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The Patient Care Ombudsman's New Reality

Top 10 Issues Relating to Appointment of an Ombudsman after BAPCPA

Contributing Editor:
Nancy A. Peterman
Greenberg Traurig, LLP; Chicago
petermann@gtlaw.com

Also Written by:
Sherri Morissette
Greenberg Traurig, LLP; Chicago
morissettes@gtlaw.com

Suzanne Koenig
SAK Management Services, LLC; Chicago
skoenig@sakmgmt.com

It has been almost two years since the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) and its health care bankruptcy provisions. Both before and after enactment of the provisions, many articles highlighted certain perceived pitfalls and concerns of these new health care bankruptcy provisions, in particular the provisions relating to the appointment of a patient care om-budsman. Two years later, we surveyed the implementation of the patient care ombudsman provisions. Below, we identify the top 10 issues facing the patient care ombudsman two years after BAPCPA's enactment.


Nancy A. Peterman

The Appointment of an Ombudsman: Individual or Firm?

Under §333(a)(2)(A) of the Bankruptcy Code,[1] the Office of the U.S. Trustee is to appoint *one disinterested person* to serve as the patient care ombudsman. The statute does not specify whether the disinterested person must be an individual or could be a firm. However, consistent with the appointments of trustees and examiners, the U.S. Trustee's office has appointed one individual, rather than the individual's firm, as the ombudsman. In certain orders appointing an ombudsman, the U.S. Trustee has authorized the individual appointed as ombudsman to delegate specific duties to the ombudsman's firm.[2] Generally, an individual would prefer that his or her firm be appointed as ombudsman for liability reasons. An individual may also need the assistance of others within his or her firm to perform the duties of an ombudsman. The ombudsman has attempted to address both of these issues by limiting an ombudsman's liability in orders terminating the ombudsman's appointment and by hiring professionals. As discussed below, both of these actions have come under attack.


Suzanne Koenig


Sherri Morissette

Appointment of an Ombudsman in Chapter 7 or 13?

Pursuant to §333(a)(1) of the Code,[3] an ombudsman shall be appointed in any chapter 7, 9 or 11 case filed by a health care business.[4] While appointment of an ombudsman in a chapter 9 or 11 case involving a restructuring, sale or other liquidation makes sense given that patient care issues may be impacted, it becomes more difficult to envision the role of an ombudsman in a chapter 7 case. Recently, an ombudsman was appointed in a chapter 7 case.[5] One jurisdiction has even considered whether to appoint an ombudsman in a chapter 13 case, although the express language of the statute does not require such an appointment (but perhaps such an appointment could be requested depending on the circumstances of the case).

The role of an ombudsman is to monitor the quality of patient care. In a chapter 7 case, there should be no ongoing patient care. In a chapter 13 case, the debtor will be an individual who may be a health care professional, but the debtor will not be a

About the Authors

Nancy Peterman is the chair of Greenberg Traurig's Chicago Business Reorganization and Bankruptcy Practice, an ABI Board Member and former co-chair of ABI's Health Care Insolvency Committee. She assisted in drafting the health care banrkuptcy provisions of BAPCPA. Sherri Morissette is an associate in Greenberg Traurig's Chicago office and has authored numerous articles relating to health care bankruptcy. Suzanne Koenig is president and founder of SAK Management Services LLC, a long-term care management and consulting services company. She has served as a patient care ombudsman in several chapter 11 and 7 cases and is co-chair of ABI's Health Care Committee.

1 11 U.S.C. §333(a)(2)(A).

2 *See* U.S. Trustee's Appointment of Patient Care Ombudsman, *In re New York Westchester Square Medical Center*, Case No. 06-13050, U.S. Bankruptcy Court for the Southern District of New York (in the notice appointing the ombudsman, the U.S. Trustee authorized the patient care ombudsman to use the staff of SAK Management Services, LLC to assist her in the performance of her duties and responsibilities, expect for her reporting obligations as set forth in §333(b)(2) of the Bankruptcy Code).

3 11 U.S.C. §333(a)(1).

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

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

corporate entity providing ongoing patient care. If appointed in a chapter 7 or 13 case, the scope of the ombudsman's appointment should be limited. For example, in a chapter 7 case, the ombudsman may only focus on patient records issues, specifically ensuring patients' access to medical records. An ombudsman's role also may need to be more limited in a chapter 7 or 13 case given concerns over the ability of the ombudsman to be paid.

Why Wouldn't an Ombudsman Be Appointed?

In many cases, a patient care ombudsman is not appointed. Under §333(a)(1), "[i]f the debtor in a case under chapter 7, 9 or 11 is a health care business, the court shall order...the appointment of an ombudsman...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."[6] Health care debtors have made various arguments, with varying degrees of success, as to why an ombudsman is not necessary, including (a) the debtor has no medical malpractice claims or prospective claims and the insurance companies are acting as a "virtual ombudsman" (*i.e.,* by conducting audits, reviewing patient charts and treatment plans, reviewing physicians' licensing and inspecting the debtor's facilities),[7] (b) the debtor is a sole practitioner with one office and patient care was not adversely affected pre-petition,[8] (c) the debtor sees patients on a limited basis and thus the ombudsman cannot monitor patients because patients are seen at the office and go home,[9] (d) the debtor is a small hospital with, on average, only 12 inpatients per day and 85 outpatients per day, is already subject to strict oversight as part of its state licensing and has a safety officer in place,[10] (e) the expense of an ombudsman would adversely affect the hospital and its patients[11] and (f) the debtor proposed a pre-packaged plan making the appointment of an ombudsman unnecessary.[12]

While the appointment of an ombudsman may be excused in certain circumstances, the lack of pre-petition patient care issues, expense of an ombudsman or insurance company oversight, for example, should not excuse the appointment of the ombudsman. An ombudsman is appointed to protect the patients and give them a voice in the bankruptcy process. Given the importance of patient care to, among other things, the health care business's cash flow, the ombudsman's role is critical and the ombudsman's appointment should only be excused in rare circumstances.

The Ombudsman Can Employ Professionals—Right?

In almost all cases, the ombudsman has employed those professionals needed to fulfill his or her duties under the Code. The professionals have ranged from legal counsel to medical specialists. Until recently, the ombudsman's employment of professionals was routinely granted by the bankruptcy courts. In the chapter 11 case of *Julian Ungar-Sargon,*[13] the U.S. Bankruptcy Court for the Northern District of Illinois denied an ombudsman's application to employ attorneys, finding, among other things, that there was no statutory basis to allow the ombudsman to employ professionals. The court preliminarily denied the retention application and gave the parties additional time to brief the issue. The ombudsman subsequently withdrew the retention application. More recently, in *In re Bayonne Medical Center,*[14] the debtor and the creditors' committee objected to the ombudsman's request to employ a medical operations advisor and legal counsel and made similar statutory arguments. The objecting parties also argued that the ombudsman could not retain her own firm to perform work as the "medical operations advisor" because the ombudsman would no longer be disinterested as "only accountants and attorneys can retain their own firms without disqualification." Finally, the objecting parties argued that the employment of such a medical operations advisor was unnecessary, duplicative and costly. The objecting parties assert that the ombudsman essentially must complete her duties without any support, legal or otherwise.[15]

The ombudsman will certainly have a different perspective on the need for the employment of professionals. For example, the ombudsman is faced with complying with bankruptcy laws, the Health Insurance Portability and Accountability Act of 1996 (HIPAA)[16] and other privacy laws. All of these issues, from an ombudsman's point of view, make the retention of counsel critical. In addition, in order to fulfill the duties of an ombudsman under §333 of the Code, the ombudsman may need to visit one or more facilities, review patient records, review complaints by patients and agencies, review the pharmacy, laboratory, emergency room, radiology, safety/risk management and nursing departments, and interview patients, doctors and nurses. Without assistance from a medical specialist, it may be impossible for the ombudsman to perform all of these tasks in a timely manner, in an efficient manner and in a manner protective of patients' rights.

The Ombudsman's Access to Patient Records: How Does the Ombudsman Reconcile the Confidentiality Provisions of the Bankruptcy Code and HIPPA?

Ombudsmen have also struggled with gaining access to patient records while trying to comply with HIPPA and the additional confidentiality requirements contained in §333.[17] There is no debate that the ombudsman must review a debtor's confidential patient records in order to fulfill those duties set forth under §333. Section 333(c)(1) provides that "such ombudsman may not review confidential patient records unless the court approves such review in advance and imposes restrictions on such ombudsman to protect the confidentiality of such records."[18] Further, Bankruptcy Rule 2015(b) provides that a motion to review confidential records is to be served on the patient and any patient's family member or other contact person.[19] The noticing requirements have raised many

6 11 U.S.C. §333(a)(1).

7 *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).

8 *In re Total Woman Healthcare Center,* Case No. 06-52000, U.S. Bankruptcy Court for the Middle District of Georgia (no ombudsman appointed).

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

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

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

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

13 *In re Julian Ungar-Sargon,* Case No. 06-08108, U.S. Bankruptcy Court for the Northern District of Illinois.

14 *In re Bayonne Medical Center,* Case No. 07-15195, U.S. Bankruptcy Court for the District of New Jersey.

15 As of the date of this article, these issues have not been fully briefed or decided in the *Bayonne Medical Center* case.

16 42 U.S.C. §1320.

17 *See, e.g., Upland Surgical,* Case No. 06-11298, U.S. Bankruptcy Court for the Central District of California; *Atlantic Health Services,* Case No. 06-10356, U.S. Bankruptcy Court for the District of Maryland.

18 11 U.S.C. §333.

19 Bankruptcy Rule 2015.1(b).

issues for the ombudsman. For instance, does the ombudsman need to notice and send copies of the motion requesting access to patient records to all former and current patients, inpatients, outpatients or all of the foregoing? The number of patients at a large health care facility could be staggering, resulting in a large expense to the estate. More importantly, however, how can an ombudsman get access to the patient, family member, and contact names and addresses, since this information is considered confidential under HIPPA and §333? If the ombudsman does gain access to such information, the ombudsman should not file a detailed certificate of service identifying all of those persons served with the notice and thus identifying patients of the health care debtor.

Thus, the ombudsman is faced with a "catch 22": The ombudsman cannot view confidential patient information until granted permission by the bankruptcy court; however, the ombudsman cannot file and serve a motion for permission to review records on all patients, as required under Bankruptcy Rule 2015.1(b), given that the patient names and addresses are considered confidential patient records under HIPPA and §333. Legal counsel for ombudsmen have obtained various forms of orders to try and correct this problem and ensure that the ombudsmen are in compliance with all legal requirements.[20] These orders generally provide that the ombudsman shall have access to all patient records without the need for written patient consent (except in certain limited circumstances). In addition, these orders generally waive the requirement that all patients, family members and other contact persons be provided with notice of the request for access to patient records. In lieu of providing such notice, the ombudsman has, for example, posted notice of the motion for access to records at the health care facility. The court has also required, under certain orders, that the ombudsman provide a specific notice to any patient whose records are to be reviewed giving the patient an opportunity to object to such review.

Should the Ombudsman Perform Clinical Procedures?

The ombudsman is appointed to monitor the quality of patient care and report to the court concerning the quality of patient care. The question becomes whether ombudsmen must intercede if they observe some medical or clinical error. Under the express language of the statute, the answer would be "no." The ombudsman is not expected to perform any clinical services at the health care facility or step in to provide clinical services if the ombudsman observes an issue in the provision of care that could be corrected on the spot. Presumably, the ombudsman would observe the situation, discuss with the health care professional and the operator of the health care facility and then include a discussion of the issue and how it was addressed in the report to the court.

Does the Ombudsman Displace the State Department of Health?

The ombudsman is appointed under the Bankruptcy Code and is not intended to displace any responsibilities of the state departments of health. The ombudsman, however, should work cooperatively with the department of health in reporting any issues, providing them with copies of the reports submitted concerning patient care. In addition, the ombudsman should have an open line of communication with the department of health and obtain any incident reports from the department of health as part of the ombudsman's investigation of the quality of patient care.

Does the Ombudsman Have Authority to Do Anything More than Observe and Report?

When beginning an assignment, the ombudsman needs to clearly understand his role. As noted above, under the express language of the applicable statute, the ombudsman is not expected to provide any on-site clinical services. Under §333(b), the ombudsman is required to "monitor the quality of patient care," "report to the court regarding the quality of patient care" and "file...a motion or a written report" if the "ombudsman determines that the quality of patient care...is declining significantly."[21] Thus, the ombudsman is an observer of the debtor's business operations rather than an active participant. At most, under §333(b)(3) the ombudsman may file a motion asking the court to take action in the event of a serious patient care issues.

How Does the Ombudsman Get Paid?

Many critics have objected to the appointment of ombudsmen in health care bankruptcy cases, arguing that the expense incurred would be significant. While the expense has not been at the levels predicted, the ombudsman must still address the issue of how to be paid in bankruptcy cases typically short on cash. This issue becomes more difficult given that an ombudsman is typically appointed after entry of a final cash-collateral order or final financing order. The debtor and committee professionals have negotiated the carve-out issues with the lender and agreed to certain amounts for themselves. But what about the ombudsman? The ability to pay an ombudsman should be addressed in these cash collateral and financing orders to ensure that the ombudsman will have a source of payment and to ensure that an ombudsman can be appointed to represent the interests of patients. While state long-term care ombudsmen have been appointed in many cases and appear to serve as ombudsmen free of charge, the state long-term care ombudsman will not accept the appointment in all cases and may not be the most appropriate appointee for certain cases. Courts, the U.S. Trustee and other parties in interest should ensure that any carve-out issues negotiated as part of the financing or cash collateral orders include the ombudsman.

The Ombudsman Is Immune from Liability—Right?

Many ombudsmen have requested that they be indemnified, released or exculpated from any potential claims from the outset of their appointment or at the conclusion of their appointment. Generally, the U.S. Trustee has opposed any request for indemnification at the beginning or end of the ombudsman's appointment, arguing that the ombudsman is protected as a result of quasi-judicial immunity—just like a trustee or examiner. There is, however, no statutory or case law support for this position. As a result, the ombudsman and his or her counsel have developed various strategies to protect the ombudsman from any potential litigation exposure. For example, ombudsmen have tried to be retained as corporations or other corporate entities in an attempt to limit any personal

[20] *See, e.g., Upland Surgical,* Case No. 06-11298, U.S. Bankruptcy Court for the Central District of California; *Atlantic Health Services,* Case No. 06-10356, U.S. Bankruptcy Court for the District of Maryland; *Beth Israel Hospital Association of Passaic d/b/a PBI Regional Medical Center,* Case No. 06-16186, U.S. Bankruptcy Court for the District of New Jersey; *New York Westchester Square Medical Center,* Case No. 06-13050, U.S. Bankruptcy Court for the Southern District of New York.

[21] 11 U.S.C. §333(b)(3).

liability and gain the protection of the corporation's directors' and officers' liability insurance. However, as noted above, the U.S. Trustee has taken the position that only an individual may serve as the ombudsman. Second, ombudsmen, like other professionals in bankruptcy cases, have requested that, as part of the order terminating the appointment of the ombudsman, the bankruptcy court enter an order containing an exculpation in favor of the ombudsman and the ombudsman's professionals protecting them from any exposure for acts taken or not taken during the ombudsman's appointment. For example, the court in *In re Upland Surgical Institute*[22] approved an exculpation clause requested by the ombudsman in his motion terminating his duties. The ombudsman requested an exculpation clause consistent with the language frequently approved in reorganization plans with respect to creditors' committees.

The U.S. Trustee objected, however, to a similar request in *In re Beth Israel Hospital.*[23] Here, the U.S. Trustee argued that the ombudsman does not meet the requirements for exculpation as set forth by the Third Circuit in *In re PWS Holding Corp.*[24] wherein the court approved a narrowly drafted exculpation clause in a chapter 11 plan, which purported to limit the liability of a creditors' committee to claims for willful misconduct and *ultra vires* acts. The Third Circuit in *PWS* found that the exculpation language for the creditors' committee reflected the correct standard for committee members as stated in §1103 of the Code. The *PWS* court also noted that any attempt to alter the liability of nondebtor parties would normally be prohibited under §524(e) of the Code. The U.S. Trustee's objection in *Beth Israel* also noted the *United Artists Theatre Co.*[25] decision as a basis for its objection to any indemnification protection for the ombudsman relying in the *PWS* decision. The U.S. Trustee argued that pursuant to §333, quasi-judicial immunity should attach to certain discretionary acts performed by the ombudsman in the performance of his or her official duties,[26] and that granting additional exculpation of ombudsmen now would only lead to confusion and inconsistency, and improperly alter the ombudsman's existing rights and immunities under federal common law. However, the U.S. Trustee did not describe what acts "*quasi*-judicial immunity" covers or what federal common law would actually provide such immunity. Without such assurances or orders of a court, the ombudsman is left without any concrete litigation protection.[27]

Conclusion

Over the past two years, the patient care ombudsmen have faced significant hurdles. As the law continues to develop, we expect to see new issues arise and we hope that the Bankruptcy Code and Bankruptcy Rules might be amended to expressly address such issues as the ability of an ombudsman to retain professionals and the significant procedural hurdles in obtaining access to patient records. ■

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22 *In re Upland Surgical Institute,* Case No. 06-11298, U.S. Bankruptcy Court for the Central District of California.

23 *In re Beth Israel Hospital Association of Passaic d/b/a PBI Regional Medical Center,* Case No. 06-16186, U.S. Bankruptcy Court District of New Jersey.

24 *In re PWS Holding Corp.,* 228 F.3d 224 (3rd Cir. 2000).

25 *In re United Artists Theatre Co. v. Walton,* 315 F.3d 217 (3rd Cir. 2003).

26 *In re Beth Israel Hospital Association of Passaic d/b/a PBI Regional Medical Center,* Case No. 06-16186, U.S. Bankruptcy Court District of New Jersey.

27 As of the date of this article, the court has not ruled on this issue.