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## **Client Alert**

### **Seventh Circuit Court of Appeals Addresses Definition of “Referral” Under the Federal Anti-Kickback Statute**

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On February 10, 2015, the Seventh Circuit Court of Appeals issued its opinion in *United States v. Patel*, an important case addressing the definition of “referral” as used in the federal Anti-Kickback Statute.

The Anti-Kickback Statute states that, “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—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 [shall be guilty of a felony].” 42 U.S.C. § 1320a-7b(b)(1)(A) (emphasis added).

The defendant-physician in *United States v. Patel*, Dr. Kamal Patel, is an internal medicine physician practicing in the Chicago-area, whose practice regularly includes prescribing medically necessary home health care services to patients. Dr. Patel typically prescribed home health services to about ten patients per month. Of the approximately ten to twenty home health agency providers used by Dr. Patel, Grand Home Health Care (“Grand”) was one such provider. Approximately 95% of Grand’s patients are beneficiaries of the federal health care program, Medicare. The owners of Grand, Nixon Encinares and Maria Buendia (“Grand Owners”), approached Dr. Patel and specifically offered to pay him for “referrals” of patients to their home health agency. According to Dr. Patel, he did not “agree with” the Grand Owners regarding payment for referrals, a factual dispute that the Seventh Circuit determined unnecessary to resolve as it was immaterial to Dr. Patel’s guilt on the violations of the Anti-Kickback Statute.

Dr. Patel’s prescribing practice for home health care to his patients began with an initial determination that the patient required home health care. It was undisputed in this case



that each instance of prescribing home health care to his patients was medically necessary, as required under Medicare. Upon determining the need for home health care, Dr. Patel would not personally discuss the selection of providers with patients or their family members. Instead, Dr. Patel's medical assistant would provide patients with approximately ten to twenty brochures from various home health agencies. These brochures were provided to Dr. Patel's office by the providers themselves. One of the brochures provided to patients was for Grand. Dr. Patel's patients then independently selected, from the brochure materials, a provider for their home health care. After a patient's selection, Dr. Patel's medical assistant would fax the selected provider the patient's name, diagnosis and Medicare number. The cover page faxed along with the patients' information contained the subject line "new referral" and the body of the fax contained prescriptions for home health care signed by Dr. Patel.

If a patient selected Grand as the provider, Grand would devise a treatment plan for the patient and fill out a Form 485 for that patient for Dr. Patel's signature. The Form 485 is a standardized Medicare form that certifies that home health care is medically necessary and outlines a patient's diagnosis, medications, treatment plans and goals. A completed Form 485 is required to be submitted to Medicare for each patient in order to receive reimbursement from Medicare for the home health services. A signed recertification form is necessary for home care that lasts longer than the initial 60-day certification period.

Once the Form 485 was prepared by Grand for Dr. Patel's signature, the Grand Owners would meet with Dr. Patel and exchange \$400 for every signed Form 485 certification, and \$300 for every signed recertification.

The issue in *Patel* hinged on the meaning of the word "referring," which is not defined under the Statute. Dr. Patel argued that to "refer" a patient means to personally recommend that a patient seek care from a particular entity, and that he did not "refer" patients to Grand since the patients independently selected Grand without his input. The government, on the other hand, argued for a broader reading of the term "refer," which would include not only a physician's recommendation of a provider, but also the physician's *authorization* of care by a particular provider. Under the government's reading of the definition for "refer," Dr. Patel referred his patients to Grand by signing the Form 485 certifications and recertifications.



The Court ultimately agreed with this interpretation of “refer” as it applies to the Anti-Kickback Statute.

The Court looked to both the plain meaning of the term “refer,” as well as statutory guidance from the federal Stark Act (42 U.S.C. § 1395nn *et al.*), which does defines “referral.” Regulations interpreting the definition of “referral” under the Stark Act define “referral” to include “the request by a physician for, or ordering of, *or the certifying or recertifying of the need for*, any designated health service for which payment may be made under Medicare Part B.” 42 C.F.R. § 411.351 (emphasis added). In considering the Statute’s main purpose—to protect federal health care programs from fraud and abuse—the Court determined that Congress intended the Statute to extend to the certification and recertification of patients for government-reimbursed care and to criminalize the receipt of kickbacks for such certification and recertification. The Court of Appeals affirmed the District Court’s ruling and found Dr. Patel guilty on all six counts of violating the Anti-Kickback Statute and one count of conspiracy to violate the Statute. He was sentenced to eight months’ imprisonment and 200 hours of community service, and was required to forfeit \$31,900 in kickback payments.

Ashley Leonard is an associate in the Health Care and Life Sciences Group at Plews Shadley Racher & Braun LLP. Leonard has experience advising healthcare clients on regulatory compliance matters involving state and Federal healthcare laws, as well as assisting healthcare industry clients on transactional matters.

If you have any questions regarding federal fraud and abuse laws, including the Anti-Kickback Statute and Stark Act, please contact Leonard at [aleonard@psrb.com](mailto:aleonard@psrb.com) or 317.637.0700.