PUBLICATION

Court of Appeals Reverses D.D.C. Order Requiring HHS to Eliminate Medicare Appeals Backlog by December 31, 2020

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Hopes were dashed for sooner relief from the backlog of Administrative Law Judge (ALJ) appeals. With the backlog of Medicare reimbursement appeals steadily growing, a reversal by the U.S. Court of Appeals for the District of Columbia complicated matters by undoing a four-year reduction plan that required the Secretary of Health and Human Services (HHS) to eliminate the backlog of appeals by December 31, 2020. *Am. Hosp. Ass'n et. al. v. Price*, No. 17-5018 (D.C.Cir. Aug. 11, 2017). The Court of Appeals vacated the order and remanded for further consideration as to whether the reduction plan was attainable through lawful means.

As explained in an earlier edition of Payment Matters on December 5, 2016, a U.S. District Court for the District of Columbia granted summary judgment in favor of the American Hospital Association (AHA) in its quest to reduce and eliminate the backlog of Medicare reimbursement appeals. In that decision, the court targeted the multi-year delays in the Medicare appeals process at the ALJ stage, the third of four stages of administrative appeals, during which some current appeals are now predicted to stall for more than a decade and newly-filed appeals for even longer. The entire appeals process is designed on a one-year timeline from start to finish and the district court noted that HHS is "bound by statutorily mandated deadlines, of which it is in flagrant violation as to hundreds of thousands of appeals." As of June, more than 600,000 appeals are pending at the ALJ stage. *AHA v. Price*, slip op. at 21. Even so, the Court of Appeals disagreed with the lower court's December 5, 2016 solution, which adopted one of AHA's proposals that required HHS to reduce the backlog as follows:

- 30 percent reduction from the current backlog of cases pending at the ALJ level by December 31;
- 60 percent reduction by December 31, 2018;
- 90 percent reduction by December 31, 2019; and
- 100 percent reduction by December 31, 2020.

AHA proposed several even more intrusive interventions to the lower court, and HHS proposed no solution, but instead offered a series of explanations for why AHA's suggestions were counterproductive, ignored changes made to the recovery audit program and would require HHS to illegally settle claims en masse to meet the deadlines. Essentially, and crucial on appeal, HHS asserted that the four-year deadline was impossible to meet through lawful means.

The lower court was clear to avoid interfering with agency process by ordering HHS to make any specific reforms, preferring instead to set deadlines and allow HHS to solve its own problem. Nonetheless, the Court of Appeals held that because HHS *alleged impossibility*, the lower court should not have ordered HHS to meet an impossible standard.

The lower court's ends-oriented solution was an "abuse of discretion" because HHS stated it could not lawfully structure any means to achieve the ends ordered by the court and the court did not make a separate finding that lawful means were possible. Instead, the lower court gave "short shrift" to HHS's assertion of impossibility, ignoring that the order might require unlawful acts by HHS. The Court of Appeals remanded for further consideration of the equities and the possibility of adherence to any court order.

As Judge Henderson articulates in her dissenting opinion, this presents the proverbial "chicken or egg" conundrum, shifting the burdens and requiring the lower court to make a finding of possibility even if HHS has not made a threshold showing of impossibility, but merely presents predictions of impossibility through hypothetical means. She found that HHS did not meet its burden and did not establish that meeting the four-year deadline was "demonstrably impossible" and that the lower court did, essentially, reject the impossibility argument proffered by HHS. Judge Henderson stated that on remand the majority was essentially looking for the lower court to use "magic words" such as "lawful compliance [is] indeed possible" to order a backlog reduction plan.

Baker Donelson's Comment

Perhaps on remand, the lower court will find the "magic words" to address HHS's impossibility argument with more clarity. Though seemingly counterproductive to allow HHS to assert the *mere prediction of impossibility* to circumvent any hard deadlines proposed by AHA, the lower court – and AHA – will need to establish that any ends can be achieved through lawful means.

Either way, in Judge Henderson's words, "Today's remand gets the equities backwards: it punishes providers with further delay and rewards an obdurate agency."