Health Care Restructurings and Bankruptcies in the COVID-19 Era

In his Health Law column, Francis J. Serbaroli observes that the coronavirus pandemic has affected not just the health and welfare of the humans infected, but has taken a severe toll on the financial health of hospitals, nursing homes, and other health care providers caring for these patients. He discusses some important steps that the governing boards and senior executives of health care providers should consider taking when deciding whether to restructure or file for bankruptcy protection.

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Nothing in memory has been as disruptive to the health care sector—and the general economy—as the current coronavirus pandemic. Already challenged by reduced Medicare and Medicaid spending, increased costs, the shift to more outpatient services, greater demands for charity care, and other factors, many providers have had to shift to treating coronavirus patients and to suspend more profitable elective procedures and routine medical care. Moreover, many patients without coronavirus symptoms are becoming more reluctant to enter these facilities, even for routine medical care or procedures.

While the recently enacted CARES Act and the Paycheck Protection Program and Health Care Enhancement Act provide approximately $175 billion in funding to qualified providers such as hospitals and nursing homes, many providers may have to restructure their organizations financially either outside of or within the bankruptcy process.

While any business restructuring or bankruptcy can be complicated, those that take place in the health care sector are even more so. That is because, unlike a restaurant or a department store, a health care facility, such as a hospital, is first and foremost a critically important community resource. For example, a hospital has to offer medical care 24 hours a day, 7 days a week, regardless of the medical issue or the patient's ability to pay. In rural areas, it may be the only provider of both emergency and nonemergency medical care. Hospitals are often one of the largest employers in the community, and their closure could severely harm not only the local health care delivery infrastructure, but also the local economy.

This article will review a number of important factors for a provider to consider as it weighs restructuring or a possible bankruptcy filing. Having been involved in the bankruptcies of various health care providers over the years, these are factors that governing boards and senior executives of providers that may be in significant financial trouble should know and utilize. While we use a hospital as an example, most if not all of these factors would apply to other financially challenged health care providers, including nursing facilities, clinics, ambulatory surgery centers, substance abuse rehabilitation facilities, home health agencies, and so on.

Restructuring

Many governing boards of hospitals are understandably reluctant to consider bankruptcy because of the perceptions associated with it: financial failure and possibly going out of business. The first step for a hospital is to try to develop a restructuring plan with its creditors, its financial institution, and state regulators. In developing this plan, the hospital may wish to consult with outside counsel and an outside management consultant with significant experience in health care restructuring. There are many factors to consider when developing a restructuring plan, including whether small or midsize hospitals should merge or affiliate with a larger health care system, whether new management has to be recruited, and identifying underutilized clinical services that may need to be consolidated or discontinued. The hospital should also identify and consider other medical services for which there is a demand and that are reimbursed at favorable rates. As a result, payor and vendor contracts may need to be renegotiated. The hospital usually can find some solid options for raising revenues and reducing expenses when it is under pressure but still financially viable.

Bankruptcy

Seeking bankruptcy protection is a very difficult decision with important implications for the hospital, its patients, and its community. For a hospital with declining revenues, an aging physical plant, and a heavy debt load, bankruptcy may be the only option. However, a properly planned and executed bankruptcy can relieve a hospital from potentially overwhelming debt and allow it to establish a stronger foundation for its long-term viability.

Information

Governing board members should be fully informed about a hospital's financial problems and be actively involved in the decisions that are made on how to address the problems. Decisions on restructuring or bankruptcy are major steps that should be weighed by the entire board. It is important to note that, under the Bankruptcy Code, any health care provider that is a not-for-profit organization cannot be forced into an involuntary bankruptcy by creditors. (11 U.S.C. §303(a)).

Next, it is critical to keep the state health department or other licensing authority fully informed of the hospital's financial problems and how it plans to address them. State regulators are ultimately responsible for assuring the health and safety of the patients receiving care from the hospital, as well as seeing that the community continues to have the hospital's services available. It is important to be completely candid with regulators about the cause of the financial problems, how the problems will be addressed, and what, if any, assistance the state may be able to provide. For their part, regulators will usually work cooperatively with the hospital when its representatives are acting in good faith and providing timely and accurate information. In the event that the hospital has to close down certain services or lay off a significant number of employees, regulators then have to determine the impact upon the hospital's current patients, and whether other hospitals and health care providers in the area can expand their services to accommodate the community's needs.

Other Interested Parties

It is important for hospitals to keep their lenders informed of major financial problems. Many not-for-profit hospitals have mortgages either issued or backed by state agencies or authorities. These parties should be kept fully informed of the hospital's problems and how it will address them.

Local elected officials should also be kept informed. The hospital's patients and employees are their constituents, as is the rest of the population in the hospital's service area. These officials can help secure political, regulatory, and financial assistance, but they must have up-to-date information on the status of the hospital's financial problems. If the hospital's employees are unionized, their union also has an important interest in any potential restructuring or bankruptcy.

Strategies

A hospital considering a financial restructuring or bankruptcy filing may retain outside attorneys, financial advisors, and public relations consultants, among others, to assist in developing overall strategy. As outlined below, the strategy can have multiple components.

Financial Strategy: The goal of the financial strategy is to place the hospital in a more stable position so it can continue to service the needs of its patients and its community. This may involve a top-to-bottom review of profitable and unprofitable services, eliminating unnecessary or duplicative services, consolidating services with other hospitals and providers, or even a possible merger with a similar hospital or a health care system. This strategy can also involve a comprehensive review of revenues to assure that the hospital is collecting all it is entitled to from Medicare, Medicaid, and all other third-party payors. In some situations, the hospital may have to consider selling off assets, such as its real estate.

Regulatory Strategy: Dealing with state regulators and getting any required approvals for adding or discontinuing clinical services, or merging with another hospital is a key part of any restructuring or bankruptcy. In addition, the hospital must be prepared to remedy any current noncompliance with federal or state regulatory requirements.

Political Strategy: Hospitals may benefit from galvanizing political and community support to potentially help solve their financial problems. It is also important to be aware of and prepared for any attempts by competing providers to disrupt the implementation of the strategy and how to counter them.

Public Relations: Even the rumor of significant financial problems or an imminent bankruptcy filing can cause physicians, nurses, employees, and patients to gravitate to other more financially stable hospitals. A troubled hospital's traditional sources of patient referrals can divert patients elsewhere, adding further to the provider's financial pressures. The community may lose faith in the hospital's ability to survive and curtail or withdraw its support. Keeping all interested parties up-to-date with truthful information can help keep the community's interest and support.

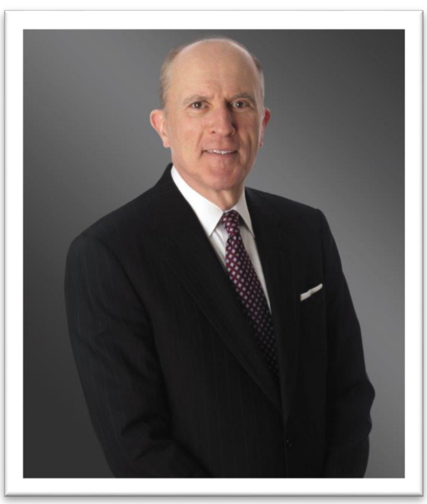
Legal Strategy: It is important to choose counsel specifically experienced in representing debtors or creditors in the health care sector. While many lawyers are experienced in restructurings and bankruptcies, fewer have experience in representing debtors or creditors in the complexities of a health care case, and fewer firms have all the expertise that maybe needed: health care law, Medicare, Medicaid and third-party payor reimbursement, tax, labor, ERISA, real estate, corporate, regulatory and so on.

Conclusion

These are just some of the many issues that can arise in the course of a health care provider's restructuring or bankruptcy. Each particular situation can present its own unique clinical, financial, legal, regulatory, and political problems. The facility's governing board and senior management should work closely with all interested stakeholders so that the provider can regain its financial footing and continue to contribute to the health and the economy of its community.

About the Author:

Francis J. Serbaroli is a shareholder at Greenberg Traurig and the former vice-chair of the New York State Public Health Council.



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