

**UNPUBLISHED**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ABINGDON DIVISION**

**HIGHLANDS AMBULANCE SERVICE,** )  
 )  
Plaintiff, ) Case No. 1:03CV00052(Lead)  
 )  
v. ) **OPINION AND ORDER**  
 )  
**UNITED STATES OF AMERICA, ET** ) By: James P. Jones  
**AL.,** ) United States District Judge  
 )  
Defendants. )

*James R. Creekmore, Woods, Rogers & Hazlegrove, P.L.C., Roanoke, Virginia, for Plaintiffs; Julie C. Dudley, Assistant United States Attorney, Roanoke, Virginia, and Susan Maxson Lyons, Attorney, U.S. Department of Health & Human Services, for Defendants.*

The issue before me is the motion of the defendants, the United States and certain government officials and agencies, to stay this case pending the resolution of other litigation pending in the Eleventh Circuit. For the reasons stated in this opinion, at this time I will grant only a limited stay.

The Balanced Budget Act of 1997 (“BBA”)<sup>1</sup> required the Secretary of Health and Human Services (“Secretary”) to develop a national fee schedule to govern payment for ambulance services under Medicare. It was provided in the BBA that the

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<sup>1</sup> Pub. L. No. 105-33, 1997 U.S.C.C.A.N. (111 Stat.) 251.

fee schedule “shall apply to services furnished on or after January 1, 2000.”<sup>2</sup> In 2000, the Secretary issued a proposed ambulance fee schedule rule to be phased in over a four-year transition period beginning in 2001.<sup>3</sup> A few months later, in the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 (“BIPA”),<sup>4</sup> Congress further required full payment to certain ambulance suppliers for miles traveled within the patients’ home counties, as well as increased compensation for transitional assistance for certain rural suppliers, all applying “to services furnished on or after July 1, 2001.”<sup>5</sup>

In 2002, in response to the BBA and the BIPA, the Secretary issued a final rule containing a fee schedule with a five-year phase-in period and an effective date of April 1, 2002.<sup>6</sup>

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<sup>2</sup> *Id.* § 4531(b)(3), 1997 U.S.C.C.A.N. (111 Stat.) at 452.

<sup>3</sup> *See* Fee Schedule for Payment of Ambulance Services, 65 Fed. Reg. 55,078, 55,090 (proposed Sept. 12, 2000).

<sup>4</sup> Pub. L. No. 106-554, 2000 U.S.C.C.A.N. (114 Stat.) 2763, 2763A-463.

<sup>5</sup> *Id.* § 423(b)(2), 2000 U.S.C.C.A.N. (114 Stat.) at 2763A-518.

<sup>6</sup> *See* Fee Schedule for Payment of Ambulance Services, 67 Fed. Reg. 9100, 9104 (Feb. 27, 2002).

On January 16, 2003, in an action styled *United States v. Lifestar Ambulance Service, Inc.*,<sup>7</sup> the United States District Court for the Middle District of Georgia certified under Rule 23(b)(2)<sup>8</sup> a nationwide class of “[a]ll ambulance suppliers in the United States covered by the provision of the BBA that provided ambulance services to Medicare eligible recipients during the period January 1, 2000 through March 31, 2002.”<sup>9</sup> The *Lifestar* court also certified a subclass for claims under BIPA consisting of all ambulance service suppliers that provided ambulance services to Medicare recipients between July 1, 2001 and March 31, 2002.<sup>10</sup> That court also granted the plaintiffs’ summary judgment motion and ordered the Secretary to promulgate a fee schedule covering the relevant time period within ninety days. The Secretary issued a schedule on April 16, 2003.<sup>11</sup> In the meantime, the *Lifestar* defendants appealed the district court’s order to the United States Court of Appeals for the Eleventh

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<sup>7</sup> 211 F.R.D. 688 (M.D. Ga. 2003), *appeal docketed*, No. 03-11392 (11th Cir. Mar. 14, 2003).

<sup>8</sup> Fed. R. Civ. P. 23(b)(2).

<sup>9</sup> 211 F.R.D. at 702.

<sup>10</sup> *See id.*

<sup>11</sup> *See* Notice of Ambulance Fee Schedule in Accordance With Federal District Court Order, 68 Fed. Reg. 18,654 (Apr. 16, 2003).

Circuit. That appeal has been briefed and is now scheduled for oral argument on December 12, 2003.

On April 17, 2003, the plaintiffs here<sup>12</sup> filed complaints in this court alleging that the Secretary failed to meet a statutory duty to implement the ambulance fee schedule effective January 1, 2000, and pay full mileage pursuant to the BIPA mileage provisions for services provided on or after July 1, 2001. The plaintiffs seek damages as well as injunctive relief.

The defendants have moved to stay these proceedings pending final resolution of the *Lifestar* case. The defendants rely on the presumption in favor of the first-filed case, considerations of judicial economy, and principles of res judicata and collateral estoppel. The defendants argue that the resolution of *Lifestar* will likely determine its obligations to the plaintiffs in this case.

The plaintiffs oppose the defendant's motion to stay on the basis that they are not members of the *Lifestar* class for the purposes of damages because that action only requested declaratory and mandamus relief, and not damages. They claim that if the *Lifestar* court does not award damages, they should be able to pursue the action

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<sup>12</sup> There are two plaintiffs, Highlands Ambulance Service and Mercy Ambulance Service. By order entered July 21, 2003, their separate actions were consolidated pursuant to Federal Rule of Civil Procedure 42(a). The case filed by Highlands Ambulance Service was designated as the lead action.

here, and if, in the alternative, the *Lifestar* court does determine damages for the class, they will be able to opt out of that class. Additionally, the defendants point out that a final resolution of the *Lifestar* case may take years and request that should the court determine that a stay is necessary, that only a partial stay be imposed.

Since the submission of the *Lifestar* appeal is not far off, and since the Eleventh Circuit may clarify some of the issues in this case, I will enter a stay, but only until the issuance of the court of appeals' decision. Thereafter, if the defendants desire a further stay, they must reapply. The further course of the *Lifestar* litigation may then be clearer and I may be better able to consider whether any further stay of this case is proper.

For the foregoing reasons, it is **ORDERED** as follows:

1. The Motion to Stay Proceedings [Doc. No. 6] is granted in part and denied in part;
2. This consolidated case is stayed pending the issuance of a decision by the United States Court of Appeals for the Eleventh Circuit in the appeal styled *United States v. Lifestar Ambulance Service, Inc.*, No. 03-11392; and
3. The parties must promptly advise the court of the issuance of such decision.

ENTER: November 14, 2003

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United States District Judge