MADNESS IN MEDICARE: *BAYOU* CASTS UNCERTAINTY OVER THE FUTURE OF NURSING FACILITY BANKRUPTCIES

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Currently, there is a circuit split between the Ninth and Eleventh Circuits regarding whether bankruptcy courts have jurisdiction over a Medicare or Medicaid dispute under Title 42, § 405(h) of the U.S. Code. If the bankruptcy court does not have jurisdiction over a Medicare provider agreement dispute, as the Eleventh Circuit recently held in In re Bayou Shores SNF*, the nursing facility is effectively unable to bring its case before the bankruptcy court and potentially denied an opportunity to reorganize. This Note analyzes the practical effects of the Eleventh Circuit's* In re Bayou Shores SNF *decision by considering statistics on rising Medicare costs, projected elderly population growth, increase in the number of people expected to use long-term care, and a recent increase in nursing home Chapter 11 filings. Additionally, this Note examines the potential reorganization hurdles nursing facility debtors may face if their Medicare claims are adjudicated through the HHS's review process. This Note further argues that* In re Bayou Shores SNF *is contradictory to many of the congressional policies of bankruptcy law. Lastly, this Note recommends that because the Supreme Court has denied certiorari to resolve the circuit split, bankruptcy courts should exercise jurisdiction over Medicare disputes under 42 U.S.C. § 405(h)—while using discretionary factors to abstain from hearing especially complex Medicare issues. This recommendation places an emphasis on the congressional-endorsed objective of providing an expeditious and efficient bankruptcy process for the debtor, while balancing the interests of the Department of Health and Human Services to process complicated Medicare disputes.*

* This Note is dedicated to my family, for providing me with constant love and support—and specifically to my Dad, for instilling in me his passion for education, learning, and all things concerning the University of Illinois. Thank you to my Note Editor, Jackie McCaffery, for your continuous help in editing and revising my Note, and to the editors and staff of the *University of Illinois Law Review* for their countless hours spent working on our journal. Lastly, thank you to Professors Brubaker, Lawless, and Tabb for providing a wonderful bankruptcy curriculum at the University of Illinois. Your classes consistently challenged me and enabled me to pursue my interest in bankruptcy law.

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I. INTRODUCTION

Imagine a world where you have just been told your granny's Florida nursing facility is insolvent and on the brink of closing. You are assured that granny will be able to stay put because the nursing facility will simply avail itself to the protection of the federal bankruptcy courts. Yet, due to the federal law applied in that circuit, the Florida bankruptcy court is unable to hear the nursing facility's case.[1]

Now, move across the country. If that same nursing facility were in California, its case would be heard, and granny could stay put while the nursing facility organizes its affairs.[2] What gives? The same federal law that is supposed to lead to uniform results instead reaches drastically different outcomes depending on to what part of the country granny decided she wanted to retire.

This is the current state of affairs in bankruptcy law. After a recent Eleventh Circuit decision, circuit courts are divided on whether bankruptcy courts can hear cases regarding nursing facilities that rely on Medicare provider

1. *See infra* Section II.C.
2. *See infra* Section II.B.

agreements.[3] To make matters worse, the Supreme Court recently denied certiorari, leaving the issue unresolved and a majority of courts without guidance.[4] As more Americans reach the age of retirement,[5] healthcare becomes a bigger player in bankruptcy than ever before; yet the nation's Bankruptcy Code is unable to offer uniform results.[6]

This Note examines the unresolved circuit split regarding bankruptcy jurisdiction over Medicare claims and the substantial impact it may have on nursing facilities in the United States. Part II of this Note examines recent differing opinions in the Ninth and the Eleventh Circuit regarding bankruptcy courts' jurisdiction over Medicare disputes under Title 42 of the U.S. Code, Section 405(h).[7] Part III analyzes the applicable case law and future legal issues that bankruptcy courts will face when deciding Medicare disputes. Additionally, Part III examines policy concerns unique to bankruptcy law overlooked in relevant court decisions. Part IV provides a recommendation that would produce uniform results in bankruptcy law across the nation, while still considering the administrative interests of the Department of Health and Human Services ("HHS"). Specifically, this Note recommends bankruptcy courts should exercise jurisdiction over Medicare disputes, but only after examining the abstention provisions in §§ 305(a) and 1334(c) of the U.S. Code.[8] Bankruptcy courts should examine a series of factors to determine whether the complexity of Medicare disputes and the need for administrative review outweighs a nursing facility's need for an expeditious and efficient hearing.

II. BACKGROUND

Long-term nursing care for seniors comes in a variety of different forms and offers a variety of different services, including nursing homes, skilled nursing facilities, assisted-living facilities, hospice facilities, and adult family homes.[9] These facilities offer many benefits for seniors, such as twenty-four-hour comprehensive care and specialized services.[10] Yet nursing facilities also

3. BILL ROCHELLE, AM. BANKR. INST., ROCHELLE'S DAILY WIRE: ABUNDANT SPLITS AND OTHER SIGNIFICANT DECISIONS 39–41 (2016), http://www.acba.org/portals/0/pdf/Bankruptcy/2016/PGH2016.pdf.

4. Florida Agency for Health Care Admin. v. Bayou Shores SNF (*In re* Bayou Shores SNF), 828 F.3d 1297 (11th Cir. 2016), *cert. denied*, (U.S. June 5, 2017) (No. 16-967), https://www.supremecourt.gov/search.aspx?filename=/docketfiles/16-967.htm [hereinafter *Cert. denied*].

5. *See* Glen Kessler, *Do 10,000 Baby Boomers Retire Every Day?*, WASH. POST (July 24, 2014), https://www.washingtonpost.com/news/fact-checker/wp/2014/07/24/do-10000-baby-boomers-retire-every-day/ (citing SOCIAL SECURITY ADMINISTRATION, ANNUAL PERFORMANCE PLAN FOR FISCAL YEAR 2013 52 (Feb. 2012)) ("By 2015, almost 33 percent of our workforce, including 48 percent of our supervisors, will be eligible to retire.").

6. *Compare* Section II.B, *with* Section II.C (discussing different interpretations of bankruptcy jurisdiction among the Ninth and Eleventh Circuits).

7. *See generally* 42 U.S.C. § 405(h) (2012).

8. *See generally* 11 U.S.C. § 305(a) (2012); 28 U.S.C. § 1334(c) (2012).

9. *LTSS Information: Facility-Based Care*, CMS.GOV (June 22, 2016, 10:55 AM), https://www.cms.gov/Outreach-and-Education/American-Indian-Alaska-Native/AIAN/LTSS-TA-Center/info/facility-based-care.html [hereinafter *LTSS Information*].

10. *Id.*

have high operating costs and often rely on minimal occupancy levels for financial viability.[11] Thus, a significant portion of nursing facility funding comes from Medicare, which makes up a total of 15% of federal spending and is expected to grow 17.5% by 2027.[12]

Medicare requirements for individuals are uniform across the states[13] and can cover many senior healthcare services, including noncustodial nursing home care, skilled nursing facilities, hospital care, and hospice.[14] Studies suggest that "[m]edicare per capita spending is projected to grow at an average annual rate of 4.6% over the next 10 years . . . ."[15] Additionally, the percentage of the population using long-term care services is also expected to grow.[16] The number of individuals using paid long-term care services in assisted living, skilled nursing facilities, or other facilities is projected to double from 13 million in 2000 to 27 million in 2050.[17]

The steady growth of Medicare and the growing elderly population suggests that nursing facilities should be thriving; however, a significant number have struggled with insolvency.[18] For example, in early 2000, Kansas City lost seven large nursing homes to bankruptcy in just a six-month span.[19] This mirrored the nation at that time, where an estimated 10% of nursing homes were in bankruptcy, accounting for a total of 1,651 skilled nursing facilities.[20] A decade later, insolvency problems continued to plague nursing facilities. From 2010–2014, bankruptcy filings for nursing facilities increased to 38%, despite total Chapter 11 bankruptcy filings decreasing by 60%.[21] With a growing elderly population and a need for long-term care, bankruptcy law should provide solutions for struggling nursing facilities. Yet, under the current circuit split, many nursing facilities reliant on Medicare may find themselves turned away at the steps of the bankruptcy courthouse.

11. *Id.*

12. Juliette Cubanski & Tricia Neuman, *The Facts on Medicare Spending and Financing*, KAISER FAMILY FOUND. (June 22, 2018), https://www.kff.org/medicare/issue-brief/the-facts-on-medicare-spending-and-financing/.

13. *LTSS Information*, *supra* note 9.

14. *What Medicare Covers: What Part A Covers*, MEDICARE.GOV, https://www.medicare.gov/what-medicare-covers/what-part-a-covers (last visited Nov. 3, 2018).

15. Cubanski & Neuman, *supra* note 12.

16. HHS ET AL., REPORT TO CONGRESS: THE FUTURE SUPPLY OF LONG-TERM CARE WORKERS IN RELATION TO THE AGING BABY BOOM GENERATION, at v (2013).

17. *Id.*

18. *See infra* notes 19–21.

19. Dan Margolies & Julius A. Karash, *Nursing Home Operator's Bankruptcy Points Up Industry's Fragility*, J. TIMES (Feb. 5, 2000), http://journaltimes.com/nursing-home-operator-s-bankruptcy-points-up-industry-s-fragility/article_091b4be6-ef43-56ad-808e-09caae69f808.html.

20. *Id.*

21. Katie Thomas, *Facing Suits, a Nursing Home in California Seeks Bankruptcy*, N.Y. TIMES (Feb. 17, 2015), https://www.nytimes.com/2015/02/18/business/facing-suits-a-nursing-home-seeks-bankruptcy.html.

A. Statutory Provisions for Bankruptcy Jurisdiction and Medicare Claims

The issue surrounding nursing facilities in bankruptcy is a jurisdictional question of whether a bankruptcy court can hear a nursing facility's case when a Medicare dispute arises.[22] This issue begins with how bankruptcy courts derive their jurisdiction. Bankruptcy courts' jurisdiction originates from 28 U.S.C. § 1334, which provides: "the district court shall have original and exclusive jurisdiction of all cases under title 11. . . . [T]he district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to a case under title 11."[23] Bankruptcy courts may hear bankruptcy cases on behalf of the district court under 28 U.S.C. § 157, which states:

> Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district. Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings under title 11, or arising in a case under title 11 . . . .[24]

Thus, bankruptcy courts—through §§ 1334 and 157 of the U.S. Code—exercise jurisdiction over bankruptcy cases and proceedings in federal court.[25]

Statutory law for Medicare claims is generally found under 42 U.S.C. § 1395, enacted as Title XVIII of the Social Security Act.[26] Instead of providing directly for review of Medicare claims in § 1395(ii) of Title XVIII, the statute expressly cross-references § 405(h) of the broader Social Security Act to provide for review of Medicare claims, stating: "subsection . . . (h) . . . of section 405 of this title, shall also apply with respect to this subchapter" and "any reference therein to the Commissioner of Social Security . . . shall be considered a reference to the Secretary of the Department of Health and Human Services, respectively."[27] The Supreme Court noted that "Social Security provision, 405(h), channels most, if not all, Medicare claims through this special review."[28] Thus, to bring a Medicare claim in any court, the petitioner must look to 42 U.S.C. § 405(h) of the Social Security Act ("§ 405(h)").[29]

Whether a Medicare dispute can be heard first in bankruptcy court stems from the statutory language of § 405(h):

22. *See* ROCHELLE, *supra* note 3.

23. 28 U.S.C. § 1334(a)-(b) (2012).

24. 28 U.S.C. § 157(a)-(b)(1) (2012).

25. WILLIAM L. NORTON III, 1 NORTON BANKR. L. & PRAC. 3d § 4.2 (2017).

> [T]he bankruptcy courts, subject to the limitation in 28 U.S.C.A. § 157(c)(1) . . . in practice exercise jurisdiction over virtually all phases of bankruptcy cases and proceedings by virtue of the general reference, pursuant to 28 U.S.C.A § 157(a), of all existing and future bankruptcy cases and proceedings by every district court to the bankruptcy judges of the district.

Id.

26. HARVEY L. MCCORMICK, MEDICARE & MEDICAID CLAIMS AND PROCEDURES 43 (4th ed. 2005).

27. 42 U.S.C. § 1395ii (2012).

28. Shalala v. Illinois Council on Long Term Care, Inc. 529 U.S. 1, 9 (2000) ("Section 1395ii makes § 405(h) applicable to the Medicare Act 'to the same extent as' it applies to the Social Security Act.").

29. *See* 42 U.S.C. § 1395ii (2012); *Shalala*, 529 U.S. at 8.

> Social Security after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought under *section 1331 or 1346* of title 28 to recover on any claim arising under this subchapter.[30]

When the statute is broken down, it is apparent why the language of § 405(h) presents a bankruptcy-specific issue. First, for purposes of bringing a Medicare claim, § 405(h) effectively provides that a Medicare dispute cannot first be brought in a district court under 28 U.S.C. §§ 1331 or 1346.[31] Yet § 405(h) does not expressly prohibit a Medicare claim brought under § 1334, where bankruptcy jurisdiction originates.[32] Thus, the circuit split centers upon whether the exclusion of § 1334 means a Medicare claim can first be brought in a bankruptcy court, instead of being subject to the administrative review of the HHS.[33] This is especially significant in nursing facility cases where Medicare service provider agreements can lead to claims against the estate that must be resolved during a bankruptcy case.[34]

B. The Ninth Circuit's Plain-Meaning Analysis

The Ninth Circuit, in *In re Town & Country Home Nursing Services, Inc.*,[35] ("*Town & Country*") was the first circuit to consider whether the exclusion of bankruptcy jurisdiction under § 1334 in § 405(h) left a bankruptcy court with authority to hear a Medicare dispute before administrative review.[36] The facts involved an in-home nursing service provider, T & C, who filed a Chapter 11 bankruptcy in 1985.[37] While reorganizing its affairs in bankruptcy court, T & C brought a claim against the HHS for deducting $88,700 from its service provider agreements due to an overpayment calculation error that occurred while T & C was operational.[38] The Medicare dispute revolved around whether the HHS was required to reimburse T & C for a payment error because they

30. 42 U.S.C. § 405(h) (2012) (emphasis added).

31. *Id.*; *see* Weinberger v. Salfi, 422 U.S. 749, 757–59 (1975) (holding that a district court did not have jurisdiction under 405(h)).

32. *See supra* notes 28–31 and accompanying text.

33. *See* ROCHELLE, *supra* note 3.

34. 11 U.S.C. § 101(5)(A) (2012) ("[C]laim means – (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."); *see also* Peter R. Roest, *Recovery of Medicare and Medicaid Overpayments in Bankruptcy*, 10 ANNALS OF HEALTH L. 1, 6–7 (2001) (noting that Medicare overpayments for prepetition services constitute "claims").

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

36. *See* Donna Higgins, *High Court Asked to Decide If Bankruptcy Courts Can Hear Medicare Act Claims*, 21 WESTLAW J. BANKR. 2, 2–3 (2017).

37. *In re Town & Country Home Nursing Servs., Inc.*, 963 F.2d at 1148.

38. *Id.*

were a healthcare service provider under the Medicare Act.[39] T & C believed it should be reimbursed by the Secretary of HHS, who is responsible for correcting payment errors.[40]

In the bankruptcy case, T & C brought its Medicare dispute against the HHS because T & C believed, under § 1334(b), the bankruptcy court had jurisdiction to hear the Medicare service provider dispute because the money was crucial to T & C's business and related to property of the estate.[41] The Secretary of the HHS disagreed with T & C, arguing that the claim needed to first be disputed with the HHS under administrative review due to § 405(h)'s "threshold requirement of administrative exhaustion."[42]

The Ninth Circuit examined whether the language of § 405(h) and the exclusion of bankruptcy jurisdiction under § 1334 from other federal court jurisdiction prohibited bankruptcy courts from reviewing Medicare claims.[43] The Ninth Circuit held that "Section 405(h) only bars actions under 28 U.S.C §§ 1331 and 1346; it in no way prohibits an assertion of jurisdiction under section 1334."[44] The court examined the plain language of the statute and considered the policy rationales behind excluding the bankruptcy courts from the list of prohibited claims in § 405(h).[45] The Ninth Circuit reasoned that § 1334 was intentionally broad: "[t]his section allows a single court to preside over all of the affairs of the estate, which promotes a 'congressionally-endorsed objective: the efficient and expeditious resolution of all matters connected to the bankruptcy estate.'"[46]

The Ninth Circuit has decided several similar cases post-*Town & Country*, but its decision that bankruptcy courts are not precluded from hearing Medicare claims still stands.[47] First, in *Kaiser v. Blue Cross of California* ("*Kaiser*"), the Ninth Circuit appeared to contradict its earlier holding in *Town & Country*.[48] The case involved a home health agency that was a Medicare service provider operating under intermediary Blue Cross of California.[49] The health agency filed for Chapter 7 bankruptcy and brought a claim against Blue Cross and the

39. *Id.* at 1147–48.

40. *Id.* (citing 42 U.S.C. § 1395g (2012); 42 C.F.R. § 413.60 (1990)).

41. *In re Town & Country Home Nursing Servs., Inc.*, 963 F.2d at 1154 ("T & C, on the other hand, contends that the bankruptcy court had a separate and distinct basis for exercising jurisdiction because T & C's counterclaims related to property of the estate . . . ."); *see also* 11 U.S.C. § 362(a) (2012) (providing that generally property and legal interests of the estate are subject to the automatic stay upon filing of bankruptcy court); 11 U.S.C. § 541(a) (2012).

42. *In re Town & Country Home Nursing Servs., Inc.*, 963 F.2d at 1154.

43. *Id.* at 1155.

44. *Id.*

45. *Id.*

46. *Id.* (citations omitted).

47. *See* cases cited *infra* notes 49, 58 and accompanying text.

48. *See* Kaiser v. Blue Cross of Cal., 347 F.3d 1107, 1115 (9th Cir. 2003); *see also* Florida Agency for Health Care Admin. v. Bayou Shores SNF (*In re* Bayou Shores SNF), 828 F.3d 1297, 1312 (11th Cir. 2016) ("*Kaiser* at least hints that the court would have come to the opposite conclusion of *In re Town & Country*, *i.e.* by holding that bankruptcy jurisdiction could not trump the exhaustion requirements of §§ 405(g) and (h).").

49. *Kaiser*, 347 F.3d at 1109.

HHS Secretary.[50] The Ninth Circuit held that the health agency must proceed under § 405(g) and "satisfy the presentment and exhaustion requirements under that subsection prior to seeking judicial relief."[51] This holding meant the health agency must undergo administrative review before bringing a proceeding in federal court.[52]

Opponents of the Ninth Circuit's *Town & Country* decision have turned to *Kaiser* to devalue *Town & Country*.[53] The cases, however, have a different background. *Kaiser* was based around the question of whether the claims "arose under" Medicare and were thus subject to the administrative review of § 405(g).[54] Notably, this is different from *Town & Country*, which examined whether the exclusion of § 1334 from § 405(h) meant a bankruptcy court had jurisdiction to hear a Medicare claim.[55]

The Ninth Circuit addressed this issue in *Do Sung Uhm*.[56] As with bankruptcy jurisdiction under § 1334, diversity jurisdiction under 28 U.S.C § 1332 is also excluded from Medicare in § 405(h).[57] Yet despite § 1332's exclusion, courts have held that Medicare claims under § 1332 are subject to administrative review before they can be heard by a federal court in diversity.[58] Therefore, the Ninth Circuit was faced with the argument that § 1334's exclusion should be treated the same as § 1332, and that in both instances, the claims should first be subject to administrative review.[59] Yet, in a footnote, the Ninth Circuit noted that, importantly, §§ 1334 and 1332 have distinct purposes, and unlike federal courts sitting in diversity, bankruptcy courts have a special status and must be able to hear all claims and proceedings.[60] Therefore, *Town & Country* still governs in the Ninth Circuit, and bankruptcy courts may hear claims under the Medicare Act.

50. *Id.*

51. *Id.* at 1115.

52. *See, e.g.*, 42 U.S.C. § 405(g) (2012).

53. *See In re Bayou Shores SNF*, 828 F.3d at 1312.

54. *Kaiser*, 347 F.3d at 1111 ("We ask first whether the Kaisers' claims arise under Medicare, requiring them to have exhausted their administrative remedies.").

55. Sullivan v. Town & Country Home Nursing Servs., Inc. (*In re* Town & Country Home Nursing Servs., Inc.), 963 F.2d 1146, 1149 (9th Cir. 1991) ("[D]oes the bankruptcy court lack jurisdiction because the Medicare Act or Federal Tort Claims Act provides the exclusive remedy for T & C's claims?").

56. Do Sung Uhm v. Humana, Inc., 620 F.3d 1134, 1140 (9th Cir. 2010).

57. *Id.* at 1140–41 n.11.

58. *See* Nichole Med. Equip. & Supply, Inc. v. TriCenturion, Inc., 694 F.3d 340, 346–47 (3d Cir. 2012); Midland Psychiatric Assocs., Inc. v. United States, 145 F.3d 1000, 1004 (8th Cir. 1998); Bodimetric Health Servs., Inc. v. Aetna Life & Cas., 903 F.2d 480, 488–90 (7th Cir. 1990).

59. *Do Sung Uhm*, 620 F.3d at 1140. The Eleventh Circuit suggested that the cases deciding § 1332 were applicable to bankruptcy cases under § 1334 when it stated, "we align ourselves with the Seventh, Eighth, and Third Circuits, and hold that § 405(h) bars § 1334 jurisdiction." Florida Agency for Health Care Admin. v. Bayou Shores SNF (*In re* Bayou Shores SNF), 828 F.3d 1297, 1314 (11th Cir. 2016).

60. *Do Sung Uhm*, 620 F.3d at 1140–41 n.11.

C. The Eleventh Circuit's Codification Analysis

The Eleventh Circuit recently disagreed with the Ninth Circuit's *Town & Country* decision.[61] On July 11, 2016, the Eleventh Circuit in *In re Bayou Shores SNF* ("*Bayou*") held bankruptcy courts do not have jurisdiction to hear Medicare disputes under § 405(h).[62] The court's rationale hinged largely on a complex analysis of "codification error" of § 405(h).[63] The court reasoned that Congress never substantively changed the text of § 405(h) to give bankruptcy courts jurisdiction over Medicare disputes.[64] Instead, it was an error that slipped through the cracks when codifying the statute.[65] The Eleventh Circuit's holding in *Bayou* is significant because it splits from the Ninth Circuit's *Town & Country* holding,[66] which the Supreme Court recently declined to review.[67]

Bayou's fact pattern is similar to *Town & Country*: a large nursing facility filed a Chapter 11 bankruptcy with the goal of restructuring its debts in a payment plan, rather than liquidating.[68] The nursing facility aimed to continue its operations and provide care for its residents, while it gradually repaid its debts over the course of the Chapter 11 payment plan.[69] The Florida nursing facility in *Bayou* received approximately 90% of its revenue from its Medicare and Medicaid patients.[70] The court explained the nursing facility's process of obtaining Medicare revenue: "[t]o be eligible for the Medicare/Medicaid program, Bayou Shores entered into so-called 'provider agreements' with the federal and Florida state governments, respectively, which provide reimbursement to Bayou Shores for the provision of medical services to Bayou Shores' Medicare/Medicaid patients."[71] As an administrative agency, the HHS monitors nursing facilities using provider agreements to ensure the facilities follow applicable administrative requirements and do not "pose immediate jeopardy to the health or safety of the facility's patients."[72]

In *Bayou*, the nursing facility was issued a series of regulatory violations from February to July 2014, wherein the HHS warned Bayou Shores of its defi-

61. *See In re Bayou Shores SNF*, 828 F.3d at 1322.
62. *Id.* at 1304.
63. *Id.* at 1314.
64. *Id.*
65. *Id.* at 1319.
66. *See, e.g.*, ROCHELLE, *supra* note 3.
67. *Cert. denied*, *supra* note 4.
68. *In re Bayou Shores SNF*, 828 F.3d at 1302; Sullivan v. Town & Country Home Nursing Servs., Inc. (*In re* Town & Country Home Nursing Servs., Inc.), 963 F.2d 1146, 1148 (9th Cir. 1991).
69. *See* WILLIAM L. NORTON JR. ET AL., NORTON BANKRUPTCY LAW AND PRACTICE 3D § 91:1 (2018) ("It is often said that Chapter 11 (as distinct from Chapter 7) permits the debtor to continue to operate while devising a plan for its rehabilitation or survival."). *See generally* David A. Samole, *Health Care Bankruptcy: Not an Ordinary Chapter 11 Case*, LAW360 (Mar. 16, 2017, 11:24 AM), https://www.law360.com/articles/901737/health-care-bankruptcy-not-an-ordinary-chapter-11-case.
70. *In re Bayou Shores SNF*, 828 F.3d at 1300–01.
71. *Id.* at 1301.
72. *Id.*

ciencies, and gave the facility an opportunity to remedy its problems.[73] On July 22, 2014, the HHS determined Bayou Shores's noncompliance was a threat to the residents' health and safety and used its regulatory discretion to terminate Bayou Shores's Medicare provider agreement.[74] The nursing facility first sought injunctive relief from the district court to stop the termination of its provider agreement.[75] When the district court denied Bayou Shores's emergency injunction for failing to first exhaust available administrative remedies, the nursing facility filed for Chapter 11 bankruptcy, invoking the automatic stay and temporarily stopping the HHS from terminating its provider agreements.[76] In deciding whether to hear the dispute, the bankruptcy court "heard testimony from doctors, patients and other Bayou Shores witnesses."[77] After weighing the evidence, the bankruptcy court decided there were no immediate risks to the patients and issued an order to stop the HHS from terminating the Medicare provider agreements, later confirming Bayou Shores's Chapter 11 plan.[78] *Bayou* presented an essential question: should the exclusion of bankruptcy jurisdiction from § 405(h) give a bankruptcy court authority to decide the status of the Medicare provider agreements before any HHS administrative hearings have taken place?[79] Contrary to the Ninth Circuit, the Eleventh Circuit held it should not.[80] The Eleventh Circuit's analysis of § 405(h) went beyond the text of § 405(h) itself and examined the statute's origins through its legislative history. The Eleventh Circuit concluded, "it is clear that the Office of the Law Revision Counsel made an error in revising § 405(h) in 1976 (and again in 1982)."[81] The court reasoned this was a codification error because any intent for an expansion of bankruptcy jurisdiction in the Medicare Act would have been clearly expressed in the legislative history before being implemented into the text of § 405(h).[82]

First, the Eleventh Circuit analyzed the original text of § 405(h) from 1939, along with the history of federal court jurisdiction.[83] In 1939, all district and bankruptcy court jurisdiction laws were codified under Section 24 of the

73. *Id.* at 1301–02.

74. *Id.* at 1302.

75. *Id.*

76. *Id.* at 1302–03; *see* 11 U.S.C. § 362(a) (2012).

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors . . . stops all collection efforts, all harassment, and all foreclosure actions . . . permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

WILLIAM L. NORTON JR. ET AL., 10 NORTON BANKRUPTCY LAW & PRACTICE 3D § 362 (2017).

77. *In re Bayou Shores SNF*, 828 F.3d at 1303.

78. *Id.*

79. *Id.* at 1300 ("Now the central question is whether the statutory revision in this case demonstrated Congress's clear intention to vest the bankruptcy courts with jurisdiction over Medicare claims.").

80. *Compare id.* at 1322, *with* Sullivan v. Town & Country Home Nursing Servs., Inc. (*In re* Town & Country Home Nursing Servs., Inc.), 963 F.2d 1146, 1155 (9th Cir. 1991).

81. *In re Bayou Shores SNF*, 828 F.3d at 1319.

82. *Id.*

83. *Id.* at 1305.

Judicial Code of the U.S., instead of today's Title 28.[84] This was reflected in the language of 405(h), which stated "under section 24 of the Judicial Code of the United States."[85]

Next, the Eleventh Circuit noted that federal and bankruptcy court jurisdiction laws were recodified in 1948.[86] Both district and bankruptcy court jurisdiction laws were moved from Section 24 of the Judicial Code to Title 28 of the U.S. Code.[87] Congress also decided to separate the jurisdiction laws into different sections: 28 U.S.C. § 1331 for original jurisdiction; 28 U.S.C. § 1332 for diversity jurisdiction; and 28 U.S.C. § 1334 for bankruptcy jurisdiction.[88] This is where the problem for Medicare disputes in bankruptcy began.

Due to the change of federal court jurisdiction from Section 24 of the Judicial Code to Title 28 of the U.S. Code, the Law Revision Counsel needed to update § 405(h).[89] In 1976, the current version of § 405(h) was created.[90] "Section 24 of the Judicial Code" was replaced with "sections 1331 or section 1346 of title 28."[91] This meant, in the text of § 405(h), only jurisdiction under §§ 1331 and 1346 were expressly barred from hearing Medicare disputes—the textual language that still stands today.[92]

This change had major implications for bankruptcy courts that were previously barred from hearing Medicare claims under § 405(h) because they were included under the general bar of Section 24 of the Judicial Code. After bankruptcy was recodified to Title 28 § 1334, bankruptcy courts were omitted from § 405(h)'s jurisdictional bar.[93] This change occurred in two recodifications—Section 24 of the Judicial Code to Title 28 of the U.S. Code in 1948 and the recodification of § 405(h) in 1976.[94] The latter change left bankruptcy courts free from the bar of § 405(h), and still stands today.[95]

Yet when the Eleventh Circuit parsed through the legislative history of § 405(h), it found no written intent from Congress that bankruptcy courts should suddenly have jurisdiction over Medicare disputes.[96] Therefore, the Eleventh Circuit reasoned bankruptcy courts must have developed jurisdiction over Medicare disputes due to a "codification error" because Congress did not

84. *Id.* (citing Judicial Code, Pub. L. No. 61-475, 36 Stat. 1087 § 24(19)–(20) (1911)).

85. *Id.* (citing Social Security Amendments of 1939, Pub. L. No. 76-379, 53 Stat. 1360 (1939)).

86. *Id.*

87. *Id.* (citing U.S. Code, Title 28, Pub. L. No. 80–773, 62 Stat. 869 (1948)).

88. *Id.* (citing U.S. Code, Title 28, Pub. L. No. 80–773, 62 Stat. 869 (1948)) ("As part of that revision, Congress split the district courts' jurisdictional grants into multiple sections under Title 28.").

89. *Id.* at 1306.

90. *Id.* (citing 42 U.S.C. § 405 (1976)).

91. *Id.*

92. *See* 42 U.S.C. § 405(h) (2012).

93. *See In re Bayou Shores SNF*, 828 F.3d at 1305 ("It is thus undisputed that under the original text of § 405(h), bankruptcy court jurisdiction over Medicare claims was barred.").

94. *See generally id.* at 1305–06 (discussing changes and recodification of Section 24 of the Judicial Code and § 405(h)).

95. *See id.* at 1306–10; Samuel R. Maizel & Michael B. Potere, *Killing the Patient to Cure the Disease: Medicare's Jurisdictional Bar Does Not Apply to Bankruptcy Courts,* 32 EMORY BANKR. DEV. J. 19, 23–24 (2015).

96. *In re Bayou Shores SNF*, 828 F.3d at 1319.

express any intent to "revers[e] forty years of Congressional policy" in which bankruptcy courts did not have jurisdiction over Medicaid disputes.[97]

The Eleventh Circuit's belief that a substantive change during the codification process be "clearly expressed" relied upon prior Supreme Court cases.[98] In *Tidewater Oil Co.*, the Supreme Court held the court of appeals did not have extended jurisdiction over interlocutory orders because no language in the Revisionary Notes expressed such a substantive change.[99] Further, the Eleventh Circuit turned to *Muniz*, where the Supreme Court stated, "[we] cannot accept the proposition that Congress without expressly so providing, intended in § 3692 to change the rules for enforcing injunctions."[100]

The "clearly expressed" doctrine applied by the Eleventh Circuit was best articulated by Justice Antonin Scalia in *Finley*: "[u]nder established canons of statutory construction, it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed."[101] The Eleventh Circuit followed Justice Scalia's logic in reasoning that because there was no clearly expressed intent from Congress to give bankruptcy courts' jurisdiction over Medicare disputes, the text of § 405(h) should be read to bar bankruptcy courts from deciding such claims.[102]

The result of the Eleventh Circuit's decision is that all Medicare disputes should first be "channeled" through the administrative agency.[103] Thus, the Bayou Shores nursing facility should have first sought relief through a hearing with the HHS before a bankruptcy court decided the issue.[104] For support, the Eleventh Circuit cited to the Supreme Court in *Shalala*, which noted, § 405(h) "give[s] HHS a greater opportunity to 'apply, interpret, or revise policies, regulations, or statutes without possibl[e] premature interference by different individual courts.'"[105]

Applying *Shalala*, the Eleventh Circuit found when the bankruptcy court deemed the nursing facility safe from jeopardy, they effectively reversed the HHS decision and "interfere[d] with HHS's role in deciding who is eligible to participate in Medicare/Medicaid."[106] The court reasoned:

> [T]hough charged with broad jurisdiction to deal with issues related to a debtor's bankruptcy estate, bankruptcy courts generally lack the institutional competence or technical expertise of HHS to oversee the health and

97. *Id.*

98. *See infra* notes 100–02.

99. *Id.* at 1316–17 (citing Tidewater Oil Co. v. United States, 409 U.S. 151, 162 (1972)).

100. *Id.* at 1317 (citing Muniz v. Hoffman, 422 U.S. 454, 456–57 (1975)).

101. *Id.* at 1318 (citing Finley v. United States, 490 U.S. 545, 553–54 (1989)).

102. *Id.* at 1304, 1320.

103. *See id.* at 1309–10 (citing Shalala v. Illinois Council on Long Term Care, Inc., 529 U.S. 1, 13 (2000)).

104. *See id.* at 1326–27 ("HHS, not the bankruptcy court, has been charged by Congress with administering the Medicare Act and regulating Medicare providers.").

105. *See id.* at 1325 (citing Shalala v. Illinois Council on Long Term Care, Inc., 259 U.S. 1, 1 (2000)).

106. *Id.*

welfare of nursing home patients or to interpret and administer a "massive, complex health safety program such as Medicare."[107]

As a result, Eleventh Circuit law requires a nursing facility to first have its Medicare disputes decided by the HHS before the nursing facility can administer a Chapter 11 plan—even if Medicare/Medicaid makes up 90% of the nursing facility's revenue and might jeopardize the bankruptcy estate.[108]

III. ANALYSIS

Bayou will have a direct impact on the ability of nursing facilities to avail themselves to the benefits of U.S. bankruptcy law.[109] The Eleventh Circuit's reasoning in *Bayou* was based around a complex codification argument presented in Part II of this Note.[110] Part III of this Note does not discredit *Bayou's* legislative codification analysis. Instead, Part III discusses the practical impact *Bayou's* holding will have on Medicare funded medical facilities that are left to deal with the administrative review process under the HHS.[111]

Further, Part III explores the conflict *Bayou's* holding has with other provisions and purposes of bankruptcy law, such as a bankruptcy court's exclusive jurisdiction over property of the estate, protection for the debtor under the automatic stay, and the reasoning behind Congress's implementation of the Bankruptcy Code.[112] Additionally, Part III explores *Bayou's* reliance on and distinction from other existing judicial opinions on a bankruptcy court's jurisdiction over Medicare, as well as *Bayou's* apparent conflict with bankruptcy law's purpose.[113]

A. Realities and Results of Bayou

A key function of bankruptcy courts as expressed by the Supreme Court is to "deal efficiently and expeditiously with all matters connected with the bankruptcy estate."[114] This function is accomplished when a bankruptcy court can efficiently hear all matters concerning the bankruptcy estate under the umbrella of § 1334 within a single court.[115] The single court bankruptcy system provides the court with tools to increase efficiency, such as the ability to confirm a reor-

107. *Id.* at 1326 (citing Shalala v. Illinois Council on Long Term Care, Inc., 259 U.S. 1, 13 (2000)).
108. *Id.* at 1300.
109. *See infra* Section III.A.
110. *See supra* Section II.C.
111. *See infra* Subsection III.A.2.
112. *See supra* Section II.B.
113. *See infra* Subsections III.B.2–3.
114. Celotex Corp. v. Edwards, 514 U.S. 300, 308 (1995).
115. 1 COLLIER ON BANKRUPTCY ¶ 3.01[2], at 3-5 to 3-7 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2017) [hereinafter COLLIER ON BANKRUPTCY].

ganization plan under §1141 free and clear of all claims, or the power to waive sovereign immunity of government agencies such as HHS under § 106.[116]

Perhaps most important is the § 362(a) automatic stay provision, which is an injunction that arises automatically upon the filing of bankruptcy and stops creditors from seizing assets of the estate.[117] In a bankruptcy case concerning Medicare, the automatic stay is relevant because it disallows the HHS from immediately pulling the service provider funding from the nursing facility.[118] This protection is exactly what the nursing facility debtor in *Bayou* sought when it filed for bankruptcy, as it wanted to keep Medicare funding in place temporarily and resolve its financial affairs.[119]

This relief provided by the automatic stay is central to bankruptcy law, which exists to "assist financially distressed business enterprises by providing them with breathing space."[120] The stay provides "breathing space" by preventing creditors from racing to the courthouse to collect the debtor's assets, thereby allowing the debtor an opportunity to obtain a fresh start.[121] The breathing space provided by the automatic stay essentially keeps a financially sinking nursing facility afloat until the court confirms a reorganization plan.[122] Without the automatic stay, a skilled nursing facility could potentially collapse.[123]

The Eleventh Circuit's decision in *Bayou* is significant because if a nursing facility is denied access to the bankruptcy court solely due to Medicare disputes with the HHS, it is denied many of the aforementioned protections of the bankruptcy court.[124] Thus, *Bayou* has pragmatic ramifications that could effectively frustrate the purposes of bankruptcy law for several reasons: (1) it underestimates the scope of nursing facility insolvency and the need for bankruptcy due to the growing elderly population and rising Medicare costs; (2) it potentially forces insolvent nursing facilities into the lengthy HHS review process without the protections of the bankruptcy court; and (3) the delay created is contrary to congressional intent.[125]

116. Petition for Writ of Certiorari at 5, Bayou Shores SNF v. Florida Agency for Health Care Admin., 2017 WL 475658 (U.S.) (No. 16-967) [hereinafter *Petition for cert.*]; *see also* 11 U.S.C. § 106 (2012); 11 U.S.C. § 1141 (2012).

117. *See* CHARLES JORDAN TABB, THE LAW OF BANKRUPTCY 244 (2d ed. 2009) ("The stay is essential to the effective realization and implementation of the two core functions of a bankruptcy case: the equitable treatment of multiple creditor claims, and the provision of a financial fresh start for an honest debtor.").

118. Peter R. Roest, *supra* note 34, at 25.

119. *Petition for cert.*, *supra* note 116, at 3; *See generally* Florida Agency for Health Care Administration v. Bayou Shores SNF (*In re* Bayou Shores SNF), 828 F.3d 1297, 1302–03 (11th Cir. 2016).

120. *See, e.g.*, Maizel & Potere, *supra* note 95, at 50; *see also* TABB, *supra* note 117, at 244 (citing H.R. Rep. No. 95-595, 340 (1977)).

121. Maizel & Potere, *supra* note 95, at 50; *see* TABB, *supra* note 117, at 244.

122. Maizel & Potere, *supra* note 95, at 50.

123. *Id.*

124. *See Petition for cert.*, *supra* note 116, at 26.

125. *See infra* Subsection III.A.3.

1. Growing Need for Sound Healthcare Bankruptcy Law

In *Bayou,* the Eleventh Circuit recognized its holding could potentially remove tools of bankruptcy like the automatic stay from the nursing facility.[126] Without breathing space, an insolvent skilled nursing facility could be placed in dire financial straits.[127] *Bayou* specifically acknowledged a situation where the debtor "could never assume its Medicare provider agreement since it is highly unlikely the appeals process will be complete before the debtor files for bankruptcy. In other words, unless the bankruptcy court can take jurisdiction over the provider agreements, Bayou Shores would cease to exist . . . ."[128] Thus, while the court briefly acknowledged the impact of its holding, the issues it presents for nursing facilities may be far larger than the Eleventh Circuit imagined due to growing nursing facility patient counts and costs.[129]

For example, the debtor in *Bayou* received a staggering 90% of its revenue from Medicare/Medicaid payments.[130] This number is not surprising given the general growth of Medicare spending. Total skilled nursing facility spending has steadily increased from $15 billion in 2003, to over $30 billion in 2015.[131] Along with total skilled nursing facility spending, Medicare costs and payments to skilled nursing facilities also grew 50% from 2003 to 2013.[132] Total Medicare enrollment counts for medical facilities increased by almost 10 million enrollees from 2012 to 2016 alone.[133] Perhaps most importantly, Florida—within *Bayou's* jurisdiction—has the second most Medicare covered skilled nursing facilities, while California—within *Town & Country*'s jurisdiction—leads the nation in total skilled nursing facilities covered under Medicare.[134]

Projections suggest that the population of people eighty years old will increase from 2015 to 2030, which is significant because that age group makes up the largest percentage of skilled nursing facility residents.[135] Many nursing fa-

126. *See* Florida Agency for Health Care Admin. v. Bayou Shores SNF (*In re* Bayou Shores SNF), 828 F.3d 1297, 1324 (11th Cir. 2016) (discussing the possibility that a nursing home could cease to exist if it could not hear a Medicare dispute).

127. *See id.*

128. *See id.*

129. *See infra* discussion accompanying notes 131–36.

130. *See In re Bayou Shores SNF*, 828 F.3d at 1300–01.

131. *See* MEDPAC, REPORT TO THE CONGRESS: MEDICARE PAYMENT POLICY 194 (2015), http://www.medpac.gov/docs/default-source/reports/chapter-8-skilled-nursing-facility-services-march-2015-report-.pdf?
sfvrsn=0.

132. *Id.*

133. *Medicare Enrollment Dashboard,* CTRS. FOR MEDICARE AND MEDICAID SERVS. (July 2018), https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/CMSProgramStatistics/Dashboard.html (last visited Nov. 3, 2018).

134. *Medicare Service Use: Skilled Nursing Facilities*, KAISER FAM. FOUND., https://www.kff.org/medicare/state-indicator/skilled-nursing-facilities/?activeTab=map&currentTimeframe=0&selectedDistributions=total-skilled-nursing-facility-covered-days-in-thousands&sortModel (last visited Nov. 3, 2018).

135. OMEGA HEALTHCARE INVESTORS, INC., SNF INDUSTRY AND EVOLVING REVENUE MODELS 21 (2016), http://www.omegahealthcare.com/~/media/Files/O/Omega-HealthCare/featured-

cilities frequently rely on Medicare, making the HHS a major player for revenue; yet *Bayou's* holding leaves bankruptcy courts unable to hear disputes with the HHS, and unable to hear claims regarding a major source of skilled nursing facilities' revenue.[136] *Bayou* not only denies a nursing facility automatic stay protection but also affects reorganizational prospects if the bankruptcy court cannot coordinate a major source of the nursing facility's revenue when confirming a plan under § 1141.[137] These concerns are added to an already troubled healthcare industry, with nursing facility insolvency already prevalent—evidenced by an increase in nursing facility bankruptcy filings in 2010–2014.[138] Thus, *Bayou* potentially dooms an entire class of debtors through denying them access to bankruptcy relief.[139]

While it was not the Eleventh Circuit's role in *Bayou* to base its decision solely on statistics, the numbers are still significant because they show the potentially grim impact of the court's decision and the pressure it could put on nursing facilities within the Eleventh Circuit.[140] Moreover, the increase of nursing facility bankruptcy filings perhaps provides an explanation for why Congress did not add § 1334 into § 405(h), and, even if it was a "codification error," explains why Congress did not fix it.[141] Indeed, nursing facility bankruptcies were a problem Congress considered as early as 2000, with one senator noting "[i]n my own State of Louisiana, we have 38 skilled nursing facilities in bankruptcy. That is a figure that is very frightening."[142]

2. The HHS Administrative Review Process and Bankruptcy

So far, this Note has discussed the growing number of nursing facility members, growing Medicare costs, and increased number of nursing facility bankruptcy filings.[143] But how will insolvent nursing facilities fair outside the bankruptcy and under the HHS's review process as *Bayou* demands? Most likely, not well.

The extended time frame of the administrative review process could act as a death blow to an insolvent nursing facility. If the Medicare claim cannot be heard first in the bankruptcy court, it could initially be subject to the HHS's review process without any protections of the bankruptcy court.[144] If the administrative hearing process lasts too long, the nursing facility may run out of the

documents/August%202016
%20Evolving%20Revenue%20Presentation.pdf.

136. Florida Agency for Health Care Admin. v. Bayou Shores SNF *(In re* Bayou Shores SNF*),* 828 F.3d 1297, 1331 (11th Cir. 2016).

137. 11 U.S.C. § 1141 (2012); *see* TABB, *supra* note 117, at 1098–1100.

138. *See* Thomas, *supra* note 21.

139. Maizel & Potere, *supra* note 95, at 43.

140. *See supra* notes 131–37 and accompanying text.

141. *See generally* 42 U.S.C. § 405(h) (2012); *In re Bayou Shores SNF*, 828 F.3d at 1304–10.

142. *Nursing Home Bankruptcies: What Caused Them?: Hearing Before the S. Comm. on Aging*, 166th Cong. 3 (2000) (statement of Sen. John Breaux).

143. *See supra* Subsection III.A.1.

144. *Petition for cert.*, *supra* note 116, at 26.

cash necessary to continue its operations and be forced to close its doors, leaving its residents and employees out of luck.[145] This is the potential result of the Eleventh Circuit's holding in *Bayou*, which subjects nursing facilities to HHS review.[146]

First, for an insolvent nursing facility to appeal a decision by the HHS to withdraw its Medicare service provider agreements, the nursing facility needs to file a redetermination with the Medicare Administrative Contractor ("MAC").[147] The nursing facility has 120 days to file; once filed, the MAC has sixty days to render a decision.[148] This is only the first level of review.[149]

Next, either party may file another redetermination within 180 days of receiving the MAC's decision.[150] This request is filed with a Qualified Independent Contractor ("QIC"), who then has sixty days to rule or the claim is automatically appealable to the next level of review.[151]

The third level of review is appealable sixty days after the QIC decision.[152] The hearing is with an Administrative Law Judge ("ALJ") at the Office of Medicare Hearings and Appeals ("OMHA"), who has ninety days to reach a final decision.[153]

Finally, the last level of administrative appeals is before a Council of Administrative Law Judges at the HHS Department Appeals Board ("DAB").[154] The nursing facility can appeal for a DAB hearing within sixty days after the ALJ decision.[155] The DAB reviews decisions *de novo* and is the final level of review.[156] Sound complex? These are the governmental hoops facing an insolvent nursing home in the Eleventh Circuit if a Medicare dispute arises between the nursing facility and the HHS. As a direct result of *Bayou*,[157] only after completing all of the administrative appeal levels can an insolvent nursing facility file in the bankruptcy court.[158]

145. *See generally id.* at 3; *In re Bayou Shores SNF*, 828 F.3d at 1324; Maizel & Potere, *supra* note 95, at 31.

146. *In re Bayou Shores SNF*, 828 F.3d at 1326–27 ("§ 405(h) clearly requires administrative exhaustion.").

147. U.S. DEP'T OF HEALTH & HUMAN SERVS., HHS PRIMER: THE MEDICARE APPEALS PROCESS 1 (2017), https://www.hhs.gov/sites/default/files/dab/medicare-appeals-backlog.pdf [hereinafter HHS PRIMER].

148. *Id.*

149. *Id.*

150. *Id.* at 1–2.

151. *Id.*

152. *Id.* at 2.

153. *Id.*

154. *Id.*

155. *Id.*

156. U.S. DEP'T OF HEALTH & HUMAN SERVS., DIFFERENT APPEALS AT DAB: APPEALS TO BOARD, https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-board/index.html (last visited Nov. 3, 2018).

157. Florida Agency for Health Care Admin. v. Bayou Shores SNF (*In re* Bayou Shores SNF), 828 F.3d 1297, 1326–27 (11th Cir. 2016) ("§ 405(h) clearly requires administrative exhaustion.").

158. HHS PRIMER, *supra* note 147, at 2 (noting that after HHS administrative remedies have been exhausted, a party may request judicial review in federal court within sixty days).

To make matters worse for insolvent nursing facilities, aside from the already lengthy decision timeline, the HHS administrative process is currently facing a significant backlog.[159] In the 2015 fiscal year, 1.2 billion Medicare claims were processed, with only 10% of those claims being denied first level review.[160] Further, from 2010–2015, the HHS saw a 442% increase in the number of appeals received annually.[161] While the volume of administrative appeals increased dramatically, funding for the HHS has remained stagnant.[162] This has led to a large backlog of HHS Medicare claims.[163]

For example, at the third level of administrative review, there are currently 884,017 appeals waiting to be heard.[164] The HHS estimates it will take eleven years for OMHA to process all of these backlogged appeals.[165] It gets worse: after waiting in the eleven-year backlog, an insolvent nursing facility would then be forced to wait amongst 14,874 claims waiting to be heard at the final level of administrative review under DAB.[166] The HHS estimates it will take six years to process all of the pending claims in the final appeals backlog.[167] The insolvent nursing facility must wait in this backlog first before it can advance to judicial review in a bankruptcy or district court.[168]

Bayou's holding essentially forces a nursing facility's reorganization to come to the grinding halt of administrative review whenever a Medicare claim is in dispute. The idea that an insolvent nursing facility must wait six to eleven years to settle its Medicare disputes—either before or during its bankruptcy case— is completely contradictory to the purpose of bankruptcy law, which is to give bankruptcy courts power to "deal efficiently and expeditiously with all matters connected with the bankruptcy estate."[169] In the Eleventh Circuit, a nursing facility debtor in possession in charge of the estate no longer has the benefit of litigating Medicare disputes in the bankruptcy court.[170] This acts as a death blow to the nursing facility's reorganization prospects because it forces the nursing facility to expend its limited resources litigating throughout multiple levels of governmental review.[171]

In the event the nursing facility is already in bankruptcy, the estate pays for the debtor in possession's time, legal efforts, and any counsel the debtor in

159. *Id.* at 3.
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *See* Florida Agency for Health Care Admin. v. Bayou Shores SNF (*In re* Bayou Shores SNF), 828 F.3d 1297, 1326–27 (11th Cir. 2016) ("§ 405(h) clearly requires administrative exhaustion.").
169. Celotex Corp. v. Edwards, 514 U.S. 300, 308 (1995) (quoting Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984)).
170. *In re Bayou Shores SNF*, 828 F.3d at 1325 (noting that the HHS must adjudicate the claims in the "first instance").
171. *In re* Clawson Med., Rehab. & Pain Care Ctr., 9 B.R. 644, 649–52 (Bankr. E.D. Mich.), *rev'd,* 12 B.R. 647 (E.D. Mich. 1981).

possession must hire to litigate the claims in the administrative review process.[172] These costs are all charged to the estate as an administrative expense under § 503(b) of the Bankruptcy Code,[173] and are paid out of the estate ahead of the unsecured claims and creditors.[174] Thus, forcing the debtor in possession to go through the backlogged HHS administrative process will not only harm the nursing facility's prospects of reorganizing, but it will also potentially diminish the amount of money the nursing facility's other creditors will be paid in the plan by decreasing the total dollar amount remaining in the estate's pot.[175] If the administrative review occurs before bankruptcy is filed and without the automatic stay, creditors will likely still be harmed because they will "race" for the debtor's assets and lose the benefit of a pro rata distribution.[176]

3. Delay Is Inconsistent with Congressional Intent

Bayou's practical outcomes discussed in Subsections II.A.1 and II.A.2 of this Note are at ends with Congress's initial intent for bankruptcy jurisdiction under the Bankruptcy Code, which focused on the trustee and the estate's cost of administering the estate.[177] Congress noted, "the dockets of the nonbankruptcy courts are likely to be more crowded . . . than in bankruptcy courts. Delay is critical in cases where litigation is most likely to occur."[178] Congress foresaw the exact state of affairs created by *Bayou*, where a bankruptcy court has docket space to hear the HHS Medicare dispute yet must cede to a slower forum—here, the HHS administrative docket's eleven and six-year backlog, respectively.[179]

Moreover, Congress was specifically worried about proceedings outside of the bankruptcy court causing undue delay.[180] Congress was careful to note that nonbankruptcy proceedings are "likely to be paced more slowly with longer intervals between successive steps," and "the expense differential is likely to be most pronounced when it is necessary for the Trustee to sue the adversary party in a distant court."[181] Again, Congress's intent when drafting the Bankruptcy Code describes the exact situation *Bayou* creates. Instead of litigating in bankruptcy court, the Medicare claims will be heard in the distant administrative review process.[182] Further, the litigation procedure will now encompass a four-level "successive step" process of HHS administrative review, a danger

172. *See generally* TABB, *supra* note 117, at 691.
173. *See generally id.*
174. *See generally id.* at 674–75.
175. *See generally id.* at 674–92.
176. *See id.* at 4–6.
177. *See infra* notes 179–80 and accompanying text.
178. H.R. REP. NO. 95-595, at 46 (1977).
179. HHS PRIMER, *supra* note 147, at 3.
180. *See* H.R. REP. NO. 95-595, at 45–46 (1977).
181. *Id.* at 45.
182. *See* Florida Agency for Health Care Admin. v. Bayou Shores SNF (*In re* Bayou Shores SNF), 828 F.3d 1297, 1326–27 (11th Cir. 2016) ("§ 405(h) clearly requires administrative exhaustion.").

Congress warned of when balancing the costs of the estate and trustee.[183] These concerns are magnified by comparing the current lengthy process with procedures in place before *Bayou*, where the bankruptcy court was able to immediately and efficiently hear the case and issue a preliminary order in less than two weeks.[184]

The *Bayou* decision will not only act as a death blow by adding more costs to the estate, it also gives the HHS a significant advantage over an insolvent nursing facility.[185] Congress specifically worried about a "division of jurisdiction" in bankruptcy cases.[186] Congress noted:

> Generally, time is on the side of the defendant. If he can subject the plaintiff Trustee to the necessity of suing in another court, he can gain additional time which that necessity imposes on the Trustee. Similarly, the extra expense entailed by the estate when the Trustee is forced to sue elseelsewhere gives his adversary a counter for bargaining with him.[187]

Post-*Bayou*, this situation could easily occur. The HHS can threaten to withhold their service provider agreements, and use the timely and expensive threat of the HHS's own administrative review process as leverage over the insolvent nursing facility.[188] This leverage could even discourage litigating over the service provider claims altogether: as Congress noted, "it is common knowledge that Trustees have often foregone litigation to recover assets of estates because of the potential expense and other difficulties of litigating in distant courts, having limited resources with which to wage such litigation."[189] Thus, when drafting the Bankruptcy Code, Congress foresaw and comprehended several of the jurisdictional problems created by *Bayou's* interpretation of § 405(h) and the role of bankruptcy law.

In the wake of *Bayou,* the HHS can currently require the debtor to first proceed through its own administrative process.[190] If the estate cannot afford to litigate the Medicare claims in the lengthy administrative review process, then the HHS will be able to pull Medicare agreements—regardless of if it was justified in doing so—simply because the nursing facility debtor will cease to exist.[191] In fact, this is why only two circuits have currently ruled on the issue.[192] Medicare funded debtors simply cannot survive long enough to keep appealing up the ranks, and will certainly not be able to do so with an added layer of administrative review.[193] With the combination of the increasing number of nursing facility bankruptcies, more Medicare patients than ever before, and a back-

183. *See* HHS PRIMER, *supra* note 147, at 1–2; *see also* H.R. REP. NO. 95-595, at 45 (1977).

184. *See In re Bayou Shores SNF*, 828 F.3d at 1302.

185. *See infra* notes 187–88.

186. H.R. REP. NO. 95-595, at 44–45 (1977).

187. *Id.* at 46.

188. *See supra* Subsection III.A.2 for discussion on the HHS review process.

189. H.R. REP. NO. 95-595, at 46 (1977).

190. *See* Florida Agency for Health Care Admin. v. Bayou Shores SNF (*In re* Bayou Shores SNF), 828 F.3d 1297, 1325 (11th Cir. 2016) (noting the HHS should adjudicate the claims first).

191. *See* Maizel & Potere, *supra* note 95, at 29.

192. *Petition for cert.*, *supra* note 116, at 29.

193. *Id.* at 25–29.

logged and lengthy HHS administrative process, nursing facilities in the Eleventh Circuit post-*Bayou* face an uncertain future and potentially a death blow should they become insolvent.[194] Additionally, as previously stated, the Supreme Court has refused to decide the issue, leaving struggling nursing facilities with an uncertain future.[195]

B. Do Bankruptcy Courts Have Special Jurisdictional Status?

Bankruptcy courts have broad jurisdiction under § 1334 that encompasses many specific interests and concerns of creditors, shareholders, employees, and the debtor itself.[196] This is demonstrated by § 1334(b), which provides, "*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."[197] The point of this provision is "to bring all bankruptcy-related litigation within the purview of the district court [and through 28 U.S.C. §157 the bankruptcy court], at least as an initial matter, irrespective of congressional statements to the contrary in the context of other specialized litigation."[198] Does this provision give bankruptcy courts special status over an administrative agency? The debtor in *Bayou* suggested it does.[199]

Yet, in *Bayou*, the Eleventh Circuit stated bankruptcy courts did not have special status over the HHS: "§ 1334 does not give bankruptcy courts special jurisdiction over Medicare claims."[200] *Bayou's* refusal to grant special status to bankruptcy courts is supported in three of its points: (1) the court's analysis of the Ninth Circuit's decisions in *Town & Country* and *Do Sung Uhm* and its distinction between "courts" and "agencies;"[201] (2) the court's view that diversity lawsuits are similar to bankruptcy claims;[202] and (3) the court's emphasis on the policy interests of the HHS and Medicare, not bankruptcy courts.[203]

1. Bayou's *Distinction of "Courts" and "Agencies"*

First, *Bayou* aimed to deny the special status of bankruptcy courts by attacking inconsistences in the Ninth Circuit's cases and making a subtle distinc-

194. *See In re Bayou Shores SNF*, 828 F.3d at 1324 (noting that a nursing home could cease to exist); *see supra* Section III.A and accompanying discussion.

195. *Cert. denied*, *supra* note 4.

196. COLLIER ON BANKRUPTCY, *supra* note 115, at ¶ 3.01 (noting that § 1334(b) intends to bring all "bankruptcy-related" litigated matters into the district court).

197. 28 U.S.C. § 1334(b) (2012) (emphasis added).

198. COLLIER ON BANKRUPTCY, *supra* note 115, at ¶ 3.01[3].

199. *See In re Bayou Shores SNF*, 828 F.3d at 1322 (emphasis added). *See generally* 28 U.S.C. § 1334(b) (2012).

200. *See In re Bayou Shores SNF*, 828 F.3d at 1332.

201. *See infra* Subsection III.B.1.

202. *See infra* Subsection III.B.2.

203. *See infra* Subsection III.B.3.

tion between "courts" and "agencies."[204] Yet *Bayou's* reasoning overlooks the broad purposes of bankruptcy law.

The *Bayou* court first noted that in *Kaiser*, the Ninth Circuit seemed to stray from its earlier holding in *Town & Country* when it "hinted" that court would hold "bankruptcy jurisdiction could not trump the administrative exhaustion requirements of § 405(g) and (h)."[205] According to *Bayou*, this would seem to weaken the Ninth Circuit's previous *Town & Country* holding, when it stated, "where there is an independent basis for bankruptcy court jurisdiction, exhaustion of administrative remedies pursuant to jurisdictional statutes is not required. We agree."[206]

The Eleventh Circuit then distinguished itself from the Ninth Circuit's later holding in *Do Sung Uhm*, where the Ninth Circuit reconciled *Kaiser*'s holding by acknowledging that bankruptcy courts have a special status under § 1334 over § 405(h) Medicare claims.[207] The *Bayou* court pointed to Supreme Court case law in an attempt to show that both the debtor in its case and the Ninth Circuit in *Do Sung Uhm* were incorrect in suggesting a bankruptcy court has special jurisdiction over administrative agencies.[208]

Specifically, the court used the Supreme Court's decision in *MCorp Financial* to reason that a bankruptcy court could not stay every administrative proceeding.[209] Citing to the Supreme Court, the Eleventh Circuit reasoned subjecting an administrative agency (the HHS) to the exclusive jurisdiction of bankruptcy courts "conflicts with the broad discretion Congress has expressly granted many administrative entities."[210] Thus, the *Bayou* court reasoned Congress clearly granted broad discretion to administrative agencies and that § 1334's special status is specifically over other "courts," and not agencies.[211] According to *Bayou*, because an administrative agency like the HHS is not technically a "court" and because Congress gave agencies broad discretion, the bankruptcy court's special status under § 1334(b) does not apply to § 405(h) when the case concerns the HHS.[212]

Bayou's distinction undermines the general interests of bankruptcy law.[213] While the Supreme Court may have used the word "courts" in *MCorp Financial*,[214] the Court has also emphasized bankruptcy courts need to deal efficient-

204. *See In re Bayou Shores SNF*, 828 F.3d at 1322–23.

205. *Id.* at 1312.

206. *See id.* at 311–12; Sullivan v. Town & Country Home Nursing Servs., Inc. (*In re* Town & Country Home Nursing Servs., Inc.), 963 F.2d 1146, 1154 (9th Cir. 1991).

207. *See In re Bayou Shores SNF*, 828 F.3d at 1312, 1322.

208. *Id.* at 1322.

209. *Id.* at 1323 (quoting Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin., Inc., 502 U.S. 32, 40 (1991)).

210. *In re Bayou Shores SNF*, 828 F.3d at 1323.

211. *Id.*

212. *Id*.

213. *Id.*

214. Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin., Inc., 502 U.S. 32, 39–40 (1991).

ly and expediently with all matters concerning the bankruptcy estate.[215] Surely, this general principle of bankruptcy law does not cease to exist solely because the debtor is dealing with an administrative agency. Further, while the *MCorp Financial* case is similar to *Bayou* in that both involve an administrative agency, there is also an important distinction: *MCorp Financial* was a banking decision focusing on an administrative action taken by the Federal Reserve, while *Bayou* is a Medicare decision focusing on an administrative action taken by the HHS Secretary.[216] The nature of these administrative agencies and their role in bankruptcy is entirely different.[217]

Generally, the Federal Reserve acts as a prudential regulator to "regulate safety and soundness of banking practices."[218] This is dissimilar from the HHS's role in *Bayou*, where the HHS not only regulated operations of the nursing facility but also provided 90% of the nursing facility's funding, making the administrative agency more akin to a creditor than a regulator.[219] For example, in *MCorp Financial*, the debtor was a bank holding company with assets and capital stemming from its twenty subsidiary banks, and thus, was not reliant on an administrative agency for its revenue.[220] But, in Medicare cases like *Bayou*, the nursing facility is not only regulated by the HHS, it is heavily dependent on the agency for a significant portion of its revenue.[221]

While *Bayou* may be correct that an administrative agency is not technically a "court," the HHS hearings still fit within the issues Congress anticipated when drafting the Bankruptcy Code.[222] Congress expressly stated its concern for "busy dockets" and "multiple step" proceedings that would cripple a bankruptcy reorganization.[223] While the HHS is not a "court," surely the 1.2 billion HHS appeals and eleven-year backlog for third level review exemplify the "busy docket" concerns that rationalized Congress's grant of broad jurisdiction to bankruptcy courts.[224] Further, the HHS's four-step level of review—and respective eleven-year and six-year backlog for two of those steps—are the exact "multiple step" proceedings Congress sought to avoid.[225] Thus, *Bayou's* subtle distinction of "courts" and reliance on *MCorp Financial* to circumvent the

215. Celotex Corp. v. Edwards, 514 U.S. 300, 308 (1995) (quoting Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984)).

216. *Bd. of Governors of Fed. Reserve Sys.*, 502 U.S. at 36.

217. *See infra* notes 219–21.

218. *See Bd. of Governors of Fed. Reserve Sys.*, 502 U.S. at 34 n.1. *See generally* BD. OF GOVERNORS OF THE FED. RES. SYS., THE FEDERAL RESERVE SYSTEM PURPOSES AND FUNCTIONS: SUPERVISING AND REGULATING FINANCIAL INSTITUTIONS AND ACTIVITIES 72 (2018), https://www.federalreserve.gov/aboutthefed/files/pf_5.pdf.

219. *In re* Florida Agency for Health Care Admin. v. Bayou Shores SNF (*In re* Bayou Shores SNF), 828 F.3d 1297, 1299 (11th Cir. 2016).

220. *See Bd. of Governors of Fed. Reserve Sys.*, 502 U.S. at 35–37.

221. *In re Bayou Shores SNF*, 828 F.3d at 1300–01 ("[N]inety percent of Bayou Shores' revenue is derived from carding for Medicare and Medicaid patients.").

222. *See infra* notes 224–26 and accompanying text.

223. H.R. REP. NO. 95-595, at 44–45 (1977).

224. HHS PRIMER, *supra* note 147, at 3.

225. *Id.* at 1–3.

Ninth Circuit's recognition of a bankruptcy's unique purpose seems insensible to the goals of the Bankruptcy Code.[226]

2. Bayou *Views Diversity Lawsuits as Similar to Bankruptcy Claims*

Bayou also ignores the bankruptcy courts' specialty in its reliance on other circuits' holdings on diversity jurisdiction under § 1332. The Eleventh Circuit assumes that courts who hold that § 1332 diversity lawsuits are barred under § 405(h)—using a similar codification analysis—would absolutely do the same when deciding a bankruptcy case under § 1334.[227] This was evident when *Bayou* stated: "[b]ecause we are persuaded that the 1984 amendments to § 405(h) were a codification and not a substantive change, we *align ourselves* with the Seventh, Eighth, and Third Circuits and hold that § 405(h) bars § 1334 jurisdiction over claims that 'arise under [the Medicare Act].'"[228] The wording of *Bayou's* holding seems to mischaracterize the positions of other circuits; it implies other circuits expressly ruled on the same issue under § 1334, when, in reality, they decided § 1332 diversity claims.[229]

First, in *Biometric Health Service Inc.*, the Seventh Circuit held that § 1332 claims under § 405(h) were barred due to a codification error.[230] This holding was later adopted by the Eighth Circuit in *Midland Psychiatric*[231] and the Third Circuit in *Nichole Medical Equipment*.[232] All of these cases considered nonbankruptcy matters § 1332.[233] While indicative of how the circuits might hypothetically rule when examining a § 1334 bankruptcy claim, the cases are neither dispositive nor in direct factual alignment with *Bayou*.

For example, in *In re University Medical Center*, the Third Circuit specifically noted while § 405(h) did not apply in the matter before it, the court was persuaded by the Ninth Circuit *Town & Country* decision: "[t]hus we agree with the Ninth Circuit that 'where there is an independent basis for bankruptcy court jurisdiction, exhaustion of administrative remedies pursuant to other jurisdictional statutes is not required.'"[234] The Third Circuit further noted, "[t]his conclusion advances the congressionally-endorsed objective of 'the effective and expeditious resolution of all matters connected to the bankruptcy estate.'"[235]

226. *See In re Bayou Shores SNF*, 828 F.3d at 1323 (noting that an administrative agency is not a court).

227. *See infra* note 229 and accompanying text.

228. *In re Bayou Shores SNF*, 828 F.3d at 1314 (emphasis added).

229. *See infra* notes 231–33 and accompanying text.

230. Bodimetric Health Serv., Inc. v. Aetna Life & Cas., 903 F.2d 480, 489–90 (7th Cir. 1990).

231. Midland Psychiatric Assoc. v. United States, 145 F.3d 1000, 1004 (8th Cir. 1998).

232. Nichole Med. Equip. & Supply, Inc. v. TriCenturion, Inc., 694 F.3d 340, 346–47 (3d Cir. 2012).

233. *See supra* notes 231–32 and accompanying text.

234. *In re* Univ. Med. Ctr., Inc., 973 F.2d 1065, 1073–74 (3d Cir. 1992) (quoting Sullivan v. Town & Country Home Nursing Servs., Inc. (*In re* Town & Country Home Nursing Servs., Inc.), 963 F.2d 1146, 1154 (9th Cir. 1991)).

235. *Id.* (quoting *In re* Town & Country Home Nursing Servs., Inc., 963 F.2d at 1154–55).

The Eleventh Circuit in *Bayou* attempted to distinguish the Third Circuit's statement on the facts of that case.[236] *Bayou* reasoned the Third Circuit's claim concerned an HHS violation of the automatic stay, not a claim under § 405(h).[237] Yet this reasoning ignores language in the Third Circuit's second sentence noting the importance of "effective and expeditious resolution of all matters connected to the bankruptcy estate," which points to a broader interest applicable to all bankruptcy jurisdiction under § 1334.[238]

Further, in this sentence, the Third Circuit specifically compared jurisdiction under § 405(h) with jurisdiction under § 1334, making the decision less tailored to only the automatic stay, as the Eleventh Circuit suggests.[239] Considering this sentence, one can reasonably infer the Third Circuit is not perfectly "aligned" with the Eleventh Circuit and may disagree with *Bayou* in a future bankruptcy case, especially considering the backlogged status of HHS administrative review.[240]

Two scholars have suggested there are specific reasons courts may hold similarly to the Ninth Circuit and find that § 1332 is barred from § 405(h),[241] while § 1334 is not, due to special bankruptcy purposes.[242] As Samuel Maizel and Michael Potere noted:

> 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 proceeding: 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*.[243]

Thus, as Maizel and Potere provide, there is ample reason to think that a court may approach a bankruptcy analysis under § 1334 differently than a diversity analysis under § 1332. It is no secret that debtors in bankruptcy have drastically different legal claims and seek different remedies than plaintiffs in diversity lawsuits.[244] Yet *Bayou's* simple reliance on other circuits' diversity jurisdiction Medicare cases overlooks interests unique to bankruptcy law.[245]

3. Interests of the HHS Versus Bankruptcy Debtors

The Eleventh Circuit in *Bayou* had a choice. On the one hand, it could use legislative history and statutory interpretation of § 405(h) to require administra-

236. Florida Agency for Health Care Admin. v. Bayou Shores SNF (*In re* Bayou Shores SNF), 828 F.3d 1297, 1311 (11th Cir. 2016).

237. *Id.*

238. *In re Univ. Med. Ctr., Inc.*, 973 F.2d at 1073–74 (quoting *In re Town & Country Home Nursing Serv., Inc.*, 963 F.2d at 1154–55).

239. *Id.*

240. HHS PRIMER, *supra* note 147, at 3.

241. *See* Kaiser v. Blue Cross of Cal., 347 F.3d 1107, 1114 (9th Cir. 2003).

242. *See* Maizel & Potere, *supra* note 95, at 31.

243. *Id.*

244. *See, e.g.*, Do Sung Uhm v. Humana, Inc., 620 F.3d 1134, 1140–41 n.11 (9th Cir. 2010).

245. *See infra* Subsection III.B.3.

tive review under the HHS at the expense of bankruptcy debtors. On the other hand, it could allow debtors to proceed directly in bankruptcy court, forcing the HHS to litigate outside its administrative bounds. Yet the Eleventh Circuit came to an interesting conclusion. Rather than simply decide the case on the statutory merits and legislative history of § 405(h), it attempted to justify its decision on policy grounds, stating: "[b]arring bankruptcy court jurisdiction is consistent with Congressional Medicare policy."[246] Thus, rather than simply choose option one or option two, *Bayou* specifically mentioned the benefits its decision gave the HHS, while it ignored the interests of bankruptcy debtors and downplayed the harm to the estate.[247]

First, the Eleventh Circuit stated, "[§ 405(g)] restricts the role of district courts to a limited review of final HHS decisions, thus reflecting Congressional policy to let HHS adjudicate."[248] The Eleventh Circuit then cited to the Supreme Court's *Shalala* decision in stating that §§ 405(g) and 405(h) "give HHS a greater opportunity to 'apply interpret, or revise policies, regulations, or statutes without possibly premature interference by different individual courts.'"[249]

The Eleventh Circuit's reasoning is problematic because the objectives of the HHS are at odds with those of bankruptcy.[250] The HHS aims to administer a "massive, complex health and safety program"[251] with a focus on suspending Medicare payments to "protect the program against financial loss."[252] In contrast, Congress's intent behind bankruptcy law encompasses much more—it seeks to reach an equitable solution considering the interests of debtors, shareholders, secured creditors, unsecured creditors, and other administrative agencies with claims against the estate.[253] This is apparent in the legislative history to the Bankruptcy Code, which states: "[t]he purpose of a business reorganization case . . . is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and provide a return for its stockholders."[254]

The competing purposes of Medicare and bankruptcy are similar to those of tax and bankruptcy.[255] In *In re Costas*, the court found that extending tax policy would undermine the goals of bankruptcy, encourage forum shopping, and lead to a windfall.[256] The same can be said of *Bayou*. While the HHS may have its interests protected through withholding the service provider agreements, the purposes of bankruptcy are frustrated. The administration of the es-

246. Florida Agency for Health Care Admin. v. Bayou Shores SNF (*In re* Bayou Shores SNF), 828 F.3d 1297, 1324 (11th Cir. 2016).

247. *Id.* at 1325–26.

248. *Id.* at 1325.

249. *Id.* (citing Shalala v. Illinois Council on Long Term Care, Inc. 529 U.S. 1, 13 (2000)).

250. *See generally infra* notes 252–55.

251. *Shalala*, 529 U.S. at 120.

252. LESLIE ANN BERKOFF ET AL., *Ch. 1 The Health Care Industry*, 15 ABI HEALTH CARE INSOLVENCY MANUAL (3d ed. 2012).

253. *See, e.g.*, H.R. REP. NO. 95-595, at 220 (1977).

254. *Id.*

255. *See, e.g.*, *In re* Costas, 555 F.3d 790, 797 (9th Cir. 2009).

256. *Id.*

tate will not be "expeditious or efficient" with the backlogged HHS process.[257] Additionally, different holdings in the Ninth and Eleventh Circuits could encourage venue shopping, and those creditors who act first to collect will certainly receive a windfall.[258]

Finally, Congress recently addressed specific healthcare bankruptcy issues in the 2005 BAPCPA Amendments to the Bankruptcy Code.[259] The amendments aim to make the healthcare bankruptcy process smoother by providing special administrative priority under § 508(b)(8) and allowing a patient care ombudsman to be paid directly from the estate under § 330(a).[260] *Bayou's* holding not only places these purposes behind the HHS's goals, but it also makes the 2005 amendments irrelevant because the special priority or direct payment from the estate is immaterial if the nursing facility ceases to operate.[261] Thus, by only considering the policy goals of the HHS, the Eleventh Circuit is seemingly disregarding the interests of bankruptcy debtors.

C. Uniformity in Bankruptcy Law and Venue Shopping

The main consequence of the split between the Ninth and Eleventh Circuit, and the Supreme Court's refusal to grant certiorari,[262] is the current lack of uniformity in bankruptcy law. The Constitution specifically grants Congress the power to "establish[] *uniform* laws on the subject of Bankruptcies throughout the United States."[263] Early Supreme Court Justice Joseph Story noted "creating a uniform system" was intended to secure "equality of rights and remedies among the citizens of all the states."[264] Yet after *Bayou*, courts in Montana, Idaho, Washington, Oregon, Nevada, California, and Alaska will be able to hear Medicare disputes under § 405(h), while courts in Florida, Georgia, and Alabama cannot.[265]

The ripple of *Bayou* could vary by state and by district depending on whether the circuit decides to adopt the Eleventh or Ninth Circuits' holding. This could lead to the use of venue shopping by nursing facilities. Under 28 U.S.C. §1408, a corporate debtor can file bankruptcy where it is domiciled (in-

257. *See* Celotex Corp. v. Edwards, 514 U.S. 300, 308 (1995).

258. *See infra* Section III.C.

259. *Petition for cert.*, *supra* note 116, at 5–6.

260. *Id.*; *see also* 11 U.S.C. § 508(b)(8) (2012); 11 U.S.C. § 330(a) (2012).

261. *See generally* 11 U.S.C. § 508(b)(8) (2012); 11 U.S.C. § 330(a) (2012) (providing healthcare-specific bankruptcy relief).

262. *Cert. denied*, *supra* note 4.

263. U.S. CONST. art. I, § 8, cl. 4 (emphasis added).

264. *Petition for cert.*, *supra* note 116, at 24 (citing Joseph Story, *Commentaries on the Constitution of the United States* § 1102, at 6 (1833)).

265. *Compare* Sullivan v. Town & Country Home Nursing Servs., Inc. (*In re* Town & Country Home Nursing Servs., Inc.), 963 F.2d 1146, 1154 (9th Cir. 1991), *with* Florida Agency for Health Care Admin. v. Bayou Shores SNF (*In re* Bayou Shores SNF), 828 F.3d 1297, 1314 (11th Cir. 2016). *See generally Geographic Boundaries of the United States Courts of Appeals and United States District Courts*, U.S. COURTS, http://www.
uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf (last visited Nov. 3, 2018).

corporated) or where its principal place of business or assets are located.[266] Thus, one possibility is that post-*Bayou* skilled nursing facilities will only incorporate within the Ninth Circuit's jurisdiction to avoid the Eleventh Circuit's unfavorable holding.

It is also possible that skilled nursing facilities will avoid *Bayou's* holding by using an "affiliate hook."[267] To accomplish this, a skilled nursing facility would obtain a shell "affiliate" in the Ninth Circuit, prior to filing bankruptcy.[268] Then, the affiliate would file for bankruptcy because it would be favorably domiciled under § 1408(1) within the Ninth Circuit. Under § 1408(2), the larger parent company, the nursing facility, would file its case were the affiliate is located.[269] Doing this would allow the skilled nursing facility to use the Ninth Circuit's holding in *Town & Country*, which would allow the bankruptcy court to hear the Medicare disputes. While venue shopping may seem like a nursing facility's easy solution to circumvent *Bayou*, it creates a risk that the Ninth Circuit's bankruptcy courts' dockets might become overloaded if skilled nursing facilities flock exclusively to the circuit.[270] More importantly, venue shopping destroys the idea of Congress creating uniform laws on bankruptcy.[271]

D. Exclusive Jurisdiction over Property of the Estate

A unique function of § 1334 is it allows bankruptcy courts to develop jurisdiction necessary to administer property of the estate under § 541(a).[272] When Congress drafted the Bankruptcy Code in 1978, it intended to ensure adjudication of all claims in a single forum.[273] The Eleventh Circuit in *Bayou* recognized the exclusivity granted to bankruptcy courts in § 1334 stating: "courts are split over the application of § 405(h) to suits arising under 1334 which grant district courts *exclusive* jurisdiction over bankruptcy cases."[274] Nevertheless, *Bayou* held that because § 1334's exclusion from § 405(h) was a codification error, the bankruptcy court did not have jurisdiction.[275] Problematically, *Bayou's* holding looked solely to § 405(h) of the Medicare Act to determine juris-

266. 28 U.S.C. § 1408 (2012); TABB, *supra* note 117, at 376–77.

267. TABB, *supra* note 117, at 376–78.

268. *Id.* at 378.

269. 28 U.S.C. § 1408(1)–(2) (2012); TABB, *supra* note 117, at 378.

270. *See, e.g.*, Susan Mathews, *Corporate Chapter 11 Bankruptcies: The Case for Venue Reform*, ABFJOURNAL (Oct. 2014), http://www.abfjournal.com/articles/corporate-chapter-11-bankruptcies-the-case-for-venue-reform/.

271. *See id.*

272. COLLIER ON BANKRUPTCY, *supra* note 115, at ¶ 3.01 ("Civil proceedings encompassed by section 1334(b)'s 'related proceedings,' that is, those whose outcome could conceivably have an effect on the bankruptcy estate fall into two main categories: (1) those that involve causes of action owned by the debtor that became property of a title 11 estate under section 541 . . . ."); *see* 11 U.S.C. § 541 (2012).

273. Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 87–88 n.40 (1982) (citing H.R. REP. NO. 95-595, at 43–48 (1977)) ("Indeed, we note that one of the express purposes of the Act was to ensure adjudication of all claims in a single forum and to avoid the delay and expense of jurisdictional disputes.").

274. Florida Agency for Health Care Admin. v. Bayou Shores SNF (*In re* Bayou Shores SNF), 828 F.3d 1297, 1302 n.7 (11th Cir. 2016).

275. *Id.* at 1304.

diction, and ignored the exclusive jurisdiction already granted to bankruptcy courts under § 1334.[276] Instead, *Bayou* rejected a "broad reading" of § 1334(b), stating, "§ 1334 does not concern the allocation of jurisdiction between the bankruptcy court and HHS, and cannot trump the § 405(h) jurisdictional bar."[277]

In their article published prior to *Bayou*, Maizel and Potere argued that § 1334(b) provides its own basis for jurisdiction, and "[Section 1334] and not the Medicare Act—should govern who determines a debtor's disputes with Medicare."[278] This was the same argument presented by the debtor in *Town & Country*, who argued that whether the bankruptcy court has jurisdiction under § 1334 over the Medicare service provider agreements is not a question for the Secretary of the HHS.[279] In fact, both the Ninth Circuit and the initial bankruptcy court in *Bayou* held the provider agreements were property of the estate, and thus subject to the exclusive jurisdiction of the bankruptcy court under § 1334.[280] Still, in *Bayou*, the Eleventh Circuit focused its holding on whether § 405(h) barred § 1334, and did not extensively consider §1334's grant of exclusivity over property of the estate when deciding the jurisdictional split.[281]

Unlike *Bayou*, other courts deciding this issue have strongly considered exclusive jurisdiction over property of the estate.[282] For example, a bankruptcy court in Michigan deciding the same issue noted that, "[bankruptcy] court has jurisdiction over all the property of the Debtor."[283] Like the lower bankruptcy court in *Bayou*, the Michigan court noted that Medicare payments are property of the estate: "This proceeding seems clearly within the scope of such jurisdiction. It is initiated by a trustee whose appointment and actions are regulated by the Code. . . . Its resolution will have a considerable impact on the Medical Center's estate and on its prospects for effecting a successful reorganization."[284] Yet *Bayou's* decision means that the valuable property of the estate under the umbrella of § 1334 will instead be heard outside of the bankruptcy court.[285]

First, *Bayou's* result means an administrative body will decide a key bankruptcy issue—whether service provider agreements can be used in reorganizing a business. The Eleventh Circuit recognized this dilemma, but noted that HHS is given greater opportunity to decide issues under § 405 without

276. *Id.* at 1323.

277. *Id.*

278. Maizel & Potere, *supra* note 95, at 41.

279. Sullivan v. Town & Country Home Nursing Servs., Inc. (*In re* Town & Country Home Nursing Servs., Inc.), 963 F.2d 1146, 1153 (9th Cir. 1991); Maizel & Potere, *supra* note 95, at 38.

280. Florida Agency for Health Care Admin. v. Bayou Shores SNF (*In re* Bayou Shores SNF), 828 F.3d 1297, 1302–03 (11th Cir. 2016).

281. *Id.* at 1324 (calling the reasoning of the bankruptcy court a mere "policy" argument instead of implementing that "policy" to interpret the jurisdictional conflict between the statutes).

282. *See infra* notes 284, 290 and accompanying text.

283. *In re* Clawson Med., Rehab. & Pain Care Ctr., 9 BR. 644, 647 (Bankr. E.D. Mich.), *rev'd*, 12 BR. 647 (E.D. Mich. 1981).

284. *Id.*

285. *See Petition for cert.*, *supra* note 116, at 5.

"premature interference by different individual courts."[286] Yet whether a claim "arises under" § 405 of Medicare is potentially a moot point if Congress granted bankruptcy courts their own grounds to exclusively decide cases and issues necessary for an effective reorganization.[287]

Additionally, *Bayou* reasoned that regardless of whether § 1334 was barred or not in § 405(h), a case is still subject to administrative exhaustion before being subject to the judicial review of the bankruptcy court.[288] A debtor filing in a bankruptcy court, however, is seeking to reorganize its financial affairs; if the debtor was seeking judicial review of an administrative decision, it would file in federal district court.[289]

Further, it is possible that a bankruptcy court administering the bankruptcy estate is not practicing "judicial review" under §§ 405(g) and 405(h).[290] Rather, a bankruptcy court exercises review over the property of the estate to ensure all creditors are treated equally and within the scope of the Bankruptcy Code.[291] *Bayou's* disallowance of the bankruptcy court to administer property of the estate combats congressional intent, which is to provide bankruptcy courts power to determine the outcome of "all disputes affecting property in custody of the court."[292] Further, the bankruptcy court is not the final ruling: any decision a bankruptcy court makes regarding the substance of Medicare administration can be reviewed on appeal by a federal district court.[293] Thus, *Bayou's* holding effectively disrupts the bankruptcy court's exclusive jurisdiction over property of the estate, and intrudes upon the court's ability to administer the estate.

IV. RECOMMENDATION

The Eleventh Circuit's holding in *Bayou* has created a direct circuit split between the Eleventh and Ninth Circuits, over what the courts have deemed a "codification error."[294] The split is particularly perplexing given the ease with which a "codification error" could be resolved by either Congress or the Supreme Court. Yet the two resolutions are at odds with each other. The Supreme Court has declined to resolve this dispute, bouncing the ball into Congress's court; meanwhile, Congress has allowed the "error" to remain in place since it recodified § 405(h) in 1976, perhaps suggesting it is up to the courts to resolve

286. *In re Bayou Shores SNF*, 828 F.3d at 1324–25.

287. Maizel & Potere, *supra* note 95, at 41.

288. *In re Bayou Shores SNF*, 828 F.3d at 1327 ("Thus, even if we were to assume that § 405(h) does not bar jurisdiction under § 1334, the bankruptcy court erred by not dismissing Bayou Shores' claim for failure to exhaust Bayou Shores' administrative remedies first.").

289. *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).

290. *Id.* at 469.

291. Maizel & Potere, *supra* note 95, at 34–35.

292. H.R. REP. NO. 95-595, at 44 (1977).

293. *See generally* 6-117 COLLIER BANKRUPTCY PRACTICE GUIDE P. 117.02 (Richard Levin & Henry J. Sommer eds., 2017).

294. *See* ROCHELLE, *supra* note 3, at 39–41.

the dispute.[295] Thus, caught in this bind, courts are now left to interpret § 405(h) and reach a resolution.

A. Bankruptcy Courts' Power to Abstain

Perhaps the most feasible resolution to the circuit split is already at the disposal of the bankruptcy courts: the judicial power of abstention.[296] Under both 28 U.S.C. § 1334(c) and § 305 of the Bankruptcy Code, bankruptcy courts have the power to abstain from hearing a case or proceeding, despite having jurisdiction over the matter.[297] Therefore, a practical solution could be to allow the bankruptcy courts to exercise jurisdiction over Medicare disputes under § 405(h), while implementing judicial guidelines to assist bankruptcy courts in deciding when to exercise its discretion and abstain from hearing the proceeding, thus sending the case to the HHS for review.

Bankruptcy courts have two abstention vehicles: (1) § 305(a), which allows the court to abstain from hearing the entire case; or (2) § 1334(c), which allows the court to abstain from a particular adversary proceeding.[298] Both vehicles are feasible in the current circuit split. For a case like *Bayou*, where 90% of the nursing facility's revenue comes from the HHS, the bankruptcy court may decide to abstain under § 305(a) because doing so essentially dismisses or suspends the entire case.[299] This could prove to be practical when it might be impossible to reorganize the nursing facility with such a large amount of the assets coming from the HHS who, in this circumstance, the bankruptcy court has determined should adjudicate the claim.

If a nursing facility's Medicare revenue was less substantial, the court could choose to abstain under § 1334(c) because it would allow the bankruptcy court to proceed with the bankruptcy case, keep the automatic stay in place to temporarily protect the nursing facility from its other creditors, and allow the HHS to litigate in another forum.[300] While both options are viable, abstaining under § 1334(c) appears to be the most practical solution for the circuit split because it keeps many of the protections of bankruptcy in place, while only potentially granting the party seeking to litigate in the HHS a motion for stay relief under § 362(d).[301]

Using abstention as the solution to this circuit split falls within Congress's intent when constructing bankruptcy jurisdiction. Specifically, Congress stated:

295. *See Cert. denied*, *supra* note 4; Florida Agency for Health Care Admin. v. Bayou Shores SNF (*In re* Bayou Shores SNF), 828 F.3d 1297, 1305–08 (11th Cir. 2016).

296. *See generally* COLLIER ON BANKRUPTCY, *supra* note 115, at ¶ 305.05.01[1] ("Under 28 U.S.C. § 1334(c)(1), the court may, in the interest of justice, abstain 'from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.'").

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.* at ¶ 5011.02[1] ("[E]ntry of an order of abstention is not itself cause for relief from the stay. Any party who seeks to continue litigation in a nonbankrputcy forum must move for relief from the stay and demonstrate the right to relief pursuant to 11 U.S.C. § 362(d).") (footnote omitted).

301. *See generally id*. at ¶¶ 5011.02[1]–5011.02[2].

> [I]n order to insure that the jurisdiction of the bankruptcy court is exercised only when appropriate to the expeditious disposition of bankruptcy cases, the bill codifies present case law relating to the power of abstention in particular proceedings by the bankruptcy court. Occasions arise when determination of an issue is best left to a court that decides similar issues regularly, especially if the issue is one that requires a *particular expertise* that the bankruptcy court does not have.[302]

Congress explicitly recognized that abstention could serve as a self-check solution to bankruptcy jurisdiction, especially when complex issues like Medicare require expertise.[303] But, when Medicare issues are simpler and there is a need for "expeditious disposition,"[304] it seems practical to allow the bankruptcy court to resolve the matter in order to keep the nursing facility afloat. While there is the possibility that bankruptcy courts may abuse their discretion and choose not to abstain, the Bankruptcy Code provides judicial review of all bankruptcy abstention orders by the district court.[305] Thus, if the HHS felt a Medicare issue was too complex for the bankruptcy court and the court should have abstained, the HHS could directly appeal the abstention order to the district court.

Starting in the bankruptcy court and appealing to the district court if abstention should have been exercised could potentially be a far more expedient process than starting at the bottom of the HHS administrative review and appealing up four levels to reach the bankruptcy court.[306] Additionally, with the possibility of HHS budget cuts,[307] it perhaps makes more economic sense to place the burden of appealing on the objecting government entity rather than on the debtor's estate. Doing so alleviates unequal bargaining power by preventing the HHS from strong-arming the estate and forcing the matter immediately into administrative review, when it knows the bankruptcy estate will not survive the lengthy administrative review process.[308] Further, the abstention solution would not only provide nursing facilities with temporary bankruptcy protection but also indirectly help the HHS by removing the number of claims to be processed through the HHS's backlogged dockets.[309] If nursing facilities act in bad faith and try to abuse bankruptcy jurisdiction subject to abstention, the court could simply dismiss the case for "cause" under § 1112(b)(1).[310]

302. H.R. REP. NO. 95-595, at 51 (1977) (emphasis added).

303. *Id.*

304. *Id.*

305. *See* COLLIER ON BANKRUPTCY, *supra* note 115, at ¶ 305.05 n.2; id. at ¶ 5011.13.

306. *See* HHS PRIMER, *supra* note 147, at 1–2 (showing the levels of HHS administrative review).

307. Virgil Dickson, *Trump Calls for $18 Billion Cut to HHS Funding*, MOD. HEALTHCARE (Feb. 12, 2018), http://www.modernhealthcare.com/article/20180212/NEWS/180219983 ("President Donald Trump on Monday unveiled his $4.4 trillion fiscal 2019 budget proposal that includes sharp cuts for HHS funding. Trump's proposed budget allocates $68.4 billion to HHS, a 21% decrease or $17.9 billion less than what the agency received in fiscal 2017.").

308. *See* H.R. REP. NO. 95-595, at 46 (1977) ("Similarly, the extra expense entailed by the estate when the Trustee is forced to sue elsewhere gives his adversary a counter for bargaining with him.").

309. Maizel & Potere, *supra* note 95, at 44.

310. 11 U.S.C. § 1112(b) (2012); *see* COLLIER ON BANKRUPTCY, *supra* note 115, at ¶ 1112.02[6].

B. Abstention Factors

In deciding whether to abstain, bankruptcy courts could balance several factors which would not only provide them with guidelines but also set precedent and provide a test which the district court could review if the HHS appealed. In fact, bankruptcy courts determining tax liability already follow this practice, as they examine factors including: (i) the need to administer the case in an orderly manner; (ii) the complexity of the tax issue; (iii) the asset and liability structure of the debtor; (iv) the time and length of the decision; and (v) the court's docket.[311] Bankruptcy courts deciding complex Medicare issues could consider similar factors.

First, courts could consider the possible effect the Medicare claim has upon administration of the estate.[312] This would allow the court to examine potential costs to the estate when litigating in administrative review versus litigating in the bankruptcy court. Courts could also consider the amount of revenue a nursing facility receives from Medicare, the impact on other creditors, and a feasible time frame for which the estate could stay afloat if the court decided to abstain.

Second, courts could consider the complexity of the Medicare claim and whether "esoteric and technical issues predominate."[313] This would be a familiar practice for bankruptcy courts, as they already routinely balance the complexity of issues in areas like tax and domestic matters when deciding whether to abstain.[314] In the Medicare context, the court may decide to examine the difficulty of the Medicare provider agreements or the need for the HHS to decide health law issues of first impression.

Third, the bankruptcy court could examine evidence of venue shopping.[315] As discussed in Part III of this Note, there is a possibility that debtors may seek venue in the Ninth Circuit to avoid *Bayou's* holding using either domicile or an affiliate hook.[316] If bankruptcy courts felt that abstaining and letting the HHS adjudicate would simply result in the debtor circumventing their decision by seeking venue in the Ninth Circuit, it may be more cost-effective for the estate to let the bankruptcy court exercise jurisdiction over the Medicare claim.[317]

Lastly, the bankruptcy court could balance other factors such as the financial condition of the parties or the bankruptcy court's docket. For example, if a bankruptcy court's docket is too crowded, the debtor may not receive an expeditious resolution of their claim, and the interests of the HHS in adjudicating Medicare claims may trump the bankruptcy interests of debtor. Thus, there are

311. *See In re Grossman*, 206 B.R. 264, 266–68 (Bankr. N.D. Ga. 1997).

312. COLLIER ON BANKRUPTCY, *supra* note 115, at ¶ 5011.02[1]. *See generally In re Grossman*, 206 B.R. at 266–68.

313. COLLIER ON BANKRUPTCY, *supra* note 115, at ¶ 5011.02[1].

314. *See In re Grossman*, 206 B.R. at 266–68; COLLIER ON BANKRUPTCY, *supra* note 115, at ¶ 5011.02[1] n.12–13.

315. *Id.* at ¶ 5011.02[1].

316. *See generally* TABB, *supra* note 117, at 376–78.

317. *See supra* notes 181–82 and accompanying text.

a host of malleable factors that bankruptcy courts could consider, which could each be reduced or expanded over time. While the abstention solution is not perfect, it is already built into bankruptcy law.[318] Thus, the abstention powers of the bankruptcy courts could be used immediately without waiting for congressional action.

V. CONCLUSION

The Eleventh Circuit's decision in *Bayou* has created a sharp divide between the Eleventh and Ninth Circuit regarding bankruptcy jurisdiction over Medicare disputes. While the Eleventh Circuit's decision carefully examined the complex codification history of the applicable statute, the holding in many ways frustrates the very purpose of bankruptcy law. Largely insolvent nursing facilities that rely on Medicare for their revenue will effectively be turned away from the bankruptcy courthouse. The consequences of the recent decision are uncertain, but the reliance of nursing facilities on Medicare and the backlogged HHS administrative review process seem to create a grim future for nursing facilities in the Eleventh Circuit.[319] Further, with bankruptcy jurisdiction over Medicare disputes permitted in the Ninth Circuit, venue shopping is a risk.

While the Supreme Court and Congress have effectively decided to avoid resolving the conflict,[320] bankruptcy courts may have a built-in solution through their power of abstention. Bankruptcy courts could first assume bankruptcy jurisdiction and then abstain from hearing the proceeding if certain factors are met.[321] This would provide an immediate resolution and provide an effective test for courts to balance the purposes of bankruptcy law against the administrative interests of the HHS.[322] Further, utilizing the power of abstention would ensure a more expeditious judicial process, and reassure insolvent nursing facilities that their bankruptcy difficulties will at least be considered.[323]

Thus, for those worried about their granny having to move nursing facilities, they could at the very least rest assured that her nursing facility will have its day in court.

318. *See supra* note 297 and accompanying text.
319. *See supra* Subsection III.A.2.
320. *See Cert. denied*, *supra* note 4.
321. *See supra* note 297 and accompanying text.
322. *See supra* Section IV.B and accompanying text.
323. *See supra* Section IV.B and accompanying text.