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The Travel Act: State crimes become federal crimes

By Lester J. Perling, Esq., CHC

Lester J. Perling (lester.perling@nelsonmullins.com) is a Partner in the Fort Lauderdale office of Nelson Mullins Broad and Cassel.

The federal Anti-Kickback Statute (AKS) makes it a crime to solicit or receive remuneration, specifically kickbacks or bribes, for patient referrals (among other activities) when the source of payment is a federal healthcare program (e.g., Medicare, Medicaid, or Tricare).^[1] The AKS does not give the federal government jurisdiction to prosecute cases that don't involve federal healthcare programs. Kickback schemes involving private payers are often covered under individual state laws and are prosecuted by state governments.

Because the AKS is limited to situations in which a federal healthcare program is the source of coverage, the Department of Justice (DOJ) has begun employing a new strategy to combat illegal remuneration cases, regardless of the source. If the acts of an individual or entity involve some interstate activity and rise to a level of priority for the federal government, the DOJ may use the Travel Act, which criminalizes unlawful activity crossing state lines, to implicate state law violations on the federal level.

What is the Travel Act?

Although this law is new to healthcare providers, the Travel Act was passed in 1961 and has been used in various types of cases.^[2] The Travel Act prohibits “whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce” from distributing the proceeds of, committing, or promoting unlawful activity across state lines.

Unlawful activity is defined to include gambling, narcotic distributions, bribery, and other illegal monetary exchanges. The Travel Act gives the federal government the ability to criminalize a wide range of illegal conduct occurring between states. The broad definition of the Travel Act suggests why and how it is now being used in healthcare cases involving kickbacks, which are a form of bribery.

Recently, physicians and other healthcare providers accused of participating in illegal kickback schemes involving private payers have been charged or indicted federally under the Travel Act. Even if an individual or entity is not in violation of the AKS, the federal government may still have jurisdiction over that individual or entity for being in violation of a state law.

There have been four key cases that explain how the Travel Act is being used to prosecute kickback schemes and how state law violations are being brought in as the underlying claim in federal complaints and indictments.

Travel Act indictments this year

Most recently, in May 2019, in the Eastern District of New York, two individuals were indicted under the Travel Act. Christopher Walker, MD, is a licensed physician in Florida who was working with Wesley Blake Barber, the owner of Florida companies that coordinated vaginal mesh removal surgeries.^[3] They are alleged to have induced individuals to undergo these procedures in order to profit from lawsuits against surgical mesh manufacturers.

The defendants allegedly falsely defined the risks of the revision surgery to the victims, inferred that the victims would have to travel to visit specific doctors and deceived the victims into believing that their health insurance would cover the cost of surgery.

The federal government's charges against the defendants included wire fraud conspiracy, wire fraud, Travel Act conspiracy, and violations of the Travel Act. Under the wire fraud conspiracy and wire fraud charges, the defendants knowingly and intentionally devised this scheme to benefit from lawsuit settlements and misrepresented the facts to the patients through multiple emails. Under the Travel Act conspiracy and Travel Act violations, the defendants were charged with knowingly and willfully conspiring to use facilities of interstate commerce to carry out unlawful activity in violation of the laws of the state where these acts were committed. The indictments allege that the defendants violated the Florida kickback prohibitions, which criminalize all remuneration received in exchange for referrals, regardless of the payment source. The overt acts that were used to indict the defendants under the Travel Act included paying for the victims' travel between New York and Florida for surgery and the checks that were issued for the surgeries on the patients' behalf.

Similarly, in a jury trial in Dallas, Texas, this year, physicians were convicted and sentenced to prison based on claims brought under the Travel Act.^[4] Others who were involved in the scheme previously pleaded guilty. The 2016 indictment alleged that Forest Park Medical Center (FPMC) paid \$40 million in kickbacks to surgeons and other providers for referring patients to FPMC in order to take advantage of out-of-network insurance plans.^[5] The Travel Act was implicated because by paying the kickbacks, the individuals were in violation of Texas's commercial bribery law.^[6]

Travel Act indictments in past years

In May 2018, in New Jersey, the Travel Act was also used to indict five individuals from Biodiagnostic Laboratory Services LLC (BLS). The defendants were allegedly bribing doctors in exchange for patient blood specimen referrals.^[7] The individuals allegedly used fake companies, lease agreements, and service agreements to hide the laboratory's actual identity. They allegedly paid physicians, pursuant to an agreement, to order unnecessary tests for patients in order to double payouts BLS received.^[8] Based on the checks issued and the sham agreements that were entered into, Travel Act (as a result of violations of New Jersey's commercial bribery statute),^[9] AKS, and conspiracy charges were brought to indict the defendants.^[10] The individuals were sentenced to prison, and \$13 million dollars was recovered through the investigation.^[11]

Lastly, in 2017, in the Southern District of Florida, Eric Snyder, the owner of a treatment center and sober home, and Christopher Fuller, an alleged patient broker, were federally charged with conspiracy to commit healthcare fraud.^[12] In that case, claims were submitted to private insurance companies for services that were not allegedly medically necessary or were never provided. The defendants also allegedly engaged in client brokering and offered kickbacks to patients for participating in rehabilitation programs. On June 7, 2018, the defendants were subsequently federally indicted for healthcare and wire fraud and for being in violation of the Travel Act.^[13] The Travel Act was implicated, because the defendants allegedly defrauded health insurance companies of \$20,190,941, illegally recruited patients, and paid kickbacks in violation Florida's kickback statute,^[14] which was the basis of the Travel Act charge.^[15] This case was of particular importance to the federal government, because it involved the opioid epidemic that has affected the nation tremendously for years.

Practical considerations for compliance

Prior to the recent indictments, healthcare companies and compliance officers may not have worried about

federal government actions if they do not treat patients covered by a federal healthcare program. However, the DOJ has begun to pursue new avenues in order to establish jurisdiction over kickback cases involving private insurance companies. Therefore, compliance officers should be aware that the DOJ may prosecute healthcare providers under the Travel Act for alleged kickback schemes, even though the source of payment may not come from a federal healthcare program, which is the trigger for the AKS to apply.

These indictments are indicative of the fact that state laws are now becoming much more important and compliance is essential on the state and federal level. Even though state prosecutors may not be as aggressive in addressing unlawful kickback schemes, there is now a potential that state law violations will be used as the basis for federal prosecution.

This is important to keep in mind when evaluating compliance measures because, as shown in the recent indictments, there are both state and federal penalties for violating a state kickback law. Compliance officers should re-evaluate and implement new policies in order to take state laws into account in their compliance programs. They may need to re-analyze payment arrangements and explain the essence of these indictments to providers. There also may be a need to update training programs to explain the Travel Act and its relationship to state kickback laws.

Other considerations

Although these indictments are cause for concern, the above cases did not only involve violations of state laws but included federal violations as well. Similarly, the case that came out of the Southern District of Florida pertained to the national opioid epidemic that the federal government has been trying to combat and find a solution to for years. Federal jurisdiction under the Travel Act does not reach violation of state law without more. It is more likely to be used in the context of larger conspiracies and in cases involving enforcement priorities. Nonetheless, as successful prosecutions increase, its use is likely to increase.

Keeping in mind the context of the above indictments, compliance officers will want to limit exposure and should do so by making sure all payment arrangements and individual activities are as compliant as possible with both federal and state anti-kickback laws.

Summary

Even though providers may have thought they were not within the reach of the federal government, recent Travel Act indictments exemplify how state law violations are bringing about federal scrutiny. As both a deterrence mechanism and a lesson, the above prosecutions and indictments can assist compliance professionals in their efforts to motivate healthcare organizations to realize the importance of compliance with state laws, as well as federal laws.

Takeaways

- The Travel Act implicates state anti-kickback laws to prosecute individuals on the federal level.
- In order to be in violation of the Travel Act, individuals must be using interstate facilities to carry out unlawful activities.
- Recent indictments demonstrate how the federal government has used the Travel Act to combat kickback cases involving private payers.
- Providers should pay more attention to state laws in order to avoid DOJ involvement.

- Analysis of state law compliance is now more important and re-evaluation of payment arrangements under state law should be a priority for compliance officers.

Summer Associate Danna Khawam, who is attending Nova Southeastern University – Shepard Broad College of Law, contributed to this article.

1 42 U.S.C. § 1320a- 7b(b) (2012).

2 18 U.S.C. § 1952 (a&b) (2012).

3 U.S. v. Barber & Walker, No. 19239 (E.D.N.Y.) May 23, 2019

4 Department of Justice. “Seven Guilty in Forest Park Healthcare Fraud Trial.” U.S. Attorney’s Office: Northern District of Texas. April 19, 2019. <https://bit.ly/2WZU1kv>.

5 Department of Justice. “Executives, Surgeons, Physicians, and Others Affiliated with Forest Park Medical Center (FPMC) in Dallas Indicted in Massive Conspiracy.” U.S. Attorney’s Office: Northern District of Texas. December 1, 2016. <https://bit.ly/2gX5HLV>

6 Ibid, Ref #4.

7 Department of Justice. “Five Former Salesmen For Morris County Clinical Lab Sentenced For Bribing Doctors In \$100 Million Test Referral Scheme.” U.S. Attorney’s Office: District of New Jersey. May 17, 2018.

<https://www.justice.gov/usao-nj/pr/five-former-salesmen-morris-county-clinical-lab-sentenced-bribing-doctors-100-million>

8 Complaint at 5, U.S. v. Biodiagnostic Laboratory Services LLC, No. 13-8106 (D.N.J. Apr. 9, 2013).

9 N.J.S.A. § 2C:21-10.

10 Idem at 3-4.

11 Department of Justice. “Five Former Salesmen For Morris County Clinical Lab Sentenced For Bribing Doctors In \$100 Million Test Referral Scheme.” U.S. Attorney’s Office: District of New Jersey. May 17, 2018.

<https://www.justice.gov/usao-nj/pr/five-former-salesmen-morris-county-clinical-lab-sentenced-bribing-doctors-100-million>.

12 Complaint at 3, U.S. v. Snyder, No. 17-8268-DLB (S.D. Fla. July 7, 2017).

13 Department of Justice. “Southern District of Florida Charges 124 Individuals Responsible for \$337 Million in False Billing as Part of Healthcare Fraud Takedown.” U.S. Attorney’s Office: Southern District of Florida. July 2, 2018. <https://www.justice.gov/usao-sdfl/pr/southern-district-florida-charges-124-individuals-responsible-337-million-false-billing>.

14 Fla. Stat. § 817.505(1)(a)-(d) (2019).

15 Ibid, Ref # 12, Complaint at 12

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