Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of: Durrell A. Chappell, Petitioner, - v. - The Inspector General.	DATE: November 8, 1990 Docket No. C-241 Decision No. CR108

DECISION

In this case, governed by section 1128 of the Social Security Act, Petitioner timely filed a request for a hearing before an Administrative Law Judge (ALJ) to contest the March 29, 1990 notice of determination (Notice) issued by the Inspector General (I.G.) of the United States Department of Health and Human Services. The Notice informed Petitioner that he was excluded from participating in the Medicare and Medicaid programs for five years.[1]

Based on the entire record before me, I conclude that summary disposition is appropriate in this case, that Petitioner is subject to the federal minimum mandatory exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Social Security Act, and that Petitioner's exclusion for a minimum period of five years is mandated by federal law. I also conclude that there is no legal basis to stay Petitioner's exclusion pending the outcome of Petitioner's proceedings before the federal bankruptcy court.

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[1] The Medicaid program is one of three types of federally-financed State health care programs from which Petitioner is excluded. I use the term "Medicaid" to represent all three of these programs which are defined in section 1128(h) of the Act.

APPLICABLE STATUTES AND REGULATIONS

I. The Federal Statute.

Section 1128 of the Social Security Act is codified at 42 U.S.C. 1320a-7 (West U.S.C.A., 1989 Supp.). Section 1128(a)(1) of the Social Security Act provides for the exclusion from Medicare and Medicaid of those individuals or entities "convicted" of a criminal offense "related to the delivery of an item or service" under the Medicare or Medicaid programs. Section 1128(c)(3)(B) provides for a five-year minimum period of exclusion for those excluded under section 1128(a)(1).

II. The Federal Regulations.

The governing federal regulations (Regulations) are codified in 42 C.F.R. Parts 498, 1001, and 1002 (1989). Part 498 governs the procedural aspects of this exclusion case; Parts 1001 and 1002 govern the substantive aspects.

Section 1001.123 requires the I.G. to issue an exclusion notice to an individual or entity whenever the I.G. has "conclusive information" that such individual or entity has been "convicted" of a criminal offense "related to the delivery of an item or service" under the Medicare or Medicaid programs; the exclusion begins 20 days from the date on the notice.[2]

BACKGROUND

By letter dated March 29, 1990, the I.G. notified Petitioner that he and DAC Community Services would be excluded from participation in the Medicare program and State health care programs (such as Medicaid) for a period of five years. (DAC Community Services is an ambulance transportation company owned solely by Petitioner.) The I.G. based the exclusion on Petitioner's conviction of a criminal offense related to the delivery of an item or service under the Medicaid program. The I.G. stated that such exclusions are mandated by section 1128(a)(1) of the Social Security Act.

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[2] The I.G.'s notice letter adds five days to the 15 days prescribed in section 1001.123, to allow for receipt by mail.

On April 24, 1990, Petitioner requested a hearing to contest the I.G.'s determination, and the case was assigned to me for a hearing and decision. On June 12, 1990, I held a prehearing conference, at which time I established a schedule for filing prehearing motions and briefs. On June 15, 1990, I issued a Prehearing Order in which I set forth the issues raised by the parties at the June 12, 1990 prehearing conference.

Thereafter, the I.G. filed a motion for summary disposition on all issues. Petitioner submitted a brief in response to the I.G.'s motion. The I.G. filed a reply brief. Neither party requested oral argument. Based on the undisputed facts and the law, I conclude that the exclusion imposed and directed by the I.G. in this case is mandated by law. Therefore, I enter summary disposition in favor of the I.G.

ADMISSIONS

Petitioner admits that: (1) he was "convicted" of a criminal offense within the meaning of section 1128(i) of the Social Security Act; and (2) the offense was "related to the delivery of an item or service" under the Medicaid program within the meaning of section 1128(a)(1) of the Social Security Act. These admissions are set forth in the Prehearing Order and Schedule for Filing Motions for Summary Disposition of June 15, 1990.

ISSUES

The remaining issues in this case are:

1. Whether Petitioner's conviction of a program-related criminal offense triggers the mandatory minimum five year exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Social Security Act.

2. Whether there is any legal basis to stay Petitioner's mandatory minimum five year exclusion pending the outcome of his bankruptcy case before the United States Bankruptcy Court.

3. Whether summary disposition is appropriate in this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[3]

Having considered the entire record, the arguments and submissions of the parties, and being fully advised herein, I make the following Findings of Fact and Conclusions of Law:

1. Petitioner, at all times relevant to this case, has been a proprietor of an ambulance transportation business. This business operates under the name of DAC Community Services and serves Berks County, Pennsylvania. I.G. Ex. A/2.[4]

2. On March 9, 1989, Petitioner filed a bankruptcy petition under Chapter 11 of the United States Bankruptcy Code, codified at 11 U.S.C. 101, et. seq. (1978), in the United States Bankruptcy Court for the Eastern District of Pennsylvania. Petitioner continued to operate his ambulance business as a "debtor-in-possession" after the filing of his bankruptcy petition. I.G. Ex. A/1,3.

3. An undated document entitled "SECOND AMENDED INFORMATION" which appears to amend a criminal information (not contained in the record in this case) was filed in the Court of Common Pleas of Berks County, Pennsylvania charging Petitioner with the intentional submission of fraudulent Medical Assistance invoices to the Pennsylvania Department of Welfare on 123 separate occasions beginning after January 1, 1986. The SECOND AMENDED INFORMATION alleged that these invoices "indicated that Medical Assistance recipients had received medically necessary ambulance transportation to a legal destination when, in fact, ambulance transportation was not medically necessary for a particular recipient; and/or the recipient was transported to a destination which is specifically non-compensable under the Medical Assistance Program; and/or transportation for a Medical Assistance recipient was rendered in a non-ambulance vehicle." I.G. Ex. D/1.

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[3] Some of my statements in the sections preceding these formal findings and conclusions are also findings of fact and conclusions of law. To the extent that they are not repeated here, they were not in controversy.

[4] The citations in this Decision are as follows:

Petitioner's Brief	P. Br. (page)
I.G.'s Brief	I.G. Br. (page)
I.G.'s Reply Brief	I.G. Rep. Br. (page)
I.G.'s Exhibits	I.G. Ex. (letter)/(page)

4. Petitioner pleaded guilty to one count of continuing Medicaid Fraud relating to the submission of 123 fraudulent Medicaid invoices. The crime of Medicaid Fraud is a felony of the third degree under Pennsylvania law. I.G. Ex. E/1.

5. On June 28, 1989, Petitioner was sentenced to incarceration in the Berks County Prison for 30 days and, thereafter, to placement on probation for 22 months. In addition, Petitioner was required to pay a $15,000 fine and to reimburse the Commonwealth of Pennsylvania for the cost of investigating and prosecuting his case. I.G. Ex. E/1; I.G. Ex. C.

6. Petitioner admits, and I conclude, that he was "convicted" of a criminal offense within the meaning of section 1128(i) of the Social Security Act.

7. Petitioner admits, and I conclude, that he was convicted of a criminal offense "related to the delivery of an item or service" under the Medicaid Program, within the meaning of section 1128(a)(1) of the Social Security Act.

8. The Secretary of the United States Department of Health and Human Services (the Secretary) delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Social Security Act. 48 Fed. Reg. 21662 (1983).

9. The I.G. properly excluded Petitioner from participation in the Medicare and Medicaid programs for a period of five years as required by the minimum mandatory exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Social Security Act.

10. There is no legal basis and it is not appropriate to stay Petitioner's exclusion pending the outcome of his bankruptcy case before the United States Bankruptcy Court for the Eastern District of Pennsylvania.

11. Since the material facts are undisputed in this case, there is no need for an evidentiary hearing in this proceeding and the I.G. is entitled to summary disposition as a matter of law.

DISCUSSION

I. A Minimum Mandatory Five Year Exclusion Is Required In This Case.

Petitioner admits, and I conclude, that he was "convicted" of a criminal offense within the meaning of section 1128(i) of the Social Security Act. Petitioner also admits, and I conclude, that he was convicted of a criminal offense "related to the delivery of an item or service" under the Medicaid Program within the meaning of section 1128(a)(1) of the Social Security Act.

Sections 1128(a)(1) and 1128(c)(3)(B) of the Social Security Act require the I.G. to exclude individuals and entities from the Medicare and Medicaid programs for a minimum period of five years, when such individuals and entities have been "convicted" of a criminal offense "related to the delivery of an item or service" under the Medicare or Medicaid programs, within the meaning of section 1128(a)(1) of the Social Security Act. Congressional intent on this matter is clear:

> A minimum five-year exclusion is appropriate, given the seriousness of the offenses at issue. . . Moreover, a mandatory five-year exclusion should provide a clear and strong deterrent against the commission of criminal acts.

S. Rep. No. 109, 100th Cong., 1st Sess. 2 (1987), reprinted in 1987 U.S. Code Cong. & Admin. News 682, 686.

Since Petitioner was "convicted" of a criminal offense and it was "related to the delivery of an item or service" under the Medicaid program within the meaning of section 1128(a)(1) and (i) of the Social Security Act, the I.G. was required by section 1128(c)(3)(B) of the Social Security Act to exclude Petitioner for a minimum of five years and an ALJ has no discretion to reduce the mandatory minimum five year period of exclusion. See Jack W. Greene v. Louis Sullivan, 731 F. Supp. 835, 838 (E.D. Tenn. Feb. 8, 1990). See also Jack W. Greene v. Louis Sullivan, 731 F. Supp. 838, 840 (E.D. Tenn. Feb. 22, 1990).

II. It Is Not Appropriate to Stay Petitioner's Minimum Mandatory Five Year Exclusion Pending the Outcome of Petitioner's Bankruptcy Case.

The record shows that, on March 9, 1989, Petitioner initiated bankruptcy proceedings in his capacity as a sole proprietor of DAC Community Services by filing a bankruptcy petition under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Pennsylvania. Petitioner continued to operate his ambulance business after filing the bankruptcy petition, maintaining full managerial control as a "debtor in possession" under Chapter 11 of the United States Bankruptcy Code. Petitioner sought the protection of the bankruptcy court while he reorganized his business and devised a plan to make payment to his creditors. I.G. Ex. A/1,3. In a letter dated March 29, 1990, approximately a year after Petitioner filed his bankruptcy petition and while his bankruptcy case was still pending in the bankruptcy court, the I.G. notified Petitioner that he and DAC Community Services would be excluded from participation as a provider in the Medicare and Medicaid programs for a period of five years.

Petitioner contends that provisions of the United States Bankruptcy Code, which are binding on this administrative tribunal, require that Petitioner's exclusion from participation in the Medicare and Medicaid programs be stayed until the conclusion of his bankruptcy case.

Petitioner argues that section 362(a) of the Bankruptcy Code imposes an "automatic stay" on all actions against a debtor, subject to certain exceptions specified in section 362(b). According to Petitioner, the purpose of the automatic stay is to prevent dissipation of a debtor's assets before an orderly distribution to creditors can be achieved. Petitioner contends that the Provider Agreement between him and the Department of Health and Human Services is an "asset" of the bankruptcy estate which must be protected by the automatic stay. Petitioner argues that any action taken by the Department of Health and Human Services to terminate this Provider Agreement would severely cripple his ambulance business. This, according to Petitioner, would be contrary to the purpose of the Bankruptcy Code because it would prevent a successful reorganization of his business and, therefore, threaten the interests of creditors protected by the Bankruptcy Code.

Petitioner contends that an important policy consideration underlying the Bankruptcy Code is the protection of the interest of creditors. According to

Petitioner, "(i)t is the presence of creditors that takes this case out of the exclusive control of the Medicare statute and requires a more comprehensive balancing of interests." P. Br. 3. Petitioner, therefore, asserts that since the imposition of an exclusion in this case would be detrimental to the creditor interests protected by the bankruptcy laws, the "policies of the Bankruptcy Code take precedence over the administrative sanction." P. Br. 4.

While Petitioner argues that the scope of the automatic stay of actions against a debtor in bankruptcy is broad, he concedes that it is not unlimited. According to Petitioner, section 362(b)(4) of the Bankruptcy Code creates an exception to the automatic stay where there is a "bona fide exercise of police power" directed at the protection of public health or safety. P. Br. 4.

Although Petitioner recognizes the exception to the automatic stay for the exercise of government actions taken to protect the public welfare, he takes the position that the exclusion imposed by the I.G. is not the type of government action which falls within the exception. Petitioner therefore concludes that the exclusion imposed by the I.G. against him must be stayed pending the outcome of his bankruptcy case.

The I.G. argues that I do not have the authority to decide the issue of whether the exclusion imposed by the I.G. must be stayed. The I.G. contends that an ALJ hearing federal exclusion cases must confine his decision to the three issues set forth in section 1001.128(a) of the Regulations. 42 C.F.R. section 1001.128(a). The I.G. contends that Petitioner's attempt to stay his exclusion in this case "is not within the parameters" of the three issues set forth in the Regulations and therefore Petitioner's attempt to stay his exclusion in this case is "not appealable in this forum." I.G. Br. 9.

The I.G. also argues that there is no legal support under either the Social Security Act or the United States Bankruptcy Code for staying Petitioner's exclusion. The I.G. states that once it has been established that a conviction exists, and that the conviction is related to the delivery of an item or service under the Medicaid program, the Social Security Act requires the I.G. to impose an exclusion for a minimum period of five years. According to the I.G., in cases where a petitioner has admitted a conviction of a program-related offense, the imposition of a five year exclusion is mandatory and there is no legal basis to stay it.

The I.G. also disagrees with Petitioner's position that the automatic stay provision at section 362(a) of the Bankruptcy Code applies to this case. The I.G. asserts that by enacting certain exceptions to the automatic stay at section 362(b) of the Bankruptcy Code, Congress recognized that there are competing and more compelling policy considerations which take precedence over the goal of preserving a debtor's assets. Specifically, the I.G. argues that the exception to the automatic stay for the exercise of government police and regulatory power set forth at 362(b)(4) of the Bankruptcy Code applies to Petitioner's exclusion in this case.

I have carefully considered the contentions of the parties and the relevant law, and I will address first the jurisdictional question regarding the scope of my review raised by the I.G. While I agree with the I.G. that 42 C.F.R. 1001.128(a) sets forth guidelines concerning the scope of an ALJ's review in hearing federal exclusion cases, I do not read that regulation as narrowly as the I.G. does. Section 1001.128(a) of the Regulations provides that an ALJ has the authority to hear and decide issues of whether: (1) a petitioner was, in fact, convicted; (2) the conviction was related to his or her participation in the delivery of medical care or services under the Medicare, Medicaid, or social services program; and (3) the length of the exclusion is reasonable. Read together, the three issues set forth in section 1001.128(a) of the Regulations permits inquiry by the ALJ into the propriety of the imposition of an exclusion in particular cases. In order to accomplish this, an ALJ must interpret, construe, and apply relevant statutory provisions to individual cases. As stated by the Departmental Appeals Board in Jack W. Greene, DAB App. 1078 at 17 (1989):

> The ALJ must consider the meaning of the pertinent statutory provision as well as related provisions, relevant legislative history, the effective date of the statute, case law interpretations, and implementing regulations and policy issuances. It would literally be impossible to apply the issue identified by [42 C.F.R. 1001.128] in a legally correct manner without considering these factors, as appropriate.

In this case, Petitioner has argued that the imposition of an exclusion prior to the conclusion of his bankruptcy case is legally impermissible. Since this issue concerns the propriety of the imposition of an exclusion under the facts of this case, it falls within the scope of review

set forth in 42 C.F.R. 1001.128(a). I therefore have a duty to consider how Congress intended to apply all relevant statutory provisions to this case.

With regard to Petitioner's position that I am required to stay his exclusion until the conclusion of his bankruptcy case, I agree with the I.G. that there is no legal basis to stay the exclusion in this case.

The I.G. excluded Petitioner from participating in Medicare and State health care programs pursuant to section 1128(a)(1) of the Social Security Act. 42 U.S.C. 1320a-7(a)(1). That section provides that the Secretary of the Department of Health and Human Services must exclude from participation in Medicare, and direct the exclusion from participation in State health care programs, any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under the Medicare or Medicaid programs. The Secretary has delegated to the I.G. the responsibility for excluding or directing the exclusion of individuals or entities pursuant to the law. 48 Fed. Reg. 21662 (1983).

The Social Security Act provides that exclusions "shall be effective at such time and upon such reasonable notice to the public and to the individual or entity excluded as may be specified in regulations . . ." 42 U.S.C. 13201-7(c)(1). It further provides that, with exceptions not relevant to this case, "an exclusion shall be effective with respect to services furnished to an individual on or after the effective date of the exclusion." 42 U.S.C. 1320a-7(c)(2)(A).[5] In the case of an exclusion under section 1128(a)(1) for convictions for program-related offenses, the Social Security Act provides that the minimum period of exclusion shall be not less than five years. The only exception to this is where, upon the request of a State, the Secretary, in his discretion, waives the exclusion for an individual or entity "that is the sole community physician or sole source of essential specialized services in a community." 42 U.S.C. 1320a-7(c)(3)(B).

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[5] The exceptions referred to in subsection (2)(A) include payments made under Title XVIII or under a State health care program for inpatient institutional services furnished to an individual who was admitted to such institution before the date of the exclusion, or home health services and hospice care furnished to an individual under a plan of care established before the date of the exclusion.

There is nothing in the Social Security Act which provides that interim relief, such as staying exclusions pending the outcome of a bankruptcy case, is available to excluded parties. Nor does the legislative history of the Social Security Act reveal Congressional intent to provide excluded parties involved in bankruptcy proceedings the opportunity to obtain stays of their exclusions pending the outcome of their bankruptcy case. On the contrary, the Social Security Act requires a minimum five year exclusion in cases such as this where Petitioner has admitted that he has been convicted of a program-related offense. Congress' silence on the availability of stays pending the outcome of bankruptcy cases supports the conclusion that Congress did not intend that stays be available as interim relief for excluded debtors involved in proceedings before the bankruptcy courts.

Moreover, a review of the statutory scheme for handling the nation's bankruptcy matters as set forth by Congress in the United States Bankruptcy Code shows that Congress recognizes that the goal of preserving a debtor's assets for the benefit of creditors is not invariably paramount, and that in some circumstances that goal must yield to overriding public policy considerations.

Under section 362(a) of the Bankruptcy Code, 11 U.S.C. 362(a), Congress provided that the filing of a bankruptcy petition automatically operates as a stay of all judicial and nonjudicial proceedings against the debtor or his property. According to the legislative history of section 362(a), the automatic stay is one of the fundamental protections for the debtor's assets provided by the Bankruptcy Code. It gives the debtor a breathing spell from his creditors. It stops all collection actions and all harassment. It provides the debtor with an opportunity to compose, rehabilitate, and attempt a repayment or reorganization plan. The purpose of the automatic stay provision is to preserve the debtor's assets so that an orderly distribution to creditors can be arranged. H. Rep. No. 95-595, 95th Cong., 1st Sess. 340 (1977), reprinted in 1978 U.S. Code Cong. & Admin. News 5787.

The automatic stay is not without its exceptions, as Petitioner aptly points out. Section 362(b)(4), 11 U.S.C. 362(b)(4), provides that the filing of a bankruptcy petition does not operate as a stay "of a commencement or continuation of an action or proceeding by a government unit to enforce such governmental unit's police or regulatory power." In enacting this exception to the automatic stay, Congress explicitly articulated

its intent that actions taken against a debtor and his property by a governmental unit seeking to exercise its police and regulatory powers should not be stayed, even though the debtor files a bankruptcy petition, because the interest in protecting the public welfare is more compelling than the interest in preserving an individual debtor's assets.

While Petitioner acknowledges the exception set forth in section 362(b)(4), he contends that the exclusion imposed by the I.G. in this case is not a governmental action which falls within this exception.

I disagree with Petitioner. In my view, the language of section 362(b)(4), its legislative history, and the case law requires an opposite conclusion.

On its face, section 362(b)(4) exempts from the automatic stay an action by a governmental unit "to enforce such governmental unit's police or regulatory power." It is indisputable that the I.G. is a "governmental unit." The question is whether the action taken by the I.G. in imposing an exclusion was the exercise of a "police or regulatory power".

Just what is meant by the language of section 362(b)(4) is explained in its legislative history, which states:

> . . . where a governmental unit is suing a debtor to prevent or stop a violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws . . . the action or proceeding is not stayed under the automatic stay. S. Rep. No. 95-989, 95th Cong., 2d Sess. 52 (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5838.

The legislative history of section 362(b)(4) of the Bankruptcy Code specifically mentions the protection against fraud as an exercise of the governmental police or regulatory power. In this case, Petitioner was convicted of the criminal offense of continuing Medicaid fraud involving the intentional submission of fraudulent invoices to the Medicaid program on 123 separate occasions. Section 1128 of the Social Security Act requires the I.G. to exclude individuals and entities from the Medicare and Medicaid programs for a minimum period of five years when such individuals or entities have been convicted of a criminal offense related to the Medicare or Medicaid programs. As stated in the legislative history of the Social Security Act, a major

purpose of the exclusion sanction is "to protect the [Medicare and Medicaid programs] from fraud and abuse." S. Rep. No. 109, 100th Cong., 1st Sess. 2 (1987), reprinted in 1987 U.S. Code Cong. & Admin. News 682.

Petitioner argues that the exclusion sanction imposed by the I.G. in this case does not fall within the section 362(b)(4) exception to the automatic stay because the I.G. is not seeking to stop or prevent a present danger of fraud. Petitioner points out that the language of the legislative history of section 362(b)(4) states that in order to be exempt from the automatic stay, the action of the governmental unit must be undertaken to "prevent or stop a violation of fraud." Petitioner interprets this language to mean that the section 362(b)(4) exception to the automatic stay applies only to government actions taken to protect against a "present and immediate harm" to the public. P. Br. 6. While Petitioner does not deny that he engaged in fraudulent activities in the past, he points out that there is no evidence that he is presently engaging in such activities. Petitioner reasons that the exclusion imposed by the I.G. in this case is not an exercise of governmental power directed at stopping or preventing a present and immediate harm to the public because the danger of fraud no longer exists in this case. Petitioner therefore concludes that the exclusion sanction imposed on him is "purely punitive and financial in nature" and that it "bears no relationship to a present or future threat to public health or safety." P. Br. 5.

While I agree with Petitioner's assertion that the section 362(b)(4) exception to the automatic stay applies to governmental actions taken to prevent or stop a present and immediate danger to the public, I disagree with his conclusion that no such danger exists in this case. Petitioner was convicted of a criminal offense involving Medicaid fraud. He therefore is an individual who has caused harm to the integrity of the Medicaid program, and by his conduct has demonstrated that he is untrustworthy. The purpose of the exclusion sanction is to protect program integrity by preventing untrustworthy providers from having ready access to Medicare and Medicaid trust funds. See Orlando Ariz and Ariz Pharmacy, Inc., DAB Civ Rem. C-115 (1990). In discussing the reasons for enacting the mandatory minimum five year exclusion for conviction of program-related offenses, the Senate Finance Committee stated in its report that the minimum five year exclusion "is appropriate, given the seriousness of the offenses at issue." The Senate Finance Committee also stated that five years is the minimum amount of time necessary to provide the

government "with adequate opportunity to determine whether there is a reasonable assurance that the types of offenses for which the individual or entity was excluded have not recurred and are not likely to do so." S. Rep. No. 109, 100th Cong., 1st Sess. 2 (1987), reprinted in 1987 U.S. Code Cong. & Admin. News 682, 686. Thus, it is clear that the legislative purpose for the enactment of the mandatory minimum five year exclusion is to prevent violations of fraud by untrustworthy individuals from recurring. In achieving this goal to prevent the recurrence of fraud, the exclusion imposed by the I.G. against Petitioner satisfies the requirement to "prevent or stop a violation of fraud." The exclusion therefore is the type of governmental action which falls within the exception to the automatic stay under section 362(b)(4) of the Bankruptcy Code.

To support his position that the exclusion imposed by the I.G. must be stayed, Petitioner relies on several cases where courts determined that actions taken by a governmental unit against a debtor were not exempt from the automatic stay. Petitioner's reliance on these cases is misplaced.

In University Medical Center, 93 B.R. 412 (Bankr. E.D. Pa. 1988) the bankruptcy court applied the automatic stay to the United States Department of Health and Human Services so that it could not recover Medicare overpayments it had made to the debtor hospital. The facts in University Medical Center are distinguishable from the facts in this case because in University Medical Center the Department of Health and Human Services was not pursuing its police or regulatory powers. Instead, it was attempting to obtain unwarranted preferential treatment in its capacity as a creditor. This is contrary to the Bankruptcy Code's intent that governmental and private creditors be treated alike for most purposes. In the instant case, the I.G. is not seeking to obtain preferential treatment as a creditor of Petitioner's estate, but instead is taking an action against Petitioner for the purpose of protecting the public welfare. It is actions of this kind that are exempt from the automatic stay under the Bankruptcy Code.

Petitioner also relies on the case Corporacion De Servicios Medicos Hospitalarios de Fajardo, 60 B.R.920 (D. Puerto Rico 1986). In Corporacion, the Department of Health of the Commonwealth of Puerto Rico negotiated a contract whereby Corporacion, a private entity, agreed to operate a government owned hospital in exchange for an annual fee. During the contract period, the Department of Health conducted an audit which revealed financial

irregularities in the operation of the hospital. As a result of these financial irregularities, the Department of Health initiated court proceedings to terminate its contract with Corporacion for non-compliance of the terms of the contract. Corporacion subsequently filed a petition for reorganization under Chapter 11 of the Bankruptcy Code. The Department of Health, fully aware of the bankruptcy proceedings, notified Corporacion that its license to operate the hospital would be revoked on the grounds that Corporacion's continued operation of the hospital was creating a public health risk. The United States District Court in Corporacion determined that the automatic stay applied to the Department of Health's threatened actions to terminate its contract with Corporacion and to revoke the hospital's operating license.

The facts in Corporacion are more similar to the facts in the case before me than the facts presented in University Medical Center for the reason that the Department of Health in Corporacion, like the I.G. in this case, was not acting in the capacity as a creditor in its attempt to terminate its contract with the debtor. In spite of this similarity, Corporacion is distinguishable from the facts of this case and it is not controlling. In Corporacion the court carefully scrutinized the reason for the Department of Health's actions, and concluded that even though the Department of Health was not a creditor of the estate, its actions against the debtor were nevertheless undertaken for the primary purpose of protecting the government's pecuniary interest in the debtor's property rather than to protect the public welfare. The court was not persuaded by the Department of Health's stated claim that its actions were taken to protect public health, but instead determined that this claim was merely an excuse to justify an attempt to protect its pecuniary interests under the contract rather than to protect the public welfare.

Similarly, in the case King Memorial Hospital, 4 B.R. 704 (Bankr. S.D. Fla. 1980), also cited by Petitioner, the bankruptcy court applied the automatic stay to an attempt made by the Florida Department of Health and Rehabilitative Services to prevent the construction of a hospital. The bankruptcy court's reasoning in King was similar to that in Corporacion in that it found that the administrative agency had not made the requisite showing that public health or welfare was at stake to qualify for an exception from the automatic stay.

In the instant case, the five year exclusion sanction was imposed by the I.G. because Petitioner was convicted of a

program-related criminal offense. The purpose of the exclusion sanction is to effectuate the public policy of protecting the integrity of the Medicare and Medicaid programs. It is not imposed by the I.G. for the primary purpose of protecting the government's claim of entitlement to a pecuniary interest in Petitioner's bankruptcy estate.

In view of the foregoing, I conclude that Congressional intent on the availability of a stay in this case is clear under both the Social Security Act and the United States Bankruptcy Code. The Social Security Act requires an exclusion in cases such as this where the Petitioner was convicted of a program-related criminal offense. There is no exception for cases where the excluded individual or entity is engaged in bankruptcy proceedings. In addition, the United States Bankruptcy Code specifically creates an exception to the automatic stay for government actions, such as the exclusion action taken by the I.G. in this case, which was taken for the purpose of preventing fraud in the federal health care programs. Congress did not intend that stays be available as interim administrative relief for excluded parties engaged in bankruptcy proceedings. Given this intent, the relief requested by Petitioner in this case has no legal basis and is not appropriate.

III. Summary Disposition Is Appropriate In This Case.

The issue of whether the I.G. had the authority to exclude Petitioner under section 1128(a)(1) is a legal issue. I have concluded as a matter of law that Petitioner was properly excluded and that the length of his exclusion is mandated by law. There are no genuine issues of material fact which would require the submission of additional evidence, and there is no need for an evidentiary hearing in this case. Accordingly, the I.G. is entitled to summary disposition as a matter of law. See, Charles W. Wheeler and Joan K. Todd, DAB App. 1123 (1990), and Rule 56 F.R.C.P.

CONCLUSION

Based on the law and undisputed material facts in the record of this case, I conclude the I.G. properly excluded Petitioner from the Medicare and Medicaid programs pursuant to section 1128(a)(1) of the Social Security Act, and that the minimum period of exclusion for five years is mandated by federal law. In addition, I conclude that there is no legal basis to stay the

exclusion imposed on Petitioner pending the outcome of his bankruptcy proceedings.

/s/

Charles E. Stratton