

**BANKRUPTING THE TRUSTEE:
COPING WITH BAPCPA's NEW BURDENS ON
CHAPTER 7 TRUSTEES IN BUSINESS CASES**

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I. A Trustee's Duties Under § 704(a)(11) of the Bankruptcy Code

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), amended the Bankruptcy Code to add § 704(a)(11), which provides that the Trustee shall:

if, at the time of the commencement of the case, the debtor (or any entity designated by the debtor) served as the administrator (as defined in section 3 of the Employee Retirement Income Security Act of 1974) of an employee benefit plan, continue to perform the obligations required of the administrator

In short, § 704(a)(11) requires a Trustee to perform all of the obligations required of a plan administrator of an employee benefit plan if the debtor, or an entity designated by the debtor, served as administrator when the bankruptcy case was filed.¹ Section 704(a)(11) was designed to remove the confusion regarding who bears responsibility for the administration of a debtor's employee benefit plan after the bankruptcy case is filed. *Compare In re New Ctr. Hosp.*, 200 B.R. 592 (E.D. Mich. 1996) (holding that a chapter 11 trustee assumes the duties of a plan administrator), *with Chambers v. Kaleidoscope, Inc. v. Profit Sharing Plan & Trust*, 650 F. Supp. 359 (N.D. Ga. 1986) (holding that until a pre-bankruptcy plan administrator resigns pursuant to ERISA, the pre-bankruptcy plan administrator and not the Trustee serves as plan administrator during the pendency of the debtor's bankruptcy case). Under § 704(a)(11), the trustee is the plan administrator in bankruptcy.

II. Trustee's Obligations as Plan Administrator Under ERISA

While § 704(a)(11) is clear that the Trustee bears the responsibilities of plan administrator in bankruptcy, the Bankruptcy Code is silent as to what those responsibilities may be or how the Trustee is to carry them out. Therefore, the Trustee must look to ERISA to determine what he must do in order to fulfill his duties under §704(a)(11). ERISA is well-known

¹ Section 1106(a)(1) specifically makes § 704(a)(11) applicable to chapter 11 Trustees.

for being immensely complicated to the point of being undecipherable. The following does not attempt to give an exhaustive analysis of the depths of ERISA law. Instead, what follows is a general discussion which highlights some of the key components every Trustee must understand in order to successfully administer a debtor's employee benefit plan.

A. The Trustee as a Fiduciary

As an initial matter, the Trustee, as plan administrator, and as one who wields discretionary authority or control over the plan is considered a fiduciary under ERISA. Section 404(a)(1) of ERISA requires a fiduciary to discharge his duties with respect to an employee benefit plan solely in the interests of the participants and beneficiaries, with loyalty to the participants and beneficiaries, with prudence, and in accordance with the terms of the plan so long as such terms are consistent with ERISA. In addition, § 404(a)(1) of ERISA also requires the fiduciary to diversify the plan's investments unless it is clearly not prudent to do so.

The essence of prudence is on the Trustee's decision making process, not necessarily on the results. Under ERISA, a Trustee must act "with the care, skill, prudence, and diligence under the circumstances that a prevailing prudent man acting in like capacity and familiar with such matters would use" ERISA § 404(a)(1). Therefore, a court will look at whether the Trustee employed the appropriate method to investigate and determine the merits of a particular course of action. The best way a Trustee may position himself against an attack on his conduct is by building a record that can withstand close scrutiny. In terms of the loyalty requirement, generally ERISA prohibits a fiduciary from self-dealing or dealing with plan assets as his own. In addition, unless an exemption exists, ERISA prohibits a fiduciary from entering into a transaction with a party in interest of the plan.

As noted above, ERISA sets forth a general requirement that the Trustee follow the terms of the plan. Likewise, charters or resolutions passed by the Debtor or the service agreements underlying the plan also may have obligations the Trustee must follow. While not an exhaustive list the following provides common duties and actions a Trustee could be expected to perform:

- a. determining a 401(k) plan investment menu
- b. selecting plan service providers
- c. authorizing payment of plan expenses with plan assets
- d. participant communications, including required disclosure documents
- e. determining eligibility and interpreting plan provisions
- f. amending the plan
- g. terminating the plan
- h. modifying the plan structure

B. Delegating Fiduciary Duties

Provided that the decision is made with prudence, loyalty and in accordance with “plan terms,” the Trustee may appoint a fiduciary or delegate the Trustee’s fiduciary duties to a third party. The Trustee, however, has a continuing duty to monitor the employee plan and the actions taken by the appointed party. A best practice would be to receive regular reports regarding the status of the employee benefit plan and the decisions that have been made, and to stay informed enough so that you know that the appointed/delegated fiduciary is doing their job.

C. Statutory Safe Harbors

Section 404(c) of ERISA contains several safe harbor provisions that shield Trustees, as administrators, from liability. For example, if an employee plan permits participant-directed investments, the Trustee is not responsible for those directions. Section 404(c) not only applies

where the participant makes an affirmative investment election but also applies where the participant fails to make an affirmative election (i.e., auto enrollment, profit sharing contributions).

III. ERISA and the Bankruptcy Courts -- a Jurisdictional Question

As noted above, § 704(a)(11) requires a Trustee to serve as the plan administrator of a debtor's employee benefit plan, and the Trustee's duties as plan administrator are governed by ERISA. Given that the typical Trustee likely is relatively inexperienced with administering an employee benefit plan, and the potential liability associated with the administration of an employee benefit plan, a Trustee may seek court authorization before taking certain major actions as to the employee benefit plan (i.e., the termination of a 401(k) plan, or the use of pension funds to pay administrative costs regarding the plan). Given the tenuous connection between an employee benefit plan and the debtor's estate, and the Bankruptcy Code's lack of guidance regarding the Trustee's duties as to an employee benefit plan, parties in interest may argue that a bankruptcy court lacks jurisdiction to give any order to a Trustee authorizing the Trustee to take or not to take certain actions as to an employee benefit plan.

Thus far, two primary arguments have been raised against a bankruptcy court's ability to issue orders regarding a Trustee's administration of an employee benefit plan. First, that § 541(b)(7) expressly excludes the corpus of an employee benefit plan from property of the debtor's estate. Second, that the propriety or reasonableness of a Trustee's actions is governed solely by ERISA, and therefore any actions taken by the Trustee as to an employee benefit plan does not "arise under," "arise in," or "relate to" the Debtor's bankruptcy case. These arguments have been addressed in two published cases. In *In re AB & C Group, Inc.*, 411 B.R. 284 (Bankr. N.D. W. Va. 2009), the bankruptcy court held that it did not have jurisdiction to rule on the

reasonableness of proposed fees to be paid from the corpus of the employee benefit plan. In *In re Trans-Industries, Inc.*, 419 B.R. 21 (Bankr. E.D. MI 2009), however, the bankruptcy court held that it could exercise “related to” jurisdiction over the Trustee’s, as plan administrator, adversary complaint against certain fiduciaries of the debtor’s pension plan. Both *AB & C*, and *Trans-Industries* are discussed below.

A. *AB & C Group*

In *AB & C Group*, the Trustee sought entry of an order that provided for the pre-bankruptcy plan administrator (a bank) to wind up the employee benefit plan and for the bank to be compensated from the assets of the plan. 411 B.R. at 287-288. The Department of Labor objected stating that ERISA governs whether the bank could be paid from the corpus of the plan and as the relief affects non-estate assets, the Bankruptcy Court does not have subject matter jurisdiction to enter the order. *Id.* at 289. The Trustee argued that the Bankruptcy Court did have jurisdiction because (1) because the administration of the plan is an explicit duty of the Trustee under §704(a)(11), (2) the Trustee must employ the bank under § 327 of the Bankruptcy Code, and (3) the Trustee must assume the pre-existing service agreement with the Bank under § 365 of the Bankruptcy Code. *Id.*

The Bankruptcy Court rejected all three of the Trustee’s arguments. First, the Court held that while the Court has jurisdiction to approve the retention of the bank under § 327, the Bankruptcy Code only allows the Court to approve payment to a retained professional from the assets of the Debtor’s estate. *Id.* at 291. As the assets of the employee benefit plan are non-estate assets, § 327 cannot be used to approve the payment to the bank and cannot provide the Court with a jurisdictional basis to approve the proposed order. *Id.*

Second, the Court rejected the argument that the Trustee could use § 365 to not only assume the service agreement between the bank and the debtor but also to pay the bank for fees incurred in terminating the employee benefit plan. The Court held that while the Trustee was free to assume the contract, nothing in the contract required the bank to perform services in connection with the termination of the employee benefit plan. *Id.* at 291. Therefore, what the Trustee was actually seeking was not to assume a preexisting contract but Court approval of a new contract, which is beyond the scope of § 365. *Id.*

Finally, the Court rejected the argument that the Court has jurisdiction over the carrying out of the Trustee's duties under § 704(a)(11). The Court noted that the Trustee's decision to pay the bank from the employee benefit plan's assets implicated several provisions of ERISA pertaining to the administrator's obligation to defray reasonable expenses incurred in connection with the administration of the employee benefit plan, and that the proposed order required the Court to find that the requested relief complies with ERISA's provisions *Id.* at 294. While the Trustee's requested relief was certainly entwined in ERISA, the Court did not believe that the requested relief had any applicability to the debtor's estate. Instead, the Court held that:

there is not real possibility that the Trustee's decision to charge the Plan with administrative costs will impact the bankruptcy estate. The Plan is not an estate asset. Additionally, the Proposed Order serves no bankruptcy administrative purpose. Its terms are designed primarily to resolve Plan-specific issues, and, as such, have no discernable impact upon the estate, the Debtor, or any of its pre-petition creditors.

Id. at 295.

The Court held that the mere fact that the plan administrator is a chapter 7 Trustee acting pursuant to a duty created by the Bankruptcy Code is not sufficient to give the Bankruptcy Court jurisdiction over a matter governed by ERISA. *Id.* Instead, the relief sought must, at a minimum, relate to the underlying bankruptcy case. As the Court did not find that the termination of the plan or payment to the bank from the corpus of the employee benefit plan had any effect on either the bankruptcy estate or the debtor's creditors, the Court held that it could not exercise jurisdiction over the Trustee's Order. *Id.* ("The court can find nothing in the Proposed Order that relates to the underlying bankruptcy case beyond the coincidental identities of the Plan's administrator and the bankruptcy estate's trustee, which ... is an insufficient nexus for asserting [jurisdiction].")

B. *Trans-Industries*

In *Trans-Industries*, the Trustee brought an adversary proceeding against the pre-petition trustees of the debtor's pension plan asserting a breach of fiduciary duty under ERISA. The defendants sought to dismiss the complaint for lack of subject matter jurisdiction on the grounds that (1) any recovery by the Trustee would be on behalf of the pension plan and not the debtor, and (2) the pension plan was not property of the debtor's estate. 419 B.R. at 25. The Trustee argued that while the claims were not property of the estate, the Bankruptcy Court could assert, "arising under", "arising in", or "related to" jurisdiction over the adversary proceeding. *Id.* at 30. While the Court held that it did not have "arising under," or "arising in" jurisdiction, the Court did hold that it could assert "related to" jurisdiction over the Trustee's claims.

The Court first rejected the Trustee's argument that the adversary case was a proceeding "arising under" or "arising in" the debtor's bankruptcy case because the adversary proceeding was brought by the Trustee acting pursuant to his duties under § 704(a)(11). The Court held that

the cause of action was “created and will be determined by [ERISA] rather than any provision of title 11,” and did not involve “claims that by their very nature, could only arise in bankruptcy cases,” that it could not assert “arising under” or “arising in” jurisdiction. *Id.* at 31 (internal citations omitted).

The Court, however, did find that it could assert “related to” jurisdiction over the adversary proceeding. The defendants argued that the Bankruptcy Court did not have jurisdiction because the claims are not property of the debtor’s estate nor would any recovery by the Trustee go to the debtor’s estate but would instead go to the pension plan for distribution to the debtor’s employees. Applying the test first articulated in *Pacor, Inc. v. Higgins (In re Pacor, Inc.)*, 743 F.2d 984, 994 (3d Cir. 1984), the Court held that it could assert “related to” jurisdiction because “the outcome of the proceeding could conceivably have [an] effect on the estate being administered in bankruptcy.” *Id.* at 33. The Court based its holding on the fact that the Trustee had reasonably advanced funds of the bankruptcy estate to pay for the initial costs of the adversary proceeding and that any recovery the Trustee obtained would be used, in part, to repay the bankruptcy estate for these litigation costs, and that “[t]he ultimate distribution to creditors ... will be directly affected by the extent to which the ERISA Plan reimburses the bankruptcy estate for the fees and expenses the estate has paid to enable the Trustee to administer the Plan” *Id.* at 34. In short, the Bankruptcy Court held that if a Trustee’s administration of an employee benefit plan could have an effect on the ultimate distribution to creditors, then a Bankruptcy Court may assert “related to” jurisdiction of an ERISA-related proceeding.

C. What Can We Learn From *AB & C Group* and *Trans-Industries*

Given that there are only two cases that discuss a Bankruptcy Court’s jurisdiction over a Trustee acting pursuant to his duties under § 704(a)(11), and the factual distinctions between the

two cases, it is difficult to draw any definite conclusions from *AB & C Group* and *Trans-Industries*. Some general observations, however, can be made. In both cases, the Courts rejected the argument that a Bankruptcy Court has jurisdiction solely because the Trustee is acting pursuant to a prescribed duty in the Bankruptcy Code. The fact that a “plan administrator” also happens to be a bankruptcy Trustee does not appear to be enough for a Court to assert jurisdiction over the Trustee’s decisions regarding an employee benefit plan. Instead, both Courts looked for what effect the Trustee’s requested relief could have on the bankruptcy estate. In *AB & C Group*, the Court was unable to discern any effect that the payment of administrative expenses from an employee benefit plan could have on the bankruptcy estate. It is unclear, however, from the case what arguments were made as to this point as the Court only addresses the Trustee’s arguments based on his prescribed duty under § 704(a)(11), and the Trustee’s attempts to tie the relief requested to other provisions of the Bankruptcy Code. In contrast, in *Trans-Industries*, the Court accepted the Trustee’s argument that what happened with the debtor’s pension plan could affect the amount of distribution the debtor’s creditors could expect to receive. In short, both cases appear to support the proposition that a Trustee’s best tactic is to tie the Trustee’s requested relief to the benefit or detriment of a debtor’s general creditors.

DR. TRUSTEE

INTRODUCTION

Dr. Fred Feelgood is a geriatric specialist. For the past ten years he has operated a geriatric practice and run a 100 unit nursing home, which is completely full. Most of the patients in the nursing home are Medicare or Medicaid patients. The entire practice and the nursing home are all operated under dba's as a sole proprietorship. Dr. Feelgood got divorced last year and owes his wife lump sum alimony payments of \$100,000 per year, for five years, and alimony and child support of \$10,000 per month for the foreseeable future. He is currently behind on the lump sum alimony \$200,000. Dr. Feelgood's local bank has a \$500,000 line of credit on the business assets, including a mortgage on the nursing home, which in today's real estate market may be worth more or less than the mortgage amount. There are about \$100,000 of receivables due to his practice. Over the years, he has treated over 50,000 patients and has a warehouse of files including 5,000 current files. He has about \$100,000 of personal property including jewelry, etc, which is not exempt. He also has some retirement funds which may or may not be exempt, containing \$500,000. He files Chapter 7 bankruptcy and Teresa Trustee is appointed Trustee. He is still trying to practice post-Chapter 7, but does not have the cash flow to really practice in a meaningful way. Patients are calling demanding their files, doctors are calling demanding past records, the bank is demanding cash collateral be frozen and someone needs to take care of the patients in the nursing home. In addition, at the end of the day, some provision needs to be made for the 50,000 patient records he has.

Who is going to do all of this and who is going to pay for it?

The Bankruptcy Abuse Prevention and Consumer Protection Action of 2005 ("BAPCPA") imposed a number of new requirements on Bankruptcy Trustees regarding patients rights, records, privacy and care. The key sections are 11 U.S.C. § 351 which provides for the disposal of patient records; 11 U.S.C. § 333 which provides for the appointment of a patient care ombudsman; 11 U.S.C. § 503(b)(8) which grants

administrative priorities status to certain expenses in connection with closing the healthcare business; and 11 U.S.C. § 704(a)(12) which makes the Chapter 7 Trustee obligated to use all reasonable efforts to transfer patients from a closing health care business to another appropriate healthcare business.

These provisions, while altruistic in nature, do not provide for proper funding for the duties imposed upon the Trustee and have the risks of bankrupting the Dr. Trustee.

HIPAA PRIVACY RULES

The United States Department of Health and Human Services (“HHS”), issued the “Standards for Privacy of Individually Identifiable Health Information (“Privacy Rule”) to implement the requirement of the Health Insurance Portability and Accountability Act of 1996 (HIPAA”).

It sets forth Privacy Rules to insure that an individual’s health information was properly protected while allowing the flow of health information needed to provide the care for patients. A good reference point for HIPAA compliance is the United States Department of Health and Human Services OCR Privacy Brief entitled “Summary of the HIPAA Privacy Rules” which can be found on the Health & Human Services’ website at <http://www.hhs.gov>.

These rules went into effect before the 2005 amendments to the Bankruptcy Code as discussed in this outline, but they are very important for Trustees to understand because in a health care business, these provisions apply to Chapter 11 and Chapter 7 Trustees.

The Rules set forth the concept of “Protected Health Information”. (“PHI”). Individually Identifiable Health Information is information that relates to a person’s past, present or future physical or mental health and the past care for that person.

The scope of the HIPAA Rules are quite broad and encompass all aspects of a patient’s records and care. The provisions that apply most commonly to a Trustee involve protection of the records and the disclosure of the records. If you are the Trustee for an entity covered by the regulations, you must maintain reasonable and appropriate administrative, technical and physical safeguards to prevent intentional or unintentional use or disclosure of protected health information in violation of the privacy rule. For example, you might have to shred documents before disposing of them. The HHS can impose civil money penalties on you of \$100 for failure to comply with the Rule, not to exceed \$25,000 per year. There are also criminal provisions for someone who knowingly obtains or discloses individually identifiable health information in violation of HIPAA, with a fine of \$50,000 and up to one year imprisonment. The criminal penalties increase to \$100,000 and up to five years imprisonment if the unlawful conduct involves false pretenses, and a \$250,000 and up to ten years imprisonment if the wrongful conduct involved the intent to sell, transfer or use an Individually Identifiable Health Information for commercial advantage, personal gain or malicious harm.

These provisions apply to a Trustee who is trying to sell a health care business which includes records which contain HIPAA protected information.

PATIENT CARE OMBUDSMAN

11 U.S.C. § 3033 provides for the appointment of a Patient Care Ombudsman in a Chapter 7, 9 or 11 case of a healthcare business.

A “Health Care Business” is defined in the 101(27A) as “any public or private entity.....that is primarily engaged in offering to the general public facilities and services” for “the diagnosis or treatment of medical conditions, including psychiatric and drug treatment care.” Clearly, this includes hospitals, hospices, home health care agencies, skilled nursing facilities, assisted living facilities, homes for the aged, domiciliary care facilities and “any health care institution that is related to any of these examples, if that institution is primarily engaged in offering room, board, laundry, or personal assistance with activities of daily living and incidentals to activities of daily living.

Bankruptcy Rule 2015.1 is the Rule that implements the Patient Care Ombudsman Statute.

Nowhere in Section 333 are HIPAA regulations referenced. However, the Rule provides that the acts of Patient Care Ombudsman are “subject to applicable non-bankruptcy law relating to patient privacy”. 2015.1(b). Thus HIPAA is incorporated in the Rule and the Statute by implication and directly by the Rule.

The appointment of an Ombudsman is mandatory unless the Court finds that the appointment is not necessary to protect the patients and the specific facts of the case. A hearing on a motion to appoint an ombudsman is an evidentiary motion.

In Alternate Family Care, 377 B.R. 754, (Bankr SD FL 2007), the Court set forth a list of factors to be considered in determining whether to appoint a Patient Care Ombudsman including:

1. the cause of the bankruptcy;
2. the presence and role of licensing or supervising entities;
3. the debtor’s past history of patient care;
4. the ability of 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 an appropriate level of care; and
9. the impact of the cost of an ombudsman on the likelihood of a successful reorganization.

The Ombudsman's duties are to monitor the quality of patient care and represent the interests of the patients of the healthcare business. They do not include the responsibility to access the records. Thus, the duties of an Ombudsman are more as a patient advocate than as a custodian of records.

The United States Trustee's Office has published a paper called "The United States Trustee Program Administers BAPCPA's Patient Care Ombudsman Requirements" written by Roberta A. DeAngelis and Paul W. Bridenhagen of the Executive Office. This paper examines the criteria as set forth above in In Re Alternate Family Care. The U.S. Trustee Program agrees that a totality of the circumstances approach is appropriate in determining whether to appoint an ombudsman but differs that cost is a factor to consider. The U.S. Trustee's Program believes that cost should not be a controlling criteria for appointment, noting that in general costs have not been significant so far in cases involving ombudsman. For instance, in a Chapter 7 case the U.S. Trustee's Offices does really does not believe that an ombudsman is appropriate because there is a Chapter 7 Trustee. ABI Journal, Vol. XXVII, No. 5.

TRANSFER OF PATIENTS IN A CLOSING HEALTH CARE BUSINESS

Section 704(a)(12) expanded the duties of a Trustee by requiring that a Trustee shall

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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 healthcare business that

- (A) is in the vicinity of the healthcare business that is closing;
- (B) provides the patient with services that are substantially similar to those provided by the healthcare business that is in the process of being closed; and
- (C) maintain a reasonable quality of care.

I think that the fear of every Chapter 7 Trustee is that midnight phone call from the local U.S. Trustee that he or she has been appointed in a nursing home case, the home is full of 100 patients, and there is no money to pay the bills and Congratulations!. Bankruptcy Rule 2015.2 implements 704(a)(2) by providing that the Trustee “may not transfer a patient to another health care business..... unless the Trustee gives at least ten (10) days’ notice of the transfer to the Patient Care Ombudsman, if any, and the patient and any family member or other contact person whose name and address have been given to the Trustee or the debtor for the purpose of providing information regarding the patients health care. The notices is subject to applicable non-bankruptcy law relating to patient privacy”. HIPAA again raises its head.

In a no-asset case the Trustee does not appear to have an out but must follow the mandates of § 704(a)(12). This writer has heard of trustees trying to surcharge the secured creditors for fulfilling this obligation or seeking local, state or federal funds to accomplish the same. That is no guaranty, however, that anyone other than a Chapter 11 or Chapter 7 Trustee is going to have to foot this bill, whether or not there is money to pay for it.

There is one non-reported case under this Section, In Re Clayton and Ephannia Anderson, 2008 Westlaw 2557473 (Bkrcty. N.D.CA). In this case the individual debtors

operated a small nursing home at their residence. The Chapter 7 Trustee moved the Court, on an emergency basis, for approval of his abandonment of the property and the business. The U.S. Trustee argued that because the Trustee has a continuing responsibility to the patients, he could not abandon the facility notwithstanding the lack of funds to operate it and notwithstanding any possible personal liability. The Court, however, allowed the abandonment notwithstanding the Trustee's continuing responsibility under § 704(a)(12), since the debtors were taking of the patients in their own home and appeared to continue the ownership of the home through the bankruptcy. The Court found that there was no near-term danger to the patients. The Court also ordered an Ombudsman and thus requested reports. This was a "no-asset case". The issue then becomes whether reasonable and best efforts means that a trustee dip into his or her personal funds in order to care for or transfer patients. The Court found that if there are assets at all in a bankruptcy estate, the assets must be devoted to the health and welfare of patients in a health care facility. However, in a case where there are no assets and no prospects for creating an estate, it is unreasonable to demand that a Trustee care for patients out of his own pocket and best efforts does not include such a requirement.

BAPCPA also added § 503(b)(8) which grants administrative priority status to expenses in connection with closing a health care business. That implies, however, that there is an asset case.

DISPOSAL OF PATIENT RECORDS

BAPCPA added § 351 which sets forth requirements for the disposal of patient records. In summary, it provides that if a Trustee does not have sufficient amount of funds to pay for storage of records under State and Federal Law, the Trustee shall (a)

publish notice in one or more appropriate newspapers that if patient records are not claimed by the patient or an insurance provider within one year, the Trustee may destroy the records and (b) during the first 180 days of this period, promptly attempt to notify directly every patient and the appropriate insurance carrier concerning these records.

At the end of the one year period if the records are not claimed, the Trustee shall mail by certified mail a written request to each appropriate federal agency to request permission from the agency to deposit the records with that agency, but the Federal agencies are not required to accept them. If the records are not claimed, then the Trustee shall destroy the records.

A Patient Record is described in Section. 101 as “any written document relating to a patient or a record recorded in magnetic, optical or other form of electronic medium”. The definition of what is a legal record is also complicated and can be changed depending upon the State in which one is located and under what Federal Law one operates. Which Federal Agency is contacted? The Statute does not say, it simply says appropriate federal agencies. Centers for Medicare and Medicaid Services might be one, Health and Human Services might be another. There is nothing that says how long the Trustee shall give the Federal Agency to make the decision. Many States may have laws that allow a Trustee to transfer records to State Agencies for storage.

Some Trustees have been able to get local hospitals to take the records, the debtors to take the records, and even the doctors themselves to take the records if they wanted to continue their practice post-bankruptcy with their old patients.

In order to defer the costs, the Trustee must show that the estate does not have the sufficient amount of funds to store the records under State or Federal Law. The Trustee

must calculate the cost of storing, including labor, boxes, transportation, storage and retrieval costs for the retention period.

There is no requirement that the Trustee seek court order before destruction of the records, but it would seem to be good practice to do so after notice to creditors and interested parties.

The notice to the patients of the possession of the records should include a provision that if the records are not claimed within the one-year period, they will be destroyed. That would seem to be a good practice tip. Bankruptcy Rule 6001 addresses the implication of the noticing under §351(a)(1).

In another case that is unreported, In re LLSS MANAGEMENT COMPANY, INC., 2008 WL 395184 (Bkrcty. E.D.N.C.) the Trustee dealt with the medical records of a health care business. Here there were paper medical record histories of patients, but also a compact disc with a copy of the records. The Court ordered the Trustee to shred the medical histories and keep the compact disc and to provide at the debtor's expense mail notification to the patients who were treated in the past year.

CONCLUSION

So far, there have not appeared to have been many cases involving bankruptcies on onerous medical records to maintain or patients to move. There have been cases, however, and the Trustees who have had them, have been impacted.

The obligations here for a diligent trustee are typical to say the least. The Trustees want to do their jobs properly. In a case even with funds, maintaining medical records is expensive, time consuming and takes money away from creditors. This is a

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statutory requirement, however, and Trustees certainly will have to fulfill those requirements.