Health Care Committee

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Why So Many Excuses to Avoid the Appointment of a Patient Care Ombudsman?

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Congress enacted the health care provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) [1] with the goal of providing patients with protections and a voice in health care bankruptcy cases.[2] The creation of a patient care ombudsman, under §333 of the Bankruptcy Code, was one of the crucial provisions that provided patients with a voice and advocate in the bankruptcy case. Section 333(a)(1) of the Bankruptcy Code requires that "[i]f the debtor in a case under chapter 7, 9 or 11 is a health care business,[3] the court shall order . . . the appointment of an ombudsman to monitor the quality of patient care and to represent the interests of the patients of a health care business *unless the court finds that the appointment of such ombudsman is not necessary for the protection of patients under the specific facts of the case*."[4]

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1 *See* Pub. L. No. 109-8.

2 *See* U.S. Senate Committee on Judiciary Subcommittee on Administrative Oversight and the Courts: Hearing Regarding S. 1914, The "Business Bankruptcy Reform Act," 144 Cong. Rec. D564-02, 105th Cong. (2d Session, 1998) (summary of key points in testimony of Keith J. Shapiro, American Bankruptcy Institute); *See also* full text of Statement of Keith J. Shapiro, June 1, 1998, at 2:00 p.m., Hearing Regarding S. 1914, The Business Bankruptcy Reform Act—Preserving the Quality of Patient Care in Health Care Bankruptcies, U.S. Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts.

3 A health care business is defined in 11 U.S.C. §101(27A).

4 11 U.S.C. §333(a)(1).

This article will provide an overview of various bankruptcy court decisions[5] concerning the appointment of a patient care ombudsman under §333 and the various arguments raised to avoid the appointment of a patient care ombudsman.

The Debtor Is Not A Health Care Business

Several debtors have attempted to avoid the appointment of a patient care ombudsman by arguing that the debtor is not a health care debtor, as that term is defined in §101(27A) of the Bankruptcy Code. If the debtor is not a health care debtor, then §333 of the Bankruptcy Code does not apply and a patient care ombudsman would not be appointed.

For example, one debtor argued that its outpatient and residential counseling facility was not a "health care business."[6] The debtor's services consisted of talk therapy and group sessions with a goal of controlling the behavior of an addict, not to cure a disease. The U.S. Trustee argued that alcoholism was a disease and therefore the debtor's facilities fell under the definition of a "health care business." The bankruptcy court agreed with the debtor and found that the appointment of an ombudsman was unnecessary because the debtor was not a "health care business."

Another debtor argued that its dental practice was not a "health care business" as defined by the Bankruptcy Code.[7] The bankruptcy court agreed that the dental practice was not a "health care business" because the debtor's dental practice did not provide patients with shelter and sustenance in addition to medical treatment. Another court held that a debtor, which supplied administrative support to a group of doctors, was not a "health care business."[8] The debtor was simply an administrative support arm of numerous doctors and therefore not a health care business. Finally, another debtor argued that it was not a health care business given that it gave radiology tests to patients referred by treating physicians and did not advise the patients of the test results.[9] Rather, the debtor sent the test results to the treating physician. The court agreed. Thus, in each of these cases, given that the debtor was not a health care debtor, as defined under the Bankruptcy Code, a patient care ombudsman was not appointed.[10]

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[5] This article is not intended to provide a comprehensive overview of all cases concerning the appointment of a patient care ombudsman. The authors have randomly identified various cases to understand the basic arguments raised to avoid the appointment of a patient care ombudsman.

[6] *In re Elan Senior Living Inc*., Case No. 06-90040, U.S. Bankruptcy Court for the Eastern District of California (no ombudsman appointed).

[7] *In re Anne C. Banes*, D.D.S., P.L.L.C., 355 B.R. 532 (Bankr. M.D.N.C. 2006) (no ombudsman appointed).

[8] *In re Medical Associates of Pinellas*, 2007 WL 117930 (Bankr. M.D. Fla. Jan. 3, 2007) (no ombudsman appointed).

[9] *In re 7-Hills Radiology LLC*, 350 B.R. 902 (Bankr. D. Nev. 2006).

[10] *See, also, In re Tod*d *Adams Chiropractic Inc.*, Case No. SA06-10596 ES, U.S. Bankruptcy Court for the Central District of California (chiropractor is not a health care business; ombudsman not appointed). Finally, in *In re United Radiology Associates Inc., et al*., Jointly Administered Case No. 05-95014, U.S. Bankruptcy Court for the Southern District of Texas, the debtor argued that as a radiology business, it was not within the definition of a health care business. While the court excused the appointment of an ombudsman, it is not clear whether the court's ruling was based on this argument.

While each of these rulings may be technically correct, in drafting the definition of health care business, the intent of the legislators was to make the definition as broad as possible; thus, ensuring a broad application of BAPCPA's health care provisions for the protection of patients. In reviewing each of these cases, it is important to note that each of these debtors dealt directly with critical patient issues. The outpatient and residential counseling facility and dental business dealt directly each day with patients and likely had important patient records. The debtor supplying administrative support to doctors likely had access to or possibly stored patient records. As part of the ombudsman's job of monitoring patient care, an ombudsman must ensure that a patient has access to critical medical records, whether the debtor reorganizes or liquidates.

One court has broadly applied the definition of a health care business and rejected an argument attempting to limit the definition to avoid the appointment of a patient care ombudsman. In this case, the debtor argued that the appointment of an ombudsman was unnecessary because the dermatologist office was not a "health care business." The debtor argued that it did not provide shelter or sustenance to the general public but just provided limited outpatient services.[11] The U.S. Trustee objected arguing that the debtor is continuing her practice, which includes performing surgical procedures on patients and is therefore a "health care business." The court ruled from the bench and directed the appointment of the ombudsman.

The Debtor Has No Patient Issues -- Either Pre-Filing or Post-Filing

Some debtors have argued that an ombudsman need not be appointed because the debtor has no patient issues. For example, one debtor argued that it was a sole practitioner with one office and that pre-petition patient care was not adversely affected by the bankruptcy filing.[12] The court entered a memorandum opinion in which it agreed with the debtor and found that the appointment of an ombudsman was unnecessary because patient care was not adversely affected by the bankruptcy filing. The court found that the debtor had the same staff as before the bankruptcy filing, had not received any complaints since the bankruptcy filing and the bankruptcy filing has not affected the physician's scheduling of appointments for patients.

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[11] *In re Dari Ann Ungaretti*, Case No. 06-16094, U.S. Bankruptcy Court for the Northern District of Illinois (ombudsman appointed).

[12] *In re Total Woman Healthcare Center*, Case No. 06-52000 RFH, 2006 WL 3708164 (Bankr. M.D. Ga. Dec. 14, 2006) (no ombudsman appointed). *See, also, In re Heartland Memorial Hospital LLC*, Case No. 07-20188-JPK-7, U.S. Bankruptcy Court for the Northern District of Indiana, Hammond Division (relying upon *Total Woman Healthcare Center*, the court excused the appointment of an ombudsman; the debtor argued that an ombudsman was not required because the filing was not precipitated by patient care issues, the debtor did not expect to have any patient care issues, the delivery of patient care had not been impacted since the filing and the debtor understood privacy laws); *In re New York Westchester Square Medical Center*, Case No. 06-13050 (SMB), U.S. Bankruptcy Court for the Southern District of New York (debtor requests that the scope of the ombudsman's appointment be limited based, in part, on the lack of any patient care issues; court appoints ombudsman without any limitations); *In re Carlton Cove Inc.*, Case No. 06-81553-JAC-11, U.S. Bankruptcy Court for the Northern District of Alabama, Northern Division (debtor argues, among other things, that it has no survey issues, has complied with all regulatory requirements and patient care has been consistently high quality; court appoints ombudsman).

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Another debtor argued that an ombudsman was unnecessary because the debtor's bankruptcy filing was not precipitated by concerns relating to the quality of patient care or to patient privacy matters.[13] The court excused the appointment of an ombudsman in this case. Similarly another debtor argued that its health care business previously provided quality health care to its patients and will continue to do so.[14] Here, the debtor was not as successful -- the court appointed an ombudsman. Finally, another debtor argued that it has no medical malpractice claims or prospective claims.[15]

While the debtors' arguments concerning the pre-petition quality of patient care, the lack of patient care issue precipitating the bankruptcy filing or the lack of any post-petition patient care issues are interesting and important pieces of information, these arguments should not impact, in any way, the appointment of an ombudsman. The ombudsman, who will be a trained health care professional, is appointed to monitor the quality of patient care throughout the bankruptcy case. Patient care issues could arise at any time. Given the importance of providing quality patient care, including from the perspective of the debtor's ability to reorganize, the debtor's ability to generate cashflow and the importance of limiting the amount of any post-petition administrative claims that could arise and prevent a restructuring, an ombudsman should be appointed to independently evaluate patient care issues and to work with the debtors and other parties in interest throughout the case to address any patient care issues.

The Debtor Already Has The Equivalent of A Patient Care Ombudsman

Several debtors have argued that they already have the equivalent of a patient care ombudsman on staff. One debtor argued that the insurance companies were acting as "virtual ombudsmen" (*i.e.*, by conducting audits, reviewing patient charts and treatment plans, reviewing physicians' licensing and inspecting the debtor's facilities).[16] The U.S. Trustee disagreed with the debtor and argued that the appointment of an ombudsman was necessary because the tasks of the ombudsman include monitoring of patient care, interviewing patients, and making a judgment whether the quality of patient care is declining – tasks the insurance companies do not collectively undertake. The debtor's objection was withdrawn before the court ruled.

Another debtor argued that it is already subject to strict oversight as part of its state licensing and has a safety officer in place.[17] The bankruptcy court denied the motion to appoint an ombudsman

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[13] *In re William L. Saber, M.D. P.C.*, 2007 WL 1466741, *5 (Bankr. D. Colo.) (no ombudsman appointed).

[14] *In re Shreveport Doctors Hospital 2003, Ltd*., Case No. 07-10415, U.S. Bankruptcy Court for the Western District of Louisiana, Shreveport Division (ombudsman appointed).

[15] *In re Anderson Medical Centers*, Case No. 07-01892, U.S. Bankruptcy Court for the Northern District of Illinois (motion to excuse the appointment of an ombudsman was withdrawn).

[16] *In re Anderson Medical Centers*, Case No. 07-01892, U.S. Bankruptcy Court for the Northern District of Illinois (motion to excuse the appointment of an ombudsman was withdrawn).

[17] *In re Moshannon Valley Citizens*, Case No. 06-00095, U.S. Bankruptcy Court for the Middle District of Pennsylvania (no ombudsman appointed). *See, also, In re New York Westchester Square*

finding that the debtor already employed a full-time patient safety officer whose primary duties were to monitor the quality of patient care and serve as a patient advocate.

Finally, another debtor, an imaging facility, argued that while it did not have patients, to the extent that patients with prescriptions used the debtor's imaging facilities, those patients were protected by the various state and federal regulations and safeguards already in place.[18] Due to these regulations and safeguards, the oversight by a patient care ombudsman would be redundant. The court excused the appointment of the ombudsman based upon the specific facts of the case.

The various arguments that there are other entities, *i.e.* insurance companies, state agencies or in-house personnel, already monitoring patient care should not be accepted by the courts as valid reasons for holding that the appointment of a patient care ombudsman is unnecessary. These entities do not have a direct obligation to report any patient care issues to the bankruptcy court nor are they actually responsible for on-site patient care monitoring. Although, it can be argued that the in-house personnel may have responsibility for monitoring patient care, as personnel of the debtor that person is subject to the post-petition events occurring during the case.

A Patient Care Ombudsman Is Too Expensive

Some debtors have attempted to avoid the appointment of an ombudsman by arguing that it would be too expensive. For example, one debtor argued, among other things, that an ombudsman was unnecessary because it is a small hospital with, on average, only 12 in-patients per day and 85 out-patients per day, and the expense of an ombudsman would adversely affect the hospital and its patients.[19] The U.S. Trustee objected arguing that although it was not aware of any facts suggesting that patient care at the hospital was currently at risk, the trustee was concerned that a bankruptcy filing would create different financial and operating constraints that may impact patient care. The bankruptcy court denied the motion to appoint an ombudsman finding, among other things, that expense of an ombudsman would adversely affect the debtor. Other courts have rejected this argument.[20]

Medical Center, Case No. 06-13050 (SMB), U.S. Bankruptcy Court for the Southern District of New York (debtor requests that the scope of the ombudsman's appointment be limited based, in part, on the fact that the debtor has had its own patient ombudsman on staff for 10 years; court appoints ombudsman without any limitations); *In re Carlton Cove Inc.*, Case No. 06-81553-JAC-11, U.S. Bankruptcy Court for the Northern District of Alabama, Northern Division (debtor argues, among other things, that it has a residents' committee in place that serves the same role as the ombudsman; court appoints ombudsman).

[18] *In re United Radiology Associates Inc., et al.*, Jointly Administered Case No. 05-95014, U.S. Bankruptcy Court for the Southern District of Texas (no ombudsman appointed); *but see TSG Inc., et al.*, Case No. 06-80899, U.S. Bankruptcy Court for the Eastern District of Oklahoma (debtor argued, among other things, that the appointment of an ombudsman should be excused due to the licensing and regulatory environment under which the debtors operate; the court appointed an ombudsman).

[19] *In re Moshannon Valley Citizens*, Case No. 06-00095, U.S. Bankruptcy Court for the Middle District of Pennsylvania (no ombudsman appointed).

[20] *See In re New York Westchester Square Medical Center*, Case No. 06-13050 (SMB), U.S. Bankruptcy Court for the Southern District of New York (debtor requests that the scope of the ombudsman's appointment be limited based, in part, on the fact that the debtor has concerns over the cost;

A debtor should not be allowed to avoid the appointment of an ombudsman due to the expense. As with an examiner, trustee or any professional employed in a bankruptcy case, the expense can be addressed through budgets, negotiations and other arrangements. Patient care issues cannot be short changed in a health care bankruptcy case given their importance. And, thus, a patient care ombudsman, whose role is to provide the patients with a voice in the bankruptcy case, cannot be avoided simply due to a concern over cost.

The Debtor Has Filed A Pre-packaged Plan

One debtor argued that the appointment of an ombudsman was unnecessary because they had proposed a prepackaged plan.[21] The court granted the debtors' request and extended the time to appoint an ombudsman until the confirmation hearing date. While the testimony given in support of the health care bankruptcy provisions of BAPCPA indicated that the filing of a pre-packaged plan may excuse the appointment of a patient care ombudsman,[22] as in this case, the courts must be careful in excusing the appointment of a patient care ombudsman solely due to the filing of a pre-packaged plan. As in this case, the prudent action is to extend the time to appoint an ombudsman. As we all know, confirmation of a pre-packaged plan could take 30 days or could take months depending upon what happens in the bankruptcy case. As a result, if a pre-packaged plan is proposed and confirmation is delayed, patient care issues are raised or other issues occur, a court should revisit the need for the appointment of an ombudsman.

The Debtor Has Ceased All Business Operations

Some debtors or other parties in interest have argued that an ombudsman need not be appointed because the debtor has ceased all business operations. In one case, although the court excused the appointment of an ombudsman on the basis that the debtor was not a health care business, the court also noted that the appointment of an ombudsman could be excused because the debtor had ceased operations, dissolved its corporate identity and *made patient records available to all patients.*[23] It

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court appoints ombudsman without any limitations); *In re Cardiology Associates of Nevada, McMahon, Thomas and Stahl LTD. d/b/a Heart Institute of Nevada*, Case No. BK-S-06-11638-bam, U.S. Bankruptcy Court for the District of Nevada (ombudsman was not appointed for, among other reasons, the expense).

[21] *In re Curative Health Services*, Case No. 06-10552, U.S. Bankruptcy Court for the Southern District of New York (no ombudsman appointed).

[22] *See* U.S. Senate Committee on Judiciary Subcommittee on Administrative Oversight and the Courts: Hearing Regarding S. 1914, The "Business Bankruptcy Reform Act," 144 Cong. Rec. D564-02, 105th Cong. (2d Session, 1998) (summary of key points in testimony of Keith J. Shapiro, American Bankruptcy Institute); *See also* full text of Statement of Keith J. Shapiro, June 1, 1998, at 2:00 p.m., Hearing Regarding S. 1914, The Business Bankruptcy Reform Act—Preserving the Quality of Patient Care in Health Care Bankruptcies, U.S. Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts.

[23] *In re Anne C. Banes*, D.D.S., P.L.L.C., 355 B.R. 532 (Bankr. M.D.N.C. 2006). *See, also, In re Lakeside Heights Nursing Center LLC*, Case No. 8:06-bk-5492-KRM, U.S. Bankruptcy Court for the Middle District of Florida, Tampa Division (no ombudsman appointed because the debtor had ceased all business operations and all patients had been transferred to another facility); *In re Cardiology Associates of*

is important to note that a debtor's lack of ongoing business operations should not automatically excuse the appointment of a patient care ombudsman. As recognized by this court, the importance of access to patient records for ongoing medical care is an important consideration and this issue alone may justify the appointment of an ombudsman when a health care business is no longer operating.

Conclusion

Patient care is vital to the health care business' cash flow and ability to reorganize. Therefore, the importance of the ombudsman's role in a bankruptcy case should be recognized by the courts and the appointment should only be excused in rare, exceptional circumstances. As practitioners are aware, just because a debtor did not have patient issues pre-petition does not in any way correlate to the operation of the debtor's business during the post-petition time period. For example, employees leave, morale declines and cash becomes scarce. The same applies to the argument that the debtor is going to sell all its assets or has a proposed plan in progress. All of these events may easily lead to the decline of the quality of patient care while the debtor's bankruptcy case is pending – the exact reason Congress implemented §333. Given the critical ombudsman's critical role in evaluating and monitoring patient care, every effort should be used to appoint a patient care ombudsman in each health care bankruptcy case and only the rare excuse should justify a ruling that an ombudsman not be appointed.

Nevada, McMahon, Thomas and Stahl LTD. d/b/a Heart Institute of Nevada, Case No. BK-S-06-11638-bam, U.S. Bankruptcy Court for the District of Nevada (debtor ceased business operations pre-bankruptcy, had no patients and had retained patient records; no ombudsman appointed).