AMERICAN BANKRUPTCY INSTITUTE
JOURNAL
The Essential Resource for Today's Busy Insolvency Professional

Issues Facing Patient Care Ombudsmen

Contributing Editor:
Andrew Troop
Cadwalader, Wickersham & Taft LLP; New York
andrew.troop@cwt.com

Also Written by:
Joseph V. Zujkowski[1]
Cadwalader, Wickersham & Taft LLP; New York
joseph.zujkowski@cwt.com

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) added a number of noteworthy provisions related to the liquidation or reorganization of "health care businesses" to the Bankruptcy Code. One such provision, codified in § 333(a)(1), directs a bankruptcy court, within 30 days of the commencement of a chapter 7, 9 or 11 case by a health care business, to order the appointment of an ombudsman "to monitor the quality of patient care and to represent the interests of the patients of the 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."


Andrew Troop

With nearly six years of experience under BAPCPA, this article explores how some of the more vexing questions that surrounded the anticipated role of a patient care ombudsman (PCO) in health care bankruptcy proceedings at the time BAPCPA became effective have been resolved in practice by asking three individuals that have served as the PCO in numerous health care bankruptcies to share their thoughts on the topics set forth below. Their experiences with the processes implemented and materials relied upon by PCOs hopefully will provide some insights into a few of the current trends in health care liquidations and restructurings.

1 The authors thank Kathryn Borgeson, a financial restructuring associate in Cadwalader's Washington, D.C., office, for her assistance with this article.

About the Authors

Andrew Troop is a partner and Joseph Zujkowski is an associate with Cadwalader, Wickersham and Taft LLP in New York.

The Panel

The three PCOs who participated in this article are Wilmarie Gonzalez, Pennsylvania state long-term care ombudsman, and **Daniel McMurray** and **Suzanne Koenig**, private health care consultants who have served as PCOs in several high-profile health care restructurings.

Since 2005, Gonzalez has served as the PCO in six bankruptcy cases. She is able to serve in this role because § 333(a)(2)(A) provides that if a debtor is a health care business that provides long-term care, the U.S. Trustee may appoint the "State Long-Term Care Ombudsman appointed under the Older Americans Act of 1965 for the State in which the case is pending to serve as the ombudsman." In addition to a familiarity with the local health care industry, appointment of the state long-term PCO often has cost-related benefits, as in certain jurisdictions the state pays for the services of the state long-term care PCO and does not seek reimbursement from the bankruptcy estate.

McMurray is a managing director of Focus Management Group in Tampa, Fla., and has been appointed as the PCO in eight proceedings, including *In re Saint Vincent Catholic Medical Center*,[2] *In re Caritas Health Care Inc.*[3] and *In re Renaissance Hospital Grand Prairie Inc.*[4] Koenig is the president and founder of SAK Management Services LLC in Northfield, Ill., a nationally recognized health care and long-term care management and consulting services company. She is also frequently appointed as a PCO and served in this capacity in, among other cases, *In re Brotman Medical Center Inc.*,[5] *In re Bayonne Medical Center*[6] and *In re Illinois Skin Inc.*[7]

Discussion Questions

Question One

Issue: A PCO is not directly authorized under § 333 to hire professionals to assist in performing the PCO's duties or represent the PCO before the bankruptcy court. While § 327 provides that bankruptcy trustees can retain professionals in other contexts, bankruptcy courts are split as to whether this provision can be extended to allow for the retention of professionals by PCOs.[8]

Intensive Care

Discussion Question: Following enactment of BAPCPA, there was a lot of debate over and several cases challenging a PCO's ability to hire professionals. Has the attitude over retention of professionals changed since the introduction of the PCOs to bankruptcy cases? What has been your experience with respect to the retention of professionals?

Response: McMurray and Koenig noted that orders approving the appointment of a PCO only authorize the appointment of the one "disinterested person" required under § 333 and that, in practice, they are subsequently required to file retention applications for their

2 No. 10-11963 (Bankr. S.D.N.Y.).
3 No. 09-40901 (Bankr. E.D.N.Y.).
4 No. 08-43775 (Bankr. N.D. Tex.).
5 No. 07-19705 (Bankr. C.D. Cal.).
6 No. 07-15195 (Bankr. D. N.J.).
7 No. 06-16098 (Bankr. N.D. Ill.).
8 *Compare* Order Authorizing Patient Care Ombudsman to Retain and Employ Greenberg Traurig LLP as Counsel, *In re N.Y. Westchester Square Med. Ctr.*, No. 06-13050 (Bankr. S.D.N.Y. Feb. 26, 2007), ECF No. 98; *with* Order Withdrawing Application to Employ, *In re Julian Ungar-Sargon*, No. 06-08108 (Bankr. N.D. Ill. May 29, 2007), ECF No. 293 (court allowed briefing on issue but PCO ultimately withdrew application to employ counsel).

consulting firms and legal counsel. They stressed that legal counsel is essential because the PCO, as a nonlawyer, is not able to submit documents to the bankruptcy court. A PCO will also rely on counsel's familiarity with the local bankruptcy rules and their relationships with counsel representing the various other parties in interest.

Commenting on the evolution of the debate over retention of professionals, Koenig stated that "when the statute was first written in 2005 there was a lot of dissension about the ability to hire professionals" and added that as parties have become more comfortable with and learned to appreciate the PCO's role, their resistance to PCOs retaining professionals has dissipated. Koenig acknowledged the possibility of objections still being filed in contentious bankruptcies, but advised that "there is enough case law" supporting the retention of professionals by PCOs to overcome such objections on a consistent basis.

Gonzalez noted that her office has in-house counsel on which she can rely without expense to the bankruptcy estate and thus separate retention applications are not required.

Question Two

Issue: Section 333(b)(2) directs the PCO to prepare a report regarding the quality of patient care every 60 days, and to file the report with the bankruptcy court. However, neither the Bankruptcy Code nor the Bankruptcy Rules provide any guidance as to the scope or content of these reports.

Discussion Question: The recommendations in a PCO report are commonly based on several different categories of information, including (1) interviews with physicians, staff and patients; (2) licensing reports; (3) financial materials; (4) reports prepared by state regulatory agencies; (5) physician, laboratory, nursing and other health care professionals' accreditation certifications; (6) physical plant observations; (7) inspections of a facility's equipment, maintenance records and general upkeep; (8) inspections of a facility's medications and supplies; (9) pending malpractice actions; (10) patient complaints; (11) observations regarding a facility's ability to handle emergencies; and (12) reviews of a facility's policies concerning patient record storage, privacy issues and the release of patient information. Do you consider any of these categories to be of particular importance in preparing the recommendations set forth in your PCO reports? Why?

Response: In general, the panelists regularly review and consider each of the categories of information listed above, and work closely and share information with state licensing and regulatory agencies in preparing their reports. PCOs contact these agencies regularly to discuss any trends that the PCOs or the agencies have uncovered in their evaluations of a debtor. Additionally, it is not unusual for the PCO to arrange a joint site visit with a licensing agency as part of the PCO's review process.

In addition, McMurray stressed the importance of internal quality control and risk-management systems in his assessment of the quality of care being provided to patients by a health care business. He added that an institution's performance-improvement plan for its departments is instrumental to his reports and that he utilizes such information in interviews with staff at all levels.

Question Three

Issue: Professionals employed or retained in a bankruptcy case, including a chapter 11 case, are protected from claims against them in various contexts, for example, under § 1125(e) of the Code, when soliciting votes on a plan of reorganization, for action taken in good faith during the course of a chapter 11 case. There is no Code provision that explicitly indemnifies a PCO for actions undertaken in furtherance of a PCO's responsibilities. When BAPCPA was passed, serious questions arose over whether a PCO could be, should be or would be indemnified by a debtor's estate or could otherwise benefit from some court-ordered prohibition on claims, and if so, the appropriate process for obtaining indemnification or similar protections.

Discussion Question: When you are employed as a PCO, do you ask to be indemnified by the bankruptcy estate? Is the request often approved?

Response: The panelists have had mixed experiences with indemnification. Gonzalez, who serves in a state-appointed position, never seeks indemnification given her representation of the state and application of the doctrine of sovereign immunity.

In contrast, Koening and McMurray noted that they always request indemnification, most often when seeking an order terminating their appointment, but note that this request is usually denied without explanation from the bankruptcy court. Specifically, McMurray stated that "[i]n general, an attempt is made to have the court provide full indemnification for the PCO as the court would for other appointed professionals such as a Trustee...there is [often] a sense that the indemnification is provided through the statute, which does not address the issue, or is unnecessary. Given the role of the PCO and the constraints under which PCOs operate, indemnification is essential." Additionally, he noted that he would like to see indemnification set forth in the order authorizing appointment of a PCO and that he is likely to pursue such inclusion in the future.

Question Four

Issue: As noted, a PCO is required to file a report regarding the standard of patient care with the court every 60 days. In addition, pursuant to § 333(b)(3), if the PCO determines that the quality of patient care has declined significantly between reports, the PCO must immediately notify the court by report or motion. However, neither the Code nor Rules contain any guidance regarding the contents of an emergency PCO motion or report.

Discussion Question: Given the lack of statutory guidance on filing an emergency PCO motion or report, have you ever filed one and under what circumstances do you think such a motion or report should be filed?

Response: Although the ability to petition or notify the court is there when emergent circumstances warrant, the panelists generally have not had to do so. The panelists noted that they may draft a motion and circulate it to the debtor and other interested parties when a critical issue arises, but it is rare for the motion to be filed. Debtors have been very responsive when a serious patient-care issue is identified both before and after an emergency report is filed. Summarizing her experience with respect to this issue, Gonzalez stated that "[i]n two of my cases, emergency reports were filed with the bankruptcy court when quality of care and environmental concerns were identified based on visits to the facility and discussions with residents. In the interim, conference calls were also conducted with the relevant parties, additional facility visits were scheduled, and meeting were held to discuss, identify and implement timelines for corrective plans of action."

Question Five

Issue: Under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the disclosure or use of a patient's protected health informa-

tion other than for treatment, payment or health care operations, without the patient's authorization, is permitted only in limited circumstances. One such limited circumstance is disclosure or use made in connection with a judicial proceeding, such as a bankruptcy case. Section 333(c) of the Code also provides for pre-approval by the bankruptcy court for the review of otherwise confidential patient records, but does not provide a way to obtain patient information to provide notice with regard to a request for review.

Discussion Question: Describe the process you follow, and how you address issues of notice in requesting confidential patient information.

Response: The panelists all stressed how important it is for PCOs to have access to patient records, and how difficult it is for PCOs to carry out their duties if they cannot talk to patients about specific problems related to the debtor. In some cases, the U.S. Trustee will request that the court grant the PCO access to patient records in the PCO appointment order. As Koenig noted, "[i]t saves money in not having to file future motions to address this issue and it is more efficient to get authorization upfront."

In the panelists' experience, notice to the patients regarding the PCO's access to patient records varies by jurisdiction. Some courts require that individuals receive actual notice, while others allow for constructive notice. Koenig stated that in some of the large hospital cases that she has worked on, notice has been posted in a high-traffic areas, such as the hospital lobby, instead of being sent to each individual patient.

However, even in jurisdictions that only require constructive notice, Koenig advised that PCOs should ask each patient that they are interviewing or whose records they are reviewing to sign a consent form. She added that although the PCO may have court permission to review patient records and discuss the records with the patient, the PCO should generally respect a patient's decision to decline an interview or to have their records reviewed. Finally, she noted that they generally use standard consent forms provided by the debtor in order to minimize time and expenses.

Question Six

Issue: Providing quality health care is often a cornerstone of any health care restructuring exit plan. However, the Bankruptcy Code does not provide a PCO with a formal role in the restructuring or sales process, even though the PCO may have a unique perspective about continuing care given the reports prepared and filed.

Discussion Question: To what extent are you involved with the formulation of exit strategies for a debtor by way of a plan, sale or liquidation? Do you find you have a seat at the table when a reorganization plan is being negotiated or evaluated? If so, who generally invites you to participate?

Response: Gonzalez noted that occasionally she has been asked to accompany the U.S. Trustee to meetings with the debtor about a reorganization plan but generally does not review a plan until after it is filed. McMurray similarly stated that "generally, PCOs have not received drafts of the plan for review or approval, but routinely elements of the plan, particularly those related to the PCO's primary roles, are reviewed with the PCO and input is sought. Most debtors and their advisors hope the plan will receive support from the PCO."

The other panelists agreed that, although they generally are not asked to review and comment on drafts of the debtor's plan of reorganization, they are generally informed of a plan's contents. If any part of the plan adversely affects patient care, the PCO typically tries to addresses the issue with the debtor and interested parties informally, and to file an objection only if unsuccessful. The panelists indicated that they might ask the U.S. Trustee's office to file such an objection in certain circumstances.

Conclusion

After six years, PCOs are now firmly established players in heath care bankruptcies. The trend clearly is to respect the PCO's role and to try to cooperate with the PCO's efforts and observations. The issues still evolving, and on which focus should remain, include whether bankruptcy estates will indemnify PCOs for executing their duties, and the role of PCOs as health care debtors seek to exit bankruptcy. ■

Reprinted with permission from the ABI Journal, Vol. XXX, No. 2, March 2011.