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## Florida Judge Finds State Anti-Kickback Statute Unconstitutional

On February 5, 2003, Judge David Miller of the Eleventh Circuit Court of Miami (Dade County) held that Florida's version of the federal Anti-Kickback Statute is unconstitutional. Specifically, the Court held that the state statute (1) was pre-empted by federal law and violated the Supremacy Clause by purporting to criminalize conduct that fell within the "safe harbors" established under federal law; (2) impermissibly allowed conviction based on a lesser mental state than required under federal law; (3) violated the First Amendment by criminalizing protected speech; and (4) was void for vagueness.

The case, *State of Florida v. Harden*, involved charges against nine defendants for criminal violations predicated on an alleged violation of Florida Statute 409.920(2)(e), which is Florida's version of the federal Anti-Kickback Statute (42 U.S.C. § 1320a-7b). The Florida statute makes it unlawful to "[k]nowingly solicit, offer, pay, or receive any remuneration . . . in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made, in whole or in part, under the Medicaid program." The prosecution alleged that a management company had employed drivers to solicit and transport Medicaid-eligible patients to the offices of dental professionals with whom the management company contracted. The prosecution charged that the wages that the management company paid to its drivers, based on a "per [patient] head" fee, constituted the payment of unlawful remuneration in violation of Florida Statute 409.920.

In granting the defendants' motion to dismiss the charges, the Court held that the Florida statute was unconstitutional on four separate grounds. First, the Court held that the state statute, as the prosecution sought to apply it, was pre-empted by federal law and violated the Supremacy Clause (Article VI § 2 of the United States Constitution) because it purported to criminalize conduct that is expressly permitted under Federal law. The Court noted the existence of a "safe harbor" from the federal version of the Anti-Kickback statute explicitly permitting employers to pay bona fide employees to solicit business. 42 C.F.R. § 1001.952(i). The Court concluded that allowing states to prosecute conduct expressly permitted by federal law would "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Accordingly, the statute as the prosecution sought to apply it violated the Supremacy Clause.

Separately, the Court held that the statute was also pre-empted by federal law and violated the Supremacy Clause because it incorporated a lower standard of intent than that required for conviction under the federal Anti-Kickback Statute. Federal law criminalizes only "willful" violations of the federal Anti-Kickback Statute. Under Florida law, however, a defendant may be convicted if the defendant was "aware or *should be aware* of the nature of his or her conduct." Fla. Stat. 409.920(1)(d) (emphasis supplied). The Court concluded that the State's attempt to criminalize what would effectively be negligent violations of the state statute contradicted "Congress' inten[t] to prevent kickback criminal prosecutions based on mere negligence."

The Court also held that the Florida statute was overbroad because it purports to criminalize all forms of "remuneration," including remuneration paid for constitutionally-protected forms of solicitation. As the Court noted, "[t]here is 'nothing sinister' about a Medicaid provider hiring employees to either solicit patients or provide the type of transportation services that the Medicaid Act contemplates," absent proof of an intent to defraud. Because the state statute purports to criminalize such solicitations, the Court held that it violates the First Amendment.

For similar reasons, the Court held that the statute is unconstitutionally vague. By failing to define "remuneration" by

requiring a higher standard of intent, and failing to incorporate the statutory and regulatory exceptions found under federal law, the state statute denies employers fair notice of what payments to employees would trigger prosecution.

The ruling in the *Harden* case is not legally binding on any other court, and a spokesperson for the Florida Attorney General has announced that the State intends to appeal Judge Miller's ruling. If the ruling stands, however, it will cast doubt on pending prosecutions for violations of Florida's Anti-Kickback statute. It could also provide a basis for challenging other state anti-kickback statutes that might be broader than, or otherwise inconsistent with, the federal Anti-Kickback Statute and applicable safe harbors.

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