THE PATIENT CARE OMBUDSMAN: WHO SHOULD IT BE?

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Nursing home bankruptcies have been on the rise in recent years during the worsening financial crisis, and, as such, changes may need to be made to give greater protection to the rights of the nursing home residents and allow for a smoother transition for all parties affected by the bankruptcy. Section 333 to the Bankruptcy Code was enacted in 2005 and provides for the appointment of a patient care ombudsman (PCO), which advocates for the patients during the bankruptcy proceedings. However, details related to the duties of the PCO remain unresolved. This Note suggests that a one-size-fits-all solution is not appropriate for structuring the PCO because bankruptcies of different sizes call for different levels of oversight and legal expertise. For example, in small bankruptcies, it may be appropriate for a government attorney to collaborate with the State Long-Term Care Ombudsman in order to represent the patients. However, in large-scale nursing home bankruptcies, not enough is being done, and the government attorneys do not have enough time or resources. In these situations, a private actor should be appointed to the role of PCO.

I. Introduction

The troubled economy has impacted the commercial sector, causing business bankruptcies to increase by more than 50% between 2007 and 2008.[1] The elderly are particularly

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1. *US Business Bankruptcies Increase*, BBC NEWS, May 6, 2008, http://news.bbc.co.uk/2/hi/business/7386393.stm.

vulnerable in this economic downturn. In the last year, several nursing homes filed for bankruptcy, including Guilderland Center Nursing Home in New York,[2] Brighten Health Group in Pennsylvania and Massachusetts,[3] Marathon Healthcare in Connecticut,[4] Haven Healthcare in Connecticut,[5] and Sunwest Management affiliated companies in Oregon and Texas.[6] However, these bankruptcy filings are not unique to today's poor economy. Rather, they are just the latest wave of nursing home chain failures that began in the 1990s with a flood of nursing home acquisitions by the large chains.[7] In 2000, more than 1,600 of the 17,000 nursing homes had filed for bankruptcy, but most of these nursing homes remained open.[8] Consequently, 10% of U.S. nursing homes were operating under the protection of Chapter 11 of the U.S. Bankruptcy Code.[9]

Yet the Bankruptcy Code was not designed to protect the patients when a health care facility filed for bankruptcy.[10] Rather, the purpose was to assist debtors in their reorganization and creditors in recovering their losses.[11] Accordingly, Congress added § 333 to the Bankruptcy Code through the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 in order to protect the safety of patients served by health care businesses that filed for bankruptcy.[12] Sec-

2. Larry Rulison, *Nursing Home Seeks Court Shield: Guilderland Center Facility Owes $800,000 in Taxes*, TIMES UNION (Albany), Aug. 22, 2008, at C1.

3. Jane M. Von Bergen, *Nursing-Home Group Files for Bankruptcy*, PHILA. INQUIRER, Aug. 21, 2008, at C04.

4. Lisa Chedekel, *Home Chain Fiscally Ill Marathon Healthcare Seeks Bankruptcy Protection*, HARTFORD COURANT, Apr. 5, 2008, at B1.

5. Alison Leigh Cowan, *Nursing Home Operator in Connecticut Files for Bankruptcy*, N.Y. TIMES, Nov. 22, 2007, at B6.

6. Jeff Manning, *Retirement Homes File Chapter 11*, OREGONIAN, Dec. 3, 2008, at C02.

7. Janet M. Phelps, *The Ailing NH Nursing Homes Industry*, BUS. NH MAG., Mar. 1, 2000, at 50, 50.

8. Brendan Riley, *Bankruptcy Wave Prods Nursing Home Industry to Change*, L.A. TIMES, Apr. 9, 2000, at B3.

9. *Nursing Home Bankruptcies: What Caused Them?: Hearing Before the S. Spec. Comm. on Aging*, 106th Cong. 1 (2000) [hereinafter *Hearings Nursing Home Bankruptcies*] (statement of Sen. Chuck Grassley).

10. *The Business Bankruptcy Reform Act: Preserving Quality Patient Care in Healthcare Bankruptcies: Hearing on S. 1914 Before the Subcomm. on Administrative Oversight and the Courts of the S. Comm. on the Judiciary*, 105th Cong. 150 (1998) [hereinafter *Hearings Business Bankruptcy*] (statement of Sen. Chuck Grassley).

11. *Id.*; Jack M. Zackin, *The Intersection of Bankruptcy Law and Health Care Regulation*, METROPOLITAN CORP. COUNS., Jan. 2006, at 17, 17.

12. The Bankruptcy Code, 11 U.S.C. § 333 (Supp. V 2005); Kevin A. Spainhour, Comment, *Statutory Quixotics: Tilting Against the Health Care Business Amendments to the Bankruptcy Code*, 24 EMORY BANKR. DEV. J. 193, 197, 224 (2008).

tion 333 creates a new bankruptcy officer, the patient care ombudsman, whose position is "not concerned with the economics of the case" and the value of the estate but serves the patients to ensure that they are well-cared for by the other bankruptcy officers.[13]

Part II of this Note explores the reasons for the enactment of § 333, the provision itself, and its effects on nursing home bankruptcy cases since § 333 became effective in October 2005. Part III argues that the State Long-Term Care Ombudsman program cannot adequately fulfill the role of patient care ombudsman as suggested by § 333. Part IV presents and contrasts two options to resolve problems in the status quo and argues that the particular circumstances of the bankruptcy should determine which option is used, though the majority of cases require the appointment of a private actor.

II. Background

A. Reasons for the Enactment of § 333

Before the 2005 amendments to the Bankruptcy Code, patients did not have standing in the bankruptcy courts to introduce their concerns about the quality of patient care.[14] The bankruptcy of a health care facility, such as a nursing home, is different from other business bankruptcies, however, because "matters of dollars and cents are often matters of life or death."[15] The primary concern for a health care facility that files for bankruptcy is its ability to deliver a proper level of patient care.[16]

The bankruptcy of a California nursing home, the Reseda Care Center, illustrates the problems under the previous law.[17] The Reseda Care Center was home to sixty-three patients ranging from 70 to 108 years of age.[18] On September 5, 1997, the nursing home filed for bankruptcy, and a trustee took over the affairs of the facility on September 24, 1997.[19] The trustee believed that he would be able to sell the nursing home to a buyer who would continue to operate the facility and

13. *In re* Renaissance Hosp.-Grand Prairie, Inc., No. 08-43775-11, 2008 WL 5746904, at *1, *2 (Bankr. N.D. Tex. Dec. 31, 2008).
14. *Hearings Business Bankruptcy*, *supra* note 10, at 150.
15. Janice Francis-Smith, *Ombudsman Cares for Patients When Facilities in the Red*, J. REC. (Okla. City), Sept. 13, 2007, at 1, *available at* 2007 WLNR 26822873.
16. *Id.*
17. *Hearings Business Bankruptcy*, *supra* note 10, at 162 (statement of Robert Shapiro, Vice President of Education, American Bankruptcy Institute).
18. *Id.*
19. *Id.*

decided not to inform the patients or their families of the bankruptcy status of the Reseda Care Center.[20] On September 26, 1997, the sale fell through, and the nursing home began contacting the patients' families at 7:00 p.m. that the patients would have to be transferred that same evening.[21] Many of the families did not learn of the facility's closure until the evening news aired or by word of mouth.[22] Some family members were still calling the next morning to learn of the location to which their elderly relatives were transferred.[23] In this situation, there was no one to advocate for the patients' rights to keep the nursing home open because "[t]he trustee's interest is to maximize the amount of the estate to pay off the creditors,"[24] and the trustee of the Reseda Care Center believed the cost of one more night was too high.[25]

If a nursing home goes into bankruptcy and the facility needs to be closed, the biggest concern is finding an appropriate placement for the patients in order to minimize the negative impacts of a transfer on patients' health.[26] Transfer trauma has been recognized by both the Department of Aging and courts as a real problem.[27] Transfer trauma was formally approved as an official nursing diagnosis in 1992 as "relocation stress syndrome" and defined as "physiologic and/or psychosocial disturbances as a result of transfer from one environment to another."[28] Characteristics of transfer trauma include anxiety, apprehension, increased confusion, depression, and loneliness.[29] Transfer trauma is described as a "wave of disorientation and despair so intense that it can kill."[30] Residents who are forced to move become agi-

20. Claire Vitucci, *Outrage over Sudden Nursing Home Closing*, L.A. TIMES, Sept. 28, 1997, at B1.

21. *Hearings Business Bankruptcy*, *supra* note 10, at 162 (statement of Robert Shapiro, Vice President of Education, American Bankruptcy Institute).

22. Vitucci, *supra* note 20, at B1.

23. *Id.*

24. Sharon Bernstein & Barry Stavro, *County Asks for Warning of Care Home Shutdowns*, L.A. TIMES, Oct. 1, 1997, at B1 (quoting Assistant U.S. Trustee Donald Walton).

25. Vitucci, *supra* note 20, at B1.

26. *Hearings Business Bankruptcy*, *supra* note 10, at 163 (statement of Robert Shapiro, Vice President of Education, American Bankruptcy Institute).

27. WILLIAM F. BENSON, CTR. FOR DISEASE CONTROL, DISASTER PLANNING FOR OLDER ADULTS AND THEIR FAMILIES 7 (2009), http://www.cdc.gov/aging/pdf/disaster_planning_goal.pdf.

28. Pamela S. Manion & Marilyn J. Rantz, *Relocation Stress Syndrome: A Comprehensive Plan for Long-Term Care Admissions*, 16 GERIATRIC NURSING 108, 108 (1995).

29. *Id.*

30. Matt Smith, *Diagnosis: Eviction*, S.F. WKLY., June 9, 1999, at 1, *available at* http://www.sfweekly.com/1999-06-09/news/diagnosis-eviction/.

tated, anxious, and disoriented in addition to the increase of acuity levels and mortality rates.[31]

The elderly are particularly vulnerable to transfer trauma because of the "little flexibility left in their physical or psychological make up, the inability to adjust due to chronic conditions, and the accumulation of losses (physical/psychological, family, home, and nursing home)."[32] In order to decrease transfer trauma, a slow closure is needed to inform the patients of the upcoming transfer, plan appropriate placements, and train the relocation staff in the needs of the particular patients.[33] As the Reseda Care Center bankruptcy demonstrates, nursing home bankruptcies can become very chaotic, and the trustee of the bankrupt estate is not necessarily looking out for the safety and care of the patients.[34] The result is an increased risk of death for the elderly patients.[35]

Section 333 was enacted in order to deal with the problems patients face when their nursing home files for bankruptcy. These concerns include that patients are unlikely to receive notice of the facility's bankruptcy case, many patients know nothing about bankruptcy laws, and patients are too ill to deal with problems arising from the bankruptcy filing.[36] Section 333 is an extension of the State Long-Term Care Ombudsman (SLTCO) program, a state run program created to oversee the quality of patient care at nursing homes.[37]

The main duties of the SLTCO are to: (1) "identify, investigate, and resolve complaints that are made by, or on behalf of, residents and relate to action, inaction, or decisions, that may adversely affect the health, safety, welfare, or rights of the residents"; (2) "provide services to assist the residents in protecting the health, safety, welfare,

31. *Nursing Home Closures, Bankruptcies, and Liability Insurance: Is There a Crisis?: Hearing Before S. Comm. on Health & Human Servs.* (Cal. 2002) [hereinafter *Nursing Home Hearings*] (testimony of Patricia L. McGinnis, Executive Director, California Advocates for Nursing Home Reform), http://senweb03.senate.ca.gov/committee/standing/health/ (follow "Patricia McGinnis" hyperlink).

32. SHERER MURTIASHAW, THE ROLE OF LONG-TERM CARE OMBUDSMEN IN NURSING HOME CLOSURES AND NATURAL DISASTERS 11–12 (2000), http://74.125.95.132/search?q=cache:yt6cX0vDjlMJ:www.ltcombudsman.org/uploads/File/OmbinNHclosures.pdf+%22little+flexibility+left+in+their+physical+or+psychological+make+up%22&cd=2&hl=en&ct=clnk&gl=us.

33. *See id.* at 14–15.

34. *See* Bernstein & Stavro, *supra* note 24, at 31.

35. *See Nursing Home Hearings*, *supra* note 31.

36. *Hearings Business Bankruptcy*, *supra* note 10, at 162 (statement of Robert Shapiro, Vice President of Education, American Bankruptcy Institute).

37. *Id.*

and rights of the residents"; and (3) "represent the interests of the residents before governmental agencies and seek administrative, legal, and other remedies to protect the health, safety, welfare, and rights of the residents."[38] Today, SLTCO programs exist in all fifty states, the District of Columbia, and Puerto Rico.[39]

B. Section 333: Patient Care Ombudsman

Section 333 provides that a patient care ombudsman (PCO) will be appointed within thirty days of the beginning of a health care bankruptcy case "to monitor the quality of patient care and to represent the interests of the patients of the health care business."[40] This is the default rule unless the court finds that an ombudsman is not necessary under the specific facts of the case.[41] Thus, the PCO will play two roles: the monitor and the advocate.[42] As a monitor, the PCO needs to inspect facilities, review records and evaluations, and interview staff and patients.[43] Based on the gathered information, the PCO will evaluate the quality of care that patients receive.[44]

As an advocate, the PCO must voice the patients' needs by taking a position on events in the bankruptcy process and informing the judge of the effects of a particular course of action on the quality of patient care.[45] For example, the PCO would investigate potential buyers to determine if they were capable of providing proper patient care or suggest a course of action that would minimize the impact on patients if a facility needed to be closed.[46] The PCO must file a motion or

38. 42 U.S.C. §§ 3058g(a)(3)(A)(i)–(ii), (B), (E) (2006); *see also* Timothy M. Lupinacci & Eric L. Pruitt, *New Player at the Health Care Reorganization Table: Practical Implications of the Patient Care Ombudsman*, AM. BANKR. INST. J., July/Aug. 2005, at 26, 26.

39. Carroll L. Estes et al., *State Long Term Care Ombudsman Programs: Factors Associated with Perceived Effectiveness*, 44 GERONTOLOGIST 104, 104 (2004) [hereinafter Estes et al., *Perceived Effectiveness*]; JUNE GIBBS BROWN, OFFICE OF INSPECTOR GEN., LONG TERM CARE OMBUDSMAN PROGRAM: OVERALL CAPACITY 7 (1999), http://www.oig.hhs.gov/oei/reports/oei-02-98-00351.pdf.

40. 11 U.S.C. § 333 (Supp. V 2005).

41. *Id.*

42. Samuel R. Maizel, *The First Year of the Patient Care Ombudsman in Review: Part I*, AM. BANKR. INST. J., Mar. 2007, at 18, 18 [hereinafter Maizel, *First Year Part I*] (citing 11 U.S.C. § 333 (a)(1)).

43. *Id.* at 19.

44. *Id.*

45. *Id.* at 67.

46. Telephone Interview with Nancy A. Peterman, S'holder, Greenberg Traurig (Feb. 13, 2009). Ms. Peterman assisted in drafting the health care provisions of

written report with the court and serve notice to the parties if the PCO "determines that the quality of patient care provided to patients of the debtor is declining significantly or is otherwise being materially compromised."[47] The PCO should also ensure that there is sufficient funding for patient care, which would require the PCO to closely monitor the bankruptcy case.[48] In particular, the PCO should stay informed of any motions by creditors for relief from the automatic stay to recover debts because the result may significantly decrease the available funding for patient care.[49]

Section 333 applies to all health care businesses that file for bankruptcy under Chapters 7, 9, or 11 and specifies that a disinterested individual must be appointed to serve as the PCO.[50] The drafters likely anticipated that the individual appointed would have a background in the health care industry, such as nurses, doctors, or people experienced in health care reorganizations.[51] Congress included a special provision for nursing homes in which it specified that an SLTCO can be appointed to serve as the PCO for a long-term care facility.[52] However, the drafters likely did not foresee that the SLTCO would be appointed in large or complex bankruptcy cases.[53]

Section 330 provides that the PCO will be awarded "reasonable compensation for actual, necessary services rendered" by the PCO or any paraprofessional employed by the PCO.[54] The drafters likely anticipated that the PCO would be able to hire any professionals that were necessary to provide proper oversight, as a large bankruptcy case would be impossible for one person to handle.[55] The compensation comes out of money from the estate of the debtor,[56] but this cost is avoided when the SLTCO is appointed because it is already compensated by the state and has not charged for its services.[57] In fact, the SLCTO is prohibited from receiving remuneration of any kind, direct-

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the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, including § 333.

47. § 333(b)(3).
48. Telephone Interview with Nancy A. Peterman, *supra* note 46.
49. *Id.*
50. § 333(a)(1).
51. Telephone Interview with Nancy A. Peterman, *supra* note 46.
52. § 333(a)(2)(B).
53. Telephone Interview with Nancy A. Peterman, *supra* note 46.
54. 11 U.S.C. § 330 (Supp. V 2005).
55. Telephone Interview with Nancy A. Peterman, *supra* note 46.
56. 3 COLLIER ON BANKRUPTCY ¶ 333.05[1] (Alan N. Resnick & Henry J. Sommers eds., 15th ed. rev. 2009).
57. Maizel, *First Year Part I*, *supra* note 42, at 67.

ly or indirectly, from the owner or operator of a long-term care facility.[58] Thus, some states will not allow compensation to the SLTCO for the PCO role.[59] However, other states have begun asking for compensation because the appointment to serve as the PCO is a burden on the already limited resources of the SLTCO program.[60]

Prior to the enactment of § 333, in 2002, the U.S. Bankruptcy Court for the Northern District of Texas appointed an SLTCO to act as a resident advocate, essentially a PCO, during the bankruptcy of a nursing home chain.[61] The chain had fifty-one facilities in Texas and involved sixteen local ombudsman regions.[62] The Texas Department of Aging trained sixteen members of the SLTCO office to deal with the special issues they would confront during the bankruptcy process.[63] The SLTCO communicated biweekly with the debtor to work out broad issues while local ombudsmen and volunteers visited the many nursing facilities focused on specific complaints.[64] While only one person was appointed by the court to oversee the bankruptcy case, complete oversight required the participation of many people.[65]

The major contribution of the SLTCO was "to slow the closing process in certain instances where the patients needed more time to relocate and transition to other facilities."[66] In slowing down the nursing home closures, the SLTCO was able to minimize transfer trauma in the patients.[67] Legal counsel provided by bankruptcy attorneys from the Texas Attorney General's office (which assisted the ombudsmen in the bankruptcy proceedings by filing reports and attending conversion proceedings) was critical to the success of the SLTCO.[68]

58. 42 U.S.C. § 3058g(f)(3)(D) (2006). During a national conference of state ombudsmen, at least one ombudsman believed the SLTCO could not receive compensation because it would mean taking money from facilities. National Long-Term Care Ombudsman Resource Center, Teleconference Notes, The Role of the LTC Ombudsman 1, 3 (Feb. 1, 2006), http://www.ltcombudsman.org/uploads/ConferenceNotes0206.pdf [hereinafter Teleconference Notes]. Other ombudsmen believed that the SLTCO's limited resources would be a barrier to the added work and responsibilities of the PCO role. *Id.*

59. Telephone Interview with Samuel R. Maizel, Partner, Pachulski Stang Ziehl & Jones (Feb. 11, 2009).

60. Telephone Interview with Carolyn G. Wade, Senior Assistant Attorney Gen., Or. Dep't of Justice (Feb. 19, 2009).

61. Maizel, *First Year Part I*, *supra* note 42, at 18–19.

62. Teleconference Notes, *supra* note 58, at 2.

63. Maizel, *First Year Part I*, *supra* note 42, at 19.

64. *Id.*

65. *See id.*

66. *Id.*

67. *See supra* text accompanying note 32.

68. Teleconference Notes, *supra* note 58, at 2.

This case illustrates the amount of work required to fulfill the PCO role.[69] It also demonstrates the financial burden placed on the SLTCO programs because oversight of a bankruptcy case requires staff time, travel expenses, and legal expenses.[70] Reimbursement would have totaled several thousand dollars.[71]

C. Effects of § 333

The U.S. Trustee has recognized 271 cases related to § 333 since its enactment.[72] Forty-seven of those cases concerned long-term care facilities (nursing homes).[73] A PCO was appointed in thirty-three of those cases, or 70% of the time.[74] In the remaining cases, an ombudsman was not appointed because the facility was closed, sold prepetition, or the court found an ombudsman unnecessary under the specific facts of the case.[75] In most cases involving long-term care facilities,

69. Maizel, *First Year Part I*, *supra* note 42, at 19.

70. Teleconference Notes, *supra* note 58, at 2.

71. Lori Smetanka, National Long-Term Care Ombudsman Resource Center, Notes from Conversation with John Willis, Tex. State Ombudsman 1 (Oct. 12, 2005) (on file with author).

72. Roberta A. DeAngelis & Paul W. Bridenhagen, *U.S. Trustee Program Administers BAPCPA's Patient Care Ombudsman Requirements*, AM. BANKR. INST. J., June 2008, at 14, 14. The U.S. Trustee Program does not have more recent data available.

73. *Id.*

74. *Id.*

75. *Id.* at 44. One court decided against the appointment of the PCO in a bankruptcy case in which the debtor operated several hospitals and a nursing home based on weighing nine nonexclusive factors:

> (1) The cause of the bankruptcy;
> (2) The presence and role of licensing or supervising entities;
> (3) 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 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.

In re Valley Health Sys., 381 B.R. 756, 761 (Bankr. C.D. Cal. 2008). The court decided that there was enough oversight in the hospitals and no evidence that patient care had been compromised, so the financial burden on the estate would not justify the appointment of the PCO. *Id.* at 765. The court did not provide a separate evaluation for the appointment of the PCO only at the nursing home. *Id.*

the U.S. Trustee has selected the SLTCO to serve as the PCO.[76] The SLTCO has also been appointed to bankruptcy cases involving other health care facilities such as hospitals.[77] The drafters likely did not anticipate such appointments because the health care issues in hospitals are outside of the training that most SLTCO programs provide to their staff.[78]

III. Analysis

The state long-term care ombudsman lacks the ability to adequately serve as the patient care ombudsman for four primary reasons. First, the SLTCO is not experienced in bankruptcy issues.[79] Second, the SLTCO is unable to meet the needs of its present job description and cannot handle additional duties.[80] Third, the SLTCO program is presently underfunded and lacks the ability to fund an expansion into the bankruptcy field.[81] Finally, the SLTCO programs vary in staffing and training and lack the individual support necessary to expand services to bankruptcy issues.[82]

A. Lack of Knowledge in the Bankruptcy Process

Most of the SLTCOs have no experience with bankruptcy, or law in general, and face significant issues in fulfilling their role as advocates for the patients during the bankruptcy process.[83] The PCO role will require experience in preparing court documents and appearing in court, which necessitates the assistance of counsel.[84] However, many SLTCO programs do not even provide access to counsel with bankruptcy experience.[85] One bankruptcy judge described the proper role of legal counsel for the PCO as assistance in identifying and understanding the laws regulating patient care and protection, writing

76. Samuel R. Maizel, *The First Year of the Patient Care Ombudsman in Review: Part II*, AM. BANKR. INST. J., Apr. 2007, at 18, 18 [hereinafter Maizel, *First Year Part II*].
77. Telephone Interview with Samuel R. Maizel, *supra* note 59.
78. Telephone Interview with Nancy A. Peterman, *supra* note 46.
79. *See infra* Part III.A.
80. *See infra* Part III.B.
81. *See infra* Part III.C.
82. *See infra* Part III.D.
83. Lupinacci & Pruitt, *supra* note 38, at 56; Maizel, *First Year Part II*, *supra* note 76, at 18.
84. *In re* Renaissance Hosp.-Grand Prairie, Inc., No. 08-43775-11, 2008 WL 5746904, at *1, *4 (Bankr. N.D. Tex. Dec. 31, 2008).
85. Maizel, *First Year Part II*, *supra* note 76, at 18.

motions the PCO may require, and identifying and opposing relief sought by other parties that would impact patient care.[86]

Ombudsmen have access to three legal support models: the Office of the Attorney General, in-house counsel, and a contracted private attorney or legal service program.[87] One-third of ombudsmen believe not enough legal counsel is available to adequately meet their needs.[88] Proper legal counsel should have knowledge of elder law as well as special skills needed by a particular ombudsman program, such as bankruptcy for ombudsmen who serve as PCOs.[89]

Most ombudsman programs rely on government attorneys,[90] but many ombudsmen are dissatisfied with this model of legal support.[91] Government attorneys are not experienced in elder issues and have commitments to other agencies that adversely affect access and accountability.[92] Many inexperienced government attorneys are assigned to work with the ombudsmen when they lack knowledge about elder law and bankruptcy; then, after a few years of learning, they are replaced by more inexperienced attorneys.[93]

As most ombudsmen are not attorneys, "legal counsel must be available on a daily basis to assist the ombudsman in the performance of his or her official duties."[94] Lack of access to counsel due to conflicts of commitment of government attorneys is a major obstacle to the PCO role when the ombudsman needs legal assistance to deal with a significant decline or otherwise material compromise in the patient quality of care.[95] Serious or life-threatening complaints require

86. *Renaissance Hosp.*, 2008 WL 5746904, at *6.

87. Lori Owen & Michael R. Schuster, *Legal Support to Long-Term Care Ombudsman Programs: Seven Years Later*, 28 CLEARINGHOUSE REV. 617, 618 (1994).

88. DIV. OF HEALTH CARE SERVS., INST. OF MED., REAL PEOPLE REAL PROBLEMS: AN EVALUATION OF THE LONG-TERM CARE OMBUDSMAN PROGRAMS OF THE OLDER AMERICANS ACT 94 (Jo Harris-Wehling et al. eds., 1995) [hereinafter REAL PEOPLE REAL PROBLEMS]; CARROLL L. ESTES ET AL., INST. FOR HEALTH & AGING, EFFECTIVENESS OF THE STATE LONG TERM CARE OMBUDSMAN PROGRAMS 42 (2001), http://ltcombudsman.org/sites/default/files/norc/Estes-Effectiveness-SLTCOP.pdf [hereinafter ESTES ET AL., EFFECTIVENESS OF SLTCO].

89. Owen & Schuster, *supra* note 87, at 621.

90. NAT'L ASS'N OF STATE UNITS ON AGING, LEGAL COUNSEL AND REPRESENTATION OF THE LONG-TERM CARE OMBUDSMAN PROGRAM 3 (2005), http://www.nasua.org/pdf/LCpaper.pdf.

91. Owen & Schuster, *supra* note 87, at 619.

92. *Id.* at 621, 624; REAL PEOPLE REAL PROBLEMS, *supra* note 88, at 94.

93. Owen & Schuster, *supra* note 87, at 621, 624; REAL PEOPLE REAL PROBLEMS, *supra* note 88, at 94.

94. Owen & Schuster, *supra* note 87, at 621.

95. *Id.*

prompt action; when legal advice or consultation is necessary, the ombudsman needs to have access to legal counsel immediately.[96]

Furthermore, government attorneys experience conflicts of interest because they are also required to represent other state agencies, and "[i]t is unlikely that the attorney general will zealously represent the ombudsman (or the interests of nursing home residents) if there will be an adverse budget or political consequence to the representation."[97] However, inadequate funding prevents ombudsmen from obtaining outside counsel when conflicts of interest arise with government attorneys.[98] If ombudsmen are going to be able to succeed, they must have immediate access to counsel that has experience in elderly issues and bankruptcy and will zealously advocate for the patients.[99]

B. Overwhelming Workload

The SLTCO program's main duty is to advocate for patients in long-term care facilities,[100] but the ombudsmen perform many activities to fulfill that duty. Besides investigating and resolving complaints, SLTCOs visit facilities, participate in facility surveys conducted by state regulatory agencies, work with resident and family councils, provide community education, work with the media, train other ombudsmen and volunteers, train and consult with managers and staff of long-term care facilities, consult with individuals who need information about long-term care, and monitor and advocate on laws, regulations, and government policies on long-term care.[101] Because the SLTCOs are responsible for performing so many tasks already, there is reason for concern that the ombudsmen cannot take on more responsibility.[102]

The SLTCO programs have produced mixed results. Though the program is responsible for improving the quality of care in nursing

96. *Id.*
97. *Id.* at 622, 624.
98. REAL PEOPLE REAL PROBLEMS, *supra* note 88, at 94.
99. *See* Owen & Schuster, *supra* note 87, at 621, 622, 624.
100. U.S. ADMIN. ON AGING, DEP'T OF HEALTH & HUMAN SERVS., LONG-TERM CARE OMBUDSMAN REPORT FY 2004, at 1 (2004), http://www.aoa.gov/AoARoot/AoA_Programs/Elder_Rights/Ombudsman/National_State_Data/2004/docs/2004%20Ombudsman%20Report%20final.pdf.
101. *Id.* at 11.
102. *See* Maizel, *First Year Part II*, *supra* note 76, at 18.

homes, poor care is still very prevalent.[103] In 2007, the network of SLTCO programs employed 1,278 paid staff and nearly 9,200 volunteer ombudsmen to oversee the quality of care at nursing homes.[104] In November 2007, there were roughly 17,000 nursing facilities with nearly 1.7 million patients.[105] The average ratio of full-time employees to beds per state is one to 2,698.[106] The Institute of Medicine recommended that the proper ratio should be one full-time employee to every 2,000 beds based on a national survey of SLTCO programs.[107] Achieving this ratio would require a 26% increase of staffing.[108] Unfortunately, since the recommendation was released in 1995, the SLTCO programs have remained underfunded and understaffed.[109] The ratio of paid staff to beds varies widely from state to state; while California, which has the largest number of paid staff, has a ratio of one paid staff to 1,472 beds, Connecticut has a ratio of one to 6,407.[110] The ombudsman programs lack the time and funding to complete their own tasks.[111] They can hardly be expected to fulfill the additional duties of a PCO when they are already significantly overwhelmed by their present workload.[112]

The effects of such a workload are a reduction in both monitoring of the quality of patient care and advocating for change where problems arise.[113] A survey of nursing homes which are funded by

103. *Nursing Homes: Business as Usual*, CONSUMER REP., Sept. 2006, at 38, *available at* http://www.consumerreports.org/health/healthy-living/health-safety/nursing-homes-9-06/overview/0609_nursing-homes_ov.htm.

104. *Long-Term Care Workers and Abuse of the Elderly: Hearing Before the S. Spec. Comm. on Aging*, 106th Cong. 1 (2007) (statement of Beverley Laubert, President of National Association of State Long-Term Care Ombudsman Programs).

105. *Nursing Home Transparency and Improvement: Hearing Before the S. Spec. Comm. on Aging*, 110th Cong. 3 (2007) (statement of Sen. Chuck Grassley).

106. Maizel, *First Year Part II*, *supra* note 76, at 18.

107. REAL PEOPLE REAL PROBLEMS, *supra* note 88, at 194.

108. *Id.*

109. *See* Maizel, *First Year Part II*, *supra* note 76, at 18.

110. *See* ADMIN. ON AGING, DEP'T OF HEALTH & HUMAN SERVS., 2006 NATIONAL OMBUDSMAN REPORTING SYSTEM DATA TABLES—TABLE A-1: SELECTED INFORMATION BY STATE (2006), http://www.aoa.gov/AoARoot/AoA_Programs/Elder_Rights/Ombudsman/National_State_Data/2006/Index.aspx (follow "Excel" hyperlink) [hereinafter INFORMATION BY STATE].

111. Elizabeth B. Herrington, Note, *Strengthening the Older Americans Act's Long-Term Care Protection Provisions: A Call for Further Improvement of Important State Ombudsman Programs*, 5 ELDER L.J. 321, 348–49 (1997).

112. Maizel, *First Year Part II*, *supra* note 76, at 18.

113. *See* Elma L. Holder, *The Changing Long-Term Care Resident Population and Its Needs*, *in* NAT'L ASS'N OF STATE LONG-TERM CARE OMBUDSMAN PROGRAMS, THE LONG-TERM CARE OMBUDSMAN PROGRAM: RETHINKING AND RETOOLING FOR THE FUTURE app. IX, at 3 (2003), http://nasop.org/papers/Bader.pdf.

Medicare and Medicaid found that 91% of nursing homes surveyed in 2005, 2006, and 2007 were cited for deficiencies.[114] Thus, repeat offenders are all too prevalent.[115] The most common deficiency categories cited were quality of care (74% of nursing homes), resident assessment (58%), and quality of life (43%).[116] In 2007, 3% of nursing homes were cited for immediate jeopardy deficiencies and 15% for actual harm deficiencies.[117] Further, an ombudsman's ability to visit these facilities on a regular basis (quarterly) to monitor the resolution of these deficiencies is compromised: nationally, ombudsmen visit 79.4% of nursing homes on a regular basis and 42% of other long-term care facilities.[118] Though the SLTCO program has made significant contributions to the protection of the elderly, problems persist because "the ombudsman program has always been under-funded to deliver the services it is mandated to provide and to meet ever constant and mounting consumer needs and expectations."[119]

In order to provide a sufficient voice for the patients, the PCO must have the time to visit and monitor the bankrupt facilities.[120] The ombudsman's primary basis for monitoring patient care is real-time and independent information.[121] A review of court records found that there is an excess of reliance on the debtor's safety or compliance officer.[122] The debtors' "quality assurors are not the independent voices needed to ensure patient safety and provide the necessary information to approve budgets that affect the health care provided by the debtor."[123] Furthermore, many of these quality assurors either quit or are

114. DANIEL R. LEVINSON, OFFICE OF INSPECTOR GEN., TRENDS IN NURSING HOME DEFICIENCIES AND COMPLAINTS 6 (2008), http://www.oig.hhs.gov/oei/reports/oei-02-08-00140.pdf.

115. *See id.*

116. *Id.* at 8. "The most common quality-of-care deficiencies involved accident hazards; providing care for residents' highest practicable physical, mental, and psychosocial well-being; and urinary incontinence." *Id.* "The most common resident assessment deficiencies involved services meeting professional quality standards, comprehensive care plans, and service provision by qualified persons." *Id.* "The most common quality-of-life deficiencies involved housekeeping and maintenance services, dignity, and accommodation of needs." *Id.*

117. *Id.* at 9.

118. INFORMATION BY STATE, *supra* note 110. Visitation on a regular basis varies by state. In 2006, nineteen states visited 100% of nursing homes, and eleven states visited 100% of other long-term care facilities. *Id.*

119. Holder, *supra* note 113, at app. IX, at 3.

120. *Id.* at app. IX, at 16–17.

121. Jerry Seelig & Richard Cussigh, *Vital Considerations in the Ombudsman Debate*, AM. BANKR. INST. J., Oct. 2008, at 32, 32.

122. *Id.*

123. *Id.* at 33, 66.

fired within a few months of the bankruptcy filing.[124] Because the ombudsman and court must work quickly to determine the necessary procedures in restoring patient care,[125] "the very fact that the ombudsman has an additional and unrelated duty may well create situations that divert valuable time and attention away from the mission of the ombudsman program."[126]

This conflict of commitment raises the question of whether the SLTCO is able to properly complete the tasks of both jobs. Without the addition of the PCO role, patients currently under the monitoring of the SLTCO program are not being fully assisted and protected.[127] There is a real concern that the completion of the PCO role diminishes the effectiveness of the SLTCO programs at their historically mandated duties because time spent fulfilling the additional duties of the PCO means time that the SLTCO duties are neglected.[128] The previous wave of nursing home bankruptcies before the enactment of § 333 included Vencor, Sun Healthcare Group, and Mariner Post Acute Network, which provided care to a combined total of more than 100,000 patients.[129] SLTCO programs would be overwhelmed by the amount of work that would be necessary to monitor the quality of patient care for these bankruptcies.[130]

C. Lack of Funding

The greatest barrier named by ombudsmen to the success of the ombudsman program is insufficient funding.[131] The present level of funding is insufficient to satisfy the unmet needs of the historically mandated duties of the SLTCO program.[132] First, the SLTCO program is unable to support a full-time and qualified professional staff or properly recruit and train volunteers.[133] Inadequate funding creates

124. Telephone Interview with Suzanne Koenig, President, SAK Mgmt. Servs., LLC (Mar. 27, 2009).
125. *See* Seelig & Cussigh, *supra* note 121, at 67.
126. REAL PEOPLE REAL PROBLEMS, *supra* note 88, at 113.
127. Holder, *supra* note 113, at app. IX, at 3.
128. *See* REAL PEOPLE REAL PROBLEMS, *supra* note 88, at 113.
129. Maizel, *First Year Part I*, *supra* note 42, at 67.
130. *See id.* at 66–67.
131. *See* ESTES ET AL., EFFECTIVENESS OF SLTCO *supra* note 88, at v; REAL PEOPLE REAL PROBLEMS, *supra* note 88, at 147–48; Estes et al., *Perceived Effectiveness*, *supra* note 39, at 104, 108; Holder, *supra* note 113, at app. IX, at 3.
132. REAL PEOPLE REAL PROBLEMS, *supra* note 88, at 201.
133. ESTES ET AL., EFFECTIVENESS OF SLTCO *supra* note 88, at 41; REAL PEOPLE REAL PROBLEMS, *supra* note 88, at 148, 150; Estes et al., *Perceived Effectiveness*, *supra* note 39, at 113–14.

conflicts of commitment because the PCO role requires one to divide time between talking with patients, evaluating facilities, analyzing patient records, consulting with bankruptcy lawyers, writing reports, discussing recommendations with the court and debtor, and any additional duties required by the SLTCO program that would prevent the ombudsman from fulfilling all the tasks to a satisfactory degree.[134] A "conflict of commitment is more likely to occur if resources are limited and staff are frequently called upon to take on more duties for the entire agency."[135] More ombudsmen are needed; however, they cannot be recruited, trained, and supported without adequate funding.[136]

Conflicts of commitment due to inadequate resources arise which lead to an inability to complete the required tasks.[137] The conflict is evident by the decrease of routine and unannounced visits to facilities and the increase of response time for complaint investigation and resolution.[138] Real-time information may be sacrificed because visits to the debtor's facility are reduced. The result is a slow response to a complaint or deficiency and a problem that has grown to a critical level.[139] This is especially problematic for over 50% of nursing home residents who may be unable to request assistance from the ombudsman due to difficulty in calling or writing because the patient suffers from frailty, sickness, mental retardation, and dementia or other psychiatric diagnoses.[140] Consequently, the only way for these residents to access ombudsman services is through a face-to-face visit by an ombudsman.[141]

Second, insufficient funding forces ombudsmen to focus on the monitoring of immediate concerns instead of advocating systemic change.[142] The sacrifice impacts community education and outreach,[143]

134. *See* REAL PEOPLE REAL PROBLEMS, *supra* note 88, at 113.
135. *Id.*
136. Holder, *supra* note 113, at app. IX, at 20.
137. *See* REAL PEOPLE REAL PROBLEMS, *supra* note 88, at 113.
138. ESTES ET AL., EFFECTIVENESS OF SLTCO *supra* note 88, at v, 41, 51; Estes et al., *Perceived Effectiveness*, *supra* note 39, at 109, 113–14.
139. Seelig & Cussigh, *supra* note 121, at 66.
140. Robyn Grant, *Long Term Care Ombudsman Program Effectiveness: Building Strong Advocacy*, *in* NAT'L ASS'N OF STATE LONG-TERM CARE OMBUDSMAN PROGRAMS, *supra* note 113, app. VIII, at 17, http://nasop.org/papers/Bader.pdf.
141. *Id.*
142. ESTES ET AL., EFFECTIVENESS OF SLTCO, *supra* note 88, at 41; Estes et al., *Perceived Effectiveness*, *supra* note 39, at 113–14.
143. ESTES ET AL., EFFECTIVENESS OF SLTCO, *supra* note 88, at v, 41; Estes et al., *Perceived Effectiveness*, *supra* note 39, at 109.

the pursuit of policy change,[144] and use of legal services.[145] Legal "counsel clarifies laws and regulations for ombudsmen and assists ombudsmen in developing arguments and strategies that benefit residents,"[146] but access to counsel costs money as some states bill the SLTCO program for the use of the state's attorney.[147] Accordingly, ombudsmen are hesitant to use the attorney general's office on routine matters due to cost considerations.[148] Also, ombudsmen have noted that conflicts of interest arise in using the state's attorney, but there are no funds available to obtain outside counsel.[149]

Finally, because most SLTCOs who are appointed to serve as PCOs do not receive compensation from the debtor's estate,[150] no funding is available to support the additional duties of the PCO role. The costs associated with the PCO role are high, especially for large health care facilities.[151] The SLTCO will have difficulty in completing the duties of § 333 due to the lack of funding for SLTCO programs, the lack of compensation for an SLTCO serving as the PCO, and the need to hire assistance due to a lack of experience in bankruptcy.[152] As the SLTCOs lack knowledge in bankruptcy,[153] whenever "expansion into new services occurs, the costs of high-quality training [for paid staff and volunteers] must be considered."[154] Also, ombudsmen will lack funding to hire outside counsel experienced in bankruptcy and elder law issues.[155]

Moreover, additional duties without additional compensation may affect the number of staff willing to work or able to zealously advocate for the patients due to a significant conflict of commitment produced by insufficient funding.[156] Any expansion of the duties of the SLTCO program should not be "undertaken unless the program is

144. ESTES ET AL., EFFECTIVENESS OF SLTCO, *supra* note 88, at 41; Estes et al., *Perceived Effectiveness*, *supra* note 39, at 114.
145. REAL PEOPLE REAL PROBLEMS, *supra* note 88, at 150; Estes et al., *Perceived Effectiveness*, *supra* note 39, at 108.
146. Grant, *supra* note 140.
147. Owen & Schuster, *supra* note 87, at 621.
148. *Id.*
149. REAL PEOPLE REAL PROBLEMS, *supra* note 88, at 94.
150. Maizel, *First Year Part I*, *supra* note 42, at 67.
151. *See* Ted A. Berkowitz & Jason W. Trigger, *What Constitutes a Health Care Business Under 11 U.S.C. § 333?*, BANKR. STRATEGIST, Nov. 2007, at 3, 4.
152. *Id.*
153. *See supra* Part III.A.
154. Holder, *supra* note 113, at app. IX, at 24.
155. *See* REAL PEOPLE REAL PROBLEMS, *supra* note 88, at 94.
156. *See supra* text accompanying notes 97, 134–35.

adequately funded to meet its current obligations and to fulfill new responsibilities."[157] Because funding will be insufficient to meet the needs of all long-term care residents, priority should be placed to "provide the highest quality performance for those who *can* be served, rather than stretching the program's services so thin that they fail to achieve the goals of the program."[158]

D. Inadequate Staffing and Training

Three-fourths of ombudsmen cite lack of staffing as a barrier to effectiveness,[159] including insufficient numbers of paid staff and insufficient numbers of volunteers.[160] Seventeen programs have a paid staff of ten or less, while thirty-seven programs have twenty-five or less.[161] Only seven programs have a paid staff of fifty or more.[162] SLTCO programs are in great need of staff with skills in long-term care or with knowledge of health issues or the law.[163] Insufficient staffing is evident from the limited number of regular nursing home visits.[164] Because volunteers are assigned to just one nursing home, they are able to visit this home on a weekly basis.[165] However, most nursing homes are not assigned volunteers, and these homes receive visits once or twice a year for no longer than one to three hours.[166] Lack of coverage due to insufficient staffing not only reduces the number of on-site visits, but also results in inadequate response times to complaints.[167]

Though 85% of ombudsman programs utilize volunteers, the number of certified volunteers varies from one to 1,812.[168] Of the SLTCO programs with certified volunteers, eleven programs have less than twenty-five volunteers, twenty programs have more than one hundred volunteers, and only four programs have more than five

157. Holder, *supra* note 113, at app. IX, at 2.
158. *Id.*
159. Estes et al., *Perceived Effectiveness*, *supra* note 39, at 108.
160. BROWN, *supra* note 39, at 11; REAL PEOPLE REAL PROBLEMS, *supra* note 88, at 147; Estes et al., *Perceived Effectiveness*, *supra* note 39, at 108.
161. INFORMATION BY STATE, *supra* note 110. The term "programs" is used because there are fifty-two programs: all fifty states, District of Columbia, and Puerto Rico. *See supra* text accompanying note 39.
162. INFORMATION BY STATE, *supra* note 110.
163. REAL PEOPLE REAL PROBLEMS, *supra* note 88, at 150.
164. BROWN, *supra* note 39, at 2.
165. *Id.* at 12.
166. *Id.*
167. *Id.* at 2; REAL PEOPLE REAL PROBLEMS, *supra* note 88, at 150.
168. INFORMATION BY STATE, *supra* note 110.

hundred volunteers.[169] Many ombudsmen also say they would like better supervision and training of the volunteers they have.[170] The SLTCO training varies by state; some are volunteers who simply meet with the elderly, and others are trained professionals.[171] Thirty-eight states have a certification process for their volunteers,[172] but classroom training varies from five to forty-eight hours.[173] Sixteen programs entail facility training on-site, but it varies from two to thirty hours.[174] Only eleven programs require a certification test.[175]

This problem of inadequate training for the PCO role is illustrated in the *King Solomon* bankruptcy case where the PCO, an appointed SLTCO, supplied a couple of reports to the court as mandated by § 333, but the reports consisted of patients' complaints and the status of their resolution.[176] The reports did not actually provide information on the quality of patient care such that the judge would be able to decide whether sufficient funding was provided to the nursing home or whether the quality of care was acceptable, but rather the reports were just a continuation of the SLTCO's duties.[177] Other reports are inadequate due to being overly detailed and cumbersome.[178] For instance, one PCO reported on a patient complaining about not receiving the soup ordered for lunch and the resolution of the complaint when the staff member cited the patient's egg allergy for not serving

169. *Id.*

170. BROWN, *supra* note 39, at 11; REAL PEOPLE REAL PROBLEMS, *supra* note 88, at 147.

171. 3 COLLIER ON BANKRUPTCY, *supra* note 56, ¶ 333.03[2]; Herrington, *supra* note 111, at 344; Wayne Nelson, *Ombudsman Training and Certification: Toward a Standard of Best Practice*, *in* NAT'L ASS'N OF STATE LONG-TERM CARE OMBUDSMAN PROGRAMS, *supra* note 113, app. VI, at 10, http://nasop.org/papers/Bader.pdf; *see also* Maizel, *First Year Part II*, *supra* note 76, at 18.

172. ESTES ET AL., EFFECTIVENESS OF SLTCO, *supra* note 88, at 10; GAIL MCINNES, VOLUNTEERS IN THE LONG TERM CARE OMBUDSMAN PROGRAM: TRAINING, CERTIFICATION AND LIABILITY COVERAGE 2 (1999), http://www.docstoc.com/docs/3849451/volunteers-in-the-long-term-care-ombudsman-program-training-certification.

173. MCINNES, *supra* note 172, at 2; Nelson, *supra* note 171, at app. VI, at 10, 15.

174. MCINNES, *supra* note 172, at 2.

175. *Id.*

176. First Report of Patient Care Ombudsman, *In re* King Solomon Mgmt., Inc., No. LA 05-50000-VZ (Bankr. C.D. Cal. filed Oct. 31, 2005); Second Report of Patient Care Ombudsman, *In re* King Solomon Mgmt., Inc., No. LA 05-50000-VZ (Bankr. C.D. Cal. filed Oct. 31, 2005).

177. Maizel, *First Year Part II*, *supra* note 76, at 71–72; Nancy A. Peterman & Sherri Morissette, *The New Health Care Bankruptcy Law—Will Patients Be Heard?*, *in* NORTON ANNUAL SURVEY OF BANKRUPTCY LAW 161, 167 (William L. Norton, Jr. et al. eds., 2006).

178. Telephone Interview with Samuel R. Maizel, *supra* note 59.

the soup as it contained noodles made from eggs.[179] The inclusion of irrelevant details detracts from the utility of the reports, and there is a concern that the reports have no impact because judges do not know what to do with the information provided.[180]

The successful completion of the duties of the PCO under § 333 require the ombudsman "to visit one or more facilities, review patient records, review complaints by patients and agencies, review the pharmacy, laboratory, emergency room, radiology, safety/risk management and nursing departments, and interview patients, doctors and nurses."[181] While some of these tasks may not be encountered in a particular nursing home bankruptcy, the tasks would still be difficult to fulfill without a medical specialist.[182] Most SLTCOs are only trained in reviewing facilities by responding to complaints and questions from patients.[183] However, the PCO role requires the ombudsman to go beyond resolving individual complaints and evaluate the effects of the bankruptcy proceeding on the quality of patient care.[184] Even where the individuals are properly trained to perform SLTCO tasks, they would lack training on the impact of the bankruptcy process on the quality of patient care, such as the effects of a proposed financing motion or a reorganization plan.[185]

Volunteers present another problem because they are not involved in the program for significant amounts of time, and the resulting high turnover rate leads to inexperienced volunteers performing tasks requiring medical and legal knowledge.[186] Staff and volunteer turnover require ongoing training.[187] Inadequate training of staff and volunteers may lead to high turnover rates as a result of role misunderstandings and frustrations over the lack of authority to make

179. First Report of Patient Care Ombudsman, *In re* Beth Israel Hosp. Ass'n of Passaic, No. 06-16186 (NLW) (Bankr. D.N.J. filed July 10, 2006).
180. Jacqueline Palank, *Patient Advocates Are Hindered in Health-Care Bankruptcy Cases*, DAILY BANKR. REV., Mar. 20, 2008.
181. Nancy A. Peterman, *The Patient Care Ombudsman's New Reality*, AM. BANKR. INST. J., July 2007, at 22, 66.
182. *Id.*
183. 3 COLLIER ON BANKRUPTCY, *supra* note 56, ¶ 333.03[2]; Maizel, *First Year Part II*, *supra* note 76, at 18; .
184. Maizel, *First Year Part I*, *supra* note 42, at 19, 67.
185. Maizel, *First Year Part II*, *supra* note 76, at 18.
186. Herrington, *supra* note 111, at 349.
187. Holder, *supra* note 113, at app. IX, at 24.

changes.[188] Training is critical in order to fulfill the PCO role successfully as it requires a familiarity with medical and legal issues.[189]

IV. Recommendation

This Note argues that, on a national level, the appointment of the state long-term care ombudsman as the patient care ombudsman has failed to adequately meet the duties of the appointment. However, this Note is not meant to criticize the SLTCO programs, but rather the decision to appoint an underfunded and overworked actor. While this Note has focused on nursing homes and other long-term care facilities, SLTCOs have been appointed to health care bankruptcies outside of the long-term care facility cases, such as hospitals.[190] In appointing a PCO, the U.S. Trustee should never appoint the SLTCO to serve as PCO for any health care facility that is not a long-term care facility. It is difficult to expect satisfactory results in appointing the SLTCO to a type of facility with which they are not familiar. Hospitals offer a wider array of services than nursing homes.[191]

In focusing on the appointments of SLTCOs to long-term care bankruptcy cases on a national level, the SLTCOs have also failed to live up to expectations.[192] The recommendation will focus on two possible solutions by evaluating their advantages and disadvantages. The first option, based on the ombudsman program in Texas, would be to appoint the SLTCO and provide them with access to legal counsel experienced in bankruptcy. The second option would be to appoint a disinterested party or private actor as prescribed by the text of § 333.

A. Pairing the SLTCO with an Assigned Government Attorney

One solution to improve the SLTCO's ability to fulfill the PCO role would be to pair the SLTCOs with government attorneys. Texas has been upheld as a model for others states to follow.[193] In 2007 and

188. REAL PEOPLE REAL PROBLEMS, *supra* note 88, at 150.
189. *See* Nelson, *supra* note 171, at app. VI, at 15.
190. *See supra* text accompanying note 72.
191. Kenneth S. Boockvar & Maria Camargo, *Easing the Transition Between Nursing Home and Hospital*, *in* AN INTRODUCTION TO HOSPITALS AND INPATIENT CARE 198, 202 (Eugenia L. Siegler et al. eds., 2003).
192. *See supra* text accompanying notes 107–12.
193. The National Citizen's Coalition for Nursing Home Reform uses Texas as a guide for other states to follow. Tex. Dep't of Aging & Disability Servs., Outline

2008, Texas was appointed to serve as the PCO in six bankruptcy cases involving twenty-two nursing homes,[194] and it has been successful through interagency collaboration. The SLTCO has access to five attorneys experienced in bankruptcy from the Office of the Texas Attorney General, and these attorneys closely monitor the bankruptcy cases assigned to the SLTCO.[195]

Texas requires training in long-term care issues for the ombudsmen to be certified and provides opportunities thereafter for training on a monthly or quarterly basis.[196] The SLTCO and local ombudsmen have had training in bankruptcy issues as well.[197] There is guidance for the individuals visiting the facilities in what types of details to look for when completing their oversight duties and providing relevant information for the PCO report to the court.[198] Texas has twenty-eight local ombudsman programs with forty-five full-time staff and additional part-time staff equivalent to eleven full-time employees.[199] In addition, there are more than 900 certified volunteers.[200] Consequently, Texas has managed to resolve many of the issues that most SLTCO appointments present, as they have a large staff to help when the SLTCO is appointed and legal counsel experienced in bankruptcy is at the ombudsman's disposal.[201]

1. ADVANTAGES

A collaboration between the SLTCO program and Office of the Attorney General following the Texas model provides several advantages. First, it is likely that the costs to the debtor's estate can be minimized given that the SLTCO and legal counsel are not likely to seek compensation from the estate.[202] In eliminating the cost of compensat-

for Sixty-Day Bankruptcy Report, http://www.nccnhr.org/uploads/Ducayet-2of5-Roundtable(Bankruptcy).pdf (last visited Sept. 1, 2009).

194. OFFICE OF THE STATE LONG-TERM CARE OMBUDSMAN, TEXAS DEP'T OF AGING & DISABILITY SERVS., ANNUAL REPORT STATE FISCAL YEARS 2007–2008, at 21 (2008), http://www.dads.state.tx.us/news_info/ombudsman/publications/07-08annualreport.pdf [hereinafter ANNUAL REPORT 2007–2008].

195. E-mail from Hal F. Morris, Assistant Attorney Gen., Bankr. & Collections Div. of the Office of the Attorney Gen. of Tex., to Anna Kaluzny (Mar. 25, 2009, 01:33 CST) (on file with author).

196. ANNUAL REPORT 2007–2008, *supra* note 194, at 20, 23.

197. *See supra* text accompanying note 63.

198. Tex. Dep't of Aging & Disability Servs., *supra* note 193.

199. ANNUAL REPORT 2007–2008, *supra* note 194, at 5.

200. *Id.*

201. *See id.*; *see also* E-mail from Hal F. Morris, *supra* note 195.

202. E-mail from Hal F. Morris, *supra* note 195. In Texas, the SLTCO has reserved the right to seek reimbursement for fees and expenses incurred in the PCO

ing a PCO, debtors will have more money to spend on the quality of patient care during the bankruptcy proceeding. Second, as the ombudsmen routinely deal with patient complaints and promote quality in nursing homes, familiarity with the elderly patients and their more common problems gives the ombudsmen a base of experiences with which to work when giving the court advice on what steps are needed to maintain the quality of patient care in a long-term care facility.[203]

Third, a procedure is in place for dealing with facility closings to minimize the negative impact on patients.[204] The Reseda Care Center closing illustrates the problems associated with the lack of an adequate procedure to deal with a facility closing.[205] An already developed procedure in the SLTCO program would ensure that the PCO could bring some order to such a chaotic event.[206] Finally, access to legal counsel trained in bankruptcy provides the SLTCO with help in monitoring the bankruptcy case for issues that may impact patient care.[207]

2. DISADVANTAGES

This solution has some drawbacks as well. First, SLTCO programs are understaffed and will have difficulty in completing the duties of the PCO role.[208] While Texas has the staff for an appointment in a large bankruptcy case, many SLTCO programs do not.[209] A PCO appointment of an SLTCO involves many people as the job is too large for one person, especially one person with other responsibilities as well.[210] Second, ombudsmen and government attorneys already have a full workload and might lack the time needed to successfully deal with a large bankruptcy.[211] One reason for the success in Texas is the large staff of the Texas SLTCO program; this current staffing level is needed to complete the historically mandated duties of the SLTCO

role as in the Notice of Appointment that has been negotiated with the United States Trustee's Office; however, to date the SLTCO has not filed any such requests for fees and expenses. *Id*.

203. ANNUAL REPORT 2007–2008, *supra* note 194, at 13.
204. *Id.* at 18.
205. *See supra* Part II.A.
206. *Id.*
207. *See supra* Part III.A.
208. *See supra* Part III.B.
209. *See supra* Part III.D.
210. *See supra* Part III.B, III.D.
211. *See supra* Part III.B.

program.[212] It is not clear whether the SLTCO staff neglected any of their historically mandated duties in fulfilling the PCO role in Texas, but it is evident that ombudsman programs with a small staff would sacrifice the discharge of prior duties in fulfilling the new tasks of a PCO appointment.[213] Accordingly, in many states, an SLTCO appointment to serve as the PCO will lead to an inadequate job in either fulfilling the PCO role, the SLTCO historically mandated duties, or both.[214] While volunteers exist to help ombudsmen, a PCO appointment should not rely on the use of certified volunteers to complete the monitoring and advocacy roles of the PCO.

Third, to be successful, both the ombudsman and legal counsel must receive training in bankruptcy issues.[215] Most states do not provide the budget for such training or access to counsel.[216] The issue of reports is one example of the problems of appointing the SLTCO. Bankruptcy training is critical to the PCO role because the complexity of the Bankruptcy Code has direct effects on the patients.[217] In a Chapter 7 liquidation case, the trustee and the creditors will try to close the facility as soon as possible to maximize the debtor's assets for the repayment of debts without regard to the relocation process or its impacts on the elderly patients.[218] A PCO is essential to a liquidation case to ensure that patients are given notice of the facility closure and are prepared for relocation to new facilities close to their families.[219]

In a Chapter 11 reorganization case, the debtor will continue to operate the facility and seek more financing in order to repay creditors.[220] A PCO is needed to make sure that the patients continue to receive the same quality care throughout the reorganization.[221] It is not enough for the PCO to interview patients and resolve their complaints; a PCO must also make certain that the facility is clean and well maintained, the food and medical supplies are well stocked, and sufficient staff is available to provide care to all the patients.[222] These

212. Maizel, *First Year Part II*, *supra* note 76, at 18; *see also* ANNUAL REPORT 2007–2008, *supra* note 194, at 33.
213. *See* Maizel, *First Year Part II*, *supra* note 76, at 18, 71.
214. *Id.* at 18.
215. *Id.*
216. *See* REAL PEOPLE REAL PROBLEMS, *supra* note 88, at 94.
217. *See* Francis-Smith, *supra* note 15.
218. *See* Bernstein & Stavro, *supra* note 24, at B1.
219. *See supra* Part II.A–B.
220. CHARLES JORDAN TABB, THE LAW OF BANKRUPTCY 6 (2d ed. 2009).
221. 11 U.S.C. § 333 (Supp. V 2005).
222. *See* Maizel, *First Year Part I*, *supra* note 42, at 19, 67.

responsibilities require the PCO to determine that enough financing was obtained to pay the rent and utilities, the food and medical vendors, and the staff.[223] If medical staff or vendors are not being compensated due to a lack in financing, the PCO must bring such an issue to the judge's attention for resolution to ensure that staff do not quit and vendors do not stop delivering.[224]

Fourth, many ombudsmen simply lack the training to make any evaluations on the quality of care as some states only require ombudsmen to respond to inquiries or complaints from patients.[225] Certified volunteers may be able to resolve patients' complaints, but they will not be able to complete the various duties needed to evaluate a facility.[226] Due to time conflicts of the SLTCO, a review of the debtor's facility is often conducted by volunteers.[227] Accordingly, any sort of evaluations in the quality of care are taken from information gathered by volunteers from either the patients themselves or the debtor's employees.[228] This is unlikely to be what Congress had in mind when they enacted § 333 to provide an independent voice to advocate for patients.[229] Any PCO appointed should have the time to complete the job themselves or with the help of their staff, and the PCO and their staff must be knowledgeable in nursing, long-term care and elderly issues, and bankruptcy.

Finally, funding remains a problem which will create conflicts of commitment and interest.[230] For instance, the Oregon SLTCO has served as the PCO without compensation, but it is unable to continue accepting such appointments without compensation in the future because there is not enough funding for legal counsel.[231] Without the funding to hire trained professionals to assist the ombudsmen, the amount of work required to deal with a bankrupt nursing home will prevent the ombudsmen from completing other duties that are less pressing.[232] Government attorneys will need to divide their time be-

223. *See supra* text accompanying notes 46, 48.
224. *See* Maizel, *First Year Part I*, *supra* note 42, at 67.
225. *See supra* text accompanying note 183.
226. *See supra* text accompanying notes 181–82.
227. Maizel, *First Year Part II*, *supra* note 76, at 18.
228. *Id.* at 71.
229. Peterman & Morissette, *supra* note 177, at 167.
230. *See supra* Part III.C.
231. Telephone Interview with Carolyn G. Wade, *supra* note 60.
232. *See supra* text accompanying note 142.

tween other cases and may be unavailable when needed most, but funding is not available for outside counsel.[233]

While Texas offers a model for other states to follow, it is not clear that this would be possible based on the significant differences in the fifty-two SLTCO programs around the nation.[234] Since the enactment of § 333, the expansion of the SLTCO to the PCO role has not worked well on a national level.[235] While large states may be able to afford to redirect the efforts of their ombudsmen and attorneys as well as the money needed to fund the additional duties, small states cannot afford this. Though this solution would be the most efficient if funding were available for better training and more staff, most states do not have the budget to fund the SLTCO programs to fulfill their historically mandated duties without expanding into another realm of work altogether.[236]

B. Appointing a Private Actor PCO

Another possible solution to the failure of the SLTCOs to live up to the demands of the PCO role would be to stop appointing them in favor of an appointment of a private actor as the court would in other health care bankruptcy cases.[237] Model appointments by the U.S. Trustee would be "consultants and advisors that have health care bankruptcy experience, and that have operational experience dealing with quality of care and delivery issues for their clients."[238] Because the PCO role requires a unique base of knowledge, "there are relatively few qualified persons who possess the necessary skills and training needed to effectively perform the required tasks."[239] Compensation for the PCO comes from the bankruptcy estate as would compensation for any other bankruptcy officer.[240] The court retains the discretion to establish the appropriate amount based on several factors: the time spent on the services, the rates charged, the reasonableness of the

233. *See supra* Part III.A.
234. *See* Maizel, *First Year Part II*, *supra* note 76, at 18, 71.
235. *See supra* text accompanying note 192.
236. *See supra* Part III.C.
237. 11 U.S.C. § 333 (Supp. V 2005).
238. Robert A. Guy, Jr., John C. Tishler & Daniel McMurray, *The Patient Care Ombudsman: A New Professional Gets Added to Chapter 11*, HEALTH CARE COMMITTEE NEWSL. (Am. Bankr. Inst., Alexandria, Va.), Apr. 2007, http://www.abiworld.org/committees/newsletters/health/vol4num2/PatientCare.html.
239. Jean R. Robertson, *How Can the Patient Care Ombudsman Ensure Appropriate Compensation?*, AM. BANKR. INST. J., Oct. 2008, at 30, 58.
240. 11 U.S.C. § 330(a)(1) (Supp. V 2005).

time spent in relation to the complexity or importance of the task, and the customary rates charged by similarly skilled professionals in similar cases.[241]

1. ADVANTAGES

The appointment of a private actor has many advantages because it avoids the problems experienced by SLTCO programs. First, the proper appointment by the U.S. Trustee would eliminate issues of training. Turnaround firms exist with experience in restructuring of long-term care facilities.[242] Individuals from such firms would have the knowledge and experience to evaluate the quality of patient care and advocate for what types of changes are needed.[243] They would also be familiar with the possible implication of a bankruptcy proceeding on the quality of patient care.[244] In one case, the private actor serving as PCO brought to the court's attention issues of funding for supplies and medical staff and the risks to the patients of transfer trauma "in the event that the debtor was forced to shut down on an accelerated basis for lack of funding."[245]

Second, private actors appointed as PCOs would not experience time commitment issues because the U.S. Trustee would be able to appoint a person without other time commitments that would prevent them from completing the PCO role. Finally, staffing would not be an issue because funding would be available to hire assistants in large bankruptcy cases if the ombudsman requests the right to retain professionals in its application for retention.[246] The bankruptcy of Sun Healthcare Group in 1999 affected 320 nursing homes with 40,000 patients.[247] It would be impossible for one person to serve as PCO without the proper staff to assist in monitoring the quality of care and advocating for needed improvements, but a private actor would be able to delegate some tasks to staff while keeping the chaos at bay.

241. § 330(a)(3)(A)–(B), (D)–(E).

242. *See, e.g.*, SAK Management Services, LLC, Patient Care Ombudsman, http://www.sakmgmt.com/services/patientcare.aspx (last visited Sept. 1, 2009).

243. *Id.*

244. *See supra* text accompanying note 46.

245. David N. Crapo, *Of Patient Care Ombudsmen and Asset Sales: 2008 Cases of Interest to Health Law Practitioners in Bankruptcy Cases*, HEALTH CARE COMMITTEE NEWSL. (Am. Bankr. Inst., Alexandria, Va.), July 2008, http://www.abiworld.org/committees/newsletters/health/vol5num4/patientcare.html.

246. *In re* Haven Eldercare, LLC, 382 B.R. 180, 183 (Bankr. D. Conn. 2008).

247. *Sun Healthcare Group Files for Bankruptcy Protection*, N.Y. TIMES, Oct. 15, 1999, at C4.

2. DISADVANTAGES

PCOs have experienced several problems related to compensation. First, PCOs are usually left out of the agreements designating how much compensation each bankruptcy officer will receive.[248] By the time a PCO is appointed, the court has already entered the final cash-collateral or financing order after the debtor and other bankruptcy officers negotiate a carve-out agreement with the lender.[249] The PCO has no ability to negotiate a carve-out, but "[g]etting paid is a big deal. If you can't get paid, you can't do a good job."[250] Second, PCOs have had trouble receiving interim compensation. Section 330, which authorizes compensation for PCOs, only refers to final fee applications, but the PCO is not included under § 331, the interim compensation provision.[251] The inability to receive interim compensation would create a disincentive to PCOs as they would work for several months, at least, without any compensation for their services.[252] Some courts have determined that the PCO may receive compensation on an interim basis, though it is not explicit in the statute.[253]

Third, private actors serving as PCOs require the assistance of other professionals to complete the duties of the appointment, but whether these professionals will be compensated is not clear. Professionals range from an attorney to assist with filing documents and petitioning for compensation to medical specialists to assist in evaluating the quality of patient care.[254] One court denied the PCO's application to retain legal counsel to assist them,[255] but the majority of private actors that serve as PCOs are health care or restructuring professionals who have no knowledge of the proper bankruptcy procedure for filing papers or seeking compensation.[256] The appointment of a private actor with the proper medical background to serve as PCO

248. Nancy A. Peterman, Sherri Morissette & Suzanne Koenig, *The Patient Care Ombudsman's New Reality*, AM. BANKR. INST. J., July/Aug. 2007, at 22, 67 [hereinafter Peterman et al., *New Reality*].

249. *Id.*

250. Palank, *supra* note 180 (quoting Suzanne Koenig, President of SAK Management Services, LLC).

251. Robertson, *supra* note 239, at 58.

252. *Id.*

253. *E.g.*, *In re* Haven Eldercare, LLC, 382 B.R. 180, 183 (Bankr. D. Conn. 2008).

254. Peterman et al., *New Reality*, *supra* note 248, at 66.

255. *See* Application for Entry of Order Authorizing Retention and Employment *In re* Julian Ungar-Sargon No. 06-08108 (N.D. Ill. May 2, 2007); *see also* Order Withdrawing Application to Employ *In re* Julian Ungar-Sargon, No. 06-08108 (N.D. Ill. May 29, 2007).

256. Robertson, *supra* note 239, at 58.

makes evident the need to hire legal counsel for assistance. Accordingly, most courts allow the PCO to hire professionals to assist them if it is necessary to fulfill the PCO's duties.[257]

Finally, one court determined that interim payments would not be given for the professionals hired by the PCO.[258] Consequently, the PCO would need to compensate the professionals for their work and then apply to the court at the end of the case for compensation.[259] The court acknowledged the burden this would place on the PCO, but decided the fees in the particular case were not large enough to present a substantial problem.[260] While it may not create a large burden for a specific case, the decision forces the "PCO to accept the economic loss of temporarily compensating others until reimbursement at some later date"[261] and creates a large burden on private actors who serve as PCOs in many cases due to the lack of qualified individuals.[262] Furthermore, the drafters likely anticipated that the PCO would be able to hire whatever professionals they needed and would be reimbursed as all other bankruptcy officers for all their expenses; however, the statute was not amended properly.[263]

While the issues of compensation raise concerns, private actors serving as PCOs have continued to serve while attempting to prove to courts, debtors, and creditors the importance of their work and the need for compensation.[264] Despite the added cost to the estate, the U.S. Trustee Program did not intend for the cost to the bankruptcy estate to be a barrier to patient care.[265] In fact, this was the exact reason that this provision was added: patient care cannot be sacrificed to make the pot bigger for the creditors of the bankrupt health care facility. Though it will take time for courts to realize the issues in denying interim compensation to PCOs and their professionals, the qualified private actor can make a substantial contribution to the quality of care for patients in facilities that have filed for bankruptcy. With the time and expertise, private actors can successfully monitor the quality of care and advocate on behalf of patients.

257. *E.g.*, *In re* Renaissance Hosp.-Grand Prairie, Inc., No. 08-43775-11, 2008 WL 5746904, at *1, *7–8 (Bankr. N.D. Tex. Dec. 31, 2008).
258. *Haven Eldercare*, 382 B.R. at 183–84.
259. *Id.* at 183.
260. *Id.*
261. Robertson, *supra* note 239, at 59.
262. *Haven Eldercare*, 382 B.R. at 184.
263. Telephone interview with Nancy A. Peterman, *supra* note 46.
264. *E.g.*, *Haven Eldercare*, 382 B.R. at 180.
265. DeAngelis & Bridenhagen, *supra* note 72, at 45.

C. Recommendation

The differences in long-term care facility bankruptcies due to size and other circumstances suggest that a one-size-fits-all solution is not ideal. For small bankruptcy cases, such as one facility with fewer than thirty patients, collaboration between the SLTCO program and a government attorney may work out well. However, such an appointment would not be successful if the SLTCO program does not have access to legal counsel experienced in bankruptcy. Nor would such an appointment work for SLTCO programs with few paid staff. Thus, the U.S. Trustee should be hesitant in appointing an SLTCO. Many factors should be taken into account before the trustee appoints an SLTCO to serve as PCO, including the size of the SLTCO program, proper training in medical evaluations and bankruptcy issues, experience in restructuring, the size of their workload and time availability, and access to legal counsel experienced in bankruptcy.

A different approach should be taken for large and complex bankruptcy cases. Private actors should be appointed as they would be able to fulfill the PCO role. The SLTCOs should not be forced to sacrifice the many other tasks under their responsibility if someone else could serve as the PCO. Private actors should be able to hire other professionals to provide them with the manpower to handle large cases. If the U.S. Trustee appoints a private actor with the right background and courts respect the intent of Congress in adding § 333, a private actor can ensure that patients are given a voice during bankruptcy.

V. Conclusion

Congress enacted § 333 to give patients in nursing homes and other health care facilities a voice during the bankruptcy process. The positive effects of this provision are already evident, but past experiences have revealed many flaws. Depending on the size of the SLTCO program and the type of bankruptcy case, the U.S. Trustee should appoint the proper person to serve as the PCO. In smaller bankruptcy cases dealing with long-term care facilities, the larger SLTCO programs working with a government attorney would be able to serve successfully as PCOs. In all other cases, a private actor with experience in long-term care and bankruptcy issues should be appointed to serve the PCO role to ensure regular monitoring and zealous advocacy. With so many patients affected by bankruptcies of

their long-term care facilities, this group deserves a proper voice in the bankruptcy court.