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# HOT TOPICS IN THE HEALTHCARE SPACE

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Even before the COVID-19 Pandemic began to roil the global economy, the health care sector was facing long-standing acute financial pressures.[1] Existing in a space that routinely sees significant statutory and regulatory changes, health care businesses have often had to make rapid adjustments to fast-moving forces beyond their control. Moreover, because they exist in a heavily regulated space that invariably implicates numerous governmental interests and regulatory powers, health care businesses considering bankruptcy relief bring with them many unique issues above and beyond those with which non-health care business debtors face. This paper breaks down some of the most prominent of those issues which parties in interest should be prepared to confront when participating in a health care business bankruptcy.

Certain provisions in the Bankruptcy Code deal specifically with health care debtors. Others apply more generally to nonprofit entities, among which are many hospitals and other health care businesses. Finally, certain issues arising in bankruptcy cases have special significance for health care businesses.

1. **Prominent Stress Factors Driving Health Care Businesses into Bankruptcy**
2. **Patient Care Ombudsman**
3. **Custodianship and Disposition of Patient Records**
4. **Duty to Transfer Patients of Closing Health Care Business and Restrictions on Transfers**
5. **Exemption from Automatic Stay for Exclusion From Medicare Participation**
6. **Termination of Provider Agreements**
7. **Disputes Regarding Recoupment and Setoff**
8. **Sale or Closure of Health Care Business—Assumption and Assignment of Provider Agreements**
9. **Lender Issues**
10. **Disputes with Insurance Companies**
11. **Recent Case Study: True Health Diagnostics v. CMS**
12. **Recent Case Study: Setoff v. Recoupment**

[1] *See, e.g.*, The Next (Tidal) Wave of Cases: Health Care Restructurings and Insolvencies, 061710 ABI-CLE 127 (June 17-20, 2010) (in-depth discussion of challenges that health care businesses regularly face); *see also* https://www.distressindex.com/reports/latest (data regarding trends in bankruptcy filings across industries).

## 1. PROMINENT STRESS FACTORS DRIVING HEALTH CARE BUSINESSES INTO BANKRUPTCY

The phrase "health care business" covers a broad and many-faceted industry that ranges from solo practitioner pediatricians to large hospital systems with thousands of employees and from home health care businesses to out-patient cosmetic surgery centers. As such, the relevant market and regulatory forces that can contribute to rising insolvency levels run across a broad gamut. The following are some of the prominent stress factors that are regularly involved when health care businesses end up needing to seek bankruptcy protection:

- Overexpansion (domino effect, regulatory delays, unanticipated costs, miscalculations regarding forward revenues);
- Low/declining volume (i.e. rural, new competition);
- high proportion of uninsured, Medicaid, and/or Medicare patients;
- government investigations and fraud allegations (e.g. improper kickbacks to doctors, improper billing practices);
- statutory and regulatory changes;
- payor pressure (e.g. insurance companies negotiating low reimbursement rates);
- market disruptions;
- poor financial management;
- demographic changes;
- poor management; and
- physician politics.

Perhaps more so than many, if not most, other industries, health care businesses seeking bankruptcy protection are likely to see active involvement in their cases by government agencies, especially the relevant states attorneys general and the Office of the United States Trustee. The positions that government agencies take in health care bankruptcy will generally be predictable for debtors that have an advance understanding of the process and the particular issues which government agencies expect to see adequately addressed in health care bankruptcies. Failure to be well prepared, however, can result in costly and time-consuming litigation and other unexpected administrative expenses for the bankruptcy estate.

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