

Bankruptcy Brief

by Mark L. Desgrosseilliers



Bankruptcy Law Section

Members of the Bankruptcy Law Section have been

busy over the past several months. The Bankruptcy Law Section teamed up with the American Bankruptcy Institute (ABI) and the Federal Bar Association (FBA) Government Contracts Section to present “Federal Contracts in Bankruptcy” on Oct. 6, 2014, at the ABI’s headquarters in Arlington, Va. We were proud to be able to present this informative and timely topic for members of the Federal Bar Association and look forward to many future collaborations with other sections and chapters, and where possible, with other organizations dedicated to bankruptcy issues.

In addition, under the stewardship of executive committee member Marc Taubenfeld and contributing authors Tyson Attaway, Timothy Springer, and Nicholas Antaki, along with the indispensable assistance of Henry Lopez, a talented graphic artist and friend of the Bankruptcy Section, the section released its latest addition of *Bankruptcy Briefs*, its periodic newsletter. Please look for one more edition of this valuable resource toward the end of this year, if all goes well. Section members (and, indeed, any FBA member with an interest in bankruptcy) should reach out to Taubenfeld if they would like to assist with this publication, either by contributing an article or helping with the layout.

Members of the Bankruptcy Law Section have also published and circulated regular updates on significant cases through our ongoing “Circuit Writer” project, copies of which are available on the Bankruptcy Section website. Special thanks to executive committee members Judge Craig A. Gargotta and Christopher Sullivan for leading this effort and especially to those Bankruptcy Section members who have written updates. If any section members would like to contribute to this important project, please reach out to Judge Gargotta, or Sullivan.

In addition, members of the Bankruptcy Law Section contributed articles and judicial profiles to *The Federal Lawyer*, the official magazine of the Federal Bar Association, over the past several months. Links to such articles, including recent articles published by executive committee members Steve Peirce and Justin Alberto, are also available on the Bankruptcy Law Section website.

The section has continued to give back to its members, using



member dues and funds raised from programming to provide financial and marketing support for a number of events, including continuing legal education, moot court competitions, and social gatherings throughout the country. By way of example, the Bankruptcy Law Section was a proud sponsor of the 33rd Annual Bankruptcy Conference presented by the FBA’s Iowa Chapter in Des Moines, Iowa, on October 30 and 31. The section has also sponsored a joint presentation with the FBA’s Dallas Chapter on November 14 and the Bankruptcy Ethics Symposium with the FBA’s Los Angeles Chapter on November 21.

In addition, the Bankruptcy Law Section was selected to present at the FBA Annual Meeting in Providence, R.I., in September. Thanks to Judges Alan Trust (U.S. Bankruptcy Court for the Eastern District of New York) and Craig A. Gargotta (U.S. Bankruptcy Court for the Western District of Texas), both executive committee members, for their outstanding presentations on the Top 10 Bankruptcy Cases in the past year.

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Finally, at the Annual Meeting, the Bankruptcy Law Section seated a new slate of officers for 2014-15 as follows: Mark Desgrosseilliers of Womble Carlyle Sandridge & Rice, LLP in Wilmington, Del., chair; Lisa Lambert, assistant U.S. trustee for Region 6 in Dallas, chair-elect; Judge Craig A. Gargotta of the U.S. Bankruptcy Court for the Western District of Texas in San Antonio, Texas, treasurer; and Chris Sullivan of Diamond McCarthy LLP in San Francisco, Calif., secretary. The section extends its gratitude to its outgoing chair, Robert Weber of Skadden, Arps, Slate Meagher & Flom, LLP, for his tireless devotion throughout the past two years and to all of the members of the executive committee for their continuing efforts on behalf of the Bankruptcy Law Section.

During the next year, the section will continue to support continuing legal education, scholarship, and opportunities for members of the bankruptcy community to get to know each other a little better. We need the continued active engagement of our members to continue having an effective and responsive Bankruptcy Law Section and building on the strong foundation laid by the efforts of prior members, officers, and executive committee members. If you have an idea for an event (including co-sponsorship opportunities with other sections or chapters of the FBA) or would like to get more involved in the Bankruptcy Law Section, please reach out to any member of the executive committee or any officer of the section. ☉

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million below their targets and earned performance payments of more than \$300 million as their share of program savings. One ACO overspent its target by \$10 million and owed shared losses of \$4 million. The Medicare Trust Funds will save about \$345 million, including repayment of losses for one ACO.

- An additional 52 ACOs reduced health costs compared to their benchmark but did not qualify for shared savings, as they did not meet the minimum savings threshold.
- Shared Savings Program ACOs improved on 30 of 33 quality measures. Quality improvement was shown in such measures as patients' ratings of clinicians' communication, beneficiaries' rating of their doctor, health promotion and education, screening for tobacco use and cessation, and screening for high blood pressure.

In their first four years, ACOs are anticipated to save Medicare up to \$940 million.³ This makes up a very small fraction of Medicare spending during that same period; however, the program appears to be aligning the interests of Medicare, providers, and their patients. The Secretary of the Department of Health and Human Services may also further expand the program.

Some industry analysts are concerned that the model is encouraging hospital and provider mergers and consolidations, which reduces competition and gives larger health systems more bargaining power

with insurers. However, the Federal Trade Commission and the Department of Justice Antitrust Division have jointly issued detailed guidance on behaviors ACOs should avoid and how they can operate within an antitrust "safety zone." Other industry participants have criticized the fact that most ACOs have opted for the one-sided risk program (providers being bonus eligible with no downside risk) rather than the two-sided risk program with higher bonus potentials but also financial risk to providers who fail.⁴ Another area to monitor will be ACOs that partner with entities other than physician groups or hospitals, such as drugstore chains or large insurance companies.

For the ACO program to be deemed successful in the long term, it will need to evolve and demonstrate that it meaningfully reduces Medicare costs and improves patient outcomes, without facilitating market dominance by a small number of large providers. ☉

Endnotes

¹See www.hhs.gov/news/press/2014pres/09/20140916a.html.

²See www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/ACO/index.html?redirect=/ACO.

³See www.kaiserhealthnews.org/stories/2011/january/13/aco-accountable-care-organization-faq.aspx.

⁴See [www.medpac.gov/documents/comment-letters/comment-letter-to-cms-on-accountable-care-organizations-\(june-16-2014\).pdf?sfvrsn=0](http://www.medpac.gov/documents/comment-letters/comment-letter-to-cms-on-accountable-care-organizations-(june-16-2014).pdf?sfvrsn=0).



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