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# KILLING THE PATIENT TO CURE THE DISEASE: MEDICARE’S JURISDICTIONAL BAR DOES NOT APPLY TO BANKRUPTCY COURTS

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*Michael B. Potere\*\**

## ABSTRACT

*Sections 405(g) and 405(h) of the Social Security Act require exhaustion of administrative remedies prior to judicial review for any claims brought under the Medicare Act. Generally, these claims arise when the Centers for Medicare and Medicaid Services decides that a hospital owes the government for prior overpayment. The appeal of such decisions can take years, potentially forcing hospitals to close due to a lack of continued Medicare payments. As such, filing for bankruptcy protection quickly becomes one of the hospital's primary avenues for survival. Historically, however, some bankruptcy courts have looked to the legislative context of § 405(h) and determined that bankruptcy courts lack jurisdiction over Medicare claims prior to the exhaustion of administrative remedies. This Article argues that such an interpretation is incorrect because the plain language of § 405(h) renders it inapplicable to a federal bankruptcy court's jurisdictional grant, and is also contrary to the Bankruptcy Code's purpose.*

## INTRODUCTION

Acute care hospitals and other providers of goods and services to Medicare beneficiaries face a very difficult situation. Many of the patients treated by hospitals, the supplies provided to patients in hospitals, and numerous other goods and services, are paid for by the Medicare program.<sup>1</sup> However, if the

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<sup>1</sup> The Medicare Program is a federal health insurance program for people age 65 or older, people under age 65 with certain disabilities, and people of all ages with permanent kidney failure requiring dialysis or a kidney transplant. The Medicare Program has three parts: Part A Hospital Insurance covers hospice care, some

Centers for Medicare and Medicaid Services (“CMS”) (or a private contractor working under contract to CMS), which administers the Medicare Program, decide the hospital owes the government for a prior overpayment, the Medicare Program arguably has the right to recoup the amount it believes it is owed by offsetting it against monies otherwise payable to the hospital. The hospital has the right to appeal the decision, but in the meantime, its cash flow could be reduced to a point where it cannot stay in business and provide its services to Medicare beneficiaries. The right to appeal CMS’s decision is, in many instances, a meaningless right, because it takes years to proceed through the Medicare Program’s appeals process. In the meantime, many hospitals risk being forced to close their doors during this time because they cannot pay their bills if Medicare does not pay them.

This Article addresses a unique jurisdictional issue that can shorten the time required to obtain judicial review of a CMS decision by going directly to federal bankruptcy court. Two bankruptcy court decisions from 2015, *In re Bayou Shores, SNF, LLC*<sup>2</sup> and *In re Nurses’ Registry and Home Health Corp.*,<sup>3</sup> held that Medicare’s jurisdictional bar under 42 U.S.C. § 405(h), which would otherwise prevent judicial review of CMS decisions prior to exhausting Medicare’s appeals process, does not apply to federal bankruptcy courts. If bankruptcy courts continue to make this finding consistently (as this Article argues they should), then filing for bankruptcy would become an important option available to health care providers and suppliers to resolve disputes with CMS and the Medicare Program when they would otherwise go out of business absent the speedy resolution of these disputes. However, bankruptcy courts (as well as federal district courts and circuit courts of appeal) have debated this issue for more than thirty years and are not in agreement on the outcome.

This Article concludes that debtors in bankruptcy court are exempt from 42 U.S.C. § 405(h)’s exhaustion requirement because its plain language does not bar bankruptcy court jurisdiction prior to exhaustion—thus, bankruptcy courts do not have to wait. However, some language in § 405(h)’s “legislative

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home health care, inpatient care in hospitals, and some care in skilled nursing facilities; Part B Medical Insurance covers physician care and outpatient care among other things; and Part C covers prescription drugs. CMS (formerly known as the Health Care Financing Administration), is a component of the United States Department of Health and Human Services. See Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (codified as amended at 42 U.S.C. §§ 1395 to 1395kkk-1).

<sup>2</sup> 525 B.R. 160, 166 (Bankr. M.D. Fla. 2014).

<sup>3</sup> 533 B.R. 590, 593–94 (Bankr. E.D. Ky. 2015).

history”<sup>4</sup> has caused courts to ignore the statute’s plain language in favor of trying to interpret what Congress meant when it passed § 405(h). This analysis is flawed; § 405(h)’s plain language should govern its interpretation and application. Part I of this Article discusses § 405(h)’s background and legislative history. Part II outlines the current state of the Medicare appeals process, noting the delays that plague the system. Part III discusses the requirement that the proceedings “arise under” the Medicare Act. Part IV analyzes the analytical framework in which § 405(h) has been interpreted and concludes that § 405(h)’s plain language, not its legislative history, should govern its application.

## I. BACKGROUND ON 42 U.S.C. § 405(h) AND ITS ANALYTICAL FRAMEWORK: MEDICARE’S JURISDICTIONAL BAR ABSENT EXHAUSTION OF ADMINISTRATION REMEDIES

### A. *Section 405(h) and Its Legislative History*

The Social Security Act requires exhaustion of administrative remedies prior to judicial review through 42 U.S.C. §§ 405(g) and (h), and this requirement specifically applies to the Medicare Act—which itself has been described by courts as one of the “most completely impenetrable texts within human experience”<sup>5</sup>—via 42 U.S.C. §§ 1395ii (incorporating § 405(h)) and 1395ff(c) (incorporating § 405(g)).<sup>6</sup> The relevant provisions state:

#### **42 U.S.C. § 405(g) Judicial Review**

Any individual, after any final decision of the Commissioner . . . may obtain a review of such decision by a civil action. . . . The court shall

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<sup>4</sup> In 1984, § 405(h) was amended by the Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2663(a)(4)(D), 98 Stat. 1162. The language cited to by courts to read beyond § 405(h)’s plain language is contained in the Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2664(b), 98 Stat. 1162. Because § 2664(b) is itself legislation, it cannot be “legislative history.” The analysis courts must employ when considering § 2663 in conjunction with § 2664 is that of statutory construction, and not legislative intent. Be that as it may, this Article uses the “legislative history” label to refer to arguments based on § 2664(b) to mirror the language, however imprecise, used by the courts.

<sup>5</sup> *Cooper Univ. Hosp. v. Sebelius*, 636 F.3d 44, 45 (3d Cir. 2010) (internal quotation marks and citations omitted).

<sup>6</sup> *See also* 42 U.S.C. § 1395oo(f) (West Supp. 1977) (added in 1974). Generally, the concept of requiring exhaustion of administrative remedies provides that a party is not entitled to judicial relief unless and until available administrative remedies have been exhausted. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 50–51 (1938). The doctrine of exhaustion of administrative remedies is applicable in bankruptcy cases. *See, e.g., In re Cottrell*, 213 B.R. 33 (M.D. Ala. 1997) (discussing statutory and non-statutory exhaustion).

have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner . . . with or without remanding the cause for a rehearing. . . . The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions.

#### **42 U.S.C. § 405(h) Finality of Commissioner's Decision**

The findings and decision of the Commissioner . . . after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision . . . shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, . . . or any officer or employee thereof shall be brought under § 1331 or 1346 of title 28 to recover on any claim arising under this subchapter.<sup>7</sup>

Absent a final decision by the applicable administrative body, federal courts cannot take jurisdiction over a disputed issue arising under the Social Security or Medicare Acts. The concept underlying this requirement is that a party is not entitled to federal judicial relief unless and until available administrative remedies have been exhausted.<sup>8</sup> The question then becomes whether such a jurisdictional limitation applies only to those suits brought pursuant to 28 U.S.C. §§ 1331 and 1336, or if § 405(h) applies to other federal jurisdictional grants, including the bankruptcy courts' jurisdictional grant in 42 U.S.C. § 1334.

Section 405 was enacted in 1939 as part of the Social Security Act.<sup>9</sup> At that time, it barred jurisdiction under 28 U.S.C. § 41.<sup>10</sup> Section 41 contained

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<sup>7</sup> 42 U.S.C. §§ 405(g), (h) (2015). In this discussion, we address an instance where the exhaustion requirement is based on a statute. There are cases, however, where courts have required parties to exhaust their administrative remedies based on the court's discretion, rather than a statute. In such cases requiring the exhaustion of administrative remedies, it is generally thought to encourage more economical and less formal means of dispute resolution, as well as to promote efficiency. *See generally* Stephens v. Pension Benefit Guar. Corp., 755 F.3d 959, 964–66 (D.C. Cir. 2014) (discussing ERISA).

<sup>8</sup> *See generally* Myers, 303 U.S. at 50–51.

<sup>9</sup> 42 U.S.C. § 405(h) (Supp. V 1939); BP Care, Inc. v. Thompson, 398 F.3d 503, 515 n.11 (6th Cir. 2005). *See* Pub. L. No. 76-379, § 205(h), 53 Stat. 1360, 1371 (1939) (amendment to Social Security Act adding jurisdictional bar now found at 42 U.S.C. § 405(h)).

<sup>10</sup> In 1939, 42 U.S.C. § 405(h) stated:

The findings and decision of the Board after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Board shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Board, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under sections 401–09 of this chapter.

twenty-eight sub-sections that granted the United States district courts “original jurisdiction” over various types of claims, including, in sub-section 19, “all matters and proceedings in bankruptcy.”<sup>11</sup> In 1948, when Congress revised the U.S. Code, it extracted these jurisdictional grants from § 41 and re-codified some of them as 28 U.S.C. §§ 1331 to 1348, 1350 to 1357, 1359, 1397, 2361, 2401, and 2402.<sup>12</sup> The re-codification included numerous substantive changes, such as removing the designation of a married woman as “disabled” for the purpose of tolling of the statute of limitations for her to bring a claim against the United States government.<sup>13</sup> Although Congress re-wrote § 41, it did not correspondingly update § 405(h), which maintained its reference to § 41 for the next three decades. As such, § 405(h) was applied as though it referred to all of the jurisdictional grants that previously existed in § 41, largely due to the proposition in the 1975 Supreme Court decision *Weinberger v. Salfi* that the 1948 re-codification of 28 U.S.C. § 41 “caused no substantive change in the coverage of [§ 405(h)’s] jurisdictional bar.”<sup>14</sup>

In 1976, one year after the *Weinberger* decision, the Office of Law Revision Counsel<sup>15</sup> revised § 405(h) by removing its reference to 28 U.S.C. § 41 and replacing it with references to 28 U.S.C. §§ 1331 (federal question jurisdiction) and 1346 (suits against the United States).<sup>16</sup> Seemingly (and to at least one court, “clearly”), these were the only jurisdictional grants the Office

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*See also BP Care, Inc.*, 398 F.3d at 515 n.11.

<sup>11</sup> 28 U.S.C. § 41 (1946), 36 Stat. 1091, 1093 (1911), 28 U.S.C. § 41(19) (1934).

<sup>12</sup> Pub. L. No. 80-773, 62 Stat. 869, 930–35 (1948); 28 U.S.C. §§ 1331–1348, 1350–1357, 1359, 1397, 2361, 2401, 2402 (1952); *see also In re St. Mary Hosp.*, 123 B.R. 14, 17 (E.D. Pa. 1991). Absent from the re-codification was, for example, § 41(4)’s grant of original jurisdiction in the federal district courts for “all suits arising under any law relating to the slave trade.” 28 U.S.C. § 41(4) (1946).

<sup>13</sup> *Compare* 28 U.S.C. § 41(20) (1946) (“The claims of married women, first accrued during marriage . . . entitled to the claim, shall not be barred if the suit be brought within three years after the disability has ceased . . .”), *with* 28 U.S.C. § 2401 (1952) (“The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.”).

<sup>14</sup> *In re Nurses’ Registry & Home Health Corp.*, 533 B.R. 590, 594 (Bankr. E.D. Ky. 2015) (citing *Weinberger v. Salfi*, 422 U.S. 749, 756 n.3 (1975) (“The literal wording of this section bars actions under 28 U.S.C. § 41. At the time § 405(h) was enacted, and prior to the 1948 re-codification of Title 28, § 41 contained all of that title’s grants of jurisdiction to United States district courts, save for several special-purpose jurisdictional grants of no relevance to the constitutionality of Social Security statutes.”)).

<sup>15</sup> The Office of the Law Revision Counsel is part of the United States House of Representatives and publishes the United States Code. *See* 2 U.S.C. § 285(b) (2015). The United States Code contains the general and permanent laws of the United States.

<sup>16</sup> 28 U.S.C. §§ 1331, 1346; *BP Care, Inc. v. Thompson*, 398 F.3d 503, 515 n.11 (6th Cir. 2005).

of Law Revision Counsel believed were relevant to Medicare Act claims.<sup>17</sup> And so, after almost three decades, the Social Security Act caught up with and incorporated the changes in the Code pertaining to federal court jurisdiction.

Eight years later, in 1984, Congress expressly enacted the Law Revision Counsel's changes as part of the Deficit Reduction Act of 1984 ("DRA").<sup>18</sup> As part of the DRA, Congress enacted a provision entitled, "Effective Dates," which stated in sub-section (b) that:

Except to the extent otherwise specifically provided in this subtitle, the amendments made by section 2663 shall be effective on the date of the enactment of this Act; *but 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.*<sup>19</sup>

Some courts have found that this provision represents Congress's caution to the courts not to interpret § 2663's "technical corrections" as "substantive changes" to § 405(h).<sup>20</sup> In so doing, however, these courts have ignored § 405(h)'s facially limited applicability to §§ 1331 or 1346.<sup>21</sup>

### *B. Section 405(h)'s Purpose and Application*

Section 405(h) serves two primary purposes. First, its rigorous enforcement is said to aid in and benefit from the development of the Secretary of Health and Human Services's expertise.<sup>22</sup> Second, it is intended to prevent "disgruntled" claimants from bringing actions in federal court instead of exhausting their remedies with the agency.<sup>23</sup>

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<sup>17</sup> *Nurses' Registry*, 533 B.R. at 594 ("Clearly the Office of Law Revision Counsel believed that these grants of jurisdiction were the only ones relevant to SSA or Medicare Act claims.").

<sup>18</sup> Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2663(a)(4)(D), 98 Stat. 1162 ("Section 205(h) of such Act is amended by striking out 'section 24 of the Judicial Code of the United States' and inserting in lieu thereof 'section 1331 or 1346 of title 28, United States Code . . . .'). Changes to a statute by the Law Revision Counsel are not binding absent enactment by Congress.

<sup>19</sup> Deficit Reduction Act § 2664(b) (emphasis added).

<sup>20</sup> *E.g., In re St. Mary Hosp.*, 123 B.R. 14, 17 (E.D. Pa. 1991).

<sup>21</sup> *See Midland Psychiatric Assocs., Inc. v. United States*, 145 F.3d 1000, 1004 (8th Cir. 1998) (applying a jurisdictional bar in a case invoking 28 U.S.C. § 1332); *Bodimetric Health Servs., Inc. v. Aetna Life & Cas.*, 903 F.2d 480, 488-89 (7th Cir. 1990) (applying a jurisdictional bar in a case invoking 28 U.S.C. § 1332); *Total Renal Labs., Inc. v. Shalala*, 60 F. Supp. 2d 1323, 1331 (N.D. Ga. 1999) (applying a jurisdictional bar in a case invoking 28 U.S.C. § 1361).

<sup>22</sup> *E.g., St. Mary Hosp.*, 123 B.R. at 17.

<sup>23</sup> *United States v. Tenet Healthcare Corp.*, 343 F. Supp. 2d 922, 926-27 (C.D. Cal. 2004).

With these purposes in mind, hundreds of courts, including dozens of bankruptcy courts, have analyzed the applicability of § 405(h) since the 1980s. During that time, courts have elaborated on the legal standard for determining whether § 405(h) applies to bar a court's jurisdiction. The first step in the analysis is to determine whether the claim "arises under" the Medicare Act.<sup>24</sup> If it does, the next step—and the question we address herein—is whether the claim falls within § 405(h)'s jurisdiction: "under § 1331 or 1346 of title 28."<sup>25</sup> As discussed in more detail below, one line of cases looks to § 405(h)'s legislative context and defines that jurisdictional grant broadly to include all forms of federal court jurisdiction, including bankruptcy jurisdiction under 28 U.S.C. § 1334;<sup>26</sup> the other line of cases reasons (correctly, in our view) that the plain language of § 405(h) only restricts judicial review prior to exhaustion for claims brought under 28 U.S.C. §§ 1331 and 1346.<sup>27</sup>

A claim "arises under" the Medicare Act when: (1) the "standing and substantive basis for the presentation" of the claim is the Medicare Act;<sup>28</sup> and (2) the claim is "inextricably intertwined" with a claim for Medicare benefits.<sup>29</sup> In evaluating whether a claim arises under the Medicare Act, courts have looked beyond whether the claim was allegedly brought under the Constitution, other federal statutes, or even state law, to find that the claim nevertheless arose under the Medicare Act because it was inextricably intertwined with the Medicare Act.<sup>30</sup> Courts have also "refused to treat the remedy sought as dispositive of the 'arising under' question."<sup>31</sup> In essence, the issue as to whether a claim "arises under" the Medicare Act is very broadly interpreted.<sup>32</sup>

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<sup>24</sup> 42 U.S.C. § 405(h) (2015); *see also* *Quinones v. United Health Grp. Inc.*, No. 14-00497, 2015 WL 3965961, at \*4 (D. Haw. June 30, 2015); *Nat'l Ass'n for Home Care & Hospice, Inc. v. Burwell*, 77 F. Supp. 3d 103, 109 (D.D.C. 2015); *In re St. Johns Home Health Agency, Inc.*, 173 B.R. 238, 244–45 (Bankr. S.D. Fla. 1994).

<sup>25</sup> *E.g.*, *Bodimetric Health Servs.*, 903 F.2d at 488.

<sup>26</sup> *E.g.*, *Nicole Med. Equip. & Supply, Inc. v. TriCenturion, Inc.*, No. 10-389, 2011 WL 1162052, at \*14 n.24 (E.D. Pa. Mar. 28, 2011).

<sup>27</sup> *E.g.*, *In re Town & Country Home Nursing Servs., Inc.*, 963 F.2d 1146, 1155 (9th Cir. 1991).

<sup>28</sup> *Do Sung Uhm v. Humana, Inc.*, 620 F.3d 1134, 1141 (9th Cir. 2010) (quoting *Heckler v. Ringer*, 466 U.S. 602, 615 (1984)).

<sup>29</sup> *Id.*

<sup>30</sup> *See id.* at 1141–42.

<sup>31</sup> *Id.* at 1142.

<sup>32</sup> *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 14 (2000) ("Claims for money, claims for other benefits, claims of program eligibility, and claims that contest a sanction or remedy may all similarly rest upon individual fact-related circumstances, may all similarly dispute agency policy determinations, or may all similarly involve the application, interpretation, or constitutionality of interrelated regulations or statutory



If a claim both arises under the Medicare Act and falls within § 405(h)'s jurisdictional bar, a court may not review the claim unless it has received a final decision from the Secretary.<sup>33</sup> This finality requirement has two elements. First, it has a non-waivable requirement that the claim has been “presented to” the Secretary.<sup>34</sup> Second, it has a waivable requirement that the Secretary’s administrative remedies have been “exhausted,” commonly known as the “exhaustion requirement.”<sup>35</sup> Determining whether the exhaustion requirement can be waived in any case is not “mechanical” and should be “guided by” the exhaustion requirement’s underlying policies.<sup>36</sup> Instead, and after the claim has been “presented to” the Secretary, courts analyze three factors from the Supreme Court’s decision in *Mathews v. Eldridge* to determine if the exhaustion requirement should be waived: (1) whether the claim is “collateral” to the demand for benefits, (2) whether exhaustion would be “futile,” and (3) whether the plaintiff would suffer “irreparable harm” if required to navigate the agency’s review process.<sup>37</sup> A claim is “collateral” when it challenges an agency policy and the outcome of the merits of that challenge does not impact the plaintiff’s benefits award—in other words, “if [the claim] doesn’t automatically increase benefits if successful.”<sup>38</sup> Whether a claim is “futile” turns on its futility within the context of the Medicare system—in other words, whether favorable agency review could actually grant the plaintiff the relief sought.<sup>39</sup> Finally, “irreparable harm” results when any damage caused to the plaintiff by the delay awaiting final agency review cannot be remedied with money.<sup>40</sup> In addition to the *Eldridge* factors, courts will weigh the harm to the government and the purpose of the Medicare Act when determining whether to waive a plaintiff’s exhaustion requirement.<sup>41</sup> For our purposes, however, we focus on the period before the *Eldridge* exhaustion review and consider

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provisions. There is no reason to distinguish among them in terms of the language or in terms of the purposes of § 405(h).”).

<sup>33</sup> *E.g.*, Nat’l Ass’n for Home Care & Hospice, Inc. v. Burwell, 77 F. Supp. 3d 103, 109 (D.D.C. 2015) (citing *Mathews v. Eldridge*, 424 U.S. 319, 326 (1976)).

<sup>34</sup> *E.g.*, *id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* (citing *Bowen v. City of New York*, 476 U.S. 467, 484 (1986)).

<sup>37</sup> *Miller v. Burwell*, No. 14-CV-4245, 2015 WL 2257278, at \*4 (N.D. Ill. May 11, 2015) (citing *Mathews v. Eldridge*, 424 U.S. 319, 330 (1976); *Martin v. Shalala*, 63 F.3d 497, 504 (7th Cir.1995)).

<sup>38</sup> *Miller*, 2015 WL 2257278, at \*6.

<sup>39</sup> *Id.* at \*7.

<sup>40</sup> *Id.* (quoting *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 13 (2000)).

<sup>41</sup> *E.g.*, *V.N.A. of Greater Tift Cty. v. Heckler*, 711 F.2d 1020, 1032 (11th Cir.1983), *cert. denied* 466 U.S. 936 (1984).

whether § 405(h) applies to bar a bankruptcy court's jurisdiction prior to exhaustion in the first place.

## II. THE CURRENT STATE OF MEDICARE CLAIMS DISPUTES PROCESS AND APPEALS

### A. *Steps in the Medicare Appeals Process*

There are several ways a hospital can become involved in a Medicare dispute. First, Medicare could deny a hospital's claim or a group of claims. Second, Medicare could review a hospital's annual cost report and decide the hospital was overpaid. And third, Medicare could suspend payments due to concerns about a hospital's billing practices, including allegations of fraud.

Regarding the first avenue, the Medicare appeals process for a denied hospital claim contains five distinct steps. Medicare contractors, under the supervision of CMS, conduct the first two levels of review.<sup>42</sup> First, the hospital could ask the Medicare Administrative Contractor ("MAC") (also referred to as a "fiscal intermediary" ("FI")) that actually denied its claims or declared the overpayment to "redetermine" its decision. Initial submitted claims are usually quite rudimentary, but to commence the redetermination the hospital has to compile documents that support its claim and file the appeal within 120 days of the denial.<sup>43</sup> If that redetermination is denied (the MAC has 60 days to act), the hospital has 180 days to file for reconsideration to the Qualified Independent Contractor ("QIC").<sup>44</sup> If this appeal is denied (the QIC has 60 days to decide), the hospital can appeal to an administrative law judge ("ALJ") who operates under the supervision of the Office of Medicare Hearings and Appeals ("OMHA").<sup>45</sup> If the ALJ decides against the hospital, the next level of appeal is the Medicare Appeals Council of the Departmental Appeals Board ("DAB").<sup>46</sup> The DAB decision is the "final decision" referenced in § 405(g),

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<sup>42</sup> Courts have not allowed suits against these private contractors to proceed as a way to avoid the jurisdictional bar to suing the federal agency (CMS) itself. *See, e.g.,* Bodimetric Health Services, Inc. v. Aetna Life & Cas., 903 F.2d 480, 487–88 (7th Cir. 1990). This is because Medicare contractors are merely conduits for payment and have no vested interest in the Medicare funds they administer. 42 U.S.C. § 1395kk-1(a)(4)(A), (B) (2015).

<sup>43</sup> 42 C.F.R. § 405.942(a) (2015).

<sup>44</sup> 42 C.F.R. § 405.962(a).

<sup>45</sup> 42 C.F.R. § 405.1000.

<sup>46</sup> 42 C.F.R. § 405.1100.

so that only after the DAB decides can a federal court have jurisdiction over the matter in dispute.<sup>47</sup>

Another avenue a hospital may take through the Medicare appeals process is based on a review of a hospital's cost report. At the end of a hospital's fiscal year, it files a "cost report" that describes the actual claims submitted during that year. A MAC or FI reviews the cost report and makes an initial determination of whether the hospital was overpaid or underpaid during the cost year.<sup>48</sup> If the hospital was overpaid, the MAC or FI will issue a notice of overpayment, and if payment is not forthcoming, may recover the overpayment through recoupment of outgoing payments. The MAC or FI subsequently performs a full audit of the cost report and issues a Notice of Program Reimbursement ("NPR"), which is the MAC's final determination as to the alleged overpayment.<sup>49</sup> The MAC has seven years to issue the NPR, however, and thus the process can be lengthy. The hospital may appeal an adverse NPR to the Provider Reimbursement and Review Board ("PRRB"),<sup>50</sup> and it is only after receiving a PRRB decision that a hospital may obtain judicial review of an adverse NPR in federal district court.<sup>51</sup>

Finally, if there are questions about a hospital's claims against Medicare, the Medicare Program can institute administrative measures, such as a prepayment review of claims or a suspension of payments, which may result in delayed, smaller, or even the absence of payments to the hospital.<sup>52</sup> If a payment suspension is initiated, the hospital can submit a rebuttal that the CMS or the MAC reviews. A suspension is generally not appealable, but once a determination of an overpayment is made, the same appeals process for denied claims (described above) applies.

So, naturally, the question is "how long does all this take?" The answer: it can be a really long time.<sup>53</sup> Why? Because review at the ALJ level is broken.

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<sup>47</sup> Review by the DAB is discretionary, and if it decides to review the ALJ decision, the ALJ decision becomes the "final" decision.

<sup>48</sup> 42 C.F.R. § 413.20.

<sup>49</sup> 42 C.F.R. § 405.1803.

<sup>50</sup> The PRRB reviews costs reports and handles "provider" payment disputes that are not claims related. MACs also review "claims" including "supplier" claim payment issues. (Suppliers are not providers, so MACs use a different process for claims payment issues). Providers also use the ALJ process for claims disputes.

<sup>51</sup> 42 U.S.C. § 1395oo(a) (2015); 42 C.F.R. § 405.1835.

<sup>52</sup> 42 C.F.R. §§ 405.370–75. As a general rule, suspensions are limited to 180 days, with a possible one-time 180-day extension. However, there are some exceptions that allow longer suspensions.

<sup>53</sup> The average processing time for appeals decided by the OMHA in fiscal year 2015 was 547.1 days, a number that may be underreporting the problem because an increasing number of appeals in 2015 also created

The OMHA is currently staffed to handle approximately 72,000 claims on appeal in a year. However, as of July 1, 2014, it had over 800,000 claims pending on appeal and was getting an additional 10,000 to 16,000 claim appeals per week (while it can only dispose of approximately 1,300 claims per week).<sup>54</sup> The situation is so bad that as of June 2015, Medicare offered to settle over 300,000 appeals based on inpatient claims for sixty-eight cents on the dollar.<sup>55</sup>

### *B. A Hospital's Dilemma*

As discussed above, a hospital's appeals process can take a long time. And once the QIC's decision is made, CMS can institute recoupment<sup>56</sup> against the hospital's ongoing payments (and while the ALJ decision is pending). Although the hospital will be repaid if it later prevails in the appeals process, this creates a potentially fatal dilemma. On the one hand, the hospital must exhaust the administrative process before appealing the Medicare Program's decision in federal district court. Yet, the delay associated with exhausting the administrative process could put the hospital out of business by reducing the hospital's cash flow to a point where it could not continue to operate pending the administrative decision. Thus, the hospital's only viable option may be to eschew the administrative process by filing for bankruptcy. Bankruptcy courts, in turn, have been wrestling with the issue of whether they have jurisdiction over this type of matter for decades.

## III. SECTION 405(h)'S APPLICATION IN BANKRUPTCY CASES

Although 28 U.S.C. § 1334 provides the statutory basis for bankruptcy courts' jurisdiction and expressly makes that jurisdiction "exclusive,"<sup>57</sup> courts

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a 20–24 week delay in even docketing new requests into OMHA's case processing system. *Adjudication Timeframes*, OFFICE OF MEDICARE HEARINGS AND APPEALS, [http://www.hhs.gov/omha/important\\_notice\\_regarding\\_adjudication\\_timeframes.html](http://www.hhs.gov/omha/important_notice_regarding_adjudication_timeframes.html) (last visited December 21, 2015).

<sup>54</sup> *Office of Medicare Hearings and Appeals Workloads: Hearing on Exploring Medicare Appeal Reform Before the H. Comm. on Oversight & Gov't Reform & the Subcomm. on Energy Policy, Healthcare & Entitlements*, 113th Cong. (2014) (statement of Nancy J. Griswold, Chief A.L.J., Office of Medicare Hearings and Appeals), [www.hhs.gov/asl/testify/2014/07/t20140710a.html](http://www.hhs.gov/asl/testify/2014/07/t20140710a.html) (last visited on Feb. 13, 2015).

<sup>55</sup> *Inpatient Hospital Reviews*, CENTERS FOR MEDICARE & MEDICAID SERVICES (Sept. 23, 2015, 9:26 PM), <https://www.cms.gov/research-statistics-data-and-systems/monitoring-programs/medicare-ffs-compliance-programs/medical-review/inpatienthospitalreviews.html>.

<sup>56</sup> Recoupment occurs when Medicare recovers an overpayment by withholding from ongoing payments to a provider.

<sup>57</sup> 28 U.S.C. § 1334 (2015) (emphasis added).

analyzing § 405(h) in the bankruptcy context are nevertheless split on whether its jurisdictional limitation to claims “brought under § 1331 or 1346 of title 28” also bars judicial review absent exhaustion under the bankruptcy jurisdictional grant, § 1334. The line of cases finding that bankruptcy cases do not fall under § 405(h) primarily rely on § 405(h)’s plain language (which is limited to §§ 1331 and 1346), as well as § 1334’s grant of exclusive jurisdiction to the bankruptcy courts over the debtor’s estate.<sup>58</sup> The line of cases holding that bankruptcy claims do fall within § 405(h)’s jurisdiction bar and require presentment and exhaustion to the Secretary before seeking judicial review primarily rely upon § 405(h)’s legislative context, which the courts argue implicitly cites to every jurisdictional grant contained in the former 28 U.S.C. § 41, and therefore includes bankruptcy jurisdiction.<sup>59</sup>

Outside of the bankruptcy context, courts are understandably less likely to find that parties are able to avoid § 405(h)’s jurisdictional bar. For example, courts have held that claims brought under mandamus jurisdiction (28 U.S.C. § 1361) and diversity jurisdiction (28 U.S.C. § 1332) are not excused from Medicare’s exhaustion requirement.<sup>60</sup> Although § 405(h)’s plain language

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<sup>58</sup> *E.g.*, *In re Nurses’ Registry & Home Health Corp.*, 533 B.R. 590, 595 (Bankr. E.D. Ky. 2015); *In re Bayou Shores SNF, LLC*, 525 B.R. 160, 166 (Bankr. M.D. Fla. 2014); *In re Consol. Med. Transp., Inc.*, 300 B.R. 435, 445 (Bankr. N.D. Ill. 2003); *In re Slater Health Ctr., Inc.*, 294 B.R. 423, 428 (Bankr. D.R.I. 2003), *vacated in part*, 306 B.R. 20 (D.R.I. 2004), *aff’d*, 398 F.3d 98 (1st Cir. 2005); *First Am. Health Care of Ga., Inc. v. U.S. Dep’t of Health & Human Servs.*, 208 B.R. 985, 989 (Bankr. S.D. Ga. 1996), *vacated and superseded*, No. 96-2007, 1996 WL 282149 (Bankr. S.D. Ga. Mar. 11, 1996); *In re Rusnak*, 184 B.R. 459, 462–63 (Bankr. E.D. Pa. 1995); *In re Healthmaster Home Health Care, Inc.*, No. 95-01031A, 1995 WL 928920, at \*1 (Bankr. S.D. Ga. Apr. 13, 1995); *In re Univ. Med. Ctr., Inc.*, 973 F.2d 1065, 1072 (3d Cir. 1992); *In re Town & Country Home Nursing Servs., Inc.*, 963 F.2d 1146, 1155 (9th Cir. 1991); *In re Shelby Cty. Healthcare Servs. of Ala., Inc.*, 80 B.R. 555, 559–60 (Bankr. N.D. Ga. 1987); *In re Clawson Med., Rehab. & Pain Care Ctr., P.C.*, 9 B.R. 644, 648 (Bankr. E.D. Mich.), *rev’d*, 12 B.R. 647 (E.D. Mich. 1981).

<sup>59</sup> *E.g.*, *In re Hodges*, 364 B.R. 304, 306 (Bankr. N.D. Ill. 2007) (analyzing in the Social Security context); *In re House of Mercy, Inc.*, 353 B.R. 867, 872 (Bankr. W.D. La. 2006); *Excel Home Care, Inc. v. U.S. Dep’t of Health & Human Servs.*, 316 B.R. 565, 572 (D. Mass. 2004); *U.S. Dep’t of Health & Human Servs. v. James*, 256 B.R. 479, 481 (W.D. Ky. 2000); *In re Hosp. Staffing Servs., Inc.*, 258 B.R. 53, 56 (S.D. Fla. 2000); *In re Mid-Delta Health Sys., Inc.*, 251 B.R. 811, 816 (Bankr. N.D. Miss. 1999); *In re Tri County Home Health Servs., Inc.*, 230 B.R. 106 (Bankr. W.D. Tenn. 1999); *In re S. Inst. for Treatment & Evaluation, Inc.*, 217 B.R. 962, 965 (Bankr. S.D. Fla. 1998); *In re AHN Homecare, LLC*, 222 B.R. 804, 812 (Bankr. N.D. Tex. 1998); *In re Home Comp Care, Inc.*, 221 B.R. 202, 206 (N.D. Ill. 1998); *In re Orthotic Ctr., Inc.*, 193 B.R. 832, 835 (N.D. Ohio 1996); *In re St. Johns Home Health Agency, Inc.*, 173 B.R. 238, 245–46 (Bankr. S.D. Fla. 1994); *In re Upsher Labs., Inc.*, 135 B.R. 117, 119 (Bankr. W.D. Mo. 1991); *In re St. Mary Hosp.*, 123 B.R. 14, 17 (E.D. Pa. 1991); *In re Visiting Nurse Ass’n of Tampa Bay, Inc.*, 121 B.R. 114 (Bankr. M.D. Fla. 1990); *In re Berger*, 16 B.R. 236, 237–38 (Bankr. S.D. Fla. 1981); *Clawson*, 12 B.R. at 653.

<sup>60</sup> *E.g.*, *BP Care, Inc. v. Thompson*, 398 F.3d 503, 515 (6th Cir. 2005) (mandamus jurisdiction); *Bodimetric Health Servs., Inc. v. Aetna Life & Cas.*, 903 F.2d 480, 488–89 (7th Cir. 1990) (diversity jurisdiction); *Nicole Med. Equip. & Supply, Inc. v. TriCenturion, Inc.*, No. 10-389, 2011 WL 1162052, at \*4

makes this reading strained, the outcome at least makes more sense in the context of mandamus and diversity jurisdiction because those jurisdictional grants are more susceptible to concealing a Medicare claim under the guise of another claim to improperly avoid going through the Medicare appeals process. And, more importantly, the parties employing mandamus or diversity statutes in a federal district court may not face the same potential fate as a hospital that has initiated bankruptcy proceedings: slow resolution of the claim by the Medicare appeals process could be that hospital's death knell. In short, debtors in bankruptcy courts fighting for their survival should be treated differently under the law.

#### A. Overview of § 405(h) Litigation in Bankruptcy Courts

##### I. In re Clawson Medical, Rehabilitation and Pain Care Center

Three cases capture the bulk of the substantive arguments employed in the analysis between § 405(h) and bankruptcy jurisdiction. Among the first cases to discuss the issue, 1981's *In re Clawson Medical, Rehabilitation and Pain Care Center*,<sup>61</sup> also happens to be among the most comprehensive. *Clawson* involved a Medicare service provider that sought the bankruptcy court's order enjoining Medicare from taking actions that would have "reduced the debtor's revenues below levels at which the business can be operated."<sup>62</sup> The *Clawson* court noted that this factual context was "becoming increasingly familiar to the courts," albeit not in the bankruptcy context.<sup>63</sup> The debtor alleged that the changes in its Medicare payments rendered the continuation of its business untenable and, combined with delays in the Medicare appeals review process, would cause it to cease operations.<sup>64</sup> The bankruptcy court granted the debtor's motion.<sup>65</sup>

The *Clawson* court first reasoned that the Bankruptcy Reform Act of 1978<sup>66</sup> gave the bankruptcy courts "exclusive jurisdiction of the debtor's

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(E.D. Pa. Mar. 28, 2011) (diversity jurisdiction); *Younes v. Burwell*, No. 15-11225, 2015 WL 3556689, at \*2 (E.D. Mich. Apr. 2, 2015) (diversity jurisdiction).

<sup>61</sup> 9 B.R. 644.

<sup>62</sup> *Id.* at 646.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 649-50, 652.

<sup>66</sup> Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C. § 301). At the time, the bankruptcy jurisdiction statute was 28 U.S.C. § 1471(e) (1978).

property.”<sup>67</sup> This, in turn, authorized bankruptcy court jurisdiction over a debtor’s estate and claims “irrespective of congressional statements to the contrary in the context of specialized legislation.”<sup>68</sup> This jurisdiction included jurisdiction over issues the resolution of which would “have a considerable impact on the [debtor’s] estate and on its prospects for effecting a successful reorganization.”<sup>69</sup> Because such determinations were “crucial” to the administration of the debtor’s estate, the *Clawson* court found it had jurisdiction over the debtor’s claims, irrespective of the language of § 405(h).<sup>70</sup>

The *Clawson* court then went on to explain that § 405(h) did not bar its jurisdiction over the debtor’s claims because it only applies “in disputes to which it is applicable.”<sup>71</sup> And because § 405(h) did not expressly bar jurisdiction under what was then numbered 28 U.S.C. § 1471, it did not bar review of the debtor’s Medicare claims.<sup>72</sup> Indeed, the court reasoned, “[s]uch omission has been found to permit review under other sections of Title 28[] and is indicative of Congressional intent not to preclude jurisdiction.”<sup>73</sup> The court noted that the Bankruptcy Reform Act “extensively” amended the Bankruptcy Code but did not include a reference to the revised statute in § 405(h) and concluded that, “in the absence of ‘clear and convincing evidence’ of legislative intent to preclude or condition this Court’s jurisdiction, no further barriers will be erected.”<sup>74</sup> This reasoning was consistent with Congress’s intent for revamping the Bankruptcy Code: eliminating the “frequent, time-consuming and expensive litigation of the question whether the bankruptcy court has jurisdiction of a particular proceeding.”<sup>75</sup> One way to

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<sup>67</sup> *Clawson*, 9 B.R. at 647. This authorizes bankruptcy court jurisdiction over a debtor’s estate and claims “irrespective of congressional statements to the contrary in the context of specialized legislation.” See also *In re Town & Country Home Nursing Servs., Inc.*, 963 F.2d 1146, 1155 (9th Cir. 1991).

<sup>68</sup> *Clawson*, 9 B.R. at 647.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 647–48.

<sup>71</sup> *Id.* at 648.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* (citing *White v. Mathews*, 559 F.2d 852, 855–56 (2d Cir. 1977); *Whitecliff, Inc. v. United States*, 536 F.2d 347, 351 (Ct. Cl. 1976); *Fox v. Harris*, 488 F. Supp. 488 (D.D.C. 1980) (emphasis added), *rev’d*, 12 B.R. 647 (E.D. Mich. 1981); *Ark. Soc’y of Pathologists v. Harris*, CCH Medicare and Medicaid Guide, ¶ 30, 706 (E.D. Ark. 1980).

<sup>74</sup> *Clawson*, 9 B.R. at 648 (citing *Johnson v. Robison*, 415 U.S. 361, 373–74 (1974); *Chelsea Comm. Hosp., SNF v. Mich. Blue Cross Ass’n*, 630 F.2d 1131, 1132–36 (6th Cir. 1980); *Wayne State Univ. v. Cleland*, 590 F.2d 627, 632 (6th Cir. 1980)).

<sup>75</sup> *Clawson*, 9 B.R. at 648–49 (citing H.R. Rep. No. 95-595, at 45 (1977), *reprinted in* 1978 U.S.C.C.A.N. 6007).

accomplish such a goal was through a comprehensive jurisdictional grant to the bankruptcy courts over the debtor's estate and its corresponding claims.<sup>76</sup>

Finally, in the context of its preliminary injunction analysis, the *Clawson* court discussed in depth both (1) the harm the debtor would face if it were forced to stop operating because its Medicare payments were stopped and (2) that the Medicare review process took so long the debtor became unable to cover its operating expenses.<sup>77</sup> It found that, once shut down, the likelihood the debtor would be able to revive the business would be low, in part due to the "loss of goodwill" the debtor would suffer as a result.<sup>78</sup> Because revival would be unlikely, the debtor would be forced to liquidate, and the estate's value at liquidation would likewise have decreased in value due to the shutdown.<sup>79</sup> The *Clawson* court recognized (as courts regularly do in the trademark and intellectual property context, for example) that the value of lost goodwill would be "difficult if not impossible" to calculate and recover in monetary damages.<sup>80</sup> Moreover, shutting down would harm the debtor's patients and employees, who would be forced to seek out other facilities and jobs—an unnecessary toll on innocent parties, particularly if the debtor's claims were successful.<sup>81</sup> For all these reasons, the *Clawson* court determined the "best" reading of the statute was that it had jurisdiction over the debtor's Medicare claims.<sup>82</sup>

## 2. *In re St. Johns Home Health Agency*

The second case, decided nearly fifteen years later, was *In re St. Johns Home Health Agency*,<sup>83</sup> and there, the bankruptcy court came to a different conclusion. Faced with facts similar to *Clawson*, the *St. Johns* court declined to take jurisdiction over the debtor's Medicare claims in the bankruptcy court for three primary reasons. First, it found that the absence of reference to bankruptcy jurisdiction in § 405(h) was due to a scrivener's error, basing its conclusion on § 405(h)'s "legislative history," and thus bankruptcy jurisdiction

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<sup>76</sup> *Id.* at 649.

<sup>77</sup> *Id.* at 650–52.

<sup>78</sup> *Id.* at 650.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 650–51; *see also* *Dunkin' Donuts Franchised Rests. v. Elkhatib*, No. 09 C 1912, 2009 WL 2192753, at \*4 (N.D. Ill. July 17, 2009) (stating that loss of goodwill is impossible to quantify or reverse).

<sup>81</sup> *Clawson*, 9 B.R. at 651.

<sup>82</sup> *Id.*

<sup>83</sup> 173 B.R. 238, 242, 247–48 (Bankr. S.D. Fla. 1994). Sam Maizel, one of this Article's authors, represented the United States in *In re St. Johns Home Health Agency, Inc.*



was incorporated implicitly by reference.<sup>84</sup> Second, the court voiced concern that, if it did have jurisdiction, a hospital might use a bankruptcy filing as a “shortcut to judicial review” of a party’s administrative claims.<sup>85</sup> Finally, and perhaps most surprisingly, the *St. Johns* court indicated that it did not matter whether, as a result of its ruling, the debtor would be unable to reorganize.<sup>86</sup>

### 3. In re Healthback

The third case is 1999’s *In re Healthback*.<sup>87</sup> Like the court in *Clawson*, the court in *Healthback* also concluded that independent bankruptcy jurisdiction existed to cover the claim, that § 405(h)’s plain language does not include § 1346’s bankruptcy jurisdictional grant, and that jurisdiction was supported by the purpose of the Bankruptcy Code because the debtor might cease to exist without its protection.<sup>88</sup>

The *Healthback* court also addressed three new arguments. First, it held that § 405(h)’s legislative history cautioning courts against reading a *substantive* change into the technical modifications is inapposite because § 405(h)’s jurisdictional grant is *procedural* in nature.<sup>89</sup> This argument is discussed in more detail in Section V below. Second, it rejected the Secretary’s argument that it could not “judicial[ly] review” the debtor’s Medicare claim.<sup>90</sup> According to the court, “judicial review” means “review of an administrative decision [in] an adjudicatory process to directly determine [its] legality.”<sup>91</sup> Thus, “judicial review” is not what a bankruptcy court does; instead, bankruptcy courts “exercise jurisdiction over the property of the estate to ensure that all creditors are treated equally within the scope of the Bankruptcy

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<sup>84</sup> *Id.* at 244; see also Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2664(b), 98 Stat. 1162.

<sup>85</sup> *St. Johns Home Health Agency, Inc.*, 173 B.R. at 243 (“[T]he possibility that its administrative remedy may not provide relief as quickly as St. Johns desires, or indeed may require to survive, is one of the potentially unfortunate consequences of doing business in a heavily regulated field where compensation is highly dependent upon administrative processes. . . . [P]roviders which [*sic*] choose to operate within the Medicare system on a cash-poor basis take a knowing risk that an intermediary’s determination might delay payment, and their risk of being forced out of business alone does not justify a fundamental deviation from the statutory scheme[.]” (citing *V.N.A. of Greater Tift Cty. v. Heckler*, 711 F.2d 1020, 1034 (11th Cir.1983), cert. denied 466 U.S. 936 (1984))).

<sup>86</sup> 173 B.R. at 242, 243–44.

<sup>87</sup> 226 B.R. 464, 479 (Bankr. W.D. Okla. 1998), vacated, No. 97-22616, 1999 WL 35012949 (Bankr. W.D. Okla. May 28, 1999).

<sup>88</sup> *Id.* at 469–71, 473–74.

<sup>89</sup> *Id.* at 472–73.

<sup>90</sup> *Id.* at 469–70.

<sup>91</sup> *Id.*

Code.”<sup>92</sup> That a bankruptcy court’s administration of the debtor’s estate might frustrate the Secretary’s jurisdiction does not “constitute illegal interference” with the same.<sup>93</sup> Finally, the court rejected the Secretary’s “primary jurisdiction doctrine” argument, which would require a judicial body to defer the decision-making process to the administrative agency’s “special competence.”<sup>94</sup> The *Healthback* court determined that the doctrine cannot be relied upon at the “whim” of a pleader and instead may only be invoked “if the benefits of obtaining the agency’s aid would outweigh the need to resolve the litigation expeditiously.”<sup>95</sup>

#### 4. Other § 405(h) Arguments Analyzed in the Bankruptcy Context

Other arguments courts have considered when determining whether the § 405(h) jurisdictional bar applies in bankruptcy cases include: whether Medicare payments are themselves an asset in the debtor’s estate,<sup>96</sup> whether a

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<sup>92</sup> *Id.* at 470.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 470–71 (“The doctrine of primary jurisdiction, generally, requires that where a matter has been placed under the authority and special competence of an administrative body, the courts should suspend judicial process until that administrative body has had the opportunity to address the issue in question.”).

<sup>95</sup> *Id.* at 471.

<sup>96</sup> The commencement of a bankruptcy case creates a bankruptcy estate. 11 U.S.C. § 541(a)(1) (2012). Property of the estate includes “all legal or equitable interests . . . in property” held by the debtor “as of commencement of the case.” *Id.* The phrase “legal or equitable interests” in property includes “every conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative.” *In re Yonikus*, 996 F.2d 866, 869 (7th Cir. 1993) (citation omitted). Although § 541(a) defines what interests of the debtor become property of the estate, applicable non-bankruptcy law, usually state law, determines the existence and scope of the debtor’s interest in a particular asset as of commencement of the case. *Butner v. United States*, 440 U.S. 48, 55 (1979) (“Property interests are created and defined by state law.”); *McCarthy, Johnson & Miller v. N. Bay Plumbing, Inc. (In re Pettit)*, 217 F.3d 1072, 1078 (9th Cir. 2000). Thus, courts have held that the scope of § 541(a) includes “contingent future payments that were subject to a condition precedent on the date of bankruptcy.” *In re Bagen*, 186 B.R. 824, 829 (Bankr. S.D.N.Y. 1995) (citing H.R. Rep. No. 595, 95th Cong., 1st Sess. 175–76 (1977)), *aff’d*, 201 B.R. 642 (S.D.N.Y. 1996). However, courts are split on whether government medical payments, such as Medicare or Medicaid, constitute “property.” *Compare Sulphur Manor, Inc. v. Burwell*, No. CIV-15-250, 2015 WL 4409062, at \*2 (E.D. Okla. July 20, 2015) (emphasis added) (quoting *Geriatrics, Inc. v. Harris*, 640 F.2d 262 (10th Cir. 1981)) (“Medicaid providers do not have a property right to continued enrollment as a qualified provider.”), *with First Am. Health Care of Ga., Inc. v. U.S. Dep’t of Health & Human Servs.*, 208 B.R. 985, 990 (Bankr. S.D. Ga. 1996), *vacated and superseded*, No. 96-2007, 1996 WL 282149 (Bankr. S.D. Ga. Mar. 11, 1996) (“First American is entitled to bi-weekly PIPs because it continues to provide reimbursable services to Medicare beneficiaries under the Provider Agreements.”). Section 541(c)(1)(A) of the Bankruptcy Code expressly states that any “interest of the debtor in property becomes property of the [debtor’s] estate . . . notwithstanding any provision in an agreement . . . or applicable nonbankruptcy law that restricts or conditions transfer of such interest by the debtor.” 11 U.S.C. § 541(c)(1)(A). Additionally, § 542(b) requires that “an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt to, or

debtor going out of business because its Medicare payments stopped and it could not appeal quickly enough to remain in operation will result in “precluding” review of the debtor’s claims or merely “postpone” it,<sup>97</sup> whether the government will be harmed if it is not able to be the first to review and decide the debtor’s claims,<sup>98</sup> and whether permitting such jurisdiction will encourage bankruptcy filings simply to avoid the agency’s review process.<sup>99</sup>

In 2015, two significant bankruptcy court opinions involving the termination of Medicare payments and the bankruptcy court’s jurisdiction in light of § 405(h) were issued: *In re Bayou Shores*<sup>100</sup> and *Nurses’ Registry & Home Health Corp. v. Burwell*.<sup>101</sup> As discussed in more detail below, both found that the bankruptcy court’s jurisdiction is not barred by § 405(h).

## B. *The In re Bayou Shores Decisions*

### 1. *The Facts of Bayou Shores*

*Bayou Shores* involved a skilled nursing facility (“SNF”) that was facing termination from the Medicare program, and, by extension, being forced to

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on the order of, the trustee, except to the extent that such debt may be offset under section 553 of [the Bankruptcy Code] against a claim against the debtor.” 11 U.S.C. § 542(b).

<sup>97</sup> See, e.g., *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 19 (2000).

<sup>98</sup> *In re Healthback, L.L.C.*, 226 B.R. 464, 472 (Bankr. W.D. Okla. 1998), vacated, No. 97-22616, 1999 WL 35012949 (Bankr. W.D. Okla. May 28, 1999) (“[A]dministrative inconvenience is not grounds for denying debtors their statutory rights, as a matter of due process. Thus, even though the exercise of this court’s jurisdiction might cause administrative difficulties for the Department of Health and Human Services, these difficulties are not sufficient grounds for denying jurisdiction.” (citing *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973); *Schlesinger v. Ballard*, 419 U.S. 498, 506–07 (1975))); *First Am. Health Care of Ga., Inc. v. U.S. Dep’t of Health & Human Servs.*, 208 B.R. 985, 991 (Bankr. S.D. Ga. 1996), vacated and superseded, No. 96-2007, 1996 WL 282149 (Bankr. S.D. Ga. Mar. 11, 1996) (“If the relief sought by Parent and its providers is not granted, the Debtors are out of business, its approximately 15,000 employees will be out of work, and approximately 32,000 patients will be without, at least temporarily, needed home health care services. Conversely, the potential harm to the Defendants, if any, is completely pecuniary, does not affect people’s health and well-being, is less immediate in effect, and more easily corrected at a later date than the sudden termination of health care services to infirm, disabled, or poor people.”).

<sup>99</sup> *Healthback*, 226 B.R. at 470, 474 (Bankr. W.D. Okla. 1998) (“[T]here is no indication that the debtor filed this bankruptcy case merely to circumvent the administrative requirements of 42 U.S.C. § 405 to obtain ‘judicial review’ of the withholding. . . . It seems highly improbable to this court that every home health care provider will declare bankruptcy for the purpose of avoiding the Medicare administrative requirements in response to this court exercising jurisdiction in this case.”).

<sup>100</sup> 525 B.R. 160, 161 (Bankr. M.D. Fla. 2014). Although *In re Bayou Shores* presents interesting issues related to the automatic stay and executory contracts, among others, this Article will only discuss whether bankruptcy courts can be used to avoid fatal delay in obtaining judicial review of CMS’s decisions.

<sup>101</sup> 533 B.R. 590 (Bankr. E.D. Ky. 2015).

close its doors.<sup>102</sup> The debtor operated a 159-bed SNF for patients with serious psychiatric conditions in St. Petersburg, Florida.<sup>103</sup> The vast majority—over 90 percent—of the debtor’s revenue was derived from Medicare and Medicaid.<sup>104</sup> Between February and July of 2014, the debtor was cited on three separate occasions for noncompliance with Medicare Program requirements.<sup>105</sup> The debtor immediately cured the first two citations and CMS found the debtor to be in substantial compliance. Thereafter, the debtor also cured the third deficiency and hired an outside consultant to conduct a comprehensive review of the debtor’s corrective measures.<sup>106</sup> Nevertheless, CMS did not visit the facility and instead elected to terminate the SNF’s Medicare Provider Agreement.<sup>107</sup> Although the debtor appealed the decision to terminate, that appeal did not prevent CMS from denying payments.<sup>108</sup> On August 1, 2014, two days before the provider agreements were going to be terminated, the debtor filed a lawsuit in the District Court for the Middle District of Florida seeking an injunction to prohibit the termination of the provider agreement.<sup>109</sup> On the same day, the district court entered a temporary restraining order (“TRO”) prohibiting the termination of the agreements until August 15, 2014.<sup>110</sup> However, once the government briefed the district court on the administrative exhaustion requirements described above, the district court dissolved the TRO.<sup>111</sup>

## 2. *The Bankruptcy Court’s Decision Pertaining to Bankruptcy Jurisdiction over Medicare Matters*

Unable to pay its bills, the debtor filed a chapter 11 petition and sought an order preventing CMS from terminating the Medicare Provider Agreement between the debtor and the Medicare Program. The bankruptcy court granted that motion, and the debtor quickly filed a plan of reorganization and sought its confirmation. In its objection to confirmation, CMS argued that the bankruptcy court could not take jurisdiction over the Medicare disputes unless and until

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<sup>102</sup> *Bayou Shores*, 525 B.R. 160.

<sup>103</sup> *Id.* at 161.

<sup>104</sup> *Id.* at 162.

<sup>105</sup> *Id.* at 163.

<sup>106</sup> *Id.* at 164.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 164–65.

<sup>111</sup> See *Bayou Shores SNF, LLC v. Burwell*, No. 8:14-cv-1849-T-33MAP, 2014 WL 4101761, at \*8–10 (M.D. Fla. Aug. 20, 2014).

the debtor exhausted its administrative remedies, relying on the Medicare statutes described above. The bankruptcy court rejected that argument and confirmed the plan over CMS's objection.<sup>112</sup> The bankruptcy court ruled that it had jurisdiction because the plain language of § 405(h) did not restrict jurisdiction under 28 U.S.C. § 1334. The bankruptcy court referenced a similar decision in *First American Health Care of Georgia, Inc. v. HHS*,<sup>113</sup> although noting that this decision had been vacated because of a subsequent settlement between the parties.

### 3. *The District Court's Decision Pertaining to Bankruptcy Jurisdiction over Medicare Matters*

HHS appealed the bankruptcy court's order confirming the debtor's plan to the district court. The appeal of the confirmation order raised the jurisdictional issue of whether § 405(h) precluded the bankruptcy court from taking any action related to the Medicare Provider Agreement. In ruling on the appeals, the district court made several conclusions. First, "the bankruptcy court erred because as a matter of law the jurisdictional bar in Section 405(h) precluded the Bankruptcy Court from delaying or preventing the effect of CMS determination that the provider agreements should be terminated."<sup>114</sup> Second, the bankruptcy court's decision that it had jurisdiction under § 1334 was in error because it ignored the jurisdictional bar provided for in the Medicare Act, and that "[t]he Bankruptcy Court exceeded its subject matter jurisdiction when it interfered with CMS termination of the provider agreements."<sup>115</sup> Third, that "[t]here is no jurisdiction for a court to interpose itself in a provider's termination from the Medicare and Medicaid programs except to provide judicial review under Section 405(g) only after administrative remedies have been exhausted and the Secretary has issued a final agency decision."<sup>116</sup> The district court, therefore, ruled that the bankruptcy court lacked the jurisdiction because of the requirement for exhaustion of administrative remedies included in § 405(h).

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<sup>112</sup> Michael Nordskog, *Nursing Homes Chapter 11 Plan Ruled Feasible Despite Medicare Problems*, WESTLAW Bankruptcy Daily Briefing, Jan. 8, 2015, at 2015 WL 94779.

<sup>113</sup> 208 B.R. 985 (Bankr. S.D. Ga. 1996), *vacated and superseded*, No. 96-2007, 1996 WL 282149 (Bankr. S.D. Ga. Mar. 11, 1996).

<sup>114</sup> Fla. Agency for Health Care Admin. v. Bayou Shores SNF, LLC (*In re Bayou Shores SNF, LLC*), 533 B.R. 337, 340 (M.D. Fla. 2015).

<sup>115</sup> *Id.* at 341.

<sup>116</sup> *Id.*

#### 4. *Bayou Shores's Appeal*

The debtor appealed the district court's ruling to the Eleventh Circuit Court of Appeals and moved to stay the termination of its Medicare payments pending the appeal. Although the Eleventh Circuit denied the stay, the district court granted it after Bayou Shores filed an emergency motion. In so holding, the district court noted:

Bayou Shores presented ample evidence that absent a stay it and its patients, employees, and staff will suffer irreparable damage. The Court finds that if the stay is not continued, Bayou Shores will no longer be able to operate and will be forced to discharge its patients and terminate its staff. Notably, this evidence also relates to the public interest, an interest that is highly relevant here because it involves the patients and their family.

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Medicare and Medicaid are required under both federal and state law to pay for the care of Bayou Shores' patients regardless of where they reside, whether it be at Bayou Shores or at any other nursing home.<sup>117</sup>

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As Bayou Shores noted, *there is a significant factor of human dignity at issue here that this Court cannot ignore*. Bayou Shores' patients are comfortable, they know the staff, they have the same routines, and they retain some dignity and independence from this comfort and familiarity. It would be *draconian* to disrupt their dignity based on a jurisdictional debate that has resulted in significant contrary opinions among the circuit courts and the lower courts.<sup>118</sup>

Curiously, the district court highlighted the very policy reasons for permitting the speedy resolution of a debtor's Medicare disputes in a bankruptcy court, rather than through the Medicare appeals process, which would similarly cause providers to shutter their doors and harm their patients.

The case is currently pending in the Eleventh Circuit.

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<sup>117</sup> *In re Bayou Shores SNF, LLC*, No. 8:14-BK-9521-MGW, 2015 WL 6502704, at \*2 (M.D. Fla. Oct. 27, 2015).

<sup>118</sup> *Id.* at \*3 (emphasis added).

C. *The Nurses' Registry & Home Health Corp. Decision*

In *Nurses' Registry & Home Health Corp. v. Burwell*, the bankruptcy court granted the debtor's emergency motion for preliminary injunction and temporary restraining order enjoining the suspension of debtor's Medicare payments.<sup>119</sup> The government filed a motion to stay pending appeal.<sup>120</sup> In reviewing the defendants' motion, the bankruptcy court analyzed § 405(h)'s jurisdictional bar in the context of the "likelihood of success" factor of the preliminary injunction standard.<sup>121</sup>

The *Nurses' Registry* court ultimately held that the government had a very low likelihood of success on the merits of its jurisdictional arguments on appeal, and in so doing expressly rejected the "legislative history" line of cases.<sup>122</sup> To begin, the bankruptcy court held that the debtor fell within an exception to § 405(h)'s jurisdictional bar because waiting for the Medicare review process to finish would have caused the debtor to "become defunct" and resulted in "no judicial review of its claims."<sup>123</sup> The bankruptcy court then turned to the legislative history arguments. First, the bankruptcy court held that, even if the change in § 405(h) from § 41 to §§ 1331 and 1346 was a "scrivener's error," the court did not have the power to correct that error and enforce § 405(h) as barring all of § 41's jurisdictional grants, including bankruptcy.<sup>124</sup> Second, the bankruptcy court noted that:

[A]t least several of the technical amendments Congress enacted in the DRA made undeniably substantive changes to Social Security and Medicare, belying Congress's blanket assertion that none of the technical amendments were intended to affect any preexisting rights or interpretations, and thus, the suggestion to the contrary in the legislative history could not be given credence.<sup>125</sup>

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<sup>119</sup> 533 B.R. 590, 591 (Bankr. E.D. Ky. 2015).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 592.

<sup>122</sup> *Id.* at 592–93, 594–96.

<sup>123</sup> *Id.* at 593 ("Had this Court waited for the Medicare process to play itself out while Medicare continued to suspend payments, the Debtor would have become defunct, and the Debtor would never have been heard on its request for turnover. Thus, channeling the Debtor's claims through the agency would mean no judicial review of its claims at all.")

<sup>124</sup> *Id.* at 595 ("If Congress hoped to bar all federal jurisdiction over unexhausted Medicare claims but mistakenly believed it could do so by only barring § 1331 and § 1346 jurisdiction, this Court cannot correct their mistake.")

<sup>125</sup> *Id.* at 595–96.

The *Nurses' Registry* court highlighted, as an example, the repealing of “an entire title of the SSA, Title XIII, which provided a program of unemployment benefits for federal seamen,” and noted that, “[i]f the DRA’s technical amendments truly did not ‘chang[e] or affect[ ] any right,’ the Reconversion Unemployment Benefits for Seamen program is still federal law.”<sup>126</sup>

As discussed in more detail below, the interpretation and application of § 405(h) by the courts in *Bayou Shores* and *Nurses' Registry* should be more widely followed, while the so-called legislative history rationale should be abandoned. If Congress does not want to provide bankruptcy courts with jurisdiction over pre-exhaustion review of a debtor-hospital’s Medicare claims, it should so legislate.

#### IV. SECTION 405(h)’S “ARISING UNDER” JURISDICTION

For § 405(h) to prevent a court from exercising jurisdiction over a hospital’s Medicare appeal, three conjunctive elements must be satisfied: (1) the claims must arise under the Medicare Act, (2) the party must be seeking “judicial review,” and (3) the action must be brought under 28 U.S.C. §§ 1331 or 1346.<sup>127</sup> However, the Bankruptcy Code has its own jurisdictional statute that confers *exclusive* jurisdiction to the district and bankruptcy courts over cases “arising under” the Bankruptcy Code and involving the debtor’s property.<sup>128</sup> The Bankruptcy Code’s exclusive jurisdictional grant, combined with its fundamental purpose of providing debtors with an opportunity to have a “fresh start,” makes it clear that it—and not the Medicare Act—should govern who determines a debtor’s disputes with Medicare.

Claims “arise under” the Medicare Act when their resolution is “inextricably intertwined” with benefits determinations<sup>129</sup> and when their “standing and substantive bas[e]s” are created by the Medicare Act.<sup>130</sup> In a

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<sup>126</sup> *Id.* at 596; *see also* discussion *infra* at note 225.

<sup>127</sup> 42 U.S.C. § 405(h) (2015); *In re Healthback L.L.C.*, 226 B.R. 464, 470 (Bankr. W.D. Okla. 1998), *vacated*, No. 97-22616, 1999 WL 35012949 (Bankr. W.D. Okla. May 28, 1999).

<sup>128</sup> 28 U.S.C. §§ 1334(a), (b) & (e) (2015).

<sup>129</sup> *Heckler v. Ringer*, 466 U.S. 602, 621–24 (1984).

<sup>130</sup> *Weinberger v. Salfi*, 422 U.S. 749, 760–61 (1975); *see also In re St. Johns Home Health Agency, Inc.*, 173 B.R. 238, 244 (Bankr. S.D. Fla. 1994) (quoting *V.N.A. of Greater Tift Cty. v. Heckler*, 711 F.2d 1020, 1025 (11th Cir.1983), *cert. denied* 466 U.S. 936 (1984)) (“The central target of § 405(h) preclusion is ‘any action envisioning recovery on any claim emanating from’ the Medicare Act.”). Courts will not indulge “cleverly concealed claims for benefits” that, by means of a sort of artful pleading, attempt to mask a Medicare benefits claim behind some other cause of action. *Quinones v. UnitedHealth Grp. Inc.*, No. CIV. 14-00497 LEK, 2015 WL 3965961, at \*3 (D. Haw. June 30, 2015).



vacuum, it would appear obvious that a hospital seeking to continue its Medicare payments after a CMS termination would “arise under” the Medicare Act.<sup>131</sup> But when a hospital becomes a debtor, the analysis changes.

To begin, although § 405(h) is said to prohibit a court’s “judicial review” of Medicare decisions, a bankruptcy court exercising jurisdiction over a debtor’s estate is not “judicial review” of a Medicare Program decision, but is rather an effort to ensure the debtor’s creditors are treated fairly under the Bankruptcy Code.<sup>132</sup> Thus, the proper view of a bankruptcy court’s jurisdiction is that of administering the debtor’s estate (which may include Medicare payments owed to the debtor) and not a debtor’s improper evasion of the Medicare appeals process.<sup>133</sup> This conclusion is supported by the very fact that the question arises before a bankruptcy court by a debtor; if an otherwise *solvent* hospital wanted merely to challenge a Medicare decision prior to exhaustion, it would only be able to do so in a federal district court and would not have to file, among other things, a first day declaration<sup>134</sup> to explain that it is unable to service its debts.<sup>135</sup>

The Bankruptcy Code’s “arising under” jurisdictional grant should also trump the Medicare Act’s jurisdictional grant because ignoring the former when the cessation of Medicare payments is at issue would frustrate the Bankruptcy Code’s purpose.<sup>136</sup> The same fundamental frustration does not exist, however, if the Medicare Act’s jurisdiction is superseded by a bankruptcy court. The courts that have found Medicare’s jurisdictional bar controlling have done so in the context of the legislative history argument,<sup>137</sup>

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<sup>131</sup> *E.g.*, *Timberlawn Mental Health Sys. v. Burwell*, No. 3:15-CV-2556-M, 2015 WL 4868842, at \*3 (N.D. Tex. Aug. 13, 2015) (In the context of a motion for a temporary restraining order, the court held that “[the Hospital’s] claims arise under the Medicare Act because the Hospital seeks to continue its participation in the Medicare program pending an administrative appeal of CMS’s termination decision.”).

<sup>132</sup> *Healthback*, 226 B.R. at 469–70.

<sup>133</sup> *Id.*

<sup>134</sup> “It is typical (particularly in large bankruptcy cases) for a debtor to file declarations or affirmations in support of the first day motions. These declarations [generally are signed] by the debtor’s senior management, [and] give the trade creditor important information about the facts and circumstances leading to the bankruptcy filing, as well as a preliminary road map for where the case is headed. It will also highlight significant issues that may impede the efforts to reorganize.” Jeffrey Baddeley, *Managing Trade Credit to Struggling Companies*, CORP. FIN. REV., May/June 2013, at 16, 19.

<sup>135</sup> *See Healthback*, 226 B.R. at 470.

<sup>136</sup> Courts should be reluctant to interpret a statute in a way that frustrates its purpose. *See King v. Burwell*, 135 S. Ct. 2480, 2484 (2015) (“Here, the [Affordable Care Act’s] statutory scheme compels us to reject petitioner’s interpretation because it would destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very ‘death spirals’ that Congress designed the Act to avoid.”).

<sup>137</sup> *E.g.*, *In re Hosp. Staffing Servs., Inc.*, 258 B.R. 53, 56 (S.D. Fla. 2000).

but that argument presumes—without support—that in the same breath Congress also intended to exclude a class of debtors (those who rely on Medicare payments to remain solvent) from bankruptcy protection.<sup>138</sup> If a hospital relies on Medicare payments to survive and those Medicare payments stop, the hospital shuts down, and the effects ripple throughout its patients, service providers, and staff.<sup>139</sup> To prevent such a (potentially unnecessary) result, the Bankruptcy Code exists to provide distressed businesses “breathing space” in which they can reorganize with assistance from the bankruptcy courts.<sup>140</sup> This is why bankruptcy (and district) courts have broad and exclusive jurisdiction over debtors and their assets and liabilities—without which external entities, including governmental entities such as CMS, would be able to interfere with the restructuring process and impinge on a debtor’s breathing space. Indeed, such interference is expressly prohibited by protections like the automatic stay, which pauses all litigations pending against a debtor, and is a protection that would be rendered meaningless if Medicare jurisdiction governed a debtor’s dispute with Medicare because the debtor

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<sup>138</sup> See *First Am. Health Care of Ga., Inc. v. U.S. Dep’t of Health & Human Servs.*, 208 B.R. 985, 990 (Bankr. S.D. Ga. 1996), *vacated and superseded*, No. 96-2007, 1996 WL 282149 (Bankr. S.D. Ga. Mar. 11, 1996) (“First American is entitled to bi-weekly PIPs because it continues to provide reimbursable services to Medicare beneficiaries under the Provider Agreements.”).

<sup>139</sup> The factual background in *U.S. ex rel. Sarasola v. Aetna Life Ins. Co.*, 319 F.3d 1292, 1296–97 (11th Cir. 2003) aptly sums up the series of events:

The court denied St. Johns’s motion in a written order dated September 23, 1994. It agreed with the Secretary that it lacked jurisdiction to entertain the motion because St. Johns had not exhausted its administrative remedies. Assuming that it had jurisdiction, the court added, it could not “grant effective relief . . . under 11 U.S.C. § 365 without fundamentally and impermissibly altering the contractual relationship between St. Johns and the Secretary which incorporates the statutory and administrative scheme imposed by the Medicare Program.” *The court’s decision was St. Johns’s death knell*. On November 10, 1994, the court entered an order approving the sale of St. Johns’s assets (except the above-mentioned lawsuit pending against the Secretary and CMS) to Amitan Health Services, Inc. On August 21, 1995, St. Johns moved the court to convert its Chapter 11 case to a Chapter 7 liquidation. The court granted its motion.

(emphasis added). *Accord* *Livingston Care Ctr., Inc. v. United States*, No. 89-40200-FL, 1990 WL 125000, at \*1 (E.D. Mich. May 31, 1990), *aff’d*, 934 F.2d 719 (6th Cir. 1991) (“Plaintiff’s status as *Medicaid* provider was automatically terminated as well, which resulted in extensive lost revenues to plaintiff and its eventual bankruptcy.” (emphasis added)); see also *Sulphur Manor, Inc. v. Burwell*, No. CIV-15-250-RAW, 2015 WL 4409062, at \*3 (E.D. Okla. July 20, 2015) (analyzing irreparable injury in a preliminary injunction motion); *Healthback*, 226 B.R. at 471 n.8; *First Am. Health Care of Ga.*, 208 B.R. at 989–90; *In re Tidewater Mem’l Hosp.*, 106 B.R. 876, 880 (Bankr. E.D.Va. 1989) (analyzing the automatic stay).

<sup>140</sup> See *In re Town & Country Home Nursing Servs., Inc.*, 963 F.2d 1146, 1155 (9th Cir. 1991) (“The language of section 1334(b) grants jurisdiction to the district court, and therefore to the bankruptcy court, over civil proceedings related to bankruptcy and accords with the intent of Congress to bring all bankruptcy-related litigation within the umbrella of the district court, at least as an initial matter, irrespective of congressional statements to the contrary in the context of other specialized litigation.”).

would then be litigating its rights before both the bankruptcy court and the Medicare ALJs.<sup>141</sup>

Moreover, finding that the Bankruptcy Code's *exclusive* jurisdictional grant applies to a debtor's Medicare Program payments and disputes does not frustrate the purpose of the Medicare Act. To begin, the argument that it would negatively impact the Medicare ALJs' ability to gain expertise rings hollow.<sup>142</sup> Medicare ALJs have their hands full with Medicare appeals as it is, and bankruptcy judges are competent to the task of adjudicating a wide variety of legal claims—Medicare questions are no different.<sup>143</sup> In addition, relieving Medicare of its jurisdiction over this small subsection of its providers will not harm the Medicare Act's purpose. Medicare will continue to function as it normally does, and in fact, given the backlog of Medicare appeals, losing this jurisdiction may actually be a *relief* to a system that is already burdened to the breaking point.<sup>144</sup> Indeed, resolution of the dispute could happen both earlier and more expeditiously if administered by a bankruptcy judge, preserving the Medicare Program's scarce administrative resources.

Even if a court were to find that Medicare's jurisdictional grant trumps the Bankruptcy Code's, bankruptcy courts would still be the proper venue to resolve a debtor's Medicare disputes because § 405(h) does not apply to bar a bankruptcy court's jurisdiction.

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<sup>141</sup> See, e.g., *In re Univ. Med. Ctr., Inc.*, 973 F.2d 1065, 1073 (3d Cir. 1992); *In re Rusnak*, 184 B.R. 459, 462–63 (Bankr. E.D. Pa. 1995); *Tidewater Mem'l Hosp.*, 106 B.R. at 880 (“Here, however, the Government’s action in apparent violation of the automatic stay provisions of § 362 could well prevent the debtor from having an opportunity for rehabilitation and reorganization. There is an urgency here which goes beyond the domain of Medicare law, and the doctrine of exhaustion of administrative remedies should not be allowed to frustrate the clearly stated goals of the Bankruptcy Code.”).

<sup>142</sup> *In re St. Mary Hosp.*, 123 B.R. 14, 17 (E.D. Pa. 1991) (“Moreover, a broad reading of section 405(h) puts its interpretation in accord with Congress’ intent to permit the Secretary in Medicare disputes to develop the record and base decisions upon his unique expertise in the health care field.”).

<sup>143</sup> See, e.g., *Healthback*, 226 B.R. at 472 n.10 (“Under 11 U.S.C. § 105(a) the court has the power to issue any order[,] process[,] or judgment necessary or appropriate to execute the provisions of Title 11. In almost all bankruptcy cases, the creditors and parties are inconvenienced to some degree. This court perceives no reason why the Department of Health and Human Services should receive special consideration in this context.”); *First Am. Health Care of Ga.*, 208 B.R. at 991 (observing that the government is actually better off if the debtor continues receiving its payments because that increases its chances of exiting bankruptcy and repaying the government).

<sup>144</sup> *Office of Medicare Hearings and Appeals Workloads: Hearing on Exploring Medicare Appeal Reform Before the H. Comm. on Oversight & Gov’t Reform & the Subcomm. on Energy Policy, Healthcare & Entitlements*, 113th Cong. (2014) (statement of Nancy J. Griswold, Chief A.L.J., Office of Medicare Hearings and Appeals), [www.hhs.gov/asl/testify/2014/07/t20140710a.html](http://www.hhs.gov/asl/testify/2014/07/t20140710a.html) (last visited Feb. 13, 2015).

## V. INTERPRETING MEDICARE'S JURISDICTIONAL BAR

### A. Discussion of Plain Language Argument

It is hornbook law that unambiguous language in a statute is given its plain meaning: “[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.”<sup>145</sup>

#### 1. The Plain Language of 42 U.S.C. § 405(h)

The words Congress wrote into law in § 405(h) only bar federal court jurisdiction if the dispute arises under 28 U.S.C. §§ 1331 or 1346; bankruptcy jurisdiction under 28 U.S.C. § 1334 is not referenced. The Supreme Court observed as much in *Heckler v. Ringer*, “The third sentence of 42 U.S.C. § 405(h), made applicable to the Medicare Act by 42 U.S.C. § 1395ii, provides that § 405(g), *to the exclusion of 28 U.S.C. § 1331*, is the sole avenue for judicial review for all “claim[s] arising under” the Medicare Act[.]”<sup>146</sup> and again in *Shalala v. Illinois Council on Long Term Care, Inc.*, “The statute [§ 405(h)] *plainly bars § 1331 review . . .*”<sup>147</sup> The plain meaning of § 405(h)’s jurisdictional limitations has been adopted by both the Third<sup>148</sup> and Ninth Circuits,<sup>149</sup> as well as by numerous district<sup>150</sup> and bankruptcy courts,<sup>151</sup> and has

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<sup>145</sup> *Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925); *see also* *E.P.A. v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1600–01 (2014) (quoting *Pavelic & LeFlore v. Marvel Entm’t Grp., Div. of Cadence Industries Corp.*, 493 U.S. 120, 126 (1989)) (“[A] reviewing court’s task is to apply the text of the statute, not to improve upon it.”); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 460 (2002); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989); *In re Kolich*, 328 F.3d 406, 409 (8th Cir. 2003) (“The plain meaning of legislation should be conclusive . . .”).

<sup>146</sup> 466 U.S. 602, 614–15 (1984) (emphasis added).

<sup>147</sup> 529 U.S. 1, 10 (2000) (emphasis added).

<sup>148</sup> *In re Univ. Med. Ctr., Inc.*, 973 F.2d 1065, 1072 (3d Cir. 1992).

<sup>149</sup> *In re Town & Country Home Nursing Servs., Inc.*, 963 F.2d 1146, 1155 (9th Cir. 1991).

<sup>150</sup> *E.g.*, *Cal. Clinical Lab. Ass’n v. Sec’y of Health & Human Servs.*, No. 14-CV-0673, 2015 WL 2393571, at \*10 (D.D.C. May 20, 2015).

<sup>151</sup> *In re Nurses’ Registry & Home Health Corp.*, 533 B.R. 590, 595 (Bankr. E.D. Ky. 2015); *In re Bayou Shores SNF, LLC*, 525 B.R. 160, 166 (Bankr. M.D. Fla. 2014); *In re Slater Health Ctr., Inc.*, 294 B.R. 423, 428 (Bankr. D.R.I. 2003), *vacated in part*, 306 B.R. 20 (D.R.I. 2004), *aff’d*, 398 F.3d 98 (1st Cir. 2005); *First Am. Health Care of Ga., Inc. v. U.S. Dep’t of Health & Human Servs.*, 208 B.R. 985, 989 (Bankr. S.D. Ga. 1996), *vacated and superseded*, No. 96-2007, 1996 WL 282149 (Bankr. S.D. Ga. Mar. 11, 1996); *In re Healthmaster Home Health Care, Inc.*, No. 95-01031A, 1995 WL 928920, at \*1 (Bankr. S.D. Ga. Apr. 13, 1995); *In re Shelby Cty. Healthcare Servs. of AL, Inc.*, 80 B.R. 555, 560 (Bankr. N.D. Ga. 1987).

gone unchanged by Congress for over twenty years.<sup>152</sup> Although § 405(h) and § 1334 are “incongruous,” it is not “absurd” to have a bankruptcy exception to Medicare’s exhaustion requirement,<sup>153</sup> particularly in light of the harm that can arise to the debtor due to stopped Medicare payments during the lengthy Medicare review process.<sup>154</sup> Thus, courts should not “allow[] ambiguous legislative history to muddy clear statutory language.”<sup>155</sup>

The Supreme Court recently addressed statutory construction in the health care context in *King v. Burwell*,<sup>156</sup> and the Court’s analytical framework in both the majority’s opinion and Justice Scalia’s dissent (both of which capture the thrust of the Court’s plain language doctrine) strongly support applying § 405(h) based on its plain language. In *King*, the Court was charged with interpreting the short phrase, “established by the State,” in the Affordable Care Act, and the outcome of which would either preserve or undermine the entire statutory scheme.<sup>157</sup> The Court chose preservation because it was “implausible” that Congress would have written the term such that it would cause a “death spiral” and undermine the entire Affordable Care Act.<sup>158</sup> In so holding, the Court determined that although the words appeared clear on the surface, they became ambiguous when viewed in light of the entire statute.<sup>159</sup> The Court reasoned that, “the words of a statute must be read in their context and with a view to their place in the overall statutory scheme,” and only then can they be deemed non-ambiguous and subject to enforcement based on their plain meaning.<sup>160</sup>

Here, neither the context of the Social Security Act nor the Medicare Act render § 405(h)’s jurisdictional grant over 28 U.S.C. §§ 1331 and 1346 ambiguous. This is because the structures of the acts and their pertinent sections do not include contradictory cross-references or jurisdictional terms that, if defined one way would undermine the entirety of either the Medicare or Social Security Acts. If anything, relieving the Medicare Program of some of its appellate review jurisdiction and placing it with the bankruptcy courts for

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<sup>152</sup> *In re Nurses’ Registry & Home Health Corp.*, 533 B.R. 590, 595 (Bankr. E.D. Ky. 2015).

<sup>153</sup> *Id.*

<sup>154</sup> *See supra* at note 139; *see also, e.g.*, U.S. *ex rel.* *Sarasola v. Aetna Life Ins. Co.*, 319 F.3d 1292, 1296–97 (11th Cir. 2003).

<sup>155</sup> *Milner v. Dep’t of Navy*, 562 U.S. 562, 572 (2011).

<sup>156</sup> 135 S. Ct. 2480 (2015).

<sup>157</sup> *Id.* at 2489.

<sup>158</sup> *Id.* at 2492–94.

<sup>159</sup> *Id.* at 2490–91.

<sup>160</sup> *Id.* at 2492.

debtors might actually aid the agency in the execution of its duties, alleviating some of the burden for its strained system resources to focus on the existing, crippling backlog of cases currently pending review therein.<sup>161</sup>

And, of course, Justice Scalia's dissent propounding the unassailable merits of the Court's well-established plain language doctrine supports a reading of § 405(h) that limits its jurisdictional bar to §§ 1331 and 1346. Justice Scalia notes that although "[l]aws often include unusual or mismatched provisions," courts may "not revise legislation just because the text as written creates an apparent anomaly."<sup>162</sup> Here, although § 405(h) may have formerly referred to a broad jurisdictional provision that included bankruptcy, it currently does not, and moreover, as it is presently written, § 405(h) contains no anomalies or references to other mismatched provisions—it clearly states that it applies only to §§ 1331 and 1346. Justice Scalia's reasoning continued that, "The purposes of a law must be 'collected chiefly from its words,' not 'from extrinsic circumstances.' Only by concentrating on the law's terms can a judge hope to uncover the scheme of the statute, rather than some other scheme that the judge thinks desirable."<sup>163</sup> In § 405(h), the words "under § 1331 or 1346 of title 28" plainly omit any reference to bankruptcy jurisdiction under 28 U.S.C. § 1334. And finally, he urged that, "[i]f Congress enacted into law something different from what it intended, then it should amend the statute to conform to its intent."<sup>164</sup> Here, Congress actually did draft something different into law to change its operation: previously, § 405(h) cited a broad jurisdictional statute that gave widespread reviewing authority to federal courts; now it cites to two out of nearly two dozen such jurisdictional grants, many of which were written or amended *after* § 405(h) was updated in 1984.

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<sup>161</sup> *Office of Medicare Hearings and Appeals Workloads: Hearing on Exploring Medicare Appeal Reform Before the H. Comm. on Oversight & Gov't Reform & the Subcomm. on Energy Policy, Healthcare & Entitlements*, 113th Cong. (2014) (statement of Nancy J. Griswold, Chief A.L.J., Office of Medicare Hearings and Appeals), [www.hhs.gov/asl/testify/2014/07/t20140710a.html](http://www.hhs.gov/asl/testify/2014/07/t20140710a.html) (last visited Feb. 13, 2015).

<sup>162</sup> *Burwell*, 135 S. Ct. at 2500 (Scalia, J., dissenting).

<sup>163</sup> *Id.* at 2503 (Scalia, J., dissenting) (citing *Sturges v. Crowninshield*, 4 Wheat. 122, 202, 4 L.Ed. 529 (1819) (Marshall, C.J.)).

<sup>164</sup> *Id.* at 2505 (Scalia, J., dissenting); *see also* *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967) (quoting *Rusk v. Cort*, 369 U.S. 367, 380 (1962)) ("[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review."), *abrogated on other grounds* by *Califano v. Sanders*, 430 U.S. 99 (1977); *In re W.J.P. Properties*, 149 B.R. 604, 607 (Bankr. C.D. Cal. 1992) (citations omitted) ("The Supreme Court has on many occasions stressed that in interpreting statutes, the court should first look to the statute. If the statute is clear and unambiguous, the court should enforce the statute as written without reference to legislative history.").

## 2. *The Plain Language of 28 U.S.C. § 1334*

The plain language of 28 U.S.C. § 1334 is equally clear. Section 1334 provides the statutory basis for bankruptcy courts' jurisdiction. Specifically, it provides *exclusive jurisdiction* over all cases under title 11 and all property of the debtor and the estate, wherever located, to the district courts, which then may refer the case to the bankruptcy courts:

(a) Except as provided in subsection (b) of this section, the district courts shall have *original and exclusive jurisdiction* of all cases under title 11.

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(e) The district court in which a case under title 11 is commenced or is pending shall have *exclusive jurisdiction* of [] all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate . . . .<sup>165</sup>

This structure creates no ambiguity,<sup>166</sup> and nothing suggests that this exclusive jurisdictional grant cedes to the Medicare Act.<sup>167</sup> Courts have thusly employed § 1334's plain meaning as independent grounds for permitting bankruptcy jurisdiction over Medicare disputes.<sup>168</sup> The Ninth Circuit has reconciled this

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<sup>165</sup> 28 U.S.C. § 1334 (2012) (emphasis added).

<sup>166</sup> See *Burwell*, 135 S. Ct. 2480.

<sup>167</sup> See *In re Town & Country Home Nursing Servs., Inc.*, 963 F.2d 1146, 1155 (9th Cir. 1991) (emphasis added) ("The language of Section 1334(b) grants jurisdiction to the district court, and therefore to the bankruptcy court, over civil proceedings related to bankruptcy and accords with the intent of Congress to bring all bankruptcy-related litigation within the umbrella of the district court, at least as an initial matter, *irrespective of congressional statements to the contrary in the context of other specialized litigation.*"). Although the Supreme Court stated, "Section 1334(b) concerns the allocation of jurisdiction between bankruptcy courts and other 'courts,' and, of course, an administrative agency such as the Board is not a 'court'" in *Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 41–42 (1991), that decision does not apply to the present discussion because there the Board's decision had not yet been rendered, and the debtor's estate had therefore not yet been harmed. Here, CMS would have already stopped payments to the hospital-debtor, thereby harming the debtor's estate—a situation expressly carved out of the *MCorp*. Court's decision based on 28 U.S.C. § 1334(d): "Moreover, contrary to MCorp's contention, the prosecution of the Board proceedings, prior to the entry of a final order and prior to the commencement of any enforcement action, *seems unlikely to impair the Bankruptcy Court's exclusive jurisdiction over the property of the estate protected by 28 U.S.C. § 1334(d).*" *Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 42 (1991) (emphasis added); see also *Sunflower Elec. Co-op., Inc. v. Kan. Power & Light Co.*, 603 F.2d 791, 796 (10th Cir. 1979) (implying doctrine of exhaustion of administrative remedies is applicable only when agency has exclusive jurisdiction).

<sup>168</sup> *E.g., In re Slater Health Ctr., Inc.*, 398 F.3d 98 (1st Cir. 2004) (affirming decision that bankruptcy jurisdiction under 28 U.S.C. § 1334 provides an independent basis for jurisdiction); *In re Town & Country Home Nursing*, 963 F.2d at 1154; see also *In re Univ. Med. Ctr., Inc.*, 973 F.2d 1065, 1072 (3d Cir. 1992) ("Because we agree . . . that the Bankruptcy Code supplies an independent basis for jurisdiction in this case,

conclusion with its holdings that have excluded other jurisdictional grants from § 405(h). In *Do Sung Uhm v. Humana, Inc.*,<sup>169</sup> the court noted that although *Kaiser v. Blue Cross of California*<sup>170</sup> held that the absence of any reference to 42 U.S.C. § 1332 (diversity jurisdiction) in § 405(h) was irrelevant and diversity jurisdiction was still barred, § 1334's "broad jurisdictional grant over all matters conceivably having an effect on the bankruptcy estate" ultimately carried the day.<sup>171</sup> In short, *Do Sung Uhm* correctly concluded that bankruptcy is special, which is consistent with the Bankruptcy Code's plain language and purpose, neither of which are present in a dispute based on diversity jurisdiction where neither party is insolvent. This outcome is consistent with the rule of statutory construction that "when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed Congressional intention to the contrary, to regard each as effective"<sup>172</sup> because the Medicare Act and Bankruptcy Code "coexist" due to Medicare's jurisdictional carve-out for bankruptcy courts in § 405(h).

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we reject the Secretary's arguments and find that the district and bankruptcy courts properly had jurisdiction under 28 U.S.C. §§ 157, 158 and 1334 and that we may properly exercise jurisdiction over this appeal under 28 U.S.C. §§ 158(d) and 1291." Nor does § 1334(b)'s "original but not exclusive" language for "all civil proceedings arising under title 11, or arising in or related to cases under title 11" change the analysis. See *Excel Home Care, Inc. v. U.S. Dep't of Health & Human Servs.*, 316 B.R. 565, 572 (D. Mass. 2004) ("The statute itself provides that "unless indicated otherwise by another Act of Congress," the district courts are endowed with "original *but not exclusive* jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11."). As the United States Bankruptcy Appellate Panel of the Ninth Circuit explains:

Essentially all litigation within a bankruptcy case is a "civil proceeding" within § 1334(b) "arising under, arising in, or related to" jurisdiction, which jurisdiction is concurrent with state courts. 28 U.S.C. § 1334(b). Although such jurisdiction is concurrent with state courts, the automatic stay renders state jurisdiction more theoretical than real until after the case is closed. 11 U.S.C. § 362. As one would expect, the decisions construing § 1334(b) deal with how to draw the line at the outer fringe of "related to" matters. Most circuits agree that the test of "related to" jurisdiction is whether the outcome of the proceeding could conceivably have any effect on the estate being administered in bankruptcy. . . . In short, virtually every act a bankruptcy judge is called upon to perform in a judicial capacity is a "civil proceeding" within § 1334(b).

*In re Menk*, 241 B.R. 896, 908–09 (B.A.P. 9th Cir. 1999).

<sup>169</sup> 620 F.3d 1134, 1140 n.11 (9th Cir. 2010).

<sup>170</sup> 347 F.3d 1107, 1115 (9th Cir. 2003).

<sup>171</sup> *Do Sung Uhm*, 620 F.3d at 1140 n.11.

<sup>172</sup> *J.E.M. Ag. Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143 (2001).



### 3. *Enforcing § 405(h) Based on Its Plain Language Is Consistent with the Bankruptcy Code's Purpose*

That § 405(h)'s plain language governs its interpretation is supported by the purpose of the Bankruptcy Code: "The purpose of Chapter 11 reorganization is to assist financially distressed business enterprises by providing them with breathing space in which to return to a viable state."<sup>173</sup> Absent such breathing space, a debtor may be forced to cease its operations, rendering virtually impossible a return to a viable state. The problem is particularly acute for hospital-debtors that rely on Medicare payments and cannot have their Medicare disputes appealed quickly enough to keep operating.<sup>174</sup>

A debtor's breathing space is created by the bankruptcy court's exclusive jurisdiction over its estate. If not for this exclusive jurisdiction, the debtor may be called to defend its assets and debts in multiple courts (here, the Medicare appeals labyrinth),<sup>175</sup> which would create a race to the courthouse for its creditors and, more importantly, distract the debtor from the important task of successful reorganization. Indeed, "[o]ne of the primary purposes of revising the statutory grant of jurisdiction to the bankruptcy courts [in 1978] was the elimination of frequent, time-consuming, and expensive litigation of the question whether the bankruptcy court has jurisdiction of a particular proceeding."<sup>176</sup> Thus, § 1334's exclusivity provision is susceptible to little legislative weakness: bankruptcy jurisdiction is exclusive "irrespective of congressional statements to the contrary in the context of specialized legislation," and "in the absence of clear and convincing evidence of

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<sup>173</sup> *In re Golden Ocala P'ship*, 50 B.R. 552, 557 (Bankr. M.D. Fla. 1985).

<sup>174</sup> *In re Tidewater Mem'l Hosp.*, 106 B.R. 876, 880 (Bankr. E.D. Va. 1989) ("Here, however, the Government's action in apparent violation of the automatic stay provisions of § 362 could well prevent the debtor from having an opportunity for rehabilitation and reorganization. There is an urgency here which goes beyond the domain of Medicare law, and the doctrine of exhaustion of administrative remedies should not be allowed to frustrate the clearly stated goals of the Bankruptcy Code.")

<sup>175</sup> To require a hospital to complete the "complex and time-consuming maze of the [Medicare] administrative review process" as a prerequisite to obtaining bankruptcy relief will "virtually ignore the purpose of the changes in the jurisdictional grant enacted in the [1978] Reform Act elimination of delay and expense as a barrier to a successful reorganization." *In re Clawson Med., Rehab. & Pain Care Ctr., P.C.*, 9 B.R. 644, 49 (Bankr. E.D. Mich.), *rev'd*, 12 B.R. 647 (E.D. Mich. 1981).

<sup>176</sup> *Clawson*, 9 B.R. at 648-49.

legislative intent to preclude or condition [a bankruptcy c]ourt’s jurisdiction, no further barriers will be erected.”<sup>177</sup>

If a hospital is not provided with breathing space and Medicare is allowed to stop its payments while the hospital appeals an adverse CMS decision, the hospital may well run out of money and be forced to stop operating before the appeals process is complete.<sup>178</sup> True, § 405(h) is meant to act as a channeling requirement where virtually all challenges to Medicare decisions go through the agency.<sup>179</sup> This scheme becomes problematic, however, when adhering to it means “killing the patient to cure the disease.”<sup>180</sup> And killing the patient can be precisely what happens when a court requires hospitals to appeal a decision that stops their essential Medicare payments through the Medicare appeals process: if the hospital dies before its Medicare appeal can be heard, it effectively will have lost its opportunity for meaningful judicial review,<sup>181</sup> and in turn, it will be difficult or impossible to reorganize.<sup>182</sup> Consequently,

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<sup>177</sup> *Id.* at 648 (citing *Johnson v. Robison*, 415 U.S. 361, 373 (1974); *Chelsea Comm. Hosp., SNF v. Mich. Blue Cross Ass’n*, 630 F.2d 1131 (6th Cir. 1980); *Wayne St. Univ. v. Cleland*, 590 F.2d 627, 632 (6th Cir. 1980)).

<sup>178</sup> *See First Am. Health Care of Ga., Inc. v. U.S. Dep’t of Health & Human Servs.*, 208 B.R. 985, 989–90 (Bankr. S.D. Ga. 1996), *vacated and superseded*, No. 96-2007, 1996 WL 282149 (Bankr. S.D. Ga. Mar. 11, 1996).

<sup>179</sup> *Nat’l Ass’n for Home Care & Hospice, Inc. v. Burwell*, 77 F.Supp.3d 103, 109 (D.D.C. 2015).

<sup>180</sup> *See In re Jewish Mem’l Hosp.*, 13 B.R. 417, 420 (Bankr. S.D.N.Y. 1981).

<sup>181</sup> *E.g., Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 22–23 (2000) (emphasis omitted) (“Rather, the question is whether, as applied generally to those covered by a particular statutory provision, hardship likely found in many cases turns what appears to be simply a channeling requirement into complete preclusion of judicial review.”); *Frontier Health Inc. v. Shalala*, 113 F. Supp. 2d 1192, 1193 (E.D. Tenn. 2000) (“If Woodridge Hospital were forced to close down before its administrative remedies had been exhausted, it would not be in a position to seek judicial review at the close of the administrative process.”). Outside of the bankruptcy context, courts are unlikely to find this reasoning persuasive. *See, e.g., Fox Ins. Co v. Sebelius*, 381 F. App’x 93, 95–96 (2d Cir. 2010) (“Fox’s claimed financial harm does not constitute the circumstances in which the CMS’s actions and their effects on Fox are subject to ‘no review at all.’ *Illinois Council* does not hold that where a party may suffer economic hardship it may sidestep administrative review.”); *Sulphur Manor, Inc. v. Burwell*, No. CIV-15-250-RAW, 2015 WL 4409062, at \*3 (E.D. Okla. July 20, 2015); *Cal. Clinical Lab. Ass’n v. Sec’y of Health & Human Servs.*, No. 14-CV-0673, 2015 WL 2393571, at \*10 (D.D.C. May 20, 2015). However, bankruptcy courts, employing their expertise on the matters affecting debtors’ estates, frequently find otherwise. *E.g., U.S. ex rel. Sarasola v. Aetna Life Ins. Co.*, 319 F.3d 1292, 1296–97 (11th Cir. 2003); *In re Healthback, L.L.C.*, 226 B.R. 464, 471 n.8 (Bankr. W.D. Okla. 1998), *vacated*, No. 97-22616, 1999 WL 35012949 (Bankr. W.D. Okla. May 28, 1999); *First Am. Health Care of Ga.*, 208 B.R. at 989–90; *In re Tidewater Mem’l Hosp.*, 106 B.R. 876, 880 (Bankr. E.D.Va. 1989).

<sup>182</sup> *See, e.g., Sulphur Manor*, 2015 WL 4409062, at \*3 (“The court does find a showing of irreparable injury in the assertion that plaintiff will go out of business upon termination of the provider agreements . . . .”); *Healthback*, 226 B.R. at 471 n.8 (“In this matter, where there is no timely administrative remedy available to the debtor, this court will not require the debtor to, literally, commit suicide to adhere to this rule.”); *First Am. Health Care of Ga., Inc.*, 208 B.R. at 989–90; *Tidewater Mem’l Hosp.*, 106 B.R. at 880.

patients will have lost their access to care, Medicare will have lost a provider that potentially could reorganize and improve, and the hospital's employees will have lost their jobs.<sup>183</sup> But “[i]f there is not a potentially viable business in place worthy of protection and rehabilitation, the Chapter 11 effort has lost its *raison d’être*.”<sup>184</sup> Because the Bankruptcy Code in general—and chapter 11 in particular—exist to prevent the unnecessary shuttering of businesses that are temporarily but not irreversibly experiencing hardship, reading the natural language of § 405(h) as omitting reference to the Bankruptcy Code’s jurisdictional grant in 28 U.S.C. § 1334 fully supports the purpose of the Bankruptcy Code.<sup>185</sup>

### *B. Discussion of the “Legislative History” Argument*

The argument that § 405(h), as it is currently written, prevents bankruptcy courts from hearing Medicare claims prior to exhaustion of administrative remedies is based on explanatory language enacted by Congress when § 405(h) was amended in 1984.<sup>186</sup> This argument fails for six reasons, summarized here and explained in greater detail below.

First, to the extent § 2664(b) of the Deficit Reduction Act can be read as applying only to preclude substantive changes (a conclusion not supported by the statute’s language), jurisdictional statutes are procedural, not substantive, and are therefore not covered by § 2664(b)’s directive.

Second, the 1948 re-codification of 28 U.S.C. § 41 did include substantive changes, and applying § 405(h) in 2015 to a jurisdictional statute dating back nearly a century (that includes, for example, a jurisdictional grant for questions pertaining to slavery) leads to absurd results.

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<sup>183</sup> See, e.g., *First Am. Health Care of Ga., Inc.*, 208 B.R. at 989–90.

<sup>184</sup> *In re Golden Ocala P’ship*, 50 B.R. 552, 557 (Bankr. M.D. Fla. 1985).

<sup>185</sup> This outcome is consistent with other unique provisions in the Bankruptcy Code dealing with governmental entities. For example, § 525(a) of the Bankruptcy Code prohibits governmental entities from denying, revoking, superseding, or refusing to “renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against . . . a person that is or has been a debtor under” the Bankruptcy Code. 11 U.S.C. § 525(a). The similar provisions dealing with private employers is much more limited. 11 U.S.C. § 525(b). Section 525(a) has been applied to licenses and government contracts and applied to prohibit the Medicare program from refusing to allow entities that have been through bankruptcy from future participation as a Medicare provider. See, e.g., *In re St. Mary Hosp.*, 89 B.R. 503, 504 (Bankr. E.D. Pa. 1988). But see E.H. Sperow, *Section 525(a) of the Bankruptcy Code Plainly Does Not Apply to Medicare Provider Agreements*, 34 J. HEALTH L. 487, 487–500 (2001). See generally *F.C.C. v. NextWave Pers. Commc’ns Inc.*, 537 U.S. 293, 302 (2003); *In re Stoltz*, 315 F.3d 80, 95 (2d Cir. 2002).

<sup>186</sup> See *supra* text accompanying notes 7, 11–18; Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2664(b), 98 Stat. 1162.

Third, since its extraction from § 41, 28 U.S.C. § 1334 (bankruptcy jurisdiction) has been amended and *expanded* several times as part of significant revisions to the entire Bankruptcy Code. Ignoring this presumes Congress meant to preclude certain individuals and businesses from bankruptcy protection—despite a lack of express language so stating—while it was at the same time greatly increasing the jurisdictional authority of bankruptcy courts.

Fourth, in addition to the changes to § 405(h), many of the other amendments made by Congress in § 2663 of the DRA affected parties' substantive and procedural rights and liabilities. This (combined with the second and third reasons above) lends strong evidence to an argument that the *real* scrivener's error is the overbroad catchall in § 2664(b) that none of the 250 sub-sections of the U.S. Code that § 2663 amended did so in a way that altered a party's rights or liabilities.

Fifth, § 2664(b) is labeled "Effective Dates" and ends with the limitation, "before that date." Just eight days "before that date" of the DRA's enactment, the Bankruptcy Reform Act of 1984 was passed, reaffirming the bankruptcy court's exclusive jurisdiction over a debtor's case and estate. The plain language of § 2664(b) therefore prohibits courts from ignoring the rights created in the Bankruptcy Reform Act.

Sixth and finally, even if the Office of Revision Counsel's change, which was then codified by Congress, was a "scrivener's error," courts are not permitted to correct technical legislative errors.

### *1. Jurisdiction Under § 405(h) is Procedural, Not Substantive*

Assuming that § 2664(b) only applies to preclude any substantive changes that may be read into § 2663 (a conclusion unsupported by § 2664(b)'s plain language), such a preclusion would not apply to prevent alteration to § 405(h) because jurisdictional grants are procedural, not substantive.

As discussed above, Congress expressly enacted the Law Revision Counsel's changes to § 405(h) as part of the DRA.<sup>187</sup> As part of that

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<sup>187</sup> Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2663(a)(4)(D), 98 Stat. 1162 ("Section 205(h) of such Act is amended by striking out 'section 24 of the Judicial Code of the United States' and inserting in lieu thereof 'section 1331 or 1346 of title 28, United States Code . . . .'). Changes to a statute by the Law Revision Counsel are not binding absent enactment by Congress.

legislation, Congress included a provision entitled, “Effective Dates,” which stated in § 2664(b) that:

Except to the extent otherwise specifically provided in this subtitle, the amendments made by section 2663 shall be effective on the date of the enactment of this Act; *but 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.*<sup>188</sup>

Beginning in 1990 with *Bodimetric Health Servs., Inc. v. Aetna Life & Cas.*,<sup>189</sup> courts have tended to assume, without explanation, that § 2664(b) applies only to substantive and not procedural changes.<sup>190</sup> However, a close reading of the statute and an analysis of its precise terms suggests otherwise. Section 2664(b) states, “none of such amendments shall be construed as changing or affecting *any right, liability, status, or interpretation.*”<sup>191</sup> By its plain language, the word “right” in § 2664 is not qualified. As such, it is equally plausible—and, indeed, likely—that “right” includes *both* substantive *and* procedural rights. Moreover, Black’s Law Dictionary includes a definition for “right,” “substantive right,” and “procedural right.”<sup>192</sup>

In either event, to the extent that § 2664(b) does refer exclusively to substantive changes, it does not apply to § 405(h)’s jurisdictional bar, which is procedural in nature.<sup>193</sup> Black’s Law Dictionary defines “substantive law” as, “[t]he part of law that creates, defines, and regulates the rights, duties, and

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<sup>188</sup> *Id.* § 2664(b) (emphasis added).

<sup>189</sup> 903 F.2d 480, 489 (7th Cir. 1990).

<sup>190</sup> *E.g.*, *Nichole Med. Equip. & Supply, Inc. v. TriCenturion, Inc.*, 694 F.3d 340, 346 (3d Cir. 2012) (citing *Bodimetric Health Servs., Inc.*, 903 F.2d at 489); *BP Care, Inc. v. Thompson*, 398 F.3d 503, 515 (6th Cir. 2005); *Midland Psychiatric Associates, Inc. v. United States*, 969 F. Supp. 543, 549 (W.D. Mo. 1997), *aff’d*, 145 F.3d 1000 (8th Cir. 1998); *Nicole Med. Equip. & Supply, Inc. v. TriCenturion, Inc.*, No. CIV.A. 10-389, 2011 WL 1162052, at \*4 (E.D. Pa. Mar. 28, 2011); *Reg’l Med. Transp., Inc. v. Highmark, Inc.*, 541 F.Supp. 2d 718, 731 (E.D. Pa. 2, 2008); *Excel Home Care, Inc. v. U.S. Dep’t of Health & Human Servs.*, 316 B.R. 565, 573 (D. Mass. 2004); *Allstar Care Inc. v. Blue Cross & Blue Shield of S.C.*, 184 F. Supp. 2d 1295, 1298 (S.D. Fla. 2002); *Total Renal Labs., Inc. v. Shalala*, 60 F. Supp. 2d 1323, 1331 (N.D. Ga. 1999); *In re Healthback, L.L.C.*, 226 B.R. 464, 473 (Bankr. W.D. Okla. 1998), *vacated*, No. 97-22616, 1999 WL 35012949 (Bankr. W.D. Okla. 1999); *In re House of Mercy, Inc.*, 353 B.R. 867, 871 (Bankr. W.D. La. 2006); *In re AHN Homecare, LLC*, 222 B.R. 804, 808 (Bankr. N.D. Tex. 1998); *In re St. Mary Hosp.*, 123 B.R. 14, 17 (E.D. Pa. 1991).

<sup>191</sup> Deficit Reduction Act § 2664(b).

<sup>192</sup> BLACK’S LAW DICTIONARY 623–24 (3d pocket ed. 2006).

<sup>193</sup> *See* Deficit Reduction Act § 2664(b).

powers of the parties.”<sup>194</sup> Black’s further defines “right” as, *inter alia*, “[s]omething that is due to a person by just claim, legal guarantee, or moral principle,” “[a] power, privilege, or immunity secured to a person by law,” and “[a] legally enforceable claim that another will do or will not do a given act; a recognized and protected interest the violation of which is a wrong.”<sup>195</sup> A “substantive right” is, therefore, a “right that can be protected or enforced by law; a right of substance *rather than form*,”<sup>196</sup> whereas a “procedural right” is a “right that derives from legal or administrative procedure; a right that helps in the enforcement of a substantive right.”<sup>197</sup> Because jurisdiction, a “court’s power to decide a case or issue a decree,”<sup>198</sup> merely informs the parties of the proper forum, thereby “help[ing] in the enforcement of a substantive right,” and does not create, define, or regulate rights—such as those arising under 42 U.S.C. § 405(h) and 28 U.S.C. § 1334—it is a procedural right, not a substantive one.<sup>199</sup> And to the extent § 2664(b) can be read to apply only to substantive rights, it does not apply to alter the plain meaning of § 405(h).<sup>200</sup>

Even if the phrase “none of such amendments shall be construed as changing or affecting any right, liability, status, or interpretation” in § 2664(b) can be read to apply to both substantive and procedural rights, it still fails to bar bankruptcy court jurisdiction over Medicare disputes prior to exhaustion under § 405(h), for the reasons outlined below.

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<sup>194</sup> BLACK’S LAW DICTIONARY, *supra* note 192, at 686; *see also Healthback*, 226 B.R. at 473 (“**Substantive law.** That part of law which creates, defines, and regulates rights and duties of parties, as opposed to ‘adjective, procedural, or remedial law,’ which prescribes method of enforcing the rights or obtaining redress for their invasion. The basic law of rights and duties (contract law, criminal law, tort law, law of wills, etc.) as opposed to *procedural* law (law of pleading, law of evidence, *law of jurisdiction*, etc.).”).

<sup>195</sup> BLACK’S LAW DICTIONARY, *supra* note 192, at 623–24.

<sup>196</sup> *Id.* at 624 (emphasis added).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 393.

<sup>199</sup> Note, however, that the label “procedural” is not unassailable. When a procedural rule “makes changes in remedies, procedures, and evidence[,] such changes can have as profound an impact on behavior outside the courtroom as avowedly substantive changes.” *Luddington v. Ind. Bell Tel. Co.*, 966 F.2d 225, 229 (7th Cir. 1992) (Posner, J.); *see also Associated Dry Goods Corp. v. E.E.O.C.*, 543 F. Supp. 950, 956 (E.D. Va. 1982) (discussing facially procedural EEOC rules and their substantive impact and reasoning that when a purportedly “procedural” rule “trench[es] upon the rights and obligations of the parties affected” it could be considered “substantive”), *rev’d*, 720 F.2d 804 (4th Cir. 1983).

<sup>200</sup> *In re Healthback, L.L.C.*, 226 B.R. 464, 474 (Bankr. W.D. Okla. 1998), *vacated*, No. 97-22616, 1999 WL 35012949 (Bankr. W.D. Okla. May 28, 1999).

## 2. Federal Jurisdiction: Claims Against the United States

If § 405(h) refers to 28 U.S.C. § 41's jurisdictional grant, and not 28 U.S.C. §§ 1331 (federal question) and 1346 (concurrent jurisdiction to the district and other federal courts as to certain claims against the United States) as indicated in its text, then the *entirety* of § 41 must be enforced as it was then written, and not merely selectively. Applying this reasoning highlights the absurdity of referring to a law that was abrogated decades ago.

For example, there can be no dispute that § 405(h) covers jurisdiction under § 1346.<sup>201</sup> Before 1948, § 1346 was part of 28 U.S.C. § 41(20), which at the time provided that:

No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made. *The claims of married women, first accrued during marriage*, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, *shall not be barred if the suit be brought within three years after the disability has ceased*; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively.<sup>202</sup>

The 1948 amendment broke the statute of limitations out of § 41 and re-codified it at 28 U.S.C. § 2401:

[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.<sup>203</sup>

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<sup>201</sup> 28 U.S.C. § 41 (1946); 28 U.S.C. §§ 1331 to 1348, 1350 to 1357, 1359, 1397, 2361, 2401, and 2402 (1952); *see also* Bodimetric Health Servs. Inc. v. Aetna Life & Cas., 903 F.2d 480 (7th Cir. 1990) (discussing how § 405(h) bars action brought under diversity jurisdiction statute although § 1332 is no longer mentioned in § 405(h)); AHN Homecare v. Home Health Reimbursement & HCFA, 222 B.R. 804, 807–08 (Bankr. N.D. Tex. 1998); *In re* St. Mary Hosp., 123 B.R. 14, 17 (E.D. Pa. 1991); *In re* Visiting Nurse Ass'n of Tampa Bay, Inc., 121 B.R. 114 (Bankr. M.D. Fla. 1990). Absent from the re-codification was, for example, § 41(4)'s grant of original jurisdiction in the federal district courts for "all suits arising under any law relating to the slave trade." 28 U.S.C. § 41(4) (1946).

<sup>202</sup> 28 U.S.C. § 41(20) (emphasis added).

<sup>203</sup> 28 U.S.C. § 2401 (1952).

Notably absent from § 2401 is the provision that labels married women “disabled” and stops the clock from running on the statute of limitations for claims against the United States while they are married.

Although the “disabled” label is disparaging, if the term were still in effect, it would actually confer a benefit to married women. If § 405(h) refers to 28 U.S.C. § 41, which ceased to exist in 1948, then a married woman whose claims against the United States arise during marriage would be able to avoid tolling the statute of limitations on those claims for potentially well beyond the six-year limit that applies to everyone else (albeit litigation of her claims would be limited to the Medicare appeals process). For example, if a woman’s Medicare dispute arises during her marriage and her husband dies nine years later, then she would still have an additional three years to bring her claim, for a total limitations period of twelve years, more than double that of a non-married woman. Indeed, this is precisely the way courts during that era viewed 28 U.S.C. § 41(20) as operating: “[I]f her marriage tolled the statute, she failed to start her action within three years after the death of her husband, and is clearly barred.”<sup>204</sup>

Circuit and lower courts have held, outside of the bankruptcy context, that the omission of references to other grants of jurisdiction should be ignored, and the pre-1984 version of the statute should be applied. These courts reason that because Congress, in passing the 1984 law that adopted the 1976 revision, wrote that the 1984 amendments should not be “construed as changing or affecting any right, liability, status, or interpretation which existed (under the provisions of law involved) before that date.”<sup>205</sup> But if this legislative language means any changes affecting a person’s rights must be ignored (as some courts have held), then all such changes—for example, with regard to the jurisdictional rights of women—would also have to be ignored. Thus, applying the “guidance” in § 2664(b)’s legislative note also requires ignoring 28 U.S.C. § 2401 as it is currently written. Congress could not have intended such an absurd<sup>206</sup> and likely unconstitutional result,<sup>207</sup> and in 2016 and beyond, courts should not employ logical reasoning that would tend to enforce it.

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<sup>204</sup> *Stubbs v. United States*, 21 F. Supp. 1007, 1010 (M.D.N.C. 1938).

<sup>205</sup> *Bodimetric Health Services, Inc. v. Aetna Life & Cas.*, 903 F.2d 480, 488–89 (7th Cir. 1990) (holding that, even in the absence of reference to diversity jurisdiction provision 28 U.S.C. § 1332 in § 405(h), such suits were still barred).

<sup>206</sup> *See Luddington v. Ind. Bell Tel. Co.*, 966 F.2d 225, 228 (7th Cir. 1992) (Posner, J.) (“Section [42 U.S.C.] § 1981 dates back to 1866. It is as unlikely that Congress was attempting to restore section 1981 to the



### 3. Federal Jurisdiction: Bankruptcy Jurisdiction

The legislative history argument also fails because applying § 405(h) to § 41 as it was written in 1935<sup>208</sup> requires ignoring the numerous (and painstaking) changes Congress has since made to bankruptcy jurisdiction. In particular, it would require sidestepping the grant of exclusive jurisdiction to bankruptcy courts over a debtor's estate, which was itself written into law to solve the complex jurisdictional fights that persisted during the preceding century.<sup>209</sup> In short, enforcing 28 U.S.C. § 41 as it was written before 1948 reinvigorates the jurisdictional morass that subsequent amendments to the Bankruptcy Code were expressly written to address—indeed, such a jurisdictional debate is the very topic of this article.

In 1935, 28 U.S.C. § 41(19) stated, “The district courts shall have original jurisdiction . . . [o]f all matters and proceedings in bankruptcy.”<sup>210</sup> When § 41 was broken out into subparts in 1948, § 41(19) became § 1334 and the “phraseology” was modified to read, “The district courts shall have original jurisdiction, exclusive of the courts of the States, of all matters and proceedings in bankruptcy.”<sup>211</sup>

Section 1334 remained unchanged until 1978. The 1978 amendment arose in the context of growing dissatisfaction with the Bankruptcy Act of 1898, which was still in effect at the time, causing Congress to overhaul the entire legislative scheme.<sup>212</sup> Among the problems with the Bankruptcy Act at the time was the limited effectiveness of bankruptcy adjudication, which worked as follows:

Before the [1978] Act, federal district courts served as bankruptcy courts and employed a ‘referee’ system. Bankruptcy proceedings were generally conducted before referees, except in those instances in which the district court elected to withdraw a case from a referee. The referee’s final order was appealable to the district court. The

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understanding of its framers . . . . The new civil rights act reflects contemporary policy and politics, rather than a dispute between Congress and the Supreme Court over the mechanics of interpretation.”)

<sup>207</sup> Applying the statute in this way may violate the Fifth Amendment’s Equal Protection Clause. See *Silbowitz v. Sec’y of Health, Ed. & Welfare*, 397 F. Supp. 862, 867 (S.D. Fla. 1975), *aff’d sub nom. Califano v. Silbowitz*, 430 U.S. 924 (1977).

<sup>208</sup> Social Security Act Amendments of 1939, Pub. L. No. 379, § 205(h), 53 Stat. 1360, 1371.

<sup>209</sup> See Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. 47, 62 (1997); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 53 (1982).

<sup>210</sup> 28 U.S.C. § 41(19) (1934).

<sup>211</sup> 28 U.S.C. § 1334 (Supp. II 1948).

<sup>212</sup> See Posner, *supra* note 209, at 61.

bankruptcy courts were vested with ‘summary jurisdiction’—that is, with jurisdiction over controversies involving property in the actual or constructive possession of the court. And, with consent, the bankruptcy court also had jurisdiction over some ‘plenary’ matters—such as disputes involving property in the possession of a third person.<sup>213</sup>

Under this regime, however, “bankruptcy judges did not have sufficient jurisdictional and remedial powers to decide cases in an expeditious way—they would have to refer issues outside their power to the supervising district court—and that bankruptcy judges’ subordinate status weakened their authority with litigants.”<sup>214</sup>

To remedy this defect, Congress created “in each judicial district, as an adjunct to the district court for such district, a bankruptcy court which shall be a court of record known as the United States Bankruptcy Court for the district.”<sup>215</sup> Accompanying the creation of the courts was a broad jurisdictional grant in 28 U.S.C. § 1471 (which went into effect on April 1, 1984) that gave the bankruptcy courts “exclusive jurisdiction” of a debtor’s bankruptcy case and assets:

(a) Except as provided in subsection (b) of this section, the district courts shall have *original and exclusive jurisdiction of all cases under title 11*.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.

(c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.

(d) Subsection (b) or (c) of this section does not prevent a district court or a bankruptcy court, in the interest of justice, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11. Such abstention, or a decision not to abstain, is not reviewable by appeal or otherwise.

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<sup>213</sup> *N. Pipeline Const. Co.*, 458 U.S. at 53; Posner, *supra* note 209, at 62.

<sup>214</sup> Posner, *supra* note 209, at 62; *see also N. Pipeline Constr. Co.*, 458 U.S. at 53.

<sup>215</sup> *N. Pipeline Constr. Co.*, 458 U.S. at 53 (citing 28 U.S.C. § 151(a) (Supp. IV 1976)).

(e) The bankruptcy court in which a case under title 11 is commenced shall have exclusive jurisdiction of all of the property, wherever located, of the debtor, as of the commencement of such case.<sup>216</sup>

Correspondingly, § 1334 was changed to provide for the appeals process:

(a) The district courts for districts for which panels have not been ordered appointed under section 160 of this title shall have jurisdiction of appeals from all final judgments, orders, and decrees of bankruptcy courts.

(b) The district courts for such districts shall have jurisdiction of appeals from interlocutory orders and decrees of bankruptcy courts, but only by leave of the district court to which the appeal is taken.

(c) A district court may not refer an appeal under that section to a magistrate or to a special master.<sup>217</sup>

Shortly after the enactment of the 1978 Act, in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,<sup>218</sup> the Supreme Court held that the authority of the bankruptcy courts violated Article III of the United States Constitution because it “gave Article III powers to judges who do not have lifetime tenure and independent salaries.”<sup>219</sup>

Congress fixed the statute in 1984, and amended the unconstitutional elements of the bankruptcy courts’ jurisdictional grant in § 1334 as follows:

(a) Except as provided in subsection (b) of this section, the district courts shall have *original and exclusive Jurisdiction of all cases under title 11.*

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for

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<sup>216</sup> 28 U.S.C. § 1471 (Supp. IV 1978) (emphasis added).

<sup>217</sup> 28 U.S.C. § 1334 (Supp. III 1978) (changing § 1334’s heading from “Bankruptcy matters and proceedings” to “Bankruptcy appeals”).

<sup>218</sup> 458 U.S. at 73.

<sup>219</sup> Posner, *supra* note 209, at 93; see *N. Pipeline Constr. Co.*, 458 U.S. at 73 (holding that the authority granted to bankruptcy courts violated Article III of the Constitution).

State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain made under this subsection is not reviewable by appeal or otherwise. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a case under title 11 is commenced or is pending shall have *exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of the estate.*<sup>220</sup>

Notably, Congress removed the provision providing bankruptcy courts with “all of the jurisdiction conferred by this section on the district courts.”<sup>221</sup>

Given the substantial amount of effort and energy that went into overhauling the Bankruptcy Code in 1978 and 1984—again, an overhaul geared towards solving this very jurisdictional debate—it is implausible that Congress intended to deprive the bankruptcy courts of “exclusive jurisdiction” over the debtor and its estate when the debtor was a hospital that sought to challenge a Medicare payment decision. This would lead to the absurd result that the Bankruptcy Code’s protections do not apply to a small but not insignificant part of the population of debtors (insolvent hospitals relying on Medicare payments) due to an inferred deference to Medicare’s administrative expertise. If Congress preferred the development of administrative expertise to judicial efficiency in bankruptcy proceedings, it would have expressly excluded bankruptcy jurisdiction from *every* type of administrative proceeding in the Bankruptcy Code. But it did not. Instead, by providing “an independent basis for bankruptcy court jurisdiction,” Congress made clear that in the

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<sup>220</sup> 28 U.S.C. § 1334 (Supp. III 1984) (emphasis added).

<sup>221</sup> Compare 28 U.S.C. § 1471(c) (Supp. IV 1978), with 28 U.S.C. § 1334 (Supp. III 1984).

Medicare Act and elsewhere, “exhaustion of administrative remedies pursuant to other jurisdictional statutes is not required.”<sup>222</sup>

#### 4. *Section 2663 Contains Numerous Sections that Change Parties’ Rights*

If § 2663 of the DRA is interpreted to have made no changes to a party’s rights, many of its provisions lead to absurd results. And this, combined with the clarity of the Bankruptcy Code, makes it more likely that the actual scrivener’s error is the broad statement in § 2664(b) that none of the hundreds of changes in § 2663(a) alter a party’s rights.

The court in *Nurses’ Registry* highlights four such absurdities:

- A change in § 2663 to 42 U.S.C. § 1307 added to the law making it a crime to impersonate a “former wife divorced” to obtain information about a Social Security beneficiary’s benefits provisions for husbands, mothers, and fathers; no change in rights under § 2664(b) would mean that § 1307 still only made it a crime to impersonate a “former wife divorced.”<sup>223</sup>
- “Congress amended 42 U.S.C. § 422(b)(4), since repealed, which mandated deductions from Social Security benefits on account of refusal to accept rehabilitation services, to not apply to ‘full-time elementary or secondary school students’ between the ages of eighteen to twenty-two, whereas § 422(b)(4) previously carved out all ‘full-time students’ of the same ages. If Defendants were right about the ineffectiveness of the DRA’s technical amendments, college students between the ages of eighteen to twenty-two would have continued to be exempt from § 422(b)(4) until its repeal in 1999.”<sup>224</sup>
- “[M]ost remarkably, a ‘technical amendment’ in the DRA repealed an entire title of the SSA, Title XIII, which provided a program of unemployment benefits for federal seamen. If the DRA’s technical amendments truly did not ‘change or

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<sup>222</sup> *In re Town & Country Home Nursing Servs., Inc.*, 963 F.2d 1146, 1154 (9th Cir. 1992) (quotation marks omitted).

<sup>223</sup> *In re Nurses’ Registry & Home Health Corp.*, 533 B.R. 590, 596 (Bankr. E.D. Ky. 2015).

<sup>224</sup> *Id.*

affect any right,’ the Reconversion Unemployment Benefits for Seamen program is still federal law.”<sup>225</sup>

- Regarding the Medicare Act, “At least one of the DRA’s sixty-five ‘technical amendments’ to the Medicare Act, while minor, is likewise unmistakably substantive. This amendment amended 42 U.S.C. § 1395y’s exclusion of certain benefits during the period from when an individual becomes eligible under Medicare to ‘the month in which such individual attains the age of 70,’ to an exclusion of benefits during the period from eligibility to ‘the month *before the month* in which such individual attains the age of 70.’ In other words, this ‘technical amendment,’ which Congress claimed did not ‘affect any right,’ abbreviated a benefits exclusion by a month.”<sup>226</sup>

Therefore, if § 2663 made no changes to parties’ rights, then many of its textual changes make no sense. However, § 2664(b) has been plainly misapplied and misinterpreted because courts have wholly ignored its key qualifier: language limiting the time period of its efficacy.

##### 5. “*Before That Date*” Language

Section 2664(b) of the “technical” amendments in the DRA states that, “but 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*.”<sup>227</sup> However, the Bankruptcy Reform Act of 1984, which granted bankruptcy courts broad jurisdictional authority over a debtor’s estate, was passed eight days before the DRA. As such, § 2664(b) actually preserves the jurisdictional rights granted to bankruptcy courts as they existed *before* the passage of the DRA, which would be based on the

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<sup>225</sup> *Id.* It bears noting that Title XIII’s effective period expired on June 30, 1950. Olga S. Halsey, *Reconversion Unemployment Benefits for Seamen*, SOCIAL SECURITY BULLETIN (Aug. 1949), <https://www.ssa.gov/policy/docs/ssb/v12n8/v12n8p15.pdf>. But even reading this example out of the *Nurses’ Registry* court’s reasoning does not alter the overall conclusion that § 2663 does, in fact, alter rights. Nor does § 2663’s title, “OTHER TECHNICAL CORRECTIONS IN THE SOCIAL SECURITY ACT AND RELATED PROVISIONS” and its location in “Subtitle D—Technical Corrections” change this outcome because where, as is the case with § 405(h), there is no ambiguity in the statutory language the “title of a statute . . . cannot limit the plain meaning of [its] text.” Pa. Dep’t of Corrs. v. Yeskey, 524 U.S. 206, 212 (1998).

<sup>226</sup> *Nurses’ Registry*, 533 B.R. at 596 n.11 (citing 42 U.S.C. § 1395y(b)(3)(A)(iii) (1982) and 42 U.S.C. § 1395y(b)(3)(A)(iii) (Supp. 1985)).

<sup>227</sup> Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2664(b), 98 Stat. 1162 (1984) (emphasis added).

Bankruptcy Reform Act. Section 2664(b)'s plain language<sup>228</sup> therefore requires § 1334 to be read out of § 405(h) because § 1334 was passed eight days earlier and grants significant procedural and substantive rights to bankruptcy courts over the debtor's estate.<sup>229</sup> Indeed, it is implausible that Congress enacted the Bankruptcy Code and its jurisdictional grant and then, just over a week later, abrogated parts of it in the Medicare Act without any explicit intent to do so.

#### 6. Courts Lack Power to Correct Technical Errors

Finally, § 405(h) must be enforced as written even if its omission of § 1334 is a technical error because courts cannot correct technical errors.<sup>230</sup> If Congress enacts something it did not intend to, the solution is for Congress to pass another law amending it.<sup>231</sup> Indeed, "courts only correct drafting errors where they are certain, usually for reasons of absurdity, that an error occurred, and where the error is a 'technical mistake in transcribing' a law rather than a 'substantive mistake in designing' a law."<sup>232</sup> If the omission of § 1334 from § 405(h) was a technical error, as the "legislative history" argument requires, it must nevertheless be enforced as written until Congress amends or rewrites it.

### CONCLUSION

Despite the compelling nature of the plain language argument, whether a bankruptcy court jurisdictional grant supersedes Medicare's is an issue that has resulted in many contrary decisions over more than two decades. Still, the recent decisions in *Nurses' Registry* and *Bayou Shores* remind bankruptcy attorneys and financial advisors that the bankruptcy court may offer relief to a distressed hospital by avoiding spending years wandering the desert that is the

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<sup>228</sup> Assuming § 405(h)'s jurisdictional grant is substantive and not procedural. See *supra* at note 193; *In re Healthback, L.L.C.*, 226 B.R. 464, 472–73 (Bankr. W.D. Okla. 1998), *vacated*, No. 97-22616, 1999 WL 35012949 (Bankr. W.D. Okla. May 28, 1999).

<sup>229</sup> The "under the provisions of law involved" parenthetical includes § 405(h) and § 1334.

<sup>230</sup> Even if § 2664(b) and its apparently broad application is a scrivener's error that a court cannot correct, enforcing it as written does not change the present analysis due to its qualifying time limitation language discussed above.

<sup>231</sup> *Lamie v. U.S. Trustee*, 540 U.S. 526, 542 (2004) ("If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. 'It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result.' This allows both of our branches to adhere to our respected, and respective, constitutional roles. In the meantime, we must determine intent from the statute before us." (quoting *United States v. Granderson*, 511 U.S. 39, 68 (1994) (Kennedy, J., concurring))).

<sup>232</sup> *In re Nurses' Registry & Home Health Corp.*, 533 B.R. 590, 595 (Bankr. E.D. Ky. 2015) (quoting *King v. Burwell*, 135 S.Ct. 2480, 2505 (2015) (Scalia, J., dissenting)).

Medicare appeals process and instead having its life-threatening disputes handled quickly and efficiently by a federal bankruptcy court.