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CLIENT ALERT

Medicare Jurisdictional Bar Limits Bankruptcy Court Authority in Health Care Bankruptcy

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Introduction

In an opinion dated June 26, 2015, the U.S. District Court for the Middle District of Florida ruled that the bankruptcy court administering the *Bayou Shores SNF, LLC* ("Debtor" or "Bayou Shores"), chapter 11 proceeding lacked subject matter jurisdiction to enjoin the termination of the Debtor's Medicare and Medicaid provider agreements or to order the assumption of the provider agreements.[1] Specifically, the district court held that the Medicare jurisdictional bar under 42 U.S.C. § 405(h) limits the authority of the bankruptcy court to interfere with efforts by the Centers for Medicare & Medicaid Services ("CMS") to terminate the provider agreements except to provide judicial review under section 405(g) after administrative remedies have been exhausted. Bayou Shores has expressed its intention to appeal the district court's decision, but if the decision is affirmed, it could have broad implications for health care bankruptcies by limiting the ability of health care businesses in bankruptcy to reorganize or sell their assets on a going-concern basis.

Background

Bayou Shores operates a skilled nursing facility in Florida serving patients with neurological disorders and psychiatric conditions. This skilled nursing facility is one of only a few facilities in the area that serves this population and receives more than 90 percent of its revenue from Medicare and Medicaid. Pursuant to 42 C.F.R. Part 482, Subpart B, payment under Medicare and Medicaid programs is contingent on compliance with the requirements set forth in the regulations governing those programs.

[1] *See* Fla. Agency for Health Care Admin. v. Bayou Shores SNF, LLC (In re Bayou Shores SNF, LLC), Case No. 8:14-cv-02816 (M.D. Fla. June 26, 2015), *available at* http://www.justice.gov/usao-mdfl/file/627661/download.

Based on surveys of the Debtor over the course of five months in 2014, the Debtor was found to no longer be in compliance with these requirements, and, as such, CMS notified the Debtor that its Medicare provider agreement would terminate on August 3, 2014.

Procedural History

To thwart the upcoming termination of its provider agreements, the Debtor sought and obtained from the district court a temporary restraining order ("TRO") enjoining the termination of the provider agreements until August 15, 2014. On that date, the Debtor's motion to extend the TRO was denied and subsequently dissolved by the district court on the ground that 42 U.S.C. § 405(h) precluded the district court from exercising jurisdiction over the controversy prior to the Debtor exhausting its administrative remedies. Within an hour, the Debtor filed a voluntary chapter 11 petition and obtained an interim order of the bankruptcy court enjoining CMS from terminating the provider agreements or denying payments of claims. The bankruptcy court stated that it had jurisdiction over the matter pursuant to 28 U.S.C. § 1334 (the statute that provides bankruptcy jurisdiction) and found the Medicare and Medicaid provider agreements to be "property of the estate," warranting the entry of an order precluding the termination of the provider agreements.

In a subsequent evidentiary hearing, the bankruptcy court noted that jurisdiction over this matter was appropriate pursuant to 28 U.S.C. § 1334 and concluded that since the provider agreements were not terminated prior to the Debtor's bankruptcy filing, the provider agreements constituted executory contracts that could be assumed in bankruptcy. The bankruptcy court noted that the Debtor's patients were not in any danger, the Debtor had cured the asserted deficiencies, and CMS had notified the Debtor that it was in substantial compliance with the regulations. Accordingly, the bankruptcy court prohibited the termination of the provider agreements. In addition, the bankruptcy court approved the Debtor's assumption of the provider agreements pursuant to the Debtor's plan of reorganization. The United States, on behalf of the Secretary of the Department of Health and Human Services ("Secretary") and the Florida agency that administers the Medicaid program, appealed.

The Medicare Jurisdictional Bar

The Medicare jurisdictional bar promulgated in 42 U.S.C. § 405(h) states that "no findings of fact or decision . . . shall be reviewed by any person, tribunal, or governmental agency except as herein provided," and no action against the Secretary "shall be brought under section 1131 or 1346 of Title 28 to recover on any claim arising under" the Medicare Act. The government argued that section 405(h) precludes the bankruptcy court from taking *any* action related to the provider agreements *until* the Debtor exhausts its administrative remedies. In response, the Debtor argued that the bankruptcy court's jurisdiction was not barred by section 405(h) because that section does not *expressly* proscribe the bankruptcy court's jurisdiction under 28 U.S.C. § 1334. Having examined congressional intent in enacting the Medicare jurisdictional bar to

broadly apply to all cases in which administrative remedies have not been exhausted, the district court concluded that section 405(h) precluded the bankruptcy court's exercise of jurisdiction over the provider agreements before the Debtor's administrative remedies had been exhausted. The district court therefore reversed the bankruptcy court orders.

Possible Impact on Health Care Bankruptcy Cases

Bankruptcy can be a strategic tool for a debtor at risk of losing a valuable contract. The Bankruptcy Code's automatic stay and a bankruptcy court's equitable powers are often utilized to prevent a counter-party from terminating a contract, which can be critical to a debtor's ability to reorganize or sell its assets as a going concern.

A health care provider relying on Medicare and Medicaid, however, may be limited in its ability to use the bankruptcy process to prevent the termination of, or to obtain the assumption and assignment of, a provider agreement if CMS seeks to terminate the provider agreement or exercise other remedies. This can fundamentally affect the value and survival of a distressed health care business.

An appeal of the district court's decision is expected.

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This Client Alert was authored by **Wendy G. Marcari**. **Elena M. Quattrone,** *a Summer Associate (not admitted to the practice of law) in Epstein Becker Green's New York office, contributed significantly to the preparation of this Client Alert.* ***For additional information about the issues discussed in this Client Alert, please contact the author or the Epstein Becker Green attorney who regularly handles your legal matters.***