State Anti-Kickback Statutes: Where the Action is

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I. Introduction

A low-income, pregnant, drug addicted woman walks into her local health and rehabilitative services department seeking help. The counselor threatens the vulnerable woman that the state will take away her baby unless the woman enrolls in a specific drug treatment center. The frightened woman enrolls in the specific treatment center, but behind the scenes, the counselor receives a “kick-back” from the drug treatment center in the form of $250 for each woman referred.

In order to prevent these types of financial arrangements that may skew professional medical judgment to the detriment of patients, Congress, in 1972, passed the Federal Anti-kickback Statute and has since broadened the scope and increased the criminal liability for actions violating the statute.

Following the federal government’s lead, most states enacted their own Anti-kickback Statutes. States enacted these statutes to protect patients from medical referrals based upon the health care provider’s financial incentives, rather than medical necessity. Recently, in State v. Harden, the Florida Supreme Court declared the state’s anti-kickback statute unconstitutional under the Supremacy Clause because it imposed criminal liability where the Federal Anti-kickback Statute did not. This article evaluates several state Anti-kickback Statutes, using Harden to determine whether constitutional challenges would be successful against other state statutes. Part II provides a general overview of the federal and state anti-kickback statute and analysis of Harden. Part III assesses whether other state statutes could be declared unconstitutional using Harden’s reasoning and provides recommendations on how states could amend their anti-kickback statutes to circumvent constitutional challenges.

II. Overview

This section provides a brief history of the Federal Anti-kickback Statute and compares various state anti-kickback statutes.

A. The Federal Anti-kickback Statute

In 1972, Congress passed the original Federal Anti-kickback Statute, which prohibited payment of kickbacks, bribes, or rebates for the referral of Medicaid or Medicare patients. Congress declared that any conduct violating the statute would result in a criminal misdemeanor punishable by fines of up to $10,000 and/or one year in prison. In response, Congress amended the Anti-kickback Statute in 1977, declaring that any remuneration offered, solicited, or received in exchange for Medicare or Medicaid referrals violated the Statute and constituted a felony. Congress again amended the Anti-kickback Statute in 1980 to provide the requisite mens rea of “knowingly and willfully” to justify the heightened fines.

Once the violation became a federal felony, health care providers lobbied Congress to provide greater clarity on what types of referrals, remunerations, or offers are prohibited by the statute. As a result, in 1987, Congress once again amended the Anti-kickback Statute providing the Office of Inspector General of the Department of Health and Human Services (OIG), along with the Department of Justice, authority to punish individuals who violated the Anti-kickback Statute. This amendment also imposed a duty on the OIG to establish “safe harbors,” which would provide guidance and protection to individuals engaged in the health care business. Congress continued to tinker with the Anti-kickback Statute by broadening the scope of the statute to cover all federal health programs, except the Federal Employee Benefit Health Program (FEBHP), imposing more duties on the OIG, such as the requirement to issue advisory opinions, and by drafting more safe harbors. Currently, the Federal Anti-kickback Statute provides that any person who:
Anti-kickback Statute provides that any person who knowingly and willfully solicits, receives, offers, or pays remuneration directly, indirectly, overtly, or covertly for a referral under medical assistance or to purchase, lease, order, or arrange for any goods, facilities, or services “for which payment may be made in whole or part under medical assistance” shall be guilty of a felony.21 The statute does not apply to properly disclosed discounts, bona fide employee-employer relationships, authorized group purchases, or any business arrangement allowed under the Federal Anti-kickback Statute.22

Minnesota’s Anti-kickback Statute takes a more direct approach in demonstrating its conformity with the Federal Anti-kickback Statute by providing that the Commissioner of Health shall adopt rules restricting financial relationships within the health care industry.23 Interestingly, however, the rules must be “compatible with, and no less restrictive than” the Federal Anti-kickback Statute, except that the rules may apply to “additional provider groups and businesses and professional arrangements.”24 Furthermore, until the Commissioner adopts such rules, the Federal Anti-kickback Statute shall apply to “all persons in the state, regardless of whether the person participates in any state health program.”25 The Statute also exempts properly disclosed discounts or remunerations for continued product use so long as certain elements are met.26

ii. State Anti-kickback Statutes that Mirror the Federal Anti-kickback Statute and Provide Statutory Exceptions

Three of the seven states surveyed provide that a violation of their anti-kickback statute constitutes a misdemeanor, unless the value of the remuneration in question exceeds a certain amount, or if certain elements are met. If not, the violation constitutes a felony. Ohio’s Anti-kickback Statute provides that it is fraudulent to solicit, offer, or receive any remuneration in connection with goods or services for which payment may be made in whole or part under the medical assistance program.27 Ohio’s intent standard requires either “with the purpose to commit fraud or knowing that the person is facilitating a fraud.”28 While Ohio’s statute does not provide any exceptions, if the value of property, services, or funds obtained is under $500, the violation is a misdemeanor. Otherwise, the violation is a felony.29

The New York Anti-kickback Statute raises the punishment level from misdemeanor to felony at the threshold value of $7,500.30 The statute criminalizes any “medical assistance provider”31 who accepts, offers, receives, or solicits any payment or any other consideration for referrals or “to purchase, lease, or order any goods, facilities, or services which payment is made” by the State.32 While the New York Statute does
not contain a knowing or willful intent requirement.\textsuperscript{33} It specifically declares that it shall not apply to any activity exempted by either the Federal Anti-kickback Statute or regulations.\textsuperscript{34}

While Texas’ Anti-kickback Statute differentiates between a misdemeanor and a felony violation, it does not take into account the value of remuneration obtained.\textsuperscript{35} Instead, a person can be convicted of a felony for violating Texas’ anti-kickback statute only if the person has previously been convicted of an offense or if he or she was an employee of the federal, state, or local government at the time that the offense was committed.\textsuperscript{36} To violate the Texas Statute, one must “knowingly offer to pay or agree to accept, directly, indirectly, overtly, or covertly, any remuneration for securing or soliciting a patient or patronage for or from a person licensed, certified, or registered” by Texas’ health care regulatory agency.\textsuperscript{37}

\textbf{iii. Pennsylvania’s Anti-kickback Statute, Contains No Intent Requirement, but a Violation Constitutes a Felony}

Pennsylvania’s Anti-kickback Statute stands alone because it does not include an intent standard, nor does it provide for any exceptions. Nonetheless, it still characterizes any violation as a felony.\textsuperscript{38} The statute provides that it shall be unlawful for anyone to offer, receive, or solicit any remuneration, directly or indirectly, to any person for referrals or “in connection with the furnishing of services or merchandise for which payment may be in whole or in part under the medical assistance program.”\textsuperscript{39}

\textbf{C. State v. Harden}

The Florida Anti-kickback Statute provides that it is unlawful to knowingly offer, pay, receive, or solicit any remuneration directly or indirectly, overtly or covertly, for referrals or for leasing, obtaining, ordering, or purchasing any goods, items, facilities, or services for which payment may be made in whole or in part under Medicaid.\textsuperscript{40} In \textit{Harden}, the state alleged that ten individuals either associated with or employed by Dental Express Dentists engaged in a “pay for patients” scheme where these individuals received “per head” payments in exchange for soliciting and driving Medicaid-eligible children to Dental Express for dental treatment.\textsuperscript{41} The state argued this “scheme” violated Florida’s statute because the defendants received money in exchange for rounding up children from poor neighborhoods and taking them to their employer for dental services and, in turn, billing Florida’s Medicaid Program for the services rendered.\textsuperscript{42} The defense argued that such an arrangement was protected by the Federal Employee Safe Harbor.\textsuperscript{43} The defense further argued that since the Florida Statute criminalized behavior the Federal Anti-kickback Statute allowed, it was unconstitutional under the Supremacy Clause.\textsuperscript{44}

Federal law may preempt state law under express preemption, implied field preemption, or implied conflict preemption.\textsuperscript{45} Express preemption is when the federal statute explicitly states that it preempts state statutes; (2) implied field preemption is when the “scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it;” and (3) implied conflict preemption is when it is physically impossible to comply with both federal and state law or when the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”\textsuperscript{46} In dealing with the explicit preemption theory, the Florida Supreme Court looked to both the Federal Anti-kickback Statute and the OIG, determining that there was no explicit preemption provision within the Statute.\textsuperscript{47} However, the court believed that this fact alone did not bar the preemption claim because the Florida Statute could still be preempted under the theory of implied conflict preemption.\textsuperscript{48}

The court held that Florida’s Statute failed under the implied conflict preemption theory for two reasons: (1) the Florida statute contained a lower intent requirement, which permitted a violation based on negligent behavior;\textsuperscript{49} and (2) the Florida statute did not contain safe harbors or exceptions.\textsuperscript{50} In addressing the intent requirement, the court looked to Congress’ intent for increasing the mens rea, and found that Congress did not want to impose criminal liability on individuals whose conduct, while improper, was ultimately inadvertent.\textsuperscript{51} Thus, Congress intended that only those individuals who acted “knowingly or willfully” should be criminally liable under the Federal Anti-kickback Statute, while Florida’s Statute criminalizes individuals who knew or should have known their conduct was unlawful.\textsuperscript{52}

In addition, Congress explicitly stated that any compensation received in an employee-employer relationship would be exempt from criminal liability under the Federal Anti-kickback Statute, thus exempting the compensation the defendants received from their employer in return for transporting Medicaid-eligible children to receive dental services from their employer.\textsuperscript{53} Congress clearly intended to exempt this type of employee-employer compensation arrangement from criminal liability and only wanted to criminalize individuals with a heightened mens rea. Thus, the Florida Supreme Court found that the state’s Anti-kickback Statute presented an obstacle to the accomplishments and purposes of Congress and of
III. Discussion

While it is unclear whether the Florida Supreme Court would have declared the Florida Anti-kickback Statute preempted if the intent requirement was heightened or if the statute contained exceptions, Harden provides an analytical framework under which to evaluate other state anti-kickback statutes’ constitutionality.56 Harden also demonstrates ways state legislatures can amend their anti-kickback statutes in order to avoid successful preemption challenges.57

A. State Anti-kickback Statutes that Expressly Exempt any Allowable Arrangement Under the Federal Anti-kickback Statute Should Not be Preempted

The Florida Supreme Court’s primary problem with the state statute was that it posed an obstacle to the objectives and purposes of the Federal Anti-kickback Statute.58 Applying this reasoning to the laws in Minnesota, New York, and Virginia, it appears unlikely that a court would find that these statutes frustrate the objectives and purposes of the Federal Anti-kickback Statute primarily because the state statutes explicitly exempt any conduct from criminal liability that the Federal Anti-kickback Statute allows.59 Given this interpretation, anti-kickback statutes in these three states would likely survive a preemption challenge under the Supremacy Clause.

B. It is Unclear Whether State Anti-kickback Statutes Which Have Either Some Exceptions or Classifies a Violation a Misdemeanor Rather Than a Felony Will be Preempted

The two elements that the Florida Supreme Court relied on to declare the Florida Statute unconstitutional were that: (1) the state statute provided a lower intent standard of “knowingly” as compared to the Federal Anti-kickback Statute’s intent standard of “knowingly and willfully;” and (2) the state statute did not provide for any exceptions similar to the safe harbor found in both the Federal Anti-kickback Statute and regulations.60 It remains unclear whether the court would have reached the same conclusion had only one of the two elements mentioned above been present.

For example, New Mexico’s statute provides a lower intent standard of “knowingly” as compared to the Federal Anti-kickback Statute’s intent standard of “knowingly and willfully.”61 The state statute includes two exceptions found in the Federal Anti-kickback Statute, namely: the discount and bona fide employment exceptions, but fails to incorporate the remaining exceptions currently found in the Federal Anti-kickback Statute and regulations.62 While New Mexico’s statute appears to be better suited to defend a preemption challenge than Florida’s statute, a court would likely find the New Mexico statute preempted because: (1) it provides a lower intent requirement than the Federal Anti-kickback Statute; (2) it only provides two statutory exceptions compared to the numerous federal safe harbors; and (3) the statute provides that anyone found in violation with the law shall be guilty of a felony.63

While New Mexico’s regulations incorporate any conduct that violates federal law into its definition of “provider misconduct,” it does not provide for any other exceptions found in the federal regulatory scheme, and therefore frustrates the Federal Anti-kickback’s purpose by criminalizing behavior specifically exempted by the federal government.64 The analysis becomes more interesting when the state anti-kickback statute provides that anyone violating the law shall be guilty of a misdemeanor, rather than a felony. For example, Ohio’s statute provides an arguably more stringent intent requirement than the Federal Anti-kickback’s “knowingly and willfully” by requiring a person to act “with the purpose to commit fraud or knowing that the person is facilitating fraud.”65 In addition to the higher intent requirement, a violation of the Ohio statute equates to a misdemeanor, rather than a felony (unless the value of the property obtained is more than $500, which in that case would constitute a felony).66 While Ohio does not include any exceptions, a court may be persuaded that the state statute does not frustrate the objectives or purposes of the Federal Anti-kickback Statute because: (1) fewer individuals would be found in violation of the law due to the higher intent requirement; and (2) even if the prosecution is able to prove the higher intent requirement, the person is guilty of only a misdemeanor unless the prosecution can prove that remuneration over $500 was actually obtained, rather than just offered, solicited, or agreed upon.67 Texas’ statute falls somewhere in between, because it provides a lower “knowingly” intent requirement than the Federal Anti-kickback Statute’s “knowingly and willfully” standard.68 The state statute also provides no exceptions and only classifies a violation as a misdemeanor (unless previously convicted under the statute or the individual was a government employee at the time of the violation then it is a felony), as opposed to the federal law’s felony classification.69 Texas’ regulations provide an exception for a “referral of a patient to another practitioner within a multi-specialty group or university medical services research and development plan for necessary medical services.”70 Arguably, the Texas Statute does not frustrate the objectives or purpose of the Federal Statute because it provides a lower intent requirement for a lower classification of punishment and provides at least one exception to common health care business practices.71 Nonetheless, the statute still prohibits other common health care business arrangements or conduct, such as a bona fide lease of
office space or medical equipment, which the Federal Anti-kickback Statute sanctions. A court would be hard pressed to find two individuals guilty of a misdemeanor for “knowingly” offering and receiving remuneration in the form of a fair market value lease arrangement in exchange for reasonable space or equipment provides. This is how the U.S. economy operates. One must consider, however, whether this reasoning will be sufficient to appease the OIG.

In order to remedy the possibility of a successful preemption challenge, New Mexico, Ohio, and Texas should amend their statutes with a catch-all provision, providing that these statutes do not apply to any conduct sanctioned by the Federal Anti-kickback Statute or regulations adopted thereafter. These states will still be able to maintain their autonomy and uniqueness in combating health care fraud, waste, and abuse, while complying with the Supremacy Clause of the U.S. Constitution.

C. A Court will Likely Find the Federal Anti-kickback Statute Preempts Pennsylvania’s Anti-kickback Statute Under Harden

Under Harden, the Federal Anti-kickback Statute appears to preempt Pennsylvania’s statute because the state statute seems to be more of an obstacle to the objectives and purposes of the federal statute than the Florida Anti-kickback Statute. Pennsylvania’s anti-kickback statute does not provide any intent requirement for a violation classified as a felony. Moreover, the Pennsylvania Statute fails to provide for any exceptions for normal health care business practices that the Federal Anti-kickback Statute exempts. However, Pennsylvania’s regulations provide two exceptions, namely a bona fide office space lease exception and a properly disclosed discount exception. While the regulatory exceptions help strengthen the argument against preemption of the Pennsylvania Statute, the lack of intent requirement along with any bona fide employment exception frustrates the purpose of the Federal Anti-kickback Statute. Thus, if the Florida’s statute fails under the Supremacy Clause because it provides a lower intent requirement and fails to grant exceptions, then the Pennsylvania Statute will fail as well. Pennsylvania provides no intent requirement and only two regulatory exceptions, as compared to the numerous federal regulatory exceptions. In order to remedy this defect, the Pennsylvania legislature should add a provision stating that this statute does not apply to any conduct sanctioned by the Federal Anti-kickback Statute or any regulations promulgated under it.

IV. Conclusion

The Federal and state anti-kickback statutes play a valuable and necessary role in combating fraud, waste, and abuse in the health care industry. As Congress realized, these statutes must be narrowed in order to allow normal and necessary business transactions to occur without fear of criminal liability. Without such exceptions, the health care industry would cease to exist, which would devastate not only our economy but also jeopardize the well-being of all U.S. citizens. Consequently, state legislators must reevaluate their anti-kickback statutes and ensure that they do not frustrate the objectives of the Federal Anti-kickback Statute. If the state finds that its anti-kickback statute may pose a problem, the state legislature should add a provision exempting all conduct sanctioned by the Federal Anti-kickback Statute and regulations adopted thereunder.
any person who violates this provision knowingly, or with the purpose to commit fraud, is guilty of Medicaid fraud which is a misdemeanor, unless the “value of the property, services or funds obtained is $500 or more” because then the person is guilty of a felony); Tex. Occ. Code Ann. § 102.001 (Vernon 2006) (explaining that any person who knowingly offers or agrees to accept any illegal remuneration shall be guilty of a misdemeanor, unless the person has been previously convicted under the provision or was employed by the federal, state, or local government at the time, then they shall be guilty of a felony).


See id.


See id.


See id.

See id.

See id. (listing the following exemptions: (1) a health industry manufacturer or distributor that reduces the patient’s fee for a needed prescribed product or item, or (2) a health industry manufacturer or distributor that provides the patient with a “trinket or memento of insignificant value,” or (3) a tiered formulary with different co-payment or cost-sharing amounts for different drugs).


See id.

See id.


See id. (defining medical assistance provider as “any person, firm, partnership, group, association, fiduciary, employer, or representative thereof or other entity who is furnishing care, services or supplies” under the state medical program).

See id.

See id.

See id.


See id.

See id.


See id.


See id. at 483-84.

See id. at 484.


See U.S. Const. art. VI, cl.2 (declaring that federal law “shall be the supreme law of the land” and anything in a state constitution or statute to the contrary is not withstanding); Harden, 938 So.2d at 492-93.

See Harden, 938 So.2d at 486.

See id.

See id. at 487-90 (discussing the OIG’s position that lawful conduct under the Federal Anti-kickback Statute may still be unlawful under the state Anti-kickback Statute, and vice versa).

See id. at 490.

See id. at 491-92 (explaining that the Florida Legislature amended the Anti-kickback Statute in 2004 in order to increase the intent requirement and remove negligent actions from criminal liability). However, the defendants in Harden were tried and convicted under the pre-amended statute and that is the version the court analyzed. Id.

See id. at 492.

See Harden, 938 So.2d at 493.

See id. at 491.

See id. at 493.

See id.

See id.

See id.