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Federal Court Rejects Health System's Efforts to Dismiss 60-Day Rule Suit

On August 3, 2015, the United States District Court in the Southern District of New York issued a long-awaited [opinion and order](#) rejecting a motion to dismiss filed by the defendants in *U.S. ex rel. Kane v. Continuum Health Partners, Inc., et al.* (alternately known as *Kane v. Healthfirst, Inc., et al.*). The case, which we previously covered [here](#), [here](#), and [here](#), is the first publicly unsealed whistleblower case interpreting the Patient Protection and Affordable Care Act's (PPACA) so-called "60-Day Rule." The 60-Day Rule subjects health care providers to potential liability under the federal False Claims Act (FCA) for failing to report and return an overpayment of Medicare or Medicaid funds within 60 days of the date on which such overpayments are "identified."

The central issue in the case, the subject of the defendants' motion to dismiss and the Court's opinion and order, concerns the definition of "identify" for purposes of the 60-Day Rule, as that term is not defined by the PPACA. The Court stated that "the term 'identified' has no 'plain meaning' as it is used in the [PP]ACA" and looked to the statutory scheme as a whole to determine the meaning of that term within the context of the 60-Day Rule. After considering the legislative history and purpose of the 60-Day Rule, the Court sided with the Department of Justice and held that an overpayment is "identified" when a provider is put on notice of a potential overpayment rather than the moment when an overpayment is conclusively ascertained. The Court stated that the legislative history indicates that Congress intended for FCA liability to attach with an established duty to repay the government, even if the exact amount due is not yet determined.

The Court acknowledged that this holding imposes a stringent, and in certain cases potentially unworkable, burden on providers to comply with the PPACA and the 60-Day Rule. It stated that to rule otherwise would create an incentive for providers to delay determining the exact amount of overpayments due to the government.

It is important to note that this decision is only a ruling on the defendants' motion to dismiss the government's claims—not a final decision of the Court regarding FCA liability—but the holding may reflect in part the Court's unwillingness to reward the defendants for what it perceived as undue delays in returning the overpayments at issue. As a result, it remains to be seen how influential this decision will be for regulators and courts considering FCA claims against health care providers for overpayments and the impact the decision will have on the Centers for Medicare & Medicaid Services' (CMS) 2012 proposed rule for Medicare Part A and Part B overpayments. CMS has delayed the deadline for publication of a final rule until February 1, 2016.

We will continue to monitor developments in this case and CMS's rulemaking regarding the 60-Day Rule. In the meantime, health care providers may wish to consult with legal counsel as soon as possible in the event of a potential identification of an overpayment of Medicare or Medicaid funds.

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