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Editor's Note: DOJ in Action

Victoria Prussen Spears

711

DOJ Clarifies Administration's Stance on What Constitutes "Illegal DEI"

Olaoluwaposi O. Oshinowo, Savanna L. Shuntich, Brandon J. Moss, Diana R. Shaw, Diane Holland and Kahlil H. Epps

714

DOJ Announces Renewal of FCA Working Group

Kristin Graham Koehler, Jaime L.M. Jones, Raj D. Pai, David J. Ludlow, Matt Bergs and Joseph R. LoCascio

720

2025 National Health Care Fraud Takedown Sets Record as Largest in U.S. History, Charging 324 Defendants for Over \$14.6 Billion in Alleged Fraud

Joe D. Whitley, Luke Cass, Audrey N. Karman and Matthew L. Hickman

723

Protecting Defense Technology Innovations

Graham C. Phero, Michael Nathanson and Mike D. Webb

727

In Case of First Impression, Looking to AKS Precedent, Ninth Circuit Affirms EKRA Conviction for Improper Payments to Marketers

Ryan S. Hedges, Brian F. McEvoy and G. Phillip Kim

734

Court of Federal Claims Specifies "Jurisdictional Blackout" During OT Prototype Phase and Applies *Blue & Gold* Waiver Rule

Sonia Tabriz, Stuart Turner, Nicole Williamson and Kyung Liu-Katz

737

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In Case of First Impression, Looking to AKS Precedent, Ninth Circuit Affirms EKRA Conviction for Improper Payments to Marketers

*By Ryan S. Hedges, Brian F. McEvoy and G. Phillip Kim**

The U.S. Court of Appeals for the Ninth Circuit recently held that the Eliminating Kickbacks in Recovery Act, like the Anti-Kickback Statute, applies to payments made to marketers (not just doctors and providers who interface with patients). While percentage-based payments to marketers, without more, do not violate the Recovery Act, a violation may be established where a referral is induced through undue influence on a provider's independent decision-making, such as directing marketers to make false, fraudulent, or misleading statements to providers.

In one of the few prosecutions based on the Eliminating Kickbacks in Recovery Act (EKRA), and in an even rarer Court of Appeals opinion interpreting the statute, the U.S. Court of Appeals for the Ninth Circuit in *United States v. Schena*,¹ affirmed an EKRA jury conviction of a laboratory operator based on his improper payments to marketers. The Ninth Circuit held that (1) like the Anti-Kickback Statute (AKS), EKRA applies to payments made to marketing agents who act as intermediaries—not just to doctors or providers who interface directly with patients; and (2) although a payment arrangement based on a percentage of the revenue generated by a marketer does not *per se* violate EKRA, inducing referrals through undue influence on providers by making false or fraudulent misrepresentations does.

BACKGROUND OF THE ELIMINATING KICKBACKS IN RECOVERY ACT

EKRA was passed by Congress in 2018 to broaden the prohibition against the payment of kickbacks for patient referrals under the AKS, which only applies to services covered by federal health care programs such as Medicare and Medicaid. EKRA imposes similar prohibitions for patient referrals involving private health insurance plans, but only for certain covered services (recovery homes, clinical treatment facilities, and laboratories). In relevant parts, EKRA penalizes anyone who knowingly and willfully “pays or offers any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly, in cash

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¹ No. 23-2989 (9th Cir. July 11, 2025).

or in kind[,] to induce a referral of an individual to a recovery home, clinical treatment facility, or laboratory.”² Possibly because of EKRA’s controversial reach into the field of private health insurance—traditionally outside the scope of the AKS—federal prosecutions based on EKRA have been few and far between.

THE NINTH CIRCUIT’S INTERPRETATION OF EKRA

First, the Ninth Circuit rejected the argument that EKRA³ only applies to payments made to referring doctors or providers who interact directly with patients. Instead, the Ninth Circuit held that EKRA applies to payments made to marketing intermediaries, even though they do not directly interact with patients, as the statute covers payments made “directly or indirectly” to induce referrals. This reading of EKRA is consistent with case law interpreting the AKS on the same issue.⁴

Second, and more importantly, the Ninth Circuit interpreted what it means “to induce” a referral, in the context of payments made to marketers. The court again looked to case law interpreting the AKS and held that the term “induce” requires “undue influence” on those who make healthcare decisions.⁵ Simply engaging in advertising activities, where there is no evidence of undue influence on the independent decision to purchase a healthcare good or service, does not constitute an unlawful inducement under the statute.⁶

Critically, the Ninth Circuit noted that a percentage-based compensation structure for marketers, without more, is not enough “to induce” a referral and does not per se violate EKRA. But where there is evidence of undue influence on the provider—such as directing marketers to convey false, fraudulent, or misleading representations about the covered medical services—those payments would violate EKRA.

As applied to the facts, the Ninth Circuit held there was sufficient evidence to establish undue influence to uphold the EKRA conviction. Specifically, the facts involved percentage-of-revenue-based payments to marketers to sell blood

² 18 U.S.C. § 220(a)(2)(A).

³ 18 U.S.C. § 220(a)(2)(A).

⁴ See *United States v. Shoemaker*, 746 F.3d 614 (5th Cir. 2014); *United States v. Miles*, 360 F.3d 472, 480 (5th Cir. 2004); *United States v. Polin*, 194 F.3d 863, 866–67 (7th Cir. 1999).

⁵ See *United States v. Shoemaker*, 746 F.3d 614 (5th Cir. 2014); *United States v. Miles*, 360 F.3d 472, 480 (5th Cir. 2004); *United States v. Marchetti*, 96 F.4th 818, 827 (5th Cir. 2024).

⁶ See *United States v. Sorensen*, 134 F.4th 493, 502 (7th Cir. 2025) (reversing AKS jury conviction where there was no evidence that marketers subjected physicians to improper influence).

testing services for allergens and COVID-19. The defendant lab operator directed marketers to mislead and deceive doctors about the lab's blood testing services in an effort to cause them to make referrals to his lab. The defendant also directed marketers to target doctors who were less knowledgeable about allergies and therefore more likely to believe the false claim that the lab's blood tests were superior to skin tests, and would not understand that it was unnecessary to test for 120 allergens. The marketers also misrepresented the speed and efficacy of the lab's COVID-19 blood tests compared to PCR, and falsely claimed that allergies and COVID-19 symptoms could be confused with one another so it was necessary to test for both. Further, there was trial testimony that the marketers effectively "controlled" which lab a sample would be sent to. Based on these aggravating facts, the court upheld the defendant's EKRA conviction for inducing referrals by directing marketers to engage in deceitful conduct that exerted undue influence on the referring providers.

PRACTICAL CONSIDERATIONS

Although EKRA remains somewhat controversial due to its broad reach into the realm of private payors, this case signals that courts will uphold jury convictions based on EKRA violations. This case also demonstrates that courts are likely to borrow from AKS case law when interpreting EKRA, which helps provide future guidance given the dearth of cases (and prosecutions) under EKRA.

Finally, this case provides some assurance that percentage-based payments to marketers, without more, are not per se violations of EKRA (at least in the Ninth Circuit) or the AKS (in the Fifth Circuit⁷). Typically, these types of payment arrangements are disfavored and often targeted by prosecutors, in part due to the safe harbor's requirement that payments not vary by the number of referrals, tests, or amount billed.⁸ However, compliance with the safe harbor is not required to avoid a violation. Rather, according to *Schena*, the important question in determining if a payment was made "to induce" a referral is whether there was any undue influence on the independent decision to purchase a healthcare good or service.

⁷ Marchetti, 96 F.4th at 826.

⁸ 18 U.S.C. § 220(b)(2).