

Report on Medicare Compliance Volume 31, Number 28. August 08, 2022 In Case of Lovebirds, Court Raises Bar for Kickback-FCA Connection

By Nina Youngstrom

Romance and the Anti-Kickback Statute (AKS) don't typically go together, but that was the backdrop of an appeals court decision that may make it harder for the Department of Justice (DOJ) to tie a kickback to a False Claims Act (FCA) violation, an attorney said.^[1]

The U.S. Court of Appeals for the Eighth Circuit on July 26 reversed a jury verdict that put a Missouri neurosurgeon and his fiancée, who owns a medical equipment distributorship, on the wrong end of the FCA in connection with the AKS. The appeals court sent the case back to federal district court for a new trial in a decision that turned on the definition of false claims "resulting from" a violation of the AKS. In a nutshell, the court ruled that the district court judge's instruction to the jury wasn't consistent with an amendment to the Affordable Care Act (ACA) because it "brushed aside causation."

The message from the appeals court is that "just because you have a potential anti-kickback problem doesn't necessarily mean you have a false claim or mandatory overpayment refund," said attorney Jeff Fitzgerald, with Polsinelli in Denver, Colorado. "Medicare claims that result from kickbacks are actionable, but the court said the kickback has to cause the false claim."

The FCA lawsuit was set in motion by whistleblowers who were physicians in other practices. DOJ intervened and filed a complaint in intervention against the neurosurgeon, Sonjay Fonn, D.O.; his medical practice, Midwest Neurosurgeons (MWN), in Cape Girardeau, Missouri; Deborah Seeger, his fiancée since June 2008; and her distributorship, DS Medical, which is in the same town.^[2] The complaint alleged the submission of false claims "to Medicaid and Medicare for services rendered as a result of kickbacks."

The picture of the alleged inextricable links between MWN and DS Medical are painted in the complaint. For example, DS Medical rents space from MWN and Fonn and Seeger showed up together at DS Medical meetings.

Fonn had privileges to do spinal fusion surgeries at a hospital in Cape Girardeau from November 2008 through March 2012, with the hospital allowing him and other physicians performing surgeries there to select their preferred type of implants from among many spinal implant manufacturers, according to the complaint. They could deal directly with the manufacturer or use a distributor. "In theory, from the hospital's perspective, physicians would use their expertise and discretion to pick spinal implants that best suited each patient's medical needs, using only the implants that gave each patient the best chance of having a favorable surgical outcome," the complaint said.

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