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## I Declare Bankruptcy! Clearing the Jurisdictional Bar on Social Security Claims in Bankruptcy Courts

Elyce Ieyoub

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# I Declare Bankruptcy! Clearing the Jurisdictional Bar on Social Security Claims in Bankruptcy Courts

*Elyce Ieyoub\**

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#### INTRODUCTION: THE RIGHT PLACE AT THE RIGHT TIME

In 2013, Kenneth Benjamin received a letter from the Social Security Administration (SSA) notifying him that he no longer qualified for disability benefits and, further, that his ineligibility dated back to 2012.<sup>1</sup> Benjamin had received a total of \$19,286.90 in disability benefits since 2012, and the SSA declared its intent to recover the overpayment by withholding money from his social security checks—effective immediately.<sup>2</sup> This debt was no small burden for someone like Benjamin,

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1. Kenneth Benjamin’s story is based on the facts of *In re Benjamin*. *In re Benjamin*, 932 F.3d 293 (5th Cir. 2019). In the case, Benjamin’s sister, Marie, rather than Benjamin, is the recipient of social security disability benefits. *Id.* at 295. In 2006, Benjamin filed a “Request to be Selected as Payee” with the SSA, requesting that the agency name him as his sister’s representative payee due to her mental impairment. *In re Benjamin*, No. AP 17-3321, 2018 WL 572998, at \*1 (S.D. Tex. Jan. 26, 2018), *rev’d*, 932 F.3d 293 (5th Cir. 2019). In December 2007, the SSA granted his request, meaning that, in addition to managing the disability payments on behalf of Marie, Benjamin was liable for any overpayment of benefits and was required to report to the SSA if Marie started working. *Id.* Consequently, Benjamin was responsible for the \$19,286.90 overpayment. *Benjamin*, 932 F.3d at 295.

2. *See generally Benjamin*, 932 F.3d at 294–95. For the purposes of this fact pattern, assume that the SSA was withholding money from Benjamin’s Supplemental Security Income (SSI) benefits, as a social security beneficiary can receive both disability and SSI benefits concurrently. *How Workers’ Compensation and Other Disability Payments May Affect Your Benefits*, SOC. SEC. ADMIN. (2017), <https://www.ssa.gov/pubs/EN-05-10018.pdf> [<https://perma.cc/4RZT-GXPB>]. In cases where the claimant is only receiving one type of social security benefit and the benefit ceases, overpayments must be paid in full

who was already in a financially precarious position.<sup>3</sup> In hopes of alleviating this burden, Benjamin requested a waiver of overpayment<sup>4</sup> and a reconsideration<sup>5</sup> of the overpayment determination.<sup>6</sup> Under 20 C.F.R. § 404.506(b), the SSA is required to consider waiver requests before collecting on an overpayment.<sup>7</sup> The SSA violated this policy when it recovered around \$6,000 from Benjamin before finally considering—and ultimately denying—his waiver three years later.<sup>8</sup> Benjamin then initiated the first step in the administrative appeals process by applying for a reconsideration of the waiver denial.<sup>9</sup> After receiving yet another denial, Benjamin filed a timely appeal to an administrative law judge.<sup>10</sup>

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by check within 30 days after receiving notice of the overpayment or in person at the local Social Security Field Office. *Overpayments*, SOC. SEC. ADMIN. (2018), <https://www.ssa.gov/pubs/EN-05-10098.pdf> [<https://perma.cc/W6WZ-8P98>].

3. See generally *Benjamin*, 932 F.3d at 294–95; see also discussion *infra* Part III.A.2.

4. A waiver of overpayment is a claimant’s admission that the overpayment happened but that there are extenuating circumstances as to why the claimant should not be required to reimburse the overpaid funds. BARBARA SAMUELS, SOCIAL SECURITY DISABILITY CLAIMS: PRACTICE AND PROCEDURE § 15:25, Westlaw SSDCPP (2d ed. 2018).

5. In filing a request for reconsideration of an overpayment determination, a claimant asserts that he does not agree that he has been overpaid or he believes the amount is incorrect. *Request For Waiver Of Overpayment Recovery*, SOC. SEC. ADMIN., <https://www.ssa.gov/forms/ssa-632.html> [<https://perma.cc/TU73-MG43>], (last visited Jan. 27, 2020).

6. *Benjamin*, 932 F.3d at 294–95.

7. Specifically, 20 C.F.R. § 404.506(b) states:

If an individual requests waiver of adjustment or recovery of a [T]itle II overpayment within 30 days after receiving a notice of overpayment that contains the information in § 404.502a, *no adjustment or recovery action will be taken until after the initial waiver determination is made*. If the individual requests waiver more than 30 days after receiving the notice of overpayment, SSA will stop any adjustment or recovery actions until after the initial waiver determination is made.

20 C.F.R. § 404.506(b) (2020) (emphasis added).

8. *Benjamin*, 932 F.3d at 295.

9. *Id.*

10. *Id.* If a claimant is dissatisfied with the SSA’s reconsideration decision, the claimant can then request a rehearing before an administrative law judge (ALJ), the second step in the administrative appeals process. *The Appeals Process*, SOC. SEC. ADMIN. (2018), <https://www.ssa.gov/pubs/EN-05-10041.pdf> [<https://perma.cc/S2G6-JGA5>]. The rehearing is held by an administrative law judge who had no part in the original decision or in the reconsideration of the claim. *Id.* New

Over the next three years Benjamin's appeal remained pending, the SSA's withholdings continued, and Benjamin's already feeble financial condition became untenable.<sup>11</sup> In July 2019, Benjamin filed for Chapter 7 bankruptcy in the United States Bankruptcy Court for the Southern District of Texas.<sup>12</sup> He then filed an adversarial proceeding<sup>13</sup> against the SSA, alleging that it collected \$6,000 from him in violation of agency regulations.<sup>14</sup> In response, the SSA filed a motion to dismiss<sup>15</sup> based on a lack of subject-matter jurisdiction, asserting that Benjamin must first exhaust his claim through the administrative appeals process before suing in bankruptcy court.<sup>16</sup> If the bankruptcy court were to deny the motion and exercise its grant under 28 U.S.C. § 1334 of general bankruptcy jurisdiction over the adversarial claim, then Benjamin would be able to resolve his debts at once.<sup>17</sup> If the court were to instead grant the SSA's motion, then Benjamin would be right back where he started: at the whim of the long-winded administrative appeals process.<sup>18</sup>

Whether the bankruptcy court can rely on § 1334 to adjudicate Benjamin's claim against the SSA turns on 42 U.S.C. § 405(h) of the

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evidence is allowed on rehearing. *Id.* The claimant and any witnesses brought by the claimant will be subject to questioning by the ALJ. *Id.*

11. *Benjamin*, 932 F.3d at 295.

12. Chapter 7 of the U.S. Bankruptcy Code allows a trustee to collect and liquidate a debtor's nonexempt property, either voluntarily or by court order, to satisfy creditors. An individual debtor who seeks Chapter 7 relief receives a "fresh financial start" through a discharge of all debts. *Chapter 7*, BLACK'S LAW DICTIONARY (11th ed. 2019), Westlaw. In the actual case, Benjamin filed for bankruptcy in 2017. *See generally Benjamin*, 932 F.3d 293. In bankruptcy court he asserted an adversarial claim against the SSA. *Id.* The bankruptcy court granted the SSA's motion to dismiss for lack of jurisdiction, and Benjamin appealed to the Fifth Circuit Court of Appeals. *Id.* At the time the Fifth Circuit heard the appeal, in July 2019, Benjamin's administrative appeal for a hearing before the ALJ was still pending. *Id.*

13. In bankruptcy court, an adversary proceeding is a lawsuit brought within a bankruptcy proceeding that is governed by special procedural rules and that is based on conflicting claims, typically between the debtor and a creditor. *Adversary Proceeding*, BLACK'S LAW DICTIONARY (11th ed. 2019), Westlaw.

14. *Benjamin*, 932 F.3d at 295.

15. A motion to dismiss is "[a] request that the court dismiss the case because of . . . a procedural defect. Under the Federal Rules of Civil Procedure . . . the defendant may ask the court to dismiss the case, usually based on one of the defenses found in Rule 12(b)," such as lack of subject-matter jurisdiction. *Motion to Dismiss*, BLACK'S LAW DICTIONARY (11th ed. 2019), Westlaw.

16. *Benjamin*, 932 F.3d at 295.

17. *See discussion infra* Part III.A., C.

18. *See discussion infra* Part III.A.1.

Social Security Act,<sup>19</sup> which sets out the parameters of claims brought in federal district court against the United States, the Commissioner of Social Security, or any officer or employee of the two.<sup>20</sup> The absence of certain jurisdictional grants, such as § 1334, from the language of § 405(h) has created a circuit split over whether federal courts have the statutory authority to adjudicate claims arising under the Social Security or Medicare<sup>21</sup> Acts.<sup>22</sup> This debate is particularly significant with respect to bankruptcy jurisdiction because of the increasing number of insolvent healthcare providers and individual debtors.<sup>23</sup> Due to federal courts' conflicting interpretations of § 405(h), motions to dismiss for lack of subject-matter jurisdiction may quickly defeat debtors' social security claims depending on the forum in which they file suit.<sup>24</sup> For both insolvent healthcare providers and individual debtors, these social security claims then funnel back through a four-step administrative appeals process that usually takes multiple years to conclude.<sup>25</sup>

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19. 42 U.S.C. § 405(h) states:

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, United States Code to recover on any claim arising under this subchapter.

42 U.S.C. § 405(h) (2018).

20. *Id.*; *Benjamin*, 932 F.3d at 295–96.

21. Section 1395ii of Title 42 of the U.S. Code provides that the provisions of § 405(h) “shall also apply with respect to [the Medicare Act] to the same extent as [it is] applicable to [the Social Security Act].” *See* 42 U.S.C. § 1395ii (2018).

22. *See* discussion *infra* Part II; *see also* Jack Haake, *Circuit Split Widens On Bankruptcy Jurisdiction in SSA Claims*, LAW360 (June 27, 2019, 2:38 PM), [https://www.law360.com/articles/1173381/circuit-split-widens-on-bankruptcy-jurisdiction-in-ssa-claims?te\\_pk=213cae0d-533d-4169-bb7b-?copied=1](https://www.law360.com/articles/1173381/circuit-split-widens-on-bankruptcy-jurisdiction-in-ssa-claims?te_pk=213cae0d-533d-4169-bb7b-?copied=1) [<https://perma.cc/WT9S-FZEW>].

23. *See* discussion *infra* Part II; *see also* Haake, *supra* note 22.

24. *See, e.g., In re La Fuente Home Health Servs., Inc.*, No. 14–70265, 2017 WL 1173599, at \*11 (Bankr. S.D. Tex. Mar. 28, 2017) (“As such, the Court finds that HHS's Motion, as to dismissal for lack of subject matter jurisdiction, should be denied.”); *see generally* discussions of the lower court holdings *infra* Part II.

25. *See generally* 42 U.S.C. § 405(g); *Smith v. Berryhill*, 139 S. Ct. 1765, 1776 (2019) (“[T]he four steps preceding judicial review . . . can drag on for years.”); *see also* discussions *infra* Part I.A., III.A.

The current federal circuit split over the scope of § 405(h) highlights the need for a legislative solution.<sup>26</sup> The United States Congress should amend sentence three of § 405(h) to state:

No action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought *to recover on any claim arising under this subchapter [of the Social Security Act] except for claims brought by individuals pursuant to section 1334 of Title 28. The individual must have received an initial determination of eligibility for benefits prior to bringing a claim under section 1334.*<sup>27</sup>

This proposed amendment gives a bankruptcy court jurisdiction over social security claims without the requirement of administrative exhaustion.<sup>28</sup> A legislative solution will eliminate the conflicting interpretations of § 405(h) among courts and provide a similar procedural standard for debtors across the federal circuits.<sup>29</sup>

Part I of this Comment will provide an overview of administrative law and bankruptcy jurisdiction in relation to social security claims.<sup>30</sup> Specifically, Part I will discuss § 405(h) of the Social Security Act and the history surrounding its amendments.<sup>31</sup> Part II will present the various cases forming the split among the federal circuit courts of appeals over whether § 405(h) serves to bar jurisdiction.<sup>32</sup> Part III will argue that bankruptcy courts should have jurisdiction over certain claims brought under the Social Security Act due to the overburdened administrative appeals process, the vulnerable nature of the debtor, and the effect of the claims on the bankruptcy estate.<sup>33</sup> Further, Part III will outline why a legislative solution is necessary and will offer a proposed amendment to § 405(h) that explicitly acknowledges bankruptcy court jurisdiction over social security claims brought by individual debtors.<sup>34</sup> This Comment will conclude by reiterating the efficacy of this legislative amendment in harmonizing the policies of both bankruptcy and administrative law.<sup>35</sup>

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26. *See infra* Part II, III.B.

27. *Cf.* 42 U.S.C. § 405(h). To see a full explanation of the proposed amendment, see *infra* Part III.C.

28. *See infra* Part III.C.

29. *See infra* Part III.C.

30. *See infra* Part I.A–B.

31. *See infra* Part I.A.

32. *See infra* Part II.

33. *See infra* Part III.A–C.

34. *See infra* Part III.

35. *See infra* Part III.

## I: BANKRUPTCY JURISDICTION AND SOCIAL SECURITY CLAIMS

At the core of the question as to whether bankruptcy courts should have jurisdiction over social security claims lies the balance between administrative expertise and the expedient resolution of a debtor's encumbrances.<sup>36</sup> This balance manifests itself statutorily in 28 U.S.C. § 1334, or general bankruptcy jurisdiction, and 42 U.S.C. § 405(h) of the Social Security Act, which establishes the boundaries of federal jurisdiction over social security claims.<sup>37</sup> In resolving this jurisdictional question, it is important to understand the processes for applying to social security and for appealing an adverse SSA decision, along with the history and scope of § 405(h) and § 1334.<sup>38</sup>

*A. A Brief Overview of Social Security*

The Social Security Administration rose in 1935, when President Roosevelt signed the Social Security Act<sup>39</sup> into law.<sup>40</sup> The SSA is one of the largest and most complex administrative agencies in the United States, providing financial assistance to more than 61 million citizens.<sup>41</sup> In furtherance of its overarching mission to promote economic security, the SSA carries out two major responsibilities: (1) administering the program of Old-Age, Survivors, and Disability Insurance (OASDI)<sup>42</sup> under Title II and (2) administering the program of Supplemental Security Income

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36. See Haake, *supra* note 22.

37. *Id.*

38. *Id.*

39. See 42 U.S.C. §§ 301–1397(mm) (2018).

40. Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. §§ 301–1397(f) (1995)); SAMUELS, *supra* note 4; see also *Social Security History*, SSA.GOV, <https://www.ssa.gov/history/ssa/ssa2000chapter1.html> (last visited Sept. 18, 2019) [<https://perma.cc/J3J3-P8KQ>].

41. SOC. SEC. ADMIN., UNDERSTANDING THE BENEFITS 1 (2019), <https://www.ssa.gov/pubs/EN-05-10024.pdf> [<https://perma.cc/LP72-Q6R5>]; SAMUELS, *supra* note 4.

42. To be eligible for retirement, survivors, or disability insurance benefits you must be insured under Social Security before retirement. “Insured status” is determined by the number of social security credits earned for work covered under Social Security. *Introduction to Social Security: Section 218 Training*, SOC. SEC. ADMIN., [https://www.ssa.gov/section218training/basic\\_course\\_3.htm#1](https://www.ssa.gov/section218training/basic_course_3.htm#1) (last visited Nov. 11, 2019) [<https://perma.cc/T49G-2E5A>].



(SSI)<sup>43</sup> under Title XVI.<sup>44</sup> The specific purposes of these programs are to provide for the material needs of individuals and families, protect the aged and disabled against expenses of illnesses that might otherwise exhaust their savings, keep families together, and give children the chance to grow up healthy and secure.<sup>45</sup> To receive these benefits, one must submit an application through the SSA website, by phone, or by visiting a local social security office.<sup>46</sup> Social security applicants have the right to appeal any of the SSA's decisions regarding their benefits, whether the decision concerns an initial eligibility determination, a determination that social security requirements are no longer met, or a determination that the beneficiary was overpaid.<sup>47</sup>

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43. SSI and social security benefits are closely intertwined. *Understanding Supplemental Security Income (SSI) Overview*, SOC. SEC. ADMIN. (2019), <https://www.ssa.gov/ssi/text-over-ussi.htm> [<https://perma.cc/QF3B-NAXS>]. To receive SSI benefits you must be disabled, blind, or at least 65 years old and have limited income and resources. *Id.* Those eligible for SSI may also be entitled to social security benefits; an application for SSI is also one for social security benefits. *Id.* SSI benefits are not based on an applicant's or a family member of the applicant's prior work. *Id.* A recipient of SSI benefits may also receive social security benefits if an applicant is insured, meaning the applicant worked a certain number of years and paid social security taxes. *Id.* In fact, in order to even be eligible for SSI payments, an applicant must have submitted an application for all other possible benefits. 20 C.F.R. § 416.210 (2020).

44. *Smith v. Berryhill*, 139 S. Ct. 1765, 1772 (2019). SAMUELS, *supra* note 4; *About Us*, SOC. SEC. ADMIN., <https://www.ssa.gov/agency/> (last visited Oct. 31, 2019) [<https://perma.cc/Y97G-XJL5>].

45. *Introduction to Social Security: Section 218 Training*, *supra* note 42. The SSA itself does not issue the actual social security benefits and SSI payments; the SSA administers the programs and the U.S. Treasury Department issues the payments and benefits. *Id.*

46. *Apply for Social Security Benefits*, SOC. SEC. ADMIN., <https://www.ssa.gov/benefits/forms/> (last visited Nov. 11, 2019) [<https://perma.cc/ME3B-444M>].

47. *Hearing Process*, SOC. SEC. ADMIN., [https://www.ssa.gov/appeals/hearing\\_process.html](https://www.ssa.gov/appeals/hearing_process.html) (last visited Oct. 31, 2019) [<https://perma.cc/W4LW-B2CE>].

*1. Running the Gauntlet of the SSA's Administrative Appeals Process*<sup>48</sup>

For someone to have a right to administrative review of an SSA decision, the individual must have first filed an application for benefits.<sup>49</sup> The SSA reviews the applications and determines whether an applicant qualifies for OASDI or SSI benefits.<sup>50</sup> The SSA refers to its decision on this matter as an “initial determination.”<sup>51</sup> Initial determinations include but are not limited to decisions regarding eligibility, continuation of benefits, overpayments, benefit reductions, and recomputations of benefits.<sup>52</sup> Once the SSA makes its initial ruling on the application, the applicant has the right to administrative review.<sup>53</sup>

There are four steps in the administrative appeals process: (1) reconsideration of the initial determination;<sup>54</sup> (2) a hearing by an administrative law judge (ALJ);<sup>55</sup> (3) review by the Appeals Council;<sup>56</sup>

48. *In re Benjamin*, 932 F.3d 293, 296 n.3 (5th Cir. 2019) (“Ordinarily this means that a plaintiff must run the gauntlet of the SSA’s four-level-review process, which culminates in a decision from the Appeals Council.”).

49. 20 C.F.R. §§ 404.603, 416.305 (2020).

50. *Id.* §§ 404.900, 416.400.

51. *Id.* §§ 404.900(a)(1), 404.902; *id.* §§ 416.1400(a)(1), 404.1402.

52. Under the OASDI and SSI programs, initial determinations include, but are not limited to: entitlement or re-entitlement to benefits, the amount of benefits, underpayment or overpayment determinations; suspension, reduction, or termination of benefits; how an underpayment of benefits due to a deceased person will be paid; who will act as a social security beneficiary’s representative payee; the establishment or termination of a period of disability; a revision of your earnings record; an offset of benefits under § 404.408b because of previously received SSI payments for the same period; whether or not the claimant has a disabling impairment as defined in § 404.1511 for OASDI or § 416.911 for SSI; and whether the SSA was negligent in investigating or monitoring or failing to investigate or monitor your representative payee, which resulted in the misuse of benefits by your representative payee. *Id.* §§ 404.902, 416.1402.

53. *Id.* § 404.900(a)(1).

54. *Id.* §§ 404.907, 416.1407, .1409, .1413.

55. *Id.* §§ 404.929, 416.1429. If a claimant disagrees with the reconsideration decision, he or she may request a rehearing. *The Appeals Process, supra* note 10.

56. If a claimant disagrees with the ALJ’s decision, the claimant may request that the Social Security Appeals Council review the decision. *The Appeals Process, supra* note 10. The SSA Appeals Council issues the SSA’s final decision for claims arising under Title II and Title XVI of the Social Security Act. *Brief History and Current Information about the Appeals Council*, SOC. SEC. ADMIN., [https://www.ssa.gov/appeals/about\\_ac.html](https://www.ssa.gov/appeals/about_ac.html) (last visited Oct. 30, 2019) [<https://perma.cc/5JL5-PDT7>]. The Council may deny a request for review if it

and, finally, (4) Federal Court Review.<sup>57</sup> First, if a claimant is dissatisfied with the SSA's initial determination, the claimant may request the SSA to reconsider the decision by completing and submitting a form online, through the SSA website, or by mailing the completed form to the local SSA office within 60 days of receiving notice of the initial determination.<sup>58</sup> An initial determination is binding on the applicant unless the applicant requests reconsideration.<sup>59</sup> Reconsideration, which is undertaken by an agency member uninvolved with SSA's initial determination, is the thorough, independent review of all the claimant's medical and financial evidence considered in the original decision as well as any new evidence presented by the claimant.<sup>60</sup> Upon completion of the reconsideration, the agency member issues a determination either approving or denying the claim.<sup>61</sup> If the reconsideration decision is unfavorable to the applicant, the applicant may then seek redress through the second step of the appeals process: a hearing before an ALJ.<sup>62</sup> At this stage, a hearing is held by an ALJ that took no part in the initial decision or in the reconsideration of the claim.<sup>63</sup> New evidence is allowed at the hearing, and the claimant, as well as any witnesses that the claimant presents, is subject to questioning by the ALJ.<sup>64</sup> If the ALJ's decision is once again a denial, then the claimant may request that the SSA Appeals Council ("Council") review the decision—the third step in the appeals process.<sup>65</sup>

The claimant must make his request to the Council within 60 days of receiving notice of dismissal or of the decision from the ALJ hearing.<sup>66</sup>

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believes the ALJ's hearing decision was correct. *The Appeals Process*, *supra* note 10. If the Appeals Council grants the request for review, it will either decide the case or return it to an ALJ for further review. *Id.*

57. *The Appeals Process*, *supra* note 10; *Your Right to an Administrative Law Judge Hearing and Appeals Council Review of Your Social Security Case*, SOC. SEC. ADMIN. (2015), <https://www.ssa.gov/appeals/pubs/70-10281.pdf> (last visited March 22, 2020) [<https://perma.cc/F3Z6-G245>].

58. 20 C.F.R. §§ 404.900(a)(2), .907; *id.* §§ 416.1409, .1413. The online application and the specific form that claimants must complete to request the SSA's reconsideration of their initial determination is found here: *Form SSA-561 Request for Reconsideration*, SOC. SEC. ADMIN., <https://www.ssa.gov/forms/ssa-561.html> (last visited March 23, 2020) [<https://perma.cc/YU33-83E2>].

59. 20 C.F.R. § 404.905.

60. *Id.* § 404.913; *The Appeals Process*, *supra* note 10.

61. 20 C.F.R. § 404.913; *The Appeals Process*, *supra* note 10.

62. 20 C.F.R. §§ 404.900(a)(3), .907, 416.1433.

63. *The Appeals Process*, *supra* note 10.

64. 20 C.F.R. §§ 404.944, 416.1429, .1499; *The Appeals Process*, *supra* note 10.

65. 20 C.F.R. §§ 404.900(a)(4), 416.1456, .1468.

66. *Id.* §§ 404.968, 416.1467, .1468.

The Council looks at all cases in which a claimant files a request for review and will either grant, deny, or dismiss the request.<sup>67</sup> The Council will dismiss a case without review unless it finds one of the following: (1) an abuse of discretion by the ALJ; (2) an error of law; (3) a lack of substantial evidence supporting the actions, findings, or conclusions of the ALJ; (4) a broad policy or procedural issue that may affect the general public interest; or (5) additional, material evidence that relates to the period on or before the date of the ALJ hearing decision and that has a reasonable probability of changing the outcome of the decision, had the ALJ considered the evidence.<sup>68</sup> If the Council grants a request for review, it will either decide the case or remand it to the ALJ for further action.<sup>69</sup> Once the claimant has exhausted the first three steps of the administrative review process, the SSA's decision is final.<sup>70</sup> The agency's final decision, however, does not mark the end of the appeals process.<sup>71</sup> A dissatisfied claimant has the fourth and final option of judicial review<sup>72</sup> by filing a civil suit in federal district court within 60 days of receiving notice of the Council's action.<sup>73</sup>

## 2. Federal Courts' Jurisdiction Over SSA Claims Under § 405(g)–(h)

A plain reading of § 405(g) and (h) of the Social Security Act indicates that judicial review of claims arising under the Act is available after a claimant has fully exhausted the administrative remedies and 28 U.S.C. §§ 1331 or 1346 provides the jurisdictional basis for the claim.<sup>74</sup> Section 405(g) states in pertinent part:

Any individual, after any *final decision* of the Commissioner of Social Security *made after a hearing* to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after

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67. *Brief History and Current Information about the Appeals Council*, *supra* note 56.

68. 20 C.F.R. §§ 404.970, 416.1469, .1470.

69. *Brief History and Current Information about the Appeals Council*, *supra* note 56; *Understanding Supplemental Security Income (SSI) Overview*, *supra* note 43. The Council may remand to a new ALJ if the court finds that the original ALJ's actions raise at least the appearance of unfair bias and partiality. *Keith v. Massanari*, 17 Fed. Appx 478, 481 (7th Cir. 2001).

70. *Hearing Process*, *supra* note 47.

71. 20 C.F.R. § 404.900(a)(5).

72. *Id.* §§ 404.900(a)(5), 416.1481; *Hearing Process*, *supra* note 47.

73. 20 C.F.R. §§ 404.900(a)(5), .981, 416.1481; *The Appeals Process*, *supra* note 10.

74. *See generally* 41 U.S.C. § 405(g)–(h) (2018).

the mailing to him of notice of such decision. . . . Such action shall be brought in the district court of the United States . . . .<sup>75</sup>

The Supreme Court has interpreted “final decision” to mean a decision rendered by the SSA Appeals Council and “made after a hearing” to most naturally refer an ALJ hearing on the merits.<sup>76</sup> In other words, § 405(g) requires a claim to pass through the first three levels of the administrative appeals process before the claim is ripe for judicial review in federal district court.<sup>77</sup> Section 405(h) purports to make the method of judicial review set forth in § 405(g) exclusive.<sup>78</sup> In its current form, § 405(h) states:

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, United States Code to recover on any claim arising under this subchapter.*<sup>79</sup>

On its face, the third sentence of § 405(h) strips federal courts of two sources of jurisdiction—28 U.S.C. § 1331, or federal question jurisdiction, and § 1346, or suits against the United States—in this context, over claims arising under the Social Security Act.<sup>80</sup> Section 405(h) then channels those claims into 405(g), which subsequently grants federal courts jurisdiction to review the SSA’s final decisions.<sup>81</sup> The history of § 405(h), however, fosters tension with this plain language interpretation.<sup>82</sup>

When Congress first enacted § 405(h) in 1939, the statute contained a general bar on jurisdiction over all suits brought under 28 U.S.C. § 41, which encompassed all of Title 28’s jurisdictional grants to the federal district courts, including diversity and bankruptcy jurisdiction.<sup>83</sup>

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75. 42 U.S.C. § 405(h).

76. See *Smith v. Berryhill*, 139 S. Ct. 1765, 1777–78 (2019).

77. 42 U.S.C. § 405(g) (emphasis added); *Hearing Process*, *supra* note 47.

78. *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 5–6 (2000).

79. 42 U.S.C. § 405(h) (emphasis added).

80. *In re Benjamin*, 932 F.3d 293, 296 (5th Cir. 2019).

81. See *Smith*, 139 S. Ct. at 1777–78; Haake, *supra* note 22.

82. See discussion *infra* Part II.

83. 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, 22–23 (2015).

Specifically, the original version stated, “No action against the United States . . . shall be brought under *section 41 of Title 28* to recover on any claim arising under [this subchapter].”<sup>84</sup> In 1948, Congress rewrote § 41, splitting and re-codifying the jurisdictional grants into separate sections: 28 U.S.C. §§ 1331–1348, 1350–1357, 1359, 1397, 2351, 2401, and 42 U.S.C. § 2401.<sup>85</sup> Despite the revision of § 41, the language in § 405(h) referring to § 41 remained unchanged.<sup>86</sup> Over the next 30 years, courts continued to apply § 405(h) as if it contained the broad bar on all grants of jurisdiction previously encompassed by § 41.<sup>87</sup> In 1976, the Office of Law Revision Counsel<sup>88</sup> revised § 405(h) to its current form, replacing the reference to § 41 with § 1331 and § 1346.<sup>89</sup> Congress adopted the Law Revision Counsel’s changes to § 405(h) as part of the Deficit Reduction Act of 1984 (DRA),<sup>90</sup> making the revisions binding.<sup>91</sup>

The legislative history behind § 405(h), combined with the location of the revisions in a section of the DRA labeled “technical corrections,”<sup>92</sup> has led federal courts to disagree over whether § 405(h) bars federal district courts from hearing claims arising under the Social Security Act brought

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84. 42 U.S.C. § 405(h) (1939) (amended 1976) (emphasis added).

85. Pub. L. No. 80–773, 62 Stat. 869, 930–35 (1948); 28 U.S.C. §§ 1331–48, 1350–57, 1359, 1397, 2361, 2401, 2402 (1952). For instance, Congress codified the grant of jurisdiction over suits “arising under the Constitution, laws, or treaties of the United States” as 28 U.S.C. § 1331, or federal question jurisdiction. Pub. L. No. 80–773, 62 Stat. 869, 930–35 (1948); 28 U.S.C. §§ 1331–48, 1350–57, 1359, 1397, 2361, 2401, 2402 (1952).

86. Maizel & Potere, *supra* note 83, at 23.

87. *Id.*

88. The Office of Law Revision Counsel of the United States House of Representatives is responsible for preparing and publishing the U.S. Code, which contains all general and permanent U.S. laws organized by subject matter. *Understanding the Code: About the Code and Website*, UNITED STATES CODE, <https://uscode.house.gov/about/info.shtml> (last visited Sept. 25, 2019) [<https://perma.cc/UP87-Q9Z5>].

89. Maizel & Potere, *supra* note 83, at 24.

90. President Reagan signed the Deficit Reduction Act into law on July 18, 1984. *Deficit Reduction Act of 1984: Provisions Related to the AFDC Program*, 47 SOC. SEC. BULL. NO. 12, 3 (1984). The Act contained multiple provisions affecting the Old-Age, Survivors, and Disability Insurance (OASDI), Supplemental Security Income (SSI), Medicare, Medicaid, and Aid to Family with Dependent Children (AFDC) programs. *Id.*

91. Deficit Reduction Act of 1984, Pub. L. No. 98–369, § 2663(a)(4)(D), 98 Stat. 494, 1162 (1984) (“Section 205(h) of such Act is amended by striking out ‘section 24 of the Judicial Code of the United States Code’ and inserting in lieu thereof ‘section 1331 or 1346 of Title 28, United States Code . . . .’”).

92. Pub. L. No. 98–369, § 2663(a)(4)(D), 98 Stat. 494, 1156 (1984).

pursuant to § 1331 and § 1346, or if § 405(h) continues to bar all jurisdictional grants pursuant to its original language.<sup>93</sup> A significant part of the debate involves the scope of the general bankruptcy jurisdictional grant in 28 U.S.C. § 1334.<sup>94</sup>

*B. The Role of § 1334: General Bankruptcy Jurisdiction*

The generous scope of bankruptcy courts' judicial power under § 1334 sheds light on why courts have wrestled with the question of whether social security and Medicare claims belong in the bankruptcy arena.<sup>95</sup> The substantive law of bankruptcy is located in Title 11 of the U.S. Code, also known as the Bankruptcy Code.<sup>96</sup> The principal purpose of the Bankruptcy Code, as stated by the United States Supreme Court, is to "grant a 'fresh start' to the 'honest but unfortunate debtor,'" mitigating the effects of financial failure for individuals.<sup>97</sup> For business entities, bankruptcy serves a different purpose in that it provides a means for reorganization to avoid liquidation.<sup>98</sup> Sections 1334, 151, and 157 of Title 28 procedurally effectuate the purpose of the Bankruptcy Code.<sup>99</sup> Section 1334 grants

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93. John Aloysius Cogan Jr. & Rodney A. Johnson, *Administrative Channeling Under the Medicare Act Clarified: Illinois Council, Section 405(h), and the Application of Congressional Intent*, 9 ANN. HEALTH L. 125, 145–46 (2000).

94. See *infra* Part II.

95. See *infra* Part I.B., II.

96. Bankruptcy law is federal law and is found in Title 11 of the U.S. Code; cf. 28 U.S.C. §§ 151, 157, and 1334 (2018).

97. See *Marrama v. Citizens Bank*, 549 U.S. 365 (2007) (quoting *Grogan v. Garner*, 498 U.S. 279, 286, 287 (1991)); see also *Local Loan Co. v. Hunt*, 292 U.S. 234, (1934); *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181 (1902).

98. Alan N. Resnick & Henry J. Sommer, 1 COLLIER ON BANKRUPTCY P 1.01 (16th ed. 2019). Liquidation is "the process . . . of collecting a debtor's nonexempt property, converting that property to cash, and distributing the cash to various creditors." *Liquidation*, BLACK'S LAW DICTIONARY (11th ed. 2019), Westlaw. During the process of reorganization, the Bankruptcy Code enables the restructuring of a business entity's debts and equity interests. *Id.* A secured debt is one that is backed by collateral, whereas an unsecured debt is one that is not supported by collateral or other security. *Debt*, BLACK'S LAW DICTIONARY (11th ed. 2019), Westlaw. Equity is the difference in value of the property and all encumbrances on it or the amount in which the value of or an interest in property exceeds secured claims or liens. *Equity*, BLACK'S LAW DICTIONARY (11th ed. 2019), Westlaw.

99. 28 U.S.C. § 1334(a)–(b), (e); *id.* § 157(a); *id.* § 151; see also Resnick & Sommer, *supra* note 98, at P 3.01.

jurisdiction over bankruptcy cases to federal district courts, and §§ 151 and 157 serve to funnel these claims into bankruptcy court.<sup>100</sup> Section 151 establishes bankruptcy courts as units of federal district courts.<sup>101</sup> Therefore, any reference to “district court” within § 1334 or § 157 includes bankruptcy courts and judges.<sup>102</sup>

### I. § 1334

Section 1334(a), (b), and (e) grant federal district courts jurisdiction over Title 11 cases, civil proceedings in Title 11, and property of the Title 11 estate.<sup>103</sup> Section 1334(a) vests original and exclusive jurisdiction in federal district courts over “all cases arising under [T]itle 11” of the Bankruptcy Code.<sup>104</sup> The reference to a Title 11 case in § 1334(a) is distinct from the “civil proceedings” arising in<sup>105</sup>, arising under<sup>106</sup>, or related to<sup>107</sup> Title 11 covered by § 1334(b).<sup>108</sup> The difference between the two subsections is that district court jurisdiction over Title 11 cases in § 1334(a) is original and exclusive, whereas jurisdiction over civil proceedings arising under Title 11, or arising in or related to Title 11, in § 1334(b) is only original.<sup>109</sup> The term “case” encompasses all proceedings that follow the filing of a civil suit pursuant to §§ 301, 302, 303, or 1504

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100. 28 U.S.C. § 1334(a)–(b), (e); *id.* § 157(a); *id.* § 151; *see also* Resnick & Sommer, *supra* note 98, at P 3.01.

101. 28 U.S.C. § 151.

102. *Id.*; Resnick & Sommer, *supra* note 98, at P 3.01[1].

103. 28 U.S.C. § 1334(a)–(b), (e); 28 U.S.C. § 157(a); 28 U.S.C. § 151; *see also* Resnick & Sommer, *supra* note 98, at P 3.01. *See infra* Part I.B.1. for an explanation of the differences between Title 11 cases, civil proceedings in Title 11, and property of the Title 11 estate.

103. 28 U.S.C. § 1334(a)–(b), (e); *see also* Resnick & Sommer, *supra* note 98, at P 3.01.

104. 28 U.S.C. § 1334(a).

105. *See infra* text accompanying notes 118–19.

106. *See infra* text accompanying notes 113–14.

107. *See infra* text accompanying notes 116–19.

108. Resnick & Sommer, *supra* note 98, at P 3.01[2].

109. 28 U.S.C. § 1334(a)–(b). Section 1334(b) provides:

Except as provided in subsection (e)(2), and 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 [T]itle 11, or arising in or related to cases under [T]itle 11.

*Id.*



of the Bankruptcy Code.<sup>110</sup> A proceeding is a specific dispute that arises in a case such as an administrative matter, a contested matter, an adversary proceeding,<sup>111</sup> or a plenary action.<sup>112</sup> At the moment of filing, the “civil proceedings” begin.<sup>113</sup>

Section 1334(b) grants district courts jurisdiction over the three types of proceedings, the first being “civil proceedings arising under [T]itle 11.”<sup>114</sup> This grant provides to district courts jurisdiction over all civil proceedings where Title 11 creates the cause of action.<sup>115</sup> The next type of proceedings is any “related to cases under [T]itle 11.”<sup>116</sup> Almost every court, including the U.S. Supreme Court, maintains that the test for determining whether a civil proceeding relates to a bankruptcy case turns on whether the outcome of the proceeding could conceivably have an effect on the estate’s administration in bankruptcy.<sup>117</sup> The standard does

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110. 11 U.S.C. § 101(42); Resnick & Sommer, *supra* note 98, at P 3.01[2]. Section 301 sets out the requirements for a voluntary case, § 302 for a joint case, and § 303 for an involuntary case. 11 U.S.C. §§ 301–03. Section 1504 covers the commencement of an ancillary case. 11 U.S.C. § 1504.

111. Adversary proceedings under the bankruptcy code include proceedings: to recover money or property; to determine the validity, priority, or extent of a lien or other interest in a property; to obtain approval under 11 U.S.C. § 363(h) for the sale of the interest of the estate and co-owner in property; to object or revoke a discharge or an order of confirmation of a chapter 11, chapter 12, or chapter 13 plan; to determine dischargeability of a debt; to obtain an injunction or other equitable relief; to subordinate any allowed claim or interest; to obtain a declaratory judgment relating to any of the foregoing; and to determine a claim or cause of action removed under 28 U.S.C. § 1452.

112. Resnick & Sommer, *supra* note 98, at P 3.01[2], [3D].

113. *Id.* at P 3.01[2].

114. *See generally* 28 U.S.C. § 1334(b); Resnick & Sommer, *supra* note 98, at P 3.01[2].

115. 28 U.S.C. § 1334(b); Resnick & Sommer, *supra* note 98, at P 3.01[2]. The determination of cases “arising under” Title 11 can be analogized to the test under 28 U.S.C. § 1331, which confers, on district courts, jurisdiction over “all civil actions arising under the Constitution.” *See* 28 U.S.C. § 1331; *see also* Resnick & Sommer, *supra* note 98, at P 3.01[3E]. (“The governing test in interpreting 28 U.S.C. § 1331 is that a case arises under the laws of the United States if “the title or right set up by one party, may be defeated by one construction of the . . . laws of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out.””).

116. 28 U.S.C. § 1334(b).

117. *See* *New Horizon of N.Y. LLC v. Jacobs*, 231 F.3d 143, 151 n.18 (4th Cir. 2000) (pointing out that the “conceivably have any effect” test originated in the Third Circuit case of *Pacor, Inc. v. Higgins* and has been adopted by the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits); *Pacor, Inc. v.*

not require that the proceeding in question certainly result in liability; instead, jurisdiction exists as long as it is plausible that the proceedings have an effect on the debtor's estate.<sup>118</sup> Section 1334(b)'s proceedings that relate to cases under Title 11 fall into two main categories: (1) those involving a debtor's causes of action that become property of a Title 11 estate under § 541 and (2) suits between third parties that may have been brought in state or district court absent the bankruptcy action.<sup>119</sup> The third type of proceedings are those "arising in" Title 11 cases, and this type serves as a catch-all for matters in which there is no cause of action created by Title 11 or for matters which may be the subject of a lawsuit outside of the bankruptcy case.<sup>120</sup> These proceedings include administrative matters, determinations of lien status, and contempt proceedings.<sup>121</sup>

Pursuant to § 1334(e)(1), the district court in which the Title 11 case is pending holds exclusive jurisdiction over all of the debtor's and estate's property.<sup>122</sup> The property of a debtor includes all legal or equitable interests of the debtor in property, subject to the exceptions in §§ 541(b) and (c)(2).<sup>123</sup> Here, the term "property" includes all forms of property including both tangible and intangible items and causes of action.<sup>124</sup> Section 157 of Title 28 is the mechanism through which bankruptcy courts can exercise this § 1334 jurisdictional power.<sup>125</sup>

## 2. § 157

Section 157(a) permits district courts to refer to bankruptcy courts "any or all cases under [T]itle 11 . . . arising under [T]itle 11 or arising in or related to a case under [T]itle 11."<sup>126</sup> Section 157(b)(1) vests bankruptcy judges with the authority to hear "all cases under [T]itle 11 *and all core proceedings* arising under [T]itle 11, or arising in a case under [T]itle 11."<sup>127</sup> Core proceedings include but are not limited to the following:

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Higgins, 743 F.2d 984, 994 (3d Cir. 1984); Resnick & Sommer, *supra* note 98, at P 3.01[3E].

118. *In re TXNB Internal Case*, 483 F.3d 292, 298 (5th Cir. 2007).

119. Resnick & Sommer, *supra* note 98, at P 3.01[3E].

120. 28 U.S.C. § 1334(b); *see also* Resnick & Sommer, *supra* note 98, at P 3.01[3E].

121. Resnick & Sommer, *supra* note 98, at P 3.01[3E].

122. 28 U.S.C. § 1334(e)(1).

123. 1 NORTON BANKR. L. & PRAC. 3d § 3:11 (2021).

124. Resnick & Sommer, *supra* note 98, at P 3.01[3E].

125. 28 U.S.C. § 157; Resnick & Sommer, *supra* note 98, at P 3.01.

126. *Id.* § 157(a).

127. *Id.* § 157(b)(1) (emphasis added).

matters concerning the administration of the estate; counterclaims by the estate; orders to turn over property to the estate; determinations as to the dischargeability of debts; and proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor relationship.<sup>128</sup> Although § 157(b) does not mention the related matters mentioned in § 157(a) and § 1334(b), bankruptcy courts have the authority to hear related, non-core matters, subject to restrictions prescribed in § 157(c).<sup>129</sup> Under § 157(c), bankruptcy courts may hear non-core proceedings that are related to a case under Title 11, but they may only enter a final order or judgment with the parties' consent.<sup>130</sup> If the parties do not consent, then the bankruptcy judge submits the proposed findings of fact and conclusions of law to the district court, and the district judge will enter the final order or judgment.<sup>131</sup> Under § 157, it is undisputed that bankruptcy courts hold a far-reaching power over § 1334 claims.<sup>132</sup> Certain federal circuit courts' restrictive interpretations of § 405(h), however, contradict this expansive power.<sup>133</sup>

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128. *Id.* § 157(b)(2). (The full illustrative list of core proceedings set out in § 157(b)(2) is as follows: “(A) matters concerning the administration of the estate; (B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of [T]itle 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under [T]itle 11; (C) counterclaims by the estate against persons filing claims against the estate; (D) orders in respect of obtaining credit; (E) orders to turn over property of the estate; (F) proceedings to determine, avoid or recover preferences; (G) motions to terminate, annul, or modify the automatic stay; (H) proceedings to determine, avoid, or recover fraudulent conveyances; (I) determinations as to the dischargeability of particular debts; (J) objections to discharges; (K) determinations of the validity, extent, or priority of liens; (L) confirmations of plans; (M) orders approving the use or lease of property, including the use of cash collateral; (N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; (O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and (P) recognition of foreign proceedings and other matters under chapter 15 of [T]itle 11.”).

129. *Compare id.* § 157(b)(1), *with id.* § 1334(b); 28 U.S.C. § 157(c).

130. *Id.* § 157(c).

131. *Id.*

132. *See supra* Part I.B.

133. *See infra* Part II.A.

## II: THE CIRCUIT SPLIT

Prior to 2019, a majority of federal circuit courts held that the omission of certain jurisdictional grants, like diversity jurisdiction and general bankruptcy jurisdiction, from the current language of § 405(h) was a legislative error and that the 1984 amendments to § 405(h) were technical in nature, leaving the statute's original scope and purpose intact.<sup>134</sup> To support its position, the majority, comprised of the Third, Seventh, Eighth, and Eleventh Circuits, pointed to the legislative history of § 405(h) and its broad jurisdictional bar to show that the lack of a reference to § 1332 and § 1334 in the new language of § 405(h) was inadvertent.<sup>135</sup> In contrast, the minority, consisting of the Ninth and the Fifth Circuits, asserts that a plain text reading of § 405(h) shows that the statute only bars suits brought under § 1331 and § 1346, thereby allowing suits brought under other jurisdictional grants.<sup>136</sup> Further, the Fifth and Ninth Circuits argue that the majority misapplied the recodification canon<sup>137</sup> and overlooked other tools of statutory interpretation in reaching their conclusions.<sup>138</sup> The circuits are now split as to whether § 405(h), in its current form, contains a hidden bar on claims brought pursuant to jurisdictional grants not explicitly listed in § 405(h).<sup>139</sup> Consequently, the question of whether bankruptcy courts have jurisdiction over claims arising under the Social Security Act remains open, garnering inconsistent decisions among the nation's courts.<sup>140</sup> Each circuit's interpretation of § 405(h) takes into account various policy

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134. *In re Bayou Shores SNF, LLC*, 828 F.3d 1297 (11th Cir. 2016); *Nichole Med. Equip. Supply, Inc. v. TriCenturion, Inc.*, 694 F.3d 340 (3d Cir. 2012); *Midland Psychiatric Assocs., Inc. v. United States*, 145 F.3d 1000 (8th Cir. 1998); *Bodimetric Health Servs. v. Aetna Life & Cas.*, 903 F.2d 480 (7th Cir. 1990).

135. *In re Bayou Shores SNF, LLC*, 828 F.3d 1297; *Nichole Med. Equip. Supply, Inc.*, 694 F.3d 340; *Midland Psychiatric Assocs., Inc.*, 145 F.3d 1000; *Bodimetric Health Servs.*, 903 F.2d 480.

136. *In re Benjamin*, 932 F.3d 293, 296 (5th Cir. 2019) (“[W]e reject the non-textual approach exemplified by the Eleventh Circuit and join the Ninth Circuit in applying the third sentence’s plain meaning—a meaning that, everyone agrees, does not bar § 1334 jurisdiction.”).

137. “[T]he recodification canon . . . states that ‘when legislatures codify the law, courts should presume that no substantive change was intended absent a clear indication otherwise.’” *In re Benjamin*, 932 F.3d at 297.

138. *Id.* at 296; *In re Town & Country Home Nursing Servs., Inc.*, 963 F.2d 1146, 1155 (9th Cir. 1991).

139. See discussion *infra* Part II; see Haake, *supra* note 22.

140. See discussion *infra* Part II, III.B.1; see Haake, *supra* note 22.

considerations surrounding the issue and further reinforces the need for a legislative solution to resolve the statutory discrepancies.<sup>141</sup>

*A. The Majority Position: § 405(h) Maintains the Broad Jurisdictional Bar*

The Seventh, Eighth, Third, and Eleventh Circuits read into the third sentence of § 405(h)<sup>142</sup> a jurisdictional bar not explicitly stated in the statute, reaching beyond § 1331 and § 1346, against adjudicating social security and Medicare claims in federal courts.<sup>143</sup> The Seventh Circuit was the first federal circuit court of appeal to provide this interpretation in 1990.<sup>144</sup>

*1. The Seventh Circuit – Bodimetric Health Services v. Aetna Life & Casualty*

In *Bodimetric Health Services v. Aetna Life & Casualty*, the Seventh Circuit considered whether § 405(h) precludes federal courts from exercising jurisdiction over claims arising under the Medicare Act<sup>145</sup> on the basis of § 1332, diversity jurisdiction.<sup>146</sup> The plaintiff, Bodimetric Health Services (Bodimetric), owned and operated 15 home health agencies (HHAs) that were certified as Medicare providers.<sup>147</sup> Under the

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141. See discussion *infra* Part II, III.B.1; see Haake, *supra* note 22.

142. The third sentence of § 405(h) provides: “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, United States Code to recover on any claim arising under this subchapter.” 42 U.S.C. § 405(h) (2018).

143. See *Bodimetric Health Servs. v. Aetna Life & Cas.*, 903 F.2d 480 (7th Cir. 1990); *Nichole Med. Equip. Supply, Inc. v. TriCenturion, Inc.*, 694 F.3d 340 (3d Cir. 2012); *Midland Psychiatric Assocs., Inc. v. United States*, 145 F.3d 1000 (8th Cir. 1998); *In re Bayou Shores SNF, LLC*, 828 F.3d 1297 (11th Cir. 2016).

144. *Bodimetric Health Servs.*, 903 F.2d at 488.

145. Section 1395ii of Title 42 of the U.S. Code provides that the provisions of § 405(h):

shall also apply with respect to [the Medicare Act] to the same extent as they are applicable with respect to [the Social Security Act], except that in applying such provisions with respect to [the Medicare Act], any reference therein to the Commissioner of Social Security or the Social Security Administration shall be considered a reference to the Secretary or the Department of Health and Human Services, respectively.

42 U.S.C. § 1395ii.

146. *Bodimetric*, 903 F.2d at 488.

147. *Id.* at 482.

Medicare Act, fiscal intermediaries must reimburse Medicare providers, like HHAs, for rendering services and providing treatment.<sup>148</sup> Here, the insurance company, Aetna Life & Casualty (Aetna) served as Bodimetric's fiscal intermediary.<sup>149</sup> At first, Aetna reimbursed almost all of Bodimetric's claims.<sup>150</sup> Problems arose, however, when Aetna adopted a stricter method of review that resulted in a number of denials of reimbursement.<sup>151</sup> Bodimetric filed a suit against Aetna in the United States District Court for the Northern District of Illinois, alleging Aetna's improper denial of reimbursement claims made under the Medicare Act.<sup>152</sup> Aetna responded with a motion to dismiss for lack of subject-matter jurisdiction, asserting that the exclusive review mechanisms set out by § 405(g)–(h) prevented Bodimetric from bringing its claim in federal court.<sup>153</sup> The district court granted the motion and Bodimetric appealed, arguing that § 405(h) does not expressly preclude actions brought under § 1332.<sup>154</sup>

On appeal, the Seventh Circuit set out to determine whether § 405(h) precludes federal courts from hearing Medicare claims under § 1332.<sup>155</sup> After a detailed study of § 405(h)'s legislative history, the Seventh Circuit affirmed the district court's decision, holding that the statute bars federal district courts from hearing Medicare claims brought under § 1332.<sup>156</sup> The court reasoned that the placement of the § 405(h) amendment under a section entitled "technical corrections" in the DRA of 1984 demonstrates that Congress did not intend to change the substance of the statutory provision, and, therefore, the jurisdictional bar on actions brought under § 1332 still applies.<sup>157</sup> The Seventh Circuit further noted that Congress is responsible for making any changes to this express limitation on remedies for dissatisfied claimants under § 405(h), not the courts.<sup>158</sup>

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148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 481–82.

153. *Id.* at 481.

154. *Id.*

155. *Id.* at 488.

156. *Id.*

157. *Id.* at 489.

158. *Id.* at 490.

2. *The Eighth Circuit – Midland Psychiatric Associates, Inc. v. United States*

Eight years later, the Eighth Circuit likewise addressed the question of whether sentence three of § 405(h) bars diversity-based claims in *Midland Psychiatric Associates, Inc. v. United States*.<sup>159</sup> Midland Psychiatric Associates (Midland) provided intensive outpatient services to nursing home residents.<sup>160</sup> Midland billed hospitals for its services, and the hospitals would, in return, submit Medicare claims for reimbursement to Mutual of Omaha Insurance Company (Mutual), a Medicare carrier.<sup>161</sup> A dispute arose between Mutual and Midland when Mutual denied thousands of the hospitals' claims on the basis that Midland's services did not comply with the Medicare requirements.<sup>162</sup> The hospitals were unable to receive Medicare reimbursements and consequently stopped using Midland's services.<sup>163</sup>

Midland subsequently filed suit against Mutual and the United States, claiming that Mutual had tortiously interfered with Midland's hospital contracts and that the United States negligently supervised this interference.<sup>164</sup> The Eighth Circuit affirmed the lower court's findings that § 405(h) barred Midland's contract claims against Mutual and the United States brought pursuant to diversity jurisdiction.<sup>165</sup> Indeed, the court adopted the same reasoning as the Seventh Circuit: § 405(h), as originally enacted, barred all claims brought under § 41, which included the grant of diversity jurisdiction now embodied in § 1332, and Congress did not intend to make a substantive change in the law when it amended § 405(h).<sup>166</sup> Thus, the Eighth Circuit joined what would later become the majority position by interpreting the amendment to § 405(h) as a technical, as opposed to a substantive, correction.<sup>167</sup>

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159. *Midland Psychiatric Assocs., Inc. v. United States*, 145 F.3d 1000, 1003 (8th Cir. 1998).

160. *Id.* at 1001.

161. *Id.* at 1002.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 1001.

166. *Id.* at 1001–02.

167. *Id.* at 1004.

3. *The Third Circuit* – Nichole Medical Equipment & Supply, Inc. v. TriCenturion, Inc.

In *Nichole Medical Equipment & Supply, Inc. v. TriCenturion, Inc.*, the Third Circuit adopted the position of the Seventh and Eighth Circuits regarding § 405(h)'s broad jurisdictional bar.<sup>168</sup> In this case, Nichole Medical Equipment & Supply (Nichole) filed a suit against TriCenturion (TC) and the National Health Insurance Company (NHIC), alleging that TC had erroneously withheld Nichole's Medicare payments, which led to its insolvency.<sup>169</sup> Nichole based its claim for damages on state tort law<sup>170</sup> and a breach of the statutory duty of care pursuant to 42 U.S.C. § 1320c-6(b),<sup>171</sup> which requires employees and fiduciaries of organizations that contract with the Secretary of the Department of Health and Human Services (HHS) to exercise "due care" in performing duties, functions, or activities required or authorized by that contract.<sup>172</sup> The United States District Court for the Eastern District of Pennsylvania dismissed the case because Nichole had not first exhausted all administrative remedies for the claims.<sup>173</sup> In other words, Nichole would have to take the HHS decision to withhold payments through the multi-step administrative appeals process before a federal court could review the decision.<sup>174</sup>

Nichole appealed to the Third Circuit, arguing that Congress intended § 405(h) only as a bar against suits brought under § 1331 and § 1346 and,

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168. *Nichole Med. Equip. Supply, Inc. v. TriCenturion, Inc.*, 694 F.3d 340, 347 (3d Cir. 2012).

169. *Id.* at 345.

170. The alleged state torts included negligence, unjust enrichment, intentional interference with contractual relations, extreme and outrageous conduct, malicious prosecution, and trespass. *Id.* at 340 n.12.

171. Section 1320c-6(b), which provides the limitations on liability for employees and fiduciaries having contracts with the Secretary, states:

No organization having a contract with the Secretary under this part and no person who is employed by, or who has a fiduciary relationship with, any such organization or who furnishes professional services to such organization, shall be held by reason of the performance of any duty, function, or activity required or authorized pursuant to this part or to a valid contract entered into under this part, to have violated any criminal law, or to be civilly liable under any law of the United States or of any State (or political subdivision thereof) provided due care was exercised in the performance of such duty, function, or activity.

42 U.S.C. § 1320c-6(b) (2018).

172. *Nichole Med. Equip. Supply, Inc.*, 694 F.3d at 345.

173. *Id.*

174. *See supra* Part I.A.



thus, the district court had diversity jurisdiction over its claims.<sup>175</sup> The Third Circuit rejected this argument, holding that Congress intended to limit federal courts' diversity jurisdiction over claims arising under the Social Security Act, evidenced by the fact that § 405(h) has undergone only technical changes.<sup>176</sup> The court cited both *Bodimetric* and *Midland*, the respective Seventh and Eighth Circuit cases, in support of its decision.<sup>177</sup>

#### 4. *The Eleventh Circuit – In re Bayou Shores SNF, LLC*

Four years later, the Eleventh Circuit joined the majority in *In re Bayou Shores*, echoing the Seventh, Eighth, and Third Circuits' arguments that § 405(h) contains a broad jurisdictional bar.<sup>178</sup> The claimant, Bayou Shores SNF, LLC (Bayou), operated a skilled nursing facility that derived 90% of its revenue from Medicare and Medicaid payments.<sup>179</sup> Bayou received compensation for its Medicare and Medicaid services through provider agreements with federal and state governments.<sup>180</sup> To receive reimbursement, Bayou had to comply with the Secretary of HHS's qualifications.<sup>181</sup> On July 22, 2014, Bayou received a letter from the Secretary stating that the HHS planned to terminate Bayou's Medicare and Medicaid provider agreements the following month due to Bayou's noncompliance with the requirements of Medicare program participation and the unsafe conditions of Bayou's facility.<sup>182</sup> To avoid the consequences of termination, Bayou filed an action in the United States Bankruptcy Court for the Middle District of Florida.<sup>183</sup> The bankruptcy court assumed authority over the provider agreements as property of the debtor Bayou's estate and enjoined the Secretary from terminating the agreements.<sup>184</sup>

The district court reversed the bankruptcy court's confirmation order with respect to the assumption of Bayou's provider agreements.<sup>185</sup> Bayou timely appealed the district court decision on the grounds that the plain

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175. *Nichole Med. Equip. Supply Inc.*, 694 F.3d at 347.

176. *Id.*

177. *Id.* at 346.

178. *In re Bayou Shores*, 828 F.3d 1297, 1299 (11th Cir. 2016).

179. *Id.*

180. *Id.*

181. *Id.* at 1300.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

text of § 405(h) precludes federal jurisdiction under § 1331 and § 1346 only.<sup>186</sup> The Eleventh Circuit Court of Appeals affirmed the district court's reversal of the bankruptcy court's judgment, finding that § 405(h) bars bankruptcy court jurisdiction over claims arising under the Medicare Act.<sup>187</sup> Specifically, the Eleventh Circuit held that Congress's exclusion of the grants of jurisdiction that were present in the original language of § 405(h) from the current version of the statute was a codification error.<sup>188</sup> To the Eleventh Circuit, this error indicated that Congress intended § 405(h) to create a broad jurisdictional bar against bringing Medicare claims in bankruptcy and federal district courts.<sup>189</sup>

In contrast to the Seventh, Eighth, Third, and Eleventh Circuits, the Fifth and the Ninth Circuits assert that under the plain language of § 405(h) bankruptcy courts have jurisdiction over claims arising under the Social Security and Medicare Acts.<sup>190</sup>

*B. The Minority Position: § 405(h) Means What It Says*

The Ninth and Fifth Circuits maintain the minority view that § 405(h) only bars claims arising under the Social Security Act brought pursuant to § 1331 and § 1346, the two jurisdictional grants explicitly listed in the statute.<sup>191</sup> The Ninth Circuit first took this position in *In re Town & Country Home Nursing Services, Inc.*, where the court held that the language of § 405(h) in no way prohibits assertions of jurisdiction under § 1334.<sup>192</sup> Twenty-eight years later, in the 2019 case of *In re Benjamin*, the Fifth Circuit echoed the Ninth Circuit's interpretation, holding that § 405(h) does not prohibit bankruptcy courts from adjudicating social security claims brought by claimants in accordance with § 1334.<sup>193</sup>

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186. *Id.* at 1304.

187. *Id.* at 1318.

188. *Id.* at 1319.

189. *Id.*

190. *See In re Benjamin*, 932 F.3d 293 (5th Cir. 2019); *see also In re Town & Country Home Nursing Servs., Inc.*, 963 F.2d 1146 (9th Cir. 1991).

191. *In re Benjamin*, 932 F.3d at 297.

192. *In re Town & Country*, 963 F.2d at 1155.

193. *In re Benjamin*, 932 F.3d at 296.

1. *The Ninth Circuit* – In re Town & Country Home Nursing Services, Inc.

The claimant in *Town & Country* was a healthcare provider of in-home nursing services.<sup>194</sup> Under the Medicare Act, government fiscal intermediaries and their subcontractors reimburse healthcare providers like Town & Country Home Nursing Services (TC) for their services.<sup>195</sup> Blue Cross of California (BCC) served as TC's fiscal intermediary.<sup>196</sup> In 1984, BCC claimed that it overpaid TC in the amount of \$555,000.<sup>197</sup> TC executed a promissory note<sup>198</sup> for this amount plus interest, made payable in monthly increments to the government.<sup>199</sup> Accordingly, BCC offset the agreed-upon amount from TC's monthly provider payments from November 1984 to September 1985.<sup>200</sup> In September, BCC realized it made a calculation error and that TC had only been overpaid about \$250,000.<sup>201</sup> In July 1985, TC filed for Chapter 11 bankruptcy.<sup>202</sup> In bankruptcy court, TC initiated an adversary proceeding against the Secretary of HHS, BCC, Blue Cross of America, and the Health Care Financing Administration.<sup>203</sup>

The Secretary of HSS argued that no claim arising under the Medicare Act is subject to judicial review until there is a final agency decision and, thus, TC's claims were immature.<sup>204</sup> The Ninth Circuit rejected this argument, holding that § 405(h) only bars actions under § 1331 and

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194. *In re Town & Country*, 963 F.2d at 1147.

195. *Id.*

196. *Id.* at 1148.

197. *Id.*

198. A promissory note is an unconditional written promise, signed by the promise-maker, to pay absolutely and in any event a certain sum of money either to the bearer or to a designated person. *Note*, BLACK'S LAW DICTIONARY (11th ed. 2019), Westlaw.

199. *In re Town & Country*, 963 F.2d at 1148.

200. *Id.*

201. *Id.*

202. *Id.* Chapter 11 of the U.S. Bankruptcy Code allows businesses that are insolvent or at risk of insolvency to reorganize their capital structure while continuing their normal operations. *Chapter 11*, BLACK'S LAW DICTIONARY (11th ed. 2019), Westlaw. The reorganization takes place under court supervision and is subject to creditor approval. *Id.* Although individual nonbusiness debtors can use Chapter 11, most of the claimants are business debtors. *Id.*

203. The Healthcare Financing Administration is the section of the Department of Health and Human Services that administers the Medicare program. *In re Town & Country*, 963 F.2d at 1148.

204. *Id.* at 1154.

§ 1346, leaving § 1334 as an independent basis for jurisdiction over claims arising under the Social Security and Medicare Acts.<sup>205</sup> The court further stated that where there is an independent basis for jurisdiction, exhaustion of administrative remedies is not required.<sup>206</sup> In support of its interpretation of § 405(h), the court noted that Congress intended for § 1334 to act as a broad jurisdictional grant over all matters conceivably having an effect on the bankruptcy estate.<sup>207</sup> Specifically, Congress enacted § 1334 to allow a single court to preside over all affairs of the estate and to promote the efficient and expeditious resolution of all matters connected to the bankruptcy estate.<sup>208</sup> According to the Ninth Circuit, the specific Medicare claim at issue was one of these bankruptcy-related matters.<sup>209</sup>

## 2. *The Fifth Circuit* – In re Benjamin

On July 25, 2019, the Fifth Circuit joined the Ninth Circuit’s position in *Benjamin*, holding that § 405(h) does not bar bankruptcy courts from relying on their grant of general bankruptcy jurisdiction to hear debtors’ claims arising under Title II of the Social Security Act.<sup>210</sup> *Benjamin* involved an individual debtor, Kenneth Benjamin, who sought relief from the U.S. government to recover amounts withheld from his social security payments.<sup>211</sup> At the center of this controversy were the disability benefits that Benjamin’s sister, Marie, received from the SSA.<sup>212</sup> In September 2013, the SSA sent a letter to Marie and Benjamin claiming that Marie no longer qualified for disability benefits due to her return to work in April 2012.<sup>213</sup> The letter further stated that the SSA planned to recoup the \$19,286.90 that Marie received in benefits following her ineligibility.<sup>214</sup> In

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205. *Id.* at 1155. The language of § 1334(b) displays Congress’s intent to “bring all bankruptcy-related litigation within the umbrella of district court, at least as an initial matter, irrespective of congressional statement to the contrary in the context of other specialized litigation.” 1 L. KING COLLIER ON BANKRUPTCY, Par. 3.01[1][c]ii, at 3–22 (15th ed. 1991).

206. *In re Town & Country*, 963 F.2d at 1154.

207. *Id.* at 1155.

208. *Id.*

209. *In re Town & Country*, 963 F.2d at 1155.

210. *In re Benjamin*, 932 F.3d 293, 296 (5th Cir. 2019).

211. *Id.* at 294.

212. *Id.*

213. *Id.*

214. *Id.* at 294–95.

response, Benjamin and his sister requested a waiver of overpayment and a reconsideration of the overpayment determination.<sup>215</sup>

Given that Benjamin was the designated beneficiary of his sister's disability benefits, he became financially responsible for the overpayment when she died in July of 2014.<sup>216</sup> A month following Marie's death, the SSA began to withhold \$536 per month from Benjamin's own social security checks.<sup>217</sup> These withholdings commenced before the SSA even considered Benjamin's waiver request, in contravention of 20 C.F.R. § 404.506(b).<sup>218</sup> In July 2016, when the SSA finally considered the waiver request that he submitted three years prior, the SSA had already collected \$6,000.<sup>219</sup> The SSA further denied the waiver and resumed the withholdings from Benjamin's social security checks.<sup>220</sup> Benjamin asked for a reconsideration of the waiver denial, and upon reconsideration the SSA again ruled against him.<sup>221</sup> He then filed a timely appeal to an ALJ.<sup>222</sup> During the waiting period, the financial burden became too much for Benjamin.<sup>223</sup> In May 2017, he filed for Chapter 7 bankruptcy<sup>224</sup> in the United States Bankruptcy Court for the Southern District of Texas.<sup>225</sup> Additionally, Benjamin asserted an adversarial claim against the SSA for collecting \$6,000 in violation of its own agency regulations.<sup>226</sup> The

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215. *Id.*

216. *Id.*

217. *Id.* at 295.

218. 20 C.F.R. § 404.506(b) states:

If an individual requests a waiver of adjustment or recovery of a [T]itle II overpayment within 30 days after receiving a notice of overpayment that contains the information in § 404.502a, no adjustment or recovery action will be taken until after the initial waiver determination is made. If the individual requests waiver more than 30 days after receiving the notice of overpayment, SSA will stop any adjustment or recovery actions until after the initial waiver determination is made.

20 C.F.R. § 404.506(b) (2020); *In re Benjamin*, 932 F.3d at 295.

219. *In re Benjamin*, 932 F.3d at 295.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. Chapter 7 of the U.S. Bankruptcy Code allows a trustee to collect and liquidate a debtor's nonexempt property, either voluntarily or by court order, to satisfy creditors. An individual debtor seeks Chapter 7 relief receives a "fresh financial start" through a discharge of all debts. *Chapter 7*, BLACK'S LAW DICTIONARY (11th ed. 2019), Westlaw.

225. *In re Benjamin*, 932 F.3d at 295.

226. *Id.*

bankruptcy court granted the SSA's motion to dismiss for lack of subject-matter jurisdiction and failure to state a claim upon which relief could be granted.<sup>227</sup> Benjamin appealed to the United States District Court for the Southern District of Texas, which affirmed the bankruptcy court's decision on jurisdictional grounds.<sup>228</sup> Specifically, the district court held that because Benjamin had not completed the administrative review process, there was no final agency decision as required by § 405(g) and that, absent a final agency decision, the bankruptcy court lacked subject-matter jurisdiction over the underlying adversary proceeding.<sup>229</sup> Benjamin then appealed the district court's judgment to the Fifth Circuit Court of Appeals.<sup>230</sup> In July 2019, when the Fifth Circuit heard his appeal, Benjamin's request for an ALJ hearing remained pending.<sup>231</sup>

The sole issue before the Fifth Circuit was whether § 405(h) barred the bankruptcy court from hearing Benjamin's claim against the SSA.<sup>232</sup> The SSA argued that the court should adopt the recodification canon<sup>233</sup> over a strictly textual reading to interpret § 405(h) as barring bankruptcy jurisdiction.<sup>234</sup> The Fifth Circuit, however, aligned with the Ninth Circuit and ruled in favor of Benjamin, holding that a plain text reading of § 405(h) clearly bars the exercise of jurisdiction under § 1331 and § 1346 but not under other statutes like § 1334.<sup>235</sup> The court stated that the recodification canon only applies in the absence of a clear indication that

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227. *Id.* A plaintiff fails to state a claim upon which relief can be granted if the plaintiff has not alleged facts in the complaint that are sufficient to maintain a claim. *Failure to State a Claim Upon Which Relief Can Be Granted*, BLACK'S LAW DICTIONARY (11th ed. 2019), Westlaw.

228. *In re Benjamin*, 932 F.3d at 295.

229. *In re Benjamin*, No. AP 17-3321, 2018 WL 572998, at \*3 (S.D. Tex. Jan. 26, 2018), *rev'd and remanded sub nom.*, *Matter of Benjamin*, 924 F.3d 180, *withdrawn from bound volume, opinion withdrawn and superseded*, 932 F.3d 293 (5th Cir. 2019); *see also In re Benjamin*, 932 F.3d at 295. In bankruptcy court, an adversary proceeding is a lawsuit brought within a bankruptcy proceeding that is based on conflicting claims usually between a debtor and a creditor. *Adversary Proceeding*, BLACK'S LAW DICTIONARY (11th ed. 2019), Westlaw.

230. *In re Benjamin*, 932 F.3d at 295.

231. *Id.*

232. *Id.* at 295-96.

233. "[T]he recodification canon . . . states that 'when legislatures codify the law, courts should presume that no substantive change was intended absent a clear indication otherwise.'" *Id.* at 297.

234. *Id.* at 296-97.

235. *Id.* at 298 ("[W]e reject the non-textual approach exemplified by the Eleventh Circuit and join the Ninth Circuit in applying the third sentence's plain meaning—a meaning that, everyone agrees, does not bar § 1334 jurisdiction.").

Congress intended to change the law's substance.<sup>236</sup> Regardless of whether Congress expresses that an amendment is intended to be technical in nature, the court maintained that the new text is primary evidence of Congress's intent and, thus, the plain language should govern.<sup>237</sup>

The Fifth Circuit acknowledged that its holding with respect to § 405(h)'s third sentence may lead to confusion in future judicial applications of § 405(h).<sup>238</sup> To allay this confusion, the court clarified the types of social security claims governed by the second<sup>239</sup> and third sentences of § 405(h).<sup>240</sup> According to the court, § 405(h)'s second sentence does not serve to channel all decisions made by the SSA into § 405(g), which authorizes judicial review of the SSA's final decision.<sup>241</sup> Rather, the second sentence only applies when claimants are challenging a decision regarding their entitlement to benefits.<sup>242</sup> The court stated that where an individual is not challenging an initial determination regarding entitlement to benefits, the second sentence of § 405(h) does not channel the claim into § 405(g).<sup>243</sup> Instead, the dissatisfied claimant can bring suit against the SSA in bankruptcy court or federal district court pursuant to § 405(h)'s third sentence, where the claim is not brought pursuant to § 1331 or § 1346.<sup>244</sup>

The minority position highlights why the issue of interpreting § 405(h)'s scope is difficult to resolve when weighing the power of bankruptcy jurisdiction against administrative expertise.<sup>245</sup> The Fifth Circuit's decision in *Benjamin*, as it sits in direct contradiction with the majority of circuits, positively benefits not only Benjamin, but the other 62 million U.S. citizens who receive social security benefits.<sup>246</sup> By the time the Fifth Circuit heard Benjamin's case on appeal, he had waded through the administrative appeals process for almost seven years.<sup>247</sup> Notably, the process would have likely taken much longer if he had to wait on the SSA

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236. *Id.* at 297–98 (internal citations omitted).

237. *Id.* (internal citations omitted).

238. 42 U.S.C. § 405(g) (2018).

239. *In re Benjamin*, 932 F.3d at 300–02.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *See supra* Part II.B.

246. *See generally In re Benjamin*, 932 F.3d at 295; *see infra* Part III.A.2.

247. *See generally In re Benjamin*, 932 F.3d 293; *see also* discussion *supra* Part II.B.

to grant his hearing request.<sup>248</sup> Questions of statutory interpretation aside, a bankruptcy judge should have the authority to hear these claims regarding the SSA's withholding of benefits.<sup>249</sup> The current circuit split over the application of § 405(h) illustrates the need for the Legislature to intervene and modify the statute to allow for bankruptcy jurisdiction over claims arising under the Social Security Act.<sup>250</sup>

### III: TIME FOR CONGRESS TO AMEND 42 U.S.C. § 405(H)

The Fifth Circuit's recent decision in *Benjamin* brought back to the fore an important debate among circuits that adversely impacts debtors across the country.<sup>251</sup> Currently, debtors in the Ninth and Fifth Circuits may adjudicate their Social Security claims in a speedy hearing in front of a bankruptcy judge, whereas debtors in the Third, Seventh, Eighth, and Eleventh Circuits must rely on an administrative appeals process that often takes years to conclude.<sup>252</sup>

#### *A. The Administrative Appeals Process Directly Affects the Vulnerable*

If a claimant seeks an initial determination of eligibility for social security benefits, and the SSA denies eligibility, then the claimant may request an appeal within 60 days of receiving the SSA's denial letter.<sup>253</sup> In practice, this multi-step appeal process can last for years.<sup>254</sup> SSA

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248. See generally *In re Benjamin*, 932 F.3d 293; see also discussion *infra* Part III.A.

249. See *infra* Part III.B., III.C.1–2.

250. See *supra* Part II; see *infra* Part III.A–C.

251. See generally *D&G Holding, L.L.C. v. Azar*, 776 Fed. Appx. 845, 847–48 (5th Cir. 2019) (“Because *Benjamin* could impact D&G’s claim, we vacate the district court’s judgment and remand for reconsideration in light of *Benjamin*. On remand, the district court should allow D&G to amend its complaint to add a mandamus claim under 28 U.S.C. § 1361, which *Benjamin* makes clear would not be barred—or in any way limited—by either the second or third sentence of § 405(h).”). *Id.* at 846; see also Haake, *supra* note 22.

252. *Smith v. Berryhill*, 139 S. Ct. 1765, 1776 (2019) (“[T]he four steps preceding judicial review . . . can drag on for years.”); *In re Benjamin*, 932 F.3d at 295; see Haake, *supra* note 22; see also *supra* Part II.

253. *The Appeals Process*, *supra* note 10.

254. See *Smith*, 139 S. Ct. at 1776. In *Smith v. Berryhill* the question before the Supreme Court was whether a dismissal for untimeliness, after a claimant has had an ALJ hearing, is a “final decision . . . made after a hearing” for purposes of allowing judicial review under § 405(g). *Id.* at 1772–73. While the issue before the Court differs from that of this paper, the Court’s rationale underscores both



processing centers (PCs) handle actions after the SSA determines benefit eligibility, which includes managing the most complex benefit payment decisions, administering appeals decisions, collecting debt, correcting records, and performing program integrity work.<sup>255</sup> As of September 2018, the PCs are working through a backlog of an estimated 3.2 million pending SSA actions.<sup>256</sup> This backlog further extends the waiting period for a decision on appeal.<sup>257</sup> The average waiting period for an appeal hearing in the 2018 fiscal year was around 591 days, a 39% increase from the waiting period in 2010.<sup>258</sup>

According to the 2020 Congressional Justification, the SSA will complete approximately 660,000 reconsiderations, 693,000 hearings, and 189,000 Appeals Council Reviews in 2020.<sup>259</sup> Further, the SSA estimates that it will conduct approximately 2.8 million Supplemental Security Income (SSI) redeterminations and 674,000 full medical reviews of continuing disability in 2020.<sup>260</sup> Even with this anticipated work load, the SSA estimates that by the end of 2020, it will have 385,000 hearings pending and an average wait time of 390 days—a decrease of over 100 days from the average wait time in 2019.<sup>261</sup> To achieve its goal of expediting the appeals process, the SSA has implemented measures such as video hearings, hiring more ALJs, reinstating the reconsideration process, and offering more web services such as *iAppeal*, which allows social security beneficiaries to request appeals online.<sup>262</sup>

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the inadequacies in the administrative appeals process and the positives of judicial review. *Id.* at 1776–77.

255. *Fiscal Year 2020 Budget Overview*, SOC. SEC. ADMIN. 1,12 (2019), [https://www.ssa.gov/budget/FY20Files/2020BO\\_1.pdf](https://www.ssa.gov/budget/FY20Files/2020BO_1.pdf) [<https://perma.cc/7ZMS-PZLA>].

256. *Id.*

257. Mark Miller, *Have a Social Security Question? Please Hold*, N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/business/social-security-service-backlog-delays.html> [<https://perma.cc/YYE6-58DT>].

258. *Id.*

259. *Fiscal Year 2020 Budget Overview*, *supra* note 255.

260. *Id.*

261. *Id.* The delays will likely be exacerbated due to the SSA’s suspension of in-person hearings during the COVID-19 pandemic. *See infra* note 268.

262. *Your Guide to Social Security Disability Video Hearings*, SOC. SEC. ADMIN. (2017), <https://www.ssa.gov/appeals/pubs/70-067.pdf> [<https://perma.cc/8BS5-J9Z6>]; *Fiscal Year 2020 Budget Overview*, *supra* note 255. The SSA stated that video hearings provide a number of benefits including “additional flexibility, especially with respect to aged and backlogged hearing requests, improved case processing times, and reduced ALJ travel.” *See* Setting the Manner for the Appearance of Parties and Witnesses at a Hearing, 83 Fed. Reg. 57,368 (proposed

Despite the new measures, there has been little improvement in the backlog of claims and, consequently, negligible change in the timeliness of hearings.<sup>263</sup> The average waiting time for hearings decreased by only 10 days from 2017 to 2018 and by 90 days from 2018 to 2019.<sup>264</sup> Although the 90-day reduction seems significant, it is important to note that the SSA's calculations include only the number of days that a claimant waits for an ALJ decision, which starts from the time the person requests a hearing before an ALJ and ends when the ALJ renders a decision.<sup>265</sup> The numbers omitted from the calculation include the average waiting time for an initial determination, which averages around 113 days, and the processing time for reconsideration decisions, which averages around 105 days. These omissions mean that in reality the time spanning from the initial determination to a final SSA disposition is almost two years.<sup>266</sup> Though the effort to mitigate the SSA's overloaded appeal system is sincere, it remains one of the SSA's most recurring and critical challenges that will certainly double down in force with the current COVID-19 pandemic forcing the closure of all SSA offices and the suspension of in-person services.<sup>267</sup>

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Nov. 15, 2018); *Your Guide to Social Security Disability Video Hearings*, SOC. SEC. ADMIN. (2017), <https://www.ssa.gov/appeals/pubs/70-067.pdf> [<https://perma.cc/8BSS-99Z6>]; *Social Security Administration Workload FY 2019 Actual*, SOC. SEC. ADMIN. (2020), <https://www.ssa.gov/budget/FY19Files/2019APM.pdf> [<https://perma.cc/8G4Z-39SS>].

263. *Fiscal Year 2018 Inspector General Statement on the Social Security Administration's Major Management and Performance Challenges*, OFFICE OF THE INSPECTOR GEN. (2018), <https://www.ssa.gov/finance/2018/OIG%202018%20Mgmt%20Challenges.pdf> [<https://perma.cc/T6SS-5BFY>]; see also *Fiscal Year 2020 Budget Overview*, *supra* note 255 (“Eliminating the hearings backlog and reducing the time it takes to get a hearing decision remains one of our most critical priorities.”).

264. *Fiscal Year 2020 Budget Overview*, *supra* note 255; *Social Security Administration Workload FY 2019 Actual*, *supra* note 262.

265. *Social Security Administration Workload FY 2019 Actual*, *supra* note 262.

266. *Fiscal Year 2020 Budget Overview*, *supra* note 255.

267. *Your Guide to Social Security Disability Video Hearings*, *supra* note 262; see also *Fiscal Year 2020 Budget Overview*, *supra* note 255 (“Eliminating the hearings backlog and reducing the time it takes to get a hearing decision remains one of our most critical priorities.”); *Fiscal Year 2018 Inspector General Statement on the Social Security Administration's Major Management and Performance Challenges*, *supra* note 263 (“The Agency still faces challenges with pending disability hearings and appeals. Continued focus is necessary . . .”); *Social Security & Coronavirus*, SOC. SEC. ADMIN., <https://www.ssa.gov/corona>

The overburdened, lengthy administrative appeals process is more than a mere inconvenience.<sup>268</sup> By statutory definition, social security benefits exclusively help individuals with limited resources and income such as the poor, the disabled, and the elderly.<sup>269</sup> The very nature of social security claims, therefore, evinces that the “inconvenient” waiting period can be a life-or-death matter for claimants.<sup>270</sup> Disability benefits, for instance, are paid out to those who are unable to work due to a medical condition that is expected to last at least one year or result in death.<sup>271</sup> SSI beneficiaries are defined as individuals with a limited amount of resources such as cash, bank accounts, stocks, U.S. savings bonds, land, vehicles, personal property, and life insurance convertible to cash.<sup>272</sup> Courts and scholars have long pointed out the negative effects of the long administrative appeal process on health care providers, such as nursing home facilities.<sup>273</sup> The same reasoning that underlies the push for bankruptcy jurisdiction over insolvent healthcare providers’ claims—namely, economic strife—is present in cases involving individual debtors to a heightened degree.<sup>274</sup>

Individual debtors, unlike healthcare providers, do not have the resources to stay financially afloat while waiting years for relief through

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virus/ (last visited Mar. 24, 2020) [<https://perma.cc/5B6A-7JF4>]; *Hearing and Appeals*, SOC. SEC. ADMIN., [https://www.ssa.gov/appeals/hearing\\_options.html](https://www.ssa.gov/appeals/hearing_options.html) (last visited October 17, 2020) [<https://perma.cc/HBX4-UU7U>] (“Our hearing offices will be closed to the public for the foreseeable future, and we will not be offering in-person service in our hearing offices. . . . [W]e do not have an estimate of when our offices may reopen for an in-person hearing.”).

268. Miller, *supra* note 257.

269. *Sanders v. Weinberger: Judicial Review of Decisions Not to Reopen Administrative Proceedings Under the Social Security Act*, 18 WM. & MARY L. REV. 181, 191 (1976) [hereinafter *Sanders*].

270. *Id.*

271. *Disability Benefits*, SOC. SEC. ADMIN. (2019), <https://www.ssa.gov/pubs/EN-05-10029.pdf> [<https://perma.cc/ALD2-ZFMC>].

272. *Understanding Supplemental Security Income (SSI) Overview*, *supra* note 43.

273. *Smith v. Berryhill*, 139 S. Ct. 1765, 1776 (2019); *Family Rehab, Inc. v. Azar*, 886 F.3d 496, 498 (5th Cir. 2018) (noting that a massive backlog in Medicare appeals meant that Medicare service provider would likely go bankrupt if recoupment of an alleged overpayment continued while waiting for the hearing); see also Samuel J. Seneczko, *Madness in Medicare: Bayou Casts Uncertainty over the Future of Nursing Facility Bankruptcies*, 2019 U. ILL. L. REV. 429 (2019); Maizel & Potere, *supra* note 83, at 44.

274. See generally *In re Benjamin*, 932 F.3d 293 (5th Cir. 2019); see *infra* Part III.A.

the administrative process.<sup>275</sup> For the vulnerable, the long wait of the appeal process may result in the exhaustion of their entire savings, the declaration of bankruptcy, the loss of a home, the lack of access to necessary medical treatment, or even the loss of a life.<sup>276</sup> In 2016, almost 10,000 people died while their appeals were pending.<sup>277</sup>

The financial death of an entity providing medical care, in comparison, may in turn detrimentally affect the health of its patients, but not as directly as would ceasing the social security payments to individuals in need.<sup>278</sup> Although healthcare providers may suffer losses in finances and clientele as they wade through the long administrative appeals process, the monetary loss may not terminate the business completely, and, further, the provider's patients have the option of seeking care elsewhere.<sup>279</sup> By contrast, individual debtors cannot simply "seek care elsewhere," because their benefits provide the integral means of supporting themselves and their families, as well as obtaining necessary medical services.<sup>280</sup> Thus, the nature of social security claims demands a solution that safeguards these individual debtors in particular.<sup>281</sup> With the SSA's exorbitant number of pending appeals, the threat to social security recipients' health, finances, and lives is far from neutralized and is further exacerbated by the courts' failure to consistently interpret the meaning of § 405(h).<sup>282</sup> Changing the language of § 405(h) to explicitly designate bankruptcy courts as an additional forum in which individuals can bring their social security claims will ensure that the expertise and specialization of administrative agencies is upheld while promoting judicial efficiency.<sup>283</sup>

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275. *Understanding Supplemental Security Income (SSI) Overview*, *supra* note 43; Miller, *supra* note 257.

276. Miller, *supra* note 257. Lisa Ekman, the director of government affairs for the National Organization of Social Security Claimants' Representatives stated: "These long wait times are devastating to people with severe health impairments . . . . Sometimes they exhaust their savings and declare bankruptcy, and sometimes they lose their homes. Or, they can't afford their medical treatment and get sicker—sometimes they die." *Id.*

277. *Id.*

278. *Id.*

279. Seneczko, *supra* note 273, at 429.

280. *See generally In re Benjamin*, 932 F.3d 293 (5th Cir. 2019); *see also* Maizel & Potere, *supra* note 83, at 23; *Understanding Supplemental Security Income (SSI) Overview*, *supra* note 43; Miller, *supra* note 257; *see also* discussion *supra* Part III.A.

281. *Sanders*, *supra* note 269; *see also* discussion *infra* III.A.

282. *Understanding Supplemental Security Income (SSI) Overview*, *supra* note 43; Miller, *supra* note 257.

283. *See infra* Part III.B., C.1.

*B. Bankruptcy Court as an Additional Venue for Social Security Claimants*

Congress's intent in enacting the Bankruptcy Code was to provide an equitable solution that considered the interests of debtors, creditors, and administrative agencies with claims against the estate.<sup>284</sup> A legislative amendment to § 405(h) codifying the Fifth Circuit's opinion would serve to fulfill the Bankruptcy Code's purpose and alleviate the agency's burden while also eliminating the ambiguous language in the statute that led to the circuit split in the first place.<sup>285</sup>

Although determinations of initial benefits have little correlation with the matters that bankruptcy judges encounter, the claims stemming from that initial grant of benefits do.<sup>286</sup> Once the SSA deems a claimant eligible for social security, the claimant is then entitled to receive those benefits, which are monetary in nature.<sup>287</sup> Issues that arise from that point on include disputes over continuing qualification of benefits, overpayments and underpayments, and violations of agency procedure.<sup>288</sup> Thus, the primary factual issues involve the allocation of debts, a principle not unique to social security and certainly not beyond the competence of a bankruptcy court.<sup>289</sup> By giving authority to additional experts in the form of bankruptcy judges, individual debtors can obtain the speedy adjudication of their social security claims without overriding administrative expertise entirely.<sup>290</sup> Indeed, involving bankruptcy courts in a subset of social security claims will relieve the SSA by lowering the number of pending

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284. Seneczko, *supra* note 273, at 429.

285. *Fiscal Year 2018 Inspector General Statement on the Social Security Administration's Major Management and Performance Challenges*, *supra* note 263. The SSA stated that video hearings provide a number of benefits including "additional flexibility, especially with respect to aged and backlogged hearing requests, improved case processing times, and reduced ALJ travel." *See* Setting the Manner for the Appearance of Parties and Witnesses at a Hearing, 83 Fed. Reg. 57368 (proposed Nov. 15, 2018); *see supra* Part III.A; *see infra* Part III.B.

286. *See* discussion *supra* I.A.

287. *See* discussion *supra* I.A.

288. *See generally In re Healthback, LLC*, 226 B.R. 464 (W.D. Okla. Bankr. Ct. 1998); *see* discussion *supra* I.A.

289. *See* discussion *supra* I.A–B.

290. *See Fiscal Year 2018 Inspector General Statement on the Social Security Administration's Major Management and Performance Challenges*, *supra* note 263; Setting the Manner for the Appearance of Parties and Witnesses at a Hearing, 83 Fed. Reg. 57368 (proposed Nov. 15, 2018); *supra* Part III.A; *infra* Part III.B.

claims and, as a result, speed up the administrative appeals process for individual debtors.<sup>291</sup> The benefit, therefore, is two-fold.<sup>292</sup>

Although bankruptcy courts should have jurisdiction over social security claims as a policy matter, bankruptcy courts must have the authority to do so under § 1334.<sup>293</sup> Social security claims do not arise under Title 11, as Title 11 does not create the cause of action; however, the claims may qualify as proceedings related to or arising in cases under Title 11.<sup>294</sup> Claims regarding the overpayment, reduction, or cessation of benefits are “related to” a Title 11 case because they have a conceivable effect on the bankruptcy estate.<sup>295</sup> In other words, the resolution of the claim determines whether or not the debtor receives money or owes money to the creditor, the SSA.<sup>296</sup> The social security claims may also fall within the catch-all provision involving claims that “arise in” a Title 11 case, given that these proceedings include administrative matters.<sup>297</sup> Finally, the disputed social security benefits may be property of the debtor, conferring jurisdiction under § 1334(e), especially in the case of an overpayment where the claimant has already received the benefits in question.<sup>298</sup> Sections 151 and 157 confer this jurisdictional power over the claims from federal district courts to bankruptcy courts.<sup>299</sup> As a matter of policy and statutory power, therefore, bankruptcy courts should have jurisdiction over social security claims.<sup>300</sup>

### *C. A Proposed Legislative Amendment to § 405(h) to Incorporate Bankruptcy Jurisdiction*

Although agency determinations deserve a degree of deference, it is crucial that an agency like the SSA not “bootstrap itself into an area in which it has no jurisdiction”; such areas include determining the contours of judicial power vested in the courts.<sup>301</sup> Further, the current circuit split

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291. Maizel & Potere, *supra* note 83, at 44.

292. *Id.*

293. *See* discussion *supra* I.B.

294. 28 U.S.C. § 1334(b) (2018); Resnick & Sommer, *supra* note 98, at P 3.01[2]

295. *See supra* Part I.A–B.

296. *See supra* Part I.A–B.

297. *See supra* Part I.A–B.

298. *See* 28 U.S.C. § 1334(e); *see also supra* Part I.A–B.

299. *See supra* Part I.B.

300. *See supra* Part I.A–B.

301. *Smith v. Berryhill*, 139 S. Ct. 1765, 1778–79 (2019) (quoting *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649–50 (1990)).

and the ensuing inconsistent opinions of district courts demonstrate that leaving the determination of § 405(h)'s scope to the courts will result in the same lack of cohesivity that is present now.<sup>302</sup> Absent explicit legislation or a ruling from the Supreme Court, lower courts are unlikely to abandon their positions on the matter.<sup>303</sup> Bankruptcy courts that align with the majority position of the circuit split will likely choose to abstain<sup>304</sup> from hearing social security claims, whereas those courts siding with the minority will likely adjudicate social security claims, causing the circuit split to persist in spirit.<sup>305</sup> The Supreme Court has stated that though immediate judicial access for parties is desirable, Congress struck a different balance with § 405(g) and § 405(h). If the balance is to be reformed, the Court opined that “the decision must come from Congress and not from this Court.”<sup>306</sup> The Supreme Court, therefore, refuses to settle

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302. See *supra* Part II.

303. Compare *In re AHN Homecare, LLC*, 222 B.R. 804, 812 (Bankr. N.D. Tex. 1998) (§ 405(h) prohibits judicial review of controversies arising under the Medicare Act before exhaustion of all administrative remedies), with *In re Healthback, LLC*, 226 B.R. 464 (Bankr. W.D. Okla. 1998) (§ 405(h) does not state that § 1334 is subordinate to § 405; therefore, bankruptcy courts have jurisdiction over Medicare matters), and *United States ex rel. Rhodey*, 181 B.R. 624, 642–45 (Bankr. N.D. Fla. 1994) (exhaustion of administrative remedies not required for cause of action relating to claim of the government against the bankruptcy estate); see *supra* Part II, III.A.

304. Abstention is “[a] federal court’s relinquishment of jurisdiction when necessary to avoid needless conflict with a state’s administration of its own affairs.” *Abstention*, BLACK’S LAW DICTIONARY (11th ed. 2019), Westlaw. There is discretionary and mandatory abstention. *Id.* In bankruptcy disputes, discretionary—or permissive—abstention is “[a]bstention that a court can, but need not, exercise,” over claims “that relate[] to the bankruptcy estate but that can be litigated, or [are] being litigated, in another forum.” *Id.* The bankruptcy court considers the following factors when deciding whether to abstain: “(1) the degree to which state law governs the case, (2) the appropriateness of the procedure to be followed in the other forum, (3) the remoteness of the dispute to the issues in the bankruptcy case, and (4) the presence of nondebtor parties in the dispute.” *Id.* (citing 28 U.S.C. § 1334(c)(1)). Mandatory abstention is “abstention that a bankruptcy court must exercise in a related (noncore) proceeding that could not have been brought in federal court in the absence of the pending bankruptcy.” *Id.* (citing 28 U.S.C. § 1334(c)(2)).

305. Maizel & Potere, *supra* note 83, at 23; see discussion *supra* Part II; Seneczko, *supra* note 273, at 429.

306. Heckler v. Ringer, 466 U.S. 602, 646–47 (1984).

In the best of all possible worlds, immediate judicial access for all these parties might be desirable. But Congress, in § 405(g) and § 405(h), struck a different balance, refusing declaratory relief and requiring that

the dispute, and bankruptcy jurisdiction over social security claims remains uncertain until the Legislature amends § 405(h) to resolve the ambiguity. The Legislature should intervene and amend § 405(h) to read:

No action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought *to recover on any claim arising under this subchapter [of the Social Security Act] except for claims brought by individuals pursuant to section 1334 of Title 28. The individual must have received an initial determination of eligibility for benefits prior to bringing the claim under section 1334.*<sup>307</sup>

The amendment expressly allows for a separate means of jurisdiction for individual debtors' social security claims, without the requirement of administrative exhaustion.<sup>308</sup> This solution is viable for four reasons: (1) it prevents courts from issuing differing interpretations of § 405(h); (2) it limits the jurisdictional grant to bankruptcy courts, as opposed to other grants like diversity jurisdiction, thereby curtailing concerns that this new statutory language will open the floodgates and overburden federal courts with social security claims; (3) the social security claims will necessarily relate to the bankruptcy estate because the claims must fall within the ambit of § 1334; and, finally, (4) the ability to adjudicate these claims in one place promotes judicial efficiency and lightens the backlog of SSA claims.<sup>309</sup> Expressly granting bankruptcy court jurisdiction over individuals' claims arising under the Social Security Act decreases the

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administrative remedies be exhausted before judicial review of the Secretary's decisions takes place. Congress must have felt that the cases of individual hardship resulting from delays in the administrative process had to be balanced against the potential for overly causal or premature judicial intervention in an administrative system that processes literally millions of claims every year. If the balance is to be struck anew, the decision must come from Congress and not from this Court.

*Id.* at 626. The Supreme Court also denied the Eleventh Circuit's petition for a writ of certiorari to decide whether § 405(h) bars bankruptcy and district court jurisdiction over Medicare claims. *Petition for Writ of Certiorari, Bayou Shores, SNF LLC v. Fla. Agency for Health Care Admin.*, 2017 WL 475658 (2016) (No. 16-967); *see also* *Smith v. Berryhill*, 139 S. Ct. 1765, 1776 (2019) (acknowledging that decisions where the agency has not yet reviewed the facts should be left to the agency but refusing to comment or extend to rationale to cases in which the agency has reviewed the facts).

307. *See generally* 42 U.S.C. § 405(h) (2018).

308. *See supra* Part II, III.A.

309. *See supra* Part III.



excessive waiting period that debtors would otherwise face in the administrative appeals process by lightening the SSA's caseload.<sup>310</sup>

*1. Eligibility of Benefits Must Occur Before a Claimant Invokes § 405(h) and § 1334*

Under the above proposed legislation, an individual has the option of adjudicating claims arising under the Social Security Act in bankruptcy court if the claimant has filed a bankruptcy action under Chapter 7, 11, or the like and if the SSA has issued an initial determination stating the claimant's eligibility for social security benefits.<sup>311</sup> If an individual applies for benefits and the SSA denies the application, then the individual cannot file suit against the SSA in bankruptcy court; both a filed bankruptcy action and a determination of eligibility are necessary to open up the bankruptcy court as an additional forum.<sup>312</sup> Thus, the sole avenue for challenging the eligibility determination lies in the administrative appeals process.<sup>313</sup> Restricting bankruptcy jurisdiction to social security claims in which the SSA either has already issued benefits or has recognized an individual's eligibility for such benefits ensures that these claims involve monetary disputes and, therefore, have a conceivable effect on or constitute part of the bankruptcy estate.<sup>314</sup> The proposed solution recognizes that the SSA and its administrative procedures are in the best position to handle issues regarding eligibility determinations.<sup>315</sup> Additionally, this limitation on the types of claims that bankruptcy courts have jurisdiction over ensures that the backlog in SSA claims is not entirely transferred over to the court docket.<sup>316</sup>

The process behind disability claims most clearly illustrates the need to keep the initial application determination within agency expertise.<sup>317</sup> When an applicant applies for disability benefits, the SSA forwards the application to the Disability Determination Services (DDS) office in the applicant's state.<sup>318</sup> The DDS's doctors and disability specialists review medical evidence from the applicant's doctors, hospital visits, and test

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310. *See supra* Part III.

311. *See supra* Part III.

312. *See supra* Part III.C.

313. *See supra* Part III.C.

314. *See supra* Part I.B., III.

315. *See supra* Part I.B., III.

316. *See supra* Part I.B., III.

317. *Disability Benefits, supra* note 271.

318. *Id.*

results to determine if the applicant is disabled.<sup>319</sup> To fall into the SSA's definition of "disabled," the medical condition must be severe, meaning the condition "significantly limit[s] [an applicant's] ability to do basic work activities—such as lifting, standing, walking, sitting, and remembering—for at least 12 months."<sup>320</sup> The SSA maintains a list of impairments that it considers severe enough to prevent a person from performing profitable work.<sup>321</sup> If an applicant satisfies the criteria of a listed impairment, the DDS office will automatically deem the applicant qualified for disability.<sup>322</sup> If an applicant does not meet the criteria, then the DDS office determines whether the medical condition prevents the applicant from performing past work and from doing other types of work in the future, taking into account age, education, and past work experience.<sup>323</sup> If the DDS office finds the applicant unable to perform past work and unable to perform other types of work, then the applicant is considered disabled for purposes of receiving benefits.<sup>324</sup>

Bankruptcy courts are not equipped with a staff of doctors or medical experts, nor should they allocate their time to determining whether a debtor is capable of performing certain jobs.<sup>325</sup> Instead, an initial determination of disabled should be a prerequisite to bringing a related social security claim into bankruptcy court to ensure that the claimant has either a valid claim for financial benefits or for relief from the mishandling of said benefits.<sup>326</sup> Under those circumstances, the resolution of the social security claims will increase the efficiency of adjudicating the claimant's bankruptcy estate.<sup>327</sup>

With a grant for benefits already in place, the claims that follow are likely to relate to withholdings of payments, the circumstances surrounding the ceased payments, and the adherence to or misapplication of agency procedure in allocating benefits, all of which are within the purview of bankruptcy courts.<sup>328</sup> These prerequisites, which require claimants to have a current bankruptcy action filed and pending and to

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319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.* Note that there are special rules for blind people. *See generally If You Are Blind Or Have Low Vision—How We Can Help*, SOC. SEC. ADMIN. (2019), <https://www.ssa.gov/pubs/EN-05-10052.pdf> [<https://perma.cc/3CQD-RF4B>].

325. *See supra* Part I.A–B., III.A–B.

326. *See supra* Part I.A–B., III.A–B.

327. *See supra* Part I.A–B., III.A–B.

328. *See supra* Part III.A–B.

have received an initial determination from the SSA stating that at some point the claimant was eligible for social security benefits, ensure that the claimants do not entirely circumvent the administrative appeals process and, further, that the claims strongly affect the bankruptcy estate.<sup>329</sup> Allowing for this second option of bankruptcy court jurisdiction will serve to lighten the load of the agency appeal process, promote judicial efficiency, and ensure that debtors can have their claims heard without jumping through a variety of procedural hoops.<sup>330</sup> A hypothetical of how the amended § 405(h) would work in a case similar to Benjamin's displays the efficacy of this solution.<sup>331</sup>

*2. Hypothetical Demonstrating the § 405(h) Amendment in Practice*<sup>332</sup>

In 2010, Claimant A applied for and began to receive disability benefits.<sup>333</sup> In 2013, the SSA contacted Claimant A and said that Claimant A's eligibility for disability benefits expired in 2012.<sup>334</sup> Thus, the SSA asserted that Claimant A had received an overpayment of benefits in the amount of \$20,000 and that the SSA planned to recoup that money.<sup>335</sup> If Claimant A disagrees with the SSA's decision regarding the reassessment of his disability, then the amended version of § 405(h) allows him to proceed in one of two ways: the SSA's administrative appeals process or the bankruptcy court, if the statute's prerequisites are met.<sup>336</sup>

Claimant A chose to pursue the administrative appeals process, asking first for a reconsideration of the SSA decision.<sup>337</sup> While Claimant A waited for reconsideration, the SSA began to collect on the disputed overpayment by withholding \$600 from Claimant A's monthly SSI benefits.<sup>338</sup> Three years later, the SSA finally reconsidered the overpayment and issued an unfavorable decision against Claimant A.<sup>339</sup> Claimant A, believing that the

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329. See *supra* Part I.B., III.

330. See *supra* Part III.

331. See *infra* Part III.C.2.

332. This hypothetical incorporates the facts of *In re Benjamin*, 932 F.3d 293 (5th Cir. 2019); see Appendix A for exemplary diagrams of this hypothetical.

333. See generally *In re Benjamin*, 932 F.3d 293; see Appendix A for exemplary diagrams of this hypothetical.

334. See generally *In re Benjamin*, 932 F.3d 293.

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

SSA had incorrectly terminated his disability benefits, sought relief through the second step of the administrative appeals process by requesting a hearing before an ALJ in 2016.<sup>340</sup> As his ALJ hearing request pended, the SSA continued to withhold money from Claimant A's SSI checks.<sup>341</sup> Three years of debt collection from the SSA led to the exhaustion of Claimant A's savings.<sup>342</sup> Claimant A filed for bankruptcy in 2017.<sup>343</sup>

Administrative exhaustion, however, was not Claimant A's only means of relief.<sup>344</sup> Rather than waiting years for the grant of his ALJ hearing request, Claimant A could have filed an adversary claim against the SSA in bankruptcy court.<sup>345</sup> Claimant A is an individual debtor with an initial SSA determination of eligibility for benefits and with a bankruptcy action filed.<sup>346</sup> The amended § 405(h),<sup>347</sup> therefore, authorizes Claimant A to bring a claim against the SSA regarding the overpayment determination in bankruptcy court.<sup>348</sup>

#### CONCLUSION

Courts will continue to struggle with interpreting the extent of federal jurisdiction under § 405(h) without a legislative amendment to the statute, leading to unjust results for individual debtors in particular.<sup>349</sup> The current circuit split highlights the need for § 405(h) to expressly grant to bankruptcy courts jurisdiction over individual debtors' social security claims.<sup>350</sup> Tailoring the language of § 405(h) to a specific population and to all claims against the SSA that arise out of the receipt of benefits or a grant of entitlement to benefits ensures that courts do not undermine the expertise of the SSA.<sup>351</sup> Rather, opening this additional venue for aggrieved social security beneficiaries will ensure that their debts are quickly and efficiently adjudicated in one place, while also lightening the

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340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.*; see *supra* Part III.C.

345. See generally *In re Benjamin*, 932 F.3d 293; see *supra* Part III.C.

346. See generally *In re Benjamin*, 932 F.3d 293.

347. *Id.*

348. See discussion *supra* Part III.C.

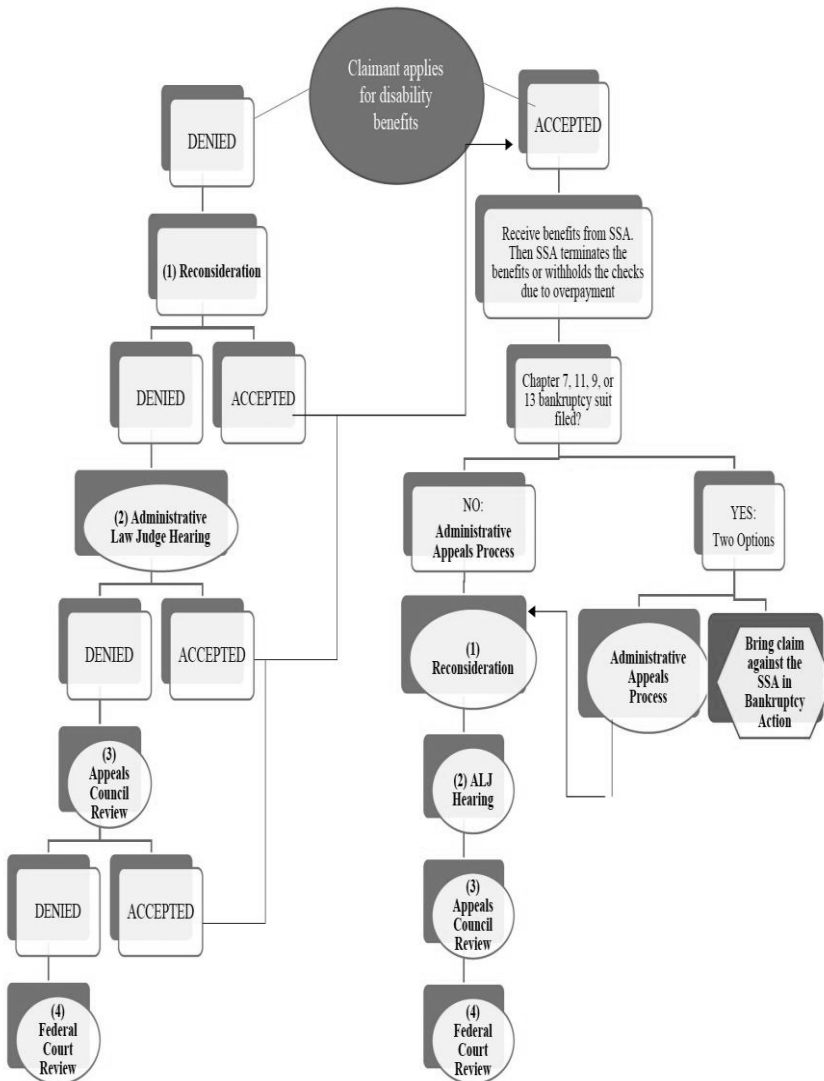
349. See *supra* Part II, III.A.

350. See generally *supra* Part II.

351. See *supra* Part III.C.

overwhelming load of appeals handled by the SSA.<sup>352</sup> Thus, this amendment to § 405(h) will benefit the debtor, the SSA, and bankruptcy courts alike.<sup>353</sup>

*Appendix A – § 405(h) Amendment in Practice (Using the Example of a Disability Benefits Application)*



352. See *supra* Part II.B., III.

353. See *supra* Part III.

