



Health Care Litigation / Government & Internal Investigations ADVISORY ■

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Important Developments on Overpayment Liability Under the False Claims Act

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On August 3, 2015, the U.S. District Court for the Southern District of New York issued the first judicial opinion interpreting the Affordable Care Act's "60-day overpayment rule," which requires providers to "report and return" an overpayment of Medicare or Medicaid funds to the appropriate government body within 60 days "after the date on which the overpayment was identified." *U.S. ex rel. Kane v. Healthfirst, Inc. et al.*, No. 11 CIV 2325, 2015 U.S. Dist. LEXIS 101778 (S.D.N.Y. Aug. 3, 2015); 42 U.S.C. § 1320a.7k(d)(1)–(3). Under the False Claims Act (FCA), any provider that knowingly fails to report and return an overpayment within the 60-day time period is in violation of the FCA's reverse false claims act provision and may be liable for a penalty between \$5,500 to \$11,000 for each false claim. The decision is the first to address what it means to "identify" an overpayment and to define the bounds of the 60-day rule under the FCA. The potential implications of the decision are significant for compliance purposes.

The case involves several New York hospitals, all operated by Continuum Health Partners, Inc., and allegations that each facility submitted erroneous claims for payment to Medicaid due to a glitch in Healthfirst, Inc.'s billing software. Specifically, the relator and the government claim that Continuum violated the FCA by failing to report and repay overpayments within a 60-day period of first identifying them. The relator, a former Continuum employee, identified potential overpayments in February 2011 during an audit of claims for potential billing errors that may have resulted from the software glitch. Within days of submitting his report on the potential overpayments, the relator was terminated. He subsequently filed the qui tam action against Continuum in which the government later intervened.

The relator and the government claimed that Continuum identified the overpayments, within the meaning of the FCA, in February 2011 when the relator initially provided the report to Continuum managers and executives. They claimed this put Continuum on notice of the overpayments, triggering Continuum's 60-day obligation to report and return any funds owed to the government. Continuum contended there was no obligation under the rule until it determined each overpayment with certainty. Continuum further argued that over the course of the next two years, it went through the process of investigating, identifying and returning the overpayments in the relator's report, approximately only half of which were, in fact, overpayments.

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In an order denying Continuum's motion to dismiss, the court ruled that "identification" of overpayments, which triggers the 60-day repayment obligation, occurs when a company is put "on notice" of potential overpayments, rejecting Continuum's argument that "identified" means when the overpayment is "known with certainty." While Continuum urged the court to consider the practicality of such a standard for providers, particularly given that it often takes longer than 60 days from notice to reconcile potential overpayments, the court suggested a reliance on "prosecutorial discretion would counsel against the institution of enforcement actions aimed at well-intentioned healthcare providers working with reasonable haste to address erroneous overpayments. Such actions would be inconsistent with the spirit of the law and would be unlikely to succeed."

The decision in the Continuum case essentially interprets the 60-day rule in the same way the Centers for Medicare & Medicaid Services (CMS) interpreted the statute in its proposed rule on overpayments for Part C providers. The decision, thus, provides support for CMS to move forward with issuance of the final overpayment rule for Part C providers as proposed.

A day after the Continuum decision, the U.S. Attorney's Office for the Northern District of Georgia announced a \$6.88 million settlement reached with Pediatric Services of America Healthcare and its affiliates (PSA) to resolve claims that PSA failed to report and return overpayments. This is the first settlement under the FCA involving a provider's failure to investigate credit balances on its books to determine whether they resulted from overpayments. In a statement released by the Department of Justice, U.S. Attorney John Horn stated, "Participants in federal health care programs are required to actively investigate whether they have received overpayments and, if so, promptly return the overpayments. This settlement is the first of its kind and reflects the serious obligations of health care providers to be responsible stewards of public health funds." Collaborating on the investigation, U.S. Attorney for the Southern District of Georgia Edward J. Tarver added, "The failure to report and return a known overpayment is a serious offense that ultimately drives up the costs of health care for all of us. This U.S. Attorney's Office and its federal and state law enforcement partners will continue to work together to ensure that health care providers, who receive millions of tax dollars every year, play by the rules and do not waste critical program funds."

As these recent decisions indicate, the failure to report and return overpayments is and will continue to be a focus area of enforcement for the government. In order to maintain proactive compliance, it is vitally important that providers diligently and promptly conduct investigations related to any potential overpayments. Notably, federal enforcement agencies appear to view credit balances attributable to federal health care program patients for any reason, including the Medicare Secondary Payer rule and duplicate payments, as indicative of overpayments. Therefore, it would be prudent for providers to review their procedures for timely identification and investigation of such credit balances and the prompt refunding of any balances that result from such overpayments.

Moreover, while the Southern District of New York has provided context for what it means to identify an overpayment, it is not entirely clear when a provider is deemed on notice of an overpayment. Accordingly, providers should thoroughly document the measures they take to audit for overpayments and act with reasonable diligence to promptly refund any overpayments that are identified.

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