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Battle Royal in Health-Care World

Dispute Between HCP and Ventas Over Sunrise Senior Living Leaves Scars

By A.D. PRUITT

HCP Inc. recently sent a \$102 million check to **Ventas** Inc. in what appeared to end a nasty four-year takeover and legal battle between the country's two largest public owners of medical office buildings, senior-living and other health-care-related real estate.

But then again maybe not. Ventas now says it plans to seek punitive damages, which could run as high as \$300 million, according to an estimate by [Richard Anderson](#), an analyst at BMO Capital Markets.



Sunrise Senior Living

Ventas purchased Sunrise Senior Living in 2007. Pictured is a Sunrise 'mansion' in Virginia.

Ventas's move opens a new chapter in a battle that has transfixed the typically collegial world of health-care real estate. It dates back to Ventas's C\$1.8 billion (US\$1.75 billion) acquisition of Sunrise Senior Living, a Canadian real-estate investment trust, in April 2007. Chicago-based Ventas successfully argued in federal court in Kentucky that HCP, sabotaged its deal with Sunrise after losing in the bidding process, forcing Ventas to pay a higher price.

The players know each other well. Ventas Chief Executive Debra Cafaro was a classmate of HCP Chief Executive Jay Flaherty at the University of Notre Dame.

Even if Ventas succeeds in collecting punitive damages, the financial pain won't be great for Long Beach, Calif.-based HCP, which has a market capitalization of \$15 billion. But some of the testimony at the trial in 2009 was embarrassing to the company.

According to a transcript of the trial, Mr. Flaherty acknowledged at one point he sent an email stating: "Show me what you got, yoe mama," referring to Ms. Cafaro. He also testified that he played "Brilliant Disguise" by Bruce Springsteen as the hold music on a conference call to announce an unsolicited takeover offer.

Other witnesses were critical of HCP's tactics. "Ventas followed the rules," Michael Warren, who was Sunrise's chairman at the time, said during the trial. "HCP tried a number of approaches outside the rules, within the rules, difficult to deal with, and they were a frustrating bidder."

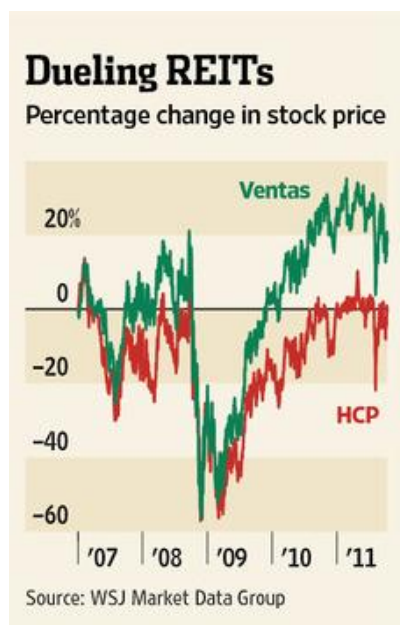
HCP has lost five decisions in court in its efforts to nullify the \$102 million claim. An HCP spokesman didn't return calls, and HCP's attorney in the case, Jeffrey Lamken, referred questions to the company.

In the company's August earnings call, Mr. Flaherty noted that "the litigation has been expensive and distracting, and we would prefer to resolve this case if reasonably possible."

These have been tumultuous times in the health-care real estate world even apart from the legal battle. The industry is going through a period of consolidation as hospitals shed their real-estate operations to cut costs and senior living operators seek financial capital from bigger players to keep afloat. Ventas became roughly equal in size with HCP earlier this year when it acquired Nationwide Health Properties Inc. in a deal valued at \$5.8 billion.

HCP and Ventas regularly run into each other in the acquisition arena. "As each tries to ride the big wave of consolidation, they should continue to keep butting heads," said Jeff Theiler, an analyst at Green Street Advisors.

Many investors and analysts, meantime, would like to see the lengthy legal battle end. "It's tiring," said Mr. Anderson of BMO Capital.



The battle over Sunrise is a cautionary tale for companies that underscores the importance of playing by the rules in takeover battles. In 2006, when Sunrise Senior Living put its 31,000 units of senior housing and other assets up for sale in a confidential auction, both Ventas and HCP signed up to participate. They both signed a so-called "standstill agreement," which prohibited them from making or publicly announcing bids for 18 months after the auction ended, according to court documents.

Ventas won the auction in early 2007 with a bid of C\$15 a share. But one month later HCP announced a bid of C\$18, forcing Ventas to raise its bid. Ventas eventually paid C\$16.50 a share.

"I have never experienced a negotiating process that one party [HCP] decided to put into the public arena when the whole understanding was that this was a confidential process," testified Mr. Warren, Sunrise's chairman.

Ventas argued at the trial that HCP's bid wasn't in good faith and was, rather, designed to force Ventas to pay a higher price. As evidence, Ventas noted that HCP didn't state in its press release that its offer

depended on its ability to work out a separate agreement with the company managing the Sunrise properties. Moreover, HCP didn't sign the bid it sent to Sunrise. "This was just unacceptable behavior," Mr. Warren testified. "I felt that Mr. Flaherty had basically lied to us."

In his testimony, Mr. Flaherty defended HCP's actions, saying that they didn't amount to wrongfully interfering in Ventas's takeover effort. He noted he signed the letter that accompanied the bid but wasn't authorized to make a binding bid without board approval. Mr. Flaherty also testified that by the time Sunrise shareholders voted on the Ventas deal, the market knew the HCP bid was conditional.

But others argued that the damage was already done. "I asked Mr. Flaherty not to press release the transaction," testified Andrew Philips, managing director of TD Securities, which represented Sunrise in the deal. "I knew what would happen is the market would explode... effectively blowing up the deal we had with Ventas because if the market expected an \$18 offer, they were not going to vote for a \$15 offer."

