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CLIENT ALERT

Healthcare and Commercial Litigation Practice Groups — August 17, 2017

Update: D.C. Circuit Court of Appeals Vacates District Court Order Requiring HHS to Eliminate the Medicare Payment Appeals Backlog by 2021

By Trevor Presler, William Stewart, and PJ Puryear

On August 11, 2017, the U.S. Circuit Court of Appeals for the District of Columbia vacated an Order of the District Court requiring the Department of Health and Human Services ("HHS" or the "Agency") to eliminate the backlog of more than 600,000 Medicare payment appeals pending review by an administrative law judge ("ALJ") by no later than January 1, 2021. *Am. Hosp. Ass'n v. Price*, No. 17-5018 (D.C. Cir. Aug. 11, 2017). The D.C. Circuit found that the District Court abused its discretion by failing to make a predicate finding as to whether it was, in fact, possible for the Agency to lawfully comply with the Order under the laws governing the Medicare program.

We previously published a Client Alert on the District Court's December 5, 2015 Order, which required HHS to reduce the number of old cases pending ALJ review by 30 percent by the end of 2017, 60 percent by the end of 2018, 90 percent by the end of 2019, and 100 percent by the end of 2020. *Am. Hosp. Ass'n v. Burwell*, No. CV 14-851 (D.D.C. Dec. 5, 2016). As of January 1, 2021, claimants with pending appeals would be eligible to file for default judgment against the Agency. On appeal, the Agency argued, in part, that it could not legally comply with the Order because the deadline would undermine its statutory obligation to protect the Medicare Trust Funds. HHS contended that, without additional congressional appropriations, mass settlements would be required to meet the 2021 deadline. However, such settlements would require the Agency to pay claims without prior substantiation of their merit, which is illegal under the Medicare statutes.

The D.C. Circuit found that the lower court had failed to seriously consider the Agency's argument, essentially telling HHS to "figure [it] out." The Circuit Court concluded "that since the [Agency] represented that lawful compliance with the [Order] was impossible, it was an error of law, and therefore an abuse of discretion, to nonetheless order the Secretary to render that performance without first finding that lawful compliance was indeed possible."

On remand, the Agency will bear a "heavy burden to demonstrate the existence if impossibility." Regardless, it seems likely that the case will find its way back to the D.C. Circuit in 2018. If you have any questions related to this Client Alert, please contact one of the following members of our Healthcare Practice Group:

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