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# Recent Developments in Litigation Challenging the Medicare Appeals Delays: Is Victory Likely for Medicare Providers?

BY DAVID TOLLEY AND GREER DONLEY

On September 19, 2016, the U.S. District Court for the District of Columbia (D.D.C.) refused to stay a highly anticipated case seeking to force the government to comply with statutory deadlines governing the Medicare appeals process.[1] Delays affecting the third stage in the appeals process—a hearing before an ALJ—have grown exponentially.[2] Though a provider is entitled by statute to an ALJ hearing and determination within 90 days of the provider's request, providers face years-long delays that increase every month.[3] Providers win at the ALJ level more than 50% of the time, making the delays all the more unfair to the many providers that struggle daily with ever thinning operating margins as reimbursement generally decreases.[4]

Last month, we discussed an emerging trend in federal courts (and a glimmer of hope for providers): judicial willingness to entertain legal challenges to this ever lengthening appeals process. See our article, *A Favorable, New Climate for Challenging Medicare Appeals* (27 MCR 737, 8/12/16). The D.D.C.'s September 19, 2016 opinion in *AHA v. Burwell* builds substantially on this trend. More importantly, it recognizes an opportunity for plaintiffs to win disputes like these on the merits. With the D.D.C. signaling that the ''balance of interests drives the conclusion that there are equitable grounds for mandamus,''[5] it seems as if the Court will ultimately order the agency to comply with its statutory deadlines absent some unexpected legislative solution. As explored below, providers will experience significant leverage to negotiate settlements with the agency if the DDC issues a writ of mandamus.

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## I. Sept. 19, 2016 Opinion in *AHA v. Burwell*

In May 2014, the American Hospital Association (AHA) sued the Department of Health and Human Services (HHS) asking for a writ of mandamus that would force the government to comply with its statutory deadlines for issuing Medicare appeals. The D.D.C. initially

[1] *Am. Hosp. Ass'n v. Burwell*, 2016 BL 307248, D.D.C., No. 1:14-cv-00851-JEB, 9/19/16

[2] U.S. GOV'T ACCOUNTABILITY OFFICE, NO. GAO-16-366, MEDICARE FEE-FOR-SERVICE: OPPORTUNITIES REMAIN TO IMPROVE APPEALS PROCESS 21-22 (2016), http://www.gao.gov/assets/680/677034.pdf.

[3] *Id.*

[4] *Id.*

[5] Memorandum Opinion, *supra* note 1, at 16.

dismissed the case for lack of jurisdiction. In May 2016, however, the U.S. Court of Appeals for the District of Columbia Circuit reversed, finding that jurisdiction existed to hear the claim.[6] The Circuit Court's opinion extended beyond jurisdiction by suggesting that a writ would be required if meaningful and urgent progress did not occur: "given the unique circumstances of this case, the clarity of the statutory duty likely will require issuance of the writ 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."[7] The case was remanded to the D.D.C. for a decision on the merits.[8]

Quickly after the D.C. Circuit's decision, the agency submitted a motion asking the D.D.C. to stay the case until September 2017. According to the agency, the stay would "allow HHS to continue to make meaningful progress in resolving the [Office of Medicare Hearings and Appeals] backlog, and also to allow Congress to continue its deliberations with respect to the legislative proposals that are pending before it."[9] In a pained opinion, Judge James E. Boasberg refused to grant the stay.[10] Though the Court was "reluctant to intervene," it understood that it must "follow the Court of Appeals' direction on remand."[11] The Circuit Court's direction required it to consider the burden faced by the providers without judicial action, the burden faced by the agency with judicial action, and whether meaningful progress had been made toward a solution.[12] Though the D.D.C.'s decision was not a determination on the merits, the court acknowledged that the "stay and mandamus inquiries are . . . overlapping."[13] As a result, its holding—while technically confined to the motion to stay—foreshadows its view of the merits of the underlying mandamus claim.

In ruling on the stay, the Court made many findings. It reiterated the current strain facing providers as a result of the excessive delays as well as the future stress a writ of mandamus would place on the agency.[14] The Court was ultimately persuaded in favor of providers after reviewing the lack of meaningful progress made to resolve the situation in recent months.[15] The Court found that the agency's various proposed and implemented reform attempts were "unlikely to turn the tide."[16] Instead, the Court highlighted that "[t]hese problems likely will worsen in the coming years because . . . the backlog is projected to grow considerably absent legislative intervention."[17] Given the lack of imminent solution and the current impact on providers, the Court suggested that issuing a writ would be necessary:

> Although the Court remains loathe to intervene in the legislative and executive branches' efforts—or lack thereof, as it may be—to respond to the problem, its "ultimate obligation is to enforce the law as Congress has written it." *AHA II*, 812 F.3d at 193. *The balance of interests drives the conclusion that there are equitable grounds for mandamus, and the Court will not issue a stay and further delay the proceedings.*[18]

Despite the Court's reluctance, it seems to believe its hands are tied to ultimately rule in favor of providers. Absent an unexpected regulatory or legislative solution, plaintiffs are likely to win their mandamus action in the coming months.

## II. If a Writ is Granted, How Will Providers Be Affected?

As Judge Boasberg made very clear, the issuance of a writ would not magically change any of the substantive issues underlying the ultimate problem: "The Court, however, does not possess a magic wand that, when waved, will eliminate the backlog. Plaintiffs' suggestion that the Court simply order HHS to resolve each of the pending appeals by the statutorily prescribed deadlines is extremely wishful thinking."[19] A writ of mandamus will not suddenly alter the capacity of ALJs, the funding available, or the nature of post-payment audits. A writ would, however, place enormous pressure on the agency to quickly reduce the number of appeals. This pressure should give providers enormous leverage against the agency.

Perhaps the most likely outcome is that providers will be able to negotiate favorable settlements, dismissing their appeals and saving them the time and expense of proceeding through the appeals process. A writ of mandamus might force HHS to the negotiating table as it considers the costs and benefits of protracted litigation with the provider community. We already have evidence that the agency would consider mass settlement. For instance, CMS recently settled 260,000 inpatient-hospital claims currently awaiting ALJ review.[20] The agency has also settled two lawsuits in which providers successfully won preliminary injunctions to stall recoupment under the Due Process Clause.[21] Settlement provides the agency with a quick way to lighten the backlog—thereby complying with the Court's order—without fundamentally altering its post-payment review process. As a result, it might be a particularly attractive option for the agency. To date, HHS has been able to avoid much of the normal settlement risk calculations required of typical defendants because it can recoup any disputed funds without facing a meaningful challenge for years. That incentive structure will shift once a court explicitly denounces the agency's delays and providers should use their newfound leverage to negotiate provider-friendly settlement arrangements.

We encourage providers to take advantage of the settlement window as it begins to open in the coming months. Over the long term, we expect Congress will need to develop more robust long-term solutions, but it

[6] *Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 193-94 (D.C. Cir. 2016) (*AHA II*).
[7] *Id.*
[8] *Id.* at 194.
[9] *Am. Hosp. Ass'n v. Burwell*, D.D.C., No. 1:14-cv-00851-JEB, *motion to stay* 5/25/16.
[10] Memorandum Opinion, *supra* note 1.
[11] *Id.* at 1, 6.
[12] *Id.* at 6-7.
[13] *Id.* at 7.
[14] *Id.* at 7-9.
[15] *Id.* at 9-16.
[16] *Id.* at 2.
[17] *Id.* at 9.
[18] *Id.* at 16 (emphasis added).
[19] *Id.*
[20] *Id.* at 10.
[21] *D&G Holdings, LLC v. Burwell*, W.D. La., No. 5:15-cv-02624-EEF-MLH, *order* 4/22/16; *Hospice Savannah, Inc. v. Burwell*, S.D. Ga., No. 4:15-cv-00253-JRH-BKE, *order* 11/9/15.

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is impossible to predict when that may occur. As Judge Boasberg stated: ''Congress is unlikely to play the role of the cavalry here, riding to the rescue of the Secretary's besieged program.'' Until meaningful reform occurs, a writ of mandamus will give providers the upper hand in negotiations with the agency.