PUBLICATION

Recent Florida Patient Brokering Act Developments Spark Growing Quandary

September 2019

Florida's health care industry is facing a growing quandary over how to structure arrangements in light of recent legislative and judicial events with the Florida Patient Brokering Act Fla. Stat. § 817.505 (PBA). As a practical matter, the PBA has historically been viewed as extending the federal Anti-Kickback Statute (AKS) beyond federal health care programs to all payors. As explained below, recent events are calling into question whether arrangements that would pass muster under the AKS will now be subject to greater scrutiny under the PBA.

Background on PBA

The PBA is a criminal statute which prohibits any person, including, but not limited to, any health care provider or health care facility, from: (a) offering or paying any form of remuneration or engaging in any split-fee arrangement to induce the referral of patients or patronage; (b) soliciting or receiving any form of remuneration or engaging in any split-fee arrangement in return for referring a patient or patronage; (c) soliciting or receiving anything of value in return for accepting or acknowledging treatment and (d) aiding, abetting advising or participating in the aforementioned conduct. While the AKS is limited to federal health care programs, the PBA applies regardless of the source of payment for the applicable service or product. The PBA also has a tiered penalty structure under which violations can range from third-degree felonies punishable by up to five years imprisonment, fines of $50,000 to first-degree felonies punishable by up to 30 years imprisonment, and fines of $500,000 depending on how many patients are involved.

Legislative Development

Earlier this year, a change to the PBA was included in House Bill 369 (HB 369), legislation that was primarily aimed at tackling issues in the addiction treatment industry. Given its breadth, the PBA includes a number of exceptions for arrangements that, if met, are deemed not to violate the law. One of the most commonly utilized exceptions has been the so-called AKS Exception. Historically, the AKS Exception provided protection to "[a]ny discount, payment, waiver of payment or payment practice *not prohibited* by 42 U.S.C. § 1320a-7b(b) [the AKS] or regulations *promulgated* thereunder" (emphasis added) (Pre-2019 Version). Following the change in HB 369, the AKS Exception now applies to arrangements involving "any discount, payment, waiver of payment, or payment practice *expressly authorized* by 42 U.S.C. § 1320a-7b(b)*(3)* [a subsection of the AKS] or regulations adopted thereunder" (emphasis added) (2019 Version). This change became effective July 1, 2019.

According to the staff analysis of HB 369 by the Florida Legislature, the amendment to the PBA was intended to address an interpretation of the PBA in a trial court order in *State v. Kigar,* No. 16-CF-10364 (15th Fla. Cir. Ct. Jan. 31, 2019). The staff analysis couched the changes as a "clarification" of the PBA that was needed in response to the *Kigar* court's order denying the State Attorney's motion in limine allowing a defendant to assert advice of counsel as an affirmative defense. In Florida, the advice of counsel defense applies only to specific intent crimes. In *Kigar*, the court found the AKS Exception incorporated the entire AKS by reference so that the specific intent element of the AKS requiring knowing and willful conduct was thereby incorporated into the PBA. The *Kigar* court then held that "a defendant may assert the advice of counsel defense when charged with violations of the PBA." The Legislature's characterization suggesting that the PBA amendments to the AKS Exception were needed to ensure the interpretation was not relied on by other courts created uncertainty regarding the potential impact of the changes.

As a practical matter, few arrangements are "expressly authorized" by the AKS and its regulations. The AKS contains a potentially broad prohibition although all of the elements of the AKS (including the intent of the parties) must be present for there to be an actual violation. There are statutory exceptions and regulatory safe harbors that protect certain arrangements from violating the AKS, but only if those arrangements fully satisfy all elements of an exception or safe harbor. Failure to fit precisely within an exception or safe harbor, however, does not necessarily mean that an arrangement violates the AKS. For an arrangement to violate the AKS, all of the elements of the statute must be present. Furthermore, many accountable care organizations and other value-based programs operate pursuant to waivers which are similarly not "expressly authorized" by the AKS. By changing the language in the AKS Exception from "not prohibited" to "expressly authorized," the Florida Legislature appeared to have substantially limited the arrangements to which the AKS Exception would apply. Given that this was not the stated purpose in the legislative history, it is unclear whether the Florida Legislature intended this effect in amending the 2019 Version of the AKS Exception.

Judicial Development

In an August 7, 2019 decision, one of the intermediate appellate courts in Florida quashed the *Kigar* trial court's order denying the State Attorney's motion in limine. Florida's Fourth District Court of Appeal, while acknowledging the PBA was recently amended, agreed with the State Attorney that even prior to amendment the PBA was a general intent crime for which advice of counsel was not a defense. This means that all that is required to prove a violation of the PBA is intent to commit the act prohibited by an applicable subsection of the PBA as opposed to specific knowledge that the conduct was illegal. Furthermore, the court ruled that the Pre-2019 Version only exempted specifically enumerated practices as contained in the AKS, essentially holding that the Pre-2019 and 2019 Versions of the AKS Exception to the PBA are identical. Accordingly, this opinion implicates arrangements that were in effect prior to the July 1, 2019 amendments.

The district court opinion states it is not final "until disposition of timely filed motion for rehearing." As of August 19, 2019, a motion for extension of time to file a motion for rehearing and/or motion for certification to the Florida Supreme Court is pending decision. It is unclear whether the district court's order will be appealed to the Florida Supreme Court, whether other courts will follow the opinion in *Kigar*, or whether the Florida Legislature will revisit the statutory change. The uncertainty is particularly troubling because there is no clear path to obtain clarity. Unlike regulatory prohibitions under the Florida Department of Health's jurisdiction, for which licensed providers can petition for binding declaratory statements and prospective guidance prior to entering into transactions, the PBA is a criminal statute under the jurisdiction of the Florida Office of the Attorney General and applies to both licensed and non-licensed individuals and entities. Unfortunately, Fla. Stat. § 16.01(3) only permits the Florida Attorney General to provide legal opinions to certain specified state, county, or municipal officers on questions relating to the requesting officer's own official duties. Florida law does not authorize the Attorney General to render opinions to private individuals or entities, whether their requests are submitted directly or through governmental officials. This means that health care industry participants are not able to definitively protect themselves from potential felony liability under the PBA by seeking an advisory opinion from state prosecutors or regulators.

Takeaway

These recent events are creating a growing quandary for anyone doing business in Florida's health care industry. While prosecutors still need to establish intent to influence referrals for the PBA to be violated, the road to such proof may be getting easier as some of the traditional defenses are being eroded. Therefore, parties to existing arrangements in Florida may want to consider reevaluating those arrangements in light of recent events. Parties considering new arrangements in Florida should take recent events into consideration as they structure their arrangements.