CLIENT ALERT

SIXTH CIRCUIT DEFINES FALSE CLAIMS STANDARDS

by Kimberly J. Ruppel

The Federal False Claims Act ("FCA") imposes civil liability for presenting a false claim to the government for payment. The Federal Anti-Kickback Statue ("AKS") prohibits medical providers from making referrals in return for "remuneration." In a recent decision by the Sixth Court of Appeals, the Court found that a hospital's decision not to hire an ophthalmologist in return for a commitment for continued referrals from another ophthalmologist did not constitute prohibited "remuneration" in violation of the AKS.[1] The ruling contains important findings on the definition of remuneration and on the causation standard to be applied in FCA cases in this jurisdiction, rejecting the Third Circuit's reasoning and joining in the Eighth Circuit's analysis.

The case involved a two-physician ophthalmologist practice in Marshall, Michigan, and Oaklawn Hospital, located in the same town. For a number of years, the practice and hospital routinely referred patients back and forth as the only local option for each. After friction developed between the practice's physician owner, Dr. Darren Hathaway, and physician employee of the practice, Dr. Shannon Martin, Dr. Hathaway began negotiations to join another practice in Lansing, Michigan, which ultimately did not include Dr. Martin. As a result, Dr. Martin began employment negotiations with Oaklawn. After learning about these negotiations, Dr. Hathaway approached Oaklawn's Board to request the hospital not hire Dr. Martin due to his concern that the hospital's future referrals would go to her, instead of his practice. Dr. Hathaway assured the Board that if the hospital did not hire Dr. Martin, his surgical referrals to the hospital would continue and likely increase. The Board voted not to hire Dr. Martin. As a result, Dr. Martin sued Dr. Hathaway in a qui tam action, claiming Dr. Hathaway and Oaklawn engaged in an illegal kickback scheme.

Because the AKS does not define remuneration, the question for the Court was whether that term covered only payments and other transfers of value; or any act that may be valuable to another, such as an ongoing pattern of referrals. In the past, the Office of Inspector General ("OIG") directed the U.S. Health and Human Services to interpret remuneration as "anything of value". The Court analyzed the dictionary definition of remuneration, other statutory usage of the word, the OIG's practical application, and interpretations by other circuit courts, which consistently interpreted remuneration as a form of payment or transfer of value. In addition, because the AKS creates both civil and criminal liability, the Court applied the rule of lenity, favoring a narrower definition in the case of ambiguity, as here.

After deciding that remuneration was defined as payment or transfer of value, the Court held no such remuneration occurred in this case because Oaklawn's decision not to hire Dr. Martin in return for Dr. Hathaway's assurance of continued surgical referrals to the hospital did not entail a payment or transfer of value to Dr. Hathaway. Acknowledging that Dr. Hathaway might benefit from the arrangement, the Court found no evidence that any payment was made or that the value or cost of services was any different from what existed before.

The Court then turned to the question of causation and whether Dr. Martin was able to establish that Oaklawn or Dr. Hathaway submitted claims for Medicare or Medicaid reimbursement for items or services "resulting from" alleged violations of the AKS. Following the Eighth Circuit's reasoning and rejecting the Third Circuit's analysis, the Court here found that "resulting from" means "but-for" causation. The Court noted that the alleged arrangement here did not change anything, and there was no claim for any reimbursement that would not have occurred as before. Oaklawn was the only hospital in Marshall, and Dr. Hathaway's practice was the only local ophthalmology group. The two entities naturally referred local patients back and forth before and after Dr. Martin's departure from the practice.

This ruling gives important guidance in how courts will interpret remuneration going forward. In dicta, the Court noted that financial arrangements without any time frame, volume requirement, or conditions on use of certain services or equipment based on the number of referrals are unlikely to constitute impermissible remuneration. The Court also described certain scenarios that would be unlikely to constitute impermissible remuneration. One example provided was a hospital that opened a research center, purchased new state-of-the-art equipment, or donated to charity in hopes of recruiting new physicians. Another example provided was that of a general practitioner refusing to refer patients for dialysis treatment to a local facility until it obtained updated equipment. The Court reasoned that none of these scenarios would involve payments changing hands or any other transfer of value between providers.

In addition, the Court's "but-for" analysis sets a standard requiring evidence that claims for reimbursement are directly linked to impermissible remuneration. Where claims for reimbursement occur or continue without any impact by alleged violations of the AKS, courts are unlikely to draw a causal connection.

ABOUT THE AUTHOR

Kimberly Ruppel is Co-Chair of Dickinson Wright, PLLC's Healthcare Litigation Task Force. Kim has over 20 years of experience as a commercial litigator representing healthcare providers, insurers, and benefit plans in healthcare contract litigations, licensing and regulatory disputes, governmental fraud and abuse investigations, HIPAA compliance, and insurance claims and coverage disputes. She can be contqcted at 248.443.7291 or kruppel@dickinsonwright.com

[1] *U.S. ex. rel. Martin v. Hathaway, et al,* (6th Cir., March 28, 2023) case no. 22-1463, – F.4th –, 2023 WL 2661358 (for publication).