The United States Trustee Program Administers BAPCPA's Patient Care Ombudsman Requirements

Written by:

Roberta A. DeAngelis, Acting General Counsel
Paul W. Bridenhagen, Trial Attorney
Executive Office for United States Trustees
Washington, D.C.

In an effort to ensure the safety and welfare of one of the most vulnerable groups of persons affected by the bankruptcy process, Congress added section 333 to the Bankruptcy Code, through the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("2005 Reform Act"), Pub. L. 109-8, 119 Stat. 23, 191 (2005). Section 333 requires the bankruptcy court to order the United States Trustee ("UST") to appoint a disinterested patient care ombudsman ("PCO") in every health care business case under chapters 7, 9, or 11, unless the court finds that the appointment is not necessary "under the specific facts of the case." 11 U.S.C. § 333(a)(1).[1] The United States Trustee Program ("USTP") is the government agency charged with ensuring the integrity of the bankruptcy system. The purpose of this article is to provide a statistical profile of health care businesses tracked by the USTs, to set forth the positions and procedures adopted by the USTP and to highlight efforts to ensure that this mandate is properly applied.

The role of a PCO is to monitor the quality of patient care and to represent the interests of the patients. 11 U.S.C. § 333(a)(1). To meet this charge a PCO will interview patients, physicians and other staff, as necessary to satisfy the statute's mandate. 11 U.S.C. § 333(b)(1). An initial report must be filed within 60 days of appointment; additional reports must be filed not less frequently than every 60 days thereafter. 11 U.S.C. § 333(b)(2). Regardless of the 60-day reporting cycle, if the PCO determines that the quality of patient care is declining significantly, or is otherwise being materially compromised, the PCO must immediately file a motion or written report, with notice to parties in interest. 11 U.S.C. § 333(b)(3).

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[1] Section 333(a)(1) provides as follows:

> If the debtor in a case under chapter 7, 9 or 11 is a health care business, the court shall order, not later than 30 days after the commencement of the case, 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.

1. Statistical Profile of PCO Appointments

Although only a handful of decisions implicating health care businesses have been reported, that number belies a much larger number of cases filed. Indeed, through the end of 2007, the USTP has identified 271 cases filed under the 2005 Reform Act that have raised issues related to § 333.[2] Of those cases identified, 47 concerned long-term care facilities (nursing homes), 33 concerned hospitals and 181 concerned miscellaneous health care businesses, including sole practitioners, groups of practitioners, professional corporations and partnerships, clinics, nursing services, home health services and other health-related entities. Based on available information, it appears that in only 10 cases the bankruptcy court determined that debtors were not health care businesses.

With respect to the 47 nursing homes identified, PCOs were appointed in 33 cases or 70 percent, while in the remaining 14 cases the appointment of a PCO was deemed unnecessary. Of those 14 cases in which a PCO was not appointed, in nine cases the facilities were closed or had been sold pre-petition and one case was dismissed before the PCO issue was addressed. In the remaining four cases, the bankruptcy court determined that the appointment of a PCO was not necessary for the protection of the patients. In the 33 bankruptcy cases concerning hospitals, PCOs were appointed in 16 of the cases or 48 percent. Of the 17 cases in which a PCO was not appointed, 14 of the facilities were closed or had been sold pre-petition and in the remaining cases the appointment of a PCO was held not necessary for the protection of the patients. Finally, as discussed above, in 10 cases the court made an affirmative determination that the debtors were not health care businesses. Of the remaining 171 cases that involved neither nursing homes nor hospitals, the appointment of a PCO was ordered in less than10 percent of the cases.

2. Prerequisites to the Appointment Process

A. Is the Debtor a Health Care Business?

The bankruptcy court initially must determine whether a debtor is a "health care business," as that term is broadly defined in 11 U.S.C. § 101(27A). Because a debtor is obliged to designate on its bankruptcy petition whether it is a health care business, in most cases, the answer should be obvious. However, if there is doubt after reviewing the petition and/or schedules, UST personnel will make appropriate inquiry at the Initial Debtor Interview and the section 341 meeting to determine whether a debtor, or any affiliate, is a health care business.

In practice, courts generally have avoided the issue of whether the debtor is a health care business by focusing instead on whether the appointment of a PCO is necessary under the facts of the particular case. The case law is conflicted as to the

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[2]The USTP does not have jurisdiction over cases filed in Alabama or North Carolina. Of the cases identified, none was filed in Alabama or North Carolina.

statutory interpretation of section 101(27A). Some courts have held that the term health care business is limited to those that provide "facilities and services" in an institutional setting, such as hospitals or nursing homes. *In re Banes*, 355 B.R. 532, 535 (Bankr. M.D.N.C. 2006); *In re 7-Hills Radiology, LLC,* 350 B.R. 902, 905 (Bankr. D. Nev 2006); *see also In re Medical Associates of Pinellas, L.L.C.*, 360 B.R. 356 (Bankr. M.D. Fla. 2007) (stating same in dicta). Another court adopted a broader definition that is not dependent on where the debtor provides its services, such as an individual doctor's office. *In re Saber*, 369 B.R. 631 (Bankr. D. Colo. 2007). The USTP generally favors a broad interpretation of this remedial statute. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 504 (1999) (remedial legislation should be construed broadly to effectuate its purposes.)

B. Is the Appointment of a PCO Necessary?

If the debtor is a health care business, the bankruptcy court may be asked to assess whether the appointment of a PCO is necessary. In this regard, the 2005 Reform Act requires a case-specific assessment of the need for a PCO in each case. *See* 11 U.S.C. § 333(a). In effect, the statute creates a statutory presumption that a PCO will be appointed, unless the bankruptcy court specifically finds that the appointment is not necessary under the facts of the case. The burden of proof is therefore properly on any party (*e.g.*, debtor, creditors' committee, *etc.*) seeking to avoid the appointment to demonstrate that a PCO is not necessary for the protection of patient safety. The UST may, in some cases, not oppose a motion to avoid the appointment, if the moving party presents adequate evidence to satisfy the UST that a PCO is not necessary for patient safety as required pursuant to section 333(a)(1). More likely, however, the party will be required to present its proofs to the court.

In determining whether the party seeking to avoid the appointment has satisfied its burden of proof that a PCO is not necessary, the following non-exhaustive list of factors may be considered:

1. whether the debtor is operating;

2. whether the financial status of the debtor is sufficiently strong that there is not a likelihood it would cut back on services;

3. whether there is sufficient local, state, or federal oversight such that the patients' welfare is adequately monitored;

4. whether current staffing (medical or otherwise) is adequate and reliable;

5. whether the level of medical care is adequate to protect the health of the patients;

6. whether adequate nutrition is provided;

7. whether there is any history of inadequate patient care (under this category any past lawsuits or liabilities would be important indicia);

8. the level of vulnerability or dependency of patients;

9. the presence and sufficiency of internal safeguards to ensure appropriate level of care;

10. whether the facilities are adequately maintained; and

11. the factors surrounding the bankruptcy filing and the debtor's operations.

A number of the criteria listed above for determining the necessity of a PCO were identified in *In re Alternate Family Care*, 377 B.R. 754 (Bankr. S.D. Fla. 2007), where the court applied a totality of the circumstances test in determining that the appointment of a PCO was not necessary in that case. This case has been cited by other courts. *See, e.g., In re Valley Health System,* 381 B.R. 756, 761 (Bankr. C.D. Cal. 2008).

The USTP agrees that a totality of the circumstances approach is appropriate in determining whether to appoint a PCO; we differ, however, from the focus of the bankruptcy court in *Alternate Family Care* in deciding the issue. The decision in *Alternate Family Care* identified the cost of a PCO in determining whether to order an appointment. In contrast, the USTP has determined that cost should not be a controlling criteria for appointment. Instead, costs may be managed by establishing a budget for a PCO.[3] In reviewing the extent to which PCOs have increased costs to the estate, we note that, in general, the costs have not been significant. In cases involving long-term care facilities, costs generally are limited by the appointment of a State Long Term Care Ombudsman ("SLTCO"), who operates pursuant to the Older Americans Act and receives state and federal funding, and typically does not seek compensation from the bankruptcy estate.

The fact that a debtor is no longer operating may justify not appointing a PCO. Thus, an appointment should be unnecessary in a chapter 7 case, unless the trustee obtains an order to operate the business under section 721. However, notwithstanding that a chapter 11 debtor states that a business is no longer operating, USTP personnel are likely to make further inquiry to ensure that necessary medical services to patients are not interrupted and to determine whether the appointment of a PCO is necessary. For example, a nursing home or provider of home health care assistance that sends a nurse or medical technician to a patient's home to administer critical medications or to monitor a patient's vital signs, such as blood pressure and heart rate, may jeopardize a patient's

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[3] The management of costs should not be unique to PCOs. Such considerations and limits should be imposed on all bankruptcy professionals.

health by operating inadequately or by ceasing business abruptly without providing for continued service. In cases in which a trustee has been appointed, the trustee should take all necessary steps to ensure patient safety.

3. PCO Compensation

The notices of appointment filed by USTs track the PCO's statutory duties and indicate that applications for compensation must comply with section 330. Compensation is fixed by the court following notice and hearing as provided in section 330 and Rule 2016 of the Federal Rules of Bankruptcy Procedure. Because compensation is the sole prerogative of the court, the USTs' notices of appointment do not set forth any terms of compensation.

Some USTs have encountered cases in which cash collateral orders and associated carve outs were fixed early in the case, prior to the appointment of a PCO. A lack of available funding was then cited as grounds for opposing appointment. In such cases, USTP personnel are likely to seek to assure that there is a line item in the debtor's budget that provides for possible appointment of a PCO, or that any carve out includes provision for a PCO. This is similar to the approach followed in chapter 11 cases with respect to the possible appointment of creditors' committees to assure that adequate funds are available from debtor-in-possession financing.

4. Employment of Professionals by a PCO?

Section 327 does not expressly provide that a PCO may hire professionals. *See* 11 U.S.C. § 327. Likewise, nothing in section 330 expressly addresses the issue of compensation for any professionals hired by a PCO. *See* 11 U.S.C. § 330. However, section 330(a)(1)(B) allows a PCO reimbursement for "actual, necessary" expenses, which may include the fees and expenses of professionals under appropriate circumstances.

Consistent with USTP policy concerning examiners, whose professionals are similarly omitted from section 327, the USTP has taken the position before the courts that PCOs may retain professionals on a showing of need. As an alternative, the fees and expenses of counsel could reasonably be deemed to be an "actual, necessary" expense reimbursable under section 330(a)(1)(B). *See* 3 *Collier on Bankruptcy* ¶ 333.05[1] (15th ed.) ("if the ombudsman decides to file motions in accordance with the statute, or becomes involved in an evidentiary hearing defending a determination that the quality of health care is declining, representation by an attorney would be necessary and such counsel fees should be paid by the estate as a necessary expense of the ombudsman").

5. Discharge/Exculpation of PCO

Upon completion of their duties, some PCOs have sought orders that exculpate them from any wrongdoing in the discharge of their duties, and have sought immunity from any discovery for the PCO and for any of their professionals with respect to the

discharge of their duties. In other cases, these protections were sought at the inception. Generally, these requests for relief are overly broad. When the exculpation provision occurs in the context of the plan, with its attendant notice and voting, it may be less problematic.

Exculpation requests also raise the issue of the extent to which a PCO may be subject to liability for errors committed in the performance of his or her statutory duties. Although we are aware of no authority on this issue concerning PCOs, courts have extended quasi-judicial immunity to private case trustees. *See Curry v. Castillo (In re Castillo)*, 297 F.3d 940, 947 (9th Cir. 2002) (extending quasi-judicial immunity for "actions that are functionally comparable to those of judges, *i.e.,* those that involve discretionary judgement"). Private trustees perform a variety of discretionary functions, which include investigating the activities of debtors and filing reports that assist the bankruptcy court in case administration. In a similar vein, PCOs assist the bankruptcy court by monitoring the actions of the debtor, *see* 11 U.S.C. § 333(a)(1), and filing reports with the court regarding the quality of patient care, 11 U.S.C. § 333(b)(2). The extent to which quasi-judicial immunity may be available to a PCO will likely depend on the particular facts. There is no direct authority on this issue at this time. [4]

6. Immunity from Discovery

Some PCOs have also requested orders granting them prospective immunity from any potential discovery. Although such discovery could increase the expenses of the PCO, the USTP does not agree that all conceivable future discovery requests are necessarily improper, or that the court may or should enjoin discovery on a global, prospective and permanent basis. *See In re Baldwin United Corp.*, 46 B.R. 314, 316-17 (Bankr. S.D. Ohio 1985) (opining that a bankruptcy examiner would be entitled to "some immunity" from discovery, but also expressly ordering the examiner to preserve documents and not to disclose them without first obtaining court approval, leaving open the possibility that certain tort plaintiffs might be granted access to those documents through discovery). *See also*, *In re Adelphia Commc'n Corp.*, 348 B.R. 99, 102 (Bankr. S.D.N.Y. 2006) (determining that discovery of fee committee was not prohibited as a matter of law); *In re Enron Corp.,* No. 04 Civ. 3624, 2004 WL 1661093 (S.D.N.Y. July 22, 2004) (unpublished) (bankruptcy court order limiting discovery from examiner was not absolute, but permitted exceptions where appropriate under federal criminal law).

[4] If a health care business is a long-term care facility and the UST appoints the SLTCO, additional protections are available. Under section 712(g) of the Older Americans Act, each state is required to ensure that no representative of a SLTCO will be liable under state law for the good faith performance of official duties.

If the disclosure of a PCO's investigative record becomes a serious concern in a given case, which it may if private or otherwise sensitive information is at issue, then it may be appropriate for the court to provide a limited protective order of the type discussed in *Baldwin, supra*. Thus, the court may require the parties seeking discovery from the PCO first to seek court approval and explain why the information cannot be obtained from other sources. *See Adelphia*, 348 B.R. at 110 (limited protective order provided for the fee committee).

Conclusion

The appointment of PCOs involves an area of law on which few written decisions have been issued. The USTP will continue to make every effort to ensure that the statute is enforced as written, and will continue to refine its positions and procedures as more information and experience are garnered.