

D. Blair Clark, ISB No. 1367
 RINGERT CLARK, CHARTERED
 455 South 3rd
 P.O. Box 2773
 Boise, ID 83701
 Telephone: (208) 342-4591
 Facsimile: (208) 342-4657

U.S. COURTS
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Attorneys for Gary & Verlene Kaiser

UNITED STATES BANKRUPTCY COURT

In re:)	
)	
COMMUNITY HOME HEALTH, INC)	Case No. 98-02141
)	
)	RESPONSE TO OBJECTION TO
)	AMENDED NOTICE OF SALE BY
Debtor.)	TRUSTEE
_____)	

The Department of Health and Human Services, Health Care Financing Administration (“HCFA”) by and through its attorney, Warren Derbidge, has objected to the Trustee’s Sale of “all receivables, claims and causes of action against federal agencies or their agents related to Medicare including Dept. of Health & Welfare, Health Care Financing Administration (“HCFA”), Social Security Administration and Blue Cross of California” as stated in the Amended Notice of Sale by Trustee dated April 14, 2000.

The five enumerated objections of HCFA are better addressed by a federal judge after the assets are sold here. The objections are basically jurisdictional and challenge the ability of any purchaser of the assets to go forward against Blue Cross of California and/or HCFA relating to reimbursement matters and statutory and common law violations which damaged Community Home Health, Inc. and its shareholders, Gary and Verlene Kaiser, among others.

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The arguments of HCFA will be responded to in turn.

1. The Trustee Cannot Sale A Cause Of Action Against Medicare,
HCFA, Or Blue Cross of California.

42 U.S.C. §§ 405(h), 1395 ii is cited to support the proposition. The argument is made that “Failure to follow the administrative procedure deprives the federal courts of subject matter jurisdiction and eliminates any further judicial review,” citing *Your Visiting Nurse Services, Inc. v. Shalala*, 119 S. Ct. 930, 933-35 (1999) and other cases.

HCFA misconstrues the intent of the purchasers and the trustee. First, none of the cases cited indicate that the trustee cannot sell these assets. That is simply a bold assertion by HCFA.

Further, the operative language of 42 U.S.C. §§ 405(h), 1395 ii, refers to “this title.” In context, that clearly refers to reimbursement matters relating to participants and the Medicare program.

The cases cited, e.g., *Your Visiting Nurse Services, Inc. v. Shalala*, 119 S. Ct. 930, 933-35 (1999) involve the fiscal intermediary’s refusal to reopen Notice of Program Reimbursement. The health care provider in *Your Visiting Nurse Services, Inc.* did not seek administrative review of certain NPRs issued by its fiscal intermediary but did , within three years, ask the intermediary to reopen the determination. When the request was denied and the Provider Review Reimbursement Board dismissed the provider’s subsequent appeal of that denial on the grounds of lack of jurisdiction, the provider sought judicial review. The district court upheld the PRRB on the narrow issue that the Board does not have jurisdiction to review a fiscal intermediary’s

refusal to reopen an reimbursement determination. At 933-935 Justice Scalia affirmed and the district court was upheld with respect to judicial review on this narrow issue. All of this is interesting enough, but involves issues not involved here. Claims have been timely filed by the Trustee with the Provider Reimbursement Review Board regarding certain NPRs issued by HCFA and those appeals are pending and will be heard at some point in the distant future. It's not contemplated that any suit will ever be filed asking for judicial review, but, certainly, the administrative process has not yet been concluded. Put otherwise, the Trustee and any subsequent purchaser of the claim to further reimbursement from HCFA can and will work the administrative scheme established by Congress and HCFA.

With respect to the second part of subsection 1 in HCFA's Memorandum, i.e., that neither the Trustee nor the Kaiser's can pursue a claim against Blue Cross of California concerning Medicare matters, all that 42 U.S.C. § 421.5(b) indicates is that "HCFA is the real party of interest in any litigation involving the administration of the program." This follows the language which states that intermediaries "act on behalf of HCFA in carrying out certain administrative responsibilities that the law imposes." 42 C.F.R. § 421.5(b). It is the contention of those seeking to purchase the assets here that Blue Cross of California acted outside the scope of those "certain administrative responsibilities that the law imposes" and thus would be a real party in interest. This is an issue, however, that could wait until suit is brought against Blue Cross of California and tested in light of all of the facts. The case cited by HCFA, *Mitchell v. Occidental Ins. Medicare*, 619 F. 2d 28, 30 (9th Cir. 1980) is not on point on this issue.

2. The Trustee Can Not Sell The Right To Medicare Payments

HCFA cites 42 U.S.C. § 1395(g) and 42 C.F.R. §§ 424.73, 90 for the proposition that Medicare payments can only be made to the provider and cannot be assigned to another party unless specific exceptions apply.

The Fifth Circuit has held in *U.S. v. Vernon Home Health, Inc.*, 21 F. 3d 693(5th Cir.) Cert. Den. 115 S. Ct. 575 (1994), that a purchaser of a Medicare provider's corporate assets, including the provider agreement, was liable under the Social Security Act and federal regulations for Medicare overpayments made to the provider. Since the United States has taken this position, the obverse must be equally true: the purchaser of the assets in a bankruptcy proceeding must be entitled to any underpayments. 42 C.F.R. § 424.73(b)(2) allows for payment under an assignment established by, or in accordance with, the order of the court of competent jurisdiction if the assignment meets the conditions set forth in § 424.90. 42 C.F.R. § 424.90 states that an assignment established by court order "is effective for Medicare payments only if (1) a certified copy of the Order is filed with the intermediary or carrier responsible for processing the claim and (2) the assignment or reassignment applies to all Medicare benefits payable to a particular person or entity during a specified or indefinite time period; or . . ."

Clearly, all of this involves payment (or assignment) of monies owned by HCFA to a provider for Medicare services as governed by a very complex set of rules. The process has now been followed by the Trustee in timely filing appeals of reimbursement to the PRRB. If the sale of assets here causes a legal infirmity, HCFA or Blue Cross can file a motion for dismissal with the PRRB and a decision can be made by that agency in due course. HCFA's objection here is simply inappropriate.

42 U.S.C. § 1395(g) simply prohibits payment to be made to someone other than a

provider of services “under an assignment or power of attorney” this is to prevent factoring by health care providers. It does not, however, prohibit a sale by a trustee under the circumstances existing here.

3. Offset and Prior Payments

HCFA cites as authority for this proposition *U.S. v. Consumer Health Services*, 108 F. 3d 390 (D.C. Cir. 1997). The decision itself holds clearly “our decision does not purport to govern the effect of a petition for bankruptcy on a claim by Medicare for reimbursement of prior overpayments when the provider in question does not continue to provide services post-petition.” At 396. Indeed, Community Home Health, Inc., stopped providing services at the time it sought the protection of this Court. Community Home Health, Inc., no longer provides services because it was driven out of business by HCFA and Blue Cross of California, the fiscal intermediary. On its face, the decision here does not apply.

Even if, arguably, there is a right to offset which follows the purchase of these assets, it would seem that that would be an argument which could be posed by HCFA in any subsequent action taken against HCFA or Blue Cross of California by the purchaser.

4. The Purchasers Are Not The Medicare Provider And Cannot Pursue Medicare Appeals

The assertion is made that only Medicare providers can appeal to the PRRB. The citation for this proposition is 242 U.S.C. § 1395oo and 42 C.F.R. § 405.1801, *et seq.*

The statute allows for a “provider of services” to appeal within 180 days after notice of the Secretary’s Final Determination. That has been done. The statute then goes on to say that the “provider of services” shall have the right to be represented by counsel, to introduce evidence, and to examine and cross examine witnesses. There is no prohibition in the statute, however, that any entity succeeding to the provider of services’ appeal rights cannot carry the appeal. In 42 U.S.C. § 3950o(j) the term “provider of services” is not defined to exclude purchasers of the provider’s assets including causes of action and appeal rights.

Similarly, 42 C.F.R. §§ 405.1801, *et seq.*, nowhere states that a provider’s successor in interest, assignee or heir cannot prosecute a PRRB appeal which has been timely filed as is the case here.

If the Government’s position here were literally absolute as asserted, the result would be very harsh indeed. There are many Medicare providers who are individual, unincorporated physicians, nurses or therapists. If an adverse reimbursement decision were made with respect to any of these persons and they filed a timely appeal and then died or became incapacitated, should not heirs, or conservators, or successors in interest be allowed to go forward with the appeal? Since there is no absolute prohibition against this procedure, the statute and regulations should not be read so narrowly as to divest bonafide purchasers at a trustee’s sale from pursuing the interests of the provider, their assignor.

Finally, this is again an issue that can be taken up with the PRRB itself. The PRRB is far more knowledgeable about its own procedures and regulations than this Court and if HCFA wishes to move to dismiss the appeals because they are not being prosecuted by an appropriate party, that would be something the PRRB could take up at an appropriate time.

5. Sale Of The Corporation's Name Is Not A Sale Of The Corporation Itself

It is not the sale of the corporate name that is as important here as is the sale of choses in action, receivables, claims against federal agencies or their agents related to Medicare. Rights can be assigned at common law and the case law cited by the Government does not preclude such an assignment or sale.

The Government has also been less than candid with this Court in its assumption that all that is at stake here are a series of appeals with the PRRB. Rather, the purchasers of the assets purchasing *all* of the claims which Community Home Health, Inc., may have against the Government or its intermediary. This would include § 1983 actions, *Bivins* claims, common law torts, statutory torts, constitutional torts, breaches of contract and any other claim that could legally be brought against HCFA and/or its intermediary Blue Cross of California.

If the assets that are being purchased are, in fact, not viable assets and would not entitle purchasers to go forward with the assertion of claims and/or appeals, then that, presumably, would be the ruling of a subsequent court. All that is being asked of this Court is to sell receivables, claims and causes of actions against federal agencies or their agents related to Medicare. The Government's objections are not viable here and should not prohibit the sale.

DATED this 23 day of May, 2000.

RINGERT CLARK, CHARTERED



D. Blair Clark - Of the Firm
Attorneys for Gary & Verlene Kaiser

CERTIFICATE OF SERVICE

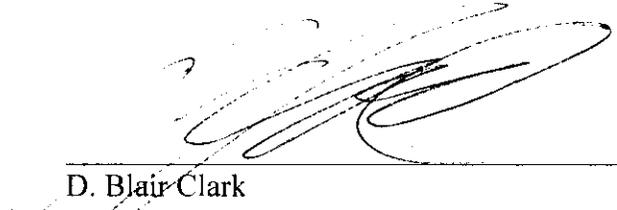
I HEREBY CERTIFY that on the 23rd day of May, 2000, a true and correct copy of the foregoing instrument was served on opposing counsel by the method indicated below, and addressed as follows:

<input checked="" type="checkbox"/>	Hand Delivered	Betty Richardson,
<input type="checkbox"/>	U.S. Mail (postage prepaid)	Warren Derbidge
<input type="checkbox"/>	Overnight Express Mail	U.S. Attorney's Office
<input type="checkbox"/>	Facsimile copy	Box 32
		First Interstate Center
		877 Main Street, Suite 201
		Boise, Idaho 83707

<input checked="" type="checkbox"/>	Hand Delivered	Jed Manwaring
<input type="checkbox"/>	U.S. Mail (postage prepaid)	EVANS KEANE, LLP
<input type="checkbox"/>	Overnight Express Mail	1101 W. River St., Suite 200
<input type="checkbox"/>	Facsimile copy	P.O. Box 959
		Boise, Idaho 83701

<input checked="" type="checkbox"/>	Hand Delivered	Bernie Rakozy
<input type="checkbox"/>	U.S. Mail (postage prepaid)	P.O. Box 1738
<input type="checkbox"/>	Overnight Express Mail	Boise, Idaho 83701
<input type="checkbox"/>	Facsimile copy	

<input type="checkbox"/>	Hand Delivered	Community Home Health, Inc.
<input type="checkbox"/>	U.S. Mail (postage prepaid)	2739 Starcrest Drive
<input type="checkbox"/>	Overnight Express Mail	Boise, Idaho 83712
<input checked="" type="checkbox"/>	Facsimile copy	



D. Blair Clark