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These Records Are Never "Double Platinum"

Medical Records Present Challenges in Health Care Provider Bankruptcy Transactions and Business Closures

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In bankruptcy cases involving health care providers, the status of patients' medical records — particularly in a sale transaction — can have a significant impact on creditor recoveries, including the ability to confirm a plan of reorganization or liquidation. From a commercial perspective, medical records are "rocks in the debtor's rucksack" that create challenges for a successful plan and distribution to creditors. General unsecured creditors might bear the cost of records retention for patient care that occurred and was paid for far before the bankruptcy.

Providers are required to retain patient medical records for lengths of time that vary by state and other factors (including whether the patient was a minor when treated). Most states require the retention and maintenance of medical records for seven or more years.[1] It is not uncommon for struggling providers to have poorly organized records and suboptimal procedures for retrieving records and automatically arranging for their destruction when permissible. Providers have retained records longer than required because they do not have the processes to identify what can be destroyed (destruction also has cost).

When a business subject to medical records retention statutes is sold in bankruptcy, the seller/debtor will usually seek to require (under the asset-purchase agreement) that the purchaser assume custodianship of the medical records in order to unburden the debtor with the very large expense of retaining custodianship of the records.[2]

Once the seller/debtor sells the operating entity, *ownership* of the medical records has little value for the debtor, but it can significantly decrease value for the estate and availability of funds for distribution to unsecured creditors. Access to the records might be necessary to complete patient billing for patients discharged or treated (in the case of outpatients) prior to a sale closing.[3] The records might be important to appeal payor-remittance denials or in defending tort claims. They also are required for cost reports and other regulatory purposes.[4]

If the seller does not have access to the medical records to complete its final cost report, an overpayment will be assessed and the government will seek to recoup the overpayment from any remaining payments due to the debtor/seller. However, *access* for these purposes can be arranged under a transition-services agreement or other post-closing arrangement and can make a purchaser's bid more valuable ... often at little additional purchaser out-of-pocket cost.

If responsibility for the medical records is not borne by the purchaser, the burden to the seller/debtor can be substantial, and more importantly, the cost is an administrative expense[5] to the debtor's estate. Accordingly, general unsecured creditors bear the financial burden of retaining and/or disposing of the records, including for patient services performed prior to the petition date. In either case, the storage and retrieval of the medical records — when required — can be expensive, running into the hundreds of thousands (if not millions) of dollars depending on the size of the health care providers.

Medical record storage costs for a closed facility can vary based on circumstances. To make a reasoned estimate, the authors queried ChatGPT[6] to create a methodology (using a closed hypothetical 150-bed community hospital) for estimating the page volume of records created per year, as shown in Exhibit 1 (p. 56).

Exhibit 2 (p. 57) illustrates an estimate of the cost of storing the records in compliance with law and regulation generally using ChatGPT's practice of using

1 For the maintenance and retention requirements for medical records, health care providers should look to various sources: (1) state law, which varies depending on the type of medical record and type of health care provider; (2) the Health Insurance Portability and Accountability Act of 1996 (HIPPA), which does not have its own mandated retention period for medical records, although it does require that certain documentation, such as policies and procedures related to privacy and security, be retained for at least six years from the date of its creation or the date that it was last in effect, whichever is later; and (3) the Centers for Medicare and Medicaid Services, which requires providers submitting cost reports to retain patient records for at least five years after the closure of the cost report and requires Medicare managed-care program providers to retain the patient records for 10 years.

2 Conversely, for a purchaser, offering to include custodianship of the seller's/debtor's records may make its bid more attractive. *See* "State Medical Record Laws: Minimum Medical Record Retention Periods for Records Held by Medical Doctors and Hospitals," Nat'l Coordinator for Health Info. Tech., *available at* healthit.gov/sites/default/files/appa7-1.pdf; "Medical Records Retention Guide," *World Population Review*, *available at* securescan.com/articles/records-management/medical-record-retention-and-destruction-our-guide-for-2023 (unless otherwise specified, all links in this article were last visited on June 28, 2024).

3 Patients in the hospital at the time of a sale closing (called "straddle patients") are customarily invoiced by the buyer under a fee-splitting arrangement under the asset-purchase agreement.

4 A failure to file a final cost report may place future Medicare receipts, if any, in peril by operation of Medicare's recoupment rights.

5 Expenses associated with the closure of a health care facility, including the disposal of medical records, are classified as an administrative-priority expense under § 503(b)(8) of the Bankruptcy Code.

6 ChatGPT's sources are cited in Exhibits 1 and 2 (not verified by authors).

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the mid-point of inputs. As Exhibit 2 illustrates, the costs — particularly for paper records — are very significant. The authors made manual overriding adjustments to the volume records created (generally using the lower end of the ChatGPT estimate range) to alternatively illustrate a more favorable scenario for paper records. As illustrated, in the case of electronic records, the cost of the storage itself is quite modest, but this research suggests that access may have fixed minimums, which will not be impacted by fewer record pages generated.

Buyers might be more willing to take on the medical records given that they most likely already have onsite physical storage capacity and/or remote-storage arrangements for paper records, and the benefit to the debtor can be material. Electronic medical records (EMRs) — while clearly less expensive in some regards — present different commercial challenges to debtors and their stakeholders.

First, EMR contract formats can vary, so from the perspective of a purchaser, it might incur real per-unit incremental costs that will impact its bid to purchase the assets while assuming responsibility for the records. Second, from the sellers/debtor's perspective, its EMR provider may have the contractual ability to block the transfer unless arrearages (including pre-petition) are cured and may additionally charge fees for the data transfer.

Not all provider bankruptcies end with a sale of the enterprise or a liquidation, and in that case, it is highly possible that the debtor will lack the wherewithal to fulfill its records-retention responsibilities. If there are insufficient funds[7] to store the records pursuant to federal and/or state law, § 351 of the Bankruptcy Code can be utilized to enable the debtor to dispose of the medical records. This section is most often used when the debtor has stopped operating or has sold the business (without transferring the medical records) and is no longer treating patients. Under § 351, if there are insufficient funds to maintain and store medical records, the debtor must comply with a series of steps. There is a reasonable chance that in the typical accompanying environment, the debtor might not have the funds to perform these steps:[8]

- Publish a notice in the newspaper stating that if the patient records are not claimed by the patient or insurance provider within 365 days after the notification date, the trustee or debtor in possession (DIP) will destroy the patient records;
- The published notice must not include patient names or any other information that could identify the patient, but must (1) identify the health care facility whose patient records the trustee proposes to destroy; (2) state the name, address, telephone number, email address and website of a person from whom information about the patient records may be obtained; (3) state how to claim the patient records; and (4) state the deadline when the patient records must be claimed, and specify that if records are not claimed, they will be destroyed;
- The notice must also direct a patient's family member or other representative who receives the notice to inform the patient of the notice;
- The notice must be mailed to (1) the patient and any family member or other contact person whose name and address have been given to the trustee or DIP for the purpose of providing information regarding the patient's health care; (2) the attorney general of the state where the health care facility is located; and (3) any insurance company known to have provided health care insurance to the patient;
- During the first 180 days of the 365-day period, the debtor must also attempt to directly notify each patient who is the subject of the patient records and their insurance carrier regarding the claiming or disposing of the patient records; after notice, the trustee must maintain the proof of compliance with § 351(1)(B) of the Bankruptcy Code for a reasonable time, unless the court orders such proof of compliance to be filed under seal;
- If medical records are not claimed during the 365-day period, the DIP must mail, by certified mail, at the end of the 365-day period, a written request to each federal agency to request permission to deposit the medical records with that agency, except no federal agency is required to accept the medical records; if medical records are not claimed by a patient or insurance provider, or the

Exhibit 1: Estimated Pages of Records Per Year (150-Bed Hospital)

	Mid-Point	Notes
Licensed Beds	150	(a)
Average Daily Census (Range of 75 to 100)	90	
ALOS (Range of 4 to 5)	4.5	
Implied Admissions	7,300	
Medical Records, Pages Per Admission (Range 100-200 Pages)	150	(b)
Medical Records IP Pages Per Year	1,095,000	
OP Visit Per Bed (Range of 50 to 100)	75	(c)
Licensed Beds	150	
Medical Records, Pages Per Admission	11,250	
Medical Records Pages Per OP (Range of 10 to 40)	25	(d)
Medical Records OP, Pages Per Year	281,250	
Total Pages of Records Generated Per Year	1,376,250	

Sources Cited by ChatGPT:
(a) Derived from common hospital statistics found in health care management literature and specific studies on hospital ADC and ALOS. For example, sources like the American Hospital Association provide data on average lengths of stay and patient admissions.
(b) These figures are based on industry averages and typical hospital record-keeping practices. For example, studies and reports from the American Health Information Management Association (AHIMA) provide insights into the typical size of patient records.
(c) Based on typical outpatient visit statistics for community hospitals, as reported by health services research and hospital management publications.
(d) Data on outpatient record sizes also come from health care management sources and AHIMA reports.

7 Section 351 of the Bankruptcy Code does not explain the meaning of insufficient funds, and it is unclear what the threshold is for a debtor to be deemed to "not have a sufficient amount of funds to pay for the storage of patient records." This could lead to the debtor paying other administrative claims, then claiming to have insufficient funds to store the medical records.

8 Generally pursuant to Fed. R. Bankr. P. 6011(a)-(d), § 351 of the Bankruptcy Code and HIPAA.

request is not granted by a federal agency, they must destroy the records by shredding or burning written records or, if electronic, by destroying such records so that those records cannot be retrieved; and

• The debtor is required to file a report within 30 days after the destruction of the medical records certifying that the unclaimed records have been destroyed and explaining the method used for destruction. The report must not identify any patient by name or other identifying information.

In the event that the debtor must use a third-party storage-provider during this process, the record storage-provider becomes the official custodian of the records and assumes responsibility for the records, including compliance with record requests for ongoing patient care and litigation.

Protected Information *During* Bankruptcy

While in bankruptcy, debtors are still subject to HIPPA. Health care providers that have access to or handle protected health information (PHI) related to their past and current patients must take steps to protect it. PHI includes health information, plus demographic information, collected from an individual and

> (1) is created or received by a health care provider, health plan, employer, or health care clearinghouse; and (2) relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and (i) identifies the individual; or (ii) with respect to which there is a reasonable basis to believe the information can be used to identify the individual.[9]

The Bankruptcy Code does not excuse a health care debtor from continued compliance with HIPPA, and debtors must take special care not to disclose PHI.[10] Debtors must

9 45 C.F.R § 160.103.

10 *See Pac. Gas & Elec. Co. v. California*, 350 F.3d 932 (9th Cir. 2003) (discussing bankruptcy pre-emption of nonbankruptcy laws); *see generally* Sophie R. Rogers Churchill, "The 'P' Isn't for Privacy: The Conflict Between Bankruptcy Rules and HIPPA Compliance," *Wash. & Lee L.R.*, Vol. 78, Issue 2 (Spring 2021), *available at* scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=4729&context=wlulr.

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Exhibit 2: A "Directional Estimate" of Medical Records Costs to Debtor

Total Medical Records Pages Created Per Year	1,376,250	
Pages Per Box	2,250	(a)
Total Boxes	612	
Costs Per Year		
Storage ($4 Per Month)	$48.00	(b)
Supplies	1.50	(c)
	–	
Total Cost Per Box Per Year	$49.50	
Boxes Created in One Year Stored One Year	30,278	
Times 10 Years	10	
	302,775	
Times 10 Years of Records	10	
Reduced for Average Amount of Time	50%	
Storage Cost — Paper Records	$1,513,875	
Destruction ($7.50 Per Box)	45,875	(d)
Total Cost — Paper Records	$1,559,750	
Rounded	***$1,560,000***	
Author's Note		
Rounded — Low End of Range of Pages Stored	***$722,000***	

Total Medical Records Pages Created Per Year	1,376,250	
Kilobytes (KB) Per Page		
Est. Storage Required at 50KB Per Page Gigabyte (GB)	68.813	
Costs Per Year		
Cloud Storage at $0.50 Per GB Per Year	$103.00	(e)
Estimated Software Licensing (75 Users at Retrieval (Paid by Patient), $1,000; Assumed Minimum)	75,000	(f)
Back-Up/Recovery (High Side)	10,000	(g)
Retrieval (Paid by Patient)	–	
Total Annual Cost	$85,172	
Times 10 Years of Records	10	
Reduced for Average Amount of Time	0%	
Storage Cost — Electronic Records	$851,720	
Destruction ($7 Per GB)	723	
Destruction ($7 Per GB)	50%	
Total Cost — EMR	$852,443	
Rounded	***$1,560,000***	
Author's Note		
Rounded — Low End of Range of Pages Stored	***$852,000***	

Sources Cited by ChatGPT:

(a) Iron Mountain Records Storage Capacity, and Industry Standards and Practices (low of 2,000 pages per box).
(b) Iron Mountain Records Nation.
(c) Staples, Office Depot and other office-supply stores.
(d) Estimates are based on industry standards from such document-destruction companies as Shred-It, Iron Mountain and Stericycle. Information from AHIMA on best practices for record destruction also informed these estimates.
(e) AWC Pricing and Google Cloud Pricing.
(f) Kaufman Hall Report; EHR Costs Guide: Software Advice HealthIT.org; Maintenance Guide: HealthIT.gov; HIPPA Journal; HIPPA Compliance Costs Datto Data; and Protection Cost Guide: Datto.
(g) Data-Destruction Services: Industry data from such providers as Blanco, Iron Mountain and Stericycle.

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also be careful when sharing information and documentation with other parties in the case. Debtors should enter into a business-associates agreement in these situations, which allows parties to share PHI for certain limited purposes and ensures protection of PHI.

Debtors must also be vigilant in not sharing PHI in situations where there is discovery. Parties may seek a qualified protective order from the court before producing the documents, which will prohibit the parties from using or disclosing the PHI for any purpose other than the litigation and require the return or destruction of the PHI at the end of the litigation.[11] It would be diligent for a seller/debtor to enter into a business-associates agreement with a buyer if the buyer has agreed to transfer the medical records, since the buyer will also need to agree to comply with the PHI requirements for those medical records.

Conclusion

In a health care bankruptcy case, PHI and medical records should be top of mind at the beginning of the case to avoid being "rocks in the debtor's rucksack." Dealing with them early on could result in greater distributions to general unsecured creditors and a smoother transition. abi

11 *See id.*; 45 C.F.R. § 164.512(e)(1)(v).