AMERICAN BANKRUPTCY INSTITUTE
JOURNAL
Issues and Information for Today's Busy Insolvency Professional

Patient Care Ombudsman: What about Counsel?

Contributing Editor:
Samuel R. Maizel[1]
Pachulski Stang Ziehl & Jones LLP
Los Angeles
smaizel@pszjlaw.com

About the Author

Sam Maizel is a partner in Pachulski Stang Ziehl & Jones LLP's Los Angeles office.

The patient care ombudsman (PCO) has been the topic of many articles in this column since §333 of the Bankruptcy Code[2] was enacted in 2005. Although many thought when §333 was enacted that PCOs would hire counsel to assist them in the discharge of their duties, many PCOs, the majority of whom are not attorneys, have proceeded without retaining counsel. This article explores whether that practice is permissible and, assuming it is not, whether PCOs have the authority under the Code to retain counsel.


Samuel R. Maizel

To analyze whether PCOs must or should have counsel requires review of the two roles of a PCO under the Bankruptcy Code. First, because §333 requires that the PCO report on the quality of patient care, the PCO must serve as a monitor of the patient care that the health care debtor delivers (the "monitor role"). Second, because §333 requires that the PCO "represent the interests of the patients of the health care business," the PCO must serve as an advocate for the patients of the health care debtor (the "advocate role"). These two distinct roles must be kept in mind when evaluating whether a PCO must retain counsel.

Can the PCO Appear Pro Se?

Many nonattorney PCOs have appeared in bankruptcy cases without retaining counsel.[3] However, a recent decision of the Bankruptcy Appellate Panel for the United States Court of Appeals for the Tenth Circuit (BAP) raises an interesting issue concerning whether PCOs *must* retain counsel to represent them in a bankruptcy case. In *In re Shattuck,*[4] a nonattorney state court receiver filed a motion to dismiss a chapter 13 bankruptcy case. The receiver filed the motion on his own, without the assistance of counsel. The debtors moved to strike the receiver's motion, arguing that the receiver was not eligible to file pleadings because under the local rules, "[o]nly *pro se* individual parties and members of this court's bar may appear or sign pleadings, motions or other papers."[5] The receiver argued that the state court appointed him as a receiver in his individual capacity for the limited liability corporation (LLC) debtor, and therefore he was allowed to proceed *pro se*. The receiver also argued that he did not have funds to hire an attorney, and alternatively, if required to retain counsel, that he be given 30 days to obtain counsel.

At the hearing on the motion to dismiss, counsel for the debtors argued that the motion to dismiss was not properly filed before the court because the receiver, as a nonattorney representative of the receivership estate, lacked authority to file the motion or any other documents, or to elicit and present evidence in support of the motion. The bankruptcy court overruled the debtors' motion to strike and granted the receiver's motion to dismiss, holding that it had the discretion to allow nonlawyers to file pleadings and appear in court on behalf of entities.

On appeal the BAP reversed, relying on 28 U.S.C. §1654, which provides that "[i]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, [they] are permitted to manage and conduct causes therein." The BAP remarked that it was "...well settled that a lay person could not represent the rights or interests of anyone else."[6] Thus, the BAP noted that the statute does not permit artificial entities, which would include an LLC, to prosecute or defend actions in federal court other than through an attorney.

With regard to the receiver's assertion that he was appearing as an individual, the BAP noted that as an individual he had no personal claims being asserted against the debtors through the motion, nor was he "exclusively advocating his own personal rights and interests."[7] The receiver was, therefore, appearing only in a representative capacity for the receivership estate of the LLC, and because he was not licensed to practice law, he could not do so.

In re Shattuck does not resolve the question as to whether a PCO, who

Intensive Care

1 The author wishes to thank James Stang, Gillian Brown and Teddy Kapur for their valuable assistance in the preparation of this article.

2 Section 333 provides, among other things, that "[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 to monitor the quality of patient care and to represent the interests of the patients of the health care business...."

3 For example, the PCOs appearing in the U.S. Bankruptcy Court for the Central District of California in the *In re Pacifica of the Valley Corp.*, chapter 11 case no. 09-bk-11678-MT, and *In re Karykeion Inc.*, chapter 11 case no. 08-bk-17254-MT, cases regularly file documents and appear at hearings without counsel.

4 411 B.R. 378 (B.A.P. 10th Cir. 2009).

5 *Id.* at 380, citing D.C. Colo. L. R. 11.1(A) (2008). Other courts have similar rules. *See, e.g.,* C.D. Cal. L.R. 83-2.10.1 (2009) ("A corporation...may not appear in any action or proceeding *pro se.*"); C.D. Cal. L.R. 83-2.10.2 (2009) ("Any person representing himself or herself without an attorney must appear *pro se* for such purpose. That representation may not be delegated to any other person....").

6 411 B.R. at 383.

7 *Id.*

is clearly not appearing in the case to assert any of his or her own claims or rights, can appear and file reports without counsel. Because there are many different circumstances involving a PCO in a bankruptcy case, there may be different answers to this question depending on the facts of the case.

Let us dispose of the easy scenarios first. Section 333 allows the U.S. Trustee to appoint a "disinterested person" to serve as the PCO.[8] Because "person" is defined in the Code as including partnerships and corporations,[9] it seems clear that the U.S. Trustee can appoint a corporation as a PCO. Because an artificial entity, including a corporation, cannot appear *pro se* even if representing its own interests,[10] a corporation serving as PCO must retain counsel to file its reports and otherwise allow it to appear in the bankruptcy case in which it is appointed.

Suppose, however, as is more often the case, the U.S. Trustee appoints an individual to serve as the PCO. Can the individual PCO participate in the case by filing reports and appearing at hearings in the monitor role? In the advocate role?

When PCOs appear in the advocate role, in which they are representing the interests of the patients of the health care business debtor, it seems clear that the PCO must be represented by counsel. The BAP in *In re Shattuck* held that unless the receiver had a personal claim or was exclusively advocating his own personal rights and interests, it was irrelevant whether he was appointed in his personal capacity. Because the receiver was "acting in a representative capacity on behalf of the receivership estate of the LLC and, by extension, on behalf of the creditors of that estate," the LLC, an artificial entity, was appearing without counsel.[11] In a bankruptcy case, one cannot argue that the PCO is appearing on behalf of the health care business debtor, so the argument that the PCO is appearing on behalf of the bankruptcy estate—or, by extension, its creditors—is simply not analogous. However, PCOs clearly are appearing on behalf of the patients of the health care business debtor, and in that capacity they are not advocating either their personal claims nor any personal rights or interests. Rather, the PCOs are representing the patients of the health care business, and therefore almost certainly are barred from appearing *pro se* in that capacity because §1654 requires that the party appearing *pro se* must be the "actual beneficial owner of the claims being asserted" and must be "conducting his 'own case personally'" to invoke the right to appear *pro se*. Unless the PCO is also a patient of the health care business, it is hard to imagine how the PCO can satisfy these requirements.

However, when PCOs are serving in the monitoring role, whether the PCOs must retain counsel to file reports and otherwise participate in the case is less clear. The act of reviewing the quality of patient care and reporting to the bankruptcy court is, arguably, not representing the patients, but is merely reporting in a neutral way on the quality of patient care. In some respects, PCOs in the monitor role are analogous to court-appointed expert witnesses under Rule 706 of the Federal Rules of Evidence, and many of those parties proceed without counsel.[12] "One of the principal reasons for the court to appoint an expert witness [under Rule 706] is to obtain impartial testimony to aid the court...in resolving a scientific issue."[13] As long as the PCO merely reports on the quality of patient care, like an expert witness for the bankruptcy court providing impartial testimony to aid the bankruptcy court in resolving patient care issues without advocating a legal course of action and thereby representing the rights of the patients, it seems that a PCO proceeding without counsel may not run afoul of §1654.

Can the PCO Retain Counsel?

Unfortunately, when Congress created the role of PCO in 2005, it did not explain whether it intended PCOs to retain counsel (or other professionals) to assist the PCOs in the performance of their duties. The ability of the debtor, trustee and the creditors' committee to retain counsel is clearly set forth in the Bankruptcy Code.[14] Section 333 contains no comparable language authorizing PCOs to retain counsel. Although Congress did amend §330 to authorize the bankruptcy court to "award to...an ombudsman appointed under section 333...reimbursement for actual, necessary expenses,"[15] courts have generally rejected the notion that payments to a professional can be authorized as an "expense" if not otherwise permissible, and at least one bankruptcy court opinion discussing it in the context of a PCO seeking to retain counsel expressly rejected that a PCO could rely on §330 to authorize employment of an attorney.[16]

However, an analogy can be drawn to cases involving the appointment of an examiner. Pursuant to §105 of the Code, bankruptcy courts have routinely authorized examiners to employ professionals notwithstanding the absence of express authorization in the Code for such employment.[17] The duties of a PCO are analogous to the duties of an examiner. An examiner is generally appointed, among other things, to "investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business...[and] as soon as practicable...file a statement of any investigation...and...transmit a copy or a summary of such statement to any creditors' committee....and to such other entity as the court designates...."[18] The duties of a PCO in the monitor role could be described similarly: The PCO's duties clearly include investigating the acts, conduct, assets, liabilities and financial condition of the debtor as those areas affect patient care and to regularly file a statement (called a report for the PCO) of their investigation and to transmit the report to the court and interested parties. Thus, although the duties of a PCO are more narrow than the duties of an examiner, they are analogous. Therefore, the right to retain counsel could also be supposed.

One powerful argument against this analogy is that there is a longstanding rule that examiners are allowed to retain counsel, but Congress failed to deal with the issue in 2005 with regard to PCOs. It is a well-established principle of statutory construction that courts should "...not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure."[19] Thus, because the practice of allowing examiners to retain counsel is longstanding in bankruptcy practice,

8 11 U.S.C. §333(a)(2)(A).

9 11 U.S.C. §101(41).

10 *See, e.g.,* 411 B.R. 384, n. 32 (citing *United States v. Hagerman,* 545 F.3d 579, 581 (7th Cir. 2008); *Harrison v. Wahatoyas LLC,* 253 F.3d 552 (10th Cir. 2001)).

11 411 B.R. at 383-84

12 *See, e.g., G.K. Vegas LP v. Simon Property Group Inc.,* 2009 U.S. Dist. LEXIS 111034 (D. Nev. Nov. 30, 2009) (FTI served as expert witness appointed under Rule 706 without counsel).

13 *G.K. Las Vegas Ltd. Partnership v. Simon Property Group,* 2009 WL 4283086, 22 (D. Nev. Nov. 30, 2009).

14 *See* 11 U.S.C. §327 (trustee may employ attorneys); §1107(a) (DIP has rights of trustee); §1103(a) (committee may employee attorneys).

15 11 U.S.C. §330(a)(1)(A).

16 *In re Renaissance Hospital - Grand Prairie Inc.,* 2008 WL 5746904, *3 (Bankr. N.D. Tex. Dec. 31, 2008). However, other courts have relied on §330 as support for the retention of a professional, although it seems clear that §330 only governs the compensation of professionals and provides no support for their retention. *See, e.g.,* Application for Order Pursuant to Section 330(a) of the Bankruptcy Code Authorizing the Employment of Saul Ewing LLP as Counsel for the Patient Care Ombudsman, filed in In re Atlantic Health Services Inc., Chapter 11 Case No. 06-10356 (PM) (Bankr. D. Md.). The court granted the employment application. Still other courts have referenced §330 without directly deciding the issue. *See, e.g., In re Haven Eldercare LLC,* 382 B.R. 180, 183 (Bankr. D. Conn. 2008) ("Code seems to contemplate that in the first instance the compensation of such entities [as counsel to the PCO] should be the responsibility of [the PCO] who may then seek to have such expenses reimbursed under section 330(a)(1)(B).").

17 *See, e.g., In re Southmark Corp.,* 113 B.R. 280, 283 (Bankr. N.D. Tex. 1990) (allowing examiner to retain professionals where appropriate to carry out substantive provisions of Code); *In re Tighe Mercantile Inc.,* 62 B.R. 995, 1000 (Bankr. S.D. Cal. 1986) ("This Court holds that in appropriate circumstances, a bankruptcy court may rely on §105(a) to authorize examiners to employ professional persons.").

18 11 U.S.C. §1106(b) (incorporating 11 U.S.C. §1106(a)(3), (4)).

19 *Cohen v. de la Cruz,* 523 U.S. 213, 221, 118 S.Ct. 1212, 140 L.Ed.2d 341 (1998).

bankruptcy courts could legitimately say that there was no "clear indication" that Congress intended to change that practice. Perhaps Congress thought that the analogy between examiners and PCOs would be so clear that the rules for examiners would clearly apply to PCOs.

At least the bankruptcy court, in *In re Synergy Hematology-Oncology Medical Associates Inc.*[20] found this analogy persuasive, and relied on cases permitting examiners to retain counsel as providing support for PCOs retaining counsel, However, the bankruptcy court in *In re Renaissance Hospital - Grand Prairie Inc.*[21] found that an examiner "presents a very different case than does" a PCO, and expressly rejected that the cases allowing an examiner to retain counsel under §105 of the Code allowed a PCO to do the same.[22] Nonetheless, the *Renaissance Hospital - Grand Prairie Inc.* court permitted the PCO to retain counsel under §105 of the Bankruptcy Code, holding that such employment was "necessary and appropriate to carry out the provisions of the Code."[23]

The application of well-established principles of statutory construction suggest that Congress's failure to expressly authorize a PCO to employ counsel may be counted against a PCO's effort to retain counsel. The Supreme Court has expressly rejected arguments seeking to read absent words into statutes, saying that such arguments "would result 'not [in] a construction of [the] statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope.'"[24] That the results of such an interpretation may be viewed as being harsh on PCOs is basically irrelevant, according to the Supreme Court.[25]

Practical Results

Despite the legal issues revolving around the ability of a PCO to retain counsel, in practice many PCOs appear in cases without counsel and do so without discussion. In some cases, this is because the U.S. Trustee discourages PCOs from retaining counsel to keep administrative expenses down, or the bankruptcy court limits either the ability to retain counsel or limits the role of counsel, also usually to reduce administrative expenses.[26] In other cases, it may be because the PCO genuinely believes that the scope of his or her duties will not require the assistance of counsel. In the author's opinion, PCOs acting without counsel frequently ignore the applicable requirements of the Bankruptcy Code, Federal Rules of Bankruptcy Procedure and/or the applicable local rules of court.

Conclusion

Bankruptcy courts have not yet explored whether PCOs may appear without counsel, and if so, in what circumstances. It is clear, however, that in some contexts, including when corporations are appointed as PCOs, or when PCOs choose to appear to "represent the interests of the patients" in the advocate role, PCOs will have to retain counsel to fulfill their statutory duties. In those cases, the absence of statutory authority for a PCO to retain counsel may be troublesome. While this matter has not been litigated in the four years since the PCO role was created, the recent decisions of the BAP in *In re Shattuck* and the bankruptcy courts in *In re Renaissance Hospital - Grand Prairie Inc.* and *In re Synergy Hematology-Oncology Medical Associates* may move this topic to the front burner for the U.S. Trustee, bankruptcy courts and PCOs. ■

Reprinted with permission from the ABI Journal, Vol. XXIX, No. 1, February 2010.

20 Chapter 11 Case No. 08-bk-29315-SB, Opinion Authorizing Patient Care Ombudsman to Hire Legal Counsel (Bankr. C.D. Calif., entered on docket Jan. 4, 2010).

21 *See* 2008 WL 5746904, *3 (Bankr. N.D. Tex. Dec. 31, 2008). Among other things, the bankruptcy court found that the fiduciary obligations of the examiner were to the estate, while the PCO's obligations were to the patients of the debtor.

22 *Id.* at *3-4.

23 2008 WL 5746904 at *4 (quoting 11 U.S.C. §105).

24 *Lamie v. United States Trustee,* 540 U.S. 526, 538, 124 U.S. 1023, 157 L. Ed. 2d 1024 (2004) (quoting *Iselin v. United States,* 270 U.S. 245, 251, 46 S. Ct. 248, 70 L.Ed. 566 (1926)).

25 *Id.*