AMERICAN BANKRUPTCY INSTITUTE

2017 Alexander L. Paskay Memorial Bankruptcy Seminar

BUSINESS SESSION

The Doctor Is In! Health Care Update

Hon. K. Rodney May, Moderator
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2017

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedLimited on Constitutional Grounds by U.S. v. Hawley, N.D.Iowa, Aug. 01, 2011

United States Code Annotated
Title 31. Money and Finance (Refs & Annos)
Subtitle III. Financial Management
Chapter 37. Claims (Refs & Annos)
Subchapter III. Claims Against the United States Government (Refs & Annos)

31 U.S.C.A. § 3729

§ 3729. False claims

Currentness

(a) Liability for certain acts.--

(1) In general.--Subject to paragraph (2), any person who--

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-410[1]), plus 3 times the amount of damages which the Government sustains because of the act of that person.

(2) Reduced damages.--If the court finds that--

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation,

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of that person.

(3) Costs of civil actions.--A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Definitions.--For purposes of this section--

(1) the terms "knowing" and "knowingly" --

(A) mean that a person, with respect to information--

(i) has actual knowledge of the information;

(ii) acts in deliberate ignorance of the truth or falsity of the information; or

(iii) acts in reckless disregard of the truth or falsity of the information; and

(B) require no proof of specific intent to defraud;

(2) the term "claim"--

(A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that--

(i) is presented to an officer, employee, or agent of the United States; or

(ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government--

(I) provides or has provided any portion of the money or property requested or demanded; or

(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and

(B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property;

(3) the term "obligation" means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment; and

(4) the term "material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

(c) Exemption from disclosure.--Any information furnished pursuant to subsection (a)(2) shall be exempt from disclosure under section 552 of title 5.

(d) Exclusion.--This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

[(e) Redesignated (d)]

CREDIT(S)

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 978; Pub.L. 99-562, § 2, Oct. 27, 1986, 100 Stat. 3153; Pub.L. 103-272, § 4(f)(1)(O), July 5, 1994, 108 Stat. 1362; Pub.L. 111-21, § 4(a), May 20, 2009, 123 Stat. 1621.)

Notes of Decisions (1559)

Footnotes

1 So in original. Probably should read "Public Law 101-410".

31 U.S.C.A. § 3729, 31 USCA § 3729
Current through P.L. 114-248.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Regulation

Code of Federal Regulations
Title 42. Public Health
Chapter IV. Centers for Medicare & Medicaid Services, Department of Health and Human Services (Refs & Annos)
Subchapter B. Medicare Program
Part 405. Federal Health Insurance for the Aged and Disabled (Refs & Annos)
Subpart C. Suspension of Payment, Recovery of Overpayments, and Repayment of Scholarships and Loans (Refs & Annos)
Suspension and Recoupment of Payment to Providers and Suppliers and Collection and Compromise of Overpayments

42 C.F.R. § 405.371

§ 405.371 Suspension, offset, and recoupment of Medicare payments to providers and suppliers of services.

Effective: October 1, 2014

Currentness

(a) General rules. Medicare payments to providers and suppliers, as authorized under this subchapter (excluding payments to beneficiaries), may be—

(1) Suspended, in whole or in part, by CMS or a Medicare contractor if CMS or the Medicare contractor possesses reliable information that an overpayment exists or that the payments to be made may not be correct, although additional information may be needed for a determination;

(2) In cases of suspected fraud, suspended, in whole or in part, by CMS or a Medicare contractor if CMS or the Medicare contractor has consulted with the OIG, and, as appropriate, the Department of Justice, and determined that a credible allegation of fraud exists against a provider or supplier, unless there is good cause not to suspend payments; or

(3) Offset or recouped, in whole or in part, by a Medicare contractor if the Medicare contractor or CMS has determined that the provider or supplier to whom payments are to be made has been overpaid.

(b) Good cause exceptions applicable to payment suspensions.

(1) CMS may find that good cause exists not to suspend payments or not to continue to suspend payments to an individual or entity against which there are credible allegations of fraud if—

(i) OIG or other law enforcement agency has specifically requested that a payment suspension not be imposed because such a payment suspension may compromise or jeopardize an investigation;

(ii) It is determined that beneficiary access to items or services would be so jeopardized by a payment suspension in whole or part as to cause a danger to life or health;

(iii) It is determined that other available remedies implemented by CMS or a Medicare contractor more effectively or quickly protect Medicare funds than would implementing a payment suspension; or

(iv) CMS determines that a payment suspension or a continuation of a payment suspension is not in the best interests of the Medicare program.

(2) Every 180 days after the initiation of a suspension of payments based on credible allegations of fraud, CMS will—

(i) Evaluate whether there is good cause to not continue such suspension under this section; and

(ii) Request a certification from the OIG or other law enforcement agency that the matter continues to be under investigation warranting continuation of the suspension.

(3) Good cause not to continue to suspend payments to an individual or entity against which there are credible allegations of fraud must be deemed to exist if a payment suspension has been in effect for 18 months and there has not been a resolution of the investigation, except CMS may extend a payment suspension beyond that point if—

(i) The case has been referred to, and is being considered by, the OIG for administrative action (for example, civil money penalties); or such administrative action is pending or

(ii) The Department of Justice submits a written request to CMS that the suspension of payments be continued based on the ongoing investigation and anticipated filing of criminal or civil action or both or based on a pending criminal or civil action or both. At a minimum, the request must include the following:

(A) Identification of the entity under suspension.

(B) The amount of time needed for continued suspension in order to conclude the criminal or civil proceeding or both.

(C) A statement of why or how criminal or civil action or both may be affected if the requested extension is not granted.

(c) Steps necessary for suspension of payment, offset, and recoupment.

(1) Except as provided in paragraphs (d) and (e) of this section, CMS or the Medicare contractor suspends payments only after it has complied with the procedural requirements set forth at § 405.372.

(2) The Medicare contractor offsets or recoups payments only after it has complied with the procedural requirements set forth at § 405.373.

(d) Suspension of payment in the case of unfiled cost reports.

(1) If a provider has failed to timely file an acceptable cost report, payment to the provider is immediately suspended in whole or in part until a cost report is filed and determined by the Medicare contractor to be acceptable.

(2) In the case of an unfiled cost report, the provisions of § 405.372 do not apply. (See § 405.372(a)(2) concerning failure to furnish other information.)

(e) Suspension of payment in the case of unfiled hospice cap determination reports.

(1) If a provider has failed to timely file an acceptable hospice cap determination report, payment to the provider is immediately suspended in whole or in part until a cap determination report is filed and determined by the Medicare contractor to be acceptable.

(2) In the case of an unfiled hospice cap determination report, the provisions of § 405.372 do not apply. (See § 405.372(a)(2) concerning failure to furnish other information.)

Credits

[37 FR 10723, May 27, 1972. Redesignated at 42 FR 52826, Sept. 30, 1977; 51 FR 41351, Nov. 14, 1986; 53 FR 6647,

March 2, 1988; 61 FR 63745, Dec. 2, 1996; 67 FR 66813, Nov. 1, 2002; 76 FR 5961, Feb. 2, 2011; 79 FR 50509, Aug. 22, 2014]

SOURCE: 31 FR 13534, Oct. 20, 1966, unless otherwise noted. Redesignated at 42 FR 52826, Sept. 30, 1977; 51 FR 6235, Feb. 21, 1985; 50 FR 15326, April 17, 1985; 50 FR 19687, May 10, 1985; 50 FR 33030, Aug. 16, 1985; 54 FR 41733, Oct. 11, 1989; 57 FR 19092, May 4, 1992; 61 FR 69034, Dec. 31, 1996; 63 FR 41002, July 31, 1998; 74 FR 47468, Sept. 16, 2009; 74 FR 65333, Dec. 9, 2009; 76 FR 5961, Feb. 2, 2011; 77 FR 29028, May 16, 2012, unless otherwise noted.

AUTHORITY: Secs. 205(a), 1102, 1861, 1862(a), 1869, 1871, 1874, 1881, and 1886(k) of the Social Security Act (42 U.S.C. 405(a), 1302, 1395x, 1395y(a), 1395ff, 1395hh, 1395kk, 1395rr and 1395ww(k)), and sec. 353 of the Public Health Service Act (42 U.S.C. 263a).; Secs. 1102, 1815, 1833, 1842, 1862, 1866, 1870, 1871, 1879 and 1892 of the Social Security Act (42 U.S.C. 1302, 1395g, 1395*l*, 1395u, 1395y, 1395cc, 1395gg, 1395hh, 1395pp and 1395ccc) and 31 U.S.C. 3711.

Current through December 15, 2016; 81 FR 90947.

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JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Wednesday, December 14, 2016

Justice Department Recovers Over $4.7 Billion From False Claims Act Cases in Fiscal Year 2016

Third Highest Annual Recovery in FCA History

The Department of Justice obtained more than $4.7 billion in settlements and judgments from civil cases involving fraud and false claims against the government in fiscal year 2016 ending Sept. 30, Principal Deputy Assistant Attorney General Benjamin C. Mizer, head of the Justice Department's Civil Division, announced today. This is the third highest annual recovery in False Claims Act history, bringing the fiscal year average to nearly $4 billion since fiscal year 2009, and the total recovery during that period to $31.3 billion.

"Congress amended the False Claims Act 30 years ago to give the government a more effective tool against false and fraudulent claims against federal programs," said Mizer. "An astonishing 60 percent of those recoveries were obtained in the last eight years. The beneficiaries of these efforts include veterans, the elderly, and low-income families who are insured by federal health care programs; families and students who are able to afford homes and go to college thanks to federally insured loans; and all of us who are protected by the government's investment in national security and defense. In short, Americans across the country are healthier, enjoy a better quality of life, and are safer because of our continuing success in protecting taxpayer funds from misuse."

Of the $4.7 billion recovered, $2.5 billion came from the health care industry, including drug companies, medical device companies, hospitals, nursing homes, laboratories, and physicians. The $2.5 billion recovered in fiscal year 2016 reflects only federal losses. In many of these cases, the Department was instrumental in recovering additional millions of dollars for state Medicaid programs. This is the seventh consecutive year the Department's civil health care fraud recoveries have exceeded $2 billion.

The next largest recoveries came from the financial industry in the wake of the housing and mortgage fraud crisis. Settlements and judgments in cases alleging false claims in connection with federally insured residential mortgages totaled nearly $1.7 billion in fiscal year 2016 – the second highest annual recovery in this area.

The False Claims Act is the government's primary civil remedy to redress false claims for government funds and property under government programs and contracts relating to such varied areas as health care, defense and national security, food safety and inspection, federally insured loans and mortgages, highway funds, small business contracts, agricultural subsidies, disaster assistance, and import tariffs. In 1986, Congress strengthened the Act by amending it to increase incentives for whistleblowers to file lawsuits alleging false claims on behalf of the government.

Most false claims actions are filed under those whistleblower, or *qui tam*, provisions. If the government prevails in the action, the whistleblower, also known as the relator, receives up to 30 percent of the recovery. Whistleblowers filed 702 *qui tam* suits in fiscal year 2016, and the Department recovered $2.9 billion in these and earlier filed suits this past year. The government awarded the whistleblowers $519 million during the same period.

Health Care Fraud

The Department recovered $19.3 billion in health care fraud claims from January 2009 to the end of fiscal year 2016 – 57 percent of the health care fraud dollars recovered in the 30 years since the 1986 amendments to the False Claims Act. These recoveries restore valuable assets to federally funded programs such as Medicare, Medicaid, and TRICARE, the health care program for service members and their families. But just as important, the Department's vigorous pursuit of health care fraud prevents billions more in losses by deterring others who might otherwise try to cheat the system for their own gain. The Department's success is a direct result of the high priority the Obama Administration has placed on fighting health care fraud. In 2009, the Attorney General and the Secretary of the Department of Health and Human Services, the Department that administers Medicare and Medicaid, announced the creation of an interagency task force called the Health Care Fraud Prevention and Enforcement Action Team (HEAT), to increase coordination and optimize criminal and civil enforcement. Additional information on the government's efforts in this area is available at StopMedicareFraud.gov, a webpage jointly established by the Departments of Justice and Health and Human Services.

The largest recoveries this past year – $1.2 billion – came from the drug and medical device industry. Drug manufacturers Wyeth and Pfizer Inc. paid $784.6 million to resolve federal and state claims that Wyeth knowingly reported false and fraudulent prices on two drugs used to treat acid reflux, Protonix Oral and Protonix IV. The government alleged that Wyeth (before it was acquired by Pfizer) failed to report deep discounts available to hospitals, as required by the government to ensure that the Medicaid program enjoyed the same pricing benefits available to the company's commercial customers. Wyeth paid $413.2 million to the federal government and $371.4 million to state Medicaid programs.

In another settlement against a drug company, Novartis Pharmaceuticals Corp. paid $390 million based on claims that the company gave kickbacks to specialty pharmacies in return for recommending Exjade, an iron chelation drug, and Myfortic, an anti-rejection drug for kidney transplant recipients. The settlement includes $306.9 million for the federal government and $83.1 million for state Medicaid programs.

Hospitals and outpatient clinics accounted for $360 million in recoveries. Tenet Healthcare Corp., a major hospital chain in the United States, paid $244.2 million to resolve civil allegations that four of its hospitals engaged in a scheme to defraud the United States by paying kickbacks in return for patient referrals. Tenet paid an additional $123.7 million to state Medicaid programs, and two of its subsidiaries pleaded guilty to related charges and forfeited $145 million, bringing the total resolution to $513 million.

In the medical lab arena, Millennium Health (formerly Millennium Laboratories) paid $260 million to settle allegations that it billed Medicare, Medicaid, and other federal health care programs for excessive and unnecessary urine drug and genetic testing and also that it gave free items to induce physicians to refer expensive and profitable lab tests to Millennium, in violation of the Anti-Kickback Statute and Stark Law. The settlement included $214.8 million in alleged false claims against federal programs, $26 million in alleged false claims against state Medicaid programs, and $19.2 million in related administrative claims.

The nation's largest contract therapy provider paid $125 million to resolve claims that it had induced skilled nursing homes to submit false claims to Medicare for rehabilitation services that were not reasonable, necessary, and skilled, or that weren't provided at all. The settlement was with RehabCare Group Inc., RehabCare Group East Inc., and their parent, Kindred Healthcare Inc. Cases involving nursing homes and

skilled nursing facilities accounted for more than $160 million in settlements and judgments this past fiscal year.

"These health care recoveries benefit vulnerable citizens in Medicare and Medicaid and the taxpayers who pay for those programs," said Inspector General Daniel R. Levinson of the U.S. Department of Health and Human Services. "Beyond those significant settlements, though, my agency works to improve voluntary observance of federal laws through corporate integrity agreements addressing compliance weaknesses, and self-disclosures that encourage health care providers and other entities to voluntarily report suspected violations."

Housing and Mortgage Fraud

The Department recovered more than $7 billion in housing and mortgage claims from January 2009 to the end of fiscal year 2016, including settlements and judgments totaling $1.6 billion this past fiscal year – the second highest annual recovery in the history of the federally insured mortgage program. Notable this year were settlements with Wells Fargo for $1.2 billion and Freedom Mortgage Corp. for $113 million.

Wells Fargo and Freedom Mortgage both admitted that they had originated and endorsed residential mortgages as eligible for federal insurance by the Federal Housing Administration (FHA) that did not meet requirements intended to reduce the risk of default. This put consumers at risk of losing their homes in foreclosure and increased the number of claims against the FHA when their loans went into default. The banks also admitted failing to report such deficiencies to the authorities as required under the program, despite internal reports exposing high rates of underwriting deficiencies that would have put the agency on notice so it could prevent continued program violations and mounting losses. By originating and endorsing ineligible loans for FHA insurance, the banks increased their mortgage profits at taxpayer expense while incurring little or no risk of their own.

As part of the Wells Fargo settlement, the bank's vice president of Credit Risk – Quality Assurance, Kurt Lofrano, admitted that he annually certified Wells Fargo's compliance with FHA's Direct Endorsement Lender program and the bank's continued qualification to remain in the program.

These recoveries are part of the broader enforcement efforts by President Obama's Financial Fraud Enforcement Task Force. President Obama established the interagency task force in 2009, to wage an aggressive, coordinated, and proactive effort to investigate and prosecute financial crimes. The task force includes representatives from a broad range of federal agencies, regulatory authorities, inspectors general, and state and local law enforcement who, working together, bring to bear a powerful array of criminal and civil enforcement resources. The task force is working to improve efforts across the federal executive branch, and with state and local partners, to investigate and prosecute significant financial crimes, ensure just and effective punishment for those who perpetrate financial crimes, combat discrimination in the lending and financial markets, and recover proceeds for victims of financial crimes. For more information about the task force, visit www.stopfraud.gov.

Other Fraud Recoveries

Although health care and mortgage fraud dominated fiscal year 2016 recoveries, the Department has aggressively pursued fraud wherever it is found in federal programs and contracts. For example, the Department recovered $82.6 million in false claims from BP Exploration and Production Inc. (BP) arising from the April 2010 Deepwater Horizon/Macondo Well explosion and oil spill in the Gulf of Mexico. The government, through the Department of the Interior, leases portions of the Outer Continental Shelf to companies like BP that operate exploratory oil wells. In exchange for the lease, the operators pay royalties based on the volume of oil extracted from the wells. Program regulations applicable to exploration of the Outer Continental Shelf require well operators to maintain a "safe drilling margin" and to report plans to drill

further into an open hole if the margin falls below legal limits. The government alleged that BP provided false reports about its "safe drilling margin" that concealed its improper drilling, which left the well in a fragile state and ultimately resulted in the blowout. The government's civil fraud claims were part of a $20 billion consent decree reached with the United States and five Gulf states that also included damages and penalties under state and federal environmental laws, mandatory restoration of the area, and other relief.

The government also continued to pursue a variety of procurement fraud matters. For example, L-3 Communications EOTech Inc. and its parent company, L-3 Communications Corp., paid the United States $25.6 million for defective holographic weapon sites EOTech sold to the Department of Defense, Department of Homeland Security, and FBI. The defendants, including EOTech's president, admitted knowing the sights failed to perform as represented in cold temperatures and humid environments, but delayed disclosing the defects to federal authorities for years. Besides compensating the government for critical funds lost through fraud, such settlements ensure that the vital terms of contracts supporting the nation's defense and security agencies are enforced, and deter other contractors from acting fraudulently or recklessly to increase their profits in the future.

The Department had several settlements with for-profit schools that allegedly participated in illegal schemes to secure federal education funds. For example, the second largest for-profit education company in the country, Education Management Corp., paid the United States $52.6 million to resolve allegations that it unlawfully recruited students, engaged in deceptive and misleading recruiting practices, and falsely certified compliance with Title IV of the Higher Education Act and parallel state laws that prohibited such conduct, as part of a $95.5 million global federal-state settlement.

The Department also recovered $50 million in customs fraud. U.S. Customs and Border Protection collects duties on imports of foreign goods to protect U.S. manufacturers from unfair competition abroad by leveling the playing field for domestic products. Importers who seek an unfair advantage by knowingly evading or reducing their obligation to pay these duties are subject to damages and penalties under the False Claims Act. These recoveries both address lost duties and safeguard U.S. markets.

These suits and settlements illustrate the diversity of cases pursued by the Department and the Department's quest to root out fraud and false claims against the government wherever it may be found.

Holding Individuals Accountable

On Sept. 9, 2015, the Department issued a memorandum on individual accountability for corporate wrongdoing. This memorandum reinforced the Department's commitment to use the False Claims Act and other civil remedies to deter and redress fraud by individuals as well as corporations.

Cardiologist Dr. Asad Qamar and his practice, the Institute of Cardiovascular Excellence (ICE), paid $2 million this past fiscal year, and released claims to an additional $5.3 million in suspended Medicare funds, to settle allegations that he and his practice billed Medicare, Medicaid, and TRICARE for medically unnecessary procedures and paid kickbacks to patients by waiving Medicare copayments irrespective of financial hardship. Medicare copayments provide beneficiaries with an incentive to be smart health care consumers and avoid unnecessary procedures. The government alleged that by waiving the required copayments indiscriminately, Dr. Qamar and ICE induced patients to undergo unnecessary and invasive procedures. This conduct made Dr. Qamar the highest paid Medicare cardiologist in the United States in 2012 and 2013. Dr. Qamar also agreed to a three-year exclusion from participating in any federal health care program followed by a three-year integrity agreement with the Department of Health and Human Services Office of the Inspector General.

Additional examples of individuals held personally liable for alleged false claims include George Hepburn ($10.3 million), founder and president of Dynasplint Systems Inc.; Dr. Jonathan Oppenheimer ($9.35

million), former owner and chief executive officer of a Nashville drug testing laboratory; Gottfried and Mieke Kellermann ($8.5 million), founders of Pharmasan Labs Inc. and NeuroScience Inc.; Jacob (Jake) J. Kilgore ($4 million), former co-owner, vice president, and later president of Orbit Medical Inc.; Dr. David G. Bostwick ($3.75 million), founder and former owner and chief executive officer of Bostwick Laboratories Inc.; Mark T. Conklin ($1.75 million), former owner, operator, and sole shareholder of Recovery Home Care Inc. and Recovery Home Care Services Inc.; Dr. David Spellberg ($1.05 million) and Robert A. Scappa, D.O. ($250,000), urologists with 21st Century Oncology LLC; and Ralph J. Cox III ($1 million), former chief executive officer of Tuomey Healthcare System.

Recoveries in Whistleblower Suits

Of the $4.7 billion the government recovered in fiscal year 2016, $2.9 billion related to lawsuits filed under the *qui tam* provisions of the False Claims Act. During the same period, the government paid out $519 million to the individuals who exposed fraud and false claims by filing a *qui tam* complaint.

The number of lawsuits filed under the *qui tam* provisions of the Act has grown significantly since 1986, with 702 *qui tam* suits filed this past year – an average of 13.5 new cases every week. The growing number of *qui tam* lawsuits, particularly since 2009, has led to increased recoveries. From January 2009 to the end of fiscal year 2016, the government recovered nearly $24 billion in settlements and judgments related to *qui tam* suits and paid more than $4 billion in whistleblower awards during the same period.

"The *qui tam* provisions provide a valuable incentive to industry insiders who are uniquely positioned to expose fraud and false claims to come forward despite the risk to their careers," said Principal Deputy Assistant Attorney General Mizer. "This takes courage, for which they are justly rewarded under the Act."

In 1986, Senator Charles Grassley and Representative Howard Berman led the successful efforts in Congress to amend the False Claims Act to, among other things, encourage whistleblowers to come forward with allegations of fraud. In 2009, Senator Patrick J. Leahy, along with Senator Grassley and Representative Berman, championed the Fraud Enforcement and Recovery Act of 2009, which made additional improvements to the False Claims Act and its whistleblower provisions. And in 2010, the passage of the Affordable Care Act provided additional inducements and protections for whistleblowers.

Mizer also expressed his deep appreciation for the many dedicated public servants who investigated and pursued these cases – the attorneys, investigators, auditors, and other agency personnel throughout the Department's Civil Division and the U.S. Attorneys' Offices, as well as the agency Offices of Inspector General, and the many federal and state agencies that contributed to the Department's recoveries this past fiscal year.

"The Department's lawyers and staff, together with our law enforcement partners in federal and state governments, work tirelessly and often overcome daunting challenges," said Mizer. "Their efforts continue to pay for themselves many times over, providing substantial benefits to the taxpayers."

The government's claims in the matters described above are allegations only; except where indicated, there has been no determination of liability. The numbers contained in this press release may differ slightly from the original press releases due to accrued interest.

1469

Civil Division

Topic:
Financial Fraud
Healthcare Fraud
Mortgage Fraud
StopFraud

Download FY 1987 to FY 2016 Fraud Stats
Download Fact Sheet on Significant FY 2009 to FY 2016 FCA Recoveries

Updated December 14, 2016

12/13/2016
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FRAUD STATISTICS - OVERVIEW

October 1, 1987 - September 30, 2016

Civil Division, U.S. Department of Justice

FY	NEW MATTERS[1]		SETTLEMENTS AND JUDGMENTS[2]					RELATOR SHARE AWARDS[3]		
	NON QUI TAM	QUI TAM	NON QUI TAM	QUI TAM			TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL				
1987	343	30	86,479,949	0	0	0	86,479,949	0	0	0
1988	210	43	173,287,663	2,309,354	33,750	2,343,104	175,630,767	88,750	8,438	97,188
1989	224	87	197,202,180	15,111,719	1,681	15,113,400	212,315,580	1,446,770	200	1,446,970
1990	243	72	189,564,367	40,483,367	75,000	40,558,367	230,122,734	6,590,936	20,670	6,611,606
1991	234	84	270,530,467	70,384,431	69,500	70,453,931	340,984,398	10,667,537	18,750	10,686,287
1992	285	114	137,958,206	133,949,447	994,456	134,943,903	272,902,109	24,121,648	259,784	24,381,432
1993	304	138	181,945,576	183,643,787	6,603,000	190,246,787	372,192,363	27,576,235	1,766,902	29,343,137
1994	280	218	706,022,897	379,018,205	2,822,323	381,840,528	1,087,863,425	69,453,350	838,897	70,292,246
1995	233	269	269,989,642	239,024,292	1,635,000	240,659,292	510,648,934	45,162,296	465,800	45,628,096
1996	185	341	247,357,271	124,361,203	13,522,433	137,883,636	385,240,908	22,119,619	3,731,978	25,851,597
1997	186	547	465,568,061	621,919,274	6,021,200	627,940,474	1,093,508,535	65,857,419	1,658,485	67,515,904
1998	120	468	151,435,794	438,834,846	30,248,075	469,082,921	620,518,715	70,264,372	8,486,645	78,751,017
1999	140	493	195,390,485	492,924,785	5,067,503	497,992,288	693,382,773	63,018,064	1,374,487	64,392,552
2000	95	363	367,887,197	1,208,370,688	1,688,957	1,210,059,645	1,577,946,841	183,679,377	375,143	184,054,520
2001	85	311	494,496,974	1,215,525,916	128,587,151	1,344,113,067	1,838,610,042	187,550,470	30,701,881	218,252,350
2002	61	318	119,598,292	1,078,174,023	25,786,140	1,103,960,162	1,223,558,454	161,377,822	4,582,319	165,960,141
2003	92	334	711,098,299	1,534,862,352	5,185,911	1,540,048,263	2,251,146,563	337,307,857	1,382,741	338,690,598
2004	105	432	115,656,023	561,717,502	9,261,879	570,979,382	686,635,404	110,224,220	2,376,128	112,600,348
2005	105	406	276,914,983	1,149,047,524	7,481,593	1,156,529,117	1,433,444,099	168,580,543	2,031,695	170,612,237
2006	71	385	1,712,459,257	1,491,105,499	22,711,363	1,513,816,862	3,226,276,119	219,976,072	5,647,836	225,623,908
2007	129	365	564,826,844	1,251,726,955	160,246,894	1,411,973,849	1,976,800,693	192,888,212	4,616,899	197,505,111

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FRAUD STATISTICS - OVERVIEW

October 1, 1987 - September 30, 2016

Civil Division, U.S. Department of Justice

FY	NEW MATTERS[1]		SETTLEMENTS AND JUDGMENTS[2]					RELATOR SHARE AWARDS[3]		
	NON QUI TAM	QUI TAM	NON QUI TAM	QUI TAM			TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL				
2008	161	379	312,193,480	1,042,582,229	12,678,936	1,055,261,165	1,367,454,645	201,382,144	2,997,615	204,379,759
2009	132	433	469,334,681	1,959,856,256	33,776,480	1,993,632,735	2,462,967,417	249,567,135	9,684,147	259,251,282
2010	140	576	647,383,493	2,280,378,123	108,890,899	2,389,269,023	3,036,652,516	363,349,351	30,649,677	393,999,028
2011	125	635	241,365,995	2,648,195,115	173,888,703	2,822,083,818	3,063,449,813	510,631,604	49,041,606	559,673,210
2012	144	652	1,608,112,862	3,342,216,074	44,973,343	3,387,189,418	4,995,302,280	435,679,630	12,640,243	448,319,873
2013	101	755	169,126,772	2,838,439,485	127,348,056	2,965,787,541	3,134,914,313	522,362,640	30,449,937	552,812,577
2014	97	715	1,676,564,226	4,371,182,653	81,378,451	4,452,561,104	6,129,125,330	694,250,967	14,868,000	709,118,968
2015	110	639	731,342,286	1,879,431,785	1,174,568,601	3,054,000,386	3,785,342,672	330,344,878	336,706,994	667,051,872
2016	143	702	1,856,329,432	2,800,043,469	104,984,935	2,905,028,403	4,761,357,835	491,202,979	28,402,836	519,605,815
TOTAL	4,883	11,304	15,347,423,655	35,394,820,358	2,290,532,213	37,685,352,572	53,032,776,227	5,766,722,898	585,786,731	6,352,509,628

NOTES:

1. "New Matters" refers to newly received referrals, investigations, and qui tam actions.
2. Non qui tam settlements and judgments do not include matters delegated to United States Attorneys' offices. The Civil Division maintains no data on such matters.
3. Relator share awards are calculated on the portion of the settlement or judgment attributable to the relator's claims, which may be less than the total settlement or judgment. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U. S. C. § 3730(h).

246 B.R. 817
United States District Court,
E.D. Virginia,
Alexandria Division.

UNITED STATES of America, ex rel., JANE DOE 1, Jane Doe 2, Jane Doe 3, and Jane Doe 4, Plaintiffs,
v.
X, INC., and John Does, Defendants.

No. CIV.A.98–47–MC.
|
March 23, 2000.

Question arose, during qui tam action filed against bankruptcy debtor under the False Claims Act, as to whether relators were barred from proceeding with suit, in absence of intervention by federal government, by automatic stay. The District Court, Ellis, J., held that: (1) suit under False Claims Act was, of necessity, a proceeding to enforce "police or regulatory power" of government, within meaning of statutory exception to automatic stay; (2) proceeding was brought by "governmental unit," as required by stay exception; and (3) mere fact that qui tam relators had requested entry of money judgment did not remove action from scope of "police or regulatory power" exception to automatic stay.

So ordered.

West Headnotes (5)

[1] **Bankruptcy**
Administrative Proceedings and Governmental Action

False Claims Act, which is designed to prevent or stop fraud, is in nature of police or regulatory law, a suit under which is, of necessity, a proceeding to enforce "police or regulatory power" of government, within meaning of statutory exception to automatic stay. Bankr.Code, 11 U.S.C.A. § 362(b)(4).

7 Cases that cite this headnote

[2] **Bankruptcy**
Administrative Proceedings and Governmental Action

"Police or regulatory power" exception to automatic stay applies only to police or regulatory actions that are brought by governmental units. Bankr.Code, 11 U.S.C.A. § 362(b)(4).

Cases that cite this headnote

[3] **Bankruptcy**
Administrative Proceedings and Governmental Action

Qui tam action brought on federal government's behalf under the False Claims Act qualified as police or regulatory action brought by "governmental unit," even though government had not yet decided whether to intervene, and though qui tam relators possessed many of the characteristics of private litigants, such as by having personal financial stake in outcome of litigation; suit was undeniably of a public nature, as it is brought in name of, and on behalf of, federal government, and as government was entitled to lion's share of any amount recovered. Bankr.Code, 11 U.S.C.A. § 362(b)(4); 31 U.S.C.A. § 3730(b)(1).

10 Cases that cite this headnote

[4] **Bankruptcy**
Administrative Proceedings and Governmental Action

Governmental action, even one seeking entry of money judgment, is exempt from automatic stay as action to enforce police or regulatory powers

of governmental unit, provided that it does not conflict with bankruptcy court's control over property of estate, and that it does not otherwise create pecuniary advantage for the government vis-a-vis other creditors. Bankr.Code, 11 U.S.C.A. § 362(b)(4).

6 Cases that cite this headnote

[5] **Bankruptcy**
Administrative Proceedings and Governmental Action

Mere fact that qui tam relators pursuing action against bankruptcy debtor, on government's behalf, under the False Claims Act had requested entry of money judgment did not remove action from scope of "police or regulatory power" exception to automatic stay; relators could proceed with action up to and including the point when amount of judgment against debtor was quantified, but could not seek enforcement of judgment. Bankr.Code, 11 U.S.C.A. § 362(b)(4).

6 Cases that cite this headnote

Attorneys and Law Firms

***818** M. Miller Baker, Washington, DC, Brian D. Miller, Assistant United States Attorney, United States Attorney's Office, Alexandria, VA, for Plaintiff or Petitioner.

MEMORANDUM OPINION

ELLIS, District Judge.

This False Claims Act case raises the question, unresolved in this circuit, of whether a qui tam action can proceed against a defendant in bankruptcy under the police powers exception to the automatic stay[1] when the United States has not yet decided whether to intervene pursuant to 31 U.S.C. § 3730(b)(4)(B).

I.[2]

In June 1998, plaintiffs, as qui tam relators for the United States, filed a lawsuit against defendants alleging, *inter alia,* violations of the False Claims Act, 31 U.S.C. § 3729. Over a year later, in July 1999, defendants filed for protection under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 301 *et seq.* Although this case was filed nearly two years ago, the United States has not yet completed its investigation of the underlying facts, and as a result, has sought a series of extensions of time in which to decide whether to intervene pursuant to 31 U.S.C. § 3730(b)(3). At a hearing on the fifth such request, the question arose whether the automatic stay provisions of § 362(a),[3] triggered by defendants' bankruptcy filing, applied to this qui tam action, thereby obviating the need for the government's request.

II.

[1] The narrow issue presented here is whether the police powers exception to the automatic stay applies to a qui tam False Claims action where the government has not yet decided whether to intervene. Analysis properly begins with the language of 11 U.S.C. § 362(b), which states, in pertinent part, that the automatic stay does not apply to

> the commencement or continuation of an action or proceeding by a governmental unit ... to enforce such governmental unit's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's ... police or regulatory power.

11 U.S.C. § 362(b)(4). Thus, whether a qui tam suit against a defendant that has filed bankruptcy fits within this exception raises several questions. The first is whether a False Claims Act suit is a proceeding by a governmental unit to enforce that unit's "police or regulatory power." *Id.* This question is easily and confidently answered in the affirmative, as there is ample authority holding that laws, such as the False Claims Act, that are designed to prevent or stop fraud, or to fix

damages for fraud already committed, are police or regulatory laws. *See United States v. Commonwealth Companies, Inc.,* 913 F.2d 518, 525 (8th Cir.1990); *United States ex* ***819** *rel. Marcus v. NBI, Inc.,* 142 B.R. 1, 3 (D.D.C.1992). Moreover, the legislative history of § 362(b)(4) explicitly recognized that a fraud law is a police or regulatory law. *See* S.Rep. No. 989 at 52 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5838.

[2] [3] Yet the inquiry does not end here because § 362(b)(4)'s police powers exception applies only to police or regulatory actions brought by a "governmental unit." Thus, in a qui tam case where, as here, the government has not yet intervened, a second question is presented, namely whether the private qui tam relator qualifies as a governmental unit for the purposes of § 362(b)(4). The answer to this question is not readily apparent because a qui tam relator possesses many of the characteristics of a private litigant, such as a personal financial stake in the outcome of the litigation.[4] On the other hand, a qui tam suit is also undeniably public in nature, as it is brought in the name of, and on behalf of the government, and the government is entitled to the lion's share of any amount recovered. *See* 31 U.S.C. § 3730(b)(1). Moreover, the government retains significant rights in the litigation, even if it chooses not to intervene, such as the right to approve any settlement or agreed dismissal of the action. *See* 31 U.S.C. § 3730(c)(2).

While there is no authority specifically addressing this question,[5] analogous authority from this circuit and elsewhere is, on principle, dispositive. This line of authority does not involve the application of § 362(b)(4), but is nonetheless closely analogous, as it focuses on whether a qui tam suit against a state agency is barred by the Eleventh Amendment because the relator is a private party. Thus, in *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Center,*[6] the Fourth Circuit panel held that a qui tam suit against a Texas state agency, in which the government declined to intervene, was not barred by the Eleventh Amendment. *See Milam,* 961 F.2d at 50. Other circuits have reached the same result, although not all circuits are in agreement on this point.[7] The rationale for this line of authority is that the United States is the real party in interest in qui tam cases even where the government has not, or elects not, to intervene. This is so because, as noted above, even when it does not intervene, the government receives the lion's share of any amount recovered and retains significant ***820** rights over the litigation. *See Milam,* 961 F.2d at 49. Just as the United States is the real party in interest in a qui tam suit for Eleventh Amendment purposes, so too must it be that the United States is the real party in interest in all qui tam suits, including those where the defendant files for bankruptcy. Given this, it follows that the instant qui tam suit is "brought by a governmental unit" for the purposes of § 362(b)(4)'s police powers exception, even though the United States has not yet made its intervention election.

[4] [5] The final question raised by the application of § 362(b)(4) to this case is whether the police or regulatory action at issue seeks "enforcement of a judgment other than a money judgment." 11 U.S.C. § 362(b)(4). On this question there is a split of authority, resulting in the application of two related, but different tests to determine when an action seeks enforcement of a money judgment. Under the "pecuniary advantage test," an action, even one seeking entry of a money judgment,[8] is exempt from the automatic stay under the police or regulatory powers exception provided it does not conflict with the bankruptcy court's control over the property of the estate and does not otherwise create a pecuniary advantage for the government vis-à-vis other creditors. *See Commonwealth Companies,* 913 F.2d at 524; *United States v. Nicolet, Inc.,* 857 F.2d 202, 207–09 (3rd Cir.1988). The more narrow "pecuniary interest" test holds that an action by a governmental unit will only be exempted from the automatic stay if the government is seeking to protect public health, safety and welfare, and is not seeking to protect a so-called "pecuniary interest." *See In re Corporacion de Servicios Medicos Hospitalarios de Fajardo,* 805 F.2d 440, 445 n. 4 (1st Cir.1986). Under this test, any attempt by the government to fix the amount of damages for a police or regulatory violation renders the action subject to the provisions of the automatic stay. *See In re Bicoastal Corp.,* 118 B.R. 854 (M.D.Fla.1990).

The more sensible approach, and the one implicitly adopted by the Fourth Circuit, is the pecuniary advantage test, which concludes that § 362(b)(4) permits the government to seek the entry of a money judgment as the remedy for the violation of a fraud or other police or regulatory law. *See Commonwealth Companies,* 913 F.2d at 522. The pecuniary interest test is less sound because it mistakenly assumes that every time the government seeks to enforce a regulatory scheme through the imposition of civil penalties, it is seeking to protect some "pecuniary interest." *See Commonwealth Companies,* 913 F.2d at 524. To the contrary, it is more sensible to assume instead that, in imposing such penalties, the government is simply seeking to deter and punish violations of its regulations. Moreover, the Fourth Circuit has implicitly rejected the pecuniary interest test. *See EEOC v. McLean Trucking Co.,* 834 F.2d 398 (4th Cir.1987). In *McLean Trucking,* the panel held that the EEOC could seek money damages against the defendant, who had filed for bankruptcy, despite the automatic stay because, in seeking to recover

back pay for the victims of alleged unlawful discrimination, the EEOC was "proceeding in the exercise of its police or regulatory power." *Id.* at 402. This decision, although rendered in the context of an EEOC action, compels the conclusion that, in this circuit, a police or regulatory powers action seeking entry of a money judgment, such as the instant qui tam suit, is exempt from the automatic stay under § 362(b)(4). *See Commonwealth Companies,* 913 F.2d at 523 (finding that the Fourth Circuit concluded in *McLean Trucking* that "§ 362(b)(4) does not exclude a governmental action to obtain the entry of a money judgment for a past violation of the law").

***821** Consistent with this conclusion, the relators may proceed with this action up to and including the point where the amount of the judgment against defendant is quantified, but, if defendant remains in bankruptcy, relators cannot seek enforcement of that judgment. *See Commonwealth Companies,* 913 F.2d at 522. Given this result, it is necessary to consider whether a further extension of time is warranted for the government to decide whether to intervene. The extension of time is warranted, and an appropriate order will enter.

All Citations

246 B.R. 817

Footnotes

1 *See* 11 U.S.C. § 362(a).

2 As the United States has not yet resolved whether to intervene in this case, the file remains under seal, and thus the facts giving rise to this action may not be revealed. In any event, the underlying facts are not necessary to resolve the very narrow legal question presented.

3 *See* 11 U.S.C. § 362(a). The automatic stay provision of the Bankruptcy Code states, in pertinent part, that "a [bankruptcy] petition ... operates as a stay ... of ... the commencement or continuation ... of a judicial ... proceeding against the debtor that was ... commenced before the commencement of the [bankruptcy] case...." 11 U.S.C. § 362(a)(1).

4 Where the government prosecutes the action, the relator gets 15–25% of the recovery; if the government chooses not to intervene, the relator gets 25–30% of any money recovered by the United States. *See* 31 U.S.C. § 3730(d)(1), (2).

5 The case closest on its facts is *United States ex rel. Marcus v. NBI, Inc.,* 142 B.R. 1 (D.D.C.1992). There, the district court addressed the question of whether an attorneys' fees action brought by private qui tam relator is exempt from the automatic stay under the police powers exception where the United States had elected to intervene, and the parties had reached a settlement. *See Marcus,* 142 B.R. at 2. The court held that the action was exempted from the automatic stay because the action was "a continuation of and integral to a proceeding that is exempted from the automatic stay." *Id.* at 4. The obvious difference between *Marcus* and the case at bar is that in the former, the government had intervened, thereby rendering the case exempt from the automatic stay, whereas, in the instant case, the government has not yet intervened.

6 961 F.2d 46, 49 (4th Cir.1992).

7 *See United States ex rel. Stevens v. Vermont Agency of Natural Resources,* 162 F.3d 195 (2nd Cir.1998), *cert. granted,* 527 U.S. 1034, 119 S.Ct. 2391, 144 L.Ed.2d 792 (June 24, 1999); *United States ex rel. Rodgers v. Arkansas,* 154 F.3d 865, 868 (8th Cir.1998); *United States ex rel. Fine v. Chevron, U.S.A., Inc.,* 39 F.3d 957 (9th Cir.1994), *vacated on other grounds,* 72 F.3d 740 (9th Cir.1995). Two other circuits, the Fifth and the D.C. Circuits, have disagreed with *Milam* and held that the United States is not always the real party in interest in a qui tam suit brought by a private relator. *See United States ex rel. Foulds v. Texas Tech Univ.,* 171 F.3d 279 (5th Cir.1999); *United States ex rel. Long v. SCS Bus. and Technical Inst.,* 173 F.3d 870 (D.C.Cir.1999). Perhaps because of this judicial cacophony, the Supreme Court has granted certiorari in *Stevens,* the Second Circuit case. *See* 527 U.S. 1034, 119 S.Ct. 2391, 144 L.Ed.2d 792.

8 These courts, and the legislative history of § 362(b)(4), make clear that while the police powers exception includes *entry* of a money judgment against a bankrupt defendant, it does not extend to enforcement of that judgment. *See Commonwealth Companies,* 913 F.2d at 522; S.Rep. No. 989 at 52 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787,

351 B.R. 280
United States District Court,
E.D. New York.

UNITED STATES ex rel. Anthony FULLINGTON,
Plaintiff,
v.
PARKWAY HOSPITAL, INC., Defendant.

No. 98–CV–3618(JFB)(RLM).
|
Sept. 19, 2006.

Synopsis
Background: Relator commenced proceeding against hospital in the name of the United States pursuant to the qui tam provisions of the False Claims Act. The United States intervened with respect to one of the counts in the complaint. Subsequent to the filing of the suit, hospital filed for voluntary bankruptcy under Chapter 11 of the Bankruptcy Code, and then filed motion to stay the action pursuant to automatic stay provisions.

Holdings: The District Court, Bianco, J., held that:

[1] claim asserted by government was an exercise of the government's "police and regulatory power" for the purposes of the exception to the automatic bankruptcy stay for actions by a governmental unit to enforce its police or regulatory power, and

[2] claims asserted by relator in which the government had not intervened did not fall within exception to the automatic stay for actions by a governmental unit to enforce its police or regulatory power.

Motion granted in part and denied in part.

West Headnotes (4)

[1] **Bankruptcy**
Judicial proceedings in general

Filing of a bankruptcy petition automatically stays the commencement or continuation of judicial proceedings against the debtor. 11 U.S.C.A. § 362(a)(1).

Cases that cite this headnote

[2] **Bankruptcy**
Administrative Proceedings and Governmental Action

"Pecuniary advantage" test was the appropriate standard to apply in determining applicability of exception to the automatic stay for actions by a governmental unit to enforce its police or regulatory power; under "pecuniary advantage" test, the relevant inquiry was not whether the governmental unit sought property of the debtor's estate, but rather whether the specific acts that the government wished to carry out would create a pecuniary advantage for the government vis-à-vis other creditors. 11 U.S.C.A. § 362(b)(4).

10 Cases that cite this headnote

[3] **Bankruptcy**
Administrative Proceedings and Governmental Action

Claim asserted by government against Chapter 11 debtor under the False Claims Act (FCA) was an exercise of the government's "police and regulatory power" for the purposes of the exception to the automatic bankruptcy stay for actions by a governmental unit to enforce its police or regulatory power. 11 U.S.C.A. § 362(b)(4); 31 U.S.C.A. §§ 3729–33.

13 Cases that cite this headnote

[4] **Bankruptcy**
Administrative Proceedings and Governmental Action

False Claims Act (FCA) claims asserted by relator against Chapter 11 debtor, in which the government had not intervened, did not fall within exception to the automatic stay for actions by a governmental unit to enforce its police or regulatory power. 11 U.S.C.A. § 362(b)(4).

10 Cases that cite this headnote

Attorneys and Law Firms

***281** Richard K. Hayes, Esq., Assistant United States Attorney, Roslynn R. Mauskopf, Esq., United States Attorney, Brooklyn, NY, for United States.

Alan L. Sklover, Esq. and Jason W. Snell, Esq., of Sklover & Associates, New York, NY, for relator plaintiff.

Carlos F. Ortiz, Esq., of DLA Piper Rudnick Gray Cary U.S. LLP, New York, NY, for Defendant.

MEMORANDUM AND ORDER

BIANCO, District Judge.

This action was commenced by relator plaintiff Anthony Fullington in the name of the United States, pursuant to the *qui tam* provisions of the False Claims Act ("FCA"), 31 U.S.C. §§ 3729–33. The United States elected to intervene and proceed with one count in the action. Defendant Parkway Hospital, Inc. ("Parkway") is in the midst of a Chapter 11 bankruptcy proceeding, and contends that the automatic stay arising under section 362 of the Bankruptcy Code serves to stay the instant action. For the reasons stated below, the Court finds that the government may proceed with its FCA claim against Parkway under the police and regulatory powers exception to the automatic stay, pursuant to 11 U.S.C. § 362(b)(4). On the other hand, the Court stays the action with respect to claims maintained solely by the relator against Parkway because the relator is not a "governmental unit" for the purposes of the § 362(b)(4) exception.

I. BACKGROUND

Fullington commenced this proceeding against Parkway in the name of the United States pursuant to the *qui tam* provisions of the False Claims Act, 31 U.S.C. §§ 3729–33. The complaint alleges, *inter alia,* that Parkway wrongfully included certain non-covered costs in annual reports submitted to the Medicare Program for reimbursement, and received payment for those costs. On March 31, 2004, the United States intervened with respect to one of ***282** the counts in the complaint, pursuant to 31 U.S.C. § 3730(b)(2).

Subsequent to the filing of the instant suit, Parkway filed for voluntary bankruptcy under Chapter 11 of the Bankruptcy Code in the Southern District of New York. In the instant motion, Parkway urges the Court to find that the instant action is stayed under the automatic stay provision pursuant to section 362 of the Bankruptcy Code. The parties filed letter briefs addressing this issue to the Honorable Dora L. Irizarry, who was presiding over the case at the time. On April 12, 2006, the case was reassigned to the undersigned. Oral argument was held on September 5, 2006.

II. LEGAL STANDARDS

[1] Under 11 U.S.C. § 362(a)(1), the filing of a bankruptcy petition automatically stays the commencement or continuation of judicial proceedings against the debtor.[1] *See Eastern Refractories Co. Inc., v. Forty Eight Insulations, Inc.,* 157 F.3d 169, 172 (2d Cir.1998). The automatic stay is a fundamental component of a bankruptcy petition, as it "provides the debtor with a breathing spell from his creditors" and "allows the bankruptcy court to centralize all disputes concerning property of the debtor's estate in the bankruptcy court so that reorganization can proceed efficiently, unimpeded by uncoordinated proceedings in other arenas." *Shugrue v. Air Line Pilots Ass'n, Int'l (In re Ionosphere Clubs, Inc.),* 922 F.2d 984, 989 (2d Cir.1990) (internal citations and quotation marks omitted).

Section 362(b)(4) of the Bankruptcy Code provides an exception to the automatic stay for actions by a

governmental unit to enforce its police or regulatory power. Specifically, it provides that the filing of a bankruptcy petition does not operate as a stay against:

> commencement or continuation of an action or proceeding by a governmental unit ... to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power.

11 U.S.C. § 362(b)(4). As the Second Circuit explained, "the purpose of this exception is to prevent a debtor from frustrating necessary governmental functions by seeking refuge in bankruptcy court." *Securities and Exchange Comm'n v. Brennan,* 230 F.3d 65, 71 (2d Cir.2000) (internal quotation and citations omitted). "Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action of proceeding is not stayed under the automatic stay." *Id.* (internal quotation and citations omitted).

In attempting to apply the § 362(b)(4) exception, courts look to the purposes of the law that the government seeks to enforce, to distinguish between situations in which a "state acts pursuant to its 'police ***283** and regulatory power,' and where the state acts merely to protect its status as a creditor." *Safety–Kleen, Inc. v. Wyche,* 274 F.3d 846, 865 (4th Cir.2001) (quoting *Universal Life Church, Inc. v. United States (In re Universal Life Church, Inc.),* 128 F.3d 1294, 1297 (9th Cir.1997)); *Enron Corp. v. People of the State of California (In re Enron Corp.),* 314 B.R. 524, 535 (Bankr.S.D.N.Y.2004). Two tests have been historically applied to resolve this question: (1) the "pecuniary purpose" test (sometimes referred to as the "pecuniary interest" test), and (2) the "public policy" test. *See Universal Life Church,* 128 F.3d at 1297; *see also In re Chateaugay Corp.,* 115 B.R. 28, 31 (Bankr.S.D.N.Y.1988). Under the pecuniary purpose test, a court looks to whether a governmental proceeding relates to public safety and welfare, which favors application of the stay exception, or to the government's interest in the debtor's property, which does not. *See Enron,* 314 B.R. at 535; *see also Chateaugay,* 115 B.R. at 31. The public policy test, in turn, distinguishes " 'between proceedings that adjudicate private rights and those that effectuate public policy.' " *Chateaugay,* 115 B.R. at 31 (quoting *In re Commerce Oil Co.,* 847 F.2d 291, 295 (6th Cir.1988)). The inquiry is objective-a court must examine the purpose sought to be achieved by the law generally, rather than the government's intent in enforcing the particular law in that case. *See United States v. Commonwealth Cos., Inc. (In re Commonwealth Cos.),* 913 F.2d 518, 523 n. 6 (8th Cir.1990); *see also Enron,* 314 B.R. at 535.

Other courts have backed away from the "pecuniary purpose" test, and apply a broader "pecuniary advantage" test. *Commonwealth Cos.,* 913 F.2d at 523–25; *see also United States ex rel. Jane Doe 1 v. X, Inc.,* 246 B.R. 817, 820 (E.D.Va.2000). Under the "pecuniary advantage" test, the relevant inquiry is not whether the governmental unit seeks property of the debtor's estate, but rather whether the specific acts that the government wishes to carry out would create a pecuniary advantage for the government vis-à-vis other creditors. *See Commonwealth Cos.,* 913 F.2d at 523; *Jane Doe 1,* 246 B.R. at 820. Exception under the pecuniary purpose test is much narrower, as it renders "any attempt by the government to fix the amount of damages for a police or regulatory violation subject to the provisions of the automatic stay." *Jane Doe 1,* 246 B.R. at 820 (citing *In re Bicoastal Corp.,* 118 B.R. 854 (Bankr.M.D.Fla.1990)); *Commonwealth Cos.,* 913 F.2d at 525 (" 'Under the 'pecuniary interest' test as it seems to be applied, a money judgment could *never* be entered against a debtor, for it would necessarily represent only a 'pecuniary interest' in the property of the debtor, thus triggering the automatic stay.' ") (quoting *CPI Crude, Inc. v. United States Dep't of Energy,* 77 B.R. 320, 323 (D.D.C.1987) (emphasis in original)); *Chateaugay,* 115 B.R. at 33 (noting that action was merely "to fix damages" as part of its analysis concluding that the § 362(b)(4) exception to the stay was inapplicable). However, under the pecuniary advantage test, the § 362(b)(4) exception applies to actions that seeks to enter a judgment for money damages because it would "simply fix the amount of the government's unsecured claim against the debtors" and would not otherwise "convert the government into a secured creditor, force payment of a prepetition debt, or otherwise given the government a pecuniary advantage over other creditors of the debtors' estate." *Commonwealth Cos.,* 913 F.2d at 524.

III. DISCUSSION

The central issue in this case is whether a lawsuit brought

under the FCA is an exercise of the Department of Justice's "police and regulatory power" for the purposes ***284** of the § 362(b)(4) exception to the automatic bankruptcy stay.[2]

Parkway asserts that courts within the Second Circuit have consistently found that FCA claims are not exempt from the automatic bankruptcy stay under § 362(b)(4). In support of this proposition, Parkway cites three cases: *In re Chateaugay Corp.,* 115 B.R. 28 (Bankr.S.D.N.Y.1988); *United States v. Seitles,* 106 B.R. 36 (S.D.N.Y.1989), *vacated on other grounds,* 742 F.Supp. 1275 (S.D.N.Y.1990); and *Enron Corp. v. People of the State of California (In re Enron Corp.),* 314 B.R. 524 (Bankr.S.D.N.Y.2004). The Court proceeds to examine each of these decisions in turn.

First, in *Chateaugay,* the Bankruptcy Court for the Southern District of New York noted that " 'the type of governmental action Congress anticipated to be excepted from the stay is a circumstance which requires injunctive relief, and the type of damages intended to be permitted are those accompanying or following an injunctive action.' " 115 B.R. at 32 (quoting *In re Commonwealth Cos., Inc.,* 80 B.R. 162, 164 (Bankr.D.Neb.1987), *rev'd* 913 F.2d 518 (8th Cir.1990)). The Court found that under either the pecuniary purpose or public policy test, the FCA " 'is merely an action for damages,' " highlighting the fact that the preface of the FCA does not include a public or safety purpose. *See id.* (quoting *Commonwealth Cos.,* 80 B.R. at 165.) The *Chateaugay* court rejected the government's argument that deterrence would be furthered by the action, noting that the alleged violations took place over ten years earlier, and that the defendant was no longer in business. *See id.* Noting that the action was only "to fix damages" for violation of the FCA, the court concluded that it did not fall under the § 362(b)(4) exception from the automatic stay. *Id.* at 33.

Similarly in *Seitles,* the district court concluded that a claim brought under the FCA did not fall under the § 362(b)(4) stay exception. *See* 106 B.R. at 40. First, it found that the pecuniary purpose test counseled towards application of the stay because the case at hand, involving fraudulently obtained printing contracts, "posed only a monetary, not a safety, threat to the government." 106 B.R. at 39. Further, the court noted that pecuniary purposes predominated, given the fact that defendants had already been criminally convicted and sentenced in connection with the underlying fraud, and so the civil action did not serve to stop any continuing harm by the debtor. *See id.* With respect to the public policy test, the court concluded, following *Chateaugay,* that deterrence was not the government's primary motivation because deterrence was already served by the criminal penalties assessed in the underlying criminal action, which included an order to pay restitution. *See Seitles,* 106 B.R. at 39–40.

Finally, in *Enron,* the Bankruptcy Court for the Southern District of New York ***285** revisited the issue with respect to a lawsuit brought by the California Attorney General seeking civil penalties against Enron Corporation under California's Unfair Competition Law and Commodity Law, regarding the alleged manipulation of the California energy markets. *See* 314 B.R. at 535. As with the FCA, the court noted that the California consumer protection laws at issue included a treble damages provision, and were acknowledged to have both restitution and deterrence purposes. *See id.* at 530–31, 35–36. The court applied the pecuniary purpose test, and relying extensively on *Chateaugay* and *Seitles,* noted that the stay was applicable because the primary purpose of the lawsuit was "to seek money damages or other monetary relief for past conduct, and not to prevent future conduct that could harm the public health or safety." *See Enron,* 314 B.R. at 538 (citing *Seitles,* 106 B.R. at 39; *Chateaugay,* 115 B.R. at 31–33). The court highlighted the fact that the threat of continuing harm was remote, as Enron was no longer a going concern, and deterrence was already served by proceedings initiated by the Federal Energy Regulatory Commission (FERC), as well as the well-publicized criminal prosecutions of former Chairman and CEO Kenneth Lay, former CEO Jeff Skilling, former CFO Andrew Fastow, and the top three Enron executives directly responsible for Enron's alleged manipulation of the energy markets in California. *See id.* at 538–39.

The Court does not find the *Chateaugay, Seitles* and *Enron* cases persuasive, as they are all based on reasoning that no longer appears applicable, given developing precedent regarding the application of the § 362(b)(4) exception.

First, all three of the decisions cited by Parkway rely on an analysis conducted pursuant to the "pecuniary purpose" test, and conclude that since the actions in those cases only sought damages for past and not continuing harm, the suits were brought only to vindicate the pecuniary interest of the government and were therefore not subject to the § 362(b)(4) exception. *See Chateaugay,* 115 B.R. at 31–33; *see also Seitles,* 106 B.R. at 39; *Enron,* 314 B.R. at 538. The "pecuniary interest" language, first quoted in *Chateaugay,* was derived from the "isolated remarks of a congressman and a senator during floor debates"[3] on the Bankruptcy Reform Act:

> This section is intended to be given a narrow construction in order to permit governmental units to

pursue actions to protect public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate.
115 B.R. at 32 (quoting 124 Cong.Rec. 32, 395 (1978) (Statement of Rep. Edwards); 124 Cong.Rec. 33,995 (1978) (identical Statement of Sen. Deconcini); *In re Commonwealth Cos., Inc.,* 80 B.R. at 164) (emphasis omitted). However, in *Commonwealth Companies,* the Eighth Circuit also highlighted other legislative history contained within legislative committee reports regarding the § 362(b)(4) exception's applicability to governmental efforts to fix the amount of damages for violations of law:

> [W]here a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such law, the action or proceeding is not stayed under the automatic stay.

***286** 913 F.2d at 522 (quoting S.Rep. No. 989, 95th Cong., 2d Sess. 52, *reprinted in* 1978 U.S.Code Cong. & Admin. News 5787, 5838; H.R.Rep. No. 595, 95th Cong., 2d Sess. 343 (1977), *reprinted in* 1978 U.S.Code Cong. & Admin. News 5963, 6299) (emphasis omitted). The Eighth Circuit noted that "[t]his legislative history makes it plain that § 362(b)(4) permits the government to seek the entry of a money judgment as its sole remedy for the violation of a fraud or other police or regulatory law." *Commonwealth Cos.,* 913 F.2d at 522. The Eighth Circuit highlighted the tension between (1) a narrow "pecuniary purpose" test derived from the remarks from the floor debate, which would never allow a money judgment to be entered against a debtor, "for it would necessarily represent only a 'pecuniary interest' in the property of the debtor";[4] (2) the plain statutory terms, which only explicitly exclude the *enforcement* of a monetary *judgment* from the ambit of the § 362(b)(4) exception; and (3) the Senate and House Reports, which it concluded permitted the government to seek the entry of a money judgment notwithstanding a bankruptcy stay. *See id.* at 523–25 (internal citations omitted). The Eighth Circuit rejected the lower court's application of a narrow pecuniary interest test, finding that the pecuniary advantage test, looking to whether the action interfered with the bankruptcy's control of the property or created advantage to the government vis-à-vis other parties and creditors of the estate, was more aligned with the express statutory language and Senate and House Reports.[5] *See id.* at 524–25. A number of other courts, relying on *Commonwealth Companies,* have adopted the broader "pecuniary advantage" test. *See, e.g., Chao v. Hospital Staffing Servs., Inc.,* 270 F.3d 374, 389 n. 9 (6th Cir.2001); *Jane Doe 1,* 246 B.R. at 820 (rejecting pecuniary interest test in favor of pecuniary advantage test, relying on *Commonwealth Companies*).

[2] The Court agrees that the pecuniary advantage test is the appropriate standard to apply regarding the § 362(b)(4) exception, finding the Eighth Circuit's reasoning in *Commonwealth Companies* persuasive. First, the Court concludes that the pecuniary advantage test is most consistent with the statutory language and, thus, should be adopted. The plain language of § 362(b)(4) exempts from the automatic stay efforts of the government to exercise their police and regulatory power, and only specifically carves out attempts to *enforce* money judgments. Thus, the statutory language lacks any textual basis for the pecuniary interest test because it contains no broader exclusion on efforts by the government to pursue lawsuits that ***287** concern money damages generally. Indeed, the language is more consistent with the pecuniary advantage test because it does not exclude efforts by the government to *fix* damages for violation of a statute, provided that such effort is an enforcement of the governmental unit's police and regulatory power.

Second, although the Second Circuit has not directly addressed the conflict between the "pecuniary purpose" or "pecuniary interest" test and the "pecuniary advantage" test, the Court believes that it would also adopt the "pecuniary advantage" test and follow the reasoning of the Eighth Circuit, based on its pronouncements in *Securities and Exchange Commission v. Brennan,* 230 F.3d 65 (2d Cir.2000). In *Brennan,* the Second Circuit quoted the identical legislative history passage from the Senate and House Reports that the Eighth Circuit relied on, and cited other precedent, to assert that "[i]t is well established that the governmental unit exception of § 362(b)(4) permits the *entry* of a money judgment against a debtor so long as the proceeding in which such a judgment is entered is one to enforce the governmental unit's police or regulatory power." 230 F.3d at 71 (citations omitted) (emphasis in original). It would be inconsistent for the Second Circuit to endorse the narrower "pecuniary purpose" test, having endorsed the view that a governmental unit could seek the *entry* of a money judgment despite a bankruptcy stay.[6]

Moreover, according to the Second Circuit in *Brennan,*

the imposition of financial liability on a party deters unlawful behavior and thus serves the police and regulatory efforts of the government, and the Court distinguished efforts of the government to *enforce* any such judgments as being beyond the scope of the stay exception provided by § 362(b)(4):

> When the government seeks to impose financial liability on a party, it is plainly acting in its police or regulatory capacity—it is attempting to curb certain behavior (such as defrauding investors, or polluting groundwater) by making the behavior much more expensive. It is this added expense that deters a party from defrauding or polluting—not the identity of the entity which it must eventually pay. Accordingly, up to the moment when liability is definitively fixed by entry of judgment, the government is acting in its police or regulatory capacity—in the public interest, it is burdening certain conduct so as to deter it. However, once liability is fixed and a money judgment has been entered, the government necessarily acts only to vindicate its own interest in collecting its judgment.

230 F.3d at 72–73. Drawing the line at attempts by the government to enforce a monetary judgment against the bankrupt entity's estate is consistent with the "pecuniary advantage" test, which excludes attempts by the government to gain an advantage over other creditors from use of the § 362(b)(4) exception. Thus, based on the statutory language, as well as the reasoning *Brennan* and *Commonwealth Companies,* ***288** the Court finds that the "pecuniary advantage" test is the proper standard to apply in the instant case.

Applying the "pecuniary advantage" test, the Court finds that the fact that the Department of Justice is seeking monetary damages for past fraud does not prevent the application of the § 362(b)(4) exception. At this juncture, up to the point that a judgment is entered and the amount of damages is fixed, the government is not conferred any advantage over Parkway's creditors or any third parties—if the government is successful in obtaining the entry of a judgment, it would merely become an unsecured creditor of Parkway, which would not conflict with the bankruptcy court's control of the debtor or the estate.[7] *Commonwealth Cos.,* 913 F.2d at 524 ("The entry of judgment would simply fix the amount of the government's unsecured claim against the debtors. It would not convert the government into a secured creditor, force the payment of a prepetition debt, or otherwise give the government a pecuniary advantage over other creditors of the debtors' estate.") Since § 362(b)(4) plainly allows the entry of a money judgment, the only remaining question is whether or not the judgment is entered as part of a proceeding to enforce the governmental unit's police or regulatory power. *Brennan,* 230 F.3d at 71 ("[Section] 362(b)(4) permits the *entry* of a money judgment against a debtor so long as the proceeding in which such a judgment is entered is one to enforce the governmental unit's police or regulatory power.") (emphasis in original).

[3] The Court finds that actions brought pursuant to the FCA enforce the Department of Justice's police or regulatory power because it serves the important public policy interest of deterring fraud upon the government. Although it is undeniable that the FCA has, as one of its purposes, the objective of providing restitution to the government for frauds committed upon the national treasury, *see United States ex rel. Marcus v. Hess,* 317 U.S. 537, 551, 63 S.Ct. 379, 87 L.Ed. 443 (1943), it is well-settled that the statutory scheme, which includes a treble damages provision, also has the distinct public policy purpose of punishing and deterring fraud committed upon the national treasury. *Vermont Agency of Natural Resources v. United States ex rel. Stevens,* 529 U.S. 765, 784–86, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000) ("[T]he current version of the FCA imposes damages that are essentially punitive in nature ... 'The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers.' ") (quoting *Texas Industries, Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630, 639, 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981)); *see also United States v. Bornstein,* 423 U.S. 303, 309 & n. 5, 96 S.Ct. 523, 46 L.Ed.2d 514 (1976) (noting that the FCA was adopted for the purpose of punishing and preventing frauds); *United States v. Mackby,* 261 F.3d 821, 830 (9th Cir.2001) (noting that the FCA has, as one of its purposes, punishing and preventing ***289** frauds); *United States ex rel. Finney v. Nextwave Telecom, Inc.,* 337 B.R. 479, 487–88 (S.D.N.Y.2006) (noting that the purposes of the FCA are "to deter fraud and recover treasury funds lost to fraud"). Based on the FCA's public policy purpose of deterring fraud against the government, the Eighth Circuit held that suits brought by governmental units under the FCA are exempt from the ambit of the automatic bankruptcy stay, pursuant to the § 362(b)(4) police and regulatory power exception:

> [C]ivil actions by the government to enforce the FCA serve to inflict the "sting of punishment" on wrongdoers and, more importantly, deter fraud against the government, which Congress has recognized as a severe, pervasive, and expanding national problem. The police and regulatory interests furthered by enforcement of the FCA are undeniably legitimate and substantial. The fact that the statute's chief purpose is to make the government whole does not reduce the weight of these interests so as to make their vindication insufficient to qualify for the § 362(b)(4) exception from the automatic stay. We find nothing in the language or legislative history of the exception that warrants such an artificial restriction on its scope.

Commonwealth Cos., 913 F.2d at 526; *Universal Life Church,* 128 F.3d at 1298 ("[A] civil suit brought pursuant to the Federal False Claims Act is sufficient to satisfy the section 362(b)(4) exception.") (citing *Commonwealth Cos.,* 913 F.2d 518); *United States ex. rel. Goldstein v. P & M Draperies, Inc.,* 303 B.R. 601, 603 (D.Md.2004) ("[I]t is well settled that an action under the False Claims Act qualifies as an action to enforce the government's 'police or regulatory power.' ") (citing *Commonwealth Cos.,* 913 F.2d at 527); *Jane Doe 1,* 246 B.R. at 818–19 (holding that claims brought under the FCA were exempt from bankruptcy stay under § 362(b)(4)); *accord United States ex rel. Marcus v. NBI, Inc.,* 142 B.R. 1, 4 (D.D.C.1992). The Court agrees with the reasoning of *Commonwealth Companies* because it is well-established that the FCA is punitive in nature and serves to deter fraud, and the Second Circuit has endorsed the proposition that deterrence through the imposition of financial liability falls within the scope of governmental police or regulatory efforts.[8] *Brennan,* 230 F.3d at 72–73 ("When the government seeks to impose ***290** financial liability on a party, it is plainly acting in its police or regulatory capacity—it is attempting to curb certain behavior (such as defrauding investors, or polluting groundwater) by making the behavior that much more expensive ... up to the moment when liability is definitively fixed by entry of judgment, the government is acting in its police or regulatory capacity—in the public interest, it is burdening certain conduct so as to deter it.").

Having determined that the government may proceed with its FCA claim against Parkway—up to the point of entry of judgment—under the § 362(b)(4) exception, the Court must briefly turn to discuss the status of the claims brought by Fullington against Parkway in which the government did not intervene.

[4] The Court finds that the claims asserted by relator Fullington against Parkway, in which the government has not intervened, are stayed by the automatic stay provision of § 362(a). Once again, the Court begins its inquiry by consulting the plain language of the statute. If the statute has a " 'plain and unambiguous meaning with regard to the particular dispute in the case,' " the inquiry ends, unless the case falls within the rare situation in which "the result reached by applying the plain language is sufficiently absurd to override its unambiguous terms." *Frank G. v. Bd. of Educ. of Hyde Park,* 459 F.3d 356, 368 (2d Cir.2006) (quoting *Barnhart v. Sigmon Coal Co., Inc.,* 534 U.S. 438, 450, 459, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002)). The plain text of § 362(b)(4) specifically indicates that the exception is applicable to an "action or proceeding by a *governmental unit.*"[9] 11 U.S.C. § 362(b)(4) (emphasis added). The definition of "governmental unit" is provided in 11 U.S.C. § 101(27):

> The term "governmental unit" means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.

"This definition is limited to actual government entities and makes no mention of *qui tam* plaintiffs ... [A]lthough a *qui tam* action can certainly be said to be an action 'on behalf' of a 'governmental unit' or 'for' a 'governmental unit,' it is not an action 'by a governmental unit.' " *Goldstein,* 303 B.R. at 603–04. Since the Court finds that the plain statutory language does not include *qui tam* plaintiffs, and the plaintiffs have not preferred any authority supporting the proposition that a private party acting on behalf of a state can assert the § 362(b)(4) exception, the Court finds that ***291** Fullington's claims against Parkway are stayed pursuant to § 362(a). *See Grayson v. Worldcom, Inc. (In re Worldcom, Inc.),* No. 05–CV–5704 (RPP), 2006 WL 2270379, at *6 (S.D.N.Y. Aug.8, 2006) (holding that *qui tam* plaintiff could not assert § 362(b)(4) exception where government declined to intervene).

IV. CONCLUSION

In sum, the Court finds that the government's FCA action against Parkway is not stayed by Parkway's bankruptcy, pursuant to the § 362(b)(4) police and regulatory power exception. The government may proceed with its action, up until the point that damages are fixed through the entry of judgment. On the other hand, the relator may not proceed with his claims against Parkway because he is not a "governmental unit" and, thus, may not take advantage of the § 362(b)(4) exception from the automatic bankruptcy stay.

Accordingly, the instant action is stayed in part, only with respect to relator's claims against Parkway for which the government has declined intervention.

SO ORDERED.

All Citations

351 B.R. 280

Footnotes

1 Section 362(a) provides, in relevant part:
> Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities,—of(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title ...

2 As a threshold matter, the relator argues that Parkway has waived the protections of the stay by participating in the instant suit for over six months after the bankruptcy petition was filed, without arguing that the automatic stay applies. The Court rejects this argument—"[i]t is well settled that, since the purpose of the automatic stay is to protect creditors as well as the debtor, the debtor may not waive the stay." *In re Enron Corp.,* 300 B.R. 201, 213 (Bankr.S.D.N.Y.2003) (citing *Commerzanstalt v. Telewide Sys., Inc.,* 790 F.2d 206, 207 (2d Cir.1986); *Shimer v. Fugazy (In re Fugazy Express),* 982 F.2d 769, 776 (2d Cir.1992) ("Unless lifted by the court, the stay remains in effect until the case is concluded."); *Constitution Bank v. Tubbs,* 68 F.3d 685, 691 (3d Cir.1995) ("The automatic stay cannot be waived. Relief from the stay can be granted only by the bankruptcy court having jurisdiction over a debtor's case.")).

3 *In re Mansfield Tire & Rubber Co.,* 660 F.2d 1108, 1112 (6th Cir.1981).

4 The Supreme Court has emphasized the dangers in courts interpreting statutes by relying on remarks from floor debates or similar comments by lawmakers to discern legislative intent. *Garcia v. United States,* 469 U.S. 70, 76 n. 3, 105 S.Ct. 479, 83 L.Ed.2d 472 (1984) ("[T]o select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its important functions.") (quoting *Schwegmann Bros. v. Calvert Distillers Corp.,* 341 U.S. 384, 395–96, 71 S.Ct. 745, 95 L.Ed. 1035 (1951) (Jackson, J., concurring)). The conflict that is created in the instant case by passing comments made on the floor of Congress and the committee reports highlights the very danger created by relying on legislative history to interpret statutory language.

5 It should be noted that the *Chateaugay* and *Seitles* decisions relied extensively upon the bankruptcy court decision, subsequently reversed by *Commonwealth Companies,* for the proposition that the § 362(b)(4) exception should be construed narrowly and not apply to actions for damages. *See Chateaugay,* 115 B.R. at 31–33; *see also Seitles,* 106 B.R. at 38–40.

6 If confronted with the conflict in legislative history identified by the Eighth Circuit between the floor debate remarks and the Senate and House reports, the Second Circuit is likely to agree with the analysis giving more weight to the committee reports, favoring the "pecuniary advantage" test, given that it favorably quoted the identical committee report language in *Brennan,* and the fact that it regularly avoids reliance on remarks made during floor debates when it has found it necessary to analyze legislative history. *See United States v. Nelson,* 277 F.3d 164, 186–87 (2d Cir.2002) (eschewing reliance on the "passing comments of one Member, and casual statements from the floor debates," and focusing on committee reports instead) (citing *Garcia,* 469 U.S. at 76, 105 S.Ct. 479).

7 If the government is successful in obtaining an entry of judgment against Parkway, and if Parkway is still bankrupt at

that juncture, the government would be required to petition the bankruptcy court for relief to enforce the judgment, where it would be on equal footing as other similarly situated unsecured creditors. *Brennan,* 230 F.3d at 72 (noting that " '[t]he collection of [a money] judgment *after entry* ... is not authorized ... and requires a separate application to the bankruptcy court.' ") (quoting *NLRB v. 15th Avenue Iron Works, Inc.,* 964 F.2d 1336, 1337 (2d Cir.1992)); *see also Jane Doe 1,* 246 B.R. at 821 (noting that suit could proceed under § 362(b)(4) exception up to and including entry of judgment, but could not seek enforcement of such judgment).

8 In *Chateaugay, Seitles,* and *Enron,* the courts rejected the government's argument that the lawsuit at issue served deterrence purposes by pointing out the fact that the entities at issue were no longer capable of committing fraud, and that deterrence was being served by other means, including parallel criminal prosecutions. However, as the bankruptcy court noted in *Enron,* courts have moved away from a subjective analysis focusing on the propriety of whether particular exercises of police and regulatory authority are legitimate, and now "look only to the purpose of the law that the governmental unit is attempting to enforce to determine whether the section 362(b)(4) exception applies." *Enron,* 314 B.R. at 534–35 (citing *Pinewood,* 274 F.3d at 865); *Pinewood,* 274 F.3d at 865 ("The inquiry is objective: we examine the purpose of the law that the state seeks to enforce rather than the state's intent in enforcing the law in a particular case."); *Commonwealth Cos.,* 913 F.2d at 523 n. 6 ("[A]n inquiry into the subjective purposes behind a given FCA lawsuit would be amorphous and speculative ... the appropriate analysis under § 362(b)(4) is one which focuses on the purposes underlying the law that the government is attempting to enforce.") (internal quotation and citations omitted). Despite this phenomenon and citing the proper objective standard, *Enron* itself curiously invoked the subjective analysis, rejecting the government's argument that the lawsuit under California consumer law served deterrence purposes given the fact that Enron was no longer viable and deterrence was being served by other means, including criminal prosecutions for the alleged fraud and FERC's revocation of energy trading licenses. *See* 314 B.R. at 538–39. The proper mode of analysis was that applied by the Eighth Circuit in *Commonwealth Companies,* which objectively looked to the nature and purposes of FCA actions generally, to determine whether actions brought under the statute were subject to the automatic bankruptcy stay, or exempted under § 362(b)(4). That notwithstanding, even if the subjective form of analysis applied by *Chateaugay, Seitles* and *Enron* is still viable, the instant case is facially distinguishable because Parkway remains operational in the hospital services industry, and the instant action constitutes the only vehicle through which the government has attempted to address the alleged fraud committed on the Medicare system.

9 Apart from actions brought by a "governmental unit," § 362(b)(4) also applies to actions brought by an action or proceedings commenced by an "organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993." 11 U.S.C. § 362(b)(4). The parties do not argue that Fullington constitutes such an organization, nor is there any sound basis for arguing so.

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UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LFORIDA
OCALA DIVISION

UNITED STATES OF AMERICA, ex rel. ROBERT A. GREEN and HOLLY A. TAYLOR, Plaintiff, vs. DR. ASAD U. QAMAR and the INSTITUTE OF CARDIOVASCULAR EXCELLENCE, PLLC, Defendants.	CASE NO. 5:11-ck-00406-RBD-TBS

AMENDED SUGGESTION OF BANKRUPTCY

COMES NOW the Defendants, DR. ASAD U. QAMAR, HUMERAA QAMAR, INSTITUTE OF CARDIOVASCULAR EXCELLENCE, PLLC, and ICE HOLDINGS, PLLC, by and through undersigned counsel, and file this Suggestion of Bankruptcy in the above-entitled proceeding and state:

1. On April 20, 2016, a Voluntary Petition for relief under Chapter 11, Title 11, of the United States Bankruptcy Code was filed by the Defendants, DR. ASAD U. QAMAR and HUMERAA QAMAR, in the United States Bankruptcy Court for the Middle District of Florida, under Case No. 3:16-bk-01490.

2. On April 20, 2016, a Voluntary Petition for relief under Chapter 11, Title 11, of the United States Bankruptcy Code was filed by the Defendant, INSTITUTE OF CARDIOVASCULAR EXCELLENCE, PLLC, in the United States Bankruptcy Court for the Middle District of Florida,

under Case No. 3:16-bk-01491.

3. On April 20, 2016, a Voluntary Petition for relief under Chapter 11, Title 11, of the United States Bankruptcy Code was filed by the Defendant, ICE HOLDINGS, PLLC, in the United States Bankruptcy Court for the Middle District of Florida, under Case No. 3:16-bk-01492.

4. That pursuant to the Bankruptcy Code, Section 362, the above styled cause is hereby automatically stayed.

5. The filing of this Suggestion of Bankruptcy is not intended to be a Notice of Appearance by the undersigned.

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on all parties receiving electronic notification this 21st day of April, 2016.

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UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

UNITED STATES OF AMERICA, ex rel. ROBERT A. GREEN and HOLLY A. TAYLOR, Plaintiffs, v. DR. ASAD U. QAMAR and the INSTITUTE OF CARDIOVASCULAR EXCELLENCE, PLLC, Defendants.	)	Case No. 5:11-cv-406-Oc-37TBS

UNITED STATES' RESPONSE TO DEFENDANTS' AMENDED SUGGESTION OF BANKRUPTCY AND INCORPORATED MEMORANDUM OF LAW

The United States hereby responds to the Amended Suggestion of Bankruptcy, filed by Dr. Asad U. Qamar ("Dr. Qamar") and the Institute of Cardiovascular Excellence, PLLC ("ICE," and together with Dr. Qamar, "Defendants"). (Doc. 90). Contrary to Defendants assertion, this case is not subject to the automatic stay provision of Section 362 of the Bankruptcy Code. 11 U.S.C. § 362(a). Rather, this action brought pursuant to the False Claims Act ("FCA") falls within the "police or regulatory power" exception to the automatic stay. 11 U.S.C. § 362(b)(4). As a result, this case should proceed as scheduled.

MEMORANDUM OF LAW

Defendants represent that they each filed a "Voluntary Petition for relief under Chapter 11, Title 11, of the United States Bankruptcy Code" in the United States Bankruptcy Court for the Middle District of Florida, Case Nos. 3:16-bk-01491 and 3:16-bk-01492. (Doc.

90). Defendants further represent "[t]hat pursuant to the Bankruptcy Code, Section 362, the above styled cause is hereby automatically stayed." (Doc. 90, ¶ 2). Defendants' representation is incorrect.

While automatic stay, 11 U.S.C. § 362(a), generally stays the "continuation of any action by a creditor against the debtor or to recover a claim against a debtor that arose before the bankruptcy," there are exceptions, including the "police and regulatory power" exception. 11 U.S.C. § 362(b)(4). Specifically, a bankruptcy filing does not act to stay "the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's or organization's police and regulatory power. . . ." Id.

Actions brought pursuant to the False Claims Act fall within the "police and regulatory power" exception to the automatic stay. United States v. Bourseau, 531 F.3d 1159, 1164 (9th Cir. 2008)(recognizing that the district court had jurisdiction to enter its judgment in a FCA case despite debtor's bankruptcy proceedings); Universal Life Church, Inc. v. United States, 128 F.3d 1294, 1298 (9th Cir. 1997) ("[A] civil suit brought pursuant to the Federal False Claims Act is sufficient to satisfy the section 362(b)(4) exception."); Commonwealth Cos. v. United States, 913 F.2d 518 (8th Cir. 1990)(holding that the government's proposed FCA action against the debtors was excepted from the automatic stay under § 362(b)(4) up through the entry of a money judgment); but see In re Bicoastal Corp., 118 B.R. 854 (M.D. Fla. 1990). Indeed, "whether a False Claims Act suit is a proceeding by a governmental unit to enforce that unit's 'police or regulatory power' . . . is easily and confidently answered in the affirmative, as there is ample authority holding that laws, such as the False Claims Act, that are designed to prevent or stop fraud, or to fix damages for fraud

already committed, are police or regulatory laws." United States v. X, Inc., 246 B.R. 817, 818 (E.D. Va. 2000); see also United States v. Worldwide Fin. Servs., Inc., No. 01-70414, 2007 WL 4180718 (E.D. Mich. November 26, 2007); United States v. Oncology Assocs., P.C., Nos. CIV. H–95–2241, CIV. H–00–1216, CIV. H–00–1569, 2000 WL 1074304 (D. Md. July 24, 2000); United States v. Mickman, 144 B.R. 259 (E.D. Pa. 1992); United States v. NBI, Inc., 142 B.R. 1, 3 (D.D.C. 1992) (permitting qui tam relator's action to fix attorney's fees, costs and expenses); United States v. Burton, 132 B.R. 968 (S.D. Ala. 1991). Moreover, the legislative history of § 362(b)(4) explicitly recognized that a fraud law is a police or regulatory law. See S. Rep. No. 989 at 52 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5838. The FCA is certainly a fraud law. Commonwealth Cos., 913 F.2d at 525 (citing S. Rep. No. 345, 99th Cong., 2d Sess. 2, reprinted in 1986 U.S.C.C.A.N. 5266, 5266 (stating that 1986 amendments to FCA are intended to make the statute more useful as "the [g]overnment's primary litigative tool for combatting fraud")).

The seminal case on this issue is Commonwealth Cos., wherein the Eighth Circuit held that the government's proposed FCA action against the debtors was excepted from the automatic stay under § 362(b)(4) up through the entry of a money judgment. 913 F.2d at 527. In reaching this decision, the Eighth Circuit "conclude[d] that civil actions by the government to enforce the FCA serve to inflict the 'sting of punishment' on wrongdoers and, more importantly, deter fraud against the government, which Congress has recognized as a severe, pervasive, and expanding national problem." Id. at 526. Therefore, the "police and regulatory interests furthered by enforcement of the FCA are undeniably legitimate and substantial." Id. at 526.

Accordingly, this FCA action falls within the police and regulatory exception to the automatic stay. 11U.S.C. § 362(b)(4). This should proceed as scheduled.

CONCLUSION

Based on the foregoing, this False Claims Act case should proceed as scheduled, notwithstanding Defendants' Amended Suggestion of Bankruptcy.

Dated: April 22, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2016, a copy of the foregoing was filed with the Court and served on all counsel of record via CM/ECF.

s/ Sean P. Flynn
Sean P. Flynn
Assistant United States Attorney

2016 WL 2936369
Only the Westlaw citation is currently available.
United States District Court,
M.D. Florida,
Orlando Division.

United States of America ex rel. Robert A. Green; State of Florida ex rel. Holly Taylor, Plaintiffs,
v.
Institute of Cardiovascular Excellence, PLLC; Ice Holdings, PLLC; Asad Ullah Qamar; and Humera A. Qamar, Defendants.

Case No. 5:11-cv-406-Oc-37TBS
|
Signed 04/26/2016

ORDER

ROY B. DALTON JR., United States District Judge

*1 This cause is before the Court on the following:

1. Amended Suggestion of Bankruptcy (Doc. 90), filed April 21, 2016; and

2. United States' Response to Defendants' Amended Suggestion of Bankruptcy and Incorporated Memorandum of Law (Doc. 91), filed April 22, 2016.

Defendants in this False Claims Act ("**FCA**") *qui tam* action ("**Instant Action**") have filed for Chapter 11 bankruptcy. (See Doc. 90); see *also In re Asad U. Qamar & Humera A. Qamar,* 3:16–bk–1490 (M.D.Fla.2016); *In re Institute of Cardiovascular Excellence, PLLC,* 3:16–bk–1491 (M.D.Fla.2016); *In re ICE Holdings, PLLC,* 3:16–bk–1492 (M.D.Fla.2016). As such, Defendants filed a "Suggestion of Bankruptcy" with this Court, indicating their belief that the Instant Action is automatically stayed pursuant to the Bankruptcy Code's automatic stay provision, 11 U.S.C. § 362(a). (Doc. 90.) The United States opposes a stay. (See Doc. 91.)

Ordinarily, a petition for Chapter 11 bankruptcy operates as a stay of an action against the debtor ("**Automatic Stay**"). See 11 U.S.C. § 362(a). Particular actions are exempt from the Automatic Stay. See *id.* § 362(b). In the absence of binding authority, the Court finds persuasive the rational that exempts FCA actions from the Automatic Stay through the point of entry of judgment. See *In re Commonwealth Cos., Inc.,* 913 F.2d 518, 527 (8th Cir.1990); see *also In re Bilzerian,* 146 B.R. 871, 873 (M.D.Fla.1992). That is, the Court can permit the action to proceed to the entry of a final monetary judgment against the debtor, but it cannot enforce that judgment. See *In re Commonwealth Cos., Inc.,* 913 F.2d at 527; *In re Bilzerian,* 146 B.R. at 873.

Accordingly, the Court declines to stay the Instant Action; the Instant Action will proceed as set forth in the Court's Case Management and Scheduling Order (Doc. 65).

IT IS SO ORDERED.

DONE AND ORDERED in Chambers in Orlando, Florida, on April 26, 2016.

All Citations

Slip Copy, 2016 WL 2936369

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118 B.R. 854
United States Bankruptcy Court, M.D. Florida, Tampa Division.

In re BICOASTAL CORPORATION, d/b/a Simuflite, f/k/a The Singer Company, Debtor.

Bankruptcy No. 89–8191–8P1.
|
Aug. 1, 1990.

Government moved for relief in automatic stay so that it could bring action against Chapter 11 debtor under the False Claims Act. The Bankruptcy Court, Alexander L. Paskay, Chief Judge, held that government's action against debtor to establish damages for fraud under the qui tam provisions of the False Claims Act was not excepted from automatic stay as proceeding to enforce government's police or regulatory powers.

Motion denied.

See also, Bkrtcy., 118 B.R. 855, and 117 B.R. 700.

West Headnotes (1)

[1] **Bankruptcy**
⇐Administrative Proceedings and Governmental Action

Government's action against Chapter 11 debtor to establish damages for fraud under the qui tam provisions of the False Claims Act was not excepted from automatic stay as proceeding to enforce government's police or regulatory powers, but, rather, was nothing more than claim for monetary damages against estate. Bankr.Code, 11 U.S.C.A. §§ 362(b)(4), 1101 et seq.; 31 U.S.C.A. § 3730.

3 Cases that cite this headnote

***854** ORDER ON MOTION FOR RELIEF FROM STAY

ALEXANDER L. PASKAY, Chief Judge.

THIS is a Chapter 11 case and the matter under consideration is a Motion for Relief from Stay filed by the United States of America (Government). The Government seeks to have the lawsuit entitled *United States of America ex rel. Taxpayers against Fraud and Christopher Urda v. Link Flight Simulation Corporation, CAE—Link Corporation and The Singer Company,* 722 F.Supp. 1248 (D.Md.1989) excepted from the automatic stay. This cause came on for hearing with proper notice given to all interested parties, and the Court has considered the Motion, together with the record and argument of counsel, and is satisfied that it is appropriate to enter an order denying the Government's Motion.

This Court is satisfied that lifting the stay to permit the Government to proceed on its action in the Maryland District Court would unduly delay the Debtor's reorganization, and it is therefore appropriate that the Motion for Relief from Stay should be denied and the Government's claim should be estimated in this Court.

The Government argues that an action by the Government to establish damages for fraud is an exception to the automatic stay, according to the legislative history of § 362(b)(4) of the Bankruptcy Code. Section 362(b)(4) provides an exception to the automatic stay for the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power. 11 U.S.C. § 362(b)(4). This Court is satisfied, however, that the Government's ***855** action is not a proceeding to enforce its police or regulatory powers; instead, it is a proceeding to seek monetary damages for injuries allegedly caused by the Debtor. Therefore, the Government's action is not excepted from the automatic stay pursuant to § 362(b)(4).

The Government's action against the Debtor was brought under the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3730. The purpose of the False Claims Act is to provide restitution for the Government, not to punish the wrongdoer or to prevent repetition of fraudulent behavior. *In re Stelweck,* 86 B.R. 833 (Bankr.E.D.Pa.1988). The *Stelweck* court found that the False Claims Act provided "a civil remedy designed to make the Government whole

for fraud losses," and that the objective of the False Claims Act was to "broadly protect the funds and property of the Government from fraudulent claims." *Id.*, at 852, *quoting, United States ex rel. Marcus v. Hess,* 317 U.S. 537, 551–52, 63 S.Ct. 379, 387–88, 87 L.Ed. 443 (1943) and *Rainwater v. United States,* 356 U.S. 590, 592, 78 S.Ct. 946, 948, 2 L.Ed.2d 996 (1958).

This Court is satisfied that the claim asserted under the False Claims Act is not a procedure to enforce the Government's police or regulatory powers and, therefore, the automatic stay provided by the Bankruptcy Code applies to the Government's suit against the Debtor. The Government's claim in this case is nothing more than a claim for money damages against the Debtor's estate to be allowed or disallowed by this Court as may appear to be appropriate and, if allowed, treated on par with all other claims of equal rank against the estate of the Debtor. Accordingly, it is

ORDERED, ADJUDGED AND DECREED that the Motion for Relief from Stay filed by the United States be, and the same is hereby, denied.

DONE AND ORDERED.

All Citations

118 B.R. 854

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KeyCite Yellow Flag - Negative Treatment
Declined to Follow by U.S. ex rel. Fullington v. Parkway Hosp., Inc., E.D.N.Y., September 19, 2006

913 F.2d 518
United States Court of Appeals,
Eighth Circuit.

In re COMMONWEALTH COMPANIES, INC. and Commonwealth Electric Co., Inc., Debtors.
UNITED STATES of America, Appellant,
v.
COMMONWEALTH COMPANIES, INC. and Commonwealth Electric Co., Inc., Appellees.

No. 89-1797NE.
|
Submitted Feb. 16, 1990.
|
Decided Sept. 6, 1990.

United States brought adversary proceeding for exception or relief from stay to pursue action against corporate debtors under the False Claims Act. The Bankruptcy Court, 80 B.R. 162, Timothy J. Mahoney, Chief Judge, denied relief. The United States District Court for the District of Nebraska, Lyle E. Strom, Chief Judge, affirmed. Government appealed. The Court of Appeals, Magill, Circuit Judge, held that: (1) fact that corporate debtors had not engaged in any business activity postpetition did not render inapplicable subparagraph excepting from stay action by governmental unit to enforce unit's police or regulatory power; (2) proposed action did not fall outside scope of the excepting subparagraph on theory action sought to protect Government's pecuniary interest; and (3) excepting subparagraph would not be found inapplicable on theory Government could assert False Claims Act claim in bankruptcy court and defending the action elsewhere would result in dissipation of estate assets due to increased litigation expenses.

Reversed.

West Headnotes (11)

[1] **Bankruptcy**
Conclusions of Law; De Novo Review

Bankruptcy
Clear Error

Court of Appeals reviews bankruptcy court's legal conclusions de novo and its factual findings under clearly erroneous standard.

3 Cases that cite this headnote

[2] **Bankruptcy**
Administrative Proceedings and Governmental Action

Paragraph excepting from stay action by governmental unit to enforce unit's police or regulatory power is not limited in application only to actions to protect public health or safety. Bankr.Code, 11 U.S.C.A. § 362(b)(4).

5 Cases that cite this headnote

[3] **Bankruptcy**
Administrative Proceedings and Governmental Action

Fact that debtor corporations had not engaged in any business activity postpetition did not render inapplicable subparagraph excepting from stay action by governmental unit to enforce unit's police or regulatory power on theory exception encompassed only governmental actions to prevent or stop imminent or ongoing harm to public. Bankr.Code, 11 U.S.C.A. § 362(b)(4).

4 Cases that cite this headnote

[4] **Bankruptcy**
Administrative Proceedings and Governmental Action

Subparagraph excepting from stay action by governmental unit to enforce unit's police or

regulatory power was not limited by alleged congressional intent to exclude any action for money damages from exception unless damages accompanied or followed some type of injunctive remedy. Bankr.Code, 11 U.S.C.A. § 362(b)(4).

1 Cases that cite this headnote

[5] **Bankruptcy**
Administrative Proceedings and Governmental Action

Government's motivation in seeking to maintain nonbankruptcy proceeding against debtors would not be considered in determining whether subparagraph excepting from stay action by governmental unit to enforce unit's police or regulatory power applied. Bankr.Code, 11 U.S.C.A. § 362(b)(4).

2 Cases that cite this headnote

[6] **Bankruptcy**
Administrative Proceedings and Governmental Action

Generally, subparagraph excepting from stay action by governmental unit to enforce unit's police or regulatory power does not include Governmental actions that would result in pecuniary advantage to government vis-a-vis other creditors of debtor's estate. Bankr.Code, 11 U.S.C.A. § 362(b)(4).

15 Cases that cite this headnote

[7] **Bankruptcy**
Administrative Proceedings and Governmental Action

In determining applicability of subparagraph excepting from stay action by governmental unit to enforce unit's police or regulatory power, analysis to determine whether governmental action would result in pecuniary advantage to Government vis-a-vis other creditors of debtor's estate is proper, although unfocused inquiry into Government's pecuniary interest would not be. Bankr.Code, 11 U.S.C.A. § 362(b)(4).

19 Cases that cite this headnote

[8] **Bankruptcy**
Administrative Proceedings and Governmental Action

Government's proposed False Claims Act action against corporate debtors would not conflict with bankruptcy court's control of property of debtor or estate and would not otherwise create pecuniary advantage for Government, which was attempting only to obtain entry of money judgment and would not seek enforcement of any judgment, so proposed action would not be excluded from scope of subparagraph excepting from stay action by governmental unit to enforce unit's police or regulatory power on theory proposed action sought to protect Government's pecuniary interest. Bankr.Code, 11 U.S.C.A. § 362(b)(4); 31 U.S.C.A. §§ 3729-3733.

19 Cases that cite this headnote

[9] **Bankruptcy**
Administrative Proceedings and Governmental Action

False Claims Act qualifies as "fraud law" for purposes of subparagraph excepting from stay governmental unit's action to enforce unit's police or regulatory power. Bankr.Code, 11 U.S.C.A. § 362(b)(4); 31 U.S.C.A. §§ 3729-3733.

8 Cases that cite this headnote

[10] **Bankruptcy**

Administrative Proceedings and Governmental Action

Civil actions by Government to enforce the False Claims Act serve to inflict punishment on wrongdoers and deter fraud against Government, although chief purpose of the FCA was to make government whole, and FCA action accordingly qualified for subparagraph excepting from stay action by governmental unit to enforce unit's police or regulatory power. Bankr.Code, 11 U.S.C.A. § 362(b)(4); 31 U.S.C.A. §§ 3729-3733.

8 Cases that cite this headnote

[11] **Bankruptcy**
Administrative Proceedings and Governmental Action

Subparagraph excepting from stay action by governmental unit to enforce unit's police or regulatory power would not be found inapplicable to Government's proposed False Claims Act action against corporate debtors on theory FCA claim could be asserted in bankruptcy court and defending FCA action elsewhere would result in dissipation of estate assets due to increased litigation expenses. Bankr.Code, 11 U.S.C.A. § 362(b)(4); 31 U.S.C.A. §§ 3729-3733.

5 Cases that cite this headnote

Attorneys and Law Firms

*520 Richard A. Olderman, Washington, D.C., for appellant.

Robert F. Craig, Omaha, Neb., for appellees.

Before WOLLMAN and MAGILL, Circuit Judges, and WATERS,* District Judge.

Opinion

MAGILL, Circuit Judge.

The United States (the government) appeals from the district court's judgment affirming the bankruptcy court's denial of the government's motion for exception from the Bankruptcy Code's automatic stay under 11 U.S.C. § 362(b)(4), or, in the alternative, relief from the stay for cause under § 362(d)(1). The government's motion sought a ruling that it could join the debtors, Commonwealth Companies, Inc. and its subsidiary, Commonwealth Electric Company, Inc., in a pending civil fraud action brought against officers of the debtor corporations and others under the False Claims Act (FCA), 31 U.S.C. §§ 3729-3733. We hold that § 362(b)(4) excepts the government's proposed FCA action against the debtors from the automatic stay up to and including the entry of a money judgment.[1] Accordingly, we reverse the judgment of the district court.

I.

On August 10, 1987, the debtors filed a Chapter 11 bankruptcy petition in the District of Nebraska. Four days later, the government brought a civil fraud action under the FCA in federal court in Tennessee, alleging that the debtor corporations, three of their officers, and other parties had conspired to rig bids on an electrical construction subcontract for a waste water treatment plant in Tennessee. The government had paid seventy-five percent of the costs of the project through a grant awarded by the United States Environmental Protection Agency. The complaint stated that the bid-rigging conspiracy had caused the submission of false and inflated claims, resulting in actual damages to the government totaling approximately $778,000. For the alleged violations of the FCA, the government requested treble damages, a $10,000 penalty for each false or inflated claim, and interests and costs.

Because the debtors had filed a bankruptcy petition four days earlier, the *521 government's complaint did not name them as defendants. On August 25, 1987, the government filed a proof of claim in the bankruptcy court, asserting that it held an unsecured claim against the debtors for approximately $2,723,961. In seeking leave from the bankruptcy court to join the debtors in the Tennessee lawsuit, the government agreed that if it were permitted to join the debtors, it would not seek enforcement of the requested money judgment but only entry of judgment, which would fix the amount of the debtors' liability for violation of the FCA.[2]

The bankruptcy court held that § 362(b)(4) does not

except the government's proposed FCA action against the debtors because the action is one solely for the pecuniary advantage of the government, rather than to protect public health or safety. *In re Commonwealth Cos., Inc.,* 80 B.R. 162, 165 (Bankr.D.Neb.1987). In support of its holding, the bankruptcy court concluded that Congress intended § 362(b)(4) to permit an action for money damages only if the damages are sought in conjunction with some sort of injunctive relief. *Id.* at 164. The district court affirmed, finding that the "pecuniary purpose" test used by the bankruptcy court was the correct legal standard and that the bankruptcy court's factual determinations in applying this test were not clearly erroneous.

II.

[1] Our standard of review is the same as that used by the district court. We review the bankruptcy court's legal conclusions *de novo* and its factual findings under the clearly erroneous standard. *Wegner v. Grunewaldt,* 821 F.2d 1317, 1320 (8th Cir.1987).

It is undisputed that if not excepted by § 362(b)(4), the government's proposed FCA action against the debtors is subject to the automatic stay of § 362(a), which states that the filing of a bankruptcy petition

operates as a stay, applicable to all entities, of-

> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.

Section 362(b)(4) provides that the filing of a petition does not operate as a stay "under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power."[3]

A.

[2] At the outset, we must reject the bankruptcy court's view that § 362(b)(4) applies only to actions to protect public health or safety.[4] The statutory language does not contain or suggest such a limitation of purpose. *See Midatlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection,* 474 U.S. 494, 503, 106 S.Ct. 755, 760, 88 L.Ed.2d 859 (1986) ("*one* of the purposes of [the police or regulatory power] exception is to protect public health and safety") (emphasis added). Moreover, there are numerous decisions holding § 362(b)(4) applicable to ***522** governmental actions or proceedings that did not concern public health or safety. *See, e.g., EEOC v. Rath Packing Co.,* 787 F.2d 318, 323-25 (8th Cir.) (Title VII employment discrimination suit), *cert. denied,* 479 U.S. 910, 107 S.Ct. 307, 93 L.Ed.2d 282 (1986); *Brock v. Rusco Indus. Inc.,* 842 F.2d 270, 273 (11th Cir.) (action to prevent sale of goods in violation of Fair Labor Standards Act), *cert. denied,* 488 U.S. 889, 109 S.Ct. 221, 102 L.Ed.2d 212 (1988); *SEC v. First Fin. Group,* 645 F.2d 429, 437-38 (5th Cir. Unit A May 1981) (civil enforcement action to enjoin purchase and sale of securities); *NLRB v. Evans Plumbing Co.,* 639 F.2d 291, 293 (5th Cir. Unit B Mar.1981) (per curiam) (enforcement proceeding for reinstatement of employees with back pay).

[3] Since the filing of their Chapter 11 petition, the debtor corporations have not engaged in any business activity. They argue that this fact renders § 362(b)(4) inapplicable in the instant case because the exception encompasses only governmental actions to prevent or stop an imminent or ongoing harm to the public. The Fifth Circuit flatly rejected this argument in *In re Commonwealth Oil Refining Co., Inc.,* 805 F.2d 1175, 1184-86 (5th Cir.1986), *cert. denied,* 483 U.S. 1005, 107 S.Ct. 3228, 97 L.Ed.2d 734 (1987). We agree with the Fifth Circuit that the language of § 362(b)(4) "is unambiguous-it does not limit the exercise of police or regulatory powers to instances where there can be shown imminent and identifiable harm or urgent public necessity." *Id.* at 1184. We also find that the relevant legislative history is not to the contrary. *See id.* & n. 7.

[4] The debtors contend the bankruptcy court was correct in concluding that the legislative history of § 362(b)(4) reveals a congressional intent to exclude any action for money damages from the exception unless the damages accompany or follow some type of injunctive remedy. We disagree. For an explanation of the meaning of § 362(b)(4), the circuit courts have consistently looked to the Senate and House Committee Reports on the Bankruptcy Reform Act of 1978. *See, e.g., EEOC v. Rath,* 787 F.2d at 324; *Brock v. Morysville Body Works, Inc.,* 829 F.2d 383, 388-89 (3d Cir.1987); *Commonwealth Oil,*

805 F.2d at 1182-83. In regard to § 362(b)(4), (b)(5), the reports state:

> Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop violation of *fraud,* environmental protection, consumer protection, safety, or similar police or regulatory laws, *or attempting to fix damages for violation of such a law,* the action or proceeding is not stayed under the automatic stay.
>
> Paragraph (5) makes clear that the exception extends to permit an injunction and enforcement of an injunction, *and to permit the entry of a money judgment,* but does not extend to permit enforcement of a money judgment.

S.Rep. No. 989, 95th Cong., 2d Sess. 52, *reprinted in* 1978 U.S.Code Cong. & Admin.News 5787, 5838; H.R.Rep. No. 595, 95th Cong., 2d Sess. 343 (1977), *reprinted in* 1978 U.S.Code Cong. & Admin.News 5963, 6299 (emphasis added). This legislative history makes it plain that § 362(b)(4) permits the government to seek the entry of a money judgment as its sole remedy for the violation of a fraud or other police or regulatory law.[5] In accordance with the clearly expressed congressional intent, those circuits addressing the question have concluded that § 362(b)(4) does not exclude ***523** a governmental action to obtain the entry of a money judgment for a past violation of the law simply because money damages are the only relief sought in the action. *See United States v. Nicolet, Inc.,* 857 F.2d 202, 207-09 (3d Cir.1988); *EEOC v. McLean Trucking Co.,* 834 F.2d 398, 400-02 (4th Cir.1987).

B.

[5] [6] [7] In determining that § 362(b)(4) does not apply in this case, the bankruptcy court purported to apply the so-called "pecuniary purpose" or "pecuniary interest" test.[6] The relevant inquiry under this test is whether the "specific acts the government wishes to carry out ... would result in an economic advantage to the government or its citizens over third parties in relation to the debtor's estate."[7] *In re Charter First Mortgage, Inc.,* 42 B.R. 380, 382 (Bankr.D.Or.1984). We agree that as a general matter, § 362(b)(4) does not include governmental actions that would result in a pecuniary advantage to the government *vis à vis* other creditors of the debtor's estate.[8] This limitation on the scope of § 362(b)(4) is consistent with Congress' rationale for not extending the exception to permit the enforcement of a money judgment:

> Since the assets of the debtor are in the possession and control of the bankruptcy court, and since they constitute a fund out of which all creditors are entitled to share, enforcement by a governmental unit of a money judgment would give it preferential treatment to the detriment of all other creditors.

S.Rep. No. 989 at 52; H.R.Rep. No. 595 at 343, 1978 U.S.Code Cong. & Admin.News 5838, 6299. The limitation is also consistent with our decision in *Missouri v. Bankruptcy Court,* 647 F.2d at 776, where we held § 362(b)(4) inapplicable to the enforcement of state laws governing the operation and liquidation of insolvent grain warehouses because the laws "directly conflict [ed] with the control of the property [of the estate] by the bankruptcy court." *See also In re Cash Currency Exch., Inc.,* 762 F.2d 542, 555 (7th Cir.) (following this holding), *cert. denied,* 474 U.S. 904, 106 S.Ct. 233, 88 L.Ed.2d 232 (1985); *In re Berry Estates,* 812 F.2d 67, 71 (2d Cir.) (proceedings to recover excess rents retained by debtor landlord within § 362(b)(4) exception because no harm to other creditors), *cert. denied,* 484 U.S. 819, 108 S.Ct. 77, 98 L.Ed.2d 40 (1987); *Commodity Futures Trading Comm'n v. Co Petro Mktg. Group, Inc.,* 700 F.2d 1279, 1284 (9th Cir.1983) (court order directing law firm to ***524** return proceeds of debtor's unlawful activities within police or regulatory power exception because order did not give government or defrauded investors preference over other creditors).[9]

[8] The bankruptcy court's finding that the proposed FCA action is solely for the pecuniary advantage of the government is both factually and legally incorrect. It is undisputed that the government is attempting only to obtain the entry of a money judgment against the debtors for their alleged violation of the FCA. The entry of judgment would simply fix the amount of the government's unsecured claim against the debtors. It would not convert the government into a secured creditor, force the payment of a prepetition debt, or otherwise give the government a pecuniary advantage over other creditors of the debtors' estate.

Despite the fact that the government's proposed FCA action would not give it a pecuniary advantage over other creditors, the debtors contend that § 362(b)(4) cannot apply here because the action is one "to protect a pecuniary interest." This language has its origin in "the isolated remarks of a congressman and a senator during floor debates" on the Bankruptcy Reform Act. *In re Mansfield Tire & Rubber Co.,* 660 F.2d 1108, 1112 (6th Cir.1981). The remarks suggested a limitation on §

362(b)(4):

> This section is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate.

124 Cong.Rec. H11089, *reprinted in* 1978 U.S.Code Cong. & Admin.News 6436, 6444-45 (statement of Rep. Edwards); 124 Cong.Rec. S17406, *reprinted in* 1978 U.S.Code Cong. & Admin.News 6505, 6513 (statement of Sen. DeConcini). As the Third Circuit has observed, these remarks "do no more than state the very problem" courts must resolve in determining the parameters of § 362(b)(4). *Penn Terra Ltd. v. Department of Envtl. Resources,* 733 F.2d 267, 274 n. 6 (3d Cir.1984). Contrary to the debtors' contentions, our holding in *Missouri v. Bankruptcy Court,* 647 F.2d at 775-76, resolved this problem by classifying an action to protect a "pecuniary interest" in property of the debtor or of the estate as one which directly conflicts with the bankruptcy court's control of that property, perhaps the clearest example of an action resulting in a pecuniary advantage over other creditors. To the extent that the floor debate remarks concerning the scope of § 362(b)(4) must be given meaning, this interpretation is far more compatible with the express statutory terms and the Senate and House Reports than the view urged by the debtors. The debtors' view does find support in a number of bankruptcy court decisions that have applied the "pecuniary interest" notion in such a way as to effectively preclude the application of § 362(b)(4) to any action or proceeding that includes a significant pecuniary element. *See, e.g., In re Greenwald,* 34 B.R. 954, 956-57 (Bankr.S.D.N.Y.1983). However, this approach has received the following insightful criticism, with which we agree:

> While it is true that the assessment by the government of a debtor's liability for violations of law may look like the "protection of a pecuniary interest," such a reading of section 362(b)(4) and of that provision's legislative history would render the exception unworkable. It is generally the case that the government regulates private conduct by establishing ***525** penalties for certain violations of rules it prescribes. This does not mean that when it seeks to enforce the regulatory scheme in question, it is merely seeking to protect some "pecuniary interest" in the monies represented by the penalties or damages levied.... Under the "pecuniary interest" test as it seems to be applied, a money judgment could *never* be entered against a debtor, for it would necessarily represent only a "pecuniary interest" in the property of the debtor, thus triggering the automatic stay.

CPI Crude, Inc. v. United States Dep't of Energy, 77 B.R. 320, 323 (D.D.C.1987) (emphasis in original); *see also In re Compton Corp.,* 90 B.R. 798, 803-05 (N.D.Tex.1988) (employing similar analysis), *appeal dismissed,* 889 F.2d 1104 (Temp.Emer.Ct.App.1989); *In re Hughes,* 87 B.R. 49, 51 (Bankr.S.D.Ohio 1988) (concurring in *CPI* 's criticism); *In re Career Consultants, Inc.,* 84 B.R. 419, 423-24 (Bankr.E.D.Va.1988) (same). In sum, because the proposed FCA action would not conflict with the bankruptcy court's control of property of the debtor or of the estate, and would not otherwise create a pecuniary advantage for the government, we decline to place it outside the scope of § 362(b)(4) on the ground that it seeks to "protect" the government's "pecuniary interest."

C.

[9] As noted above, *supra* at 522, the legislative history of § 362(b)(4) explicitly recognizes that a fraud law is a police or regulatory law. The FCA is certainly a fraud law. *See* S.Rep. No. 345, 99th Cong., 2d Sess. 2, *reprinted in* 1986 U.S.Code Cong. & Admin.News 5266, 5266 (stating that 1986 amendments to FCA are intended to make the statute more useful as "the [g]overnment's primary litigative tool for combatting fraud"). It seems inescapable then that a governmental action attempting to fix damages for violation of the FCA comes within § 362(b)(4). *See EEOC v. Rath,* 787 F.2d at 325 (describing enforcement of police or regulatory laws listed in § 362(b)(4)' s legislative history as "expressly exempt from the automatic stay").

[10] The debtors argue though that absent very rare circumstances not present here, the sole purpose of the FCA is to make the government whole for monetary loss and therefore enforcement of the statute does not qualify

for the § 362(b)(4) exception. If this characterization of the FCA as strictly compensatory in nature were accurate, there might be reason to hold § 362(b)(4) inapplicable to the government's proposed FCA action against the debtors on the ground that the action could be considered analogous to a lawsuit for contract damages. *See In re Corporacion de Servicios Medicos Hospitalarios de Fajardo,* 805 F.2d 440, 445-47 (1st Cir.1986) (holding that § 362(b)(4) does not apply to action by governmental unit to enforce its contractual rights); *Nicolet,* 857 F.2d at 209 (indicating that § 362(b)(4) would not apply to a lawsuit by the government seeking "a remedy for a private contract breach"). However, we believe the FCA serves other purposes that bring actions to enforce it within the police or regulatory power exception.

In *United States ex rel. Marcus v. Hess,* 317 U.S. 537, 551, 63 S.Ct. 379, 387-88, 87 L.Ed. 443 (1943), the Supreme Court stated that the "chief purpose" of the FCA "was to provide for restitution to the government of money taken from it by fraud." The debtors contend that *United States v. Halper,* 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989), establishes this as the FCA's sole purpose. However, *Halper* simply held that a civil sanction under the FCA will constitute "punishment" for purposes of the double jeopardy clause if it bears no rational relationship to the government's actual damages and expenses. *Id.* 109 S.Ct. at 1901-04.[10] Indeed, the Court made a point of noting that "for ***526** the defendant even remedial sanctions carry the sting of punishment." *Id.* at 1901 n. 7; *see also United States v. Bornstein,* 423 U.S. 303, 309 & n. 5, 311 & n. 6, 96 S.Ct. 523, 528 & n. 5, 529 & n. 6, 46 L.Ed.2d 514 (1976) (noting that FCA was adopted for the purpose of punishing and preventing frauds); *cf. American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp.,* 456 U.S. 556, 575-76, 102 S.Ct. 1935, 1947-48, 72 L.Ed.2d 330 (1982) (antitrust treble damages are "designed in part to punish past violations" and also serve to deter future violations and compensate victims). We find the *Halper* decision was not meant to invalidate the view that the FCA's purposes are both "to make the government whole (restitution) and to deter fraud against the government." *United States v. O'Connell,* 890 F.2d 563, 568 (1st Cir.1989); *see also United States v. McLeod,* 721 F.2d 282, 285 (9th Cir.1983) ("damages provision of the False Claims Act is meant not only to compensate the government fully but also to deter fraudulent claims from being filed against it"). In *Bornstein,* 423 U.S. at 316-17, 96 S.Ct. at 531-32, the Supreme Court held that the government's actual damages must be doubled (now trebled) under the FCA before compensatory payments are subtracted because "[t]his method of computation, which maximizes the deterrent impact of the double-damages provision ... best comports in our view with the language and purpose of the Act." The objective of deterring fraud was reinforced by the 1986 amendments to the FCA, which require the payment of treble damages and increase the forfeiture penalty for each false claim submitted by the defendant.[11] *See United States v. Ettrick Wood Prods., Inc.,* 683 F.Supp. 1262, 1265 (W.D.Wis.1988) ("[t]he increased penalties in the 1986 amendments ... indicate that Congress sought both to deter the increasingly pervasive and severe problem of fraud and to enhance the government's ability to recover losses sustained as a result of fraud"); *United States v. Hill,* 676 F.Supp. 1158, 1167 (N.D.Fla.1987) ("the amendments seek to deter [g]overnment fraud through the imposition of substantial forfeitures and treble damages"). After a thorough review of the 1986 amendments and their legislative history, the court in *Hill,* 676 F.Supp. at 1169, concluded that the amendments "evince a clear effort by Congress to address a paramount national concern ... in preventing and remedying government fraud." Other courts examining the purposes of the amendments have reached the same conclusion. *See Kelsoe v. Federal Crop Ins. Corp.,* 724 F.Supp. 448, 451 (E.D.Tex.1988); *United States ex rel. Stinson v. Provident Life & Accident Ins. Co.,* 721 F.Supp. 1247, 1253 (S.D.Fla.1989); *United States ex rel. Luther v. Consolidated Indus., Inc.,* 720 F.Supp. 919, 921 (N.D.Ala.1989); *Ettrick Wood,* 683 F.Supp. at 1265.

In view of the case law identifying the purposes of the FCA and the statute's legislative history, we conclude that civil actions by the government to enforce the FCA serve to inflict the "sting of punishment" on wrongdoers and, more importantly, deter fraud against the government, which Congress has recognized as a severe, pervasive, and expanding national problem. The police and regulatory interests furthered by enforcement of the FCA are undeniably legitimate and substantial. The fact that the statute's chief purpose is to make the government whole does not reduce the weight of these interests so as to make their vindication insufficient to qualify for the § 362(b)(4) exception from the automatic stay. We find nothing in the language or legislative history of the exception that warrants such an artificial restriction on its scope.[12]

***527** D.

[11] The debtors' final argument is that § 362(b)(4) should not apply in this case because the government could assert its FCA claim in the bankruptcy court and defending the FCA action in Tennessee would result in the dissipation of estate assets due to increased litigation expenses. The

Fourth Circuit has rejected these reasons as grounds for holding § 362(b)(4) inapplicable. *McLean Trucking,* 834 F.2d at 400-01. We agree that "the language of § 362, its legislative history and the case law require [this] conclusion." *Id.* at 401. As we have previously observed, "Congress by excepting certain actions from the automatic stay provision recognized that the debtor would likely incur litigation expenses as a result of any excepted lawsuit." *EEOC v. Rath,* 787 F.2d at 325 (holding that litigation expenses alone do not justify a discretionary stay under § 105). To hold that a governmental action does not come within § 362(b)(4) for the reasons urged here would run counter to a fundamental policy behind the police or regulatory power exception, which is "to prevent the bankruptcy court from becoming a haven for wrongdoers." *Commodity Futures,* 700 F.2d at 1283.[13]

It is important to recognize that debtors are not left without an avenue for relief if they or the estate would be harmed by a governmental action excepted from the automatic stay under § 362(b)(4). The bankruptcy court has " 'ample other powers' " to stay such an action, *Missouri v. Bankruptcy Court,* 647 F.2d at 776 n. 14 (quoting § 362(b)'s legislative history), including the discretionary power under 11 U.S.C. § 105(a) to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." Discretionary § 105 stays are to be granted under the usual rules governing the issuance of injunctions. *EEOC v. Rath,* 787 F.2d at 325. They will be granted only if a party shows a necessity for a stay. *Id.* Thus, " '[b]y excepting an act or action from the automatic stay, [§ 362(b)] simply requires that the trustee move the court into action, rather than requiring the stayed party to request relief from the stay.' " *Missouri v. Bankruptcy Court,* 647 F.2d at 777 n. 14 (quoting § 362(b)'s legislative history); *see also Commerce Oil,* 847 F.2d at 297 (requiring debtor to use § 105 to protect estate from proceedings excepted under § 362(b)(4) does not "impose[ ] any unintended or undue burden on the estate").

III.

In conclusion, we hold that the government's proposed FCA action against the debtors is excepted from the automatic stay under § 362(b)(4) up through the entry of a money judgment. Accordingly, the judgment of the district court is reversed.

All Citations

913 F.2d 518, 59 USLW 2212, 20 Bankr.Ct.Dec. 1519, Bankr. L. Rep. P 73,610

Footnotes

* The HONORABLE H. FRANKLIN WATERS, Chief Judge, United States District Court for the Western District of Arkansas, sitting by designation.

1 Because we hold that the stay does not apply, we do not reach the government's alternative argument that it is entitled to modification of the stay for cause under § 362(d)(1).

2 The government's complaint also alleged common-law unjust enrichment and sought the imposition of a constructive trust and/or equitable lien upon the proceeds of the fraud to the extent the government's legal remedy proved inadequate. However, the government also agreed that it would not attempt to enforce these equitable remedies if they were granted.

3 A related exception to the automatic stay is set forth in § 362(b)(5). Section 362(a)(2) stays the enforcement, against the debtor or property of the estate, of a judgment obtained prepetition. Section 362(b)(5) provides that the filing of a petition does not operate as a stay "under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power."

4 For their part, the debtors acknowledge that § 362(b)(4) is not limited to such actions. Appellees' Brief at 16.

5 In reaching a contrary conclusion, the bankruptcy court attached great significance to the following passage in the Senate and House Reports: " 'Subsection (b) lists five exceptions to the automatic stay. *The effect of an exception is not to make the action immune from injunction.*' " 80 B.R. at 164 (quoting reports) (emphasis added by court). This passage simply refers to a bankruptcy court's discretionary authority under 11 U.S.C. § 105 to enjoin an action that is

excepted from the automatic stay by a provision of § 362(b). *See Missouri v. United States Bankruptcy Court,* 647 F.2d 768, 776-77 & n. 14 (8th Cir.1981), *cert. denied,* 454 U.S. 1162, 102 S.Ct. 1035, 71 L.Ed.2d 318 (1982). Thus, the language emphasized by the bankruptcy court says nothing about the scope of § 362(b)(4) or any other exception listed in § 362(b).

6 The court also referred to the so-called "public policy" test, but did not explicitly rely on it in reaching its decision. As described by the Sixth Circuit, the public policy test " 'distinguishes between proceedings that effectuate public policy and those that adjudicate private rights: only the former are excepted from the automatic stay.' " *NLRB v. Edward Cooper Painting, Inc.,* 804 F.2d 934, 942 (6th Cir.1986) (quoting *In re Herr,* 28 B.R. 465, 468 (Bankr.D.Me.1983)). The bankruptcy court did not find that the government's proposed FCA action would adjudicate private rights, and the debtors do not contend that the action would constitute such an adjudication. Furthermore, as discussed *infra* at 525, 526, we conclude that a civil FCA action effectuates important public policies. There is a suggestion in the bankruptcy court's opinion that it based its decision in part on a finding regarding the government's motivation in seeking to join the debtors in the pending FCA action. *See* 80 B.R. at 165 (quoting *In re Wellham,* 53 B.R. 195, 198 (Bankr.M.D.Tenn.1985)). We reject this approach for two reasons. First, an inquiry into the subjective purposes behind a given FCA lawsuit "would be amorphous and speculative." *United States v. Halper,* 490 U.S. 435, 109 S.Ct. 1892, 1904, 104 L.Ed.2d 487 (1989) (Kennedy, J., concurring). Second, the appropriate analysis under § 362(b)(4) is one which focuses on the purposes underlying the law that the government is attempting to enforce. *See EEOC v. Rath,* 787 F.2d at 324-25.

7 Under the circumstances of this case, we need not address the applicability of § 362(b)(4) to a governmental action that would provide certain individuals with a pecuniary advantage over other creditors of the estate.

8 This should not be considered an absolute rule because there may be instances where Congress intended that the preference resulting from the enforcement of a particular statutory provision would take precedence over the Bankruptcy Code's distribution scheme. *See Brock v. Rusco,* 842 F.2d at 272-74 (enforcement of Fair Labor Standards Act's prohibition against sale of goods manufactured in violation of minimum wage provision).

9 Although most of the circuits have addressed the application of § 362(b)(4), the Sixth Circuit is the only one that has adopted the pecuniary purpose "test." *See In re Commerce Oil Co.,* 847 F.2d 291, 295-96 (6th Cir.1988) (holding that § 362(b)(4) applied to action to assess civil damages and penalties against debtor for violation of state environmental statute); *see also Nicolet,* 857 F.2d at 209 (noting that pecuniary purpose test is "[a]nother factor ... sometimes added to [§ 362(b)(4)] calculus"); *In re Corporacion de Servicios Medicos Hospitalarios de Fajardo,* 805 F.2d 440, 445 n. 4 (1st Cir.1986) (discussing test in dictum). We find no fault with the *Commerce Oil* court's use of the test to the extent the court undertook a pecuniary advantage analysis rather than an unfocused inquiry into the state's "pecuniary interest." *See* 847 F.2d at 296.

10 The Court limited its holding to a case where the defendant has previously been criminally punished for the same conduct. *Id.* at 1903. Approximately one year prior to filing its bankruptcy petition, Commonwealth Electric pleaded *nolo contendere* to an antitrust charge based on the bid-rigging conspiracy. The record before us does not indicate whether any criminal penalty has been imposed upon the corporation.

11 The government is entitled to recover forfeitures even without proof of any damages or proof that payments were made on the claims. *See* S.Rep. No. 345 at 8.

12 In addition to the bankruptcy court decision in the instant case, three other decisions have held that a civil FCA action by the government was not excepted from the automatic stay under § 362(b)(4). *See In re Chateaugay Corp.,* 115 B.R. 28, 31-33 (Bankr.S.D.N.Y.1988); *In re Wellham,* 53 B.R. 195, 198 (Bankr.M.D.Tenn.1985). We find these decisions unpersuasive because each of them applied reasoning similar to the flawed analysis of the bankruptcy court in this case.

13 We note that application of the § 362(b)(4) exception in this case has the added beneficial effect of furthering judicial economy and reducing the burden on federal taxpayers because the government can litigate the FCA action against the debtors and the other defendants in a single forum.

End of Document

In re Bilzerian, 146 B.R. 871 (1992)
Fed. Sec. L. Rep. P 97,043, 23 Bankr.Ct.Dec. 965, Bankr. L. Rep. P 74,993

146 B.R. 871
United States Bankruptcy Court, M.D. Florida, Tampa Division.

In re Paul A. BILZERIAN, Debtor.
Paul A. BILZERIAN, Plaintiff,
v.
SECURITIES AND EXCHANGE COMMISSION, Defendant.

Bankruptcy No. 91–10466–8P7.
|
Adv. No. 91–556.
|
Oct. 22, 1992.

Chapter 7 debtor sought to enjoin Securities and Exchange Commission (SEC) from continuing with civil enforcement action commenced against debtor prepetition. On SEC's motion for summary judgment, the Bankruptcy Court, Alexander L. Paskay, Chief Judge, held that SEC's pursuit in district court of its equitable remedy of disgorgement by debtor of profits he made as result of his allegedly illegal activities was exempt from automatic stay.

Motion granted.

West Headnotes (1)

[1] **Bankruptcy**
Administrative Proceedings and Governmental Action

Securities and Exchange Commission's (SEC) pursuit in district court of its equitable remedy of disgorgement by debtor of profits he made as result of his allegedly illegal activities was to enforce government's police or regulatory powers and thus was exempt from automatic stay, though stay prevented SEC from attempting to enforce any disgorgement award. Bankr.Code, 11 U.S.C.A. § 362(b)(4).

21 Cases that cite this headnote

Attorneys and Law Firms

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ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

ALEXANDER L. PASKAY, Chief Judge.

THIS CAUSE came on for hearing with notice to all parties in interest to consider a Motion For Summary Judgment filed by the Defendant, the Securities And Exchange Commission (SEC). In its Motion, the SEC contends that the issues raised in the Debtor's Complaint for Injunctive Relief may be resolved in its favor as a matter of law as there are no genuine issues of material facts.

The undisputed facts as appear from the record may be summarized as follows: On June 30, 1989, the SEC commenced a civil enforcement action against the Debtor in the United States District Court for the District of Columbia, alleging that the Debtor violated the anti-fraud and numerous other provisions of the Federal Securities Laws in connection with his takeover attempts of several public companies. In the civil enforcement action, the SEC sought equitable relief in the form of an injunction against future violations of the securities laws as well as disgorgement by the Debtor of profits he made as a result of his claimed illegal activities concerning his attempt to acquire control of several entities.

On April 18, 1991, the district court entered Partial Summary Judgment in favor of the SEC and against the Debtor and issued a permanent injunction prohibiting the Debtor from continuing to violate the securities laws. *SEC v. Bilzerian, et al.*, 1991, Fed.Sec.L.Rep. (CCH) ¶ 95,875, 1991 WL 83964 (D.D.C. April 18, 1991). The only

remaining issue in the civil enforcement action is the fixing of the proper amount of profits which the Debtor should be compelled to disgorge. Both the SEC and the Debtor have completed briefing the disgorgement issue, and the parties are now waiting for the district court to render its decision on this issue.

On August 5, 1991, the Debtor filed his voluntary Petition for Relief under Chapter 11 of the Bankruptcy Code. The case was subsequently converted to a Chapter 7 liquidation on October 22, 1991, but before the conversion, the Debtor filed its Complaint for Injunctive Relief against the SEC seeking an injunction prohibiting the SEC "from further pursuit of monetary damages" on the grounds that the automatic stay provisions of 11 U.S.C. § 362(a) prohibit the SEC from proceeding further with the civil enforcement action.

The SEC then filed the Motion for Summary Judgment presently under consideration. In resolving this matter, it is important to note that § 362 provides in pertinent part as follows:

> § 362. Automatic stay
>
> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302 or 303 of this title, ... operates as a stay, applicable to all entities, [except—]
>
> . . . . .
>
> (b) The filing of a petition under section 301, 302 or 303 of this title, ... does not operate as a stay—
>
> . . . . .
>
> (4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;
>
> (5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;
>
> . . . . .

In support of its Motion For Summary Judgment, the SEC contends that its pursuit in the district court of its equitable remedy of disgorgement is to enforce the ***873** Government's police or regulatory powers and therefore, is exempt from the provisions of 11 U.S.C. § 362(a) by virtue of 11 U.S.C. § 362(b)(4). It is important to note that the SEC concedes that the scope of § 362(b)(4) is not broad enough to permit the SEC to seek to enforce any disgorgement order, and the payment of any disgorgement award will be subject to the applicable provisions of the Bankruptcy Code and the control of this Court.

The Debtor concedes that there are no facts in dispute, and urges that the SEC's suit in the district court in which the SEC seeks an order to fix the amount of profits is nothing more than an attempt to impose personal liability on the Debtor for a pre-petition claim and therefore would be a violation of the automatic stay. In the alternative, the Debtor contends that if it is compelled to defend the action in the district court, it will suffer severe hardship by being compelled to incur attorneys fees and costs.

In opposing the SEC's Motion, the Debtor relies on several cases, including *In re Bicoastal Corp.*, 118 B.R. 855 (Bankr.M.D.Fla.1990), where this Court denied the Government's Motion for Relief from Automatic Stay to continue with its suit filed under the False Claims Act against Bicoastal Corporation, the debtor. In this Order, this Court denied the Motion because lifting the stay would unduly delay the Debtor's reorganization efforts. Further, this Court noted that the purpose of the False Claims Act is to provide restitution for the Government, not to punish the wrongdoer or to prevent repetition of fraudulent behavior, and therefore did not fall within the scope of § 362(b)(4).

In contrast, the SEC's action against the Debtor is not to pursue restitution for the Government, but is instead to prevent those such as the Debtor from repeatedly violating the securities laws. This type of action is within the scope of § 362(b)(4).

The legislative history of § 362 states:

> "Where a governmental unit is suing a debtor to prevent or stop violation of fraud, ... or similar police or regulatory laws, or attempting to fix damages for violation of such law, the action or proceedings is not stayed under the automatic stay."

S.Rep. No. 95–989 at 52, reprinted in 1978 U.S.Code Cong. and Admin.News at 5787, 5838.

As stated by the Ninth Circuit Court of Appeals, the policy behind § 362(b)(4) is "to prevent the bankruptcy court from becoming a haven for wrongdoers." *Citing*

SEC v. Elmas Trading Corporation, 620 F.Supp. 231, 240 (D.Nev.1985), *aff'd,* 805 F.2d 1039 (9th Cir.1986) (quoting *Commodity Futures Trading Commission v. Co Petro Marketing,* 700 F.2d 1279, 1283 (9th Cir.1983). In sum, this Court is satisfied that in this instance, disgorgement is a remedy sought by the SEC in furtherance of its police powers under the Securities Laws. As stated by the Second Circuit Court of Appeals:

> "The effective enforcement of the securities laws requires that the SEC be able to make violations unprofitable. The deterrent effect of an SEC enforcement action would be greatly undermined if securities laws violators were not required to disgorge illicit profits." *Securities & Exchange Commission v. Manor Nursing Centers, Inc.,* 458 F.2d 1082, 1104 (2nd Cir.1972).

While there is no question that the automatic stay provisions prevent the SEC from attempting to enforce any disgorgement award, this Court is satisfied that the mere fixing of the award is well within the provisions of 11 U.S.C. § 362(b)(4).

As a final note, this Court must reject the Debtor's argument that permitting the SEC to seek a disgorgement order would result in severe hardship. As noted previously, the parties have completed their briefs regarding the disgorgement issue, and are simply waiting for the district court to rule on the issue. Therefore, it appears that the Debtor will incur minimal inconvenience or expense. In accordance with the foregoing, it is

ORDERED, ADJUDGED AND DECREED that the Motion For Summary Judgment is hereby granted, and a separate ***874** Final Judgment will be entered in accordance with the foregoing.

DONE AND ORDERED.

All Citations

146 B.R. 871, Fed. Sec. L. Rep. P 97,043, 23 Bankr.Ct.Dec. 965, Bankr. L. Rep. P 74,993

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2. Selling Healthcare Assets in Chapter 11[1]

As with other Chapter 11 bankruptcies, asset sales via Section 363 or a plan of reorganization are common. This section addresses a number of challenges unique to executing such healthcare transactions – primarily from the debtor's perspective.

A. Maintaining Value Before and During the Sale Process

Patient Referrals

The volume and "quality mix" of patient flow are significant drivers of value in most healthcare businesses (e.g. most often through physician referrals). In a distressed hospital setting, the mere mention of a potential sale could adversely impact physician referral patterns. The issue of lost physician support potentially becomes more acute if a physician-owned entity is involved. Typically, a buyer will often expect some loss of physician support (vis-à-vis pre-sale levels), and may even apply a purchase price reduction in anticipation thereof. Thus, in an effort to best position the debtor for a successful auction, the seller should carefully control the communication to staff / doctors and tightly manage the M&A process in order to minimize operational turbulence.

The seller must attempt keep the physicians engaged through the sale process be exploring potential new roles that the physicians owners might take with the successful buyer. Quite often, keeping the physician owners engaged and cooperating becomes pure finesse and salesmanship.

Patient A/R

Buyers of healthcare businesses with sufficient short-term working capital financing often prefer to leave behind the patient A/R of a distressed seller. Other times, buyers have inadequate short-term working capital to fund the post-sale build-up of A/R and, thus, seek to acquire the seller's patient A/R as part of the overall transaction. Valuing patient account receivables (A/R) presents several challenges, as "net" A/R contains a number of subjective management estimates and reserves. When a buyer plans to purchase the A/R, the most prudent approach is to set forth a clear methodology in the asset purchase agreement for determining the net A/R value as of the sale date – along with a clear post-closing adjustment mechanism.

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[1] Adopted from: *On Life Support? Selling Healthcare Assets in Chapter 11*, XXCVIII ABI Journal 7, 12, 74-75 (Sept. 2009).

Medical Equipment

In a healthcare transaction, the medical equipment can be a significant component of the overall value of the ongoing enterprise; such equipment is often leased from third parties. Resolving issues with equipment lessors can be time-consuming and can require sufficient lead time to resolve. A gating consideration is whether the leases are "true lease" transactions or financed sales transactions. If the former, Section 365 requirements of assumption or rejection must be determined, including the cost of curing prior defaults and proof of financial wherewithal of the assignee to perform in the future. Considering the market for used medical equipment and the high rate of obsolescence for these types of assets, assumption of equipment leases is often uneconomical.

Many medical equipment leases contain dollar-buyout provisions, renewal options for modest consideration and other indicia of financing arrangements. Restructuring of the business based on the fair market value of the used equipment (vis-à-vis an adversary proceeding seeking to re-characterize) may be far more achievable than if the leases are required to be assumed or rejected and the equipment replaced. In hospital cases, in particular, the number of equipment leases may be significant. Consideration of an alternative dispute resolution (or ADR) procedure should reduce the cost of litigating these issues with numerous parties.

B. Special Considerations in Healthcare Asset Sales

Combination OTA / APA

An operations transfer agreement (OTA) is typically used to memorialize the allocation of responsibilities and timing of transfer of key elements in the sale of an ongoing healthcare business. The parties can combine, into one document, an asset purchase agreement (APA) and OTA.

The basic OTA / APA should clearly cover issues such as: (i) the assets, operations and liabilities being transferred or assumed, (ii) purchase consideration, (ii) timing of transfer, (iv) transfer of employees (including WARN Act issues), (v) regulatory filings / requirements, (vi) partitioning / collection of accounts receivable, (vii) ownership of, and access to, business and patient records, (viii) transfer and custody of patient funds / property, (ix) responsibility for filing final cost reports, (x) proration of operating costs, (xi) establishment of new vendor / contractor relationships, including resolution of vendor deposits and letters of credit,(xii) assignment of contracts, (xiii) agreements and leases, (xiv) electronic fund transfer ("EFT") / bank account control issues, and (xv) any other conditions to closing.

Medicare / Medicaid "Change of Ownership" Issues

Regardless of the identity of the legal entity that is currently billing under a particular Medicare provider agreement, CMS functionally takes the position that the provider agreement has a life of its own until effectively terminated by CMS or by the provider. Practically speaking, CMS disavows any duty to match or offset overpayments claims or reimbursement credits to any particular entity in the "chain of title"[2] of a provider agreement. As noted in an article published in the ABI Journal in May, 2009,[3] even though the Medicare statues prohibit sale of a Medicare provider number upon a change of ownership (CHOW), the provider agreement is *automatically assigned* to the new owner.[4] As long as a provider agreement, and its concomitant provider number[5] is not terminated, CMS views the agreement as essentially having a separate "corporate" life—one that allows CMS essentially to ignore the private contractual dealings between buyers and sellers and impose upon the purchasing entity choosing to accept (or failing to terminate) the agreement upon the CHOW, any liabilities, known or unknown, that have already attached to the agreement, as well, of course, as any future liabilities arising after the CHOW. In contrast, Medicaid agreements are administered at a state level, and issues of successor liability and duties of a successor are treated differently from state to state. States can provide for the preservation of a state's security against overpayments pending filing of a final cost report by stopping payment on a Medicaid contract held by the existing provider as soon as information regarding a pending CHOW is received.

Separately licensed healthcare facilities generally have distinct Medicare and Medicaid provider agreements (and therefore separate provider IDs), irrespective of ownership structure or common management. Therefore, it follows that cost report settlements are resolved on an individual provider basis, rather than on a portfolio basis. In structuring the APA, Debtors should be aware of this concept, as well as the limitation of Medicare and Medicaid to recover cost report overpayments only on an individual provider basis, and not on a portfolio basis. The concept of separateness does not necessarily extend to commercial and managed care payors as "corporate level" contracts are commonly utilized.

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[2] Although useful in discussing the "single provider" concept, "chain of title" is a misnomer in the sense that the provider agreement cannot, in CMS' view, be bought or sold.

[3] See *Transfer of Medicare Provider Numbers in Bankruptcy: Executory Contract or Saleable Asset*, by Frank A. Oswald and Howard P. Magaliff, ABI Journal 18 May 2009.

[4] See 42 CFR §489.18(c) and *U.S. v. Vernon Home Health, Inc.*, 21 F.3d 693, 694 (5th Cir. 1994).

[5] Although generally the same number stays with the provider agreement, there are certain situations in which a new number is assigned by CMS. See the State Operations Manual at 3210.4C. (Certain changes, for example, in an End State Renal Disease facility classification.)

Medicare Provider Agreement NOT Assigned to the Buyer

Generally, a provider agreement with its potential liabilities and credits is "automatically" assigned to the new provider in a CHOW.[6] However, the successor provider at a Medicare certified facility may refuse to accept assignment of the previous owner's provider agreement, which means that the existing provider agreement terminates as of the CHOW date. The CMS State Operations Manual[7] provides that "the [facility's new owner's] refusal to accept assignment must be put in writing by the new owner and forwarded to the Regional Office 45 calendar days prior to the CHOW data to allow for the orderly transfer of any beneficiaries that are patients of the provider."[8] Needless to say, when a healthcare business is sold in connection with a bankruptcy, it may be difficult or impossible to meet those notice requirements. The State Operations Manual states that "[ ]it is the responsibility of the prospective purchaser to know that it can refuse to accept assignment of the provider agreement and that it should formally indicate its choice in that regard. If, however, the CHOW goes into effect without a refusal or acceptance of assignment on record, the RO concludes that the agreement has been automatically assigned to the new owner and completes processing of the CHOW." *Id.*

Written Policies vs. Actual Practice

It is important to remember that any government program is operated by individual regulators who often retain an important degree of discretion regarding the details of how their program will operate with regard to your bankrupt client. It is always advisable to contact CMS to discuss any needed variation in usual CMS practice. For example, timing of recoupment amounts and any offset by pending credits can sometimes be negotiated. It may even be fruitful to discuss from which entity, in the "chain of title" for a particular provider agreement, CMS will first seek recoupment of any outstanding amounts. Because bankruptcy impacts the normal procedures (and timelines) utilized by CMS and its contractors, it is important to not only review and become familiar with the directives in the CMS Medicare Financial Management Manual (see Chapter 3 – Overpayments, Section 140, Bankruptcy), but to be aware of CMS attitudes with regard to any administrative freeze that might be placed on payments to a provider. These issues can make or break the sale of a healthcare business in bankruptcy because they affect the timing and flow of critical income streams to a facility.

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[6] See 42 CFR §489.18(c).
[7] See 3210.5 *et seq.* [New Owner Refuses to Accept Assignment of the Provider Agreement].
[8] See §3210.5A, CMS State Operations Manual.

C. Medicare / Medicaid Cost Report and Recoupment Issues

Successor Liability

As noted elsewhere in this article, assignment of (whether intentional, or by failure to properly reject) a Medicare provider agreement can result in successor liability to the purchaser of a healthcare business. Sometimes buyers attempt to contract around this successor liability. Such an attempt by a buyer to deny liability was considered in February of 2009 by the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, in a Chapter 11 proceeding involving the sale of skilled nursing facilities in Texas. The buyers sought payment (or reimbursement) from the plan agent for CMS' recoupment of Medicare payments based upon prior alleged overpayments to the seller *and* to the seller's predecessor. The buyers' relied on theories of statutory and equitable subrogation.

The OTA did not contain an indemnification provision, but did contain an express statement that the buyers were not assuming any of the debtor's Medicare overpayment liabilities. The court rejected the buyers' claim, ruling that under applicable law[9] by assuming the provider agreements, the buyers became primarily liable for the recoupment payments. The court rejected both the buyers' 11 U.S.C. §509 statutory subrogation argument[10] and the buyers' equitable subrogation argument[11] because neither basis for subrogation is available to a party who satisfies a debt for which that party was primarily obligated, and the recoupment liabilities were assumed when the buyers assumed the provider numbers. In granting summary judgment to the plan agent, the court further noted that nothing in the OTA can contradict controlling federal law, but also, that the OTA recited that the facilities were purchased "as is, where is" by the buyers. The court commented: "Due to the wealth of case law and regulations in this area, the Court finds it hard to believe that [buyers] did not understand this [that the liabilities were assumed with the provider numbers] when entering into the Operations Transfer Agreement, and factor the possibilities into their valuation and purchase price of the facilities, finding that possible liabilities were outweighed by the inability to operate the facilities and collect Medicare payments in the interim without assuming the provider numbers."[12]

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[9] *Vernon Home Health, Inc.*, 21 F.3d at 696

[10] Citing *In re Celotex Corp.*, 472 F.3d 1318, 1322 (11th Cir. 2006)

[11] Citing *Berliner Handels-Und Frankfurter Bank v. East Texas Steel Facilities, Inc.* (*In re East Texas Steel Facilities, Inc.*), 117 B.R. 235, 241 (Bankr. N.D. Tex. 1990).

[12] *In re Senior Management Services of Treemont, Inc., et al*, Chapter 11 Case No. 07-30230-HDH-11 (Order entered February 27, 2009).

Cost Report Receivables & Overpayments

Since most healthcare providers are now paid by Medicare and Medicaid under various forms of "prospective payment" methodologies[13] (versus the "cost based" reimbursement schemes of the past), the magnitude of yearly overpayments or underpayments have decreased substantially. Nonetheless, there are reimbursement items that are subject to "true-up" upon filing of the annual cost report. For hospitals, these items include reimbursement for (i) disproportionate share, (ii) Medicare bad debt and (iii) graduate medical education. Generally, these annual settlements are considered separate and distinct from "accounts receivable" and are frequently retained by the seller even if A/R is sold. [14]

Medicare and Medicaid cost reports are generally filed annually. [15] There is ordinarily a requirement to file a "stub period" cost report if a change of ownership occurs during the cost report year.[16] The APA should clearly address which party is responsible for meeting cost report filing requirements.

Post-Sale Collection of A/R

Resolution of A/R retained by the seller is one of the most important aspects of the OTA. In practice, collection of A/R in an "ordinary course environment" always yields a higher value than selling the A/R to a third-party. The buyer is usually in the best position to collect the retained A/R, particularly if the seller's billing and collection employees were included in the transferred operations. Therefore, it is critical that an agreement to collect the retained A/R be reached early in the overall OTA negotiation process, and not dealt with as an afterthought. Note that until the buyer's change of ownership process has been finalized by Medicare and Medicaid (typically 75 – 90 days), all EFT payments for both pre-sale and post-sale A/R will continue to flow to the seller's bank accounts. After the buyer's change of ownership has been finalized, all EFT payments will then flow to the buyer's bank accounts. Obviously, the OTA must contain a clear methodology for identifying and segregating collections of pre-sale and post-sale A/R.

Regulatory Approvals – brief listing

Required regulatory approvals vary according to the type of healthcare entity being sold. Sale of a hospital, for example, would include, in addition to filing any Medicare and Medicaid

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[13] One notable exception is hospitals with a designation of critical access facility, which are reimbursed on a cost basis.

[14] Recall that Medicare has a "single provider" view. Therefore, if any interest in Medicare A/R or cost report settlements are retained by the seller, beware that Medicare will not acknowledge this partition and will view the buyer as the sole counterparty for all payments or recoveries once the provider agreement has been assigned.

[15] Cost report year can be determined by the provider and need not correspond to a calendar year.

[16] Exception being a provider's ability to file a 13-month cost report. Slippage of more than a month into a subsequent cost report year usually triggers the requirement to file a stub period cost report.