



## **THE OMBUDSMAN COMETH**

### **Health Care Law Aspects of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005**

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## **I. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005**

### **A. In General.**

On April 20, 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "Act") was enacted and became law. The consumer bankruptcy aspects of the Act have been widely publicized in the media and elsewhere. Less attention has been paid to the business bankruptcy aspects of the Act, including a number of provisions that specifically apply when the debtor is a "health care business" or that otherwise may impact health care related bankruptcy cases.

### **B. Effective Date and Application of Amendments.**

Section 1501(a) of the Act provides that the Act and the amendments made by the Act are generally effective 180 days after the April 20, 2005 date of enactment—that is, on October 17, 2005.

In addition, § 1501(b) of the Act provides that the amendments made by the Act generally do not apply to cases filed before the October 17, 2005 effective date of the Act.

Thus, unless otherwise noted, the new provisions discussed in these materials apply only in cases filed on or after October 17, 2005.

## **II. New Definitions**

### **A. Healthcare Business.**

A "health care business" is defined broadly to mean "any public or private entity (without regard to whether that entity is organized for profit or not for profit) that is primarily engaged in offering to the general public facilities and services for -- (i) the diagnosis or treatment of injury, deformity, or disease; and (ii) surgical, drug treatment, psychiatric or obstetric care."

The definition goes on to state expressly that a "health care business" includes any (a) general or specialized hospital, (b) ancillary ambulatory, emergency or surgical treatment facility, (c) hospice, (d) home health agency, and (e) other "health care institution" that is similar to any of the foregoing.

The definition also expressly states that a "health care business" includes skilled nursing facilities, intermediate care facilities, assisted living facilities, homes for the aged, domiciliary care facilities, and any other long-term care facility as well as any "health care institution" related to such long-term care facilities that "is primarily engaged in offering room, board, laundry, or personal assistance with activities of daily living and

incidentals to activities to activities of daily living." (Act § 1101(a), new 11 U.S.C. § 101(27A))

**B. Patient.**

A "patient" is defined to mean "any individual who obtains or receives services from a healthcare business." (Act § 1101(b), new 11 U.S.C. § 101(40A))

**C. Patient Records.**

"Patient records" are defined to mean "any written document relating to a patient or a record recorded in a magnetic, optical, or other form of electronic medium." (Act § 1101(b), new 11 U.S.C. § 101(40B))

**III. The Patient Care Ombudsman**

**A. Appointment Required.**

The Act adds a new § 333 of the Bankruptcy Code that requires the court to order the appointment of a patient care ombudsman not later than 30 days after commencement of a Chapter 7, 9 or 11 case if the debtor is a "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."

If an appointment is ordered, the United States Trustee must appoint one disinterested person to serve as the patient care ombudsman.

If the debtor is a health care business that provides long term care, the United States Trustee is permitted to appoint the State Long-Term Care Ombudsman appointed under the Older Americans Act of 1965 (42 U.S.C. § 3001, *et seq.*) for the state in which the bankruptcy case is pending.<sup>1</sup> In the event the United States Trustee does not appoint the State Long-Term Care Ombudsman in that instance, the court is required to notify the State Long-Term Care Ombudsman of the name and address of the person appointed as patient care ombudsman. (Act § 1104(a), new 11 U.S.C. §§ 333(a))<sup>2</sup>

**B. Duties of the Ombudsman.**

**1. Monitor and Report:** The duty of the patient care ombudsman is to (a) "monitor the quality of patient care provided to patients of the debtor, to the extent necessary under the circumstances," and (b) report thereon to the court in writing, or at a

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<sup>1</sup> The Office of the State Long-Term Care Ombudsman is established under 42 U.S.C. § 3058g. The functions of a State Long-Term Care Ombudsman specified in § 3058g(a)(3) extend well beyond monitoring and reporting on the quality of patient care.

<sup>2</sup> The text of Act § 1104(a) and new § 333 of the Bankruptcy Code is attached at the end of these materials.

hearing, on not less than 60-day intervals after notice to the parties in interest. The patient care ombudsman is expressly permitted to interview "patients and physicians." (Act § 1104(a), new 11 U.S.C. §§ 333(b)(1), (b)(2))

**2. Immediate Reports/Motions in Emergency Circumstances:** In the event the patient care ombudsman determines that "the quality of patient care provided to the patients of the debtor is declining significantly or is otherwise being materially compromised," the patient care ombudsman is authorized to "file with the court a motion or a written report, with notice to the parties in interest immediately upon making such determination." The statute does not specify or limit the type of motion that a patient care ombudsman might file under such circumstances. (Act § 1104(a), new 11 U.S.C. § 333(b)(3))

**3. Access to and Confidentiality of Patient Information and Records:** The patient care ombudsman is required to maintain as confidential information any information obtained that relates to patients or patient records, and will not be permitted to review confidential patient records without advance court approval that imposes restrictions to protect confidentiality of those records. A State Long-Term Care Ombudsman will be entitled to access to patient records consistent with the Older American Act of 1965 and non-Federal laws governing the State Long-Term Care Ombudsman program. (Act § 1104(a), new 11 U.S.C. § 333(c))

**C. Compensation**

By reason of an amendment to § 330(a)(1) of the Bankruptcy Code, a patient care ombudsman is entitled to reasonable compensation for actual, necessary services rendered and to reimbursement for actual, necessary expenses, all of which is allowable as an administrative expense priority claim. (Act § 1104(b), new 11 U.S.C. § 330(a)(1))

**IV. Disposal of Patient Records**

**A. Orderly Disposal and Notice Mandated**

The Act adds new § 351 of the Bankruptcy Code that dictates a notice and disposal procedure for patient records in Chapter 7, 9 and 11 cases filed by a health care business if the estate lacks the funds "to pay for storage of patient records in a manner required under applicable Federal or State law."

Under new § 351, the trustee or debtor-in-possession is required to retain patient records for at least 365 days after publication of a notice that the records will be destroyed if not claimed by the patient or an insurance provider. In addition, during the first six months of that period, the trustee or debtor in possession must attempt to directly notify each patient and the patient's insurance carrier by mail.

Upon expiration of the 365-day notice period, the trustee or debtor-in-possession must then by certified mail request permission from "each appropriate Federal agency" to deposit the patient records with that agency. Only if the Federal agency does not grant the request may the trustee or debtor-in-possession proceed with destruction of patient records.

Destruction of patient records is required to be by (a) shredding or burning if the records are written, or (b) otherwise destroying the records so that the records cannot be retrieved if they are magnetic, optical or other electronic records. (Act § 1102, new 11 U.S.C. § 351)<sup>3</sup>

## **B. Payment of Disposal Costs.**

The Act does not specify how a Chapter 7 trustee or a Chapter 11 debtor-in-possession is to pay for the costs associated with compliance with new § 351 of the Bankruptcy Code in the event funds are not available to pay disposal costs as an administrative expense priority claim.

The legislative history, however, suggests that Congress believes such costs will be surcharged against a secured creditor's collateral in such circumstances. The House Report that accompanied the Act states that, "It is anticipated that if the estate of the debtor lacks the funds to pay for the costs and expenses related to [the disposal of patient records], the trustee may recover such costs and expenses under section 506(c) of the Bankruptcy Code." H.R. Rep. No. 109-31, pt. 1, at 139 (2005).

## **V. Duty to Transfer Patients**

The Act amends § 704 of the Bankruptcy Code to require that a Chapter 7 trustee "use all reasonable and best efforts to transfer patients from a health care business that is in the process of being closed to an appropriate health care business." The transfer is required to be to a facility that (a) is in the vicinity, (b) provides substantially similar services, and (c) maintains a reasonable quality of care. (Act § 1105, new 11 U.S.C. § 704(a)(12))

A conforming amendment to § 1106(a)(1) of the Bankruptcy Code imposes these new § 704(a)(12) duties on Chapter 11 debtors-in-possession.

## **VI. Cost of Closing a Health Care Business**

The Act adds a new § 503(b)(8) of the Bankruptcy Code that provides for administrative expense priority claim treatment for the actual, necessary costs and expenses of closing a health care business incurred by a trustee, a Federal agency or a department or agency of a State or political subdivision. Such administrative expense

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<sup>3</sup> The text of Act § 1102(a) and new § 351 of the Bankruptcy Code is attached at the end of these materials.

priority costs are expressly defined to include any cost or expense incurred (a) to dispose of patient records in accordance with new § 351 of the Bankruptcy Code, or (b) in connection with transferring patients to another facility from a health care business that is being closed. (Act § 1103, new 11 U.S.C. § 503(b)(8))

## **VII. Exception to Automatic Stay for Secretary of HHS**

The Act adds a new exception to the automatic stay under § 362 of the Bankruptcy Code to permit the Secretary of Health and Human Resources to exclude the debtor from participation in the medicare program or certain other Federal health care programs specified in § 1128B(f) of the Social Security Act. (Act § 1106, new 11 U.S.C. § 362(b)(28))

## **VIII. Transfer of Assets by Nonprofit Corporations**

Although not limited to health care business debtors, the amendments made by § 1221 of the Act are of significance in health care business cases because many hospitals are operated by nonprofit corporations.<sup>4</sup>

### **A. Recognition of Nonbankruptcy Law Limitations.**

**1. Section 363 Sales:** Section 363(d) of the Bankruptcy Code is amended by the Act to provide that a trustee may use, sell or lease property of the bankruptcy estate "only in accordance with applicable nonbankruptcy law that governs the transfer of property by a corporation or trust that is not a moneyed, business or commercial corporation or trust." (Act § 1221(a), new 11 U.S.C. § 363(d)(1))

According to the limited legislative history available, the effect of this amendment is "to restrict the authority of a trustee to use, sell, or lease property by [sic.] a nonprofit corporation or trust." H.R. Rep. No. 109-31, pt. 1, at 145 (2005).

**2. Transfers Pursuant to Confirmed Chapter 11 Plans:** Section 1129(a) is amended by the Act to provide for confirmation of a Chapter 11 plan only if all transfers of property are "made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust." (Act § 1221(b), new 11 U.S.C. § 1129(a)(16))

The legislative history, making reference to the amendment to § 363(d), states that this amendment "imposes similar restrictions with regard to plan confirmation requirements for chapter 11 cases." H.R. Rep. No. 109-31, pt. 1, at 145 (2005).

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<sup>4</sup> The text of Act § 1221 is attached at the end of these materials.

**3. Limitation on Assets of 501(c)(3) Corporations:** Lastly, the Act amends § 541 of the Bankruptcy Code to provide that notwithstanding any other provision of the Bankruptcy Code, property held by a debtor that is a § 501(c)(3) corporation may be transferred to an entity that is not such a corporation "only under the same conditions as would apply if the debtor had not filed a case under [the Bankruptcy Code]." (Act § 1221(c), new 11 U.S.C. § 541(f))

**B. Immediate Application of the § 1221 Transfer Restrictions.**

The amendments made by Act § 1221 apply to cases pending on, or filed on or after, April 20, 2005. However, the bankruptcy court is directed not to confirm a Chapter 11 plan "without considering whether [Act § 1221] would substantially affect rights of a party in interest who first acquired rights with respect to the debtor after the date of the filing of the petition." (Act § 1221(d))

The applicability provisions in Act § 1221(d) go on to state that the parties "who may appear and be heard in a proceeding under [Act § 1221] include the attorney general of the State in which the debtor is incorporated, was formed, or does business." This may mean that the specified State attorneys general have standing to be heard on issues related to new § 541(f) of the Bankruptcy Code and sales of the property of nonprofit corporations, whether pursuant to § 363 of the Bankruptcy Code or pursuant to confirmation of a Chapter 11 plan.

**C. Rule of Construction (Not Codified).**

Section 1221(e) sets forth a rule of construction that is not codified. That rule of construction states that nothing in § 1221 of the Act shall be construed to require the court in which a Chapter 11 case is pending to "remand or refer any proceeding, issue, or controversy to any other court or to require the approval of any other court for the transfer of property."

**IX. Consumer Privacy Ombudsman in Health Care Business cases?**

The amendments made by § 231 of the Act regarding protection of "personally identifiable information" might come into play in health care business cases. If applicable, they may trigger appointment of a "consumer privacy ombudsman."

**A. Personally Identifiable Information.**

"Personally identifiable information" is defined to mean, among other things, the name of an individual, the geographical address of the individual's residence, the e-mail address of the individual, the residential telephone number of the individual, and the individual's social security number if provided by the individual to the debtor in connection with obtaining a product or service from the debtor primarily for personal, family or household purposes. It also includes any other information given in connection



with such items of information "that, if disclosed, will result in contacting or identifying such individual physically or electronically." (Act § 231(b), new 11 U.S.C. § 101(41A))

**B. Limits on Sale of Personally Identifiable Information**

The Act amends § 363(b) to provide that a trustee may not sell or lease personally identifiable information to any person if the debtor had a policy prohibiting transfer of personally identifiable information that was in effect on the date the bankruptcy case was commenced unless the proposed sale or lease is consistent with that policy or a consumer privacy ombudsman is appointed. If a consumer privacy ombudsman is appointed, new section § 363(b)(1)(B) provides that the court may approve the sale or lease after (a) notice and hearing, (b) giving "due consideration to the facts, circumstances, and conditions of such sale or such lease," and (c) "finding that no showing has been made that such sale or such lease would violate applicable nonbankruptcy law. (Act § 231(a), new 11 U.S.C. § 363(b)(1))

**C. The Consumer Privacy Ombudsman**

The Act adds new § 332 of the Bankruptcy Code, which deals with the appointment and right to be heard of a consumer privacy ombudsman. If the court orders an appointment, the United States trustee must appoint one disinterested person to serve as the consumer privacy ombudsman not later than five days prior to any hearing under § 363(b)(1)(B). The consumer privacy ombudsman has the right to be heard and is required to provide the court "information to assist the court in its consideration of the facts, circumstances, and conditions of the proposed sale or lease of personally identifiable information." The consumer privacy ombudsman is prohibited from disclosing any personally identifiable information obtained by the ombudsman. (Act § 232, new 11 U.S.C. § 332)

**D. Compensation**

By reason of an amendment to § 330(a)(1) of the Bankruptcy Code, a consumer privacy ombudsman is entitled to reasonable compensation for actual, necessary services rendered and to reimbursement for actual, necessary expenses, all of which is allowable as an administrative expense priority claim. (Act § 233(b), new 11 U.S.C. § 330(a)(1))

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## **S.256**

### **Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (Reported in House)**

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#### **SEC. 1104. APPOINTMENT OF OMBUDSMAN TO ACT AS PATIENT ADVOCATE.**

(a) OMBUDSMAN TO ACT AS PATIENT ADVOCATE-

(1) APPOINTMENT OF OMBUDSMAN- Title 11, United States Code, as amended by section 232, is amended by inserting after section 332 the following:

**Sec. 333. Appointment of patient care ombudsman**

(a)(1) 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.

(2)(A) If the court orders the appointment of an ombudsman under paragraph (1), the United States trustee shall appoint 1 disinterested person (other than the United States trustee) to serve as such ombudsman.

(B) If the debtor is a health care business that provides long-term care, then the United States trustee may appoint the State Long-Term Care Ombudsman appointed under the Older Americans Act of 1965 for the State in which the case is pending to serve as the ombudsman required by paragraph (1).

(C) If the United States trustee does not appoint a State Long-Term Care Ombudsman under subparagraph (B), the court shall notify the State Long-Term Care Ombudsman appointed under the Older Americans Act of 1965 for the State in which the case is pending, of the name and address of the person who is appointed under subparagraph (A).

(b) An ombudsman appointed under subsection (a) shall-

(1) monitor the quality of patient care provided to patients of the debtor, to the extent necessary under the circumstances, including interviewing patients and physicians;

`(2) not later than 60 days after the date of appointment, and not less frequently than at 60-day intervals thereafter, report to the court after notice to the parties in interest, at a hearing or in writing, regarding the quality of patient care provided to patients of the debtor; and

`(3) if such ombudsman determines that the quality of patient care provided to patients of the debtor is declining significantly or is otherwise being materially compromised, file with the court a motion or a written report, with notice to the parties in interest immediately upon making such determination.

`(c)(1) An ombudsman appointed under subsection (a) shall maintain any information obtained by such ombudsman under this section that relates to patients (including information relating to patient records) as confidential information. 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.

`(2) An ombudsman appointed under subsection (a)(2)(B) shall have access to patient records consistent with authority of such ombudsman under the Older Americans Act of 1965 and under non-Federal laws governing the State Long-Term Care Ombudsman program.'

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## **S.256**

### **Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (Reported in House)**

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#### **SEC. 1102. DISPOSAL OF PATIENT RECORDS.**

(a) IN GENERAL- Subchapter III of chapter 3 of title 11, United States Code, is amended by adding at the end the following:

##### **Sec. 351. Disposal of patient records**

If a health care business commences a case under chapter 7, 9, or 11, and the trustee does not have a sufficient amount of funds to pay for the storage of patient records in the manner required under applicable Federal or State law, the following requirements shall apply:

(1) The trustee shall--

(A) promptly publish notice, in 1 or more appropriate newspapers, that if patient records are not claimed by the patient or an insurance provider (if applicable law permits the insurance provider to make that claim) by the date that is 365 days after the date of that notification, the trustee will destroy the patient records; and

(B) during the first 180 days of the 365-day period described in subparagraph (A), promptly attempt to notify directly each patient that is the subject of the patient records and appropriate insurance carrier concerning the patient records by mailing to the most recent known address of that patient, or a family member or contact person for that patient, and to the appropriate insurance carrier an appropriate notice regarding the claiming or disposing of patient records.

(2) If, after providing the notification under paragraph (1), patient records are not claimed during the 365-day period described under that paragraph, the trustee shall mail, by certified mail, at the end of such 365-day period a written request to each appropriate Federal agency to request permission from that agency to deposit the patient records with that agency, except that no Federal agency is required to accept patient records under this paragraph.

(3) If, following the 365-day period described in paragraph (2) and after providing the notification under paragraph (1), patient records are not

claimed by a patient or insurance provider, or request is not granted by a Federal agency to deposit such records with that agency, the trustee shall destroy those records by--

`(A) if the records are written, shredding or burning the records; or

`(B) if the records are magnetic, optical, or other electronic records, by otherwise destroying those records so that those records cannot be retrieved.'.

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## S.256

### Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (Reported in House)

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#### **SEC. 1221. TRANSFERS MADE BY NONPROFIT CHARITABLE CORPORATIONS.**

(a) SALE OF PROPERTY OF ESTATE- Section 363(d) of title 11, United States Code, is amended by striking `only' and all that follows through the end of the subsection and inserting `only--

`(1) in accordance with applicable nonbankruptcy law that governs the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust; and

`(2) to the extent not inconsistent with any relief granted under subsection (c), (d), (e), or (f) of section 362.'.

(b) CONFIRMATION OF PLAN OF REORGANIZATION- Section 1129(a) of title 11, United States Code, as amended by sections 213 and 321, is amended by adding at the end the following:

`(16) All transfers of property of the plan shall be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust.'.

(c) TRANSFER OF PROPERTY- Section 541 of title 11, United States Code, as amended by section 225, is amended by adding at the end the following:

`(f) Notwithstanding any other provision of this title, property that is held by a debtor that is a corporation described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code may be transferred to an entity that is not such a corporation, but only under the same conditions as would apply if the debtor had not filed a case under this title.'.

(d) APPLICABILITY- The amendments made by this section shall apply to a case pending under title 11, United States Code, on the date of enactment of this Act, or filed under that title on or after that date of enactment, except that the court shall not confirm a plan under chapter 11 of title 11, United States Code, without considering whether this section would substantially affect the rights of a party in interest who first acquired rights with respect to the debtor after the date of the filing of the petition. The parties who may appear and be heard in a proceeding under this section include the attorney general of the State in which the debtor is incorporated, was formed, or does business.

(e) RULE OF CONSTRUCTION- Nothing in this section shall be construed to require the court in which a case under chapter 11 of title 11, United States Code, is

pending to remand or refer any proceeding, issue, or controversy to any other court or to require the approval of any other court for the transfer of property.