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Providers Be Warned: Court Applies ACA's 60-Day "Report and Return" Rule Even When the Precise Amount of Overpayments Is Unknown

by Jeffrey D. Grossman

In 2010, Congress enacted the Patient Protection and Affordable Care Act (ACA). One of the ACA's key provisions strengthened the government's ability to recover from providers any overpayments which result from disputed coding and billing procedures. 42 U.S.C. § 1320a-7k(d)(1) – (3). The statute set a deadline: providers must report and return overpayments within 60 days of the "date on which the overpayment was identified." And the statute made the failure to timely "report and return" a potential violation under the False Claims Act (FCA). Violations of the FCA may burden a provider with onerous financial liabilities, including triple the amount of the overpayments themselves and a separate penalty for each improperly retained overpayment.

While the ACA clearly established a 60-day period for "identified" overpayments to be reported and returned, Congress did not define in the statute the term "identified." This absence left medical providers wondering in certain circumstances when an overpayment would be considered "identified" by the government and thus the obligation to report and return would be triggered. Obviously, an overpayment actually known to a provider is "identified" as such, but could a provider wait until it had identified an overpayment with *certainty* before the ACA's obligation to report and return within 60 days started?

Earlier this summer, the U.S. District Court for the Southern District of New York answered this important question in the negative and established precedent to guide other courts and providers. In the case of *Kane v. Healthfirst, Inc.*, et al., U.S.D.C. (S.D.N.Y) (Case No. 1:11-cv-02325), the plaintiff brought a *qui tam* action against certain providers and an insurance plan, contending that a glitch in the plan's software relating to payments to providers for Medicare Advantage claims miscoded remittance forms which the plan sent to the providers. These forms erroneously permitted the providers to seek additional payments from Medicaid. The provider-defendants allegedly billed and received these additional payments from Medicaid, which they retained. The United States and New York State intervened in the case and asserted that the providers violated the False Claims Act by failing to report and return the additional Medicaid payments within the 60-day period following the providers' identification of the overpayments.

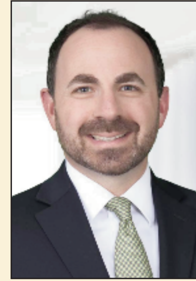
At the heart of this particular claim was a spreadsheet prepared by plaintiff Kane during his employment with a provider-defendant. The spreadsheet allegedly demonstrated claims that were or could be considered overpayments the provider received as a result of the software

glitch. As it turned out, hundreds of the claims Kane listed on his spreadsheet had not actually been overpaid; however, nearly 500 were, in fact, overpayments.

The provider-defendants argued to the court that Congress could not have intended for Kane's spreadsheet — the identification of *potential* overpayments — to trigger the 60-day period, explaining that such an interpretation would impose an unworkable burden. Instead, the defendants asked the court to interpret the term "identified" as requiring the provider to know with certainty the overpayments made, such that the specific amounts could be reported and returned within 60 days. The court rejected this interpretation, reasoning that it would allow providers to simply ignore potential overpayments and subvert the law. Instead, the court held that the duty to report and return would arise once overpayments were "identified," and at that point, the 60-day period would begin to run, even where the precise amount due had not yet been determined. The court noted that its holding was consistent with an interpretive rule adopted by the Centers for Medicare and Medicaid Services (CMS), that a Medicare Advantage organization or Part D sponsor "has identified an overpayment when the [entity] has determined, or should have determined through the exercise of reasonable diligence, that [it] has received an overpayment[,]" citing 42 C.F.R. §§ 422.326(c), 423.360(c), as well as with CMS's proposed but not adopted rule with similar language, relating to Medicare providers and supplies. That proposed rule is opposed by provider representatives and remains pending.

The court did at least acknowledge that a strict interpretation of the word "identified" created some risk of the government harshly treating a well-intentioned provider that cannot, despite the exercise of diligence, comprehensively report its findings and return all overpayments within the requisite 60-day period. To place that risk into context, the court noted that in a "reverse false claims context," the obligation to return overpayments must be "knowingly concealed or knowingly and improperly avoided or decreased" in order to trigger an FCA violation. Also, the court suggested, the prosecutorial discretion afforded to the government should aid a responsible, well-intentioned provider that has diligently worked with reasonable haste to address erroneous overpayments and yet is unable to complete an audit of potential overpayments within 60 days.

The important takeaway from *Kane* is that providers and payers that simply identify overpayments from a federal program, even where the amounts are yet to be determined, are most likely required to report and return the overpayments within 60 days. Allowing 60 days to lapse while an identified overpayment evolves into a specifically identifiable amount carries a serious risk of violating the ACA and, potentially, the False Claims Act. If circumstances are such that a diligent audit conducted with reasonable haste cannot be completed within 60 days, a report should be presented to the appropriate administrative agency within the 60-day period along with a clear timeline for completing the audit and returning the overpayments. ■



To discuss how ACA's 60-Day "Report and Return" Rule will affect your organization, contact Jeffrey D. Grossman (jgrossman@stradley.com or 215.564.8061).

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