



## Health Care Enforcement Defense Advisory

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# Seventh Circuit Upholds Conviction of a Physician for a Violation of the Anti-Kickback Statute

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A recent decision by the Seventh Circuit Court of Appeals upholding a physician's criminal sentence is yet another reminder that health care providers and physicians must carefully structure their financial relationships to avoid running afoul of the Anti-Kickback Statute (42 U.S.C. § 1320a-7b *et seq.*). The Anti-Kickback Statute makes it a criminal offense for a provider to give "remuneration" to a physician in order to compensate the physician for past referrals or to induce future referrals of patients to the provider for items or services that are reimbursed, in whole or in part, by Medicare or Medicaid. The Seventh Circuit recently joined several other Circuit Courts in adopting the so-called "one purpose" test, which holds that a payment or offer of remuneration violates the Anti-Kickback Statute so long as part of the purpose of a payment to a physician or other referral source by a provider or supplier is an inducement for past or future referrals. *United States v. Borrasi*, No. 09-4088, 2011 WL 1663373 (7th Cir. May 4, 2011). Thus, the Anti-Kickback Statute may be implicated, even if a provider compensates a physician for bona fide services in circumstances, where part of the purpose of that payment can be shown to be an inducement for referrals of Medicare- or Medicaid-reimbursed items or services.

Additionally of note, the Anti-Kickback Statute applies not just to remuneration to induce referrals, but also to inducements for the purchasing and ordering of items and services and for arranging referrals. This charging language brings within the ambit of the statute a broad range of conduct well beyond mere referrals. As a result, the Anti-Kickback Statute can potentially be implicated when financial arrangements are created virtually anywhere within the health care system. Examples include arrangements involving manufacturers or suppliers and their customers, advertising and marketing arrangements with consultants who do not directly provide services, and a variety of discounting purchasing arrangements.

The *Borrasi* decision underscores the need for providers to exercise caution in the structuring their relationships with physicians. The delivery of health care services is a complex undertaking. To meet patient needs, hospitals and other health care facilities and organizations must provide care by and through arrangements with physicians. Many of these common interactions between physicians and other providers are "referrals" under the Anti-Kickback Statute. The following are examples of common referrals: when a physician admits a patient with chest pain; when a physician uses a hospital surgical suite to perform surgery in conjunction with a team of hospital nurses; when a physician orders a blood test performed by the hospital's laboratory. Since only physicians are licensed to make medical judgments and order services, a referral element exists in virtually every interaction between a hospital and a physician. Under the logic of the Seventh Circuit and other courts, Anti-Kickback

Statute liability can arise even in circumstances in which referrals for items and services that are reimbursed through the Medicare or Medicaid program are not a primary purpose for remuneration to physicians.

## The Allegations

In *Borrasi*, the physician defendant owned a corporate group of healthcare providers (the “Company”), and worked primarily at nursing homes and hospitals. *Borrasi*, 2011 WL 1663373, at \*1. The government alleged that the defendant was paid for a no-show position with an inpatient psychiatric facility in exchange for defendant’s referral of Medicare patients to the facility. The inpatient facility placed the physician and his employees on its payroll. These newly-added “employees” received false titles and phony job descriptions and were asked to submit false time sheets. *Id.* at \*1. The physician defendant was also not expected to perform any of the duties listed in his job description, and he rarely attended any meetings at the inpatient facility. *Id.* The physician defendant and his Company received \$647,204 in total remuneration including salaries, and lease payments. In one year alone, the physician referred approximately 484 Medicare patients to the inpatient facility.

## The Anti-Kickback Statute and Court’s Adoption of the One Purpose Test

The government charged the physician and certain executives of the inpatient facility with conspiracy to defraud the United States government (in violation of 18 U.S.C. § 371), and violations of the Anti-Kickback Statute.<sup>1</sup> The physician’s defense was, in part, that he actually performed some duties at the facility and that such duties were the “primary purpose” for his arrangement with the inpatient facility. The defendants sought a jury instruction that would require the jury to find that inducement of referrals was the primary purpose for the payment of remuneration before it could convict the defendants for violation of the Anti-Kickback Statute. The trial court, however, rejected that request, and instead instructed the jury that it could convict so long as one purpose of the arrangement was to induce the defendant to refer Medicare patients to the facility. *Borrasi*, 2011 WL 1663373, at \*5-6.

The “one purpose” test for Anti-Kickback Statute liability has been criticized because it results in overly-broad application of the statute and criminalizes ordinary commercial conduct. For example, if a hospital pays fair market compensation to a physician for administrative services actually rendered to the hospital (e.g., as medical director for a department), a decision by that doctor to admit a patient covered by Medicare to that hospital potentially raises the specter that “one purpose” for the legitimate payment of compensation to the physician was to “induce” the Medicare referral, thereby triggering scrutiny under the Anti-Kickback Statute. Further, the one purpose test allows prosecutors to evade their burden to prove the specific intent element for a violation of the Anti-Kickback Statute by using the mere existence of Medicare or Medicaid referrals to allow the jury to infer intent to induce the referral.

The jury in *Borrasi*, having been instructed to apply the one purpose test, found both the defendants guilty on all counts. The court sentenced the physician to seventy-two months in prison and two years’ supervised release. The executive was sentenced to six months in prison, one year of home confinement, and five years’ supervised release. Both defendants were required to pay \$497,204 in restitution. *Id.* at \*2.

The defendant physician appealed his conviction. Among other things, he argued that the trial court had erred by instructing the jury to apply the one purpose test for liability under the Anti-Kickback Statute. The defendant asked the Seventh Circuit “to adopt a ‘primary motivation’ doctrine, under which the trier of fact would determine the defendants’ intent in any given case and find them not guilty if the primary motivation behind the remuneration was to compensate for bona fide services provided.” *Id.* at \*6.

The Seventh Circuit rejected that argument and held that “if part of the payment compensated past referrals or induced future referrals, that portion of the payment violates the [Anti-Kickback

Statute].” *Id.* at \*7 (emphasis added).

The Seventh Circuit relied upon the reasoning of Third, Fifth, Ninth and Tenth Circuits which have also adopted a form of the “one purpose” test. *Id.* at \*6 (citing *United States v. Greber*, 760 F.2d 68, 71 (3d Cir. 1985); *United States v. Davis*, 132 F.3d 1092, 1094 (5th Cir. 1998); *United States v. Kats*, 871 F.2d 105, 108 (9th Cir. 1989); *United States v. McClatchey*, 217 F.3d 823, 835 (10th Cir. 2000)). The court distinguished *United States v. Bay State Ambulance and Hosp. Rental Serv., Inc.*, 874 F.2d 20 (1st Cir.1989), where the First Circuit affirmed the appellants’ convictions after “the district court instructed that the defendants could only be found guilty if the payments were made primarily as [referral] inducements” because the First Circuit did not decide in *Bay State* “whether the government must show that such payments were made primarily or solely with a corrupt intent.” *Id.* at \*6.

## Comments

Given the particularly egregious facts in *Borrasi*, it seems unlikely that application of the defendant’s proposed primary purpose test would have yielded a different outcome. Even if the Seventh Circuit had rejected the one purpose test, the minimal nature of the duties and services performed for the compensation paid to the physicians would probably have supported conviction under the primary purpose test. As such, *Borrasi* was a poor candidate to challenge the growing acceptance of the one purpose test. Nonetheless, the argument was made and was rejected, thus adding the Seventh Circuit to the roster of jurisdictions adopting the one purpose test.

Missing from the cases upholding the one purpose test is any meaningful discussion of the role of the “one purpose” or “primary purpose” tests in assisting juries in determining criminal intent. It is understandable why the defense believed that applying a primary purpose test would have placed an appropriate burden on the government to establish liability and helped shield innocent behavior from unwarranted scrutiny. But the Anti-Kickback Statute does not contain words suggestive of primary or one purpose. Rather, a conviction requires proof of criminal intent. Given the development of the case law on this question, query whether defendants would be better off if juries focused on whether criminal intent was present without parsing whether the illegal motive was the primary purpose or merely one purpose.

Nevertheless, it is now even clearer that physicians and providers and others who participate in the health care system must take great care in reviewing their existing financial relationships, and structuring new relationships that avoid implicating the Anti-Kickback Statute, among other fraud and abuse laws. Clients seeking further information about the decision should contact the authors or your Mintz Levin attorney.

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## Endnotes

- 1 [W]hoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) ... 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 and upon conviction thereof, shall be fined not more than \$25,000 or imprisoned for not more than five years, or both.
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