

National LTC Ombudsman Resource Center

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: The Role of the LTC Ombudsman February 1, 2006 Teleconference

Background:

In 2005, Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act. One provision allows for the State LTC Ombudsman to be appointed as Patient Care Ombudsman to monitor patient care and services of a long-term care facility that has filed for bankruptcy. The law went into effect October 15, 2005.

Since the law was passed, Bankruptcy US Trustee's Offices around the country have contacted a number of State LTC Ombudsmen. And, as of the teleconference, at least 4 State Ombudsmen had been appointed as Patient Care Advocate in a bankruptcy proceeding.

See www.ltcombudsman.org for more information about the Bankruptcy Law, including pertinent language.

Teleconference Notes:

State Ombudsmen from Ohio, California, and Virginia – all who have been appointed as Patient Care Ombudsmen in a bankruptcy proceeding – shared information about their contact with the U.S. Trustee's office, and what their role is as Patient Care Ombudsman. The Wisconsin State Ombudsman has also been appointed, but was unable to join the teleconference.

- In each situation, 1 facility is involved in the bankruptcy. The Virginia facility belongs to a Louisiana corporation.
- Each Ombudsman is required to file reports with the Bankruptcy Court every 60 days.
- In each situation, the local ombudsman and/or volunteer ombudsman that provides direct service to the residents of the involved facility will be doing the actual on-site visiting and monitoring.

The California State Ombudsman (Joe Rodrigues) has already filed his first report with the Trustee's office. In the report, he identified all complaints filed in that facility, whether or not they were verified, and the resolution. The report did not include resident or complainant identifying information. The complaints were typical of those the ombudsman generally sees in facilities. The facility Administrator has been very cooperative in working with the ombudsman.

The Texas State Ombudsman (John Willis), who served such a role in a bankruptcy proceeding several years ago, shared some observations.

- The bankruptcy case involved a nursing home chain with 51 facilities throughout Texas.
 - A regular presence in these facilities involved ombudsmen from 16 of the 28 AAA's throughout the state.
 - To coordinate communication with and among the ombudsman programs, John created a separate listserve for these 16 programs; and held a separate breakout session for them at a statewide ombudsman training program.
 - Facility closings also became an issue during this process.
 - Legal Counsel support for the LTC Ombudsman Program is critical.
- In retrospect, John would have included a provision for compensation for the program, as oversight involved more ombudsman resources (ie., staff time, travel, etc.) focused on these facilities. Flora Feron, with the TX AG's office, encouraged ombudsmen to have adequate legal counsel regarding these bankruptcy proceedings for assistance with report filings, conversion hearings (ie., chapter 11 conversion to chapter 7), etc.
- Once the corporation emerged from bankruptcy, a normal ombudsman relationship with the facility resumed.

Conference call participants also heard from several state ombudsmen (Illinois, Michigan, Delaware, Missouri) who have been contacted by, or who initiated contact with, US Trustee Offices in their regions. These meetings, to date, seem to have been primarily educational.

What was clear from those ombudsmen who have talked with US Trustees' Offices is that they are interested in learning about the Long-Term Care Ombudsman Program – its role, training, governing laws, capacity, limitations, etc. Representatives from at least one trustee field office mentioned that in past experiences with health care institutions in bankruptcy, they felt they didn't know how to assist the consumers in those cases. Having the ombudsman looking out for resident interests would be helpful.

- The Delaware Ombudsman (Victor Orija) asked about corporations with facilities in more than one state. He was assured that he would be responsible only for facilities within the state of Delaware.
- The Michigan Ombudsman (Sarah Slocum) is preparing a follow-up report to the US Trustee in her region covering what the ombudsman agreed to do in the event of an appointment as Patient Care Ombudsman.
- The Illinois Ombudsman (Sally Petrone) was told that the US Trustee's Office would provide training or guidelines if the State Ombudsman were appointed as Patient Care Ombudsman. Also, in response to whether she could refuse the appointment, the US Trustee's office noted that another entity could be appointed, but the Ombudsman would need justification for why she could not serve in that role.

Also participating on the call were 2 representatives from the U.S. Department of Justice – Suzanne Hazard and Paul Bridenhagen. Paul is with the DoJ's General Counsel Office. The DoJ has encouraged the US Trustees in the Regional Offices to contact the State Ombudsmen in their regions. Paul is currently working on a memo to the US Trustees (who are federal employees) which is along the lines of a guidance – strongly recommending contact with the ombudsmen, and encouraging discussion of mutual concerns or questions.

Question: How long bankruptcy cases generally last?

- The DoJ noted that how long depended on the case, but it was a good question to ask the US Trustee's office if they approach the ombudsman to serve in this capacity.

Question: Can appointments involve an on-going bankruptcy case, or only future cases?

- DOJ thinks only future cases.

Question: What is the difference between Chapter 7 Bankruptcy and Chapter 11?

- Chapter 7 involves liquidation of assets. The debtor gives up all assets, which are liquidated or parceled out to creditors. A Trustee (a private individual, not a federal employee) can be appointed that will run the business.
- Chapter 11 is a re-organization case. Its intent is to get the corporation back on its feet. Those involved formulate a plan of re-organization for the corporation.

Question: What about compensation for the LTC Ombudsman Program?

- It's an issue that should be discussed at the time of appointment.
- To be considered is whether there are assets available to provide for payment to the ombudsman, or whether it is a no-asset case? The Trustee should be able to make that determination fairly early on.
- At least one ombudsman believes the LTCOP can't be paid for their work as a Patient Care Ombudsman because it would mean accepting \$\$\$ from facilities.
- Another had concerns that taking compensation would take away \$\$ from patient care.
- Others considered the limited resources of the ombudsman program – at both the state and local levels – and the added work and responsibilities this would entail.
- *** NORC will have preliminary discussions with AoA to get their perspective on compensation for the LTCOP.

Question: North Carolina and Alabama are not assigned to a regional US Trustee's office. Who should they contact?

- North Carolina and Alabama are overseen instead by the Administrator's Offices of U.S. Courts. Paul and Suzanne from DOJ will get NORC contact information.

Question: Is there discretion for the SLTCO about whether they have to accept this role as Patient Care Ombudsman?

- To date, the majority of ombudsmen who have already been appointed in this role were asked whether they would be willing to take on this responsibility. Only one felt there was no discretion.
- In conversations with his regional US Trustee's office, Victor Orija's impression was that if he felt unable or unwilling to take on this responsibility, he would need to provide justification.
- DOJ said that while the law gives discretion to appoint to the US Trustee's Office, they don't have the authority to compel the State Ombudsman to take this on.

Question: Is there any requirement to inform residents and families about the bankruptcy?

- No. Some discussion ensued as to whether or not residents and families should be told, and if so, how to do so.
- One recommendation is to share the information with the Resident and Family Councils
- Another recommendation is to ask the facility Administrator what the residents know about the bankruptcy.

Question: How does the law fit with the requirement that states have contingency plans for emergency situations, including financial problems of facilities and corporations?

- All states are required to have contingency plans and submit them to CMS.
- Ohio, Delaware, and Nebraska all indicated their states have such plans.
- Also relevant to this is what the role of the licensing agency is when a facility files for bankruptcy. Needs more discussion.