



## THE NEW BANKRUPTCY LAW'S SURPRISING CONSEQUENCES FOR HOSPITALS

**W**hile much has been written about the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), there has been little focus on the law's startling, "under the radar" changes that could affect health care businesses in financial difficulty. These changes are further complicated by the apparent vagueness and drafting inconsistencies in BAPCPA that plague, among other parts of the bill, the health care provisions. Accordingly, the statute may produce unintended results that health care businesses, their lenders and their vendors must be prepared to address.

### HEALTH CARE PROVISIONS OF BAPCPA

BAPCPA introduces into the U.S. Bankruptcy Code the new concept of a "health care business." BAPCPA defines a "health care business" as "any public or private entity (without regard to whether that entity is organized for profit or not for profit) that is primarily engaged in offering to the general public facilities and services for (i) the diagnosis or treatment of injury, deformity or disease, and (ii) surgical, drug treatment, psychiatric or obstetric care." The new definition then continues with some examples of a "health care business," such as an "ancillary, ambulatory, emergency, or surgical treatment facility," or "other health care institution that is similar to" one of the enumerated examples.

A "health care business" in bankruptcy has significant new and costly obligations regarding the handling of patient records, transfer of patients upon the termination of operations and the rights of a patient care ombudsman to become involved in the bankruptcy case and perhaps the operations of a health care business. The new burdens are compounded by the poor drafting of related definitions. For example, a "patient" is defined in BAPCPA as "any individual who obtains or receives services from a health care business." The definition is not limited to what is customarily thought of as health care services. Thus, for example, if a pharmacy is determined to be a health care business, then all of its customers, not just the customers who obtained pharmaceuticals, may be patients. Similarly, "patient records" are defined as "any written document relating to a patient. . . ." The definition is not limited to traditional medical records.

In light of the new BAPCPA sections, closing a health care business during a bankruptcy case will be more complicated and more costly. These costs, including any cost of destroying patient records or transferring cases, are now a priority administrative expense in bankruptcy.

### NEW PATIENT RIGHTS

Prior to enactment of BAPCPA, patients had limited input in a bankruptcy case and a bankruptcy court had minimal involvement in the health care delivery aspects of a distressed health care business. The focus of the bankruptcy court and the bankruptcy proceedings concerned the financial aspects of the business and the terms and conditions of the reorganization or liquidation. That has changed dramatically. The new law provides for the mandatory appointment, with certain exceptions, of a "patient care ombudsman" within 30 days after the commencement of the case to monitor the quality of patient care for the court and to represent the interests of the patients. The health care ombudsman must monitor the quality of

patient care, which may include interviews with patients and doctors, not later than 60 days after appointment and report those findings to the court not less frequently than at 60-day intervals thereafter. The ombudsman must alert the court immediately if the quality of patient care provided by the debtor is declining significantly.

### NEW LIMITATIONS ON THE SALE OF ASSETS OF NOT-FOR-PROFIT ENTITIES

BAPCPA limits the ability of not-for-profit entities, including health care institutions, to use the bankruptcy code to transfer assets without also complying with applicable non-bankruptcy law. The bankruptcy code generally provides that a debtor in possession in a chapter 11 case may use, sell or lease assets of the debtor with court permission. BAPCPA explicitly permits a sale only in accordance with applicable non-bankruptcy law that governs the transfer of property by a not-for-profit entity.

### HHS AND THE DEATH PENALTY

The filing of a bankruptcy petition automatically stays a variety of actions against the debtor. BAPCPA clarifies that the stay does not prevent the Secretary of Health and Human Services from imposing the "death penalty" of excluding the debtor from participating in the Medicare program or any other federal health care program.

### THE IMPACT OF THESE NEW PROVISIONS

- Health care businesses must seek help from insolvency professionals much earlier in the process, as the bankruptcy option has become more complicated and more costly.
- The beneficiaries of the new health care provisions of BAPCPA are patients and insurers, and not the general unsecured creditors and the debtor. Yet creditors and the debtor must incur costs of complying with these new provisions without enjoying any concomitant benefit. Thus, there is every incentive for creditors and the debtor to engage in increased efforts to shift the costs of complying with the new requirements to someone else. The debtor, creditors, lenders, vendors, investors, patients and insurers will seek to impose those costs on each other. Moreover, typical negotiations between a lender and a debtor regarding the use of cash or for a postpetition loan may be complicated because of these new and costly obligations.
- There may be substantial prebankruptcy planning to engage in transactions before filing bankruptcy that may be prohibited under the new provisions.
- BAPCPA may have inadvertently increased the jurisdiction of the bankruptcy court. At its outermost limit, a bankruptcy court has jurisdiction over any matter that conceivably could have an effect on the bankruptcy estate. It is not difficult to envision a court concluding that allocation of the costs of complying with these new provisions, such as by adjusting reimbursement rates, falls within the bankruptcy court's expansive jurisdiction.

*If you have a question on this material, or would like to discuss legal services, please contact us at [healthcare@duanemorris.com](mailto:healthcare@duanemorris.com).*

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