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Medicare Appeals 10-Year Backlog: D.C. Circuit Signals Enough is Enough [Ober|Kaler]

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Issued within a month of one another, two cases regarding the Medicare appeals backlog reached opposite conclusions, providing a circuit-split. The first case from the D.C. Circuit, signaling a major shift toward judicial intervention, ordered the lower court to review complaints of systemic delay in the Medicare appeals process in *American Hospital Association v. Burwell*, 812 F.3d 183, 185 (D.C. Cir. 2016) [PDF].

This could be the welcomed reprieve providers are looking for. On the other hand, the Fourth Circuit reached the opposite conclusion in *Cumberland County Hospital v. Burwell*, No. 15-1393 (4th Cir. Mar. 7, 2016) [PDF], finding the appeals backlog, although "incontrovertibly grotesque," does not allow for judicial intervention.

The two circuit court cases are the culmination of multi-year delays in the Medicare appeals process at the Administrative Law Judge (ALJ) stage. Estimates project it would take 10 years or more to resolve the already-filed appeals. The courts have been reluctant to intervene in the Medicare appeals process, but with the recent decision from the D.C. Circuit, it appears further judicial intervention is possible.

The D.C. District Court originally dismissed the action on jurisdictional grounds, ruling the American Hospital Association and several hospitals did not meet the threshold requirements for mandamus jurisdiction. Mandamus jurisdiction is the ability of the federal courts to review a lawsuit to compel an officer or employee of the United States, such as the Secretary of the Department of Health and Human Services (HHS), to perform a duty owed to the plaintiff. In overturning the lower court, the D.C. Circuit found the Medicare appeal timeframe statute "imposes a clear duty on the Secretary [of HHS] to comply with the statutory deadlines," and a "systemic failure [has] caus[ed] virtually all appeals to be decided well after the statutory deadlines," which is 60 days for the ALJ stage.

In contrast, the Fourth Circuit, finding mandamus jurisdiction does not exist, cited health care providers' ability to escalate appeals to the Departmental Appeals Board (DAB) when appeals exceed the statutory deadline at the ALJ stage. Because of this, the Fourth Circuit found the administrative process for Medicare appeals contemplated delays and included an ability to escalate appeals as an adequate alternative remedy. The Fourth Circuit conveyed that judicial intervention is inappropriate in this case concerning a violation of a statutory deadline because it would be based on a "myopic reading of the Medicare Act" and would circumvent the comprehensive administrative appeals process.

Absent from the Fourth Circuit decision is any discussion regarding the adequacy of the alternative remedy by escalating Medicare appeals to the DAB. With an estimated 10-year backlog at the ALJ stage, if health care providers escalated their appeals, the DAB is just as unlikely to provide a timely hearing. Faced with egregious delays, the D.C. Circuit noted the Secretary is in an untenable position, even if health care providers were to escalate their appeals.

Additionally, the D.C. Circuit found it concerning that the majority of the delayed appeals at the ALJ stage were ultimately overturned. This means hospitals are often deprived of significant Medicare payment since HHS recoups the funds at the prior appeals stage, when it is decided by the Qualified Independent Contractor. The

delays are having a real impact on "human health and welfare," given the severity of the financial impact. The clear consequences of the delays, the court goes on to say, are that "lengthy payment delays will affect hospitals' willingness and ability to provide care."

Ideally, the political branches of government would address the appeals backlog, but even the D.C. Circuit remains skeptical by stating, "The clarity of the statutory duty likely will require issuance of the writ [of mandamus] if the political branches have failed to make meaningful progress within a reasonable period of time—say, the close of the next full appropriations cycle." It appears the tide may be changing with this latest shot across the bow by the D.C. Circuit. The Secretary of HHS and Congress will need to address this systemic failure of the appeals process in the foreseeable future. If not, the court is signaling its willingness to take judicial intervention.

Ober|Kaler's Comments

- Providers may see the court intervene if the appeals backlog does not improve, but it remains unclear how soon this will occur.
- Stay tuned to whether the AFIRM Act, a bill appropriating additional funds to HHS for administering the appeals program, is expedited in Congress to avoid judicial intervention.
- Follow the case, *Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 185 (D.C. Cir. 2016), as it returns to the United States District Court for the District of Columbia for its ruling on remand. On remand, the District Court is to consider the equities and decide "whether the [HHS'] delay is so egregious as to warrant mandamus."
- It is possible this case could be elevated to the Supreme Court, given the split in the circuits. That would occur if one or both of the parties in either case requested the court to take the case and the court decided to do so.