NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF WASHINGTON

In Re: HEALTH LINK, Debtor(s).	No. 98-06581-W1R
EMPIRE HEALTH SERVICES, a Washington non-profit corporation, doing business as DEACONESS MEDICAL CENTER and VALLEY HOSPITAL AND MEDICAL CENTER, Plaintiff(s), vs. AETNA U.S. HEALTHCARE OF WASHINGTON, INC., a Washington corporation; successor-in-interest to NYL Care Health Plans Northwest, Inc., a health care service contractor, Defendant(s).	Adv. No. A01-00027-W1R
EMPIRE HEALTH SERVICES, a Washington non-profit corporation, doing business as DEACONESS MEDICAL CENTER and VALLEY HOSPITAL AND MEDICAL CENTER, Plaintiff(s), vs. STATE OF WASHINGTON, acting through its Department of Social and Health Services and Health Care Authority; and AETNA U.S. HEALTHCARE OF WASHINGTON, INC., a Washington corporation; successor-in-interest to NYL Care Health Plans Northwest, Inc., a health care service contractor, Defendant(s).	Adv. No. A01-00028-W1R MEMORANDUM DECISION RE: PLAINTIFF'S MOTIONS FOR REMAND

FILED

JUL 11 2001

T.S. McGREGOR, CLERK
U.S. BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

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THESE MATTERS came on for hearing before the Honorable Patricia C. Williams on April 23, 2001 upon Plaintiff's Motions for Remand. Plaintiff was represented by Scott Smith; Defendant Aetna U.S. Healthcare of Washington, Inc. was represented by John Campbell; Defendant State of Washington Department of Social and Health Services was represented by Kara Larsen; Defendant State of Washington Department of Healthcare Authority was represented by Richard McCartan; and John Geisa appeared as attorney for Jack Reeves, Trustee. The Court reviewed the files and records herein, heard argument of counsel and was fully advised in the premises. The court now enters its Memorandum Decision.

INTRODUCTION

On December 29, 2000, Empire Health Services (hereinafter "Empire Health") brought suit against Aetna U.S. Healthcare of Washington, Inc. (hereinafter "Aetna") in the Superior Court of the State of Washington, County of Spokane, No. 00207514-1. The essential facts giving rise to the suit are that Aetna provided health care insurance coverage to its insureds in exchange for premium payments from the insureds. Aetna paid some portion of the premiums to Health Link which agreed to pay the cost of the health care services provided to Aetna's insureds. Those insureds obtained health care services from the plaintiff. Health Link did not pay for the services and is a debtor in this court. Thus, the plaintiff seeks to recover the cost of the services provided Aetna's insureds from Aetna.

Also on December 29, 2000, Empire Health brought suit against Aetna and the State of Washington in the same Superior Court, Case No. 00207515-1. This suit is conceptually similar as the State of

Washington, through its Healthy Options and Medicaid programs provided health care coverage to certain residents of the state. It paid "premiums" [some were Medicaid funds] to Aetna on behalf of those residents and Aetna in turn was to pay the cost of the health care services provided the residents. Again Aetna paid some portion of the premiums to Health Link which agreed to pay the cost of the health care services provided to the residents. Those residents obtained health care services from the plaintiff. Health Link did not pay the cost of those services and the plaintiff seeks to recover the cost of the services from either the state or Aetna.

On January 29, 2001, defendant Aetna filed in both suits in state court, Notices of Removal under 28 U.S.C. § 1452 of the suits to this court. The State of Washington has not filed its own notice of removal but has appeared and argued both in briefs and orally in support of the removal and in opposition to the plaintiff's Motion for Remand. It appears based upon this court's files that the state has waived its sovereign immunity and consents to this court's exercise of jurisdiction in these matters and this decision is based upon that conclusion. **However, the state must within 20 days of the entry of this decision file a pleading unequivocally waiving sovereign immunity and consenting to jurisdiction or stating that it does not do so.**

These matters arose pursuant to the plaintiff's Motions for Remand and request for abstention under 28 U.S.C. § 1334. Although there are two state court suits, as the suits are conceptually similar in nature, this discussion will address the two suits as one.

LEGAL ANALYSIS

Although both discretionary abstention under 28 U.S.C. § 1334(c)(1) and mandatory abstention under 28 U.S.C. § 1334(c)(2) have been argued, when a state court suit has been commenced but removed pursuant to 28 U.S.C. § 1452(a) to a federal court, no state court suit is then pending. The question of whether these suits are to remain in federal court is a question not of abstention but of remand under 28 U.S.C. § 1452(b). *Security Farms v. International Bhd. of Teamsters*, 124 F.3d 999 (9th Cir. 1997).

In this particular situation, the plaintiff Empire Health has argued in its Motions for Remand that not only does equity require remand to the state court, but that the removal was improper.

WAS REMOVAL PROPER UNDER 28 U.S.C. § 1452(a)?

28 U.S.C. § 1452(a) allows a party to remove a suit to federal court ". . . if such district court has jurisdiction of such claim or cause of action under section 1334 of this title." The plaintiff Empire Health argues that the Bankruptcy Court does not have jurisdiction under 28 U.S.C. § 1334 and thus the removal was improper and this court has no option but to remand the suits to the state court.

28 U.S.C. § 1334 provides bankruptcy courts with three types of jurisdiction. The first is exclusive jurisdiction of "all cases arising under title 11" which refers to the underlying bankruptcy proceeding itself. The second is non-exclusive jurisdiction of all cases "arising in" a case under Title 11. This refers to administration and adjudication of matters which would not exist absent a bankruptcy proceeding. *Bethlahmy v. Kuhlman (In re ACI-HDT Supply Co.)*, 205 B.R.

231 (B.A.P. 9th Cir. 1997). The third is non-exclusive jurisdiction of cases which are "related to" cases under Title 11, i.e., those which could conceivably have an impact on the administration of the bankruptcy estate. If the outcome of the litigation could alter the debtor's rights or liabilities or determine legal rights of the estate, the bankruptcy court has "related to" jurisdiction over the litigation. *Pacor Inc. v. Higgins,* 743 F.2d 984 (3rd Cir. Pa. 1984); *In re American Hardwoods,* 885 F.2d 621 (9th Cir. 1989).

This situation certainly does not constitute the first type of jurisdiction, cases "arising under". If it constitutes either of the remaining types of jurisdiction, the removal was proper. A lengthy examination of the circumstances of the underlying bankruptcy proceeding and the factual and legal disputes arising in several related matters is necessary to analyze the issue.

In 1998 three related entities, commonly and collectively referred to as Health Link, commenced Chapter 11 proceedings in this court. The records and affairs of each of the entities were commingled and in disarray. Health Link in its various corporate forms had contracted with health care providers and served as their agent for the purpose of negotiating and contracting with insurance companies and HMOs and others. This was a small portion of Health Link's business however. Some of the contracts between Health Link and health care providers may have related to the same insurance companies and HMOs which were parties to separate contracts with Health Link.

Health Link's primary business was contracting with health insurance companies and health maintenance organizations (HMOs) to pay

health care providers for services rendered to the insureds or members of the HMOs. Terms of the contracts between Health Link and the insurers and HMOs varied. Some contracts provided that the insurance company or HMO would pay a specific monthly sum to Health Link which sum was the estimated cost of the services needed by the insureds or members of the HMO. If the actual cost of the services was less, Health Link was very profitable. If the actual cost was more, Health Link paid the difference. Other contracts have different terms and generally required Health Link be reimbursed amounts it paid for actual cost of services to the insureds or members. In some situations, it appears no formal contract existed but a course of dealing arose whereby health care providers sent bills to Health Link which paid them on behalf of certain insurance companies or HMOs.

In September of 1999, the Chapter 11 proceedings were converted to Chapter 7 proceedings as Health Link's only significant assets were claims against third parties. Health Link's officers and directors were mostly health care providers who for the most part were the same health care providers to be paid by Health Link under its contracts with the insurance companies and HMOs. The debtor alleged claims against individual officers and directors for misfeasance and malfeasance. The claims ranged from embezzlement to negligently failing to review financial records. Essentially most of the claims were based upon an allegation that officers or directors acted in their own self interest as a health care provider and not in Health Link's best interest. Many officers and directors were elected to the position as a representative of an institutional health care provider. Health Link alleged that

those institutions were vicariously liable for the misfeasance or malfeasance of certain officers and directors.

Two of the three Health Link entities had insurance policies covering errors and omissions of officers and directors. Litigation in federal district court was commenced against the insurance carriers and was resolved by mediation with some millions of dollars recovered by the estate. Many claims against officers and directors have been resolved but some remain unresolved.

In federal district court several health care providers sued certain insurance companies and HMOs which had contracted with Health Link and utilized the debtor to process billing by health care providers for services to the insureds and members of the HMO. That case is No. CS-99-140-FVS. The causes of action were similar in that federal court litigation to those in the state court suits now removed to this court. The federal district court cases were mediated and were settled. Although the terms of the settlement are confidential, it resulted in a significant payment to the bankruptcy estate and a release of claims against the estate by the health insurance companies and also provided some of the releases necessary to consummate the settlement of the litigation regarding the directors and officers.

Another significant asset of the estate is the approximately 350 adversary proceedings it filed alleging voidable preferences. Most defendants are health care providers who received payments within 90 days of the bankruptcy filing. The total sought is approximately $13,000,000. A 38-page Case Management Order has been entered setting the procedure to resolve these adversary proceedings. They involve

significant legal questions such as whether continuing to provide health care services to insureds constitutes new value to the debtor. Currently the adversary proceedings are being mediated.[1]

There are 1,456 entities listed on the master mailing list. There have been 1,237 proofs of claims filed and, although most of the claims are duplicate, they total some hundreds of millions of dollars. One of the striking features of the bankruptcy proceeding is the number of roles played by the same entities. Typically, a health care provider is an unsecured creditor with claims relating to more than one health insurance carrier or HMO, a defendant in an adversary proceeding alleging a voidable preference, and often defending a claim by Health Link for actions taken as an officer or director. That same health care provider may be a party to a contract under which Health Link acted as the health care provider's agent in negotiating contracts with certain insurance companies or HMOs. To further complicate the situation, many of the health care providers are large institutions consisting of various related entities each of which may play multiple roles.

As to plaintiff Empire Health and its related entities, Deaconess Medical Center and Valley Hospital, they are each listed on the schedules as an unsecured creditor. Empire Health filed three proofs of claim which are likely duplicative but are $2,246,718.50 each. Any recovery by plaintiff in the suits now removed to this court could affect distribution from the estate's assets on that claim. Empire

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[1]The Bankruptcy Court and District Court have an active mediation program with a panel of mediators. One mediator has acted in the various cases and has been supplemented by an out-of-district bankruptcy judge to mediate the adversary proceedings.

Health is also a defendant in an adversary alleging a voidable preference payment of approximately $1,000,000. The defendant Aetna is allegedly a successor-in-interest to NYL Care Health Plans Northwest, Inc. (hereinafter "NYL Care") which was a defendant in the federal court litigation cause No. CS-99-140-FVS brought by various health care providers against various insurance companies on essentially similar theories as these removed cases. That is the litigation which resulted in a release of claims against the estate by the insurance companies and a significant payment to the estate for distribution to health care providers. It is not known how the release given by NYL Care in that litigation will be effected by the suits removed to this court from state court, but some impact is possible. That federal court case No. CS-99-140-FVS had also started in the Superior Court of Spokane County and was removed to federal district court. The plaintiff health care providers in that litigation also filed a Motion for Remand to state court. The federal district court in its order dated December 17, 1999 concluded that at a minimum, "related to" jurisdiction existed. The federal district court refused to remand the litigation.

"Related to" jurisdiction also exists in this situation. Although the litigation removed to this court is in the very early stages, from reading the pleadings, it is apparent that one of the necessary results of the litigation will be to determine the basis of the transfer of premiums from defendant Aetna to Health Link. In order to address Aetna's affirmative defense that the transfer of the funds to Health Link satisfied any obligation to pay plaintiff for services, the court must examine the relationship between Health Link and Aetna and the

relationship between Health Link and the plaintiff. If the determination is made that Health Link was acting as either Aetna's or plaintiff's agent, that determination will impact the rights and duties of Health Link. If the determination is made that Health Link was acting merely as a billing service, that too, impacts the rights and duties of Health Link. In the briefing regarding the Motions for Remand, the parties raise the possibility that the funds transferred from Aetna to Health Link were held in a constructive trust for the benefit of the health care providers. Such a determination would mean that any such funds held at the time of filing would not be property of the estate which would certainly impact the administration of the estate.

The cases removed to this court also raise issues regarding the course of dealing or possible contractual relationship between Health Link and the plaintiff. Plaintiff alleged it had no contract with Health Link and submitted billings to it at Aetna's direction. Aetna generally denies this allegation and raises as an affirmative defense that to the extent funds were given to Health Link, that satisfied its duty to pay plaintiff. In order to resolve the question of liability of Aetna to plaintiff, the facts and circumstances surrounding the plaintiff's submission of billings to Health Link must be examined. That examination may well result in a determination of Health Link's legal relationship and duties to plaintiff.

The test to determine "related to" jurisdiction is one of conceivable or possible impact, not one of actual foreseeable impact on the estate. Under the circumstances of this bankruptcy proceeding, any

determination of the nature of the relationship between Health Link and Aetna as it relates to the plaintiff would most likely impact the estate and other creditors as this plaintiff is not the only health care provider rendering services to Aetna's insurers and submitting bills to Health Link. The same is true as to any relationship between Health Link and the state. If the litigation results in factual findings as to the relationship between Health Link and plaintiff, those factual findings could determine Health Link's legal relationship to the plaintiff. Consequently, at a minimum, "related to" jurisdiction exists under 28 U.S.C. § 1334 rendering removal proper under 28 U.S.C. § 1452(a).

SHOULD THE SUITS BE REMANDED UNDER 28 U.S.C. § 1452(b)?

When considering a request to remand a suit to state court under 28 U.S.C. § 1452(b), a bankruptcy court exercises its equitable jurisdiction and determines whether it is in the best interest of justice to retain or remand the suit. The factors it considers are essentially the same as those considered in determining whether discretionary abstention should occur. Case law analyzing discretionary abstention under 28 U.S.C. § 1334(c)(2) is relevant, but the ultimate determination whether remand is appropriate is determined under 28 U.S.C. § 1452(b).

In determining whether equity requires remand, the court is to consider whether the bankruptcy court or state court would be the most convenient to the parties, whether the original forum has expertise in the subject matter of the dispute, and judicial economy and efficiency. This later also includes the economic impact upon the parties to resolve

the dispute in a particular forum as well as whether related cases are pending in either forum. *Billington v. Winograde (In re Hotel Mt. Lassen*, 207 B.R. 935 (Bankr. E.D. Cal. 1997). Factors which have been applied in determining discretionary abstention are the extent to which state law issues predominate and whether such issues are unsettled under state law and the feasibility or desirability of severing such issues. The burden on the bankruptcy court's docket is to be considered as is the existence of a right to jury, the desires of non-debtor parties to the litigation and whether it is likely that one party has engaged in forum shopping. *In re Tucson Estates, Inc.*, 912 F.2d 1162, (9th Cir. 1990). *Williams v. Shell Oil Co.*, 169 B.R. 684 (S.D. Cal. 1994); *Schulman v. California (In re Lazar)*, 237 F.3d 967 (9th Cir. 2001).

These suits removed to this court predominately involve factual issues regarding the transfer of payments for health care providers from Aetna to Health Link. Underlying legal issues are whether a contract was created and how the transfer impacted any duty of Aetna to pay health care providers for services to its insureds. The nature of the contract or course of dealing between Aetna and Health Link is primarily basic contract law. The contract course of dealing between Aetna and the plaintiff is also primarily one of basic contract law. Possibly there will be a federal issue in the suits involving the state as to that portion of the suits which relate to Medicaid funds.

This court sits roughly six blocks from the Superior Court of Spokane County. Convenience does not appear to be a factor. Nor do efficiency or economic impact on the parties appear to be a factor. The suits were removed promptly after service and no discovery has occurred,

but can occur just as efficiently and economically in one court as the other. Nor is there any right to a jury trial to be considered.

As to judicial economy and burden, both the Superior Court and the Bankruptcy Court have heavy dockets. However, this court regularly sets aside judicial days to hear Health Link matters and there is no indication that the state court would more readily be available to hear discovery disputes, motions, etc. As to trials of the cases, this court provides a firm trial date to parties at its scheduling conferences and believes that trial could occur in either court whenever the parties are ready.

As set forth above in greater detail, the legal and factual disputes and issues involving the Health Link estate form a very complicated picture. These suits removed from state court are a fragment of that picture and cannot easily be severed from it. The picture shows a pattern of interlocking, overlapping and occasionally conflicting relationships among various related and unrelated entities. To remove the relationship between Health Link and Aetna from the picture, even just that portion which relates to this health care provider, has the potential of distorting other portions of the picture.

There are also advantages to these parties remaining in federal court. If the parties wish to mediate, there is a mediator available with a thorough background in the Health Link matter who could expeditiously assist the parties. Should the parties not wish to mediate, they have available either a district or bankruptcy court judge with background in the matter. It seems neither economical or efficient to resolve this factual dispute before a court which is not familiar

with the parties or the business milieu in which the transactions occurred.

Therefore, Plaintiff's Motions for Remand are **DENIED** and the court will enter orders to that effect.

The Clerk of Court is directed to file this Memorandum Decision and provide copies to counsel.

DATED this 11th day of July, 2001.

PATRICIA C. WILLIAMS, Bankruptcy Judge