CASE NO. 20-50963
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Vista Health Plan, Incorporated; Vista Service Corporation,

Plaintiffs-Appellants

v.

United States Department of Health and Human Services; Xavier Becerra, Secretary, U.S. Department of Health and Human Services; Centers for Medicare and Medicaid Services; Seema Verma, Administrator of the Centers for Medicare and Medicaid Services,

Defendants - Appellees

On Appeal from the United States District Court for the Western District of Texas, Austin Division

APPELLANTS' REPLY BRIEF

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Introduction

The United States Department of Health and Human Services (HHS) does not dispute jurisdiction and did not perfect its own appeal of the district court's order granting Vista's due process claims and remanding this case to the agency on that basis. The HHS's Response Brief, however, raises significant jurisdictional questions that warrant consideration. (HHS Brief, p. 1) This Court may certainly consider jurisdiction and may do so *sua sponte*. *See United States v. Hayes*, 515 U.S. 737, 115 S.Ct. 2431, 132 L.Ed. 2d 635 (1995)(federal courts under independent obligation to consider their jurisdiction).

The HHS attempts to rely on its November 2019 and July 2021 letters to Vista for finality under 28 U.S.C. §1291. But the HHS, in so doing, also attempts to avoid providing a hearing on remand and to limit this appeal and any remand to Vista's challenge to the 2018 Rate Adjustment Transfer (RAT), suggesting that the district court found that only the 2018 RAT had been timely challenged. That is incorrect. Consideration of the jurisdictional issues does not authorize the HHS to obtain more relief than that granted by the district court.

The Nature of Vista's Due Process Claims

When Vista filed its lawsuit, only the 2017 RAT was at issue. Vista included a challenge to the 2017 RAT:

> Vista requested that the CMS provide an agency adjudication under the APA on the RAT decision assessed against Vista. (Exhibit P-2) The CMS did not respond. The CMS has established a procedure to request "reconsideration," with an on-line submission of reasons for the request, which Vista followed, but that procedure does not afford a hearing, much less an evidentiary hearing. See 45 C.F.R. §156.1220. Both the APA and the due process clause of the United States Constitution entitle Vista to a hearing on whether they must pay out $4,313, 687.40 to its competitors.

ROA.20-50963.22. Vista attached to its complaint a copy of its September 7, 2018 letter requesting an APA "agency adjudication" (a hearing) and reconsideration of the 2017 RAT. ROA.20-50963.33-38.

When the HHS sought to impose its 2018 RAT, Vista timely sought reconsideration. ROA.20-50963.209-227. Vista also filed an unopposed motion for leave to amend its complaint to include both the 2017 and 2018 RATs. ROA.20-50963.178-180; *see also* ROA.20-50963.183. The district court granted the motion. ROA.20-50963.228.

The amended complaint provided, in pertinent part:

> 47. Vista requested that the CMS provide an agency adjudication under the APA on the RAT decision assessed against Vista. (Exhibit P-2) The CMS did not respond. The CMS has established a procedure to request "reconsideration," with an on-line submission of reasons for the request, which Vista followed, but that procedure does not afford a hearing, much less an evidentiary hearing. *See* 45 C.F.R.

> §156.1220. Both the APA and the due process clause of the United States Constitution entitle Vista to a hearing on whether they must pay out $4,313.687.40 for 2017, $8,038,278.50 for 2018, and some similar amount for 2019 to its competitors.
>
> 48. Vista has a property interest in its money. The Defendants threaten to take that money without due process, without prior notice of the standards that will govern the calculation of how much will be taken, and without a hearing.

ROA.20-50963.198-199. Vista moved for summary judgement, or, in the alternative, for partial summary judgment, on what Vista believed were dispositive issues. ROA.20-50963.2153-2164. The motion was styled "partial" because Vista did not include all of the issues in its complaint in its motion.

HHS filed a cross motion for summary judgment. ROA.20-50963.2182-2401. The HHS motion did not assert that Vista failed to request reconsideration of the 2017 or 2018 RATs. HHS did not dispute that it had not provided a hearing or discuss the sufficiency of that hearing. Instead, the gist of the HHS's argument on due process was that no hearing was required:

> HHS's risk adjustment rules are "legislative" decisions to which "procedural due process considerations" do not apply.

ROA.20-50963.2203. HHS did not discuss its own regulations that provide for a hearing.

In its reply to Vista's response, HHS simply stated:

> Vista's arguments as to procedural due process require no further response as Vista's opposition brief adds nothing to what was previously alleged in the complaint. Accordingly, Defendants stand on their arguments in their motion for summary judgment; the APA controls and Vista is not entitled to any additional process under the Constitution.

ROA.20-50963.2472. Again, HHS did not discuss its own regulations that provide for a hearing. *See* 45 C.F.R. §156.1220.

Nor did the HHS file an "administrative record" of Vista's requests for hearing and reconsideration of the 2017 and 2018 RATs, of any hearing or review conducted on such requests, or of the HHS's decisions on such requests. Instead, HHS filed an administrative record that consisted entirely and solely of the rule-making record for the RAT rules. The index to the administrative record makes that clear. ROA.20-50963.248-251. To now assert that a letter or letters denying the requests for hearing are sufficient to satisfy a remand on due process grounds ignores the nature of the district court's remand order.

The District Court's Remand Order

With this summary judgment record before it, the district court found as follows:

> It is undisputed that Vista did not receive an agency adjudication, and that "such an omission is a denial of due process." HHS responds that Vista is not entitled to a hearing and that HHS's notice-and-comment decisions are not subject to procedural-due-process constraints.

ROA.20-50963.2502. By remanding for further proceedings, the district court clearly disagreed with the HHS position. As noted, HHS did not perfect its own appeal of the decision that the omission of an agency adjudication was a denial of due process.

The district court further found, however, that

> The court concludes that there is a genuine dispute of material fact concerning Vista's right to administrative appeal that is not adequately resolved by reference to the administrative record.

ROA.20-50963.2503. In other words, the district court rejected the HHS's assertion that the rule making, i.e. quasi-legislative, record alone sufficed.

HHS attempts to minimize the district court's ruling on Vista's due process claims:

> [T]he district court perceived a factual gap and "remand[ed] the issue to HHS" for any remaining proceedings necessary on Vista's request for reconsideration as to the 2018 risk adjustment charges." ROA.20-50963.2503.

(HHS Brief, p. 17)

HHS suggests that its November 2019 and July 2021 letters rejecting Vista's request for reconsideration of the 2018 RAT is sufficient to address the district court's remand order. But the letters address only the 2018 RAT. Vista's response clearly raised both the 2017 and 2018 RATs. ROA.20-50963.2426-2428. Nothing in the district court's final judgment is limited to a remand of Vista's due process claim as to the 2018 RAT. ROA.20-50963.2516. Moreover, the letters relied on by HHS do not constitute the record of an agency adjudication conducted under the HHS regulations, as directed by the district court.

Remand Orders and Jurisdiction

At issue is whether the district court's order, which , among other things, granted Vista's due process claims and remanded the case to the HHS for hearing, is a "final order" within the meaning of 21 U.S.C. §1291. As this Court stated in *Memorial Hosp. System v. Heckler*, 769 F.2d 1043, 1044 (5th Cir. 1985),

> An order of the district court that remands the proceedings to the administrative agency for further evidence or findings, in an action for judicial review of an earlier administrative decision, is ordinarily regarded as not an appealable final judgment. *Silver v. Secretary of the Army*, 554 F.2d 664 (5th Cir. 1977); *Barfield v. Weinberger*, 485 F.2d 696 (5th Cir. 1973).

Memorial, 769 F.2d at 1044.

The cases in which this Court has found it lacked jurisdiction involve district court remand to the respective agencies for further evidence or findings. In *Memorial*, the remand was for the purpose of taking new evidence material to the Hospitals' Medicare reimbursement claim, evidence the agency had not previously considered. In *Silver v. Secretary of the Army*, 554 F.2d 664 (5th Cir. 1977), the remand was to correct military records in a case filed for expunction of unfavorable reports in Silver's military service records. In *Barfield v. Weinberger*, 485 F.2d 696 (5th Cir. 1973), the district court remanded a case regarding the cessation of disability benefits for a determination of whether the Secretary of Health, Education, and Welfare had afforded the disability applicant due process. In each instance, this Court determined that it did not have jurisdiction under 28 U.S.C. §1291.

The decision of the Fifth Circuit in *Barfield* is the most on point here. In *Barfield*, the Secretary contended that the district court's order was appealable under the "collateral order" exception contemplated in *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949), and *Gillespie v. United States Steel Corporation*, 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964), since the order presented "a final determination of a claim of right separable and collateral to rights asserted

in the action that are serious and unsettled questions too important to now be denied review." *Barfield,* 485 F.2d at 698. The Fifth Circuit disagreed, noting that any party aggrieved could appeal all issues after the remand was resolved. *Id*.

Having now squarely addressed and briefed the issue, Vista is inclined to agree that *Barfield* applies. There are some differences, however, that should be noted. Here, unlike *Barfield*, HHS did not file its own appeal challenging the district court's remand. And, unlike *Barfield*, HHS does not seek to dismiss this appeal.

HHS does not rely on the collateral order exception to finality, contending that this Court has jurisdiction under 21 U.S.C. §1291 because "HHS had already denied plaintiffs' relevant request for agency reconsideration in November 2019." (HHS Response Brief, p. 1) The November 2019 decision, however, suggests in the last paragraph that Vista did not seek review. As a result, HHS asserts that there was a "final" agency decision and no need for remand. HHS attempts to avoid the due process issue and remand simply because it says it made a final decision.

As noted above, Vista did timely request a hearing and reconsideration of both the 2017 and 2018 RATs. And the issue is whether HHS must provide a hearing – not whether HHS has denied the requests

for hearing and reconsideration *without a hearing.* That is a part of why Vista pursued relief in district court. Had HHS pursued an appeal of the remand order, this Court might have jurisdiction -- but for very different reasons. In specific, HHS could have preserved the issue of whether HHS must provide a hearing. It did not.

If the HHS position were correct, i.e. that it need not provide a hearing, Vista would have no adequate administrative remedy, and Vista has attempted to exhaust all available administrative remedies. The APA, in 5 U.S.C. § 704 reads as follows:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. §704. As a result, this Court could find that it has jurisdiction under 28 U.S.C. §1291 in conjunction with section 5 U.S.C. §704.

Finally, this Court arguably could find that it has jurisdiction under section 1291 on the concept of "practical" finality. In *Bender v. Clark*, 744 F.2d 1424 (10th Cir. 1984), a bidder on an oil and gas lease on public land

sought judicial review of the Department of the Interior's Board of Land Appeals' decision that the bidder failed to show a dispositive issue by "clear and definite" evidence. The district court remanded for a determination on the "preponderance of the evidence" standard of proof. The agency appealed.

The Tenth Circuit found that it had jurisdiction. The court rejected the contention that the order was an appealable "collateral order" under *Cohen* and its progeny. *Bender v. Clark*, 744 F.2d at 1427. The court, however, held that an issue may not be "collateral" but may nonetheless require immediate review. *Id*.

In *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683 (10th Cir.2009), the district court rejected most of the plaintiffs' claims but held that the BLM had violated the NEPA by failing to do a site-specific environmental analysis. 565 F.2d at 695. The district court remanded and ordered the BLM to do so. The plaintiffs appealed. The BLM moved to dismiss the appeal under the administrative-remand rule for lack of jurisdiction. 565 F.3d at 696.

The Tenth Circuit declined to dismiss the appeal because the district court's order was not a typical "remand" and was instead a "final decision" under 28 U.S.C. § 1291, thereby rendering the administrative-remand rule

inapplicable. 565 F.3d at 699. The court considered "the nature of the agency action as well as the nature of the district court's order." 565 F.3d at 697 (citing 15B Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 3914.32, at 237 (2d ed.1992)). The court was influenced by the fact that the BLM's decision was more quasi-legislative than quasi-judicial in nature.

In *Western Energy Alliance v. Salazar*, 709 F.3d 1040 (10th Cir. 2013), the Tenth Circuit addressed an administrative remand case in which the BLM attempted to obtain a ruling on whether the applicable statutes required the BLM to actually issue pending leases or to decide whether to issue the leases within the statutory deadline. The district court had remanded the case, ordering the BLM to make a decision on the leases within 30 days. The BLM appealed. The Tenth Circuit dismissed the appeal, distinguishing the *Richardson* case on the basis that the remand order in *Richardson* left nothing for the agency to do on remand. *Western Energy*, 709 F.3d at 1048-1049. In *Western Energy*, the BLM had yet to conduct a hearing or issue a decision on whether to issue the leases. Thus, the *Western Energy* decision is similar to the *Barfield* decision issued by this Court.

In *New Mexico Health Connections v. United States Department of Health and Human Services,* 946 F.3d 1138 (10th Cir. 2019), New Mexico Health challenged the 2014, 2015, 2016, 2017, and 2018 RAT rules. New Mexico Health did not challenge the application of the rules on due process grounds. *See* 946 F.3d at 1153-1154. The remand order at issue was one to provide a better-reasoned statement for the 2017 and 2018 RAT rules. The agency did not appeal that order; instead the agency followed the remand order. The Tenth Circuit found that it lacked jurisdiction over the 2017 and 2018 rules, as initially published by the agency, since they were moot. 946 F.3d at 1157. What remained was a straight up rule challenge.

In contrast, at issue here is the *application* of the original 2017 and 2018 RAT rules during the time they had been vacated. Although Vista also made a traditional APA rule challenge, Vista's APA and due process challenges that Vista was entitled to a hearing were the subject of the remand. The court in *New Mexico Health* did not address that kind of remand order. The decisions of the Fifth Circuit in *Barfield* and of the Tenth Circuit in *Richardson* did.

For these reasons, this Court must decide whether it has jurisdiction over the appeal of this case from a "final judgment" under 28 U.S.C. §1291, as set forth in detail in the cases decided in the Tenth Circuit or whether

this circuit's decision in *Barfield* and decisions such as that of the Tenth Circuit in *Richardson* control such that Vista's claims should await decision after remand. The judgment states that "[a]s nothing remains to resolve, the court renders the following Final Judgment pursuant to Federal Rule of Civil Procedure 58." ROA.20-50963.2516. Appellate jurisdiction, however, does not depend on whether the district court labeled an order or a judgment as "final." *Riley v. Kennedy*, 553 U.S. 406, 419-20, 128 S.Ct. 1970, 170 L.Ed. 2d 837 (2008). The Final Judgment at issue here remands Vista's due process claims. ROA.20-50963.2516.

Because HHS is forbearing collection, *see* ROA.20-50963.91-94, if Vista is afforded a due process hearing as directed by the district court, Vista must acknowledge that it will not be harmed by having to proceed with a remand and then, if necessary, appeal all issues together.

Reply Argument on the Merits

Standard of Review

HHS urges that the district court and this Court must decide this case for Vista only if the agency decision "is arbitrary, capricious, an abuse of discretion, not in accordance with law, or unsupported by substantial evidence in the record." (HHS Brief, p. 20) Vista agrees. But HHS continues to ignore the fact that there is no record of any hearing or review

before HHS. No evidence whatsoever cannot constitute "substantial evidence."

HHS simply did not file an "administrative record" of Vista's requests for hearing and reconsideration of the 2017 and 2018 RATs, of any hearing or review conducted on such requests, or of the HHS's decisions on such requests. To omit all of Vista's requests with respect to the 2017 RAT, requests which are clearly in the record before the district court, and to prepare a self-serving letter denying Vista's request for reconsideration of the 2018 RAT are no substitute for a hearing and a record of the hearing.

HHS filed an administrative record that consisted entirely and solely of the rule-making record for the RAT rules. The index to the administrative record makes that clear. ROA.20-50963.248-251. That is consistent with the HHS position that it need not provide a hearing – a position the district court rejected.

Retroactive Application of the 2017 and 2018 RAT Rules

HHS asserts that Vista's challenge to the vacated 2017 and 2018 RAT rules adopted in late 2018 as retroactive must fail because Vista relies on "idiosyncratic reasons unique to Vista." (HHS Brief, p. 24) That is the nature, however, of an "as applied" challenge. And that is what the HHS

procedural rules and the due process clause contemplate will be at issue in a hearing. That hearing has not occurred.

In specific, HHS states that

> Vista claims that it made unilateral business decisions premised on a mistaken assumption that the (statutorily mandated) risk-adjustment program had been permanently terminated for the 2017 and 2018 benefit years because of the New Mexico litigation.

(HHS Brief, p. 25)

Vista never asserted that its decisions were made on any premise that the rules had been *permanently* terminated for 2017 and 2018, only that the rules had been vacated by a federal district court and subsequently repealed by the agency for a period of time in 2018, a time during which Vista made decisions in reliance on the fact that no rules were in place. It is HHS that would like to act as if this regulatory gap never existed. Or, in the alternative, that only regulated entities on the receiving end of RAT payments were entitled to fair notice, notice to be provided by pretending that the regulatory gap never existed.

The statements made by HHS in 2018 about the regulatory gap caused by the district court's ruling vacating the RAT rules are subject to interpretation. Vista disagrees that they are statements that the rules, although vacated, are still in place. (*See* HHS Brief, p. 26) If so, was HHS

placing itself in contempt of court? Was HHS adopting and applying the same rules despite the district court's ruling, without any pretense of following the APA notice and comment rule making requirements?

Were Reissued Rules Necessary to Implement the ACA?

HHS argues that "necessity" authorizes the retroactive application of the new 2017 and 2018 RAT rules. (HHS Brief, pp. 28-30) That argument, however, is not that Congress intended and that the statute, by its language, necessarily requires and, therefore, authorizes HHS to adopt and implement retroactive rules. Rather, HHS argues that the necessity arises because HHS "would not have needed to issue [new rules] at all if the New Mexico district court has not erroneously vacated HHS's original rules." (HHS Brief, p. 30) That is not the sort of "necessarily implied" authority referenced in *National Petrochemical & Refiners Ass'n v. EPA*, 630 F.3d 145 (D.C. Cir. 2010).

Nor did *National Petrochemical* change the ruling that federal agencies must establish that they have the authority to promulgate rules with retrospective effect. *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). Absent clear legislative intent to authorize an agency to promulgate retrospective rules, they simply cannot do so. *Id.*

HHS states that "[t]he reasoning discussed by Justice Scalia in *Bowen* and applied by the D.C. Circuit in *National Petrochemical & Refiners Ass'n* applies with even greater force here." (HHS Brief, p. 30) Justice Scalia's concurring opinion, however, warrants closer review. Justice Scalia suggested that the APA simply does not authorize retroactive rule making *at all*. *Georgetown*, 488 U.S. at 216 (Justice Scalia, concurring). In fact, Justice Scalia stated:

> I fully agree with the District of Columbia Circuit that acceptance of the Secretary's position would "make a mockery ... of the APA," since "agencies would be free to violate the rulemaking requirements of the APA with impunity if, upon invalidation of a rule, they were free to 'reissue' that rule on a retroactive basis." 261 U.S.App.D.C. 262, 270, 821 F.2d 750, 758 (1987).

Georgetown, 488 U.S. at 225 (Justice Scalia, concurring). HHS makes a mockery of the APA in this case.

No Rational Basis for the Statewide Average Premium

HHS chides Vista for not addressing the decision of the Tenth Circuit in the *New Mexico Health* case on the validity of the 2017 and 2018 RAT rules. (HHS Brief, p. 38) As discussed above, however, the Tenth Circuit did not address the validity of the original 2017 and 2018 rules because it found that it lacked jurisdiction over the 2017 and 2018 rules – they were moot. 946 F.3d at 1157. The *New Mexico Health* case did not address the

due process and APA hearing issues about the need for a hearing on the application of the rules, particularly during the time the rules were vacated.

HHS also suggests that Vista "misunderstands the payment formula" and urges that

> The statewide average premium is a cost-scaling measure used at the final step of the calculations under the transfer formula, to convert actuarial risk scores into dollar amounts (i.e. the monetary charge or payment due from or to a particular insurer)

(HHS Brief, p. 39)

It is HHS, however, that appears to misunderstand the distinction between costs and revenue. The formula is indeed a "scaling" or averaging formula, but the point not addressed by HHS is precisely that costs are associated with risk in that what an insurer pays out in claims are the largest of its costs and reflects its actual as opposed to predicted or actuarial risk. What an insurer receives in premiums are not costs, have nothing to do with risk, and cannot be "cost-scaling" measures. HHS simply does not address the fact that 42 U.S.C. § 18063 specifies that the HHS should address risk, not revenue.

Certainly, Vista is responsible for its own business planning and there is no guarantee it will be profitable. HHS suggests, however, that Vista just was not reasonable in assuming that the RAT would be less than $1 million

when in fact it turned out to be in excess of $4 million. But it is not just Vista that made such assumptions. Vista relied on actuaries who predicted risk based on well-established actuarial standards. The Texas Department of Insurance then approved premium rates based on its own review, based on well-established actuarial standards. They all relied on risk, for which there is an industry understanding and well-established actuarial standards. Vista maintains that Congress intended those well-established understandings and standards to govern in section 18063.

It is HHS that has skewed the risk standard in section 18063 by adding an element of revenue, and by making that an average revenue. Insurers are required to enter actual claims data into the HHS's computer system. But that data is not considered against the actual premiums charged and received by the insurer. As a result, insurers who charge high premiums, obtain a windfall whereas other insurers, who charge low premiums, are penalized. That is certainly not consistent with the statutory directive to encourage competition.

Conclusion

For these reasons, Vista Health Plan, Inc., and Vista Service Corporation ask that this Court reverse the district court's decision and remand the case for further proceedings consistent with this Court's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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