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Sovereign Immunity Extended to Medicare Contractors

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Win or lose, one out of two clients ask this question after an ALJ hearing: Can we sue the contractors to recoup our legal and other costs? With the recent decision from the United States Court of Appeals for the Third Circuit, the routine negative response is now, unfortunately, set in stone. In [Nichole Medical Equipment & Supply, Inc. v. TriCenturion, Inc. and NHIC Corp. \(Case No. 11-2132\) \[PDF\]](#) issued on September 13, 2012, a DMEPOS supplier that consequently went out of business sued the Medicare contractor that conducted the audit and the Medicare contractor that recouped the overpayment. Despite arguing that these rogue Medicare contractors did not comply with CMS procedures and Medicare law, the DMEPOS supplier lost in both levels of the federal court system. Not surprisingly, the appellate court ruled that (1) the DMEPOS supplier did not exhaust its administrative remedies by raising these tort and contract issues in the Medicare claims appeal process, and (2) Medicare contractors are entitled to "official immunity." Such a holding is consistent with other court decisions that have held that providers/suppliers cannot sue their Medicare contractors for fraud outside the administrative review process. See [Bodimetric Health Services, Inc. v. Aetna Life & Casualty](#), 903 F.2d 480 (7th Cir. 1990).

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