the seller with respect to the assets being acquired. For example, the seller should represent that your organization will be acquiring all of the assets free and clear of all encumbrances and that it has obtained all necessary consents required in order for the seller to effect the transaction. The seller may also request that your organization provide certain representations and warranties in the purchase agreement as well, but the purchaser's representations and warranties are usually much less extensive than those of the seller and typically relate to the purchaser's corporate authority to enter into the transaction.

Indemnifications

It is standard for a purchase agreement to include indemnification provisions that require each party to indemnify the other for losses incurred as a result of such party's breach of any provision of the agreement, specifically the representations and warranties that the party has provided in the agreement. Typically, there is no expiration of a party's indemnification obligations for "fundamental" representations and warranties (such as the representation that the party made regarding its corporate authority to enter into the transaction). However, the purchase agreement may set a time limitation on the parties' indemnification obligations with respect to other representations and warranties. If the seller will be merely a shell company after the acquisition, with no assets or operations to support the seller's indemnification, you may consider requiring a third-party guaranty of the seller's indemnification obligations. This guaranty could be issued by the seller's parent company or by individual principals of the seller. In addition, you may consider requiring that a portion of the purchase price be held in an escrow account for a period of time in order to secure the seller's indemnification obligations.

Financial Responsibilities of the Non-Profit Board Member – What to Watch For When the Financials Look Bleak (continued from page 1)

to its requirements. The amount of the TFRP is equal to the unpaid balance of the trust fund tax, and it is important to note that the once a TFRP has been assessed, the IRS can take collection action against the individual's personal assets. Because the liability is joint and several, meaning both the organization and the individual are liable, the IRS can pick and choose whom to go after first.

- Ensure that health insurance premiums, retirement plan contributions, customer deposits, etc., are maintained in trust. If a non-profit organization is in possession of funds such as health insurance premiums (typically collected from employees through payroll) or customer deposits, and the organization uses those funds for anything other than the intended purpose, a director could be held liable for civil conversion. In many states, statutes allow for recovery of treble damages as well as attorneys fees and costs in such cases.
- Be cautious with fund-raising efforts and wary of borrowing from Peter to pay Paul. When a non-profit organization is facing significant financial difficulties, it may be enticing to run out and try to raise funds from donors to attempt to avert the crisis. While a successful fund-raising campaign may relieve financial pressures, board members should be cautious with such activities to manage the expectations of donors and respect their wishes with regard to the donations made. If restricted donations are received (event sponsorships, specific program funding or other designated contributions), the organization must not use those restricted funds for general operating expenses or paying off old debt. If it becomes evident that the organization will not be able to host the event, or run the program for which the restricted funds are being solicited, the organization needs to stop fund-raising for those activities.
- Consider involving an insolvency professional, such as a bankruptcy attorney, to advise the board and management about their responsibilities—before you decide it is time to close the doors.

While these issues are very real concerns for board members, they should not be a deterrent to service on the board of a non-profit. Board service is one of the best ways to make a difference in your community and can be an incredibly fulfilling experience. The next time you receive that packet of financial information in advance of the board meeting, take a few minutes to digest and understand what you are reading, and don't be shy about asking questions or expressing your concerns.

For more information, please contact **Wendy Brewer** at wbrewer@beneschlaw.com or 317.685.6160.

Exempt Organization Select Check

Exempt Organizations Select Check is an online search tool that allows users to select an exempt organization and check certain information about its federal tax status and filings. It consolidates three former search sites into one, providing expanded search capability and a more efficient way to search for organizations that:

- Are eligible to receive tax-deductible charitable contributions (Publication 78 data).
- Have had their tax-exempt status automatically revoked because they have not filed Form 990 series returns or notices annually as required for three consecutive years (Auto-Revocation List).
- Have filed a Form 990-N annual electronic notice (e-Postcard).

Exempt Organizations Select Check data is generally updated on the third Monday of each month for automatically revoked organizations and organizations eligible to receive deductible contributions, and weekly for Form 990-N (e-Postcard) filings. In addition to searching for a particular organization, users may download a complete list of each of the three types of organizations through *Exempt Organizations Select Check*. Please click [here](#) for related information.

Non-Profit Views Offered by the Republican Presidential Contenders

As the campaign for the GOP nomination progresses, keep track of the Republican candidates' non-profit activities, their records on philanthropic issues and stances on tax policy by checking out [this article in The Chronicle of Philanthropy](#).

REMINDER: IRS Announces Two-Month Suspension of IRS Modernized e-File Operations for 990 Filers; Advises Hospital Organizations About 2011 Filing Requirements

In order to facilitate systems and programming changes, the IRS recently notified tax-exempt organizations that the IRS Modernized e-file (MEF) system will not be available from January 1, 2012, through February 29, 2012, for electronic filing of Forms 990, 990-EZ, 990-PF and 1120-POL information returns. The IRS is suspending the availability of the system to implement changes to IRS programs and systems for the 2011 tax year. The 990-N e-postcard filing system will not be affected by the temporary suspension of the MEF system.

Please click [here](#) for further information on the IRS website.

SAVE THE DATE

May 30, 2011 | 1:00 PM–6:00 PM

Main Auditorium, One American Square
Indianapolis, IN 46282

Benesch and Blue & Co.'s Not-for-Profit Workshop

Please mark your calendars for this afternoon of educational sessions and networking geared toward not-for-profits.

More information and invitation coming soon.

Diligence and Purchase Agreement Considerations for Asset Acquisitions (continued from page 2)

Be Smart. Be Thorough.

If your organization is considering acquiring assets of another entity, it is important for you and your advisors to conduct thorough due diligence on the assets that you are acquiring and to ensure that your investment is adequately protected in the transaction documents. These considerations are just a starting point for you to discuss with your advisors. Happy dealing!

For more information, please contact [Sara Evans](mailto:sevens@beneschlaw.com) at sevens@beneschlaw.com or 614.223.9349.

Events

January 31, 2012 | 12:30 PM–3:00 PM

Dayton, OH

February 7, 2012 | 12:30 PM–3:00 PM

Columbus, OH

February 23, 2012 | 12:30 PM–3:00 PM

Cleveland, OH

Government Funding Opportunities for Non-Profits

GSP Consulting, an experienced and successful firm of accredited professionals, will be presenting on the possible government funding opportunities available for non-profits. With an impressive track record from a variety of clients, GSP can help your organization determine what potential opportunities may exist on the federal, state and local levels for grant-writing, procurement services, government affairs/advocacy and development services. Come to listen, learn and ask questions about the best way to navigate the government marketplace. This program is presented by Ohio Association of Non-Profit Organizations (OANO).

Please click [here](#) for more information and to register.

February 15, 2012 | 10:00 AM–11:30 AM

Webinar

Revenue Streams – What Are The Opportunities in This New Economy?

As we emerge from the great recession, there are fundamental changes to philanthropy. How can your organization adjust to reap the greatest reward from your relationships with your donors, including earned, contributed, investment and other sources? During this session, participants will learn how to determine and approach different revenue streams, the pros and cons of each revenue source and how to analyze which options will yield the best success for your organization. Please click [here](#) to register for this OANO webinar.



Friend us on Facebook:
<http://facebook.com/benesch.friedlander>



Follow us on Twitter:
twitter.com/BeneschLaw