

**LOUISIANA STATE BAR ASSOCIATION**

**NAVIGATING THE SWAMP: A REVIEW  
OF ISSUES ENCOUNTERED IN *CLIENT NETWORK  
SERVICES, INC. v. STATE*, A CIVIL CONTRACT  
TERMINATION CASE DUE TO A CONCURRENT  
CRIMINAL PROSECUTION AND INDICTMENT**

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## **I. INTRODUCTION**

*Client Network Services, Inc. v. State of Louisiana, et al*, arose from the State's termination "for cause" of a \$2+ million Medicaid Management Information System ("MMIS") contract with Client Network Services, Inc. ("CNSI") on March 21, 2013. In many ways, this was a trial lawyer's dream case. It involved factual intrigue, politics, press coverage, "bet the business" consequences, related and concurrent criminal proceedings and a "bar exam's worth" of legal issues. Prior papers and presentations have covered the jurisdiction issues, the evolution of the negotiation strategy and the particular issues involved in discovery in cases against the State. This particular presentation deals with the issues that arose due to the related and concurrent criminal prosecution.

## **II. FACTUAL BACKGROUND**

The CNSI case began with a state procurement process for a company to build and operate a new MMIS for Louisiana. The MMIS is the computer system each U.S. state or territory uses to process and pay Medicaid claims. In Louisiana, the Department of Health ("LDH")<sup>1</sup> is the agency that owns the MMIS.

Around 2008, Louisiana began the procurement process that would result in the award of a contract to build and operate a new MMIS. The state's existing MMIS had been operated for nearly thirty years by various iterations of the same contractor (which had most recently been acquired by Molina Medicaid Management ("Molina")). By the time Louisiana initiated the procurement process, the system was badly outdated and in need of upgrades.

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<sup>1</sup> Until June 2016, LDH was known as the Louisiana Department of Health and Hospitals, or DHH.

In Louisiana, MMIS contracts are to be awarded based on a competitive selection process using criteria outlined in a "solicitation for proposal."<sup>2</sup> On November 1, 2010, the state's central purchasing agency, the Division of Administration's Office of State Purchasing ("OSP"),<sup>3</sup> issued a "Solicitation for Proposal for Medicaid Management Information System Replacement and Fiscal Intermediary Services" (the "SFP").

Meanwhile, just before the SFP was released, Bruce Greenstein was appointed by Governor Bobby Jindal to serve as Secretary of LDH. Greenstein was a well-respected healthcare expert with experience in state and federal government programs, as well as private industry – most recently as Managing Director of Worldwide Health for Microsoft. He had also worked prior to that at CNSI for less than one year in 2006. Although Greenstein had extensive background in healthcare-related information technology, his appointment came after the SFP's drafting was nearly complete and he had little input in the SFP's contents.

Four bidders ultimately submitted proposals in response to the SFP: Molina, CNSI, ACS State Health Care ("ACS"), and HP Enterprise Services. The proposals then were evaluated through a detailed procedure involving eleven teams comprised of over sixty individuals. Greenstein had no involvement in the evaluation process.

In summer 2011, the State announced that CNSI was the winning proposer. The award generated controversy even before it was announced. Greenstein was peppered with questions about the MMIS procurement during his confirmation hearing before the Senate

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<sup>2</sup> See La. R.S. 39:198(I). The statute uses the term "fiscal intermediary services" because Louisiana uses a "fiscal intermediary" arrangement, where the MMIS contractor processes claims and issues payments to providers on behalf of the state Medicaid office. Thus, the contractor is a fiscal intermediary between the state and healthcare providers.

<sup>3</sup> The name of the state central purchasing agency changed to "Office of State Procurement" effective January 1, 2015. See La. R.S. 39:1556(4); Acts 2014, No. 864, § 2.

Governmental Affairs Committee. It seemed clear from the questioning that the Senators knew "something." In fact, competing lobbyists at the hearing were congratulating CNSI's lobbyist before CNSI knew about the award. The pressure on Greenstein became so intense that he was forced to announce that CNSI had won the award, even though the statutory prerequisites for a public announcement arguably had not been completed.<sup>4</sup>

Greenstein's announcement, and the subsequent official notification by OSP of the award to CNSI, attracted more controversy and significant press coverage. Two of the disappointed proposers — ACS and the incumbent, Molina — protested the award to the Director of State Purchasing. The protests were denied and CNSI and DHH entered into the "Agreement for the Operation and Enhancement of the Louisiana Medicaid Management Information System (LMMIS) through a Fiscal Intermediary Type Arrangement" (the "LMMIS Agreement") effective February 15, 2012. The initial total price for the work under the LMMIS Agreement was \$197.4 million.

CNSI performed under the LMMIS Agreement for over a year. On the morning of March 21, 2013, the Baton Rouge Advocate reported that the Division of Administration ("DOA") had received a federal grand jury subpoena seeking documents related to the MMIS procurement. That afternoon, CNSI employees began seeing media reports to the effect that the State was terminating the LMMIS Agreement for cause. After calling an attorney within DOA to verify reports, CNSI's General Counsel received a letter signed by the Director of State Purchasing that announced the termination for cause but did not provide the alleged reasons.

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<sup>4</sup> Discovery in the CNSI case revealed that lawyers within LDH and the DOA had advised Greenstein and others that La. R.S. 39:198(I)(6) required that the House and Senate Committees on Health and Welfare conduct a hearing concerning an award of an MMIS contract before there could be any public announcement of the award.

Commissioner of Administration Kristy Nichols issued a statement in connection with the termination in which she took responsibility for the decision after consultation with the Attorney General's Office (the "AG").<sup>5</sup> She also publicly accused CNSI of "wrongdoing," stating that: "We have zero tolerance for wrongdoing, and we will continue to cooperate fully with any investigation."<sup>6</sup> Within days after the termination, LDH's General Counsel wrote a letter asserting a claim against the \$6 million bond that CNSI had obtained to secure the LMMIS Agreement.

Greenstein resigned as Secretary under pressure several days later due to the controversy generated by the contract termination. Months later, he was indicted by a grand jury in East Baton Rouge Parish under the control of the AG. In fact, the AG's office was the real driver behind the criminal and the civil case. Interestingly, the indictment was not for any of the alleged grounds used by the State to terminate the contract; but rather, for alleged perjury before the Louisiana State Senate Committee in his confirmation hearing and before the AG's East Baton Rouge Parish grand jury in his voluntary testimony.

The backstory here is intriguing. The AG's office became interested in the CNSI MMIS contract in June, 2011, as a result of the Greenstein confirmation hearings, during which it was disclosed that CNSI had won the bid for the contract, as mentioned above. It was later determined by LDH that a leak had occurred, although the leaker was never found. Rumors alleging CNSI's unsuitability had been floated by competitors and allegations of collusion between Greenstein and CNSI due a prior relationship were also floating around at the time of the award. These allegations were addressed during the bid protest process and were dismissed by the State.

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<sup>5</sup> See Ex. 2, Marsha Shuler, The Advocate, "Jindal Cancels Contract: Action Follows Grand Jury Probe of CNSI Medicaid Award," Mar. 21, 2013 ("Based on consultation with the Attorney General's Office, today I am terminating the state's contract with CNSI, effective immediately.").

<sup>6</sup> See *id.*

Then, in December of 2011, one of the losing competitors (the prior contract holder) met with CNSI's project head in Louisiana and scared him in conversations, threatening to sue CNSI and the individual alleging misconduct. The employee then sent an anonymous email to The Center for Medicare and Medicaid Services ("CMS"), the federal government agency in charge of the MMIS process, alleging various misdeeds by CNSI. He said he did this to "cover my ass" in case suits were filed. Discovery later revealed that the employee in question did not have personal knowledge to support his allegations. Ultimately, CNSI sued him and obtained a judgment in federal district court in Maryland for breach of his fiduciary obligation.

CMS forwarded the email to the AG's office in Louisiana for investigation. At some point, the AG involved the federal prosecutors in the Middle District of Louisiana to jointly investigate the allegations. These allegations were apparently taken to a federal grand jury in the Middle District of Louisiana, but nothing was done except it is known that subpoenas were issued in January, 2013, seeking the complete records of all bidders that responded to the MMIS procurement. It wasn't until May of 2013, after CNSI's suit for breach of contract was filed, that the AG empaneled a state grand jury in East Baton Rouge Parish to investigate the allegations and ultimately indict Greenstein for perjury. CNSI was never made a target or was it or any of its people ever indicted.

Earlier, in the spring of 2013, LDH and Secretary Greenstein sought to amend the MMIS agreement to add some fraud prevention features which would save the State significant sums of money on Medicaid payments in the long term. Short term, the cost of amending the contract to do additional work was in the tens of millions of dollars. Upon hearing of the proposed amendment, the AG's office took it upon itself to contact the DOA and scheduled a series of meetings between March 15, 2013 and March 21, 2013. During those meetings, the AG's office

told the DOA and the Governor's office that CNSI was being investigated for wrongdoing and basically recommended termination of the MMIS contract. Without any investigation or the involvement of LDH – the actual State party to the contract – the DOA terminated the contract for cause on March 21, 2013. CNSI, after unsuccessful attempts to negotiate, filed suit on May 6, 2013, alleging a bad faith breach of contract by the State.

### **III. ISSUES**

During the next three years of litigation, a myriad of issues arose from the proceedings. Some of these specifically related to problems which occur because of the concurrent and related criminal prosecution and civil case. In the *CNSI v. State* context, these were:

- A. Stay of civil proceedings;
- B. Prosecutor's privilege versus civil discovery; and
- C. Debris.

These issues are addressed herein below.

#### A. Stay of Civil Proceedings.

Shortly after suit was filed, the AG's office filed on May 14, 2013 a motion to stay the civil proceedings. The motion was based on the AG's assertion that it was conducting a criminal investigation into the "facts and circumstances of the awarding of the State Medicaid billing contract to...CNSI", which soon empanel a special grand jury to "investigate, among other issues, the relationship between CNSI and former DHH Secretary Bruce Greenstein."<sup>7</sup> The motion further alleged that CNSI was seeking to circumvent criminal discovery rules and that the stay was

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<sup>7</sup> Motion to Stay Civil Proceedings, 5/14/13, *Client Network Services, Inc. v. State, Department of Health and Hospitals, et al*, No. 621,271, 19th Judicial District Court, Parish of East Baton Rouge, State of Louisiana.



necessary to maintain "the integrity of the grand jury proceedings." *Id.* The AG cited no authority for the motion.

There is no statutory authority in Louisiana for the stay of the proceedings. However, in *Brown v. Daigle*, 609 So.2d 243 (La. 1992), the Louisiana Supreme Court seemingly recognized a court's right to grant such a motion in a three-sentence writ grant citing no further authority. Apparently, it was deemed to be in the inherent authority of the court in such situations.

Louisiana CCP art. 1426.1 authorizes a court "to stay all or a portion of discovery sought in a civil action or proceeding." This can be done on motion of the district attorney, after a contradictory hearing, if the motion is found to be "in the interest of justice and for good cause shown." *Id.* Good cause includes "a finding that such discovery will adversely affect the ability of the district attorney to conduct a related criminal investigation." *Id.* No cases have been cited under the statute. Even so, the AG was seeking a stay of the proceedings, not just all or a portion of discovery.

Other jurisdictions have addressed the issue mostly from the court's inherent authority. *Landis v. North American Co.*, 299 U.S. 248, 57 S.Ct. 163, 81 L.Ed. 153; *Warren v. Geller*, No. 11-2282 (E.D. La. 4/9/2013), 2013 W.L. 1455688; and *Alcala v. Webb County*, 625 F.Supp. 391 (S.D. Tx. 5/1/09). Due to the major role that discretion plays in exercising the court's inherent authority, courts have applied different tests to the evaluation of whether or not to stay a civil proceeding. See e.g. *Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, Inc.*, 87 F.R.D. 53 (E.D. Pa. 1980) – 5-Factor Test; and *Malone v. Gordon*, 328 F.2d 508 (D. Del. 204) – 6-Factor Test. Recurring factors in these tests include: extent of issue overlap; status of criminal proceedings; civil plaintiff's interests; criminal defendants' interests; the burden on the court; and, the public interest.

CNSI opposed the AG's motion to stay, arguing primarily that its suit had nothing to do with compromising the integrity of the potential grand jury; but rather, was seeking significant money damages (over \$200 million) due to the State's bad faith breach of contract. CNSI was not here by choice. CNSI had no idea that the AG would "soon empanel a grand jury" when it filed its civil suit, so how could it have been done with intent to subvert the grand jury process which didn't exist yet? All the AG's "factual" bases for the motion were supposition and guesses regarding possible outcomes. So, lack of issue overlap, the preliminary status of the criminal proceeding and the significant interests of the plaintiff were evident here. The trial court agreed with CNSI and denied the AG's motion to stay the proceedings. His comments from the bench seemed to indicate that he believed the motion was premature and simply did not provide sufficient basis for granting of the stay.

Then, on July 30, 2013, at a hearing on other motions in the suit, the trial court, *sua sponte*, ordered a six-month stay of all proceedings, to the surprise of all parties. The court specifically stated that this decision was not based upon the evidence properly filed into the record, but rather upon sealed documents presented by the State for *in camera* review. The court reiterated that the showing made at the initial hearing on the motion to stay was insufficient.

After some investigation, it was determined that the court mistakenly believed that CNSI had no objection to the AG's presenting confidential, sealed evidence to the court for *in camera* review. CNSI did not know of the *ex parte* communication, nor of the contents of the sealed evidence. CNSI quickly filed a motion to lift the stay and sought the information given to the court by the AG for the court's review. After a contradictory hearing on September 10, 2013, the court lifted the stay and CNSI was allowed to view the documents presented under seal.

Two days later, on September 12, 2013, the AG filed a second motion to stay. This motion was based upon the entire record, including the sealed evidence. The motion cited the court's inherent authority to grant the stay. CNSI opposed the motion, which was not set for hearing until December 20, 2013.

Essentially, CNSI pointed out to the court that the AG already had a "*de facto*" stay through use of motion practice. Any further delay would be violative of Article 1, Section 22, of the Louisiana Constitution, which prohibits "undue delay" in a party's right to trial. Any such delay is a denial of due process. See, for example, *Green v. Champion Insurance Co.*, 577 So.2d 249 (La. App. 1 Cir. 1991). This was particularly true given the AG's prior representations to the court that it only needed six months to complete what it needed to do with the criminal investigation.

The court ruled in CNSI's favor, again denying the motion for stay for a second time. CNSI's belief was that the judge had seen enough of the delay factors, as well as misrepresentations without any concrete evidence of impairment of the grand jury process. The impact of the motions, however, was significant in delaying the discovery process and the eventual resolution of the case.

B. Prosecutor's Privilege Versus Civil Discovery

1. Public Records Suit

At the very beginning of the case, CNSI had been terminated "for cause" by DOA, but no real reasons were given between the March 21, 2013 termination and the April 26, 2013 letter from DOA prior to a scheduled conference on April 29, 2013. In the interim, CNSI, through its counsel, filed a written request for public records on April 5, 2013 to both DOA and LDH. After initial attempts to negotiate the process for production, DOA and LDH sent letters to CNSI on May 10, 2013 stating that they could not reply, because the agency was asserting a "law

enforcement privilege" over the records. A Petition for Mandamus was then filed on May 14, 2013, and the AG intervened in the public records case on May 20, 2013.

At the hearing on the matter on May 23, 2013, the trial judge granted the mandamus in part. He denied the writ as to documents that reflected communications between the AG and the departments, as well as those that revealed the AG's thoughts or investigative processes. The court also denied the writ as to those records which supported the termination of the contract, because determining which documents to produce in response would require discretion and more than just a ministerial task. The AG appealed.

The appeal was based on LSA-R.S. 44:3A(1) which exempts production of records "held by the Offices of the Attorney General" which pertain "to pending criminal litigation or any criminal litigation which can reasonably be anticipated." The Court of Appeal affirmed the trial court, pointing out that the case "involves public records not exempt from disclosure in the hands of the original and present custodians, which the Attorney General seeks to shield from disclosure as privileged." *McKay v. State*, 143 So.3d 510, 516 (La. App. 1 Cir. 2014). The court further recognized that the disclosure here "does not reveal the Attorney General's investigative process because hundreds of thousands of documents are responsive to McKay's request such that those of particular interest to the Attorney General are just part of a massive group of records." *Id.* At 517. So, the mere possibility that the documents requested in the public records suit might be interest to the AG's investigation, it was not enough to shield disclosure under the public records request.

## 2. Breach of Contract Suit

The role of the AG's office in the suit was an incredibly complicating factor. The AG initially received the anonymous email and began a criminal investigation, which led to an indictment of former Secretary Greenstein. The AG intervened to stay the breach of contract suit and the public records suit to avoid disclosure of documents and evidence that were potentially

useful in the criminal investigation. The AG, on its own volition, went to DOA and advised them to terminate the CNSI contract. The AG essentially wanted the evidentiary field to itself, regardless of consequences to the civil suit arising from its advice.

Due to these factors and the assertion of privilege throughout the case, CNSI filed on April 4, 2016, a Motion to Pierce Investigatory Privilege. The Motion sought to pierce the prosecutor's privilege asserted by the AG covering its documents and communications with Molina, the prior contract holder; with the DOA, which had put the AG's advice at issue and waived any attorney-client privilege in its dealings with the AG on the MMIS contract termination; and, to allow the complete deposition of the Assistant AG in charge of the investigation and prosecution, as well as his investigator. The Memorandum in Support of that Motion is attached hereto as Attachment "A" and is made a part of this presentation.<sup>8</sup> It sets forth in detail the various complications and reasons why CNSI believed that these privileges had been waived under the peculiarly complex facts of this case. Unfortunately, or fortunately as the case may be, the matter was never heard by the court, as the parties had entered into settlement discussions which were ultimately fruitful prior to the hearing. Even so, the Memorandum thoroughly details many of privilege issues which arose because of the complicating positions that the AG had in this matter.

C. Debris

Anyone who has eaten at Mother's Restaurant in New Orleans knows what "debris" is – the leftover meat after carving that is floating around in the "áú jus." The most interesting debris here involves the circumstances which led to CNSI's taking the deposition of the AG's criminal investigator in the civil suit.

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<sup>8</sup> This Memorandum was almost wholly prepared by Justin P. Lemaire, Stone Pigman Walther Wittmann L.L.C.

The deposition of the former CNSI employee who started the dispute with his email to CMS was scheduled in Orlando, Florida, on May 1, 2014. The deposition lasted all day, but wasn't completed by the end of the day. So, it was suspended to be reconvened and completed on July 8, 2014. The AG's office was represented at the deposition by the Assistant AG in charge of the prosecution. When the deposition was reconvened, the witness changed his testimony on some critical pieces of evidence. When questioned about the change, the witness stated that the AG's investigator had met with him in the interim between the deposition dates, showed him documents and convinced him to change his testimony. Basically, the AG did not like what he heard under oath on the first day of the deposition; so, they wanted the witness to change his story.

CNSI moved for permission to take the deposition of the investigator regarding his contacts with the witness about the deposition and to review the documents shown and discussed. CNSI asserted that much like a deposition of a lawyer who leads a witness to change his testimony during the deposition; the investigator should not be allowed to do so either. See e.g. *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1993).

The AG's office opposed the motion on the basis of grand jury secrecy, CCRP art. 434 and on the basis of LSA-R.S. 44:3A(1). The court didn't buy it. The court granted CNSI's motion on November 14, 2014, ordered the production of the documents shown to the witness between depositions and allowed the deposition of the investigator for the limited purpose of inquiring into his discussions with the witness between the two deposition dates. This deposition basically ended up with a situation where the investigator said the witness was lying and the witness said the investigator was lying. One just can't make this stuff up.

#### **IV. CONCLUSION**

While it would have been very interesting to have the results of a court hearing and judgment on the Motion to Pierce Privilege, the issues set forth above do give some guidance as to some problems which may result when there is a concurrent, related criminal procedure involved with an ongoing civil lawsuit. There are others. For example, CNSI fortunately did not have to deal directly with the grand jury secrecy provisions for itself and its witnesses and the impact that would have had on civil discovery in this case. As mentioned above, the AG's presence was a complicating factor due to its multiple roles. Overall, this was just another interesting area adding complication to this complex, fascinating case.