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## Intensive Care

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### Eleventh Circuit: Bankruptcy Courts Lack Jurisdiction over Medicare Provider Agreements



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The U.S. Court of Appeals for the Eleventh Circuit recently held that § 205 of the Social Security Act, codified as 42 U.S.C. § 405(h), bars a bankruptcy court from exercising jurisdiction over Medicare provider agreements under 28 U.S.C. § 1334.<sup>1</sup> Section 405 addresses the evidence, procedure and certification required for payments under the Social Security Act, including under Medicare provider agreements.

Specifically, § 405(h) limits the jurisdiction of courts to address certain issues concerning Medicare provider agreements, stating that “[n]o 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.”<sup>2</sup> Section 1331 governs federal question jurisdiction, and § 1346 addresses the jurisdiction of district courts over proceedings where the U.S. is a defendant.<sup>3</sup> Absent from the text of § 405(h) is any reference to § 1334, which addresses bankruptcy jurisdiction.

In *Bayou Shores*, the court’s analysis focused on the significance — or lack thereof — of the omission of § 1334 from the third sentence of § 405(h). Concluding that there was no evidence that Congress intended to omit § 1334 jurisdiction from § 405(h), the Eleventh Circuit created a circuit split with the U.S. Court of Appeals for the Ninth Circuit, which previously held that § 405(h) does not limit bankruptcy jurisdiction under § 1334.<sup>4</sup> Lower courts have also reached conflicting results

when addressing whether § 405 bars courts from exercising bankruptcy jurisdiction over Medicare provider agreements.<sup>5</sup>

#### Background

Bayou Shores SNF LLC operated a “skilled nursing facility”<sup>6</sup> in St. Petersburg, Fla., and derived the majority of its revenue from compensation received for Medicare and Medicaid patients through provider agreements with the federal and Florida state governments.<sup>7</sup> On Feb. 10, 2014, the Florida Agency for Health Care Administration (AHCA) surveyed the Bayou Shores facility and subsequently reported to the U.S. Department of Health and Human Services (HHS) that Bayou Shores failed to comply with certain regulatory requirements and this noncompliance posed a threat of immediate jeopardy to Bayou Shores’s patients.<sup>8</sup>

After two additional findings of noncompliance, HHS notified Bayou Shores of its intention to terminate the Medicare provider agreement on Aug. 3, 2014.<sup>9</sup> On Aug. 1, Bayou Shores sought a temporary restraining order from the U.S. District Court for the Middle District of Florida prohibiting HHS from terminating the provider agreements. The district court initially granted the temporary restraining order but later dismissed Bayou Shores’s complaint for lack of subject-matter jurisdiction.<sup>10</sup> On Aug. 15, 2014, approximately one hour after the district court issued the dismissal order, Bayou Shores filed

1 Fla. Agency for Health Care Admin v. Bayou Shores SNF LLC (In re Bayou Shores LLC), No. 15-13731, --F.3d ----, 2016 WL 3675462 (11th Cir. July 11, 2016).

2 See 42 U.S.C. § 402(h).

3 See 28 U.S.C. §§ 1331 and 1346.

4 In re Town & Country Home Nursing Servs., 963 F.2d 1146, 1155 (9th Cir. 1991).

5 See Bayou Shores, 2016 WL 3675462, at \*12, n.22, 23.

6 See 42 U.S.C. § 1395i-3(a).

7 Bayou Shores, 2016 WL 3675462, at \*2.

8 Id.

9 Id. at \*3. A termination of the Medicare provider agreement would automatically terminate the Medicaid provider agreement.

10 See Bayou Shores SNF LLC v. Burwell, No. 8:14-CV-1849-T-33MAP, 2014 WL 405990, \*6-8 (M.D. Fla. Aug. 15, 2014).

a voluntary petition under chapter 11 in the U.S. Bankruptcy Court for the Middle District of Florida.

## The Lower Court Decisions

Bayou Shores filed an emergency motion to enforce the automatic stay and/or for a preliminary injunction to prevent the termination of the Medicare and Medicaid provider agreements.<sup>11</sup> Over objections by HHS and AHCA, the bankruptcy court held that it had jurisdiction under § 1334 and that Bayou Shores had made a *prima facie* showing that the provider agreements are property of the estate sufficient to warrant the entry of an order providing that the automatic stay prohibits HHS and AHCA from taking any action to terminate them.<sup>12</sup> Subsequently, after a final evidentiary hearing, the bankruptcy court entered an order prohibiting HHS and AHCA from terminating the provider agreements.<sup>13</sup> The bankruptcy court later confirmed Bayou Shores's chapter 11 plan and again held that jurisdiction was proper.<sup>14</sup> HHS and AHCA appealed to the district court the order prohibiting termination of the provider agreements and the confirmation order.

The district court reversed the bankruptcy court's orders and concluded that the omission of § 1334 from § 405(h) is inconsistent with Congress's intent when it enacted the jurisdictional bar.<sup>15</sup> The district court determined that no other independent basis for jurisdiction existed to enjoin and order the assumption of the provider agreements.<sup>16</sup> Bayou Shores appealed the district court's decision to the Eleventh Circuit.

## The Eleventh Circuit's Decision

On appeal, the Eleventh Circuit considered whether § 405(h) bars a bankruptcy court from exercising § 1334 jurisdiction over claims arising under the Medicare Act. Bayou Shores asserted a "plain-meaning" argument, stressing that the third sentence of § 405(h) forbids only actions brought under §§ 1331 or 1346 of title 28; thus, actions brought under § 1334 are not prohibited by § 405(h).<sup>17</sup> Bayou Shores also argued that the appeal was constitutionally and equitably moot. The Eleventh Circuit rejected these arguments.<sup>18</sup>

## Codification of Law

The Eleventh Circuit analyzed the history of § 405(h), noting that the third sentence of § 405(h) originally referred to actions under § 24 of the Judicial Code.<sup>19</sup> Prior to 1948, § 24 of the Judicial Code applied to most grants of jurisdiction to the district courts, including bankruptcy jurisdiction.<sup>20</sup> Congress recodified § 24 under title 28 of the U.S. Code in 1948 and divided the jurisdictional grants into multiple sections under title 28, including bankruptcy jurisdiction

under § 1334.<sup>21</sup> However, the original text of § 405(h) did not change until 1976, when the Office of the Law Revision Counsel, having apparently noted the error, replaced "section 24 of the Judicial Code of the United States" with "sections 1331 or 1346 of title 28."<sup>22</sup> In 1984, Congress passed the Deficit Reduction Act (DRA), which amended § 405(h) to change the reference to "section 24 of the Judicial Code of the United States" to "section 1331 or 1346 of title 28, United States Code."<sup>23</sup>

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The Eleventh Circuit concluded that, with respect to the codification of law, "when legislatures codify the law, courts should presume that no substantive change was intended absent a clear indication otherwise."<sup>24</sup> Based on this conclusion, the Eleventh Circuit found no indication that the Law Revision Counsel's codification in 1976 intended to expand district court jurisdiction.<sup>25</sup>

The Eleventh Circuit also concluded that it was not significant that Congress enacted the omission of § 1334 into positive law when it passed the DRA more than 30 years ago.<sup>26</sup> Although the court noted that when code is enacted into positive law "the text of the code becomes evidence of the law," it did not apply this concept to the text of amended § 405(h).<sup>27</sup> Instead, the Eleventh Circuit applied the codification-of-law analysis and reasoned that the text of DRA § 2664(b) "tells us that the amendment in question is not to be interpreted as making any substantive change to the law."<sup>28</sup>

The Eleventh Circuit also rejected Bayou Shores's argument that because Congress enacted § 1334(b) expanding bankruptcy jurisdiction, prior to the DRA, Congress's omission of § 1334 in the amendment to § 405(h) indicated Congress's intention to exclude § 1334 from the scope of § 405(h).<sup>29</sup> Further, because § 1334 was enacted only eight days prior to the DRA, "reading too much into the significance of the timing of the passage of these acts is at best speculative."<sup>30</sup>

The Eleventh Circuit further rejected Bayou Shores's argument that the DRA effectuated two substantive amendments

11 See Order Granting Emergency Motion to Enforce the Automatic Stay and/or for an Order, Pursuant to 11 U.S.C. § 105, Prohibiting Any Action to Terminate Debtor's Medicaid and Medicare Provider Agreements, to Deny Payment of Claims, and/or to Relocate Residents on a Temporary Basis [Doc. No. 25], *In re Bayou Shores SNF LLC*, No. 8:14-bk-09521-MGW (Bankr. M.D. Fla. Aug. 25, 2014).

12 *Id.* at ¶¶ 3-5.

13 See Order Granting Motion to Enforce the Automatic Stay and/or for an Order, Pursuant to 11 U.S.C. § 105, Prohibiting Any Action to Terminate Debtor's Medicaid and Medicare Provider Agreements, to Deny Payment of Claims, and/or to Relocate Residents [Doc. No. 78], *In re Bayou Shores SNF LLC*, No. 8:14-bk-09521-MGW (Bankr. M.D. Fla. Sept. 5, 2014).

14 See *In re Bayou Shores SNF LLC*, 525 B.R. 160 (Bankr. M.D. Fla. Dec. 31, 2014).

15 See *Fla. Agency for Health Care Admin v. Bayou Shores SNF LLC (In re Bayou Shores LLC)*, 533 B.R. 337, 342 (M.D. Fla. June 26, 2015).

16 *Id.* at 343.

17 *Bayou Shores*, 2016 WL 3675462, at \*5.

18 *Id.* at \*14-21.

19 *Id.* at \*5-6.

20 *Id.* at \*6.

21 *Id.*

22 *Id.*

23 *Id.* at \*7-8.

24 *Id.* at \*14.

25 *Id.* at \*17.

26 *Id.* at \*17-18.

27 *Id.* at \*7, n.13, 17-18.

28 *Id.* at \*17-18 (citing DRA, § 2664(b)).

29 *Bayou Shores*, 2016 WL 3675462, at \*21.

30 *Id.*; but see *First Am. Health Care of Ga. Inc., et al. v. U.S. Dept. of Health and Human Services (In re First Am. Health Care of Ga. Inc.)*, 208 B.R. 985 (Bankr. S.D. Ga. 1996) (holding that when considering proximity of enactment of both statutes and significant changes in bankruptcy jurisdiction established by § 1334, plain meaning of § 405(h) should be enforced).

notwithstanding the language of § 2664(b). It reasoned that, even assuming Bayou Shores is correct that DRA § 2664(b) enacted some substantive amendments, the examples “are minor substantive amendments at best, compared to the massive shift in policy that giving bankruptcy courts parallel authority to adjudicate Medicare disputes would represent.”<sup>31</sup>

The court also looked to case law addressing § 405(h) and diversity jurisdiction under 28 U.S.C. § 1332 for guidance.<sup>32</sup> The Third, Seventh and Eighth Circuits applied § 405(h) to cases brought under § 1332 (diversity jurisdiction), despite the omission of § 1332 from its text, which the Eleventh Circuit found instructive concerning § 1334 jurisdiction.<sup>33</sup>

The Eleventh Circuit chose not to follow the Ninth Circuit, which held “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.’”<sup>34</sup> Instead, the Eleventh Circuit concluded that the omission of certain jurisdictional grants, including § 1334, from the text of § 405(h) was the result of a mistaken codification rather than an intention by Congress to remove bankruptcy jurisdiction from the scope of § 405(h).<sup>35</sup>

### Section 1334 Jurisdiction

Bayou Shores argued that § 1334 is different from other jurisdictional provisions, such as § 1332, because the text of § 1334(b) indicates that Congress intended for bankruptcy courts to have “special,” expansive jurisdiction.<sup>36</sup> The Eleventh Circuit rejected this argument,<sup>37</sup> concluding that § 1334(b) “does not concern the allocation of jurisdiction between the bankruptcy court and HHS, and cannot trump the § 405(h) jurisdictional bar.”<sup>38</sup>

### Medicare Policy

The Eleventh Circuit also rejected the bankruptcy court’s reasoning that if § 405(h) barred bankruptcy court jurisdiction, then providers would cease to exist before the administrative process of appealing a termination decision could be completed.<sup>39</sup> While recognizing the bankruptcy court’s policy concerns, the court held that HHS — not the bankruptcy court — was charged by Congress with adjudicating Medicare claims.<sup>40</sup>

### Administrative Exhaustion

The Eleventh Circuit also stated that the first two sentences of § 405(h) require administrative exhaustion of a

claimant’s remedies prior to review of decisions of HHS.<sup>41</sup> Bayou Shores did not dispute that its claims were not administratively exhausted. Thus, the bankruptcy court erred by not dismissing Bayou Shores’s claim for failure to exhaust its administrative remedies.<sup>42</sup>

### Constitutional and Equitable Mootness

Bayou Shores raised several other arguments, including constitutional and equitable mootness.<sup>43</sup> The Eleventh Circuit held that constitutional mootness did not apply because holding that the bankruptcy court lacked subject-matter jurisdiction would allow HHS and AHCA to terminate the provider agreements and seek to recover payments made since the bankruptcy filing.<sup>44</sup> Further, the Eleventh Circuit reasoned that the absence of subject-matter jurisdiction precludes the exercise of a court’s discretionary authority to apply the doctrine of equitable mootness.<sup>45</sup>

### Implications of Bayou Shores

*Bayou Shores* highlights the potential limitations, at least in the Eleventh Circuit, on the ability of bankruptcy courts to exercise jurisdiction over Medicare and Medicaid provider agreements. This case also emphasizes the importance of careful planning for health care businesses, whether in potential disputes with HHS or state health care agencies concerning provider agreements or in connection with a bankruptcy filing. **abi**

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31 *Id.* at \*20.

32 The Eleventh Circuit first analyzed several U.S. Supreme Court cases, including *Weinberger v. Salfi*, 422 U.S. 749, 757, 95 S. Ct. 1084 (1975) (first two sentences of § 405(h) require exhaustion of administrative remedies prior to bringing Medicare claims to district court); *Heckler v. Ringer, et al.*, 466 U.S. 602, 615-14, 104 S. Ct. 2013, 2022 (1984) (“The third sentence of 42 U.S.C. § 405(h) ... provides that § 405(g), to the exclusion of 28 U.S.C. § 1331, is the sole avenue for judicial review for all ‘claim[s] arising under’ the Medicare Act.”); and *Shalala v. Illinois Council on Long Term Care Inc.*, 529 U.S. 1, 13, 120 S. Ct. 1084, 1094 (2000) (section 405(h) “demands the ‘channeling’ of virtually all legal attacks through the agency”).

33 *Bayou Shores*, 2016 WL 3675462, at \*11 (citing *Bodimetric Health Servs. Inc. v. Aetna Life & Cas.*, 903 F.2d 480 (7th Cir. 1990); *Nichole Med. Equip. & Supply Inc. v. TriCenturion Inc.*, 694 F.3d 340, 346-47 (3d Cir. 2012); *Midland Psychiatric Assocs. Inc. v. United States*, 145 F.3d 1000, 1004 (8th Cir. 1998)).

34 *Bayou Shores*, 2016 WL 3675462, at \*11 (quoting *Town & Country*, 963 F.2d at 1155). Subsequent Ninth Circuit case law joined the other circuit courts in holding that § 405(h) bars § 1332 jurisdiction, yet the *Town & Country* decision remains controlling law in the Ninth Circuit for § 1334 jurisdiction. *Id.* at \*12 (citing *Do Sung Uhm v. Humana Inc.*, 620 F.3d 1134 (9th Cir. 2010)).

35 *Bayou Shores*, 2016 WL 3675462, at \*8, 14-20.

36 *Id.* at \*20.

37 *Id.* (citing *Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin. Inc.*, 502 U.S. 32, 41-42, 112 S. Ct. 459, 464-65 (1991)).

38 *Bayou Shores*, 2016 WL 3675462, at \*20.

39 *Id.* at \*21.

40 *Id.* at \*22.

41 *Id.* at \*23.

42 *Id.*

43 *Id.* at \*24.

44 *Id.* at \*25.

45 *Id.*