

BY HON. REBECCA B. CONNELLY AND CALEB CHAPLAIN¹

Debtors Against the SSA: Who May Hear the Case?



Hon. Rebecca B. Connelly
U.S. Bankruptcy Court
(W.D. Va.); Harrisonburg



Caleb Chaplain
U.S. Bankruptcy Court
(W.D. Va.); Harrisonburg

Hon. Rebecca Connelly is the chief bankruptcy judge for the Western District of Virginia, appointed in July 2012. A former standing chapter 13 trustee and chapter 12 trustee for the Western District of Virginia, she serves on the board for Credit Abuse Resistance Education and is an adjunct professor at Washington and Lee University School of Law. Caleb Chaplain is the career law clerk for Judge Connelly and previously clerked for Hon. Paul M. Black.

A May 2019 opinion simultaneously provides a look at competing methods of statutory construction and raises the interesting question of whether bankruptcy judges may hear Social Security claims. In *Benjamin v. United States (In re Benjamin)*,² the U.S. Court of Appeals for the Fifth Circuit concluded that a bankruptcy court may have subject-matter jurisdiction over Social Security claims against the Social Security Administration (SSA). This decision awakens the debate plaguing courts and splitting the circuits: May bankruptcy courts hear Social Security disputes?³

Words, Words, Words⁴

Section 405(h) contains three sentences:

The findings and decision of the Commissioner of 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.⁵

The last sentence of § 405(h) is a jurisdictional bar. The statute restricts jurisdiction over actions against the U.S., the Commissioner of Social Security or any other officer or employee thereof to recover on Social Security claims. The statute explicitly bars such claims from §§ 1331 or 1346 jurisdiction.

Section 1331 of title 28 provides for original jurisdiction to federal district courts for “federal question” matters, while § 1346 provides jurisdiction to federal district courts over civil actions against the U.S. Thus, based on the plain language, it appears that original actions against the SSA to

recover on Social Security claims should not be filed in federal district court. Instead the Social Security Act provides for these claims to be brought before the SSA, and only after exhausting administrative appeals may the claim be raised in federal district court, as provided in § 405(g). If a debtor files for bankruptcy before he/she has obtained a final decision of the SSA, does the bankruptcy court have jurisdiction to hear this claim against the SSA?

Expressio Unius Est Plain and Simple

According to the Fifth and Ninth Circuits,⁶ the language of § 405(h) clearly answers the question in the affirmative. The plain language of § 405(h) does not provide any jurisdictional bar preventing bankruptcy courts from hearing Social Security claims against the SSA. In *Benjamin*, the Fifth Circuit applied the words of the statute as written: “[N]o action ... shall be brought under section 1331 or 1346 of title 28,” which simply means that the jurisdictional bar restricts courts whose jurisdiction to hear the case would arise from §§ 1331 or 1346. This language does not restrict a court from hearing the claim if that court’s jurisdiction over the case arises from a different federal statute (such as 28 U.S.C. § 1334 in the case of a bankruptcy court).

Since § 405(h) lists two and only two federal jurisdictional provisions (“section 1331 or 1346”), § 405(h) does not apply to other federal jurisdictional provisions. The Fifth Circuit explained that this interpretation of the statutory words is consistent with the *expressio unius est exclusio alterius* canon (“the expression of one thing implies the exclusion of others”).⁷ Given this clear text, the Fifth Circuit found no basis or reason to look beyond the text to the legislative history.

Split and Recodification Canon

Unlike the Fifth and Ninth Circuits, four other circuits⁸ apply these same words from the same statute to reach a different result. These four circuit courts have held that § 405(h) bars all federal jurisdiction. How do these circuits apply the same words of the statute to render a different interpretation? These courts follow a principle of statu-

1 The views expressed in this article are those of the authors and not of the U.S. Bankruptcy Court for the Western District of Virginia.

2 924 F.3d 180 (5th Cir. 2019).

3 Specifically, the circuits are divided over whether 42 U.S.C. § 405(h) precludes all jurisdictional grants under title 28, including § 1334’s jurisdiction over bankruptcy cases and proceedings, or whether the bar contained in § 405 is limited to the two explicitly listed sections, which are §§ 1331 (federal question) and 1346 (claims against the U.S.).

4 William Shakespeare, *Hamlet*, Act 2, Scene 2.

5 42 U.S.C. § 405(h). The applicable “subchapter” is subchapter II concerning Federal Old-Age, Survivors, and Disability Insurance Benefits, which is Title II of the Social Security Act. For the sake of simplicity, this article will use the generic term “Social Security claims” to mean claims made under this subchapter.

6 See *In re Benjamin*, 924 F.3d at 185; *Sullivan v. Town & Country Home Nursing Servs. Inc. (In re Town & Country Home Nursing Servs. Inc.)*, 963 F.2d 1146, 1155 (9th Cir. 1991).

7 *Benjamin*, 924 F.3d at 185-86 (quoting Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 10, at 107 (2012)).

tory construction that requires courts to not read into a law substantive changes from prior versions of that law unless Congress expressed an intention to deviate from prior law. The process is known as the “recodification canon” of statutory construction.⁹

Relying on the recodification canon, the Third, Seventh, Eighth and Eleventh Circuits looked at the history of the statute and considered the words of the statute compared to the words contained in its prior versions. The courts then considered congressional intent, available from legislative history or elsewhere in the legislation.

The original language of § 405(h), as enacted in 1939, barred filing any Social Security claims against the SSA under federal court jurisdiction.¹⁰ Specifically, the 1939 language barred Social Security claims under “section 24 of the Judicial Code of the United States.”¹¹ Section 24 of the Judicial Code was codified at 28 U.S.C. § 41, “which at the time contained virtually all the jurisdictional grants to the federal courts — including the diversity grant — now scattered throughout Title 28.”¹² A 1976 technical correction to the Social Security Act, adopted by Congress in the Data Reduction Act of 1984, revised the language of § 405(h).¹³

Section 405(h) was “amended by striking out ‘section 24 of the Judicial Code of the United States’ and inserting in lieu thereof ‘section 1331 or 1346 of title 28, United States Code.’”¹⁴ The Data Reduction Act also included a provision advising that none of the technical changes “shall be construed as changing or affecting any right, liability, status, or interpretation which existed (under the provisions of law involved) before that date.”¹⁵

And so, the Third, Seventh, Eighth and Eleventh Circuits concluded that Congress had expressed its intent not to alter substantively the scope of § 405(h), and as such, the revised § 405(h) should be read as continuing the bar on all federal jurisdiction.¹⁶ Thus, the circuit split stems from the circuit’s selection to apply or reject the recodification canon. In rejecting the application of the recodification canon, the Fifth Circuit explained that the canon “only applies ... in the absence of a clear indication from Congress that it intended to change the law’s

substance.”¹⁷ While the courts applying the recodification canon found no clear indication from Congress to change the substance of the law, the Fifth Circuit looked to “the most obvious source of congressional intent — the actual words of § 405(h)’s third sentence.”¹⁸

Suit the Action to the Word, the Word to the Action¹⁹

It clearly remains debatable whether the jurisdictional bar in § 405(h) prohibits bankruptcy courts from having jurisdiction over Social Security claims against the SSA. If § 405(h) does not preclude bankruptcy courts from hearing Social Security claims, the next question is whether the bankruptcy court has the authority to enter final judgment on a Social Security claim against the SSA. Perhaps the answer depends on the type of action brought before the bankruptcy court.

A debtor or his/her estate might have many types of claims against the SSA related to rights under the Social Security Act. While it might seem unusual that a claimant would pursue an action against the SSA related to a Social Security claim in a court created to hear bankruptcy law matters, the claim could arise in connection with a bankruptcy matter.

For example, a debtor or trustee might seek to challenge setoff actions, avoid transfers to the SSA as possible preference payments or constructively fraudulent transfers, or pursue actions under other theories of recovery under the strong-arm powers.²⁰ Similarly, the SSA might pursue a non-dischargeability action for alleged overpayment or unauthorized payment of Social Security benefits. To the extent that the obligation is contested, the bankruptcy court might first need to determine the Social Security claim. Along these lines, a debtor could raise a counterclaim to an SSA claim in his/her bankruptcy case, or the debtor or trustee might wish to pursue an action on a theory that the claim will enhance the estate or that it is related to the bankruptcy case.

In the case that made its way to the Fifth Circuit, the debtor was a designated beneficiary of his sister’s disability benefits.²¹ After his sister returned to work, the SSA sought to recover alleged overpayments from the debtor by withholding amounts from his own Social Security checks to pay toward the purported overpayments.²² The debtor challenged the action.²³

After administrative proceedings proved unsuccessful for the debtor, he filed a chapter 7 petition,²⁴ then filed an adversary proceeding against the SSA.²⁵ After dismissal of the adversary proceeding in part on jurisdictional grounds, the debtor appealed to the district court, then the Fifth Circuit. The Fifth Circuit has now remanded the matter to the bank-

8 These include the U.S. Courts of Appeals for the Third, Seventh, Eighth and Eleventh Circuits. Only one opinion (from the Eleventh Circuit) specifically addresses bankruptcy court jurisdiction pursuant to 28 U.S.C. § 1334. See *Fla. Agency for Health Care Admin. v. Bayou Shores SNF LLC (In re Bayou Shores SNF LLC)*, 828 F.3d 1297, 1314 (11th Cir. 2016) (concluding that bankruptcy court lacked jurisdiction to enjoin Secretary of the U.S. Department of Health and Human Services from terminating chapter 11 debtor’s Medicare and Medicaid provider agreements); *Nichole Med. Equip. & Supply Inc. v. TriCenturion Inc.*, 694 F.3d 340, 350 (3d Cir. 2012) (affirming district court’s dismissal for lack of subject-matter jurisdiction of complaint of Medicare supplier that had not exhausted its administrative remedies and thus could not invoke § 405(g) review); *Midland Psychiatric Assocs. Inc. v. United States*, 145 F.3d 1000, 1004 (8th Cir. 1998) (holding that Medicare provider’s tortious interference claim, which was inextricably intertwined with Medicare benefits determination, against insurer acting as Medicare carrier (and thus as officer or employee of government) was barred under third sentence of § 405(h)); *Bodimetric Health Servs. Inc. v. Aetna Life & Cas.*, 903 F.2d 480, 489-90 (7th Cir. 1990) (affirming district court’s dismissal pursuant to § 405(h) of Medicare provider’s complaint brought under diversity jurisdiction).

9 An 1884 Supreme Court case provides the most often quoted iteration of this canon: “It will not be inferred that the legislature, in revising and consolidating the laws, intended to change their policy, unless such intention be clearly expressed.” *United States v. Ryder*, 110 U.S. 729, 740 (1884).

10 See Pub. L. No. 76-379, § 201, 53 Stat. 1360, 1371 (1939).

11 *Id.*

12 *Benjamin*, 924 F.3d at 184 and n.6.

13 *Bodimetric Health Servs. Inc.*, 903 F.2d at 488-89 (citing Pub. L. No. 98-369, § 2663(a)(4)(D), 98 Stat. 494, 1162 (1984)).

14 *Id.* This revision came under the heading, “Other Technical Corrections in the Social Security Act and Related Provisions.”

15 Pub. L. No. 98-369, § 2664(b), 98 Stat. at 1171.

16 See *In re Bayou Shores SNF LLC*, 828 F.3d at 1319 (“Again, if Congress intended such an important expansion of bankruptcy court jurisdiction to be enacted in a recodification, one would expect to find some indication in the statute or legislative history stating as much.”).

17 *Benjamin*, 924 F.3d at 185.

18 *Id.*

19 Shakespeare, *supra* n.4, Act 3, Scene 2.

20 See, e.g., *Berg v. Soc. Sec. Admin.*, 900 F.3d 864, 871 (7th Cir. 2018) (holding that debtor could recover portion of setoff by SSA to recover past overpayment of disability insurance benefits during 90-day pre-petition period to extent that SSA improved its position). *But cf. Damas v. United States (In re Damas)*, 504 B.R. 290, 296 (Bankr. D. Mass. 2014) (holding that setoffs are not “transfers” for purposes of preference actions under § 547(b)).

21 *Benjamin*, 924 F.3d at 182.

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.* at 182-83.

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ruptcy court to decide whether the debtor's claims relate to a disability determination after a hearing, or whether they are some other type of claim against the SSA.²⁶ If the debtor's claim was not based on a disability determination after a hearing, the Fifth Circuit noted that the bankruptcy court has jurisdiction to hear the claim.²⁷

The Short and the Long of It²⁸

When a claim against the SSA arises in a bankruptcy context, it is not obvious whether the bankruptcy court may (or may not) hear the matter. The circuits are split on the inquiry of bankruptcy court jurisdiction to hear Social Security claims, and not all circuits have addressed the issue.²⁹

²⁶ *Id.* at 189-90.

²⁷ *Id.*

²⁸ William Shakespeare, *The Merry Lives of Windsor*, Act 2, Scene 2.

²⁹ The U.S. Courts of Appeals for the First, Second, Fourth, Sixth and Tenth Circuits have yet to weigh in.

To answer the question of whether the bankruptcy court has jurisdiction over the action, the parties should consider the words of the applicable statutes in light of the canons of statutory construction followed by the relevant circuit when interpreting those words. The parties should carefully consider what type of relief has been requested. Finally, the parties should consider the nature of the claim against the SSA.

In selecting the forum, practitioners should consider the best interests of their clients, including time, cost, efficiency and their client's desire for expeditious relief. As long as the circuit split persists, the ultimate practical question might not be whether concurrent jurisdiction exists, but which forum is best suited for just and speedy resolution of the debtor's dilemma. And that answer might be surprising. **abi**

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