



AMERICAN
BANKRUPTCY
INSTITUTE

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But I'm Afraid of Needles: The Sale of Health Care Assets

Presented by the Health Care & Asset Sales
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*Navigating
Fearlessly the Sale of
Health Care Assets
When to Sell and When Not to Sell*

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Perspectives to Consider

- ▶ Healthcare providers
- ▶ Community
- ▶ Government
- ▶ Payors
- ▶ Lenders
- ▶ Buyers

Circumstances Leading to Distress

- ▶ Declining census
- ▶ Tort Litigation/Employee Litigation
- ▶ Overexpansion
- ▶ Macro-industry trends
 - ▶ In-patient to outpatient,
 - ▶ Volume-based to value-based treatment model
- ▶ Insufficient Reimbursements (particularly Medicaid)
- ▶ Payment Delays
- ▶ IT/Facilities Issues
- ▶ *Impact of COVID-19*

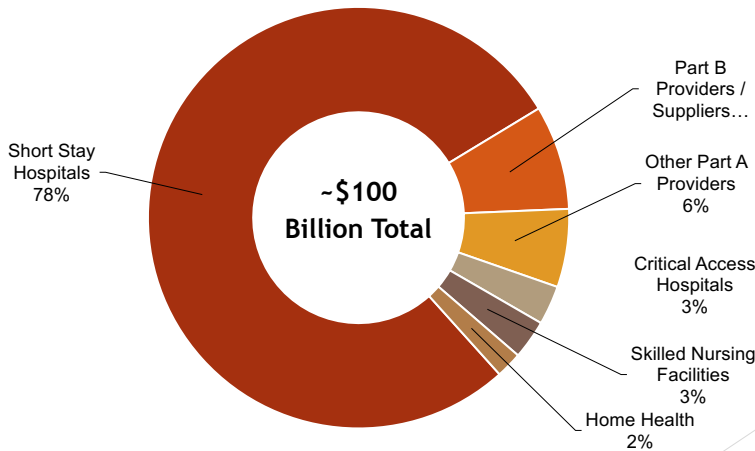
COVID-19 Stimulus Funding Programs

- ▶ To assist healthcare related companies with the significant disruption caused by COVID-19, the following large pools of capital were made available to healthcare companies to stabilize / sustain operations

Medicare Accelerated and Advance Payments	Provider Relief Funds
<ul style="list-style-type: none">• \$100 billion<ul style="list-style-type: none">- Short term loans made as an advance on fee-for-service Medicare payments- Repayments to commence 120 days after receipt of the advance with most hospitals having one year to repay and other providers having seven months	<ul style="list-style-type: none">• \$175 billion<ul style="list-style-type: none">- Grant funds- Subject to a certification process to retain funds received

Medicare Accelerated and Advance Payments

- ▶ The allocation of payments under this program has been heavily concentrated on hospitals



Provider Relief Funds

- ▶ Approximately 70% of the total funds approved in the stimulus plans have been distributed. Further, more recent distributions have been targeted in contrast to the initial \$50 billion of funds.

Recipient	Amount	Date
(\$ billions)		
General Distribution		
Medicare Fee for Service Providers	\$30.0	4/10/2020
Medicare Fee for Service Providers	20.0	4/24/2020
	<u>50.0</u>	
Targeted Distributions		
Rural Health Distribution	10.0	5/6/2020
COVID-19 High Impact Distribution	12.0	5/7/2020
Skilled Nursing Facilities	4.9	5/22/2020
Tribal Hospitals, Clinics & Urban Health Cente	0.5	5/29/2020
Medicaid/CHIP, Dental	15.0	6/9/2020
Safety Net Hospitals	10.0	6/9/2020
Safety Net Hospitals / Specialty Rural Health	4.0	7/10/2020
COVID-19 High Impact Distribution	10.0	7/17/2020
Children's Hospitals	1.4	8/27/2020
Skilled Nursing Facilities	2.5	8/27/2020
	<u>70.3</u>	
Total Distributions	<u>\$120.3</u>	

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Retention of Provider Relief Funds

- ▶ Payments will only be used to prevent, prepare for, and respond to coronavirus and shall reimburse the Recipient only for:

“Healthcare related expenses attributable to coronavirus”

- ▶ Supplies and equipment for services for possible or actual COVID-19 patients
- ▶ Workforce training
- ▶ Developing and staffing emergency operation centers
- ▶ Reporting COVID-19 test results to federal, state or local governments
- ▶ Building or constructing temporary structures to expand capacity for:
 - COVID-19 patient care
 - Non-COVID-19 patients in a separate area from where COVID-19 patients are being treated
- ▶ Acquiring additional resources (facilities, equipment, supplies, health care practices, staffing, and technology)

“Lost revenues that are attributable to coronavirus”

- ▶ Revenue lost due to coronavirus and includes revenue losses associated with:
 - Fewer outpatient visits
 - Canceled elective procedures or services
 - Increased uncompensated care
- ▶ Providers can use payments to cover any cost that the lost revenue otherwise would have covered
- ▶ HHS encourages the use of funds to cover lost revenue so that providers can respond to the coronavirus public health emergency by maintaining health care delivery capacity, such as using Provider Relief Fund payments to cover:
 - Employee or contractor payroll
 - Employee health insurance
 - Rent or mortgage payments
 - Equipment lease payments
 - Electronic health record licensing fees

- ▶ The program covers expenses attributable to coronavirus and were used to prevent, prepare for or respond to coronavirus (“highly unusual” to have eligible expenses prior to January 1, 2020)

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The Impact of Opting Out of Medicaid Expansion

- ▶ The Affordable Care Act (ACA): Provides Medicaid to all low income persons at 138 percent below the poverty line (\$17,236 in income).
- ▶ In June 2012, the Supreme Court held the Federal Government could not force states to participate in Medicaid expansion. *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012).
- ▶ As of now, 14 states have opted out (Florida, Texas, Mississippi, Alabama, Georgia, South Carolina, North Carolina, Tennessee, Missouri, Oklahoma, Kansas, Wisconsin, South Dakota, Wyoming).
- ▶ The uncompensated care in these states puts a strain on healthcare.

The Impact of Opting Out of Medicaid Expansion (cont'd)

- ▶ Texas leads the nation with 19 permanently closed hospitals.
- ▶ Concentration of healthcare bankruptcies in regions where states have opted out.
 - ▶ For example, in the last quarter of 2019, 35% of healthcare bankruptcy filings took place in the southeast region (Texas, Florida, North Carolina, South Carolina, Tennessee, Mississippi, Alabama) (See Polsinelli PC Distress Index, <https://www.distressindex.com/reports>).
- ▶ **Healthcare bankruptcies increased 125% in the last quarter of 2019** compared to the benchmark period of the fourth quarter of 2010, while Chapter 11 filings have decreased 50% over the same period (See *id.*)
- ▶ 13 of the 19 hospital filings in 2019 were in states that opted out.

Challenges Arising in the Context of a Sale

Political and Community-Based Concerns

- ▶ Hospitals are often a major (if not the major) regional employer
 - ▶ High and low skilled
- ▶ Significant importance to the community
 - ▶ Bayonne Medical Center
- ▶ Closure can lead to healthcare deserts
 - ▶ Rural areas
 - ▶ Underserved, low income urban areas
 - ▶ Even suburban area (Seton Medical Center/Verity Health)
- ▶ Community involvement can impede or facilitate sale
 - ▶ St. Michael's (facilitated in face of rationalization plan)

Political and Community-Based Concerns (cont'd)

- ▶ **States Hospital Rationalization Plans**
 - ▶ Berger Commission Report (NY)
 - ▶ Reinhardt Commission Report (NJ)
- ▶ **Certificate of Need Laws**
- ▶ Example:
 - ▶ St. Michael's Hospital (Newark, NJ)
 - ▶ Hospital rationalization plan for Newark (NJ) region
 - ▶ State was on the hook for bonds
 - ▶ Sale to a for-profit

Impact of Valuable Real Estate

- ▶ Does a valuable piece of real estate influence the decision to close or keep a facility open?
- ▶ Consider the hospital closures
 - ▶ St. Vincent's (NY)
 - ▶ Michael Reese (Chicago)
 - ▶ Hahnemann University Hospital (Philadelphia)
 - ▶ St. Vincent (LA)
- ▶ What about hospitals in rural America where the real estate is of little or no value?

Considerations When Evaluating Healthcare Real Estate

- ▶ Zoning issues
 - ▶ Saddlebrook Memorial (San Clemente)
- ▶ Regulatory approval
 - ▶ Daughters of Charity Health System
- ▶ Real Estate - Legal Entity Separation
 - ▶ Hahnemann / St. Christopher's
- ▶ Leases and Limitations
 - ▶ The Clare
 - ▶ Promise Healthcare

Regulatory Hurdles in Healthcare Bankruptcy Sales

- ▶ Police power exception to the stay
- ▶ US Department of Health & Human Services
 - ▶ Centers for Medicare and Medicaid Services (CMS)
 - ▶ Overpayment and set-off/recoupment issues
 - ▶ Patient quality issues/exclusion from federal health care programs
 - ▶ Office of Inspector General (Fraud & Abuse)/Office of Civil Rights (HIPAA)
 - ▶ Twentieth Century Oncology (resolution of fraud/abuse and HIPAA a condition to reorganization)
 - ▶ Laboratory Partners (MedLab): HIPAA and sales in healthcare bankruptcies
- ▶ US Trustees have raised sale objections based on Healthcare laws

Issues with Government Receivables

- ▶ **Setoff:** A pre-petition creditor can set off any pre-petition debt owed by the debtor. 11 U.S.C. 553.
 - ▶ If there is a claim against the debtor prior to commencement, the creditor owes a debt to the debtor that arose before commencement, and the claim is mutual, then each are valid and enforceable.
 - ▶ Requires relief from stay.

- ▶ **Recoupment:** Allows a creditor to reduce post-petition obligations to the debtor by the amount of the creditor's pre-petition claim.
 - ▶ Differs from setoff because the obligation and claim must arise from a single unitary transaction.
 - ▶ Not stayed.
 - ▶ *Medicare and Medicaid receivables are subject to recoupment for overpayment.*

Issues with Government Receivables (cont'd)

- ▶ Other payments may be subject to recoupment like **Quality Assurance Fees**. *In re Gardens Regional Hospital and Medical Center, Inc.*, 569 B.R. 788 (Bankr. C.D. Cal. 2017).
- ▶ Issues with private insurance:
 - ▶ **Capitation payments (HMO)** - If there is an overpayment by the private insurer, contractual reduction in future capitation payments subject to recoupment. The Integrated Transaction test was applied in *St. Francis Physician Network, Inc. v. Rush Prudential HMO, Inc. (In re St. Francis Physician Network, Inc.)*, 213 B.R. 710 (Bankr. N.D. Ill. 1997).
 - ▶ **Private insurance audits** - If an audit is conducted, the determination of improper payment of claims gives rise to setoff or recoupment, depending on the circumstances.

Issues with Government Receivables (cont'd)

- ▶ “Logical Relationship Test” - Majority view.
 - ▶ All payments are part of the same transaction and recoupment to span over several years. *United States v. Consumer Health Servs. of America, Inc.*, 108 F.3d 390 (D.C. Cir. 1997); *See also Sims v. U.S. Dep’t of Health and Human Services (In re TLC Hospitals, Inc.)*, 225 B.R.709 (N.D. Cal. 1998); *AHN Homecare, LLC v. Home Health Reimbursement, et al. (In re AHN Homecare, LLC)*, 222 B.R. 804 (Bankr. N.D. Tex. 1998); *In re Southern Institute for Treatment And Evaluation, Inc.*, 217 B.R. 962 (Bankr. S.D. Fla. 1998).
- ▶ “Integrated Transaction” - Third Circuit.
 - ▶ Payments are yearly, and recoupment has to be within the same year. *In re University Medical Center*, 973 F.2d 1065 (3d Cir. 1992).

Other Regulatory Hurdles

- ▶ Licensing and Permits
- ▶ Anti-trust considerations: **Phoebe Putney Memorial/Palmyra Medical Center**
- ▶ Transfer of Existing Provider Agreements versus New Provider Number
- ▶ Provider Agreements as Statutory Entitlements
 - ▶ *In re Center City Healthcare LLC*, Case No. 19-11466(KG) (Bankr. D. Del. Sept. 10, 2019) (on appeal) (finding that provider agreement was not an executory contract but instead a statutory entitlement capable of being sold free and clear of all interests and successor liability).
 - ▶ *In re Verity Health Sys. Of Cal. Inc.*, 606 B.R. 843 (Bankr. C.D. Cal. 2019) (vacated as moot) (finding that provider agreements were statutory entitlements that could be sold free and clear to liabilities to the California Department of Healthcare Services).

Role of Government in Bankruptcy Sales: Who Are the Players?

- ▶ Internal Revenue Service (§ 541(f)): Sales of Non-Profits' Assets
 - ▶ Sales by non-profits qualifying for § 501(c)(3) tax exemption not complying with applicable state law endanger the tax exemption
 - ▶ Use of a non-profits assets in a manner inconsistent with the debtor's tax-exempt purpose
 - ▶ Sale results in a change in the non-profit's activities inconsistent with its tax-exempt purpose
 - ▶ Sale results in undue benefit
- ▶ DOJ/FTC: Antitrust considerations
- ▶ State Agencies
 - ▶ State Departments of Health
 - ▶ Licensing and Certificate of Need laws and regulations
 - ▶ Medicaid
 - ▶ Taxing agencies

Role of State Attorneys General in Bankruptcy Sales

- ▶ Review, objection and approval, particularly re: sales by non-profits:
 - ▶ § 363(d)(1) sales of the assets of a non-profit outside of a plan subject to applicable non-bankruptcy state law
 - ▶ § 1129(a)(16) same for sales pursuant to a plan
- ▶ Sales by Non-Profits to For-Profits
- ▶ Verity Health:
 - ▶ Prequel: Daughters of Charity Sale (non-profit to for-profit)
 - ▶ AG sought to condition the sale by Verity (a for profit) to the same conditions as those imposed in the Daughters of Charity Sale
 - ▶ Sale largely free and clear of those conditions

The Patient Care Ombudsman

- ▶ Patient Care Ombudsman (11 U.S.C. § 333)
 - ▶ Advocates for patients
 - ▶ Conflict between monitoring quality of patient care and safety and maximizing values for creditors, including via sale
 - ▶ Financing Orders
 - ▶ Sale Orders
 - ▶ Plan of Reorganization
 - ▶ Positive role of PCO re: sales
 - ▶ Quality Control
 - ▶ North Philadelphia Health System: PCO's regular visits to an aging facility
 - ▶ St. Francis Hospital Poughkeepsie: expedited investigation expedited sale
 - ▶ Working with governmental agencies: ANKA Behavioral Health—50 facilities transferred or closed in 3 weeks, patients to be transferred to other facilities

Best Practices for Working with Governmental Agencies

- ▶ **Know which agency or agencies have jurisdiction/authority**
 - ▶ Become familiar with agency procedures, particularly those related to bankruptcy
 - ▶ Know which offices/personnel at the agency address bankruptcy issues
- ▶ **Lines of communication should exist before filing**
 - ▶ If not, establish them as soon after filing as possible
- ▶ **Have a communication plan**
 - ▶ Decide when/how debtor should contact the agencies
 - ▶ Decide when/how debtor's counsel should contact agency counsel

Best Practices for Working with Governmental Agencies (cont'd)

- ▶ Resolution of Governmental Claims
 - ▶ Timeframes and procedures
 - ▶ Procedures are often complex and time-consuming
 - ▶ Factor “government time” into the resolution process to avoid being up against bankruptcy deadlines
 - ▶ Keep the interests of the governmental agency in mind.
 - ▶ Keep in mind the need to have approvals by the appropriate governmental agency, who is not likely to be involved in negotiations or mediations
 - ▶ Resolutions are discretionary; government considers
 - ▶ Risks involved in any necessary litigation
 - ▶ Debtor’s ability to pay
 - ▶ Public interest.

Communication Issues

- ▶ Consider the role of communications in controlling the message and the case.
- ▶ Press - Have a press release, and consider retaining a PR firm if funds allow.
- ▶ WARN notices to workers - Generally speaking, sent by any employer who has 100 or more employees. Must give 60 days’ notice of layoff or be subject to 60 days’ pay per employee, penalties, and attorneys’ fees. Consider, also, messages by management and counsel related to the notices.

Communication Issues (cont'd)

▶ Unions

- ▶ Communications vary on a case by case basis.
- ▶ Essential employees require an ongoing dialogue with unions.
- ▶ Must determine who is the voice of the debtor with support from counsel.
- ▶ Negotiations of issues related to collective bargaining agreements:
 - ▶ 11 U.S.C. 1113 Rejection of collective bargaining agreements.
 - ▶ Prior to rejection: (1) Proposal; (2) Accompanied by sufficient information; (3) To have proper evaluation of proposal.

▶ Doctors and Nurses

- ▶ Communications related to bankruptcy process.
- ▶ Must plan and communicate in order to keep staff.

▶ Patients and Residents

- ▶ Access to a point person or team.
- ▶ Consistent, timely answers in response, even if the answer is that: "We don't know yet."

If the Sale Does Not Close, What Happens?

- ▶ **Alternative bidder (was there a back up to the stalking horse?)**
 - ▶ Promise Health: Seven Louisiana hospitals sold for 7 dollars
 - ▶ Impact of a large Medicaid census on locating an alternate bidder
- ▶ **Debtor remains in place temporarily, at least to keep licenses intact.**
 - ▶ North Philadelphia Health System
- ▶ **Repurposing the facility:**
 - ▶ Potential for loss of tax exempt status
 - ▶ State Attorney General objection, especially if the result will be conversion to for-profit status.
 - ▶ Community opposition: Ascension/Providence in DC converted to an urgent care facility and developing primary care capabilities
- ▶ **Closure**
 - ▶ Verity's St. Vincent's Hospital in California - Los Angeles COVID Surge Hospital
 - ▶ Anka Behavioral Health—no pre-filing sale; 50+ facilities transferred to other providers or closed and patients transferred in three weeks. Transferee providers temporarily used ANKA's licenses
 - ▶ Patient transfer issues (see, e.g., § 704(a)(12))

Best Practices

- ▶ Have a plan of what you want to accomplish and how to accomplish it.
- ▶ Running a local healthcare institution - no cookie cutter solution.
- ▶ Good communication with employees, lenders, the public and regulators and government.
- ▶ Know who you need to work with.
- ▶ Presenting government officials with a fait accompli will not work well.
- ▶ If you ask for 10 opinions, you'll get 10 answers.