

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2009

4 (Argued: October 1, 2009

5 Supplemental Briefing Received: October 30, 2009

6 Decided: June 18, 2010)

7 Docket No. 08-5052-ag

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9 JENNIFER MATTHEW NURSING AND REHABILITATION CENTER,

10 Petitioner,

11 - v. -

12 UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

13 Respondent.*

14 -----
15 Before: SACK, LIVINGSTON, and LYNCH, Circuit Judges.

16 Petition for review of a ruling by the Appeals Board of
17 the United States Department of Health and Human Services
18 affirming the decision of an Administrative Law Judge that upheld
19 the assessment of an \$80,000 civil monetary penalty for
20 regulatory violations imposed by the Centers for Medicare and
21 Medicaid Services against a certified nursing facility formerly
22 owned and operated by the petitioner. During the pendency of the
23 administrative proceedings, the facility was sold by the
24 petitioner to a new owner-operator. Subsequent to the filing of

* The Clerk is directed to amend the caption accordingly.

1 this petition, the new owner-operator satisfied the civil
2 monetary penalty assessed against the facility. We dismiss the
3 petition for review as moot.

4 Petition dismissed.

5 JOSEPH L. BIANCULLI, Health Care
6 Lawyers, PLC, Arlington, VA, for
7 Petitioner.

8 ABBY C. WRIGHT, Appellate Staff
9 Attorney, Civil Division, Department of
10 Justice, for Tony West, Assistant
11 Attorney General (Mark B. Stern, on the
12 brief), for Respondent.

13 SACK, Circuit Judge:

14 Petitioner Jennifer Matthew Nursing and Rehabilitation
15 Center ("Jennifer Matthew"), the former owner and operator of a
16 nursing facility of the same name in Rochester, New York,
17 petitions for review of a ruling by the Appeals Board (the
18 "Board") of the United States Department of Health and Human
19 Services ("HHS" or the "Agency"), affirming the decision of an
20 Administrative Law Judge ("ALJ") that upheld the assessment of an
21 \$80,000 civil monetary penalty by the Centers for Medicare and
22 Medicaid Services ("CMS") against the facility for regulatory
23 violations. During the pendency of the administrative
24 proceedings, the facility was sold by the petitioner. Subsequent
25 to the filing of this petition for review, the new owner-operator
26 made a payment to CMS in satisfaction of the penalty assessed
27 against the facility.

28 The parties dispute whether the petitioner had standing
29 under Article III of the United States Constitution to bring this

1 petition at the time it was filed in light of the prior sale of
2 the facility to another owner-operator. They also dispute the
3 merits of the penalty imposed against the facility by CMS. We
4 need not reach either of these questions, however, because we
5 conclude that the satisfaction of the penalty by the facility's
6 current owner-operator, from which CMS sought payment, has
7 rendered this petition moot. We therefore lack jurisdiction over
8 the petition and dismiss it on that basis.

9 **BACKGROUND**

10 "Jennifer Matthew Nursing and Rehabilitation Center"
11 was, until July 2006, the name of a skilled nursing facility
12 located in Rochester, New York. It was also the trade name or
13 "d/b/a" of the original owner-operator of that facility, a
14 closely-held corporation by the name of NRNH, Inc. In February
15 2006, the original owner-operator sold the facility and ceased
16 using the Jennifer Matthew name. Throughout the administrative
17 record and the proceedings before this Court, however, the
18 original owner-operator, who is the petitioner here, is often
19 referred to as "Jennifer Matthew Nursing and Rehabilitation
20 Center" or "Jennifer Matthew," even though it no longer owns the
21 facility and is in fact a separate entity incorporated under a
22 different name. We accordingly refer to the original owner-
23 operator hereinafter as "Jennifer Matthew" or "NRNH," and to the
24 rehabilitation center as the "Jennifer Matthew facility."

1 The Jennifer Matthew facility participated in the
2 Medicare program. In order to participate, it entered into a
3 provider agreement with the administrator of that program, the
4 Centers for Medicare and Medicaid Services ("CMS"), one of eleven
5 operating divisions of HHS. See United States Department of
6 Health & Human Services Homepage, <http://www.hhs.gov/about> (last
7 visited June 7, 2010). Participants in the Medicare program are
8 required to remain in "substantial compliance" with various
9 statutes and agency regulations. Compliance is "substantial" to
10 the extent that any failure to meet the participation
11 requirements gives rise to no more than a risk of "minimal harm"
12 to the health or safety of a provider's residents. See 42 C.F.R.
13 § 488.301. If a provider's non-compliance causes a greater risk
14 of harm, CMS has the authority to, among other things, impose a
15 civil monetary penalty against the provider. See 42 C.F.R. §§
16 488.404, 488.406, 488.408.

17 In June 2005, the New York State Department of Health
18 investigated the Jennifer Matthew facility following an anonymous
19 complaint from within the facility that one of its residents had
20 choked to death without receiving appropriate aid from the staff.
21 On July 21, 2005, CMS issued a determination, based mostly on the
22 investigation by the Department of Health, that for eight days in
23 July 2005, the Jennifer Matthew facility had failed to remain in
24 substantial compliance with various regulations, including
25 regulations governing conduct relating to the choking death. It

1 also cited sub-par care that the facility had provided to its
2 residents during a heat wave that had prevailed for those eight
3 days.¹ CMS imposed a civil monetary penalty of \$80,000 against
4 the facility, \$10,000 for each day.

5 The facility protested the penalty and requested an
6 administrative hearing. Proceedings before the ALJ ensued, but
7 the case was remanded to CMS on the consent of the parties for
8 reasons not relevant here.

9 On July 18, 2006, CMS issued a revised determination
10 that cited additional regulatory violations by the Jennifer
11 Matthew facility and retained the \$80,000 penalty. The case was
12 returned to the ALJ who, in rulings dated February 15 and
13 December 27, 2007, upheld the CMS findings in relevant part, and
14 the \$80,000 penalty. The Board issued a Final Decision on August
15 21, 2008, affirming the rulings of the ALJ.

16 Meanwhile, in February 2006, while the administrative
17 proceedings were ongoing, NRNH agreed to sell the Jennifer
18 Matthew facility to an unrelated entity, Blossom North, LLC
19 ("Blossom North"), pursuant to a purchase and sale agreement
20 entered into by the parties that month (the "Purchase and Sale
21 Agreement"). The sale closed in July 2006. The intangible
22 property acquired by Blossom North in the transaction included

¹ Although the choking incident occurred in June, CMS seems to have been of the view that for at least those eight days in July, the systemic flaws that made the choking incident possible went unremedied.

1 the name "Jennifer Matthew Nursing and Rehabilitation Center."
2 The facility was nonetheless renamed "Blossom North Nursing &
3 Rehabilitation Center" (the "Blossom North facility") by its new
4 owner.

5 The Purchase and Sale Agreement provided in relevant
6 part that "any health facility assessment liabilities, relating
7 to services rendered by, or the operation of, the Facility [under
8 Jennifer Matthew's ownership and operation]," "shall be retained
9 and satisfied by Seller, shall not be assumed by Buyer, and are
10 expressly excluded from the Assumed Liabilities." Resp't Supp.
11 Br., Ex. A § 1.04(b). The agreement also provided that the
12 seller "shall be solely responsible for the satisfaction of all
13 Retained Liabilities." Id. § 6.01. And it contained a "Survival
14 and Indemnification" clause reading: "Seller hereby agrees to
15 indemnify . . . Buyer . . . from and against all . . .
16 liabilities . . . suffered by Buyer . . . on account of . . . the
17 ownership and operation of the Facility [under Jennifer Matthew]
18 (except with respect to . . . liabilities of Seller expressly
19 assumed under this Agreement)" Id. § 10.01.

20 Thus, after the acquisition, there was no longer a
21 "Jennifer Matthew Nursing and Rehabilitation Center" in
22 existence. NRNH was no longer entitled to the use of that name,
23 pursuant to the terms of the Purchase and Sale Agreement, and
24 appears to have stopped using that name altogether. The Agency
25 nevertheless permitted NRNH, continuing to appear as "Jennifer

1 Matthew Nursing and Rehabilitation Center," to pursue its appeal
2 of CMS's determination to the ALJ and the Board. And the
3 administrative rulings following the acquisition make no mention
4 of the renaming of the facility as "Blossom North Nursing &
5 Rehabilitation Center," continuing to speak in terms of upholding
6 a monetary penalty against "Jennifer Matthew Nursing and
7 Rehabilitation Center."

8 This petition for review was filed with the Clerk of
9 this Court on October 14, 2008, by "Jennifer Matthew Nursing and
10 Rehabilitation Center." Although the petitioner referred to
11 itself there and in its initial brief to this Court as the
12 Jennifer Matthew facility, see Pet'r Br. 1 ("Petitioner is a . .
13 . certified nursing facility"), neither the actual facility nor
14 the corporation that, by then, owned and operated it, Blossom
15 North, petitioned for review. We therefore understand the
16 petitioner to be the former owner-operator of the facility, NRNH,
17 despite its continued use of the Jennifer Matthew name. We
18 accordingly refer to the petitioner as "Jennifer Matthew" or
19 "NRNH."

20 In its initial brief, filed on March 17, 2009, Jennifer
21 Matthew discussed only the merits of its challenge to the civil
22 monetary penalty. In the mandatory corporate disclosure
23 statement included in its brief, Jennifer Matthew asserted that
24 the facility "is currently owned and operated under a different
25 name by an unrelated third party, . . . which is [not] affected
26 by this appeal." Pet'r Br., Corporate Disclosure Stmt.

1 On April 14, 2009, six months after this petition was
2 filed, CMS sent a letter to the administrator at Blossom North
3 Nursing & Rehabilitation Center -- previously the Jennifer
4 Matthew facility. Despite the fact that the Agency had referred
5 only to the "Jennifer Matthew" facility during the administrative
6 proceedings, this letter referred to the civil monetary penalty
7 "imposed on Blossom North Nursing & Rehabilitation Center
8 (formerly known as Jennifer Matthew Nursing & Rehabilitation
9 Center)," and "inform[ed] [the administrator] that the [penalty
10 was] due and payable on May 9, 2009." Resp't Supp. Br., Ex. C at
11 1. The letter advised: "[Y]our facility did not waive its right
12 to a hearing Your facility requested a hearing and
13 subsequently a review of the [ALJ's] decision to uphold the
14 imposition of the [penalty]. The final decision of the [Board]
15 affirms the ALJ's decision to uphold the imposition of the
16 [penalty]." Id. The letter made no mention of the Blossom North
17 facility petitioning for review of the Board's ruling. Neither
18 the Blossom North facility nor Blossom North challenged the
19 Board's ruling.

20 Two weeks after the date of the letter, CMS sent a
21 follow-up letter to the administrator of the Blossom North
22 facility amending the amount due on the penalty to reflect a
23 thirty-five percent reduction, from \$85,700 to \$55,705 -- even
24 though the previous letter had indicated no such reduction was

1 available.² Id. Ex. D at 1. On May 7, 2009, Blossom North --
2 the owner-operator of the Blossom North facility -- issued a
3 check to CMS in satisfaction of the penalty, as reduced. Id. Ex.
4 E.

5 Thereafter, on June 30, 2009, the Agency filed its
6 answering brief in this Court. It argued, among other things,
7 that Jennifer Matthew lacked standing to bring this petition at
8 the time it was filed because, under the administrative
9 regulations, "[c]ivil monetary penalties for noncompliance are
10 imposed on the facility, and these monetary penalties follow the
11 provider agreement when it is transferred to a new owner and
12 operator." Resp't Br. 12 (internal citation omitted, emphasis in
13 original). Thus, according to the Agency, under those
14 administrative regulations, the facility, owned and operated by
15 and under the name of Blossom North, was solely liable for the
16 penalty. The penalty therefore did not represent a cognizable
17 injury to the Jennifer Matthew facility, nor to its former owner-
18 operator, for Article III standing purposes. Curiously, the
19 Agency failed to mention that Blossom North had already paid the
20 penalty, upon CMS's request for payment from the Blossom North
21 facility.

22 We ordered supplemental briefing from the parties on
23 the issue of standing, including information as to whether and
24 under what conditions the civil monetary penalty had been paid.

² The record does not contain an explanation of the reason
the reduction was granted.

1 The briefs recounted the essentially undisputed sequence of
2 events described above relating to the sale of the Jennifer
3 Matthew facility and the satisfaction of the civil monetary
4 penalty by Blossom North.

5 In its supplemental brief, Jennifer Matthew argues that
6 it has standing to bring this petition notwithstanding the sale
7 of the facility and the satisfaction of the penalty because
8 Blossom North could seek indemnification from it under the
9 Purchase and Sale Agreement. It also argues that CMS's
10 regulations are "immaterial" and that CMS should not be permitted
11 to "divest this Court of jurisdiction" by "reserving to itself
12 the right to collect a penalty imposed against a provider from
13 someone else, even the provider's successor." Pet'r Supp. Br.
14 11-12.

15 The Agency, in its supplemental brief, maintains that
16 Jennifer Matthew "never had standing to proceed in federal court"
17 because the sale of the facility from Jennifer Matthew to Blossom
18 North, which preceded the filing of this petition for review,
19 "removed liability from petitioner and placed it on the new
20 provider." Resp't Supp. Br. 7 n.1.

21 **DISCUSSION**

22 I. Subject Matter Jurisdiction

23 "[W]e have an independent obligation to consider the
24 presence or absence of subject matter jurisdiction sua sponte."
25 Joseph v. Leavitt, 465 F.3d 87, 89 (2d Cir. 2006), cert. denied,

1 549 U.S. 1282 (2007). Our inquiry to ascertain whether we have
2 subject matter jurisdiction ordinarily precedes our analysis of
3 the merits. See Steel Co. v Citizens for a Better Env't, 523
4 U.S. 83, 94 (1998). Part of this inquiry requires us to
5 determine whether a plaintiff has standing under Article III to
6 pursue its claim, see, e.g., Bennett v. Spear, 520 U.S. 154, 162
7 (1997), an issue that the parties addressed in their supplemental
8 briefing.

9 We must also ensure, however, that there remains a live
10 controversy for us to decide. "Accordingly, when, during the
11 pendency of an appeal, events occur that would prevent the
12 appellate court from fashioning effective relief, the appeal
13 should be dismissed as moot." In re Chateaugay Corp., 988 F.2d
14 322, 325 (2d Cir. 1993). "We may resolve the question whether
15 there remains a live case or controversy . . . without first
16 determining [the issue of] standing to appeal because the former
17 question, like the latter, goes to the Article III jurisdiction
18 of this Court . . . , not to the merits of the case." Arizonans
19 for Official English v. Ariz., 520 U.S. 43, 66-67 (1997).

20 II. The Petition for Review is Moot

21 In this case, events that occurred subsequent to the
22 filing of the petition for review have rendered the petition
23 moot.

1 As of the date on which the petition for review was
2 filed, CMS had imposed, and the ALJ and the Board had upheld, a
3 civil monetary penalty on the Jennifer Matthew facility. The
4 facility had, by that time, ceased to exist as the Jennifer
5 Matthew Nursing and Rehabilitation Center, having been sold and
6 renamed, but the administrative decisions at issue omitted any
7 mention of the sale and persisted in referring to the infractions
8 by and punishment of the "Jennifer Matthew Nursing and
9 Rehabilitation Center." Thus the owner-operator of the facility
10 during the time period it had been known as the "Jennifer
11 Matthew" facility may well have thought that it was expected to
12 pay the outstanding penalty.³ Whether the sale of the facility
13 rendered that belief incorrect as a matter of law under the
14 Agency regulations, as the Agency argues, and whether that would
15 strip Jennifer Matthew of any cognizable injury for purposes of
16 Article III standing, are questions that we need not address in
17 light of the events that followed.

18 After the petition for review was filed, CMS sent two
19 letters to the Blossom North facility asserting that it
20 considered the penalty at issue to have been "imposed on [the]
21 Blossom North [facility] (formerly known as [the] Jennifer
22 Matthew [facility])," and requesting payment from the Blossom

³ Although civil monetary penalties, as the Agency points out, are assessed directly against a provider facility, rather than its owner-operator, the check issued to CMS by Blossom North, rather than the Blossom North facility, makes plain that the owner-operator of a facility may be the party that actually pays the penalty.

1 North facility. Blossom North then made the requested payment.
2 The penalty that Jennifer Matthew contested before the ALJ and
3 the Board, and that it seeks to contest on this petition for
4 review, has therefore been satisfied, albeit not by the
5 petitioner. CMS no longer seeks to collect the paid-in-full
6 penalty.⁴

7 "An appeal becomes moot when the issues presented are
8 no longer live or the parties lack a legally cognizable interest
9 in the outcome." Dennin v. Conn. Interscholastic Athletic
10 Conference, Inc., 94 F.3d 96, 100 (2d Cir. 1996) (internal
11 quotation marks omitted). There is no longer a live controversy
12 between Jennifer Matthew and the Agency. Jennifer Matthew
13 petitions for review of a penalty that it is not being asked to
14 pay, that has since at least April 14, 2009 -- the date of the
15 first letter from CMS to the Administrator of the Blossom North
16 facility -- been assessed against a different entity, and that
17 has been paid by that entity. Nothing has been taken from the
18 petitioner Jennifer Matthew by the Agency and the Agency is no
19 longer asking anything of Jennifer Matthew.

20 Jennifer Matthew (NRNH) seeks to pursue this petition
21 on the merits nonetheless, apparently in fear of a possible
22 indemnification suit against it by Blossom North. But no such

⁴ There is no suggestion in the briefs or the record that because CMS imposed upon Blossom North, and collected, a reduced payment amount, it could seek an additional amount from Jennifer Matthew.

1 suit is pending before us on appeal, and there is no indication
2 that such a suit has even been filed, or that it will be filed.

3 We understand Jennifer Matthew's desire for a judgment
4 in its favor here to head off a future suit by Blossom North.
5 Cf. HSBC Bank USA v. Bond, Schoeneck & King, PLLC, 55 A.D.3d
6 1426, 1428, 866 N.Y.S.2d 469, 471 (4th Dep't 2008) ("Where a
7 party voluntarily settles a claim, he must demonstrate that he
8 was legally liable to the party whom he paid . . . in order to
9 recover against an indemnitor." (internal quotation marks and
10 citation omitted)). And such a judgment might, alternatively,
11 prompt Blossom North to seek recovery of the penalty from CMS,
12 assuming such an action were permissible after payment has
13 already been made without being challenged by the paying entity.
14 But whether Jennifer Matthew might thus benefit from an advisory
15 opinion is irrelevant. "[A] federal court lacks the power to
16 render advisory opinions." U.S. Nat'l Bank of Or. v. Indep. Ins.
17 Agents of Am., 508 U.S. 439, 446 (1993) (internal quotation marks
18 omitted, alteration incorporated). And any decision we were to
19 issue on the merits of the civil monetary penalty would be
20 strictly advisory, because the penalty has already been paid and
21 Blossom North, the entity that paid the penalty, has not
22 challenged it. See United States v. Balint, 201 F.3d 928, 936-37
23 & n.2 (7th Cir. 2000) (concluding that challenge by non-paying
24 defendants to restitution penalty already satisfied by co-
25 defendant was moot, despite possibility of contribution action
26 against them by paying co-defendant: "[T]he defendants'

1 vulnerability to a future civil suit for contribution by a third
2 party not before us does not preserve this appeal" (emphasis in
3 original)).

4 Jennifer Matthew argues in its supplemental brief that
5 Blossom North lacked an incentive to challenge the penalty in
6 federal court because it could, instead, bring suit against
7 Jennifer Matthew for indemnification. See Pet'r Supp. Br. 12
8 (lamenting that Blossom North "thr[ew] in the towel"). Perhaps
9 it can use that argument in future litigation, if any, against it
10 by Blossom North, or perhaps it could have bargained for the
11 inclusion of protection against that eventuality in the Purchase
12 and Sale Agreement. Jennifer Matthew's possible predicament does
13 not, however, serve as a basis for our exercising jurisdiction
14 here.

15 We have considered the remainder of Jennifer Matthew's
16 arguments, which appear to center on the contention that it is
17 unfair for the Agency, under its regulations, to collect the
18 civil monetary penalty from Blossom North and thus deprive
19 Jennifer Matthew of recourse to this Court, but conclude that
20 they offer no basis upon which we can exercise jurisdiction over
21 this petition.⁵

22 CONCLUSION

23 For the foregoing reasons, we dismiss Jennifer
24 Matthew's petition for review as moot.

⁵ Jennifer Matthew does not contest that the Agency was entitled, under the regulations, to collect the penalty from Blossom North.