UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	:	
PHYSICIANS RELIANCE ASSOCIATION, INC.,	:	CASE NO. 93-72201
PHYSICIANS RELIANCE MARKETING COMPANY,	:	CASE NO. 93-72200
PHYSICIANS RELIANCE ASSOCIATION INSURANCE AGENCY, INC.,	:	CASE NO. 93-72203
MEDICAL PROSPECTIVE, INC.,	:	CASE NO. 93-72202
Debtors.	:	CHAPTER 7

ORDER ON MOTION OF PAUL A. LEA, JR. FOR APPROVAL OF "UNSETTLEMENT FEE"

In adversary proceedings commenced in this Court, the Chapter 7 Trustee of Debtor Physicians Reliance Association, Inc. sued literally thousands of physicians who were alleged to have been members of that Debtor to recover contributions those members were alleged to owe to that Debtor arising out of the insolvency of Physicians National Risk Retention Group, Inc., a Louisiana insurance company. The defendants resided in many different states. A great many of those defendants defaulted by not responding to the complaint or by failing to perform settlement agreements, leaving the Trustee with the problem of liquidating the judgments, most of which were for $6,000 plus interest or less. The Trustee decided to sell the judgments.

In 2002, the Trustee made contact with Paul A. Lea, Jr. and others concerning the possible purchase of the uncollected judgments. The Trustee reached a deal with Mr. Lea and filed a motion for authority to sell the judgments to Mr. Lea. Ultimately, the existence of a second serious

bidder required an auction at which Mr. Lea was not the successful bidder. His motion seeks what he describes as an "unsettlement fee" for having submitted a bid that required him to incur costs in doing due diligence. The Trustee's motion to sell the judgments contained no provision for payment of an upset fee to Mr. Lea. It may well be, however, that Mr. Lea's willingness to spend the money and effort to make a bid had the effect of allowing the bankruptcy estate to obtain a much higher price for the judgments that it would have otherwise received.

The Court held a hearing on the motion on May 4, 2004, at which the Trustee, counsel for the Trustee and Mr. Lea (by telephone) appeared. The Trustee stated that he had no opposition to the motion, but his counsel stated that the attorney representing the sole remaining creditor in this case had written a letter expressing opposition. The Court raised a question concerning proper notice to that creditor and directed that Mr. Lea should either brief the issue of proper service or re-serve the motion. To save time for the parties, the Court has looked into the matter and determines that service of the motion on the sole remaining creditor was not proper.

Only eight creditors filed claims in this case. The claims of seven of those creditors have been paid because the eighth creditor holds more than 99% of the debt and consented to payment of those creditors as an administrative convenience. The proof of claim of the remaining creditor was filed as claim no. 7 in the amount of $31,995,916.61 by Robert A. Bourgeois as receiver of the Physicians National Risk Retention Group. That proof of claim supplemented an earlier proof of claim designated as claim no. 3 and filed by James H. Brown in his capacity as Louisiana Insurance Commissioner. Claim no. 7 states the name of the creditor as "Physicians National Risk Retention

Group, in Liquidation, through James H. 'Jim' Brown, Commissioner of Insurance, State of Louisiana" (hereinafter the "Creditor") and is signed by Mr. Bourgeois in his capacity as Receiver.

Sections 726, 507(a)(1) and 503 of the Bankruptcy Code are relevant to Mr. Lea's motion. Section 726(a)(1) directs a trustee to distribute property of the estate "first, in payment of claims of the kind specified in, and in the order specified in, section 507 of this title . . . ." Section 507(a)(1) provides that "(a) The following expenses and claims have priority in the following order: (1) First, administrative expenses allowed under section 503(b) of this title . . . ."

Section 503(b) provides in part: "(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including -" certain enumerated types of expenses, such as the actual and necessary costs and expenses of preserving the estate, awards of compensation under section 330, expenses incurred by a creditor, indenture trustee, equity security holder, committee, custodian or committee member, an attorney for such an entity making a substantial contribution to the estate. 11 U.S.C. § 503(b). Although Mr. Lea in his motion stated that he seeks an "unsettlement fee," it is clear that such a fee is not one allowed under section 330, and it is difficult to make a cogent argument that the value he claims to have provided to the estate was the result of his having helped to preserve the estate in the sense that the word "preserving" is used in section 503(b)(1)(A). That an expense was not incurred to preserve the estate, is not a fee allowed under section 330, and was not incurred by a creditor, indenture trustee, equity security holder, committee, custodian or committee member, an attorney for such an entity does not, however, foreclose the possibility that it might still be allowed because the words "'includes' and 'including' are not limiting." 11 U.S.C. § 102(3).

The first words in section 503(b) are "after notice and a hearing." Section 102(a) defines this phrase:

> In this title -
>
> > (1) "after notice and a hearing", or a similar phrase - (1) "after notice and a hearing", or a similar phrase -
> >
> > > (A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances[.]

What sort of notice is appropriate under the circumstances? The particular circumstances are that (1) there is only one creditor left in the case, (2) if the Court approves Mr. Lea's expense application, the funds to pay that expense will result in a dollar for dollar reduction in the amount payable to the creditor, (3) Mr. Lea did not serve the motion on the creditor named in proof of claim no. 7 or the person signing that claim, although he did serve it on Gary McGoffin of the Durio, McGoffin firm of Lafayette, Louisiana and (4) he served the notice of hearing by mail 15 days prior to the hearing on his motion.

Mr. McGoffin and Jeffrey Ackerman filed and then amended an application for admission pro hac vice as counsel for the Creditor (documents 124 and 132), and the Court granted that application (document 134). Neither the application as amended nor the order granting it state that Mr. McGoffin is designated to receive notice for the Creditor or is its agent for service of process in this case. Mr. McGoffin filed no separate notice of appearance in the case indicating that he or anyone in his firm would accept service of motions or other pleadings on behalf of the Creditor. Local counsel for the Creditor is Michael H. Murphy, who first appeared every early in the case by filing motions to conduct Rule 2004 examinations.

Mr. Lea's motion is for approval of an administrative expense in the amount of $10,000. Bankruptcy Rule 2002(a)(6) requires notice of a hearing on such a motion or application; it states:

> (a) Twenty-Day Notices to Parties in Interest
>
> Except as provided in subdivisions (h), (i), and (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least 20 days' notice by mail of: * * *
>
> > (6) a hearing on any entity's request for compensation or reimbursement of expenses if the request exceeds $1,000[.]

In the certificate of service attached to a notice of a hearing on the motion scheduled for May 4, 2004, Mr. Lea stated that on April 19, 2004 he served the notice on various individuals and entities, including Mr. McGoffin but not the Creditor.

Mr. Lea failed to comply with Bankruptcy Rule 2002(a)(6), and no exigent circumstance justified his failure to do so. First, he failed to provide 20 days' notice of the hearing.

More importantly, he failed to serve the Creditor, as Rule 2002(a) and (g) requires. Subsection (g) states:

> (g) Addressing notices
>
> (1) Notices required to be mailed under Rule 2002 to a creditor, indenture trustee, or equity security holder shall be addressed as such entity or an authorized agent has directed in its last request filed in the particular case. For the purposes of this subdivision--
>
> > (A) a proof of claim filed by a creditor or indenture trustee that designates a mailing address constitutes a filed request to mail notices to that address, unless a notice of no dividend has been given under Rule 2002(e) and a later notice of possible dividend under Rule 3002(c)(5) has not been given; and
> >
> > (B) a proof of interest filed by an equity security holder that designates a mailing address constitutes a filed request to mail notices to that address.
>
> (2) If a creditor or indenture trustee has not filed a request designating a mailing address under Rule 2002(g)(1), the notices shall be mailed to the address shown on the list of creditors or schedule of liabilities, whichever is filed later. If an equity security holder has

not filed a request designating a mailing address under Rule 2002(g)(1), the notices shall be mailed to the address shown on the list of equity security holders.

(3) If a list or schedule filed under Rule 1007 includes the name and address of a legal representative of an infant or incompetent person, and a person other than that representative files a request or proof of claim designating a name and mailing address that differs from the name and address of the representative included in the list or schedule, unless the court orders otherwise, notices under Rule 2002 shall be mailed to the representative included in the list or schedules and to the name and address designated in the request or proof of claim.

Neither the Creditor nor Mr. McGoffin filed a notice of appearance under Bankruptcy Rule 9010 or filed a request designating a name and mailing address for notice purposes. A general appearance in a bankruptcy case by an attorney for a creditor does not obviate the requirement of giving notice directly to the creditor, except as provided in Bankruptcy Rule 2002(g). (Service of a motion commencing a contested matter is governed by Bankruptcy Rule 9014. An application for reimbursement of an expense of administration seeks relief from the estate and not from the property of creditors, even though in almost all cases, one or more creditors will indirectly absorb an approved expense. Whether an application for reimbursement of an expense of administration would initiate a contested matter in a case in which there is only one creditor, the Court need not decide in view of the improper service of notice of the hearing.)

To be thorough, Mr. Lea should serve the motion and a notice of hearing on the Receiver at the address stated in the proof of claim, the Insurance Commissioner of the State of Louisiana (who, by the way, is apparently no longer Jim Brown - see http: //www.ldi.state.la.us/) at the appropriate address and Mr. Ackermann or Mr. McGoffin and Mr. Michael C. Murphy, local counsel for the creditor (see document no. 133).

For the benefit of the parties, the Court has requested the Clerk to scan and file in the Court's electronic case file database, the documents mentioned in this Order, which were filed on

paper before the Court ceased to maintain paper files. A party or attorney may access the Court's files on the Internet through PACER. See http://pacer.psc.uscourts.gov/.

For these reasons, it is

ORDERED that the motion of Paul A. Lea, Jr. for Approval of "Unsettlement Fee" cannot now be granted because of the lack of proper notice. He shall have fifteen days within which to re-serve the motion and a notice of a hearing to be held more than 23 days after the service of the motion and notice of hearing and to file a certificate of service. If he fails to do so, the Court will enter an order denying the motion. It is

FURTHER ORDERED that if Mr. Lea complies with the foregoing direction, any response to the motion shall be filed in writing at least three business days prior to the date of the hearing, and failure to file a written response will indicate no opposition to the motion. If Mr. Lea chooses to continue to prosecute his motion, he is directed to state in the notice of hearing on his motion that this Order requires that a party in interest opposing the motion must file a written response at least three business days prior to the hearing and that failure to file a response will indicate no opposition to the motion.

This 7th day of May 2004.

JAMES E. MASSEY
U.S. BANKRUPTCY JUDGE