



CMS Files Objection in Skilled Nursing Bankruptcy Case

Hedy S. Rubinger and Alexander B. Foster

An increasing number of Medicare providers have found themselves in financial distress and are contemplating bankruptcy filings. While provider bankruptcies include a host of issues outside the government reimbursement sphere, the Medicare provider agreement remains central to the bankruptcy analysis. Medicare reimbursement is a significant—and often primary—revenue stream for many healthcare providers, so the stakes are high when the assignment of some or all of a provider agreement’s terms are involved. These stakes are currently at issue in the U.S. Bankruptcy Court for the Northern District of Texas, and Centers for Medicare & Medicaid Services (CMS) has recently made its position as to agreement transferability clearer.

The case in Texas (*In re 4 West Holding, Inc., et al.*) involves Orianna Health System (OHS), which, along with its affiliates, operates 43 skilled nursing facilities (SNFs). OHS’s bankruptcy plan includes both the transfer of many of its SNF operations to new operators and the sale of the remaining facilities under a plan of reorganization. On April 9, 2018, CMS filed a limited objection (the “Objection”), stating that the “relief requested . . . violates federal law to the extent it allows the assumption and assignment of Medicare Provider Agreements without compliance with all the statutory and regulatory terms under which the Agreements were issued.”¹ The following is a summary of CMS’s position:

1. **The bankruptcy court cannot, at least at this time, oversee the transfer of Medicare provider agreements:** CMS states in the Objection that “the Medicare Statute and its regulations exclusively govern the payment of Medicare reimbursement claims, which precludes court review of reimbursement determinations until the provider complies with the necessary jurisdictional prerequisites. Federal courts lack jurisdiction to review those reimbursement determinations until the Secretary has issued a final administrative decision after exhaustion of all administrative remedies.” In other words, the bankruptcy court must wait until the U.S. Department of Health and Human Services (HHS) and CMS determine “a cure amount setting the final reimbursement amount for its past or current cost reporting years or civil monetary penalties, if any.”
2. **The new operators must assume liabilities accruing prior to the beginning of their operations:** CMS points out in its Objection that “The Motion provides that at closing, the New Operators shall assume or otherwise be responsible for all liabilities and obligations accruing or arising *solely* after the Closing.” (Emphasis added). In support of its objection, CMS states that Provider Agreement transfers are “strictly limited” and can only be assigned when there is a “change of ownership.” 42 C.F.R. § 489.18. When assigned, new operators are subject to successor liability. CMS’s position is that, because the proposed Order would “reject all successor liability after the transfer/sale of the Debtor’s assets,” it violates “applicable bankruptcy and Medicare law under which a purchaser must assume all of the burdens, as well as the benefits, arising from the assignment of the Provider Agreements.”

In response to the CMS Objection, OHS filed a revised proposed order which yielded to CMS’s position and clarified that the new operators would assume the Medicare liabilities associated with the facilities.

¹ The Objection is available at <https://3b6ds314e7i9efidz7829x2-wpengine.netdna-ssl.com/wp-content/uploads/2018/04/Orianna-doc.pdf>.

In 2013, CMS clarified its policy of incentivizing providers undergoing a change of ownership to accept assignment of the Medicare provider agreement.² The CMS Policy Memorandum confirmed that new owners that do not accept automatic assignment but want to participate in Medicare will be considered new enrollment applicants and subject to a lengthy enrollment period after which they will be unable to bill for services retroactively. Because it is not uncommon for initial enrollments to take more than a year to process, the delay is a significant financial and operational burden on the new operator and interested parties, such as real estate owners. Institutional providers in bankruptcy (or providers that may see bankruptcy on the horizon), as well as providers' landlords and other interested parties, should take note of CMS's recent Objection. Parties should carefully consider the bankruptcy process before initiation, and the Objection makes clear that all parties should be aware of the hurdles they will face with respect to Medicare provider agreements, particularly if the new operators expect to assign Medicare provider agreements without the attached liability.

² For the text of CMS's policy memorandum, see <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-13-60.pdf>.

Authors and Contributors

Hedy S. Rubinger
Partner, Atlanta Office
404.873.8724
hedy.rubinger@agg.com

Alexander B. Foster
Associate, Atlanta Office
404.873.8598
alex.foster@agg.com

not *if*, but *how*.[®]

About Arnall Golden Gregory LLP

Arnall Golden Gregory (AGG), an Am Law 200 law firm with 165 attorneys in **Atlanta** and **Washington, DC**, takes a “business sensibility” approach when advising clients. AGG provides industry knowledge, attention to detail, transparency and value to help businesses and individuals achieve their definition of success. AGG’s transaction, litigation, regulatory and privacy counselors serve clients in healthcare, real estate, litigation, business transactions, fintech, global commerce, government investigations and logistics and transportation. AGG subscribes to the belief “not if, but how.”[®]
Visit us at www.agg.com.

Atlanta Office
171 17th Street, NW
Suite 2100
Atlanta, GA 30363

Washington, DC Office
1775 Pennsylvania Avenue, NW
Suite 1000
Washington, DC 20006

To subscribe to future alerts, insights and newsletters: <http://www.agg.com/subscribe/>

©2018. Arnall Golden Gregory LLP. This legal insight provides a general summary of recent legal developments. It is not intended to be, and should not be relied upon as, legal advice. Under professional rules, this communication may be considered advertising material.