



Health Care Litigation / Government & Internal Investigations ADVISORY ■

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Raising *Kane*: CMS's 60-Day Rule Commands More Than Treble Damages

By *Frank Sheeder, Wade Pearson Miller, and Kimyatta McClary*

In August 2015, we published a [client advisory](#) on the first judicial opinion interpreting the Affordable Care Act's (ACA) "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 (S.D.N.Y. Aug. 3, 2015); 42 U.S.C. § 1320a-7k(d)(1)-(3).¹ Since then, the Centers for Medicare & Medicaid Services (CMS) has issued a Final Rule relating to reporting and returning identified overpayments. Failure to follow this rule can subject a provider to the provisions of the federal False Claims Act (FCA).

The *Kane* decision was particularly noteworthy because it was the first to address what it means to "identify" an overpayment and to potentially define the bounds of the 60-day repayment rule under the FCA. 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 the provider's argument that "identified" means when the overpayment is "known with certainty."

Now a year later, Mount Sinai Health System, one of the defendants in the *Kane* litigation, has agreed to pay \$3 million to resolve allegations it violated the FCA by failing to report and return Medicaid overpayments within 60 days of when it identified them. This marks the first settlement to resolve FCA liability under the 60-day rule. The settlement was more than triple the nearly \$850,000 principal amount that Mount Sinai's hospitals repaid after learning about the inadvertent double-billing of Medicaid.

In *Kane*, the federal district court interpreted the 60-day rule in the same way that CMS previously interpreted the ACA provision in its Proposed Rule on overpayments for Part A and B providers. The decision likely provided support for CMS to move forward with the issuance of the final overpayments rule in February of this year; it took effect in March.

The CMS Final Rule provides further clarity on what it means to "identify" and defines "identification" as when a person "has or should have, through the exercise of reasonable diligence," determined and quantified the amount of the overpayment. This definition resolves the ambiguity in the Proposed Rule about whether the time spent investigating the amount of a potential overpayment would toll the 60-day clock or count toward the 60 days.

¹ 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, treble damages and other remedies.

While the Final Rule is relatively short, it is preceded by a 200-page preamble that gives insight into CMS's positions on some key issues. First, it says that "reasonable diligence" includes "both proactive compliance activities conducted in good faith by qualified individuals to monitor for the receipt of overpayments and investigations conducted in good faith and in a timely manner by qualified individuals in response to obtaining credible information of a potential overpayment." In light of this, CMS could challenge a provider's diligence by alleging that it did not have an effective compliance program. Second, CMS has stated that the 60-day period begins when reasonable diligence is completed or the provider received credible information about the potential overpayment but failed to conduct reasonable diligence. Such diligence includes identifying and quantifying the overpayment. Third, there are limits to the diligence period. CMS has set six months as the standard for timely investigation, which provides for a total of eight months between the receipt of notice and the reporting and return of any overpayment. Fourth, the look-back period for potential overpayments is six years, which is more favorable than the 10-year period in the previous proposed rule.

The recent first-of-its-kind settlement in the *Kane* litigation and CMS's Final Rule confirm that the failure to report and return overpayments is, and will continue to be, a focus for government enforcers. In order to maintain proactive compliance, it is vitally important that providers diligently and promptly conduct investigations into 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 potential overpayments that are subject to these standards. Therefore, it would be prudent for providers to review both their potential overpayments procedures and the documentation of their compliance efforts. Providers that do not have efficient and effective processes for preventing, identifying, quantifying, reporting and returning overpayments with dispatch now face heightened risks under the FCA.

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If you have any questions, or would like additional information, please contact any of the following:

George Abney
404.881.7980
george.abney@alston.com

Thomas E. Crocker
202.239.3318
thomas.crocker@alston.com

Jennifer S. Kozar
212.210.9440
jennifer.kozar@alston.com

Samuel R. Rutherford
404.881.4454
sam.rutherford@alston.com

Randall L. Allen
404.881.7196
randall.allen@alston.com

Christina Hull Eikhoff
404.881.4496
christy.eikhoff@alston.com

John L. Latham
404.881.7915
john.latham@alston.com

Theodore J. Sawicki
404.881.7639
tod.sawicki@alston.com

Joshua L. Becker
404.881.4732
josh.becker@alston.com

Rodney J. Ganske
404.881.4996
rod.ganske@alston.com

Dawnmarie R. Matlock
404.881.4253
dawnmarie.matlock@alston.com

Eileen M.G. Scofield
404.881.7375
eileen.scofield@alston.com

Jeffrey A. Belkin
404.881.7388
jeff.belkin@alston.com

Mary C. Gill
404.881.7276
mary.gill@alston.com

Kimyatta E. McClary
404.881.7982
kimyatta.mcclary@alston.com

Frank Sheeder
214.922.3420
frank.sheeder@alston.com

Donna P. Bergeson
404.881.7278
donna.bergeson@alston.com

James A. Harvey
404.881.7328
jim.harvey@alston.com

Wade Pearson Miller
404.881.4971
wade.miller@alston.com

Brian Stimson
404.881.4972
brian.stimson@alston.com

Debra D. Bernstein
404.881.4476
debra.bernstein@alston.com

H. Douglas Hinson
404.881.7590
doug.hinson@alston.com

William R. Mitchelson
404.881.7661
mitch.mitchelson@alston.com

Robert D. Stone
404.881.7270
rob.stone@alston.com

Michael L. Brown
404.881.7589
mike.brown@alston.com

J. Andrew Howard
213.576.1057
andy.howard@alston.com

Bruce Pasfield
202.239.3585
bruce.pasfield@alston.com

Jason M. Waite
202.239.3455
jason.waite@alston.com

Cathy L. Burgess
202.239.3648
cathy.burgess@alston.com

Brett D. Jaffe
212.210.9547
brett.jaffe@alston.com

Kimberly K. Peretti
202.239.3720
kimberly.peretti@alston.com

Kyle G.A. Wallace
404.881.7808
kyle.wallace@alston.com

Angela T. Burnette
404.881.7665
angie.burnette@alston.com

Daniel G. Jarcho
202.239.3254
daniel.jarcho@alston.com

William T. Plybon
404.881.7893
bill.plybon@alston.com

Kenneth G. Weigel
202.239.3431
ken.weigel@alston.com

Mark T. Calloway
704.444.1089
mark.calloway@alston.com

William H. Jordan
404.881.7850
bill.jordan@alston.com

Jason Popp
404.881.4753
jason.popp@alston.com

Michelle A. Williams
404.881.7594
704.444.1541
michelle.williams@alston.com

Craig Carpenito
212.210.9582
craig.carpenito@alston.com

Edward T. Kang
202.239.3728
edward.kang@alston.com

T.C. Spencer Pryor
404.881.7978
spence.pryor@alston.com

Steven M. Collins
404.881.7149
steve.collins@alston.com

Louis A. Karasik
213.576.1148
lou.karasik@alston.com

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WWW.ALSTON.COM

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ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777

BEIJING: Hanwei Plaza West Wing ■ Suite 21B2 ■ No. 7 Guanghua Road ■ Chaoyang District ■ Beijing, 100004 CN ■ +86 10 8592 7500

BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719

CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111

DALLAS: 2828 North Harwood Street ■ 18th Floor ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899

LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213.576.1100

NEW YORK: 90 Park Avenue ■ 15th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444

RESEARCH TRIANGLE: 4721 Emperor Blvd. ■ Suite 400 ■ Durham, North Carolina, USA, 27703-85802 ■ 919.862.2200 ■ Fax: 919.862.2260

SILICON VALLEY: 1950 University Avenue ■ 5th Floor ■ East Palo Alto, California, USA, 94303-2282 ■ 650.838.2000 ■ Fax: 650.838.2001

WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.239.3300 ■ Fax: 202.239.3333