

Federal court rejects government's evidence of Anti-Kickback Statute violations

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In November, the U.S. District Court for the Northern District of Georgia entered an order¹ critiquing the government's lack of evidence in a criminal case alleging violations of the Anti-Kickback Statute (AKS).

Even if the hospital asked "or even badgered" the clinic to refer more patients, that did not prove an Anti-Kickback Statute violation.

The court's analysis provides several key takeaways for potential AKS and False Claims Act defendants and other regulated entities:

- **Government alleged "sham" contracts were meant to disguise kickbacks.** The government alleged that a hospital entered into "sham" contracts for management and translation services with a community obstetrics clinic to disguise kickbacks for referrals, claiming that many of the contracted services were not needed, not justifiable, duplicative, substandard, or simply not rendered. The government was seeking to introduce co-conspirator statements in the case and to do so it had to show by a preponderance of evidence that a conspiracy existed. In assessing whether the government had adequately demonstrated the existence of a conspiracy to violate the AKS, the court made several findings leading to its conclusion that the government's evidence could not prove defendants acted "willfully."
- **Application of AKS "one-purpose rule" is "unsettled and unclear."** The government argued that under the judicially-created "one-purpose rule," if the transaction was in any way meant to reward or increase referrals, it violated the AKS, regardless of whether the payments were legitimate, fair-market value, or even if the transaction met a statutory safe harbor. The court went through a lengthy analysis of AKS cases before concluding that application of the one-purpose rule was "unsettled and unclear." The court even cited several articles showing that "learned healthcare lawyers" advising

clients in the healthcare industry disagreed on the appropriate application. Thus, even if the government successfully proved that one of the purposes of the contracts was to induce referrals, that would not be enough to show the defendants acted willfully in violation of the AKS, given the ambiguity in the rule's application. "Rather, the government must show that the individuals in question must have known they were breaking the law beyond knowing that one purpose of the deal was to induce referrals."

- **PowerPoint slides did not prove knowledge of wrongdoing.** The government argued that all of the defendants had attended training sessions about the AKS and were thus aware of its requirements —citing more than 100 pages of slide decks produced in the case. The court found that the government had not developed any testimony or context for the slides and therefore failed to show that the training would have put the defendants on notice that the contracts violated the AKS. The court again noted the ambiguity in the statute's application, explaining that the instructor may have, in good faith, believed the one-purpose rule didn't apply to the contracts.
- **Discussions of expected referrals are "common sense" for hospitals.** The government also told the court it expected testimony that during negotiations of the contracts, administrators at the hospital asked the clinic how many referrals it could expect to justify the expense of the agreements and "focused only on obtaining and increasing volume" from the clinic. It also expected testimony that the parties had ongoing conversations about patient volume but no ongoing conversations about the quality of services provided by the clinic. The court found these discussions of patient volumes unpersuasive because it was "common sense" for a hospital to want to know its expected patient volume "for numerous reasons that have nothing to do with violating the AKS." It also said that simply encouraging patient referrals does not violate the law. So, even if the hospital asked "or even badgered" the clinic to refer more patients, that did not prove an AKS violation.
- **Contracts were not "pretextual" where "valuable services" were provided.** The government also argued that the contracts were "pretextual" and meant to disguise the kickbacks. But, the

court found “ample evidence showing that [the clinic] provided valuable services under the contracts and no evidence that the contracts were a sham.”

- **Creating an “attractive” referral destination does not violate the law.** The court further held that when a hospital needs a service, it is not prohibited from selecting an entity to provide those services simply because that entity also can refer patients. The court added that creating an “attractive place to refer patients” by providing more services through such contracts does not violate the law.
- **Evidence that contracts were vetted by counsel helped show lack of intent.** The defendants are also raising advice-of-counsel and a safe harbor affirmative defense in the case, although it does not appear that either affirmative defense is essential to the court’s decision. However, the court did find persuasive the fact that attorneys for both the hospital and clinic vetted the contracts before they were signed, concluding that “[d]efendants had a reasonable basis to believe that the contractual arrangements under the terms of the contracts were legal.” The court held that without evidence that the contracts were not performed or that the payments were more than fair market value, it could not conclude that

any of the defendants had reason to believe they were violating the law.

Takeaways for False Claims Act litigation

Because a claim for services that results from a violation of the AKS constitutes a false or fraudulent claim for purposes of the False Claims Act, alleged AKS violations often serve as the basis for False Claims Act lawsuits. In such suits, courts routinely hold the government to the same burden of proof as was applied in *Holland* — requiring the government to prove an AKS violation by a preponderance of evidence.

The key takeaway from this decision is that in False Claims Act suits predicated on alleged AKS violations, the government must show by a preponderance of evidence that the defendants knew “they were breaking the law beyond knowing that one purpose of the deal was to induce referrals.” Discussing patient volumes, entering into contracts for services, and creating an attractive destination for referrals, knowing these measures would induce referrals, is not enough.

Notes

¹ <https://bit.ly/3Fz4qYC>

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