



Alerts

Seventh Circuit Upholds Criminal Conviction Under the Anti-Kickback Statute Utilizing a Broad Definition of "Refer"

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Health Law Alert

On February 19, 2014, Dr. Kamal Patel was convicted on six counts of violating the Anti-Kickback Statute ("AKS") and one count of conspiracy to violate the AKS. He appealed the judgment, and on February 10, 2015, Dr. Patel's conviction was upheld by the Seventh Circuit Court of Appeals. (*U.S. v. Patel*, Seventh Circuit Court of Appeals, No. 14-2607, February 10, 2015). The Seventh Circuit, which has jurisdiction over Illinois, Indiana and Wisconsin, held that, by accepting a cash payment from Grand Home Health Care ("Grand") in exchange for every patient Dr. Patel "referred" to Grand, he was receiving kickbacks in violation of the AKS.

The AKS, 42 U.S.C §§ 1320a-7b, is designed to prevent Medicare and Medicaid fraud. It expressly prohibits physicians from receiving any remuneration in return for referring an individual to a person for the furnishing of any item or service for which payment may be made under a Federal health care program. The focus of the Seventh Circuit's analysis was on whether or not Dr. Patel "referred" patients to Grand.

Dr. Patel argued that he was not "referring" patients in the manner prohibited by the AKS. Dr. Patel prescribed home health care services to approximately ten of his patients per month. Grand was one of 10-20 home health providers used by Patel's patients.

Dr. Patel would make the initial determination that a patient required home health care services, and then the patient and his or her family would discuss home health care options with Dr. Patel's medical assistant. His assistant was not informed of which provider to recommend. Each patient was provided with a list of home health providers and their brochures. Each patient independently chose a provider. If a patient chose Grand, Dr. Patel would complete Grand's certification for new patients and re-certification papers for Grand's existing patients, after which he would receive a sum of money from Grand.

In his appeal, Dr. Patel argued that, in the context of the AKS, the word "refer" means to personally recommend to a patient that the patient seek care from a particular entity. Patel contended that his patients independently chose their home care providers. The government argued for a broader reading of the word "refer," which includes a doctor's authorization of care by a particular provider. The Seventh Circuit rejected Dr. Patel's argument, choosing a more expansive definition of the term "refer" and held that certifications and re-certifications are "referrals" under the AKS.

The Court reasoned that it does not matter who first identifies the home care provider. The physician acts as a gatekeeper, because without his or her approval, the patients could not receive home care services from the provider that the patient selected. What matters is whether the physician facilitates or authorizes that choice. In this case, the court reasoned that Dr. Patel facilitated Grand's care of his patients by completing its certification/recertification papers and then received cash payments.

This decision reinforces the expansive reading of the term "refer." It is important to evaluate any existing or future arrangements in which a physician is directly involved in facilitating a patient's admission to or enrollment in any health care service. If he or she is, it is very likely that any payments by the service provider to the physician would be held to be a kickback in return for facilitating the service.



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