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Health Pulse

## Anti-kickback appeal may clarify legality of health care advertising deals

By Jon Asplund



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In a case that could define what is and is not an illegal kickback in health care, the U.S. 7th Circuit Court of Appeals has overturned a Chicago businessman's conviction for paying an advertising firm to get physicians to order his company's orthopedic braces.

In reversing the conviction of Mark Sorensen, former owner of now-closed SyMed, the appeals court ruled that payments for advertising and marketing services for medical equipment do not violate the law when physicians maintain independent decision-making authority over patient care and when patients maintain choice over their care.

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"The court found that percentage-based compensation structures for marketing services are not inherently unlawful under the statute," said Annie Kastanek, a partner at Jenner & Block who co-defended Sorensen in his appeal. "This is significant as it's the 7th Circuit's first comprehensive examination of how the Anti-Kickback Statute applies to advertising and marketing arrangements in the health care sector."

The allegations date back to January 2015, when Sorensen worked with durable medical equipment manufacturer PakMed, Byte Success Marketing and Dynamic Medical Management, a billing agency, the appeals court said. The parties agreed to advertise orthopedic braces to patients, obtain signed prescriptions from the patients' doctors, distribute the braces and bill Medicare for them.

ADVERTISING



Part of the plan included faxing prefilled but unsigned prescription forms to patients' doctors, with the consent of those patients.

The U.S. attorney's office that prosecuted Sorensen said his company paid illegal kickbacks to obtain patients to bill to Medicare and other federal payors and illegally bought patient leads and tricked patients into agreeing to receive braces. Sorensen was sentenced in 2024 to three and a half years in prison and ordered to forfeit \$1.8 million.

However, in reversing Sorensen's 2022 conviction, the appeals court said that there was no evidence of the actual kickbacks in question, pointing out that physicians who received the unsigned prescription forms could then decide to sign them or ignore them. In fact, physicians declined 80% of the orders.

Kastanek said the court established a crucial distinction between two types of payments: illegal kickbacks to those who can make and influence health care decisions versus legitimate compensation for advertising services.

The court noted the statute can apply to non-physicians, but that non-physicians would need to leverage "fluid, informal power and influence over health care decisions."

"This ruling provides much-needed clarity on permissible marketing and advertising relationships in health care," Kastanek said. "Organizations can engage in certain percentage-based compensation arrangements for marketing services without automatically running afoul of the Anti-Kickback Statute, provided these arrangements don't interfere with independent medical decision-making. The decision establishes crucial guardrails around prosecutorial discretion that protect legitimate business practices while still allowing prosecution of truly problematic arrangements that could compromise patient care."

In light of the decision, health care organizations should review their existing marketing and advertising arrangements, focusing on whether arrangements preserve physician independence in decision-making, she said.

Stephen Chahn Lee, co-defense counsel for Sorensen's appeal, said in an emailed statement that SyMed was closed years ago because the federal government suspended all Medicare payments shortly after the charges were brought.

"Mr. Sorensen ultimately had to close down while the appeal was pending. He looks forward to rebuilding his personal and professional reputation."

It remains unclear whether convictions of co-defendants Bernie Perconti, owner of PakMed, which manufactured the braces, and Craig O'Neil and Christine Anderson, respective owners of lead-generating companies KP Network and Byte Success, who each pleaded guilty to conspiracy to pay and receive kickbacks in October 2019, July 2020 and January 2021, respectively, will be appealed. Perconti and O'Neil are scheduled to be sentenced at a later date. Anderson was sentenced in April 2022, according to a Department of Justice statement.

By Jon Asplund

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