Health Care Alert: Conviction of Texas Doctors, Surgeons and Health Care Executives Raises Important New Fraud and Abuse Considerations for Providers

Related Industries

Health Care

CLIENT ALERT | 4.22.2019

On April 9, 2019, federal jurors in the Northern District of Texas returned a guilty verdict against seven doctors, surgeons, and health care executives accused of participating in a $200 million bribery and kickback scheme at Forest Park Medical Center (FPMC), a physician-owned hospital in Dallas.

Specifically, federal prosecutors alleged that FPMC made payments to a conspiring third-party entity for "management support and marketing services," which payments were then used to reward local surgeons and primary care physicians for referring patients with out-of-network insurance benefits to FPMC. According to the 2016 indictment, FPMC executives determined in advance what volume of business the physician defendants could be expected to direct to FPMC, then funneled monthly payments of "marketing money," calculated based on these projections, to the physicians along with spreadsheets detailing their actual referrals.

The defendants were charged with conspiring to violate and violating the Anti-Kickback Statute (AKS), which makes it a crime to offer, pay, solicit, or receive anything of value in exchange for the referral of items or services reimbursable by federal health care programs.

However, many of the patients referred were not beneficiaries of federal health care programs, but members of private-pay insurance plans. To reach these kickbacks, federal prosecutors also charged the defendants under a law significantly less familiar to healthcare providers: the Travel Act.

Originally enacted in 1961 to allow then-Attorney General Robert Kennedy to prosecute organized crime, the Travel Act forbids the use of any "facility in interstate or foreign commerce" with intent to commit, facilitate, or distribute the proceeds of any unlawful activity.[1] Because the Travel Act defines "unlawful activity" to include extortion or bribery "in violation of the laws of the State in which committed,"[2] it effectively transforms a State law offense into a basis for federal prosecution.

Violations of the Travel Act are punishable by a fine, up to five years' imprisonment, or both.[3]

In the FPMC case, the defendants were charged with violating the Texas Commercial Bribery Statute, which prohibits a fiduciary from knowingly or intentionally accepting, without the consent of his beneficiary, any benefit to influence the fiduciary's conduct in relation to the beneficiary's affairs.[4] Because the checks paid by FPMC to the third-party entity were uploaded to a server in Atlanta – a "facility of interstate commerce" – this predicate offense then formed the basis for federal charges under the Travel Act, eliminating any need for the "jurisdictional hook" of federal reimbursement.

For several reasons, this novel use of the Travel Act is significant for health care providers across the country. First, it dramatically expands the scope of federal fraud and abuse enforcement as discussed above, exposing even facilities who do not accept federal health care program beneficiaries to potential liability. Second, it limits the ability of providers to rely on "safe harbors," specific instances of remuneration designated by law as protected from AKS prosecution – where State laws such as the Texas Commercial Bribery Statute do not contain analogous exceptions, even arrangements structured to comply with the AKS safe harbors may give rise to liability under the Travel Act.

If you have questions about the Travel Act, the implications of the FPMC convictions, or your organization's liability risk under State law, please contact Jonathan Ishee, Nita Garg, Matt Albers, Mairi Mull, or your regular Vorys attorney.

---

[1] 18 U.S.C. § 1952(a).

[2] *Id.*, at § 1952(b)

[3] *Id.*, at § 1952(a)(3)(A).

[4] Texas Penal Code § 32.43.