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Editors: [Leslie Demaree Goldsmith](#) and [Carel T. Hedlund](#)

## RACs Unleashed: 9th Circuit's Palomar Decision Gives Even More Discretion to Medicare Contractors

By: [Mark A. Stanley](#)

In [Palomar v. Sebelius, D.C. No. 3:09-cv-00605-BEN-NLS \(Sept. 11, 2012\) \[PDF\]](#), the United States Court of Appeals for the Ninth Circuit held that a decision by a Recovery Audit Contractor (RAC) to reopen a Medicare claim for complex review was not reviewable. Providers already confronting a variety of challenges served up by Medicare contractors, will unfortunately find that the Palomar decision offers fresh cause for concern.

The *Palomar* case concerned a RAC's determination that services provided to a Medicare beneficiary were not reasonable and necessary. The claim in question was more than one year old, and so could only be reopened for "good cause" under Medicare regulations. All of the reviewing bodies that examined the case concurred with the RAC's determination regarding medical necessity. However, the administrative law judge (ALJ) who reviewed the RAC determination concluded that there was not good cause to reopen the claim, and therefore reversed the RAC. On appeal, the Medicare Appeals Council (MAC) reversed the ALJ and ruled that the Medicare regulation at 42 C.F.R. § 405.980(a)(5) makes a Medicare contractor's decision to reopen a claim unreviewable.

The MAC's opinion was affirmed by both the U.S. District Court and the U.S. Court of Appeals for the Ninth Circuit. The court held that jurisdiction to review the reopening decision is expressly foreclosed by the regulation and that only the substance of a contractor's overpayment determination may be appealed by providers.

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## **Ober|Kaler's Comments**

The Palomar decision represents a significant threat to providers' hopes for finality in Medicare payment determinations. The Secretary for the Department of Health and Human Services argued (in both the preamble to the regulations and before the *Palomar* court) that the review of contractors' compliance with the regulations is solely a matter for CMS's performance evaluations of the contractors. However, as we noted here, CMS has been either unwilling or unable to rein in contractors even when they are in clear violation of the regulations. Thus, it appears that RAC reopening decisions will continue unchecked.

Additionally, there is every reason to fear that the RACs will reopen claims whether or not "good cause" exists under the Medicare regulations. The overwhelming majority of determinations finding absence of medical necessity are based on a lack of documentation. Since it will be harder to find documentation and testimony to support older claims, contingent fee contractors such as RACs have a much greater incentive to reopen and review claims that were paid more than a year in the past. The "good cause" requirement was therefore the sole source of protection against contractor fishing expeditions. The Palomar decision essentially reads that protection out of the regulations.