Litigating the Appointment of a Patient Care Ombudsman

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The Code requires the court to appoint a patient care ombudsman (a "**PCO**") in every case under chapters 7, 9, and 11 where the debtor is a health care business[1] *unless* the court makes a finding that such an appointment is not necessary for the protection of patients.[2] The decision of whether to make such an appointment is significant: it can impact patient safety, administrative costs, and the likelihood of success of the case. Because of the short timeframes dictated by statute and rule, all parties must evaluate the necessity of a PCO early in the case.

The Basics. A PCO is a disinterested person responsible for "monitor[ing] the quality of patient care provided to patients of the debtor, to the extent necessary under the circumstances, including interviewing patients and physicians" and who must report on patient care quality to the court at least every sixty days.[3] The PCO constitutes another estate professional who may be entitled to retain counsel.[4]

Timing. Debtor's counsel must act swiftly if the Debtor wishes to avoid the appointment of a PCO. Any motion seeking a finding that a PCO is not necessary must be filed within 21 days after the petition date, Fed. R. Bankr. P. 2007.2(a), and an order appointing a PCO or finding that such an appointment is not necessary must be entered not later than thirty days after the petition date. 11 U.S.C. § 333(a)(1). While this isn't a true first day motion, any debtor seeking to avoid appointment of a PCO must prepare to present evidence on an expedited basis. There is no explicit provision for the court to extend the thirty-day deadline imposed upon it, although a court may be willing to enter an interim order to buy some time.

The Standard. The burden is on the debtor to demonstrate that the appointment of a PCO is unnecessary.[5] Most courts have adopted a nine-part test.[6] Under that test, the court reviews the totality of the circumstances, including (but not limited to): (1) the cause of the bankruptcy; (2) the presence and role of licensing or supervising entities; (3) the debtor's past history of patient care; (4) the ability of the patients to protect their rights; (5) the level of dependency of the patients on the facility; (6) the likelihood of tension between the interests of the patients and the debtor; (7) the potential injury to the patients if the debtor drastically reduced its level of patient

[1] "Health care business" is defined in the Code. *See* 11 U.S.C. § 101(27A).
[2] 11 U.S.C. § 333(a)(1).
[3] 11 U.S.C. § 333(b).
[4] The author has experienced one judge orally questioning whether a PCO has the right to hire counsel and have the estate pay for legal expenses. This does not appear to be a settled issue.
[5] *In re Smiley Dental Arlington, PLCC*, 503 B.R. 680, 688 (Bankr. N.D. Tex. 2013).
[6] *See In re Alternate Family Care*, 377 B.R. 754, 758 (Bankr. S.D. Fla. 2007) (first articulating the test).

care; (8) the presence and sufficiency of internal safeguards to ensure appropriate level of care; and (9) the impact of the cost of an ombudsman on the likelihood of a successful reorganization.[7]

Notably, in most of the reported cases, the court found that the appointment of a PCO was not necessary. There is a distinct lack of cases where the question was litigated and a PCO was appointed. Without knowing for certain, this is probably because debtors are not litigating the issue in close cases and simply accepting the appointment. This shortage of case law coming down on both sides of the question does impede thorough briefing of the issues.

Practice Tips. The statute creates a default: a PCO will be appointed unless the Debtor meets its burden. There is a logical institutional bias in favor of appointment: no judge wants to oversee a case in which the absence of a PCO causes harm to a patient. In the author's experience, the U.S. Trustee often supports the appointment of a PCO as a matter of policy.

Parties litigating this issue need to treat it like a trial and prepare evidence in support of their position. Declarations, witnesses, and exhibits will need to be prepared. Even if no party opposes a debtor's request for a finding that a PCO is not necessary, the court must still have evidence on which to base that finding.

The declaration and testimony supporting any motion concerning the necessity of a PCO should walk the court through each of the nine points of the *Alternate Family Care* test. Thematically, the debtor should present evidence that demonstrates that patient care is of the highest priority for the debtor and that the appointment of a PCO will not materially change patient outcomes. Opposing parties should explain why patient safety should not be left to the debtor; the fact that Congress decided that a PCO should be appointed by default supports this position.

Non-debtor parties may be handicapped by the shortness of time to prepare for an evidentiary hearing and the lack of access to the debtor's internal information. (Practically speaking, there is minimal time for discovery.) Counsel for such parties would be advised to consult with regulators and other interested parties to gather evidence that a PCO could potentially improve patient outcomes or call the debtor's arguments into question.

Each of the nine points of the *Alternate Family Care* test should be addressed with competent evidence. It is usually good practice to concede those points of the test that are not helpful for the client's position and focus in on those that are.

Cause of the Bankruptcy. Where a bankruptcy is motivated by purely economic issues that are unrelated to patient care, courts have held that a PCO is not necessary.[8] Logically, if malpractice

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[7] *Id.*

[8] *See In re Saber*, 369 B.R 631, 637 (Bankr. D. Colo. 2007) (bankruptcy was not "precipitated by concerns relating to the quality of patient care or patient privacy matters."); *In re The Total Womens Healthcare Center P.C.*, 2006 Bankr. LEXIS 3411 at *5 (Bankr. M.D. Fla. 2006) ("[m]ost of [the debtor's] obligations appear to be for taxes. The obligations do not appear to arise from deficient patient care."); *In re Alternate Family Care*, 377 B.R. 754, 759 (Bankr. S.D. Fla. 2007) (bankruptcy due to fire and loss of revenue stream and "was not related to patient care in

suits or regulatory actions related to patient care issues spurred the filing, it will be more difficult to argue that a PCO is not necessary.

Other Licensing or Supervising Entities. Many health care businesses are heavily regulated and subject to considerable oversight from governmental or private entities, including insurers. In such instances, the appointment of a PCO may be redundant.[9] Debtor's counsel should collect information on all entities providing oversight. In particular, recent inspections or audits with favorable results can be helpful evidence. On the flip side, outside entities will likely not provide as close scrutiny as a PCO would.

History of Patient Care. The debtor's track record for patient care will be influential in the court's analysis. This may be revealed by complaints, both legal and informal. Counsel should analyze those complaints (which are sometimes a matter of public record) and explain how they support the position of their client. For example, debtor's counsel might present evidence showing that most complaints involve billing issues. Counsel for opposing parties might highlight the number of malpractice claims in comparison to similarly situated health care businesses.

Patient Protection of Rights. Many health care businesses deal with patients who are not able to advocate for themselves, because they are minors or incapacitated. While such businesses often have internal procedures in place (such as patient advocates), and these procedures should be highlighted, this factor often weighs in favor of the appointment of a PCO for such businesses. Health care businesses where only adults are treated and where the patients are able to advocate for themselves will be able to argue those factors in opposing the appointment of a PCO.

Patient Dependency. Where patients are highly dependent on the debtor (such as in the nursing home or foster home contexts), the facts might support the appointment of a PCO. For many health care businesses, the fact that patients can choose different providers reduces the relevance of this factor.

Tension of Interests. Some debtors might be tempted to change their business model in a way that threatens patient outcomes; a PCO might be more appropriate in such cases. Where a health care business needs to maintain a high level of patient care in order to maintain its business through bankruptcy, it can argue that the interests of the patient and the business are aligned.

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any way"); *In re Valley Health Sys.*, 381 B.R. 756, 761 (Bankr. C.D. Cal. 2008) ("no evidence that the bankruptcy was precipitated by allegations of deficient patient care or privacy concerns").

[9] *See In re Valley Health Sys.*, 381 B.R. 756, 761-62 (Bankr. C.D. Cal. 2008) (noting that the hospital district "is subject to substantial monitoring by a variety of federal and state regulatory agencies and independent accreditation associations."); *In re Alternate Family Care*, 377 B.R. 754, 759 (Bankr. S.D. Fla. 2007) (No ombudsman needed where "adding an ombudsman . . . would be a total duplication of the efforts of the various public and private entities already playing an oversight role."); *In re N. Shore Hematology-Oncology Assocs., P.C.*, 400 B.R. 7, 12-13 (Bankr. E.D.N.Y. 2008) (noting that debtor was monitored by New York State Department of Health and that its labs were certified by the Clinical Laboratory Improvement Amendments the directives of which are carried out by the Food and Drug Administration, which performs a bi-annual audit and inspection of the labs).

Risk of Injury. For health care businesses that provide essential medical services, there is an obvious risk of injury to patients if the level of patient care is reduced.

Internal Safeguards. Many health care businesses, especially hospitals, have robust internal safeguards in place that would potentially render a PCO redundant. Counsel should dig into the existence and efficacy of these systems.

Cost. The impact of the cost of a PCO will depend on the specific circumstances of each case. Each side should be able to present evidence, perhaps from professionals who have served as PCOs in other cases, regarding the likely cost of appointment. Such costs can vary widely, from a few to many tens of thousands of dollars *per month*.

The Bottom Line. Evidence always matters, something that can be easy to forget in the bankruptcy setting. Preparation of the details supporting each party's position is key to prevailing. The most convincing story usually wins; make it your client's story!