Bankruptcy, HIPAA and Issues with Medical Privacy

By Craig D. Robins, Esq.

Society has increasingly recognized the importance of treating a consumer's medical records as confidential. We now have federal laws safeguarding a patient's right to privacy.

What happens, however, when a bankruptcy filing enters the picture? If a consumer files for bankruptcy relief and the health care creditor needs to become involved in the case, what information can and cannot be filed? Suppose the medical provider, itself, files a bankruptcy. What protections are there to ensure that the health care business's patient records remain confidential? These are all concerns that have been addressed over the past 25 years during an evolving period of patient privacy.

Consumers Seeking Bankruptcy Relief

One of the biggest contributing factors for personal bankruptcy is a large amount of medical debt arising from a significant health event. Several studies have demonstrated that medical bills are the single largest causal factor in consumer bankruptcy filings. Medical debt, which is non-priority unsecured debt, is dischargeable. Many debtors easily discharge medical debt in Chapter 7 cases. Trustees are charged with the obligation of examining the debtor at the meeting of creditors. Usually a trustee is only concerned about a debtor's medical issues when they may involve a cause of action which might be an asset of the bankruptcy estate. As such, a trustee may ask the debtor if a disability or medical debt is related to an accident, or if an accident was involved, the trustee may inquire as to the extent of the medical injury, including diagnosis and prognosis. However, based on my observations, trustees have been extremely respectful about delving into sensitive medical issues, and if a debtor expressed concern about disclosing confidential medical information on the record, I suspect the trustee

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would permit such discussion to continue off the record in a subsequent confidential manner.

Medical Debt in Chapter 13 cases

Some consumers are not able to file for Chapter 7 relief, either because they do not qualify for that chapter or for other reasons. Such consumers will often file for Chapter 13 relief instead. In Chapter 13, the debtor pays some or all of their debt back through a payment plan over a period of three to five years. In order to be paid, the creditor must file proof of claim form and any documents supporting the claim. The issue then becomes: What information should the health care creditor provide to protect its rights to file a claim, and what details should it hold back because they may impair the debtor's patient privacy rights? In the past, there has been tension between the general bankruptcy concept that there should be full transparency when one seeks bankruptcy relief, and a patient's right to reasonable medical privacy.

The official court instructions for preparing a proof of claim are found in Form B-410. With regard to health care providers, the instructions provide that: "If a claim is based on delivering health care goods or services, limit the disclosure of the goods or services to avoid embarrassment or disclosure of confidential health care information."As many hundreds of thousands of medical debt claims are filed each year, there is always a danger that the creditor will carelessly violate privacy laws. Any health care provider or collections agent on their behalf who fills out a proof of claim form should be especially careful to comply with privacy requirements. If any party, including the party filing the information, realizes that confidential information was inadvertently included, that party can immediately file a motion to seal the record. As mistakes do happen, the sooner the offending party takes responsibility for the error and engages in remedial action, the more likely they will be able to mitigate any negative recourse.

Bankruptcies Filed by Health Care Providers

Doctors, hospitals and health care businesses are not immune from debt problems. However, when they do seek bankruptcy relief, they face unique challenges regarding the use and disclosure of patients' medical information and must especially comply with HIPAA.

HIPAA Laws

The most extensive federal health care privacy law got its start with the Health Insurance Portability and Accountability Act of 1996, most frequently referred to as HIPAA. Now viewed as our nation's primary patient privacy law, its privacy rules were added in 2003, which adopted national standards to prevent the disclosure of protected health information (PHI), which it defined as "any information held by a covered entity which concerns health status, the provision of healthcare, or payment for healthcare that can be linked to an individual." Since then, most medical providers have endeavored to achieve full HIPAA compliance. However, a bankruptcy filing certainly complicates matters. The Bankruptcy Code does not contain any provisions that excuse a health care debtor from HIPAA compliance.

In general, in a health care business bankruptcy, the trustee or the Chapter 11 debtor in possession must provide certain notice to patient creditors. In addition, health care business debtors or trustees will often seek bankruptcy court approval of procedures to ensure HIPAA compliance and to avoid potential liability for violating HIPAA requirements for protecting for patient data. With a healthcare business bankruptcy, it can be the patient who is the creditor and who must file a proof of claim. In such cases, the debtor should seek a bankruptcy court order before sending out blank claims forms to patients, to restrict public access to the proofs of claims.

In some cases, the trustee or debtor in possession is sometimes left with the difficult task of disposing of thousands of patient files, each containing very confidential medical information. Ordinarily, the Chapter 7 trustee can abandon assets and simply walk away from them. However, when it comes to dealing with files containing sensitive medical data, Bankruptcy Code 351 addresses this issue.

It provides that when a debtor lacks funds to retain medical records, certain notice requirements must be adhered to, such as providing written and/or published notices to patients and insurance companies, and destroying unclaimed records.

The Bankruptcy Code provides another protection for patients in health care business bankruptcies. Code Section 333 requires the Court to appoint a patient care ombudsman in such cases to monitor the quality of patient care and represent the interests of patients, unless the court determines that doing so is not necessary for the protection of patients. Bankruptcy Code Section 101(27A) sets forth a lengthy definition of what comprises a health care business.

Medical privacy in bankruptcy cases is an evolving area of the law. There are many cases that patients have brought against parties that have improperly disclosed confidential medical information. This is one area where extra care and attention is mandatory.