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Fifth Circuit: No Anti-Kickback Violation When Defendant Merely Hopes or Expects Referrals from Benefits Designed for Other Purposes

Article By:

David L. Douglass

Matt Turetzky

Julie A. Bauman

The Fifth Circuit recently affirmed the grant of summary judgment in favor of Omnicare, Inc., in a *qui tam* action alleging violations of the False Claims Act (“FCA”) and the Anti-Kickback Statute (“AKS”). The ruling signifies that, to violate the AKS, there must be unambiguous evidence that a business specifically designed its practices to induce referrals.

Omnicare, the nation’s largest provider of pharmacy services to long term care facilities, also provides services for skilled nursing facilities (“SNFs”). In turn, these SNFs provide medical services to resident patients, and are generally reimbursed by Medicare and Medicaid for their pharmacy and drug costs. The relator in this action, a former Omnicare employee, alleged that Omnicare offered the SNFs prompt payment discounts (“PPDs”) and debt forgiveness in exchange for contract referrals. By doing so, Omnicare allegedly violated the FCA by making, and causing SNFs to make, false claims to Medicare and Medicaid by falsely certifying compliance with the AKS when submitting claims for reimbursement.

This lawsuit was filed by the relators in the United States District Court for the Southern District of Texas. On September 3, 2015, the district court granted summary judgment in Omnicare’s favor, explaining that “[i]n order to reach a jury, an accusation of a multimillion-dollar fraud must be supported by more than a few ambiguous e-mails. An accusation of fraud should be made cautiously, and only when there is evidence to support it.” The relator appealed the district court’s decision to the United States Court of Appeals for the Fifth Circuit.

The Fifth Circuit determined that Omnicare’s settlement negotiation and debt collection practices were not designed to induce Medicare and Medicaid referrals from the SNFs. Omnicare therefore did not violate the AKS or the FCA. Rather, the Fifth Circuit explained, the documents (mostly emails) at worst showed that Omnicare attempted collecting debt and settling billing disputes with SNFs in a way that would not exasperate ongoing or anticipated contractual negotiations with those same SNFs. The Fifth Circuit noted that there was no evidence the SNFs were even aware they were receiving special benefits or that those benefits were tied to making Medicare and Medicaid referrals to Omnicare, which was the type of evidence “one might expect” if such a scheme existed. Similarly, there was no evidence the PPDs were offered for the illegitimate purpose of inducing referrals rather than the legitimate purpose of inducing payments, noting that OIG-HHS Guidelines specifically stated that PPDs did not violate the AKS.

This ruling highlights the requirements and limitations on the AKS’s “one purpose” test. Under the “one purpose” test, a payment may violate the AKS if one purpose of the payment is to wrongfully induce referrals, even if there are also other, less nefarious motivations for the payment. The Fifth Circuit’s ruling focuses the inquiry into whether a payment violates the AKS on the “purpose” of the payment, not its consequences. As the Fifth Circuit underscored, the one purpose test is not triggered when a defendant “merely hopes or expects referrals from benefits that were designed for wholly other purposes.” Without explicit evidence demonstrating that Omnicare designed its settlement negotiation and debt collection practices with the specific purpose of inducing referrals, the Fifth Circuit declined to extend AKS and FCA liability. Thus, while the one-purpose test undeniably is an expansive doctrine, it is not limitless. The decision is welcome news for health care providers because it demonstrates that courts are receptive to the notion that expansive theories of liability under the AKS and FCA must have certain limiting principles. It also demonstrates the importance of setting up clear, documented business practices to demonstrate the valid business purpose of the payment or transaction as well as to reduce the risk that payments are made or appear to have been made for improper purposes.

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