A Deepening Divide: Fifth Circuit Adds to Split Regarding Bankruptcy Court Jurisdiction over Social Security Claims

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Bankruptcy court jurisdiction over Medicare issues is increasingly important given the distressed state of the health care industry and skyrocketing level of bankruptcy filings by health care providers. On May 10, 2019, in *Benjamin v. United States (In re Benjamin)*, [1] the Fifth Circuit rejected the argument that the "recodification canon" deprives bankruptcy courts of the requisite subject-matter jurisdiction to hear Social Security claims, bolstering the minority view previously articulated by only the Ninth Circuit [2] regarding whether Section 405(h) of Title 42 (the "Medicare Act") bars bankruptcy courts from adjudicating Social Security and/or Medicare disputes. *Benjamin* involved a specific inquiry into whether 42 U.S.C. § 405(h) divests bankruptcy courts of the jurisdiction to hear Social Security claims. As bankruptcy court jurisdiction over Medicare claims is derived from the same statute, the Fifth Circuit's decision will likely have further significant implications.

The Social Security Administration (SSA) determined that the debtor in *Benjamin* received an overpayment of Social Security benefits, thus entitling the SSA to recoup the overpayment from him by withholding some future Social Security benefits. [3] The SSA denied the debtor's request for waiver, and he properly appealed to an administrative law judge. [4] Before the appeal was decided, the debtor filed for bankruptcy under chapter 7 in May 2017 and initiated an adversary proceeding against the SSA. The debtor alleged that the SSA improperly recouped his benefits and sought recovery of the withheld amounts. [5] The SSA moved to dismiss for lack of subject-matter jurisdiction, arguing that the debtor must first exhaust the administrative appeal process, or alternatively, for failure to state a claim. [6] The district court affirmed the bankruptcy court's dismissal on jurisdictional grounds, resulting in the debtor's appeal to the Fifth Circuit. [7]

The sole issue before the Fifth Circuit was whether the bankruptcy court had jurisdiction to hear the debtor's claims. [8] In pertinent part, 42 U.S.C. § 405(h) states:

> No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as [provided in § 405(g)]. No 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 [Title II of the Social Security Act]. [9]

As the court explained, the third sentence of § 405(h) "strips district courts of the most obvious sources of federal jurisdiction for any claims arising under Title II of the Social Security Act." [10] The second sentence "then channels a certain class of those claims into § 405(g), which . . . grants jurisdiction to district courts to review final agency decisions made after a hearing." [11] Finding, however, that the bankruptcy court was *not* barred from relying on its general grant of jurisdiction in 28 U.S.C. § 1334(b) to hear the debtor's claims, the Fifth Circuit reversed and remanded for a more detailed determination of whether, notwithstanding jurisdiction under § 1334, those claims are channeled by § 405(h)'s second sentence into § 405(g): "If they are, then the [bankruptcy] court must determine if jurisdiction under § 405(g) exists. But if not, then the bankruptcy court has jurisdiction under § 1334 to hear Benjamin's claims." [12]

The Fifth Circuit's Analysis

The debtor advocated for plain reading of § 405(h) — *i.e.*, as a bar of jurisdiction under §§ 1331 and 1346, but not § 1334. [13] The SSA argued for the adoption of the approach of the Third, Seventh, Eighth and Eleventh Circuits: a bar of § 1334 jurisdiction as well, despite it not being listed in the statutory text. [14] The court reviewed several decisions of its sister circuits, among them the Seventh Circuit's *Bodimetric Health Services Inc. v. Aetna Life & Casualty*, the first to find that § 405(h)'s third sentence included a hidden jurisdictional bar. [15]

As originally enacted in 1939, § 405(h) barred federal courts of jurisdiction over all actions brought under 28 U.S.C. § 41, which at the time contained virtually *all* jurisdictional grants to federal courts, "now scattered throughout Title 28." [16] In 1984, Congress recodified and revised § 405(h) to its current form, which on its face deprives federal courts of jurisdiction over Social Security, Medicare and Medicaid disputes under §§ 1331 and 1346 *only*. [17] The codification revision was labeled in the relevant act as part of a litany of "Technical Corrections," and Congress instructed that none of the technical changes "shall be construed as changing or affecting any right, liability, status, or interpretation which existed (under the provisions of law involved) before [the amendments' effective] date." [18]

In *Bodimetric*, the Seventh Circuit found that this language "clearly expressed Congress's 'intent not to alter the substantive scope of section 405(h). Because the previous version of section 405(h) precluded judicial review of diversity actions, so too must newly revised section 405(h) bar these actions.'" [19] More recently, the Eleventh Circuit expanded upon this body of case law and held that § 405(h) specifically barred jurisdiction under *§ 1334* — reasoning that "the 1984 amendments to section 405(h) were a codification and not a substantive change." [20] The Eleventh Circuit's conclusion was based on the recodification canon: When legislatures codify the law, courts should presume that no substantive change was intended absent a clear indication otherwise. [21]

Acknowledging the recodification canon's usefulness in certain instances, the Fifth Circuit found it applicable only "in the absence of a clear indication from Congress that it intended to change the law's substance." [22] Finding the "most obvious source of congressional intent" to be the clear statutory text, the court rejected the notion of a hidden jurisdictional bar in § 405(h). "[Section 405(h)] mean[s] what it says. *And it says nothing about section 1334.*" [23] Finding that the recodification canon cannot be used to "trump clear text" that is otherwise unambiguous, the Fifth Circuit applied the plain meaning of § 405(h) — "a meaning that, everyone agrees, does not bar § 1334 jurisdiction." [24]

The court's inquiry did not end there. Noting that per another sentence of § 405(h) [25] § 405(g) only comes into play where a would-be plaintiff is challenging (1) a disability determination (2) for which the statute requires a hearing, the court remanded the case and instructed the bankruptcy court to determine whether the debtor's claims "are channeled by section 405(h)'s second sentence into section 405(g)." [26] If so, the bankruptcy court must determine whether it has jurisdiction over the debtor's claims under § 405(g). [27]

Benjamin highlights a circuit split of critical significance to those dealing with the insolvency of health care providers. Often, Medicare and Medicaid issues are inextricably entwined with other factors leading to a bankruptcy filing. If bankruptcy courts do not have the jurisdiction to decide reoccurring issues in health care bankruptcies — such as disputes over Medicare reimbursements — then the utility of having a single forum to address issues is severely affected. Until the Supreme Court weighs in on the recodification canon, this area will remain unsettled.

[1] No. 18-20185, 2019 U.S. App. LEXIS 14071 (5th Cir. May 10, 2019).

[2] *Sullivan v. Town & Country Home Nursing Servs. Inc.* (*In re Town & Country Home Nursing Servs. Inc.*), 963 F.2d 1146, 1155 (9th Cir. 1991).

[3] *Benjamin*, 2019 U.S. App. LEXIS 14071, at *2.

[4] *Id.* at *2–3. This appeal remained pending as of the date of the Fifth Circuit's opinion.

[5] *Id.* at *3.

[6] *Id.*

[7] *Id.* at *3–4.

[8] *Id.*

[9] 42 U.S.C. § 405(h) (2012); *see Benjamin*, 2019 U.S. App. LEXIS 14071, at *4.

[10] *Benjamin*, 2019 U.S. App. LEXIS 14071, at *5.

[11] *Id.*

[12] *Id.* at *18–19.

[13] *Id.* at *5.

[14] *Id.* at *5–6.

[15] *Id.* at *6 (citing *Bodimetric*, 903 F.2d 480, 488–90 (7th Cir. 1990)). *Bodimetric* evaluated whether § 405(h) stripped courts of their 28 U.S.C. § 1332 *diversity* jurisdiction to hear claims arising under the Medicare Act.

[16] *Benjamin*, 2019 U.S. App. LEXIS, at *6 (citations omitted).

[17] *Id.* (citations omitted).

[18] *Id.* at *6–7 (citations omitted).

[19] *Id.* at *7; *Bodimetric*, 903 F.2d at 489. The Third and Eighth Circuits adopted the *Bodimetric* reasoning to reach the same conclusions. *See 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).

[20] *Fla. Agency for Health Care Admin. v. Bayou Shores SNF LLC* (*In re Bayou Shores SNF LLC*), 828 F.3d 1297, 1314 (11th Cir. 2016).

[21] *Benjamin*, 2019 U.S. App. LEXIS, at *7 (citing *Bayou Shores*, 828 F.3d at 1314).

[22] *Id.* at *8–9.

[23] *Id.* *8–9, *15 (citations omitted). The court also cited Justice Scalia: "The new text is the law, and where it clearly makes a change, that governs. This is so even when the legislative history . . . expresses the intent to make no change." *Id.* at *9 (quoting A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 257 (2012)).

[24] *Id.* at *8, *10.

[25] *Id.* at *16; *see* 42 U.S.C. § 405(h) (2012) ("No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as [provided in § 405(g)].").

[26] *Benjamin*, 2019 U.S. App. LEXIS, at *17–19.

[27] *Id.* at *19.

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