AMERICAN BANKRUPTCY INSTITUTE
JOURNAL
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Intensive Care

BY PATRICK J. POTTER AND ANDREW M. TROOP

Two Health Care Providers' Critical —Yet Curious — Search for Bankruptcy Court Jurisdiction

Patrick J. Potter
Pillsbury Winthrop Shaw Pittman LLP
Washington, D.C.

Coordinating Editor Andrew M. Troop
Pillsbury Winthrop Shaw Pittman LLP
New York

Patrick Potter is a partner with Pillsbury Winthrop Shaw Pittman LLP in Washington, D.C. Andrew Troop is a partner in the firm's New York office and serves as the East Coast local section leader for its Insolvency and Restructuring Practice.

Two recent decisions reached completely opposite results about whether disputes affecting the fate of a health care debtor's business operations (not to mention patient care and treatment of creditors) might be litigated and resolved in the bankruptcy courts. Both decisions turned in large part on the interpretation of statutory provisions that are not models of clarity. Although these differing results might be explained in part by the specifics of the disputes and their procedural postures, the decisions are instructive to future health care debtors aiming to continue operations while availing themselves of chapter 11's perceived hospitable and speedy dispute-resolution process.

Health Care Facilities Seek Shelter and Solutions in Bankruptcy Court

In the first case, Bayou Shores, a privately owned skilled nursing facility in St. Petersburg, Fla., serving approximately 130 patients (with 90 percent of its revenues derived from Medicare and Medicaid), and the U.S. Department of Health and Human Services (HHS) were engaged in a dispute over quality-of-care issues, which ultimately resulted in HHS notifying the debtor that it would be terminated from the Medicare program (and therefore Medicaid as well) because patient health had been jeopardized.

Absent revenue from these programs, Bayou Shores would be forced to close its doors. So, two days prior to the scheduled termination, the debtor filed for chapter 11, wherein the bankruptcy court found that the Medicare provider agreement was property of the estate, Bayou Shores had resolved the quality-of-care issues, and patients were no longer in immediate jeopardy. Within five months of the chapter 11 filing, the bankruptcy court authorized Bayou Shores to assume its Medicare and Medicaid provider agreements, and confirmed a non-sale reorganization plan that forbade HHS from enforcing its termination rights, based on the pre-petition quality-of-care disputes, over HHS's objection that the bankruptcy court lacked jurisdiction to do so.[1]

In the second case, Hebrew Hospital, a non-profit elder facility in Bronx, N.Y., with 120 senior apartments, 20 skilled nursing beds and 10 enriched housing beds, was in jeopardy of closing because it was running out of cash. In response, the bankruptcy court approved a 10-week asset-sale process that netted two competing bidders. After evaluating the financial feasibility of each proposal and a variety of other factors, the bankruptcy court approved the sale to the debtor's — rather than the committee's — choice, without requiring Hebrew Hospital to get state court approval under applicable New York law.[2]

Wrestling with Jurisdiction

Bayou Shores Is Denied Access for Speedy Dispute Resolution, Putting Survival at Risk

On appeal, the Eleventh Circuit in *Bayou Shores* held that, pursuant to 42 U.S.C. § 405(h), the bankruptcy court overstepped its authority in deciding whether the debtor's agreements with HHS could be terminated because it lacked jurisdiction over the HHS/debtor dispute.[3] Relying on *Shalala v. Illinois Council on Long Term Care Inc.*,[4] the Eleventh

1 *In re Bayou Shores SNF LLC*, 828 F.3d 1297 (11th Cir. 2016).
2 *In re HHH Choices Health Plan LLC*, 554 B.R. 697 (Bankr. S.D.N.Y. 2016).
3 *See Bayou Shores*, 828 F.3d 1297.
4 529 U.S. 1 (2000).

Circuit concluded that "claims of program eligibility, and claims that contest a sanction or remedy," the crux of the HHS/Bayou Shores dispute that was resolved by the bankruptcy court, constitute claims arising under the Medicaid Act beyond the bankruptcy court's jurisdiction.[5]

The court reached this result even though § 405(h) only states 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 [*i.e.*, the Medicaid Act]."[6] It does not specifically prohibit claims brought under the grant of bankruptcy jurisdiction in 28 U.S.C. § 1334. To reach this conclusion, the Eleventh Circuit had to read a reference to § 1334 into § 405(h), despite its unequivocal absence from the statute.[7] It did so as follows:

- The original 1939 text of § 405(h) read: "No action against the United States, the Board, or any officer or employee thereof shall be brought under *section 24 of the Judicial Code of the United States* to recover on any claim arising under this title."[8] Dating back to 1911, § 24 of the U.S. Judicial Code embodied the grant of jurisdiction to federal district courts, which included bankruptcy jurisdiction.
- In 1948, although Congress split federal court jurisdiction into multiple sections under title 28, including codifying bankruptcy jurisdiction in § 1334, the reference to § 24 in § 405(h) remained unchanged for approximately 30 years.
- In 1976, the Office of the Law Revision Counsel (OLRC), a House of Representatives body that is charged with codifying laws and publishing updates to the U.S. Code, apparently recognized the error. When the OLRC published the U.S. Code that year, it substituted the old "section 24" language with the newer "section 1331 or 1346 of title 28" language that remains in § 405(h) to this day. The Eleventh Circuit reasoned that the failure by the OLRC, which has no legislating authority, to include all of the jurisdictional grants covered by the 1911 version of § 24, including bankruptcy jurisdiction, was an oversight.
- In 1984, Congress passed "technical correction" legislation enacting into positive law precisely that which the OLRC had published in 1976. While § 1334 remained absent from § 405(h), the legislation elsewhere stated that "*none of such amendments shall be construed as changing or affecting any right, liability, status, or interpretation which existed (under the provisions of law involved) before that date*."[9] The legislative history to the statute passed in 1984, including statements from the House floor, is consistent with this notion.
- Based on the forgoing, the Eleventh Circuit concluded that a proper reading of § 405(h) includes a prohibition on invoking § 1334 (bankruptcy) jurisdiction to resolve claims arising under the Medicare Act.

In holding that the bankruptcy court was without subject-matter jurisdiction to resolve the Bayou Shores/HHS disputes, the Eleventh Circuit acknowledged that Bayou Shores might "cease to exist as a going concern long before the HHS administrative appeals process could complete. While we are not unsympathetic to this argument, the choice of whether the bankruptcy court or HHS is best positioned to adjudicate Medicare claims is a policy decision that the bankruptcy court was not empowered to make."[10] In light of the Eleventh Circuit's decision, the debtor's operations were confronted with the risk of closure due to a delayed dispute-resolution process in a forum other than the bankruptcy court.

Hebrew Hospital Is Afforded Access to Bankruptcy Court for Speedy Dispute Resolution and Opportunity to Survive

Due to Hebrew Hospital's nonprofit status, New York Supreme Court approval for the sale of its assets would ordinarily have been required pursuant to § 511 of the New York Not-for-Profit Corporation Law. That state statute sets forth the procedural and substantive requirements for asset sales by nonprofit corporations in New York. The applicable standard for approval of the sale states, in relevant part:

> If it shall appear ... that the consideration and the terms of the transaction are fair and reasonable to the corporation and that the purposes of the corporation or the interests of the members will be promoted, it may authorize the sale, lease, exchange or other disposition of all or substantially all the assets of the corporation ... for such consideration and upon such terms as the court may prescribe. The order of the court shall direct the disposition of the consideration to be received thereunder by the corporation.[11]

Despite § 511's mandate that a New York Supreme Court judge approve a nonprofit's asset sale, the *HHH* bankruptcy judge, like the *Bayou Shores* bankruptcy judge, undertook the task of resolving nonbankruptcy law issues in order to prevent closure of the debtor's health care operations. In doing so, the New York bankruptcy court relied on § 1221(e) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), which is codified as a note at the end of 11 U.S.C. § 363, though not easily (if at all) found in the commercially published versions of the Bankruptcy Code used by most chapter 11 practitioners. Section 1221(e) reads in full:

> (e) Rule of Construction. — Nothing in this section[12] shall be construed to require the court in which a case under chapter 11 of title 11 ... is pending to remand or refer any proceeding, issue, or controversy to any other court or to require the approval of any other court for the transfer of property.[13]

The bankruptcy court interpreted § 1221 to mean that although "substantive state law requirements [are] appli-

5 *Bayou Shores*, 828 F.3d at 1329 (citing *Shalala*, 529 U.S. at 14).

6 42 U.S.C. § 405(h). The Eleventh Circuit observed that § 405(h) also prohibits resorting to the courts until all administrative remedies have been exhausted, which did not occur in this case. *See Bayou Shores*, 828 F.3d at 1310.

7 *See In re Town & County Home Nursing Servs.*, 963 F.2d 1146, 1155 (9th Cir. 1991) ("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.").

8 *See* Social Security Amendments of 1939, Pub. L. No. 76-379, 53 Stat. 1360 (1939) (emphasis added).

9 *Bayou Shores*, 828 F.3d at 1307 (emphasis in original) (citing Technical Corrections Act of 1983: Hearing on H.R. 3805 Before the H. Comm. on Ways and Means, 98th Cong. 89-90 (1984) (draft text of H.R. 3805)).

10 *Id.* at 1324-25.

11 N.Y. Not-for-Profit Corp. Law § 511(d) (McKinney).

12 "Section" refers to § 1221 of BAPCPA (entitled "Transfers Made by Nonprofit Charitable Corporations") and not § 363 (or any other section) of title 11. Nothing in subparagraphs (a) through (d), the only other subparagraphs of § 1221, require bankruptcy courts to remand or refer disputes to nonbankruptcy courts — though such provisions do generally state that asset sales by nonprofits must be made in accordance with applicable nonbankruptcy law. The statute appears to be silent about any requirements external to § 1221 that might require a nonbankruptcy court to resolve a sale-related dispute.

13 Pub. L. No. 109-8, § 1221(e) (2005).

cable ... I am the one who is supposed to apply them, not the New York Court."[14] Indeed, the bankruptcy court went so far as to say "I cannot send [the § 511 question] back to state court because the Bankruptcy Code does not let me do so."[15] Apparently more sympathetic to the risks that delayed dispute-resolution posed to the debtor's operations than the Eleventh Circuit, the New York bankruptcy court noted, "The circumstances here just do not permit any more time. The evidence is quite clear that the Debtor is running out of money, and it cannot continue to operate after [Sept. 30] or so."[16]

Accordingly, the New York bankruptcy court proceeded to decide whether the competing bids for HHH satisfied § 511. First, it concluded that the selection of one of the bidders by the debtor's board was not entitled to substantial deference. It then found that (1) each bidder was capable of closing, (2) secured and priority claims would be paid in full under both bids, and (3) any difference in the treatment between the bidder's proposals was immaterial. Finally, the court concluded that the board's selection "was more consistent with the mission of the company," so it approved that bidder.[17] Consequently, from a very practical perspective, the debtor's operations averted the risk of closure due to a streamlined dispute-resolution process in bankruptcy court and the bankruptcy court's focus of the debtor's mission.

Claim Characterization and Procedural Context Matter

Like debtors in other industries, health care operators confronted with a business-threatening dispute often see chapter 11 as a means to facilitate resolution of the dispute faster than the dispute would be resolved outside of bankruptcy. Among other benefits, a swift dispute-resolution process has the potential for protecting patients, maintaining staff employment and preserving value for creditors.

While both Bayou Shores and Hebrew Hospital sought to avail themselves of this strategy to avoid imminent closure, one failed and one succeeded — with each case turning on the judicial determination as to *where* critical decisions could be resolved and the accompanying time frame for such resolution. Admittedly, Bayou Shores's dispute was with a federal agency, HHS (perceived by some to be the proverbial "800-pound gorilla" in chapter 11 Medicaid cases), as opposed to a private-contract counterparty, and the procedure Bayou Shores pursued involved the § 365 assumption of the provider agreement under a reorganization plan rather than issues needing resolution to complete a § 363 sale.

Moreover, in contrast to HHH, Bayou Shores was a for-profit enterprise, though it is not clear whether or why BAPCPA § 1221(e)'s mandate that bankruptcy judges must resolve all justiciable sale-related issues should be limited to nonprofits. While the Medicare-related quality-of-care disputes confronting Bayou Shores could just as easily arise in connection with a nonprofit provider, this difference certainly distinguishes the decisions. That being said, and regardless of both for-profit status and procedural posture, one must acknowledge the hurdles in attempting to re-characterize the *Bayou Shores* disputes as anything other than Medicare Act claims, and presenting them in the context of a sale may well have been equally futile.

Conclusion

Even if the statutory grounds for denying bankruptcy court jurisdiction over a Medicare/Medicaid dispute under § 405(h) and for finding bankruptcy court jurisdiction for a nonprofit sale under § 1221(e) are subject to some question, each case serves as helpful guidance to health care providers confronted with similar dispute-resolution challenges. There is no doubt that parties who perceive leverage in delay will likely seek to label every dispute as a Medicare Act claim. Some may also argue that (1) § 1221(e) does not bar bankruptcy courts from exercising discretion to refer disputes to nonbankruptcy courts, or (2) bankruptcy courts must refer disputes to nonbankruptcy courts pursuant to applicable law external to § 1221.

Health care providers would be wise to do all that they reasonably can to cast their disputes in ways that minimize Medicare Act characterization, and to do so in the context of resolving a dispute necessary to consummating a § 363 sale, arguing that pursuant to § 1221(e), all justiciable disputes must be resolved by the bankruptcy court. This way, a debtor might eventually be successful in obtaining bankruptcy court resolution under § 1221(e) of a dispute that is otherwise jurisdictionally barred under § 405(h). In doing so, patients, jobs and value could very well be saved. abi

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14 *In re HHH*, 554 B.R. at 700.
15 *Id.* at 706.
16 *Id.*
17 *Id.* at 713.