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BUSINESS CRIMES BULLETIN

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The Rise of the Travel Act

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The U.S. Department of Justice (DOJ) continues to prioritize health care anti-fraud enforcement through the aggressive use of different statutes and investigative methods. Although the prosecutions and recoveries vary, between October 2016 and March 2017, “Strike Force” team efforts led to charges against 49 individuals or entities, 152 criminal actions, and more than \$266.8 million in investigative receivables. Semiannual Report to Congress, U.S. Dep’t of Health & Human Services: Office of Inspector General: Oct. 1, 2016 to Mar. 31, 2017, <http://bit.ly/2jaG6VP>. Attorney General Jeff Sessions recently reaffirmed his interest in keeping health care fraud as a priority, and followed up those comments with the largest ever DOJ national health care fraud takedown, involving charges against 412 persons, including physicians.

Health care anti-fraud enforcement initiatives traditionally focus on cases involving Medicare and Medicaid fraud. The reason is clear: recovery of government-funded money. More than half of the estimated expenditures in health care fraud overall are against public health care programs. For that other half, there has been another approach to combat health care fraud in which the government often uses the federal mail and wire fraud statutes; one of HIPAA’s specialized mail and wire fraud provisions tailored to health care fraud; or 18 U.S.C. § 1347, which makes it a crime to knowingly and willfully execute a scheme to defraud a health care benefit program, whether that program be public or private.

Recently, a new tactic has emerged. The government is putting a 60-year-old tool to a new use. It is using the federal Travel Act to pursue criminal charges against health care entities in connection with health care bribery/kickback schemes. The courts have yet to rule on the viability of such charges. This article discusses these recent actions and the potential ramifications of the expansion of the scope of the Travel Act.

The Origins of the Travel Act

Enacted in 1961, the Travel Act was the centerpiece of then Attorney General Robert F. Kennedy's war on organized crime. Its original purpose was to stem the clandestine flow of profits from organized crime and to assist states in combating criminal activities that crossed state lines. *U.S. v. Nardello*, 393 U.S. 286, 292 (1969). The Travel Act targeted persons who lived in one state while operating or managing illegal activities located in another. *Rewis v. U.S.*, 401 U.S. 808, 811 (1971).

The Travel Act provides that:

- (a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to—
- (1) distribute the proceeds of any unlawful activity; or
 - (2) commit any crime of violence to further any unlawful activity; or
 - (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity.

18 U.S.C. § 1952

The term “unlawful activity” includes extortion and bribery, as defined by state law. *Id.* § 1952(b). Even where there are not any Medicare or Medicaid funds at issue, a health care provider who travels or uses the mail or a facility in interstate commerce, with the intent to engage in “unlawful activity under state law,” is at risk of being prosecuted under the federal Travel Act for this state law crime.

The Travel Act in Health Care Fraud Enforcement

Although the Travel Act has been used by prosecutors pursuing charges under the Foreign Corrupt Practices Act (FCPA), only recently has the government twice used the Travel Act in health care fraud enforcement actions — against Biodiagnostic Laboratory Services and Forest Park Medical Center. In the 2013 Biodiagnostic Laboratory Services case, three doctors were indicted for accepting bribes in return for sending blood specimens of their patients to Biodiagnostic Laboratory Services in New Jersey. Press Release, U.S. Attorney, <http://bit.ly/2gYvwwM>. Each doctor pleaded guilty to a violation of the Travel Act, based on the New Jersey commercial bribery statute as the predicate state crime (NJSA § 2C:21-10). *Id.*; Plea Agreement, *U.S. v. Aponte, et al.*, Case No. 13-cr-00464 (D. N.J.). While it is unclear why the government used the Travel Act instead of other fraud statutes, the Travel Act approach has the potential to preclude certain defenses grounded in the safe harbors of the Anti-Kickback Statute and pertinent state crimes.

In 2016, the U.S. Attorney for the Northern District of Texas charged a total of 21 defendants — physicians, advertising executives, health care executives, and an attorney — with an alleged kickback scheme at Forest Park Medical Center (FPMC) in Texas. Press Release, U.S. Attorney of N.D. Tex., <http://bit.ly/2xgsWMI>. FPMC was a hospital designed to serve patients with commercial insurance or the ability to self-pay; in other words, FPMC did not intend to depend on federal health care programs, such as Medicare, although it allegedly did treat patients with federally funded insurance programs. See *id.* FPMC allegedly attempted to keep only those patients with

the highest reimbursement at their facility, but the government also contends that FPMC received some form of payment when it transferred some lower reimbursing patients to other facilities. According to the indictment, FPMC executives and their employees attempted to “sell” patients with lower reimbursing insurance coverage, particularly Medicare and Medicaid beneficiaries, to other facilities in exchange for cash. Indictment, *U.S. v. Beauchamp, et al.*, Case No. 16-cr-00516-D (N.D. Tex.) (filed Nov. 16, 2016).

The government alleges that FPMC collected more than \$200 million in “tainted” claims, at least \$100 million of which was billed to federal health care programs such as TRICARE; it also claims there was payment and/or receipt of over \$40 million in bribes and kickbacks as part of the patient referral network. *Id.*; Press Release, U.S. Attorney of N.D. Tex., <http://bit.ly/2xrHF8n>.

The indictment includes charges under the Anti-Kickback Statute (AKS) (42 U.S.C. § 1320a-7b), and alleged violations of the Travel Act, among others. *Id.* The Travel Act charges are predicated on acts of alleged “bribery” under state law — here, the Texas Commercial Bribery Statute (Texas Penal Code § 32.43). *Id.* Under the TCBS, a doctor is a “fiduciary.” Tex. Penal Code § 32.43(a)(2)(C). The allegation is that, as a “fiduciary,” the physician accepted payments “from another person” that “influence[d]” the doctor’s conduct. A person who is a fiduciary commits an offense if, without the consent of his beneficiary, he intentionally or knowingly solicits, accepts or agrees to accept any benefit from another person on agreement or understanding that the benefit will influence the conduct of the fiduciary in relation to the affairs of his beneficiary. Tex. Penal Code § 32.43(b).

The alleged bribe and kickback payments purportedly incentivized the doctors and their staff to steer patients to FPMC for services. Indictment, at 11, 33-35. Several individual defendants pleaded guilty to conspiracy to pay and receive health care kickbacks, including a founder of the hospital who also pleaded guilty to bribery in violation of the Texas Commercial Bribery Statute as a predicate to the Travel Act. *See* Plea Agreements (ECF Nos. 204, 242, 267, 293), *U.S. v. Beauchamp*; Press Release, U.S. Attorney of N.D. Tex., <http://bit.ly/2gYTQIN>. (Previously, that founder of the hospital was convicted of health care fraud in another case with different allegations, and he awaits sentencing in that earlier case.)

Defendant’s Motion to Dismiss

The remaining FPMC defendants moved to dismiss the Travel Act charges, arguing that the Act was never intended for use in health care fraud enforcement. They contend that:

- the Travel Act allegations fail to state a claim because they rely on the conduct of other defendants;
- reliance on the Texas Commercial Bribery Statute as the predicate state law fails because the state statute is preempted by the federal Anti-Kickback Statute — since the state law criminalizes conduct identified as legal under AKS “safe harbors” and because the *mens rea* required by the Commercial Bribery Statute is lower than that required under the AKS;
- the Texas Commercial Bribery Statute conflicts with a later-enacted and more specific Texas law — the Solicitation of Patients Act — which mirrors the AKS (except that the Texas statute

applies to all payors, not just to government payors), including its safe harbors, which apply to the defendants here;

- the Texas Commercial Bribery Statute is unconstitutionally vague; and
- allowing the federal government to prosecute a health care provider under the Texas bribery statute (via the Travel Act) would violate principles of federalism.

Surgeon Defendants' Motion to Dismiss the Travel Act Counts, at 2-3, *U.S. v. Beauchamp*, Case No. 16-cr-00516-D (N.D. Tex.). Significantly, the FPMC defendants also argue that their hospital's practices differ substantially from those claimed in the typical health care fraud case because there are no allegations of patient harm, no allegations of billing for treatment not rendered or for medically unnecessary treatment, no involvement of federal funds, and the physicians did not knowingly treat patients who were federal program beneficiaries — who apparently made up only a “handful” of the FPMC patients identified in the indictment, most of whom had commercial insurance. *Id.* at 1. Additionally, the FPMC defendants point out that the alleged conduct ended in January 2013. *Id.* at 23. The limitations period under the state law is only three years. *Id.* As such, certain alleged violations of the state fiduciary law were time-barred, and “expired” conduct should not be permitted as a predicate to application of the Travel Act. *Id.*

The Government's Response to the Motion to Dismiss

The government is using the Travel Act — through the predicate state commercial bribery law — to charge FPMC with illegal kickbacks stemming from those privately insured referrals while acknowledging that the AKS only applies to federal payments. Government's Response to Surgeon Defendants' Motion to Dismiss, at 4,7, *U.S. v. Beauchamp, et al.*, Case No. 16-cr-00516-D (N.D. Tex.). In response to the motion to dismiss, the government counters that the Travel Act is appropriately applied to the case, given that commercial bribery is an explicitly recognized crime in the Act. *Id.* at 1.

The government argues that the Travel Act is routinely used to prosecute health care kickback schemes that extend beyond federal insurance programs, although the government did not cite to any specific cases in which this had been done. *Id.* It justifies its use of the Texas bribery law as the Travel Act predicate by citing U.S. Court of Appeals for the Fifth Circuit law holding that, in Travel Act prosecutions, the state law merely serves a definitional purpose, so there is no need for proof of a violation of the state law. *Id.* at 16 (citing *U.S. v. Prince*, 515 F.2d 564, 566 (5th Cir. 1975)) (additional citations omitted).

The government maintains that the federal district court should decline to address constitutionality challenges to the underlying state crime in Travel Act prosecutions. *Id.* (citing for this proposition two district court cases in other circuits, *U.S. v. Keresty*, 323 F. Supp. 230, 232 (W.D. Pa. 1971) (collecting cases in support of declining constitutionality challenges to use of Travel Act for purpose of making interstate travel in aid of racketeering endeavors a federal offense); *U.S. v. Goldfarb*, 464 F. Supp. 565, 574 (E.D. Mich. 1979) (“I do not think the unconstitutionality of the underlying state statute would necessarily be a defense to prosecution under [the Travel Act]”).

District Court Ruling

On Sept. 20, the district court denied the defendants' Motions to Dismiss, concluding, first, that the indictment was sufficient because the counts, including the Travel Act count, contained all the elements of the crimes charged and, therefore, fairly informed the defendants of the charges against them. The court also ruled that the Texas Commercial Bribery Statute, which defendants had argued could not support the Travel Act charges as the predicate state law violation, was not preempted under federal law. It found that the two statutes are not irreconcilable and that because the federal Anti-Kickback Statute and Texas Commercial Bribery Statute regulate and criminalize different conduct, it is immaterial whether the requisite *mens rea* of the two statutes differs. The court rejected the defendants' contention that the Texas Commercial Bribery Statute is invalid under Texas law because the statute was superseded and supplanted by the later and more specific Texas Solicitation of Patients Act. The court also found that the Texas Commercial Bribery Statute was not unconstitutionally vague.

In addition, the court rejected the argument (made by several defendants in a Motion to Dismiss a superseding indictment returned not long before the issuance of the court's ruling) that the facts alleged in the indictment did not qualify as a "use of a facility in interstate commerce" under the Travel Act. In so ruling, the court followed certain cases which state that the federal statutes' use of the phrases "facilities of interstate commerce" and "facilities in interstate commerce" encompass purely intrastate uses of these interstate facilities.

What Is the Potential Impact of *Forest Park*?

The *Forest Park* case showcases the government's willingness to carry federal statutes to new enforcement areas. The specter of the Travel Act approach — discussed at length by the parties in *Forest Park* — is that the defendant health care provider, who attempted to conduct itself in accordance with the standards of the AKS and pertinent state laws (relying upon the defenses available therein), nevertheless finds itself the target of a federal criminal statute that had not previously been used to address the complex health care regulations. Also, the Travel Act approach includes the threat that, if the charged conduct was otherwise time-barred under the state bribery statute, that conduct could nevertheless be "revived" under the federal Travel Act predicated on that very state statute.

The government's pursuit of fraud enforcement actions under the Travel Act leads to some unintended consequences that should worry all health care providers. Since the government will be pursuing cases involving private and publicly funded programs as health care enforcement actions continue, the outcome in *Forest Park* will be consequential.

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