March

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

IN RE RICHMOND PARAMEDICAL SERVICES, INC.,	)	
Debtor.	)	
RICHMOND PARAMEDICAL SERVICES,	)	
Appellee,	)	Civil Action No. 89-0081-R
v.	)	
US. DEPT. OF HEALTH AND HUMAN SERVICES,	)	
Appellant.	)	

MEMORANDUM OPINION

This case is before the Court on appeal from a decision of the Bankruptcy Court granting a preliminary injunction against the Department of Health and Human Services (HHS). The injunction barred HHS from excluding the debtor, Richmond Paramedical Services (RPS), from participation in Medicare and Medicaid programs for sixty days.

On February 23, 1988, RPS pleaded nolo contendere to ten misdemeanor counts of misrepresentation. RPS, a Richmond area ambulance service, had billed Medicaid for more miles than its ambulances had traveled. On July 15, 1988, RPS filed a Chapter 11 petition in bankruptcy.

The relevant portion of the Social Security Act, 42 U.S.C. § 1320a-7, requires that any individual or entity convicted of Medicare or Medicaid fraud be excluded from reimbursement for a minimum of five years. The statute is mandatory and provides an

exception only in cases where the state petitions HHS for a waiver because the offender is the only supplier of medical services in its area. RPS concedes that it does not fit that description and that it had no grounds to challenge the mandatory exclusion. HHS learned of RPS' conviction and notified RPS on November 4, 1988 that HHS was excluding RPS from reimbursement for five years. The letter also informed RPS that it could seek review of the exclusion decision before an administrative law judge.

RPS then requested a sixty-day injunction from the Bankruptcy Court. RPS argued that exclusion would force it to convert its petition to Chapter 7, in which case no creditors would be paid. RPS also represented that its plan of reorganization called for a merger with Atlantic Ambulance Associates (AAA). If RPS was permitted to merge with AAA, it could pay all creditors, but exclusion would prevent the merger.

The Bankruptcy Court granted a temporary restraining order on November 23, 1988. The Court held a preliminary injunction hearing on December 5, 1988, and granted the sixty-day injunction on December 20. HHS noted its appeal. Meanwhile, the debtor filed its reorganization plan on December 9, which the Bankruptcy Court approved on January 7, 1989. RPS successfully merged with AAA on February 14, 1989. AAA was the surviving entity.

RPS initially suggests that because it no longer exists, the appeal is moot. However, the issues presented fall in the category of questions "capable of repetition, yet evading review." Commonwealth of Virginia v. Tenneco, Inc., 538 F.2d 1026, 1031

(4th Cir. 1976). Such cases are not moot if the challenged action is too short to permit full litigation and the complaining party may reasonably expect to face the same issue again. B & B Chemical Co. v. U.S. E.P.A., 806 F.2d 987 (11th Cir. 1986). This is clearly such a case: sixty-day injunctions do not normally receive appellate review during their lifespan, even in the Eastern District of Virginia. HHS has also pointed out that the issue will undoubtedly recur: another bankruptcy case in this division has already confronted the same issue, see In re Tidewater Memorial Hospital, BK No. 88-01656-RT (Tice, J.), and the Court agrees with HHS that bankrupt health care providers may well seek the same relief in the future. Therefore, the Court will not dismiss the case as moot.

HHS first argues that the Bankruptcy Court lacked jurisdiction because RPS had not exhausted its administrative remedies. The statute, 42 U.S.C. § 1320a-7(f), requires an administrative hearing before a provider may seek judicial review of the exclusion decision. See also 42 U.S.C. §405(b),(g). Both the Supreme Court and the Fourth Circuit have emphasized the importance of exhaustion when litigants challenge the merits of an HHS decision. See, e.g., Heckler v. Ringer, 466 U.S. 602 (1984); Buckner v. Heckler, 804 F.2d 258 (4th Cir. 1986). However, RPS did not challenge the merits of the exclusion decision here; in fact, it conceded that such an effort would have been unethically frivolous. Litigants may avoid the exclusion decision only by demonstrating that they were not convicted or that the conviction was not for program-related

fraud. The only issue before the Bankruptcy Court was when an admittedly correct decision should be implemented, and that Court was merely asked to delay a decision the Secretary was not required to make at any particular time in an effort to satisfy RPS' creditors. Therefore, while exhaustion is strictly required where claimants challenge the merits of the exclusion decision, HHS regulations do not offer administrative review of the timing of the Secretary's decision, and there is no administrative remedy to be exhausted.

If RPS were excluded from Medicare reimbursement, its reorganization plan would have failed and none of its creditors would have been paid. The timing of the Secretary's decision thus threatened a substantial impact on the estate of the debtor, and permitting the exclusion to proceed would have frustrated the central goals of the Bankruptcy Code. The broad power of 11 U.S.C. § 105 gives the Bankruptcy Court the authority to prevent just such an end: the Court can "issue any order, process or judgment that is necessary or appropriate to carry out the provisions" of the Code. The Court concludes that such authority extends to delaying implementation of administrative decisions. See NLRB v. Superior Forwarding, Inc., 762 F.2d 695, 698 (8th Cir. 1985), and cases cited therein.

Turning to the merits of the injunction decision, HHS argues that the Bankrupty Court erred in considering the factors set out by the Fourth Circuit for preliminary injunctions: the balance of harms that will occur if the injunction is granted or withheld, the movant's likelihood of success on the merits, and the public

interest. Televest, Inc. v. Bradshaw, 618 F.2d 1029 (4th Cir. 1980); Blackwelder Furniture Co. v. Seilig Manufacturing Co., 550 F.2d 189 (4th Cir. 1977).

As the Bankruptcy Court concluded, the harm to HHS from a sixty-day injunction is minimal. RPS presumably will not accumulate substantial reimbursement amounts during those few weeks. Moreover, once RPS merged with AAA, it was excluded from reimbursement permanently rather than for the five years HHS sought. (To the extent HHS argues that such a result permits the individuals in RPS from escaping punishment, that issue should be taken up in the decision of whom to charge with fraud and in the sentence imposed by the convicting court). On the other side of the balance, denying the injunction would have required RPS to convert its petition to Chapter 7. The public interest would not have been served at all by such a result: Richmond would have lost an ambulance service, various creditors (including the federal government) would have gone wholly unpaid, tax revenues would have been lost, and the salutary purposes of the Bankruptcy Code would have been frustrated.

As to success on the merits, HHS argues that RPS could not hope to succeed in challenging the exclusion decision, but again HHS confuses the issues. RPS never challenged the merits of the exclusion decision. This Court agrees with the bankruptcy judge that the action on which RPS had to appear likely to succeed was its plan of reorganization, thereby justifying a preliminary injunction allowing it to proceed. The Bankruptcy Court's

factual conclusion that it was likely to succeed is a factual determination, and was not clearly erroneous.

Finally, HHS argues that it never waived its sovereign immunity, and the Bankruptcy Court therefore could not have enjoined it from effectuating the exclusion. This argument appears to have merit, especially in light of the Court's conclusion that the statute does not provide any administrative rview of such a claim. Whatever the merit of this position, however, the argument was presented for the first time on appeal. Because it does not implicate the lower court's subject-matter jurisdiction, and because the Bankruptcy Court never had an opportunity to pass on the argument in considering its decision, the Court will not reverse the lower court's decision on that ground. See, e.g., Matter of Abel, 17 B.R. 424 (D. Md. 1981).

The Bankruptcy Court correctly decided the issues presented to it, and the Court cannot consider the sovereign immunity argument HHS presented on appeal. The judgment of the Bankruptcy Court is therefore AFFIRMED.

Let the Clerk send a copy of this Memorandum Opinion to all counsel of record.

Richard L. Williams

DATE

UNITED STATES DISTRICT JUDGE