

# The Only Way to Fight and Win a Medicaid Audit – On its Own Turf

By MARK D. JICKA AND  
H. RUSTY COMLEY

Have you heard statements like these: *“It is not fair what Medicaid is doing . . . Medicaid’s rule conflicts with the standard of care . . . Medicaid’s definition conflicts with the American Medical Association’s and the Department of Health’s definitions. . . We barely make any money on Medicaid patients as it is”?*

If you know someone Medicaid audited, chances are that you have heard similar statements. Unfortunately, the truthfulness of these statements will not help win an administrative hearing or appeal challenging a Medicaid audit.

It is no secret that audits by both Medicare and Medicaid are on the rise. In fact, every state is now required to contract with a Recovery Audit Contractor (“RAC”) to help identify and recoup Medicaid overpayments. Mississippi Medicaid has hired PRGX Global, Inc. as its RAC for the state, and providers can expect a new wave of audits in addition to those traditionally performed by Medicaid’s Program Integrity department. PRGX’s audits will involve automated reviews of claims as well as unannounced site visits and medical record requests to perform

medical necessity determinations.

## Challenging the Audit

This article is not focused on preventing audits. Prevention is ideal, but it is not always possible. Even before the creation of RACs, Medicaid’s Program Integrity conducted audits, some of which were not preventable. For instance, the authors recently represented a provider in a Medicaid administrative hearing challenging an unavoidable audit. For years the provider had followed a certain billing procedure in an area where Medicaid policy was lacking. The provider had even consulted with ACS (Medicaid’s fiscal agent that operates Medicaid’s “Help” line) about the billing procedure at issue and had been told to initiate it, only to have Medicaid determine years later that its policy did not allow such billing. Fortunately, this provider won its administrative hearing, and the audit determination was reversed.

So what does a provider do when prevention efforts failed and it is facing a demand for reimbursement? Is an administrative hearing a viable option? It depends. Not every audit is worthy of an administrative hearing. Only a fraction of audits are viable candidates for an administrative hearing because the cost and risk

of losing are high. Providers who want to appeal an audit should first understand and consider the cost and risk involved, as well as the mindset, strategy, and legal standards necessary to win an administrative hearing or ensuing appeal to the courts.

In many circumstances, financial reality may counsel against pursuing an administrative hearing, especially if the provider does not have insurance that provides coverage for the defense of an audit. In other words, if Medicaid’s reimbursement demand is less than \$50,000 (an estimate of legal, expert, and appeal costs), or when obvious billing or other mistakes are apparent, it may be wise to negotiate a settlement and not have a hearing.

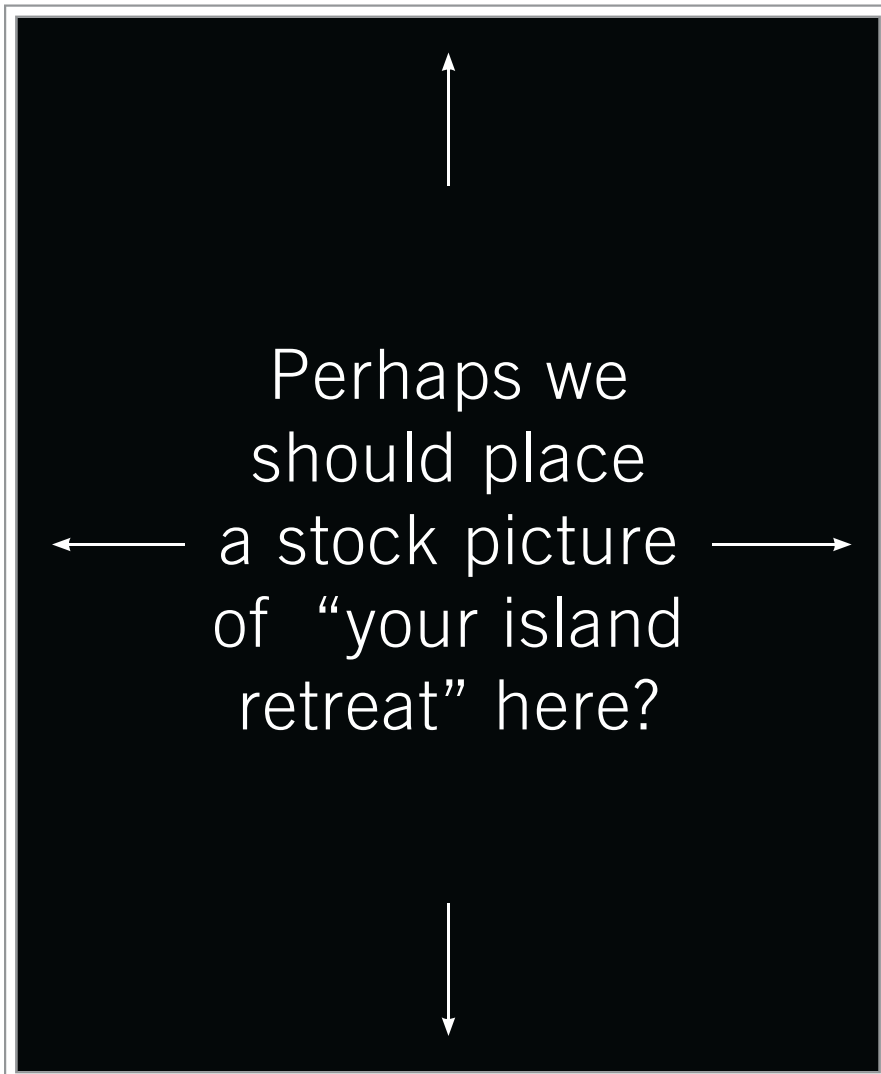
Obviously, the decision to pursue an administrative hearing becomes easier when Medicaid’s reimbursement demand exceeds \$50,000, which is not uncommon. For example, an audit of an ambulatory surgery center in a small town might find alleged overpayments of only several thousand dollars on the claims examined, but after those overpayments are statistically extrapolated to all of the surgery center’s claims over the audit period, Medicaid’s reimbursement demand could easily grow to \$200,000. Plus, a Medicaid audit can

cover the five-year period the provider is required to maintain records (RAC’s can audit 3 years back), yet Medicaid requires that any reimbursement be paid back in 12 months. So while it may have taken the provider multiple years to earn the amount sought in the audit, the provider must reimburse Medicaid within one year. Thus, for many providers, a reimbursement demand of \$200,000 can be devastating.

With respect to risk, providers should understand that the odds of winning an administrative hearing are less than even. This is not to say that favorable outcomes are impossible; they are just difficult and rare. The Administrative Law Judges (ALJ) that preside over the hearings must defer to Medicaid’s interpretations of its rules and policies, unless those interpretations can be shown to be arbitrary and capricious (*i.e.*, whimsical, without reason, disregarding facts, based upon will alone). Consequently, it is important for providers that seek to challenge audit findings to understand the limited legal standards discussed below that apply to an administrative hearing or appeal.

A provider opting to pursue an administrative hearing should generally

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by Mitchell Earrey

DECEMBER 2012

## Brunched Together

As a child, the word “December” would hit my ears, and my brain would think nothing but “Christmas.” Now, I don’t mean that I would be filled with the excitement of presents and surprises. I was more attached to the thrill of the Christmas season and the family traditions that were sure to take place each year just as they had the year before.

Decorating the house with my mother was my favorite undertaking for the holiday season. Pulling the giant tree down from the attic, unpacking all the delicate ornaments that my mother had collected over the years (including ones I had made in preschool), and strategically placing the lights and embellishments about the tree...the whole ritual was so fulfilling. However, the remaining tradition I enjoy the most is brunch with my family on Christmas morning. The only thing about brunch that has changed is pairing beverages with some of my favorite dishes.

My mother’s French toast is a Christmas brunch *requirement*. Those thick, doughy pieces of bread drenched in egg and seared in a hot skillet fill the entire house with the most delicious aroma. Only one thing could satiate my palate with that aroma wafting through my nostrils... Champagne. Hold on, though. Let’s not get ahead of ourselves quite yet. What shall I eat with my fantastic helping of mouthwatering French toast that

**The only thing about brunch that has changed is pairing beverages with some of my favorite dishes.**

has been blessed with a drizzle of maple syrup and gently dusted with powdered sugar? BACON!

At this point, one might wonder if I’m still going to pair Champagne with my French toast and bacon. You bet I am. However,

I am going to recommend a very specific Champagne to pair with this dish. The house of Veuve Clicquot makes an impressive and celebrated rosé style of Champagne that retails for about \$55. The cuvée (or blend) is predominantly comprised of Pinot Noir, which has a strength that plays well against the smoky flavors contributed by the bacon. The rest of the cuvée is Chardonnay and Pinot Munier. The Chardonnay component lends body and refinement along with complex aroma and spice. Finally, Pinot Munier enters the cast list with the task of balancing the structure of the Pinot Noir with the body of the Chardonnay. Even though the Pinot Munier has but a small cameo, the overall taste of the Champagne would be greatly altered without all three varietals present.

Now, I realize that true Champagne with brunch might not be a realistic or desirable purchase for everyone. An alternative sparkling rosé that is extremely versatile with food is a rosé of Tempranillo. Veuve Du Vernay is a French label that cranks out sparkling wines at a much lower price point than its counterparts located in the Champagne appellation. The Veuve Du Vernay rosé is 100% Tempranillo and retails for less than \$15. While Veuve Clicquot is much more luscious, Veuve Du Vernay is great for the price.

At any rate, having Christmas brunch in my mother’s home with my family is now the cognitive image my synapses conjure when the word “Christmas” hits my ear. Wherever you go or whatever your traditions are, I wish you and yours a happy holiday season.

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only do so if it is also prepared to take the second and third steps of appealing any adverse decision by the ALJ to Hinds County Chancery Court, and then, if necessary, to the Mississippi Supreme Court. Taking this long term view of challenging the audit is important for two reasons. First, costs, stress, and business interruption are at their peak during the administrative hearing since this is the stage where testimony is given, but they decrease during the subsequent appeals. Second, the chances of a favorable result improve slightly on appeal (closer to even odds), in large part because the provider has more time to examine the record and prepare its argument.

### The Necessary Mindset to Challenge an Audit

What kind of mindset is needed to win an administrative hearing? One that sets aside notions of fairness and opinions about the propriety of Medicaid’s rules or policies (like those statements at the beginning of this article), and instead focuses on beating Medicaid at its own game. To be successful, providers must accept the reality that they must defend themselves playing Medicaid’s game (following its appeal process), using its rules (policies, definitions, etc.), and playing on its turf (with the ALJ Medicaid selects for a hearing at its offices).

Even though a provider’s interpretation of a Medicaid definition, rule, or policy is medically accurate and consistent with respected associations (or even Medicare) does not matter and will not win the day. For example, the authors represented an ambulance service provider on an appeal to Hinds County Chancery Court after the provider lost an administrative hearing. In this case, Medicaid’s definition of a particular service conflicted with definitions of the same service promulgated by Medicare, the Mississippi Department of Health, and the American Medical Association. Did this make a difference? No. What won the appeal was the fact that Medicaid had not properly and consistently applied its definition (however incorrect) to the audit. In other words, the court found that Medicaid failed to play by its own rules.

### Strategy

Approaching an audit with the understanding that you must try to beat Medicaid at its own game is critical to evaluating whether it is sensible to pursue an administrative hearing in the first place. The decision to challenge Medicaid’s audit findings requires an in-depth, objective analysis of: (1) the provider’s own practices; (2) Medicaid’s rules and policies upon which the audit findings are based; (3) other policies and rules which are not relied on by Medicaid but could apply; (4) the manner in which Medicaid conducted the audit; and, (5) any claims where Medicaid audited the provider but did not find an overpayment.

There is a good chance that mistakes were made during the audit, and this approach will uncover them. After any mis-

takes are identified, a legal strategy can be developed to increase the chance of winning the hearing or negotiating a favorable settlement.

### Legal Standards

Providers must also recognize that even with the right mindset and strategy, the law provides for a limited review of Medicaid’s audit findings, whether by the ALJ or the courts. The judges can only look at the record (testimony, documents, etc.) presented during the administrative hearing.

The two legal standards most likely to apply to a Medicaid audit are that the findings can only be reversed if they are: (1) unsupported by substantial evidence or (2) arbitrary and capricious. Neither of these are low hurdles for a provider. In a recent opinion reversing a Medicaid audit determination for the ambulance provider discussed above, Chancery Court Judge William Singletary acknowledged that it is rare and difficult to reverse a Medicaid finding:

This Court is ever mindful of the great deference to be afforded to an agency in the interpretation and application of its own rules and regulations. However, this Court is also mindful that this deference is not a rubber stamp and a meaningful review of the record is essential. After careful review, this Court finds that the Final Decision of the DOM is of the rare type that does qualify as a ruling to be vacated or set aside.

In short, neither an ALJ nor any other judge can change Medicaid policy. He or she can only determine whether the policy has been properly followed. In the case of the ambulance provider, the appeal was successful because the provider was able to show that Medicaid had inconsistently **or arbitrarily and capriciously** interpreted and enforced its own policies.

### Beating an Audit is Not Impossible

It is not impossible to beat a Medicaid audit. With the right mindset and a strategy that identifies the audit’s mistakes and places the agency in the crosshairs of the applicable legal standard, it can be done! But don’t wait to seek assistance after learning of an audit. Medicaid has done 50 percent or more of the work necessary to take the provider’s money back before the provider learns about the audit. Providers have to play catch up. It takes time to identify audit mistakes, applicable Medicaid policies (especially those that Medicaid fails to identify), and a sound legal strategy. Beginning this process immediately after notice of an audit can help secure a favorable settlement or make the difference between winning and losing an administrative hearing.



Mark Jicka and Rusty Comley are litigators at Watkins & Eager, PLLC in Jackson, who defend providers in all types of Medicaid and Medicare audits, as well as in healthcare related civil or criminal prosecutions. They can be reached at mjicka@watkinseager.com and rcomley@watkinseager.com.