



AMERICAN  
BANKRUPTCY  
INSTITUTE

## 2019 Winter Leadership Conference

### **Litigating Issues in a Health Care Case**

*Hosted by the Bankruptcy Litigation  
and Health Care Committees*

**David E. Gordon**

*Polsinelli; Atlanta*

**Tania M. Moyron**

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# Litigating Issues in a Health Care Case

2019 Winter Leadership Conference  
December 6, 2019

## Panelists

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# Revenue Cycle Issues

## Revenue Cycle Issues

- Maintaining cash flow for distressed healthcare providers
  - Addressing revenue cycle vendor issues and potential disputes
  - Addressing interruptions in cash flows
    - Causes for cash flow interruptions and possible remedies
- Outsourcing of Regarding Revenue Cycle Management
  - Benefits
  - Pitfalls
- Intersection Between Financing and Revenue Cycle Management
  - Use of Accounts Receivable as Collateral
    - Provider AR is frequently used as collateral for loans but is subject to anti-assignment provisions under 42 U.S.C. § 1395g(c) and 1396a(32)
    - Requires “double lockbox” arrangement where funds are swept daily from borrower’s deposit account into lender’s account
      - Sweeps need to be based on *revocable* instructions in compliance with anti-assignment rules

## Revenue Cycle Issues (continued)

- Healthcare specific assets and accounts receivable
  - Government Receivables
  - Private Receivables
    - Insured
    - Uninsured
  - Payor Mix Issues
  - Other assets/reimbursements
    - Setoff/recoupment regarding reimbursement programs
- Cash Collateral
- Foreclosure and remedies by secured lenders

## Revenue Cycle Issues (continued)

- Medicaid supplemental payments
  - Disproportionate share hospital (DSH) payments which help offset hospital uncompensated care costs
  - UPL (upper payment limit) supplemental payments, which are intended to make the difference between fee-for-service payments and the amount that Medicare would have paid for the same service
- Treatment of claims relating to supplemental payments
  - Fees – unsecured claim
  - Taxes – priority claims
  - Setoff/Recoupment of amounts relating to supplemental payments

# The Human Element

## Influence of Human Element on Litigation Tactics

- Healthcare cases can literally involve life and death issues
- The human element often has a profound influence on the Court's decisions regarding major issues in the case
  - Facility closures
  - Transfer of Patients
  - Appointment of Ombudsman
  - Sales
    - Highest v. Best – Money v. Mission
- Counsel can leverage this dynamic to obtain results

## Community & Political Dynamic

- Healthcare facilities, particularly hospitals, are often bedrocks of their communities
  - Large employers
  - Drivers of economic development
  - Serve important social function
- Political forces can play a large role
- Importance of having a public relations strategy

## Role of State & Federal Government

## Working Constructively With Government Agencies

- **Who** represents government agencies in a bankruptcy case?
  - Federal Agencies
    - Department of Justice, United States Attorneys' Office
    - Department of Justice, Civil Division, Commercial Litigation Branch
    - Agencies with Independent Litigation Authority
      - Securities & Exchange Commission
      - Department of Labor
      - PBGC
  - State Agencies
    - State Attorney General – dual role

## Working Constructively With Government Agencies

- **What** are governmental interests in healthcare bankruptcies?
  - Department of Health & Human Services
    - Centers for Medicare and Medicaid Services
    - National Institutes of Health
    - Office of the Inspector General
  - State
    - Medicaid
    - Departments of Healthcare Services
  - Agencies with Secured Loans
    - Department of Agriculture, Rural Development
    - Department of Housing & Urban Development

## Working Constructively With Government Agencies

- **What** are governmental interests in healthcare bankruptcies? (continued)
  - Contract Counterparties
    - CMS
    - Department of Veteran's Affairs
    - Department of Defense
  - Fraud & Enforcement – Department of Justice
  - Taxes
    - Internal Revenue Service
    - State Taxing Authorities

## Working Constructively With Government Agencies

- **When** and **how** should counsel contact and communicate with counsel for federal agencies?
  - Establish and maintain lines of communication with governmental attorneys/contacts
  - When can clients or regulatory counsel contact agency personnel directly?



## Working Constructively With Government Agencies

- **How** are settlements with the government handled?
  - Timeframes and procedures affecting settlements with the U.S. Government
  - Need for internal governmental approvals, role of trial attorney
  - Federal government ultimate decision-makers do not attend mediations or settlements conferences
  - The federal government has discretion over whether litigation settlements are in the best interests of the United States. Factors considered:
    - Litigation risk
    - Ability to pay
    - Public Interest

## Common Areas of Litigation with the Government

- Ability of state regulators to impose conditions on the sale of assets
  - Section 363(b)
  - Not-for-Profit Healthcare Business Rules
- Treatment of Provider Agreements
  - Executory contract v. license
- Bankruptcy Court jurisdiction over CMS
- Automatic Stay, Setoff & Recoupment