

News & Alerts

February 16, 2017

Nursing Home Asks SCOTUS To Decide Termination of Medicare Provider Agreements in Bankruptcy

Healthcare is predicted to be one of the most volatile industries in 2017—and one of the most active in restructurings. But, in light of a series of recent federal circuit court rulings, the issue of whether Medicare provider agreements can be unilaterally cancelled by the federal government in bankruptcy is uncertain. Without the ability to rely upon revenue derived from Medicare provider agreements, healthcare providers may lose their ability to successfully reorganize in bankruptcy filings, resulting in more liquidations and fewer reorganizations.

Typically, upon a bankruptcy filing, the “automatic stay” arises, which prevents, among other things, a counterparty from terminating an executory contract on the grounds of the debtor’s insolvency, bankruptcy filing or a pre-bankruptcy breach of the contract. In the ordinary instance, the debtor in a bankruptcy case has the power to determine whether to assume (i.e., continue) the contract or reject (i.e., breach) the contract—not the counterparty. As such, a counterparty is bound to perform post-bankruptcy unless the bankruptcy court orders otherwise. If a counterparty refuses to perform post-bankruptcy, the counterparty could be sanctioned for actual and punitive damages for violating the automatic stay.

Courts across the country are split as to whether these general principles apply to Medicare provider agreements. On one hand, the Ninth Circuit has held that this general rule applies to Medicare provider agreements. In contrast, the First, Third, Eighth and Eleventh Circuits have all held that HHS may terminate Medicare provider agreements without violating the automatic stay. In so holding, the Third, Eighth and Eleventh Circuits all held that the bankruptcy court lacked jurisdiction due to a clause in the Medicare Act that these courts interpreted as a complete jurisdictional bar if administrative appeals are not completed exhausted. The First Circuit reached the same conclusion, but on slightly different grounds.

In an attempt to resolve this circuit split, a nursing home in Florida has filed a petition requesting the Supreme Court to decide whether the automatic stay applies to prevent the Department of Health and Human Services (HHS) from terminating its Medicare provider agreements.

Unless and until the Supreme Court decides this issue, healthcare providers considering bankruptcy need to take particular care in choosing where to file bankruptcy. The Fourth Circuit has not yet decided this issue definitively, which may make it an attractive forum for a

healthcare provider to reorganize. Providers in the First, Third, Eighth and Eleventh Circuits should file at their own risk.

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