

June 30, 2010

UNITED STATES COURT OF APPEALS

Elisabeth A. Shumaker
Clerk of Court

TENTH CIRCUIT

SOJOURN CARE, INC.,d/b/a Sojourn
Care of Tulsa, a Delaware corporation,

Plaintiff-Appellant/Cross-
Appellee,

v.

KATHLEEN SEBELIUS, Secretary of
the United States Department of
Health and Human Services,

Defendant-Appellee/Cross-
Appellant.

Nos. 09-5031, 09-5066
(D.C. No. 4:07-CV-00375-GFK-PJC)
(N.D. Okla.)

ORDER*

Before **HARTZ, GORSUCH, and HOLMES**, Circuit Judges.

These appeals are dismissed for lack of appellate jurisdiction. Sojourn Care Inc.’s complaint contains a single cause of action. It contends that a regulation used to calculate certain reimbursements to hospice providers such as itself (42 C.F.R. § 418.309) is contrary to Title XVIII of the Social Security Act (42 U.S.C. § 1395f(i)). So far, the district court has awarded Sojourn a

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

declaratory judgment but deferred decision on certain other forms of relief requested by Sojourn until after a remand to the Provider Reimbursement Review Board (PRRB), for additional proceedings, can be completed. In these circumstances we lack a final judgment that might afford us appellate jurisdiction under 28 U.S.C. § 1291. *See Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 743-44 (1976). Neither, in these circumstances, is there a proper basis for the government's cross-appeal. The government, like Sojourn, will have an avenue for obtaining judicial review of any adverse decision by the district court when the case reaches a final judgment. *See Bender v. Clark*, 744 F.2d 1424, 1428 (10th Cir. 1984).

If we lack appellate jurisdiction to hear Sojourn's appeal under § 1291, Sojourn contends we should still issue a writ of mandamus. *See* 28 U.S.C. § 1651(a). But a writ of mandamus is a "drastic remedy" that may be "invoked only in extraordinary situations." *Barclaysamerican Corp. v. Kane*, 746 F.2d 653, 654 (10th Cir. 1984) (quotation marks omitted). This is not such a case. Sojourn can obtain meaningful review of the district court's rulings in the normal course, when proceedings finish. *See In re: Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1187 (10th Cir. 2009) ("[T]he party seeking issuance of the writ must have no other adequate means to attain the relief he desires" (quotation marks omitted)). And whether or not the district court is in error, a question we do not decide, its decision is not clearly and indisputably wrong, as it must be to warrant the

issuance of a writ. *See id.* (writ of mandamus may issue only when right to it is “clear and indisputable” (internal quotation marks omitted)).**

These appeals are **DISMISSED**.

Entered for the Court,



ELISABETH A. SHUMAKER, Clerk

** Sojourn has not sought to invoke our jurisdiction under 28 U.S.C. § 1292(a)(1), and it is our general practice to avoid passing on possible arguments in support of our jurisdiction that the parties themselves haven't raised and had the opportunity to join issue on. *Cf. Kaw Nation ex rel. McCauley v. Lujan*, 378 F.3d 1139, 1142 (10th Cir. 2004) (“[W]e need not consider a new argument in support of jurisdiction” not raised in a party's opening brief). We see no reason to depart from that practice in this case.