



The Patel Decision: Will the Court's Affirmation of the "Gatekeeper" Theory Lead to Increased Enforcement?

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In a recent decision of the U.S. Court of Appeals for the Seventh Circuit, the court affirmed an expansive interpretation of the term "referral" under the federal anti-kickback statute ("AKS"). The case is based on the relatively novel "gatekeeper" theory. The decision may signal a new wave of anti-kickback investigations.

The case stemmed from a February 2014 conviction of Dr. Kamal Patel, a Chicago-area geriatric internal medicine specialist, on six counts of violating the AKS and one count of conspiracy to violate the AKS. On appeal, Patel's conviction was upheld by the Seventh Circuit in February 2015 (*U.S. v. Patel*, No. 14-2607, 7th Cir, Feb. 10 2015). While the Seventh Circuit's jurisdiction is limited to Illinois, Indiana and Wisconsin, the decision may signal increased enforcement on a national basis through the Office of Inspector General and the Department of Justice.

The AKS prohibits the provision of remuneration to induce or reward the referral of an individual for the provision of an item or service which is reimbursed in whole or in part by a federal healthcare program such as Medicare. The *Patel* case centered on the term "referral." Specifically, the question before the court was whether Patel's act of certifying a patient's need for home health services constituted a referral.

In the course of treating his patients, Dr. Patel would often prescribe home health services. The patients were presented with brochures for a substantial number of local home health providers. Dr. Patel did not recommend any particular provider or otherwise encourage the patients to select one provider over another. However, if a patient independently selected Grand Home Health Care ("Grand"), then Dr. Patel would complete the certification paperwork required in order for Grand to receive Medicare reimbursement for the home health services provided to Dr. Patel's patients. Pursuant to a verbal deal struck with the owners of Grand, Dr. Patel received a cash payment from Grand for each certification he completed. Dr. Patel was not compensated by any other home health provider.

The payment from Grand constituted remuneration, so the only open issue for decision was whether Dr. Patel's act of completing certification paperwork constituted a "referral." Dr. Patel argued that he was not referring patients in the manner prohibited by the AKS because he did not recommend a particular home health provider. Instead, Dr. Patel's patients independently chose their home health providers. However, the government argued for a more expansive interpretation of the word "refer," and asked the court to include within the definition a physician's authorization or certification of care. The court sided with the government and affirmed Dr. Patel's conviction.

In the opinion, the Seventh Circuit indicated that it did not ascribe relevance to the fact that Dr. Patel's patients independently selected Grand. Instead, the court viewed the certifying physician as the "gatekeeper" to Medicare reimbursement, as the certification is the requirement for Medicare payment. Consequently, Dr. Patel was viewed as the individual that authorized the provision of Medicare-reimbursed home health services, and the receipt of compensation for that authorization was viewed as a violation of the AKS.

In light of the *Patel* decision, the government might be inclined to increase enforcement efforts under the "gatekeeper" theory. Providers of all services that require physician certification or

authorization would be wise to review their compensation arrangements to determine whether physicians are being paid for certification work, even if such certifications are completed as a part of a larger relationship.

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