

## **Body Brokering in New Jersey**

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**Abstract:** The New Jersey State Commission of Investigation (SCI) conducted a hearing in October 2022, which addressed patient or body brokering, the practice of offering cash or other financial incentives in return for patient referrals, primarily those with private insurance, to outpatient treatment centers for treatment for Substance Use Disorders. After the referrals, the treatment centers then billed the insurance companies. Treatment was not necessarily appropriate, completed, or even offered. The Commission’s witnesses identified many instances of patient brokering in NJ as well as numerous examples of improper billing. NJ and federal law prohibits the practice. Although no cases have been prosecuted under the NJ statute, some cases have been successfully prosecuted under the federal law, including one involving NJ residents.

A final report and the results of further investigation by the SCI are expected.

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### **Much of the following information was revealed at an October 2022 public hearing conducted by the New Jersey State Commission of Investigation (SCI).<sup>1</sup>**

People suffering from the disease of addiction have particular needs when it comes to treatment. There is no one-size-fits-all version of treatment options. Yet, that is exactly what treatment centers, particularly outpatient ones, ignore, when they engage in the practice of patient or body brokering.

The addiction recovery industry is a massive business, worth an estimated \$42 billion, and growing. Yet, it’s largely unregulated by most states or the federal government, according to SCI Chairwoman Tiffany Williams-Brewer.<sup>2</sup>

During a public hearing in October 2022, SCI, within that context of offering treatment, Williams-Brewer set out the definition of body brokering in her opening statement: “The recovery industry theoretically exists to help people overcome their addictions and get them back to healthy and productive lives. But the reality is that the business model for some treatment centers and rehabs is not about getting patients clean and sober. It’s about keeping them trapped in a cycle of addiction, treatment and relapse. Why? To ensure that profits – especially those in

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<sup>1</sup> Public Hearing for Addiction Rehabilitation Industry in New Jersey, State of New Jersey Commission of Investigation. Page (2022).

<sup>2</sup> Addiction Rehabilitation Industry NJ, SCI. Page 15 (2022).

the form of often hefty health insurance payments – continue to flow. Fueling this vicious cycle is the immoral and illegal practice known as patient brokering, where corrupt players in the addiction recovery industry steer patients to specific treatment centers in exchange for a financial payoff. The system of cash for bodies has grown increasingly sophisticated as brokers find ways to circumvent laws banning the practice or operate within the gray areas of the law.”<sup>3</sup>

The hearing focused predominantly on body brokering involving outpatient treatment centers. The investigation demonstrated that the care received did not necessarily equal the care needed.<sup>4</sup> What drove the transactions was how much private insurance coverage a patient carried and how much the policy would pay out.

To ramp up insurance payments, some centers also manipulated drug and alcohol test results or kept patients at unnecessarily higher levels of care to get those insurance payments. There was manipulation of billing, including double billing, and charges for non-existent treatments.<sup>5</sup>

As the first witness explained, (the sister of a former Miss New Jersey who suffered from SUD and eventually died), there is no transparency in the process of searching for treatment, trying to find the best placement for a loved one, ascertaining if the center would accept the insurance and actually cover the services. As she discovered, most were only interested in patients with private insurance coverage and not those who were uninsured or who had Medicaid. This is the driving force that propels patient brokering.

While the technical definition of patient brokering is receiving cash or other financial benefits for client referrals, that has now taken other forms as individuals and treatment entities seek to avoid legal scrutiny and entanglements.<sup>6</sup>

Those legal entanglements are in the form of a state law (passed in 2021 as A 2280 and see 2C:48-6) and a federal law<sup>7</sup>. Both will be discussed in more detail below.

How does patient or body brokering typically work? It often begins with a patient engaging with a recovery coach, who although they receive some training are not clinicians, or with a marketing specialist at a counseling center.<sup>8</sup> These individuals may then refer a patient to a particular facility. What the patient may not know though, is that the organization that referred them receives some financial reward for doing so, these days often in the form of donations or grants. As for the treatment center the patient was referred to, they reap the benefits of ongoing

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<sup>3</sup> Ibid. Pages 4 - 11 (2022).

<sup>4</sup> Ibid. Page 7 (2022).

<sup>5</sup> Ibid. Page 8 (2022).

<sup>6</sup> Ibid. Page 34 (2022).

<sup>7</sup> 18 USC 220, Eliminating Kickbacks & Recovery Act of 2018 (EKRA)

<sup>8</sup> Ibid. Page 22 (2022).

insurance payments. Maybe the patient goes to a detox center for a few days, and then inpatient or outpatient care, until insurance runs out or until it's determined the patient has private insurance and then the center extends the care.

There are now non-profit organizations that serve as steering mechanisms, and are circumventing the laws by accepting donations to health care facilities in return for referring patients to those treatment centers. They also supply airline tickets if the centers are out of state (often in Florida). There are recovery coaches who work for hospitals and other facilities who as a second job receive an additional salary from private treatment centers. They send patients, primarily those with private insurance, to the centers (under the noses of the unwitting primary employers).<sup>9</sup>

Often enticements are offered to patients in the form of food, beverages, housing referrals to sober living houses (affiliated with the treatment centers), or transportation to the treatment centers, all things the patients might really need.<sup>10</sup> There is no determination made as to whether or not the treatment center is a good fit or not for the patient.

As the monies were collected from the insurance companies, forensic accountants uncovered payments from the centers to owner individuals disguised as business loans. In addition, numerous deposits of less than \$10,000 were made which otherwise would trigger federal banking regulations scrutiny and reporting requirements for deposits exceeding the \$10,000 threshold. Rapid movement of funds from the treatment center accounts to owners' personal accounts followed and the funds used to sustain the owners' lifestyles.<sup>11</sup>

The question of state oversight of these facilities arose. The response? The investigation as to whether there is or should be state oversight remains ongoing. No one has been charged under the new state law.<sup>12</sup>

On which centers did the investigation focus? The first one was Recovery Advocates of America, a 501(c)(3) non-profit organization located in Hamilton, NJ. They received funding in the form of donations and grants and through sponsorship agreements (where Recovery received fees for referrals), as well as rent payments from treatment centers like Banyan Treatment Center in Philadelphia and Florida as well as Recreate Behavioral Health Network located in NJ and Florida.<sup>13</sup>

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<sup>9</sup> Ibid. Page 35 (2022).

<sup>10</sup> Ibid. Page 38 (2022).

<sup>11</sup> Ibid. Page 38-41 (2022).

<sup>12</sup> Ibid. Page 46 (2022).

<sup>13</sup> Ibid. Page 48-53 (2022).

How did patients find out about Recovery in the first place? Recovery had a robust marketing program with a website, word of mouth, and referrals from law enforcement. They also distributed promotional materials at school and community events.

Recovery provided referrals as well as transportation in the form of airline tickets to the treatment centers in Florida. (The treatment centers are not allowed to pay for airline tickets so Recovery used its debit cards and got reimbursed.)

How much money was involved? Banyan paid Recovery \$25,000 quarterly as well as made donations totalling \$600,000 between 2017-2020. Recreate gave \$175,000 to Recovery between 2017-2020.

What did Recovery use these donations for? They used the donations for salaries, telephones, car leases, gas, repairs, plane tickets, Ubers and taxis.<sup>14</sup>

Did Recovery utilize clinicians to determine which treatment centers were the best fit? They used only recovery coaches.<sup>15</sup>

Recovery also got donations from Allure Detox, connected to Recreate. Allure again used Recovery debit cards to get airline tickets as Allure could not do so under the law, because it would be an enticement.<sup>16</sup>

What if a patient had no insurance? In one case, the patient was told to take drugs and drink alcohol to qualify for treatment.<sup>17</sup>

The well known case of John Brogan, in Lifeline Recovery, was discussed as well. He got leads from sheriffs and prosecutors, hired recovery coaches and then made referrals to a treatment center called Discovery Institute and Any Length Retreat located in numerous places including Texas, Florida, California, Pennsylvania and New Jersey as well as Behavioral Wellness and Recovery in PA. He received a salary and bonuses.<sup>18</sup>

In Morris County, a salaried manager at a NJ hospital which provides addiction support, used his position to make referrals to a number of treatment centers and was actually employed by them to do so. In 2022, another hospital employee was employed by Enlightened Solutions in Atlantic

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<sup>14</sup> Ibid. Page 53 (2022).

<sup>15</sup> Ibid. Page 55 (2022).

<sup>16</sup> Ibid. Page 59 (2022).

<sup>17</sup> Ibid. Page 62 (2022).

<sup>18</sup> Ibid. Page 66 (2022).

County and received \$400,000 from the centers as well as collecting a \$50,000 per year salary from Enlightened and his hospital salary. Hospitals didn't know, but they do now!<sup>19</sup>

Why is it that so much of the body brokering occurs in outpatient facilities? The theory is that the centers have lower overhead, no food services, or sleep needs for the patients as would be required in an inpatient facility. All they need are offices and conference rooms.<sup>20</sup>

Billing irregularities are common as well, billing for services not rendered, excessive treatment, or overlapping charges. (Here's an example of overlap: A patient is in a counseling therapy session. The center can charge for that. But someone at the center pulls out the patient to ask about billing or scheduling or has a question about the patient's insurance. The centers bill for each of those as well.)

Sometimes the centers misuses bundled codes ( a single item containing numerous related services). A treatment center might unbundle services and charge individually and then re-bundle and charge for the same services.<sup>21</sup>

Kingsway Recovery Center in Mullica Hill used these gimmicks. They are also affiliated with Graceway Sober Living (a husband and wife team). It should be noted that sober living houses cannot bill insurance companies for their services.<sup>22</sup> The owners provided incentives to those in sober living facilities (of which they own six), incentives like food, beverages, gifts, transportation, to "encourage" the residents to use Kingsway.<sup>23</sup>

When a Kingsway patient's insurance was about to run out, they downplayed the patient's progress and convinced the insurance company to approve additional treatment time. They often kept patients at a higher level of treatment when the patient was instead improving.<sup>24</sup>

Between 2019-2021, Kingsway received \$15 million from insurers, such as Horizon and Aetna by unbundling.<sup>25</sup>

When the forensic accountants examined Kingsway's bank records, they found much of the money funneled directly into the owners' personal accounts, more than \$4.2 million. The money was used to pay off personal credit card debt (\$2.1 million), \$288,000 on vehicles and jewelry, \$80,000 on student loans, \$764,000 on commercial properties.<sup>26</sup>

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<sup>19</sup> Ibid. Page 75 (2022).

<sup>20</sup> Ibid. Page 94 (2022).

<sup>21</sup> Ibid. Page 104 (2022).

<sup>22</sup> Ibid. Page 117 (2022).

<sup>23</sup> Ibid. Page 97 (2022).

<sup>24</sup> Ibid. Page 99 (2022).

<sup>25</sup> Ibid. Page 104 (2022).

<sup>26</sup> Ibid. Page 109 (2022).

The largesse continued in 2019-2021, with Kingsway paying an additional \$1.6 million into the owners' joint accounts and then individual ones, including residential property purchases of \$883,000 for their current residence.<sup>27</sup>

As mentioned above, the deposits were frequent and always less than the \$10,000 amounts that would have triggered federal scrutiny.<sup>28</sup>

Witnesses speculated that the owners potentially evaded taxes which would be a federal offense.<sup>29</sup>

Although a subpoena was issued for Kingsway owner, Nicholas DeSimone, to appear before the SCI, he failed to appear. The day before the hearing, DeSimone tried to quash the subpoena. It is unclear what the result was and if the investigators succeeded in eventually forcing his appearance.<sup>30</sup>

### **What protections are in place and how can we improve them?**

As indicated during the hearing, NJ passed A2280 into law in 2021. Subpart 1a provides for a declaration of a crime in the 4th degree to make or receive payment or to furnish or receive a fee, commission, rebate to any person in connection with a referral of patients to a facility licensed for Substance Use Disorder treatment or services. Subpart 1b. indicates guilt of a 4th degree crime if a person knowingly assists, conspires, or urges any person to do anything in violation of section a above. Subpart 1c indicates it is not a violation of a if based on: 1) number of patients referred to an SUD treatment facility; 2) Duration, level, volume, nature of treatment provided; or 3) amount of benefits provided by a carrier to an SUD facility or services to a patient.

Despite this law being passed, not a single case against patient brokering has been initiated. The investigators suggested that the innovative schemes created by the treatment centers did not fit the description of a crime under this law. Also, most, if not all the schemes, were uncovered and occurred before the NJ law was enacted.

Receiving donations or grants doesn't seem to be covered by the acts here, even if they occurred after the law's enactment. For many of the nonprofits, that's how they were compensated. If that's the case, the coverage of the law probably should be expanded.

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<sup>27</sup> Ibid. Page 115 (2022).

<sup>28</sup> Ibid. Page 110 (2022).

<sup>29</sup> Ibid. Page 113 (2022).

<sup>30</sup> Ibid. Page 117 (2022).

On the other hand, the federal statute that covers these crimes and was in place at the time most of the bad players in SCI's investigation were performing their potentially illegal acts, might just be expansive enough so that the push should be for the NJ US Attorney, who has already prosecuted one case of patient brokering, to be the main player, and not try to amend the NJ statute.

The applicable federal law is called EKRA, Eliminating Kickbacks in Recovery Act of 2018. Congress enacted EKRA as a part of the bipartisan Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act of 2018 (SUPPORT Act), Pub. L. No. 115-271, to respond to the opioid epidemic. EKRA prohibits patient brokering and kickback arrangements involving recovery homes, clinical treatment facilities, and clinical laboratories regardless of whether the service was paid for by a government payer, such as Medicaid, Medicare, or Tricare. EKRA includes the following language, that it applies to protect services covered by any "health care benefit program, in or affecting interstate or foreign commerce..."

EKRA makes it a federal crime to "knowingly and willfully":

- (1) solicit, or receive, any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind, in return for referring a patient or patronage to a recovery home, clinical treatment facility, or laboratory; or
- (2) pay, or offer, any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind—(A) to induce a referral of an individual to a recovery home, clinical treatment facility, or laboratory; or (B) in exchange for an individual using the services of that recovery home, clinical treatment facility, or laboratory.

Penalties for violating EKRA include a fine of not more than \$200,000, imprisonment of not more than ten years, or both, per violation. 18 U.S.C. § 220(a). I could not find any regulations implementing this statute which might have provided further guidance. However, there is some case law.

In a federal district court case, US v Marcovich, NO21-cr-60020 (SDFL), in Ft. Lauderdale, two brothers, Jonathan and David Markovitch received prison sentences of 188 and 97 months, respectively, for patient brokering. They had been convicted under the EKRA statute after a jury trial in 2021, for illegal billing, prescribing, and referral irregularities related to two Florida substance abuse treatment facilities.

The brothers were accused of paying bribes to patients, money, gift cards, drugs, and airline tickets to entice patients to their facilities. There were bribes paid to marketers too. Finally,

Jonathan, the CEO, was accused of accepting a bribe in exchange for referring patients urine samples to a specific outside testing laboratory.

While the government might have used another federal law, the Anti-Kickback Statute (42 U.S.C. § 1320a-7b(b)), that law (AKS) dating back to 1972, which prohibits payment or receipt of “any remuneration” in exchange for the referral of a patient to a health care provider, only applies to a “federal health care program.” (The penalties are steep, maximum of 10 years imprisonment and hefty fines, \$250,000 per individual and \$500,000 for a corporation.) The AKS was used recently in December 2021, when Vincent Marchetti, Jr. was found guilty of facilitating the payment of bribes in an amount over \$28 million to distributors for referring genetic testing to labs in California. The labs billed Medicare for the tests, thus, triggering the applicability of AKS.<sup>31 32 33</sup>

What is the juxtaposition between the state of NJ’s law and the federal one? Clearly, the federal one is more robust and has been applied in significant ways since its inception in 2018. NJ has done nothing to implement its patient brokering statute as far as we can tell.

While the SCI hearing clearly exposed the broad landscape of patient brokering in NJ, its impact seems to be minimal, unless there are circumstances behind the scenes we are not privy to. The witnesses themselves acknowledged that the question of state oversight on these facilities remains unclear and requires further investigation. The witnesses were unsure if the behaviors they uncovered fit within the state’s statute and/or predated it. Is there a statute of limitations issue with these offenses? None of the witnesses brought that up as an impediment.

Since many of the offenses involved transporting patients to other states, clearly EKRA or AKS should apply, (the latter if insurance involved Medicare, Medicaid, or Tricare).

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<sup>31</sup> Please go to the following for more details explaining the federal legal landscape:  
<https://www.jdsupra.com/legalnews/health-care-s-expanding-landscape-of-8704187/>

<sup>32</sup> This article provided a summary of the first guilty plea under EKRA which involved kickbacks between a treatment center and a lab testing urine samples.  
<https://www.dwt.com/insights/2020/02/eliminating-kickbacks-in-recovery-act>

<sup>33</sup> Also see this press release from the US Attorney’s office in NJ regarding another patient brokering scheme in multiple states, including New Jersey, Maryland, California, and other states. The defendants bribed people suffering from substance abuse disorder to enter into drug rehabilitation centers to generate referral fees from those facilities. They paid for patients’ airline tickets.  
<https://www.justice.gov/usao-nj/pr/two-california-men-admit-roles-multi-state-recovery-home-patient-brokering-scheme>