

## **AHA Sues CMS Over Medicare Payment Denials**

Legal Alert  
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On November 1, 2012, the American Hospital Association (AHA) sued the United States Department of Health and Human Services and the Centers for Medicare and Medicaid Services (CMS) claiming that CMS is illegally denying hospitals Medicare payments.

At issue in the AHA lawsuit is whether hospitals have been determining the proper “setting” for provision of certain healthcare services. All hospitals are subject to Medicare Recovery Audit Contractors (RAC) audits. During the course of the RAC audits RAC contractors have determined targeted “setting,” whether inpatient or outpatient, where services are provided. RAC auditors are paid on a contingent fee basis and only make money if they find errors which lead to a recoupment of funds. The AHA complaint notes that during the RAC Demonstration Project from 2003 to 2006, 41% of the purported “errors” the RACs found involved situations where medical services supposedly were provided in the wrong setting. According to the RACs, services were provided on an inpatient basis when they should have been provided on an outpatient basis. In 2006 the RAC Demonstration Project became permanent. RACs continue to focus on inpatient versus outpatient provision of services. Hospitals rely on the expert judgment of physicians, with oversight from the hospital and input from the patient for making decisions on the setting for the provision of healthcare services. The RACs rely solely on a paper record, often years old, to evaluate whether the physician’s determination was correct. According to the AHA complaint, hospitals are successful 75% of the time when they appeal RAC denials for providing services in the wrong setting. The typical determination by the RAC auditor will be that services were provided in an inpatient setting when it would have been more appropriate to provide the services in an outpatient setting. The RAC and the hospital agree that the services were medically necessary and were delivered to the patients but disagree on the setting where the services were provided. Thus, according to the RACs, the hospital must pay back the entire amount it received for the services provided. CMS does pay a very small amount to the hospitals but not an amount equal to what would have been paid to the hospital if the patient had been billed under Medicare Part B and had been treated as an outpatient right from the beginning. According to the AHA, “allowing government auditors to second-guess these difficult medical decisions about where to best treat a patient” has cost hospitals “hundreds of millions of dollars.”

The AHA seeks a declaratory judgment against CMS and an order that would require CMS to pay hospitals the full amount allowed under Medicare Part B for all instances where it was determined that the patient should not have been treated as an inpatient but should have

been treated as an outpatient.

View a copy of the complaint [here](#) (PDF).