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**Protecting Patients or Protecting Government Agencies: Bankruptcy involvement in
Medicare/Medicaid Termination**

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Through Chapter 11 bankruptcy, a struggling business can preserve essential property needed to remain operational. However, when a healthcare institution is in financial disarray and becomes noncompliant with federal regulatory standards, courts may block rehabilitation through bankruptcy. Healthcare institutions such as nursing homes, which are in the process curing deficiencies, must stay in compliance with the federal regulations in order to continue to receive Medicare and Medicaid funds.¹ Nursing homes must make the necessary changes before funds are terminated or they will be forced to abruptly close.² Courts often scrutinize nursing homes' ability to care for their patients because of their infirm status and state of dependency. Courts are divided on whether Medicare and Medicaid payments entitled to the debtor are within the jurisdiction of the district court. In addition, it is unclear whether concerns over the potential harm to nursing home patients can trump the United States Department of Health and Human Services ("HHS") determinations.

¹ *In re* Bayou Shores SNF, LLC, 533 B.R. 337, 339 (Bankr. M.D.Fla. 2015).

² *Id.*

In *In re Bayou Shores SNF, LLC*, a district court found that a bankruptcy court lacked subject matter jurisdiction to thwart the regulation of Medicare and Medicaid funds of a non-compliant debtor.³ The district court, siding with the majority view, determined that 42 U.S.C. § 405(h) bars bankruptcy courts from interfering with decisions made by the (“CMS”).⁴ The CMS, an agency of the HHS, ensures the quality and safety of nursing homes, which is regulated by the CMS’s survey and certification process.⁵ The CMS found that the debtor was not compliant with the regulations and placed its patients’ health and safety in jeopardy.⁶ Subsequently, the CMS informed the debtor that Medicare and Medicaid payments would terminate in 30 days on August 3, 2014.⁷ Bayou’s deficiencies included errors with electronic medical records, inadequate screening of their staff and a single security failure.⁸ With over one hundred patients under their care, Bayou found that transferring patients would be nearly impossible.⁹ Bayou argued there was no legitimate reason to close its doors due to deficiencies that were easily cured and after the patients, their families and the staff were satisfied with the institution.¹⁰

Upon the debtor’s request the District Court for Middle District of Florida issued an *ex parte* temporary restraining order (“TRO”) enjoining termination of the Medicaid and Medicare

³ *Id.* at 343.

⁴ *Id.* at 342.

⁵ See Survey & Certification - General Information, Centers for Medical & Medicaid Services, (Oct. 5, 2015), <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/index.html?redirect=/SURVEYCERTIFICATIONGENINFO/PMSR/list.asp>.

⁶ See *In re Bayou Shores SNF*, 533 B.R. at 338.

⁷ *Id.* at 339.

⁸ *In re Bayou Shores SNF, LLC*, 525 B.R. 160, 172 (Bankr. M.D.Fla. 2014).

⁹ *Id.* at 162.

¹⁰ *Id.*

agreements, until August 15, 2014.¹¹ Thereafter, the district court dissolved the TRO after concluding that 42 U.S.C § 405(h) precluded the court from exercising jurisdiction prior to the debtor exhausting its administrative remedies.¹² One hour after the district court dissolved the TRO, the debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code and requested an emergency order enjoining CMS from terminating the patient agreements.¹³ The bankruptcy court found that it had jurisdiction over all civil proceedings arising under or relating to chapter 11 pursuant to 28 U.S.C. § 1334.¹⁴ Consequently, the bankruptcy court found the provider agreements to be property, and enjoined CMS from terminating the agreements.¹⁵

The Agency for Health Care and Administration (“AHCA”) and the United States of America appealed and the district court reversed the bankruptcy court, finding that a bankruptcy court may only conduct judicial review of the Secretary’s final decision pursuant to 42 § U.S.C. 405(g).¹⁶ The court reasoned that enjoining the CSM’s termination “essentially thwarted the administrative process and allowed the debtor to circumvent its administrative obligations.”¹⁷ On appeal the Eleventh Circuit allowed the District Court to rehear in Bayou’s motion for a stay because of the pragmatic difficulties of closing their institution and relocating patients.¹⁸

Part I of this article details the bounds of bankruptcy jurisdiction within 28 U.S.C. § 1334 and 42 U.S.C. § 405(h). Part II discusses courts’ conflicting jurisdictional terminations. Part III

¹¹ *Id.* at 165.

¹² 42 U.S.C. § 405(h)(2012); *In re* Bayou Shores SNF, 533 B.R. at 337.

¹³ *Id.*

¹⁴ 28 U.S.C. § 1334 (2012).

¹⁵ *Id.*

¹⁶ 42 U.S.C. § 405(g)(2012); *In re* Bayou Shores SNF, 533 B.R. at 340.

¹⁷ *Id.* at 342

¹⁸ *In re* Bayou Shores SNF, LLC, No. 8:14-BK-9521-MGW, 2015 WL 6502704, at *3 (M.D.Fla. Oct. 27, 2015)

explores the public policies factors that courts consider when deciding whether to intervene in Medicare/Medicaid payment terminations and outlines the current state of the law.

I. Court's are Split on Whether Bankruptcy's Absence From 42 U.S.C. § 405(h) Bars Bankruptcy Jurisdiction Over Medicare/Medicare Payments.

A district court has original jurisdiction over chapter 11 cases and property of the debtor's estate.¹⁹ After a district court establishes initial jurisdiction, day-to-day handling of the case can be transferred to bankruptcy courts.²⁰ 28 U.S Code, § 1334(e)(1) grants the district court jurisdictions over property of the debtor at the commencement of the case.²¹ District courts also have jurisdiction over property the estate obtains post commencement, such as payments from patients and clients.²² When these payments, which are property of the debtor's estate, are threatened, district courts have jurisdiction to decide the fate of these funds to ensure that the debtor's estate is successfully reorganized.²³

Conflicting jurisdiction can occur when a bankruptcy court's exclusive jurisdiction is concurrent with determinations made by administrative agencies. When Congress expressly grants exclusive jurisdiction to administrative agencies, bankruptcy courts may not intervene in

¹⁹ See 28 U.S.C. § 1334 (2012); COLLIER ON BANKRUPTCY, ¶ 3.01 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2015).

²⁰ See 28 U.S.C. § 157(a)(2012); COLLIER ON BANKRUPTCY, ¶ 3.01. (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2015).

²¹ 28 U.S.C. § 1334(e)(1) (2012).

²² See COLLIER ON BANKRUPTCY, ¶ 3.01 [4] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2015).

²³ See 1 NORTON BANKRUPTCY LAW AND PRACTICE § 4:119, (William L. Norton, Jr. ed., 3d ed. 2016).

the agency's finding.²⁴ However, when no congressional bar is present, bankruptcy jurisdiction can be assumed over the matter involving an administrative agency.²⁵

Courts have provided conflicting rulings on whether district courts are barred from intervening in the HHS's determinations.²⁶ Jurisdictional bars regarding the Medicare Act are located in 42 U.S.C. § 405(h).²⁷ 42 U.S.C. § 405(h) precludes district courts from retaining subject matter jurisdiction over federal question claims under 28 U.S.C. §1331 and claims where the United States is a defendant under 28 U.S.C. § 1346.²⁸ Significantly, within 42 U.S.C. § 405(h), there is no mention of the district courts' jurisdiction of bankruptcy proceedings under 28 U.S.C §1334.²⁹

A. The Majority Jurisdictional Determination

District Courts are split on whether to interpret section 405(h) as granting or prohibiting the district court's jurisdiction relating to determination made by the Medicare/Medicaid regulatory agency.³⁰ The Bayou court adopted the view held by the majority of courts, including the Seventh and Eighth Circuit.³¹ This majority found Medicare's jurisdictional restrictions to bar the courts' ability to interfere with the agency's regulations.³² These courts considered the first version of 42 U.S.C. § 405(h) as indicative of Congress' intent. The original statute

²⁴ See *Comm'n v. NextWave Personal Commc'ns.*, 537 U.S. 293, 304 (2003) (holding Federal Communication Commission's cancelation of licenses violated Bankruptcy Code Section 525 as there was no conflict with another federal statute).

²⁵ See *Id.*; 1 NORTON BANKRUPTCY LAW AND PRACTICE § 4:48, (William L. Norton, Jr. ed., 3d ed. 2016).

²⁶ *In re Bayou Shores SNF*, WL 6502704, at *3.

²⁷ 42 U.S.C. § 405(h) (2012).

²⁸ 42 U.S.C. § 405(g); See *In re Bayou Shores SNF*, 533 B.R. at 342.

²⁹ See *In re Bayou Shores SNF*, 533 B.R. at 340. See *In re Nurses' Registry & Home Health Corp.*, 533 B.R. 590, 595 (Bankr. E.D. Ky. 2015).

³¹ *Midland Psychiatric Assocs., Inc. v. United States*, 145 F.3d 1000, 1004 (8th Cir.1998); *Bodimetric Health Servs., Inc. v. Aetna Life & Cas.*, 903 F.2d 480, 488-89 (7th Cir.1990).

³² *Id.*

prohibited any action under which contained “virtually all jurisdictional grants, including bankruptcy jurisdiction.”³³ However, in the 1948 revision, jurisdiction was prohibited under 28 U.S.C. §1331 and 28 U.S.C. §1346 but did not include 28 U.S.C. §1334, bankruptcy jurisdiction.³⁴ These courts relied on Congress’ statement that “none of such amendments shall be construed as changing or affecting any right, liability or status or interpretation which existed” before the amendment.³⁵ The exclusion of 28 U.S.C. §1334, the majority concluded was meaningless and found jurisdiction to be barred.³⁶ Bayou relied on the fact that “[m]any courts have analyzed the amendments to 42 U.S.C. 405(h) and determined that the jurisdictional bar applies to all cases in which administrative remedies have not been exhausted, and not simply those in which jurisdiction is asserted under § 1331 or § 1346.”³⁷

Moreover, courts that have barred bankruptcy jurisdiction emphasized that Congress provided methods for appealing HHS’s determinations.³⁸ 42 U.S.C. § 405(g) entitles healthcare institutions to a “hearing thereon by the Secretary to the same extent as is provided in section 405(b) of this title, and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title.”³⁹ The majority finds the plain reading of 42 U.S.C. § 405(g) to bar a district court’s interference with any of CSM’s regulatory power when it is not a final review of the agency’s termination.⁴⁰

B. Granting Jurisdiction and Rehabilitating Institutions

³³ See *In re Bayou Shores SNF*, 533 B.R. at 342.

³⁴ 42 U.S.C. § 405(h) (2012)

³⁵ District Courts Jurisdiction, Pub. L. No. 98-369, § 2664(b), 98 Stat. 1171-72 (1984).

³⁶ Social Security Act, Pub. L. No. 109-8, § 323, 53 Stat. 1362, 1371, (1939).

³⁷ 533 B.R. at 342.

³⁸ *Bodimetric Health Servs., Inc.* 903 F.2d at 483.

³⁹ 42 U.S.C. § 405(g); See *In re Bayou Shores SNF*, 533 B.R. at 342.

⁴⁰ *Id.*

In the alternative, the bankruptcy court in *In re Nurses' Registry & Home Health Corp.*, rejected the use of congressional intent in interrupting 42 U.S.C.⁴¹ In *Nurses' Registry*, decided soon after *Bayou*, a debtor operating a caregiver service, which tended to over 1,300 patients, successfully received a preliminary injunction requesting turnover of Medicare funds.⁴² The bankruptcy court rejected the majority's interpretive reasoning and felt "it is beyond our province to rescue Congress from its drafting errors...."⁴³ The court rationalized that Congress' assertion that no technical amendments "shall be construed as changing or affecting any right, liability or status or interpretation which existed" is nonsensical. Congress' use of technical amendments to change substantive rights in the past persuaded the bankruptcy court that the provision had no weight.⁴⁴ The bankruptcy court found that it was not its place to amend statutes that may have been written erroneously.⁴⁵

Recently, Bayou Shores filed a motion for an additional stay on the fund determinations with the Eleventh Circuit and permitted the institution to file a renewed motion with District Court for Middle District of Florida.⁴⁶ The district court acknowledged that reasonable minds could defer on whether there is bankruptcy jurisdiction without conceding their stance that the district court had no jurisdiction.⁴⁷ The court however, granted an emergency motion to stay the district court's order pending appeal because patients would be irreparably harmed and it was against public policy to do otherwise.⁴⁸ The *Bayou* court's concern over their patient's well-

⁴¹ *In re Nurses' Registry & Home Health Corp.*, 533 B.R. 590, 595 (Bankr. E.D. Ken. 2015).

⁴² *Id.*

⁴³ *Id.* (citing *Lamie v. United States Tr.*, 540 U.S. 526, 542(2004)).

⁴⁴ *See Id.* at 595.

⁴⁵ *Id.*

⁴⁶ *In re Bayou Shores SNF, LLC*, No. 8:14-BK-9521-MGW, 2015 WL 6502704, at *1 (M.D. Fla. Oct. 27, 2015).

⁴⁷ *Id.* at 2.

⁴⁸ *Id.* at 2.

being demonstrates the importance of public policy when litigation involves vulnerable and infirm patients.⁴⁹

II. Courts' Consider Real World Implications

When the closing of a skilled nursing home and the safety of patients are at stake, a court's action can have severe consequences. Background on the skilled nursing home industry is key to understanding the environment in which the court made its decisions. Skilled nursing homes typically care for patients with Alzheimer's disease, dementia, or other serious psychiatric conditions.⁵⁰ These facilities charge higher costs than traditional nursing homes, as their patients are typically dependent on the government through Medicaid for payment.⁵¹ These institutions are also prone to financial difficulty and bankruptcy due to the constant need to modernize, competition with traditional nursing homes, and dependence on Medicaid reimbursements.⁵² Nevertheless, public policies can speak to both sides of the jurisdictional issue.

A. Deferring to Government Agencies

The *Bayou* court, following the majority, originally relied on the legitimacy of government regulations in its decision when it originally upheld the jurisdiction.⁵³ The district court trusted the CSM's determination that Bayou's conditions constituted "immediate jeopardy

⁴⁹ *Id.*

⁵⁰ *In re Bayou Shores SNF*, 533 B.R. at 337.

⁵¹ See Amy Parise DeLaney, *Maneuvering the Labyrinth of Long-Term Care Admissions Contracts*, 4 NAELA. 35, 35 (2008). ("The laws pertaining to skilled and intermediate care facilities are the most detailed and expansive. Public policy necessitates widespread control, since skilled and intermediate care nursing facilities generally service the infirm, chronically ill, and most vulnerable members of our society.")

⁵² See Nancy A. Peterman & Collin B. Williams, *Skilled Nursing Home Facilities: The Challenges of the 21st Century*, Am. Bankr. Inst. J., March 2005, at 30.

⁵³ *In re Bayou Shores SNF*, 533 B.R. at 337.

to residents' health and safety.”⁵⁴ The district court was concerned for the patient’s welfare and granted the CSM ability to determinate the debtor’s funds possibly for that reason.

These concerns were also echoed by Congress and point to the legitimacy of the CSM. In 1987, Congress enhanced regulations on nursing homes to ensure that dangerous nursing homes would be shut down promptly.⁵⁵ These changes were created in part because “large numbers of marginal or substandard nursing homes that are chronically out of compliance when surveyed . . . temporarily correct their deficiencies . . . and then quickly lapse into noncompliance until the next annual survey.”⁵⁶ Therefore, a district court’s decision to interfere within a specialized agency decisions can in turn jeopardize patients.

B. Harmful Effects of Nursing Home Closures

The courts in *Nurses Registry* and *Bayou* considered pragmatically if patients could be moved safely once the nursing home was suddenly closed.⁵⁷ In both cases the court was considering a stay pending appeal and looked to the following four factors: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.⁵⁸

Both courts found the jurisdictional debate surrounding 42 U.S.C. § 405(h) to hamper their ability to judge the likelihood of who would prevail on appeal.⁵⁹ In analyzing the remaining three factors the courts examined the harm that the HHS, the patients and the community would

⁵⁴ *Id.* at 339.

⁵⁵ R. Rep. No. 100-391(pt. I), at 452 (1987)

⁵⁶ H. R. Rep. No. 100-391(I) at 471

⁵⁷ *In re Nurses' Registry & Home Health Corp.*, 533 B.R. at 595; *In re Bayou Shores SNF, LLC*, No. 8:14-BK-9521-MGW, 2015 WL 6502704, at *1 (M.D. Fla. Oct. 27, 2015)

⁵⁸ *In re Nurses' Registry & Home Health Corp.*, 533 B.R. at 595; *In re Bayou Shores SNF*, at *1.

⁵⁹ *In re Nurses' Registry & Home Health Corp.*, 533 B.R. at 599; *In re Bayou Shores SNF, LLC*, at *2.

endure due to the stay.⁶⁰ The *Bayou* court found that HHS would suffer no harm because the agency would still pay for Medicare and Medicaid patients regardless of where the patients reside.⁶¹ Similarly, in *Nurses Registry* the court found the harm to Medicare would only be a minimal loss of funds.⁶²

Alternatively, the courts were more sympathetic to the community and patients. The *Nurses Registry* court found that terminating the funds would hurt the nursing homes' "fragile patients."⁶³ The court found that providing the nursing home with additional time through the TRO would allow it to rehabilitate its business and further care for its patients. In addition, the court considered how two hundred jobs could be saved if the institution was able to stay open.⁶⁴

The *Bayou* Court on appeal heavily weighed the practicality of Medicare's termination of funds. Bayou Shores, in attempting to transfer patients to other homes, found that no other intuitions in the area could accommodate the special needs of their patients.⁶⁵ Their patients would also suffer because they "need stability and a daily routine" which would be disrupted by patient transfer.⁶⁶ The district court stated that "a significant factor of human dignity at issue here that this Court cannot ignore."⁶⁷ The court reasoned that "[i]t would be draconian to disrupt [the patient's] dignity based on a jurisdictional debate."⁶⁸ The closing of the Bayou institution, the court reasoned, created a high risk of irreparable harm to its patients and thus granted the

⁶⁰ *In re Nurses' Registry & Home Health Corp.*, 533 B.R. at 595; *In re Bayou Shores SNF, LLC*, at *2.

⁶¹ *Id.*

⁶² *In re Nurses' Registry & Home Health Corp.*, 533 B.R. at 598;

⁶³ *Id.* at 599.

⁶⁴ *Id.*

⁶⁵ *In re Bayou Shores*, at *2.

⁶⁶ *Id.* at 3.

⁶⁷ *Id.*

⁶⁸ *Id.*

emergency stay.⁶⁹ Adequate evidence provided by Bayou Shores persuaded the district court to grant a TRO. However, the middle district of Florida did not decide the jurisdictional issue and instead focused on the fact that CSM's determination would directly result in patient harm.

Conclusion

Until it is settled whether district courts have jurisdiction over Medicare/Medicare determinations, policy considerations may continue to play a large role in deciding a nursing home's fate. Healthcare providers considering bankruptcy should understand that Medicare/Medicaid provider agreements may be unprotected if administrative remedies are not exhausted. Practitioners representing healthcare institutions should demonstrate with detailed evidence that patients will be left without proper care when faced with an abrupt transfer. Such evidence may consist of the number of vacant slots in surrounding nursing homes and the condition of the patients. Additionally, courts should be made aware that it is in the best interest of the community for these institutions to stay operational, especially when they are in compliance with medical regulations. However, if a court finds that an institution is abusing bankruptcy protections to skirt HSS's regulatory powers and place its patients in danger, a stay will likely be rejected.

⁶⁹ *Id.*