Health Care and Banking Law Alert

Loans to Health Care Providers Not Always Easy

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Our nation spends trillions of dollars each year on healthcare and that amount is expected to increase as our population ages. The medical industry is expanding to meet this growing demand for services and accordingly, lenders should position themselves to service this expanding industry. As with all highly-regulated industries, lenders seeking to capitalize on this growing market should familiarize themselves with the specific laws, rules, and regulations that govern the health care industry. Opportunities for a lender to expand its loan portfolio into the healthcare industry do not come without risks, and there are issues and dangers specific to extending credit to healthcare providers.

A fundamental concern for all loans is the collateral for the loan. A primary source of collateral for a loan to a healthcare provider will be its accounts receivable, but accounts receivables in the healthcare industry have different rules and restrictions than standard commercial receivables. Under the Uniform Commercial Code, health-care-insurance receivables are a subset of accounts (Section 9-102(46)) and a security interest in health-care-insurance receivables is perfected through the customary filing of a UCC-1. However, lenders have different rights regarding government paid health care insurance receivables, such as Medicare and Medicaid, as opposed to receivables paid through a private insurance company.

Medicare and Medicaid have statutory anti-assignment provisions that preempt the standard provisions in the Uniform Commercial Code. While the anti-assignment provisions of Medicare and Medicaid do not cause any perfection issues regarding government paid healthcare-insurance receivables themselves, they do impact a lender's ability to realize the full collateral benefit from those receivables. These government restrictions create two issues for lenders trying to realize on health-care-insurance receivables:

1. A lender is not permitted to take control of the healthcare provider debtor's deposit account that receives government paid health-care-insurance receivables.

2. If a lender forecloses on the security interest in the health-care-insurance receivables, the lender does not have the ability to directly receive payments on the government paid health care insurance receivables or direct the government to make payments to the lender.

Because of these issues with government receivables, at a minimum, the lender should require that the proceeds from private paid receivables should not be commingled in the same account with the proceeds of government paid receivables. It is also recommended that the lender consult with counsel to discuss how to maximize the value of its security interest in government paid health-care-insurance receivables.

A lender to the health care industry should also engage counsel to draft and review its loan documents to any healthcare providers as there are many unique terms that need to be included in a loan to healthcare providers. For example, the loan documents should include representations and warranties regarding the following:

•Fraud and abuse (anti-kickback statutes).

•Proper medical coding practices.

•Proper federal and state government reporting.

•Intellectual property matters.

•Health Insurance Portability and Accountability Act of 1996 (HIPAA) compliance.

•Accreditation and licensing.

•Government reimbursement programs.

•Reporting and billing requirements.

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