

2011 WL 7099422 (Ala.) (Appellate Brief)  
Supreme Court of Alabama.

EX PARTE BLUE CROSS AND BLUE SHIELD OF ALABAMA, Petitioner.  
In Re: MAIN & ASSOCIATES, INC. d/b/a Southern Springs Healthcare Facility,  
v.  
BLUE CROSS and Blue Shield of Alabama.

No. 1101464.  
November 7, 2011.

On Petition for Writ of Mandamus to the Honorable Burt Smithart  
From the Circuit Court of Bullock County Civil Action No. CV-2010-900016

**Motion for Leave to File Brief of Amicus Curiae On Behalf of the Alabama Nursing Home Association**

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**\*2 MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE ON BEHALF OF THE ALABAMA NURSING HOME ASSOCIATION**

COMES NOW The Alabama Nursing Home Association, and pursuant to [Rule 29 of the Alabama Rules of Appellate Procedure](#), moves this Court for leave to file a brief as *Amicus Curiae* in support of Respondent and in opposition to the Petition for Writ of Mandamus filed by Blue Cross Blue Shield of Alabama (“Petitioner BCBS”). In support of this motion, *Amicus* states as follows:

1. The Alabama Nursing Home Association (hereinafter “Amicus”) is a nonprofit trade association representing more than 220 Alabama licensed nursing facilities. Each member nursing home is committed to delivering quality care to Alabama's **elderly** and disabled.

2. Petitioner BCBS filed a motion to dismiss a complaint filed in state court by Main & Associates, Inc. d/b/a Southern Springs Healthcare Facility (“Southern Springs” or “Respondent”) seeking damages for breach of contract. The Honorable Burt Smithart denied Petitioner's motion to dismiss. On or about September 13, 2011, Petitioner filed a writ of mandamus **\*3** with this Court seeking to compel Judge Smithart to dismiss Respondent's complaint.

3. Respondent's class action complaint seeks redress from Petitioner BCBS for its failure to meet its contractual obligations under its Medicare Advantage plan, Blue Advantage.

4. Amicus requests leave to file a brief in opposition to the Petition for a Writ of Mandamus because Amicus possesses a compelling interest in the case due to its representation of more than 220 nursing facilities within Alabama. These nursing facilities provide care to almost 24,000 of our state's **elderly** and disabled, many of whom are Medicare beneficiaries enrolled in the Medicare Advantage Plans provided by Blue Cross Blue Shield (hereinafter “BCBS”). Many of Amicus' members entered into similar contracts with Petitioner BCBS, and Amicus' compelling interest stems from its desire to guarantee that these members receive adequate representation through the judicial process of this State and to ensure that its members can enforce their contractual rights. If Petitioner BCBS's motion is granted, Amicus' members face serious harm with no **\*4** opportunity for judicial redress of traditional state law claims in Alabama courts.

4. Therefore, Amicus requests that it be allowed to present arguments showing that the trial court did not **abuse** its discretion by refusing to dismiss Respondent's state law claims. A copy of Amicus' brief is attached hereto as Exhibit A.

WHEREFORE, the above-named Amicus respectfully moves the Court for leave to file its brief of amicus curiae.

### **\*1 INTRODUCTION**

The Alabama Nursing Home Association, Inc. (“ANHA”) files this brief as amicus curiae in opposition to the Petition for Writ of Mandamus (the “Petition”) filed by Blue Cross and Blue Shield of Alabama (“BCBS”) seeking dismissal of the claims of Main & Associates, Inc. d/b/a Southern Springs Healthcare Facility (“Southern Springs”) and the putative class.

ANHA is a nonprofit trade association with more than 220 individual Alabama nursing facilities as members, each of which is committed to delivering quality care to Alabama's **elderly** and disabled. ANHA members provide care for the overwhelming majority of Alabama citizens residing in nursing facilities throughout the state.

ANHA possesses a compelling interest in the case due to its representation of Alabama nursing facilities. These nursing facilities provide care to almost 24,000 of our state's **elderly** and disabled, many of whom are Medicare beneficiaries enrolled in the Medicare Advantage Plans provided by BCBS. ANHA's compelling interest stems from its desire to guarantee that its members have the ability through the judicial process to have its disputes heard and **\*2** to ensure that its members can enforce their contractual rights. If BCBS's Petition is granted, ANHA's members face serious harm with no opportunity for judicial redress of traditional state law claims in Alabama courts.

ANHA adopts the Statement of the Facts and the Statement of the Issue contained in Respondent's Answer to Petition for Writ of Mandamus and submits the following argument in opposition to the Petition filed by BCBS.

### **\*3 SUMMARY OF ARGUMENT**

This lawsuit presents the question of whether a private nursing facility must pursue its contractual dispute against BCBS in an administrative process designed to address claims by beneficiaries as opposed to seeking redress in a judicial forum. BCBS argues that Southern Springs' contractual claims are preempted by the Medicare Act and, thus, should be dismissed. This position ignores existing authority on preemption under the Medicare Act, which clearly provides that common law business disputes, such as the claims of Southern Springs and the putative class, are not preempted.

Additionally, the only available forum for this type of dispute is a judicial forum. Although BCBS suggests that nursing facilities or other medical providers must seek redress through the administrative or grievance process, the only forum available to nursing facilities, such as Southern Springs, to address whether BCBS has violated its contract is a judicial forum. The claims asserted by Southern Springs are not the types of claims or grievances envisioned by the Medicare Act's administrative process. A \*4 contractual dispute between two private entities belongs in state court not before a claims review board.

## ARGUMENT

The Petition is due to be denied because: (1) the claims of Southern Springs do not arise under the Medicare Act; and (2) the judicial process provides the only forum for Southern Springs' claims.

### I. Southern Springs' claims do not arise under the Medicare Act.

There is clear precedent that Southern Springs' claims do not “arise under” the Medicare Act. *See Rencare, Ltd. v. Humana Health Plan of Texas, Inc.*, 395 F.3d 555 (5th Cir. 2004). In *Heckler v. Ringer*, 466 U.S. 602 (1984), the United States Supreme Court set forth the test for determining whether claims arise under the Medicare Act. The Court held that a claim arises under the Medicare Act and is thus subject to preemption if: (1) the Medicare Act is both the standing and the substantive basis for the presentation of the claim, or (2) the claim “is inextricably intertwined with a claim for Medicare benefits.” *Id.* at 614.

\*5 In *Rencare, Ltd.*, a provider of medical services under contract with a Medicare Advantage insurance provider brought suit in state court alleging a variety of state law claims including breach of contract. *See* 395 F.3d 555 The insurance provider moved to dismiss the claims arguing that the claims were preempted by the Medicare Act. *Id.* In the first step of its analysis, the court summarily stated that there was no standing or substantive basis for the claims in the Medicare Act. *Id.* Under the second prong of *Heckler*, the court then analyzed whether the provider's claims were inextricably intertwined with a claim for Medicare benefits. *Rencare, Ltd.*, 395 F.3d 555. The Fifth Circuit held the claims were not preempted because “there were no enrollees seeking Medicare benefits” and “the government had no financial interest in the case.” *Id.* at 558. Rather, the court found that the dispute was based solely on the “parties' privately-agreed-to payment plan.” *Id.* at 558.

Just like the insurance company in *Rencare*, BCBS has not established that the claims asserted by Southern Springs arise under the Medicare Act. Pursuant to the test in *Heckler*, Southern Springs' claims do not have standing \*6 in the Medicare Act, nor does the Medicare Act form the substantive basis of Southern Springs' action. *See Rencare, Ltd.*, 395 F.3d 555. Southern Springs' claims arise under a contract and do not involve a claim of a beneficiary. Consequently, Southern Springs does not have standing under the Medicare Act to bring an administrative appeal. *See id.*; *see also* 42 C.F.R. 422.566.

Moreover, the contractual and tort claims of a nursing facility, such as Southern Springs, are not inextricably intertwined with a claim for benefits. Similar to the situation in *Rencare*, Southern Springs' claims do not involve “enrollees seeking Medicare benefits,” and the government has “no financial interest” in the outcome of the case because it pays BCBS a flat rate regardless of what BCBS pays to the providers.

Not only has the Fifth Circuit addressed the exact issue before this court, two other courts have addressed the issue of whether Southern Springs' claims are preempted by the Medicare Act - Bullock County Circuit Court and the United States District

Court for the Middle District of Alabama. These courts correctly interpreted the existing \*7 authority on this issue in finding that Southern Springs' claims were not preempted by the Medicare Act.

First, the United States District Court for the Middle District of Alabama, a federal court that is tasked with interpreting federal laws and regulations, addressed the preemption question in the context of removal. BCBS removed the complaint filed by Southern Springs in state court, and Southern Springs filed a motion to remand arguing that the Court did not have subject matter jurisdiction over Southern Springs' claims. See *Main & Associates, Inc. v. Blue Cross and Blue Shield of Alabama*, 776, F. Supp. 2d 1270 (M.D. Ala. 2011). In its Memorandum Opinion and Order granting Southern Springs Motion for Remand, the court concluded that removal jurisdiction did not exist because: (1) the case did not “arise under” the Medicare Act, and (2) the MMA does not “completely preempt” state law. *Id.* In reaching the first conclusion, the court found that the dispute between the parties was “between a private provider of skilled nursing care and BCBS. Neither the government nor any Medicare enrollees are parties to this action.” *Id.* Additionally, the Court found that “the action concerns only Medicare benefits under Part C, no \*8 government funds are at risk whatever the outcome of the litigation may be.” *Id.* After examining all of the facts and relevant authority, the court ultimately concluded that it was “persuaded that this case neither arises under Medicare, nor is it inextricably intertwined with a claim for Medicare benefits.” *Id.* In reaching its second conclusion, the court found that complete preemption is a “narrow” exception to the well-pleaded complaint rule, and that the statutory provisions, which BCBS cited, did not satisfy the test for complete preemption. *Id.*

BCBS made the same argument that it made in federal court when it filed its Motion for Judgment on the Pleadings in Bullock County Circuit Court. BCBS argued that the claims of Southern Springs failed to state a claim upon which relief can be granted because all of Southern Springs' claims were expressly preempted by the Medicare Act. The trial court disagreed with the assertions of BCBS and denied BCBS's Motion for Judgment on the Pleadings.

As both of the courts previously held, common law business disputes, such as the claims brought by Southern Springs against BCBS, do not arise under and are not preempted by the Medicare Act. Alabama state courts should \*9 permit Southern Springs and other similarly situated nursing homes to pursue their common law claims in a judicial forum. Any holding by this Court to the contrary would deny health care providers the ability to seek redress for business disputes available to all other businesses under Alabama law.

## **II. Contractual disputes are not covered by the grievance process under the Medicare Act; therefore, a judicial forum is the appropriate forum for Southern Springs' claims.**

As indicated above, a health care provider can only avail itself of the administrative grievance process in the Medicare Act if it is representing the interests of a Medicare Advantage enrollee. See 42 C.F.R. 422.566(a). That is not what is at issue in this case. Rather, this case involves a challenge to BCBS's system of evaluating ALL claims, not a single beneficiary's claim.

The Fifth Circuit in *Rencare, Ltd.*, addressed this argument in addition to preemption and determined that because the provider was “pursuing its own claims” against the insurance company, the grievance procedures outlined in the Medicare Act were inapplicable. \*10 *Rencare, Ltd.*, 395 F.3d 555. “As is evident from the regulations, the administrative review process focuses on enrollees, not health care providers.” See *id.*

As in *Rencare*, Southern Springs' claims are based on its contractual relationship with BCBS not the beneficiary's rights. BCBS argues that Southern Springs' claims should be dismissed because the Medicare Act requires that coverage disputes must go through the administrative process. The problem with BCBS's argument is that it ignores the substance of the claims asserted. The grievance and administrative process outlined in the Medicare Act is not the appropriate forum for the type of dispute at issue here - a contractual dispute between private parties.

Additionally, it was not the intent of Congress when it promulgated the administrative review process to subsume the contractual disputes between healthcare providers and a Medicare Advantage organization such as BCBS. A 2005 Federal Register

discussing the Medicare Act and preemption stated that “in areas where we have neither the expertise nor the authority to regulate, we do not believe that State laws would be superseded or preempted.” When providing \*11 examples of such instances, it specifically stated that it did not intend to preempt “laws governing private contracting relationships” and “tort law.” 70 Fed. Reg., No. 18, pp- 4319-20(January 28, 2005).

Based on BCBS's motion to dismiss, it would have Southern Springs and other similarly situated providers bring their challenge to BCBS's payment system in the administrative process described in the Medicare Act. Southern Springs wishes to address a systematic breach of a contractual duty not a denied claim of a beneficiary. Southern Springs cannot bring such an action under the Medicare Act because it does not fall within the definition of an organization determination. *See* 42 C.F.R. 566(b). Therefore, the only avenue for redress is through the judicial process. To deny Southern Spring the right to bring this action would deny it of its ability to determine whether BCBS has violated its contract and breached its duties to nursing home providers.

### CONCLUSION

The Petition for Writ of Mandamus filed by BCBS is due to be denied because (1) the claims of Southern Springs and the putative class do not arise under the Medicare Act and \*12 (2) the judicial process provides the only appropriate forum for these claims. Therefore, ANHA respectfully requests that this Honorable Court deny the Petition for Writ of Mandamus filed by BCBS.

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