

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33

United States Court of Appeals
for the Second Circuit

August Term, 2020

(Argued: September 2, 2020 Decided: April 27, 2021)

Docket No. 19-3953

AVON NURSING AND REHABILITATION, BRIGHTONIAN NURSING AND REHABILITATION, WOODSIDE MANOR NURSING AND REHABILITATION, THE SHORE WINDS NURSING AND REHABILITATION, THE HURLBUT NURSING AND REHABILITATION, HORNELL GARDENS NURSING AND REHABILITATION, CONESUS LAKE NURSING AND REHABILITATION, NEWARK MANOR NURSING AND REHABILITATION, PENFIELD PLACE NURSING AND REHABILITATION, HAMILTON MANOR, LATTA ROAD NURSING HOME EAST, LATTA ROAD NURSING HOME WEST, SENECA NURSING AND REHABILITATION, ELDERWOOD AT AMHERST, ELDERWOOD OF LAKESIDE AT BROCKPORT, ELDERWOOD AT CHEEKTOWAGA, ELDERWOOD AT GRAND ISLAND, ELDERWOOD AT HAMBURG, ELDERWOOD OF HORNELL, ELDERWOOD OF UIHLEIN AT LAKE PLACID, ELDERWOOD AT LANCASTER, ELDERWOOD AT LIVERPOOL, ELDERWOOD AT LOCKPORT, ELDERWOOD AT NORTH CREEK, ELDERWOOD AT WAVERLY, ELDERWOOD AT WHEATFIELD, ELDERWOOD AT WILLIAMSVILLE, ELDERWOOD AT RIVERSIDE, ELDERWOOD OF SCALLOP SHELL AT WAKEFIELD, WESTCHESTER CENTER FOR REHABILITATION AND NURSING, HIGHFIELD GARDENS CARE CENTER OF GREAT NECK, SAN SIMEON BY THE SOUND, DRY HARBOR NURSING HOME AND REHABILITATION CENTER,

Plaintiffs-Appellants,

1 NEW YORK CENTER FOR REHABILITATION AND NURSING,
2 *Plaintiff,*

3 v.

4
5 XAVIER BECERRA, Secretary of the United States
6 Department of Health and Human Services,

7 *Defendant-Appellee.**

8
9 Before:

10
11 KATZMANN, LOHIER, and PARK, *Circuit Judges.*

12
13 Plaintiffs-Appellants are a group of nursing homes that participate in both
14 the Medicare and Medicaid programs, making them “dually participating
15 facilities.” They challenge the legality of a Final Rule issued by the U.S.
16 Department of Health and Human Services that permits survey teams conducting
17 certain inspections of nursing homes not to include a registered nurse. The United
18 States District Court for the Southern District of New York (Swain, J.) dismissed
19 Plaintiffs’ claims, brought under the Medicare and Medicaid Acts, for lack of
20 subject-matter jurisdiction based on claim-channeling and jurisdiction-stripping
21 provisions governing claims arising under the Medicare Act. We conclude,
22 however, that the district court has jurisdiction under 28 U.S.C. § 1331 over
23 Plaintiffs’ claim arising under the Medicaid Act, which does not incorporate the
24 same claim-channeling and jurisdiction-stripping provisions as the Medicare Act.
25 The Medicare Act’s review provisions do not preclude Plaintiffs from challenging
26 the Final Rule in federal court because their challenge is independently rooted in
27 the Medicaid Act. **REVERSED** and **REMANDED** for further proceedings.

28
29 BRIAN MARC FELDMAN, Harter Secrest &
30 Emery LLP, Rochester, NY, *for Plaintiffs-*
31 *Appellants.*

32

* Under Federal Rule of Appellate Procedure 43, Secretary Xavier Becerra is automatically substituted for former Secretary Alex Azar. The Clerk of Court is respectfully directed to amend the caption accordingly.

1 CHRISTOPHER CONNOLLY (Arastu K.
2 Chaudhury, *on the brief*), for Audrey Strauss,
3 United States Attorney for the Southern
4 District of New York, New York, NY, for
5 *Defendant-Appellee*.

6
7 James F. Segroves, Reed Smith LLP,
8 Washington, DC, for *Amicus Curiae American*
9 *Health Care Association*.

10 PARK, *Circuit Judge*:

11 Plaintiffs-Appellants are a group of nursing homes that participate in both
12 the Medicare and Medicaid programs, making them “dually participating
13 facilities.” They challenge the legality of a U.S. Department of Health and Human
14 Services (“HHS”) regulation that permits survey teams conducting certain
15 inspections of nursing homes not to include a registered nurse. *See* Survey Team
16 Composition, 82 Fed. Reg. 36,530, 36,623–25, 36,635–36 (Aug. 4, 2017) (the “Final
17 Rule”).

18 The United States District Court for the Southern District of New York
19 (Swain, J.) dismissed Plaintiffs’ claims for lack of subject-matter jurisdiction based
20 on claim-channeling and jurisdiction-stripping provisions governing claims
21 arising under the Medicare Act. We conclude, however, that the district court has
22 jurisdiction under 28 U.S.C. § 1331 over Plaintiffs’ claim arising under the
23 Medicaid Act, which does not incorporate the same claim-channeling and

1 jurisdiction-stripping provisions as the Medicare Act. The Medicare Act’s review
2 provisions do not preclude Plaintiffs from challenging the Final Rule in federal
3 court because their challenge is independently rooted in the Medicaid Act.

4 We reverse the judgment of the district court and remand for further
5 proceedings.

6 I. BACKGROUND

7 A. Statutory Context and the Final Rule

8 Congress created the Medicare and Medicaid programs in 1965. *See* Social
9 Security Amendments of 1965, Pub. L. No. 89-97, §§ 102, 121, 79 Stat. 286, 291, 343.
10 Medicare, set forth in subchapter XVIII of the Social Security Act, is a federally
11 funded health-insurance program for the aged and disabled. 42 U.S.C. § 1395c.
12 Medicaid, set forth in subchapter XIX, is a cooperative federal-state medical
13 assistance program for individuals “whose income and resources are insufficient
14 to meet the costs of necessary medical services.” *Id.* §§ 1396-1, 1396a. The
15 programs cover certain stays in nursing facilities, and the vast majority of nursing

1 facilities participate in both Medicare and Medicaid,¹ making them “[d]ually
2 participating facilit[ies].” 42 C.F.R. § 488.301.

3 State health agencies are responsible for conducting periodic inspections, or
4 “surveys,” and “certifying . . . the compliance of” nursing facilities with the
5 requirements of the Medicare and Medicaid Acts. 42 U.S.C. §§ 1395i-3(g)(1)(A),
6 1396r(g)(1)(A).² Both Acts direct States to “maintain procedures and adequate
7 staff to . . . investigate complaints of violations of requirements by” nursing
8 facilities. *Id.* §§ 1395i-3(g)(4), 1396r(g)(4). “A State may maintain and utilize a
9 specialized team (including an attorney, an auditor, and appropriate health care
10 professionals) for the purpose of identifying, surveying, gathering and preserving
11 evidence, and carrying out appropriate enforcement actions against substandard”

¹ See Nat’l Ctr. for Health Stats., U.S. Dep’t of Health & Hum. Servs., Long-term Care Providers and Services Users in the United States, 2015–2016, at 9–10 (2019), https://www.cdc.gov/nchs/data/series/sr_03/sr03_43-508.pdf (stating that 97.5% of nursing facilities are certified under Medicare and 95.2% are certified under Medicaid).

² The Medicare and Medicaid Acts identify three types of surveys conducted by State agencies: (1) “standard” surveys, which occur annually to evaluate the quality of care furnished by a facility, *id.* §§ 1395i-3(g)(2)(A), 1396r(g)(2)(A); (2) “extended” surveys, which are conducted after a standard survey reveals substandard care, *id.* §§ 1395i-3(g)(2)(B), 1396r(g)(2)(B); and (3) “special” surveys, which may include standard or “abbreviated standard” surveys, *id.* §§ 1395i-3(g)(2)(A)(II), 1396r(g)(2)(A)(II), and up until the Final Rule’s publication, *see* 82 Fed. Reg. at 36,624, included “survey[s] conducted for the purpose of investigating a complaint against a facility,” 59 Fed. Reg. 56,116, 56,158 (Nov. 10, 1994). The Secretary may also conduct “validation surveys” to evaluate the adequacy of a State agency’s survey results. 42 U.S.C. §§ 1395i-3(g)(3), 1396r(g)(3).

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.