

# New legal niche in ‘Medicare audits’ emerges

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A budding legal niche is developing in health care law in light of a new program focused on recovering money owed to Medicare from incorrect billing by health care providers.

The program, known as the Recovery Audit Contractors (“RACs”) program, began in 2005 as a demonstration project in three states and is scheduled for roll-out to the rest of the country in the coming year.

RACs are private companies contracted by the Centers for Medicare & Medicaid Services to audit health care billing records and recover underpayments on behalf of Medicare.

Some lawyers warn of a “RAC attack” and anticipate a lot of new work as a result.

“We view it as a growth area,” said Andrew Wachler of Wachler & Associates in Royal Oak, Mich., who has reserved the website [www.racattorneys.com](http://www.racattorneys.com).

Given the success of the demonstration program - Medicare recovered over \$1 billion in underpayments - lawyers expect to be providing guidance to health care providers on RAC audits and compliance procedures, as well as on appealing a RAC claim.

“There are a number of different roles for health care lawyers in this program. There is going to be significant growth,” said Abby Pendleton, a partner at The Health Law Partners in Southfield, Mich. and co-chair of the firm’s Medicare and RAC Practice Group.

## ‘Bounty hunters’

Lawyers are looking at the demonstration program to predict what’s to come.

The program began in California, Florida and New York in 2005, and then expanded to Arizona, Massachusetts and South Carolina in 2007. It was authorized under the Medicare Prescription Drug Improvement and Modernization Act of 2003.

CMS has published [a schedule](#) for introduction of the RAC program in rest of the country.

“Health care systems are really struggling with preparing for this because they know it’s just a nightmare. During the demonstration program, it was very broad in that RACs were given all the data and told to go out and find errors,” said Steve Lokensgard, a health care lawyer and special counsel to Faegre & Benson in Minneapolis, who previously worked as chief compliance officer to Allina Hospitals and Clinics.

The unique aspect of the RAC program is that RACs work on a contingency fee basis, receiving between 9 and 12.5 percent of underpayments they discover, so there is a big incentive to find billing errors.

“They’re bounty hunters on behalf of the Medicare program,” said Jessica L. Gustafson, also a partner at The Health Law Partners, who co-chairs the RAC practice group with Pendleton.

She noted that of the misbilling identified by RACs during the demonstration phase, 96 percent were for underpayments and only 4 percent were for overpayments to Medicare.

There are two types of audits: automated audits and complex audits.

The automated audit is based on data mining and automated analysis and usually involves clear error, such as where a provider billed for two duplicate procedures performed on the same patient on the same day.

A complex audit requires an auditor to request medical records and will typically involve areas susceptible to error based on the auditor’s knowledge of the industry, said Lokensgard.

The vast majority - 85 percent - of underpayments found by RACs in the demonstration phase involved in-patient hospital stays, such as short hospital stays or in-patient rehabilitation following surgery, said Gustafson.

Gustafson predicts that Medicaid will step up audits under a parallel program similar to RAC called “Medicaid Integrity Contractors” (although MICs are not paid on a contingent basis).

And Wachler said he has already seen an increase in audits by private third-party payors like Blue Cross Blue Shield of Michigan and others.

### **Niche for lawyers**

Lawyers who represented health care providers during the demonstration program say there will be more work in two areas: compliance and appeals.

“Health care providers will engage an attorney to conduct a review to see what areas they need to improve on to prepare for a RAC audit,” said Lokensgard.

Given the heavy focus on short in-patient stays, compliance will also involve looking at health care providers’ utilization review process and whether physicians are admitting patients to the right area of the hospital, Wachler said.

In addition, attorneys are likely to be advising clients on improving record-keeping, documentation and training employees.

“When providers take a close look at the records, maybe a patient met the criteria for an in-patient stay, but the documentation could be improved so that defending claims is easier,” said Pendleton.

As the RAC program expands to the rest of the country, lawyers expect more work representing health care providers in appealing “denials” - the term for a RAC claim for underpayment.

Although only a small percentage of denials were appealed during the demonstration phase, lawyers predict more appeals as the program expands.

“In the permanent program, health care providers are going to be more interested in appealing and fighting these denials,” said Lokensgard.

The appeals process has five levels, including a hearing before an administrative law judge and a fifth stage before a U.S. District Court.

Lawyers can be involved at any stage, and many health care providers engage an attorney even before the hearing stage because of rules about presenting evidence and preserving it for the next level, said Gustafson.

Attorneys who have represented health care providers in RAC appeals said they have a high success rate.

“These appeals are winnable,” said Gustafson.

Pendleton said appeals are made both on the substantive merits of a claim, such as presenting a physician’s testimony as to why a patient was treated as an in-patient rather than as an out-patient, as well as on legal grounds, such as whether records are beyond the time frame of allowable requests or whether the standards for determining in-patient care were clear.

Lawyers with experience in administrative hearings who have knowledge of health care law and regs are most suited for this type of appellate work.

“It’s an area of law where you have to be familiar with the Medicare program and health care law,” Pendleton said.

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