

5th Circ.'s Health Care Fraud Ruling May Help Defendants Broadly

By **Richard Roper and Elissa McClure** (April 21, 2021, 5:40 PM EDT)

Prosecuting health care fraud and anti-kickback violations is a key priority for the U.S. Department of Justice and other government agencies.

As a counterweight to the government's trend of aggressively prosecuting health care fraud, the U.S. Court of Appeals for the Fifth Circuit recently reversed a defendant's convictions for conspiracy to commit health care fraud, conspiracy to pay illegal kickbacks, and aiding and abetting health care fraud in *U.S. v. Nora*.^{[1][2]}

Jonathon Nora was indicted in connection with Abide Home Health Care Services Inc.'s fraudulent schemes using (1) house doctors to approve medically unnecessary care plans to bill Medicare; (2) an illicit pay-for-referral system; and (3) ghosting, i.e., the practice of officially discharging patients but informally continuing care and recertifying them at a later date, to avoid Medicare scrutiny.

The court's reversal was based on its conclusion that there was insufficient evidence for a jury to conclude, beyond a reasonable doubt, that Nora acted with knowledge that his conduct was unlawful.

By way of background, in order to succeed in obtaining a health care fraud or anti-kickback conviction, the government must present evidence sufficient to show that the defendant knowingly and willfully defrauded Medicare or engaged in an illegal kickback scheme. A willful act is one undertaken with a bad purpose either to disobey or disregard the law. The defendant must have acted with knowledge that his conduct was unlawful.^[3]

Applying this principle, the court rejected as insufficient each category of evidence presented at trial concerning Nora's knowledge.

First, Nora's compliance training was not sufficient to establish that he was alerted to the unlawful nature of Abide's practices, as there was no evidence about the training's content, including whether it discussed health care regulations. Essentially, the jury would have to make an improper speculative leap about the content of the trainings to find that Nora acted willfully or had knowledge that the practices were unlawful.^[4]



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Similarly, the testimony that "everybody [at Abide] knew" about the fraud was also insufficient, as there was no testimony that Nora himself "understood the unlawful or fraudulent purpose."

Furthermore, even if Nora should have known of the practices' illicit nature, then Nora would be guilty of only negligently participating; it would "not prove that Nora acted 'willfully' in facilitating ghosting and the fraud it furthered." [5]

The court distinguished Nora's case from a case affirming the subject convictions, [6] where the defendant, among other things, (1) had 20 years' experience, understood health care regulations and held a billing role, (2) knew patients were not homebound and reassigned patients to nurses willing to risk their licenses, and (3) had conversations about the impropriety of paying kickbacks to recruiters.

Nora, by contrast, joined Abide at age 22 and did not handle billing. There was no evidence that Nora (1) knew patients were not actually homebound, (2) assigned patients to nurses or doctors willing to run afoul of regulations, or (3) had ever discussed with colleagues the impropriety of Abide's practices. [7]

Finally, evidence concerning Nora's proximity to the fraudulent activities was also insufficient, because he was not directly exposed to dishonest and fraudulent behavior. In other words, there was no evidence that Nora directly observed or deliberately ignored fraudulent behavior. [8] Thus, the Fifth Circuit reversed his convictions and vacated his sentence. [9]

The Nora case highlights the relative difficulty in proving a defendant's intent, as it is subjective. Nora may have additional defendant-favorable implications in both civil and criminal contexts involving alleged fraud or corporate misconduct, where knowledge that the subject conduct was unlawful or deceitful is required.

Such contexts can include alleged health care fraud, illegal kickback schemes, obstruction of justice, [10] false statements [11] or False Claims Act violations. [12]

Specifically, Nora seems to strengthen myriad intent-based defense theories, for a broad range of defendants. In other words, defendants in multiple contexts may have more viable arguments that they lack the requisite intent. For example, the advice-of-counsel defense generally turns on whether all material facts were provided to obtain the relevant advice, and whether the defendant in good faith followed the advice.

The Nora intent standard indicates that, even if a defendant mistakenly left out a material fact in seeking the advice, reliance on legal advice may nonetheless show lack of the requisite intent, as the defendant may not have realized that the conduct was unlawful. [13] The same may be true if the legal advice was equivocal, if the defendant followed it in good faith.

Furthermore, if a defendant relied upon advice given to another party in the transaction, under Nora, such good faith reliance may be sufficient to show that the defendant did not knowingly break the law.

In other words, even where the requirements of the advice-of-counsel defense are technically not met, or where the defense may be inapplicable, there may nonetheless be useful evidence of good intent to strengthen a defendant's position.

Nora may render these considerations particularly persuasive in the investigation/pre-indictment phase, before an investigation target is required to disclose all communications but is able to indicate the

strength of the target's position on the intent element.

Nora also may open the door for more defendant-favorable jury instructions on the intent element. For example, in the Fifth Circuit, defendants may request, as part of the instruction, the inclusion of the facts of Nora as an example of evidence that is not enough to convict.

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[1] These convictions were based on alleged violations of 18 U.S.C. § 1349 (Count 1), 18 U.S.C. § 371 and 42 U.S.C. § 1320a-7b(b)(2) (Count 2), and 18 U.S.C. §§ 1347 and 2 (Count 27), respectively.

[2] See *United States v. Nora*, ___, F.3d ___, No. 18-31078, 2021 WL 716628, at *2 (5th Cir. Feb. 24, 2021).

[3] Neither "conspiracy nor aider and abettor liability lowers this mens rea requirement." See *Nora*, 2021 WL 716628, at *5-6.

[4] *Id.* at *5-7.

[5] *Id.* at *7.

[6] *United States v. Murthil*, 679 F. App'x 343 (5th Cir. 2017) (per curiam).

[7] See *Nora*, 2021 WL 716628, at *8.

[8] *Id.* at *8-9.

[9] *Id.* at *9.

[10] 18 U.S.C. § 1503.

[11] 18 U.S.C. § 1001.

[12] 31 U.S.C. §§ 3729 – 3733.

[13] Of course, it would be up to the jury to decide whether omission of a material fact was, in fact, unintentional, and whether the advice was followed in good faith.