

HEALTH LAW

Update

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

Florida Supreme Court Rules That Federal Anti-Kickback Law Preempts Florida Medicaid Statute

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On May 18, 2006, the Florida Supreme Court ruled¹ that the Federal Anti-Kickback Law² preempts Florida's Medicaid anti-kickback statute adopted in 2000.³ Although the Federal Anti-Kickback Law is silent on its preemptive status, the Florida Supreme Court found an implied conflict, ruling that the broader Florida law prohibited conduct that is legal under the Federal Anti-Kickback Law. The decision raises constitutional questions regarding state healthcare anti-kickback prohibitions that either are broader than the Federal Anti-Kickback Law or do not contain safe harbors similar to those in the federal statute and regulations.

Ten defendants in *State v. Harden*, the Florida case, were charged with conspiracy, racketeering, and Medicaid fraud. The State alleged that the defendants engaged in a scheme in which individuals "employed" by Medicaid providers received per-patient payments in exchange for soliciting and driving Medicaid-eligible children for dental treatment. The trial court dismissed the charges against the defendants on constitutional grounds and the Florida appeals court upheld the dismissal. The Florida Supreme Court affirmed the appeals court's decision.

Safe Harbor Provisions. The Florida Supreme Court determined, based on a finding that the employees in this case were bona fide employees of the Medicaid providers, that the alleged scheme would be exempted from federal anti-kickback liability by the employment safe harbor provision of the Federal Anti-Kickback Law. The employment safe harbor to the Federal Anti-Kickback Law exempts remunerations paid by an employer to a bona fide employee from prosecution under the federal anti-kickback laws. Because Florida's anti-kickback statute contains no safe harbor exceptions, the court found that the Florida statute criminalized activity that the federal law intended to shield from prosecution.

¹ *State v. Harden*, 873 So.2d 352 (Fla. Dist. Ct. App. 2004).

² 42 U.S.C. § 1320a-7b(b).

³ Fla. Stat. § 409.920(2)(e) (2000).

Although the State of Florida argued that the Federal Anti-Kickback Law does not permit the type of “per head” referral payments involved in the case, even to bona fide employees, the Florida Supreme Court determined that there was no OIG advisory opinion or other guidance that directly addressed this payment arrangement. The court reasoned that the defendants’ payment design was more analogous to a permissible commission-based payment to employees rather than impermissible payments to non-employees.

Intent Standard. The Florida Supreme Court also compared the conflicting criminal intent requirements of the Federal Anti-Kickback Law and the Florida anti-kickback statute. To violate the Florida statute, a person must act “knowingly,” defined by Florida statutes to include negligent behavior. To violate the Federal Anti-Kickback Law, a person’s actions must be “knowing and willful.” The Florida statute’s lower intent standard criminalized activity that would be insufficient for a conviction under the federal statute, the Florida Supreme Court determined. While courts have varied interpretations of the federal intent standard, the Florida Supreme Court wrote that no court has concluded that a negligent or inadvertent act creates liability under the Federal Anti-Kickback Law.

While this Florida court case only affects the Florida Medicaid anti-kickback statute, providers and companies should be aware of its potential implications for other state anti-kickback laws that are either broader than the Federal Anti-Kickback Law or do not contain safe harbors similar to those in the federal statute and regulations. Please feel free to call any of the attorneys in our Healthcare Practice Area, shown below and on the next page, if you have any questions regarding this decision or other matters.

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