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***Selected Issues in Health Care Bankruptcy Cases:
Medicare Provider Agreements – Executory
Contracts – Regulatory Issues – Interfaith Medical
Center Case Study***

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By

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I. MEDICARE PROVIDER AGREEMENTS AS EXECUTORY CONTRACTS

A. Regulatory Framework

Medicare’s regulations, found at 42 C.F.R. § 489.18(c), govern the “Assignment of agreement” and provide that when “there is a change of ownership ... the existing provider agreement will automatically be assigned to the new owner.” Practically speaking, this “means that the new owner assumes the obligation to repay HHS [Health & Human Services] for any of the assignor’s accrued Medicare overpayments,” regardless of which entity owned the actual provider agreement “at the time the overpayments were made or discovered.”²

B. Bankruptcy’s Rubric

Bankruptcy, however, injects several potential wrinkles into this equation. If a Medicare provider agreement is classified as an executory contract under 11 U.S.C. § 365, then “the trustee, subject to the court’s approval, may assume or reject” the agreement under Section 365(a) of the Bankruptcy Code. However, as is true in all circumstances involving the assumption of executory contracts, the trustee may not assume the contract if there is an existing default unless the debtor cures the default or offers adequate assurances that it will cure the

¹ Grateful appreciation is given to Robert C. Yan, Associate in Otterbourg’s Bankruptcy Department, for his contributions to this article.

² Ted A. Berkowitz & Veronique A. Urban, *Intensive Care: Medicare Issues*, 31-7 Am. Bankr. Inst. J. 28 (Aug. 2012).

default.³ Similarly, if an executory contract is assigned, then the assignee would be liable for the obligations connected with the Medicare provider agreement. On the other hand, if it is not considered to be an executory agreement, then the potential exists for the Medicare provider agreement to be the subject of a Section 363 sale, with the result being that liability is “washed away.”

Beyond that, recent case law raises the possibility that bankruptcy courts lack the necessary jurisdiction to adjudicate disputes concerning the assignment and enforceability of Medicare provider agreements. In *Bayou*, the Eleventh Circuit held that Section 205 of the Social Security Act (42 U.S.C. § 405(h)) effectively precluded bankruptcy courts from exercising jurisdiction over Medicare Provider Agreements.⁴

The ruling in *Bayou* is consistent with prior Third,⁵ Seventh,⁶ and Eighth Circuit⁷ decisions. *Bayou*, however, is at odds with the Ninth Circuit’s decision in *Sullivan v. Town & Country Home Nursing Servs. Inc., (In re Town & Country Home Nursing Servs., Inc.)*.⁸ This apparent split among the circuit courts served as a predicate for the unsuccessful 2017 petition for certiorari in *Bayou*.⁹

C. Is It an Executory Agreement?

Whether the Medicare provider agreement is deemed to be an executory contract is a question of judicial interpretation in light of the absence of statutory definition. Still, “courts have generally relied on the following definition: “[An executory contract is] a contract under

³ 11 U.S.C. § 365(b).

⁴ *Florida Agency for Health Care Administration v. Bayou Shores SNF, LLC (In re Bayou Shores SNF, LLC)*, 828 F.3d 1297 (11th Cir. 2016), *cert. denied sub nom, Bayou Shores SNF, LLC v. Florida Agency for Healthcare Administration*, 137 S. Ct. 2214 (June 5, 2017).

⁵ *Nichole Medical Equipment & Supply, Inc. v. TriCenturion, Inc.*, 694 F.3d 340 (3d Cir. 2012).

⁶ *Bodimetric Health Servs., Inc. v. Aetna Life & Casualty*, 903 F.2d 480 (7th Cir. 1990)

⁷ *Midland Psychiatric Assocs., Inc. v. United States*, 145 F.3d 1000 (8th Cir. 1998).

⁸ 963 F.2d 1146, 1155 (9th Cir. 1991).

⁹ *Bayou Shores SNF, LLC v. Florida Agency for Healthcare Administration*, 137 S. Ct. 2214 (June 5, 2017); *see also* <http://www.scotusblog.com/case-files/cases/bayou-shores-snf-llc-v-florida-agency-health-care-administration/>.

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