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IS THE DEBTOR A "HEALTH CARE BUSINESS"?

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One of Congress' many innovations with the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 was the addition of provisions intended to address the unique circumstances presented when health care businesses file for protection under the Bankruptcy Code, 11 U.S.C. §§ 101, *et seq*. ("Bankruptcy Code"). Salient among these are provisions requiring the appointment of a patient care ombudsman ("PCO"), 11 U.S.C. § 333, when a health care business, 11 U.S.C. § 101(27A), becomes a debtor. Battles relating to the appointment of a PCO often preliminarily involve fights over whether a debtor qualifies as a "health care business" within the meaning of the Bankruptcy Code.

11 U.S.C. § 101(27A) provides that a "health care business"

(A) means any public or private entity (without regard to whether that entity is organized for profit or not for profit) that is primarily engaged in offering to the general public facilities and services for—

(i) the diagnosis or treatment of injury, deformity, or disease; and

(ii) surgical, drug treatment, psychiatric, or obstetric care; and

(B) includes—

(i) any—

(I) general or specialized hospital;

(II) ancillary ambulatory, emergency, or surgical treatment facility;

(III) hospice;

(IV) home health agency; and

(V) other health care institution that is similar to an entity referred to in subclause (I), (II), (III), or (IV); and

(ii) any long-term care facility, including any—

(I) skilled nursing facility;

(II) intermediate care facility;

(III) assisted living facility;

(IV) home for the aged;

(V) domiciliary care facility; and

(VI) health care institution that is related to a facility referred to in subclause (I), (II), (III), (IV), or (V), 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.

Some courts have read this definition as providing for two categories of "health care businesses." In this view, subsection (A) identifies a broad category of entities which may qualify as "health care businesses," while subsection (B) identifies specific types of entities that so qualify. If a putative health care business does not qualify as one of the specific entities listed in subsection (B), then in order to qualify under subsection (A) a putative health care business must meet each element of 11 U.S.C. § 101(27A)(A). *In re Medical Associates of Pinellas, L.L.C.*, 360 B.R. 356, 359 (Bankr. M.D. Fla. 2007) (in order to qualify as a health care business, the debtor must (i) be a public or private entity, (ii) be primarily engaged in offering facilities and services to the general public, (iii) offer these facilities and services to the general public for the diagnosis or treatment of injury, deformity or disease, *and* (iv) offer these facilities to the public for surgical care, drug treatment, psychiatric care or obstetric care).

Adopting this approach, 11 U.S.C. § 101(27A)(A)'s definition of a health care business should be read narrowly as "contemplat[ing] something more than a doctor's office and clearly…more than an administrative support facility…that does not deal with the general public." *Medical Associates of Pinellas, supra*, 360 B.R. at 361 (Congress' definition of a health care business was intended "to be something more than an administrative support facility that offers ancillary laboratory services", and "was intended to refer to inpatient care facilities such as hospitals and nursing homes and not most out-patient facilities such as a doctor's office").

Differing with *Pinellas*' approach to statutory interpretation (but otherwise adopting its test), the court in *In re Saber*, 369 B.R. 631, 636 (Bankr. D. Colo. 2007), found that the conjunctive "and" between subsections (A) and (B) of 11 U.S.C. § 101(27A) means that "a debtor who is a 'health care business' must meet every requirement under both subsections." Viewing the definition through this prism, the *Saber* court found (applying *Pinellas*' test) that a sole-owner, sole-physician plastic surgery office with three additional employees nonetheless qualified as a "surgical treatment facility" as contemplated by 11 U.S.C. § 101(27A)(B), and hence constituted a "health care business" within the meaning of 11 U.S.C. § 101(27A)). *Id*. at 637.

Focusing on the fact that § 101(27A)(B)'s use of "including" is "not a limiting word under the Bankruptcy Code . . . ([because under] 11 U.S.C. § 102(3) [, 'i]n this title ... 'includes' and 'including' are not limiting')", *Id*., other courts also have taken a broad view of what may constitute a health care business. For example, in *In re Starmark Clinics, LP*, 388 B.R. 729 (Bankr. S.D. Tex. 2008), the court determined that a private entity which offered outpatient cosmetic surgery to the general public qualified as a "health care business." *Id*. at 734. Similarly, in *In re Alternate Family Care*, 377 B.R. 754 (Bankr. S.D. Fla. 2007), the court (applying the *Pinellas* test) concluded that a state-licensed agency that provided child placement and caring services, as well as residential psychiatric treatment for emotionally-disturbed children, qualified as a "health care business" under §101(27A) because the debtor maintained a website that invited parents to make direct contact with the debtor to request treatment for their children without a physician's referral (although a large part of its client base was based upon physician referrals). For this reason, the court concluded that the debtor offered services to the general public and, therefore, qualified as a health care business. *Id*. at 758. *See also In re Plaza de Retiro, Inc.*, 417 B.R. 632 (Bankr. D.N.M. 2009) (concluding that a debtor which had "a Home Health Care License and [was] licensed as a Skilled Nursing Facility" was a "health care business").

While it may seem like these rulings on the question of what constitutes a "health care business" boil-down to "if it looks like a duck and quacks like a duck . . .", nonetheless it seems apparent there is sufficient "wiggle room" in how Congress couched its §101(27A) definition of "health care business" to make it difficult for most health care-oriented enterprises to escape it.

About the Author

Mr. Motsinger is a partner with Krieg DeVault, LLP, a firm founded in Indianapolis over 130 years ago. Mr. Motsinger's experience in creditors' rights, bankruptcy and commercial law spans more than 30 years. He chairs the firm's Creditors' Rights and Bankruptcy Practice Group. Mr. Motsinger is certified in Business Bankruptcy by the American Board of Certification of Bankruptcy and Creditors' Rights Attorneys* and was the 2011 Chair of the Board of Directors of that organization, of which he now is an Emeritus Director. He has represented creditors, debtors and investors in litigation and bankruptcy cases throughout the United States. Mr. Motsinger testified before the Congressionally-appointed National Bankruptcy Review Commission in 1997. He served as a judicial clerk to U.S. District Judge James Lawrence King in Miami, Florida, and as a judicial intern and research assistant to the Administrative Assistant to the Chief Justice, Supreme Court of the United States.