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Medicare's Jurisdictional Bar and the Bankruptcy Code

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One of the many issues that hospitals and other health care providers face when they become insolvent is addressing their Medicare provider agreements and the prohibitions contained within the Medicare Act. There is currently a split among the circuits regarding whether or not § 405(h) of the Medicare Act bars a bankruptcy court from adjudicating Medicare-related issues. This topic is critically important given the ongoing distressed state of the health care industry and continuous bankruptcy filings by health care providers. The circuit courts have developed three different approaches to these issues: Several circuit courts have aligned themselves with one form of interpretation, one circuit has held to the contrary, and a recent decision from the First Circuit has taken a much different approach. Further, the recent filing of a petition for *writ of certiorari* to the U.S. Supreme Court might finally lead to a resolution of these various circuit approaches.

To be eligible for payments from Medicare and/or Medicaid, health care providers must enter into "provider agreements" with federal and state governments. These provider agreements provide for reimbursement to health care providers who provide medical services to Medicare and Medicaid patients.[1] However, in order to qualify, health care providers must satisfy certain regulatory requirements.[2] If a health care provider fails to comply and there is a finding of immediate jeopardy to patient safety, the Department of Health and Human Services (HHS) may terminate the provider agreement without a pre-termination hearing.[3] Terminating the provider agreement immediately ceases the flow of income to the provider, which often creates a cash crisis. Medicare is a large — if not the largest — source of income for many providers. For this reason, providers (like many other cash-strapped entities) may turn to bankruptcy to reorganize and hopefully stave off this loss of income.

However, the power of bankruptcy courts to adjudicate issues involving the Medicare Act is unclear. In 2016, the Eleventh Circuit joined the Third,[4] Seventh[5] and Eighth[6] Circuits in holding that bankruptcy (and district) courts lack jurisdiction over Medicare claims. The Eleventh Circuit expressed concerns that a bankruptcy court lacks "institutional competence or technical expertise of [the HHS] to oversee the health and welfare of nursing home patients or to interpret and administer a 'massive, complex health and safety' program such as Medicare."[7] It appears that only the Ninth Circuit holds that § 405(h) permits bankruptcy court jurisdiction over Medicare claims under 28 U.S.C. § 1334.[8] The First Circuit chose not to "add its voice to the circuit split on this particular issue" and instead chose to decide the matter "on narrower grounds," finding that the termination of the provider agreement was not a violation of the automatic stay based on the police and regulatory power exception under § 362(b)(4) of the Bankruptcy Code.

This legal conflict stems from an amendment to § 405(h) of the Medicare Act.[9] In the aforementioned Third, Seventh, Eighth and Eleventh Circuit cases, the health care providers argued that a plain reading of § 405(h) of the Medicare Act did not preclude district or bankruptcy courts from having jurisdiction over Medicare-related claims. In fact, the Ninth Circuit adopted this very position.[10] However, the Third, Seventh, Eighth and Eleventh Circuit Courts found that although the plain reading of § 405(h) did not preclude bankruptcy court jurisdiction under 28 U.S.C. §§ 1332 and 1334, it was a merely a result of a codification error. Currently, 42 U.S.C. § 405(h) provides for the following:

> (h) Finality of Commissioner's decision. The findings and decision of the Commissioner of Social Security after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought under section 1331

1 *Parkview Adventist Med. Ctr. v. United States*, 842 F.3d 757, 761 (1st Cir. 2016).
2 *Id.*
3 *See* 42 U.S.C. § 1395(i)-3(h)(2)(A).
4 *Nichole Med. Equip. & Supply Inc. v. TriCenturion Inc.*, 694 F.3d 340 (3d Cir. 2012).
5 *Bodimetric Health Servs. Inc. v. Aetna Life & Casualty*, 903 F.2d 480 (7th Cir. 1990).
6 *Midland Psychiatric Assocs. Inc. v. United States*, 145 F.3d 1000 (8th Cir. 1998).
7 *Fla. Agency for Health Care Admin. v. Bayou Shores SNF LLC (In re Bayou Shores SNF LLC)*, 828 F.3d 1297, 1330 (11th Cir. 2016).
8 *See In re Town & Country Home Nursing Servs.*, 963 F.2d 1146, 1155 (9th Cir. 1991) (holding that "Section 405(h) only bars actions under 28 U.S.C. §§ 1331 and 1346; it in no way prohibits an assertion of jurisdiction under section 1334").
9 Section 405(h) applies to the Medicare Act through 42 U.S.C. § 1395ii.
10 *See In re Town & Country Home Nursing Servs. Inc.*, 963 F.2d 1146, 1155 (9th Cir. 1991).

or 1346 of title 28 to recover on any claim arising under this subchapter.

Although this section on its face does not seem to bar bankruptcy jurisdiction under § 1334 of title 28,[11] as it specifically references only §§ 1331[12] and 1346 of title 28,[13] the pre-amendment language of § 405(h) of the Medicare Act specifically barred bankruptcy court jurisdiction. Originally, § 405(h) of the Medicare Act provided for the following:

> (h) The findings and decisions of the Board after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Board shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Board, or any officer or employee thereof shall be brought under section 24 of the Judicial Code of the United States to recover on any claim arising under this title.

As the Eleventh Circuit stated in *Fla. Agency for Health Care Admin v. Bayou Shores SNF LLC (In re Bayou Shores SNF LLC)*, it is "undisputed that under the original text of § 405(h), bankruptcy court jurisdiction over Medicare claims was barred."[14] The issue arose in 1948 when § 24 of the Judicial Code was recodified under title 28 of the U.S. Code and split the different types of jurisdiction into multiple sections, including §§ 1331, 1332, 1334 and 1346.

For years, § 405(h) of the Medicare Act still referred to § 24 of the Judicial Code, and thus § 405(h) of the Medicare Act was amended in 1984 to reflect the new jurisdiction section under title 28.[15] When Congress eventually amended § 405(h) to address this issue, it failed to include §§ 1332 and 1334 and instead only referenced §§ 1331 and 1346. Despite this omission, the legislative history indicates that the amendment to § 405(h) was not intended to give bankruptcy courts jurisdiction over issues involving Medicare.[16] Thus, Congress's failure to include 28 U.S.C §§ 1332 and 1334 in § 405(h) of the Medicare Act has been viewed by many courts as inadvertent.[17]

Courts have supported this conclusion by noting that Medicare claims are highly regulated and recognizing that the underlying issues frequently involve the health and safety of patients; as such, courts have found that administrative agencies are best equipped to make these decisions, rather than bankruptcy courts. In *Parkview*,[18] the First Circuit agreed that because these kinds of claims are highly regulated, they are best left to administrative agencies and there was no violation of the automatic stay. The First Circuit affirmed the bankruptcy and district courts' decisions based on this narrow focus and chose not to address the implications of § 405(h) of the Medicare Act. The court held that the government's termination of the provider agreement was not a violation of the automatic stay based solely on the police and regulatory exception, and thus did not decide whether the bankruptcy court had jurisdiction to compel the assumption of the provider agreement.[19]

[I]f the Supreme Court sides with the Ninth Circuit ... CMS might still be able to terminate provider agreements without bankruptcy court approval as a result of the police and regulatory powers exception to the automatic stay.

Parkview Adventist Medical Center was a hospital in Brunswick, Maine, that provided emergency services, inpatient services and outpatient services.[20] Parkview maintained the Medicare provider agreement with the Centers for Medicare and Medicaid Services (CMS) (a part of HHS), which contained certain conditions with which Parkview had to adhere to receive reimbursements from Medicare for both inpatient and outpatient services.[21]

On June 15, 2015, Parkview sent CMS a letter stating that it would be filing for chapter 11, would be closing the hospital, and would no longer participate in the Medicare program, effectively ending its participation in Medicare.[22] On June 16, 2015, Parkview filed its chapter 11 petition.[23] Three days later, CMS responded to Parkview's letter, stating that it would terminate the provider agreement as of June 18, 2015, because Parkview "no longer meets the definition of [a] 'hospital,' as outlined in Section 1861(e) of the Social Security Act."[24] On June 19, 2015, Parkview informed CMS that "it was not terminating the Provider Agreement and that CMS'[s] decision to terminate the agreement would adversely affect Parkview's bankruptcy transition plan."[25] CMS indicated that it would rescind the termination of the provider agreement only if Parkview began admitting patients again for inpatient services.[26]

On July 9, 2015, Parkview filed a motion to compel post-petition performance of executory contracts,[27] including the provider agreement. Parkview argued that the provider agreement was an executory contract under § 365 of the Bankruptcy Code and CMS's termination was a post-petition termination in violation of §§ 362, 365 and 525 of the Bankruptcy Code. Both the bankruptcy and district courts agreed that § 405(h) of the Medicare Act barred the court from exercising jurisdiction over the motion to compel because Parkview did not exhaust its administrative remedies and CMS did not violate the automatic stay or nondiscrimination provision of the Bankruptcy Code by terminating the provider agreement.[28]

11 *See, e.g.*, 28 U.S.C. § 1334 (conferring upon district courts original and exclusive jurisdiction over bankruptcy cases).
12 *See, e.g.*, 28 U.S.C. § 1331 (conferring upon district courts original jurisdiction over federal questions).
13 *See, e.g.*, 28 U.S.C. § 1346 (conferring upon district courts concurrent jurisdiction regarding civil claims against the U.S.).
14 *Fla. Agency for Health Care Admin v. Bayou Shores SNF LLC (In re Bayou Shores SNF LLC)*, 828 F.3d 1297, 1305 (11th Cir. 2016).
15 *See* 42 U.S.C. § 405.
16 *See* Pub. L. 98-369, § 2664(b), 98 Stat. 1171-72 (1984).
17 *See Bayou Shores*, 828 F.3d 1297; *Nichole Med. Equip. & Supply*, 694 F.3d 340; *Midland Psychiatric Assocs. Inc.*, 145 F.3d 1000; *Bodimetric Health Servs.*, 903 F.2d 480 (7th Cir. 1990).
18 842 F.3d at 757.
19 *See Bayou Shores* at 760.
20 *Parkview Adventist Med. Ctr.*, 842 F.3d at 761.
21 *Id.* at 761.
22 *Id.*
23 *Id.*
24 *Id.* at 762.
25 *Id.*
26 *Id.*
27 *Id.*
28 *Id.* at 757.

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On appeal, the First Circuit chose not rule on whether the bankruptcy court had jurisdiction to determine whether Parkview could assume or reject the provider agreement under § 365 of the Bankruptcy Code. For purposes of deciding the appeal, the court assumed that it had "hypothetical jurisdiction" and denied Parkview relief based on a finding that CMS had not violated the automatic stay by terminating the agreement.[29] The First Circuit found that in this scenario, the "police and regulatory power" exception to the automatic stay applies; CMS did not violate the non-discrimination provisions of the Bankruptcy Code.

CMS had argued that (1) the provider agreement was not "property of the estate" in that Parkview did not have a "cognizable property or contractual interest in participating in Medicare without meeting Medicare's conditions of participation"; (2) the automatic stay did not apply because the termination was "non-final"; and (3) even if the automatic stay applied, the "police and regulatory power" exception to the automatic stay would apply.[30]

To determine whether the exception applied, the First Circuit made two inquires: (1) whether the government action was "designed to protect the public safety and welfare"; or (2) "if the action [was an] attempt to recover property from the estate."[31] If the action had a "pecuniary purpose," the court found that it would be subject to the automatic stay.[32]

Unlike in *Bayou* where the government found repeated violations of the conditions of the provider agreement that threatened the health and safety of patients, Parkview argued that the government's "termination was not based on a finding of a threat to the health or safety of patients." Therefore, the policy and regulatory exception should not apply.[33]

The First Circuit found this argument irrelevant because the question was "whether CMS's termination enforces a generally applicable regulatory law or furthers a public policy interest beyond the contractual rights in the Provider Agreement."[34] Therefore, the application of the police and regulatory exception to the automatic stay did not depend on whether Parkview's actions threatened the health or safety of the patients. The court noted that Parkview had actively taken steps to disqualify itself as a hospital, rendering it unable to provide necessary services, a required condition under the provider agreement. As such, it would have been a waste of public resources to not terminate the agreement.[35]

Based on these cases, it is clear that even if the bankruptcy court does have jurisdiction under the statute to bar the termination of the provider agreement, courts are mindful of the precarious issues that are raised in health care and hospital cases. Despite the arguments by both Bayou and Parkview that if bankruptcy courts lack jurisdiction to adjudicate Medicare-related issues, a provider's potential reorganization will be jeopardized, the courts seemed sensitive to substituting the judgment of the bankruptcy courts for that of the administrative agency.

This jurisdictional issue is ripe for resolution by the Supreme Court. Indeed, on Feb. 2, 2017, Bayou filed a petition for *writ of certiorari* asking the Court to determine whether § 405(h) of the Medicare Act bars bankruptcy and district court jurisdiction over Medicare claims.[36] The time to file a response to the petition has been extended to May 5, 2017. Even so, the Supreme Court's ruling may not be dispositive. Based on the First Circuit's decision in *Parkview*, if the Supreme Court sides with the Ninth Circuit and decides that § 405(h) of the Medicare Act does not bar bankruptcy jurisdiction, CMS might still be able to terminate provider agreements without bankruptcy court approval as a result of the police and regulatory powers exception to the automatic stay. abi

29 *Id.* at 760.
30 *Parkview Adventist Med. Ctr.*, 842 F.3d at 763. The policy and regulatory power exception to the automatic stay is embodied in § 362(b)(4), which provides that the automatic stay does not apply to "an action or proceeding by a governmental unit ... to enforce such governmental unit's ... police and regulatory power." 11 U.S.C. 362(b)(4).
31 *Parkview Adventist Med. Ctr.*, 842 F.3d at 763.
32 *Id.*
33 *Id.*
34 *Id.* at 764.
35 *Id.*
36 Petition for *Writ of Certiorari*, *Bayou Shores SNF LLC v. Fla. Agency for Health Care Admin.*, No. 16-697 (2016).