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CLIENT ADVISORY

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First Case Interpreting 60-Day Rule Sides with Government on Meaning of "Identified" Overpayments

On August 3, 2015, the Southern District of New York issued the first judicial opinion in a False Claims Act case brought under CMS' "60-day rule," Kane v. Healthfirst, Inc., et al.[1] The court denied the defendant hospitals' motion to dismiss, finding that the government stated a claim under the False Claims Act ("FCA") even though the hospitals had repaid the overpayments at issue. The decision is a victory for the government, which took a hard-line position based on the 60-day rule that the hospitals' retention of the overpayments for up to two years violated the FCA. To health care providers and their counsel, this case is instructive of the government's increased enforcement power under the FCA to go after providers who "put their head in the sand" and fail to fully investigate and correct payment mistakes in a timely manner.

Background

The 60-day rule requires health care providers to report and return "identified" overpayments within 60 days or face liability under the FCA. The rule was enacted as part of the Affordable Care Act ("ACA") in 2010, and CMS published a proposed rule in February 2012. Even though the proposed rule has not yet been finalized,[2] the government's intervention in the Kane case demonstrates its power to enforce the 60-day deadline for returning overpayments under the statutory provisions of the FCA.

In the Kane case, a software glitch caused three hospitals in the Continuum Health Partners system to submit erroneous claims to the New York Medicaid program. A hospital employee (Kane, the relator) was tasked with performing an internal investigation to determine the extent of the problem. On February 4, 2011, Kane sent an email to Continuum executives with a spreadsheet listing 900 claims that were improperly billed to New York Medicaid, resulting in potential overpayments of over $1 million. The hospitals made some repayments to New York Medicaid in "batches," but did not make the bulk of the repayments until March 2013 (after being served with a Civil Investigative Demand from the Department of Justice). The government alleged that the hospitals violated the 60-day rule by not returning the overpayments within 60 days of Kane's email, claiming that the hospitals "fraudulently delayed" their repayments for up to two years. The hospitals argued that Kane's report did not "identify" any overpayments, but instead provided a list of claims that were potentially affected by the coding error, and that notice of potential overpayments is distinct from "identification" of overpayments.

The Meaning of "Identified"—According to the Kane Decision

The court acknowledged that Congress did not define the word "identified" when it enacted the 60-day rule, and that because no other court has weighed in, the Kane case "present[ed] a novel question of statutory construction."[3] The defendant hospitals urged the court to adopt a definition of "identified" "that means classified with certainty."[4] The government took the position that a person has "identified" an overpayment if they are "put on notice that a certain claim may have been overpaid."[5]

In its analysis, the court looked to the plain meaning of "identified," the legislative history of the ACA and FERA amendments to the FCA, the purpose of the 60-day rule provision, the results of adopting each party's position, and CMS' interpretation of the statute. The court sided with the government, stating that "[t]o define 'identified' such that the sixty day clock begins ticking when a provider is put on notice of a potential overpayment, rather than the moment when an overpayment is conclusively ascertained, is compatible with the legislative history of the FCA and the FERA highlighted by the Government."[6] The court stated that adopting the hospitals' interpretation of "identified" "would make it all but impossible to enforce the reverse false claims provision of the FCA in the arena of healthcare fraud."[7]

The court realized that its decision would "impose a demanding standard of compliance," but stated that the "ACA itself contains no language to temper or qualify this unforgiving rule."[8] But, the court indicated that prosecutorial discretion "would counsel against the institution of enforcement actions aimed at well-intentioned healthcare providers working with reasonable haste to address erroneous overpayments" but who fail to meet the 60-day deadline.[9]

What should providers do?

Health care providers and their counsel have been waiting more definitive guidance from CMS on the meaning of "identified" overpayments through the rulemaking process, but the Kane case demonstrates the government's ability to successfully litigate FCA cases based on the statutory 60-day rule alone. The Kane decision is not binding precedent, but as the first judicial interpretation of the 60-day rule, its reasoning may be adopted by other courts and may lead the Department of Justice to intervene in more qui tam cases based on violations of the 60-day rule.

The government's power to enforce the FCA against providers who fail to act in a timely manner is strong, and the best way to avoid being a defendant in a case like Kane is to voluntarily report and return overpayments within 60 days.

If you have questions about the Kane decision and how it impacts you or your organization, or need assistance conducting an internal investigation or making repayments to the government, please contact a member of HDJN's Compliance team:

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1 Kane v. Healthfirst, Inc., Civil Action No. 11-2325 (ER), Doc. 63 (S.D.N.Y. Aug. 3, 2015).
2 CMS delayed publication of the final rule until February 2016.
3 Id. at 17.
4 Id.
5 Id.
6 Id. at 23.
7 Id. at 26.
8 Id. at 25.
9 Id. at 26.

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