SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA,
Department of Insurance, Securities and Banking,

Petitioner,

v.

D.C. CHARTERED HEALTH PLAN, INC.,

Respondent.

Civil Action No.: 2012 CA 008227 2
Judge: Melvin R. Wright
Next Event: Status Hearing July 17, 2013, at 9:30 a.m.

PARTY-IN-INTEREST D.C. HEALTHCARE SYSTEMS, INC.'S OPPOSITION TO PETITION FOR ORDER APPROVING (1) SETTLEMENT WITH CARDINAL BANK AND (2) PROCESS FOR REVIEWING AND PAYING REHABILITATION FEES AND EXPENSES

As part of his Fifth Status Report, and without any supporting memorandum or sufficient explanation, the Rehabilitator of D.C. Chartered Health Plan, Inc. ("Chartered") seeks approval of a proposed settlement agreement and of a procedure for paying his many retained professionals. D.C. Healthcare Systems, Inc. ("DCHSI") objects to both. In addition, DCHSI highlights a number of significant deficiencies in the Rehabilitator's disclosures.

1. The Proposed Cardinal Bank Settlement Should Not Be Approved Absent Justification and Correction.

There are at least two problems with the proposed Cardinal Bank settlement. First, the Rehabilitator has provided no explanation of what is being settled and why, what potential claims are being released, and why the proposed settlement is reasonable and in Chartered's best interests. The Rehabilitator simply attaches the proposed settlement to the status report and asks this Court to approve it, when it is unclear why any settlement agreement is necessary. The proposed settlement relates to the payment of $150,000 to Chartered, representing the return of a

small, final portion of certain collateral. For the return of this collateral, the Rehabilitator is offering a broad release to Cardinal Bank. Cardinal Bank, however, previously returned $1,657,000 of the same collateral to Chartered without the need for a settlement agreement or release (*see* Fifth Status Report at ¶ 1(d)(i) & Ex. 3 at Recital 7). It is unclear why any settlement agreement is necessary, what potential claims are being settled and released, and why the approval of this Court is necessary or appropriate. In short, the Rehabilitator has done nothing to demonstrate why this Court should approve the settlement or why he is now asking for Court approval given that, as discussed below, the Rehabilitator appears to have settled millions of dollars of claims by creditors against Chartered without any settlement agreements or otherwise seeking Court approval.

Second, paragraph 3 of the proposed settlement agreement provides for a curious "contribution" of $25,000 from Cardinal Bank to "the Rehabilitator." The Rehabilitator is defined in the proposed agreement as "William P. White, Commissioner of Insurance, Securities and Banking for the District of Columbia, in his official capacity as Rehabilitator" of Chartered. The payment of the collateral set out in paragraph 2 is, in contrast, "to Chartered." It is unclear why this payment is proposed to be made and what claims Chartered would have to release in consideration of this $25,000, let alone the potential value of such claims. Regardless, any payments made must be paid to Chartered, not to the Insurance Commissioner.

DCHSI continues to investigate issues concerning this proposed settlement agreement and reserves its right to raise additional concerns, whether by separate filing in advance of the status hearing set for July 17, 2013, or at the hearing.

2. The Proposed Pay-First, Review-Later Payment Protocol Should Be Rejected.

The Rehabilitator to date has incurred fees and expenses in excess of $6 million on lawyers and professionals without explanation or Court approval. The Rehabilitator has only recently disclosed the extent of his retention of professionals and the alarming rate with which they are burning through Chartered's limited assets. The fees incurred to date constitute a substantial portion of Chartered's liquid assets, and the fees incurred are entirely out of proportion given the size of Chartered's assets. The Rehabilitator has not sought Court approval to retain most of his team of professionals, has not explained the scope of each professional's retention, and has not provided assurances of appropriateness and need.

Now, to make matters worse, the Rehabilitator asks this Court to permit it to pay its myriad of widely-dispersed professionals without Court review or approval, and then hopes he can claw back any payments this Court later determines were "unnecessary or unreasonable." Although such a "pay-first, review-later" protocol would be troubling in any situation, this payment protocol is particularly troubling here since any money paid to professionals reduces the estate's ability to pay creditors and DCHSI's residual interest. Even if fees paid to professionals are later determined to be "unnecessary or unreasonable" and are recouped by Chartered, there is a collection risk and it inevitably would take additional expense to collect.

Furthermore, this irresponsible proposal runs in stark contrast to the standard procedure for bankruptcy cases, which is an appropriate model as the interests affecting the payment of professionals from money that otherwise would be available to creditors and shareholders are identical. The procedural goals of both a bankruptcy and rehabilitation proceeding are the same: to ensure an open and fair process for appropriately managing limited estate assets.

As explained in a leading bankruptcy treatise, "[a] meaningful retention procedure is a prerequisite to the employment of any bankruptcy professional," including a thorough examination of potential conflicts of interest. Michael L. Cook, Bankruptcy Litigation Manual, § 20.02 at 20-6 (2012-13 rev. ed.) ("Bankruptcy Litigation Manual"). The retention of a professional "begins with the filing of a retention application ... accompanied by an affidavit in which the professional shows, among other things, its qualifications [and] billing practices," and "[t]he details of the professional's compensation." *Id.* § 20.06 at 20-10-11. The retention and compensation process is guided by the principle that "'conduct of bankruptcy [cases] not only should be right but *must seem right*.'" *Id.* § 20.07 at 20-11 (quoting *Knapp v. Seligson (In re Ira Haupt),* 361 F.2d 164 (2d. Cir. 1966) (Judge Friendly)).

Even with full disclosure through a retention application, retention of professionals has been denied when, for example, the proposed professional had "billing rates the bankruptcy court deemed 'excessive in light of the modest assets of the estates involved.'" *Id.* § 20.12 at 20-39 (quoting *In re Kurtzman*, 220 B.R. 538, 541 (Bankr. S.D.N.Y. 1998)). Moreover, a retention application (and any approval order) must clearly state the scope of the services the professional is approved to perform. In this way, the court is assured that professionals are performing only work that is necessary and that the work will be done efficiently. As such, even if a professional does work that otherwise could be justified, compensation will be denied if the work performed falls outside the approved scope of retention. *See, e.g., In re Churco*, No. 07-61442, 2008 Bankr. LEXIS 1173 at *15, *18 (Bankr. N.D.N.Y. Apr. 10, 2008) (even though court found no fault with actual services rendered by special counsel, without expansion of appointment court could not approve compensation for services outside the scope of the appointment).

Once retained, any professional seeking payment must "file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested." Fed. Bankr. Rule 2016(a); *see also* Bankruptcy Litigation Manual § 2016[E][3] at 20-72 (citing cases describing need to set forth time details and explain all services and expenses). In the bankruptcy context, this allows the Department of Justice Office of the United States Trustee, creditors, and parties in interest to review and comment on the fees incurred before any payment is permitted. *See, e.g.*, 28 C.F.R Part 58, Appendix.

Here, there is no United States Trustee to police Chartered's interests. As such, the need for disclosure and scrutiny is heightened relative to a bankruptcy proceeding. Before the Rehabilitator and his professionals bleed the Chartered estate dry, this Court should put in place procedures to ensure that only approved professionals are performing services; only services within the approved scope of retention are paid; and that all fees and expenses are reasonable in the context of Chartered and its assets.

The Rehabilitator's proposal stands logic on its head by continuing to shroud his retention and payment of at least **six law firms** and several other professionals in darkness. The Rehabilitator's proposal shows insufficient regard for the Court's and creditors' critical roles in the rehabilitation process and for the need to preserve Chartered's assets. Accordingly, the Rehabilitator's proposed payment protocol should be rejected, and new retention, disclosure and review requirements should be adopted.

3. The Rehabilitator Has Failed to Disclose Adequate Information.

In the Fifth Status Report, the Rehabilitator refers to a number of important facts, but does not amplify or explain them in a way that is useful to the Court and interested parties. As noted, there has been no explanation as to the need for and scope of the Cardinal Bank proposed

settlement or why Chartered is paying a half dozen law firms and other professionals. Beyond these issues, however, there are other glaring omissions.

Settlements with creditors. The Rehabilitator apparently has reached various settlements under which Chartered will pay various provider-creditors approximately $48 million, with some provider claims and the Medstar arbitrated claim still outstanding. *See* Fifth Status Report at 4-5. There is no disclosure, however, of whether these claims have been adequately reviewed and discounted in view of the typical sorts of billing errors generally found in provider billings. The Rehabilitator should disclose whether the federal government (the Centers for Medicaid and Medicare Services, or CMS) has reviewed and approved the billings, which is significant because the federal government pays approximately 70% of provider billings and thus has a strong incentive to pay such claims only to the extent valid. Such disclosures are necessary to give assurance that the Rehabilitator is taking appropriate steps to pay only what Chartered actually owes. In addition, the Rehabilitator does not disclose why he believes he can settle these creditor claims unilaterally at the same time he has concluded he needs Court approval to accept the return of the last fraction of collateral from Cardinal Bank.

Settlement of Chartered's claims against the District of Columbia. The Rehabilitator discloses in the Fifth Status Report that he has reached an agreement in principle with the District to resolve Chartered's "premium claims" arising from underpayments by the District. The Rehabilitator does not disclose, however, precisely what claims he proposes to resolve, what claims he proposes to release, or what the District is proposing to pay. Given that Chartered's claims against the District are its biggest asset – and the only means by which DCHSI can hope to realize value from its residual interest in Chartered – fulsome disclosure with time to evaluate the settlement is critical. A fair resolution of Chartered's claims against the District (as well as

any remaining claims against Chartered's reinsurers) and the creditor claims against Chartered will determine whether there will be excess cash for distribution to Chartered's shareholder, DCHSI.

It is unclear whether the Rehabilitator is proposing to settle all of the pending claims valued at over $60 million, a portion of those claims, or even claims in addition to those currently filed. Full disclosure is critically important because, as DCHSI has informed the Rehabilitator, Chartered has additional claims that the Rehabilitator has not yet asserted. Most obviously, Chartered's current filed claims do not seek recovery for the District's continuing underpayments during the last year of Chartered's operation of the Medicaid contract (April 1, 2012 to March 31, 2013). This is not the only additional claim the Rehabilitator has failed to assert, but alone could be quite significant. Furthermore, the Rehabilitator has not disclosed the extent to which he would accept a discount off of the asserted claims. Based on press reports, it appears that United Healthcare recently settled its similar claims for over 80% of their claimed value, and it would be relevant to compare the Rehabilitator's conduct in determining reasonableness.

Because of the complexity and financial significance of the claims against the District, DCHSI will need time to have its own experts examine the details of the settlement, so that this Court will have a record to determine whether the Rehabilitator is appropriately disposing of Chartered's most significant asset. There will be no exigency, as Chartered is out of business, and due process requires a full and fair opportunity to examine the proposed settlement.

Dated: July 15, 2013

Respectfully submitted,

_____/s/_____

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July, 2013, a copy of the foregoing was filed and served by email upon:

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ORDER

Upon consideration of Party-In-Interest D.C. Healthcare Systems, Inc.'s Opposition to Petition for Order Approving (1) Settlement with Cardinal Bank and (2) Process for Reviewing and Paying Rehabilitation Fees and Expenses, it is on this ___ day of July, 2013, by the Superior Court of the District of Columbia, hereby:

ORDERED, that the Rehabilitator's Petition for Order Approving (1) Settlement with Cardinal Bank and (2) Process for Reviewing and Paying Rehabilitation Fees and Expenses is DENIED.

_____
Judge Melvin R. Wright

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