

December 15, 2020

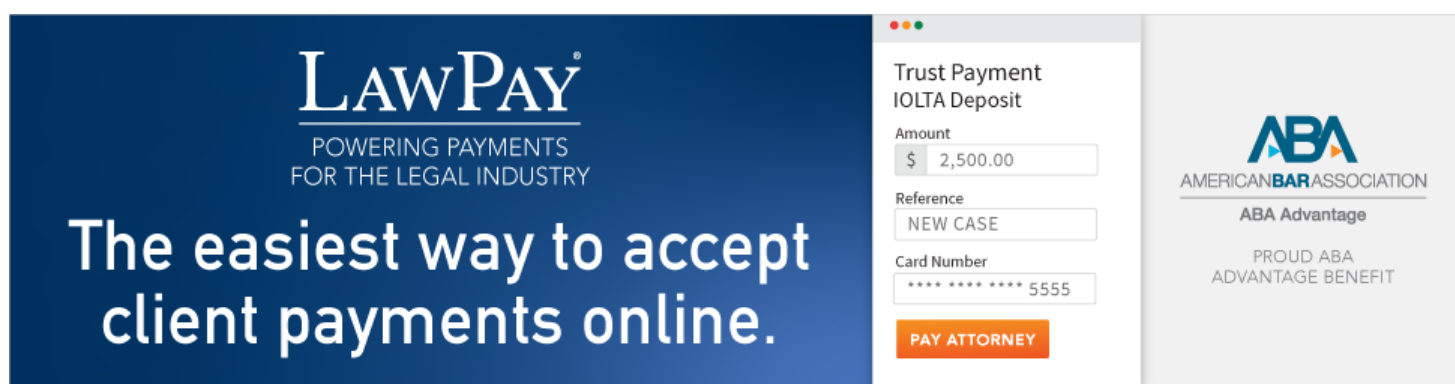
Eleventh Circuit Holds that the Government Need Not Prove a Payee's Motivation for Accepting a Payment Under the Anti-Kickback Statute

By Scott R. Grubman, Esq., Chilivis Grubman Dalbey & Warner LLP, Atlanta GA

Share this:



In *United States v. Shah*,¹ a case involving the federal Anti-Kickback Statute (AKS),² the defendant attempted to convince the Eleventh Circuit Court of Appeals to get rid of the defense-dreaded and government-friendly “one purpose” rule. The court did so, but appears to have replaced it with an even less defense-friendly “no purpose” rule, at least for AKS payees.



On November 24, 2020, the Eleventh Circuit issued its opinion in *Shah*, in which it held that the AKS requires no proof of a payee's motivation for accepting a payment. The court's decision in *Shah* is likely to have a significant effect on criminal AKS prosecutions out of Georgia, Florida, and Alabama moving forward. The defendant, Alap Shah, was a podiatrist in Columbus, Georgia who was charged with receiving kickbacks and conspiracy to receive kickbacks for writing prescriptions for compounded drugs. After he was convicted of three counts at trial, Shah was sentenced to 36 months in prison.³

The AKS in General

The AKS criminalizes both sides of a kickback scheme: the payor of the kickback, and the payee of the kickback. On the payee side,⁴ the AKS prohibits “knowingly and willfully solicit[ing] or receiv[ing] any remuneration . . . *in return for*” certain enumerated actions, including making a federal healthcare program referral. Many circuit courts, including the First, Third, Fifth, Seventh, and Ninth, have adopted the “one purpose” rule, under which a person violates the AKS if “one purpose” of the payment in question is to induce referrals.⁵

The One Purpose Rule

At Shah's trial, the district court granted the government's request to give a jury instruction on the “one purpose” rule, which read as follows:

To satisfy the second element of this offense, the Government does not have to prove that the defendant's sole purpose in soliciting or receiving the remuneration or kickback was to obtain payment in return for the purchasing, leasing, ordering and arranging for, and recommending purchasing, leasing and ordering. Rather, the Government must only prove that obtaining

payment in return for the purchasing, ordering or leasing was one of the defendant's purposes in soliciting or receiving the remuneration or kickback.

Shah objected to this jury instruction and argued in his written briefs on appeal that the district court erred in giving it because, in order to prove an AKS violation, it was not sufficient for the government simply to prove that "one purpose" of the payment was to induce referrals, but instead the government was required to prove that "his main or only reason for accepting the payment was because it was made in return for writing prescriptions."⁶

The Eleventh Circuit's Decision

The Eleventh Circuit held that the district court did, in fact, err in giving the jury instruction, but not for the reason Shah argued in his written briefs. Instead, the Eleventh Circuit held that the jury instruction was erroneous because the AKS "does not require proof of the defendant's motivation for accepting the payment." In other words, instead of the "one purpose" rule being too *low* of a standard, as Shah argued in his written briefs, and as did the American Medical Association as *amicus curiae*, the court held that it was actually too *high* of a standard.

In support of its holding that the AKS does not require proof of a defendant's motivation for accepting a payment, the court cited the text of the AKS itself and noted that the AKS says nothing about the reasons a defendant accepted a payment. The phrase "in return for," the court reasoned, is not about the defendant's motivation, but is instead "an adjectival prepositional phrase describing *the payment*." The court also declined to read this state-of-mind component into an AKS offense (as it sometimes does for statutes that lack an express mens rea requirement), because the AKS already has a state-of-mind component: the defendant must act "knowingly and willfully."

The court drew a parallel to another federal statute that uses the phrase "in return for" – the federal bribery statute found at 18 U.S.C. § 201(b)(2). The Eleventh Circuit noted that various courts interpreting that bribery statute had held that the phrase "in return for" does not relate to the defendant's motivation for accepting a bribe, but instead relates to the purpose of the bribe. The Eleventh Circuit also noted that its own Pattern Jury Instructions supported this reading.⁷

Finally, the Eleventh Circuit cited various cases from other Circuits that had adopted the one purpose rule (such as the First, Fifth, Seventh, and Ninth), and held that its decision in *Shah* did not conflict with those cases because none of them addressed the *payee* crime at issue in *Shah* (found at 42 U.S.C. § 1320a-7b(b)(1)), but instead they all addressed the *payor* crime (found at 1320a-7b(b)(2)). The payor crime, the court noted, prohibits "knowingly and willfully offer[ing] or pay[ing] any remuneration . . . to induce" certain enumerated actions (emphasis added), which the Eleventh Circuit held to mean that it prohibits "payments that are meant by *the payor* to induce one of the enumerated actions." According to the Eleventh Circuit, "motive matters for the payor crime even though it does not for the payee crime."⁸

Conclusion

Although the Eleventh Circuit upheld Shah's conviction after it found that the district court's error in giving the "one purpose" jury instruction was harmless, the decision in *Shah*, assuming it is not reversed *en banc* or by the Supreme Court on cert, is bound to be cited in every AKS payee prosecution out of Georgia, Florida, and Alabama district courts moving forward.⁹ In those courts, pursuant to *Shah*, an AKS conviction is supported so long as the government proves beyond a reasonable doubt that the payee of a kickback acted "knowingly and willfully," regardless of whether the government presents any evidence as to the payee's motivation in receiving the kickback.

¹ No. 19-12319, 2020 WL 6878434 (11th Cir. Nov. 24, 2020).

² 42 U.S.C. § 1320a-7b(b).

- 3 2020 WL 6878434, at *3.
- 4 *Id.* § 1320a-7b(b)(1).
- 5 *See, e.g., United States v. Kats*, 871 F.2d 105, 108 (9th Cir. 1989). Every Circuit that has addressed the issue has accepted the one purpose rule.
- 6 According to the Eleventh Circuit, Shah “conceded at oral argument” that the AKS does not require proof of the defendant’s motivation for accepting payment. Despite this apparent concession, the Eleventh Circuit addressed the issue in detail anyway.
- 7 <https://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCriminalPatternJuryInstructionsCurrentComplete.pdf?revDate=20200227>.
- 8 *Shah* represents the first time a federal circuit court has made such a distinction between the payee and payor side of the AKS. *Shah* is also the first time that the Eleventh Circuit has directly addressed the one purpose rule.
- 9 It is also possible that courts outside of the Eleventh Circuit will look to the opinion in *Shah* as persuasive in crafting their own take on the one purpose rule.

About the Author

Scott Grubman represents healthcare providers of all types and sizes in connection with government investigations, both criminal and civil, and False Claims Act litigation. He is a former Assistant United States Attorney and DOJ Trial Attorney. He may be reached at sgrubman@cglawfirm.com.