SAMANTHA L. GRODEN

Beyond Steering: A Broad Definition of "Referral" Under the Anti-Kickback Statute

An Analysis of the Seventh Circuit's Decision in *U.S. v Patel*

Samantha L. Groden is an associate in the Health and Life Sciences practice in Dentons US LLP's San Francisco office. She can be reached at 415/882-5056 or by email at samantha.groden@dentons.com.

The U.S. Court of Appeals for the Seventh Circuit has issued an opinion that expansively interprets the term "referral" under the federal health care program anti-kickback statute (AKS), which may mean that more arrangements fall within the ambit of the AKS than previously thought. The AKS is a criminal statute that, among other things, prohibits the receipt of remuneration "in return for referring an individual to a person" for the furnishing of items or services reimbursable under a federal health care program.[1] The term "referring" is undefined in the statute.

On February 10, 2015, in *U.S. v. Patel*,[2] the Seventh Circuit affirmed the conviction of Dr. Kamal Patel under the AKS for accepting payments from a home care provider that the government argued were in exchange for referrals. What makes this case significant is that it is undisputed that Dr. Patel did not direct or steer patients to a particular provider, which has been the typical basis for finding a prohibited "referral" under the AKS.[3] Indeed, as noted in the brief submitted for Dr. Patel, this case appears to mark the first time that an individual has been charged with violating the AKS "who did not steer his patients to the health care provider from which he received [the] payments [at issue]."[4] In affirming Dr. Patel's conviction, the Seventh Circuit held that a "referral" under the AKS includes not only a physician's recommendation of a provider but also a physician's "authorization of care by a particular provider," which marks a significant expansion of the term "referral" under the AKS.[5]

BACKGROUND

Dr. Patel was convicted of six counts of violating, and one count of conspiring to violate, the AKS for receiving undisclosed payments from Grand Home Health Care

(Grand), a home care provider with a large Medicare population.[6] Under Medicare conditions for payment, a home care provider will not be reimbursed unless a physician certifies that home health care services are medically necessary. Recertification is required if home care lasts longer than the initial 60-day episode.[7]

Grand paid Dr. Patel $400 for each signed certification and $300 for each signed recertification for patients of Dr. Patel's who received home health care services from Grand.[8] It is undisputed, however, that (1) Dr. Patel did not influence (or attempt to influence) any patient's initial decision to receive home health services from Grand, (2) Dr. Patel's medical assistant discussed the selection of providers with patients who required home care services and gave patients an array of brochures from providers, one of which was Grand's, and (3) each patient then "independently chose" a provider from that array.[9]

Seventh Circuit Decision

The Seventh Circuit's decision to affirm Dr. Patel's conviction rested on an interpretation of the term "referring" under the AKS. As noted earlier, "referring" is undefined in the statute. On appeal, Dr. Patel argued that he was not guilty of violating the AKS because "refer" meant "to personally recommend to a patient that he seek care from a particular entity," and the evidence showed that Dr. Patel's patients independently chose their home care provider.[10]

The Seventh Circuit rejected this argument, holding that "refer" includes "not only a doctor's recommendation of a provider, but also a doctor's *authorization* of care by a provider." Under this interpretation, Dr. Patel "referred" his patients to Grand by signing certifications and recertifications for patients who had chosen Grand as their home care provider.[11]

The Seventh Circuit based its interpretation on the dictionary definition of the term "refer," the construction of the term "referral" under the federal physician self-referral statute (Stark Law), and the purpose of the AKS. Starting with the basic rule of statutory construction that words should be interpreted based on their common usage, the Seventh Circuit noted that common usage supported both the government's and Dr. Patel's interpretation of the term "refer." The term "referral" was commonly used both in a narrow sense (to mean a doctor's recommendation that a patient see a particular provider) and in a broader sense (to describe a doctor's authorization to receive care).[12]

The Seventh Circuit then looked to the definition of "referral" in the Stark Law, which is a civil statute that prohibits, in the absence of an applicable exception, a physician from referring Medicare patients for designated health services to an entity in which the physician or the physician's family has a financial interest.[13] The Seventh Circuit again found that each side could find support under the Stark Law for its interpretation of "referral." The Seventh Circuit noted that the Stark Law defines "referral" to include "the request or establishment of a plan of care by a physician" and that regulations further interpreting the term defined "referral" to include a physician "certifying or recertifying the need for" designated health services. Under this definition, Dr. Patel's certifying and recertifying of patients would seem to constitute referrals.[14] However, Dr. Patel argued that Congress needed to define "referral" broadly under Stark because the ordinary meaning of the term was narrower.[15]

Faced with two "plausible readings" of the AKS, the Seventh Circuit looked to the purpose of the AKS, concluding that a broader interpretation of "referral" better served two purposes of the statute — fraud prevention and protection of patient choice. With respect to fraud prevention, the Seventh Circuit noted that even though all of Dr. Patel's patients needed home health care services, there was a clear danger that physicians could be paid kickbacks to provide false certifications, which would increase costs to the Medicare program. With respect to protecting patient choice, the court noted that a broader interpretation of "referral"

protected a patient's choice of provider, as a physician could refuse to provide a certification — and thus undermine patient choice — unless paid a kickback.[16]

In reaching the conclusion that "referral" includes more than steering, the Seventh Circuit emphasized the physician's role as a "gatekeeper":

> Patel argues that he, in contrast, played no role in his patients' initial selection of Grand or their decision to continue using Grand. True, but Patel chose *whether* his patients could go to Grand at all, which we think is just as important. Patel acted as a gatekeeper to federally-reimbursed care. Without his permission, his patients' independent choices were meaningless.[17]

The Seventh Circuit also rejected an argument that has been used as a Stark defense — that "refer," as modified by "to," limits the definition "referral" to steering. Dr. Patel argued that the AKS prohibited receiving kickbacks in return for referring a patient "to a person," and thus Congress intended the AKS to address "only situations in which a doctor recommends a specific provider, not a situation where the patient independently chooses a provider after the physician issues a generic order for treatment." The Seventh Circuit countered that, because a "referral" includes an authorization of care, Dr. Patel had referred to a specific provider — the certifications and recertifications were for care provided by Grand, and these certifications/recertifications, not the initial order for care, were the basis for his liability under the AKS.[18]

Implications

The Seventh Circuit's interpretation of "referral" as including activities beyond steering marks a departure from previous case law. In response to concerns that this definition was overly expansive, the Seventh Circuit attempted to draw a line by saying that a "referral" still requires that a doctor "do *something* that either directs a patient to a particular provider or allows the patient to receive care from that provider."[19] However, the Seventh Circuit's reasoning that a "referral" includes gatekeeping activities and can occur even when independent patient choice is exercised raises concerns that physicians and providers may face AKS liability in unexpected situations.

It remains to be seen whether other circuits will adopt the Seventh Circuit's interpretation of "referral." However, given the expansiveness of the Seventh Circuit's interpretation and the uncertainty it creates, providers would be well advised to take *U.S. v. Patel* into account when evaluating AKS risk. At a minimum, providers should be aware that AKS liability may attach in the context of certifications and recertifications, even when patients have exercised independent choice. More generally, providers should consider what activities constitute gatekeeping functions, as these activities may come under scrutiny for potential AKS liability.

Endnotes:

1. 42 U.S.C. § 1320a-7b(b)(1)(A).
2. *U.S. v. Patel*, No. 14-2607, slip op. (7th Cir. Feb. 10, 2015).
3. *Id.* at 5-6.
4. Br. of Def. at 12, *Patel,* No. 14-2607.
5. *Patel,* No. 14-2607, slip op. at 9-10 (emphasis removed).
6. *Id.* at 1, 3, 7.
7. 42 C.F.R. § 424.22.
8. *Patel,* No. 14-2607, slip op. at 6.
9. *Id.* at 5. It also is undisputed that all of Dr. Patel's patients who were treated by Grand needed home health care services, so Dr. Patel's initial decision to prescribe home health care was not at issue. *Id.*
10. *Id.* at 9.
11. *Id.* at 9-10 (emphasis in original).
12. *Id.* at 10-13.
13. 42 U.S.C. § 1395nn.
14. Patel, No. 14-2607, slip op. at 13-14 (quoting 42 U.S.C. § 1395nn(h)(5) and 42 C.F.R. § 411.351) (emphasis removed).
15. *Id.* at 14.
16. *Id.*
17. *Id.* at 16.
18. *Id.* at 17.
19. *Id.* at 20 (emphasis in original).

Reprinted from Journal of Health Care Compliance, Volume 17, Number 3, May-June 2015,
pages 43–44, 61–62, with permission from CCH and Wolters Kluwer.
For permission to reprint, e-mail permissions@cch.com.