New York Law Journal

NEW YORK LAW JOURNAL SPECIAL REPORT

Corporate Restructuring And Bankruptcy

An ALM Publication

WWW.NYLJ.COM

VOLUME 257—NO. 111

MONDAY, JUNE 12, 2017

Limitations on Adjudicating Disputes Involving **Medicare Provider Agreements**

BY LESLIE A. BERKOFF AND KRISTA L. KULP

SHUTTERSTOCK

The power of bankruptcy courts to adjudicate Medicare provider agreements has been addressed by several circuit courts in recent years. Given the distressed nature of the health care industry and the continued bankruptcy filings by health care providers, this issue has become more prominent. Insolvent health care providers often have issues with Medicare involving their provider agreements. However, several circuit courts determined that bankruptcy courts lack jurisdiction to adjudicate these issues; and, recently, the First Circuit took an unusual approach.

In order to receive payments from Medicare and/or Medicaid, providers must enter into provider agreements with the federal and state governments. The provider agreements provide reimbursements to providers who provide medical services to Medicare and Medicaid patients. *Parkview Adventist Med. Ctr. v. United States*, 842 F.3d 757, 761 (1st Cir. 2016). However, in order to qualify, providers must satisfy certain regulatory requirements and, if they do not comply, then the Department of Health and Human Services (DHS) may terminate the provider agreement without a hearing if there is an immediate threat to the health and safety of patients. See 42 U.S.C. §1395(i)-3(h)(2)(A). As Medicare reimbursement is a large or largest source of income, providers may turn to bankruptcy in order to hopefully stave off this loss of income.

However, the power of bankruptcy courts to adjudicate issues involving the Medicare Act is currently unclear. In *Fla. Agency for Health Care Admin v.*

LESLIE A. BERKOFF *is a partner and* KRISTA L. KULP *is an associate at Moritt Hock & Hamroff.*

Bayou Shores SNF (In re Bayou Shores SNF), the Eleventh Circuit determined the bankruptcy court lacked jurisdiction pursuant to 42 U.S.C. §405(h) and 28 U.S.C. §1334 to resolve claims under the Medicare Act. 828 F.3d at 1304. Bayou Shores SNF was a nursing facility whose income was generated from Medicare or Medicaid. Id. at 1300-01. DHS sent a letter to Bayou stating that it was "not in substantial compliance with the Medicare program requirements, and that the conditions in its facility constituted an immediate jeopardy to residents' health and safety" and that the provider agreements would terminate approximately two weeks later. Id. at 1300. Thereafter, Bayou filed for bankruptcy protection. Id. After the bankruptcy court entered an order assuming the provider agreements, the district court reversed and upheld DHS's jurisdictional challenge; Bayou then appealed. Id. at 1303-04.

The Eleventh Circuit determined that 42 U.S.C. §405(h), which applies to the Medicare Act through 42 U.S.C. §1395ii, barred the bankruptcy court from exercising jurisdiction over Medicare claims. 42 U.S.C. §405(h) provides:

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

Because §405(h) specifically references only §§1331 and 1346 of title 28, it seemingly does not bar bankruptcy jurisdiction, which falls under Section 1334 of Title 28. Despite a plain reading of the statute, the Eleventh Circuit found that, after reviewing the history of 42 U.S.C. §405(h), the failure to include §§1332 and 1334 was inadvertent and Congress did not intend to vest the bankruptcy courts with jurisdiction over Medicare claims. The Eleventh Circuit joined the Third, Seventh, and Eighth Circuits in so holding. *Nichole Medical Equipment & Supply v. TriCenturion*, 694 F.3d 340 (3d Cir. 2012); *Bodimetric Health Services v. Aetna Life & Casualty*, 903 F.2d 480 (7th Cir. 1990); *Midland Psychiatric Associates, Inc. v. United States*, 145 F.3d 1000 (8th Cir. 1998). Only the Ninth Circuit permits bankruptcy jurisdiction over Medicare claims. See *In re Town & Country Home Nursing Servs.*, 963 F.2d 1146, 1155 (9th Cir. 1991) (holding that "[§]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").

Courts have recognized that administrative agencies are best equipped to make these decisions, rather than bankruptcy courts, because Medicare is highly regulated and the issues frequently involve the health and safety of patients.

In a case involving similar issues, the First Circuit chose instead to decide the matter "on narrower grounds" rather than address the jurisdiction issue. In *Parkview Adventist Med. Ctr. v. United States*, 842 F.3d 757 (1st Cir. 2016), the First Circuit held that the government's termination of the provider agreement was not a violation of the automatic stay based solely upon the police and regulatory exception, and thus there was no need for it to decide whether the bankruptcy court had jurisdiction to compel the assumption of the provider agreement. Id. at 760.

Parkview Adventist Medical Center was a hospital that provided emergency, inpatient, and outpatient services. *Parkview Adventist Med. Ctr.*, 842 F.3d at 761. After advising a division of DHS (CMS) on June 15, 2015 that it would be filing for Chapter 11 the following day, it would be closing the hospital, it would no longer participate in the Medicare program and it was ending its participation in Medicare, Parkview filed for bankruptcy. Id. CMS

responded that it would terminate the provider agreement as of June 18, 2015 because Parkview failed to satisfy the conditions of the provider agreement. Id. at 762. However, on June 19, 2015, Parkview advised CMS that if CMS terminated the provider agreement, it would hinder Parkview's bankruptcy. Id. CMS stated that it would only rescind the termination if Parkview began providing inpatient services again. Id.

Parkview filed a "Motion to Compel Post Petition Performance of Executory Contracts" on the grounds that the post-petition termination of the provider agreement was a violation of §§362, 365 and 525 of the Bankruptcy Code. Id. The bankruptcy and district courts found that 42 U.S.C. §405(h) barred the court from exercising jurisdiction over the motion to compel and CMS did not violate the automatic stay or non-discrimination provisions of the Bankruptcy Code by terminating the provider agreement. Id. at 757.

On appeal, the First Circuit chose not address the bankruptcy jurisdiction issue; rather, it assumed that it had "hypothetical jurisdiction" and based its decision solely upon finding no violation of the automatic stay existed. Id. at 760. The First Circuit found that the "police and regulatory power" exception to the automatic stay applied and, therefore, CMS did not violate the non-discrimination provisions of the Bankruptcy Code.

CMS had argued, among other things, that even if the automatic stay applied, the "police and regulatory power" exception to the automatic stay would apply (Id. at 763), 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). To determine whether it applied, the First Circuit made two inquiries: whether the action was "designed to protect the public safety and welfare" or "if the action [was an] attempt to recover property from the estate." *Parkview Adventist Med. Ctr.*, 842 F.3d at 763. If the action had a "pecuniary purpose", then it would still be subject to the automatic stay. Id.

The First Circuit stated that 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 and found it was irrelevant whether the termination was based on "a finding of a threat to the health or safety of patients in order to justify the application of the police and regulatory power exception. Id. at 764. The court noted that Parkview actively disqualified itself as a hospital and failed to meet the required conditions under the provider agreement, thus, it would have been a waste of public resources to not terminate the provider agreement. Id.

It appears that even if they have jurisdiction over Medicare issues, bankruptcy courts are mindful of the precarious issues that are raised in health care and hospital cases. Courts seem to be more sensitive to balancing the needs of the patients than the need for providers to reorganize under the Bankruptcy Code.

Bayou filed a petition for writ of certiorari to the Supreme Court on the question of whether §405(h) of the Medicare Act bars bankruptcy and district court jurisdiction over Medicare claims. Petition for Writ of Certiorari, *Bayou Shores SNF v. Fla. Agency for Health Care Admin*, No. 16-697 (2016). Thus, it seems that there may ultimately be a resolution to this issue if the Supreme Court grants certiorari.