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7th Circuit Court of Appeals Creates Expansive Definition of "Referral" Under the Anti-Kickback Statute

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On February 10, 2015, in ***United States v. Patel*** (Case No. 14-2607), the ***Seventh Circuit Court of Appeals*** ruled that a physician makes a "***referral***" within the meaning of the federal health care programs ***Anti-Kickback Statute (AKS)*** when the physician makes a certification and recertification for ***Medicare***-reimbursed home health services even without playing any role in the patient's selection of the provider. This expansive definition could give broad leeway to prosecutors and will make it more difficult for counsel to advise clients on the scope of the AKS.

Patel was convicted in February 2014 by the Northern District Court of Illinois (J. Dow) for receiving kickbacks from Grand Home Health Care (Grand) in the form of $400 cash for each original home health care certification (CMS Form 485) and $300 for each recertification. It was undisputed in the case that all of the patients needed home health services. Importantly, Grand was one of many home health agencies that Patel's patients used. As explained by the court, the process used in Patel's office was the following:

> Patel made the initial determination that the patient required home health care services. . . . After this initial determination was made, . . . Patel did not personally discuss the selection of providers with patients or their family members, either as an initial matter or as part of recertification. Rather, his patients discussed home health care options with Patel's medical assistant, . . [who] gave patients an array of 10-20 brochures from various providers. . . Each patient independently chose a provider from those in the array.

The court affirmed Patel's conviction and rejected his argument that he never referred a patient to Grand. "[I]t does not matter who first identifies the care provider; what matters is whether the doctor facilitates or authorizes that choice. . . [T]he doctor acted as a gatekeeper—without his approval, the patient could not receive treatment from the provider the patient had selected." The court found it irrelevant that Patel "played no role" in his patients' selection of Grand because in signing the Form 485s he "chose *whether* his patients could go to Grand." (Emphasis in original)

The court appeared to recognize the potential breadth of its holding, but sought to narrow the ruling to Medicare certifications and recertifications. The court also distinguished this case from one in which a physician is paid to give a speech at a hospital and he ends up treating some of his patients at that hospital. The court stated a provider cannot be prosecuted for receiving payment for legitimate services, such as giving a speech. An illegal referral, according to the court, "requires a doctor to do *something* that either directs a patient to a particular provider or allows the patient to receive care from that provider." (Emphasis in original).

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7th Circuit (incl. bankruptcy)

The problem with the court's attempt at cautionary language is that it is prosecutors who make the original charging decision whether the payment was for "legitimate" services and whether, in the words of the court, the doctor did *something* that allows the patient to receive care from the provider who is making the payments. In the context here, where all parties agreed that the physician played no role in the selection of the provider, i.e., did not formally "refer" the patient or "recommend" the provider, the court appears to have widened the AKS in troubling ways. Compliance counsel should take note of the *Patel* holding and the facts of this case when advising clients on whether referrals within the meaning of the AKS are involved.