

General Overview of Causes of Financial Distress in the Healthcare Industry

State of the Healthcare Industry -- The COVID-19 Era

- **Outbreaks at SNFs and Other Facilities**
- **PPE (Personal Protective Equipment) Supply**
- **Increased Operating Costs**
- **Increased Litigation Risk**
- **Reduced Revenue (SNFs, Rural Hospitals, PPMs, etc.)**
 - Lack of/Reduced Elective Surgeries/Non-Essential Services
 - Declining Census
 - Closed Practices
- **Stimulus Funds**

Bankruptcy – Recoupment/Setoff and the *Strumpf* Freeze

- **Setoff** is an equitable right of a creditor to deduct a debt it owes to the debtor from a claim it has against the debtor arising out of a separate transaction. **Recoupment** differs in that the opposing claims must arise from the same transaction. Whether Medicare's (or Medicaid's) right to recover prior overpayments, established in 42 U.S.C. § 1395(g), is a right of recoupment or setoff is subject to some controversy.
 - ***In re University Medical Center***, 973 F.2d 1065 (3d Cir. 1992) (Medicare's right of recoupment is limited to overpayments arising in the same cost report year as the ongoing payments the government seeks to offset).
 - ***Sims v. United States Dep't of Health & Human Servs. (In re TLC Hosps., Inc.)***, 224 F.3d 1008 (9th Cir. 2000) (holding that Medicare overpayments can be recouped without limitations).

Bankruptcy – Recoupment/Setoff and the *Strumpf* Freeze (cont'd)

- ***United States v. Consumer Health Services of America, Inc.***, 108 F.3d 390 (D.C. Cir. 1997) (Recoupment of Medicare overpayments allowed).
- ***Holyoke Nursing Home Inc. v. Health Care Fin. Admin. (In re Holyoke Nursing Home, Inc.)***, 372 F.3d 1 (1st Cir. 2004) (Recoupment of Medicare overpayments allowed).
- ***In re THGH Liquidating, LLC (True Health Diagnostics, LLC), Case No. 19-11689*** (Bankr. Del. 2019) (Automatic stay prevents CMS from withholding postpetition Medicare reimbursements notwithstanding a prepetition suspension due to credible allegations of fraud).
- ***Strumpf Freezes***: Government’s use of administrative freezes to hold payments owed to a debtor to allow the government time to determine what prepetition overpayments might exist. *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16 (1995).

Bankruptcy – Does the Bankruptcy Court Have Jurisdiction Over Reimbursement Disputes/Exhaustion of Remedies

- 42 U.S.C. § 405(h) as it applies to Medicare reads:

Finality of [Secretary's] decision: The findings and decision of the [Secretary] after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decisions of the [Secretary] shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the [Secretary] or any officer or employee thereof shall be brought under section 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter.

- This section does not explicitly apply to actions brought under section 1334 of Title 28, the section governing the referral of bankruptcy cases by the district court to the bankruptcy court.

Bankruptcy – Does the Bankruptcy Court Have Jurisdiction Over Reimbursement Disputes/Exhaustion of Remedies (cont'd)

- **NO** -- *In re Bayou Shores SNF*, 828 F.3d 1297 (11th Cir. 2016): "Because we are persuaded that the 1984 amendments to § 405(h) were a codification and not a substantive change, we align ourselves with the Seventh, Eighth, and Third Circuits and hold that §405(h) bars § 1334 jurisdiction over claims that 'arise under [the Medicare Act].'"
- **YES** -- *Sullivan v. Town & Country Home Nursing Servs., Inc. (In re Town & Country Home Nursing Servs., Inc.)*, 963 F.2d 1146 (9th Cir. 1992) ("The BAP rejected the Secretary's arguments and found 'the better reasoned position' to be that 'where there is an independent basis for bankruptcy court jurisdiction, exhaustion of administrative remedies pursuant to other jurisdictional statutes is not required.' ... We agree."); *In University Medical Center*, 973 F.3d 1065, 1073-74 (3d Cir. 1992) (same).

Bankruptcy – Is the Provider Agreement An Executory Contract or a Statutory Entitlement

- ***Executory Contract***

- *In re Vitalsigns Homecare, Inc.*, 396 B.R. 232, 239 (Bankr. D. Mass. 2008): "[M]ajority of bankruptcy courts considering the Medicare-provider relationship conclude that the Medicare provider agreement, with its attendant benefits and burdens is an executory contract."

Bankruptcy – Is the Provider Agreement An Executory Contract or a Statutory Entitlement (cont'd)

- ***Statutory Entitlement/Sale Free and Clear***
 - ***PAMC, Ltd. v. Sebelius***, 747 F.3d 1214, 1221 (9th Cir. 2014) (internal citations omitted): "We have, on occasion, stated that providers and others have contracts with the government in this area, but our decisions have turned on the regulatory regime rather than on contract principles. ... [Here we hold that] '[u]pon joining the Medicare program, however, the hospitals received a statutory entitlement, not a contractual right.'"
 - ***In re Verity Health Systems of California, Inc.***, Case No. 18-20151 (Bankr. C.D. Cal. 2018): Provider agreements are statutory entitlements that can be sold free and clear of liabilities, including successor liabilities. Decision subsequently vacated.
 - ***In re Center City Healthcare, LLC***, Case No. 19-11466 (Bankr. Del. 2019): Same. Decision subsequently vacated.
 - ***In re B.D.K. Health Mgmt., Inc.***, 1998 WL 34188241 (Bankr. M.D. Fla. Nov. 16, 1998) (provider agreement can be sold free and clear).

Bankruptcy – Is a Skilled Nursing Facility Lease a Nonresidential or Residential Real Property Lease?

- ***Non-Residential Leases***

- ***In re Passage Midland Meadows Operations, LLC***, 578 B.R. 367 (Bankr. S.D. W. Va. 2017)
- ***In re Summit Ventures***, No. 90-00213, 1991 WL 133412, at *2 (Bankr. D. Vt. Mar. 4, 1991)
- ***In re Sonora Convalescent Hosp., Inc.***, 69 B.R. 134 (Bankr. E.D. Cal. 1986)

- ***Residential Leases***

- ***In the Matter of Memory Lane of Bremen LLC***, 535 B.R. 901 (Bankr. N.D. Ga. 2015)
- ***In re Care Givers, Inc.***, 113 B.R. 263, 267 (Bankr. N.D. Tex. 1989)
- ***In re Independence Village, Inc.***, 52 B.R. 715 (Bankr. E.D. Mich. 1985)
- ***In re Texas Health Enterprises, Inc.***, 255 B.R. 181 (Bankr. E.D. Tex. 2000)
- ***PNW Healthcare Holdings, LLC***, Case No. 19-43754 (Bankr. W.D. Wash. 2019)

Healthcare Bankruptcy Code Sections

Bankruptcy Code Provision	Summary of provision
Section 101	Provides definitions for use throughout the Bankruptcy Code, including “healthcare business,” “patient,” and “patient records.”
Section 333	Creates the patient care ombudsman, a professional to be retained by the bankruptcy estate.
Section 351	Addresses the disposal of patient records in situations where there are insufficient funds to provide proper storage of the patient records as required by law.
Section 362(b)(28)	Provides that the automatic stay is inapplicable with respect to the Secretary of Health and Human Services excluding a debtor from the Medicare program or any other Federal healthcare program.
Section 503(b)(8)	Allows administrative expense claim status for the actual, necessary costs and expenses incurred in association with closure of a healthcare business.
Section 704(a)(12)	Governs the transfer of patients from a closing healthcare business to a facility nearby offering substantially similar services and maintaining a reasonable quality of care.

Non-Profit Bankruptcy Code Sections

Bankruptcy Code Provision	Summary of provision
Section 363(d)	Trustee/debtor may use, sell or lease property of a non-profit “only in accordance with non-bankruptcy law applicable to the transfer of property by a debtor that is such a corporation or trust.”
Section 541(f)	Notwithstanding any other provision of this title, property that is held by a debtor that is a corporation described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code may be transferred to an entity that is not such a corporation, but only under the same conditions as would apply if the debtor had not filed a case under this title.
Section 1129(a)(16)	All transfers of property under the plan shall be made in accordance with any applicable provisions of non-bankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed business or commercial corporation or trust.