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What Constitutes A Health Care Business Under 11 U.S.C. § 333?

Addressing Issues Relating To the Appointment of A Patient Care Ombudsman

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The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") was initially enacted to reform the Bankruptcy Code as it relates to health care businesses and to protect the ongoing quality of patient care being provided by such health care establishments during a bankruptcy proceeding. Specifically, this legislation added Section 333 to the United States Code Title 11, which requires the appointment of a patient care ombudsman ("PCO") in Chapters 7, 9 or 11 reorganization cases where the debtor is a "health care business," as defined by the Code, unless the court finds the appointment is not necessary to protect the health and well-being of the business' patients.

The role of the PCO is twofold: "to monitor the quality of patient care and to represent the interests of the patients of the health care business." 11 U.S.C. § 333(a)(1). This includes the obligation to interview patients and physicians and report to the court every 60 days in writing or at a hearing regarding "the quality of patient care provided to patients of the debtor." *Id.* at § 333(b). The PCO must also file a motion or written report with the court if he determines that "the quality of patient care provided to the patients of the debtor is declining significantly or is otherwise being materially compromised." *Id.*

In the two and a half years following the law's passing, various issues have arisen from the PCO requirement, including litigation arising from the definition of a "health care business" and the law's applicability to specific entities; the financial drain on lender carve-outs and cash flow due to various costs associated with the ombudsman's roles; and proposed solutions designed to curb the high costs involved.

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Courts Have Broad Discretion

A handful of federal cases have been decided since the enactment of BAPCPA that have examined the question of whether or not the appointment of a PCO was required for the debtor businesses in question. Specifically, most of these cases have attempted to clarify which entities fall within the definition of a "health care business" so as to require the appointment of a PCO for the duration of the bankruptcy proceeding. Some address whether there is need for a PCO, even where the debtor can properly be described as a health care business.

The Bankruptcy Code defines a health care business as "any public or private entity (without regard to whether that entity is organized for-profit or nonprofit) that is primarily engaged in offering to the general public facilities and services for: 1) the diagnosis or treatment of injury, deformity or disease; and 2) surgical, drug treatment, psychiatric or obstetric care." 11 U.S.C. § 101(27A)(A). Subsection (B) attempts to clarify the definition with a non-exhaustive list, stating subsection (A) "includes any (I) general or specialized hospital; (II) ancillary ambulatory, emergency or surgical treatment facility; (III) hospice; (IV) home health agency; and (V) other health care institution that is similar to an entity referred to in subclause (I), (II), (III), or (IV)." *Id.* at § 101(27A)(B). The definition of a health care business also encompasses "any long-term care facility, including any (I) skilled-nursing facility, (II) intermediate-care facility, (III) assisted-living facility, (IV) home for the aged; (V) domiciliary care facility and (V) health care institution that is related to a facility referred to in subclause (I), (II), (III), (IV) or (V) if that institution is primarily engaged in offering room, board, laundry or personal assistance with activities of daily living and incidentals to activities of daily living" *Id.*

Cases Addressing the PCO Requirement As Stated in § 333

In re Medical Associates of Pinellas stands for the proposition that where the Debtor provided administrative support to a group of physicians and their practices, "with any services to the public only ancillary to that public function … the Debtor is not a 'health care business' and, therefore, there is no requirement in this case to appoint a patient care ombudsman." 360 B.R. 356, 357 (Bankr. M.D. Fl. 2007). The court further explained the "health care business" definition statute describes businesses where patients "reside, receive emergency ambulatory or surgical treatment, or receive in-home or inpatient care, and clearly includes long-term care health facilities such as hospitals and nursing homes." *Id.* at 360. "[T]he legislative history …. appears consistent with the concept that a health care business was intended to refer to inpatient care facilities such as hospitals and nursing homes and not most out-patient facilities such as a doctor's office." *Id.* at 361.

In the next case of interest, a bankruptcy

court held that a dental practice was not intended to be included within the definition of a "health care business" and even if it were included, a PCO was not required under the facts of that particular case. *In re Banes*, 355 B.R. 532, 534 (Bankr. M.D. N.C. 2006). "Debtor's dental practice does not provide patients with shelter and sustenance in addition to medical treatment and is plainly not within the range of health care businesses anticipated by the statute." *Id*. at 535. Furthermore, Debtor was no longer engaged in the practice of dentistry and therefore would not require an ombudsman. As the *In re Banes* Court described, Congress defined "health care business" in the present tense, "indicating that it was concerned with appointing patient care ombudsmen in cases where health care businesses seeking bankruptcy protection are currently engaged in the ongoing care of patients." *Id*.

In re 7-Hills Radiology, LLC also dealt with the issue of whether or not the Debtor fell within the definition of "health care business," thus requiring it to hire a PCO. 350 B.R. 902 (Bankr. D. Nev. 2006). The court there held that a provider of radiological tests to patients referred by treating physicians, who does not advise patients of the test results and who does not keep patients' records, was outside the definition of "health care business." The court explained that the businesses targeted by this definition were entities that "had some form of direct and ongoing contact with patients to the point of providing them shelter and sustenance in addition to medial treatment." *Id*. at 905.

Finally, in *Matter of Total Woman Healthcare Center*, the Debtor employed one physician and there were no complaints from patients since Debtor filed for bankruptcy relief. 2006 WL 3708164 (Bankr. M.D. Ga. Dec. 14, 2006) The court in that case was not persuaded that the appointment of a PCO was necessary for the protection of patients because patient care was not adversely affected by the respondent's bankruptcy filing. *Id*. at * 2. "The court, having determined that the appointment of an ombudsman is not necessary under the specific facts of this case, need not decide whether [the debtor] is a 'health care business.'" *Id*.

Challenges in Selecting and Appointing a PCO

Another issue that has been arising from BAPCPA is the high financial cost involved with the monitoring and advocate responsibilities of the PCO. The costs associated with PCO monitoring and reporting on the quality of health care provided has proven to be financially burdensome and extremely costly. In order to evaluate the quality of patient care, the PCO needs to inspect the facility, review records and evaluations, and interview patients, staff, nurses and doctors. Expenses for the initial 60-day report alone with respect to a large home health care business have been estimated at around $3 million. *See* Maizel, Samuel R., "The First Year of the Patient Care Ombudsman in Review: Part I," 26-2 ABIJ 18, 19.

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Moreover, in order to be successful in monitoring the impact of the bankruptcy process on patient care, it is advisable that the PCO retain counsel or other professionals. Because the PCO's role can become limitless in certain cases, the compensation of the PCO and its retained professionals, the expenses relating to the performance of the PCO's duties and the expenses of addressing the PCO's recommendations regarding patient care can create substantial costs for the debtor and trustees. There is also little guidance regarding exposure or what type of protection, including immunity or indemnification, the PCO should seek, if any. *See* Kaplan, Harold L., "BAPCPA: Health Care Lenders Beware?" 24-10 ABIJ 32, 67-68.

One Potential Solution

To curb these escalating expenses in long-term health care cases, the United States trustee has in several instances selected a State Long-Term Care Ombudsman ["SLTC"] as the PCO. Each state has its own SLTC program, and selects its own ombudsmen throughout the state. An SLTC is paid by the state in which he or she is employed and does not charge the estate for his or her services. The law authorizes this alternative, stating "[i]f the debtor is a health care business that provides long-term care, then the United States trustee may appoint the State Long-Term Care Ombudsman appointed under the Older Americans Act of 1965 for the State in which the cases is pending to serve as the ombudsman…" 11 U.S.C. § 333(a)(2)(B).

The hiring of an SLTC as the PCO has proven the cause of additional concerns because of their inability to fulfill the monitoring and advocacy roles required by the Code due to lack of time or an experienced staff. It is difficult for an SLTC to assist in the advocacy role of being a PCO because they generally have little bankruptcy law experience and are not given guidance as to their duties and responsibilities under this new area of the law. The SLTCs also do not have legal backgrounds or access to counsel with familiarity with bankruptcy procedure. This means they have no experience or training to offer opinions on relief from stay motions, reorganization plans or proposed financing motions. Moreover, because they are taking on additional tasks, there is often not enough funding or time to complete all tasks obligated by the statute. A final hurdle is the limited amount of paid SLTCs in each state, which creates the need for the SLTCs to delegate their monitoring tasks to volunteers who do not have sufficient training to effectively fulfill the ombudsman's responsibility. *See* Maizel, Samuel R., "The First Year of the Patient Care Ombudsman in Review: Part II," 26-3 ABIJ 18. Thus, although the appointing of the SLTC as the PCO is a way to limit the excessive costs, it is also rife with its own problems.

Conclusion: Be Prepared

These new requirements put in place by BAPCPA have proven challenging in a number of respects, all of which must be considered and addressed when handling bankruptcy proceedings for a debtor that might be considered a health care business under the Code. Once the preliminary question of whether a PCO is required by BAPCPA is answered, bankruptcy advocates must still look to the issue of finding an appropriate individual to be appointed, as well as provide for the potential expenses associated with the PCO's role.