UT LAW CLE THE UNIVERSITY OF TEXAS SCHOOL OF LAW

**PRESENTED AT**

38th Annual Jay L. Westbrook Bankruptcy Conference

November 14-15, 2019
Austin, TX

# Health Care Bankruptcies- How to Diagnose and Treat These Patients (from the State's Perspective)

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[1] The views and opinions expressed in this article are solely those of the author and are not to be construed as the official position of the Office of the Attorney General of Texas ("OAG") or any client agency represented by OAG.

Congratulations! You have a health care bankruptcy case on your hands. In case you have not had the pleasure of interacting with the Bankruptcy Regulatory Section of the Office of the Attorney General of Texas (the "State"), you will quickly become acquainted with our team. Depending upon how you choose to proceed, the State can either be a partner or an adversary. For purposes of this summary, we'll presume you decide to consider the State as a colleague that can offer a second opinion and insight.

As far as bankruptcy cases are concerned, "health care business"[1] bankruptcies come in many different shapes and sizes. Debtors can be entire hospital groups, hospitals, practice groups, clinics, individual practices, long-term care facilities, and home health care providers. Each type of debtor will bring with it their own complexities for you as debtor's counsel. The State, however, will have a more finite set of concerns. In a nutshell, those concerns include: patient care, medical records, and Medicaid recoupment.[2] Given that this paper is intended to serve as a basic guide, we'll take the issues in the order they would come up for a debtor's counsel.

## I. Hemorrhaging Cash, with bouts of Recoupment

Cash flow- a key concern for any professional advising a client considering bankruptcy. Many health care business debtors will rely upon either Medicare or Medicaid reimbursements for some level of their income, if not the majority. Briefly, Medicare[3] is the federal medical insurance program for the elderly while Medicaid[4] is a joint federal-state medical insurance program assisting those who otherwise cannot afford health coverage. While the State's interest does not

[1] The Bankruptcy Code defines "Health Care Business" in § 101(27A).
[2] Other concerns include: disposition of medical goods, some equipment, and some pharmaceuticals; use of restricted funds in nonprofit cases, and Civil Medicaid Fraud.
[3] Medicare as a program is administered through the Center for Medicare and Medicaid Services. The statutory basis for Medicare can be found at 42 U.S.C. § 1395, et. seq.
[4] In Texas, Medicaid is administered through the Texas Health and Human Services Commission. The federal statutory basis for Medicaid is found at 42 U.S.C. § 1396, et. seq. and the state statutory basis is found at TEX. HUM. RES. CODE § 32.001

extend to Medicare[5], the two programs have many similarities. If your client has received either Medicare or Medicaid reimbursement payments, it has entered into a contract with the administrator commonly referred to as the "Provider Agreement." The provider agreement, echoing various statutes and rules, will set forth the obligations of your client in conjunction with the Texas Medicaid Providers Procedures Manual.[6]

The Medicare and Medicaid programs are designed to provide expedient interim payments to the providers[7] but subject to a review or audit after the provider submits the annual cost reports. Assuming your client submits the claim correctly, it will receive the initial payment promptly; monthly reimbursements are essential for many health care business reorganizations. Understandably, the tradeoff for a prompt payment to the provider is the right of the government to thereafter audit the claim. This review may determine that the provider is owed additional payment for their work, that they were overpaid for the services, or that they submitted their claims correctly.

*Correcting Overpayments*-

If, upon review of the cost reports, HHSC or CMS owes your client extra money, it should get paid in the normal course of business. This is not a problem that opposing counsel usually raises with our office. However, if your client was overpaid, you'll want to know two things- how much is the debtor required to reimburse and what is the basis for the overpayment? Audited overpayments can be as little as a fraction of the monthly claims paid to the provider or many

[5] For a good primer on how to address cashflow issues arising in Medicare cases, see the article "Planning Cash Flow in Health Care Bankruptcies: Medicare and the Administrative Freeze by Andrea R. Cunha and Evan J. Atkinson. ABI Journal, October 2019 (pages 28-29)
[6] See: www.tmhp.com
[7] *See generally* TEX. ADMIN. CODE § 355, et. seq.

# Title search: Health Care Bankruptcies - How to Diagnose and Treat These Patients (from the State's Perspective)

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2019 Jay L. Westbrook Bankruptcy eConference

First appeared as part of the conference materials for the
38th Annual Jay L. Westbrook Bankruptcy Conference session
"Health Care Bankruptcies - How to Diagnose and Treat These Patients"