

## Seventh Circuit Adopts “One Purpose Test” Under Federal Health Care Anti-Kickback Statute

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On May 4, 2011, the U.S. Court of Appeals for the Seventh Circuit joined four other Circuits in adopting a “one purpose test” for assessing the legality of payments under the federal health care criminal Anti-Kickback Statute, 42 U.S.C. § 1320a-7b. The court held that if at least part of a hospital’s remuneration to a physician “was ‘intended to induce’ him to refer patients” to the hospital, “the statute was violated, even if the payments were also intended to compensate for professional services.” *United States v. Borassi*, No. 09-4088 (7th Cir. May 4, 2011) (quoting *United States v. Greber*, 760 F.2d 68, 72 (3d Cir. 1985)).

In *United States v. Borassi*, a medical doctor, after trial in a Chicago federal court, was convicted of violating 42 U.S.C. § 1320a-7b(b)(1) for accepting a salary from a hospital “in exchange for continually referring patients” to the hospital. The vast majority of payments received by the hospital came from Medicare.

The statute at issue, 42 U.S.C. § 1320a-7b(b)(1), provides:

(1) Whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind—

(A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

(B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than \$25,000 or imprisoned for not more than five years, or both.

While these provisions apply to soliciting or receiving payment, 42 U.S.C. § 1320a-7b(b)(2) makes it a crime to offer or make payments under the same circumstances.

The statute also provides, however, that “any amount paid by an employer to an employee (who has a bona fide employment relationship with such employer) for employment in the provision of covered items or services” cannot serve as the basis of a violation. 42 U.S.C. § 1320a-7b(b)(3) (parentheses in original).

At trial, the doctor receiving the payments argued that he had a *bona fide* employment relationship with the hospital. He asserted that the jury should be instructed that he could not have violated the Anti-Kickback Statute if the “primary motivation” behind the hospital’s payments was to compensate him for legitimate services he provided. The district court rejected that argument.

Affirming the district court, the Seventh Circuit declined to adopt the proposed “primary motivation” test, stating that each federal court of appeals to consider that proposed test had rejected it. Instead, the Seventh Circuit joined the Third, Fifth, Ninth and Tenth Circuits “in holding that if part of the payment compensated past referrals or induced future referrals, that portion of the payment violates 42 U.S.C. § 1320a-7b(b)(1).” The court held that even if the hospital’s payments were compensation for the doctor’s professional services, the statute was violated because “at least part of the payments” were intended to induce patient referrals. In other words, according to the court, the jury could find the defendant guilty “if some amount was paid not pursuant to a bona fide employment relationship.”

The Seventh Circuit quoted from three other Circuits, which described the “purpose” of the payments as the critical issue in assessing legality: *United States v. Kats*, 871 F.2d 105, 108 (9th Cir. 1989) (“[T]he Medicare fraud statute is violated if ‘one purpose of the payment was to induce future referrals.’” (quoting *Greber*, 760 F.2d at 69)); and *United States v. McClatchey*, 217 F.3d 823, 835 (10th Cir. 2000) (“[A] person who offers or pays remuneration to another person violates the Act so long as one purpose of the offer or payment is to induce Medicare or Medicaid patient referrals.”).

The Seventh Circuit did not indicate it had any reservations in adopting the “one purpose test.” Rather, it described its adoption as a “common-sense holding” based on the plain language of the statute.

Any entity with financial relationships with physicians that might benefit from business with the physicians’ patients receiving government assistance must be vigilant in complying with the one purpose test. Entities must ensure that they make no payments to physicians to induce or compensate for referrals, and they are well-advised to avoid even the appearance of such motivations. This includes medical centers, pharmaceutical manufacturers and medical device manufacturers, among others. Such vigilance includes ensuring that policies regarding engagement of physicians are carefully drafted and communicated; that personnel are trained on the limitations on engaging physicians; that services provided by physicians are designed to satisfy legitimate needs and are clearly documented; and that compensation is strictly limited to the fair market value of such services.

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