Protecting Patient Privacy in the Fishbowl of Bankruptcy

By: Jennifer Mercer, Senior Vice President
Companies across numerous industries—from airlines to steel manufacturers to automakers and their suppliers—have availed themselves of Chapter 11 of the U.S. Bankruptcy Code not only to resolve untenable debt loads, but also to address legacy issues and, ultimately, transform their business models to allow them to compete successfully in current market conditions.

In many ways, the healthcare industry is only the latest sector to embark on a journey of transformation. Secular trends in this industry, including structural changes implemented to accommodate the Affordable Care Act as well as preparations for additional potential regulatory changes in the current political climate, will undoubtedly drive the need for even more financial reorganizations in this troubled sector.

Like so many companies that came before them, a significant number of healthcare facilities will choose to address these issues through the Chapter 11 process. However, these cases are remarkably different in a couple of very significant ways from the scores of Chapter 11 filings that have preceded them.

**Regulatory Requirements**

One of the most daunting issues in administering bankruptcy cases in the healthcare sector is maintaining federally mandated patient privacy and confidentiality while still meeting the level of transparency required by bankruptcy law. The Health Insurance Portability and Accountability Act (HIPAA) was enacted by Congress in 1996 and included the Privacy Rule, which set standards in connection with the use and disclosure of individuals’ health information.

Among other things, the Privacy Rule prohibits disclosure of patients’ personally identifiable information. Yet, the first step in administering any bankruptcy case is compiling a listing or matrix of all potential creditors, which can include patients’ names for a variety of reasons. In some instances, for example, it’s simply that a patient is owed a refund by the healthcare provider.

However, even disclosing a patient’s name can be a violation of HIPAA, as it can divulge that an individual sought certain healthcare services. A hypothetical example would be a Chapter 11 filing by Acme Fertility Clinics. If the debtor filed its schedules and statements with the court and included patient names, it would inadvertently disclose the names of men and women who presumably had sought medical help when they encountered difficulty conceiving. It is easy to see how this would be a direct violation of HIPAA.

HIPAA was further strengthened by the passage of the Health Information Technology for Economic and Clinical Health Act (HITECH) in 2009. Part of the federal government’s efforts to promote and expand the adoption of health information technology, HITECH also provided for increased privacy protection in relation to electronic health records.

How, then, is a debtor to balance the federally mandated need to safeguard patient information while still meeting the disclosure requirements under the Bankruptcy Code?

As a best practice and to benefit the debtor, bankruptcy case administrators may implement specific confidentiality processes to ensure that patients themselves don’t inadvertently make their healthcare information or personal identifiable information public. Returning to the hypothetical example of the Acme Fertility Clinics can illustrate how this might occur.

The debtor would send the bar date notice and proof of claim forms to all unsecured creditors listed on the matrix, including patients identified as potential creditors. Typically, proof of claim forms in large, complex Chapter 11 cases are processed electronically and become public documents.

However, the case administrators for the Acme Fertility Clinics would need to review each proof of claim form to ensure that patients did not include doctors’ reports, test results, or even explanations of benefits from their insurers as supporting materials for the proof of claim forms they file. If these instances are not identified and the forms properly redacted, the debtor risks violating HIPAA.

Even when patients or their representatives are clearly instructed not to include any protected information with their proof of claim forms, such as medical records, inevitably a claimant will do just that. Regardless of whether a patient voluntarily submits this information, it is the responsibility of bankruptcy case administrators, as insolvency professionals, to ensure that it does not become publicly available.

Great care must be taken to first redact all personally identifiable information and patient healthcare information from a claim image before it is posted to a website. Additionally, the record in the claims register...
must be sanitized to ensure that no materials available in the public domain disclose that an individual has any sort of specific medical issue.

In fact, it is important to ensure that all required physical, network, and process security measures are in place and followed throughout the entire restructuring process and not just during the claim filing process. Every document in the public domain should be reviewed and quality checked to be certain that bankruptcy case administrators are meeting the stringent regulations by which healthcare organizations must abide.

The Human Element

In any distressed situation, the attention of management and their advisors is rightly focused on the operations and the immediate financial pressures facing the company. As such, the impact these troubled situations may have on the people involved are often overlooked or not immediately addressed.

Companies in the healthcare industry are not only employers and customers to suppliers who rely on the business for their livelihoods. They are also providers of care to the chronically ill, the elderly, and other vulnerable members of the communities they serve. For many, these healthcare facilities literally deal with life-and-death situations, and their Chapter 11 filings can be very traumatic for all involved.

In view of that, it becomes especially critical for a healthcare debtor to implement a well-thought-out communications plan with all stakeholders. This should begin with a facility’s employees. The doctors, nurses, and even administrators have the very important task of maintaining quality of care. Often lives depend on these medical professionals’ abilities to put aside their own anxiety and concerns and place the interests of their patients first.

As a result, it is important for this audience to receive direct communications not only about the actions the company has taken and the reasoning behind them, but also regarding management’s vision for what the company will look like when it emerges from Chapter 11. These employees are the face of the healthcare company and must be able to address patient and community concerns. In addition to easing the concerns of these caregivers, the company needs to provide them with the tools and training necessary to deliver these important messages to their patients and their patients’ families properly.

Critical suppliers also take on additional significance in a healthcare Chapter 11 case. For instance, what happens if a debtor is unable to pay prepetition amounts owed for the storage of medical records or the delivery of critical medical equipment? While motions seeking special relief regarding such issues would need to be filed with the Bankruptcy Court, communicating with such vendors in the interim, until the motions can be heard by the court, is vital to the ongoing operation of the company, the continuity of care it provides, and, in the case of medical record storage, the protection of patient privacy.

Unique Issues

Healthcare bankruptcy cases present legal counsel, financial advisors, and even case administrators with a host of unique issues. The real world issues healthcare providers face when communicating with patients and their families, governmental agencies, healthcare practitioners, insurers, and unions while working to complete a financial reorganization are further complicated by HIPAA rules and constraints. Working with experienced insolvency professionals is therefore essential for troubled healthcare companies.

Jennifer Mercer

Jennifer Mercer is a senior vice president and head of the strategic communications practice at Epiq. She and her team manage complex issues and are knowledgeable in the many facets of crisis and corporate communications, employee and financial/investor communications, media relations, and program development.

jmercer@epiqsystems.com
+1 310 712 6215

Epiq is not authorized to practice law or provide legal services. The services offered by the company are limited to non-legal, administrative aspects of document review and discovery projects.