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

Intensive Care

By Suzanne Koenig and Nancy A. Peterman

PCOs and the Ongoing Debate over Cost: 10 Years Later

Suzanne Koenig
SAK Management Services LLC
Northfield, Ill.

Nancy A. Peterman
Greenberg Traurig, LLP
Chicago

In 2005, the Bankruptcy Code was amended to include the "health care bankruptcy provisions," which included a requirement that a patient care ombudsman (PCO) be appointed in all chapter 7, 9 or 11 cases filed by a health care business[1] "unless the court finds that the [PCO] appointment ... is not necessary for the protection of patients under the specific facts of the case."[2] In most health care business cases (even when there is opposition), a PCO is appointed. However, there continues to be significant opposition to the appointment of PCOs due to one of the main criticisms of the bankruptcy process today: cost.

Chapter 11 offers significant benefits to any small or large business attempting to reorganize — whether through a going-concern sale, a right-sizing of the balance sheet or a combination of both. However, for a small business, the cost of chapter 11 might be a deterrent to seeking such relief. In a health care bankruptcy case, in addition to the cost of debtor's professionals, committee's professionals, lender's professionals and other chapter 11-related costs, these businesses must also cover the cost of the PCO and the PCO's professionals. While that latter cost is typically a fraction of all other professionals in the case, this concern can often be addressed through careful management of the appointment process and cooperation with the PCO.

As many debtors are beginning to understand, the PCO can be a valuable ally in the bankruptcy case in helping with a sale process, helping address regulatory issues with governmental agencies or otherwise assisting on key case issues impacting patient care. For example, a PCO may take a position on plan negotiations,[3] contract terminations (such as service contracts for an emergency room),[4] funding needs[5] or a sale process, all of which impact patient care. The PCO's voice can be very powerful in representing the patient's interests and helping with the debtor's reorganization, when those interests are aligned.

This article highlights some practices developed over the past 10 years to streamline the appointment process for a PCO and help eliminate the perception that the PCO cost will be a concern — primarily by reducing the legal costs otherwise incurred by a PCO. Ultimately, in a health care bankruptcy case, it is highly likely that a PCO will be appointed. Therefore, instead of opposing that appointment or the PCO's efforts to do his/her job, which will also be a cost to the estate, implement some of these ideas to streamline the PCO appointment process, and cooperate with and view the PCO as your ally. As a health care business, both the debtor and PCO have the same thing in mind: the patient's interests.

The Appointment Order and Notice

With certain exceptions, a PCO must be appointed in any health care business bankruptcy case within 30 days after commencement of the case.[6] The court will typically enter an order requiring the appointment of a PCO (the "appointment order"), whether *sua sponte*, as a result of a motion by the Office of the U.S. Trustee or as a result of a debtor's motion to excuse a PCO's appointment. Once the appointment order is entered, the U.S. Trustee will

1 "Health care business" is defined in 11 U.S.C. § 101(27A).
2 11 U.S.C. § 333(a)(1).
3 *In re El Paso Children's Hosp. Corp.*, Case No. 15-30784 (Bankr. W.D. Tex., El Paso Division), Docket No. 383 (Patient Care Ombudsman's Statement Relating to (A) El Paso County Hospital District d/b/a University Medical Center of El Paso's Emergency Motion to Terminate Exclusivity Period Pursuant to 11 U.S.C. § 1121(d) and (B) the Debtor's Response Thereto).
4 *Christ Hosp. v. Emergency Med. Assocs. of N.J. PA (In re Christ Hosp.)*, Adv. Pro. No. 12-1542 (MS), Case No. 12-12906 (MS) (Bankr. D.N.J.), Docket No. 10 (Statement of Suzanne Koenig as PCO in Support of the Debtor's Verified Complaint Seeking Continuation of Emergency Medical Services by Emergency Medical Associates of New Jersey PA).
5 *In re Brotman Med. Ctr. Inc.*, Case No. LA 07-19705 (BB) (Bankr. C.D. Cal., Los Angeles Division), Docket No. 463 (Response of PCO to Emergency Motion to Compel Debtor-in-Possession Funding and for Immediate Authority to Use Cash Collateral).
6 11 U.S.C. § 333(a)(1).

file a notice identifying the individual appointed as the PCO (the "appointment notice").

Both the appointment order and notice represent key opportunities to save costs associated with the PCO. First, in order to do his/her job, the PCO must have access to patient records. Under the Bankruptcy Code, the PCO can only access patient records if the bankruptcy court approves such review in advance and imposes restrictions to ensure the confidentiality of those records.[7] Under the Bankruptcy Rules, a motion to access patient records must be served on the patient, family member or other contact person (all of the information is confidential), and a hearing on such motion cannot occur any earlier than 14 days after service of the motion.[8] Therefore, once the PCO is appointed, the PCO has to file a motion to obtain access to patient records, provide at least 14 days' notice of such motion and provide extensive notice of such motion.

The PCO will also necessarily require the assistance of an attorney to draft that motion and present the motion to the court, which can sometimes be costly. Over the years, working with several U.S. Trustee offices and various attorneys representing debtors, we have been able to streamline this process and obtain, in the appointment order or notice,[9] the necessary language to grant the PCO immediate access to patient records (with the necessary confidentiality restrictions).[10] Not only does this save the cost of a motion and court hearing, but it also allows the PCO to immediately begin work upon appointment.

In addition, the PCO is required to provide written or oral reports to the bankruptcy court every 60 days as to patient care issues. The Bankruptcy Rules require the PCO to provide at least 14 days' notice that a report will be made (the report notice), unless the court orders otherwise.[11] The report notice must be posted conspicuously at the health care business and served on the debtor, U.S. Trustee, any committee and all patients.[12]

Depending on the type of health care business, service on patients might be costly or practically impossible. If the health care business is a hospital, the patients are changing every day and the volume can be significant. The appointment order and notice represent another opportunity to address this issue because this notice process can be altered to make it clear that the PCO simply needs to file the report notice and post it at the health care facility.[13] Absent addressing this issue in the appointment order or notice, the PCO will have to file a motion asking the court to alter the process of providing the report notice if the list of patients is lengthy or changes every day. Again, the PCO likely would have to hire counsel to draft this motion and attend the court hearing on the PCO's behalf.

The Early Orders

In many chapter 11 cases, two key orders are entered at the beginning of the case: (1) an order authorizing use of cash collateral and/or authorizing debtor-in-possession financing (the "cash collateral/DIP financing order"); and (2) an order establishing monthly procedures for the payment of professionals (the "monthly fee procedures order"). In health care bankruptcy cases, these orders often do not address the PCO, who is typically appointed after these orders have become final orders, or the PCO's professionals.

Why is this important? Just like any professional in the case, the PCO and the PCO's professionals need to be paid. The cash collateral/DIP financing order will likely contain a carve-out for professionals, which should cover the PCO and the PCO's professionals. The monthly fee procedures order will typically provide a monthly process to pay the debtor's and committee's professionals and should include, within that monthly process, the PCO and the PCO's professionals.

In the early stages of the case, the debtor, the U.S. Trustee or the court needs to protect the yet-to-be-appointed PCO to ensure that the PCO and the PCO's professionals can be paid and are treated in substantially the same way as any other professionals in the bankruptcy case. Absent this occurring, the PCO will incur the time and expense (likely with assistance of counsel) to address these issues through motion practice or negotiation after the PCO's appointment. This is yet another cost of the process that can be easily addressed and avoided early in the case.

In addition, recently, in two cases, the PCO's fee-application process was streamlined to yet again save cost: the cost of preparing fee applications and attending hearings every three months. Generally, the cost of the PCO and the PCO's professionals is negligible in comparison to the cost of debtor's professionals and committee's professionals. In one case, the PCOs were excused from filing any fee applications.[14] Instead, the PCOs circulated their invoices monthly to the debtor, com-

Suzanne Koenig is president and founder of SAK Management Services LLC in Northfield, Ill., and has been appointed as a PCO in several bankruptcy cases. Nancy Peterman is chair of Greenberg Traurig, LLP's Business Reorganization and Financial Restructuring Practice in Chicago. She is also an ABI Director and a former co-chair of ABI's Health Care Committee, and co-authored the ABI Health Care Insolvency Manual.

7 11 U.S.C. § 333(c).

8 Fed. R. Bankr. P. 2015.1(b).

9 Ideally, these provisions would be included in the appointment order so that there is a court order that can be enforced and relied upon. However, in certain cases, a PCO may be contacted after the appointment order is entered, and therefore, unless the U.S. Trustee or debtor's counsel is willing to incur the cost of modifying the original appointment order, these provisions may be included in the appointment notice. While the appointment notice does not have the force of a court order, it is noticed to all parties-in-interest and can certainly be relief if this procedure is acceptable to the U.S. Trustee and other major parties in the case. If such provisions are in the appointment notice, the PCO can highlight such provisions to the court in each report and obtain the written consent of patients to access records, if possible.

10 *See, e.g., In re El Paso Children's Hosp. Corp.*, Case No. 15-30784 (Bankr. W.D. Tex., El Paso Division), Docket No. 79 (Appointment Order); *In re ICL Holding Co., et al.*, Case No. 12-13319-KG (Bankr. D. Del.), Docket No. 515 (Second Amended Appointment Order); *In re Arnold W. Klein, MD*, Case No. 02:11-bk-13868-RN (Bankr. C.D. Cal., Los Angeles Division), Docket No. 114 (Appointment Order); *In re Meridian Behavioral Health LLC, et al.*, Case No. 11-10860 (SHL) (Bankr. S.D.N.Y.), Docket No. 20 (Appointment Order); *In re Johnny Kumar Jain, MD*, Case No. 02:10-bk-24550-ER (Bankr. C.D. Cal., Los Angeles Division), Docket No. 88 (Appointment Order); *In re Brotman Med. Ctr. Inc.*, Case No. 02:07-bk-19705-BB (Bankr. C.D. Cal., Los Angeles Division), Docket No. 190, 218 (Appointment Order and Appointment Notice).

11 Fed. R. Bankr. P. 2015.1(a).

12 *In re El Paso Children's Hosp. Corp.*, Case No. 15-30784 (Bankr. W.D. Tex., El Paso Division), Docket No. 79 (Appointment Order); *In re ICL Holding Co., et al.*, Case No. 12-13319-KG (Bankr. D. Del.), Docket No. 515 (Second Amended Appointment Order); *In re Meridian Behavioral Health LLC, et al.*, Case No. 11-10860 (SHL) (Bankr. S.D.N.Y.), Docket No. 20 (Appointment Order).

13 *See supra*, n.9.

mittee and U.S. Trustee, and were paid within a short time thereafter unless objections were raised. In another case, the PCO and her professionals were allowed to circulate their invoices monthly to a short list of key parties-in-interest, and absent objection, the debtor was allowed to pay 80 percent of the fees and 100 percent of the expenses.[15] The PCO and her professionals were excused from filing interim fee applications and were only required to file final fee applications to obtain the 20 percent holdback on fees. Again, this helps control cost.

PCO's Retention of Legal Counsel

For various reasons, a PCO may wish to retain legal counsel, which may review reports for confidentiality concerns, consult concerning possible patient care issues, file reports or represent the PCO in court on matters impacting patient care. The PCO's efforts to retain counsel are often met with significant resistance, at a significant cost to the estate. Rather than fight the PCO's request to hire legal counsel and incur the associated costs, a debtor, U.S. Trustee or committee might consider imposing a budget on counsel and/or limiting the scope of any services. By carefully negotiating a budget and limiting the scope of services, costs can be controlled.

As an alternative, there have been suggestions that a PCO forgo counsel. Instead, the PCO has been asked to rely on debtor's counsel to file and serve reports and rely on state regulatory agencies to represent the interests of the PCO if there are patient care issues. While these are creative ideas, the PCO is supposed to be an independent, disinterested party in the bankruptcy case representing the interests of patients. The PCO's interests may or may not be aligned with the debtor or the state regulatory agencies. Therefore, to eliminate any issues, the PCO should be allowed to retain counsel on a limited basis with appropriate cost-control procedures in place.

Termination of the PCO's Appointment

Neither the Bankruptcy Code nor Bankruptcy Rules addresses when or how the PCO's appointment is to be terminated. Logically, the PCO's appointment should be terminated, for example, upon completion of a sale (if all operations are sold to a third party, all patient records are properly accounted for and all patients are transferred), upon confirmation of a reorganization plan, upon case dismissal and possibly upon conversion to chapter 7 (assuming that patients have been transferred and records properly stored or destroyed). If a motion to sell, dismiss or convert is being filed, the PCO's appointment could be terminated as part of any order granting such motion. If a reorganization plan is proposed, the PCO's appointment could be terminated as part of the plan. Absent addressing the termination of the PCO's appointment in this manner, the PCO will have to file a motion to authorize his/her termination, at an additional cost to the estate.[16]

Conclusion

Patients and quality of care are critical to any health care business. Without sufficient patients, a health care business's cash flow will suffer. Without adequate patient care, a health care business's license to operate might be in jeopardy, or its Medicare or Medicaid provider numbers might also be in jeopardy. The PCO plays a critical role in any health care business bankruptcy case by ensuring that the quality of patient care is maintained during the bankruptcy case and that the interests of patients are represented. This is important for the patients and for all constituents, who are counting on ongoing cash flow from the business. The PCO can be an effective advocate for the patients and the debtor, and the cost of the PCO and the PCO's professionals should not negatively impact any bankruptcy case. These costs can certainly be controlled through a carefully planned appointment process and good working relationship between the PCO and all constituents in the case. abi

Reprinted with permission from the ABI Journal, Vol. XXXV, No. 1, January 2016.

14 *In re Sears Methodist Ret. Sys. Inc., et al.*, Case No. 14-32821-11 (Jointly Administered) (Bankr. N.D. Tex., Dallas Division).

15 *In re El Paso Children's Hosp. Corp.*, Case No. 15-30784 (Bankr. W.D. Tex., El Paso Division), Docket No. 170.

16 A PCO and the PCO's professionals will typically receive exculpation and certain protections from further discovery upon termination of the PCO's appointment. Again, these provisions can be built into any sale order, dismissal order, conversion order and, perhaps more easily, a reorganization plan.