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### Medicare

## Medicare Appeals Backlog Fight Not Going Away



By Eric Topor

The HHS signaled its continued objections to a court order directing it to clear 658,000 Medicare reimbursement claim appeals within four years when it filed a notice of appeal Jan. 30 challenging the order (*Am. Hosp. Ass'n v. Cochran*, D.D.C., No. 14-cv-851, *notice of appeal* 1/30/17).

The appeal continues the Department of Health and Human Services' battle with the American Hospital Association, which filed the lawsuit seeking a solution to the swelling backlog of Medicare appeals at the administrative law judge level. The appeal, filed by acting Secretary of the Department of Health and Human Services Norris W. Cochran, will bring the U.S. Court of Appeals for the District of Columbia Circuit into the fight.

The appeal likely will stay the order from the U.S. District Court for the District of Columbia, which granted the AHA's request for the court to intervene in the backlog situation on Dec. 5, 2016, Kenneth Marcus, a partner with Honigman Miller Schwartz and Cohn LLP in Detroit told Bloomberg BNA Jan. 31. The AHA could oppose the stay of the backlog reduction order, though the AHA declined to comment on the appeal filing, Marcus said.

The HHS has repeatedly insisted that Judge James E. Boasberg's order is impossible to implement without running the risk of paying Medicare claims that either aren't meritorious or are fraudulent (236 HCDR, 12/8/16). The order requires HHS to meet annual reduction target benchmarks until the entire backlog is cleared by the end of 2020. The appeal shows the agency isn't ready to accept judicial intervention in its bureaucratic operations, despite the fact that Boasberg repeatedly rejected the HHS's arguments against court intervention during litigation in his court.

### Appeal Uncertainties

Marcus noted however that "on occasion [the Centers for Medicare & Medicaid Services] files an appeal to preserve the appeal right but before the final agency decision whether to appeal has been made." Marcus said the HHS's filing of a notice of appeal "does not necessarily mean that it will proceed."

The agency has already tried unsuccessfully to persuade Boasberg to reconsider his decision, which he declined to do in a Jan. 4 ruling.

The ultimate HHS decision on pursuing appeal may reside with the agency's incoming leadership from the Trump administration. Marcus noted though that "historically there has not been a constituency supporting an efficient and effective appeals process." He said, "unless the agency receives additional resources the backlog will remain."

Hogan Lovells US LLP represents the AHA. The Department of Justice represents the government.

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### For More Information

The HHS's notice of appeal is at <http://src.bna.com/IPO>.

### Snapshot

- HHS files appeal against federal court order to eliminate Medicare backlog
- Attorney: Appeal of court could halt order implementation unless plaintiffs oppose stay

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