

**Federal Appeals Court Decision Makes for More Uncertainty in RAC Program:** Medicare's recovery audit contractor ("RAC") program has been plagued with uncertainty for more than a year, and a recent decision of the United States Court of Appeals for the Federal Circuit is simply adding to the confusion. In *CGI Federal, Inc. v. United States*, decided on March 10th, the Court reversed a decision of the United States Court of Federal Claims that the changes to the payment terms issued by the United States Department of Health and Human Services' Centers for Medicare and Medicaid Services ("CMS") did not violate relevant statutory and regulatory law. Under the program, RACs audit providers, such as hospitals and physicians, to ensure Medicare payments are appropriate. The RACs receive a contingency fee based upon a percentage of overpayments found. Since the program began in 2008, RACs have been paid after the overpayments are collected from providers, which usually takes around 41 days. However, when bids for new contracts were issued in 2014, they specified payment would only be made "after a provider's challenge passed the second level of appeal," which can take anywhere from four months to more than a year. A legislative analyst has opined this leaves CMS with only two options: it must rebid the contracts through the general commercial process with the original 2008 contingency fee structure, or through the longer noncommercial process with the new payment terms, and that contracts for the new RACs will likely not be finalized until early 2016.

**Justice Kennedy Skeptical of Obamacare Opponents in *King v. Burwell*:** The United States Supreme Court heard oral argument on March 4, 2015 in *King v. Burwell*. This is the case where opponents of the Patient Protection and Affordable Care Act ("PPACA," or commonly referred to as "Obamacare") have argued that the plain language of the statute provides that premium subsidies are available only through healthcare exchanges established by state governments, and that Federal exchanges set up in states which did not establish their own exchanges are not authorized under the statute. The Internal Revenue Service ("IRS") has adopted regulations approving the Federal exchanges, but the challengers contend these regulations violate the clear meaning of the statute's language. However, Justice Kennedy, a likely "swing vote" between the Court's conservative and liberal wings, expressed skepticism about the opponents' position during oral argument. Although it is hard to gauge what position a Justice will take based upon questioning at oral argument (for example, a Justice who may lean in favor of a litigant's position will often question that party's attorney more vigorously, and make that attorney defend their position, in order to convince him- or herself about the soundness of that party's position), some Court watchers have opined that Justice Kennedy is likely to side with the law and against the challengers. According to the *Wall Street Journal*, Justice Kennedy said he sees "a serious Constitutional problem" with the idea that Congress would force states to establish exchanges by punishing the citizens of states who do not do so by withholding premium subsidies. He also asked whether the challengers' reading of the law would upset the federal-state balance. While it may be amusing to try to read the proverbial "tea leaves" and guess the outcome, it will not be known until the Court issues its opinion.

**Reminder: New Patient Disclosure Requirements Go Into Effect 3/31/15:** Public Health Law section 23 goes into effect, which provides that a non-participating physician must include a claim form (such as a CMS 1500 form) with a patient bill for health care services, other than a bill for the patient's co-payment, coinsurance or deductible. Public Health Law section 24 goes into effect which requires disclosures be given to patients or prospective patients, including: (1) Disclosure, in writing or through an internet website, of the health care plans in which the physician participates and the hospitals with which the physician is affiliated; (2) If a physician does not participate in the patient's network, prior to the provision of non-emergency services, inform the patient or prospective patient that the amount or estimated amount that the physician will bill for such services is available upon request, and upon such request, must disclose the amount or estimated amount to the patient or prospective patient, in writing; (3) Provide a patient or prospective patient with the name and contact information of any health care provider scheduled to perform anesthesiology, laboratory, pathology, radiology or assistant surgeon services in connection with care to be provided in the physician's office for the patient, or coordinated or referred by the physician for the patient at the time of referral to or coordination of services; (4) For a patient's scheduled non-emergency hospital admission or outpatient hospital services, provide the patient and the hospital with the name and contact information of any other physician whose services will be arranged by the physician and are scheduled at the time of preadmission testing, registration or admission; and information on how to determine the healthcare plans in which the physician participates. If you are a client or member of a medical society and would like to know more, please visit the "New York Resources" page of the Kern Augustine Conroy & Schoppmann, P.C. website, [www.DrLaw.com](http://www.DrLaw.com).

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