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Feature

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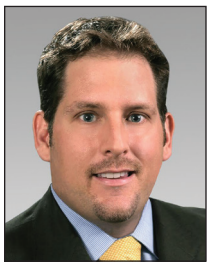
Healthy Outcomes from HIPAA and Corporate Bankruptcy



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In the world of health care, the Health Insurance Portability and Accountability Act (HIPAA) has transformed how information is collected, stored and shared among patients, providers and payors since it was enacted by Congress in 1996. Health care companies are often customers, suppliers, employers and health care providers, so when health care companies and facilities are faced with the prospect and reality of filing for bankruptcy (restructuring or otherwise), HIPAA presents unique challenges for debtors. At times, its purpose seems incompatible with the law's due-process requirements of transparency by notifying parties-in-interest throughout bankruptcy proceedings.

Among the biggest challenges faced by health care debtors and their restructuring professionals is whether patients should receive notice as potential creditors within the guise of a corporate bankruptcy. While the natural inclination of most corporate restructuring professionals would be to say, "Yes, of course," HIPAA presents significant obstacles and risks in that patient information may become public in the natural course of the claims and noticing process. This presents a dilemma from both an administrative and procedural standpoint, as well as some financial considerations that have typically discouraged debtors from noticing patients as *potential* creditors whenever possible. The dilemma is how to strike a balance between transparency and privacy.

However, even when the decision has been made to omit patients from the list of potential creditors, it is still possible that patient data might be inadvertently "leaked" as part of the claims and noticing process unless certain requisite confidentiality safeguards are put into place. As a result, health care debtors and their teams must implement HIPAA-compliant noticing strategies to circumvent these challenges.

Why Was HIPAA Created?

HIPAA's goal and primary purpose was to create federal privacy standards for the protection of medical records and other personal health information that is collected and stored within doctors' offices, hospitals, third-party payers and health plans. Prior to HIPAA's enactment, fragmented state and federal laws controlled how and when personal health information could be distributed by health care organizations. In some cases, personal health information could be disclosed without a patient's permission or notification to third parties who may or may not have had anything to do with the patient's health care needs. For example, prior to HIPAA's enactment, a health plan could potentially share patient information with employers or lenders without the individual's consent.

Much like the documents that are involved in corporate bankruptcy filings, medical files are no longer paper records that can be locked away and safeguarded in filing cabinets. Rather, the proliferation of electronic records and the sharing of information have led to an even greater need to protect personal health information.

The national standards imposed by HIPAA require that health care providers, health plans and health care clearinghouses follow specific guidelines and procedures to protect personal health information and its disclosure. HIPAA also empowers patients to have full access to their health information, whether it is to request a copy of health records or request any corrections.

Where HIPAA and Corporate Bankruptcy Intersect

How can personal health information become an issue within corporate bankruptcy? The answer is that documents commonly shared within corpo-

rate bankruptcy — whether it is chapter 7, 9 or 11 — to collect and process creditors' claims and/or ballots can inadvertently reveal confidential patient data and other personal details without a patient's authorization, whether or not the information on those documents has any bearing or significance on the bankruptcy proceeding. This can result in a HIPAA violation.

When a hospital files for corporate bankruptcy and the debtor's counsel and other advisors compile the lists of potential creditors to which pre-petition monies are owed (known as the "creditor matrix"), patients might be included on that list with or without the debtor's knowledge. For example, if the patient paid his/her health care bill prior to reimbursement to the hospital by the insurance company and/or inadvertently overpaid before knowing the amount that was covered by their insurance, the hospital may then owe the patient a refund for that balance. As a result, the patient could be shown as a creditor in the hospital's accounting records. Another likely scenario where patients might be creditors in a hospital bankruptcy occurs when there is pending litigation filed by the patient against a physician or hospital for malpractice or other charges.

The documents that are served to creditors in a typical chapter 11 case, and subsequently to patients if they are creditors, include (1) the notice of commencement, also known as the "notice of 341 hearing"; (2) the bar date mailing, which is served with a bar date notice and a proof-of-claim form; (3) the notice of the disclosure-statement hearing; (4) the notice of the plan-confirmation hearing; and (5) the notice of the effective date. In some cases, there might be a reason to serve patients more often, such as when there is pending litigation or if the filing converts to a sale case.

One of the greatest risks for patient-data exposure occurs when and if they submit their proofs of claim. Once the proof of claim is within the public domain, it can inherently reveal information about the patient such as their name and contact information. Furthermore, if a hospital invoice is attached to the proofs of claim, it may reveal the nature of the procedure or treatment that the patient received at the hospital. All of these details are considered personal health information that is subject to HIPAA's restrictions. In addition, the related affidavit of service for such mailings is a publicly accessible document that requires that the name and address of the creditors served be listed. This can also lead to a potential leakage of personal patient information.

Should Patients Receive Notice?

The question of whether to notice patients in a corporate bankruptcy can lead to a slippery slope and will ultimately require a careful analysis of the pros and cons. The purpose of corporate bankruptcy is to apply its outcome to all conceivable constituencies so that the debtor can reduce its debt and liabilities by paying creditors in post-petition "bankruptcy dollars" rather than in "real dollars." As part of this process, it is important to cast a wide net to assess the debt that is owed to all parties. It is often the debt that you do not know about that can be problematic and can be a significant risk if patients/creditors to whom money is owed are not served appropriately.

Furthermore, patient claims are treated as priority claims in hospital bankruptcy proceedings, which means that they rank among the first in ultimately receiving disbursement funds and can further complicate matters if they are not served properly. On the flip side, beyond the inherent risks of potential HIPAA violations that can occur throughout the claims and noticing process, there are some significant disadvantages to serving patients as creditors or potential creditors in a corporate bankruptcy.

The most formidable risk is cost. Even a small, rural community hospital may have 1 million patients or more. In that specific instance, when the cost of postage, labor, materials, document production and other costs that go into the claims and noticing process are factored in, the price tag of physically noticing the hospital's entire patient population may be in the range of $1.25 per creditor, totaling a potential cost of $6.25 million, and for just one mailing: There could four or more other such instances. If the debtor's counsel assesses that patients are not owed money as creditors, this astronomical expenditure to include them in the claims and noticing process simply does not make sense. A hospital (certainly a rural community hospital) mired in bankruptcy proceedings likely cannot afford to serve notice on its entire patient body.

Another reason that some hospital debtors may decide against noticing patients is reputation management — a point that cannot be overstated. If the hospital is planning to emerge from corporate bankruptcy as a going concern, the hospital leadership will want to assure patients that their health care remains a top priority and has not been compromised by the financial restructuring of the organization. If there is little reason to alert them to the news that the hospital is filing for bankruptcy, it might be best to avoid raising concerns about the viability and reliability of the hospital in providing patient care to their community.

However, even if the decision is made to not serve the patients as creditors, any document that potentially deals with the patient population can still become a hand grenade if the appropriate precautions are not taken. One scenario where this can happen is if a patient decides to reach out to the debtor's call center with a question regarding a past-due invoice or some other seemingly innocuous question. Call centers might be required to record call logs of individuals who have called, their contact information and other details, which are then subject to becoming public documents. Furthermore, billing entries might contain patient data and can become public record. In addition, even if patients are not served notice as creditors, they may hear about the corporate bankruptcy filing from other sources and decide to file a proof of claim on their own — which happens quite frequently.

Navigating the Perils of Patient Data

Knowing all of the potential risks of HIPAA violations, as well as the pros and cons of noticing patients, may leave health care debtors feeling unsure of what path to take when it comes to claims and noticing strategies in a health care bankruptcy. Whether or not a health care debtor decides to serve notice to patients as creditors, there are some steps that they can take to avoid a breach of patient data and minimize any future risk of HIPAA violations.

The most significant measure that health care debtors can take is to assume that all documents may contain patient data — whether that data is within the creditor matrix, a proof of claim, a claims register, a call log, an affidavit of service or any other document. As a result, any such document should not be made public on the debtor's website or bankruptcy court's docket, at least until it can be reviewed to ensure that it does not contain HIPAA-protected data.

To avoid surprises once the company emerges from corporate bankruptcy, health care debtors and their professionals should establish security measures to ensure that HIPAA-protected information is not disclosed — intentionally or unintentionally. This should start early in the bankruptcy-planning process with a careful determination of what creditors are also patients. As part of that determination, a health care debtor should also determine how it should legally notice such patients/creditors so that these parties may protect their pecuniary interests in the bankruptcy. From this analysis, a health care debtor may identify only a small subset of patients who are creditors and should be served notice, or they may set a threshold of the amount owed in order to include a patient as a creditor.

It is wise for hospital debtors to enlist support from professionals who fully understand the tension between HIPAA and due-process requirements imposed by bankruptcy law. Financial advisors and claims/noticing agents who are knowledgeable about HIPAA's restrictions can also help debtors and their professionals design and implement protocols and procedures in handling sensitive patient data. Do not assume that the bankruptcy court will have a firm grasp on these issues and how best to navigate them. Many jurisdictions rarely see hospital bankruptcies and therefore lack experience dealing with them.

Whether or not a health care debtor decides to serve notice to their patients as creditors, they should be armed with as much knowledge as possible and the guidance of professionals who understand the pitfalls of HIPAA within the corporate bankruptcy process and how best to navigate them to strike the proper balance between confidentiality and due process. This understanding will increase the chances of a healthy outcome. abi

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