Second Federal Court Case Interprets EKRA – Reaches Opposite Result

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In *USA v. Schena*, a federal court in Northern California held on May 28, 2022 that EKRA prohibits a laboratory from paying commissions to its employed sales force, which is the exact opposite position taken by a federal court in Hawaii a few months earlier, in *S&G Labs Hawaii, LLC v. Graves*. The Eliminating Kickbacks in Recovery Act ("EKRA"), is a federal anti-kickback statute that, among other things, prohibits knowingly and willfully soliciting, receiving, paying or offering any remuneration, directly or indirectly, overtly or covertly, in cash or in kind (1) in return for "referring a patient or patronage" to a recovery home, treatment facility or laboratory, or (2) in "exchange for an individual using the services" of a recovery home, treatment facility or laboratory. The prohibition in EKRA does not extend to conduct such as "recommending or arranging for" the purchase of items and services, which conduct is included in the more broadly worded federal anti-kickback statute. EKRA is an ***all-payor*** kickback statute, meaning that it applies to federal health care programs, commercial insurance and self-cash pay patients. A violation of EKRA can result in a fine of up to $200,000, imprisonment for 10 years, or both, for each occurrence. The full text of EKRA is codified at 18 U.S.C. § 220.

EKRA has an exception that permits certain types of compensation arrangements for some *bona fide* employment and independent contractor arrangements. This exception, however, prohibits compensation determined by or varying with (1) referrals to the laboratory, (2) the number of tests or procedures performed, or (3) the amount billed or received from payors. Accordingly, many observers had concluded that paying sales commissions to laboratory sales agents could violate EKRA.

In the earlier *Graves* decision, the federal court in Hawaii adopted a narrower reading of EKRA, concluding that laboratory sales agents are not typically paid for "referring a patient or patronage" to a laboratory, because they do not typically solicit or refer individual patients for testing. Instead, they generally are paid to convince those who do make referrals to a laboratory, *e.g.*, physicians, clinics, *etc*., that ***they*** should be sending ***their*** referrals and patronage to the laboratory for whom the sales agent is working:

Undoubtedly, Graves's commission-based compensation structure induced him to try to bring more business to S&G, either directly through the accounts he serviced himself, or through the accounts of the personnel under his management. However, the 'client' accounts they serviced were not individuals whose samples were tested at S&G. Their 'clients' were 'the physicians, substance

abuse counseling centers, or other organizations in need of having persons tested.' ... Because Graves was not working with individuals, the compensation that S&G paid him was not paid to induce him to refer individuals to S&G.

S&G Labs Hawaii, LLC v. Graves, D. Haw., 19-00310 LEK-WRP (Oct. 18, 2021).

The recent *Schena* decision explicitly rejects this interpretation by the *Graves* court, and asserts that the marketer in *Schena* was paid to induce referrals of individuals, albeit indirectly, because a marketer is paid to try to persuade others, *e.g.*, physicians and others in position to refer, that their referrals should be directed to the laboratory employing the marketer. The *Schena* court points out that the statute does not explicitly require any direct interaction between the marketer and the patient in order for a violation to occur.

On the other hand, *Graves* may be the better reasoned decision, given the *Schena* court arguably stretches for its result. EKRA prohibits remuneration "to induce a referral" and, while it is true that there is no requirement of direct interaction between the marketer and the individual, the text of the statute also does not suggest that an indirect referral could result in a violation. EKRA uses the phrasing "directly or indirectly" in only two instances, both of which modify only the meaning of remuneration. The *Schena* court asserts that its decision follows the plain meaning of the statute, but its holding rests on the assumption that the meaning of "to induce a referral" under EKRA ***implicitly*** includes ***indirect*** referrals even though the statute otherwise explicitly states when it reaches both direct and indirect conduct.

For now, we have two EKRA decisions, in Hawaii, and in the Northern California district. It remains to be seen how other federal courts might view the reasoning of these two conflicting decisions, if presented with similar situations. In the meantime, those seeking to understand the precise scope of EKRA may be left to struggle with these two seemingly irreconcilable decisions. If you have questions about EKRA or its application to specific arrangements, please contact Charles Oppenheim, Robert Miller, Paul Garcia or Stephanie Gross, or the attorney at Hooper Lundy & Bookman, P.C. who normally handles your matters.

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