



The Court Decides

United States v. Greber
760 F.2d 68 (3rd Cir. 1985)

WEIS, Circuit Judge

[The defendant was convicted of fraud related to his durable medical equipment company's billing practices. The company supplied Holter monitors—portable devices worn by patients to record their heartbeats for later interpretation. For this service, Dr. Greber's company, Cardio-Med, billed Medicare and remitted a portion of each payment to the referring physician. For this practice, he was found guilty of having violated the AKS even though the payments were made for consultative services rendered. Dr. Greber was also convicted of submitting false statements concerning the length of time the monitors were operated (Medicare requires at least eight hours of operation to qualify for payment) and mail fraud (by using the mail to bill for services that were medically unnecessary or were never provided). Only the kickback issue is addressed in the following excerpt.]

On appeal, defendant raises several alleged trial errors. He presses more strongly, however, his contentions that the evidence was insufficient to support the guilty verdict on the Medicare fraud counts, and that the charge to the jury on that issue was not correct. . . .

i. Medicare Fraud

The Medicare fraud statute was amended [in 1977]. Congress, concerned with the growing problem of fraud and abuse in the system, wished to strengthen the penalties to enhance the deterrent effect of the statute. To achieve this purpose, the crime was upgraded from a misdemeanor to a felony.

Another aim of the amendments was to address the complaints of the United States Attorneys who were responsible for

prosecuting fraud cases. They informed Congress that the language of the predecessor statute was "unclear and needed clarification."

A particular concern was the practice of giving "kickbacks" to encourage the referral of work. Testimony before the Congressional committee was that "physicians often determine which laboratories would do the test work for their Medicaid patients by the amount of the kickbacks and rebates offered by the laboratory. . . . Kickbacks take a number of forms including cash, long-term credit arrangements, gifts, supplies and equipment, and the furnishing of business machines."

To remedy the deficiencies in the statute and achieve more certainty, the present version of 42 U.S.C. § 1395nn(b)(2) was enacted. It provides:

whoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe or rebate) directly or indirectly, overtly or covertly in cash or in kind to induce such person . . . (B) to purchase, lease, order, or arrange for or recommend purchasing . . . or ordering any . . . service or item for which payment may be made . . . under this title, shall be guilty of a felony.

[The evidence showed that the defendant had paid physicians "interpretation fees" for the doctors' consultation services and for explaining the test results to the patients. Some evidence existed that physicians received interpretation fees even though Dr. Greber had actually evaluated the monitoring data. Moreover, the fixed percentage paid to the referring physician was more than Medicare allowed for such services.]



The district judge instructed the jury that the government was required to prove that Cardio-Med paid . . . some part of the amount received from Medicare; that defendant caused Cardio-Med to make the payment; and did so knowingly and willfully as well as with the intent to induce Dr. Avallone to use Cardio-Med's services for patients covered by Medicare. The judge further charged that even if the physician interpreting the test did so as a consultant to Cardio-Med, that fact was immaterial if a purpose of the fee was to induce the ordering of services from Cardio-Med.

Defendant contends that the [instruction to the jury] was erroneous. He insists that absent a showing that the only purpose behind the fee was to improperly induce future services, compensating a physician for services actually rendered could not be a violation of the statute. The government argues that Congress intended to combat financial incentives to physicians for ordering particular services patients did not require.

The language and purpose of the statute support the government's view. Even if the physician performs some service for the money received, the potential for unnecessary drain on the Medicare system remains. The statute is aimed at the inducement factor. The text refers to "any remuneration."

That includes not only sums for which no actual service was performed but also those amounts for which some professional time was expended. "Remunerates" is defined as "to pay an equivalent for service." Webster Third New International Dictionary (1966). By including such items as kickbacks and bribes, the statute expands "remuneration" to cover situations where no service is performed. That a particular payment was a remuneration (which implies that a service was rendered) rather than a kickback, does not foreclose the possibility that a violation nevertheless could exist.

In *United States v. Hancock* the court applied the term "kickback" found in the predecessor statute to payments made to chiropractors by laboratories which performed blood tests. The chiropractors contended that the amounts they received were legitimate handling fees for their services in obtaining, packaging, and delivering the specimens to the laboratories and then interpreting the results. The court rejected that contention and noted, "The potential for increased costs to the Medicare-Medicaid system and misapplication of federal funds is plain, where payments for the exercise of such judgments are added to the legitimate cost of the transaction. . . . [T]hese are among the evils Congress sought to prevent by enacting the kick-back statutes. . . ."

Hancock strongly supports the government's position here, because the statute in that case did not contain the word "remuneration." The court nevertheless held that "kickback" sufficiently described the defendants' criminal activity. By adding "remuneration" to the statute in the 1977 amendment, Congress sought to make it clear that even if the transaction was not considered to be a "kickback" for which no service had been rendered, payment nevertheless violated the Act.

We are aware that in *United States v. Porter* the Court of Appeals for the Fifth Circuit took a more narrow view of "kickback" than did the court in *Hancock*. Porter's interpretation of the predecessor statute[,] which did not include "remuneration[,] is neither binding nor persuasive. . . . We conclude that the more expansive reading is consistent with the impetus for the 1977 amendments and therefore hold that the district court correctly instructed the jury. If the payments were intended to induce the physician to use Cardio-Med's services, the statute was violated, even if the payments were also intended to compensate for professional services. ■

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Discussion Questions

1. How, if at all, can you distinguish Greber from other instances of payments for professional services? Suppose the percentage Dr. Greber paid to the physicians had not exceeded Medicare's guidelines. Would that payment still amount to prohibited remuneration in this court's eyes?
2. Suppose you are a lawyer or a compliance officer advising a hospital cardiology department. The department has a contract under whose terms it will pay a certain cardiology group a fixed dollar amount for every electrocardiogram (ECG) it interprets, and the hospital will bill Medicare accordingly. The dollar amount is equal to Medicare's allowable charge for a basic ECG and report, and all readings are medically necessary. You ask why the hospital does not just let the doctors bill Medicare themselves, and the reply is, "Oh, it's such a hassle for them. We already have a billing department, and we can do it for them easily." What is your response, and why?



The Court Decides



United States v. McClatchey
217 F.3d 823 (10th Cir. 2000)

MURPHY, Circuit Judge

[Fifteen years after Greber, the type of intent required to violate the AKS was still an open question. Greber determined that if any purpose of the remuneration was to induce referrals, the act was violated even if other purposes were legitimate. The following case excerpt illustrates some of the difficulties of this interpretation.]

The case involved two physicians who were the principals in a group practice (BVMG) that provided care to nursing home patients. In 1984, the physicians approached Baptist Medical Center in Kansas City, Missouri, and proposed that they would move their patients from other hospitals to Baptist if the hospital would buy BVMG. Baptist

rejected the proposal, but after much negotiation the parties agreed that the physicians would provide various services to the hospital in return for \$75,000 each per year. (Among other findings, testimony indicated that the fee was determined before the physicians had agreed on the services.) The physicians then began admitting their patients to Baptist.

The contractual arrangement continued until 1993—though as early as 1986, attorneys for Baptist's new owner, the Health Midwest system, were concerned that it did not comply with the safe harbor regulations that had since been issued by the US government. In addition, in late 1991 or early 1992, Baptist

moned that the physicians were not performing some of the contractual services, but the fees continued to be paid and the contract was renewed.

The jury convicted the hospital chief executive officer, the two physicians, and McClatchey (Baptist's chief operating officer) of violating the AKS. Two attorneys for Health Midwest who were involved in the negotiations to renew the contract were charged with conspiracy but were found not guilty by the judge on motions for acquittal. The judge also granted McClatchey's motion for acquittal on the ground that no reasonable jury could find that he deliberately intended to violate the law. Thus, the issue on appeal concerned the type of criminal intent necessary to violate the AKS.]

In Instruction 32, the district court charged the jury as follows:

In order to sustain its burden of proof against the hospital executives for the crime of violating the Anti-Kickback statute, the government must prove beyond a reasonable doubt that the defendant under consideration offered or paid remuneration with the specific criminal intent "to induce" referrals. To offer or pay remuneration to induce referrals means to offer or pay remuneration with the intent to gain influence over the reason or judgment of a person making referral decisions. The intent to gain such influence must, at least in part, have been the reason the remuneration was offered or paid.

On the other hand, defendants Anderson, Keel, and McClatchey cannot be convicted merely because they hoped or expected or believed that referrals may ensue from remuneration that was designed wholly for other purposes. Likewise, mere oral encouragement to refer patients or the mere creation of

an attractive place to which patients can be referred does not violate the law. There must be an offer or payment of remuneration to induce, as I have just defined it.

McClatchey contends this instruction was incorrect and warrants a new trial, because a defendant should not be convicted under the Act when his offer or payment of remuneration was motivated merely in part to induce referrals, but rather the motivation to induce referrals must be the defendant's primary purpose. . . .

Whether the "at least in part" or "one purpose" standard applied in the instant case constitutes a correct interpretation of the Act is an issue of first impression in this Circuit. McClatchey urges this court to reject the test set out in Instruction 32 as too broad, because "[e]very business relationship between a hospital and a physician is based 'at least in part' on the hospital's expectation that the physician will choose to refer patients." This argument, however, ignores the actual instruction given in the instant case, in which the district court specifically informed the jury that "McClatchey cannot be convicted merely because [he] hoped or expected or believed that referrals may ensue from remuneration that was designed wholly for other purposes." According to this instruction, therefore, a hospital or individual may lawfully enter into a business relationship with a doctor and even hope for or expect referrals from that doctor, so long as the hospital is motivated to enter into the relationship for legal reasons entirely distinct from its collateral hope for referrals.

The only three Circuits to have decided this issue have all adopted the "one purpose" test. [One of these was Greber, which was set forth earlier.] In Greber, a doctor who owned a diagnostic laboratory was convicted of violating the Act because he paid "interpretation

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