UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

NICK GERHART, *et al.*,	)	
	)	**No. 16-cv-00151**
Plaintiffs,	)	
v.	)	
	)	**Plaintiffs' Reply in Support of**
U.S. DEPARTMENT OF HEALTH	)	**Motion for Preliminary**
AND HUMAN SERVICES, et al.,	)	**Injunction and Brief in Support**
	)	
Defendants.	)	

HHS[1] does not contest that Congress *intended* for Iowa law to apply to the insolvency of CoOportunity and for creditor claims to be disposed by the Iowa state court.[2] Rather, HHS claims it can disregard Iowa law by unilaterally reducing or indefinitely withholding millions of dollars. Plaintiffs seek declaratory and injunctive relief that would require HHS to engage in the liquidation process like all other creditors and that would require court permission before HHS engages in self-help. Thus, HHS's claim that Plaintiffs seek "to *receive money*…while *disregarding* amounts [owed]" while "bar[ring] HHS from exercising…setoff"[3] is not accurate.

I. THIS COURT AND THE IOWA COURT HAVE JURISDICTION

HHS makes two jurisdictional arguments: (1) Plaintiffs' federal APA claims are disguised claims for "money damages" that must be heard in the Court of Claims, and (2) sovereign immunity bars the Iowa state court from taking jurisdiction over HHS.

This Court has jurisdiction to enter the preliminary injunction, irrespective of whether it has jurisdiction over the merits. *Laclede Gas Co. v. St. Charles Cty., Mo.*, 713 F.3d 413, 416-17 (8th Cir. 2013) (there is no rule requiring a district court to resolve disputes over subject matter

[1] "HHS" refers to all Defendants.
[2] There do not appear to be material disputes as to the underlying facts giving rise to this suit.
[3] Doc. 40, p. 1.

jurisdiction before entering temporary injunctive relief).[4] Additionally, this Court has jurisdiction over the merits of Plaintiffs' claims. Indeed, Plaintiffs seek the Court's assistance in regulating the ongoing relationship of the parties vis-à-vis the liquidation and what HHS admits is an ongoing payment scheme under the 3Rs of the ACA. This is directly analogous to the situation in *Bowen* where the Supreme Court found a similar claim seeking to regulate the government's payment of Medicaid funds on a prospective basis was squarely within the APA and beyond the scope of any relief the Court of Claims could provide by way of "money damages." *See* 487 U.S. 879, 906 (1988); *see also Zellous v. Broadhead Assocs.*, 906 F.2d 94, 100 (3d Cir. 1990) (same). Further, *Bowen* specifically explains that injunctive claims that might result in the payment of money are not claims for "money damages" that must be brought in the Court of Claims:

> The State's suit to enforce § 1396b(a) of the Medicaid Act, which provides that the Secretary "shall pay" certain amounts for appropriate Medicaid services, is not a suit seeking money in *compensation* for the damage sustained by the failure of the Federal Government to pay as mandated; rather, it is a suit seeking to enforce the statutory mandate itself, which happens to be one for the payment of money.

Bowen, 487 U.S. at 900. Jurisdiction in this Court is therefore proper.[5]

In addition, sovereign immunity does not bar the Iowa state court from asserting jurisdiction over HHS in the liquidation because Congress consented to Iowa liquidation procedures (and, thus, Iowa state courts) governing disposition of HHS's own claims. *See* Doc. 17-1 at 6-7; 42 U.S.C. § 10841(d). Indeed, HHS admitted as much, stating its claims were "otherwise subject to *disposition* under the relevant provisions of Iowa law concerning liquidation proceedings." *See* Ex. 5, to Brief in Support (emphasis added).

[4] Even if HHS moves to transfer to the Court of Claims, under 28 U.S.C. 28 U.S.C. § 1292(d)(4)(B), the Court *retains authority* to enter preliminary injunctive relief while the jurisdictional issues are pending.

[5] HHS invokes the Anti-Injunction Act ("AIA"), but that relates only to a small subset of debits (tax debts). HHS has provided no authority for its arbitrary decision to place an "administrative hold" of funds due and owing to CoOportunity while it purportedly "calculates" and "evaluates" some unspecified tax liability.

In any event, it is black letter law that sovereign immunity bars suit *against* the Government without its consent. *See* 14 Wright and Miller, Fed. Practice and Procedure § 3654 (4th ed. 2015); *see also United States v. Brosnan*, 363 U.S. 237, 250 (1960). The Iowa Liquidation Case is not a *suit* against the United States, nor does that suit seek to cause any *affirmative* action on the part of the United States. Instead, it is a proceeding to adjudicate and resolve claims *against* CoOportunity. The fact that this proceeding may *affect* HHS's claimed interest in debts owed to HHS does *not* transform the suit into one *against* HHS. *See Brosnan*, at 251; *United States v. Rural Elec. Convenience Co-op Co.*, 922 F.3d 429, 436 (7th Cir. 1991).

II. THE GOVERNMENT MUST ACCOUNT FOR THE FULL $130 MILLION IN RISK CORRIDOR PAYMENTS OWED IN ANY SET-OFF OR NETTING

HHS argues Plaintiffs cannot prevail on the merits because it need only account for that fraction of the $130 million debt to CoOportunity that is "presently due" when it conducts set-off or netting. But this argument is contrary to Iowa law and the ACA regulation.

The risk corridors statute states the Secretary of HHS "shall pay to the plan" those amounts determined under the risk corridors formula. 42 U.S.C. § 18062. HHS does not dispute that the total amount it "shall pay" for 2014 is $130 million. Iowa's set-off statute states: "debts or mutual credits between the insurer and another person…shall be set off and the balance only shall be allowed or paid." Iowa Code 507C.30. While the term "debt" is not defined, the term must be given its plain and ordinary meaning, such as by a dictionary definition. *See Incorporated City of Denison v. Clabaugh*, 306 N.W.2d 748, 752 (Iowa 1981). The dictionary defines a "debt" as "something owed." *See* Merriam-Webster Dictionary (Online), *www.merriam-webster.com*. Here, HHS admits it owes $130 million, irrespective of when specific payments are due.[6] Therefore, any Iowa set-off must account for the full $130 million.[7]

[6] A simple mortgage analogy proves the point. If Jane takes out a $200,000 mortgage, she owes a "debt" of

The result is the same under the ACA's netting regulation, which states that HHS may "net *payments owed* to [CoOportunity] against *amounts due* to the Federal government from [CoOportunity]." 45 C.F.R. § 156.1215(b) (emphasis added). In other words, HHS must determine the payments it "owe[s]" to CoOportunity and then reduce that amount by "amounts due" to the Government from CoOportunity. The dictionary defines the term "owe" as "to be under obligation to pay." *See* Merriam-Webster. Whereas, the term "due" refers to "having reached the date at which payment is required." *Id.*[8] Thus, while HHS must consider whether *CoOportunity's* payments are actually due in order to include them in netting, the Government must consider the broader category of payments it "owes" for *its* side of the netting equation. Thus, the full $130 million must be included under an ACA netting analysis.

III. THERE IS A REAL AND SUBSTANTIAL THREAT OF IRREPARABLE HARM.

HHS incorrectly asserts that "this case is *solely* about the balance of debits and credits due between CoOportunity and the United States."[9] To the contrary, this case primarily concerns HHS's frustration of the orderly liquidation process through its disregard of court orders and unauthorized and improper acts of self-help. Although HHS has filed a Proof of Claim in the Liquidation Case, HHS dismisses the importance of an "orderly liquidation process."[10] That process *matters*, and is the reason Iowa has developed a liquidation code that seeks to resolve all creditors' claims in an efficient, single process rather than a multitude of individual lawsuits, which may result in inconsistent judgments, and that would serve only to delay wind down of the estate and dissipate the estate's assets. *See* Iowa Code § 507C.1 (articulating "[e]nhanced efficiency and economy of liquidation," "[l]essening the problems of interstate rehabilitation and

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$200,000, even though the *payments* on that debt are spread over a 30 year period.

[7] Plaintiffs do not concede that all the amounts HHS set off are mutual. In any event, the $130 million dwarfs any amounts HHS claims it may set off. (HHS does not assert a right to set-off for the solvency loan.)

[8] *In re Miller*, 778 F.3d 711, 714-15 (8th Cir. 2015) (different terms are presumed to have different meanings).

[9] Doc. 40, p. 14 (emphasis added).

[10] Doc. 40, p. 17.

liquidation" and "[p]roviding for a comprehensive scheme for the rehabilitation and liquidation of insurance" as purposes of the Iowa liquidation laws and stating that "insurer insolvency . . . [is] of vital public interest and concern"); *Hager v. Doubletree*, 440 N.W.2d 603, 608 (Iowa 1989) (a purpose of the Act is to minimize "legal uncertainty and litigation").

Rather than resolving *all* creditors' claims in a predictable manner in *one proceeding*, HHS claims that Plaintiffs' *exclusive* remedy is to allow HHS to flout the Iowa state court indefinitely, and then dissipate estate assets by pursuing a *separate* lawsuit in the Court of Federal Claims. In the meantime, questions regarding which law controls priority and set-off rights would remain unanswered, leaving Plaintiffs subject to potential personal liability for wrongful payment and other creditors and taxpayers with no relief. 31 U.S.C. § 3713. These are the same concerns that led the court in *In re CD Liquidators Co.*, 462 B.R. 124 (Bankr. D. Del. 2011), to enjoin a creditor's similar attempt to shun the bankruptcy process in lieu of self-help.

It is no consolation that Plaintiffs could attempt to seek recompense through a lawsuit for money damages in the Court of Claims. As discussed above, this case primarily seeks the Court's declaratory and equitable assistance in forcing HHS to submit to the orderly liquidation process so Plaintiffs can complete their work, priority can be determined, and the estate can be wound down. The Court of Claims lacks the power to award prospective equitable relief. *Bowen*, 487 U.S. at 905. Thus, a claim for money damages is wholly inadequate to address the concerns that motivate the Complaint and Plaintiffs' request for a preliminary injunction.[11]

[11] HHS claims that there is no irreparable injury because CoOportunity failed to seek "injunctive relief for more than one year," but Plaintiffs have been negotiating with HHS for months in an attempt to resolve these disputes. (Doc. 38-3, p. 5, Doc. 38-4, p. 5.) A party cannot be faulted for delay in seeking injunctive relief when the delay is the result of settlement negotiations. *See, e.g., Wetzel's Pretzels, LLC v. Johnson*, 797 F. Supp. 2d 1020, 1029 n. 4 (C.D. Cal. 2011); *Dunkin' Donuts Franchised Restaurants LLC v. ABM Donuts, Inc.*, 2011 WL 6026129, at *9 (D.R.I. 2011); *Sanofi-Synthelabo, Inc. v. Apotex, Inc.*, 488 F. Supp. 2d 317, 347-48 (S.D.N.Y. 2006).

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on June 24, 2016, I electronically filed the foregoing with the Clerk of Court using the ECF system, causing electronic service on all counsel that have entered an appearance, including the following counsel for Defendants:

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