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Florida Patient Brokering Act Amended – Does it Clarify or Create New Issues?

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The Florida Legislature recently passed HB 369 (the Bill), which would tweak an important provision of the Florida Patient Brokering Act, Section 817.505 of the Florida Statutes (Patient Brokering Act). It seeks to clarify the exception to the Patient Brokering Act which incorporated by reference the criminal provisions of the federal Anti-Kickback Statute (42 U.S.C. S1320a-7b(b)) pertaining to illegal remuneration) (the AKS) and its safe harbor regulations. But the attempt to clarify the exception may have made it less clear.

The applicable exception in the Patient Brokering Act currently states that:

"(3) This section shall not apply to: (a) Any discount, payment, waiver of payment, or payment practice not prohibited by 42 U.S.C. s. 1320a-7b(b) or regulations promulgated thereunder."

The revision in the Bill enacted by the Legislature on May 3, 2019 states that:

"(3) This section shall not apply to the following payment practices: (a) Any discount, payment, waiver of payment, or payment practice expressly authorized by 42 U.S.C. s. 1320a-7b(b)(3) or regulations adopted thereunder."

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So, what does the change mean? And why was the language changed?

The Summary Analysis of the Bill states that it "[c]larifies the application of the patient brokering statutes to certain payment practices..." Unfortunately, it does not accomplish this objective. The current phrase "not prohibited by [the federal Anti-Kickback Statute]" is somewhat vague in that the federal AKS is intent-based. To determine whether a business or payment practice is "not prohibited", one would need to analyze the intent of the parties and attempt to apply extensive federal case law to the specific facts and circumstances. But the reference to "or regulations promulgated thereunder" incorporates the federal safe harbor regulations. One interpretation is that if conduct meets the criteria of an applicable federal safe harbor regulation, it will not violate the Florida Patient Brokering Act.

The change to "payment practices"..."expressly authorized [emphasis added] by [the federal AKS]" renders the exception less clear in that the AKS is a criminal statute which prohibits certain business and payment practices. The AKS does not expressly authorize any business or payment practices.

The safe harbor regulations adopted under the AKS describe business and payment practices which would not be subject to criminal prosecution under the AKS. They too do not expressly authorize business or payment practices. In light of the expansive language in the AKS and broad prosecutorial discretion, the safe harbor regulations were adopted to describe business and payment practices that, although they potentially implicate the AKS, would not be treated as a criminal offense under the statute.

The Committee Analysis raises another issue when it states that "[t]he federal provisions only apply to federally funded programs,..." The statement raises the question whether the federal safe harbor

regulations to the AKS, by being incorporated into the Patient Brokering Act, apply to business and payment practices applicable to private insurance payors. The Staff Analysis suggests that the safe harbor regulations to the AKS incorporated into the Patient Brokering Act do not apply to patient brokering related to private insurance policies and coverage. The Court in State v. Kigar, No. 16-CF-10364 (Fla. 15th Cir. Ct., Jan 31, 2019) recently held that the AKS, including its mens rea standard, was incorporated by reference into the Patient Brokering Act. The Staff Analysis to the Bill indicated that this decision results in "uncertainty on whether [the Patient Brokering Act] will apply to private insurance-related patient brokering..." Unfortunately, the revisions to the Patient Brokering Act contained in the Bill do not serve to clarify this issue.

If a provider treats patients under both federally-funded programs and patients with private insurance, would the provider be immune from criminal prosecution under federal law but subject to prosecution under the Patient Brokering Act for the same business or payment practice? The Florida Supreme Court has already reviewed a similar issue in the conflict between the Florida Medicaid Anti-Kickback Statute and the federal AKS and determined that the doctrine of implied conflict preemption applies where it is impossible to comply with both the state and federal regulations or where the state law is an obstacle to accomplishing the full purpose and objectives of Congress. [State v. Harden, 938 So.2d 480 (Fla. 2006), cert denied, 127 S.Ct. 2097, 167 L.Ed.2d 812 (2007)]. It should be noted that the Hardencase involved a conflict between the Florida Statute governing Medicaid, a joint federal/state program, and the federal AKS which applies to the same program.

While the overall objectives of the Bill may be laudatory, the change to the Patient Brokering Act does not provide clarity to providers seeking to comply and prosecutors and payors seeking to

enforce the law. Courts in adjudicating issues raised by litigants may ultimately determine whether the revision has clarified the Patient Brokering Act or whether the Act has raised additional issues in its application to providers who endeavor to comply with both the AKS and the Patient Brokering Act. The Bill was approved by the Governor on June 27, 2019 and takes effect on July 1, 2019.
