Health Law Daily Wrap Up, STRATEGIC PERSPECTIVES: The Travel Act: Enforcing prohibitions against referrals through state bribery laws, (Jun. 14, 2018)

Health Law Daily Wrap Up

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What is the Federal Travel Act (18 U.S.C. §1952) and why is it important for health care providers and health law attorneys to have an understanding of the legal implication of violations of the Act in cases involving accepting or offering payment in exchange for patient referrals? The federal government has enforced the prohibition against accepting or giving kickbacks for patient referrals under the provisions of the Anti-Kickback Statute (AKS) (42 U.S.C. §1320a-7b) when payment for such referrals is made by a federal health care program. In the past, when payment was made by private insurance companies rather than a federal health care program, physicians and health care professionals were not as concerned about the possibility of the government imposing criminal charges. In the last few years, however, the federal government began charging health care providers and professionals with violations of the Travel Act when they travel or use the mail or a facility in interstate commerce with the intent to engage in unlawful activity under state law.

This Strategic Perspective provides an overview of the history of the Travel Act and discusses how the government is using the Travel Act by predicating it on state commercial bribery laws. It also looks at the issues facing health law attorneys and health care practitioners through the eyes of health law experts.

The History and Elements of the Travel Act

In a 2007 *Journal of Health Law* article, James G. Sheehan, then New York Medicaid Inspector General designate, and law professor Jesse A. Goldner explained that the Travel Act criminalizes a business enterprise that promotes, manages, establishes, carries out, or facilitates any unlawful activity through interstate commerce or by using the U.S. mail. Sheehan and Goldner noted that an individual may violate the Travel Act by engaging in interstate commerce with the intent to promote or carry on a violation of state bribery law, including activities related to illegal remuneration regarding improper payments in connection with referral for services. The relevant section of 18 U.S.C. §1952(a)(3)(A) provides that any individual who violates the laws of the state in which the unlawful activity took place will be fined and imprisoned not more than five years.

Background. A chapter on the Travel Act published in the 2018 Edition of Wolters Kluwer's *Health Law and Compliance Update*, written by Greenberg Traurig Shareholder Carolyn Fitzhugh McNiven and resident attorney Sonia Nguyen, resident attorney, provides the history and application of the Act and identifies state statutes that may be used as predicates for charges under the Act. In 1961, Attorney General Robert F. Kennedy proposed legislation that imposed criminal sanctions on individuals who crossed state lines or national boundaries to further certain unlawful acts, specifically those associated with traditional organized crime: primarily gambling, prostitution, violent crime, untaxed liquor distribution, extortion, and bribery. The purpose of the legislation was to expand federal criminal enforcement authority to control the increase of multi-state criminal enterprises. The law federalized activity that traditionally had been authority of state and local law enforcement. Thereafter, the Department of Justice used the Travel Act to prosecute official corruption at the state and local level. Federal jurisdiction was based upon the criminal activity's interstate nexus, specifically "interstate travel, interstate commerce, and interstate communication."

Elements. The Travel Act does not require the government to prove fraud as required under a health care fraud prosecution, McNiven and Nguyen explained. The elements to sustain a charge of a Travel Act violation as identified in 18 U.S.C. §1952(a) are (1) travel in interstate commerce or use of an interstate facility (interstate

commerce element); (2) an intent to promote an unlawful activity (intent element); and (3) a subsequent overt act in furtherance of the unlawful activity (performance element). The performance element must follow the interstate commerce element chronologically.

Incorporation of state criminal laws. Incorporation of state criminal laws as predicates for Travel Act violations under the performance element means that the reach of the Travel Act is largely determined by the scope of state statute where the unlawful act occurred, according to McNiven and Nguyen. State misdemeanor offenses may become federal felonies when incorporated as predicates of a Travel Act charge. Moreover, "federal enforcement of a state predicate does not preempt state enforcement of its own statute." Individuals charged with a federal crime predicated upon a state statute can be separately charged by state authorities for violations of the same state statute.

Experts Weigh in on the Travel Act

Wolters Kluwer interviewed Carolyn Fitzhugh McNiven and Michael E. Clark, Special Counsel at Duane Morris LLP, to provide insight into the use of and issues presented for attorney when violations of the Travel Act are alleged in AKS cases.

1. Why has the Travel Act become so important in criminal anti-kickback cases?

McNiven: There have been several very high-profile prosecutions of health care providers that have raised awareness of how the Travel Act can be used in this context. There have been over 50 criminal prosecutions in the District of New Jersey alone, and quite a bit of press coverage over recent indictments of physicians in the Dallas area. All involve allegations of paying kickbacks for privately insured patients. Federal prosecutors seem to regard the use of the Travel Act as a way to eliminate a legal loophole in existing federal kickback laws.

The recent increased use of the Travel Act by federal prosecutors in health care cases reflects a few disparate forces:

- First, prosecutors have become convinced through prosecutions under the AKS that kickbacks are bad and corrupt the provision of health care services, consequently they are motivated to find a way to prosecute this conduct where they find it, even outside the federal payor context.
- Second, many providers are choosing not to enroll in Medicare and Medicaid, which means that by and large their actions do not implicate the AKS (unless they take federally funded insurance for the military or federal employees).
- Third, the increased funding for fighting health care fraud means that law enforcement has more resources to ferret out kickbacks, including those in the private pay context.
- Finally, and perhaps most importantly, the early success of a few high-profile Travel Act prosecutions has convinced prosecutors that there is a viable way to charge these cases and literally given them a template to do so.

Clark: Some federal prosecutors have started using the Travel Act … to go after alleged wrongdoers in the health care industry. They likely believe it is an easier way to convict wrongdoers. … [I]t may lower the government's burden of proof as to the required culpability to convict—in that the AKS requires evidence that the challenged acts were committed *willfully* (see *Surgeon Defendants' Motion to Dismiss the Travel Act Counts and Brief In Support* [(Surgeon Defendants' Motion/Brief)], filed in *U.S. v. Beauchamp*, Memorandum Opinion and Order, No. 3:16-cr-00516-D, N.D. Tex., September 20, 2017 (discussing the AKS's exceptions and regulatory safe harbors and the Texas Commercial Bribery Statute used a predicate violation for the alleged Travel Act violations)). When a statute, like the AKS, requires proof of willfulness to convict, the defense may be entitled to a very strong jury instruction. Since an accused's *good faith* can be a complete defense to willfulness, prosecuting the behavior under the Travel Act may effectively eliminate this hurdle by lowering the government's burden of proof required to convict someone for conduct that could be charged under either statute.

2. In what situations would prosecutors target health care providers and/or health care executives with a violation of the Travel Act?

McNiven: Prosecutors that live in a state that has an applicable state anti-bribery provision and have a case in which the facts of the case meet their office's prosecution guidelines are in a position to consider charging the Travel Act. This presumes, of course, that the investigation has uncovered substantial evidence that their targets have paid kickbacks (or offered or received kickbacks) in exchange for private pay patients. Prosecutors in districts that have successfully used the Travel Act in such circumstances are, of course, more likely to turn to these charges again.

Clark: Federal prosecutors could assert this theory in cases involving broad, corrupt conduct in the health care industry that arguably is covered by state statutes, such as the Texas Commercial Bribery Statute or its New Jersey analogue used in the two matters noted above, which can serve to meet part of the Travel Act's required elements of proof as to the necessary underlying unlawful activity predicate. But, as the Surgeon Defendants' Motion/Brief also explains, the Travel Act requires proof of additional required elements to convict. "[T]o violate the Travel Act, a defendant must first be shown to have travelled interstate or used a facility in interstate commerce with the intent to violate a state law involving extortion, bribery, or arson, among other things."

3. What state laws need to be considered and what elements must be included in the state law to raise to the level of a federal Travel Act violation?

McNiven: The Travel Act can only be used to prosecute private-pay kickback offenses in states that have a commercial bribery statute or anti-kickback statute. Significantly ten states currently have no commercial bribery or related statute: Georgia, Idaho, Indiana, Maryland, Montana, New Mexico, Oregon, Tennessee, West Virginia, and Wyoming. Others such as California have several. Where commercial bribery is prohibited, it is common for the statute to word the offense in terms [of] fiduciary relationships and require that the prosecutor prove that the kickback was made without the knowledge or consent of the principal or beneficiary and/or in violation of the defendant's fiduciary or related duty to the patient. Physicians are commonly held to have a fiduciary duty to their patients, consequently accepting a benefit in exchange for referring them to another provider will violate the typical state commercial bribery statute.

4. What are the main issues for prosecutors alleging violations of the Travel Act against a health care provider?

McNiven: The two greatest problems for a prosecutor are understanding the elements of the predicate state offense (with which they may not have prior familiarity) and meeting the somewhat convoluted elements of the Travel Act itself (or conspiracy to violate the Travel Act when that is charged). Because the state statues are unique and may not have been utilized by state authorities to penalize kickbacks in the health care context, there may be no state interpretive authority. The absence of authority may not matter if the statute is clear; however, where the statute is vague, it can present a problem. Since a motion to dismiss will likely be filed if the defendant is contesting his guilt, the prosecutor also will have to educate the judge about the crime. Further, the scope of the crime also depends on the state statute, and so will vary, which means that charges from one federal district may not be translatable.

In addition, the Travel Act is demanding and not exactly a model of clarity. Among other things, the performance element (i.e., the overt act that violates the predicate state statute) must come chronologically after the interstate commerce element. Where conspiracy to violate the Travel Act is charged, there is even a third layer: (1) conspiracy to violate the (2) Travel Act, which involves a (3) state law commercial bribery violation. In cases in which an undercover investigation has yielded strong covert tape recordings there are fewer challenges; however, proving such a case via circumstantial evidence can be hard particularly when the services provided were medically necessary and met or exceeded the standard of care. Put another way, some of these cases can lack jury appeal, particularly if the provider obtained legal advice prior to engaging in the problematic activity, which can open the government to arguments that it is overreaching.

Clark: Using the Travel Act in lieu of the federal AKS to go after allegations involving kickbacks in the industry appears to be quite problematic since, among other things, it may effectively preclude the defense from relying upon the statutory exceptions and regulatory safe harbors available under the AKS.

The government's use of the Travel Act in such cases presents difficult issues to consider, including: (1) whether it is appropriate to deny an accused the otherwise available defenses that Congress either enacted or charged the Office of Inspector General (OIG) … to promulgate to offer protection against allegations of alleged wrongdoing when an entity or individual that participates in federal health care programs had relied upon those exceptions or safe harbor and structured the underlying conduct to fall within one or more of the various statutory exceptions and safe harbors available under the AKS; (2) will widespread use of this theory of liability create unnecessary uncertainty within the healthcare industry about whether there is any way now to structure transactions to eliminate the threat of prosecution; and (3) is it appropriate for prosecutor to be so "innovative" by such statutes in new ways never anticipated by the regulated community—effectively giving prosecutors too much unbridled discretion to criminalize behavior thought to be legal, instead of going after individuals who violated known legal duties?

5. What are the most significant issues for attorneys preparing a case when a health care provider has been charged with violating the federal Travel Act?

McNiven: Attorneys in this situation likely will have to do quite a bit of explaining to their provider clients as the Travel Act is not well-known. Clients may even have received and relied on prior legal advice from healthcare transactional or regulatory counsel who likewise were unaware of the Travel Act and its reach, namely that it often prohibits arrangements that are permissible under the AKS and federal Stark laws [42 U.S.C. §1395nn]. Another significant issue is whether the client also will be charged by state authorities via the same statute that federal prosecutors used as the Travel Act predicate. As most criminal statutes are very straightforward, defense attorneys will face a steep learning curve regarding the elements of the offense and how the prosecutor will likely prove up those elements at trial. Helpful authority from prior prosecutions such as oral arguments on motions to dismiss, jury instructions, and briefs [is] hard to find.

Clark: Counsel for health care providers or professionals being threatened or charged with Travel Act violations must carefully analyze the underlying state law being used and the government's theory of its case to respond with arguments that may be used pretrial and at trial to challenge the applicability of the theory. While the Surgeon Defendants in *U.S. v. Beauchamp* were not successful with convincing the trial judge to dismiss the Travel Act allegations under various arguments, the next question is what impact will their challenges have on the ultimate audiences when the case moves forward to trial?

While frontal attacks on statutes like theirs are rarely granted pretrial by federal courts—in part because of the very low threshold needed to comply with fair notice pleading in criminal cases—there are clear advantages to educating the presiding judge about the unique issues in the case to be tried that can impact a judge's willingness to reconsider the arguments after the government's case-in-chief has been made. For instance, the Surgeon Defendants have asserted an "as applied" constitutional challenge to the use of the Travel Act against them given that they claim not to have anticipated that the conduct in question fell outside the available protections offered under the AKS, which will require proof in support of this claim. A judge ordinarily is not in a position to rule on such an "as applied" challenge until evidence has been offered to support the arguments. In addition, a judge may be willing to allow the defense to offer evidence that undercuts any proof of "knowledge" under the Travel Act given the apparent unfairness of the unique situation presented, or allow the defense to obtain some favorable jury instructions setting out the defensive theory of its case. This may have an impact on the factfinder or the appeals court if convictions are rendered.

6. What arguments have attorney's representing health care providers presented to the court to dismiss the charges under the Travel Act?

McNiven: The majority of these cases have plead out without adversarial proceedings. Where a motion to dismiss the indictment has been made, the arguments have ranged from (a) violation of constitutional rights (lack of notice, due process, vagueness); (b) violation of the Supremacy Clause (in instances where the conduct satisfied a federal safe harbor, Stark, or other federal statute); (c) no fiduciary duty was implicated; (d) lack of sufficient allegation of violation of duty (i.e., choice of provider in referral situation did not violate fiduciary duty as required by state commercial bribery statute); (e) advice of counsel/lack of intent; (f) drafting failures (i.e., failure

to allege elements of crime); and (g) statute of limitations. None of the motions that have been filed in recent cases have been successful to date.

Clark: An excellent blueprint is provided in the Surgeon Defendants' Motion/Brief, in which the defendants raised several arguments, including:

- the indictment fails to state a Travel Act offense against them because it relies on the conduct of other defendants to satisfy the Act's basic elements;
- the government's reliance on the Texas Commercial Bribery Statute as the predicate state law violation is fatal in that AKS preempts the predicate state since the state law criminalizes conduct identified in the AKS as lawful under various exceptions and safe harbors;
- the Commercial Bribery Statute conflicts with a later-enacted and more specific Texas law, the "Solicitation of Patients Act," which the Texas legislature enacted to govern the arrangements at issue and it mirrors the AKS, incorporates the safe harbors, and was intended to provide a single comprehensive statutory scheme regulating health care providers in Texas;
- the Commercial Bribery Statute is unconstitutionally vague because it fails to provide adequate notice of what conduct it prohibits and encourages arbitrary and discriminatory enforcement; and
- allowing the federal government to prosecute a health care provider under the Commercial Bribery Statute (via the Travel Act) violates principles of federalism and runs afoul of Supreme Court precedent by altering "sensitive federal-state relationships" under *Rewis v. United States*, 401 U.S. 808, 812 (1971).

The federal judge then overseeing *U.S. v. Beauchamp* rejected these arguments.

Conclusion

In recent years, the Travel Act has been used as an enforcement method for the federal government to charge physicians and other health care professionals with crimes based alleged prohibited payments for patient referrals that are outside of the federal government health care programs. The government increased its enforcement activity to include private payors and health care professionals who have control or influence over business decisions by using access to patient health and utilization information and provider data. Sheehan and Goldner recommend that attorneys investigate state commercial bribery laws, state illegal remuneration statutes, and current professional and ethical standards for health care professionals. Attorneys must look for activities that may not only be illegal under a state law that is not actively enforced or administratively interpreted but may fall under the "unlawful activity" language of the Travel Act. McNiven and Nguyen warn that as the use of the Act increases, "the opportunity for its abuse also increases. This danger is particularly acute when federal prosecutors make use of a general state commercial bribery statute to charge payments as illegal kickbacks for patient referrals when there has been no prior precedent in the state suggesting such an application."

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