

Payment for Access to Patient Data May be a Violation of the AKS

Article

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The Northern District of Illinois recently found that a home health care company violated the federal Anti-Kickback Statute (AKS) because the fees it paid to a community care organization for access to that company's patient data constituted a prohibited referral. In *Stop Illinois Health Care Fraud, LLC v. Asif Sayeed, et al.* (No. 12-cv-09306) (*Sayeed*), the plaintiff alleged that Management Principals, Inc. (MPI) violated the AKS, the federal False Claims Act, and the Illinois False Claims Act, by paying Healthcare Consortium of Illinois (HCI) to give it information about clients that HCI had evaluated for eligibility for programs run by the Illinois Department on Aging so that MPI could then market Medicare-reimbursed health care services to those clients.

The AKS prohibits knowingly and willfully providing remuneration in exchange for inducing or rewarding patient referrals or generating business involving any item or service payable by federal health care programs, unless an enumerated "safe harbor" provision applies. "Remuneration" is considered anything of value. The applicable safe harbor in *Sayeed* was for personal services and management contracts. Under that safe harbor, remuneration does not include any payment made by a principal to an agent as compensation for the services of the agent only if certain requirements are met.

Sayeed involved an agreement under which MPI paid HCI \$5,000 per month for 18 months in exchange for HCI's administrative advice and counsel. However, an additional unwritten purpose of the agreement was for HCI to give MPI access to its files so that MPI could perform data mining and solicit HCI clients for health care services, neither of which were explicitly mentioned in the agreement. In addition, HCI continued to give MPI access to its clients' information even after the written agreement was no longer in effect.

At issue was whether the arrangement was a prohibited referral arrangement under the AKS. The plaintiff's theory was that MPI's payments under the agreement were intended to secure access to client information in the HCI files. MPI argued that it never offered any money or anything else of value directly for the purpose of receiving a referral. The Court found that giving MPI access to client contact information that was used to solicit those clients constituted a

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referral, albeit an indirect one. Pointing to Sayeed's testimony that the \$5,000 per month fee was intended, at least in part, for MPI's access to HCI's client data, the Court found that the fees were partially intended as remuneration for a referral. Further, Sayeed's testimony proved that he knowingly and willfully induced HCI to provide referrals (i.e., access to data) in exchange for the \$5,000 monthly fee. The Court rejected the defendants' safe harbor affirmative defense because the agreement between HCI and MPI failed to specify all of the services MPI provided to HCI for the term of the agreement.

Because MPI's access to HCI's data constituted a referral and no safe harbor applied, the Court concluded that the fees were intended as remuneration for the referrals. The Court also found that the services provided were funded by Medicare and the defendants' inducement was knowing and willful. Therefore, the arrangement was illegal.

Sayeed reinforces the technical manner in which the AKS safe harbors are applied. While certain types of arrangements are allowed, the safe harbors do not apply unless all of their requirements are met. If an arrangement is intended to fall within the safe harbor allowing for payment made by a principal to an agent for the agent's services, the principal and the agent must enter into a written agreement that clearly sets forth the services to be provided by the agent. A service not specifically contemplated by the agreement likely will result in liability under the AKS.

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