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White Collar Corner: Department of Justice uses Travel Act to prosecute health care fraud

In April 2019, a federal jury found seven defendants associated with the Forest Park Medical Center (FPMC) in Dallas guilty on charges of conspiring to pay or receive health care bribes. The defendants in United States v. Beauchamp were convicted of collecting over $200 million dollars in a kickback scheme under which doctors were paid to refer patients to FPMC.

Prosecution of this case was in many ways unsurprising. In 2018 alone, the federal government prosecuted more than 30 health care fraud cases yielding over $2.5 billion dollars in settlements and fines. The Beauchamp case is notable, however, because of the particular charges filed by the Department of Justice (DOJ).

In addition to alleging violations of the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b) (AKS), the government charged several defendants with violating the Travel Act of 1961, 18 U.S.C. § 1952 ("Travel Act"), an anti-racketeering statute that is rarely used in health care fraud cases. This novel use of the Travel Act may foreshadow a new government enforcement strategy that could broaden the scope of liability for uninformed physicians and health care administrators across the United States.

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The AKS and the Travel Act

Originally passed in 1972, the AKS makes it unlawful to offer or pay anything of value as remuneration for the referral of services reimbursable under a federal health care program, such as Medicare or Medicaid. It similarly prohibits soliciting or receiving such payments. Although the statute is generally applicable to a wide range of activities, subsequent amendments have created several safe harbor provisions covering beneficial commercial arrangements. 18 U.S.C. § 1320a-7b(b)(3)(A)-(K).

The Travel Act was enacted in the early 1960s to prevent racketeering activities stemming from organized crime. It forbids knowingly using any facility in interstate or foreign commerce with the intent to distribute the proceeds of an unlawful activity or facilitate an unlawful activity. The phrase "unlawful activity" is defined to include "bribery … in violation of the laws of the State in which committed." 18 U.S.C. § 1952(b)(i)(2). The Supreme Court has held that state commercial bribery statutes are precisely the kind of crimes Congress intended to capture when drafting the Travel Act. Perrin v. United States, 444 U.S. 37, 50 (1979).

United States v. Beauchamp

The Beauchamp defendants were charged with conspiracy to commit AKS and Travel Act offenses, and with substantive violations of both statutes. United States v. Beauchamp, No. 3:16-CR-516-D, 2017 WL 9646933 (N.D. Tex. Aug. 30, 2017). As to the Travel Act, prosecutors alleged that the defendants used interstate commerce to violate the Texas Commercial Bribery Statute (TCBS). Importantly, no state criminal case had been prosecuted under the TCBS prior to Beauchamp. Following a lengthy trial, seven defendants were found guilty of conspiracy to violate the AKS. Three defendants were also convicted of commercial bribery in violation of the TCBS and the Travel Act.

The AKS charges related to the payment of kickbacks to induce patient referrals for services covered under the Federal Employee Compensation Act and TRICARE, a health care program of the United States Department of Defense. With respect to the Travel Act, defendants directed kickback payments by email and checks were processed through interstate computer networks. Such actions constituted commercial bribery under the TCBS, and because channels of interstate commerce were used, the Travel Act applied. The only relevant difference between the allegations supporting the Travel Act charges and those supporting AKS charges is that the former included an interstate commerce hook, and the latter included a federal-program beneficiary hook.

Other applications of the Travel Act

While Beauchamp has garnered significant attention given the dollars at stake and the number of defendants, it is not the only health care case in which the

federal government pursued both AKS and Travel Act charges. One recent case involved a New Jersey doctor who received kickbacks for referring blood tests. See United States v. Greenspan, 923 F.3d 138 (3d Cir. 2019). Another concerned a Maryland physician who received bribes for referring urinalysis tests. See United States v. Malik, Crim. No. MJG-16-0324, 2018 WL 3036479 (D. Md. June 19, 2018). In both cases, as in Beauchamp, the government charged state commercial bribery as the underlying Travel Act offense, and a single kickback scheme gave rise to charges under both statutes.

However, DOJ has also demonstrated a willingness to advance Travel Act charges in health care fraud cases even without AKS counts. As part of its lengthy prosecution of a kickback scheme involving Pacific Hospital in Long Beach, California, DOJ charged some defendants with both Travel Act and AKS violations. Other defendants, however, face Travel Act charges without related AKS counts. See United States v. Gross, No. 18-00014-CJC, 2018 WL 3216816 (C.D. Cal. Jan. 23, 2018); United States v. Payne, No. 17-53, 2017 WL 9853724 (C.D. Cal. June 6, 2017).

In the Travel Act-only cases, the government alleged that defendants violated California Business and Professions Code § 650 and California Insurance Code § 750 rather than traditional commercial bribery statutes. These state laws prohibit referral payments in certain circumstances. Nevertheless, one court has already held that the state crimes qualify as bribery under the Travel Act. United States v. Gross, 370 F. Supp. 3d 1139, 1150 (C.D. Cal. 2019). Both cases are pending trial.

Ramifications for future practice

The Travel Act has rarely been used to prosecute federal health care fraud. However, DOJ's reliance on the statute in Beauchamp and other recent cases shows that the federal government is willing to police fee-for-referral arrangements that do not implicate federal programs. The New Jersey and Maryland cases noted above indicate that DOJ will utilize the Travel Act in smaller-scale schemes involving fewer defendants and lower dollar figures. Further, its charging decisions in some of the Pacific Health cases demonstrate that DOJ does not view the Travel Act as necessarily dependent on related AKS charges.

Health care providers, and those who advise them, must be cognizant of this new strategy. Although experienced providers and attorneys are familiar with the strictures of traditional health care fraud statutes like the AKS, the Travel Act substantially broadens the potential for criminal sanctions. The Travel Act could prove a valuable tool for prosecutors because it does not require a nexus with federal health care programs, nor does it contain the safe harbor provisions of the AKS. It has the potential to be used to transform any number of state law violations into federal crimes. Accordingly, a fee-for-referral arrangement could result in Travel Act charges even if it complies with the AKS.

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