

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.

Physicians and Advance Practice Nurses Face Off Over Authority to Sign Death Certificates: On March 9, 2015, the Assembly amended and passed Bill S-1152, which would permit Advanced Practice Nurses (APNs) to determine the cause of death and sign death certificates if the nurse was the patient's primary caregiver and a physician is not available. The bill is now before the State Senate, which must vote upon it, as it was amended in the Assembly. The legislature passed a similar bill in January, 2014, which received a "pocket veto" from Governor Christie (this occurs when a bill remains unsigned at the end of a legislative session). APNs claim that patients can often wait unnecessarily long times to obtain death certificates if a physician is not available, and that this can be distressing to family members and is particularly significant in situations where a patient's religious beliefs require interment within twenty-four hours of death. They claim they receive graduate education in diagnosing and treating illnesses and are often in a better position to address routine patient needs. Physician groups, on the other hand, point to the much more extensive training which physicians receive, and call the bill an unjustified expansion of what nurses are permitted to do and a further encroachment upon duties best performed by physicians. A representative of the New Jersey Academy of Family Physicians has pointed out that, since New Jersey has adopted an electronic death registry, it is now actually easier for physicians to issue death certificates remotely.

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