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By Jason W. Harbour and Shannon E. Daily

First Circuit Declines to Weigh In on Bankruptcy Court Jurisdiction over Medicare Provider Agreements

Jason W. Harbour
Hunton & Williams LLP
Richmond, Va.

Shannon E. Daily
Hunton & Williams LLP
Richmond, Va.

Jason Harbour is a partner and Shannon Daily is an associate in the Bankruptcy, Restructuring and Creditors' Rights Practice at Hunton & Williams LLP in Richmond, Va.

The U.S. Court of Appeals for the First Circuit recently declined to join the debate over whether § 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, absent prior exhaustion of administrative remedies.[1] *Parkview* comes only four-and-a-half months after the U.S. Court of Appeals for the Eleventh Circuit furthered a circuit split by holding that § 405(h) bars courts from exercising bankruptcy jurisdiction over Medicare provider agreements, even though § 405(h) does not expressly reference § 1334 bankruptcy jurisdiction.[2]

In pertinent part, § 405(h) provides 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."[3] For a more complete discussion of the Eleventh Circuit's decision and the circuit split, read an article published in the October 2016 issue of the *ABI Journal*.[4] Instead of addressing the jurisdictional issue, the First Circuit chose to resolve *Parkview* on narrower grounds by assuming hypothetical statutory jurisdiction and affirming that the Centers for Medicare and Medicaid Services (CMS) did not violate (1) the automatic stay because the "police and regulatory" exception codified in 11 U.S.C. § 362(b)(4) applied, or (2) the nondiscrimination provision of 11 U.S.C. § 525(a).[5]

Background

Parkview Adventist Medical Center operated a hospital in Brunswick, Maine, that provided emergency, inpatient and outpatient services to the community.[6] Parkview participated in Medicare pursuant to a provider agreement with CMS and received reimbursements from CMS for both inpatient and outpatient services.[7]

On June 15, 2015, one day before its chapter 11 filing, Parkview sent a letter to CMS stating that Parkview was ending its participation in Medicare, informing CMS of its upcoming chapter 11 filing and stating that Parkview would close as a hospital "effective upon the order of the Bankruptcy Court and will no longer participate in the Medicare Program ... as an acute care hospital provider."[8] CMS responded on June 19, 2015, and designated June 18, 2015, as the termination date of the provider agreement because Parkview ceased to meet the definition of "hospital" in § 1861(e) of the Social Security Act when it stopped inpatient services on June 18.[9] The Maine Department of Health and Human Services subsequently issued Parkview a conditional license to operate outpatient, but not inpatient, services through Dec. 19, 2015.[10]

On July 27, 2015, Parkview sought to rescind its notice and informed CMS that it considered CMS's termination to be an "involuntary termination"

1 *Parkview Adventist Med. Ctr. v. United States*, 842 F.3d 757 (1st Cir. 2016) ("*Parkview*").
2 *See Fla. Agency for Health Care Admin v. Bayou Shores SNF LLC (In re Bayou Shores SNF LLC)*, 828 F.3d 1297 (11th Cir. 2016) ("*Bayou Shores*"). *Compare with In re Town & Country Home Nursing Servs.*, 963 F.2d 1146, 1155 (9th Cir. 1991) (holding that § 405(h) only bars judicial review absent administrative exhaustion of actions brought under §§ 1331 and 1346 and does not encompass actions brought under § 1334).
3 *See* 42 U.S.C. § 405(h).
4 *See* Jason W. Harbour and Shannon E. Daily, "Eleventh Circuit: Bankruptcy Courts Lack Jurisdiction over Medicare Provider Agreements," XXXV *ABI Journal* 10, 28-29, 75-76, October 2016, *available at* abi.org/abi-journal.
5 *Parkview*, 842 F.3d at 760.
6 *Id.* at 761.
7 *Id.*
8 *Id.* (quoting Letter from Parkview to CMS dated June 15, 2015).
9 *Id.* at 761-62.
10 *Id.* at 762.

because it was based on Parkview's failure to meet a requirement to be a hospital.[11] CMS agreed to rescind the termination if Parkview resumed inpatient services.[12] Parkview subsequently filed a motion to compel post-petition performance of the provider agreement in the U.S. Bankruptcy Court for the District of Maine.[13]

The Lower Court Decisions

In its motion to compel, Parkview argued that (1) the bankruptcy court had exclusive jurisdiction because the provider agreement was an executory contract and therefore property of the bankruptcy estate; (2) CMS violated the provider agreement post-petition by sending the termination notice and terminating the provider agreement; (3) CMS's termination of the provider agreement was an attempt to exercise control over property of the estate in violation of § 362(a)(3) of the Bankruptcy Code; and (4) CMS's termination of the provider agreement unfairly discriminated against Parkview in violation of § 525(a).[14] The bankruptcy court denied the motion to compel, concluding that it lacked authority to compel CMS to perform under the provider agreement because Parkview had not exhausted its administrative remedies.[15]

The bankruptcy court further concluded that CMS did not violate the automatic stay, and that even if it exercised control over property of the estate, § 362(b)(4) and possibly § 362(a)(28) of the Bankruptcy Code provided protection.[16] Finally, the bankruptcy court held that CMS's termination of the provider agreement did not constitute unfair discrimination against a debtor in bankruptcy in violation of § 525(a) of the Bankruptcy Code.[17]

The U.S. District Court for the District of Maine affirmed on appeal, concluding that § 405(h) bars bankruptcy jurisdiction over Medicare provider agreements absent prior exhaustion of administrative remedies.[18] The district court further held that because the motion to compel presented a claim "arising under" the Medicare Act, Parkview was required to exhaust its administrative remedies prior to seeking judicial review from the bankruptcy court.[19] The district court did not address Parkview's arguments under §§ 362(a)(3) and 525(a). Parkview subsequently appealed to the First Circuit.

The First Circuit's Decision

On appeal, the First Circuit acknowledged the circuit split over whether § 405(h) bars bankruptcy jurisdiction absent an exhaustion of administrative remedies, but noted that "[r]ather than add our voice to the circuit split on this difficult issue, we choose to resolve this case on narrower grounds evident from the record."[20] Accordingly, the First Circuit bypassed the jurisdictional issue and, assuming statutory jurisdiction, addressed the merits of the arguments raised by Parkview in the motion to compel.[21] Affirming the lower courts' decisions, the First Circuit held that the termination of the provider agreement (1) fell within the "police and regulatory power" exception found in § 362(b)(4) of the Bankruptcy Code, and (2) did not violate the nondiscrimination provision in § 525(a).[22]

Automatic Stay

The First Circuit first analyzed whether CMS's termination of the provider agreement violated the automatic stay in § 362(a)(3) of the Bankruptcy Code, which prohibits "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate."[23] Both Parkview and CMS agreed that the provider agreement was an executory contract under § 365.

Parkview further contended that the provider agreement was property of the estate and that by terminating it, CMS took an unauthorized act to exercise control over property of the estate in violation of § 362(a)(3) of the Bankruptcy Code.[24] CMS disputed that the provider agreement was property of the estate because Parkview "never had a cognizable property or contractual interest in participating in Medicare without meeting Medicare's conditions of participation," and it "did not acquire one by commencing this case."[25] CMS also argued that even if Parkview had a property interest in the provider agreement, the termination is exempted from the automatic stay by the "police and regulatory power" exception found in § 362(b)(4) of the Bankruptcy Code.[26]

Without reaching the other automatic stay arguments, the First Circuit concluded that the exception to the automatic stay found in § 362(b)(4) applied to the provider agreement. Under § 362(b)(4), a bankruptcy filing does not stay "an action or proceeding by a governmental unit ... to enforce such governmental unit's ... police and regulatory power."[27] An action by a governmental unit falls within this exception if it "is designed primarily to protect the public safety and welfare" and does not have a pecuniary purpose.[28] The First Circuit held that CMS's termination of the provider agreement fell within the § 362(b)(4) exception because (1) CMS had a strong public policy interest in ensuring that Medicare program funds were not spent on an institution that fails to meet qualification standards, and (2) the termination did not have a pecuniary interest because CMS was not seeking any recovery from Parkview.[29]

Non-Discrimination Provision

The First Circuit also rejected Parkview's argument that the termination of the provider agreement violated § 525(a)

11 *Id.*
12 *Id.*
13 *Id.*
14 *See* Debtor's Motion to Compel Post Petition Performance of Executory Contracts Pursuant to 11 U.S.C. § 365 and Compliance with 11 U.S.C. §§ 362 and 525 and Incorporated Memorandum of Law [Doc. No. 144], *In re Parkview Adventist Med. Ctr.*, No. 15-20442 (Bankr. D. Me. July 9, 2015).
15 *See* Audio Recording of July 24, 2015, Hearing [Doc. No. 195], *In re Parkview Adventist Med. Ctr.*, No. 15-20442 (Bankr. D. Me. July 24, 2015).
16 *Id.*
17 *Id.*
18 *See* Order on Appeal of Bankruptcy Court's Order Denying Debtor's Motion to Compel Post-Petition Performance of Executory Contract [Doc. No. 18], *Parkview Adventist Med. Ctr. v. United States of Am.*, No. 2:15-cv-00320-JDL (D. Me. May 25, 2016).
19 *Id.*
20 *Parkview*, 842 F.3d at 760.
21 *Id.* In *In re Ludlow Hosp. Soc. Inc.*, the First Circuit chose to bypass the § 405(h) jurisdictional issue because it was problematic, whereas the merits of the appeal were not. *See* 124 F.3d 22, 25, n.7 (1st Cir. 1997).
22 *Parkview*, 842 F.3d at 762.
23 *Id.* at 762-63 (citing 11 U.S.C. § 362(a)(3)).
24 *See* Brief of Appellant at 35 [Document No. 00117054426], *Parkview Adventist Med. Ctr. v. United States of Am.*, No. 16-1731 (1st Cir. Sept. 13, 2016).
25 *See* Appellee's Brief at 56 [Document No. 00117057812], *Parkview Adventist Med. Ctr. v. United States of Am.*, No. 16-1731 (1st Cir. Sept. 21, 2016).
26 *Id.* at 57.
27 11 U.S.C. § 362(b)(4).
28 *Parkview*, 842 F.3d at 763 (citing *In re McMullen*, 386 F.3d 320, 325 (1st Cir. 2004); *In re Nortel Networks Inc.*, 669 F.3d 128, 140 (3d Cir. 2011)).
29 *Parkview*, 842 F.3d at 763-64.

of the Bankruptcy Code, which prohibits governmental units from discriminating against a person that is or has been a debtor in bankruptcy.[30] The First Circuit noted that nothing in the record indicated the termination occurred as a result of Parkview's bankruptcy filing. In fact, unlike the cases cited by Parkview, CMS's letter to Parkview stated that the termination was the result of Parkview's discontinuance of inpatient services and decision to disqualify itself as a hospital.[31] Since the termination was unrelated to Parkview's pre-petition debts, the First Circuit concluded that it did not constitute impermissible discrimination.[32]

Implications of *Parkview*

Parkview highlights the importance of careful planning for health care businesses considering a bankruptcy filing. Health care businesses should analyze the potential effects of their actions on their Medicare provider agreements, as a debtor may have limited remedies — or possibly no remedy at all — in bankruptcy court should CMS terminate a debtor's provider agreement. In addition, although *Parkview* does not provide further support to either side of the circuit split concerning the § 405(h) jurisdictional issue, some lower courts in the First Circuit previously issued rulings consistent with the Eleventh Circuit's position in *Bayou Shores* that § 405(h) bars bankruptcy jurisdiction over Medicare provider agreements absent the exhaustion of administrative remedies.[33] abi

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30 *Id.* at 765.

31 *Id.*; *see, e.g., In re Psychotherapy & Counseling Ctr. Inc.*, 195 B.R. 522, 524-27 (Bankr. D.D.C. 1996) (holding that Department of Health and Human Services violated § 525(a) by excluding debtor from government program for nonpayment of dischargeable pre-petition debt); *In re Sun Healthcare Grp. Inc.*, No. 00-986-GMS, 2002 WL 2018868, at *1 (D. Del. Sept. 4, 2002) (holding that Health Care Financing Administration (HCFA) violated § 525(a) when it failed to reinstate debtor's subsidiary as Medicare and Medicaid participant because subsidiary owed pre-petition debts to HCFA).

32 *Parkview*, 842 F.3d at 765-66.

33 *See, e.g., Excel Home Care Inc. v. DHHS*, 316 B.R. 565, 572-74 (D. Mass. 2004) (holding that § 405(h) applies to § 1334); *Slater Health Ctr. Inc. v. United States (In re Slater Health Ctr. Inc.)*, 306 B.R. 20 (D.R.I. 2004) (bankruptcy court jurisdiction is appropriate where debtor previously exhausted administrative remedies); *DHHS v. Noonan*, Nos. 96-20064, 96-30084, 1996 WL 728352, at *3 (D. Mass. 1996) (stating that "the Bankruptcy Code does not confer subject-matter jurisdiction over matters directly 'arising under' the Medicare Act").