

NOT RECOMMENDED FOR FULL TEXT PUBLICATION

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE**

IN RE:

**PRIORITY HEALTH CARE SERVICES,
L.L.P.,
Debtor.**

**Case No. 99-31559whb
Chapter 7**

**ORDER DENYING JOINT MOTION OF TRUSTEE AND RICKY A. SMITH TO
REQUIRE UNIVERSITY OF TENNESSEE–BOWLD HOSPITAL TO APPEAR
FOR RULE 2004 EXAMINATION AND FOR PRODUCTION OF DOCUMENTS**

In this chapter 7 case, Ricky A. Smith, a creditor of the debtor, and George W. Stevenson, the chapter 7 trustee, jointly moved for an order requiring the University of Tennessee’s Bowld Hospital (“University”) to appear for a Bankruptcy Rule 2004 examination and to produce multiple documents listed in Exhibit A to the motion. The University appeared specially through its Office of General Counsel to object to the jurisdiction of this Court over the University under the theory that the relief sought in the motion would violate the Eleventh Amendment to the United States Constitution. More specifically, the University asserts that, as a part of the State of Tennessee, the University is entitled to all of the protections of sovereign immunity provided for in the Eleventh Amendment.

That Amendment provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST., amend. XI.

Put simply, the University argues that any order from this Court compelling it to involuntarily produce documents and send a representative to testify at a Rule 2004 examination would amount to a suit against it. The moving parties, on the other hand, argue that they have not initiated suit against the University and that the present motion does not rise to the level of a suit; as a result, they

argue that the Eleventh Amendment is not violated nor threatened at this time. The issue is not simply whether the present motion technically constitutes a suit against the University, since an order compelling action by the University may in itself look and feel like a suit. Some courts have struggled with whether a particular proceeding amounted to a suit. *See, e.g., NVR Homes, Inc. v. Clerks of the Circuit Courts (In re NVR, LP)*, 189 F.3d 442 (4th Cir. 1999) (court stressed need to look at substance of proceeding as well as form). Although the bankruptcy court is not presently presiding over a suit, when no process has been issued against the University, the resolution of a dispute between the moving parties and the University would require this Court to exercise jurisdiction over the University, and that jurisdiction would escalate should, for example, there arise a dispute as to the compliance by the University with this Court's order compelling the examination.

Without the necessity of reaching the complex issues raised by the Eleventh Amendment argument, this Court finds cause to **DENY** the motion, as it has not been demonstrated that the authority of the bankruptcy court is necessary at this time to obtain the requested information.

First, the Court notes that the chapter 7 trustee's attorney, who appeared at the hearing, admitted that it was unknown whether this would ever be an asset case, but that it was at present a no asset case, meaning that until assets are found the trustee is not the primary party in interest. That party is Mr. Smith, who, according to his pleadings, became a major secured creditor of the debtor when Mr. Smith was required to honor his guarantee of the debtor's obligation to the Nashoba Bank. Although the trustee joined in the motion, at this point it is clearly Mr. Smith who is anxious to receive information from the University. Mr. Smith has remedies outside of the bankruptcy court that he has not yet exhausted.

Second, although the argument was made that the moving parties wanted only to discover what happened to the debtor's assets, in particular accounts, it is obvious that Mr. Smith desires ultimate recovery from someone. The University certainly looks like a target, although Mr. Smith's attorney conceded that remedies against the University under applicable state law would be limited to a Board of Claims action. *See* TENN. CODE ANN. § 9-8-101 et seq.

Third, as the University's attorney argued and as conceded in the joint motion, the documents sought are public records pursuant to TENN. CODE ANN. § 10-7-503, which provides a method for inspection of such records. The University says that no request under the applicable state statute has

been made for inspection of its records. There is no present need for this Court to exercise jurisdiction over public records when an adequate remedy, as to the documents, is available to both Mr. Smith and the trustee in the appropriate state court. See TENN. CODE ANN. § 10-7-505.

Although Mr. Smith's attorney asserted that having the documents was not as good as requiring a representative of the University to testify about them, this Courts finds it appropriate for Mr. Smith to start with the documents before asking this Court to exercise jurisdiction over the University.

Finally, although the movants argue that they are merely trying to find all property of the bankruptcy estate, the reality is that what is property of the estate under Bankruptcy Code § 541 is often determined by applicable state law, and there is no compelling need in this case for the bankruptcy court to decide controlling state law issues, especially when it has not been demonstrated that inadequate remedies are available in state courts. The assertion of sovereign immunity in this case makes it even more important for this Court to be cautious before exercising jurisdiction unnecessarily.

THE COURT THEREFORE CONCLUDES that it is unnecessary for it to exercise jurisdiction at this time over the University of Tennessee Bowld Hospital in a discovery dispute. The motion to compel the University's attendance at a Rule 2004 examination and its production of documents will be **DENIED**; however, this order is without prejudice to a future motion, should cause exist for such a motion. The Clerk will notice this order to the attorneys listed below.

SO ORDERED this 28th day of September, 2000.

UNITED STATES BANKRUPTCY JUDGE

W. Rowlett Scott, attorney for Ricky A. Smith
Steven N. Douglass, attorney for Chapter 7 Trustee
George W. Stevenson, Chapter 7 Trustee
Lisa Karen Atkins, Assistant General Counsel, University of Tennessee Bowld Hospital