

CMS'S REACH MAY BE LIMITED IN BANKRUPTCY PROCEEDINGS

The Bankruptcy Court for the District of Delaware analyzed whether CMS could suspend payments to a health care organization once the organization seeks bankruptcy court protection. The question centered on whether such payments are considered estate property within the scope of the automatic stay rule, 11 U.S.C. § 362. This case highlights the limits of CMS's perceived police powers.

BACKGROUND

In *True Health Diagnostics LLC v. Alex M. Azar, II & Seema Verma*,^[1] the plaintiff laboratory filed for a Chapter 11 bankruptcy protection, initiated an adversary proceeding and filed a Motion for Preliminary Injunction (the "Motion") against the Secretary and CMS (collectively, the "defendants") after CMS suspended its Medicare payments, and issued two overpayment determinations of \$19,759,699 and \$7,707,433.32. The Motion sought to enforce an automatic stay pursuant to 11 U.S.C. § 362 to prevent the defendants from withholding Medicare payments to True Health once it sought bankruptcy court protection.

The majority of the plaintiff laboratory's tests are paid for by the Medicare Program. Federal regulations give CMS leeway to suspend, offset, and recoup Medicare payments for multiple reasons, including "where a credible allegation of fraud exists against a provider or supplier, unless there is good cause not to suspend payments." 42 C.F.R. § 405.371(a)(2).

CMS opposed the Motion and argued, among other things, that (i) the Court lacks subject matter jurisdiction to enforce the automatic stay; (ii) even if jurisdiction exists, withholding Medicare payments is an exercise of CMS's police or regulatory power; and (iii) the Medicare payments are not property of the Debtor's estate.

The two main questions before the Court were (1) whether payments withheld by CMS are considered "estate property" according to the automatic stay rule of 11 U.S.C. § 362 (the "Rule"), and if so, (2) whether payments withheld by CMS post-bankruptcy petition are exempt from the Rule.

ANALYSIS

The Bankruptcy Court ruled it had jurisdiction to hear the plaintiff laboratory's claims stating "where there is an independent basis for bankruptcy court jurisdiction, exhaustion of administrative remedies pursuant to other jurisdictional statutes is not required." Although CMS pointed out that Medicare regulations 42 C.F.R. § 405.900 et seq. bar the Court from exercising jurisdiction over Medicare claims, the Court found that the matters at hand are not "inextricably intertwined with pre-petition fiscal reimbursement determinations." Therefore it is not barred by the Medicare regulatory requirement to exhaust administrative remedies.

As for the Rule, the Court determined that it applies to the suspended Medicare payments because 11 U.S.C. §541(a)(1) defines "property of the estate" as "all legal or equitable interest of the debtor in property as of the commencement of the case." The Third Circuit's definition of "property of the estate" includes all property whether tangible, intangible, contingent or postponed,^[2] and Congress intended the automatic stay provision to apply to governmental entities acting as creditors because the term "entities," as defined under the Bankruptcy Code, includes governmental units.^[3] Therefore, the Medicare reimbursements that were suspended post-petition were indisputably property of the plaintiff's Bankruptcy estate and therefore subject to the automatic stay.

CMS pointed out the police power exception to the Rule under which the stay does not apply to actions "to enforce such governmental unit's police and regulatory power." However, the Court found that CMS failed to meet both the pecuniary interest test and the public policy test which determine whether the exception applies. The Court found, with little reasoning, that "nothing in the record suggests that the defendants' withholding of the post-petition Medicare payments is for any purpose other than protecting its pecuniary interest in property of the estate over the interests of other unsecured creditors." Therefore, the Defendants fail the tests, and the automatic stay should apply to the post-petition Medicare payments suspended by CMS.

KEY TAKEAWAYS

Although CMS has discretion to suspend, offset or recoup Medicare payments to entities, that discretion has its limits. If an entity is receiving Medicare payments and seeks to enforce the automatic stay given by a bankruptcy petition, it appears that CMS will have to continue to pay

that entity unless CMS can prove that withholding payments is to promote public safety and welfare or to effectuate public policy. It is important to note that this decision represents the opinion of a federal bankruptcy court in one district and that other courts, or an appellate court, could reach a different conclusion.

If you have any questions or would like additional information about this topic, please contact:

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[1] Case No. 19-50280-JTD (Aug. 29, 2019).

[2] See *The Majestic Star Casino, LLC v. Barden Dev., Inc.*, 716 F.3d 736, 750-51 (3rd Cir. 2013).

[3] 11 U.S.C. 101(15).