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THURSDAY, FEBRUARY 19, 2015
Chicago Daily Law Bulletin®
Volume 161, No. 34

Nursing facility takes a creative path to skirt Medicare termination

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Long-term care providers may have a new avenue to stave off financial collapse when faced with a proposed termination by the Centers for Medicare and Medicaid Services (CMS) — protection and reorganization under Chapter 11 of the Bankruptcy Code.

That strategy will likely prove to be a tough row to hoe if pursued in federal court here, though.

This interesting development stems from a recent decision in the U.S. Bankruptcy Court for the Middle District of Florida involving a 159-bed skilled-nursing facility operated by Bayou Shores SNF LLC. Bayou Shores derives 90 percent of its revenues from Medicare and Medicaid patients, a situation not uncommon for a skilled-nursing facility (SNF).

At the time of the bankruptcy court's Dec. 31 ruling, the facility had 109 residents who were suffering primarily from Alzheimer's disease, dementia or other psychiatric conditions. According to the bankruptcy court, the facility is one of the few, and maybe the only one, in its area that is capable of meeting the needs of these patients.

The bankruptcy court noted that this type of population may have difficulty relocating, and if they are able to relocate, may be at greater risk owing to a condition known as transfer trauma, than if they remained at Bayou Shores.

On July 22, the Centers for Medicare and Medicaid Services notified Bayou Shores that it planned to terminate its Medicare provider agreement based on three deficiencies identified in regulatory surveys by the state of Florida. The termination was to be effective Aug. 3.

Although no resident was harmed in any of the three incidents, each deficiency resulted in the facility being placed in "immediate jeopardy" status. Through a plan of correction, the facility showed to the satisfaction of CMS that two of the deficiencies had been corrected immediately. Bayou Shores alleged that the third deficiency also was corrected immediately. CMS apparently disagreed as to the third deficiency, and the termination took effect Aug. 3.

Bayou Shores appealed the termination. A Medicare administrative appeal though does not stay termination. Two days prior to the termination date, the facility sought a temporary restraining order in U.S. District Court. The facility was successful in its ex parte request for a restraining order, but that was short-lived, as often occurs in cases challenging Medicare's ability to terminate provider agreements before an administrative hearing can be held.

The government argued that the facility must exhaust its administrative remedies, an argument that typically carries the day in circuits, such as our 7th Circuit, where the courts have for many years agreed with the government that a Medicare provider's post-termination administrative remedy is adequate due process. The temporary restraining order was dissolved by the district court on Aug. 15.

Hours before termination, the facility filed for Chapter 11 protection. The bankruptcy court then enjoined termination of Bayou Shores' Medicare provider agreement until completion of the administrative appeal process. The court found subject-matter jurisdiction through a provision in the Bankruptcy Code, 28 U.S.C. Section 1334.

Under that law, a debtor may assume an "executory contract." To assume an executory contract that is in default, a facility must prove that it can promptly cure the default and provide "adequate assurance of future performance."

The court noted the facility had offered documentation to CMS establishing the steps it was taking to cure the third deficiency and concluded that "the debtor is adequately and satisfactorily providing for the health and welfare of the debtor's patients ... [and] has provided adequate assurances of future performance."

The court concluded that the facility could assume its Medicare provider agreement because termination is not complete until the provider's appeal has been exhausted.

The court also looked at whether Bayou Shores' plan was feasible despite the Florida licensing agency's intent to revoke or refuse to renew its state license. The Florida agency argued that it can invoke its state police powers to protect public safety or welfare, an exception to the automatic stay in bankruptcy. The bankruptcy court concluded that Bayou Shores' plan was still feasible.

A flurry of activity has followed the Dec. 31 bankruptcy court order.

On Jan. 20, the court clarified that the Florida agency can terminate the facility's license, under the state police power exception, but prohibited the state from basing its action on CMS' termination of the Medicare provider agreement, the court having found that termination incomplete.

CMS appealed the final order and filed an emergency motion for stay pending appeal. In its request for stay, CMS noted that the decision "will embolden health care providers that are facing termination from the Medicare program to seek refuge in bankruptcy court."

To the surprise of many observers, and presumably to the government, the bankruptcy court denied the government's motion to stay.

Although the Florida strategy may provide some hope for Medicare providers across the country faced with the virtual financial death penalty of termination, it remains to be seen whether similar relief could be achieved in the 7th Circuit. The established law in this circuit will be hard to overcome.

Counsel should be on the alert for cases similar to Bayou Shores' situation. If the Florida bankruptcy order survives appeal, attorneys for SNFs and other health care providers facing termination may feel emboldened to test the legal adequacy of a post-termination remedy in the 7th Circuit.

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