COURT ORDERS ELIMINATION OF MEDICARE APPEALS BACKLOG BY 2022

Date: 6 November 2018

Health Care Alert

On November 1, 2018, the United States District Court for the District of Columbia ("District Court") issued an order [1] and memorandum opinion [2] addressing the government's current backlog of administrative appeals for Medicare reimbursement claims. Specifically, the court ordered the government to achieve the following reductions from the currently projected backlog of 426,594 appeals:

- 19% reduction by the end of FY 2019;
- 49% reduction by the end of FY 2020;
- 75% reduction by the end of FY 2021; and
- Elimination of the backlog by the end of FY 2022.

OVERVIEW OF THE ORDER AND MEMORANDUM OPINION

Over four years ago, the American Hospital Association and three other regional hospitals and health care systems ("Plaintiffs") filed an action to compel the Secretary of the Department of Health and Human Services ("HHS") to eliminate the long delays in the administrative appeals process for Medicare reimbursement claims and to comply with the statutory deadlines the Medicare Act imposes on the appeals process. [3]

Initially, the District Court dismissed the case. [4] On appeal, the United States Court of Appeals, District of Columbia Circuit ("D.C. Circuit") reversed and remanded, holding that the District Court had jurisdiction to force HHS' compliance with the statutory deadlines for Medicare appeals. [5] The D.C. Circuit instructed the District Court to "determine whether 'compelling equitable grounds' . . . exist" to force compliance and noted that compliance would likely be required unless HHS made "meaningful progress" towards reducing its substantial backlog. [6]

On remand, the District Court recognized that "equitable grounds [existed] for mandamus" but noted that it "[did] not possess a magic wand that, when waved, [would] eliminate the backlog." [7] District Court requested briefing on the form any relief should take [8] and stated that setting a "timetable with deadlines for set backlog-reduction targets [was a] preferable approach" to giving HHS specific methods for clearing the backlog. [9]

The District Court then entered an order requiring HHS to meet certain deadlines to clear the backlog. [10] On appeal, the D.C. Circuit reversed the order, giving the District Court the narrow task "to evaluate the merits of the [HHS] Secretary's claim that lawful compliance would be impossible" and to determine whether it was possible for HHS to meet the deadlines imposed by the mandamus order. [11]

After receiving briefs, the District Court held a hearing to "address specific proposed mandamus remedies to reduce the backlog, aside from fixed deadlines." [12] HHS argued that the government had already significantly

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reformed Recovery Audit Contractor ("RAC") review and settlement practices and that the further reforms Plaintiffs proposed would be unlawful, impossible, or counterproductive. [13]

Subsequent to the hearing, in response to HHS's "repeated requests" for additional funds to address the appeals backlog, [14] Congress appropriated $182.3 million to HHS, which HHS projects will "more than doubl[e] its FY 2017 disposition capacity." [15] HHS then projected that, with the additional funding, the Office of Medicare Hearings and Appeals' ("OMHA's") "adjudication capacity will increase over FY 2017 levels by 23% in FY 2018, 42% in FY 2019, 108% in FY 2020, and approximately 122% in FY 2021 and 2022," indicating that "the Secretary [of HHS] will be able to eliminate the backlog entirely in FY 2022." [16] In response to this development, on October 23, 2018, the District Court held another hearing "to address potential deadline-based remedies." [17]

In the November 1, 2018, Memorandum Opinion, the District Court stated that, with the additional funding, the court "can easily conclude that it would be possible for the [HHS] Secretary to comply with a mandamus order requiring that the backlog be reduced and then eliminated on the precise timeline that Defendant itself has projected." [18] Accordingly, the District Court ordered that HHS reduce the backlog annually based on the following reduction percentages: 19% reduction by the end of FY 2019; 49% reduction by the end of FY 2020; 75% reduction by the end of FY 2021; and elimination of the backlog by the end of FY 2022. [19]

The order extends HSS' original deadline to eliminate the backlog by two years. It remains to be seen if HHS can actually meet the deadlines and the District Court left the door open to potential modifications, allowing the HHS Secretary to request a modification to the order if a change in circumstances, such as an appropriations shortfall, should occur. Even with the additional funding, it is likely that HHS will implement additional settlement opportunities to ensure compliance with the order, should it stand.

If you are a provider or supplier that is interested in learning more about Medicare appeals or pursuing Medicare appeals, K&L Gates' health care practice can help. Our health care lawyers have experience representing providers through the Medicare appeals and settlement process. Additionally, our health care lawyers are closely monitoring all developments related to the Medicare appeals process.

NOTES

[1] https://www.aha.org/system/files/2018-11/181101-aljdelay-remedyorder.pdf.

[2] https://www.aha.org/system/files/2018-11/181101-aljdelay-remedyopinion.pdf.

[3] *See Am. Hosp. Ass'n v. Burwell* ("AHA III"), 209 F. Supp. 3d 221, 222–24 (D.D.C. 2016); *Am. Hosp. Ass'n v. Burwell* ("AHA I"), 76 F. Supp. 3d 43, 46–48 (D.D.C. 2014).

[4] *See* AHA I, 76 F. Supp. 3d at 56.

[5] *See Am. Hosp. Ass'n v. Burwell* ("AHA II"), 812 F.3d 183, 192 (D.C. Cir. 2016).

[6] *Id.* (internal citations omitted)

[7] AHA III, 209 F. Supp. 3d at 230.

[8] *See* Minute Order of Oct. 3, 2016.

[9] *Am. Hosp. Ass'n v. Burwell* (AHA IV), 2016 WL 7076983, at *3 (D.D.C. 2016).

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[10] *See Id.*

[11] *Am. Hosp. Ass'n v. Price* (AHA V), 867 F.3d 160 (D.C. Cir. 2017).

[12] Minute Order of Feb. 27, 2018.

[13] *See* Def. Resp. at 6-9, 11, 13, 18-19, 22-23, 24.

[14] Def. Resp. at 3.

[15] *Id.*

[16] *Id.* at 1, 4.

[17] *See* Minute Order of Oct. 11, 2018.

[18] https://www.aha.org/system/files/2018-11/181101-aljdelay-remedyorder.pdf.

[19] *Id.*

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