Docket No. 12-40010

In the

United States Court of Appeals

For the

Fifth Circuit

LYNNCORE MEDGROUP, INCORPORATED,

Plaintiff-Appellant,

v.

KATHLEEN SEBELIUS,
Secretary, Department of Health and Human Services,

Defendant-Appellee.

Appeal from a decision of the United States District Court for the Eastern District of Texas, No. 4:11-CV-195 · Honorable Michael H. Schneider

BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

United States Court of Appeals Case No. 12-40010

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Lynncore Medgroup, Inc., certifies that it has no parent, subsidiary or affiliate entities that have issued shares to the public.

Furthermore, the undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

Lynncore Medgroup, Inc. - Plaintiff - Appellant

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Kathleen Sebelius, Secretary, Department of Health and Human Services - Defendant - Appellee

Bradley Elliot Visosky, Esq. - Attorney for Appellee

Date: March 29, 2012

Respectfully submitted,

s/ Mark S. Kennedy

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STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument. The Court of Appeals has not addressed the critical question of whether a Medicare supplier may be deprived of statutory administrative appeal rights following issuance of a determination that has all of the hallmarks of APA finality. The issues raised by the appeal are complex and oral argument may assist this Court in its resolution of the issues in controversy.

STATEMENT OF JURISDICTION

The district court had jurisdiction to hear Appellant's claims under 28 U.S.C. §1331 (federal-question jurisdiction), 28 U.S.C. §§1361 (mandamus), and the Administrative Procedure Act ("APA"), 5 U.S.C. §§551 *et seq*. Alternatively, the court has jurisdiction over the lawsuit pursuant to 42 U.S.C. §§405(g), 1395ii and 1395ff(b), and on the authority of *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1 (2000).

A final judgement was entered on December 7, 2011 (RE 6). The district court's judgment was based on its memorandum and order adopting the magistrate judge's report and recommendation (RE 4). The report and recommendation was issued on November 10, 2011 that, among other things, granted Appellee's motion to dismiss Appellant's complaint (RE 5). This U.S. Court of Appeals for the Fifth Circuit has jurisdiction over the appeal of the trial court's judgment under 28 U.S.C. §1291.

STATEMENT OF ISSUES PRESENTED

1. Whether the district court erred in not finding mandamus jurisdiction and in dismissing Appellant's case for lack of subject-matter jurisdiction under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6).

2. Whether the district court erred in not finding an exception to the

administrative exhaustion requirement and in dismissing Appellant's case for lack of subject-matter jurisdiction under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6).

STATEMENT OF THE CASE

Appellant filed suit against Appellee on April 11, 2011. The suit alleged, among other things, Appellee issued a notice of a $9,487,496 overpayment but refused to make available appeal rights required by law. In its suit, Appellant asserted against the government claims for mandamus, unreasonable and unlawful withheld action, violation of Due Process of Law, and violation of the statutory limitation on recoupment and conversion. The trial court dismissed Appellant's case for lack of subject-matter jurisdiction under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6). The trial court issued its judgment on December 7, 2011.

A notice of appeal was filed by Appellant on December 29, 2011.

STATEMENT OF FACTS

Appellant is a durable medical equipment ("DME") supplier that participates in the Medicare program. [1] DME includes equipment that can

[1] This statement of facts is drawn from the Original Complaint filed in this case (Docket Entry 1).

withstand repeated use, is primarily and customarily used to serve a medical purpose, and generally is not useful to a person in the absence of illness or injury. Certain medical supplies and equipment billed to Medicare requires a signed Certificate of Medical Necessity from the treating physician.

On June 11, 2010 Health Integrity, L.L.C. ("Health Integrity"), Appellee's zone program integrity contractor, delivered a letter notifying Appellant it had reviewed records "to determine whether services billed for by providers and paid for by Medicare were reasonable and necessary." Included with the notice letter were the Provider Summary of Medical Review Findings, the Sampling Methodology, and the Medical Review Findings spreadsheet.

Health Integrity's June 11th letter stated the dates of services to be reviewed were 7/24/2000 through 2/14/2007 for durable medical equipment services. It also identified a list of HCPCS codes that were the focus of the review and various documents Appellant was to produce concerning the sample group. According to the letter, a "computer-generated Statistically Valid Random Sample (SVRS) of HCPCS codes was selected for review" from the universe of Appellant's claims.

According to the June 11th letter, Appellant had received Medicare payments in error and an overpayment of $9,487,496.00 for the dates of service in question. Also, the letter stated Appellee would notify Appellant of appeal rights

and repayment options in a formal demand letter. Nonetheless, no demand letter was sent by the Appellee and thus Appellant was never formally informed of an overpayment amount, nor was Appellant given notice of its appeal rights or repayment options.

Subsequently, on February 2, 2011, Health Integrity sent a letter informing the provider that it was "suspending" Medicare payments owed to Appellant on the authority of 42 C.F.R. §405.372. According to this letter, the suspension was based on "reliable information that an overpayment exists, or fraud or willful misrepresentation exists, or that payments to be made may not be correct," which is a recitation of the bases under the regulations for imposition of suspension.

When an overpayment is alleged, a healthcare provider may pursue an appeal and seek administrative review of the determination. The Medicare appeal process is an elaborate and multi-level right of review. [2] It consists of five stages. The first level of appeal is called "redetermination" by the fiscal contractor. It is followed by "reconsideration" by a Qualified Independent Contractor (QIC). The QIC's reconsideration may be reviewed in a hearing before an administrative law judge (ALJ). The ALJ's decision may be reviewed by the Medicare Appeals Council. After conclusion of the administrative appeal process, judicial review is

[2] *See* 42 U.S.C. §1395ff; 42 C.F.R. §§405.940 – 405.1140.

available if the amount in controversy is at least $1,000. [3]

Under the regulation, a "suspension" on Medicare payments is not warranted where the auditors have completed their audit and determined an overpayment amount, which has occurred in this case. Appellee refuses to issue a formal overpayment notice and extend to the Appellant the associated appeal rights required by law. Instead, Appellee has acted with blatant disregard of the Appellant's rights by refusing to provide Appellant with notice of its appeal rights, by improperly suspending Appellant's Medicare payments after the auditor made its overpayment determination, and by illegally converting funds to which the Appellant is entitled by law.

Appellee has made a *de facto* overpayment determination based upon the auditor's overpayment determination but refused to issue the formal overpayment notice that extends to Appellant its appeal rights, as required by law. In doing so, Appellant is "deprived of life, liberty, or property without due process of law" and its Due Process rights afforded it by the Fifth and Fourteenth Amendments to the U.S. Constitution are violated.

Due to the improper suspension of Medicare payments, the Appellant has already been forced to lay off a significant portion of its work force. If Appellee's

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[3] *See* 42 U.S.C. §1395ff(b); 42 C.F.R. §§405.1136, 405.1006.

ultra vires actions are not restrained, Appellant will ultimately be forced to shut down its Medicare-reliant business, the remainder of its employees will lose their jobs, and, most importantly, the patients who depend upon Appellant will be at serious risk of not receiving the medical equipment to which they are entitled.

SUMMARY OF ARGUMENT

Appellant seeks to contest an alleged $9,487,496 Medicare overpayment. Appellee does not dispute it issued the determination on June 11, 2010. Although the determination has all of the hallmarks of finality, Appellee contends it may withhold Appellant's appeal rights, and no appeal can be pursued until a notice of appeal rights has been issued. Appellant seeks a writ of mandamus to compel issuance of its appeal rights in accordance with 42 U.S.C. §1395ff. Appellant also seeks mandamus to compel Appellee's compliance with 42 U.S.C. §1395ddd(f)(2), which it contends is circumvented by suspending Medicare payments when administrative appeal rights are not extended. Alternatively, Appellant contends it satisfies the exception to administrative exhaustion because to require "channeling" in such circumstances would, in fact, result in no review at all. The trial court dismissed the case on Appellee's motion to dismiss for lack of subject matter jurisdiction and failure to state a claim for relief.

STANDARD OF REVIEW

The grant of a motion to dismiss under Rule12(b)(1) for lack of subject matter jurisdiction is reviewed *de novo*. *Taylor v. Acxiom Corp.*, 612 F.3d 325, 331, (5th Cir. 2010). Likewise, a dismissal under Rule 12(b)(6) is reviewed *de novo*. *Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009). In both instances, the reviewing court must accept as true all nonfrivolous allegations of the complaint. *McClain v. Pan. Canal Comm'n*, 834 F.2d 452, 454 (5th Cir. 1987); *Dorsey v. Portfolio Equities, Inc*., 540 F.3d 333, 338 (5th Cir. 2008).

ARGUMENT

In adopting the magistrate judge's Report and Recommendation, the district court erred in it's legal conclusions and, specifically, the holding that the government's motion to dismiss should be granted. Magistrate Judge Mazzant concludes that (1) Appellant is not entitled to mandamus relief that would order Appellee to immediately issue an overpayment notice and extend appeal rights (RE 5, at 11-12); and (2) that the medical equipment supplier also failed to establish entitlement to a judicial waiver of §405(g)'s administrative exhaustion requirement (RE 5, at 8-11). In drawing these conclusions, however, the magistrate judge incorrectly analyzes the issues by assuming with respect to both that the government *properly withheld from Appellant its appeal rights* to contest

a $9,487,496 overpayment. In deciding Appellee's motion to dismiss, the magistrate judge is required to accept Appellant's allegation that the government illegally refused to extend appeal rights. Because he failed to do so, the magistrate judge wrongly found the Court lacked mandamus jurisdiction or an exception to the Medicare Act's administrative exhaustion requirement and jurisdictional bar. Accordingly, Appellant contends these conclusions of law are error and, thus, the district court has committed reversible error in dismissing this case.

A. The District Court Erred in Concluding that Appellant is Not Entitled to Mandamus Relief Requiring Appellee to Immediately Issue an Overpayment Notice and Extend Appeal Rights

At the very core of Appellant's case is the allegation that Appellee is *illegally* denying the provider its appeal rights. It cannot be disputed that the provider is statutorily entitled to administratively appeal an overpayment determination. *See* 42 U.S.C. §1395ff. And it is undisputed that Appellee failed to extend appeal rights to challenge the $9,487,496 overpayment. In asserting these facts, Appellant has done enough to make out its claim for mandamus relief and jurisdiction under 28 U.S.C. §1361. Although the magistrate judge acknowledged he must accept these facts as true, and construe them in a light most favorable to Appellant, he failed to do so. And by doing otherwise, the Court wrongly tackles the merits of the case "under the ruse of assessing jurisdiction."

Truman v. United States, 26 F.3d 592, 594 (5th Cir. 1994); *Gonzales v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009); *Jones v. Alexander*, 609 F.2d 778, 781 (5th Cir. 1980); *Carter v. Seamans*, 411 F.2d 767, 770 (5th Cir. 1969), *cert. denied*, 397 U.S. 941. Clearly, the magistrate judge has committed error because he violates this cardinal principle in applying the test for mandamus jurisdiction.

1. Mandamus Jurisdiction Not Barred by Medicare Act

Initially, is should be noted that the government has long argued that the Medicare Act requires administrative exhaustion and that 42 U.S.C. §405(g) is the sole avenue for judicial review of claims "arising under" the Medicare Act. However, in *Wolcott v. Sebelius*, 635 F.3d 757 (5th Cir. 2011), the Fifth Circuit held that §405(g) does not preclude mandamus jurisdiction. In *Wolcott,* the Court held that the traditional administrative exhaustion cases were not controlling where, as here, "the suit is brought to review otherwise unreviewable procedural issues." *Id.*, at 764. It concluded that 28 U.S.C. §1361 provides jurisdiction in cases challenging the procedures used in administering benefits but unrelated to the merits of the benefits claim. *Id*., at 765. Where, as here, it is contended that the government is illegally withholding appeal rights required by law, the suit is clearly brought to "review otherwise unreviewable procedural issues." *Id.*

2. Mandamus Compels Non-Discretionary Duty to Extend Appeal Rights

Appellant contends that Appellee has a non-discretionary duty to extend statutory appeal rights to contest a $9,487,496 Medicare overpayment determined on June 11, 2010. This notice letter stated it was the "final determination." It also explained that Appellant was "at fault" and "responsible for the overpayment." Further, it instructed the supplier to "remedy the billing issues" and to expect collection action. The notice letter stated that Appellant would subsequently receive information on its appeal rights and repayment obligation. *See* (RE 2, ¶¶27-32).

The test for determining mandamus jurisdiction requires that (1) Appellant have a clear right to the relief requested, (2) the government have a clear duty to act, and (3) no other adequate remedy exists. *Wolcott*, 635 F.3d at 768. However, the magistrate judge has incorrectly analyzed each of these prongs.

With respect to the first prong, the magistrate judge asserts that Appellant does not have a clear right "to an immediate overpayment determination" (RE 5, at 12). This misstates the nature of the relief sought by Appellant, however. The focus should be on whether the provider has a clear right to the relief sought to remedy the injury, i.e., the illegal denial of the statutory appeal rights. Appellant

has a clear right to administratively appeal the overpayment determination under the procedure established by 42 U.S.C. §1395ff. Thus, Appellant meets the first prong of the test.

In determining the second prong, the magistrate judge wrongly concludes that Appellee has no duty "to assess an overpayment" (RE 5, at 12). This, too, misses the mark. The proper question is whether the Medicare Act clearly imposes upon the government a non-discretionary duty to make available an administrative appeal and an opportunity to contest the overpayment determination, once assessed. *See* 42 U.S.C. §1395ff. The statutory language makes clear that the right to an appeal is triggered when a determination "prejudices" the suppler's rights. *See* 42 U.S.C. §405(b); 42 U.S.C. §1395ii. Inasmuch as the notice letter clearly determined the overpayment, Appellant was prejudiced.

Appellee's argument that appeal rights are required only if it "collects" the overpayment is without merit. Indeed, the statute explicitly states that upon a showing "rights may be prejudiced" by the agency's decision, a hearing "shall" be made available. *See* 42 U.S.C. §405(b); 42 U.S.C. §1395ii. Appellant's rights are prejudiced merely by virtue of the government having determined the DME supplier is not entitled to payments it already received. Furthermore, and contrary

to Appellee's assertion, the government cannot deny to Appellant its appeal rights merely because of an ongoing investigation. [4] Appellee contends that it obtained information when determining the overpayment that resulted in a different investigation. According to the government, the suspension relates *only* to this investigation, but not the overpayment. Yet, nowhere do the regulations authorize Appellee "to postpone an overpayment determination pending the outcome of judicial inquiry into the presence of fraud." *See United States ex rel. Rahman v. Oncology Assocs., P.C.*, 198 F.3d 502 (4th Cir. 1999). Indeed, the Fourth Circuit explicitly rejected the argument the government was entitled to defer making an overpayment determination pending the imposition of a suspension and investigation of fraud. *Id.* Clearly, no discretion is accorded Appellee to refuse to extend appeal rights after determining the overpayment, thus, Appellee has a clear duty to make available the administrative appeal required by the statute.

Essentially, Appellee contends that it is not required to extend appeal rights because there is "nothing to appeal," that is, until the government issues a notice of appeal rights. Although Appellee admits it issued the June 11, 2010

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[4] Attached to its Reply to Plaintiff's Response to Motion to Dismiss, Appellee attached the Affidavit investigator Stephen Scott. Mr. Scott averred that HHS's OIG had instructed the contractor to not collect the $9,487,496 overpayment.

overpayment determination, which reflected it is the "final determination," the government contends it simply cannot be forced to extend appeal rights.

Ultimately, the question is whether the agency action is "final." In *Sackett v. EPA*, 566 U.S. ___ (2012), the Supreme Court recently addressed a similar situation where the aggrieved party's rights were "entirely at the mercy" of the government. In that case, the EPA had issued a compliance order alleging violation of the Clean Water Act and assessed penalties. The EPA did not initiate an enforcement action, however, and until it did so the Sacketts were blocked from access to the courts. Nevertheless, Sackett sought declaratory and injunctive relief claiming the compliance order was arbitrary and capricious and deprived them of Due Process in violation of the Fifth Amendment. The trial court dismissed the case for want of subject-matter jurisdiction, and the case was affirmed by the Ninth Circuit.

In reversing, the *Sackett* Court held the APA provides for judicial review of a "final agency action for which there is no other adequate remedy in a court." *See* 5 U.S.C. §704. It concluded that the compliance order had all the hallmarks of APA finality. Similarly, Appellee's June 11, 2010 overpayment determination is a final action as well. It meets the two conditions that must be satisfied for agency action to be "final." First, the action must mark the consummation of the agency's

decision-making process. *See Bennett v. Spear*, 520 U.S. 154, 178 (1997). Second, the action must be one by which rights or obligations have been determined or from which legal consequences will flow. *Id.* Clearly, the Appellee's $9,487,496 overpayment determination meets these requisites, and thus Appellant may properly pursue its claim in federal court. [5]

Finally, with respect to the third prong, the magistrate judge turns a blind eye to Appellee's illegal withholding of statutory appeal rights and, thus, wrongly concludes that an adequate remedy exists upon exhaustion of the very appeal rights for which it cannot reach and has no control over (RE 5, at 12). In effect, the magistrate judge is requiring Appellant to exhaust the very administrative remedies for which Appellee refuses to make available to it. The government made essentially the same argument in *Rahman* and it was rejected by the Fourth Circuit. In considering the government's argument that a provider must exhaust administrative remedies that were not being extended, the Court observed that the argument "blinks the procedural reality" by asking the provider to exhaust the withheld procedure. The Fourth Circuit observed that "when the administrative

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[5] It should be noted that Justice Alito stated in his concurring opinion that "[i]n a nation that values due process, not to mention private property," the government's arbitrary blocking of access to the courts is "unthinkable." *Sackett v. EPA*, 566 U.S. ___ (2012) (Alito, J., concurring).

process normally available is not accessible," there is no other adequate means to attain the relief sought. Indeed, the *Rahman* Court reasoned the judicial relief sought under such circumstances is "not to circumvent the administrative process, but to compel its resumption." *See also Hopewell Nursing Home, Inc. v. Schweiker*, 666 F.2d 34, 42 (4th Cir. 1981) (mandamus jurisdiction impliedly available when Secretary will not act on claims presented to him) . *Cf. McDonald v. Centra, Inc.*, 946 F.2d 1059 (4th Cir. 1991) (exhaustion requirement excused where "the resort to administrative procedures would be futile"); *Starnes v. Schweiker,*715 F.2d 134 (4th Cir. 1983); *vacated,* 467 U.S. 1223 (1984) ("[M]andamus jurisdiction [is] unavailable to those Appellants who fail to exhaust administrative remedies, absent a showing that the Secretary frustrated exhaustion by failing to act on the Appellant's administrative claims"). Clearly, in light of Appellee's refusal to extend the statutory appeal rights, no other adequate means exists for the relief sought.

3. Mandamus Compels Non-Discretionary Duty to Comply with Statutory Limitation on Recoupment

Additionally, Appellant seeks mandamus to compel Appellee's compliance with its non-discretionary duty to comply with 42 U.S.C. §1395ddd(f)(2). This statute establishes a prohibition against collection of overpayments during the

administrative appeal. Had Appellee properly extended the appeal rights required by law, the government would have been statutorily barred from taking *any* collection action during the administrative process. Thus, Appellee would have been statutorily prohibited from imposing suspension on February 2, 2011. Inasmuch as Appellant has a clear right to the procedural protection against overpayment collection established under 42 U.S.C. §1395ddd(f)(2), Appellee has a clear duty to comply with this law, and Appellant has no other adequate remedy to compel the government's adherence to the statute, mandamus relief lies to enforce this duty. Accordingly, the district court erred in finding Appellant was not entitled to a writ of mandamus to compel Appellee to perform her non-discretionary duties.

B. The District Court Erred in Concluding that Appellant Failed to Establish an Exception to the Administrative Exhaustion Requirement and §405(h)'s Jurisdictional Bar

With respect to claims "arising under" the Medicare Act, the Supreme Court has held that "virtually all legal attacks" must be channeled and brought through the agency. Nevertheless, it also has stated that administrative exhaustion is not required where application of §405(h) would not simply channel review through the agency, but would mean "no review at all." While mandamus jurisdiction clearly lies to compel Appellee to comply with its nondiscretionary duties, the

magistrate judge erroneously concluded that Appellant failed to establish as an alternative basis for jurisdiction "entitlement to a judicial waiver of §405(g)'s administrative exhaustion requirement" (RE 5, at 11).

In *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 19 (2000), the Supreme Court reaffirmed the *Michigan Academy* "no review at all" exception. [6] Lower courts have applied this exception to a variety of situations where the aggrieved is deprived of *any and all* administrative review. *See, e.g., Am. Lithotripsy Soc'y v. Thompson*, 215 F.Supp.2d 23, 27 (D.D.C. 2002) (allowing challenge to regulation barring reimbursement for certain referrals of lithotripsy procedure to proceed under "no review at all" exception because forcing physicians to make referrals that would trigger administrative appeal rights would subject them to severe civil and criminal penalties); *Am. Chiropractic Ass'n v. Shalala*, 131 F.Supp.2d 174, 177 (D.D.C. 2001) (allowing challenge to Medicare regulation barring reimbursement for chiropractors to proceed where "an enrollee's lack of incentive to challenge eligibility of non-chiropractors to provide manual manipulations, a chiropractor's inability to raise this issue while serving as a representative of the enrollee, and the obstacles presented by the claims

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[6] *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 675 (1986).

assignment process in this context persuade the Court that, as applied generally to those covered by the Medicare provisions and regulations at issue in this case, requiring administrative adjudication of plaintiff's remaining claims, as a practical matter, will lead to "no review at all."); *DeWall Enters., Inc. v. Thompson*, 206 F.Supp.2d 992, 998 (D.Neb. 2002) (plaintiff's repeated successful administrative appeals ignored); *Bartlett Mem'l Med. Ctr. v. Thompson*, 347 F.3d 828, 844 (10th Cir. 2003) (the agency determines that it has no jurisdiction over the matter); *and Pathfinder Healthcare, Inc. v. Thompson*, 177 F.Supp.2d 895, 896-97 (E.D.Ark. 2001) (ruling that a denial of injunctive relief barring plaintiff's termination from Medicare program prior to allowing it to exhaust its administrative remedies "would amount to the practical equivalent of a total denial of judicial review"). Indeed, trial courts have applied the exception where, as here, the plaintiff receives no "initial determination" from HHS from which it can seek review. *See Connecticut State Dep't of Soc. Servs. v. Thompson*, 242 F.Supp.2d 127, 135 (D. Conn. 2002). Moreover, in *Wolcott,* this Court held that the traditional administrative exhaustion cases were not controlling where, as here, "the suit is brought to review otherwise unreviewable procedural issues." *Id.*, at 764. Clearly, where Appellant contends the government is *illegally withholding appeal rights* that it has a nondiscretionary duty to make available, Appellant satisfies the

requirement for the exception because to require channeling through the agency in such circumstances would, in fact, result in no review at all. *See Illinois Council*, at 19.

Essentially, the magistrate judge is requiring Appellant to exhaust the very administrative remedy that the government refuses to make available to the DME supplier. In fact, he places Appellant entirely at the mercy of Appellee by allowing the agency to withhold appeal rights even though the overpayment determination has all the hallmarks of finality. *See Sackett v. EPA*, 566 U.S. ___ (2012). Clearly, Appellant is accorded no review at all.

Again, the magistrate judge (applying the wrong standard) incorrectly analyzes this issue as he did with mandamus jurisdiction by wrongly assuming the government is *properly withholding Appellant's appeal rights*. *See Truman v. United States*, 26 F.3d at 594; *Gonzales v. Kay*, 577 F.3d at 603; *Jones v. Alexander*, 609 F.2d at 781; *Carter v. Seamans*, 411 F.2d at 770. If he had properly accepted as true Appellant's allegation the government had illegally deprived it of appeal rights and construed this fact in a light most favorable to Appellant, the magistrate judge could not have concluded Appellant's claim was "not wholly collateral" to a claim for benefits (RE 5, at 9-10). Nor could he have concluded that the provider was "not irreparably injured" or that administrative

exhaustion "was not futile" (RE 5, at 10). Indeed, if the government is illegally depriving Appellant of appeal rights required by law, there are no administrative remedies that can be exhausted.

Furthermore, had the magistrate judge properly accepted as true Appellant's allegation the government is illegally withholding appeal rights, he would *not* have concluded that Appellant's claim merely "seeks to prevent improper recoupment and suspension" (RE 5, 9-10). The flip-side of HHS depriving Appellant of its appeal rights is the government's violation of the statutory procedural protection that prohibits collection of the overpayment (and bars the Medicare payment suspension) during the pending appeal. *See* 42 U.S.C. 1395ddd(f)(2). Obviously, Appellant seeks to stop the government's *ultra vires* collection of the alleged overpayment in violation of 42 U.S.C. §1395ddd(f)(2), but this is derivative of pursuing the administrative appeal of which it has been deprived. Had an administrative appeal been made available to Appellant, the government would be subject to the statutory limitation on recoupment, and the prohibition on collecting overpayments during the pending appeal.

In other words, Appellee could not have properly suspended Appellant's payments. *See* 74 Fed.Reg. 47458-47470, 47459 (Sept. 16, 2009). In fact, the Final Rule clarifies that while recoupment may be initiated because of an

undetermined overpayment amount or suspected fraud, once an overpayment amount is determined, the suspended payments are applied to liquidate the overpayment. Moreover, the preamble specifically states that "[i]f the suspended payments are insufficient to fully eliminate any overpayment, and the provider or supplier meets the requirements of this final rule, *the limitation on recoupment provision under section 1893(f)(2) of the Act will be applicable to any remaining balance owed* to CMS." *Id*. (Emphasis added). Thus, the Appellee's suspension of payments is subject to the statutory limitation on recoupment. The government has argued the suspension is not being used to collect the $9,487,496 but merely to safeguard program funds while it investigates other instances of fraud and abuse. Clearly, this ignores that suspension is a Medicare overpayment collection tool. *See* 42 C.F.R. §405.372. Although the government may argue it is *only* suspending payments because of suspected fraud, the regulation requires that withheld payments be "first applied to reduce or eliminate any overpayment." *Id*. Indeed, it makes no difference how the government couches its use of suspension in this case, it is being wrongly used in circumvention of the statutory limitation and to collect the overpayment. Accordingly, the district court erred in finding Appellant did not satisfy, as an alternative jurisdictional basis, the "no review at all" exception to the administrative exhaustion requirement.

CONCLUSION

For these reasons, the Court has jurisdiction over Appellant's claims either under its mandamus authority *or* under the exception to the administrative exhaustion requirement. Appellee has violated its non-discretionary statutory duty to extend appeal rights and make available a hearing to contest an adverse action. Also, the government has circumvented the prohibition against collecting overpayments during administrative appeals by violating the statutory duty to extend appeal rights. Clearly, these non-discretionary duties may be enforced by mandamus. Alternatively, the Court may exercise jurisdiction under the exception to the administrative exhaustion requirement. Appellant clearly satisfies the requirement for the exception because channeling review through the agency when it is illegally withholding appeal rights ensures "no review at all." While Appellee admits it determined the overpayment, it contends the government has not formally asked Appellant to repay. Nonetheless, Appellee has initiated collection action by imposing a "suspension" of payments, a tool that is designed to collect payments due the government. Clearly, Appellee's action violates the government's statutory duties, prejudices Appellant's rights, and impinges on the Constitutional guarantee of Due Process, and thus it has all of the hallmarks of finality. Accordingly, jurisdiction exists over Appellant's claims under mandamus

or under the exception to the administrative exhaustion, thus this Court should reverse the trial court's dismissal of its case for lack of subject-matter jurisdiction under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6).

Date: March 29, 2012 Respectfully submitted,

s/ Mark S. Kennedy

Mark S. Kennedy

Kennedy, Attorneys and Counselors at Law

Attorney for Appellant,

Lynncore Medgroup, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ John Hur

CERTIFICATE OF COMPLIANCE

Counsel for Appellant hereby certifies that the enclosed brief complies with the requirements of Federal Rule of Appellate Procedure 32(a). The brief was prepared in Times New Roman 14-point font, has 10.5 or fewer characters per inch, and contains 4,786 words. Counsel relies on the word count of the computer program, Corel Word Perfect, used to prepare this brief.

Date: March 29, 2012 Respectfully submitted,

s/ Mark S. Kennedy

Mark S. Kennedy

Kennedy, Attorneys and Counselors at Law

Attorney for Appellant,

Lynncore Medgroup, Inc.