

## District Court Rules Online Auction for Medical Supplies Violates Anti-Kickback Statute

### IN SHORT

**The Situation:** A federal district court in Connecticut held that an online auction service for the purchase of medical supplies violates the Anti-Kickback Statute.

**The Result:** If the ruling holds and is accepted by other courts, it makes illegal a trend towards online auctions utilized by providers to reduce costs in the purchase of medical supplies and other items necessary for the delivery of health care.

**Looking Ahead:** In our view, the ruling unnecessarily limits a means of reducing health care costs and is inconsistent with the spirit and language of the AKS, and should not be accepted by other courts.

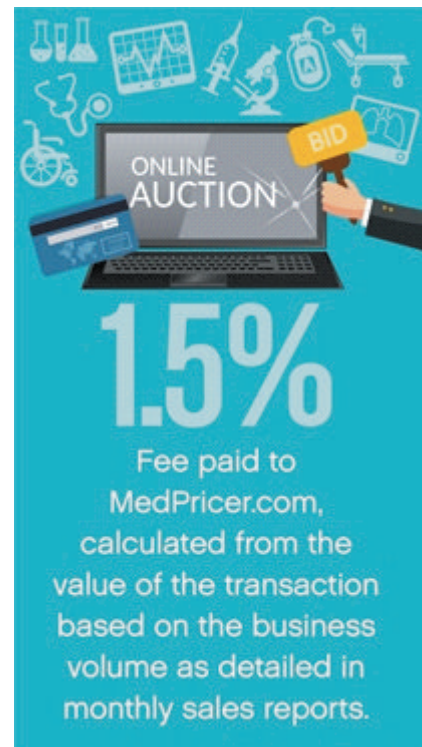
On March 6, 2017, the U.S. District Court for the District of Connecticut held that an arrangement between a company operating an online portal for purchases of medical equipment and a supplier of medical products violates the Anti-Kickback Statute ("AKS"), 42 U.S.C. § 1320a-7b(b), because it resulted in a payment for "arranging" for the purchase of goods for which reimbursement may be received from federal health care programs. *MedPricer.com, Inc. v. Becton, Dixon and Company*, 2017 WL 888479 (D. Conn. 2017). Recognizing that the court was grappling with a novel issue and took care to analyze relevant law, in our view the holding stands the AKS on its head and is wrong.

The action before the court originated as a contract dispute between MedPricer.com, Inc. ("MedPricer"), the operator of the online portal, and Becton, Dickinson & Company ("Becton"), a supplier of medical equipment. Hospitals and other providers engage MedPricer to facilitate negotiations with suppliers of medical equipment through an online system of requests for quotes ("RFQs") and bids. The hospitals control the pool of providers invited to bid and which supplier is ultimately awarded the business. Each supplier that is invited to participate in online bidding (or "sourcing events"), if selected, contracts with MedPricer to pay a fee of 1.5 percent of the value of the transaction based on the volume of business as detailed in required monthly sales reports. After successfully participating in several sourcing events, Becton refused to provide such sales reports or pay MedPricer the fee. As a result, MedPricer filed an action against Becton alleging breach of contract, among other claims. In briefing on cross motions for summary judgment, Becton argued that the contract was unenforceable because it violated the AKS.

The court agreed with Becton's argument that the contract "violates the AKS because it involves MedPricer's receiving 'remuneration' for 'arranging' the purchasing of goods for which payment may be made in whole or in part under a federal health care program." The court concluded MedPricer, through the sourcing events, "arranges" for the purchase or selling of goods, payment for which may be made through federal health care programs.

The court further concluded Becton was not required to establish that MedPricer "knowingly and willfully" solicited remuneration in order to be entitled to summary judgment. Although the court conducted a thorough analysis, in our opinion its finding that the contract at issue violates the AKS goes against the spirit and intent of the statute.

First, the intent of the AKS is to protect the public fisc from fraudulent or otherwise improper



arrangements that drive up health care costs. The court's decision here, however, does the opposite by discouraging competition among suppliers of medical equipment through an online auction. Through MedPricer's system of sourcing events, hospitals and other providers have the opportunity to seek competitive pricing and award business to those suppliers who can provide quality products at lower prices. By holding that MedPricer's arrangements violate the AKS, the court is denying hospitals and other providers a vehicle for lowering costs.



"... the court is denying hospitals and other (health care) providers a vehicle for lowering costs."



Further, the court's conclusion that MedPricer "arranges" for the purchase or sale of goods misinterprets the intent of the AKS. As the court itself points out, the term "arranging" is not defined in the statute. MedPricer's contracts reportedly state that it plays no role in selecting the suppliers that are invited to bid or in choosing which supplier is ultimately awarded a contract. Those decisions are made solely by the hospitals. MedPricer merely provides an online venue and services that buyers and suppliers may utilize in the bidding process. In determining that such actions rise to the level of "arranging" for the purchase or selling of goods, the court extends the broad reach of the AKS beyond the plain meaning of the statute.

Additionally, the court's determination that Becton was not required to prove the scienter element of the AKS is problematic. The court concluded that because it was "not holding anyone criminally liable for a violation of the statute," and instead was "determining whether the [contract between MedPricer and Becton] itself is contrary to public policy and illegal," Becton was not required to establish that MedPricer had solicited remuneration "knowingly and willfully." This reasoning seems flawed. A knowing and willful violation is a core element of the offense. How can the enforcement of the contract cause a violation of the law if a fundamental element of the law at issue has not been established? Moreover, in civil False Claims Act cases based on AKS violations, the plaintiff must prove a knowing and willful violation of the AKS. See, e.g., *Gonzalez v. Fresenius Medical Care North America*, 689 F.3d 470 (5th Cir. 2012). A defense to a breach of contract case should require no less.

### THREE KEY TAKEAWAYS

1. Online auctions do not "arrange" for the sale of goods or services covered by federal health care programs as intended in the AKS.
2. Scienter is a critical element of the AKS that must be proven before an agreement can be determined to be violative of the statute.
3. Online auctions and other creative mechanisms for the purchase and sale of goods and services needed for the delivery of health care should be encouraged to further wring costs out of the system.

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