

Hot Topics in the Healthcare Space

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and are not official opinions of the Office of the Texas Attorney General.

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Medicare/Medicaid Participation

- 11 U.S.C. 362(b)(28) exempts exclusion of debtor from participation in Medicare or other federal health care program (42 U.S.C. 1230a-7).
- Permissive and mandatory exclusion
- Permissive: conviction relating to fraud or obstruction of an investigation or audit, license revocation or suspension, failure to take corrective action, claims for excessive charges or unnecessary services, failure to furnish medically necessary services

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Provider Agreements and Disputes (Gov't)

- Assumption and Assignment (cannot simply be purchased)
- Liability follows the provider number
- In theory at least, DIP/purchaser can negotiate risk limitation with government
- Practical considerations affecting patient care (including geographical location)

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Changes of Ownership

- Liability runs with the provider number
- Seller's current Medicaid billings may be put on vendor hold
- Purchasing company means assuming liability for prior billing and compliance errors
- Consider that there will typically be a substantial wait time for admission into Medicare/Medicaid programs

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Medicare Payment Recoupment/Offset

- In re THG Holdings, LLC, 604 B.R. 154 (Bankr. D. Del. 2019), appeal dismissed, No. 19-11689 (JTD), 2020 WL 1493622 (D. Del. Mar. 27, 2020).
 - Debtor sued arguing violation of automatic stay against Centers for Medicare and Medicaid for withholding post-petition payments for offset/recoupment against pre-petition claims
 - Court ruled against CMS, noting that no post-petition misconduct was alleged
 - Debtor sold operating assets and moved to dismiss

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(cont.)

- Conclusion in THG Holdings: withholding current claims based on alleged past misconduct may violate automatic stay
- THG Holdings is not the majority view; see, e.g., *Personal Care Products, Inc. v. Hawkins*, 635 F.3d 155 (5th Cir. 2011) (there is no due process protection right to payment on current claims where conduct is under investigation); *Malinowski v. New York State Dep't of Labor (In re Malinowski)*, 156 F.3d 131 (2d Cir. 1998) (holding that "[t]he automatic stay is inapplicable, because funds subject to recoupment are not the debtor's property.")

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