

Fifth Circuit Finds No Anti-Kickback Violation in Appeal Against Omnicare



A [recent decision by the Fifth Circuit](#) addressing the “one purpose” test of the

[Anti-Kickback Statute \(AKS\)](#) demonstrates that courts are open to the idea that expansive theories of liability under the AKS and the False Claims Act (FCA) can be limited by certain principles. And that’s where the good news for healthcare providers lies.

Omnicare, Inc. is the country’s largest provider of pharmacy services to long-term care facilities; it also provides services for skilled nursing facilities (SNFs). Those SNFs provide Omnicare’s resident patients with medical services and are typically reimbursed by Medicare and Medicaid for pharmaceutical expenses.

Former employee alleges Omnicare illegally bartered for referrals

In the action brought against Omnicare, the relator (a former Omnicare employee) alleged that the company offered the SNFs forgiveness and prompt payment discounts (PPDs) in exchange for contract referrals. The allegation was that in this way, Omnicare violated the FCA by causing SNFs to submit false claims to Medicare and Medicaid since those claims were not compliant with the AKS.

The suit was filed in the United States District Court for the Southern District of Texas. In early September of 2015, the court granted summary judgment in Omnicare’s favor, noting that “[i]n order to reach a jury, an accusation of a multimillion-dollar fraud must be supported by more than a few ambiguous e-mails. An accusation of fraud should be made cautiously, and only when there is evidence to support it.”

The relator went on to appeal the district court’s ruling to the U.S. Court of Appeals for the Fifth Circuit, which affirmed the grant of summary judgment in favor of Omnicare. This ruling specifies that in order for there to be a violation of the AKS, unambiguous evidence of a business arranging its operations to generate referrals must exist.

The Fifth Circuit decided that Omnicare’s debt collection and settlement negotiation protocols were not devised in order to generate Medicare and Medicaid referrals by SNFs, and therefore, the company was not in violation of the FCA or the AKS in the eyes of the Court.

Payment inducement, yes; referral inducement not as obvious

The Fifth Circuit acknowledged the existence of documents (the bulk of them email) that revealed Omnicare trying to settle billing disputes and collect debt with SNFs in a method that avoided further complicating contract negotiations with the SNFs in question. However, the Court did not find that behavior to be an AKS violation. Further, the Fifth Circuit was not convinced that the SNFs even had an awareness that they were receiving deferential treatment.

The Fifth Circuit also noted that the Office of Inspector General-U.S. Health and Human Services (OIG-HHS) Guidelines do not



include PPDs as violations of the AKS, and that in addition, there was no indication that Omnicare's PPDs were proffered for referral inducement instead of merely (and legitimately) payment inducement.

Purpose, not consequence, was key

Under the "one purpose" test, a payment runs the risk of violating the AKS if one purpose of the payment is to improperly induce referrals, even when additional, benign reasons for the payment exist. The Fifth Circuit decision zeroed in on whether a payment violates the AKS through the payment's purpose, not the payment's consequences.

The Fifth Circuit ruling noted that the one purpose test does not come into question when a defendant "merely hopes or expects referrals from benefits that were designed for wholly other purposes." Therefore, without direct evidence of a deliberate design, Omnicare's part of its practices in collecting debt and negotiating settlements in order to induce referrals, the Court did not extend AKS and FCA liability.

The takeaway? The one purpose test may be expansive, but it is nonetheless subject to certain limiting principles.

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